SUPREME COURT OF FLORIDA

Case No. SC01-1830
DCA Case No. 4D00-1255

BOCA BURGER, INC., v. RICHARD FORUM,

Petitioner Respondent

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# BRIEF OF AMICI CURIAE PUBLIX SUPERMARKETS; CITIZENS FOR A SOUND ECONOMY; ASSOCIATED INDUSTRIES OF FLORIDA; FLORIDA CHAMBER OF COMMERCE; FLORIDA INSTITUTE OF CPA'S; FLORIDA MEDICAL ASSOCIATION; FLORIDA RETAIL FEDERATION; FLORIDA UNITED BUSINESS ASSOCIATION; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; ASSOCIATION OF COMMUNITY HOSPITALS AND HEALTH SYSTEM OF FLORIDA, INC.; CITY OF ORLANDO; DADE COUNTY; FLORIDA ASSOCIATION OF COUNTIES; FLORIDA LEAGUE OF CITIES: FLORIDA SHERIFFS ASSOCIATION; AND TORT REFORM UNITED EFFORT (TRUE)

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## STATEMENT OF INTEREST

PUBLIX SUPERMARKETS; CITIZENS FOR A SOUND ECONOMY; ASSOCIATED INDUSTRIES OF FLORIDA; FLORIDA CHAMBER OF COMMERCE; FLORIDA INSTITUTE OF CPA'S; FLORIDA MEDICAL ASSOCIATION; FLORIDA RETAIL FEDERATION; FLORIDA UNITED BUSINESS ASSOCIATION; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; ASSOCIATION OF COMMUNITY HOSPITALS AND HEALTH SYSTEM OF FLORIDA, INC.; CITY OF ORLANDO; DADE COUNTY; FLORIDA ASSOCIATION OF COUNTIES; FLORIDA LEAGUE OF CITIES: FLORIDA SHERIFFS ASSOCIATION; AND TORT REFORM UNITED EFFORT (TRUE), amici curiae, submit this brief in support of Respondent, Richard Forum, and ask this Court to decline to review the constitutionality of Chapter 99-225, Laws of Florida in this proceeding, or, in the alternative, declare Chapter 99-225, Laws of Florida constitutional.

Amicus Publix Supermarkets ("Publix") is the largest and fastest-growing employee-owned supermarket chain in the United States. Publix has more than 700 stores in the Southeast and more than 120,000 employees.

Amicus Citizens for a Sound Economy ("CSE") is a non-profit, grassroots organization devoted to educating the public about the benefits of the free-market system and a less intrusive government.

Amicus Associated Industries of Florida ("AIF") is a voluntary association of diversified businesses representing every segment of Florida's private sector. AIF's core philosophy is that the good fortune of the state hinges on the prosperity of its employers, and it seeks to foster an economic climate in Florida which is conducive to developing and stimulating industry and business growth.

Amicus Florida Chamber of Commerce, Inc. ("the Chamber") is a corporation organized and existing under the laws of the State of Florida. The Chamber has approximately 6,000 members including corporations, partnerships, sole proprietorships, and other business entities that are regulated by and pay taxes to state, regional and local governments. The Chamber's mission is "to be the leader in the formulation and advocacy of sound public policy for Florida business."

Amicus Florida Institute of CPA's ("FICPA") is a professional society representing Certified Public Accountants in the State of Florida. FICPA seeks to enhance the competency and professionalism of its members, and supports standards of independence, integrity and objectivity which are in the public interest.

Amicus Florida Medical Association ("FMA") is a not-for-profit corporation, which is organized and maintained for the benefit of the approximately sixteen thousand (16,000) licensed Florida physicians who comprise its membership. FMA was created and exists for the purpose of securing and maintaining the highest standards of practice in medicine and to further the interests of its members. One of the primary purposes of the FMA is to act on behalf of its members by representing their common interests before the courts of the State of Florida. Members of the FMA are substantially affected by state or national statutes, rules, regulations and policies applicable to medical negligence actions.

Amicus Florida Retail Federation is a trade association whose primary purpose is representing the interests of its members, which include persons and entities in the business of retail sales, before the Florida Legislature, various regulatory agencies, and in the judicial system as needed.

Amicus Florida United Business Association ("FUBA") is a trade association representing more than 10,000 small businesses in the State of Florida. FUBA serves as an advocate for state legislation favorable to its business members on such issues as workers compensation, unemployment compensation, business tax reductions, and civil litigation reform.

Amicus National Federation of Independent Business is a trade association specializing in the representation of its small business members before the Florida Legislature, various regulatory agencies, and in the judicial system as needed.

Amicus Association of Community Hospitals and Health System of Florida, Inc. ("CHHS"), is a not-for-profit association composed of more than 90 public hospitals and private, not-for-profit hospitals in Florida. All of the members of CHHS are qualified as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code. The members of CHHS are located in every area of the state and provide more than 85% of all of the indigent and charity care in this state. The outcome of this appeal has the potential to affect the interests of every member of CHHS.

Amicus City of Orlando is one of the world's premier travel destinations. As home to Florida's tourism industry, the City uses the prosperity brought to the area by that industry to attract other growth industries such as international business, film and television, health care and high technology. The City is working to enhance the quality of life of its citizens by nurturing and cultivating small business development, engaging in innovative programs to educate the workforce, and supporting neighborhood economic development.

Amicus Miami-Dade County is the largest metropolitan government in the southeastern United States. Representing its 2.1 million residents-- people from 156 countries who communicate in 64 different languages-- the County serves as a gateway to Latin America and has sought to offer many economic development opportunities in several business sectors including international commerce, telecommunications, financial services, information technology, and visitor services.

Amicus Florida Association of Counties ("FAC") is a private, non-profit association of Florida's 67 counties and 24 affiliated organizations founded in 1929 to represent the concerns of Florida's county governments. Part of FAC's mission is "to preserve democratic principles by working to keep appropriate authority at the level of government closest to the people and to increase the capacity of Florida counties to effectively serve the citizens of the state through legislative action."

Amicus Florida League of Cities ("the League") is a voluntary organization whose members consist of municipalities and other units of local government rendering municipal services in the State of Florida. Under the League's Charter, its purpose is to work for the general improvement of municipal government and its efficient administration, and to represent its members before various legislative,

executive and judicial branches of government on issues pertaining to the welfare of its members. The League is particularly interested in the case pending before this Court regarding the interpretation of the constitutionality of Chapter 99-225, Laws of Florida, and how that interpretation will impact its members.

Amicus Florida Sheriffs Association ("FSA") is a not-for-profit 501(c)(3) corporation made up of the 67 Sheriffs of Florida, approximately 3500 business leaders and 85,000 citizens throughout the state. FSA serves the citizens of Florida by supporting the needs of the state's law enforcement community. FSA advocates and promotes policy changes in the Legislature that will benefit public safety and the overall interests of law enforcement.

Amicus Tort Reform United Effort ("TRUE Coalition") is comprised of thousands of private citizens, hundreds of Florida businesses–small and large alike–and scores of professional associations. Its members include the National Federation of Independent Business (representing over 14,000 small Florida businesses), Citizens for a Sound Economy, Florida United Business Association, Florida Retail Federation, Associated Industries of Florida, Publix Supermarkets, Inc., Winn-Dixie Stores, Inc., Ryder Systems, Inc., the Florida Medical Association, the Florida Hospital Association, the Florida League of Cities, and separate counties and municipalities. The TRUE Coalition is dedicated to the

promotion of common sense measures which will enhance the lives of all citizens and permit Florida's small business community to compete in the world marketplace. The competitive advantage and economic viability of the TRUE Coalition's member businesses are directly affected by the provisions of Chapter 99-225, Laws of Florida.

Amici, collectively, are defendant-appellants in a declaratory judgment action challenging the constitutionality of Chapter 99-225, Laws of Florida, pending before the First District Court of Appeal styled *State v. Florida Consumer Action Network, et al.*, 1st DCA Case No. 1D01-787. In that action, Amici have appealed the decision in *Florida Consumer Action Network v. Bush*, No. 99-6689 (Fla. 2d Cir. Ct. Feb. 9, 2001), declaring Chapter 99-225 unconstitutional in violation of Article III, Section 6 of the Florida Constitution. Accordingly, Amici are well-acquainted with legal issues presented to this Court relative to the constitutionality of Chapter 99-225.

## STATEMENT OF CASE AND FACTS

Amici adopt and incorporate the Statement of Case and Facts in the Respondent's Brief.

## SUMMARY OF ARGUMENT

Petitioner invites this Court to go beyond the district court's decision and declare Chapter 99-225, Laws of Florida, unconstitutional as a violation of the single-subject requirement of Article III, Section 6 of the Florida Constitution. The Court should decline to consider the constitutionality of chapter 99-225, Laws of Florida, because Petitioner seeks to inject this issue into this proceeding for the first time on appeal to this Court. The function of an appellate court is to review errors allegedly committed by trial courts, not to entertain issues raised for the first time on appeal. Accordingly, this Court should confine its review to matters ruled on by the lower courts.

The Court should also decline review of the constitutionality of Chapter 99-225 because that issue is currently being considered by the First District Court of Appeal in *State v. Florida Consumer Action Network*. (Case No. 1D01-787), after extensive briefing and a development of a record at the trial court level.

However, should this Court decide to consider the constitutionality of Chapter

99-225, the Court should abide by its prior precedents. The argument advanced by Petitioner that tort reform comprises more than one subject is wrong. Three decisions by this Court and twenty-five years of precedent leave no doubt; tort reform is a single subject under Article III, Section 6 of the Florida Constitution. The arguments advanced by Petitioner and the Academy of Florida Trial Lawyers ("AFTL") fly in the face of this binding precedent.

The attempt by Petitioner and AFTL to avoid the dispositive effect of this Court's precedents fails for a number of reasons. First, and most importantly, the tort reform bill in *State v. Lee*, 356 So. 2d 276 (Fla. 1978), did not address a legislative crisis and cannot be distinguished away. The act involved in that case, Chapter 77-468, Laws of Florida, did not include a preamble, findings of crisis, or any extraordinary need for comprehensive legislation. *State v. Lee* remains the law of Florida and establishes conclusively that tort reform is a single subject.

Second, *Heggs v. State*, 759 So. 2d 520 (Fla. 2000), and *State v. Thompson*, 750 So. 2d 643 (Fla. 1999), did not sweep away a generation of precedent and declare that comprehensive tort reform is unconstitutional unless accompanied by legislative findings of crisis. These decisions make no mention of tort reform. Not a single Florida decision in modern times holds that tort reform comprises more than a single subject.

The elements of Chapter 99-225 fairly promote the objectives of common sense

tort reform. They address the efficiency and early resolution of civil litigation claims, the standards of liability for such claims, damages, and a means to monitor the benefits of the reforms. Indeed, "it would have been awkward and unreasonable to attempt to enact many of the provisions of this act in separate legislation." *Burch v. State*, 558 So. 2d 1, 3 (Fla. 1990).

In contrast to the circumstances involved in *Heggs v. State*, Chapter 99-225 represents the very antithesis of logrolling. The Tort Reform Act was the product of three years of deliberate, comprehensive analysis and debate. It is a process worthy of praise, not blanket judicial rejection.

The Florida Legislature, no less than the individual citizens it represents, had a right to rely on dispositive Supreme Court decisions and craft tort reform legislation in a single bill. AFTL seeks to convince this Court to ignore its own precedents. AFTL has failed to demonstrate unconstitutionality beyond any reasonable doubt. This Court should accord Chapter 99-225 the strong presumption of constitutionality it is due and declare the act constitutional

Finally, Petitioner's assertion that section 57.105, Florida Statutes, violates the Separation of Powers Doctrine of the Florida Constitution is incorrect. This Court has previously held that the award of attorney's fees under section 57.105 is a matter of substantive law, and therefore does not impinge upon the Court's procedural rulemaking authority under Article V of the Florida Constitution. Petitioner asserts

that the Legislature invaded the authority of the judiciary to determine policy and procedure by adopting the 1999 amendments to section 57.105. However, the 1999 amendments to section 57.105 simply require an attorney to obey more stringent standards when bringing a lawsuit. In no way does the Legislature's mandate in section 57.105 encroach upon the authority of this Court to determine policy and procedure. Accordingly, this Court should declare section 57.105 constitutional.

## ARGUMENT

### I. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO DETERMINE THE CONSTITUTIONALITY OF CHAPTER 99-225

#### A. THE CONSTITUTIONALITY OF CHAPTER 99-225 IS NOT PROPERLY BEFORE THIS COURT

Petitioner and Amici Curiae, The Academy of Florida Trial Lawyers et al. ("AFTL"), invite this Court to go beyond the district court's decision and declare Chapter 99-225, Laws of Florida ("Chapter 99-225") unconstitutional under Article III, section 6, Florida Constitution. AFTL. Br. at 9-27. This Court should decline to consider the constitutionality of Chapter 99-225 because Petitioner seeks to introduce this issue for the first time on appeal to this Court. This issue was neither tried nor decided by either of the courts below.

The function of an appellate court is to review errors allegedly committed by the trial court, not to entertain issues raised for the first time on appeal. *See*

*Peterson v. State*, 810 So. 2d 1095, 1098 (Fla. 5th DCA 2002); *Lee v. City of Jacksonville*, 793 So. 2d 62, 63 (Fla. 1st DCA 2001); *Mobley v. State*, 447 So. 2d 328, 329 (Fla. 2d DCA 1984); *Ward v. Ward*, 742 So. 2d 250, 255 (Fla. 1st DCA 1996) ("Since the function of this court is to review possible error committed by the trial court, absent jurisdictional or fundamental error, a legal argument must be raised initially in the lower court before it can be considered on appeal."). Accordingly, an appellate court should confine review to matters presented to the trial court. *Lipe v. City of Miami,* 141 So. 2d 738, 743 (Fla. 1962) ("It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings or ruled upon by the trial court will not be considered by this court on appeal."); *accord State v. Barber*, 301 So. 2d 7, 9 (Fla. 1974) ("An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made.").

Where the lower court has not yet considered the constitutionality of a statute, an appellate court should refrain from deciding that issue. *See, e.g.*, *Dickinson v. Stone*, 251 So. 2d 268, 271 (Fla. 1971) ("Under ordinary circumstances, this Court prefers that the constitutionality of a statute be

considered first by a trial court.").[1] Although, under certain circumstances, the facial validity of a statute may be raised for the first time on appeal, "prudence dictates that it be presented at the trial court level…." *Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1983). With respect to a constitutional application of a statute to a particular set of facts, however, the constitutional matter "must be raised at the trial level." *Id*. at 1130. (emphasis added).

In this proceeding, the trial court was never presented with and never ruled on any of the various issues asserted by Petitioner and AFTL in their broad-based challenge to Chapter 99-225. In fact, no provision of Chapter 99-225 was implicated at any time in this proceeding until the Fourth District Court of Appeal, in its written opinion, decided, *sua sponte*, to impose sanctions against Petitioner under section 57.105, Florida Statutes. In his motion for rehearing, Petitioner

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[1] In *Dickinson*, the Court granted review of a constitutional issue not raised in the lower courts because the "functions of government [would] be adversely affected unless an immediate determination [was] made [regarding the constitutionality of the statute] by this Court." The Court has also considered the constitutionality of statutes even though the issue had not been raised at the trial court level, under the doctrine of fundamental error. *See, e.g. Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970). Fundamental error is that "which goes to the foundation of the case or goes to the merits of the cause of action." *Id.* at 137. In the present case, it is unlikely that the functions of the government will be adversely affected should this Court decline to consider the constitutionality of Chapter 99-225, Laws of Florida, nor does there exist a fundamental error based on the constitutionality of a statute.

raised for the first time, the constitutionality of section 57.105, Florida Statutes, and of that statutory provision only.

At no time in the trial court or in the proceedings before the Fourth District Court of Appeal (before or after the Court rendered its opinion) did Petitioner ever address the constitutionality of Chapter 99-225 as a whole. A multitude of other issues have yet to be presented and ruled on by the trial court. Accordingly, review of the constitutionality of Chapter 99-225 is not properly before this Court.

### B. THERE IS NO URGENCY FOR THE COURT TO REVIEW THE CONSTITUTIONALITY OF CHAPTER 99-225 BECAUSE THAT ISSUE IS CURRENTLY PENDING BEFORE A LOWER COURT WITH PROPER JURISDICTION

As discussed below, the constitutionality of Chapter 99-225 is currently being considered by the First District Court of Appeal. That court, having proper jurisdiction of the constitutional issues, had the benefit of review of a full record developed in the trial court below. The review sought by Petitioner and AFTL in this proceeding will result in a needless expenditure of judicial resources.

The First District Court of Appeal is currently considering the constitutionality of Chapter 99-225. *State v. Florida Consumer Action Network*, Case No.: 1D01-787, is a declaratory judgment action currently pending in the First District Court of Appeal involving the constitutionality of Chapter 99-225. The

First District has been fully briefed on the constitutionality of Chapter 99-225 and heard oral argument regarding this issue on March 26, 2002. Consideration of the constitutionality of Chapter 99-225 by this Court would effectively bypass the First District Court and its proper consideration of this issue.

This Court should decline to consider the constitutionality of Chapter 99-225 in congruence with its decision in *State v. Florida Consumer Action Network*, 789 So. 2d 348 (Fla. 2001). In March 2001, the Florida Consumer Action Network ("Network"), et. al., requested that the First District Court of Appeal certify *State v. Florida Consumer Action Network,* Case No.: 1D01-787, directly to this Court, thereby effectively bypassing the First District's consideration of the constitutionality of Chapter 99-225. *See* App. A. The First District of Appeal granted the Network's Suggestion, and certified the case to this Court. *See* App. B.

In its response to the Network's request for certification, the State of Florida argued, among other things, that the request should be denied because (1) several determinative issues[2] were present in the case that did not relate to the constitutionality of Chapter 99-225 and (2) the single subject issue was well within

[2] For example, a threshold issue in *State v. Florida Consumer Action Network* was whether the State of Florida could be subjected to suit without its consent under the declaratory judgment statute.

the ambit of cases routinely considered by the First District Court of Appeal. *See* App. C.

After examining the suggestion for certification and the responses thereto, this Court declined to consider the constitutionality of Chapter 99-225 and remanded the case back to the First District for further proceedings. *State v. Florida Consumer Action Network*, 789 So. 2d 348 (Fla. 2001). The rationale supporting this Court's decision to decline to consider the constitutionality of Chapter 99-225 applies equally in this proceeding. This Court should act in accordance with its previous decision and decline to consider the constitutionality of Chapter 99-225 in the current proceeding.

### C. THIS COURT SHOULD BE FULLY BRIEFED BY ALL PARTIES BEFORE CONSIDERING THE CONSTITUTIONALITY OF CHAPTER 99-225

Should this Court decide to consider the constitutionality of Chapter 99-225, this Court should be fully briefed by all the parties on the constitutional issue. *See State ex. rel. Randall v. Miami Coin Club, Inc.*, 88 So. 2d 293, 293-94 (Fla. 1956); *Bush v. Holmes*, 767 So. 2d 668, 677 (Fla. 1st DCA 2000); *Glendale Fed. Savs. and Loan Ass'n v. State, Dept. of Ins.*, 485 So. 2d 1321, 1324-25 (Fla. 1st DCA 1986).

## II. CHAPTER 99-225 COMPLIES WITH THE SINGLE SUBJECT

## REQUIREMENT OF ARTICLE III, SECTION 6 OF THE FLORIDA CONSTITUTION

## 1 ELEMENTS OF CHAPTER 99-225 ARE FAIRLY AND NATURALLY GERMANE TO THE SUBJECT OF THE ACT AND CONSISTENT WITH THIS COURT'S PRECEDENTS.

As Amici argued in the proceedings before the First District Court of Appeal, Chapter 99-225 is a comprehensive statute covering a single subject and is not violative of the meaning and intent of the single subject rule. Article III, Section 6 of the Florida Constitution mandates that "Every law shall embrace but one subject and matter properly connected therewith. . . . " The standard under Article III, Section 6 is not hard to meet. Article III, Section 6 does not require that legislation be limited to one subject. Rather, legislation may include one subject "and matter properly connected therewith." Art. III, §. 6, *Fla. Const.*.

Chapter 99-225 fits squarely within the long-established parameters of appropriate tort reform legislation upheld by this Court in a series of decisions spanning three decades. The arguments advanced by AFTL ignore this judicial legacy and the strong presumption of constitutionality to which Chapter 99-225 is entitled. Chapter 99-225 is classic tort reform and attempts to assure greater efficiency, fairness, and predictability in litigation of civil damages claims. The act includes the following:

1. Elements improving the speed and efficiency of litigating civil damages claims; (Sections 1, 3-8)

2. Elements determining the proper venue of such damage claims; (Section 9)

3. Mediation and alternative dispute resolution of civil damages claims; (Sections 2, 30-32)

4. Standards of liability for damages claims; (Sections 11-20, 28-29)

5. The availability and apportionment of damages, both compensatory and punitive, in civil claims; (Sections 7-8, 21-27)

6. Creation of a statutory mechanism to assess the benefits of the reform provisions. (Sections 10 and 33)

App. D. These elements have a natural, logical connection directed to the improvement of the civil litigation system in Florida. The elements of Chapter 99-225 are far less diverse than those contained in the Acts upheld by the Court in a line of cases spanning three decades.

### *1. STATE V. LEE* ESTABLISHES THAT TORT REFORM COMPRISES A SINGLE SUBJECT.

The Court's decision in *State v. Lee,* 356 So. 2d 276 (Fla. 1978), established–definitively–that tort reform comprises a single subject.[3] In fact, *State*

[3] As a preliminary matter, it makes no difference whether Chapter 99-225 is characterized as "tort reform," or an act relating to "civil actions." In this context, those terms are legally interchangeable. This Court has authoritatively construed tort reform to include all manner of civil damages claims, whether technically couched as sounding in tort or contract. *Smith v. Dept. of Ins.*, 507 So. 2d 1080, 1087 (Fla. 1987). Indeed, the legislation involved in *Smith*, Chapter 86-160, was titled "an act relating to insurance **and civil actions**, but the act was expressly named the "**Tort Reform** and Insurance Act of 1986." Accordingly, throughout this brief, Amici will use these terms interchangeably.

*v. Lee* upheld an act involving both tort reform **and** comprehensive insurance regulation–far broader than the discrete tort reform provisions in Chapter 99-225.

*State v. Lee* has been reaffirmed numerous times and remains the cornerstone of Florida's single subject jurisprudence.[4] Tort reform–precisely of the sort found in Chapter 99-225–has been held constitutional for the past 30 years. AFTL suggests, however, that 30 years of precedent do not count because no legislatively declared crisis existed to prompt the enactment of the tort reform in Chapter 99-225. AFTL contends that *State v. Lee* and its progeny are not controlling because the legislation involved was enacted "because of the detailed findings of crisis that the Legislature made to justify them" (which, supposedly, altered or eliminated the single subject requirement). AFTL Br. at 26. AFTL's conclusion is incorrect. ***State v. Lee* did not involve a declared crisis.** The act in *State v. Lee*, Chapter 77-468, Laws of Florida, has no preamble or findings of crisis. App. E. The trial court orders in *State v. Lee* make no such findings. App. F; App. G. The *State v. Lee* Court upheld that act not because of a declared crisis, but rather, because it recognized that the Legislature has every right to enact comprehensive legislation:

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[4] *Heggs v. State*, 759 So. 2d 620 (Fla. 2000); *Burch v. State*, 558 So. 2d 1 (Fla. 1990); *Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1987).

> The Legislature, in enacting Chapter 77-468, has dealt comprehensively with a broad subject, but we cannot say that Appellees have demonstrated a plain violation of Article III, Section 6 of the Florida Constitution. Prior comprehensive enactments by the Legislature demonstrate that widely divergent rights and requirements can be included without challenge in a statute covering a single subject matter. For example, the recently enacted Probate Code encompasses a wide range of rights, penalties, and forfeitures in a single legislative enactment. Chapter 77-220, Laws of Florida. With the presumption of validity that Chapter 77-468 carries with it, we must give the Legislature the benefit of the doubt.

*State v. Lee*, 356 So. 2d 276, 282-283 (Fla. 1978).

The elements of Chapter 77-468 are far broader than the elements of Chapter 99-225. AFTL can run, but cannot hide from *State v. Lee*. *State v. Lee* is the law of Florida with regard to tort reform measures, and it establishes conclusively that Chapter 99-225 is constitutional.

### *2. HEGGS V. STATE* AND *STATE V. THOMPSON* DID NOT REVERSE A GENERATION OF SINGLE SUBJECT JURISPRUDENCE.

**"Tort reform is a single subject."**

*Smith v. Dept. of Ins.*, 507 So. 2d 1080, 1098 (Fla. 1987) (Erhlich, J., concurring and dissenting, and arguing for a more restrictive definition of "single subject").

*State v. Lee* is no anomaly. It is one of at least three Florida Supreme Court decisions expressly holding that civil justice reform comprises a single subject. *State v. Lee*, 356 So. 2d 276 (Fla. 1978); *Smith v. Dept. of Ins.*, 507 So. 2d 1080

(Fla. 1987); *Chenoweth v. Kemp*, 396 So. 2d 1122 (Fla. 1981). These three decisions have been reaffirmed and cited with approval many times.[5]

The most striking feature of these decisions is that they uphold legislation **twice as broad** as the subject involved in Chapter 99-225. All three conclude that **both** civil litigation reform **and** insurance regulation comprise a single subject. *Smith*, 507 So. 2d at 1087; *Lee*, 356 So. 2d at 282; *Chenoweth*, 396 So. 2d at 1124. Here, in contrast, Chapter 99-225 involves only civil litigation reform. *Chenoweth v. Kemp*, 396 So. 2d 1122 (Fla. 1981); *State v. Lee*, 356 So. 2d 276 (Fla. 1978); *Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1987).

AFTL posits that this Court's decisions in *Heggs v. State,* 759 So. 2d 620 (Fla. 2000), and *State v. Thompson,* 750 So. 2d 643 (Fla. 1999), reversed twenty-five years of precedent, declaring that comprehensive tort reform legislation is unconstitutional unless accompanied by legislative findings of crisis. AFTL Br. at 25. AFTL also contends, as construed by *Heggs* and *Thompson*, the decisions in

[5] As of the date of this brief, Shepard's lists no less than 57 decisions citing *State v. Lee*, none of which reverses its holding. Likewise, Shepard's lists 133 cases citing but not reversing *Smith*; and 57 cases citing *Chenoweth*.

*Lee*, *Chenoweth*, and *Smith* conclude that tort reform comprises multiple subjects.[6]

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[6] When *Heggs* and *Thompson* suggested that the statute in *Lee* included findings of crisis, the Court simply made an incorrect observation. The Court made a mistake in finding that Chapter 77-468 included a preamble or finding of crisis. It did not. Manifestly, the misstatement was not a ruling of law, or a fact adjudicated in underlying proceedings. It was a mistake. No court is forced to perpetuate error, particularly where the error is found in a decision having little to do with the specific issues now before the Court:

> It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason for this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principals which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result. Therefore, in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. When this rule is followed, much of the misapprehension and uncertainty that often arise as to the effect of a decision will be practically avoided.

*Ex parte Amos*, 93 Fla. 5, 112 So. 289, 294-95 (Fla. 1927) (en banc) (citations omitted) (Whitfield, J. concurring); *accord Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975); *Ard v. Ard*, 395 So. 2d 586 (Fla. 1st DCA 1981).

AFTL Br. at 26-27. AFTL's arguments are pure alchemy.

This Court has never held that findings of crisis immunize multiple-subject legislation. Rather, findings of crisis enhance the strong presumption of constitutionality by explaining the need to combine a broad array of sections in a single enactment. *Heggs,* 759 So. 2d at 627 ("The Legislature has not identified a crisis **that would require combining the criminal provisions with the three sections dealing with civil remedies…."**) (emphasis added).

Even if AFTL's interpretations of *Heggs* and *Thompson* were correct, tort reform would remain a single subject. Florida jurisprudence has tacitly recognized since the 1970's that tort reform, standing alone, is a single subject. Thus Justice Erhlich, who long ago advocated a stricter interpretation of the single subject constitutional provision, readily acknowledged that "[t]ort reform is a single subject." *Smith v. Dep't. of Ins.*, 507 So. 2d 1080, 1098 (Fla. 1987) (Erhlich, J., concurring and dissenting). That has never been disputed–until AFTL led the lower court in *State v. Florida Consumer Action Network,* Case No.: 1D01-787 astray.

Further, Florida courts have never–repeat never–held that tort reform comprises multiple subjects. *Heggs* and *Thompson* do not say that and this Court certainly has **not** reversed twenty-five years of precedent and declared that

comprehensive tort legislation is unconstitutional unless accompanied by legislative findings of crisis. First, this Court knows how to reverse or disapprove a decision, and would have expressly done so had it so intended. *See Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000). Second, as noted above, the pivotal decision in *State v. Lee* did not involve any legislative findings of crisis. Third and most importantly, neither *Heggs* nor *Thompson* even remotely addressed tort reform legislation. Those cases make one holding–an act combining civil justice reform with criminal justice reform comprises two subjects in violation of the single subject rule. *Thompson*, 750 So. 2d at 647-648; *Heggs*, 759 So. 2d at 626. Nothing more. They do not even hint that tort reform comprises multiple subjects. In fact, those cases support the assertion that tort reform is a single subject.

Contrary to AFTL's unprecedented reading of *Heggs*, that decision's treatment of *Chenoweth, Lee*, *Smith,* and *Burch v. State*, has a much simpler and logical explanation. The Supreme Court is duty bound to accord the widest possible latitude to the Legislature in the enactment of laws, and it must resolve every possible doubt in favor of a statute's constitutionality. *Burch v. State*, 558 7So. 2d 1, 2 (Fla. 1990); *State v. Lee*, 356 So. 2d 276, 282 (Fla. 1978). To fulfill that obligation, the Court in *Smith* and *Burch* looked to the acts' preambles and legislative findings to help explain how the broad array of topics in each of these comprehensive acts was "properly connected" under Article III, Section 6. *See*

*Smith v. Dept. of Ins.*, 507 So. 2d 1080, 1086 ("The legislature explained in the preamble of the act how tort reform provisions and the insurance regulatory provisions are 'properly connected' . . . ."); *Burch v. State*, 558 So. 2d 1, 2 ("In the preamble to chapter 87-243, the legislature explained the reasons for the legislation. . . ."). Because the preambles and legislative findings provided a plausible explanation as to how the diverse elements were properly connected, the Court afforded the Legislature the benefit of the doubt and upheld the acts.

*Heggs* and *Thompson*, in contrast, presented the Court with a combination of diverse criminal and civil elements without apparent connection and without findings to help explain the connection. *Thompson*, 750 So. 2d at 647-648; *Heggs*, 759 So. 2d at 626. *Heggs* held that Chapter 99-184 was unconstitutional because "the Legislature has not identified a crisis that would require combining the criminal provisions with the three sections dealing with civil remedies for victims of domestic violence." 759 So. 2d at 627. The Court's implicit holding is that civil justice reform comprises one subject, and criminal justice another. *See Heggs*, 759 So. 2d at 627; *Thompson*, 750 So. 2d at 647.

Chapter 99-225 does not involve criminal enactments. *Heggs* and *Thompson* do not address tort reform. These cases hold–at most–that the

combination of comprehensive criminal justice provisions with civil elements extends too far under Article III, Section 6.[7]

Similarly, the only rational reading of *State v. Lee*, *Chenoweth v. Kemp*, and *Smith v. Dep't. of Ins.* is that tort reform–with or without findings of crisis–comprises a single subject. The issue in *Lee*, *Chenoweth*, and *Smith* was never whether tort reform is a single subject, but whether tort and insurance, in combination, comprised a single subject.

Chapter 99-225 needs no preamble to explain why tort reform comprises a single subject. *State v. Lee* established that twenty-five years ago (again, without legislative findings). *Chenoweth* and *Smith* make that conclusion indisputable.

Simply put, if civil justice reform and insurance regulation comprises a single subject (as it did in *Lee*, *Chenoweth*, and *Smith*), it cannot rationally be argued that civil litigation reform alone comprises multiple subjects. *Accord Burch v. State*, 558 So. 2d 1, 3 (Fla. 1990) ("controlling crime" is a single subject).

Last, the Court in *Heggs* and *Thompson* could not have intended to create a rule providing that the mere existence of legislative findings trumps the requirements of Article III, Section 6. Such a rule would enable, indeed encourage, the

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[7] At the same time, however, it is firmly established that "crime control" is a single subject. *Burch v. State*, 558 So. 2d 1 (Fla. 1990).

Legislature to include wildly divergent topics in a single act and immunize the act from single subject challenge by the simple expedient of a preamble or finding of crisis.

The Court created no such standard in *Heggs* or *Thompson* and should decline to adopt such a standard now.

**1**
**CHAPTER 99-225 COMPRISES A SINGLE SUBJECT**

AFTL argues that thirty years of precedent do not count because the tort reform in Chapter 99-225 is particularly broad. The argument is false. Chapter 99-225 fits squarely within the long-established parameters of appropriate tort reform legislation created in *Smith*, *Chenoweth,* and *Lee*. As noted above, legislation twice as broad as the civil litigation reforms contained in Chapter 99-225 has repeatedly been held constitutional under this standard. *Chenoweth v. Kemp,* 396 So. 2d 1122 (Fla. 1981); *State v. Lee*, 356 So. 2d 276 (Fla. 1978); *Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1987).

Just as important, the combination of elements in Chapter 99-225 makes good sense. Civil litigation, like all human systems, is neither static nor uni-dimensional. Its constituent elements must interact and work cooperatively. In turn, changing conditions affect the entire system as well as individual elements. Thus, it is not rational to suggest that venue of civil claims or trial processes have

no bearing on litigation efficiency, or that changes in tort causes of action or apportionment of damages are unrelated to settlement/ADR. The elements are interconnected and interdependent. A heart transplant doesn't just affect one organ, it saves an entire life.

The elements of Chapter 99-225 are logically related to the functioning of Florida's civil damages system. However, AFTL suggests that Article III, section 6 requires each section of a legislative enactment to connect directly with each other section, rather than each section having a logical or appropriate connection to the subject expressed in the act's title. AFTL Br. at 13-25. AFTL's error stems from a flawed single-subject analysis which pits each statutory section against all others, rather than comparing each section with the subject stated in the title to the act. This analysis is flawed and contrary to controlling precedent.

In recognition of the Separation of Powers Doctrine, this Court has given the widest possible latitude to the Legislature in the manner of enacting its laws. *Burch v. State*, 558 So. 2d 1, 2 (Fla. 1990). The elements of an act need only be "fairly and naturally germane to the subject of the act" or alternatively, they need only "tend to make effective or promote the objects and purposes of legislation included in the subject." *Smith v. Dept. of Ins.*, 507 So. 2d 1080, 1087 (Fla. 1987) (quoting *State v. Canova*, 94 So. 2d 181, 184 (Fla. 1957)).

AFTL must concede that the subject of an act is that "which is expressed in the title." *Farabee v. Bd. of Trustees,* 254 So. 2d 1 (Fla. 1971); *Rouleau v. Avrach,* 233 So. 2d 1 (Fla. 1970); *State v. Lee,* 356 So. 2d 276, 282 (Fla. 1978). In addition, the subject expressed in the title "may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection." *State v. Thompson*, 750 So. 2d 643, 647 (Fla. 1999); *Bd. of Pub. Instruction of Broward County v. Doran,* 224 So. 2d 693 (Fla. 1969). The proper analysis is not whether the disparate sections of an act are necessarily connected, but whether those sections are fairly germane to the subject expressed in the title or alternatively, "tend to make effective or promote the objects and purposes of legislation included in the subject." *Smith v. Dept. of Ins.*, 507 So. 2d 1080, 1087 (Fla. 1987) (quoting *State v. Canova*, 94 So. 2d 181, 184 (Fla. 1957)); *Bd. of Pub. Instruction of Broward County v. Doran,* 224 So. 2d 693 (Fla. 1969). Here, to the contrary, AFTL studiously avoids the stated title in Chapter 99-225, and instead questions the connection between various sections of the Act.

AFTL's analysis violates the law just as surely as it does common sense. The Florida Legislature, both before and after *Heggs,* has a constitutional right to legislate in broad areas of state concern:

> Prior comprehensive enactments by the legislature demonstrate that widely divergent rights and requirements can be included without challenge in statutes covering a single subject matter. For example, the

> recently enacted Probate Code encompasses a wide range of rights, penalties, and forfeitures in a single legislative enactment. . .We must give the legislature the benefit of the doubt.

*Lee*, 356 So. 2d at 282-83.

Florida's Probate Code was not enacted to address a crisis. *See* Ch. 75-220, Laws of Fla. (1975). And while a statutory section determining whether a bank can reject a six month old check has virtually nothing to do with an evidentiary rule governing the effectiveness of a signature on a security, or the conditions under which a warehouse can obtain a lien on stored property, no one would seriously argue that the Uniform Commercial Code is unconstitutional because it comprises multiple subjects. *Compare* §§ 674.404 *with* 678.1141 *and* 677.209, Florida Statutes; Ch. 65-254, Laws of Fla. (1965).

The elements of Chapter 99-225 are far less diverse than those contained in the acts upheld in *Lee*, *Chenoweth*, and *Smith*. Just as important, the combination of elements in Chapter 99-225 makes good sense. Accordingly, AFTL's analysis is not only contrary to controlling precedent, it would virtually guarantee the invalidity of great numbers of legislative enactments.

### 1. INCLUSION OF REFORMS PERTAINING TO CONTRACT CLAIMS WITH REFORMS RELATING TO TORT CLAIMS DOES NOT RENDER CHAPTER 99-225 UNCONSTITUTIONAL

AFTL's suggestion that section 9 of Chapter 99-225, dealing with venue of actions arising from contracts for improvements to real property, exceeds the permissible scope of civil justice reform is incorrect. AFTL Br. at 16-17. The Court should summarily reject this notion.

The same argument was expressly rejected in *Smith v. Dept. of Ins.*, 507 So. 2d 1080, 1087 (Fla. 1987), where the Court held that tort cases and contract claims for damages are appropriately included in tort reform legislation. ("We reject appellants' contention that by including contract actions where damages are sought, the legislature impermissibly broadened the subject matter and violated the single subject requirement."). Numerous civil causes of action span the doctrinal divide between "tort" and "contract" actions. *Id*. Strict liability claims include elements of tort (personal injury) and contract (breach of warranty). *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976). A cause of action in tort can arise from a contractual duty. *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999); *Floyd v. Video Barn*, 538 So. 2d 1322, 1324 (Fla. 1st DCA 1989); *Robertson v. Deak Perera (Miami), Inc.*, 396 So. 2d 749, 750 (Fla. 3d DCA 1981). The inevitable interplay between tort and contract demonstrates that both types of cause of action are properly included in reforms to the civil damages system.

Notably, this Court reaffirmed this ruling just three years ago, holding that tort and contract actions are inextricably linked. *Comptech Int'l., Inc. v. Milam*

*Commerce Park, Ltd.*, 753 So. 2d 1219 (Fla. 1999) (affirming claims for negligent construction and negligent selection of contractor arising from contracts to improve real property, despite the availability of contract claims); *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999). In addition, the United States Supreme Court recognizes that in Florida, "contract actions" give rise simultaneously to tort and contract claims:

> . . .[A]n action may arise for the breach of the contract, or for the positive tort committed by the violation of a duty arising out of the assumption of the contractual relation;…it is a long– established general principle that injuries caused by the allegedly negligent performance of a contractual duty may be redressed through a tort action.

*Int'l Brotherhood of Elec. Workers v. Hechler*, 481 U.S. 851, 860 (1987) (citations omitted).

If any doubt remains about the logical combination of tort claims with certain contract claims, this Court must construe the venue provisions of Section 9 of Chapter 99-225 to apply to all actions involving personal injury or property damages, regardless of whether it sounds technically in contract or tort.[8] *State v. Lee*, 356 So. 2d 276 (Fla. 1978). No decision in Florida history has concluded that

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[8] The Court is constitutionally obliged to construe Chapter 99-225 in a way to assume its constitutionality. *Bonvento v. Board of Public Instruction of Palm Beach County*, 194 So. 2d 605 (Fla. 1967).

civil reform embraces more than one subject because it includes both tort and contract actions.

Indeed, this Court has recognized that legitimate reasons exist to meld civil litigation reforms into a single comprehensive act. *Burch v. State*, 558 So. 2d 1 (Fla. 1990). Chapter 99-225 is a good example. For instance, many Florida legislators might not have wanted to modify the elements of liability for civil claims without a concurrent effort to speed up the efficient resolution of those claims. Ch. 99-225, §§ 3-8 and 11-20, Laws of Fla.; App. D. Many legislators might not have wanted to address apportionment of compensatory damages without simultaneously addressing those areas of the tort system which impose liability without fault (such as strict product liability or vicarious liability). Ch. 99-225, §§ 11-16 and 27, Laws of Fla.; App. D. It is equally plausible that Florida legislators wanted to address an employer's liability to pay punitive damages only in conjunction with providing additional incentives to those same employers to do background checks on prospective employees. Ch. 99-225, §§ 16 and 21, Laws of Fla.; App. D.

If these possibilities are plausible, (and they are), Florida's Separation of Powers Doctrine demands that this Court presume their truth. *Bonvento v. Bd. of Pub. Instruction of Palm Beach County*, 194 So. 2d 605 (Fla. 1967). *State ex rel.*

*Flink v. Canova*–a case which the Court relied upon in *State v. Thompson*, 750 So. 2d 643, 646 (Fla. 1999)–makes clear that:

> Should any doubt exist that an act is in violation of art. III, Sec. 16 of the Constitution, or of any constitutional provision, the presumption is in favor of constitutionality. To overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the legislature intended to enact a valid law. Therefore, the act must be construed, if fairly possible, as to avoid unconstitutionality and to remove grave doubts on that score.

94 So. 2d 181, 184-85 (Fla. 1957); *Accord State v. Lee*, 356 So. 2d 276, 283 (Fla. 1978) ("With the presumption of validity that [an act] carries with it, we must give the legislature the benefit of the doubt."). Chapter 99-225 is no hodgepodge; it is a rational, coherent response to important public policy imperatives.

**1**
**CHAPTER 99-225 REPRESENTS THE ANTITHESIS OF LOGROLLING.**

Contrary to AFTL's assertions, logrolling is not the mere aggregation of multiple elements of legislation into a single act. Logrolling occurs **only** when the act includes **wholly dissimilar elements.** *State v. Lee*, 356 So. 2d 276, 282 (Fla. 1978). As demonstrated above, the elements of Chapter 99-225 have a logical and unitary purpose to improve Florida's civil litigation system.

In addition, the Court in *State v. Thompson* suggested that if review of an act's legislative history identified last-minute combinations of disparate topics into a

single piece of legislation during floor debate, that circumstance might increase the likelihood of improper logrolling. 750 So. 2d 643, 648 (Fla. 1999).

The legislative history here proves just the opposite point–Chapter 99-225 is the very antithesis of logrolling.[9]

The enactment of the Tort Reform Act of 1999 was informed by several years of methodical, deliberative legislative consideration and debate. House Bill 2117, the "Florida Accountability and Individual Responsibility (FAIR) Liability Act," was introduced in the 1997 legislative session. The bill, which contained provisions addressing a statute of repose, vicarious liability, an alcohol and drug defense, punitive damages, and joint & several liability, was introduced but proceeded no further during the 1997 session. Fla. HB 2117 (1997). Under House Rule 96, however, the bill was carried over to the 1998 session. Fla. Legis., Final Legislative Bill Information, 1997 Regular Session, History of House Bills at 332-333, HB 2117. Between the 1997 and 1998 legislative sessions, attorneys for Florida business interests and the trial lawyers met at least twice to negotiate a

[9] This Court has the clear right to review the legislative history of Chapter 99-225. *State v. Thompson*, 750 So. 2d 643, 648 (Fla. 1999); *Reino v. State*, 352 So. 2d 853, 860-861 (Fla. 1977); *Florida Insurance Guaranty Association v. State*, 400 So. 2d 813, 815-817 (Fla. 1st DCA 1981).

compromise bill. Charter Document for the Select Committee on Litigation Reform (on file with Fla. S. Comm. on Judiciary).

In the fall of 1997, the House Civil Justice & Claims Committee began hearings on tort reform issues in preparation for the 1998 legislative session. No less than eight hearings were held between September 1997 and March 1998, at which the Committee heard hours of testimony by experts, academicians, and representatives of both sides of the tort reform issue. Each meeting was devoted to consideration of a few discrete tort reform issues. Records of Fla. H.R. Comm. on Civ. Just. & Cl. (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 2834). For instance, the meeting scheduled for September 16-17, 1997, addressed negligence, intentional torts by employees or third parties, and premises liability. The schedule contemplated and allotted time for advocates on each side of the issues to present testimony and documentation. Agenda for Meetings, Sept. 15, 1997 through Jan. 22, 1998 (on file with Fla. S. Comm. on Judiciary). The committee received numerous position papers, news articles, academic and professional studies and reports, and draft legislation from all interested parties. Records of Fla. H.R. Comm. on Civ. Just. & Cl. (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 2834).

Based on the testimony and documentation accumulated through this hearing process, the Civil Justice & Claims Committee proposed several bills in the 1998 session,[10] each dealing with a particular tort reform provision:

HB 3871 Products Liability

HB 3873 Punitive Damages

HB 3875 Premises Liability

HB 3877 Rental Car Liability

HB 3879 Negligence

HB 3881 Litigation Reform

Committee Bill Files, Fla. H.R. Comm. on Civ. Just. & Cl. (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 2835).

Also in the fall of 1997, Senate President Toni Jennings created the Senate Select Committee on Litigation Reform. The committee's mission was to

> . . . conduct hearings to assess the manner and extent to which the current civil litigation environment is affecting economic development and job-creation efforts in the state. The select committee shall ascertain what civil litigation reforms, if any, would enhance the economic development climate of the state while continuing to preserve the rights of citizens to seek redress through the courts.

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[10] House Bill 2117, carried over from the 1997 session, died in the House Committee on Civil Justice & Claims. Fla. Legis., Final Legislative Bill Information, 1998 Regular Session, History of House Bills at 316, HB 2117

Charter Document for the Select Committee on Litigation Reform (on file with Fla. S. Comm. on Judiciary).

Consistent with its mission, and like the House Civil Justice & Claims Committee, the Senate Select Committee conducted approximately 10 hearings in 1997 and 1998, noticed and open to all interested parties, at which it heard hours of testimony and received thousands of pages of documents from representatives of all sides of the tort reform debate. Records of Select Committee on Litigation Reform (on file with Fla. S. Comm. on Judiciary). The committee's recommendations were incorporated in Senate Bill 874, a comprehensive bill containing multiple tort reform measures. Fla. S. Select Comm. on Litigation Reform, CS for SB 874 (1998) Staff Analysis 1 (rev. Apr. 29, 1998) (on file with Fla. S. Comm. on Judiciary).

The several House bills passed that body in 1998, but died in the Senate Committee on Rules and Calendar. Fla. Legis., Final Legislative Bill Information, 1997 Regular Session, History of House Bills at 389-390, HBs 3871, 3873, 3875, 3877, 3879 and 3881. Meanwhile, Senate Bill 874 passed the Senate, but was then amended by the House. Fla. S. Jour. 421-422 (Reg. Sess. 1998); Fla. H.R. Jour. 518 (Reg. Sess. 1998). Differences in the bills as passed by each house required a conference committee to reconcile the various provisions. Fla. S. Jour. 442 (Reg. Sess. 1998). The conference committee spent no less than 20 hours reviewing and

debating the House and Senate versions of the bill, eventually presenting its conference committee amendment. Fla. Conf. Comm. on SB 874 tape recordings of proceedings (Apr. 14, 15, 16, 20, 22, 23, 27 and 28, 1998) (on file with Fla. S. Comm. on Judiciary). That amendment, in turn, was debated and considered by the House and Senate again before its adoption by each house. Fla. H.R. Jour. 914-924 (Reg. Sess. 1998); Fla. S. Jour. 1259-1269 (Reg. Sess. 1998). The Legislature passed the Conference Report, but Governor Chiles vetoed it. Fla. Legis., Final Legislative Bill Information, 1998 Regular Session, History of Senate Bills at 105, SB 874.

In 1999, armed with a two-year history of hearings, testimony, documentation, bill drafting and amendment, and legislative debate, the House Judiciary Committee introduced House Bill 775. Fla. H.R. Jour. 69 (Reg. Sess. 1999). As admitted by the opposition,[11] the 1999 tort reform bill contained dozens of measures which were the same as or similar to those in 1998's Senate Bill 874. "1999 House Judiciary Committee Bill File, PCB JUD 01 Civil Actions" (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 2987). Despite the Legislature's legislative consideration and passage of similar tort reform measures

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[11] See Appendix I, *Tort Reform 1999: A Building Without A Foundation*, Robert S. Peck, Richard Marshall, and Kenneth D. Kranz, 27 Fla. St. U. L. Rev. 397, 445 (Winter 2000).

the previous year, House Bill 775 was still subjected to contentious debate and substantial amendment in the House before passing that body.[12] Additionally, the Senate proposed and passed its own amendments to the bill, amendments that the House did not accept, and as happened in 1998, a conference committee was appointed to reconcile the differences. Fla. H.R. Jour. 519-529 (Reg. Sess. 1999). Once again, the conference committee spent hours reviewing and debating the various provisions and eventually presented its amendment for consideration, debate and adoption by both houses. Fla. Conf. Comm. on HB 775 tape recordings of proceedings (Apr. 13, 14, 15, 28 and 29, 1999) (available at Fla. Dep't. of State, Div. of Archives Ser. 414, carton 1226); Fla. H.R. Jour. 1895-1906 (Reg. Sess. 1999). The bill as amended by the conference committee was passed in the House by an 84-33 vote, and in the Senate by a 25-14 vote. Fla. H.R. Jour. 1906 (Reg. Sess. 1999); Fla. S. Jour. 1824 (Reg. Sess. 1999). The bill was signed by Governor Bush, becoming Chapter 99-225. Fla. Legis., Final Legislative Bill Information, 1999 Regular Session, History of House Bills at 292, HB 775.

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[12] Twenty-two amendments were proposed on the floor of the House over a two-day period. The bill passed the House by a vote of 86 to 33. Fla. H.R. Jour. 225-235, 257-280 (Reg. Sess. 1999); Fla. H.R. tape recordings of proceedings (March 9-10, 1999) (available at Fla. Dep't of State, Div. of Archives, ser. 38, carton 258).

**2**

## THE SINGLE SUBJECT STANDARD APPLICABLE TO INITIATIVE PETITIONS IS NOT APPLICABLE TO CHAPTER 99-225

AFTL concludes their misapplication of single subject law with the assertion that this Court should adopt the single subject standard applicable to initiative petitions, not legislative enactments. AFTL Br. at 19-20. The argument is not a serious one, but rather it serves as a vehicle to argue that Chapter 99-225 includes matters of procedure. Both contentions should be rejected out of hand.

Turning first to the appropriate single subject standard, the difference between Article XI, Section 3 (Initiative Petitions) and Article III, Section 6 (Legislative Enactments) is not "slight." It is substantial and crucial to a proper determination of this appeal. This Court has been explicit—the difference in language between the initiative petition provision (one single subject and matter directly connected therewith) and the legislative provision (one subject and matter properly connected therewith), evinces the Framers' intent to afford the Legislature the widest possible latitude to include a broad array of sections in a single legislative act. *Smith*, 507 So. 2d at 1085; *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). This clear intent is the cornerstone on which *Lee*, *Chenoweth*, and *Smith* rest, and it compels the Judiciary to afford unyielding deference to the Legislature.

**3**

## CHAPTER 99-225 DOES NOT ENCROACH ON THE COURT'S AUTHORITY TO PRESCRIBE PRACTICE AND PROCEDURE IN THE COURTS.

The Court should also summarily reject AFTL's suggestion that Chapter 99-225 improperly encroaches on judicial procedure. Two points do, however, bear mentioning. First, litigation efficiency is germane to the tort system and the proper functioning of the civil damages system. For that reason, this Court in *Smith* had

no problem in concluding that numerous sections in Chapter 86-160, Laws of Florida (1986), involving litigation reform were properly included in that tort reform bill. *See* 507 So. 2d at 1087. Second, in Chapter 99-225, the Florida Legislature took extraordinary steps to give deference to the Judiciary on matters of practice and procedure. Section 34 states as follows:

> It is the intent of this act and the Legislature to accord the utmost comity and respect to the constitutional prerogatives of Florida's judiciary, and nothing in this act should be construed as any effort to impinge upon those prerogatives. To that end, should any Court of competent jurisdiction enter a final judgment concluding or declaring that any provision of this act improperly encroaches upon the authority of the Florida Supreme Court to determine the Rules of Practice and Procedure in Florida Courts, the Legislature hereby declares its intent that any such provision be construed as a request for rule change pursuant to Section 2, Article 5 of the State Constitution and not as a mandatory legislative directive.

Had the trial court in *State v. Florida Consumer Action Network,* Case No.: 1D01-787 afforded the Legislature the deference and respect required by Article III, Section 6–the very same deference and respect the Legislature afforded the Judiciary in section 34–the court would have rejected AFTL's single subject claim.

## 4 AFTL'S INTERPRETATION OF THE SINGLE SUBJECT RULE UNREASONABLY IMPAIRS THE EFFICIENT CONDUCT OF LEGISLATIVE AFFAIRS.

The single subject requirement is "not a design to embarrass legislation by making laws unnecessarily restrictive in their scope and operation and thus multiply

their number." *State ex rel. X-Cel Stores, Inc. v. J.M. Lee*, 166 So. 568, 571 (Fla. 1936). But that is precisely what would occur if this Court were to adopt the reasoning of AFTL. In fact, AFTL alleges that Chapter 99-225 includes "at least 14 subjects." AFTL Br. at 14. Thus, if this were the law, the Legislature would have to process 14 different bills in order to enact the provisions contained in Chapter 99-225.

AFTL's argument disregards *Heggs* and *Thompson*. This Court long ago clarified the limited purpose explanation of the purpose of the single subject rule:

> [T]o remedy (1) the practice of bringing together into one bill subjects diverse in their nature, and having no necessary nor appropriate connections, with a view to combining in their favor the advocates of all, and thus secure the passage at one time of several unrelated measures, no one of which could succeed upon its own merits alone, and (2) to outlaw the practice of inserting, by dexterous manipulation, clauses of which the title to the bill gave no intimation, thereby sanctioning the passage of legislative provisions which the Legislature's membership could not be made by the title to the bill generally aware.

*State ex rel. X-Cel Stores, Inc. v. J.M. Lee*, 166 So. 568, 571 (1936) (quoting from 1 *Cooley's Constitutional Limitations* 291 *et seq.* (8th Ed.))

Moreover, AFTL fails to take into account the enormous complexity of the lawmaking process. This complexity led the Florida House of Representatives in 1998 to limit to six the number of bills that each member may have under consideration at one time during a regular legislative session. *The Rules of the*

*Florida House of Representatives*, 1998-2000, As Adopted November 17, 1998, Rule 54 "Limitation on Member Bills Under Consideration." The limits have been recently tightened further, so Representatives may file no more than six bills during a regular legislative session. *The Rules of the Florida House of Representatives*, 2001-2002, As Adopted November 21, 2000, Rule 5.3 "Limitation on Member Bills Filed." Accordingly, AFTL's interpretation of the single subject rule would result in no fewer than three members of the Legislature being forced to use all of their allocated general bill "slots" to sponsor separately the various sections of the single piece of unified public policy legislation embodied in Chapter 99-225. This was not the intent and true meaning of the single subject rule.

Nor is the argument advanced by AFTL consistent with guidance afforded to the Legislature by judicial precedent. *See, e.g, Chenoweth v. Kemp*, 396 So. 2d 1122 (Fla. 1981); *State v. Lee*, 356 So. 2d 276 (Fla. 1978); *Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1987). The Legislature, just as any other party, is justified in its reliance on judicial precedent in determining the permissible ways to conduct its business. Adhering to precedent is an essential part of our judicial system and philosophy. *Perez v. State*, 620 So. 2d 1256, 1259 (Fla.1993) (Overton, J., concurring). The very purpose of the *stare decisis* doctrine is to promote efficiency and to provide guidance and consistency in future cases. *State v. Gray*,

654 So. 2d 552, 554 (Fla. 1995); *State v. Schopp*, 653 So. 2d 1016, 1023 (Fla. 1995) (Harding, J. dissenting).

At the time of enactment of Chapter 99-225, the Legislature was well aware of the generation of precedent directly supporting inclusion of civil justice reforms in a single act. That precedent remains the law of Florida.

## V. SECTION 57.105, FLORIDA STATUTES DOES NOT VIOLATE THE SEPARATION OF POWERS REQUIREMENT OF ARTICLE II, SECTION 3, OF THE FLORIDA CONSTITUTION.

Petitioner asserts that section 57.105, Florida Statutes, violates the separation of powers mandate of Article II, section 3 of the Florida Constitution. Article II, section 3 prohibits the members of one branch of government from exercising "any powers appertaining to either of the other branches unless expressly provided herein." Article V, section 2(a), of the Florida Constitution provides that the Florida Supreme Court has exclusive authority to adopt rules for practice and procedure in the courts of this state.

In assessing the Petitioner's separation of powers claims, this Court must initially decide whether the challenged statutory provision concerns matters of substantive law which are within the domain of the Legislature, or whether they concern matters of practice and procedure over which the Supreme Court has

authority. *See Markert v. Johnson*, 367 So. 2d 1003 (Fla. 1978). As the Court stated in *Haven Federal Sav. & Loan v. Kirian*:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *State v. Garcia*, 229 So. 2d 236 (Fla. 1969). It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. *Adams v. Wright*, 403 So. 2d 391 (Fla. 1981). On the other hand, practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1972)(Adkins, J., concurring). It is the method of conducting litigation involving rights and corresponding defenses. *Skinner v. City of Eustis*, 147 Fla. 22, 2 So.2d 116 (1941).

579 So. 2d 730, 732 (Fla. 1991).

The award of attorney's fees is a matter of substantive law properly within the domain of the Legislature. *See Estate of Hampton v. Fairchild-Florida Construction Co.*, 341 So. 2d 759 (Fla. 1976); *Campbell v. Maze*, 339 So. 2d 202 (Fla. 1976); *Rivera v. Deauville Hotel, Employee Service Corp.*, 277 So. 2d 265 (Fla. 1973). This Court has previously held that the award of attorney's fees under section 57.105 is a matter of substantive law, and therefore does not impinge upon the Court's procedural rulemaking authority under Article V. *See Whitten v. Progressive Casualty Insurance Co.*, 410 So. 2d 501, 504 (Fla. 1982) (“[A] an award of attorney's fees is a matter of substantive law properly under the aegis of

the legislature."), *rev'd in part on other grounds, Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (1985).

AFTL suggests, however, the 1999 amendments to section 57.105 altered the Legislature's ability to instruct this Court on sanctions. AFTL contends that the amendments to section 57.105 create "a spoils system that has no place in the civil justice setting by subjecting only a losing party and his or her attorney to an atomistic examination of all claims or defenses asserted" and "require lawyers to forego the extension, modification or reversal of existing law unless the attorney has a 'reasonable expectation of success.'" AFTL's assertions are incorrect.

The 1999 amendment simply requires an attorney to obey more stringent standards when bringing a lawsuit. Rather than requiring the attorney to ensure that the claim or defense as a <u>whole</u> is with merit, the 1999 amendment to section 57.105 requires the attorney to ensure that <u>any</u> claim or defense brought at any time during the litigation is supported by the facts or the then-existing law.

Contrary to AFTL's suggestion to the contrary, the sanctions available under section 57.105 may not be extended to every unsuccessful litigant. Section 57.105 provides a remedy "only where the plaintiff's complaint is completely untenable." *Vasquez v. Provincial South, Inc.*, 795 So. 2d 216, 218 (Fla. 4th DCA 2001). As long as the complaint alleges some justiciable issue, an award of attorney's fees is not appropriate. *Boyce v. Cluett*, 672 So. 2d 858, 861 (Fla. 4th DCA 1996).

Further, "a party's good faith efforts to change existing law does not render an action frivolous." *Carnival Leisure Indus., Ltd. v. Holzman*, 660 So. 2d 410, 412 (Fla. 4th DCA 1995). Where a party or his attorney asserts a good faith attempt to change or modify an existing rule of law, that party is not subject to attorney's fees under section 57.105. *See Jones v. Charles*, 518 So. 2d 445 (Fla. 4th DCA 1988).

As the *Whitten* Court emphasized—"[m]erely losing, either on the pleadings or by summary judgment, is not enough to invoke the operation of the statute." *Whitten*, 410 So. 2d at 506; *accord Mason v. Highlands County Bd. of County Comm'rs*, 2002 Fla. App. LEXIS 6149 at *4 (Fla. 2nd DCA May 28, 2002)("Failing to state a cause of action is not, in and of itself, a sufficient basis to support a finding that a claim was so lacking in merit as to justify an award of fees pursuant to section 57.105."). "In order to be subject to sanctions under section 57.105. . . a filing must be patently frivolous." *Oglesby-Dorminey v. Lucy Ho's Restaurant*, 815 So. 2d 749 (Fla. 1st DCA 2002).

Moreover, the statute provides that a party is entitled to an award of attorney's fees only when the court determines that " the losing party or the losing party's attorney 'knew or should have known that a claim or defense. . .was not supported by the material facts necessary to establish the claim or defense…or would not be supported by the application of then-existing law to those material facts.'"*Mason*, 2002 Fla. App. LEXIS 6149 at *2. In order to award attorney's

fees under section 57.105, the court's findings "must be based upon substantial, competent evidence presented at the hearing on attorney's fees or otherwise before the court and in the record." *Id*. at *4; *accord Vasquez v. Provincial South, Inc.*, 795 So. 2d 216 (Fla. 4th DCA 2001).

The 1999 amendments to section 57.105, requiring an attorney to attend to a higher standard of conduct when bringing a claim or defense, in no way affected the Legislature's ability to instruct this Court on sanctions and in no way does the Legislature's mandate in section 57.105 encroach upon the authority of this Court to determine policy and procedure. Accordingly, this Court should declare section 57.105 constitutional.

## CONCLUSION

The Court should decline to consider the constitutionality of chapter 99-225, Laws of Florida, because Petitioners seek to introduce the constitutional issue for the first time on appeal to this Court, and because the First District has proper jurisdiction of this matter and has been fully briefed on the issue.

However, should the Court decide to consider the constitutional issue, the Court should be fully briefed by all parties therein. For the aforementioned reasons, Chapter 99-225 is a comprehensive statute covering a single subject and is not violative of the meaning and intent of the single subject rule. Therefore, Amici respectfully request that this Court declare Chapter 99-225 constitutional.

Respectfully submitted,

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I certify that the font used in this brief is Times New Roman 14 point and in compliance with Rule 9.210, Florida Rules of Appellate Procedure.

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