IN THE SUPREME COURT OF NEW JERSEY
Docket No.: 089973

RUSSELL FORDE HORNOR
Plaintiff-Petitioner

v.

UPPER FREEHOLD REGIONAL BOARD OF EDUCATION d/b/a UPPER FREEHOLD REGIONAL SCHOOL DISTRICT; ALLENTOWN HIGH SCHOOL; NEW JERSEY FUTURE FARMERS OF AMERICA; CHARLES J. HUTLER, JR., DEFENDANT DOE 1-10; AND DEFENDANT INSTITUTION 1-10
Defendant-Respondents

Brief in Support of Plaintiff-Petitioner Russell Forde Hornor's Motion for Permission to File a Reply to Defendant-Respondent's Opposition to Plaintiff-Petitioner's Motion for Leave to Appeal from the October 8, 2024 Appellate Division Decision

Docket No.: A-366-22, Civil Action

SAT BELOW: HON. ALLISON E. ACCURSO, J.A.D., HON. FRANCIS J. VERNOIA, J.A.D., AND HON. ARNOLD NATALI, J.A.D.

REPLY BRIEF FOR PLAINTIFF-PETITIONER RUSSELL HORNOR

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<u>Reply Point One</u>: The Revised Language of N.J.S.A. 59:2-1.3 Mirrors the Language from the Charitable Immunities Act, and Thus Demonstrates that the Intent of the Legislature was to make the Liability of a Public Entity the same as that of a Charitable Entity.

Defendant-Respondent Upper Freehold Regional BOE's Opposition argues extensively that the difference between the original version of N.J.S.A. 59:2-1.3 and the amended version of 59:2-1.3 demonstrate that, despite numerous express statements that the goal was to make the liability of a public and charitable entity the same, the Legislature did not intend to impose vicarious liability here. Judge Accurso made this same point in her Appellate Division opinion. In reality, this argument actually ignores the clear and express intent of the Legislature, and instead creates a straw man of "predicate liability" that both the Appellate Division and Defendant-Respondent proceed to not just knock over, but trample on repeatedly. However, while the reliance on this straw man is undoubtedly flawed, both the Appellate Division and Defendant-Respondent fail to recognize that, as demonstrated below, the amended language of 59:2-1.3 does not support their argument about the intent of the Legislature, but rather rebuts it.

The argument made by the Appellate-Division and Defendant-Respondent, is that the Legislature changed the language of 59:2-1.3 from a *"predicate liability"* provision to an *"immunity removing"* provision. Basically, they argue that Plaintiff's argument is flawed because this difference shows that 59:2-1.3 fails to establish the predicate liability for vicarious liability for acts outside the scope of employment.

This amendment, they argue, demonstrates that the Legislature intended this change in order to prevent the imposition of vicarious liability under Hardwicke.[1]

However, both Defendant-Respondent and the Appellate Division fail to recognize that this amendment actually makes the language of the TCA mirror the language of the CIA and, therefore, it actually demonstrates that the Legislature intended to, as Governor Murphy instructed, make the liability of a public entity the same as that of a charitable entity. Since, as shown below, this revised language is the exact language of the CIA that was analyzed in Hardwicke, the result of this, it must follow, is that both public and charitable entities are now subject to the holding in Hardwicke to the exact same manner and extent.

The original version of N.J.S.A. 59:2-1.3, in pertinent part, as follows:

> Section 7 of that bill provided, in pertinent part, that *"[n]otwithstanding any other provision of law to the contrary, including but not limited to the 'New Jersey Tort Claims Act'. . . 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 . . . or sexual abuse[.]" Act of May 13,2019, c. 120, 2019 N.J. Laws 120.*

Contrary to the Appellate Division's narrow view, the main problem with the original language was that it exposed a public entity to more liability than a

[1] Interestingly, neither ever explains exactly what removing the immunity for a public entity's liability for its employee's acts of sexual abuse, as the revised statute does, accomplishes if it doesn't permit vicariously liability under Hardwicke.

charitable one because it removed protections found not just in the TCA, but "any other provision of the law to the contrary," including common law protections that a charitable entity enjoys.

Correspondingly, the amended version of N.J.S. 59:2-1.3 provides:

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

This revised language mirrors the language from the Charitable Immunities Act ("CIA").

> *Nothing in this section shall be deemed to grant immunity to: (1) any nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes, or its trustee, director, officer, employee, agent, servant or volunteer, causing damage by a willful, wanton or grossly negligent act of commission or omission, including sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in section 2 of P.L.1992, c.7 (C.2A:30B-2), or sexual abuse as defined in section 1 of P.L.1992, c.109 (C.2A:61B-1); ….*

N.J.S.A. § 2A:53A-7 (Rev. 2023). This demonstrates, as Plaintiff has repeatedly said, that the intent of the Legislature was to make the liability of a public entity the same as that of a charitable entity. It also supports the conclusion that Governor Murphy thought that the original language was too broad because the amended

language, like the CIA, leaves in place any immunities available under the common law.

Most importantly, what both the Appellate Division and Defendant-Respondent fail to realize is that the revised language now found in the TCA mirrors the language analyzed by Hardwicke when it held that the CIA only provided immunity for negligence. See Hardwicke, 188 N.J. at 94-9 (analyzing the school's claim of immunity under the then-current version of N.J.S.A. § 2A:53A-7). After holding that the plaintiff had a statutory claim under the CSAA that was not barred by this language in the CIA, the court went on to recognize that this very language also did not prevent the plaintiff from bringing common law claims, including vicarious liability under the Restatement (2d) of Agency § 219(2)(d).

This mirroring language shows that the Legislature did exactly what Governor Murphy asked - they made public entities liable to the same extent as charitable entities by amending N.J.S. 59:2-1.3. In doing so, they inserted the exact same language into the TCA that the Hardwicke court ruled did not provide immunity from CSAA claims and vicarious liability. In the context of New Jersey law and this appeal, the only logical result is that a public entity may now be subject to vicarious liability under Hardwicke.

Importantly, both the Appellate Division and Defendant-Respondent repeatedly concede that the intent of the Legislature in amending the TCA was to

make the liability of a public and charitable entity the same. Yet, inexplicably, both arrive at a decision that creates an injustice by failing to achieve this. This is best demonstrated by the facts of this case, since if the Appellate Division decision were to stand, it creates a situation where Upper Freehold Regional BOE is not subject to vicarious liability under Hardwicke, but the co-defendant, Future Farmers of America, which is a charitable entity, is. This directly contradicts the Legislature's intent.

Indeed, this situation demonstrates the fundamental flaw in the Appellate Division decision. Under Hardwicke, vicarious liability pursuant to § 219(2)(d) applies to any employer: charitable entities, private or public ones. The only thing that prevents its application to a public entity is the TCA. Defendant-Respondent conceded as much when it raised the TCA as the basis for filing its Motion to Dismiss, which resulted in this appeal. And yet, somehow, Defendant-Respondent's entire position, and the Appellate Division's entire decision, rests on the fiction that the TCA does not provide a public entity with "immunity" from vicarious liability under Hardwicke.

But, despite the Appellate Division's tunnel vision search for a "predicate liability," the TCA clearly did provide immunity from vicarious liability under Hardwicke and just as clearly, the Legislature's intent was to remove all of the immunity that a public entity has under the TCA that a charitable entity does not

have under the CIA. The Appellate Division and Defendant-Respondent never really address this fact and instead, use linguistic constructs that amount to legal sophistry to doggedly avoid the imposition of vicarious liability and frustrate the Legislature's intent. But the Court's role is to carry out the intent of the Legislature, where as here, it is clear. The Appellate Division's failure to do so amounts to an injustice that justifies granting the Motion for Leave to Appeal.

Respectfully submitted,

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