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; DEFENDANT DOE REPRESENTATIVE OF THE ESTATE OF CHARLES J. HUTLER JR., DECEASED 1-5; DEFENDANT DOE 1-10; DEFENDANT DOE INSTITUTION 1-10, 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 Order dated: October 8, 2024 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.

AMENDED BRIEF OF AMICUS CURIAE NEW JERSEY DEFENSE ASSOCIATION

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PRELIMINARY STATEMENT

The New Jersey Tort Claims Act (hereinafter the "Act") has been interpreted to permit the finding of liability against public entities only when permitted by the "Act". The Act itself provides that public entities shall only be liable for their negligence within the limitations of the "Act" and in accordance with the fair and uniform provisions established in the "Act". Public entities are immune from liability unless they are declared to be liable under the "Act".

The "Act" only recognizes vicarious liability for public entities for the acts or omissions of employees acting within the scope of their employment. Without this predicate for liability, no vicarious liability can be imputed on public entities. The Plaintiff/Appellant seeks to rewrite, or simply evade, the plain and ordinary language of the "Act" and fifty-five years of reported case ratifying the limited parameters within which recovery for tortious injury may be had against public entities. The Plaintiff/Appellant's objective is to circumvent the "Act" and expand vicarious liability for public entities to include the acts or omissions of employees outside the scope of employment. Such an expansion runs contrary to the explicit language and intent of the "Act" and creates new tort liability against public entities which exposes them to immeasurable liability.

The New Jersey Defense Association seeks affirmation of the clear and explicit language of the "Act" and opposes any expansion of vicarious liability for public entities beyond what is explicitly permitted in the "Act". The application before the Court is essentially a request for the Court to rewrite, reinterpret, or overlook explicit limiting language in the "Act" which specifically limits tort liability for public entities for the acts or omissions of employees within the scope of employment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The New Jersey Defense Association relies upon the facts and procedural histories submitted by the parties in this matter.

LEGAL ARGUMENT

POINT I

THE TORT CLAIMS ACT DOES NOT RECOGNIZE VICARIOUS LIABILTY CLAIMS AGAINST PUBLIC ENTITIES WHEN THE EMPLOYEE'S CONDUCT IS OUTSIDE THE SCOPE OF EMPLOYMENT.

Pursuant to the legislative declaration to the Tort Claim Act, "it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein." N.J.S.A. 59:1-2. Public entities are not liable for an injury, except as such liability may be provide for in the Act. Chatman v. Hall, 128 N.J. 394 (1992); Velez v. City of Jersey City, 180 N.J. 284, 289 (2004). While the purpose of the Act is to ameliorate the harsh consequences of the common law doctrine of sovereign immunity, the guiding "principle" of the Torts Claims Act is "that immunity from tort liability is the general rule and liability is the exception." Coyne v. State Dep't of Transp., 182 N.J. 481 (2005) (quoting Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (2005).

N.J.S.A. 59:2-1 provides:

> a. Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.
>
> b. Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defences that would be available to the public entity if it were a private person.

The Comment to N.J.S.A. 59:2-1 a. provides that when read together with N.J.S.A. 59:1-2, the effect is to strictly limit the tort liability of public entities to the provisions in the Tort Claims Act, and to confine claimants to causes of action which can be maintained under specific provisions in the Act, such as 59:2-2(a) (the doctrine of respondent superior), or N.J.S.A. 59:4-2 and N.J.S.A. 59:4-4. N.J.S.A. 59:2-1 Task Force Comment.

Hence, the initial inquiry in a tort claim against a public entity in New Jersey is to locate the predicate for liability in the Act. Troth v. State, 117 N.J. 258, 277 (1989); Kolitch v. Lindedohl, 100 N.J. 485, 502 (1985). If there is no predicate for liability, the inquiry is at an end. "[P]ublic entities are immune from liability unless they are declared to be liable" by a provision of the Tort Claims Act. N.J.S.A. 59:2-1 Task Force Comment. There is no predicate for vicarious liability in the "Act" for an employee's omission or act that is outside the scope of employment. Here, the employee's acts are outside the scope of employment.

Fifty-five years ago, this Court abrogated common-law sovereign immunity in tort cases against public entities. Willis v. Dep't of Conserv. & Encon. Dev., 55 N.J. 534, 536-40, 264 A.2d 34 (1970). In response, the Legislature enacted the TCA, which restored *limited* sovereign immunity in such cases. Alston v. City of Camden, 168 N.J. 170, 176, 773 A.2d 693 (2001); Fluehr v. City of Cape May, 159 N.J. 532, 539, 732 A.2d 1035 (1999). The Legislature declared that it was "the public policy of this State that public entities shall *only* be liable for their negligence *within the limitations of [the TCA]*." N.J.S.A. 59:1-2 (emphasis added). Smith v. Fireworks by Girone, 180 N.J. 199, 207 (2004) (noting "dominant theme of the [Act] was to re-establish the immunity of all governmental bodies in New Jersey, subject only to the [Act's] specific liability provisions"). "[I]mmunity for public entities is the rule and liability is the exception." Fluehr, *supra*, 159 N.J. at 539, 732 A.2d 1035. In light of that overriding policy, the TCA has been construed to allow the finding of liability against public entities only when permitted by the Act. Pico v. State, 116 N.J. 55, 59, 560 A.2d 1193 (1989).

N.J.S.A. 59:2-2(a) provides that "a public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual

under like circumstances." N.J.S.A. 59:2-2 Task Force Comment. This section "establishes the principal of vicarious liability for all public entities." Ibid. The "Act" does not recognize vicarious liability for employee acts or omissions beyond the scope of employment. Simply stated, public entities have no vicarious liability for acts or omissions by its employees outside the scope of employment. Cosgrove v. Lawrence, 214 N.J. Super. 670 (Law Div. 1986), aff'd 215 N.J. Super. 561 (App. Div. 1987), Tice v. Cramer, 133 N.J. 347, 355 (1993) (reiterating "the liability of the public entity must be found in the Act").

The Act has been strictly construed to effectuate its purpose. McDade v. Siazon, 208 N.J. 463, 474 (2011); Dickson ex rel. Duberson v. Tp. 400 N.J. Super. 189, 195 (App. Div.), certify. Den. 196 N.J. 461 (2008). The legislative intent in the Act was to re-establish the immunity of all governmental bodies in New Jersey except where enumerated in the Act. Ayers v. Jackson Tp., 106 N.J. 557, 574 (1987); Birchwood Lakes Colony Club v. Borough of Medford Lakes, 90 N.J. 502, 596 (1982).

A public entity cannot be held liable for the acts or omissions of employees outside the scope of employment of their employment in the same manner as a private entity may be held vicariously liable. The Legislature has specifically

deemed a public entity only vicariously liable for the acts or omissions of its employees occurring within the scope of employment. N.J.S.A. 59:2-2(a). The Court in Hardwicke v. American Boychoir School, 188 N.J. 69 (2006), held, among other things, that a private Boychoir School could be held vicariously liable for the intentional torts of its employees outside the scope of employment under Restatement (Second) of Agency §219(2)(d). E.S. for G.S. v. Brunswick Inv. Ltd. P'ship, 469 N.J. Super. 279, 299 (App. Div. 2021).[1] The Court relied upon the "aided-by-agency" theory in the Restatement (Second) of Agency to impose vicarious liability on a private entity for an employee's conduct outside the scope of employment. Simply stated, public entities, as opposed to private entities, can only bear vicarious liability if the act or omission by the employee is within the scope of employment as reflected in N.J.S.A. 59:2-2(a). The "aided-by-agency" theory, recognized in Hardwicke, to establish vicarious liability for employee conduct outside the employment scope, has no application to public entities whose liability is prescribed only by the "Act" itself. Any attempt by the movant to graft the "aided-by-agency" theory onto the "Act", or argue "the sea change in the law", conflicts

[1] The American Law Institute abandoned the aided-by-agency theory of vicarious liability in its Restatement (Third). Restatement (Third) of Agency §7.08 cmt. b. (2006); E.S., 469 N.J. Super. at 295-96.

with the explicit language in the Act itself which sets the predicate for public entity liability.

The "aided-by-agency" principle espoused in the Restatement (Second) of Agency at Section 219 recognizes a "master's" liability, under (2)(a-d), in specific circumstances, when the servant is acting outside the scope of their employment. The TCA, in contrast, has no validation of a master's liability in any instances where the servant is acting outside the scope of employment. The "aided-by-agency" principles at §219(2)(a-d) are inopposite to N.J.S.A. 59:2-2(a) as the TCA does not recognize a predicate for liability under any circumstances for vicarious liability when the employee's conduct is outside the scope of employment. The "aided-by-agency" theory, which endorses employer liability in specific settings where the employee is beyond the scope of the employment, has no congruity with the TCA which does not legitimize claims for vicarious liability unless the employee is within the scope of their employment. Plaintiff/Appellant seeks a ratification of a liability theory, "aided-by-agency" or "the sea change in the law," in the face of an Act that does not recognize claims for vicarious liability for conduct beyond an employee's scope of employment.

There is no provision in the Tort Claims Act creating vicarious liability for an act or omission by a public employee acting outside the scope of employment regardless of any 2019 amendment, including N.J.S.A. 59:2-1.3. N.J.S.A. 59:2-1.3 disabled immunities for a public entity (N.J.S.A. 59:2-10 provided immunity for certain acts committed by an employee within the scope of employment) but did not expand the breadth by which a public entity could be held vicariously liable for an employee's acts or omissions. N.J.S.A. 59:2-1.3 did not alter the Act's liability predicate.

The Plaintiff/Appellant has already acknowledged the conduct of the employee (Hutler) as outside the scope of employment. The employee conduct in Davis v. Devereux Foundation, 209 N.J. 269, 303 (2012) (criminal act by employee of severely scalding a child) or Cosgrove v. Lawrence, 214 N.J. Super. 670 (Law Div. 1986), aff'd 215 N.J. Super. 561 (App. Div. 1987) (public employee initiated sexual relationship with patient during therapy session) and in Frugis v. Bracigliano, 177 N.J. 250, 257 (2003) (principle abusing students), are easily characterized as intentional, if not criminal, and outside the scope of employment. In that same way, the conduct of the employee (Hutler) herein cannot be viewed as anything other than outside the scope of employment for a teacher.

Any argument that Hutler's conduct is within the scope of his employment conflicts with the Restatement §228(1) and the four factors discussed in Davis v. Devereux Foundation, 209 N.J. 269, 303 (2012). Hutler's conduct is not the kind he was employed to perform; the conduct was not actuated to serve the master; and the force is "unexpectable" by the "master." Simply stated, an employee's act is outside the scope of employment "if it is different in kind from that authorized, far beyond the authored time or space limits, or too little actuated by a purpose to serve the master." See Davis, at p. 303. The difference between acts that are within the scope and acts that are not, is sharply illustrated when the employee commits a crime. Davis, at p. 307. Any suggestion that the employee's (Hutler's) conduct is within the scope of his employment must be rejected under both the Reinstatement as discussed in Davis, but by common sense as well.

CONCLUSION

The New Jersey Defense Association opposes any application that seeks to overlook or alter the plain language and intent of the Tort Claims Act and expand vicarious liability for public entities. Any expansion of vicarious liability for a public entity to include employee conduct outside the scope of employment is inequitable, contrary to the statute and legislative intent of the Act, and creates a tremendous liability exposure for public entities for the unauthorized, perhaps even criminal, conduct by employees.

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Dated: May 2, 2025