Comparative Analysis of Florida’s Admissibility Standards for Medical Causation Expert Testimony Under Frye: Is It “Generally Accepted?”

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COMPARATIVE ANALYSIS OF FLORIDA'S ADMISSIBILITY STANDARDS FOR MEDICAL CAUSATION EXPERT TESTIMONY UNDER FRYE: IS IT "GENERALLY ACCEPTED?"

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I. INTRODUCTION

This article will take a comparative look at the two dominant and widely accepted common law evidentiary standards applied by courts nationwide.

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in order to determine the admissibility of expert testimony, specifically, testimony relating to medical causation. This article will analyze how these different standards are applied in various jurisdictions and will also analyze Florida’s approach, which follows the initial standard which was set forth in *Frye v. United States*. In 2007, the Supreme Court of Florida, in *Marsh v. Valyou*, explicitly held fast to the adherence and application of the *Frye* test in Florida courts for the admissibility of medical causation expert testimony. However, many seem to believe that the substance of its decision seems to say otherwise.

In an apparent effort to “to limit the admission of opinion [testimony] based on so-called ‘junk science’ or pseudo science,” the Supreme Court of Florida held in *Marsh* that expert testimony is subject to the stringent standard that was set forth in *Frye*, which requires the “general acceptance” in the relevant scientific community of the theory or methodology upon which the opinion is based. However, the dissent, in its opinion, diverged from the majority’s rationale and pointed out that, although the majority claimed to be adhering to *Frye*, the fact that it found the expert evidence as to the medical cause of the plaintiff’s condition, which had not been generally accepted by the relevant scientific community to be admissible is in complete contradiction with the *Frye* standard.

This article will, in general, provide a synopsis of the current approach as to admissibility under Florida law and also provide insight as to the methods that have been adopted by other jurisdictions. Section II of this article will provide a brief history as to the two different widely accepted common law standards for the admissibility of expert testimony that have been set out by the District of Columbia Court of Appeals’ decision in *Frye*, as well as the United States Supreme Court’s subsequent decision, decided seventy years after *Frye*, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

Section III of this article will take an in-depth look at Florida’s approach under the Supreme Court of Florida’s decision in *Marsh*. Section IV of this article will then take a comparative approach, analyzing other jurisdictions’ approaches regarding the application of their adopted standard to

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1. 293 F. 1013 (D.C. Cir. 1923).
2. 977 So. 2d 543 (Fla. 2007).
3. *Id.* at 547.
7. *Id.* at 559–60 (Cantero, J., dissenting).
medical causation testimony, under each of the widely accepted "Frye" or "Daubert" standards. This article will also discuss the federal courts' approach to expert testimony admissibility. Section V of this article will offer support as to why the Supreme Court of Florida should either explicitly deny the "Frye" standard and adopt a new standard of admissibility or adhere to the "Frye" standard by revisiting its reasoning in "Marsh" in order to clarify Florida's approach as to medical causation testimony.

This article will further explain the critical need for the Supreme Court of Florida to clarify its decision in "Marsh" because, as its decision is set forth, many seem to believe that Florida is currently without a clear common law standard for admissibility for medical causation expert testimony. Currently, more than three years after the court's decision in "Marsh", there is still uncertainty as to the standard that should be applied in Florida. This article will conclude by finding that the Supreme Court of Florida's decision in "Marsh" has many questioning whether "Frye" is, in actuality, the standard that is used in Florida. This article will also point out how some of the standards for admissibility are used in other jurisdictions and whether they could provide a clear and logical analysis for the Florida courts to follow.

II. THE FRAMEWORK OF COMMON LAW EVIDENTIARY STANDARDS

A. The Dominate Standards

The majority of the states have adopted one of the two most commonly recognized common law standards "for determining the admissibility of scientific evidence in court." These standards have enabled the courts to apply a common law standard in order to determine whether scientific expert testimony should be admissible in court and ultimately heard by a jury. The theory behind both of the standards is to keep "scientifically unreliable testimony from reaching the trier of fact," but the approach that is utilized

9. See E. Kelly Bittick, Jr., Out of the Frye-ing Pan . . . ? The Florida Supreme Court Limits Frye Challenges to Medical Causation Testimony, 27 No. 2 TRIAL ADVOC. Q. 8, 8 (Spring 2008).
10. See Andries, 12 So. 3d at 264–65 (overturning the trial court’s decision that the unsupported evidence is subject to Frye and is inadmissible).
11. See Bittick, supra note 9, at 8.
13. See id. at 479–80.
under each different standard in order to satisfy this common purpose is considerably different.\textsuperscript{15}

1. \textit{Frye v. United States}: The “General Acceptance” Standard

\textit{Frye} was the first case to set forth a widely accepted common law standard for determining the admissibility of scientific evidence and was therefore adopted by a majority of the states and by the other federal courts.\textsuperscript{16} The issue on appeal in \textit{Frye} was whether the expert testimony as to the results of a systolic blood pressure deception test made upon the defendant should be admissible in a court of law.\textsuperscript{17} The court, in a citation-free decision in \textit{Frye}, held that in order for an expert to testify as to a scientific principle or discovery it must be well-recognized and must have gained “general acceptance” within the specific “field in which it belongs.”\textsuperscript{18} The court set forth the “general acceptance” standard as follows:

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.\textsuperscript{19}

Under this standard the trial “judges are to survey relevant scientific literature, not for substantive content, but to determine the level of acceptance within the scientific community.”\textsuperscript{20} “General acceptance is determined by considering ‘the quality, as well as quantity, of the evidence supporting or opposing a new scientific technique.’”\textsuperscript{21} The “general acceptance” test was adopted and applied by a majority of the states and federal courts and was the dominant standard for over seventy years; however, after taking into con-

\begin{itemize}
\item \textsuperscript{15} \textit{Id.} Compare \textit{Frye v. United States}, 293 F. 1013, 1014 (D. C. Cir. 1923) (requiring the evidence to be generally accepted within the relevant scientific community), \textit{with Daubert v. Merrell Dow Pharm., Inc.}, 509 U. S. 579, 580 (1993) (requiring the evidence to be both reliable and relevant as provided for under the Federal Rules of Evidence).
\item \textsuperscript{16} \textit{See Lustre, supra note 12, at 453.}
\item \textsuperscript{17} \textit{Frye}, 293 F. 1013 at 1013–14.
\item \textsuperscript{18} \textit{Id.} at 1014.
\item \textsuperscript{19} \textit{Id.} (emphasis added).
\item \textsuperscript{21} \textit{Id.} (quoting \textit{Hummert}, 933 P.2d at 1196 n.5).
\end{itemize}
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sideration the enactment of Federal Rule of Evidence 702, the United States Supreme Court took a new approach as to the admissibility of expert testimony.

2. Daubert v. Merrell Dow Pharmaceuticals, Inc.: The Gatekeeper

In the United States Supreme Court’s decision in Daubert, the Court ruled that the standard set forth in Frye “was superseded by the [enactment] of the Federal Rules of Evidence” and in light of such determination, the Court established a new common law standard to be used in order to determine whether novel scientific evidence should be admissible. The standard under Daubert looks at the relevancy and reliability of the evidence that is proffered instead of its “general acceptance” and is described by the Court as being a more liberal standard. The Court set forth its two prong standard stating:

That the Frye test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but [also] reliable.

Although the Court ruled that the Frye standard was superseded by the Federal Rules of Evidence, it noted that a common law standard could never-

22. FED. R. EVID. 702 (amended 2000). The current version of Rule 702 reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id.

23. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 585, 587 (1993). “[Petitioners] contend that the Frye test was superseded by the adoption of the Federal Rules of Evidence. We agree.” Id. at 587; see also Lustre, supra note 12, at 481.


25. Lustre, supra note 12, at 481.

26. Daubert, 509 U.S. at 587 (defining relevant evidence “as that which has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” (quoting FED. R. EVID. 401) (amended 2000)).

27. Id. at 589 (emphasis added).
theless serve as an aid or give guidance as to the application of the rules.  

The Court pointed out that there is nothing in the text of the relevant Rule of Evidence that requires “general acceptance” as a factor the court must consider when determining whether the scientific testimony offered by the expert is admissible in a court of law. Because the standard under Frye exclusively looked at “general acceptance” in determining the admissibility of scientific expert testimony, and the Rule of Evidence did not establish a standard resembling the Frye test, the Court held that Frye should not be applied in the federal courts.

The Court further stated that even with the displacement of Frye, there are still limits on the admissibility of scientific expert testimony, and it is the job of the trial judge to “ensure that any and all scientific testimony or evidence [that is] admitted is not only relevant, but [also] reliable.” This is the central theory of the standard that is now applied by the federal courts and any state that has adopted the Daubert standard.

The Court determined that the Rule of Evidence placed an obligation of “gatekeeper” upon the trial court judge by interpreting the very text of the rule which clearly proposes a degree of regulation on all scientific evidence provided by an expert witness before it can be considered admissible. The Court specifically analyzed the terminology used in the rule in order to make the determination that: “the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability,” and the requirement “that the evidence or testimony ‘assist the trier of fact to understand the evidence or to determine a fact in issue’ ... goes primarily to [the requirement of] relevance.”

The Court listed four non-exclusive factors that a trial judge acting as “gatekeeper” could take into consideration when determining the reliability of the expert’s testimony: “(1) whether the theory or technique can be tested; (2) whether it has been subjected to peer review; (3) whether the technique has a high known or potential rate of error; and (4) whether the theory has

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28. Id. at 587-88.
29. Id. at 588.
30. Id. at 588-89 (“The drafting history makes no mention of Frye, and a rigid ‘general acceptance’ requirement would be at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to “opinion” testimony.’” (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988))).
32. See Lustre, supra note 12, at 481.
33. Daubert, 509 U.S. at 589.
34. Id. at 587, 590-91. “[I]n order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., ‘good grounds,’ based on what is known.” Id. at 590.
attained general acceptance within the scientific community." The Court noted that "general acceptance" is one of the factors that can be considered by the trial judge when determining the reliability of the evidence proffered, but it "is not a necessary precondition" as it is under Frye. Under this standard the trial court is viewed as a "gatekeeper," and any and all scientific evidence must be considered in light of the "relevancy standard" set forth in Daubert in order to determine its admissibility.

III. FLORIDA’S APPROACH

The Supreme Court of Florida expressly adopted the Frye standard for the admissibility of scientific testimony in Florida courts to be applied "when an expert attempts to render an opinion that is based upon new or novel scientific techniques." After the United States Supreme Court’s decision in Daubert, the Supreme Court of Florida reaffirmed its adherence to the Frye standard and did not adopt the approach taken by the United States Supreme Court in Daubert. However, the Supreme Court of Florida held in its decision, United States Sugar Corp. v. Henson, that "by definition the Frye standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques." The court also noted that the Frye inquiry "must focus only on the general acceptance of the

35. Id. at 593–94; Allison v. McGhan Med. Corp., 184 F.3d 1300, 1312 (11th Cir. 1999); see Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) ("[T]he test of reliability is ‘flexible,’ and Daubert’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case."); see also Black v. Food Lion, Inc., 171 F.3d 308, 313 (5th Cir. 1999).
36. Daubert, 509 U.S. at 594, 597.
37. See id. at 589, 591.
38. See Marsh v. Valyou, 977 So. 2d 543, 546 (Fla. 2007) (citing Bundy v. State, 471 So. 2d 9, 18 (Fla. 1985); Stokes v. State, 548 So. 2d 120, 195 (Fla. 1989)).
40. See Marsh, 977 So. 2d at 547 (citing Ibar v. State, 938 So. 2d 451, 467 (Fla. 2006) ("Florida courts do not follow Daubert, but instead follow the test set out in Frye."); Brim v. State, 695 So. 2d 268, 271–72 (Fla. 1997) ("Despite the federal adoption of a more lenient standard in Daubert, we have maintained the higher standard of reliability as dictated by Frye."); Hadden v. State, 690 So. 2d 573, 578 (Fla. 1997) ("Our specific adoption of that test after the enactment of the evidence code manifests our intent to use the Frye test as the proper standard for admitting novel scientific evidence in Florida, even though the Frye test is not set forth in the evidence code."); Flanagan v. State, 625 So. 2d 827, 829 n.2 (Fla. 1993) ("We are mindful that the United States Supreme Court recently construed Rule 702 of the Federal Rules of Evidence as superseding the Frye test. However, Florida continues to adhere to the Frye test for admissibility of scientific opinions.").
41. 823 So. 2d 104 (Fla. 2002).
42. Id. at 109.
scientific principles and methodologies upon which an expert relies in rendering his or her opinion” and not on the general acceptance of that expert’s conclusion.43

A. The Admissibility of Medical Causation Expert Testimony

A district split between the Second and Fifth District Courts of Appeal, involving the applicability of Frye as to the admissibility of expert medial causation opinion testimony set the stage for the controversial Supreme Court of Florida’s decision in Marsh.44 The Second District was the first of the districts to address this issue in State Farm Mutual Automobile Insurance Co. v. Johnson.45 In this case, the issue was whether the expert’s testimony stating that trauma, experienced from plaintiff’s car accident, caused plaintiff’s fibromyalgia was admissible under Frye when the scientific community had not reached a generally accepted understanding of what causes fibromyalgia.46 The parties agreed that there is an established association between trauma and fibromyalgia but that the cause of fibromyalgia is still “unknown to medical science.”47 The court found that experts based their opinions upon their clinical experience, the plaintiff’s medical history, and the recognized “association between trauma and the onset of fibromyalgia.”48 The court based its ruling of admissibility of the expert’s testimony on the accepted theory of “differential diagnosis”, rather than ruling on the lack of causation evidence between trauma and fibromyalgia.49 The Second District held that because the experts for the plaintiff based their opinions of causation on the theory of differential diagnosis, which is not a “new or novel scientific test or procedure,” that it was therefore properly admitted.50

43. Id. at 110; see Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995) (“In utilizing the Frye test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand.” (emphasis added)).
44. See Bittick, supra note 9 at 11-12.
45. 880 So. 2d 721 (Fla. 2d Dist. Ct. App. 2004).
46. Id. at 722.
47. Id.
48. Id. at 723.
49. See id. (citing U.S. Sugar Corp. v. Henson, 787 So. 2d 3, 19 (Fla. 1st Dist. Ct. App. 2000), aff’d, 823 So. 2d 104 (Fla. 2002)).

Differential diagnosis is the standard scientific technique of identifying the cause of a medical problem by eliminating likely causes until the most probable one is isolated. This technique has been found to have widespread acceptance in the medical community, to have been subjected to peer review, and to not frequently lead to incorrect results.

Henson, 787 So. 2d at 19.
50. Johnson, 880 So. 2d at 723.
Just over a year after the Second District’s decision, the Fifth District ruled on a very similar issue in *Marsh v. Valyou*, but did not adhere to the reasoning of the Second District court and certified a district conflict. The issue in *Marsh* was very similar to that in *Johnson* in that it involved the admissibility of expert testimony relating to whether trauma could cause fibromyalgia. The court noted that the Supreme Court of Florida has distinguished between medical causation testimony that is derived from “studies and tests,” which is subject to *Frye*, from that of “pure opinion testimony,” which is based upon the “expert’s personal experience and training,” which is not subject to *Frye*.

The court explained that the overwhelming majority of the courts that have considered this issue under *Frye* or *Daubert* have held that the “causative evidence linking trauma to fibromyalgia is inadmissible because of the plaintiff’s inability to demonstrate a general acceptance in the relevant scientific community of a causative link between the two.” The expert, in the court’s opinion, did not show sufficient evidence that medical science has accepted the proposition that trauma causes fibromyalgia. Without this showing, the expert’s testimony cannot be admissible as “pure opinion” and is inapplicable under *Frye* because in order for the expert to come to a conclusion it requires the reliance on an underlying assumption, “that trauma can cause fibromyalgia,” which has yet to be generally accepted in the scientific community.

1. The Supreme Court Settles the District Split

The Supreme Court of Florida accepted review of the Fifth District’s decision in *Marsh* which certified conflict with the Second District. The court, in a split decision, approved the Second District’s decision in *Johnson*, and quashed the Fifth District’s decision in *Marsh*.

The court found that the causation testimony as to the trauma and fibromyalgia was not new or novel because the testimony and opinions proffered were based on the expert’s diagnosis, reviewing the patient’s medical history, physical examinations, the expert’s personal experience and pub-

51. 917 So. 2d 313 (Fla. 5th Dist. Ct. App. 2005), rev’d, 977 So. 2d 543 (Fla. 2007).
52. See id. at 323, 329.
53. See id. at 314.
54. Id. at 320.
55. Id. at 323.
57. Id. at 327 (emphasis added).
58. Marsh v. Valyou, 977 So. 2d 543, 544 (Fla. 2007).
59. Id. at 545.
lished findings, as well as, engaging in a differential diagnosis evaluation.\(^\text{60}\) The court relied on numerous cases that stand for the position that medical causation testimony is not subject to Frye ""when it is based solely on the expert’s training and experience.""\(^\text{61}\) The court further analyzed that the underlying methodology for the expert’s opinion testimony was based on differential diagnosis, which has been repeatedly held to be a "“generally accepted method for determining specific causation.""\(^\text{62}\) Because differential diagnosis is not a "“new or novel” method, the opinion that is reached by the expert based upon this methodology was found not to be subject to Frye.\(^\text{63}\)

a.  \textit{Did the Majority Get It Right for the Wrong Reasons?}

Justice Anstead concurred specially agreeing that the expert testimony at issue is admissible; however, he did not join the majority opinion because of his belief that the adoption of Florida’s Evidence Code, similar to the Federal Evidence Code, supersedes the Frye standard.\(^\text{64}\) Justice Anstead, relying on the United States Supreme Court’s decision in \textit{Daubert} and previous Florida case law,\(^\text{65}\) expressed issue with the majority’s adherence to Frye when the court has failed to explain "“how Frye has survived the adoption of the” Florida Evidence Code, which similar to the federal rule, does not mention Frye or the “general acceptance” standard.\(^\text{66}\) He further reasoned that the legislative intent for adopting such a rule of evidence was to have courts "“apply a straightforward relevancy test to expert evidence” and the Frye standard does not comply with such intention of the rule.\(^\text{67}\) Some of the lower courts in Florida have confronted the issue that they believe exists with Florida’s continued adherence to the Frye standard and have reached the same conclusion as the United States Supreme Court in \textit{Daubert} because the

\begin{itemize}
\item \textit{Id.} at 548.
\item \textit{Id.} (quoting Cordoba v. Rodriguez, 939 So. 2d 319, 322 (Fla. 4th Dist. Ct. App. 2006); citing Gelsthorpe v. Weinstein, 897 So. 2d 504, 510 (Fla. 2d Dist. Ct. App. 2005); Fla. Power & Light Co. v. Tursi, 729 So. 2d 995, 996 (Fla. 4th Dist. Ct. App. 1999)).
\item \textit{Id.} at 549.
\item \textit{See Marsh, 977 So. 2d at 548–49.}
\item \textit{Id.} at 551 (Anstead, J., concurring); FLA. STAT. § 90.702 (2009).
\item \textit{Id.} at 551 (Anstead, J., concurring); FLA. STAT. § 90.702 (2009).
\item \textit{Id.} at 551 (Anstead, J., concurring).
\item \textit{Marsh, 977 So. 2d at 551 (Anstead, J., concurring).}
\item \textit{Id.}
\end{itemize}
Federal Rules of Evidence did not incorporate a general acceptance requirement. 68

Justice Anstead pointed out that the identical medical causation issue that was presented in *Marsh* has been resolved in other jurisdictions following *Daubert*, and such courts have found that, although the causative medical evidence may not be generally accepted in the relevant scientific community, such testimony meets the more liberal standard and is found to be reliable and relevant, therefore, making such testimony admissible in a court of law under that standard. 69 The concurrence suggests that perhaps the Supreme Court of Florida should find that the Florida Evidence Code has superseded *Frye* and adopt the *Daubert* standard, which will enable the trial judge to act as “gatekeeper” and analyze both the reliability and the relevance of the expert testimony proffered. 70 Such an approach would be in line with the accepted approach of the federal courts and many other jurisdictions, as well as adhere to the intent of the Florida Legislature. 71

Justice Anstead concludes by stating that he would have held that *Frye* was superseded by the Florida Rules of Evidence and that the expert testimony on medical causation would be found to be admissible after determining its relevance and reliability as required under the Code. 72

b. Does the Dissent Have It Right?

Justice Cantero, in his dissenting opinion, did not agree with the majority’s finding that the *Frye* standard would not apply to the medical causation testimony, and as such, he approved of the Fifth District Court of Appeal’s reasoning in *Marsh*. 73 The *Frye* standard requires that the “basic underlying principles of scientific evidence have been sufficiently tested and accepted by the relevant scientific community.” 74 If there is not a requirement that the underlying basis for the expert’s opinion be generally accepted, then any evidence offered would be admissible simply by stating that it is the “pure opinion” of the expert, rendering *Frye* essentially useless. 75

“Pure opinion” testimony is only that which is “based solely on [the expert’s] experience and training” and it does not require reliance on some new

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68. *Id.* at 554 (citing Brown v. State, 426 So. 2d 76, 86-88 (Fla. 1st Dist. Ct. App. 1983)).

69. *Id.* at 558 (citing Reichert v. Phipps, 84 P.3d 353, 364 (Wyo. 2004)).

70. See *id.* at 559 (Cantero, J., dissenting).

71. See *Marsh*, 977 So. 2d at 546.

72. *Id.* at 559 (Anstead, J., concurring).

73. *Id.* (Cantero, J., dissenting).

74. *Id.* at 560 (quoting Brim v. State, 695 So. 2d 268, 272 (Fla. 1997)).

75. See *id.*
or novel “principle, test, or methodology.” 76 If the deduction upon which the expert’s opinion is based requires reliance on anything but his own personal experience, observations, or research, then his opinion is not “pure testimony” and the methodology upon which the opinion is formed is subject to Frye. 77

The expert opinion offered in Marsh is said by the plaintiff to be based upon the expert’s own experience and training, however, Justice Cantero points out that the expert must have some basis for forming the opinion that trauma is a plausible cause of fibromyalgia, and it is this scientific principle of causation that must be subject to the general acceptance standard. 78 Justice Cantero cites the reasoning of the Fifth District Court of Appeal in order to further articulate his position regarding the requirements of “pure opinion” by stating that:

[I]t is 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.’ 79

To permit such evidence into a court of law would allow an expert to testify as to the specific causation of the plaintiff’s injury without ever requiring that opinion to be based upon the scientific community’s general acceptance of general causation, simply by saying that it is the expert’s “pure opinion.” 80 It would be impermissible to allow the expert to give his opinion that trauma caused Marsh’s fibromyalgia in this instance without first demonstrating that trauma can cause fibromyalgia by showing general acceptance of causation within the relevant scientific community. 81

The majority opinion found that the expert’s testimony was also admissible because it was based upon “differential diagnosis,” which is a “generally accepted methodology for determining specific causation.” 82 However, the

76. Marsh, 977 So. 2d at 560 (Cantero, J., dissenting).
77. See Bittick, supra note 9, at 13.
78. Marsh, 977 So. 2d at 561 (Cantero, J., dissenting). "This theory of general causation does not become admissible simply because it is the opinion of some experts that trauma caused Marsh’s fibromyalgia." Id. at 562.
79. Id. at 562 (alteration in original) (quoting Marsh v. Valyou, 917 So. 2d 313, 327 (Fla. 5th Dist. Ct. App. 2005), rev’d, 977 So. 2d 543 (Fla. 2007)).
80. Id. at 563 (“Permitting an expert to testify that X caused Y in a specific case without requiring the general acceptance of the theory that X can ever cause Y expands the ‘pure opinion’ exception to the point where it swallows the rule.”).
81. See id. at 562–63.
82. Marsh, 977 So. 2d at 564 (Cantero, J., dissenting).
dissent takes issue with this line of reasoning finding that the use of differential diagnosis alone is not sufficient to get around the Frye standard for admissibility because “[d]ifferential diagnosis is not a wild card that can be used to introduce novel scientific theories into the courtroom.”

Before an expert can begin a differential diagnosis determination, which is essentially the process of elimination, the expert must first determine what the scientific general causes of the plaintiff’s condition are before they can be scientifically included or excluded as the specific cause of a certain condition. This means that an expert cannot find that something was the cause of the plaintiff’s condition in a particular instance without first demonstrating that it could be the cause of that condition.

The majority “obscures the fact that differential diagnosis assumes general causation . . . [and] give[s] the impression . . . that any differential diagnosis will always be admissible as ‘pure opinion’ that is not subject to Frye.” If this were the case, there would be no end as to what an expert could claim has been established though differential diagnosis if courts permit testimony on the specific cause of a condition without first demonstrating that the general causation of such condition is generally accepted by the relevant scientific community.

Since the expert witness in Marsh was unable to show general acceptance in the scientific community that trauma can be a cause of fibromyalgia, Justice Cantero believes that the expert opinion testimony that trauma is the

83. Id. at 564–65.
84. See id.; Bittick, supra note 9, at 14.
   [D]ifferential diagnosis methodology assumes the answer to that general causation question,
   and proceeds to deduce from that underlying assumption—together with other evidence
   gleaned from a clinical examination, the patient’s medical history, and any relevant tests—a
   conclusion regarding whether the exposure or event in fact caused the illness in a particular
   case. From this viewpoint, the general causation principle is the “thing from which the deduc-
   tion is made,” and therefore, in the words of Frye, it “must be sufficiently established to have
   gained general acceptance in the particular field in which it belongs.”

85. Marsh, 977 So. 2d at 565 (Cantero, J., dissenting).
86. Bittick, supra note 9, at 14.
87. See Marsh, 977 So. 2d at 565 (Cantero, J., dissenting).

To illustrate [the absurd results that could result] with an extreme example: a patient suffering
from depression sees a doctor because her arm hurts. She does not know why her arm hurts.
The doctor diagnoses a broken arm. The patient cannot tell the doctor how she broke her arm.
The doctor may, through performing tests and interviewing the patient, conclude that it could
not have been a car accident (the patient was not involved in a car accident) and it could not
have been playing sports (the patient does not play sports), but the doctor cannot then conclude
that it must have been depression that caused the broken arm—unless, of course, the doctor
can show that the theory that depression can cause a broken arm is generally accepted in the
scientific community.

Id.
specific cause of fibromyalgia in this case is not admissible under the standard set forth under *Frye*.88

IV. A COMPARATIVE ANALYSIS: IS FLORIDA’S APPROACH “GENERALLY ACCEPTED?”

In light of the strong split of opinion as to the admissibility of medical causation testimony in the Florida courts,89 it is imperative to examine the views and methods that have been applied in other jurisdictions that have adopted one of the predominate common law tests, either *Frye* or *Daubert*, in order to provide guidance as to what has become “generally accepted” in relation to the admissibility of medical causation testimony.

A. The Approach of the “Frye” Followers

Many other jurisdictions have considered the issue as to the admissibility of medical causation testimony under *Frye* and have found that, unless the underlying basis for the opinion was generally accepted, such testimony would not be admissible.90 The standard set forth in *Frye* explicitly states that “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.”91 As *Frye* is commonly applied by courts, if the “thing from which the [expert’s] deduction is made” is based solely upon the expert’s training and experience, and only requires inductive reasoning to form the opinion, then the testimony is considered “pure opinion” and is not subject to *Frye*.92 However, if the expert is relying on deductive reasoning to form his conclusion, and it is based upon new or novel methods or theories, then the expert’s opinion is subject to *Frye* and is only admissible if the methods or theories are generally accepted in the relevant scientific community.93

If the theory or method upon which the expert is basing his or her opinion is in controversy or dispute within the scientific community, it shows

88. See id. at 565–66.
92. Id.; see Luyster, supra note 14, at 29–30.
93. Luyster, supra note 14, at 29–30; see also Kuhn v. Sandoz Pharm. Corp., 14 P.3d 1170, 1178 (Kan. 2000) (“If a new scientific technique’s validity has not been generally accepted or is only regarded as an experimental technique, then expert testimony based upon the technique should not be admitted.” (citing State v. Canaan, 964 P.2d 681, 691–92 (Kan. 1998))).
that there is a lack of conformity among experts in the field and throws into question the validity of the opinion given by the expert being paid to give his opinion in court.\textsuperscript{94} If the focus of the dispute in the community is over the underlying principles upon which the opinion is based, the testimony would not be admissible under \textit{Frye}; however, if there was only dispute as to the conclusion that was drawn from the accepted underlying principles, the testimony would not be subject to \textit{Frye}.\textsuperscript{95}

In one of the most cited relevant decisions, \textit{Grant v. Boccia},\textsuperscript{96} the court was faced with the identical issue that the Supreme Court of Florida was presented with in \textit{Marsh}, but took a much different approach and came to a completely opposite conclusion.\textsuperscript{97} The decision in \textit{Grant}, which was relied on by Justice Cantero in his dissenting opinion in \textit{Marsh},\textsuperscript{98} cited and agreed with the reasoning of the Florida Fifth District Court of Appeal in \textit{Marsh}, and is in full agreement with that court's determination that medical causation testimony, which is not supported by general approval of the scientific community, is subject to \textit{Frye} and is not admissible.\textsuperscript{99}

In \textit{Grant}, the plaintiff appealed the trial court's finding that the testimony of the plaintiff's expert witness—that trauma experienced as the result of a car accident caused the plaintiff's fibromyalgia—was inadmissible because the expert was unable to demonstrate that the \textit{theory} that trauma causes fibromyalgia is generally accepted.\textsuperscript{100} The appellate court found that there was not an abuse of discretion by the trial court because the evidence which was proffered was not supported by the general community, and it is the type of evidence which requires the expert to testify as to something that is not based

\begin{enumerate}
\item[95.] \textit{See} \textit{Frye}, 293 F. at 1014 (D.C. Cir. 1923); \textit{see also} \textit{Kuhn}, 14 P.3d at 1183 ("[M]edical expert opinion testimony that is controversial in its conclusions can support a jury finding of causation as long as the doctor's conclusory opinion is based upon well-founded methodologies." (alteration in original) (quoting Osburn v. Anchor Labs., Inc., 825 F.2d 908, 915 (5th Cir. 1987))).
\item[96.] 137 P.3d 20 (Wash. Ct. App. 2006).
\item[97.] \textit{See id.}
\item[98.] \textit{Marsh}, 977 So. 2d at 570 (Cantero, J., dissenting).
\item[99.] \textit{Grant}, 137 P.3d at 24–25.
\item[100.] \textit{Id.} at 21.
\end{enumerate}

Given the clear disagreement in the relevant scientific community as to the cause of fibromyalgia, which conflict has also been recognized in other jurisdictions across the country, the trial court properly concluded [that the [plaintiff's] proffered expert testimony was subject to the \textit{Frye} test and was inadmissible. Until medical science determines with sufficient reliability and acceptance that a causal relationship exists ... such evidence is inadmissible under the \textit{Frye} test . . . .

\textit{Id.} at 25.
solely upon his experience or training and is clearly at odds with the standard under *Frye*.

Courts that continue to adhere to *Frye* and have not adopted *Daubert*, impose a heavy burden on the party attempting to admit the expert testimony into evidence and require the evidence to be more than reliable because under this standard “it is not enough that a qualified expert, or even several experts, testify that a particular scientific technique is valid;” instead the party must prove that the technique is “generally accepted by the relevant scientific community.”

Because *Frye* is considered the more stringent test, and less liberal than *Daubert*, courts that adhere to *Frye* do not find testimony which does not strictly adhere to the “general acceptance” standard to be admissible in a court of law. To give such deference to the expert witness would defeat the very purpose of *Frye* by allowing unverified and unreliable evidence into the courtroom and would essentially turn the courtroom into a laboratory in which “junk” or “pseudo” science would be admissible. Because science and evidence as to scientific tests or methods tend to be viewed by society—and potentially jurors—as the truth, or more credible than non-scientific evidence, such evidence could be given undue weight by a jury because of this preconceived notion regardless of its acceptance in the relevant scientific community.

“*Frye* was deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles. . . . Several reasons founded in logic and common sense support a posture of judicial caution in this area. Lay jurors tend to give considerable weight to ‘scientific’ evidence when presented by ‘experts’ with impressive credentials.”

103. *Grant*, 137 P.3d at 24 (Under *Frye*, the existence of “acceptance in the relevant community as to the cause of fibromyalgia . . . is necessary for admissibility of expert opinion testimony that trauma following a car accident caused [the plaintiff’s] fibromyalgia.”).
104. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *Grant*, 137 P.3d at 22 (reasoning that the “relevant inquiry is the general acceptance by scientists, not by the courts”).
105. *See Lofgren*, 1998 WL 299925, at *5; *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999) (finding that a jury is more likely than a judge to become “awe-struck by the expert’s mystique”).
The predominating trend in jurisdictions that adhere to Frye—and Daubert alike—is a refusal to admit into evidence expert testimony in which the underlying basis for the opinion was not accepted and is unsupported by the relevant scientific community.  

The Supreme Court of Florida, unlike most other jurisdictions that follow Frye, found that Frye did not apply to such unsupported medical causation testimony and admitted the expert's testimony into evidence. Such determination appears to be inconsistent with the requirement of general acceptance in the relevant scientific community, which is explicitly stated as the requirement by the court in Frye. The very distinction between the Frye standard and Daubert is that Frye is more stringent and requires general acceptance of the experts' evidence before it can become admissible in court. Although the majority opinion in Marsh explicitly states their continued adherence to Frye, the substance of its decision, in allowing the unsupported and unverified expert testimony into court, completely contradicts the very purpose of Frye.  

B. The Approach of the “Daubert” Followers  

The majority of jurisdictions, which have considered the issue of the admissibility of medical causation testimony, have resolved the question under the Daubert analysis. The predominant amount of the opinions applying the Daubert standard have found such medical causation testimony, which is based on a theory that has not yet been generally accepted, to be inadmissible. However, there are a few decisions in which the courts found the testimony to be admissible when applying this more liberal test and analyzing the reliability and relevancy of such testimony, rather than analyzing the general acceptance of the experts’ evidence.  

Although general acceptance is not a required predicate under the Daubert standard, general acceptance by the relevant scientific community of a proposition upon which the expert’s opinion is based is one factor a court
may take into consideration when determining the reliability of such expert testimony. Most courts, traveling under the Daubert standard, found that in order for testimony to be considered admissible, the opinion that is drawn by the expert must be based on a scientific predicate for which there has been established acceptance for such testimony to be considered reliable. In other words, there must be scientific support or acceptance in the relevant community for the opinions proffered by the experts to be considered reliable, and therefore, admissible in a court of law.

In Black v. Food Lion, one of the most heavily relied upon federal decisions pertaining to the issues of the admissibility of medical causation testimony under Daubert, the court found that unsupported expert testimony is not reliable, and therefore, not admissible. This case involved a slip and fall inside a Food Lion grocery store, from which that plaintiff claims caused the onset of her fibromyalgia. The expert witness produced by the plaintiff was also unable to show that the theory that trauma could cause fibromyalgia had been generally accepted within the relevant scientific community. The court further expressed that the expert’s opinion that the trauma from plaintiff’s fall caused the onset of fibromyalgia failed all of the non-exclusive factors to be considered under Daubert because the theory has not been verified by testing nor subject to peer review—it had failed to gain general acceptance within the relevant scientific community, and there was no potential rate of error from testing. The court reasoned that:

If medical science does not know the cause [of the medical condition], then [the medical expert’s] “theory” of causation, to the extent it is a theory, is isolated and unsubstantiated. Even [the expert has] recognized the limits of her opinion. . . . On its own terms, [the expert’s] opinion includes conjecture, not deduction from scientifically-validated information. It also follows from the scien-

117. See, e.g., Black v. Food Lion, Inc., 171 F.3d 308, 314 (5th Cir. 1999).
118. See id.
119. 171 F.3d 308 (5th Cir. 1999).
120. Id. at 314; see Marsh v. Valyou, 917 So. 2d 313, 324 (Fla. 5th Dist. Ct. App. 2005), rev’d, 977 So. 2d 543 (Fla. 2007).
121. See Black, 171 F.3d at 309.
122. Id. at 312.
123. Id. at 313; Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593 (1993) (“Many factors will bear on the [trial judge’s] inquiry, and we do not presume to set out a definitive checklist or test.”).
Because the testimony of causation was clearly unsupported by specific methodology and lacked common acceptance in the relevant scientific community, the evidence could not be deemed reliable under *Daubert*, and therefore, to find such evidence admissible would be an abuse of the trial court’s discretion. It is important to note that a majority of the courts applying the *Daubert* standard have reached a similar conclusion as to inadmissibility, which is in line with the reasoning of the court in *Black*.

For courts adhering to the *Daubert* standard, it is important for the trial judge, acting as “gatekeeper,” “to keep unreliable and irrelevant information from the jury because of its inability to assist in factual determinations, its potential to create confusion, and its lack of probative value.” Even under the more liberal standard of *Daubert*, it is still critical for the court to disallow unsupported and unverified science in the courtroom. In order for the trial court to properly “carry out its ‘gatekeeping’ responsibility, the court has discretion both in deciding how to evaluate an expert’s reliability and in determining whether that expert’s testimony is reliable.” An expert witness is different from a lay witness in that the expert’s knowledge and opinion “cannot be based [upon a] subjective belief or [an] unsupported speculation.” The trial court’s “objective is ‘to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'”

124. *Black*, 171 F.3d at 313.
125. *Id.* at 314.
126. *Id.* at 314.
127. *Id.* at 314.
128. *Id.* at 314.
129. *See* *Marsh v. Valyou*, 977 So. 2d 543, 571 (Fla. 2007) (Cantero, J., dissenting).
A few of the courts applying *Daubert* have taken a different approach from the majority of like opinions, and have found such unsupported medical causation testimony to be admissible under the rationale that reliability "goes to the weight of [the evidence] rather than to its admissibility," which is a determination for the fact finder not the trial judge. However, the courts which do not find such evidence to be reliable hold that the evidence must meet the "threshold criteria" which is set forth in the Rules of Evidence, and then "[o]nce that threshold of reliability is met, then any remaining issues of credibility remain for the trier of fact." It is "the judge, not the jury, [whom] decides preliminary questions of fact under the rules of evidence . . . . [W]hen evidence is offered as science or on technical matters, the courts must assess its 'validity' [first] by reference[ing] . . . multiple factors, before any substantive testimony is given." Courts that travel under the liberal *Daubert* standard have also held that an expert cannot rely on the accepted theory of "differential diagnosis" in order to testify as to the specific cause of plaintiff's medical condition without first demonstrating the acceptance of general causation. "In the absence of such a foundation for a differential diagnosis analysis, differential diagnosis generally may not serve as a reliable basis for an expert opinion on causation . . . ." However, a valid differential diagnosis test only satisfies the *Daubert* standard if the expert can show the general causation of the medical condition by reliable methods. Scientific evidence is only to be "deemed reliable if the principles and methodology used by an expert are grounded in the methods of science."

133. *Jones*, 2001 WL 1001083, at *5; see also *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311 (11th Cir. 1999) ("The gatekeeper role, however, is not intended to supplant the adversary system or the role of the jury: '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" (alteration in original) (quoting *Daubert*, 509 U.S. at 596)).


136. See *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1252 (11th Cir. 2005). "[A]n expert does not establish the reliability of his techniques or the validity of his conclusions simply by claiming that he performed a differential diagnosis on a patient." *Id.* at 1253; see also *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1058 (9th Cir. 2003) ("[I]t is . . . important to recognize that a fundamental assumption underlying [differential diagnosis] is that the final, suspected "cause" . . . must actually be capable of causing the injury."" (alteration in original) (quoting *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1413 (D. Or. 1996))).

137. *McClain*, 401 F.3d at 1253.

138. See *id*.

139. *Clausen*, 339 F.3d at 1056 (emphasis added) (citing *Daubert*, 509 U.S. at 592-95).
Nevertheless, the Supreme Court of Florida in *Marsh* found that the medical causation evidence was not based on a new or novel methodology because the theory of the differential diagnosis is generally accepted in the scientific community and therefore it was admissible. This rationale is evidently at odds with the approach taken by most courts, even those that are applying the more liberal and flexible standard under *Daubert*.

V. LOOKING AHEAD

The Supreme Court of Florida was "unable to reach agreement on whether and how to apply the *Frye* test," and the majority left many unanswered questions in its opinion. These unanswered questions could pose much confusion for the lower courts in conducting *Frye* hearings in order to determine the admissibility of scientific evidence. This confusion is evident in one of the most recent Florida decisions regarding the admissibility of medical causation testimony, *Andries v. Royal Caribbean Cruises, Ltd.*, in which the Third District Court of Appeal reversed the trial court’s finding that the unsupported evidence was inadmissible because it was based on novel and investigational methods. The appellate court reasoned that:

> The fact that experts may disagree about an opinion or medical diagnosis does not transform an expert’s opinion into a “new or novel principle” in the second category of opinions, nor does that disagreement preclude or limit admissibility. Rather, the resulting "battle of the experts" creates an issue for resolution by the jury . . .

The court found the evidence of causation to be admissible under the approach set forth under *Marsh*, because they reasoned that the disagreement as

141. See id. at 565 (Cantero, J., dissenting).
142. Bittick, supra note 9, at 13.
143. The approach the Florida Supreme Court took in *Marsh* . . . appears to narrow the reach of *Frye* with respect to expert evidence on medical causation, but leaves unanswered a number of questions about how *Frye* applies in that context. It is also unclear how the court’s approach squares with prior case law applying *Frye*, and leaves for further clarification the critical distinctions between *Frye*-testable opinion and “pure opinion,” and between underlying principles or methods and ultimate conclusions.
144. Id. at 14.
145. See id.
146. Id. at 16.
to the underlying basis of the opinion was merely a “duel of competing—and admissible—pure opinions.”

However, an important distinction becomes whether the experts disagree as to a conclusion, which formed from reliance on a generally accepted principal or methodology, or whether there is a disagreement as to the reliability or acceptability of the methodology itself. If there is a disagreement in the relevant scientific community as to the reliability or acceptability of the principal or methodology then that method is evidently not “generally accepted” and therefore cannot be admissible. Alternatively, a disagreement as to an expert’s conclusion which is based upon accepted or reliable principles or methodologies is simply the expert’s opinion and will be admissible as long as it is based on an accepted or reliable principle or methodology. The “battle of the experts” only creates an issue of fact for the jury to resolve when the disagreement concerns conclusions that are reached by different experts who are relying on accepted principles and methodologies. If there is a “battle of the experts” as to the reliability or the acceptability of a principle or methodology it is not a question of fact, but rather a question of admissibility for the judge to resolve.

The opinion in Marsh did not explain “where and how to draw the line between [the] underlying methodology and conclusions in cases involving issues of both general and specific causation.” Nor did the court clarify “how the distinction between general causation and specific causation impacted its Frye analysis.” Without such clarification, it could lead to much confusion among the Florida courts.

A. Acknowledgement of Florida’s Evidence Code

Florida’s Evidence Code is essentially identical to, and was based upon, the Federal Rules of Evidence. However, the Supreme Court of Florida has yet to address how Frye is still applicable in light of the rules of evi-

147. Id. at 265.
149. See id.
150. Id. (“The logical corollary of the Frye test’s focus on the methodology rather than conclusions is that even unpopular conclusions are admissible so long as they are based upon generally accepted methodologies.”).
151. Id.
152. See id.
153. Bittick, supra note 9, at 13–14.
154. Id. at 14.
155. See id.
Many of the Florida district and appellate courts have addressed the inconsistency in the rational of adhering to Frye since that is not the standard set forth under the Florida Evidence Code.

Part of Florida’s Evidence Code requires that evidence be deemed inadmissible “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.” The legislature passed such a statute to ensure that the only evidence that reaches the jury is both relevant and reliable in order to prevent prejudicing the jury with unverified and unreliable evidence. To allow medical causation evidence into the courtroom without confirming that the underlying basis for the opinion is verifiable, is in complete contradiction with the intent of the legislature.

Because the Florida Legislature did not include terminology consistent with the requirements under Frye, such as a “general acceptance” requirement, the continued adherence to Frye by the Florida courts is inconsistent with the intent of the code. It has been suggested that the Supreme Court of Florida should review the Florida Evidence Code and determine whether it has superseded Frye.

157. Id.

While [the Supreme Court of Florida] has continued to apply Frye in determining the admissibility of scientific expert opinion testimony after the adoption of the Florida Rules of Evidence, it has done so without confronting the fact that those rules do not mention Frye or the test set out in Frye. Hence, unlike the United States Supreme Court, [the Supreme Court of Florida has] never explained how Frye has survived the adoption of the rules of evidence.

Id. at 551.

158. See id. at 554.

159. FLA. STAT. § 90.403 (2009).

160. See Bittick, supra note 9, at 9.

161. See id. at 15.

162. Marsh, 977 So. 2d at 554 (Anstead, J., concurring) (“Frye is not consistent with Florida’s code.”).

163. See id. at 551, 554, 556. Justice Anstead certified the following question to be one of great public importance:

HAS THE FRYE STANDARD OF GENERAL ACCEPTANCE WITHIN THE PARTICULAR SCIENTIFIC COMMUNITY, AS A PRECONDITION TO THE ADMISSIBILITY OF NOVEL SCIENTIFIC EVIDENCE, SURVIVED THE ADOPTION OF THE FLORIDA EVIDENCE CODE? AND IF IT HAS NOT, DOES IT NEVERTHELESS REMAIN A FACTOR TO BE CONSIDERED WHEN BALANCING THE PROBATIVE WORTH OF THE PROFFERED EVIDENCE AGAINST COUNTERVAILING FACTORS, AS PROVIDED BY SECTION 90.403, FLORIDA STATUTES?

Id. at 556.
B. Frye or Daubert? That Is the Question

Although the Supreme Court of Florida has explicitly and adamantly held fast to the Frye standard, the decision in Marsh appeared to take a more liberal approach and the court did not require strict adherence to the general acceptance standard as did other courts in jurisdictions that follow Frye.\(^{164}\) It is not clear how the court’s decision aligns with the prior case law that has applied the Frye standard nor has the court provided clarification as to the distinction between pure opinion and opinion which is subject to Frye.\(^{165}\) It appears as if the Supreme Court of Florida in Marsh really applied the liberal standard under Daubert, instead of Frye, when they determined that “[a] lack of studies conclusively demonstrating a causal link between trauma and fibromyalgia . . . calls for further research [and does] not preclude admission of the testimony.”\(^{166}\) The court in Marsh continually referred to and relied on the reliability of the evidence proffered and did not require the general acceptance of the causation theory in the scientific community, which is more in line with the reasoning under Daubert.\(^{167}\)

The question now becomes: Does Florida, in actuality, adhere to the Frye standard after the Supreme Court of Florida’s decision in Marsh?\(^{168}\)

VI. CONCLUSION

The determination of admissibility of expert testimony is a critical issue for judges and trial lawyers alike; it is also one of much debate and confusion among the courts. Because of the critical importance and the lack of certainty that surrounds this topic in the Florida courts, it is imperative that the Supreme Court of Florida adequately address and clarify the standard for courts to apply in determining the admissibility of expert testimony. Being that the Supreme Court of Florida’s decision in Marsh is clearly at odds with the Florida Evidence Code and the majority of other jurisdictions adhering to both Frye and Daubert,\(^{169}\) a clarification in the current law might mean that the Court expressly reject Frye and adopt Daubert as the relevant standard in Florida taking into account the Florida Evidence code, or perhaps re-visit its reasoning in Marsh as to the application of the general acceptance standard to medical causation expert testimony in Florida courts.

164. See id. at 564, 565, 570 (Cantero, J., dissenting).
165. Bittick, supra note 9, at 14.
166. Marsh, 977 So. 2d at 550.
167. See id.
168. See Bittick, supra note 9, at 8.
169. See Marsh, 977 So. 2d at 570 (Cantero, J., dissenting).