

11/8/13

Prof. Earhardt on Daubert

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Florida trial objections

S.Ct. adopts every 2-4 yrs

1 exception - obscure hearsay - not rule until case/control

- effec. date is ^{effec.} date of statute

- assume constitutional

Daubert

- Similar to Test for all evidence: - relevance - reliability

relevance = "fit" - has to fit the facts

- Judge decides that the underlying methodology is reliable - not the jury

- Frye - de novo review; Daubert = abuse of discretion

Daubert vs. Frye - Significant changes

- Marsh v. Valyou expressly repealed -

- car accident → fibromyalgia (controversial dx)

- "pure opinion" not subject to Frye - b/c it's not

- this is Kumho tire -

- concurring opin. Parents - ~~Ft~~ should be Daubert

Dow v. Castillo 854 So2d 1264

Beulah

S.Ct. overruled 3d DCA and said we're not

a Daubert state - directly contrary to Joiner - reasoning extrapolated

3d DCA "before it's time" - applied Daubert - note
concurring opin. in Marsh

#3

Zicam case

Δ had 7 fedl opinions saying inadmiss. under Daubert
Court: we are a Frye ~~state~~ pure opinion is admiss.

Daubert - underlying methodology must be relevant + reliable

- if scientific, must be scientifically reliable

do not let jury decide what's reliable - we are
going to screen unreliable testimony from jury

#1 - no pure opinion (Kumho)

⁺ 40 states have adopted Daubert

Procedure

- Raise it b/f trial - M/Limine

- Don't have to have a hearing

- Objecting party - attach testimony, learned articles,
attacking reliability

- looked at xray or CT scan - ^{cases -} court can take jid.
notice of other cases - if legit Daubert obj
raised - proponent has burden

- "it's not a big deal"

Note: Some opinions of an expert may meet Daubert,
some may not. United Fire v. Windpool, 704 F3d 1338

2 opinions - how did fire start - ignition sequence - not admiss.
- where did the fire start - did meet Daubert

Westlaw
481 F. Appx. 505
US v Barnes

(11th Cir - unpublished op.)

Expert can testify to an ultimate fact -
violate SOC? Yes
negligent? No

Routine diagnosis - Not a Daubert issue

RIP

Claims adjuster testimony re reasonable
cost of medical care

Daubert applies to all expert testimony

M/Limine - attach aff't of opposing expert
Yes - attach testimony, aff't, supporting
articles

remote issue; rare areas of expertise -
frenology -?

Battle of experts: one side could be admissible
Summary judgments: if no expert testimony can't
meet burden of proof

- May ↑ granting of SJ in Fla. cases

Nonjury trials / admin. proceedings

- Same rules apply in non-jury trials
- Frye applic. to admin hearings - 1st DCA
 - so Daubert should apply

704 - if you Q reliability of the inadmiss. reliance materials, then it b/c admiss and goes back to jury

Industry standard and practice

If procedural - S.Ct. adopts + presume Constit. Mortimer

If tried under Frye - what happens on appeal

Objection in depo based on Daubert is probably not enough if motion made - may have to go back + lay foundation

Have to make an MIL -

if definitively denied - preserved for appeal

Also, can file an MIL in support of wid.

Pure opinion - observations of videos
pure opinion repealed
no pure opinion

Predicate for non-medical ~~isss~~ opinions

Lowry, Patricia E.

From: Murray, John B.
Sent: Friday, November 08, 2013 11:57 AM
To: Lowry, Patricia E.
Subject: RE: Ramirez

Yes, he used it as an example of where the court applied *Frye* and acted as a gatekeeper, or as a finder of fact, in a manner that took the decision away from the jury. The point seemed to be to diffuse criticism that *Daubert* was particularly novel in that it took away part of the jury's role and thus reduced the instances where there could be a "battle of experts."

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SQUIRE
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From: Lowry, Patricia E.
Sent: Friday, November 08, 2013 11:51 AM
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Subject: Ramirez

Were you able to hear what Earhardt said about Ramirez? My transmission stopped in the middle of his answer.

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