



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Expert Witnesses

An expert witness is a person, who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.<sup>1</sup> Previously, both Federal and Florida courts used the standard established in *Frye v. United States*<sup>2</sup> to determine whether or not scientific and expert testimony could be admitted into evidence. In *Frye*, the court established a test regarding admitting expert testimony of new or novel theories. The court held that "in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery must be sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>3</sup> Under the *Frye* standard, a judge must determine that the basic underlying principles of scientific evidence have been tested and accepted by the scientific community.

The Federal Rules of Evidence were formally promulgated in 1975. Federal courts still continued to use the *Frye* standard until 1993, though, when the United States Supreme Court held in *Daubert*<sup>4</sup> that the *Frye* standard had been superseded by the Federal Rules of Evidence which provides in relevant part that

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.<sup>5</sup>

The Florida Evidence Code was established in 1979 and was patterned after the Federal Rules of Evidence. Section 90.102, F.S., provides that the Florida Evidence Code replaces and supersedes existing statutory or common law in conflict with its provisions. Section 90.702, F.S., relates to the admissibility of expert witness testimony and provides that

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.<sup>6</sup>

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<sup>1</sup> Bryan A. Garner, Black's Law Dictionary, Second Pocket Edition (West Publishing Co. 2001).

<sup>2</sup> *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

<sup>3</sup> *Id.*

<sup>4</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 US. 579 (1993)

<sup>5</sup> Rule 702, Federal Rules of Evidence.

<sup>6</sup> Section 90.702, F.S.

Florida courts still use the *Frye* standard, however, for expert testimony.<sup>7</sup> The Florida Supreme court held in *Brim v. State* that "despite the federal adoption of a more lenient standard in *Daubert*... we have maintained the higher standard of reliability as dictated by *Frye*."<sup>8</sup>

In November 2007, the Florida Supreme Court decided *Marsh v. Valyou*.<sup>9</sup> In that case, the court addressed a conflict between the 1st and the 5th DCAs regarding expert testimony on fibromyalgia.<sup>10</sup> The court held that the testimony should have come in under pure opinion testimony<sup>11</sup> and in the alternative should have also come in under *Frye*. In dissent, two Justices questioned why Florida still uses the *Frye* standard, stating that "we have never explained how *Frye* has survived the adoption of the rules of evidence." The two Justices concluded that *Frye* was superseded by the adoption of Florida's Evidence Code.

### Interlocutory Appeals

An interlocutory appeal is an appeal of a ruling by a trial court that is made before the trial itself has concluded. Most jurisdictions generally prohibit such appeals, requiring parties to wait until the trial has concluded before they challenge any of the decisions made by the judge during that trial. Article V, s. 4(b) of the Florida Constitution provides the jurisdiction for district courts of appeal. It provides that district courts of appeal may review interlocutory orders in such cases to the extent provided by rules adopted by the Supreme Court.

### Appellate Standards of Review

Appellate courts conduct an examination of a lower court's decision by a higher court. An appellate court can affirm, reverse or modify the lower court's decision.<sup>12</sup> There are different standards of review which apply depending on the type of information being reviewed. For instance, the standard of review for a pure question of law is *de novo*.<sup>13</sup> *De novo* review is where the appellate court reviews the entire case from the trial court, even elements of fact, with no prejudice and makes an independent decision.

## **Effect of Bill**

### Expert Testimony Standard

This bill provides a standard regarding witness testimony that is more closely related to *Daubert* and the Federal Code of Evidence than *Frye*. This bill provides a three-part test to be used in determining whether or not an expert may testify. The test provides that an expert may testify in the particular field in which he is qualified in the form of an opinion or otherwise if:

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

The bill also provides that facts or data, which are otherwise inadmissible, must not be disclosed to a jury by the proponent of the opinion *unless* the court determines that the probative value substantially outweighs the prejudicial effect.

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<sup>7</sup> *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993); *Hadden v. State*, 690 So. 2d 573 (Fla. 1997).

<sup>8</sup> *Brim v. State*, 695 So. 2d 268, 271 (Fla. 1997)

<sup>9</sup> *Marsh v. Valyou*, 2007 WL 4124744 (Fla. 2007)

<sup>10</sup> Fibromyalgia is a chronic condition characterized by widespread pain in the muscles, ligaments and tendons, as well as fatigue and multiple tender points. See <http://www.mayoclinic.com/health/fibromyalgia/DS00079>.

<sup>11</sup> Pure opinion testimony is based on the expert's personal experience and training and does not have to meeting the *Frye* standard. See *Flanagan*, 625 So. 2d at 828.

<sup>12</sup> Bryan A. Garner, *Black's Law Dictionary*, Second Pocket Edition (West Publishing Co. 2001).

<sup>13</sup> *Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001); *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000)

### Pre-Trial Hearing

This bill provides that the court must hold a pre-trial hearing when a timely motion is made to do so, to determine whether an expert's proposed testimony, even pure opinion testimony, meets the requirements of s. 90.702, F.S. and 90.704, F.S. The trial court must note the findings of fact and the conclusions of law that are the basis or whether or not to admit or exclude the testimony.

This bill also provides that the trial court's ruling is a determination of law which must be reviewed de novo on appeal.

### Interlocutory Appeal

This bill provides that an interlocutory appeal of the ruling to admit or exclude expert testimony is available at the discretion of the appellate court. The bill lists three factors that should be used in deciding whether or not to grant the interlocutory appeal:

- Whether the ruling involves a challenge to the constitutionality of this act;
- Whether the testimony would help prove or disprove criminal liability; or
- Whether the testimony would establish civil liability for or greater than \$75,000.

This bill further provides that if a party does not seek an interlocutory appeal or if the appellate court denies interlocutory appeal, it does not affect the party's right to appeal a ruling to admit or exclude expert testimony after the entry of a judgment in the case.

### Interpretation

This bill provides that courts must interpret and apply s. 90.702, F.S., and s. 90.704, F.S, in a consistent manner with Rules 702 and 703 of the Federal Rules of Evidence and with all United States Supreme Court case law interpreting those rules as of the effective date of the bill.

The bill provides that if any portion of the bill or application of the bill is held invalid, then it will not *affect* the validity of any other portion of the bill and that the provisions of the bill are severable.

### Effective Date

This bill provides an effective date of July 1, 2008. This bill applies to actions commenced on or after July 1, 2008, and to pending actions not scheduled for trial yet or for which trial does not commence more than 90 days after July 1, 2008.

#### C. SECTION DIRECTORY:

Section 1 amends s. 90.702, F.S., relating to testimony by experts.

Section 2 amends s. 90.704, F.S., relating to the basis of opinion testimony by experts.

Section 3 amends s. 90.705, F.S., relating to disclosure of facts or data underlying expert opinion.

Section 4 provides direction for the Division of Statutory Revision.

Section 5 amends s. 90.707, F.S., relating to uniformity in interpretation.

Section 6 provides that the provisions of the act are severable.

Section 7 provides an effective date of July 1, 2008.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

The impact of this bill is indeterminate at this time. According to the State Courts Administrator, the fiscal impact of this legislation cannot be accurately determined due to the unavailability of data needed to establish the increase in judicial time resulting from the addition of new determinations the court must make related to expert testimony and opinions. An increase in judicial time is also expected for the required pre-trial hearing to hear and rule on whether to admit or exclude expert testimony and to set forth the findings of fact and conclusions on which the order is based.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

To the extent that this bill provides for a pre-trial hearing, individuals may have to pay for attorneys to work more hours due to the increased requirements regarding pre-trial hearings.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take any action requiring expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### 2. Other:

This bill provides for interlocutory appeal of a ruling on whether to admit or exclude expert testimony on lines 78- 92. However, art. V, s. 4(b)(1) of the Florida Constitution provides that courts may hear interlocutory appeals as provided by rules adopted by the Florida Supreme Court. Therefore, this bill could possibly be interpreted as impeding on the exclusive rulemaking authority of the court.

### B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The rules of evidence apply in both civil and criminal cases. In almost no case are interlocutory appeals currently allowed in criminal cases. It is unclear why this bill would specifically provide for an interlocutory appeal that would apply in criminal cases.

D. STATEMENT OF THE SPONSOR

No Statement Submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

n/a