BOROUGH OF ENGELWOOD CLIFFS, Plaintiff-Appellant, v. THOMAS J. TRAUTNER, ALBERT WUNSCH, 800 SYLVAN AVENUE, LLC CHIESA SHAHINIAN & GIANTOMASI P.C., JEFFREY R. SURENIAN, JOSEPH MARINIELLO, JR. JEFFREY R. SURENIAN and ASSOCIATES, LLC, and MARINIELLO & MARINIELLO, P.C., Defendants-Respondents.	:	SUPREME COURT OF NEW JERSEY DOCKET NO. 089406 Civil Action On Certification from the Superior Court, Appellate Division Docket No. A-002765-21 Sat Below: Hon. Thomas W. Sumners, Jr., C.J.A.D. Hon. Lisa Rose, J.A.D. Hon. Morris G. Smith, J.A.D.

BRIEF OF AMICUS CURIAE, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
25 Market Street
Trenton, New Jersey 08625
Attorney for Amicus Curiae,

Sookie Bae-Park
Assistant Attorney General
Of Counsel

Brett Haroldson (ID # 212792016)
Eric Intriago (ID # 274302019)
Deputy Attorneys General
On the Brief

Eric Intriago (274302019)
Deputy Attorney General
Eric.intriago@law.njoag.gov
(609) 376-2780
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PRELIMINARY STATEMENT

On January 29, 2025, the Attorney General moved for leave to appear as an amicus in this matter to represent a significant interest the State has in this pending matter and for an extension to file his amicus brief. Those motions currently remain pending as of the filing of this brief. The Attorney General seeks to participate here to address an issue of public importance that requires correction: the Appellate Division's construction of the Frivolous Litigation Statute (FLS), N.J.S.A. 2A:15-59.1, which exposes not only municipalities like Englewood Cliffs, but also the State, to litigation and potential liability

Such a result would undermine the distinct treatment the State enjoys as a sovereign under the law. At the very least, the Court should clarify that the State cannot be liable under the FLS, regardless of whether municipalities and other non-State public entities can.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

In the interest of brevity and for the Court's convenience, the State generally relies on the statement of facts and procedural history in the Borough's brief in this Court as to the details of Trautner's claim and this litigation. The State supplements the Borough's recitation, as follows.

[1] Because the procedural and factual histories are closely related, they are combined for the Court's convenience and to avoid repetition.

Background

The FLS "serves a punitive purpose, seeking to deter frivolous litigation," and "a compensatory purpose, seeking to reimburse 'the party that has been victimized by the party bringing the frivolous litigation.'" Toll Bros., Inc. v. Township of W. Windsor, 190 N.J. 61, 67 (2007) (quoting Deutch & Shur, P.C. v. Roth, 284 N.J. Super. 133, 141 (Law Div. 1995)).

The statute was originally enacted in 1988 to allow prevailing parties in civil suits "to recover reasonable attorney fees and litigation costs from the nonprevailing person if the judge" found that the "legal position of the nonprevailing person was frivolous." L. 1988, c. 46. To be deemed "frivolous" a judge had to find that: 1.) the litigation was initiated or continued "in bad faith, solely for the purpose of harassment, delay or malicious injury;" or that 2) the "nonprevailing person" either knew or should have known "that the action was without any reasonable basis in law [or] equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law or was based on false allegations of fact." S. Judiciary Comm. Statement to A. 1316 (Feb. 19, 1988). That version made no reference to public entities and allowed only "persons" to recoup expenditures made in connection with frivolous litigation.

The first court to address whether the statute applied to public entities was In re K.L.F., 275 N.J. Super. 507 (Ch. Div. 1993). That court looked to N.J.S.A. 2A:15-59.1(a)(1) which grants a prevailing "party" in a civil action a right to recover all reasonable litigation costs and reasonable attorney fees "against any other party" upon a judicial finding that the "nonprevailing person was frivolous."

The court expressly acknowledged uncertainty about whether the phrase "any other party" included public entities. However, based on the punitive intent of the Act and the absence of language explicitly exempting public entities, it concluded that the Legislature intended to eliminate all baseless litigation without exceptions. Id. at 517-19.

Notably, the court recognized that its reading of FLS conflicted with N.J.S.A. 2A:15-60, which—then and now—generally prohibits awarding costs against the State. Id. at 520-22. The court noted that the mandates of each were "seemingly incompatible" but resolved that incompatibility by finding that the FLS, as the newer and more specific statute, superseded N.J.S.A. 2A:15-60, which was enacted in 1903. Id. at 520-22.

Not long after K.L.F., the lawmakers proposed amendments to FLS. Early versions of the bill explained that the amendments were intended to discourage frivolous lawsuits against municipal police officers which had

proliferated in the preceding years. See A. Local Gov't Comm., Statement to A.1012 (May 12, 1994). Townships like Woodbridge[2] were bearing legal expenses defending their officers in such actions, which they were compelled to do by law, see N.J.S.A. 40A:14-155, but they could not recoup legal expenses under the FLS because the public entities were not parties to the litigation, only the police officer defendants were. To remedy that problem, the early versions of the legislation provided the term "party" included "a municipality which provides the means for the defense of a member or officer of its police department or force." S. Community Affairs Comm., Statement to S. Comm. Substitute for A.1012, S.1399 & S.1290 (Oct. 13, 1994).

The proposed legislation was then expanded to allow all prevailing public entities, not just municipalities, to seek FLS damages for having to defend against a frivolous claim. See S. Community Affairs Comm., Statement to S. Comm. Substitute for A.1012, S.1399 & S.1290 (Oct. 13, 1994).

[2] As additional context, the amendments were introduced and sponsored by then-Senator James McGreevey, who was also serving as the mayor of Woodbridge at the time. S. Community Affairs Comm., Statement to S. Comm. Substitute for S.1290 (June 30, 1994).

The enacted bill made no substantive changes to subsection (a)(1). However, it specifically allowed public entities to recoup litigation expenses from non-prevailing parties in subsection (a)(2) which now provides:

> When a public entity is required or authorized by law to provide for the defense of a present or former employee, the public entity may be awarded all reasonable litigation costs and reasonable attorney fees if the individual for whom the defense was provided is the prevailing party in a civil action, and if there is a judicial determination at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim, or defense of the nonprevailing party was frivolous.
>
> [L. 1995, c. 13, § 1 (emphasis added).]

The 1995 amendments also revised subsection (c). The pre-amendment version of that subsection had provided that "a party seeking an award under this section shall make application to the court which heard the matter." As amended, the statute now states, "a party or public entity seeking an award under this section shall make application to the court which heard the matter," evidencing a purposeful distinction between parties and public entities. Ibid.

The question of whether public entities are subject to liability under FLS arose again in 1997 in Division of Youth & Family Services v. P.M., 301 N.J. Super. 80 (Ch. Div. 1997). P.M. disagreed with the K.L.F.'s broad reading of the phrase "any party" in subsection (a)(1), noting that "after first referring to

the litigant against whom fees are sought as the 'other party,' the Legislature then qualified its description of that litigant by referring to it as the 'nonprevailing person.'" Id. at 86. In the court's view, that switch from "party" to "person" was particularly revealing of the Legislature's intent because N.J.S.A. 1:1-2 defined that word to exclude the State of New Jersey except when referring to the State as the owner of property. Id. at 87.

The court found that the 1995 amendments to the FLS further confirmed its reading. It viewed the introduction of "public entity" to other subsections as evidence that the FLS, prior to the 1995 amendments, had not contemplated public entities at all. Id. at 87-88. P.M. found other flaws in K.L.F. such as its assumption that FLS impliedly repealed N.J.S.A. 2A:15-60, id. at 87, or that the FLS effected a waiver of the State's sovereign immunity. Id. at 91.

The Legislature has made no amendments to FLS since that 1997 decision.

Appellate Division Decision

The Appellate Division's April 22, 2024, decision in Borough of Englewood Cliffs v. Trautner, 478 N.J. Super. 426, 433 (App. Div. 2024) marks the third time that courts have addressed the extent to which public entities are liable under the FLS. The Appellate Division recognized that the divergent views of K.L.F. and P.M., but ultimately agreed with K.L.F.

Trautner, 478 N.J. Super. at 438. Like the court in K.L.F., the Appellate Division found that the phrase "any other party" in subsection (a)(1) included all public entities. Id. at 441. The court found, despite potential ambiguity resulting from the FLS saying that a "person" can be liable under that statute, other sections of "the FLS, specifically N.J.S.A. 2A:15-59.1(a)(2) and (b), expressly allow recovery of fees against a 'nonprevailing party' whose litigation conduct was frivolous." Id. at 442.

The Appellate Division further held that, even if the term "party" was ambiguous, allowing for sanctions against public entities would better serve the Legislature's intent to deter frivolous litigation, and it believed that the legislative history lacked any indication of an intent to exempt public entities. Id. at 442. As further support for its conclusion, the Appellate Division observed that, following K.L.F. in 1993—which found public entities subject to FLS sanctions—the Legislature did not specifically immunize public entities in its 1995 amendments. Ibid. Instead, as to public entities, the 1995 amendments simply added an explicit right for those entities to seek FLS sanctions. Id. at 443.

This Court granted certification on November 12, 2024.

ARGUMENT

THE FLS LIABILITY PROVISIONS DO NOT APPLY TO PUBLIC ENTITIES, OR, AT MINIMUM, DO NOT APPLY TO THE STATE.

A. Public Entities are Not Subject to FLS Liability

The Appellate Division's reading of the FLS statute is contrary to the text and spirit of the law. The overriding goal of all statutory interpretation is to give effect to the Legislature's intent. State v. J.V., 242 N.J. 432, 442 (2020). In conducting that exercise, the language used must be given their plain and ordinary meaning, id. at 442-43, and viewed "in context with related provisions so as to give sense to the legislation as a whole." DiProspero v. Penn, 183 N.J. 477, 492-93 (2005). The decision below departs from these established principles and promotes reading that would increase the State's litigation costs and inhibit zealous advocacy by the State in the countless civil matters in which it appears—the Legislature could not have intended such a result.

The Appellate Division's assumption that the general use of the phrase "any other party" in subsection (a)(1) includes public entities cannot be sustained. As a matter of construction, that reading would render the more specific use of the term "public entity" in subsections (a)(2) and (c) mere surplusage. However, the Legislature is presumed to have "purposely included

every word" in a statute. In re Proposed Const. of Compressor Station (CS327), 258 N.J. 312, 325 (2024). It is also presumed to know how the courts construe its laws. Brewer v. Porch, 53 N.J. 167, 174 (1969). The sum of those principles is significant given here the timeline: the Legislature amended the FLS after K.L.F. and deliberately introduced the phrase "public entity" as a means of reducing the litigation costs.

As noted previously, the then-mayor of Woodbridge sponsored the 1995 amendments, which were first introduced following a proliferation of civil suits against municipal police officers, which the municipalities were obliged to defend under State law. Assembly Local Gov't Comm., Statement to A.1012 (May 12, 1994). The FLS was amended specifically to deter such lawsuits, and the class of potential public entities who could affirmatively recover under the FLS was expanded by an amendment before final enactment, with the aim to allow recovery of litigation costs and preserve public funds in the face of frivolous litigation. See Sen. Community Affairs Comm., Statement to Sen. Comm. Substitute for A.1012, S.1399 & S.1290 (Oct. 13, 1994).

The ruling below here does the opposite of what the 1995 amendments unambiguously intended: instead of saving tax dollars by limiting suits against public entities, it incentivizes the pursuit of FLS claims against public entities.

Thus—like the plain language of the FLS and established tenets of statutory construction—the legislative history here demonstrates that public entities are not liable under the FLS.

Other considerations support this outcome. First, unlike the speedy response in 1995, the Legislature has made no changes to the FLS since the P.M. was issued, which suggests its acquiescence to that ruling. Macedo v. Dello Russo, 178 N.J. 340, 346 (2004) (stating "long acquiescence on the part of the Legislature or [] continued use of the same language or failure to amend the statute, is evidence that such construction is in accord with the legislative intent).

Second, the Appellate Division's assumption that the punitive intent of the FLS cannot be achieved unless public entities can be held liable is flawed because there are already judicial remedies to deter public entities from engaging in the type of frivolous litigation that the Act targets. For instance, malicious prosecution and malicious-use-of-process claims (most commonly asserted against public entities and their employees) are available and provide adequate remedies to safeguard against the most egregious abuses that unfortunately occur sometimes in our legal system, albeit uncommonly. Furthermore, successful claimants under the New Jersey Civil Rights Act can recover attorney fees. See N.J.S.A. 10:6-2(f). Thus, New Jersey law already

provides adequate avenues for recovery against public defendants, making liability under the FLS for public entities unnecessary.

The Appellate Division's decision also perpetuates a fundamental flaw in K.L.F. Unable to square its broad reading of subsection (a)(1) with the limiting intent of N.J.S.A. 2A:15-60, K.L.F. found a conflict and then purported to resolve it by finding that the former superseded the latter. But whenever a court reviews two separate enactments, it "has an affirmative duty to reconcile them, so as to give effect to both expressions of the lawmakers' will." Ramapo River Reserve Homeowners Ass'n, Inc. v. Borough of Oakland, 186 N.J. 439, 466-67 (2006) (quoting St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14-15 (2005)). The Appellate Division's decision falls short in that regard.

Here, the Legislature unambiguously and specifically prohibited recovery of costs in actions brought by the State or a party acting for the State, providing in N.J.S.A. 2A:15-60:

> In an action brought by the state, or the governor, or any person for the use of the state, the plaintiff shall recover costs as any other plaintiff; but the defendant in such an action shall not recover any costs against such plaintiff, whether the action is dismissed, judgment shall pass in favor of the defendant or any other proceeding is taken.

K.L.F., whose analysis the Appellate Division ostensibly adopted, concluded that the Legislature must have intended to repeal (or at least modify) this statute by enacting the FLS. K.L.S., 275 N.J. Super. at 522. That ruling should be reversed.

When interpreting two supposedly conflicting statutes, "[e]very reasonable construction should be applied to avoid a finding of implied repealer." Bd. of Educ. of City of Sea Isle v. Kennedy, 393 N.J. Super. 93, 105-06 (App. Div. 2007) (quoting Twp. of Mahwah v. Bergen Cty. Bd. of Taxation, 98 N.J. 268, 281 (1985). "A repeal by implication requires clear and compelling evidence of the legislative intent, and such intent must be free from reasonable doubt." Twp. of Mahwah, 98 N.J. Super. at 280. However, when two statutes can "reasonably stand together, each in its own particular sphere of action," the intent necessary to effectuate an implied repealer is absent. Swede v. City of Clifton, 22 N.J. 303, 317 (1956). Rather, "[r]epugnancy or statutory incompatibility to [find] an implied repeal of legislation must be inescapable." Hinfey v. Matawan Reg'l Bd. of Educ., 77 N.J. 514, 527 (1978). And statutes that "relate to the same matter or subject . . . are to be construed together as a unitary and harmonious whole, in order that each may be fully effective." City of Clifton v. Passaic Cty. Bd. of Taxation, 28 N.J. 411, 421 (1958).

The FLS immediately precedes N.J.S.A. 2A:15-60. By their plain language, the two statutes can be easily harmonized. The Court should do so. The FLS allows all parties, including public entities, to recover costs against a non-prevailing party who is also a person. N.J.S.A. 2A:15-59.1(a). The term "person" has a precise definition under New Jersey law. It includes "corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals." N.J.S.A. 1:1-2. By its unambiguous language, the definition does not include public entities, up to and including the State, except in the narrow context of certain State property-ownership disputes that are not relevant here. Ibid. In contrast, the FLS allows prevailing "parties" (which can include public entities) to recover against any nonprevailing "party," regardless of personhood. N.J.S.A. 2A:15-59.1(a)(2). This interpretation honors the plain language of the FLS by not reading out the distinction between "party" and "person," which is presumed to have been purposeful. Compressor Station (CS327), 258 N.J. at 325.

This interpretation also avoids a conflict between the FLS and its related statute, N.J.S.A. 2A:15-60. Applying the Appellate Division's holding here would pit these two statutes against each other and nullify the one that is far more specific. New Jersey law requires the opposite: if two statutes are irreconcilably at odds with one another, the more specific should control.

State v. Tier, 228 N.J. 555, 564 (2017). Here, the more specific provision precludes levying costs against the State under the FLS, so the supposition in K.L.F. (whose conclusions the Appellate Division here approved) that the FLS was an implied repealer of N.J.S.A. 2A:15-60, which then motivated that court's application of the FLS to public entities, was erroneous.

B. At Minimum, the Court Should Clarify that the State is Immune from FLS Liability.

Alternatively, even if Court finds that the FLS is applicable to some public entities, it should clarify that the State is not subject to potential FLS sanctions based on the doctrine of sovereign immunity. New Jersey law is clear that the State's potential liability is carefully circumscribed and limited to instances when it has unequivocally consented to be liable, which is not the case here.

"[A]n essential and fundamental aspect of sovereignty is freedom from suit by private citizens for money judgments absent the State's consent." Allen v. Fauver, 167 N.J. 69, 73-74 (2001). The "[S]tate may voluntarily waive its sovereign immunity" but to be an "effective waiver," it requires "a clear and unequivocal statement of the Legislature." Royster v. New Jersey State Police, 227 N.J. 482, 494 (2017) (quoting Allen, 167 N.J. at 77). Examples of the State waiving its sovereign immunity include the Tort Claims

Act, N.J.S.A. 59:1-1 to 12-3, the Contractual Liability Act, N.J.S.A. 59:13-1 to 13-10, and the Law Against Discrimination, 10:5-5(e). See Royster, 227 N.J. at 494; Allen, 167 N.J. at 75.

Here, allowing for potential FLS sanctions against the State violates the State's sovereign immunity because the FLS contains no "clear and unequivocal statement of the Legislature" that the State is waiving its sovereign immunity to allow claims against it under the FLS. Royster, 227 N.J. at 494. Rather, as noted above, the use of "person" in subsection (a)(1) signals the opposite choice by the Legislature because, in New Jersey statutes, the State is not included in the definition of "person," except in narrow circumstances involving property disputes. See N.J.S.A. 1:1-2.

The conclusion that the State is not potentially liable under the FLS is further confirmed by N.J.S.A. 2A:15-60, which remains in effect and specifically precludes the recovery from the State of "any costs" in a case brought by the State (or its representative) "whether the action is dismissed, judgment shall pass in favor of the defendant or any other proceeding is taken." A finding that the State could be liable under the FLS, which would include including potential liability for costs, contravenes the prohibition in N.J.S.A. 2A:15-60 of recovery of such costs.

At the very least, the dissonance between the FLS and the statutes identified above means that the FLS is, at minimum, ambiguous as whether the State is subject to that Act. The law in such instances is clear, to the extent that this Court finds that the FLS is in any way ambiguous as to its applicability to the State, no "clear and unequivocal waiver" of sovereign immunity can be found, see Royster, 227 N.J. at 494, which requires the conclusion that the State is not subject to potential liability under the FLS.

Thus, this Court should clarify that the State is not potentially liable under the FLS, even if the Court concludes that other public entities are.

CONCLUSION

For the foregoing reasons, this Court should hold that public entities are not subject to FLS sanctions, or, at minimum, that State entities are not subject to FLS sanctions.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: s/*Eric Intriago*
Eric Intriago
Deputy Attorney General
NJ ID: 274302019
Eric.intriago@law.njoag.gov