Legal Standards for Admissibility of Expert Testimony in State and Federal Court

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I. Legal Standards for Admissibility of Expert Testimony in State and Federal Court

Section 90.704 of the Florida Evidence Code provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion; however, the opinion is admissible only if it can be applied to the evidence at trial.

In *CSX Transp., Inc. v. Whittler*, 584 So.2d 579, 584 (Fla. 4th DCA 1991) (en banc), the court set forth a "four-prong test for the admissibility of expert testimony: (1) the opinion evidence must be helpful to the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion evidence must be applied to evidence offered at trial; and (4) the evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value." *See also Anderson v. State*, 863 So.2d 169 (2003) (holding that section 90.702 requires that before an expert may testify in the form of an opinion, two preliminary factual determinations must be made by the court under section 90.105, Florida Statutes. First, the court must determine whether the subject matter will assist the trier of fact in understanding the evidence or in determining a fact in issue. Second, the court must determine whether the witness is adequately qualified to express an opinion on the matter.).

Section 766.102(5), Florida Statutes (2004) governs qualifications for expert testimony in medical malpractice actions.

Rule 702 of the Federal Rules of Evidence is similar to section 90.704 and states as

follows:

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

The chief difference in the two rules is the Federal rule's incorporation of the standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), which is discussed below. *See* Fed. R. Evid. 702, Advisory Committee Notes (observing that Rule 702 was amended in 2000 in response to *Daubert* and cases applying *Daubert*).

Thus, in federal court, a three-pronged test applies. Admission of an expert opinion is proper if "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F.3d 548, 562 (11th Cir.1998)(citations omitted). "The burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and admissibility must be shown by a preponderance of the evidence." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir.1999) (citing *Daubert*, 509 U.S. at 592 n. 10).

A. Who is an Expert? Expert Qualifications.

To be qualified as an expert, a witness must have requisite "knowledge, skill, experience, training, or education." *See also* Fla. R. Civ. P. 1.390(a) (defining an "expert witness" as "a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify."). "The question regarding an expert witness' qualifications is a question of fact to be decided by the trial court determined by the testimony adduced." *Dedge v. State*, 442 So.2d 429 (Fla. 5th DCA 1983)(citing *Upchurch v. Barnes*, 197 So.2d 26, 28 (Fla. 4th DCA 1967)).

The cases make clear that "a person does not necessarily have to have a degree in order to qualify as an expert." *Sihle Ins. Group, Inc. v. Right Way Hauling, Inc.*, 845 So.2d 998, 1000 (Fla. 5th DCA 2003); *see also Circle J Dairy, Inc. v. A.O. Smith Harvestore Products, Inc.*, 790 F.2d 694, 700 (8th Cir.1986)(observing that Rule 702 "does not rank academic training over demonstrated practical experience....").

For example, in *Brooks v. State*, 762 So. 2d 869 (Fla. 2000), the court held that a drug dealer properly was permitted to express opinions on the identity and weight of rock cocaine in a sandwich bag. The court noted, among other things, that the State presented evidence that the witness was an experienced crack cocaine dealer, having sold that drug almost every day for approximately two years, and the witness never sold bad, defective, or fake crack. *See id.* at 893. *See also United States v Johnson*, 575 F2d 1347, 1360 (5th Cir. 1978) (witness was properly permitted to opine that marijuana came from Colombia where he testified that he had smoked marijuana over a thousand times and that he had dealt in marijuana as many as twenty times; his

qualifications came entirely from "the experience of being around a great deal [of marijuana] and smoking it.").

The courts have permitted a wide variety of "experts" to testify. *See e.g., Sihle Ins. Group,* 845 So. 2d at 1000 (public adjuster permitted to testify on lost profits); *Weese v. Pinellas County*, 668 So.2d 221, 223 (Fla. 2d DCA 1996)(former operator of a used car lot permitted to testify to business damages as a result of a condemnation of the lot); *International Ins. Co. v. Ballon*, 403 So.2d 1071 (Fla. 4th DCA 1981) (trial court properly allowed a senior police officer formerly with the FBI and a notorious long-time thief who had participated in countless robberies involving alarm systems and many with safety deposit boxes to testify about how relatively easy it is for professional criminals to foil burglar alarm systems and open safety deposit boxes); *Florida Bar v. Hollander*, 607 So.2d 412, 414 (Fla.1992) (attorney experienced with personal injury and contingency fee agreements was qualified as an expert to testify to personal injury cases and contingent fee agreements); *Van Sickle v. Allstate Ins. Co.*, 503 So.2d 1288, 1289 (Fla. 5th DCA 1987)(permitting an orthopedic physician to testify regarding certain chiropractic treatment); *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984)(chief of health care financing agency's coverage and eligibility policy section and health and human services special agent were qualified as expert witnesses on subject of scope of Medicare coverage for prosthetic eyewear).

An expert may only provide opinion testimony on matters within his areas expertise. *Hall v. State*, 568 So.2d 882, 884 (Fla.1990) (affirming a trial court's refusal to allow a religion professor to testify to the defendant's alleged insanity); *see also Mattek v. White*, 695 So.2d 942, 943 (Fla. 4th DCA 1997)(in an automobile negligence action, a physicist with a Ph.D. who was qualified as an expert on accident reconstruction and biomechanics was not qualified to express a

medical opinion on whether the plaintiff had suffered a permanent injury); *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003) (expert in the use of an electron microscope was not qualified to testify in a negligence action against helicopter maintenance contractor that a fin spar crack which caused the crash would have been visible upon inspection).

Once an expert is qualified, a trial court generally should not declare in front of the jury that a witness is an "expert," as such statements can influence the jury in its evaluation of the expert's testimony. *See Chambliss v. White Motor Corp.*, 481 So.2d 6, 8 (Fla. 1st DCA 1985);*United States v. Bartley*, 855 F.2d 547, 552 (8th Cir.1988).

B. Assisting the Trier of Fact: Admissible Subjects of Expert Testimony

Under both the Federal and state rules, an expert's opinion is admissible only to the extent it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person. *See United States v. Rouco*, 765 F.2d 983, 995 (11th Cir.1985). Generally, a trial court has broad discretion in determining the subject upon which an expert may testify in a particular trial. *Angrand v. Key*, 657 So.2d 1146 (Fla.1995); *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir.2004) (*en banc*); *Grindstaff v. Coleman*, 681 F.2d 740 (11th Cir. 1982).

On the other hand, proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments. *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir.2004) (*en banc*). The opinion of an expert should be excluded where facts testified to are of a kind that do not require any special knowledge or experience in order to form a conclusion, or are of such a character that they should be presumed to be within the common experience and knowledge of the jurors. *State*

Farm Mut. Auto. Ins. Co. v. Penland, 668 So. 2d 200, 202 (Fla. 4th DCA 1995) (holding that a trial court correctly excluded an expert's testimony that a passenger who suffered injuries in an auto accident actually was driving where his testimony was based on factors within the common knowledge of jurors, including where the steering wheel was located, where a spider web windshield crack was located, and the location of the vehicle's occupants); *cf. Mathieu v. Schnitzer,* 559 So.2d 1244, 1245 (Fla. 4th DCA 1990) (remanding for a new trial where the court refused to permit expert testimony concerning the damage found on the defendant's car in relation to the plaintiff's injuries, and holding that what such evidence means to a trained investigator is not within the common understanding of the average layman); *see also Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, Case No. 03-14784, 2005 WL 552483 (11th Cir. Mar 10, 2005) (holding that a suicide prevention expert's opinions that deputies at a detention facility failed to properly assess a prisoner's suicidality, and that a deputy should have read the prisoner's request for a psychiatrist and notified Medical offered nothing more than what lawyers for the parties could argue in closing arguments, and therefore were properly excluded).

In *Angrand v. Key,* 657 So.2d 1146, 1147 (Fla.1995), the court affirmed a trial court's decision to disallow testimony of a "grief expert," holding that the trial court did not abuse its discretion in finding that the expert's testimony would not be helpful to the jurors. The court, however, did not foreclose such testimony in all cases and held that "psychiatrists, psychologists, or other qualified physicians who have treated a survivor or reviewed records concerning a survivor's treatment for physical or mental sequelae related to mental pain and suffering caused by the death of a survivor's decedent may provide testimony which will assist the jury in understanding evidence and deciding damages issues." Also, "the experience, age, and other

relevant information about the jurors or the facts in a particular case could provide a basis for the trial judge to conclude that Dr. Platt or a person with similar expertise, training, and education would assist the jury in understanding the evidence or in deciding the appropriate damages." The court concluded that there were factors for a trial judge to consider in exercising his or her discretion. *See id.* at 1147. In reaching its holding, the *Angrand* court disapproved *Holiday Inns, Inc. v. Shelburne,* 576 So.2d 322 (Fla. 4th DCA 1991) to the extent that decision foreclosed a trial court's discretion to admit such testimony. *See Angrand*, 657 So. 2d at 1150.

In addition, although Rule 704 and section 90.703 abolished the prohibition on testimony on an "ultimate issue," there nonetheless remain certain areas where expert testimony is not permitted, generally on grounds that it would not be "helpful" to the jury. For example, the state and federal courts are divided on the admissibility of testimony regarding factors that affect the reliability of eye-witness identification. The Florida Supreme Court has held that a trial court has the discretion to admit such testimony. *See McMullen v. State*, 714 So. 2d 368, 372 (Fla. 1998). In *McMullen*, the court held that the trial court properly exercised its discretion and excluded testimony that: (1) eyewitness identifications are incorrect much more often than the average person thinks; (2) a witness's confidence or certainty in an identification is unrelated to the accuracy of the identification; (3) cross-racial identifications are more difficult than same-race identifications; (4) it is easier for a person to remember a face than to remember the circumstances under which the person saw the face; (5) the accuracy of facial identifications decreases in stressful situations; and (6) the accuracy of identification decreases as the interval between the event and the time when the witness attempts to retrieve the memory increases. *See id.* at 370.

The *McMullen* court noted that it was following the majority view. *See id.* (citations omitted). The Eleventh Circuit, however, has adopted the minority view and holds that such testimony is per se inadmissible. In the Eleventh Circuit, expert testimony regarding the credibility of eyewitness identification testimony is inadmissible under any circumstances. *United States v. Holloway,* 971 F.2d 675 (11th Cir.1992); *United States v. Thevis,* 665 F.2d 616, 641 (5th Cir. Unit B 1982).

The court in *Thevis* explained, "To admit such testimony in effect would permit the proponent's witness to comment on the weight and credibility of opponents' witnesses and open the door to a barrage of marginally relevant psychological evidence. Moreover, we conclude, as did the trial judge, that the problems of perception and memory can be adequately addressed in cross-examination and that the jury can adequately weigh these problems through common-sense evaluation." *Id.* at 641. More recently, the court applied the *Daubert* analysis to its rule but declined to recede from its earlier decisions. *See United States v. Smith,* 122 F.3d 1355 (11th Cir. 1997).

The courts also have cautioned that a trial court should not permit a trial to devolve into a debate regarding the ability, credibility, or reputation of an expert based on the perception of another expert. Thus, an expert may properly explain his or her opinion on an issue in controversy by outlining the claimed deficiencies in the opposing expert's methodology so long as the expert does not attack the opposing expert's ability, credibility, reputation, or competence. *See Network Publications, Inc. v. Bjorkman,* 756 So.2d 1028, 1031 (Fla. 5th DCA 2000).

In addition, an expert may not directly vouch for the truthfulness or credibility of a witness. *State v. Townsend,* 635 So.2d 949 (Fla.1994); *Tingle v. State,* 536 So.2d 202 (Fla.1988).

The *Tingle* court explained, " 'some expert testimony may be helpful, but putting an impressively qualified expert's stamp of truthfulness on a witness' story goes too far.' " 536 So.2d at 205 (quoting *United States v. Azure*, 801 F.2d 336, 340 (8th Cir.1986)).

Experts also generally may not express legal conclusions or opine on pure matters of law, including the proper interpretation of a statute. *See Lee County v. Barnett Banks*, 711 So.2d 34 (Fla. 2d DCA 1997) ("Statutory construction is a legal determination to be made by the trial judge, with the assistance of counsels' legal arguments, not by way of 'expert opinion.'"). Determining whether a subject is a "pure question of law" is not always easy, and experts are often permitted to testify concerning the application of disputed facts to the law. The opinion in *Edward J. Seibert, A.I.A. Architect and Planner, P.A. v. Bayport*, 573 So.2d 889 (Fla. 2d DCA1990), an architectural negligence case, illustrates this distinction. In that case, the court held that a trial court erred in allowing experts to testify concerning the proper interpretation of the building code. The court noted that the experts did not testify concerning the character of an object or the type of design, nor did they give testimony concerning disputed facts which would determine the requirements of the Standard Building Code. Their testimony related to a pure question of law and therefore invaded the court's province. *See id.* at 891. *See also Smith v. Ingersoll-Rand Co.,* 214 F.3d 1235, 1246 (10th Cir.2000) ("In no instance can a witness be permitted to define the law of the case.").

Sometimes courts will even allow testimony on what amount to legal questions. *See, e.g., United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984) (trial court did not err in allowing expert in Medicare fraud trial to testify whether certain claims were eligible for reimbursement); *United States v. Fogg*, 652 F.2d 551, 556 (5th Cir. 1981) (trial court properly allowed IRS agent

in a tax evasion trial to testify that money the defendant received would be considered a constructive dividend).

Finally, the expert's testimony must be relevant. *See Shelter Corp. of Canada, Ltd. v. Bozin*, 468 So.2d 1094, 1098 (Fla. 2d DCA 1985)(in a specific performance case, an expert's opinion on "rents and profits" due to the buyer was irrelevant because his estimate of the fair rental value of the condominium at issue was not based upon comparable units and did not reflect the rental value for the relevant time period); *see also Stano v. State*, 473 So.2d 1282 (Fla.1985) (trial court properly excluded testimony of a psychiatrist that certain people confess to crimes they did not commit; the fact that some people confess to crimes they did not commit is not evidence that the confession in this case was infirm or tainted); *but see United States v. Roark*, 753 F.2d 991 (11th Cir. 1985) (psychiatrist's testimony that a criminal defendant was highly suggestible was relevant to the issue of whether the defendant's incriminating statements were made voluntarily).

It is important to remember that "An expert's testimony is subject to impeachment or to having its weight reduced because of its failure to properly consider one of the many factors that may influence an opinion . . . , but that failure should not prevent the opinion's admission, nor cause its complete exclusion from the jury's consideration." *Florida Dept. of Transp. v. Armadillo Partners, Inc.*, 849 So. 2d 279 287-88 (Fla. 2003); *see also Dixon v. River City Brewing Co.*, 904 So. 2d 447 (Fla. 1st DCA 2005) (trial court erred in vacating verdict based on admission of expert engineering testimony where the expert visited the accident scene for only a short time without performing any tests or taking measurements and lacked a factual basis for his testimony).

C. New or Novel Scientific Evidence

In *Frye v. United States*, 293 Fed. 1013, 1015 (D.C. Cir.1923), the court rejected the use of an early lie detector test on grounds that the test had not yet gained sufficient scientific recognition among physiological and psychological authorities. In reaching its holding, the court announced the so-called "*Frye* test," stating, "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. Most federal and state courts adopted the *Frye* "generally accepted" test, but there was some division in the federal courts when the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), held that the Rule 702 of the Federal Rules of Evidence displaced the *Frye* standard. *Id.* at 589.

1. Federal Court: *Daubert, Joiner, Kumho Tire*

The *Daubert* Court held that judges must serve as "gatekeepers" to ensure that speculative, unreliable expert testimony does not reach the jury. The Court announced the following test:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Id. at 593.

The Court also listed factors the trial courts "may" consider. First, the Court noted that ordinarily a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been)

tested. *Id.* at 593. "Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication." *Id.* The court also should consider the "known or potential rate of error." *Id.* at 594. Finally, "general acceptance" can have a bearing on the inquiry. *Id.* Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community may properly be viewed with skepticism. *Id.*

The Supreme Court followed *Daubert* with *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), in which the Court held that an appellate court reviews a district court's decision to admit or exclude expert testimony under *Daubert* on an abuse of discretion standard. The Court found that the district court did not abuse its discretion in excluding evidence. In reaching its ruling, the Court also held that a trial court's analysis is not necessarily limited to reviewing the expert's methodology, as opposed to conclusions. The Court noted that "conclusions and methodology are not entirely distinct from one another," and nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* at 146.

Finally, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held that *Daubert* applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. *Id.* at 149. Further, a trial court may consider one or more of the specific *Daubert* factors, but the test is flexible, and *Daubert's* list of factors does not apply to all experts or in every case. Rather, a district court has the same broad discretion in deciding *how* to determine reliability as it enjoys in making its ultimate reliability

determination. *Id.* at 153.

"The burden of laying the proper foundation for the admission of expert testimony is on the party offering the expert, and the admissibility must be shown by a preponderance of the evidence." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir.1999). The proponent must show that his expert was qualified to testify competently regarding the matters he intends to address; the methodology by which the expert reaches his conclusions is sufficiently reliable; and the testimony assists the trier of fact. *Maiz v. Virani*, 253 F.3d 641, 664 (11th Cir.2001).

In *Rider v. Sandoz Pharmaceuticals Corp.*, 295 F.3d 1194 (11th Cir. 2002), the court held that the district court correctly applied the principles established in the *Daubert* trilogy. The court considered all of the voluminous evidence in the record and all of the evidence taken at a three-day hearing and was unable to find sufficiently reliable scientific evidence to bridge the gap between the conclusion that the drug Parlodel caused injuries, possibly including ischemic stroke, and the conclusion that the drug was a probable cause of the plaintiffs' hemorrhagic strokes. *See id.* at 1196.

2. Florida State Court: *Frye*

In *Stokes v. State*, 548 So. 2d 188 (Fla.1989), the Florida Supreme Court adopted the *Frye* test in considering the admissibility of hypnotically refreshed testimony. The court noted that the underlying theory for this rule is that a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. "If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use." *Id.* at 194. Post-*Daubert*, the Florida Supreme Court has continually reaffirmed its adherence to the *Frye* test. *See, e.g., Ibar v. State*, 938 So. 2d 451 (Fla. 2006); *Hadden v.*

State, 690 So. 2d 573, 578 (Fla.1997); *Flanagan v. State*, 625 So.2d 827, 829 n.2 (Fla.1993).

In *Ramirez v. State*, 651 So.2d 1164 (Fla.1995), the court addressed the proper procedures for the admission of expert opinion testimony. The court held that there was a four step process for the admission of expert opinion testimony concerning a new or novel scientific principle. First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. Second, the trial judge must apply the *Frye* test and decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. All three of these initial steps are decisions to be made by the trial judge alone. Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject. *Id.* at 1166.

In utilizing the *Frye* test, the proponent of the evidence has the burden to prove by a preponderance of the evidence the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts at issue. The trial judge has the sole responsibility to determine this question. *Id.* at 1168.

In a subsequent appeal in the same case, the Florida Supreme Court addressed the manner in which a trial court is to evaluate the reliability of an expert's opinion. First, the court observed that evidence based on a novel scientific theory is "inherently unreliable and inadmissible" unless the theory has been adequately tested and accepted by the relevant scientific community.

Ramirez v. State, 810 So.2d 836, 843 (Fla.2001). A court, however, is not required to accept a "nose count" of experts in the field. Rather, the court may peruse "disparate sources" such as expert testimony, scientific and legal publications, and judicial opinions, and decide for itself whether the theory in issue has been "sufficiently tested and accepted by the relevant scientific community." *Id.* at 844. In gauging acceptance, the court must look to "indicia" or "hallmarks" of scientific acceptance for the type of methodology or procedure under review. An expert's "bald assertion" that his deduction is premised upon well-recognized scientific principles is inadequate if the witness's application of these principles is untested and lacks indicia of acceptability. *Id.* It should also be noted that only general acceptance, not unanimity, is required. *David v. National Railroad Passenger Corp.*, 801 So.2d 223, 226 (Fla. 2d DCA 2001) (citing *Brim v. State*, 695 So.2d 268 (Fla.1997)).

The *Ramirez* court ultimately held that the State failed to show by a preponderance of the evidence that its expert's knife mark evidence procedure was generally accepted by scientists active in the relevant field. The court noted that in applying the *Frye* criteria, "general scientific recognition requires the testimony of impartial experts or scientists. It is this independent and impartial proof of general scientific acceptability that provides the necessary *Frye* foundation." *Ramirez*, 810 So. 2d at 851. Unlike the federal abuse of discretion standard of review, Florida appellate courts review *Frye* rulings de novo. *See Hadden*, 690 So. 2d at 579. Thus, an appellate court reviews a trial court's ruling as a matter of law. When undertaking such a review, an appellate court considers the issue of general acceptance at the time of appeal rather than at the time of trial. An appellate court may examine expert testimony, scientific and legal writings, and judicial opinions in making its determination. *Id.* That being said, the trial court must make a

Frye determination only upon a proper objection that expert testimony presenting novel scientific evidence is unreliable. Thus, unless the party against whom the testimony is being offered makes a specific objection, the trial court will not have committed error in admitting the testimony. *Id.* at 580.

It is worth emphasizing that only new or novel scientific evidence must be *Frye* tested. *United States Sugar Corp. v. Henson,* 823 So.2d 104, 109 (Fla.2002). The *Frye* standard is not applicable to "pure opinion testimony" which is based on an "expert's personal experience and training." *Flanagan v. State,* 625 So.2d 827, 828 (Fla.1993). Medical 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. *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007); *Gelsthorpe v. Weinstein*, 897 So. 2d 504 (Fla. 2d DCA 2005). On the other hand, *Frye* will be applied where particular expert testimony concerning the cause of a medical condition is based on a novel scientific methodology. *See Kaelbel Wholesale, Inc. v.. Soderstrom,* 785 So.2d 539, 547 (Fla. 4th DCA 2001) (holding that expert testimony concerning causation of medical condition, which "was not based upon personal experience or training," would be "required to meet the *Frye* test").

D. Basis for the Opinion

Section 90.704, Florida Statutes provides 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.

Under section 90.704, an expert is generally permitted to express opinions which are

based, at least in part, upon inadmissible information. *See Erwin v. Todd*, 699 So.2d 275 (Fla. 5th DCA 1997)(citing *Maklakiewicz v. Berton,* 652 So.2d 1208 (Fla. 3d DCA 1995); *Department of Corrections v. Williams,* 549 So.2d 1071 (Fla. 5th DCA 1989); *Riggins v. Mariner Boat Works, Inc.,* 545 So.2d 430 (Fla. 2d DCA 1989); *Smithson v. VMS Realty, Inc.,* 536 So.2d 260 (Fla. 3d DCA 1988); *Hungerford v. Mathews,* 511 So.2d 1127 (Fla. 4th DCA 1987); *Bunyak v. Clyde J. Yancey and Sons Dairy, Inc.,* 438 So.2d 891 (Fla. 2d DCA 1983)). The purpose of this section is to enable experts to reach their opinions and explain them in the manner in which they would in their own offices and laboratories.

The rule is frequently cited to allow doctors to base their medical opinions upon tests and laboratory reports which are not admitted into evidence. The rule, however, does not allow a party to use an expert merely as a conduit for introduction of otherwise inadmissible evidence. *Erwin*, 699 So. 2d at 277. Thus, an expert may not testify on direct examination that the expert relied on consultations with colleagues or other experts in reaching his or her opinion. *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006).

In addition, while the underlying facts need not be admissible, there must be some basis for the opinion. The expert cannot simply assume facts which form the basis for his opinion. *Brito v. County of Palm Beach*, 753 So.2d 109, 114 (Fla. 4th DCA 1998)(trial court correctly excluded an engineer's opinion in a product liability action where the engineer admitted that he was not aware of studies supporting his opinion and the only record evidence to support his opinion was his own testimony).

Applying this principle, the court in *Schindler Elevator Corp. v. Carvalho*, 895 So. 2d 1103 (Fla. 4th DCA 2005) held that an expert's opinion that a handrail malfunction caused the

escalator accident at issue did not have a factual basis and did not provide evidence of negligence that was a legal cause of the plaintiff's injuries. The expert conceded that none of the witnesses testified that any slowing of the handrail occurred. He admitted that he did not know specifically what caused the handrail to malfunction. Not only did he ignore the facts in the record, he never explained how inadequate maintenance caused the handrail to malfunction, nor did he even explain how an escalator operates. The jury was never given even a rough understanding of the workings of the handrail and how any lack of maintenance could cause it to malfunction, if indeed it did. Thus, his opinion was unsupported by the evidence.

Federal Rule of Evidence 703 is similar and states as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The last sentence of the rule was added in 2000. The Advisory Committee notes explain that the purpose of the amendment was to "emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted." F.R.E. 703, Advisory Committee Notes, 2000 Amendments. The notes add that the amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying

on information that is inadmissible for substantive purposes. *Id.*

Applying this rule, the Eleventh Circuit has effectively permitted juries to consider hearsay evidence offered through an expert. *See United States v. Brown*, 299 F.3d 1252 (11th Cir. 2002), *reversed on other grounds*, 538 U.S. 1010 (2003). In *Brown*, a DEA agent testified as an expert on drug valuation. He offered expert opinion that the approximate wholesale price in Bermuda for the quantity of cocaine base with which the defendant was found was $217,000. On cross-examination, the agent testified that he could not have offered his testimony on value without information provided to him by an intelligence agent in another DEA office, who had conferred with Bermuda authorities to arrive at an estimated value. *See id.* at 1256. The court held that the testimony was properly admitted under Rule 703, which allows experts to rely upon data which itself would not have been admissible, if this data is "of a type reasonably relied upon by experts in the particular field in forming opinions...."

The court concluded that Rule 703 encompasses hearsay statements in a context such as the instant one, where the government expert specifically testified that his opinion was based on his experience and expertise, in conjunction with the information he received from a DEA intelligence agent and Bermudan authorities, and that such sources of information were regularly relied upon in valuating narcotics. *Id.*; *see also United States v. Floyd*, 281 F.3d 1346 (11th Cir.2002) (holding that expert testimony by an ATF agent based partly on his own analysis, but verified by consultation with an ATF technical specialist, was properly admitted under Rule 703 where the agent testified that the consultation was of the kind regularly relied upon by experts in his field).