

# TORT & INSURANCE PRACTICE



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## Is *Daubert* Dead?

By Richard Akin, Esq.

**T**he answer is probably. The Florida Supreme Court recently “declined to adopt” the *Daubert* standard to “the extent that it is procedural.” *In Re. Amends to Fla. Evidence Code*, Case No SCI6-181 (Fla. 2017). The Court explained that its decision to decline the adoption of the *Daubert* standard was based on constitutional concerns about “undermining the right to a jury trial and denying access to courts.” *In Re. Amends to Fla. Evidence Code*, Case No SCI6-181 (Fla. 2017).

In 2013, the Florida legislature passed legislation changing the evidentiary standard for expert testimony from the long standing *Frye* (in state Court) to *Daubert*, which has been the standard in federal courts since 1993. The Court did not go into detail about the reasons for its decision, nor did it explain what effect the decision will have on substantive changes made by the 2013 legislation. Presumably, a later decision of the Court will address what portions of the 2013 legislation (if any) are substantive and what portions are procedural. However, until such time as the issue is presented before the Court, those of us practicing in the civil trial arena are left to wonder whether *Daubert* applies at all under the 2013 legislation.

The *Frye* standard asks whether expert testimony is “generally accepted” in a particular scientific community. *Daubert* is stricter scientifically and can often require a kind of “mini-trial” even before an expert can appear in front of jurors. Both standards are named after court cases.

The dissent, authored by Justice Polston and joined by Justice Canady, criticized the characterization that there were any real constitutional issues regarding the amendment. The dissent pointed out that the United States Supreme Court had decided *Daubert* more than 20 years ago; that federal courts have routinely applied the *Daubert* rule since; and that “36 states have rejected *Frye* in favor of *Daubert* to some extent.” *In Re. Amends to Fla. Evidence Code*, Case No SCI6-181 (Fla. 2017).

Later decisions are likely to focus on whether the evidentiary standard for admissibility of expert testimony is entirely procedural. If the answer to this question is yes, then *Daubert* is out and *Frye* is back. Only time will tell, but given the Supreme Court’s position on *Daubert*, it’s likely back to *Frye* in Florida state courts.

### Kyle Dudek and Michael Versnik Join the TIPS Litigation Team



**Kyle Dudek** is a transplant to Florida, having grown up in New York and attended college at Cornell University. After receiving his law degree, Kyle served as a law clerk in several federal courts, including the U.S. Court of the Appeals for the Fourth Circuit, the U.S. District Court for the Eastern District of Virginia, and in the U.S. District Court for the Northern

District of New York. Mixed among his time clerking, Kyle worked as an associate with a law firm in Washington DC. Drawing on his time as a federal clerk, Kyle devotes a substantial portion of his practice to supporting our governmental clients pursued for civil rights violations under 42 U.S.C. 1983. Kyle’s written advocacy has covered a wide range of substantive areas, including environmental matters, fraud and claims under the False Claims Act, complex civil litigation, and patent and trademark disputes. Kyle can be reached at 239-344-1237 or via email at [kyle.dudek@henlaw.com](mailto:kyle.dudek@henlaw.com).



**Michael Versnik** joined Henderson Franklin in March 2017. He previously practiced as an insurance defense attorney, representing policy holders against bodily injury and construction defect claims and lawsuits. He began his legal career as a plaintiff’s personal injury attorney. He has tried numerous bodily injury cases to verdict and has experience as an appellate

attorney in both the state and federal courts. Michael is a graduate of Webber International University and obtained his law degree from Florida Coastal School of Law in 2010. He can be reached at 239-344-1249 or via email at [michael.versnik@henlaw.com](mailto:michael.versnik@henlaw.com).

# RECENT VICTORIES

**Traci McKee** received a *per curiam* affirmance from the Second District Court of Appeal of the trial court's entry of final summary judgment in favor of a physician and medical practice. Bruce Stanley obtained the final summary judgment after convincing the Court to grant a Motion to Strike plaintiff's standard of care expert for the expert's failure to meet the expert qualifications set forth in Florida Statute Section 766.102. After striking the plaintiff's sole expert on the eve of trial, the Court found that the plaintiff had no evidence to establish that the defendant physician and medical practice deviated from the standard of care.

**Traci McKee** obtained summary judgment in favor of a school board as to claims of negligence and respondeat superior. The claims arose out of an inappropriate relationship between a teacher and a student which occurred off school grounds and outside of school hours. The circuit court determined that the school board owed no legal duty at the time of the incident giving rise to the alleged injuries, and further determined that the school board was entitled to sovereign immunity for the actions of the teacher.

**Robert Shearman** and **John Miller** obtained directed verdict on the half of a local sheriff in a section 1983 excessive force claim. The judge granted directed verdict after two days of trial.

**Robert Shearman** and **John Miller** recently received a defense verdict in a three day trial in a 1983 excessive force claim on behalf of a local sheriff. The jury returned a verdict finding that the Sheriff's actions were not in violation of the plaintiff's constitutional rights.

**Richard Akin** and **Robert Shearman** recently obtained summary judgment on behalf of a local city. The Court found that the City had the right to enforce its ordinances and building codes and affirmed the City's enforcement actions. The City was entitled to recover its attorney's fees as a result of the action.

**Matt Belcastro** and **Kyle Dudek** obtained a defense verdict for a local city and its former manager in a two-day trial that revolved around a government services contract. The plaintiff alleged that the City manager improperly altered the terms of the contract after a deal had already been struck with City council. Thus, according to the plaintiff, it was entitled to more money than reflected in the signed agreement. After securing a directed verdict on part of plaintiff's complaint, the jury finished the job with a complete defense verdict.

## Upcoming Events

**May 23, 2017 – TIPS Spring Executive Forum** will be held on Tuesday, May 23, 2017 from 5:00 to 7:00 pm at downtown Fort Myers office. After an hour of networking with your peers, there will be a one-hour CEU (approved for 1.0 - CE 3-24a, adjuster law and policy) discussing Non-Binding Arbitration (presented by Traci McKee, Esq.), an Update on Medicare, Medical Reporting and Releases (presented by Mark Schultz, Esq.), and a Case Law Update (presented by John Miller, Esq.). There is no cost to attend but RSVP is required by Wednesday, May 17, 2017. If you would like to attend, please RSVP to Gail Lamarche, our Director of Marketing at 239-344-1186 or email her at [gail.lamarche@henlaw.com](mailto:gail.lamarche@henlaw.com).

**September 26, 2017 – The annual TIPS Claims Defense Seminar** will take place in Fort Myers, Florida. In response to popular demand, the TIPS team will be offering the 5 Hour Law and Ethics required course (5-620) and will also livestream the event so that those who hold a Florida adjuster's license in other states and are unable to travel can attend and obtain the required credits. More details will be announced once continuing education approval has been received. If you have any questions regarding the conference, please email Gail Lamarche.

# Tips Team

<b>Michael Corso</b> <i>Chair</i>	<b>Bruce Stanley</b> <i>Of Counsel</i>
<b>Richard Akin</b>	<b>Michael Versnik</b>
<b>Matthew Belcastro</b>	
<b>William "Bill" Boltrek</b>	
<b>Kyle Dudek</b>	
<b>Traci McKee</b>	
<b>John Miller</b>	
<b>Mark Schultz</b>	
<b>Robert Shearman</b>	



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