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.

SUPPLEMENTAL 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 APPEAL FROM THE APPELLATE DIVISION'S OCTOBER 8, 2024 DECISION

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PRELIMINARY STATEMENT

The issues before this Court are confined to whether plaintiff, who alleges he was sexually assaulted in the late 1970s by his teacher, Hutler, inside his teacher's apartment, can maintain (1) a tort cause of action for vicarious liability, and (2) breach of fiduciary duty, against the public entity defendants, Upper Freehold Regional Board of Education and Allentown High School (collectively "Board" or "defendants"). Defendants submit the Appellate Division correctly concluded that these claims are not viable, and the October 8, 2024 decision should be affirmed. Contrary to what plaintiff would like this Court to believe from its supplemental brief, plaintiff's Law Against Discrimination ("LAD") claims are not at issue and there is no dispute that the Tort Claims Act ("TCA") does not apply to LAD claims.

Plaintiff's argument, raised for the first time in his supplemental brief, that the TCA does not apply to all tort claims based upon sexual abuse as a result of the Legislature's 2019 amendments, L. 2019, c. 120, and L. 2019, c. 239, is contrary to statutory language and history, and is simply unsupported by law. The Appellate Division correctly concluded that N.J.S.A. 59:2-2(a) controls vicarious liability, and the requirement to establish conduct was "within the scope of employment" was not altered by N.J.S.A. 59:2-1.3(a), because 59:2-2(a) is not an immunity. Further, it correctly concluded that the "aided-by-agency" theory of vicarious liability, an exception to the general standard of respondeat superior, is inapplicable. Thus, as

intended by the Legislature, potential liability of the Board and codefendant Future Farmers of America, are assessed by the same standards in sexual abuse cases – no specific statutory immunity for willful, wanton and grossly negligence acts, and the accepted respondeat superior standard for vicarious liability.

Defendants submit that the Appellate Division's well-reasoned and detailed decision correctly applies the law to the facts of the case. A school board and its teacher do not owe a fiduciary duty to their students, and a public school district cannot be held vicariously liable for sexual abuse by an employee that is outside the scope of employment. Accordingly, the decision should be affirmed in its entirety.

LEGAL ARGUMENT

POINT I

THE TORT CLAIMS ACT INDISPUTABLY APPLIES TO CLAIMS OF CHILD SEXUAL ABUSE (Not Raised Below)

Without any support whatsoever, plaintiff has now, for the first time, raised the argument that the Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 et seq., does not apply to any acts of child sexual abuse after the Legislature's 2019 statutory amendments, L. 2019, c. 120 ("Chapter 120") and L. 2019, c. 239 ("Chapter 239") (referred to herein collectively as "Amendments"[1]). This contention is laughable and

[1] Plaintiff refers to the Amendments as the Child Victims Act ("CVA"); however, this is not a title imposed by the Legislature and is not appropriate as the Amendments apply to adults and children. Thus, defendants submit this is a misnomer that mischaracterizes the legislation in an effort to blur the issues and actual intent of the Amendments. The term CVA should not be utilized.

contradicts not only specific legislative language amending the TCA and the accompanying legislative history, but also numerous cases that have been decided in the five years since its enactment. The Amendments are not directed at "ending child sexual abuse within institutions" as plaintiff asserts, nor do they constitute remedial legislation as they do not create specific new statutory rights, standards, or causes of action such as the Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et seq., the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 et seq., or the Child Sexual Abuse Act ("CSAA"), N.J.S.A. 2A:61B-1.[2] To the contrary, the Amendments merely extended the statute of limitations for sexual abuse victims to bring the aforementioned and common law claims, disabled the TCA's stated immunities for sexual abuse claims to be consistent with the amendments disabling the same immunities for charitable organizations in the Charitable Immunity Act ("CIA"), N.J.S.A. 2A:53A-7 et seq., and expands categories of potential defendants in civil actions concerning claims alleging sexual abuse. (A410) The purpose is not to provide additional protections for or to prevent sexual abuse, but, rather, to provide sexual abuse victims greater access to the courts to seek damages.

[2] The Legislature enacted the LAD in 1945 to abolish discrimination in the workplace. In 1986, the Legislature enacted the CEPA, "whistleblower law," to protect employees from retaliatory actions by employers. The Legislature enacted the CSAA in 1992 to provide a specific cause of action for child sexual abuse, above and beyond assault and battery and intentional infliction of emotional distress. Unlike the Amendments, LAD, CEPA and CSAA specifically dictate how and when employer liability attaches, as opposed to a general respondeat superior standard.

Plaintiff's reliance upon case law related to the LAD, CEPA, and the CSAA is misplaced and presented in a weak attempt to confuse and mislead the Court. The plaintiff has provided this Court with a nice summary of Fuchilla v. Layman, 109 N.J. 319 (1988) and its explanation of how the TCA does not apply to LAD claims. (Psb[3] 7-13) He then simply replaces CVA for LAD to ineffectively make a comparison between the two; however, plaintiff fails to explain and point out how the Amendments or their legislative history actually mimic the LAD (or CEPA or CSAA) and have any similarities that would justify using the same rationale in Fuschilla to conclude that the TCA does not apply to the Amendments, and common law tort claims. This is because there are no similarities and they a very different.

Unlike the aforementioned statutes, the Amendments at issue specifically made changes to the TCA, reflecting it applies to sexual abuse claims. Though C.V. by and through C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289 (2023), cited by plaintiff, involved alleged sexual abuse by a school bus aide towards a student, it only addressed applicability and the liability standard under the LAD. It did not address common law negligence claims or vicarious liability under the TCA, nor did it even mention the TCA; thus, C.V. is irrelevant. Plaintiff is grasping at straws. The fact that the Appellate Division did not waste its time addressing issues that are irrelevant and were not presented, does not show that its opinion is flawed.

[3] "Psb" refers to plaintiff's supplemental brief.

Similarly, J.H. v. Mercer Cnty. Youth Detention Ctr., 396 N.J. Super. 1 (App. Div. 2007), has no bearing on this matter. The plaintiff in J.H., a minor, alleged sexual assault by an adult public employee of the detention center, and filed both CSAA and common law causes of action as a result. With respect to the claim for damages under the CSAA, the Appellate Division concluded that passive abuser liability of the CSAA applies to the county defendants and the TCA does not bar such claims. J.H., 396 N.J. Super. at 5, 18. The conclusion was based upon the rationale of Restatement (Second) of Agency ("Restatement") §219(2)(c) (1958), which permits vicarious liability of an employer for employee acts outside the scope of employment when the conduct violates the employer's nondelegable duty. Id. at 18. This is not pertinent here. It is well established that public school districts are not held to a nondelegable duty of care; rather, it is a duty of reasonable due care and foreseeability. See Frugis v. Bracigliano, 177 N.J. 250, 268 (2003); Jerkins ex rel. Jerkins v. Anderson, 191 N.J. 285, 295-97 (2007); S.H. v. K&H Transport, Inc., 465 N.J. Super. 201, 214-20 (App. Div. 2020), cert. denied, 245 N.J. 366 (2021); Doe on behalf of Doe v. Small, 654 F.Supp.3d 376, 396 (D.N.J. 2023).

Notwithstanding, and what plaintiff fails to apprise the Court, the Appellate Division in J.H. concluded that plaintiff's common law claims were barred by the TCA. J.H., 396, N.J. Super. at 5, 20-22. Specifically, the Appellate Division affirmed the trial court's dismissal of the common law torts against the public entity employer

as the employer could not be held vicariously liable for its employee's sexual abuse of the minor because the conduct was outside the scope of employment, id. at 5-6, and plaintiff could not satisfy the TCA's verbal threshold. Id. at 20. Accordingly, J.H. demonstrates that the TCA applies to common law causes of action for cases involving child sexual abuse, and fails to support plaintiff's argument.

Incredibly, plaintiff asserts that vicarious liability for injuries arising from sexual abuse under the Amendments are not grounded in negligence, and tries to transition it into an undefined civil rights claim.[4] There is no support for this novel suggestion in the Amendments' legislative language or history, and such theory must be rejected. Further, even if it were accepted, plaintiff's argument would nonetheless fail because there is no governmental liability based upon the doctrine of respondeat superior for alleged violations of a person's civil rights. Monell v. Department of Social Service of City of New York, 436 U.S. 658, 691 (1978).

Had the Legislature intended for the entirety of the TCA to not apply to the Amendments or sexual abuse claims, it could have explicitly stated so, but did not. Instead, the Legislature's Amendments specifically revised the TCA and included new carefully written language that removed the procedural notice of claim requirements under the TCA for injuries resulting from sexual abuse, Chapter 120,

[4] Accepting plaintiff's theory would essentially convert any tort claim involving a touching of another person, including assault and battery, into a civil rights claim. This is an extremely broad and meritless assertion.

§8 (codified N.J.S.A. 59:8-3(b)), and disabled the TCA's immunities from liability for injuries caused by sexual abuse, Chapter 120, §7[5] modified by Chapter 239, §1 (codified N.J.S.A. 59:2-1.3(a)). Even as recently as March 2025, the Legislature continued to make changes to the TCA with respect to the verbal threshold, N.J.S.A. 59:9-2(d), stating that those recovery limits would not apply to actions at law for injuries caused by sexual abuse. L. 2025, c. 29, §§1 and 2 (codified at N.J.S.A. 59:2-1.3(c) and N.J.S.A. 59:9-2(d)(2)(b)).[6] In fact, with respect to the most recent change, the Senate Budget and Appropriations Committee acknowledged, "actions at law against public entities and public employees for certain sexual offenses committed

[5] Importantly, the initial language of Chapter 120, §7, "Notwithstanding any other provision of law to the contrary, including but not limited to the 'New Jersey Tort Claims Act,' N.J.S.A. 59:1-1 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. 1992, c.7 (C.2A:30B-2), or sexual abuse as defined in section 1of P.L. 1992, c. 109 (C.2A:61B-1)" (A84), was not approved or enacted into law because it did not establish a standard of proof for sexual abuse claims against public entities. (A100) The Governor was assured that the Legislature would correct this "by clarifying that public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations." (A100) Accordingly, the Legislature did just that with Chapter 239. (A385, A421) This reflects that not only did the Legislature not intend strict liability for public entities, but also that it intended for the TCA to apply, including its provisions related to vicarious liability, namely N.J.S.A. 59:2-2.

[6] This legislation reflects that N.J.S.A. 59:9-2(d) is not an immunity subject to N.J.S.A. 59:2-1.3(a)(1), but rather a limitation on damages as had been properly concluded in E.C. by D.C. v. Inglima-Donaldson, 470 N.J. Super. 41 (App. Div. 2021) and C.W. v. Roselle Bd. of Educ., 474 N.J. Super. 644 (App. Div. 2023). These cases reflect that the TCA applies in cases involving sexual assault, despite the fact that the statute was just recently amended.

against a person or a minor have previously been and continue to be filed under the New Jersey Tort Claims Act." See Senate Budget and Appropriations Committee Statement to Assembly Bill No. 4684(2R) (Feb. 3, 2025) (Da1). Such legislative action would be illogical and render continuous revisions of statutes meaningless, if we were to believe plaintiff's unsupported theory that the Legislature intended for the TCA to not apply to sexual abuse claims.

Plaintiff's theory is further belied by the fact that unlike the verbal threshold, the Legislature specifically chose to not amend the TCA with respect to other forms of limited recovery in sexual abuse cases such as punitive damages and prejudgment interest.[7] See N.J.S.A. 59:9-2(a) and -2(c). Clearly the Legislature was aware of them as they are included in the same section as the verbal threshold; yet, it definitely decided to leave the provisions undisturbed and viable limitations on public entity liability for damages in sexual abuse cases. In addition, and most critical to this matter, the Legislature has not amended the TCA provision concerning vicarious liability, N.J.S.A. 59:2-2(a), nor is there any proposed legislation related to same. This further contradicts plaintiff's position and demonstrates the opposite – the Legislature intended, and continues to intend, for the TCA to apply to tort claims resulting from sexual abuse.

[7] Based upon same, plaintiff's reference to cases allowing punitive damages and pre-judgment interest in LAD cases are irrelevant to this matter. See Psb 16.

POINT II

VICARIOUS LIABILITY IS GOVERNED BY THE TORT CLAIMS ACT AND CAN ONLY EXIST IF AN EMPLOYEE'S CONDUCT IS WITHIN THE SCOPE OF EMPLOYMENT

Contrary to plaintiff's argument in the supplemental brief, the Appellate Division did not "immuniz[e] public entities from the consequences of child sexual abuse" or hold in general that there is no predicate liability in the TCA for vicarious liability for acts of child sexual abuse. Instead, it held that N.J.S.A. 59:2-2(a) is the provision that provides predicate liability for vicarious liability of public entities for employee's acts that occur "within the scope of employment," but in this matter plaintiff conceded that Hutler's acts of sexual abuse were outside the scope of employment. Thus, there is no predicate liability in this particular case.

Plaintiff's assertions that N.J.S.A. 59:1-2 provides a "broad blanket of sovereign immunity," and there is no predicate liability in the TCA for a public entity to have direct liability for acts of child sexual abuse caused by a public entity's negligent hiring, retention or supervision of a public employee, are nonsense. Specifically, N.J.S.A 59:1-2 states

> it is hereby declared to be the public policy of this State that *public entities shall only be liable for their negligence within the limitations of this act* and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration.
>
> N.J.S.A. 59:1-2 (emphasis added)

Thus, The TCA includes a "predicate liability" for direct claims against the public entity for its own negligent actions, including those that result in sexual abuse. It is because this is so obvious, that the Supreme Court in Frugis, supra, did not need to identify this provision, and analyzed the common law duty of negligence imposed upon school personnel. Frugis, 177 N.J. at 268-70. In Frugis, the school principal had been sexually abusing students for years inside his closed locked office of the school, and there was no vicarious liability imposed upon the school Board for his intentional criminal acts.

It is further evident from Frugis that the TCA applies to child sexual abuse cases because it analyzed the applicability of N.J.S.A. 59:9-3.1[8] and other TCA provisions regarding apportionment of fault between the school board and the

[8] "Notwithstanding the provisions of P.L. 1952, c. 335 (C. 2A:53A-1 et seq.), P.L. 1973, c. 146 (C. 2A:15-5.1 et seq.) or any other law to the contrary, in any case where a public entity or public employee acting *within the scope of his employment* is determined to be a tortfeasor in any cause of action along with one or more other tortfeasors, the public entity or public employee shall be liable for no more than that percentage share of the damages which is equal to the percentage of the negligence attributable to that public entity or public employee and only to the extent authorized by N.J.S. 59:9-2 and N.J.S. 59:9-4." N.J.S.A. 59:9-3.1 (emphasis added). Further, N.J.S.A. 59:9-3 states, "Notwithstanding any other law, in any case where a public entity or public employee acting *within the scope of his employment* is determined to be a joint tortfeasor the public entity or public employee shall be required to contribute to a joint tortfeasor only to the extent of the recovery provided for under this act." N.J.S.A. 59:9-3 (emphasis added). Notably, neither of these TCA provisions, which encompass "within the scope of his employment" were altered by Chapter 120 or Chapter 239, further demonstrating the Legislature's intent for "within the scope of his employment" set forth in N.J.S.A. 59:2-2(a) to be viable.

employee who committed the sexual abuse. Without apportionment, the school board argued that the intent of the TCA would be ignored and the school board would ultimately be held vicariously liable for the intentional tortfeasor's criminal conduct. 177 N.J. at 274. Importantly, the Court agreed and concluded that N.J.S.A. 59:9-3.1 requires apportionment of fault because "we are constrained to apply the statute and not substitute our public policy preferences for the Legislature's mandate placing limitations on the liability of public entities." Id.

The Court applied the express language of the TCA and noted, "[w]e 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." Id. at 276 (citing N.J.S.A. 59:1–3, "'Law' includes enactments and also the decisional law applicable within this State as determined and declared ... by the courts...."). It observed that "to abrogate apportionment between a negligent public entity and an intentional tortfeasor under N.J.S.A. 59:9–3.1 and –4 would extend a public entity's liability beyond that intended by the Legislature." Id. at 280. So too would allowing a public entity to be held vicariously liable for an intentional tortfeasor's acts that are not within the scope of employment. As such, this Court should, as it did in Frugis, 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 any provision of the Restatement.

N.J.S.A. 59:2-2, "Liability of public entity," states:

> a. **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(a) (emphasis added)

The Legislature has not revised this provision. Defendant can only be vicariously liable under the common-law doctrine of *respondeat superior* for employee's acts that occur "within the scope of his employment" and not actions that occur outside the scope of employment. "The theoretical underpinning of the doctrine of respondeat superior has been described as follows: that one who expects to derive a benefit or advantage from an act performed on his behalf by another must answer for any injury that a third person may sustain from it." Carter v. Reynolds, 175 N.J. 402, 408 (2003) (citations omitted). For liability to attach to the employer pursuant to the doctrine of *respondeat superior*, "plaintiff must prove the existence of an employer-employee relationship and that the employee's tortious actions 'occurred within the scope of that employment.'" G.A.-H v. K.G.G., 238 N.J. 401, 415 (2019).

The "scope of employment" standard "refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." Di Cosala v. Kay, 91 N.J.

159, 169 (1982) (citation omitted). Four factors, collectively, must be satisfied to establish that an employee's conduct is within the scope of his employment: (1) "it is the kind he is employed to perform," (2) "it occurs substantially within the authorized time and space limits," (3) "it is actuated, at least in part, by a purpose to serve the master," and (4) "if force is intentionally used by the servant against another, the use of force is not unexpectable by the master." Davis v. Devereaux Found., 209 N.J. 269, 302-03 (2012) (quoting Restatement §228(1)[9]). "Conversely, an employee's act is outside of the scope of his or her employment 'if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.'" Id. at 303 (quoting Restatement §228(2)). 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." Ibid. Here, Hutler admits that his sexual assault of plaintiff was not within the scope of his employment as a teacher and, thus, there cannot be vicarious liability on defendant for his actions. See Cosgrove v. Lawrence, 214 N.J. Super. 670 (1986), aff'd 215 N.J. Super. 561, 563 (App. Div. 1987).

[9] Only §228 of the Restatement is applicable to this matter as it describes the conduct of a servant that is considered to be "within the scope of employment" and that which is not "within the scope of employment;" the exact standard that N.J.S.A. 59:2-2(a) directs to be utilized.

POINT III

N.J.S.A. 59:2-1.3(a)(1) DOES NOT ALTER THE STANDARD FOR, NOR IMPOSE, VICARIOUS LIABILITY ON A PUBLIC ENTITY FOR SEXUAL ABUSE

There is nothing contained within the language of N.J.S.A. 59:2-1.3(a) to conclude, as plaintiff would prefer, that the Legislature intended for the entire TCA, in particular N.J.S.A. 59:2-2(a), to not apply to tort claims involving sexual abuse. Neither the statutory language nor the legislative history reflect the Legislature intended to always impose vicarious liability on a public entity for sexual abuse by an employee that is not within the scope of employment. In fact, the history of the initial language of Chapter 120, §7, being rejected because it automatically held public entities liable in sexual abuse cases as noted supra, see Dsb at n.5, supports the position that the Legislature did not intend for vicarious liability of public entities except as delineated by the TCA. The TCA's language cannot be ignored.

N.J.S.A. 59:2-1.3(a)'s language is very clear – it prevents a public entity in sexual abuse lawsuits from relying on a statutory immunity specifically set forth within the TCA, such as N.J.S.A. 59:2-10, which are the same statutory immunities from sexual abuse lawsuits of the CIA that do not apply to nonprofit organizations.[10]

[10] The Senate and Assembly Judiciary Committee Statements to the bill state, "[t]hese new standards are identical to the liability standards applied to nonprofit organizations, and their officers, employees and other agents, based on exceptions to the immunity granted to such organizations and agents under the Charitable Immunity Act" as revised by Chapter 120. (A388-90) Accordingly, by creating

See Senate Judiciary Committee Statement to Senate No. 3739 (June 17, 2019) (A401-02) The statute does not prevent the public entity from relying upon any other defense or immunity for liability related to acts of sexual abuse. See id. ("The committee amendments to the bill expressly provide that only the specific immunity from lawsuits granted to public entities and public employees pursuant to the 'New Jersey Tort Claims Act,' N.J.S. 59:1-1 et seq., is not applicable with respect to the types of sexual abuse lawsuits described in the bill, thus, any available immunity from some other source of law could be raised by public entities and public employees as a defense to any such lawsuits.") (A402)

Since N.J.S.A. 59:2-2(a) is not an immunity provision of the TCA, but a predicate liability provision; it is not affected by N.J.S.A. 59:2-1.3(a), and a public entity can rely upon it as a means to defend against vicarious liability in sexual abuse lawsuits. Thus, N.J.S.A. 59:2-1.3(a) does not automatically mean that a public entity is vicariously liable for sexual abuse by a public employee. This also does not equate to public entities being immune from vicarious liability in sexual abuse claims as plaintiff posits.[11]

N.J.S.A. 59:2-1.3(a) and disabling immunities in the TCA for public entities, the Legislature accomplished its goal of establishing the same liability standards for public entities and nonprofit organizations. Said another way, neither public entities nor nonprofit organizations can rely upon immunities set forth in their applicable statutes, the TCA and CIA respectively.

[11] Even if one were to ignore N.J.S.A. 59:2-2(a)'s language and entertain plaintiff's argument that it effectively provides immunity to a public entity for

Plaintiff's suggestion to rewrite N.J.S.A. 59:2-1.3(a)(1) so that it disables not only public entity immunities, but also predicate liability provisions in sex abuse cases, including the phrase, "within the scope of his employment" in N.J.S.A. 59:2-2(a), just to reach his desired end result is not permitted. See Murray v. Plainfield Rescue Squad, 210 N.J. 581, 596 (2012) (declining to "rewrite" statute to align with party's view of "public policy" because courts "are charged with interpreting a statute" and "have been given no commission to rewrite one"); Voss v. Tranquilino, 206 N.J. 93, 99 (2011) (discussing how Appellate Division panel "transgressed a cardinal rule of statutory construction" by rewriting a statute "based on its own public-policy analysis"). "[T]he Legislature is presumed to be aware of judicial construction of its enactments," DiProspero v. Penn, 183 N.J. 477, 494 (2005), and well-knew that the liability and immunity provisions of the TCA are distinct and that, as a rule, courts first ask whether an immunity applies and if not, whether

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employee's acts that are outside the scope of employment, by reinstating a public entity's sovereign immunity for same, the public entity would be able to rely upon it. The Legislature did not enact N.J.S.A. 59:2-1.3(a) as originally proposed in Chapter 239, which would have prevented public entities from relying on "any" immunity established by any law, not just the TCA. Cf. Pa385 with Pa388. Recognizing this would not achieve the intent, as detailed supra, N.J.S.A. 59:2-1.3(a) and the Senate Judiciary Committee Statement, expressly provide that it is only specific immunity provisions of the TCA that cannot be relied upon in sexual abuse cases, but any immunity from another source is fair game. Thus, a public entity could, theoretically, rely upon "leftover sovereign immunity" not specifically delineated within a particular TCA provision, which would be consistent with the Legislature's intent.

liability should attach. See Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 407-08 (1988). Notwithstanding, the Legislature enacted N.J.S.A. 59:2-1.3(a)(1) to narrowly disable the TCA's provided "immunity from civil liability" in sex abuse cases – and nothing else. See Perrelli v. Pastorelle, 206 N.J. 193, 200 (2011) ("Courts are cautioned against 'rewrit[ing] a plainly-written enactment of the Legislature or presum[ing] that the Legislature intended something other than that expressed by way of the plain language.' If the language is 'clear on its face,' courts should 'enforce [the statute] according to its terms.'").

Accordingly, the Legislature specifically chose to strip public entities of immunity, similar to the CIA's immunities that were no longer applicable to sexual abuse cases for charitable organizations. Consequently, plaintiff must prove in sexual abuse cases that the public entity can be vicariously liable for employee conduct "within the scope of his employment" just as would be shown against a private individual under like circumstances. N.J.S.A. 59:2-2(a). Had the Legislature intended to further expand liability for a public entity and nonprofit charitable organizations, it could have further revised the TCA (and likewise a mirroring provision amending the CIA) to include a provision that in sexual abuse lawsuits a public employer (and nonprofit charitable organization) will be subject to vicarious liability for a public employee's acts that are outside the scope of employment, or that in sexual abuse cases vicarious liability of public entities and charitable

organizations would be based upon the "aided-by-agency" theory of Restatement §219(2)(d), as applied to the specific circumstances in Hardwicke v. American Boychoir School, 188 N.J. 69 (2006). Critically, and despite the Legislature being aware of Hardwicke as it is mentioned in the history of Chapter 120, the Legislature specifically chose not to do so, as it did not intend for such broad liability.

Here, the plain language of the statute is clear and unambiguous. There is further no clear statement of intent to negate the vicarious liability standard of N.J.S.A. 59:2-2(a) in the legislative history of Chapter 120 or Chapter 239. Vicarious liability must be established through the criteria enumerated in Davis, supra. Thus, under certain circumstances that are not presented here, it is plausible for a public entity to be vicariously liable for sexual abuse caused by an act of an employee within the scope of employment, and there is no immunity for vicarious liability.

POINT IV

LIABILITY OF THE BOARD AND FUTURE FARMERS OF AMERICA WILL BE ASSESSED THE SAME AS HARDWICKE AND "AIDED-BY-AGENCY" IS INAPPLICABLE

As detailed in defendant's brief in opposition to plaintiff's motion for leave to appeal, the Appellate Division painstakingly explained that the Legislature achieved its goals of establishing the liability of public entities and nonprofit charitable organizations to be the same in sexual abuse cases, namely, by ensuring that the identical immunities from sexual abuse lawsuits specifically set forth in the TCA

and CIA could not be utilized.[12] Thus, the Board and Future Farmers of America ("FFA") (assuming they are subject to the CIA) will be on the same general playing field. This, however, does not mean that they cannot rely upon other immunities, defenses or limitations of liability.[13] Moreover, plaintiff is putting the cart before the horse and assumes there would be a different standard of liability imposed on the FFA compared to the Board. The specific factual underpinnings concerning FFA's and Hutler's relationship, including but not limited to whether FFA was Hutler's "employer" or "master", has not been explored, and the liability of the FFA is not at issue before this Court. Notwithstanding, contrary to plaintiff's unsupported insistence, the "aided-by-agency" theory of vicarious liability set forth in Restatement §219(2)(d), as relied upon in Hardwicke, supra, (a case distinguishable from the case at bar) is not a viable theory of liability for any party, as duly noted by the Appellate Division in this matter.

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[12] Immunity from lawsuits for entity employers set forth in the TCA and CIA cannot be used for actions as a result of sexual assault caused by a willful, wanton or grossly negligent act. See N.J.S.A. 59:2-1.3(a) and N.J.S.A. 2A:53A-7(c).

[13] The TCA does not include any specific immunity for a public entity due to negligent acts of an employee, including those resulting in sexual abuse; however, the CIA does include broad immunity for negligent acts of its employees, N.J.S.A. 2A:53A-7(a), which still apply to claims of sexual abuse. Similarly, a public entity can rely upon N.J.S.A. 59:2-2(a) in sexual abuse cases to limit vicarious liability to acts that occur within the scope of employment. This is the typical vicarious liability standard applied to all persons, including nonprofit and private organizations. Thus, theoretically, charitable organizations have less exposure to liability in sexual abuse cases than public entities.

Restatement §219(2)(d), details circumstances where liability can be imposed upon an employer for an employee's actions outside the scope of employment. The aided-by-agency doctrine of vicarious liability is an exception to employer nonliability and has been rarely applied, and only in a select few circumstances. Importantly, the aided-by agency theory has never been applied to a public entity subject to the TCA, which only permits vicarious liability for acts within the scope of employment. See Frugis, supra; Cosgrove, supra (applying Restatement §228 and not §219 when assessing vicarious liability).

Specifically, §219(2)(d) states 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). Our Appellate Division recently expressed "concern that an overly broad application of §219(2)(d)," which plaintiff seeks here, "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) (citation omitted). Without principled limitations, such as Restatement §228 or the specific statutory language of N.J.S.A. 59:2-2(a), §219(2)(d) would "swallow[ ] the general rule that *respondeat superior* does not attach to intentional torts" and impose strict liability upon employers for their employees' private misconduct that occurs outside of the

employee's scope of employment. E.S., 469 N.J. Super. at 300. Certainly, our Legislature did not intend to impose strict liability, as demonstrated by its carefully chosen words and refusal to adopt the initial proposed language of Chapter 120, §7, or to have the aided-by-agency doctrine apply to sexual abuse cases.

In E.S., which involved claims under the LAD, CSAA, and common law, the Appellate Division refused to apply §219(2)(d) to impose vicarious liability on a private property owner for a maintenance employee's sexual assault of children on the property. It observed that "the Restatement's commentary makes clear, vicarious liability for an employee's torts committed outside the scope of employment is limited to 'situations in which the principal's liability is based upon conduct which is within the apparent authority of a servant.'" E.S., 469 N.J. Super. at 302-03 (quoting Restatement, § 219 cmt. e). The Appellate Division concluded that there was no apparent authority by the maintenance employee to impose vicarious liability on his employer. Id. at 305. In rendering its conclusion, it relied upon a case where §219(2)(d) was not applied to impose vicarious liability on a school for its employee's sexual assault of students:

> In Jean-Charles v. Perlitz, the district court applied Connecticut law to consider whether the defendants were vicariously liable for the sexual abuse of school children by their employee, Perlitz, who was the school's founder. 937 F. Supp. 2d 276, 279–81 (D. Conn. 2013). In dismissing the plaintiffs' claims for vicarious liability, and addressing § 219(2)(d), the court noted "Connecticut courts have consistently declined to apply the doctrine of

> apparent authority in tort cases, notwithstanding the principles of agency set forth in the Restatement (Second)." Id. at 286. More importantly, the court held "the allegations of the complaint taken as a whole do not support a plausible inference that the moving defendants held out Perlitz as authorized to engage in sexual exploitation of the plaintiffs." Id. at 287 (emphasis added).
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> Id. at 303.

Accordingly, Restatement §219(2)(d) is limited to "situations in which the principal's liability is based upon conduct which is within the apparent authority of a servant." Id. Just at E.S. refused to find liability for a private company under Restatement §219(2)(d), the same result would occur for all defendants here (if §219 (2)(d) were applicable, which defendant does not concede), where Hutler's nighttime sexual assault inside a private apartment is not within the apparent authority or scope of employment of a teacher or coach.

More importantly, and ignored by plaintiff, a note to Restatement §219 states that the aided-by-agency theory "was not approved by the ALI[14] membership and thus did not represent the position of the ALI. It has since been superseded by the Restatement of the Law Third, Agency." Restatement §219, Note. This crucial fact was recognized in E.S., which analyzed and applied the Restatement (Third) of Agency (2006) ("Restatement Third"). E.S., 469 N.J. Super. at 296, 301, 303-04.

[14] ALI (American Law Institute) is a non-profit organization of judges, lawyers, and legal scholars that works to clarify and simplify US common law.

The Restatement Third was published in 2006, nearly 50 years after the Restatement, and the same year that Hardwicke was decided. Thus, the near 20-year rationale in Hardwicke that applied Restatement §219(2)(d), is outdated, inconsistent with current law, and is simply inapplicable to the case at bar. The Legislature likely recognized this, which is why it specifically did not refer to or include any provision concerning aided-by-agency vicarious liability in the Amendments.

"The Restatement Third entirely eliminated the 'aided-by-agency' doctrine of vicarious liability by adopting § 7.03(2)[.]" E.S., 469 N.J. Super. at 301. Under the Restatement Third, vicarious liability for employees' acts outside the scope of employment can only exist if there is "some nexus between the principal's manifestation of authority and the agent's tortious conduct." Id. at 303. Pursuant to the Restatement Third, "[a]pparent authority rarely serves as a basis for liability when an employee ... commits an intentional physical tort." Id. at 303-304.

Applying the Restatement's "aided-by-agency" theory without an affirmative statutory basis, or any current legal precedent for doing so is plainly incorrect. It essentially revives a standard of strict liability that the Legislature abandoned when it amended the initial language of N.J.S.A. 59:2-1.3 to its current version. The limitations on liability provisions of the TCA, N.J.S.A. 59:2-2(a), remain. Furthermore, this Court has adopted the "within the scope of employment" standard for vicarious liability for all entities – public, charitable, and private, see O'Toole v.

Carr, 175 N.J. 421, 425 (2003); Davis, supra, not Restatement §219. Accordingly, vicarious liability of the Board and FFA will be equally determined under the within the scope of employment standard.[15] Here, Hutler's sexual assault of plaintiff in his apartment nearly 45 years ago, admittedly, does not meet this standard.

POINT V

THE APPELLATE DIVISION DECISION CLEAR AND PLAINTIFF'S CLAIMS FOR VIOLATION OF THE LAD WERE NOT PREVIOUSLY PRESENTED (Not Argued Below)

The issue before this Court is not an LAD claim, which was not raised in either of the lower courts. Any alleged "vicarious liability" under the LAD, which is better characterized as independent supervisory liability, was not presented below and is not for this Court to decide. See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 624 (1993) (holding that employers can be liable for supervisory sexual harassment under the LAD regardless of actual or constructive notice, if they "negligently or recklessly fail[ ] to have an explicit policy that bans sexual harassment and ... provides an effective procedure for the prompt investigation and remediation of such claims"). This is an issue that may be raised in the future at the trial court level. The Appellate Division's decision is not flawed or unclear as it addressed the specific issues presented. Clarification is not needed; the request for same should be denied.

[15] Even if the Restatement Third were applied, neither the Board nor FFA could have vicarious liability as neither provided apparent authority to Hutler to sexually abuse children. Rather the authority was to teach and coach.

CONCLUSION

For the reasons stated herein and within the brief opposing plaintiff's motion for leave to 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: May 23, 2025