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| BOROUGH OF ENGLEWOOD CLIFFS,<br><br>Plaintiff-Petitioner,<br><br>v.<br><br>THOMAS J. TRAUTNER, ALBERT WUNSCH, JEFFREY R. SURENIAN, JOSEPH MARINIELLO, JR 800 SYLVAN AVENUE, LLC, CHIESA SHAHINIAN & GIANTOMASI PC, JEFFREY R. SURENIAN AND ASSOCIATES, LLC, MARINIELLO & MARINIELLO PC, AND UNNAMED CO-CONSPIRATORS,<br><br>Defendants-Respondents. | SUPREME COURT OF NEW JERSEY<br><br>DOCKET NO.: 098406<br><br>Civil Action<br><br>ON CERTIFICATION FROM SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION<br>Docket No.: A-002765-21<br><br>SAT BELOW:<br><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. |

# DEFENDANTS-RESPONDENTS THOMAS J. TRAUTNER AND CHIESA SHAHINIAN & GIANTOMASI PC'S RESPONSE TO BRIEF OF AMICUS CURIAE, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

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Defendants-Respondents Thomas J. Trautner ("Trautner") and Chiesa Shahinian & Giantomasi PC ("CSG", collectively with Trautner, the "CSG Defendants") respectfully submit this brief in response to the amicus brief submitted by the New Jersey Attorney General (the "AG").

## PRELIMINARY STATEMENT

There is no dispute that the Borough of Englewood Cliffs ("Borough") engaged in frivolous litigation. Its mayor instructed the filing of a vexatious, bad-faith complaint designed to harm the Borough's former lawyers, which litigation the trial court correctly dismissed with prejudice. The only question now is whether the Borough can be held to account for its misconduct. Had any private party committed the Borough's misdeeds, it would be sanctioned. But because the politically driven, harassing lawsuit was initiated by a government actor, amicus urges this Court to immunize the violation.

The AG's position is internally inconsistent, misreads the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1 ("FLS"), and misapprehends its legislative history. For all the reasons that follow, the Court should reject the AG's contentions and affirm the Appellate Division's unanimous ruling in this case.

# ARGUMENT

## POINT ONE

### Public Entities Generally, and Municipalities Specifically, Are Subject to FLS Liability.

In seeking to shield all government actors from sanctions, even if they engaged in frivolous litigation, the AG advances a recitation of statutory history that is unconnected to the plain language used by the Legislature. (AGb2–6, 9–10).[1] Given the incorrect narrative offered by the AG, a proper recount of that history is warranted.

The first iteration of the FLS was signed into law on June 28, 1988. See L. 1988, c. 46. The FLS at the time stated,

> *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.
>
> [L. 1988, c. 46, § 1(a) (emphases added).]

The beginning of that clause is straightforward, stating that a prevailing "party" can recover against "any other party" that engages in frivolous litigation. Ibid. The language makes no distinction between public and private actors.

[1] "AGb" denotes the Attorney General's amicus brief.

The sentence continues that the offending filing would come from a "nonprevailing person." Ibid. Had the statute stopped there, momentary confusion might be understandable; but the statute continues. While that first sentence references a "nonprevailing person," the very next sentence clarifies that it can come from a "nonprevailing party." See L. 1988, c. 46, § 1(b) ("In order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous . . . ."). The statute repeats that concept a few sentences later, inquiring whether "[t]he nonprevailing party knew, or should have known, that" the pleading was frivolous. Ibid.

If the singular use of the phrase "nonprevailing person" in the first sentence showed a desire to insulate government actors from FLS sanctions, then the remaining instances of "nonprevailing party" would make no sense. Those phrases would instead need to read "nonprevailing person," which of course they do not. In short, this would be an absurd way to try to protect public entities from sanctions.

The purpose of statutory construction is to give meaning to the intent of the Legislature. Young v. Schering Corp., 141 N.J. 16, 25 (1995). And since the best indication of legislative intent is the words used by the Legislature read as a whole, State v. Fuqua, 234 N.J. 583, 591 (2018); Febbi v. Bd. of Rev., Div. of Emp. Sec., Dept. of Lab. and Indus., 35 N.J. 601, 606 (1961), the meaning of the 1988 statute is clear. Whoever the "nonprevailing party" is that engaged in frivolous litigation—

be it private or public in nature—the court has the discretion to impose "all reasonable litigation costs and reasonable attorney fees" as a sanction. L. 1988, c. 46, § 1(a).

Urging a contrary reading, the AG first offers a series of quotations that are not actually from the statute. In the second full paragraph on page 2 of the brief, the AG asserts that the following language appears in L. 1988, c. 46: "[T]o recover attorney fees and litigation costs from the nonprevailing person . . . ." (AGb2). That language, however, is not in the 1988 Chapter Law. Nor is it in N.J.S.A. 2A:15-59.1. As such there is no support for the AG's contention in the same paragraph, "That version made no reference to public entities and allowed only 'persons' to recoup expenditures made in connection with frivolous litigation." (AGb2). Nor is there any support for the claim that the 1988 law inquires whether "the 'nonprevailing person' either knew or should have known" that the filing was frivolous. (AGb2). The statute said, and still says, "nonprevailing party."[2] The AG's quotations are just wrong.

[2] The commentary on the Chapter Law itself is in accord with the plain language. See New Jersey State Library Legislative Histories, P.L. 1988, c. 46 (photo. reprt. 1988) (1988) ("JUDICIARY[,] Courts[:] Permits the recovery of attorney's fees in a civil suit when the legal position of nonprevailing party was not justified."), available at repo.njstatelib.org/server/api/core/bitstreams/4a50c35d-b128-40ee-9540-d4f6cc66beda/content.

As the AG does correctly point out, however, the FLS at the time contained an important limitation on who could be compensated for an opponent's frivolity. (AGb3-4). Fees and costs could only go to "[a] party seeking an award under this section." L. 1988, c. 46, § 1(c)(2). Thus, when a municipality was not itself a "party" but was nevertheless paying the attorneys' fees for a party, the municipality was without recourse under the FLS.

Thus came the amendments of 1995, wherein the Legislature added a new subsection. Thereafter, if a "public entity is required or authorized by law to provide for the defense of" its employee, the "public entity may be awarded" fees and costs if the subject employee "is the prevailing party in a civil action" when the claim of "the nonprevailing party was frivolous." L. 1995, c. 13, § 1(a)(2). Thus, the municipality in the previous example could be reimbursed if the claim against its employee offended the FLS. And because the statute previously had said that only "a party" could file the application, the Legislature provided a further tweak: The motion for fees can come from "[a] party or public entity." L. 1995, c. 13, § 1(c). In all other respects, however, the statute remained unaltered.

Reading the two statutes in order and in context, their respective meanings are clear. In 1988 the Legislature determined that any party—including public actors—that engaged in frivolous litigation could be sanctioned. And in 1995 the Legislature determined to allow an award of fees to a public entity that defended against a

frivolous litigation even if that public entity was not itself a "party." The AG is wrong to argue otherwise.

The additional claims offered by the AG fare no better than the above misquotations and misguided recitation of statutory history.

*First*, the AG claims that including the government within "any party" "would render the more specific use of the term 'public entity' in subsections (a)(2) and (c) mere surplusage." (AGb8). That is not accurate. As set forth above, the addition of "public entity" in 1995 was intended to correct a unique problem where the government was paying its employees' defense costs but could not recover fees for frivolous litigation. Indeed, even the AG acknowledges that as the purpose of the 1995 amendments. (AGb3–4). Concluding that the phrase "any . . . party" means *any party* is logical and creates no "surplusage." Cf. (AGb13) (agreeing that "parties" "can include public entities").

*Second*, the AG urges that the 1995 legislative goal of "preserv[ing] public funds in the face of frivolous litigation" should immunize the government from potential FLS sanctions. (AGb9). But that is not what the 1995 amendments accomplished. They instead corrected a loophole whereby private actors engaging in frivolous litigation were effectively exempt from sanctions depending on who was covering the defendants' legal expenses. Closing that loophole, and thereby

allowing the government to recover under those circumstances, cannot insulate the government from sanctions should it violate the FLS.

*Third*, the AG claims that the Legislature's inaction in the face of P.M. "suggests its acquiescence to that ruling." (AGb10). By that logic, the Legislature's inaction in the face of K.L.F. might likewise "suggest its acquiescence to that ruling." But it is not necessary to dwell long on the issue. The Legislature's inaction in the face of a trial court-level split of authority is unsurprising and indicative of nothing.

*Fourth*, the AG claims that allowing attorneys' fees and costs against government actors is inconsistent "with the limiting intent of N.J.S.A. 2A:15-60." (AGb11). That statute states that when the State is the plaintiff, "the plaintiff shall recover *costs* as any other plaintiff." N.J.S.A. 2A:15-60 (emphasis added). But when the State is the plaintiff, the defendant "shall not recover any *costs* against such plaintiff" regardless of how the matter is terminated. Ibid. (emphasis added).

To begin, there are of course substantial, material distinctions between "costs" and "attorneys' fees," as the Rules of Court make plain. Compare R. 4:42-8 (generally mandating the award of "costs" "to the prevailing party") with R. 4:42-9 (generally disallowing any "fee for legal services" against the nonprevailing party). Regardless, the FLS came long after the 1903 enactment of N.J.S.A. 2A:15-60, and

as already stated, the FLS explicitly authorizes the award of "all reasonable litigation costs and reasonable attorney fees." N.J.S.A. 2A:15-59.1.

This construction does not, as the AG claims, cause friction between two statutory enactments or result in an "implied repealer." (AGb12). The two statutes are easy to harmonize. As a general proposition, costs "are allowed as of course to the prevailing party" in a civil litigation. R. 4:42-8. This includes an award to the State if it prevails as a plaintiff. N.J.S.A. 2A:15-60. If the State is a plaintiff and it loses its *non-frivolous* suit, then the defendant should not be awarded costs. Ibid. However, if any party has engaged in *frivolous* litigation, then it could be held accountable. N.J.S.A. 2A:15-59.1. Indeed, that is how Rule 1:4-8 works for frivolous attorney filings, making no distinction whether the lawyer is in private practice or in the government's employ. In any event, the *State* is not a party to this case, which involves frivolous litigation by a *municipality*.

*Fifth*, the AG invokes a public policy of protecting taxpayer dollars, arguing that sanctions should be permissible only if the actor engaged in malicious prosecution or a violation of the New Jersey Civil Rights Act. (AGb9-11). Common sense indicates otherwise. If a government actor has committed a common-law tort or violated someone's statutory or constitutional rights, there are independent means to make the aggrieved person whole for resulting damages. But if a government actor has engaged in frivolous litigation—e.g., by acting "in bad faith, solely for the

purpose of harassment," or advancing arguments "without any reasonable basis in law or equity," N.J.S.A. 2A:15-59.1(a)(b)—there is no reason to insulate such misconduct under the statute. The prevailing party has incurred the expense of defending against the government's overreach, and if the trial court deems the government's transgressions severe enough, of course there should be an ability to compensate the prevailing party for its legal expense. The FLS's permission in those unique circumstances is plain.

*Finally*, the AG claims that at the very least the AG's clients (the State) should be immune from FLS sanctions even if municipal actors are not. (AGb14). Putting aside any internal inconsistencies and other shortcomings in that argument, even if it were to be favorably viewed, affirmance would be warranted here: the Borough is a "person." Per N.J.S.A. 1:1-2, "person" includes all "corporations." N.J.S.A. 1:1-2 states that a "borough" is an example of a "municipal corporation." As such, a "borough" is a "person" under N.J.S.A. 1:1-2. See J.H. v. Mercer Cnty. Youth Det. Ctr., 396 N.J. Super. 1, 11 (App. Div. 2007) ("[A] municipal corporation[] is a corporation included within the definition of person contained in N.J.S.A. 1:1-2 . . . ."). The AG thus errs when claiming that "person" "does not include public entities, up to and including the State." (AGb13).

## CONCLUSION

The CSG Defendants respectfully request that the Court affirm the Appellate Division's decision and find that municipalities can be liable for frivolous litigation sanctions under N.J.S.A. 2A:15-59.1.

Dated: March 3, 2025

Respectfully submitted,

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