RUSSELL FORDE HORNOR, Plaintiff-Appellant, v. UPPER FREEHOLD REGIONAL BOARD OF EDUCATION d/b/a UPPER FREEHOLD REGIONAL SCHOOL DISTRICT; ALLENTOWN HIGH SCHOOL; NEW JERSEY FUTURE FARMERS OF AMERICA; ALLENTOWN FUTURE FARMERS OF AMERICA; AND CHARLES J. HUTLER, III, Defendants-Respondents.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 089973 Civil Action On Motion for Leave to Appeal from Superior Court of New Jersey, Appellate Division, Docket No. A-0366-22 Sat Below: Hon. Allison E. Accurso, P.J.A.D. Hon. Francis J. Vernoia, J.A.D. Hon. Arnold L. Natali, Jr., J.A.D.

BRIEF OF AMICUS CURIAE MATTHEW J. PLATKIN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

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PRELIMINARY STATEMENT[1]

In 2019, the Legislature passed a series of amendments to expand liability for child sexual abuse. Among other changes, the Legislature modified public entities' immunity to permit liability for sexual abuse torts based on the willful, wanton, or grossly negligent acts of public employees or the public entity's negligence in hiring, training, or supervision. By its plain terms, the statute—N.J.S.A. 59:2-1.3—disables any immunity provided by the Tort Claims Act (TCA) with respect to such sexual abuse torts, including the blanket immunity granted to public entities by that Act. And the legislative history is clear that this amendment was intended to make public entities liable for sexual abuse to the same extent as non-profits, who had long been subject to vicarious liability for such willful, wanton, or grossly negligent acts of their employees. Yet despite the plain statutory language and legislative intent, the Appellate Division misread the statute to require that Plaintiffs locate predicate liability within the TCA to bring their claims. This Court should correct that error and hold that

[1] As both Hornor v. Upper Freehold Regional Board of Education, et al., No. 089973, and Simpkins, et al. v. South Orange-Maplewood School District, et al., No. 089974, present the same legal question—whether, consistent with the Tort Claims Act, a public school may be held vicariously liable for sexual assault of a minor student by a teacher employed by the school—and because the Attorney General's participation is limited to addressing this legal question, the Attorney General has submitted the same amicus brief in both Hornor and Simpkins.

public entities do not have immunity for claims that fall within N.J.S.A. 59:2-1.3's immunity-stripping provision.

But while it is clear that TCA immunity does not apply to Plaintiffs' claims, the standard of liability for such claims is far from certain, warranting clarification from this Court. Plaintiffs advocate a broad reading of the aided-by-agency theory of the Second Restatement of Agency, which imposes vicarious liability on employers if the employee was "aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency § 219(2)(d) (1958) (hereinafter "Restatement"). Yet an overly broad interpretation of the aided-by-agency theory could border on strict liability for schools when their employees commit sexual assault—an outcome at odds with this Court's case law.

Instead, for common law claims against a school based on the sexual abuse of a minor student by a school employee, a plaintiff should be required to prove that (1) the school itself was negligent in the hiring, supervision, or retention of the tortfeasor, or (2) the tortfeasor was a supervisor exercising authority delegated to him by the school, and, under the totality of the circumstances, it reasonably appeared that the supervisor's misconduct was tacitly approved by the school. This standard ensures that schools are held accountable for sexual

abuse of students traceable to the schools' own failings without subjecting them to strict liability for criminal misconduct wholly beyond their control.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Attorney General adopts the Procedural History and Statement of Facts from the Appellate Division's opinions below, adding only the following. Hornor-A322-326; Simpkins-A004-006.[2]

A. The Tort Claims Act.

In 1970, the Supreme Court of New Jersey abrogated the common law doctrine of sovereign immunity. Willis v. Dep't of Conservation & Econ. Dev., 55 N.J. 534, 537-41 (1970); see also Bombace v. City of Newark, 125 N.J. 361, 372 (1991). In response, the Legislature enacted the TCA, which "reestablishe[d] sovereign immunity for public entities" by statute. Chatman v. Hall, 128 N.J. 394, 402 (1992).

Through the TCA, the Legislature reimposed "a system in which immunity is the rule, and liability the exception." Tice v. Cramer, 133 N.J. 347, 355 (1993) (quoting Bombace, 125 N.J. at 372). The Act first provides blanket immunity to public entities for all claims. See N.J.S.A. 59:2-1(a). The Act then provides carve-outs for liability. See ibid.; N.J.S.A. 59:2-2. Finally, the Act

[2] "AGa" refers to the Attorney General's appendix; "Hornor-A" refers to Plaintiff-Appellant's Appendix in Hornor; and "Simpkins-A" refers to Plaintiff-Appellant's Appendix in Simpkins.

provides further exceptions to those carve-outs that reimpose immunity for claims that would otherwise be permitted. See N.J.S.A. 59:2-1(b); see, e.g., N.J.S.A. 59:2-3 to -11. Therefore, in a typical claim against a public entity, a plaintiff must find a source of liability within the TCA, most often respondeat superior liability for a public employee's negligence within the scope of employment. See Tice, 133 N.J. at 355 (citing N.J.S.A. 59:2-2). Nevertheless, a plaintiff's claim would be precluded if another source of immunity applied—either from the TCA itself (such as immunity for "the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct," N.J.S.A. 59:2-10) or from another source. See Tice, 133 N.J. at 355; N.J.S.A. 59:2-1(b).

B. This Court's Decision In Hardwicke.

In 2006, this Court decided Hardwicke v. American Boychoir School, 188 N.J. 69 (2006). In that case, a plaintiff sued a boarding school for sexual abuse that he had experienced as a child at the hands of the school's musical director—a figure who played a significant role in the management and running of the school. Id. at 75-79. The case involved several novel questions, including interpreting the scope of the Child Sexual Abuse Act (CSAA), N.J.S.A. 2A:61B-1, and the Charitable Immunity Act, N.J.S.A. 2A:53A-7 to -11. Id. at 87-102; see also id. at 103 (Rivera-Soto, J., concurring in part and dissenting in

part) (delineating "five separate substantive conclusions" reached by the majority).

As to the Charitable Immunity Act, the Court held that the Act provides immunity to charitable entities for "simple negligence only, and not 'other forms of aggravated wrongful conduct, such as malice or fraud, or intentional, reckless and wanton, or even grossly negligent behavior.'" Id. at 97 (quoting Schultz v. Roman Cath. Archdiocese of Newark, 95 N.J. 530, 542 (1984) (Handler, J., dissenting)). The Court focused on the plain language of the statute, which provides, in relevant part, that no non-profit organization "shall ... be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such" organization.[3] Id. at 95 (quoting N.J.S.A. 2A:53A-7(a)). Because "the statute speaks only of immunity for 'negligence,'" the Court "delve[d] no deeper than the act's literal terms to divine the Legislature's intent." Id. at 95 (quoting O'Connell v. State, 171 N.J. 484, 488 (2002)); see also id. at 97-99 (explaining how other interpretive tools support this conclusion). The Court therefore found that non-profits were not immunized against "claims for willful, wanton or grossly negligent conduct," and the Charitable Immunity Act would not bar the plaintiff's claims for

[3] This statutory language remains the same in the current version of the statute. N.J.S.A. 2A:53A-7(a).

vicarious liability for intentional sexual abuse. Id. at 99. The Court also recognized that the school could be held liable for "negligent hiring, supervision and retention" under a separate provision of the Charitable Immunity Act. Ibid. (quoting N.J.S.A. 2A:53A-7.4).

The Court then addressed the defendant-school's argument "that, in any case, the law of agency prevents holding the [s]chool liable for acts of its employees outside the scope of their employment." Id. at 100. The Court recognized that the Second Restatement of Agency provides for vicarious liability outside of the scope of employment under certain circumstances. Id. at 101. Specifically, § 219 provides exceptions to the traditional scope-of-employment limitation on vicarious liability where "the conduct violated a non-delegable duty of the [employer], or ... the [employee] purported to act ... on behalf of the [employer] and there was reliance upon apparent authority, or [the employee] was aided in accomplishing the tort by the existence of the agency relation." Ibid. (alterations in original) (quoting Restatement § 219(2)(c)-(d)). The Court recognized that it had previously adopted § 219 as "the framework for evaluating employer liability in hostile environment sexual harassment claims brought under" the Law Against Discrimination (LAD) in Lehmann v. Toys R Us, Inc., 132 N.J. 587 (1993), and for "claims brought under the Conscientious Employee Protection Act" in Abbamont v. Piscataway Township

Board of Education, 138 N.J. 405 (1994). Id. at 101-02. The Court concluded "[t]he considerations that informed [the Court's] analyses in Lehmann and Abbamont apply equally to claims predicated on facts indicating child abuse." Id. at 102. So the Court held that § 219 applied "to [the] plaintiff's common-law claims" in that case. Ibid.

C. The 2019 Amendments To The TCA And Charitable Immunity Act.

In 2019, the Legislature passed a series of acts that expanded liability for sexual abuse. Enacted in May 2019, L. 2019, c. 120 (Chapter 120) extended the statute of limitations in civil actions for sexual abuse; expanded public entities' liability for sexual abuse claims; and amended the Charitable Immunity Act to "create … additional retroactive liability for non-profit organizations … concerning willful, wanton or grossly negligent acts resulting in abuse that occurred prior to August 8, 2006." S. Judiciary Comm., Statement to S. Comm. Substitute for S. 477, at 2, 7 (Mar. 7, 2019) (AGa002, 007); see also L. 2019, c. 120 (AGa009-014). That date, the Senate Judiciary Committee said, was when this Court decided Hardwicke, which "found for the first time that the Charitable Immunity Act does not bar lawsuits against organizations based on such aggravated forms of wrongful conduct; it only bars suits based on 'simple' or 'standard' negligent conduct (with some statutorily carved out exceptions)." S. Judiciary Comm., Statement to S. Comm. Substitute for S. 477, at 2 (AGa002)

(citing Hardwicke, 188 N.J. at 96-97). The law's "amendment to the Charitable Immunity Act, to be applied retroactively, recognizes the current interpretation and scope of organizational liability based on Hardwicke." Ibid.

Following the amendment, the Charitable Immunity Act generally grants immunity to charitable organizations from liability to a beneficiary of the organization arising from the negligent acts of the organization's directors, officers, employees, and other agents, see N.J.S.A. 2A:53A-7(a), but expressly provides—as held in Hardwicke, 188 N.J. at 97—that the Act does not immunize charitable organizations (or their agents) from liability arising from a "willful, wanton or grossly negligent act ... including sexual assault" and other similar, specified crimes of a sexual nature. N.J.S.A. 2A:53A-7(c). The Act continues to provide—as recognized in Hardwicke, 188 N.J. at 99—that its grant of immunity does not apply to civil claims alleging "that the negligent hiring, supervision or retention of any employee, agent or servant resulted in a sexual offense being committed against a person under the age of 18 who was a beneficiary of the nonprofit organization." N.J.S.A. 2A:53A-7-4.

When the Governor signed the bill, he recognized that the law would "greatly increase[] the ability of victims of sexual abuse to pursue justice through the court system." Philip D. Murphy, Governor's Statement Upon Signing S. Comm. Subst. for S. 477, at 1 (May 13, 2019) (AGa015). He noted,

however, "an error in the section of the bill relating to the liability of public entities," which "inadvertently fail[ed] to establish a standard of proof for cases involving claims filed against public entities." Ibid. He therefore "sign[ed] the bill based on a commitment from the bill's sponsors to introduce and swiftly pass a bill" to "correct this omission by clarifying that public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations." Ibid.

The same day, the Legislature responded by introducing Assembly Bill No. 5392. (AGa016-018). The bill's statement clarified that it would "establish[] new liability standards in sexual abuse lawsuits filed against public entities and public employees," which "are identical to the liability standards applied to non-profit organizations, and their officers, employees and other agents, based on exceptions to the immunity granted to such organizations and agents under the Charitable Immunity Act ... as revised by [Chapter 120] …." A. 5392, as introduced, at 2-3 (May 13, 2019) (AGa017-018); accord A. Judiciary Comm., Statement to A. 5392, at 1 (May 20, 2019) (AGa019); A. Budget Comm., Statement to A. 5392, at 1 (June 17, 2019) (AGa021). The Assembly Budget Committee explained that the law "would expressly provide that the statutory immunity from lawsuits granted to public entities and public employees pursuant to the [TCA] would not be applicable with respect to"

certain "sexual abuse lawsuits," specifically, "the same types of lawsuits for which the general statutory immunity of the Charitable Immunity Act does not apply …." A. Budget Comm., Statement to A. 5392, at 1 (June 17, 2019) (AGa021) (citation omitted).

The law was approved and took effect on the same day as Chapter 120. See L. 2019, c. 239 (eff. Dec. 1, 2019). Codified in a section entitled "Liability for injury; public entities," it provides that, "[n]otwithstanding any provision of the [TCA] to the contrary: (1) immunity ... granted by that act to a public entity or public employee shall not apply to" civil actions for "damages as a result of a sexual assault" or other specified crimes of a sexual nature "caused by a willful, wanton, or grossly negligent act of the public entity or public employee;" N.J.S.A. 59:2-1.3(a)(1), and "(2) immunity ... granted by that act to a public entity shall not apply to" civil actions for "damages as a result of a sexual assault" or other specified crimes of a sexual nature "committed against a minor under the age of 18" and "caused by the negligent hiring, supervision, or retention of any public employee. " N.J.S.A. 59:2-1.3(a)(2).

ARGUMENT

POINT I

THE TCA DOES NOT BAR PLAINTIFFS' VICARIOUS LIABILITY CLAIMS.

The Appellate Division incorrectly held that a claim within the scope of the immunity-stripping provision, N.J.S.A. 59:2-1.3(a), may only proceed if it also falls within one of the TCA's liability provisions, like N.J.S.A. 59:2-2 (which provides respondeat superior liability for acts within the scope of a public employee's employment). Hornor-A359-360; Simpkins-A010-012. But the immunity-stripping provision—by its plain terms—overrides all TCA immunity. So if someone can bring a claim against a public entity that falls within the scope of the immunity-stripping provision, then that claim is not barred by the TCA, regardless of whether the public entity is liable under the TCA itself.[4]

The text and structure of the TCA compel this result. After this Court abrogated public entities' common law sovereign immunity, the TCA

[4] If there is another source of immunity available outside of the TCA, then such immunity would of course still be available to the public entity, because it would not be abrogated by the immunity-stripping provision. See N.J.S.A. 59:2-1.3(a) (overriding only Tort Claims Act immunity); A. Budget Comm., Statement to A. 5392, at 1 (June 17, 2019) (AGa021) ("[A]ny available immunity for public entities and public employees from some source of law other than the 'New Jersey Tort Claims Act' could be raised by public entities and public employees as a defense to any of the aforementioned types of sexual abuse lawsuits.").

reestablished by statute a blanket immunity for public entities with specific carve-outs for liability. See supra at 3-4; Tice, 133 N.J. at 355; N.J.S.A. 59:2-1(a). While the TCA also provides specific immunities that limit its affirmative liability-granting provisions, its blanket immunity is a central part of the statutory scheme. See Tice, 133 N.J. at 355; cf. Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 407-08 (1988) (discussing TCA's "statutory approach" of general immunity limited by liability-granting exceptions). But the immunity-stripping provision overrides that blanket immunity.

The text of the 2019 amendment is clear. See Sanchez v. Fitness Factory Edgewater, LLC, 242 N.J. 252, 261 (2020) (stating that the "first step in interpreting a statute is to look to 'the actual words of the statute, giving them their ordinary and commonsense meaning'" (quoting State v. Gelman, 195 N.J. 475, 482 (2008))). The amended statute provides: "[n]otwithstanding any provision of the 'New Jersey Tort Claims Act,' N.J.S.59:1-1 et seq., to the contrary[,] … immunity from civil liability granted by that act to a public entity shall not apply …." N.J.S.A. 59:2-1.3(a) (emphasis added). The blanket immunity provided by N.J.S.A. 59:2-1 is, quite plainly, a "provision" of the TCA that grants "immunity from civil liability." Ibid. And the 2019 amendments codified in N.J.S.A. 59:2-1.3 make clear that such a "provision" of the Tort Claims Act "shall not apply" to the sex-abuse-related claims that fall within its

scope. Ibid. Put simply, the "statute is clear and unambiguous on its face and admits of only one interpretation," so the statutory interpretation can end here. Sanchez, 242 N.J. at 260-61 (quoting O'Connell, 171 N.J. at 488).

But if the Court looks to legislative history, it confirms this conclusion. The Legislature was clear that the immunity-stripping provision was meant to equalize the immunity of public entities and charitable entities for sexual abuse torts. See supra at 9-10. Under the Charitable Immunity Act, charitable entities do not have immunity for enumerated sexual abuse torts inflicted "by a willful, wanton or grossly negligent act of commission or omission" of an employee, N.J.S.A. 2A:53A-7(c), or for "negligent hiring, supervision or retention of any employee, agent or servant [that] resulted in a sexual offense being committed against a person under the age of 18 who was a beneficiary of the nonprofit organization," N.J.S.A. 2A:53A-7.4. See S. Judiciary Comm., Statement to S. Comm. Substitute for S. 477, at 2 (Mar. 7, 2019) (AGa002) (noting the codification of this Court's holding in Hardwicke); supra at 7-9. Substantially similar language is used in the immunity-stripping provision, which removes immunity for sexual abuse torts "caused by a willful, wanton, or grossly negligent act of the public entity or public employee" or sexual abuse torts against a person "under the age of 18, which was caused by the negligent hiring, supervision, or retention of any public employee." N.J.S.A. 59:2-1.3(a); see

supra at 9-10. Given that substantially similar language, and given the Legislature's express goal to equalize the immunity of public entities and charitable entities, it would make little sense to interpret the immunity-stripping provision as barring claims of vicarious liability for willful, wanton, or grossly negligent sexual abuse torts against public entities when the Charitable Immunity Act unambiguously allows such claims.

Case law confirms this interpretation too. In E.C. by D.C. & S.C. v. Inglima-Donaldson, the Appellate Division held that the immunity-stripping provision permits vicarious liability for the willful, wanton, or grossly negligent act of a public employee. See 470 N.J. Super. 41, 53 (App. Div. 2021) (holding that "N.J.S.A. 59:2-1.3(a)(1) … sensibly and reasonably imposes an obligation on a plaintiff to show the 'willful, wanton or grossly negligent' conduct of only the public entity 'or' public employee, but not both"). That holding accords with both the plain statutory text and legislative history discussed above.

For those reasons, this Court should hold that the Tort Claims Act does not bar Plaintiffs' vicarious-liability claims against Defendant schools based on the sexual abuse of their former teachers. In Hornor, Plaintiff alleges that his former teacher, Hutler, acted intentionally and grossly negligently in committing sexual assault against him when he was fifteen years old. In Simpkins, Plaintiffs allege that their former teacher, Dufault, acted intentionally and grossly

negligently in sexually abusing them when they were between the ages of fourteen and seventeen. These facts clearly indicate sexual abuse "committed against a person, which was caused by a willful, wanton, or grossly negligent act of the … public employee." N.J.S.A. 59:2-1.3(a)(1) (emphasis added). And both cases involve claims of negligence against Defendant schools for their own negligent hiring, supervision, or retention of Hutler and Dufault, which are claims resulting from sexual abuse "committed against a minor under the age of 18 … caused by the negligent hiring, supervision, or retention of any public employee." N.J.S.A. 59:2-1.3(a)(2). If Plaintiffs' allegations prove true, then Defendant schools are not immune under the Tort Claims Act for those claims because they fit squarely within the plain language of the immunity-stripping provision.

Indeed, a contrary holding would make the immunity-stripping provision effectively useless. Specifically, Defendants argue that even if a claim fits the plain terms of the immunity-stripping provision, it must still allege conduct within the scope of employment under N.J.S.A. 59:2-2(a). But a "willful, wanton, or grossly negligent" sexual assault would never fall within the scope of an individual's public employment. No public entity affirmatively authorizes their employees to commit such deplorable conduct. Nor would there be, under Defendants' theory, any way to hold a public entity liable for its own "negligent

hiring, supervision, or retention" of employees who commit sexual assault against minors because there is no separate liability provision in the Tort Claims Act to cover that scenario. See N.J.S.A. 59:2-1.3 (a)(2). So Defendants would construe the immunity-stripping provision as a dead letter for victims of sexual assault: victims would almost never be able to establish that the abuse falls within a liability provision of the Tort Claims Act, making the immunity-stripping provision effectively "meaningless." Spade v. Select Comfort Corp., 232 N.J. 504, 522 (2018) ("[L]egislative language must not, if reasonably avoidable, be found to be … meaningless." (alteration in original) (quoting Carter v. Doe, 230 N.J. 258, 274 (2017)). This Court should reject that contention, and instead hold that where N.J.S.A. 59:2-1.3's immunity-stripping provision applies, Plaintiffs may bring common law claims of vicarious liability against Defendant public schools based on the sexual abuse of their former teachers without offending the TCA.[5]

[5] The Appellate Division was correct that N.J.S.A. 59:2-1.3(a)'s immunity-stripping provision is not itself a liability provision. Hornor-A354; see also Simpkins-A016-017 (implicitly concluding that N.J.S.A. 59:2-1.3(a) was not a liability provision when it stated that Plaintiffs had "failed to identify any provision" in the TCA that would provide liability). Instead, this provision states that "immunity … shall not apply" to claims within its scope. Compare N.J.S.A. 59:2-1.3(a) (emphasis added), with N.J.S.A. 59:2-2(a) (stating that a "public entity is liable" for claims within its scope). In other words, Plaintiffs cannot source liability from the immunity-stripping provision in the same way they would from, for example, the scope-of-employment provision under the

POINT II

VICARIOUS LIABILITY UNDER HARDWICKE SHOULD BE APPROPRIATELY CIRCUMSCRIBED.

Given that N.J.S.A 59:2-1.3's immunity-stripping provision eliminates public-entity immunity for sexual abuse torts, this Court's guidance is needed to clarify the uncertain scope of liability available against public schools. Under this Court's decision in Hardwicke, that is an open question because the Court simply adopted the Second Restatement's aided-by-agency theory without explaining how it applies in this particular context. Hardwicke, 188 N.J. at 102. That open question could be resolved in various ways.

That said, the best approach, and the approach that is most faithful to existing New Jersey law, is to import a modified version of the test for liability under the Law Against Discrimination (LAD). Under this proposed test, a school should incur common law liability if a school official commits sexual abuse of a minor and either (1) the school itself was negligent in the hiring, supervision, or retention of the tortfeasor,[6] or (2) the tortfeasor was a supervisor

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traditional Tort Claims Act framework. N.J.S.A. 59:2-2(a). Plaintiffs must source liability from some other source of law—including, for example, the common law.

[6] A school would not be liable for its own negligent hiring, supervision, or retention of a tortfeasor when the sexual abuse victim is an adult because immunity for such negligent conduct has not been abrogated by N.J.S.A 59:2-1.3's immunity-stripping provision.

exercising authority delegated to the supervisor by the school, and, under the totality of the circumstances, it reasonably appeared that the supervisor's misconduct was tacitly approved by the school. This standard ensures that schools are held accountable for sexual abuse of students traceable to the schools' own failings without subjecting them to strict liability for criminal misconduct wholly beyond their control.

A. The Bounds Of Vicarious Liability Under Hardwicke Are Presently Uncertain, But Vulnerable To An Overly Expansive Interpretation.

Plaintiffs seek to hold the defendant school board liable for intentional sexual abuse of students by school teachers, citing this Court's decision in Hardwicke as the basis for that vicarious liability. While Hardwicke opens the door to such liability, citing § 219 of the Restatement, New Jersey courts have never explained its bounds.

Hardwicke concerned egregious misconduct by a private boarding school's executive director. 188 N.J. at 74-77. The director "functioned as the School's 'alter ego,'" not only "controlling the musical program" but also "perform[ing] a wide variety of key administrative and educational tasks," including "running the admissions office and hiring and firing staff." Id. at 75-76. From both the staff and the students' perspective, the director was "the person in control." Id. at 76. The plaintiff alleged that the executive director sexually abused him daily for over six months, while the plaintiff was a minor

student at the school. Ibid. The director's abuse of plaintiff and other students was "open, frequent, and prolonged," such that "the abuse could not have continued unnoticed." Ibid. As an adult, the plaintiff sued the school, asserting violation of the CSAA, N.J.S.A. 2A:61B-1, and various common law claims as well. Id. at 79.

The bulk of the Hardwicke opinion concerned whether the statutory elements for the CSAA claim were met, see id. at 84-94, and whether the school was immune from liability under the Charitable Immunity Act, see id. at 94-98. But the opinion also contains a short section discussing whether "the law of agency prevents holding the School liable" for the executive director's willful sexual abuse, conduct considered definitionally "outside the scope of [his] employment." Id. at 100-02. The plaintiff argued that his vicarious liability claims were supported by "modern principles of agency law," citing § 219 of the Restatement. Id. at 100-01. Under that section, the general rule is that "an employer is not liable for the torts of an employee acting outside the scope of the employment," but there is an exception for circumstances in which the employee "was aided in accomplishing the tort by the existence of the agency relation." Id. at 101 (quoting Restatement § 219(2)(d)).

The Court noted it had previously "adopted section 219 as the framework for evaluating employer liability in hostile environment sexual harassment

claims brought under LAD." Id. at 101 (citing Lehmann, 132 N.J. at 619-20). Specifically, "an employer could be held vicariously liable under [§ 219(2)(d)] … 'if an employer [had] delegate[d] the authority to control the work environment to a supervisor and [the] supervisor abuse[d] [the] delegated authority.'" Ibid. (quoting Lehmann, 132 N.J. at 620). The Court recounted that extending vicarious liability in this context "effectuate[s] important public policies," specifically, redressing "victimization of employees" by imposing responsibility on those "best situated to avoid or eliminate" such victimization by "implement[ing] corrective measures." Id. at 102 (quotation omitted). Because these same considerations "apply equally to claims predicated on facts indicating child abuse," the Court held that Restatement § 219 applies to plaintiff's common law claims. Id. at 102. But the Court did not actually apply § 219 there or provide any guidance on how it would do so. Ibid.

In the two decades since Hardwicke, its aided-by-agency liability holding has not been applied to common law claims. See E.S. for G.S. v. Brunswick Investment Ltd. P'ship, 469 N.J. Super. 279, 299 (2021) ("[E]xcept in the context of causes of action under remedial statutory schemes, plaintiff fails to cite any published New Jersey decision that relied on § 219(2)(d) of the Restatement as a basis for vicarious liability, and we have found none in our research."). Even in the LAD context, "[t]his Court has never decided what

standard of liability should apply to a school district in a case of sexual harassment perpetrated by a school employee." C.V. by & through C.V. v. Waterford Township Bd. of Educ., 255 N.J. 289, 319 n.2 (2023). So there remains a dearth of guidance concerning how that liability should be analyzed.

This lack of instruction presents cause for concern, given that "an overly broad application of § 219(2)(d) … treads perilously close to imposing strict liability on an employer." E.S., 469 N.J. Super. at 299. Indeed, numerous courts and commentators have voiced this concern for the Second Restatement's aided-by-agency theory.[7] Id. at 299-300. As the Appellate Division has explained, "in almost all vicarious liability cases the mere 'existence of the agency relation' aids the employee in accomplishing the tort because the agent often would not have committed the tort but for the responsibilities, duties, and knowledge gained from the existence of the agency relationship," meaning that an overly broad interpretation "could expose the employer to nearly limitless liability." Id. at 301 (citation omitted); see also Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995). Indeed, it is "difficult to conceive of an instance when the [aided-

[7] See, e.g., Spurlock v. Townes, 368 P.3d 1213, 1216 (N.M. 2016); Pena v. Greffet, 110 F. Supp. 3d 1103, 1118 (D.N.M. 2015); Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 226 (Mich. 2006); Doe v. Forrest, 853 A.2d 48, 60 (Vt. 2004); id. at 70 (Skoglund, J., dissenting); Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1029-30 (7th Cir. 1997); Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995); Barnes v. Costle, 561 F.2d 983, 996 (D.C. Cir. 1977).

by-agency] exception would not apply." Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 226 (Mich. 2006). For example, absent appropriate guardrails, an aided-by-agency theory could support holding a café liable where its barista poisons a patron's coffee, or a firm liable where its employee commits a drive-by shooting using a company-issued car. See Pena, 110 F. Supp. 3d at 1118.

Not to mention that, "despite purporting to be an exception," an overly broad interpretation of the aided-by-agency theory "nearly swallows the general rule that respondeat superior does not attach to intentional torts" committed outside of the scope of employment. Pena v. Greffet, 110 F. Supp. 3d 1103, 1118 (D.N.M. 2015); see also Zsigo, 716 N.W.2d at 226. New Jersey has long recognized the common law rule of agency that an employer is vicariously liable for tortious conduct committed by its employee within the scope of employment. See, e.g., G.A.-H. v. K.G.G., 238 N.J. 401, 415 (2019); Carter v. Reynolds, 175 N.J. 402, 408-09 (2003); Abbamont, 138 N.J. at 416; McAndrew v. Mularchuk, 33 N.J. 172, 190 (1960); Efstathopoulos v. Fed. Tea Co., 119 N.J.L. 408, 409 (N.J. 1938). Yet broad aided-by-agency liability would make the traditional scope-of-employment limitation on vicarious liability superfluous. Cf. Matter of K.M.G., 477 N.J. Super. 167, 174 (App. Div. 2023) (stating that courts should avoid interpretations that would "create a manifestly absurd result, contrary to public policy"). Because scope of employment is the traditional rule of vicarious

liability long recognized by courts, it defies belief that the "exception" recognized in § 219(2)(d) was intended to overtake the rule. Zsigo, 716 N.W.2d at 226; Pena, 110 F. Supp. 3d at 1118-19; Restatement of Employment Law § 4.03 cmt. f (2015).

Concerns about such expansive interpretations are not hypothetical. See, e.g., Costos v. Coconut Island Corp., 137 F.3d 46, 49-50 (1st Cir. 1998) (imposing vicarious liability on inn where employee entered guest's room at night and raped her because employee could not have access to guest's room but for his employment with the inn); see also E.S., 469 N.J. Super. at 300-01 (noting "widespread criticism of Costos" and its subsequent rejection by the Supreme Court of Maine). Indeed, in Hornor, the trial court appeared to embrace a broad standard of aided-by-agency liability, stating that the plaintiff would have to prove "that the agent leveraged his or her position of authority to effectuate the sexual assault." Hornor-A021; Order, Hornor v. Upper Freehold Reg'l Bd. Educ., No. MON-L-3887-21 (N.J. Super. Ct. Law Div. July 21, 2022) (AGa023).

For these reasons, "[c]ourts have split on the continued vitality of the 'aided-by-agency'" theory, and those that have applied it have done so only in limited circumstances. E.S., 469 N.J. Super. at 300-01. The Third Restatement has dropped the theory altogether. See id. at 301 (citing Restatement (Third) of

Agency § 7.03(2) (2006), and id. § 7.08 cmt. b).[8] And other Restatement drafters have gone "even further in disapproving of the broad interpretation of § 219(2)(d)" by "suggest[ing] that it may have been the result of a drafting oversight" due to a misplaced comma. Pearce v. Werner Enterprises, Inc., 116 F. Supp. 3d 948, 956 (D. Neb. 2015); see Restatement of Employment Law § 4.03 cmt. f (2015).

The amorphous, potentially unbounded nature of the aided-by-agency concept warrants clarification from this Court now that many more schools are potentially liable for willful sexual abuse committed by school officials under Hardwicke. This Court should therefore provide a framework to ensure aided-by-agency liability under Hardwicke is not misinterpreted as a form of strict liability whereby a school is liable for its employee's willful sexual abuse merely because that abuse was the result of a teacher-student relationship. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998) (vicarious liability "requires the existence of something more than the employment relation itself"); Davis v. Devereux Found., 414 N.J. Super. 1, 16 (App. Div. 2010), aff'd in part,

[8] In comments, the drafters acknowledged that the aided-by-agency theory was intentionally removed, stating that "[t]he purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents." Restatement (Third) of Agency § 7.08 cmt. b (2006).

rev'd in part on other grounds, 209 N.J. 269, 37 A.3d 469 (2012) (explaining that a broad reading of § 219(2)(d) is tantamount to strict liability and is therefore "inconsistent with the Court's implicit rejection of strict liability in Hardwicke"); cf. Davis v. Devereux Found., 209 N.J. 269, 291-92 (2012) (rejecting an interpretation of Hardwicke as embracing strict liability, albeit under a different theory).

B. The LAD Provides The Appropriate Framework For Determining Whether A School Is Liable Under Hardwicke.

Consistent with how vicarious liability has been analyzed in the LAD context, a school should be held vicariously liable for sexual abuse of a minor student committed by a school official only where (1) the school itself was negligent in the hiring, supervision, or retention of the tortfeasor, or (2) the tortfeasor was a supervisor exercising authority delegated to the supervisor by the school, and, under the totality of the circumstances, it reasonably appeared that the supervisor's misconduct was tacitly approved by the school. It makes sense to import a modified LAD framework to define the scope of vicarious liability, as Hardwicke also looked to that context in holding that the Second Restatement's § 219 applies to common law claims for sexual abuse of a minor by a school employee. See supra at 6-7, 19-20.

Under the LAD, whether "an employer may be vicariously liable … for sexual harassment committed by a supervisor that results in a hostile work

environment" requires application of a "fact-sensitive" standard. Aguas v. State, 220 N.J. 494, 498, 510 (2015) (discussing Lehmann). Critically, an employer is not "strictly liable for sexual harassment committed by its employee." Id. at 509 As this Court explained in specifically rejecting a strict liability standard in Lehmann, adopting such a standard, in which "an employer would always be liable" for an employee's workplace sexual harassment, "regardless of the specific facts of the case," would lead to "unjust" results—such as holding an employer liable "where a supervisor rapes one of his subordinates in the workplace." Lehmann, 132 N.J. at 624 (citation omitted).

Instead, an employer is liable in "two primary" circumstances under the LAD. Aguas, 220 N.J. at 512. First, an employer is directly liable for sexual harassment caused by its own "negligence or recklessness." Id. at 512-13. Second, an employer is vicariously liable where "the sexual harasser purported to act on the employer's behalf and 'there was reliance upon his or her apparent authority,'" or "the harasser 'was aided in his or her misconduct by the … relationship' with his or her employer." Id. at 514 (quoting Restatement § 219(2)(d)) (cleaned up). This second class of LAD claims is limited to circumstances where the harasser is a supervisor. See id. at 525. To qualify, a harasser need not be a "senior executive[]," but must have been delegated power "to control the day-to-day working environment." Id. at 525-28; see, e.g.,

Dunkley v. S. Coraluzzo Petrol. Transporters, 437 N.J. Super. 366 (App. Div. 2014) (employer not vicariously liable for employee-on-employee discriminatory harassment). And an employer may avoid liability by establishing that it "exercised reasonable care to prevent and to correct promptly sexually harassing behavior," and "that the plaintiff employee unreasonably failed to take advantage of [these] preventive or corrective opportunities." Aguas, 220 N.J. at 524.

This LAD framework can be adapted to common law claims seeking to hold a school liable for the sexual abuse of a minor by a school employee, "mindful that schools are different from workplaces" and that "[a] school cannot be expected to shelter students from all instances" of abuse. L.W. ex rel. L.G. v. Toms River Reg'l Schs. Bd. of Educ., 189 N.J. 381, 406-08 (2007) (adopting modified vicarious liability standard from Lehmann to LAD claims seeking to hold schools liable for student-on-student sexual harassment).

First, a school is of course liable for its own negligence in the hiring, supervision, or retention of the tortfeasor that foreseeably results in a minor student's sexual abuse. See N.J.S.A. 59:2-1.3(a)(2). As this Court has recognized, "[n]o greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others." Frugis v.

Bracigliano, 177 N.J. 250, 268 (2003); see also Davis v. Devereux Found., 209 N.J. 269, 291 (2012) ("Hardwicke underscores the continued viability of reasonable care as the standard imposed upon *in loco parentis* institutions"). A school board violates the ordinary duty of care it owes to students if it fails to adopt "reasonable measures to assure that the teachers and administrators who stand as surrogate parents during the day are educating, not endangering, and protecting, not exploiting, vulnerable children." Frugis, 177 N.J. at 268; cf. L.W., 189 N.J. at 407 (holding that "a school district may be found liable under the LAD for student-on-student" harassment "when the school district knew or should have known of the harassment, but failed to take action reasonably calculated to end [it]"). For example, in Frugis, the school board violated that duty where numerous school employees witnessed the school principal inappropriately touching students and knew that the principal routinely brought students to his office and photographed them, and there was no clear mechanism for reporting this misconduct to the board. 177 N.J. at 268-74.

Second, apart from its own negligence, a school may be vicariously liable for sexual abuse that is (a) committed by a supervisor (b) exercising authority delegated to the supervisor by the school, and where, (c) under the totality of the circumstances, it reasonably appeared that the supervisor's misconduct was tacitly approved by the school. This is analogous to the LAD aided-by-agency

framework, see Aguas, 220 N.J. at 514, 524-25, and reflects the factual circumstances in Hardwicke, see supra at 18-19.

As to the supervisor prong, amicus is aware of no cases in which the New Jersey courts have recognized aided-by-agency liability for a non-supervisory employee. See Aguas, 220 N.J. at 525-28; Lehmann, 132 N.J. at 620, 626. That makes sense. Supervisors are those most powerfully aided by authority granted to them by their employers, they are closer to upper-management officials and directors whose conduct is most fairly imputed to the employer itself. See, e.g., Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 64 (2d Cir. 1992) (while acknowledging that, "[a]t some point ... the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company," declining to impute particular manager's harassment of subordinate to the company that employed him where company lacked "constructive notice" of the harassment). And "employers have greater opportunity and incentive to screen [supervisors], train them, and monitor their performance." Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998).

The same principles counsel in favor of limiting a school's vicarious liability for sexual abuse of a student to circumstances in which that abuse was perpetrated by a supervisory school employee. See D.T. v. Archdiocese of Phila., 260 N.J. 27, 46 n.4 (2025) (interpreting Hardwicke as holding that

vicarious liability is available where "the employer delegated the authority to control the work environment to a supervisor and the supervisor abused that delegated authority" (emphasis added)). Indeed, in Hardwicke itself, the abuser was a director at the school who functioned as its "alter ego." 188 N.J. at 75-77. Other supervisors in the school context would include principals and superintendents, while teachers who lack any supervisory responsibilities with respect to other school employees would be excluded.

Limiting vicarious liability to the tortious acts of supervisory school officials exposes schools to liability for the tortious acts of only those employees whose delegated "authority [is] of sufficient magnitude" powerfully to have aided them in the commission of the tort, Aguas, 220 N.J. at 526; see, e.g., Hardwicke, 188 N.J. at 75-77, and to have put the school on "constructive notice" of their misconduct, Kotcher, 957 F.2d at 64; cf., Frugis, 177 N.J. at 268-74. And it avoids capaciously subjecting a school—which has not itself been negligent in any way—to vicarious liability for nearly every intentional tort committed by a teacher against a student. Cf. Lehmann, 132 N.J. at 624 (rejecting strict liability for workplace harassment by supervisors); Davis, 209 N.J. at 292 (rejecting argument that Hardwicke supports adopting standard that would "amount[] to an employer's absolute liability for an employee's criminal act"); E.S., 469 N.J. Super. at 301 (if "[t]he agency relation by itself could

expose the employer to nearly limitless liability," that would "involv[e] situations that fall well beyond a fair assessment of the employer's responsibility." (quotation omitted)).

Further, the supervisor must have been exercising authority delegated to him by the school when the supervisor committed the sexual abuse. See Aguas, 220 N.J. at 514 (exercise of "authority delegated by the employer to the supervisor" must have "aid[ed] the supervisor in injuring the plaintiff"); Lehmann, 132 N.J. at 620 (same). For example, the facts in Frugis would have qualified. There, the school principal's abuse of students was aided by the principal's supervisory role because other school employees who observed the principal's concerning conduct felt that "there was nothing they could do" since "[h]e was their superior." 177 N.J. at 259 (cleaned up); see also id. at 260 (stating that the nurse "would have reported" concerning conduct "to the principal, had [the defendant] not been the principal himself"). And the principal secured the silence of his student victims by threatening to suspend them if they spoke out, a power he had as principal. Id. at 266. By contrast, a school would not be liable where, for example, a superintendent attended a social gathering where he happened to know an acquaintance's child through school, and the superintendent abused the child at the social gathering. Indeed, in most cases where a sexual assault occurs off school premises and unconnected

with a school activity, the test will not be satisfied because the supervisor is unlikely to be exercising authority delegated to him by the school.

Finally, a school should only be held liable where, under the totality of the circumstances, it reasonably appeared that the supervisor's misconduct was "tacitly approved" by the school. Lehmann, 132 N.J. at 623. This element of the plaintiff's case is an adaptation of the affirmative defense available to employers in the LAD context, modified to account for the differences between student-sexual-abuse cases and employee-workplace-harassment cases.

In the LAD context, an employer may avoid liability for a supervisor's sexual harassment where the employer establishes "that the employer exercised reasonable care to prevent and to correct promptly sexually harassing behavior" yet "the plaintiff employee unreasonably failed to take advantage of [those] preventive or corrective opportunities." See Aguas, 220 N.J. at 524. This affirmative defense may be established by showing that the employer has an "effective anti-harassment polic[y]." Id. at 523. The Court adopted this defense in recognition of the fact that "imposition of strict liability on an employer[,] … without respect to that employer's efforts to foster a workplace free from harassment, would contravene the legislative goal of deterrence." Id. at 520.

While it would be equally counterproductive to impose strict liability on schools without respect to their efforts to foster an educational environment free

from sexual abuse, the LAD affirmative defense does not translate cleanly to the context of sexual abuse of minor students. For one, it does not make sense to scrutinize whether a minor student "unreasonably failed" to utilize established grievance procedures when the minor student was sexually abused. Aguas, 220 N.J. at 524. For another, the deterrence rationale that motivates the LAD affirmative defense translates imperfectly to the context of willful sexual abuse of children, where it is unlikely the abuser mistakenly believed such abuse was appropriate and that mistaken belief could have been corrected with appropriate training on the school's anti-abuse policy. And given the extended statute of limitations for sexual abuse torts, schools may need to defend against claims of misconduct that occurred decades prior, where they may not be able affirmatively to establish the school's anti-abuse measures during the relevant period.

For these reasons, while the LAD affirmative defense is not a perfect fit, a school's anti-abuse measures and policies should be relevant to a plaintiff's ability to hold the school liable for sexual abuse of a student by the school's supervisory employee. Instead of an affirmative defense, a plaintiff should be required to establish that the sexual abuse she suffered was "tacitly approved" by the school, or that it reasonably appeared that the abuse "was tolerated" by the school. Lehmann, 132 N.J. at 622-23. The absence of meaningful anti-abuse

measures or policies would be relevant to this inquiry. See ibid. For example, if a school "failed to establish an explicit policy against sexual [abuse] and did not have a reasonably available avenue by which victims … could complain to someone with authority to investigate and remedy the problem," that "could give rise to a reasonable inference that the supervisor's [abusive] conduct was tacitly approved" by the school. Id. at 623; cf. Frugis, 177 N.J. at 260-61, 270 (finding liability where there was no established reporting procedure for sexual abuse). Or if, as in Hardwicke, the supervisor's abusive conduct was "open, frequent[,] and prolonged," such that "the abuse could not have continued unnoticed," 188 N.J. at 76, that would also support a finding of tacit approval by the school.

Sound policy rationales support the application of this rule to these cases. Preventing child sexual abuse is a goal of the utmost importance, as is ensuring that survivors of child sexual abuse can recover for the lifelong pain and suffering caused by such abuse, which is why the Legislature eliminated immunity in this context. See Hardwicke, 188 N.J. at 102; Frugis, 177 N.J. at 268; Murphy, Governor's Statement, at 1 (AGa015). But for vicarious liability to fulfill that goal, there must be a genuine "relationship between the employee's job responsibilities and his or her tortious conduct." Davis, 209 N.J. at 287; cf. Carter v. Reynolds, 175 N.J. 402, 408 (2003) (stating that the underlying policy rationale of respondeat superior liability is "that one who expects to derive a

benefit or advantage from an act performed on his behalf by another must answer for any injury that a third person may sustain from it"). Indeed, insisting on this sort of connection—and linking liability to the defendant's actions or inactions—also appropriately incentivizes organizations to take proactive measures to prevent sexual abuse by denying liability where the organization actively sought to prevent such mistreatment. That, too, mirrors the framework recognized for LAD sexual harassment claims, where this Court has recognized that "[t]he prospect of an affirmative defense in litigation is a powerful incentive for an employer to unequivocally warn its workforce that sexual harassment will not be tolerated, to provide consistent training, and to strictly enforce its policy." Aguas, 220 N.J. at 523; cf. Frugis, 177 N.J. at 270 (finding a school negligent based on its "fail[ure] to implement effective rudimentary reporting procedures … and … gross[] disregard[] [of] critical information" indicating a need to scrutinize the principal's conduct).

A standard more akin to strict liability, this Court has recognized, would not properly serve sound policy rationales. See Lehmann, 132 N.J. at 624. It may disincentivize certain defendants from offering some services to children altogether, for fear of their liability exposure if any employee engages in such heinous and illegal behavior, notwithstanding a defendant's policies and efforts to prevent it. See, e.g., John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 956

(Cal. 1989) (in the educational context, noting that a low standard could "deter districts from encouraging, or even authorizing, extracurricular and/or one-on-one contacts between teachers and students" or "induce [them] to impose such rigorous controls … that the educational process would be negatively affected"). And for public entities in particular, there are other risks to overly expansive liability. Unlike private parties, such entities operate with a set budget year-by-year and may therefore be required to pull funding from other areas of critical need—such as educational programming—in order to offset any liability. Cf. Doe v. Forrest, 853 A.2d 48, 75 (Vt. 2004) (Skoglund, J., dissenting) ("Public agencies … cannot raise their prices, [so] … their only option may be to cut funding elsewhere."). Instead, this Court should adopt the standard that both incentivizes organizations to be proactive in preventing sexual abuse and avoids the harms from an unsupported and overly capacious vicarious liability test in this context.[9]

[9] In an appropriate case, this Court could also consider whether to transition the doctrine from the Second Restatement's approach to the Third Restatement.

CONCLUSION

This Court should vacate the Appellate Division's decision and remand for further consideration under the appropriate standard.

Respectfully submitted,

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