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

PLAINTIFF-APPELLANT'S BRIEF IN RESPONSE TO AMICUS CURIAE MATTHEW J. PLATKIN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

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Date Submitted: July 16, 2025

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PRELIMINARY STATEMENT

The Attorney General of New Jersey (herein also "AG") has now filed an amicus brief that argues that the Appellate Division opinions erred and that the amendments to the Tort Claims Act ("TCA") do impose vicarious liability upon Defendant. Without question, it is significant that the AG, a public entity itself, acknowledges that the Child Victims Act ("CVA") abolished any immunities for "willful, wanton or grossly negligent" acts of child sexual abuse committed by both public entities and their employees, and in so doing, imposed vicarious liability upon public entities for these acts by their agents. N.J.S.A. § 59:2-1.3(a)(1). On this critical issue, the AG gets it right. This Court should recognize this and overturn the Appellate Division opinions for this reason.

Unfortunately, the AG goes on to inappropriately request that this Court limit a public entity's vicarious liability under Hardwicke v. Am. Boychoir Sch., 188 N.J. 69 (2006). In doing so, the AG appears to want to strike a balance between justice for victims of child sexual abuse and liability for public entities. However, the AG's misguided proposal goes too far in the direction of the latter, ultimately creating an unworkable and unjust framework that suffers the same fate of the Appellate Division's opinions. As detailed below, the AG's proposal for limiting vicarious liability under Hardwicke attempts to address a problem that does not exist and should not be considered, let alone adopted, by this Court.

COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS

Plaintiff-Appellant relies on the statement of procedural history and facts from its prior submissions, incorporated here by reference, adding only the following:

Three amicus briefs have been submitted in opposition to Plaintiff-Appellant's position. A separate response to those three briefs will be submitted. Two amicus briefs were submitted in support of Plaintiff-Appellant's position: one on behalf of Child USA and one on behalf of New Jersey Coalition Against Sexual Assault.

The Attorney General of New Jersey submitted an amicus brief which supports Plaintiff-Appellant's position that the historic changes to our law under the CVA amended the TCA such that a public entity may now be held vicariously liable for the acts of child sexual abuse committed by an employee. However, the Attorney General's amicus brief goes on to request that this Court limit that vicarious liability in a manner that Plaintiff-Appellant strongly disagrees with. This response follows.

ARGUMENT

RESPONSE TO ATTORNEY GENERAL'S POINT I

Public Entities Are Vicarious Liable for Acts of Child Sexual Abuse Committed By Employees.

On June 4, 2025, the New Jersey Attorney General submitted an amicus brief to this Court in both Hornor v. Upper Freehold BOE, et al., MON-L-3887-21 and Simpkins/Jerome/Hayes v. South Orange-Maplewood School District, et al., ESX-L-4264-21/ ESX-L-4265-21/ ESX-L-4478-21.[1]

In Point I, the Attorney General ("AG") agrees with Plaintiff-Appellants that the Appellate Division opinions erred and that the amendments to the TCA enacted by the CVA do in fact mean that a public entity may now be held vicariously liable for an employee's acts of sexual abuse pursuant to Hardwicke v. Am. Boychoir School, 188 N.J. 69 (2006). (NJAGb at 1-2). In doing so, the AG provides an analysis of Hardwicke, the TCA, and the amendments provided by the CVA that comports with Plaintiff-Appellant's arguments, namely, that "predicate liability" is not required for the imposition of vicarious liability here and that a public entity may now be held liable for acts of sexual abuse committed by an employee pursuant to Hardwicke. (NJAGb at 1-16.).

[1] The Attorney General filed identical Amicus Briefs in all four matters pending before this Court.

The Attorney General agrees that N.J.S.A. § 59:2-1.3(a) "overrides all TCA immunity" and refers to this as the CVA's "immunity-stripping provision." (NJAGb at 11) (emphasis in original). The AG explains

> the immunity-stripping provision – by its plain terms – overrides all TA immunity. So if someone can bring a claim against a public entity that falls within the scope of the immunity-stripping provision, then that claim is not barred by the TCA, regardless of whether the public entity is liability under the TCA itself.

(NJAGb, at 11) (emphasis in original). The AG goes on to point out that the structure of the TCA compels this result because while the:

> TCA also provides specific immunities that limit its affirmative liability-granting provisions, its blanket immunity is a central part of the statutory scheme. See Tice, 133 N.J. at 355; cf. Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 407-08 (1988) (discussing TCA's "statutory approach" of general immunity limited by liability-granting exceptions). But the immunity-stripping provision overrides that blanket immunity.

(NJAGb at 12). Because of this, the only logical result, based on the plain language of § 59:2-1.3(a)(1), is that a public entity's immunity for acts of sexual abuse committed by an employee has been removed:

> The blanket immunity provided by N.J.S.A. 59:2-1 is, quite plainly, a "provision" of the TCA that grants "immunity from civil liability." Ibid. And the 2019 amendments codified in N.J.S.A. 59:2-1.3 make clear that such a "provision" of the Tort Claims Act "shall not apply" to the sex-abuse-related claims that fall within its scope. Ibid. Put simply, the "statute is clear and unambiguous on its face and admits of only one interpretation," so the statutory interpretation can end here. Sanchez, 242 N.J. at 260-61 (quoting O'Connell, 171 N.J. at 488).

(NJAGb at 12-3). The AG goes on to point out, as Plaintiff-Appellant here has argued, that the Legislative history of the CVA confirms this because it is "clear that the immunity-stripping provision was meant to equalize the immunity of public entities and charitable entities for sexual abuse torts . . . " and it is clear that, under the CIA, charitable entities may be held vicariously liable pursuant to Hardwicke. (NJAGb at 13-4). Consequently, the AG argues that this Court should reverse the Appellate Division decisions and instead "hold that the Tort Claims Act does not bar Plaintiff-Appellant's vicarious liability claims against Defendant schools based on the sexual abuse of their former teachers." (NJAGb at 14).

Finally, the AG notes that "a contrary holding would make the immunity-stripping provision effectively useless." (NJAGb at 15). This is because a willful, wanton, or grossly negligent act of sexual abuse would not fall within the scope of an individual's public employment. (NJAGb at 15). In addition, as Plaintiff-Appellant has argued, there would also be no way to hold a public entity liable for its own negligent hiring, retention, and supervision of employees who commit sexual abuse of minors because there is also no separate "predicate liability" provision for this conduct within the TCA. (NJAGb at 15-6).

To put it bluntly, the Attorney General gets this right and it provides a powerful counterpoint to the Appellate Divisions' unpublished opinions that this Court should consider in making its decision here. The Attorney General's argument

solves all of the Appellate Division's concerns about the purported lack of "predicated liability," while at the same time avoids making § 59:2-1.3(a) a nullity. This analysis, in the context of child sexual abuse, achieves the intent of the Legislature as set forth in the clear and direct language of § 59:2-1.3(a) where subsection (1) unambiguously abolished immunity for *both* public entities and public employees, creating vicarious liability for a **"willful, wanton or grossly negligent act of the public entity or public employee,"** in contrast to subsection (2) which abolished immunity for *only* public entities, creating direct liability for the **"negligent hiring, supervision or retention of any public employee."** N.J.S.A. § 59:2-1.3(a) (emphasis added).

This Court should adopt this same position and likewise reject the decision to strike Plaintiff-Appellant's claims of vicarious liability here.

RESPONSE TO ATTORNEY GENERAL'S POINT II

The AG's Proposal to Limit Vicarious Liability under Hardwicke for Public Schools is Inappropriate and Misguided.

In its second point, the Attorney General requests that the Supreme Court "circumscribe"[2] the vicarious liability under Hardwicke that a public school, like Defendant, faces under the CVA, and submits a misguided proposal woven out of whole cloth. Unfortunately, this request by the AG is both procedurally and legally improper. Moreover, as shown below, the proposal is deeply flawed, illogical at times, and would result in significant and unjust consequences for survivors of child sexual abuse. Consequently, it should be rejected by this Court.

A. The Attorney General's Request is Procedurally Improper and Should Not Be Considered at This Time

First, no party to this Appeal has raised or briefed the issue of circumventing vicarious liability under Hardwicke and the Appeal is of a Motion to Dismiss, so it is devoid of a factual record that would even permit such an enquiry. It is simply inappropriate for the AG to ask the Supreme Court to analyze and circumscribe or circumvent the ruling in Hardwicke without any factual basis, briefing or even a

[2] The AG uses the word "circumscribe" to describe its proposed limitation of vicarious liability under Hardwicke for schools. However, as demonstrated herein, the AG's proposal goes so far that it completely circumvents, rather than circumscribes, vicarious liability under Hardwicke, ultimately turning it into an unworkable and flawed negligent supervision claims that, once again, nullifies the vicarious liability that the Legislature specifically chose to enact in § 59:2-1.3(a)(1).

request from any party to do so. See, e.g., Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (N.J. 1973) (indicating that it is well-settled that appellate courts will generally decline to consider issues not properly raised below, unless the issue is one of jurisdiction or great public importance).

Moreover, as the AG acknowledges, the Legislature clearly intended to hold public entities liable in the same manner as private and charitable entities pursuant to New Jersey common law, namely Hardwicke and its adoption of the Restatement (2d) of Agency § 219(2)(d). Governor Murphy himself recognized that this would place a larger burden on these institutions. Yet, at no point did the Legislature indicate that vicarious liability under Hardwicke should be circumscribed. Nor did it ever indicate that it should be limited so severely in the way the AG proposes, which effectively eliminates vicarious liability by simply converting it into a negligence claim.

All of the AG's misguided solutions to the purported liability concerns result in redirecting and limiting all claims brought by sexually abused public school children into a public entity's "negligent hiring, supervision or retention" under § 59:2-1.3(a)(2). This completely undermines and negates the Legislature's decision to permit claims by survivors for the vicarious liability of a "willful [or] wanton … act of the … public entity or public employee" under § 59:2-1.3(a)(1). As the AG acknowledges in the first segment of its brief, the Legislature's addition of the

"willful" and "wanton" language in 59:2-1.3(a)(1), which mirrors the language from the CIA, was intentional and cannot be ignored. Nor can it simply be worked around, as the AG suggests. Therefore, it is improper for this Court to entertain the AG's invitation to limit, or more to the point circumvent, vicarious liability under Hardwicke at this time and on this record.

But even if this Court does decide to use its equitable authority to address the scope of vicarious liability under Hardwicke, the AG's request to adopt a framework from the LAD to limit vicarious liability under Hardwicke should be rejected because it is deeply flawed, illogical at times, and would result in significant and unjust consequences for survivors of child sexual abuse. Indeed, the AG acknowledges that its proposed solution is fraught with problems. Ultimately, the AG's proposal fatally repeats the same mistakes as the Appellate Division opinions by making vicarious liability under § 59:2-1.3(a)(1) essentially meaningless; creating a different standard of liability for public entities; and failing to achieve the intent of the Legislature. For these reasons, as detailed below, the AG's second point should be rejected by this Court.

B. Summary of the Attorney General's Proposed Limitation on Vicarious Liability Under Hardwicke

The AG urges the Supreme Court to limit vicarious liability under Hardwicke by adopting a "modified version of the test for liability under" the LAD. (NJAGb at 17). Under this proposed test, a school[3] would be vicariously liable for acts of sexual abuse committed by an agent if (1) the school itself was negligent in the hiring, retention or supervision of the perpetrator[4] or (2) the perpetrator was a "supervisor exercising authority delegated to the supervisor by the school and, under the totality of the circumstances, it reasonably appeared that the supervisor's misconduct was tacitly approved by the school." (NJAGb at 17-8). The AG states that this standard "ensures that schools are held accountable for sexual abuse of students traceable to

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[3] It should be noted that the AG only refers to a school, and not to other public entities. The failure to apply its proposal to all public entities, not just public schools, immediately dooms this proposal by once again creating a different standard of liability for an even narrower class of entities than that which doomed the Appellate Division opinions. It is hard to understand why the AG limits its proposal in this way to schools only, as opposed to the far broader category of public entities. Even giving the AG the benefit of the doubt that this was merely a scrivener's error, it perhaps betrays such a narrow focus on protecting schools that, unfortunately, is at least partially responsible for the flaws that make its proposal unrealistic, unworkable, and unjust. For purposes of this Brief, Plaintiff-Appellant uses the terms "school" and "public entity" interchangeably.

[4] It is unclear why the AG included liability for negligent hiring, retention or supervision here. This Court has made it clear that negligent hiring, retention or supervision claims sound in the direct fault of the employer, not vicarious liability. G.A.-H. v. K.G.G., 238 N.J. 401, 415, 210 A.3d 907, 916 (2019). Moreover, liability for these acts is already explicitly contained in § 59:2-1.3(a)(2). For this reason, this point is not addressed herein.

the schools' own failings without subjecting them to strict liability for criminal misconduct wholly beyond their control." (NJAGb at 18). This proposed standard is, unfortunately, deeply flawed and should be rejected by this Court. As will be shown below, this justification for the AG's proposal fundamentally contradicts the logic of Hardwicke, which is premised on maximizing the protection of children by placing the burden on the entity that is in the best position to prevent, report, or eliminate this conduct.

C. The Attorney General's Proposed Limitation Improperly Conflates Vicarious Liability with Strict Liability and is Unnecessary

First, the AG complains that courts have never explained the bounds of vicarious liability under the Restatement (2d) of Agency § 219(2)(d) and that, as a result, vicarious liability under 219(2)(d) treads close to imposing strict liability. (NJAGb 21 (quoting E.S., 469 N.J. Super. at 299)). But these overblown fears are contradicted by the AG's own recitation of the cases where this Court has, in fact, adopted and applied vicarious liability under 219(2)(d), namely, Lehmann v. Toys 'R' Us, 132 N.J. 587 (N.J. 1983), Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405 (N.J. 1994), and Hardwicke. (See NJAGb 4-7). Numerous lower courts have applied these holdings in the context of the LAD, CEPA, and the CSAA for decades without raising the specter of strict liability.

The AG points to a paucity of caselaw where vicarious liability under Hardwicke has been challenged by charitable and private entities as proof that the

boundaries of vicarious liability are not well defined. But the more logical conclusion from this is just the opposite: that this Court's imposition of vicarious liability in Hardwicke struck the proper balance between protecting our children and placing the burden on the entities in the best place to achieve this. The lack of subsequent challenges to that decision suggest that it is functioning effectively and efficiently, not the opposite.

The reality is that vicarious liability under Hardwicke and 219(2)(d) is conditional, not strict, and already contains sufficient safeguards that were built into this Court's decision and have been delineated by subsequent case law. At the outset, it is important to recognize that it is only applied in the context of remedial legislation enacted to combat a specific systemic societal problem, namely child sexual abuse. Once that initial threshold is met, there are three additional conditions that must be satisfied.

First, vicarious liability under Hardwicke only applies to an employer who stands *in loco parentis* to children. Second, the employer then delegates the authority to supervise children to the perpetrator. Finally, it only applies if the perpetrator uses his or her apparent authority or aided agency to aid in the commission of the acts of sexual abuse of a child. These significant procedural and evidentiary requirements differentiate vicarious liability from strict liability and demonstrate that the AG's

request to limit vicarious liability under Hardwicke is unnecessary and, at best, premature.

In support of this purported concern of strict liability, the AG cites a list of cases, but none of these are from New Jersey and almost all of them pre-date Hardwicke. (NJAGb at 21, FN 7). The AG also cites to cases outside New Jersey that have raised concerns about the breadth of vicarious liability under 219(2)(d), including hypotheticals that are totally irrelevant because they have nothing to do with child sexual abuse. (NJAGb at 22-3).

Regardless of what other commentors or courts outside of New Jersey have said or done, this Court has never expressed any doubts about the continuing validity of vicarious liability under 219(2)(d). Moreover, the claim that vicarious liability under 219(2)(d) was dropped from the Restatement (3d) of Agency is as erroneous[5]

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[5] Contrary to the AG's assertion, the concept of vicarious liability under § 219(2)(d) has been incorporated into the Third Restatement and a careful analysis of it demonstrates that, even if it were to be adopted, public entities would still be vicariously liable for acts of child sexual abuse committed by their agents. Restatement (3d.) incorporates 219(2)(d) under § 7.05(2) by imposing direct liability upon entities for harms committed by employees where the entity has a *"special relationship"* with the person who is harmed. One example of this type of special relationship that is specifically identified is a school with its students. In fact, comment e to § 7.05(2) specifically states that schools may be directly liable when and employee or agent harms a student, even if that employee acted without actual or apparent authority and was acting outside the scope of employment. Thus, Rstmt. (3d.) still contains the same vicarious liability for an employee's acts of child sexual abuse as Rstmt. (2d.), except now it explicitly applies to a school, among other entities. In addition, vicarious liability for harms inflicted while the agent is utilizing apparent authority also survive under Rstmt. (3d.) § 7.08.

as it is irrelevant here, since this Court has never adopted the Restatement 3d and, regardless of what the ALI subsequently chose to do, vicarious liability under 219(2)(d) has repeatedly been incorporated into our case law. Ironically, this includes its continuing validity within the LAD, upon which the AG's entire proposal is predicated. For the AG to suggest that this concept of vicarious liability is no longer valid undermines its entire proposal.[6]

The truth is that in the decades since this Court endorsed vicarious liability under 219(2)(d), these claimed dangers of vicarious liability somehow morphing into "strict liability" have not come to pass. Nor will they do so here because the application of vicarious liability under Hardwicke is contingent upon a fact-based

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[6] It should also be noted that the AG erroneously assumes that this Court would be required to make a binary choice between 219(2)(d) and 7.05(2) – this is not true. The concept of "aided agency" and a "special relationship" are not necessarily mutually exclusive. They are distinct conception of duty that can correspond to each other but have different applications, much like the way "apparent authority" and "aided agency" in the context of 219(2)(d) can be related or different depending upon the specific factual posture. In fact, the "special relationship" between a school and its student under 7.05 is nearly identical to the special relationship recognized by Judge Acquaviva in the trial court opinion and was the basis for the refusal to dismiss the claim for a violation of a fiduciary duty. To the extent that the AG or Respondents now urge this Court to consider adopting 7.05, this would not replace the concept of vicarious liability under Hardwicke, but instead would justify the modest extension of the concept of fiduciary duty to the facts here, as urged by the trial court below. (A1, at 26).

determination that the perpetrator used either his/her apparent authority or aided-agency in accomplishing the sexual abuse of a child.

Moreover, the AG apparently forgets that any concerns over strict liability are far outweighed by New Jersey's important and long-standing public policy of protecting children. Indeed, the imposition of vicarious liability upon a public entity for this narrow class of sex abuse claims is the necessary and proper means to achieve the Legislators' intent in enacting the CVA. As this Court noted long ago in Frugis, this is justified because:

> The law imposes a duty on children to attend school and on parents to relinquish their supervisory role over their children to teachers and administrators during school hours. While their children are educated during the day, parents transfer to school officials the power to act as the guardians of those young wards. No greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others. Although the overarching mission of a board of education is to educate, its first imperative must be to do no harm to the children in its care. A board of education must take reasonable measures to assure that the teachers and administrators who stand as surrogate parents during the day are educating, not endangering, and protecting, not exploiting, vulnerable children.

Frugis v. Bracigliano, 177 N.J. 250, 268 (N.J. 2003). With this proclamation in mind, this Court specifically adopted vicarious liability under 219(2)(d) in Hardwicke for claims related to child sexual abuse in a school setting because it advances the goal of protecting children from victimization by imposing liability "on those in the best position to know of the abuse and stop it . . . ." Hardwicke, 188 N.J. at 102. The need

to protect child victims, both past and present, from these dangers in the school setting by utilizing the powerful tool of vicarious liability is as necessary today as it was nearly 20 years ago.

For these reasons, this Court should reject the AG's improper invitation to circumscribe (or, to put it more bluntly, circumvent) Hardwicke at this time. No party has requested this, nor has this issue been briefed. Importantly, this appeal arises from a Motion to Dismiss, meaning that the record before this Court is devoid of any facts that would permit this Court to analyze the application of Hardwicke to Plaintiff-Appellant's claims at this time.

The only issue here is whether, as a matter of law, a plaintiff may bring a claim for vicarious liability against a public entity for an employee's "willful" or "wanton" act of child sexual abuse as a result of the amendments to the TCA. There is no basis, legally or factually, to consider the AG's proposal under Point II at this time, let alone adopt it. Instead, this Court should reject the AG's Point II and permit the crucible of the lower courts to interpret the appropriate application of Hardwicke to the unique facts of this case and others like it. Given the plain language of the CVA and the intent of our Legislature, the path for vicarious liability against a public school must go through Hardwicke and 219(2)(d).

D. The Attorney General's Proposed Incorporation of the LAD Framework into Vicarious Liability Under Hardwicke is Premature

At the outset, it must be recognized that the AG's proposed incorporation of the framework of vicarious liability under the LAD rests on unsettled ground. While it is clear that our courts recognize claims under the LAD for a hostile school environment, this Court has not yet set the liability standard for those claims, as here, where the harassing conduct is committed by a school employee against a student. C.V. by & through C.V v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 319 FN 2 (N.J. 2023). This Court first recognized a hostile school environment claim under the LAD in the context of peer-on-peer sexual harassment and adapted the Lehmann four-prong test to govern liability for such claims. L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 189 N.J. 381, 407 (N.J. 2007). In C.V., the Court discussed this adaption of the Lehmann four-prong test in the context of sexual harassment and sexual abuse of a student by a school employee and ultimately held that allegations of sexual touching automatically satisfy the "because of sex" prong of that adapted standard, but this Court was not asked to decide the actual standard and, therefore, did not do so. C.V., 255 N.J. at 319 FN 2.

While it certainly seems likely that the standard for hostile school environment claims arising from the sexual harassment and abuse of a student by a school employee must ultimately be the same or similar to the adapted Lehmann

standard recognized in L.W. and discussed in C.V., this has not yet been so held by this Court. But even if this is the correct standard for a hostile school environment claim resulting from the sexual harassment and sexual abuse of a student by a public entity's employee, it still remains to be seen whether public entities will be afforded an affirmative defense to this conduct as recognized in Aguas v. State, 220 N.J. 494, 499 (N.J. 2015). Neither L.W. nor C.V. discuss an affirmative defense. Indeed, as the AG itself recognizes, there are significant problems with this affirmative defense in the context of LAD claims of sexual harassment and sexual abuse where the victim is a child and a student, as opposed to an adult employee. The point here is that to adopt the AG's proposal would result in the anomalous situation where vicarious liability under Hardwicke is now premised upon a framework derived from LAD case law that does not yet even definitively apply to LAD claims arising from the same conduct. This demonstrates that the AG's proposal is far too premature and should be rejected.

E. The Attorney General's Proposed Incorporation of the LAD Framework Into Vicarious Liability Under Hardwicke is Fundamentally Flawed

First and foremost, the AG's attempt to adapt the LAD framework here is flawed because victims of child sexual abuse are not analogous to adult employees. The AG attempts to basically insert these child victims into the shoes of adult employees and then subject them to the same framework identified for claims of

vicarious liability under the LAD in Aguas v State. (NJAGb at 25-9). But this is fatally flawed because it fails to recognize the differences between child sexual abuse and adult sexual harassment, as well as the unique position of power and authority that school employees, especially teachers, have over the students they are tasked to supervise, educate, and mentor.

Based on its flawed understanding of the power dynamic between students and teachers, the AG's proposal limits vicarious liability claims to instances where the sexual abuse is committed by a "supervisor," but then goes on to inexplicably limit this role to administrators such as principals and superintendents, excluding teachers. (NJAGb at 25-30). The AG argues this limitation is necessary in order to put the school on constructive notice of the sexual abuse and to avoid imposing vicarious liability for "nearly every intentional tort committed by a teacher against a student." (NJAGb at 30). This suggestion is flawed for many reasons, not the least of which is that constructive notice is a negligence concept and, therefore, requiring it here is contrary to the entire purpose behind vicarious liability.

In addition, the AG's rationale for limiting vicarious liability to principals and superintendents, or even "upper management" employees, here is unnecessary. There is no risk that public entities will be exposed "for nearly every intentional tort committed by an employee against a student" because the vicarious liability applies only to a single class of tortious conduct: sexual abuse of a minor.

However, there are much larger problems with arbitrarily limiting vicarious liability to only administrative employees, as the AG suggests. First, in the school context, the vast majority of sexual abuses committed against students are not done by administrators, but rather by staff, such as (and most often) teachers. Given that the entire rationale behind both the CVA and Hardwicke is the protection of children from acts of sexual abuse, the AG's suggestion almost completely nullifies this goal by failing to target and prevent the main source of the conduct at issue here. By only applying vicarious liability to administrators, it once again guts the CVA's imposition of vicarious liability and simply fails to protect children from those most likely to abuse them.

Second, the AG seems to ignore the obvious fact that teachers are supervisors. They supervise students on a day-to-day basis, and this is one of their most vital functions. Undoubtedly, when it comes to students, teachers are far more akin to workplace supervisors than school administrators are. Indeed, the AG seems to fundamentally misunderstand its own analogy from the LAD context, despite the fact that this has basically already been recognized by this Court.

For instance, in L.W., this Court adapted the Lehmann hostile work environment claim to students and noted that a peer-to-peer hostile school environment claim was most analogous to a hostile work environment claim under the LAD. L.W., 189 N.J. at 402-3. It follows then that the most natural analogy for

a hostile school environment claim under the LAD where the harassing conduct is inflicted by a public employee, like a teacher, is to the supervisor of that hostile environment, namely the teacher tasked with supervising those children. This was implicit (though not ruled upon) in the C.V. decision. See C.V., 255 N.J. at 319 FN 2. This is because a teacher's position of power and authority over a student is the same (if not greater) than the power and authority of a supervisor over his or her adult professional subordinates in the employment context. The AG's failure to recognize this obvious analogy suggests a misguided focus not on protecting children, but rather on limiting the exposure of public entities.

It must also be recognized that the AG's proposal to limit vicarious liability to a supervisor is unnecessary because Hardwicke has already identified the contours of the relationships that justify imposition of vicarious liability, without this arbitrary restriction. In fact, defining "supervisor" in this way actually violates one of the fundamental aspects of vicarious liability under Hardwicke. This is because Hardwicke adopted two categories from 219(2)(d) where a master will be liable for the conduct of a servant: apparent authority and aided-agency. Hardwicke, 188 N.J. at 101-2. To limit these categories to only administrators is as unnecessary as it is unjust.

In Lehmann, this Court recognized that apparent authority requires that the employer "delegates authority to control the work environment to a supervisor and that supervisor abused that delegated authority." Lehmann v. Toys 'R' Us, 132 N.J. 587, 620 (N.J. 1993). In this sense, a supervisor is not a title, but rather is defined by the fact that the individual wields delegated authority. Similarly, the Court noted that "whether a supervisor who creates a hostile work environment was aided in accomplishing that tort by the power delegated to him or her to control the day-to-day working environment requires a detailed fact-specific analysis." Id. This means that the contours needed to identify a supervisor are already built into vicarious liability under 219(2)(d) and Hardwicke. It also means that the determination of what amounts to a supervisor cannot be the AG's arbitrary definition, but rather is fact specific.

Indeed, it is for this reason that the AG's focus on of the role of the perpetrator in Hardwicke is not well taken. The AG fails to realize that this Court was not focused arbitrarily on the perpetrator's title or the fact that, at times, he was considered an alter-ego of the school itself. Rather, this Court recited those facts because they demonstrated that the perpetrator had been delegated sufficient authority to trigger vicarious liability under 219(2)(d). They were also important to the Court's analysis *vis a vis* the CIA and the CSAA. But the AG mistakenly assumes such facts are necessary rather than sufficient when it comes to vicarious liability.

This Court never stated that such a high level of control and authority is necessary, nor should it. On the contrary, it recognized that this determination is a fact-sensitive one, to be made on a case-by-case basis. It seems clear that the Court remanded the case for just that reason. Hardwicke, 188 N.J. at 102. Here, no such determination is possible, as this case arises on a Motion to Dismiss, without a factual record.

Most importantly, the foregoing highlights that, in the school context, the concepts of apparent authority and aided-agency naturally apply to teachers, not just administrators, because teachers are delegated the authority to control a student's environment. Thus, the AG's attempt to limit vicarious liability does not comport with the very case law it attempts to base that limitation on, nor does it achieve the Legislature's fundamental goal of protecting children.

Oddly, the AG only asks this Court to limit vicarious liability with respect to "schools." This alone is fatal to its proposal, since it would create a different standard for public schools than for all other public entities, without any justification. But even if this Court expanded the AG's proposal to all public entities, not just schools, the AG's proposal would still fail. This is because it suffers the same fatal flaw that dooms the Appellate Division opinions, that is, it creates different standards of liability for public entities than for private or charitable ones. The AG's proposal would significantly curtail a public entity's vicarious liability under Hardwicke, without providing the same benefit to charitable and private entities. This would run

afoul of the Legislature's stated intent of making the liability under the CVA equal for all of these entities and, therefore, fail for the same reasons the Appellate Division opinions fail (which the AG itself has recognized).

However, assuming *arguendo* that, in order to avoid this fate, the AG is suggesting that this Court instead limit vicarious liability under Hardwicke in this manner for all entities, whether public, charitable or private, reveals that the AG's proposal is terminally and irrevocably unsustainable. This is because, outside of schools, it makes almost no sense to limit the application of vicarious liability to only supervisors, defined as administrators, principals or superintendents.

The vast majority of entities do not utilize these titles and often do not even have a similar structure. Many charitable entities will not have the type of hierarchical structure that would lend itself to these roles. This means that the AG's proposal would amount to essentially making vicarious liability inapplicable outside the narrow confines of the school setting, leaving the Legislature's goal of protecting children completely unsatisfied and resulting in vulnerable children being less protected rather than more protected. Perhaps ironically, it would also mean that now vicarious liability would apply to public schools (albeit in a severely limited way) but not to a public or private entity that did not have these "administrators." It would also encourage gamesmanship by allowing entities to potentially avoid vicarious liability by simply not labelling employees as "supervisors."

Although there are many examples that could demonstrate this flaw, there is an obvious single example that should be enough to make it clear why the AG's proposal must be rejected: namely, the Roman Catholic Church. This is a charitable entity to which vicarious liability under Hardwicke has undoubtedly applied since this Court's decision in 2006. Yet, if the AG's proposal were to be adopted, it is nearly impossible to understand what the term "supervisor" would mean within the hierarchy of the Catholic church. In fact, the most logical outcome is completely absurd because, as defined by the AG, the term would not apply to most priests and yet, these are the most prolific child sexual abusers of children within the church. This would mean that a charitable entity would not be vicariously liable for sexual abuse committed by a priest simply because the perpetrator is not considered an administrator or supervisor. This is completely contrary to the CVA and Hardwicke and leaves children unprotected. Thus, the AG's proposal is not just unjustified, but dangerous, and must be rejected.

Conversely, here, the Complaint alleges that Hutler was Hornor's teacher, but also his Future Farmers of America ("FFA") chapter advisor, team coach, and mentor. (A199, at ¶¶ 13, 41, 46). Under the AG's proposal, this allegation alone would arguably be sufficient to allege vicarious liability against the charitable entity, the FFA, while it would fail as to the public entity, the school. This directly contradicts the Legislature's stated intent, recognized by the AG itself, of making the

liability of public and charitable entities the same. Thus, the AG's proposal suffers the same fate as the Appellate Division's opinions and must likewise be rejected.

F. The Attorney General's "Tacitly Approved" Standard is Contrary to Both the LAD and Hardwicke

The AG goes on to state that a public entity should only be held liable where "under the totality of the circumstances, it reasonably appeared that the supervisor's misconduct was 'tacitly approved' by the school." (NJAGb at 30) (citing Lehmann, 132 N.J. at 623). First, and problematically, the discussion in Lehmann cited here by the AG is actually with respect to holding an employer liable for its own negligence, not truly vicarious liable. See Lehmann, 132 N.J. at 621-23 ("Another basis for employer liability under agency law is negligence, as set forth in § **219(2)(b)** . . . Although an employer's liability for sexual harassment of which the employer knew or should have known can be seen to flow from agency law, it also can be understood as direct liability.") (emphasis added). But 219(2)(b) imposes liability for acts outside the scope of employment where "the master was negligent or reckless . . . ." Thus, "tacit approval" is really a negligence concept that should not be imported here because it amounts to demonstrating that the employer knew or should have known of the sexual abuse and, thus, completely undermines vicarious liability. Whether intended or not, this standard converts vicarious liability into negligent

supervision and thereby negates the plain language of N.J.S.A. § 59:2-1.3(a)(1). This repeats the same error that the Appellate Division made, which the AG itself has recognized.

Equally problematic is the AG's "totality of the circumstances" test here, since this amounts to an objective test to be determined by the trier of fact. But the entire point of apparent authority or aided-agency is that it must be viewed from the standpoint of the child-victim. This fundamentally undermines the decision in Hardwicke by shifting the burden onto the victim. There is also no support for this under the LAD. In short, the AG's proposal in this regard weakens the rights and protection of child-victims in complete contrast to the CVA and the intent of the Legislature.

G. The Attorney General's Affirmative Defense to Vicarious Liability Should be Rejected

To provide an affirmative defense here based on a child's failure to disclose sexual abuse is inappropriate and unjust. The AG admits as much, noting that the "LAD affirmative defense does not translate cleanly to the context of sexual abuse of minor students." (NJAGb at 33). The truth is it simply does not translate at all. Numerous studies demonstrate that those who are sexually abused as children do not normally disclose that abuse for years or decades, if ever. Thus, it simply makes no sense to permit a defendant to raise an affirmative defense based on the minor-

plaintiff's failure to take advantage of "anti-abuse measures" when almost no children will ever do so, due to the shame, embarrassment, guilt, and self-blame caused by the sexual abuse itself.

Unbelievably, after recognizing the problems with this defense, the AG then suggests that the plaintiff should bear the burden of demonstrating that the sexual abuse was tacitly approved by the public entity or that it reasonably appeared that the abuse was tolerated by the public entity. (NJAGb at 33). This is not only deeply flawed and contrary to the CVA and Hardwicke, but also blind to the reality of how children are sexually abused in secret, how they are incapable of emotionally processing the abuse at the time it occurs, and why they carry the psychological burden and shame of these abuses in secrecy for decades. The AG's suggestion, if implemented, would defy and nullify the purpose and basic principles of the CVA. Instead of vindicating this Court's prior decisions and the Legislature's intent of protecting children through the provision of vicarious liability, the AG turns it completely on its head. Adding in this requirement would completely nullify vicarious liability by simply turning it into a negligence claim. See Lehmann, 132 N.J. at 621-23.

To put it bluntly, after taking the Appellate Division to task for failing to recognize that the Legislature intended to impose vicarious liability under Hardwicke on public entities to the same extent as charitable and private entities, the

AG's proposal accomplishes the same exact thing by completely and utterly destroying vicarious liability. In an effort to mitigate a public entities exposure for vicarious liability, purportedly out of some fear that it could turn into strict liability, the AG shifts the burden of proof onto child-victims and turns it into an unworkable and essentially unprovable negligence claim. This once again makes the CVA's amendments to NJSA § 59:2-1.3(a)(1) a nullity. This should and must be rejected.

What the AG fails to recognize, fundamentally, is that the imposition of vicarious liability under Hardwicke is not justified by "linking liability to the defendant's actions or inactions." (NJAGb at 33). Rather, it is justified by New Jersey's longstanding policy of protecting the most vulnerable members of our society from horrific acts of sexual abuse when we entrust them to others. It is for this reason that this Court and our Legislature deemed it appropriate to apply vicarious liability to an entity whose employees sexually abused a child. It is for this same reason that the AG's proposal must be rejected.

CONCLUSION

Fundamentally, before this Court are two important public policies that have now, like two giant icebergs, slowly but perhaps inevitably crashed into one another. On one hand is New Jersey's long-standing and important public policy of protecting our children from the massive physical, mental, and emotional harms inflicted by acts of grooming and sexual abuse. On the other is New Jersey's long-standing

policy of affording public entities with immunity for certain acts, an immunity which private and even charitable entities are not given. In passing the CVA and the amendments to § 59:2-1.3, the Legislature has now made it clear that the latter must give way to the former.

Almost 20 years ago, this Court adopted vicarious liability under Hardwicke and 219(2)(d) for common law claims as the appropriate method for protecting our children from these dangerous acts when we entrust them to the care of a private or charitable entity. It did so because it advances the goal of protecting children from victimization by imposing liability "on those in the best position to know of the abuse and stop it . . . ." Hardwicke, 188 N.J. at 102.

This Court and our Legislature have repeatedly endorsed the imposition of vicarious liability upon those who stand *in loco parentis* to the most vulnerable members of our society for acts of child sexual abuse as the best way to achieve the goal of protecting children. In doing so, both have recognized that this affords maximum protection for our children at the expense of imposing liability on the youth-serving entities who supervise them outside the watchful eye of a parent. But now this has ground up against the policy of protecting public entities from liabilities that private and charitable entities face, a protection premised on the unique role that public entities play in our society, as well as their alleged more limited financial

resources.[7] These policies are now tethered to one another: imposing vicarious liability increases the liability of public entities, while limiting the liability of public entities reduces the protection of children.

It must be recognized that the Legislature has now made it clear that the liability for an act of sexual abuse committed by an employee must be the same for all entities, whether they are public, charitable or private. Thus, if this Court is seriously considering the AG's invitation to limit vicarious liability under Hardwicke, it will impact not only public schools, but also charitable entities such as the Roman Catholic Church, religious orders, non-Catholic religious institutions, and Jewish synagogues. It will also impact youth serving organizations throughout the state, as well as victims of child sexual abuse (past, present, and future), and all of the entities that support and assist those victims. Given these wide-ranging impacts, it is simply inappropriate for this Court to consider the AG's proposal in the manner it has been raised.

[7] The unspoken reason behind these purported fears of vicarious liability is that it exposes schools to liability that will outstrip their ability to pay. But such fears fail to recognize that in the overwhelming majority of these cases, schools have insurance policies providing coverage for these claims, namely through General Liability Coverage ("GLC") policies that remain applicable *in perpetuity*. For this reason, these fears are not justified.

For nearly two decades, private and charitable entities that stand *in loco parentis* have been subject to vicarious liability for these acts. It has applied to common law claims arising from an employee's acts of child sexual abuse against the most well-endowed private schools and the smallest, charitable entities. This has not resulted in the parade of horribles that the AG and some of the amici fear from the alleged danger of "strict liability."

More importantly, contrary to the AG's position, the paucity of case law where vicarious liability under Hardwicke has been challenged by charitable and private entities demonstrates the appropriateness and wisdom of that decision. There is no logical reason to assume that vicarious liability will have a massive, detrimental impact upon public entities, when this has not happened to private or charitable entities. While the AG cites the lack of case law as evidence that the "bounds" of vicarious liability under Hardwicke have not been established, the opposite conclusion is true: this Court's imposition of vicarious liability in Hardwicke struck the proper balance between protecting our children and placing the burden on the entities in the best place to achieve this. If anything, the lack of case law demonstrates that this system is working, that the fears of "strict liability" are unjustified, and that there is no need, and indeed no basis, for limiting vicarious liability under Hardwicke now.

In fact, the AG's deeply flawed proposal demonstrates exactly why this Court should refrain from trying to fashion a prophylactic limitation for a problem that does not exist: trying to do so without the benefit of any facts and the input from the stakeholders who will be impacted runs far too great a risk of unintended and unforeseen outcomes that lead to unjust results. The far better approach is to affirmatively hold that public entities are now subject to vicarious liability under Hardwicke and then allow the lower courts to implement this decision. This avoids the pitfalls of the AG's approach. But more importantly, it allows any issues to be dealt with within the traditional confines of the civil legal system, a system which has been working efficiently and effectively since Hardwicke was first decided.

Given that vicarious liability pursuant to 219(2)(d) was adopted by this Court in Lehmann, Abbamont, and Hardwicke and those decisions have been interpreted and utilized by trial courts in this state for over 20 years without any of the issues that the AG has raised, this Court should allow that process to continue. Not only is this traditional approach utilized by this Court, but if indeed the AG turns out to be correct, then ultimately the issue will be properly before this Court and, if that time ever comes, a narrowly-tailored and well-reasoned decision can be made with the benefit of the arguments of all stakeholders.

For all the foregoing reasons, this Court should adopt the AG's Point I and Plaintiff-Appellant's argument and reverse the holding of the Appellate Division. In doing so, it should clearly hold that the amendments to the CVA now permit plaintiffs to bring claims of vicarious liability under Hardwicke against a public entity. It should then remand this case for further proceedings, without any additional limitations at this time.

Respectfully submitted,

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