WHERE AM I AND HOW DID I GET HERE?

By: Brandon K. Bains

Location, location, location . . . This is a cliché we have all heard and is the mantra of many realtors. For surety professionals and lawyers who work across the country (we have three licensed attorneys in Florida), the same is true when developing strategy for handling claims and litigation in different states. This newsletter addresses the developing area of law in Florida when it comes to the reliability of expert testimony, as well as the different approaches to tackling the complexities of the economic loss rule.

Florida Expert Challenges

The federal system has a robust canon of law when it comes to expert challenges, dating back to the Supreme Court's seminal 1993 opinion in *Daubert*.[1] The *Daubert* standard allows a party to challenge the reliability of an expert's opinions on several grounds, including that the expert lacks the requisite qualifications, or more commonly, that the expert's opinions are *ipse dixit* ("because I said so"), which renders the opinions inherently unreliable and therefore something that should not be presented to the jury as part of its fact-finding mission.

While many states have moved towards a *Daubert* approach, Florida was a notable holdout for many years. For decades, Florida has used a *Frye* standard (based on a 1923 D.C. Circuit opinion), which only applies to expert testimony based on new or novel scientific techniques.[2] In contrast, *Daubert* is more comprehensive and ensures that the trial Court determine that any and all expert testimony is both relevant and inherently reliable. In electing to switch to a *Daubert* standard, the Florida Supreme Court noted that this would bring Florida into the more modern age where the method of permitting expert testimony was more aligned with the federal system, which in turn results in fairness and predictability.[3] This, by extension, reduces forum shopping -- which as any surety professional likely has learned from experience -- can be very detrimental depending on the state or even region within that state (such as the Rio Grande Valley or Miami-Dade County).

[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 2789, 125 L. Ed. 2d 469 (1993)
[2] *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923)
[3] *In re Amendments to Florida Evidence Code*, SC19-107, 2019 WL 2219714 (Fla. May 23, 2019)

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To "Go Green", our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

We hope that these changes make big differences in the future.

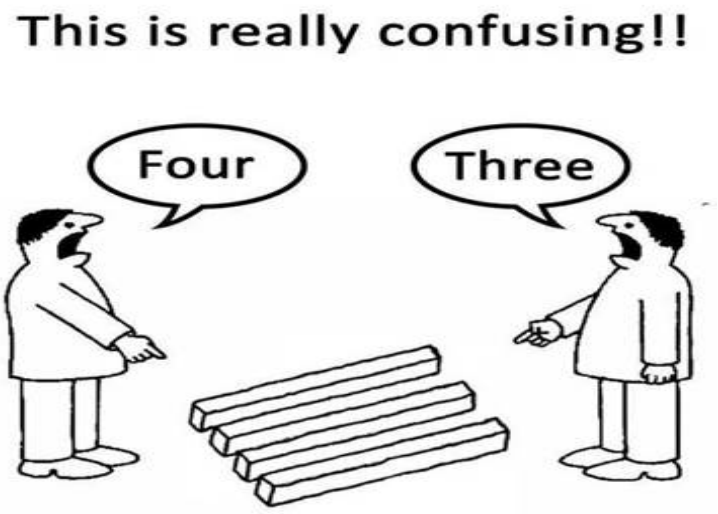
Well done is better than well said.

- Benjamin Franklin

While one would expect this to now be the law of the land for Florida, we will be keeping a close eye on all developments. This is mainly because the Supreme Court had the exact same opportunity to change its standard of review just last year and soundly rejected the idea in an impassioned opinion.[4] Thus, observers were caught somewhat off guard by the 180 degree change with the current court. Regardless, for now *Daubert* is alive (finally) in Florida. Time will tell if the Florida courts fall in line with the federal opinions on the nuances of expert testimony or perhaps branch out in their own direction (as we have seen in Texas, which does not exactly model the federal *Daubert* standard under its own distinct analogue of *Robinson* challenges). Stay tuned . . . .

Economic Loss Rule

Most states, including Texas, have found that the Economic Loss Rule precludes a general contractor from suing an engineer on tort theories with whom it has no contract. As was the case for many years with expert challenges, Florida is somewhat of an outlier.



Although fact dependent, Florida courts have long found that a supervising architect owes a duty to a general contractor even in the absence of privity. The rationale is that a supervising architect has too much control over a contractor not to also owe the contractor a legal duty.

Accordingly, "control" is the key word. Florida courts have often found that control is manifested in the architect or engineer's knowledge that a third party will use its designs, plans or reports. In a recent opinion from the Southern District of Florida on a motion to dismiss, the Court addressed these principles in depth. In denying the motions to dismiss by the engineer and architect, the District Court noted that control would typically exist when there is "knowledge that the contractor will rely on [the] plans, [which] places the contractor within the foreseeable zone of risk such that a duty may be imposed [on the design professionals]. By extension then, it is also sufficient if the sub consultants to the supervising engineer know that the contractor will rely upon the designs.

Ultimately, this is an area of the law that is constantly in flux. The economic loss rule is complex and often does not fit neatly into every fact pattern – particularly, construction projects where many parties owe multiple obligations to others on the job, sometimes with a contract and sometimes without. Because of this, it is important to not only understand the controlling law of each jurisdiction, but continue to stay abreast of the constant refinement of the rule by the courts.

[5] *See e.g., LAN/STV v. Martin K. Eby Const. Co., Inc.*, 435 S.W.3d 234 (Tex. 2014)
[6] *See A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973); *Casa Clara Condo. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993)
[7] *Suffolk Constr. Co., Inc. v. Rodriguez & Quiroga Architects Chartered*, 16-CV-23851, 2018 WL 1335185 (S.D. Fla. Mar. 15, 2018)

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