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| S.M. O/B/O H.M.<br><br>Plaintiff-Respondent<br><br>v.<br><br>BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE IN THE COUNTY OF MIDDLESEX, J.H., S.H. A.H., ROBERT GOODALL, ANTHONY GAMBINO, DANIEL LEE, ABC CORPORATIONS 1-5 (FICTICIOUS NAMES DESCRIBING PRESENTLY UNIDENTIFIED BUSINESS ENTITIES), AND JOHN DOES 1-5 (FICTITIOUS NAMES DESCRIBING PRESENTLY UNIDENTIFIED BUSINESS INDIVIDUALS)<br><br>Defendants-Appellants | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO.: A-001256-23<br><br>Civil Action<br><br>ON APPEAL FROM:<br><br>SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>MIDDLESEX COUNTY<br>DOCKET NO.: MID-L-2756-17<br><br>SAT BELOW:<br><br>HON. ALBERTO RIVAS, J.S.C. |

# BRIEF OF DEFENDANT-APPELLANT BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE

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## PRELIMINARY STATEMENT

While the Board Defendants took issue with numerous aspects of the trial court's rulings and the jury's verdict, the exclusive subject of this appeal is the wholly deficient jury verdict sheet regarding Plaintiff's harassment claim under the New Jersey Law Against Discrimination (NJLAD).

The purposes of submitting interrogatories to the jury are to require the jury to specifically consider the essential issues of the case, to clarify the court's charge to the jury, and to clarify the meaning of the verdict and permit error to be localized. The Board's proposed sheet accomplished all; the trial court's sheet here accomplished none. The sheet was unquestionably confusing and misleading, and these deficiencies certainly were not harmless.

The subject suit involved claims arising in two distinct contexts. First, Plaintiff alleged that while a student of the Monroe Township Board Education, specifically from grades six through ten (2011-November 2015), he was targeted for harassment and bullying by co-defendant J.H. based upon perceived sexual orientation, thus giving rise to the NJLAD claim. Second, Plaintiff alleged that on November 15, 2015, he was involved in a physical altercation with J.H. in a school locker room and sustained a fractured orbital, giving rise to negligence claims against the Board as well as assault and battery claims against J.H. (The second claim is not being addressed in this

appeal.) **The above notwithstanding, the evidence strongly demonstrated that the plaintiff, having initiated the November 2015 physical altercation, after-the-fact fabricated a false narrative of prior harassment to save face, avoid punishment, and/or justify his own conduct.**

The thrust of the Board's defense to the NJLAD claim was the dearth of evidence that Plaintiff had in fact been harassed by J.H. The only evidence was Plaintiff's testimony, *i.e.*, his own say so; there were no other witnesses to support the claim. In fact, J.H. denied any interaction with Plaintiff whatsoever prior to the November 2015 locker room altercation. Moreover, there was substantial, even overwhelming, circumstantial evidence indicating that no such harassment had occurred.

Plaintiff's case presentation did not attempt to address, refute, or explain away any of the above deficiencies. Instead, Plaintiff's case focused on trying to gin up anger against the Board Defendants. Over objection, Plaintiff presented a case of educational malpractice in the handling/disciplining of J.H. Also over objection, Plaintiff spent time claiming that the Board added "insult to injury" by suspending him for his role in the locker room altercation and by allegedly mistreating him in other ways in the aftermath of that altercation.

In advance of the charge conference, the Board submitted a proposed jury verdict sheet which set forth a separate interrogatory for each of the six disputed elements of the NJLAD claim, including the questions as to whether J.H. had harassed Plaintiff, whether the school was or should have been aware, and whether such harassment was severe or pervasive.

Over the Board's objection, the trial court instead asked the jury one lone question in lieu of the six, asking simply whether the Board had "subjected" Plaintiff to harassment. The trial court had apparently taken this interrogatory from the jury verdict sheet attached to Model Jury Charge 2.21, which was for a different type of discrimination claim and thus did not apply to this claim. Even more glaring, the trial court did not follow the admonition set forth therein – "NOTE TO JUDGE" – that the jury verdict sheet needs to include a separate interrogatory for each disputed prong of the claim; in this case, each prong was in fact in dispute. In short, the verdict sheet collapsed six discrete and specifically apt questions into one, inapt question.

There can be no question that the jury verdict sheet was wholly inadequate vis-à-vis its purposes and was thus misleading and confusing. Accordingly, the Board asks this Court to correct this manifest injustice by overturning the verdict on the NJLAD claim and remanding this matter for a new trial on the NJLAD claim only.

## PROCEDURAL HISTORY

On May 4, 2017, Plaintiff H.M. (through his mother, S.M.) filed a complaint against the Board of Education of the Township of Monroe ("Board"), Robert Goodall, Anthony Gambino, and Daniel Lee (collectively "Board Defendants"), as well as J.H. and his mother, S.H. As to the Board Defendants, the complaint asserted claims for a hostile classroom environment in violation of the NJLAD (Count 1), retaliation in violation of the NJLAD (Count 2), negligence (Count 5), negligent supervision (Count 6), negligent training (Count 7), and intentional infliction of emotional distress (Count 8). As to J.H. and S.H., the complaint asserted claims for assault (Count 3), battery (Count 4), and intentional infliction of emotional distress (Count 8). **Da1.** The thrust of the complaint was that J.H. harassed Plaintiff for four years – from 2011-12 school year to November of 2015 - based upon perceived sexual orientation and that there was a physical altercation in a locker room in which J.H. injured Plaintiff on November 15, 2015. **Da1.** On July 7, 2017, the Board Defendants filed an answer. **Da18.** On July 16, 2018, J.H. and S.H. filed an answer. **Da44.**

On December 2, 2020, a Substitution of Attorney was filed on behalf of the Board Defendants. **Da56.**

On February 5, 2021, the Board Defendants moved for partial summary judgment to dismiss Counts 2 and 8 (retaliation in violation of the NJLAD and intentional infliction of emotional distress, respectively). **Da57**. On February 22, 2021, Plaintiff filed opposition and a cross-motion for partial summary judgment on Counts 5, 6, and 7 (negligence, negligent supervision, and negligent training, respectively), regarding the claims of negligent supervision of the locker room. **Da59.** On May 21, 2021, the trial court entered an Order granting the Board Defendants' motion for summary judgment and denying Plaintiff's motion. **Da61.**

The matter was listed for trial on May 8, 2023. The Board Defendants filed multiple in limine motions, including to bar Plaintiff's liability expert, Dr. Edward Dragan, from opining regarding alleged educational malpractice committed by the Board as to the handling of J.H.'s education. **Da63.** Plaintiff filed multiple in limine motions, including to admit J.H.'s school disciplinary record into evidence at trial. **Da76.**

The matter was assigned out for trial to the Honorable Alberto Rivas, J.S.C., on May 8, 2023.[1] Judge Rivas ruled on the in limine motions, including the above. **1T9-23.** Judge Rivas denied the Board Defendants' motion to bar

[1] 1T – May 8, 2023; 2T – May 9, 2023; 3T – May 10, 2023; 4T – May 11, 2023 Volume I; 5T – May 11, 2023 Volume II; 6T – May 15, 2023; 7T – May 16, 2023; 8T – May 17, 2023 Volume I; 9T – May 17, 2023 Volume II; 10T – May 18, 2023; 11T – May 22, 2023; 12T – May 23, 2023

the educational malpractice opinion of Dr. Dragan. **Id**. Judge Rivas ruled that only certain items in J.H.'s disciplinary record would be permitted. **Id.**

The evidentiary part of the trial concluded on May 18, 2023. **10T93-13.** Thereafter, the parties agreed to a voluntary dismissal of all claims and cross-claims as to J.H., S.H., and the individually named Board employees, leaving the Board itself as the only remaining defendant. **10T98 and 11T16.**

On May 18, 2023, the trial court held a charge conference (with some brief further discussion on May 22, 2023). **10T119-10T157**; **11T4-11T13.** In advance of the next trial day, May 22, 2023, the Board submitted a proposed verdict sheet. **Da78.** On the morning of May 22, the trial court circulated its own proposed sheet. **Da82.** The Board took exception to the trial court's proposed sheet, but that exception was overruled. **11T17-12-11T19-6.**

On May 22, 2023, the parties conducted closing arguments and the trial court charged the jury. **11T27; 11T109.**

The jury deliberated on May 23, 2023 only, for a total of approximately one hour and fifteen minutes, and did not ask the trial court any questions during deliberations. **12T3.** The jury returned a verdict in Plaintiff's favor on the NJLAD claim and awarded him $400,000. **12T4-2-12T4-12.** The jury also returned a verdict in Plaintiff's favor on the tort claim, found that he was entitled to damages for pain and suffering, found no comparative fault against

him, and awarded him $100,000. **12T4-13-12T5-8.** Accordingly, the jury awarded Plaintiff a total of $500,000. **12T4-10T6.**

On June 7, 2023, the Board moved for a new trial, arguing that the jury verdict sheet regarding the NJLAD claim was wholly deficient and misleading and that the verdicts were against the weight of the evidence**. Da85.**

On June 9, 2023, Plaintiff moved for counsel fees arising out the verdict obtained on the NJLAD claim. **Da89.**

On August 11, 2023, the trial court entered an Order denying the Board's motion for new trial. **Da87.**

On November 30, 2023, the trial court entered an Order for Judgment in the amount of $1,397,487.60, inclusive of an award of attorneys' fees and expenses. **Da91.**

On December 27, 2023, the Board filed a notice of appeal.

## STATEMENT OF FACTS

At all relevant times, Plaintiff and J.H. were students in the same grade in the Monroe Township School District. **4T78-19-4T78-22; 4T80-22-4T80-24; 4T82-9-4T82-4T83-1; 4T84-6-4T84-14**. This included grades six through ten. Both attended Monroe Township Middle School for grades six through eight and then Monroe Township High School for ninth and tenth. **Id**. Robert Goodall was the principal of Monroe Township High School. **4T149-1-4T149-4**. Anthony Gambino was Plaintiff's high school guidance counselor beginning in tenth grade. **4T119-16-4T120-3**. Daniel Lee was Plaintiff's tenth grade driver's education and physical education teacher. **9T150-20-9T150-25**.

Plaintiff testified that he first had issues with J.H. in sixth grade. **4T78-19-4T78-22.** He testified that J.H. would target him once or twice a week, pushing him in class and in the hallways and calling him "f*ggot" and "gay." **4T79-5-4T79-21.** Plaintiff testified that he told his homeroom teacher (whose name he could not recall) and that she said that she would take care of it but never did. **4T79-22-4T80-6.** On direct examination, Plaintiff testified that this behavior continued a few times a week during seventh grade, while on cross examination, he testified that this behavior continued once a week and that J.H. would throw his backpack. **4T80-22-4T81-11; 4T149-13-4T149-15.**

Plaintiff also testified that he told "security guards that were around the cafeteria." **4T82-3-4T82-6.** Plaintiff further testified that in eighth grade J.H. would throw his school papers and call him "f*ggot." **4T82-9-4T83-1.** However, there was no testimony that this was reported to anyone.

Plaintiff testified that there were no issues with J.H. in ninth grade. **4T84-8-4T84-11.** However, Plaintiff's mother testified that just before the start of tenth grade, she had a meeting with Anthony Gambino to advise him of J.H.'s alleged harassment of Plaintiff. **5T80-5-5T80-13.** Mr. Gambino denied any such meeting occurred. **9T243-18-9T243-24.** In fact, the alleged timing of the meeting per Plaintiff's mother pre-dates the actual commencement of Mr. Gambino's employment. **5T76-25-5T77-3.** Mr. Gambino also denied ever being advised of any alleged harassment of Plaintiff prior to the November 2015 altercation. **9T242-4-9T242-21.**

As for tenth grade (2015-16 school year), Plaintiff testified that he and J.H. shared a driver's education class taught by Daniel Lee. **4T84-12-4T84-19.** Plaintiff testified that on the first or second day of class, he sat down at a table right next to J.H. and that J.H. started throwing "stuff" at him and kicking his chair. **4T84-20-4T85-5.** Plaintiff testified that he told Mr. Lee, who allowed him to change his seat. **4T85-5-4T85-9.** Plaintiff testified that even after changing seats, J.H. would still knock his books over and call him

"gay." **4T86-2-4T86-6.** Then, when driver's education switched to a gym class, Plaintiff testified that J.H. would knock him over when they were playing floor hockey. **4T86-8-4T86-19.** Plaintiff testified that Mr. Lee saw this occur and said that J.H. was just playing the sport. **4T86-23-4T86-25.**

Both Mr. Gambino and Mr. Lee testified to the school's zero tolerance policy regarding allegations of HIB as addressed in annual seminars. **9T179-9-9T179-21; 9T249-15-9T249-19.** Per policy, if such allegations had been brought to their attention they had zero discretion and would have reported the allegations to the administration for appropriate investigation by the anti-bullying specialist, Ms. Ielpi. **9T179-9-9T180-6; 9T249-15-9T249-19.**

J.H. denied any interaction whatsoever with Plaintiff prior to the locker room incident of November 15, 2015; he denied ever harassing, making fun of, or ever hitting Plaintiff. **6T218-22-6T219-7.**

Plaintiff did not present any eyewitnesses or evidentiary support to the alleged harassment other than his own say-so.

Plaintiff's counsel stated in opening that plaintiff is heterosexual; there was no testimony in this regard. **1T48**

Plaintiff was a "pretty active" member of the school's Gay/Straight Alliance (GSA). **4T77-24-4T78-3.** Cathy Ielpi was the GSA faculty advisor as well as the school's anti-bullying specialist. **6T141-21-6T141-25.** A

primary subject matter of the GSA was addressing HIB based upon sexual orientation. **9T267-12-9T267-22**. Throughout high school, Plaintiff was "very close" with Ms. Ielpi and would frequently visit her office socially during the school day. **4T125-6-4T125-11; 9T268-7-9T268-13**. In the immediate aftermath of the altercation in the locker room, Plaintiff asked for Ms. Ielpi to be summoned to the locker room and then asked her to contact his mother to advise what had occurred. **4T125-12-4T125-19.** Plaintiff admitted that he never advised Ielpi of any of the alleged harassment. **4T128-8-4T128-14.** In addition, Plaintiff denied advising Mr. Goodall or Mr. Gambino of any alleged harassment. **4T148-21-4T149-4.**

During the pertinent timeframe Plaintiff was under the care of psychologist, Dr. Jeffrey Mandel. **8T20-11-8T20-23.** At no point did Plaintiff ever advise Dr. Mandel of any alleged bullying or harassment at school or any problems whatsoever in school. **8T21-4-8T23-15**. He expressed no complaints about school; "school's OK." **8T22-12-8T22-15.** Even after the November 2015 altercation with J.H., Plaintiff still never told Dr. Mandel that there was a prior history of any bullying or harassment. **Id.** Plaintiff never received any treatment for the alleged bullying or harassment. **8T23-16-8T24-15.**

There was no evidence of any alleged bullying or harassment of Plaintiff in the school records. **10T58-20-10T58-25.**

On November 15, 2015, Plaintiff and J.H. had a physical altercation in the gym locker room while changing after class. **4T87-15-4T90-13.** Plaintiff testified that the origin of the altercation was that J.H. directed homophobic slurs at Plaintiff's openly gay friend, R.A., and that Plaintiff was coming to his friend's defense. **Id**. J.H. denied Plaintiff's account. J.H. testified that he and his own group of friends were talking amongst themselves and that Plaintiff then inserted himself into their conversation. **6T251-8-6T252-3.**

A statement from R.A., the plaintiff's friend, contradicted Plaintiff's account. Per the statement, R.A. was in an entirely different area of the locker room – by the door waiting to exit the locker room - at the time and he was completely unaware of the altercation until after it had occurred. **10T52-25-10T56-2**. In fact, none of the eyewitness statements supported Plaintiff's account of what precipitated the altercation. **10T56-6-10T57-7.**

On cross-examination, Plaintiff himself also contradicted key aspects of his narrative regarding coming to the defense of R.A. Plaintiff was shown his sworn Answers to Interrogatories in which Plaintiff stated that Plaintiff and J.H. "were in the locker room during physical education class when [J.H.] was talking to another student who was openly gay [identified as R.A.]." The

Answer went on as follows: "[J.H.] began his usual berating of the boys calling them gay saying they were so gay for each other and calling them [f*ggots]." **4T132-18-133-7**. This contradicted Plaintiff's account on direct examination in which he testified for the first time that R.A. was standing by the door to locker room, while Plaintiff was standing by J.H., (presumably an attempt by Plaintiff to reconcile his explanation for the altercation with the fact that R.A.'s statement indicated that he was not there and was unaware of the altercation altogether). **4T88-23-4T89-5**. Ultimately on cross-examination, Plaintiff "conceded" that R.A. was standing next to Plaintiff when J.H. allegedly made those comments to R.A. and then to both R.A. and Plaintiff. **4T134-1-4T134-18**. Plaintiff further "conceded" that R.A. was present when Plaintiff got down on his knees to embarrass J.H. (even though again, R.A. indicated absolutely no involvement or awareness). **4T134-19-4T134-25**.

There was cell phone video of the November 15, 2015 locker room altercation. **4T137-2-4T137-3**. The video begins with Plaintiff, on his knees smiling at J.H., offering oral sex to him and asking him to expose his penis. In response, J.H. repeatedly asked Plaintiff to stop, becoming more and more agitated. **4T138-1-4T138-13**. He kept warning Plaintiff that he would hit him if Plaintiff continued. The smiling Plaintiff continued on in the same way,

completely relaxed and without any outward indicia of concern in spite of the purported history with J.H. Plaintiff testified that he was doing this to make fun of J.H. **Da100.**

Plaintiff conceded at trial that based upon the video, it appears that the two were completely unfamiliar with one another. **4T139-15-4T139-18**. In the video, J.H. can be heard asking Plaintiff, "Do you know who I am?" and then seen gesturing around, "Ask anyone." **Da100**. Plaintiff's friend attempted to intercede to get him to stop taunting J.H., advising Plaintiff that J.H. "has too many chromosomes." **4T138:14-4T138-24.** At no point in the exchange is there any reference to prior harassment or there being any prior history between the two; at no point is any gay slur uttered. **4T139-4-4T141-14**.

Plaintiff nonetheless continued and then the fight began. Plaintiff conceded at trial that Plaintiff himself provoked the fight by taunting J.H., that Plaintiff was trying to embarrass and humiliate J.H. **4T137-17-4T137-20.** As shown on the video, the initial stage of the physical altercation consists of J.H. throwing numerous punches. **4T141-22-4T144-6.** None of those punches resulted in the fractured orbital. **Id**. The two were then separated. **Id**. J.H. backed away as if the altercation was over. **Id**. Plaintiff then stood up and moved towards J.H. to re-engage. **Id**. The video shows Plaintiff with a cocked

fist, about to throw a punch, but before that could happen J.H. struck him in the face, resulting in the injury. **6T253-7-6T253-18**; **Da101**. At trial, Plaintiff denied that he had any intention of punching J.H. and testified that he only went towards J.H. to ask why he had hit Plaintiff. 4T22-14-4T22-21. However, in a conversation with the investigating police officer, secretly recorded by Plaintiff's mother, Plaintiff told the officer that he went towards J.H. in order to hit him. **4T22-24-4T23-19; Da102**.

Based on the November 2015 incident, both Plaintiff and J.H. filed cross-HIB complaints. **4T128-15-4T128-23**. J.H. asserted in his complaint that Plaintiff had sexually harassed him. **6T79-17-6T79-23.** J.H.'s mother, S.H., testified that she felt that her son was acting in self-defense as a result of being sexually harassed by Plaintiff and that any fifteen year old boy would have reacted as J.H. did under those circumstances. **6T78-18-6T79-13**. Ms. Ielpi investigated both complaints. **4T128-15-4T128-23**. Based upon Ms. Ielpi's investigation and recommendation, Plaintiff was suspended for five days. **4T109-20-4T110-8**.

As a result of the fight, J.H. was placed in another school, Nu-View Academy. He remained there for the remainder of the 2015-16 school year. **6T48-14-6T48-19**. Both J.H. and his mother testified to the bad experience at Nu-View Academy. **6T51-7-6T51-19**.

In a subsequent criminal matter, J.H. pled guilty to assault and was placed on probation for two years. **6T253-19-6T254-17**. Pursuant to the Court's order, he was to have no contact with Plaintiff; the penalty for a violation would be jail time. **Id**.

After J.H.'s return to Monroe High School for eleventh grade in September 2016, Plaintiff testified that he saw J.H. a couple of times in the hallways but that J.H. never said anything to him. **4T152-6-4T152-24**.

Plaintiff called Dr. Edward Dragan, an education expert, who offered opinions regarding the alleged negligent handling of J.H. Dr. Dragan opined that the school failed to evaluate and provide J.H. with necessary supports and services to address his behavior. **10T34-11-10T38-25**. He asserted that the school should have done a comprehensive evaluation of J.H. to determine what may be causing his behavior and his academic problems and put together a plan for him. **Id.** He opined that this entailed a "major breach" of the professional standard of care. **Id**. He testified that J.H. was a victim because the school did not focus on helping him. Dr. Dragan also testified that he could not understand why or how the school could discipline Plaintiff for his conduct in the locker room. **10T44-7-10T44-18**. Finally, Dr. Dragan testified to a breach of care when J.H. returned to the school for the 2016-17 school

year because, he claimed, there was no transition plan in place. **10T46-8-10T47-3**.

On cross-examination, Dr. Dragan conceded the absence of any record documenting the alleged harassment and that Plaintiff had testified to no interaction whatsoever with J.H. in ninth grade. **10T58-20-10T58-25**. He also conceded that J.H. had not been involved in any documented physical altercation in over 2 ½ years prior to the locker room incident. **10T66-6-10T66-9**. He also conceded the absence of any recorded history of J.H. physically assaulting anyone based upon sexual orientation. **10T61-2-10T61-6**.

With regard to the emotional/psychological injuries, Plaintiff called Dr. Jeffrey Singer as an expert. **8T3:6**. Significantly, in Dr. Singer's testimony, it was brought out that Plaintiff had never mentioned any harassment to his treating psychologist. **8T21-4-8T23-15.** Moreover, Dr. Singer related his diagnoses of PTSD and major depressive disorder, primarily if not exclusively, to the altercation in the locker room on November 25, 2015, and not to the alleged years of harassment. **8T15-17-8T16-16**.

In opening arguments, Plaintiff indicated that the evidence would show that from sixth grade onward, J.H. bullied Plaintiff on a daily basis based upon homophobia and that the school was aware of it and failed to take steps to

prevent it. Plaintiff also suggested that the school had failed both Plaintiff and J.H., the latter for allegedly failing to properly address prior disciplinary issues. Plaintiff contended that this ultimately led to November 2015 physical confrontation in which Plaintiff suffered injury. Plaintiff indicated "but it gets worse" and then proceeded to cite several post-confrontation events as adding insult to injury: (1) the school not reaching out to Plaintiff when he was in the hospital, (2) suspending Plaintiff for his role in the altercation, (3) allowing J.H. to return to school for his junior year ten months later, and (4) taking no measures to make sure that Plaintiff did not see J.H. when he returned. **4T46:3**.

For purposes of this appeal, the central point of the Board Defendants' opening was the significant doubts regarding whether the alleged harassment had actually occurred or whether it was a complete fabrication.[2] **4T59-7**.

On May 20, 2023, the Board submitted a proposed jury verdict sheet. Most notably, that verdict sheet broke down the NJLAD claim into separate

[2] As an aside, it should be noted that a patently erroneous and misleading talking point in Plaintiff's post-trial submissions has been that "Defendant MTBOE presented no case" – with "perfunctory" cross-examination - as if to suggest that the two-plus week trial was essentially a default judgment hearing. As is obvious from the factual and trial record, defendant presented an extensive case through fertile cross-examination of the witnesses called by the plaintiff which, by the way, included five Board employees and co-defendant J.H., who would have otherwise been called in defendant's case-in-chief.

questions, each setting forth an element of the claim, including the two elements of the Board's affirmative defenses: **Da78**

**JURY VERDICT SHEET**

**Law Against Discrimination Claim**

1. Has the plaintiff proved that the claimed harassment against him by [J.H.] actually occurred?

Yes _____ No _____ Vote: _____

**If the answer is YES, go to question 2.**
**If the answer is NO, go to question 8.**

2. Has the Plaintiff proved that the harassment occurred because of perceived sexual orientation?

Yes _____ No _____ Vote: _____

**If the answer is YES, go to question 3.**
**If the answer is NO, go to question 8.**

3. Has the Plaintiff proved that that the defendant Monroe Township Board of Education knew or should have known of the harassment and failed to take effective remedial measures to stop it?

Yes _____ No _____ Vote: _____

**If the answer is YES, go to question 5.**
**If the answer is NO, go to question 4.**

4. Has the Plaintiff proved that defendant Monroe Township Board of Education was negligent by failing to take reasonable steps to prevent the harassment from occurring?

Yes _____ No _____ Vote: _____

**If the answer is YES, go to question 5.**
**If the answer is No, go to question 8.**

5. Has defendant Monroe Township Board of Education proved that it exercised reasonable care to prevent harassment in school by having in place appropriate policies and complaint mechanisms and that Plaintiff negligently failed to take advantage of such policies and complaint mechanisms provided by defendant-appellant?

Yes _____ No _____ Vote: _____

**If the answer is YES, go to question 8.**
**If the answer is No, go to question 6.**

6. Has the Plaintiff proved that the harassment was severe or pervasive enough to make a reasonable person believe that the conditions of his schooling were altered and that the school environment was hostile?

Yes _____ No _____ Vote: _____

**If the answer is YES, go to question 7.**
**If the answer is NO, go to question 8.**

7. What amount of money would fairly and reasonably compensation Plaintiff for pain, suffering, disability, impairment, and loss of enjoyment of life due to the harassment.

$_____ Vote:_____

**Go to question 9.**

On the morning of May 22, 2023, the trial court presented its proposed jury verdict sheet, which presented the NJLAD liability issue as one question:

**Da82**

> 1. Do you find that Plaintiff [H.M.] has proven by a preponderance of the evidence at the Monroe Township Board of Education defendants subjected [H.M.] to discrimination and harassment while a student at the Monroe Township High School?

The Board took exception to the Court's proposed verdict sheet, again arguing that the NJLAD claim should be broken down into the various prongs, as set forth in its proposed verdict sheet, as opposed to having all of the elements subsumed into the one question. **11T17-12-11T19-6; 11T21-14-11T22-4.** The trial judge overruled the objection, indicating that Court felt that the one question would be sufficient in light of the fact that the Court was going to provide the jury with a printed copy of the 53 page jury charge. **Id**.

Closing arguments were completed on May 22, 2023.

The jury deliberated for approximately one hour and 15 minutes, all occurring on May 23, 2023. **11T169-23-11T170-4**. The jury returned a verdict answering the first question "yes" in 8-0 vote and awarding damages of $400,000 for emotional distress from the harassment. **Da82**. The jury further found the Board 100% at fault with regard to the negligence claim, finding no comparative fault at all on the part of the Plaintiff, and awarding $100,000.00 in damages for the injuries from the physical altercation in the locker room. **Da82.**

## LEGAL ARGUMENT

### POINT I

### THIS COURT SHOULD REVERSE AND ORDER A NEW TRIAL ON THE NJLAD CLAIM BECAUSE THE JURY VERDICT SHEET WAS SO DEFICIENT AS TO PRODUCE AN UNJUST RESULT [11T17-12-11T19-6; 11T21-14-11T22-4]

The trial court's verdict sheet compressed six separate and heavily disputed elements of the NJLAD claim into one vaguely and inaptly worded interrogatory that completely failed the fundamental purposes of a verdict sheet, leading to an unjust result and reversible error.

A verdict sheet can constitute reversible error if it is likely to "confuse or mislead the jury[.]" Wade v. Kessler Inst., 172 N.J. 327, 341 (2002). As such, the inquiry is "whether the interrogatories were so misleading, confusing, or ambiguous that they produced an unjust result." Mogull v. CB Commer. Real Estate Group, Inc., 162 N.J. 449, 468 (2000).

**"The purposes of submitting interrogatories to the jury are to require the jury to specifically consider the essential issues of the case, to clarify the court's charge to the jury, and to clarify the meaning of the verdict and permit error to be localized."** Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 419 (1997) (citation and internal quotation marks omitted)(Emphasis added).

In Ponzo v. Pelle 166 N.J. 481 (2001), the New Jersey Supreme Court overturned a verdict because of a confusing jury verdict sheet. There, the plaintiff was injured during a rear-end collision. Id. at 484. The defendant conceded negligence and that a knee injury was caused by the accident, but disputed that the plaintiff's claimed back and RSD injuries were proximately caused by the accident. Id. at 491. Without any objection being presented, the jury was presented a single interrogatory: "Did defendant's negligence proximately cause damage to Karen Ponzo?" The jury answered the question "no" and returned a no cause verdict, thus leading to an appeal based on the ground that the issue of proximate cause as to the plaintiff's knee injury should have been removed from the jury's consideration. Id. at 488.

The Court found *plain error* and remanded the matter for a new trial due to the fact the single interrogatory led to an impossibility in "ascertain[ing] what happened," and why the jury returned a verdict of no cause. Id. at 492; see also Wenner v. McEldowney & Co., 102 N.J. Super. 13, 19 (App. Div. 1968) (holding that the purpose of interrogatories and verdicts sheets is "to require the jury to specifically consider the essential issues of the case, to clarify the court's charge to the jury, and to clarify the meaning of the verdict and permit error to be localized").

In Benson v. Brown, 276 N.J. Super. 553 (App. Div. 1994), the Appellate Division had a similar issue, where an interrogatory combined multiple different questions into one. There, an intoxicated minor named Robert Jellinik drove onto a curb, striking the plaintiff and causing injuries. Id. at 555. The interrogatory in question read: "Do you find that Robert Jellinik was served by the tavern defendants and that he apparently was a minor or was visibly intoxicated at the time he was served by the tavern defendants?" Id. at 559. The Appellate Division examined this interrogatory and said:

> Respecting jury interrogatory one, it would be preferable not to lump together three questions into a single question. In combining the questions, we, like counsel and the trial judge, were deprived of knowing on what basis that jury answered the question. For all we know, the jury could have decided that Jellinik was not served in the New North End Tavern. Or, they could have decided that he was served, but he was neither visibly intoxicated nor did the server know or reasonably should have known Jellinik to be underage. The better way to have proceeded, as defense counsel requested, was to break the various elements down into separate interrogatories as to the tavern's liability. That could easily have been accomplished by inverting the elements in accordance with [the] Model Jury Charges[.]

Id. at 563.

Here, the proposed verdict sheet submitted by the Board broke down the NJLAD liability components into six separate questions:

**JURY VERDICT SHEET**

**Law Against Discrimination Claim**

1. Has the plaintiff proved that the claimed harassment against him by [J.H.] actually occurred?

Yes _____ No _____ Vote: _____

**If the answer is YES, go to question 2.**
**If the answer is NO, go to question 8.**

2. Has the Plaintiff proved that the harassment occurred because of perceived sexual orientation?

Yes _____ No _____ Vote: _____

**If the answer is YES, go to question 3.**
**If the answer is NO, go to question 8.**

3. Has the Plaintiff proved that that the defendant Monroe Township Board of Education knew or should have known of the harassment and failed to take effective remedial measures to stop it?

Yes _____ No _____ Vote: _____

**If the answer is YES, go to question 5.**
**If the answer is NO, go to question 4.**

4. Has the Plaintiff proved that defendant Monroe Township Board of Education was negligent by failing to take reasonable steps to prevent the harassment from occurring?

Yes _____ No _____ Vote: _____
**If the answer is YES, go to question 5.**
**If the answer is No, go to question 8.**

5. Has defendant Monroe Township Board of Education proved that it exercised reasonable care to prevent harassment in school by having in place appropriate policies and complaint mechanisms and that Plaintiff negligently

failed to take advantage of such policies and complaint mechanisms provided by defendant-appellant?

Yes _____ No _____ Vote: _____

**If the answer is YES, go to question 8.**
**If the answer is No, go to question 6.**

6. Has the Plaintiff proved that the harassment was severe or pervasive enough to make a reasonable person believe that the conditions of his schooling were altered and that the school environment was hostile?

Yes _____ No _____ Vote: _____

**If the answer is YES, go to question 7.**
**If the answer is NO, go to question 8.**

7. What amount of money would fairly and reasonably compensation Plaintiff for pain, suffering, disability, impairment, and loss of enjoyment of life due to the harassment.

$_____ Vote:_____

**Go to question 9.**

The Board's proposed verdict sheet broke down the elements of Plaintiff's NJLAD claim and the two elements of the Board's affirmative defense[3] into its constituent components in a manner consistent with the principles outlined in Ponzo, Wenner, and Benson. This approach was consistent with C.S. & G. v. Bridgewater-Raritan Reg'l Sch. Dist. Bd. of Educ., 2023 N.J. Super. Unpub.

[3] See Aguas v. State of New Jersey, 220 N.J. 494 (2015).

LEXIS 175 (App. Div. Feb. 8, 2023), decided just a few months before this case was tried, in which this Court described "'the three-prong test adopted in L.W. ex rel. L.G. v. Toms River Reg'l Schs. Bd. of Educ., 189 N.J. 381, 402-03, 915 a.2D 535 (2007)' for 'claims of . . . hostile educational environment under the LAD.'" Id. at *12. And while Model Jury Charge 2.21, and its associated Sample Jury Interrogatory, does not apply for the reasons explained in greater detail below, the Board's proposed verdict sheet was nonetheless consistent with the 'NOTE TO JUDGE' within that Model Interrogatory, which provides: '[I]f an element or elements of Plaintiff's prima facie case is disputed and has been charged to the jury, an interrogatory should be fashioned to decide whether Plaintiff has proven that element(s).'" Here, each element was disputed.

Instead, over the Board's objection, the jury verdict sheet reduced the NJLAD liability issue to one question:

> 1. Do you find that Plaintiff [H.M.] has proven by a preponderance of the evidence at the Monroe Township Board of Education defendants subjected [H.M.] to discrimination and harassment while a student at the Monroe Township High School?

Not only was the jury not presented with the various prongs of the NJLAD claim, the one posed question contained a lone operative word, "subjected," which was not defined anywhere in the jury charge and has no legal meaning. That one question did not reference harassment by J.H., nor

that the harassment had to be based on perceived sexual orientation, nor that the harassment had to be severe or pervasive.

The trial judge overruled the objection, indicating that the Court felt that the one question would be sufficient in light of the fact that the Court was going to provide the jury with a printed copy of the 53 page jury charge. Notably, the trial judge's comment exhibited a stark reversing of the relationship between the jury charge and the verdict sheet, with the trial judge expressing the conception that the jury charge was the aid for understanding and clarifying the verdict sheet when in fact the exact opposite is true, that being that the verdict sheet's purpose, in part, is to clarify the jury charge.

Of further note, the trial court's posed interrogatory was taken from the Sample Jury Interrogatory found in Model Jury Charge 2.21, which applies to an entirely different type of NJLAD claim – one in which an employer is alleged to have discriminated against an employee in hiring, firing, promotion, etc. – and thus on its face only remotely related in substance to the within claim. The actual jury charge in the within matter bears essentially no resemblance to Model Jury Charge 2.21, thus making the inaptness of the Sample Jury Interrogatory from 2.21 even more stark.

Model Jury Charge 2.21's inapplicability aside, the preamble to the Sample Jury Interrogatory strikingly includes a "NOTE TO JUDGE" which states:

> **" . . . [I]f an element or elements of Plaintiff's prima facie case is disputed and has been charged to the jury, an interrogatory should be fashioned to decide whether Plaintiff has proven that element(s) . . ."**

Thus, the Note expressly directs that every element that is in dispute should have an interrogatory fashioned as to whether that element has been proven.[4]

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[4] Mogull provides an example of jury interrogatories in a case in which a plaintiff sues her former employer on sex discrimination grounds:

> 2. Do you find by a preponderance of the credible evidence:
>
> 2.(a) That plaintiff was denied benefits relating to the Allstate transaction and/or by the resolution of the CBS dispute and/or the resolution of the Edwards & Kel[c]ey dispute?
>
> . . .
>
> 2.(c) Do you find that defendant C.B. has articulated or advanced one or more legitimate, non-discriminatory reasons for its decision(s) relating to the event(s) checked off in # 2(b) above?
>
> 2.(d) Do you find by a preponderance of the evidence that plaintiff, Martha Mogull, has proved by a preponderance of the evidence that defendant's legitimate, non-discriminaotry reasons were a pretext or "cover-up" for sex

Here, each element of Plaintiff's NJLAD claim was disputed and the jury was charged thereupon, but of course the verdict sheet did not contain a separate interrogatory for each disputed element. Thus, the trial judge co-opted an inapt jury interrogatory, and then applied it incorrectly by ignoring the Note's directive.

It also bears noting that, in contrast to the within matter, at the very least the 2.21 Jury Interrogatory contains operative language that, *at least* on a general level, encapsulates *that* employer-employee discrimination type of cause of action: "(1) defendant-appellant engaged in intentional discrimination, (2) by [insert actual alleged adverse action] against Plaintiff (3) because of Plaintiff's [insert the protected category]." Further, the operative language is explained in the model charge. Contrast that with the within matter in which the jury was merely asked whether the Board "subjected" Plaintiff to harassment, which has no direct correlation to the governing law on which the jury was charged.

Closing arguments were completed on May 22, 2023. The Board's closing, as it related to the NJLAD claim, highlighted the fact that the only

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> discrimination relating to the event(s) checked off in #2(b) above?

Mogull, 162 N.J. at 446-47.

evidence of harassment was Plaintiff's own say-so, and thereafter highlighted the overwhelming evidence that such harassment never occurred: (1) the absence of any documentation of harassment in school records, (2) the absence of any documentation in Plaintiff's contemporaneous, or even post-altercation, psychology records (3) the fact that Plaintiff admitted never reporting such harassment to Cathy Ielpi, his close confidante and the school's anti-bullying specialist and faculty advisor for the Gay Straight Alliance, and (4) the video of the altercation between Plaintiff and J.H. which demonstrated, as Plaintiff himself agreed, no indication of any history – or even familiarity – whatsoever between the two of them. Conversely, Plaintiff's closing did not offer any refutation of the above.

The jury deliberated for approximately one hour and 15 minutes. The jury returned a verdict answering the first question "yes" in an 8-0 vote and awarding damages of $400,000 for emotional distress from the harassment. The jury further found the Board 100% at fault with regard to the negligence claim, finding no comparative fault at all on the part of Plaintiff, and awarding $100,000.00 in damages for the injuries from the physical altercation in the locker room.

In short, the subject verdict sheet as it relates to the NJLAD claim was confusing, misleading, and failed to assist the jury in understanding the

numerous prongs of the NJLAD claim, including the affirmative defenses thereto. In so doing, the verdict sheet did not meet its purpose of (1) requiring the jury to consider the essential questions, (2) to clarify the court's charge, (3) to clarify the meaning of the verdict, and (4) to permit error to be localized.

As to the first, there is no question that the verdict sheet did not require the jury to consider the essential questions of the NJLAD claim. Glaringly, the verdict sheet really did not require consideration of any of the essential questions.

In fact, the overwhelming indication is that the jury did **not** consider the essential questions of the NJLAD claim. The fact that the jury returned a verdict on both claims in approximately one-hour-and-fifteen minutes unquestionably demonstrates that the jury did not, on its own, go through and deliberate the six separate elements of the NJLAD charge/law, much less review the Court's 53-page charge. This is particularly so given that the jury, in addition to the NJLAD liability issue, also had to deliberate regarding the damages incurred from the NJLAD violation, and then put a monetary value on that, and then had to address the separate liability and damages issues from the locker room incident, and then to place a monetary value on damages. Moreover, there were significant fact disputes at each step: (1) that the alleged harassment occurred, (2) that the alleged harassment was severe or persuasive,

given Plaintiff's own account which includes no harassment in the ninth grade and the absence of any mention of, or treatment for, in any psychology records, (3) that the school was aware of the alleged harassment, and (4) then as to the tort claim, the issue of Plaintiff's own comparative fault in light of Plaintiff's own admission that he initiated the fight by trying to humiliate the co-defendant-appellant, and then the undisputable video and audio recording evidence that Plaintiff re-initiated the fight when he followed and then attempted to strike J.H. and then whether Plaintiff pierced the tort injury threshold. In short, the verdict sheet did not require nor cue the consideration of the different prongs and in fact it does not appear that the jury considered the different prongs of the NJLAD claim.

Second, the verdict sheet did not clarify the Court's charge. The charge itself – 53 pages in total – contained the law regarding the six prongs of the NJLAD claim, including the affirmative defense. But the verdict sheet did not expressly incorporate those prongs to clarify the charge. In fact, it provided the jury essentially no guidance as to the meaning of the charge, instead leaving the jury to determine whether the Board "subjected" Plaintiff to harassment and discrimination. The verdict sheet did not even clarify for the jury that the harassment was to be at the hands of J.H., that the school was or should have been aware, and that the harassment was severe or pervasive.

For the same reasons, the third and fourth purposes of the verdict sheet were not met, as we have no idea what the jury determined factually.

The merits of the jury's verdict are further clouded by the fact that so much of Plaintiff's case was centered around the alleged mishandling of J.H. as well as the asserted "callous" post-fight response and the aftermath thereto (characterized by Plaintiff's counsel in his opening argument as "adding insult to injury") e.g. allegedly telling Plaintiff to put ice on it and go back to class, finding Plaintiff in violation of HIB polices and suspending him, not returning phone calls, not advising him when J.H. was returning to school, etc. In short, the verdict sheet allowed the jury to believe that any alleged "mistreatment" by defendant-appellant towards Plaintiff, of which there was significant argument by Plaintiff, would be sufficient for the jury to make an affirmative finding on the NJLAD claim.

Additionally, the reliability of the verdict is even further clouded by the incongruence that the jury awarded Plaintiff $100,000.00 for the fractured orbital and, per Plaintiff's experts, causally related PTSD and depression, but awarded Plaintiff $400,000.00 for alleged emotional distress on the NJLAD claim, which was not documented in any record, nor treated, nor even causally related in any significant way by Plaintiff's own psychology expert.

The woeful inadequacy of the jury verdict sheet is further illustrated by comparison to above-cited cases in which courts overturned verdicts based upon flawed verdict sheets. In those cases, the verdict sheet correctly encapsulated all of the elements of the applicable law but did so in a compound question. Here, there was one question which did not encapsulate all of the elements of the applicable law, but instead at best misstated the law. Viewing it in another vein, those courts overturned the verdict because the verdict sheet did not fulfill one of the purposes of a verdict sheet – to clarify the meaning of the verdict; in the within matter, the verdict sheet failed to meet any of the four purposes of the verdict sheet. Thus, the flaws and inadequacies of the subject verdict sheet grossly exceed those of the cited cases, which include one case where it was overturned on a plain error analysis.

In this case, the Board provided the trial court with a set of interrogatories that would have met all of the purposes of a jury verdict sheet and would have complied with the directive in the Model Jury Interrogatory from 2.21. There was absolutely no reason for the trial court not to have used the submitted interrogatories, much less to instead then employ such a facially deficient verdict sheet.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment on the NJLAD claim be overturned and this matter be returned for a new trial on the NJLAD claim only.

**METHFESSEL & WERBEL, ESQS.**
Attorneys for Board of Education of
Township of Monroe

By:_____
William Bloom

DATED: June 19, 2024

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| S.M. o/b/o H.M.;<br><br>Plaintiffs-Respondents,<br><br>vs.<br><br>BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, IN THE COUNTY OF MIDDLESEX; J.H.; S.H.; A.H.; ROBERT GOODALL; ANTHONY GAMBINO; and DANIEL LEE;<br><br>Defendants-Appellants. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO.: A-001256-23<br><br>On Appeal From:<br>Superior Court of New Jersey<br>Law Division – Middlesex County<br>Docket No. MID-L-2756-17<br><br>Sat Below:<br>Hon. Alberto Rivas, J.S.C |

# BRIEF OF PLAINTIFFS/RESPONDENTS S.M. o/b/o H.M.

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## I. PRELIMINARY STATEMENT

After nearly six years of contentious litigation between Plaintiffs/Respondents S.M. o/b/o H.M. ("Respondents") and Defendant/Appellant Monroe Township Board of Education ("Appellant MTBOE"), including a two-week jury trial in May 2023, the jury unanimously decided that Appellant MTBOE subjected Plaintiff/Respondent H.M. ("Respondent H.M.") to discrimination and retaliation because of his perceived sexual orientation while attending the Monroe Township High School. Critically, the jury made its determination in favor of Respondents after deliberating for just 75 minutes. At trial, Respondents presented (1) testimony from 13 party, fact, and expert witnesses; and (2) 23 documentary and/or audio/video exhibits substantiating Respondent H.M.'s claims of hostile classroom environment and negligence. In response, Appellant MTBOE called no witnesses and, instead, mounted a misguided defense that sought to undermine Respondents' viable claims by blaming Respondent H.M. for the disparate treatment and violent attack he was subjected to on school premises.

After the parties presented their respective evidence, the jury was carefully charged on the applicable law and provided with a helpful, concise, and unambiguous verdict sheet posing interrogatories to guide the deliberations. The jury ultimately decided in Respondents' favor on all claims and, with respect to Respondents' New Jersey Law Against Discrimination ("NJLAD") claim, in

unanimous fashion. Appellant MTBOE filed a motion for a new trial, arguing the verdict sheet was confusing and misleading and, as such, led to an unjust result. The trial court denied Appellant MTBOE's motion, which is now the subject of this appeal.

Appellant MTBOE's request for a new trial is not supported by fact or law. Indeed, it is well-established by New Jersey case law that jury verdicts can ***only*** be overturned in clear cases where sustaining the jury's verdict would be a "***miscarriage of justice***." See Lockley v. Turner, 344 N.J. Super., 1, 12 (2001) (emphasis added). Appellant MTBOE urges this court to now abandon the jury's verdict and/or a new trial, claiming that the jury's verdict was the result of a deficient verdict sheet and jury charge. However, to do so, Appellant MTBOE must establish that the verdict sheet provided to the jury posed questions which were "misleading, confusing, or ambiguous." See Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 418 (1997). That clear and unmistakable standard is fatal to Appellant MTBOE's instant appeal.

For Respondents to prevail on their NJLAD claim and impute liability for same as against Appellant MTBOE, they must establish that Respondent H.M. was subjected to a hostile classroom environment because of his perceived sexual orientation and that Appellant MTBOE should be held liable for any damages that Respondent H.M. sustained as a proximate cause thereof. See L.W. ex rel. L.G. v.

Toms River Reg'l Schs. Bd. of Educ., 189 N.J. 381, 403-04 (2007). To aid in making that determination, Judge Rivas carefully, and painstakingly, charged the jury on the applicable law. Then, Judge Rivas provided the jury with a verdict sheet containing, in pertinent part, three straightforward questions for the jury to answer to reach an ultimate verdict.

After just over one hour of deliberations, and without asking any clarifying questions regarding Judge Rivas' jury charge or the verdict sheet, the jury answered the first two questions in the affirmative and answered the third with an award of $400,000.00. The jury charge was clear, concise, and in accordance with the applicable law. Telling of this fact is that the jury's verdict with respect to Respondents' NJLAD claim was ***unanimous*** and supported by the extensive evidence submitted by Respondents at trial.

For the reasons discussed further below, the only miscarriage of justice in this case would be to disturb the jury's verdict in this matter, as there is clearly no legal basis to do so. Accordingly, Respondents submit that the trial court's denial of Appellant MTBOE's motion for a new trial should be affirmed.

## II. PROCEDURAL HISTORY (Pa000001-000339).[1]

On May 4, 2017, Respondent S.M. o/b/o Respondent H.M. filed Respondents' Complaint and Jury Demand in the Superior Court of New Jersey, Middlesex County

[1] Pa – Plaintiffs/Respondents' Appendix

Vicinage, alleging (1) violations of New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1, et seq. (the "NJLAD") and (2) negligence, assault, battery, and intentional infliction of emotional distress against Appellant MTBOE, J.H. ("Defendant J.H."), S.H. ("Defendant S.H."), A.H. ("Defendant A.H."), Robert Goodall ("Defendant Goodall"), Anthony Gambino ("Defendant Gambino"), and Daniel Lee ("Defendant Lee"). (DA1).[2] Specifically, Respondents alleged that Appellant MTBOE and Defendants Lee, Goodall, and Gambino subjected Respondent H.M. to a hostile classroom environment due to gender and/or perceived sexual orientation and retaliation following his complaints of said harassment and discrimination. (Id.). Additionally, Respondent H.M. alleged that he was subjected to an assault and battery by Defendant J.H. while under the negligent supervision of negligently trained Appellant MTBOE employees, including Defendants Goodall, Gambino, and Lee. (Id.). Finally, Respondents alleged that Appellant MTBOE and

4T – Volume I of May 11, 2023 Trial Transcript
5T – Volume II of May 11, 2023 Trial Transcript
3T – Volume I of May 15, 2023 Trial Transcript
9T – Volume I of May 17, 2023 Trial Transcript
10T – Volume I of May 18, 2023 Trial Transcript

[2] At the time of Respondents' filing of Respondents' Complaint, Respondent H.M. was a minor child, as was Defendant J.H. By the time of trial in May 2023, Respondent H.M. and Defendant J.H. were adults.

Defendants Goodall, Gambino, and Lee subjected him to intentional infliction of emotional distress. (Id.).[3]

After years of discovery, on February 5, 2021, Appellant MTBOE and Defendants Goodall, Gambino, and Lee filed a motion for partial summary judgment. (DA57). Specifically, Appellant MTBOE and Defendants Goodall, Gambino, and Lee moved for summary judgment on Respondents' NJLAD-based retaliation claim and intentional infliction of emotional distress claim. (Id.). On February 22, 2021, Respondents contemporaneously filed their opposition to Appellant MTBOE and Defendants Goodall, Gambino, and Lee's motion for summary judgment and, contemporaneously, filed a cross-motion for summary judgment on Respondents' negligence, negligent supervision, and negligent training claims. (DA59). On May 21, 2021, the trial court granted Appellant MTBOE and Defendants Goodall, Gambino, and Lee's motion for partial summary judgment and denied Respondents' aforementioned cross-motion. (DA61). As a result, Respondents' claims at trial were hostile classroom environment and discrimination based on gender and/or perceived sexual orientation and negligence-based claims.

Trial began on May 8, 2023 before the Honorable Alberto Rivas, J.S.C. ("Judge Rivas"). As part of their case-in-chief, Respondents elicited testimony from

[3] The present litigation spanned the course of many years and featured extensive motion practice. As such, only the procedural history directly pertinent to the issues presented in the present appeal are discussed herein.

thirteen party, fact, and expert witnesses, and presented a total of twenty-three (23) documentary and audio/video exhibits to the jury. (Pa00027-000037). As part of Appellant MTBOE and Defendants Goodall, Gambino, and Lee's pre-trial exchange, they identified eighteen (18) witnesses they intended to call at trial – eight (8) of which were not called by Respondents in presenting their case-in-chief. (Pa000038-000039). Nonetheless, after Respondents completed their case-in-chief, Appellant MTBOE and Defendants Goodall, Gambino, and Lee decided to call no witnesses at trial, including a liability expert witness they had retained as part of this litigation. (Pa000034-000035).

Thereafter, on May 22, 2023, the parties presented their closing arguments and Judge Rivas then charged the jury. (Pa000042-000086). Additionally, the Court provided the jury with a verdict sheet[4] which broke down the essential elements of Respondents' NJLAD-based claims as well as Respondents' other claims herein. (DA82).

On May 23, 2023, the jury deliberated for approximately seventy-five (75) minutes, at which time they returned a verdict in Respondents' favor and awarded Respondents a total of $500,000.00 in compensatory damages. (DA82). More specifically, the jury awarded Respondents $400,000.00.00 in damages as a result of

[4] Defendants J.H., A.H., S.H., Goodall, Lee, and Gambino are not on the verdict sheet because they were dismissed from the case prior to submission of the verdict sheet.

the harassment and discrimination endured by Respondent H.M. and $100,000.00 in additional damages to compensate Respondent H.M. for the physical injuries he sustained from the assault and battery of Respondent H.M. which occurred in Appellant MTBOE's premises on November 25, 2015. (Id.).

On June 7, 2023, Appellant MTBOE filed a motion for a new trial, arguing that the verdict sheet provided to the jury with respect to Respondents' NJLAD-based claims was deficient and the jury's verdict was against the weight of the evidence. (Pa000091-000190). On June 15, 2023, Respondents filed their opposition to said motion. (Pa000191-000336). On August 11, 2023, Judge Rivas denied Appellant MTBOE's motion for a new trial. (DA87).

Meanwhile, on June 9, 2023, Respondents filed a motion for the award of attorneys' fees and costs ("Motion for Fees") related to the jury's verdict on Respondents' successful NJLAD-based claim. (DA89). Ultimately, on November 30, 2023, after careful consideration of all information submitted in connection with Respondents' Motion for Fees, Judge Rivas granted Respondents' motion in that regard and entered an Order for Judgment in the total amount of $1,397,487.60, inclusive of an award for Respondents' attorneys' fees and costs. (DA91).

On December 27, 2023, Appellant MTBOE filed their instant notice of appeal.[5] The instant appeal listed a total of five (5) issues, one (1) of which is that

[5] Appellant MTBOE filed an Amended Notice of Appeal on January 2, 2024.

the "Court erred in the award of counsel fees." Specifically, Appellant MTBOE listed the following issues:

(1) The jury verdict sheet was so deficient as to produce an unjust result on the NJLAD claim;

(2) The verdict on both claims was against the weight of the evidence;

(3) The Court erred in permitting testimony regarding alleged acts omissions [*sic*] of the school in the time period following the period of the alleged harassment and the altercation;

(4) The Court erred in permitting educational malpractice opinion against the defendant with regard to the handling of co-defendant; and

(5) The Court erred in the award of counsel fees.

However, Appellant MTBOE's Brief herein proffers argument solely with respect to the first issue listed above. As such, it is respectfully submitted that Respondents have waived any argument as to the remaining four (4) issues listed in the instant appeal, including with respect to Respondents' Motion for Fees. See Appellant MTBOE's Appellate Brief.

## III. FACTUAL BACKGROUND (Pa00027-000383).

### A. The extensive evidence elicited at trial fully corroborates Respondents' claims.

At trial, Respondents elicited testimony from several party witnesses; namely, Respondents H.M. and S.M. as well as Defendants S.H., J.H. Lee, Goodall, and Gambino. (Pa000027-000037). Additionally, Respondents elicited testimony from fact witnesses Shawn McCorkle and Michael Collins. (Id.). Lastly, Respondents

elicited testimony from four (4) expert witnesses; namely, Edward Dragan, Ed.D., Jeffrey Singer, Ph.D., Joel Confino, M.D., and Cary Skolnick, M.D. (Id.). The extensive testimony and evidence submitted to the jury corroborated Respondents' claims in all respects.

Indeed, Respondent H.M. testified that during the relevant period, he was a student at Monroe Township High School, where he was an active member of the Gay Straight Alliance, an organization where all students were invited to discuss their sexual orientation and/or topics related to sexual orientation without judgment or reprisal. (4T77:3-78:8). Respondent H.M. went on to testify that he joined the club as a freshman and continued being an active member in the organization such that most of his classmates were aware that he was in the club. (Id.).

Respondent H.M. also testified that he met Defendant J.H. for the first time in middle school, where Defendant J.H. was a troubled student and often got into fights and/or was needlessly aggressive with other students, including Respondent H.M. (4T78:19-79:4). Respondent H.M.'s testimony was that Defendant J.H. would regularly push Respondent H.M. in the hallways, knock him to the ground, and repeatedly call Respondent H.M. "gay" and refer to him as a "faggot." (Id. at 79:5-80:6).

Respondent H.M. went on to testify that Defendant J.H.'s harassment of Respondent H.M. was a recurring theme during the course of their attendance in

Appellant MTBOE's schools. (Id. at 80:22-82:2, 82:9-83:1). Specifically, Respondent H.M. testified that in middle school, he complained about Defendant J.H.'s harassment between five (5) to ten (10) times and, yet, was never told anything other than "I'll see what I can do" from any teacher and/or faculty member who would listen. (Id. at 82:3-8). Respondent S.M. further corroborated Respondent H.M.'s testimony to that effect, indicating that Respondent H.M. spoke to Respondent S.M. on several occasions about Defendant J.H.'s harassment of Respondent H.M. throughout middle school. (5T28:13-31:3).

Respondent H.M. also testified that the harassment continued and grew worse when the boys advanced to the seventh (7th) grade. At that point, Defendant J.H. continued calling Respondent H.M. "gay," along with homophobic slurs such as "fag" or "faggot," and also physically pushed Respondent H.M. around in the hallways and cafeteria on a regular basis throughout that school year. (Id. at 80:22-82:2). Subsequently, in the eighth (8th) grade, Respondent H.M. testified that the same harassment continued, as Defendant J.H. would push and throw Respondent H.M.'s books down to the ground while calling him "gay" or a "faggot." (Id. at 82:9-83:1). Although Respondent H.M. and Defendant J.H. were not even in class together that year, Defendant J.H. would go out of his way to harass Respondent H.M. around school. (Id.). Respondent H.M.'s testimony at trial was that during the eighth (8th) grade, he would repeatedly tell security guards in the cafeteria that

Defendant J.H. was harassing and bullying him, to no avail. (Id. at 82:3-8). Respondent H.M. testified that as a result of Appellant MTBOE's inaction in that regard, "everyone started to view [Respondent H.M.] as – as the gay kid, easy to bully, couldn't stand up for – couldn't stand up for myself." (Id. at 83:16-84:1).

Respondent S.M. testified that she brought up Defendant J.H.'s harassment of her son during parent-teacher conferences in either the seventh (7th) or eighth (8th) grade. (5T31:5-14). Respondent S.M. even asked one of Respondent H.M.'s teachers whether they were aware of Defendant J.H.'s constant bullying. (Id. at 31:15-22). In response, Respondent H.M.'s math teacher advised that they were aware of the harassment and, in fact, it was happening during his class. (Id. at 31:19-22). Respondent S.M. also complained about the harassment her son endured to Respondent H.M.'s guidance counselor in the eighth (8th) grade. (Id. at 32:1-16). The guidance counselor advised that she would "see what she could do," but as Respondent S.M. went on to testify, "nothing changed." (Id.).

Respondent H.M. testified that while he did not recall any specific interactions with Defendant J.H. during ninth (9th) grade, Defendant J.H's harassment and discrimination of him promptly resumed on just the second day of tenth (10th) grade. (Id. at 84:12-19). Respondent H.M. and Defendant J.H. were in the same driver's education class at that time and, during same, Defendant J.H. sat behind Respondent H.M. and harassed him. (Id. at 84:20-85:9). Specifically, Respondent H.M. testified

that Defendant J.H. would not only throw pens at Respondent H.M., but also, kick Respondent H.M.'s chair and, as he had for years by that point, repeatedly call Respondent H.M. a "faggot." (Id. at 85:2-9). Testimony at trial further evidenced that Respondent H.M. asked his teacher, Defendant Lee, for permission to move his seat and for Defendant J.H. to be reprimanded for said harassment and discrimination. (Id.).

Respondent S.M. further testified during the summer between Respondent H.M.'s freshman year and sophomore years at school, she was contacted by Respondent H.M.'s new guidance counselor, Defendant Gambino. (5T35:19-36:8). After receiving said communication from Defendant Gambino, Respondent S.M. testified that she met with Defendant Gambino at the school and explained that Respondent H.M. had a difficult freshman year and wanted to see Respondent H.M. turn things around sophomore year. (Id. at 36:22-37:21). Respondent S.M. testified that at one point in their conversation, she specifically mentioned Defendant J.H. by name, telling Defendant Gambino that Respondent H.M. was very anxious about the ongoing harassment and, as such, she would appreciate if Respondent H.M. could have someone to turn to. (Id. at 37:9-21). Respondent S.M. testified that in response to same, Defendant Gambino told her that he would "take [Respondent H.M.] under his wing. [Defendant Gambino] would, you know, keep a special eye out for him." (Id.).

Additional testimony elicited at trial established that the harassment and discrimination of Respondent H.M. continued outside of drivers' education class, even though that was the only class Respondent H.M. and Defendant J.H. had together. Respondent H.M. testified that Defendant J.H. and his friends would wait outside Respondent H.M.'s classroom and block the door, preventing him from entering at the beginning of class. (Id. at 85:17-86:6). In addition, Defendant J.H. and his friends would simultaneously call Respondent H.M. "gay" and state that "gay people aren't allowed in the classroom." (Id.). Further trial testimony evinced that although teachers witnessed said harassment and discrimination, they failed to do anything more than instruct the students to enter the classroom so they could begin class. (Id. at 86:23-87:8).

Respondent H.M. further testified that after the driver's education portion of the class had finished and then transitioned to gym class, Defendant J.H. resumed physically harassing and bullying Respondent H.M. (Id. at 86:23-87:8). Specifically, Respondent H.M. testified that Defendant J.H. would physically push and otherwise hurt Respondent H.M. during gym class. (Id.). Despite Respondent H.M.'s complaints to Defendant Lee regarding same, they were not taken seriously. (Id.).

The foregoing pattern of anti-gay animus by Defendant J.H. soon came to a head on November 25, 2015. On that date, Respondent H.M. was in the locker room talking with one of friends, who happened to be openly gay, when he heard

Defendant J.H. call Respondent H.M.'s friend a "faggot" and tell Respondent H.M. that he and his friend were "two fags who belong together." (Id. at 88:23-90:13). Respondent H.M. attempted to step in and prevent the bullying of his friend by telling Defendant J.H. to stop. (Id.). Defendant J.H. then turned his attention to Respondent H.M., calling both Respondent H.M. and his friend "faggots." (Id.). Respondent H.M.'s testimony was that as a fifteen (15) year old boy at the time, he tried to defuse the situation by making a joke, stating "if I'm gay, how about I suck your dick" to Defendant J.H. (Id.). Respondent H.M. testified that he then got down on his knees, while smiling and laughing and continuing to joke; meanwhile, Defendant J.H. told Respondent H.M. "Don't say that faggot" and also repeated the "n" word several times. (Id.). Defendant J.H. then walked closer to Respondent H.M., at which time Defendant J.H. proceeded to punch Respondent H.M. with both fists until Respondent H.M. fell to the ground. (Id.).

In addition to hearing testimony regarding Defendant J.H.'s aforementioned violent attack of Respondent H.M., same was corroborated, too, by a video recording of the incident which was introduced into evidence and shown to the jury during the trial. (DA100). Said recording begins by depicting Respondent H.M. kneeling on the ground and smiling as Defendant J.H. creeps closer to Respondent H.M. until Defendant J.H. begins punching Respondent H.M. several times in the face. (Id.). Then, the video shows Defendant J.H. walking away and Respondent H.M.

following behind; critically, Respondent H.M. testified that he followed Defendant J.H. to merely ask him why he would attack Respondent H.M. (4T92:1-93:3). The recording then shows Defendant J.H. continuing to mercilessly beat Respondent H.M. until he slammed into a locker and fell to the ground. (DA100). At that point, Respondent H.M. was profusely bleeding from his head and onto the floor. (4T94:7-25, 98:20-99:7).

Testimony elicited at trial further revealed that there were no teachers physically inside the locker room at the time that Respondent H.M. was viciously attacked by Defendant J.H. (4T92:10-16, 93:25-94:3). Importantly, this was not only Respondent H.M.'s testimony at trial, but also, corroborated by the testimony of the gym teachers present on the day in question; namely, Defendant Lee as well as Shawn McCorkle and Michael Collins, who each testified they were unable to see or hear the attack at the time it broke out. (Id.; 6T110:6-111:10, 176:21-177:2, 179:15-181:2; 9T161:18-21). Notably, this was contrary to Appellant MTBOE's policy with respect to supervising students in the locker room. (Id.; 5T103:17-104:14). Perhaps even more surprising, after the assault, nobody immediately called an ambulance. (4T99:8-10). Instead, Michael Collins asked Respondent H.M. whether he would be willing to "go back to class," if he simply "cleaned [him]self up[.]" (Id. at 99:22-25). To that end, a few individuals actually brought Respondent H.M. a towel to place on his nose so he could "go back to [his] next class." (Id. at

100:3-5). Finally, a guidance counselor and the faculty advisor to the Gay/Straight Alliance, Cathy Ielpi ("Ms. Ielpi"), called the ambulance which finally transported Respondent H.M. from the school to the hospital. (Id. at 100:3-20).

Further trial testimony revealed that Respondent H.M. underwent surgery a few days later and was hospitalized for a total of five (5) days following Defendant J.H.'s November 25, 2015 attack. (Id. at 101:12-17). Respondent H.M. underwent surgery and a titanium plate was inserted in the orbital floor of his right eye, which was fractured as a direct result of Defendant J.H.'s violent attack on November 25, 2015. (Id. at 101:19-102:14). Respondent H.M. testified at trial that, to this day, he suffers from floaters in his vision and continues to suffer from pain and swelling in the area of his right eye when he is having an allergic reaction. (Id. at 104:19-106:7). Additionally, Respondent H.M. testified about his emotional distress, which continued through the time of trial. As a result of Defendant J.H.'s brutal assault and battery, Respondent H.M. suffers from post-traumatic stress disorder ("PTSD"), anxiety, and feels embarrassed and upset about the assault and battery. (Id. at 121:11-124:1). Indeed, Respondent H.M. testified that even eight (8) years following the foregoing events, he continues to have nightmares where he relives the awful memory of same. (Id.).

The testimony of Defendant Goodall, who was the principal of Monroe Township High School at the time of the aforementioned attack, further justified the

jury's verdict in Respondents' favor. Defendant Goodall served as the principal of the school from August of 2005 until the end of the school year in 2018. (9T5:11-18). Defendant Goodall testified that although it was an unusual occurrence that a student would be admitted to the hospital for five (5) days of treatment following a fight, he acknowledged that he did not visit Respondent H.M. in the hospital to see how he was doing, nor did he instruct any staff member to reach out to Respondents to see how they were doing. (9T37:18-38:19). Shockingly, Defendant Goodall testified that while Defendant J.H. admitted he was making fun of Respondent H.M. and his friend for being "gay," Defendant J.H.'s homophobic animus ***was not*** considered in making the decision to suspend him from school. (9T66:18-67:16). Egregiously, even though multiple students of the school specifically advised Defendant Goodall that Defendant J.H. was homophobic at or around the time of the November 25, 2015 attack, he failed to even consider Defendant J.H.'s homophobic animus as part of said decision to suspend Defendant J.H. (9T68:22-69:23).

Defendant Goodall further testified that despite being temporarily removed from the school after attacking Respondent H.M., Appellant MTBOE's administration decided to permit Defendant J.H. to return to Monroe Township High School. (9T78:7-25). Defendant Goodall admitted that although he had reservations about allowing Defendant J.H. to return to the school, neither he nor any other staff member of Appellant MTBOE informed either Respondents S.M. or H.M. that

Defendant J.H. was returning to school. (Id.; 9T91:23-95:24). Proving this point, Defendant Goodall admitted at trial that he "should have followed up" with Respondents that Defendant J.H. was going to return to school after his removal. (9T99:25-101:12).

Respondent H.M.'s severe emotional distress was further corroborated by correspondence dated September 19, 2016 from his treating psychologist, Jeffrey A. Mandell, Ed.D. ("Dr. Mandell"). (Id.; Pa000349). Indeed, Dr. Mandell wrote as follows:

> I have been treating [H.M.] in psychotherapy since September, 2015 for depression on a weekly, individual basis. In December, 2015, he was beaten up in the boys' locker room at Monroe High School. As a result of the injuries which he incurred in the altercation he received medical and dental treatment. The boy involved in the incident was suspended from school and did not return to school for the rest of the school year.
>
> Upon return to school for the 2016-7 year, [H.M.] was surprised to see the boy who hurt him had returned to school. He noted that he experiences panic, rapid heartbeat, sweating and general inability to problem-solve. He has been late for class several times as he has taken the "long way" around school in order to not see the boy in the hall. He noted to me that he has repeated thoughts about what happened last year and is having difficulty focusing on the subjects being taught in class. These symptoms are consistent with Post Traumatic Stress Disorder. I am attempting to treat him for this disorder, but I am concerned with the effect that it will have on his grades and overall functioning in school.

(Pa000349).

In further support of Respondents' allegations herein, part of Defendant J.H.'s disciplinary record was introduced at trial. (Pa000350-000352). Importantly, said documents established that in the three (3) years leading up to the aforementioned assault and battery of Respondent H.M. on November 25, 2015, Defendant J.H. was disciplined on multiple occasions for, among other things, (1) sexual harassment of a teacher, (2) bullying, (3) bias incidents, (4) fighting, (5) profanity, and (6) violations of Appellant MTBOE's harassment, intimidation, and bullying ("HIB") policies. (Id.). However, shockingly, Defendant Goodall—who was the principal of Monroe Township High School at the time Respondent H.M. and Defendant J.H. were students—was never informed of Defendant J.H.'s extensive disciplinary history. (9T11:21-13:3).

Respondents presented the testimony of a liability expert, Edward D. Dragan, Ed.D. ("Dr. Dragan"), at trial as well. Notably, Dr. Dragan has extensive education and experience in the field of standards of care in child and youth-serving organizations, including schools. (Pa000353-000377). It was established at trial that Dr. Dragan possesses relevant prior experience working as a school superintendent, a school principal, and in an advisory capacity to school districts on the proper administration of policies to ensure student safety. (Id.; 10T8:5-10:6). Dr. Dragan testified at trial that there were several measures that Appellant MTBOE could have implemented so as to ensure that Respondent H.M. was not the victim of harassment

and discrimination as well as an assault and battery by Defendant J.H., particularly in light of the fact that Appellant MTBOE was well aware and assuredly on notice of Defendant J.H.'s troubled disciplinary record prior to the November 25, 2015 attack. (10T22:10-24:9).

Following the presentation of evidence through the remainder of Respondents' witnesses, exhibits, and expert evidence, Respondents rested their case-in-chief. Although Appellant MTBOE identified eight (8) witnesses who were not called in Respondents' case-in-chief in their pre-trial information exchange, they opted against calling a single party, fact, or expert witness and, instead, relied solely on their cross-examination of Respondents' witnesses. (Pa000038-00041).

**B. The charge conference and jury charge.**

After the parties rested their respective cases-in-chief, the charge conference was held at which time Respondents submitted a proposed jury charge for the trial court's consideration. Respondents' proposed jury charge was modeled after the New Jersey Model Civil Jury Charge related to the issues presented by the matter at hand. (Pa000042-000086). The jury charge broke down each and every element of Respondents' NJLAD-based claims, negligence claims, damages, the standard of proof, and the role of the judge and jury in a trial such as the instant matter. (Id.). Initially, Appellant MTBOE asserted an objection to the jury charge but, subsequently, withdrew same in writing. (Pa000035).

In addition to the jury charge, Respondents provided a proposed verdict sheet to assist the jury in finding the facts necessary to support a finding in favor of either party. (Pa000378-000379). The verdict sheet submitted by Respondents focused on the essential elements of Respondents' NJLAD-based claims and provided the jury with clear and concise questions to consider in reaching its ultimate determination. (Id.). Appellant MTBOE objected to Respondents' proposed verdict sheet, simultaneously submitting their own proposed verdict sheet which posed a series of six (6) questions to the jury for consideration. (DA78).

Over Appellant MTBOE's objection, the Court provided its own version of the verdict sheet. (DA82). With respect to Respondents' NJLAD-based claims, the verdict sheet asked the jury to consider the following questions:

1. Do you find that [Respondent H.M.] has proven by a preponderance of the credible evidence that the Monroe Township Board of Education defendants subjected [Respondent H.M.] to discrimination and harassment while a student at the Monroe Township High School?
   **IF YOU ANSWER YES, PROCEED TO QUESTION 2. IF YOU ANSWER NO, PLEASE PROCEED TO QUESTION 4 [addressing negligence].**

2. Do you find that [Respondent H.M.] has proven by a preponderance of the credible evidence that the actions of the Monroe Township Board of Education defendants were a proximate cause of his injuries?

> **IF YOU ANSWER YES, PROCEED TO QUESTION 3. IF YOU ANSWER NO, PLEASE PROCEED TO QUESTION 4.**
>
> 3. What amount of money do you find would fairly compensate [Respondent H.M.] as a result of the discrimination and harassment?

(Id.).

Subsequently, the Court charged the jury on the applicable law and provided the jury with copies of both the jury charge and verdict sheet to use in deliberations. (Pa000036-000037). After approximately seventy-five (75) minutes of deliberation, the jury returned a verdict which was overwhelmingly in Respondents' favor. (DA82). With respect to Respondents' NJLAD-based claims, the jury unanimously determined that Respondent H.M. was the victim of harassment and discrimination based on his perceived sexual orientation while a student at Monroe Township High School and that Appellant MTBOE's actions were the proximate cause of Respondent H.M.'s injuries. As a result of same, Respondents were awarded $400,000.00 in damages for the harassment and discrimination endured by Respondent H.M. (Id.).

With respect to Respondents' negligence claims, the jury's findings were, yet again, overwhelmingly in Respondents' favor. The jury unanimously found that Respondents met their burden in proving that Appellant MTBOE was negligent and that said negligence was the proximate cause of Respondent H.M.'s injuries. (Id.).

Then, in a seven (7) to one (1) vote, the jury found that Appellant MTBOE failed to prove that Respondent H.M.'s alleged negligence contributed to his injuries. (Id.). With respect to fault, the jury allocated 100% of the fault to Appellant MTBOE and 0% to Respondents, and found that Respondent H.M.'s injuries were permanent in nature and he would be fairly compensated for same with an additional damages award of $100,000.00. (Id.). Said additional award of $100,000.00 in damages brought the jury's total damages award to $500,000.00. (Id.).

## IV. ARGUMENT

### A. The Standard of Review (not raised below).

An appellate court must affirm the trial court's ruling on a motion for a new trial "unless it clearly appears that there was a miscarriage of justice under the law." Delvecchio v. Twp. of Bridgewater, 224 N.J. 559, 572 (2016) (quoting R. 2:10-1); see also State v. Sims, 65 N.J. 359, 373-74, 322 A.2d 809 (1974) ("[T]he trial court's ruling on [a motion for a new trial] shall not be reversed unless it clearly and convincingly appears that there was a manifest denial of justice under the law"). "The standard for appellate review of a trial court's decision on a motion for a new trial is substantially the same as that controlling the trial court except that due deference should be made to its 'feel of the case,' including credibility." Caldwell v. Haynes, 136 N.J. 422, 432 (1994) (quoting Feldman v. Lederle Lab., 97 N.J. 429, 463, 479 A.2d 374 (1984)). A jury verdict "should not be overthrown except upon

the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighting the evidence, that the continued viability of the judgment would constitute a manifest denial of justice." Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521, 20 A.3d 1123 (2011) (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98, 379 A.2d 225 (1977)); see also Boryszewski v. Burke, 380 N.J. Super. 361, 391, 882 A.2d 410 (App. Div. 2005) ("[j]ury verdicts should be set aside in favor of new trials only with great reluctance, and only in cases of clear injustice").

### B. The Trial Court's Denial Of Appellant MTBOE's Motion For A New Trial Should Be Affirmed Because Appellant MTBOE Has Failed To Establish That The Trial Court's Denial Of Its Motion For A New Trial Was A Miscarriage Of Justice. (Pa00091-000190).

In its instant appeal, and as it did in the trial court below,[6] Appellant MTBOE contends that the trial court improperly denied its motion for a new trial on Respondents' NJLAD-based claims because the verdict sheet submitted to the jury was "so deficient as to produce an unjust result." (Pa000105-000112). Even setting aside Appellant MTBOE's specious arguments in support of its position that the verdict sheet herein somehow "produced an unjust result," Appellant MTBOE has

[6] Appellant MTBOE also previously argued at the trial court level that a new trial was warranted because the jury's verdict was against the weight of the evidence. (Pa000103-000118). However, Appellant MTBOE did not brief this issue on appeal and, accordingly it is respectfully submitted that Appellant MTBOE has waived that issue. See Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021) ("[a]n issue not briefed on appeal is deemed waived").

failed to advance any viable argument that the jury verdict manifests the necessary "miscarriage of justice" requiring a new trial. For the reasons explained further below, the trial court's denial of Appellant MTBOE's Motion for a New Trial should be denied because the verdict sheet submitted to the jury, along with the jury charge on the applicable law, provided the jury with clear instructions to guide their deliberations and was not, in any way, confusing, misleading, and/or ambiguous.

The New Jersey Supreme Court has consistently held that jury verdicts should be overturned only in "clear cases." Lockley v. Turner, 344 N.J. Super. 1, 12 (2001) (citing Caldwell v. Haynes, 136 N.J. 422, 431-32 (1994)). "When such a motion is presented to the trial judge, the judge 'must consider the evidence in the light most favorable to the prevailing party in the verdict.'" Id. (quoting Caldwell, 136 N.J. at 432). That is because the "jury's evaluation should be regarded as final" provided it has "reasonable support in the record." Id. at 12-13 (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 599 (1977)). These guiding principles lead to the general proposition that a jury's verdict should only be disturbed if "the continued viability of the judgment would constitute a manifest denial of justice." Ibid.

Pursuant to Rule 4:39-1, "[t]he court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact [by providing the jury with] written questions which can be categorically or briefly answered…." Jury interrogatories are used "to require the jury to specifically consider the essential

issues of the case, to clarify the court's charge to the jury, and to clarify the meaning of the verdict and permit error to be localized." Ponzo v. Pelle, 166 N.J. 481, 490-91, 766 A.2d 1103 (2001) (quoting Wenner v. McEldowney & Co., 102 N.J. Super. 13, 19, 245 A.2d 208 (App. Div. 1968)).

The questions posed to the jury on a verdict sheet should be clear. Benson v. Brown, 276 N.J. Super. 553, 565, 648 A.2d 499 (App. Div. 1994). However, the "trial court's interrogatories to a jury ***are not*** grounds for reversal ***unless*** they were misleading, confusing, or ambiguous." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 418 (1997) (emphasis added); see also Ponzo, 166 N.J. at 490. When reviewing an alleged deficient verdict sheet for reversible error, the court "should consider [the verdict sheet] in the context of the [jury] charge as a whole." Ponzo, 166 N.J. at 491. Provided the jury charge is "accurate and thorough," then it "often can cure the potential for confusion that may be present in an interrogatory." Id. (quoting Sons of Thunder, 148 N.J. at 418).

In the instant matter, the jury charge and verdict sheet submitted to the jury for deliberation was not in any way "misleading, confusing, or ambiguous" such that a new trial is warranted. Sons of Thunder, 148 N.J. at 418. Despite the baseless contentions advanced by Appellant MTBOE in this appeal, the verdict sheet submitted to the jury was clear and required the jury to consider the essential elements of Respondents' NJLAD-based claims. Indeed, the verdict sheet submitted

to the jury with respect to Respondents' NJLAD claims provided the following interrogatories:

> 1. Do you find that [Respondent H.M.] has proven by a preponderance of the credible evidence that the Monroe Township Board of Education defendants subjected [Respondent H.M.] to discrimination and harassment while a student at the Monroe Township High School?
>
>    **IF YOU ANSWER YES, PROCEED TO QUESTION 2. IF YOU ANSWER NO, PLEASE PROCEED TO QUESTION 4** [pertaining to negligence].
>
> 2. Do you find that [Respondent H.M.] has proven by a preponderance of the credible evidence the actions of the Monroe Township Board of Education defendants were a proximate cause of his injuries?
>
>    **IF YOU ANSWER YES, PROCEED TO QUESTION 3. IF YOU ANSWER NO, PLEASE PROCEED TO QUESTION 4** [pertaining to negligence].
>
> 3. What amount of money do you find would fairly compensate [Respondent H.M.] as a result of the discrimination and harassment?

(DA82) (bold and capitalization in original).

Appellant MTBOE contends that the above verdict sheet was deficient because it did not break down each and every element of Respondents' claims, and of Appellant MTBOE's defenses, into separate questions. This argument ignores the fact that, along with the verdict sheet, Judge Rivas carefully read the jury charge to

the jury, which served the purpose of charging the jury on the law, facts and standards of proof. (Pa000042-000086). Although Appellant MTBOE originally asserted an objection to the jury charge, it subsequently withdrew ***said objection***. (Pa000033). In addition to hearing the applicable law directly from Judge Rivas, the jury was also provided the benefit of a physical copy of the forty-five (45) page jury charge breaking down the elements of Respondents' claims and of Appellant MTBOE's defenses. (Pa000042-000086). Not only was the charge incredibly detailed, but also, the jury charge, and the verdict sheet for that matter, were modeled after the New Jersey Civil Model Jury Charge for NJLAD claims. (Pa000042-000090; see also New Jersey Model Civil Jury Charge 2.21(C)). Appellant MTBOE's insistence on viewing both the verdict sheet and jury charge in isolation from one another is contrary to controlling law, as the sufficiency of the verdict sheet is to be examined "in the context of a [jury] charge as a whole." Ponzo, 166 N.J. at 491.

Appellant MTBOE now contends that the verdict sheet herein is deficient because it did not parse out each and every element of Respondents' *prima facie* discrimination claims. In support of this argument, Appellant MTBOE cites to Ponzo, 166 N.J. at 481, and Benson, 276 N.J. Super. at 553, for the proposition that a single interrogatory posed to the jury on a verdict sheet led to an improper jury verdict. However, the decision by the Ponzo Court makes very clear that a verdict

sheet is not "deficient" simply because it poses one (1) interrogatory to the jury. See Ponzo, 166 N.J. at 492. In fact, a plain reading of the Ponzo decision evidences that the Supreme Court did not, in any way, suggest that a verdict sheet must be broken down into several interrogatories to the jury. Id.

In Ponzo, the court ultimately determined that the verdict sheet given to the jury in a personal injury case, where three (3) different injuries were claimed and the existence of two (2) of which was hotly contested, was deficient when the single interrogatory asked was, "Did defendant's negligence proximately cause damage to [the plaintiff]?" Id. at 490. There, the plaintiff claimed the defendant's negligence caused injury to plaintiff's knee, back, and diagnosis of RSD. Id. Although the defendant conceded to causing the knee injury, the defendant disputed that the back and RSD injury ever existed. See id. In those circumstances, the Ponzo court determined that the single interrogatory posed to the jury was misleading because it only asked about non-descript "damages" without parsing out the two (2) different injuries which were in dispute. Id. In that case, the Supreme Court ultimately determined that multiple interrogatories that "detailed the distinct approach that was required of the jury where [the defendant] advanced entirely distinct defenses to the different claims" would have been a clearer instruction to the jury in guiding their deliberations on the facts at issue. Id. at 492. The Supreme Court, however, expressly cautioned ***against*** the very proposition that Appellant MTBOE incorrectly claims

the Ponzo case stands for: "[t]hat is not to suggest that every single case requires finely diced interrogatories." Id. (emphasis added).

Here, as an initial matter, there were multiple interrogatories posed to the jury on the verdict sheet. (DA82). Contrary to what Appellant MTBOE would have the Appellate Division believe, the jury could not have entered a verdict in favor of Respondents as to their NJLAD-based claims based simply on answering the first question posed on the verdict sheet. This is transparently obvious from a simple review of the verdict sheet. (DA82). With respect to the issues raised on this appeal, the jury was asked to first determine whether Respondent H.M. proved that Appellant MTBOE subjected Respondent H.M. to discrimination and harassment. (DA82). First, this question derives directly from Model Civil Jury Charge 2.21(C); however, it is crafted to the specific needs of the case, which is exactly what the Model Civil Jury Charge calls for. Before the jury was given the verdict sheet, they were carefully charged on what it would be required to determine that Respondents proved, or failed to prove, in order to answer that question. (Pa000042-000087). In the charge, Judge Rivas carefully explained both parties' theories of the case and what was required to be proven to establish said claims or defenses. (Pa000042-000065). As provided by the jury charge herein, the jury was required to decide the following issues:

> First, you must decide whether the complained-of conduct actually occurred.

> Second, if you decide that the complained-of conduct did occur, you must then decide whether that conduct constitutes harassment and/or discrimination on the basis of perceived sexual orientation.
>
> Third, if you decide that the conduct does constitute harassment on the basis of perceived sexual orientation, you must then decide whether [Appellant MTBOE] should be held responsible for that conduct.

(Pa000051). Judge Rivas then proceeded to explain what was to be considered in answering each of those three questions. (Pa000051-000065).

The Final Verdict Sheet herein indicated that if the answer to the first question was in the affirmative, the jury was then asked to determine whether Respondent H.M. proved that Appellant MTBOE's actions in that regard were a proximate cause of his injuries (the presence of which was never disputed by Appellant MTBOE). (DA82). This question must be answered to prove an essential element of Respondents' claims, which could be established through any of the following: (1) Appellant MTBOE knew or should have known of the harassment and failed to take effective remedial measures to stop it; or (2) that Appellant MTBOE was negligent in failing to take reasonable steps to prevent the harassment from occurring in the first place; or (3) that Appellant MTBOE failed to take appropriate remedial or corrective action designed to stop or deter future acts of discrimination or harassment. See L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 189 N.J. 381, 403-04 (2007) (quoting Lehmann v. Toys 'R Us, 132 N.J. 587, 621-23, 626

A.2d 445 (1993)). If anything, the jury charge, read in combination with the questions posed on the verdict sheet – which is precisely what happened at trial – streamlines and simplifies the issues present in the case in a way that assists a jury of laypeople to reach their ultimate determination. See Ponzo, 166 N.J. at 491; see also Sons of Thunder, 148 N.J. at 418.

Only if the jury's answers to the first two (2) questions were in the affirmative were they to proceed to the third interrogatory which, in turn, asks what amount of money should be awarded to compensate Respondents for the discrimination and harassment found by the jury. (DA82). In Ponzo, the verdict sheet was defective because it was confusing to simply ask if the defendant was the proximate cause of vague "injuries," insofar as the defendant's theory on the case was that two (2) of the three (3) injuries never even existed. Ponzo, 166 N.J. at 491. Very much to the contrary, the jury in the instant matter was asked to make a finding on essential elements of Respondents' NJLAD-based claims based on the evidence elicited at trial and in light of the trial court's detailed and comprehensive explanation of what is required to establish each of the elements of Respondents' claims under the applicable law. (Pa000040-000084). To that end, Judge Rivas explained what Respondents need to prove and spelled out the parties' precise theories based on the evidence elicited at trial. (Pa000050-000084). Specifically, the jury charge provided the following:

> According to [Respondent H.M.], [Appellant MTBOE] failed to prevent or remediate the harassment and discrimination of [Respondent H.M.] by Defendant [J.H.] during [Respondent H.M.]'s time enrolled at Monroe Township High School despite [Respondents]' complaints to administration and staff about such discrimination and harassment or due to [Appellant MTBOE's] knowledge of [Defendant J.H.'s] behavioral record that includes bias incidents or discriminatory conduct. [Appellant MTBOE] denies having knowledge of [Defendant J.H.]'s harassment of [Respondent H.M.] prior to the November 25, 2015 incident and asserts it[] took appropriate corrective or remedial action to address [Defendant J.H.]'s bias incidents or discriminatory conduct. If the [Appellant MTBOE] was, in fact, aware of the discrimination and harassment and failed to stop, such would be unlawful under New Jersey's Law Against Discrimination.

(Pa000050-000051). Appellant MTBOE claims, with zero basis in the record, that "the jury was not presented with the various prongs of the NJLAD claim"; in reality, however, the charge to the jury explained each and every element of Respondents' NJLAD-based claims in painstaking detail. (Pa000050-000084).

Appellant MTBOE's reliance on Benson, 276 N.J. Super. at 553, is similarly misplaced. Benson was a dram shop case wherein the appellate division reversed the denial of a plaintiff's motion for a new trial based on erroneous jury charges and verdict sheet. See id. However, in Benson, the trial judge outright misstated the law in the charge to the jury and, importantly, "failed to follow the model jury charge in several significant respects." See id. at 560. The Appellate Division in Benson did not remand that case for new trial because the verdict sheet failed to have several

interrogatories breaking down the issues for the jury's consideration; rather, it was remanded because the jury charge was ***not*** in accordance with the applicable law. Id. at 563 ("The instructions here misstated the applicable law"). The Benson Court went on to explain that it would have been preferable for the trial court to parse out separate interrogatories for the jury in the verdict sheet, but that was because doing so in those circumstances would be consistent with the Model Civil Jury Charge 5.39(D), which was applicable to dram shop cases at that time. Id. As such, to the Benson Court, it was much less about whether the verdict sheet contained several interrogatories than it was about ensuring that the jury is charged with the appropriate and correct law at issue. See id.

Here, however, there is no contention that the jury charge contained any inapplicable law. Instead, Appellant MTBOE summarily contends that simply because proving Respondents' claims requires establishing the several prongs of an NJLAD discrimination claim, the verdict sheet ***must*** contain several interrogatories. Appellant MTBOE does not take issue with the law that was provided in the charge to the jury and, although it originally asserted an objection to the jury charge at the charge conference, subsequently withdrew its objection to the charge in writing. (Pa000033). Furthermore, and unlike the deficient verdict sheet in Benson, the verdict sheet provided to the jury herein was entirely consistent with the Model Civil Jury Charge.

Appellant MTBOE's contention that the first question of the verdict sheet is deficient because it "did not reference harassment by [Defendant J.H.], nor that the harassment had to be based on perceived sexual orientation, nor that the harassment had to be severe or pervasive," is flatly wrong, as each of those issues, and much more, were thoroughly explained ***in the jury charge***. (Pa000042-000086). While Appellant MTBOE objected to the sole question on that basis, Judge Rivas overruled the objection for the precise reason that the verdict sheet and jury charge complemented one another and were not to be evaluated in a vacuum. It is worth further noting that under the law, significant deference is to be given to Judge Rivas' decision in that regard, because as the presiding trial judge, only he was able to get the "feel of the case" after presiding over the trial. See Caldwell, 136 N.J. at 432.

Even further highlighting the clarity and straightforward instructions provided to the jury in the charge and simple questions presented on the verdict sheet herein is the fact that the jury returned a verdict after just seventy-five (75) minutes of deliberation, with an answer of a ***unanimous*** "yes" to (1) each of the questions on the verdict sheet as to Respondents' NJLAD-based claims and (2) all but one (1) of the questions on the verdict sheet as to Respondents' remaining claims. (Pa000034-000035; DA82). Surely, had the verdict sheet or jury charge caused any confusion whatsoever, the jury would have, at minimum, either (1) asked a clarifying question; (2) deliberated for longer than just seventy-five (75) minutes; or (3) returned a

verdict that was not overwhelmingly in Respondents' favor. The jury, however, did none of same which only further demonstrates the straightforward nature of the jury charge and the questions posed on the verdict sheet.

### C. Appellant MTBOE has failed to demonstrate that sustaining the jury's verdict would be a "miscarriage of justice" warranting a new trial.

Finally, Appellant MTBOE has completely and utterly failed to advance any meaningful argument suggesting that the jury's verdict was, in any way, a "miscarriage of justice." Appellant MTBOE appears to argue, rather awkwardly, that the confusing nature of the verdict sheet is highlighted based on defense counsel's own evaluation of the evidence elicited at trial. This argument should be swiftly rejected, however, because as discussed above, Appellant MTBOE has not raised their weight of the evidence argument on appeal and, thus, as a matter of law, it is respectfully submitted that same is waived. See Green Knight Cap., LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021).

Furthermore, "[a] jury's verdict … is cloaked with a 'presumption of correctness.'" Cuevas v. Wentworth Grp., 226 N.J. 480, 501, 144 A.3d 890 (2016) (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 598, 379 A.2d 225 (1977)). "A party seeking to overturn the jury's verdict must present clear and convincing evidence establishing that the verdict was a miscarriage of justice." George v. Liberty Ins. Corp., 2019 N.J. Super. Unpub. LEXIS 132, *1, *13 (App. Div. Jan. 17, 2019) (citations omitted). A trial court judge may not substitute their judgment for

that of the jury merely because they would have reached the opposite conclusion because the judge "is not a decisive juror." Dolson v. Anastasia, 55 N.J. 2, 6, 258 A.2d 706 (1969).

On appeal, Appellant MTBOE does not precisely contend that sustaining the jury's verdict would be a "miscarriage of justice" because it is against the weight of the evidence. Instead, its entire brief argues that the verdict sheet was deficient such that the jury's verdict must be overturned. See generally Appellant MTBOE's Appellate Brief. It does, however, argue that the verdict sheet was deficient because the jury returned a verdict in just seventy-five (75) minutes despite the "factual disputes" allegedly raised by Appellant MTBOE at trial to contradict Respondents' evidence at trial. See Appellant MTBOE's Appellate Brief, pp. 37-38. In support of its argument in that regard, Appellant MTBOE presents its self-serving view of the evidence as follows:

> (1) that the alleged harassment occurred,
>
> (2) that the alleged harassment was severe or persuasive [*sic*], given Plaintiff's own account which includes no harassment in the ninth grade and the absence of any mention of, or treatment for, in any psychology records,
>
> (3) that the school was aware of the alleged harassment, and
>
> (4) then as to the tort claim, the issue of Plaintiff's own comparative fault in light of Plaintiff's own admission that he initiated the fight by trying to humiliate the co-defendant-appellant, and then the undisputable video and audio recording evidence that Plaintiff re-

> initiated the fight when he followed and then attempted to strike J.H. and then whether Plaintiff pierced the tort injury threshold[7].

Id.

To be clear, ***Appellant MTBOE did not present a case-in-chief.*** (Pa000201). Appellant MTBOE decided not to call a single fact or expert witness and relied solely on the perfunctory cross-examination of the thirteen (13) credible witnesses who testified as part of Respondents' case-in-chief. (Pa000201-000202).[8] In reality, Respondents presented compelling NJLAD claims through the presentation of party, fact and expert witness testimony and several trial exhibits and, yet, Appellant MTBOE takes issue with the fact the jury's verdict was somehow not in their favor. In other words, there is no "miscarriage of justice" simply because a verdict is in favor of one party of the other. The only "miscarriage of justice" that may occur here

[7] While not included as part of the instant appeal, Appellant MTBOE argued at the trial court level that the jury's determination that Respondent H.M.'s injuries to his eye were permanent in nature was against the weight of the evidence. This argument, too, properly failed as a matter of law. Respondent H.M. testified that to this day, he still suffers from floaters in his vision and suffers from pain and swelling when he is having an allergic reaction. (4T104:8-105:7). Indeed, Respondent H.M. is not required to prove that he suffers from vision issues or loss of visual field to demonstrate that his damages are permanent by nature. In 2023—more than seven (7) years after he was brutally assaulted by Defendant J.H. in the locker room—Respondent H.M. still suffered from complications stemming from the beating. (4T104:8-107:25). Respondent H.M. testified at trial to those symptoms and the jury determined that he met his burden to establish by a preponderance of the evidence that his injuries were permanent. Critically, Appellant MTBOE's arguments to the contrary at the trial court level were made solely from defense counsel's memory and with zero reference to the actual record at trial.

is if the jury's verdict is disturbed, based on the extensive evidence which ***was*** elicited at trial which completely supports the jury's unanimous verdict in Respondents' favor on their NJLAD claims and verdict overwhelmingly in favor of Respondents on their negligence claims.

The evidence at trial through the testimony of Respondents, several teachers and administrators of Monroe Township High School, and Respondents' liability and damages experts, all collectively revealed that Defendant J.H. harassed and terrorized Respondent H.M. on the basis of his perceived sexual orientation ***for years*** throughout their attendance at Appellant MTBOE's schools, leading up to the date in question when Respondent H.M. was beaten by Defendant J.H. (Pa000026-0000029). Indeed, Respondent H.M. testified that, beginning in middle school, Defendant J.H. began repeatedly calling Respondent H.M. "gay" and referred to him as being a "faggot." (4T79:8-80:6). Respondent H.M. also testified that Defendant J.H. would regularly push Respondent H.M. in the hallways and even knock him to the ground. (4T79:5-80:6). Respondent H.M. explained that he complained about said harassment to faculty while he was in middle school, but no remedial action was taken. (4T82:3-8). Once Respondent H.M. was in high school, Respondent S.M. testified that she personally approached Respondent H.M.'s guidance counselor, Defendant Gambino—mere months before Respondent H.M. was viciously attacked by Defendant J.H.—and expressed her concerns about the ongoing harassment and

bullying her son dealt with through middle school and now into high school. (5T32:1-16). Still, no action was taken to protect Respondent H.M. (Id.).

The jury's verdict was not merely supported by Respondents' own testimony; very much to the contrary, same was also wholly supported by Defendant J.H.'s own disciplinary record maintained by Appellant MTBOE which was presented to the jury at trial. (Pa000350-000352). Indeed, in addition to witness testimony, limited portions of Defendant J.H.'s aforementioned disciplinary record submitted to the jury demonstrated that Appellant MTBOE, quite clearly, was aware of the likelihood of Defendant J.H. one day brutally attacking Respondent H.M. on the basis of his perceived sexual orientation. (See Pa000350-000352). Even before the brutal attack on November 25, 2015, Defendant J.H.'s disciplinary record evinces that during his time enrolled in Appellant MTBOE schools, he was disciplined for aggressive behavior, fighting, bias incidents, bullying, sexual harassment, profanity, and other violations of Appellant MTBOE's harassment, intimidation and bullying ("HIB") policies. (Pa000350-000352). Critically, the portion of Defendant J.H.'s disciplinary history admitted at trial established the following incidents:

| Date of Incident | Infraction | Action[9] |
|---|---|---|
| December 16, 2008 | Aggressive Behavior | Recess Detention |
| November 12, 2010 | Bullying | None |
| November 19, 2010 | Bullying | Student Conference |
| December 16, 2011 | Fighting | 2 Days ISS, 1 Day OSS |
| September 19, 2012 | Punching | 1 Day ISS, 1 Day OSS |

[9] "OSS" = Out-Of-School Suspension; "ISS" = In-School Suspension

| | | |
|---|---|---|
| February 1, 2013 | Bias Incident[10] | 2 Days ISS |
| April 19, 2013 | Fighting | 2 Days ISS, 3 Days OSS |
| May 23, 2013 | Punching | 6 Days OSS |
| October 9, 2014 | Sexual Harassment[11] | 10 Days OSS |
| October 27, 2015 | HIB Violation[12] | 5 Days OSS |
| November 25, 2015 | Simple Assault[13] | 10 Days OSS |
| September 27, 2016 | Bias Incident[14] | 5 Days OSS |
| December 9, 2016 | Bias Incident[15] | 10 Days OSS |

(Pa000350-000352). Thus, it was not merely Respondents' testimony which supported the contention that he complained to several officials of Appellant MTBOE about the incessant harassment and discrimination he endured at the hands of Defendant J.H.; rather, Appellant MTBOE also had clear notice of Defendant J.H.'s discriminatory animus and penchant for violence and/or aggression. (Pa000350-000352). Defendant Goodall—the principal of Monroe Township High School on the date in question—testified that he was aware that Defendant J.H. exhibited homophobic animus prior to the date of his violent attack of Respondent H.M. (9T66:18-69:23). To that end, Appellant MTBOE's suggestion that there is no evidence of Defendant J.H.'s disciplinary record which suggests that he was capable

[10] Defendant J.H. used the "N-word" towards another student in connection with said incident.
[11] Defendant J.H. made a joke about gay men in connection with said incident.
[12] Defendant J.H. called another student "gay ass" and a "queer" in connection with said incident.
[13] This is Defendant J.H.'s punishment for violently assaulting and battering Respondent H.M. on the date in question.
[14] Defendant J.H. tweeted "N***** are such fags in this school…" in connection with said incident.
[15] Defendant J.H. called another student the "N-word" and an "ape," and stated that said student should "go back to Africa," in connection with said incident.

of the violent November 2015 attack on Respondent H.M. and/or that same was motivated by Defendant J.H.'s homophobic animus is patently false. Further, the evidence elicited at trial evidences that Appellant MTBOE completely and utterly fumbled the ball with respect to its handling of the investigation of the fight. That much is clear because even though a known homophobic student was repeatedly calling Respondent H.M. a "faggot" just moments before brutally assaulting Respondent H.M., Appellant MTBOE did not even suspend Defendant J.H. because of this homophobic animus; rather, Defendant J.H. was suspended only due to fighting. (9T68:22-69:23). That evidence alone, which shows Appellant MTBOE's complete and utter failure to properly investigate and remediate complaints of discrimination and harassment, wholly supports the jury's finding of liability as against Appellant MTBOE at trial.

Further evidence elicited at trial exemplified, again contrary to Appellant MTBOE's position herein, that Respondent H.M. did, in fact, discuss Defendant J.H.'s harassment and discrimination of Respondent H.M. with his treating therapist. Indeed, treatment records from Respondent H.M.'s treating psychologist, Dr. Mandell, make direct reference to Defendant J.H. and his harassment of Respondent H.M. In correspondence dated September 19, 2016, Dr. Mandell memorialized the following:

> I have been treating [Respondent H.M.] in psychotherapy since September, 2015 for depression on a weekly,

> individual basis. In December, 2015, he was beaten up in the boys' locker room at Monroe High School. As a result of the injuries which he incurred in the altercation he received medical and dental treatment. The boy involved in the incident was suspended from school and did not return to school for the rest of the school year.
>
> Upon return to school for the 2016-7 year, [Respondent H.M.] was surprised to see the boy who hurt him had returned to school. He noted that he experiences panic, rapid heartbeat, sweating and general inability to problem-solve. He has been late for class several times as he has taken the "long way" around school in order to not see the boy in the hall. He noted to me that he has repeated thoughts about what happened last year and is having difficulty focusing on the subjects being taught in class. These symptoms are consistent with Post Traumatic Stress Disorder. I am attempting to treat him for his disorder, but I am concerned with the effect that it will have on his grades and overall functioning in school.

(Pa000349). Again, documentary evidence fully corroborated Respondent H.M.'s trial testimony relating to the severe emotional distress he endured as a direct result of the hostile classroom environment and November 2015 violent attack to which he was subjected.

Also, whether Respondent H.M. complained about Defendant J.H.'s harassment to Cathy Ielpi ("Ms. Ielpi") does not undermine the jury's findings in any way. Ms. Ielpi is not the only employee of Appellant MTBOE who needed to be on notice of Defendant J.H.'s harassment of Respondent H.M. to hold Appellant MTBOE liable for violations of the NJLAD. Indeed, Appellant MTBOE's notice of same, by way of Defendant J.H.'s disciplinary record as it relates to harassment,

bullying, bias incidents, fighting, and HIB violations, is thoroughly documented in the limited portions of his disciplinary record admitted at trial. (Pa000350-000352). To the extent that Respondent H.M. "admitted" in his testimony to have never complained to Ms. Ielpi, Appellant MTBOE was free to call Ms. Ielpi to testify in this matter to discuss whether Respondent H.M., ever, in fact, complained to her about the harassment he endured at Appellant MTBOE schools. Furthermore, even assuming Respondent H.M. made any "admissions" – which he did not – testimony showed that Respondent H.M. complained to faculty about Defendant J.H.'s harassment in high school and Respondent S.M. complained about same with faculty and Respondent H.M.'s guidance counselor as recently as the summer before Respondent H.M. was viciously attacked in the locker room. Despite having Ms. Ielpi and her testimony at their own disposal, however, Appellant MTBOE chose not to call her (or anyone, for that matter) as a witness to corroborate any of Respondent H.M.'s alleged "admissions," or undermine any of his testimony.

Appellant MTBOE also takes issue with the jury's determination that Respondent H.M. was not at fault for the injuries he suffered as a result of being violently and viciously assaulted by Defendant J.H. in the locker room. Appellant MTBOE's theory of the case as to Respondents' negligence claim is that Respondent H.M. was at fault for "taunting" Defendant J.H. and that said taunting "caused" Defendant J.H. to brutally attack Respondent H.M. until Respondent H.M.'s right

orbital bone was fractured. While Appellant MTBOE pursued this theory at trial, the jury's finding that Respondent H.M. was not comparatively at fault for his injuries was hardly a "manifest miscarriage of justice."

In addition to the extensive testimony and documentary evidence substantiating Respondent H.M.'s claims, the jury was shown a video depicting Defendant J.H.'s brutal assault and battery of Respondent H.M. on November 25, 2015. (DA100). The fifty-nine (59) second video begins by showing Respondent H.M. kneeling on the ground and smiling as Defendant J.H. slowly approaches Respondent H.M. until he suddenly begins punching Respondent H.M. repeatedly in the face. (Id.). Defendant J.H. is then seen walking away with Respondent H.M. following behind. (Id.). Respondent H.M. testified that he followed Defendant J.H. because he wanted to ask Defendant J.H. why he would attack Respondent H.M. in that way. (4T92:1-93:3). Then, the video shows Defendant J.H. continuing to mercilessly beat Respondent H.M. until he slammed into a locker and fell to the ground. (DA100). While Appellant MTBOE could have certainly presented evidence to pursue its theory Respondent H.M. instigated the fight and was allegedly contributorily negligent, it did not. The only evidence the jury was left to consider was that elicited by Respondents in their case-in-chief and on cross-examination – which overwhelmingly supports the jury's verdict.

The aforementioned recording of Defendant J.H.'s violent attack was also

presented in light of Respondent H.M.'s testimony as to how Defendant J.H. tormented and harassed Respondent H.M. based on his perceived sexual orientation ***for years***. Respondent H.M. testified that just months before the attack, Defendant J.H. was calling Respondent H.M. homophobic slurs, kicking the back of his chair, and throwing objects at Respondent H.M. in driver's education class. (4T84:20-85:16). Testimony at trial further evidenced that Respondent H.M. asked his teacher, Defendant Lee, for permission to move his seat and for Defendant J.H. to be reprimanded for said harassment and discrimination. (Id.). Once again, this harassment followed years of Defendant J.H. directing homophobic slurs towards Respondent H.M. in middle school and into high school. (Id.).

Regarding the moments leading up to the assault on November 25, 2015, Respondent H.M. testified that on November 25, 2015, Defendant J.H. was mocking Respondent H.M.'s friend, who is gay, and making homophobic remarks. (Id.). Respondent H.M.—tired of being incessantly harassed and called homophobic slurs by Defendant J.H.—decided to stand up for his friend and attempt to humiliate Defendant J.H., hoping he would back off. See Id. Nonetheless, Defendant J.H. exploded and proceeded to brutally attack Respondent H.M. in response to his efforts to defuse the situation. Again, while Appellant MTBOE was free to pursue their theory that Respondent H.M. was at fault for allegedly instigating the fight that led

to his fractured right orbital bone, the jury's findings in favor of Respondents is hardly a manifest injustice, as Appellant MTBOE ***presented no evidence***.

Additionally, while Appellant MTBOE was free to disagree with the jury's findings, there was ample evidence presented to the jury supporting the verdict that Appellant MTBOE was on notice of Defendant J.H.'s harassing and violent nature and, yet, failed to take any action to stop it. Whether Appellant MTBOE chooses to recognize it or not, the November 25, 2015 assault of Respondent H.M. by Defendant J.H. was the "boiling over" point of years of harassment, bullying, bias incidents, fighting, and HIB violations by Defendant J.H. Defendants failed to acknowledge and/or accept this prior to trial, failed to do so during trial, and based upon the instant Appeal, they still fail to recognize same.

While Appellant MTBOE was certainly permitted to—and did in fact—argue to the jury the aforementioned evidence suggests Respondent H.M. "instigated" the attack on November 25, 2015, it presented ***no case*** and relied exclusively on testimony on cross-examination to flesh out its theory in that regard. Of course, the jury ***could have*** found Appellant MTBOE's theory to be founded; however, the inescapable reality is that the jury's verdict in favor of Respondents was supported by the extensive evidence presented at trial.

Moreover, it bears repeating that Appellant MTBOE outright declined to put on a single witness to develop any of its theories allegedly undermining Respondent

H.M.'s credibility. Meanwhile, Respondents presented (a) testimony from nine (9) party and fact witnesses; (b) relied upon extensive written documentation and video and audio recordings, with twenty-three (23) trial exhibits in total that were published to the jury; and (c) expert testimony and reports from four (4) separate experts[16], all of which demonstrated Appellant MTBOE's multiple violations of the NJLAD and negligence. While the jury was not required to accept the evidence proffered by Respondents as the truth, Appellant MTBOE did not flesh out any of its theories in defense of Respondents' claims through any evidence whatsoever. Accordingly, and contrary to what the Appellant MTBOE would have the Appellate Division believe, Appellant MTBOE has failed to demonstrate that the verdict was clearly and convincingly a "miscarriage of justice" warranting a new trial pursuant to Rule 4:49-1(a). The jury in this case did precisely what our judicial system calls upon juries to do: find facts and determine which party should prevail. Appellant MTBOE is not entitled to a "do-over" simply because the verdict was not in its favor and disturbing the jury's verdict in light of the evidence presented before it would be a grave miscarriage of justice.

[16] Said experts were Edward Dragan, Ed.D., who served as a liability expert, and Jeffrey Singer, Ph.D., Cary Skolnick, M.D. and Joel Confino, M.D., who served as damages experts.

## V. CONCLUSION

Accordingly, for the reasons set forth above, the verdict sheet and jury charge presented to the jury for deliberations was not confusing, ambiguous, or misleading in any way. The jury charge instructed the jury on the applicable controlling law with respect to Respondents' NJLAD-based and negligence claims and subsequently provided the jury with a verdict sheet to report their findings. Appellant MTBOE has completely and utterly failed to demonstrate that the verdict sheet herein warrants a new trial and, accordingly, the trial court's decision should be affirmed.

Respectfully submitted,

*/s/ Austin B. Tobin*
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Dated: December 11, 2024

METHFESSEL & WERBEL
A Professional Corporation



**Superior Court of New Jersey – Appellate Division**
**Letter Brief**

Appellate Docket No. A-001256-23

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December 18, 2024

Letter Brief on Behalf of Respondents Board of Education of the Township of Monroe in the County of Middlesex, Robert Goodall, Anthony Gambino and Daniel Lee

S.M. O/B/O H.M. Plaintiff

v.

Board of Education of the Township Of Monroe in the County of Middlesex, J.H., S.H., A.H., Robert Goodall, Anthony Gambino, Daniel Lee, ABC Corporations 1-5 (Fictitious Names Describing Presently Unidentified Business Entities), And John Does 1-5 (Fictitious Names Describing Presently Unidentified Business Individuals) Defendants

Case Type: Civil
County/Agency: Middlesex
Trial Court/Agency Docket No.: MID-L-2756-17
Trial Court Judge/Agency Name: HON. ALBERTO RIVAS, J.S.C.

# TABLE OF AUTHORITIES

## Cases

To the Honorable Judges of the Appellate Division:

Conspicuously absent from Respondent's Brief is any attempt – beyond a one self-serving, conclusory statement[1] - to address the crux of the appeal: **A jury verdict sheet has four purposes and none were met by the NJLAD portion of the verdict sheet.** It is beyond dispute that the lone NJLAD liability question did **not** (1) require the jury specifically consider the essential issues of the case; (2) clarify the court's charge to the jury, (3) clarify the meaning of the verdict, or (4) permit error to be localized.[2] See Sons of Thunder, Inc. v. Borden, Inc. 147 N.J. 396, 419 (1997). Thus, the jury verdict sheet was plainly inadequate.

The verdict sheet had no chance of meeting its purposes because the Trial Court coopted an inapt Model Jury Interrogatory and then further corrupted its application by not following the stated dictate that a separate question be provided for each prong in dispute. That dictate, of course, perfectly aligns with each of the recognized purposes of a verdict sheet, which leads to the obvious conclusion that the failure to abide by the dictate inherently results in interrogatories so misleading, confusing, or ambiguous that they produced an unjust result. See Mogull v. CB Commer. Real Estate Group, Inc., 162 N.J. 449, 468 (2000).

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[1] Respondent makes the plainly indefensible assertion that "the verdict sheet submitted to the jury was clear and required the jury to consider the essential elements of Respondents' NJLAD-based claims." **Pb27**

[2] Respondent touts the verdict sheet as "helpful, concise, and unambiguous," instead of judging the sheet against the applicable standards and stated purposes set forth in controlling caselaw.

It bears emphasizing that the first purpose is to require the jury to specifically consider the essential issues of the case. Asking the jury whether the Appellant "subjected" Respondent to harassment – as the sole NJLAD liability interrogatory – did not require the jury to specifically consider each of the six disputed prongs i.e., the essential issues. As to the second purpose – clarifying the court's charge – it is clear that asking the jury if Appellant "subjected" Respondent to harassment – does nothing to clarify the charge. As to the third and fourth purposes, again we have no idea what the jury considered or determined. Such a result is unjust on its face – particularly when Respondent had submitted appropriate jury interrogatories to the Trial Court - and warrants a reversal for a new trial.

For the sake of completeness, Appellant makes the following observations regarding Respondent's Brief.

Respondent celebrates the jury's brief deliberations as indicative of "clarity" and a lack of confusion. **Pb36** First, for the reasons set forth above, on its face the jury verdict sheet plainly did not offer even a smidge of clarity; in short, there is no reason to believe there could have been clarity, particularly given the origin of the interrogatory. At step two, had there been "clarity" and a lack of confusion, the jury would have to had to deliberate in a two-week trial on six disputed separate questions on the NJLAD claim, then on the issue of the unliquidated damages amount on the NJLAD claim, then on four disputed prongs of the Tort Claims Act claim including

arriving at another unliquidated damages amount. In short, had there been "clarity," deliberations would have taken significantly longer than seventy-five minutes. Said otherwise, the jury's quick verdict was not a byproduct of "clarity" but instead the fact that the verdict sheet omitted - thereby allowing the jury to ignore – the six hotly disputed questions.

Second, Respondent also spends a great deal of time recapitulating the evidence he feels corroborates his claim. But this misses the point. As Respondent correctly points out, Appellant has decided to keep this appeal exclusively focused on the fatally flawed verdict sheet to the exclusion of the weight of evidence issue. Thus, Appellant's reference to the factual record is to simply demonstrate the significant disputes brought out over the two-week trial that the jury would have been required to consider if presented with an appropriate jury verdict sheet, furthering the point that it is impossible to believe that the jury did so given the brief deliberations. In short, there was far too much countervailing evidence – not to mention the complete absence of even one corroborating eyewitness to the years of alleged harassment - for the jury to have reached a verdict on all of those questions so quickly. This covers disputes as to both the NJLAD and Tort Claims Act claims.

As to some of those factual disputes centering around whether there in fact was any history of harassment and bullying, it is interesting to note in briefing the Respondent argues that it is of no moment that the plaintiff admittedly did not tell

Cathy Ielpi of any alleged harassment. Again, he did not report this alleged long-term, incessant sexual orientation-based bullying to his closest confidante, Cathy Ielpi, who happened to be the school anti-bullying specialist and the advisor to the Gay Straight Alliance, a club in which the plaintiff was a very active participant and had as its prime directive the combating of harassment and bullying based upon sexual orientation. Respondent's assertion that plaintiff's admission that he never told Ms. Ielpi of this harassment has no significance is facially absurd, which is probably why counsel did not make such an argument in closing to the jury. It is also probably why plaintiff initially testified at trial that he had told Ms. Ielpi of the harassment and bullying, until he was confronted with his conflicting sworn deposition testimony and conceded that he had not told her.[3]

Another piece of evidence that counsel chose to ignore both in briefing and in closing arguments is the video of the moments leading up to the physical altercation in the locker room which, even the plaintiff himself conceded, evidenced no prior interaction or relationship of any kind between plaintiff and the co-defendant, much less a longstanding history of torment. Instead, the students appeared completely unfamiliar with one another and despite the heated words there was not one homophobic slur. Notably, this is not addressed in Respondent's Brief, nor was it addressed or attempted to be explained away in closing argument at trial.

[3] In light of the above, the defense did not see any need to call Ms. Ielpi at trial.

Curiously, Respondent's Brief purports to cite evidence refuting the fact that plaintiff never reported any pre-altercation bullying to his treating psychologist. But the evidence at trial, which consisted of the psychologist's daily notes, confirmed plaintiff never reported any such bullying. Again, counsel did not argue otherwise in closing arguments. However, in subsequent briefing, Respondent cites Dr. Mandell's September 19, 2016 letter (almost one year after the altercation) which makes no mention of the plaintiff ever having advised him of bullying in the period pre-dating the November 2015 altercation. The letter itself speaks only to having treated the plaintiff for depression prior to the locker room altercation but makes no mention of any complaints of bullying during that period; at trial, it was brought out that there was no mention in Dr. Mandel's notes of any bullying. In fact, the letter does not even make mention of any bullying occurring after the altercation, but instead discusses issues of PTSD arising from the altercation.

With regard to the Tort Claims Act claim, which obviously also had to be deliberated about by the jury, Respondent ignored in briefing and at trial the indisputable evidence at trial that the plaintiff – per the video and his own concession at trial – of the plaintiff's own comparative fault in the injury sustained in the November 2015 physical altercation. Plaintiff admitted to – and the video showed him - repeatedly taunting the co-defendant. Then after the initial altercation had ended without significant injury, plaintiff pursued the co-defendant in an attempt to

hit him, the latter being demonstrated both by plaintiff's admission in the secret audio recording of the police interview and the video showing the plaintiff with a cocked fist immediately before being struck with the injuring punch.

Again, Appellant's purpose in citing the countervailing evidence – and absence of corroborating evidence - is not to argue about the weight of evidence, but to demonstrate the extensive and fertile grounds for deliberation, further demonstrating it is inconceivable that the jury could have decided each and every NJLAD prong – as well as the other issues - in merely seventy-five minutes.

While not addressing the above factual disputes now or at trial, Respondent's Brief reprises the "added insult to injury" and the educational malpractice themes, which further leaves one to wonder what issues the jury deliberated, how the jury interpreted the term "subjected" and in general what the verdict means.

Finally, as a last refuge, Respondent's extols the Trial Judge's "carefully and painstakingly" charging of the jury as a cure-all for the jury verdict sheet that indisputably did not meet any of the purposes of a verdict sheet. Again, this completely flips the relationship between the charge and verdict sheet. It is absurd to expect a jury to sufficiently digest and understand a perfunctorily read 53-page jury charge, which lists and expounds upon six separate NJLAD prongs among other things. That is exactly why the recognized purposes of the jury charge include requiring consideration of all the essential elements and clarifying the charge. That

is exactly why the Note to Model Jury Interrogatory 2.21 specifically instructs the judge to include a separate question for each disputed prong. Instead here, the jury was simply asked whether defendant "subjected" plaintiff to harassment.

In conclusion, Appellant respectfully requests a reversal of the NJLAD jury verdict and a remand for a new trial on the NJLAD claim.

Respectfully submitted,

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