IN THE SUPREME COURT OF NEW JERSEY
Docket No.: 89973

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; CHARLES J. HUTLER, JR., DEFENDANT DOE 1-10; AND DEFENDANT INSTITUTION 1-10
Defendant-Respondents

Supplemental Brief in Support of Plaintiff-Appellant, Russell Forde Hornor's 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.

SUPPLEMENTAL BRIEF FOR PLAINTIFF-APPELLANT RUSSELL FORDE HORNOR

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INTRODUCTION

Plaintiff-Petitioner respectfully submits this supplemental brief to further explain that the Appellate-Division's narrow focus on "predicate liability" resulted in a fundamentally flawed opinion that failed to recognize the far simpler truth: that the Tort Claims Act does not apply to SB 477, commonly referred to as the Child Victims Act ("CVA").[1] Recognition of this, as detailed below, provides this Court with a far simpler solution to the problem that the Appellate Division grappled with. Moreover, this solution achieves, rather than frustrates, the Legislature's intent, without any of the inherent flaws and contradictions that result from the Appellate Division's order.

PLAINTIFF-RESPONDENT'S SUPPLEMENTAL ARGUMENT

I. The Appellate Division Opinion is Fatally Flawed

First and foremost, the matter before this Court highlights the most fundamental flaw in the Appellate Division's Opinion: it not just fails to achieve the Legislature's express intent, it actually frustrates it. Every document related to the CVA, from budget analyses to Governor Murphy's signing statement, clearly states that the intent was to protect children from sexual abuse and vindicate the rights of survivors by making the liability for acts of child sexual abuse the same for public

[1] Plaintiff-Petitioner uses the terms SB 477 and the CVA interchangeably.

and private entities. Yet, if the Appellate Division opinion is not reversed, it means that the defendant that is a private, charitable entity, New Jersey Future Farmers of America, will be potentially subject to vicarious liability under Hardwicke v. Am. Boychoir Sch., 188 N.J. 69 (N.J. 2006), while the defendant that is a public entity, Upper Freehold Board of Education, will not be. This alone is so contrary to the Legislature's stated intent that it justifies reversal here.

The Appellate Division Opinion arrives at this flawed position because it begins with the misguided premise that a public entity may only be held liable if there is a "predicate liability" within the Tort Claims Act ("TCA") for the claim. Starting from this premise, it then argues that no such "predicate liability" for vicarious liability for acts of child sexual abuse exists in the TCA. From this, the Appellate Division concludes that there can be no vicarious liability for these acts. However, because the Appellate Division's conclusion rests on the false premise of the requirement of "predicate liability," its opinion is fundamentally flawed and must be reversed. As discussed in Plaintiff-Petitioners' Motion for Leave to Appeal and clarified below, there is a far simpler and more logical solution here to the problem that the Appellate Division has grappled with, which is to simply recognize that the Tort Claims Act does not apply to claims of child sexual abuse brought pursuant to the CVA.

First, the notion that every claim against a public entity requires that the plaintiff point to a "predicate liability" within the TCA is rebutted by the very section that gives rise to this appeal. When the Legislature passed the CVA, it amended the TCA to include 59:2-1.3(a)(1) & (2). As this Court is aware, 59:2-1.3(1)(a) is the subsection at issue here, which removes a public entity's immunity for an employee or agent's acts of child sexual abuse. But the Legislature also added 59:2-1.3(a)(2), which removes a public entity's immunity for acts of sexual abuse against a child that are caused by the public entity's negligent hiring, retention or supervision of a public employee. Both of these subsections remove immunity, as opposed to imposing "predicate liability."

But there is no "predicate liability" for acts of sexual abuse against a child that are caused by the public entity's negligent hiring, retention or supervision of a public within the TCA and neither the Defendant nor the Appellate Division has ever required that Plaintiff-Petitioner (or any plaintiff) identify such "predicate liability" in order to proceed with such a claim. The Appellate Division opinion simply accepts that such liability exists based on this Court's holding in Frugis v. Bracigliano, 177 N.J. 250 (N.J. 2003). App. Div. Op. at 36, FN 12. But the Frugis decision never mentions "predicate liability," nor does it even analyze whether or not the TCA bars such claims.

Despite the lack of predicate liability, no one has ever questioned that 59:2-1.3(a)(2) imposes liability for negligent hiring, retention or supervision. This fact alone demonstrates that, contrary to the Appellate Division's opinion, it has long been recognized that a party does not have to be able to point to a specific "predicate liability" in the TCA in order to bring a claim against a public entity. Indeed, if the Appellate Division's opinion was correct, then the entirety of 59:2-1.3 would be a nullity. Since the Appellate Division's fundamental premise fails, its entire opinion fails.

Second, due to the Appellate Division's single-minded focus, it completely ignores that it has long been recognized that a party may bring a claim against a public entity for violations of the Law Against Discrimination ("LAD") or Conscientious Employee Protection Act ("CEPA"), even though there is no "predicate liability" for these claims within the TCA. This is because the TCA does not apply to claims brought pursuant to these types of remedial legislation. See, e.g., Fuchilla v. Layman, 109 N.J. 319, 332-38 (N.J. 1988); Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (N.J. 1994).

Moreover, in Lehmann v. Toys 'R' Us, 132 N.J. 587 (N.J. 1993), this Court made it clear that LAD claims include vicarious liability claims under 219(2)(d) for acts traditionally considered outside the scope of employment. Thus, under the LAD a party may bring a claim for vicarious liability for acts outside the scope of

employment against a public entity, despite the fact that no "predicate liability" for such claims can be found in the TCA. See, e.g., C.V. by & through C.V v. Waterford Twp. Bd. of Educ., 255 N.J. 289 (N.J. 2023). The failure to even consider this further demonstrates that the Appellate Division opinion rests on a flawed premise.

Third, neither the Appellate Division, nor Defendant, can really explain what 59:2-1.3(a)(1) accomplishes if it does not impose vicarious liability upon a public entity. It has long been established that statutes must be interpreted to "discern and effectuate" the legislative intent. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (N.J. 2012). But the Appellate Division opinion completely ignores the legislative intent behind the passage of the CVA. The plain language of 59:2-1.3(a)(1) makes it clear that the Legislature intended for this section to remove a public entity's immunity from vicarious liability for its employee's acts of child sexual abuse so that public entity liability is the same as that of charitable and private entities. Every statement and report from the Legislature demonstrates this intent, as does Governor Murphy's signing statement. But by insisting that the Legislature failed to use the "magic words" of predicate liability when it wrote this subsection, the Appellate Division makes it a nullity. This simply cannot be the case and further demonstrates why the Appellate Division must be rejected.

The foregoing all demonstrates why the Appellate Division opinion is fatally flawed.

II. The Appellate Division Opinion Must Be Reversed Because It Fails to Recognize that the Tort Claims Act Does Not Apply to the CVA

The Appellate Division creates a complex knot out of this issue that it then attempts to untangle with its concept of "predicate liability." However, this solution creates more problems than it purports to solve. This Court should reject the Appellate Division's opinion and cut this Gordian knot by simply recognizing that the Tort Claims Act does not apply to the CVA. This not only achieves the intent of the Legislature by making the vicarious liability of public, charitable, and private entities the same with respect to an employee's acts of child sexual abuse, it avoids the complications and contradictions created by the Appellate Division's opinion.

As demonstrated in Plaintiff-Petitioner's Motion for Leave to Appeal, the CVA is a landmark piece of remedial legislation designed to vindicate the civil rights of survivors of child-sexual abuse and protect children in New Jersey. It has long been recognized that the TCA does not apply to this type of remedial legislation. For example, this Court has made it clear that the TCA does not apply to claims brought pursuant to the Law Against Discrimination ("LAD") and Conscientious Employee Protection Act ("CEPA"), and the Appellate Division has held that the TCA does not bar claims under the Child Sexual Abuse Act ("CSAA"). This Court should now reverse the Appellate Division Opinion and definitively hold that the TCA does not apply to the CVA since, just like the LAD, CEPA, and CSAA, the CVA is remedial legislation with a purpose that is different from the TCA.

It has long been the case that the TCA does not apply to LAD claims. In fact, it is so ingrained in our law that Defendant-Respondent's original Motion did not even challenge Plaintiff-Petitioner's LAD claims, even though LAD claims also impose vicarious liability.

Over thirty years ago, in Fuchilla, this Court first recognized the important differences between the LAD and TCA while holding that the procedural aspects of the TCA did not apply to a plaintiff's LAD claims because the purpose of these two pieces of legislation is different. Fuchilla v. Layman, 109 N.J. 319, 332-38 (N.J. 1988). The Court began by recognizing that

> . . . the clear public policy of this State is to abolish discrimination in the workplace. Indeed, the overarching goal of the Law [LAD] is nothing less than the eradication "of the cancer of discrimination." . . . In contrast to the sweep of the Law, the Act [TCA] seeks to provide compensation to tort victims without unduly disrupting governmental functions and without imposing excessive financial burden on the taxpaying public.

Id. at 334-35 (referring to the LAD as the "the Law" and the TCA as "the Act") (citations omitted).

The Court explained that the "history, purpose, and text" of the TCA indicates that its primary concern is with negligent conduct, but that the TCA's "declaration pertaining to negligent conduct sheds little light on the Legislature's intention concerning discrimination . . . ." Id. at 335 (citations omitted).

However, in an analysis that would come to be repeatedly cited, the Court went beyond just holding that the procedural provisions of the TCA do not apply to the LAD, noting that "[t]he difference between the substantive standard for negligence, which was clearly a legislative concern in the Act [TCA], and the Law's [LAD's] implicit emphasis on motive or intent suggests that the Legislature did not intend that the Act apply to discrimination claims under the Law." Fuchilla, 109 N.J. at 335 (emphasis added). The Court also pointed out several differences between the LAD and the TCA, noting that the LAD has its own unique procedural requirements; the LAD does not prohibit an award for pain and suffering in any way; and the LAD permits punitive damages. Id. at 336-37. The reason for these differences is that the two acts serve two completely different purposes.

The concurrence by Justice Handler illustrates this point. He emphatically stated that he had little doubt that

> the Legislature did not intend to include unlawful discrimination violative of the Law Against Discrimination as an "injury" to be governed by the Act. Fault or lack of reasonable care, which are the basis of "negligence," are generally not essential in determining whether conduct constitutes invidious discrimination that is unlawful under the Law Against Discrimination. **Moreover, such unlawful discrimination frequently entails purposeful, willful, or intentional conduct.**

Id. at 339-40 (J. Handler, concur.) (emphasis added). He went on to point out that if the TCA were to apply to LAD claims, then it would "preclude the imposition of vicarious liability on a public entity employer for unlawful discrimination" under

the LAD. Fuchilla, 109 N.J. at 340 (J. Handler, concur.). The result would be to "immunize the public entity and stigmatize only the public employee for invidious discrimination" and this "would clearly be at variance with the Law Against Discrimination. To the extent public entities would be immunized under the Act from the consequences of discriminatory conduct of its employees, it is clearly out of sync with prevailing law." Id. (J. Handler, concur.). Likewise here, immunizing public entities from the consequences of child sexual abuse, as the Appellate Division has done, is out of sync with the expressed intent of the Legislature.

Justice Handler also pointed out that vicarious liability of the employer is an integral part of the protection provided by the LAD and its federal cognate, Title VII, and awards for vicarious liability have long been recognized. Id. at 340-41 (J. Handler, concur.). For Justice Handler, the fact that the application of the TCA to LAD claims would frustrate vicarious liability and result in a reduction of responsibility for discrimination and a restriction of the protection the LAD affords victims of discrimination indicated that the Legislature never meant for the TCA to apply to these claims. Id. at 341 (J. Handler, concur.). This same logic applies with equal force to acts of sexual abuse authorized by the CVA – frustrating vicarious liability for such acts, as the Appellate Division has done, reduces a public entity's responsibility for child sexual abuse and restricts the protections that the Legislature put in place with the passage of the CVA. This is even more egregious here because

charitable and private entities are subject to this vicarious liability, so it actually increases the responsibility of these entities for such acts, in direct contradiction of the Legislature's stated intent to make the liability of all these entities equal. This Court should recognize, as Judge Handler did with respect to the LAD, these clear signals that the Legislature never meant for the TCA to apply to claims brought pursuant to the CVA.

Furthermore, according to Judge Handler, the history of the TCA further clarified that it does not apply to violations of civil rights, like those governed by the LAD. After reviewing that history, he noted that "[i]t bears iteration that none of the plethora of judicial decisions that form the matrix of the Tort Claims Act involved a violation of a civil right. Quite clearly the Tort Claims Act was not needed to structure liability -- or immunity -- for such claims." Fuchilla, 109 N.J. at 343 (J. Handler, concur.). This same logic applies to Plaintiff-Petitioner's claims governed by the CVA.

Judge Handler went on to point out that

> [t]he objectives of the Law Against Discrimination are markedly different from those of the Tort Claims Act. As observed by the Appellate Division: "The Law Against Discrimination is directed at ending discrimination in employment and public accommodations while the Tort Claims Act provides liability for damages for the negligence of public entities." Id. at 578. These contrasting legislative goals are manifest in very different statutory schemes. Awards under the Law Against Discrimination "are intended to serve not only the interest of the individual involved but the public interest as well."

Fuchilla, 109 N.J. at 343-44 (J. Handler, concur.). The same is true here: the contrasting legal goals of the CVA and the TCA have manifested in very different schemes. Unlike the TCA, the CVA is directed at ending child sexual abuse within institutions in New Jersey; this is just as contrary to the TCA as the LAD.

Justice Handler went on to note that, as a result of these differing objectives, the TCA

> ignores what the Law seeks to prevent. The Law Against Discrimination is solicitous of the hurt endured by a victim of discrimination. It is designed so that no citizen shall be subject to the embarrassment and humiliation of discrimination. See, e.g., Evans v. Ross, 57 N.J. Super. 223, 231 (App. Div.), certif. den., 31 N.J. 292 (1959). In stark and dramatic opposition to the purposes of the Tort Claims Act, the philosophy and spirit of remedial awards available under the Law Against Discrimination are "fine-tuned to the nuances of discrimination and the psychological as well as economic suffering it causes." Castellano v. Linden Bd. of Educ., 79 N.J. 407, 417 (1979) (Handler, J., concurring in part and dissenting in part).
>
> Distinctive substantive standards, as well as procedural rules, have been developed in the litigation of a claim under the Law Against Discrimination to advance its special goals of combatting discrimination. . . . These substantive liability standards under the Law Against Discrimination are totally at odds with the deference to governmental discretion that serves as a cornerstone for the scheme of liability established by the Tort Claims Act.

Id. at 344-46 (J. Handler, concur.). Everything that Justice Handler stated above about the LAD and its differences from the TCA is equally true about the CVA.

He then went on to conclude that "[i]t follows from this analysis and comparison of different goals, substantive standards, procedural rules, and remedial

provisions that an interpretation of the Law that requires the superimposition of the Tort Claims Act to claims of unlawful discrimination would be wholly inconsistent with the intent of the Legislature when it provided expressly for suits under the Law to be brought in Superior Court." Fuchilla, 109 N.J. at 346 (J. Handler, concur.). The same exact thing is true with respect to the CVA. It logically follows that an interpretation of the CVA that requires the superimposition of the TCA to claims of child sexual abuse (which is exactly what the Appellate Division has done) is wholly inconsistent with the intent of the Legislature when it provided expressly for suits under the CVA to be brought in Superior Court. It therefore also follows that the TCA does not apply to the CVA, just like it does not apply to the LAD.

If there was any remaining doubt as to whether Justice Handler did not believe that the TCA applied, in any way, shape or form to an LAD claim, he clarified that:

> Any interpretation of the current statutory scheme that engrafts upon the Law the Tort Claims Act, with its shorter notice filing period, higher standards of liability, heavier burdens of proof, reduced damages, and broad immunity provisions would substantially weaken the relief that could be obtained in a judicial civil rights action for unlawful discrimination under the Law. **I do not for a moment believe that it was legislative inadvertence or carelessness that accounts for the possible failure to include invidious discrimination cases under the Tort Claims Act. It is to me inconceivable that the Legislature contemplated such inclusion or indeed might even be sympathetic to such an approach in view of its own distinguished history in giving great vigor and maximum protection to these civil rights.**

Fuchilla, 109 N.J. at 348 (J. Handler, concur.) (emphasis added). There is no other way to read Justice Handler's concurrence, and indeed the entire majority opinion in Fuchilla, as anything other than standing for the proposition that the TCA cannot be applied to LAD claims at all.

But more importantly, Justice Handler was also pointing out that the failure of the Legislature to include predicate liability in the TCA for LAD claims does not somehow mean that a plaintiff cannot pursue these claims (as the Appellate Division believes), it means the exact opposite. The Legislature did not include predicate liability for LAD claims in the TCA because the TCA deals only with negligence claims. But claims under the LAD, just like claims for vicarious liability under the CVA, are not grounded in negligence concepts and, therefore the TCA has no bearing on claims under either legislation.

LAD claims are designed to vindicate the important civil rights of those subject to "invidious discrimination." Likewise, vicarious liability claims under the CVA are designed to vindicate the important civil rights of survivors of child sexual abuse. Because both share this common purpose, the lack of predicate liability in the TCA for claims of vicarious liability under the CVA actually demonstrates that the TCA does not apply here, just as it does not apply to LAD claims. Indeed, contrary to the Appellate Division's opinion, the fact that there is no predicate liability in the TCA for claims of vicarious liability related to child sexual abuse is, as Justice

Handler recognized long ago with respect to the LAD, proof that the TCA does not apply to them.

Further proof of this is found in subsequent opinions from this Court. Fuchilla's recognition of the LAD's unique objectives, due to its nature as remedial legislation, ultimately resulted in a watershed decision by this Court in the seminal case of Lehmann v. Toys 'R' Us, which set the standard for an employer's liability, including vicarious liability, for a violation of the LAD. Lehmann v. Toys 'R' Us, 132 N.J. 587, 626 (N.J. 1993). This Court explicitly adopted the Rstmt. (2d.) of Agency § 219(2) and applied it to an employer's liability under the LAD, including when an employee's acts are traditionally considered outside the scope of employment:

> even in the more common situation in which the supervisor is acting outside the scope of his or her employment, the employer will be liable in most cases for the supervisor's behavior under the exceptions set forth in § 219(2). For example, if an employer delegates the authority to control the work environment to a supervisor and that supervisor abuses that delegated authority, then vicarious liability under § 219(2)(d) will follow.

Id. at 619-20. This is the same concept of apparent authority that would later be adopted by this Court in Hardwicke. The Court went on to clarify that it was imposing vicarious liability on the employer, not strict liability. Id. at 623 ("We recognize that although we have declined to hold employers strictly liable for hostile work environment sexual harassment by supervisors, we have created a standard that may often result in employers being held vicariously liable for such harassment.").

It then explained that it was also imposing vicarious liability under § 219(2)(d)'s concept of aided agency for violations of the LAD:

> Under agency law, an employer's liability for a supervisor's sexual harassment will depend on the facts of the case. An employer will be found vicariously liable if the supervisor acted within the scope of his or her employment. Moreover, even if the supervisor acted outside the scope of his or her employment, the employer will be vicariously liable if the employer contributed to the harm through its negligence, intent, or apparent authorization of the harassing conduct, **or if the supervisor was aided in the commission of the harassment by the agency relationship**.

Lehmann, 132 N.J. at 624 (emphasis added). This conception of aided agency was also adopted by the Hardwicke court. Thus, the justification for imposing vicarious liability for acts of child sexual abuse under Hardwicke is firmly rooted in and grounded upon the logic of imposing this liability upon entities as a remedial measure for violations of the LAD. Moreover, Lehmann's imposition of vicarious liability is predicated on Justice Handler's recognition of the remedial purposes that underly the LAD. This further suggests that liability under the CVA for acts of child sexual abuse, just like liability under the LAD, is not subject to the restrictions of the TCA.

The foregoing explains why it is now well-ingrained in our law that the TCA does not apply to remedial, statutory claims against a public entity. See, e.g., Richter v. Oakland Bd. of Educ., 246 N.J. 507, 539-40 (N.J. 2021) (endorsing Fuchilla's holding that difference between the TCA's focus on the substantive standard for

negligence and the LAD's implicit emphasis on motive or intent suggests that the Legislature did not intend that the TCA apply to discrimination claims under the LAD); Cavouti v. New Jersey Transit Corp., 161 N.J. 107, 132 (N.J. 1999) (permitting the recovery of punitive damages against a public entity under the LAD, despite the TCA's prohibition on punitive damages, due to the differing objectives of the two first identified in Fuchilla); Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (N.J. 1994) (noting that the purpose of CEPA, like that of LAD, is different from that of TCA); Potente v. Cty. of Hudson, 378 N.J. Super. 40, 47-49 (App. Div. 2005) (upholding the award of pre-judgment interest under the LAD against a public entity, despite the TCA's prohibition of this, because the purpose of the LAD is different from that of the TCA); Lakes v. City of Brigantine, 396 N.J. Super. 65, 69 (Super. Ct. 2007) (recognizing that the Fuchilla and Abbamont analyses both stand for the proposition that the procedural and substantive provisions of the TCA do not necessarily apply to actions brought pursuant to explicit statutory authority, as opposed to claims brought against an employer under common law theories). The citations demonstrate that many courts have refused to apply the TCA to LAD claims based on the distinction between these two pieces of legislation that was elucidated in Fuchilla and which undergirds Lehmann. The same logic should be applied here and this Court should cut the knot

created by the Appellate Division with the simplest solution: holding that the TCA does not apply to claims brought pursuant to the CVA.

Recently, this Court reinstated a claim for a violation of the LAD by a minor child and student who was sexually abused by a public-school employee. C.V. by & through C.V v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 296 (N.J. 2023). This demonstrates that the TCA has no bearing on remedial, statutory claims like those pursuant to the LAD, including claims arising from child sexual abuse. This further supports the conclusion that the TCA likewise does not apply to Plaintiff-Petitioner's claims brought pursuant to the CVA.

The C.V. matter involved a pre-kindergarten student, C.V., who was repeatedly sexually assaulted over five months by a seventy-six-year-old bus aide who was employed by the Waterford Board of Education. Id. at 296. As a result, C.V. and her parents sued the Waterford Township Board of Education and Waterford Township School District, alleging, among other things, discrimination "on account of . . . sex" in violation of the LAD. Id. Both the trial court and the Appellate Division erroneously ruled that the sexual abuse of C.V. was not "on account of sex" and dismissed the LAD claims. This Court reversed this decision, basing its ruling both on Lehmann and L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 189 N.J. 381 (N.J. 2007). In doing so, the Court made it crystal clear that

> in Lehmann we explicitly held that "[w]hen the harassing conduct is sexual . . . in nature," the first prong of a claim for hostile-environment

> sexual harassment, which asks whether the harassing conduct occurred because of sex, or "would not have occurred but for" the person's sex, "will automatically be satisfied." 132 N.J. at 605, 626 A.2d 445 (emphasis added). We made clear that "when a plaintiff alleges that she has been subjected to sexual touchings . . . she has established that the harassment occurred because of her sex." Ibid.

C.V., 255 N.J. at 313. The same is certainly true here. But, the C.V. decision was also based on the fact that this Court had previously recognized the validity of an LAD claim in the school setting in L.W., which recognized that the Lehmann standard applied equally in the workplace and the school setting. Indeed, the Court clarified that the holding in L.W. was premised on the basic principle that sexual harassment is as unacceptable in a school as it is in the workforce. This is because a school district's first imperative must be to "do no harm" to the children in its care and, therefore, must "assure that the teachers and administrators who stand as surrogate parents during the day are educating, not endangering, and protecting, not exploiting, vulnerable children." Id. at 312. This same logic applies equally to child sexual abuse as it does to sexual harassment.

The reason that the trial court and Appellate Division erred in C.V. was because they had improperly focused on the facts surrounding the sexual abuse of the plaintiff. However, and importantly here, as this Court pointed out, this was immaterial under the LAD because:

> As we held in Lehmann, "[t]he LAD is not a fault-or intent-based statute." 132 N.J. at 604, 626 A.2d 445. Because "[t]he purpose of the

> LAD is to eradicate discrimination, whether intentional or unintentional," plaintiffs need not show that an employer or place of public accommodation "intentionally discriminated [against] or harassed [them], or intended to create a hostile . . . environment." Id. at 604-05 (emphases added). Indeed, "[a]lthough unintentional discrimination is perhaps less morally blameworthy than intentional discrimination, it is not necessarily less harmful in its effects, and it is at the effects of discrimination that the LAD is aimed." Id. at 605, 626 A.2d 445 (emphasis omitted).
>
> Therefore,. . . "the perpetrator's intent is simply not an element of the cause of action," Lehmann, 132 N.J. at 605, 626 A.2d 445.

C.V., 255 N.J. at 314-15. This holding, based on Lehmann, arises from the distinction between the LAD and TCA that was first recognized in Fuchilla. It is predicated on the recognition that the purpose of the LAD, unlike the TCA, is to eradicate discrimination and its negative effects, and this is precisely why the TCA does not apply to it. The exact same dynamic is true about vicarious liability under the CVA — its purpose is to eradicate child sexual abuse and its negative effects on children. Thus, C.V. supports the conclusion that the TCA does not apply to remedial legislation, like the CVA.

But the Court's ruling in C.V. is also notable for another reason here. It also demonstrates that the fundamental difference between the LAD and TCA, which lead to the seminal decision in Lehmann, is now so fully entrenched in New Jersey law that courts, and even public entities themselves, no longer even bother discussing the TCA in the context of LAD claims against a public entity. Indeed, the best evidence of this is the fact that neither Board of Education in C.V. nor L.W. ever

even bothered to raise the TCA as a defense to the LAD claims nor is the Tort Claims Act mentioned in either opinion. Nor did Defendant-Respondent even raise the TCA as a bar to Plaintiff-Petitioner's LAD claims here; in fact, the original Motion concedes that it did not address the LAD claims. At this stage, it is simply beyond question that the TCA does not apply to LAD claims. Given this reality, combined with the clear remedial purpose of the CVA to combat child sexual abuse, it is hard to understand why the Appellate Division failed to recognize that the TCA does not apply to the CVA.

Indeed, the plain language of the CVA's amendments to the TCA also support this conclusion, since 59:2-1.3(a) begins by clearly stating that "[n]otwithstanding any provision of the "New Jersey Tort Claims Act," N.J.S.59:1-1 et seq., to the contrary . . ." it is removing a public entity's immunity for acts of child sexual abuse committed by an employee or agent. This language further demonstrates that the Legislature's intent was that the TCA would not apply to a public entity's liability for acts of child sexual abuse under the CVA.

It must also be noted that almost twenty years ago, the Appellate Division faced, and rejected, nearly the same argument being made here, but with regard to claims under the CSAA. In J.H., the plaintiff was a minor who alleged that he had been sexually abused by an employee of the Mercer County Youth Detention Center while he was being detained there. J.H. v. Mercer Cty. Youth Detention Ctr., 396 N.J.

Super. 1, 4 (App. Div. 2007). He brought claims pursuant to the CSAA, as well as common law claims. Id. The issue before the Appellate Division was "whether the immunities granted to public entities under . . ." the TCA "bar plaintiff's causes of action against the County defendants both under the CSAA and under the common law torts . . . ." Id. at 5.

The public entity's position there, with respect to the CSAA, is almost identical to the position taken here, with respect to the CVA:

> The County defendants assert that plaintiff's CSAA claim must fail under the general concepts of respondeat superior liability espoused in Cosgrove, supra, 215 N.J. Super. at 563, 522 A.2d 483. The County defendants contend that based on the statutory limitations contained in the language of the TCA at N.J.S.A. 59:2-2 with respect to negligent conduct of an employee outside the scope of the employee's employment, and at N.J.S.A. 59:2-10 with respect to acts of an employee constituting willful misconduct, they are immune from liability.

Id. at 16. The Appellate Division analysis of this issue relied upon Hardwicke, and traced that decision's development through Lehmann and Abbamont. Id. at 16-18. In doing so, the J.H. court recognized that Hardwicke's adoption of vicarious liability pursuant to 219(2)(d) was predicated on providing the best mechanism to effectuate the Legislature's expressed intent in passing the CSAA, which was to protect vulnerable children from victimization. J.H., 396 N.J. Super. at 18. Importantly here, this recognition led the J.H. court to conclude that:

> The logical extension of the Court's rationale in Hardwicke supports a finding that the passive abuser liability provision of the CSAA **was intended to supersede in a child sexual abuse case any conflicting limitation of action provision against public entities contained in the TCA**. The Court cited a long list of remedial statutes that have as the paramount goal of the Legislature to keep children safe and to identify those who facilitate their abuse. Id. at 90, 902 A.2d 900.

J.H., 396 N.J. Super. at 18 (emphasis added). Thus, when faced with the issue of whether the TCA prevented the imposition of liability for claims under the CSAA, it did not reject them due to the fact that no "predicate liability" existed in the TCA. Instead, the Appellate Division looked to the intent behind the CSAA and recognized that, just as Justice Handler had concluded with respect to the LAD, the TCA did not apply because the CSAA was remedial legislation enacted for a different purpose. The same is true here, for the CVA.

Finally, the Legislature recently passed new legislation that removes any doubt that it never intended for the TCA to apply to plaintiffs' claims under the CVA. On February 25, 2025, SB 3564/A 4684 passed both houses and was signed into law by the Governor on March 7, 2025. A418. This Legislation removes the TCA's $3,600 damages threshold on recovery for pain and suffering for claims brought against public entities resulting from sexual assault, sexual abuse or any other crime of a sexual nature. A421. Furthermore, the Senate Judiciary statement specifies that:

> The list of acts for which pain and suffering damages may be awarded against a public entity or public employee is based upon the list of acts of abuse for which **the Legislature previously eliminated immunity from civil liability for governmental actors under the "New Jersey**

> **Tort Claims Act,"** N.J.S.59:1-1 et seq., applied new, extended statute of limitations periods for victims to file civil actions against such public actors, **and made them generally liable in any such action in the same manner as private parties**. See P.L.2019, c.120 (C.2A:14-2a et al.); and P.L.2019, c.239.

A421, at 1 (emphasis added). This makes it abundantly clear that the Legislature passed this law to specifically remove the TCA's damages threshold for claims arising from sexual abuse, including those brought pursuant to the CVA. But even more importantly, it once again definitively shows that when the Legislature passed the CVA, its intent and belief was that it "eliminated immunity from civil liability for governmental actors under the New Jersey Tort Claims Act . . . and made them generally liable in any such action in the same manner as private parties." A421, at 1 (emphasis added). It could not be more crystal clear that the CVA makes public entities like Defendant-Respondent generally liable in the same manner as private entities, which means it may be held vicariously liable under Hardwicke. This again demonstrates why the Appellate Division opinion is flawed and must be rejected.

But this Legislation is important here for another reason; it demonstrates that the Legislature has now stepped in and corrected the errors of the courts that have applied the TCA's damages threshold to claims brought under the CVA and, in doing so, further demonstrates that the Legislature intended that the TCA would not apply to these claims.

In E.C., the Appellate-Division addressed whether or not the damages threshold of the 59:9-2(d) applied to the plaintiff's claims against a public entity arising from child sexual abuse. E.C. by D.C. v. Inglima-Donaldson, 470 N.J. Super. 41, 54 (App. Div. 2021). The defendant board of education in that case argued that 59:2-10 and 59:9-2(d) were not immunities, but rather limitations on liability, and therefore they had not been eliminated by the CVA's removal of a public entity's immunity. Id. at 44. First, the Court recognized that 59:2-1.3 removed a public entity's immunity under the TCA with respect to claims arising from sexual assault. Id. at 54. There, the Appellate Division assumed that

> The phrase "immunity from civil liability" was intended by the Legislature to mean exactly what it suggests: an "exemption from a duty [or] liability." BLACK'S LAW DICTIONARY 898 (11th Ed. 2019). This view comports not only with common usage and dictionary definitions but also with how the word "immunity" has been historically understood by courts. See McDonald v. City of Chicago, 561 U.S. 742, 813-15 (2010).

Id. Based on this assumption, the court analyzed, inter alia, whether 59:9-2(d) was an immunity, which had been eliminated by the CVA, or a "limitation on liability" which was not affected by the CVA. It concluded that 59:9-2(d) was not an immunity because the language of that section "does not purport to free a public entity from liability. It instead limits the damages that may be awarded once a public entity is held liable by precluding damages for pain and suffering unless certain

circumstances are met." E.C., 470 N.J. Super. at 55.[2] Furthermore, the court went on to hold that "[b]ecause this verbal threshold only impacts the award that may result from a claim and not whether the claim may be maintained against the public entity, we reject the argument that N.J.S.A. 59:9-2(d) is an immunity." Id.

Similarly, in C.W., the Appellate Division affirmed the trial court's grant of summary judgement pursuant to 59:9-2(d), dismissing a student's claim for pain and suffering damages against the board of education arising from sexual abuse inflicted upon the student by a teacher. C.W. v. Roselle Bd. of Educ., 474 N.J. Super. 644, 646 (App. Div. 2023). The court held that dismissal was appropriate, despite the amendments to the TCA, because the victim had not demonstrated medical expenses that exceeded the $3,600 monetary threshold. Id. On appeal, Plaintiff argued, among other things, that precluding pain and suffering damages violated the legislative intent of the CVA. C.W., 474 N.J. Super. at 648-49. The court rejected plaintiff's argument, based on the E.C. decision. Id. at 654.

Interestingly, the E.C. Court closed by noting that "[w]e take comfort in the knowledge that if we have misconstrued its intent, the Legislature has the power to clarify its intent by amendatory enactments." E.C., 470 N.J. Super. at 56.

[2] Notably, the Appellate Division opinion's dogmatic insistence on predicate liability forced it to claim that it somehow agreed with the E.C. court's holding, yet disagreed that this was a "limitation on liability." See App. Div. Op. at 39, FN 13.

Now, over three years later, the Legislature has done just that by clarifying that, despite the language used, it did not intend for 59:9-2(d) to apply to claims brought pursuant to the CVA. However, this legislation actually demonstrates much more than just a rejection of the E.C. and C.W. holdings. In reality, it shows that a narrow interpretation of the CVA and 59:2-1.3, based on semantics, is flawed. Unfortunately, this was exactly the interpretation taken by the Appellate Division. In this light, the Legislature's passage of SB 3564/A 4684 is further proof that it did not mean for the CVA to be construed so narrowly. On the contrary, the Legislature is sending a clear signal, just as the one recognized by Justice Handler so long ago, that the TCA simply does not apply at all to claims of child sexual abuse against a public entity brought under the CVA.

Based on the foregoing, the Appellate Division opinion directly contradicts the holdings of Fuchilla, Lehmann, L.W., and C.V, all of which recognize that the TCA does not apply to remedial, statutory authority, like the LAD, CEPA, CSAA, and now the CVA. The Appellate Division opinion ignores the important differences between the purposes of the LAD, CEPA, CSAA, and the CVA on one hand, and the TCA on the other. This Court should remedy this situation by reversing that opinion, rather than waiting another three years for the Legislature to change the law again.

In fact, and perhaps most shockingly, the Appellate Division opinion actually denies that the CVA is a landmark piece of remedial legislation that is intended to

achieve the important public policy of protecting our children from sexual abuse. The failure to recognize that the CVA is a remedial, statutory authority, like the LAD, is ultimately fatal to its decision because it means that the Appellate Division never realized that the TCA simply does not apply to the CVA. Since the TCA does not apply to the CVA, it cannot bar Plaintiff's claims of vicarious liability under Hardwicke.

This Court should reject the Appellate Division's opinion and instead recognize that the TCA does not apply to child sexual abuse claims brought pursuant to the CVA, including claims of vicarious liability. This recognition not only honors and achieves the stated intent of the Legislature, but it also avoids all of the problems created by the Appellate Division's narrow and dogmatic insistence on locating predicate liability. For all these reasons, the Appellate Division opinion should be reversed.

III. In the Alternative, the Appellate Division's Opinion Fails to Recognize That the CVA Removal of Immunity Imposes Vicarious Liability

Even if this Court believes that the TCA does apply to Plaintiff's claims of vicarious liability brought pursuant to the CVA and the amendments to 59:2-1.3(a)(1), the Appellate Division opinion should still be reversed because it fails to recognize that the removal of immunity is, in reality, no different than the imposition of liability. They are two sides of the same coin, and the Appellate Division opinion should be reversed for all of the reasons contained in Plaintiff-

Petitioner's Motion for Leave to Appeal and Reply Brief, incorporated here by reference.

IV. The Appellate Division Opinion Does Not Apply to Plaintiff's Claims for Violation of the Law Against Discrimination

Even if this Court believes that the TCA does apply to Plaintiff-Petitioner's claims, this Court should take the opportunity to clarify that this in no way impacts Plaintiff's claims for violation of the LAD, including claims of vicarious liability. As demonstrated above, it has long been recognized that the TCA does not apply to LAD claims. Moreover, the Court in Lehmann made it clear that an entity may be vicariously liable for an employee's or agents acts under the LAD, even if outside the scope of employment, pursuant to Rstmt. (2d.) 219(2)(d). Lehmann, 132 N.J. at 619-20, 624. Thus, the Appellate Division opinion has no impact upon Plaintiff's claims for vicarious liability under the LAD, since those opinions rest entirely on the TCA and the TCA does not apply to LAD claims.

Defendant-Respondent did not actually challenge the LAD claims. However, the Appellate Division order states that "[w]e reverse the trial court's denial of the Board's motion to dismiss those counts of Hornor's complaint asserting claims for breach of fiduciary duty and vicarious liability and remand for the dismissal of those counts with prejudice." App Div. Op. at 63. Plaintiff's Complaint does not have individual counts asserting vicarious liability. Instead, it contains assertions of

vicarious liability within the counts, including Count I- Negligence, Count V- Intentional Infliction of Emotional Distress, and Count VII- Violation of the LAD.

First, even if this Court agrees that Plaintiff-Petitioner cannot maintain claims of vicarious liability against the public entity here as a result of the TCA, this holding would only be limited to Defendant-Respondent, it would not result in the dismissal of any claims against Defendant Future Farmers of America, which is a charitable entity to which the TCA is not applicable.

Second, even if the TCA prevented the imposition of vicarious liability under the TCA, this would not result in the dismissal of the entirety of Plaintiff's claims of negligence and infliction of emotional distress, but instead it would only operate to strike the allegations of vicarious liability contained in those counts.

Finally, the Appellate Division opinion cannot apply to dismiss Plaintiff's claims of vicarious liability for violations of the LAD, since the TCA does not apply to LAD claims. Nor was this relief even requested by Defendant-Respondent's original motion. Thus, not only is the Appellate Division decision flawed to the extent that it appears to dismiss Plaintiff's vicarious liability claims under the LAD, when this is improper, the fact that this cannot be done casts further doubt upon the soundness of the Appellate Division opinion, which would eliminate vicarious liability for Plaintiff's claims pursuant to the CVA, while leaving in place vicarious liability under the LAD.

CONCLUSION

For all the foregoing reasons, as well as those identified in Plaintiff's Motion for Leave to Appeal, the Appellate Division's October 8, 2024 decision should reversed.

Respectfully submitted,

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