

IN THE SUPREME COURT OF FLORIDA

AMANDA JEAN HALL, etc.

Petitioner,

v.

Case No. SC11-1611

L.T. No. 1D10-2820

R.J. REYNOLDS TOBACCO CO.,

Respondent.

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

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Amanda Jean Hall has invoked this Court's jurisdiction to hear her constitutional challenges to section 569.23(3), Florida Statutes (2010), which gives specified tobacco companies a special right to obtain a stay of a money judgment pending appeal that no other Florida defendant enjoys. She contends that the statute is an unconstitutional special law granting a benefit to private corporations and an unconstitutional legislative attempt to regulate judicial procedure.

Mrs. Hall obtained a \$15.75 million judgment against the respondent R.J. Reynolds Tobacco Company in this *Engle* progeny lawsuit. (App. 2.) Reynolds appealed and posted a bond of only \$5 million, claiming the benefit of an automatic stay pursuant to section 569.23(3). (App. 2.) While Florida Rule of Appellate Procedure 9.310(b)(1) requires other defendants to post security for the full amount of the judgment plus twice the rate of interest, section 569.23(3) purports to exempt from the rule the five tobacco companies who entered into settlement agreements with the state in *State of Florida v. American Tobacco Co.*, No. 95-1466AH (Fla. 15th Cir. Ct.), at least when they appeal *Engle* judgments. § 569.23(1), (3)(a). (App. 3-4, 12.)

Mrs. Hall unsuccessfully moved the trial court to determine that section 569.23(3) was unconstitutional and then sought review in the district court. (App. 2-3.) The district court determined that the statute is not a special law because,

although it only applies to the five companies that signed the settlement agreements, it protects the state's revenue stream under those agreements, which is "a matter of significant statewide importance." (App. 10-16.) And it rejected Mrs. Hall's separation of powers argument because it concluded 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." (App. 16-23.) The court 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?

(App. 23-24.) Mrs. Hall timely invoked this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction because the decision below expressly (1) certifies a question of great public importance, (2) upholds the validity of a statute, (3) construes the constitution, (4) impacts a constitutional officer (this Court's clerk), and (5) conflicts with this Court's prior decision that one branch may not delegate to the other the authority to regulate its procedures.

The Court should grant review because the decision below cuts to the core of this Court's rulemaking authority and employs circular reasoning to gut another

constitutional check on legislative power. Moreover, the issue will impact hundreds, if not thousands of appeals and hundreds of millions of dollars. The statute at issue dramatically shifts the balance of power between plaintiff and defendant and creates an economic incentive for tobacco companies to prolong *Engle* cases by using appeals and certiorari petitions as delay tactics.

ARGUMENT

This Court has discretionary jurisdiction for no less than five reasons. First, the court has discretionary jurisdiction to answer the certified question pursuant to article V, section 3(b)(4), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v). Second, because the opinion below expressly declares section 569.23(3) valid, the Court has discretionary jurisdiction pursuant to article V, section 3(b)(3) and Rule 9.030(a)(2)(A)(i). Third, because the opinion below expressly construes provisions of the Florida Constitution, the Court has discretionary jurisdiction pursuant to article V, section 3(b)(3) and Rule 9.030(a)(2)(A)(ii). Fourth, because section 569.23 “imposes several reporting and record retention requirements on ... the Clerk of the Florida Supreme Court,” (App. 9), a constitutional officer, the Court has discretionary jurisdiction pursuant to article V, section 3(b)(3) and Rule 9.030(a)(2)(A)(iii). Finally, the district court’s conclusion that this Court delegated authority over stays to the Legislature conflicts with this Court’s holding that one branch cannot delegate the authority

over its procedures to another branch. *Amendments to the Fla. R. Workers' Comp. P.*, 891 So. 2d 474, 478-79 (Fla. 2004). Thus, this Court also has jurisdiction pursuant to article V, section 3(b)(3) and Rule 9.030(a)(2)(A)(iv).

It seems rare that a single case could present five separate bases for this Court's discretionary jurisdiction, but that is a testament to how important the issue is and why this Court should grant review. The issue cuts to the core of this Court's own authority over judicial rulemaking and the separation of powers between the branches. And the decision guts another constitutional check on legislative power by employing circular reasoning to conclude that the prohibition against certain special laws under article III, section 11(a) may be overcome by a showing that a law serves a public purpose, even though many of the special laws prohibited by section 11(a) serve public purposes by definition. *See* art. III, § 11(a)(2) (prohibiting special laws for collection of taxes); § 11(a)(4) (prohibiting special laws for punishment of crime); § 11(a)(19) (prohibiting special laws for hunting and fishing); § 11(a)(20) (prohibiting special laws for regulation of occupations regulated by state agencies).

Moreover, as the district court noted, Mrs. Hall's challenge "implicate[s] significant public policy issues of statewide importance because there are thousands of *Engle* progeny cases pending around the state and there are an increasing number of multi-million dollar judgments in excess of the thresholds in

section 569.23(3) being entered and appealed in those cases.” (App. 23.) The Court’s clerk maintains a 587-page list of the more than 4,000 *Engle* cases pending in state court, and by Mrs. Hall’s count, defendants have appealed judgments in 30 of those cases so far, with hundreds, if not thousands, likely to follow. *See* http://www.floridasupremecourt.org/clerk/tobaccoBonds/Master%20List_052710.pdf. According to Courtroom View Network, 49 *Engle* cases have gone to verdict as of August 25, 2011, resulting in 34 plaintiff’s verdicts awarding an average of \$14.5 million in damages. <http://info.courtroomview.com/engle-verdict-tracker> That source calculates that 1.6 verdicts are reached each month, a pace that will take over 250 years assuming only 5,000 of the original 8,000+ lawsuits (in both state and federal court) end up going to trial. *Id.* Now that this Court has denied review of *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), *rev. denied*, __ So. 3d __, No. SC11-483, 2011 WL 2848783 (Fla. July 19, 2011), it seems likely that this pace will pick up to some degree. But the important point is that this issue will impact hundreds, if not thousands, of appeals.

And the amount of money at stake is in the hundreds of millions. The clerk of this Court maintains a list of section 569.23(3) bonds on the Court’s website. http://www.floridasupremecourt.org/clerk/tobaccoBonds/TAB_Appeals-Bonds%20Posted082411.pdf. Adding up the figures in that list, over \$356 million in judgments have already been superseded by bonds posted pursuant to

section 569.23(3)(a). (Section 569.23(3)(b) bonds are also on the list, but are addressed separately in this brief.) Rule 9.310(b)(1) would require those bonds to total nearly \$400 million, but due to the caps in section 569.23(3)(a), the tobacco companies have posted less than \$95 million in bonds. Thus, to date, the statute has resulted in *Engle* plaintiffs being under secured by over \$305 million compared to similarly situated plaintiffs suing any other defendants.

On the flipside, the tobacco companies have received a windfall in terms of setting aside less collateral and paying less in bond premiums. While Mrs. Hall does not know the specific arrangement the tobacco companies may have, the typical arrangement is for the surety to require the appellant to provide collateral for the full amount of the bond and pay a premium of two percent of the amount bonded. *E.g.*, <http://www.jurisco.com/rates.html>. Using these standards, section 569.23(3)(a) has allowed the tobacco companies to leave over \$300 million in assets unencumbered and save over \$6 million in premiums in just two years.

This is an important imbalance of power compared to normal cases as it increases the incentive for the tobacco companies to appeal as a delay tactic. They keep more of their funds unencumbered during the appeals and conversely force plaintiffs and their lawyers to bear the heavy costs of litigation for an extra year or more. Even with the benefit of the *Engle* findings, these cases are extremely expensive to try, and the industry's litigation strategy is well documented – drive

up the cost of trying these cases so that plaintiff's lawyers will be dissuaded from taking them. As a Reynolds' defense lawyers famously bragged, "To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but my making that other son of a bitch spend all his." *Smith v. R.J. Reynolds Tobacco Co.*, 630 A.2d 820, 826 n.7 (N.J. Super. Ct. App. Div. 1993); *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198, 237 (E.D.N.Y. 2001), *rev'd sub nom. Empire Healthchoice, Inc. v. Philip Morris USA Inc.*, 393 F.3d 312 (2d Cir. 2004); *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993); *Richardson v. Philip Morris Inc.*, No. 96145050/CE212596, 1996 WL 34388360 (Md. Cir. Ct. 1996). This imbalance is especially dramatic for *Engle* cases where there is little chance that all of the cases can be tried before the plaintiffs and their survivors die. In this war of attrition, any advantage that allows the defendants to delay cases even further is unjust.

And the issue does not end even when the defendants have exhausted their appeals in Florida courts. If a tobacco defendant "exercises its right to seek discretionary appellate review outside of Florida courts, including review by the United States Supreme Court," the statute provides for an additional automatic stay upon the posting of security in an amount capped by the lesser of the amount of the judgment (without interest) and three times the cap for stay pending state court review (i.e., \$15 million when 40 or fewer judgments are on appeal).

§ 569.23(3)(b). Four *Engle* judgments, including Mrs. Hall's, have now survived appellate review in the state courts after this Court recently denied review. *R.J. Reynolds Tobacco Co. v. Martin*, Case No. SC11-483 (Fla. July 19, 20011); *R.J. Reynolds Tobacco Co. v. Gray*, Case No. SC11-1323 (Fla. July 20, 2011); *R.J. Reynolds Tobacco Co. v. Hall*, Case No. SC11-1165 (Fla. July 19, 2011); *Liggett Group, LLC v. Campbell*, Case No. SC11-1143 (Fla. July 19, 2011). Although they have not yet filed a petition for writ of certiorari, the tobacco defendants have promised to do so and have posted new bonds for an automatic stay pending review in the Supreme Court of the United States pursuant to section 569.23(3)(b). Those four plaintiffs are currently under secured by roughly \$20 million. The tobacco companies are correspondingly keeping that \$20 million unencumbered and saving over \$400,000 in bond premiums.

This aspect of the stay provides two additional reasons why this case is well suited as the vehicle to address the issue. First, these cases result in further conflicts between section 569.23(3) and the appellate rules beyond the amount of security required to supersede a money judgment. For example, Rule 9.310(e) provides that a stay generally only lasts until the appellate court issues its mandate, and Rule 9.340 requires the appellate court to issue its mandate after 15 days following rendition of its decision.

The effect of these rules is to make the decisions of the district courts of appeal presumptively final in money judgment (as well as

most other) matters, subject to an applicant's showing that there is both a likelihood of success in the Supreme Court and irremediable harm by the denial of a stay pending review in that Court. Only upon such a showing will the stay entered by the trial court remain in effect to protect the applicant.

State ex rel. Price v. McCord, 380 So. 2d 1037, 1039 (Fla. 1980). *See also* Fla. R. App. P. 9.120 committee note (emphasizing that stays pending discretionary review in this Court should be granted "only when essential"). Thus, the conflict between the Legislature's directive in section 569.23(3) and this Court's judgments on how best to regulate court procedures is joined with even more force.

Second, this issue may become moot in every case before the issue has time to reach the Court and be decided on the merits. For example, Mrs. Hall's claim may be moot or become so shortly. Specifically, if Reynolds fails to timely seek review in the Supreme Court or that Court denies review, then the issue will be moot as to her. (Any thought that this issue would become moot in the abstract was removed when the Legislature repealed the December 31, 2012, sunset provision from the statute. Ch. 2011-61 § 16, at 31, Laws of Fla. (repealing § 569.23(3)(f), *available at* <http://laws.flrules.org/2011/61>).) But because this important issue is certain to repeat with each new appeal, the Court should decide it now without regard to mootness. *See Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984) ("It is well settled that mootness does not destroy an appellate court's jurisdiction ... when the questions raised are of great public importance or are

likely to recur.”); *N.W. v. State*, 767 So. 2d 446, 447 n.2 (Fla. 2000) (noting that this Court may address an issue presented by a technically moot case if the case “presents a controversy capable of repetition, yet evading review”).

This matter has already been fully briefed at the circuit and district court levels, including active participation by the Attorney General. Appellate counsel for both parties (and the Attorney General) made a substantial record in this case with oral arguments before two Alachua County circuit judges. Regardless of whether the issue becomes moot to Mrs. Hall, her appellate counsel has every incentive to fully litigate this issue as he is defending judgments of several other *Engle* plaintiffs, including *R.J. Reynolds Tobacco Co. v. Clay*, Case No. 1D10-5544 (\$20+ million judgment); *R.J. Reynolds Tobacco Co. v. Alexander*, Case No. 1D10-5282 (\$3+ million judgment); *Soffer v. R.J. Reynolds Tobacco Co.*, Case No. 1D11-3724 (\$2 million judgment); *Lorillard Tobacco Co. v. Mrozek*, Case No. 1D11-4446 (\$15+ million judgment). Requiring plaintiffs in other cases or in other district courts of appeal to incur the time and expense of litigating this collateral issue would be unjust and continue the tremendous imbalance of power created by section 569.23. The Court should resolve this issue now.

CONCLUSION

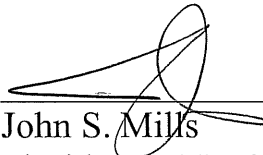
For the foregoing reasons, this Court has and should exercise discretionary jurisdiction over the decision below.

Respectfully submitted,

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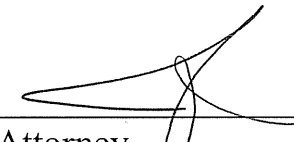
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been
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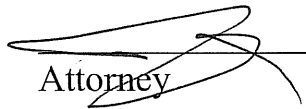


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¹ The parties have agreed to accept service by email at the email addresses listed above in lieu of U.S. Mail and have further agreed that electronic service will be deemed service by mail for purposes of Fla. R. App. 9.420(e).

CERTIFICATE OF COMPLIANCE

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



Attorney

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

R.J. REYNOLDS TOBACCO
COMPANY,

Appellant,

CASE NO. 1D10-2820

v.

AMANDA JEAN HALL, as
Personal Representative for the
Estate of ARTHUR HALL SR.,

Appellee.

_____/

Opinion filed July 12, 2011.

An appeal from the Circuit Court for Alachua County.
Hon. Robert E. Roundtree, Jr., Judge.

Stephanie E. Parker and Gregory G. Katsas, of Jones Day, Atlanta, Georgia; and
Charles Trippe, of Moseley Prichard Parrish Knight & Jones, Jacksonville, Florida,
for Appellant.

Rod Smith, Mark A. Avera, and Dawn M. Vallejos-Nichols, of Avera & Smith,
LLP, Gainesville, Florida; and John S. Mills and Gregory J. Philo, of The Mills
Firm, Tallahassee, Florida, for Appellee.

ON MOTION FOR REVIEW OF STAY ORDER

WETHERELL, J.

Appellee seeks review of the trial court's order denying her motion
challenging the sufficiency of the bond posted by Appellant, R.J. Reynolds

Tobacco Company (RJR), pursuant to section 569.23(3), Florida Statutes (2010), to obtain a stay of the judgment in this Engle¹ progeny case. Appellee contends that the bond is insufficient because the statute upon which it is based is unconstitutional. We reject Appellee's constitutional challenges to section 569.23(3) and affirm the trial court's order.

Appellee obtained a \$15.75 million judgment against RJR in this case. RJR appealed the judgment to this court and obtained an automatic stay of the judgment by posting a \$5 million bond in accordance with section 569.23(3), rather than the approximately \$17.6 million bond that would have been required for a stay under Florida Rule of Appellate Procedure 9.310(b)(1). Appellee filed a motion with the trial court to determine the sufficiency of the bond and, in that motion, Appellee argued that section 569.23(3) was unconstitutional. The Attorney General was permitted to intervene to defend the constitutionality of the statute. After a hearing, the trial court denied the motion, citing an unpublished order of this court in another Engle progeny case² and the Third District Court of Appeal's decision in

¹ Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006).

² R.J. Reynolds Tobacco Co. v. Clay, No. 1D10-5544 (Apr. 12, 2011) (affirming order denying motion to determine sufficiency of bond).

BDO Seidman, LLP v. Banco Espirito Santo International, Ltd.³ Appellee seeks review of the trial court's order pursuant to rule 9.310(f).⁴

As she did below, Appellee contends in her motion for review that section 569.23(3) is unconstitutional because 1) it is a special law granting a privilege to a corporation in violation of article III, section 11(a)(12) of the Florida Constitution, and 2) it impermissibly intrudes on the Florida Supreme Court's authority to regulate practice and procedure in the courts under article V, section 2(a), thereby violating the separation of powers mandate in article II, section 3. Each claim will be addressed in turn after a brief discussion of the background, history and operation of section 569.23(3).

Background

In 1995, the State of Florida sued RJR and other cigarette manufacturers, asserting various claims for monetary and injunctive relief. See State of Fla., et al. v. Am. Tobacco Co., et al., Case No. 95-1466 AH (Fla. 15th Cir. Ct.). The suit was resolved in 1997 through a settlement agreement (commonly referred to as "the FSA") that, among other things, required RJR and the other settling

³ 998 So. 2d 1 (Fla. 3d DCA 2008), rev. denied, 996 So. 2d 211 (Fla. 2008).

⁴ We have jurisdiction even though we affirmed the judgment in this case (see 2011 WL 1938199) and RJR filed a notice to invoke the discretionary jurisdiction of the Florida Supreme Court. See City of Miami v. Arostegui, 616 So. 2d 1117, 1119 (Fla. 1st DCA 1993). The issue framed by the motion was not rendered moot by our decision affirming the judgment because the stay provided by section 569.23(3) extends "during the pendency of all appeals or discretionary appellate reviews of such judgment in Florida courts." § 569.23(3)(a)1., Fla. Stat.

companies to pay the State approximately \$13 billion over 25 years along with additional payments that will continue in perpetuity. The payments have been as high as \$765 million and are projected to be approximately \$350 million per year in the upcoming fiscal years. The payments are used to fund various state agencies and programs, including the comprehensive statewide tobacco education and prevention program mandated by article X, section 27 of the Florida Constitution. See Art. X, § 27(b), Fla. Const. (requiring 15% of the total gross funds that tobacco companies pay the State under the FSA to be used to fund the constitutionally-mandated tobacco education and prevention program).

Starting in 2000, the Florida Legislature passed several statutes in response to concerns about the potential adverse impact of large verdicts in suits filed by individual smokers on the ability of the tobacco companies to continue to make the payments required by the FSA. The clear purpose and intent of these statutes was to protect the State's pecuniary interest in the revenue stream under the FSA.

In 2000, the Legislature enacted section 768.733, Florida Statutes. This statute established a \$100 million cap on the bond or other security required to stay execution of a punitive damage award in a certified class action. See § 768.733(2), Fla. Stat. (2000) (limiting the bond to the lesser of the amount of the punitive damages plus interest or 10% of the defendant's net worth, but in no event more than \$100 million). At the time, Engle was proceeding as a class action and the

jury had awarded \$146 billion in punitive damages against RJR and the other defendants in that case. The Legislature was concerned that “the State of Florida itself would be at risk in its continued receipt of settlement payments if the ability of participating manufacturers to make the payments were threatened by a requirement that the manufacturers immediately pay massive awards of punitive damages.” See Fla. CS for SB 1720 (2000) (First Engrossed) (providing legislative intent for section 768.733 as recognized in Fla. S. Jour. 1442 (Reg. Sess. 2000)); see also Fla. H.R. Comm. on Fin. Servs. CS/HB 1721⁵ Staff Analysis 1, 4 (final July 13, 2000) (on file with comm.) (explaining that section 768.733 was part of a comprehensive bill designed to protect the state’s proceeds under the FSA, and noting that “[w]hile the tobacco settlement payments are to be made in perpetuity, there is concern by some that the companies may declare bankruptcy and default on their obligations” because of lawsuits such as Engle).

In 2003, the Legislature enacted section 569.23. This statute established a \$100 million cap on the bond or other security that a signatory to the FSA had to post in order to obtain a stay of any judgment pending appeal. See § 569.23(1), Fla. Stat. (2003) (cross-referencing section 215.56005(1)(f), which defined “tobacco settlement agreement” to mean “the settlement agreement, as amended, entered into by the state and participating cigarette manufacturers in settlement of

⁵ CS/HB 1721 became chapter 2000-128, Laws of Florida, which enacted section 768.733.

State of Florida v. American Tobacco Co., No. 95-1466AH (Fla. 15th Cir. Ct. 1996’’). As was the case with section 768.733, the enactment of section 569.23(3) was based on concerns that the FSA signatories might default on their obligations to the State if they could not afford the bond required to stay an extremely large money judgment pending appeal. See Fla. S. Comm. on Judiciary SB 2826⁶ Staff Analysis 3 (Apr. 18, 2003) (on file with comm.).

Section 569.23 was amended in 2009 in response to the Florida Supreme Court’s decision in Engle, which had the practical effect of decertifying the class in that case. The legislative staff analysis for the 2009 amendments explained:

In 2006, the Florida Supreme Court decertified a class action lawsuit [Engle] but authorized the members of the class to bring individual lawsuits within a certain time period. As a result of this case, there are approximately 3,000 separate lawsuits in which damages may be awarded. Prior to this decertification, the class action suit would have been covered by the supersedeas bond cap in s. 569.23, F.S. However, the separate 3,000 cases are not currently covered by s. 569.23, F.S., which would mean that the tobacco companies may have to post supersedeas bonds in up to 3,000 separate cases that could cumulatively total billions of dollars.

Fla. S. Comm. on Judiciary CS/SB 2198⁷ Staff Analysis 5 (Apr. 23, 2009) (on file with comm.); see also id. at 3 (noting that the cost of the individual and class

⁶ SB 2826 became chapter 2003-133, Laws of Florida, which enacted section 569.23.

⁷ CS/SB 2198 became chapter 2009-188, Laws of Florida, which included the amendments to section 569.23.

action lawsuits against the FSA signatories is a factor affecting the stability of the tobacco settlement payments).

The 2009 amendments retained and revised the \$100 million bond limit created in 2003. See § 569.23(2), Fla. Stat. (clarifying that the \$100 million is cumulative for all appellants). The amendments also added a new subsection (3), which provides in pertinent part:

(a)1. In civil actions against a signatory, or a successor, parent, or affiliate of a signatory, to a tobacco settlement agreement brought by or on behalf of persons who claim or have been determined to be members of a former class action that was decertified in whole or in part, the trial courts shall automatically stay the execution of any judgment in any such actions during the pendency of all appeals or discretionary appellate reviews of such judgment in Florida courts, upon provision of security as required in this paragraph. All security shall be provided through the posting with or payment into the registry of the clerk of the Supreme Court.

2. The total amount of security that must be provided for all appellants collectively with regard to a single judgment is equal to the lesser of the amount of the judgment to be stayed or the amount of security per judgment required based on the following tiers of judgments on appeal in the courts of this state at the time the security is provided:

TIER— NUMBER OF JUDGMENTS	AMOUNT OF SECURITY PER JUDGMENT	MAXIMUM TOTAL ALL SECURITY
1-40	\$5,000,000	\$200,000,000
41-80	\$2,500,000	\$200,000,000
81-100	\$2,000,000	\$200,000,000
101-150	\$1,333,333	\$199,999,950

TIER— NUMBER OF JUDGMENTS	AMOUNT OF SECURITY PER JUDGMENT	MAXIMUM TOTAL ALL SECURITY
151-200	\$1,000,000	\$200,000,000
201-300	\$666,667	\$200,000,100
301-500	\$400,000	\$200,000,000
501-1,000	\$200,000	\$200,000,000
1,001-2,000	\$100,000	\$200,000,000
2,001-3,000	\$66,667	\$200,001,000

3. In cases having multiple defendants, an individual appellant shall provide security in proportion to the percent or amount of liability specifically allocated against that appellant in the judgment, or, if liability is not specifically allocated in the judgment, for a share of the unallocated portion of the judgment determined by dividing the unallocated portion of the judgment equally among all defendants against whom the judgment is entered. Once an appellant has provided its required security with respect to a judgment, that appellant is entitled to a stay of that judgment regardless of whether other defendants in that case have provided the security required of them.

4. When the number of judgments on appeal changes so that the total is within a higher or lower tier, the amount of security required in each case shall change by operation of law, upon notice provided by any party to all other parties and upon deposit within 30 days after notice of any additional security required hereunder, from the amount of security previously posted to an amount consistent with the statutory appeal bond rights prescribed in this paragraph. . . .

* * *

(c) A claim may not be made against the security provided by an appellant unless an appellant fails to pay a judgment in a case covered by this subsection within 30

days after the judgment becomes final. For purposes of this subsection, a judgment is “final” following the completion of all appeals or discretionary appellate reviews, including reviews by the United States Supreme Court. If an appellant fails to pay a judgment within such time period, the security for that judgment provided by that appellant shall be available to satisfy the judgment in favor of the appellee. Upon satisfaction of the judgment in any case, the clerk of the Supreme Court may refund any security on deposit with respect to that case to the appellant upon an order from the trial court confirming satisfaction of the judgment.

§ 569.23(3), Fla. Stat.

Section 569.23(3) has two main components. First, it provides that, upon posting a bond or other security in accordance with the statute, a signatory to the FSA is entitled to an automatic stay of the judgment in any civil case brought by or on behalf of a person who was a member of a decertified class action. § 569.23(3)(a)1., Fla. Stat. Second, and most pertinent to the issue framed by Appellee’s motion for review, the statute limits the amount of security that the signatory is required to post in order to obtain the automatic stay provided by the statute. § 569.23(3)(a)2., Fla. Stat. The limit is tied to the number of cases on appeal, subject to a cumulative cap of \$200 million. Id. Currently, there are less than 40 judgments on appeal, so the maximum security required to obtain a stay under the statute is the lesser of the amount of the judgment or \$5 million.

The statute also imposes several reporting and record retention requirements on the FSA signatories and the Clerk of the Florida Supreme Court. See §

569.23(3)(e), Fla. Stat. This information is maintained on the supreme court's website. See <http://www.floridasupremecourt.org/clerk/bonds.shtml>.

With this background in mind, we turn to Appellee's claims that section 569.23(3) is unconstitutional.

Section 569.23(3) is Presumed Constitutional

Like any other statute, section 569.23(3) comes to this court with a presumption of constitutionality. In re Estate of Caldwell, 247 So. 2d 1, 4 (Fla. 1971). All reasonable doubts as to the validity of the statute are to be resolved in favor of constitutionality. Id. Also, the court is required to give deference to classifications contained in the statute and such deference "will be observed in all cases where the court cannot say on its judicial knowledge that the Legislature could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made." Lewis v. Mathis, 345 So. 2d 1066, 1068 (Fla. 1977).

Section 569.23(3) is not a Special Law

Appellee contends that section 569.23(3) is a special law and that it violates article III, section 11(a)(12) because of its narrow application and the benefits it grants to RJR and the other FSA signatories. We reject this claim.

Article III, section 11(a)(12) provides that "[t]here shall be no special law . . . pertaining to . . . grant of privilege to a private corporation." This provision

operates as a limitation on the authority of the Legislature and, thus, a law passed in contravention of this limitation is unconstitutional. See Lawnwood Med. Ctr., Inc. v. Seeger, 990 So. 2d 503, 509 (Fla. 2008) (invalidating a statute that provided a special benefit to a single hospital and holding that the term “privilege” is not limited to economic benefits).

The parties disagree on whether section 569.23(3) is a special law. If the statute is a special law, then it is subject to the limitations in article III, section 11; if, however, the statute is a general law, then article III, section 11 is not applicable. Thus, before considering whether section 569.23(3) has the effect of granting a “privilege” to the FSA signatories, it is necessary to consider the threshold question of whether the statute is a general or special law.

The Florida Supreme Court has explained that a special law is “one relating to, or designed to operate upon, particular persons or things, or one that purports to operate on classified persons or things when classification is not permissible or the classification adopted is illegal.” Id. (quoting Dep’t of Bus. & Prof’l Regulation v. Gulfstream Park Racing Ass’n, 967 So. 2d 802, 807 (Fla. 2007)). By contrast, a general law is “a statute relating to . . . subjects or to persons or things as a class, based on proper distinctions and differences that inhere in or are peculiar or appropriate to the class.” Id. (quoting State ex rel. Gray v. Stoutamire, 179 So. 730, 733 (Fla. 1938)); see also Dep’t of Bus. & Prof’l Regulation v. Classic Mile,

Inc., 541 So. 2d 1155, 1157 (Fla. 1989) (“A law that operates universally throughout the state, uniformly on subjects as they may exist throughout the state, or uniformly within a permissible classification is a general law.”).

Appellee contends that section 569.23(3) is a special law because it applies only to the five tobacco companies that signed the FSA and the plaintiffs in the Engle progeny cases. The narrow scope of section 569.23(3) is not necessarily dispositive of whether the statute is a special law because the Florida Supreme Court has explained that “a law does not have to be universal in application to be a general law if it materially affects the people of the state.” St. Johns River Water Mgmt. Dist. v. Deseret Ranches of Fla. Inc., 421 So. 2d 1067, 1069 (Fla. 1982); see also Schrader v. Fla. Keys Aqueduct Auth., 840 So. 2d 1050 (Fla. 2003) (concluding that a law applicable only in Monroe County was a general law, not a special law, because it served an important and necessary purpose and had statewide impact). Indeed, the supreme court has previously found statutes that have a narrow application to be general laws, rather than special laws, where the statute served an important statewide purpose. See Schrader, 840 So. 2d at 1055-56 (citing cases).

For example, in Department of Legal Affairs v. Sanford-Orlando Kennel Club,⁸ the supreme court upheld a statute that benefitted a single pari-mutuel

⁸ 434 So. 2d 879 (Fla. 1983).

racing facility. The court rejected the contention that the law's narrow scope transformed it from a general law into a special law, reasoning that:

A general law operates uniformly, not because it operates upon every person in the state, but because every person brought under the law is affected by it in a uniform fashion. Uniformity of treatment within the class is not dependent upon the number of persons in the class.

Id. at 881. In upholding the statute, the court explained that the State “has a legitimate pecuniary interest in racing because of the substantial revenue it receives from pari-mutuel betting” and that the classification in the statute was directly related to this interest. Id. at 881-82. The significance of the statute's purpose to the decision upholding the statute was emphasized by the last paragraph of the opinion, which stated:

This state's interest in recreational racing and wagering is substantial. Not only does it enhance the tourist industry by providing entertainment and interest to our visitors, but the tax revenues have significantly aided our statewide programs. We find it very appropriate for the legislature to assist this industry as it would any other in like circumstances.

Id. at 883.

Likewise, in this case, we agree with RJR that the protection of the State's pecuniary interest in the revenue stream under the FSA is a matter of significant statewide importance and that the bond limitations in section 569.23(3) are reasonably related to this important state interest. The significant revenues from

the FSA are used to fund a variety of state programs and, according to the papers filed by the Attorney General in the trial court, “[i]f that revenue stream is disrupted by the financial instability of the companies due to a requirement to post exorbitantly large bonds, the fiscal health of the State may be threatened and important programs providing essential support to Florida citizens will be at risk.” It is not for us to say whether the Legislature could have or should have chosen other means to achieve this end; rather, as noted above, in evaluating a claim that a statute is a special law because of its narrow focus, we must give deference to the classifications in the statute unless we can say that the Legislature “could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made.” Lewis, 345 So. 2d at 1068. Here, the importance of the FSA revenue stream to the State and the prospect of a multitude of individual multi-million jury awards against the FSA signatories (whether arising out of Engle or other decertified class actions) provides an adequate justification for the narrow focus of the section 569.23(3).

The supreme court also explained in Sanford-Orlando Kennel Club that it did not matter that the members of the Legislature knew that the statute would benefit a single facility or that, once passed, the law only benefitted one facility. See 434 So. 2d at 882. Rather, the “controlling point” was whether the statute had the potential to apply to other facilities in the future. Id.; see also Dept. of Bus. &

Prof'l Regulation v. Gulfstream Park Racing Ass'n, Inc., 912 So. 2d 616, 621-22 (Fla. 2005) (“Whether a statute is a special law depends on its potential applicability to others who may come within the regulated class. . . . The critical question is not one of legislative intent; rather, it is whether the class regulated by the statute is open. . . . [T]he proper standard is whether there is a reasonable possibility that the class will include others.”); St. Vincent’s Med. Ctr. v. Mem’l Healthcare Grp., Inc., 967 So. 2d 794, 802 (Fla. 2007) (“[W]hether a law has general application turns on a determination of whether its application to others is reasonable or practical, not theoretical or speculative. The question of general application is not to be guided by irrational speculation that anything is possible.”).

Section 569.23(3), like the statute at issue in Sanford-Orlando Kennel Club, was specifically intended to apply to the Engle litigation and, at the time of its passage, the scope of the statute’s application was limited to that litigation. This is clear from the statute’s legislative history. However, the statute is not limited to judgments entered in favor of Engle plaintiffs; it applies in any civil case against an FSA signatory brought by or on behalf of a member of a decertified class action. It is not unreasonable to expect that the FSA signatories, which include the nation’s four largest tobacco companies, may be the subject of other class actions that end up being decertified. Indeed, due to the tobacco industry’s reputation as a

deep-pocket defendant and “a present-day popular villain,”⁹ the likelihood that section 569.23(3) will have a broader application than the Engle progeny cases is certainly not theoretical or speculative; thus, the class of cases subject to the statute is not closed.

In sum, we conclude that section 569.23(3) is a general law, not a special law. Accordingly, the provisions of article III, section 11 are not implicated and it is not necessary to consider whether, under Lawnwood Medical Center, the bond limitation in section 569.23(3) is a “privilege” granted to the FSA signatories.

Section 569.23(3) Does Not Violate Separation of Powers

Appellee also contends that section 569.23(3) violates the separation of powers mandate in article II, section 3¹⁰ because the statute addresses a purely procedural matter over which the Florida Supreme Court has exclusive rulemaking authority under article V, section 2(a). We reject this claim.

Article V, section 2(a) provides in pertinent part that “[t]he supreme court shall adopt rules for the practice and procedure in all courts” This provision gives the Florida Supreme Court authority to adopt procedural rules; it does not authorize the court to make substantive law. Conversely, this provision, in

⁹ Philip Morris, Inc. v. French, 897 So. 2d 480, 487 (Fla. 3d DCA 2004), rev. denied, 918 So. 2d 292 (Fla. 2005).

¹⁰ “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”

conjunction with article II, section 3, prohibits the Legislature from enacting purely procedural statutes. See State v. Raymond, 906 So. 2d 1045, 1048-49 (Fla. 2005) (declaring statute unconstitutional under article II, section 3 because it created a new procedural rule). The line between procedure and substance is fuzzy, at best, and “[t]he entire area of substance and procedure may be described as a ‘twilight zone’ and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.” In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring).

Appellee contends that section 569.23(3) impermissibly intrudes upon the supreme court’s rulemaking authority because the circumstances under which a judgment may be stayed pending appeal is a purely procedural matter. RJR responds that the establishment of a limitation on the amount of bond required to stay a judgment pending appeal is a substantive matter within the purview of the Legislature. We need not wade into the murky waters of procedure verses substance to resolve this case because, even if granting a stay pending appeal is a procedural matter, the stay rule adopted by the supreme court expressly contemplates that the requirements for obtaining a stay may be established by general law.

Rule 9.310(a) provides that “. . . a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief.” Thus, the rule establishes how a stay is to be obtained (by filing a motion), where the motion is to be filed (in the trial court), and what authority the trial court has upon receipt of the motion (to grant, modify, or deny a stay). However, the rule also recognizes that general law and the rule itself may provide different requirements for obtaining a stay because the language quoted above is preceded by a clause stating “[e]xcept as provided by general law and in subdivision (b).” Fla. R. App. P. 9.310(a); see also BDO Seidman, 998 So. 2d at 2 (recognizing that “Rule 9.310(a) expressly authorizes modifications to its terms as ‘provided by general law’”); In re Proposed Florida Appellate Rules, 351 So. 2d 981, 1010 (Fla. 1977) (stating in the commentary to rule 9.310 that “[t]he rule preserves any statutory right to a stay”).

Section 569.23(3) clearly falls within the “except as provided by general law” clause. The statute – which, as discussed above, is a general law – establishes different requirements for obtaining a stay of a judgment entered against a signatory to the FSA in certain types of cases. The statute operates similar to rule 9.310(b)(1) in that it provides for an automatic stay of the judgment upon the posting of a bond; but it also establishes limits on the amount of the bond required

to secure the stay. The establishment of limits on the amount of the bond required for a stay pending appeal is a substantive matter within the purview of the Legislature and, thus, section 569.23(3) does not impermissibly intrude on the authority granted to the Florida Supreme Court by article V, section 2(a).

Our sister court came to the same conclusion in BDO Seidman. In that case, the Third District rejected a constitutional challenge to the \$50 million bond cap in section 45.045, Florida Statutes. See 998 So. 2d at 2. The court noted that the statute “concerns substantive rights to property and to appeal,” id., and it reasoned that “since the legislature holds the power to preclude stay of payment, it likewise holds the power to limit the amount required to secure a payment stay.” Id. at 3.

BDO Seidman relied on St. Mary’s Hospital, Inc. v. Phillipe,¹¹ in which the supreme court rejected a constitutional challenge to a statute that eliminated the trial court’s discretion to stay a medical malpractice arbitration award because, under rule 9.310(a), the court’s discretion was subject to exceptions in general law. See 769 So. 2d at 966-67. Although the supreme court ultimately grounded its decision upholding the statute on the fact that the parties agreed to participate in the arbitration process that included the challenged statute, the court clearly recognized the Legislature’s authority to impose limitations on the trial court’s authority to grant stays when it observed that rule 9.310(a) “gives the trial court

¹¹ 769 So. 2d 961 (Fla. 2000).

discretion to enter a stay subject to exceptions . . . ‘by general law.’” Id. at 966 (emphasis in original).

Appellee contends that BDO Seidman was “wrongfully decided” because it conflicts with the Florida Supreme Court’s decision in Wait v. Florida Power & Light Co.¹² We disagree.

The issue in Wait was whether the provisions in the predecessor to rule 9.310 granting public bodies an automatic stay upon filing a notice of appeal controlled over a statute providing that an order requiring an agency to open its records for inspection under the Public Records Act is not stayed by the agency’s filing of a notice of appeal. See id. at 422. In the decision under review by the supreme court in Wait, this court had held that the statute controlled because the rule was intended to protect the public treasury from money judgments and to allow the agency’s notice of appeal to operate as a stay in a Public Records Act case would “delay a person’s right to examine public records until through the sheer lapse of time, the need expired[, which] would defeat the purpose of the Public Records Act.” Wait v. Florida Power & Light Co., 353 So. 2d 1265, 1267 (Fla. 1st DCA 1978). The supreme court quashed this court’s decision, and held that the rule controlled over the statute, stating that the “granting of a stay, because it is a step in the enforcement of a final judgment, is concerned with ‘the means

¹² 372 So. 2d 420 (Fla. 1979).

and method to apply and enforce’ substantive rights and falls within the definition of procedural law.” Wait, 372 So. 2d at 423.

Wait is not controlling here. Wait did not involve rule 9.310; it involved the predecessor to that rule, Florida Appellate Rule 5.12(1), and the opinion made a specific point of noting that “[t]he present decision is limited to the relationship between section 119.12(2) and the ‘Florida Appellate Rules, 1962 Revision.’” Id. at 423 n.2. Rule 5.12(1) did not include the “except as provided by general law” clause contained in the current rule 9.310(a); nor was this language included in any of the other 1962 rules concerning stays pending appeal. See Fla. App. R. 5.1 - 5.12 (1962 rev.). The “except as provided by general law” language was added when rule 9.310 was created as part of the comprehensive 1977 revision of the appellate rules and, based on the commentary to the new rule approved by the Florida Supreme Court, it is clear that this language was specifically intended to “preserve[] any statutory right to a stay.” In re Proposed Florida Appellate Rules, 351 So. 2d at 1010; see also St. Mary’s Hospital, 769 So. 2d at 968-69 (recognizing that the trial court’s authority under rule 9.310(a) is subject to exceptions created by general law).

We recognize that in Department of Highway Safety and Motor Vehicles v. Begley,¹³ we stated that the “except as provided by general law” language in rule

¹³ 776 So. 2d 278 (Fla. 1st DCA 2000).

9.310(a) was a reference to “the legislature’s power to designate when and where a motion to stay must be filed, not ... a reference to the authority and discretion of the court to grant a stay” and that it would be inconsistent with the reasoning in Wait to interpret the rule language “as a broad grant of authority [to the Legislature] to override the entire rule.” Id. at 279. Begley has no impact on our disposition of this case.

First, the discussion of rule 9.310(a) in Begley was dicta because our decision upholding the statute at issue in that case (which prohibited the trial court from staying the suspension of a driver’s license during judicial review) was based on our agreement with the Third District that “the determination of whether a party may drive pending a decision related to the suspension of the driver’s license is a decision which may be made by the legislature.” Id.; see also id. (“Since mandatory suspension is not a criminal penalty, but instead a civil sanction unrelated to an appeal of the criminal conviction, the trial court does not have jurisdiction to enter a stay.”) (quoting Dept. of Highway Safety & Motor Vehicles v. DeGrossi, 680 So. 2d 1093, 1095-96 (Fla. 3d DCA 1996)).

Second, Begley was issued prior to the Florida Supreme Court’s decision in St. Mary’s Hospital. The opinion in Begley was issued on May 8, 2000, and rehearing was denied on June 2, 2000; the opinion in St. Mary’s Hospital was not issued until June 29, 2000. Thus, the Begley court did not have the benefit of the

supreme court's recognition in St. Mary's Hospital that the trial court's authority under rule 9.310(a) is subject to exceptions created by general law.

Third, Begley is distinguishable because that case involved a statute (like the statute in Wait) prohibiting the trial court from granting a stay. By contrast, the statute at issue in this case (like the statute in BDO Seidman) simply limits the amount of the bond that is required to obtain a stay pending review. Thus, this case is more similar to BDO Seidman than it is to Begley.

In sum, we conclude that section 569.23(3) does not impermissibly intrude on the Florida Supreme Court's rulemaking authority under article V, section 2(a) and, therefore, the statute does not violate the separation of powers mandate in article II, section 3.

Conclusion

For the reasons stated above, we hold that section 569.23(3) is constitutional and we affirm the trial court's order denying Appellee's motion to determine the sufficiency of the bond posted by RJR pursuant to the statute. We recognize that the issues framed by Appellee's motion implicate significant public policy issues of statewide importance because there are thousands of Engle progeny cases pending around the state and there are an increasing number of multi-million dollar judgments in excess of the thresholds in section 569.23(3) being entered and appealed in those cases. Accordingly, because the issues in this case are likely to

continue to arise around the state until the issues are definitively resolved by the Florida Supreme Court, we also certify the following question of great public importance to the supreme court:

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?

STAY ORDER AFFIRMED; QUESTION CERTIFIED.

LEWIS and ROBERTS, JJ., CONCUR.