MARY LOU RHINES as Guardian Ad Litem for CHERYL RHINES, and CHERYL RHINES, Individually, Plaintiff, v. STATE OF NEW JERSEY, NEW JERSEY STATE POLICE, TPR J M ALBUJA, JOHN DOES 1-20 and ABC ENTITIES 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO: ESX-L-580-19 CIVIL ACTION

BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

DECOTIIS, FITZPATRICK, COLE & GIBLIN, LLP
61 South Paramus Road, Suite 250
Paramus, NJ 07652
Tel: (201) 928-1100
Attorneys for Defendants,
State of New Jersey, New Jersey State Police and Trooper Jennifer M. Albuja

On the Brief:

Benjamin Clarke (Attorney ID# 033801980)
Adrien Moncur (Attorney ID# 021262007)
William J. Hamilton (Attorney ID# 355612021)
Christian J. DiIenno (Attorney ID# 322082021)

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PRELIMINARY STATEMENT

On October 17, 2017, plaintiff Cheryl Hines, then 48 years old, suffered a stroke during her morning drive into work. As a result, her car swerved off Route 78 West in Newark and struck a guardrail. The accident was called in to the State Police and the first Trooper to arrive on scene was defendant Jennifer Albuja, a 2016 State Police Academy graduate. Trooper Albuja, after approaching the driver side window of plaintiff's car, sought to question her about what had happened. Plaintiff's responses were slurred and largely unintelligible; based on those slurred responses and on Trooper Albuja's visual observations of impairment, Trooper Albuja formed a belief that plaintiff was under the influence of drugs or alcohol. After plaintiff, on her own initiative, got out of her car and was unable to walk without supporting herself against the car, Trooper Albuja placed plaintiff under arrest for driving under the influence and transported plaintiff to the State Police station in Somerville (Albuja's assigned headquarters).

At the station house, another trooper correctly assessed the situation and suggested that plaintiff, who had vomited en route to the station, needed medical attention. Plaintiff was then taken to the hospital, where she was diagnosed and treated for stroke. Plaintiff now suffers after-effects from her stroke and alleges, in this action, that Trooper Albuja was negligent in failing to recognize that she was suffering from a stroke, and that some of the after-effects from which she suffers could have been avoided had treatment been afforded to her more promptly. In the alternative, in a claim that does not fit the facts of this case at all, plaintiff alleges Trooper Albuja engaged in intentional infliction of emotional distress ("IIED") in arresting her. Those are the only two claims asserted against Trooper Albuja: negligence and IIED.

The material facts of the case have been well developed in discovery and, for purposes of this motion, are not in genuine dispute. Plaintiff's claims are governed by the New Jersey Tort

Claims Act, N.J.S.A. 59:1-1 et seq., which provides law enforcement officers with an immunity for actions taken "in good faith in the execution or enforcement of any law." N.J.S.A. 59:3-3. Under that provision, it has long been the law that police officers cannot be sued or held liable for arrests that fall within a zone of objective legal reasonableness, even if the arrest proves to have been in error. See Hayes v. County of Mercer, 217 N.J. Super. 614 (App. Div. 1987). Here the facts of record establish that Trooper Albuja acted on a good faith belief that plaintiff had been driving under the influence, based on observations that were consistent with that belief. For acting in the good faith enforcement of laws prohibiting the operation of motor vehicles while under the influence, she is entitled to immunity. See N.J.S.A. 59:3-3; see also N.J.S.A. 59:3-2(a) (public employees are "not liable for an injury resulting from the exercise of judgment or discretion vested in" them). In turn, the State Police is likewise immune. See N.J.S.A. 59:2-2(b).

The immunities of the Tort Claims Act, to be effective, must apply not just in easy or insubstantial cases, where no error at all has been made by a public employee, but in hard cases as well, where a mistake actually has been made – provided the mistake falls within the scope of a provided immunity. This is such a case. Trooper Albuja had undergone training to recognize the signs of stroke but, when confronted with a driver who had run her car off the road, slurred her words, and appeared to be in an impaired condition, she failed to recognize those signs and instead concluded that plaintiff had been driving under the influence. Unfortunate as that error was, it was an error that Trooper Albuja made in the good faith enforcement of the law and therefore cannot form the basis for liability under our Tort Claims Act. See, e.g., Delbridge v. Schaeffer, 238 N.J. Super. 323, 345 (Law Div. 1989), aff'd sub nom. A.D. v. Franco, 297 N.J. Super. 1 (App. Div. 1989) ("Good faith may exist in the presence of negligence"; internal quotes omitted; quoting Marley v. Palmyra Bor., 193 N.J. Super. 271, 295 (Law Div. 1983)).

STATEMENT OF FACTS

On October 17, 2017, plaintiff Cheryl Rhines was making her morning commute to work when she collided with a guardrail near mile post 56 on Route 78 West in Newark, New Jersey. See Defendants' Statement of Material Facts ("SOMF"), ¶1. The Operational Dispatch Unit of the State Police received a call, at 8:42 a.m., from an individual who reported the incident and advised that plaintiff refused to roll down her window. See SOMF, ¶2. Trooper Albuja was dispatched to the scene, where she arrived at 9:14 a.m. See SOMF, ¶3.

Upon her arrival, Trooper Albuja approached the driver-side window of plaintiff's vehicle and attempted to speak with plaintiff. Plaintiff was unable to provide coherent, comprehensible responses to basic questions such as her name or what had happened to cause her to drive off the road. She was also unable to comply with requests for her license and registration. See SOMF, ¶4. Trooper Albuja, trying to assess the situation, asked plaintiff whether she had been drinking or had taken any drugs or medication that morning. See SOMF, ¶5. Plaintiff's responses remained slurred and largely incomprehensible. See SOMF, ¶6.

When Trooper Albuja returned to her troop car to report into headquarters, plaintiff made an unprompted attempt to exit from her vehicle. As dashcam video footage from Trooper Albuja's troop car shows, plaintiff was wobbly on her feet and needed to grasp onto the side of her vehicle to prevent herself from falling. See SOMF, ¶7. Trooper Albuja quickly exited her car and approached plaintiff to prevent her from potentially weaving her way into oncoming traffic, and she again asked plaintiff if she had taken any drugs or medication – this time also asking if she was diabetic. See SOMF, ¶8. Plaintiff's attempts at responding remained slurred and for the most part incomprehensible.

The dashcam footage from Trooper Albuja's vehicle reflects that at no time during their

encounter was Trooper Albuja abusive towards plaintiff and, rather, made repeated attempts to ascertain what had caused plaintiff to drive off the road. See SOMF, ¶¶5, 8, 11. Based on her observations of plaintiff during their interaction, Trooper Albuja formed a belief that plaintiff had been operating a vehicle while under the influence of a prescription drug or narcotic. See SOMF, ¶10.[1] However, in reality, plaintiff had suffered a stroke, which Trooper Albuja simply and unfortunately did not recognize at that time. See SOMF, ¶12.

Having just graduated from the Police Academy in January 2016, Trooper Albuja unsurprisingly had never responded to a prior call involving a motorist who had suffered from, or was in the midst of suffering from, a stroke. See SOMF, ¶¶12-13. However, while at the Academy, Trooper Albuja did receive training on the importance of identifying life-threatening conditions, such as a stroke, and had also been trained on how to recognize the signs of a stroke through administering the Cincinnati Stroke Scale (a widely used and widely accepted practical guide for assessing possible stroke). See SOMF, ¶¶13-14. Trooper Albuja testified that she understood that common signs of a stroke included facial droop, slurred speech, and one-sided weakness, but did not perceive, at the accident scene, that plaintiff was experiencing facial droop. See SOMF, ¶15. Instead, Trooper Albuja concluded that there was probable cause to believe plaintiff had been operating a vehicle while impaired, and, as a result, she placed plaintiff under arrest. See SOMF, ¶16.

At 10:06 a.m., Trooper Albuja proceeded to transport plaintiff to the State Police station in

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[1] Trooper Albuja testified at deposition that she heard plaintiff give an affirmative answer to the question of whether she had taken any medications. SOMF, ¶9. The videotape evidence does not clearly corroborate or refute that testimony and so defendants do not rely on it for purposes of this motion. Defendants rely, rather, on the fact that plaintiff's slurred speech, incoherence and wobbly attempts at walking are a matter of record and provided an objectively reasonable basis for Trooper Albuja's belief that plaintiff had been operating her car under the influence.

Somerville, New Jersey, where they arrived at approximately 10:32 a.m. See SOMF, ¶16. While Trooper Albuja and plaintiff were enroute to the Somerville barracks, Trooper Alejandro Molina, a drug recognition expert, reported to the station in preparation for conducting a drug recognition examination on plaintiff. See SOMF, ¶17. After plaintiff arrived at the Somerville station, Trooper Molina observed plaintiff, who had vomited during the drive there, and recognized that she was exhibiting signs of stroke, including asymmetrical drooping. See SOMF, ¶18. Within minutes, medical assistance was called for, and upon the arrival of the EMTs plaintiff was transported to the nearest hospital, Robert Wood Johnson University Hospital, where she was diagnosed with and treated for stroke. See SOMF, ¶¶19-20. Trooper Albuja accompanied the ambulance to the hospital. See SOMF, ¶20.

In this action, plaintiff seeks to hold Trooper Albuja and the State Police liable for the delay in treatment resulting from Trooper Albuja's decision to place plaintiff under arrest rather than call for immediate medical assistance.[2] For purposes of this motion, defendants do not dispute that Trooper Albuja's decision to arrest plaintiff was in error. Defendants submit, however, that Trooper Albuja's actions were taken in the good faith enforcement of the law and in the exercise of Trooper Albuja's lawful discretion within the scope and meaning of N.J.S.A. 59:3-3 and N.J.S.A. 59:3-2(a), and that, under those provisions, defendants are entitled to summary judgment.

[2] Plaintiff's only claims, it should be noted and stressed, sound in negligence and IIED; no claim of false arrest is made. To the contrary, plaintiff made a tactical decision to dismiss her false arrest / civil rights claims in response to defendants' removal of her initial complaint to federal court, and by that maneuver gained a remand of the action back to state court. The only claims now asserted against defendants are state law tort claims – specifically, claims for negligence and IIED.

POINT I

TROOPER ALBUJA IS IMMUNIZED BY N.J.S.A. 59:3-3 AND N.J.SA. 59:3-2(a) BECAUSE, IN ARRESTING PLAINTIFF, SHE WAS ACTING IN THE GOOD FAITH ENFORCEMENT OF THE LAW, WITHIN THE DISCRETION THAT POLICE OFFICERS ARE VESTED WITH BY LAW.

A. Statutory Background: The New Jersey Tort Claims Act.

Plaintiff's claims against Trooper Albuja arise under and are governed by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. ("NJTCA" or the "Act"), which applies to all tort suits against public entities and employees in New Jersey, and which sets the parameters under which they may be held liable in tort. The legislative declaration that prefaces the Act states:

> [T]he Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this state that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All the provisions of this act should be construed with a view to carry out the above legislative declaration. [N.J.S.A. 59:1-2].

Consistent with that declaration of policy, the NJTCA follows a basic approach of reestablishing immunity for all public entities except where liability is expressly allowed. As N.J.S.A. 59:2-1, the first substantive provision of the Act, makes clear, the "default" mode of the Act is immunity, not liability:

> (a) Except as otherwise provided by this act, a public entity is not liable for an injury whether such injury arises out of an act or omission of the public entity or a public employee or any person.
>
> (b) Any liability of a public entity established by this Act is subject to any immunity of the public entity.

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The official comment to N.J.S.A. 59:2-1 underscores this theme (*i.e.*, that immunity is all-inclusive, subject to specified liability provisions) by directing courts to "exercise restraint in the acceptance of novel causes of action against public entities," and by adhering to an interpretive approach that favors immunity over liability ("the approach should be whether an immunity applies and if not, should liability attach"). The Legislature emphasized, in its commentary, that the immunity provisions of the Act take precedence over the liability provisions: "Subsection (b) is intended to ensure that any immunity provisions provided in the Act or by common law will prevail over the liability provisions." See also N.J.S.A. 59:3-1(b) (providing that any liability "of a public employee established by this act is subject to any immunity of a public employee provided by law").

In accordance with the legislative intent, the Supreme Court of New Jersey has frequently reiterated that the "guiding principle of the Act is that immunity from tort liability is the rule and liability is the exception." Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 457 (2009) (quoting Coyne v. State, Dep't of Transp., 182 N.J. 481, 488 (2005)); see, e.g., Smith v. Fireworks by Girone, 180 N.J. 199, 207 (2004) (the "dominant theme of the [Act] was to reestablish the immunity of all governmental bodies in New Jersey, subject only to the [Act]'s specific liability provisions"); Tice v. Cramer, 133 N.J. 347, 356 (1993) (where a liability provision and immunity provision both apply to a given conduct, immunity "trumps" liability). "Even when one of the [NJTCA] provisions establishes liability, that liability is ordinarily negated if the public entity possesses a corresponding immunity." Rochinsky v. Dep't of Transp., 110 N.J. 399, 408 (1988); see also Manna v. State of New Jersey, 129 N.J. 341, 346 (1992) (NJTCA should be interpreted to limit public entity liability).

The immunity afforded to public entities and public employees is all the more important in challenging cases such as this one, in which a trooper arrived at the scene of a motor vehicle accident, discovered a driver behind the wheel who was only able to provide slurred responses to questions, and mistakenly formed a belief that the driver was impaired by drugs or alcohol when in fact she was having a stroke. As discussed *infra*, by incorporating the federal standard for qualified immunity, the NJTCA specifically immunizes public employees for civil actions predicated on reasonable beliefs that may later prove to have been mistaken. See N.J.S.A. 59:3-3; N.E. v. State Dep't of Children & Families, 449 N.J. Super. 379, 404 (App. Div. 2017) (holding that, under N.J.S.A. 59:3-3, New Jersey courts "appl[y] the same standards of objective reasonableness that are used in federal civil rights cases"). To that end, the Act serves as a guard against the natural human impulse to be guided by 20/20 hindsight, and it confers immunity on all public employees acting in good faith in the performance of their duties. See id. at 405.

B. Trooper Albuja at All Times Acted in Good Faith Enforcement of the Law, and Is Therefore Immunized Under N.J.S.A. 59:3-3.

One of the specific immunities that the NJTCA bestows upon all public employees but that applies with special force to law enforcement officers is N.J.S.A. 59:3-3, which provides in pertinent part that a "public employee is not liable if [s]he acts in good faith in the execution or enforcement of any law."[3] In the seminal case of Hayes v. County of Mercer, 217 N.J. Super. 614, (App. Div. 1987), certif. denied, 108 N.J. 643 (1987), the Appellate Division held that, for summary judgment purposes, the applicability of good faith immunity under N.J.S.A. 59:3-3 is governed by the same "objective good faith" test that defines the limits of good faith immunity

[3] N.J.S.A. 59:3-3, by its express terms, does not apply to claims of false arrest or false imprisonment, but as previously noted no such claim is made in this case. To the contrary, plaintiff voluntarily dismissed the claims of false arrest that were made in her initial complaint, to secure a remand of the action back to state court after defendants had removed it to federal court.

under federal law – the so-called "Harlow" test. Hayes, 217 N.J. Super. at 622-23 (adopting the "objective reasonableness" standard of Harlow but reserving "subjective good faith" as an available defense at trial); see Wildoner v. Borough of Ramsey, 162 N.J. 375, 387 (2000) ("The same standard for objective reasonableness that applies in Section 1983 actions [involving qualified immunity] also governs the questions of good faith arising under the Tort Claims Act."); see generally Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

At the summary judgment stage, the applicability of good faith immunity is a question of law to be decided by the Court. Fielder v. Stonack, 141 N.J. 101, 124 (1995) (holding that whether an officer is entitled to good faith immunity depends upon whether the officer's conduct was "objectively reasonable"); accord Curley v. Klem, 499 F.3d 199, 210 (3d Cir. 2007) (where the underlying facts are undisputed, the doctrine's applicability is a question of law); see also N.E. v. State Dep't of Children & Families, supra, 449 N.J. Super. at 404 (applying the qualified immunity analysis to the good faith analysis of N.J.S.A. 59:3-3, and holding, "A court must examine whether the actor's allegedly wrongful conduct was objectively reasonable in light of the facts known to him or her at the time.")

In N.E., the Appellate Division clarified and reinforced how N.J.S.A. 59:3-3 immunity should be applied, explaining that lower courts should "appl[y] the same standards of objective reasonableness that are used in federal civil rights cases." N.E., supra, 449 N.J. Super. at 404. The Appellate Division went on to note, "Objective reasonableness will be established if the actor's conduct did not violate a clearly established constitutional or statutory right." Id. at 405. Where a public employee's actions do not violate "a clearly established constitutional or statutory right," good faith immunity applies and shields the employee from suit and liability. Id.; see also Brayshaw v. Gelber, 232 N.J. Super. 99, 110 (App. Div. 1989) (an officer will be found to have

acted in "good faith" when her actions were taken in an "objectively reasonable manner in the performance of her duties").

As the Supreme Court has explained, the Harlow test "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow, 457 U.S. at 818). It is an "immunity from suit rather than a mere defense to liability," id. (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)), and it "applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" Pearson, 555 U.S. at 231 (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004) (KENNEDY, J., dissenting)). The immunity recognizes that police officers must be afforded the "breathing room to make reasonable but mistaken judgments." Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

Here, N.J.S.A. 39:4-50(a) provides that "[a] person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug" is guilty of violating the law. "Under the influence," as used in the statute, "means a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs." State v. Tamburro, 68 N.J. 414, 420-21 (1975). The statute notably "does not require that the particular narcotic be identified by the arresting officer." Id. at 421.

Our courts have held that the "under the influence" standard is met where a driver has taken a drug "so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway." Id. at 421 (citing State v. DiCarlo, 67 N.J. 321, 328 (1975)); see generally State v. Bealor, 187 N.J. 574, 588-90 (2006)

(holding that symptoms indicative of intoxication include demeanor and physical appearance, swaying or staggering when walking, inability to perform physical coordination tests, slurred speech, slow speech, inability to follow commands, and general lack of coordination; sustaining the defendant's conviction for driving under the influence of a drug or narcotic based on "his slurred and slow speech, his bloodshot and glassy eyes, his droopy eyelids, his pale and flushed face, his fumbl[ing] around the center console and his glovebox searching for all his credentials, the smell of burnt marijuana on defendant, his sagging knees and the emotionless stare on his face").

When Trooper Albuja sought to question plaintiff about her accident, plaintiff indisputably displayed many of the hallmark characteristics of drug-induced impairment, including slurred speech, loss of coordination and general unresponsiveness. Unfortunately, those same symptoms can be associated with stroke, and in this case that is what the true cause of the symptoms turned out to be. However, Trooper Albuja's belief that plaintiff was under the influence of a drug was consistent with the visual and auditory evidence before her and, in consequence, her belief was objectively reasonable and not in violation of any clearly established law. The actions she took based on that mistaken belief were in the "good faith enforcement of the law," as provided in N.J.S.A. 59:3-3, and are immunized by that provision. Hayes v. Mercer County, supra; N.E., supra.

The objective reasonableness of Trooper Albuja's observations and conclusions are also borne out by the reality that police encounters with motorists "driving under the influence" is a very common, if not daily, event. By contrast, coming upon a motorist having a stroke while driving, or experiencing a medical episode mimicking driving under the influence, is far rarer and could reasonably be mistaken for the more common occurrence. By way of concrete example, defendants' police practices expert, Dr. Richard Celeste, notes in his report that, in his many years

as a working police officer, he made approximately 500 arrests in which the arrestees were exhibiting symptoms similar to plaintiff and not one of those individuals was suffering from a stroke. See Clarke Cert., Exh. K at 36.

C. Trooper Albuja Is Also Entitled to Immunity Under N.J.S.A. 59:3-2(a).

Another immunity section of the NJTCA implicated by the facts of this case is N.J.S.A. 59:3-2(a). That section provides that public employees are "not liable for an injury resulting from the exercise of judgment or discretion vested" in them. Generally, the applicability of N.J.S.A. 59:3-2 "depends on whether the conduct of individuals acting on behalf of the public entity was ministerial or discretionary." Gonzalez by Gonzalez v. City of Jersey City, 247 N.J. 551, 571 (2021) (quoting Henebema v. S. Jersey Transp. Auth., 219 N.J. 481, 490 (2014)). Discretionary acts are those "'involving an exercise of personal judgment and conscience.'" Id. at 571 (quoting Black's Law Dictionary 586 (11th ed. 2019)). "[D]iscretionary immunity should attach under the TCA to … decisions requir[ing] a significant thoughtful analysis and exercise of personal deliberations regarding a variety of factors." Id. at 572 (quoting S.P. v. Newark Police Dept., 428 N.J. Super. 210, 231 (App. Div. 2012) (internal quotations omitted)).

While "high-ranking policy" decisions are at the core of discretionary immunity, N.J.S.A. 59:3-2(a) also extends and applies to "discretionary decisions of officers in the field." Gonzalez, 247 N.J. at 572 (quoting Morey v. Palmer, 232 N.J. Super. 144, 152 (App. Div. 1989)). For that reason, in S.P., supra, the Appellate Division held that the decision whether to arrest a person – in that case for possible "domestic violence" under N.J.S.A. 2C:25-21 – is discretionary because it "requires a significant thoughtful analysis and exercise of personal deliberation regarding a variety of factors." 428 N.J. Super. at 231-32; see also Perona v. Twp. of Mullica, 270 N.J. Super. 19, 30 (App. Div. 1994) (holding that two police officers were immune under N.J.S.A. 59:3-2 "based on

their discretionary determination that [the plaintiff] did not need to be confined" for mental health issues); Morey v. Palmer, 232 N.J. Super. 144, 150-51 (App. Div. 1989) (holding police officer who failed to arrest or escort home a drunken pedestrian who was later struck and killed by a truck a short distance away to be immune under N.J.S.A. 59:3-2(d) and N.J.S.A. 59:3-5, and distinguishing cases involving breaches or alleged breaches of ministerial duties).

"Ministerial acts, in contrast, are those which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, ***without regard to or the exercise of his own judgment*** upon the propriety of the act being done." Gonzalez, 247 N.J. at 571-72 (emphasis added). Our appellate courts have repeatedly held that a police officer's decision to make an arrest is discretionary – a holding that conforms to common sense.

In S.P., for example, the Appellate Division held that the police officers' decision not to arrest the defendant was discretionary despite the fact that the plaintiff herself had called the police and told them that "her roommate was trying to get into her bedroom, he would not leave her alone, and he was drunk." 428 N.J. Super. at 215. When the police arrived, they spoke to the roommate, who admitted that he "touched" the plaintiff, tried to get into the plaintiff's room, and was drinking. Id. Rather than arresting the roommate, the officers directed him to stay away from the plaintiff and told the plaintiff to stay in her room the rest of the night and to call police if she had any more problems. Id. The roommate brutally assaulted and raped the plaintiff the next morning. Id. The plaintiff filed suit, alleging the officers had a mandatory (and thus ministerial) duty under the Prevention of Domestic Violence Act of 1991 ("PDVA") to arrest the rapist. The police defendants argued, in response, that they were immune under N.J.S.A. 59:3-2 because they had and exercised lawful discretion not to arrest the drunken roommate. Id. at 221.

In upholding that contention, the Appellate Division recognized that, under the PDVA, arrest of a suspect is mandated where there are signs of injury, but held that, when no such signs of injury are apparent (as was the case there), the decision whether to arrest "requires a significant thoughtful analysis and exercise of personal deliberations regarding a variety of factors," and is thus a protected discretionary decision under N.J.S.A. 59:3-2. Id. at 231. "We are satisfied," the court held, "that the immunity provisions of the TCA apply as a matter of law because the officers did not have a ministerial duty to arrest pursuant to the PDVA under these circumstances." Id. at 213; see also Gonzalez, 247 N.J. at 573 ("where the circumstances are … such that a reasonable policeman in the position of the defendants could have differed about whether or how to act, the specific decision at issue may be considered discretionary for the purposes of determining TCA immunity") (citing Del Tufo v. Tp. of Old Bridge, 278 N.J. Super. 312, 325 (App. Div. 1995)).

Here, based on her observations of and interactions with plaintiff, Trooper Albuja determined that probable cause existed to arrest plaintiff for driving while impaired and exercised her lawful power and discretion to do so. Just as the decision ***not*** to arrest the domestic abuser in S.P. (which led to disastrous results) involved an immunized exercise of police discretion, and just as the decision not to arrest the suicidal decedent in Perona or the drunken pedestrian in Morey (both of which, again, led to disastrous results) involved an immunized exercise of police discretion, Trooper Albuja's discretionary decision to arrest plaintiff is likewise immunized and cannot form the basis of liability under the NJTCA. See Perona, 270 N.J. Super. at 29 ("discretionary decisions by law enforcement officers … may merely involve operational decisions such as whether to take a person into custody…"; "Discretionary decisions made by public employees are entitled to immunity.")

Defendants anticipate that, in response to this motion, plaintiff will seek to rely upon cases that have recognized that police officers have a duty to render necessary medical care to arrestees. See, e.g., Del Tufo v. Tp. of Old Bridge, 278 N.J. Super. 312, 318 (App. Div. 1995) ("when the police arrest someone, they have a duty to provide necessary medical treatment"), aff'd 147 N.J. 90 (1997). Those cases, and that principle, are inapplicable because, here, the very reason Trooper Albuja did not realize plaintiff needed medical attention was that she attributed the conditions that are now known to have been a product of stroke to another cause, impairment by a narcotic or prescribed medication – a conclusion that, while erroneous, was based on her firsthand observation of and interaction with plaintiff, which provided lawful justification for her arrest of plaintiff. This case thus presents a basic test of the structure of the NJTCA, under which immunity provisions trump liability. Rochinsky, supra, 110 N.J. at 408 (even when one of the provisions of the NJTCA furnishes a ground or basis for liability, "that liability is ordinarily negated if the public entity possesses a corresponding immunity").

In arresting plaintiff, Trooper Albuja acted in the good faith enforcement of the law and in the exercise of her lawful discretion. There is no question or dispute that plaintiff's condition actually warranted medical attention rather than arrest, but it is precisely because public employees – and police officers in particular – are so often placed in demanding circumstances, where a decision must be made on an assessment of imperfect or even misunderstood information, that the Legislature has established immunities like N.J.S.A. 59:3-3 and N.J.S.A. 59:3-2(a). Trooper Albuja's actions fall squarely within those immunities and her motion for summary judgment should accordingly be granted. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995) (directing trial courts "not to refrain from granting summary judgment when the proper circumstances present themselves").

POINT II

TROOPER ALBUJA IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

As discussed above, Trooper Albuja's conduct in arresting plaintiff is immunized by N.J.S.A. 59:3-3 and 59:3-2(a). Under the "immunity trumps liability" structure of the NJTCA, that immunity applies irrespective of how plaintiff frames her claim, and thus applies with equal force to plaintiff's IIED claims as it does to her negligence claims. Plaintiff's IIED claims fail for a second, equally dispositive reason, though: no evidence exists to support a rational finding that Trooper Albuja engaged in the intentional infliction of emotional distress.

A. Plaintiff Cannot Make Out a Prima Facie IIED Case.

In Buckley v. Trenton Saving Fund Soc., 111 N.J. 355 (1988), the Supreme Court of New Jersey set forth the required elements for a claim of intentional infliction of emotional distress:

- First, a plaintiff must demonstrate that defendant acted "intentionally or recklessly." Id. at 366. To attach liability to an intentional act, the defendant must have both intended to do the act and to produce emotional harm, while for liability to attach to a reckless act, the defendant must have acted with a "deliberate disregard of a high degree of probability that emotional distress will follow." Id. (citing Hume v. Bayer, 178 N.J. Super. 310, 319 (Law Div. 1981)).

- Second, "the defendant's conduct must be extreme and outrageous," going "'beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" Id. (quoting Restatement (Second) of Torts, § 46 comment d (1965)). New Jersey courts have referred this prong "as an 'elevated threshold' that is satisfied only in extreme cases." Id. at 21 (quoting Griffin v. Tops Appliance City, Inc., 337 N.J. Super. 15, 23 (App. Div. 2001)).

- "Third, the defendant's actions must have been the proximate cause of the plaintiff's emotional distress," and "[f]ourth, the emotional distress suffered by the plaintiff must be 'so severe that no reasonable man could be expected to endure it.'" Id. (quoting Restatement (Second) of Torts, § 46 comment d (1965)).

On a motion for summary judgment addressing a claim of IIED, "[t]he severity of the emotional distress raises questions of both law and fact. Thus, the court decides whether as a matter of law such emotional distress can be found, and the jury decides whether it has in fact been proved." Ingraham v. Ortho-McNeil Pharm., 422 N.J. Super. 12, 20 (App. Div. 2011) (quoting Buckley, supra, 111 N.J. at 367).

As explained by the Appellate Division in Ingraham, the following cases have presented issues that required resolution by the jury:

> (1) a county sheriff's using an atrocious racial slur to refer to an African-American employee, *Taylor v. Metzger,* 152 *N.J.* 490, 508–21 (1998); (2) a defendant teacher's false report that the plaintiff teacher, a practicing non-violent Buddhist, had threatened to kill her students, and arranging to have the plaintiff removed publicly from the school, allegedly in retaliation for rebuking the defendant's sexual advances, *Leang v. Jersey City Bd. of Educ.,* 198 *N.J.* 557, 568, 587-88 (2009); (3) a supervisor and two co-workers at a military facility surrounding the plaintiff and making comments and gestures to suggest that she was to perform a sexual act on the supervisor while the others watched, followed by a threatening telephone call implying that the Mafia would become involved if the plaintiff pursued the investigation, *Wigginton v. Servidio,* 324 *N.J.Super.* 114, 119-20, 123, 130-32 (App.Div.1999), *certif. denied,* 163 *N.J.* 11 (2000); (4) a landlord's intentional shutting off heat, running water, and security in a rent-controlled building in an effort to induce the tenants to vacate, *49 Prospect St. Tenants Ass'n v. Sheva Gardens, Inc.,* 227 *N.J.Super.* 449, 455-57, 466, 471-75, (App.Div.1988); and (5) a doctor's allegedly telling parents that their child was "suffering from a rare disease which may be cancerous knowing that the child has nothing more than a mildly infected appendix," *Hume v. Bayer,* 178 *N.J.Super.* 310, 319 (Law Div.1981). [422 N.J. Super. at 21; A.2d cites omitted].

Notably, all of the above examples involved knowing or reckless conduct, that any reasonable person should have known would result in the targeted individual experiencing severe emotional distress. By contrast, no evidence exists in this case to indicate, much less support a rational finding, that Trooper Albuja acted with the requisite intent or recklessness to make out a

viable claim of IIED. It is a matter of record that Trooper Albuja repeatedly attempted to solicit information from plaintiff regarding her condition, specifically asking whether she was diabetic and whether she was under the influence of alcohol or any drugs. See SOMF, ¶¶4-5, 8. As the dashcam video of the incident documents, Trooper Albuja struggled to obtain information that would help her assess plaintiff's condition, and repeatedly attempted to assist Plaintiff. These were not actions taken by an individual acting "beyond all possible bounds of decency," in a manner "utterly intolerable in a civilized community." Buckley, supra, 111 N.J. at 366. They were actions taken by a police officer attempting to uphold her duties in the face of confusion and uncertainty. Plaintiff thus fails to meet the "elevated threshold" necessary to hold Trooper Albuja liable on a claim for intentional infliction of emotional distress. Ingraham, supra, 422 N.J. Super. at 21.

B. N.J.S.A. 59:3-14 Is Inapplicable.

Defendants anticipate that, in response to this motion, plaintiff may seek to invoke N.J.S.A. 59:3-14, which provides, "Nothing in this act shall exonerate a public employee from liability if it is established that [her] conduct was outside the scope of [her] employment or constituted a crime, actual fraud, actual malice, or willful misconduct." See Fielder v. Stonack, supra, 141 N.J. at 29 (finding that questions of fact existed as to whether the defendant police officer engaged in willful misconduct in connection with a police chase that resulted in injury). Any such attempted invocation should be rejected for two reasons: first and foremost, just as there is no evidence in the record to support a finding that Trooper Albuja engaged in the "intentional infliction of emotional distress," there is no evidence to support a rational finding that Trooper Albuja's conduct rose to the level of a "crime, actual fraud, actual malice or willful misconduct"; second, no claim of "willful misconduct" is pled, anywhere in the complaint. Accordingly, N.J.S.A. 59:3-14 affords no reason or basis for denying Trooper Albuja summary judgment here. Brill, supra.

POINT III

SINCE TROOPER ALBUJA ENJOYS IMMUNITY UNDER THE TORT CLAIMS ACT, THE STATE AND NJSP ARE LIKEWISE ENTITLED TO IMMUNITY.

Plaintiff, in the caption and body of her complaint, has named the State of New Jersey and the New Jersey State Police as two separate defendants. As is well-established, the Division of State Police is part of the State of New Jersey, Department of Law and Public Safety. See N.J.S.A. 52:17B-6 et seq.; In re Attorney General Law Enforcement Directive Nos. 2020-5 and 2020-6, 246 N.J. 462, 501 (2021) ("The Attorney General oversees the Department of Law and Public Safety, of which the State Police is a part."); In re Carberry, 114 N.J. 574, 578 (1989) ("The Division is established in the Department of Law and Public Safety, with the Superintendent as the executive and administrative head of the Division."). Thus, for purposes of the NJTCA and this case, the State of New Jersey and the State Police are one and the same "public entity," and will hereafter be referred to simply as "the NJSP."

Under the NJTCA, there are three, and only, three "liability" provisions directed toward public entities:

- N.J.S.A. 59:2-2(a), which generally renders public entities liable for "acts or omissions" of their employees "in the same manner and to the same extent as a private individual under like circumstances" – subject, however, to any applicable immunities. See N.J.S.A. 59:2-2(b) (a public entity cannot be liable "where the public employee is not liable").

- N.J.S.A. 59:4-2, which, under specified conditions and again subject to any applicable immunities, renders public entities liable for injuries arising from a "dangerous condition of public property"; and

- N.J.S.A. 59:4-4, which renders public entities liable for failure to post "emergency signals."

Of those three provisions, the only potentially applicable one here is N.J.S.A. 59:2-2,

which, broadly speaking, renders public entities liable in *respondeat superior* for the negligence of their employees. See, e.g., Tice v. Cramer, 133 N.J. 347, 355 (1993) ("The primary liability imposed on public entities [under the NJTCA] is that of *respondeat superior*: when the public employee is liable for acts within the scope of that employee's employment, so too is the entity; conversely, when the public employee is not liable, neither is the entity"; holding police officers and their employers immune for a pedestrian death arising out of a police chase).

As discussed in Point I, plaintiff's negligence claims against Trooper Albuja are barred, and overcome, by applicable immunities – specifically N.J.S.A. 59:3-3 and N.J.S.A. 59:3-2(a). Hayes v. County of Mercer, supra; S.P. v. City of Newark, supra. Since Trooper Albuja cannot be held liable under the circumstances presented here, neither can the NJSP. N.J.S.A. 59:2-2(b); Tice, supra, 133 N.J. at 355 ("when the public employee is not liable, neither is the entity").

In an attempt to plead her way around the NJSP's derivative immunity, plaintiff asserts a "direct" claim against the NJSP, alleging that it is liable for "negligent training" of Trooper Albuja – specifically, for failing to train her in the recognition of stroke symptoms. See Amended Complaint, Third Count; see generally G.A.-H. v. K.G.G., 238 N.J. 401, 415 (2019) (holding, in a case that did not arise under the NJTCA, that negligent hiring, training, and supervision claims are not based on the theory of *respondeat superior*, but rather are "based on the direct fault of an employer").

That claim fails for two dispositive reasons: 1) the NJTCA does not establish, support, or allow "direct" claims against public entities for alleged "failure to train"; and 2) the record establishes that, in fact, Trooper Albuja ***was*** trained in the recognition of stroke symptoms, and simply failed to recognize those symptoms when confronted, in the field, with a non-responsive, disoriented driver who had run her car off the road.

A. No Direct Claim Against Public Entities Exists Under the NJTCA for "Negligent Training."

As discussed in Point I, the "dominant theme" of the NJTCA "was to reestablish the immunity of all governmental bodies in New Jersey, subject only to the [Act]'s specific liability provisions." Smith v. Fireworks by Girone, supra, 180 N.J. at 207; see also Caporusso v. New Jersey Dept. of Health and Senior Services, 434 N.J. Super. 88, 98-99 (App. Div. 2014) ("immunity generally applies and liability is the exception"). As the legislative comment to N.J.S.A. 59:2-1 makes clear, the "approach" courts are to take under the Act is to ask "whether an immunity applies and if not, should liability attach" – the Legislature's express "hope" being that "utilizing this approach the courts will exercise restraint in the acceptance of novel causes of action against public entities." Comment, N.J.S.A. 59:2-1; see Ayers v. Tp. of Jackson, 106 N.J. 557, 598 (1987) (quoting legislative comment).

Since, under the NJTCA, the only "liability" provisions that run against public entities are N.J.S.A 59:2-2 (*respondeat superior*), N.J.S.A 59:4-2 (dangerous condition – not applicable here), and N.J.S.A 59:4-4 (emergency signals – again, not applicable here), and since no "direct" claim against public entities for "negligent training" is established or recognized by any of those provisions, Count Three of plaintiff's Amended Complaint fails at the threshold. See Tice, supra, 133 N.J. at 366-67 (holding that a public entity's immunity under the NJTCA cannot be overcome or evaded by pleading a direct claim for "failure to train").

B. The Record Establishes, Without Material Dispute, That the NJSP Did Provide Trooper Albuja With Training in the Recognition of Stroke Symptoms, and No Triable Issue Exists on That Score.

Even if plaintiff's direct "failure to train" claim against the NJSP were viable under the NJTCA, which it is not, plaintiff's "failure to train" claim would fail for lack of proof. As stated in G.A.-H. v. K.G.G., "To be found liable for negligent supervision or training, ... the plaintiff

must prove that (1) an 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 (2) that risk of harm materializes and causes the plaintiff's damages." 238 N.J. at 415.

Here, there is no credible evidence in the record to support a finding that the NJSP's training or supervisory policies were inadequate or deficient. To the contrary, Trooper Albuja ***was*** trained on stroke recognition and, specifically, was trained on and expected to know the Cincinnati Stroke Scale. See SOMF, ¶14. Trooper Albuja also received training on the importance of quickly identifying life-threatening medical conditions and, with specific bearing on this case, she was trained to know that a stroke is a medical emergency and that a stroke victim may suffer additional brain damage if treatment is delayed. See SOMF, ¶13.

Thus, the record is clear that Trooper Albuja's failure to attribute plaintiff's slurring of her speech and physical instability and disorientation to stroke was not due to a lack of training.[4] Indeed, plaintiff's own police practices expert does not opine that the New Jersey State Police's training was inadequate in any way. See SOMF, ¶22. To the contrary, plaintiff's expert details, and provides citations to, the extensive training provided to New Jersey State Troopers. Id. Plaintiff's expert even cites to the deposition testimony of several troopers, including Trooper Albuja, as evidencing that they had been trained on the Cincinnati Stroke Scale's three-part stroke assessment. Id.

Thus, from a factual standpoint, the opinion offered by defendants' expert, Dr. Richard Celeste – namely, that the "stroke recognition" training provided to Troopers was sufficient and

[4] Trooper Albuja had never previously encountered, in her job duties, a member of the public having a stroke, see SOMF, ¶12, and most police officers go their entire careers without such an encounter, as the report of defendants' police practices expert, Dr. Richard Celeste, documents. See Clarke Cert., Exh. K at 36.

robust – is undisputed. See SOMF, ¶23. Dr. Celeste goes so far as to note the many instances where plaintiff's expert discusses NJSP's training as support for his own opinion that the NJSP provided "rigorous training and supervision of its personnel." Id.

Absent qualified expert testimony opining that NJSP's training, supervision and policies relating to stroke recognition were inadequate under an applicable standard of care, plaintiff's "failure to train" claim presents no triable issue of fact. Expert testimony is required when "the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014). "[A] jury should not be allowed to speculate without the aid of expert testimony in an area where laypersons could not be expected to have sufficient knowledge or experience." Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997); see also Giantonnio v. Taccard, 291 N.J. Super. 31, 44 (App. Div. 1996) (the standard of care governing "the safe conduct of a funeral procession constitutes a complex process involving assessment of a myriad of factors," thus requiring expert testimony); Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 444-445 (1993) (holding that the "customary standards governing the responsibilities and functions of real-estate brokers with respect to open-house tours … should ordinarily be elucidated by witnesses who are experts in the real-estate field"); Fantini v. Alexander, 172 N.J. Super. 105, 108 (App. Div. 1980) (finding that the standard of care "applicable to the conduct of those teaching karate" required expert testimony).

Here, the standard of care governing the mode, method, and frequency of medical training provided to law enforcement officers, especially in the context of acute diagnosis of particular conditions, such as stroke, does not easily lend itself to a common-sense articulation. A "jury is simply not competent to supply the standard by which to measure [the New Jersey State Police's]

conduct," Davis, 219 N.J. at 407, regarding matters such as how much training is legally required, the particular topics that must be covered, and how detailed the training must be. Thus, to permit a claim of failure to train, supervise, and promulgate policies to proceed, the court should require expert testimony on the subject. Absent any expert opinions on the sufficiency of the training and supervision provided by the New Jersey State Police, this claim should be dismissed, with prejudice.

CONCLUSION

For the reasons set forth above, defendants' Motion for Summary Judgment should be granted.

Respectfully submitted,

DECOTIIS, FITZPATRICK, COLE & GIBLIN, LLP
Attorneys for Defendants,
State of New Jersey, New Jersey State Police and Trooper Jennifer M. Albuja

By: *s/ Benjamin Clarke*
Benjamin Clarke

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