New Florida Expert Witness Law

Greg Snell, Esquire

As of July 1, 2013 no longer will pure opinion testimony of an expert witness be admissible as evidence in Florida state courts. Moreover, even scientific principles generally accepted in their field may not be a sufficient basis for admissibility of expert opinions. Now, only if the judge makes a preliminary determination that admissibility standards have been met, most notably reliability, will expert opinions be admissible.

The law which Florida followed is known as the *Frye* standard, as articulated in the 1923 federal District Court for the District of Columbia case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) the United States Supreme Court superseded *Frye* with the more stringent *Daubert* standard, including five criteria to determine the reliability of prospective expert testimony as follows:

1) Whether the methods on which the testimony is based have been tested;
2) The known or potential rate of error associated with the testing;
3) Whether the method has been subject to peer review;
4) Whether the method is generally accepted in the relevant scientific community; and
5) Whether standards exist for the use of the method and whether the expert followed those standards.

Both *Frye* and *Daubert* were interpretations of Federal Rule of Evidence 702 – Testimony by Expert Witnesses. Subsequently the Supreme Court reaffirmed and refined the *Daubert* standard in cases such as *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), which culminated in amendment to Rule 702 consistent with these decisions. Federal courts, of course, were bound to the interpretation of Rule 702 as set forth in *Frye* and then *Daubert* but the state courts were not. Nonetheless, ultimately many states adopted the *Daubert* standard such that Florida was in a minority of states which hadn't.

By signing HB 7015 Governor Rick Scott caused the Florida corollary to Rule 702, found at Fla. Stat. §90.702 – Testimony by Experts, to be amended, as well as the related rule found at Fla. Stat §90.704 – Basis of Opinion Testimony by Experts.

§90.702 formerly read as follows:

> 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.**

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New Florida Expert Witness Law (cont.)

§90.702 now reads as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion **or otherwise if:**
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> 1) **The testimony is based on sufficient facts or data;**
> 2) **The testimony is the product of reliable principles and methods; and**
> 3) **The expert has reliably applied the principles and methods to the facts of the case.**

§90.704 now reads as follows:

> 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. **Facts or data that are otherwise inadmissible in evidence may not be disclosed to the jury by the proponent of the opinion or inference unless the court determined that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect.**
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> (bold text in statutory language above denotes amendment)

Separately Governor Scott signed into law SB 1792, which limits expert opinions in medical malpractice cases to those given by experts who have practiced in the same specialty at issue, in place of the prior law which also allowed experts who have practiced in a "similar" specialty. This is an amendment to Fla. Stat. §456.057 and also permits doctors who treated a patient who has brought a medical malpractice action, but who has not been named a party, to retain and confer with legal counsel, and to meet with the defense attorney for a doctor who is a named party. This latter provision, relating to what is referred to as "ex parte communications" has been attacked by no less than five lawsuits already on the grounds that it is a violation of the Florida constitutional right to privacy and the federal Health Insurance Portability and Accountability Act (HIPAA).

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Greg Snell is an attorney with the firm **Snell Legal** who provides representation in a wide range of business litigation matters. He accepts referrals and is also available for consultation or to serve as co-counsel to assist with business litigation issues. Mr. Snell can be contacted by telephone at **386.677.3232** or by e-mail at gregsnell@snelllegal.com.