

Conley v. State,
2013 WL 6703503, 39 Fla. L. Weekly D24 (Fla. 1st DCA Dec. 20, 2013)

DAUBERT UPDATE:

DAUBERT PREDICTED TO APPLY RETROACTIVELY

The First District Court of Appeal issued the first Florida opinion discussing the newly adopted *Daubert* standard for reviewing expert testimony. In *Conley v. State*, 2013 WL 6703503, 39 Fla. L. Weekly D24 (Fla. 1st DCA Dec. 20, 2013), the Court evaluated whether evidence of penile plethysmograph test (PPG) in a criminal case against a defendant for sexually violent predator under the Jimmy Ryce Act was properly admitted. Because the PPG test was previously held not to be “new or novel” evidence and thus not subject to the analysis in *Frye* (see *State v. Fullwood*, 22 So. 3d 655 (Fla 3d DCA 2009), the trial court admitted the test results.

However, the ruling was appealed, and while the appeal was pending, Florida adopted the federal standard governing the admissibility of scientific evidence in *Daubert*. The First District reversed and remanded the case for a new trial and directed the trial court to first determine “the admissibility of *Daubert* standard codified by section 90.702.”

This case serves as an example of retroactive application of *Daubert*. **Florida courts faced with concerns of *Daubert*'s retroactive application, as predicted, will likely continue in the direction of *Conley* and retroactive application.** As such, practitioners facing concerns identified in my prior article, “Florida’s New Expert Opinion Law: Who Should Care and Does It Really Matter?”, of *Daubert*'s retroactive application should cite *Conley* where trial has been set and some expert depositions occurred prior to enactment and a party:

- files *Frye* motions to strike an expert;
- requests redeposing the expert to discover basis for striking the expert on *Daubert* grounds;
- files a *Frye* motion to strike an expert; or
- seeks to amend or substitute an expert to satisfy *Daubert*.

The *Conley* opinion, although in action retroactively applied *Daubert*, it leaves the overarching question of retroactive application open to interpretation in the scenarios above. The Court’s direction to the trial court to apply *Daubert* would seem to answer this question in the affirmative. That said there is room to argue otherwise because the First District did not specifically state retroactive application, *Conley* can easily be distinguished from other cases and all other Florida District Courts of Appeal have yet to address the *Daubert* standard and its retroactive application. *Daubert* and the evolution of Florida case law on the matter should be continuously monitored by practitioners dealing with expert testimony. **ELL**