Rumberger
KIRK & CALDWELL

J. Richard Caldwell, Jr.
Attorney
Rumberger, Kirk & Caldwell, P.A.
Attorneys at Law
100 North Tampa Street
Suite 2000
Tampa, Florida 33602-5830
Phone: 813.223.4253
Fax: 813.221.4752
dcaldwell@rumberger.com
www.rumberger.com

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Supreme Court of Florida
Office of the Clerk
500 So. Duval St.
Tallahassee FL 32399

Re: Amendments to the Florida Evidence Code
S. Ct. Case no. 16-181

To the Justices of the Supreme Court of Florida:

In 2013, the Florida legislature, by its enactment of chapter 2013–107, amended Fla. Stat. Sections 90.702 and 90.704 of the Florida Evidence Code to provide that the admission of expert testimony in Florida courts must meet the standards set forth in *Daubert v. Merrill–Dow Pharmaceuticals Inc.*, 509 US 579 (1993) and its progeny. These changes to the Florida Evidence Code should be adopted by the Supreme Court of Florida to the extent that they are procedural.

Until 2013, Florida continued to follow the principles set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The issue in *Frye* concerned the defendant's attempt to introduce the results of a polygraph or "lie detector" test, to buttress his contention that he was innocent of the crime for which he was charged. The court rejected defendant's arguments, holding that the subject of expert testimony must be sufficiently established to have gained general acceptance in the particular field involved. As the science of polygraphy was "new and novel," there was insufficient predicate for the admission of the polygraph results.

In *Ramirez v. State*, 651 So.2d 1164 (Fla. 1995), one of the leading Florida cases following *Frye,* the Supreme Court of Florida pointed out that the very reason for undertaking an analysis of proffered testimony in this area is to ensure the *reliability* of expert evidence to be heard by the jury. The court flatly stated that trial courts should refuse to admit unreliable expert evidence. *id.* at 1167–1168.

As pointed out in a number of Florida cases, *Frye* is a very narrow test of extremely limited application. It only applies to situations involving new or novel scientific techniques, and is inapplicable to the "vast majority of scientific evidence." *King v. State*, 89 So.3d 209, 228 (Fla. 2012); *U.S. Sugar v. Henson*, 823 So.2d 104, 109 (Fla. 2002). Thus, in the "vast

majority" of cases in which there may be issues susceptible to attempts to adduce expert evidence, *Frye* gives our Florida trial judges no guidance whatsoever. *Rickgauer v. Sarkar*, 804 So.2d 502, 504 (Fla. 5th DCA 2001). This is especially true with respect to "pure opinion" testimony. *See, Marsh v. Valyou*, 977 So.2d 543, 562 (Fla. 2007) (Cantero, J., dissenting).

The "new" sections 90.702 and 90.704 of the Florida Evidence Code established the *Daubert*-type principles as the bedrock test of the admissibility of expert evidence in Florida state courts. The principles in *Daubert* and its progeny, together with the revised Rule 702 of the Federal Rules of Evidence, clearly set forth the trial judge's role as "gatekeeper" of the evidence, which applies to all expert testimony. *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 1178 (1999). The *Daubert* principles provide much clearer guidance to the trial court in determining the admissibility of expert evidence than does the *Frye* test set forth above. A *Daubert* analysis includes an examination of whether the technique or theory has been generally accepted in the scientific community (the key point of *Frye*), among several other elements. The effect of the new sections of the Florida evidence code are thus to replace a limited test of occasional applicability with a much more comprehensive one of general application to all expert issues.

Florida law has long recognized that the goal of any analysis of expert evidence by the trial court is to ensure that only reliable evidence is heard by the jury. The *Daubert* analytical principles do this much better than *Frye*. The multiple aspects of judicial analysis set forth in *Daubert* and the subsequent cases foster more predictable, consistent decisions on expert issues, to the benefit of both judges and litigants.

The more than 22 years' experience with the *Daubert* principles in the federal court system has proven quite positive. Federal trial courts have the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is less open to question, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises. *Kumho Tire Company v. Carmichael, supra.* The revised federal rule 702 and the *Daubert* line of cases make "...no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony," and courts "have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert.*" Judicial Conference of the United States, Report of the Advisory Committee on Evidence Rules, May 1, 1999.

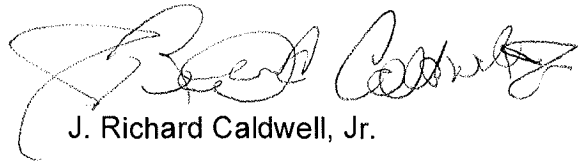
Thus, the experience with *Daubert*-type analyses in the federal court system proves the effectiveness of this approach, contrary to the claims of those who prophesy adverse effects from the full implementation of the revised sections 90.702 and 90.704. The experience in our state court system since 2013 has shown likewise. *See, Perez v. Bell South Telecommunications, Inc.,* 138 So.3d 492 (Fla. DCA 3d 2014); *Conley v. State,* 129 So.3d 1120 (Fla. 1st DCA 2013). In *Perez*, for example, the District Court of Appeal had little trouble in determining that the proffered opinion testimony was objectionable under either *Frye* or *Daubert,* as it reflected the physician's personal opinion, which he

acknowledged was unsupported by any scientific or medical evidence. Citing Fla. Stat. sec. 90.702, the Court affirmed the trial court's ruling that the opinion testimony was inadmissible. 138 So.3d at 498-9.

It is interesting that the most recent pronouncement by the Supreme Court of Florida concerning the admissibility of expert evidence was hardly a ringing endorsement of *Frye v. United States, supra. Marsh v. Valyou,* 977 So.2d 543 (Fla. 2007). In fact, *Marsh* demonstrates the problems which arise under *Frye*. Of the 4 justice majority, only two (Justices Lewis and Quince) agreed that the *Frye* standard was the sole proper test to be applied in Florida. However, they held that *Frye* did not apply, because the expert testimony there was "pure opinion," to which a *Frye* analysis does not extend. Justice Anstead wrote a concurring opinion, joined by Justice Parienti, in which it was stated that the *Frye* test had not survived the adoption Florida evidence code, just as the principle was held not to have survived the adoption of the Federal Rules of Evidence in the federal system. Justice Anstead pointed out that the Florida Evidence Code was patterned substantially after the Federal Rules of Evidence, and that the "general acceptance" rationale was not mentioned in either set of rules. Justices Anstead and Parienti concurred with the majority, however, because they agreed that the expert testimony in question (concerning causation of fibromyalgia) would be admissible under *Daubert.* The dissent argued that such expert testimony was not admissible under either *Frye* or *Daubert.* It especially took issue with the majority's position that pure opinion testimony could not be excluded under *Frye,* calling it a "sea change" in Florida law, rendering causation testimony always admissible as "pure opinion" of the expert. 977 So.2d at 562.

When the Florida Evidence Code was new, it was fairly clear that the "... most widely adopted test [of expert evidence] has been that of *Frye v. United States.*" C.W. Ehrhardt, Handbook of Florida Evidence, section 90.702 (1987 edition). This is no longer the case. Only a relatively few jurisdictions in the United States still adhere to the *Frye* criteria. Kansas (2014) and California (2012) are among the latest states, along with Florida, to have adopted *Daubert* as the test for the admissibility of expert evidence. The 2013 revisions to the Florida evidence code have moved Florida into the mainstream with newer, more flexible evidentiary guidelines of general applicability, and should be adopted by the Supreme Court of Florida.

Respectfully submitted



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