Out of the *Frye* Pan?
Expert Witness Testimony Under New Rule 702

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If too many cooks spoil the broth, what are we to make of the new rule of evidence governing the admissibility of expert testimony?[1] Rule 702 was just amended, not by the Florida Supreme Court, but by the Legislature.[2] The amendment forces Florida courts to throw out the old *Frye* test and swallow the *Daubert* standard.

However, carving *Frye* out of the Evidence Code, and stuffing it with *Daubert*, is a recipe the high court previously turned its nose up at. The Legislature may have baked a constitutional challenge, as procedural rule making is the Supreme Court's specialty. Given judicial budget cuts, expect slow service of a resolution. To curb your appetite, this article is a starter on Florida's *Frye* test and the *Daubert* trilogy, with a reduction of the new Rule's impact in family cases.

Hors d'oeuvres: Florida's *Frye* Test

Federal and Florida courts have been using different standards to admit expert testimony into evidence. It was not always this way. For almost 70 years, both court systems used the same standard established in *Frye v. United States*.[3]

In *Frye,* a defendant on trial for murder wanted to offer an expert witness to testify about a lie detector test.[4] The trial judge denied the request.[5] The appellate court affirmed: ". . . while courts will go a long way in admitting expert testimony . . . the thing from which the deduction is made must . . . have gained *general acceptance* in the particular field in which it belongs."[6]

When the Federal Evidence Code was established in 1975, there was a dispute as to whether its adoption replaced the *Frye* general acceptance standard. As will be discussed below, the U.S. Supreme Court held in *Daubert* that the Code superseded *Frye.* The Florida Evidence Code was established in 1979 and adopted the same numbering system and significant portions of the Federal Code. However, the Florida Supreme Court never addressed whether the Evidence Code superseded *Frye*.[7]

Florida has been one of the few remaining places still serving *Frye*. The Florida Supreme Court announced in *Brim v. State* that "despite the federal adoption of a more lenient standard in *Daubert* . . . we have maintained the higher standard of reliability as dictated by *Frye*."[8]

However, the *Frye* rule was deglazed in Florida. The Florida Supreme Court held in *Marsh v. Valyou* that if an expert relies only on his or her personal experience and training, then the testimony is admissible without the need for a *Frye* hearing.[9] In other words, if an expert is testifying as to "pure opinion," it is presumptively admissible.

Additionally, *Marsh* carved a big exclusion out of *Frye* by limiting it to opinions involving "new or novel scientific techniques."[10] As the *Marsh* court noted, most expert testimony does not involve new or novel scientific techniques, so the "vast majority" of expert testimony in Florida was not even subject to *Frye*.[11]

With the aftertaste of *Daubert* swirling in his concurrence, Justice Anstead questioned why Florida still uses the *Frye* test after adoption of the Florida Evidence Code commenting, "unlike the United States Supreme Court, we have never explained how *Frye* has survived the adoption of the rules of evidence."[12]

Entremet: New Rule 702

During the 2013 regular session, the House bill amending Rule 702 was passed in April. The bill was signed by Governor Scott in June, and became effective July 1, 2013. However, a constitutional controversy could boil over.

Generally, legislation which encroaches on the Supreme Court's power to regulate courtroom practice and procedure is unconstitutional, but the Legislature can enact substantive law.[13] When one branch of government encroaches on another branch, Florida traditionally applies a "strict separation of powers doctrine."[14]

Given that the Evidence Code contains both substantive and procedural provisions, there is a question whether the Legislature seared the separation of powers doctrine.[15] Whether or not amended Rule 702 passes the constitutional taste test will not be known until a case is presented to the court.

Florida's amendment of Rule 702 is similar to the way Arizona tossed the *Frye* standard. After the Arizona legislature enacted a similar *Daubert* bill, the statute was declared unconstitutional under a separation of powers argument.[16] However, the bill pressured the Arizona Supreme Court to amend Rule 702 itself, which it later did.[17]

The Florida Legislature's recent amendment to Rule 702 may be a recipe for disaster if it is held unconstitutional, proving the old adage "laws are like sausages, it's better not to see them being made."[18] However, the legislative action could prompt

the Florida Supreme Court to cook up its own study, and cure the new Rule as Arizona did.[19] Until Florida gets a taste of how its courts view the amended Rule 702, *Daubert* is on the menu for now.[20]

Florida's new expert witness rules now state:

> Section 90.702, Testimony by experts. – 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 or otherwise, if:
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> (1) The testimony is based upon sufficient facts or data;
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> (2) The testimony is the product of reliable principles and methods; and
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> (3) The witness has applied the principles and methods reliably to the facts of the case; ~~however, the opinion is admissible only if it can be applied to evidence at trial~~.
>
> Section 90.704, Basis of opinion testimony by experts. –The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The preamble to House Bill 7015 states the legislative intent was to pattern Rule 702 after the Federal Rules of Evidence, adopt the *Daubert* standard for expert testimony, abandon the *Frye* rule, and prohibit "pure opinion testimony" in Florida courts.[21] The expert witness rule is now drizzled with a test blended from three U.S. Supreme Court opinions.

L'Entrée: The *Daubert* Trilogy[22]

The *Daubert* standard developed in three product liabilities cases in which the main issue was causation. The plaintiffs in each case tried to introduce expert testimony to prove products caused their damages. The courts ultimately rejected each of the plaintiffs' experts. The result was three opinions which increasingly tightened the rules for admitting expert testimony.

The trilogy began in 1993 with *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[23] *Daubert* was a toxic tort case against the maker of the morning sickness drug Bendectin, which the plaintiffs alleged caused limb reduction birth defects.[24] The U.S. Supreme Court first had to decide whether the *Frye* test had been replaced by the Federal Rules of Evidence, and ultimately held that it was.

The majority then established a new standard for admitting expert testimony which diverged from the *Frye* test. Recall that *Frye* admitted all expert testimony as long as it was based on a science generally accepted in the scientific community. Under *Daubert,* a judge has to ensure that expert testimony is both reliable and relevant; this requires establishing the expert's theory or technique is scientifically valid, and can be applied to the facts in issue.[25]

The *Daubert* court listed four non-exclusive factors to consider when applying the test: (1) whether the theory or technique can be tested; (2) whether the theory or technique has been peer reviewed; (3) what the "potential rate of error" is; and (4) whether it has widespread acceptance.[26]

The next case added to the mix was *General Electric Co. v. Joiner*.[27] The plaintiff was an electrician who claimed his exposure to polychlorinated biphenyls (PCBs) caused his lung cancer.[28] The Plaintiff's expert testified that it was "more likely than not that lung cancer was causally linked to PCB exposure" by extrapolating from animal studies in which mice were injected with PCBs.[29] The trial judge excluded the expert's testimony because the studies did not sufficiently support the expert's conclusion that PCBs caused cancer.[30]

The appellate court reversed after applying a "stringent standard of review" to the order excluding the expert testimony.[31] The U.S. Supreme Court reversed, requiring that the abuse of discretion standard be applied to rulings on the admissibility of expert testimony.[32] This is another split from the Florida *Frye* test. The abuse of discretion standard is far more deferential than the *de novo* standard we have been using in Florida.[33]

Joiner also resolved the challenge to the underlying expert testimony by requiring the trial judge to sit as "gatekeeper" to screen testimony. In excluding the testimony, Chief Justice Rehnquist wrote: "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."[34] Instead, courts are free to exclude testimony when "there is simply too great an analytical gap between the data and the opinion proffered."[35]

Expert *ipse dixit* is another area in which the *Daubert* standard differs from Florida law. After *Marsh*, an expert's 'pure opinion' testimony was presumptively admitted in Florida. By contrast, *Daubert* frees judges to reject 'pure opinion' testimony because it is only "connected to existing data only by the *ipse dixit* of the expert."[36]

The third ingredient to the trilogy was *Kumho Tire Co. v. Carmichael*.[37] The plaintiffs sued after a tire blew out on their minivan, causing a fatal accident.[38] The plaintiffs' expert, a tire-failure analyst, testified that the tire was defective after visually inspecting it.[39] The trial judge excluded the expert's testimony.[40] The appel-

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late court reversed, limiting *Daubert* to cases where an expert is applying scientific principles, rather than personal observation.[41] The U.S. Supreme Court reversed, and extended *Daubert* test to all expert testimony.[42]

Kumho marks another difference with Florida case law. Remember, *Marsh* limited the *Frye* test to "new or novel scientific techniques", rendering it "inapplicable in the vast majority of cases." By contrast, *Kumho* extended the new *Daubert* standard to all expert testimony, forcing experts to apply the same "intellectual rigor in their field" to the courtroom.[43]

Le Fromage: Impact in Family Court

Amended Rule 702 offers something for everyone. For judges, the rule change may increase the heat in court, as the number of hearings to exclude experts is dialed up. The *Daubert* standard also forces judges to refresh themselves with a new evidentiary standard, as Rule 702 folds them into their new role as gatekeepers of expert testimony.

For family lawyers, new Rule 702 offers a chance to fillet experts about their qualifications, the reliability of their testing methods, and the relevancy of their testimony, in a way they never could. A successful *Daubert* motion could flambé an opponent's case.

Expert witnesses will now face a greater risk of being scalded. *Daubert* pressures expert witnesses to knead through their professional literature more than before, and to defend their choice of methods, tests and evaluation techniques. Otherwise experts risk a courtroom grilling.

Le Dessert: Conclusion

The Legislature seems to have a taste for family law this year, experimenting with alimony reform, adding a pinch of equitable distribution change, and garnishing with amended Rule 702. Perhaps it is just their way of celebrating the Family Law Section's 40th anniversary. Whatever the reason, there is a smorgasbord of changes; more bills are simmering and we have new issues to digest. Bon appétit.

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Endnotes:

1 *See* Fla. Stat. § 90.702 (2012).

2 HB 7015 amended both Rule 702 and Rule 704. The expert witness rule in this article is collectively referred to as Rule 702 for simplicity. *See* Fla. H.R. Comm. on Jud., Subcomm. on Civ. Just., H.B. 7015 (2013) Staff Analysis 3 (final June 5, 2013).

3 293 F. 1013 (D.C. Mun. App. 1923).

4 *Id.*

5 *Id.* at 1014.

6 *Id.* (emphasis added).

7 *See Sikes v. Seaboard Coast Line R.R.,* 429 So. 2d 1216, 1221 (Fla. 1st DCA 1983) (citing Charles W. Ehrhardt, *A Look at Florida's Proposed Code of Evidence*, 2 Fla. St. U.L. Rev. 681, 682–83 (1974)).

8 695 So. 2d 268, 271 (Fla. 1997). Ironically, scholars have concluded that *Daubert* is the stricter standard. *See* Stephen E. Mahle, *The "Pure Opinion" Exception to the Florida Frye Standard*, 86 Fla. B.J. 41 (Feb. 2012); Edward Cheng & Charles Yoon, *Does Frye or Daubert Matter?: A Study of Scientific Admissibility Standards*, 91 Va. L. Rev. 471, 472 (2005).

9 977 So. 2d 543 (Fla. 2007).

10 *Id.* at 547.

11 *Id.*

12 *Id.* at 551.

13 *See* Fla. Const. art. V, § 2 ("The supreme court shall adopt rules for the practice and procedure in all courts . . . ."). *See also Massey v. David,* 979 So. 2d 9314, 936 (Fla. 2008).

14 *Bush v. Schiavo,* 885 So. 2d 321, 329 (Fla. 2004).

15 *See In re Amendments to the Florida Evidence Code*, 782 So. 2d 339, 341 (Fla. 2000) (recognizing that the Florida Evidence Code contains both substantive and procedural provisions, and that the Florida Supreme Court regularly issues opinions adopting or refusing to adopt the procedural rules enacted as amendments to the Florida Evidence Code).

16 *See Lear v. Fields,* 245 P.3d 911 (Ariz. App. Div. 2011) (finding section 12-2203(A), Arizona Statutes, titled *Admissibility of expert opinion testimony*, was unconstitutional because it violated the separation of powers doctrine).

17 *AZ Supreme Court adopts Daubert standard for expert witness testimony after constitutional dustup,* 53 Ariz. L. Rev. (2011) (syllabus available at http://www.arizonalawreview.org/2011/syllabus/az-supreme-court-adopts-daubert-standard-for-expert (last visited July 7, 2013)).

18 The quote is sometimes attributed to either Mark Twain or Otto von Bismarck. The credit actually belongs to John Godfrey Saxe, according to one expert. *See* The Quote Investigator, *Laws are Like Sausages*, http://quoteinvestigator.com/2010/07/08/laws-sausages/ (accessed July 8, 2010).

19 The Supreme Court reviews legislative changes to the Florida Evidence Code triennially. *See* Fla. R. Jud. Admin. 2.140(b)(1).

20 *See McLean v. State*, 854 So. 2d 796, 803 n.7 (Fla. 2d DCA 2003) (noting the Supreme Court's unwritten policy is to allow trial courts "to utilize a rule of evidence during the period between its legislative enactment and its adoption by the supreme court if the trial court determines that the new rule of evidence is procedural and does not violate the prohibition against ex post facto application").

21 *See* Fla. HB 7015 (2013) at 1-3.

22 Early reviewers of this article complained that an "entrée" is an appetizer in France. However, in the United States the entrée is the main course. *See* Dan Jurafsky, *Entrée*, http://languageoffood.blogspot.com/2009/08.entree.html (accessed August 25, 2009). Professor Jurafsky is a linguistics professor at Stanford University and is no stranger to legislative fry controversies. He covered the 2003 diplomatic crisis when the U.S. House of Representative's cafeteria changed the name of "french fries" to "freedom fries". The author offers the professor as a fries expert.

23 509 U.S. 579 (1993).

24 Interestingly, Bendectin is returning to the marketplace under a new name with a new maker. The FDA never required Bendectin's removal, it is just that no one wanted to risk litigation. *See* Amy Orciari Herman, *Morning-Sickness Pill Bendectin Back on the Market with a New Name,* http://www.jwatch.org/fw201304100000001/2013/04/10/morning-sickness-pill-bendectin-back-market-with (accessed April 10, 2013).

25 *See Daubert*, 509 U.S. at 590–591.

26 *Id.* at 593-94

27 522 U.S. 136 (1997).

28 *Id.* at 139.

29 *Id.* at 143.

30 *Id.* at 140.

31 *Id.*

32 *Id.* at 139.

33 *See Castillo v. E.I. Du Pont De Nemours & Co., Inc.,* 854 So. 2d 1264, 1268 (Fla. 2003).

34 *Joiner*, 522 U.S. at 146. "Ipse dixit" is Latin for "he himself said it".

35 *Id.*

36 *Id.* at 146.

37 526 U.S. 137 (1999).

38 *Id.* at 142.

39 *Id.* at 143.

40 *Id.* at 145.

41 *Id.* at 146.

42 *Id.*

43 *Id.* at 152.