Fort Lauderdale, Fla. – Kelley Kronenberg, a diverse business law firm, announced partner Louis Reinstein will be honored with the Joseph J. Carter Professionalism Award presented by the Broward County Bar Association (BCBA).

The Joseph J. Carter Professionalism Award honors current and active members of the BCBA who exhibit the highest degree of professionalism in accordance with BCBA Standards of Professional Conduct and Florida Rules of Professional conduct. They must also demonstrate respect for the law and legal system, and enhance the image of the profession.

The award will be presented at the BCBA 2019 Annual Installation Dinner and Gala at the Ritz-Carlton in Fort Lauderdale on June 22, 2019.

Reinstein focuses his legal practice on Police Professional Litigation, Correctional Healthcare, Civil Rights Violations and Commercial Litigation both at the trial and appellate levels. He is the immediate past President of the Board of Directors for the B’nai B’rith Justice Unit #5207, and has served on several Boards of Directors for various South Florida secular agencies and religious affiliated organizations. For the BCBA, he previously held roles on the Young Lawyers Section Board of Directors and was Vice Chair of the Appellate Section.

Reinstein earned his Bachelor of Arts degree from University of Florida and his Master’s degree from Emory University. He then went on to earn his Juris Doctor from Nova Southeastern University Shepard Broad College of Law. He is admitted to practice law in Florida, the United States District Court for the Middle, Southern and Northern Districts of Florida, and the United States Court of Appeals, Eleventh Circuit.

OVERVIEW

Fort Lauderdale – Kelley Kronenberg, a diverse business law firm, was selected by the South Florida Legal Guide as a “Top Law Firm” in the publication’s 2019 edition. Principal Partners Michael J. Fichtel, Howard L. Wander, Heath S. Eskalyo and Karen M. Gilmartin, along with firm Partners Gary L. Brown, Amy Siegel Oran and Dominick V. Tamarazzo were named to the “Top Lawyers” list in their respective areas of practice. All of the firm’s selected lawyers have also been peer review rated AV Preeminent by Martindale-Hubbell.

The South Florida Legal Guide is a peer-nominated publication. Lawyers selected must be well-regarded in the legal profession, have several years of experience, and possess a distinguished track record.

Attorney Biographies:
Michael J. Fichtel serves as firm-wide Managing Partner and Chief Executive Officer. In addition to his litigation practice, he initiated and orchestrated an overhaul of the firm’s business practices and philosophies, resulting in the firm’s unprecedented diversification, economic growth, and emergence as a technological leader in the legal realm. Under his leadership, the firm transformed from a statewide firm with limited scope to a comprehensive industry leader. He was selected in the Workers’ Compensation - Defense category.

Howard L. Wander serves as Principal Partner, Chief Operating Officer and Managing Partner of the firm’s West Palm Beach office. He has been directly involved in the firm’s strategic consultation and growth. Mr. Wander maintains an active Insurance Defense Litigation and trial caseload, focusing on the representation of employers, third-party administrators and insurance carriers. While he oversees the firm’s Property and Casualty Department, he was selected in the Workers’ Compensation category for his more than 30 years of experience and commitment to the Workers’ Compensation industry.

Heath S. Eskalyo is a Principal Partner in the firm’s Fort Lauderdale office and serves as the firm’s Chief Financial Officer. A Civil Trial Litigator, he focuses his practice on Workers’ Compensation and OSHA defense. Mr. Eskalyo has also been a driving force in the growth of the firm and oversees its philanthropic efforts, such as the firm-wide Kelley Kronenberg Cares initiative. He was selected in the Workers’ Compensation - Defense category.

Karen M. Gilmartin is a Principal Partner, Chief Legal Officer and leads the firm’s Miami Lakes office. She focuses her practice on the defense of employers, carriers and self-insureds in the field of Workers’ Compensation and Subrogation. She has practiced in this area more than 30 years. In 2015, she was inducted into the Workers’ Compensation Hall of Fame, a select group of industry professionals who have substantially impacted the Workers’ Compensation field. Additionally, Mrs. Gilmartin is certified by the state of Florida to provide continuing education courses for insurance carriers and regularly presents seminars on a wide variety of general legal matters. She was selected in the Workers’ Compensation - Defense category.
Gary L. Brown, a Partner in the firm’s Fort Lauderdale office, is head of the Construction Practice Group. In this role, he assists clients in both complex and routine commercial matters with substantial experience and expertise in construction-related issues. He practices in state and federal trial and appellate courts throughout Florida. Brown is also Board Certified by The Florida Bar in Construction Law and is a published author on the subject. In 2015, he published *Florida Construction Defect Litigation*, which is now in its 4th edition. He was selected in the Construction Litigation category.

Amy Siegel Oran is a Partner in the firm’s West Palm Beach office. She focuses her practice exclusively on Workers’ Compensation defense, representing employers, insurance carriers, self-insured corporations, third party administrators, and claims servicing agencies. Her background includes extensive experience with all aspects of Litigation and Appellate law and a significant amount of catastrophic claim management. She was selected in the Workers’ Compensation category.

Dominick V. Tamarazzo is a Partner in the firm’s Fort Lauderdale office. He is highly experienced in handling a variety of complex Commercial, Construction, Insurance Defense and general Civil Litigation matters in both federal and state courts. He was selected in the Insurance Litigation – Defense category.

OVERVIEW

Fort Lauderdale/Tampa/West Palm, Fla. – Kelley Kronenberg, a diverse business law firm, announced that firm Partners Gary L. Brown, Dennis J. LeVine and Louis Reinstein have been selected to the 2019 Florida Super Lawyers list. Additionally, Partners Lauren K. Einhorn, Jason M. Vanslette, Jeffrey M. Wank and Attorneys Jacqueline Costoya Guberman and Marc A. Marra were selected for inclusion in the 2019 Florida Rising Stars list, a designation in the Super Lawyers publication.

Super Lawyers, part of Thomson Reuters, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a patented multiphase process that includes a statewide survey of lawyers, an independent research evaluation of candidates and peer reviews by practice area.

Attorney Bios:

Gary L. Brown, a Partner in the Fort Lauderdale office, is head of the
firms Construction Practice Group. In this role, he assists clients in both complex and routine commercial matters with substantial experience and expertise in construction-related issues. He practices in state and federal trial and appellate courts throughout Florida. Brown is also Board Certified by The Florida Bar in Construction Law and is a published author on the subject. In 2015, he published Florida Construction Defect Litigation, which is now in its 4th edition. In his 10th year on the Florida Super Lawyers list, he was selected in the Construction Litigation category.

Dennis J. LeVine, a Partner in the firm’s Tampa office, focuses his statewide practice on Bankruptcy Litigation and Creditors’ Rights. LeVine is one of only seven attorneys in Florida to be Board Certified in both Consumer Bankruptcy Law and Business Bankruptcy Law by the American Board of Certification (ABC). He is also rated AV Preeminent by Martindale-Hubbell, which indicates a demonstration of professional and ethical standards and is the highest rating a lawyer can receive. He was selected in the category of Bankruptcy: Consumer and has been listed in Florida Super Lawyers magazine since 2009.

Louis Reinstein, a Partner in the firm’s Fort Lauderdale office, focuses his statewide practice on Police Professional Litigation, Correctional Healthcare, Civil Rights Violations, and Commercial Litigation. He has extensive experience in state and federal civil court, working on both trial and appellate cases. He is also rated AV Preeminent® by Martindale-Hubbell and was selected for the General Litigation category by Florida Super Lawyers. Reinstein was previously included on the Florida Rising Stars list from 2012 to 2016 and on the Florida Super Lawyers list since 2017.

Lauren K. Einhorn, a Partner in the firm’s Fort Lauderdale office, has spent her entire legal career in the real estate sector. She currently focuses her practice on real estate matters with a particular emphasis on Real Property Litigation, as well as residential and commercial Real Estate Transactions. Einhorn is also rated AV Preeminent by Martindale-Hubbell. In her first year on the Super Lawyers Florida Rising Stars list, Einhorn was selected in the Consumer Law category.

Jason M. Vanslette, a Partner in the firm’s Fort Lauderdale office, focuses his practice on Mortgage Foreclosure Litigation and assisting banks and other financial service providers with regulatory, enforcement, transactional and litigation matters. Rated AV Preeminent by Martindale-Hubbell, this is his first selection to the Florida Rising Stars list, selected in the Creditor Debtor Rights category.
Jeffrey M. Wank, also a Partner in the firm’s Fort Lauderdale office, focuses his practice on First Party Property Insurance Defense Litigation, including coverage and bad faith litigation, as well as a wide array of Third Party Insurance Defense claims. He was selected in the Insurance Coverage category and has been listed in Florida Rising Stars since 2015.

Jacqueline Costoya Guberman, an Attorney in the firm’s Fort Lauderdale office, focuses her practice on real estate matters with a particular emphasis on Real Property Litigation, as well as residential and commercial Real Estate Transactions, and Appellate litigation. She also assists in the acquisition, financing, and development of real estate including commercial and residential projects. Selected in the Real Estate category, this is her first year on the Florida Rising Stars list.

Marc A. Marra, an Attorney in the firm’s Fort Lauderdale office, focuses his practice on assisting banks and other financial service providers with regulatory, enforcement, transactional and litigation matters. He also represents Condominium and Homeowner’s Associations throughout South Florida. He was selected in the Real Estate category and has been included on the Florida Rising Stars list since 2018.

OVERVIEW

Admissibility Under the Frye Standard

Since the Florida Supreme Court’s adoption of the federal standard for admissibility of expert testimony announced in Frye v. U.S.[i], the Court had consistently reaffirmed this standard.[ii] As noted in Frye:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the field in which it belongs.[iii]

The Frye test applies to any new or novel scientific evidence,[iv] but does not apply to “pure opinion” testimony of an expert.[v] Therefore, it is inapplicable in the “vast majority” of cases.[vi] Under Frye, “[t]he proponent of the evidence bears the burden of establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology.”[vii] A trial court “has broad discretion in determining the range of the subjects on which an expert can testify, and the trial judge’s ruling will be
upheld absent a clear error.”[viii]

“When applying Frye, a court is not required to determine that evidence is ‘generally accepted’ on the basis of a mere ‘nose count’ of experts in the field.”[ix] Instead, a court may peruse disparate sources—e.g., expert testimony, scientific and legal publications, and judicial opinions—and decide for itself whether the theory in issue has been “sufficiently tested and accepted by the relevant scientific community.”[x] However, a court should not admit expert testimony based solely upon “[a] bald assertion by the expert that his deduction is premised upon well-recognized scientific principles…if the witness’s application of these principles is untested and lacks indicia of acceptability.”[xi] especially where “the expert has a personal stake in the new theory or is prone to an institutional bias.”[xii] It is also within the trial court’s discretion to determine the proper subject matter for expert testimony.[xiii] However, that discretion is not boundless and only expert testimony which will assist the trier of fact should be admitted.[xiv]

Admissibility Under the Daubert Standard

In 2013, nearly 50 years after the Court’s adoption of Frye, the Legislature amended § 90.702, Florida Statutes, to pattern it after Federal Rule of Evidence 702 and adopt the standards for expert testimony as provided in Daubert,[xv] General Electric[xvi] and Kumho Tire Co.[xvii] With the amendment, the Legislature attempted to eliminate the Frye standard in the state courts of Florida.[xviii] Following the amendment, it was recognized by some courts in Florida that “the Daubert test applied[d] not only to ‘new or novel’ scientific evidence (which was subject to Frye), but to all other expert opinion testimony.”[xix] However, given the Florida Supreme Court’s subsequent refusal to adopt the legislative changes as a rule of the Court,[xx] there was some question at the time as to whether Florida remained a Frye jurisdiction notwithstanding the legislative amendments.[xxi] This uncertainty was eliminated by the Court’s decision in DeLisle.[xxii]

With the Court’s re-affirmation of Frye in DeLisle, any pending cases at the time were subject to the standards announced in Frye and Marsh.[xxiii] For cases that were adjudicated under the Daubert standard pursuant to the 2013 legislative amendments—which the Court in DeLisle ruled were unconstitutional to the extent they were procedural—the question remained whether parties suffering from an adverse judgment or other final order may be entitled to relief.[xxiv] The DeLisle Court was silent on this point. Generally, when the Court is silent on whether its ruling has prospective or retroactive application, the ruling is prospective only. “In deciding whether a new rule should apply retroactively, [the] Court balances two important considerations: (1) the finality of decisions; and (2) the fairness and uniformity of the court system.”[xxv] Given these considerations, including the Stovall[xxvi] and Linkletter[xxvii] factors, one could certainly have argued against retroactive application of Frye to cases decided under the Daubert standard. And where a ruling is given prospective application, it does not affect cases tried before the ruling.[xxviii] However, at the time DeLisle was decided, it remained to be seen how Florida’s lower courts would react to DeLisle on the issue of prospective application of Frye in cases adjudicated under Daubert, where the excluded expert testimony would have been outcome determinative.[xxix] The judicial landscape at the time suggested no relief from judgment for a party on this basis, which would require retroactive application of the ruling announced in DeLisle.[xxx]

Now, less than a year after DeLisle was decided, the Court—with three (3) new members replacing retired Justices who had joined in the majority opinion in DeLisle—has abruptly reversed course. In In Re: Amendments to the Florida Evidence Code, No. SC19-107 (May 23, 2019), a more conservative Court has “now recede[d] from the Court’s prior decision not to adopt the Legislature’s Daubert amendments to the Evidence Code and to retain the Frye standard” noting that the “grave constitutional concerns raised by those who oppose the [Daubert] amendments to the Code appear unfounded.”[xxxi] While deciding to adopt the Legislature’s Daubert amendments, the Court did not, however decide the “constitutional or other substantive concerns that have been raised about the amendments,” which the Court felt were better left for another day.[xxxii] Accordingly, effective immediately upon the release of the opinion, the Court has now adopted the amendments to sections 90.702 and 90.704 of the Florida Evidence Code made by chapter 2013-107, sections 1 and 2, of the Laws of Florida, to the extent the amendments are procedural.[xxxiii]

It should be noted that two of the Court’s Justices dissented from the majority opinion of the Court, albeit for different reasons. One Justice believes that “Frye is the superior standard for determining the reliability of expert testimony,”[xxxiv] and that “Daubert would negatively impact access to Florida courts.”[xxxv] The other Justice, while believing that DeLisle was wrongly decided by the Court, nonetheless criticized the majority’s adoption of the amendments to section 90.702 because in his view the Court did not follow “its procedure for adopting rules.”[xxxvi] He also questioned the constitutional authority of the Court to adopt the amendments because “the majority opinion use[d] [its constitutional] rulemaking authority to adopt the Daubert amendment based on the faulty premise that it
is procedural in nature," and "[the Court does] not have the constitutional authority to adopt substantive laws as procedural rules."[xxxvii] While these dissenting opinions are not binding on the Court (or any lower Florida courts), they could be used as persuasive authority to one day challenge the amendments based upon "constitutional or other substantive concerns that have been raised about the amendments."[xxxviii] Until then, Daubert will, once again, determine the fate of expert opinions in Florida’s courtrooms.

If you have any questions about this article or any construction-related legal issues, please contact Gary Brown, Partner and head of the firm’s Construction Practice Group in the firm’s Fort Lauderdale office. Brown assists clients in both complex and routine commercial matters with substantial experience and expertise in construction-related issues. He practices in state and federal trial and appellate courts throughout Florida. Brown is also Board Certified by The Florida Bar in Construction Law and is a published author on the subject. In 2015, he published Florida Construction Defect Litigation, which is now in its 4th edition.


[iii] Frye v. U.S., 293 F. 1013, 1014 (D.C. Cir. 1923); see Marsh v. Valyou, 977 So. 2d 543, 546 (Fla. 2007); Perez v. Bell S. Telecomm., Inc., 138 So. 3d 492, 496 (Fla. 3d DCA 2014).

[iv] See U.S. Sugar Corp. v. Henson, 823 So. 2d 104, 109 (Fla. 2002) ("By definition, the Frye standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques.").

[v] See Perez v. Bell S. Telecomm., Inc., 138 So. 3d 492, 496 (Fla. 3d DCA 2014) (noting that under “pure opinion” path to admissibility, “if the proposed testimony is not ‘new or novel,’ but instead is based upon the expert’s personal experience, observation, and training, the Frye test does not apply to the ultimate opinion of an expert, so long as the methods used to reach the opinion were generally accepted scientific methods under Frye”); see also Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993) (["P"]ure opinion testimony, such as an expert’s opinion that a defendant is incompetent, does not have to meet Frye, because this type of testimony is based on the expert’s personal experience and training. While cloaked with the credibility of the expert, this testimony is analyzed by the jury as it analyzes any other personal opinion or factual testimony by a witness."); Hadden v. State, 690 So. 2d 573, 579–80 (Fla. 1997) (same); Marsh v. Valyou, 977 So. 2d 543, 548–49 (Fla. 2007) (noting inapplicability of Frye to pure opinion testimony); Herlihy v. State, 927 So. 2d 146, 148 (Fla. 1st DCA 2006) ("[A] diagnosis based on an expert’s opinion and experience, versus a specific scientific test, would not be subject to a Frye hearing."); Gelsthorpe v. Weinstein, 897 So. 2d 504, 510–11 (Fla. 2nd DCA 2005) (finding Frye inapplicable to “pure opinion testimony based upon clinical experience” where the “testimony did not rely on any study, test, procedure, or methodology that constituted new or novel scientific evidence,” but instead was based on an analysis of medical records and differential diagnosis).

[vi] U.S. Sugar Corp. v. Henson, 823 So. 2d 104, 109 (Fla. 2002); see also Rickgauer v. Sarkar, 804 So. 2d 502, 504 (Fla. 5th DCA 2001) ("Most expert testimony is not subject to the Frye test.")

[vii] Castillo v. E.I. Du Pont De Nemours & Co., Inc., 854 So. 2d 1264, 1268 (Fla. 2003); see Perez v. Bell S. Telecomm., Inc., 138 So. 3d 492, 496 (Fla. 3d DCA 2014) (noting that “if the proposed expert testimony espoused a ‘new or novel’ scientific theory, principle or discovery, then ‘the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the field in which it belongs.’” (citing Marsh v. Valyou, 977 So. 2d 543, 546 (Fla. 2007)) (emphasis in original omitted). This method of establishing admissibility is commonly known as the “Frye test.” Perez, 977 So. 2d at 496.

[viii] Davis v. State, 142 So. 3d 867, 872 (Fla. 2014) (quoting Penalver v. State, 926 So.2d
Office: 810 So. 2d 836, 844 (Fla. 2001). Florida Laundry Servs., Inc. v. Sage Condo. Ass'n, Inc., 193 So. 3d 68, 68–69 (Fla. 3d DCA 2016) ("It is well established that the acceptance or rejection of expert testimony is a matter within the sound discretion of the trial court, and such decision will not be overthrown on appeal absent a showing of abuse of discretion."). Florida Laundry Servs., Inc. v. Sage Condo. Ass'n, Inc., 193 So. 3d 68, 68–69 (Fla. 3d DCA 2016) ("It is well established that the acceptance or rejection of expert testimony is a matter within the sound discretion of the trial court, and such decision will not be overthrown on appeal absent a showing of abuse of discretion.").

In reversing exclusion of opinions from mechanical engineer that testified as accident reconstructionist where expert visited scene for only a short time without performing any tests or taking measurements, noting that expert’s testimony is “subject to impeachment or to having its weight reduced because of its failure to properly consider one of the many factors that may influence an opinion . . . but that failure should not prevent the opinion’s admission, nor cause its complete exclusion from the jury's consideration.” (quoting Florida Dept of Transp. v. Armadillo Partners, Inc., 849 So. 2d 279, 287–88 (Fla. 2003)) (ellipsis in original).


[x] Ramirez v. State, 810 So. 2d 836, 844 (Fla. 2001). See Delisle v. Crane Co., 258 So. 3d 1219, 1234 (Fla. 2018) (J. Pariente concurring) (quoting Ramirez, 810 So. 2d at 844); see also Brim v. State, 695 So. 2d 268, 272 (Fla. 1997).


[xiii] See Orpe v. Carnival Corp., 909 So. 2d 929, 930 (Fla. 3d DCA 2005) (citing Angrand v. Key, 657 So. 2d 1146, 1149 (Fla. 1995)).

[xiv] Angrand v. Key, 657 So. 2d 1146, 1149 (Fla. 1995). See also L.B. v. Naked Truth III, Inc., 117 So. 3d 1114, 1116 (Fla. 3d DCA 2012) (“The purpose of expert testimony is to ‘assist the trier of fact in understanding the evidence, or in determining a fact in issue.’”); Sidran v. E.L. Dupont De Nemours & Co., Inc., 925 So. 2d 1040, 1043 (Fla. 3d DCA 2003) (same); see also State Farm Mut. Auto. Ins. Co. v. Long, 189 So. 3d 335, 338 (Fla. 5th DCA 2016) (“The decision to qualify a witness as an expert is left to the sound discretion of the trial judge. Although the trial judge ‘has broad discretion in determining the range of the subjects on which an expert can testify . . . , this discretion is not unfettered.’”) (quoting Penalver v. State, 926 So. 2d 1118, 1134 (Fla. 2006) (internal citations omitted) (ellipsis in original)). It bears noting that a trial court may take judicial notice of an expert’s opinion if the expert testimony has been previously deemed reliable by an appellate court. Booker v. Sunner Cnty. Sheriff’s Office N. A. Risk Servs., 166 So. 3d 189, 194 (Fla. 1st. DCA 2015) (citing Hamilton v. Commonwealth, 293 S.W.3d 413, 419 (Ky. Ct. App. 2009)) (“If a party is offering expert testimony in a field of scientific inquiry so well established that it has been previously deemed reliable by an appellate court, the trial court may take judicial notice of the evidence. This ‘relieves the proponent . . . from the obligation to prove . . . that which has been previously accepted as fact by the . . . appellate court. It shifts to the opponent of the evidence the burden to prove. . .that such evidence is no longer deemed scientifically reliable. The proponent may either rest on the judicially noticed fact or introduce extrinsic evidence as additional support or in rebuttal.”) (italics in original). See also Boyles v. Dillards Inc., 199 So. 3d 315, 318 (Fla. 5th DCA 2016) (trial court permitted to take judicial notice if expert previously deemed reliable by appellate court) (citing Booker, 166 So. 3d at 194).


[xviii] See Laws 2013, c. 2013-107 § 1 (preamble to § 90.702). In amending the statute, the Legislature expressed its intention to “prohibit in the courts of this state pure opinion testimony” as provided in Marsh. See Perez v. Bell S. Telecomm., Inc., 138 So. 3d 492, 497 (Fla. 3d DCA 2014) (quoting preamble to § 90.702); Giaino v. Florida Autosport, Inc., 154 So. 3d 385, 387 (Fla. 1st DCA 2014) (holding “pure opinion” testimony inadmissible under amended § 90.702). Thus, the revisions to § 90.702 “chang[ed] Florida from a Frye jurisdiction to a Daubert jurisdiction.” Perez, 977 So. 2d at 497.
Significantly, the revisions applied retroactively to any cases pending at the time of the amendment. See *Bunin v. Matrixx Initiatives, Inc.*, 197 So. 3d 1109, 1110 (Fla. 4th DCA 2016). As the court in *Matrixx* noted, “It is well-settled that ‘[p]rocedural or remedial statutes ... are to be applied retrospectively and are to be applied to pending cases.’ A statute that merely ‘relates to the admission of evidence’ is generally considered procedural. Accordingly, ... ‘section 90.702 of the Florida Evidence Code indisputably applies retrospectively.’” Id. at 1110 (internal citations omitted) (ellipsis in original).

Therefore, the court held was not an abuse of discretion to exclude the plaintiff’s expert’s causation opinion under Daubert, even though the expert’s opinion would have been admissible under the “pure opinion” rule of Marsh. Id.; see also *Perez v. Bell S. Telecomm., Inc.*, 138 So. 3d 492, 498 (Fla. 3d DCA 2014) (finding that Daubert standard, enacted while appeal was pending, would be applied retroactively); *Conley v. State*, 129 So. 3d 1120, 1121 (Fla. 1st DCA 2013) (same). While the Florida Supreme Court has twice stated that Daubert did not apply retroactively, this was in the context of criminal proceedings where the defendants argued that Daubert should apply to prior proceedings, not pending cases. See *Anderson v. State*, 220 So. 3d 1133, 1151 (Fla. 2017); *Zakrzewski v. State*, 147 So. 3d 531 (Fla. 2014). Thus, these decisions did not affect the lower appellate rulings in *Matrixx*, *Perez*, and *Conley* that Daubert applied retroactively.

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[xix] *Perez v. Bell S. Telecomm., Inc.*, 138 So. 3d 492, 497 (Fla. 3d DCA 2014) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–49 (1999)) (“The initial question before us is whether this basic gatekeeping obligation applies only to ‘scientific’ testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony.”).

[xx] See *In re Amendments to Fla. Evid. Code*, 210 So. 3d 1231, 1239 (Fla. 2017) (declining to adopt the Daubert amendment to the extent it is procedural, citing “grave constitutional concerns”).

[xxi] The Court did not expressly strike down the amendments. In *In re Amendments to Fla. Evid. Code*, 210 So. 3d 1231, 1239 (Fla. 2017) (noting that the constitutional concerns “must be left for a proper case or controversy”). While the effect of the Court’s decision on the lower trial and appellate courts in Florida remained to be seen at the time, at least one appellate court continued to follow the Daubert amendment. See *State Dep’t of Corr. v. Junod*, 217 So. 3d 200, 208 n.4 (Fla. 1st DCA 2017) (“We reaffirm that Daubert continues to apply in workers compensation proceedings . . . .”) (citing *Baricko v. Barnett Transp., Inc.*, 220 So. 3d 219 (Fla. 1st DCA 2017)) (Wetherell, J., concurring) (noting that supreme court’s failure to adopt the procedural aspects of Daubert “will have no impact whatsoever on the applicability of the Daubert test in workers’ compensation proceedings”). See also *D.R. Horton, Inc. – Jacksonville v. Heron’s Landing Condo. Ass’n of Jacksonville, Inc.*, 266 So. 3d 1201, 1207 (post-DeLisle, applying Frye to case pending on appeal and holding expert testimony admitted at trial under Daubert standard was proper where opinions not based on new or novel scientific methods or techniques); *See Perez v. Bell S. Telecomm., Inc.*, 138 So. 3d 492, 498 (Fla. 3d DCA 2014) (finding that Daubert standard, enacted while appeal was pending, would be applied retroactively); *Conley v. State*, 129 So. 3d 1120, 1121 (Fla. 1st DCA 2013) (same).

[xxii] See *Matrixx Initiatives, Inc. v. Collar*, 220 So. 3d 1231, 1239 (Fla. 2017) (noting that the exclusion of pulmonologist’s opinion was proper under either Daubert or Frye).

[xxiii] *DeLisle v. Crane Co.*, 258 So. 3d 1219, 1234 (Fla. 2018).

[xxiv] *D.R. Horton, Inc. – Jacksonville v. Heron’s Landing Condo. Ass’n of Jacksonville, Inc.*, 266 So. 3d 1201, 1207 (post-DeLisle, applying Frye to case pending on appeal and holding expert testimony admitted at trial under Daubert standard was proper where opinions not based on new or novel scientific methods or techniques); *See Perez v. Bell S. Telecomm., Inc.*, 138 So. 3d 492, 498 (Fla. 3d DCA 2014) (finding that Daubert standard, enacted while appeal was pending, would be applied retroactively); *Conley v. State*, 129 So. 3d 1120, 1121 (Fla. 1st DCA 2013) (same).

[xxv] With respect to final judgment and orders, Florida Rule of Civil Procedure 1.540 provides in relevant part: (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, decree, order, or proceeding for the following reasons: ... or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be filed within a reasonable time, and for
reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court. (emphasis added)

[xxv] Witt v. State, 387 So. 2d 922, 925 ( Fla. 1980) cert. denied, 449 U.S. 1067 (Fla. 1980) (England, J., specially concurring). In Witt, the Court stated that a new rule of law would not apply retroactively unless the new rule “(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.” Id. at 931. The first factor in Witt is satisfied because DeLisle is a decision of the Florida Supreme Court. With respect to the second factor under Witt, the DeLisle ruling pertained to the legislature’s unconstitutional overreach, so arguably this factor is satisfied. Assuming it is, retroactive application of DeLisle would be permissible only if the third factor is satisfied. With respect to the third factor, a decision is of fundamental significance when it either places “beyond the authority of the state the power to regulate certain conduct or impose certain penalties” or when the rule is “of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall v. Denno, 388 U.S. 293 (1967) and Linkletter v. Walker, 381 U.S. 618 (1965).” Witt, 387 So. 2d at 929. Since DeLisle held that the application of Frye versus Daubert for admission of expert testimony is procedural, see DeLisle, 258 So. 3d 1219, 1220 (Fla. 2018), the ruling reaffirming the application of Frye can only apply retroactively under Florida law if retroactive application is deemed necessary after assessing the Stovall and Linkletter factors. See Chandler v. Crosby, 916 So. 2d 728, 729–30 (Fla. 2005) (noting that prior announced rule of the United States Supreme Court that controlled the admissibility of testimonial hearsay “did not change the power of the State to regulate certain conduct or impose certain penalties [but] rather is a procedural rule” that could only apply in case retroactively if necessary after assessing Stovall and Linkletter factors) (emphasis added). The Stovall and Linkletter factors are: “(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.” Witt, 387 So. 2d at 926 (citations omitted).


[xxviii] See Boyett v. State, 688 So. 2d 308, 310 (Fla. 1996) (“Unless we explicitly state otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced.”) (emphasis in original). See also Wuornos v. State, 644 So. 2d 1000, 1012 n.4 (Fla. 1994) (“We recognize that this holding may seem contrary to a portion of Smith v. State . . . which can be read to mean that any new rule of law announced by this Court always must be given retroactive application. However, such a reading would be inconsistent with a number of intervening cases. We read Smith to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise.”) (emphasis added) (internal citations omitted). That Boyett refused to recognize retroactive application in a criminal proceeding where defendants are afforded certain constitutional rights not attendant to civil proceedings, suggests the same result would obtain in a civil proceeding where a judgment has been entered.

[xxix] Especially given the fact that the exclusion of expert testimony is reviewed under an “abuse of discretion” standard. See Castillo, et al., v. E.I. Du Pont De Nemours & Co., Inc., et al., 854 So. 2d 1264, 1280 (Fla. 2003) (citing Grau v. Branham, 761 So. 2d 375 (Fla. 4th DCA 2000) (“Overall, broad discretion rests with the trial court in matters relating to the admissibility of relevant evidence, and that ruling will not be overturned absent a clear abuse of discretion.”); see also Kemp v. State, No. 4D15–3472, 2017 WL 6371164, at *2 (Fla. 4th DCA Dec. 13, 2017) (A trial court’s ruling on the admissibility of expert testimony is reviewed for an abuse of discretion.) (citing Booker v. Sumter Cnty. Sheriff’s Office/N. Am. Risk Servs., 166 So. 3d 189, 194 n.2 (Fla. 1st DCA 2015)).

[xxx] Cf. Anderson v. State, 220 So. 3d 1133, 1151 (Fla. 2017) (noting that legislative adoption of the Daubert standard in 2013 did not apply retroactively) (citing Zakrzewski v. State, 147 So. 3d 531 (Fla. 2014)).


[xxviii] In Re: Amendments to the Florida Evidence Code, No. SC19-107, 7 (Fla. May 23,
OVERVIEW

FORT LAUDERDALE, Fla. — Kelley Kronenberg, a diverse business law firm, is proud to announce that Attorney Paul M. May has been elected to the Broward County Bar Association’s (BCBA) Young Lawyers Section Board of Directors for the 2019-2020 term.

Founded in 1925, the BCBA is a not-for-profit organization, which aims to foster courtesy, ethics, and professionalism among Broward County lawyers. The Young Lawyers Section contributes to the educational and professional advancement of attorneys under the age of 36.

Kelley Kronenberg Attorney Kyle S. Roberts will join May on the Board of Directors for the BCBA’s Young Lawyers Section. Additionally, firm Partner Louis Reinstein and Attorney Marc A. Marra were elected to serve on the Board of Directors for the BCBA. The boards will be inducted at the Annual Installation Dinner and Gala on June 22.

In his legal practice, May assists in handling matters related to First Party Insurance Defense Litigation. He earned his Bachelor of Arts degree in History and Political Science from The University of Alabama, and went on to earn his Juris Doctor degree from Stetson University College of Law.

Kelley Kronenberg’s legal team has been heavily involved with the BCBA over the years, with many of its lawyers holding several leadership positions. The firm is also home to multiple winners of the Paul May Professionalism in Practice Award.
Consumers demand the latest and greatest technology has to offer. No longer limited to phones, PDAs, or cars, emerging technologies are now becoming common place in the construction process. For instance, luxury residential condominiums now offer garages with automated parking systems. And in the not too distant future, buildings will be constructed with “smart” concrete thanks to engineers at the University of Rhode Island who have developed “self-healing concrete”[i] and engineers at State University of New York at Buffalo who are using carbon fibers and electricity to predict failures in concrete before they occur.[ii] As buildings become “smarter,” the risk of technology failures – and the resulting defect claims against those involved in the design and construction of these buildings – becomes even greater. The consequences of their failure to operate as intended could range widely. With automated garages, a unit owner may suffer a minor inconvenience having to wait longer for a vehicle, or a system failure could result in property damage or personal injury. With smart concrete, the failure to “self-heal” or detect stress cracks could lead to a catastrophic collapse, resulting in significant property damage or injury, and even death. As technology in construction evolves, so too, must strategies for risk management.

Under a traditional design-bid-build delivery method, the owner, or developer, bears the risk that the completed project, including building components, will function as designed. This is particularly so with Florida condominium construction, where the developer is deemed to provide initial and subsequent purchasers with an implied warranty of fitness and merchantability for the purposes or uses intended extending to: each unit, personal property that is transferred with, or appurtenant to, each unit; all other improvements for the use of unit owners; all other personal property for the use of unit owners; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving improvements or a building (except mechanical elements serving only one unit); and all other property which is conveyed with a unit. Depending upon the portion of the unit or property that is transferred or conveyed with the unit that the warranty relates to, these implied warranties last between one and three years (up to five years depending upon the date of turnover and potentially even longer as it pertains to manufacturer warranties).[iii]

Under a design-build approach, the contractor is responsible to ensure a functional design. In other words, the design must not only comply with applicable building codes and standards of care, but also the expectations of the owner so that the completed building functions as intended.

With either delivery method, the contractor is responsible to the owner for proper construction. Regardless of whether failures in technology result from errors in design or construction (or both), the owner will ultimately suffer the consequences of these failures, and worse, may have liability to third parties as a result of such failures. Thus, it is important that owners mitigate these risks with the use of well-tailored contract provisions and carefully crafted insurance coverage. Contractors should manage these risks with subcontractors in a similar way.

An owner, or contractor under a design-build contract, may elect to purchase additional insurance coverage for design liability to account for lower limits traditionally in place for design professionals (typically less than $2,000,000 per claim). Importantly, errors and omissions policies covering design liability are so-called “wasting” or “burning limits” policies where coverage limits erode with every dollar spent on the costs of defending claims. Where defense costs are significant, there will be little to no coverage remaining to pay a settlement or judgment for a defective design. Even though under a contractor’s commercial general liability policy, defense costs do not affect coverage limits, contractors should consider increasing traditional limits (often $1,000,000 per occurrence and
Another strategy to manage risk from failed technology is by reallocating it through contract. For instance, where the owner's contemplated design requires use of a sole-source provider (such as with automated parking garages) or use of only certain specified "smart" materials, the contractor could limit its scope to installation only, with the owner being responsible for any design failures of the system or "smart" materials. This will limit the contractor's liability to the owner for the subcontractor's work for installation failures only. This is important, because a typical commercial general liability policy or default insurance for defective work of a subcontractor will not cover professional design liability. Neither will a performance bond. Another alternative for the contractor is to limit its professional design obligations for a design-build project through completion of the project only, as opposed to a longer period generally applicable under the law.[iv] Where "smart" materials are required, the contractor could attempt to limit its liability from material failures by using indemnity and hold harmless provisions in its contract with the owner. Alternatively, the design liability owed to the owner from the contractor could be transferred to the design professional or supplier of the "smart" materials through a release of the contractor and an assignment to the owner of the design professional's or supplier's obligations to the contractor. Another option is for the contractor to limit its liability to the extent of its insurance coverage.

Regardless of such limitations or an assignment by the contractor, an owner may still have other remedies against a negligent design professional. For instance, regardless of privity, a negligent design professional is liable to an owner in tort.[v] And the design professional may have statutory liability.[vi] However, it bears noting that some jurisdictions, such as Florida, limit individual design professional liability for damages which are "solely economic in nature and…do not extend to personal injuries or property not subject to the contract" where the contract with the design professional complies with certain statutory requirements.[vii] Where property damage or personal injuries occur, the statute has no application.

In short, emerging technologies in construction are becoming more prevalent. As developers – and the construction industry professionals employed by them – continue to implement new technologies, the risk of liability for all parties involved will continue to increase. While avoiding liability altogether is unlikely, owners and contractors presenting these technologies to end-users should explore non-traditional approaches in contracting and insurance to better manage and mitigate these risks, keeping in mind the potential limitations on liability that may exist through contractual provisions or by law.

If you have any questions about this article or any construction-related legal issues, please contact Gary Brown, Partner and head of the firm's Construction Practice Group in the firm's Fort Lauderdale office. Brown assists clients in both complex and routine commercial matters with substantial experience and expertise in construction-related issues. He practices in state and federal trial and appellate courts throughout Florida. Brown is also Board Certified by The Florida Bar in Construction Law and is a published author on the subject. In 2015, he published Florida Construction Defect Litigation, which is now in its 4th edition.

[i] In 2010, a graduate student at University of Rhode Island, working with engineers, developed "self-healing concrete." Directly embedded within the concrete matrix is a microencapsulated sodium silicate that acts as a healing agent when tiny stress cracks begin to form in the concrete. The tiny capsules rupture and release the healing agent into the adjacent areas which in turn causes a chemical reaction that blocks the pores in the concrete. This chemical reaction creates a gel-like material that hardens in about one week. As explained by the graduate student, "[s]mart materials usually have an environmental trigger that causes the healing to occur…only in the areas that really need it."[source: https://today.uri.edu/news/uri-research-on-self-healing-concrete-yields-cost-effective-system-to-extend-life-of-structures/]

[ii] Carbon fibers naturally conduct electricity. By adding carbon fibers to concrete, electrical impulses are added to the concrete structure, making the concrete able to have electrical resistance change in response to damage or defamation. In other words, the concrete becomes a sensor, able to detect even minute changes in the amount of stress inside. Thus, the concrete becomes a self-monitor for signs of cracks or stress. Where
Once, personal inspection was required to check concrete structures for signs of cracking, stresses can now be measured with more precision before cracks form. "With smart concrete, scientists are able to measure the precise amount that the concrete deforms as it is exposed to massive amounts of weight...With the ability to monitor the hidden stressors within to a very precise degree, smart concrete may be able to lead engineers to troubleshoot weak spots in their structures long before a crack is ever visible to the human eye."[source: https://www.mma-midatlantic.com/2017/05/22/smart-concrete-expected-to-revolutionize-building-structures-in-the-future/]

[iii] See e.g., Fla. Stat. § 718.203.

[iiv] See e.g., Fla. Stat. § 95.11(3)(c) which set forth a four-year statute of limitations for design defects (up to ten years for latent defects).

[v] See e.g., Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Ass’n, Inc., 581 So. 2d 1301, 1303 (Fla. 1991) (“Clearly, privity between the parties may create a duty of care providing the basis for recovery in negligence...However, lack of privity does not necessarily foreclose liability if a duty of care is otherwise established.”) (internal citations omitted).

[vi] An aggrieved owner can pursue a design professional for building code violations. See e.g., Fla. Stat. § 553.84 (“Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the Florida Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation...”).


OVERVIEW
Kelley Kronenberg is excited to be a sponsor of the 2019 Annual Broward County Bar Association (BCBA) Installation Gala. The event will take place on Saturday, June 22, at the Ritz Carlton Fort Lauderdale, FL. The Broward County Bar Association and Young Lawyers’ Section 2019 - 2020 Officers and Directors will be inducted at this year’s Casino Royale Gala.

The firm is proud to announce that Partner Louis Reinstein and Attorney Marc A. Marra have been elected to serve on the Board of Directors for the Broward County Bar Association (BCBA). Additionally, Attorneys Kyle Roberts and Paul May have been appointed to serve on the Board of Directors for the BCBA's Young Lawyers' Section, which contributes to the educational and professional advancement of attorneys under the age of 36.

Congratulations to you all!

OVERVIEW

Firm Welcomes Micheline Gros-Jean and Dakeitha Haynes
FORT LAUDERDALE, Fla. — Kelley Kronenberg, a diverse business law firm, announced that Micheline Gros-Jean and Dakeitha Haynes have joined the firm’s Fort Lauderdale office as Attorneys.

Gros-Jean assists in handling matters related to General Liability, Products Liability, Construction Defect claims and the prosecution and defense of declaratory judgment actions involving insurance coverage disputes and extra-contractual claims.

Prior to joining the firm, Gros-Jean worked as an Associate Attorney at an insurance defense law firm in Miami, Florida where she focused on First Party Property insurance defense litigation.

Gros-Jean earned her Bachelor of Arts in Political Science and History from Florida International University and her Juris Doctor degree from Nova Southeastern University, Shepard Broad College of Law. While in law school, she served as the Subscriptions Editor of the ILSA Journal of International and Comparative Law and as a Judicial Intern to the Honorable Dave Brannon in the United States District Court for the Southern District of Florida. She is admitted to practice law in Florida and the United States District Court, Southern District of Florida and is fluent in Haitian Creole.


Prior to joining the firm, Haynes worked as an Assistant Public Defender in Miami-Dade County where she handled over 150 misdemeanor and felony cases and litigated several motions and trials to verdict.

Haynes earned her Bachelor of Science Degree in Criminal Justice from Sam Houston State University and her Juris Doctor degree from St. Thomas University School of Law. During law school, she served as a Legal Intern at the Southern Poverty Law Center and Florida Justice Institute, where she helped advocate for legislative changes relating to juvenile justice, children’s rights, mass incarceration, and various unconstitutional conditions of confinement. She also served as a Judicial Intern for the Honorable Michael Robinson of the 17th Judicial Circuit, Articles Editor for the St. Thomas Journal of Complex Litigation and received multiple CALI Book Awards. She is admitted to practice law in Florida.

OVERVIEW

Firm Welcomes Charles Gowland and Katherine L. Koener

TAMPA, Fla. — Kelley Kronenberg, a diverse business law firm, announced that Charles...
Gowland and Katherine L. Koener have joined the firm’s Tampa office as Partners.

**Gowland** handles First Party Property Insurance Defense Litigation, including coverage and bad faith litigation, with a special focus on insurance claims and investigations potentially involving fraud or arson. He also defends a wide array of Third Party Insurance claims.

Prior to joining Kelley Kronenberg, Gowland gained more than 20 years of civil litigation experience. He previously served as Vice President and General Counsel for the Property and Casualty Claims department of a national insurance company. Additionally, he served as General Counsel for a Florida based Property and Casualty insurance company and Chief Counsel to the Division of Insurance Fraud for the State of Florida’s Department of Financial Services.

Gowland earned both his Bachelor of Science degree, *cum laude*, and his Juris Doctor degree, *cum laude* with honors, from Florida State University. He is admitted to practice law in Florida, Louisiana and North Carolina.

**Koener** focuses her practice on First Party Property Insurance Defense Litigation throughout the state of Florida, including coverage and bad faith litigation. She also handles the defense of a wide array of Third Party Insurance Defense claims.

Koener is experienced in defending Florida property insurers in First Party coverage matters. She has handled a broad range of claims, such as sinkhole, windstorm, fire, mold, theft and water losses. She is also skilled in handling complex civil and commercial matters for her clients, including the defense of personal injury, premises liability, construction defect cases, and admiralty law.

Koener earned her Bachelor of Arts degrees in Political Science and Linguistics from the University of Florida and her Juris Doctor degree from Stetson University College of Law. She is admitted to practice law in Florida, including the United States District Courts for the Northern, Middle and Southern Districts of Florida.

**OVERVIEW**

**TAMPA, Fla.** — Kelley Kronenberg, a diverse business law firm, is pleased to announce that Dana G. Andrews, Managing Partner of the firm’s Tampa office, has been elected President-Elect of the 2019-2020 Board of Directors for the United States Tennis Association (USTA) Florida.

USTA Florida is a volunteer organization that strives to not only help people play tennis, but also help build communities. For more than 65 years, the organization has worked to promote and develop tennis for all.

“This organization holds a special place in my heart because my father B.A. Grubbs previously served as President and was ultimately inducted into the USTA Florida Hall of Fame. I am honored to continue the work he started and continue to serve this important...
Andrews will replace Chuck Gill, who resigned from the President-Elect role earlier this year. Following nominations and a secret ballot voting process, Andrews was named to the position. She previously served as a member of the USTA’s Junior Competitive Committee as well as the USTA Florida Foundation Board and as Grievance Chairman.

Andrews is rated AV Preeminent by Martindale-Hubbell, which indicates a demonstration of the highest professional and ethical standards and is the highest rating a lawyer can receive. She is also Board Certified by The Florida Bar as a specialist in Workers’ Compensation.

A graduate of the University of Georgia, Andrews went on to earn her law degree from Cumberland School of Law in Birmingham, Alabama. While completing her undergraduate degree, Andrews was a scholar athlete and member of the university’s tennis team. She is admitted to practice law in all Florida state courts.