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DAVID MARCOU, Executor of the Estate of
Jodi Marcou, deceased; DAVID MARCOU,
individually; STEVEN ROSS MARCOU,
individually; and ALYSA TAYLOR
MARCOU, individually;

Plaintiffs,

vs.

ELHAJJMALIK DIALLO, an individual;
ESTATE OF DAMAJIA JENAY HORNER,
deceased; JENNIFER HORNER, an
individual; ARBINA ASANI, an individual,
JOHN DOES 1-10, fictitious individuals; ABC
COS 1-10, fictitious business entities; and THE
HANOVER INSURANCE GROUP, a
business entity,

Defendants,

and

THE HANOVER INSURANCE GROUP,

Third-Party Plaintiff,

vs.

MARK FRED A, **MUNICIPALITY OF
PRINCETON**, PRINCETON FIRST AID
AND RESCUE SQUAD, **PRINCETON
FIRE DEPARTMENT**,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY
DOCKET NO.: MER-L-2330-23

CIVIL ACTION

Third-Party Defendants.

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**BRIEF IN SUPPORT OF DEFENDANTS THE MUNICIPALITY OF PRINCETON AND
THE PRINCETON FIRE DEPARTMENT’S MOTION FOR SUMMARY JUDGMENT**

OF COUNSEL:

Patrick F. Carrigg, Esq.

ON THE BRIEF:

Costadinos J. Georgiou, Esq.

PRELIMINARY STATEMENT

Jodi Marcou left her home on the morning of November 7, 2021, and never returned. She was killed in a violent collision on Princeton-Kingston Road when a stolen vehicle, traveling at nearly ninety miles per hour, crossed into her lane of travel. The driver of that stolen vehicle, Defendant Damajia Jenay Horner (“Horner”), was also killed. What caused Horner to flee at that speed, on that road, at that moment, is not in dispute: she was fleeing what she perceived to be a law enforcement pursuit.

At the outset, it bears emphasis that this motion is brought solely by the Municipality of Princeton and the Princeton Fire Department against Plaintiff. It does not address the claims asserted against any other defendant in this action, and the municipal defendants expressly reserve all rights, arguments, and defenses with respect to those parties, including all issues of causation.

Defendant Freda’s conduct that day was not authorized by the Municipality of Princeton or sanctioned by the Princeton Fire Department. It was not directed by any superior, preceded by any dispatch, or supported by any policy, job description, legal obligation, or employment responsibility. It was an entirely personal decision, made by a civilian responding to a phone call from a private resident, that set in motion a chain of events in which no municipal authority played any role. The law is clear — a municipality cannot be held vicariously liable for conduct that bears no relationship to any authorized municipal function, a public entity cannot be held liable for the independent criminal actions of a fleeing driver, and a defendant who neither directed, authorized, nor sanctioned the conduct at issue cannot be made to answer in damages for it.

Plaintiff nonetheless asks this Court to hold the Municipality of Princeton and the Princeton Fire Department responsible for the death of Jodi Marcou. The record does not support that result, and the law does not permit it. Freda’s own sworn admissions, the written policies of the

organizations he belonged to, the findings of the Princeton Police Department's crash investigation, and the unequivocal conclusions of Plaintiff's own expert all compel the same conclusion — that neither the Municipality of Princeton nor the Princeton Fire Department bears any responsibility for what occurred on November 7, 2021. This brief explains why in seven independent points, each of which standing alone requires the dismissal of every count against these defendants.

Point I establishes that Freda's conduct was wholly outside the scope of any authorized municipal or fire department role and that the doctrine of respondeat superior therefore cannot attach to these defendants. Under the framework established in Carter v. Reynolds, Fielder v. Stonack, and Alston v. City of Camden, the predicate for vicarious liability is entirely absent, a conclusion that rests not on inference but on Freda's own sworn admissions and the unequivocal opinion of Plaintiff's own expert that Freda had no authority to do what he did in any public official capacity he held.

Building directly on that foundation, Point II establishes that even if this Court were to find a basis for vicarious liability, which Defendants submit is not supported by the record, the municipal defendants are independently immune from liability under N.J.S.A. 59:5-2(b)(3) because the fatal collision was caused by a person fleeing and evading what she perceived to be a law enforcement presence. Point II presents an inescapable logical framework — if Freda was acting as a public employee, the statutory immunity applies; if his conduct constituted willful misconduct, N.J.S.A. 59:2-10 independently shields the public entities; and if he was acting as a private citizen, the agency theory fails under Point I. Every path leads to the same result.

Point III establishes that the negligent supervision and improper training claim in the Thirteenth Count fails because the municipal defendants did not fail to supervise Freda — they expressly prohibited the conduct he engaged in through written policy, and he violated those

prohibitions entirely of his own volition. Flowing naturally from that same premise, Point IV establishes that the Portee claim in the Tenth Count fails on three independent grounds: the municipal defendants bear no predicate liability for Jodi Marcou's death; David Marcou witnessed only the aftermath of the collision rather than the collision itself; and the uncontroverted medical evidence conclusively eliminates the factual foundation upon which the claim rests.

The medical record proves equally decisive in the points that follow. Point V establishes that the punitive damages claim in the Twelfth Count is categorically barred against public entities under N.J.S.A. 59:9-2(c), an absolute statutory prohibition that requires no further analysis, and that no conduct attributable to the municipal defendants could support such an award in any event. Point VI establishes that the conscious pain and suffering and survivorship claims in the Sixth and Fourteenth Counts fail because Jodi Marcou experienced no conscious pain and suffering — she was unresponsive and pulseless when first responders arrived, and there is no witness, no video, and no medical evidence to suggest otherwise. Point VII establishes that the remaining damage claims in the Seventh, Eighth, and Ninth Counts, encompassing wrongful death, pecuniary loss, and medical and funeral expenses, are entirely derivative of the underlying liability determinations established in Points I through VI and cannot survive their dismissal.

Taken together, these seven points leave no viable theory of liability standing against the Municipality of Princeton or the Princeton Fire Department. Neither defendant directed, authorized, or sanctioned Defendant Freda's conduct on November 7, 2021, and the law does not permit their liability for it. Summary judgment dismissing every count against them is required as a matter of law.

STATEMENT OF FACTS

a. The Fatal Collision

This action arises from a fatal motor vehicle collision on November 7, 2021, on Princeton-Kingston Road, which resulted in the death of Jodi Marcou (“Decedent”). Exhibit A, First Count, ¶¶ 1–3. At the time of the collision, a black Jeep Grand Cherokee, which had been reported stolen, was being operated by Horner, with Defendant Elhajjmalik Diallo (“Diallo”) as a passenger. Exhibit A, First Count, ¶ 2; Exhibit C, pp. 3–5. Horner, who was driving the stolen vehicle, was also killed in the crash. Exhibit A, First Count, ¶ 2; Exhibit C, p. 4. The undisputed record establishes that the Jeep had been stolen from Defendant Arbina Asani after it was left unlocked with the key fob inside the vehicle. Exhibit A, Fourth Count, ¶ 3.

The manner in which Horner operated the stolen Jeep in the moments preceding the collision is not in dispute. The Princeton Police Department’s crash investigation, conducted by Ptl. Jonathan Myzie and documented in Case No. 21-25417, compiled the accounts of multiple independent witnesses who observed Horner’s driving firsthand. See Exhibit E. Each witness provided a statement to the investigating officer at the scene and a later taped statement at police headquarters, and their accounts are consistent in every material respect. Id., pp. 5–6.

Witness James Martinetti was positioned in the front yard of his residence on the westbound side of Princeton-Kingston Road, approximately 40 feet from the roadway, at the time of the collision. Id. p. 5. He reported hearing the Jeep traverse the rumble strips cut into the centerline of the roadway — indicating that it had already crossed into oncoming traffic — before looking up and observing it pass his residence heading eastbound at an estimated 80 to 90 miles per hour. Id. Witness Charles Leckenby, who was traveling eastbound on Princeton-Kingston Road at approximately 45 miles per hour, reported that the Jeep entered the westbound

lane of travel so rapidly that he expected it to reach him in the oncoming lane almost immediately. Id. An instant later, he heard, saw, and felt what he described as an explosion to his left, observed Jodi Marcou's vehicle become airborne before coming to rest on top of the Jeep, and estimated the Jeep's speed at 90 miles per hour. Id. Witness Glen Swindle, traveling westbound at approximately 40 miles per hour approximately ten car lengths behind Jodi Marcou's vehicle, reported that the Jeep suddenly and violently pulled into the westbound lane of travel directly in front of Jodi Marcou's vehicle less than one second before impact, and that from his vantage point the operator of Jodi Marcou's vehicle would have had no time whatsoever to react or take evasive action. Id., pp. 5-6. The investigating officer concluded that Horner was at fault for the collision, identifying unsafe speed, improper passing, and driver inattention as the contributing circumstances, and further noted that it is believed Horner was attempting to flee the area at the time of the crash.¹ Id., p. 6-7.

b. Freda's Roles

On that same date, Defendant Mark Freda ("Freda") held several roles within the Princeton community, including employment with the Princeton First Aid and Rescue Squad, volunteer service with the Princeton Fire Department, and service as the Mayor of the Municipality of Princeton. See Exhibit B, p. 11, ll. 9-11; p. 11, ll. 22-25; p. 12, ll. 10-13. None of those roles conferred upon Freda the status of a law-enforcement officer or authorized him to engage in pursuit-type conduct. Consistent with that limitation, Freda was not responding to any call, dispatch, or authorized emergency at the time of the incident, a point he admitted plainly and without qualification:

Q. Okay. In this particular case, were you responding to a call?

¹ Vehicle 1 was subsequently determined to have been stolen and was connected to an additional motor vehicle theft and motor vehicle burglary in Princeton on the same date, confirming that Horner was actively fleeing the area at the time of the crash. Exhibit E, p. 6.

A. No. Id., p. 33, ll. 3-5.

Notwithstanding that admission, Freda nevertheless chose to involve himself in events concerning the stolen black Jeep Grand Cherokee. Acting on his own initiative, he attempted to follow the vehicle and activated a blue emergency light while doing so. See Exhibit A, Fifth Count, ¶ 5. Plaintiffs themselves characterize this conduct in their own pleading, alleging that Freda acted “*while unauthorized to do so*” and that he “*had no formal authority in activating his blue lights and in conducting any form of pursuit*” and “*was not properly trained or authorized.*” Id., Fifth Count, ¶¶ 5–6 (emphasis added). That characterization is consistent with the record: by activating a blue emergency light on his private vehicle while following the stolen Jeep, Freda acted entirely without authority. Exhibit C, pp. 21-22.

Freda’s own testimony further defines the scope of his responsibilities as Mayor and provides the context for the conduct at issue. Under oath, he described those responsibilities as follows:

Q. All right. And what were your responsibilities as the mayor of the municipality of Princeton back in November of 2021?

A. You’re -- I guess you’re the -- you’re the head of the -- you’re seen as the head of the town. You work with staff and other elected officials deciding policies, budgets, other day-to-day decisions of the town. Exhibit B, p. 162, ll. 20-25 through p. 163, ll. 1-2.

As Freda described it, the role of Mayor involved governance, policymaking, and coordination with municipal staff — not roadside intervention, vehicular pursuit, or the use of emergency signaling devices. He confirmed as much when asked directly:

Q. Okay. You’d agree that your responsibilities as the mayor of the municipality of Princeton **DID NOT INCLUDE FOLLOWING STOLEN VEHICLES?**

6 A. **YES.** Id., p. 163, ll. 3-6 (emphasis added).

Yet on November 7, 2021, Freda departed from those defined responsibilities. Operating a private vehicle, without dispatch, without authority, and without policy support, he activated a

blue emergency light and followed a suspected stolen vehicle on public roadways. Exhibit B, p. 24, ll. 2–6; p. 33, ll. 3–5; p. 36, ll. 24–25 through p. 37, l. 1; p. 25, ll. 14–23; Exhibit A, Fifth Count, ¶ 5. That conduct was not undertaken pursuant to any municipal policy or authorized function, but instead reflected a decision made by Freda in his personal capacity. Exhibit A, Fifth Count, ¶ 6.

c. A Private Response to a Private Request

Consistent with his testimony regarding the nature of his role, Freda was not responding to any police dispatch, emergency first aid call, or rescue assignment at the time of these events. Exhibit B, p. 24, ll. 2–6; p. 33, ll. 3–5; p. 36, ll. 24–25 through p. 37, l. 1. He likewise was not transporting a patient or engaged in any medical or rescue-related function. Id., p. 80, ll. 6–8. Instead, Freda became involved only after receiving a call on his personal cell phone from a private resident with whom he had a longstanding personal acquaintance. Id., p. 84, ll. 2–25 through p. 85, ll. 1–19. As Freda testified:

Q. Okay. What were you doing in the area that day? What brought you to the area?

A. A phone call from a resident.

Q. Okay. Who called you?

A. I'm sorry?

Q. Who called you?

A. Dina Shaw.

Q. Who's Dina Shaw?

A. **Dina Shaw is a woman who was at the scene where one of the cars was attempted to be stolen.**

Q. Yeah, but who is Dina Shaw? As it pertains to the municipality of Princeton, who is Dina Shaw?

A. **SHE'S A RESIDENT.**

Q. **That's it?** Is she a councilwoman?

A. No.

Q. Was she ever a councilwoman?

A. Not that I know of. No, I don't think so. Id., p. 84, ll. 2–21. (emphasis added).

Freda further testified that Ms. Shaw contacted him to report an attempted vehicle theft at her residence, stating: “Someone tried to steal our car, I called the police and *the police aren’t here yet*. Can you please come over?” Id. p. 86, ll. 6-8 (emphasis added). Acting on that request—before law enforcement arrived and without any coordination with police—Freda drove his personal vehicle to Ms. Shaw’s home at 185 Clover Lane, the site of the reported attempted theft. Exhibit B, p. 86, ll. 6-8; Exhibit C, p. 6. The attempted theft involved Ms. Shaw’s red Ferrari. Exhibit C, p. 3; Exhibit B, p. 91, ll. 11-13.

After arriving at the residence, Freda did not wait for responding officers, did not relay information through any municipal or emergency-response channel, and did not act pursuant to any official assignment. Exhibit C, p. 6; Exhibit B, p. 88, l. 11. Instead, he left the scene and began searching for the alleged perpetrators on his own, continuing to operate his personal vehicle. Exhibit C, p. 6. The sequence of events thus reflects a private response to a private request—an individual decision by Freda to intervene personally in an unfolding criminal matter that bore no connection to any municipal responsibility or authorized function.

d. No Dispatch, No Coordination, No Awareness of Police Decisions

Departing from Ms. Shaw’s residence, Freda continued to act independently and without coordination with law enforcement. Freda did not have a police scanner in his personal vehicle — carrying one was not part of any duty or obligation associated with any of his roles — and had no ability to monitor police dispatches or track law-enforcement activity in real time. Exhibit B, p. 87, ll. 22–25; p. 88, ll. 1–5. He therefore had no awareness of, and no coordination with, the decisions being made by responding police officers — including, as discussed below, the decision to terminate the police pursuit of the other stolen vehicle. Id., p. 87, ll. 22–25; p. 143, ll. 1–2. It was during this entirely self-directed course of conduct that Freda activated his blue

emergency lights. As Freda acknowledged, his original statement to police was that he did not activate the blue light until after the crash had already occurred and he had arrived at the scene.

Id., p. 131, ll. 10–18.

Q. The police had asked you at the station whether or not you had or had not activated your blue lights, and I believe you said to them that you didn't activate the lights until **AFTER** the crash had occurred and you had arrived at the scene; right?

A. That could be.

Q. Okay. **THAT WOULD NOT BE ACCURATE?**

A. **CORRECT.** Id. (emphasis added).

His later Supplemental Statement, however, states that he activated the blue light on Snowden Lane, before the collision — and that “[t]he two cars sped away” immediately thereafter. Exhibit B, p. 133, ll. 3-14; Exhibit C, p. 8. Whatever the precise moment of activation, Freda himself acknowledged in his Supplemental Statement the sequential link between his blue light and the Jeep's acceleration, a link that Plaintiff's own expert characterizes as evidence that the fleeing driver perceived the blue light as signaling a law-enforcement presence. Exhibit C, p. 16.

The record further establishes that Freda continued his self-directed pursuit of the black Jeep while entirely unaware of contemporaneous law-enforcement decisions. Exhibit B, p. 87, ll. 22–25; p. 88, ll. 1–5; p. 143, ll. 1–2. According to dispatch records and testimony, Princeton Police Officer Luis Martinez had been following the stolen Range Rover — the other vehicle involved in the theft — but was ordered by a superior officer to terminate that pursuit.

Officer Martinez attempted to close the distance between himself and the Range Rover, notified the dispatcher of his actions, and shortly thereafter activated his emergency lights and siren. In response to a query from a senior officer (Officer Schubert), Officer Martinez reported that he was traveling approximately **50 miles per hour** and that the **suspect vehicle was traveling at approximately 70-80 miles per hour.** Officer Martinez was ordered by Officer Schubert to terminate the pursuit. Exhibit C, p. 19 (emphasis added).

Officer Martinez complied with that termination order. Id. Freda, by contrast, had no scanner, no radio contact, and no awareness of any police activity on Route 27. Exhibit B, p. 87, ll. 22–25; p. 88, ll. 1–5; p. 143, ll. 1–2. When asked directly at his deposition whether he had any knowledge of a police pursuit of the black Jeep on Route 27, Freda answered: “I do not have knowledge of that.” Id., p. 143, ll. 1–2. Freda continued following the black Jeep — with his activated blue emergency light, crossing double yellow lines, and passing stopped traffic — even as a trained, professional law-enforcement officer was simultaneously ordered to stand down from pursuit of the companion vehicle under the very same circumstances. Exhibit C, pp. 19–21.

e. The Blue Light Was Unauthorized Under Every Applicable Policy

That blue light, however, was not issued to him in his capacity as Mayor of the Municipality of Princeton, as he testified unequivocally:

Q. And just so I’m clear, you were issued that blue light -- or when you were issued that blue light, that was **NOT** in your capacity as the mayor; correct?

A. Correct. Exhibit B, p. 157, ll. 19-25 (emphasis added).

Although Freda claimed that the blue light had been issued to him in his capacity as a member of the Princeton Fire Department, he also acknowledged that activating blue emergency lights under the circumstances presented was inconsistent with the policies and procedures of the Princeton Fire Department as well. Id., p. 157, ll. 24-25 through 158, l. 1; p. 26, ll. 12–25 through p. 27, ll. 1–6.

Q. As we sit here today, do you have an understanding as to whether the use of the blue light on November 7 of ‘21 was consistent or inconsistent with the policies and procedures of the first aid and rescue squad of Princeton?

A. Inconsistent.

Q. Tell me why.

A. **Well, again, as I explained, if you’re not dispatched to a call, then you’re not supposed to use the blue light.**

Q. Okay. Do you have an understanding as to whether the use of the blue light on November 7, 2021, was consistent or inconsistent with the policies and procedures of the Princeton Fire Department?

A. Same. Same answer.

Q. Inconsistent?

A. Correct.

Q. And for the same reason?

A. And for the same reason. Id. p. 26, ll. 12–25 through p. 27, ll. 1–6. (emphasis added).

Indeed, when asked specifically whether the Princeton Fire Department permitted use of a blue light when a member was not responding to an actual fire call, Freda was unequivocal:

Q. Okay. Did you have any knowledge as to whether the policy and procedure of the volunteer fire department of Princeton permitted a fire person or the chief to use a blue light if not going to an actual fire response call?

A. No.

Q. Was not allowed?

A. CORRECT, NOT ALLOWED. Id., p. 20, ll. 20–25 through p. 21, ll. 1–2 (emphasis added).

Accordingly, even under the fire-department role he invoked, Freda acknowledged that his use of the blue light was inconsistent with governing policy because he had not been dispatched to a call. Id. p. 26, ll. 12–25 through p. 27, ll. 1–6; 20, ll. 20–25 through p. 21, ll. 1–2.

Freda’s testimony further establishes that he had no authority or policy basis to use a blue emergency light in his capacity as Mayor. He acknowledged that the Municipality of Princeton provided him with no training regarding the use of blue emergency lights in his ayoral capacity and that he was unaware of any municipal policy authorizing such use:

Q. Okay. Would it be fair to say in your capacity as the mayor, the municipality of Princeton has **NOT** provided you with any training on the use of the blue light? Is that accurate?

A. Yeah, I would say so.

Q. Okay. Are you aware whether any policy exists with the municipality of Princeton on whether any of their employees including the mayor can use a blue light in the capacity as the mayor?

A. Not that I’m aware of. Id., p. 25, ll. 14–23 (emphasis added).

When asked directly whether the blue emergency light had any connection at all to his mayoral duties, Freda confirmed that it did not:

Q. Did you have the blue light for any of your work as -- as the mayor?

A. No.

Q. Did you ever use the blue light in your capacity as the mayor?

A. No. Id., p. 21, ll. 3-8.

f. Following Stolen Vehicles Was Outside the Scope of Any Authorized Role

Freda likewise expressly acknowledged that following stolen vehicles was not among the responsibilities of the Mayor of the Municipality of Princeton:

Q. Okay. You'd agree that your responsibilities as the mayor of the municipality of Princeton **DID NOT INCLUDE FOLLOWING STOLEN VEHICLES?**

6 A. YES. Id., p. 163, ll. 3-6 (emphasis added).

He further stated:

Q. Okay. You're aware that there are statutes and local ordinance that delineate what your powers and duties are as a mayor?

A. Yes.

Q. And you're aware that -- **are you aware if any of those powers and duties that are delineated under the law, whether any of those include following stolen vehicles?**

A. **Not that I'm aware of.** Id. p. 180, ll. 18-25 through p. 181, l. 1. (emphasis added).

Taken together, these admissions establish a clear and unbroken progression. Freda chose to involve himself in a criminal matter based on a private request, acted without dispatch or situational awareness, activated emergency signaling devices on his personal vehicle, and engaged in pursuit-type conduct that he knew was unrelated to any mayoral responsibility, unsupported by municipal policy, inconsistent with fire-department procedures, and unaccompanied by any training or authorization. Exhibit B, p. 33, ll. 3-5; p. 36, ll. 24-25 through p. 37, l. 1; p. 84, ll. 2-21; p. 85, ll. 6-7; p. 87, ll. 22-25; p. 88, ll. 1-5; p. 133, ll. 12-14;

p. 157, ll. 19–25; p. 26, ll. 12–25 through p. 27, ll. 1–6; p. 25, ll. 14–23; p. 21, ll. 3–8; p. 163, ll. 3–6; p. 180, ll. 18–25 through p. 181, l. 1.

Plaintiff’s own expert characterizes Freda’s conduct as participation in measures reserved for law enforcement officers, consistent with the claim that Defendant Horner was evading law enforcement. Exhibit C, p. 22.

In the course of his continued participation in measures that are clearly reserved for law enforcement officers, Mr. Freda activated an emergency blue light, pursued a suspected stolen vehicle, exceeded the speed limit, drove through a red light, turned left on red from the opposing lane of traffic, and at least twice drove into the lane of oncoming traffic. Id. (emphasis added).

Following these events, Freda's blue emergency light permit was suspended, and he was directed to surrender it. Id., p. 72, ll. 21–23; p. 73, ll. 2–10. Moreover, the Princeton First Aid and Rescue Squad reprimanded Freda for improper use of the blue light, which he did not contest and acknowledged was warranted, stating that “it was [an] improper use of the blue light.” Id., p. 63, ll. 14–25 through p. 64, l. 1 (emphasis added).

g. Plaintiff's Own Expert Confirms the Absence of Authority

The undisputed record thus establishes that Freda independently involved himself in a criminal matter, activated a blue emergency light on his personal vehicle, followed the stolen Jeep on public roadways, and did so without dispatch, authorization, or training. Id., p. 33, ll. 3–5; p. 84, ll. 2–21; p. 85, ll. 6–7; p. 133, ll. 12–14; p. 25, ll. 14–23; p. 21, ll. 3–8.

As set forth in Plaintiff’s expert report authored by Wayne S. Fisher, Ph.D., Freda “inarguably made decisions reserved for professional police officers...” Exhibit C, p. 18. Those decisions included initiating and continuing pursuit-type conduct, activating emergency signaling devices, and persisting in such conduct despite his admitted lack of authority and training. Id. p. 21-22.

Dr. Fisher further opines that, when Freda’s conduct is viewed in its entirety:

it is evident that he had **NO AUTHORITY** to do what he did by virtue of any of the roles or positions he occupied in Princeton at that time. He **HAD NO AUTHORITY** to do what he did as:

Mayor of Princeton;

Princeton First Aid and Rescue Squad member or officer;

Princeton Fire Department member; or

Private Citizen. Id., pp. 21-22 (emphasis added).

That conclusion is consistent with the record. Notwithstanding the complete absence of authority, Freda acted as though he possessed law-enforcement powers, and Defendant Horner fled and evaded on that basis.

h. No Evidence of Conscious Pain and Suffering.

Beyond the question of liability, the medical evidence likewise forecloses any claim for damages predicated on conscious pain and suffering. As set forth in the expert report authored by Michael W. Johnson, M.D., Ph.D., F.C.A.P., there is no medical support for any claim that Ms. Marcou experienced conscious pain or suffering as a result of the collision. Dr. Johnson opines that “[t]here is in fact no evidence to support a reasonable medical opinion that Ms. Marcou sustained any conscious pain and suffering.” Exhibit D, p. 3. The expert analysis further confirms that Ms. Marcou was unresponsive and pulseless when first responders arrived, with her reported time of death only moments after the collision. Id. Accordingly, although the loss itself is profound, the evidentiary record does not support damages predicated on conscious pain and suffering.

In sum, the undisputed record establishes that Freda’s conduct on November 7, 2021 — undertaken without authority, without training, without dispatch, and without any nexus to any authorized municipal or fire department function — was entirely his own. Neither the Municipality of Princeton nor the Princeton Fire Department directed, authorized, or sanctioned

what Freda did that day, and the evidentiary record compels the conclusion that no basis exists for imposing liability upon either entity.

STANDARD OF REVIEW

New Jersey's standard for summary judgment as set forth in Brill v. Guardian Life Ins. Co. Am., 142 N.J. 520, 540 (1995) entitles a movant to summary judgment if the adverse party, having all facts and inferences viewed most favorably towards it, has not demonstrated the existence of a dispute whose resolution in its favor will entitle him to judgment. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact challenged[.] R. 4:46-2(c). The Supreme Court stated that:

[T]he summary judgment rule set forth in Rule 4:46-2 "serve[s] two competing jurisprudential philosophies": first, "the desire to afford every litigant who has a bona fide cause of action or defense the opportunity to fully expose his case," and second, to guard "against groundless claims and frivolous defenses," thus saving the resources of the parties and the court. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541-42 (1995) (quoting Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957)). In light of the important interests at stake when a party seeks summary judgment, the motion court must carefully evaluate the record in light of the governing law and determine the facts in the light most favorable to the non-moving party. R. 4:46-2(c). In Globe Motor Company v. Igdaley, 225 N.J. 469, 479 (2016).

When evaluating a summary judgment motion, the motion court "does not draw inferences from the factual record as does the factfinder in a trial, who 'may pick and choose inferences from the evidence to the extent that 'a miscarriage of justice under the law' is not created.'" Id. (citing Brill, 142 N.J. at 536). "Instead, the motion court draws all legitimate inferences from the facts in favor of the non-moving party." Id. With the factual record construed in accordance with R. 4:46-2(c), the motion court's task is to "determine whether a rational factfinder could resolve the alleged disputed issue in favor of the non-moving party." Id. at 481 (citing Perez v. Professionally Green,

LLC, 215 N.J. 388, 405 (2013)).

The motion court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried. Id. at 481 (citing Bhagat v. Bhagat, 217 N.J. 22, 40 (2014)). Thus, neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action. Id.

“A litigant must establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met.” Id. at 482 (quoting Biunno, Current N.J. Rules of Evidence, cmt. 5a on N.J.R.E. 101(b)(1) (2005)). If the non-moving party “points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment.” Brill, 142 N.J. at 529. “Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment.” U.S. Pipe & Foundry Co. v. Am. Arbitration Association, 67 N.J. Super. 384, 399-400 (App. Div. 1961) (citing Gherardi v. Trenton Board of Education, 53 N.J. Super. 349, 358 (App. Div. 1958)). The Court in Brill encouraged trial courts not to hesitate in granting summary judgment when the appropriate circumstances are presented, such that the “evidence is so one-sided that one party must prevail as a matter of law.” Brill, 142 N.J. at 540.

Generally, summary judgment pursuant to R. 4:46 is not appropriate before the party resisting such a motion has had an opportunity to complete the discovery of relevant and material evidence to aid in defense of the motion, especially when “critical facts are peculiarly within the moving party’s knowledge.” Velantzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 193 (1988). Thus, where discovery on a relevant and material issue is incomplete, the responding party must be given the opportunity to take discovery before the motion is decided. Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54 (2001).

While summary judgment is generally inappropriate prior to the completion of discovery, the court is not prohibited from granting such relief prior to that time. See Velantzas, 109 N.J. at 193. In fact, in order for the objecting party to defeat a motion for summary judgment on the ground that such relief is premature due to outstanding discovery, the objecting party must demonstrate with some specificity the discovery sought and its materiality. In re Ocean Cnty. Comm’r of Registration for a Recheck of the Voting, 379 N.J. Super. 461, 478 (App. Div. 2005); see also Wellington v. Wellington, 359 N.J. Super. 484 (App. Div. 2003) (party objecting to summary judgment motion must show with some degree of particularity that further discovery will lead to material facts in dispute).

LEGAL ARGUMENT

I. THE MUNICIPALITY OF PRINCETON AND THE PRINCETON FIRE DEPARTMENT ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE FRED A WAS NOT A LAW ENFORCEMENT OFFICER, WAS NOT DISPATCHED, AND VIOLATED EVERY APPLICABLE POLICY GOVERNING EACH OF THE ROLES HE OCCUPIED, PLACING HIS CONDUCT ENTIRELY OUTSIDE THE SCOPE OF ANY AUTHORIZED MUNICIPAL OR FIRE DEPARTMENT ROLE.

Because Freda’s conduct on November 7, 2021 bore no relationship to any authorized mayoral, municipal, or volunteer fire department duty, neither the Municipality of Princeton nor the Princeton Fire Department can be held vicariously liable for his actions as a matter of law.

It is well established that to impose vicarious liability, a plaintiff must demonstrate an employment relationship and that the alleged tort occurred in the scope of that employment. Carter v. Reynolds, 175 N.J. 402, 408-09 (2003). “Although as a general rule of tort law, liability must be based on personal fault,” an employer will be held vicariously liable under the doctrine of respondeat superior “for the negligence of an employee causing injuries to third parties, if, at the time of the occurrence, the employee was acting within the scope of his or her employment.” Ibid. (emphasis added). An act falls within the scope of employment only if: “a) it is the kind

[the employee] is employed to perform; b) it occurs substantially within the authorized time and space limits; and c) it is actuated, at least in part, by a purpose to serve the [employer].” Id. at 411-12 (citing Restatement (Second) of Agency § 228 (1958)). All three conditions must be satisfied.

Where those conditions are not met, liability cannot attach. Conversely, “[c]onduct of a servant is not within the scope of employment if it is . . . too little actuated by a purpose to serve the master.” Ibid. As the Appellate Division has made clear, the most essential principle governing respondeat superior is that “once the [employee] has abandoned his duty and acted in furtherance of his own interest, then the doctrine of respondeat superior does not apply.” Gottself v. Prop. Mgmt. Sys., Inc., 189 N.J. Super. 237, 241 (App. Div. 1983) (citation omitted).

The question of whether an employee’s conduct is outside the scope of employment “is decided by the court if the answer is clearly indicated[.]” Mason v. Sportsman’s Pub., 305 N.J. Super. 482, 499 (App. Div. 1997) (quoting Restatement (Second) of Agency § 228(1)(d), comment d (1958)). In such circumstances, courts do not hesitate to resolve the issue on summary judgment. New Jersey courts have done so repeatedly. See, e.g., Gottself, *supra*, 189 N.J. Super. at 240 (affirming summary judgment where property management employees were acting outside scope of employment when they stole items from tenants’ apartments); Snell v. Murray, 121 N.J. Super. 215, 216 (1972) (affirming summary judgment where on-duty police officer who shot and robbed a man was “palpably” not acting within scope of employment).

The governing principles come into sharpest focus when applied to the law enforcement context, where the New Jersey Supreme Court has directly addressed the relationship between scope of employment and municipal liability. The New Jersey Supreme Court’s decision in Fielder v. Stonack, 141 N.J. 101 (1995), establishes the framework within which municipal

liability operates in the vehicular pursuit context. In Fielder, a Neptune Township police officer was pursuing a motorcycle fleeing toward a heavily traveled intersection when his patrol car collided with an innocent third party's vehicle, causing serious injury. Id. at 107-08. Fielder filed a complaint against the officer, the Neptune Police Department, and the Township of Neptune to recover damages for her injuries. Id. at 108.

The Court's analysis of the Township's liability began with the foundational principle that under the Tort Claims Act, the primary liability imposed upon public entities "results from the application of the doctrine of respondeat superior." Id. at 118 (citing Tice v. Cramer, 133 N.J. 347, 355 (1993)). N.J.S.A. 59:2-2a provides that a public entity is liable for injury 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." Id. The Act further provides, however, that "the public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable." N.J.S.A. 59:2-2b; Fielder, 141 N.J. at 118. From those provisions, the Court drew the conclusion that governs this case: if the officer "is protected by any immunity, either under the Act or from some other source, that immunity extends to any respondeat superior liability on the part of Neptune Township as well." Id. at 118.

Applying that framework, the Court held that the Township was entitled to summary judgment under N.J.S.A. 59:5-2b(2), recognizing that the legislative goal was "to free law enforcement from the threat of civil liability, so that it could function effectively to protect the public in these most difficult and dangerous situations[.]" Id. at 117. Underlying that holding was the Court's express recognition that "police officers engaged in the pursuit of fleeing drivers are acting within the scope of their duty to uphold the motor vehicle laws." Id. at 129-30. That

recognition, that the officer was performing an authorized function within the scope of his employment, was the indispensable predicate for the entire analysis. Felder thus establishes a principle that controls here: it is only because an officer is acting within the scope of an authorized law enforcement duty that the framework of municipal liability and immunity under the Tort Claims Act is implicated at all.

Six years later, the New Jersey Supreme Court reaffirmed and extended that principle in Alston v. City of Camden, 168 N.J. 170 (2001), this time in the context of a foot pursuit.² In Alston, a Camden police officer was pursuing a drug suspect on foot when his firearm discharged and struck an innocent bystander. Id. at 173. The plaintiff filed a negligence action against the officer, the Camden Police Department, and the City of Camden. Id. The Supreme Court proceeded from the foundational premise that a public entity may be held liable for the acts of its employees only “where those acts are carried out within the scope of employment.” Id. at 177 n.1 (citing N.J.S.A. 59:2-2a). The Court identified the predicates that satisfied that threshold: the officer was a trained law enforcement professional, he was responding to a reported crime, he was conducting a pursuit in the course of his official duties, and he was performing his official police functions throughout. Id. at 173-77.

Because all of those conditions were present, the Court held that the officer, the police department, and the City of Camden were shielded from liability under the pursuit immunity provision of the New Jersey Tort Claims Act, N.J.S.A. 59:5-2b(2), which confers absolute immunity on public entities and their employees for injuries arising out of a police pursuit, absent willful misconduct. Id. at 177-83. The Court’s reasoning reflected a considered legislative

² Although Alston involved a foot pursuit, the New Jersey Supreme Court expressly held that pursuit immunity under N.J.S.A. 59:5-2b(2) is not limited to vehicle pursuits. Alston, 168 N.J. at 179. The threshold principle that municipal liability requires an authorized law enforcement function performed within the scope of employment applies equally regardless of the manner of pursuit.

judgment, observing that “[p]olice officers engaged in pursuits should not be impeded by the threat of civil liability,” and that policy extends equally to the public entities that employ them. Id. at 179.

Taken together, Fielder and Alston establish an unmistakable threshold principle: the inquiry in any municipal liability analysis begins with whether the employee was performing an authorized function within the scope of his employment. That predicate was not incidental to the Court’s analysis. It was the foundation of it. The liability framework, the immunity analysis, and the policy rationale supporting the outcome all presupposed that the officer was doing precisely what law enforcement officers are trained, authorized, and required to do. Where that predicate is absent, where the individual whose conduct is at issue was not a law enforcement officer, was not performing any authorized function, and was acting contrary to every applicable policy, the threshold condition for municipal liability under N.J.S.A. 59:2-2a is never satisfied, the liability analysis never begins, and the municipal defendant is entitled to judgment as a matter of law.

In this case, the predicate for municipal liability under N.J.S.A. 59:2-2a is entirely absent, and the analysis under Carter confirms what that threshold inquiry already compels. Freda was not a law enforcement officer. He was not dispatched. He was not authorized. He was acting outside the roles he occupied. His conduct fails every condition of the Carter test, and summary judgment dismissing all vicarious liability claims against the Municipality of Princeton and the Princeton Fire Department is required as a matter of law.

The first Carter condition requires that the conduct be of the kind the employee is employed to perform. Carter, 175 N.J. at 411-12. Following a stolen vehicle on public roadways, activating a blue emergency light, and committing multiple motor vehicle violations is not, by any measure, the kind of work Freda was employed to perform in any role he held. Under oath,

Freda described his mayoral responsibilities as involving governance, policymaking, budgets, and coordination with staff and other elected officials, not roadside intervention, vehicular pursuit, or emergency enforcement activity. Exhibit B, p. 162, ll. 20-25 through p. 163, ll. 1-2. When asked directly whether those responsibilities included following stolen vehicles, he admitted without qualification that they did not. Id., p. 163, ll. 3-6. He further acknowledged that no statute, ordinance, or delineated power of the mayor authorized such conduct. Id., p. 180, ll. 18-25 through p. 181, l. 1.

His fire department role fares no better. Freda admitted that Princeton Fire Department policy permitted use of a blue emergency light only when a member was responding to an actual fire call, a condition plainly not present on November 7, 2021. Id., p. 20, ll. 20-25 through p. 21, ll. 1-2. No fire call had been dispatched. Id., p. 36, ll. 24-25 through p. 37, l. 1. The Municipality provided him no training on blue light use in his mayoral capacity, as no municipal policy authorized the mayor's use of the blue emergency light. Id., p. 25, ll. 14-23. These facts are undisputed and establish beyond any doubt that his conduct on November 7, 2021 was not the kind of work the Municipality or the Fire Department employed him to perform. The first Carter condition is not satisfied.

Equally fatal to any claim of vicarious liability, Freda's conduct did not occur within any authorized time or space limits of his municipal or fire department role, as the second Carter condition requires. Freda became involved in the events of November 7, 2021 solely because he received a call on his personal cell phone from Dina Shaw, a private resident who held no municipal position and exercised no governmental authority, asking him to come to her home because police had not yet arrived. Exhibit B, p. 84, ll. 2-21; p. 86, ll. 6-8. That private request did not transform Freda into a municipal actor, and no official assignment, directive, or

authorization followed from it. He was not dispatched through any official channel. Id., p. 33, ll. 3-5; p. 36, ll. 24-25 through p. 37, l. 1. He had no police scanner and no ability to monitor law enforcement communications in real time. Id., p. 87, ll. 22-25; p. 88, ll. 1-5. He had no awareness of, and no coordination with, the decisions being made by responding officers, including the decision by a superior officer to order termination of the police pursuit of the companion vehicle under the very same circumstances. Id., p. 87, ll. 22-25; p. 88, ll. 1-5; p. 143, ll. 1-2. When asked directly whether he had any knowledge of a police pursuit of the black Jeep on Route 27, Freda answered without hesitation: “I do not have knowledge of that.” Id., p. 143, ll. 1-2. From the moment he received Ms. Shaw’s call to the moment of the collision, Freda’s conduct was entirely private, arising from a private request and executed through purely personal initiative, without authorization from any municipal, fire department, or law enforcement authority. Exhibit C, pp. 21-22. The second Carter condition is not satisfied.

The third and final Carter condition is similarly absent. That condition requires that the conduct be actuated, at least in part, by a purpose to serve the employer. No reasonable reading of this record supports that conclusion. The blue emergency light was not issued to Freda in his mayoral capacity, a fact he admitted without qualification. Exhibit B, p. 157, ll. 19-25. No municipal policy authorized its use as he deployed it. Id., p. 25, ll. 14-23. The fire department expressly prohibited its use outside of an actual fire response call, and Freda acknowledged that his conduct on November 7, 2021 was inconsistent with the policies of both the fire department and the Princeton First Aid and Rescue Squad for the same reason: he was not dispatched to any call. Id., p. 20, ll. 20-25 through p. 21, ll. 1-2; p. 26, ll. 12-25 through p. 27, ll. 1-6. The institutional response to his conduct removes any remaining doubt. His blue light permit was suspended and he was directed to surrender it. Id., p. 72, ll. 21-23; p. 73, ll. 2-10. The Princeton

First Aid and Rescue Squad formally reprimanded him for conduct he acknowledged was improper, stating that “it was [an] improper use of the blue light.” Id., p. 63, ll. 14-25 through p. 64, l. 1. Conduct that is repudiated and sanctioned by the very organizations an employee claims to have been serving cannot, as a matter of law, be deemed actuated by a purpose to serve those organizations. As the Appellate Division held in Gotthelf, once an employee “has abandoned his duty and acted in furtherance of his own interest, then the doctrine of respondeat superior does not apply.” Gotthelf, 189 N.J. Super. at 241. Freda’s situation is in some respects more compelling than Gotthelf, where the employees at least had authorized access to the premises in which the unauthorized conduct occurred. Freda had no authority whatsoever to engage in pursuit, activate emergency lights in this situation, or disregard traffic laws in any capacity he held. The third Carter condition is not satisfied.

With all three Carter conditions established as unsatisfied, the comparison to Fielder and Alston makes the conclusion inescapable. In Fielder, Officer Jenkins was a sworn Neptune Township police officer, legally charged by statute with enforcing the motor vehicle laws, authorized to arrest without a warrant any person who violated those laws in his presence, responding to a known pursuit in progress, and operating under the supervision of a superior officer with authority to order termination of the chase. Fielder, 141 N.J. at 107-08, 129-30. The officer’s statutory authority to act was the foundation of the entire municipal liability analysis, and it was only because that authority existed that the framework of the Tort Claims Act was implicated at all. Id. at 118. In Alston, Officer Conley was an on-duty Camden City detective, responding to a reported drug transaction, conducting a foot pursuit of a fleeing suspect in the course of his official police duties, and performing precisely the functions the law authorized and required him to perform. Alston, 168 N.J. at 173-77. The Supreme Court proceeded from the

foundational premise that municipal liability attaches only where the employee's acts are "carried out within the scope of employment," and found that predicate satisfied because the officer was doing precisely what law enforcement officers are trained, authorized, and required to do. Id. at 177 n.1 (citing N.J.S.A. 59:2-2a).

None of those conditions are present here. Freda was not a sworn officer. He had no statutory enforcement authority. He was not responding to any dispatch. No superior officer directed his conduct or had authority to restrain it. No departmental policy authorized it. Indeed, a trained professional law enforcement officer was simultaneously ordered to stand down from pursuit of the companion vehicle under these very same circumstances, Exhibit C, pp. 19-21, while Freda, a civilian with no law enforcement authority, continued. The contrast between what happened in Fielder and Alston and what happened here is not a matter of degree. It is a matter of kind. The predicate for municipal liability that existed in both of those cases is entirely absent here, and neither the Municipality of Princeton nor the Princeton Fire Department can be held vicariously liable for what Freda did.

Freda's post hoc characterization that he activated the blue light "as mayor" does not alter this conclusion. Bare, self-serving assertions do not create material fact issues. Scope of employment is an objective legal determination based on assigned duties, conferred authority, and lawful purpose, not an employee's after-the-fact description of his own conduct. The principle is well illustrated by Snell, where the court found it palpably clear that an on-duty police officer who shot and robbed a man was not acting within the scope of his employment, notwithstanding his status as an officer and his use of official equipment. If a uniformed, on-duty officer using his service weapon while on active patrol can be found palpably outside the scope of employment, it follows with even greater force that a civilian with no law enforcement

authority, no dispatch, no training, and no policy support, operating a private vehicle, cannot be characterized as acting within the scope of any municipal or fire department role. No mayoral duty authorized what Freda did. No fire department policy permitted it. No dispatch directed it. No supervisor approved it.

Any remaining doubt is resolved by the conclusions of Plaintiff's own witnesses. Plaintiff's expert, Wayne S. Fisher, Ph.D., former Deputy Director of the New Jersey Division of Criminal Justice, chair of the Attorney General's Task Force on Police Vehicular Pursuit, and architect of the State's 1993 vehicular pursuit policy, reviewed the entire record and concluded without equivocation that Freda "had **NO AUTHORITY** to do what he did by virtue of any of the roles or positions he occupied in Princeton at that time" — not as Mayor, not as a Fire Department member, not as a First Aid and Rescue Squad member, and not as a private citizen. Exhibit C, pp. 21-22 (emphasis in original). Dr. Fisher further concluded that Freda "inarguably made decisions reserved for professional police officers, decisions for which he was ill-prepared and not qualified to make." Id. at p. 18. Plaintiff's own pleading is equally candid, alleging that Freda "had no formal authority in activating his blue lights and in conducting any form of pursuit" and "was not properly trained or authorized." Exhibit A, Fifth Count, ¶ 6. When the party opposing summary judgment has, through its own expert and its own pleading, dismantled the very predicate upon which its vicarious liability claim depends, the evidentiary record merely supports dismissal and Brill compels it.

Because Freda's conduct satisfies none of the Carter conditions, because the foundational predicate for municipal liability established in Fielder and Alston is entirely absent, and because Plaintiff's own evidence confirms that Freda acted without authority in any capacity, the doctrine of respondeat superior cannot attach to the Municipality of Princeton or the Princeton Fire

Department. Once Freda abandoned his defined duties and acted in furtherance of his own initiative, “the doctrine of respondeat superior does not apply.” Gotthelf, 189 N.J. Super. at 241. Therefore, summary judgment dismissing all vicarious liability claims against the Municipality of Princeton and the Princeton Fire Department is compelled as a matter of law.

II. THE MUNICIPALITY OF PRINCETON AND THE PRINCETON FIRE DEPARTMENT ARE INDEPENDENTLY IMMUNE FROM LIABILITY UNDER THE TORT CLAIMS ACT BECAUSE THE FATAL COLLISION WAS CAUSED BY A PERSON EVADING ARREST, AND ANY ARGUMENT TO THE CONTRARY DESTROYS THE AGENCY THEORY ON WHICH PLAINTIFF'S CLAIMS DEPEND.

Even if this Court were to find a basis for vicarious liability under Point I, which defendants submit is not supported by the record, the Municipality of Princeton and the Princeton Fire Department are independently immune from liability under N.J.S.A. 59:5-2(b)(3) because the fatal collision was caused by Horner, a person who was fleeing and evading what she perceived to be a law enforcement presence. This Point presents an inescapable logical framework. Whatever position Plaintiff takes regarding Freda’s role and authority, the result is the same: if Freda was acting as a public employee, the statutory immunity applies; if his conduct constituted willful misconduct, N.J.S.A. 59:2-10 independently shields the public entities; and if he was acting as a private citizen, the agency theory fails under Point I. Every path leads to the same conclusion — the Municipality of Princeton and the Princeton Fire Department are entitled to summary judgment as a matter of law.

The New Jersey Tort Claims Act provides several independent grounds of immunity that shield the Municipality of Princeton and the Princeton Fire Department from liability in this matter. N.J.S.A. 59:5-2 provides in relevant part:

Neither a **public entity** nor a public employee is liable for:

- a. An injury resulting from the parole or release of a prisoner or from the terms and conditions of his parole or release or from the revocation of his parole or release;

- b. any injury caused by:
 - (1) an escaping or escaped prisoner;
 - (2) an escaping or escaped person;
 - (3) **a person resisting arrest or evading arrest;**
 - (4) a prisoner to any other prisoner; or
- c. **any injury resulting from or caused by a law enforcement officer's pursuit of a person.** (emphasis added).

Further, N.J.S.A. 59:3-3 provides that “[a] public employee is not liable if he acts in good faith in the execution or enforcement of any law.”

The New Jersey Supreme Court has held that “good faith” under N.J.S.A. 59:3-3 and “objective reasonableness” encompass “the operation of police vehicles by police officers acting within the scope of their duties and in response to an emergency.” Canico v. Hurtado, 144 N.J. 361, 367 (1996). The Court in Canico explained:

Although we recognize that people ordinarily do not use the term “good faith” to describe the operation of motor vehicles, we believe that the Legislature intended that the term could encompass the operation of police vehicles. A public employee, although negligent, may still act in good faith. Marley v. Palmyra Bor., 193 N.J. Super. 271, 295 (Law Div. 1983). To pierce [N.J.S.A. 59:3-3]'s qualified immunity, a plaintiff must prove more than ordinary negligence. See id. at 294 (stating that recklessness usually denies good faith). Id. at 365.

The Court also held, “[i]n many cases, the question of ‘good faith’ presents a question of fact to be resolved at a plenary hearing.” Ibid. (citing Fielder, 141 N.J. at 132). “Summary judgment under [N.J.S.A. 59:3-3], however, is appropriate if public employees can establish that their acts were objectively reasonable or that they performed them with subjective good faith.” Ibid. (citing Hayes v. Mercer Cnty., 217 N.J. Super. 614, 622 (App. Div. 1987)).

Pursuit immunity under section 5-2b is “absolute except in the event of willful misconduct on the part of a public employee (see N.J.S.A. 59:3-14a).” Tice v. Cramer, 133 N.J. 347, 367 (1993). Thus, “[n]othing in this act shall exonerate a public employee from liability if it is established that his conduct . . . constituted . . . willful misconduct.” N.J.S.A. 59:3-14a.

Additionally, N.J.S.A. 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.” (emphasis added).

In the context of a police or public employee vehicular pursuit, willful misconduct requires the individual “(1) disobey[] either a specific lawful command of a superior or a specific lawful standing order and (2) know [] of the command or standing order, knowing that it is being violated and, intend[] to violate it.” Fielder, 141 N.J. at 126. As Freda was not a police officer, there was no specific command and no standing order governing his duties and responsibilities, further confirming that he was not acting as a public employee at the time of the events at issue.

In Tice, the New Jersey Supreme Court was called on to decide whether N.J.S.A. 59:5-2b(2) applies to all injuries arising out of a police pursuit, even those that would not have occurred but for the negligence of the police. In that case a police pursuit ended with the fleeing vehicle colliding with a motorist, resulting in the motorist’s death. The decedent’s estate brought an action against the police officer, the police department, and the City, among others. Tice, 133 N.J. at 351. The Supreme Court held that N.J.S.A. 59:5-2b(2) “confers absolute immunity except where the police officer engages in willful misconduct,” id. at 356, and that such immunity applies to all injuries arising out of the police officer’s pursuit even though those acts would not have occurred but for the negligence of the pursuing officer. The Tice Court observed that “[t]he most likely legislative intention evinced by the statutory language in the context of police pursuit is that when the officer suspected someone of having violated the law and was pursuing him, the officer’s conduct was immune from liability.” Id. at 361. Consequently, “[t]he effect of section 5-2b(2) immunity would seem to be clear. The immunity relieves the officer (and the public

entity--the immunity applies to both) of whatever liability would otherwise attach for the officer's negligent conduct in connection with the pursuit." Id. at 363.

Chief Justice Wilentz, writing for the Court in Tice, set forth the policy considerations that are the basis for pursuit immunity:

[T]he justification is the encouragement of the police officer diligently and aggressively to enforce the law, thought to be diminished by the specter of tort liability. Not so clear, but equally applicable, is the policy consideration involved when the potential liability is that of the public entity for its 'independent' negligence in failing to impose standards regarding pursuit, or in failing to train police officers in the execution of those standards. Obviously, such standards and training could result in greater care on the part of police officers and in fewer injuries. But, equally obviously, the potential of tort liability might encourage standards and training so restrictive--for the purpose of avoiding injuries and liability--as to impede the ultimate goal of vigorous law enforcement, including the vigorous pursuit of suspects. It is true there might be much greater care, even better care, but it is also true that there might be less vigorous enforcement. The Legislature has made its choice, and we are bound by it. Id. at 365.

Those policy concerns support an interpretation of pursuit immunity that "immuniz[es] both the employee and the entity for all acts of negligence related to the injuries caused by the escape, whether those of the employee or the entity, and whether independent or not." Ibid. Critically, this immunity extends not only to injuries caused by a pursuing officer's negligence, but independently to any injury caused by a person resisting arrest or evading arrest. N.J.S.A. 59:5-2(b)(3). Where the injury arises from the conduct of a person who is fleeing and evading what she perceives to be a law enforcement presence, the public entity is shielded from liability as a matter of law, regardless of any other theory of recovery asserted against it.

In this case, the undisputed record establishes that the death of Jodi Marcou was caused by Defendant Horner, who was fleeing and evading what she perceived to be a law enforcement presence at the time of the fatal collision. That single fact triggers the immunity provided by

N.J.S.A. 59:5-2(b)(3) and independently shields the Municipality of Princeton and the Princeton Fire Department from liability as a matter of law.

In reaching that conclusion, defendants acknowledge that the cases addressing pursuit immunity under N.J.S.A. 59:5-2 — including Tice, Fielder, Alston, and Canico — uniformly arose in the context of sworn law enforcement officers conducting authorized pursuits. No reported New Jersey decision has addressed these immunity provisions in the context of a mayor or volunteer fire department member. That distinction, however, does not diminish the immunity available here. It reinforces it. The immunity under N.J.S.A. 59:5-2(b)(3) does not turn on the status of the pursuer. It turns entirely on the conduct of the person fleeing. The statute immunizes public entities from liability for any injury caused by a person resisting or evading arrest, without regard to whether the individual who activated an emergency light was a police officer, a mayor, or a private citizen. The Legislature made that choice deliberately, and this Court is bound by it. See Tice, 133 N.J. at 365.

The record establishes that predicate conclusively, and it does so through Plaintiff's own evidence. Plaintiff's expert, Dr. Fisher, expressly opined that:

[I]t is reasonable to infer that the driver of the Jeep believed that the blue emergency light signaled a law enforcement presence. Exhibit C, p. 16. (emphasis added).

That inference is corroborated by Freda's own Supplemental Statement, which acknowledged that "the two cars sped away" immediately after he activated the light, Exhibit B, p. 133, ll. 3-14, and is further confirmed by the official findings of the Princeton Police Department's crash investigation, which independently determined that Horner was attempting to flee the area at the time of the crash — a conclusion based on multiple independent witness accounts and reinforced by the subsequent determination that the stolen Jeep was connected to an additional motor vehicle theft and motor vehicle burglary in Princeton on the same date. Exhibit

E, pp. 6-7. Dr. Fisher described the Jeep throughout his report as “fleeing,” Exhibit C, pp. 19-23, and characterized Freda’s conduct as participation “in measures that are clearly reserved for law enforcement officers.” Exhibit C, p. 22. These are not defendants’ characterizations. They are the conclusions of the expert Plaintiff retained, paid, and disclosed, corroborated by the independent findings of the investigating law enforcement agency. Together they establish beyond dispute that Defendant Horner was a person evading what she perceived to be a law enforcement pursuit, that the fatal collision was caused by that evasion, and that N.J.S.A. 59:5-2(b)(3) immunizes the municipal defendants from liability for that injury.

Notwithstanding that record, Plaintiff may argue that because Freda was not actually a law enforcement officer, Horner could not have been evading arrest. That argument fails for two independent reasons. First, N.J.S.A. 59:5-2(b)(3) does not require that the person evading arrest be fleeing an actual law enforcement officer. It requires only that the injury be caused by a person resisting or evading arrest. Defendant Horner was a person resisting or evading arrest from the moment she stole the Jeep, fled police, and continued fleeing as a fugitive of the law. Plaintiff cannot credibly claim — and Dr. Fisher carefully avoids any suggestion — that Defendant Horner was no longer evading arrest at the moment she encountered Freda’s blue light. Indeed, Defendant Horner was, at all times after stealing the Jeep, evading arrest. The statute is satisfied regardless of Freda’s actual status. Second, the argument that Horner knew she was fleeing a civilian is irreconcilable with the theory Plaintiff must advance to hold these defendants liable at all.

As established in Point I, supra, vicarious liability requires that Freda was acting within the scope of an authorized municipal or fire department role. Freda acknowledged that he was not responding to any call, Exhibit B, p. 33, ll. 3-5, was not dispatched by any authority, Id., p.

36, ll. 24-25 through p. 37, l. 1, and had no law enforcement authority in any capacity. Exhibit C, pp. 21-22. If Horner knew she was fleeing a civilian, then Freda was not acting as a public official, and the predicate for vicarious liability is destroyed entirely. Plaintiff cannot simultaneously argue that Freda was acting as a public official to establish agency and that Horner knew she was fleeing a civilian to defeat immunity. Those positions are mutually exclusive.

The willful misconduct exception presents the same irreconcilable problem. If Plaintiff argues that Freda's conduct constituted willful misconduct under Fielder's two-part test, that argument concedes precisely what Point I establishes — that Freda knowingly acted contrary to every applicable policy and without authorization from the Municipality or the Fire Department. Freda admitted that his use of the blue light was inconsistent with the policies of both the Princeton Fire Department and the Princeton First Aid and Rescue Squad because he was not dispatched to any call. Exhibit B, p. 26, ll. 12-25 through p. 27, ll. 1-6. He was formally reprimanded and his blue light permit was suspended. Exhibit B, p. 63, ll. 14-25 through p. 64, l. 1; p. 72, ll. 21-23; p. 73, ll. 2-10. That concession does not open the door to entity liability, but rather closes it. N.J.S.A. 59:2-10 provides that a public entity is not liable for the acts or omissions of a public employee constituting willful misconduct. While the willful misconduct exception strips Freda of his personal immunity, it does not create liability for the Municipality of Princeton or the Princeton Fire Department. And a public employee acting with willful misconduct is by definition not acting within the scope of his employment, which returns the analysis to Point I and confirms that no vicarious liability can attach to these defendants on any theory.

The logical outcomes of the argument are straightforward. If Freda was acting as a public employee, N.J.S.A. 59:5-2(b)(3) immunizes the municipal defendants because the injury was caused by a person evading arrest, and N.J.S.A. 59:2-10 independently bars entity liability for any willful misconduct. If Freda was acting as a private citizen, the agency theory fails under Point I. If Horner was evading a law enforcement presence, the statutory immunity is triggered. If Defendant Horner was not evading law enforcement, the agency theory is defeated (and Defendant Freda was not a proximate cause of the accident). Under every available theory, by every available path, the Municipality of Princeton and the Princeton Fire Department are entitled to judgment as a matter of law. Summary judgment on this independent and alternative ground is compelled.

III. THE MUNICIPALITY OF PRINCETON AND THE PRINCETON FIRE DEPARTMENT ARE ENTITLED TO SUMMARY JUDGMENT ON THE THIRTEENTH COUNT BECAUSE THEY PROHIBITED THE VERY CONDUCT AT ISSUE AND CANNOT BE LIABLE FOR NEGLIGENTLY SUPERVISING AN UNLAWFUL PURSUIT THEIR OWN POLICIES FORBADE.

Because the municipal defendants expressly prohibited the very conduct Plaintiff characterizes as an “unlawful pursuit,” had no prior basis to anticipate that Freda would disregard those policies, and because Freda himself acknowledged his conduct was improper, the Thirteenth Count cannot be reconciled with the law or the record and fails as a matter of law.

Negligent hiring, supervision, and training are not forms of vicarious liability but are instead based on the direct fault of an employer. Hoag v. Brown, 397 N.J. Super. 34, 54 (App. Div. 2007) (“[A] claim based on negligent hiring or negligent supervision is separate from a claim based on respondeat superior.”); see also Schultz v. Roman Catholic Archdiocese of Newark, 95 N.J. 530, 534-35 (1984). To establish liability for negligent supervision or training, a plaintiff must prove two elements: first, that the employer knew or had reason to know that the failure to supervise or train an employee in a certain way would create a risk of harm; and

second, that the risk of harm materialized and caused the plaintiff's damages. G.A.-H. v. K.G.G., 238 N.J. 401, 416 (2019) (citing DiCosala v. Kay, 91 N.J. 159, 173 (1982)). A claim of negligent supervision does not hold an employer derivatively liable for its employees' wrongs — it holds an employer directly liable for its own wrongs that cause injury through its employee. Hoag, 397 N.J. Super. at 54; see also N.J.S.A. 59:2-2(a) (providing that a public employer will be liable for an "injury proximately caused by" its employee "in the same manner and to the same extent as a private individual under like circumstances"). Courts have recognized that N.J.S.A. 59:2-10's immunity for acts or omissions of a public employee constituting willful misconduct "does not prevent allocation of fault to a public entity where that entity is liable for the negligent supervision of an employee who has engaged in willful misconduct." Hoag, 397 N.J. Super. at 54 (quoting Harry A. Margolis & Robert Novack, Claims Against Public Entities, cmt. on N.J.S.A. 59:2-10 (Gann 2007)).

In this case, Plaintiff's negligent supervision and training claim fails as a matter of law because the record does not support either element of the G.A.-H. test, and because the theory advanced in the Thirteenth Count is internally contradicted by Plaintiff's own evidence and Plaintiff's own characterization of Freda's conduct.

To satisfy the first element, Plaintiff must prove that the municipal defendants knew or had reason to know that the failure to supervise or train Freda in a certain way would create a risk of harm. G.A.-H., 238 N.J. at 416. That showing cannot be made on this record. The Princeton Fire Department maintained a written policy expressly prohibiting use of a blue emergency light by any member not responding to an actual fire call, Exhibit B, p. 20, ll. 20-25 through p. 21, ll. 1-2, and Freda acknowledged without qualification that his conduct on November 7, 2021 was inconsistent with that policy and with the policy of the Princeton First

Aid and Rescue Squad for the same reason — he was not dispatched to any call. Id., p. 26, ll. 12-25 through p. 27, ll. 1-6. The Municipality maintained no policy authorizing blue light use in any mayoral capacity and provided no training on such use precisely because no such use was authorized or contemplated. Id., p. 25, ll. 14-23.

Critically, there is no evidence in this record of any prior similar conduct by Freda that would have placed either defendant on notice that he posed a risk of engaging in unauthorized pursuit-type activity. There is no evidence of proclivity. Where written policies prohibiting the conduct existed, where those policies were known to the employee, and where no prior conduct created any basis for anticipating their violation, the defendants cannot be said to have known or had reason to know that additional supervision or training was required to prevent the harm that occurred. The first element is not satisfied.

The second element fails for an equally fundamental reason. To satisfy it, Plaintiff must prove that the risk of harm — an accident caused by a stolen vehicle fleeing arrest — materialized and caused Plaintiff's damages. G.A.-H., 238 N.J. at 416. But the harm here did not arise from any supervisory or training deficiency — Plaintiff contends it arose from Freda's decision to disregard applicable policies and act entirely outside any authorized function. As established in Point I, supra, Freda's conduct was not the kind of work he was employed to perform, did not occur within any authorized time or space limits of his employment, and was not actuated by any purpose to serve the Municipality or the Fire Department. The municipality is not liable for the police officer that uses the municipally issued firearm to engage in unlawful robbery in the same way that Defendant Princeton is not liable for Freda's unapproved use of the blue emergency light and/or his private vehicle.

The record further establishes that Freda had no police scanner in his personal vehicle and no ability to monitor law enforcement communications in real time. Exhibit B, p. 87, ll. 22-25; p. 88, ll. 1-5. He therefore had no awareness that a trained, professional law enforcement officer — operating within an authorized law enforcement framework — was simultaneously ordered by a superior officer to terminate pursuit of the companion vehicle under the very same circumstances. Id., p. 143, ll. 1-2; Exhibit C, pp. 19-21. Freda, a civilian with no dispatch, no radio contact, and no situational awareness, continued — and the harm that resulted was not the product of any supervisory failure by the municipal defendants, but Horner’s criminal decision to flee at 80 to 90 miles per hour in a stolen vehicle, a conclusion documented by the Princeton Police Department’s crash investigation and confirmed by multiple independent witnesses. Exhibit B, p. 87, ll. 22-25; p. 88, ll. 1-5; Exhibit E, pp. 6-7.

The institutional record confirms that conclusion. Freda acknowledged without qualification that the reprimand was warranted, testifying that “it was [an] improper use of the blue light.” Exhibit B, p. 63, ll. 14-25 through p. 64, l. 2. His blue light permit was subsequently suspended and he was directed to surrender it. Id., p. 72, ll. 21-23; p. 73, ll. 2-10. An employee’s deliberate deviation from clear written policies, made while entirely unaware of the law enforcement decisions unfolding around him, confirmed by his own admissions, and resulting in formal disciplinary action he did not contest, is not a foreseeable consequence of inadequate supervision. It is an independent intervening act that severs any causal connection between the employer’s alleged supervisory failure and the resulting harm. The second element is not satisfied.

Beyond the failure of both G.A.-H. elements, the Thirteenth Count is further undermined by its own internal logic. Plaintiff expressly characterizes Freda's conduct as an “unlawful

pursuit.” Exhibit A, Thirteenth Count, ¶ 4. Accepting that characterization as true for purposes of argument, it forecloses rather than supports the negligent supervision theory. A municipality cannot be held liable for negligently supervising an unlawful pursuit that its own written policies expressly prohibited, that no supervisor authorized or directed, and that resulted in formal disciplinary action against the very employee who engaged in it. To impose supervisory liability under these circumstances would be to hold the municipal defendants responsible not for failing to address a known risk, but for failing to prevent allegedly willful misconduct that their own policies already prohibited. That is not what the tort of negligent supervision addresses, and the theory cannot be reconciled with this record.

That conclusion is further reinforced by Plaintiff’s own evidence. Negligent supervision is a theory of direct employer fault — it requires that the employer, through its own negligent act or omission, created the conditions that allowed the employee’s harmful conduct to occur. Hoag, 397 N.J. Super. at 54. Here, however, Plaintiff’s own expert concluded without equivocation that Freda had no authority to do what he did in any capacity — not as Mayor, not as a Fire Department member, not as a First Aid and Rescue Squad member, and not as a private citizen. Exhibit C, pp. 21-22 (emphasis in original). If Freda’s conduct bore no relationship to any authorized municipal or fire department function, as Plaintiff’s own expert confirms, then the municipal defendants had no supervisory relationship over that conduct that could give rise to a duty to prevent it. The negligent supervision theory and the no-authority conclusion are irreconcilable on the face of this record — an employer cannot be faulted for failing to supervise conduct that fell entirely outside any authorized function it controlled.

Because Plaintiff cannot satisfy either element of the G.A.-H. test, because Freda’s deliberate violation of clear written policies — confirmed by his own admissions and

uncontested disciplinary action — constitutes an independent intervening act that severs any causal connection between the alleged supervisory failure and the harm, and because Plaintiff's own evidence confirms that Freda's conduct bore no relationship to any authorized municipal or fire department function over which these defendants exercised supervisory control, the Thirteenth Count fails as a matter of law. Summary judgment dismissing the negligent supervision and training claims against the Municipality of Princeton and the Princeton Fire Department is compelled.

IV. THE MUNICIPALITY OF PRINCETON AND THE PRINCETON FIRE DEPARTMENT ARE ENTITLED TO SUMMARY JUDGMENT ON THE TENTH COUNT BECAUSE PLAINTIFF CANNOT ESTABLISH THE PREDICATE NEGLIGENCE, THE REQUIRED OBSERVATION, OR THE FACTUAL BASIS FOR THE EMOTIONAL DISTRESS CLAIMED.

Because the municipal defendants bear no liability for the death of Jodi Marcou, because David Marcou witnessed only the post-accident aftermath rather than the collision itself, and because the uncontroverted medical evidence eliminates the factual foundation of the claim entirely, the Tenth Count fails under both Portee and Decker as a matter of law.

“Our courts have recognized two types of tortious conduct that support a claim for negligent infliction of emotional distress.” Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 236 (App. Div. 2014). First, “[a] claim of direct, negligent infliction of emotional distress,’ can exist where the plaintiff claims proximately-caused damages as a result of the breach of a duty owed by the defendant.” Ibid. (quoting Lascurain v. City of Newark, 349 N.J. Super. 251, 277 (App. Div. 2002)). Second, a bystander claim of negligent infliction of emotional distress “first recognized in Portee . . . exists if the plaintiff witnessed the death or serious physical injury of another, with whom he shares a marital or intimate, familial relationship, as the result of the defendant’s negligence.” Ibid. (citing McDougall v. Lamm, 211 N.J. 203, 214-15 (2012)).

In Portee, plaintiff's seven-year-old son became trapped between the outer door and wall of an elevator shaft, which dragged him as it rose to the third floor of the apartment building. Portee, 84 N.J. at 91. Plaintiff watched for four and a half hours while her son "moaned, cried out and flailed his arms" as police officers attempted to free him. Ibid. Officers were unable to rescue plaintiff's son, who "died while still trapped, his mother a helpless observer." Ibid. As a result, plaintiff "became severely depressed and seriously self-destructive," culminating in an attempt to take her own life. Ibid. Plaintiff required surgery to repair the wound from the attempted suicide, and afterwards "required considerable physical therapy and . . . received extensive counseling and psychotherapy to help overcome the mental and emotional problems caused by her son's death." Id. at 91-92.

The trial judge rejected plaintiff's liability claim, and the Court directly certified the case and reversed. Id. at 90. The Court articulated a four-factor test for bystander negligent infliction of emotional distress claims: "(1) the death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress." Id. at 101. These claims have been limited to relationships with a "plain and obvious emotional bond" such as between a plaintiff and a "parent, child, spouse or an individual with whom one shares a marital-like or intimate familial relationship[.]" McDougall, 211 N.J. at 229.

In McDougall, the Court declined to extend Portee to circumstances where a plaintiff witnessed the death of a pet. Id. at 230. There, plaintiff was walking her small dog when a larger dog belonging to a defendant ran out from defendant's house and "grabbed plaintiff's dog by the neck, picked it up and shook it several times before dropping it and returning to defendant's

yard.” Id. at 208. Plaintiff alleged that “as a result of witnessing the events up to and including the dog’s death, she suffered significant and continuing emotional distress and discomfort and demanded damages for that emotional distress.” Id. at 209. The Court affirmed the trial judge’s dismissal, finding that there was not sufficient foreseeability for such a claim, id. at 227, that it was inconsistent with existing statutory causes of action, id. at 228, that damages would exceed the value of the pet, id. at 228-29, that allowing such a claim would unreasonably expand the reach of bystander liability, id. at 229, and that permitting recovery for witnessing the death of a pet would “open the door to claims that attachments to inanimate forms of property should likewise be honored,” id. at 229-230.

In contrast, a direct claim of negligent infliction of emotional distress “can be understood as negligent conduct that is the proximate cause of emotional distress in a person to whom the actor owes a legal duty to exercise reasonable care.” Decker v. Princeton Packet, Inc., 116 N.J. 418, 429 (1989). To establish a direct claim of negligent infliction of emotional distress, a plaintiff must establish “(a) defendant owed a duty of reasonable care to plaintiff; (b) defendant breached that duty; (c) plaintiff suffered severe emotional distress; and (d) defendant’s breach of duty was the proximate cause of the injury.” Russo v. Nagel, 358 N.J. Super. 254, 269 (App. Div. 2003) (citing Decker, 116 N.J. at 429). “Whether the defendant has a duty of care to the plaintiff depends on whether it was foreseeable that the plaintiff would be seriously, mentally distressed.” Id. at 269-70 (citing Decker, 116 N.J. at 429).

In this case, the Tenth Count fails as a matter of law under both theories of negligent infliction of emotional distress recognized by New Jersey courts. Whether analyzed as a bystander claim under Portee or as a direct claim under Decker, the analysis leads independently to the same conclusion — the municipal defendants are entitled to summary judgment.

Beginning with the bystander theory, a Portee claim requires satisfaction of four elements: the death or serious physical injury of another caused by defendant's negligence; a marital or intimate familial relationship between plaintiff and the injured person; observation of the death or injury at the scene of the accident; and resulting severe emotional distress. Portee, 84 N.J. at 101. The Tenth Count fails three of those four elements as to the municipal defendants, and the failure of any one of them is independently sufficient to compel dismissal.

The first element fails for the reasons established in Points I, II, and III, supra. A Portee claim requires as its indispensable predicate the death or serious physical injury of another caused by defendant's negligence. Because the municipal defendants bear no liability for the death of Jodi Marcou, the Tenth Count — which is entirely derivative of those underlying negligence claims — cannot survive their dismissal. That deficiency alone is dispositive, but two additional and independent grounds confirm the same result.

Turning to the third element, Portee requires “observation of the death or injury at the scene of the accident.” Portee, 84 N.J. at 101. That language reflects a deliberate limitation to contemporaneous observation of the injury-producing event as it unfolds — not observation of its aftermath. The contrast with Portee illustrates that boundary precisely. In that case, the plaintiff stood helplessly for four and a half hours as her seven-year-old son was trapped in an elevator shaft, moaning and crying out, while rescuers were unable to free him — she was a witness to the event itself, in real time, as it unfolded before her. Portee, 84 N.J. at 91. Here, by contrast, Plaintiff does not allege that David Marcou witnessed the collision. The Tenth Count alleges only that he witnessed “the post-accident condition and the post-mortem condition of his wife.” Exhibit A, Tenth Count, ¶ 3 (emphasis added). It is not the contemporaneous observation

of a death or injury at the scene of an accident within the meaning of Portee, and the third element is therefore not satisfied.

The fourth element fails on the medical evidence, and that failure is equally conclusive. The Tenth Count alleges that David Marcou witnessed his wife's "conscious pain, suffering, subsequent medical care and attention, and resulting death." Exhibit A, Tenth Count, ¶ 4. Those allegations are directly and conclusively contradicted by the uncontroverted medical record. Dr. Johnson concluded that Ms. Marcou was already unresponsive and pulseless when first responders arrived at the scene, that there is "no video documentation or testimony to indicate that she was conscious or alive, even briefly, in the aftermath of the collision," and that "[t]here is in fact no evidence to support a reasonable medical opinion that Ms. Marcou sustained any conscious pain and suffering." Exhibit D, p. 3. Her reported approximate time of death was only moments after the collision. Id. If Ms. Marcou was never conscious or alive even briefly in the aftermath of the collision, the factual predicate upon which the fourth Portee element depends — that David Marcou witnessed her conscious pain and suffering — simply does not exist on this record. A bystander claim cannot survive where the medical evidence has conclusively eliminated the very experience the plaintiff claims to have witnessed.

The direct theory of negligent infliction of emotional distress leads to the same result by a different but equally certain path. To establish a direct claim, a plaintiff must prove that the defendant owed a duty of reasonable care to the plaintiff, that the defendant breached that duty, that the plaintiff suffered severe emotional distress, and that the defendant's breach was the proximate cause of that distress. Russo, 358 N.J. Super. at 269 (citing Decker, 116 N.J. at 429). Whether such a duty exists turns on whether it was foreseeable that the plaintiff would be seriously, mentally distressed. Id. at 269-70. The direct theory fails at the threshold for the same

reason the bystander theory fails — the municipal defendants bear no liability for the death of Jodi Marcou, as established in Points I, II, and III, supra. Without a breach of any duty owed to Jodi Marcou attributable to these defendants, no duty runs to her husband, and no causal connection links these defendants to his alleged emotional distress. The first and second elements of the direct theory are not satisfied as to the municipal defendants, and the claim fails as a matter of law on that ground alone.

Because the Tenth Count fails under both the bystander theory established in Portee and the direct theory established in Decker — failing three of the four Portee elements and the threshold duty and causation requirements of the direct claim — summary judgment dismissing the Tenth Count against the Municipality of Princeton and the Princeton Fire Department is compelled as a matter of law.

V. **THE MUNICIPALITY OF PRINCETON AND THE PRINCETON FIRE DEPARTMENT ARE ENTITLED TO SUMMARY JUDGMENT ON THE TWELFTH COUNT BECAUSE THE TORT CLAIMS ACT ABSOLUTELY PROHIBITS PUNITIVE DAMAGES AGAINST PUBLIC ENTITIES AND NO SUCH CONDUCT IS ATTRIBUTABLE TO THESE DEFENDANTS IN ANY EVENT.**

Because the Tort Claims Act imposes a categorical and unqualified bar on punitive damages against public entities, and because the record contains no evidence of actual malice or wanton and willful disregard attributable to the municipal defendants, the Twelfth Count fails as a matter of law.

The New Jersey Tort Claims Act provides an absolute and categorical bar to the recovery of punitive damages against a public entity. N.J.S.A. 59:9-2(c) states without qualification: “**No punitive or exemplary damages shall be awarded against a public entity.**” N.J.S.A. 59:9-2(c) (emphasis added).

Furthermore, pursuant to the Punitive Damages Act, N.J.S.A. 2A:15-5, et seq.,

Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the

result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence. N.J.S.A. 2A:15-5.12(a). Rusak v. Ryan Auto., L.L.C., 418 N.J. Super. 107, 118 (App. Div. 2011).

It is well settled law that punitive damages are not generally available and are to be awarded only in "exceptional cases." Catalane v. Gillian Instrument Corporation, 271 N.J. Super. 476, 500-01 (App. Div.), cert. denied, 136 N.J. 298 (1994); see also, Lehman v. Toys 'R' Us, Inc., 132 N.J. 587, 624-25 (1993) ("punitive damages are to be awarded when the wrongdoer's conduct is especially egregious"); Rendine v. Pantzer, 141 N.J. 292 (1995) (offending conduct must be "especially egregious"). "[T]he test for egregiousness ... [is] satisfied if plaintiff has proven an intentional wrongdoing in the sense of an evil-minded act or an act accompanied by a wanton and willful disregard for the rights of [plaintiff].... In the alternative, we have found that the evidence will suffice if it demonstrates that defendant acted with actual malice." Ibid. Rusak v. Ryan Auto., L.L.C., 418 N.J. Super. 107, 119 (App. Div. 2011). Plaintiffs may not recover punitive damages by "recasting merely negligent conduct as willful and wanton." Entwistle v. Draves, 102 N.J. 559, 562 (1986). "Neither mere negligence nor gross negligence can support an award of punitive damages". LoRocco v. N.J. Mfrs. Ind. Co., 82 N.J. Super. 323, 327 (App. Div. 1964), cert. den., 42 N.J. 144 (1964).

Plaintiff must prove that defendant's conduct rises to the level necessary for an award of punitive damages. The first step in the punitive damages assessment requires Plaintiff to prove, by clear and convincing evidence, that the injury, loss, or harm suffered by Plaintiff was the result of defendant's acts or omissions. N.J.S.A. 2A:15-5.12(a). If Plaintiff were to satisfy this prong, she would then be required to prove that either (1) defendant's conduct was malicious, or (2) defendant acted in a wanton and willful disregard of Plaintiff's rights. N.J.S.A. 2A:15-5.12(a).

Edwards v. Our Lady of Lourdes Hospital evaluates a claim for punitive damages in a medical negligence action and the proper application of the law. Edwards v. Our Lady of Lourdes Hospital, 217 N.J. Super. 448 (App. Div. 1987). In Edwards, the same conduct of the defendants and alleged negligent care of the plaintiff was used to substantiate the claims for both medical negligence as well as punitive damages. Id. at 455-460. In assessing the allegations, the Edwards court determined that “[p]laintiffs are simply trying to recast negligent conduct as willful and wanton misconduct. That is not permitted.” Id. at 462. As stated above, the Edwards court made clear that a plaintiff cannot recover an award for punitive damages by recasting merely negligent conduct as willful and wanton. Id. at 460. There must be a showing that a defendant committed “a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences.” Id. at 462. Accordingly, the Edwards court found no such evidence and held that an award of punitive damages was not appropriate.

In this case, the Twelfth Count fails against the municipal defendants on two independent and conclusive grounds, either of which standing alone compels summary judgment.

The first ground is statutory and absolute. N.J.S.A. 59:9-2(c) categorically prohibits an award of punitive or exemplary damages against a public entity, and the Municipality of Princeton and the Princeton Fire Department are public entities within the meaning of the Tort Claims Act. That prohibition is unqualified, admits of no exception, and requires no further analysis. Whatever Plaintiff proves or fails to prove with respect to any other defendant in this action, punitive damages cannot be awarded against the municipal defendants as a matter of law, and summary judgment on the Twelfth Count is compelled on that ground alone.

Even setting the statutory bar aside, the Twelfth Count fails independently on the merits. The substantive allegations of egregious and reckless conduct are directed exclusively at Horner,

Diallo, and Freda — not at the municipal defendants. Exhibit A, Twelfth Count, ¶ 2. The Municipality of Princeton and the Princeton Fire Department appear in the Twelfth Count only in the wherefore clause demanding judgment, not in any substantive allegation of wrongdoing, and that is not a pleading oversight. It reflects the undisputed reality that the municipal defendants engaged in no conduct that could support a punitive damages award. They did not follow the stolen Jeep, activate a blue emergency light, or commit any of the conduct alleged in the Twelfth Count. There is no evidence in this record, clear and convincing or otherwise, that the Municipality of Princeton or the Princeton Fire Department committed any deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences, as Edwards requires. Edwards, 217 N.J. Super. at 462. To the extent Plaintiff seeks to hold the municipal defendants liable for punitive damages by recasting the same conduct underlying the negligence and supervision claims as willful and wanton misconduct attributable to these entities, that is precisely what Edwards and Entwistle prohibit, and it is not permitted.

Because N.J.S.A. 59:9-2(c) absolutely prohibits an award of punitive damages against a public entity, and because the record contains no evidence of actual malice or wanton and willful disregard attributable to the municipal defendants in any event, summary judgment dismissing the Twelfth Count against the Municipality of Princeton and the Princeton Fire Department is compelled as a matter of law.

VI. THE MUNICIPALITY OF PRINCETON AND THE PRINCETON FIRE DEPARTMENT ARE ENTITLED TO SUMMARY JUDGMENT ON THE SIXTH AND FOURTEENTH COUNTS BECAUSE THE MEDICAL EVIDENCE FORECLOSES ANY CONSCIOUS PAIN AND SUFFERING CLAIM AND NO LIABILITY ATTACHES TO THESE DEFENDANTS IN ANY EVENT.

Because the uncontroverted medical evidence establishes that Jodi Marcou experienced no conscious pain and suffering and the municipal defendants bear no liability for her death, the Sixth and Fourteenth Counts fail as a matter of law.

Pursuant to the New Jersey Survival Act, N.J.S.A. 2A:15-3, damages for pain and suffering are permitted, but only if the decedent experienced conscious pain and suffering between the time of the injury and his or her death. Smith v. Whitaker, 160 N.J. 221, 236 (1999). It is essential for a successful pain and suffering claim that the pain and suffering be consciously experienced. Carey v. Lovett, 132 N.J. 44, 67 (1993). Additionally, damage awards for pain and suffering may not be based on mere speculation or conjecture. See Model Jury Charge (Civil), 1.12(O), “Damages”.

In Tirrell, the Court permitted the plaintiff to recover for decedent’s conscious pain and suffering claims after he was run over by a truck and killed “practically instantaneously.” Tirrell v. Navistar Int’l, 248 N.J. Super. 390, 407 (App. Div. 1991). In affirming the jury award, the Court noted the plaintiff submitted testimonial evidence that the decedent survived the initial collision and suffered conscious pain and suffering. Ibid. Specifically, a witness to the accident testified that the decedent “raised his head” after being hit by the truck before dying. Ibid.

In this case, the Sixth and Fourteenth Counts fail as a matter of law because the uncontroverted medical evidence does not merely fail to support the conscious pain and suffering claims — it conclusively forecloses them. This is not a case where the evidence is conflicting, where expert opinions diverge, or where a jury could reasonably draw competing inferences. The record speaks with one voice, and that voice extinguishes these claims entirely.

The Sixth Count alleges that Ms. Marcou “was caused to live and suffer moments of great pain and horror from the time of the accident up until the time of her death,” that “she suffered greatly” and “endured significant pain and suffering.” Exhibit A, Sixth Count, ¶ 2. The Fourteenth Count goes further still, alleging that she experienced “immediate agony and anguish,” “subsequent and protracted hospitalization,” and the “agony and conscious pain and suffering of his [sic] own impending death.” Exhibit A, Fourteenth Count, ¶ 2. The medical record responds to each of those

allegations with equal clarity and equal force.

Dr. Johnson reviewed the complete record and concluded that Ms. Marcou was already unresponsive and pulseless when first responders arrived at the scene, that there is “no video documentation or testimony to indicate that she was conscious or alive, even briefly, in the aftermath of the collision,” and that “[t]here is in fact no evidence to support a reasonable medical opinion that Ms. Marcou sustained any conscious pain and suffering.” Exhibit D, pp. 2-3. She did not receive subsequent medical care and attention in any meaningful sense — she was unresponsive at the scene and died within moments of impact. The allegations of protracted hospitalization and endured suffering in the Fourteenth Count are not merely unsupported by this record. They are factually impossible on it.

That conclusion is further confirmed by comparison to Tirrell, where the critical distinction is unmistakable. In that case, the conscious pain and suffering claim survived because the plaintiff presented an eyewitness who observed the decedent raise his head after being struck — a moment of post-impact consciousness that the court found sufficient to support a jury award. Tirrell, 248 N.J. Super. at 407. That single fact made all the difference, and its absence here makes all the difference in the other direction. No witness observed Ms. Marcou conscious or responsive after the collision. No medical evidence supports any period of awareness between impact and death. Tirrell stands for the proposition that conscious pain and suffering claims require an evidentiary foundation. This record has none, and what Plaintiff offers in its place is precisely what Smith, Carey, and the Model Jury Charge prohibit — a claim built entirely on speculation and conjecture, unsupported by a single witness account, a single piece of medical evidence, or a single expert opinion. Carey, 132 N.J. at 67; Smith, 160 N.J. at 236.

Beyond the medical evidence, the Sixth and Fourteenth Counts fail on an additional and

independent ground. As established in Points I through V, *supra*, the municipal defendants bear no liability for the death of Jodi Marcou, and both counts — being entirely derivative of those underlying liability claims — cannot survive their dismissal regardless of the state of the medical evidence.

Because the uncontroverted medical evidence conclusively forecloses any claim for conscious pain and suffering, because no witness or expert testimony supports any period of post-impact consciousness, and because the municipal defendants bear no liability for the death of Jodi Marcou in any event, summary judgment dismissing the Sixth and Fourteenth Counts against the Municipality of Princeton and the Princeton Fire Department is compelled as a matter of law.

VII. THE MUNICIPALITY OF PRINCETON AND THE PRINCETON FIRE DEPARTMENT ARE ENTITLED TO SUMMARY JUDGMENT ON THE SEVENTH, EIGHTH, AND NINTH COUNTS BECAUSE ALL REMAINING DAMAGE CLAIMS ARE DERIVATIVE OF THE UNDERLYING LIABILITY DETERMINATIONS AND CANNOT SURVIVE THEIR DISMISSAL.

Because the Municipality of Princeton and the Princeton Fire Department bear no liability for the death of Jodi Marcou, as established in Points I through VI, *supra*, the remaining damage claims asserted in the Seventh, Eighth, and Ninth Counts fail as a matter of law.

The Seventh Count, brought by David Marcou as Executor of the Estate of Jodi Marcou, seeks damages for wrongful death, including the loss of the decedent's services, society, love, companionship, advice, and guidance. *Exhibit A*, Seventh Count, ¶ 2. The Eighth Count, brought by David Marcou individually, seeks damages for the pecuniary loss suffered as a result of the deprivation of the benefits that would have resulted from the continuance of his wife's life. *Id.*, Eighth Count, ¶ 2. The Ninth Count seeks recovery for medical expenses incurred from the time of the accident through the time of death, together with funeral service expenses and burial expenses. *Id.*, Ninth Count, ¶ 2. Each count incorporates by reference the underlying negligence

allegations against the municipal defendants and demands judgment predicated entirely on a finding of liability against them.

That predicate has been conclusively eliminated. As established across Points I through VI, the municipal defendants bear no liability for the death of Jodi Marcou — not under the doctrine of respondeat superior, not under the Tort Claims Act, not for negligent supervision, and not under any other theory Plaintiff has advanced. A plaintiff cannot recover wrongful death damages, pecuniary losses, or medical and funeral expenses from defendants who bear no legal responsibility for the death giving rise to those claims. Because the municipal defendants bear no such responsibility, summary judgment dismissing the Seventh, Eighth, and Ninth Counts against the Municipality of Princeton and the Princeton Fire Department is compelled as a matter of law.

CONCLUSION

For the foregoing reasons, the Municipality of Princeton and the Princeton Fire Department respectfully request that this Court grant their motion for summary judgment and dismiss all counts asserted against them in the Second Amended Complaint with prejudice.

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/s/ Costadinos J. Georgiou

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