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Who's on First? Frye, then Daubert, then Frye, and now back to Daubert? The Florida Supreme Court's Internal Battle Over the Standard for Admissibility for Expert Testimony. (May, 2019)

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Admissibility Under the Frye Standard

Since the Florida Supreme Court's adoption of the federal standard for admissibly of expert testimony announced in *Frye v. U.S.*[i], the Court had consistently reaffirmed this standard.[ii] As *noted in Frye:*

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the field in which it belongs.[iii]

The *Frye* test applies to any new or novel scientific evidence,[iv] but does not apply to "pure opinion" testimony of an expert.[v] Therefore, it is inapplicable in the "vast majority" of cases.[vi] Under *Frye*, "[t]he proponent of the evidence bears the burden of establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology."[vii] A trial court "has broad discretion in determining the range of the subjects on which an expert can testify, and the trial judge's ruling will be upheld absent a clear error."[viii]

"When applying *Frye*, a court is not required to determine that evidence is 'generally accepted' on the basis of a mere 'nose count' of experts in the field."[ix] Instead, a court "may peruse disparate sources—e.g., 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.'"[x] However, a court should not admit expert testimony based solely upon "[a] bald assertion by the expert that his deduction is premised upon well-recognized scientific principles…if the witness's application of these principles is untested and lacks indicia of acceptability,"[xi] especially where "the expert has a personal stake in the new theory or is prone to an institutional bias."[xii] It is also within the trial court's discretion to determine the proper subject matter for expert testimony.[xiii] However, that discretion is not boundless and only expert testimony which will assist the trier of fact should be admitted.[xiv]

Admissibility Under the Daubert Standard

In 2013, nearly 50 years after the Court's adoption of *Frye,* the Legislature amended § 90.702, Florida Statutes, to pattern it after Federal Rule of Evidence 702 and adopt the standards for expert testimony as provided in *Daubert*,[xv] *General Electric*[xvi] and *Kumho Tire Co.*[xvii] With the amendment, the Legislature attempted to eliminate the *Frye standard in* the state courts of Florida.[xviii] Following the amendment, it was recognized by some courts in Florida that "the *Daubert* test applie[d] not only to 'new or novel' scientific evidence (which was subject to *Frye*), but to all other expert opinion testimony."[xix] However, given the Florida Supreme Court's subsequent refusal to adopt the legislative changes as a rule of the Court[xx], there was some question at the time as to whether Florida remained a *Frye* jurisdiction notwithstanding the legislative amendments.[xxi] This uncertainly was eliminated by the Court's decision in *DeLisle*.[xxii]

With the Court's re-affirmance of *Frye* in *DeLisle*, any pending cases at the time were subject to the standards announced in *Frye* and Marsh.[xxiii] For cases that were adjudicated under the *Daubert* standard pursuant to the 2013 legislative amendments—which the Court in *DeLisle* ruled were unconstitutional to the extent they were procedural—the question remained whether parties suffering from an adverse judgment or other final order may be entitled to relief.[xxiv] The *DeLisle* Court was silent on this point. Generally, when the Court is silent on whether its ruling has prospective or retroactive application, the ruling is prospective only. "In deciding whether a new rule should apply retroactively, [the] Court balances two important considerations: (1) the finality of decisions; and (2) the fairness and uniformity of the court system.[xxv] Given these considerations, including the *Stovall*[xxvi] and *Linkletter*[xxvii] factors, one could certainly have argued against retroactive application of *Frye* to cases decided under the *Daubert* standard. And where a ruling is given prospective application, it does not affect cases tried before the ruling.[xxviii] However, at the time *DeLisle* was decided, it remained to be seen how Florida's lower courts would react to *DeLisle* on the issue of prospective application of *Frye* in cases adjudicated under *Daubert*, where the excluded expert testimony would have been outcome determinative.[xxix] The judicial landscape at the time suggested no relief from judgment for a party on this basis, which would require retroactive application of the ruling announced in *DeLisle*.[xxx]

Now, less than a year after *DeLisle* was decided, the Court – **with three (3) new members replacing retired Justices who had joined in the majority opinion in *DeLisle*** – has abruptly reversed course. In *In Re: Amendments to the Florida Evidence Code,* No. SC19-107 (May 23, 2019), a more conservative Court has "now recede[d] from the Court's prior decision not to adopt the Legislature's *Daubert* amendments to the Evidence Code and to retain the *Frye* standard" noting that the "`grave constitutional concerns raised by those who oppose the [*Daubert*] amendments to the Code appear unfounded."[xxxi] While deciding to adopt the Legislature's *Daubert* amendments, the Court did not, however decide the "constitutional or other substantive concerns that have been raised about the amendments," which the Court felt were better left for another day.[xxxii] Accordingly, effective immediately upon the release of the opinion, the Court has now adopted the amendments to sections 90.702 and 90.704 of the Florida Evidence Code made by chapter 2013-107, sections 1 and 2, of the Laws of Florida, to the extent the amendments are procedural.[xxxiii]

It should be noted that two of the Court's Justices dissented from the majority opinion of the Court, albeit for different reasons. One Justice

believes that "*Frye* is the superior standard for determining the reliability of expert testimony,"[xxxiv] and that "*Daubert* would negatively impact access to Florida courts."[xxxv] The other Justice, while believing that *DeLisle* was wrongly decided by the Court, nonetheless criticized the majority's adoption of the amendments to section 90.702 because in his view the Court did not follow "its procedure for adopting rules."[xxxvi] He also questioned the constitutional authority of the Court to adopt the amendments because "the majority opinion use[d] [its constitutional] rulemaking authority to adopt the *Daubert* amendment based on the faulty premise that it 'is procedural in nature,'" and "[the Court does] not have the constitutional authority to adopt substantive laws as procedural rules."[xxxvii] While these dissenting opinions are not binding on the Court (or any lower Florida courts), they could be used as persuasive authority to one day challenge the amendments based upon "constitutional or other substantive concerns that have been raised about the amendments."[xxxviii] Until then, *Daubert* will, once again, determine the fate of expert opinions in Florida's courtrooms.

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[i] *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923). [ii] *See Marsh v. Valyou*, 977 So. 2d 543, 546–47 (Fla. 2007) ("We expressly adopted *Frye* in *Bundy v. State* and *Stokes v. State* . . . . Despite the Supreme Court's decision in *Daubert* [*v. Merrell Dow Pharms.*, 509 U.S. 579, 587 (1993) that the adoption of the Federal Rules of Evidence superseded the *Frye* test], we have since repeatedly reaffirmed our adherence to the *Frye* standard for admissibility of evidence.") (internal citations omitted). [iii] *Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923); *see Marsh v. Valyou*, 977 So. 2d 543, 546 (Fla. 2007); *Perez v. Bell S. Telecomm., Inc.*, 138 So. 3d 492, 496 (Fla. 3d DCA 2014). [iv] *See U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109 (Fla. 2002) ("By definition, the Frye standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques."). [v] *See Perez v. Bell S. Telecomm., Inc.*, 138 So. 3d 492, 496 (Fla. 3d DCA 2014) (noting that under "pure opinion" path to admissibility, "if the proposed testimony is not 'new or novel,' but instead is based upon the expert's personal experience, observation, and training, the *Frye* test does not apply to the ultimate opinion of an expert, so long as the methods used to reach the opinion were generally accepted scientific methods under *Frye*"); *see also Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993) ("[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."); *Hadden v. State*, 690 So. 2d 573, 579–80 (Fla. 1997) (same); *Marsh v. Valyou*, 977 So. 2d 543, 548–49 (Fla. 2007) (noting inapplicability of *Frye* to pure opinion testimony); *Herlihy v. State*, 927 So. 2d 146, 148 (Fla. 1st 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 v. Weinstein*, 897 So. 2d 504, 510–11 (Fla. 2nd DCA 2005) (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). [vi] *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109 (Fla. 2002); *see also Rickgauer v. Sarkar*, 804 So. 2d 502, 504 (Fla. 5th DCA 2001) ("Most expert testimony is not subject to the *Frye* test.") [vii] *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So. 2d 1264, 1268 (Fla. 2003); *see Perez v. Bell S. Telecomm., Inc.*, 138 So. 3d 492, 496 (Fla. 3d DCA 2014) (noting that "if the proposed expert testimony espoused a 'new or novel' scientific theory, principle or discovery, then 'the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the field in which it belongs.'") (citing *Marsh v. Valyou*, 977 So. 2d 543, 546 (Fla. 2007)) (emphasis in original omitted). This method of establishing admissibility is commonly known as the "*Frye* test." *Perez*, 977 So. 2d at 496. [viii] *Davis v. State*, 142 So. 3d 867, 872 (Fla. 2014) (quoting *Penalver v. State*, 926 So.2d 1118, 1134 (Fla. 2006)); *see also Davis v. Caterpillar, Inc.*, 787 So. 2d 894, 897 (Fla. 3d DCA 2001) ("[I]t is generally within the trial court's discretion to determine a witness's qualifications to express an opinion as an expert, and the court's determination in this regard will not be reversed absent a clear showing of error."); *Florida Laundry Servs., Inc. v. Sage Condo. Ass'n, Inc.*, 193 So. 3d 68, 68–69 (Fla. 3d DCA 2016) ("'It is well established that the acceptance or rejection of expert testimony is a matter within the sound discretion of the trial court, and such decision will not be overturned on appeal absent a showing of abuse of discretion.'") (quoting *Kaiser v. Harrison*, 985 So. 2d 1226, 1232 (Fla. 5th DCA 2008)); *Hadden v. State*, 690 So. 2d 573, 581 (Fla. 1997) (noting that reversal not necessarily required where evidence is found to be inadmissible under *Frye* because the error may be harmless) (citing *Flanagan v. State*, 625 So.2d 827, 829–30 (Fla. 1993)); *Cf. Dixon v. River City Brewing Co.*, 904 So. 2d 447 (Fla. 1st DCA 2005) (reversing exclusion of opinions from mechanical engineer that testified as accident reconstructionist where expert visited scene for only a short time without performing any tests or taking measurements, noting that 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.'") (quoting *Florida Dep't of Transp. v. Armadillo Partners, Inc.*, 849 So. 2d 279, 287–88 (Fla. 2003)) (ellipsis in original). [ix] *Ramirez v. State*, 810 So. 2d 836, 844 (Fla. 2001). *See DeLisle v. Crane Co.*, 258 So. 3d 1219, 1234 (Fla. 2018) (J. Pariente concurring) (quoting *Ramirez*, 810 So. 2d at 844). [x] *Ramirez v. State*, 810 So. 2d 836, 844 (Fla. 2001). *See DeLisle v. Crane Co.*, 258 So. 3d 1219, 1234 (Fla. 2018) (J. Pariente concurring) (quoting *Ramirez*, 810 So. 2d at 844); *see also Brim v. State*, 695 So. 2d 268, 272 (Fla. 1997). [xi] *Ramirez v. State*, 810 So. 2d 836, 844 (Fla. 2001). *See DeLisle v. Crane Co.*, 258 So. 3d 1219, 1234 (Fla. 2018) (J. Pariente concurring) (quoting *Ramirez*, 810 So. 2d at 844). [xii] *Ramirez v. State*, 810 So. 2d 836, 844, n. 13 (Fla. 2001). [xiii] *See Orpe v. Carnival Corp.*, 909 So. 2d 929, 930 (Fla. 3d DCA 2005) (citing *Angrand v. Key*, 657 So. 2d 1146, 1149 (Fla. 1995)). [xiv] *Angrand v. Key*, 657 So. 2d 1146, 1149 (Fla. 1995). *See also L.B. v. Naked Truth III, Inc.*, 117 So. 3d 1114, 1116 (Fla. 3d DCA 2012) ("The purpose of expert testimony is to 'assist the trier of fact in understanding the evidence, or in determining a fact in issue.'"); *Sidran v. E.I. Dupont De Nemours & Co, Inc.*, 925 So. 2d 1040, 1043 (Fla. 3d DCA 2003) (same); *see also State Farm Mut. Auto. Ins. Co. v. Long*, 189 So. 3d 335, 338 (Fla. 5th DCA 2016) ("The decision to qualify a witness as an expert is left to the sound discretion of the trial judge. Although the trial judge 'has broad discretion in determining the range of the subjects on which an expert can testify ...', this discretion is not unfettered.") (quoting *Penalver v. State*, 926 So. 2d 1118, 1134 (Fla. 2006) (internal citations omitted) (ellipsis in original). It bears noting that a trial court may take judicial notice of an expert's opinion if the expert testimony has been previously deemed reliable by an appellate court. *Booker v. Sumter Cnty. Sheriff's Office/ N. A. Risk Servs.*, 166 So. 3d 189, 194 (Fla. 1st. DCA 2015) (citing *Hamilton v. Commonwealth*, 293 S.W.3d 413, 419 (Ky. Ct. App. 2009)) ("If a party is offering expert testimony in a field of scientific inquiry so well established that *it has been previously deemed reliable by an appellate court*, the trial court may take judicial notice of the evidence. This 'relieves the proponent . . . from the obligation to prove . . . that which has been previously accepted as fact by the . . . appellate court. It shifts to the opponent of the evidence the burden to prove. . .that such evidence is no

longer deemed scientifically reliable. The proponent may either rest on the judicially noticed fact or introduce extrinsic evidence as additional support or in rebuttal.'") (italics in original). *See also Boyles v. Dillards Inc.*, 199 So. 3d 315, 318 (Fla. 5th DCA 2016) (trial court permitted to take judicial notice if expert previously deemed reliable by appellate court) (citing *Booker*, 166 So. 3d at 194). [xv] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). [xvi] *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997). [xvii] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). [xviii] *See* Laws 2013, c. 2013-107 § 1 (preamble to § 90.702). In amending the statute, the Legislature expressed its intention to "'prohibit in the courts of this state pure opinion testimony'" as provided in *Marsh. See Perez v. Bell S. Telecomm., Inc.*, 138 So. 3d 492, 497 (Fla. 3d DCA 2014) (quoting preamble to § 90.702); *Giaimo v. Florida Autosport, Inc.*, 154 So. 3d 385, 387 (Fla. 1st DCA 2014) (holding "pure opinion" testimony inadmissible under amended § 90.702). Thus, the revisions to § 90.702 "chang[ed] Florida from a *Frye* jurisdiction to a *Daubert* jurisdiction." *Perez*, 977 So. 2d at 497. Significantly, the revisions applied retroactively to any cases pending at the time of the amendment. *See Bunin v. Matrixx Initiatives, Inc.*, 197 So. 3d 1109, 1110 (Fla. 4th DCA 2016). As the court in *Matrixx* noted, "It is well-settled that '[p]rocedural or remedial statutes … are to be applied retrospectively and are to be applied to pending cases.' A statute that merely 'relates to the admission of evidence' is generally considered procedural. Accordingly, . . . 'section 90.702 of the Florida Evidence Code indisputably applies retrospectively.'" Id. at 1110 (internal citations omitted) (ellipsis in original). Therefore, the court held is was not an abuse of discretion to exclude the plaintiff's expert's causation opinion under *Daubert*, even though the expert's opinion would have been admissible under the "pure opinion" rule of *Marsh. Id.*; *see also Perez v. Bell S. Telecomm., Inc.*, 138 So. 3d 492, 498 (Fla. 3d DCA 2014) (finding that *Daubert* standard, enacted while appeal was pending, would be applied retroactively); *Conley v. State*, 129 So. 3d 1120, 1121 (Fla. 1st DCA 2013) (same). While the Florida Supreme Court has twice stated that *Daubert* did not apply retroactively, this was in the context of criminal proceedings where the defendants argued that *Daubert* should apply to prior proceedings, not pending cases. *See Anderson v. State,* 220 So. 3d 1133, 1151 (Fla. 2017); *Zakrzewski v. State*, 147 So. 3d 531 (Fla. 2014). Thus, these decisions did not affect the lower appellate rulings in *Matrixx*, *Perez*, and *Conley* that *Daubert* applied retroactively. [xix] *Perez v. Bell S. Telecomm., Inc.*, 138 So. 3d 492, 497 (Fla. 3d DCA 2014) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–49 (1999)) ("The initial question before us is whether this basic gatekeeping obligation applies only to 'scientific' testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony."). [xx] *See In re Amendments to Fla. Evid. Code*, 210 So. 3d 1231, 1239 (Fla. 2017) (declining to adopt the *Daubert* amendment to the extent it is procedural, citing "grave constitutional concerns"). [xxi] The Court did not expressly strike down the amendments. In *re Amendments to Fla. Evid. Code*, 210 So. 3d 1231, 1239 (Fla. 2017) (noting that the constitutional concerns "must be left for a proper case or controversy"). While the effect of the Court's decision on the lower trial and appellate courts in Florida remained to be seen at the time, at least one appellate court continued to follow the *Daubert* amendment. *See State Dep't of Corr. v. Junod*, 217 So. 3d 200, 208 n.4 (Fla. 1st DCA 2017) ("We reaffirm that *Daubert* continues to apply in workers compensation proceedings . . . .") (citing Baricko v. Barnett Transp., Inc., 220 So. 3d 219 (Fla. 1st DCA 2017)) (Wetherell, J., concurring) (noting that supreme court's failure to adopt the procedural aspects of Daubert "will have no impact whatsoever on the applicability of the *Daubert* test in workers' compensation proceedings"). *See Crane Co. v. Delisle*, 206 So. 3d 94, 112 n.7 (Fla. 4th DCA 2016) ("[The plaintiff] also argues that this court lacks the authority to apply *Daubert*, as incorporated through section 90.702, Florida Statutes . . . because it is a legislative change to the evidence code that has not yet been approved by the Florida Supreme Court. However, statutes are presumed to be constitutional and are to be given effect until declared otherwise. Further, we, and other Florida appellate courts, have applied the statute to the admission of testimony. We therefore find that this argument lacks merit.") (internal citations omitted). *See also Northrop Grumman Sys. Corp. v. Britt*, 241 So. 3d 208, 214 (Fla. 3d DCA 2017) (noting "the competing [*Frye* and *Daubert*] standards embroiled in the legislative amendments . . . and the Florida Supreme Court's analysis of the constitutionality of those amendments" and approving trial court's use of the *Daubert* standard); *Collar v. R. J. Reynolds Tobacco Co.*, 222 So. 3d 581, 584 n.1 (Fla. 4th DCA 2017) (noting that exclusion of pulmonologist's opinion was proper under either *Daubert* or *Frye*). [xxii] *DeLisle v. Crane Co.*, 258 So. 3d 1219, 1234 (Fla. 2018). [xxiii] *D.R. Horton, Inc. – Jacksonville v. Heron's Landing Condo. Ass'n of Jacksonville, Inc.*. 266 So. 3d 1201, 1207 (post-DeLisle, applying *Frye* to case pending on appeal and holding expert testimony admitted at trial under *Daubert* standard was proper where opinions not based on new or novel scientific methods or techniques); *See Perez v. Bell S. Telecomm., Inc.*, 138 So. 3d 492, 498 (Fla. 3d DCA 2014) (finding that *Daubert* standard, enacted while appeal was pending, would be applied retroactively); *Conley v. State*, 129 So. 3d 1120, 1121 (Fla. 1st DCA 2013) (same). [xxiv] With respect to final judgment and orders, Florida Rule of Civil Procedure 1.540 provides in relevant part: (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: . . . or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court. (emphasis added) [xxv] *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) cert. denied, 449 U.S. 1067 (Fla. 1980) (England, J., specially concurring). In *Witt*, the Court stated that a new rule of law would not apply retroactively unless the new rule "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Id. at 931. The first factor in *Witt* is satisfied because *DeLisle* is a decision of the Florida Supreme Court. With respect to the second factor under *Witt*, the *DeLisle* ruling pertained to the legislature's unconstitutional overreach, so arguably this factor is satisfied. Assuming it is, retroactive application of *DeLisle* would be permissible only if the third factor is satisfied. With respect to the third factor, a decision is of fundamental significance when it either places "beyond the authority of the state the power to regulate certain conduct or impose certain penalties" or when the rule is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v. Denno*, 388 U.S. 293 (1967)] and *Linkletter* [*v. Walker*, 381 U.S. 618 (1965)]." *Witt*, 387 So. 2d at 929. Since *DeLisle* held that the application of *Frye* versus *Daubert* for admission of expert testimony is procedural, *see DeLisle*, 258 So. 3d 1219, 1220 (Fla. 2018), the ruling reaffirming the application of *Frye* can only apply retroactively under Florida law if retroactive application is deemed necessary after assessing the *Stovall* and *Linkletter* factors. *See Chandler v. Crosby*, 916 So. 2d 728, 729–30 (Fla. 2005) (noting that prior announced rule of the United States Supreme Court that controlled the admissibility of testimonial hearsay "did not change the power of the State to regulate certain conduct or impose certain penalties [but] rather is a procedural rule" that could only apply in case retroactively if necessary after assessing *Stovall* and *Linkletter* factors) (emphasis added). The *Stovall* and *Linkletter* factors are: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Witt*, 387 So. 2d at 926 (citations omitted). [xxvi] *Stovall v. Denno*, 388 U.S. 293 (1967). [xxvii] *Linkletter v. Walker*, 381 U.S. 618 (1965). [xxviii] *See Boyett v. State*, 688 So. 2d 308, 310 (Fla. 1996) ("Unless we explicitly state otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced.") (emphasis in original). *See also Wuornos v. State*, 644 So. 2d 1000, 1012 n.4 (Fla. 1994) ("We recognize

that this holding may seem contrary to a portion of *Smith v. State* . . . which can be read to mean that any new rule of law announced by this Court always must be given retrospective application. However, such a reading would be inconsistent with a number of intervening cases. We read *Smith* to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise.") (emphasis added) (internal citations omitted). That *Boyett* refused to recognize retroactive application in a criminal proceeding where defendants are afforded certain constitutional rights not attendant to civil proceedings, suggests the same result would obtain in a civil proceeding where a judgment has been entered. [xxix] Especially given the fact that the exclusion of expert testimony is reviewed under an "abuse of discretion" standard. *See Castillo, et al., v. E.I. Du Pont De Nemours & Co., Inc.*, et al., 854 So. 2d 1264, 1280 (Fla. 2003) (citing *Grau v. Branham*, 761 So. 2d 375 (Fla. 4th DCA 2000) ("Overall, broad discretion rests with the trial court in matters relating to the admissibility of relevant evidence, and that ruling will not be overturned absent a clear abuse of discretion."); *see also Kemp v. State*, No. 4D15–3472, 2017 WL 6371164, at *2 (Fla. 4th DCA Dec. 13, 2017) (A trial court's ruling on the admissibility of expert testimony is reviewed for an abuse of discretion.) (citing *Booker v. Sumter Cnty. Sheriff's Office/N. Am. Risk Servs.*, 166 So. 3d 189, 194 n.2 (Fla. 1st DCA 2015)). [xxx] *Cf. Anderson v. State*, 220 So. 3d 1133, 1151 (Fla. 2017) (noting that legislative adoption of the *Daubert* standard in 2013 did not apply retroactively) (citing *Zakrzewski v. State*, 147 So. 3d 531 (Fla. 2014)). [xxxi] *In Re: Amendments to the Florida Evidence Code*, No. SC19-107, 4 (Fla. May 23, 2019). [xxxii] *In Re: Amendments to the Florida Evidence Code*, No. SC19-107, 5 (Fla. May 23, 2019). [xxxiii] *In Re: Amendments to the Florida Evidence Code*, No. SC19-107, 7 (Fla. May 23, 2019). [xxxiv] *In Re: Amendments to the Florida Evidence Code*, No. SC19-107, 13 (Fla. May 23, 2019)(Labarga J. dissenting). [xxxv] *In Re: Amendments to the Florida Evidence Code*, No. SC19-107, 16 (Fla. May 23, 2019)(Labarga J. dissenting). [xxxvi] *In Re: Amendments to the Florida Evidence Code*, No. SC19-107, 18-19 (Fla. May 23, 2019)(Luck J. dissenting). [xxxvii] *In Re: Amendments to the Florida Evidence Code*, No. SC19-107, 41 (Fla. May 23, 2019)(Luck J. dissenting). [xxxviii] *In Re: Amendments to the Florida Evidence Code*, No. SC19-107, 5 (Fla. May 23, 2019).

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