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**WHEN DOES FRYE APPLY?**  
**By Ted Babbitt**

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) and its progeny Daubert v. Merrell Dow Pharms., 509 U.S. 579, 587 (1993), General Electric Co. v Joiner, 522 U.S. 136 (1997) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) have resulted in more pretrial hearings than virtually any other line of cases. Florida adopted Frye, supra, in Bundy v. State, 471 So. 2d 9, 18 (Fla. 1985), and Stokes v. State, 548 So. 2d 188, 195 (Fla. 1989). It has not adopted Daubert or the cases which follow it. There is a continuing argument among scholars as to whether Frye or Daubert is stricter in the test to be applied as to the admissibility of expert testimony. The recent Florida Supreme Court case of Marsh v. Valyou, 32 Fla. L. Weekly S750 (Fla. Nov. 21, 2007) clarifies when and how Frye should apply.

Ms. Marsh filed a lawsuit against four defendants as a result of four separate automobile accidents in which she claimed injuries. The basis for her claim was that the multiple traumas that she received caused fibromyalgia and myofascial pain syndrome. One of the defendants set a Frye hearing and the trial court excluded the testimony of the plaintiff's expert witnesses. The Fifth District affirmed in Marsh v. Valyou, 917 So. 2d 313 (Fla. 5<sup>th</sup> DCA 2005).

In an almost identical case, the Second District in State Farm Mutual Automobile Insurance Co. v. Johnson, 880 So. 2d 721 (Fla. 2d DCA 2004) allowed expert testimony causally linking trauma to fibromyalgia. Conflict was certified and the Supreme Court used the opportunity to clarify its holdings with

respect to the Frye test. The Court concluded that Frye did not apply and, even if it did, plaintiff's proffered expert testimony was sufficient to permit the admissibility of the testimony under Frye.

At a Frye hearing, the party seeking admissibility of the testimony bears the burden of establishing by a preponderance of evidence that the scientific principles and methodology utilized by the expert have been generally accepted. Castillo v. E.I. Du Pont De Nemours & Co., Inc., 854 So. 2d 1264, 1268 (Fla. 2003). In Marsh, at Page 751, the Supreme Court makes it clear that the first test to determine whether Frye applies at all is whether the expert's testimony is based upon "new or novel scientific techniques." If it is not, there is no necessity for testing the expert's testimony against the Frye doctrine. Since medical causation is at the heart of almost all issues on which Frye is attempted to be imposed, it is the rare case where Frye applies at all. At Page 751, the Florida Supreme Court holds:

"We review Frye issues de novo, with general acceptance considered as of the time of the appeal. *Id.* 'By definition, the Frye standard *only applies* when an expert attempts to render an opinion that is based upon *new or novel scientific techniques.*' U.S. Sugar Corp. v. Henson, 823 So. 2d 104, 109 (Fla. 2002) (emphasis added). Therefore, we have recognized that Frye is inapplicable in the 'vast majority' of cases. *Id.*; *see also* Rickgauer v. Sarkar, 804 So. 2d 502, 504 (Fla. 5<sup>th</sup> DCA 2001) ('Most expert testimony is not subject to the Frye test.')

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*See, e.g. Cordoba v. Rodriguez*, 939 So. 2d

319, 322 (Fla. 4<sup>th</sup> DCA 2005) ('Medical expert testimony concerning the causation of a medical condition will be considered pure opinion testimony and admissible when it is based solely on the expert's training and experience.')

*Gelsthorpe v. Weinstein*, 897 So. 2d 504, 510 (Fla. 2d DCA 2005) ('[M]edical expert testimony concerning the causation of a medical condition will be considered pure opinion testimony – and thus not subject to *Frye* analysis – when it is based solely on the expert's training and experience.');

*Fla. Power & Light Co. v Tursi*, 729 So. 2d 995, 996 (Fla. 4<sup>th</sup> DCA 1999).

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See *Gelsthorpe*, 897 So. 2d at 511 (recognizing that 'a typical opinion on medical causation' should not be treated as a 'new principle, subject to *Frye* analysis, simply because some other experts disagree with it and because the challenged expert does not rely on any specific authority to support his particular opinion").

The Florida Supreme Court has admonished trial courts and district courts that pure opinion testimony does not justify utilizing Frye at all but the trial courts of Florida seemingly just don't get it. At Page 751, the Court holds:

"It is well-established that *Frye* is inapplicable to 'pure opinion' testimony:

[P]ure opinion testimony, such as an expert's opinion that a defendant is incompetent, does not have to meet *Frye*, because this type of testimony is based on the expert's personal experience and training. While cloaked with the credibility of the expert, this testimony is analyzed by the jury as it analyzes any

other personal opinion or factual testimony by a witness.

*Flanagan*, 625 So. 2d at 828; *see also Hadden*, 690 So.2d at 579-80 (same); *Herlihy v. State*, 927 So. 2d 146, 148 (Fla. 1<sup>st</sup> DCA 2006) ('[A] diagnosis based on an expert's opinion and experience, versus a specific scientific test, would not be subject to a *Frye* hearing. '); *Gelsthorpe*, 897 So. 2d at 510-11 (finding *Frye* inapplicable to 'pure opinion testimony based upon clinical experience' where the 'testimony did not rely on any study, test, procedure, or methodology that constituted new or novel scientific evidence,' but instead was based on an analysis of medical records and differential diagnosis). Because testimony causally linking trauma to fibromyalgia is based on the experts' experience and training, it is 'pure opinion' admissible without having to satisfy *Frye*. *See Johnson*, 880 So. 2d 723."

Quoting from *U.S. Sugar Corp. v. Henson*, 787 So. 2d 3, 14 n. 10 (Fla. 1<sup>st</sup> DCA 2000), approved 823 So. 2d 104 (Fla. 2002), the Court explained that a trial court at a *Frye* hearing needs to look only at the general acceptance of the scientific principles and methodologies which the expert relies upon in rendering the opinion. If the opinion were tested by the Court as well, the trial judge would become a finder of fact and that is the exclusive providence of the jury. Experts are not required to simply recite scientific principles from a book but are entitled to render their own opinion as to the applicability of those principles to the facts of the case. It is up to the jury to decide whether to accept that conclusion or not. At Page 752, the Supreme Court holds:

"Trial Courts must resist the temptation to

usurp the jury's role in evaluating the credibility of experts and choosing between legitimate but conflicting scientific views. See *Castillo*, 854 So. 2d at 1275 ('[I]t is important to emphasize that the weight to be given to stated scientific theories, and the resolution of legitimate but competing scientific views, are matters appropriately entrusted to the trier of fact.') (quoting *Berry*, 709 So. 2d at 569 N. 14); *Rodriguez v. Feinstein*, 793 So. 2d 1057, 1060 (Fla. 3d DCA 2001) (same). A challenge to the conclusions of Marsh's experts as to causation, rather than the methods used to reach those conclusions, is a proper issue for the trier of fact. See *U.S. Sugar*, 823 So. 2d at 110; *Castillo*, 854 So. 2d at 1270, 1272, 1276; *Rodriguez*, 793 So. 2d at 1060 (recognizing that 'to involve judges in an evaluation of the acceptability of an expert's opinions and conclusions would convert judges into fact-finders' to an extent not contemplated by Florida's *Frye* jurisprudence)."

*Frye* is being overused by trial courts and counsel. Since it is rare that new or novel scientific principles are applicable to most expert testimony, it is rare that *Frye* applies at all. When it does, it does not apply to the opinion of experts but rather to the underlying principles, which form those opinions. This case seeks to clarify the settled jurisprudence in that area.

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