Legal Backgrounder

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 23 No. 9 March 7, 2008

FLORIDA COURT REAFFIRMS OUTDATED *FRYE* TEST FOR SCIENTIFIC EVIDENCE

by

Lewis F. Collins, Jr. and Barbara M. Cowherd

In the era of junk science in the courtroom, where the use of "experts" has proliferated and the cost of litigation has escalated as a result thereof, it is time for an examination of the *Frye* test's use in Florida. Florida is among only a handful of states that still follow a "test" for expert testimony that was first created in 1923 in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* is a test of limited application and inquiry. It asks only whether an expert's methodology is generally accepted. It does so without defining "general acceptance," and is generally applied only if new or novel scientific evidence is sought to be introduced. Its adoption could not have envisioned experts testifying on such esoteric topics as epidemiology, crash worthiness, tensile strength, guarding and the psychology of warnings.

After a flood of product liability cases in the 1980s and 1990s resulted in otherwise beneficial products being removed from the stream of commerce based on so-called junk science, the United States Supreme Court, in 1993, affirmed the role of the trial judge as the gatekeeper of scientific evidence. The court was clearly troubled with the shaky foundation of expert "proof" that underlay these cases and outlined a method of inquiry that judges should follow to assure that allegedly scientific testimony was reliable and accurate. *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579 (1993). In 1999, the Court extended this ruling to apply to all expert testimony, not just scientific testimony. *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999).

In response to new challenges, the Supreme Court used the *Daubert* case to right the ship and preserve the role of the judge as the filter of reliable evidence. *Daubert* refocused the trial judge on the important task of deciding on the admissibility of expert testimony by clearly articulating the test for allowing it. In doing this, the Justices gave judges the tools needed to evaluate expert testimony in a more complex legal environment. Justice Blackmun, writing for the Court, found that the adoption of the Federal Rules of Evidence displaced the *Frye* general acceptance test. In doing so, *Daubert* makes

---

Lewis F. Collins, Jr. is a partner, and **Barbara M. Cowherd** is an associate, with Butler Pappas Weihmuller Katz Craig, LLP, a law firm with offices in Tampa, Tallahassee, and Miami, Florida, as well as Mobile, Alabama and Charlotte, North Carolina. Mr. Collins served as President of the Federation of Defense & Corporate Counsel (2005-06) and is past President of the Florida Defense Lawyers Association. Mr. Collins currently holds the position of Vice President of the Lawyers for Civil Justice.

the trial judge the gatekeeper, requiring him or her to ensure that any expert testimony is both reliable and relevant. *Id.* at 589. The Court went on to reinforce that an expert's conclusions are subject to the relevance/reliability test, *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), and encouraged trial judges to evaluate whether the proffered opinions are consistent with the expert's work outside the courtroom. *Daubert v. Merrill Dow Pharms., Inc.,* 43 F.3d 1311, 1317 (9th Cir. 1995). This way of looking at expert testimony is a far cry for the pre-*Daubert* "hands off" approach by many district court judges.

The law is a living, adaptive organism which must, on one hand, follow the precedents of the past, while (at the same time) embracing the changing legal landscape. In recognizing this dichotomy, the Court in *Daubert* fashioned some guidance for trial judges.

Daubert's four-prong test for reliability consists of a flexible set of factors that are neither exclusive nor dispositive:

1. Whether the conclusion or methodology proffered can be or has been tested (that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability);

2. Whether the conclusion or methodology has been subjected to peer review and publication;

3. Whether standards exist that control the methodology's operation, and if so, the known or potential rate of error; and

4. Whether the conclusion or methodology is generally accepted.

See Daubert, 509 U.S. at 594; *Advisory Committee Notes to* F.R.E. 702 (2000).

The relevance threshold espoused in *Daubert* refers to the fit between the expert opinions being offered and the issues in the case. Specifically, *Daubert* looks at the reasonableness of the use of that particular methodology to draw the conclusion being proffered by the expert. *Id.* at 591; *see also, Kumho Tire Co.,* 526 U.S. at 147.

A perfect storm has formed to point the way to *Daubert*. First, Florida adopted the Federal Rules of Evidence in 1976. In 1984 the U.S. Supreme Court ruled in *United States v. Abel*, 469 U.S. 45 (1984), that the Federal Rules of Evidence occupy the field concerning the admissibility of expert testimony. And, finally, in 1993 that same court in *Daubert* found that *Frye* was superseded by the adoption of the Federal Rules of Evidence. This storm, coupled with the profligate use of experts on every possible subject, has made the *Frye* standard obsolete and wholly unable to cope with the realities of litigation in the age of technology. Nevertheless, Florida continues to embrace the *Frye* standard as its touchstone for testing new or novel scientific theories. The result: expert testimony is insufficiently tested, inconsistently admitted, and the mere offering of these expert opinions cloak them with the court's authority and prestige, exerting significant influence on juries.

The Florida Supreme Court's recent decision to reaffirm the use of the *Frye* standard in *Marsh v. Valyou*, 2007 WL 4124744 (Fla. Nov. 21, 2007), firmly places Florida in a small minority of states.

Florida continues to utilize a 1923 ruling on the possible use of the precursor of a "lie detector" in the modern era of experts of every stripe and on every subject. No longer can courts rely on the single test of whether the opinions proposed are based on new or novel scientific evidence. No longer can judges abdicate their role as the arbiter of evidence to juries, hoping that they will be able to sort it out through the magic of cross-examination.

The divided *Marsh* Court held that the Plaintiff, who was a victim of four different automobile accidents, could present expert medical testimony that the trauma from those accidents caused her fibromyalgia (specifically approving *State Farm Mutual Automobile Insurance Co. v. Johnson*, 880 So.2d 721 (Fla. 2d DCA 2004)), stating that such testimony was pure opinion testimony that was based upon the doctor's education, training and experience, and thus, not subject to a *Frye* challenge. The Court allowed such testimony, despite the lack of any peer-reviewed research linking this cluster of symptoms with trauma as the causative event. Nevertheless, the majority believed that such testimony would still be admissible under a *Frye* analysis, even though all of the epidemiological studies that were introduced did not agree that trauma can cause fibromyalgia. *Frye* does not require unanimity, only that the underlying basis for the expert's opinion be *generally accepted* within the relevant scientific community. This, the Court reasoned, gave the expert's opinions a sufficient indicia of reliability.

Under *Frye, w*hen a challenge to the basis of an expert's opinion is exercised, Florida requires that the trial judge decide whether the expert's testimony is based on a scientific principle or discovery that is sufficiently established to have gained general acceptance in the particular field in which it belongs. *See Frye* at 1014. *See also, Bundy v. State,* 471 So.2d 9, 18 (Fla. 1985) (specifically adopting the *Frye* standard for admissibility in Florida). The *Marsh* majority acknowledged that the *Frye* test is *not* set forth in the evidence code, and justified its position by reporting that other states have continued to adhere to *Frye* as well. *Marsh* at *3. In his specially concurring opinion, Justice Anstead, with whom Justice Pariente joins, agrees with the majority's result (that *Marsh's* expert's testimony is not subject to a *Frye* hearing), but disagrees with their rationale. He believes that the *Frye* standard did not survive the adoption of Florida's evidence code. *See Marsh* at *6.

The current version of Florida's evidentiary rule applicable to expert testimony, FLA. STAT. § 90.702, states as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion, but the opinion is admissible only if it can be applied to evidence at trial.

The corresponding Federal Rule of Evidence, F.R.E. 702, provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Clearly, the Federal rule embraces *Daubert* and provides clear guidelines for trial judges to determine whether expert testimony is both relevant and reliable. They can do this by testing both the methodology utilized by the expert and the conclusion reached by the expert. On the other hand, *Frye*'s application of Florida's rule leaves entirely too much room for speculation and conjecture, testing only whether the basis for the expert's opinion is generally accepted within the relevant scientific community.

Marsh is exhibit A. Plaintiffs love to litigate in state court in Florida and will do all they can to make a products case "removal proof." In cases where a plaintiff needs the help of "junk science," it is all too common for a Florida resident, whether it be an individual or company, to be sued in a matter that chiefly involves an out-of-state defendant primarily for the reason that the plaintiffs' attorney wants to prevent the case from being removed to federal court because of a preference for *Frye* (the equivalent of no standard at all) over *Daubert.*

Inasmuch as the Florida Evidence Code is a statutory creature, it is the legislature's responsibility to ensure that the judiciary properly handles expert evidence. The legislature can fulfill this responsibility to the benefit of Florida's justice system and all of her citizens. *Daubert* is the "gold standard" as the test for admission of expert testimony. The legislature could strengthen the integrity of expert testimony in Florida courts by superseding *Frye*'s general acceptance standard and adopting the core of the *Daubert* approach. In this way judges would be armed with workable standards and measures for evaluating proposed expert testimony. The vision of the trial judge as the gatekeeper is a powerful one. With the trial judge as the guardian of the gate, appellate courts can use the long-standing precedent established by *Daubert* and its progeny to insure that junk science has no place in Florida courtrooms. This is not a standard that favors plaintiffs or defendants. It is a standard that favors science.

Daubert now controls the admissibility of expert testimony in more than two-thirds of the state court systems and in the federal courts of all fifty states. Florida and Alabama are the only two states in the region which still follow the outdated *Frye* standard. Georgia, Kentucky, Louisiana, Mississippi, Tennessee, Texas, and Arkansas are all states in which *Daubert* controls. And just this month the South Carolina Supreme Court has proposed draft rules that would adopt *Daubert*. When will Florida join her sister southern states?

  ISBN 1056 3059