IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

SCHOOL BOARD
OF BROWARD COUNTY,

Appellant, CASE NO. 4D22-3144

vs.

STATE FARM MUT. AUTO INS. CO.,
Appellee,
_____/ Consolidated with

SCHOOL BOARD
OF BROWARD COUNTY,

Appellant, CASE NO. 4D23-722

vs.

STATE FARM MUT. AUTO. INS. CO.
Appellee.
_____/

THE PALM BEACH COUNTY
SCHOOL BOARD, etc.,

Appellant, CASE NO. 4D23-256

vs.

STATE FARM MUT. AUTO. INS. CO.,
Appellee,
_____/

AMICUS BRIEF OF THE FLORIDA SCHOOL BOARDS INSURANCE TRUST

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

INTRODUCTION

This is the brief of *amicus curiae* Florida School Boards Insurance Trust ("FSBIT"). It is written in support of the county school boards bringing these consolidated appeals, Case Nos. 4D22-3144, 4D23-256, and 4D23-722.

JURISDICTION

This appeal relates to final judgments of the County Court. This Court has final appellate jurisdiction under Rule 9.030(b)(1)(A) (providing that district courts shall review, by appeal, final orders of trial courts not directly reviewable by the supreme court or a circuit court). Effective January 1, 2021, Fla. Stat. § 26.012 was amended to divest circuit courts of appellate jurisdiction to hear appeals from county court in civil and criminal cases. See Chapter 2020-61, Laws of Florida. Jurisdiction to hear appeals from the county court in now vested in the district courts of appeal. *Id.*

THE FSBIT AND ITS INTEREST IN THIS CASE

The Florida School Boards Insurance Trust (FSBIT) was established in 1981 by the Florida School Boards Association, Inc. (FSBA). The role of FSBIT is to self-insure Florida school districts for property and casualty liabilities. This pooled self-insurance program is sponsored by the FSBA and is funded by the participating districts.

FSBA is itself a nonprofit corporation. It represents the elected school boards in Florida. FSBA has been the collective voice for Florida school boards since 1930 and is closely allied with other educational and community agencies to work toward improvement of education in Florida.

The mission of FSBA is to increase student achievement through the development of effective school board leadership and advocacy for public education. To do that, it is critical to preserve precious resources, including Floridians' tax dollars.

The FSBIT, as the self-insurer created by FSBA, has a material interest in this case, as do school boards and the taxpaying public at large. Unless this Court (1) certifies the question; or (2) reverses and creates conflict with the Second District's erroneous decision in *Lee County School Board v. State Farm*, 276 So. 3d 352 (Fla. 2d DCA

2019), the Second District's opinion will remain binding statewide, and the Supreme Court of Florida may never have a chance to weigh on the question.

FSBIT urges the Florida judiciary to view insurers' present claim for reimbursement under subsection 627.7405(1) with a critical eye. The payments by school districts at issue in this case, if compelled by the judiciary, would essentially turn local school districts into PIP benefits insurers for all public school bus-riding students, which is a result contrary to public policy and legislative intent.

THE ISSUES

1. Whether the public policy of Florida is to shift liability for all injuries to school bus riders from private automobile insurers to the public school districts throughout Florida, regardless of fault?

2. Whether the policy of the Florida Legislature in the 1997 amendments to the No Fault Act was to unambiguously and expressly waive school district's sovereign immunity against claims for PIP benefit reimbursements under subsection 627.7405(1), Florida Statutes?

SUMMARY OF ARGUMENT

In 1997 (Ch. 97-84, Laws of Florida), the Legislature amended the No Fault Act in order to allow pupils riding in Florida public school buses to benefit from medical coverage under the No Fault insurance maintained by a member of their household. The policy goals were (1) provide coverage where possible; and (2) save overall liability costs for school districts.

Unfortunately, the amendment was poorly drafted. Because public school buses were technically included in a subcategory of "motor vehicles" called "commercial motor vehicles," a pre-existing, generally applicable provision in the No Fault Act ostensibly applied. It calls for all owners of "commercial motor vehicles" to reimburse private No Fault insurers for all PIP benefits paid on account of accidents involving those vehicles, regardless of fault. Where public school buses are concerned, this is the opposite of the intended policy goal.

Notwithstanding the Legislature's drafting error, the legal right of reimbursement is not enforceable in court against public school districts because of sovereign immunity. Although subsection 627.7405(1) is generally applicable to owners of a "commercial motor

vehicle," school districts enjoy sovereign immunity from claims under generally applicable laws, subject only to express waivers. This includes proposed enforcement in the judicial branch of state government to compel reimbursement. In the instant case, there is no express waiver of immunity from a cause of action for reimbursement under subsection 627.7405(1).

FSBIT urges the Court to hold that, unlike other owners of commercial motor vehicles, public school districts enjoy sovereign immunity from reimbursement claims under subsection 627.7405(1).

ARGUMENT

The Florida Legislature did not intend to turn Florida public school districts into the source of school bus riders' PIP benefits, and it has expressed no intent to waive school districts' sovereign immunity.

A. Introduction: the Policy Problem in this Case

In 1997, the Florida Legislature confronted an undesirable loophole in the No-Fault system. At the time, the No-Fault Law excluded public school buses from the definition of "motor vehicle." *See* Section 627.732(3)(b), Florida Statutes (1995) (flush language). That exclusion meant that injuries sustained on a bus by a public school pupil were subject to the Florida tort system rather than the No-Fault system, which was perceived to be more quick and efficient. Even if a school bus rider had parents with No-Fault coverage, the pupil still could not benefit from the automatic $10,000 in coverage. In contrast, while riding in most other vehicles, the same pupil could recover up to $10,000 of medical coverage, regardless of fault, if injured in an accident. This was bad and illogical policy.

In *Esker v. Nationwide Mut. Fire Ins. Co.*, 593 So. 2d 303 (Fla. 2d DCA 1992), the Second District interpreted the statute just as it was written. Because of the then-existing statutory definition of

"motor vehicle," a school pupil's injuries on a school bus were not covered by the parents' PIP coverage. *See* Fla. H. R. Comm. On Ed. Serv., H. B. 9 (1997), Staff Analysis (final May 23, 1997) (hereafter "*Staff Analysis*") at 2 (citing *Esker*).

The legislative solution to this problem was simple and well-intended. The "motor vehicle" exclusion found in the flush language of section 627.732(1)(b) would be amended to exempt school buses from the exclusion. This was enacted in Chapter 97-84, Laws of Florida, Section 1. After the amendment, if a household member of a PIP-insured driver were injured while on a school bus, the injuries would be covered by the PIP insurance. For injuries capable of being treated and resolved with up to $10,000 of PIP benefits, there would be no need to sue an at-fault party or the school district and prove "fault."

Just as before the amendment, there was still no reason to require public school districts operating buses to buy the same PIP insurance required of private owners. After all, private insurers were paying those benefits. Accordingly, that exclusion from the "required security" found in section 627.733(1) was specifically maintained for school buses in another change created by the 1997 amendment. *See*

Chapter 97-84, Laws of Florida, Section 2. "Because the bill defines school buses at motor vehicles, this change is necessary to retain current law excluding school buses from the mandatory PIP requirement." *Staff Analysis* p.3.

The goal of the legislative tweak was to shift payments for most injuries on school buses *away from* the school district's liability insurance under the tort system and instead to parents' private PIP insurance. The Legislature was told that the bill would "reduce school districts' liability insurance costs and slightly increase [private motorists'] PIP premiums." *Id.* at p. 1. That is why it exempted school buses from the requirement to carry PIP coverage in the amendment to subsection 627.733(1).

B. <u>The public policy of Florida is not to shift legal liability for all injuries to school bus riders from private automobile insurers to the public school districts throughout Florida, regardless of fault.</u>

Unfortunately, the amendment was too simple. This poor drafting created consequences that, according to legislative history, were never considered by the Legislature. At the time (and to this day), "commercial motor vehicles" were awkwardly defined by exclusion as simply any "motor vehicle" that "is *not* a private

passenger motor vehicle." (emphasis supplied). To be sure, publicly owned and operated school buses are not "commercial" vehicles as that term is commonly understood. But because school buses are also not "private passenger motor vehicles," public school buses would likely fall into the category of "commercial motor vehicles," as defined, after 1997, under the No Fault Act.

As a result of this pre-existing definition, a completely separate and generally applicable subsection of a separate statute within the No Fault Act, section 627.7405(1) now arguably applied. Subsection 627.7405(1) was not amended in the 1997 revision nor discussed in the *Staff Analysis*. It generally applied, and still applies, to all "commercial motor vehicles" but not all "motor vehicles." Under this subsection, PIP insurers were due a "right of reimbursement" from owners of all "commercial motor vehicles" to recover medical benefits paid as a result of a collision involving a PIP-insured claimant. In 1997, section 627.7405 read as follows:

> **627.7405 Insurers' right of reimbursement**.-- Notwithstanding any other provisions of ss. 627.730-627.7405, any insurer providing personal injury protection benefits on a private passenger motor vehicle shall have, to the extent of any personal injury protection benefits paid to any person as a benefit arising out of such private passenger motor vehicle insurance, *a right of*

> *reimbursement against the owner or the insurer of the owner of a commercial motor vehicle*, if the benefits paid result from such person having been an occupant of the commercial motor vehicle or having been struck by the commercial motor vehicle while not an occupant of any self-propelled vehicle.

Section 627.7405, Florida Statutes (1997) (emphasis added).

Because school buses would be deemed "commercial motor vehicles," as defined, this generally applicable "right of reimbursement" under subsection 627.7405(1) literally could include public school bus operators, including sovereign school districts and school boards, after the 1997 change. But this is not what the Legislature wanted: lumping buses in with other "motor vehicles" was intended to *divert* school districts' exposure *away* to private insurers, not broaden that exposure and invite lawsuits.

In sum, it is clear from the *Staff Analysis* that the Legislature did not consider the effect of subsection 627.7405(1). It was told that the amendments would further the policy goal of enabling injured school bus riders to recover medical expenses from a household member's PIP insurance, rather than from school districts. "The bill reduces the potential obligations of school boards, school bus operators, or other parties at fault in school bus accidents to pay

damages for injuries sustained by persons covered under a No-Fault insurance policy." *Staff Analysis* at 3.

The unintended consequences of the 1997 amendment to the definition of "motor vehicle" recently manifested themselves in *Lee County School Board v. State Farm*, 276 So. 3d 352 (Fla. 2d DCA 2019). The Second District held that (1) upon paying PIP benefits for an insured school bus rider, the PIP insurer had a subsection 627.7405(1) "right of reimbursement" from the Lee County School Board and its insurer; and, (2) more significantly, the Legislature had expressly waived "sovereign immunity" as to this "cause of action."

The Second District was persuaded by the fact that the existing definition of "commercial motor vehicle" would literally include school buses after the 1997 amendments. 276 So. 3d at 355. Obviously, public school buses are not private passenger vehicles, so they were instead "commercial motor vehicles" as defined, even though there is nothing "commercial" about them. The Second District's interpretation of those definitions is certainly defensible.

But more significantly, and critically, the Second District assumed that the 1997 change to the "motor vehicle" definition was an unequivocal waiver of sovereign immunity "as to that cause of

action" under section 627.7405(1). 276 So. 3d at 356. The Second District did not discuss the fact that neither subsection 627.7405(1) nor the generally-applicable definition of "commercial motor vehicle" were actually amended in 1997. This is where the Second District erred. The application of section 627.7405(1) "right of reimbursement" against sovereign entities ignores or misinterprets the legislative intent of the 1997 amendments. It is also bad policy.

For example, if the Legislature really intended to shift all liability for PIP benefits paid resulting from school bus accidents *to public school districts via strict liability*, then there was an easy fix. It could have simply required public school bus owners to buy PIP insurance to cover injuries to public school bus riders. Instead, in the very same legislation that the Second District misinterpreted as a *waiver* of sovereign immunity, the Legislature *rejected* that option and deliberately *exempted* school buses from the insurance requirement. Ch. 97-84, Laws of Florida, Section 2. There would be no reason to do so if the Legislature considered or understood that public school districts would soon face a wave of private insurer lawsuits for reimbursement of those very same PIP benefits.

C. The public policy of Florida, as expressed in the 1997 amendments to the No Fault Act, was never to subject public school districts to lawsuits by insurers for PIP benefit reimbursements under subsection 627.7405(1).

The Second District's *Lee County* case has now created a statewide precedent that sovereign immunity was specifically and intentionally waived in the 1997 amendments to the No Fault Act. Under the *Lee County* view, the Legislature effectively shifted *all* strict PIP liability for injuries in public school bus accidents *to the public school districts*, even though it was trying to *save money* for the school districts in the 1997 amendments. School boards and their self-insurance plans all over Florida may owe up to $10,000 in No Fault insurance benefits for nearly every injured student riding public school buses, regardless of fault (excepting only those few children not living in a household with an insured driver). And according to the Second District, sovereign school districts can be sued, served, hauled into court, and compelled by the judicial branch to pay every penny of these money judgments to private insurers for "reimbursement," regardless of whether any taxpayer money had ever been budgeted for those claims.

1. The *Lee County* result is contrary to Legislative intent.

The *Lee County* case incorrectly assumed a waiver of sovereign immunity without evidence. When the Legislature enacted the 1997 amendments, it intended to *save* public money by shifting liability *away* from school districts and toward parents' private household PIP insurance. *See State Farm Mutual Automobile Insurance Company v Polk County School Board,* No. 53-2011 CC 4830 22 Fla. L. Weekly Supp. 124a (Polk Co. Ct. July 22, 2014) (citing *Staff Analysis*). As a result, the staff analysis predicted that school boards would save money and PIP premiums might *increase* for private drivers, because it expected private PIP carriers to bear the expense of benefits for injured public school bus riders. *Staff Analysis* at 1.

2. *Lee County* got sovereign immunity wrong.

The controlling principle overlooked by the erroneous *Lee County* decision is the school districts' sovereign immunity *from suit*. Laws that are generally applicable to everyone, like this one, cannot necessarily be enforced against the state and its subdivisions.

"Sovereign immunity" means both immunity from suit *and* immunity from liability. In *Florida Highway Patrol v. Jackson*, 288 So. 3d 1179 (Fla. 2020), the Supreme Court of Florida clarified that

sovereign immunity is not merely immunity from the underlying liability, but also full immunity from liability *and* from a lawsuit. Disapproving *Parker v. Am. Traffic Solutions, Inc.*, 835 F.3d 1363 (11th Cir. 2016), the supreme court explained that "[i]n Florida, sovereign immunity is both an immunity from liability and an immunity from suit." *Jackson*, 288 So. 3d at 1185. To that end, "entitlement to sovereign immunity should be established as early in the litigation as possible," because the mere existence of the suit was an impermissible violation of sovereign immunity. *Jackson*, 288 So. 3d at 1185.

Even assuming that a technical reimbursement right was arguably created for the owners of public school buses as the owners of "commercial motor vehicles," nothing about this Legislative act (and the evident failure to consider the effect of section 627.7405(1)) indicates or even implies an intentional, unequivocal waiver of sovereign immunity *from lawsuits to compel payment by public entities in the judicial branch*. Rather, in light of cases like *Florida Highway Patrol v. Jackson*, 288 So. 3d 1179 (Fla. 2020) and *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009) the mere existence of some valid

legal "right of reimbursement", i.e. a recognized right to money from a governmental entity, is not the end of the inquiry.

A valid right may exist. But it is not the same as a waiver by the sovereign government of the distinct right *not to be sued*. "[A]ny waiver of sovereign immunity must be clear and unequivocal." *American Home Assur. Co. v. National R.R. Pass. Corp.*, 908 So. 2d 459, 472 (Fla. 2005). "[W]aiver will not be found as a product of inference or implication." *Id.* Accordingly, some *express* indication by the Legislature was required to show that it intended to allow "reimbursement" lawsuits to be filed specifically against public school districts. That does not exist here.

One good example of a generally applicable law imposing liability that does not reach the sovereign is section 327.32, relating to "vessels." That section provides:

> All vessels, of whatever classification, shall be considered dangerous instrumentalities in this state, and any operator of a vessel shall, during any utilization of the vessel, exercise the highest degree of care in order to prevent injuries to others. Liability for reckless or careless operation of a vessel shall be confined to the operator in immediate charge of the vessel and not imposed upon the owner of the vessel, unless the owner is the operator or is present in the vessel when any injury or damage is occasioned by the reckless or careless operation of such vessel, whether such recklessness or carelessness

> consists of a violation of the provisions of the statutes of this state, or disregard in observing such care and such operation as the rules of the common law require.

Fla. Stat. § 327.32 (2021). In fact, this section not only imposes a liability, but also elevates the standard of care. "The standard of care imposed on operators of vessels by this statute is greater than the duty to use reasonable care ordinarily imposed in negligence cases.' *Feagle v. Purvis*, 891 So. 2d 1096, 1101 (Fla. 5th DCA 2004) (citing *Bradley v. Guy,* 438 So.2d 854 (Fla. 5th DCA 1983)).

Similarly, because the term "person" in subsection (36) includes any "entity," the statute literally and expressly reaches boats that happen to be owned by the sovereign state and its sovereign subdivisions. See § 327.02(36) (2021). *Yet the state enjoys sovereign immunity nevertheless.* But for the existence of section 768.28, Florida Statutes (relating to a limited waiver of sovereign immunity for tort claims) the state and its subdivisions would enjoy sovereign immunity from this otherwise "valid cause of action" under section 327.32 (2021). *See, e.g., Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009) (mere existence of legally valid liability claim is not enough; sovereign immunity must also be expressly waived).

Wallace makes the point. In that case, two Marion County Sheriff's deputies responded to a 911 call, undertook to determine Brenda Wallace's safety, and thereby assumed a duty of care. They allegedly failed to summon an ambulance, even after being told by third parties that she was in a diabetic coma. Her death resulted. *Wallace*, 3 So. 3d at 1041. Brenda's daughter filed a wrongful death complaint against the sheriff's office.

On direct appeal, the Fifth District held that the deputies were not liable for negligence. According to the district court, they engaged in mere passive nonfeasance rather than active negligence, which, according to the district court, at most exhibited "poor judgment." *Wallace v. Dean*, 970 So.2d 864, 867-69 (Fla. 5th DCA 2007).

The Supreme Court of Florida accepted review of the case. *Wallace*, 3 So. 3d at 1039-1041. The supreme court explained that it first needed to discuss the difference between a lack of liability under established tort law, versus sovereign immunity. *Id.* at 1044. The issue of liability was "conceptually distinct" from whether the governmental entity enjoyed immunity from suit notwithstanding the legislative waiver for tort lawsuits found in section 768.28, Fla. Stat.

> [T]he presence of sovereign immunity does not render the State's actions nontortious (***it simply means that the State has not consented to suit in its courts with regard to certain claims***). In contrast, the absence of a duty of care renders the defendant nonliable as a matter of law because his, her, or its actions are therefore nontortious vis-à-vis the plaintiff. See, e.g., *Kaisner* [*v. Kolb*], 543 So.2d [732,] 733-34 [(Fla. 1989)] (holding that the issue of sovereign immunity does not even arise unless a governmental unit otherwise owes a duty of care to the injured party and would thus be liable in the absence of such immunity); *but see Miami-Dade County v. Fente*, 949 So.2d 1101, 1103-05 (Fla. 3d DCA 2007) (conflating the issue of whether the government owes the plaintiff a duty of care with the ***separate, distinct issue of whether the doctrine of sovereign immunity shields the government from tort liability***); *Seguine v. City of Miami*, 627 So.2d 14, 17 (Fla. 3d DCA 1993) (same mistaken reasoning) (emphasis supplied).

In *Wallace*, the supreme court first determined the "threshold legal requirement," i.e., whether the deputies owed a duty of care to Brenda Wallace. *Id.* at 1046. The court concluded that the sheriff's deputies did owe a legal duty of care because they undertook to provide aid to the decedent, but unreasonably and negligently increased the risk of harm to the decedent. *Id.* at 1049-1053.

But that was not the end of the inquiry. Even though the sheriff's office owed a legal duty of care and was potentially liable like any other defendant for negligence, it meant only that the plaintiff had a "valid cause of action." *Id.* at 1053. *It did not mean that the*

governmental entity waived sovereign immunity from suit. That was a separate issue to be decided under section 768.28, Florida Statutes and the case law construing it. To reach its result, the supreme court had to decide whether the sheriff's deputies' actions responding to a call relating to Brenda Wallace's condition were "operational" or "discretionary." *Id.* at 1053-1054.

3. Sovereign immunity applied here.

Section 627.7405(1)) is no different than any other general applicable law imposing liability, such as section 327.32. Just as a sheriff's department has sovereign immunity from otherwise generally applicable and "valid cause of action," so too do the county school districts of Florida. As sovereign entities, school districts are entitled to an entirely separate, second layer of legal analysis under *Wallace.* They cannot be sued unless the legislature specifically says so. And because the instant cases are not tort cases, but "reimbursement" claims for the payment of money, section 768.28 has no application. Some *other* express waiver of sovereign immunity in the No Fault Act would be needed.

No such waiver exists pertaining to the No Fault Act. The claims presented here are neither tort claims subject to section 768.28 nor

express contract claims. There is not even the slightest indication, much less an express waiver, showing that the Legislature's goal was to authorize *subrogation lawsuits against school districts in the judicial branch* by private PIP carriers. Accordingly, even assuming that money is now generally due as 'reimbursement' from any owner of a Florida "commercial motor vehicle" under subsection 627.7405(1), school districts remain immune from suit because there is no express waiver of protection from this type of suit.

CONCLUSION

The FSBIT urges this Court to reverse the judgments below in each case. In each case, the appealing school districts enjoyed sovereign immunity from suits brought under subsection 627.7405(1), regardless of the existence of a generally applicable "right of reimbursement" against owners of "commercial motor vehicles" in Florida. The Court should certify express and direct conflict with the Second District's *Lee County* decision.

Respectfully submitted this 19th day of July, 2023, by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed on the Florida Court's e-portal and served via e-mail to the persons or entities on the service list below this 19th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief has been prepared on a computer using Microsoft Word and Adobe Acrobat Pro. It is printed in 14 Point Bookman Old Style font and contains 4017 words, exclusive of the cover page, tables, signature block, certificate of service, and certificate of compliance.

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