IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC19-87
L.T. NO. 4D17-2840

MICHAEL BARNETT,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF FINANCIAL SERVICES,

Respondent.

FLORIDA ASSOCIATION OF COUNTY ATTORNEYS' AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

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IDENTITY OF AMICUS CURIAE AND ITS INTEREST IN THIS CASE

The Florida Association of County Attorneys ("FACA") is a Florida nonprofit corporation composed of county attorneys as well as assistant, associate, and deputy county attorneys. FACA has an interest in the continued development of local government law. The issue presented in this case, whether the Legislature intended for the aggregate damages cap to apply when multiple claimants are seeking damages arising out of a single event, has substantial implications for the administration of county governments across Florida. FACA submits this amicus brief to explain the policies underlying sovereign immunity and why those policies require the Court's strict construction of sovereign immunity.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Fourth District Court of Appeal. The Legislature has enacted a limited waiver of sovereign immunity pursuant to Section 768.28, Florida Statutes (2018). Contrary to Petitioner's unsupported assertion that the rule of strict construction applies only to implied waivers of sovereign immunity, strict construction of Section 768.28 is necessary because that statute is in derogation of the common law and the policies underlying sovereign immunity require strict construction of statutes purporting to waive sovereign immunity.

STANDARD OF REVIEW

The interpretation of a statute is a purely legal matter. Therefore, the standard of review is de novo. *Kasischke v. State*, 991 So. 2d 803, 807 (Fla. 2008).

ARGUMENT

I. The Court Should Strictly Construe the Waiver Expressed in Section 768.28, Florida Statutes, so as to Find that the Statutory Cap Applies to Any and All Injuries Resulting from an Act of Negligence by the Sovereign.

The issue before this Court is the extent to which the Legislature has, through Section 768.28, Florida Statutes, waived sovereign immunity for tort claims under section 768.28, Florida Statutes. *See State of Fla., Dep't of Fin. Servs.*, 4D17-2840, 2019 WL 140947, *1 (Fla. 4th DCA Jan. 9, 2019). This Court has been asked whether a single multiple injury event triggers the $300,000 aggregate limit or whether each victim may claim the individual $200,000 limit notwithstanding the aggregate limit. *See Barnett*, 2019 WL 140947, *1. The operative language of this provision is as follows:

> Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $300,000.

Section 768.28(5), Fla. Stat. While this Court gives meaning to the plain and unambiguous definition of statutory terms, where "reasonable persons can find different meanings in the same language" the Court must resolve the ambiguity. *Forsythe v. Longboat Key Beach Erosion Ctr. Dist.*, 604 So. 2d 452, 455 (Fla. 1992).

This Court has long held that waivers of sovereign immunity must be strictly construed in favor of sovereign immunity, *see Spangler v. Fla. Turnpike Auth.*, 106 So. 2d 421, 424 (Fla. 1958), however, Petitioner advocates for the novel

proposition that strict construction applies to only implied waivers of sovereign immunity (Ini. Br. 17.). The law on this has been clear for over fifty years: a waiver of sovereign immunity *cannot* be implied, and express waivers of sovereign immunity are *strictly construed* in favor of sovereign immunity. *See Spangler*, 106 So. 2d at 424; *accord Berek v. Metro. Dade Cty.*, 422 So. 2d 838, 840 (Fla. 1982) (reaffirming *Spangler*); *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 472 (Fla. 2005) (same); *Fla. Dep't of Transp. v. Schwefringhaus*, 188 So. 3d 840, 846 (Fla. 2016) (same).

This Court should continue to strictly construe waivers of sovereign immunity because (1) waivers of sovereign immunity are in derogation of the common law and (2) the policies underlying sovereign immunity necessitate strict construction.

A. A Waiver of Sovereign Immunity is in Derogation of the Common Law and Must Be Strictly Construed.

The doctrine of sovereign immunity provides that the sovereign may not be sued without its consent. *Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). This doctrine is the law of Florida due to the Legislature's adoption of the English common law. *See* § 2.01, Fla. Stat.; *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 471-72 (Fla. 2005). Statutes in derogation of the common law *must* be strictly construed. *See Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977). Thus, statutes in derogation of the common law "will not be interpreted to displace the common law *further than is clearly necessary*. Rather, the courts will infer that such a statute

was not intended to make any alteration *other than was specified* and *plainly pronounced*." *Id.* (citation omitted and emphasis added).[1]

If adopted, Petitioner's proposed reading of the statute would vastly change Florida law and its impact would reach far beyond the scope of this case. Therefore, this Court should reaffirm that the interpretation of an express waiver of sovereign immunity must be strictly construed in favor of sovereign immunity and that the $300,000 cumulative cap applies.

B. The Policies Underlying Sovereign Immunity Require Strict Construction of Statutes Purporting to Waive Sovereign Immunity.

Several important policy rationales support the sovereign immunity doctrine, including the: (1) "preservation of the constitutional principle of separation of powers"; (2) "protection of the public treasury"; and (3) "maintenance of the orderly administration of government." *Am. Home Assur. Co.*, 908 So. 2d at 471.

Sovereign immunity is inherent in the express separation of powers contained within the Florida Constitution. Art. II, §3, Fla. Const. The Legislature, "as representative of the people and maker of laws, including laws pertaining to appropriations," exercises the power of the purse. *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 267 (Fla. 1991); *see also Graham v. Haridopolos*, 108 So.

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[1] Adoption of Petitioner's novel argument as to sovereign immunity would have an immense impact on Florida law. For example, the same rule of strict construction *also* applies to statutes governing attorney's fees, *see Campbell v. Goldman*, 959 So. 2d 223, 226-27 (Fla. 2007, tort law, *Ady v. Am. Honda Fin. Corp.*, 675 So. 2d 577, 581 (Fla. 1996), and criminal law, *State ex rel. Williams v. Coleman*, 180 So. 357, 359 (Fla. 1983).

3d 597, 603 (Fla. 2013) ("[T]he Florida Constitution gives the Legislature 'the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.'" (citation omitted)); *State v. Fla. Police Benev. Ass'n*, 613 So. 2d 415, 418 (Fla. 1992) ("Under the Florida Constitution, exclusive control over public funds rest solely with the legislature."). The Legislature also has exclusive power to determine how county funds are held and dispersed and has vested this power in elected county commissioners who have authority to set county budgets. *See* Art. VIII, §1(b), Fla. Const., § 129.01(2)(a), Fla. Stat.

This scheme ensures that the people, through their elected representatives, maintain control of the public treasury. *See Am. Home Assur. Co.* 908 So. 2d at 471; *Town of Gulf Stream v. Palm Beach Cty.*, 206 So. 3d 721, 726 (Fla. 4th DCA 2016) ("[B]udgetary considerations and fundamental questions of policy are discretionary matters outside the realm of courts, and are therefore shielded by sovereign immunity"). Indeed, in situations where the judiciary has found legal entitlement to damages, the Legislature retains the power to award compensation through a claims bill notwithstanding sovereign immunity. *See* § 768.28(5), Fla. Stat.; *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1195 (Fla. 2017) ("That legislative discretion to perform an act of grace in passing . . . a claims bill, and in determining the amount of compensation to be included in a claims bill, is sacrosanct pursuant to separation of powers." (citing Art. III, §3, Fla. Const.)).

The doctrine of sovereign immunity also protects against "profligate encroachments on the public treasury." *Spangler*, 106 So.2d, at 424. The state and its political subdivisions hold the people's money, paid from taxes, in trust and may only use those funds for a public purpose such as law enforcement, roads, and other public safety measures. *See* Art. VII, §10, Fla. Const. Unlike suits against private entities where only private resources are at risk, tort claims against state and county governments put *the people's* money at risk. *See Circuit Ct. of Twelfth Jud. Cir. v. Dep't of Natural Resources*, 339 So. 2d 1113, 1116 (Fla. 1976) (finding waiver of sovereign immunity to be coextensive with insurance coverage because the source of payment was "other than the treasury of the state"). Thus, sovereign immunity protects public money from being depleted as a result of government wrongdoing.

Finally, "[i]f the State could be sued at the instance of every citizen, the public service would be disrupted and the administration of government would be bottlenecked." *State Rd. Dep't of Fla. v. Tharp*, 1 So. 2d 868, 747-48 (Fla. 1941). Counties perform numerous public functions such as construction and maintenance of roads, funding the five constitutional officers, operating public facilities such as airports, and other public services. Subjecting counties to unfettered tort suits endangers counties' abilities to perform these valuable functions to the detriment of its citizens. The United States Supreme Court has stated:

> It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government.

The Siren, 74 U.S. (7 Wall.) 152, 154 (1868).[2]

Although the Florida Constitution vests the people, through their Legislature, with authority to waive sovereign immunity, *see* Art. X, §13, Fla. Const., *Wallace v. Dean*, 3 So. 3d 1035, 1041 n.9 (Fla. 2009), because of the interests discussed herein, waivers of sovereign immunity must be "clear and unequivocal" and "will not be found as a product of inference or implication." *Am. Home Assur. Co.*, 908 So. 2d at 472. Where waiver exists, "this Court has stated that it must strictly construe the waiver." *Id.*

The limited waiver in section 768.28, Florida Statutes, is a clear expression of legislative policy: the Legislature has assuaged the harsh consequence of sovereign immunity for tort claims by waiving liability, but it has done so in only a limited manner to minimize damage to the public treasury and government administration. The clear legislative intent by the aggregate cap was to insulate government subdivisions from multiple claims arising out of a single event such that a single negligent act did not unduly deplete the public treasury, potentially causing an inability to provide essential government services. Expanding upon sovereign immunity through liberal interpretation of waiver statutes (or through outright judicial lawmaking) disrupts the careful balance the Legislature has established. Therefore, in the absence of clear legislative intent to the contrary, this Court should not deviate from the long-standing policies surrounding the

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[2] The judiciary is also without power to review discretionary governmental decisions under the separation of powers. *See Comm. Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1022 (Fla. 1979).

protection that sovereign immunity provides and that the Legislature did not intend to waive sovereign immunity in excess of $300,000 for a single mass-injury incident.

Adoption of Petitioner's interpretation of section 768.28 would create significant exposure for counties to tort claims unintended by the Legislature. Petitioner's construction of section 768.28 would multiply counties' potential liability for mass-injury events, increasing the counties' exposure from the $300,000 aggregate cap to $200,000 multiplied by the number of claimants (however many that might be), endangering the counties' resources and their ability to perform public services. While the consequences of mass-injury incidents may be horrific, under Florida's separation of powers, balancing these interests is a determination for the Legislature. The Legislature can either enact a claims bill or amend section 768.28, Florida Statutes, to increase the cap (as it has done in the past) or to expressly allow for multiple recoveries in a single incident as Petitioner proposes. Judicial lawmaking or departure from well-established legal doctrines risks this Court's intrusion upon legislative authority and endangers county governments' ability to perform essential services for their citizens.

Therefore, this Court should affirm the well-reasoned decision of the Fourth District Court of Appeal and its conclusion that damages for a single multiple injury incident are capped at $300,000 regardless of the number of claimants.

CONCLUSION

For the foregoing reasons, this Court should find in Respondent's favor and affirm the decision of the Fourth District Court of Appeal.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief on jurisdiction has been furnished to all parties of record in the manner specified in the below Service List on this 7th day of June 2019.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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