Daubert House

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"Like the little-known codicil in the Faber College constitution . . ."[2]

For much of Florida's history, we have relied on the *Frye* "general acceptance" standard for the admission of expert testimony.[3] Six years ago, the Florida Legislature enacted the *Daubert* standard to govern the admissibility of expert testimony, replacing the old *Frye* standard.[4]

Since then, the *Daubert* standard was criticized for the way it was enacted, and caused many lawyers to shout about the threat to our constitutional rights.[5] Last year a majority of the Florida Bar Board of Governors plotted to get rid of the *Daubert* standard, and the Florida Supreme Court ultimately expelled it. This year *Daubert* crashed back into law like a rogue parade float, proving once again 'it wasn't over when the Germans bombed Pearl Harbor.'[6]

This article briefly looks at Florida's old *Frye* test, discusses the rapid-fire changes to Florida's expert witness rules, and reviews the *Daubert* evidentiary standard for the admission of expert testimony.

Florida is a *Frye* State

For almost 70 years, both the Florida and Federal court systems used the same expert witness standard established in *Frye v. United States*.7 In *Frye,* a defendant on trial for murder wanted to offer an expert witness to testify about a lie detector test. The trial judge denied the request. 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."[8]

The Federal Evidence Code was established in 1975. The Florida Evidence Code was established in 1979, and adopted the same numbering system and significant portions of the Federal Code. At the time, there was a dispute as to whether the adoption of the respective Evidence Codes replaced the *Frye* general acceptance standard.

The U.S. Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 590 U.S. 579 (2013) that *Frye's* "general acceptance" test was superseded by the adoption of the Federal Rules of Evidence.[9] However, the Florida Supreme Court never addressed whether Florida's Evidence Code superseded *Frye*.[10]

Since the U.S. Supreme Court's decision, Florida was one of the dwindling minority of states still applying the *Frye* test to expert testimony. 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*."[11]

However, the *Frye* rule was always applied very loosely in Florida. For instance, 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.[12] In other words, if an expert is testifying as to "pure opinion," it is presumptively admissible.

Marsh also created an exclusion from *Frye* by limiting it to opinions involving "new or novel scientific techniques." 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 never even subject to *Frye*.[13]

In his concurrence in *Marsh*, Justice Anstead questioned why Florida still used 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."[14]

Florida is a *Daubert* State

The Florida House bill amending Rule 702 became effective July 1, 2013, and fundamentally changed Florida law on expert testimony. However, there was a lot of constitutional uncertainty because of the way the bill passed.

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.[15] When one branch of government encroaches on another branch, Florida traditionally applies a "strict separation of powers doctrine."[16]

Given that the Evidence Code contains both substantive and procedural provisions, deciding whether a law is substantive or procedural is as difficult to distinguish as the difference between courts of law and equity.[17]

Accordingly, there was a looming question whether the Legislature violated the separation of powers doctrine.[18] Determining if amended Rule 702 was substantive or procedural would not be known until *DeLisle v. Crane Co.,* 258 So. 3d 1219 (Fla. 2018) reached the Florida Supreme Court.

Florida's expert witness rules, as amended from the former rules, 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:
>
> (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; ~~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.[19]

Over the next few years, and despite a growing controversy, Florida courts were faithfully applying *Daubert* and following the Legislative amendment. After all, *Daubert* seemed to have the tacit approval of the Florida Supreme Court.[20] Unknown to everyone, the *Daubert* Standard would flounder under secret probation.

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No, Florida is a *Frye* State

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?[21]

The controversy over the *Daubert* amendment graduated into a full-blown food fight among members of the Florida Bar. As part of the Evidentiary Rules making process, the Florida Bar Code and Rules of Evidence Committee, by a vote of 16–14, recommended that the Florida Supreme Court not adopt the Legislature's amendments to sections 90.702 to replace the *Frye* standard for admitting expert opinion evidence with the *Daubert* standard.

Next, the Florida Supreme Court declined to adopt the *Daubert* Amendment to the extent that it is procedural, due to the constitutional concerns raised. The Florida Supreme Court instead left it for a proper case or controversy.[22]

The case arose in *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018). Delisle developed mesothelioma, a disease caused by exposure to asbestos. He filed a personal injury action against sixteen defendants, but proceeded to trial only against Crane, Lorillard Tobacco Co., and Hollingsworth & Vose Co., claiming he was exposed to asbestos fibers from sheet gaskets and smoking Original Kent cigarettes from 1952 to 1956.

The parties hotly disputed causation, and even DeLisle's own experts did not agree on which products produced sufficient exposure to asbestos to constitute a substantial contributing factor to DeLisle's disease. The trial court awarded DeLisle $8 million in damages, apportioned among the defendants based on the jury's distribution of fault.

The Fourth District reviewed the admission of the testimony of the experts under the *Daubert* standard, and as a boon to the defendants, reversed for a new trial for R. J. Reynolds, and reversed and remanded for entry of a directed verdict for Crane.

After review of the Fourth District's opinion, the Florida Supreme Court invalidated the 2013 legislative changes to the Florida Evidence Code that adopted the *Daubert* standard.

The Florida Supreme Court found that the Legislative amendments to Section 90.702 were not substantive because they did not "create, define, or regulate a right", but was procedural rulemaking instead.

Additionally, the Court held that the *Daubert* amendment conflicted with the exiting *Frye* rule because *Frye* and *Daubert* were competing methods to determine the reliability of expert testimony. The Court held that, once again, *Frye* was the appropriate test in Florida courts. Unknown to everyone, *Frye* was on "Double Secret Probation."[23]

Florida is a *Daubert* State!

But we can't ignore the process altogether and do whatever we want, whenever we want to do it . . .[24]

D-Day marking the return of *Daubert* was November 20, 2018. On that day, following a machine recount, Floridians learned Republican nominee, Ron DeSantis, defeated Democratic nominee Andrew Gillum. At age 40, DeSantis became the youngest incumbent governor in the United States.

As an otter takes to water, the new Governor's Supreme Court appointments started on his second day in office. For purposes of the Evidence Code, his appointments became the most consequential moves of his governorship. That is because at the time Governor DeSantis took office, three justices forming the plurality decision in *Delisle*, Barbara Pariente, R. Fred Lewis and Peggy Quince, reached mandatory retirement, giving the Governor a rare

opportunity to change Florida's expert witness rules.[25]

The Florida Supreme Court, as part of its Constitutional rulemaking authority, has the power to adopt Legislative changes to the Evidence Code. As we learned in 2017, the Court previously refused to adopt the *Daubert* amendments, to the extent that they were considered procedural, solely "due to the constitutional concerns raised" by the Committee members and commenters who opposed the amendments.[26]

This year however, without re-addressing the correctness of its own ruling in *DeLisle*, and after noting that *DeLisle* did not address the amendment to section 90.704 made by section 2 of chapter 2013-107, the Florida Supreme Court chose to recede from its prior decision not to adopt the Legislature's *Daubert* amendments.[27]

Rejecting the recent complaints about the *Daubert* standard, the Florida Supreme Court remarked that *Daubert* has been routinely applied in federal courts since 1993, a majority of states adhere to the *Daubert* standard, and caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.

Effective immediately, the Florida Supreme Court has adopted the Legislatures' 2013 amendments to section 90.702 as procedural rules of evidence, and adopted the amendment to section 90.704 to the extent it is procedural.[28]

The *Daubert* Trilogy

> *Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method."*[29]

The Florida Supreme Court, having decided that Florida is a *Daubert* state again, it is useful to review what that actually means for family cases. 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 a fraternity of three opinions, which raised the minimum passing grade for the admission of expert testimony.

The dean of the trilogy was *Daubert v. Merrell Dow Pharmaceuticals, Inc*. itself.[30] *Daubert* was a toxic tort case against the maker of the morning sickness drug Bendectin. The plaintiffs alleged Bendectin caused limb reduction birth defects.[31] 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.[32]

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.

The next case to matriculate was *General Electric Co. v. Joiner*.[33] The plaintiff was an

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electrician who claimed his exposure to polychlorinated biphenyls (PCBs) caused his lung cancer. 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. The trial judge excluded the expert's testimony because the studies did not sufficiently support the expert's conclusion that PCBs caused cancer.

The appellate court reversed after applying a "stringent standard of review" to the order excluding the expert testimony. The U.S. Supreme Court reversed, requiring that the abuse of discretion standard be applied to rulings on the admissibility of expert testimony. 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.[34]

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."[35] Instead, courts are free to exclude testimony when "there is simply too great an analytical gap between the data and the opinion proffered."[36]

Expert *ipse dixit* is an area in which the new *Daubert* standard differs from previous 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."

The omega case in the trilogy was *Kumho Tire Co. v. Carmichael*.[37] The plaintiffs sued after a tire blew out on their minivan, causing a fatal accident. The plaintiffs' expert, a tire-failure analyst, testified that the tire was defective after visually inspecting it. The trial judge, grading the expert's opinion 0.0, excluded the expert's testimony. The appellate court reversed, limiting *Daubert* to cases where an expert is applying scientific principles, rather than personal observation. The U.S. Supreme Court reversed, and extended *Daubert* test to all expert testimony.[38]

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.[39]

Admitting Expert Testimony Under *Daubert*

To qualify a witness as an expert under the new *Daubert* standard, and have the opinion testimony admitted, the witness must be qualified to give an opinion. In other words, the witness must be an actual expert. Additionally, the expert's testimony must be both relevant and reliable.

A. Qualifying the Expert Witness

There is no hard and fast rule as to the degree of knowledge required to qualify a witness as an expert under *Daubert*. Rule 702 merely defines an expert as someone who is qualified in a subject matter by knowledge, skill, experience, training, or education.[40] However, the proponent of the expert evidence carries the burden of laying the proper foundation for the admission of expert testimony by a preponderance of the evidence.[41]

Establishing an expert's competency and knowledge in a particular profession is done

through *voir dire*, an examination of the expert's credentials.[42] Once the proper foundation is met, the witness is deemed an expert after being qualified as an expert by the court.

Family law cases frequently rely on experts, and accountants and psychologists are two of the more commonly admitted experts. In Florida, accountants and mental health professionals are required to be licensed in order to practice.

Additionally, professionals licensed in other states have to be certified in Florida as an expert witness to testify here.[43] However, unless specifically required by statute, a witness need not have a state license to qualify as an expert.[44] The lack of a license then only goes to the weight of the testimony given.

B. <u>Relevancy and Reliability</u>

Since the Legislature passed the *Daubert* standard in Florida, a few appellate courts have had an opportunity to consider the new evidentiary rule.[45] For example, in *Perez v. Bell South Telecommunications Inc.*, the plaintiff became pregnant while employed as a call center operator by Bell South. Plaintiff's board-certified obstetrician and gynecologist, classified plaintiff's pregnancy as "high risk", and recommended a week of bed rest.[46]

The plaintiff had also had a prior medical history which contributed to her high-risk pregnancy: she was obese, and had gastric surgery due to her obesity, she had suffered two herniated discs, had back surgery, and had her gall bladder removed prior to her pregnancy.

The plaintiff was fired for non-performance. Two days later, she suffered a placental abruption and delivered her child twenty weeks early. Plaintiff's expert opined in that workplace stress, exacerbated by Bell South's alleged refusal to accommodate Ms. Perez's medical condition, was the causal agent of the abruption. The expert's testimony was the only testimony linking the premature birth to Bell South.

However, the plaintiff's expert also testified there was no way of ever knowing for sure what caused the placental abruption, and that his conclusions were purely his own personal opinion, not supported by any credible scientific research.

Interestingly, the trial court dismissed the expert's testimony under the old *Frye* standard.[47] In affirming the lack of admissibility of the plaintiff doctor's testimony, the *Perez* panel held that under *Daubert:*

> "the subject of an expert's testimony must be 'scientific knowledge.' "[I]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." The touchstone of the scientific method is empirical testing—developing hypotheses and testing them through blind experiments to see if they can be verified. "[S]cientific method [is][a]n analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation."). As the United States Supreme Court explained in *Daubert*, "This methodology is what distinguishes science from other fields of human inquiry." Thus, "a key question to be answered" in any *Daubert* inquiry is whether the proposed testimony qualifies as "scientific knowledge" as it is understood and applied in the field of science to aid the trier of fact with information that actually can be or has been tested within the scientific method. "General acceptance" [from the Frye test] can also have a bearing on the inquiry, as can error rates and whether the theory or technique has been subjected to peer review and publication. Thus, there remains some play in the joints. However, "general acceptance in the scientific community" alone is no longer a sufficient basis for the admissibility of expert testimony. It "is simply one factor among several." Subjective belief and unsupported speculation are henceforth inadmissible.[48]

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Perez established three things: (1) the Legislature intended to tighten the rules concerning the admissibility of expert testimony, (2) the *Daubert* standard applies retroactively to all cases, and (3) an expert's subjective, unsupported belief – the so-called "pure opinion" testimony – is inadmissible.

Conclusion

National Lampoon's Animal House follows Faber College freshmen Lawrence Kroger and Kent Dorfman as they get rejected from the prestigious Omega Theta Pi fraternity. They reluctantly pledge the disreputable Delta Tau Chi. Unknown to everyone Faber's Dean puts Delta House on double-secret probation after invoking "the little-known codicil in Faber's Constitution." Despite being expelled, the Deltas are not over, and ultimately become respectable.

Animal House may explain how we got here, but it is more important to understand where "here" is. After Florida expelled *Frye* and passed *Daubert*, it brought our courts back into line with the U.S. Supreme Court, all federal courts, and a growing majority of state courts. While not everyone will be throwing toga parties in celebration, *Daubert* is the prevailing law in Florida again. If you are still confused, there is always John "Bluto" Blutarsky's guidance.[49]

Endnotes

[1] Ronald H. Kauffman is board certified in marital and family law and practices in Miami. He is a Fellow of the American Academy of Matrimonial Lawyers and currently serves on the Executive Council of the Florida Bar Family Law Section.

[2] *See In re Amendments to Florida Evidence Code*, SC19-107, (Fla. May 23, 2019) (Luck, J. dissenting).

[3] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[4] *See* §90.702, Fla. Stat. (2019).

[5] *See* Ronald H. Kauffman, *The Daubert Crucible*, The Commentator (Fall 2015) ("Given that the Evidence Code contains both substantive and procedural provisions, there is still lingering suspicion that the Legislature violated the separation of powers doctrine.").

[6] *See National Lampoon's Animal House*, Universal Pictures (1978) (What? Over? Did you say "over"? Nothing is over until we decide it is! Was it over when the Germans bombed Pearl Harbor? Hell no!").

[7] 293 F. 1013 (D.C. Cir. 1923).

[8] *Id.* (emphasis added).

[9] *See Daubert v. Merrell Dow Pharmaceuticals, Inc*, 590 U.S. 579 (2013).

[10] *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)).

[11] *Brim v. State*, 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., Feb. 2012, 41; Edward Cheng & Charles Yoon, *Does Frye or Daubert Matter?: A Study of Scientific Admissibility Standards*, 91 Va. L. Rev. 471, 472 (2005).

[12] 977 So.2d 543 (Fla. 2007).

[13] *Id.* at 547.

[14] *Id.* at 551.

[15] *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).

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

[17] *See* Reuben Doupé, *But This is a Court of Equity!*, The Commentator (Winter 2019).

[18] *See supra* note 5.

[19] *See* Fla. HB 7015 (2013) at 1-3.

[20] *See Perez v. Bell S. Telecommunications, Inc.*, 153 So. 3d 908 (Fla. 2014) (The Florida Supreme Court declined to accept jurisdiction.) *See also Perez v. Bell S. Telecommunications, Inc.*, 138 So. 3d 492, 498, n. 12 (Fla. 3d DCA 2014). ("We take comfort here in the fact that the Florida Supreme Court periodically adopts all legislative changes to the Florida Evidence Code to the extent they are procedural . . . and has already stricken all references to the Frye test from the Florida Rules of Juvenile Procedure . . .").

[21] *See In re Amendments To Florida Evidence Code*, 210 So. 3d 1231, 1242 (Fla. 2017) (Polston, J. dissenting).

[22] *See Id.*, 210 So. 3d at 1236.

[23] *See supra* note 6 ("There is a little-known codicil in the Faber College constitution which gives the dean unlimited power to preserve order in time of campus emergency.").

[24] *See supra* note 2 (Luck, J. dissenting).

[25] Jim Saunders, *How is new Florida Supreme Court doing? Ruling on expert testimony signals shift*, Sun Sentinel (May 24, 2019) Available at https://www.sun-sentinel.com/news/politics/fl-ne-nsf-florida-supreme-court-20190524-so76lr6imjfp7bzgnfh6jdesn4-story.html

[26] In *In re Amendments to Florida Evidence Code*, 210 So.3d 1231, 1239 (Fla. 2017).

[27] *See supra* note 2 (Luck, J. dissenting).

[28] In 2010, after the Arizona legislature enacted a *Daubert* bill, the Arizona statute was declared unconstitutional under a separation of powers argument. However, the Arizona Supreme Court was pressured to amend Rule 702

itself, which it later did. *See* Ronald H. Kauffman, *Out of the Frye Pan? Expert Witness Testimony Under New Rule 702*, The Commentator (Fall 2013).

[29] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, (9th Cir. 1995).

[30] 509 U.S. 579 (1993).

[31] 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 (April 10, 2013).

[32] *See Daubert*, 509 U.S. at 590–591.

[33] 522 U.S. 136 (1997).

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

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

[36] *Id.*

[37] 526 U.S. 137 (1999).

[38] *Id.*

[39] *Id.* at 152.

[40] *See* §90.702, Fla.Stat. (2018).

[41] *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

[42] From the French meaning "to speak the truth." See Cornell Law School, Legal Information Institute, available at https://www.law.cornell.edu/wex/voir_dire (last visited July 23, 2015).

[43] *See e.g.* §466.005, Fla.Stat. (2014).

[44] *See Rose v. State*, 506 So. 2d 467, 470 (Fla. 1st DCA 1987).

[45] *See Conley v. State*, 129 So. 3d 1120, 1121 (Fla. 1st DCA 2013), (remanding for a determination of the admissibility of the evidence under the Daubert standard codified by section 90.702).

[46] *See Perez v. Bell S. Telecommunications, Inc.*, 138 So. 3d 492 (Fla. 3d DCA 2014).

[47] Section 90.702 of the Florida Evidence Code was held to be applied retrospectively. *See Id.* at 498.

[48] *Id. at* 498-99 [internal quotations omitted].

[49] *See supra* note 6 ("My advice to you...is to start drinking heavily.").