



## Florida Supreme Court ruling raises questions about expert witness testimony standards

### **FLORIDA'S ANTIQUATED FRYE RULE ALLOWS JUNK SCIENCE INTO OUR COURTS**

Florida courts continue to accept an 85-year old “general acceptance” standard to determine if scientific expert witness testimony is admissible in court. The standard is the result of a 1923 Federal Court ruling, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) which required expert witness testimony at trials to only meet a “general acceptance” standard.

The standard applies only to an expert’s methodology, and not to his or her opinion, reasoning and conclusions. The result is the testimony of almost any so-called expert is allowed in our courts under the *Frye* general acceptance standard. Florida courts continue to use the general acceptance standard despite the U.S. Supreme Court embracing more stringent standards for expert testimony and empowering federal judges to act as “gatekeepers” to ensure admissible expert witness testimony is based on sound science.

In 1993, the U.S. Supreme Court ruled in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), that federal trial court judges are responsible for ensuring expert testimony presented in court is based on reliable methodology and is applicable to the facts at issue. Under *Daubert*, federal judges are instructed to act as “gatekeepers” to avoid the presentation of junk science during trials.

*Daubert* provides much stronger safeguards for ensuring judges and juries make decisions based on sound science. In *Daubert*, the U.S. Supreme Court set forth several general factors for judges to consider when determining whether to allow expert testimony. These factors include:

- Has the theory or technique been tested;
- Has the theory or technique been subjected to peer review;
- What is the known potential rate of error;
- Is the theory or technique generally accepted within the relevant scientific community?

While many states have adopted the *Daubert* standards, Florida courts continue to uphold *Frye*. However, a recent Florida Supreme court case highlights the growing debate over which standard Florida courts should uphold when considering expert testimony.

### **FRYE OR DAUBERT?**

In *Marsh v. Valyou* 32 Fla.L.Weekly S750 (Fla. 2007) the plaintiff, Marsh, claimed that she suffered from fibromyalgia as a result of several car accidents. Fibromyalgia is a syndrome of widespread pain, decreased pain threshold and characteristic symptoms including non-restorative sleep, fatigue, stiffness, mood swings and headaches among other symptoms. Marsh sought to present expert testimony stating that the syndrome was a result of the accidents. The defendants argued the testimony was not admissible because the premise that trauma can trigger fibromyalgia is not generally accepted by the scientific community and therefore did not meet the *Frye* “general acceptance standards.”

The Florida Supreme Court ruled that the *Frye* rule did not apply to the testimony and even if it did, the testimony satisfied the standards and therefore was admissible. The ruling resulted in several of the justices raising the issue of how Florida courts define the standards of expert testimony and whether continuing to apply the *Frye* rule in Florida is appropriate.

In a special concurrence with the majority opinion, in which Justice Pariente joined, Justice Anstead stated:

“[It is] my belief the *Frye* standard did not survive the adoption of Florida’s Evidence Code. While the Court has continued to apply *Frye* in determining the admissibility of scientific expert opinion testimony after the adoption of the Florida Rules of Evidence, it has done so without confronting the fact that those rules do *not* mention *Frye* or the test set out in *Frye*. Hence, unlike the United States Supreme Court, we have never explained how *Frye* has survived the adoption of the rules of evidence. Because, like the United States Supreme Court, I find no basis for concluding that *Frye* has survived Florida’s adoption of an evidence code similar to the federal code, I would recede from our cases continuing to apply *Frye* and hold that the rules of evidence do not include a *Frye* test for determining the admission of expert testimony....And while this Court has clung to its reliance upon *Frye*, no opinion of the Court has every confronted or explained how *Frye* is consistent with the provisions of Florida’s Evidence Code. The plain fact is, as fully and cogently explained by the United States Supreme Court in *Daubert*, *Frye* is not consistent with Florida’s code.”

Continuing to apply *Frye* leaves Florida judges largely powerless to consider the reliability of an expert’s reasoning or the connection between an expert’s conclusions and the supporting scientific principles. Expert witnesses in Florida’s courts are therefore rarely challenged or subjected to rigorous scrutiny. The result is oftentimes allowing “junk science” to influence a jury or the court’s decisions.

### **FLORIDA’S LEGISLATURE CAN ELIMINATE JUNK SCIENCE FROM OUR STATE COURTS**

Florida is among a shrinking number of states still using the 85-year old *Frye* standard. While the *Daubert* standard is applied in all federal courts nationwide and in a majority of state courts, Florida’s state trial courts lack such a strong standard for regulating expert witness testimony.

The Florida Legislature is responsible for seeing that the state’s judges properly handle expert evidence. Lawmakers can do this by enacting the American Legislative Exchange Council’s model: “Reliability in Expert Testimony Standards Act.” This act will strengthen the integrity of Florida courts by replacing *Frye*’s general acceptance standard with *Daubert*’s more stringent standard which empowers judges to serve as gatekeepers when considering proposed expert testimony.

The act would also require judges to consider whether an expert’s testimony is reliable, relevant and has been subject to peer-review. Florida lawmakers have the ability to ensure that expert testimony submitted to our state courts is reliable and not merely based on speculation and opinion but is based on sound science for the purpose of serving justice in Florida courts.