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## A Plea for Legislative Reform: The Adoption of Daubert to Ensure the Reliability of Expert Evidence in Florida Courts

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# A PLEA FOR LEGISLATIVE REFORM: THE ADOPTION OF DAUBERT TO ENSURE THE RELIABILITY OF EXPERT EVIDENCE IN FLORIDA COURTS

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## I. INTRODUCTION

Witnesses called to testify as “experts” are cloaked with prestige and authority, and are positioned to exert heavy influence on juries. This is accentuated in areas of expert testimony that are highly technical or specialized. The Supreme Court of the United States has recognized that “[e]xpert

evidence can be both powerful and quite misleading because of the difficulty in evaluating it.”<sup>1</sup> The Court has therefore given federal trial court judges the important responsibility of ensuring that expert testimony is based on reliable methodology and fits the facts of the case.<sup>2</sup> Trial judges are instructed to act as “gatekeepers” to prevent juries from being inundated with “junk science.”<sup>3</sup>

On the other hand, Florida is among a shrinking minority of states still clinging to the antiquated “*Frye* test.”<sup>4</sup> This test does not provide trial judges with the legal tools for ensuring that “expert” witnesses are qualified and that their testimony is relevant, reliable, and appropriate for a jury.<sup>5</sup> Instead, the “test” is nothing more than a determination of whether an expert’s methodology is “generally accepted.”<sup>6</sup> This nebulous standard of “general acceptance” is not an adequate check on the integrity of expert evidence. The problem is compounded by Supreme Court of Florida precedent, holding that the *Frye* test applies only to a minority of cases involving expert testimony—those involving “new science.”<sup>7</sup> If an expert’s testimony is based on science

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1. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993) (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 632 (1991)).

2. *Id.* at 589, 592.

3. *See id.* at 597.

4. *Spann v. State*, 857 So. 2d 845, 852 (Fla. 2003) (per curiam); *see Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *see also Murray v. State*, 3 So. 3d 1108, 1117 (Fla.) (per curiam), *cert. denied*, 130 S. Ct. 396 (2009); *Marsh v. Valyou*, 977 So. 2d 543, 547 (Fla. 2007) (per curiam).

5. *See Frye*, 293 F. at 1014.

6. *Id.*

7. *Murray*, 3 So. 3d at 1117 (citing *McDonald v. State*, 952 So. 2d 484, 498 (Fla. 2006) (per curiam)); *Marsh*, 977 So. 2d at 547–48 (quoting *U.S. Sugar Corp. v. Henson*, 823 So. 2d

that the court does not deem “new” or derived from a field that is not traditionally “science,” then the test is not even triggered.<sup>8</sup> So-called “pure opinion” testimony purportedly based on an expert’s overall experience is also beyond the reach of the *Frye* test.<sup>9</sup>

This shortcoming in Florida jurisprudence undermines the integrity of the court system and the quality of justice dispensed by trial courts. It also threatens to diminish the state’s many advantages in attracting business, particularly in light of the fact that most states in the Southeast have already modernized their laws governing the admissibility of expert evidence, including Georgia by legislation enacted in 2005.<sup>10</sup>

The Florida Legislature can and should solve this problem by statutorily adopting the “*Daubert* test” to place Florida on equal footing with most other jurisdictions and federal courts.

104, 109 (Fla. 2002)); *Spann*, 857 So. 2d at 852 (citing *Henson*, 823 So. 2d at 109; *Brim v. State*, 695 So. 2d 268, 271–72 (Fla. 1997)).

8. See *Murray*, 3 So. 3d at 1117 (citing *McDonald*, 952 So. 2d at 498); *Marsh*, 977 So. 2d at 547–48 (quoting *Henson*, 823 So. 2d at 109); *Spann*, 857 So. 2d at 852.

9. *Marsh*, 977 So. 2d at 548, 561 (citing *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993)); *Hadden v. State*, 690 So. 2d 573, 579–80 (Fla. 1997) (citing *Flanagan*, 625 So. 2d at 828).

10. See *infra* notes 114, 116, 117. The Georgia Legislature first adopted the *Daubert* test of admissibility in 2005. See GA. CODE ANN. § 24-9-67.1(f) (2010); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94 (1993). Subsequently, a Georgia trial court found portions of subsections (a) and (b)(1) and subsection (f) of the statute unconstitutional, and severed them from the statute as a whole. *Mason v. Home Depot U.S.A., Inc.* (*Mason I*), No. 97-A-5105-1, 2006 WL 6057895, at \*7–9 (Ga. Cobb County State Ct. Oct. 6, 2006), *vacated in part*, 658 S.E.2d 603 (Ga. 2008). On appeal, the Supreme Court of Georgia agreed with the severance of sections (a) and (b)(1), but disagreed with the trial court’s analysis and severance of section (f), *Mason v. Home Depot U.S.A., Inc.* (*Mason II*), 658 S.E.2d 603, 608–09 (Ga. 2008), which referenced *Daubert* and stated:

“It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.”

*Mason II*, 658 S.E.2d at 605–06 n.1, 608–09 (quoting GA. CODE ANN. § 24-9-67.1(f)). In its holding, the Supreme Court of Georgia concluded that “the trial court was mistaken in declaring subsection (f) unconstitutional.” *Id.* at 609. Most recently, the Georgia Legislature has proposed new legislation to take the place of section 24-9-67.1. See GA. CODE ANN. § 24-7-702 (Supp. 2011) (effective Jan. 1, 2013). Like the previous statute, the proposed legislation incorporates the same *Daubert* standard of admissibility and reaffirms Georgia’s adherence to *Daubert*. *Id.* § 24-7-702(f).

Part II of this article discusses the inherent failings of the *Frye* test as applied and interpreted by Florida courts. Part III of this article focuses on the components of the *Daubert* test and the particular need for the test in professional liability cases. Part IV of this article examines the prior legislative attempts to adopt a statutory *Daubert* standard in Florida. Finally, Part V proposes a bill for the legislature to consider in the upcoming legislative session to implement a *Daubert* standard in Florida state courts.

## II. THE PROBLEM: FLORIDA LACKS ADEQUATE MEANS FOR ENSURING EXPERT EVIDENCE IS TRUSTWORTHY

### A. Overview

The modern jury trial is likely to feature scientific or technical issues too complex for jurors to understand and decide solely on the basis of personal knowledge and experience. While juries usually function well using their collective memories and assessing credibility, the same cannot be said for understanding and deciding complex scientific or technical issues. Indeed, for this very reason parties are permitted to offer testimony from “experts” on such issues.<sup>11</sup> Jurors may place a great deal of reliance on expert witnesses, so it is imperative that an expert witness have true expertise on the issues at hand.<sup>12</sup>

Our legal system has long grappled with the challenge of expert testimony that does not meet minimum thresholds of reliability and relevance.<sup>13</sup> The federal system and many states have seen excellent progress in this area

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11. FLA. STAT. § 90.702 (2011). Section 90.702 of the *Florida Statutes* provides: 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; however, the opinion is admissible only if it can be applied to evidence at trial.

*Id.*

12. *Flanagan*, 625 So. 2d at 828. In the words of the Supreme Court of Florida, “[t]he jury will naturally assume that the scientific principles underlying the expert’s conclusions are valid.” *Id.*; see, e.g., *Marsh*, 977 So. 2d at 561 (Cantero, J., dissenting) (quoting *Flanagan*, 625 So. 2d at 828); *Ramirez v. State (Ramirez III)*, 810 So. 2d 836, 844 (Fla. 2001) (quoting *Flanagan*, 625 So. 2d at 828); *Hadden*, 690 So. 2d at 578 (quoting *Flanagan*, 625 So. 2d at 828); *Holy Cross Hosp., Inc. v. Marrone*, 816 So. 2d 1113, 1118 (Fla. 4th Dist. Ct. App. 2001) (citing *Flanagan*, 625 So. 2d at 828); *Kaelbel Wholesale, Inc. v. Soderstrom*, 785 So. 2d 539, 547 (Fla. 4th Dist. Ct. App. 2001) (quoting *Flanagan*, 625 So. 2d at 828).

13. See *Kaminski v. State*, 63 So. 2d 339, 340 (Fla. 1952) (per curiam) (applying the *Frye* standard to test the reliability of the foundation of the expert’s testimony); see also *Copolino v. State*, 223 So. 2d 68, 70–71 (Fla. 2d Dist. Ct. App. 1968) (establishing that Florida officially adopted the *Frye* standard as a way to ensure that evidence was “sufficiently reliable to justify [its] admission”).

within current generations of judges and lawyers.<sup>14</sup> A federal circuit judge surveying the situation in 1986 made the following assessment:

[E]xperts whose opinions are available to the highest bidder have no place testifying in a court of law. . . . We will turn to that task with a sharp eye, particularly in those instances . . . where . . . the decision to receive expert testimony was simply tossed off to the jury under a “let it all in” philosophy. Our message to our able trial colleagues: [I]t is time to take hold of expert testimony in federal trials.<sup>15</sup>

This call to action was followed by dramatic change at the federal level, both in awareness of the problem and the implementation of solutions.<sup>16</sup> Most states have followed suit.<sup>17</sup> Florida has not.<sup>18</sup>

Rather, Florida is increasingly isolated as a jurisdiction yoked to a “test” for expert witness testimony created in 1923.<sup>19</sup> The Supreme Court of Florida continually reaffirms the state’s adherence to the 1923 test,<sup>20</sup> and as a result the state’s trial judges are bound to “let it all in” in all but the rarest of cases.<sup>21</sup>

There are demonstrable effects of Florida’s out-dated approach to expert evidence. In 2010, Florida ranked forty-second in the overall fairness of its litigation environment, and ranked thirty-ninth in its treatment of scientific and technical evidence in a poll of state liability systems surveying nearly 1500 general counsel and senior corporate attorneys familiar with the state

14. See, e.g., *Daubert*, 509 U.S. at 589; *United States v. Williams*, 506 F.3d 151, 161 (2d Cir. 2007); *Eymard v. Pan Am. World Airways (In re Air Crash Disaster at New Orleans)*, 795 F.2d 1230, 1234 (5th Cir. 1986); *Taylor v. State*, 889 P.2d 319, 328–29 (Okla. Crim. App. 1995).

15. *In re Air Crash Disaster at New Orleans*, 795 F.2d at 1234.

16. See, e.g., *Gen. Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Daubert*, 509 U.S. at 589.

17. See *infra* pp. 21–23 and notes 113–45.

18. See, e.g., *Taylor v. State*, 62 So. 3d 1101, 1110–11 (Fla. 2011) (per curiam); *Murray v. State*, 3 So. 3d 1108, 1117 (Fla.) (per curiam), *cert. denied*, 130 S. Ct. 396 (2009) (citing *McDonald v. State*, 952 So. 2d 484, 498 (Fla. 2006) (per curiam)); *Marsh v. Valyou*, 977 So. 2d 543, 546–50 (Fla. 2007) (per curiam); *Spann v. State*, 857 So. 2d 845, 852 (Fla. 2003) (per curiam).

19. *Frye v. United States*, 293 F. 1013, 1013–14 (D.C. Cir. 1923).

20. See, e.g., *Taylor*, 62 So. 3d at 1110; *Murray*, 3 So. 3d at 1117; *Marsh*, 977 So. 2d at 546–50; *Spann*, 857 So. 2d at 852.

21. See, e.g., *Janssen Pharm. Prods., L.P. v. Hodgemire*, 49 So. 3d 767, 771–72 (Fla. 5th Dist. Ct. App. 2010) (per curiam), *review denied*, 64 So. 3d 1260 (Fla. 2011); *Gelsthorpe ex rel. Bacus v. Weinstein*, 897 So. 2d 504, 509 (Fla. 2d Dist. Ct. App. 2005); *Kaelbel Wholesale, Inc. v. Soderstrom*, 785 So. 2d 539, 546 (Fla. 4th Dist. Ct. App. 2001).

litigation environments.<sup>22</sup> Florida annually scores well overall in business climate and prospects for growth, but less well in regulatory/legal environment.<sup>23</sup> In *Forbes' 2007 Best States for Business* rankings, for example, Florida placed in the top ten overall but scored lower on regulatory environment and below average on business costs.<sup>24</sup> By contrast, Georgia, which passed expert evidence reform legislation in 2005, scored in the top five on regulatory environment.<sup>25</sup> Currently, Florida's rank has dropped all the way to number twenty-six.<sup>26</sup> Florida—South Florida in particular—routinely appears in business and legal interest rankings of the worst “judicial hellholes” in the nation.<sup>27</sup> For 2010–2011, according to the American Tort Reform Foundation, South Florida ranks as one of the top six worst judicial hellholes in the United States.<sup>28</sup>

### B. *Good Science Makes Good Law*

It should not be controversial to suggest that judges and juries will struggle to make fair and accurate decisions if invalid science or technical information distorts their understanding of the facts. On the other hand, reliable expert testimony will increase the quality of justice.<sup>29</sup> Good science makes good law. This is a point that should find broad acceptance among the stakeholders in Florida's justice system.

Whether one starts with consideration of the rationale underpinning federal decisions, led by the 1993 opinion of the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>30</sup> or the current state of Florida common law regarding expert testimony, the conclusion is the same: it is imperative that Florida's Legislature adopt progressive legis-

22. HARRIS INTERACTIVE, *2010 U.S. Chamber of Commerce State Liability Systems Ranking Study*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM 1, 7, 42 (Mar. 9, 2010), <http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/lawsuitclimate2010/2010FullHarrisSurvey.pdf>.

23. Kurt Badenhausen, *The Best States for Business and Careers*, FORBES.COM (Oct. 13, 2010, 6:30 PM), <http://www.forbes.com/2010/10/13/best-states-for-business-business-beltway-best-states-table.html>.

24. Kurt Badenhausen, *The Best States for Business*, FORBES.COM (July 11, 2007, 6:00 AM), [http://www.forbes.com/2007/07/10/washington-virginia-utah-biz-cz\\_kb\\_0711bizstates-table.html](http://www.forbes.com/2007/07/10/washington-virginia-utah-biz-cz_kb_0711bizstates-table.html).

25. *Id.*

26. Badenhausen, *supra* note 23.

27. *See, e.g., Judicial Hellholes*, AM. TORT REFORM FOUND. 1, 8–10 (2010), <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2010.pdf>.

28. *Id.* at 3.

29. *See, e.g., Taylor v. State*, 889 P.2d 319, 329 (Okla. Crim. App. 1995).

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

lation governing the disclosure, qualifications, and reliability of expert testimony in litigation. Such legislation would equip Florida trial judges with specific benchmarks for evaluating the admissibility of expert testimony. This would vastly improve the level of science and the quality of expert testimony in Florida courts. The Supreme Court of the United States was motivated by a concern for good science in *Daubert*, when it gave federal trial court judges the important responsibility of ensuring that expert testimony presented in court is based on reliable methodology and fits the facts of the case.<sup>31</sup> Federal trial judges are made “gatekeepers” of expert evidence to prevent juries from being misled by junk science.<sup>32</sup> The Supreme Court of Florida has not followed the same path, and Florida trial judges are extremely limited in their ability to keep junk science and unreliable or irrelevant expert evidence out of court.<sup>33</sup>

Good science makes good law, and Florida’s lawmakers need to enact legislation that will maximize the likelihood that only good science is factored into the case-by-case law made in Florida’s courts.

### C. Florida’s 1923 Frye “General Acceptance” Test

*Frye v. United States*<sup>34</sup> dealt with the admissibility of a blood pressure “deception test.”<sup>35</sup> In this criminal case, the defendant appealed his conviction for second degree murder based on the trial court’s exclusion of expert testimony on the result of the test on the defendant.<sup>36</sup> The defendant attempted to convince the court to allow the expert testimony based on the following:

It is asserted that blood pressure is influenced by change in the emotions of the witness, and that the systolic blood pressure rises

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31. *Id.* at 592–93.

32. *See id.* at 597.

33. *See, e.g., State v. Demeniuk*, 888 So. 2d 655, 658 (Fla. 5th Dist. Ct. App. 2004) (citing *Sybers v. State*, 841 So. 2d 532, 542 (Fla. 1st Dist. Ct. App. 2003) (“*Frye* requires that the judge perform the function of gatekeeper. In general terms, the gate of admissibility is not opened unless the proponent of new scientific evidence can demonstrate by the greater weight of the evidence that the scientific principle upon which the evidence is based, and the testing procedures used to apply the principle to the facts of the case, have gained general acceptance for reliability among impartial and disinterested experts within the particular scientific community to which the principle belongs.”)).

34. 293 F. 1013 (D.C. Cir. 1923).

35. *Id.* at 1013.

36. *Id.* at 1013–14. Ostensibly, defendant’s counsel wished to introduce the results of the test to show that the defendant was truthful on questions relating to his commission of the crime. *Id.* at 1014.



are brought about by nervous impulses sent to the sympathetic branch of the autonomic nervous system. Scientific experiments, it is claimed, have demonstrated that fear, rage, and pain always produce a rise of systolic blood pressure, and that conscious deception or falsehood, concealment of facts, or guilt of crime, accompanied by fear of detection when the person is under examination, raises the systolic blood pressure in a curve, which corresponds exactly to the struggle going on in the subject's mind, between fear and attempted control of that fear, as the examination touches the vital points in respect of which he is attempting to deceive the examiner.<sup>37</sup>

The court summarized the defendant's theory as: "[T]ruth is spontaneous, and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure."<sup>38</sup> The defendant did not appear to cite to any cases, scientific studies, or medical literature to directly support his theory.<sup>39</sup>

In ruling that the test results were not admissible, the court fashioned a requirement of "general acceptance" for "the thing from which the [expert's] deduction is made."<sup>40</sup> The *Frye* court's reasoning was contained in a single paragraph lacking citation to any legal authority:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.<sup>41</sup>

*Frye* is now almost ninety years old.<sup>42</sup> Its general acceptance test to guide courts in discerning trustworthiness in the "twilight zone" of science seems to have had an appealing simplicity in simpler times.<sup>43</sup> Florida

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37. *Id.* at 1013–14.

38. *Frye*, 293 F. at 1014.

39. *Id.* The opinion only referenced the fact that "no cases directly [o]n point have been found." *Id.*

40. *Id.*

41. *Id.*

42. *Frye*, 293 F. at 1013.

43. *See id.* at 1014; *infra* notes 44, 113–57 and accompanying text.

adopted the general acceptance test in 1952.<sup>44</sup> Most other states adhered to *Frye* for much of the twentieth century.<sup>45</sup>

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

1) [T]he 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 [trial] 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.<sup>46</sup>

In the decades since Florida adopted *Frye*, however, its courts have rigidly upheld the general acceptance test in concept, while at the same time narrowing its applicability to a small fraction of the cases involving expert testimony.<sup>47</sup> The Supreme Court of Florida's 2007 decision in *Marsh v. Valyou*<sup>48</sup> exemplifies an essentially unbroken line of cases proclaiming that Florida follows the general acceptance test but restricting the test's reach to the point of near non-usability.<sup>49</sup> The *Frye* test has been rendered an anomaly by scores of Florida decisions embracing the concepts of "pure opinion"

44. See *Kaminski v. State*, 63 So. 2d 339, 340 (Fla. 1952) (per curiam).

45. See *infra* notes 112–57 and accompanying text. For example, Alaska originally adopted the *Frye* test of admissibility in 1970 in *Pulakis v. State*, 476 P.2d 474, 478–79 (Alaska 1970), *overruled by* *State v. Coon*, 974 P.2d 386 (Alaska 1999), but later found that the *Frye* test was outdated and decided to replace it with the federal *Daubert* test in 1999. See *Coon*, 974 P.2d at 402 (adopting *Daubert*).

46. *Ramirez v. State (Ramirez II)*, 651 So. 2d 1164, 1166–67 (Fla. 1995) (citations omitted).

47. Compare *Kaminski*, 63 So. 2d at 340, with *Marsh v. Valyou*, 977 So. 2d 543, 551 (Fla. 2007) (per curiam).

48. 977 So. 2d 543 (Fla. 2007) (per curiam).

49. See *id.* at 546–51; see also *Taylor v. State*, 62 So. 3d 1101, 1110–11 (Fla. 2011) (per curiam); *Murray v. State*, 3 So. 3d 1108, 1117 (Fla.) (per curiam), *cert. denied*, 130 S. Ct. 396 (2009); *Overton v. State*, 976 So. 2d 536, 550 (Fla. 2007) (per curiam) (quoting *Ramirez II*, 651 So. 2d at 1168); *Rodgers v. State*, 948 So. 2d 655, 666 (Fla. 2006) (per curiam) (quoting *Frye*, 293 F. at 1014); *Zack v. State*, 911 So. 2d 1190, 1197–98 (Fla. 2005) (per curiam) (citing *Frye*, 293 F. at 1014; *Brim v. State*, 695 So. 2d 268, 271 (Fla. 1997)).

and “methodology vs. reasoning and conclusion” and “new or novel science” as touchstones of the applicability of the general acceptance requirement.<sup>50</sup>

### 1. Florida’s *Frye* Rule Does Not Apply to an Expert’s “Pure Opinion”

Florida courts have held that an expert can testify to his or her “pure opinion” without satisfying any general acceptance test.<sup>51</sup> This begs the question of when an opinion is “pure” as opposed to the alternative—whatever that is—and a leading case offers this explanation: “‘Pure opinion’ refers to expert opinion developed from inductive reasoning based on the experts’ own experience, observation, or research, whereas the *Frye* test applies when an expert witness reaches a conclusion by deduction, from applying new and novel scientific principle, formula, or procedure developed by others.”<sup>52</sup> As one commentator noted, this “pure opinion” doctrine incentivizes reliance on one’s own “experience” and “personal observation” to the detriment of research of actual scientific endeavor reflected in the published

50. See, e.g., *Murray*, 3 So. 3d at 1117; *Marsh*, 977 So. 2d at 548; *Castillo v. E.I. du Pont de Nemours & Co.*, 854 So. 2d 1264, 1276 (Fla. 2003).

51. See, e.g., *Marsh*, 977 So. 2d at 548 (“It is well-established that *Frye* is inapplicable to ‘pure opinion’ testimony . . . .”); *Hadden v. State*, 690 So. 2d 573, 579 (Fla. 1997) (“[T]he *Frye* standard for admissibility of scientific evidence is not applicable to an expert’s pure opinion testimony . . . .” (citing *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993)); *Flanagan*, 625 So. 2d at 828 (“[P]ure opinion testimony . . . does not have to meet *Frye* . . . .”); see also *Kaminski*, 63 So. 2d at 340; *Torres v. State*, 999 So. 2d 1077, 1079 (Fla. 4th Dist. Ct. App. 2009) (finding “the expert’s testimony to be pure opinion, not subject to *Frye*”); *Burton v. State (In re Commitment of Burton)*, 884 So. 2d 1112, 1113 (Fla. 2d Dist. Ct. App. 2004); *Jones v. Goodyear Tire & Rubber Co.*, 871 So. 2d 899, 903 (Fla. 3d Dist. Ct. App. 2003) (citing *Rickgauer v. Sarkar*, 804 So. 2d 502, 504 (Fla. 5th Dist. Ct. App. 2001)); *Fla. Power & Light Co. v. Tursi*, 729 So. 2d 995, 997 (Fla. 4th Dist. Ct. App. 1999) (quoting *Flanagan*, 625 So. 2d at 828).

52. *Holy Cross Hosp., Inc. v. Marrone*, 816 So. 2d 1113, 1117 (Fla. 4th Dist. Ct. App. 2001) (citing *Kuhn ex rel. Estate of Bishop v. Sandoz Pharm. Corp.*, 14 P.3d 1170, 1179 (Kan. 2000)); *Hadden*, 690 So. 2d at 579–80 (stating that an expert’s testimony is pure opinion when it “is based solely on the expert’s training and experience”); *Flanagan*, 625 So. 2d at 828 (“[P]ure opinion testimony . . . is based on the expert’s personal experience and training.”); *Torres*, 999 So. 2d at 1078–79 (“[T]estimony based entirely on the expert’s professional experience constituted ‘pure opinion’ . . . [because it] did not rely on scientific studies, syndrome evidence, diagnostic criteria, or any other classic scientific test.” The expert “limited the basis for his testimony to his own professional experience.”); *Johnson v. State*, 933 So. 2d 568, 570 (Fla. 1st Dist. Ct. App. 2006) (“An expert opinion based on personal training and experience is not subject to a *Frye* analysis.” (citing *Herlihy v. State*, 927 So. 2d 146, 147 (Fla. 1st Dist. Ct. App. 2006) (per curiam))); *Davis v. Caterpillar, Inc.*, 787 So. 2d 894, 898 (Fla. 3d Dist. Ct. App. 2001) (admitting expert opinion where the expert testified how to make a dangerous condition safer based solely on his experience).

or reported work of others.<sup>53</sup> For example, if an expert uses “scientific literature as a tool in helping form an opinion, then the court can and will scrutinize that opinion under *Frye*,” but if the expert chooses to give an expert opinion without any basis in scientific literature at all, then his opinion is not subjected to the *Frye* test and is likely admissible.<sup>54</sup> It seems entirely “counterintuitive to permit an expert to ignore scientific literature accepted by the general scientific community in favor of the expert’s personal experience to reach a conclusion not generally recognized in the scientific community and then allow testimony about that conclusion on the basis that it is pure opinion.”<sup>55</sup> Yet, despite the obvious deficiencies in the *Frye* exception for “pure opinion” testimony, the Supreme Court of Florida continues to affirm allegiance to it.<sup>56</sup>

## 2. Florida’s *Frye* Rule Does Not Apply to an Expert’s Reasoning or Conclusion

*Frye*’s application is limited to an expert’s methodology and scientific principles, and a judge is forbidden to apply the general acceptance test to an expert’s reasoning or conclusions.<sup>57</sup> The Supreme Court of Florida has in fact, more or less, prohibited judges confronted with a challenge to expert testimony from considering the reliability of an expert’s reasoning or the connection between an expert’s conclusions and the underlying principles.<sup>58</sup>

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53. See Neil D. Kodsi, *Confronting Experts Whose Opinions Are Neither Supported nor Directly Contradicted by Scientific Literature*, FLA. B.J., June 2006, at 80; see also *Tursi*, 729 So. 2d at 996–97 (allowing a doctor to testify that exposure to a chemical caused a patient’s cataracts despite the fact that the expert used absolutely no scientific data to support the theory).

54. Kodsi, *supra* note 53.

55. *Id.*

56. See, e.g., *Marsh*, 977 So. 2d at 561 (Cantero, J., dissenting); *Hadden*, 690 So. 2d at 580–81; *Flanagan*, 625 So. 2d at 828.

57. See, e.g., *Castillo v. E.I. du Pont de Nemours & Co.*, 854 So. 2d 1264, 1276 (Fla. 2003) (stating that “*Frye* does not require the court to assess the application of the expert’s raw data in reaching his or her conclusion,” but only requires that the underlying science is generally accepted); *Janssen Pharm. Prods., L.P. v. Hodgemire*, 49 So. 3d 767, 771 (Fla. 5th Dist. Ct. App. 2010) (per curiam), *review denied*, 64 So. 3d 1260 (Fla. 2011); *Gelsthorpe ex rel. Bacus v. Weinstein*, 897 So. 2d 504, 509 (Fla. 2d Dist. Ct. App. 2005); *Kaelbel Wholesale, Inc. v. Soderstrom*, 785 So. 2d 539, 547 (Fla. 4th Dist. Ct. App. 2001).

58. See *Castillo*, 854 So. 2d at 1276 (stating that *Frye* looks only at the validity of the underlying science, and derogating the court below for engaging in essentially a federal analysis that questioned the expert’s methodology and reasoning); see also *Rodgers v. State*, 948 So. 2d 655, 666 (Fla. 2006) (per curiam) (reaffirming the *Castillo* opinion and stating that the *Frye* test only should be applied to the underlying principles or methodology and not to the

### 3. Florida's *Frye* Rule Does Not Apply Unless the Expert's Testimony Involves "New or Novel Science"

Finally, as applied in Florida, the *Frye* test is only invoked in cases involving "new or novel scientific evidence."<sup>59</sup> No Florida court has or can reasonably define "new or novel" in the context of science, but courts have found that enhancement of operator visibility on sophisticated construction equipment,<sup>60</sup> handwriting analysis,<sup>61</sup> footprint analysis,<sup>62</sup> tire thickness,<sup>63</sup> global positioning satellite technology,<sup>64</sup> and even basic DNA analysis<sup>65</sup> are not new or novel and are therefore immune from scrutiny under *Frye*.<sup>66</sup> Indeed, a recent decision of the Supreme Court of Florida declared that "*in the vast majority of cases, no Frye inquiry will be required.*"<sup>67</sup>

#### D. *Life Under Frye—Expert Evidence Seldom Challenged, Rarely Scrutinized*

A historian might say that the *Frye* general acceptance test was typical Roaring-Twenties hubris. Much closer in vintage to the flight of the Wright brothers than to the Apollo landing, the *Frye* test is a Prohibition-era relic that continues to short-change most of the stakeholders in Florida's judicial system.<sup>68</sup> In Florida, there is virtually no stopping a lawyer who seeks to

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opinion itself because the credibility of the expert opinion does not implicate the *Frye* test, but instead goes to the weight of the evidence).

59. See, e.g., *Murray v. State*, 3 So. 3d 1108, 1117 (Fla.) (per curiam) (quoting *McDonald v. State*, 952 So. 2d 484, 498 (Fla. 2006) (per curiam)), cert. denied, 130 S. Ct. 396 (2009); *Overton v. State*, 976 So. 2d 536, 550 (Fla. 2007) (per curiam); *Rodgers*, 948 So. 2d at 666; *Branch v. State*, 952 So. 2d 470, 483 (Fla. 2006) (per curiam) (citing *Brim v. State*, 695 So. 2d 268, 271–72 (Fla. 1997)); *Ibar v. State*, 938 So. 2d 451, 467 (Fla. 2006) (per curiam); *Zack v. State*, 911 So. 2d 1190, 1198 (Fla. 2005) (per curiam) (citing *Brim*, 695 So. 2d at 271–72); *Still v. State*, 917 So. 2d 250, 251 (Fla. 3d Dist. Ct. App. 2005) (citing *Brim*, 695 So. 2d at 271–72); *Jones v. Goodyear Tire & Rubber Co.*, 871 So. 2d 899, 902 (Fla. 3d Dist. Ct. App. 2003) (citing *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109 (Fla. 2002)).

60. *Davis v. Caterpillar, Inc.*, 787 So. 2d 894, 898–99 (Fla. 3d Dist. Ct. App. 2001).

61. *Spann v. State*, 857 So. 2d 845, 851–52 (Fla. 2003) (per curiam).

62. *Ibar*, 938 So. 2d at 468.

63. *Jones*, 871 So. 2d at 903.

64. *Still*, 917 So. 2d at 251.

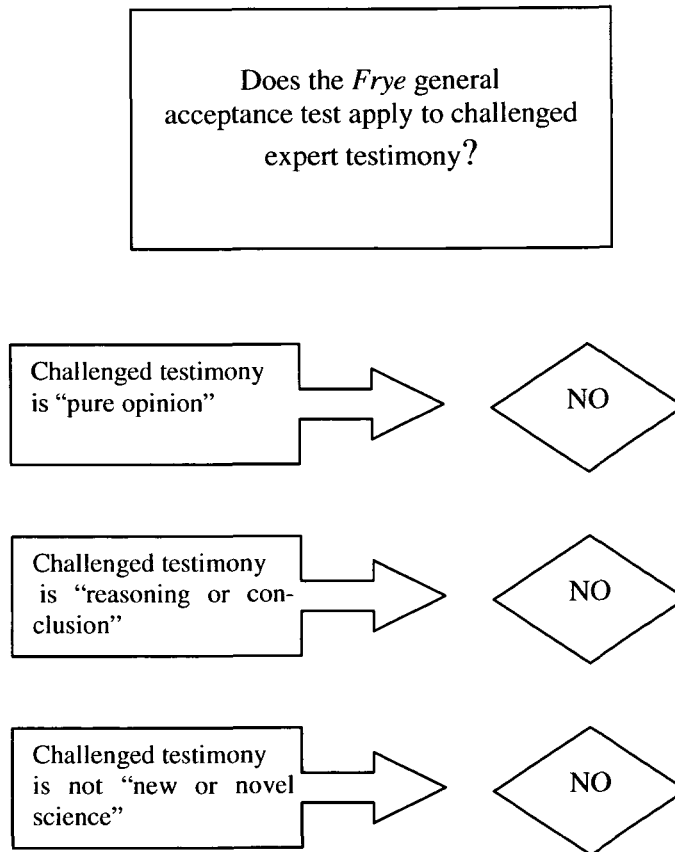
65. *Hayes v. State*, 660 So. 2d 257, 264–65 (Fla. 1995).

66. *Ibar*, 938 So. 2d at 468; *Spann*, 857 So. 2d at 852; *Hayes*, 660 So. 2d at 264–65; *Still*, 917 So. 2d at 251; *Jones*, 871 So. 2d at 903; *Davis v. Caterpillar, Inc.*, 787 So. 2d 894, 898–99 (Fla. 3d Dist. Ct. App. 2001).

67. *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109 (Fla. 2002) (emphasis added).

68. See *Marsh v. Valyou*, 977 So. 2d 543, 548 (Fla. 2007) (per curiam). The exception might be criminal defendants, for whom *Frye* seems to have provided a fertile appellate field;

influence the jury with a “hired gun” expert espousing junk science—the lawyer merely needs to aim for one of the gaping holes in *Frye*’s applicability.<sup>69</sup>



Even the expert who fails to avoid the application of *Frye* can still satisfy the general acceptance test by purporting to base his or her testimony on the principles of some recognized field.<sup>70</sup> Such a standard, with so many

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some examples in this regard include the Supreme Court of Florida’s rejection under *Frye* of a psychologist’s “sex offender profile,” *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993); a psychologist’s testimony on “child sexual abuse accommodation syndrome,” *Hadden v. State*, 690 So. 2d 573, 575 (Fla. 1997); “hypnotically refreshed testimony,” *Stokes v. State*, 548 So. 2d 188, 195–96 (Fla. 1989); and an expert on the marks made by the blade of a knife, *Ramirez v. State* (*Ramirez I*), 542 So. 2d 352, 355 (Fla. 1989) (*per curiam*).

69. See, e.g., *Marsh*, 977 So. 2d at 560–61 (Cantero, J., dissenting).

70. See *id.* at 546–47 (majority opinion).

exceptions, is really no standard at all and offers trial courts no consistent, objective measure for admitting expert testimony. While the *Frye* test as originally stated was simple, the case law eroding its application in a host of contexts has made it very difficult to apply.<sup>71</sup>

The unsurprising result of Florida being a *Frye* jurisdiction is that it is all too rare for expert evidence to be subjected to rigorous scrutiny in Florida courts.<sup>72</sup> A party has little incentive to challenge an opponent's expert regardless of how questionable the expert's opinions might be.<sup>73</sup> Unfortunately, making a *Frye* challenge in Florida is usually roughly equivalent to coaching the challenged expert—and retaining counsel—on his or her vulnerabilities and telegraphing the likely thrust of cross-examination at trial. Most Florida attorneys, therefore, tend to make the pragmatic, but unsatisfying choice of forgoing *Frye* challenges, even when facing an expert who should be challenged and who would be challenged under a better system.<sup>74</sup>

#### E. *The Entrenchment of Frye in the Supreme Court of Florida*

Florida's appellate courts have had several opportunities to modernize and improve the way expert evidence is dealt with at trial, but their adherence to *Frye* has never wavered.<sup>75</sup> Instead, as noted above, the test has been consistently honored in name, but construed in a manner that renders it toothless.<sup>76</sup> Consequently, the harm is compounded—an evidentiary safeguard that is woefully inadequate to begin with, becomes an open floodgate in application.

Supreme Court of Florida decisions reflect that *Frye* is now so entrenched in Florida precedent that it is unrealistic to believe that the judicial system will solve Florida's expert evidence problem from within.<sup>77</sup> In 2007, the Court decided *Marsh* with five of seven justices reaffirming *Frye* as the law of Florida.<sup>78</sup> A majority of four ruled that *Frye* does not even apply to expert testimony causally linking trauma to fibromyalgia.<sup>79</sup> More signifi-

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71. See *id.* at 547. “The *Frye* test is simple to state, if not always easy to apply.” *Id.* at 560 (Cantero, J., dissenting).

72. See *id.* at 547, 550 (majority opinion).

73. See *Marsh*, 977 So. 2d at 547–48, 550.

74. See *id.* at 546–47, 549.

75. *Id.* at 547. The Supreme Court of Florida appears to have first adopted *Frye* almost sixty years ago in 1952. See *Kaminski v. State*, 63 So. 2d 339, 340 (Fla. 1952) (per curiam) (applying the *Frye* standard to test the reliability of the foundation of the expert's testimony).

76. See *Marsh*, 977 So. 2d at 547.

77. See *id.*

78. See *id.* at 547, 551.

79. *Id.* at 549–50.

cantly, the majority recognized that the *Frye* test “is inapplicable in the vast majority of cases” because it applies only to “new or novel” science.<sup>80</sup> The majority also stated that the test is likewise “inapplicable to ‘pure opinion’ testimony,” and in a medical context, for example, this exempts from the test a causation opinion based solely on a purported expert’s “experience and training.”<sup>81</sup>

As the dissent recognized, these gaping holes in the *Frye* test’s applicability threaten to swallow the test itself, and in effect, render expert testimony “*always admissible as . . . ‘pure opinion.’*”<sup>82</sup> But, it was not just the dissent that recognized the flaws in the *Frye* test; the concurring opinion authored by Justice Anstead—and joined by Justice Pariente—expressed the view that *Frye* was superseded by the Federal Rules of Evidence and that the Florida Supreme Court should adopt *Daubert* as consistent with Florida’s Rules of Evidence.<sup>83</sup> Justice Anstead also pointed out that the Supreme Court of Florida has “never explained how *Frye* has survived the adoption of the rules of evidence.”<sup>84</sup>

The *Marsh* decision came at a point in time when pro-business interests probably saw the zenith of a favorable composition of the Supreme Court of Florida.<sup>85</sup> Given this fact and the bulwark of unbroken adherence to *Frye* emanating from the Florida Supreme Court for decades, *Marsh* is likely to be the high-water mark—as close as the court is likely to come to changing this aspect of Florida law.

### III. SOLUTION: BRING *DAUBERT* TO FLORIDA THROUGH LEGISLATIVE CHANGE

#### A. *The Daubert Approach*

In its 1993 *Daubert* decision, the Supreme Court of the United States created a seismic shift in the test for the admissibility of expert testimony.<sup>86</sup> *Daubert* held that Congress’ adoption of the Federal Rules of Evidence displaces the general acceptance test and requires the federal trial judge to en-

80. *Id.* at 547 (internal quotation marks omitted).

81. *Marsh*, 977 So. 2d at 548 (quoting *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993)).

82. *Id.* at 562 (Cantero, J., dissenting) (emphasis added).

83. *Id.* at 551, 554 (Anstead, J., concurring).

84. *Id.* at 551.

85. The three dissenting justices in *Marsh*—Cantero, Wells, and Bell—are no longer on the Supreme Court of Florida.

86. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).



sure that any expert testimony admitted is both reliable *and* relevant.<sup>87</sup> The Court has also clarified that an expert's conclusions are not beyond the reach of the relevance/reliability test,<sup>88</sup> and that the relevance/reliability test is not limited to the "scientific" and applies to all expert testimony.<sup>89</sup>

The discussion below focuses on the reliability and relevance prongs of the *Daubert* test, the trial judge's continuing role as "gatekeeper" under this test, and the number of states that have embraced the *Daubert* test.

### 1. Reliability

Reliability is determined on the basis of flexible factors, which typically include, at a minimum: 1) whether the conclusion or methodology being espoused is subject to being tested; 2) whether the conclusion or methodology has been subjected to peer review and publication, such that substantive flaws will likely have been flushed out; 3) whether there exists standards controlling the methodology's operation, and, if so, the known or potential rate of error; and 4) whether the conclusion or methodology is generally accepted.<sup>90</sup>

Additionally, the *Daubert* approach encourages a trial judge to consider whether an expert is offering opinions that are consistent with the expert's work outside the courtroom.<sup>91</sup> Consistency between what an expert has said on a subject in litigation and non-litigation contexts is an indicator of reliability; in contrast, courts are rightfully suspicious of the expert who opines on a subject only when hired to do so in lawsuits.<sup>92</sup>

The *Daubert* approach also embraces the notion that given the fluidity and complexity of science and other disciplines giving rise to expertise,

87. *Id.*

88. Although *Daubert* spoke of "theory or technique" as opposed to "conclusion," the Court's holding in *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), recognized that conclusions are properly scrutinized, and that courts should not permit conclusions tied to data only by the expert's *ipse dixit* (i.e., "because I said it").

89. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

90. *Daubert*, 509 U.S. at 593-94.

91. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

92. *See id.* ("[E]xperts whose findings flow from existing research are less likely to have been biased toward a particular conclusion by the promise of remuneration; when an expert prepares reports and findings before being hired as a witness, that record will limit the degree to which he can tailor his testimony to serve a party's interests."); *see also* *McCorvey v. Baxter Healthcare Corp.*, No. 99-1250-CIV, 2008 WL 8095712, at \*3 (S.D. Fla. Feb. 28, 2008); *Haggerty v. UpJohn Co.*, 950 F. Supp. 1160, 1162 (S.D. Fla. 1996); *Reynard ex rel. Estate of Reynard v. NEC Corp.*, 887 F. Supp. 1500, 1507 (M.D. Fla. 1995).

courts should be able to consider a variety of factors in any given case.<sup>93</sup> Some of the additional factors expressly recognized include: 1) “[w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;”<sup>94</sup> 2) “[w]hether the expert has adequately accounted for obvious alternative explanations;”<sup>95</sup> 3) whether the expert is being as careful

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93. See FED. R. EVID. 702 advisory committee’s note (stating that the “standards set forth in the amendment [to Rule 702] are broad enough to require consideration of *any* or *all* of the specific *Daubert* factors where appropriate” and that other factors can and should be applied where necessary (emphasis added)).

94. *Id.*; see, e.g., *Kumho Tire Co.*, 526 U.S. at 157 (quoting *Gen. Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)) (following *Daubert* and stating that a trial court is not required to admit “evidence that is connected to [the] data only by the *ipse dixit* of the expert.”); *Joiner*, 522 U.S. at 146 (stating that a trial court may exclude evidence where it finds that “there is simply too great an analytical gap between the data and the opinion proffered” for the evidence to be admissible); *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1194 (11th Cir. 2010) (quoting *Joiner*, 522 U.S. at 146) (finding that there is nothing in either *Daubert* or the Federal Rules of Evidence that requires the trial court to admit an expert’s opinion “that is connected to existing data only by the *ipse dixit* of the expert.”); *Guinn v. AstraZeneca Pharm. L.P.*, 602 F.3d 1245, 1255 (11th Cir. 2010) (per curiam) (upholding the district court’s exclusion of an expert’s testimony because the expert failed to show how her opinions were logically derived from the facts of the case); *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1112 (11th Cir. 2005) (affirming the trial court’s exclusion of an expert’s opinion because the opinion was “unsubstantiated by any proffered facts, explanation, or analysis.”); *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1255 (11th Cir. 2005) (“Plaintiffs’ experts took leaps of faith and substituted their own *ipse dixit* for scientific proof on essential points.”); *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 (11th Cir. 2005) (explaining that the expert’s opinion “required the kind of scientifically unsupported ‘leap of faith’ which is condemned by *Daubert*.” (citation omitted)); *Fuesting v. Zimmer, Inc.*, 362 F. App’x 560, 562–63 (7th Cir. 2010); *Bland v. Verizon Wireless, (VAW) L.L.C.*, 538 F.3d 893, 898 (8th Cir. 2008); *Smith v. Sears Roebuck & Co.*, 232 F. App’x 780, 782 (10th Cir. 2007); *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 263 (4th Cir. 2005); *Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 815 (7th Cir. 2004); *Montgomery Cnty. v. Microvote Corp.*, 320 F.3d 440, 448 (3d Cir. 2003) (citing *Joiner*, 522 U.S. at 146); *Phelan v. Synthes (U.S.A.)*, 35 F. App’x 102, 106–07 (4th Cir. 2002) (per curiam); *J.B. Hunt Transp., Inc. v. Gen. Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001); *Holesapple v. Barrett*, 5 F. App’x 177, 179–80 (4th Cir. 2001) (per curiam); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 158 (3d Cir. 2000) *overruled on other grounds* *Soufflas v. Zimmer, Inc.*, 474 F. Supp. 2d 737 (E.D. Pa. 2007); *Cooper ex rel. Estate of Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1021 (7th Cir. 2000); *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1084 (8th Cir. 1999); *Heller v. Shaw Indus.*, 167 F.3d 146, 153–59 (3d Cir. 1999); *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 81–82 (1st Cir. 1998); *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 279 (5th Cir. 1998); *Schudel v. Gen. Electric Co.*, 120 F.3d 991, 997 (9th Cir. 1997); *Turpin v. Merrell Dow Pharm., Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992); *Washburn v. Merck & Co.*, No. 99-9121, 2000 WL 528649, at \*627 (S.D.N.Y. May 1, 2000) (unpublished table decision).

95. FED. R. EVID. 702 advisory committee’s note; see also *Davis v. City of Loganville*, No. 3:04-CV-068 (CAR), 2006 WL 826713, at \*11 (M.D. Ga. Mar. 28, 2006) (11th Circuit case); *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 694 (8th Cir. 2001) (discussing that an expert must “explain why other conceivable causes are excludable”); *Turner v. Iowa Fire*

in paid litigation consulting as the expert is in work outside of litigation;<sup>96</sup> and 4) “[w]hether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion” being offered.<sup>97</sup>

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Equip. Co., 229 F.3d 1202, 1208 (8th Cir. 2000); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999) (“A differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation.”); *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997); *Brown v. Se. Pa. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.)*, 35 F.3d 717, 760 (3d Cir. 1994), *rev’d in part sub nom. In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449 (3d Cir. 2000); *Claar v. Burlington N. R.R.*, 29 F.3d 499, 502–03 (9th Cir. 1994) (rejecting expert testimony where the experts failed “to rule out other possible causes for the injuries plaintiffs complain[ed] of, even though they admitted that this step would be standard procedure before arriving at a diagnosis” (footnote omitted)); *Paul M. da Costa & Melinda Harris, Has Expert Adequately Accounted for Obvious Alternative Explanations?*, in *THE DAUBERT COMPENDIUM* 301, 303–16 (D.R.I. 2011). *But see Heller v. Shaw Indus.*, 167 F.3d 146, 156 (3d Cir. 1999) (finding that an expert’s testimony “should not be excluded because he or she has failed to rule out every possible alternative cause of a plaintiff’s illness,” but should only be ruled out if he or she fails to rule out obvious alternative explanations (emphasis added)).

96. FED. R. EVID. 702 advisory committee’s note; *see Kumho Tire Co.*, 526 U.S. at 152 (finding that the purpose of *Daubert* is to ensure that only reliable and relevant evidence is admissible and that one way of ensuring this is to make sure that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”); *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010) (adopting the exact phraseology of *Kumho Tire Co.*); *Wells v. Smithkline Beecham Corp.*, 601 F.3d 375, 378 (5th Cir. 2010) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Boyd v. City & Cnty. of S.F.*, 576 F.3d 938, 946 (9th Cir. 2009) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Best v. Lowe’s Home Ctrs., Inc.*, 563 F.3d 171, 181 (6th Cir. 2009) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Jenkins ex rel. Estate of Jenkins v. Bartlett*, 487 F.3d 482, 489 (7th Cir. 2007) (citing *Kumho Tire Co.*, 526 U.S. at 152); *Mariposa Farms, L.L.C. v. Westfalia-Surge, Inc.*, 211 F. App’x 760, 762 (10th Cir. 2007) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Nimely v. City of New York*, 414 F.3d 381, 396 (2d Cir. 2005) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Burleson v. Tex. Dep’t of Criminal Justice*, 393 F.3d 577, 584 (5th Cir. 2004) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Zaremba v. Gen. Motors Corp.*, 360 F.3d 355, 358 (2d Cir. 2004) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Goebel v. Denver & Rio Grande W. R.R.*, 346 F.3d 987, 992 (10th Cir. 2003) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Grp. Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753, 760 (8th Cir. 2003) (quoting *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996)); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025 (10th Cir. 2002); *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 265–66 (2d Cir. 2002) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063 (9th Cir. 2002) (quoting *Kumho Tire Co.*, 526 U.S. at 152), *amended by* 319 F.3d 1073 (9th Cir. 2003); *Chapman ex rel. Estate of Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002) (citing *Cummins v. Lyle Indus.*, 93 F.3d 362, 369 (7th Cir. 1996)); *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1205–06 (10th Cir. 2002) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 203 (4th Cir. 2001) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Jahn v. Equine Servs., P.S.C.*, 233 F.3d 382, 388 (6th Cir. 2000) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Elcock v. Kmart Corp.*, 233 F.3d 734, 746 (3d Cir. 2000) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 25 (1st Cir. 1999) (quoting

## 2. Relevance

*Daubert* relevance, in turn, refers to the requisite “fit” between the expert opinions being offered and the issues in the case.<sup>98</sup> The focus is not the general reasonableness of a particular methodology, but the reasonableness of using that methodology to draw a conclusion regarding the particular subject matter of the case.<sup>99</sup> Though it has received far less judicial and scholarly attention than the twin requirement of reliability, the requirement of relevance must be satisfied or expert testimony is subject to exclusion on this basis alone.<sup>100</sup> In fact, the Supreme Court of the United States re-emphasized

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*Kumho Tire Co.*, 526 U.S. at 152); *Black v. Food Lion, Inc.*, 171 F.3d 308, 311 (5th Cir. 1999) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) (stating that whether an “expert is being as careful as he would be in his regular professional work outside his paid litigation consulting” may be an important factor (citations omitted)).

97. FED. R. EVID. 702 advisory committee’s note; *see also Kumho Tire Co.*, 526 U.S. at 151 (“*Daubert*’s general acceptance factor [does not] help show that an expert’s testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.”); *Hendrix ex rel. G.P.*, 609 F.3d at 1195 (“[T]he district court must ensure that . . . the expert’s opinion on general causation is ‘derived from scientifically valid methodology.’” (citations omitted)); *McClain*, 401 F.3d at 1240 (finding that the expert’s testimony was inadmissible because it was based on “questionable principles of pharmacology”); *McEwen v. Balt. Wash. Med. Ctr. Inc.*, 404 F. App’x 789, 791 (4th Cir. 2010) (per curiam); *Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 825–26 (7th Cir. 2010); *Best*, 563 F.3d at 178 (citing *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001)); *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir.), *cert. denied*, 130 S. Ct. 54 (2009); *Polski v. Quigley Corp.*, 538 F.3d 836, 840 (8th Cir. 2008) (quoting *Polski v. Quigley Corp.*, No. 04-CV-4199 (PJS/JJG), 2007 WL 2580550, \*5 (D. Minn. Sept. 5, 2007); *United States v. Day*, 524 F.3d 1361, 1368 (D.C. Cir. 2008); *Pineda v. Ford Motor Co.*, 520 F.3d 237, 247 (3d Cir. 2008) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 742); *United States v. Williams*, 506 F.3d 151, 161 (2d Cir. 2007); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006); *United States v. Mahone*, 453 F.3d 68, 71–72 (1st Cir. 2006); *United States v. Fullwood*, 342 F.3d 409, 412 (5th Cir. 2003); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 263 (4th Cir. 1999); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1208 (6th Cir. 1988) (excluding expert testimony based on “clinical ecolog[y]” because the field consists of “an unproven methodology lacking any scientific basis in either fact or theory”).

98. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993); *see Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999) (citing *Daubert*, 509 U.S. at 591).

99. *Kumho Tire Co.*, 526 U.S. at 154.

100. *See Allison*, 184 F.3d at 1312; *United States v. Batiste*, No. 06-20373-CR, 2007 WL 5303052, at \*2 (S.D. Fla. Oct. 26, 2007) (citing *Allison*, 184 F.3d at 1312) (explaining that there must be a connection between the evidence and the expert’s testimony for the testimony to be relevant under the second prong of the *Daubert* test); *Covas v. Coleman Co.*, No. 00-8541-CIV, 2005 WL 6166740, at \*1–2 (S.D. Fla. June 27, 2005) (citing *Allison*, 184 F.3d at 1312) (explaining that there must be a connection between the evidence and the expert’s testimony for the testimony to be relevant under the second prong of the *Daubert* test); *see also*

the importance of relevance in its post-*Daubert* opinion in *Kumho Tire Co. v. Carmichael*.<sup>101</sup> In *Kumho Tire Co.*, the Court reiterated that the Federal Rules of Evidence impose a special obligation on judges to perform the “gatekeeping” function of excluding irrelevant scientific evidence.<sup>102</sup>

Just months after *Kumho Tire Co.*, the Eleventh Circuit followed and reinforced this principle in *Allison v. McGhan Medical Corp.*<sup>103</sup> There, the court explained that the *Daubert* four-factor test “does not operate in a vacuum,” and that a court’s determination of whether scientific evidence is admissible must be considered against the backdrop of whether the evidence was also relevant under the Federal Rules of Evidence.<sup>104</sup> The court emphasized that the relevance requirement was especially important in the *Daubert* context to ensure that “a barrage of questionable scientific evidence [was not dumped] on a jury.”<sup>105</sup> The court supported its concern by noting that a jury would be ill-equipped, or at least “less equipped than the judge to make [the necessary] . . . relevance determinations.”<sup>106</sup> Thus, it is particularly crucial that the judge keep irrelevant scientific evidence out of the jury’s purview “because of its inability to assist in factual determinations, its potential to create confusion, and its lack of probative value.”<sup>107</sup>

### 3. Judge as Gatekeeper

The *Daubert* reforms would mean little without a mechanism of enforcement, and here both the Supreme Court of the United States and Congress—by virtue of adoption of the Federal Rules of Evidence—have commissioned trial judges to serve as “gatekeepers” who must exclude expert testimony that is not sufficiently reliable or relevant.<sup>108</sup> A trial judge is em-

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*Williams v. Michelin N. Am., Inc.*, 381 F. Supp. 2d 1351, 1360 (M.D. Fla. 2005) (stating that expert testimony “must have a valid scientific connection to the disputed facts in the case” and that a judge has the discretion to exclude evidence that has “too great an analytical gap between the data and the opinion proffered” (citations omitted)).

101. 526 U.S. 137, 141 (1999).

102. *Id.* at 147.

103. 184 F.3d 1300, 1311–12 (11th Cir. 1999).

104. *Id.* at 1309.

105. *Id.* at 1310.

106. *Id.*

107. *Id.* at 1311–12.

108. *See, e.g.*, FED. R. EVID. 702 advisory committee’s note (“In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony . . . .”); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 295 (6th Cir. 2007) (“*Daubert* and its progeny have placed

powered with broad discretion in addressing the reliability and relevance of expert testimony, and will be upheld on appeal in the absence of an abuse of that broad discretion.<sup>109</sup> In fact, in *Allison*, the Eleventh Circuit made it a point to specifically state just how deferential the standard of review for *Daubert* rulings is: “After careful but *deferential* review, we AFFIRM the district court’s *Daubert* rulings excluding Allison’s causation experts, finding that Allison has failed to show that the decision [was] *manifestly erroneous*.”<sup>110</sup> *Allison* is just one example of how appellate courts generally apply a very deferential standard of review to *Daubert* rulings, even if the exclusion or inclusion of evidence may be outcome-determinative.<sup>111</sup>

#### 4. The Results

The *Daubert* approach has swept the nation and now controls the admissibility of expert testimony in thirty-three states as well as the federal courts in all fifty states.<sup>112</sup> Currently, six states have explicitly adopted *Daubert* by statute: Delaware,<sup>113</sup> Georgia,<sup>114</sup> Michigan,<sup>115</sup> Mississippi,<sup>116</sup> North

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the district courts in the role of ‘gatekeeper,’ charging them with evaluating the relevance and reliability of proffered expert testimony with heightened care.”); *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003) (“[T]he district court acts as a gatekeeper, preventing opinion testimony that does not meet the requirements of qualification, reliability and fit from reaching the jury.”); *Duffee ex rel. Thornton v. Murray Ohio Mfg. Co.*, 91 F.3d 1410, 1411 (10th Cir. 1996) (agreeing with *Daubert* that judges are empowered to “act as gatekeepers to ensure that scientific evidence is both relevant and reliable” before it is admitted into evidence (citing *Daubert*, 509 U.S. at 591–95)).

109. See *Kumho Tire Co.*, 526 U.S. at 152 (“[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”); see also *Gen. Electric Co. v. Joiner*, 522 U.S. 136, 146–147 (1997); *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1312 (11th Cir. 2000) (citing *Kumho Tire Co.*, 526 U.S. at 142); *United States v. Majors*, 196 F.3d 1206, 1215 (11th Cir. 1999) (“The trial judge is required to inquire into . . . reliability . . . [and has] ‘substantial discretion in deciding how to test an expert’s reliability and whether the expert’s relevant testimony is reliable.’” (quoting *Forklifts of St. Louis, Inc. v. Komatsu Forklift, USA, Inc.*, 178 F.3d 1030, 1035 (8th Cir. 1999))).

110. *Allison*, 184 F.3d at 1322 (emphasis added); see FED. R. EVID. 702 advisory committee’s note (“A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.”).

111. *Allison*, 184 F.3d at 1306 (“Th[e] deferential standard is not relaxed even though a ruling on the admissibility of expert evidence may be outcome-determinative.”).

112. *Daubert*, 509 U.S. at 597; see *infra* notes 113–45.

113. DEL. R. EVID. 702 (identical to FED. R. EVID. 702).

114. *Mason II*, 658 S.E.2d 603, 610 (Ga. 2008) (“Since OCGA § 24–9–67.1(b) was based on Fed. R. Evid. Rule 702, which in its present form is based on the holdings in *Daubert*, . . . the trial court’s application of the standards of *Daubert* was proper.” (citations omitted)).

Carolina,<sup>117</sup> and Vermont.<sup>118</sup> Similarly, twenty-seven states have adopted *Daubert* via common law: Alabama,<sup>119</sup> Alaska,<sup>120</sup> Arkansas,<sup>121</sup> Colorado,<sup>122</sup> Connecticut,<sup>123</sup> Idaho,<sup>124</sup> Indiana,<sup>125</sup> Iowa,<sup>126</sup> Kentucky,<sup>127</sup> Louisiana,<sup>128</sup>

115. MICH. R. EVID. 702 (nearly identical to FED. R. EVID. 702). A comment in the Michigan Rules of Evidence states that the:

[A]mendment of MRE 702 . . . conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words “the court determines that” after the word “IF” at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. The retained words emphasize the centrality of the court’s gatekeeping role in excluding unproven expert theories and methodologies from jury consideration.

MICH. R. EVID. 702, staff comment to 2004 amendment (citing *Daubert*, 509 U.S. at 579; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)).

116. MISS. R. EVID. 702 (identical to FED. R. EVID. 702).

117. 2011 N.C. Sess. Laws 283, sec. 1.4 (H.B. 542). The North Carolina statute was signed into law on June 24, 2011, became effective on October 1, 2011, and was codified at N.C. GEN. STAT. § 8C-702(a)(2011). 2011 N.C. Sess. Laws 283, secs. 1.4, 5.2. Prior to the enactment of the statute, North Carolina had adopted its own test of admissibility. See *Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674, 690 (N.C. 2004) (While “North Carolina cases share obvious similarities with the principles underlying *Daubert*, application of the North Carolina approach is decidedly less mechanistic and rigorous than the ‘exacting standards of reliability’ demanded by the federal approach. Moreover, had we ever intended to adopt *Daubert* and supersede this established body of North Carolina case law, we would certainly have referenced the basic *Daubert* factors that have come to define the federal standard. But we did not.” (citations omitted)).

118. VT. R. EVID. 702 (identical to FED. R. EVID. 702).

119. *Turner v. State (Ex parte State of Alabama)*, 746 So. 2d 355, 359 (Ala. 1998). Alabama has adopted *Daubert* for certain types of cases, but remains loyal to *Frye* in others, and thus, the state of Alabama is found on both lists. *Id.* at 359, 361 n.7 (“[T]he Legislature chose the more flexible admissibility standard established in *Daubert*” for the admissibility of DNA evidence, but “[w]ith respect to expert scientific testimony on subjects other than DNA techniques governed by § 36-18-30, *Frye* remains the standard of admissibility in Alabama.”).

120. *State v. Coon*, 974 P.2d 386, 402 (Alaska 1999) (adopting the *Daubert* test of admissibility and rejecting *Frye*).

121. *Farm Bureau Mut. Ins. Co. of Ark. v. Foote*, 14 S.W.3d 512, 519 (Ark. 2000) (adopting the *Daubert* test of admissibility).

122. See *People v. Shreck*, 22 P.3d 68, 78 (Colo. 2001) (en banc). The Colorado Supreme Court has held that trial courts must follow Rule 702 of the Colorado Rules of Evidence (CRE), and that when applying CRE 702, trial courts can consider the *Daubert* factors but are not limited by them. *Id.* (“[A] trial court making a CRE 702 reliability determination may, but need not consider any or all of these [*Daubert*] factors, depending on the totality of the circumstances of a given case. A trial court may also consider other factors not listed here, to the extent that it finds them helpful in determining the reliability of the proffered evidence. Our determination that a trial court may, but need not consider the factors listed in *Daubert* is consistent with the United States Supreme Court’s reasoning in *Kumho Tire Co. v. Carmichael*.”).

123. *State v. Porter*, 698 A.2d 739, 742 (Conn. 1997) (adopting the *Daubert* test of admissibility).

Maine,<sup>129</sup> Massachusetts,<sup>130</sup> Montana,<sup>131</sup> Nebraska,<sup>132</sup> Nevada,<sup>133</sup> New Hampshire,<sup>134</sup> New Jersey,<sup>135</sup> New Mexico,<sup>136</sup> Ohio,<sup>137</sup> Oklahoma,<sup>138</sup> Oregon,<sup>139</sup>

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124. *See Weeks v. E. Idaho Health Servs.*, 153 P.3d 1180, 1184 (Idaho 2007) (“The Court has not adopted the *Daubert* standard for admissibility of an expert’s testimony but has used some of *Daubert*’s standards in assessing whether the basis of an expert’s opinion is scientifically valid,” and has also explicitly rejected *Frye*’s general acceptance test of admissibility.).

125. *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995) (acknowledging that although Indiana has not explicitly adopted *Daubert*, “[t]he concerns driving *Daubert* coincide with the express requirement of Indiana Rule of Evidence 702(b) . . . [t]hus, although not binding upon the determination of state evidentiary law issues, the federal evidence law of *Daubert* and its progeny is helpful to the bench and bar in applying Indiana Rule of Evidence 702(b).”).

126. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532 (Iowa 1999) (en banc) (adopting a modified/limited application of *Daubert*).

127. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (“After careful review . . . we adopt the reasoning of *Kumho* and hold that *Daubert* and *Mitchell* apply.”); *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995) (adopting the *Daubert* test of admissibility), *overruled on other grounds*, *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), and *abrogated in part* by *Christian v. Commonwealth*, No. 2004-SC-1055-MR, 2005 WL 3500806, at \*1 (Ky. Dec. 22, 2005).

128. *State v. Foret*, 628 So. 2d 1116, 1123 (La. 1993) (adopting the *Daubert* test of admissibility).

129. *See State v. Williams*, 388 A.2d 500, 504 (Me. 1978). Although Maine has refused to officially adopt *Daubert*, the state’s test of admissibility, called the *Williams* test, is similar to *Daubert*. *See id.* (establishing Maine’s standards for the admissibility of expert evidence and stating that “[t]he controlling criteria regarding the admissibility of expert testimony, so long as the proffered expert is qualified and probative value is not substantially outweighed by the factors mentioned in Rule 403, are whether in the sound judgment of the presiding Justice the testimony to be given is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue.”).

130. *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1349 (Mass. 1994) (“We accept the basic reasoning of the *Daubert* opinion because it is consistent with our test of demonstrated reliability.”).

131. *State v. Bieber*, 170 P.3d 444, 454 (Mont. 2007) (“[T]his Court has consistently held since *Moore* that the *Daubert* factors apply exclusively to *novel* scientific evidence.”); *State v. Moore*, 885 P.2d 457, 470–71 (Mont. 1994), *overruled on other grounds*, 906 P.2d 697 (Mont. 1995) (adopting the *Daubert* test of admissibility and acknowledging that the Supreme Court of Montana had previously rejected the *Frye* test).

132. *City of Lincoln v. Realty Trust Grp., Inc.*, 705 N.W.2d 432, 436–37 (Neb. 2005) (reinforcing Nebraska’s use of *Daubert*); *Schafersman v. Agland Coop*, 631 N.W.2d 862, 876 (Neb. 2001) (adopting the *Daubert* test of admissibility and rejecting *Frye*).

133. *See Hallmark ex rel. Hallmark v. Eldridge*, 189 P.3d 646, 650 (Nev. 2008) (“The statute governing the admissibility of expert testimony in Nevada district courts is NRS 50.275, which, as we have construed it, tracks Federal Rule of Evidence (FRE) 702. To date, however, this court has not adopted the United States Supreme Court’s interpretation of FRE 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* But, as we have stated, *Daubert* and the federal court decisions discussing it may provide persuasive authority in determining whether expert testimony should be admitted in Nevada courts.” (footnotes omitted)).



Rhode Island,<sup>140</sup> South Dakota,<sup>141</sup> Tennessee,<sup>142</sup> Texas,<sup>143</sup> West Virginia,<sup>144</sup> and Wyoming.<sup>145</sup>

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134. *Baker Valley Lumber, Inc. v. Ingersoll-Rand Co.*, 813 A.2d 409, 415 (N.H. 2002) (“Today, we apply the *Daubert* standard to New Hampshire Rule of Evidence 702.”).

135. *State v. Harvey*, 699 A.2d 596, 621 (N.J. 1997). New Jersey has partially accepted and partially rejected *Daubert* in different types of cases. *See id.* (“Even before the United States Supreme Court decided *Daubert*, this Court had relaxed the test for admissibility of scientific evidence in toxic-tort cases. We have been cautious in expanding the more relaxed standard to other contexts. Thus, the test in criminal cases remains whether the scientific community generally accepts the evidence.” (citations omitted)).

136. *State v. Alberico*, 861 P.2d 192, 203 (N.M. 1993) (rejecting *Frye* and adopting the *Daubert* factors for “assessing the validity of a particular technique to determine if it is ‘scientific knowledge’ under [New Mexico’s evidence] Rule 702” (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 597, 593–95 (1993))).

137. *See Miller v. Bike Athletic Co.*, 687 N.E.2d 735, 741 (Ohio 1998) (citing to *Daubert* when determining the admissibility of expert testimony, but never explicitly adopting the *Daubert* standard); *State v. Williams*, 446 N.E.2d 444, 447 n.5 (Ohio 1983) (acknowledging that Ohio never adopted the *Frye* test and finding that the *Frye* test has been widely criticized and rejected by many commentators and courts).

138. *Christian v. Gray*, 65 P.3d 591, 600 (Okla. 2003) (“Our Court of Criminal Appeals has already adopted *Daubert* for criminal proceedings in Oklahoma Courts. Today we likewise adopt *Daubert* and *Kumho* as appropriate standards for Oklahoma trial courts in deciding the admissibility of expert testimony in civil matters.”); *Taylor v. State*, 889 P.2d 319, 328 (Okla. Crim. App. 1995) (“We . . . believe the time is right for this Court to abandon the *Frye* test and adopt the more structured and yet flexible admissibility standard set forth in *Daubert*.”).

139. *State v. O’Key*, 899 P.2d 663, 680 (Or. 1995) (in banc) (finding that *Daubert* is consistent with Oregon’s leading case, *State v. Brown*, and further finding that *Daubert* should be instructive to Oregon courts); *State v. Brown*, 687 P.2d 751, 759 (Or. 1984) (in banc) (rejecting *Frye* and outlining seven factors courts should consider when determining the admissibility of expert evidence).

140. *Owens v. Silvia*, 838 A.2d 881, 890 (R.I. 2003) (“Although we declined to expressly adopt the standards outlined in the United States Supreme Court decision of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, we drew guidance from the principles of that case.” (citations omitted)); *Raimbeault v. Takeuchi Mfg. (U.S.)*, 772 A.2d 1056, 1061 (R.I. 2001) (per curiam) (recognizing the applicability of *Daubert* in cases proposing the use of scientific evidence and applying R.I. R. Evid. 702).

141. *See Burley v. Kytac Innovative Sports Equip., Inc.*, 737 N.W.2d 397, 406 (S.D. 2007) (reaffirming South Dakota’s reliance on the *Daubert* test); *State v. Hofer*, 512 N.W.2d 482, 484 (S.D. 1994) (adopting the *Daubert* test of admissibility).

142. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997) (rejecting *Frye*, and although not expressly adopting *Daubert*, noting that the *Daubert* factors are useful in determining the admissibility of expert testimony).

143. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995) (adopting *Daubert* and stating that “[w]e are persuaded by the reasoning in *Daubert* and *Kelly*”); *Kelly v. State*, 824 S.W.2d 568, 572–73 (Tex. Crim. App. 1992) (en banc) (rejecting the *Frye* test of admissibility and providing a list of relevant factors to be considered when determining the admissibility of expert evidence).

Twelve states and the District of Columbia have refused to adopt the *Daubert* test of admissibility and instead have chosen to follow the outdated *Frye* test: Alabama,<sup>146</sup> Arizona,<sup>147</sup> California,<sup>148</sup> District of Columbia,<sup>149</sup> Florida, Illinois,<sup>150</sup> Kansas,<sup>151</sup> Maryland,<sup>152</sup> Minnesota,<sup>153</sup> New York,<sup>154</sup> North

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144. *San Francisco v. Wendy's Int'l, Inc.*, 656 S.E.2d 485, 492–94 (W. Va. 2007) (reaffirming West Virginia's continued use of the *Daubert* test of admissibility); *Gentry v. Mangum*, 466 S.E.2d 171, 179 (W. Va. 1995) (rejecting the *Frye* test of admissibility); *Wilt v. Buracker (In re Estate of Nickelson)*, 443 S.E.2d 196, 203 (W. Va. 1993) (adopting the *Daubert* test of admissibility and concluding "that *Daubert's* analysis of Federal Rule 702 should be followed in analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence").

145. *Cooper v. State*, 174 P.3d 726, 728 (Wyo. 2008) (acknowledging the continued use of the *Daubert* test of admissibility); *Bunting ex rel. Bunting v. Jamieson*, 984 P.2d 467, 471 (Wyo. 1999) (adopting the *Daubert* test of admissibility and stating that "*Daubert* and its progeny [should be] guidance for the Wyoming courts' determination whether to admit or exclude expert testimony").

146. *Turner v. State (Ex parte State of Alabama)*, 746 So. 2d 355, 359, 361 n.7 (Ala. 1998) ("[T]he Legislature chose the more flexible admissibility standard established in *Daubert*" for the admissibility of DNA evidence, but "[w]ith respect to expert scientific testimony on subjects other than DNA techniques governed by § 36-18-30, *Frye* remains the standard of admissibility in Alabama.>").

147. *Logerquist v. McVey*, 1 P.3d 113, 125 (Ariz. 2000) (en banc) (continuing to use the *Frye* test of admissibility and stating that "we have left no doubt whether Ariz. R. Evid. 702 was intended to abolish the *Frye* doctrine, for we have continued to apply *Frye*"); *State v. Tankersley*, 956 P.2d 486, 491 (Ariz. 1998) (en banc) (refusing to abandon *Frye*).

148. *People v. Leahy*, 882 P.2d 321, 323 (Cal. 1994) (in bank) (refusing to abandon the *Kelly/Frye* test); *People v. Kelly*, 549 P.2d 1240, 1244 (Cal. 1976) (adopting the *Frye* test of admissibility and altering it slightly).

149. *Jones v. United States*, 990 A.2d 970, 977 (D.C. 2010) (continuing to apply the *Frye* test of admissibility).

150. *People v. McKown*, 875 N.E.2d 1029, 1036 (Ill. 2007) (finding that while "[i]n Illinois, the application of the *Frye* standard is limited to scientific methodology that is considered 'new' or 'novel,'" the test is still very much the standard); *People v. Miller*, 670 N.E.2d 721, 731 (Ill. 1996) ("Illinois follows the *Frye* standard for the admission of novel scientific evidence.>").

151. *Kuhn ex rel. Estate of Bishop v. Sandoz Pharm. Corp.*, 14 P.3d 1170, 1181–82 (Kan. 2000) (listing the long lineage of Kansas cases applying the *Frye* test of admissibility).

152. *Blackwell v. Wyeth*, 971 A.2d 235, 247–48 (Md. 2009) (continuing to apply the *Frye* test); *Reed v. State*, 391 A.2d 364, 372 (Md. 1978) (adopting the *Frye* test of admissibility).

153. *State v. MacLennan*, 702 N.W.2d 219, 230 (Minn. 2005) (continuing to apply the *Frye* standard); *Goeb v. Tharaldson*, 615 N.W.2d 800, 810–14 (Minn. 2000) (thoroughly analyzing the *Frye* standard as compared to the new federal *Daubert* standard and determining that Minnesota still uses the *Frye* test of admissibility).

154. *People v. LeGrand*, 867 N.E.2d 374, 379 (N.Y. 2007) (continuing to apply the *Frye* test of admissibility).

Dakota,<sup>155</sup> Pennsylvania,<sup>156</sup> and Washington.<sup>157</sup> There are also five states that have adopted their own test of admissibility: Hawaii,<sup>158</sup> Missouri,<sup>159</sup> South Carolina,<sup>160</sup> Utah,<sup>161</sup> and Virginia.<sup>162</sup> At this point, the only southern state other than Florida that follows *Frye* is Alabama, and even Alabama has recognized the use of *Daubert* in certain contexts.<sup>163</sup>

155. *State v. Hernandez*, 707 N.W.2d 449, 453 (N.D. 2005) (refusing to adopt *Daubert*); *City of Fargo v. McLaughlin*, 512 N.W.2d 700, 704 (N.D. 1994) (finding that the *Frye* test of admissibility applies).

156. *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1044 (Pa. 2003) (taking a careful look at *Daubert*, but ultimately deciding to continue to follow *Frye*).

157. *Anderson v. Akzo Nobel Coatings, Inc.*, No. 82264-6, 2011 WL 3930205, at \*4 (Wash. Sept. 8, 2011) (en banc) (“In civil cases, we have neither expressly adopted *Frye* nor expressly rejected *Daubert*.”); *State v. Copeland*, 922 P.2d 1304, 1310 (Wash. 1996) (en banc) (adhering to the *Frye* test and declining to adopt *Daubert*); *Reese v. Stroh*, 907 P.2d 282, 286 (Wash. 1995) (en banc) (declining to adopt *Daubert*).

158. *See State v. Vliet*, 19 P.3d 42, 53 (Haw. 2001). Hawaii is unique, in that, it has neither rejected *Frye*, nor adopted *Daubert*, yet it follows both cases in certain types of cases. *See id.* (“[T]his court has not adopted the *Daubert* test, and we expressly refrain from doing so. However, because the HRE are patterned on the Federal Rules of Evidence (FRE), construction of the federal counterparts of the HRE by the federal courts is instructive, but obviously not binding on our courts.” (citations omitted)).

159. *See State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. 2003) (en banc). The Missouri Supreme Court has made it clear that Missouri follows its own unique test of admissibility. *See id.* (stating that the Missouri Supreme Court “expressly holds that to the extent that cases since *Lasky* have suggested that the standard of admissibility of expert testimony in civil cases is that set forth in *Frye* or some other standard, they are no longer to be followed. The relevant standard is that set out in section 490.065.”).

160. *See State v. Council*, 515 S.E.2d 508, 518 (S.C. 1999), *cert. denied*, 129 S. Ct. 2770 (2009) (“While this Court does not adopt *Daubert*, we find the proper analysis for determining admissibility of scientific evidence is now under the SCRE. When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. The trial judge should apply the *Jones* factors to determine reliability.”).

161. *See Alder v. Bayer Corp., AGFA Div.*, 61 P.3d 1068, 1083 (Utah 2002) (rejecting the exclusive use of *Frye*, and declining to adopt *Daubert*, but instead adopting its own test of admissibility governed by its rules of evidence and the case of *State v. Rimmasch*, 775 P.2d 388, 396–99 (Utah 1989)).

162. *John v. Wong Shik*, 559 S.E.2d 694, 698 (Va. 2002) (“[W]e have not previously considered the question whether the *Daubert* analysis employed by the federal courts should be applied in our trial courts to determine the scientific reliability of expert testimony [and], [t]herefore, we leave this question open for future consideration.”).

163. *See Turner v. State (Ex parte State of Alabama)*, 746 So. 2d 355, 359–61 (Ala. 1998).

## B. Daubert's Utility in Professional Liability Cases

The *Daubert* analysis has particular significance in complex medical malpractice cases.<sup>164</sup> As expert evidence becomes increasingly intricate, our judges and juries become increasingly vulnerable to bad science. The *Frye* general acceptance test exacerbates this vulnerability because of its extreme relativism.<sup>165</sup> Under *Frye*, every expert conclusion is worthy of jury consideration as long as it has some underlying link to a generally accepted methodology.<sup>166</sup> *Frye* has even been read by the Supreme Court of Florida as *prohibiting* a trial judge from considering an expert's application of scientific principles to the facts at hand, as long as the expert purports to rely on scientific principles that are generally accepted.<sup>167</sup>

Medical causation is one of the areas where the shortcomings of *Frye* are most evident.<sup>168</sup> A causation expert only needs to attribute his or her opinions to the generally accepted methodology of differential diagnosis to avoid an admissibility issue.<sup>169</sup> This can literally be as blatant as an expert testifying that he or she considered other possible causes and simply finds

164. See *Gelsthorpe ex rel. Bacus v. Weinstein*, 897 So. 2d 504, 511 (Fla. 2d Dist. Ct. App. 2005) (finding that in a medical malpractice case that the expert's pure opinion testimony does not even have to be based on his or her experience with patients suffering from the same injuries, but that the opinion can be based on the expert's "experience treating similar patients" (quoting FLA. STAT. § 766.102(5)(a)(1) (2003))).

165. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

166. *Id.*

167. See *Castillo v. E.I. du Pont de Nemours & Co.*, 854 So. 2d 1264, 1276 (Fla. 2003) ("By considering the extrapolation of the data from the admittedly acceptable experiments, the Third District went beyond the requirements of *Frye*, which assesses only the validity of the underlying science. *Frye* does not require the court to assess the application of the expert's raw data in reaching his or her conclusion. *We therefore conclude that the Third District erroneously assessed the Castillos' expert testimony under Frye by considering not just the underlying science, but the application of the data generated from that science in reaching the expert's ultimate conclusion.*" (emphasis added)).

168. See, e.g., *Marsh v. Valyou*, 977 So. 2d 543, 548 (Fla. 2007) (per curiam); *Gelsthorpe ex rel. Bacus*, 897 So. 2d at 510; *Castillo*, 854 So. 2d at 1271.

169. See *Castillo*, 854 So. 2d at 1271 ("It is well-settled that an expert's use of differential diagnosis to arrive at a specific causation opinion is a methodology that is generally accepted in the relevant scientific community." (citations omitted)); see also *Marsh*, 977 So. 2d at 549 (repeating that the Supreme Court of Florida previously held in *Castillo* "that differential diagnosis is a generally accepted method for determining specific causation"); *Gelsthorpe ex rel. Bacus*, 897 So. 2d at 510 ("[U]se of the technique of differential diagnosis by an expert medical witness in determining causation does not raise concerns under *Frye*. Differential diagnosis is an established scientific methodology in which the expert eliminates possible causes of a medical condition to arrive at the conclusion as to the actual cause of the condition." (citations omitted) (internal quotation marks omitted)).

them inapplicable.<sup>170</sup> It is no secret that the medical malpractice litigant who could not otherwise meet the greater weight of the evidence (*i.e.* more-likely-than-not) standard of causation<sup>171</sup> can likely evade this proof problem with an expert who cloaks his or her opinions in a differential diagnosis.<sup>172</sup> And if that fails, as the dissent in *Marsh* recognized, an expert only needs to couch testimony as “pure opinion,” which is essentially “always admissible” based merely on a purported expert’s “training and experience.”<sup>173</sup>

As discussed above, the *Daubert* approach would provide a much more rigorous system for ensuring that our judges and juries decide cases involving complex professional liability issues based on good science.<sup>174</sup> One of the fundamental tenets of *Daubert* is the rejection of the *ipse dixit* expert opinion.<sup>175</sup> The phrase “because I said so” may never lose its cherished place in the parenting lexicon, but under *Daubert*, it has rightfully lost any validat-

170. See, e.g., *Castillo*, 854 So. 2d at 1270–71 (ending discussion of the parties’ experts’ “disagree[ments] about the conclusions” from available data and information on the basis that, “[c]learly, the Castillos’ experts did utilize differential diagnosis, and as amici admit, this was a generally accepted method for addressing specific medical causation” (citations omitted)).

171. See, e.g., *Gooding ex rel. Estate of Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984) (“Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff’s injury. Prosser explored this standard of proof as follows: ‘[T]he plaintiff . . . has the burden of proof . . . [and] must introduce evidence . . . that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when . . . the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.’” (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* § 41, at 241 (4th ed. 1971)) (emphasis added)); see also *Jackson Cnty. Hosp. Corp. v. Aldrich ex rel. Estate of Roddenberry*, 835 So. 2d 318, 328 (Fla. 1st Dist. Ct. App. 2002) (“The ‘more likely than not’ standard is satisfied . . . if a plaintiff presents evidence that establishes that the decedent had a fifty-one percent or better chance that [a loss] would not have occurred but for the actions or lack thereof of the medical care provider.” (citations omitted)).

172. See, e.g., *Castillo*, 854 So. 2d at 1271, 1277. The problem is further confounded by Florida’s evidence code, which makes it extremely difficult to cross-examine such an expert with external material such as treatises or studies *unless the expert recognizes the source of the contrary material as authoritative*. See FLA. STAT. § 90.706 (2011); see also *Whitfield v. State*, 859 So. 2d 529, 530 (Fla. 1st Dist. Ct. App. 2003) (per curiam) (disallowing the defendant’s use of a medical article to cross-examine the prosecution’s expert witness because although the expert conceded that the medical journal itself was generally accepted in the medical community, the expert refused to recognize that the specific article was generally accepted or authoritative).

173. See *Marsh*, 977 So. 2d at 560, 562 (Cantero, J., dissenting).

174. See *supra* notes 164–73 and accompanying text.

175. See *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1244 (11th Cir. 2005) (rejecting “expert’s assurances . . . [of] utiliz[ing] generally accepted scientific methodology [as] insufficient. [Because] [s]uch statements can spring just as quickly from the *ipse dixit* of the expert . . . [and] nothing in . . . *Daubert* . . . requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert” (citations omitted)).

ing power when uttered by an expert.<sup>176</sup> Without intending to suggest that medical doctors are more prone to resort to “because I said so” than other types of experts, it is nonetheless obvious that the methodology of differential diagnosis has no built-in safeguards to catch the *ipse dixit* opinion and, indeed, almost invites it.<sup>177</sup> The *Daubert* approach corrects this shortcoming and would improve the quality of expert evidence in professional liability cases across the board.<sup>178</sup>

#### IV. CALL TO ACTION: FLORIDA’S ADOPTION OF A STATUTORY *DAUBERT* STANDARD

The Florida Legislature has made two recent attempts in 2008 and 2011 to amend *Florida’s Evidence Code* to adopt a *Daubert* standard.<sup>179</sup> In both years, both houses filed bills which would have empowered Florida’s capable trial judges with the same combination of specific guidance, procedural tools, and gate-keeping discretion that has worked well at the federal level and in the states following *Daubert*.<sup>180</sup> The 2011 legislation would have implemented *Daubert* by amending sections 90.702 and 90.704, *Florida Statutes* in the following respects.<sup>181</sup>

Section 1 engrafted the essentials of *Daubert* onto section 90.702 of the Florida Evidence Code by requiring as a condition of admissibility that expert evidence be based upon sufficient facts or data, be the product of reliable principles and methods, and that the principles and methods be applied

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176. See *id.* (“The trial court’s gatekeeping function requires more than simply ‘taking the expert’s word for it.’” (quoting FED. R. EVID. 702 advisory committee’s note)); see, e.g., *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1201 (11th Cir. 2010); *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004); *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995); FED. R. EVID. 702 advisory committee’s note.

177. See *Castillo*, 854 So. 2d at 1271; cf. *Daubert*, 43 F.3d at 1315.

178. See *McClain*, 401 F.3d at 1244; *Daubert*, 43 F.3d at 1315, 1319.

179. See Fla. SB 822 (2011); Fla. HB 391 (2011); Fla. HB 645 (2008); Fla. SB 1448 (2008). The legislature has also proposed two bills for the 2012 legislative session: Florida House of Representatives Proposed Committee Bill 243 and Florida Senate Proposed Committee Bill 378. Fla. H.R. Comm. on, PCB 243 (draft of Sept. 29, 2011) (proposed FLA. STAT. §§ 90.702, .704); Fla. S. Comm. on, PCB 378 (draft of Sept. 29, 2011) (proposed FLA. STAT. §§ 90.702, .704). These two 2012 bills are substantially similar and are written to take effect on July 1, 2012. Compare Fla. H.R. Comm. on, PCB 243, with Fla. S. Comm. on, PCB 378. The bills contain no provision for a pretrial *Daubert* hearing and do not require written findings and conclusions. See generally Fla. H.R. Comm. on, PCB 243; Fla. S. Comm. on, PCB 378.

180. See Fla. SB 822; Fla. HB 391; Fla. HB 645; Fla. SB 1448.

181. Fla. SB 822; Fla. HB 391.

reliably to the facts of the case.<sup>182</sup> Section 1 expressly adopted *Daubert* and its significant progeny and rejected *Frye* and all of its Florida progeny by adding the following language to section 90.702(2):

The courts of this state shall interpret and apply the requirements of subsection (1) and [section] 90.704 in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); [and] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) . . . . *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and subsequent Florida decisions applying or implementing *Frye* no longer apply to subsection (1) or [section] 90.704.<sup>183</sup>

Section 2 addressed the too common use of experts as conduits for evidence that would otherwise be inadmissible, by amending section 90.704 to require that before otherwise inadmissible facts or data are disclosed to a jury through expert evidence, the trial judge must make a finding that the probative value of the facts or data in assisting the jury's evaluation of expert evidence substantially outweighs the prejudicial effect of the facts or data.<sup>184</sup> This is consistent with the *Daubert* conceptualization of the trial judge as gatekeeper and with ensuring the trustworthiness of evidence that reaches a jury through an expert.<sup>185</sup>

The 2008 bills, unlike the 2011 legislation, would have also amended sections 90.705 and 90.707, *Florida Statutes*.<sup>186</sup> Section 90.705 would have allowed a party to have a *Daubert* hearing upon a timely motion, to require the trial court to set forth its findings of facts and conclusions of law, and to permit an interlocutory discretionary appeal of the admission or exclusion of

182. Fla. SB 822; Fla. HB 391.

183. Fla. SB 822; Fla. HB 391. This precise language was not in the 2008 legislation. Fla. SB 1448; Fla. HB 645. The 2008 legislation included much broader language:

The courts of this state shall interpret and apply the requirements of [sections] 90.702 and 90.704 in a manner consistent with Rules 702 and 703, Federal Rules of Evidence, and with all United States Supreme Court case law interpreting those rules in effect at the time of enactment of this provision.

Fla. SB 1448; Fla. HB 645.

184. Fla. SB 822; Fla. HB 391.

185. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

186. Compare Fla. SB 1448 (2008) (amending section 90.705 and creating section 90.707 of the *Florida Statutes*), and Fla. HB 645 (2008) (amending section 90.705 and creating section 90.707 of the *Florida Statutes*), with Fla. SB 822 (2011) (disregarding sections 90.705 and 90.707 of the *Florida Statutes*), and Fla. HB 391 (2011) (disregarding sections 90.705 and 90.707 of the *Florida Statutes*).

expert testimony with the criteria for the appellate court to consider in whether to grant such an appeal.<sup>187</sup>

The passages of bills similar to those proposed in 2008 and 2011 would immediately put Florida on par with the federal system, where, incidentally, Federal Rules of Evidence 702 and 703 were themselves amended in 2000 to codify *Daubert* and its progeny.<sup>188</sup> The proposed Florida legislation would in effect import the synthesized federal approach, i.e., amended FRE 702 and 703, into Florida law.<sup>189</sup> In the next part, we discuss the provisions of a proposed bill should the 2012 Legislature decide to tackle *Frye*.

#### V. A STEP TOWARDS ACTION: A PROPOSED BILL

The authors set forth the following proposed bill to implement *Daubert*. Words stricken are deletions; words underlined are additions.

Section 1. Section 90.702, *Florida Statutes*, is amended to read:

90.702 Testimony by experts.—

(1) 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:

(a) The testimony is based on sufficient facts or data;

(b) The testimony is the product of reliable principles and methods; and

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187. Fla. SB 1448; Fla. HB 645. Sections 4, 6, and 7 of the 2008 legislation were “nuts and bolts” provisions relating to numbering, severability, and the act’s effective date. *Id.* The 2011 legislation did not include severability or numbering provisions and its effective date section—unlike the 2008 bills—was silent on its application to pending cases. *Compare* Fla. SB 822 (2011), *and* Fla. HB 391 (2011), *with* Fla. SB 1448 (2008), *and* Fla. HB 645 (2008).

188. FED. R. EVID. 702 advisory committee’s note; *see* FED. R. EVID. 703 advisory committee’s note.

189. *See* Fla. SB 822; Fla. HB 391; FED. R. EVID. 702 advisory committee’s note; FED. R. EVID. 703 advisory committee’s note.



(c) 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 the evidence at trial.<sup>190</sup>

(2) The courts of this state shall interpret and apply the requirements of subsection (1) and section 90.704 in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny as well as in a manner consistent with Federal Rules of Evidence 702 and 703, and all Supreme Court of the United States case law interpreting those rules.<sup>191</sup>

Section 2. Section 90.704, *Florida Statutes*, is amended to read:

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 in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to a jury by the proponent of the opinion or inference unless the court determines that the probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect.<sup>192</sup>

Section 3. Section 90.705, *Florida Statutes*, is amended to read:

90.705 Disclosure of facts or data underlying expert opinion.—

(1) Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give reasons without prior

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190. Fla. SB 822; Fla. HB 391. The 2008 bills—HB 645, SB 1448—included a paragraph which stated: “An expert may only offer expert testimony with respect to a particular field in which the expert is qualified.” Fla. SB 1448; Fla. HB 645. Based on the fact that current Florida common and statutory law still upholds this bedrock principle, this provision was superfluous and has been omitted here. See FLA. STAT. § 90.702 (2011); Fla. SB 822 (2011); Fla. HB 391 (2011). Subparagraphs (a), (b), and (c) mirror the language used in FED. R. EVID. 702. Fla. SB 822; Fla. HB 391; FED. R. EVID. 702.

191. Fla. SB 822. The 2011 bills contained a paragraph explicitly rejecting *Frye* and all Florida decisions applying or implementing *Frye*. See *id.*; Fla. HB 391. In light of the clear language of this paragraph, such language is not necessary and has not been included here. See Fla. SB 822.

192. Fla. SB 1448. This added language mirrors Federal Rule of Evidence 703. FED. R. EVID. 703.

disclosure of the underlying facts or data. On cross-examination the expert shall be required to specify the facts or data.<sup>193</sup>

(2) Upon timely motion of a party, the court shall hold a hearing prior to trial to determine whether an expert's proposed testimony, including pure opinion testimony, satisfies the requirements of sections 90.702 and 90.704.<sup>194</sup> The trial court's ruling shall set forth written findings of fact and conclusions of law upon which the order to admit or exclude expert testimony is based.<sup>195</sup> ~~Prior to the witness giving the opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for the witness's opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.~~<sup>196</sup>

Section 6. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to

193. Fla. SB 1448.

194. *Id.* Pre-trial *Daubert* hearings will allow judges the time to closely review the relevance and reliability of the proposed testimony and the expert's credentials and to make an informed decision as to its admissibility. *See id.* Allowing the scheduling of a *Daubert* hearing prior to trial reduces the risk of a trial by ambush arising from the late disclosure or non-disclosure of experts. *See Fla. H.R. Comm. on Cts., HB 645 (2008) Staff Analysis 2-4 (Mar. 10, 2008) [hereinafter Comm. on Cts., HB 645 Staff Analysis], available at <http://archive.flsenate.gov/data/session/2008/House/bills/analysis/pdf/h0645.CTS.pdf>.* It also will provide litigants with a preview of the strength of their opponents' cases, which may encourage settlement or support disposition on summary judgment. *See id.*

195. Fla. SB 1448. Written findings will create a sufficient record to enable and facilitate appellate review. *See id.*

196. *Id.* The 2008 bills contained a provision establishing the standard of review on appeal for the court's admission or exclusion of expert testimony (*de novo*), *see e.g.*, *Brim v. State*, 695 So. 2d 268, 274 (Fla. 1997), and a new avenue for interlocutory appeal under certain limited circumstances. Fla. SB 1448. While such a provision was certainly forward-thinking, it ignored the current realities of the Florida court system. *See id.* Such a provision could not only potentially extend the life of cases causing additional congestion of trial and appellate court dockets, but it could also delay justice for both plaintiffs and defendants. *See id.* Unless and until there is a proper vetting of this type of provision by the State Courts Administrator, the authors would discourage such a provision. Additionally, because article V, section 4(b)(1) of the Florida Constitution provides that courts may hear interlocutory appeals as provided by rules adopted by the Supreme Court of Florida, such a provision may be an unconstitutional encroachment on the exclusive rulemaking authority of the Supreme Court of the United States. *See FLA. CONST. art. 5, § 4(b)(1).*

this end the provisions of this act are declared severable and shall remain valid and enforceable.<sup>197</sup>

Section 7. This act shall take effect July 1, 2012, and shall apply to all actions commenced on or after the effective date.<sup>198</sup>

## VI. CONCLUSION

It is clear that Florida has spent too long on the outside of the *Daubert* revolution looking in. The divergence between Florida's state court—where *Frye* is still law, and federal courts—where *Daubert* is followed, only makes things worse.<sup>199</sup> In cases where a plaintiff needs the help of “junk science,” it is all too common for a Florida resident—be it an individual or company—to be sued in a matter that chiefly involves an out-of-state defendant *primarily for the reason that the plaintiff's attorney wants to prevent the case from being removed to federal court because of a preference for Frye—which is equivalent to no standard at all—over Daubert.*<sup>200</sup> The Florida Evidence Code was statutorily created, and it is the legislature's responsibility to see that the judiciary properly handles expert evidence.<sup>201</sup> The legislature can fulfill this responsibility, to the benefit of Florida's justice system and all of its citizens, by enacting a statutory *Daubert* standard like the one proposed above.

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197. Fla. SB 1448.

198. The 2008 bills contained language which would have applied the *Daubert* standard retroactively “to all pending actions in which trial . . . commences more than [ninety] calendar days after that date.” Fla. SB 1448 (2008); Fla. HB 645 (2011). In order to avoid any argument that this provision would be unconstitutional and to foreclose the floodgate of litigation over this issue, the authors have dropped any language of retroactivity.

199. See Comm. on Cts., HB 645 Staff Analysis, *supra* note 194, at 2–3.

200. See *id.* at 2–4. The federal courts have “diversity jurisdiction” in matters involving citizens of different states only if none of the defendants is a citizen of Florida. See 28 U.S.C. § 1332 (2006).

201. See Comm. on Cts., HB 645 Staff Analysis, *supra* note 194, at 2–3.