



# CONSTRUCTive Talk

VOL. III ISSUE I  
2017

CONSTRUCTION LAW COMMITTEE NEWSLETTER, A COMMITTEE OF THE  
FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



Scott Pence  
Tampa  
Chair



Reece J. Henderson, Jr.  
Jacksonville  
Vice Chair



Neal Sivyver  
Tampa  
Vice Chair

## Jumping from the *Frye* Pan into *Daubert*, and Maybe Back to *Frye*

By: Tyler Derr, Esq., Rumberger, Kirk & Caldwell, P.A., Tampa, FL

In 2013, the Florida Legislature changed Florida's long-standing *Frye* standard applicable to expert testimony, and adopted the nationally more widely applied *Daubert* standard. This change effectively amended Florida Evidence Code Sections 90.702 and 90.704; however, the Florida Supreme Court rejected the adoption of the *Daubert* standard in a February 16, 2017, opinion titled *In Re: Amendments to the Florida Evidence Code*, No. SC 16-181, 2017 WL 633770 (Fla. 2017). The Supreme Court cited to Committee recommendations and "grave concerns" about the constitutionality of the amendment, ultimately deciding to "decline to adopt the *Daubert* Amendment to the ex-

tent that it is procedural due to constitutional concerns raised, which must be left for a proper case or controversy." Notably, the Supreme Court declined to adopt the *Daubert* Amendment only to the extent it was procedural.

What standard will apply in the not so distant future remains uncertain. A Hillsborough County circuit court judge was one of the first judges to address whether the *Daubert* amendment was procedural or substantive, in addition to whether the Amendment was constitutional, and found the

amendment to be procedural. See *Gross v. Plantation Key Association*, Case No. 06-CA-005879 (Fla. Cir. Ct. Sept. 13, 2013). However, what expert standard currently applies, or will apply, remains a moving target until a case or controversy is presented to the Supreme Court. Practitioners should be familiar with both standards so that, regardless of what test applies, they will be prepared to prosecute or thwart disqualification motions.

The two standards are:  
***Frye* Standard:** expert opinion must be "deduced from a well-recognized scientific principle" and "have gained general acceptance in the particular field in which it belongs." *Frye v. United*

(Continued on page 2)



## Editor's Corner

Just when you thought the Construction Law Institute couldn't get any better, along comes the 10<sup>th</sup> Annual CLI in March 2017. Heavy hitting only begins to describe the quality of speakers and topics at this year's institute. Out of the gates, we started with an eye-opening panel of attorneys who sue attorneys, and speaking specifically to construction lawyer malpractice. We could easily say we got our money's worth from that alone, and the rest was icing on the cake. The venue is outstanding, the networking opportunities unparalleled, and the sessions are timely and practical. We give a hearty shout out to Sanjay Kurian, Deborah Mastin, Bryan Rendzio and their teams for the mass amount of time invested to put the CLI and Board Certification Review courses together! I do not have enough room on the page to thank all of those who stepped up this year as speakers (and some teaching multiple sessions). For those who may have missed, we want to again extend a congratulations to our Lifetime Achievement Award winner, Peter Brandt, and our Rising Star award winner, Bryan Rendzio! Hope to see you all there next year (check p. 4 for the dates).

### INSIDE THIS ISSUE:

Article: Jumping from the *Frye* Pan into *Daubert*... 1-2

Editor's Corner 1

Case Law Updates 3

Upcoming Events and Getting Connected! 4

## Jumping from the *Frye* Pan into *Daubert*, and Maybe Back to *Frye*

By: Tyler Derr, Esq., Rumberger, Kirk & Caldwell, P.A., Tampa, FL (continued from page 1)

“Due the uncertainty of when a party will bring an actual case and controversy before the Supreme Court, best practice is to prepare your expert under both *Frye* and *Daubert*.”

*States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

**Daubert Standard:** “If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it 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 and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. See Fla. Stat. §90.702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). If these elements are met, a balancing test must then occur to determine if the probative value of the opinion assisting the trier of fact substantially outweighs any prejudicial effect. See Fla. Stat. §90.704.

For an excellent side-by-side comparison of *Daubert* and *Frye*, see *Perez v. Bell-south Telecommunications*, 138 So. 3d 492, 491-99 (Fla. 3d DCA 2014).

The *Frye* standard is generally considered to be

the more lenient standard in determining whether an individual may offer expert testimony because it requires only that an expert’s opinion be “generally accepted,” compared to the more stringent *Daubert* standard, which requires that (i) the scientific, technical or specialized knowledge of the expert will assist the trier of fact, (ii) the testimony is based upon sufficient facts or data, (iii) the testimony is the product of reliable principles and methods, and (iv) the expert’s principles and methods are reliably applied to the facts of the particular case. *Daubert* proponents contend that the *Daubert* standard produces more reliable testimony, while *Daubert* challengers argue the *Frye* standard is more efficient because it does not result in mini-trials over an expert’s qualifications.

Under *Frye*, an expert may offer an opinion based upon his or her personal experience and training, regardless of whether such opinion has been thoroughly tested. This has often been referred to as allowing ‘junk science.’ Construction litigation often includes multiple claims against multiple parties and almost always requires expert

testimony. Oftentimes this will require expert testimony across a multitude of disciplines, increasing the importance of knowing and applying the proper expert standard. So what is the proper standard and what does this mean for the practicing construction lawyer analyzing an expert’s opinion?

Unfortunately, the early, safe answer for now is to be prepared under both standards. Due the uncertainty of when a party will bring an actual case and controversy before the Supreme Court, best practice is to prepare your expert under both *Frye* and *Daubert*. In the event you have a case pending at the trial level and your expert has been disqualified under *Daubert*, consideration should be given to filing a motion for reconsideration arguing *Frye* should have been the test applied. Ideally, practitioners should aim to meet the *Daubert* standard because if an expert passes the *Daubert* test, he or she will likely also satisfy the *Frye* test. Following this belts-and-suspenders approach will prepare both the attorney and expert for an expert qualification challenge, regardless of what standard is applied.

<u>Daubert</u>	<u>Frye</u>
Judge is gatekeeper	Jury determines weight of testimony
Testimony based upon sufficient facts or data	Testimony founded in scientific principle
Testimony product of reliable principles/methods	Testimony generally accepted in field
Proper application of principles/methods to case	Pure opinion permitted
Generally more difficult standard to meet	Generally easier to have expert qualified

## Case Law Update

By: Fred Dudley, Esq. and Steve Sellers, Esq., Dudley, Sellers, & Heath, P.L., Tallahassee, FL

- ◆ ***Johnson v. State of Florida***, 2017 WL 436316 (Fla. 4th DCA February 1, 2017).

The District Court of Appeal affirmed the decision of the Construction Industry Licensing Board denying license holder's attempt to qualify his employer, a municipal corporation. Employees of municipalities are expressly excluded from part I of Chapter 489, Florida Statutes (2015). Municipalities are not among the entities enumerated in Fla. Stat. § 489.119(2) and do not fall within the catch-all term "other legal entity" as used in that section.

- ◆ ***Auto Owners Ins. Co. v. Elite Homes, Inc.***, 2017 WL 280711 (11th Cir. January 23, 2017).

Auto Owners did not have a duty to defend general contractor sued by homeowner alleging water intrusion damages. The policy contained an exclusion for damage "to your work." Court determined that all damage alleged was to structure of home constructed by Elite Homes and therefore fell within exclusion. Conclusory allegations of "extensive damage to other property" did not change result.

- ◆ ***Sunset Beach Investments, LLC v. Kimley-Horn and Assoc.***, 2017 WL 5807805 (Fla. 4th DCA January 4, 2017).

Trial court granted summary judgment to "engineer intern" who worked with licensed engineers but was not himself licensed, and was not in charge of work product of licensed engineers. Fourth DCA affirmed, holding that "engineer intern" was not a licensed professional, and could not be held personally liable for professional negligence.

Fred R. Dudley and Steve E. Sellers are partners at Dudley, Sellers, Healy & Heath, P.L. in Tallahassee, FL. Fred is Board Certified in Construction Law. Steve is Board Certified in Construction Law, Civil Trial, and Business Litigation.

## Legislative Alert

**Senate Bill 204 (House Bill HB 377)**, seeks to amend Florida Statutes § 95.11(3)(c) to clarify the 10-year construction statute of repose by specifying that "completion of the contract" means "the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made." The amendment is an apparent response to the interpretation of at least one Florida court which held that "completion of the contract" meant the date when final payment is actually made. The proposed amendment, if passed, will apply to causes of action that accrue after July 1, 2017.

### Interested in joining the Construction Law Committee?

It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.
2. Join the Real Property Probate and Trust Law Section.
3. Email Scott Pence at [spence@carltonfields.com](mailto:spence@carltonfields.com) advising you would like to join the CLC and provide your contact information.

### Editor's Corner:

Do you have an article, case update, or topic you would like to see in Constructive Talk? Submit your article, note, or idea to [jsmith@rumberger.com](mailto:jsmith@rumberger.com) or [tbench@rumberger.com](mailto:tbench@rumberger.com).



Jared E. Smith  
Tampa  
Editor



Timothy N. Bench  
Orlando  
Assistant Editor

# Upcoming Events

## Subcommittee Practice-Get On Board!

Interested in getting involved? Contact one of the persons listed below.

- ABA Forum Liaison** - Cary Wright ([cwright@carltonfields.com](mailto:cwright@carltonfields.com))
- ADR** - Deborah Mastin ([deboarhmastin@gmail.com](mailto:deboarhmastin@gmail.com))
- Certification Exam** - Steve Sellers ([steve@dshattorneys.com](mailto:steve@dshattorneys.com))
- Certification Review Course** - Deborah Mastin ([deborahmastin@gmail.com](mailto:deborahmastin@gmail.com)) and Bryan Rendzio ([brendzio@fi-law.com](mailto:brendzio@fi-law.com))
- CLE Subcommittee** - Randy Dow ([rdow@boydjen.com](mailto:rdow@boydjen.com))
- Construction Law Institute** - Sanjay Kurian ([skurian@bplegal.com](mailto:skurian@bplegal.com))
- Construction Litigation** - Neal Sivyer ([nsivyer@sbwlegal.com](mailto:nsivyer@sbwlegal.com))
- Construction Regulation** - Fred Dudley ([dudley@mylicenselaw.com](mailto:dudley@mylicenselaw.com)) and Steve Sellers ([steve@dssattorneys.com](mailto:steve@dssattorneys.com))
- Construction Transactions** - Claramargaret Groover ([cgroover@bplegal.com](mailto:cgroover@bplegal.com))
- Contractor's University** - Lee Weintraub ([lweintraub@bplegal.com](mailto:lweintraub@bplegal.com)) and Cary Wright ([cwright@cfjblaw.com](mailto:cwright@cfjblaw.com))
- Legislative Subcommittee** - Sanjay Kurian ([skurian@bplegal.com](mailto:skurian@bplegal.com))
- Membership Subcommittee** - David Zulian ([dazulian@napleslaw.com](mailto:dazulian@napleslaw.com))
- Newsletter** - Jared Smith ([jsmith@rumberger.com](mailto:jsmith@rumberger.com)) and Tim Bench ([tbench@rumberger.com](mailto:tbench@rumberger.com))
- Publications Subcommittee** - Sean Mickley ([smickley@gouldcooksey.com](mailto:smickley@gouldcooksey.com))
- Small Business Programs** - Lisa Colon-Heron ([lcheron@smithcurrie.com](mailto:lcheron@smithcurrie.com))
- Website Subcommittee** - Brent Zimmerman ([bzimmerman@jimersoncobb.com](mailto:bzimmerman@jimersoncobb.com))

## Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include .5 hours of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 7542148521 when prompted.

## Schedule of Upcoming RPPTL Events

April 20-22, 2017

ABA Forum on Construction Law-2017 Annual Meeting  
**Best Practices in Inside and Outside Construction Counseling**  
JW Marriot, Washington, DC

March 8-10, 2018

Construction Law Institute and Construction Law Certification Review Course  
JW Marriot Orlando Grande Lakes  
Orlando, Florida