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### **DAUBERT AND FRYE – WHERE DOES FLORIDA STAND?**

This is not the first time this writer has commented upon cases involving judicial review of expert testimony and the applicable test in Florida. Revisiting that issue is appropriate in light of the emergence of Vioxx and similar litigation, which will undoubtedly test the qualifications of experts in various areas. The Supreme Court of Florida analyzed the responsibility of the Court in conducting a hearing challenging an expert's ability to testify in scientific matters in the case of Castillo v. E.I. Du Pont De Nemours & Co., 854 So. 2d 1264 (Fla. 2003).

That case was brought against the manufacturer of Benlate by the mother of a child born with severely underdeveloped eyes. The mother was in the vicinity of a farm and was soaked with a sprayed substance in her 7<sup>th</sup> week of her pregnancy. The evidence indicated that that substance was in all probability Benlate, an agricultural fungicide manufactured by DuPont.

After a multi-million verdict against DuPont, the Third District reversed primarily on the basis of error in the admission of the scientific evidence presented by the Plaintiff. The Supreme Court reversed the Third District and reinstated the verdict objecting to the analysis of the District Court under Frye v. United States, 293 F.1013 (D.C. Cir. 1923).

The testimony in question related to the conclusion of the plaintiff's expert based upon animal studies, in-vitro tests and differential diagnosis with respect to the cause of the birth defect. The District Court had reversed based in part on

both the underlying science of the expert testimony and on the expert's ultimate conclusion. The Supreme Court found this to be error.

The Supreme Court explained that Frye, supra, on which Florida Courts rely, requires only that scientific principals underlying the evidence from which the expert's conclusion is reached are based upon methods generally accepted in the scientific community. See Hadden v. State, 690 So. 2d 573, 576 (Fla. 1997). The question of whether that test has been satisfied is determined by a de novo review of the appellate court. That de novo review examines the expert testimony presented, scientific and legal writings available to the appellate court and any prior judicial opinions. See Flanagan v. State, 586 So. 2d 1085, 1112 (Fla. 1<sup>st</sup> DCA 1991) approved 625 So.2d 827 (Fla. 1993).

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) is a United States Supreme Court opinion, which Florida does not follow. That opinion interpreted a Federal Rule of Evidence and not the United States Constitution and is, therefore, not binding upon Florida Courts. Daubert went beyond Frye and required that a Court assess not only the evidence used by the expert in coming to the expert's conclusion but the validity of the conclusion itself.

The Florida Supreme Court found that the Third District erroneously adopted the reasoning of Daubert by challenging the expert's ultimate conclusion. At Page 1276, the Court found:

By considering the extrapolation of the data from the admittedly acceptable experiments, the Third District went beyond the requirements of *Frye*, which assesses only the validity of the underlying science. *Frye* does not require the court to assess the application of the

expert's raw data in reaching his or her conclusion. We therefore conclude that the Third District erroneously assessed the Castillos' expert testimony under *Frye* by considering not just the underlying science, but the application of the data generated from that science in reaching the expert's ultimate conclusion.

The issue of causation in cases such as Vioxx litigation will be decided based primarily upon differential diagnosis. That is because there is no single "marker" to establish that Vioxx causes heart attacks, strokes or blood clots. Differential diagnosis was a major issue in the Castillo v, Du Pont case, supra. In that case, the Supreme Court found as a matter of law that differential diagnosis is a valid method to be utilized by experts in determining causation. At 1270, the Court held:

Differential diagnosis is "a term used 'to describe a process whereby medical doctors experienced in diagnostic techniques provide testimony countering other possible causes . . . of the injuries at issue.'" *Berry v. CSX Transportation, Inc.*, 709 So. 2d 552, 562 n. 9 (Fla. 1<sup>st</sup> DCA 1998) (quoting *Hines v. Consolidated Rail Corp.*, 926 F. 2d 262, 270 n. 6 (3d Cir. 1991). "It is well-settled that an expert's use of differential diagnosis to arrive at a specific causation opinion is a methodology that is generally accepted in the relevant scientific community." *United States Sugar Corp. v. Henson*, 787 So. 2d 3, 19 (Fla. 1<sup>st</sup> DCA 2001) (citing *Berry*, 709 So. 2d at 571)).

The application of Frye, supra, and Daubert, supra, have probably utilized more Court time than any other legal test. In Florida, Frye and not Daubert applies. If an expert's opinion is based upon evidence which is generally accepted in the scientific community, the conclusion reached therefrom is not preliminarily tested by judicial review in Florida and is up to the jury to evaluate.

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