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Can I Get Some Frye With That?

Frye Upheld as Standard for Determining Admissibility of Expert Testimony

"Does Daubert govern or does Frye?" This is an oft-heard question around Florida law offices. In 2013, when the legislature codified Daubert in the Florida Evidence Code as Florida Statute § 90.72, many assumed the debate was finally over. However, the question has proven more convoluted than ever in the wake of the Florida Supreme Court's determination that Florida would follow Frye to the extent it is procedural, such that the Florida Legislature did not infringe upon the judiciary's power to create procedural law. After years of confusion, there is perhaps some clarity now in the wake of the Florida Supreme Court's recent decision in Richard DeLisle v. Crane Co., et al., Case No. SC16-2182. The result was a win for the defendant-respondents and a win for Frye.

Under Frye, which was adopted in Florida in 1952, expert testimony is admissible if it is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." Notably, the Frye standard applies to expert testimony that involves "new or novel scientific evidence."

Unlike the Frye standard, the Daubert standard, applicable in all federal courts, applies to all expert testimony and admits expert testimony only where such testimony is both relevant and reliable. Generally, this requires an expert to show their opinion is based on the reliable application of reliable principles and methods to sufficient facts or data.

As the Florida Supreme Court noted, the Florida Legislature generally has the power to enact substantive law, or the rules that define, create, or regulate rights, while the judiciary has the power to enact procedural law, or the rules governing progress of litigation from inception through final judgment and execution. The distinction between substantive and procedural law has taken center stage in the conflict over Daubert versus Frye, as the Florida Legislature sought to adopt Daubert as the standard for determining whether expert testimony was admissible. The legislature's adoption of the Daubert amendment to the Florida Evidence Code pressed beyond the boundaries of the Florida Legislature's power to create substantive law and moved into the judiciary's realm of creating procedural law.

Ultimately, the Florida Supreme Court found that the amendments to the Florida Evidence Code incorporating the Daubert standard were an unconstitutional infringement on the judiciary's rulemaking authority. Indeed, Justice Quince even went so far as to suggest a potential impairment of litigants' access to courts by perpetuation of the Daubert standard. Interestingly, Justice Labarga wrote a concurring opinion, writing separately to expressly clarify that the Florida Supreme Court has never held that Daubert is the standard for admission of expert testimony in Florida.

For now, at least, Frye will continue to govern in Florida. The Crane opinion has significant implications for litigants across the state. Many trials involving complex facts are decided by a "battle of the experts." Crane highlights the importance of understanding the rules of evidence as they govern admissibility of expert testimony and using those rules to your advantage, whether as a sword through a motion to strike or limit an expert's testimony, or as a shield by selecting an appropriate, qualified, and reliable expert capable not only of convincing a trier of fact but also surviving any contest of admissibility.

When involved in complex litigation, you need an attorney who will make the right strategic decisions, such as the selection of a qualified expert. We pride ourselves not only on our strategic qualifications but also on the network of qualified experts with whom we work. Contact Anthony & Partners if you need an experienced attorney who can foresee the pitfalls of litigation and make the right strategic decisions for you.

STAFF MEMBER PROFILE

Carter J. Wallace is an associate at Anthony & Partners, where he focuses on commercial litigation, creditors' rights, and bankruptcy. After receiving his undergraduate degree in history and political science at the University of Florida (UF), Wallace remained in Gainesville to pursue his law degree at the University of Florida Levin College of Law.

Prior to joining Anthony & Partners, Carter interned at an Orlando law firm working on commercial litigation, bankruptcy, and real estate matters. Carter also participated in the Honorable Charlene Honeywell's internship program after his first year of law school, where he had the opportunity to support multiple U.S. District Court judges in Tampa.

During law school, Carter was an associate justice on the UF Supreme Court and served as a research assistant to Professor Robert Emerson. He was also a member of Florida Blue Key.

Education

- University of Florida Levin College of Law
- University of Florida, B.A. (History/Political Science)
- Florida Blue Key member
- University of Florida Supreme Court, Associate Justice

Professional:

- The Florida Bar
- United States District Court, Middle District of Florida

FIRM NEWS

Michael G. Williamson, chief judge of the United States Bankruptcy Court for the Middle District of Florida, has invited John Anthony to be a guest lecturer in his advanced bankruptcy class at Stetson University College of Law. Anthony will present on the topic of representation of secured creditors.

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HANDSHAKE AT FSU TAILGATE IS NOT A CONTRACT

In Florida Power & Light v. McRoberts, *(43 Fla. L. Weekly D2778),* the Fourth District Court of Appeals ruled that a handshake between a Florida Power & Light (FPL) employee and a real estate broker was not sufficient to bind FPL to pay commission on a subsequent sale of real estate that the broker introduced to the employee.

Broker Samuel McRoberts met Buck Martinez, who was then director of project management for FPL, at a tailgate party prior to a Florida State University football game. McRoberts specialized in vacant land sales and claimed he discussed the possibility of FPL land acquisitions with Martinez. Martinez allegedly agreed with a handshake that McRoberts would be entitled to a commission if he gave Martinez information about a suitable property. However, Martinez declined to give the broker his business card and told him to call only his personal phone number and not his business number.

FPL subsequently paid $40 million and $35 million for parcels that McRoberts had described to Martinez and refused to pay the commission. McRoberts sued for breach of contract and a jury awarded him $1.5 million for breach of the oral contract. On appeal, the appeals court concluded it was not reasonable for McRoberts to rely on Martinez's apparent or actual authority to bind FPL, stating it was McRobert's burden to establish that Martinez had authority. Based on the circumstances of the meeting and the failure of Martinez to provide his business contact information, the appeals court ruled that the handshake was not binding.

ARM'S-LENGTH SALE DURING PENDENCY OF COLLECTION ACTION IS NOT A FRAUDULENT TRANSFER

In Villamizar v. Luna Capital Partners, LLC, *(43 Fla L. Weekly D2395)*, the Third District Court of Appeals ruled that the arm's-length sale of a judgment debtor's property before the entry of the judgment is not a fraudulent transfer, even if the transferee has knowledge of the pending collection lawsuit.

The creditor, Luis Antonio Nieto Villamizar, obtained judgments of approximately $1.2 million against Luna after litigation to enforce payment of unsecured promissory notes. Villamizar brought a complaint alleging that Luna's sale of 145 condominium units for $13 million two years earlier constituted a fraudulent transfer because the pendency of the lawsuit should have put third parties on notice of the potential claim.

The appeals court ruled that the creditor's claims to the condominiums were not in the property itself, but in a pending lawsuit to recover money on an unsecured note. Because the sale appeared to be arm's-length to an unrelated party and other lien holders of Luna were paid through the sale, the court found that the good faith provisions of the Florida fraudulent transfer are not violated solely by the fact that an unrelated business transferee has notice that a transferor has creditors.