THE SUPREME COURT OF NEW JERSEY
DOCKET NO.: 089406

Borough of Englewood Cliffs, Plaintiff-Petitioner, v. **James J. Trautner, Albert Wunsch, Jeffrey R. Surenian, Joseph Mariniello, Jr., 800 Sylvan Avenue, LLC, Chiesa Shahinian & Giantomasi, P.C., Jefrey R. Surenian and Associates, LLC, Mariniello & Mariniello, P.C., and Unnamed Co-Conspirators,** Defendants-Respondents.	**On Petition for Certification from the Appellate Division of the Superior Court of New Jersey** 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. **On Appeal from the Law Division of the Superior Court of New Jersey** Docket No.: BER-L-005785-21 Sat Below: Hon. Christine A. Farrington, J.S.C.

APPELLANTS' AMENDED PETITION FOR CERTIFICATION AND APPENDIX

JARDIM MEISNER SALMON SPRAGUE & SUSSER, P.C.
30B Vreeland Road, Suite 100
Florham Park, NJ 07932
ssalmon@jmslawyers.com

Of Counsel and On the Brief:
Scott D. Salmon, Esq. (Attorney ID #152162015)

Of Counsel and On the Brief:
Tracy L. Lucas, Esq. (Attorney ID #006892007)
John J. Zunin, Esq. (Attorney ID #144362015)

TABLE OF CONTENTS

TABLE OF CONTENTS FOR APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

QUESTION PRESENTED TO THE COURT

1. Are public entities immune from liability under New Jersey's Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1?[1]

1. In its Amended Notice of Petition for Certification, the Borough raised multiple other issues for which it initially intended to seek certification. The Borough has since determined that it intends only to appeal the one issue identified and voluntarily withdraws and waives its right to seek certification on all other issues.

STATEMENT OF THE MATTER INVOLVED

In 2015, the Borough of Englewood Cliffs retained Thomas J. Trautner and Chiesa Shahinian & Giantomasi, P.C, (collectively, "CSG"), Albert Wunsch III, Jeffrey Surenian and Jeffrey Surenian and Associates, LLC (collectively, "Surenian"), to represent it in affordable housing litigation against a developer, 800 Sylvan Avenue, LLC ("Sylvan"). (Pa016). After judgment was entered for Sylvan, a settlement was reached between the Borough and Sylvan. (Pa023).

Thereafter, the Borough retained new legal counsel in the form of Cadwalader, Wickersham, and Taft ("CWT"), and sought legal advice as to whether CSG, Wunsch, and Surenian had committed professional malpractice and whether there was a valid cause of action against them to pursue relief. (Pa134). After being advised that there was a basis to do so, the Borough retained CWT as well as another firm, Stone & Magnanini LLP, which was meant to serve as local counsel, to pursue a lawsuit against the defendants. (Pa136).

The Borough thereafter sued CSG, Wunsch, and Surenian, alleging professional malpractice, breach of contract, unjust enrichment, civil conspiracy, and aiding and abetting arising from their representation of the Borough in the litigation. (Pa01, 046). The Borough also sued Sylvan, alleging claims of conspiracy and aiding and abetting. (Ibid.).

Ultimately, the trial court granted defendants' motions to dismiss pursuant to Rule 4:6-2(e) and dismissed the Borough's complaint with prejudice. (Pa093-118). The trial court then granted defendants' motion for sanctions, ordering the Borough to pay Defendants' attorney's fees and costs for filing a frivolous lawsuit. (Ibid.).

The Borough appealed, arguing: (1) the sanction applications were procedurally deficient; (2) as a public entity, it is immune from paying sanctions under the Frivolous Litigation Statute; and (3) the trial court abused its discretion in finding the Borough's lawsuit was frivolous.

On April 22, 2024, the Appellate Division affirmed the trial court's decision in a published opinion. Borough of Englewood Cliffs v. Trautner, No. A-2765-21, 2024 N.J. Super. LEXIS 37 (App. Div. Apr. 22, 2024). The Borough filed a timely notice of petition for certification with this Court, which was then amended. (Pca01).

REASONS FOR CERTIFICATION

Certification is warranted here because the question presented is a novel one of great public importance that has yet to be addressed directly by this Court. There are two published Chancery Division opinions on the subject that are approximately 30 years old and that reach divergent results. In the Matter of K.L.F., 275 N.J. Super. 507 (Ch. Div. 1993), the Chancery Division held that public entities are not immune from liability under the FLS. Four years later, after the Legislature amended the statute in 1995, a different judge in the Chancery Division in Div. of Youth & Fam. Servs. v. P.M., 301 N.J. Super. 80 (Ch. Div. 1997) determined that the K.L.F. Court had erred and that immunity should be given, functionally creating a circuit split.

Subsequently, there were two unpublished Appellate Division decisions, both of which were decided in 2009, that also came to divergent conclusions. In Robert J. Pacilli Homes, LLC v. Pilesgrove Twp. Planning Bd., Nos. A-3271-06, A-4226-06, A-3301-06, 2009 N.J. Super. Unpub. LEXIS 746 (App. Div. Feb. 13, 2009), the Appellate Division expressly held that public entities were immune and relied upon the P.M. decision to reach that conclusion. That year, in Borough of Seaside Park v. Sadej, No. A-6596-06T3, 2009 N.J. Super. Unpub. LEXIS 1849 (App. Div. July 17, 2009), the Appellate Division expressed skepticism about the decision in P.M. in dicta, but pointedly refused to decide the issue and remanded for other reasons.

Certification is therefore appropriate because this issue has bedeviled our judicial system for 30 years, and is highly likely to recur in the future, causing both uncertainty and litigation expense to public entities at taxpayer expense. The Court should grant certification and settle the issue once and for all.

STATEMENT OF ERRORS COMPLAINED OF AND COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

The Appellate Division erred for three reasons:

First, the Court failed to reconcile with the Legislature's 1995 amendments to N.J.S.A. 2A:15-59.1 that distinguished a "public entity" from any other "party," and in so doing, rendered language explicitly added by the Legislature as superfluous. In other words, the Court ignored the language of the amendments, which plainly intended to separate public entities from other parties subject to the statute. Instead, the Court merely stated in a conclusory manner that the Legislature had not expressly stated that they intended to immunize public entities, which effectively ignores the plain language of the statute that demonstrates the Legislature did, in fact, mean to distinguish public entities and immunize them.

Second, the Court failed to reconcile and harmonize its interpretation of N.J.S.A. 2A:15-59.1 with N.J.S.A. 2A:15-60. Instead, the Court created conflict between statutes where there is none, functionally overturning N.J.S.A. 2A:15-60 by way of judicial fiat, instead of applying basic canons of statutory construction that demonstrate that such a construction is unnecessary.

Third, the Court failed to address precedent that sovereign immunity is the presumption and that it can only be taken away when expressly removed by the Legislature, as held in Willis v. Dept. of Cons. & Ec. Dev., 55 N.J. 534 (1970). Instead, the Court assumed, without any legal support or clarification, that governmental liability is the presumption and immunity is the exception. That is simply untrue.

LEGAL ARGUMENT

1. Proper Application of the Canons of Statutory Construction Favor Immunity for Public Entities

"[I]n the interpretation of a statute our overriding goal has consistently been to determine the Legislature's intent." Young v. Schering Corp., 141 N.J. 16, 25 (1995) (quoting Roig v. Kelsey, 135 N.J. 500, 515 (1994)). In doing so, "we need delve no deeper than the act's literal terms." State v. Gandhi, 201 N.J. 161, 180 (2010) (quoting State v. Thomas, 166 N.J. 560, 567 (2001)). Put another way, "[w]here a statute is clear and unambiguous on its face and admits of only one interpretation, a court must infer the Legislature's intent from the statute's plain meaning." O'Connell v. State, 171 N.J. 484, 488 (2002). Courts will "neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language." Id.

It is well understood that the first step in interpreting a statute is to look to "the actual words of the statute, giving them their ordinary and commonsense meaning." State v. Gelman, 195 N.J. 475, 482 (2008). "If the plain language leads to a clear and unambiguous result, then the interpretive process should end, without resort to extrinsic sources." State v. D.A., 191 N.J. 158, 164 (2007). In this case, the plain language of the relevant statutes is clear, and it is only by pretending certain words are not present or that the statute says something else that makes it ambiguous.

2. The History of the Frivolous Litigation Statute Demonstrates an Intent to Separate Public Entities from Other Parties Entitled to Recover Fees

When the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1 ("FLS"), was first adopted in 1988, it was designed to both serve a punitive purpose, to deter frivolous

litigation, as well as a compensatory purpose, to reimburse the party victimized by those who brought the frivolous litigation. See Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 67 (2007). Since its inception, the FLS has stated that "**[a] party who prevails in a civil action**, either as plaintiff or defendant, **against any other party** may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the **nonprevailing person** was frivolous." N.J.S.A. 2A:15-59.1(1)(a) (emphasis added). The FLS also initially stated that "**[a] party** seeking an award under this section shall make application to the court which heard the matter." Id. at (1)(c) (emphasis added).

Separately, in 1903, the Legislature adopted N.J.S.A. 2A:15-60. See P.L. 1903, c. 247. That statute explicitly excludes liability against the State of New Jersey by stating that when the State, or the Governor, "or any person for the use of the State" brings an action, "the plaintiff [i.e., the State] shall recover costs as any other plaintiff, but the defendant in such action shall not recover any costs against such plaintiff." N.J.S.A. 2A:15-60. Succinctly stated, while the State can recover its costs from defendants it sues, defendants cannot recover their costs from the State.

In 1993, the Honorable Andrew P. Napolitano, J.S.C., while sitting in the Chancery Division of the Superior Court of New Jersey, Bergen Vicinage, issued a published decision captioned In the Matter of K.L.F., 275 N.J. Super. 507 (Ch. Div. 1993). In K.L.F., Judge Napolitano ruled that public entities were not immune from liability under the FLS and that nothing in the statute drew a distinction between public entities as a party as opposed to any other party, such as an individual or

corporation.[2] K.L.F., 275 N.J. Super. at 520. Based on this interpretation of the FLS, Judge Napolitano determined that the FLS conflicted with N.J.S.A. 2A:15-60, because he believed the FLS to apply to the State, whereas the latter statute explicitly exempted the State from liability for sanctions.[3] Id. at 520-521. While Judge Napolitano did not explicitly rule as such, the implication of his determination would render N.J.S.A. 2A:15-60 as functionally overturned, because it would require the State to be subject to sanctions under the FLS.

---

2. Judge Napolitano did not provide any explanation for the use of the phrase "nonprevailing person" in the statute, or square it with the prior references in the statute to a "nonprevailing party." He did point to an example under the Environmental Rights Act, N.J.S.A. 2A:35A-1, et seq., which allowed for limited prevailing party fees against certain public entities, to hold that "in the absence of an affirmative and explicit limitation, the court must presume the Legislature did not in any manner intend to limit the State's exposure to potential fee sanctions." K.L.F., 275 N.J. Super. at 518 (citing N.J.S.A. 2A:35-10). However, the ERA differs from the FLS in that it defines a "person" as including "the State [and] any political subdivision of the State and any agency or instrumentality of the State or of any political subdivision of the State." N.J.S.A. 2A:35A-3. No such definition exists for the FLS, and so a "person" must be given the meaning identified in N.J.S.A. 1:1-2, which explicitly does not include the State of New Jersey "or government lawfully owning or possessing property within this State," unless the word "person" is used "to designate the owner of property." That is inapplicable here, but the K.L.F. opinion does not sufficiently explain why public entities should be included in the definition of a "person" for the FLS to apply.

3. Judge Napolitano engaged in an analysis to determine that the N.J.S.A. 2A:15-60 was a "general provision" that has remained unchanged since it was enacted in 1903, whereas the FLS is more specific, and thus, the FLS prevailed in a conflict. K.L.F., 275 N.J. Super. at 521 (citing State v. Gerald, 113 N.J. 40, 83 (1988) (holding that a more specific statute will prevail over a more general one)). He appears to have largely based this determination on the relative age of the statutes. Ibid. But it is an illogical position to take when the FLS applies to all "parties" and N.J.S.A. 2A:15-60 applies to a specific subset of parties, i.e., the State and defies explanation as to how the FLS can be more specific. In this case, the Appellate Division failed to explain how they can work in concert together or if its decision functionally invalidated N.J.S.A. 2A:15-60.

In 1995, the Legislature amended the FLS. While leaving subsection (1)(a) in place,[4] it added a subsequent subsection, which stated:

> 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.

N.J.S.A. 2A:15-59.1(a)(2) (emphasis added).

Notably, the amendment allowed for sanctions against a "nonprevailing party," rather than a "nonprevailing person," which is the language used in the prior subsection. Rather than updating the language of (a)(1) to match this revision, the Legislature elected to keep "nonprevailing person" in that subsection. See In re Comm'r of Ins.'s Issuance of Orders A-92-189 & A-92-212, 137 N.J. 93, 96 (1994) ("The Legislature is presumed to be familiar with its prior enactments.").

The Legislature also amended the subsection related to applications for sanctions, (c), and modified it to state that "[a] party **or public entity** seeking an award under this section shall make application to the court which heard the matter." Id. at (c) (emphasis added). The addition of "or public entity" was new to the 1995 amendments and had not been there previously. At a minimum, this addition provides a mechanism for public entities to seek sanctions under (a)(2), but it also clarifies the distinction between parties and public entities and indicates that the

4. The 1995 amendments reversed and modified the numbering of N.J.S.A. 2A:15-59.1 from (1)(a) to (a)(1). See P.L. 1995, c. 13. Otherwise, that specific subsection remains unchanged from its pre-1995 counterpart.

Legislature did not consider them to be the same thing. Had the Legislature intended for the definition of a "party" to include a "public entity," they need not have changed the language at all. If "party" encompassed "public entity," then the language would be duplicative and superfluous, with no substantive consequence. In seeking to ascertain the meaning of a statute, a court should not assume that the Legislature would engage in a useless act. See Paper Mill Playhouse v. Millburn Tp., 95 N.J. 503, 521 (1984).

Two years after the 1995 amendments, the Honorable Clarkson S. Fisher, Jr., J.S.C., while sitting in the Chancery Division of the Superior Court of New Jersey, Monmouth Vicinage, issued a published decision captioned Div. of Youth & Fam. Servs. v. P.M., 301 N.J. Super. 80 (Ch. Div. 1997). In P.M., Judge Fisher held that the K.L.F. court had erred and that Legislature intended to immunize public entities.[5]

Judge Fisher went through the K.L.F. opinion in detail and pointed out multiple flaws in its reasoning, including that it premised its conclusion on the assumption that the Legislature had to expressly exclude the State from liability for it to be immune, as opposed to a presumption of immunity that would require an express inclusion of liability for that immunity to be pierced. P.M., 301 N.J. Super. at 90-91. Judge Fisher pointed out that Judge Napolitano's assumption was based, in part, on

5. In Robert J. Pacilli Homes, LLC v. Pilesgrove Twp. Planning Bd., Nos. A-3271-06T2, A-4226-06T2, A-3301-06T2, 2009 N.J. Super. Unpub. LEXIS 746 (App. Div. Feb. 13, 2009), the Appellate Division expressly held that public entities were immune, and relied upon the P.M. decision to do so. That same year, in Borough of Seaside Park v. Sadej, No. A-6596-06T3, 2009 N.J. Super. Unpub. LEXIS 1849 (App. Div. July 17, 2009), the Appellate Division expressed skepticism about the decision in P.M. in dicta, but pointedly refused to decide the issue and remanded the case for other reasons.

the religious texts of St. Thomas Aquinas, which is inappropriate in a secular court, among other objections. Id. at 90. Judge Fisher took the opposite tact, holding that the longstanding principles of sovereign immunity indicate a presumption of immunity from liability absent an express waiver by the Legislature. Id.

As Judge Fisher pointed out, following the Supreme Court's decision in Willis v. Dept. of Cons. & Ec. Dev., 55 N.J. 534 (1970), which waived certain aspects of sovereign immunity in the anticipation of what was to become the Tort Claims Act, N.J.S.A. 59:1-1, et seq., it has long been understood that governmental immunity exists unless expressly waived by the Legislature. See also N.J.S.A. 59:1-2; Pico v. State, 116 N.J. 55, 59 (1989). This is consistent with the purpose TCA, which expressly allows discretionary awards against public entities in limited circumstances, N.J.S.A. 59:9-5, and which supports generalized immunity unless expressly waived by the Legislature.[6] Otherwise, there would be no reason to include such an award provision at all if there is a presumption of no immunity, as Judge Napolitano held. Similarly, Judge Fisher pointed out that the ERA, identified by Judge Napolitano, also allows for an award of counsel fees against certain public entities, which would be superfluous if the award could already be given if the Legislature simply remained silent on the subject. P.M., 301 N.J. Super. at 92.

6. The TCA is clear that "immunity from tort liability is the general rule and liability is the exception." Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998). The TCA does not create this immunity, as it is inherent within our system of government. Rather, it creates a mechanism by which that immunity may be waived in certain instances. **The TCA is therefore an express waiver of general sovereign immunity, a waiver that cannot be found in the FLS.**

Judge Fisher also disputed Judge Napolitano leaping to assume in K.L.F. that a lack of immunity in N.J.S.A. 2A:15-59.1 necessitated a conflict with the immunity indicated in N.J.S.A. 2A:15-60. Id. at 89. Precedent indicates this should be the last possible consideration, as courts traditionally assume that when the Legislature enacts a statute, it does not intend to repeal an older statute unless no way can be found for the two statutes to co-exist. Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514, 527-528 (1978); Grzankowski v. Heymann, 128 N.J. Super. 563, 568 (App. Div. 1974). Repugnancy or statutory incompatibility must be "inescapable," Hinfey, 77 N.J. at 527-528, and cannot be found where both statutes may reasonably stand together "each in its own particular sphere," Swede v. Clifton, 22 N.J. 303, 317 (1956); State v. County of Hudson, 161 N.J. Super. 29, 51 (Ch. Div. 1978), aff'd 171 N.J. Super. 453 (App. Div. 1979). Courts must construe all existing statutes on the same subject matter as "a unitary and harmonious whole, in order that each may be fully effective." Clifton v. Passaic County Bd. of Taxation, 28 N.J. 411, 421 (1958); Kugler v. Banner Pontiac-Buick, Opel, Inc., 120 N.J. Super. 572, 577 (Ch. Div. 1972). Judge Fisher pointed out that the two statutes can easily be read in a harmonious manner by way of a limitation on N.J.S.A. 2A:15-59.1 through N.J.S.A. 2A:15-60, instead of necessitating a conflict between the two statutes. In this case, the Appellate Division failed to address this issue and explain why Judge Napolitano's interpretation did not lead to an impossible—and unnecessary—result.

Finally, Judge Fisher explained the 1995 amendments to the FLS, which occurred after the K.L.F. decision. P.M., 301 N.J. Super. at 87-88. He indicated that given the changes to N.J.S.A. 2A:15-59.1(a)(2), which permits a public entity to recover

frivolous litigation fees, and (c), which adds (and distinguished) a public entity to those permitted to file an application for fees, there should be no doubt that the Legislature intended to separate public entities from other parties. Ibid. Otherwise, the language would be superfluous and have no substantive consequence. Ibid.

3. The Appellate Division's Decision Ignores Critical Words from the 1995 Amendments to Pretend the Statute Says Something It Does Not Say

In this matter, the Appellate Division analyzed the FLS, both pre- and post-1995, largely by way of a recitation of the K.L.F. and P.M. decisions. (Pca06-11). It summarily concluded (spending a little more than a page in its analysis after spending nearly three pages summarizing those decisions) that the Legislature did not provide public entities with immunity from being sanctioned under the FLS, both by the express terms of the FLS and through its legislative history. (Pca10-11). The Court's opinion noted that both decisions "express sound reasoning in reaching their respective rulings, making our decision a close call." (Pca10). Notwithstanding this ambivalent conclusion, the Court flatly asserts that the "plain language" of the statute makes it clear that that there is no express language that specifically excludes a public entity from the definition of the use of the phrase "party" in N.J.S.A. 2A:15-59.1(a)(1). (Pca11). The Court essentially concludes, without any citation or legal support, that a lack of immunity for public entities must be the default state and immunity the exception, which must be explicitly stated, contradicting the TCA, among other examples. (Id.). Ultimately, the Court concluded that the 1995 amendments changed nothing and were functionally irrelevant with respect to this

issue, as the Legislature did not include an express statement that public entities were to be immune.[7] (Id.).

In so doing, the Court pooh-poohs and functionally handwaves away the use of the phrase "nonprevailing person" contained in N.J.S.A. 2A:15-59.1(a)(1). That language, by its plain terms, qualifies the FLS to state that a party who prevails in a civil action may be awarded sanctions if the pleadings of the opposing person are frivolous. The Court declines to give any basis for why the Legislature would have used the phrase "nonprevailing person" instead of "nonprevailing party" if that was what they meant, as the Court incorrectly assumes. The Court's reasoning for this is that other portions of the statute, (a)(2) and (b), refer to recovery of sanctions against a "nonprevailing party." But this is a red herring, as those subsections are not at issue; (a)(1) is, and (a)(1) specifically refers to recovery of sanctions against a "nonprevailing person." The Court fails to reconcile this disparity, although it notes its "appreciation" for Judge Fisher's analysis of the issue. (Pca10). In so doing, the Court interprets N.J.S.A. 2A:15-59.1(a)(1) and (c) to be constructed in a way that

7. For some unknown reason, the Appellate Division appears to hold it against the pro-immunity argument that the Legislature did not clarify the issue after the P.M. decision by expressly supporting it, even though the lack of such an action should imply that the Legislature agreed with the decision. (Pca11). Even more confusingly, the Court simultaneously acknowledged that the Legislature also "took no action to clarify whether public entities were not immune," (Pca11, n. 10), which ignores the 1995 amendments entirely. The Court therefore tacitly admits that, even if they were correct on the Legislature's inactions in response to K.L.F., it is a meaningless point since it is true in both respects. But this point as indicated, is based on a false premise, because the Legislature did in fact amend the FLS after K.L.F., by specifically distinguishing between a "party" and a "public entity" by way of its amendment to subsections (a)(2) and (c). That modification, on the face of the text itself, indicates a dissatisfaction with the K.L.F. decision, whereas the lack of an amendment after P.M. is indicative of their support of that decision.

renders the 1995 amendments "inoperative, superfluous, or meaningless, [which] is to be avoided," State v. Reynolds, 124 N.J. 559, 564 (1991). The Court pretends the FLS says something it does not say, by ignoring the actual language of the statute. The FLS is only unambiguous in the manner described by the Court if one pretends that the phrase "person" is replaced with "party." It does not.

The Court also does not sufficiently address the plain language of the 1995 amendments to N.J.S.A. 2A:15-59.1(c), which distinguishes "parties" from "public entities." Instead of looking at "the actual words of the statute, giving them their ordinary and commonsense meaning," Gelman, 195 N.J. at 482, which should be the first step of the analysis, the Court skips to the legislative history of the statute to base its claim of a lack of an express waiver of immunity from a single subcommittee statement in the State Senate's records. (Pca11). This is extraordinarily illogical and places an impossible burden of proving a negative on the Borough. The Court assumes, but does not address, that liability is the presumption, as opposed to immunity, but fails to reckon with the disagreements on this issue between the K.L.F. and P.M. courts, and just implicitly assumes K.L.F. to be correct without ever actually saying so or providing any evidence of that position.

If the Court were correct that "parties" is inclusive of "public entities," it would be enough if the subsection simply referred to "parties" seeking an award, and the Legislature would have not needed to make any change to subsection (c). It defies logic as to why the Legislature would have distinguished between the two if they intended for public entities to be included in the definition of a "party." See Orders A-92-189 & A-92-212, 137 N.J. at 96 ("The Legislature is presumed to be familiar

with its prior enactments."); Central Const. Co. v. Horn, 179 N.J. Super. 95, 101-02 (App. Div. 1981) ("The Legislature is presumed not to employ meaningless language or to intend useless legislation."). Such an interpretation defies basic canons of statutory interpretation, and neither K.L.F., the trial court, or the Appellate Division have tried to explain this language differential, but rather handwave it away to determine that public entities are not entitled to immunity.

4. The Appellate Division Incorrectly Assumes, Without Any Support, That Sovereign Immunity is the Exception, Not the Rule

The Court further opines that even if the FLS is ambiguous as to whether it applies to public entities or not, the legislative history supports a similar conclusion that it does not apply to immunize public entities. "There is no indication in the statute's legislative history that the public entities were meant to be exempt from the sanctions if they filed claims determined to be frivolous." (Pca11). In other words, "If the Legislature intended to afford immunity to public entities, it would have clearly stated so." Ibid. The Court conveniently ignores the precedent highlighted in P.M. that expressly demonstrated the opposite, that the Legislature must expressly allow liability for it to exist against public entities, not the other way around. That is because public entities are creatures of the State and their rights derive from the Legislature. See, generally, Wagner v. Mayor & Mun. Council of Newark, 24 N.J. 467, 474 (1957). Indeed, to the extent that any ambiguity exists, it should be construed by this Court in favor of the Borough:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local

> government, or concerning counties, shall be liberally construed in their favor.

N.J. Const., art. IV, § 7, ¶ 11.

"Courts have consistently read this constitutional provision as a mandate to liberally construe powers granted to municipalities, either by express terms or by implication, in their favor." Paruszewski v. Elsinboro, 154 N.J. 45, 52 (1998) (citing Berkeley Heights v. Bd. of Adj., 144 N.J. Super. 291, 296 (Law Div. 1976)); see also Fanelli v. Trenton, 135 N.J. 582, 591 (1994).

The Appellate Division also completely ignores other persuasive extrinsic evidence, such as Rule 11 of the Federal Rules of Civil Procedure, which generally mirrors N.J.S.A. 2A:15-59.1. Prior to 1980, Rule 11—in conjunction with Rule 37—was construed to grant sovereign immunity to public officials and entities until the adoption of 28 U.S.C. § 2412. See Adamson v. Bowen, 855 F.2d 668, 671 (10th Cir. 1988). At that point, Congress expressly waived that sovereign immunity and reflected the position that the United States should be treated like any other litigant in awarding sanctions. Ibid. Sovereign immunity is the default rule unless and until it is expressly waived by the government, and so the Appellate Division has it backwards: the Legislature need not expressly state that public entities are to be immune for them to be so; rather, **their immunity must be expressly waived**. Neither K.L.F. nor the Appellate Division provide a satisfying response to this argument, or one based on the laws or precedent of this State.

CONCLUSION

The Appellate Division's opinion is an unsatisfying wave-of-the-hand dismissal of Judge Fisher's well-reasoned opinion in P.M. and should be overturned. Its conclusory assertions, belied both by fact and law that it fails to consider, are unavailing and indicate its decision is based on public policy rather than law. Rather, the plain language of N.J.S.A. 2A:15-59.1, especially when compared to N.J.S.A. 2A:15-60, demonstrate a clear desire by the Legislature to grant immunity to public entities in accordance with general sovereign immunity principles. The Borough therefore respectfully requests that this Court grant its petition for certification.

Respectfully submitted,
/s/ Scott D. Salmon, Esq.
Scott D. Salmon, Esq.

CERTIFICATION

I certify that this petition represents a substantial question and is filed in good faith and not for purposes of delay.

/s/ Scott D. Salmon, Esq.
Dated: May 29, 2024 Scott D. Salmon, Esq.