Supreme Court of New Jersey

Docket No. 89973

RUSSELL FORDE HORNOR, *Plaintiff-Appellant,* vs. UPPER FREEHOLD REGIONAL BOARD OF EDUCATION d/b/a UPPER FREEHOLD REGIONAL SCHOOL DISTRICT; ALLENTOWN HIGH SCHOOL; NEW JERSEY FUTURE FARMERS OF AMERICA; CHARLES J. HUTLER, JR., DEFENDANT DOE 1-10; AND DEFENDANT INSTITUTION 1-10 *Defendant-Respondents.*	:	CIVIL ACTION ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No.: A-366-22, Civil Action Sat Below: HON. ALLISON E. ACCURSO, J.A.D., HON. FRANCIS J. VERNOIA, J.A.D., AND HON. ARNOLD NATALI, J.A.D.

BRIEF ON BEHALF OF AMICUS CURIAE NEW JERSEY COALITION AGAINST SEXUAL ASSAULT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

STATEMENT OF INTEREST OF AMICUS CURIAE NEW JERSEY COALITION AGAINST SEXUAL ASSAULT

The New Jersey Coalition Against Sexual Assault (NJCASA) is a statewide 501(c)(3) organization that represents New Jersey's 21 county-based sexual violence programs and the Rutgers University – New Brunswick Office of Violence Prevention and Victim Assistance. NJCASA's membership also includes a cohort of eight culturally specific programs. NJCASA provides capacity-building support to its 30 member programs which provide direct services to survivors of sexual violence across New Jersey. NJCASA's activities include legislative and budget advocacy for policies that are survivor-centered and informed by research and best-practice standards, production of position papers regarding current and trending legislative issues related to sexual violence, developing and conducting trainings on prevention of sexual violence, and supporting survivors of sexual violence across New Jersey. NJCASA has an interest in protecting children from sexual abuse and expanding civil justice remedies for survivors of childhood sexual abuse, as evidenced by its work supporting survivors. Its programs serve all survivors aged 13 and older, and many survivors seeking these free and confidential services experienced sexual violence as children. As one of New Jersey's leaders in the anti-sexual-violence movement, NJCASA uses its voice to inform survivor-centered, trauma informed policies. NJCASA leant its support to the passage of recent legislation

in this area, including the 2019 Amendments at issue in these appeals. NJCASA respectfully requests permission to appear as amicus curiae in these matters by submitting this brief and participating in oral argument.

PRELIMINARY STATEMENT

It is difficult to imagine a more heinous and damaging act than sexual abuse of a child. Childhood sexual abuse is associated with a range of lifelong injuries, including post-traumatic stress disorder (PTSD), schizophrenia, conversion disorder, borderline personality disorder, eating disorders, anxiety, depression, substance abuse, and suicidal ideation. *See* Lo Iacono L, Trentini C, Carola V. Psychobiological Consequences of Childhood Sexual Abuse: Current Knowledge and Clinical Implications. Frontiers in Neuroscience. 2021 Dec; Vol. 15, Article 771511.

To protect children from those who cause sexual harm and to provide expanded access to civil justice for survivors of childhood sexual abuse, in 2019 the Legislature passed "landmark amendments" which "overhauled" New Jersey's Child Sexual Abuse Act (CSAA), Charitable Immunity Act (CIA), and Tort Claims Act (TCA) (the 2019 Amendments). *W.S. v. Hildreth*, 252 N.J. 506, 510-511 (2023). Determinative of the issue before the Court, the Legislature passed N.J.S.A. §59:2-1.3, which by its plain language, disables all immunities for public entities provided by the TCA for sexual abuse caused by a willful,

wanton or grossly negligent act of a public employee. The express intent of the Legislature in enacting §59:2-1.3 was to make public entities liable for sexual abuse to the same extent as private entities. *See infra* p. 13-17.

Despite the plain language of §59:2-1.3, and the Legislature's stated intent, the panels of the Appellate Division below held that the TCA continues to immunize public entities from the aided by agency theory of vicarious liability, even though this doctrine has applied to charitable entities since this Court's decision in *Hardwicke v. Am. Boychoir School*, 188 N.J. 69 (2006). The aided by agency theory of vicarious liability, which was adapted from §219(2)(d) of the Second Restatement of Agency and developed by this Court's decisions, is "sufficiently well-established to provide employers with notice of their potential liability and also sufficiently flexible to provide just results in the great variety of factual circumstances..." *Lehmann v. Toys 'R' Us*, 132 N.J. 587, 619 (1993). Under the aided by agency theory, employers are liable for torts committed by their employees when the employee "'was aided in [his or her misconduct] by the existence of an agency relationship'" with the employer. *Aguas v. State*, 220 N.J. 494, 514 (2015) (quoting §219(d)(2) 2nd Restat. Agency); *see also Lehmann*, 132 N.J. at 619); *Hardwicke*, 188 N.J. at 101-02.

Application of the aided by agency theory to claims based on child sexual abuse advances New Jersey's goal of protecting vulnerable children from

victimization by imposing responsibility on those in the best position to know of abuse and stop it. *Hardwicke*, 188 N.J. at 102. When the Legislature passed §59:2-1.3, removing all TCA immunities, it removed the TCA's basic grant of sovereign immunity that kept public entities from being liable, including vicariously liable, to the same extent as private ones. Thus, the aided by agency theory should now apply to public entities. The decisions of the panels below to the contrary are in contravention to the plain language of §59:2-1.3, the stated intent of the Legislature, and New Jersey's public policy, and should be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purposes of this brief, Amicus accepts the facts and procedural history contained in the decisions of the Appellate Division below.

ARGUMENT

I. N.J.S.A. §59:2-1.3 Plainly States that it Removes All Immunities Granted by the TCA

A. The TCA Reestablished Sovereign Immunity

Prior to the enactment of the TCA, public entities were subject to liability under the common law doctrine of *respondeat superior* to the same extent as private organizations. In 1960, "municipalities came to be liable for the tortious conduct of their employees under a theory of *respondeat superior*." *Chatman v. Hall*, 128 N.J. 394, 406 (1992) (citing *McAndrew v. Mularchuk*, 33 *N.J.* 172

(1960)). From then on, "[i]n connection with application of the doctrine of *respondeat superior*, no longer [wa]s there any differentiation between a municipality and an ordinary employer." *Amelchenko v. Freehold*, 42 N.J. 541, 547 (1964) (citing *McAndrew*, 33 *N.J.* at 190-193); *see also Chatman*, 128 N.J. at 405 (prior to the 1970s, public municipalities were "governed by complex and often overlapping rules" of common law liability).

With the enactment of the TCA in 1972, the Legislature "[m]odif[ied] this Court's abrogation of sovereign immunity in *Willis v. Dep't. of Conservation and Economic Development*, 55 N.J. 534, 264 A.2d 34 (1970) and reinstate[d] the rule that protects public entities from civil liability..." *Alston v. City of Camden*, 168 N.J. 170, 181 (2001) (alterations in original). The Court has repeatedly described the TCA as reestablishing sovereign immunity. *See*, *e.g.*, *Conforti v. County of Ocean*, 255 N.J. 142, 176 (2023); *Smith v. Fireworks by Girone, Inc.*, 180 N.J. 199, 207 (2004); *Chatman*, 128 N.J. at 402; *Manna v. State*, 129 N.J. 341, 346 (1992); *Bombace v. Newark*, 125 N.J. 361, 372 (1991); *Bell v. Bell*, 83 *N.J.* 417, 423 (1980).

"The first substantive section of the [TCA] establishes the analytical framework to be used in resolving questions of governmental immunity: 'Except as otherwise provided by this act, a public entity is not liable for an injury * * *.'" *Rochinsky v. State, Dep't of Transp.*, 110 N.J. 399, 407 (1988)

(quoting *N.J.S.A.* §59:2-1(a)); *see also Nieves v. Adolf,* 241 N.J. 567, 574-575 (2020) ("*N.J.S.A.* 59:1-2 and 2-1 set forth the essential immunity of public entities."); *Posey v. Bordentown Sewerage Auth.*, 171 N.J. 172, 181 (2002).

In enacting the TCA, the Legislature "made clear that its waiver of sovereign immunity was strictly limited by the terms of the statute itself, and is not subject to expansion by case law." *Maison v. New Jersey Transit Corp.*, 245 N.J. 270, 310 (2021) (Justice Patterson, concurring in part and dissenting in part). As such, since the enactment of the TCA, the courts have "look[ed] to the TCA – not to the common law that preceded it – to determine the scope of public entity and public employee liability." *Id.* at 313. In passing the TCA, the Legislature stated "'[s]hould further study in future years demonstrate that additional liability of public entities is justified, such liability may then be imposed by the Legislature within carefully drafted limits.'" *Rochinsky*, 110 N.J. at 414 (quoting *N.J.S.A.* §59:2-1 Task Force Comment).

Prior to the TCA, the liability and immunities of public entities, including vicarious liability for the acts of employees, was governed by the common law and could be developed by the decisions of the courts. Then, §59:2-1(a) of the TCA cloaked public entities in sovereign immunity and additional liability could only be imposed by the Legislature. The Legislature chose to impose additional liability on public entities with its passage of the 2019 Amendments.

B. The Plain Language of N.J.S.A. §59:2-1.3 Removed All Immunities Granted by the TCA for Claims Arising Out of Sexual Abuse Caused by a Willful, Wanton or Grossly Negligent Act of a Public Employee.

The 2019 Amendments removed the immunities granted to public entities by the TCA with respect to certain claims for sexual abuse. Relevant to the issues here, §59:2-1.3(a)(1), enacted as part of the 2019 Amendments, states:

> a. Notwithstanding any provision of the "New Jersey Tort Claims Act," N.J.S.59:1-1 et seq., to the contrary:
>
> (1) immunity from civil liability granted by that act to a public entity or public employee shall not apply to an action at law for damages as a result of a sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in section 2 of P.L.1992, c.7 (C.2A:30B-2), or sexual abuse as defined in section 1 of P.L.1992, c.109 (C.2A:61B-1) being committed against a person, which was caused by a willful, wanton or grossly negligent act of the public entity or public employee;

§ 59:2-1.3(a)(1). By its plain language, §59:2-1.3(a)(1) removes all immunity from civil liability granted public entities by any provision of the TCA for sexual abuse caused by willful, wanton or grossly negligent acts of public employees. The directive that "immunity from civil liability granted by [the TCA] to a public entity…shall not apply…" is a definitive statement of intent to lift all immunity afforded public entities by the TCA.

Further, the Legislature's use of a "notwithstanding" provision in §59:2-1.3 is strong evidence of its intent to disable all immunity granted by the TCA. "The ordinary meaning of 'notwithstanding' is 'in spite of,' or 'without prevention or obstruction from or by.'" *NLRB v. SW Gen., Inc.*, 580 U.S. 288,

301 (2017) (quoting Webster's Third New International Dictionary 1545 (1986) and Black's Law Dictionary 1091 (7th ed. 1999)). "In statutes, the word 'shows which provision prevails in the event of a clash.'" *Id*. at 301 (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 126-127 (2012)). As this Court explained: "'[i]n construing statutes, the use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section.'" *Kennedy v. Weichert Co.*, 257 N.J. 290, 310 (2024) (quoting *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993)). Indeed, it is "difficult to imagine" a "clearer statement" of the Legislature's intent to supersede all other laws than its use of the word "notwithstanding." *Cisneros*, 508 U.S. at 18 (quoting *Liberty Maritime Corp. v. U.S.*, 928 F.2d 413, 416 (D.C. Cir. 1991)).

Decisions of New Jersey's appellate courts support the conclusion that the 2019 Amendments removed all immunity granted by the TCA. *See W.S. v. Hildreth*, 252 N.J. 506, 514 (2023) (the 2019 Amendments "provided that **the TCA's conferral of substantive immunity from civil liability would 'not apply** to an action at law for damages' resulting from sexual abuse 'which was caused by a willful, wanton, or grossly negligent act of the public entity or public employee…'") (emphasis added); *Maison v. New Jersey Transit Corp.*, 245 N.J. 270, 316 (2021) (Justice Patterson, concurring in part and dissenting in

part) (The 2019 Amendments "expanded public entity liability" by "amending N.J.S.A. 59:2-1.3 by **eliminating TCA immunity for public entities** …") (emphasis added); *C.W. v. Roselle Bd. of Educ.*, 474 N.J. Super. 644, 653-654 (App. Div. 2023) ("[T]he Legislature enacted *N.J.S.A.* 59:2-1.3 to amend the TCA **and remove immunity for public entities**….") (emphasis added).

The plain language of §59:2-1.3 expresses the Legislature's intent to remove from public entities the immunity from civil liability granted by the TCA notwithstanding, i.e., in spite of, without prevention from, without obstruction by, any provision of the TCA. As discussed above, the TCA reestablished sovereign immunity from civil liability. *See supra* p. 4-7. One of the provisions of the Act specifically grants that general immunity. *See* §59:2-1(a). The TCA also limited the waiver of immunity to the terms of the act, effectively separating public entity liability from developments in the common law. *See supra* p. 6-7. Before the enactment of the TCA, *respondeat superior* applied to public entities in the same way as private employers. *See supra* p. 4-5. Thus, notwithstanding the TCA, public entities are liable for the conduct of their employees, including under the aided by agency theory, to the same extent as private ones.

C. The Panels Below Incorrectly Interpreted the TCA and the Effect of the 2019 Amendments

To justify their decision not to follow the plain language of §59:2-1.3, the panels below relied upon an illusory distinction between immunities and

liabilities in the TCA. Finding that §59:2-1.3 only disabled the immunities in the TCA, they reasoned that plaintiffs must still point to a "predicate liability" in the TCA that allows them to bring a claim for acts by an employee outside the scope of employment. *Hornor v. Upper Freehold Reg'l Bd. of Educ.*, 2024 N.J. Super. LEXIS 2352, *34 (Oct. 8, 2024); *Simpkins v. S. Orange-Maplewood Sch. Dist.*, 2024 N.J. Super. Unpub. LEXIS 2341, *11 (App. Div. Oct. 12, 2022). The distinction the panels below drew between immunities and liabilities in the TCA, however, ignores the fundamental overall effect of the TCA, and specifically §59:2-1(a), of cloaking public entities in blanket immunity.

The panels below further reasoned that since a "liability provision" of the TCA, N.J.S.A. 59:2-2(a), states that a public entity is liable for injuries proximately caused by acts or omissions of public employees within the scope of their employment, no predicate liability exists to apply the aided by agency theory to public entities. *Hornor.*, 2024 N.J. Super. LEXIS 2352 at *34; *Simpkins*, 2024 N.J. Super. Unpub. LEXIS 2341 *13. This finding is also contrary to the plain directive of the Legislature set forth in §59:2-1.3. Under the panels' interpretation public entities still have an immunity to claims arising out of sexual abuse, granted to them by §59:2-2(a), which they would not have but for the TCA. That is, private entities can be held vicariously liable for employees' acts outside the scope of employment when the requirements of the

aided by agency theory are established and, according to the panels' interpretation, public entities cannot. Since the enactment of §59:2-1.3, such immunity shall not apply to claims for sexual abuse caused by a willful, wanton or grossly negligent act of a public employee. Without the immunity afforded public entities by the TCA, public entities are liable for such actions to the same extent as private entities, including being subject to the aided by agency theory of vicarious liability.

Mistakenly finding that §59:2-1.3 is silent as to the immunities in the TCA that it is intended to disable, the panels engaged in a flawed and unnecessary analysis to determine which immunities §59:2-1.3 disabled. *Hornor*, 2024 N.J. Super. LEXIS 2352, at *34; *Simpkins*, 2024 N.J. Super. Unpub. LEXIS 2341, at *10. The statute is not silent on which immunities it disables – it disables them all. Nevertheless, the panels went on to opine that the disabled immunity must be that found in N.J.S.A. §59:2-10, which states that "'[a] public entity is not liable for acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct.'" *Hornor*, 2024 N.J. Super. LEXIS 2352, at *34 (quoting N.J.S.A. §59:2-10); *Simpkins*, 2024 N.J. Super. Unpub. LEXIS 2341, at *10. The panels found that the disabling of the immunity in §59:2-10 did not help plaintiffs' arguments, because that section only provides immunity for acts of employees' actions that are within the scope of employment

and the parties conceded that the sexual abuse plaintiffs suffered was outside the scope of the perpetrators' employment. *See Hornor*, 2024 N.J. Super. LEXIS 2352, at *34-35; *Simpkins*, 2024 N.J. Super. Unpub. LEXIS 2341, at *11.

This narrow interpretation of the immunities disabled by §59:2-1.3(a)(1) renders that subsection basically meaningless, or a nullity, because acts of "crime, fraud, actual malice, or willful misconduct" are virtually never within the scope of employment. Indeed, "[o]nly rarely will intentional torts fall within the scope of employment." *Davis v. Devereux Foundation*, 209 N.J. 269, 303 (2012); *see also Schultz v. Roman Catholic Archdiocese*, 95 N.J. 530, 535 n.1 (1984). This is particularly true when the employee's act is a serious crime. *Davis*, 209 N.J. at 303. By finding that §59:2-1.3(a)(1) waived only the immunities in §59:2-10, the panels below read §59:2-1.3(a)(1) narrowly, to the point of a virtual nullity. This interpretation is contrary to the basic principle of statutory construction. *See Bergen Commer. Bank v. Sisler*, 157 N.J. 188, 204 (1999) ("In interpreting a statute courts should avoid a construction that would render 'any word in the statute to be inoperative, superfluous or meaningless, or to mean something other than its ordinary meaning.'") (quoting *Matter of Estate of Post*, 282 N.J. Super. 59, 72, (App. Div. 1995)); *see also Medical Soc. of N.J. v. N.J. Dep't of Law & Public Safety*, 120 N.J. 18, 27 (1990); *Smith v. Director, Division of Taxation*, 108 N.J. 19, 27-28 (1987); *Paper Mill Playhouse v.*

Millburn Township, 95 N.J. 503, 521 (1984); *Peper v. Princeton University Board of Trustees*, 77 N.J. 55, 68 (1978); *Abbotts Dairies v. Armstrong*, 14 *N.J.* 319, 327-328 (1954). Rather than fault the Legislature for not enumerating the immunities it intended to disable, guessing that it was the immunity in §59:2-10, and thereby interpreting the disabled immunity to be a virtual nullity, the panels should have accepted the plain language used by the Legislature in §59:2-1.3, and found that it disabled any and all immunity provided by the TCA with respect to the claims for sexual abuse described in the statute.

II. The Legislature Expressly Intended to Make Public Entities Liable to the Same Extent as Charitable Entities for Claims of Sex Abuse

Not only did the panels below ignore the plain language of §59:2-1.3, they disregarded the explicit intention of the Legislature. As detailed above, the panels below expressed uncertainty about the immunities waived by §59:2-1.3. *See supra* p. 11. To alleviate their uncertainty, they should have relied on the legislative history of the statute. *See DiProspero v. Penn*, 183 N.J. 477, 492-493 (2005) ("[I]f there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.'") (quoting *Cherry Hill Manor Assocs. v. Faugno*, 182 N.J. 64, 75 (2004)); *see also Kennedy v. Weichert Co.*, 257 N.J. 290, 302-303 (2024); *W.S. v. Hildreth*, 252

N.J. 506, 519 (2023); *Marino v. Marino*, 200 N.J. 315, 329 (2009); *Frugis v. Bracigliano*, 177 N.J. 250, 280-281 (2003); *Cornblatt v. Barow*, 153 N.J. 218, 234-36 (1998).

In enacting §59:2-1.3, the Legislature repeatedly stated its intent to make public entities liable for claims arising out of sexual abuse to the same extent as private entities. When originally passed, §59:2-1.3 stated:

> Notwithstanding any other provision of law to the contrary, including but not limited to the "New Jersey Tort Claims Act," N.J.S.59:1-1 et seq., a public entity is liable in an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in section 2 of P.L.1992, c.7 (C.2A:30B-2), or sexual abuse as defined in section 1 of P.L.1992, c.109 (C.2A:61B-1).

L.2019, c.120 §7. The Senate Judiciary Committee Statement regarding the original version of §59:2-1.3 states: "[t]his section provides that the 'New Jersey Tort Claims Act,' … [is] inapplicable, so that any public entity… may be held liable in any such suit in the same manner as a private organization." S. Judiciary Comm. Statement to S. No. 477 (March 7, 2019) p. 7.

When Governor Murphy signed the Bill enacting the 2019 Amendments, he noted an issue with §59:2-1.3 and stated that the Legislature had committed to introduce and swiftly pass a bill to address the issue. The Governor explained:

> This section inadvertently fails to establish a standard of proof for cases involving claims filed against public entities….I have received assurances that the Legislature will 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.** Applying a different standard would be unjustified.

Governor's Signing Statement to S.477 (May 13, 2019) (emphasis added). The Legislature fulfilled its commitment to the Governor and passed a bill amending §59:2-1.3 to its current form, explaining that the newly worded version of the statute "establishe[d] new liability standards in sexual abuse lawsuits filed against public entities and public employees" that "are **identical to the liability standards applied to non-profit organizations, and their officers, employees and other agents**…" A. Judiciary Comm. Statement to A No. 5392 (May 20, 2019) p.1 (emphasis added).

Like the Judiciary Committee, the Budget Committee noted that the type of lawsuits allowed under §59:2-1.3 "are the same types of lawsuits for which the general statutory immunity of the Charitable Immunity Act, P.L. 1959, c.90 (C.2A:52A-7 et seq.) does not apply." A. Budget Comm. Statement to A. No. 5392 (June 17, 2019) p. 1. Thus, in passing §59:2-1.3, both in its original and amended forms, the Legislature repeatedly stated its intention to make public entities liable for claims of sexual abuse to the same extent as private entities.

Even if the panels below thought their interpretation of the statute was technically correct, it was improper of them to favor their reading of the statute over the clearly stated intent of the Legislature. *See State v. Friedman*, 209 N.J. 102, 118 (2012) ("[A] literal reading of the words of a statute may not yield the

Legislature's intended result.") (citing *Quest Diagnostics, Inc. v. Director, Div. of Taxation*, 387 N.J. Super. 104, 111 (App .Div. 2006), *certif. denied*, 188 N.J. 577 (2006)). For instance, in *State v. Friedman*, the Court instructed:

> Courts thus do not slavishly limit themselves to the dry words of legislation nor rely on mere abstract logic to determine what interpretation of a statute would fulfill the Legislature's purpose. More is called for than a merely mechanical analysis. Machines can perform mechanical tasks, but judgment is necessary to reach a result informed by intelligence.

209 N.J. at 118 (quoting *Mayfield v. Comty Med. Assocs., P.A.*, 335 N.J. Super. 198, 205 (App.Div.2000)). Similarly, the Court has stated, "[w]hen all is said and done, the matter of statutory construction ... will not justly turn on literalisms, technisms, or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation.'" *LaFage v. Jani*, 166 N.J. 412, 431 (2001) (quoting *Jersey City Chapter Prop. Owners' Protective Assoc. v. City Counsel of Jersey City*, 55 N.J. 86, 100 (1969)) (alteration in original); *see also Matter of Commitment of W.W.*, 245 N.J. 438, 449 (2021); *Hubbard v. Reed*, 168 N.J. 387, 392-93, 774 A.2d 495 (2001)); *Delisa v. County of Bergen*, 165 N.J. 140, 147 (2000); *Schierstead v. City of Brigantine*, 29 N.J. 220, 230 (1959). The panels below did exactly what the above cases caution not to do, put their reading of the statute over the Legislature's intent to remove immunity and make public entities liable to the same extent as private entities.

III. The Aided by Agency Theory Applied to Charitable Entities in *Hardwicke* Should Now Apply to Public Entities

Given the plain language of §59:2-1.3 removing all immunity from civil liability granted to public entities by the TCA for sexual abuse caused by the willful, wanton or grossly negligent act of a public employee, and the clearly stated intent of the Legislature to make public entities liable to the same extent as charitable ones, the Court should find that the holding of *Hardwicke v. Am. Boychoir School*, 188 N.J. 69 (2006) also now applies to public entities. *Hardwicke* was decided long before the 2019 Amendments and it is presumed that the Legislature was aware of the Court's holding in that case. *See*, *e.g.*, *DiProspero v. Penn*, 183 N.J. 477, 494 (2005) "[T]he Legislature is presumed to be aware of judicial construction of its enactments.") (quoting *N.J. Democratic Party, Inc. v. Samson*, 175 N.J. 178, 195 n. 6 (2002)); *Matter of Commitment of W.W.*, 245 N.J. 438, 449 (2021); *Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 227 (1994). Thus, the Court should conclude that when the Legislature removed TCA immunity with the intention of making public entities liable to the same extent as private and charitable ones, it intended that the holding of *Hardwicke* apply to public entities.

The holding in *Hardwicke* arose out of two prior cases applying common law agency principles to claims under the Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -42, and the Conscientious Employee Protection Act

(CEPA). In 1993, the Court was presented for the first time with "the question of employer liability for sexual harassment since the LAD was amended in 1990 to provide that 'all remedies available in common law tort actions shall be available to prevailing plaintiffs' in Superior Court actions." *Lehmann v. Toys 'R' Us*, 132 N.J. 587, 616 (1993) (citing N.J.S.A. 10:5-13 (as amended by *L.* 1990, *c.* 12)). With the new availability of compensatory and punitive damages, the Court needed to determine a standard for employer liability. *Id.* at 617. The Court turned to agency principles, rejecting the application of strict liability. *Id.* at 617-619. Specifically, the Court applied Section 219 of the Restatement (Second) of Agency, which states:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) 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.

Restat 2d of Agency, § 219. Applying the principles set forth in §219, the Court held that not only could an employer be held liable for a hostile work environment created by a supervisor acting within the scope of their employment, but "even in the more common situation in which the supervisor

is acting outside the scope of his or her employment, the employer will be liable in most cases for the supervisor's behavior under the exceptions set forth in § 219(2).” *Lehmann*, 132 N.J. at 619-620.

With respect to subsection (d) of §219, the Court set forth the following specific questions for determining whether aided by agency liability applies:

> 1. Did the employer delegate the authority to the supervisor to control the situation of which the plaintiff complains * * *?
> 2. Did the supervisor exercise that authority?
> 3. Did the exercise of authority result in a violation of [the LAD]?
> 4. Did the authority delegated by the employer to the supervisor aid the supervisor in injuring the plaintiff?

Id. at 620. If the answer to each of these questions is yes, then the employer is vicariously liable for the supervisor’s harassment under §219(2)(d). *Id*.; *see also Gaines v. Bellino*, 173 N.J. 301, 313 (2002). The *Lehmann* Court recognized that it had “created a standard that may often result in employers being held vicariously liable for such harassment.” *Id*. at 623. The Court “view[ed] the issue of the scope of an employer's liability for compensatory and punitive damages as a question of public policy” with the “crucial issue” being “which position provides the most effective intervention and prevention of employment discrimination.” *Id*. at 625.

After this Court’s decision in *Lehmann*, the United States Supreme Court similarly applied the exception in §219(2)(d) to cases of workplace sexual harassment claims brought under Title VII of the Civil Rights Act of 1964, 78

Stat. 253, as amended, 42 U.S.C. § 2000e et seq.. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 759-760 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998).[1] Thus, the aided by agency theory of vicarious liability set forth in §219(2)(d) has been endorsed by both this Court and the U.S. Supreme Court.

The year after its decision in *Lehmann*, the Court was called upon to determine "whether a local board of education may be held vicariously liable for the retaliatory acts of its school officials in an action brought under CEPA." *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 410 (1994). In *Abbamont*, the plaintiff, a non-tenured public-school teacher, claimed that his employer, the local board of education, through its employees, engaged in retaliation against him that was prohibited by CEPA. *Id*. CEPA's definition of employers subject to its dictates explicitly included public employers, including school districts. *Id*. at 414-415. The courts below disagreed over whether CEPA "imports the traditional principles of *respondeat superior* for determining whether an employer may be deemed vicariously liable for the wrongful actions of its employees." *Id*. at 415. The Court found "that the analysis and principles

[1] In *Faragher*, the Supreme Court rejected the defendant's argument that "the second qualification of [§219(2)(d)], referring to a servant 'aided in accomplishing the tort by the existence of the agency relation,' merely 'refines' the one preceding it, which holds the employer vicariously liable for its servant's abuse of apparent authority," finding such a "narrow reading … untenable." *Faragher*, 524 U.S. at 801-802; *see also Ellerth*, 524 U.S. at 759.

of *Lehmann* are appropriate to our consideration of the essential elements of a cause of action under CEPA and [held] that the standards governing employer liability as determined and explained in that decision are fully applicable to actions brought under CEPA." *Id*. at 417.

Just as in *Lehmann*, the *Abbamont* Court's analysis was informed by considerations of public policy. *Id*. Those policy considerations led the Court to hold "that the traditional doctrine of *respondeat superior* governs employer liability for compensatory damages under CEPA." *Id*. at 418. The Court reiterated that "[a]gency law is 'sufficiently flexible to provide just results in the great variety of circumstances…'" and to accomplish the purposes of LAD and CEPA. *Id*. (quoting *Lehmann*, 132 N.J. at 619). The Court concluded that "'the Legislature intended that the same rules of vicarious liability applicable to private principals also be applied to public entities.'" *Id*. at 421 (quoting the Appellate Division's decision below, 269 N.J. Super. at 27-28). The Legislature had the same intent with respect to claims for sexual abuse as it did with respect to CEPA, to subject public entities to vicarious liability to the same extent as private ones.

Finally, in *Hardwicke v. American Boychoir School*, 188 N.J. 69 (2006), the Court addressed several issues with respect to the interpretation of the CSAA, the CIA, and the plaintiff's common law claims arising out of sexual

abuse. One of those issues was whether the law of agency prevented holding the defendant, a charitable school, liable for acts of its employees outside the scope of their employment. *Id*. at 100-102. The *Hardwicke* Court found that "[t]he considerations that informed [its] analyses in *Lehmann* and *Abbamont* apply equally to claims predicated on facts indicating child abuse." *Id*. at 102. Thus, the Court held that §219 applied to the plaintiff's common law claims against the school for the sexual abuse. *Id*. at 102. The Court held that application of §219 to plaintiff's common law claims advances the goals of protecting vulnerable children by imposing responsibility on those in the best position to know of abuse and stop it. *Id*. at 102. Since this Court's decision in *Hardwicke*, a charitable school may be vicariously liable for the sexual abuse if its employee "was aided in accomplishing the tort by the existence of the agency relation." *Id*. at 101; *see also Aguas v. State*, 220 N.J. 494, 514 (2015); *Davis v. Devereux Foundation*, 209 N.J. 269, 291 n.5 (2012). Since §59:2-1.3 lifted all immunity provided by the TCA, the same standard should apply to public entities.

IV. Public Policy Considerations Support Applying the Aided by Agency Exception to Public Entities

"[A] paramount goal of the Legislature is to keep children safe and to identify those who abuse them as well as those who facilitate the abuse.'" *R.L. v. Voytac*, 199 N.J. 285, 298 (2009) (quoting *Hardwicke*, 188 N.J. at 90). Indeed, "'[t]here can be no doubt about the strong policy of this State to protect children

from sexual abuse and to require reporting of suspected child abuse.' That policy is so obvious and so powerful that it can draw little argument. It is an interest that is massively documented." *J.S. v. R.T.H.*, 155 N.J. 330, 343 (1998) (quoting *J.S. v. R.T.H.*, 301 N.J. Super. 150, 156 (App. Div. 1997)); *see also Holm v. Purdy*, 252 N.J. 384, 403 (2022); *Doe v. Poritz*, 142 N.J. 1, 12-13 (1995). Further, "the purpose of [the 2019 Amendments] was to 'greatly increase[ ] the ability of victims of sexual abuse to pursue justice through the court system.'" *W.S. v. Hildreth*, 252 N.J. 506, 524 (2023) (quoting Governor's Statement to S. 477 1 (May 13, 2019)) (alteration in original).

These laudable public policies of protecting children and expanding civil remedies for survivors of childhood sexual abuse will be advanced by applying the same principles of agency law to public entities as are already applied to private and charitable entities. The vast majority of children attend public schools. In 2021, 81.9% of students enrolled in school nationwide were enrolled in public schools. Fabina, Jacob, Erik L. Hernandez, and Kevin McElrath, "School Enrollment in the United States: 2021," *American Community Survey Reports*, U.S. Census Bureau, Report ACS-55, June 8, 2023, at p. 3. In the five years preceding the passage of the 2019 Amendments, "465 teaching applicants and employees [in New Jersey] were disqualified from teaching…with 189 having been disqualified for sexual offenses and 276 for child abuse." Fiscal

Note to A5392, Assembly 2018-2019, issued June 24, 2019, p. 3. Generally, public school students come from homes with lower incomes than students attending private schools. Fabina, et al., *supra* at p. 3, Table 2. Thus, the panels' holdings, providing less civil remedies for public school students, will disproportionately negatively impact lower income children.

School districts are best positioned to take steps to reduce sexual abuse by "promulgat[ing] polices that will guide school staff in reporting abuse of students" and "implementing training programs to ensure the effectiveness of a zero-tolerance-of-abuse policy." *See Frugis v. Bracigliano*, 177 N.J. 250, 273 (2003) (encouraging school districts to take such measures to "promote the safety and welfare of New Jersey's children, while lessening the likelihood that school districts will have to defend against abuse-based suits."). Further, unlike survivors of sexual abuse, who often may not have the resources required to treat their trauma and otherwise ameliorate the financial effects of childhood sexual abuse on their lives, school districts can financially insulate themselves against liability for sexual abuse committed by their employees by, for instance, obtaining insurance policies for claims arising out of sexual abuse of students. *See* Fiscal Note to A5392, Assembly 2018-2019, issued June 24, 2019, p. 3 (discussing the fiscal impact of expanding the liability of public entities for sex abuse and noting that insurance premiums may go up).

As most children attend public schools, the policy goals of protecting children and compensating survivors can best be served by subjecting public entities to liability to the same extent as private ones, as the Legislature intended in passing the 2019 Amendments.

CONCLUSION

For the foregoing reasons, amicus curiae NJCASA, respectfully requests that the Court reverse the decisions of the panels below and hold that the aided by agency theory of vicarious liability applies to public entities in claims for sexual abuse.

Respectfully submitted,

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