Legal Opinion Letter
Vol. 26 No. 17 June 30, 2017

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

The Florida Supreme Court Should Adopt a Modernized Scientific-Testimony Standard for the "Sunshine" State

by Josh Becker and Aaron Block

For the last 25 years, nearly the entire judicial framework for evaluating expert testimony in US courts has moved in the same direction: away from the *Frye* standard and its tolerance of junk science. *Frye* has been replaced by the rigorous *Daubert* standard and its analogues in about 40 states. For example, in October 2016, the District of Columbia—where the *Frye* test originated—joined the long list of US jurisdictions that have adopted the *Daubert* standard. The District's highest court recognized that "[t]he ability to focus on reliability of principles and methods, and their application, is a decided advantage that will lead to better decision-making by juries and trial judges alike."[1]

Florida participated in this trend until a divided Florida Supreme Court recently rejected the state legislature's adoption of *Daubert*.[2] With that reversal, Florida became the rare US state to formally back away from *Daubert*'s heightened judicial scrutiny of expert scientific evidence. When the opportunity first presents itself, the Florida Supreme Court should re-align the Sunshine State with the overwhelming majority of its sister jurisdictions.

The case for *Daubert* is well-established, as this clear national trend demonstrates. *Frye* offers a formalistic test lingering from a different era (1923) in science and the law, more akin to seeking magic words than the transparent intellectual rigor citizens now expect from judicial decision-making. The upshot is that *Frye* tolerates junk science. As various courts have explained, "shifting the focus to the kind of empirically supported, rationally explained reasoning required in science[] has greatly improved the quality of the evidence upon which juries base their verdicts."[3] *Daubert* effectively brings "legal decisions more in line with the realities of science."[4]

Daubert's science-based framework prevents abusive litigation, which exacts various costs from society, the economy, and individuals. One of *Frye*'s unfortunate legacies, for example, was litigation claiming that Bendectin, an anti-nausea medicine often prescribed in the first trimester of pregnancy, caused birth defects. That theory ultimately was exposed as junk science, but not until courts bound by *Frye* allowed multiple, large verdicts that forced the drug off the market. The end result, according to medical scholars, was "increased hospitalization for nausea and vomiting in pregnancy"—dangerous conditions that the medical

[1] *Motorola v. Murray*, 2016 WL 6134870 (D.C. Ct. of Appeals Oct. 20, 2016).
[2] *In re Amendments to the Florida Evidence Code*, No. SC16-181 (Fla. 2017).
[3] *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002); *accord State v. Porter*, 698 A.2d 739, 743 (Conn. 1997).
[4] Black et al., *Science and the Law in the Wake of* Daubert*: A New Search for Scientific Knowledge*, 72 Tex. L. Rev. 715, 721 (1994).

Josh Becker is a Partner, and **Aaron Block** is a Senior Associate, with Alston & Bird LLP in the firm's Atlanta, GA office. They focus their practice on litigation involving scientific evidence in courts around the country.

and regulatory communities had deemed Bendectin safe and effective to prevent.[5] As Justice Stephen Breyer explained, by contrast, *Daubert* "assure[s] that the powerful engine of tort liability points toward the right substances and does not destroy the wrong ones."[6]

Florida's move away from *Daubert* puts it at risk of becoming a breeding ground for junk science-based litigation. As courts elsewhere continue to eschew the *Frye* test, Florida's embrace of it will draw plaintiffs' attorneys from across the country.

Daubert also promotes individual liberty and confidence in the criminal justice system. *Frye* tends to ossify admissibility decisions by obstructing both critical scrutiny of longstanding but flawed evidence, as well as the admission of sound, innovative science. Courts around the country have been shaken by the revelation that much "generally accepted" criminal evidence was flawed, if not fraudulent, and a landmark National Academy of Sciences report concluded that much standard forensic evidence lacks "rigorous" evidence of reliability.[7] No justice system properly so called should maintain an admissibility framework that tolerates the use of junk science to imprison people (or to exonerate the truly guilty) merely because it is in common use.

The primary arguments against requiring a threshold showing of scientific reliability do not hold up to examination. The chief argument has been that requiring scientists to demonstrate the "same level of intellectual rigor"[8] in the courtroom as they do in the laboratory somehow restricts access to the courts. But generally speaking, *Daubert* review takes place well after litigation commences and appropriate discovery is conducted. If plaintiffs cannot identify a suitable expert by that time in the litigation process, it is not because the courthouse door is shut; it is because, having been afforded a fair opportunity to develop their case, plaintiffs lack adequate evidence. That outcome no more deprives plaintiffs of access to the courts than granting summary judgment or directing a verdict.

The "grave constitutional concerns" that the Florida Supreme Court cited as justification for backing away from *Daubert* are not remotely justified. Courts around the country settled *Daubert*'s constitutionality years ago, and there cannot be a serious argument that the federal courts and nearly all US states have been unwittingly but systematically "undermining the right to a jury trial and denying access to the courts," as the *per curiam* opinion put it, for the last 25 years.[9] Moreover, *Frye* itself imposes a system of admissibility, albeit a flawed one; if admissibility systems in general are constitutionally permissible (as they are), it cannot be the case that worse systems are constitutional while better systems are not.

Maintaining consistency with the modern trend—as well as the law applied in Florida's federal courts—would enhance the quality of Florida's justice system and protect its citizens from the costs of junk science. The Florida Supreme Court should adopt *Daubert* at the first opportunity.

---

[5] Hale & Niebyl, *Bendectin: How a Safe and Effective Drug Was Removed from the Market by Our Legal System,* American College of Obstetricians & Gynecologists Clinical Reviews (2012).

[6] *General Electric Co. v. Joiner*, 522 U.S. 136, 148-49 (1997) (Breyer, J., concurring).

[7] *E.g.*, FBI Admits Flaws in Hair Analysis over Decades, W. Post, Apr. 18, 2015, *available at* https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfabc310_story.html?utm_term=.19301131fd6b; National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward (2009).

[8] *Kumho Tire Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

[9] *See, e.g.*, *Junk v. Terminix Int'l Co.*, 628 F.3d 439, 450 (8th Cir. 2010) (rejecting Seventh Amendment challenge); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 459, 558 (Tex. 1995) (similar); *accord In re Amendments to the Florida Evidence Code*, slip op. at 16 ("Has the entire federal court system for the last 23 years as well as 36 states denied parties' rights to a jury trial and access to courts?) (Polston, J., dissenting in relevant part).

 ISBN 1056 3059