Rejection of an executory contract under Section 365 of the Bankruptcy Code has the same effect as if the contract has been breached outside of the bankruptcy context, and does not rescind rights under the contract.

In Re: Amendments to The Florida Evidence Code, Case No. SC19-107 (Fla. 2019).
Chapter 2013-107, sections 1 and 2, Laws of Florida (the Daubert amendments), which amended Florida Statutes sections 90.702 (testimony by experts) and 90.704 (basis of opinion testimony by experts), is adopted by rule.

There is no “prevailing party” for purposes of attorney’s fees awards when both parties compromise and plaintiff dismisses the lawsuit.

Matlacha Civic Association, Inc. v. City of Cape Coral, Case No. 2D18-419 (Fla. 2d DCA 2019).
A party opposing annexation under Florida Statute Section 171.081(1) need only show under the statute that it is a “party affected” and need not demonstrate material injury.

A trial court may not sanction a party for delaying arbitration proceedings by failing to pay an arbitration fee.

Falsetto v. Liss, Case No. 3D18-794 (Fla. 3d DCA 2019).
A general release that covers “known and unknown” claims does not release unaccrued fraud claims.

Venezia v. JP Morgan Mortgage Acquisition Corp., Case No. 4D18-1278 (Fla. 4th DCA 2019).
A plaintiff that voluntarily dismisses the lawsuit it filed is a non-prevailing party for attorney’s fees purposes.

Levine v. Stimmel, Case No. 5D17-2572 (Fla. 5th DCA 2019).
Attorney’s fees cannot be awarded for un成功fully litigating entitlement to Florida Statute section 57.105 fees.
SUPREME COURT OF THE UNITED STATES

MISSION PRODUCT HOLDINGS, INC. v. TEMPNOLGY, LLC, NKA OLD COLD LLC

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 17–1657. Argued February 20, 2019—Decided May 20, 2019

Petitioner Mission Product Holdings, Inc., entered into a contract with Respondent Tempnology, LLC, which gave Mission a license to use Tempnology’s trademarks in connection with the distribution of certain clothing and accessories. Tempnology filed for Chapter 11 bankruptcy and sought to reject its agreement with Mission. Section 365 of the Bankruptcy Code enables a debtor to “reject any executory contract”—meaning a contract that neither party has finished performing. 11 U. S. C. §365(a). It further provides that rejection “constitutes a breach of such contract.” §365(g). The Bankruptcy Court approved Tempnology’s rejection and further held that the rejection terminated Mission’s rights to use Tempnology’s trademarks. The Bankruptcy Appellate Panel reversed, relying on Section 365(g)’s statement that rejection “constitutes a breach” to hold that rejection does not terminate rights that would survive a breach of contract outside bankruptcy. The First Circuit rejected the Panel’s judgment and reinstated the Bankruptcy Court’s decision.

Held:

1. This case is not moot. Mission presents a plausible claim for money damages arising from its inability to use Tempnology’s trademarks, which is sufficient to preserve a live controversy. See Chafin v. Chafin, 568 U. S. 165, 172. Tempnology’s various arguments that Mission is not entitled to damages do not so clearly preclude recovery as to render this case moot. Pp. 6–7.

2. A debtor’s rejection of an executory contract under Section 365 of the Bankruptcy Code has the same effect as a breach of that contract outside bankruptcy. Such an act cannot rescind rights that the contract previously granted. Pp. 7–16.
(a) Section 365(g) provides that rejection “constitutes a breach.” And “breach” is neither a defined nor a specialized bankruptcy term—it means in the Code what it means in contract law outside bankruptcy. See Field v. Mans, 516 U. S. 59, 69. Outside bankruptcy, a licensor’s breach cannot revoke continuing rights given to a counterparty under a contract (assuming no special contract term or state law). And because rejection “constitutes a breach,” the same result must follow from rejection in bankruptcy. In preserving a counterparty’s rights, Section 365 reflects the general bankruptcy rule that the estate cannot possess anything more than the debtor did outside bankruptcy. See Board of Trade of Chicago v. Johnson, 264 U. S. 1, 15. And conversely, allowing rejection to rescind a counterparty’s rights would circumvent the Code’s stringent limits on “avoidance” actions—the exceptional cases in which debtors may unwind pre-bankruptcy transfers that undermine the bankruptcy process. See, e.g., §548(a). Pp. 8–12.

(b) Tempnology’s principal counterargument rests on a negative inference drawn from provisions of Section 365 identifying categories of contracts under which a counterparty may retain specified rights after rejection. See §§365(h), (i), (n). Tempnology argues that these provisions indicate that the ordinary consequence of rejection must be something different—i.e., the termination of contractual rights previously granted. But that argument offers no account of how to read Section 365(g) (rejection “constitutes a breach”) to say essentially its opposite. And the provisions Tempnology treats as a reticulated scheme of exceptions each emerged at a different time and responded to a discrete problem—as often as not, correcting a judicial ruling of just the kind Tempnology urges.

Tempnology’s remaining argument turns on how the special features of trademark law may affect the fulfillment of the Code’s goals. Unless rejection terminates a licensee’s right to use a trademark, Tempnology argues, a debtor must choose between monitoring the goods sold under a license or risking the loss of its trademark, either of which would impede a debtor’s ability to reorganize. But the distinctive features of trademarks do not persuade this Court to adopt a construction of Section 365 that will govern much more than trademark licenses. And Tempnology’s plea to facilitate reorganizations cannot overcome what Section 365(a) and (g) direct. In delineating the burdens a debtor may and may not escape, Section 365’s edict that rejection is breach expresses a more complex set of aims than Tempnology acknowledges. Pp. 12–16.

879 F. 3d 389, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J.,
Syllabus

Section 365 of the Bankruptcy Code enables a debtor to “reject any executory contract”—meaning a contract that neither party has finished performing. 11 U. S. C. §365(a). The section further provides that a debtor’s rejection of a contract under that authority “constitutes a breach of such contract.” §365(g).

Today we consider the meaning of those provisions in the context of a trademark licensing agreement. The question is whether the debtor-licensor’s rejection of that contract deprives the licensee of its rights to use the trademark. We hold it does not. A rejection breaches a contract but does not rescind it. And that means all the rights that would ordinarily survive a contract breach, including those conveyed here, remain in place.

I

This case arises from a licensing agreement gone wrong. Respondent Tempnology, LLC, manufactured clothing and accessories designed to stay cool when used in exercise. It marketed those products under the brand name “Coolcore,” using trademarks (e.g., logos and labels) to
distinguish the gear from other athletic apparel. In 2012, Tempnology entered into a contract with petitioner Mission Product Holdings, Inc. See App. 203–255. The agreement gave Mission an exclusive license to distribute certain Coolcore products in the United States. And more important here, it granted Mission a non-exclusive license to use the Coolcore trademarks, both in the United States and around the world. The agreement was set to expire in July 2016. But in September 2015, Tempnology filed a petition for Chapter 11 bankruptcy. And it soon afterward asked the Bankruptcy Court to allow it to “reject” the licensing agreement. §365(a).

Chapter 11 of the Bankruptcy Code sets out a framework for reorganizing a bankrupt business. See §§1101–1174. The filing of a petition creates a bankruptcy estate consisting of all the debtor’s assets and rights. See §541. The estate is the pot out of which creditors’ claims are paid. It is administered by either a trustee or, as in this case, the debtor itself. See §§1101, 1107.

Section 365(a) of the Code provides that a “trustee [or debtor], subject to the court’s approval, may assume or reject any executory contract.” §365(a). A contract is executory if “performance remains due to some extent on both sides.” NLRB v. Bildisco & Bildisco, 465 U. S. 513, 522, n. 6 (1984) (internal quotation marks omitted). Such an agreement represents both an asset (the debtor’s right to the counterparty’s future performance) and a liability (the debtor’s own obligations to perform). Section 365(a) enables the debtor (or its trustee), upon entering bankruptcy, to decide whether the contract is a good deal for the estate going forward. If so, the debtor will want to assume the contract, fulfilling its obligations while benefiting from the counterparty’s performance. But if not, the debtor will want to reject the contract, repudiating any further performance of its duties. The bankruptcy court will generally approve that choice, under the deferential
“business judgment” rule. *Id.*, at 523.

According to Section 365(g), “the rejection of an executory contract[,] constitutes a breach of such contract.” As both parties here agree, the counterparty thus has a claim against the estate for damages resulting from the debtor’s nonperformance. See Brief for Petitioner 17, 19; Brief for Respondent 30–31. But such a claim is unlikely to ever be paid in full. That is because the debtor’s breach is deemed to occur “immediately before the date of the filing of the [bankruptcy] petition,” rather than on the actual post-petition rejection date. §365(g)(1). By thus giving the counterparty a pre-petition claim, Section 365(g) places that party in the same boat as the debtor’s unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar. See *Bildisco*, 465 U. S., at 531–532 (noting the higher priority of post-petition claims).

In this case, the Bankruptcy Court (per usual) approved Tempnology’s proposed rejection of its executory licensing agreement with Mission. See App. to Pet. for Cert. 83–84. That meant, as laid out above, two things on which the parties agree. First, Tempnology could stop performing under the contract. And second, Mission could assert (for whatever it might be worth) a pre-petition claim in the bankruptcy proceeding for damages resulting from Tempnology’s nonperformance.

But Tempnology thought still another consequence ensued, and it returned to the Bankruptcy Court for a declaratory judgment confirming its view. According to Tempnology, its rejection of the contract also terminated the rights it had granted Mission to use the Coolcore trademarks. Tempnology based its argument on a negative inference. See Motion in No. 15–11400 (Bkrtcy. Ct. NH), pp. 9–14. Several provisions in Section 365 state that a counterparty to specific kinds of agreements may keep exercising contractual rights after a debtor’s rejection. For example, Section 365(h) provides that if a bank-
rupt landlord rejects a lease, the tenant need not move out; instead, she may stay and pay rent (just as she did before) until the lease term expires. And still closer to home, Section 365(n) sets out a similar rule for some types of intellectual property licenses: If the debtor-licensor rejects the agreement, the licensee can continue to use the property (typically, a patent), so long as it makes whatever payments the contract demands. But Tempnology pointed out that neither Section 365(n) nor any similar provision covers trademark licenses. So, it reasoned, in that sort of contract a different rule must apply: The debtor’s rejection must extinguish the rights that the agreement had conferred on the trademark licensee. The Bankruptcy Court agreed. See *In re Tempnology, LLC*, 541 B. R. 1 (Bkrtcy. Ct. NH 2015). It held, relying on the same “negative inference,” that Tempnology’s rejection of the licensing agreement revoked Mission’s right to use the Coolcore marks. *Id.*, at 7.

The Bankruptcy Appellate Panel reversed, relying heavily on a decision of the Court of Appeals for the Seventh Circuit about the effects of rejection on trademark licensing agreements. See *In re Tempnology, LLC*, 559 B. R. 809, 820–823 (Bkrtcy. App. Panel CA1 2016); *Sunbeam Products, Inc. v. Chicago Am. Mfg., LLC*, 686 F. 3d 372, 376–377 (CA7 2012). Rather than reason backward from Section 365(n) or similar provisions, the Panel focused on Section 365(g)’s statement that rejection of a contract “constitutes a breach.” Outside bankruptcy, the court explained, the breach of an agreement does not eliminate rights the contract had already conferred on the non-breaching party. See 559 B. R., at 820. So neither could a rejection of an agreement in bankruptcy have that effect. A rejection “convert[s]” a “debtor’s unfulfilled obligations” to a pre-petition damages claim. *Id.*, at 822 (quoting *Sunbeam*, 686 F. 3d, at 377). But it does not “terminate the contract” or “vaporize[ ]” the counterparty’s
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rights. 559 B. R., at 820, 822 (quoting Sunbeam, 686 F. 3d, at 377). Mission could thus continue to use the Coolcore trademarks.

But the Court of Appeals for the First Circuit rejected the Panel’s and Seventh Circuit’s view, and reinstated the Bankruptcy Court decision terminating Mission’s license. See In re Tempnology, LLC, 879 F. 3d 389 (2018). The majority first endorsed that court’s inference from Section 365(n) and similar provisions. It next reasoned that special features of trademark law counsel against allowing a licensee to retain rights to a mark after the licensing agreement’s rejection. Under that body of law, the majority stated, the trademark owner’s “[f]ailure to monitor and exercise [quality] control” over goods associated with a trademark “jeopardiz[es] the continued validity of [its] own trademark rights.” Id., at 402. So if (the majority continued) a licensee can keep using a mark after an agreement’s rejection, the licensor will need to carry on its monitoring activities. And according to the majority, that would frustrate “Congress’s principal aim in providing for rejection”: to “release the debtor’s estate from burdensome obligations.” Ibid. (internal quotation marks omitted).

Judge Torruella dissented, mainly for the Seventh Circuit’s reasons. See id., at 405–407.

We granted certiorari to resolve the division between the First and Seventh Circuits. 586 U. S. ___ (2018). We now affirm the Seventh’s reasoning and reverse the decision below.1

1In its briefing before this Court, Mission contends that its exclusive distribution rights survived the licensing agreement’s rejection for the same reason as its trademark rights did. See Brief for Petitioner 40–44; supra, at 2. But the First Circuit held that Mission had waived that argument, see 879 F. 3d, at 401, and we have no reason to doubt that conclusion. Our decision thus affects only Mission’s trademark rights.
Before reaching the merits, we pause to consider Tempnology’s claim that this case is moot. Under settled law, we may dismiss the case for that reason only if “it is impossible for a court to grant any effectual relief whatever” to Mission assuming it prevails. *Chafin v. Chafin*, 568 U. S. 165, 172 (2013) (internal quotation marks omitted). That demanding standard is not met here.

Mission has presented a claim for money damages—essentially lost profits—arising from its inability to use the Coolcore trademarks between the time Tempnology rejected the licensing agreement and its scheduled expiration date. See Reply Brief 22, and n. 8. Such claims, if at all plausible, ensure a live controversy. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U. S. 1, 8–9 (1978). For better or worse, nothing so shows a continuing stake in a dispute’s outcome as a demand for dollars and cents. See 13C C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3533.3, p. 2 (3d ed. 2008) (Wright & Miller) (“[A] case is not moot so long as a claim for monetary relief survives”). Ultimate recovery on that demand may be uncertain or even unlikely for any number of reasons, in this case as in others. But that is of no moment. If there is any chance of money changing hands, Mission’s suit remains live. See *Chafin*, 568 U. S., at 172.

Tempnology makes a flurry of arguments about why Mission is not entitled to damages, but none so clearly precludes recovery as to make this case moot. First, Tempnology contends that Mission suffered no injury because it “never used the trademark[s] during [the post-rejection] period.” Brief for Respondent 24; see Tr. of Oral Arg. 33. But that gets things backward. Mission’s non-use of the marks during that time is precisely what gives rise to its damages claim; had it employed the marks, it would not have lost any profits. So next, Tempnology argues that Mission’s non-use was its own “choice,” for
which damages cannot lie. See id., at 26. But recall that the Bankruptcy Court held that Mission could not use the marks after rejection (and its decision remained in effect through the agreement’s expiration). See supra, at 4. And although (as Tempnology counters) the court issued “no injunction,” Brief for Respondent 26, that difference does not matter: Mission need not have flouted a crystal-clear ruling and courted yet more legal trouble to preserve its claim. Cf. 13B Wright & Miller §3533.2.2, at 852 (“[C]ompliance [with a judicial decision] does not moot [a case] if it remains possible to undo the effects of compliance,” as through compensation). So last, Tempnology claims that it bears no blame (and thus should not have to pay) for Mission’s injury because all it did was “ask[ ] the court to make a ruling.” Tr. of Oral Arg. 34–35. But whether Tempnology did anything to Mission amounting to a legal wrong is a prototypical merits question, which no court has addressed and which has no obvious answer. That means it is no reason to find this case moot.

And so too for Tempnology’s further argument that Mission will be unable to convert any judgment in its favor to hard cash. Here, Tempnology notes that the bankruptcy estate has recently distributed all of its assets, leaving nothing to satisfy Mission’s judgment. See Brief for Respondent 27. But courts often adjudicate disputes whose “practical impact” is unsure at best, as when “a defendant is insolvent.” Chafin, 568 U. S., at 175. And Mission notes that if it prevails, it can seek the unwinding of prior distributions to get its fair share of the estate. See Reply Brief 23. So although this suit “may not make [Mission] rich,” or even better off, it remains a live controversy—allowing us to proceed. Chafin, 568 U. S., at 176.

III

What is the effect of a debtor’s (or trustee’s) rejection of a contract under Section 365 of the Bankruptcy Code?
The parties and courts of appeals have offered us two starkly different answers. According to one view, a rejection has the same consequence as a contract breach outside bankruptcy: It gives the counterparty a claim for damages, while leaving intact the rights the counterparty has received under the contract. According to the other view, a rejection (except in a few spheres) has more the effect of a contract rescission in the non-bankruptcy world: Though also allowing a damages claim, the rejection terminates the whole agreement along with all rights it conferred. Today, we hold that both Section 365’s text and fundamental principles of bankruptcy law command the first, rejection-as-breach approach. We reject the competing claim that by specifically enabling the counterparties in some contracts to retain rights after rejection, Congress showed that it wanted the counterparties in all other contracts to lose their rights. And we reject an argument for the rescission approach turning on the distinctive features of trademark licenses. Rejection of a contract—any contract—in bankruptcy operates not as a rescission but as a breach.

A

We start with the text of the Code’s principal provisions on rejection—and find that it does much of the work. As noted earlier, Section 365(a) gives a debtor the option, subject to court approval, to “assume or reject any executory contract.” See supra, at 2. And Section 365(g) describes what rejection means. Rejection “constitutes a breach of [an executory] contract,” deemed to occur “immediately before the date of the filing of the petition.” See supra, at 3. Or said more pithily for current purposes, a rejection is a breach. And “breach” is neither a defined nor a specialized bankruptcy term. It means in the Code what it means in contract law outside bankruptcy. See Field v. Mans, 516 U. S. 59, 69 (1995) (Congress generally
meant for the Bankruptcy Code to “incorporate the established meaning” of “terms that have accumulated settled meaning” (internal quotation marks omitted)). So the first place to go in divining the effects of rejection is to non-bankruptcy contract law, which can tell us the effects of breach.

Consider a made-up executory contract to see how the law of breach works outside bankruptcy. A dealer leases a photocopier to a law firm, while agreeing to service it every month; in exchange, the firm commits to pay a monthly fee. During the lease term, the dealer decides to stop servicing the machine, thus breaching the agreement in a material way. The law firm now has a choice (assuming no special contract term or state law). The firm can keep up its side of the bargain, continuing to pay for use of the copier, while suing the dealer for damages from the service breach. Or the firm can call the whole deal off, halting its own payments and returning the copier, while suing for any damages incurred. See 13 R. Lord, Williston on Contracts §39:32, pp. 701–702 (4th ed. 2013) (“[W]hen a contract is breached in the course of performance, the injured party may elect to continue the contract or refuse to perform further”). But to repeat: The choice to terminate the agreement and send back the copier is for the law firm. By contrast, the dealer has no ability, based on its own breach, to terminate the agreement. Or otherwise said, the dealer cannot get back the copier just by refusing to show up for a service appointment. The contract gave the law firm continuing rights in the copier, which the dealer cannot unilaterally revoke.

And now to return to bankruptcy: If the rejection of the photocopier contract “constitutes a breach,” as the Code says, then the same results should follow (save for one twist as to timing). Assume here that the dealer files a Chapter 11 petition and decides to reject its agreement with the law firm. That means, as above, that the dealer
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will stop servicing the copier. It means, too, that the law firm has an option about how to respond—continue the contract or walk away, while suing for whatever damages go with its choice. (Here is where the twist comes in: Because the rejection is deemed to occur “immediately before” bankruptcy, the firm’s damages suit is treated as a pre-petition claim on the estate, which will likely receive only cents on the dollar. See supra, at 3.) And most important, it means that assuming the law firm wants to keep using the copier, the dealer cannot take it back. A rejection does not terminate the contract. When it occurs, the debtor and counterparty do not go back to their pre-contract positions. Instead, the counterparty retains the rights it has received under the agreement. As after a breach, so too after a rejection, those rights survive.

All of this, it will hardly surprise you to learn, is not just about photocopier leases. Sections 365(a) and (g) speak broadly, to “any executory contract[s].” Many licensing agreements involving trademarks or other property are of that kind (including, all agree, the Tempnology-Mission contract). The licensor not only grants a license, but provides associated goods or services during its term; the licensee pays continuing royalties or fees. If the licensor breaches the agreement outside bankruptcy (again, barring any special contract term or state law), everything said above goes. In particular, the breach does not revoke the license or stop the licensee from doing what it allows. See, e.g., Sunbeam, 686 F. 3d, at 376 (“Outside of bankruptcy, a licensor’s breach does not terminate a licensee’s right to use [the licensed] intellectual property”). And because rejection “constitutes a breach,” §365(g), the same consequences follow in bankruptcy. The debtor can stop performing its remaining obligations under the agreement. But the debtor cannot rescind the license already conveyed. So the licensee can continue to do whatever the license authorizes.
In preserving those rights, Section 365 reflects a general bankruptcy rule: The estate cannot possess anything more than the debtor itself did outside bankruptcy. See Board of Trade of Chicago v. Johnson, 264 U. S. 1, 15 (1924) (establishing that principle); §541(a)(1) (defining the estate to include the “interests of the debtor in property” (emphasis added)). As one bankruptcy scholar has put the point: Whatever “limitation[s] on the debtor’s property [apply] outside of bankruptcy[] appl[y] inside of bankruptcy as well. A debtor’s property does not shrink by happenstance of bankruptcy, but it does not expand, either.” D. Baird, Elements of Bankruptcy 97 (6th ed. 2014). So if the not-yet debtor was subject to a counterparty’s contractual right (say, to retain a copier or use a trademark), so too is the trustee or debtor once the bankruptcy petition has been filed. The rejection-as-breach rule (but not the rejection-as-rescission rule) ensures that result. By insisting that the same counterparty rights survive rejection as survive breach, the rule prevents a debtor in bankruptcy from recapturing interests it had given up.

And conversely, the rejection-as-rescission approach would circumvent the Code’s stringent limits on “avoidance” actions—the exceptional cases in which trustees (or debtors) may indeed unwind pre-bankruptcy transfers that undermine the bankruptcy process. The most notable example is for fraudulent conveyances—usually, something-for-nothing transfers that deplete the estate (and so cheat creditors) on the eve of bankruptcy. See §548(a). A trustee’s avoidance powers are laid out in a discrete set of sections in the Code, see §§544–553, far away from Section 365. And they can be invoked in only narrow circumstances—unlike the power of rejection, which may be exercised for any plausible economic reason. See, e.g., §548(a) (describing the requirements for avoiding fraudulent transfers); supra, at 2–3. If trustees (or debtors) could use rejection to rescind previously granted interests, then
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rejection would become functionally equivalent to avoidance. Both, that is, would roll back a prior transfer. And that result would subvert everything the Code does to keep avoidances cabined—so they do not threaten the rule that the estate can take only what the debtor possessed before filing. Again, then, core tenets of bankruptcy law push in the same direction as Section 365’s text: Rejection is breach, and has only its consequences.

B

Tempnology’s main argument to the contrary, here as in the courts below, rests on a negative inference. See Brief for Respondent 33–41; supra, at 3–4. Several provisions of Section 365, Tempnology notes, “identif[y] categories of contracts under which a counterparty” may retain specified contract rights “notwithstanding rejection.” Brief for Respondent 34. Sections 365(h) and (i) make clear that certain purchasers and lessees of real property and timeshare interests can continue to exercise rights after a debtor has rejected the lease or sales contract. See §365(h)(1) (real-property leases); §365(i) (real-property sales contracts); §§365(h)(2), (i) (timeshare interests). And Section 365(n) similarly provides that licensees of some intellectual property—but not trademarks—retain contractual rights after rejection. See §365(n); §101(35A); supra, at 4. Tempnology argues from those provisions that the ordinary consequence of rejection must be something different—i.e., the termination, rather than survival, of contractual rights previously granted. Otherwise, Tempnology concludes, the statute’s “general rule” would “swallow the exceptions.” Brief for Respondent 19.

But that argument pays too little heed to the main provisions governing rejection and too much to subsidiary ones. On the one hand, it offers no account of how to read Section 365(g) (recall, rejection “constitutes a breach”) to say essentially its opposite (i.e., that rejection and breach
have divergent consequences). On the other hand, it treats as a neat, reticulated scheme of “narrowly tailored exception[s],” id., at 36 (emphasis deleted), what history reveals to be anything but. Each of the provisions Tempnology highlights emerged at a different time, over a span of half a century. See, e.g., 52 Stat. 881 (1938) (real-property leases); §1(b), 102 Stat. 2538 (1988) (intellectual property). And each responded to a discrete problem—as often as not, correcting a judicial ruling of just the kind Tempnology urges. See Andrew, Executory Contracts in Bankruptcy, 59 U. Colo. L. Rev. 845, 911–912, 916–919 (1988) (identifying judicial decisions that the provisions overturned); compare, e.g., In re Sombrero Reef Club, Inc., 18 B. R. 612, 618–619 (Bkrtcy. Ct. SD Fla. 1982), with, e.g., §§365(h)(2), (i). Read as generously as possible to Tempnology, this mash-up of legislative interventions says nothing much of anything about the content of Section 365(g)’s general rule. Read less generously, it affirmatively refutes Tempnology’s rendition. As one bankruptcy scholar noted after an exhaustive review of the history: “What the legislative record [reflects] is that whenever Congress has been confronted with the consequences of the [view that rejection terminates all contractual rights], it has expressed its disapproval.” Andrew, 59 U. Colo. L. Rev., at 928. On that account, Congress enacted the provisions, as and when needed, to reinforce or clarify the general rule that contractual rights survive rejection.2

2 At the same time, Congress took the opportunity when drafting those provisions to fill in certain details, generally left to state law, about the post-rejection relationship between the debtor and counterparty. See, e.g., Andrew, Executory Contracts in Bankruptcy, 59 U. Colo. L. Rev. 845, 903, n. 200 (1988) (describing Congress’s addition of subsidiary rules for real property leases in Section 365(h)); Brief for United States as Amicus Curiae 29 (noting that Congress similarly set out detailed rules for patent licenses in Section 365(n)). The provisions are therefore not redundant of Section 365(g): Each sets out a remedial scheme embellishing on or tweaking the general rejection-as-breach
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Consider more closely, for example, Congress's enactment of Section 365(n), which addresses certain intellectual property licensing agreements. No one disputes how that provision came about. In *Lubrizol Enterprises v. Richmond Metal Finishers*, the Fourth Circuit held that a debtor's rejection of an executory contract worked to revoke its grant of a patent license. See 756 F. 2d 1043, 1045–1048 (1985). In other words, *Lubrizol* adopted the same rule for patent licenses that the First Circuit announced for trademark licenses here. Congress sprang into action, drafting Section 365(n) to reverse *Lubrizol* and ensure the continuation of patent (and some other intellectual property) licensees' rights. See 102 Stat. 2538 (1988); S. Rep. No. 100–505, pp. 2–4 (1988) (explaining that Section 365(n) "corrects [Lubrizol's] perception" that "Section 365 was ever intended to be a mechanism for stripping innocent licensee[s] of rights"). As Tempnology highlights, that provision does not cover trademark licensing agreements, which continue to fall, along with most other contracts, within Section 365(g)'s general rule. See Brief for Respondent 38. But what of that? Even put aside the claim that Section 365(n) is part of a pattern—that Congress whacked Tempnology's view of rejection wherever it raised its head. See *supra*, at 13. Still, Congress's repudiation of *Lubrizol* for patent contracts does not show any intent to ratify that decision's approach for almost all others. Which is to say that no negative inference arises. Congress did nothing in adding Section 365(n) to alter the natural reading of Section 365(g)—that rejection and breach have the same results.

Tempnology's remaining argument turns on the way special features of trademark law may affect the fulfillment of the Code's goals. Like the First Circuit below, Tempnology here focuses on a trademark licensor's duty to

rule.
monitor and “exercise quality control over the goods and services sold” under a license. Brief for Respondent 20; see supra, at 5. Absent those efforts to keep up quality, the mark will naturally decline in value and may eventually become altogether invalid. See 3 J. McCarthy, Trademarks and Unfair Competition §18:48, pp. 18–129, 18–133 (5th ed. 2018). So (Tempnology argues) unless rejection of a trademark licensing agreement terminates the licensee’s rights to use the mark, the debtor will have to choose between expending scarce resources on quality control and risking the loss of a valuable asset. See Brief for Respondent 59. “Either choice,” Tempnology concludes, “would impede a [debtor’s] ability to reorganize,” thus “undermining a fundamental purpose of the Code.” Id., at 59–60.

To begin with, that argument is a mismatch with Tempnology’s reading of Section 365. The argument is trademark-specific. But Tempnology’s reading of Section 365 is not. Remember, Tempnology construes that section to mean that a debtor’s rejection of a contract terminates the counterparty’s rights “unless the contract falls within an express statutory exception.” Id., at 27–28; see supra, at 12. That construction treats trademark agreements identically to most other contracts; the only agreements getting different treatment are those falling within the discrete provisions just discussed. And indeed, Tempnology could not have discovered, however hard it looked, any trademark-specific rule in Section 365. That section’s special provisions, as all agree, do not mention trademarks; and the general provisions speak, well, generally. So Tempnology is essentially arguing that distinctive features of trademarks should persuade us to adopt a construction of Section 365 that will govern not just trademark agreements, but pretty nearly every executory contract. However serious Tempnology’s trademark-related concerns, that would allow the tail to wag the
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And even putting aside that incongruity, Tempnology’s plea to facilitate trademark licensors’ reorganizations cannot overcome what Sections 365(a) and (g) direct. The Code of course aims to make reorganizations possible. But it does not permit anything and everything that might advance that goal. See, e.g., *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 51 (2008) (observing that in enacting Chapter 11, Congress did not have “a single purpose,” but “str[uck] a balance” among multiple competing interests (internal quotation marks omitted)).

Here, Section 365 provides a debtor like Tempnology with a powerful tool: Through rejection, the debtor can escape all of its future contract obligations, without having to pay much of anything in return. See *supra*, at 3. But in allowing rejection of those contractual duties, Section 365 does not grant the debtor an exemption from all the burdens that generally applicable law—whether involving contracts or trademarks—imposes on property owners. See 28 U. S. C. §959(b) (requiring a trustee to manage the estate in accordance with applicable law). Nor does Section 365 relieve the debtor of the need, against the backdrop of that law, to make economic decisions about preserving the estate’s value—such as whether to invest the resources needed to maintain a trademark. In thus delineating the burdens that a debtor may and may not escape, Congress also weighed (among other things) the legitimate interests and expectations of the debtor’s counterparties. The resulting balance may indeed impede some reorganizations, of trademark licensors and others. But that is only to say that Section 365’s edict that rejection is breach expresses a more complex set of aims than Tempnology acknowledges.

IV

For the reasons stated above, we hold that under Sec-
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Section 365, a debtor’s rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy. Such an act cannot rescind rights that the contract previously granted. Here, that construction of Section 365 means that the debtor-licensor’s rejection cannot revoke the trademark license.

We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.
SOTOMAYOR, J., concurring.

I agree with the Court that a debtor’s choice to reject an executory contract under 11 U. S. C. §365(a) functions as a breach of the contract rather than unwinding the rejected contract as if it never existed. Ante, at 8–10. This result follows from traditional bankruptcy principles and from the general rule set out in §365(g) of the Bankruptcy Code. I also agree that no specific aspects of trademark law compel a contrary rule that equates rejection with rescission. I therefore join the Court’s opinion in full. I write separately to highlight two potentially significant features of today’s holding.

First, the Court does not decide that every trademark licensee has the unfettered right to continue using licensed marks postrejection. The Court granted certiorari to decide whether rejection “terminates rights of the licensee that would survive the licensor’s breach under applicable nonbankruptcy law.” Pet. for Cert. i. The answer is no, for the reasons the Court explains. But the baseline inquiry remains whether the licensee’s rights would survive a breach under applicable nonbankruptcy law. Special terms in a licensing contract or state law could bear on that question in individual cases. See ante, at 9–10; Brief for American Intellectual Property Law Association as Amicus Curiae 20–25 (discussing examples of contract
terms that could potentially lead a bankruptcy court to limit licensee rights postrejection).

Second, the Court’s holding confirms that trademark licensees’ postrejection rights and remedies are more expansive in some respects than those possessed by licensees of other types of intellectual property. Those variances stem from §365(n), one of several subject-specific provisions in the Bankruptcy Code that “embellis[h] or twe[a]”. The general rejection rule. Ante, at 13, n. 2. Section 365(n)—which applies to patents, copyrights, and four other types of intellectual property, but not to trademarks, §101(35A)—alters the general rejection rule in several respects. For example, a covered licensee that chooses to retain its rights postrejection must make all of its royalty payments; the licensee has no right to deduct damages from its payments even if it otherwise could have done so under nonbankruptcy law. §365(n)(2)(C)(i). This provision and others in §365(n) mean that the covered intellectual property types are governed by different rules than trademark licenses.

Although these differences may prove significant for individual licensors and licensees, they do not alter the outcome here. The Court rightly rejects Tempnology’s argument that the presence of §365(n) changes what §365(g) says. As the Senate Report accompanying §365(n) explained, the bill did not “address or intend any inference to be drawn concerning the treatment of executory contracts” under §365’s general rule. S. Rep. No. 100–505, p. 5 (1988); see ante, at 14. To the extent trademark licensees are treated differently from licensees of other forms of intellectual property, that outcome leaves Congress with the option to tailor a provision for trademark licenses, as it has repeatedly in other contexts. See ante, at 13–14.

With these observations, I join the Court’s opinion.
JUSTICE GORSUCH, dissenting.

This Court is not in the business of deciding abstract questions, no matter how interesting. Under the Constitution, our power extends only to deciding “Cases” and “Controversies” where the outcome matters to real parties in the real world. Art. III, §2. Because it’s unclear whether we have anything like that here, I would dismiss the petition as improvidently granted.

This case began when Mission licensed the right to use certain of Tempnology’s trademarks. After Tempnology entered bankruptcy, it sought and won from a bankruptcy court an order declaring that Mission could no longer use those trademarks. On appeal and now in this Court, Mission seeks a ruling that the bankruptcy court’s declaration was wrong. But whoever is right about that, it isn’t clear how it would make a difference: After the bankruptcy court ruled, the license agreement expired by its own terms, so nothing we might say here could restore Mission’s ability to use Tempnology’s trademarks.

Recognizing that its original case seems to have become moot, Mission attempts an alternative theory in briefing before us. Now Mission says that if it prevails here it will, on remand, seek money damages from Tempnology’s estate for the profits it lost when, out of respect for the bankruptcy court’s order, it refrained from using the
trademarks while its license still existed.

But it’s far from clear whether even this theory can keep the case alive. A damages claim “suffices to avoid mootness only if viable,” which means damages must at least be “legally available for [the alleged] wrong.” 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3533.3, p. 22 (3d ed. 2008). Yet, as far as Mission has told us, Tempnology did nothing that could lawfully give rise to a damages claim. After all, when Tempnology asked the bankruptcy court to issue a declaratory ruling on a question of law, it was exercising its protected “First Amendment right to petition the Government for redress of grievances.” Bill Johnson’s Restaurants, Inc. v. NLRB, 461 U. S. 731, 741 (1983). And petitioning a court normally isn’t an actionable wrong that can give rise to a claim for damages. Absent a claim of malice (which Mission hasn’t suggested would have any basis here), the ordinary rule is that “no action lies against a party for resort to civil courts” or for “the assertion of a legal argument.” Lucsik v. Board of Ed. of Brunswick City School Dist., 621 F. 2d 841, 842 (CA6 1980) (per curiam); see, e.g., W. R. Grace & Co. v. Rubber Workers, 461 U. S. 757, 770, n. 14 (1983); Russell v. Farley, 105 U. S. 433, 437–438 (1882).

Maybe Mission’s able lawyers will conjure something better on remand. But, so far at least, the company hasn’t come close to articulating a viable legal theory on which a claim for damages could succeed. And where our jurisdiction is so much in doubt, I would decline to proceed to the merits. If the legal questions here are of sufficient importance, a live case presenting them will come along soon enough; there is no need to press the bounds of our constitutional authority to reach them today.
IN RE: AMENDMENTS TO THE FLORIDA EVIDENCE CODE.

May 23, 2019

PER CURIAM.

The Court, according to its exclusive rulemaking authority pursuant to article V, section 2(a) of the Florida Constitution, adopts chapter 2013-107, sections 1 and 2, Laws of Florida (Daubert amendments), which amended sections 90.702 (Testimony by experts) and 90.704 (Basis of opinion testimony by experts), Florida Statutes, of the Florida Evidence Code to replace the Frye\(^1\) standard for admitting certain expert testimony with the Daubert\(^2\) standard, the standard for expert testimony found in Federal Rule of Evidence 702.

1. See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); see also Bundy v. State, 471 So. 2d 9 (Fla. 1985) (applying Frye standard); Stokes v. State, 548 So. 2d 188, 195 (Fla. 1989) (adopting Frye standard); Hadden v. State, 690 So. 2d 573, 577-78 (Fla. 1997) (adhering to Frye standard); Marsh v. Valyou, 977 So. 2d 543, 547 (Fla. 2007) (reaffirming adherence to Frye standard).

In *In re Amendments to Florida Evidence Code*, 210 So. 3d 1231, 1239 (Fla. 2017), at the recommendation of The Florida Bar’s Code and Rules of Evidence Committee (Committee), which occurred by a close vote of 16-14, the majority of this Court previously declined to adopt the *Daubert* amendments, to the extent that they are procedural, solely “due to the constitutional concerns raised” by the Committee members and commenters who opposed the amendments. Without now readdressing the correctness of this Court’s ruling in *DeLisle v. Crane Co.*, 258 So. 3d 1221, 1229 (Fla. 2018), we note that the decision determined that section 90.702 of the Florida Evidence Code, as amended by section 1 of chapter 2013-107, 3 is procedural in nature. *DeLisle* did not address the amendment to

3. Chapter 2013-107, section 1, Laws of Florida, amended section 90.702, Florida Statutes (2012), to read as follows:

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;

(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; however, the opinion is admissible only if it can be applied to evidence at trial.
section 90.704 made by section 2 of chapter 2013-107. Therefore, the Court has not determined the extent to which that amendment may be procedural.

As noted by In re Amendments to Florida Evidence Code, 210 So. 3d at 1236-37, the Daubert amendments were considered by The Florida Bar’s Code and Rules of Evidence Committee. The Committee provided majority and minority reports against and in favor of the Court’s adoption of the Daubert amendments. The Board of Governors of The Florida Bar approved the Committee’s recommendation, and extensive comments were received in response to the published recommendation. The Court held oral argument in the case. Because of the extensive briefing and arguments on this issue previously made to the Court, and mindful of the resources of parties, members of The Florida Bar, and the

4. Chapter 2013-107, section 2, Laws of Florida, amended section 90.704, Florida Statutes (2012), to read as follows:

The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.
judiciary, we revisit the outcome of the recommendation on the *Daubert* amendments without requiring the process to be repeated.

We now recede from the Court’s prior decision not to adopt the Legislature’s *Daubert* amendments to the Evidence Code and to retain the *Frye* standard. As Justice Polston has explained, the “grave constitutional concerns” raised by those who oppose the amendments to the Code appear unfounded:

[T]he United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in 1993, and the standard has been routinely applied in federal courts ever since. The clear majority of state jurisdictions also adhere to the *Daubert* standard. See 1 *McCormick on Evidence* § 13 (7th ed. June 2016 Supp.). In fact, there are 36 states that have rejected *Frye* in favor of *Daubert* to some extent. See Charles Alan Wright & Victor Gold, 29 *Federal Practice and Procedure* § 6267, at 308-09 n.15 (2016). Has the entire federal court system for the last 23 years as well as 36 states denied parties’ rights to a jury trial and access to courts? Do only Florida and a few other states have a constitutionally sound standard for the admissibility of expert testimony? Of course not.

As a note to the federal rule of evidence explains, “[a] review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.” Fed. R. Evid. 702 advisory committee’s note to 2000 amendment. “*Daubert* did not work a ‘seachange over federal evidence law,’ and ‘the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system.’” *Id.* (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996)).

Furthermore, I know of no reported decisions that have held that the *Daubert* standard violates the constitutional guarantees of a jury trial and access to courts. To the contrary, there is case law holding that the *Daubert* standard does not violate the constitution. See, e.g., *Junk v. Terminix Int’l Co.*, 628 F.3d 439, 450 (8th Cir. 2010) (rejecting legal merit of the constitutional claim “that the district court violated [appellant’s] Seventh Amendment right to a jury trial by improperly weighing evidence in the course of its *Daubert* rulings”
and explaining that “Junk does not cite any case for the notion that a proper Daubert ruling violates a party’s right to a jury trial”); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995) (rejecting claim “that allowing the trial judge to assess the reliability of expert testimony violates [the parties’] federal and state constitutional rights to a jury trial by infringing upon the jury’s inherent authority to assess the credibility of witnesses and the weight to be given their testimony”); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43 (1997) (rejecting “argument that because the granting of summary judgment in this case was ‘outcome determinative,’ it should have been subjected to a more searching standard of review” and explaining that, while “disputed issues of fact are resolved against the moving party[,] . . . the question of admissibility of expert testimony is not such an issue of fact”). Accordingly, the . . . “grave constitutional concerns” regarding the Daubert standard are unfounded.

*In re Amends. to Fla. Evidence Code*, 210 So. 3d 1231, 1242-43 (Polston, J., concurring in part and dissenting in part). While we find Justice Polston’s observations instructive in deciding to now adopt the Legislature’s Daubert amendments, we do not decide, in this rules case, the constitutional or other substantive concerns that have been raised about the amendments. Those issues must be left for a proper case or controversy.5

5. See *In re Amends. to Fla. Evidence Code*, 210 So. 3d 1231, 1239 (stating that constitutional concerns about Daubert Amendment must be left for a proper case or controversy); *In re Amends. to Fla. Rules of Criminal Procedure—Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 820 So. 2d 185,193 (Fla. 2002) (stating that substantive concerns about comment to rule are more appropriately addressed in a true case or controversy than in a rules case).
Additionally, as outlined in the Committee minority report, the Daubert amendments remedy deficiencies of the Frye standard. Whereas the Frye standard only applied to expert testimony based on new or novel scientific techniques and general acceptance, Daubert provides that “the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” Daubert, 509 U.S. at 589 (holding that the Federal Rules of Evidence superseded Frye). Moreover, also as argued in the minority report, the Daubert amendments will create consistency between the state and federal courts with respect to the admissibility of expert testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping.

Accordingly, in accordance with this Court’s exclusive rule-making authority6 and longstanding practice of adopting provisions of the Florida Evidence Code as they are enacted or amended by the Legislature,7 we adopt the amendments to sections 90.702 and 90.704 of the Florida Evidence Code made by chapter 2013-107, sections 1 and 2. Effective immediately upon the release of this


7. See DeLisle, 258 So. 3d at 1223-24 (recognizing that, with very few exceptions, the Court has traditionally adopted, to the extent they are procedural, provisions of the Evidence Code as they are enacted or amended by the Legislature); In re Amends. to Fla. Evidence Code, 210 So. 3d at 1236 (same).
opinion, we adopt the amendments to section 90.702 as procedural rules of
evidence and adopt the amendment to section 90.704 to the extent it is procedural.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, LAGOA, and MUÑIZ, JJ., concur.
LAWSON, J., concurs and concurs specially with an opinion, in which
CANADY, C.J., and LAGOA and MUÑIZ, JJ., concur.
LABARGA, J., dissents with an opinion.
LUCK, J., dissents with an opinion.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE
EFFECTIVE DATE OF THESE AMENDMENTS.

LAWSON, J., concurring and concurring specially.

I fully concur in the majority opinion and write separately to address Justice
Luck’s contentions that: (1) we lack the authority to adopt this rule amendment
now, and (2) we should not reconsider whether to codify the *Daubert* standard into
our procedural rules until “we have a proper case or controversy,” see dissenting
op. at 1, in which to reconsider *DeLisle v. Crane Co.*, 258 So. 3d 1219, 1228-30
(Fla. 2018) (holding that the standard for use in determining the admissibility of
scientific evidence is procedural and not substantive, such that the standard can
only be validly adopted by rule of court, and holding the statute adopting the
*Daubert* standard to be an unconstitutional encroachment on this Court’s
rulemaking authority).

With respect to Justice Luck’s contention that we are only authorized to
adopt or amend a rule of court pursuant to Florida Rule of Judicial Administration
2.140, I respectfully disagree that the majority is not following the multistep process set forth in rule 2.140. As explained in the majority’s per curiam opinion, that process was followed here, with the result that the Court has had the benefit of Florida Bar recommendations, oral argument, and extensive public comments, pro and con. All that this Court is doing now is reconsidering its earlier administrative (i.e., non-adjudicative) decision not to adopt the proposed Daubert amendments. Nothing in the text of rule 2.140 prohibits this Court from doing so.

Perhaps more fundamentally, rule 2.140 sets forth the procedure “followed for consideration of rule amendments generally.” Fla. R. Jud. Admin. 2.140(a) (emphasis added). Although this is the rule that others are directed to follow when requesting that we adopt or amend one of our rules—and that we generally follow as well—our internal operating rules expressly recognize our inherent constitutional authority to amend our own rules, on our own motion, at any time, providing:

G. Rulemaking.

1. General. At the request of any justice, the Court, on its own motion, may adopt or amend rules. When the Court so acts, it generally will allow interested persons to file comments by a date certain. A specific effective date is usually designated by the Court. When the Court adopts or proposes a rule change in conjunction with a non-rule-amendment case, it will do so by means of an opinion in a separate case addressing only the rule amendment. The two opinions will reference each other and will be issued at the same time.
West’s F.S.A. Sup. Ct. Manual Internal Operating P. § II. This Court has repeatedly followed rule II.G.1. in the past, adopting or amending rules on our own motion, at the request of a justice, without following the general procedure outlined in rule 2.140. See, e.g., In re Amendment to Rule 1-26 of Rules of Supreme Court Relating to Admissions to Bar, 165 So. 3d 666, 666-67 (Fla. 2015) (amending Rules of the Supreme Court Relating to Admissions to the Bar on this Court’s own motion); In re Amendments to the Florida Rules of Civil Procedure—Mgmt. of Cases Involving Complex Litig., 15 So. 3d 558, 563 (Fla. 2009) (adopting an amendment to Florida Rule of Civil Procedure 1.440 on this Court’s own motion, relying solely on our constitutional grant of rule-making authority); In re Amendments To Florida Rule of Criminal Procedure 3.992—Criminal Punishment Code Scoresheets, 972 So. 2d 862, 863 (Fla. 2008) (amending Florida Rule of Criminal Procedure 3.992, relying solely on our constitutional grant of rule-making authority in article V, section 2(a) of the Florida Constitution).8 In each of these

8. We have bypassed the rule 2.140 process in numerous other cases, instead seeking advice from the Criminal Courts Steering Committee. See, e.g., In re Amendments To Florida Rule of Appellate Procedure 9.140, 194 So. 3d 309, 309-10 (Fla. 2016) (amending Florida Rule of Appellate Procedure 9.140, relying solely on our constitutional grant of rule-making authority); In re Amendments To Florida Rules of Criminal Procedure—Rule 3.113, 139 So. 3d 292, 293 (Fla. 2014) (adopting Florida Rule of Criminal Procedure 3.113, relying solely on our constitutional grant of rule-making authority); In re Florida Rules of Civil Procedure For Involuntary Commitment of Sexually Violent Predators, 13 So. 3d 1025, 1027-28 (Fla. 2009) (adopting the Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators, relying solely on our
cases, this Court clearly did not declare an emergency and unequivocally did not follow rule 2.140.

In his dissenting opinion, Justice Luck points out that in these cited cases we requested input from groups of lawyers and judges before adopting rule changes. I have three responses. First, my point in citing these cases is to demonstrate that this Court has repeatedly acted on its own motion to enact or amend rules in the past, based solely on its constitutional authority and without following rule 2.140. Rule 2.140 requires referral to one of the rule committees listed in subsection (a)(3), which we did not do in any of these cases. Second, nothing in the constitution or rule II.G.1. states that we must seek input from others before exercising our exclusive rulemaking authority. In fact, rule II.G.1. expressly contemplates the exercise of our constitutional and exclusive rulemaking authority without input from others. Fla. S. Ct. Internal Op. Proc. II(G)(1) (explaining that when “the Court, on its own motion . . . adopt[s] or amend[s] rules . . . it generally will allow interested persons to file comments”) (emphasis added).

Third, the Court has already received exhaustive input on this issue from the constitutional grant of rule-making authority). Although the opinions in these cases do not recount the internal court process that initiated the rule change, our internal court records do. In each case, this Court directed a group of its own creation to propose language that would accomplish a rule change that this Court determined to be necessary or appropriate.
bench, bar, and public—explaining why we need not seek additional comment now. These cases, therefore, demonstrate how isolated the dissent is reading rule 2.140 as stripping this Court of its constitutional authority—or as severely self-limiting that authority such that we are powerless to act now without re-consulting one of the bar committees that we recognize by rule. Not only does no other member of our current court read rule 2.140 in this self-limiting fashion, these cases and rule II.G.1. demonstrate that prior courts have not read rule 2.140 as displacing the Court’s constitutional power either.

Given that we have the constitutional authority to adopt or amend these rules, art. V, § 2(a), Fla. Const., and that rule II.G.1. expressly recognizes our inherent authority to do so *sua sponte*, there is no reason for (or value in) repeating the rule 2.140 process with respect to this particular rule change.

With respect to Justice Luck’s contention that we should wait for a “proper case” to reconsider *DeLisle*, I would note that this Court routinely adopts evidence rules “to the extent that they are procedural”—without deciding whether they are procedural. *See, e.g.*, *In re Amendments to Fla. Evidence Code*, 53 So. 3d 1019, 1020 (Fla. 2011) (adopting the legislative amendments to the Evidence Code made since 2007 to the extent they are procedural); *In re Amendments to Fla. Evidence Code*, 960 So. 2d 762, 763 (Fla. 2007) (adopting the legislative amendments to the Evidence Code made since 2005 to the extent they are procedural); *In re*
Amendments to Fla. Evidence Code—Section 90.104, 914 So. 2d 940, 941 (Fla. 2005) (adopting the 2003 amendment to section 90.104(1)(b), Florida Statutes, to the extent it is procedural); In re Amendments to Fla. Evidence Code, 825 So. 2d 339, 340-41 (Fla. 2002) (adopting the legislative amendments to the Evidence Code made since 2000 to the extent they are procedural). This practical approach makes sense because it conforms our rules of evidence to the Code and avoids the uncertainty that would otherwise be created by years of litigation over the substantive/procedural issue. So long as the Legislature has adopted the provision, which was done here, no separation of powers concerns can flow from our decision to simply adopt the provision to the extent that it is procedural, and thereby avoid the uncertainty and attendant costs that we would impose on parties by continued litigation of the issue. For these reasons, it makes more sense to me to adopt the standard now without readdressing the correctness of this Court’s ruling in DeLisle.

CANADY, C.J., and LAGOA and MUÑIZ, JJ., concur.

LABARGA, J., dissenting.

In 2017, following the recommendation of The Florida Bar’s Code and Rules of Evidence Committee (Committee), this Court declined to adopt to the extent they were procedural the amendments to the Florida Evidence Code (Code)
implementing the *Daubert*\(^9\) standard for admissibility of expert testimony. *In re Amendments to Fla. Evidence Code*, 210 So. 3d 1231, 1239 (Fla. 2017). In doing so, we cited “grave constitutional concerns.” *Id.* In 2018, we reiterated that *Frye*\(^{10}\) remains the appropriate standard in Florida state courts for evaluating expert testimony. *See DeLisle v. Crane Co.*, 258 So. 3d 1219, 1229 (Fla. 2018) (“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.”). Now, less than one year later, and without further input from the Committee or the public, this Court reverses course and adopts the *Daubert* amendments for use in Florida courts. I dissent because in my view *Frye* is the superior standard for determining the reliability of expert testimony.

*Daubert* and its progeny drastically expanded the type of expert testimony subject to challenge. Whereas *Frye* is limited to “new or novel scientific

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evidence,” *Brim v. State*, 695 So. 2d 268, 271 (Fla. 1997), *Daubert* applies to “all expert testimony.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Of course, if a change to the Code furthers justice for the parties, the fact that significantly more testimony is subject to challenge and exclusion is irrelevant. However, I do not believe the *Daubert* amendments will have this effect; rather, in my view they will negatively impact constitutional rights. Indeed, the Committee, in recommending we reject the *Daubert* amendments, concluded they would undermine the constitutional right to a jury trial by precluding pure opinion testimony:

Experts routinely form medical causation opinions based on their experience and training. And there is always the possibility that two experts may reach dissimilar opinions based on their individual experience. However, a disagreement among experts does not transform an ordinary opinion on medical causation into a new or novel principle subject to *Frye*.

*Marsh v. Valyou*, 977 So. 2d [543,] 548 [(Fla. 2007)] (citations omitted).

Again citing multiple precedents, the Court explained:

“[P]ure opinion testimony, such as an expert’s opinion that a defendant is incompetent, does not have to meet *Frye*, because this type of testimony is based on the expert’s personal experience and training. While cloaked with the credibility of the expert, this testimony is analyzed by the jury as it analyzes any other personal opinion or factual testimony by a witness.”

*Id.* at 548 (alteration in original) (quoting *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993)).
The [Florida] Supreme Court addressed the fundamental, constitutional reason for its insistence on maintaining the utility of legitimate but competing expert opinion testimony to help juries decide cases on their merits:

Trial courts must resist the temptation to usurp the jury’s role in evaluating the credibility of experts and choosing between legitimate but conflicting scientific views. See Castillo [v. E.I. Du Pont De Nemours & Co.], 854 So. 2d [1264,] 1275 [(Fla. 2003)] (“[I]t is important to emphasize that the weight to be given to stated scientific theories, and the resolution of legitimate but competing scientific views, are matters appropriately entrusted to the trier of fact.” (quoting Berry [v. CSX Transp., Inc.], 709 So. 2d [552,] 589 n.14 [(Fla. 1st DCA 1998)]; Rodriguez v. Feinstein, 793 So. 2d 1057, 1060 (Fla. 3d DCA 2001) (same). A challenge to the conclusions of . . . experts as to causation, rather than the methods used to reach those conclusions, is a proper issue for the trier of fact. See U.S. Sugar [Corp. v. Henson], 823 So. 2d [104,] 110 [(Fla. 2002)]; Castillo, 854 So. 2d at 1270, 1272, 1276; Rodriguez, 793 So. 2d at 1060 (recognizing that “to involve judges in an evaluation of the acceptability of an expert’s opinions and conclusions would convert judges into fact-finders” to an extent not contemplated by Florida’s Frye jurisprudence).

Marsh, 977 So. 2d at 549-50. Thus, if the Legislature’s stated intent were to hold sway, litigants’ constitutional right to trial by jury would be diminished.

Code and Rules of Evidence Committee Three-Year Cycle Report at 7-8, In re Amends. to Fla. Evidence Code, 210 So. 3d 1231 (Fla. 2017) (No. SC16-181) (some alterations in original). I agree with the Committee that the Daubert amendments create a significant risk of usurping the jury’s role by authorizing judges to exclude from consideration the legitimate but competing opinion
testimony of experts. Where evidence is not based upon new or novel science, juries should be permitted to hear the testimony of experts, evaluate their credibility, and analyze and weigh their opinions and conclusions to reach a just determination on the issues presented by the case.

Further, the concurrence in *DeLisle*, in which I concurred, described how *Daubert* would negatively impact access to Florida courts:

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. Citing numerous federal cases, the Committee explained that, because *Daubert* covers more subject areas and involves a multifactorial 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 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). [n.9]

[N.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.


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 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.

258 So. 3d at 1233-34 (Pariente, J., concurring) (footnote omitted) (alterations in original). Although I recognize that constitutional challenges to Code amendments must be reserved for a proper case or controversy, I continue to support the compelling reasons articulated in the DeLisle concurrence, as well as the significant concerns raised by the Committee, as to why Frye should remain the evidentiary standard for admission of expert testimony in Florida courts. In sum, I firmly believe Frye more adequately protects the constitutional rights of the parties.

Accordingly, I dissent from the decision of the majority to adopt the Daubert amendments and recede from our 2017 decision.

LUCK, J., dissenting.

I wish I could join the majority opinion adopting as a procedural rule of evidence the legislature’s Daubert amendment to section 90.702, Florida Statutes.
I really do. I think our decision in *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018), finding that the amendments to section 90.702 were an unconstitutional encroachment on our exclusive authority to adopt rules for the practice and procedure in all courts is wrong, and we should overrule it when we have a proper case or controversy. But, for two reasons, I can’t join the majority’s opinion. First, the majority opinion adopts the amendments to section 90.702 as procedural rules without following our procedure for adopting rules. Second, the majority opinion rests on *DeLisle*’s erroneous holding that the *Daubert* amendment is a procedural rule, rather than a substantive law, that can be adopted by the court. Because we must follow our own rules if we expect anyone else to and the legislature’s *Daubert* amendment was a substantive change in the law, I reluctantly and respectfully dissent.

*We must follow our rules for adopting procedural rules.*

Florida Rule of Judicial Administration 2.140 is the rule for “Amending Rules of Court,” and it “shall be followed for consideration of rule amendments generally.” Fla. R. Jud. Admin. 2.140(a); see also *In re Amends. to Fla. Rules of Jud. Admin.*—New Rule 2.570, No. SC17-1611, 2018 WL 472769, at *1 (Fla. Jan. 18, 2018) (“Rule 2.140 provides the procedures for amending rules of practice and procedure.”) (emphasis added)); *In re Fla. Rules of Jud. Admin.*, 389 So. 2d 202, 204 (Fla. 1980) (noting that the predecessor to rule 2.140 was “entirely rewritten to
codify the procedures for changes to all Florida rules of procedure” (emphasis added)). The majority opinion does not follow it.

This is how the rule amendment procedure works. An amendment “may be made by any person.” Fla. R. Jud. Admin. 2.140(a)(1). The amendment is submitted to our clerk, who then refers it to one of the rules committees. Id. 2.140(a)(2). There’s a special committee, called the code and rules of evidence committee, that considers amendments to the evidence code. Id. 2.140(a)(3). The rules of evidence committee will consider and vote on the proposed amendment. Id. 2.140(a)(5). If the committee accepts the amendment, it is part of a three-year cycle report that is sent to the bar’s board of governors. Id. 2.140(a)(5), (b)(1)-(2). The board of governors solicits comments from the public and then considers and makes a recommendation on each proposal. Id. 2.140(b)(2)-(3). The committee and the board of governors then file with the court a report of the proposed rule changes and their recommendations. Id. 2.140(b)(4). The court considers comments to the proposed amendment, and may hear oral argument, before deciding whether to adopt it. Id. 2.140(b)(5)-(7).

There are four, and only four, exceptions to this general procedure. Id. 2.140(a) (“The following procedure shall be followed for consideration of rule amendments generally other than those adopted under subdivisions (d), (e), (f), and (g) . . . .”).
• **Exception one—subdivision (d):** We may, with or without notice, “change court rules at any time if an emergency exists that does not permit reference to the appropriate committee.” *Id.* 2.140(d). In emergency situations, we will “fix a date for further consideration of the change,” and, in that time, allow any person to “file comments concerning the change, seeking its abrogation or a delay in the effective date.” *Id.*

• **Exception two—subdivision (e):** If the rules committee and the board of governors believe that a proposed amendment “is of an emergency nature,” or sufficiently necessary to the administration of justice, they can recommend a change to the court outside the normal three-year cycle for submitting amendments. *Id.* 2.140(e)(1)-(2). The committee submits a report to the court, the proposed amendment is published, and the court may hear oral argument on the rule change. *Id.*

• **Exception three—subdivision (f):** For non-emergencies, we “may direct special consideration of a proposal” that may be heard at any time outside the three-year reporting cycle. *Id.* 2.140(f). The committee files its report with the court, the proposed amendment is published, and the court may hear oral argument on the rule change. *Id.*

• **Exception four—subdivision (g):** The court may amend at any time and with or without notice the rules in part II of the rules of judicial administration,
and rules 2.310 and 2.320, “without reference to or proposal from the Rules of Judicial Administration Committee.” Id. 2.140(g)(1). If the court amends part II of the rules of judicial administration, or rules 2.310 or 2.320, without notice, then it will set a future date to consider the change and publish the proposal for comment by any person. Id. The court may hear oral argument on the proposed amendment. Id.

The majority opinion does not follow the general procedure that “shall be followed for consideration of rule amendments.” Id. 2.140(a). Since we considered and decided this issue two years ago, see In re Amendments to Fla. Evidence Code, 210 So. 3d 1231 (Fla. 2017), the code and rules of evidence committee has not sent us a report to consider adopting the Daubert amendment as a procedural rule. The board of governors has not made a recommendation. And we haven’t followed any of the publication and comment requirements in rule 2.140(b).

The majority opinion does not invoke any of the exceptions to the general procedure; it does not follow any of the special procedures required to invoke an exception; and none of the exceptions apply. The Daubert amendment was not an emergency when we considered it in 2017. See id. at 1235 (“We have for consideration the regular-cycle report of The Florida Bar’s Code and Rules of Evidence Committee (Committee), concerning legislative changes to the Florida
Evidence Code and to section 766.102, Florida Statutes (2012).” (emphasis added) (footnote omitted)). The legislature enacted the change five years ago, ch. 13-107, §§ 1-2, Laws of Florida, and we have not treated the change as an emergency matter in all that time. The code and rules of evidence committee also has not submitted the Daubert amendment to us as an emergency matter. We have not requested, although it is our right to do so, that the committee reconsider the Daubert amendment outside the three-year cycle. And this is not an amendment to part II, and rules 2.310 and 2.320, of the rules of judicial administration, where we have authority to act on our own.

The majority opinion, instead, says that it is adopting the Daubert amendment “according to [our] exclusive rulemaking authority pursuant to article V, section 2(a)” of the state constitution. Majority op. at 1. Article V, section 2(a) certainly requires us to “adopt rules for the practice and procedure in all courts” in the state. Art. V, § 2, Fla. Const. To meet our constitutional obligation, we have established the procedure in rule 2.140 for the adoption, amendment, and abrogation of our procedural rules. We can always change the rulemaking procedure—and maybe we should in light of this case—but where we have a procedure in place to implement our constitutional obligation, we cannot use the same constitutional provision to undermine that very procedure.
If we could do that, then why have the procedure in the first place? Why go through the trouble of establishing a multistep process, appointing lawyers and judges to the rules committees, soliciting comments, getting the view of the board of governors, and having reports filed, when all we have to do is establish any rule we want, at any time, without input or adversarial testing? Having this multistep process doesn’t make sense if all we have to do is wave our magic article V, section 2(a) wand, ignore rule 2.140, and establish any old rule we want.

Once a procedure for implementing a constitutional mandate is established, that procedure must be followed in order to invoke the mandate. Consider, for example, citizen initiative petitions. Article XI, section 3 provides that “the people” have “[t]he power to propose the revision or amendment of any portion or portions of this constitution by initiative.” Art. XI, § 3, Fla. Const. The legislature has established procedures for implementing the initiative right. See, e.g., § 101.161, Fla. Stat. (2018). For example, “[w]henever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment . . . shall be printed in clear and unambiguous language on the ballot.” Id. § 101.161(1). “The ballot summary of the amendment . . . shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.” Id. “The ballot summary and ballot title of a constitutional amendment proposed by initiative shall be prepared by the sponsor
and approved by the Secretary of State . . . .” *Id.* § 101.161(2). If an initiative sponsor did not comply with the established procedures for initiative petitions, it would not be enough to cite the right in article XI, section 3. *See Browning v. Fla. Hometown Democracy, Inc.*, 29 So. 3d 1053, 1067 (Fla. 2010) (explaining that “[a]dditional explicit or implicit requirements provided by article XI, section[] 3” include those found in section 101.161 (footnote omitted)). Having the right is not enough if one does not follow the established neutral and generally applicable procedures for exercising that right.

Because we established mandatory procedures for exercising our rulemaking authority under article V, section 2(a), we are as required to follow them as everyone else. There is no exception for administrative ease, and there is no proviso for we’ve-heard-it-all-before. *See* Majority op. at 3-4 (“Because of the extensive briefing and arguments on this issue previously made to the Court, and mindful of the resources of parties, members of the Florida Bar, and the judiciary, we revisit the outcome of the recommendation of the *Daubert* amendments without requiring the process to be repeated.”). We can refer the matter to the code and rules of evidence committee for out-of-cycle consideration; we can change the procedures by allowing summary consideration for repeat rules; and, in emergency situations, we can even act on our own and ask for comment; but we can’t do what the majority opinion does here and ignore rule 2.140 altogether.
The concurring opinion gives two reasons for why we can ignore rule 2.140 altogether. First, the concurring opinion says that, although “others are directed to follow” rule 2.140 when requesting to amend the rules, we need not follow the rule because “our internal operating rules expressly recognize our inherent constitutional authority to amend our own rules, on our own motion, at any time.” Concurring op. at 8. Like the little-known codicil in the Faber College constitution, the concurring opinion cites section II.G.1. of our internal operating procedures, which provides that “the Court, on its own motion, may adopt or amend rules.” Id. (quoting Fla. S. Ct. Internal Op. Proc. II.G.1.). According to Westlaw, no court, including ours, has ever cited this language or any part of section II. Ever.

Also, section II.G.1., which is quoted in full in the concurring opinion, does not “expressly recognize our inherent constitutional authority to amend our own rules.” Concurring op. at 8. It does not discuss, mention, cite, or refer to article V, section 2(a) or say anything about “inherent constitutional authority.”

And even if our internal operating procedures could excuse our compliance with rule 2.140, they don’t. We were careful to explain that the internal operating procedures “neither supplant[] any of the Florida rules of court procedure nor create[] any substantive or procedural rights.” Fla. S. Ct. Internal Op. Proc. Intro. We have said that our internal operating procedures do not take the place of the
procedural rules, including rule 2.140, and do not create a procedural right to rulemaking that does not exist elsewhere.

In any event, there would be no need for rule 2.140 to write in exceptions to the general procedure for the supreme court if, as the concurring opinion suggests, we are not required to follow it. Rule 2.140(d) allows the court, “with or without notice,” to “change court rules at any time if an emergency exists that does not permit reference to the appropriate committee.” Fla. R. Jud. Admin. 2.140(d).

Rule 2.140(f) allows us to “direct special consideration of a proposal” outside the three-year cycle. Id. 2.140(f). And rule 2.140(g) allows us to change some of the rules of judicial administration “without reference to or proposal from the Rules of Judicial Administration Committee.” Id. 2.140(g)(1). Why write in these exceptions to the rulemaking procedure if rule 2.140 is only a suggestion for us to follow? Why would we create exceptions to a rule that wasn’t mandatory? We wouldn’t—it wouldn’t make sense to do that—which is why we are not exempt from the command in rule 2.140 that the “procedure shall be followed.”

Second, the concurring opinion, citing six cases,\(^\text{11}\) says that we have “repeatedly followed rule II.G.1. in the past, adopting or amending rules on our

\(^{11}\) In re Amends. to Fla. Rules of App. P. 9.140, 194 So. 3d 309 (Fla. 2016); In re Amend. to Rule 1-26 of Rules of S. Ct. Relating to Admissions to Bar, 165 So. 3d 666 (Fla. 2015); In re Amends. to Fla. Rules of Crim. P.—R. 3.113, 139 So. 3d 292 (Fla. 2014); In re Fla. Rules of Civ. P. for Involuntary Commitment of Sexually Violent Predators, 13 So. 3d 1025 (Fla. 2009); In re Amends. to the
own motion, at the request of a justice, without following the general procedure outlined in rule 2.140. . . . [T]his Court has repeatedly acted on its own motion to enact or amend rules in the past, based solely on its constitutional authority and without following rule 2.140.” Concurring op. at 9, 10.

I read these six cases differently. None of them follow, discuss, mention, or even cite section II.G.1.12 None of them adopt or amend a rule on our own motion, and none of them adopt or amend a rule at the request of a justice. See Amends. to Fla. Rules of App. P. 9.140, 194 So. 3d at 309-10 (“The Florida Supreme Court’s Criminal Court Steering Committee (Steering Committee) filed a petition proposing amendments to rule 9.140(g) (Appeal Proceedings in Criminal Cases; Briefs).”); Amends. to Fla. Rules of Crim. P.—R. 3.113, 139 So. 3d at 293 (“[T]he Supreme Court’s Criminal Court Steering Committee (Steering Committee) filed its petition in this case, proposing adoption of a new rule of criminal procedure,

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12. One of the cases cited by the concurring opinion has nothing to do with procedural rules. In Amendment to Rule 1-26 of Rules of Supreme Court Relating to Admissions to Bar, we amended a bar rule under our “exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted” under article V, section 15 of the Florida Constitution. 165 So. 3d at 667. Because we did not amend a procedural rule, the case did not implicate rule 2.140 or our procedural rulemaking authority under article V, section 2(a). See id. (“We have jurisdiction. See art. V, § 15, Fla. Const.”).
rule 3.113 (Minimum Standards for Attorneys in Felony Cases).”); *Fla. Rules of Civ. P.—S.V.P.*, 13 So. 3d at 1025 (“This matter is before the Court for consideration of a proposal by the Florida Supreme Court Criminal Court Steering Committee (Committee) to adopt the Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators.”); *Amends. to the Fla. Rules of Civ. P.—Mgmt. of Cases Involving Complex Litig.*, 15 So. 3d at 558-59 (“The Task Force on the Management of Cases Involving Complex Litigation (Task Force) has submitted proposed amendments to the Florida Rules of Civil Procedure for our consideration.”); *Amends. to Fla. Rules of Crim. P. 3.992—Crim. Punishment Code Scoresheets*, 972 So. 2d at 863 (“The Supreme Court Criminal Court Steering Committee (Committee) has filed a petition proposing amendments to Florida Rule of Criminal Procedure 3.992.”). None of them expressly hold that we can bypass the rule 2.140 process.

These cases cite the constitution as establishing our jurisdiction to hear the matter, not as the basis of our authority to amend the rules. *See Amends. to Fla. Rules of App. P. 9.140*, 194 So. 3d at 309 (“We have jurisdiction. *See* art. V, § 2(a), Fla. Const.”); *Amends. to Fla. Rules of Crim. P.—R. 3.113*, 139 So. 3d at 293 (same); *Fla. Rules of Civ. P.—S.V.P.*, 13 So. 3d at 1025 (same); *Amends. to Fla. Rules of Crim. P. 3.992—Crim. Punishment Code Scoresheets*, 972 So. 2d at 863 (same). Acknowledging that we have jurisdiction to hear a rules case doesn’t
translate to a holding that we are amending a rule based solely on our inherent constitutional authority. These cases did not meaningfully address our rulemaking authority, and thus the concurring opinion’s reliance on them is misplaced.

The concurring opinion calls my reading of rule 2.140 “self-limiting” and “isolated.” Concurring op. at 11. But it wasn’t me who limited our authority to make procedural rules under article V, section 2(a). We did so when we created the rulemaking process in rule 2.140 “to codify the procedures for changes to all Florida rules of procedure,” and “to update those procedures based on current practice.” *Fla. Rules of Jud. Admin.*, 389 So. 2d at 204. All I’ve said is that once we codified the process of how we change our procedural rules, we have to stick to it or update the process again to catch up with current practice. But we can’t ignore the process altogether and do whatever we want, whenever we want to do it, as the concurring opinion suggests.

Look at the procedure for invoking our jurisdiction to review a decision of a district court of appeal. Article V, section 3(b)(3) says that we may review any decision of a district court of appeal “that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law,” art. V, § 3(b)(3), Fla. Const, but the constitution does not put a time limit on our review. The rules of appellate procedure do when they provide that, to invoke our discretionary jurisdiction, a notice must be filed “within 30 days
of rendition of the order to be reviewed.” Fla. R. App. P. 9.120(b). We haven’t read rule 9.120(b) as displacing our discretionary authority to review express and direct conflicts; we have read it as a procedural rule governing how our power is to be exercised. See Jackson v. Jones, No. SC18-1743, 2018 WL 6571192, at *1 (Fla. Dec. 13, 2018) (“To the extent petitioner is seeking discretionary review, this petition is dismissed because petitioner failed to timely file a notice with the district court to invoke this Court’s discretionary jurisdiction. See Fla. R. App. P. 9.120(b).”); Curry v. State, 36 So. 3d 655, 655 (Fla. 2010) (“Petitioner neither moved for rehearing of the August 12th opinion nor filed a notice to invoke this Court’s discretionary review within 30 days of that opinion. As such, it appears to the Court that the notice was not timely filed. See Fla. Rs. App. P. 9.020(i) & 9.120(b). It is therefore ordered that the cause is dismissed on the Court’s own motion, subject to reinstatement if timeliness is established on proper motion filed within 15 days from the date of this order.”).

Rule 2.140 is no different. It doesn’t displace our article V, section 2(a) procedural rulemaking authority; it is the procedural mechanism for exercising our constitutional authority.

This reading of rule 2.140 is hardly isolated. Since we created the rule 2.140 process, we have used it at least 284 times to consider new or amended procedural rules. That includes the ten times we used the rule 2.140 process to consider
adopting amendments to the evidence code. If any reading of rule 2.140 is isolated, it is the concurring opinion’s. The concurring opinion believes we can

13. See Amends. to Fla. Evid. Code, 210 So. 3d at 1235 (“We have for consideration the regular-cycle report of The Florida Bar’s Code and Rules of Evidence Committee (Committee), concerning legislative changes to the Florida Evidence Code and to section 766.102, Florida Statutes (2012).” (footnote omitted)); In re Amends. to Fla. Evid. Code, 144 So. 3d 536, 536 (Fla. 2014) (“We have for consideration the regular-cycle report filed by the Florida Bar Code and Rules of Evidence Committee (Committee) concerning recent legislative changes to the Florida Evidence Code (Code), see ch. 2011–183, § 1, Laws of Fla.; ch. 2012–152, § 1, Laws of Fla.; and to section 766.102(12) of the Florida Statutes, see ch. 2011–233, § 10, Laws of Fla.”); In re Amends. to the Fla. Evid. Code, 53 So. 3d 1019, 1019 (Fla. 2011) (“We have for consideration the regular-cycle report filed by the Florida Bar Code and Rules of Evidence Committee (Committee) concerning recent legislative changes to the Florida Evidence Code (Evidence Code).”); In re Amends. to the Fla. Evid. Code, 960 So. 2d 762, 762 (Fla. 2007) (“We have for consideration the regular-cycle report of The Florida Bar Code and Rules of Evidence Committee (Committee), concerning recent legislative changes to the Florida Evidence Code made in chapter 2005-46, sections 1-2, and chapter 2006-204, section 1, Laws of Florida.” (footnote omitted)); In re Amends. to the Fla. Evid. Code—Section 90.104, 914 So. 2d 940, 941 (Fla. 2005) (“We have for consideration a supplemental report of the Florida Bar Code and Rules of Evidence Committee (the Committee) concerning a recent amendment to section 90.104(1)(b) of the Florida Evidence Code made by chapter 2003-259, section 1, Laws of Florida. We have jurisdiction. See art. V, § 2(a), Fla. Const.; Fla. R. Jud. Admin. 2.130(c).”); Amends. to the Fla. Evid. Code, 891 So. 2d 1037, 1037 (Fla. 2004) (“We have for consideration the regular-cycle report of The Florida Bar Code and Rules of Evidence Committee (the committee), concerning recent legislative changes to the Florida Evidence Code made by chapter 2002-22, section 18; 2002-246, section 1; and 2003-259, sections 1, 2, and 3, Laws of Florida. See Fla. R. Jud. Admin. 2.130(c).”); In re Amends. to the Fla. Evid. Code, 825 So. 2d 339, 339 (Fla. 2002) (“We have for consideration the regular-cycle report of The Florida Bar Code and Rules of Evidence Committee (the committee), concerning recent legislative changes to the Florida Evidence Code made in chapters 2000-316, sections 1 and 2; 2001-132, section 1; and 2001-221, section 1, Laws of Florida. See Fla. R. Jud. Admin. 2.130(c).”); In re Amends. to the Fla. Evid. Code, 782 So. 2d 339, 339 (Fla. 2000) (“We have for consideration the
adopt or amend whatever procedural rule we want, on our own, at any time, and without publication, comment, or input from the bench and bar. But the cases relied on by the concurring opinion do not support such a reading. In them, we did not amend the rules on our own motion. We did so based on recommendations from committees made up of the bench and bar. The rules committees were involved in the amendment process. The concurring opinion’s cases gave notice that we were thinking of amending the rules; asked for comments; and considered the comments before adopting or amending the rules. See Amends. to Fla. Rules of App. P. 9.140, 194 So. 3d at 309 (“The Florida Supreme Court’s Criminal Court Steering Committee (Steering Committee) filed a petition proposing amendments to rule 9.140(g) (Appeal Proceedings in Criminal Cases; Briefs). . . . In considering the Court’s referral, the Steering Committee included liaisons from the Criminal Procedure Rules Committee and the Appellate Court Rules Committee. . . . The Steering Committee first published its proposed amendment to rule 9.140(g) in the September 15, 2015, edition of The Florida Bar News. The Steering

quadrennial report of The Florida Bar Code and Rules of Evidence Committee (the Committee), concerning amendments to the Florida Evidence Code which were made by the Legislature over the past four years.”); In re Fla. Evid. Code, 675 So. 2d 584, 584 (Fla. 1996) (“The Florida Bar has petitioned this Court to amend the Rules of Evidence to conform to statutory changes in the Evidence Code.”); In re Fla. Evid. Code, 638 So. 2d 920, 920 (Fla. 1993) (“The Florida Bar has petitioned this Court to amend the Rules of Evidence to conform to statutory changes in the Evidence Code.”).
Committee received two comments, and made changes to its proposal accordingly.

. . .  Upon consideration of the Steering Committee’s report and the comments received by the Steering Committee, the Court amends rule 9.140(g) as follows.”); 

Amends. to Fla. Rules of Crim. P.—R. 3.113, 139 So. 3d at 293 (“[T]he Supreme Court’s Criminal Court Steering Committee (Steering Committee) filed its petition in this case, proposing adoption of a new rule of criminal procedure, rule 3.113 (Minimum Standards for Attorneys in Felony Cases). . . . Following publication of the proposed new rule by the Court, comments were filed by the Criminal Procedure Rules Committee and the Florida Public Defender Association. . . .  

[H]aving considered the Steering Committee’s petition and the comments filed, we adopt Florida Rule of Criminal Procedure 3.113, as proposed by the Steering Committee.”); Fla. Rules of Civ. P.—S.V.P., 13 So. 3d at 1025 (“This matter is before the Court for consideration of a proposal by the Florida Supreme Court Criminal Court Steering Committee (Committee) to adopt the Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators.”); In re Amends. to the Fla. Rules of Civ. P.—Mgmt. of Cases Involving Complex Litig., 15 So. 3d at 558-60 (“The Task Force on the Management of Cases Involving Complex Litigation (Task Force) has submitted proposed amendments to the Florida Rules of Civil Procedure for our consideration. . . .  The Task Force . . . consisted of twenty members, including judges and lawyers from throughout
Florida with experience in handling and managing complex litigation. The proposed amendments were published in *The Florida Bar News*. The Court specifically asked the Florida Bar Civil Procedure Rules Committee (Civil Rules Committee) and the Family Law Rules Committee (Family Rules Committee) to comment on the proposed amendments. The Court received ten comments, including comments by the rules committees.” (footnotes omitted)); Amends. to *Fla. Rules of Crim. P. 3.992—Crim. Punishment Code Scoresheets*, 972 So. 2d at 863 (“The Supreme Court Criminal Court Steering Committee (Committee) has filed a petition proposing amendments to Florida Rule of Criminal Procedure 3.992.”).14 None of that happened here.

14. The rules in each case were proposed by either the criminal court steering committee or the task force on management of cases involving complex litigation. Both the steering committee and the task force were directed and encouraged to work with the bar committees in amending the rules. *See In re Crim. Ct. Steering Cmte.*, Fla. Admin. Order No. AOSC12-33 (July 9, 2012) (“The Steering Committee is directed to establish the necessary liaison relationships with the appropriate Florida Bar and other Supreme Court committees. The Steering Committee is authorized to pursue such proposed rule amendments jointly with the appropriate Florida Bar procedural rules committees and jointly review any amendments or proposals and indicate whether the Bar committee concurs; disagrees; or recommends modifications, further study, or other action with regard to the proposed rule amendments, and thereafter file any proposed amendments and comments in petition form with the Clerk of the Florida Supreme Court.”); *In re Task Force on Mgmt. of Cases Involving Complex Litig.*, Fla. Admin. Order No. AOSC06-53 (Sept. 19, 2006) (“The Task Force is also encouraged to seek advice and information from chief judges and other judicial officers, Bar rules committees, attorneys, and others, as appropriate. If the Task Force determines that amendments to existing rules or other development of new rules of court procedure are necessary, the Task Force is authorized to coordinate with any
After arguing that the majority opinion properly disregards rule 2.140 because of our internal operating procedures and past cases, the concurring opinion does a 180-degree turn and argues that the majority opinion follows the rulemaking process in rule 2.140 because more than two years ago, in February 2017, the court “had the benefit of Florida Bar recommendations, oral argument, and extensive public comments, pro and con.” Concurring op. at 8. The court, the concurring opinion says, is merely “reconsidering” its February 2017 decision declining to adopt the *Daubert* amendments. *Id.* at 8. Nothing in the text of rule 2.140, according to the concurring opinion, prohibits us from revisiting a two-year-old decision, as long as the process was followed some time in the past. *Id.* at 8.

This is wrong for four reasons. First, the text of rule 2.140 says that opinions adopting proposals, as the majority opinion does here, “should be issued in sufficient time for the rule changes to take effect on January 1 of the year following the reporting year.” Fla. R. Jud. Admin. 2.140(b)(7). Here, the code and rules of evidence committee submitted its report in February 2016 as part of the 2016 three-year cycle. That means the opinion adopting the proposal should have been issued within the year so that the rule could take effect on January 1, 2017.

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applicable rules committees.”). And indeed, as quoted in the string cite above, the rules committees participated in the rulemaking process.
Rule 2.140 does not contemplate a three-year opinion-writing process, as the concurring opinion proposes.

Second, the text of rule 2.140 does have a procedure for reconsidering decisions. “The supreme court may permit motions for rehearing to be filed on behalf of any person who filed a comment, The Florida Bar, any bar association, and the affected committee.” *Id.* We have used the rehearing process to reconsider rules decisions in the past, see, e.g., *In re Amends. to Fla. Evid. Code*, 144 So. 3d 536, 536 (Fla. 2014) (“The case is before the Court upon the motion for rehearing filed by the Florida Bar Code and Rules of Evidence Committee.”), but no motion for rehearing was filed in this case.

Third, even if rule 2.140 allowed for opinions adopting rules three years after the cycle report was filed and authorized the court to reconsider rules cases two years after a decision was already made, we may only rehear cases where a motion has been filed within fifteen days of our order or decision. Fla. R. App. P. 9.330(a)(1). And we may reconsider an order or decision under narrow circumstances “but not more than 120 days after its issuance.” *Id.* 9.340(a). Here, no rehearing motion was filed, and it has been more than 120 days since our order in *In re Amendments to the Florida Evidence Code* became final.

Fourth, the text of rule 2.140 requires that we have a fresh—rather than a three-year-old—report about proposed rule amendments from lawyers, judges, and
the public. The committee considering the rule change must submit its report to the board of governors no later than June 15 of the year prior to the end of the three-year cycle, and publish the recommended amendments. Fla. R. Jud. Admin. 2.140(b)(2). The public submits its comments about the proposed changes no later than August 1, and the committee must respond to the comments no later than October 31. Id. The board of governors has to consider each proposal and vote whether to recommend it by December 15. Id. 2.140(b)(3). The committee’s report must then be filed with the court no later than February 1 of the last year of the cycle. Id. 2.140(b)(4). If oral argument is necessary, the court is directed to set it in May or June. Id. 2.140(b)(5). The court is directed to issue its order adopting the proposed changes by January 1, the day after the last day of the three-year cycle. Id. 2.140(b)(7).

It has been more than three years since the code and rules of evidence committee sent its cycle report on the Daubert amendment to the court. In that time, lawyers, litigants, and judges have had another year of Daubert and two years of Frye. Understanding their on-the-ground experience is critical to deciding whether we should adopt the Daubert amendment. The concurring opinion sees no “value in” this. Concurring op. at 11. I do.

We created rule 2.140 so that we can have as much current feedback as possible from the lawyers, judges, and members of the public who will be affected
by the rules. By short-circuiting the strict timeframes in the rulemaking process, and relying on a stale committee report from two Olympics ago, we do ourselves, the branch, and the bar a disservice.

If time is of the essence, or there’s a concern for the administration of justice, as the concurring opinion suggests, we can refer rule amendments directly to a committee, they can be considered out-of-cycle, and they can even be treated as an emergency. Fla. R. Jud. Admin. 2.140(d)-(f). But there is no basis in rule 2.140 to ignore this process because we decided not to adopt the rule years earlier.

Following the concurring opinion’s logic, rules cases are never final. We can reconsider any evidentiary rule that we declined to adopt, so long as, at some point in the past, the proposed rule went through the rule 2.140 process. In 2000, for example, the code and rules of evidence committee sent us its cycle report recommending that we adopt as procedural, among other rules, a recent legislative amendment that expanded the former-testimony hearsay exemption. In re Amends. to the Fla. Evid. Code, 782 So. 2d 339, 339-40 (Fla. 2000). The court declined to adopt the amendment to the extent it was procedural because of “grave concerns about the constitutionality of the amendment.” Id. at 342. Can we go back, nineteen years later, and reconsider our earlier decision not to adopt the expanded
hearsay exemption without going through the rule 2.140 process, as the concurring opinion suggests we can with the Daubert amendment?

Another example: In 2014, the code and rules of evidence committee recommended in its regular-cycle report that we adopt as procedural the legislature’s creation in section 90.5021 of a “fiduciary lawyer-client privilege.” Amends. to Fla. Evid. Code, 144 So. 3d at 536. “We decline[d] to follow the Committee’s recommendation to adopt the new provision of the Code because we question[ed] the need for the privilege to the extent that it [was] procedural.” Id. at 537. Can we go back, five years later, and reconsider our decision to not adopt the fiduciary lawyer-client privilege without input from anybody?

We did reconsider the fiduciary lawyer-client privilege in 2018, but we did it the way it is supposed to be done. The code and rules of evidence committee sent us a recommendation, with the approval of the board of governors, that our 2014 decision “led to confusion for lawyers who represent fiduciaries, such as personal representatives, as well as for circuit court judges,” and “ask[ed] this Court to reconsider its 2014 decision.” In re Amends. to Fla. Evid. Code—2017 Out-of-Cycle Report, 234 So. 3d 565, 565-66 (Fla. 2018) (“We have for consideration the joint out-of-cycle report filed by the Florida Bar’s Probate Rules Committee (FPR Committee) and the Code and Rules of Evidence Committee (CRE Committee) (collectively Committees) asking this Court to reconsider its 2014 decision not to
adopt, to the extent it is procedural, chapter 2011–183, section 1, Laws of Florida, which created section 90.5021, Florida Statutes (2017), (Fiduciary lawyer-client privilege) of the Florida Evidence Code.”). Only “[a]fter considering the Committees’ report, the comments submitted to the Committees and filed with the Court, and the Committees’ response,” did we change our mind and adopt the fiduciary lawyer-client privilege. Id. at 566.

What we didn’t do was act on our own without notice or an opportunity for public comment, and we didn’t rely on years-old stale information from rules committees. We have never done that before, and we shouldn’t do it here without complying with the rules of judicial administration and appellate procedure.

*The legislature’s Daubert amendment is not procedural, so it cannot be adopted by us as a procedural rule.*

I also must dissent because the majority opinion uses our article V, section 2(a) rulemaking authority to adopt the *Daubert* amendment based on the faulty premise that it “is procedural in nature.” Majority op. at 2. It is not procedural. Section 90.702 is substantive, and we do not have the constitutional authority to adopt substantive laws as procedural rules.

While the burden is on us to “adopt rules for the practice and procedure in all courts,” art. V, § 2(a), Fla. Const., the power to enact substantive laws rests with the legislature. *Id.* art. III, § 1 (“The legislative power of the state shall be vested in a legislature of the State of Florida . . . .”). Neither branch is allowed to
exercise the powers of the other, id. art. II, § 3 ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.")}, so we cannot use our rulemaking power to adopt substantive laws, and the legislature (with some exceptions) cannot adopt procedural rules. See Caple v. Tuttle’s Design-Build, Inc., 753 So. 2d 49, 53 (Fla. 2000) ("In order to ascertain whether there is an infringement on this Court’s rulemaking authority, we must first determine whether the statute is substantive or procedural. If we find that the statute is ‘substantive and that it operates in an area of legitimate legislative concern,’ then we are precluded from finding it unconstitutional." (quoting VanBibber v. Hartford Accident & Indem. Ins. Co., 439 So. 2d 880, 883 (Fla. 1983)); Benyard v. Wainwright, 322 So. 2d 473, 475 (Fla. 1975) ("The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions . . . . Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions."). Although “[t]he distinction between substantive and procedural law is neither simple nor certain,” Caple, 753 So. 2d at 53, we have said that “[s]ubstantive law prescribes the duties and rights under our system of government,” while “[p]rocedural law concerns the means and method to apply and enforce those duties and rights.” Benyard, 322 So. 2d at 475.
Section 90.702 establishes the right of litigants to introduce expert testimony in the courts. See § 90.702 (“[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” certain conditions are met.). The Daubert amendment establishes the right and sets out the litigant’s duties in seeking to introduce the expert testimony. See ch. 13-107, § 1, Laws of Fla. (allowing expert testimony if “(1) [t]he testimony is based upon sufficient facts or data; (2) [t]he testimony is the product of reliable principles and methods; and (3) [t]he witness has applied the principles and methods reliably to the facts of the case”). The Daubert amendment tells us what kinds of expert evidence a party has the right to introduce at trial and defines the scope of that right. We have recognized that evidentiary rules may “be substantive law and, therefore, the sole responsibility of the legislature.” In re Fla. Evid. Code, 372 So. 2d 1369, 1369 (Fla. 1979), clarified, 376 So. 2d 1161 (Fla. 1979).

Unsurprisingly, then, our courts have held that similar statutes establishing and defining the right of a party to introduce evidence at trial are substantive. Section 921.141(7), for example, gives the prosecution in a death-penalty case the right to introduce “victim impact evidence . . . designed to demonstrate the victim’s uniqueness as an individual human being and the resultant loss to the community’s members by the victim’s death.” In Burns v. State, we rejected the
defendant’s argument that section 921.141(7) is a procedural rule that “improperly regulates practice and procedure.” 699 So. 2d 646, 653 (Fla. 1997); see also Looney v. State, 803 So. 2d 656, 675 (Fla. 2001) (plurality opinion) (“Looney next argues that section 921.141(7), Florida Statutes (Supp. 1996), allowing the admission of victim impact evidence, is a usurpation of this Court’s rulemaking authority vested in it by the Florida Constitution. We find Looney’s argument is without merit.” (footnote omitted) (citation omitted)); Booker v. State, 397 So. 2d 910, 918 (Fla. 1981) (“[W]e have held that section 921.141, Florida Statutes (1977), does not violate the requirements of article V, section 2(a), Florida Constitution, because it attempts to govern practice and procedure.”); Dobbert v. State, 375 So. 2d 1069, 1071-72 (Fla. 1979) (“Dobbert argues that the death penalty statute is unconstitutionally violative of article V, section 2(a), Florida Constitution, because it attempts to govern practice and procedure . . . . We have considered each of these arguments and find them to be without merit.”).

Also, in civil commitment proceedings for sexually violent predators, the parties have the right to admit “[h]earsay evidence, including reports of a member of the multidisciplinary team or reports produced on behalf of the multidisciplinary team . . . unless the court finds that such evidence is not reliable.” § 394.9155(5), Fla. Stat. (2000). In Cartwright v. State (In re Commitment of Cartwright), 870 So. 2d 152 (Fla. 2d DCA 2004) (Canady, J.), the committed party argued that the
right to admit hearsay evidence violated “the provision of the Florida Constitution vesting the supreme court with the authority to adopt procedural rules.”  Id. at 156. The district court concluded that the argument “that section 394.9155(5) violates article V, section 2(a), must be rejected.”  Id. at 161. “Just as the legislative authorization of the consideration of hearsay testimony in capital sentencing proceedings does not violate article V, section 2(a), so the legislative authorization of the consideration of hearsay testimony in Ryce Act proceedings does not violate that constitutional provision.”  Id.

The Daubert amendment is no different than the statutes allowing victim impact evidence in death-penalty cases and hearsay reports in Jimmy Ryce Act cases. Section 90.702, like the other two statutes, establishes the right of parties to introduce evidence in our courts by abrogating the common law prohibition against such evidence. See Leslie A. Lunney, Protecting Juries from Themselves: Restricting the Admission of Expert Testimony in Toxic Tort Cases, 48 SMU L. Rev. 103, 105 (1994) (“Because of these risks, the common law imposed a number of constraints on the admissibility of expert witness testimony, thus limiting the issues and the bases on which an expert would be permitted to testify.”); Julie A. Seaman, Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony, 96 Geo. L.J. 827, 832 (2008) (“The Federal Rules of Evidence, enacted in 1975, facilitated this explosion of expert influence by
loosening the strict common law rules that had restricted expert witness testimony both in substance and in the procedures mandated for eliciting it.”). The Daubert amendment, like the other two statutes, lays out the duties of the parties in introducing such evidence. If the death-penalty victim impact statute and the Jimmy Ryce Act hearsay statute are substantive, then so is section 90.702. It fits within our definition of substantive law and is consistent with our case law holding similar evidentiary statutes as substantive.

I understand we held in DeLisle that section 90.702 “is not substantive” and “does not create, define, or regulate a right.” 258 So. 3d at 1229. But we were wrong15 and acted without jurisdiction16 in DeLisle, and I look forward to the day we have a proper case or controversy so we can revisit our holding. While DeLisle is our precedent until that day, I would not build upon its shaky foundation by relying on its erroneous holding so we can adopt a new procedural rule. We

15. As just one example of how wrong our DeLisle opinion was, we didn’t cite, discuss, quote, or acknowledge Booker, Burns, Dobbert, Looney, or Cartwright, even though they were quoted and discussed at length by the respondent and amici and are the prior decisions of this court and others most on point in deciding whether a rule of evidence is procedural or substantive. The court, instead, relied on non-evidentiary rules cases and Glendening v. State, 536 So. 2d 212 (Fla. 1988), which discussed the procedural/substantive divide for retroactivity purposes, but said nothing about our rulemaking authority under article V, section 2(a). Only by ignoring what was in front of us were we able to reach the conclusion that we did.

16. See DeLisle, 258 So. 3d at 1236-37 (Canady, C.J., dissentsing).
shouldn’t compound one error by, on our own initiative, shoveling another case on top of it.

The concurring opinion responds that we “routinely adopt[] evidence rules ‘to the extent they are procedural’—without deciding whether they are procedural,” and cites four cases to support the proposition. Concurring op. at 11. I agree.

But the majority opinion does more than adopt the amendments to section 90.702 to the extent they are procedural. The majority opinion “adopt[s] the amendments to section 90.702 as procedural rules of evidence.” Majority op. at 7 (emphasis added). Not “to the extent they are procedural,” but “as procedural rules of evidence.” Id.

The concurring opinion, in “fully concur[ring] in the majority opinion,” Concurring op. at 7, is willing to double down on our mistake in *DeLisle* by treading on the legislature’s turf and adopting a substantive rule as procedural. I am not. I’d rather fold and wait to play another hand.

Original Proceedings – Florida Evidence Code
Valencia Golf and Country Club Homeowners' Association, Inc. (Valencia), appeals from a final judgment that awards attorneys' fees of $29,699 and costs of
$5188.58 to the appellees, Community Resource Services, Inc. (CRS), and Orangetree Homeowners’ Association, Inc. (Orangetree HOA), as prevailing parties in the litigation. Valencia contends that even though it voluntarily dismissed its complaint against the appellees, the appellees were not prevailing parties entitled to an award of fees and costs. We agree and reverse.

The Valencia Golf and Country Club residential community in Naples, Collier County, is one of several that make up a larger master planned development known as Orangetree. The appellant is a homeowners’ association that operates the Valencia Golf and Country Club residential community. Appellee Orangetree HOA is the master association for the Orangetree development. Residences in Valencia are governed both by the Declaration of Covenants, Conditions, and Restrictions of Valencia Golf and Country Club and by the Declaration of General Protective Covenants and Restrictions of Orangetree.

Article X, section 22 of the Valencia Declaration states that Valencia "has entered or will enter into an agreement" with the appellee, Community Resource Services, Inc. ("CRS"), for the provision of effluent (treated wastewater) for irrigation to Valencia Golf and Country Club. In addition, article VII, section 7.16 of the Master Declaration asserts that Orangetree HOA "has entered into an Agreement to supply the residential dwelling owners with cable television services." In 2014, a dispute arose between the parties over the provision of irrigation and cable services to Valencia. Valencia filed a complaint for declaratory relief, seeking the court's interpretation of certain terms in the covenants and cable and irrigation service agreements. In its pretrial statement, Valencia identified the key issues to be decided by the court as
whether the appellees had "the right to provide services, under what agreement, and under what provisions of such agreement do they have the right to increase the cable rates and irrigation water rates, and the means by which those increases are calculated and levied."

During discovery, Valencia obtained a copy of the relevant cable agreement which cleared up the matters concerning cable service. Valencia also obtained a copy of the Irrigation Water Service Agreement reached in 2005 between CRS and the predecessor to Valencia. Later in January 2017, the Board of County Commissioners and CRS entered into an agreement regarding the use of effluent in the Valencia Golf and Country Club Community (the Delivery Agreement). The Delivery Agreement, which Valencia also executed, read together with the 2005 Agreement, clarified the rate to be charged for effluent and under what circumstances that rate could change—precisely the outcome Valencia sought in its claim for declaratory relief.

On January 31, 2017, the court held a status conference, after which it was noted in the record that all matters in controversy had been resolved. On February 1, 2017, Valencia filed a notice of voluntary dismissal, explaining that the cable service and irrigation water rate issues had been settled. It stated that during the pendency of the action, an agreement had been reached which "resolved the bona fide, actual, present and practical need for a declaration of the court to determine what agreements governed the provision of services, who the parties to those agreements are, the services to be provided, the rates to be charged, and other provisions that govern the contractual relationship."
Thereafter, CRS and Orangetree HOA filed a motion to tax attorneys' fees and costs. They argued that the appellees were the prevailing parties in the matter, citing Yampol v. Schindler Elevator Corp., 186 So. 3d 616, 617 (Fla. 3d DCA 2016), for the general rule that the defendant is the prevailing party when a plaintiff voluntarily dismisses an action. Valencia countered that there was no contractual or statutory basis for an award of fees but that assuming fees were available, Valencia should be considered the prevailing party because "[a]s a result of the litigation, the Defendants were forced to provide documents (agreements) requested and the Defendants were forced to execute a separate and distinct agreement clarifying its obligations to the Plaintiff, just as was demanded in the Complaint."

The trial court entered an order granting the appellees' motion to tax attorneys' fees and costs, as to entitlement only, pursuant to sections 720.305 and 57.105, Florida Statutes (2015). Thereafter, the court rendered the final judgment for fees and costs in the amount of $34,887.58.

"In general, when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party." Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 919 (Fla. 1990). However, this case falls under the exception, rather than the general rule. As the Fourth District stated in Kelly v. Bankunited, FSB, 159 So. 3d 403, 407 (Fla. 4th DCA 2015):

[!]In a situation where both Appellant and Appellee compromised in effectively agreeing to a settlement to end their litigation, we will not hold Appellee responsible for payment of Appellant's attorneys' fees, as Appellee's dismissal of the pending complaint following the settlement was the obvious and appropriate course of action. Where a plaintiff's voluntary dismissal results in neither party
substantially prevailing in the litigation outcome, neither party is the prevailing party for purposes of attorneys' fees.

See also Tubbs v. Mechanik Nuccio Hearne & Wester, P.A., 125 So. 3d 1034, 1041 (Fla. 2d DCA 2013) ("A court may look behind a voluntary dismissal at the facts of the litigation 'to determine whether a party is a "substantially" prevailing party.' " (quoting Walter D. Padow, M.D., P.A. v. Knollwood Club Ass'n, 839 So. 2d 744, 745 (Fla. 4th DCA 2003))). The purpose of section 57.105 is to deter misuse of the judicial system and discourage needless litigation. Kelly, 159 So. 3d at 406. "[T]o declare [appellees] the prevailing part[ies] and entitled to attorneys' fees under these facts would be contrary to that goal." Id.; see also Tubbs, 125 So. 3d at 1041. We reach this result to avoid penalizing Valencia with a substantial assessment of attorneys' fees for dismissing their claims where a continuation of the lawsuit "would have been a waste of resources." See Padow, 839 So. 2d at 746.

Accordingly, we reverse the final judgment awarding attorneys' fees and costs to Orangetree HOA and CRS.

Reversed.

SILBERMAN and LENDERMAN, JOHN C., ASSOCIATE SENIOR JUDGE Concur.

Petition for Writ of Certiorari to the Circuit Court for Lee County; Keith R. Kyle, Judge.


Dolores D. Menendez, City Attorney, and Steven D. Griffin, Assistant City Attorney, Cape Coral, for Respondent.

KELLY, Judge.
Matlacha Civic Association, Inc., and J. Michael Hannon (collectively the "Matlacha petitioners"), and David McGugan, Gary Rehill and Robert C. Tomes (collectively the "Cape Coral petitioners") seek second-tier certiorari review of the circuit court's dismissal of the petitioners' original certiorari petition. We conclude that with respect to the Cape Coral petitioners, the circuit court departed from the essential requirements of law in determining they did not have standing to challenge an annexation ordinance passed by the City of Cape Coral.

In 2012, the City of Cape Coral purchased six parcels of land located on the eastern edge of the island community of Matlacha in unincorporated Lee County. In 2016, the City Council of Cape Coral proposed Ordinance 57-16 to annex the property into the city limits of Cape Coral. Cape Coral used the "voluntary annexation" procedure pursuant to section 171.044, Florida Statutes (2017), because it owned the parcels.

When the Cape Coral City Council conducted a hearing on the proposed annexation, it was met with significant opposition. Hundreds of objecting citizens, including the Cape Coral and Matlacha petitioners, appeared at the hearing. Among the many objections raised was an assertion that under the annexation statute, it is improper for a municipality to purchase land outside its jurisdiction and then use the "voluntary annexation" procedure to annex those parcels into the city. Despite the objections, the City passed the ordinance.

The Matlacha petitioners and the Cape Coral petitioners filed a three-count action in the circuit court to challenge the annexation. At issue here is the first count which sought certiorari review of the ordinance pursuant to section 171.081(1).
The petitioners challenged the ordinance on three fronts: (1) Cape Coral's use of voluntary annexation was not permitted under the plain language of the annexation statute; (2) even so, the City had not met the requirements of the annexation statute in that (a) the property to be annexed creates an illegal pocket or enclave, (b) there is no urban character to the property or to the surrounding wilderness land, (c) there is no reason or ability for the City to provide services to the property anytime soon, and (d) the property is not contiguous to Cape Coral; and (3) passage of the ordinance was not supported by competent substantial evidence. In response, the City argued that the petitioners lacked standing to challenge the ordinance. Ultimately, the trial court agreed with the City and dismissed the petition for lack of standing. The petitioners have asked this court to issue a writ of certiorari quashing the order of the circuit court.

Our review of a second-tier petition for writ of certiorari is limited to whether the circuit court afforded the petitioner procedural due process and whether it applied the wrong law; that is, whether it departed from the essential requirements of law. See Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d 1086, 1092 (Fla. 2010). A departure from the essential requirements of law includes failure to comply with constitutional law and statutes that deal "with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision." Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 890 (Fla. 2003). Matters of statutory interpretation present a question of pure law and are subject to de novo review. Jackson-Shaw Co. v. Jacksonville Aviation Auth., 8 So. 3d 1076, 1085 (Fla. 2008). Questions regarding standing are also pure questions of law to be reviewed de novo. Edgewater Beach Owners Ass'n v. Walton County, 833 So. 2d 215, 219 (Fla. 1st DCA 2002), receded
from on other grounds, Bay Point Club, Inc. v. Bay County, 890 So. 2d 256 (Fla. 1st DCA 2004).

Section 171.081(1) provides for review of an annexation or contraction and states, in pertinent part:

Any party affected who believes that he or she will suffer material injury by reason of the failure of the municipal governing body to comply with the procedures set forth in this chapter for annexation or contraction or to meet the requirements established for annexation or contraction as they apply to his or her property may file a petition in the circuit court for the county in which the municipality or municipalities are located seeking review by certiorari.

Section 171.031(5) defines "parties affected" as "any persons or firms owning property in, or residing in, either a municipality proposing annexation or contraction or owning property that is proposed for annexation to a municipality or any governmental unit with jurisdiction over such area." The trial court found, and the City concedes, that the Cape Coral petitioners are "parties affected" as defined by section 171.031(5).

The City argued that standing under section 171.081(1) required more than being a "party affected." Not only must the petitioner be a "party affected," the petitioner must demonstrate he or she has suffered a present "material injury" as a direct result of the annexation. The trial court dismissed the petition after concluding the Cape Coral residents had not alleged they had suffered a present material injury. The petitioners argue that the trial court departed from the essential requirements of law by failing to abide by the plain language of section 171.081(1), the result of which was to deprive them of their statutory right to seek review of the annexation. We agree.
Section 171.081(1) authorizes any "party affected who believes that he or she will suffer material injury by reason of the failure" of a municipality to comply with the statutory procedure for annexation to seek certiorari review of the annexation. (Emphasis added). The trial court's conclusion that the petitioners had to allege a present material injury directly resulting from the annexation is contrary to the plain language of the statute. This was a departure from the essential requirements of law. See Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 727 (Fla. 2012) ("[S]tatutes also constitute 'clearly established law,' meaning that a district court can use second-tier certiorari to correct a circuit court decision that departed from the essential requirements of statutory law." (citing Kaklamanos, 843 So. 2d at 890)). The Cape Coral petitioners asserted their belief that they will suffer material injury from the City's unlawful annexation, and this was sufficient to afford them the right to pursue their statutory right to seek review of the annexation. See City of Tampa v. Hillsborough County, 504 So. 2d 10, 11 (Fla. 2d DCA 1986) (explaining that the trial court applied the correct principles of law when it based its standing determination on the fact that the petitioner demonstrated a belief that it would suffer a material injury). 1

The trial court determined, correctly, that the Matlacha petitioners are not "parties affected" as defined by section 171.031(5). Based on this determination, it

1In arguing that the petitioners must demonstrate a present material injury, the City, and subsequently the trial court, relied on this court's decision in City of Auburndale v. Town of Polk City, 898 So. 2d 1101 (Fla. 2d DCA 2005). That case is inapposite because it does not involve the statutory definition of "parties affected." Polk City did not assert it was a party "affected" pursuant to section 171.031(5), Florida Statutes (2003), presumably because it did not come within the statutory definition. Instead, it relied on section 180.06, Florida Statutes (2003), and claimed that because the annexation would affect its rights under that statute, it was entitled to challenge the annexation. See City of Auburndale, 898 So. 2d at 1103.
concluded they lacked standing. Here, the Matlacha petitioners argue they have constitutional standing to challenge what they contend is the City's unconstitutional application or ultra vires use of the annexation statute and that they may use a writ of common law certiorari to pursue their challenge. They assert that because they are taxpayers and have suffered a special injury, they have standing to challenge the lawfulness of the City's purchase, ownership, and annexation of the parcels. They fault the trial court for failing to even address this issue and argue that by failing to address the issue, it deprived them of their common law right of certiorari. The City contends, among other things, that section 171.081 is the exclusive means to challenge an annexation.

We need not decide whether common law certiorari is available to the Matlacha petitioners and consequently whether the trial court deprived them of the right to proceed under a common law writ because we conclude that the issue was not properly before the trial court. The certiorari petition before the trial court alleges that it was brought pursuant to section 171.081(1). The petitioners reaffirmed that they were proceeding under the statute in their claim for attorney's fees pursuant to section 171.081(2), which entitles a party challenging an annexation under section 171.081(1) to recover fees. When challenged on standing in the trial court, the Matlacha petitioners sought to expand the statutory definition of "party affected" by asserting the City's actions were unlawful and that the definition "presupposes a lawful resort to the statute by the municipality." While the petitioners urged the trial court to find that they had standing based on what they argued was the City's unconstitutional application of the annexation statute, the only fair reading of the record is that they wanted to proceed
under section 171.081. Under these circumstances, we find no departure from the essential requirements of law in the trial court's reliance on the definition of "parties affected" in section 171.031(5) to determine whether the Matlacha petitioners had standing to proceed under section 171.081(1).

Accordingly, we grant the petition for writ of certiorari and quash that portion of the circuit court's order finding that the Cape Coral petitioners did not have standing to challenge the City's annexation ordinance.

Petition granted, order quashed in part, and remanded.

SILBERMAN, J., and LENDERMAN, JOHN C., ASSOCIATE SENIOR JUDGE, Concur.
Third District Court of Appeal
State of Florida

Not final until disposition of timely filed motion for rehearing.

No. 3D17-2443
Lower Tribunal No. 15-27242

Sea Vault Partners, LLC,
& Homero Meruelo,
Appellants,

vs.

Bermello, Ajamil & Partners, Inc,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Rosa I. Rodriguez, Judge.

Capote Grandaal, P.L., and Susan Capote, for appellants.

Daniels, Rodriguez, Berkeley, Daniels & Cruz, P.A., and Daniel A. Pelz, for appellee.

Before SALTER, SCALES, and LINDSEY, JJ.

LINDSEY, J.
Sea Vault Partners, LLC and Homero Meruelo (collectively, “Sea Vault”) appeal a final judgment awarding Bermello, Ajamil & Partners, Inc. (“BAP”) monetary sanctions against Sea Vault for bad-faith failure to arbitrate. Despite the lengthy and complicated procedural history of this case, the resolution of this appeal turns on whether the trial court erred by awarding monetary sanctions against Sea Vault for failing to pay a $5,000 fee in an arbitration proceeding pending before the American Arbitration Association. For the reasons set forth below, we find that it did, and reverse.¹

I. BACKGROUND

In December 2014, BAP and Sea Vault entered into an agreement (the “Agreement”) whereby BAP would provide architectural services for a development project located at 1583 NW 24th Ave, Miami, FL 33125 (the “Real Property”).

¹ We do not reach the issue of whether the amount of sanctions awarded was error because it is not necessary to do so given our decision. See Menendez v. W. Gables Rehab. Hosp., LLC, 123 So. 3d 1178, 1181 n.2 (Fla. 3d DCA 2013) (“[I]f it is not necessary to decide more, it is necessary not to decide more.” (alteration in original) (quoting PDK Labs., Inc. v. U.S. D.E.A., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J. concurring) (recognizing the cardinal principle of judicial restraint))); Pintado v. Miami-Dade Cty. Hous. Agency, 20 So. 3d 929, 933 (Fla. 3d DCA 2009) (Shepherd, J., concurring) (“Because ‘[t]his is a sufficient ground for deciding this case, ... the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.” (quoting PDK Labs, 362 F.3d at 799)); Mann v. State, 937 So. 2d 722, 730 (Fla. 3d DCA 2006) (Shepherd, J., concurring) (citing N. Fla. Women’s Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 640 (Fla. 2003) (“Pursuant to the doctrine of judicial restraint, we decline to address petitioners’ remaining constitutional claims because resolution of those claims is unnecessary for the disposition of this case.”)).
Things did not work out as BAP and Sea Vault originally planned, and in October 2015, BAP recorded a claim of lien on the Real Property, alleging that Sea Vault had failed to pay BAP for services rendered under the Agreement. After recording its claim of lien, BAP requested mediation pursuant to the Agreement.²

In November 2015, Brisas Del Rio, Inc. (“Brisas”), a non-party to the Agreement,³ filed an action in the trial court against BAP seeking to discharge BAP’s claim of lien (the “Trial Court Action”) on the basis that BAP had improperly recorded the claim of lien. Brisas claimed to be the actual owner of the Real Property and asserted the Agreement was only between BAP and Sea Vault.

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² The Agreement required BAP and Sea Vault to mediate disputes arising thereunder before the American Arbitration Association (the “AAA”). If issues remained unresolved after mediation, the Agreement provided that the parties would then proceed to arbitrate before the AAA. More specifically, the Agreement provided as follows:

§ 4.2.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution.

. . . .

§ 4.2.4 If the parties do not resolve a dispute through mediation pursuant to this Section 4.2, the method of binding dispute resolution shall be . . . [a]rbitration pursuant to Section 4.3 of this Agreement[.]

Section 4.3 of the Agreement provides that the agreement to arbitrate “shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.”

³ Brisas is not a party to the instant appeal.
In December 2015, BAP filed its answer, affirmative defenses, and counterclaim against Brisas in the Trial Court Action. In January of 2016, though mediation was not yet complete, BAP voluntarily initiated an arbitration proceeding with the AAA alleging Sea Vault had failed to compensate BAP for services rendered under the Agreement (the “Arbitration”). The Arbitration was stayed pending the outcome of mediation. Mediation between BAP and Sea Vault ended in an impasse in May 2016.

Shortly thereafter, BAP filed an amended counterclaim, in the parallel Trial Court Action, adding Sea Vault as counter-defendants. BAP’s amended counterclaim added fraudulent misrepresentation claims against Sea Vault. A few months later, Sea Vault filed their answer in the Arbitration. The Arbitrator set a final hearing date for March 22-24, 2017. In December of 2016, Sea Vault filed a motion for injunctive relief in the Trial Court Action (the “Injunction Motion”), requesting that the parties be required to litigate the issues in the Trial Court Action instead of in the Arbitration.4

On February 13, 2017, the trial court held a hearing on Sea Vault’s Injunction Motion and entered a hand-written order denying the Injunction Motion (“Injunction

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4 On December 22, 2016, Sea Vault filed a motion to stay the proceedings in the Arbitration pending resolution of their Injunction Motion, filed the day before in the Trial Court Action. On January 3, 2017, the Arbitrator denied Sea Vault’s motion to stay, concluding that the Arbitration would continue absent an order from the trial court enjoining the matter.

Also, on March 2, 2017, the Arbitrator notified both parties that Sea Vault had not yet paid the required $5,000 deposit for the Arbitrator’s compensation. A few days later, BAP filed a motion in the Arbitration asking the Arbitrator to sanction Sea Vault for its failure to pay the $5,000 deposit by precluding Sea Vault from presenting a defense and by limiting Sea Vault’s participation to cross-examination of BAP’s witnesses. The Arbitrator entered an order denying BAP’s motion on the basis that the relief sought was not available under the Arbitration Rules of the AAA.

On March 17, 2017, BAP filed an emergency motion in the Trial Court Action asking the trial court to award monetary sanctions against Sea Vault for bad faith

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5 On May 11, 2017, this Court recognized Sea Vault’s notice of voluntary dismissal and dismissed the appeal.
6 The Arbitrator informed the parties that its options for non-payment included proceeding with the Arbitration and continuing collection efforts or suspending or terminating the case.
7 BAP did not request monetary sanctions or an order compelling Sea Vault to pay the deposit in this motion.
8 On March 20, 2017, the Arbitration was suspended, and on April 24, 2017, the Arbitration was terminated due to Sea Vault’s failure to make the required payment.
failure to arbitrate ("Sanctions Motion"). The trial court held a hearing on the Sanctions Motion less than two weeks later. On April 21, 2017, the trial court entered an order granting BAP’s motion for sanctions and finding BAP was entitled to an award of all its reasonable attorney’s fees and costs incurred in the Arbitration. In so doing, the trial court concluded it had jurisdiction pursuant to sections 682.015 and 682.031, Florida Statutes (2017), as well as under the court’s inherent authority to impose sanctions for bad-faith conduct.

The trial court then conducted an evidentiary hearing on May 30; August 14; and August 16, 2017, to determine the amount of fees and costs to which BAP was entitled. On October 12, 2017, the trial court entered an 18-page Final Judgment (the “Final Judgment”) awarding sanctions in favor of BAP and against Sea Vault in the amount of $302,848.03. After the trial court denied Sea Vault’s motion for rehearing on October 31, 2017, this timely appeal ensued.

II. STANDARD OF REVIEW

Pure questions of law are subject to a de novo review. Pino v. Bank of New York, 121 So. 3d 23, 31 (Fla. 2013) (observing that de novo review applied to its determination whether the trial court had inherent authority to strike a notice of voluntary dismissal); see also Wells v. Halmac Dev., Inc., 189 So. 3d 1015, 1019 (Fla. 3d DCA 2016) (“[T]o the extent the trial court’s determination on a motion for attorney’s fees is based on an issue of law, our standard of review is de novo.”).
Accordingly, this Court’s determination whether the trial court was authorized to sanction Sea Vault for their conduct in the Arbitration Proceeding, a separate proceeding, which was not court-ordered, must be reviewed de novo.9

III. ANALYSIS

The sole basis for the trial court’s award of sanctions was Sea Vault’s failure to pay a $5,000 deposit for fees and costs in March 2017. The trial court premised its decision to award sanctions for this failure to pay on its February 13, 2017 Injunction Order. Specifically, the trial court stated:

[Sea Vault] had repeatedly sought to avoid arbitration, however, this Court ordered them to proceed with the arbitration on February 13, 2017, when this Court entered its Order denying [Sea Vault’s] Motion for Injunctive Relief . . . The Injunction Order required the parties to proceed to the arbitration trial that was scheduled for March 22, 2017 through March 24, 2017.

However, despite the trial court’s mistaken characterization of its Injunction Order, the Order does not require the parties to proceed with the Arbitration. The only relief requested in Sea Vault’s Injunction Motion was for the trial court to require BAP to litigate the issues in the Trial Court Action. The only ruling rendered by the

9 If the trial court were authorized to sanction Sea Vault, its decision to impose sanctions for bad-faith conduct would be reviewed for an abuse of discretion. See, e.g., Goldman v. Estate of Goldman, 166 So. 3d 927, 929 (Fla. 3d DCA 2015) (“We review a trial court’s decision to impose sanctions for bad faith conduct for abuse of discretion.”).
trial court was a denial of that request. The Injunction Order simply stated “Denied.”

As such, the trial court never affirmatively ordered the parties to arbitrate, neither on the face of the Injunction Order nor anywhere in the transcript of the hearing from which it sprung.

Further, the trial court erred in sanctioning Sea Vault for its failure to pay the $5,000 deposit because this issue was not before it. See Fla. Fish & Wildlife Conservation Comm’n v. Wakulla Fishermen’s Ass’n, 141 So. 3d 723, 729 (Fla. 1st DCA 2014) (“In ... civil matters, courts are not authorized to award relief not requested in the pleadings.” (quoting Worthington v. Worthington, 123 So. 3d 1189, 1190 (Fla. 2d DCA 2013))); Antoniadis v. EARCA, N.V., 442 So. 2d 1001, 1001 (Fla. 3d DCA 1983) (holding that the trial court lacked the authority to fashion a remedy that was not raised by any of the pleadings and not tried by consent)); see also Gold v. M & G Servs., Inc., 491 So. 2d 1297, 1299 (Fla. 3d DCA 1986) (‘‘The trial court erred in awarding damages to a party not seeking the relief granted.” (citing Antoniadis, 442 So. 2d at 1001)).

At the time of the Injunction Order, there existed two parallel proceedings: the Arbitration and the Trial Court Action. There was no pending request to compel Sea Vault to pay the $5,000 deposit in either proceeding nor had such request ever been made. Accordingly, it was error to for the trial court to award sanctions against
Sea Vault for failing to do something no party had asked that Sea Vault be compelled to do.

Moreover, a trial court’s inherent authority does not extend to a party’s conduct in arbitration. Once a matter has been voluntarily submitted to arbitration, a trial court lacks authority to become involved in the arbitration. See John B. Goodman Ltd. P’ship v. THF Constr., Inc., 321 F.3d 1094, 1098 (11th Cir. 2003) (“[O]nce the district court was satisfied the parties assented to the arbitration clause, it was for the arbitration panel, not the district court, to determine whether the construction contracts generally were enforceable under Florida law.”); Mogler v. Franzen, 669 So. 2d 269, 271 (Fla. 2d DCA 1995) (concluding that the trial court lacked jurisdiction to consider a party’s recoverable damages where the parties gave the arbitrator sole authority to determine issue by agreeing to binding arbitration).

Accordingly, the Arbitrator, not the trial court, was authorized to decide procedural questions in the arbitral dispute, such as the payment of fees and questions of timeliness. See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (“[P]rocedural questions which grow out of the dispute and bear on its final disposition’ are presumptively not for the judge, but for an arbitrator, to decide”); Dealer Comput. Servs., Inc. v. Old Colony Motors, Inc., 588 F.3d 884, 887 (5th Cir. 2009) (“Payment of fees is a procedural condition precedent that the trial
court should not review.”). Thus, the trial court was without authority to sanction Sea Vault for failing to pay the Arbitrator’s fee.

Finally, the trial court’s reliance on sections 682.015 and 682.031 was misplaced. Neither grants the trial court authority to sanction Sea Vault. Chapter 682, Florida Statutes, is known as the “Revised Florida Arbitration Code.” Section 682.015, irrelevant to the issue before us, governs the procedure for serving petitions and motions in the trial court.

Section 682.031 is entitled “Provisional remedies” and provides as follows:

(1) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(2) After an arbitrator is appointed and is authorized and able to act:

(a) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) A party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.
Subsection (1) is inapplicable because an arbitrator had already been appointed at the time of filing the Sanctions Motion. Subsection (2), applicable here, authorizes the Arbitrator to issue orders for provisional remedies and specifies that a party may move the court for a provisional remedy only “if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.” § 682.031(2)(b), Fla. Stat. (2019). Here, BAP filed its motion for sanctions in the Arbitration on March 6, 2017. The Arbitrator denied the motion one week later. Hence, no argument can be made that the Arbitrator was not able to act timely or that the Arbitrator could not provide an adequate remedy.

Three days later, BAP filed the Sanctions Motion in the Trial Court Action on March 17, 2017, seeking a second bite at the sanctions apple. Based on a plain reading of the statute, section 682.031(2)(b) does confer jurisdiction on the trial court to award sanctions simply because the Arbitrator declined to do so.

I. CONCLUSION

Accordingly, for the reasons set forth above, we reverse and remand for proceeding consistent herewith.

Reversed and remanded.
Third District Court of Appeal
State of Florida

Not final until disposition of timely filed motion for rehearing.

No. 3D18-794
Lower Tribunal No. 16-4683

Gino Falsetto, et al.,
Appellants,

vs.

Mitchell Liss, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Abby Cynamon, Judge.


Before EMAS, C.J., and LINDSEY and HENDON, JJ.

EMAS, C.J.
INTRODUCTION

Appellants, Gino Falsetto and Bernard Siegel, appeal an adverse partial summary judgment on their counterclaim and third-party claim against their former business partner, appellee Mitchell Liss. The trial court concluded that the parties’ 2014 Settlement Agreement (which included a general release) discharged appellants’ fraud claims, and that “there is no issue of contested fact that the allegations of Fraud did not occur prior to the [2014 Agreement].”

We reverse, holding a genuine issue of material fact remains in dispute: whether appellants knew or reasonably should have known about the alleged fraud in 2014 when the release was signed—in other words, whether appellants’ fraud claims had “accrued” at the time of the execution of the release.

FACTS AND PROCEDURAL BACKGROUND

A. The 2014 Settlement Agreement and General Release

Gino Falsetto and Mitchell Liss owned and operated three valet parking businesses: Double Park, Paradise Systems, and South Park. By agreement, “the parties were entitled to equal distributions and profits from the companies.” However, the parties had a falling out and, in April 2014, Liss sued Falsetto for injunctive relief, appointment of a receiver, judicial dissolution of the companies,

1 The parties’ respective companies are also parties to the lawsuit. The appellant companies include: Double Park, LLC, Paradise Systems, LLC, and South Park, LLC. The appellee company is DP Systems.
and monetary damages. In June 2014, the parties entered into the subject Settlement Agreement (2014 Agreement), which released the parties from any and all disputes, claims, causes of action, . . . whether past or present, known or unknown, filed or unfiled at present with any federal, state, or municipal court . . . . from the beginning of the world to the Effective Date of this Agreement.

(Emphasis added). It also provided that: “The releases contained in this Agreement are intended to be as broad and inclusive as Florida law permits.” Both parties were represented by counsel.

B. The Complaint, Counterclaim and Third-Party Claim

In February 2016, Liss and DP Systems sued Falsetto, Siegel, Double Park, Paradise Parking, and South Park for breach of the 2014 Agreement, alleging that appellants stopped making payments required under the 2014 Agreement. Appellants, in response, filed a counterclaim and third party claim against Liss, DP Systems, and John Battaglia\(^2\) (Liss’ business partner in DP Systems), alleging that Liss perpetrated a fraud and stole money from Paradise Parking. According to appellants, between 2010 and 2014 (before the 2014 Agreement was signed), Liss used his own company (DP Systems) to enter into a lucrative parking services contract with Latitude Condominium Association (Latitude). The “illegal subcontract,” they explained, provided Liss $30,000 a month for his company’s

\(^2\) Battaglia was dismissed as a party in this appeal.
services. Meanwhile, Liss was using Paradise Parking (appellant) to provide all of the parking services to the Latitude and paying appellants only a nominal fee ($1000/month). Appellants alleged that they discovered the fraudulent arrangement during discovery in Liss’s breach of contract lawsuit.

C. Motion for Summary Judgment

Liss moved for summary judgment on the counterclaim and defenses, contending they were barred by the 2014 Agreement’s general release. To support his motion, Liss relied in part on an email between Falsetto and Liss dated June 5, 2014. Liss contended that the email showed Falsetto knew or should have known about the alleged fraud at the time the parties entered into the 2014 Agreement.\(^3\)

Appellants filed a response with attachments including separate affidavits from Siegel and Falsetto, stating that, at the time the 2014 Agreement was executed, they did not know (nor could they have known) Liss and Battaglia were partners in DP Systems or that they had created the company “to compete with Paradise and Double Park” and to “steal business” by “confusing prospective customers into...”

\(^3\) The email read: “John Battaglia has been your partner and he still is and you and he have been operating the Parking operations at the Latitude since inception mostly for his benefit and yours. . . . You had always denied that John Battaglia was involved. Then when I confronted you with facts you finally admitted that you and John were partners. I know exactly who South Florida Management is so do not pretend that you are not involved . . . . [P]lease be advised that we will be addressing all of the outstanding and pending claims, lawsuit and other liabilities that you and John are clearly responsible for as Operators of the Latitude Account.”
believing that they were contracting with Double Park and/or its affiliates.” Both maintained they only learned of the fraud during discovery in Liss’s breach of contract lawsuit.

At the hearing on the motion, appellants contended that the trial court could not consider the June 5th email in support of appellees’ motion for summary judgment, because it had not been authenticated. Appellants further contended that the fraud claims had not yet accrued at the time the 2014 Agreement was signed because appellants did not know nor should they reasonably have known about the alleged fraud. The trial court did not explicitly rule on the admissibility of the June 5th email. However, in its order granting the motion, the trial court found that the 2014 Agreement released the claims of fraud because the alleged fraud occurred before the 2014 Agreement was signed, and that the June 5th email “clearly demonstrates that [appellants] knew or should have known of the facts supporting the claim of fraud . . . .” This appeal followed.

**DISCUSSION**

Liss generally argues first, that the fraud claims are barred because the release prohibits “known and unknown claims;” and second, that the June 5th email shows appellants knew or should have known about the alleged fraud, specifically Liss’s arrangement with Latitude. We find no merit in either argument.
“[T]he courts’ willingness to enforce general releases is not absolute.” Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co., 761 So. 2d 306, 315 (Fla. 2000). Instead, “enforcement is premised upon the assumption that the released claims are those that were contemplated by the agreement.” Id. Florida courts, including this Court, have explained that “a general release . . . does not bar a claim which had not yet accrued when the release was executed.” Hold v. Manzini, 736 So. 2d 138, 141 (Fla. 3d DCA 1999); see e.g., Schornberg v. Panorama Custom Home Builders, Inc., 972 So. 2d 243 (Fla. 2d DCA 2007); The Plumbing Serv. Co. v. Traveler’s Cas. and Sur. Co., 962 So. 2d 1056 (Fla. 5th DCA 2007); Floyd v. Homes Beautiful Constr. Co., 710 So. 2d 177 (Fla. 1st DCA 1998).

Despite Liss’s argument to the contrary, a release of an “unknown” claim does not necessarily release an “unaccrued” or future claim, as the terms are not synonymous. For instance, in Schornberg, Traveler’s and Floyd, the reviewing courts found that, to bar unknown claims in those cases, the claims must have accrued at the time the release was executed. Compare Schornberg, 972 So. 2d at 244 (release language: the homeowner “releases and discharges Builder . . . from any and all claims, . . . including, without limitation, attorneys’ fees, of any nature whatsoever, known or unknown, suspected or unsuspected, existing at any time on or before the Effective Date”) (emphasis added); Traveler’s, 962 So. 2d at 1057 (release language: the parties agreed to “waive, discharge and satisfy all causes of
action whether known or unknown, demands of every kind or character and any and all claims they have or may have whether known or unknown against THE PLUMBING SERVICE COMPANY its employees and/or officers from the beginning of the world through the date hereof”) (emphasis added); Floyd, 710 So. 2d at 178 (release language: the parties entered into a settlement and release agreement releasing Homes Beautiful from “any claim or cause of action presently existing, whether known or unknown, including but not necessarily limited to the [1986 civil suit]”) (emphasis added); with Columbia Bank v. Columbia Devs., LLC, 127 So. 3d 670, 673 (Fla. 1st DCA 2013) (explaining the bank agreed to “release, remise, acquit and forever discharge Ross, Edwards, Smith [Jr.] and NFLG . . . from all . . . causes of action, of every kind and nature, accrued or unaccrued, now known or hereafter discovered, at law or in equity relating in any way to the Loan Documents and/or to the Property, . . .”) (alterations omitted) (emphasis added); Patco Transp., Inc. v. Estupinan, 917 So. 2d 922, 923 (Fla. 1st DCA 2005) (finding a general release precluded an employee’s petition for workers’ compensation benefits where it barred “any and all past, present or future claims, . . . which the Plaintiff now has, or which may hereafter accrue or otherwise be acquired, on account of, or may in any way grow out of, or which are the subject of the Complaint (and all related pleadings)” (emphasis added). Because the Agreement in this case mutually released the parties from claims “past
or present, known or unknown”—but did not release future or unaccrued claims—its plain language requires us to hold that the parties were only released from causes of actions that had accrued at the time the parties signed the 2014 Agreement.

Liss relies on Breamer Isle Condominium Association, Inc. v. Boca Hi, Inc., 632 So. 2d 707 (Fla. 4th DCA 1994) to suggest that because the 2014 Agreement released all “known or unknown” claims, it does not matter whether appellants knew or did not know about the alleged fraud. This reliance is misplaced. In Breamer, the condominium association “released all of the appellees for all claims (both known and unknown, as to one, and all future claims as to the others), which arose out of the construction of the condominium.” Id. at 707 (emphasis added). The Second District held that the release of all claims in a prior lawsuit was enforceable in the second lawsuit even though the defects alleged in the second case “were not discoverable at the time it settled its prior lawsuit and executed releases to these defendants.” Id. Unlike here, however, the contract in Breamer released the appellees from “all future claims.” See Floyd, 710 So. 2d at 179 (distinguishing Breamer because the agreement in that case released “future” claims). The language in the 2014 Agreement renders the instant case distinguishable.
Because we conclude that the release does not bar unaccrued (or future) claims, we reach appellants’ second argument—that the trial court erred in granting summary judgment in favor of appellee because a genuine issue of material fact remains in dispute: Whether the fraud claims had “accrued” at the time the parties executed the 2014 Agreement. We find there is a genuine issue of material fact, and therefore the trial court erred in granting summary judgment on appellants’ fraud claims.

“The essential elements of a fraud claim are: (1) a false statement concerning a specific material fact; (2) the maker's knowledge that the representation is false; (3) an intention that the representation induces another’s reliance; and (4) consequent injury by the other party acting in reliance on the representation.” Lopez-Infante v. Union Cent. Life Ins. Co., 809 So. 2d 13, 15 (Fla. 3d DCA 2002). A fraud action accrues when the last element occurs or “when the plaintiff knew, or through the exercise of due diligence should have known, of the facts constituting the fraud.” Smith v. Bruster, 151 So. 3d 511, 514 (Fla. 1st DCA 2014). The question then is whether appellants knew or should have known about the fraud at the time the parties signed the 2014 Agreement.

In answering this question, we first hold that the trial court erred in relying on the unauthenticated June 5th email. See Bryson v. Branch Banking & Tr. Co., 75 So. 3d 783, 786 (Fla. 2d DCA 2011) (holding: “The unauthenticated copies of
default letters purportedly sent to Bryson by BB & T were insufficient for summary judgment purposes because only competent evidence may be considered in ruling on a motion for summary judgment”) (citing Tunnell v. Hicks, 574 So. 2d 264, 266 (Fla. 1st DCA 1991) (explaining that the court could not consider certain documents in its summary judgment decision because “Tunnell failed to attach either document to affidavits that presumably would have ensured their admissibility”)); see also Bifulco v. State Farm Mut. Auto. Ins. Co., 693 So. 2d 707, 709 (Fla. 4th DCA 1997) (holding: “Merely attaching documents which are not ‘sworn to or certified’ to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Fla. R. Civ. P. 1.510(e).”)

Because the June 5th email should not have been considered, the evidence before the court on this question consisted of the allegations contained in the Falsetto and Siegel affidavits. The affidavits generally asserted that: Neither Siegel nor Falsetto knew or could have known that, at the time they executed the 2014 Agreement, Liss and Battaglia were partners in DP Systems and created the company “to compete with Paradise and Double Park and steal business from Paradise and Double Park by . . . confusing prospective customers into believing that they were contracting with Double Park and/or its affiliates,” or that they “actually had a lucrative $30,000+ per month contract with Latitude.” Falsetto and Siegel also averred they discovered the alleged fraud during discovery in Liss’s
2016 breach of contract lawsuit. These affidavits created a genuine issue of material fact on the question of whether Falsetto knew or reasonably should have known of the alleged fraud when he entered into the 2014 Agreement with Liss.

**CONCLUSION**

The 2014 Agreement’s plain language released the parties only from “known or unknown” claims, not future or unaccrued claims. Because there is a genuine issue of material fact as to whether the fraud claim had accrued— that is, whether Falsetto knew or through the exercise of due diligence should have known about the alleged fraud at the time the 2014 Agreement was executed—the trial court erred in granting summary judgment on those fraud claims. We reverse and remand for further proceedings.
ON MOTION FOR REHEARING

PER CURIAM.

We grant the bank’s motion for rehearing, withdraw our previously issued opinion, and substitute the following in its place.

Appellants appeal an order denying their motion for attorney’s fees following the bank’s voluntary dismissal of its foreclosure action. Because the voluntary dismissal rendered appellants the prevailing party for purposes of attorney’s fees, we reverse.

JP Morgan filed a foreclosure complaint against appellants. JP Morgan alleged it was entitled to enforce the note as the holder because it had physical possession of the note endorsed in blank. JP Morgan further alleged it was entitled to fees under the note and mortgage. A copy of the note attached to the complaint listed HomeBanc as the original lender and contained an endorsement in blank by HomeBanc. Wilmington was later substituted as party plaintiff.

Appellants filed an answer, raising standing as an affirmative defense.
They also asserted entitlement to attorney’s fees.

After the bank voluntarily dismissed its case without prejudice, appellants moved for attorney’s fees pursuant to the mortgage and section 57.105(7), Florida Statutes. The bank opposed the motion, arguing that appellants could not recover fees because they denied the bank was a party to the contract rather than proving the bank was a party to the contract. During a hearing on the motion, appellants argued that “there’s no requirement on us to prove anything against—of the plaintiff’s case.” After the hearing, the trial court denied appellants’ motion for fees.

“[W]e review de novo a trial court’s final judgment determining entitlement to attorney’s fees based on a fee provision in the mortgage and the application of section 57.105(7).” Bank of N.Y. Mellon Tr. Co., N.A. v. Fitzgerald, 215 So. 3d 116, 118 (Fla. 3d DCA 2017). Under section 57.105(7), unilateral attorney’s fees provisions in a contract are deemed reciprocal. See § 57.105(7), Fla. Stat. (2018). The entitlement to fees under section 57.105(7) applies when the party seeking fees prevails and is a party to the contract containing the fee provision. Fla. Cmty. Bank, N.A. v. Red Rd. Residential, LLC, 197 So. 3d 1112, 1115 (Fla. 3d DCA 2016). “[W]here a motion for attorney’s fees is based on a prevailing-party provision of a document, the fact that a contract never existed precludes an award of attorney’s fees.” David v. Richman, 568 So. 2d 922, 924 (Fla. 1990). However, “when parties enter into a contract and litigation later ensues over that contract, attorney’s fees may be recovered under a prevailing-party attorney’s fee provision contained therein even though the contract is rescinded or held to be unenforceable.” Katz v. Van Der Noord, 546 So. 2d 1047, 1049 (Fla. 1989).

In denying the motion for fees, the trial court relied on Nationstar Mortgage LLC v. Glass, 219 So. 3d 896 (Fla. 4th DCA 2017). In Glass, after the bank voluntarily dismissed its appeal, this court denied the homeowner’s motion for appellate attorney’s fees because she prevailed on her lack of standing argument in the trial court. In reaching this decision, this court relied on Bank of New York Mellon Trust Co., N.A. v. Fitzgerald, 215 So. 3d 116 (Fla. 3d DCA 2017), which held that where a “trial court found no contract existed between the parties, which would entitle one to recover attorney’s fees in the first place, there [was] no basis to invoke the compelled mutuality provisions of section 57.105(7).” Glass, 219 So. 3d at 898 (quoting Fitzgerald, 215 So. 2d at 121). Unlike in Glass, this case does not involve a judicial determination that no contract existed between the parties.

More on point is Wells Fargo Bank, N.A. v. Elkind, 254 So. 3d 1153,
1154 (Fla. 4th DCA 2018), where this court held that a borrower who had raised lack of standing as an affirmative defense was entitled to prevailing party attorney’s fees following the bank’s voluntary dismissal. This court reasoned that “[s]tanding was never litigated below and the trial court never made a finding that the bank or the borrower were not parties to the contract” and thus, “the borrower did not prevail on his argument that dismissal was required because the bank lacked standing to sue on the contract.” *Id*; see also *Rodriguez v. Wilmington Savings Fund Society, FSB as Tr. for Stanwich Mortg. Loan Tr. A*, 43 Fla. L. Weekly D2742 (Fla. 4th DCA Dec. 12, 2018) (finding that a borrower who raised lack of standing as an affirmative defense was entitled to prevailing party attorney’s fees following the bank’s voluntary dismissal because “the parties never litigated the merits of [the bank’s] standing below, and the trial court never made a finding that the Borrower was not a party to the note or mortgage”); *Harris v. Bank of N.Y. Mellon*, 44 Fla. L. Weekly D141 (Fla. 2d DCA Dec. 28, 2018) (stating that “proof of standing is not required to establish a contractual relationship between the parties”).

In the instant case, the bank voluntarily dismissed its case and the bank alleged in its complaint that it was entitled to enforce the note and mortgage. Significantly, there was never a judicial determination by the trial court that the bank or appellants were not a party to the contract. Based on the foregoing authority, appellants were entitled to attorney’s fees. We therefore reverse and remand for the trial court to grant attorney’s fees and determine the reasonableness of the amounts sought.

*Reversed and remanded with instructions.*

WARNER and LEVINE, JJ., concur.
CIKLIN, J., dissenting with opinion.

CIKLIN, J., dissenting.

I respectfully disagree with the majority and would affirm.

In my opinion, the borrowers not only failed to prove entitlement to fees but went so far as to deny that they were required to offer *any and all types of proof whatsoever* which I believe § 57.105 requires as a prerequisite to being awarded reciprocal fees.

*          *          *

3
Appellant, Scott Levine, appeals the supplemental final judgment, awarding Appellee, Bonnie Stimmel, attorney's fees and costs pursuant to section 736.1004, Florida Statutes (2017). Appellant raises several arguments on appeal, one of which has merit. Because Appellee may not recover attorney's fees for the hours spent litigating the
entitlement to fees for an unsuccessful section 57.105, Florida Statutes (2017), motion, we reverse in part and remand with instructions. In all other respects we affirm.

After Appellant became aware of his father’s extensive gifting to his sister, Appellee, Appellant filed a complaint against Appellee, claiming: (1) undue influence; (2) tortious interference with an expectancy; (3) breach of fiduciary duty; (4) removal of trustee; (5) accounting; and (6) appointment of special fiduciary. The trial court entered final judgment in favor of Appellee.

Thereafter, Appellee moved for attorney’s fees and costs pursuant to section 736.1004(1)(a), Florida Statutes, arguing that she was entitled to fees because Appellant’s claims revolved around her alleged breaches of fiduciary duty. In addition, Appellee moved separately for attorney’s fees and costs pursuant to section 57.105, Florida Statutes, claiming that she was entitled to fees because Appellant chose to prosecute baseless claims. The trial court denied the section 57.105 motion for attorney’s fees but granted the section 736.1004(1)(a) motion. However, when determining the amount of the attorney’s fees award, Appellee included in her request the time spent litigating the entitlement to fees for the unsuccessful section 57.105 motion. Accordingly, Appellant sought a reduction of approximately $16,000 for the work connected to the section 57.105 motion. Ultimately, the trial court reduced Appellee’s requested attorney’s fee amount by approximately $20,000. However, the trial court’s rationale in reducing the award is unclear.

As the party seeking attorney’s fees pursuant to section 736.1004, Appellee had the burden to demonstrate what portion of the attorneys’ efforts were expended on claims for which section 736.1004 authorized attorney’s fees. See Van Diepen v. Brown, 55 So.
3d 612, 614 (Fla. 5th DCA 2011) ("It is the party seeking attorney's fees on multiple claims who has an affirmative burden to demonstrate what portion of the effort was expended on the claim that authorized attorney's fees."). Section 736.1004 authorizes the award of attorney's fees for actions arising under Florida's Trust Code and "[i]n all actions for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers. . . ."

Because section 736.1004 does not expressly authorize recovery of attorney's fees for time spent litigating an alternative and unsuccessful ground for fees, Appellee may not recover the hours for the time spent litigating the entitlement to fees for the unsuccessful section 57.105 motion. See Sand Lake Hills Homeowners Ass'n v. Busch, 210 So. 3d 706, 709 (Fla. 5th DCA 2017) ("A statute that awards attorney's fees is in derogation of the common law rule that each party pay its own attorney's fees and must be strictly construed." (citing Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278 (Fla. 2003))).

Accordingly, we reverse in part and remand to the trial court. If the trial court has already reduced the award for the time spent litigating the unsuccessful section 57.105 motion, then it shall make that clear in its subsequent order. Otherwise, the trial court shall remove the time spent litigating the unsuccessful section 57.105 motion in its award. In all other respects we affirm.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED with Instructions.

ORFINGER and LAMBERT, JJ., concur.