THE SUPREME COURT OF FLORIDA

CASE NO. SC19-87
DCA CASE NO: 4D17-2840

MICHAEL BARNETT, ET AL.,

Petitioners,

v.

STATE OF FLORIDA
DEPARTMENT OF FINANCIAL SERVICES,

Respondent.

AMICUS CURIAE BRIEF BY CITY OF CORAL GABLES IN SUPPORT OF RESPONDENT, STATE OF FLORIDA DEPARTMENT OF FINANCIAL SERVICES

Frances Guasch De La Guardia
Suzanne M. Aldahan
HOLLAND & KNIGHT LLP
701 Brickell Avenue, Suite 3000
Miami, Florida 33131
Tel: (305) 374-8500
Fax: (305) 789-7799

Miriam Soler Ramos,
City Attorney
City of Coral Gables,
405 Biltmore Way
Coral Gables, Florida 33134

Attorneys for Amicus Curiae City of Coral Gables

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

TABLE OF AUTHORITIES

CASES **Page**

FLORIDA STATUTES

OTHER STATE STATUTES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae, the City of Coral Gables (the "City"), submits its brief in support of the Respondent, the State of Florida, Department of Financial Services ("DFS"), et al., in an effort to inform the Court of the potential impact and consequences of its decision, which, for the City, include the ***waiver*** of sovereign immunity and the separation of powers doctrine.

This case involves an issue of great public importance regarding an increase in the statutory liability cap for tortious acts of the state amounting to a waiver of sovereign immunity. Such a waiver of sovereign immunity would negatively impact the financial resources of the cities and governmental entities throughout the state. The City's interest in this appeal is based on the effect the Florida Supreme Court's decision will have on the City's sovereign immunity, separation of powers, and the City's financial resources. Additionally, the City has cases currently under review, and predicts future cases, that would likely be affected by a decision in this case.

Should this Court reverse the Fourth District Court of Appeal, the City will face increased financial exposure; and this Court will create precedent directly impacting the City's ability to govern, to legislate, to defend itself, to defend its regulations, to defend its elected and appointed officials, to defend its employees, and to protect its treasury.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal correctly held that this case, involving only one claim of negligence against the State and multiple murders and injuries, involved only one incidence or occurrence under Florida Statute section 768.28(5). The focus, as the Fourth found, when discerning how many incidents or occurrences exist is not on the damages resulting from the State's action, but on the State's act itself. Even though there were multiple deaths or injuries, because there was only one claim of negligence, the court concluded that there was only one incident or occurrence.

The Fourth District Court of Appeal further correctly held that the statutory waiver of sovereign immunity was limited to $200,000—per the statute—for all claims arising out of that one incident or occurrence. Based on the plain language of the statute, and the intent of the Legislature, this is the correct holding.

A reversal of the Fourth District Court of Appeal's holding would amount to increased, unintended financial exposure for the City and other municipalities, and would amount to, effectively, a waiver of sovereign immunity.

ARGUMENT

A. Sovereign Immunity is Part of the State's Constitutional Fabric and Must be Strictly Construed

Sovereign immunity—the idea that a sovereign cannot be sued without its own permission—"has been a fundamental tenant of Anglo-American jurisprudence

for centuries." *Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 471 (Fla. 2005). The doctrine existed when the State of Florida was founded, and was later codified by the Florida Legislature to ensure compliance therewith. *Id.* As this Court previously recognized, three important policy considerations underlie the doctrine of sovereign immunity and explain its necessity: "First is the preservation of the **constitutional principle of separation of powers**.[1] Second is the **protection of the public treasury**. Third is the **maintenance of the orderly administration of government**." *Id.* (emphasis added).[2] Thus, sovereign immunity protects the government from litigation for acts the government takes.

The sovereign immunity bestowed upon cities, municipalities, and governmental entities arises exclusively from Florida's constitutional separation of powers provision. *Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009) (right to

---

[1] The doctrine of sovereign immunity itself performs an important separation-of-powers function by preventing undue judicial interference with executive-branch operations. Daniel Riess, Federal Sovereign Immunity and Compensatory Contempt, 80 Tex. L. Rev. 1487, 1488 (2002).

[2] *See, e.g., Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1022 (Fla. 1979) ("certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance."); *Spangler v. Fla. State Tpk. Auth.*, 106 So. 2d 421, 424 (Fla. 1959) ("immunity of the sovereign is a part of the public policy of the state[, which] is enforced as a protection of the public against profligate encroachments on the public treasury."); *State Rd. Dep't v. Tharp*, 1 So. 2d 868, 869 (Fla. 1941) ("If 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.").

sovereign immunity derives exclusively from the separation of powers provision found in Article II, Section 3 of the Florida Constitution); *see also Dep't of Educ. v. Roe*, 679 So. 2d 756, 759 at fn. 1 (Fla. 1996) (*citing Commercial Carrier Corp.*, 371 So. 2d at 1019 (stating that Florida's sovereign immunity provision stems in part from separation of powers concerns).[3] Thus, the importance of safeguarding a sovereign's immunity from suit—including the right to limit its financial exposure by capping the amount a party can recover—rests on the most basic of the structural pillars of government: the constitutional doctrine of separation of powers. Moreover, the separation of powers doctrine—and the immunity that derives from it—is necessary to ensure the orderly administration and functioning of each branch of the government. *See Commercial Carrier Corp.*, 371 So. 2d at 1022. For the City, and other municipalities, cities, and governmental entities, this constitutional doctrine prevents the judicial branch from interfering with the discretionary functions of the government by granting it sovereign immunity and shielding it from suit, unless the legislature explicitly creates a statutory exception waiving immunity.

[3] *See also Alden v. Maine*, 527 U.S. 706, 748–49 (1999) ("Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design . . . . The principle of sovereign immunity preserved by constitutional design thus accords the States the respect owed them as members of the federation.") (internal citations and quotations omitted).

Governmental entities rely on these constitutionally-based doctrines (and the immunity they afford) to enable them to function and govern effectively with respect to policy and planning decisions. For instance, the constitutional doctrines operate to limit the judicial branch from interfering with the police power of other branches of government:

> [T]he reason courts cannot generally supervise the executive . . . is not based on the archaic notion that 'the king can do no wrong.' Instead, it is founded on the doctrine of separation of powers, . . . 'under the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights.' . . . To hold otherwise, the Court reasoned, 'would require the judicial branch to second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine.'

Detournay v. City of Coral Gables, 127 So. 3d 869, 872–73 (Fla. 3d DCA 2013) (internal citations omitted). It is precisely because sovereign immunity arises pursuant to a substantive constitutional right—making it different from an immunity that only insulates a party from liability and not suit—that it is strictly construed in favor of the government. *See Tampa-Hillsborough Cty. Expressway Auth. v. K.E. Morris Alignment Serv., Inc.*, 444 So. 2d 926, 928 (Fla. 1983) ("A waiver of sovereign immunity . . . should be strictly construed in favor of the state and against the claimant.") (internal citations omitted); *Gerard v. Dep't of Transp.*, 455 So. 2d 500, 502 (Fla. 1st DCA 1984), *approved in part, quashed in part*, 472 So. 2d 1170 (Fla. 1985) (stating that waiver of sovereign immunity must be clear and

unequivocal, as well as strictly construed). Here, the same construction—favoring sovereign immunity—should be employed when a reviewing court is determining and construing the legislative statutory cap on liability.

And, while the Florida Constitution provides for abrogation of sovereign immunity, actual abrogation requires a high standard. First, the authority to waive sovereign immunity is limited to only one body: the Legislature. *Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d at 471. Moreover, "any waiver of sovereign immunity must be clear and unequivocal" and "must [be] strictly construe[d]." *Id.* at 472. Further, a waiver "**will not** be found as a product of inference or implication." *Id.* (emphasis added).

With Florida Statute section 768.28(5), the Florida Legislature created a *limited* waiver of sovereign immunity where the state is liable for tort claims up to a certain monetary limit; and the state cannot be liable for punitive damages or interest. But it is the state that has to commit the tortious act to be liable at all; and so, the purpose of the statutory cap was to protect the state from its own tortious acts by limiting the state's financial exposure.

B. The Fourth District Court of Appeal Properly Interpreted the Meaning of "Incident or Occurrence" in Florida Statute Section 768.28(5)

The City adopts the arguments of DFS regarding the fact that the Fourth District properly interpreted the meaning of "incident or occurrence" as used in

section 768.28(5), and makes the following additional arguments. This Court must strictly construe the language of the statute, and cannot make inferences as to the meaning of the words therein. "Strict Construction" means that this Court must interpret the statutory language according to the "narrowest, most literal meaning of the words without regard for context and other permissible meanings"; and with regard to the "specific intentions or understandings of the text's authors or ratifiers, and no more." *Strict* Interpretation, Black's Law Dictionary (10th ed. 2014).

> Strict construction of a statute is that which refuses to expand the law by implications or equitable considerations, but confines its operation to cases which are clearly within the letter of the statute, as well as within its spirit or reason, not so as to defeat the manifest purpose of the Legislature, but so as to resolve all reasonable doubts against the applicability of the statute to a particular case.

William M. Lile et al., *Brief Making and the Use of Law Books* 343 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914). Incorporating both the narrow language of the statute and the spirit or reason for having a statutory cap on the government's liability for tortious acts, it is clear that the "incident or occurrence" referred to in the statute is tied to the negligence of the in state actor and not the damages resulting from the negligent acts.[4]

---

[4] That the incident or occurrence refers to the negligent act of the state actor, and not the number of victims injured or killed as a result is also consistent with the statute's express language that provides a state is liable in tort to the same extent that a private person would be liable. 768.28(5), Fla. Stat. (2019) (statute expressly provides that "[t]he state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances

In this case, for example, the "incident or occurrence" is tied to the negligence of the DFS (i.e., the state actor) and has absolutely nothing to do with the fact that there were multiple murders (committed by a non-state actor). To hold that each murder committed by a non-state actor is its own "incident or occurrence" against the state makes assumptions not contained within the language of the statute, and runs afoul of the entire purpose of the statutory cap—to protect the government from ***its own*** tortious actions.

Moreover, there is authority to suggest that the "incidence" or "occurrence" relates to the tortious act of the state actor and no one else. In *Windham v. Fla. Dept. of Transp*., 476 So. 2d 735 (Fla. 1st DCA 1985), the First District Court of Appeal, in deciding when a cause of action accrues under section 768.28, recognized that:

> [R]ecovery by the plaintiffs is dependent upon proof of facts demonstrating that the negligence of the department . . . contributed to the happening of an event . . . which made possible the creation of a dangerous condition . . . which thereafter by forces of nature became transported to the underground water beneath plaintiffs' land, which in turn resulted in injury to the plaintiffs . . . it is thus apparent that **the initial link in the causative chain (the department's failure to supervise) is far removed from the occurrence of an injury to the plaintiffs by time and distance, and by other intervening circumstances and conditions over which the department had no control.** [. . .] [W]e find it useful to consider the sequence of events in

---

. . . .). If a private company had been found liable for negligence in supervising an adult, for example, and that adult proceeded to murder or injure multiple people, the private company is only liable for the one negligent act it committed—and not the multiple murders or injuries. The State cannot be more liable than a private person would be under the same circumstances.

> the causative chain in determining whether the injury of which plaintiffs complain can reasonably be regarded as a product of the . . . 'incident' of negligent conduct by the department."

Id. at 739 (emphasis added). This supports the notion that the focus should be on the state actor's tortious act. Further, this Court should consider the First District Court's reasoning related to how a state can be liable for damages resulting from actions over which it had no control.

If the state had committed multiple tortious acts, the story might be different. *See, e.g., Pierce v. Town of Hastings*, 509 So. 2d 1134, 1136 (Fla. 5th DCA 1987) (finding two "incidents" or "occurrences" when the state falsely arrested Pierce on two separate occasions). However, the consideration is still the tortious act of the *state* and not of a non-state actor. Therefore, the Fourth properly held that the meaning of "incident or occurrence" within section 768.28(5) modifies the action of the state, and not the damages resulting from the negligence acts.

C. The Fourth District Court of Appeals Properly Held that Florida Statute Section 768.28(5) Provides an Aggregate Cap Amount of $200,000.00[5]

The Fourth District Court of Appeal also properly held that section 768.28(5) provides an aggregate cap amount of $200,000 when there are multiple parties. That

[5] The statute under review before the Court is the pre-amended version in which the aggregate claims amount was $200,000. The amendment increased the limits of liability against the state and its agencies from $100,000 per individual claim and $200,000 per aggregate claims, to $200,000 per person, and $300,000 per aggregate limit per incident.

is, in the case of multiple parties affected by one incident or occurrence, the aggregate cap for all parties (not each party individually) is $200,000. To hold otherwise would disrupt the Legislature's intent in creating the cap in the first place.

The statute is not ambiguous. This Court simply needs to look to its plain language; and a plain reading of the statute makes clear that the state would only have to pay the aggregated cap of $200,000 per incident for the combined claims. Should this Court disagree, the Court should consider the Legislative intent to discern the meaning behind the statute. In reviewing Staff Analysis, it is clear that the $200,000 aggregated cap was intended to apply to multiple claimants *per incident*. *See, e.g.*, Florida Staff Analysis, H.B. 1107, March 19, 2010. H.B. 1107 amended section 768.28(5) "to increase the limits of liability against the state and its agencies from $100,000 per individual claim and $200,000 per aggregate claims, to $200,000 per person, and $300,000 per aggregate limit ***per incident***." This shows that the Legislature's intent of having the $200,000 aggregate cap was to be the entire amount paid by the state for claimants' claims arising out of the same incident; and **not** to pay each claimant $200,000.

A review of the facts at hand shows that the Legislature did not intend what the Petitioners request; and this Court should not defeat the purpose of the Legislature in making the law. Here, as detailed above, there was one incident or occurrence (negligence acts of DFS) and multiple claimants against the state

(Petitioners). Petitioners' position is that they should receive an aggregate amount of $200,000 for each murder—which would mean that the state is paying $1 million for ***one*** tortious act. This interpretation completely obliterates the Legislature's intent of minimizing its liability to a maximum amount of $200,000 for aggregate claims arising out of the same incidence or occurrence. Therefore, the Fourth correctly held that Florida Statute section 768.28(5) provides a complete aggregate cap amount of $200,000.00 for all claims from claimants arising out of one incident or occurrence.

D. Petitioners' Argument Would Render the Aggregate Cap Meaningless and Would Cause Waiver of Sovereign Immunity

This Court must affirm the Fourth District Court of Appeal. Otherwise, this Court risks annihilation of the Legislature's cap on damages and causes unintentional waiver of sovereign immunity. If Petitioners' argument survives, which it should not, the statutory cap detailed in section 768.28(5) becomes meaningless. The Legislature has already determined that the waiver of sovereign immunity is limited only to an aggregate amount of $200,000. If Petitioners' argument survives, the state will be required to pay $1 million thereby rendering the cap completely meaningless. This outcome would be in derogation of one of the principle purposes for sovereign immunity: the protection of the public treasury from an extensive damages claim. *See Spangler*, 106 So. 2d at 424.

Additionally, not only will the cap and the statute be rendered meaningless, but Petitioners' argument will cause an unintentional waiver of sovereign immunity—which is integral to the Constitutional framework of the State. The Legislature is the only entity authorized to waive sovereign immunity; and allowing Petitioners' arguments to survive will cause the courts to bypass the Legislature's power. This affects separation of powers (a major policy consideration for sovereign immunity). The courts should not usurp this power. And allowing Petitioners' arguments to survive puts into question the security of the public treasury (a second consideration of sovereign immunity). As it stands, section 768.28(5) limits what the state may have to pay for tortious acts. This certainty allows the state the ability to prepare and budget accordingly. Should the Petitioners' arguments be accepted, the state's budget will be in turmoil considering that future potential exists for one tortious act to result in $1 million in damages (or more) payable by the state.

Moreover, section 768.28(5) provides a remedy for victims whose damages are in excess of the cap (again, the purpose is to protect the State not to harm the victim). If a constituent's damages are in excess of the statutory cap, he or she may seek to obtain a claims bill from the Legislature to satisfy the damages in excess of the cap. The adaptation of Petitioners' interpretation of the statute would frustrate the purpose of the claims bills provision and render it meaningless because it would not make sense for the Legislature to include an avenue by which the constituent can

seek damages in excess of the cap if the State itself would provide full damages. Indeed, this Court, in *Gerard v. Dept. of Transp.*, 472 So. 2d 1170 (Fla. 1985) and in *Berek v. Metro. Dade Cty.*, 422 So. 2d 838 (Fla. 1982), clarified that the "purpose of this provision [claims bill] is so that the excess can be reported to the legislature and then paid in whole or in part by further act of the legislature." *Berek*, 422 So. 2d at 840; *Gerard*, 472 So. 2d at 1173. For this Court to construe the statute as suggested by Petitioners would render the claim bills provision mere surplusage; and a court must avoid rendering words as mere surplusage when construing a statute. *See Mendenhall v. State*, 48 So. 3d 740, 749 (Fla. 2010) (applying the "elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.").

Finally, this Court should consider how other states handle similar situations. The Pennsylvania statute, for example, has language similar to that of Florida's regarding the statutory cap for a state's limitation on damages. *See* 42 PA. Stat. § 8528(b) ("Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed $250,000 in favor of any plaintiff or $1,000,000 in the aggregate"). Pursuant to the statute, the Pennsylvania Supreme Court wrote the following in an opinion related to a case involving multiple underinsured motorist claims:

> In *Kmonk-Sullivan*, approximately fifty passengers on a Port Authority of Allegheny County (hereinafter "PAT") bus sustained injuries when it collided head-on with another PAT bus. PAT is a Commonwealth agency and is therefore subject to the statutory provisions for sovereign immunity and exceptions to sovereign immunity pursuant to the Judicial Code. The Judicial Code provides that, in an action against the Commonwealth arising from the 'same cause of action or transaction or occurrence,' the damages the Commonwealth must pay are limited to no more than $250,000.00 for any one person or a total of $1,000,000.00. PAT filed an interpleader action in the Court of Common Pleas of Allegheny County and paid the injured individuals $1,000,000. Unfortunately, once the money was distributed among the injured individuals, it only satisfied approximately one-third of their damages. Thereafter, thirty-four of the injured individuals filed UIM [underinsured motorist] claims with their own automobile insurance carriers to recover the remaining portion of their damages.

Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co., 567 Pa. 514, 518 (Pa. 2001). Here, there was one incident by the state actor (the bus crash) and fifty passengers. The Pennsylvania Supreme Court correctly applied the aggregate total of $1 million under the statute to **all fifty passengers** and did not award $250,000 to each of the fifty passengers for a total of $12,500,000 payable by the state of Pennsylvania. Petitioners would argue that each passengers' injury was a "separate incident or occurrence," but that reading would have obliterated Pennsylvania's statutory cap of $1 million for aggregate claims. Moreover, the Pennsylvania Supreme Court even recognized how unfortunate it was for each of the passengers that the money only covered about one-third of their damages, but the statute is the statute and the cap is the cap.

Similarly, in Florida—regardless of how unfortunate the truth may be—the

statute is clear and the cap remains the cap. This Court should therefore uphold the Fourth District's opinion and the statutory cap, which clearly states that the State is only liable for a maximum amount of $200,000 for aggregate claims arising out of the same incident or occurrence.

CONCLUSION

A waiver of sovereign immunity must be clear; and it must be unequivocal. A waiver of sovereign immunity cannot be implied or inferred, but Petitioners' ask this Court to do just that: to infer waiver of sovereign immunity where such waiver does not exist. Florida Statute section 768.28(5) is clear in the waiver that it provides to constituents of the state, and its plain language must be upheld. Therefore, this Court should affirm the Fourth District Court of Appeal.

Dated: June 7, 2019

Respectfully submitted,

/s/Frances G. De La Guardia
Frances G. De La Guardia
Florida Bar No. 775762
Suzanne M. Aldahan
Florida Bar No. 1002654
HOLLAND & KNIGHT LLP
Counsel for the City of Coral Gables
701 Brickell Ave., Suite 3300
Miami, Florida 33131
Tel.: (305) 374-8500
Fax: (305) 789-7799
frances.guasch@hklaw.com
suzanne.aldahan@hklaw.com

Miriam Soler Ramos
City Attorney – FBN 581348
Board Certified by the Florida Bar in
City, County and Local Government Law
City of Coral Gables
405 Biltmore Way
Coral Gables, FL 33134-5717
Tel.: (305) 460-5216
Fax: (305) 460-5264
mramos@coralgables.com

CERTIFICATE OF SERVICE

I Hereby Certify that on June 7, 2019, a true and correct copy of the foregoing has been electronically filed with the Supreme Court of Florida via Florida Courts E-Filing Portal which will serve it via transmission of Notices of Electronic Filing generated by the ePortal System on counsel of record on the Service List below.

s/ Frances G. De La Guardia
Frances G. De La Guardia

SERVICE LIST

H.T. Smith, Esq.
LAW OFFICES OF H.T. SMITH, P.A.
2655 LeJeune Road, #304
Miami, FL 33134
Tel: (305) 324-1845
ht@htsmithpa.com

Attorneys for Plaintiff/Petitioner Barnett

John W. McLuskey, Esq.
Lisa A. Riddle, Esq.
MCLUSKEY, MCDONALD & HUGHES, P.A.
The Barrister Building
8821 S.W. 69th Court
Miami, FL 33156
Tel: (305) 662-6160
eservice@mmlawmiami.com
jmcl@mmlawmiami.com
lriddle@mmlawmiami.com
asantamaria@mmlawmiami.com
fhudson@mmlawmiami.com

Attorneys for Plaintiff/Petitioner Barnett

Lauri Waldman Ross, Esq.
ROSS & GIRTEN
Two Datran Center, Suite 1701
9130 S. Dadeland Blvd.
Miami, FL 33156
Tel: (305) 670-8010
RossGirten@Laurilaw.com

Appellate Co-Counsel for Plaintiff/Petitioner Barnett

Sheridan Weissenborn, Esq.
DUTTON LAW GROUP P.A.
9700 S. Dixie Highway, Suite 940
Miami, FL 33156
sweissenborn@duttonlawgroup.com
nvallecillo@duttonlawgroup.com

Karen M. Nissen, Esq.
VERNIS & BOWLING OF PALM BEACH, P.A.
884 U.S. Highway One
North Palm Beach, FL 33408
knissen@florida-law.com
rrumpf@florida-law.com
pbfiling@florida-law.com

Vincent E. Miller, Esq.
55 S.E. 2nd Ave.
Delray Beach, FL 33444
vincentemiller@att.net
vmiller@vemlaw.com

Attorney for LeRoy Nelson, Jr.

Brittany O Finkbeiner, Esq.
DEAN, MEAD & DUNBAR
215 S. Monroe Street
Suite 815, Tallahassee, Florida 32301
Tel: (850) 999-4100
Fax: (850) 577-0095
BFinkbeiner@deanmead.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Times New Roman, 14-point font.

s/ Frances G. De La Guardia