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; 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.

BRIEF OF NEW JERSEY STATE LEAGUE OF MUNICIPALITIES AND NEW JERSEY INSTTITUTE OF LOCAL GOVERNMENT ATTORNEYS ON APPEAL TO SUPREME COURT

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STATEMENT OF PROCEDURAL HISTORY

Amici adopt the Statement of Procedural History contained in Plaintiff's brief on motion for leave to appeal.

STATEMENT OF FACTS

Amici adopt the Statement of Facts contained in Plaintiff's brief on motion for leave to appeal.

ARGUMENT

POINT I: PUBLIC ENTITY LIABILITY UNDER THE TORT CLAIMS ACT IS LIMITED TO THOSE SITUATIONS WHERE A PUBLIC EMPLOYEE IS ACTING WITHIN THE SCOPE OF EMPLOYMENT.

The New Jersey Tort Claims Act (TCA), *N.J.S.A.* 59:1-1, et seq., sets forth a comprehensive scheme governing claims against public entities and employees. All claims for damages against public employees and entities are barred by the TCA unless specifically permitted. N.J.S.A. 59:2-1(a). As the Supreme Court observed in Kahrar v. Borough of Wallington, 171 N.J. 3, 9-10 (2002):

> In Willis v. Department of Conservation & Economic Development, 55 N.J. 534, 540, 264 A.2d 34 (1970), this Court abrogated the doctrine of sovereign immunity for tort claims. In response, the Legislature adopted the Tort Claims Act in 1972, primarily to "re-establish immunity of public entities in New Jersey, on a basis more current and equitable than that which had obtained prior to Willis." Harry A. Margolis & Robert Novack, Claims Against Public Entities, Introduction, at ix (2025). What emerged is the general rule that public entities are immune from tort liability unless there is a specific statutory provision imposing liability. Collins v. Union County Jail, 150 N.J. 407, 413, 696 A.2d 625 (1997).

The intent of the TCA is set out in its preamble, which provides, in part, "[I]t 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. All of the provisions of this act should be construed with a view to carry out the above legislative declaration." N.J.S.A. 59:1-2. The basic statutory scheme of the TCA, reiterating that non-liability of public entities is the rule, is contained in the introductory sections to Chapter Two. 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 defenses that would be available to the public entity if it were a private person. (Emphasis supplied)

N.J.S.A. 59:2-2 (a) provides:

> A public entity is liable for an 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. (Emphasis supplied)

These provisions clearly establish that (1) public entities are not liable for any injury unless there is a specific statutory provision imposing liability and (2) public entities are liable for the acts or omissions of their public employees only where the acts or omissions are within the scope of the employee's employment. Here, the

school district cannot be liable for acts of its employee which were not within the scope of employment. The Supreme Court expressed this state's general rule favoring the nonliability of public entities provided by N.J.S.A. 59:2-1 in Pico v. State, 116 N.J. 55, 59 (1989), in which the Court stated, "[T]he public policy of this State is that public entities shall be liable for their negligence only as set forth in the Tort Claims Act." Id.

It is clear that the acts alleged as described in Plaintiff's brief are not within the scope of employment of a teacher or any other public employee. The Statement of Facts in Plaintiff's brief on his motion for leave to appeal makes this clear (Pb1-4)[1]. Additionally, the Appellate Division decision in this case notes that Plaintiff conceded that the sexual assault was outside the scope of Charles Hutler's employment. Hornor v. Upper Freehold Reg'l Bd. of Educ., 2024 N.J. Super. Unpub. LEXIS 2352, *2 (App. Div. 2024). See, also, Gazzillo v. Grieb, 398 N.J. Super. 259 (App. Div.), certif. denied 195 N.J. 524 (2008), in which the Court held that there was no nexus between a sexual assault and a public employee teacher's employment, even where the assault occurred on school grounds (which is not what is alleged to have occurred here). Id., 264.

Plaintiff's briefs incorrectly conflate the immunity provisions and the liability provisions of the TCA. New Jersey law concerning sexual assault and other crimes of a sexual nature was extensively revised by L. 2019, c. 120, and by L. 2019, c,

[1] Refers to Plaintiff's motion brief, pages 1-4.

239, both effective December 1, 2019. N.J.S.A. 59:2-1.3(a) of the Tort Claims Act, as revised by Chapter 239, provides:

> 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.A.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; and
>
> (2) immunity from civil liability granted by that act to a public entity 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.A.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 minor under the age of 18, which was caused by the negligent hiring, supervision or retention of any public employee.

Liability of public entities under Chapter 120 would have been different had Chapter 239 not been enacted. The Governor's signing statement to Chapter 120 stated, in part:

> I am also signing the bill based on a commitment from the bill's sponsors to introduce and swiftly pass a bill that will correct an error in the section of the bill relating to the liability of public entities. This section inadvertently fails to establish a standard of proof for cases involving claims filed against public entities. If unaddressed, the lack of clarity would create uncertainty and likely lead to additional litigation. 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. (Aa1).

As indicated in the brief of Defendant Upper Freehold Regional Board of Education (UFRBOE), N.J.S.A. 59:2-1.3(a), pertaining to immunities of public entities as amended by Chapter 239, now mirrors similar statutory provisions pertaining to charities.

Even though the provisions of the TCA pertaining to immunity of public entity in cases of a sexual nature were revised twice, by Chapter 120 and by Chapter 239, the liability and scope of employment provisions of N.J.S.A. 59:2-1 and 59:2-2(a) were not altered. Clearly, the legislature acted deliberately in enacting these statutes. The Appellate Division decision correctly relied upon the latter statutory provisions in dismissing Plaintiff's claims against the school district.

POINT II: PLAINTIFF'S RELIANCE ON THE HARDWICKE CASE IS MISPLACED.

Plaintiff's brief posits the question presented by his appeal as:

> Did the Legislature's express intent to achieve the important public policy of protecting all children in New Jersey from sexual abuse by amending the Tort Claims Act so that the standard of liability for a public entity is the same as the standard of liability for a charitable entity subject a public entity to vicarious liability for the acts of child sexual abuse committed by its employee and agents when those acts are committed using the employee/agents apparent authority or aided agency pursuant to this Court's holding in Hardwicke v. Am. Boychoir Sch., 188 N.J. 69 (2006)?

Respectfully, the Hardwicke case is inapplicable here because the UFRBOE's defense is based primarily on the "scope of employment" provision of the TCA as cited in Point I, above. Nevertheless, and despite its obvious inapplicability, Plaintiff's brief relies heavily on the Supreme Court decision in Hardwicke. The Hardwicke case had several holdings, including:

> 1. A school is a "person," potentially liable for passive abuse, under the Child Sexual Abuse Act (CSAA), specifically N.J.S.A. 2A:61B-1(a)(1).
>
> 2. A boarding school stands in loco parentis with respect to a student at the school.
>
> 3. A boarding school is a "household" as that term is used in the CSAA.
>
> 4. The Charitable Immunity Act (CIA), N.J.S.A. 2A:53A-7, immunizes charities from liability only for "simple negligence."
>
> 5. The discovery provisions of the CSAA apply to "any civil action for injury or illness based on sexual abuse," including common law claims, but only those actions that fit the statutory definition of "sexual abuse." Hardwicke, supra at 113.

N.J.S.A. 2A:61B-1(a)(1)[2], provides, in part:

> "Sexual abuse" means an act of sexual contact or sexual penetration between a child under the age of 18 years and an adult. A parent,

[2] This is the current definition as of December 1, 2019, changed by Chapter 120. The prior language would be applicable to the case at bar, because this revised CSAA language is not applied retroactively. See, Hornor v. Upper Freehold Reg'l Bd. of Educ., supra, 2024 N.J. Super. Unpub. LEXIS 2352, * 47, n. 17. The prior version included, immediately following "in loco parentis," the words "within the household." The case law is clear that for cases of abuse prior to December 1, 2019, a public school district cannot be "within the household" and cannot be liable as a passive abuser under the CSAA.

> resource family parent, guardian or other person standing in loco parentis who knowingly permits or acquiesces in sexual abuse by any other person also commits sexual abuse…"

In this case, Plaintiff has not alleged that any "sexual abuse" as defined in the statute took place involving anyone other than Charles Hutler. As to Defendant UFRBOE, there are no allegations of "sexual abuse" which could be attributed to that Defendant. Even if the TCA did not apply here, with respect to the potential for liability of the entity defendants in Hardwicke, and in the instant matter, the facts are starkly different. On the issue of entity liability, in Hardwicke, the school asserted that Plaintiff's common law claims against it failed because the school could not be held vicariously liable for the intentional acts of its employees. Id., at 100. Plaintiff, on the other hand, relied on §219 of the Restatement (Second) of Agency (1958) and Lehmann v. Toys "R" Us, Inc., 132 N.J. 587 (1993). The Supreme Court in Hardwicke ruled that in determining claims for vicarious liability, it would employ the Lehmann analysis, holding that an employer could be vicariously liable if it had delegated the authority to control the work environment to a supervisor and the supervisor abused that delegated authority, citing Lehmann, at 620. Hardwicke, at 101. Under both Hardwicke and Lehmann, the employer can be vicariously liable if a supervisor has been delegated the authority to control the environment and the supervisor abused the delegated authority. In Hardwicke, the Court went to great lengths to discuss how Defendant Hanson was the alter ego of the school in that he

acted "as Executive Director as well as Music Director, hiring and firing staff, running the admissions and concert offices…." Hardwicke, at 77. Hanson, who ran the boarding school, is the person who sexually abused the Plaintiff in Hardwicke.

Contrasted with the facts in the case at bar, it is clear that no supervisor was involved in "sexual abuse." Hutler, the person committing the sexual abuse, is not alleged to have been a supervisor and was, in fact, a teacher, as alleged by Plaintiff. Accordingly, the entity liability language of Hardwicke is inapplicable to the case at bar. Even if it were applicable, that would not overcome the TCA provision limiting public entity liability to those instances where a public entity is acting within the scope of his employment, as set forth in Point I, above. See, Gazzillo v. Grieb, supra, 398 N.J. Super., at 264. The Hardwicke case involved neither a public entity nor a public employee, the TCA was not implicated, and the case has little or no application here.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the Appellate Division dismissing Plaintiff's claim against the UFRBOE be affirmed.

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Dated March 21, 2025