SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A—003232-23

MARIELLE KUCZINSKI,	:	CIVIL ACTION
Plaintiff/Appellant,	:	**ON APPEAL FROM**
-v-	:	SUPERIOR COURT OF NEW JERSEY
STATE OF NEW JERSEY, NEW JERSEY STATE POLICE, MARQUICE D. PRATHER, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY, AND JOHN DOES 1-10, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES	:	LAW DIVISION MIDDLESEX COUNTY DOCKET NO. MID-L-000225-18 **SAT BELOW** HON. GARY K. WOLINETZ, J.S.C.
Defendant/Respondents.	:	

BRIEF AND APPENDIX ON BEHALF OF APPELLANT, MARIELLE KUCZINSKI

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

TABLE OF APPENDIX

VOLUME I – (Pa01-Pa175)

TABLE OF APPENDIX

VOLUME II – (Pa177-Pa367)

(Excluding Confidential Exhibits E, G, I, J, K, L, M, N)

TABLE OF APPENDIX

VOLUME III – (Pa368-Pa576)

TABLE OF APPENDIX

VOLUME IV – (Pa577-Pa749)

(Excluding Confidential Exhibits X, Y and Z

TABLE OF APPENDIX

VOLUME V – (Pa750-Pa875)

(Excluding Confidential Exhibits Pa795-Pa828)

TABLE OF APPENDIX

VOLUME VI – CONFIDENTIAL - (Pa176-Pa344) (Pa351-Pa365) (Pa598-Pa637) and (Pa812-Pa828)

RULE 2:61(a)(1) STATEMENT OF ALL ITEMS SUBMITTED TO THE TRIAL COURT ON THE SUMMARY JUDGMENT MOTION

ITEM SUBMITTED: **APPENDIX PAGE:**

PRELIMINARY STATEMENT

This appeal involves a fundamental right to be free from the abuse of power of the New Jersey State Police through the actions of its Troopers. The trial court granted the Defendants' Motion for Summary Judgment despite the genuine issues of material facts that were presented. In analyzing the trial court's decision, it reads more like a decision made during a bench trial than a decision on a Motion for Summary Judgment.

Moreover, the trial court's analysis seems somewhat biased in favor the New Jersey State Police when Judge Wolinetz writes that "the vast majority of State Troopers place their lives on the line for New Jersey residents on a daily basis." Time and time again in the trial court's decision, it baselessly asserts that Plaintiff, Marielle Kuczinski ("Plaintiff"), was not a victim of the Defendants, Marquice Prather, the New Jersey State Police and the State of New Jersey (collectively "Defendants"), actions. The moment Trooper Prather took Plaintiff's cell phone back to his troop car, he committed a crime – and Plaintiff was the victim of that crime. The trial court erred when it concluded that absent proof that Trooper Prather disseminated her personal photographs, he did nothing wrong. This offensive position denies that Plaintiff was violated when Trooper Prather viewed the photographs with his own eyes.

The trial court ignored the fact that the New Jersey State Police, upon concluding its internal investigation, never notified Plaintiff of its conclusions into Trooper Prather's conduct. Furthermore, the trial court ignored that Trooper Prather used the same modus operandi involving Plaintiff's motor vehicle stop as he did for all of his other victims. Therefore, Plaintiff now asks this Court to reverse the trial court's decision to grant summary judgment and to remand this case back to the trial court for a trial on all issues.

PROCEDURAL HISTORY

Plaintiff filed her Complaint against Defendants on January 11, 2018. (Pa50). Defendants filed an Answer to the Complaint on June 28, 2021. (Pa74). On January 31, 2024, Defendants filed a Motion for Summary Judgment. (Pa93). Plaintiff filed a Brief in Opposition to Defendants' Motion for Summary Judgment on April 03, 2024. (Pa802). Defendants filed a Reply Brief in Further Support of their Motion for Summary Judgment on April 08, 2024. (Pa829). The Honorable Gary K. Wolinetz, J.S.C. heard oral argument on Defendants' Motion for Summary Judgment on April 12, 2024. (1T)[1]. After oral argument, Judge Wolinetz reserved his decision, and on May 09, 2024 entered an Order and wrote a Statement of Reasons granting Defendants' Motion for Summary Judgment dismissing Plaintiff's Complaint. (Pa1, Pa3). Plaintiff filed a Notice of Appeal to this Court on June 20, 2024. (Pa869).

[1] 1T – Transcript of April 12, 2024.

STATEMENT OF FACTS

Plaintiff was stopped by New Jersey State Trooper Marquis D. Prather on Interstate 95 in Hamilton Township, New Jersey. (Pa243). Plaintiff did not have her insurance card in her possession and Trooper Prather directed Plaintiff to request a picture of the card for proof of insurance." (Pa243). Plaintiff handed over her cell phone to Trooper Prather, who then took the phone and went back to his vehicle. (Pa243). As Trooper Prather walked back, a cell phone with a lighted screen could be seen in his left hand. Upon his initial return to his troop car, the interior audio was audible. (Pa245). However, at 22:19:40, all interior troop car audio related to the stop becomes unavailable. (Pa246). At 22:29:50, after being in the troop car for approximately ten minutes with Plaintiff's cell phone, Trooper Prather returned to vehicle. (Pa246). Plaintiff's lit cell phone can be seen in Trooper Prather's right hand. (Pa246). Trooper Prather was in his troop car with Plaintiff's cell phone for approximately twelve minutes, but his only actions were to issue a written warning. (Pa244). Defendants' own investigation report revealed that: "[a]lthough the DIVR microphone indicated that it was still on and working, there is no audio when Tpr. Prather returned to Ms. Kuczinski's vehicle. As a result, the content of their conversation is unknown." (Pa245)

Trooper Prather was charged with Third Degree Invasion of Privacy, Fourth Degree Tampering with Physical Evidence and Fourth Degree Falsifying or

Tampering with Records. (Pa330). Trooper Prather pled guilty to all of the above crimes. (Pa339). Trooper Prather was fired from the New Jersey State Police and forced to forfeit his employment with the State of New Jersey, being "forever disqualified from holding any office or position of honor, trust or profit" with the State. (Pa340).

Detective Sergeant Tietjen initiated an investigation based on allegations that Trooper Prather "in the performance of his duties as a road trooper, conducted motor vehicle stops of young women and asked them to unlock and provide their cellular telephones under false pretenses." (Pa813). "Prather would then take custody of the phones for periods of time during the stops and review them in his troop car." (Pa813). Trooper Prather used his position as a New Jersey State Trooper to request women's telephone numbers and/or provide his telephone number to them during motor vehicle stops and would subsequently contact them or ask them to contact him. (Pa813).

A "random sampling" of Trooper Prather's stops were reviewed. (Pa813). The investigation revealed that Trooper Prather ran "full inquiries" on a high number of vehicle registrations that were not related to motor vehicle stops. (Pa813). It further revealed that the inquiries of vehicles that were registered to females between the ages of 20-35 were often followed up with driver's license number inquiries which would provide MVC photographs of those women to Trooper Prather. (Pa814).

Moreover, Trooper Prather was "in the practice" of falsely reporting drivers' genders as male to disguise the facts that he stopped a high number of females. (Pa814). Furthermore, there were a "significant amount of reported audio malfunctions," which were ultimately determined to be Trooper Prather purposely deactivating his wireless microphone. (Pa814).

The internal investigation was initiated when three (3) complainants, whose names were redacted, made allegations against Trooper Prather. (Pa818). One of the complainants telephoned the Office of Professional Standards hotline to file a complaint concerning an incident that occurred on August 20, 2016. (Pa818). It is not indicated on what date this person contacted the Office of Professional Standards. (Pa818). The report states that "[a]s a result of the allegations of [something redacted] two separate matters regarding allegations against Trooper Prather were reclassified as misconduct and will be part of this investigation." (Pa818). The report then addresses Trooper Prather's misdeeds relative to two matters, namely: on March 22, 2016, a complainant, whose name was redacted, telephoned the Office of Professional Standards hotline to report misconduct regarding Trooper Prather; and on October 05, 2016, a mother telephoned the Holmdel Police station to report Trooper Prather's misdeeds relative her daughter earlier that day. (Pa190). It is not revealed what the "reclassified as misconduct" was

originally labeled. (Pa190). It is not revealed when the "reclassified as misconduct" incidents originally occurred. (Pa190).

The report indicated that "[d]ue to the claims by the women interviewed that Trooper Prather took possession of their cell phones, and the fact that he had no lawful or legitimate purpose to do so," the phones would be analyzed by the Cyber Crimes unit. (Pa205). The investigation revealed a "trend" where the duration of stops did not comport to the action taken. (Pa822) The report stated that "[a]lthough this investigation continued to identify additional motor vehicle stops and possible victims of Trooper Prather, the Division of Criminal Justice indicated they would not be pursuing the additional crimes identified in the NJSP Investigation Report. Based on what has been uncovered to date, and the fact that only nine months of patrol activity have been reviewed, it is apparent that a complete review of Trooper Prather's career as a New Jersey State Trooper would uncover additional victims as well as support and/or identify additional crimes. However, based on DCJ's determination, all investigative efforts are suspended." (Pa827).

It was reported that Trooper Prather ran "full" inquiries on a high number of vehicle registrations that were not related to motor vehicle stops. Furthermore, the inquiries of vehicles that were registered to females between the ages of 20-35 were often followed up with driver's license number inquiries which would provide MVC photographs of those women. (Pa826). Trooper Prather knew the extent to which his

crimes were both depraved and illegal as noted by his comment that "I'm so sick for doing that lol., fired!" sent as a text message to a cohort to whom he had sent an explicit photo from one of his stop victims. (Pa229).

Plaintiff was already dealing with health and mental issues when the stop occurred. (Pa129). Plaintiff testified at her deposition that although she is not alleging physical or economic damages, she suffered from emotional damage as a result of Trooper Prather's conduct as alleged in the Complaint. (Pa128).

Plaintiff also testified that she was advised during the first interview with the State Police that she was the victim of a crime. (Pa130). Plaintiff testified that after the analysis of her cell phone she was advised that "the data for the iPhone was incompatible for their system, meaning they could not trace the pings of what I may or may not have had on my phone at that point in time with their database. So they – they said it was inconclusive for me to know. There was no way to trace it, they said." (Pa132). The "it" to which Plaintiff was referring were her "personal pictures that may or may not have been" disseminated. (Pa132). Plaintiff confirmed that she was advised that due to the limitation of technology, the investigators were unable to determine whether or not her pictures were found elsewhere. (Pa132). Plaintiff testified that she was advised that her pictures "may be out" there and that "[t]hey said there was no way to find them[.]" (Pa132).

Plaintiff testified that the investigators indicated to her that they needed her cell phone to ascertain whether her photographs were disseminated to porn sites. (Pa134). Plaintiff testified that she was advised that Trooper Prather had her pictures; the investigation for which they needed her cell phone was to ascertain where they were disseminated. (Pa134). Plaintiff testified that it was replayed to her "over and over" that she was the victim of a crime. (Pa134).

Plaintiff testified that subsequent to the investigation into her cell phone, she was never advised whether any sexually explicit pictures on her phone were found on Trooper Prather's phone. (Pa143). Plaintiff testified that the first time she was subject to a police motor vehicle stop after the incident with Trooper Prather, she had a "full-fledged anxiety attack" including "sweating through her clothes." (Pa144).

As a direct and proximate result of the illegal actions of Trooper Prather, Plaintiff was forced to undergo the mortifying process of having men, with whom she was unacquainted, view explicit pictures of her body. (Pa149-Pa150). Plaintiff has relatives who are police officers, in addition to her father being a retired police officer; prior to the incident, she trusted police and believed they were protectors. (Pa151). Subsequent to the incident, Plaintiff lost trust for police officers, having "no reason" to trust them anymore. (Pa151).

Plaintiff's expert report, provided by Dr. Nancy Burleigh Gallina, Ph.D. This report addresses the psychological impact the actions of Trooper Prather had, and continues to have, on Plaintiff. (Pa352). Dr. Gallina's report touches on Plaintiff's renewed "urge to cut herself," which harkens back to Plaintiff's history of cutting/scratching with knives and scissors such areas of her body as her wrists, arms and behind her legs. This resurfaced urge is/was a direct result of the actions of Trooper Prather. (Pa359). As a direct result of the actions of Trooper Prather, Plaintiff felt, and continues to feel, violated. Her anxiety and depression were both exacerbated by the actions of Trooper Prather. (Pa363). Dr. Gallina's diagnosis include adjustment disorder with mixed anxiety and depressed mood based on constricted affect, sadness, anxious mood and mood liability. (Pa363-Pa364). Dr. Gallina further opined that Plaintiff's social life and social attitudes changed as a direct result of Trooper Prather's actions. (Pa364). Plaintiff was caused to feel embarrassed, vulnerable and worried. Her self-esteem now fluctuates as she struggles to accept the illegal actions of Trooper Prather. (Pa364). Dr. Gallina opined that in her opinion, within a reasonable degree of psychological certainty, there is a direct causal connection between Plaintiff's mental disorders and the incident with Trooper Prather. (Pa364).

STANDARD OF REVIEW

The standard of review for an appeal of a decision pertaining to a Motion for Summary Judgment is a de novo review. *Fernandez v. Nationwide Mutual Ins.,* 402 N.J. Super. 166, 170 (App. Div. 2008). The de novo means that the Appellate Court reviews the case as if it were deciding the issues for the first time. The Appellate Court will (1) consider the evidence in the light most favorable to the appealing party, (2) determine if there are any genuine issues of material fact, and (3) review the correctness of the trial court's rulings on the law. Therefore, the trial court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. *Manalapan Realty, L.P. v. Twp. Comm. Of Twp. of Manalapan,* 140 N.J. 366, 378 (1995).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS UNDER THE THEORIES OF FAILURE TO ADEQUATELY HIRE, TRAIN AND SUPERVISE (Pa37)

The trial court erred as a matter of law in granting summary judgment to Defendants. The New Jersey Tort Claims Act provides that a public entity is not liable on the theory of vicarious liability for the acts or omission of an employee constituting a crime, actual fraud, actual malice or willful misconduct. This does not preclude liability being based on negligent hiring or negligent supervision.

In *Hoag v. Brown, 397 N.J. Super. 34 (App. Div. 2007)*, the Appellate Division differentiated between the two, stating:

> Nevertheless, a claim based on negligent hiring or negligent supervision is separate from a claim based on respondeat superior. *Schultz v. Roman Catholic Archdiocese of Newark, 95 N.J. 530, 534-35 (1984); Cosgrove v. Lawrence, 214 N.J. Super. 670, 679 (Law Div. 1986), aff'd, 215 N.J. Super. 561 (App.Div.1987*). Unlike respondeat superior liability, negligent hiring covers acts committed outside the scope of employment. *Cosgrove, supra, 214 N.J. Super. at 679-80*. It is a "primary liability" tort. *Cosgrove, supra, 215 N.J. Super. at 563; see also Adams v. City of Camden, 461 F. Supp. 2d 263, 269-70 (D.N.J.2006) (citing DiCosala ex rel. DiCosala v. Kay, 91 N.J. 159 (1982)* as support for claim against county for negligent hiring of police officer); *DiCosala, supra, 91 N.J. at 172-*74, (in private sector, tort of negligent hiring addresses different wrong from that sought to be redressed by respondeat superior doctrine); *Pacifico v. Froggatt, 249 N.J. Super. 153, 154-55 (Law Div.1991)* (New Jersey Transit could be liable for negligent hiring of its officers notwithstanding that public entities cannot be liable for the willful acts of its employees); Harry A. Margolis & Robert Novack, *Claims Against Public Entities*, comment

> on *N.J.S.A.* 59:2-10 (Gann 2007) ("Clearly this section does not prevent allocation of fault to a public entity where that entity is liable for the negligent supervision of an employee who has engaged in willful misconduct."). *Hoag* at 53-54.

In *Hoag*, a corrections officer employed by the Department of Corrections engaged in a pattern of verbal abuse, racial denigrations, and harassment, including sexual innuendo and ogling, of plaintiff prison therapist. The Appellate Division reversed summary judgment, reinstating Plaintiff's Complaint.

In the case *sub judice*, the complained of conduct by Trooper Prather went undetected for three years. It is abundantly clear that these infractions violated the New Jersey State Police Standard Operating Procedures. The central theme here is that all this information regarding Trooper Prather's misconduct was reported and in the control of the New Jersey State Police prior to the subject stop. Plaintiff respectfully submits that the illegal stops before the subject stop establish a "pattern of conduct" that was permitted by the Defendants to occur.

Insofar as Defendants have not made a showing that Plaintiff's claims are barred pursuant to claims of responsibility for their failures relative to hiring, training and supervising, they did not make a showing sufficient for the granting of summary judgment based on Plaintiff's asserted claims. Moreover, Trooper Prather engaged in a pattern of conduct that was allowed to continue for a period of over three (3) years. The facts presented to the trial court should have been allowed to be presented to a jury. The jury should have been allowed to determine if the State of

New Jersey turned a blind eye to these blatant violations constituting negligent supervision by allowing the conduct to go on for a period of over three (3) years.

The trial court further erred when it concluded that Defendants had no obligation to provide Plaintiff with a status letter regarding the outcome of the investigation. The Defendants strenuously argued and the trial court agreed that Plaintiff had no right to know what the investigation involving the violations against her revealed.

The trial court completely misinterpreted Attorney General Guideline 6.3, Investigation and Adjudication of Serious Complaints. Section 6.3.18, provides:

> In all cases, a letter shall be sent to the complainant explaining the outcome of the investigation. If the allegation was unfounded or the officer was exonerated, this conclusion shall be stated and defined for the civilian complainant. If the allegation was not sustained, the letter shall provide the complainant with a brief explanation why the complaint was not sustained (e.g., insufficient proof, lack of witnesses, etc.). If the allegation was sustained and discipline was imposed, the letter shall state that the allegation was sustained and that the officer has been disciplined according to agency procedures.

Defendants admit not fulfilling this requirement, instead setting forth irrelevant arguments relative to public disclosure of information. The trial court incorrectly concluded that Plaintiff was not a complainant, and therefore the Defendants were not obligated to send such a letter. Plaintiff was never provided this letter and continued to believe that she was a victim of Trooper Prather's conduct. Accordingly, Plaintiff respectfully asserts that the trial court erred when it granted

summary judgment to the Defendants dismissing Count Three of Plaintiff's Complaint.

LEGAL ARGUMENT

POINT II

THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO DEFENDANTS ON PLAINTIFF'S NEW JERSEY LAW AGAINST DISCRIMINATION CLAIMS (Pa40)

The trial court erred when it granted summary judgment to the Defendants on Plaintiff's New Jersey Law Against Discrimination Claims ("NJLAD"). (Pa40). The trial court incorrectly concluded that Plaintiff cannot make out a *prima facie* case of gender discrimination. (Pa 41) . This is disproven by the Defendants own actions in investigating Plaintiff's stop - and by the actions of Trooper Prather that were revealed.

In order to sustain a claim under the NJLAD, Plaintiff must show - and can show - that Defendants operated a place of public accommodation, that she was a member of a protected class and that she was denied equal treatment based on that class. *N.J.S.A.* 10:5-4, Obtaining Employment and Privileges without Discrimination; civil right, provides, in relevant part that: "[A]ll persons shall have the opportunity to . . . obtain all the accommodations, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . sex, gender identity . . . subject only to conditions and limitations

applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

The Courts of New Jersey have spoken on this issue and held that township police departments, both the building and the individual officers, are places of public accommodation as a municipal police force is nothing more than an executive and enforcement function of municipal government pursuant to *N.J.S.A. 40A:14-118.* Any state governmental agency is a place of public accommodation for purposes of inclusion under the umbrella of the NJLAD. *Ptaszynski v. Uwaneme*, 371 N.J. Super. 333, 348 (App. Div. 2004), cert. denied, 182 N.J. 147 (2004).

This right was seen to be violated where police officers insulted and threatened a transgender arrestee within a police station, which they recognized as a place of public accommodation. *Holmes v. Jersey City Police Dep 't.*, 449 N.J. Super. 600, 601 (App. Div. 2017), cert. denied, 231 N.J. 104 (2017). The Court found that a reasonable transgender person in the arrestee's position would find the environment within the police station to be hostile, threatening and demeaning sufficient to overturn the trial court's grant of summary judgment to defendants.

N.J.S.A. 10:5-5, Definitions relative to discrimination, includes: a. "Person" includes one or more individuals, partnerships, associations, organizations, labor organizations . . . . v. "Public facility" means any place of public accommodation and any street, highway, sidewalk, walkway, public building, and any other place or structure to which the general public is regularly, normally, or customarily permitted or invited."

Defendants limited their argument to asserting that Plaintiff cannot demonstrate that she was targeted based on her gender. This confusing assertion is countered by the Defendants' own actions in contacting her and conducting an investigation of her stop as one that fit into Trooper Prather's modus operandi. It is disingenuous for them to claim that Plaintiff must now prove she was targeted because of her gender - that fact was long ago established by the Defendants themselves.

The facts establish that Trooper Prather victimized a certain class of women: young, attractive women within a certain weight range. Defendants state that there is no evidence to show that he pulled her over for this reason. Plaintiff respectfully asserts that Defendants' investigation into Trooper Prather's pattern proves this point. Trooper Tietjen acknowledged that Plaintiff's stop by Trooper Prather was similar to other victims and that Trooper Prather's conduct with Plaintiff was his modus operandi towards other victims.

Trooper Prather ran "full" inquiries on a high number of vehicle registrations that were not related to motor vehicle stops. Furthermore, the inquiries of vehicles that were registered to females between the ages of 20-35 were often followed up with driver's license number inquiries which would provide MVC photographs of those women. Despite Plaintiff fitting squarely into the category of his desired detainee, and despite his actions during the stop, which included turning off his audio, walking back to his car with her unlocked cell phone, retaining her phone for twelve (12) minutes, and issuing only a written warning, the trial court somehow believe that Plaintiff did not fit into his pattern of sexual misconduct.

It is undisputed that an employer is liable for the acts of its employees if the employer was negligent or reckless. Plaintiff respectfully submits Defendants' willful blindness, failure to supervise Trooper Prather, failure to investigate earlier complaints against Trooper Prather and failure to initiate and maintain safeguards pertaining to Trooper Prather's misuse and abuse of their computer system to run an inordinate amount of full plate inquires reveals Defendants' gross indifference, recklessness and negligence as to Plaintiff.

It bears noting that after the New Jersey State Police finally took affirmative action against Trooper Prather, it was able to easily pull records that

showed Trooper Prather's overuse of their computer system to target and prey on women. The New Jersey State Police allowed Trooper Prather's infractions to continue for over three years without ever even attempting to uncover what was happening. They allowed willful violations of their own Standard Operating Procedures, which pay much lip service to protection - but in reality, failed to uphold their own rhetoric.

The New Jersey State Police allowed their computer systems to be accessed - unchecked - by Trooper Prather, they failed to notice (or failed to care) about his abuse of their system, they failed to follow their own guidelines and Standard Operating Procedures and neglected to supervise Trooper Prather in any meaningful way. They rely on their willful blindness of his actions for three years to attempt to escape culpability.

Defendant cited to *Davis v. Devereux Foundation*, 209 N.J. 269 (2012) for the proposition that a master is not liable for the torts of his servant acting outside the scope of their employment. However, *Davis* goes beyond that holding to state that a master is subject to liability for the torts of his servants acting outside the scope of their employment, when: (a) the master was negligent or reckless, or (b) the conduct violated a non-delegable duty of the master, or (c) the servant purported to act or to speak on behalf of the principal and there was

reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation. *Davis v. Devereux Foundation*, 209 N.J. 269, 287-288. citing Restatement §219(2)(c).

The Supreme Court of New Jersey has addressed the issue of vicarious liability of an employer in the context and opined that:

> A defendant is entitled to assert the existence of an effective anti-sexual harassment workplace policy as an affirmative defense to vicarious liability; however, material issues of disputed fact in the context of a motion record can deny a defendant summary dismissal based on that defense. Here, the record contains numerous factual disputes, based on plaintiff's perceptions and other evidence, that raise serious questions concerning the effectiveness of the County's policy. Having presented colorable material issues, plaintiff should have the opportunity to prove that the County may be liable vicariously for sexual harassment in the workplace because the County's anti-harassment policy was no more than words, its effectiveness at preventing harassment and protecting employees undermined to the point that the County should not be protected from liability. Summary judgment should not have been granted to defendants.

Gaines v. Bellino, 173 N.J. 301, 320 (2002).

In *Brown v. City of Bordentown,* 348 N.J. Super. 143 (App. Div. 2002), an Afro American police sergeant alleged racial bias in the City's hiring of a police chief. The Court reversed summary judgment granted to the City, remanding the matter for trial. The Court explained:

> We turn to the claim against the City which prevailed on summary judgment in the Law Division on absolute immunity grounds. We

> reverse because under certain circumstances the City could be liable under agency principles for the alleged discriminatory conduct of the Commissioner in charge of public safety. Of course, the City enjoys derivative immunity for Lynch's legislative activity, discussed above. This derivative immunity does not extend to Lynch's administrative or executive activities. The City may be liable as a principal or employer under the LAD. The definition section clearly includes as "persons," ... "the State, any political or civil subdivision thereof, and all public officers, agencies, boards or bodies." *N.J.S.A. 10:5-5(e)*. An unlawful employment practice, or an unlawful discrimination practice or reprisal may impose liability on the governmental principal. *See McDonnell v. State of Illinois,* 319 N.J. Super. 324, 336 *affirmed,* 163 NJ. 298 (2000). *See Blakey v. Continental Airlines,* 164 NJ. 38, 57-59 (2000); *Lehmann v. Toys 'R Us, Inc.,* 132 NJ. 587,624 (1993); *Payton v. New Jersey Turnpike Authority,* 148 N.J. 524, 535-59 (1997).

Brown, 348 N.J. Super. at 151.

Plaintiff contends that Defendants' condoning of Trooper Prather's actions since the inception of his hiring date (when his infractions began) implicates them for vicarious liability. Defendants argue that there is no evidence that they were negligent or reckless in their actions regarding their response to the received complaints. This ignores that previous complaints by women were buried and not investigated for over two (2) years. This further ignores the three (3) years that they took no actions to supervise their officer and their failure to even attempt to keep tabs of his actions. Accordingly, Plaintiff respectfully asserts that the trial court erred when it granted summary judgment to the Defendants dismissing Count Six of Plaintiff's Complaint.

LEGAL ARGUMENT

POINT THREE

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS UNDER THE THEORY OF INVASION OF PRIVACY (Pa41)

The trial court correctly defined the tort of invasion of privacy as an "intentional intrusion, physically or otherwise upon the solitude or seclusion of another or his private affairs or concerns that would be highly offensive to a reasonable person." (Pa43) (citing *G.D. v. Kenny*, 205 N.J. 275, 309 (2011)). An action that can constitute an invasion of privacy includes "an illegal search. " *Friedman v. Martinez*, 242 N.J. 449, 465 (2020) (quoting William L. Presser, *Privacy*, 48 Cal. L. Rev. 383, 389-90 (1960)). Plaintiffs may rely upon circumstantial evidence and courts may rely on reasonable inferences drawn from the evidence presented. *Id.* at 471.

The trial court erroneously concluded that Plaintiff failed to demonstrate any evidence that Trooper Prather intruded upon Plaintiff's privacy. (Pa44). Plaintiff presented uncontroverted evidence that Trooper Prather took her cell phone back to his official vehicle contrary to Attorney General Guidelines. Moreover, Plaintiff presented reasonable inferences that should have been drawn by the trial court that when Trooper Prather had Plaintiff's cell phone, at a minimum, he looked at her personal photographs. As the trial court correctly

stated "[t]he actions alleged against Prather would certainly constitute an intentional intrusion upon Kuczinski's solitude which, in accessing her private, explicit photographs, would be highly offensive to a reasonable person."

The trial court also was mistaken when it concluded that Plaintiff failed to provide any evidence to suggest that Trooper Prather held onto her cell phone for an inordinate amount of time during the encounter. The deposition testimony of Trooper Tietjen contradicts this conclusion by testifying that Trooper Prather had held onto Plaintiff's cell phone for a lengthy period of time. (Pa383) Accordingly, Plaintiff respectfully asserts that the trial court erred when it granted summary judgment to the Defendants dismissing Count Seven of Plaintiff's Complaint.

LEGAL ARGUMENT

POINT FOUR

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS UNDER THE THEORY OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (Pa43)

The tort of negligent infliction of emotional distress has four elements: (1) a duty of reasonable care was owed by the defendant to the plaintiff, (2) that duty was breached, (3) the plaintiff suffered severe emotional distress, and (4) the breach was a proximate cause of injury. *Russo v. Nagel*, 358 N.J. Super. 254, 269 (App. Div. 2003). Defendants boldly assert that the trial court agreed that Plaintiff was not a victim of Trooper Prather's conduct as she was not in a familial or intimate relationship with Trooper Prather's victims; and she did not have a sensory or contemporaneous observation of a death or injury.

Moreover, no authority cited by Defendants nor the trial court speaks to the violation by a State Trooper of the basic tenets of decency, as does the fact pattern herein. Given the summary judgment standard that directs that all inferences are to be viewed in the light most favorable to the non-moving party, the trial Court erred by granting Defendants' Motion for Summary Judgment.

Insofar as a jury should have the power to decide whether the New Jersey State Police had a duty to protect Plaintiff from an officer they allowed to continue

to act in an inappropriate manner. Once the duty of the New Jersey State Police is established, Plaintiff's cause of action for emotional distress is easily provable.

Plaintiff respectfully asserts that Defendants did not show, sufficient for a grant of summary judgment, that the New Jersey State Police did not owe Plaintiff a duty of "reasonable care." Their failure to oversee, train, investigate and their general laisse faire attitude when complaints were lodged, reveal their willful blindness of the actions of Trooper Prather. The undisputed damages shown by Plaintiff as testified to in her deposition and proven by her medical expert report fulfill the third and fourth prongs of the test. Accordingly, Plaintiff respectfully asserts that the trial court erred when it granted summary judgment to the Defendants dismissing Count nine of Plaintiff's Complaint.

LEGAL ARGUMENT

POINT V

THE TRIAL COURT ERRED WHEN IT DETERMINED DR. GALLINA'S REPORT WAS A NET OPINION (Pa44)

The trial court erred when it determined that Dr. Gallina's psychological expert report was not supported by facts in the record. (Pa44). While Dr. Gallina's report does have some errors, her report is not unreliable as the trial court concluded. (Pa45). The whole premise of the trial court's decision on Dr. Gallina's report is that there is no evidence to substantiate Plaintiff's claims. If this Court were to reverse the trial court's decision, then Dr. Gallina's report should be allowed to be introduced into evidence at trial if Plaintiff elects to utilize her testimony. Accordingly, Plaintiff respectfully asserts that the trial court erred when it determined that Dr. Gallina's report was a net opinion.

CONCLUSION

Plaintiff therefore respectfully requests that this Court reverse the trial court's May 09, 2024 Order granting the Defendants summary judgment and remand the matter back for a trial on the issues of liability and damages. As stated previously, in analyzing the trial court's decision, it reads more like a decision made during a bench trial than a decision on a Motion for Summary Judgment. Moreover, the trial court not only erred when it concluded that there were no genuine issues of material fact, it did not give the Plaintiff any reasonable inference from the evidence submitted. Accordingly, it is respectfully submitted trial court's decision to grant Defendants' Motion for Summary Judgment should be reversed.

Respectfully submitted

/s/ Fredrick L. Rubenstein

Fredrick L. Rubenstein

Dated: December 09, 2024

MARIELLE KUCZINSKI, Plaintiff-Appellant, v. STATE OF NEW JERSEY, NEW JERSEY STATE POLICE, MARQUICE D. PRATHER, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AND JOHN DOES 1-10, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3232-23 Civil Action On Appeal from the Superior court of New Jersey Law Division, Middlesex County Docket No. MID-L-225-18 Sat Below: Hon. Gary K. Wolinetz, J.S.C.

BRIEF ON BEHALF OF RESPONDENTS, STATE OF NEW JERSEY AND NEW JERSEY STATE POLICE

Date Submitted: July 11, 2025

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

Plaintiff, Marielle Kuczinski, appeals a May 9, 2024 order granting summary judgment to the State of New Jersey and New Jersey State Police (NJSP) (together "State Defendants").

January 13, 2016 Traffic Stop

This case arises from Kuczinski's claim that Co-Defendant, Marquise D. Prather, a former New Jersey State Police Trooper, accessed private images on her personal cellphone during a traffic stop in violation of 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the United Stats Constitution the New Jersey Civil Rights Act (NJCRA), the New Jersey Law Against Discrimination (NJLAD), and various tort claims. (Pa55; Pa57; Pa59; Pa60; Pa63; Pa65; Pa68; Pa70).[2] On January 13, 2016, at approximately 10:10 p.m., Prather conducted a traffic stop, pulling Kuczinski over on Route 95 in Hamilton, New Jersey, for making an unsafe lane change. (Pa52; Pa345). The digital-in-vehicle record (DIVR) video captured Prather telling Kuczinski that he pulled her over because she had failed to maintain her lane. (Pa345). Prather asked Kuczinski to

[1] Because the procedural history and counterstatement of facts are closely related, they are combined for efficiency and the court's convenience.

[2] "Pa" refers to Kuczinksi's appendix. "T" refers to the transcript of the oral argument of State Defendants' motion for summary judgment on April 12, 2024.

produce her insurance card, which she did not have. (Pa371-372). Kuczinski asked Prather if she could ask her parents to send her a photo of the automobile insurance card to her cellphone, and he agreed. (Pa286). Kuczinski subsequently presented Prather her cellphone with the photo of her insurance card, which he took his car. Ibid. After reviewing Kuczinski's driver motor vehicle (DMV) records, Prather returned to Kuczinski's vehicle with a written warning for careless driving. (Pa345).

Since then, Kuczinski has acknowledged that "the actual motor vehicle stop itself did not raise any red flags . . . that [nothing] nefarious had happened," and that she "didn't think anything was inappropriate" about it at the time. (Pa129; Pa1333; Pa373; Pa417). Kuczinski indicated that Prather did not he say anything inappropriate or sexual, ask her out on a date, or ask for her phone numbers during the traffic stop, nor did he stalk her afterward. (Pa152).

Subsequent Complaints by Other Motorists and Investigation

On March 22, 2016, the NJSP received a complaint from a female motorist—who is unrelated to this matter—alleging that Prather had directed her to open her phone and give it to him during a traffic stop. (Pa178; Pa187). Then, on October 6, 2016, the NJSP received a second complaint from a female motorist, alleging Prather had taken her cellphone back to his trooper vehicle. (Pa188). Last, on November 16, 2016, the NJSP received a third complaint from a female motorist stopped by Prather, who indicated that Prather had

requested sexual favors in exchange for leniency and that Prather texted her after the traffic stop. (Pa174).

Shortly after the November 16 complaint, Detective Sergeant First Class (DSFC) Joseph Tietjen of NJSP's Office of Professional Standards Internal Affairs Investigative Bureau (OLPS) was tasked with investigating those complaints. (Pa383). During that investigation, OLPS confirmed that State Defendants had trained Prather on the New Jersey State Police policy prohibiting discrimination in the workplace. (Pa366).

As part of the investigation, OLPS installed surveillance equipment in Prather's vehicle, interviewed Prather, extracted information from the complainants' and Prather's cellphones, text messages from Prather's cellphone, obtained records from Prather's cellphone provider, interviewed complainants, and examined relevant DIVR footage. (Pa203-19; Pa344-49; Pa383; Pa396). On December 9, 2016 and March 6, 2017, OLPS obtained warrants to secure data related to Prather, which included iCloud materials, a connection-log history, iMessaging logs, call history, content history, iOS backup information, photos, videos, emails, and other content. (Pa229; Pa297; Pa627-29). DSFC Tietjen also reviewed surveillance video from other motor vehicle stops conducted by Prather to identify female drivers whose cellphones had been taken by Prather. (Pa207; Pa222).

OLPS identified Kuczinski as one of the female drivers who had provided Prather with her cellphone. (Pa384). In January 2017, DSFC Tietjen and another unidentified NJSP member went to Kuczinski's home to interview her about the January 13, 2016 motor vehicle stop. (Pa129). Kuczinski met with the officers in the home's doorway with her father and brother, Michael, present "throughout the entire thing." (Pa144-45).

Kuczinski alleges that the NJSP members told her that she was "definitely a victim of a crime[,]" (Pa130); however, she also stated that DSFC Tietjen had notified her that they wanted to examine her phone to "see if they could find any of [her] pictures disseminated into the world." (Pa134). Kuczinski's brother also testified at deposition that DSFC Tietjen had notified Kuczinski that "she **may** have been a victim of a cop who had been pulling people over and stealing sensitive information off their cellphone." (Pa477-478) (emphasis added).

On January 17, 2016, DSFC Tietjen conducted a recorded OLPS interview of Kuczinski, during which he explained that there was evidence that Prather was obtaining women's photos during motor vehicle stops?, and that NJSP's "cyber-crimes unit has been conducting analyses of women's cellphones to see if . . . it is possible to see when photos were accessed and what may have been accessed." (Pa372).

On February 8, 2017, Kuczinski voluntarily submitted her cellphone to OLPS and granted permission to retrieve data from her cellphone to analyze and

determine if Prather had accessed or downloaded content from it. (Pa123; Pa131). OLPS used Cellebrite[3] to extract text messages, videos and other information on Kuczinski's cellphone. (Pa506). OLPS found sexually explicit pictures on Kuczinski's phone. (Pa147).

Ultimately, the investigator concluded that Prather had transferred or viewed information on cellphones that belonged to four women, and that he had accessed a total of five images from those four women's cellphones. (Pa398). However, Kuczinski was not one of those four women; to the contrary, the investigators stated that they "did not find any evidence to indicate that [Prather] accessed [Kuczinski's] phone" or that he had taken or distributed any of Kuczinski's sexually-explicit digital data. (Pa132; Pa135; Pa143; Pa386-87; Pa393).

DSFC Tietjen testified that if his investigation had revealed that Prather viewed or download images from Kuczinski's phone, Kuczinski would be contacted, noting that any drivers who were interviewed as part of the investigation "had understood if there was no contact, then there was no evidence to suggest that the phones were accessed." (Pa393).

[3] Cellebrite is a private company that provides digital intelligence solutions, primarily to law enforcement, government, and enterprise customers, to aid in digital investigations. www.cellebrite.com (last accessed June 27, 2025).

Prather's Arrest

On December 9, 2016, Prather was arrested, and his cellphone was confiscated for purposes of OPLS's investigation of Prather's misconduct. (Pa220-221). On September 11, 2017, Prather pleaded guilty to third-degree invasion of privacy, fourth-degree tampering with evidence, and fourth-degree falsifying records. (Pa330-338).

This Litigation

On January 11, 2018, Kuczinski filed a ten-count complaint against Prather and the State Defendants, asserting the following causes of action: (1) 42 U.S.C. § 1983 liability; (2) 42 U.S.C. § 1983 Monell liability; (3) failure to adequately hire, train, and supervise employees; (4) violation of the New Jersey Civil Rights Act (NJCRA) (as to the State Defendants); (5) violation of NJCRA (as to Trooper Prather); (6) violation of the New Jersey Law Against Discrimination (NJLAD); (7) invasion of privacy; (8) intentional infliction of emotional distress (IIED); (9) negligent infliction of emotional distress (NIED); and (10) John Doe liability. (Pa51-Pa73).

Prather defaulted in the matter below (and has failed to appear in this appeal). (Pa3). The State Defendants filed an answer, discovery ensued, and State Defendants eventually moved for summary judgment. (Pa93-94).

On May 9, 2024, the trial court issued a comprehensive forty-nine-page opinion granting summary judgment on all claims as State Defendants.[4] (Pa1-49). In dismissing all of Kuczinski's claims against State Defendants with prejudice, the trial court found: (1) that State Defendants were immune from liability for Prather's criminal actions because Section 1983 and the NJCRA, do not apply to the state or the arms of the state, nor do they allow for governmental entities to be held liable under the doctrine of *respondeat superior*, and further that the N.J.S.A. 59:2-10 does not permit any intentional tort claims against the State premised on the theory of vicarious liability where the acts or omissions constitute a crime, actual fraud, actual malice, or willful misconduct; (2) no evidence that the State Defendants were aware of Prather's behaviors before Kuczinski's traffic stop as needed to support her failure to train claim, Count III; (3) no evidence that additional training that should have been in place to prevent Prather from acting in the manner that he had as needed to support her Count III; (4) no evidence that State Defendants engaged in gender discrimination as needed to support her NJLAD claim; and (5) no evidence that Prather had ever viewed, downloaded, distributed, or otherwise accessed

[4] At oral argument, Kuczinski consented to the voluntary dismissal all claims against State Defendants except Count III (failure to hire, train, and supervise), Count IV (NJCRA), Count VI (NJLAD), Count VII (invasion of privacy), and Count IX (NIED). On this appeal, Kuczinski does not challenge the dismissal of Count IV.

Kuczinski's private photographs as needed to support her claims under the NJCRA, the NJLAD, tortious invasion of privacy, and NIED.

In addition, the trial court considered whether the expert testimony provided by Dr. Gallina, which found the January 13, 2016, motor vehicle stop caused Kuczinski emotional distress, was an inadmissible net opinion. (Pa39; Pa41; Pa43). Dr. Galina's report had concluded that as a result of being informed of the January 2016 traffic stop, Plaintiff suffered emotional damage. (Pa351-365). However, as the trial court noted, the report relied on several unsupported claims, including that the trooper stole, recorded, and disseminated photographs from Kuczinski's phone; the trooper stalked Kuczinski; and two federal agents came to her home to tell her that she was the victim of a crime. (Pa48-49; Pa351-365). In addition, the report misnames the offending officer as "Trooper Paffs," and claims that State Defendants permitted "Trooper Paffs" to resign. Ibid. The trial court could not find support for any of these facts anywhere in the record, further noting that some of them were indeed "plainly false." (Pa49). Ultimately, the trial court concluded that there was no way salvage the expert report because the conclusions are based on these unsupported facts, and in the absence of a Rule 104 hearing, the report must be discarded as an impermissible net opinion. Ibid.

Kuczinski filed this appeal on April 9, 2025. (Ab1)

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DISMISSED KUCZINSKI'S CLAIMS FOR NEGLIGENT HIRING, TRAINING AND SUPERVISION.

The trial court correctly dismissed Count III because (1) Kuczinski provided no evidence demonstrating that the State Defendants were aware of Prather's behaviors; (2) Kuczinski has not explained what additional training should have been in place to prevent Prather from acting in the manner that he did, and (3) because this claim is made pursuant to Section 1983, even if Kuczinski provided any of the required evidence, the State Defendants are immune from damages. (Pa38-39).

This court reviews a grant of summary judgment de novo, using "the same standard that governs the motion judge's" decision. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged" and that "the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995). Where the movant demonstrates a prima facie right to summary judgment, the non-movant must come forward with competent

evidentiary material to show the existence of a genuine factual dispute. Heljon Mgmt. Corp. v. Di Leo, 55 N.J. Super. 306, 312 (App. Div. 1959).

To survive a motion for summary judgment, the non-moving party may not simply allege any disputed fact. Brill, 142 N.J. at 529. Instead, the evidence must demonstrate a genuine issue of material fact, such that, when viewed in a light most favorable to the non-moving party, the evidence would allow a rational factfinder to resolve the disputed issue in favor of the non-moving party. Id. at 540. An "issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). Judged by those standards, all of Kuczinski's arguments on appeal fail as a matter of law.

To establish a prima facie claim for negligent hiring, Kuczinski had to show that: (1) State Respondents "knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of" Prather "and could reasonably have foreseen that such qualities created a risk of harm to other persons" and that (2) through its negligence in hiring Prather his "incompetence, unfitness or dangerous characteristics proximately caused the injury." G.A.-H. v. K.G.G., 238 N.J. 401, 416 (2019) (citing DiCosala v. Kay, 91 N.J. 159, 173 (1982)). Similarly, to assert a claim for negligent supervision or training, a

plaintiff must prove that the employer: (1) "knew or had reason to know that the failure to supervise or train an employee in a certain way would create a risk of harm" and (2) "that risk of harm materialize[d] and cause[d] the plaintiff's damages." Ibid. Kuszinski's claims fail for three independent reasons.

First, State Respondents are immune. A plaintiff who—like Kuczinski here—asserts a negligent hiring, supervision or training claim under § 1983 faces an additional impediment: the Supreme Court has plainly stated that the State and entities that are "arms of the state" (such as NJSP here) are not considered "persons" under § 1983, and thus are immune from suit under that statute. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). Kuczinski does not even address—let alone refute—the fact that State Defendants are immune from her claims in Count III because they are not "persons" under § 1983.[5] Because Kuczinski's brief in this court does not address that argument, she has waived any opposition to it. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) (holding that issue not briefed on appeal deemed waived); Telebright Corp. v. Dir., N.J. Div. of Tax'n, 424 N.J. Super. 384, 393 (App. Div. 2012) (deeming issue waived when brief

[5] The New Jersey Supreme Court interprets "persons" under the NJCRA, the same way. See Brown v. State, 442 N.J. Super. 406, 426 (App. Div. 2015) rev'd on other grounds 230 N.J. 84 (2017) (holding that the State is not a person for purposes of the Act and is immune from a suit for damages under the [New Jersey] Civil Rights Act).

includes no substantive argument with respect to issue). Thus, this court can affirm the dismissal of Count III on that basis alone.

Second, because there is no evidence that Prather accessed Kuczinski's private images on her phone Kuszinski cannot show that she was suffered an injury for purposes of establishing her prima facie case for her negligent hiring, training and supervision claims.

Third, even if State Defendants are not immune, and Kuczinski could show that she suffered an injury, she proffered no evidence to support her a claim for negligent hiring, training or supervision. (Pa37-39). As the trial court noted, Kuczinski was required to present evidence the State Defendants knew Prather had a dangerous attribute that they could have reasonably foreseen would cause harm and/or that Prather's need for additional training was so apparent that the failure of the State Defendants to train Prather not to engage in such conduct constituted deliberate indifference. (Pa37-38). But the record is "wholly devoid of any materials to suggest either scenario" and contains "no evidence demonstrating that State Defendants were aware of Prather's behaviors." Ibid. And, as for training, the court aptly observed that Kuczinski had failed to "explain[] what additional training should have been in place to prevent Prather from acting in the manner that he did." Ibid.

Rather than point to any concrete evidence on appeal, Kuczenski offers speculation. In her view, other illegal conduct by Prather during other traffic

stops of other female motorists, which occurred around the same time of Kuczinski's stop, establishes a "pattern of conduct that was permitted by the Defendants to occur." (Ab17). Kuczenski also argues the complaints filed against Prather after her stop provide prima facie evidence that State Defendants negligently failed in hiring, training and supervising Prather. (Ab17-18). Deconstructed, Kuczinski logic amounts to the following series of assumptions 1) because Prather was found guilty of misconduct against four women in 2016, he must have previously committed the same misconduct against other women drivers in his career; 2) because of one State Defendants either were aware of that (or should have been aware) of his behavior before her traffic stop, 3) Prather's wrongful conduct would not have occurred if Prather had received better training or supervision. That conjecture does not create a material dispute of fact sufficient to overcome summary judgment, because as a threshold matter, the record was "wholly devoid" of actual evidence that Prather accessed Kuczinski's private images. Similarly, she proffered no objective evidence for a trier of fact to conclude that State Defendants were aware at the time of Kuczinski's traffic stop that Prather was viewing, downloading, distributing, or otherwise accessing the private photographs of women during traffic stops, (Pa39), and "mere suspicion that Prather may have done something inappropriate against Kuczinski without more is insufficient to create a material issue of fact," (Pa36).

The court's decision was in full accord with direction from the New Jersey Supreme Court that "fanciful, frivolous, gauzy or merely suspicious," claims are insufficient to overcome a summary judgment motion, especially in the face of uncontradicted evidence. Brill, 142 N.J. at 529, quoting Judson v. Peoples Bank & Tr. Co. of Westfield, 17 N.J. 67, 75 (1954).

Likewise, Kuczinski offered no evidence to establish that State Defendants could have, but failed to require specific training that would have prevented Prather's alleged misconduct against her. Moreover, to the extent that Kuczinski asserted a claim for discrimination under the LAD, the record shows that State Defendants trained Prather on the New Jersey State Police Prohibiting Discrimination in the Workplace. (Pa366).

Kucsinki's failure-to-train claim contains one additional aspect as to the investigating officers. She suggests that NJSP is liable because the investigating officers did not provide her a status letter about the investigation and did not disclose if Prather improperly accessed materials on her phone in alleged violation of Attorney General Guideline 6.3.18. (Ab19). That claim also fails as a matter of law, for several reasons.

First, the guideline in question requires that a status letter be sent to a "complainant explaining the outcome of the investigation." (Pa39). As the court's held and the record confirms Kuczinski was not a complainant. (Pa187).

The only complainants were the three victims who filed complaints on March 22, 2016, October 6, 2016, and November 16, 2016. Ibid.

Second, even assuming the Guidelines required NJSP to send her a letter, she points to no factual basis to assume that such a letter was not sent to Kuczinski here because the investigating officers were not properly trained on the Guidelines.

Thus, the trial court aptly dismissed all aspects of Count III.

POINT II

BECAUSE KUCZINSKI FAILED TO ESTABLISH ANY EVIDENCE INDICATING THAT PRATHER DISCRIMINATED AGAINST HER, THE TRIAL COURT PROPERLY DISMISSED KUCZINSKI'S NJLAD CLAIMS.

The court properly dismissed Count VI because there is no basis to find that State Defendants discriminated against Kuczinski on the basis of her gender or that Prather's criminal conduct constituted a violation of the NJLAD. (Pa65).

A prima facie case under the public accommodation theory of the NJLAD, requires a plaintiff to show: (1) the defendant operated a place of public accommodation; (2) that he or she was a member of a protected class; and (3) that he or she was denied equal treatment on the basis of his or her membership in said protected class. N.J.S.A. 10:5-4. Appellant cannot make this showing because Kuczinski failed to put forth any evidence that Prather viewed,

downloaded, distributed, or otherwise accessed her private photographs, and the evidence shows that Prather initially pulled her over for a legitimate purpose.

Appellant's arguments otherwise are based on her speculation that because the NJSP investigation revealed that Prather "victimized a certain class of women," she must have been pulled over on account of her gender. (Ab20). However, the DIVR shows that Prather pulled her over because she went over the line and had a hard time maintaining her lane. Ibid. There is also no evidence that Prather accessed or took photos, used his phone to take videos of videos or otherwise downloaded content from Kuczinski's phone. (Pa386-387; Pa391; Pa393).

As noted previously, the fact that Prather committed terrible acts regarding four other female drivers does not justify the inference that Prather discriminated against every woman during every motor vehicle stop in his tenure at NJSP.

Thus, without any proof that Prather discriminated against her by pulling her over because of her gender and improperly viewing, downloading, disseminating, or accessing her private photographs, she cannot support a prima facie case of discrimination. (Pa386-387; Pa391; Pa393). For these reasons, there is no issue of material fact regarding the State Defendants' actions, and therefore summary judgment is warranted as to Count Six.

POINT III

THE TRIAL COURT PROPERLY DISMISSED KUCZINSKI'S INTENTIONAL TORT CLAIMS BECAUSE THE STATE DEFENDANTS ARE IMMUNE FROM LIABILITY FOR PRATHER'S TORTIOUS CONDUCT AND KUCZINSKI FAILED TO PROVIDE EVIDENCE THAT PRATHER INTENTIONALLY INTRUDED ON HER PRIVACY.

Kuczinski argues that the trial court erred in dismissing Count Seven (invasion of privacy) and Count Eight (NEID) because(1) reasonable inferences should have been made based on the evidence that Trooper Prather took her cell phone back to his official vehicle that he looked at her personal photographs, and (2) that Defendants did not show, sufficient for a grant of summary judgment, that the New Jersey State Police did not owe Plaintiff a duty of "reasonable care." These arguments lack merit because as noted above, the State Defendants are immune from Prather's willful misconduct.

Counts Seven and Eight were both based on the alleged actions of Prather. Because the underlying actions of these claims constitute *at least* willful misconduct, the State defendants are entitled to immunity under the New Jersey Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 to -12-3.

First, invasion of privacy is defined as an intentional intrusion, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns that would be highly offensive to a reasonable person. G.D. v. Kenny, 205 N.J. 275, 309 (2011). Second, NEID involves "negligent conduct that is the

proximate cause of emotional distress in a person to whom the actor owes a legal duty to exercise reasonable care." Decker v. Princeton Packet, Inc., 116 N.J. 418, 429 (1989). A claim for NIED requires the plaintiff to demonstrate "(1) the death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress." Portee v. Jaffee, 84 N.J. 88, 101 (1980).

Kuczinski's appeal argues that the State Defendant's liability is based on the fact that Prather took her cellphone back to his official vehicle and, contrary to Attorney General Guidelines, looked at her personal photographs. (Ab30-31). Kuczinski argues that the trial court erroneously concluded that Plaintiff failed to demonstrate any evidence that Prather intruded upon Kuczinski's privacy because she presented uncontroverted evidence that Trooper Prather took her cellphone back to his official vehicle contrary to Attorney General Guidelines, and that "reasonable inferences" should have been drawn that Prather looked at Kuczinski's personal photographs when he had her phone for a "lengthy period of time." (Ab31). As noted previously, the trial court aptly rejected that supposition as unfounded, particularly in the face of uncontradicted forensic evidence to the contrary. (Pa36-37; Pa42-44).

However, as the court below correctly held—even if that had occurred—the TCA immunizes the State Defendants from actions by Prather that constitute

"a crime, actual fraud, actual malice, or willful misconduct" under N.J.S.A. 59:2-10. (Pa42; Pa44). Aside from N.J.S.A. 59:2-10, well-established case law provides that, where the conduct of a public employee constitutes willful misconduct, the employer-public entity cannot be held vicariously liable under a theory of negligent training. McDonough v. Jorda, 214 N.J. Super. 338, 349-50 (App. Div. 1986). Similarly, New Jersey law unambiguously provides that a public entity cannot be vicariously liable for intentional torts committed by its employees. Hoag v. Brown, 397 N.J. Super. 34, 53-54 (App. Div. 2007). Kuczinski provides no argument why the TCA's immunity does not apply.

Furthermore, as the trial court also correctly held, this claim also fails because Kuczinski failed to present competent expert evidence of any emotional distress. (Pa43-49). The expert testimony provided by Dr. Gallina to support the claim for emotional distress was rightly determined to be an inadmissible net opinion.

The New Jersey Supreme Court generally adopted the principles of Daubert v. Merrell Dow, 509 U.S. 579 (1993) as New Jersey's standard for the admissibility of expert testimony in civil cases. In re: Accutane Litigation, 234 N.J. 340 (2018). Daubert compels a three-part analysis: (1) whether the expert is qualified to speak with authority on the subject at issue; (2) whether the expert's methodology is sound and whether his or her opinion is supported by "good grounds"; and (3) whether there is a relevant "connection between the

scientific research or test result to be presented and particular disputed factual issues in the case." Milanowicz v. Raymond Corp. 148 F.Supp.2d 525, 530-31 (D.N.J. 2001).

The trial court found that because Dr. Gallina's report relied on numerous facts that are not found anywhere in the record, including (1) that two federal agents came to her home to tell her she was a victim of a crime; (2) that the officer who allegedly violated her privacy was a Trooper Paffs; (3) that "Paffs" was allowed to resign; (4) that "Paffs" stole Kuczinski's naked photographs from her cellphone; (5) that "Paffs" disseminated Kuczinski's nude photographs to others; (6) that "Paffs" rerecorded nude photographs of her; and (7) that "Paffs" stalked Kuczinski. (Pa48-49; Pa351-365). Finding that supported portions of Dr. Gallina's report which were so intertwined with those unsupported portions, the court determined the report was "unreliable" and unsalvageable under Daubert v. Merrell Dow, 509 U.S. 579 (1993).

Besides boldly asserting that the opinion is "not unreliable," Appellant provides no arguments to support overturning the "sound discretion of the trial court." State v. Berry, 140 N.J. 280, 293 (1995). Thus, because "a trial court's grant or denial of a motion to strike expert testimony is entitled to deference on appellate review," this court should affirm. Townsend v. Pierre, 221 N.J. 36, 52 (2015).

CONCLUSION

This court should affirm.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A—003232-23

MARIELLE KUCZINSKI,	:	CIVIL ACTION
Plaintiff/Appellant,	:	ON APPEAL FROM
-v-	:	SUPERIOR COURT OF NEW JERSEY
STATE OF NEW JERSEY, NEW JERSEY STATE POLICE, MARQUICE D. PRATHER, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY, AND JOHN DOES 1-10, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES	:	LAW DIVISION MIDDLESEX COUNTY DOCKET NO. MID-L-000225-18 **SAT BELOW** HON. GARY K. WOLINETZ, J.S.C.
Defendant/Respondents.	:	

REPLY BRIEF ON BEHALF OF APPELLANT, MARIELLE KUCZINSKI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

This appeal involves a fundamental right to be free from the abuse of power of the New Jersey State Police through the actions of its Troopers. The trial court granted the Defendants' Motion for Summary Judgment despite the genuine issues of material facts that were presented. In analyzing the trial court's decision, it reads more like a decision made during a bench trial than a decision on a Motion for Summary Judgment.

Moreover, the trial court's analysis seems somewhat biased in favor the New Jersey State Police when Judge Wolinetz writes that "the vast majority of State Troopers place their lives on the line for New Jersey residents on a daily basis." Time and time again in the trial court's decision, it baselessly asserts that Plaintiff, Marielle Kuczinski ("Plaintiff"), was not a victim of the Defendants, Marquice Prather, the New Jersey State Police and the State of New Jersey (collectively "Defendants"), actions. The moment Trooper Prather took Plaintiff's cell phone back to his official vehicle, he committed a crime – and Plaintiff was the victim of that crime. The trial court erred when it concluded that absent proof that Trooper Prather disseminated her personal photographs, he did nothing wrong. This offensive position denies that Plaintiff was violated when Trooper Prather viewed the photographs with his own eyes.

The trial court ignored the fact that the New Jersey State Police, upon concluding its internal investigation, never notified Plaintiff of its conclusions into Trooper Prather's conduct. Furthermore, the trial court ignored that Trooper Prather used the same modus operandi involving Plaintiff's motor vehicle stop as he did for all of his other victims. Therefore, Plaintiff now asks this Court to reverse the trial court's decision to grant summary judgment and to remand this case back to the trial court for a trial on all issues.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS UNDER THE THEORIES OF NEGLIGENT HIRING, TRAINING AND SUPERVISION

The New Jersey Tort Claims Act provides that a public entity is not liable on the theory of vicarious liability for the acts or omission of an employee constituting a crime, actual fraud, actual malice or willful misconduct. This does not preclude liability being based on negligent hiring or negligent supervision. In *Hoag v. Brown,* 397 N.J. Super. 34 (App. Div. 2007), the Appellate Division differentiated between the two, stating:

> Nevertheless, a claim based on negligent hiring or negligent supervision is separate from a claim based on respondeat superior. *Schultz v. Roman Catholic Archdiocese of Newark, 95 N.J. 530, 534-35 (1984); Cosgrove v. Lawrence, 214 N.J. Super. 670, 679 (Law Div. 1986), aff'd, 215 N.J. Super. 561 (App.Div.1987*). Unlike respondeat

> superior liability, negligent hiring covers acts committed outside the scope of employment. *Cosgrove, supra, 214 N.J. Super. at 679-80*. It is a "primary liability" tort. *Cosgrove, supra, 215 N.J. Super. at 563; see also Adams v. City of Camden, 461 F. Supp. 2d 263, 269-70 (D.N.J.2006) (citing DiCosala ex rel. DiCosala v. Kay, 91 N.J. 159 (1982)* as support for claim against county for negligent hiring of police officer); *DiCosala, supra, 91 N.J. at 172*-74, (in private sector, tort of negligent hiring addresses different wrong from that sought to be redressed by respondeat superior doctrine); *Pacifico v. Froggatt, 249 N.J. Super. 153, 154-55 (Law Div.1991)* (New Jersey Transit could be liable for negligent hiring of its officers notwithstanding that public entities cannot be liable for the willful acts of its employees); Harry A. Margolis & Robert Novack, *Claims Against Public Entities*, comment on *N.J.S.A.* 59:2-10 (Gann 2007) ("Clearly this section does not prevent allocation of fault to a public entity where that entity is liable for the negligent supervision of an employee who has engaged in willful misconduct.").

Hoag, 397 N.J. Super. at 53-54.

In the case *sub judice,* the complained of conduct by Trooper Prather went undetected for three years. It is abundantly clear that these infractions violated the New Jersey State Police Standard Operating Procedures. The central theme here is that all this information regarding Trooper Prather's misconduct was reported and in the control of the New Jersey State Police prior to the subject stop. Plaintiff respectfully submits that the illegal stops before the subject stop establish a "pattern of conduct" that was permitted by the Defendants to occur.

Moreover, Trooper Prather engaged in a pattern of conduct that was allowed to continue for a period of over three (3) years. The facts presented to the trial court

should have been allowed to be presented to a jury. The jury should have been allowed to determine if the State of New Jersey turned a blind eye to these blatant violations constituting negligent supervision by allowing the conduct to go on for a period of over three (3) years.

The trial court further erred when it concluded that Defendants had no obligation to provide Plaintiff with a status letter regarding the outcome of the investigation. The Defendants strenuously argued and the trial court agreed that Plaintiff had no right to know what the investigation involving the violations against her revealed. The trial court completely misinterpreted Attorney General Guideline 6.3, Investigation and Adjudication of Serious Complaints. Section 6.3.18, provides:

> In all cases, a letter shall be sent to the complainant explaining the outcome of the investigation. If the allegation was unfounded or the officer was exonerated, this conclusion shall be stated and defined for the civilian complainant. If the allegation was not sustained, the letter shall provide the complainant with a brief explanation why the complaint was not sustained (e.g., insufficient proof, lack of witnesses, etc.). If the allegation was sustained and discipline was imposed, the letter shall state that the allegation was sustained and that the officer has been disciplined according to agency procedures.

Defendants admit not fulfilling this requirement, instead setting forth irrelevant arguments relative to public disclosure of information. The trial court incorrectly concluded that Plaintiff was not a complainant, and therefore the Defendants were not obligated to send such a letter. Plaintiff was never provided this letter and

continued to believe that she was a victim of Trooper Prather's conduct. Accordingly, Plaintiff respectfully asserts that the trial court erred when it granted summary judgment to the Defendants dismissing Count Three of Plaintiff's Complaint.

LEGAL ARGUMENT

POINT II

THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO DEFENDANTS ON PLAINTIFF'S NEW JERSEY LAW AGAINST DISCRIMINATION CLAIMS

The trial court erred when it granted summary judgment to the Defendants on Plaintiff's New Jersey Law Against Discrimination Claims ("NJLAD"). The trial court incorrectly concluded that Plaintiff cannot make out a *prima facie* case of gender discrimination. This is disproven by the Defendants own actions in investigating Plaintiff's stop - and by the actions of Trooper Prather that were revealed.

In order to sustain a claim under the NJLAD, Plaintiff must show - and can show - that Defendants operated a place of public accommodation, that she was a member of a protected class and that she was denied equal treatment based on that class. *N.J.S.A.* 10:5-4, Obtaining Employment and Privileges without Discrimination; civil right, provides, in relevant part that: "[A]ll persons shall

have the opportunity to . . . obtain all the accommodations, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . sex, gender identity . . . subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

The Courts of New Jersey have spoken on this issue and held that township police departments, both the building and the individual officers, are places of public accommodation as a municipal police force is nothing more than an executive and enforcement function of municipal government pursuant to *N.J.S.A. 40A:14-118.* Any state governmental agency is a place of public accommodation for purposes of inclusion under the umbrella of the NJLAD. *Ptaszynski v. Uwaneme,* 371 N.J. Super. 333, 348 (App. Div. 2004), cert. denied, 182 N.J. 147 (2004).

Defendants assert that Plaintiff cannot demonstrate that she was targeted based on her gender. This confusing assertion is countered by the Defendants' own actions in contacting her and conducting an investigation of her stop as one that fit into Trooper Prather's modus operandi. It is disingenuous for them to claim that Plaintiff must now prove she was targeted because of her gender - that fact was long ago established by the Defendants themselves.

The facts establish that Trooper Prather victimized a certain class of women: young, attractive women within a certain weight range. Defendants state that there

is no evidence to show that he pulled her over for this reason. Plaintiff asserts that Defendants' investigation into Trooper Prather's pattern proves this point. Trooper Tietjen acknowledged that Plaintiff's stop by Trooper Prather was similar to other victims and that Trooper Prather's conduct with Plaintiff was his modus operandi towards other victims.

Despite Plaintiff fitting squarely into the category of his desired detainee, and despite his actions during the stop, which included turning off his audio, walking back to his car with her unlocked cell phone, retaining her phone for twelve (12) minutes, and issuing only a written warning, the trial court somehow believe that Plaintiff did not fit into his pattern of sexual misconduct. Accordingly, Plaintiff respectfully asserts that the trial court erred when it granted summary judgment to the Defendants dismissing Count Six of Plaintiff's Complaint.

LEGAL ARGUMENT

POINT III

THE TRIAL COURT IMPROPERLY DISMISSED PLAINTIFF'S INTENTIONAL TORT AND INVASION OF PRIVACY CLAIMS

The tort of invasion of privacy is an "intentional intrusion, physically or otherwise upon the solitude or seclusion of another or his private affairs or concerns that would be highly offensive to a reasonable person." *G.D. v. Kenny,* 205 N.J. 75, 309 (2011). An action that can constitute an invasion of privacy includes "an illegal

search." *Friedman v. Martinez,* 242 N.J. 449, 465 (2020) (quoting William L. Presser, *Privacy*, 48 Cal. L. Rev. 383, 389-90 (1960)).

The trial court erroneously concluded that Plaintiff failed to demonstrate any evidence that Trooper Prather intruded upon Plaintiff's privacy. (Pa44). Plaintiff presented uncontroverted evidence that Trooper Prather took her cell phone back to his official vehicle contrary to Attorney General Guidelines. Moreover, Plaintiff presented credible evidence and reasonable inferences that when Trooper Prather had Plaintiff's cell phone, at a minimum, he looked at her personal photographs. As the trial court correctly stated "[t]he actions alleged against Prather would certainly constitute an intentional intrusion upon Kuczinski's solitude which, in accessing her private, explicit photographs, would be highly offensive to a reasonable person."

The tort of negligent infliction of emotional distress has four elements: (1) a duty of reasonable care was owed by the defendant to the plaintiff, (2) that duty was breached, (3) the plaintiff suffered severe emotional distress, and (4) the breach was a proximate cause of injury. *Russo v. Nagel,* 358 N.J. Super. 254, 269 (App. Div. 2003). No authority cited by Defendants nor the trial court speaks to the violation by a State Trooper of the basic tenets of decency. Given the summary judgment standard that directs that all inferences are to be viewed in the light most favorable

to the non-moving party, the trial Court erred by granting Defendants' Motion for Summary Judgment.

Moreover, the trial court erred when it determined that Dr. Gallina's psychological expert report was not supported by facts in the record. While Dr. Gallina's report does have some errors, her report is not unreliable as the trial court concluded. The whole premise of the trial court's decision on Dr. Gallina's report is that there is no evidence to substantiate Plaintiff's claims. If this Court were to reverse the trial court's decision, then Dr. Gallina's report should be allowed to be introduced into evidence at trial if Plaintiff elects to utilize her testimony.

CONCLUSION

Plaintiff respectfully requests that this Court reverse the trial court's May 09, 2024 Order granting the Defendants summary judgment and remand the matter back for a trial on the issues of liability and damages. In analyzing the trial court's decision, it reads more like a decision made during a bench trial than a decision on a Motion for Summary Judgment. Moreover, the trial court not only erred when it concluded that there were no genuine issues of material fact, it did not give the Plaintiff any reasonable inferences from the evidence submitted. Accordingly, it is respectfully submitted trial court's decision to grant Defendants' Motion for Summary Judgment should be reversed.

Respectfully submitted

/s/ Fredrick L. Rubenstein

Fredrick L. Rubenstein

Dated: August 21, 2025