The Florida Senate

Issue Brief 2012-219 *September 2011*

Committee on Judiciary

ISSUES IN EVIDENCE LAW

Statement of the Issue

The Legislature and the Florida Supreme Court share jurisdiction related to evidence law. The Florida Evidence Code, codified in ch. 90, F.S., is a product of the Legislature. Section 90.102, F.S., specifies that the chapter replaces and supersedes existing statutory or common law in conflict with its provisions. However, the Supreme Court has constitutional authority over practice and procedure in all courts. Recognizing that the Evidence Code is both substantive and procedural in nature, the Court has adopted the Evidence Code as originally enacted as well as later amended by the Legislature. However, the Court has on occasion declined to adopt amendments enacted by the Legislature.

The Legislature regularly considers changes to the Evidence Code. In recent sessions, measures have been proposed, but not ultimately adopted, to revise the standard for Florida courts to admit expert witness testimony and to bring that standard into conformity with Federal Rule of Evidence 702 and the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* requires a federal judge, upon a proffer of expert testimony, to serve as gatekeeper to determine whether the methodology underlying the testimony is scientifically valid. In making the determination, the judge under *Daubert* may consider additional factors specified in *Daubert* and other decisions applying the case. Currently, Florida courts employ the standard articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which requires the party who wants to introduce the expert opinion testimony into evidence to show that the methodology or principle has sufficient reliability.

Aside from the issue of expert witness testimony, other evidence issues periodically arise as a result of decisions of courts and through experiences of trial practitioners. For example, according to a recent Florida Supreme Court decision, Florida statutes barring the admission of evidence of settlements do not contain implicit exceptions to admit the evidence – even to impeach or show bias.[1] Additionally, Florida's Evidence Code does not recognize the hearsay exception of forfeiture by wrongdoing, unlike numerous other states' evidence codes and the Federal Rules of Evidence. This fact could give defendants in Florida the ability to exclude hearsay statements made by a witness who would be available to testify but for wrongdoing by the defendant for the purpose of preventing the witness from testifying.

The purpose of this issue brief is to review recent, current, and emerging issues in the area of evidence law.

Discussion

Article II, section 3 of the Florida Constitution provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[2] The Florida Supreme Court has explained that the separation-of-powers doctrine recognizes two fundamental prohibitions imposed on each branch of government.[3] The Court explained that "'[t]he first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned

[1] *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078, 1086 (Fla. 2009).
[2] *See also Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).
[3] *Whiley v. Scott*, 2011 WL 3568804 at 3 (Fla. 2011) (quoting *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991).

power.'"[4] Under the state's constitutional framework, the Legislature has authority to enact substantive laws, while the Florida Supreme Court has authority to govern practice and procedure in all state courts.[5]

The Florida Evidence Code is statutory, as enacted and amended by the Legislature and codified in ch. 90, F.S. There is a balance between the jurisdiction of Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature continues to revise ch. 90, F.S., and the Supreme Court tends to adopt these changes as rules. The Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. The Court has on very infrequent occasions rejected legislative amendments to the Evidence Code as rules of court.[6]

There has not been tremendous activity in the area of Florida evidence law in the past few years. This discussion, however, provides an overview of some recent revisions to the Evidence Code and the applicable rules of court procedure, as well as some current and emerging issues in the law of evidence.

Repeal of Deadman's Statute

The "Deadman's Statute" was codified in s. 90.602, F.S. (2004), and provided that no person interested in an action or proceeding could testify as a witness against the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person, or against an assignee, committee, or guardian of a mentally incompetent person, regarding any oral communication between the interested person and the person who is deceased or is now mentally incompetent.

The prohibition of the Deadman's Statute did not apply if any of the representatives of the deceased or incompetent person testified on his or her own behalf regarding the communication. The prohibition also did not apply if any of the representatives of the deceased or incompetent person offered evidence of the subject matter of the oral communication.

Section 90.602, F.S., was Florida's version of a traditional common law rule of evidence which declared that "certain interested persons are incompetent to testify in an action against an estate."[7] The Deadman's Statute prohibited an interested party from testifying regarding any oral communication between the interested person and the person who is deceased or mentally incompetent.[8] The main purpose of the prohibition on testimony by an interested party was to protect the decedent's estate from false or fraudulent claims.[9]

The Legislature abolished the Deadman's Statute in 2005.[10] The Legislature also enacted a hearsay exception to allow the introduction of written or oral statements previously made by an unavailable declarant, when other testimony from the declarant on the same subject matter had already been introduced by an adverse party.[11] The Florida Supreme Court in 2007 adopted the changes to the Evidence Code previously enacted by the Legislature.[12]

Character Evidence – Other Crimes, Wrongs, or Acts of Child Molestation

The Legislature amended s. 90.404(2), F.S., to allow for the admission of evidence of other crimes, wrongs, or acts of child molestation when a defendant is charged with a crime involving child molestation and to provide that

---

[4] *Id*.
[5] *See, e.g., Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975).
[6] *See, e.g., In re Amendments to the Fla. Evidence Code*, 782 So. 2d 339 (Fla. 2000) (Florida Supreme Court adopting Evidence Code to the extent it is procedural and rejecting hearsay exception as a rule of court); *compare with In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979) (Florida Supreme Court adopting Florida Evidence Code to the extent it is procedural), *clarified by* 376 So. 2d 1161 (Fla. 1979).
[7] 24 FLA. JUR. 2D *Evidence and Witnesses* s. 773 (2011).
[8] *Id.*
[9] *Moneyhun v. Vital Industries, Inc.*, 611 So. 2d 1316, 1320 (Fla. 1st DCA 1993).
[10] Chapter 2005-46, s. 1, Laws of Fla.
[11] *Id*. at s. 2 (amending s. 90.804, F.S.). *See also* The Florida Bar Continuing Legal Education Materials, "Topics in Evidence 2010" (Mar. 4, 2010).
[12] *See In re Amendments to the Fla. Evidence Code*, 960 So. 2d 762 (Fla. 2007).

such evidence may be considered for its bearing on any matter to which it is relevant.[13] The amendments added a new paragraph (b) to s. 90.404(2), F.S., to bring the statute into conformity with Federal Rule of Evidence 414, Evidence of Similar Crimes in Child Molestation Cases.[14] The Code and Rules of Evidence Committee of the Florida Bar recommended against adopting the amendments to s. 90.404(2), F.S., "based upon the inherent conflicts between the new legislation and sections 90.104(2) (the court should prevent inadmissible evidence from being suggested to the jury), 90.404(1) (character evidence is inadmissible to prove person acted in conformity with that character trait), and 90.404(2)(a) (similar fact evidence is inadmissible when relevant only to prove bad character or propensity)."[15]

The Florida Supreme Court declined to follow the committee's recommendation and adopted the changes as enacted by the Legislature to extent they were procedural.[16] The Court adopted s. 90.404(2)(b), F.S., in a divided opinion that did not address the constitutional issues.[17] In a subsequent decision, the Court considered the constitutionality of s. 90.404(2)(b), F.S., and held that the law comports with due process when applied in a case in which the identity of the defendant is not an issue, the provision is used to corroborate the testimony of the alleged victim of child molestation, and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.[18]

In 2008, the Legislature further amended the statute to incorporate additional acts within the definition of child molestation.[19] For purposes of s. 90.404(2)(b), F.S., the definition of child molestation was modified to include conduct prohibited under s. 847.0135(5), F.S.[20] Under the amended definition of child molestation, such conduct includes the commission of lewd or lascivious exhibition when a person transmits certain acts over the computer when he or she knows or has reason to believe it is being viewed by a victim under 16 years. The prohibited acts include intentionally masturbating, exposing the genitals in a lewd or lascivious manner, or committing other sexual acts not involving actual physical or sexual contact with the victim. In 2011, the Supreme Court adopted the legislative amendments to s. 90.404(2)(b), F.S., to the extent they are procedural.[21]

Psychotherapist-Patient Privilege

In 2006, the Legislature amended s. 90.503, F.S., to revise the definition of psychotherapist for purposes of the psychotherapist-patient privilege.[22] The expanded definition includes advanced registered nurse practitioners whose primary scope of practice is the diagnosis or treatment of mental or emotional conditions, including chemical abuse, as provided within the scope of practice of the advanced nurse's practice as outlined by the Nurse Practice Act under ch. 464, F.S. An evidentiary privilege prohibits the discovery, subpoena, or admission of what otherwise might be admissible evidence in a legal proceeding.[23] Under the psychotherapist-patient privilege, a patient's records and communications between a psychotherapist and a patient are generally confidential when made for the purposes of diagnosis or treatment of a mental or emotional condition.[24] For purposes of the psychotherapist-patient privilege in s. 90.503, F.S., the Supreme Court adopted the broadened definition of psychotherapist in 2007.[25]

---

[13] Chapter 2001-221, s. 1, Laws of Fla.
[14] *See In re Amendments to the Fla. Evidence Code*, 825 So. 2d 339, 340 n. 1 (Fla. 2002).
[15] See the concurring opinion by Justice Pariente in *In re Amendments to the Fla. Evidence Code*, 825 So. 2d at 341.
[16] *In re Amendments to the Fla. Evidence Code*, 825 So. 2d at 340-41.
[17] *See id.* at 341-42.
[18] *McLean v. State*, 934 So. 2d 1248, 1261-63 (Fla. 2006).
[19] Chapter 2008-172, s. 9, Laws of Fla.
[20] *Id.*
[21] *See In re Amendments to the Fla. Evidence Code*, 53 So. 3d 1019 (Fla. 2011).
[22] Chapter 2006-204, s. 1, Laws of Fla.
[23] *See The Florida Bar v. Forrester*, 818 So. 2d 477, 481-82 (Fla. 2002).
[24] Section 90.503(2), F.S.
[25] *In re Amendments to the Fla. Evidence Code*, 960 So. 2d 762, 763 (Fla. 2007).

Doctrine of Forfeiture by Wrongdoing

Under the doctrine of forfeiture by wrongdoing, a person who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation of his or her witnesses.[26] The doctrine of forfeiture by wrongdoing is in part an equitable doctrine in which courts curtail attempts by a defendant who seeks to undermine the judicial process by procuring or coercing silence from witnesses and victims.[27] At least one legal scholar has argued that the common law doctrine of forfeiture by wrongdoing is a part of Florida's common law confrontation jurisprudence incorporated under the Sixth Amendment via the Fourteenth Amendment of the United States Constitution.[28]

Additionally, forfeiture by wrongdoing is a common law hearsay exception in many jurisdictions.[29] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[30] Under the Florida Evidence Code, except as provided by statute, hearsay evidence is inadmissible.[31]

Section 90.803, F.S., lists 24 hearsay exceptions that do not depend upon the availability of the declarant as a witness. Although the hearsay exceptions listed in s. 90.803, F.S., are out-of-court statements, they are believed to provide trustworthy and reliable information so that, despite the lack of in-court testimony, exclusion of the evidence may be avoided.[32] Section 90.804, F.S., specifies a category of five hearsay exceptions that apply when a declarant is unavailable due to a privilege against testifying, lack of memory, death or then-existing illness or infirmity, refusal to testify, or an inability to procure the person's presence at the hearing.

Under Federal Rule of Evidence 804(b)(6), the doctrine of forfeiture by wrongdoing is codified as a hearsay exception to make admissible "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Additionally, several states have adopted a comparable hearsay exception that allows out-of-court statements to be admitted where the witness is unavailable to testify at trial and proof is established that the unavailability of the witness was due to misconduct on the part of the defendant.[33]

In *Chavez v. State*, the Florida First District Court of Appeal held that the trial court was in error as a matter of law to admit hearsay evidence of a criminal defendant's threats to harm his wife based on the legal doctrine of forfeiture by wrongdoing.[34] The First District Court of Appeal rejected the state's argument that the doctrine of forfeiture by wrongdoing is applicable in Florida as a common law hearsay exception under s. 90.102, F.S., "which provides that the Florida Evidence Code replaces or supersedes only conflicting statutory or common law."[35] The court reasoned that s. 90.802, F.S., "prohibits courts from admitting hearsay 'except as provided by statute.'"[36] The court additionally found that under the facts in *Chavez*, "[t]here [was] no evidence that [the] Appellant killed his wife with the intent to make her unavailable as a witness."[37] Based on the express statutory exclusion of the hearsay testimony under s. 90.802, F.S., the court declined to create a broad rule allowing the admission of the testimony in *Chavez*.[38] The court noted "that if a broader view of the forfeiture by wrongdoing doctrine was accepted by [the] court, [the court] would be required to craft procedures to ensure the reliability of

---

[26] 21A AM. JUR. 2D *Criminal Law* s. 1094 (2011).
[27] *Cf.* 21A AM. JUR. 2D *Criminal Law* s. 1094 (2011).
[28] Timothy M. Moore, *Forfeiture by Wrongdoing: A Survey and An Argument for Its Place in Florida*, 9 FLA. COASTAL L. REV. 525, 572-74 (2008).
[29] *See Chavez v. State*, 25 So. 3d 49, 51 (Fla. 1st DCA 2009).
[30] Section 90.801, F.S.
[31] Section 90.802, F.S.
[32] *Cf.* Charles W. Ehrhardt, *Florida Evidence*, s. 803 (2006 edition).
[33] *See* 23 C.J.S. *Criminal Law* s. 1174; *see also* Moore, *supra* note 28, at 562-63.
[34] *Chavez*, 25 So. 3d at 51.
[35] *Id*. at 52.
[36] *Id*. at 51.
[37] *Id.* at 52.
[38] *Id.* at 53.

such statements, as well as a procedure to make a factual determination that the defendant had engaged in the wrongdoing."[39]

Florida's Evidence Code does not recognize the hearsay exception of forfeiture by wrongdoing, unlike numerous other states' evidence codes and the Federal Rules of Evidence.

Admission of Settlement Evidence for Impeachment Purposes

Section 768.041(3), F.S., provides that the fact of a release or covenant not to sue or that any defendant has been dismissed by order of the court shall not be made known to the jury. Florida courts have interpreted the statute as a prohibition on informing the jury that a witness was a prior defendant, whether the defendant was dismissed by release or settlement or by court order.[40] Under s. 90.408, F.S., evidence of an offer to compromise a claim that was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value. Thus, "[s]ection 90.408[, F.S.,] only excludes evidence of a compromise or settlement which is offered to prove 'liability or absence of liability for the claim or its value.'"[41] Until the Florida Supreme Court decided the case of *Saleeby v. Rocky Elson Construction, Inc.*,[42] it appeared that if the evidence of settlement or compromise was offered under s. 90.408, F.S., for another purpose, it could be admitted for that purpose, such as to show proof of bias or prejudice.[43] Evidence that a testifying witness has previously settled may be probative to show the motive or self-interest of a testifying witness.[44]

In *Saleeby*, the Supreme Court dealt with the issue of whether evidence of a prior settlement may be admitted to impeach the testimony of a witness.[45] The Supreme Court reviewed the decision of the Fourth District Court of Appeal in *Saleeby*, which directly conflicted with the decision of the Third District Court of Appeal in *Ellis v. Weisbrot*, and held that ss. 768.041 and 90.408, F.S. (2006), prohibit the admission at trial of any evidence of settlement or dismissal of a defendant.[46] In *Saleeby*, the plaintiff, a construction worker who was injured and rendered a paraplegic when roof trusses collapsed on him, sued both the company that installed the roof trusses and the manufacturer of the trusses.[47] The president of the manufacturer of the roof trusses testified in a deposition before trial that the trusses were manufactured properly but collapsed due to faulty installation.[48] The manufacturer was dismissed from the suit after entering a settlement with the plaintiff. The plaintiff called the president of the manufacturer as a witness who testified during trial that the trusses collapsed due to improper installation.[49] The trial court overruled the construction company's objection that the manufacturer's president, who was offered as a fact witness, be prohibited from testifying as an expert witness on industry building standards and the construction company's conformity with such standards.[50] The trial court granted the construction company motion that it be allowed to impeach the manufacturer's president with evidence that the manufacturer had previously been a defendant and had subsequently settled with the plaintiff.[51]

The trial court's rationale in *Saleeby* was founded on a belief "that the evidence went to the witness's bias because [the manufacturer's president's] trial testimony was based on the opinions he formulated when [the manufacturer] was a defendant in the case."[52] The jury returned a verdict for the construction company. The injured construction worker appealed to the Fourth District Court of Appeal, arguing that ss. 768.041 and 90.408, F.S. (2006),

---

[39] *Id.*
[40] *See, e.g., Ellis v. Weisbrot*, 550 So. 2d 15 (Fla. 3d DCA 1989).
[41] Charles W. Ehrhardt, 1 Fla. Prac., Evidence s. 408.1 (2011 edition).
[42] *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078 (Fla. 2009).
[43] *Cf.* Ehrhardt, *supra* note 41.
[44] *Cf. id.*
[45] *Saleeby*, 3 So. 3d 1078.
[46] *Id.* at 1080.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 1080-81.
[51] *Id.* at 1081.
[52] *Id.*

prohibited the admission of evidence of settlement and that violation of these statutes is clear and reversible error.[53]

The Fourth District Court of Appeal affirmed the trial court reasoning in applying *Dosdourian v. Carsten*,[54] a previous Florida Supreme Court decision that held "[s.] 90.408[, F.S.,] excludes evidence of a settlement to prove liability; courts may, however, admit settlement-related evidence if offered for other purposes, such as proving witness bias or prejudice."[55] The Supreme Court rejected this reasoning in *Saleeby* because the facts did not involve Mary Carter agreements between the witness and the parties to the litigation.[56] The Supreme Court found the facts dissimilar to those in *Dosdourian*, where the Court expressly found the settlement agreement requiring the defendant to remain and participate in the litigation was a Mary Carter style agreement.[57] A Mary Carter agreement is a contract by which one or more, but not all, codefendants settle with the plaintiff and obtain a release, along with a provision granting them a portion of any recovery from the nonparticipating defendants.[58] The *Saleeby* Court interpreted "the plain language of sections 768.041(3) and 90.408[, F.S., as] expressly prohibit[ing] the admission at trial of evidence of settlement and that a defendant has been dismissed from the suit."[59] Legal scholars have criticized the decision's exclusion of evidence relating to a prior settlement when such evidence is offered for other relevant purposes other than to show liability or the invalidity or amount of the pending claim.[60]

Admission of Expert Testimony (*Daubert* or *Frye* Standard)

Expert testimony has been used to assist the trier of fact in both civil and criminal trials for a wide range of subjects, including polygraph examination, battered woman syndrome, child abuse cases, and serum blood alcohol. The Florida Rules of Civil Procedure define an "expert witness" as a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify.[61] Courts use expert witness testimony when scientific, technical, or other specialized knowledge may assist the trier of fact in understanding evidence or determining facts in issue during litigation. The Florida Evidence Code provides that 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 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.[62] The Florida Supreme Court has considered the issue of whether experts can testify on direct examination that they relied on the hearsay opinions of other experts in forming their opinions.[63] The Supreme Court has held that an expert is not permitted to testify on direct examination that the expert relied on consultations with colleagues or other experts in reaching his or her opinion because it impermissibly permits the testifying experts to bolster their opinions and creates the danger that the testifying experts will serve as conduits for the opinions of others who are not subject to cross-examination.[64] The Court emphasized that its holding did not preclude experts from relying on facts or data that are not independently admissible if the facts or data are a type reasonably relied upon by experts in the subject.[65]

---

[53] *Id.*
[54] *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993).
[55] *Saleeby v. Rocky Elson Construction, Inc.*, 965 So. 2d 211, 215-16 (Fla. 4th DCA 2007), *review granted*, 977 So. 2d 577 (Fla. 2008), *and decision quashed*, 3 So. 3d 1078 (Fla. 2009).
[56] *Saleeby*, 3 So. 3d at 1083-86.
[57] *Id.*
[58] BLACK'S LAW DICTIONARY 989 (7th ed. 1999). *See, e.g.*, *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. 2d DCA 1967).
[59] *Saleeby*, 3 So. 3d at 1086.
[60] Michael L. Seigel, Robert J. Hauser, and Allison D. Sirica, "An Unsettling Outcome: Why the Florida Supreme Court Was Wrong to Ban All Settlement Evidence in *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078 (Fla. 2009)," ExpressO, *available at* http://works.bepress.com/michael_seigel/3 (unpublished paper as of Aug. 25, 2011).
[61] Fla. R. Civ. P. 1.390(a).
[62] Section 90.704, F.S.
[63] *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006).
[64] *Id.* at 1033.
[65] *Id.*

Frye Standard

To admit scientific testimony into evidence, Florida courts currently use the standard governing the admissibility of scientific expert testimony imposed in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).[66] If the subject matter involves new or novel scientific evidence, the *Frye* standard requires the party who wants to introduce the expert opinion into evidence to show that the methodology or principle has sufficient reliability. In *Frye*, the court held that the "principle or discovery" must be sufficiently established to "have gained general acceptance in the particular field in which it belongs."[67]

The Florida Supreme Court imposes four steps in its articulation of the *Frye* test:

1. The trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue.
2. The trial judge must 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."
3. The trial judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue.
4. The judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.[68]

The Florida Supreme Court noted that, under *Frye*, the court's inquiry focuses only on the general acceptance of the scientific principles and methodologies upon which an expert relies to give his or her opinion.[69] The *Frye* test is satisfied through the court's finding of proof of general acceptance of the basis of an expert's opinion.[70] Once the basis or foundation is established for an expert's opinion, the finder of fact may then assess and weigh the opinion for its value.[71]

The *Frye* test is not applicable to all expert opinion proffered for admissibility into evidence. If the expert opinion is based solely on the expert's experience and training, and the opinion does not rely on something that constitutes new or novel scientific tests or procedures, then it may be admissible without meeting the *Frye* standard.[72] By example, Florida courts admit medical expert testimony concerning medical causation when based solely on the expert's training and experience.[73] One court in determining the admissibility of medical expert testimony noted that *Frye* was not applicable to medical testimony (pure opinion) because the expert relied on his analysis of medical records and differential diagnosis rather than a study, test, procedure, or methodology that constituted new or novel scientific evidence.[74]

Florida Rules of Evidence

The Florida Evidence Code is codified in ch. 90, F.S. Section 90.102, specifies that the chapter replaces and supersedes existing statutory or common law in conflict with its provisions. As previously noted, the Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. The Florida Evidence Code requires an expert to demonstrate knowledge, skill, experience, training, or education in the subject matter to qualify as an expert.[75] In a concurring opinion, one justice has argued that the Florida Supreme Court has "never explained how *Frye* has survived the

---

[66] *Stokes v. State*, 548 So. 2d 188 (Fla. 1989).
[67] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).
[68] *Ramirez v. State*, 651 So. 2d 1164, 1166-67 (Fla. 1995).
[69] *Marsh v. Valyou*, 977 So. 2d 543, 548-49 (Fla. 2007).
[70] *Id.*
[71] *Id*.
[72] *Id.* at 548. *See also* Charles W. Ehrhardt, *Florida Evidence*, s. 702.3 (2011 edition).
[73] *See, e.g., Cordoba v. Rodriguez*, 939 So. 2d 319, 322 (Fla. 4th DCA 2006); *Fla. Power & Light Co. v. Tursi*, 729 So. 2d 995, 996 (Fla. 4th DCA 1999).
[74] *Gelsthorpe v. Weinstein*, 897 So. 2d 504, 510-11 (Fla. 2d DCA 2005).
[75] Section 90.702, F.S.

adoption of the rules of evidence."[76] Justice Anstead also noted that the Florida Supreme Court has continued to apply *Frye* in determining the admissibility of scientific expert opinion testimony after the adoption of the Florida Rules of Evidence, but has done so without any mention that the rules do not mention *Frye* or the test set out in *Frye*.[77]

Daubert Standard

The *Frye* standard was used in federal courts until 1993 when the U.S. Supreme Court issued its opinion in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[78] The U.S. Supreme Court held that Federal Rule of Evidence 702 had superseded the *Frye* test, and it announced a new standard for determining the admissibility of novel scientific evidence.[79] Under the *Daubert* test, when there is a proffer of expert testimony, the judge as a gatekeeper must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[80] The Court announced other factors that a court may consider as part of its assessment under the *Daubert* test for the admissibility of expert scientific testimony:

- Whether the scientific methodology is susceptible to testing or has been tested;
- Whether the theory or technique has been subjected to peer review and publication;
- Whether in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error; and
- The existence and maintenance of standards controlling the technique's operation.[81]

Federal Rule of Evidence 702 was amended in 2000 to reflect *Daubert* and other decisions applying *Daubert*.[82] In *General Electric Co. v. Joiner*, the U.S. Supreme Court held that abuse of discretion is the appropriate standard of review for an appellate court to apply when reviewing a trial court's decision to admit or exclude evidence under *Daubert*.[83] In *Kumho Tire Co. v. Carmichael*, the Court held that a trial judge is not bound by the specific factors outlined in *Daubert*, but depending on the circumstances of the particular case at issue, the judge may consider other factors in his or her assessment under *Daubert*.[84] Additionally, the Court in *Kumho Tire Co.* held that the trial judge's obligation to be a gatekeeper is not limited to scientific testimony but extends to all expert testimony.[85]

The *Weisgram v. Marley Co.* case, a part of the *Daubert* progeny, was a wrongful death action against a manufacturer of heaters in which the plaintiff introduced expert testimony that the alleged heater defect caused a house fire.[86] The Court held that a federal appellate court may direct the entry of judgment as a matter of law when the court determines that evidence was erroneously admitted at trial and the remaining evidence that was properly admitted is insufficient to support the jury verdict.[87] The plaintiffs obtained a jury verdict based on the expert testimony that the heater was defective and that the heater's defect caused the fire.[88] The U.S. Supreme Court affirmed the Court of Appeals' reversal of the jury verdict, finding that the expert testimony offered by the plaintiff was speculation under Federal Rule of Evidence 702 as explicated in *Daubert* regarding the defectiveness of the heater.[89] The Court found the plaintiff's fears unconvincing that "allowing [federal] courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other

[76] Justice Anstead concurring in *Marsh*, 977 So. 2d at 551.
[77] *Id.*
[78] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
[79] *Id.*
[80] *Id.* at 592-93.
[81] *Id.* at 592-94.
[82] Fed. R. Evid. 702, Advisory Committee Notes for 2000 Amendments.
[83] *General Electric Co. v. Joiner*, 522 U.S. 136, 139 (1997).
[84] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-52 (1999).
[85] *Id.*
[86] *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).
[87] *Id.* at 445-46.
[88] *Id.*
[89] *Id.* at 445-47.

means had they known their expert testimony would be found inadmissible."[90] The Court stated that *Daubert* put parties on notice regarding the exacting standards of reliability demanded of expert testimony.[91]

Legislative Proposal

In Florida, during the 2011 Regular Session, legislation was introduced, but not adopted, to revise the standard for Florida courts to admit expert witness testimony so that it would be in conformity with Federal Rule of Evidence 702 and the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[92] The legislation provided the following additional criteria for a court to consider in determining whether an expert witness may testify in the form of an opinion or otherwise in a case:

- The testimony is based on sufficient facts or data;
- The testimony is the product of reliable principles and methods; and
- The witness has applied the principles and methods reliably to the facts of the case.

The proposed legislation required Florida courts to interpret and apply requirements for the admissibility of expert witness testimony and the determination of the basis of an expert's opinion, in accordance with *Daubert* and subsequent U.S. Supreme Court decisions applying *Daubert*.[93]

As noted, Florida courts currently employ the standard articulated in *Frye v. United States*, which requires the party who wants to introduce the expert opinion testimony into evidence to show that the methodology or principle has sufficient reliability. Under the legislation, *Frye* and subsequent Florida decisions applying or implementing *Frye* would no longer apply to a court's determination of the admissibility of expert witness testimony in the form of opinion and a court's determination of the basis of the expert's opinion.

Exclusion of Witnesses

Section 90.616, F.S., specifies requirements for the exclusion of witnesses. The section states that "[a]t the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a *proceeding* so that they cannot hear the testimony of other witnesses" (emphasis added). Section 90.616(2), F.S., specifies that the following may not be excluded as witnesses from a proceeding: a party who is a natural person; in a civil case, an officer or employee of a party that is not a natural person; a person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause; and, in a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless upon motion, the court determines such person's presence to be prejudicial.

It is unclear under current Florida decisions and s. 90.616, F.S., whether the term "proceeding" includes depositions for purposes of the requirements of the statute.[94] The Fourth District Court of Appeal in *Dardashti v. Singer* held that a trial court abused its discretion in denying the defendant's motion to compel the exclusion of the plaintiff's wife during the taking of the plaintiff's deposition.[95] However, the First District Court of Appeal in *Smith v. Southern Baptist Hospital of Florida, Inc.*, disagreed with *Dardashti* because the court found that Florida's unwritten rule of exclusion of witnesses was applicable at the "trial of cases, not depositions."[96]

In the absence of a written Florida law authorizing courts to prohibit witnesses from attending depositions, the First District Court of Appeal noted that "[t]he presence of witnesses at a deposition is controlled by Florida Rule of Civil Procedure 1.280(c), a written rule adopted by the Florida Supreme Court of Florida, which provides that upon a motion by a party and for good cause shown, the court in which an action is pending may enter a

---

[90] *Id.* at 455-56.
[91] *Id.*
[92] *See, e.g.*, SB 822 and HB 391 (2011 Reg. Session).
[93] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
[94] *See, e.g., Dardashti v. Singer*, 407 So. 2d 1098, 1099-1100 (Fla. 4th DCA 1982); *Smith v. Southern Baptist Hosp. of Florida, Inc.*, 564 So. 2d 1115, 1117 (Fla. 1st DCA 1990).
[95] *Dardashti*, 407 So. 2d at 1099-1100.
[96] *Smith*, 564 So. 2d at 1117.

protective order that discovery may be conducted with no one present except persons designated by the court."[97] The First District Court of Appeal also examined several federal decisions that have held that the applicable exclusion rule, Federal Rule of Evidence 615, applies to court proceedings and Federal Rule of Civil Procedure 26(c), which relates to a duty to disclose and discovery, applies to depositions.[98] A party may request exclusion of a witness and a court on own its motion may order that a witness be excluded from a deposition under s. 90.616, F.S. Section 90.616, F.S., had not yet been adopted as a procedural rule by the Florida Supreme Court when the *Smith* decision was rendered. In 1993, the Florida Supreme Court adopted s. 90.616, F.S., to the extent it concerns court procedure, and such amendments were effective the date the legislation became law.[99]

In the absence of express language in the exclusion law which authorizes courts to prohibit a witness from attending depositions, and in light of the conflicting district court of appeal decisions, the ambiguity as to whether a "proceeding" under s. 90.616, F.S., applies to depositions remains. A 1993 amendment to Federal Rule of Civil Procedure 30(c), which relates to depositions by oral examination, resolved ambiguities as to the applicability of the exclusion rule[100] to depositions for federal litigation.[101] Federal Rule of Civil Procedure 30(c) currently provides that Federal Rule of Evidence 615 does not apply to depositions, although exclusion can be ordered by a federal court under Federal Rule of Civil Procedure 26(c)(5), when appropriate.[102]

---

[97] *Id. See also* Humberto H. Ocariz, *Sequestration of Witnesses: Invoking the Rule and Sanctions for Violations* (2010) (on file with the Senate Committee on Judiciary).
[98] *Smith*, 564 So. 2d at 1117.
[99] See ch. 90-174, s. 2, Laws of Fla.; *In re Florida Evidence Code*, 638 So. 2d 920 (Fla. 1993).
[100] Fed. R. Evid. 615.
[101] *See, e.g.*, Ocariz, *supra* note 97.
[102] See Advisory Committee Notes on 1993 Amendments to Federal Rule of Civil Procedure 30(c), 146 F.R.D. 401, 664 (1993) ("[Federal c]ourts have disagreed, some holding that witnesses should be excluded through invocation of Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. The revision addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press."); *cf.* Ocariz, *supra* note 97.