

Florida Appellate Court Embraces Daubert Standard and Provides First In-Depth Analysis Under New Law

APPELLATE & TRIAL SUPPORT | HEALTH CARE | MAY 8, 2014



Steven Blickensderfer



Edward W. Gerecke



Jeffrey A. Cohen

Last week, the Third District Court of Appeal resolved any questions concerning the applicability of the *Daubert* standard in Florida following the legislative changes to Florida's evidence code in July 2013. In *Perez v. Bell South*, 3D11-0445, the appellate court affirmed the exclusion of an expert's testimony under the *Daubert* standard, providing the first in-depth appellate treatment of the *Daubert* standard in Florida.

The expert testimony at issue and the Legislature's changes to Florida's Evidence Code

The case involved a claim against plaintiff's former employer for injuries sustained during her first pregnancy. Specifically, the plaintiff claimed that stressful work conditions caused her to suffer a placental abruption and deliver her child 20 weeks early. To prove her claim, plaintiff offered the testimony of an obstetrician/gynecologist, who testified from his own personal experiences that "there may very well be a correlation between placental abruption and stress." The expert admitted that there was no credible scientific research to support this opinion.

The trial court excluded the expert's opinion testimony under Florida's *Frye* standard, which applied at the time, leaving plaintiff with no proof that the stress at work caused her and her child's injuries. On appeal, the plaintiff argued that the expert's testimony was "pure opinion" testimony, which the *Frye* standard recognizes as admissible.

While on appeal, however, the Florida Legislature amended Florida's Evidence Code, specifically section 90.702, to incorporate the *Daubert* standard. The *Daubert* standard replaced the *Frye* standard in federal courts decades ago and in some state courts thereafter.

The Third District's analysis and application of *Daubert*

Resolving any question as to the effect of the new law, the Third District stated that Florida changed "from a *Frye* jurisdiction to a *Daubert* jurisdiction," and that "[t]he legislative purpose of the new law is clear: to tighten the rules for admissibility of expert testimony in the courts of this state."

According to the Legislature's expressed intent, the Third District explained that the *Daubert* standard, as "reaffirmed and refined" by the *Joiner* and *Kumho Tire* cases, applies "to all expert testimony," not just medical expert testimony. As a result, while the "general acceptance" of a scientific theory in the community remains one of many factors a court should consider under the *Daubert* standard when determining admissibility, that factor, alone, "is no longer a sufficient basis for the admissibility of expert testimony."

Further, the court explained that the Legislature also expressly intended to prohibit "pure opinion" testimony, such as the testimony involved in this case. Thus, while previously admissible under Florida's *Frye* standard, "[s]ubjective belief and unsupported speculation are henceforth inadmissible."

Finally, in addressing whether the *Daubert* standard applied retroactively to the instant case, the court concluded that the new law "indisputably applies retrospectively" because it was a procedural change to the evidence rules. The court noted it was not the first district court to so hold, citing the First District's decision in *Conley v. State*, 129 So. 3d 1120 (1st DCA 2013).

Because the methodology employed by the expert did not meet the relevance and reliability standards set forth in *Daubert* and its progeny, the appellate court affirmed the judgment in favor of the defendant.

What this case means going forward

Perez v. Bell South is significant in many ways for those who seek to challenge expert testimony in Florida state courts:

- First, the Third District's opinion makes clear that the Legislature amended Florida's Evidence Code to tighten the rules concerning the admissibility of expert testimony.
- Second, Florida's *Daubert* standard is retroactive and applies in all pending cases, including those at the trial and appellate levels.
- Third, whether an expert's theory is founded on a scientific method that enjoys "general acceptance in the scientific community" will no longer constitute the only basis for the admissibility of expert testimony in Florida. Under the new law, it is simply one of several factors.
- Fourth, "pure opinion" testimony-that is, an expert's subjective, unsupported belief-is inadmissible.

Understanding how the new law works and how to effectively leverage *Daubert* may prove vital, as *Perez* demonstrates.

©2020 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.