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DeLisle v. Crane Co., Case No. SC16-2182 (Fla. 2018).

The Florida Supreme Court rejects the *Daubert* standard and continues its adoption of the *Frye* standard for the admission of scientific evidence.

Holiday Isle Improvement Association, Inc. v. Destin Parcel 160, LLC, Case No. 1D17-5241 (Fla. 1st DCA 2018).

A suit for declaratory relief may constitute an action seeking to enforce community association restrictive covenants, and as a result, the prevailing party in such action may be entitled to an award of attorney's fees and costs under Florida Statute section 720.305.

Thorlton v. Nationstar Mortgage, LLC, Case No. 2D17-2328 (Fla. 2d DCA 2018).

A witness testifying as to routine practice of a company sending letters must "be employed by the entity drafting the letter," and also must "have firsthand knowledge of the company's routine practice for mailing letters."

Garcia v. Deutsche Bank National Trust Company, Case No. 3D17-1778 (Fla. 3d DCA 2018).

Removal of a case to federal court deprives the state court of jurisdiction, including the jurisdiction to enter a final judgment.

Antoniazzi v. Wardak, Case No. 3D17-2064 (Fla. 3d DCA 2018).

The following is an enforceable mandatory forum selection clause:

> The place of performance, the exclusive jurisdiction for all legal action and the venue for legal proceedings if the client is resident abroad is the place where the head office or branch of the Bank maintaining the contractual relationship with the client is located.

Subic Bay Marine Exploratorium, Inc. v. JV China, Inc., Case No. 5D17-4030 (Fla. 5th DCA 2018).

A domestic Florida corporation is subject to the general jurisdiction of the Florida courts, notwithstanding that the corporation's principal place of business may be in another state.

Foley v. Azam, Case No. 5D18-145 (Fla. 5th DCA 2018).

The tolling provision of 28 USC § 1367(d) does not require the successful assertion of federal jurisdiction for tolling to be effective.

Supreme Court of Florida

No. SC16-2182

RICHARD DELISLE,
Petitioner,

vs.

CRANE CO., et al.,
Respondents.

October 15, 2018

QUINCE, J.

Richard DeLisle seeks review of the decision of the Fourth District Court of Appeal in *Crane Co. v. DeLisle*, 206 So. 3d 94 (Fla. 4th DCA 2016), on the ground that it expressly and directly conflicts with a decision of this Court on a question of law.[1] We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

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1. We reject the argument that the Fourth District's decision cannot conflict with *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007), because it construes an earlier version of the statute. *Marsh* reaffirmed a procedural rule of the Court that the Legislature has limited authority to repeal. Indeed, *Marsh* did not construe section 90.702, Florida Statutes (2007), because the test established by *Frye v. United State*, 293 F. 1013 (D.C. Cir. 1923), was not codified within and, in fact, contradicted it. Accordingly, the conflict between *Crane* and *Marsh* is properly before this Court for our review.

The facts of this case were described in the Fourth District's opinion as follows:

> After developing mesothelioma, DeLisle filed a personal injury action against sixteen defendants, claiming that each caused him to be exposed to asbestos. He alleged negligence and strict liability under failure-to-warn and design-defect theories. Of these defendants, DeLisle proceeded to trial only against Crane, Lorillard Tobacco Co., and Hollingsworth & Vose Co. ("H & V").
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> At trial, DeLisle presented evidence that he was exposed to asbestos fibers from sheet gaskets while working at Brightwater Paper Co. between 1962 and 1966. Crane, a valve and pump manufacturer, used "Cranite" sheet gaskets containing chrysotile asbestos fibers. DeLisle also testified that he smoked Original Kent cigarettes with asbestos-containing "Micronite" filters from 1952 to 1956. These cigarettes were produced by Lorillard's predecessor, and the filters were supplied by a former subsidiary of H & V. The filters contained crocidolite asbestos. In addition to Cranite gaskets and Kent cigarettes, DeLisle testified that he was exposed to asbestos-containing products from the following nonparty defendants: Garlock Sealing Technologies, LLC; A.W. Chesterton Co.; Ford Motor Co.; Honeywell International, Inc., f/k/a Allied Signal, as successor in interest to Allied Corp., as successor in interest to The Bendix Corp.; Georgia-Pacific LLC, f/k/a Georgia-Pacific Corp.; Goulds Pumps, Inc.; Union Carbide Corp.; Brightwater; and Owens-Corning Fiberglass.
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> Lorillard contested DeLisle's use of Kent cigarettes. DeLisle testified that he smoked on average a pack of Kent cigarettes a day from junior high school until he enlisted in the army in 1957. Two of his high school friends, however, did not recall him smoking, and his former wife testified that by the late 1960's, DeLisle was only smoking unfiltered cigarettes.
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> The parties hotly disputed causation, and even DeLisle's own experts did not agree on which products produced sufficient exposure to asbestos to constitute a substantial contributing factor to DeLisle's disease. Although all of DeLisle's experts agreed that the crocidolite asbestos in the Kent filters was a causative factor, they disagreed as to whether the other products were substantial contributing factors.

Appellees challenged each expert's opinions under section 90.702, Florida Statutes, which adopted the *Daubert* test for expert testimony. DeLisle introduced the causation expert opinions of Drs. James Dahlgren, James Millette, James Crapo, and James Rasmuson. Lorillard and H & V unsuccessfully moved to exclude their testimony, as well as any testimony regarding experiments conducted by Dr. William Longo. Dr. Dahlgren is a toxicologist who testified as to causation. Dr. Millette is an environmental scientist who tested asbestos-containing products for fiber release. Dr. Crapo, a pulmonologist, reviewed studies by both Dr. Longo and Dr. Millette to determine that Kent cigarettes would be a substantial contributing factor to mesothelioma. Dr. Rasmuson, an industrial hygienist, relied on Dr. Longo's testing to opine on DeLisle's exposure. Following *Daubert* hearings, the trial court admitted each expert's testimony.

Before the jury, Dr. Dahlgren opined that "every exposure" above background levels to friable, inhaled asbestos—regardless of product, fiber type, and dose—would be considered a substantial contributing factor to DeLisle's mesothelioma. In contrast, Dr. Rasmuson testified that low-level exposures to chrysotile asbestos would not increase the risk of mesothelioma. Dr. Crapo testified similarly to Dr. Rasmuson as to low-level chrysotile asbestos.

Crane, Lorillard, H & V, and DeLisle all moved for directed verdicts, and DeLisle sought to exclude any *Fabre* defendants from the verdict form. The court denied the motions for directed verdict and determined that Brightwater, DeLisle's former employer, and Owens-Corning, which manufactured asbestos-containing products that DeLisle had worked with at Brightwater, should be included on the verdict form. The court excluded the remaining nonparty defendants as *Fabre* defendants.

During the jury charge conference, Lorillard and H & V asked the trial court to instruct the jury on the threshold issue of whether DeLisle ever smoked Kent cigarettes. DeLisle opposed the instruction. The court denied the proposed instruction, reasoning that the issue was "subsumed in the [standard] instruction."

Following three days of deliberation, the jury awarded DeLisle $8 million in damages and apportioned fault as follows:

- Crane: 16%
- Lorillard: 22%
- H & V: 22%
- Brightwater: 20%

> • Owens-Corning: 20%
>
> After trial, Crane, Lorillard, and H & V variously moved for a judgment notwithstanding the verdict, judgment in accordance with their motions for directed verdict, a new trial, or, in the alternative, for a remittitur. The trial court denied the motions. The court then entered a final judgment awarding DeLisle $8 million in past and future non-economic compensatory damages, apportioned to Crane, Lorillard, and H & V based on the jury's distribution of fault.

Crane Co. v. DeLisle, 206 So. 3d 94, 98-100 (Fla. 4th DCA 2016) (footnotes omitted). Crane appealed the trial court's denial of its motions for directed verdict and judgment notwithstanding the verdict and the trial court's admission of expert causation testimony among other issues. *Id.* at 100. R.J. Reynolds also appealed the admission of expert testimony and both parties appealed the award as excessive. *Id.*

The Fourth District reviewed the admission of the testimony of the experts under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and found that the trial court "failed to properly exercise its gatekeeping function as to Drs. Dahlgren, Crapo, and Rasmuson." *Id.* The Fourth District reversed for a new trial for R. J. Reynolds and reversed and remanded for entry of a directed verdict for Crane. *Id.* at 111-12. DeLisle sought review by this Court, which was granted.

The Florida Legislature and the Florida Supreme Court have worked in tandem for nearly forty years to enact and maintain codified rules of evidence. This arrangement between the branches to avoid constitutional questions of separation of powers continued uninterrupted from the Evidence Code's inception

until 2000. In the instant case, we are asked to determine whether chapter 2013-107, section 1, Laws of Florida, which revised section 90.702, Florida Statutes (2015), and which we previously declined to adopt, to the extent it was procedural, infringes on this Court's rulemaking authority. We find that it does. Therefore, we reverse the Fourth District and remand for reinstatement of the final judgment.

The Florida Legislature enacted the first codified rules of evidence in 1976. Ch. 76-237, at 556, Laws of Florida. In 1979, we adopted the Florida Evidence Code, to the extent that the code was procedural. *See In re Fla. Evidence Code*, 372 So. 2d 1369 (Fla.), *clarified*, *In re Fla. Evidence Code*, 376 So. 2d 1161 (Fla. 1979). We recognized that "[r]ules of evidence may in some instances be substantive law and, therefore, the sole responsibility of the legislature. In other instances, evidentiary rules may be procedural and the responsibility of this Court." *Id.* at 1369. We therefore chose to adopt the rules, "[t]o avoid multiple appeals and confusion in the operation of the courts caused by assertions that portions of the evidence code are procedural and, therefore, unconstitutional because they had not been adopted by this Court under its rule-making authority." *Id.* Since then, we have traditionally continued to adopt the code, to the extent it is procedural, to avoid the issue of whether the Evidence Code is substantive in nature and therefore within the province of the Legislature or procedural in nature and therefore within the province of this Court. *See, e.g.*, *In re Amends. to the Fla. Evidence Code*, 53

So. 3d 1019 (Fla. 2011); *In re Amends. to the Fla. Evidence Code*, 960 So. 2d 762 (Fla. 2007); *In re Amends. to the Fla. Evidence Code–Section 90.104*, 914 So. 2d 940 (Fla. 2005); *Amends. to the Fla. Evidence Code*, 891 So. 2d 1037 (Fla. 2004); *In re Amends. to Fla. Evidence Code*, 825 So. 2d 339 (Fla. 2002); *In re Fla. Evidence Code*, 675 So. 2d 584 (Fla. 1996); *In re Fla. Evidence Code*, 638 So. 2d 920 (Fla. 1993); *In re Amend. of Fla. Evidence Code*, 497 So. 2d 239 (Fla. 1986); *In re Amend. of Fla. Evidence Code*, 404 So. 2d 743 (Fla. 1981).

Until 2000, the working arrangement between the Legislature and the Florida Supreme Court remained intact. However, in *In re Amendments to the Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000), this Court for the first time declined to adopt, to the extent they were procedural, amendments to section 90.803, Florida Statutes (1997). *Id.* (declining to adopt chapter 98-2, section 1, Laws of Florida, amending section 90.803(22), Florida Statutes, which allows the admission of former testimony although the declarant is available as a witness, in part because of concerns about its constitutionality). We then considered the constitutionality of the provision in *State v. Abreu*, 837 So. 2d 400 (Fla. 2003), determining that the revised statute was unconstitutional because it infringed on a defendant's right to confront witnesses. *Id.* at 406.

Since then, we have only rarely declined to adopt a statutory revision to the Evidence Code. *See, e.g.*, *In re Amends. to the Fla. Evidence Code*, 210 So. 3d

1231 (Fla. 2017) (declining to adopt chapter 2013-107, sections 1-2, Laws of Florida); *In re Amends. to the Fla. Evidence Code*, 144 So. 3d 536 (Fla. 2014) (declining to adopt chapter 2011-183, section 1, Laws of Florida, creating section 90.5021, Florida Statutes (2012), which establishes a "fiduciary lawyer-client privilege," and declining to adopt chapter 2011-233, section 10, Laws of Florida, creating section 766.102(12), Florida Statutes (2012), which pertains to a medical malpractice expert witness provision). Since its inception, therefore, the Florida Evidence Code has been considered neither purely substantive nor purely procedural. *See In re Fla. Evidence Code*, 372 So. 2d 1369, 1369 (Fla.), *clarified*, 376 So. 2d 1161 (Fla. 1979) ("Rules of evidence may in some instances be substantive law and, therefore, the sole responsibility of the legislature. In other instances, evidentiary rules may be procedural and the responsibility of this Court.").

Generally, the Legislature has the power to enact substantive law while this Court has the power to enact procedural law. *See Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). Substantive law has been described as that which defines, creates, or regulates rights—"those existing for their own sake and constituting the normal legal order of society, i.e., the rights of life, liberty, property, and reputation." *In re Fla. Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972) (Adkins, J., concurring). Procedural law, on the other hand, is the form, manner,

or means by which substantive law is implemented. *Id.* at 66 (Adkins, J., concurring). Stated differently, procedural law "includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution." *Allen v. Butterworth*, 756 So. 2d 52, 60 (Fla. 2000) (quoting *In re Rules of Criminal Procedure*, 272 So. 2d at 66 (Adkins, J., concurring)). "It is the method of conducting litigation involving rights and corresponding defenses." *Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) (citing *Skinner v. City of Eustis*, 2 So. 2d 116 (Fla. 1941)).

The distinction between substantive and procedural law, however, is not always clear. For example, a law is considered to be substantive when it both creates and conditions a right. *See State v. Raymond*, 906 So. 2d 1045, 1049 (Fla. 2005); *Jackson v. Fla. Dep't of Corr.*, 790 So. 2d 381, 383-84 (Fla. 2000) (holding that the Legislature could properly limit the right of indigents to proceed without payment of costs); *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 54 (Fla. 2000) (holding that a statute creating the right to petition for mortgage payment receipts during foreclosure proceedings and establishing the grounds for granting such a petition was constitutional); *School Bd. of Broward Cty. v. Price*, 362 So. 2d 1337 (Fla. 1978) (holding that section 230.23(9)(d)(2), Florida Statutes (1977), set the bounds of a substantive right conditioned on a waiver and was therefore not an

unconstitutional infringement of the Court's power to set procedural rules). However, when procedural aspects overwhelm substantive ones, the law may no longer be considered substantive. *Raymond*, 906 So. 2d at 1049.

Here, the Legislature sought to adopt *Daubert* and cease the application of *Frye* to expert testimony. In *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), a short opinion, the Court of Appeals for the District of Columbia pronounced that the line between when a scientific discovery or principle crosses from experimental to demonstrable is indiscernible so that courts would do better "admitting expert testimony deduced from a well-recognized scientific principle or discovery." *Id.* at 1014. Further, the Court explained, "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* This rule—that expert testimony should be deduced from generally accepted scientific principles—has been the standard in Florida cases and, today, we reaffirm that it is still the standard. *See, e.g., Kaminski v. State*, 63 So. 2d 339, 340 (Fla. 1952) (recognizing *Frye*'s rejection of systolic blood pressure deception tests as having "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.") (quoting *Frye*, 293 F. at 1014); *Bundy v. State*, 471 So. 2d 9, 13 (Fla. 1985) (describing the *Frye* test as one in

which "the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate").

Considering the admissibility of posthypnotic testimony, we formally adopted *Frye*, determining:

> [T]he test espoused in *Frye* properly addresses the issue of the admissibility of posthypnotic testimony. We acknowledge that the *Frye* rule has come under some criticism since its inception in 1923 as too harsh and inflexible; however, we believe that the problems associated with the other recognized judicial approaches foreclose their use.

Stokes v. State, 548 So. 2d 188, 195 (Fla. 1989) (citation omitted) (citing *Bundy v. State*, 471 So. 2d 9 (Fla. 1985); *Bundy v. State*, 455 So. 2d 330 (Fla. 1984)). Further, we noted:

> [A] courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use.

Stokes, 548 So. 2d at 193-94. We note that we adopted the *Frye* test irrespective of the Evidence Code, which was in place at the time.

In *Hadden v. State*, 690 So. 2d 573 (Fla. 1997), we rejected the argument that the Legislature's enactment and this Court's subsequent adoption of the Evidence Code replaced the *Frye* standard with the balancing test that existed in

the code. *Hadden*, 690 So. 2d at 577 (citing *Daubert*, 509 U.S. 579; *Stokes*, 548 So. 2d 188). We stated:

> The reasons for our adherence to the *Frye* test announced in *Stokes* continue today. Moreover, we firmly hold to the principle that it is the function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established. Reliability is fundamental to issues involved in the admissibility of evidence. It is this fundamental concept which similarly forms the rules dealing with the admissibility of hearsay evidence. As a rule, hearsay evidence is considered not sufficiently reliable to be admissible, and its admission is predicated on a showing of reliability by reason of something other than the hearsay itself. *See* § 90.802, Fla. Stat. (1995) ("Except as provided by statute, hearsay evidence is inadmissible."). This same premise underlies why novel scientific evidence is to be *Frye* tested. Novel scientific evidence must also be shown to be reliable on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion. In sum, we will not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community; to do otherwise would permit resolutions based upon evidence which has not been demonstrated to be sufficiently reliable and would thereby cast doubt on the reliability of the factual resolutions.

Hadden, 690 So. 2d at 578.

After decades of the federal courts' applying *Frye*, Congress revised the Federal Rules of Evidence. The revision was addressed by the United States Supreme Court in 1993. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the United States Supreme Court determined the appropriate standard for admitting expert scientific testimony in a federal trial. *Id.* at 582. The Supreme

Court ultimately agreed with the petitioners that *Frye* had been superseded by the adoption of the revised Federal Rules of Evidence. *Id.* at 587.

The Court explained its decision, stating, "[I]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." *Daubert*, 509 U.S. at 590. The inquiry derived from *Daubert* is a flexible one, as emphasized by the Supreme Court. *Id.* at 594. "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595. The Supreme Court in *Daubert* opined that the change in rule 702 was necessary to permit scientifically valid and relevant evidence, summarizing:

> "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

Id. at 597. In short, in *Daubert*, the United States Supreme Court found that otherwise probative and scientifically valid evidence was being excluded under the *Frye* standard and the change in rule 702 was necessary to permit additional relevant evidence to be considered even if it was based on scientific methods or principles that were not yet generally accepted.

Nevertheless, in *Brim v. State*, 695 So. 2d 268 (Fla. 1997), we unanimously emphasized that we continue to apply *Frye* to "guarantee the reliability of new or

novel scientific evidence." *Id.* at 271 (citing *Stokes v. State*, 548 So. 2d 188 (Fla. 1989)). We opined:

> Despite the federal adoption of a more lenient standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), we have maintained the higher standard of reliability as dictated by *Frye*. *E.g.*, *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995). This standard requires a determination, by the judge, that the basic underlying principles of scientific evidence have been sufficiently tested and accepted by the relevant scientific community. To that end, we have expressly held that the trial judge must treat new or novel scientific evidence as a matter of admissibility (for the judge) rather than a matter of weight (for the jury).

Brim, 695 So. 2d at 271-72 (footnote omitted).

Following our repeated affirmations of the *Frye* rule, in 2013 the Legislature amended section 90.702 to incorporate *Daubert* in the Florida Rules of Evidence. The amendment revised the statute to read as follows:

> 90.702 Testimony by experts.—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;
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> (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.

§ 90.702, Fla. Stat. (as amended by ch. 2013-107, § 1, Laws of Fla.).

Article II, section 3 of the Florida Constitution prohibits one branch of government from exercising any of the powers of the other branches. Further,

article V, section 2(a) provides this Court the exclusive authority to "adopt rules for the practice and procedure in all courts." Art. V, § 2(a), Fla. Const. The Legislature may only repeal the rules of this Court by "general law enacted by two-thirds vote of the membership of each house of the legislature." *Id.* First, the amendment was not written to repeal *Frye* or *Marsh* but to overrule this Court's decision. *See* Fla. HB 7015, preamble (2013) (available at www.flsenate.gov/Session/Bill/2013/7015) ("the Florida Legislature intends to prohibit in the courts of this state pure opinion testimony as provided in *Marsh* . . . ". The vote here did not meet the requirement. The House passed the bill with a majority, 70 to 41 (or 58.3% of the membership). The Senate passed the bill with more than the necessary two-thirds vote, 30 to 9 (or 75% of the membership). *Id.*

We have previously found that the Legislature exceeded its authority in adopting statutes we found to infringe on the authority of this Court to determine matters of practice or procedure. For example, in *Massey v. David*, 979 So. 2d 931 (Fla. 2008), we considered the constitutionality of section 57.071(2), Florida Statutes (1999), finding that the section was purely procedural because the substantive right it purported to create existed in a different section of the statutes. *Id.* at 935-36. We determined that "because section 57.071(2) only delineates the steps that a party must fulfill (i.e., the proverbial hoops through which a party must

jump) to be entitled to an award of expert witness fees as costs, the statute is unquestionably a procedural one which conveys no substantive right at all." *Id.* at 940 (citing *Raymond*, 906 So. 2d at 1049). Likewise, we found the time requirements established by the Legislature in section 44.102, Florida Statutes (1993), to be unconstitutional, finding that the section "sets forth only procedural requirements, [and therefore] intrudes upon the rule-making authority of the Supreme Court." *Knealing v. Puleo*, 675 So. 2d 593, 596 (Fla. 1996) (citing art. V, § 2(a), Fla. Const.).

In *Jackson v. Florida Department of Corrections*, 790 So. 2d 381 (Fla. 2001), we explained that a statute can have both substantive provisions and procedural requirements and "[i]f the procedural requirements conflict with or interfere with the procedural mechanisms of the court system, they are unconstitutional under both a separation of powers analysis, and because [they intrude upon] the exclusive province of the Supreme Court pursuant to the rulemaking authority vested in it by the Florida Constitution." *Id.* at 384 (citing art. II, § 3, art. V, § 2, Fla. Const.; *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969)). We noted that the copy requirement contained in the rule provided an extra and unnecessary burden on the operation of this Court. *Id.* at 386.

In *State v. Raymond*, 906 So. 2d 1045 (Fla. 2005), we determined that section 907.041(4)(b), Florida Statutes (2000), providing that a person charged

with a dangerous crime was prohibited from receiving a nonmonetary pretrial release, was purely procedural and, therefore, an unconstitutional violation of the separation of powers clause. "It is a well-established principle that a statute which purports to create or modify a procedural rule of court is constitutionally infirm." *Id.* at 1048 (citing *Markert v. Johnston*, 367 So. 2d 1003 (Fla. 1978)). Further, "where there is no substantive right conveyed by the statute, the procedural aspects are not incidental; accordingly, such a statute is unconstitutional." *Id.* at 1049 (citing *Knealing*, 675 So. 2d 593).

Further, we determined that the Legislature's attempt to "specif[y] the precise moment during the judicial proceeding when a motor vehicle liability insurer may be formally recognized as the real party in interest" in section 627.7262, Florida Statutes (1977), was "an invasion of this Court's rulemaking authority." *Markert*, 367 So. 2d at 1005-06. However, in *VanBibber v. Hartford Accident & Indemnity Insurance Co.*, 439 So. 2d 880 (Fla. 1983), we considered the revised version of the same statute, and determined that there were "substantial differences between the two statutes." *Id.* at 882. Because of those differences, we determined that the Legislature substantively pronounced public policy overturning

this Court's pronouncement in *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969), and was therefore constitutional. *VanBibber*, 439 So. 2d at 883.[2]

Section 90.702, Florida Statutes, as amended in 2013, is not substantive. It does not create, define, or regulate a right. Indeed, while we have stated that the Florida Evidence Code contains both substantive and procedural rights, this statute is one that solely regulates the action of litigants in court proceedings. *See, e.g.*, *Glendening v. State*, 536 So. 2d 212, 215 (Fla. 1988) (determining that section 90.803(23), Florida Statutes (1985), concerning out-of-court statements, was procedural for the purposes of ex post facto analysis).

Our consideration of the constitutionality of the amendment does not end with our determination that the provision was procedural. For this Court to determine that the amendment is unconstitutional, it must also conflict with a rule of this Court. *See Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732–

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2. We note, however, that in vigorous accompanying opinions, Justices Shaw and Boyd articulated reasons that public policy, alone, was insufficient to determine the substantive nature of a statutory provision. Justice Shaw, equally relevant to the instant case, was concerned with the rights of access to courts and would have found that the challenged statute denied "rights arising under article I, sections 9 and 21, of the Constitution of 1968." *Id.* at 885 (Shaw, J., concurring in part and dissenting in part). Justice Boyd would have continued to hold that the joinder of parties is a procedural matter pursuant to *Shingleton*. *VanBibber*, 439 So. 2d at 886 (Boyd, J., dissenting); *see also Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1092 (Fla. 1987) (finding that statutes addressing the substantive rights of plaintiffs and defendants in civil litigation actions to recover damages did not encroach on the rulemaking authority of this Court).

33 (Fla. 1991) ("Where this Court promulgates rules relating to the practice and procedure of all courts and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict.") (citing *Sch. Bd. v. Surette*, 281 So. 2d 481 (Fla. 1973), *receded from on other grounds* by *Sch. Bd. v. Price*, 362 So. 2d 1337 (Fla. 1978)); *see also Leapai v. Milton*, 595 So. 2d 12, 14 (Fla. 1992) (holding that section 45.061, Florida Statutes (1987), was not unconstitutional to the extent it did not conflict with Florida Rule of Civil Procedure 1.442 and stating that "statutes should be construed to effectuate the express legislative intent and all doubt as to the validity of any statute should be resolved in favor of its constitutionality" (quoting *McKibben v. Mallory*, 293 So. 2d 48 (Fla. 1974))). A procedural rule of this Court may be pronounced in caselaw. *See Sch. Bd. of Broward Cty. v. Surette*, 281 So. 2d 481, 483 (Fla. 1973), *receded from on other grounds* by *Sch. Bd. of Broward Cty. v. Price*, 362 So. 2d 1337 (Fla. 1978) ("Where rules and construing opinions have been promulgated by this Court relating to the practice and procedure of all courts and a statutory provision provides a contrary practice or procedure . . . the statute must fall.") While the Legislature purports to have pronounced public policy in overturning *Marsh*, we hold that the rule announced in *Stokes* and reaffirmed in *Marsh* was a procedural rule of this Court that the Legislature could not repeal by simple majority.

We recognize that *Frye* and *Daubert* are competing methods for a trial judge to determine the reliability of expert testimony before allowing it to be admitted into evidence. Both purport to provide a trial judge with the tools necessary to ensure that only reliable evidence is presented to the jury. *Frye* relies on the scientific community to determine reliability whereas *Daubert* relies on the scientific savvy of trial judges to determine the significance of the methodology used. With our decision today, we reaffirm that *Frye*, not *Daubert*, is the appropriate test in Florida courts.[3]

We have previously recognized that *Frye* is inapplicable to the vast majority of cases because it applies only when experts render an opinion that is based upon new or novel scientific techniques. *Marsh*, 977 So. 2d at 547 (citing *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109 (Fla. 2002). Further, we have stated that "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.' " *Davis v. State*, 142 So. 3d 867, 872 (Fla. 2014) (quoting *Penalver v. State*, 926 So. 2d 1118, 1134 (Fla. 2006)); *see Hadden v. State*, 690 So. 2d 573,

3. We also note our concern that the amendment would affect access to courts much in the same way expressed by Justice Shaw in *VanBibber* by imposing an additional burden on the courts. The amici in this case have described the additional length and expense *Daubert* proceedings create. *See, e.g., Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147-49 (1999).

581 (Fla. 1997) (stating that evidence found to be inadmissible under *Frye* does not necessarily require reversal because the error may be harmless) (citing *Flanagan v. State*, 625 So. 2d 827, 829-30 (Fla. 1993)).

The expert testimony in this case was properly admitted and should not have been excluded by the Fourth District. As we stated in *Marsh*, medical causation testimony is not new or novel and is not subject to *Frye* analysis. *Marsh*, 977 So. 2d at 549. Further, we have previously recognized that asbestos products "have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others." *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985). Here, the trial court heeded our caution to "resist the temptation to usurp the jury's role in evaluating the credibility of experts and choosing between legitimate but conflicting scientific views." *Marsh*, 977 So. 2d at 549 (citing *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So. 2d 1264, 1275 (Fla. 2003)). The Fourth District erred in disturbing the trial court's determination.

Next, R.J. Reynolds and Crane both challenged the trial court's denial of remittitur. We conclude that the Fourth District's application of a dissenting viewpoint[4] is inconsistent with our caselaw and, therefore, reject its reasoning.

4. *Crane Co.*, 206 So. 3d at 111 (citing *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 318 (Fla. 1st DCA 2012) (Wetherell, J., concurring in part and dissenting in part).

For the foregoing reasons, we quash the Fourth District's decision. Furthermore, because the causation of mesothelioma is neither new nor novel, the trial court's acceptance of the expert testimony was proper. We therefore remand to the Fourth District with instructions to remand to the trial court to reinstate the final judgment. We decline to address the remaining issues.

It is so ordered.

PARIENTE, LEWIS, and LABARGA, JJ., concur.
PARIENTE, J., concurs with an opinion, in which LABARGA, J., concurs.
LABARGA, J., concurs with an opinion, in which PARIENTE, J., concurs.
CANADY, C.J., dissents with an opinion, in which POLSTON and LAWSON, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

PARIENTE, J., concurring.

I fully concur with the majority's decision to remand for reinstatement of the final judgment and its conclusion that the 2013 legislative amendments to section 90.702, Florida Statutes ("the *Daubert* amendment"), infringe on this Court's rulemaking authority. I write separately to express my belief that the *Daubert*[5] amendment also has the potential to unconstitutionally impair civil litigants' right to access the courts. *See* art. I, § 21, Fla. Const.[6]

5. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

6. Our state constitution provides that "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or

Determining the admissibility of evidence in a civil or criminal case is a quintessentially judicial function. *See Johnston v. State*, 863 So. 2d 271, 278 (Fla. 2003) ("A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion."); *Cantore v. W. Boca Med. Ctr., Inc.*, 2018 WL 4235334, *3 (Fla. Apr. 26, 2018). This includes the admission of expert opinion testimony.

In deciding whether a particular expert's testimony is admissible, the trial court is guided by the rules of evidence, which require that the expert testimony "assist the trier of fact." § 90.702, Fla. Stat. (2017). Further, as part of its gatekeeping function, the trial court must, if challenged by a party, determine whether the probative value of the evidence is "substantially outweighed by the

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delay." Art. I, § 21, Fla. Const. We have explained that "[t]his 'openness' and necessity that access be provided 'without delay' clearly indicate that a violation occurs if the statute obstructs or infringes that right to any significant degree." *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001). Additionally, because the "right to access is specifically mentioned in Florida's constitution . . . it deserves more protection than those rights found only by implication." *Id.*

Under this provision, this Court has concluded that certain statutes are unconstitutional because they restrict litigants' access to courts. *See, e.g.*, *Westphal v. City of St. Petersburg*, 194 So. 3d 311, 327 (Fla. 2016); *Mitchell*, 786 So. 2d 521. Justice Shaw reached this conclusion regarding a statute that provided "that an injured party has no beneficial interest in a liability policy until that person has first obtained a judgment against an insured." *VanBibber v. Hartford Accident & Indem. Ins. Co.*, 439 So. 2d 880, 882 (Fla. 1983). Justice Shaw believed the statute was unconstitutional, in part, because it "denie[d] or delay[ed] the rights of access to the courts" under the Florida Constitution. *Id.* at 883 (Shaw, J., concurring in part and dissenting in part).

danger of unfair prejudice." *Id.* § 90.403. However, once the trial court determines that expert testimony will assist the trier of fact and is not unduly prejudicial, the jury is entitled to hear the expert testimony. Any other approach, in my view, reflects a mistrust of the jury system and the ability of jurors to weigh the evidence.

BACKGROUND

As the majority explains, *Frye*[7] has been the standard for determining the admissibility of expert testimony in Florida for decades. *See* majority op. at 9. Under *Frye*, "the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand." *Ramirez v. State*, 651 So. 2d 1164, 1168 (Fla. 1995). Significantly, *Frye* applies only to "new or novel scientific evidence." *Brim v. State*, 695 So. 2d 268, 271 (Fla. 1997).

In 1993, the United States Supreme Court held that the Federal Rules of Evidence superseded the *Frye* "general acceptance" test for the admission of expert testimony in federal trials. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588-89 (1993). Under the federal rules, instead of determining whether the basis for an expert's opinion was generally accepted in the relevant scientific

7. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

community, the Court explained that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. The Court noted that this new standard was intended to be flexible. *See id.* at 594 ("The inquiry envisioned by [the federal rules] is, we emphasize, a flexible one."); *see also Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311 (11th Cir. 1999) ("The gatekeeper role [under *Daubert*] is not intended to supplant the adversary system or the role of the jury."); Martin L.C. Feldman, *May I Have the Next Dance, Mrs.* Frye*?*, 69 Tul. L. Rev. 793, 802-03 (1995) ("The Court declared that the *Frye* test was superseded by the Federal Rules of Evidence, and thereby outwardly relaxed the standard for admission of scientific evidence.").

Several years after *Daubert*, the United States Supreme Court concluded that a trial judge *may* consider additional factors when determining whether expert testimony meets the *Daubert* standard, including whether a particular theory or technique had been or could be tested, whether it had been subjected to peer review, and whether a particular technique had a known or potential rate of error. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). Consistent with its intention that the *Daubert* standard be flexible, the Court explicitly emphasized the word "may." *Id.*

Despite the Supreme Court's intention that *Daubert* be applied flexibly, it has been observed that, in actuality, "[t]he gatekeeping role bestowed upon the

judiciary has blocked more court access than it has enabled." Allan Kanner & M. Ryan Casey, Daubert *and the Disappearing Jury Trial*, 69 U. Pitt. L. Rev. 281, 283 (2007). Particularly relevant in this case, defendants often exploit the requirements of *Daubert* as a sword against plaintiffs' attorneys. *See id.* at 283-84. Others have written that *Daubert* has "produced a minefield clogged with '*Daubert* hearings' that are more lengthy, technical, and diffuse than anything that preceded them." David Crump, *The Trouble with* Daubert-Kumho*: Reconsidering the Supreme Court's Philosophy of Science*, 68 Mo. L. Rev. 1, 1 (2003).

Daubert has limited access to courts in two significant ways. First, *Daubert* applies in substantially more cases than *Frye*. As stated previously, unlike *Frye*, which applies only to testimony which is predicated on new or novel scientific evidence, *Daubert* applies to all expert testimony. *Kumho*, 526 U.S. at 147 (stating that *Daubert* "applies to all expert testimony"). Therefore, more litigants are exposed to the risk of exclusion of their experts' testimony under *Daubert*.

Second, in addition to expanding the areas of expert testimony that are subject to challenge, the *Daubert* analysis involves more than just the *Frye* consideration of whether "the basic underlying principles of scientific evidence have been sufficiently tested and accepted by the relevant scientific community." *Brim*, 695 So. 2d at 272. Under *Daubert*, it is the trial judge who must ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task

at hand." 509 U.S. at 597. As explained previously, this is a multi-factor consideration. *Id.* at 593-94. In other words, as the majority states, "*Frye* relies on the scientific community to determine reliability whereas *Daubert* relies on the scientific savvy of trial judges . . . ." Majority op. at 19. The difference as to who makes this reliability determination is not inconsequential, as trial judges, who typically do not possess the requisite training or experience in the expert's field, must fully understand the science before they can even attempt to determine whether it is admissible under *Daubert*.

THE *DAUBERT* AMENDMENT

In 2013, the Legislature formally adopted the *Daubert* standard. *See* ch. 2013-107, Laws of Fla. The Florida Bar's Code and Rules of Evidence Committee ("the Committee") recommended that we reject the amendment to the extent it was procedural when we considered the Committee's regular-cycle report last year, citing "grave constitutional concerns," in particular, that the adoption of the *Daubert* amendment would "deny[] access to the courts." *In re Amends. to Fla. Evidence Code*, 210 So. 3d 1231, 1239 (Fla. 2017).

In addition to the constitutional concerns, the Committee believed that the amendment "would overburden the courts and impede the ability to prove cases on

their merits." Comm. Report at 10.[8] Citing numerous federal cases, the Committee explained that, because *Daubert* covers more subject areas and involves a multi-factorial analysis to determine admissibility, versus *Frye's* simple "general acceptance" inquiry, "federal courts commonly must conduct multi-day *Daubert* hearings at substantial cost in time and money." *Id.* The Committee stated further:

> Florida's judges have not been provided the level of resources and time available to their federal counterparts. The impact of *Daubert* procedures in Florida state courts would only worsen this disparity.
>
> Litigants in all kinds of cases also bear an increased burden. Having to provide a lengthy expert report or answers to interrogatories, then have an expert witness prepare to testify in a deposition and a *Daubert* hearing, then defend a *Daubert* motion, all with the hope of being allowed to do it all over again in trial, is very expensive. Daubert "represents another procedural obstacle, another motion, another hearing, and another potential issue on appeal, all causing more delay and expense."
>
> During [Committee] discussions, concerns were raised that litigation offering expert testimony under *Daubert* increases litigation costs, a prospect that only wealthy litigants can bear. Family and juvenile cases were raised as an example, since these cases often involve parties with lesser financial capabilities who must somehow participate in *Daubert* hearings or surrender their rights on the merits due to a lack of resources to fund these evidentiary fights. Contingency cases were mentioned as another example, in cases where some litigants will be unable to find counsel to represent them due to increased expenses associated with the use of experts. A final

8. Code & Rules of Evidence Comm. Three-Year Cycle Report, *In re Amends. to Fla. Evidence Code*, 210 So. 3d 1231 (Fla. 2017) (No. SC16-181) (cited herein as "Comm. Report").

> example was presented in hourly rate cases when many litigants may be unable to afford to pursue the merits of their claims because of the expense of *Daubert* hearings guaranteed to come.

Comm. Report at 11-12 (citation omitted).[9]

The concerns raised by the Committee do not merely exist in the abstract. Attorney Dan Cytryn, a lawyer with "more than 35 years [of experience] almost exclusively in the area of personal injury," urged this Court not to adopt the amendment because *Daubert* has made "complex and moderately complex cases . . . more expensive to try." Comment by Dan Cytryn at 1, *In re Amends. to Fla. Evidence Code*, 210 So. 3d 1231 (No. SC16-181). Cytryn explained that, after *Daubert*, his law firm "has taken a much closer look at cases *that are meritorious*, and perhaps are worth under $100,000, but require litigation. [They] have turned down several meritorious cases because of the additional costs and time restraints

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9. A joint comment filed by past presidents of The Florida Bar and other members of The Florida Bar echoed this concern:

> As many of the signers of this comment know personally, the *Daubert* Law has overburdened and, if adopted by this Court, will continue to overburden our already overstrained and overworked court system. The *Daubert* Law has resulted, and will result, in unwarranted delays, costs, and expenses in the administration of justice in every kind of case. These delays, costs, and expenses will be borne not only by the courts but by the litigants and will tend to have the most adverse impact on those who lack financial resources.

Joint Comment by Past Presidents of The Fla. Bar & Other Members of The Fla. Bar at 5, *In re Amends. to Fla. Evidence Code*, 210 So. 3d 1231 (No. SC16-181).

that *Daubert* implicates." *Id.* at 2. While the impact on the workload of the trial courts or the difficulty in finding a lawyer should not be the sole consideration for determining whether a rule of procedure should be adopted, if adoption of the rule is at the expense of litigants' constitutional right to access the courts, then the impact on the workload provides a compelling reason to reject the rule.

The National Association of Criminal Defense Lawyers ("NACDL") raised competing concerns in the battle between *Frye* and *Daubert* when we considered the *Daubert* amendment last year. The NACDL urged this Court to adopt the amendment, arguing that the *Frye* standard often permits the admission of "flawed scientific evidence." Comment by the NACDL at 2, *In re Amends. to Fla. Evidence Code*, 210 So. 3d 1231 (No. SC16-181). The NACDL contended that under *Daubert*, "the trial court can truly fulfill its critical role as a gatekeeper to ensure that expert testimony is the product of reliable scientific principles and methodology." *Id.* While I understand the concerns articulated by the NACDL, I am not persuaded that the proper application of the *Frye* standard is unable to sufficiently guard against these concerns.

As this Court explained in *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001), 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. *Id.* at 844. To the contrary, we explained that the 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.' " *Id.* (emphasis added) (footnote omitted) (quoting *Brim*, 695 So. 2d at 272). We further explained that "[a] bald assertion by the expert that his deduction is premised upon well-recognized scientific principles is inadequate to establish its admissibility if the witness's application of these principles is untested and lacks indicia of acceptability." *Id.*

In that case, although several of the State's experts testified that the underlying principle of a particular method concerning knife mark evidence was generally accepted in the field, we concluded that such testimony "standing alone is insufficient to establish admissibility under *Frye* in light of the fact that [the method's] testing procedure possesse[d] none of the hallmarks of acceptability that apply in the relevant scientific community to [that] type of evidence." *Id.* at 849. Likewise, in *Hadden v. State*, 690 So. 2d 573 (Fla. 1997), we concluded that a psychologist's opinion "that a child exhibits symptoms consistent with what has come to be known as 'child sexual abuse accommodation syndrome,' " which the State sought to admit, "may not be used in a criminal prosecution for child abuse" because it was not generally accepted by a majority of experts in the field. *Id.* at 575.

I acknowledge that neither *Frye* nor *Daubert* is a perfect standard that will seem fair to all litigants in every proceeding. However, this Court's case law makes clear that a proper and thorough application of *Frye* allows the trial judge to inquire beyond bare assertions of general acceptance. *Daubert*, on the other hand, has the potential to infringe on litigants' constitutional right to access the courts. In addition to the time-consuming and potentially cost-prohibitive expense created by *Daubert* hearings, as well as the onerous barriers to admitting expert testimony, the jury's role in evaluating the merits of the case may nevertheless be usurped even after the trial court has concluded that expert testimony is admissible by an appellate court's overly burdensome application of *Daubert*, as evidenced by the facts of this case. Accordingly, I do not agree that *Daubert* is preferable to *Frye*.

THIS CASE

In this case, after holding *Daubert* hearings on the plaintiff's experts' testimony, the trial court allowed the experts to testify regarding whether the products of three defendants, which contained asbestos, were a substantial contributing cause of the plaintiff's mesothelioma. *Crane Co. v. DeLisle*, 206 So. 3d 94, 99 (Fla. 4th DCA 2016). The jury asked numerous probative questions during the trial and deliberated for three days before rendering a verdict, in which

it apportioned fault against all three named defendants, in addition to a *Fabre*[10] defendant. *Crane*, 206 So. 3d at 100.

Despite the jury's careful consideration of the case, the Fourth District Court of Appeal reversed for a new trial, concluding that the trial court abused its discretion in admitting three of the plaintiff's expert witnesses who testified regarding causation. *Id.*; *see* majority op. at 20. As the majority explains, the causation testimony in this case would not have even been subject to a *Frye* challenge because "medical causation testimony is not new or novel." Majority op. at 20 (citing *Marsh v. Valyou*, 977 So. 2d 543, 549 (Fla. 2007)). Similarly, as also noted by the majority, this Court has, for decades, understood that asbestos products "have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others." Majority op. at 20 (quoting *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985)).

In other words, before *Daubert*, the testimony of the plaintiffs' causation experts would not have been subject to challenge. Under *Daubert*, however, an appellate court can usurp both the function of the trial court in ruling on the admissibility of evidence that is neither new nor novel, and the role of the jury in weighing the evidence and rendering a verdict.

10. *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

CONCLUSION

For the reasons stated, in addition to the majority's conclusion that the *Daubert* amendment unconstitutionally infringes on this Court's rulemaking authority, I would also conclude that the *Daubert* amendment has the potential to unconstitutionally impair litigants' right to access the courts in civil cases. The amendment does nothing to enhance the factfinding process, and instead, displays a gross mistrust of the jury system.

LABARGA, J., concurs.

LABARGA, J., concurring.

I fully concur with the majority opinion, but write separately to express why jurisdiction is proper in this case on the basis of express and direct conflict. In the decision below, the Fourth District Court of Appeal evaluated the admissibility of the experts' testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). However, as noted by the majority, this Court has repeatedly stated that *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), is the applicable standard for admissibility of expert testimony in Florida. For example, in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007), we explained:

> Despite the Supreme Court's decision in *Daubert*, we have since repeatedly reaffirmed our adherence to the *Frye* standard for admissibility of evidence. *See, e.g.*, *Ibar v. State*, 938 So. 2d 451, 467 (Fla. 2006) ("Florida courts do not follow *Daubert*, but instead follow the test set out in *Frye*."), *cert. denied*, 549 U.S. 1208, 127 S. Ct. 1326, 167 L. Ed. 2d 79 (2007); *Brim v. State*, 695 So. 2d 268, 271-72

> (Fla. 1997) ("Despite the federal adoption of a more lenient standard in [*Daubert*], we have maintained the higher standard of reliability as dictated by *Frye*."); *Hadden v. State*, 690 So. 2d 573, 578 (Fla. 1997) ("Our specific adoption of that test after the enactment of the evidence code manifests our intent to use the *Frye* test as the proper standard for admitting novel scientific evidence in Florida, even though the *Frye* test is not set forth in the evidence code."); *Flanagan v. State*, 625 So. 2d 827, 829 n.2 (Fla. 1993) ("We are mindful that the United States Supreme Court recently construed Rule 702 of the Federal Rules of Evidence as superseding the *Frye* test. However, Florida continues to adhere to the *Frye* test for admissibility of scientific opinions.").

Id. at 547 (alteration in original).

Thus, the decision in *DeLisle*, which applied the *Daubert* standard, conflicts with earlier decisions by this Court that conclude *Frye* is the appropriate test. Although the Legislature amended the Evidence Code in 2013, this Court has never held that *Daubert* is the appropriate standard for admission of expert testimony in Florida. In fact, in 2017—after the issuance of *DeLisle*—we expressly declined to adopt the amendments to the Evidence Code implementing *Daubert* to the extent they were procedural due to "grave constitutional concerns." *In re Amendments to Fla. Evidence Code*, 210 So. 3d 1231, 1239 (Fla. 2017). Accordingly, despite the change in the Evidence Code, conflict between *DeLisle* and *Marsh*, *Ibar*, and other decisions articulating *Frye* as the applicable standard in Florida remains, and resolution as to which standard applies is critical to resolve uncertainty in Florida law. For this reason, we absolutely possess jurisdiction to address and determine whether the lower court properly applied *Daubert*.

PARIENTE, J., concurs.

CANADY, C.J., dissenting.

The majority grounds its exercise of jurisdiction on express and direct conflict, asserting that the decision on review, *Crane Co. v. DeLisle*, 206 So. 3d 94 (Fla. 4th DCA 2016)—which applies the *Daubert*[11] standard codified in revised section 90.702, Florida Statutes—is in conflict with *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007), and other cases applying legal principles based on the *Frye*[12] standard. Under article V, section 3(b)(3) of the Florida Constitution, such jurisdiction exists only if the decision on review "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Because *Marsh* and similar cases do not address "the same question of law" addressed in *DeLisle*, there is no express and direct conflict jurisdiction.

We have long recognized that a case decided on the basis of a statutory provision cannot be in conflict with an earlier case that pre-dated the effective date of that statutory provision. *See In re Interest of M.P.*, 472 So. 2d 732, 733 (Fla. 1985) (denying review on the ground that the asserted conflict case "arose prior to

11. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

12. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

the effective date" of the controlling statute in the case on review and therefore was "clearly distinguishable"). This follows from the self-evident proposition that one case decided on the basis of a statute and another case decided prior to the effective date of the statute on the basis of previous governing law do not—and could not—address "the same question of law." The new statute changes the legal landscape and presents an entirely novel legal question—namely, what does the new statute provide?

Marsh and similar cases based on Florida's *Frye* jurisprudence do not address the "same question of law" as the question addressed in *DeLisle*, which was controlled by and applied amended section 90.702, a statute that became effective after *Marsh* and similar cases were decided and that was specifically designed to displace Florida's *Frye* jurisprudence.

To exercise jurisdiction here, the majority sets aside fundamental constitutional principles of conflict jurisdiction. Never before have we exercised conflict jurisdiction on the ground that a case applies a statute that displaces previously existing law. The majority thus charts an unprecedented and ill-advised course that would expand this Court's conflict jurisdiction to encompass every case in which a district court applies a statute that has changed a legal rule in any area of the law. This is a very serious error.

The constitutionality of amended section 90.702 is unquestionably an important issue that is worthy of consideration by this Court. But the importance of an issue does not justify transgressing the constitutional bounds of this Court's jurisdiction. Instead, such an issue should be considered by this Court only in a case that presents a proper basis for jurisdiction under our constitution. Of course, this case might well have presented a basis for jurisdiction. If DeLisle had made an argument to the district court challenging the constitutionality of amended section 90.702, the district court most likely would have addressed that argument in its opinion. And then—depending on the district court's ruling—this Court would have had either mandatory jurisdiction based on a declaration of invalidity, art. V, § 3(b)(1), Fla. Const., or discretionary jurisdiction based on a declaration of validity, art. V, § 3(b)(3), Fla. Const. Yet for some reason, such an argument was not presented to the district court. Parties every day make choices in litigating cases that limit their options for review. And parties ordinarily must live with the choices they make. This Court should not rescue a party from a poor choice by exercising jurisdiction where none exists.

This case should be discharged. I dissent.

POLSTON and LAWSON, JJ., concur.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict of Decisions

Fourth District - Case Nos. 4D13-4351 and 4D14-146

(Broward County)

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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-5241

HOLIDAY ISLE IMPROVEMENT ASSOCIATION, INC.,

Appellant,

v.

DESTIN PARCEL 160, LLC, a Florida Limited Liability Company,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
William F. Stone, Judge.

October 15, 2018

WETHERELL, J.

Appellant (the association) sued Appellee (the developer) for declaratory and injunctive relief to compel the developer to submit its building plans to the association for review and approval in accordance with the protective covenants and restrictions on the developer's property. The trial court granted summary judgment in favor of the developer, and we affirmed that order in *Holiday Isle Improvement Association, Inc. v. Destin Parcel 160, LLC*, 2018 WL 4139351 (Fla. 1st DCA Aug. 30, 2018). The trial court also awarded prevailing party attorney's fees and costs to the developer

under section 720.305(1), Florida Statutes (2013), and in this appeal, the association challenges that award.

The association argues that there was no legal basis for the award of attorney's fees and costs to the developer because its suit was filed under chapter 86, Florida Statutes, and neither chapter 86 nor the protective covenants provides for an award of prevailing party attorney's fees and costs. The developer responds that the absence of authority for an award of attorney's fees and costs in chapter 86 and the protective covenants is immaterial because the award here was properly based on section 720.305(1). We agree with the developer.

Section 720.305(1) provides in pertinent part:

> Each member and . . . and each association, are governed by, and must comply with, this chapter, the governing documents of the community, and the rules of the association. *Actions at law or in equity . . . to redress alleged failure or refusal to comply with these provisions* may be brought by the association . . . against:
>
> * * *
>
> (b) A member;
>
> * * *
>
> *The prevailing party in* ***any such litigation*** *is entitled to recover reasonable attorney fees and costs ....*

(emphasis added).[1] Even though the declaratory judgment complaint filed by the association did not refer to section 720.305,

[1] The statute further provides that in addition to recovering attorney's fees and costs, "[a] member prevailing in an action between the association and the member under this section . . . may recover additional amounts as determined by the court to be necessary to reimburse the member for his or her share of assessments levied by the association to fund its expenses of the litigation." However, that provision is not implicated in this case

the suit was a *de facto* action under that section because it sought to redress the developer's alleged failure or refusal to comply with the protective covenants. Accordingly, under the plain language of section 720.305(1), the developer was entitled to an award of its attorney's fees and costs as the prevailing party in the suit.

The association also argues that the statute cannot be retroactively applied here because the protective covenants predate the enactment of section 702.305(1) and the statute impairs the parties' contractual rights under the covenants. We disagree for two reasons.

First, the statute is being applied prospectively—not retroactively—because the association's cause of action accrued many years after the statute's effective date. "When attorney's fees are an item of costs provided by statute, the relevant analysis does not compare the effective date of the statute providing for court costs with the date of the contract, if any, which may be the cause of action in the particular litigation, but compares the effective date of the statute providing for court costs with the date of the accrual of the cause of action in the litigation as to which the court costs, including attorney's fees, are an adjunct." *Xanadu of Cocoa Beach, Inc. v. Lenz*, 504 So. 2d 518, 520 (Fla. 5th DCA 1987).

Second, the statute does not impair the parties' rights or obligations under the protective covenants because even though the covenants were silent on the issue of attorney's fees and costs, they provided that "the remedies herein stated shall be construed as *cumulative of all other remedies* now or *hereafter provided by law*" (emphasis added). Thus, unlike the case relied on by the association in which the court held that "the statutory imposition of attorneys' fees where none were bargained for materially changes the binding force of the agreement," *Commodore Plaza at Century 21 Condominium Association, Inc. v. Cohen*, 378 So. 2d 307, 309 (Fla. 3d DCA 1980), the imposition of prevailing party

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because the developer was only awarded its attorney's fees and costs.

attorney's fees and costs under section 720.305(1) is consistent with—and does not impair—the bargained-for terms of the protective covenants here.

For these reasons (and because we find no merit in the other issues raised by the association), we affirm the award of prevailing party attorney's fees and costs to the developer.

AFFIRMED.

ROBERTS and OSTERHAUS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

David A. Theriaque, S. Brent Spain, and Terrell K. Arline of Theriaque & Spain, Tallahassee, for Appellant.

John M. Stratton, Daniel C. O'Rourke, and Dana C. Matthews of Matthews & Jones, LLP, Destin, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PEGGY A. THORLTON and WILLIAM D. THORLTON, Appellants, v. NATIONSTAR MORTGAGE, LLC, Appellee.	)	Case No. 2D17-2328

Opinion filed October 17, 2018.

Appeal from the Circuit Court for Highlands County; Michael R. Raiden, Judge.

Randall O. Reder of Randall O. Reder, P.A., Tampa, for Appellants.

Nancy M. Wallace and Ryan D. O'Connor of Akerman LLP, Tallahassee; William P. Keller of Akerman LLP, Fort Lauderdale; and David A. Karp of Akerman LLP, Tampa, for Appellee.

MORRIS, Judge.

Peggy A. and William D. Thorlton appeal the final judgment of foreclosure entered against them and in favor of Nationstar Mortgage, LLC, following a bench trial. For the reasons we explain, we conclude that Nationstar adequately established that its

predecessor in interest, Chase Home Finance a/k/a JPMorgan Chase Bank National Association satisfied a condition precedent to filing suit: providing written notice of default as required by paragraph 22 of the mortgage. Thus we affirm on that issue. We affirm on all other issues without further comment.

BACKGROUND

On May 13, 2003, the Thorltons executed a promissory note and mortgage in favor of Wachovia Mortgage Corporation. Paragraph 22 of the mortgage provided that prior to acceleration, the lender must give the borrower notice and an opportunity to cure the default. Paragraph 15 provided that any such notice must be written and that it "shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."

In 2008, Chase Home Finance filed a foreclosure complaint against the Thorltons. Chase alleged that it was the servicer of the loan and acting on behalf of the owner. That complaint alleged generally that all conditions precedent to the acceleration of the note and mortgage had been performed.

Chase subsequently filed two motions for substitution of party plaintiff, alleging first that it had merged with JPMorgan Chase Bank N.A. and, at a later time, that it had become organized under a new charter and had changed its name to JPMorgan Chase Bank, National Association. In July 2016, prior to trial, a motion to substitute Nationstar as the party plaintiff was filed and ultimately granted.

At trial, Nationstar admitted a copy of the default letter purportedly mailed to the Thorltons on October 2, 2008, in compliance with paragraph 22. The letter

contained a header proclaiming "CERTIFICATE OF MAILING." As part of the same exhibit, Nationstar included a screenshot from Chase's electronic records indicating that the default letter was scanned into Chase's system on October 3, 2008. The exhibit was admitted through the testimony of Jason George, a default case specialist employed by Nationstar. Mr. George testified that he had previously worked for JPMorgan Chase and, prior to that, worked for Chase Home Finance before the two entities merged. Mr. George testified he worked for Chase from July 2011 until March 2015. He testified generally about his familiarity with Chase's practices and procedures for creating and maintaining records as well as his familiarity with the boarding process that occurs when one lender takes over the servicing of a loan from another lender.

Prior to the admission of the default letter, the Thorltons' counsel objected based on "hearsay, lack of foundation, and lack of personal knowledge." Specifically, the Thorltons' counsel argued that Mr. George did not have personal knowledge of whether the letter was actually mailed out, regardless of whether it was mailed by Chase or by a third-party vendor.[1] The Thorltons' counsel also argued that Mr. George was not qualified to lay a business records predicate for the admission of the document when the letter was mailed "by yet another department of the company that he apparently spoke to someone about." The trial court overruled the objection and admitted the letter.

During questioning about the letter, Mr. George testified that the letter was part of Nationstar's business records that had previously been part of Chase's business records. He testified that the records were made by employees with personal

[1]The Thorlton's counsel explained to the court that the use of a third-party vendor to mail out default letters was common in the mortgage industry.

knowledge of the information being entered at the time it was entered, that the records were kept in the course of Chase's regularly-conducted business activities, and that it was Chase's regular business practice to make and maintain such records. When asked how he knew that the letter was mailed to the Thorltons, Mr. George responded: "That was the routine practice back then for Chase Home Finance."

On cross-examination, Mr. George testified that he worked in multiple departments with Chase and Nationstar, including two days in Chase's breach letter department. Mr. George acknowledged that Chase used a third-party vendor to mail the breach letters and that he knew this because he worked with the third-party vendor during his training. Mr. George explained that the third-party vendor obtains a PDF copy of the breach letter from the lender, prints and mails it first class, and then sends a CD back to the lender informing the lender that the letter was mailed. Mr. George explained that the lender also receives proof of mailing via a copy of each letter with a "proof of mailing stamp from the post office." Mr. George subsequently admitted that he did not work for the third-party vendor at the time that the Thorltons' breach letter was mailed and that he never actually worked for the third-party vendor. He explained that his knowledge about the third-party vendor's mailing process came through his two-day assignment in Chase's breach letter department. He also explained that his knowledge about the third-party vendor's mailing process came entirely from other Chase employees who told him about the third-party vendor.

On appeal, the Thorltons challenged the sufficiency of the evidence regarding the mailing of the default letter. Specifically, the Thorltons argued that because Mr. George did not work for Chase at the time the letter was mailed, he could

not have personal knowledge of that issue and, as a result, Nationstar failed to prove it complied with the condition precedent set forth in paragraph 22 of the mortgage.

In response, Nationstar argued that Mr. George's testimony regarding Chase's routine business practices was sufficient to establish that the letter was mailed. Nationstar asserted that Mr. George was not required to have worked for Chase at the time the letter was mailed in order to establish his knowledge of Chase's routine business practices.

After all briefs had been filed in this case, this court issued Spencer v. Ditech Financial, LLC, 242 So. 3d 1189 (Fla. 2d DCA 2018). In Spencer, this court addressed the issue of what constitutes sufficient evidence to establish the mailing of a default letter when the testifying witness was not a current employee of and had never worked for the entity which drafted and mailed the letter. Id. At oral argument, the Thorltons noted the Spencer opinion and argued that it also served as a basis to reverse in this case because like the employee in Spencer, Mr. George did not work for the entity which mailed the letter. The Thorltons filed a notice of supplemental authority citing Spencer on the same day that oral argument occurred.

This court then issued an order directing the parties to address Spencer and its application to this case. The Thorltons' supplemental brief noted that their counsel had raised an objection to the sufficiency of Mr. George's knowledge of the mailing issue at trial, and the Thorltons argued that Spencer was directly on point and required a reversal here because Mr. George testified that his knowledge of the mailing of the letter was based merely on his training and the routine business practices of Chase. Thus, the Thorltons argued that because Mr. George had never worked for the

third-party vendor which actually mailed the letter and because his knowledge of the third-party vendor's mailing process had been obtained from other Chase employees, the evidence was insufficient to establish that the letter had been mailed.

In its supplemental brief, Nationstar argued that the Thorltons waived any challenge to Mr. George's testimony regarding routine business practices, arguing that the Thorltons only objected to the admission of the default letter as a business record. Nationstar also argued that this issue was not one related to the sufficiency of the evidence. Instead, Nationstar maintained that the issue was an evidentiary issue related to routine business practices under section 90.406, Florida Statutes (2016), or lack of personal knowledge under section 90.604. Nationstar distinguished Spencer by arguing that there, the testifying witness had never worked for the entity (prior servicer) which drafted the default letter, whereas, in this case, Mr. George had worked for Chase, the entity which drafted the default letter. Nationstar pointed to parts of Mr. George's testimony wherein he described working "at three different stations" in the breach letter department and observing how breach letters were submitted to the third-party vendor for mailing and then how Chase received proof of mailing from the third-party vendor. Thus Nationstar argued that Mr. George's testimony was sufficient under Spencer. Citing other cases, Nationstar also argued that testimony regarding routine business practices related to the drafting and mailing of default letters was sufficient to prove the letter was actually mailed.

ANALYSIS

Addressing first the issue of preservation, we reject Nationstar's attempt to frame this issue as one involving only evidentiary considerations related to the

admissibility of a business record. In its answer brief, Nationstar relied on Bank of America, N.A. v. Delgado, 166 So. 3d 857 (Fla. 3d DCA 2015), to argue that Mr. George was not required to be employed by Chase at the time the default letter was mailed in order to provide a foundation for the admission of Nationstar's business records. And in its supplemental answer brief, Nationstar argued that the issue in this case was not one related to the sufficiency of the evidence regarding the Thorltons' receipt of the default letter. However, Spencer holds otherwise. Indeed, in Spencer, we specifically rejected the appellants' reliance on Delgado, noting that it addressed the sufficiency of the evidence of an entity's boarding process to establish the admissibility of documents like default letters under the business records exception to the hearsay rule, whereas in Spencer, the issue was the sufficiency of the evidence demonstrating an entity's routine business practices to establish that a default letter was mailed. See Spencer, 242 So. 3d at 1191. We do not disagree with Nationstar's argument that "basic familiarity with [another entity's] practices for generating, storing, and sending a default [letter] in the normal course of business is all that is required to establish the admissibility of a default [letter] under the business records exception," but as in Spencer, the admissibility of the default letter is not at issue here. See id.

Further, the fact that the Thorltons did not raise the precise issue raised in Spencer below does not preclude them from raising the issue on appeal. As we noted in Wolkoff v. American Home Mortgage Servicing, Inc., 153 So. 3d 280, 282 (Fla. 2d DCA 2014), Florida Rule of Civil Procedure 1.530(e) permits parties to raise the issue of the sufficiency of the evidence on appeal even where they did not make such an objection below. While it is true that "[b]asic principles of due process suggest that

courts should not consider issues raised for the first time at oral argument," courts also acknowledge that there are "[r]are or unusual instances" where an appellate court may consider arguments raised for the first time on appeal. Powell v. State, 120 So. 3d 577, 591, 593 (Fla. 1st DCA 2013); see also Wolkoff, 153 So. 3d at 282 (recognizing that courts have ability to consider arguments raised for the first time at oral arguments in limited circumstances). This case presents one such circumstance, where a case which addresses an issue presented in this case was decided after all briefing had been completed in this case. Furthermore, we provided both parties with the opportunity to address the proof of mailing issue in supplemental briefs. Thus no due process violation has occurred and we may dispose of this issue on the merits.

Having analyzed the facts and holdings of both Spencer and a subsequently decided case, Soule v. U.S. Bank National Ass'n, 43 Fla. L. Weekly D1590 (Fla. 2d DCA July 13, 2018), we conclude that they do not require a reversal in this case. Rather, we hold that Mr. George's testimony was sufficient to establish that the default letter was mailed.

Spencer requires not only that a testifying witness "be employed by the entity drafting the letter," but also that the witness "have firsthand knowledge of the company's routine practice for mailing letters." Spencer, 242 So. 3d at 1191 (emphasis added). Prior to his employment with Nationstar, Mr. George was employed by Chase, which was the entity that drafted the default letter. Mr. George also had knowledge of Chase's routine practice of submitting the letters for mailing to a third-party vendor. He explained what those practices were at the time the subject default letter was mailed out even though he was not in Chase's employ at that time.

That point is where this case factually differs from Spencer. The issue in Spencer was that the testifying witness worked for a successor in interest to the mortgage company that initiated the foreclosure proceedings. The witness had never worked for the mortgage company which was the entity that had both drafted and mailed the letters. Id. at 1190-91. And while the witness testified about the mortgage company's policy and procedure for both drafting and mailing default letters, she had no personal knowledge of those issues. Id. at 1191.

Similarly, in Soule, the testifying witness worked for the successor in interest to the mortgage servicing company that had prepared and allegedly mailed the default letter. Soule, 43 Fla. L. Weekly D1590. The witness testified she had never worked for the original servicing company, and she admitted that she had never been trained in any of the prior servicing company's procedures. Id. Thus we concluded that the witness had no personal knowledge of whether the default letter was mailed or of the prior servicing company's policies and procedures for mailing. Id.

Here, in contrast, not only did Mr. George work for Chase, the entity which drafted the letter, but he also established his familiarity with Chase's routine practices relating to the mailing of the default letters at the time the subject default letter was mailed. We have previously held that "[t]he fact that a document is drafted is insufficient in itself to establish that it was mailed" and that additional evidence is required to establish proof of mailing. Allen v. Wilmington Tr., N.A., 216 So. 3d 685, 687-88 (Fla. 2d DCA 2017). However, such evidence may be in the form of proof of regular business practices. See id. at 688. And we have concluded that such evidence "may be sufficient to establish a rebuttable presumption of mailing," where the witness has

"personal knowledge of the company's general practice in mailing letters." Id. (citing CitiMortgage, Inc. v. Hoskinson, 200 So. 3d 191, 192 (Fla. 5th DCA 2016)).

While we acknowledge that Chase was not the entity that ultimately mailed the letter, it had a routine practice for submitting default letters to a third-party vendor which then mailed the letter. As Mr. George explained, Chase would then receive proof of mailing back from the third-party vendor. We are persuaded by PNC Bank National Association v. Roberts, 246 So. 3d 482 (Fla. 5th DCA 2018), that Mr. George's testimony was sufficient then to create a rebuttable presumption of the mailing of the letter.

Roberts contains many factual similarities to this case. There, a bank employee testified about the routine business practices of the foreclosing bank which included testimony about the creation of default letters. Id. at 485-86. Specifically, the witness testified that the bank "creates the letter by ordering it from an outsourcing vendor . . . which prints the [default] letters, folds them, places them in a window envelope, seals the envelopes, affixes postage, and mails them by first-class mail." Id. at 486. She also testified that the third-party vendor then provided the bank with a report showing which letters were mailed. Id. The Fifth District Court of Appeal acknowledged that the dates on the default letters only established the date that they were drafted and not whether or when they were sent. Id. However, the court ultimately held that the witness's "personal knowledge" of the bank's and the third-party vendor's routine business practices and policies for default letters during the time period when the pertinent default letters were mailed, in conjunction with the admission of the default letters themselves, was sufficient to establish that the letters were mailed. Id.

As in Roberts, the foreclosing bank here, Chase, was not the entity that actually mailed the letter. Additionally, like the foreclosing bank in Roberts, Chase had routine practices for drafting the default letters, submitting them to a third-party vendor for mailing, and then receiving confirmation of mailing back from the vendor. The fact that Mr. George was not employed by Chase at the time the subject default letter was mailed is not dispositive because Mr. George was able to testify not only about his own training and experience with Chase regarding default letters, but also about Chase's policies and procedures relating to the mailing of default letters at the time the subject default letter was mailed. Just as the Fifth District concluded in Roberts, we likewise conclude that where a testifying witness establishes his or her personal knowledge of a foreclosing entity's and third-party vendor's routine business practices and policies for drafting and mailing a default letter, coupled with the admission of the default letter itself, there is competent, substantial evidence that the subject default letter was mailed. Id.

Because Nationstar sufficiently established that its predecessor in interest (Chase) satisfied the condition precedent of providing the paragraph 22 notice, we affirm.

Affirmed.

NORTHCUTT, J., Concurs.
LUCAS, JJ., Concurs in result only.

Third District Court of Appeal

State of Florida

Opinion filed October 17, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-1778
Lower Tribunal No. 15-15587

Ricardo Garcia,
Appellant,

vs.

Deutsche Bank National Trust Company, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Lisa S. Walsh, Judge.

Ricardo Garcia, in proper person.

DeLuca Law Group, PLLC, and Shawn Taylor (Fort Lauderdale), for appellee.

Before EMAS, FERNANDEZ and SCALES, JJ.

SCALES, J.

Appellant Ricardo Garcia appeals a Final Judgment of Mortgage Foreclosure in favor of appellee Deutsche Bank National Trust Company. We reverse because the case below was removed to federal court one day before the trial court entered the final judgment; thus, the trial court lacked jurisdiction to enter the judgment.

After the Bank sued Garcia to foreclose a mortgage, a tenant of Garcia filed a cross-complaint against Garcia in the foreclosure action, alleging that Garcia and his wife violated the federal Truth in Lending Act by representing that the subject mortgage had been rescinded. The tenant asserted in the cross-complaint that this misrepresentation entitled the tenant to remain in the property. On July 10, 2017, this cross-complainant filed a notice of removal of the entire foreclosure action to federal court.[1] The following day, on July 11, 2017, the trial court entered the final foreclosure judgment. The United States District Court remanded the case back to the circuit court on July 19, 2017.

State court jurisdiction ceases upon removal of a case to federal court and any pre-remand proceedings occurring in the state court after the case has been removed are void. Musa v. Wells Fargo Del. Tr. Co., 181 So. 3d 1275, 1277 (Fla.

[1] This was the second time during the pendency of the foreclosure litigation that this tactic was employed. On January 20, 2017, a different tenant of Garcia filed an identical cross-complaint and sought removal of the entire case to federal court. The United States District Court remanded the case back to the circuit court on February 24, 2017.

1st DCA 2015) (citing Maseda v. Honda Motor Co., 861 F. 2d 1248 (11th Cir. 1988)). In a detailed review of the law in this area, the First District concluded that even an improper removal to federal court, or a removal for improper motives, will not preserve state court jurisdiction. Id. at 1280-84; see also Cole v. Wells Fargo Bank Nat'l Ass'n, 201 So. 3d 749, 750 (Fla. 5th DCA 2016).[2]

Because the trial court lacked jurisdiction to enter the final judgment, we are compelled to reverse the final judgment and remand for proceedings consistent with this opinion.

Reversed and remanded.

[2] As the First District pointed out, a frivolous or bad faith removal to federal court may implicate the trial court's "authority to sanction such conduct (once it regains jurisdiction)." Musa, 181 So. 3d at 1284.

Third District Court of Appeal

State of Florida

Opinion filed October 17, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-2064
Lower Tribunal No. 17-4154

Pablo Antoniazzi, et al.,
Appellants,

vs.

Hamed Wardak, et al.,
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, William Thomas, Judge.

Rivero Mestre, LLP, and M. Paula Aguila, Andrés Rivero, and Alan H. Rolnick, for appellants.

Kopelowitz Ostrow, Ferguson, Weiselberg, Gilbert, and Alexis Fields (Fort Lauderdale), for appellees.

Before SALTER, EMAS and LOGUE, JJ.

EMAS, J.

INTRODUCTION

Pablo Antoniazzi ("Antoniazzi"), Estrategia Investimentos USA, Inc. ("Estrategia Inc."), and Estrategia Investimentos, LLC ("Estrategia LLC") (collectively, "Appellants") appeal an order denying their motion to dismiss the complaint for lack of jurisdiction, based upon a forum selection clause. We reverse and hold that the forum selection clause is mandatory and unambiguous, and that application of the mandatory forum selection clause to the instant action required the action to be filed in Brazil.

FACTS AND PROCEDURAL HISTORY

On March 4, 2013, Hamed Wardak and NCL Holdings, Ltd. (collectively "Appellees") entered into an Agreement for Account Opening (the "Banking Agreement") with Brazilian bank, Estrategia Investimentos S.A., ("the Bank"). Wardak is the owner of the bank account and the deposited funds at issue. Antoniazzi was the Bank's representative and signed the Banking Agreement on behalf of the Bank. Estrategia Inc. was a strategic trading partner of the Bank, while Estrategia LLC provided financial advising services.

Appellees allege that when they entered into the Banking Agreement with the Bank, they were establishing an account for banking services that would provide Wardak with constant access to the funds. After the account was established, Wardak wired $2.7 million dollars into it, but soon afterward, the

Bank restricted his access to the funds. After this dispute arose regarding access to the funds, the Bank provided Wardak with a letter of understanding, in which it agreed to return all funds to Wardak with interest. Wardak alleges that none of the $2.7 million has been returned.

On May 5, 2016, the Brazilian government took over the Bank and initiated liquidation proceedings. Thereafter, Wardak and NCL filed an action against Appellants and the Bank,[1] sounding in breach of contract, fraud in the inducement, fraudulent misrepresentation, and violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA").

Appellants filed a motion to dismiss the complaint for lack of jurisdiction, alleging that the forum selection clause contained in the Banking Agreement was mandatory and unambiguous, and that the exclusive forum for this action was Brazil.

Appellees countered that the forum selection clause was permissive, and not mandatory and that the forum selection clause permitted Appellees to file in Brazil or in the forum where "the branch of the Bank maintaining the contractual relationship" with Appellee Wardak is located, i.e. Miami. Appellees further maintained that, even if the clause was mandatory, the term "branch of the Bank" was ambiguous and it should be interpreted to include the Bank's office in Miami.

[1] The Bank has not appeared at the trial level or in this appeal.

The forum selection clause in the Banking Agreement provides:

> **Applicable law—venue for judicial and foreclosure proceedings**
> All legal relations between the client and the Bank are governed by Brazil law.[2] The place of performance, the exclusive jurisdiction for all legal action and the venue for legal proceedings if the client is resident abroad is the place where the head office or branch of the Bank maintaining the contractual relationship with the client is located. To that end, the client elects the head office or branch concerned as its address for legal service. The Bank nevertheless reserves the right to instigate proceedings in the courts of the client's place of residence or before any other competent court.

Following an evidentiary hearing, the trial court denied the motion to dismiss, finding: "the forum selection clause lacks sufficient mandatory or exclusive language binding the parties to a specific jurisdiction or venue;" and that, even if the clause was mandatory, "venue is proper in Miami-Dade County because a 'Branch office' is nothing more than a location other than the main office."

STANDARD OF REVIEW

The trial court's construction of the forum selection clause is subject to de novo review. Celistics, LLC v. Gonzalez, 22 So. 3d 824, 825 (Fla. 3d DCA 2009). The initial determination of whether a contract term is ambiguous is a question of

[2] Although the Banking Agreement expressly provides for application of Brazilian law, the parties (in the trial court and on appeal) relied generally upon Florida law (and persuasive Federal law) in support of their respective positions, and neither relied upon nor cited Brazilian law. Thus, this court applies Florida law. See, e.g., Martinez v. Bloomberg LP, 740 F.3d 211, 223 (2d Cir. 2014); Bailey v. ERG Enters., LP, 705 F.3d 1311, 1320 (11th Cir. 2013); Chase Manhattan Bank v. Rood, 698 F.2d 435, 436 n. 1 (11th Cir. 1983).

law, which we also review de novo. Escobar v. United Auto. Ins. Co., 898 So. 2d 952 (Fla. 3d DCA 2005). If a contract term is ambiguous, requiring the trial court to resolve factual issues, we review the trial court's determinations of fact for competent substantial evidence. Weisfeld-Ladd v. Estate of Ladd, 920 So. 2d 1148, 1150 (Fla. 3d DCA 2006); Laufer v. Norma Fashions, Inc., 418 So. 2d 437 (Fla. 3d DCA 1982).

ANALYSIS

1. Whether the forum selection clause is permissive or mandatory

We hold that the provision is mandatory and that the trial court erred in determining that the forum selection clause was permissive.

The relevant portion of the forum selection clause provides:

> The place of performance, *the exclusive jurisdiction for all legal action and the venue for legal proceedings* if the client is resident abroad *is the place where the head office or branch of the Bank maintaining the contractual relationship with the client is located.*

(Emphasis added.)

The general rule is that "a forum selection clause will be considered permissive if it lacks words of exclusivity." Celistics, 22 So. 3d at 826. By contrast, "a forum selection clause is mandatory where the plain language used by the parties indicates 'exclusivity.'" Espresso Disposition Corp. 1 v. Santana Sales & Mktg. Grp., Inc., 105 So. 3d 592, 595 (Fla. 3d DCA 2013). A forum selection clause will be deemed mandatory where, by its terms, suit may be filed only in the

forum named in the clause, whereas "permissive forum selection clauses are essentially a 'consent' to jurisdiction or venue in the named forum and do not exclude jurisdiction or venue in another forum." Travel Exp. Inv. Inc. v. AT & T Corp., 14 So. 3d 1224, 1226 (Fla. 5th DCA 2009) (quoting Shoppes Ltd. P'ship v. Conn, 829 So. 2d 356, 358 (Fla. 5th DCA 2002)).

In response to the motion to dismiss, Appellees contended, and the trial court agreed, that the forum selection clause lacks words of exclusivity and thus, must be deemed permissive.

Importantly, however, the absence of the term "shall" or "must" does not necessarily render a forum selection clause permissive. Even in the absence of such "magic words," a forum selection clause may be deemed mandatory where the language used "does clearly indicate that it is mandatory in nature." Celestics, 22 So. 3d at 826 (quoting Golf Scoring Sys. Unlimited, Inc. v. Remedio, 877 So. 2d 827, 829 (Fla. 4th DCA 2004)).

Here the forum selection clause provides: "The place of performance, ***the exclusive jurisdiction*** for all legal action and ***the venue*** for legal proceedings . . . is the place . . . " (emphasis added). Thus, the plain language of this contract expresses an unmistakable intent to make the forum provision exclusive. See, e.g., Agile Assur. Group, Ltd. v. Palmer, 147 So. 3d 1017 (Fla. 2d DCA 2014) (holding the following forum selection clause mandatory: "Any legal suit, action, claim,

proceeding[,] or investigation arising out of or relating to this Agreement may be instituted exclusively in the courts of Makati City and Employee waives any objections which he may now or hereafter have to such venue of any such suit ... and irrevocably submits to the personal and subject matter jurisdiction of any such court"); Golf Scoring Sys., 877 So. 2d at 829.[3] Accord, Michaluk v. Credorax (USA), Inc., 164 So. 3d 719, 725 (Fla. 3d DCA 2015).

We further reject Appellees' contention that the lack of mutuality in the forum selection clause renders it permissive, rather than mandatory. The relevant portion of the clause provides:

> The place of performance, the exclusive jurisdiction for all legal action and the venue for legal proceedings if the client is resident abroad is the place where the head office or branch of the Bank maintaining the contractual relationship with the client is located. To that end, the client elects the head office or branch concerned as its address for legal service. *The Bank nevertheless reserves the right to instigate proceedings in the courts of the client's place of residence or before any other competent court.*

(Emphasis added.)

A contract will be considered valid even when its obligations are not mutual as long as there is consideration for the contract as a whole. Murry v. Zynyx

[3] Further, the mere fact that there were two possible fora for Appellees to file an action (i.e., "the place where the head office *or* branch of the Bank maintaining the contractual relationship with the client is located") does not alter the mandatory nature of this forum selection clause. See, e.g., Weisser v. PNC Bank, N.A., 967 So. 2d 327, 328 (Fla. 3d DCA 2007) (parties agreed "to the exclusive jurisdiction of United States District Court for the District of Kansas or the District Court of Johnson County, Kansas").

Mktg. Comm. Inc., 774 So. 2d 714, n. 2 (Fla. 3d DCA 2000). This general proposition of law applies in the instant context, and we hold that the non-mutuality of the forum selection clause does not render it invalid or permissive. See, e.g., Silverman v. Carvel Corp., 192 F. Supp. 2d 1 (W.D.N.Y. 2001) (holding nonmutuality of forum selection clause did not render clause invalid even though it restricted venue only in actions brought by plaintiff against defendant but contained no similar restrictions on venue in actions brought by defendant against plaintiff). See also Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp., 838 F.2d 656 (2d Cir. 1988); Medoil Corp. v. Citicorp, 729 F. Supp. 1456, 1459 (S.D.N.Y.1990) (upholding forum selection clause which required account holder to file all legal action "at the location of the Bank's office appearing on this Agreement," while providing that Bank "may bring action against the Account Holder(s) before the courts or any other competent authority at the place of residence of the Account Holder(s) or elsewhere").[4]

[4] Appellees also contend that, because Appellants were non-signatories to the contract, Appellants do not have standing to enforce the venue provision of the Banking Agreement. However, this Court has previously held that the mandatory nature of a forum selection clause "equally applies to the non-signatory defendants due to the fact that the claims arise directly from the agreement, as well as due to the nature of the commercial relationship of the parties as it relates to the agreement itself." Reyes v. Claria Life & Health Ins. Co., 190 So. 3d 154, 159 n.2 (Fla. 3d DCA 2016) (quoting World Vacation Travel, S.A., v. Brooker, 799 So. 2d 410, 412–412 (Fla. 3d DCA 2001)). See also Citigroup Inc. v. Caputo, 957 So. 2d 98, 102 (Fla. 4th DCA 2007) (holding a non-signatory may invoke a signatory's forum selection clause where the non-signatory and signatory are related.) Here, the actions asserted in the complaint arise directly out of the Banking Agreement,

2. Whether the phrase "branch of the Bank" is ambiguous or unambiguous

The trial court concluded alternatively that, even if the forum selection clause is mandatory, the phrase "branch of the Bank maintaining the contractual relationship with the client" was ambiguous. Resolving that ambiguity, the trial court found that Miami-Dade County was a proper forum because the Bank had an "office" in Miami. We hold that the trial court erred in this regard, because there was no ambiguity and, under a plain reading of the clause, the office in Miami was not a "branch of the Bank" as that term was used in the Banking Agreement and therefore could not serve as a proper forum for the action.

That portion of the clause at issue provides:

> "[T]he exclusive jurisdiction for all legal action and the venue for legal proceedings if the client is resident abroad is the place where the head office or branch of the Bank maintaining the contractual relationship with the client is located."

Because Appellees are "resident abroad" (i.e., not living in Brazil), the instant action could be filed only where (1) the head office is located (i.e., Rio de Janeiro, Brazil); or (2) the branch of the Bank maintaining the contractual relationship with the client is located. The term "branch of the Bank" is not defined in the Banking Agreement.

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and the only commercial relationship between the parties is the banking relationship governed and established by the Banking Agreement.

In construing a contract, the legal effect of its provisions should be determined from the words of the entire contract, which is the best evidence of the intent of the parties. Prudential Ins. Co. of Am. v. Wynn, 398 So. 2d 502, 503 n. 1 (Fla. 3d DCA 1981) (citing Jacobs v. Petrino, 351 So. 2d 1036 (Fla. 4th DCA 1976)). "If a contract is clear, complete and unambiguous, there is no need for judicial construction." Hunt v. First Nat. Bank of Tampa, 381 So. 2d 1194, 1197 (Fla. 2d DCA 1980) (citing Hamilton Constr. Co. v. Bd. of Public Instruction, 65 So. 2d 729 (Fla.1953)). See also All-Dixie Ins. Agency, Inc. v. Moffatt, 212 So. 2d 347 (Fla. 3d DCA 1968).

The Miami office was the location where Wardak met with Antoniazzi, a Bank representative, to negotiate and execute the Banking Agreement. However, this is insufficient to establish that the Miami office constituted a "branch of the Bank." It was undisputed that the Bank did not establish or maintain any State-regulated[5] or federally-regulated branch offices[6] within the United States.[7]

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[5] See, e.g., §§ 658.23, 663.04-.05, Fla. Stat. (2016) (setting forth application, licensing and approval requirements before a foreign bank can operate a branch in Florida).

[6] See, e.g., 12 U.S.C. § 3102 (2016) (setting forth application and approval requirements before a foreign bank can establish and operate a Federal branch or agency in any State).

[7] Though not necessary to our decision, we further note that, at the evidentiary hearing, Appellants introduced evidence that Appellees were looking to deposit the $2.7 million into a foreign bank that had no presence in the United States and would not respond to a subpoena from a court in the United States. The Bank apparently met these criteria: An attorney who was advising Wardak during the negotiation of the Banking Agreement testified it was his understanding that the

Nevertheless, Appellees maintain that the phrase "branch of the Bank" is ambiguous and, further, that the Miami office should be construed to be a branch of the Bank because this is where Appellees and the Bank met on two or three occasions to negotiate and sign the Banking Agreement. The trial court concluded that the Miami office constituted a branch of the Bank "because a 'branch office' is nothing more than a location other than the main office."

However, no evidence was presented that the Miami office was a location at which deposits were received, checks paid, or funds withdrawn. Indeed, the affirmative testimony established that the Miami office did not have an ATM machine or a teller. There was no evidence that Appellees ever deposited or withdrew any funds at the Miami office, or that such could be done at the Miami office.

The terms "Branch bank" and "Branch office" are defined in Black's Law Dictionary:

> **Branch bank.** An office of a bank physically separated from its main office, with common services and functions, and corporately part of the bank. Under the National Bank Act, term at very least includes any place for receiving deposits or paying checks or lending money apart from chartered premises. Nebraskans for Independent Banking, Inc. v. Omaha Nat. Bank, C.A. Neb., 530 F.2d 755, 764.

Bank "would not respond to a subpoena for a U.S. court." The attorney also acknowledged sending an email advising Wardak that Estrategia Investimentos, S.A. (i.e., the Bank) "maintains no US presence, so it is perfect." Thereafter, Wardak and NCL deposited the funds with the Bank.

* * *

> "Branch office" of a bank or savings bank includes an office, unit, station, facility, terminal, space or receptacle at a fixed location other than a principal office, however designated, at which any business that may be conducted in a principal office of a bank or savings bank may be transacted. Included in this definition are off-premises electronic bank facilities.
>
> Under Uniform Commercial Code, branch bank includes a separately incorporated foreign branch of bank. § 1-201.

BLACK'S LAW DICTIONARY, 188 (6th ed. 1991).

See also § 658.12(4), Fla. Stat. (2016) (providing: "'Branch' or 'branch office' of a bank means any office or place of business of a bank, other than its main office and the facilities and operations authorized by ss. 658.26(4) and 660.33, at which deposits are received, checks are paid, or money is lent"); 12 U.S.C. § 36(j) (2016) (providing: "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent. The term 'branch', as used in this section, does not include an automated teller machine or a remote service unit."); 12 U.S.C. §3101(3) (2016) (providing: "For the purposes of this chapter . . . 'branch' means any office or any place of business of a foreign bank located in any State of the United States at which deposits are received.") We conclude that the Miami office

does not fall within the ordinary meaning of the term "branch of the Bank." No ambiguity existed, and no further evidence was necessary to define the term or discern the intent of the parties.

CONCLUSION

Because the forum selection clause is mandatory, exclusive and unambiguous, we reverse the trial court's order denying Appellants' motion to dismiss, and remand for further proceedings consistent with this opinion.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

SUBIC BAY MARINE EXPLORATORIUM, INC.,

Appellant,

v. Case No. 5D17-4030

JV CHINA, INC.,

Appellee.

_____/

Opinion filed October 19, 2018

Appeal from the Circuit Court
for Orange County,
Julie H. O'Kane, Judge.

Stephen D. Milbrath, of Byrd Campbell, P.A., Winter Park, for Appellant.

David C. Gibbs III, of Gibbs Law Firm, P.A., Bartonville, Texas, for Appellee.

ORFINGER, J.

Subic Bay Marine Exploratorium, Inc. ("SBMEI") appeals the dismissal of its amended complaint. It argues that the trial court erred in ruling that it lacked personal jurisdiction over JV China, Inc. ("JV China"). SBMEI contends that by being a domestic Florida corporation, JV China is subject to the general jurisdiction of Florida courts. We agree and reverse.

JV China is a Florida corporation. It was incorporated in Florida in 1996, and has remained an active Florida corporation ever since. Though JV China is a Florida corporation, it maintains its principal place of business in California and conducts much of its business overseas.

The present dispute arises out of a stock subscription agreement, under which JV China agreed to purchase one million shares of SBMEI stock. After JV China allegedly failed to pay the balance owed for the shares, SBMEI filed this action. In turn, JV China moved to dismiss SBMEI's amended complaint, contending the trial court lacked personal jurisdiction over it. The trial court agreed and dismissed SBMEI's amended complaint for lack of personal jurisdiction, concluding that SBMEI "failed to establish that JV China was subject to jurisdiction under Florida's long-arm statute."[1]

SBMEI argues that the trial court erred in dismissing its amended complaint because as a domestic Florida corporation, JV China is subject to the jurisdiction of Florida's courts. Personal jurisdiction denotes a court's ability to exercise jurisdiction over a defendant, whether it is an individual or a corporate entity. Borden v. E.-European Ins. Co., 921 So. 2d 587, 591 (Fla. 2006). The primary focus of a court's personal jurisdiction inquiry is the defendant's relationship to the forum state. Bristol-Myers Squibb v. Super. Ct. of Cal., San Francisco Cty., 137 S. Ct. 1773, 1779 (2017). General jurisdiction over a defendant, meaning that a defendant can be required to answer any claim that arose anywhere in the world, requires that the defendant be "essentially at home" in the forum state. See Goodyear Dunlop Tires Operations, S.A. v. Brown, 594 U.S. 915, 919 (2011).

[1] We review a trial court's order granting a motion to dismiss for lack of personal jurisdiction de novo. Singer v. Unibilt Dev. Co., 43 So. 3d 784, 786 (Fla. 5th DCA 2010).

For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home. Id. at 924.

Florida residents are subject to the general jurisdiction of Florida courts. Patten v. Mokher, 184 So. 29, 30 (Fla. 1938). Under Florida law, corporations are residents of their state of incorporation. Fowler v. Chillingworth, 113 So. 667, 669 (Fla. 1927); see, e.g., Gay v. Bessemer Props., 32 So. 2d 587, 591 (Fla. 1947) (holding plaintiff was resident of Delaware, where it was incorporated). Consequently, corporations incorporated under Florida law are Florida residents, subject to the general jurisdiction of Florida's courts. See 18 Am. Jur. 2d Corporations § 67 (2018) (indicating for personal jurisdiction purposes, corporation is citizen of state where it was created).

Here, the trial court did not consider JV China's Florida residency. Instead, it applied section 48.193, Florida Statutes (2016), Florida's long-arm statute, which establishes when Florida courts may exercise jurisdiction over non-Florida residents. See Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 500 (Fla. 1989) (recognizing that long-arm jurisdiction statute sets forth legislature's determination as to "requisite basis for obtaining jurisdiction over *nonresident* defendants as far as Florida is concerned") (emphasis added). Such an analysis is unnecessary when dealing with a domestic corporation.

For these reasons, we conclude the trial court erred in determining that it lacked personal jurisdiction over JV China, as it is a Florida corporation. Thus, we reverse the trial court's dismissal of SBMEI's amended complaint.[2]

REVERSED and REMANDED.

TORPY and LAMBERT, JJ., concur.

[2] JV China also argues that the individual who filed the complaint on behalf of SBMEI lacked authority to act for the corporation. The trial court did not rule on this issue. Therefore, we do not consider this argument on appeal. However, we note that generally, lack of authority must be asserted as an affirmative defense unless apparent on the face of the complaint. See Patriotcom, Inc. v. Vega, 821 So. 2d 1261, 1261 (Fla. 4th DCA 2002).

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

DAVID W. FOLEY, JR. AND JENNIFER T. FOLEY,

Appellants,

v.

Case No. 5D18-145

ASIMA AZAM, TIM BOLDIG, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, MITCH GORDON, TARA GOULD, CAROL HOSSFIELD, TERESA JACOBS, RODERICK LOVE, ROCCO RELVINI, SCOTT RICHMAN, ET AL.,

Appellees.

_____/

Opinion filed October 19, 2018

Appeal from the Circuit Court
for Orange County,
Heather L. Higbee, Judge.

David W. Foley, Jr. and Jennifer T. Foley, Orlando, pro se.

Lamar D. Oxford and Eric J. Netcher, of Dean, Ringers, Morgan & Lawton, P.A., Orlando, for Appellees, Tim Boldig, Carol Hossfield, Rocco Relvini, Phil Smith, Tara Gould and Mitch Gordon.

Derek J. Angell, B.C.S., of O'Connor & O'Connor, LLC, Orlando, for Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa

Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal and Linda Stewart.

No Appearance for Orange County, a political subdivision of the State of Florida.

ORFINGER, J.

David W. Foley, Jr. and Jennifer T. Foley appeal the trial court's dismissal of their amended complaint. The Foleys argue that, contrary to the court's order, the statute of limitations did not bar their action because 28 U.S.C. § 1367(d) (2016) tolled the limitations period. We agree and reverse.

The Foleys were commercial toucan farmers who attempted to run their business out of their home in Orange County. After a neighbor complained, Orange County Code Enforcement investigated and determined that the Foleys were violating the Orange County Code. Following a public hearing, the Board of Zoning Adjustment ("BZA") found that the Foleys were in violation of the Code and the Board of County Commissioners ("BCC") affirmed that decision.

After exhausting their administrative remedies, the Foleys filed a complaint in the U.S. District Court for the Middle District of Florida against Orange County (the "County"), various county employees (the "Employee Defendants"), and the members of the BZA and BCC in both their individual and official capacities (the "Official Defendants"), raising federal and state claims. Foley v. Orange Cty., Fla., No. 6:12–cv–269–Orl–37KRS (M.D. Fla. Dec. 4, 2012). The district court determined that the County was entitled to summary judgment on all of the Foleys' federal claims. However, it ruled that the Foleys were entitled to summary judgment on their state law claims because the relevant Code provisions were void. Id.

The Foleys and the County cross-appealed to the U.S. Court of Appeals for the Eleventh Circuit. Foley v. Orange Cty., 638 F. App'x 941 (11th Cir. 2016). The Eleventh Circuit affirmed in part and reversed in part, holding that the Foleys' federal claims were frivolous and that the district court lacked subject matter jurisdiction to adjudicate the state law claims, explaining that

> [a]ll of the Foley's federal claims either "'ha[ve] no plausible foundation, or . . . [are clearly foreclosed by] a prior Supreme Court decision.'" Blue Cross & Blue Shield of Ala. [v. Sanders], 138 F.3d [1347,] 1352 [(11th Cir. 1998)] (quoting Barnett [v. Bailey], 956 F.2d [1036,] 1041 [(11th Cir. 1992)]). The District Court therefore lacked federal-question jurisdiction. Bell [v. Hood], 327 U.S. [678,] 682–83, 66 S. Ct. [773,] 776 [(1946)]. Without federal-question jurisdiction, the District Court did not have jurisdiction to determine the state-law claims presented by the Foleys. See 28 U.S.C. § 1331; 28 U.S.C. § 1332(a)(1).

Id. at 945-46.

On remand, the district court dismissed the case. Within thirty days of the dismissal, the Foleys initiated a state court action against the County and the Official and Employee Defendants. They subsequently amended their complaint, alleging that their action was timely because "28 USC § 1367(d), tolls for thirty days after such dismissal all limitations on supplemental claims related to those asserted to be within the original jurisdiction of the federal district court." The Official and Employee Defendants filed motions to dismiss, alleging, in part, that Florida's statute of limitations barred the action.[1]

In their motions to dismiss, the Official and Employee Defendants argued that the Foleys' cause of action accrued on February 18, 2008, that all of the claims were governed by the four-year statute of limitations in section 95.11(3), Florida Statutes

[1] The trial court has not yet considered the County's motion to dismiss. As such, the County is not a party to this appeal.

(2016), and that the Foleys did not file their complaint in state court until eight years after the action accrued. They admitted that the Foleys filed their federal lawsuit within the limitations period, but asserted that section 1367(d) did not toll the limitations period while the federal action was pending because the Eleventh Circuit concluded that the federal district court lacked original jurisdiction.

Following a hearing, the trial court entered an order granting both the Official Defendants' and the Employee Defendants' motions to dismiss, dismissed the amended complaint with prejudice as to the Official Defendants and entered a final judgment in favor of the Employee Defendants. The court determined that the applicable statute of limitations barred all of the Foleys' claims and rejected the Foleys' argument that section 1367(d) tolled the limitations period because that section

> only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. See Ovadia v. Bloom, 756 So. 2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

As we will explain, we disagree.

A legal issue concerning a statute of limitations is subject to de novo review. Desai v. Bank of N.Y. Mellon Tr. Co., 240 So. 3d 729, 730 (Fla. 4th DCA 2018). 28 U.S.C. § 1367 provides federal district courts with supplemental subject matter jurisdiction and reads, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within

> such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> . . . .
>
> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Thus, section 1367 provides that when a federal district court has original jurisdiction—either based on diversity, 28 U.S.C. § 1332 (2016), or federal question jurisdiction, 28 U.S.C. § 1331 (2016)—it may exercise supplemental jurisdiction over "all other claims," including state law claims, "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367 (2016). Here, the federal court's supplemental jurisdiction over the state claims was based on its federal question jurisdiction over the Foleys' federal claims.[2]

With this background in mind, we now review the development of Florida law regarding the application of section 1367(d), culminating in the Florida Supreme Court's decision in Krause v. Textron Financial Corp., 59 So. 3d 1085 (Fla. 2011). In 2000, the Third District Court of Appeal addressed the application of section 1367(d) in Ovadia v. Bloom, 756 So. 2d 137 (Fla. 3d DCA 2000), the case relied on by the Official and Employee Defendants and the trial court. There, the plaintiff filed an action in federal

[2] Federal question jurisdiction exists when the action arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331 (2016).

court based on diversity jurisdiction. Id. at 138. The federal court dismissed the case because the parties did not have diversity of citizenship. Id. at 139. Within thirty days following the dismissal, but after the limitations period had expired, the plaintiff filed an action in state court. Id. The trial court dismissed the case as barred by the statute of limitations, and the Third District Court affirmed, holding that the tolling provision of section 1367(d) was not applicable "because the federal court never had original jurisdiction over [the plaintiff]'s action. Any arguable jurisdiction was based on diversity, and the presence of non-diverse defendants in the action destroyed jurisdiction on that basis." Id.

That same year, the First District Court of Appeal addressed a similar issue in Blinn v. Florida Department of Transportation, 781 So. 2d 1103 (Fla. 1st DCA 2000). There, the plaintiff filed her action in federal court, asserting federal question and supplemental jurisdiction. Blinn, 781 So. 2d at 1104. She later voluntarily dismissed her federal case and nine days later filed her state claims in state court. Id. The trial court dismissed the case for exceeding the statute of limitations, but the First District Court reversed, concluding that "the tolling provision of section 1367 ought not be interpreted as applicable only to dismissals predicated on a federal court's decision to decline supplemental jurisdiction," and consequently, held that the limitations period was tolled for thirty days following the dismissal of the federal case. Id.; see Stevens v. ARCO Mgmt. of Wash., D.C., Inc., 751 A.2d 995, 998 (D.C. 2000) (holding that section 1367(d) tolled statute of limitations where federal case dismissed for lack of subject matter jurisdiction, and noting that it "does not require a successful assertion of federal jurisdiction" and does

not "differentiate among the possible reasons for dismissal, whether it be on the merits, or for jurisdictional reasons").

In 2002, the Fourth District Court of Appeal reached the same conclusion as Blinn in Scarfo v. Ginsberg, 817 So. 2d 919 (Fla. 4th DCA 2002). There, the plaintiff filed an action in state court less than a month after a federal court dismissed her case for lack of subject matter jurisdiction. Scarfo, 817 So. 2d at 920. The trial court dismissed the case for exceeding the limitations period. The Fourth District Court reversed, holding that section 1367(d) applied and explaining that the purpose of the tolling provision was to allow plaintiffs to pursue their federal claims in federal court without risking their state claims "should the federal claim prove unsuccessful." Id. at 921. The Fourth District reasoned:

> Section 1367(d) provides for a tolling of state law limitations on any state law claim asserted in federal court under section 1367(a). The only requirements are that the claim be asserted under section 1367(a). Plaintiff's dismissed claims arose under state law and they were asserted in federal court under section 1367(a). The mere fact that the federal court of appeals saw the question of the employers' liability under Title VII as an issue of subject matter jurisdiction does not change the text of section 1367.

Id.

Then, in 2011, the Florida Supreme Court addressed the issue in Krause. 59 So. 3d at 1088-91. The plaintiff in Krause filed his claims in state court less than one month after a federal court dismissed his case for lack of subject matter jurisdiction. Id. at 1087. The state court also dismissed the case for filing beyond the limitations period and the Second District Court of Appeal affirmed. Id. at 1088. In reversing, the Florida Supreme Court held that "[t]he plain text of the federal statute [section 1367(d)] does not, by its

terms, bar the application of the tolling provision where a claim is dismissed for lack of federal subject matter jurisdiction." Id. at 1090. It agreed with the analysis in Blinn and Scarfo, noting that the tolling provision "serves to prevent the limitations period from expiring while a plaintiff unsuccessfully pursues state claims in federal court in conjunction with federal claims." Id. at 1091. It determined that "[a]s we have explained above, the plain language of section 1367 leads us to conclude that the dismissal of a claim in federal court . . . for lack of subject matter jurisdiction, does not bar the applicability of the federal tolling provision in the subsequent state court action." Id.

The Official and Employee Defendants attempt to distinguish Krause, contending that it was "bottomed on the premise that the federal claims were at least plausible" and here, the Foleys' federal claims were frivolous. However, Krause makes no such distinction. It did not matter in Krause why the federal court found a lack of jurisdiction. See Krause, 59 So. 3d at 1091 (holding that applicability of tolling provision is not limited to instances where court declines to exercise supplemental jurisdiction solely for reasons under section 1367); see also Scarfo, 817 So. 2d at 921 (holding that "[t]he only requirements [under section 1367(d)] are that the claim be asserted under section 1367(a)" and later dismissed for lack of subject matter jurisdiction).

For these reasons, we conclude that section 1367(d) applies, as its text does not require a successful assertion of federal jurisdiction. Because the Foleys brought their state court claims within thirty days of the dismissal of their federal case, the trial court erred in finding that the statute of limitations barred their action.[3]

[3] The Official and Employee Defendants argue that if this Court finds that the amended complaint is not barred by the statute of limitations, we should affirm on tipsy coachman grounds because they are entitled to immunity from suit. Inasmuch as the trial

REVERSED and REMANDED.

TORPY, J., concurs.
BERGER, J., dissents with opinion.

court did not consider that issue, we decline to do so as well. We "cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so." Bueno v. Workman, 20 So. 3d 993, 998 (Fla. 4th DCA 2009).

While I agree with the majority that the Foleys' complaint was not barred by the statute of limitations, I would nevertheless affirm the order of dismissal under the tipsy coachman doctrine[4] because the record reflects that both the Official and Employee Defendants are entitled to immunity from suit. See Willingham v. City of Orlando, 929 So. 2d 43, 50 (Fla. 5th DCA 2006) ("Judgmental or discretionary government functions are immune from legal action . . . ."); Grady v. Scaffe, 435 So. 2d 954, 955 (Fla. 2d DCA 1983) (finding public officials immune for actions taken in connection with public office).

[4] Under the tipsy coachman doctrine, "where the trial court 'reaches the right result, but for the wrong reasons,' an appellate court can affirm the decision only if 'there is any theory or principle of law in the record which would support the ruling.'" Butler v. Yusem, 44 So. 3d 102, 105 (Fla. 2010) (emphasis is omitted) (quoting Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002)).