To: New Jersey Law Revision Commission
From: Whitney G. Schlimbach, Counsel
Re: Tort Claims Act Immunity for Claims of Sexual Misconduct
Date: April 10, 2023

MEMORANDUM

Project Summary

The New Jersey Legislature recognizes that the doctrine of sovereign immunity enables the "government . . . to act for the public good," and also "the inherently unfair and inequitable results which occur in [its] strict application."[1] New Jersey's Tort Claims Act ("TCA"), N.J.S. 59:1-1 *et seq*., provides public entities with immunity from civil liability.[2]

Public entities are "not liable for the acts or omissions of a public employee constituting a crime . . . ."[3] In addition, N.J.S. 59:9-2 provides that "[n]o damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury," except in certain serious cases.[4]

N.J.S. 59:2-1.3, however, excludes claims based on sexual misconduct "caused by a willful, wanton or grossly negligent act" from the TCA's grant of immunity.[5]

In *EC by DC v. Inglima-Donaldson*, the Appellate Division addressed whether the sexual assault of a student by a public employee, in this case a teacher, was sufficient to trigger the school board's loss of immunity.[6] The Court held that the teacher's conduct disabled the public entity's immunity pursuant to N.J.S. 59:2-1.3.[7] The Court also examined whether the statutes addressing a public entity's liability for the conduct of its public employees[8] and damages for pain and suffering[9] are immunities, or merely limitations on liability.[10]

Statutes Considered

N.J.S. 59:2-1.3 provides, in relevant part:

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[1] N.J. STAT. ANN. §§ 59:1-2 (West 2023).
[2] N.J. STAT. ANN. §§ 59:2-1 to -11 (West 2023).
[3] N.J. STAT. ANN. § 59:2-10 (West 2023).
[4] N.J. STAT. ANN. § 59:9-2(d) (West 2023) ("provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00").
[5] N.J. STAT. ANN. § 59:2-1.3(a)(1)-(2) (West 2023).
[6] *EC by DC v. Inglima-Donaldson*, 470 N.J. Super. 41, 45 (App. Div. 2021).
[7] *Id.* at 53 (concluding that N.J.S. 59:2-1.3 "imposes an obligation on a plaintiff to show the 'willful, wanton or grossly negligent' conduct of only the public entity 'or' public employee, but not both").
[8] N.J. STAT. ANN. § 59:2-10.
[9] N.J. STAT. ANN. § 59:9-2(d).
[10] *EC by DC v. Inglima-Donaldson*, 470 N.J. Super. at 53.

a. Notwithstanding any provision of the "New Jersey Tort Claims Act," N.J.S.59:1-1 et seq., to the contrary:

(1) immunity from civil liability granted by that act to a public entity or public employee shall not apply to an action at law for damages as a result of a sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in section 2 of P.L.1992, c. 7 (C.2A:30B-2), or sexual abuse as defined in section 1 of P.L.1992, c. 109 (C.2A:61B-1) being committed against a person, which was caused by a willful, wanton or grossly negligent act of the public entity or public employee; and . . . [11]

* * *

N.J.S. 59:2-10 provides that "[a] public entity is not liable for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct."[12]

N.J.S. 59:9-2 provides, in relevant part:

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d. No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; . . . .[13]

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Background

In 2008, the Pleasantville Board of Education ("Board") hired Inglima-Donaldson ("Defendant") as a teacher and then as head coach of the track team.[14] Eight years later, law enforcement was notified that a student ("J.M.") had told his therapist that he and Defendant were sexually involved.[15] The investigation by police revealed that two other students, K.F. and E.C., had also been sexually abused by Defendant.[16]

In July 2017, Defendant was indicted and charged with "aggravated sexual assault and endangering the welfare of J.M. and another minor, K.F."[17] The other student, E.C., also reported inappropriate conduct and his parents later filed a civil action for damages on behalf of their child and themselves, claiming that the Board was "vicariously liable for [Defendant's] actions."[18]

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[11] N.J. STAT. ANN. § 59:2-1.3 (emphasis added).
[12] N.J. STAT. ANN. § 59:2-10.
[13] N.J. STAT. ANN. § 59:9-2.
[14] *EC by DC*, 470 N.J. Super. at 45.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 46.

On the sole claim remaining after discovery and motion practice — that the board should be held vicariously liable for the Defendant's actions — the trial court denied summary judgment.[19] The court held that "N.J.S.A. 59:2-1.3(a)(1) was triggered by [Defendant's] wrongful acts; this triggering deprived the board of its Tort Claims Act immunities; and N.J.S.A. 59:2-10 and N.J.S.A. 59:9-2(d) are immunities and therefore do not apply to E.C.'s claims."[20]

The Appellate Division granted "leave to appeal to consider whether the trial judge accurately construed these statutes."[21]

Analysis

The Appellate Division considered whether the loss of immunity in N.J.S. 59:2-1.3(a)(1) is triggered by "willful, wanton or grossly negligent" conduct by a public employee *or* a public entity, or by *both* the employee and the entity.[22] The Court explained that "N.J.S.A. 59:2-1.3(a) was one part of a group of laws enacted to expand the rights of victims of sexual assaults and other sexual misconduct."[23] In light of this purpose, the Appellate Division analyzed "the meaning and scope of N.J.S.A. 59:2-1.3(a) as illuminated by the Legislature's stated desire to expand the rights of victims of sexual assaults and other sexual misconduct."[24]

The Court further addressed whether N.J.S. 59:2-10 and N.J.S. 59:9-2(d) "should be understood to be immunities" that are no longer available when a public entity's immunity is disabled pursuant to N.J.S. 59:2-1.3.[25]

N.J.S. 59:2-1.3

The Appellate Division analyzed the plain language and structure of N.J.S. 59:2-1.3, as well as the statue's legislative history. The Board argued that a public entity only loses immunity if the *public entity's* conduct is "willful, wanton or grossly negligent."[26] The Board contended that if an employee's conduct alone satisfied the "willful, wanton or grossly negligent" requirement, the phrase would be redundant "because the statute also depends on the commission of a sexual assault or any other crime of a sexual nature, all of which inherently carry that same or more egregious state of mind."[27]

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[19] *Id.* at 46.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 48 ("[t]he board contends that for a public entity to lose its immunities under this provision, the public entity's conduct must also be willful, wanton or grossly negligent.").
[23] *Id.* at 46 ("In addressing the fact that victims might also encounter sexual misconduct involving public entities and public employees, the Legislature disabled Tort Claim Act immunities in circumstances defined by N.J.S.A. 59:2-1.3(a) and eliminated the procedural notice-of-claim requirements in cases like this.").
[24] *Id.* at 47.
[25] *Id.* at 53 (understanding the statutes as immunities "would render them inapplicable," but if they are "merely . . . limitations of liability [the statutes] would still apply to claims like this").
[26] *Id.* at 49.
[27] *Id*.

- *Plain Language*

Citing first to the statute's plain language, the Appellate Division rejected the Board's position because it would require interpreting the statute "as if the conjunctive 'and' appears in place of the disjunctive 'or'."[28] The Court concluded that "the Legislature meant what it said when it declared that the willful, wanton or grossly negligent conduct could be provided by either the public employee or the public entity."[29]

- *Statutory Construction*

In addition, the Court pointed out that "the phrase 'willful, wanton or grossly negligent' becomes unnecessary when a public employee is the sex offender," but N.J.S. 59:2-1.3(a)(1) "encompasses much more than [the] particular instance" presented in *EC by DC*.[30] If there is no public employee involved, a statutory requirement that a public entity *and* a public employee acted in violation of the statute "would be insurmountable, and the disabling of Tort Claims Act immunities in that situation would be illusory."[31]

The Court determined that by enacting legislation expanding liability in cases of sexual misconduct, "the Legislature undoubtedly intended to make the plaintiff's pursuit of a remedy realistic rather than illusory."[32]

- *Legislative History*

The Court also reviewed the legislative history of N.J.S. 59:2-1.3 and explained that the originally enacted statute was an "abbreviated version."[33] Before signing the bill into law, the Governor was assured by the Legislature that the law would be corrected to "clarify[] that public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations" in N.J.S. 2A:53A-7(c).[34] The Appellate Division described N.J.S. 2A:53A-7(c) as

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[28] *Id.* at 49

[29] *Id.* (noting it is not the court's "role to 'rewrite a plainly-written enactment of the Legislature [ ]or presume that the Legislature intended something other than that expressed by way of the plain language") (quoting *O'Connell v. State*, 171 N.J. 484, 488 (2002)) (alteration in original).

[30] *Id.* at 50 (giving as an example "a public entity is an occupier of real property – like a school – and provides woefully inadequate security, thereby allowing a predator to enter the school and commit a sexual crime against a student").

[31] *Id.*

[32] *Id.* at 51. The Court also noted that N.J.S. 59:2-1.3(a)(2) imposes a "simple negligence standard" if the claim arises from a sexual crime against a minor which was caused by a public entity's "hiring, supervision or retention of any public employee." *Id.* at 52; *see also* N.J. STAT. ANN. § 59:2-1.3(a)(2). The imposition of a lower standard in subsection (2) indicated to the Appellate Division that the "Legislature had no intention to impose [the high standard advanced by the Board] in all situations to which subsection (1) would apply." *EC by DC*, 470 N.J. Super. at 53.

[33] *Id.* at 51. *See also* N.J. STAT. ANN. § 59:2-1.3 (West 2019) ("Notwithstanding any other provision of law to the contrary, including but not limited to the 'New Jersey Tort Claims Act,' N.J.S.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 1 of P.L.1992, c. 109 (C.2A:61B–1).").

[34] *EC by DC*, 470 N.J. Super. at 51 ("[t]he Governor viewed the [original] version of N.J.S.A. 59:2-1.3(a) as 'inadvertently fail[ing] to establish a standard of proof for cases involving claims filed against public entities'"). *See also* N.J. STAT. ANN. § 2A:53A-7(c) (West 2023) ("Nothing in this section shall be deemed to grant immunity to: (1)

"more clearly demonstrat[ing] that the standard of care can be supplied by the sexual offense . . . and does not need to stand alone or separate from the sexual offense."[35]

Given this legislative history, the *EC by DC* Court was "satisfied . . . that when the wrongful state of mind is provided by the public employee's sexual offense, there is no need for a plaintiff to establish that the public entity also engaged in willful, wanton or grossly negligent conduct."[36]

- *"Simple Negligence" Standard in N.J.S. 59:2-1.3(a)(2)*

Finally, the Court noted that N.J.S. 59:2-1.3(a)(2), which disables a public entity's immunity when the claim arises "from the public entity's hiring, supervision or retention of any public employee," imposes "only a simple negligence standard."[37] The Appellate Division found the standard required by subsection (2) to be "wholly inconsistent with the interpretation of subsection (1) offered by the board" that both the public entity and the employee "must be found to have engaged in willful, wanton or grossly negligent conduct to disable their immunities."[38] The Court concluded that the Legislature's choice to impose a simple negligence standard in subsection (2) "strongly suggests the Legislature had no intention to impose [a high] standard in all situations to which subsection (1) would apply."[39]

Consequently, the Court held that a public entity like the Board loses its immunity if the injury is caused by "willful, wanton or grossly negligent" conduct by *either* the public entity *or* a public employee, pursuant to N.J.S. 59:2-1.3(a)(1).[40]

N.J.S. 59:2-10 and N.J.S. 59:9-2(d)

The Appellate Division next considered whether N.J.S. 59:2-10 and N.J.S. 59:9-2(d) "should be understood to be immunities, which would render them inapplicable, or merely as limitations of liability, which would still apply to claims like this."[41] The term "immunity" is not defined by the TCA, "and N.J.S. 59:2-1.3(a) does not specify what [TCA] provisions . . . it intended to disable."[42] The Court found the term "was intended by the Legislature to mean exactly what it suggests: an 'exemption from a duty [or] liability.'"[43]

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any nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes, or its trustee, director, officer, employee, agent, servant or volunteer, causing damage by a willful, wanton or grossly negligent act of commission or omission, including sexual assault , any other crime of a sexual nature, a prohibited sexual act as defined in section 2 of P.L.1992, c. 7 (C.2A:30B-2), or sexual abuse as defined in section 1 of P.L.1992, c. 109 (C.2A:61B-1) . . . ") (emphasis added).

[35] *EC by DC*, 470 N.J. Super. at 52 (explaining that N.J.S. 2A:53A-7 describes "the wrongful sexual acts that disable [TCA] immunity . . . followed by a description of the same necessary state of mind").

[36] *Id.*

[37] *Id.* at 52.

[38] *Id.*

[39] *Id*. at 53.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 54, citing Black's Law Dictionary 898 (11th Ed. 2019).

The Court concluded that N.J.S. 59:2-10, which *exempts* a public entity from liability "for the acts or omissions of a public employee constituting a crime . . .," was not available to the Board because N.J.S. 59:2-1.3(a)(1) disabled the TCA's grant of immunity.[44]

The Appellate Division determined that N.J.S. 59:9-2(d) merely *limits* a public entity's liability by restricting damages for pain and suffering.[45] Finding that the statutory language "only impacts the award that may result from a claim and not whether the claim may be maintained," the Court held that N.J.S. 59:9-2(d) is not an immunity disabled by N.J.S. 59:2-1.3.[46]

As a final point, the Court "observe[d] that the [B]oard's arguments were not entirely implausible, and N.J.S.A. 59:2-1.3(a) could have been drawn with greater precision."[47] The Court concluded that "if [it has] misconstrued [the Legislature's] intent, the Legislature has the power to clarify its intent by amendatory enactments."[48]

Pending Bills

There are no bills pending that address N.J.S. 59:2-1.3. There is one bill pending that involves N.J.S. 59:2-10,[49] and two pending bills addressing N.J.S. 59:9-2,[50] but none involve the issues raised in in *EC by DC*.

Conclusion

Staff requests authorization to conduct further research and outreach to determine whether N.J.S. 59:2-1.3 would benefit from modifications clarifying: (1) that a public entity's civil immunity is disabled if either a public employee or a public entity engages in a "willful, wanton, or grossly negligent" act that results in sexual misconduct, as held by the Appellate Division in *EC by DC*;[51] and/or (2) the definition of "immunity" as used in the TCA.[52]

In addition, Staff requests authorization to conduct further research and outreach to determine whether N.J.S. 59:2-10 and N.J.S. 59:9-2 would benefit from modifications clarifying the impact on these statutes when a public entity's immunity has been disabled pursuant to N.J.S. 59:2-1.3, as discussed in *EC by DC*.[53]

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[44] *EC by DC*, 470 N.J. Super. at 54.
[45] *Id.* at 55.
[46] *Id.*
[47] *Id.* at 56.
[48] *Id.*
[49] Statement to S.B. 3039, 2022 Leg., 220th Sess. (Sept. 22, 2022) ("[t]his bill eliminates qualified immunity for State, county, and municipal prosecutors who fail to disclose exculpatory evidence in criminal cases").
[50] S.B. 1219, 2022 Leg., 220th Sess. (Feb. 3, 2022) ("[c]larifies that punitive damages may not be awarded against public entities or public employees acting within the scope of their employment in any action"); S.B. 811, 2022 Leg., 220th Sess. (Jan. 18, 2022) ("[m]odifies 'New Jersey Tort Claims Act' to provide for State to be strictly liable for injuries caused by State-mandated vaccines").
[51] *EC by DC*, 470 N.J. Super. at 53.
[52] *Id.* at 53-54.
[53] *Id.* at 54-55.