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The Daubert Standard In Fla. — 2 Years On

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Thanks to Florida's game-changing adoption of the Daubert standard for the admissibility of expert opinions, practitioners now have a new strategic tool available to them.

Gone are the admissibility of pure opinion testimony and the limited opportunity to challenge the validity of scientific evidence prior to it being presented to a jury. Florida judges are now required to act as gatekeepers, charged with evaluating the admissibility of scientific evidence pursuant to a three-part test. While the game is relatively new in the state, practitioners should feel some comfort when they take the field given the body of case law on Daubert.

In July 2013, Florida Evidence Code Section 90.702 governing the admissibility of expert testimony was amended "to adopt the standards for expert testimony in the courts of this state as provided in Daubert" and its progeny. Ch. 13-107, § 1, Laws of Fla. (2013) (Preamble to § 90.702). Previously, Florida followed what was commonly known as the Frye standard. See Frye v. United States, 293 F. 1013 (D.D.C. 1923). Under Frye, "[t]he proponent of the evidence [bore] the burden of establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology." Castillo v. E.I. DuPont De Nemours & Co. Inc., 854 So. 2d 1264, 1268 (Fla. 2003). That standard, however, only applied when an expert proffered an opinion based on new or novel scientific theories and it was generally accepted that Frye was inapplicable in the "vast majority" of cases. U.S. Sugar Corp. v. Henson, 823 So. 2d 104, 109 (Fla. 2002). This meant that absent the proffering of an opinion based on new or novel science, expert opinion testimony was admissible with little or no opportunity to challenge the science if it could be applied to the evidence at trial. Under the old regime: (1) Frye applied only when an expert attempted to render an opinion based on new or novel scientific techniques; (2) the court was not a true "gatekeeper" for the admissibility of scientific evidence; (3) a jury determined the validity of the science; and (4) there was an exception for pure opinion testimony. See Marsh v. Valyou, 977 So. 2d 543, 547-49 (Fla. 2007). That era in Florida has ended.

Under the amended evidence code, courts are now required to act as gatekeepers and to consider the admissibility of all expert testimony in accordance with the Daubert standard. See Daubert v. Merrell Dow Pharmaceutical Inc., 509 U.S. 579 (1993). A court must now determine whether: (1) the testimony

is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the expert witness has applied the principles and methods reliably to the facts of the case. The following table highlights some of main the differences between the old Frye standard and the new Daubert standard:

Old *Frye* Standard	**New *Daubert* Standard**
Applies only to new or novel theories.	Applies to all expert testimony.
Standard is whether proffered testimony is generally accepted in the scientific community.	Standard is whether proffered testimony is based on a reliable methodology.
Pure opinion exception (if an expert's opinion relies only on the expert's personal experience and training, the testimony is admissible without being subject to *Frye*).	*Ipse dixit* is insufficient (an expert must explain how experience leads to conclusion, why experience is a sufficient basis for opinion, and how that experience is reliably applied to the facts).
Jury determines validity of science.	Court acts a "gatekeeper" charged with evaluating all proffered expert testimony before it is presented to a jury. The court will test the reliability of principles and methods, supporting facts or data, and the application of the principles and methods to the facts of the case.

While there are a limited number of Florida cases on the new evidence code, those that exist are useful and express important, fundamental principles that should be appreciated by many practitioners. In Perez v. Bell South Telecommunications Inc., 138 So.3d 492 (Fla. Dist. Ct. App. 2014) (holding that the proffered expert testimony was inadmissible), the court articulated the following principles regarding the applicability of the amended admissibility standard:

• "[T]he Daubert test applies not only to 'new or novel' scientific evidence, but to all other expert opinion testimony." Id. at 497.

• "Expert testimony that might otherwise qualify as 'pure opinion' testimony is expressly prohibited." Id.

• "The legislative purpose of the new law is clear: to tighten the rules for admissibility of expert testimony in the courts of this state." Id.

• "[S]ection 90.702 of the Florida Evidence Code indisputably applies retrospectively." Id. at 498.

In Giaimo v. Florida Autosport Inc., 154 So.3d 385, 388 (Fla. Dist. Ct. App. 2015), an appellate court reversed the admission of proffered medical expert testimony under the second and third prongs of the new Florida standard because: (1) the "testimony provide[d] no insight into what principles or methods were used to reach [an] opinion"; and (2) the expert "did not demonstrate that he applied any such principles to methods to the facts of [the] case." The court noted that "[t]estimony of this type, though previously acceptable as pure opinion ... no longer suffices under 90.702." Id.

And finally, in the most recent Florida Daubert opinion, Booker v. Sumter County Sheriff's Office/N. Am. Risk Services, 40 Fla. L. Weekly D1291, (Fla. Dist. Ct. App. May 29, 2015), an appellate court affirmed an order denying the appellant's worker's compensation benefits after the appellant challenged the lower

court's denial of his evidentiary objection under Section 90.702. This case is instructive for a number of reasons. First, Booker addresses the importance of the timing of a Daubert challenge. The Booker court noted that because "a trial court has broad discretion in determining how to perform its gatekeeping function ... a judge's determination that an objection was not timely raised will be reviewed for abuse of discretion." Id. Where the appellant (a) became aware of an expert report in the form of an independent medical examination, and (b) "first raised a Daubert objection two weeks before the final hearing and only moved to strike the testimony by motion in limine ... four days before the final hearing," the lower court deemed the challenge untimely. Id. Consequently, the Booker cautions practitioners that "[t]he failure to timely raise a Daubert challenge may result in the court refusing to consider the untimely motion." The lesson is clear, practitioners must be attentive to the timing of their challenges and they should certainly comply with a court's case management order if one has been entered.

Second, Booker makes clear that "[t]he burden of proof to establish the admissibility of the expert's testimony is on the proponent of the testimony," Id., n. 1 (citing Daubert, 509 U.S. at 592 n. 10; McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253, 1256 (11th Cir. 2002)).

Third, Booker advises practitioners that a Daubert challenge must be "sufficient to put opposing counsel on notice so as to have the opportunity to address any perceived defect in the expert's testimony." Id. The challenge should provide a "specific basis" and "should include, for instance, citation to 'conflicting medical literature and expert testimony.'" Id. (quoting Tanner v. Westbrook, 174 F.3d 542, 546 (5th Cir. 1999)). "Setting forth unsubstantiated facts, suspicions or theoretical questions regarding the expert's qualifications are not sufficient." Id. (citing Rushing v. Kansas City Ry., 185 F.3d, 496, 506 (5th Cir. 1999)).

Fourth, reiterating the inadmissibility of pure opinion testimony, the Booker court advises practitioners that a judge may consider certain "flexible and nonexclusive factors" or questions that might be asked regarding an expert's methodology:

1. If it can be tested, has it?

2. Has it been subjected to peer review and/or publication?

3. If error rates can be determined, have they?

4. Are there standards controlling the technique's operation; if so, have they been maintained?

5. Is the methodology generally accepted as reliable within the scientific community? Id. (citing U.S. v. Hansen, 262 F.3d 1217, 1234 (11th Cir. 2001)).

Fifth, Booker counsels that where "expert testimony in a field of scientific inquiry [is] so well established that it has been previously deemed reliable by an appellate court, the trial court may take judicial notice of the evidence." Id. (quoting Hamilton v. Commonwealth, 293 S.W.3d 413, 419 (Ky. Ct. App. 2009)). Should a trial court take such notice, "[i]t shifts to the opponent of the evidence the burden to prove ... that such evidence is no longer deemed scientifically reliable." Id. (quoting Johnson v. Commonwealth, 12 S.W.3d 258, 262 (Ky. 1999)). In that event, "[t]he proponent may either rest on the judicially noticed fact or introduce extrinsic evidence as additional support or in rebuttal." Id. (quoting Johnson, 12 S.W.3d at 262).

The existing body of law should be instructive to Florida practitioners as they employ, apply or oppose the introduction of expert evidence under Section 90.702. While there are a limited number of

published Florida Daubert opinions, they are robust in their instruction. And where there is little or no controlling case law, Florida courts may look to federal case law as persuasive authority or guidance in the application of the Section 90.702. E.g., Carriage Hills Condo. Inc. v. JBH Roofing & Constructors Inc., 109 So. 3d 329, 334 n.1 (Fla. Dist. Ct. App. 2013) (if a Florida evidentiary rule is patterned after federal counterpart, "federal cases interpreting comparable provisions are persuasive and routinely looked to for interpretive guidance,") review dismissed, 130 So. 3d 692 (Fla. 2013).

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