**THE SUPREME COURT OF NEW JERSEY**
**DOCKET NO.: 089406**

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| **Borough of Englewood Cliffs,**<br><br>Plaintiff-Petitioner,<br><br>v.<br><br>**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,**<br><br>Defendants-Respondents. | **On Petition for Certification from the Appellate Division of the Superior Court of New Jersey**<br>Docket No.: A-002765-21<br><br>Sat Below:<br>Hon. Thomas W. Sumners, Jr., C.J.A.D.<br>Hon. Lisa Rose, J.A.D.<br>Hon. Morris G. Smith, J.A.D.<br><br>**On Appeal from the Law Division of the Superior Court of New Jersey**<br>Docket No.: BER-L-005785-21<br><br>Sat Below:<br>Hon. Christine A. Farrington, J.S.C. |

# APPELLANTS' REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR CERTIFICATION

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## POINT ONE

## THE ISSUE PRESENTED IS OF GENERAL PUBLIC IMPORTANCE AND HAS BEEN REPEATEDLY RAISED BY VARIOUS PUBLIC ENTITIES

It is one thing for Respondents to argue that the Borough of Englewood Cliff's arguments here are meritless—although the Hon. Clarkson S. Fisher, Jr., J.S.C., one of the most well-respected jurists in recent New Jersey history, certainly disagreed in Div. of Youth & Fam. Servs. v. P.M., 301 N.J. Super. 80 (Ch. Div. 1997), where he took the same position as the Borough here. It is quite another thing for Respondents to state that the expenditure of hundreds of thousands of taxpayer dollars does not "present a question of general public importance." (Pb8). Respondents appear to argue both to suggest that this is not an issue worthy of the Court's consideration.

While the former argument will be addressed below, as to the latter, Respondents indicate that the question of whether a public entity is immune from liability under New Jersey's Frivolous Litigation Statute ("FLS"), N.J.S.A. 2A:15-59.1, is such a "limited occurrence" that it has only come up twice before since the FLS was first adopted in 1988. (Pb8). But that is misleading, as the Respondents' narrow their criteria to suggest that the only times it has ever come up are the two published cases that are at issue in this matter. However, the issue has come up far more frequently.

In fact, the Borough previously identified at least **five** cases in its initial brief in which the issue has arisen: (1) the P.M. case, cited above, in which the trial court determined that public entities are immune under the FLS; (2) In the Matter of K.L.F., 275 N.J. Super. 507 (Ch. Div. 1993), in which the trial court held that such immunity does not exist; (3) 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), in which the Appellate Division expressly held that public entities were immune and relied upon the P.M. decision to reach that conclusion; (4) Borough of Seaside Park v. Sadej, No. A-6596-06T3, 2009 N.J. Super. Unpub. LEXIS 1849 (App. Div. July 17, 2009), in which 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; and (5) Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61 (2007), in which the Supreme Court declined to address the issue because it was not ripe and remanded for further proceedings on that subject.[1]

There are therefore at least five instances the Borough is aware of in which this question has come up, and it raises the question of how many would be enough for Respondents. The Borough acknowledges that this issue does not come up every year. But that does not mean it lacks public importance. And its relevancy should be self-evident given that the expenditure of public funds is obviously a matter of great public importance. See L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 89 (App. Div. 2017) (discussing how expenditure of public funds is a "legitimate issue"); Cty. of Bergen v. Paramus, 79 N.J. 302, 310 (1979) (holding that an appeal was allowed on grounds of "public importance" because "public bodies and public

1. Respondents appear to couch their position by indicating that the Borough cannot find examples of cases invoking the FLS against municipalities, just state agencies. (Pb8). The Borough disagrees given the Pacilli, Sadej, and Toll Bros. cases. They further refine their argument to say that there are no other published decisions, only unpublished ones. This is known as the "No True Scotsman" fallacy, but it fails here because the question being brought to the Court is whether **public entities** are immune, not simply municipalities, because the FLS does not distinguish between municipalities and any other type of public entity.

funds [were] involved"); Houchins v. KQED, Inc., 438 U.S. 1, 8 (1978) (holding that issues related to "public institutions" that involve "large amounts of public funds" are "clearly matters of great public importance") (internal quotations omitted). In other words, there are few matters more fundamentally important to local government than the use—and potential misuse—of public funds.

## POINT TWO

## SOVEREIGN IMMUNITY MUST BE PRESUMED ABSENT A MANIFEST INTENT BY THE LEGISLATURE OTHERWISE

Respondents refer to the Borough's invocation of sovereign immunity as "strained," which would constitute a major shift to our legal system if true. The United States Supreme Court has observed that such governmental immunity "is an axiom of our jurisprudence. The government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it." Price v. United States, 174 U.S. 373, 375-76 (1899). It is therefore perplexing to see Respondents cast doubt on the presumption that public entities are immune to liability unless expressly authorized by statute. (PB19-20).

The doctrine of municipal immunity originated in judicial decisions since the separation of the American Colonies from England. See Kenneth C. Davis, Tort Liability of Governmental Units, 40 Minn. L. Rev. 751, 773 (1956). Indeed, municipal immunity in New Jersey has been judicially understood since 1840. See Bd. of Chosen Freeholders v. Strader, 18 N.J.L. 108 (1840). It has, admittedly, since been eroded over time. See, generally, Small v. Rockfeld, 66 N.J. 231, 237 (1974). For example, and as previously discussed in the Borough's initial brief, the Tort Claims

Act ("TCA") only allows discretionary awards against public entities in limited circumstances. See N.J.S.A. 59:9-5. The same can be said of the Environmental Rights Act ("ERA"). See N.J.S.A. 2A:35-10. In those examples, the Legislature clearly waived that immunity. If Respondents were correct, these statutes would be pointless as there would be no need without a presumption of immunity. See 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.").

Moreover, the tortured history of this Court's conclusion that public entities can be held liable for punitive damages under the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1, et seq., and Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1, et seq., further evidences this point. See, e.g., Pritchett v. State, 248 N.J. 85 (N.J. 2021); Cavuoti v. N.J. Transit Corp., 161 N.J. 107 (1999); Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405 (1994). It is evident from these cases that punitive damages against public entities are severely frowned upon by the Legislature, and it was only based upon the Court's determination the two statutes had to be liberally construed according to the language of the Legislature that broke the deadlock among the Court.

The Borough submits that because of examples like the TCA, ERA, LAD, and CEPA, which only waive immunity from penalties against public entities in limited circumstances, there is a strong policy by the Legislature towards sovereign immunity for all public entities unless expressly waived. Given that, the Court is obligated, by way of N.J.S.A. 1:1-1, to "read and construe" the laws and statutes of this State to "be given their generally accepted meaning," unless "inconsistent with

the manifest intent of the Legislature or unless another or different meaning is expressly indicated." N.J.S.A. 1:1-1. As a result, while there is a general presumption of discouraging frivolous conduct, there is no manifest intent by the Legislature to exempt public entities from their sovereign immunity here. The default, therefore, is that there is to be no "punishment" against the State or its political subdivisions and public entities unless manifestly intended by the Legislature. Here, there is no reason to believe that such manifest intent exists when the plain language of the FLS is directed toward frivolous conduct by a "person" and when the Legislature expressly distinguished between those persons and public entities. Cf. N.J.S.A. 2A:15-59.1(a)(1), (a)(2), and (c).[2] As such, the Court should not find intent to include public entities by the Legislature in the statutory language where there is none.

## POINT THREE

## THE LEGISLATURE HAS NOT ADOPTED ANY AMENDMENT TO THE FRIVOLOUS LITIGATION STATUTE SINCE THE P.M. DECISION, WHICH SUPPORTS THE PROPOSITION THAT IT WAS CORRECT

Respondents repeat the argument posited by the Appellate Division that because they believe the Legislature did not amend the FLS after K.L.M. to expressly bar public entity liability, public entities must therefore be included. First, that logic ignores the presumption toward immunity previously described *supra*, as the onus

2. That the 1995 amendments to the FLS expressly allow public entities to obtain frivolous litigation damages from private parties while not stating reverse is enough to demonstrate the Legislature's manifest intent to not allow such penalties against public entities. The Legislature could have easily put in a section here clarifying that the penalties were mutual, but they chose not to do so. Respondents insist on a presumption that there is no general sovereign immunity for this very reason, because if there is such a presumption, their case falls apart as soon as you look at the actual language used in the statute.

was on the Legislature to expressly **include** public entities, as opposed to "persons," rather than to expressly **exclude** them. Second, the same logic can also be read to apply to the lack of an amendment after the P.M. decision. For nearly 30 years after that decision, the Legislature chose not to amend the FLS any further. There has been no intervening reason to believe the Legislature does not agree with Judge Fisher's analysis of that statute or intended to waive immunity for public entities.

## CONCLUSION

As previously stated, 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 its interpretation of public policy rather than law. The Legislature's own failure to amend the FLS since P.M. demonstrates support of its holding. Rather, the plain language of N.J.S.A. 2A:15-59.1 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,
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