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Column

Business Law [a1]
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NAVIGATING FLORIDA'S CHANGING *DAUBERT* TIDE IN BUSINESS CASES

The Florida Supreme Court's opinion in *In re Amendments to the Florida Evidence Code*, No. SC19-107, 2019 WL 2219714, at *2-3 (Fla. May 23, 2019), changed the standard for admissibility of expert testimony in Florida. This article explores the impact of the opinion, the distinction between the former *Frye* standard and *Daubert* standard for admissibility of expert opinion testimony at trial, and the impact upon business litigation, specifically, expert testimony on lost profits.

The Convergence of Expert Testimony and the Florida Evidence Code [1]

Much like the confluence of two bodies of water, Florida's statutes governing expert testimony, F.S. §§90.702 and 90.704, and the Florida Supreme Court's 2019 opinion, *In re Amendments to the Florida Evidence Code*, 2019 WL 2219714, at *2-3 (Fla. May 23, 2019), have blended into the application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for the admission of expert testimony.

Before the legislature's 2013 amendments to the statutes governing expert testimony, admissibility of expert testimony in Florida was governed by § §90.702 and 90.704 of the Florida Evidence Code, [2] with expert-opinion testimony based on new or novel scientific evidence subject to the *Frye* standard. [3] The *Frye* test was utilized "to guarantee the reliability of new or novel scientific evidence." [4] Pure-opinion testimony was left intact. [5] Experts could provide trial opinions based *solely* on their training and experience in a particular field. [6]

The Florida Legislature expressed its intent "to adopt the standards for expert testimony in the courts of this state as provided in *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. v. Carmichael*, 526 U.S. 137 (1999)," and "to prohibit in the courts of this state pure opinion testimony as provided in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007)." [7] The §90.702 amendment states it is an "[a]ct relating to expert testimony ... requiring the courts of this state to interpret and apply the principles of expert testimony in conformity with specified United States Supreme Court decisions" and "subjecting pure opinion testimony to such requirements." [8]

According to the 2013 legislative changes, *Daubert* controlled admissibility of all expert testimony, including pure opinion, but uncertainty still existed about the application of *Daubert* in Florida. [9] This changed in 2017, when the Florida Supreme Court, in *In re Amendments to the Florida Evidence Code*, 210 So. 3d 1231, 1237 (Fla. 2017), "declined to adopt, to the extent they

are procedural, the changes to sections 90.702 and 90.704 of the Evidence Code made by the *Daubert* Amendment." [10] The Florida Supreme Court again reiterated its position on October 15, 2018, in *DeLisle v. Crane Co.*, 258 So. 3d 1219, 1225 (Fla. 2018), when it reaffirmed its decision that Florida follows the *Frye* standard.

The court tacked the other direction in 2019, regarding the application of *Daubert*. On May 23, 2019, the Florida Supreme Court in *In re: Amendments to the Florida Evidence Code*, 2019 WL 2219714, at *2-3 (Fla. May 23, 2019), indicated that, effective upon release of the court's opinion, the court adopted the amendments to §90.702 as procedural rules of evidence, and the amendment to §90.704 to the extent it is procedural, receding from the court's prior decision not to adopt the legislature's *Daubert* amendments to the Evidence Code. [11] The court adopted Ch. 2013-107, §§1 and 2, Laws of Fla. (*Daubert* amendments), to replace the *Frye* standard for admitting certain expert testimony with the *Daubert* standard. [12]

The prevailing version of §90.702 incorporates certain principles found in the *Daubert* test for admissibility of expert testimony, and allows an expert opinion "if: (1) [t]he testimony is based upon sufficient facts or data; (2) [t]he testimony is the product of reliable principles and methods; and (3) [t]he witness has applied the principles and methods reliably to the facts of the case." [13] The counterpart to §90.702, §90.704, which governs the basis for an expert's testimony, now includes the caveat that "[f]acts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." [14]

Frye vs. *Daubert* [15]

How do the *Frye* and *Daubert* standards for expert-opinion testimony in Florida differ? Significantly. "By definition, the *Frye* standard only applies when an expert attempts to render an opinion that is based upon ***27** new or novel scientific techniques." [16] When an opponent raises a challenge to an expert's opinion testimony under *Frye*, the trial court must determine whether "the basic underlying principles of scientific evidence have been sufficiently tested and accepted by the relevant scientific community." [17] Under a *Frye* analysis, "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 at hand." [18] "The trial judge has the sole responsibility to determine this question." [19]

Unlike a *Frye* analysis, which applies only to expert-opinion testimony based on new or novel scientific evidence, *Daubert* applies to *all* expert testimony. [20] The goal of the *Daubert* standard is to ensure expert testimony is relevant and reliable. [21] The court in *Daubert* set forth a nonexclusive list of factors that may be helpful to a trial court in assessing "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." [22] Factors a court considers in a *Daubert* preliminary assessment include 1) whether the theory or technique can (and has been) tested; 2) whether the theory or technique has been subjected to peer review and publication; [23] 3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and 4) the degree of acceptance within the particular relevant community. [24] The court in *Kumho*, noted a *Daubert* inquiry "can help to evaluate the reliability even of experience-based testimony," such as how often the expert's "experienced-based methodology has produced erroneous results," or whether the expert's "preparation is of a kind that others in the field would recognize as acceptable." [25]

The court emphasized the objective of the *Daubert* requirement is to ensure an expert, "whether basing testimony on 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."[26] With this objective in mind, "a trial court must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[27]

Admissibility of Expert Testimony on Last Profits under *Daubert*

At present, all expert testimony, including pure opinion, is subject to the *Daubert* standard.[28] Florida's shift to *Daubert* will likely result in an increase in challenges to the admissibility of expert testimony, including in business litigation. Because lost profits are a critical component of damages in business litigation, such as contract disputes, tortious interference, patent infringement, and antitrust claims, it is important to understand how the standards for admitting expert lost profits evidence may change under *Daubert*. This is particularly true given lost profits are a generally disfavored form of relief under Florida law, the ***28** proof of which requires a reasonable degree of certainty.[29] At least one court has recognized the "reliability of an expert's methodology should be carefully scrutinized when an opinion concerns future lost profits, because under Florida law:

[t]he general rule is that anticipated profits of a commercial business are too speculative and dependent upon changing circumstance to warrant a judgment for their loss but a plaintiff may obtain this generally disfavored form of relief by presenting sufficient evidence to determine damages for lost profits with a reasonable degree of certainty, rather than by means of speculation and conjecture.[30]

Reliable Methodologies for Proving Lost Profits

Daubert challenges to the reliability of an expert's methodology used in determining lost profits tend to fail when the expert has used the "before-and-after" theory, which compares a financial parameter before and after the damages period,[31] and/or the "yardstick" test, which compares the profits of businesses that are "closely comparable" to that of the plaintiff company.[32] Because these are the two generally accepted methods of proving lost profits under Florida law, courts have concluded these methodologies are reliable, and thus, have admitted expert testimony relying on these methodologies.[33]

For example, in *Britt Green Trucking, Inc. v. FedEx Nat'l LTL, Inc.*, No. 8:09-cv-445-T-33TBM, 2014 WL 2861485, at *7 (M.D. Fla. June 24, 2014), a contract dispute, the court concluded the economic expert's methodology satisfied the reliability test because the method used by the expert, the before-and-after method, is a generally recognized method of proving lost profits under Florida law.[34] In addition, the court concluded that defendant's objections to the dates the expert used in reaching her conclusion (*i.e.*, 30 days prior to the notice period at issue rather than the entire calendar year) went to the weight of the expert's testimony and not to its admissibility.[35] As recognized by that court, once an expert utilizes an acceptable method of calculation, criticisms of the expert's methodology (such as criticism with the dates used in reaching the expert's opinion) go to the *weight* of the expert's testimony, and not its admissibility.[36] Accordingly, the court concluded the expert's proffered opinions satisfied the requirements of Federal Rule of Evidence 702 and *Daubert*.[37]

Similarly, in *B-K Cypress Log Homes Inc. v. Auto-Owners Ins. Co.*, No. 1:09-cv-211GRJ, 2012 WL 1933766, at *3 (N.D. Fla. May 25, 2012) (magistrate opinion), a bad-faith insurance case, the court recognized "there can be little dispute" that the before-and-after theory and the yardstick test are the two generally accepted methods in the economic community of proving lost profits, and concluded that the expert's use of both of these methods was reliable. With respect to the expert's before-and-after analysis, the court concluded defendant's criticism of the *application* of the methodology (that the expert failed to control for variables in market conditions and instead assumed all loss in profitability was attributable to the defendant's bad faith) was appropriately raised by way of cross-examination of the expert witness and plaintiff's other witnesses regarding the assumptions underlying the damages calculation.[38] As to the expert's yardstick analysis, the court concluded the reliability of the underlying

survey data, provided to the expert in performing his analysis, was open to question as to whether the surveyed companies were sufficiently comparable to the plaintiff to provide an objective measure of damages. [39]

Criticism of the Expert's Underlying Assumptions Do Not Justify Exclusion

It is not always easy to draw a line between "the quality of an expert's data and conclusions" and "the reliability of the methodology the expert employed." [40] "[C]onclusions and methodology are not entirely distinct from one another." [41] When an expert performs a reasoned analysis under one or both of the before-and-after and yardstick methods to determine lost profits, with a "rational connection between the data and opinion," courts have concluded the expert's opinion is admissible, and any attack on underlying assumptions is a matter for cross-examination. [42] For example, courts conclude attacks on the expert's assumptions or data underlying the methodology (*e.g.*, objections to the chosen date range underlying the damages calculation and to the expert's failure to control for certain variables as affecting loss of profitability) "implicate not the reliability of the methodology, but the conclusions generated" and survive a *Daubert* challenge. [43]

Unacceptable Analytical Gaps Warrant Exclusion

Expert opinions are excluded when the court concludes there is "simply too great an analytical gap between the data and the opinion proffered." [44] Examples of unacceptable analytical gaps that warrant exclusion of the expert's testimony include the expert's complete failure to evaluate the economic impact of the defendant's wrongful conduct, reliance on variables that never come to pass, and mere adoption of the parties' own statements, without any calculations by the expert.

For example, in *Gumwood HP Shopping Partners L.P.*, 221 F. Supp. 3d 1033, 1039 (N.D. Ind. 2016), an antitrust case, the expert failed to evaluate the economic impact of *any* particular antitrust violation, making it difficult to determine he reliably controlled for any other factors to isolate the effect of that particular violation. [45] Because the expert simply "made the general assumption that 'the anticompetitive conduct and effects occurred,'" the court concluded his analysis was the type you might expect for a "back-of-the-envelope, best-case-scenario estimate" and excluded his damages opinion. [46]

Sun Ins. Mktg. Network, Inc. v. AIG Life Ins. Co., 254 F. Supp. 2d 1239, 1247 (M.D. Fla. 2003), a contract dispute, involves another example of assumptions that were "mere best case scenario predictions" that were not reliably certain. In *Sun Ins. Mktg. Network*, the plaintiff's expert based his opinion on the plaintiff's estimated sales figure over a 10-year period for sales of an insurance product and 30 years for renewals without regard to the defendant's right to terminate the sales agreement and ignoring that the insurance product had been withdrawn from the market less than six months after the start ***29** date of the expert's analysis. [47] In a case that provides a good example of "the unreliability inherent in basing an opinion on a marketing estimate," which was "for a new product [the defendant] did not even own at the time," and based on assumptions that never came to fruition, the court concluded the expert's opinion was not grounded upon appropriate business valuation methodology or facts sufficient to support it. [48]

Courts have also excluded expert testimony as an unreliable methodology to project future lost profits when the expert merely adopts the unsupported beliefs of his client. [49] In *MasForce Europe*, BVBA, 2013 WL 12156469 at *6 (M.D. Fla. Dec. 4, 2013), the expert failed to make any calculations and instead simply parroted its client's business plan, without alteration, and accepted its client's own statements regarding what it would have earned but for the accident at issue involving plaintiff's boat. [50] The court concluded that "[a]dopting the unsupported beliefs of a business owner who has a financial motive to inflate recoverable damages is not a reliable methodology to project future lost profits" and excluded the expert's opinions. [51]

Conclusion

Only time will tell how the shift to *Daubert* will play out in Florida courts. Until then, a review of recent cases applying *Daubert* in other jurisdictions reveals the safest harbors in the stormy seas of business litigation, at least to prove lost profits, are a reasoned analysis under the before-and-after theory and/or the yardstick test.

Footnotes

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1 The Florida Evidence Code is set out in FLA. STAT. Ch. 90, TIT. VII. *See* FLA. STAT. §90.101 (2018).

2 Prior to the legislature's 2013 amendment (Ch. 2013-107, §1, LAWS OF FLA.), §90.702 of the Florida Evidence Code read: "*Testimony by experts*.--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." FLA. STAT. §90.702 (2012). Before the 2013 amendment (Ch. 2013-107, §2, LAWS OF FLA.), §90.704 read: "*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." FLA. STAT. §90.704 (2012).

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

4 *Brim v. State*, 695, So. 2d 268, 271 (Fla. 1997).

5 *See* *Gelsthorpe v. Weinstein*, 897 So. 2d 504, 510 (Fla. 2d DCA 2005) (pure-opinion testimony not subject to *Frye* analysis).

6 *Id.*

7 Ch. 2013-107, LAWS OF FLA. The Florida Senate in its staff analysis to CS/SB 1412 indicated: "As a result of the amendments, the effect of s. 90.704, F.S., is conformed to the effect of Federal Rule of Evidence 703." S.B. CS/SB 1412, 2013 Leg. Reg. Sess. (Fla. 2013).

8 Ch. 2013-107, LAWS OF FLA.

9 *See, e.g., Medina v. State*, 260 So. 3d 419, 422 n.4 (Fla. 3d DCA 2018) (no error in excluding expert testimony under *Daubert* where both sides requested court apply *Daubert*; noting at time of trial question remained whether courts were to follow *Frye* or *Daubert* standard, adopted by legislature in 2013); *D.R. Horton, Inc.-Jacksonville v. Heron's Landing Condo. Ass'n of Jacksonville, Inc.*, 266 So. 3d 1201, 1206-08 (Fla. 1st DCA 2018) (no error in admission of expert testimony under *Daubert* after 2013 amendment to §90.702 and considering *DeLisle*; issued when case was on appeal, on grounds no *Frye* analysis was necessary because engineer's opinions not based on new or novel scientific methods or techniques).

10 Declining to adopt "[Ch.] 2013-107, [§§]1 and 2, Laws of Florida (Daubert amendment), which amended sections 90.702 (testimony by experts) and 90.704 (basis of opinion testimony by experts), Florida Statutes (2012), of the Evidence Code to replace the *Frye* standard for admitting expert-opinion evidence with the *Daubert* standard," the court followed the committee's recommendation and noted its decision was "due to the constitutional concerns raised, which must be left for a proper case or controversy." *In re Amendments to the Florida Evidence Code,* 210 So. 3d at 1236-37, 1239.

11 The court revisited the outcome of the recommendations on the *Daubert* amendments, indicated it was not readdressing the correctness of its ruling in *DeLisle,* 258 So. 3d 1219 (Fla. 2018), and did not decide the constitutional or other substantive concerns raised about the amendments-- instead leaving those issues for a proper case or controversy. *In re: Amendments to the Florida Evidence Code*, 2019 WL 2219714 at *1-3.

12 *Id.* at *1.

13 FLA. STAT. §90.702 (2018).

14 FLA. STAT. §90.704 (2018).

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16 *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109 (Fla. 2002) (citing *Ramirez v. State*, 651 So. 2d 1164, 1166-67 (Fla. 1995)).

17 *Brim*, 695 So. 2d at 272.

18 *Ramirez*, 651 So. 2d at 1168. *See also* *Frye*, 293 F. at 1014 ("... 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").

19 *Ramirez*, 651 So. 2d at 1168.

20 The U.S. Supreme Court in *Daubert* determined the standard for admitting expert scientific evidence in a federal trial. *Daubert*, 509 U.S. at 582. The Court noted nothing in the text of Rule 702 "establishes 'general acceptance' as an absolute prerequisite to admissibility." *Id.* at 588. The Supreme Court has held the *Daubert* standard applies not only to scientific testimony but to all expert testimony. *See* *Kumho Tire Co.,* 526 U.S. at 147.

21 *See* *Daubert*, 509 U.S. at 597 ("[T]he Rules of Evidence-- especially Rule 702--do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."). In addition to determining relevance and reliability of expert testimony, under FLORIDA RULE OF EVIDENCE 90.702, [and Federal Rule 702], the trial court also determines whether a witness is qualified to render an expert opinion and whether the proffered testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue. *See* FLA. STAT. §90.702 (2018); *cf.* FED. R. EVID. 702.

22 *Daubert*, 509 U.S. at 592-93; *Kumho Tire Co.*, 526 U.S. at 151.

23 The Court noted publication in a peer-reviewed journal is relevant but not dispositive. *Daubert*, 509 U.S. at 594.

24 *Id.* at 593-95.

25 *Kumho Tire Co.,* 526 U.S. at 151.

26 *Id.* at 152.

27 *Id.*

28 *See* FLA. STAT. §90.702 (2018); FLA. STAT. §90.704 (2018); *In re Amendments to the Florida Evidence Code*, 2019 WL 2219714 at *2-3.

29 *See* *Alphamed Pharm. Corp. v. Arriva Pharm., Inc.*, 432 F. Supp. 2d 1319, 1339 (S.D. Fla. 2006).

30 *See, e.g., MasForce Europe, BVBA v. MEC3 Co.*, No. 8:11-CV-1814-T-24AEP, 2013 WL 12156469, at *5 (M.D. Fla. Dec. 4, 2013) (excluding expert's opinions regarding plaintiff's future lost profits as inadmissible) (citing *Alphamed Pharm. Corp.*, 432 F. Supp. 2d at 1339). *Compare Florida Transp. Serv., Inc. v. Miami-Dade Cnty.*, No. 05-22637-CIV, 2009 WL 10696630 (S.D. Fla. Dec. 30, 2009) (magistrate's report and recommendation rejecting defendant's argument that a party seeking to introduce expert testimony on lost profits must satisfy a "heightened standard at the *Daubert* stage" and noting the reasonable certainty standard is appropriate for ultimate trial on merits, but is not the standard applied at the *Daubert* stage), *adopted by*, 2010 WL 11591198, at *1 (S.D. Fla. Feb. 12, 2010).

31 *See e.g.,* *B-K Cypress Log Homes Inc.*, 2012 WL 1933766, at *3 (comparing profit/loss statements to determine plaintiff's profit/loss margin before and after damages period).

32 The yardstick test "is generally used when a business has not been established long enough to compile an earnings record that would sufficiently demonstrate lost profits." *4 Corners Ins., Inc. v. Sun Publ'ns of Fla, Inc.*, 5 So. 3d 780, 783 (Fla. 2d DCA 2009). The test compares the profits of businesses that are "closely comparable" to that of the plaintiff company. *Id. See also Devon Med., Inc. v. Ryvmed Med., Inc.*, 60 So. 3d 1125 (Fla. 4th DCA 2011) (reversing award of lost profits based on yardstick model because expert failed to establish comparable company was closely comparable to plaintiff in size, location, profits and position).

33 However, an expert's decision not to use the "before and after" or the "yardstick" method does not provide an independent reason to exclude the expert's testimony. *Pleasant Valley Biofuels, LLC v. Sanchez-Medina*, No. 13-23046-CIV, 2014 WL 2855062, at *7 (S.D. Fla. June 23, 2014) (determining in case involving claims for breach of escrow agent's duties, expert's testimony on lost profits was sufficiently reliable to be presented to jury).

34 *Britt Green Trucking, Inc.,* 2014 WL 2861485 at *7.

35 *Id.*

36 *Id.*

37 *Id.*

38 *B-K Cypress Log Homes Inc. v. Auto-Owners Ins. Co.*, No. 1:09-cv-211GRJ, 2012 WL 1933766, at *5 (N.D. Fla. May 25, 2012).

39 *Id.*

40 *Manpower, Inc. v. Ins. Co. of Penn*, 732 F.3d 796, 806 (7th Cir. 2013) (citations omitted).

41 *Id.* (quoting *Joiner*, 522 U.S. at 146).

42 *See, e.g., Manpower, Inc.,* 732 F.3d at 809.

43 *See id.* at 807 (concluding court erred in rejecting plaintiff's expert testimony, in insurance dispute, based on its finding that expert employed too short a base period for calculating lost profits). *See also Britt Green Trucking, Inc.*, 2014 WL 2861485 at *7 (concluding, in contract dispute, defendant's objections to dates expert used in reaching conclusion went to weight of expert's testimony and not to its admissibility); *B-K Cypress Log Homes Inc.*, 2012 WL 1933766, at *4 (concluding criticism that expert's analysis, in bad-faith dispute, failed to control for variables in market conditions and instead assumed all loss in profitability was attributable to defendant's bad faith went to weight of testimony, not admissibility); *ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F. 3d 1312, 1333 (Fed. Cir. 2012) (concluding, in patent infringement action, expert's failure to control for certain variables best addressed by cross examination, not by exclusion).

44 *See, e.g., Gumwood HP Shopping Partners L.P.*, 221 F. Supp. 3d at 1039 (N.D. Ind. 2016) (citing *Joiner*, 522 U.S. at 146).

45 *Id.* at 1037-40 (expert also made no effort to test hypothesis or tie his theory or damages figures to any facts in the case, among other criticisms).

46 *Id.* at 1037, 1045.

47 *Sun Ins. Mktg. Network, Inc.*, 254 F. Supp. 2d at 1248-49.

48 *Id.* at 1249.

49 *See, e.g., MasForce Europe,* BVBA, 2013 WL 12156469 at *6 (M.D. Fla. Dec. 4, 2013).

50 *Id.*

51 *Id.*

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