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January 30, 2025

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-19-24 *Borough of Englewood Cliffs v. Thomas J. Trautner, et al.* (089406)

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this amended letter brief in lieu of a more formal submission on behalf of amicus curiae the American Civil Liberties Union of New Jersey ("ACLU-NJ") in the above-captioned matter.

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PRELIMINARY STATEMENT

That the Legislature intended public entities to be excluded from the ambit of the Frivolous Litigation Statute ("FLS") belies the overall plain language of the statute, the clear policy behind it, contemporaneous construction, and the common sense of the statutory and court rule scheme. Indeed, as will be demonstrated below, it has been so obvious that public entities are subject to the FLS that public entities have themselves claimed against other public entities under the FLS, and – as recently as 2023 – this Court expressly assumed the FLS's applicability to public entities.

It is only because a single judge construed the single use of a single word – "person" - in the statute to absolutely exclude public entities that any doubt as to the FLS's universal applicability has been raised. However, this Court has warned against pinning the construction of a statute on so slender a weed, particularly when, as here, such a construction makes no sense as a matter of policy or logic and would undercut the basic overarching purpose of the law.

Simply put, there is no reason to assume that the Legislature intended that public entities – or, for that matter, any litigating party – be exempt from the basic standard of non-frivolousness in their litigation positions. This is

particularly so when public entities have routinely availed themselves of the FLS's protections in seeking fees against those who have sued them.

For these reasons, and those set forth in Defendants' briefs, amicus respectfully requests that this Court affirm the decision of the Appellate Division and hold that the FLS applies to all litigants, including public entities.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purposes of this brief, amicus accepts the statement of facts and procedural history contained in Defendants' Appellate Division briefs filed on September 1, 2022 and October 3, 2022.

ARGUMENT

I. The FLS is fairly construed as applying to all litigating parties, including public entities.

That public entities should be held to the same standard of litigation conduct under the FLS as are all parties would seem to be self-evident. Indeed, it is difficult to formulate a rational argument to the contrary. Their lawyers are held to the same litigating standard of conduct to which attorneys of all other parties are held under this Court's *R.* 1:4-8. There is not a whisper of evidence that the Legislature, in its enactment of the FLS, drafted it so as to carve out public entities. The plain language holds all "nonprevailing parties" to the same standard, and the singular reference to "nonprevailing person" was clearly intended to be synonymous with "party" for purposes of the statute.

Certainly, the overall scope of this important statute cannot and should not be diminished by an overly-legalistic focus on a single word. This Court's settled practice of statutory construction dictates otherwise.

Even were there ambiguity caused by that single word, settled canons of statutory construction resolve that ambiguity clearly in favor of including public entities within the ambit of the FLS: the legislative history, contemporaneous construction, comportment with the underlying policy and purpose of the FLS, and ultimately common sense and fairness.

A. The statute must be construed as a whole, not by focusing on a single word.

As this Court recently iterated, effectuating legislative intent is the prime aim in statutory construction. *Fuster v. Township of Chatham*, __ N.J. __, __ (2025) (slip op. at 15). To that end, it looks first to the ordinary meaning and significance of the law's plain language, *id.*, *Perez v. Zagami*, LLC, 218 N.J. 202, 209-10 (2014), but reads them "in context. . . ." *DiProspero v. Penn*, 183 N.J. 477, 492 (2005). This is so because this Court "must . . . read the statute as a whole and not seize upon one or two words as a fixed guide to the meaning of the entirety." *State v. Friedman*, 209 N.J. 112, 117 (2012). "'There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure,'" *id.*,

quoting with approval *Singh v. Sidana*, 387 N.J. Super. 380, 386 n.2 (App. Div. 2006), *cert. denied*, 189 N.J. 428 (2007) (in turn quoting *Cent. Hanover Bank & Tr. Co. v. Comm'r*, 159 F.2d 167, 169 (2d Cir.), *cert. denied*, 331 U.S. 836 (1947)).

These guides apply with full force here. The only ambiguity in the statute was the Legislature's reference to "person" in N.J.S.A. 2A:15-59.1(a)(1), despite its constant reference to "party" – either prevailing or non-prevailing – throughout the statute otherwise. Thus, while in N.J.S.A. 2A:15-59.1(a)(1), the Legislature provided that "[a] party who prevails" may be awarded costs and fees if the court finds that the position of the "nonprevailing person" was frivolous, throughout the rest of the statute, the Legislature made it clear that by "nonprevailing person," it meant any nonprevailing "party." *See, e.g.*, N.J.S.A. 2A:15-59.1(a)(1) ("A party who prevails . . ."); N.J.S.A. 2A:15-59.1(b) ("In order to find that a [pleading] "of the nonprevailing party" was frivolous); N.J.S.A. 2A:15-59.1(b)(2) ("the nonprevailing party knew, or should have known . . .").

Further, even if, as the court observed in *Division of Youth & Family Services v. P.M.*, 301 N.J. Super. 80 (Ch. Div. 1997) [hereinafter *P.M.*], the word "person" as used once in the FLS *could* be limited to such entities that hold "property which may be the subject of an offense," N.J.S.A. 1:1-2; 301

N.J. Super. at 86-87, that does not mean, as that court concluded, *id.*, that it *must* be so limited. The general definitions set forth in N.J.S.A. 1:1-2 do *not* apply if "there is something in the subject or context repugnant to such construction." N.J.S.A. 1:1-2. That is clearly the case here, as it would defy logic and offend public policy to exclude public entities from being held to the same standard of non-frivolousness in the conduct of litigation as are all other parties. The Legislature's use of the phrase "nonprevailing person" once should not be used to subvert the clear scope of the statute.

B. The contemporaneous construction of the FLS demonstrates virtually universal acceptance that public entities, when parties to litigation, were necessarily subject to FLS.

Even if the word "person" created any ambiguity as to whether public entities were immune from FLS sanctions, the "contemporaneous construction" of the statute resolves any ambiguity. *See Fuster*, __ N.J. __ (slip op. at 16). In an early, thorough review of defenses to the FLS, the authors did not mention, let alone include, the possibility of sovereign immunity. Gary D. Nissenbaum & Nancy Lem, *Stop, Look, and Listen: Selected Defenses to the New Jersey Frivolous Lawsuit Statute*, 20 Seton Hall L. Rev. 184 (1989). Moreover, that public entities were subject to FLS sanctions was obvious to all is shown by the way that private parties, public entities, and the courts viewed the FLS. Repeatedly, courts entertained FLS

claims against public entities apparently without the issue of immunity being raised.[1] Indeed, at least one public entity itself asserted an FLS claim against another public entity, again apparently without the issue of immunity having been raised. *Borough of North Haledon v. Bd. of Educ. of Manchester Reg'l High Sch. Dist., Passaic Cnty.*, 305 N.J. Super. 19 (App. Div. 1997). And, of course, in *In re K.L.F.*, 275 N.J. Super. 507 (Ch. Div. 1993), the court expressly held that public entities were not immune from FLS claims.

There have been few deviations from this consistent construction of the FLS. The most notable, of course, was *P.M.*, where the court found that the use of the word "person" in N.J.S.A. 2A:15-59.1(a)(1), and the 1995 amendment to the FLS, supported a conclusion that public entities were immune from FLS

[1] *See, e.g.*, *Wolosky v. Fredon Township*, 472 N.J. Super. 315, 334 (App. Div. 2022); *Middlesex Cnty. Prosecutor's Off. v. N.J. Advance Media LLC*, No. A-001276-15T4 (App. Div. Mar. 2, 2018) (Pursuant to *R.* 1:36-3, counsel includes this unpublished opinion in an appendix. Counsel is aware of no cases with contrary holdings.); *Bergen Cnty. Improvement Auth. v. Bergen Reg'l Med. Ctr., LP*, No. A-0050-16T4 (App. Div. Mar. 2, 2018) (Pursuant to *R.* 1:36-3, counsel includes this unpublished opinion in an appendix. Counsel is aware of no cases with contrary holdings.); *Isaacson v. Pub. Emp. Rels. Comm'n*, No. A-002991-14T (App. Div. Feb. 27, 2017) Pursuant to *R.* 1:36-3, counsel includes this unpublished opinion in an appendix. Counsel is aware of no cases with contrary holdings.); *B&D Assocs. Ltd. v. Township of Franklin*, Nos. 006112-2017 & 006387-2018 (Tax Feb. 5, 2021) (Pursuant to *R.* 1:36-3, counsel includes this unpublished opinion in an appendix. Counsel is aware of no cases with contrary holdings.).

claims. What happened after that decision is interesting, because apparently no appellate court – with one notable exception – chose to follow its reasoning.

In *Robert J. Pacilli Homes, LLC v. Pilesgrove Township Planning Board*, Nos. A-3271-06T2, A-4226-06T2, & A-3301-06T1 (App. Div. Feb. 13, 2009)[2], a panel of the Appellate Division, relying on *P.M.*, without any extended analysis, ruled as an alternative ground for denying an FLS claim, that the planning board was immune. Significantly, six months later, the same panel addressing another claim of immunity under the FLS stated that "upon a deeper consideration of *P.M.*, we have some misgivings about relying upon *P.M.* to resolve the issue." *Borough of Seaside Park v. Sadej*, No. A-6596-06T3 (App. Div. July 17, 2009) (slip op. at 15)[3]. Although the *Sadej* court did not decide the issue, it discussed in detail the several aspects of *P.M.* that "raise some concerns in our minds." *Id.* These included the court's reliance upon the distinction between a "party" and "person" "because, in other portions of the statute the FLS, by its express terms, appears to allow recovery of fees against a 'nonprevailing party,' whose litigation conduct was

[2] Pursuant to *R.* 1:36-3, counsel includes this unpublished opinion in an appendix. As discussed in the body of this brief, counsel is aware of no cases with contrary holdings.

[3] Pursuant to *R.* 1:36-3, counsel includes this unpublished opinion in an appendix. Except as discussed in the body of this brief, counsel is aware of no cases with contrary holdings.

frivolous." *Id.* (citing N.J.S.A. 2A:15–59.1a(2); N.J.S.A. 2A:15–59.1b; N.J.S.A. 2A:15–59.1b(2)). The panel also took issue with the *P.M.* court's attributing "substantial significance" to the 1995 amendment of the FLS, which the *Sadej* court correctly explained "added a new category of FLS claimants, namely public entities which are *not* parties to the litigation, but which are required or authorized by law to provide a defense to their employees who are parties." *Id.* (emphasis in original). Perhaps even more tellingly, in *In re Farnkopf*, 362 N.J. Super. 382 (App. Div. 2003), *abrogated on other grounds by*, *In re A.D.*, 259 N.J. 337 (2024), the panel noted but did not see the need to resolve the conflict between *K.L.F.* and *P.M.* even though Judge Fisher, the author of *P.M.*, was also the author of the opinion in *Farnkopf*. Thus, *P.M.* remains an outlier in virtually universal contemporaneous construction of the FLS as applying to public entities.

This Court has also appeared to assume that the FLS necessarily applied to all parties, including public entities. In *Rivkin v. Dover Township Rent Leveling Board*, 143 N.J. 352 (1996), the Court was confronted with the question of whether the failure of the rule implementing the constitutional cause of action of prerogative writ, *R.* 4:69-1, to include a provision of attorney's fees to the prevailing party rendered the state remedies constitutionally inadequate. *Rivkin*, 143 N.J. at 379. Noting the recent passage

of the FLS, but without deciding the issue, the Court stated that "it appears a permissible interpretation to conclude that a court may award counsel fees to the prevailing party when a local board 'without any reasonable basis in law or equity' refuses to accede to a clearly meritorious appeal." *Id.* at 379-80.[4]

The next time this Court had the opportunity to address the issue of the applicability of FLS to public entities was in *Toll Brothers, Inc. v. Township of West Windsor*, 190 N.J. 61 (2007). There, the trial court, relying on *P.M.*, had denied a motion for fees and costs under the FLS, finding that the Township was immune from frivolous litigation sanctions. The Appellate Division affirmed the trial court on other grounds, without addressing whether a public entity was immune from sanctions under the FLS. 190 N.J. at 66. Without

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[4] In support of its "permissible" interpretation of the FLS as allowing claims against public entities, the *Rivkin* Court also cited to the proposed amendment to *Rule* 1:4-8, "Frivolous Litigation." *See Proposed Rule Amendment on Frivolous Litigation*, 143 N.J.L.J. 370 (Jan. 29, 1996). The proposed amendment and the final rule contain the same language:

> **(f) Applicability to Parties.** To the extent practicable, the procedures prescribed by this rule shall apply to the assertion of costs and fees against a party other than a pro se party pursuant to N.J.S.A. 2A:15-59.1.

On its face, the rule does not carve out FLS claims against any parties in litigation, other than pro se parties, from the safe harbor provisions of *R.* 1:4-8. This, also, is consistent with the contemporaneous construction of the FLS by private parties and public entities alike that all parties in litigation were held to the same standard of non-frivolousness under the FLS.

addressing the issue of immunity, this Court reversed and remanded in order for the Appellate Division to assess whether it was practicable under the circumstances to require the intervenors to strictly adhere to the notice requirements of *R.* 1:4-8, but suggested that the Appellate Division might, in its discretion, review the trial court's determination that the Township was immune from FLS sanctions.

Most recently, and perhaps the strongest example of how clear it is from the face of the statute that public entities are subject to the FLS is *Gannett Satellite Information Network, LLC v. Township of Neptune*, 254 N.J. 242, 265 (2023). Although the issue was not before this Court, it expressly noted that FLS sanctions were available against a public entity: "[i]f a court finds that the defense asserted *by a public entity* in a common law right of access case is frivolous within the meaning of N.J.S.A. 2A:15-59.1, the requestor 'may be awarded all reasonable litigation costs and reasonable attorney fees' pursuant to that statute." 254 N.J. at 265 n.2 (emphasis supplied).[5] That is precisely the

[5] Amicus recognizes that footnotes do not merit the same precedential deference accorded to other portions of this Court's opinions. This footnote, however, was part and parcel of this Court's justification for its declining to apply an exception to the American Rule presumption against the awarding of fees. It had held that a public entity that undertook the required balancing analysis in response to requests for access to records is not subject to fees. The footnote was important because it confirmed that public entities were nevertheless subject to sanctions under the FLS if their defense in a common law right of access case was frivolous.

correct construction of the FLS, and how parties themselves, including many public entities, have viewed the FLS over the years.

C. Applying the FLS to all parties – including public entities – furthers the overarching purpose of the statute.

Subjecting municipalities and other government entities to the same standard of non-frivolous litigation to which all other litigants are held furthers the Legislature's policy behind the Frivolous Litigation Statute. "As between the two possible constructions of the statute, the one should be adopted which effectuates rather than defeats the legislative purpose." *State Dep't of Civ. Serv. v. Clark*, 15 N.J. 334, 341 (1954) (citing *Moore v. Johnson*, 85 N.J.L. 40 (Sup. Ct. 1913)). Legislative intent "emerges from the spirit and policy of the statute." *Caputo v. Best Foods*, 17 N.J. 259, 264 (1955). "Once we have grasped the genius of the regulatory measure, we are in a fair way to assay the particular terms used to fulfil [sic] the legislative design." *Id.* Here, to adopt Justice Heher's phrase in *Caputo*, the "animating principle" of the legislative enactment of the FLS was undoubtedly to deter frivolous litigation. As will be demonstrated below – and as has already been found in this case – municipalities are no less susceptible to taking frivolous positions in litigation than are any other parties. Granting them immunity from sanctions under the FLS is inimical to the legislative purpose behind that statute.

The legislative history of the FLS clearly uses "party" and "person" interchangeably, without a hint that the Legislature was applying a different meaning to one from the other:

> The purpose of this bill is to allow a party who prevails in a civil suit to recover reasonable attorney fees and litigations [sic] costs from the nonprevailing person if the judge finds that the legal position of the nonprevailing person was not justified and was commenced in bad faith solely for the purpose of delay or malicious injury, or that the nonprevailing party knew or should have known that the action was without any reasonable basis in law or equity.
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> [Sponsor's Statement to A. 1316 (L. 1988, c. 46).]

In the 1995 amendment, upon which Englewood so heavily relies, the thrust of the amendment was to "expand" coverage of the FLS to municipalities under the specific circumstance when they were not the actual "party" to a case, because they were representing their employees who were the actual party. *See* Sponsor's Statement to S. 1396 (L. 1995, c.13). Far from supporting a construction of the statute that the 1995 amendment demonstrates that public entities were treated differently by the Legislature because they were "persons," not "parties," the 1995 amendment shows that the FLS was laser-focused on "party" liability, and expanded its scope to include within "party" a public entity who was not a plaintiff, defendant, or intervenor in a suit, but merely underwriting the defense of the litigation.

There is absolutely nothing in the legislative history of the FLS or of the 1995 amendment upon which the *P.M.* court so heavily relied that even hints at legislative intent to exclude public entities from being held to the same standard of non-frivolous litigation positions under the FLS as is any other litigant.

D. The common sense of the anti-frivolous litigation scheme and an assumption that the Legislature was acting fairly and sensibly dictate that public entities are subject to FLS claims.

As Plaintiff would have it, in deciding to subject litigating parties to a basic standard of non-frivolousness, the New Jersey Legislature *sub silentio* excused public entities from meeting this standard, simply by the singular use of the word "person." Why the Legislature would do that is never explained – nor could it be.

Indeed, throughout the history of the FLS, both before and after the 1995 amendment and before and after the decision in *P.M.*, the Legislature was well aware that public entities were not only being subject to claims under the FLS, but that public entities were regularly and proactively availing themselves of the use of the FLS as a sword. In case after case, with varied success, public entities filed FLS claims against opposing parties, both large and small,

including pro se litigants.[6] "When there is a legitimate question or ambiguity over whether the Legislature intended for an enactment to cover a certain situation, it is sensible and appropriate for a court to presume that the Legislature at all times intended and desired to act fairly, equitably, and reasonably." *Mueller v. Mueller*, 446 N.J. Super. 582, 590-91 (Ch. Div. 2016); *see also Cameron v. Cameron*, 440 N.J. Super. 158, 170 (Ch. Div. 2014).

In this context, this Court may well take heed of the words of the legendary Judge Jayne, who, in construing whether the Legislature intended to differentiate between taxing property acquired by will and property acquired by intestate succession, observed:

> It would place a heavy strain on the most flexible imagination to suppose that the Legislature in this particular intended that the making or not making of a will should govern the allowance of an exemption and the rate of taxation. Something for the goose, but nothing for the gander. Certainly such a frail and feeble construction would require the aid of clear and explicit legislative language.
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> [*Bravand v. Neeld*, 35 N.J. Super. 42, 52 (App. Div. 1955).]

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[6] *See, e.g.*, *Wolosky v. Fredon Township*, 472 N.J. Super. 315 (App. Div. 2022) (fees granted); *Vetter v. Township of Warren*, No. A-00309-22 2024 (App. Div. Dec. 3, 2024) (fees granted) (Pursuant to *R.* 1:36-3, counsel includes this unpublished opinion in an appendix. Counsel is aware of no cases with contrary holdings.); *Khoudary v. Salem Cnty. Bd. of Soc. Servs.*, 281 N.J. Super. 571 (App. Div. 1995) (fees granted); *Halfond v. County of Bergen*, 279 N.J. Super. 149 (App. Div. 1995) (fees granted); *Gabbianelli v. Township of Monroe*, 271 N.J. Super. 544 (App. Div. 1994) (fees denied); *Throckmorton v. Township of Egg Harbor*, 267 N.J. Super. 14 (App. Div. 1993) (fees denied).

These words are fully applicable to the issue before this Court. Or, as this Court has itself put it: "'When all is said and done, the matter of statutory construction . . . will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation.' " *LaFage v. Jani*, 166 N.J. 412, 431 (2001) (alteration in original) (quoting *Jersey City Chapter Prop. Owner's Protective Ass'n. v. City Council of Jersey City,* 55 N.J. 86, 100 (1969)), and quoted with approval in *State v. Friedman*, 209 N.J. at 118.

The "commonsense of the situation" points in but one direction, a direction that comports with the essential purpose of the FLS and fundamental fairness. All parties, including public entities, are subject to sanctions under the FLS if they fail to meet the basic standard of non-frivolousness in their conduct of litigation.

CONCLUSION

For the reasons set forth above and in the briefs of Defendants, this Court should affirm the decision of the Appellate Division and rule that public entities, as are all litigating parties, are subject to claims under the Frivolous Litigation Statute.

Respectfully submitted,

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