

IN THE SUPREME COURT OF FLORIDA

AMANDA JEAN HALL, etc.,

Petitioner,

v.


R.J. REYNOLDS TOBACCO CO.,

Respondent.

Case No. SC11-1611

L.T. No. 1D10-2820

ORIGINAL

2012 MAR -4 PM 1:00
BY 

**ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA**

INITIAL BRIEF OF PETITIONER

AVERA & SMITH, LLP

Rod Smith
Florida Bar No. 0202551
Mark Avera
Florida Bar No. 812935
Dawn M. Vallejos-Nichols
Florida Bar No. 0009891
2814 SW 13th Street
Gainesville, Florida 32608
(352) 372-9999 Telephone
(352) 375-2526 Facsimile

THE MILLS FIRM, P.A.

John S. Mills
Florida Bar No. 0107719
Courtney Brewer
Florida Bar No. 0890901
203 North Gadsden Street, Suite 1A
Tallahassee, Florida 32301
(850) 765-0897 Telephone
(850) 270-2474 Facsimile

Attorneys for Amanda Jean Hall

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND OF THE FACTS	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT	6
I. THE <i>ENGLE</i> APPELLATE BOND LAW VIOLATES ARTICLE III, SECTION 11(A)(12) BECAUSE IT IS A SPECIAL LAW GRANTING A PRIVILEGE TO SPECIFIED PRIVATE CORPORATIONS.....	6
II. THE <i>ENGLE</i> APPELLATE BOND LAW VIOLATES THE SEPARATION OF POWERS BY REGULATING PRACTICE AND PROCEDURE IN THE COURTS	16
CONCLUSION	25
CERTIFICATE OF SERVICE.....	25
CERTIFICATE OF COMPLIANCE	26

TABLE OF CITATIONS

CASES

<i>Allen v. Butterworth</i> , 756 So. 2d 52 (Fla. 2000)	16
<i>Amendments to the Fla. R. Workers' Comp. P.</i> , 891 So. 2d 474 (Fla. 2004)	21
<i>Barco v. Sch. Bd. of Pinellas Cnty.</i> , 975 So. 2d 1116 (Fla. 2008)	21
<i>BDO Seidman, LLP v. Banco Espirito Santo Int'l, Ltd.</i> , 998 So. 2d 1 (Fla. 3d DCA 2008)	3, 20
<i>Burlington N. R.R. Co. v. Woods</i> , 480 U.S. 1 (1987)	24
<i>Campbell v. Jones</i> , 648 So. 2d 208 (Fla. 3d DCA 1994)	18
<i>Cantwell v. St. Petersburg Port Auth.</i> , 21 So. 2d 139 (Fla. 1945)	10
<i>City of Miami v. McGrath</i> , 824 So. 2d 143 (Fla. 2002)	8, 13, 14
<i>Dep't of Bus. Regulation v. Classic Mile, Inc.</i> , 541 So. 2d 1155 (Fla. 1989)	8, 11
<i>Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.</i> , 434 So. 2d 879 (Fla. 1983)	12, 13
<i>Dice v. Cameron</i> , 424 So. 2d 173 (Fla. 3d DCA 1983)	23
<i>Engle v. Liggett Grp., Inc.</i> , 945 So. 2d 1246 (Fla. 2006)	1
<i>Erie R.R. Co. v. Tompkins</i> , 304 U.S. 64 (1938)	23

<i>Fla. Dep't of Bus. & Prof'l Regulation v. Gulfstream Park Racing Ass'n,</i> 967 So. 2d 802 (Fla. 2007)	7, 13
<i>Fla. Dep't of Revenue v. City of Gainesville,</i> 918 So. 2d 250 (Fla. 2005).....	6
<i>Gold Nugget Grp. v. Metro. Dade Cnty.,</i> 464 So. 2d 535 (Fla. 1985)	10
<i>Humana Med. Plan, Inc. v. Agency for Health Care Admin.,</i> 898 So. 2d 1040 (Fla. 1st DCA 2005)	10
<i>In re Fla. R. Crim. P.,</i> 272 So. 2d 65 (Fla. 1972) (Adkins, J., concurring)	16
<i>In re Proposed Fla. Appellate Rules,</i> 351 So. 2d 981 (Fla. 1977)	20
<i>Lawnwood Med. Ctr., Inc. v. Seeger,</i> 990 So. 2d 503 (Fla. 2008)	7, 8
<i>Leisure Resorts, Inc. v. Frank J. Rooney, Inc.,</i> 654 So. 2d 911 (Fla. 1995)	21
<i>Makowski v. Makowski,</i> 578 So. 2d 737 (Fla. 3d DCA 1991)	23
<i>Palm Beach Heights Dev. & Sales Corp. v. Decillis,</i> 385 So. 2d 1170 (Fla. 3d DCA 1980)	18
<i>R.J. Reynolds Tobacco Co. v. Clay,</i> No. 1D10-5544 (Fla. 1st DCA Apr. 12, 2011)	3
<i>R.J. Reynolds Tobacco Co. v. Hall,</i> 67 So. 3d 1084 (Fla. 1st DCA 2011)	4
<i>R.J. Reynolds Tobacco Co. v. Hall,</i> 70 So. 3d 642 (Fla. 1st DCA 2011)	2
<i>R.J. Reynolds Tobacco Co. v. Hall,</i> 67 So. 3d 1050 (Fla. 2011).....	2

<i>R.J. Reynolds Tobacco Co. v. Hall</i> , No. 11-755, __ S. Ct. __, 2012 WL 9866850 (Mar. 26, 2012).....	2
<i>R.J. Reynolds Tobacco Co. v. Martin</i> , 53 So. 3d 1060 (Fla. 1st DCA 2010)	1
<i>Schrader v. Fla. Keys Aqueduct Auth.</i> , 840 So. 2d 1050 (Fla. 2003)	10, 11
<i>St. Mary’s Hosp., Inc. v. Phillipe</i> , 769 So. 2d 961 (Fla. 2000)	22, 23
<i>St. Johns River Water Mgmt. Dist. v. Deseret Ranches of Fla., Inc.</i> , 421 So. 2d 1067 (Fla. 1982)	10, 12
<i>St. Vincent’s Med. Ctr., Inc. v. Memorial Healthcare Grp., Inc.</i> , 967 So. 2d 794 (Fla. 2007)	8
<i>State Dep’t of Highway Safety & Motor Vehicles v. Begley</i> , 776 So. 2d 278, 279 (Fla. 1st DCA 2000)	21
<i>State ex rel. Gray v. Stoutamire</i> , 179 So. 730 (Fla. 1938).....	7, 12
<i>State ex rel. Landis v. Harris</i> , 163 So. 237 (Fla. 1934)	7
<i>State v. Raymond</i> , 906 So. 2d 1045 (Fla. 2005)	16
<i>Vacation Vill., Inc. v. Clark Cnty., Nev.</i> , 497 F.3d 902 (9th Cir. 2007)	24
<i>Wait v. Florida Power & Light Co.</i> , 372 So. 2d 420 (Fla. 1979)	19
<i>Wilson v. Woodward</i> , 602 So. 2d 545 (Fla. 2d DCA 1991)	18

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES OF COURT

§ 45.045, Fla. Stat.....	20
§ 119.11(2), Fla. Stat. (1975)	19
§ 569.23(1), Fla. Stat.	2, 8
§ 569.23(3), Fla. Stat. (2010)	1, 7, 10, 20
§ 569.23(3)(a), Fla. Stat.....	2, 8
§ 766.212(2), Fla. Stat.	22
Art. II, § 3, Fla. Const.....	21-22
Art. III, § 10, Fla. Const.	9
Art. III, § 11, Fla. Const.	5
Art. III, § 11(a)(2), Fla. Const.	14
Art. III, § 11(a)(4), Fla. Const.	15
Art. III, § 11(a)(8), Fla. Const.	15
Art. III, § 11(a)(10), Fla. Const.	15
Art. III, § 11(a)(12), Fla. Const.	2, 6
Art. III, § 11(a)(20), Fla. Const.	15
Art. V, § 2(a), Fla. Const.	2, 16
Art. X, § 12(g), Fla. Const.	7
Fla. App. R. 5.12(1).....	19
Fla. R. App. P. 9.310(a).....	3, 5, 17, 20
Fla. R. App. P. 9.310(b)(1).....	<i>passim</i>
Fla. R. App. P. 9.310(c)(1).....	17

STATEMENT OF THE CASE AND OF THE FACTS

This case presents dual constitutional challenges to section 569.23(3), Florida Statutes (2010) (the “*Engle* Appellate Bond Law”), which gives specified tobacco companies a unique right to obtain a stay pending appeal of a money judgment entered in favor of a member of the class approved by this Court in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Petitioner, Amanda Jean Hall, contends that the *Engle* Appellate Bond Law is both an unconstitutional special law granting a benefit to private corporations and an unconstitutional legislative attempt to regulate judicial procedure.

This particular case¹ stems from an appeal by R.J. Reynolds Tobacco Company of an *Engle*-progeny judgment² in a wrongful death case arising from the death of Arthur L. Hall, Sr. Following a jury verdict, the trial court entered a final judgment of \$15.75 million in favor of his wife, Amanda Jean Hall, as the personal representative of his estate. R:Tab B, 131. Reynolds appealed the final judgment,

¹ As predicted in the petitioner’s jurisdictional brief, the issue is now moot as to her because the United States Supreme Court has now denied certiorari and the stay provided by the *Engle* Appellate Bond Law has now dissolved. Her jurisdictional brief explained why the Court should hear the issue despite the mootness and that her counsel is prepared to litigate this issue to conclusion. (Petitioner’s Brief on Jurisdiction at 9-10.) Because the Court accepted jurisdiction despite the looming mootness issue, she presumes that no further briefing on that issue is required.

² See *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067 (Fla. 1st DCA 2010) (using term “*Engle* progeny case” to refer to an individual lawsuit of a plaintiff claiming to be a member of the *Engle* class).

the First District affirmed, and review has been denied by both this Court and the United States Supreme Court. *R.J. Reynolds Tobacco Co. v. Hall*, 70 So. 3d 642, 642 (Fla. 1st DCA), *rev. denied*, 67 So. 3d 1050 (Fla. 2011), *cert. denied*, No. 11-755, __ S. Ct. __, 2012 WL 9866850 (Mar. 26, 2012).

Shortly after filing its appeal, Reynolds posted a supersedeas bond with this Court for \$5 million. R:Tab A, 1-10. Reynolds claimed that the bond affected an automatic stay pending appeal pursuant to the *Engle* Appellate Bond Law. R:32. While Florida Rule of Appellate Procedure 9.310(b)(1) requires defendants to post security for the full amount of the judgment plus twice the rate of interest (which in this case would have totaled approximately \$17.6 million), the *Engle* Appellate Bond Law purports to exempt specific tobacco companies who appeal *Engle* judgments. §§ 569.23(1), (3)(a), Fla. Stat.

Mrs. Hall promptly filed a motion in the trial court seeking a determination under Rule 9.310(a) that the judgment was not stayed because the *Engle* Appellate Bond Law is unconstitutional. R:Tab A, 11-94. Specifically, she contended that the statute is an unconstitutional special law pertaining to a grant of privilege to a private corporation in violation of article III, section 11(a)(12) of the Florida Constitution, R:Tab A, 14-19, and that it is an attempt to create a rule of practice and procedure in the courts in violation of article V, section 2(a), which grants that authority exclusively to this Court, R:Tab A, 19-24.

Reynolds filed a memorandum in opposition. R:Tab A, 95-135. Additionally, the Attorney General intervened and filed a memorandum defending the constitutionality of the statute. R:Tab A, 136-145. After a hearing, R:Tab A, 144-291, the trial court denied Mrs. Hall's motion³ without analysis other than citations to *R.J. Reynolds Tobacco Co. v. Clay*, No. 1D10-5544 (Fla. 1st DCA Apr. 12, 2011) (unpublished order affirming trial court's denial of a substantially identical motion filed in another *Engle* case), and *BDO Seidman, LLP v. Banco Espirito Santo Int'l, Ltd.*, 998 So. 2d 1 (Fla. 3d DCA 2008). R:Tab A, 292-294.

Mrs. Hall moved the First District to review that order pursuant to Rule 9.310(f), R:1-28, and Reynolds filed a response, R:29-85. The First District determined that the statute is not a special law because, although it only applies to the five companies that signed the settlement agreement, it protects the State's revenue stream under that agreement, which is "a matter of significant statewide importance." R:122-23. It declined to determine whether the law fell within this Court's exclusive authority to regulate court procedures because it determined that this Court had delegated the authority to regulate stays to the legislature by beginning Rule 9.310(a) with the clause "Except as provided by general law."

³ The order also denied substantially identical motions filed by *Engle* plaintiffs in two other cases, *Alexander v. R.J. Reynolds Tobacco Co.*, Case No. 01-2008-CA-5067 (Fla. 8th Cir.), and *Townsend v. R.J. Reynolds Tobacco Co.*, Case No. 01-2008-CA-3978 (Fla. 8th Cir.). R:Tab A, 292-294.

R:126. It concluded by certifying the following question of great public importance:

DOES SECTION 569.23(3), FLORIDA STATUTES (2010), VIOLATE ARTICLE III, SECTION 11(a)(12) OR ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION BY LIMITING THE AMOUNT OF THE BOND NECESSARY TO OBTAIN AN AUTOMATIC STAY OF A JUDGMENT AGAINST A SIGNATORY TO THE TOBACCO SETTLEMENT AGREEMENT WITH THE STATE OF FLORIDA?

R:133. It also published its order. *R.J. Reynolds Tobacco Co. v. Hall*, 67 So. 3d 1084 (Fla. 1st DCA 2011).

After Mrs. Hall timely invoked this Court's discretionary jurisdiction, the Court accepted jurisdiction by order dated January 23, 2012.

SUMMARY OF ARGUMENT

The *Engle* Appellate Bond Law violates the Florida constitution's prohibition against special laws benefitting private corporations. In drastically reducing the amount of the bond required to automatically stay judgments, the statute provides a significant privilege to specific tobacco companies that are identified by explicit reference to a particular lawsuit that they settled with the State. The First District erred because instead of focusing on the express identification of the corporations granted the law's benefits, it focused on whether the law burdened a general class of plaintiffs as opposed to only *Engle* class members. Because the challenge presented here is limited to the claim that the

Engle Appellate Bond Law is an unconstitutional special law to the extent it grants a privilege to private corporations, the First District's conclusion that the statute would burden members of other potential classes has no bearing on this proceeding.

The First District also erred in upholding the law because it serves an important public purpose of preserving state revenue from the settlement agreement. Case law taking a statute's statewide importance into account in the analysis of whether the statute is a general or special law only involve laws that purport to be general laws by applying a facially open classification along geographic lines that in reality only affect one specific area. But the reasoning in these cases cannot save a law that grants a privilege to specifically identified corporations no matter how strong its public purpose. Indeed, many of the special laws prohibited by article III, section 11 serve public purposes by definition.

The *Engle* Appellate Bond Law also violates the constitution's guarantee of separation of powers. The statute directly conflicts with Florida Rule of Appellate Procedure 9.310(b)(1). The steps for procuring a stay are matters of pure procedure. In legislating on this issue, the legislature has tread on this Court's role. Contrary to the First District's opinion, the reference to general laws in Rule 9.310(a) does not and cannot authorize the Legislature to exercise this Court's authority. Accordingly, the decision below should be reversed.

ARGUMENT

As explained in Mrs. Hall's brief on jurisdiction, the constitutionality of the *Engle* Appellate Bond Law dramatically shifts the balance of power between plaintiff and defendant and creates an economic incentive for the tobacco companies to prolong *Engle* cases by using appeals and certiorari petitions as delay tactics that make these cases both less expensive to defend⁴ and more expensive and time consuming to prosecute, which deters trial lawyers from incurring the costs and risks of taking one of these well-funded defendants to trial.

The Court should put an end to this mischief because the law is unconstitutional for two independent reasons. These issues of constitutional interpretation are reviewed de novo. *E.g., Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005).

I. THE *ENGLE* APPELLATE BOND LAW VIOLATES ARTICLE III, SECTION 11(A)(12) BECAUSE IT IS A SPECIAL LAW GRANTING A PRIVILEGE TO SPECIFIED PRIVATE CORPORATIONS

Florida's constitution flatly prohibits any "special law ... pertaining to ... grant of privilege to a private corporation." Art. III, § 11(a)(12), Fla. Const. This Court has held "that a broad reading of the term 'privilege' as used in article III, section 11(a)(12),—one not limiting the term to any particular type of benefit or

⁴ Mrs. Hall's jurisdictional brief explains how the law has already allowed the tobacco companies to leave over \$300 million in assets unencumbered by bonds and to save over \$6 million in premiums (Brief at 6), savings that will only continue to grow.

advantage—is required.” *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008). There can be no doubt that the *Engle* Appellate Bond Law grants a substantial privilege to the subject tobacco companies. *See id.* (concluding that privilege as used here encompasses more than just a financial benefit and also includes a “right, a special benefit, or an advantage”).

Thus, the constitutional question turns on whether section 569.23(3) is a “special law.” The constitution provides only a circular definition: “ ‘Special law’ means a special or local law.” Art. X, § 12(g), Fla. Const. This Court has expanded on this definition by explaining that a special law is

one relating to, or designed to operate upon, particular persons or things, or one that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal[.]

Lawnwood, 990 So. 2d at 509 (quoting *Fla. Dep’t of Bus. & Prof’l Regulation v. Gulfstream Park Racing Ass’n*, 967 So. 2d 802, 807 (Fla. 2007) (in turn quoting *State ex rel. Landis v. Harris*, 163 So. 237, 240 (Fla. 1934))). In contrast to a special law, “a general law is defined as ‘a statute relating to ... subjects or to persons or things as a class, based upon proper distinctions and differences that inhere in or are peculiar or appropriate to the class.’ ” *Id.* at 509-10 (quoting *State ex rel. Gray v. Stoutamire*, 179 So. 730, 733 (Fla. 1938)).

The *Engle* Appellate Bond Law is a special law under the first alternative definition in *Lawnwood* because it is a law “relating to, or designed to operate

upon, particular persons or things.” 990 So. 2d at 509. Specifically, the law only applies to the specific tobacco companies that settled the Medicaid lawsuit brought by the State of Florida over fifteen years ago. This is made clear by the interaction of two subsections in section 569.23. Section 569.23(3)(a)1 provides that the *Engle* Appellate Bond Law only applies to “a signatory, or a successor, parent, or affiliate of a signatory, to a tobacco settlement agreement.” And section 569.23(1) defines the term “tobacco settlement agreement” as “any settlement agreement, as amended, entered into by the state and one or more cigarette manufacturers in settlement of *State of Florida v. American Tobacco Co.*, No. 95-1466AH (Fla. 15th Cir. Ct.).”

While this Court has a line of case law addressing when a statute that purports to create a generic classification of subjects is nonetheless a special law because in application the classification can only apply to one or a few specific entities,⁵ there is no need to resort to that analysis here because the reference to the

⁵ The general test is whether the classification is “incapable of generic application to members of a class, and fixed so as to preclude additional parties from satisfying the requirements for inclusion within the statutory classification at some future point in time.” *Dep’t of Bus. Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155, 1158 n.4 (Fla. 1989); *see also St. Vincent’s Med. Ctr., Inc. v. Memorial Healthcare Grp., Inc.*, 967 So. 2d 794, 801 (Fla. 2007) (holding that a statute was a special law where it purported to apply to any hospital meeting certain criteria but the evidence showed that there was no reasonable possibility that more than a single, specific hospital could meet the criteria); *City of Miami v. McGrath*, 824 So. 2d 143, 146-47 (Fla. 2002) (determining that a law that only applied to municipalities with a population of more than 300,000 on April 1, 1999,

specific lawsuit is no different than naming the defendants directly. One need look no further than the plain language of the statute to see that it only applies to specified tobacco companies.⁶

Instead of analyzing the statutory language limiting the private corporations to which the statute applied, the opinion below focused exclusively on whether the *Engle* Appellate Bond Law applied to appeals brought by members of the *Engle* class as opposed to members of other potential class actions. R:124-25. While that analysis might be relevant to whether the statute is a special law for other purposes, such as the general prohibition against special laws passed without notice contained in article III, section 10, Florida Constitution, it has little reference to the specific challenge advanced here that this is a special law benefitting private corporations. Regardless of whether the law has general applications with regard to the plaintiffs that it will burden, it is clearly a special law with regard to the limited few who are given its generous benefits.

was a special law because only three municipalities could ever meet that definition).

⁶ Reynolds made a passing argument below that the *Engle* Appellate Bond Law is not a special law because in addition to applying to the specifically identified tobacco companies, it also applies to their successors, parents, and affiliates. R:59. The First District did not address this argument, and it is without merit because the extension of the bond rights to successors, parents, and affiliates is merely part of the benefit conferred on the tobacco companies.

The First District also concluded that “[t]he narrow scope of section 569.23(3) is not necessarily dispositive of whether the statute is a special law” because the law serves an important public policy: protecting state revenues from tobacco judgments. R:121. In holding that the law is saved by its public purpose of protecting revenue from the Medicaid settlement agreement, the First District focused on a line of cases that generally hold that whether a statutory classification based on a specific geographic area renders legislation a special law turns in part on whether it serves a valid statewide purpose. *See Schrader v. Fla. Keys Aqueduct Auth.*, 840 So. 2d 1050 (Fla. 2003) (analyzing statute that applied only to “a local government within the Florida Keys”); *Gold Nugget Grp. v. Metro. Dade Cnty.*, 464 So. 2d 535 (Fla. 1985) (analyzing statute that could only apply in the three counties with home rule charters adopted under the Constitution of 1885); *St. Johns River Water Mgmt. Dist. v. Deseret Ranches of Fla., Inc.*, 421 So. 2d 1067 (Fla. 1982) (analyzing statute that created water district for the “Greater St. Johns River Basin”); *Cantwell v. St. Petersburg Port Auth.*, 21 So. 2d 139 (Fla. 1945) (analyzing statute that only applied to transportation franchises in areas “connected with the Gulf of Mexico”); *Humana Med. Plan, Inc. v. Agency for Health Care Admin.*, 898 So. 2d 1040 (Fla. 1st DCA 2005) (analyzing statute that only applied to managed care plans in Miami-Dade County).

As an initial matter, resort to this line of cases is improper because, by their terms, they only involve laws that applied to particular geographic areas. This distinction was noted by this Court over twenty years ago:

In each of these cases this Court upheld as general laws statutes which, on their faces, appeared to affect only limited geographic areas of the state, and found that the primary purpose of the statutes contemplated important and necessary state functions and that the actual impact of the statutes far exceeded the limited geographic area identified by the terms of the statutes.

Classic Mile, 541 So. 2d at 1159.

Permitting this limitation only when geographic classifications are drawn makes sense because the special law provision of the constitution would not prohibit the legislature from prescribing laws for particular areas of the state when those areas will impact other areas. As this Court noted in *Schrader*:

This Court has upheld as legally valid general laws legislation that facially appeared to affect only a limited geographic area of the state but which had a primary purpose contemplating an important and necessary state function and an actual impact far exceeding the limited geographic area identified by its terms.

840 So. 2d at 1056. Certain geographically narrow issues simply have ripple effects statewide, and the Court has recognized that the legislature's power to address such issues is outside the scope of the constitution's prohibition of special laws. *See id.* ("This natural resource [(the Florida Keys' near shore waters)] is one of statewide importance, as evidenced by not only the designation of the area as one of critical *state* concern but also by its direct relationship with industries of

statewide importance such as tourism and seafood. Its actual impact, therefore, far exceeds the limited geographic area of Monroe County.”); *see also Deseret*, 421 So. 2d at 1069 (“Although there is no definition of general or local law in the constitution, in our early case of *State ex rel. Gray v. Stoutamire*, 131 Fla. 698, 179 So. 730, 733 (1938), we defined the terms ‘special or local laws’ as used in the constitution and said that they ‘refer ordinarily to law relating to entities, interests, rights, and functions other than those of the State, since the organic law does not contemplate or require previous publication of notice of proposed laws for the exercise of State powers and functions though they may be more or less local or special in their operation or objects.’ (Emphasis supplied.) In the present case, the statewide water management plan created and implemented by chapter 373 is primarily a state function serving the state’s interest in protecting and managing a vital natural resource.”). The cases relied on by the First District therefore have no application here, to a special law designed to grant a privilege to five tobacco companies.

The First District attempted to clump an additional case, which did not involve a statute with a geographic limitation, into the case law focusing on whether a public purpose is served by the classification. Specifically, the opinion relies on *Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879 (Fla. 1983), which upheld a statute authorizing the conversion of failing

harness racing tracks to dog racing. Reynolds contended that this case turned on the public purpose of “[p]rotecting or increasing state revenues [which] is a classic example of a statewide purpose that imparts the character of a general law.” R:50. But this Court has subsequently made clear that the dispositive fact saving the statute in that case was that, although it only applied to one track at the time of its passage, “because the statute could be applied to future tracks, it was a constitutional general law.” *Gulfstream Park Racing Ass’n*, 967 So. 2d at 808 (noting that in *Sanford-Orlando Kennel Club*, the court “emphasized that ‘[t]he fact that matters is that the classification is potentially open to other tracks’ ”). Indeed, the importance of state revenues in the case came into play in the Court’s analysis as to the reasonable relationship between the classification drawn and the State’s interest. *Sanford-Orlando Kennel Club*, 434 So. 2d at 882 (“In light of this state interest—increased state revenues—the classification—less productive racing facilities—was certainly reasonably related to the subject matter.”). The Court later expressly set out in its analysis as to whether the statute was a general law that the “controlling point is that even though this class did in fact apply to only one track, it is open and has the potential of applying to other tracks.” *Id.*

Moreover, a review of the precedent confirms that the *Engle* Appellate Bond Law should be deemed a special law even under this alternative analysis. In *City of Miami v. McGrath*, 824 So. 2d 143 (Fla. 2002), the court struck down a law that

authorized municipalities to charge a parking tax, but only applied to municipalities with a population of more than 300,000 on April 1, 1999. Only three municipalities, Miami, Tampa, and Jacksonville, met that definition. *Id.* at 146-47. The Court concluded that because the description of the “class” of municipalities to which the law applied was nothing more than a closed description of three specific municipalities, it was a special law. *Id.* at 150-51. Notably, the Court was not the least bit troubled by the fact that that statute clearly served the public purpose of generating tax revenue. Neither the First District nor Reynolds can point to one case in which a law that applied to a particular entity or entities that were not geographic units was deemed general because it affected a matter of statewide importance.

The final, and possibly the most compelling, reason that the public purpose served by the *Engle* Appellate Bond Law cannot morph it from a special law to a general law is that such an interpretation would render much of article III, section 11(a) a nullity. For example, that section prohibits special laws pertaining to the assessment and collection of taxes for state purposes. Art. III, § 11(a)(2), Fla. Const. Thus, for example, a statute providing an additional tax on a specific entity would be unconstitutional despite—indeed, because of—the fact that it serves the same policy objective on which Reynolds relies here—maximizing state revenue. Indeed, many of the subjects that section 11 prohibits special laws from affecting

involve very compelling public purposes. *See, e.g., id.* §§ 11(a)(4) (no special law pertaining to punishment for crime), (8) (no special law pertaining to refunds of fines, penalties or forfeitures), (10) (no special law pertaining to the disposal of public property for private purposes), (20) (no special law pertaining to regulation of occupations which are regulated by a state agency).

At the end of the day, the First District's decision permits a private corporation to purchase whatever special benefits it wants from the legislature simply by offering to pay substantial sums of money. According to Reynolds, the State's interest in making sure the corporation can pay that money will justify any law giving the corporation financial protection. No matter how badly the State may need that revenue and no matter how many wonderful things might be funded with that revenue, our constitution simply does not tolerate such graft. In short, the prohibition on special laws pertaining to benefits for private corporations is an absolute prohibition with no exception where the special benefit given to the private corporations also serves a public policy. Accordingly, private corporations cannot purchase special laws by agreeing to pay the State money in exchange for special protections to safeguard their revenue. The *Engle* Appellate Bond law is therefore unconstitutional notwithstanding the fact that it serves to protect revenue that the State may really need.

II. THE *ENGLE* APPELLATE BOND LAW VIOLATES THE SEPARATION OF POWERS BY REGULATING PRACTICE AND PROCEDURE IN THE COURTS

Even if it were not a prohibited special law, the *Engle* Appellate Bond Law would still be unconstitutional because it violates the constitutional separation of powers between the judiciary and the legislature. Under article V, section 2(a) of the Florida Constitution, only this Court has the authority to “adopt rules for the practice and procedure in all courts including the time for seeking appellate review.”⁷ Therefore, statutes that purport to alter “practice and procedure” are unconstitutional. *See generally State v. Raymond*, 906 So. 2d 1045, 1048-49 (Fla. 2005).

The Court has approved Justice Adkins’ definition of “practice and procedure” to include “all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.” *Allen v. Butterworth*, 756 So. 2d 52, 60 (Fla. 2000) (quoting *In re Fla. R. Crim. P.*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)). Substantive law, the proper subject of statutes, by contrast, is that which “creates, defines, adopts and regulates rights.” *In re Fla. R. Crim. P.*, 272 So. 2d at 65 (Adkins, J., concurring).

⁷ The legislature was well aware that the *Engle* Appellate Bond Law might be challenged on this basis. For example, the senate analysis warned, “This bill may be challenged on a claim that it violates the separation of powers doctrine.” R:Tab A, 39.

The rule as to stays pending appeal provides the procedures for “a party seeking to stay a final ... order pending review” and grants the trial court “continuing jurisdiction, in its discretion, to grant, modify, or deny such relief.” Fla. R. App. P. 9.310(a). Subdivision (a) of the Rule only applies “[e]xcept as provided by general law and in subdivision (b)” of the Rule. Fla. R. App. P. 9.310(a). Subdivision (b)(1), which contains no limitation or reference to general law, provides that money judgments may be automatically stayed if the party seeking review “post[s] a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest.” Fla. R. App. P. 9.310(b)(1). Finally, subdivision (c) provides the trial court with “continuing jurisdiction to determine the actual sufficiency of any such bond.” Fla. R. App. P. 9.310(c)(1).

But the *Engle* Appellate Bond Law permits the five tobacco companies that were signatories to the settlement agreement to stay money judgments against them by posting far less than the bond required by Rule 9.310(b)(1). Under the rule, Reynolds would have to post a bond of over \$17 million to stay the judgment. Under the statute, it need post less than one third this amount.

The determination of how much of a bond is required for the automatic stay of a money judgment is not a substantive matter. First, a stay does not impact the

right to appeal because Florida courts have long held that an appellant cannot be required to post a bond in order to appeal. *E.g.*, *Campbell v. Jones*, 648 So. 2d 208, 209 (Fla. 3d DCA 1994); *Palm Beach Heights Dev. & Sales Corp. v. Decillis*, 385 So. 2d 1170, 1171 (Fla. 3d DCA 1980). The issue here is not whether the tobacco companies can appeal, it is whether they can delay compliance with final judgments entered after jury trials until after they have exhausted every possible appellate remedy. When a judgment becomes effective is a purely procedural decision that is exclusively the province of this Court.

Second, a stay does not impact the ultimate right to any property, it only determines *when* a right to property that has been established by a final judgment of a trial court becomes effective. The ownership of the amount of the judgment, formerly Reynolds' property but now Mrs. Hall's property, is not a matter determined by the amount of bond required to stay the judgment pending appeal. Therefore, determining the bond amount does not create or define property rights. It does, however, protect the substantive right to property (i.e., the judgment), by ensuring that the funds are not dissipated by any party while the owner is finally determined. *Wilson v. Woodward*, 602 So. 2d 545, 546 (Fla. 2d DCA 1991) ("The purpose behind conditioning a stay pending appeal on the posting of a bond is to ensure payment to the appellee of the full amount of the order, including interest and other items, in the event of an unsuccessful appeal."). Thus, the amount of the

bond is a matter of pure procedure reserved exclusively for this Court by the constitution.

Resolution of this issue is controlled by this Court's decision in *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979). In that case, the Court considered the conflict between Rule 9.310's predecessor, Florida Appellate Rule 5.12(1), and section 119.11(2), Florida Statutes (1975). Rule 5.12(1) provided that the filing of a notice of appeal by a public body automatically stays the order appealed, while section 119.11(2) provided to the contrary with regard to appeals of orders requiring a public agency to open its records for inspection. *Wait*, 372 So. 2d at 422. Relying on article V, section 2, the Court invalidated the statute and reasoned as follows:

The granting of a stay, because it is a step in the enforcement of a final judgment, is concerned with "the means and method to apply and enforce" substantive rights and falls within the definition of procedural law We reject Florida Power & Light's contention that rule 5.12(1) is actually substantive in nature and hold that the filing of a notice of appeal by a public agency from an order requiring the agency to open its records for inspection in accordance with the Public Records Act operates as an automatic stay of the lower court's order.

Id. at 423. Thus, the Court held that the circumstances under which a judgment may be stayed pending appeal is a purely procedural matter that falls within the Court's exclusive rule-making power.

The First District determined, however, that section 569.23(3) “does not impermissibly intrude on the authority granted to the Florida Supreme Court by article V, section 2(a).” R:128. Refusing to consider whether the statute was procedural or substantive, the court relied only on the preamble to part (a) of the rule: “Except as provided by general law.” Fla. R. App. P. 9.310(a). Citing *BDO Seidman, LLP v. Banco Espirito Santo International, Ltd.*, 998 So. 2d 1 (Fla. 3d DCA 2008), the court concluded that this general law exception gives the legislature wholesale authority to establish the amount of a bond required to automatically stay enforcement pending review and thereby vary the conditions for imposing a stay. In *BDO Seidman*, the Third District upheld the constitutionality of section 45.045, Florida Statutes, which purports to place a \$50 million cap on supersedeas bonds in all cases. 998 So. 2d at 2-3.

But the reasoning below and in *BDO Seidman* is fatally flawed. The “except as provided by general law” provision does not mean that the legislature has the power to legislate on any matter concerning bonds on appeal. Rather, that provision allows for statutory rights to a stay. *In re Proposed Fla. Appellate Rules*, 351 So. 2d 981, 1010 (Fla. 1977). And this clause is separate from the other automatic stays anticipated by subsection (b). Those automatic stays include when the order “is a judgment solely for the payment of money,” Rule 9.310(b)(1), as is the case here.

Additionally, subsection (b)(1) of the Rule is not limited by any general law provision. The Court's failure to include that limitation indicates that this matter was to be left exclusively within its purview. *See Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) ("When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded."); *see also Barco v. Sch. Bd. of Pinellas Cnty.*, 975 So. 2d 1116, 1122 (Fla. 2008) (principles of statutory construction may be used to interpret rules of procedure). The general law provision, contained only in subsection (a), cannot be read to apply to all of Rule 9.310. The Rule does not, therefore, permit the legislature to alter the particular bond requirement for automatically staying enforcement of a monetary judgment.

If the First and Third District's conclusion was correct, it would mean that this Court had given the legislature total authority to determine when a stay may be granted in all circumstances. *State Dep't of Highway Safety & Motor Vehicles v. Begley*, 776 So. 2d 278, 279 (Fla. 1st DCA 2000). But this Court has recognized that the judiciary and the legislature cannot delegate to each other the power that the constitution invests in them. *See Amendments to the Fla. R. Workers' Comp. P.*, 891 So. 2d 474, 478-79 (Fla. 2004) (holding that the legislature may not delegate to the courts the authority to promulgate workers' compensation rules of procedure). Indeed, the constitution expressly forbids such delegation. *See art. II,*

§ 3, Fla. Const. (“No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”).

The *BDO Seidman* court relied on *St. Mary’s Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), for the proposition that the legislature may vary the circumstances under which a stay pending appeal may be entered. *BDO Seidman*, 998 So. 2d at 3. But that is a misreading of *St. Mary’s Hospital*. In that case, the Court considered section 766.212(2), Florida Statutes, which provides that a medical malpractice arbitration award may not be stayed pending review except upon order of the district court of appeal. The Court upheld the statute over a separation of powers argument, but that holding has no bearing on the issue in this case for at least two reasons.

First, section 766.212(2) only conflicts with Rule 9.310 to the extent that it gives the authority to enter a stay pending appeal to the district court of appeal instead of the trial court. It does not conflict with Rule 9.310(b)(1)’s requirement of a bond to stay a money judgment because section 766.212(2) does not apply to money judgments at all, only to arbitration awards.

Second, the Court in *St. Mary’s Hospital* did not engage in any analysis of the constitutional distinction between procedure and substance. It did not refer to a single precedent on the issue. Instead, it focused on the fact that the case involved arbitration under a statutory scheme to which the parties had agreed:

The parties agreed to participate in this voluntary arbitration process. When a party voluntarily agrees to enter binding arbitration under this statutory alternative process, the party has bound itself to the statutory terms of that process. Accordingly, in this instance, when the parties agreed to participate in the arbitration process of the Medical Malpractice Act, they also agreed to the limited stay and review procedures set forth in that Act. *Under these circumstances*, we agree with the district court's conclusion that section 766.212(2) does not unconstitutionally infringe upon this Court's rule-making authority.

St. Mary's Hosp., 769 So. 2d at 967 (emphasis added).

The issue in this case arises under very different circumstances. In this case Mrs. Hall did not agree to an alternative dispute resolution process. She filed her claims in court and is entitled to all of the procedural benefits afforded her. The most important procedural benefit to which she is entitled at this point is to have her judgment fully secured while Reynolds exercises its right to appeal. *See, e.g., Makowski v. Makowski*, 578 So. 2d 737, 737 (Fla. 3d DCA 1991) (noting that the purpose of requiring a supersedeas bond as a condition for obtaining a stay pending appeal is "to insure payment of the *full amount of the order* ... if the review is dismissed or order affirmed") (emphasis added) (quoting *Dice v. Cameron*, 424 So. 2d 173, 174 (Fla. 3d DCA 1983)).

Federal courts, including the Supreme Court of the United States, have also examined whether state statutes that purport to regulate the terms of a stay pending appeal are procedural or substantive. Under the doctrine of *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), state laws governing purely procedural matters

do not bind federal courts sitting in diversity. Although the context is slightly different, the underlying policies and reasoning are analogous to the substantive-versus-procedural issue presented here. In both contexts, the underlying principle is that matters of how the judicial process will operate to adjudicate substantive rights are peculiarly within the province of the relevant court system. Accordingly, federal case law under *Erie* should at least be instructive, and it fully supports Mrs. Hall's position.

In *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987), the Supreme Court considered an Alabama statute providing for a fixed penalty on appellants who obtained stays pending ultimately unsuccessful appeals. It held that this law was procedural and because it conflicted with the federal rule of procedure governing stays pending appeal, it would not be applied in federal court. *Id.* at 7. See also *Vacation Village, Inc. v. Clark Cnty., Nev.*, 497 F.3d 902, 913-14 (9th Cir. 2007) (holding that Nevada statute requiring government agency to deposit amount of judgment in court before disputing the judgment on appeal is a procedural law that does not govern federal courts applying Nevada substantive law).

In short, the decision of when a trial court's judgment becomes effective is a purely procedural issue that the constitution places exclusively in the hands of this Court, subject only to a two-thirds legislative override. Accordingly, even if it were a general law, the *Engle* Appellate Bond Law would still be unconstitutional.

CONCLUSION

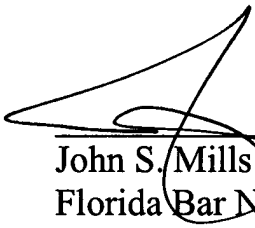
For the foregoing reasons, this Court should declare section 569.23(3) unconstitutional and reverse the First District's decision approving the trial court's bond order.

Respectfully submitted,

AVERA & SMITH, LLP

THE MILLS FIRM, P.A.

Rod Smith
Florida Bar No. 0202551
Mark Avera
Florida Bar No. 812935
Dawn M. Vallejos-Nichols
Florida Bar No. 0009891
2814 SW 13th Street
Gainesville, Florida 32608
(352) 372-9999 Telephone
(352) 375-2526 Facsimile



John S. Mills
Florida Bar No. 0107719
Courtney Brewer
Florida Bar No. 0890901
203 North Gadsden Street, Suite 1A
Tallahassee, Florida 32301
(850) 765-0897 Telephone
(850) 270-2474 Facsimile

Attorneys for Amanda Jean Hall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following persons by e-mail⁸ this 4th day of April, 2012:

Counsel for R.J. Reynolds Tobacco Co.
Robert B. Parrish – rbp@mppkj.com
David C. Reeves – dcreeves@mppkj.com

⁸ The parties have agreed to accept service by email at the email addresses listed above in lieu of U.S. Mail and have further agreed that electronic service will be deemed service by mail for purposes of Fla. R. App. 9.420(e).

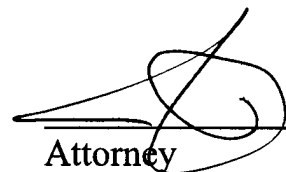
Jeffrey A. Yarbrough – jyarbrough@mppkj.com
Karen Fitzpatrick – kfitzpatrick@mppkj.com
Lynn Scott – ldscott@mppkj.com
Elliot H. Scherker – scherkere@gtlaw.com
Julissa Rodriguez – rodriguezju@gtlaw.com
Gregory G. Katsas – ggkatsas@jonesday.com
Charles R.A. Morse – cramorse@jonesday.com

Counsel for Attorney General

Louis F. Hubener – lou.hubener@myfloridalegal.com

Counsel for *Engle* Plaintiff Amici

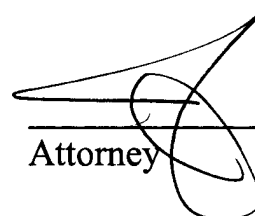
Steven L. Brannock – sbrannock@bhappeals.com
Celene H. Humphries – chumphries@bhappeals.com
Christopher V. Carlyle – ccarlyle@appellatelawfirm.com
Lincoln J. Connolly – ljc@rbrlaw.com
Robert S. Glazier – glazier@fla-law.com
Christopher J. Lynch – clynch@hunterwilliamsllaw.com
Joel S. Perwin – jperwin@perwinlaw.com
Richard B. Rosenthal – rbr@rosenthalappeals.com
Bard D. Rockenbach – bdr@flappellatelaw.com
David J. Sales – david@salesappeals.com
Matthew D. Schultz – mschultz@levinlaw.com



Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.



Attorney