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January 31, 2022

Via Electronic Filing
Chambers of the Hon. Avis Bishop-Thompson, J.S.C.
Superior Court of New Jersey, Bergen Vicinage, Law Division
Bergen County Courthouse
10 Main Street, Room 301
Hackensack, New Jersey 07601

Re: Donald LaClair v. Teaneck Board of Education, et als.
DOCKET NO. BER-L-5692-21

Your Honor:

This firm represents Defendant, Teaneck Board of Education ("Board"), in the above-captioned matter.

On December 27, 2021, the Board filed a Motion to Dismiss Counts I, V, VI, and VII of Plaintiff's November 26, 2021 First Amended Complaint for Failure to State a Claim (**eCourts Transaction ID: LCV20213132393**). On January 25, 2022, Plaintiff filed an opposition to the Partial Motion to Dismiss. (**eCourts Transaction ID: LCV2022326830**).

Please accept this letter brief in reply to Plaintiff's opposition.

POINT I

COUNT I OF PLAINTIFF'S FIRST AMENDED COMPLAINT SHOULD BE DISMISSED AS EXPRESSLY AT ODDS WITH N.J.S.A. 59:2-1.3, OR IN THE ALTERNATIVE, AS REDUNDANT.

Plaintiff's cause of action against the Board for 'Negligence' under N.J.S.A. 59:2-1.3 should be dismissed due to the cause of action being expressly at odds with the expressed statutory purpose of the recent amendments to the Tort Claims Act, or in the alternative, redundant.

In Hardwicke v. Am. Boychoir Sch., 188 N.J. 69 (2006), the Court held as follows: "We adopt today the position of the dissent in [*Schultz v. Roman Catholic Archdiocese*, 95 *N.J.* 530, 538 (1984)] and hold that the [Charitable Immunity Act, *N.J.S.A.* 2A:53A–7 to –11 ("CIA")] *immunizes simple negligence only*, and not other forms of aggravated wrongful conduct, such as malice or fraud, or intentional, reckless and wanton, or even grossly negligent behavior." See id. at 97 (emphasis added).

In the June 17, 2019 Assembly Budget Committee Statement to N.J.S.A. 59:2-1.3 - the statutory amendment to the Tort Claims Act "which established new liability standards in sexual abuse lawsuits filed against public entities and public employees" – the New Jersey Legislature expressly stated that "[t]hese types of lawsuits [permitted by N.J.S.A. 59:2-1.3] are the same types of lawsuits for which the general statutory immunity of the Charitable Immunity Act [ ] *does not apply*." See id. (emphasis added).

Read together, Hardwicke and June 17, 2019 Assembly Budget Committee Statement to N.J.S.A. 59:2-1.3 stand for the proposition that public entities are not liable for 'simple negligence' under the recent statutory amendments to the Tort Claims Act. The statutory text of N.J.S.A. 59:2-1.3 expressly supports this reading as the Legislature has mandated that liability

under N.J.S.A. 59:2-1.3 shall apply for a claim of sexual abuse "caused by a *willful, wanton or grossly negligent act of the public entity or public employee*" or "caused by *the negligent hiring, supervision or retention of any public employee*." See id. (emphasis added). Accordingly, in its December 27, 2021 moving brief, the Board moved to dismiss Count I of Plaintiff's November 24, 2021 First Amended Complaint, wherein Plaintiff asserts a cause of action against the Board for 'Negligence.' See LaClair Nov. 24, 2021 Am. Compl. ¶¶ 80-84; but see Hardwicke v. Am. Boychoir Sch., 188 N.J. at 97.

In opposition, Plaintiff does not assert that the Board's reading of N.J.S.A. 59:2-1.3 is somehow in error. See LaClair Jan. 25, 2022 Opp'n Br. at 29-30. Instead, Plaintiff asserts that "certain subparagraphs in Count I *clearly fall under the umbrella of claims for negligent hiring, supervision, or retention of an employee* that defendant concedes is permitted under N.J.S.A. 59:2-1.3." See LaClair Jan. 27, 2022 Opp'n Br. at 29 (emphasis added); see also id. at 30 ("These subparagraphs and many others fall under the categories of Board's '*negligent hiring, supervision or retention of a public employee.*'")(emphasis added). Even if accepted as true, because Plaintiff separately asserts causes of action against the Board for 'Negligent Supervision' and 'Negligent Hiring and Retention' in Counts II and III of the same amended pleading, see LaClair Nov. 24, 2021 Am. Compl. ¶¶ 85-94, Count I should be dismissed as redundant and the 'certain subparagraphs' should be properly set forth under the appropriate counts of Plaintiff's November 24, 2021 Amended Complaint.

POINT II

PLAINTIFF'S CAUSE OF ACTION FOR "RECKLESS DISREGARD INFLICTION OF EMOTIONAL DISTRESS" IS AT ODDS WITH NEW JERSEY LAW AND THE PROCEDURAL REQUIREMENTS UNDER THE NEW JERSEY TORT CLAIMS ACT FOR NON-ECONOMIC DAMAGES

Plaintiff asserts that "[D]efendant, Teaneck Board of Education, erroneously states that

plaintiff's claim is for 'intentional' infliction of emotional distress. This is a subtle misrepresentation of plaintiff's claim, which is actually framed as 'reckless disregard' infliction of emotional distress." See LaClair Jan. 25, 2022 Opp'n Br. at 31.

As a preliminary matter, New Jersey law only recognizes causes of action for 'negligent' infliction of emotional distress and 'intentional' infliction of emotional distress. Cf. Buckley v. Trenton Saving Fund Soc., 111 N.J. 355 (1988). However, in Buckley, the New Jersey Supreme Court instructed that a cause of action for 'intentional' infliction of emotional distress could be premised upon a showing of reckless conduct. See Buckley, supra, 111 N.J. at 366 ("For an intentional act to result in liability, the defendant must intend both to do the act and to produce emotional distress. *Liability will also attach when the defendant acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow.*")(internal citation omitted) (emphasis added). As such, rather than a 'subtle misrepresentation,' see LaClair Jan. 25, 2022 Opp'n Br. at 31, the reference to 'intentional' infliction of emotional distress was for purposes of conforming Plaintiff's factual allegations to a recognized cause of action. See Buckley, supra, 111 N.J. at 366; see also Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989)("The examination of a complaint's allegations of fact . . . should be one that is at once painstaking and undertaken with a generous and hospitable approach."). However, to the extent that Plaintiff maintains that his cause of action for 'reckless disregard' infliction of emotional distress is somehow distinct from a Buckley 'intentional' infliction of emotional distress cause of action, then his cause of action should be dismissed as unrecognized under New Jersey law.

As a more substantive matter, "the public policy of this State is that public entities shall be liable for their negligence **only** as set forth in the Tort Claims Act." See Pico v. State, 116 N.J. 55, 59 (1989)(emphasis added). In Lascurain v. City of Newark, 349 N.J. Super. 251 (App. Div.

2002), the Appellate Division held that "under the [Act] as in effect when suit was filed, plaintiff **must** allege medical expenses in excess of $1000 [for recovery for pain-and-suffering damages under *N.J.S.A.* 59:9-2(d)]." See id. at 281 (citing N.J.S.A. 59:9–2(d)(emphasis added)).[1] In the recently published E.C. decision, issued on December 16, 2021, the Appellate Division instructed that the verbal threshold in N.J.S.A. 59:9-2(d) remained in effect for sexual abuse claims against public entities, despite the recent statutory amendments to the Act. See E.C. by D.C. v. Inglima-Donaldson, 2021 WL 5969808, at *7 (N.J. Super. Ct. App. Div. Dec. 16, 2021)("[W]e reject the argument that N.J.S.A. 59:9-2(d) is an immunity."). Accordingly, here, where Plaintiff has failed to allege that he incurred any medical expenses above $1000 as a result of the alleged intentional infliction of emotional distress, see LaClair Nov. 24, 2021 Am. Compl. ¶¶ 1-119, the Court should enter an order, pursuant to N.J.S.A. 59:9-2(d), precluding Plaintiff from seeking any non-economic damages from the Board for his alleged emotional distress. See N.J.S.A. 59:9-2(d); see also Lascurain, supra, 349 N.J. Super. at 281.

POINT III

THE BOARD WITHDRAWS ITS ARGUMENTS AS TO COUNT VI AND COUNT VII.

In Counts VI and Count VII of his November 24, 2021 First Amended Complaint, Plaintiff asserts causes of action against the Board for "Breach of Fiduciary Duty" (Count VI); and "Sexually Hostile Environment and Discrimination" in violation of the New Jersey Law Against Discrimination (Count VII). See LaClair Nov. 24, 2021 Am. Compl. ¶¶ 103-117. In its December 27, 2021 Partial Motion to Dismiss, the Board sought the dismissal of these two causes of action. See id. at 7-8, 9. The Board now withdraws its arguments and its motion as to

[1] The Court can take judicial notice, pursuant to N.J.R.E. 201(a), of the fact that the New Jersey Legislature amended the $1,000 monetary threshold set forth in N.J.S.A. 59:9-2(d) to $3,600 for causes of action arose after September 21, 2000.

Counts VI and Count III.

CONCLUSION

For the aforesaid reasons and authorities cited herein and in Board's December 27, 2021 moving brief, the Court should grant the Board's Partial Motion to Dismiss as to Count I ("Negligence"). Pursuant to N.J.S.A. 59:9-2(d), the Court should separately preclude Plaintiff from seeking non-economic damages under Count V ("Reckless Disregard Infliction of Emotional Distress") for failure to allege medical treatment expenses in excess of $1000. Lastly, the Board withdraws its Partial Motion to Dismiss as to Count VI ("Breach of Fiduciary Duty"); and Count VII ("Sexually Hostile Environment and Discrimination") of Plaintiff's November 24, 2021 First Amended Complaint.

Respectfully submitted,

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Attorney for Defendant, Teaneck Board of Education

By: /s/ Handel T. Destinvil
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