The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Budget Committee

BILL:	SB 378
INTRODUCER:	Senator Richter
SUBJECT:	Expert Testimony
DATE:	February 24, 2012
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	**Favorable**
2.	Sneed	Rhodes	BC	**Pre-meeting**
3.				
4.				
5.				
6.				

I. Summary:

The bill conforms the standards for the admission of expert testimony in Florida courts to the Federal Rules of Evidence.

The bill amends s. 90.702, F.S., to prohibit an expert witness from testifying in the form of an opinion or otherwise unless the testimony satisfies the following additional criteria:

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

As a result of the amendments, the effect of s. 90.702, F.S., is conformed to the effect of Federal Rule of Evidence 702.

The bill amends s. 90.704, F.S., to prohibit the disclosure of inadmissible facts or data to a jury by the proponent of an expert opinion or by inference unless the court determines that their probative value in assisting the jury's evaluation of the expert's opinion is substantially outweighed by their prejudicial effect. As a result of the amendments, the effect of s. 90.704, F.S., is conformed to the effect of Federal Rule of Evidence 703.

The bill further requires courts to interpret and apply ss. 90.702 and 90.704, F.S., in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and several related federal cases.[1]

[1] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

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. Under the bill, *Frye* and subsequent Florida decisions applying or implementing *Frye* will 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.

The bill provides an effective date of July 1, 2012.

This bill amends sections 90.702 and 90.704, Florida Statutes.

II. Present Situation:

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.[2] 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.[3] 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.[4] The Court 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.[5] 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.[6]

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

[2] Fla. R. Civ. P. 1.390(a).
[3] Section 90.704, F.S.
[4] *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006).
[5] *Id.* at 1033.
[6] *Id.*

(D.C. Cir. 1923).[7] 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."[8]

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.[9]

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.[10] The *Frye* test is satisfied through the court's finding of proof of general acceptance of the basis of an expert's opinion.[11] 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.[12]

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.[13] By example, Florida courts admit medical expert testimony concerning medical causation when based solely on the expert's training and experience.[14] 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.[15]

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[7] *Stokes v. State*, 548 So. 2d 188 (Fla. 1989).
[8] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).
[9] *Ramirez v. State*, 651 So. 2d 1164, 1166-67 (Fla. 1995).
[10] *Marsh v. Valyou*, 977 So. 2d 543, 549 (Fla. 2007).
[11] *Id*.
[12] *Id*.
[13] *Id.* at 548. *See also* Charles W. Ehrhardt, *Florida Evidence*, s. 702.3 (2011 ed.).
[14] *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).
[15] *Gelsthorpe v. Weinstein*, 897 So. 2d 504, 510-11 (Fla. 2d DCA 2005); See also, *Marsh*, 977 So. 2d at 548-49.

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.[16] In a concurring opinion, one justice has argued that the Florida Supreme Court has "never explained how *Frye* has survived the adoption of the rules of evidence."[17] 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*.[18]

***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.*[19] 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.[20] 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."[21] 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.[22]

Federal Rule of Evidence 702 was amended in 2000 to reflect *Daubert* and other decisions applying *Daubert*.[23] 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*.[24] 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

[16] Section 90.702, F.S.
[17] *Marsh*, 977 So. 2d at 551 (Anstead, J., concurring).
[18] *Id.*
[19] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
[20] *Id.*
[21] *Id.* at 592-93.
[22] *Id.* at 592-94.
[23] Fed. R. Evid. 702, Advisory Committee Notes for 2000 Amendments.
[24] *General Electric Co. v. Joiner*, 522 U.S. 136, 139 (1997).

consider other factors in his or her assessment under *Daubert*.[25] 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.[26]

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.[27] 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.[28] 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.[29] 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.[30] 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 means had they known their expert testimony would be found inadmissible."[31] The Court stated that *Daubert* put parties on notice regarding the exacting standards of reliability demanded of expert testimony.[32]

III. Effect of Proposed Changes:

The bill conforms the standard for Florida courts to admit expert witness testimony to the Federal Rule of Evidence 702 and the standard articulated in *Daubert*. The requirements for a witness qualified as an expert by knowledge, skill, experience, training, or education to testify in the form of an opinion are revised to impose additional criteria for the admissibility of the testimony. Under the new criteria a court must consider whether:

- 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 bill requires 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*.[33] *Frye* and subsequent Florida decisions applying or implementing *Frye* will 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.

[25] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-52 (1999).
[26] *Id.*
[27] *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).
[28] *Id.* at 445-46.
[29] *Id.*
[30] *Id.* at 445-47.
[31] *Id.* at 455-56.
[32] *Id.*
[33] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

The bill amends s. 90.704, F.S., to specify that facts or data that are otherwise inadmissible in evidence may not be disclosed to the jury by the proponent of an opinion or by inference unless the court determines that the probative value of the facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect of the facts or data.[34] With the bill's amendment to s. 90.704, F.S., the language of the section tracks Federal Rule of Evidence 703.

Under the bill, all proposed expert testimony, including pure opinion testimony as described in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007) must comply with ss. 90.704 and 90.702, F.S., in accordance with *Daubert* and its progeny as interpreted by federal courts. Moreover, the bill provides that any facts or data that are otherwise inadmissible in evidence may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that the probative value of the facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect of the facts or data.

The bill provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues

There is a balance between enactments of the Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature has enacted and continues to revise ch. 90, F.S., and the Florida Supreme Court tends to adopt these changes as rules. 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. If the Florida Supreme Court views the changes in this bill as an infringement upon the Court's authority over practice and procedure, it may refuse to adopt the changes in the bill as a rule.[35]

[34] *Linn*, 946 So. 2d at 1036-1037 (Florida Supreme Court acknowledging that s. 90.704, F.S., is modeled after Federal Rule of Evidence 703).

[35] *See, e.g., In re Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000) (Florida Supreme Court adopting amendments to the Evidence Code to the extent procedural and rejecting a hearsay exception as a rule of court); c*ompare with In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979) (Florida Supreme Court adopting the Florida Evidence Code to the extent it is procedural); *In re Florida Evidence Code*, 376 So. 2d 1161 (Fla. 1979).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Generally, in civil litigation such as negligence actions, the plaintiff has the burden of proof on issues essential to his or her cause of action.[36] The change in the new evidentiary standard may have a fiscal impact on the outcome of lawsuits or the number of such lawsuits.

It is difficult to quantify the fiscal impact of the bill's change in evidentiary standards for the admission of expert opinions. It may or may not result in a need for additional pre-trial hearings depending on the manner in which it is actually implemented by the courts.

C. Government Sector Impact:

The change in the standard to admit expert opinions in Florida courts may have an impact on the number of pre-trial hearings needed, but it is difficult to estimate due to the unavailability of data needed to quantify any increase or decrease in judicial workload.

The Florida Prosecuting Attorneys Association estimated a recurring fiscal impact of between $1-$1.25 million due to "expert expenses and the utilization of Assistant State Attorneys' time in the more complicated cases."[37] In criminal proceedings, the state may incur additional costs in litigating the application and interpretation of the new standards supplied in this bill. There may also be some short-term costs to educate judges on the application of the *Daubert* standard.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[36] *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984). "On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff, in general, has the burden of proof."(quoting *Prosser, Law of Torts* § 41 (4th ed. 1971)). *Id.*

[37] Florida Prosecuting Attorneys Association, *Fiscal Impact of Senate Bill 378*, January 10, 2012 (on file with the Senate Budget Committee).

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.