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/decision 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 RESPONSE TO AMICI CURIAE

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PRELIMINARY STATEMENT

This brief responds to the amicus curiae briefs filed by the Attorney General of the State of New Jersey (hereinafter "Attorney General") and the New Jersey Coalition Against Sexual Assault (hereinafter "Coalition"). Absent from both briefs is citation to any legal authority establishing "predicate liability" in the Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 et seq., to impose vicarious liability upon a public entity for its employee's acts outside the scope of employment. Amici Curiae's briefs seek to shatter more than fifty years of jurisprudence by advocating a rewrite application of the TCA to expand vicarious liability for public entities when the Legislature never intended or directed such a change in the TCA. Simply stated, L. 2019, c. 120 ("Chapter 120") and L. 2019, c. 239 ("Chapter 239") (referred to herein collectively as "Amendments") did not alter or expand the TCA's vicarious lability provision set forth at N.J.S.A. 59:2-2(a), which is not an immunity.

The Attorney General properly states that the "aided-by-agency" doctrine improperly seeks to expand common law duties and potential liabilities to public schools, and the Coalition has provided no authority to apply this doctrine to schools. This Court has held that it is a fundamental principle that a board of education must take reasonable measures to assure the safety of children. The aided-by-agency doctrine seeks to drastically expand the common law duty and impose liability for employee acts that are intentional and criminal in nature, simply due to the

employment relationship. Such an extension is contrary to well established principles and the duties previously articulated by this Court for our schools, and conflicts with public policy and the underlying purpose of the TCA. Thus, the aided-by-agency doctrine does not apply.

There is no need to create a new standard of liability for common law claims against school districts involving sexual abuse by an employee, as suggested by the Attorney General. The concerns by amici curiae that school districts will not be held accountable for an employee's sexual abuse is misguided and ignores this Court's decision in Frugis v. Bracigliano, which established that when a school district is found to be directly negligent in a sexual abuse case and special instructions are given to a jury about the district's heightened duty to students, a jury will likely apportion the majority of liability upon the school district. The Amendments did not disturb this longstanding law and there is no basis in the statutory language or legislative intent to do.

For decades, the Legislature has repeatedly declared that it is the public policy of this state that public entities shall only be liable for their negligence within the limitations of the TCA. In light of that policy, this Court has only permitted the finding of liability against public entities when permitted by the TCA. Overriding public policy and blackletter was not the Legislature's intent with the Amendments. As such, the Appellate Division decision should be affirmed.

LEGAL ARGUMENT

POINT I

THE AMENDMENTS DID NOT ABROGATE THE TCA'S VICARIOUS LIABILITY PROVISION, N.J.S.A. 59:2-2(a)

Contrary to the amici curiae positions, N.J.S.A. 59:2-1.3(a) did not alter the manner in which a public entity can be held vicariously liable under the TCA. The Coalition and Attorney General fail to appreciate the manner in which claims against a public entity are analyzed. They incorrectly skip steps and ignore the plain language of the TCA to reach their desired conclusion that since a sexual assault is alleged, a public entity cannot rely upon immunity provisions of the TCA, but further cannot rely upon the TCA's provisions that explain when and how a public entity can be liable for an injury. Their position is contrary to longstanding jurisprudence and plain statutory language and must be rejected.

The Coalition acknowledges that after the TCA was enacted, our Legislature stated that "[if] additional liability of public entities is justified, such liability may then be imposed by the Legislature *within carefully drafted limits*." (Cb[1] 6, citing Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 414 (1988)) (emphasis added). It is undisputed when the Legislature enacted N.J.S.A. 59:2-1.3(a), it solely disabled immunity provisions specifically enumerated in the TCA. This section did not impact any immunity not enumerated in the TCA or change the predicate liability

[1] "Cb" refers to Coalition amicus curiae brief.

provision of the TCA that dictates when a public entity can be held vicariously liable for its employee's conduct, namely for conduct within the scope of employment pursuant to N.J.S.A. 59:2-2(a).

Improperly and without any support, the Coalition asserts that the distinction between "immunity provisions" and "predicate liability" provisions is "illusory". Similarly, the Attorney General jumps to the conclusion that since the Amendments stripped both public and charitable entities of their respective statutory immunities in claims for sexual abuse, there must be vicarious liability for willful, wanton or grossly negligent sexual abuse torts.[2] (AGb[3]12-14) Amici curiae distort and inaccurately describe longstanding TCA principles and statutory constructs. There is nothing contained within N.J.S.A. 59:2-1.3(a), or any other provision of the Amendments or the TCA, that reflect the Legislature "carefully drafted" language

[2] The Amendments removed the ability for a public entity to rely upon the TCA's specified immunity concerning civil liability in cases involving sexual abuse, and accomplished exactly what the Legislature intended as the Charitable Immunity Act ("CIA") and TCA have mirroring language and are held to the same standard of liability. Both state 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). If the Legislature sought to create vicarious liability for entities, public or otherwise, for employee conduct outside the scope of employment, it would have clearly stated so but did not. Defendants previously detailed in their other briefs how the Legislature achieved its intent to have the same liability standards for public entities and religious/nonprofit organizations (not private entities as the Coalition incorrectly contends) and incorporates these arguments in response to amici curiae.

[3] AGb refers to the New Jersey Attorney General's amicus curiae brief.

to remove the manner in which a public entity can be held vicariously liable for employee conduct under N.J.S.A. 59:2-2(a).

This Court has held that the initial inquiry in a tort claim against a public entity is to locate the "predicate" for liability under the Act. Troth v. State, 117 N.J. 258, 277 (1989); Kolitch v Lindedahl, 100 N.J. 485, 502 (1985). If there is no predicate for liability, the inquiry is at an end. After establishing the predicate for liability, a public entity can avail itself of any immunities. See N.J.S.A. 59:2-1(b); Kolitch, 100 N.J. at 502; Troth, 117 N.J. at 278, Tice v. Cramer, 133 N.J. 347, 355 (1993), Pico v. State, 116 N.J. 55, 62-63 (1989), Rochinsky, supra. This sequencing for an analysis of a claim against a public entity is a longstanding methodology embraced by our Courts, and application results in the conclusion that N.J.S.A. 59:2-2(a) is not an immunity and applies in sexual assault cases.

For all cases, including those involving sexual abuse, a public entity can only be liable for an injury as specifically provided for by a provision of the TCA. N.J.S.A. 59:2-1(a).[4] Thus, "predicate liability". It is a complete misapplication of the TCA to suggest, as the Coalition does, that N.J.S.A. 59:2-2(a) grants public entities immunity for claims arising out of sexual abuse. (Cb10) Such a reading is wildly

[4] The Attorney General refers to this as "blanket immunity" and completely ignores the introductory phrase, "Except as otherwise provided by this act," N.J.S.A. 59:2-1(a), which is a fatal flaw in its application of the TCA and liability for public entities.

inconsistent with the plain language and recognized decisions. N.J.S.A. 59:2-2(a) is the "liability provision" which only recognizes vicarious liability when the employee's conduct is within the scope of his employment. The Appellate Division below correctly determined that there was no "predicate for liability" to impose vicarious liability as Hutler's conduct was admittedly "outside the scope" of his employment. Contrary to the position maintained by the Coalition, the lower court did not "immunize" public entities, but instead found no "predicate for liability".

If there were predicate liability, under other circumstances, such as an allegation that a person was sexually assaulted by a police officer while being frisked, the next step in applying the TCA is to see if any immunity from liability applies, including N.J.S.A. 59:2-10. Finally, for sexual assault cases, the immunities enumerated by the TCA are disabled by applying N.J.S.A. 59:2-1.3(a). The amici curiae want to skip the longstanding procedure for applying the TCA to public entities to establish liability. Further, the Coalition seeks to fit a square peg in a round hole by incorrectly and unjustly characterizing N.J.S.A. 59:2-2(a) as an "immunity" so that it can be disabled by N.J.S.A. 59:2-1.3(a). Using the amici curiae's theories, there would never be vicarious liability on a public entity for sexual assault by an employee under any circumstance, because no predicate liability would ever exist. Their theory would essentially render the delicately crafted language of the TCA's Amendments superfluous. Certainly, this was not the Legislature's intent.

Contrary to the Attorney General's statement, the Appellate Division in E.C. v. Inglima-Donaldson, 470 N.J. Super. 41 (App. Div. 2021) did not hold that N.J.S.A. 59:2-1.3(a) automatically permits vicarious liability for willful, wanton, or grossly negligent acts of a public employee. (AGb 14) To the contrary, E.C. specifically rejected analyzing respondeat superior liability standards. 470 N.J. Super. at 55. The Appellate Division further observed that "limitations of liability" contained in the TCA apply even if N.J.S.A. 59:2-1.3 is triggered. Id. at 54-55. Thus, E.C. conflicts with the amici curiae's position.

There is further no support to the Attorney General's statement that a public entity cannot be held civilly liable in cases of sexual abuse. (AGb 15-16) It is undisputed that plaintiff could prove direct liability against a public entity for negligent hiring, retention and supervision of a public employee that results in sexual abuse of a minor, and the public entity cannot rely upon any immunity to avoid liability if proven. N.J.S.A. 59:2-1.3(a)(2). This predicate liability is squarely contained in N.J.S.A 59:1-2.

Public entity liability for sexual abuse by an employee can further be established if the particular facts of a case (which plaintiff conceded were not present in this matter) meet the elements of being "within the scope of employment" under N.J.S.A. 59:2-2(a). See Restatement (Second) of Agency §228 (1958). While defendants acknowledge that these circumstances may be limited, the quintessential

underpinnings of respondeat superior dictate, in general, that vicarious liability does not apply to employers (public, charitable or private) for crimes committed by employees. In fact, this Court has recognized that "only rarely will intentional torts fall within the scope of employment." Davis v. Devereaux Found., 209 N.J. 269, 303 (2012). This Court observed that a master cannot be held vicariously liable for "serious" crimes which are "different from what servants in a lawful occupation are expected to do" or "acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result." Id. The Amendments did not change this fundamental principle applied to all entities, nor did it alter N.J.S.A. 59:2-2(a), which embodies the generally accepted liability standard for vicarious liability and remains in full force and effect.

POINT II

THE "AIDED-BY-AGENCY" DOCTRINE DOES NOT APPLY AND A NEW COMMON LAW STANDARD OF LIABILITY FOR SEXUAL ABUSE CASES IS UNNECESSARY

Contrary to the Coalition's opinion, there is no basis in the statutory language of the Amendments, or even its legislative history, to conclude that the "aided-by-agency" doctrine, an exception to the general rule of vicarious liability, set forth in the Restatement (Second) of Agency ("Restatement") §219(2)(d) (1958) applies to

public entities, or any entity involving a sexual assault committed by an employee.[5] The aided-by-agency doctrine reflects that an employer can be liable for an employee's act outside the scope of employment when "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." Restatement §219(2)(d). It has never been applied to a public entity subject to the TCA, which only recognizes vicarious liability for acts within the scope of employment. Frugis v. Bracigliano, 177 N.J. 250 (2003); Cosgrove v. Lawrence, 214 N.J. Super. 670 (Law Div. 1986), aff'd 215 N.J. Super. 561 (App. Div. 1987).

This doctrine, as examined within the nuanced and rare facts of Hardwicke v. American Boychoir School, 188 N.J. 69 (2006),[6] is not a viable doctrine of liability for public schools given the statutory constructs of the TCA, as well as the fact that

[5] This legal point incorporates and supplements, without needlessly duplicating, defendants' arguments in their previously submitted briefs on the inapplicability of the "aided-by-agency" doctrine.

[6] As pointed out by the Attorney General, Hardwicke involved not only a private boarding school, but the sexual abuser was essentially the head of the school functioning as the school's "alto ego" having sole control over key administrative and educational tasks. This executive director sexually abused multiple students daily. (AGb 18-19) Accordingly, the facts were rare and unlike the more typical cases where the abuser is a teacher, substitute teacher or coach, and the abuse is off site and single or few instances, such as with Hutler. The extreme circumstances in Hardwicke are not present here and, thus, there is no similar basis to find that the aided-by-agency doctrine should apply to common law claims. Also, the Attorney General aptly notes that Hardwicke did not actually apply the doctrine to the claims, and no case since then has applied it to common law claims. (AGb 20)

Restatement §219(2)(d) was not approved by the ALI membership and, as recognized by the Attorney General, has been supplanted by the Restatement (Third) of Agency in 2006. Beyond the doctrine being violative of the TCA, it improperly seeks to establish new common law duties and expand public school liability beyond those recognized by this Court. It flies in the face of fundamental duties for schools clearly expressed by this Court, which cannot be ignored.

The fear expressed by the New Jersey Attorney General that the aided-by-agency doctrine exposes public schools to strict liability and swallows the general rule that respondeat superior does not apply to intentional torts committed outside the scope of employment is a bona fide reality. (AGb 21-23) Our Appellate Division, and other jurisdictions, recently expressed concern that an overly broad application of §219(2)(d), "treads perilously close to imposing strict liability on an employer." E.S. v. Brunswick Inv. L.P., 469 N.J. Super. 279, 299 (App. Div. 2021). The Coalition has not explained how strict liability would not result if this doctrine were applied to situations where a teacher, or any school employee, sexually assaults a student. Such application would leave a public entity, and any entity/employer for that matter, defenseless against criminal acts that were unforeseeable, purposefully hidden, and there was no possible way for there to be notice to the employer.

Holding an employer vicariously liable in such situation simply because they employed a tortfeasor is against public policy. The Attorney General correctly notes

this concern, and the impact is potentially staggering for many public schools. Particularly, this is concerning since the extended statute of limitations set forth at N.J.S.A. 2A:14-2a, is retroactive and allows claims for sexual abuse that occurred multiple decades prior, like Hornor's. Given stale claims filed against school boards, where many school boards either have insufficient or no molestation insurance coverage for such claims or insurance cannot be located, or for those districts who have not passed a budget in years, applying the aided-by-agency doctrine to impose vicarious liability on a school board could not merely be debilitating, but likely fatal. The impact could have harsh and devasting impacts on the current means used to educate and protect the school's children, as recognized by the Attorney General.

Not only would applying the aided-by-agency doctrine amount to strict liability, but it would unjustly expand a school district's duty. The common law duty for a school board to protect students in its care was set forth by this Court in Frugis v. Bracigliano, supra:

> 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, 177 N.J. at 268 (emphasis added).

The Court's discussion of a common law duty and the fundamental principles surrounding a school board's duty would be improperly expanded by employing the aided-by-agency doctrine. A broad reading of the language in, and application of, Restatement §219(2)(d) would certainly unfairly expose a school board to a strict liability standard. Consistent with Frugis, this Court should continue to apply the express statutory language in the TCA with respect to vicarious liability and not apply any contradictory common law and non-TCA statutory constructs, including the aided-by-agency doctrine, or other creative new standard of liability as suggested by the Attorney General. (AGb 25-36)

Moreover, employing the aided-by-agency doctrine would deprive a public board of education of N.J.S.A. 59:9-3.1, the allocation of fault in a sexual abuse claim between a negligent school board and an intentional tortfeasor. Amici Curiae fail to address the legislative determination not to amend N.J.S.A. 59:2-2(a) or N.J.S.A. 59:9-3.1 in the Amendments or anytime thereafter. There is no explanation as to how N.J.S.A. 59:9-3.1 can be reconciled with the aided-by-agency doctrine, because it cannot.

In Frugis, supra, plaintiffs sought to recover damages from a school board and elementary school principal due to the principal's sexual abuse of the student. Negligent supervision was alleged against the school board and there was a directed verdict for plaintiffs. Recognizing the right of apportionment by a board of education under the TCA and the statutory limit for a public entity's liability to not exceed that intended by the Legislature, this Court stated:

> N.J.S.A. 59:9-3.1, by its express language, stands alone in determining a public entity's liability relative to joint tortfeasors. We are therefore enjoined from considering common-law and non-TCA statutory constructs on joint tortfeasors that are inconsistent with the dictates of N.J.S.A. 59:9-3.1. See N.J.S.A. 59:1-3 ("'Law' includes enactments and also the decisional law applicable within the State as determined and declared . . . by the courts. . . ."). Although N.J.S.A. 59:9-3.1 states that a public entity is liable only for its percentage of negligence, that provision requires a comparison of the negligent public entity to "one or more other tortfeasor." N.J.S.A. 59:9-3.1. N.J.S.A. 59:9-3.1 does not limit apportioning fault to only "negligent" tortfeasors, but rather embraces "other tortfeasors," which includes both negligent acts and intentional wrongdoing.
>
> Frugis, 177 N.J. at 276.

However, this Court also recognized that apportionment of fault in circumstances where a public school district is found independently negligent for a student's injury involving a sexual assault required additional questions to be presented to a jury for apportionment of fault under N.J.S.A. 59:9-3.1. Id. at 282-83. Specifically, once liability is determined, a jury is to be instructed on "the heightened duty of school

boards to ensure students' safety from foreseeable harms, particularly those presented by the intentional acts of school personnel." Id. (emphasis added)

With this in mind, the jury can balance the school board's common law duty with the foreseeable harms and allocate the percentage of liability as they deem fit between the school board and the employer who committed the sexual abuse, without the need for either vicarious liability or application of the aided-by-agency doctrine. Thus, in circumstances where a school employee sexually assaults a student, if the plaintiff can prove the school board was independently negligent in its supervision, hiring, retention, or training practices, there is a strong likelihood, given the Frugis instruction, that a jury will apportion a greater percentage of fault to the entity, depending, of course, upon the facts of each case. See also Maison v. N.J. Transit Corp., 360 N.J. Super. 222, 241-42 (App. Div.), certif. granted 240 N.J. 243 (2019) (explaining that whether plaintiff's injury was so foreseeable that defendant's failure to act or adequately respond to the risk of injury "warrants imposition of the entire fault upon that defendant" is a question of fact for the jury). Accordingly, any concern that public entities will not ultimately be responsible for paying for a sexual assault by its employee is nonexistent.

For the past twenty years, New Jersey has been applying Frugis and the reasonable duty of care standard to common law claims against school districts, as well as the jury instruction for apportioning fault between a negligent school district

and an intentional tortfeasor. The Attorney General's suggestion in Point II B of their brief to abandon this methodology and binding law to create a new standard of liability for schools involving common law claims of sexual abuse based upon the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et seq., is unnecessary and fails to consider the various TCA provisions discussed supra. Notably, the TCA precludes novel causes of action and theories of liability against a public entity due to the legislative intent to broadly limit liability, not expand it. See Jones v. Morey's Pier, Inc., 230 N.J. 142, 154 (2017).

While the Attorney General accounts for some issues that arise with stale sexual abuse claims against school districts for actions that are, for example, over 40 years old, such as not being able to locate documents to demonstrate child abuse protection policies existed, the Attorney General fails to acknowledge many other issues involved in defending such claims. First, often the alleged perpetrator and/or critical witnesses, administrators and/or supervisors are deceased. Second, if not deceased, due to the passage of time memories have faded and/or dementia is a factor. Third, retention policies have changed through the years and schools are left without having investigation reports or complete student and personnel files. Fourth, the public school's duty to have policies and/or provide training on certain topics and responding to incidents in various ways has drastically changed through the years. The aforementioned issues, to name just a few, would be huge obstacles to

the Attorney General's proposed new rules for common law claims involving sexual abuse, and would be contrary not only to the purpose of the TCA, but unfair and prejudicial to schools to be held to a higher liability standard now that did not exist 40+ years prior. Simply put, the LAD liability standards should only apply to LAD claims based upon sexual assault. There is no justifiable reason to extend them to common law claims, particularly when this Court has already addressed this issue in Frugis to ensure liability of school districts under the appropriate circumstances.

Finally, the Coalition's public policy argument fails to address or even acknowledge the intent of the TCA, which is to protect public entities from unfair, unexpected, and unreasonable exposure to liability. Applying the aided-by-agency doctrine is completely contrary to New Jersey's public policy. While schools can and do, particularly in preset day, enact and enforce policies and procedures to prevent, notice and report reasonably suspected child abuse, a school district (or any entity for that matter) cannot be expected to prevent all illegal activity, control all employees' actions, and know about events that occur off school premises, outside school hours and are generally kept secret. It would be unfair, prejudicial and against public policy to apply the aided-by-agency doctrine to impute liability to a board of education, particularly in the case at bar involving Hutler's one-time sexual assault of plaintiff at his apartment in 1979. The Frugis approach, however, sufficiently balances the public policy considerations of a school district's duty to protect

children from sexual predators with the public policy of the TCA to protect public entities from exposure to liability except in very limited circumstances. There is no justification presented to change this well-established law.

CONCLUSION

For the reasons stated herein, within the previously filed brief opposing plaintiff's motion for leave to appeal, and within the supplemental brief on appeal, 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 appeal and affirm the Appellate Division's October 8, 2024 decision in its entirety.

Respectfully submitted,

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

Dated: August 7, 2025