

**PROCEDURES FOR SCHEDULING F.S. 90.702
("DAUBERT¹") TYPE HEARINGS IN DIVISION CV-E**

Hearing time requested by Counsel for motions entitled "*Daubert* Motions", matters related to *Daubert* or any other expert witness issues, or Motion(s) to Exclude Novel Opinion(s) of Expert(s) shall be treated as requests for a "*Daubert* Hearing" pursuant to Florida Statute 90.702.

Hearings to determine the admissibility of opinion testimony by experts must be heard prior to the Pre-Trial Conference and can be time consuming. By statutory definition these hearings will be evidentiary in nature. Therefore, testimony will probably be required.² However, the Court has discretion in whether a hearing is required and how to conduct any proceedings.³ The Court has the discretion to conduct a paper review only, a hearing with argument, an evidentiary hearing, or defer ruling until the time of trial. In any event, sufficient hearing time will have to be set aside within the Court's extremely busy docket, and, therefore, once scheduled, such hearings will not be continued without a court order. **ALL HEARINGS OF THIS NATURE MUST BE SCHEDULED AND HEARD AT LEAST THIRTY (30) DAYS PRIOR TO THE PRE-TRIAL CONFERENCE.**

Accordingly, the following procedures and considerations are hereby set forth to inform and govern counsel raising any expert witness issues:

1. Counsel for the parties shall familiarize themselves with all of the provisions of the *Order Setting Case for Trial and Pre-Trial Conference and Requiring Matters to be Completed Prior to Pre-Trial Conference* entered by this Court, including the specific provisions governing "*Daubert* or other expert witness issues."

2. Although the Court has broad discretion in deciding how to manage its *Daubert* gatekeeper function,⁴ counsel have an obligation to raise a *Daubert* challenge as soon as the party is reasonably aware of the basis for it.⁵ Absent "exceptional circumstances," an untimely *Daubert* motion will not be considered by the Court.⁶ After filing the *Daubert* motion, the moving party has an obligation to advance the motion by bringing it to the Court's attention and timely seeking a hearing. The Court shall consider the failure to do so a waiver.⁷

¹ *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 469 (1993).

² Video-conferenced testimony can be utilized if coordinated with other counsel and approved by the Court.

³ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

⁴ See *Booker v. Sumter County Sheriff's Office/North America Risk Services*, 166 So. 3d 189, at 192 (Fla. 1st DCA 2015).

⁵ *Id.*; *Rojas v. Rodriguez*, 185 So. 3d 710, at 711-12 (Fla. 3d DCA 2016) (noting that the trial judge reversed for excluding expert testimony when the objecting party did not raise the *Daubert* challenge timely).

⁶ *Rojas*, 185 So. 3d at 712. See also *Feliciano Hill v. Principi*, 439 F. 3d 18, 24 (1st Cir. 2006) (noting that parties are obligated to object to expert testimony in a timely fashion, so that the expert's proposed testimony can be evaluated with care); *Alfred v. Caterpillar Inc.*, 262 F. 3d 1083, 1087 (10th Cir. 2001) (holding that because *Daubert* "contemplates a gatekeeping function, not a gotcha junction," untimely *Daubert* motions should be considered only in rare circumstances); *Club Car Inc. v. Club Care (Quebec) Import, Inc.*, 362 F. 3d 775, 780 (11th Cir. 2004) (explaining that a *Daubert* objection not raised before trial may be rejected as untimely).

⁷ See *Booker*, 166 So. 3d at 193.

3. A *Daubert* challenge shall not begin until a timely, proper, and facially sufficient motion is served. Once timely raised, the Court as the gatekeeper “must determine whether the objection was sufficient to put opposing counsel on notice so as to have the opportunity to address any perceived defect in the expert’s testimony.”⁸ A proper *Daubert* motion must identify the source, substance, and methodology of the challenged testimony.⁹ If the motion is not supported by conflicting expert testimony and literature, the Court shall be justified in declining to hear the motion.¹⁰ “*Daubert* objections must be directed to specific opinion testimony and ‘state a basis for the objection beyond just stating [the party] was raising a *Daubert* objection, in order to allow opposing counsel an opportunity to have the [expert] address the perceived defect in his testimony.’”¹¹

4. Generally, in most cases, the *Daubert* challenge will focus on one or more of the following major areas:

a. **Qualifications:** The expert must demonstrate knowledge “beyond the understanding of the average person.”¹² A witness can be qualified as an expert by “knowledge, skill, experience, training, or education.”¹³

b. **Relevance and Helpfulness:** The expert testimony is relevant if it will “help”¹⁴ or “assist the trier of fact in understanding the evidence or in determining a fact in issue.”¹⁵ “Rule 702’s ‘helpfulness’ standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.”¹⁶ This “connection” has been appropriately denominated as “fit.”¹⁷

c. **Fit:** The Court, in performing its “gatekeeper” role of screening of such expert testimony, is required to analyze whether there is “too great an analytical gap between the data and the opinion proffered,”¹⁸ and may not accept opinion evidence that is connected to existing data only by the *ipse dixit* of the expert (i.e. “because I said so”).¹⁹ “‘Fit’ is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.”²⁰

⁸ See *id.*; *Tanner v. Westbrook*, 174 F. 3d 542, 546 (5th Cir. 1999), *superseded in part by rule on other grounds in Mathias v. Exxon Corp.*, 302 F. 3d 448, 459 n. 16 (5th Cir. 2002).

⁹ *Booker*, 166 So. 3d at 193.

¹⁰ *Id.*; See also *Rushing v. Kansas City Ry.*, 185 F. 3d 496, 506 (5th Cir. 1999), *superseded by statute on another ground as noted in Mathias*, 302 F. 3d at 459 n. 16.

¹¹ *Booker*, 166 So. 3d at 193.

¹² 4 Weinstein’s Federal Evidence §702.03(1).

¹³ Fla. Stat. §90.702.

¹⁴ Fed. R. Evid. 702.

¹⁵ Fla. Stat. §90.702(a).

¹⁶ See *Daubert*, 509 U.S. at 591-592.

¹⁷ *Allison*, 184 F. 3d at 1312 (citing *Daubert*, 509 U.S. at 591).

¹⁸ See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

¹⁹ *Id.*

²⁰ *Daubert*, 509 U.S. at 591.

d. **Reliable Methodology:** *Daubert* set forth the following **non-exclusive** factors, checklist or considerations for trial courts to use in assessing the reliability of scientific expert testimony: (1) whether the expert's technique or theory can be or has been tested --- that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.²¹ *Daubert* makes clear that the factors it mentions do **not** constitute a "definitive checklist or test."²² The *Daubert* court emphasized that the "inquiry envisioned by Rule 702 is...a flexible one."²³ "It's overarching subject is the scientific relevance and reliability-of the principles that underlie a proposed submission. The focus, of course, must be on principles and methodology, not on the conclusions that they generate."²⁴ The U.S. Supreme Court has concluded that "we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence."²⁵ "[T]oo much depends upon the particular circumstances of the particular case at issue."²⁶ In addition to the non-exclusive reliability factors set forth in *Daubert*,²⁷ the Federal Rules of Evidence Advisory Committee outlined and summarized Federal caselaw before and after *Daubert*, finding other non-exclusive factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact in the Notes to Fed. R. Evid. 702. In addition, *The Reference Manual on Scientific Evidence Third Edition*²⁸ published in 2011 by The Federal Judicial Center can assist the parties in identifying disputed scientific areas or issues and facilitate the process of narrowing the issues concerning the basis of expert evidence, including additional possible reliability factors the Court may consider.

5. Once a timely, proper, facially sufficient, case-specific and expert-specific *Daubert* motion or motion related to other expert witness issues such as qualification(s) or opinion(s) has been filed and served on opposing counsel pursuant to the *Order Setting Case for Trial and Pre-Trial Conference and Requiring Matters to be Completed Prior to Pre-Trial Conference*, counsel shall comply with the specific provisions of the "Division CV-E Policies

²¹ *Id.* at 593-594.

²² *Id.* at 593.

²³ *Id.* at 594.

²⁴ *Id.* at 594-595.

²⁵ *Kumho Tire*, 526 U.S. at 150 (1999).

²⁶ *Id.*

²⁷ *Daubert*, 509 U.S. at 593-594.

²⁸ See Division CV-E website: <https://www.jud4.org/Ex-Parte-Procedures-and-Dates>; "SciMan3D01.pdf". Federal Judicial Center Reference Manual on Scientific Evidence (3d Ed. 2011), available at <https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf>.

and Procedures”²⁹ related to this motion, including but not limited to, the “Meet and Confer Requirement” (Section III. L.). Counsel shall meet and confer pursuant to said “Meet and Confer Requirement” (Section III. L.) of the “Division CV-E Policies and Procedures” to resolve any issues or objections to the admissibility of expert opinion testimony. Pursuant to said “Meet and Confer Requirement” provisions a “Certificate of Compliance” (See Exhibit “A” to “Division CV-E Policies and Procedures”) that the conference has occurred shall be included in the Notice of Hearing filed with the Court.

6. If the expert witness matter is not resolved at the meet and confer, the attorneys for the parties shall discuss and provide the Court the following basic information³⁰ within a joint pre-evidentiary hearing stipulation³¹ for the *Daubert* hearing.

- a. a list of the experts that will be the subject of the hearing;
- b. a copy of the detailed resume or CV of each expert witness;
- c. the specific subject matter about which the witness is expected to testify;
- d. each opinion the expert is expected to provide at trial about which there is a challenge and for which a ruling is requested from this Court;
- e. the basis of each challenged opinion including the facts and data relied upon or that is absent;
- f. the principles and methodology used, or not utilized, to arrive at those challenged opinions;
- g. the peer review to which these methods have been subjected; and
- h. a good faith estimate be each party of the time each will need for their presentation as well as an estimate of the total amount of time needed for the entire hearing. (Counsel are reminded that hearing time is limited, and estimates should be as accurate as possible.)

7. During the above referenced meet and confer or a subsequent meet and confer, Counsel shall prepare an appropriate proposed Case Management Order (“CMO”) scheduling the evidentiary hearing on the *Daubert* Motion and appropriated deadlines for matters to be disclosed, discovered and completed prior to the hearing. To facilitate this meet and confer process the parties should utilize the Court’s template for *Case Management Order Setting Case for Non-Jury Trial and Pretrial Conference and Requiring Matters to be Completed Prior to Pretrial Conference* published in Word format on the Court’s website²⁹ to draft either an “Agreed Order” or a red-lined version of the CMO in draft form for the Court to consider competing provisions during a Case Management Conference if necessary.

²⁹ See Division CV-E website: <https://www.jud4.org/Ex-Parte-Procedures-and-Dates>

³⁰ If the attorneys cannot agree, the attorney challenging the expert will provide a list of the opinions that they expect the expert to provide and about which they object. The proponent of the expert will provide the information set forth herein as to each of those expert opinions.

³¹ The Court does not have a template form for a pre-evidentiary hearing stipulation; Exhibit “A” attached to these procedures is a comprehensive example of how local counsel Michael Pajcic and Michael Lockamy interpreted this requirement.

8. Each party shall provide the opposing counsel and file with the Court a list of any witnesses expected to be called at the *Daubert* hearing, including the challenged expert, and a short summary of their expected testimony and relevance to the expert witness issue(s) before the Court.

9. Counsel shall comply with the governing provisions of the “Division CV-E Policies and Procedures” related to scheduling hearing time(s) for the *Daubert* motion(s) or motion(s) related to other expert witness issues, including but not limited to, Sections III, IV, and V.

10. If a court reporter is to be obtained by either party, the party obtaining the court reporter should notify opposing counsel and the Court that she/he is obtaining a court reporter.

11. Counsel shall comply with the provisions of Sections III I. and J. of the “Division CV-E Policies and Procedures”²⁹ related to providing the Court courtesy copies (hard copies) of all Court filings pertaining to the motion, hearing notebooks, legal memorandums or briefs, along with hard copies of any exhibits to be marked for identification or to be admitted in evidence during the evidentiary hearing and any significant cited legal, medical and/or scientific authorities.

12. In Florida experts may consider inadmissible material in forming opinions.³² In Federal Court, a *Daubert* hearing is not bound by the Rules of Evidence.³³ Therefore, counsel may provide the Court with materials and documents inadmissible to a jury, including, but not limited to, peer-reviewed articles, industry standards, affidavits from consulting experts, or any other relevant materials that will assist the Court in reaching a conclusion as to whether a proper predicate can be laid for the expert’s testimony.³⁴

13. The Court will **NOT** read deposition transcript(s) that are offered in lieu of live testimony before the hearing, during the hearing, or after the hearing. If page(s)/line(s) of the deposition transcript(s) are considered important to the issue(s), such page(s)/line(s) should be: designated and highlighted for the Court to review, if possible, before the hearing, as part of the “courtesy copies (hard copies)” provided to the Court pursuant to paragraph 10 above; and published at the motion hearing, on the record.

14. The Court will strive to announce a ruling in a timely manner, at the conclusion of the hearing if at all possible. The attorney preparing the proposed order, and all other counsel, shall comply with the provisions of Section XX of the “Division CV-E Policies and Procedures”²⁹ related to the preparation of proposed orders after a hearing. In the event it is necessary for the Court to take the *Daubert* Motion under advisement at the end of the evidentiary hearing, the Court will endeavor to self-impose a reasonable and prompt deadline by which it will issue its ruling. The Court will give the movant(s) and nonmovant(s) specific instructions and deadlines for submitting proposed orders to the Court at the close of the hearing.

³² Fla. Stat. §90.704 (“If the facts for 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.”).

³³ Fed. R. Evid. 104.

³⁴ Fla. Stat. §90.704.

However, in general, counsel should expect and be prepared to comply with the requirements of Section XXII of the “Division CV-E Policies and Procedures”³⁵ related to the preparation of proposed orders after the Court takes a matter under advisement.

15. Please advise the Judicial Assistant when scheduling the expert witness hearing(s) how many attorneys, paralegals, parties, witnesses, and/or other interested persons will be present or participating in the hearing(s) to allow the Judicial Assistant to determine if a courtroom or hearing room is the appropriate location for such hearing(s).

³⁵ See Division CV-E website: <https://www.jud4.org/Ex-Parte-Procedures-and-Dates>

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO. 16-2022-CA-004512-XXXX-MA
DIVISION: CV-E

NATHAN KEITH BENNETT,

Plaintiff,

v.

NOE WILFREDO PORTILLO; and
SOUTHEAST DIVISION LOGISTICS, LLC,

Defendants.

JOINT SUPPLEMENTAL DAUBERT DISCLOSURE

Under the Procedures for Scheduling F.S. 90.702 (“*Daubert*”) Type Hearings in Division CV-E section 6, the parties submit the following information for the hearing on April 4, 2024:

- a. A list of the experts that will be the subject of this hearing.

Response:

James I. Middleton, Jr., M.E., P.E., Delta [v] Forensic Engineering
David L. Dorrity, CDS, CDT, Dorrity Safety Consulting, LLC

- b. A copy of the detailed resume or CV of each expert witness.

Response: See attached.

- c. The specific subject matter about which the witness is expected to testify.

Exhibit A

Middleton

- Accident reconstruction
- Alternate scenarios 1 through 6
- The brakes on Mr. Portillo's truck
- Mr. Portillo's truck was overweight if tag axle up

Dorrity

- Trucking industry standards of care
- Driving performance of Mr. Portillo
- Mr. Portillo's failure to maintain his truck's brakes
- Mr. Portillo's violation of the hours-of-service requirement
- Industry standards for cell phone usage by commercial drivers
- Alternate scenarios 1 through 6 (to the extent Dorrity claims they illustrate his opinion(s)) (Mr. Dorrity will not be offering accident reconstruction opinions)
- Mr. Portillo did not have the appropriate mindset or attitude (Plaintiff disagrees with the characterization of this opinion; Mr. Dorrity will opine on whether Mr. Portillo applied his defensive driving training as he approached and drove through the intersection.)

d. Each opinion the expert is expected to provide at trial about which there is a challenge and for which a ruling is requested from the Court.

Middleton

- Alternate scenarios 1 through 6 – challenged, Defendants request a Court ruling.
 - o Alternate scenario 1 – Mr. Portillo should not have steered before and at impact with the Nissan.

Plaintiff contends Alt 1 illustrates that Mr. Portillo would not have entered Bennett's Ace Hardware but for Defendant Portillo steering to the right. Plaintiff contends it also supports Mr. Dorrity's opinion that a reasonably careful commercial motor vehicle driver in this situation should maintain his lane.

- o Alternate scenario 2 – Mr. Portillo should have counter-steered away from the building 1.5 seconds after colliding with the Nissan.

- Alternate scenario 3 – Mr. Portillo should have lifted his foot off the accelerator when the first vehicle turned left.

Plaintiff contends Alt 3 illustrates Mr. Dorrity's opinion regarding how a commercial motor vehicle driver should approach this intersection under these conditions. The distances and speeds associated with the illustration are related to the specific conditions of this crash, hazard recognition, and defensive driving.

- Alternate scenario 4 – 6 – Mr Portillo should have lifted his foot off the accelerator when the second vehicle turned left and braked at various times depending on the scenario (see below).

Plaintiff contends Alts 4-6 illustrate Mr. Dorrity's opinion regarding how a commercial motor vehicle driver should approach this intersection under these conditions. The distances and speeds associated with the illustration are related to the specific conditions of this crash, hazard recognition, and defensive driving.

Dorrity

- Trucking industry standards of care – challenged, Defendants request a Court ruling. Specifically, Dorrity should be precluded from offering the following opinions:
 - It is the trucking industry standard to—or a reasonable driver would—coast before and through an intersection with a green light. (Alt 3-6)
 - It is the trucking industry standard to—or a reasonable driver would—reduce his speed 5-10 miles per hour under the speed limit before entering an intersection with a green light. (Alt 4-6)
 - It is the trucking industry standard to—or a reasonable driver would—reduce speed 11 miles per hour under the speed limit through an intersection with a green light. (Alt 3)
 - It is the trucking industry standard to—or a reasonable driver would—reduce speed 8 miles per hour under the speed limit through an intersection with a green light. (Alt 4)

- It is the trucking industry standard to—or a reasonable driver would—cover the brake pedal when driving through every intersection with a green light. (Alt 3-6)
- It is the trucking industry standard to—or a reasonable driver would—enter the intersection below the posted speed limit with a green light, particularly more than five miles below. (Alt 3-6)
- Mr. Portillo should have braked 1.11 seconds after impact. (Alt 5 and 6)

Plaintiff disagrees with the characterization of the seven opinions identified above and limiting the description of this crash to a driver moving “through an intersection with a green light.” Mr. Dorrity’s fundamental opinion is that the trucking industry standard of care required Mr. Portillo to lift his foot off the accelerator and cover the brake as he approached the intersection (under the conditions as they existed in this case) instead of keeping his foot with steady pressure on the accelerator, either when the first vehicle turned left or, at the very least, when the second vehicle turned left.

Mr. Dorrity provided opinions regarding how a commercial motor vehicle driver should approach this intersection under the conditions as they existed in his case. He will discuss how Mr. Portillo deviated from hazard recognition and defensive driver training at various times during the crash sequence.

- Mr. Portillo did not display the right “attitude” or mentality approaching the intersection – challenged, Defendants request a Court ruling.

Plaintiff disagrees with the characterization of this opinion. Mr. Dorrity will testify regarding defensive driving and Mr. Portillo’s failure to apply his defensive driving training as he approached the intersection.

- e. The basis of each challenged opinion including the facts and data relied upon or that is absent.

Mr. Middleton's alternative scenarios

Mr. Middleton's alternative scenarios illustrate that, had Mr. Portillo applied his industry standard truck driving training as opined to by Mr. Dorrity, he would have had a multitude of options to avoid the collision with Bennett's Ace Hardware and Mr. Bennett. Mr. Middleton relied on Mr. Dorrity's opinions for the trucking industry standard for commercial drivers in conjunction with his analysis of the dash cam video for data input and calculations into simulation software. As Mr. Middleton stated in his affidavit, it is common for accident reconstructionists to rely on the opinions of trucking-industry experts in the accident reconstruction process.

Mr. Dorrity's opinions on the trucking industry standard of care, Mr. Portillo's driving performance, and the intersection

Mr. Dorrity's opinions on the trucking industry standards for commercial drivers and Mr. Portillo's failure to follow that standard of care are based on applying his decades of experience in the trucking industry to the facts and circumstances of this case, including his years of training professional truck drivers on defensive driving and hazard recognition. In particular, his deceleration opinion is based on applying defensive driving principles to the circumstances of the intersection at the time of the crashes (including the posted speed limit, whether the green light had gone stale, the presence of other vehicles turning left, the proximity of the building, and the weight and condition of the truck). Mr. Dorrity's deceleration opinion is supported by the defensive driving training that professional truck drivers receive and is reflected in Florida's CDL test study manual, as well as other literature cited by Mr. Dorrity in his affidavit.

f. The principles and methodology used, or not utilized, to arrive at those challenged opinions.

Response:

Mr. James Middleton

Defendants' have not challenged in their Motion the reliability of Mr. Middleton's reconstruction, which utilized physics and a simulation software called Virtual Crash, and their accident reconstruction expert did not offer opinions directly rebutting the alternative scenarios.

Mr. David Dorrity

Mr. Dorrity arrived at his opinions by applying his decades of experience in the trucking industry, specifically his knowledge and familiarity teaching hazard recognition and defensive driving.

- g. The peer review to which these methods have been subjected.

Response:

Mr. James Middleton's methods have not been challenged.

Mr. Dorrity listed literature in his deposition as well as in an affidavit.

These materials include:

49 CFR 383.111 – Knowledge;

49 CFR 383.113 – Skill;

49 CFR 383.131 CDL Test Manual;

PTDI CMV Driver Training Handbooks;

Smith System Drivers Guide;

Smith System; and

Various Trucking Industry Training Texts.

- h. A good faith estimate by each party of the time each will need for their presentation as well as an estimate of the total amount of time needed for the entire hearing.

Response: A three-hour hearing has been scheduled with the Court. Defendants estimate that they will need 20 minutes for their introductory presentation. Plaintiff will need 20 minutes for his opening presentation. Plaintiff will then put up his witnesses and the balance of the hearing time will be spent with the experts' examinations. The parties may have short concluding statements afterward.

PAJCIC & PAJCIC, P.A.

s/Michael S. Pajcic

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Counsel for Defendants

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 3rd day of April 2024, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Filing Portal which will provide a copy to all counsel of record in this case.

s/Michael E. Lockamy _____
Attorney