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 DEFENDANTS/RESPONDENTS, UPPER FREEHOLD REGIONAL BOARD OF EDUCATION d/b/a UPPER FREEHOLD REGIONAL SCHOOL DISTRICT AND ALLENTOWN HIGH SCHOOL IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO APPEAL THE APPELLATE DIVISION'S OCTOBER 8, 2024 DECISION

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PRELIMINARY STATEMENT

Defendants respectfully submit that plaintiff's motion should be denied as he has failed to present any justifiable basis for this Court to exercise its discretion to grant leave to file an interlocutory appeal of the Appellate Division's October 8, 2024 decision. Plaintiff has not presented sufficient reason, including prevention of irreparable injury, to overcome the policy disfavoring piecemeal review of litigation.

The plaintiff has not been deprived of any fundamental right, nor has the complaint been dismissed in its entirety leaving him without recourse. Rather, plaintiff has six pending causes of action against defendants related to his alleged sexual assault in 1979 by his teacher, defendant Hutler, in Hutler's home. The Appellate Division correctly analyzed, consistent with the law, legislative language and intent, and concluded that the 2019 amendments to the Tort Claims Act ("TCA") do not make the Board of Education ("Board") vicariously liable for this sexual assault, which was concededly outside the scope of Hutler's employment, and aided-by-agency principles do not apply to the public entity. It also properly found that New Jersey does not recognize a fiduciary duty in teachers and boards of education to their students. Simply not having claims against defendants for breach of fiduciary duty or vicarious liability for Hutler's sexual assault does not constitute irreparable injury or result in any injustice. Defendants respectfully submit that plaintiff's motion for leave to file an interlocutory appeal should, therefore, be denied.

PROCEDURAL HISTORY

Defendants adopt plaintiff's procedural history.

LEGAL ARGUMENT

POINT I

THE MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED AS THERE IS NO IRREPARABLE INJURY PRESENT TO WARRANT IMMEDIATE REVIEW

Pursuant to R. 2:2-2, in order to appeal an interlocutory order from the Appellate Division to the Supreme Court, plaintiff must demonstrate that interlocutory review is needed to "prevent irreparable injury." R. 2:2-2(a); State v. McQueen, 248 N.J. 26, n.7 (2021) ("A motion for leave to appeal may be granted 'when necessary to prevent irreparable injury.'"). The power to grant an interlocutory appeal is "highly discretionary" and "exercised only sparingly." State v. Reldin, 100 N.J. 187, 205 (1985). "There is strong policy against piecemeal review and interruption of the orderly processing of cases to disposition in the trial courts." Vitanza v. James, 397 N.J. Super. 516, 518 (App. Div. 2008).

In fact, this Court has held that the exercise of the Court's considerable discretion turns on whether the appeal will "prevent the court and the parties from embarking on an improper or unnecessary course of litigation," and "the appeal has merit and that justice calls for interference in the cause." Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008). This stringent standard "necessarily precludes the granting of leave merely to 'correct minor injustices.'" Grow Co. v. Chokshi,

403 N.J. Super. 443, 461 (App. Div. 2008) (quoting, Brundage, 195 N.J. at 599). Interlocutory review is not warranted where, as here, plaintiff has failed to show that there is a possibility of "some grave damage or injustice" from the lower court's order. See Brundage, 195 N.J. at 599.

Plaintiff has failed to show that this Court should exercise its discretion and intervene in this matter since prevention of irreparable injury is not at issue. First, though plaintiff correctly points out that the Appellate Division's decision in this matter was unpublished, this does not constitute irreparable injury to plaintiff or any other litigant for that matter. While an unpublished opinion is not binding and does not constitute precedent, it is extremely useful and may be utilized by courts as persuasive authority and guidance in forming their opinions. In fact, counsel can cite to and rely upon unpublished opinions so long as "a copy of the opinion and of all contrary unpublished opinions known to counsel" are provided to the court. R. 1:36-3. Here, the Appellate Division's 63-page opinion is thorough, well-reasoned, harmonic with longstanding jurisprudence, and can be used by courts as guidance to ensure consistency in deciding similar issues. Additionally, the court rules provide that "[a]ny person may request publication of an opinion by letter to the Committee on Opinions explaining the basis of the request with specificity" pursuant to the rule's guidelines, R. 1:36-2(c) and (d), which many apply to the subject unpublished case. Ultimately, it can only be published "upon the direction of a majority of the

panel members issuing the opinion and with the approval of the Part's presiding judge." R. 1:36-2(a). Notwithstanding, a request for publication will easily cure this issue, and binding authority can exist. Thus, irreparable injury does not exist.

Second, and more detailed in Point II, infra, the Appellate Division's decision does not contradict legislative language or intent, nor does it create a different standard of liability for public entities that had employed someone accused of sexual abuse, and consequently, irreparable injury is not present. The Appellate Division explained that the 2019 amendments at issue (L. 2019, c. 120 and L. 2019, c. 239) ensured that the provisions of the TCA and the Charitable Immunity Act, N.J.S.A. 2A:53A-7 to -11, ("CIA") mirror one another concerning when and how immunity applies, including for sexual abuse cases. Public entities can be held accountable for employee misconduct that is within the scope of employment, which is the enduring standard for respondeat superior liability for private and charitable entities. See G.A.-H v. K.G.G., 238 N.J. 401, 415 (2019). A public entity can also be held liable for its own negligence in hiring, training and supervision of an employee who commits sexual abuse, just as a private or charitable institution. It is incredible for plaintiff to argue without any support that the Appellate Division's decision places public school children at a greater risk of being sexually abused. Simply put, there is no irreparable injury that falls upon plaintiff or any other litigant as a result of the Appellate Division's decision, and immediate review is unnecessary.

Third, irreparable injury is not a consequence of the Appellate Division's appropriate analysis of statutes, liability standards, case law, and legislative history resulting in the proper rejection of plaintiff's argument based upon Hardwicke v. American Boychoir School, 188 N.J. 69 (2006), a factually distinguishable case, that vicarious liability claims are permitted against a public entity for an employee's sexual abuse of a child based purely upon the "aided-by-agency" theory of Restatement (Second) of Agency §219(2)(d) (1958). In doing so, the Appellate Division did not create a flawed or new standard for interpreting the TCA and its recent amendments. To the contrary, the decision follows longstanding jurisprudence and logic in applying the statute's provisions. There is no novel question of law to review as plaintiff contends.

Plaintiff misses the point, which is explained in detail by the Appellate Division, that an immunity can only apply if there is first a potential for liability. "The TCA supersedes all prior common law causes of action for the negligence of public entities." Maison v. New Jersey Transit Corp., 245 N.J. 270, 312 (2021) (quotation omitted); Tice v. Cramer, 133 N.J. 347, 355 (1993) ("The liability of [a] public entity must be found in the [TCA]."). It is only if an immunity is applicable that, in cases of sexual abuse, it can then be disabled by a TCA provision (i.e., N.J.S.A. 59:2-1.3(a)), leaving the initial liability in place. Accordingly, in cases of sexual abuse, it is a three-step process.

A basic dictionary consultation demonstrates that liability and immunity are not identical as plaintiff conflates. Plaintiff does not dispute that Hutler's alleged sexual abuse was not "within his scope of his employment" with the Board, or that N.J.S.A. 59:2-2(a)[1] contains the primary source of public entity liability. Maison, 245 N.J. at 316. It cannot be disputed that neither of the 2019 amendments (Chapter 120 or 239) altered the language of N.J.S.A. 59:2-2(a), which is not an immunity. Further, it is obvious that the language of N.J.S.A. 59:2-1.3(a), which disabled immunity in sexual abuse cases, is clear and unambiguous; thus, no extrinsic evidence is needed. "[T]he Legislature narrowed the scope of substantive immunity under the TCA" by Chapter 239 (codified at N.J.S.A. 59:2-1.3(a)), W.S. v. Hildreth, 252 N.J. 506, 514 (2023), and did not alter any liability provisions.

While plaintiff may be unhappy or disagree with the Legislature, and would have preferred a change to N.J.S.A. 59:2-2(a) to expand public entity liability even further than eliminating its immunity, this did not happen. Consequently, since Hutler's acts were outside the scope of his employment, the "aided-by-agency" theory in the Restatement (Second) of Agency §219(2)(d), as applied in Hardwicke, is inapplicable as it had been prior to the 2019 amendments. The Appellate Division decision is well-reasoned, no irreparable injury exists, and review is unwarranted.

[1] "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.

Further, granting leave to appeal in this matter will not prevent the parties from engaging in an unnecessary course of litigation. See Brundage, 195 N.J. at 599. To the contrary, plaintiff has not been prevented from pursuing claims against defendants related to Hutler's alleged sexual abuse of him more than 45 years ago. Plaintiff is seeking damages and justice for the alleged sexual abuse through the remaining common law negligence claims and New Jersey Law Against Discrimination claim included in counts one through five, and seven, of the complaint, which are unaffected by dismissal of the vicarious liability and fiduciary duty claims. In fact, even while the matter was pending in the Appellate Division, the parties engaged in fact discovery concerning plaintiff's remaining claims.

Finally, plaintiff has also failed to make the "minimum" showing, as detailed in Points II and III, infra, that his desired appeal has any merit. Thus, granting plaintiff's motion for leave to appeal will not serve any benefit and will merely be an exercise that wastes judicial resources. Simply put, plaintiff is unhappy with the decision and has failed to meet his burden to show that prevention of irreparable injury requires immediate review. Accordingly, defendants respectfully request that plaintiff's motion for leave to appeal the October 8, 2024 decision be denied.

POINT II

THE MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED AS IT LACKS MERIT AND THE APPELLATE DIVISION CORRECTLY CONCLUDED THAT THE BOARD CANNOT BE VICARIOUSLY LIABLE FOR EMPLOYEE CONDUCT OUTSIDE THE SCOPE OF EMPLOYMENT

Consistent with legislative language and intent, and case law, the Appellate Division properly concluded in a 44-page detailed and well-reasoned decision that the 2019 amendments (L. 2019, c. 120 and L. 2019, c. 239) to the TCA, N.J.S.A. 59:1-1 to 12-3, do not make the Board vicariously liable under N.J.S.A. 59:2-2(a) for Hutler's sexual assault of plaintiff that was concededly outside the scope of his employment. A322, A338-382. As realized by the Appellate Division, it is undisputed that the plain language of a statute controls and the Court is not supposed to rewrite an enactment or add an additional qualification that the Legislature specifically omitted. See Murray v. Plainfield Rescue Squad, 210 N.J. 581, 596 (2012). However, this is exactly what plaintiff seeks to do by ignoring N.J.S.A. 59:2-2(a) and presuming language that is not included exists. For instance, while plaintiff would like to believe that the applicable amendment at issue, N.J.S.A. 59:2-1.3(a)(1)[2], a product of Chapter 239 which disables the TCA's immunities in sexual

[2] "Notwithstanding 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 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

abuse cases, automatically makes a public entity vicariously liable for sexual abuse by an employee, plaintiff fails to recognize that the statutory language does not permit this. "Vicarious liability" is not contained in the statute's language, or even the legislative history. In fact, plaintiff's incorrect interpretation of not only this section of the TCA, but the TCA as a whole, would resurrect initial proposed language imposing strict liability on public entities in sexual abuse cases, see Chapter 120, section 7[3], which was outwardly rejected by Governor Murphy and then later corrected by the Legislature.

In its decision, the Appellate Division did not create a new standard of liability for public entities as plaintiff contends; rather, it properly applied the statutory language and history to the facts of the case. As detailed infra, the Appellate Division detailed the history of both the TCA and CIA and how liability is imposed and when immunities apply. It reflects that the 2019 amendments do exactly what the Legislature intended – the TCA and CIA have mirroring language. In sexual abuse

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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." N.J.S.A. 59:2-1.3(a)(1)

[3] "Notwithstanding any other provision of law to the contrary, including but not limited to the 'New Jersey Tort Claims Act,' N.J.S. 59:1-2 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. 1999, c.7 (C.2A:30B-2), or sexual abuse as defined in section 1 of P.L. 1999, c. 109 (C.2A:61B-1)." L. 2019, c. 120, §7 adopted May 13, 2019, to be effective December 1, 2019.

cases, the statutory language of both demonstrate that immunity will not apply for willful, wanton or grossly negligent acts, and the entity's liability is based upon its own wrongdoing (negligent hiring, retention or supervision). This is exactly what the Legislature proscribed and intended as noted in the various committee statements to Chapter 120 and 239.

The Appellate Division also aptly rejected plaintiff's argument that the Board can be vicariously liable for Hutler's acts outside the scope of his employment to the same extent as the boarding school in Hardwicke, under the aided-by-agency theory of Restatement (Second) of Agency §219(2)(d). The fact that plaintiff wants to guess that the Legislature thought "acts of child abuse [were] *functionally* within the scope of employment for purposes of 59:2-2, pursuant to Hardwicke" is completely contrary to legislative language, the manner in which legislation is interpreted, and the general concept of within the scope of employment. See Di Cosala v. Kay, 91 N.J. 159, 169 (1982); Davis v. Devereaux Found., 209 N.J. 269, 303 (2012) ("Only rarely will intentional torts fall within the scope of employment.") Plaintiff refuses to accept that religious and nonprofit organizations are subject to the terms of the CIA, whereas a public entity is subject to the terms of the TCA. As the Appellate Division observed, a public entity's potential liability must first be found in the TCA, which provides for vicarious liability in N.J.S.A. 59:2-2(a) for acts or omissions of employees that occur "within the scope of employment" and nothing else. The

Restatement (Second) of Agency §219(2)(d), which has largely been abandoned due to its criticism of having the impact of strict liability, specifically imposes vicarious liability for acts or omissions that have already been deemed to be outside the scope of employment; it does not convert the acts to be within the scope of employment as plaintiff misrepresents. Accordingly, the Appellate Division correctly concluded that "aided-by-agency" is contrary to the language of the TCA and does not apply to Hutler's acts that plaintiff conceded were outside the scope of employment.

A. The Appellate Division Decision is Consistent with Legislative Language and Intent, and Does Not Create a Different Standard of Liability for a Public Entity

Plaintiff wants to ignore the entire history of the TCA and how the Legislature has, for years, directed that it be applied, simply to reach his desired goal. In fact, plaintiff wants to ignore all other relevant provisions of the TCA, namely N.J.S.A. 59:1-2 and 2-2(a), which the Appellate Division rightfully did not. Plaintiff incorrectly states the TCA provides immunity from everything, including vicarious liability for acts of employees that occur outside the scope of employment, and then establishes affirmative liability for some acts. This argument is simply illogical. His argument that "declaring in 59:2-1.3 that immunity from a certain type of liability for certain acts no longer applies is the same thing as declaring a 'predicate liability' for those acts" not only disregards the actual language, but essentially would impose strict liability for acts of sexual abuse, which is exactly what the Legislature did not

want to occur as evidenced by the change from the initial proposed language of Chapter 120, to the codified language. Cf. footnotes 2 and 3, supra.

In reaching its conclusion, the Appellate Division first analyzed the history and purpose of the TCA, including a public entity's liability for its employees' acts prior to the 2019 amendments, as well as distinguishing between liability and immunity provisions. A340-347. Plaintiff misrepresents N.J.S.A. 59:1-2 as providing public entities with broad immunity from liability for all acts. To the contrary, "[t]he Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity." N.J.S.A. 59:1-2. Specifically, N.J.S.A. 59:1-2 sets forth the public policy that "public entities shall only be liable for their negligence within the limitations of this act" and all of its provisions "should be construed with a view to carry out the above legislative declaration." A340-341. This is the proverbial "predicate liability" plaintiff wants to ignore. A public entity can only be liable for an act or omission of an employee as provided by the TCA and this liability is subject to any immunity; thus, the Appellate Division, consistent with over 30 years of precedent, observed that in analyzing a tort claim "the first task is always to locate the predicate for liability in the Act." A341-343.

"The primary source of public entity liability is, of course, contained in N.J.S.A. 59:2-2(a)" and mirrors the principle of respondeat superior. A346 (citation

omitted). "A public entity has no vicarious liability for acts of its employees outside the scope of employment." A347 (citing N.J.S.A. 59:2-2(a); Cosgrove v. Lawrence, 214 N.J. Super. 670, 680 (Law Div. 1986), aff'd, 215 N.J. Super. 561 (App. Div. 1987)); Carter v. Reynolds, 345 N.J. Super. 67, 71 (App. Div. 2001), aff'd, 175 N.J. 402 (2003). Here, plaintiff conceded the sexual assault was outside the scope of employment and, thus, the Appellate Division concluded that he cannot establish a statutory predicate for the Board to be vicariously liable for Hutler's acts. A347.

Though the analysis would typically end, the Appellate Division examined the impact of the 2019 amendments to the TCA, including (though not necessary) the legislative history, to see if there was any merit to plaintiff's argument that there was a new basis for public entity vicarious liability. A348-357. It correctly found there was none. Expansive legislation, L. 2019, c. 120 and L. 2019, c. 239, intended to, amongst other things, greatly extend the statute of limitations for claims of child and adult sexual abuse "and for some actions permit retroactive application of the standards of liability to past acts of abuse for which liability did not previously exist." A348 (quoting S. Judiciary Comm. Statement to S. 477 (Mar. 7, 2019)), A410. The legislation amended parts and created a new section, N.J.S.A. 59:2-1.3, of the TCA entitled "Liability for public entity, employee." A 348-349.

As first presented for the Governor's signature, the Committee Statement explained that the purpose of the new section was to *eliminate public entity immunity*

for sexual abuse claims so the entity may be held liable in the same manner as a private organization. A349. Governor Murphy rejected the initial proposed language in Chapter 120 by the Legislature finding there was an error, but the Legislature would correct it to clarify that "public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations." A350. Thus, through Chapter 239, the Legislature provided the amended language, which is now codified at N.J.S.A. 59:2-1.3. A350-352. The Assembly Budget Committee Statement to Chapter 239 explained the Legislature's purpose for altering the initial language noting the new bill "establishes new liability standards in sexual abuse lawsuits filed against public entities and public employees. It 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 sexual abuse lawsuits as a result of sexual abuse that was caused by a willful, wanton or grossly negligent act of the public entity or employee. A352 (emphasis added), A392. The reason presented was it is the same types of lawsuits that the CIA's statutory immunity does not apply to charitable organizations. A352, A392. Specifically, the Committee Amendments note that only the TCA's immunities are not applicable to the lawsuits for sexual abuse claims; "thus, any available immunity from some other source of law could be raised by public entities and public employees as a defense." A353, A392.

The Appellate Division found that the Legislature plainly responded to Governor Murphy's concerns about public entity liability by shifting the initial proposed language from a liability predicate ("a public entity is liable") to an immunity provision ("immunity . . .shall not apply"). A354. Thus, the Appellate Division concluded that the statutory text (which is clear) "along with the Assembly Budget Committee Statement establish unequivocally that Chapter 239 was intended to disable any immunity provided by the [TCA] to a public entity or to a public employee for their willful, wanton or grossly negligent act in sexual abuse cases." A355. It concluded that N.J.S.A. 59:2-1.3(a) strips public entities of those TCA immunities that may absolve them from liability; it does not provide a statutory predicate for vicarious liability for sexual assault committed outside a public employee's scope of employment. A357 (citing N.J.S.A. 59:2-1(a), 2-2(a)). Thus, N.J.S.A. 59:2-10 is an immunity from vicarious liability for certain employee acts committed within the scope of employment that is disabled. A358. Conversely, N.J.S.A. 59:2-2(a), the TCA's vicarious liability predicate, is not disabled. A359.

Focusing on the Governor's Statement that "public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations," the Appellate Division went above and beyond and analyzed the 2019 amendments to the CIA to see if there was consistency and any basis for the Board to have liability. A361-371. The Appellate Division detailed the history of the

CIA, which in 1958 was created to provide immunity for all nonprofit corporations organized for religious, charitable, educational or hospital purposes from negligence suits brought by any person who was a beneficiary. A361. In 1995, the Legislature amended the CIA to provide immunity for negligence to a charity's employees, but specifically, denied immunity to the individuals (but not the charity itself) for "any willful, wanton or grossly negligent act of commission or omission, including sexual assault and other crimes of a sexual nature." A362-363 (citing N.J.S.A. 2A:53A-7(a) and -7(c)). Ten years later, in 2005, the CIA was amended to deprive the charity of immunity for "any civil action that the negligent hiring, supervision or retention of any employees, 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." A363 (citing N.J.S.A. 2A:53A-7.4).

The CIA was amended again in 2019 by Chapter 120. A367-368. According to the Statement of the Senate Judiciary Committee, the purpose was to codify the holding in Hardwicke "that organizational charitable immunity only applies to protect organizations from lawsuits claiming injury based on merely negligent acts, not more aggravated forms of wrongful conduct, such as willful, wanton or grossly negligent acts," including sexual assault or abuse. A369 (citing S. Jud. Comm. Statement to S. 477; N.J.S.A. 2A:53A-7(a)), A413. The 2019 amendment also made the more limited organizational immunity applicable to any suit filed under the new

extended statute of limitations for sexual abuse cases. A370. Thus, the Appellate Division pointedly noted that the 2019 amendments did not signal a "sea change in the law" or broaden liability for non-profit entities; rather, it codified the limits of charitable immunity as it exists for nearly 20 years and lengthened the applicability time significantly. A371, A411.

Based upon the statutory language and the legislative history, the Appellate Division observed that the 2019 amendments to the CIA and the TCA "have not had, nor were they intended to have had, any effect on the law of agency as applied to either nonprofit organizations or public entities."[4] A374. The CIA "is a statute addressing the immunity of charitable entities for tort claims, not a statute addressing the common law doctrine of respondeat superior." A375. As such, the Appellate Division held that it is clear that the Legislature intended only to codify the central holding in Hardwicke that the CIA immunizes simple negligence only, not other elevated forms of negligence or intentional conduct. A374-375, A413

Thus, the 2019 amendments to the CIA codified that charitable entities do not have immunity for willful, wanton or grossly negligent acts. A375. This was made retroactive as well as the lack of immunity to charitable entities for negligent hiring, supervision or retention resulting in a sexual offence being committed against a

[4] The Committee Statement only concerns direct liability of the entity and makes no mention of vicarious liability standards or the "aided-by-agency" theory.

beneficiary under the age of 18. A375. Similarly, the 2019 amendments to the TCA [N.J.S.A. 59:2-1.3] disabled any immunity in a sexual abuse case to a public entity for willful, wanton or grossly negligent acts committed by an employee within the scope of employment [N.J.S.A. 59:2-10]. A375. The amendments also codified at N.J.S.A. 59:2-1.3(a)(2), the longstanding history that a public entity does not have immunity for negligent hiring, retention or supervision of an employee. A374. Accordingly, the 2019 amendments to the CIA and the TCA mirror each other, as required by and plainly within the Legislature's intent.

Section 59:2-1.3 of the TCA does exactly what was intended by the Legislature as referenced within the Committee Statements – it removes public entity immunity, as provided for within the TCA, from lawsuits involving claims of sexual abuse. A392, A401. The Statements do not state that the manner in which a public entity can be held vicariously liable is or should be changed, or specially that the "within the scope of employment" vicarious liability standard of N.J.S.A. 59:2-2(a) does not apply. All extrinsic evidence supports the Appellate Division's decision, and reflects that immunity as proscribed by the TCA for public entities was removed as intended to be consistent with the terms of the CIA that removed immunity for the same exact willful, wanton and grossly negligent acts in sexual abuse cases. It cannot be disputed that the Appellate Division did not keep any immunity in place for public entities in sexual abuse cases, and therefore, it did not

create any new or differing standard of liability as that for religious and charitable organizations. The Appellate Division simply applied and enforced the terms of the TCA as written and intended. While the Board could not rely upon the immunity of N.J.S.A. 59:2-10, the fact remains that plaintiff could not establish any potential vicarious liability under N.J.S.A. 59:2-2(a) because he conceded that Hutler's sexual abuse was not within the scope of employment.

B. The Appellate Division Correctly Found that the "Aided-by-Agency" Clause in Restatement (Second) of Agency §219(2)(d) Relied Upon in Hardwicke Does Not Apply

The Appellate Division also analyzed and properly rejected plaintiff's argument that the Board has vicarious liability for an employee's sexual abuse of a child pursuant to Hardwicke, which applied Restatement (Second) of Agency §219(2)(d) ("aided-by-agency" theory) that pertains to vicarious liability for employee conduct occurred outside the scope of employment. A364-382. While this theory was applied in that particular setting involving a private boarding school subject to the CIA, Hardwicke and/or the "aided-by-agency" theory has *never been applied* to a public entity subject to the TCA. Simply because Hardwicke involved sexual abuse of a minor, as here, this similarity does not supplant statutory language. The 2019 amendments, namely N.J.S.A. 59:2-1.3(a), do not alter this continued lack of applicability because the TCA's "within the scope of employment" liability predicate has not been altered. Thus, this novel theory cannot proceed.

In 2006, the Supreme Court in Hardwicke held that the CIA "immunizes charitable entities for 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.'" A364 (citations omitted). It also found that the boarding school in Hardwicke could be held liable as a passive abuser under the Child Sexual Abuse Act ("CSAA"), N.J.S.A. 2A:61B-1, and the CIA did not immunize it from statutory liability or common law claims for child abuse based upon conduct falling within the statutory definition of sexual abuse (i.e., passive abuser liability that involves actual knowledge and wrongful conduct on the part of the entity to protect the child). A364-365. Under those limited circumstances, the school's vicarious liability for its employees' acts that occurred outside the scope of employment was premised under the aided-by-agency theory. A365-367.

The Appellate Division noted that this Court in Davis, supra, observed that the focus in Hardwicke was not only reinterpreting the scope of immunity under the CIA, but also the impact of the CSAA. A376. After Hardwicke, public schools were not liable for sexual abuse of their students under the CSAA because they were not passive abusers as they did not stand in loco parentis "within the household." A377. The 2019 amendments removed the "within the household" requirement of the CSAA for an organizational entity (including a public school) to be held directly liable as a passive abuser; however, the amendments did "not address the entity's

vicarious liability for sexual assault or abuse committed by an active abuser-employee." A378-379. Also, the amendments did not address whether a private day school qualifying as a passive abuser under the CSAA may be held vicariously liable for the sexual assault of a student pursuant to the aided-by-agency clause under the CIA. A379.

Notwithstanding, the Appellate Division concisely and correctly concluded that a public school, which liability is subject to the TCA, cannot be held vicariously liable for sexual assault or abuse of a student under the aided-by-agency theory. A372-374, 379. Specifically, the TCA commands in N.J.S.A. 59:2-2(a) that vicarious liability can only attach to a public entity for an employee's conduct that occurs "within the scope of his employment." A380. Since the aided-by-agency theory relied upon in Hardwicke addresses employer vicarious liability for conduct that has already been deemed to be outside the scope of employment, it does not set forth any basis for vicarious liability of a public entity under the TCA.[5] A381.

[5] While not the basis for the holding, the Appellate Division noted that a broad reading of the aided-by-agency theory in Restatement (Second) of Agency §219(2)(d) (which has been abandoned by the American Law Institute in its Restatement (Third) of Agency §7.08 cmt. b) would result in an employer's strict liability for employee intentional torts committed outside the scope of employment. A379-380. It also recognized the concern for strict liability is why this Court has rejected imposing a non-delegable duty on in loco parentis institutions, A379, and the TCA expressly bars strict liability claims, N.J.S.A. 59:9-2(b). A380. Plaintiff's reference to Restatement (Third) of Agency §7.05 (2006) is further misplaced as it is not a vicarious liability standard; rather, it is a direct liability standard used to determine whether the employer failed to take appropriate action to protect a third

The Appellate Division noted that "[a] public entity is not liable for the intentional torts of its employes outside the scope of employment in the same manner a private entity is liable because the Legislature has deemed a public entity is only vicariously liable for the acts or omissions of its employees occurring within the scope of employment, 59:2-2(a); and 59:2-1.3(a)(1) only disabled a public entity's immunity for sexual assaults or abuse under 59:2-10," which only applies to employee conduct occurring within the scope of employment. A381. Therefore, the Appellate Division concluded that even after the 2019 amendments and enactment of N.J.S.A. 59:2-1.3(a)(1), there is no provision in the TCA making a public entity liable for an injury caused by an employee acting outside the scope of employment. A381. Accordingly, since plaintiff conceded that the sexual assault did not occur within the scope of the teacher's employment, N.J.S.A. 59:2-2(a) is an absolute barrier to plaintiff's vicarious liability claim. A381. This holding is consistent with the statutory language and legislative intent, which was clearly only to eliminate statutory immunities for direct liability of both public and charitable entities as detailed within the CIA and TCA. Consequently, plaintiff's argument lacks merit, there is no irreparable injury that requires intervention, and the motion for leave to appeal the Appellate Division's October 8, 2024 decision should be denied.

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party from a foreseeable danger. Vicarious liability is detailed in §§7.07 and 7.08 and specifically adopts the "within the scope of employment" standard. See Restatement (Third) of Agency §7.03(2)(a).

POINT III

PLAINTIFF'S MOTION SHOULD BE DENIED BECAUSE IT LACKS MERIT AND THE APPELLATE DIVISION CORRECTLY CONCLUDED THAT A FIDUCIARY DUTY DOES NOT EXIST BETWEEN A BOARD AND ITS STUDENTS

Contrary to plaintiff's assertion, the Appellate Division did not cause irreparable injury when it appropriately concluded that "New Jersey does not recognize a fiduciary duty in teachers, school administrators and boards of education to their students." A321-322. Our case law is clear that there is no heightened duty or special relationship between a public school and its students; rather, the in loco parentis relationship imposes a duty to act as reasonable educators under the totality of circumstances. There is no basis in our longstanding jurisprudence to create a new tort and impose a fiduciary duty upon a public school district. Simply put, plaintiff's position lacks merit and his request for interlocutory review should be denied.

The Appellate Division reasoned that F.G. v. MacDonell, 150 N.J. 550 (1997) "provides no support for recognizing a fiduciary duty on the part of a board of education to a student in the district." A331. Grooming a student for sexual abuse, as Hutler did, is not akin to a voluntary counseling relationship between a pastor and parishioner, as in F.G. A333-334. It held that "assigning a fiduciary duty running to a specific student from an entity like the Board, that owes obligations to multiple stakeholders involved in educating the district's children often with conflicting interests, is incompatible with the duty's defining characteristic of undivided loyalty

to a particular person or interest." A331. A fiduciary duty between a school board and a student would unnecessarily create a new tort and be inconsistent with this Court's longstanding reaffirmed duty applied in cases involving in loco parentis relationships, including those of sexual abuse, which is based on "traditional principles of due care and foreseeability"; it is not a non-delegable or absolute duty, closely akin to a fiduciary duty. A334-337 (citing Frugis v. Bracigliano, 177 N.J. 250 (2003); Titus v. Lindberg, 49 N.J. 66 (1967); and Davis, supra). The Appellate Division's decision here should not be disturbed.

CONCLUSION

For the reasons stated, Defendants/Respondents Upper Freehold Regional Board of Education d/b/a Upper Freehold Regional School District and Allentown High School respectfully request that the Supreme Court deny plaintiff's motion for leave to file an interlocutory appeal of the Appellate Division's October 8, 2024 decision.

Respectfully submitted,

By:/s/ Cherylee O. Melcher
Cherylee O. Melcher

Dated: November 27, 2024