The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 822
INTRODUCER:	Senator Bogdanoff
SUBJECT:	Expert Testimony
DATE:	March 8, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

The bill revises the standard for Florida courts to admit expert witness testimony so that it is in conformity with Federal Rule of Evidence 702 and the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The bill provides additional criteria for a court to consider in determining whether an expert witness may testify in the form of an opinion or otherwise in a case:

- 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 of the case.

The bill requires Florida courts to interpret and apply requirements for the admissibility of expert witness testimony and the determination of the basis of an expert's opinion, in accordance with *Daubert* and subsequent U.S. Supreme Court decisions applying *Daubert*.[1] Currently, Florida courts employ the standard articulated in *Frye v. United States*, 293 F. 1010 (D.C. Cir. 1923), which requires the party who wants to introduce the expert opinion testimony into evidence to show that the methodology or principle has sufficient reliability. Under the bill, *Frye* and subsequent Florida decisions applying or implementing *Frye* would no longer apply to a court's determination of the admissibility of expert witness testimony in the form of opinion and a court's determination of the basis of the expert's opinion.

The bill provides an effective date of July 1, 2011.

[1] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); and *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

This bill amends section 90.702, Florida Statutes.

II. Present Situation:

Expert testimony has been used to assist the trier of fact in both civil and criminal trials for a wide range of subjects, including polygraph examination, battered woman syndrome, child abuse cases, and serum blood alcohol. The Florida Rules of Civil Procedure define "expert witness" as a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify.[2] Courts use expert witness testimony when scientific, technical, or other specialized knowledge may assist the trier of fact in understanding evidence or determining facts in issue during litigation. The Florida Evidence Code provides that 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 trial.[3] 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.

Frye Standard

To admit scientific testimony into evidence, Florida courts, use the standard governing the admissibility of scientific expert testimony imposed in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).[4] If the subject matter involves new or novel scientific evidence, the *Frye* standard requires the party who wants to introduce the expert opinion into evidence to show that the methodology or principle has sufficient reliability. In *Frye*, the court held that the "principle or discovery" must be sufficiently established to "have gained general acceptance in the particular field in which it belongs."[5]

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

1. The trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue.
2. The trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs."
3. The trial judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue.
4. The judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.[6]

[2] Fla. R. Civ. P. 1.390(a).
[3] Section 90.704, F.S.
[4] *Stokes v. State*, 548 So. 2d 188 (Fla. 1989).
[5] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).
[6] *Ramirez v. State*, 651 So. 2d 1164, 1166-67 (Fla. 1995).

The Florida Supreme Court noted that, under *Frye*, the court's inquiry focuses only on the general acceptance of the scientific principles and methodologies upon which an expert relies to give his or her opinion.[7] The *Frye* test is satisfied through the court's finding of proof of general acceptance of the basis of an expert's opinion.[8] Once the basis or foundation is established for an expert's opinion, the finder of fact may then assess and weigh the opinion for its value.[9] Florida courts continue to apply the *Frye* standard for determining the admissibility of scientific evidence.

The *Frye* test is not applicable to all expert opinion proffered for admissibility into evidence. If the expert opinion is based solely on the expert's experience and training, and the opinion does not rely on something that constitutes new or novel scientific tests or procedures, then it may be admissible without meeting the *Frye* standard.[10] By example, Florida courts admit medical expert testimony concerning medical causation when based solely on the expert's training and experience.[11] One court in determining the admissibility of medical expert testimony noted that *Frye* was not applicable to medical testimony (pure opinion) because the expert relied on his analysis of medical records and differential diagnosis rather than a study, test, procedure, or methodology that constituted new or novel scientific evidence.[12]

Florida Rules of Evidence

The Florida Evidence Code is codified in chapter 90, F.S. Section 90.102, specifies that the chapter replaces and supersedes existing statutory or common law in conflict with its provisions.[13] The Florida Supreme Court regular adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. The Florida Evidence Code requires an expert to demonstrate knowledge, skill, experience, training, or education in the subject matter to qualify as an expert.[14] In a concurring opinion, one justice has argued that the Florida Supreme Court has "never explained how *Frye* has survived the adoption of the rules of evidence."[15] Justice Anstead also noted that the Florida Supreme Court has continued to apply *Frye* in determining the admissibility of scientific expert opinion testimony after the adoption of the Florida Rules of Evidence, but has done so without any mention that the rules do not mention *Frye* or the test set out in *Frye*.[16]

***Daubert* Standard**

The *Frye* standard was used in federal courts until 1993 when the U.S. Supreme Court issued its opinion in the case of *Daubert.*[17] The United States Supreme Court held that Federal Rule of

[7] *Marsh v. Valyou*, 977 So. 2d 543, 548-49 (Fla. 2007).
[8] *Id.*
[9] *Id.*
[10] *Marsh*, 977 So. 2d at 548. *See also* Charles W. Ehrhardt, *Florida Evidence* s. 702.3 (2004 edition).
[11] *See, e.g., Cordoba v. Rodriguez*, 939 So. 2d 319, 322 (Fla. 4th DCA 2006); *Fla. Power & Light Co. v. Tursi*, 729 So. 2d 995, 996 (Fla. 4th DCA 1999).
[12] *Gelsthorpe v. Weinstein*, 897 So. 2d 504, 510-11 (Fla. 2d DCA 2005).
[13] Section 90.102, F.S.
[14] Section 90.702, F.S.
[15] Justice Anstead concurring in *Marsh* 977 So. 2d at 551.
[16] *Id.*
[17] *Daubert v.Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Evidence 702 had superseded the *Frye* test, and it announced a new standard for determining the admissibility of novel scientific evidence.[18] Under the *Daubert* test, when there is a proffer of expert testimony, the judge as a gatekeeper must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[19] The Court announced other factors that a court may consider as part of its assessment under the *Daubert* test for the admissibility of expert scientific testimony:

- Whether the scientific methodology is susceptible to testing or has been tested;
- Whether the theory or technique has been subjected to peer review and publication;
- Whether in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error; and
- The existence and maintenance of standards controlling the technique's operation.

Federal Rule of Evidence 702 was amended in 2000 to reflect *Daubert* and other decisions applying *Daubert*.[20] In *General Electric Co. v. Joiner*, the U.S. Supreme Court held that abuse of discretion is the appropriate standard of review for an appellate court to apply when reviewing a trial court's decision to admit or exclude evidence under *Daubert*.[21] In *Kumho Tire Co. v. Carmichael*, the Court held that a trial judge is not bound by the specific factors outlined in *Daubert*, but depending on the circumstances of the particular case at issue, the judge may consider other factors in his or her assessment under *Daubert*.[22] Additionally, the Court in *Khumo Tire Co.* held that the trial judge's obligation to be a gatekeeper is not limited to scientific testimony but extends to all expert testimony.[23]

The *Weisgram v.Marley Co.* case, a part of the *Daubert* progeny, was a wrongful death action against a manufacturer of heaters in which the plaintiff introduced expert testimony that the alleged heater defect caused a house fire.[24] The Court held that a federal appellate court may direct the entry of judgment as a matter of law when the court determines that evidence was erroneously admitted at trial and the remaining evidence which was properly admitted is insufficient to support the jury verdict.[25] The plaintiffs obtained a jury verdict based on the expert testimony that the heater was defective and that the heater's defect caused the fire.[26] The Supreme Court affirmed the Court of Appeals' reversal of the jury verdict, finding that the expert testimony offered by the plaintiff was speculation under Federal Rule of Evidence 702 as explicated in *Daubert* regarding the defectiveness of the heater.[27] The Court found the plaintiff's fears unconvincing that "allowing [federal] courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they

[18] *Id.*
[19] *Id.* at 592-93.
[20] Fed. R. Evid. 702, Advisory Committee Notes for 2000 Amendments.
[21] *General Electric Co. v. Joiner*, 522 U.S. 136, 139 (1997).
[22] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-52 (1999).
[23] *Id.*
[24] *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).
[25] *Id.* at 445-46.
[26] *Id.*
[27] *Id.* at 445-47.

known their expert testimony would be found inadmissible."[28] The Court stated that *Daubert* put parties on notice regarding the exacting standards of reliability demanded of expert testimony.[29]

Other state courts have used the *Frye*, *Daubert*, and other tests in determining the admissibility of expert testimony regarding scientific, technical, or other specialized knowledge.[30] Advocacy groups and scholars differ on how many states still maintain the *Frye* standard and the number which have moved to the *Daubert* or a similar standard for determining the admissibility of scientific and evidence.[31]

III. Effect of Proposed Changes:

The bill revises the standard for Florida courts to admit expert witness testimony so that it is in conformity with Federal Rule of Evidence 702 and the standard articulated in *Daubert*. The requirements for a witness qualified as an expert by knowledge, skill, experience, training, or education to testify in the form of an opinion are revised to impose additional criteria for the admissibility of the testimony. The criteria include the following three-part test for a court's consideration to determine whether an expert witness may testify in the form of an opinion or otherwise in a case:

- 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 of the case.

The bill requires Florida courts to interpret and apply requirements for the admissibility of expert witness testimony and the determination of the basis of an expert's opinion, in accordance with *Daubert* and subsequent U.S. Supreme Court decisions applying *Daubert*.[32] *Frye* and subsequent Florida decisions applying or implementing *Frye* would no longer apply to a court's determination of the admissibility of expert witness testimony in the form of opinion and a court's determination of the basis of the expert's opinion.

The bill provides an effective date of July 1, 2011.

Other Potential Implications:

There is a balance between enactments of the Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature has enacted and continues to revise ch. 90, F.S., and the Florida Supreme Court tends to adopt these changes as rules. The Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. If the Florida Supreme Court views the changes

[28] *Id.* at 455-56.
[29] *Id.*
[30] Comm. on Judiciary, The Florida Senate, *Analysis of Law Relating to Admissibility of Expert Testimony and Scientific Evidence*, 5 (Issue Brief 2009-331) (Oct. 2008).
[31] *Id.*
[32] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); and *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

in this bill as an infringement upon the Court's authority over practice and procedure, it may refuse to adopt the changes in the bill as a rule.[33]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

[33] *See, e.g., In re Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000) (Florida Supreme Court adopting Evidence Code to the extent it is procedural and rejecting hearsay exception as a rule of court) and *compare with In re Florida Evidence Code*, 372 So.2d 1369 (Fla. 1979) (Florida Supreme Court adopting Florida Evidence Code to the extent it is procedural), *clarified, In re Florida Evidence Code*, 376 So. 2d 1161 (Fla. 1979).

B. Amendments:

None.