TREMAYNE HOWARD PLAINTIFF vs. TOWNSHIP OF EDISON, TOWNSHIP OF HIGHLAND PARK, OFFICER MICHAEL KOHUT, OFFICER MICHAEL GEIST, HEAD DOE AND JOHN DOES 1-10, (DOES IDENTITIES UNKNOWN) DEFENDANTS	SUPERIOR COURT NEW JERSEY APPELLATE DIVISION-**0836-23** Sat Below Hon. HON. ALBERTO RIVAS, J.S.C. Docket No: MID-L- 00765-22 Civil Action **Submitted: February 6, 2024**

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[1] Multiple documents are attached under exhibit cover pages.

[2] The various summonses and criminal records are different because some have notations and others don't, thus they should not be considered duplicates.

[3] Attorney Renaud used the exhibits from Attorney Hawkins under his own exhibits so there are no duplicate exhibit letters

Exhibit C-3 to Renaud's Certification

Exhibit C-4 to Renaud's Certification

Exhibit C-8 to Renaud's Certification

Exhibit C-9 to Renaud's Certification

[4] This should not be considered a duplicate because it has an additional recipient.

Exhibit C-10 to Renaud's Certification

Consent to Search Vehicle 2/20/20-00:47 (Attached at Pa029)
Use of Force Report by Officer Geist (Attached at Pa030)

Use of Force Report by Officer Kohut (Attached at Pa031)

Evidence Form (Marijuana) (Attached at Pa032)

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Letter From Hawkins to Highland Park 9/25/2020 (Attached at Pa056)

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Hawkins Notice of Claim to Edison Clerk 2/27/2020
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Letter From Hawkins to Edison Municipal Complex 6/19/2020
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Letter From Hawkins to Edison Municipal Complex 6/22/2020
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Letter From Edison Public Safety to Hawkins 7/7/2020 (Attached at Pa071)

Discovery Checklist (billing date 7/7/2020) (Attached at Pa028)

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Use of Force Report by Officer Kohut (Attached at Pa0031)

Evidence Form (Marijuana) (Attached at Pa0032)

Evidence Form (Orange Pill) (Attached at Pa0033)

[5] Also on Pa218 but should not be considered duplicate since the submitted button does not clearly reflect that it was in fact submitted

Exhibit G to Baratz's Certification

Exhibit H to Baratz's Certification

Exhibit I to Baratz's Certification

[6] The signature lines for the trial judge and defendant are not visible but they are unsigned by both

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Notice of Appeal to NJ Superior Court 11/05/2021 (Attached at Pa185)

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Application in Support of a Support Fee Waiver
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[8] This should not be considered a duplicate because it has an additional recipient.

PRELIMINARY STATEMENT

Treymane Howard (Plaintiff), a young African American male while in the City of Edison was in the process of taking items out of one vehicle and putting them in another vehicle with keys to both cars in hand, when Edison police defendants, approached him attempted to take the keys out of his hands, and started questioning him, which caused him to sit on the ground and cry.

When on the ground, the police proceeded admittedly to strike him to get him to loosen his grips on the keys to vehicles owned by the party (Amanda) that gave him a ride to that location and the party who was going to give him a ride home. The police had no warrant or consent to search Amanda's car. The police lifted plaintiff then threw him back to the ground, placed their knees into his ribs and choked him, causing him to sustain a dislocated jaw, multiple cuts and bruises warranting a trip to the Emergency room.

The police stated that they needed Amanda's key to determine whether Amanda owned the car. The police did not tell the plaintiff that he was under arrest at anytime. A notice of claim was filed against Edison which resulted in the request to have Woodbridge Municipal court in Highland try the matter. A review of the decision of the Highland Park judge would readily demonstrate that the judge in his decision was doing what was necessary to make the police look pristine in their actions. The judge and the clerical staff of Highland Park failed to forward to Edison

court or the plaintiff's attorney the disposition judgment of guilt. Thus, Howard had no signed and dated judgment of conviction from which could legally take an appeal.

Howard and his mom both went to the Edison court to attempt to obtain the documents prior to the Highland Park Judge of the Superior Court dismissal of the appeal. Howard's counsel was most concerned about having the judgment of conviction from which to take the appeal and the same day spoke to the Edison staff who confirmed there was no such signed order from Judge Herman of highland park in Edison's files.

It was not until a summary judgement (two years later) filed by Highland Park's counsel that a copy of a signed (undated)judgment of disposition that was never presented to the plaintiff during the time frame when an appeal could be taken. The court rules require the staff of a municipality to provide the Case disposition judgment of conviction. Neither municipality did so. This Violated the NJSA 10:1-2 et als and the place of Public Accommodation law which require that all services and accommodations must be given to each member of the public equally.

STATEMENT OF FACTS

Treymane Howard (Plaintiff) is an African American male of dark complexion, who resides in Fords New Jersey (**Pa001)**. On February 20, 2020, plaintiff exited the Chestnut bar onto Lafayette street in the Township of Edison.

(**Pa003**). Plaintiff was wearing a hooded sweatshirt raised over his head and removing a backpack from the passenger side of a green jeep and transferring it to the trunk area of a nearby black jeep. (**Pa003, Pa093 Pa053).** Although he was sitting in his own patrol car when plaintiff placed the back pack in the car trunk, and most likely could not see the area where the spare tire was kept in the other car, Office Kohut stated that he asked plaintiff: "what did you put under the trunk in the area by the spare tire?" (**Pa022)** Officer Kohut who does not have x-ray vision, stated that after observing plaintiff placing something in the area where the spare tire was kept, he exited his patrol vehicle in which he had been sitting, and made contact with the plaintiff. (**Pa022).** Plaintiff was standing outside of the black jeep with the driver's door open. (**Pa93, Pa022**). Plaintiff stated that the jeep belonged to his friend and had the two sets of keys in his hand. (**Pa093, Pa053, Pa022**)

When officer Geist inquired as to who the two vehicles belonged, plaintiff stated Amanda. **(Pa303).** Officer Kohut inquired as to what Howard placed in the trunk. (**Pa022**). Plaintiff stated that an alcoholic beverage was in the trunk and officer Kohut stated that he observed a bottle of whiskey on top of the floorboard in the trunk. (**Pa022, Pa054**). Plaintiff stated that he wanted to make sure that the opened bottle was unobtainable to avoid repercussions during the transit home. **(Pa054).**

Officer Kohut who had no warrant, asked Howard for the keys to the

Amanda's jeep so he could make sure the vehicle belonged to "Amanda," even though he could run the plates himself and identify the vehicles by their registration numbers in his report. **(Pa022)** At that time neither Amanda nor any other person had given any consent for Officer Kohut or Geist to search her vehicle without a warrant because the consent to search time was dated 2/20/20 00:47 while Officer's Kohut's narrative report is dated 2/20/2020 00:23. (See **Pa022; Pa029**). After the police approached him without reasonable suspicion or probable cause, the plaintiff fell to the ground and started crying out of fear. **(Pa054; Pa93).** The police started utilizing physical force against the plaintiff. (**Pa093-Pa096; Pa054**)

Defendant police officer did not tell plaintiff he was under arrest for any offense. (**See Pa22; Pa302-Pa304; Pa453).** Plaintiff was wrestled back down to the ground and choked by the police. (**Pa303; Pa54; Pa093; Pa094)** The Edison Police seized, choked, beat up and punched the plaintiff repeatedly, took the keys from him and searched both vehicle without exigent circumstances and retrieved whatever they desired. (**Pa303; Pa54; Pa055; Pa093)** Plaintiff was hysterical in fear and sustained severe emotional distress. **(Pa055).**

The police officer placed their knees into plaintiff's ribs. **(Pa054)** The plaintiff did not present himself as a danger as he was on the ground when he was taken into custody. **(Pa023; Pa093).** Plaintiff had a panic attack, endured extreme emotional distress requiring him to be taken by ambulance obtain medical

treatment. (**Pa054; Pa96**) Plaintiff suffered a dislocated jaw, neck and back pain, leg injury multiple bruises and pain to various parts of his body caused by defendant police officers. **(Pa096; Pa097)**)

Plaintiff was taken into custody and given an arrest record**. (Pa021-Pa050)** Plaintiff was charged with resisting arrest, possession of CDS that was taken from the car without a warrant, and for obstruction. **(Pa021-Pa050)** Plaintiff's counsel then served the Township of Edison with a notice of claim. (**Pa053).** The defendants charged the plaintiff i.e, with possession of CDS that was found from an illegal search seizure. (**Pa050).** The criminal charges against Plaintiff were transferred from the Municipal Court of the Township of Edison to the Borough of Highland Park, due to Plaintiff's filing of a Notice of Tort Claim against the Township of Edison alleging excessive force and false arrest. (**Pa166).**

Plaintiff's case was tried in the Highland Park Municipal Court over the course of several trial days. (**Pa177; Pa269-Pa281**). On October 27, 2021, after a virtual (Zoom) trial, Highland Park Municipal Court Judge, Hon. Edward Hermann, found Plaintiff guilty of violating N.J.S.A. 2C:29- 1(a), Obstructing the Administration of Law, and 2C:29-2(a)(1) Resisting Arrest. (**Pa041; Pa045)**

On February 27, 2020, and December 20, 2020, plaintiff submitted a notice of claim against the Township of Edison and the police. (**Pa053; Pa106).** Prior to filing his Civil complaint on 2/14/2022, Plaintiff was never presented with a signed

Order of conviction from which he could take an appeal. **(Pa505)** Plaintiff timely filed documents through JEDS and even through the superior Court in support of and Appel of his conviction abut had no Order of conviction from which to appeal. (**Pa218, Pa309**) The Court of the Clerk never forwarded the Order to the plaintiff or his attorney as required by the rules of Court. (**Pa469-Pa471).** Plaintiff and his mother went to Edison and could not obtain the order which disallowed Plaintiff to perfect the appeal of his criminal matter. (**Pa469-Pa471).**

On February 14, 2022, plaintiff filed a complaint against the Township of Highland Park, the Township Officer Geist and Officer Kohut. (**Pa001**). On June 24, 2022, plaintiff upon being sure that there was never any signed Order entered by any Judge finding him guilty of anything, filed another notice of claim against the Township of Highland Park. (**Pa505).** On 08/11/2023, more than two years after plaintiff filed his first complaint, Defense Counsel for Edison upon filing his motion for summary judgment, produced a copy of an undated order of conviction with a signature. **(Pa168).** The signature line where defendant is also required to sign, has no signature and the defendant's date line has no date. **(Pa168).** Because plaintiff was certain that this sudden appearance of an undated Order with a signature was an act of misuse and abuse of process, on 9/26/2023, plaintiff filed another lawsuit adding the Criminal Trial Judge (Judge Herman) who had failed to produce a

properly signed order that was required for plaintiff to perfect his appeal, as a defendant. (**Pa488)**

Plaintiff then moved to consolidate both cases. (**Pa485**). On 10/06/2023, the Court in denying consolidation to the plaintiff, expressed that Plaintiff had not filed a notice of claim against Highland Park even though one was filed. (**1T40-1to 3[1]; Pa535; Pa505).** On 10/06/2023, the Court stated that with respect to plaintiff's motion to consolidate, he would deny it at this point because there were questions related to when plaintiff had access to discovery. **(1T42-6 to14).** The judge expressed that regarding the newly discovered [undated order] it was best for it to reviewed in a **separate proceeding. (1T42-6 to14).** The Judge stated that whether or not that case would go forward was not for him to say at this point, other than to say the motion to consolidate is denied. **(1T42-6 to14).** The Court then granted summary judgment to the defendants. (**Pa533; Pa534)**

PROCEDURAL HISTORY

Plaintiff filed his complaint on February 14, 2022, against the Township of Edison, the Township of Highland Park, Officer Michael Kohut and Officer Michael Geist. (**Pa001).** On May 4, 2022, the Township of Edison filed and Answer. **(Pa111)**

[1] Transcripts of Motion dated 10/06/2023

On October 17, 2022, Defendant Highland Park filed its answer and cross claimed against Borough of Highland Park. (**Pa122).** As shown on the Case Jacket, there were two discovery motions filed by the defendants that were opposed and withdrawn. (**Pa626-Pa630**). On 8/10/2023, a motion for summary judgment was filed by the Township of Edison and Officers Geist and Kohut. (**Pa335).** On 8/11/23, a motion for summary judgment was filed by the Township of Highland Park. (**Pa137).** On 8/29/2023 Plaintiff filed his oppositions to both motions for summary judgment. **(Pa480, Pa483).** On 9/26/2023, Plaintiff filed a cross motion to Consolidate his complaint that included Judge Herman, with the current complaint, and added further opposition to the defendants' motion Summary Judgment. **(P485).** Plaintiff attached his proposed Complaint filed at MID-L-5427-23 to his cross motion. (**Pa488).** On 10/02/2023 Attorney Renaud filed a opposition to plaintiff's motion for consolidation on behalf of Highland Park. (**Pa516).** On October 2, 2023, attorney Baratz filed his reply on behalf of the Township of Edison. **(Pa531**). On 10/06/2023 the Court granted summary judgment to the defendants and denied plaintiff's motion for consolidation of the two complaints. (**Pa533, Pa534, Pa535).**

LEGAL ARGUMENT

POINT ONE
THE COURT ERRED AS A MATTER OF LAW BY NOT FINDING THAT PLAINTIFF ESTABLISHED THAT HE WAS WRONGFULLY ARRESTED FALSELY IMPRISONED, SUBJECTED TO ASSAULT AND BATTERY AND EXCESSIVE FORCE AS WELL AS MALICIOUS PROSECUTION (Pa22-Pa23; Pa53-Pa54; Pa093, Pa094-Pa096; Pa30-Pa31; Pa561; Pa588; Pa621; Pa29; Pa041; Pa533; Pa534)

An arrest without probable cause is a constitutional violation actionable under 42 USC§ 1983. Walmsley v. Philadelphia, 872 F.2d 546 (3d. Cir. 1989); See also Albright v. Oliver, 510 U.S. 266, 274 (1994). A 42 USC § 1983 claim for false arrest may be based upon an individual's Fourth Amendment right to be free from unreasonable seizures. Under NJ law, a false arrest has been defined as "the constraint of the person without legal justification." Ramierz v. United States, 998 F. Supp. 425, 434.

Probable cause exists where the police have reasonably trustworthy information sufficient to warrant a reasonable person to believe a particular person has committed or is committing an offense Amores v. State, 816 S.W.2d 407, 413 (Tex.Cr.App.1991). The determination of the existence of probable cause concerns "the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act." See Woodward v. State, 668 S.W.2d

337, 345 (Tex.Cr.App.1982) (opinion on rehearing), cert. denied, 469 U.S. 1181, 105 S.Ct. 939, 83 L.Ed.2d 952 (1985)

The standard in establishing a probable cause defense in the context of a false arrest claim is one of "objective reasonableness." Hayes v. Mercer County, 217 N.J. Super at 622-623. An officer can defeat a claim by establishing probable cause, or even absent same, if a reasonable officer similarly situated would have believed in its existence. See Wildoner v. Borough of Ramsey, 162 N.J. 375,386 (2000); Kirk v. City of Newark, 109 N.J. 173, 184 (1988) and Malley v. Briggs, 475 U.S. 335, 337 (1986). Although it eludes precise definition, probable cause "is not a technical concept but rather one having to do with 'the factual and practical considerations of eve1y day life' upon which reasonable men, not constitutional lawyers, act" State v. Waltz, 61 N.J. 83, 87 (1972) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)). Although nervous evasive behavior is a pertinent factor in determining reasonable suspicion, Illinois v. Wardlow, 528 U.S. 119, 124 (2000), it is not uncommon for people to appear nervous or excited when a police officer is approaching. State v. Lund, 119 N.J. 35, 47 (1990).

It is settled that mere nervousness and fugitive gestures are insufficient, standing alone, to rise to the level of an articulable suspicion. State v. Patterson, 270 N. J Super 500, 561 (1993). Moreover, nervousness may be consistent with innocent behavior. United States v. Andrews, 600 F. 2d 563, 566(1979). A Terry

stop must be supported by more than just an awkward reaction to police presence. See State v. Costa, 327 N.J. Super 22, 32 (1999). Thus, while "the common and specialized experience and work-a-day knowledge of police [officers] must be taken into account, the Officer's belief must be based on objective, reasonable and particularized facts of the defendant's involvement in a crime. State v. Contursi, 44 N.J. 422, 431 (1965).

Our Courts have held that "although an officer's experience and knowledge must be afforded due weight to specific reasonable inferences, which an officer is entitled to draw from the facts in light of his or her experience, generalizations cannot form the basis for reasonable and articulable suspicion." State v. Stoval, 170 N.J. 346, 367 (2002).

" In deciding whether challenged conduct constitutes excessive force, a court must determine the objective `reasonableness' of the challenged conduct, considering `the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Couden v. Duffy, 446 F.3d 483, 496-97 (3d Cir. 2006); Green v. New Jersey State Police, Civil Action No. 04-0007 (JEI) (D.N.J. Aug. 9, 2006).

Excessive force may be shown when the measure taken inflicted unnecessary and wanton pain maliciously and sadistically for the purpose of causing harm.

Whitley v. Albers, 475 US 312, 320-21 (1986). Here, plaintiff was stopped without probable cause, severely beaten and beaten and arrested. The choking and kneeling in the plaintiff's rib were sadistic acts inflicted with malice to cause harm. Officer Kohut stated in his report (but failed to provide the body cam) that the Plaintiff was on the ground who then "tightened his body and put his arms under himself, making it difficult to pull his arms behind his back" to avoid being handcuffed. **(Pa022**). Officer Kohut then claims that despite plaintiff allegedly trying to hide his arms under himself to prevent the handcuffs, plaintiff some how used the ground to push his body up and that each hand had a key that was sticking out that could be used as a weapon, causing the Officer to punch plaintiff in the left side to "soften up" the plaintiff. **(Pa023**). Really? How did the plaintiff manage to raise his body without placing his hands on the ground?

Based on Officer Kohut's report that did not add up, plaintiff who posed no threat and was already on the ground when he was choked and beaten, was subjected to excessive force. (**Pa54; Pa093, Pa094, Pa096**). It should not be overlooked that Officer Kohut stated in his narrative report that he placed two closed fist strikes to the left side of plaintiff's body. (**Pa23).** Officer Giest states that he used his "knee and elbow to strike the plaintiff's right side!" (**Pa30, Pa031**). Despite all this, Plaintiff ended up in the emergency room with a dislocated jaw. (**Pa094; Pa096)**

Because plaintiff was subjected to a similar pattern of excessive force via assault and battery by the Edison Police to which many have been subjected, it is fair to say that plaintiff satisfied Count Four of his complaint alleging that a pattern and practice of police brutality ad excessive force, discrimination and failure to train. (**Pa053-Pa054; Pa094; Pa096; Pa561; Pa588; Pa621).** Our Courts have held that "although an officer's experience and knowledge must be afforded due weight to specific reasonable inferences, which an officer is entitled to draw from the facts in light of his or her experience, generalizations cannot form the basis for reasonable and articulable suspicion." State v. Stoval, 170 N.J. 346, 367 (2002). An officer's action must be justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 20, (1968). Generalizations cannot not form the basis for reasonable and articulable suspicion. Id.

The defendants did not show how plaintiff's "wearing a hooded sweatshirt in winter, raised over his head, removing a backpack from the passenger side of a green Jeep, and transferring it to the hunk area of a nearby black Jeep" created articulable suspicion warranting that plaintiff be stopped. The police do not show that there were reports of criminal activity related to the *green jeep* or the *black jeep* or that either vehicle was reported as stolen. (**See Pa022; See Pa303**). They do not state that there were reports of a previous act related to someone wearing a hoodie. What

the defendants presented in their argument was a generalization about a black man wearing a hoodie in Winter, and nothing objective and reasonable with particularized facts of the plaintiff's involvement in a crime that would create articulable suspicion warranting that they approached the plaintiff. **(Pa022-Pa023)**

Based solely on a black man wearing a hoodie in Edison, transferring items from one car to another, defendants then advises that court in point one of their briefs, that there was certainly *no opportunity for abstract contemplation* by the police officers! The police officers acted as if the plaintiff behaved unreasonably by becoming visibly upset and agitated. (**Pa022).** Plaintiff, was a black man, being faced with one of the most brutal police forces in New Jersey (See **Pa561; Pa588; Pa621).** Any reasonable black man engaging in innocent activity would have panicked and feared for his life after being stopped at night by the EDISON POLICE.

Based on the facts presented, the defendants did not establish reasonable suspicion or probable to stop and arrest the terrified plaintiff. Plaintiff's alleged initial attempt to run is an insufficient fugitive gesture to provide articulable suspicion or probable cause for an arrest since he was contained and on the ground prior to the search of his car and bags without a warrant or exigent circumstances. **(Pa022-Pa023; Pa093).** The police did not show any reasonably trustworthy information sufficient to warrant a reasonable person to believe that the plaintiff had committed an offense.

Plaintiff who fell to ground on his own before he was picked up and thrown down again by the police, established that he was simply nervous and afraid of the police and falsely arrested and imprisoned without probable cause**. (Pa093).** The time stated on the narrative report is 0023. **(Pa022).** The time stated on the consent to search form is 00:47. **(Pa029).** This means that the police searched the vehicle and the bags before the consent to search was received. **(Pa029).** Upon refusing to hand over the car keys, plaintiff was beaten to a pulp and thrown in jail. **(Pa93**). The police then falsely prosecuted him. Plaintiff was racially profiled due to his black race, stopped then searched.

The defendants in their brief also rely on the plaintiff's later incorrect conviction to establish probable cause in hindsight. As per defense counsel, "*given those convictions, probable cause for plaintiffs arrest that night is manifest and as such he cannot establish a cause of action for wrongful arrest as a matter of law."* Probable cause cannot be established if there was no reasonable suspicion to stop plaintiff in the first place. See State v. Pineiro, 181 N.J. 29-30 (2004); See also " State v. Moore, 181 N.J. 40, 45, (2004). Our Courts have held that subsequent development of probable cause may be inadequate to eliminate the constitutional violation. See New Jersey v. Smith, 525 U.S. 1033 (1998).

Probable cause must occur when or before the police intervenes. Probable cause cannot develop after a conviction because it is defined as a well- grounded

suspicion that a crime **is being** or **has been** committed. State v. Waltz, 61 NJ 83, 87 (1972).

The unlawful and excessive force violated N.J.S.A. 2C:12-1. Plaintiff was punched, kneed in the ribs, choked by the police officers warranting that an ambulance be called to take him to the hospital. **(Pa092-P096; Pa53-Pa54).** The stop and the beating were ultra vires. The severe beating and choking causing dislocation of plaintiff's jaw constitutes assault and battery which were committed under color of law, resulted in physical injuries, monetary loss and severe emotional distress. Plaintiff was also improperly seized and arrested, all which violated Plaintiff's Constitutional and Statutory rights including violations of N.J.S.A. 10:6-2 (c). (**Pa093-Pa096; Pa053-Pa054; Pa041)**

Plaintiff also met the elements of Malicious prosecution because plaintiff was stopped, brutally beaten and falsely imprisoned based on his race. Plaintiff was then maliciously convicted of Obstructing the Administration of Law in violation of N.J.S.A. 2C:29·l(a). As will be argued below, there must be a separate lawful act that was obstructed to satisfy N.J.S.A. 2C:29·l(a). Stopping and searching people based on their race cannot reasonably be considered "the Administration of Law." Encounters with the police in which a person's freedom of movement is restricted, such as an arrest or an investigatory stop or detention, must satisfy acceptable constitutional standards. See State v. Nishina, 175 N.J. 502, 510-11 (2003).

Based on this, plaintiff satisfied Count Four of his complaint. (**Pa533; Pa534)**

POINT TWO
THE COURT ERRED AS A MATTER OF LAW BY FAILING TO FIND THAT PLAINTIFF HAD SHOWN THAT THE DEFENDANTS HAD VIOLATED N.J.S.A. 10:6-2 (c) (Pa023; Pa561; Pa588; Pa621; Pa546; Pa533; Pa534)

The Court erred in ruling in the defendants' favor because the plaintiff showed that he was assaulted and battered, falsely arrested, and imprisoned by the police implicating the New Jersey Civil Rights Acts.

The New Jersey Civil Rights Act provides, in relevant part:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.

[N.J.S.A. 10:6-2(c) (emphasis added).]

Article 1 para 7 of the New Jersey State Constitution provides for:

> "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no wal1'ant shall issue except upon probable cause, supplied by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized."

Pursuant to 42 U.S.C.§ 1983, which provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ... "

42 USC § 1983 allows tort liability for the deprivation of any rights, privileges, or immunities secured by the Constitution." Manuel v. City of Joliet, 580 U.S._ (2017). The NJCRA does the same for the federal constitution, as well as for the New Jersey constitution. See N.J.S.A. 10:6-2(c). The liability of a public entity under 42 USC §1983 attaches when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 694 (1978)

A policy is created when a decision-maker with authority "issues an official proclamation, policy, or edict." Bielevicz v. Dubinon, 915 F.2d 850 (3rd Cir 1990). A course of conduct may be considered a custom when the practice of municipal officials, though not authorized by state law, is "so permanent and well-settled that it constitutes law. Monell, supra, 436 U.S. at 691; See Torres v. Kuzniasz, 936 F. Supp. 1201, 1206 (D.N.J. 1996). A city can be sued "for constitutional deprivations visited pursuant to governmental `custom' even though such a custom

has not received formal approval through the body's official decision making channels. "Monell v Dept of Social Services, 436 US 658, 690-91 (1978).

A "practice of state officials could well be so permanent and well settled as to constitute a `custom or usage' with the force of law." Id at 691. In Upchurch v City of Orange, the plaintiff sued the City of Orange and several defendants for sexual harassment other NJLAD and Civil rights violations**. (Pa546).** The Appellate Division held that the City's failure to have a policy that would protect employees from sexual harassment was a ***fatal flaw*** because policy been in place that was being enforced by management, the City would have been aware of all acts of harassment against its employees. Consequently, the city was liable. See Id.

It is public knowledge that the Edison Police department has a history of excessive force and police brutality. Edison has a history of police brutality.[2] **; Pa561; Pa588; Pa621)**. The acts of the Edison police have been found to be so egregious and brutal that the FBI was previously called in to investigate them. (**Pa561**) The Edison police is said to have the worst criminal cop record in the States' history.[3] Id. The continued brutality has become custom. [4] The Township of Edison's failure and or refusal to train its police officers to respect the rights of black citizens and avoid the use of excessive force reflects deliberate indifference.

[2] https://www.nj.com/middlesex/2012/12/edison_police_misconduct_bruta.html
[3] https://www.app.com/story/news/investigations/watchdog/shield/2018/01/22/edison-police-department-criminal-cops/1039312001/
[4] https://www.nj.com/middlesex/2012/12/edison_police_lawsuit_intimida.html

A review of defendants' submissions to the court demonstrates a failure of any submissions on issuance of public accommodation services to the public in a non-hostile fashion. There is no indication of any well-advertised, reviewed, effective policies and training on excessive force or probable cause, or reasonable cause to effectuate an arrest, or to seize someone's keys to perform a warrantless search in non-exigent circumstances. The Township of Edison has clearly acquiesced to this well-settled custom. Under no condition is a broken jawbone necessary to protect an officers' safety. Under no condition is choking a suspect necessary to convince him to turn over a car key. **(Pa022-Pa23).** Officer Kohut's police report specifically states that the plaintiff refused to turn over the keys and became irate and at that moment they attempted to place him in handcuffs. **(Pa023).** This is the clearest display of abuse of authority. They then proceeded to beat him. (**Pa023).** Thus, it is logical to conclude that there are no widely distributed policies that prevent these acts of violence against members of the public.

The failure to produce proof of existence of these policies which must be reviewed for effectiveness and widely disseminated is fatal to summary judgment relief as stated by the Appellate Division in Upchurch. Because Edison had no policies in place that could have prevented constitutional deprivations, it is liable to the plaintiff. Here, the lack of policy that allows the use of excessive force and police brutality is the reason why plaintiff's civil and constitutional rights were

violated by these police officers. Said lack of policies is the custom for which the municipality may be held liable. See Upchurch v City of Orange Township **(Pa546)**; See also Holmes v City of Jersey City, 449 N.J. Super 600, 601 (App Div 2020); Ptaszynski v Ehiri Uwaneme, 371 N.J. Super 333, (App Div 2004).

POINT THREE

THE COURT ERRED AS A MATTER OF LAW BY FAILING TO FIND THAT THE POLICE DEFENDANTS EXCEEDED THE SCOPE OF THEIR LAWFUL AUTHORITY BY THE USE OF EXCESSIVE FORCE AND AS SUCH WERE NOT ENTITLED TO QUALIFIED IMMUNITY (1T24-1-4, Pa093; Pa22-Pa23; Pa533; Pa534)

Contrary to the argument to the court on 10/06/2023, the defendants are liable in their individual capacities for violation of the plaintiff's civil rights and not eligible for qualified immunity. **(1T24-1to 4**) "Qualified immunity is a doctrine that shields government officials from a suit for civil damages when `their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Gormley v. Wood-El, 218 N.J. 72, 113 (2014) (emphasis added) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity may only shield an officer from liability if the officer "reasonably believes that his or her conduct complies with the law." Pearson v. Callahan, 555 U.S. 223, 244 (2009).

Whether an official is covered by qualified immunity is a matter of law to be decided by a court, "preferably on a properly supported motion for summary judgment or dismissal." Gormley, 218 N.J. at 113 (quoting Wildoner v. Borough of Ramsey, 162 N.J. 375, 387 (2000)). Moreover, there is no presumption of qualified immunity; rather, the immunity is considered "an affirmative defense that the defendant must establish." Schneider v. Simonini, 163 N.J. 336, 354 (2000)

Individuals may be sued under 42 USC § 1983 and the NJCRA in their personal or individual capacity as long as plaintiff show that the individual violated a clearly established law and that the individual exhibited a callous indifference for the rights of the plaintiff. Davis v. Scherer, 468 U.S. 183 (1984). The NJCRA is interpreted as analogous to 42 USC§ 1983, Szemple v. Correctional Med. Servs., Inc., 493 Fed. Appx. 238, 241 (3d Cir. 2012), and a "court will analyze ... NJCRA claims through the lens of 1983." Trafton v. City of Woodbury, 799 F.Supp.2d 417,444 (D.N.J. 2011).

Section 1983 allows tort liability for the deprivation of any rights, privileges, or immunities secured by the Constitution." Manuel v. City of Joliet, 580 U.S._ (2017). The NJCRA does the same for the federal constitution, as well as for the New Jersey constitution. See N.J.S.A. 10:6-2(c).

In Davis v. Scherer, the Supreme Court held that: "Officials are shielded from liability for civil damages insofar as their conduct does not violate the clearly

established statutory or constitutional rights of which a reasonable person would have known." 468 U.S. 183 (1984). In Hafer v. Melo, the Supreme Court held that state officers may be PERSONALLY LIABLE for damages under Section§ 1983 suit based upon actions taken in their official capacities under color of law. 502 U.S. 21 (1991).

In Hafer, the United States Supreme Court rejected the argument that the language of Section 1983 does not authorize suits against state officers for damages arising from official acts. In Hafer, the Court of Appeals for the Third Circuit reversed the district court's decision. Id. The Court of Appeals held that while Hafer's power to hire and fire an aggrieved employee derived from her position as Auditor General, a suit for damages based on the exercise of this authority could be brought against Hafer in a personal capacity because Hafer acted under color of state law. Id. The Court of Appeals held that the respondents could maintain a Section § 1983 suit against Hafer in her individual capacity. Id. The court rejected Hafer's argument that she should not be personally liable for any actions taken in her official capacity.

The Hafer court held that state executive officials are not entitled to absolute immunity for their official actions and held that qualified immunity attaches to administrative employment decisions, even if the same official has absolute immunity when performing other functions. Id at 27-29. The court held that state officials sued in their individual capacities are 'persons' within the meaning of

section 1983. Id. Here, as in Hafer, the police officers were sued in their individual capacities for violating the plaintiff's civil rights. Here there was malice and ill will due to the color of plaintiff's skin. Plaintiff established that he was falsely arrested and imprisoned without probable cause. Plaintiff was standing peaceably by a car on the street of Edison when the police stopped him without reasonable suspicion or probable cause. Plaintiff told the police that he had two sets of keys for the two cars which he was interacting with. **(Pa093)**

Police Officer Kohut could NOT have been sitting in patrol vehicle 207, yet see the plaintiff place something under the floor board in Amanda's care in the hole "*where the spare tire would be located***." (Pa22).** The police officer could NOT have seen plaintiff place any item UNDER the trunk floor board in the area where the spare tire would be located unless he was standing right next to plaintiff and looking down in the trunk or unless he had x-ray vision and could see through the trunk area of the car while seated in his own car**. (Pa022).**

Moreover, the fact that the police saw a bottle of whisky on top of the floor board in the trunk, does not create reasonable suspicion or probable cause because Whisky is legal in New Jersey. The police officer's contention that he needed the keys to the other car *in order to determine that the car belonged to Amanda* does not sound credible. **(Pa022).** The police do not need the keys to peoples' cars or their homes to determine who owns them.

Contrary to the Court the defendants are not protected under the Tort claims act. **(1T24-1to 4).**

NJSA 59:3-14. Public employee immunity—exception states as follows**:**

> **a.** Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.
>
> **b.** Nothing in this act shall exonerate a public employee from the full measure of recovery applicable to a person in the private sector if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

The police in this case acted with malice and willful misconduct due to the severe nature of the beating due to his race and by falsely imprisoning him without probable cause. By stopping plaintiff without probable cause, assaulting and battering him, searching him unlawfully arresting him and attempting to violate Amanda's privacy by trying to enter her car without her consent without reasonable suspicion, and without a warrant, the police acted with intent and violated clearly established statutory or constitutional rights of which a reasonable person would have known.

Plaintiff was racially profiled due to his black race, stopped then searched which violates his civil rights in violation of NJSA 10:6-2 (c) and rights under Article 1 para 1, 5, 7 of the New Jersey Constitution.

Based on this, the police were not eligible to qualified immunity.

POINT FOUR

THE COURT ERRED IN FAILING TO FIND THAT THE DEFENDANTS DENIED PLAINTIFF OF HIS RIGHTS UNDER N.J.S.A. 10:5-4, 12(D),(E)(F), N.J.S.A. 10:1-2, PLACE OF PUBLIC ACCOMMODATIONS. (Pa533; Pa534) Pa536; Pa053-Pa055; SeePa505; Pa469).

Pursuant to NJSA 10:5-4 in relevant part:

> All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin. . .

Pursuant to NJSA 10:1-2:

> All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons."

A Township police department—both the building and the individual officers—are places of public accommodation. Ptaszynski v. Uwaneme 371 N.J. Super. 333, 853 (App. Div. 2004). Arresting citizens based on race is a denial of public accommodation that would impose liability upon police officers under 42 U. S. C. § 1983. See Pierson v. Ray, 386 U.S. 547, 558 (1967). Pursuant to the Appellate

Division, a place of public accommodation is not free to offer its services in a hostile fashion. See Sandy v Township of Orange (**Pa536).**

In Holmes v. Jersey City Police Department, the Appellate Division reversed an order granting summary judgment dismissing a transgender plaintiff's claim of public accommodation discrimination in violation of the LAD based on allegations that, following the plaintiff's arrest, police subjected the plaintiff to a hostile environment because plaintiff was transgender. 449 N.J. Super. 600, 601, 606 (App. Div. 2017).

An unlawful stop and arrest by the police violate the New Jersey's Public Accommodation laws. See Sandy (**Pa536**). The police are not immune because they acted maliciously, willfully with intent in denying plaintiff accommodations, advantages, facilities and privileges on the basis of a suspect criteria. The brutal beating and choking of the plaintiff because he was a black man wearing a hoodie who was minding his business and objecting to the police conducting a warrantless search upon a car in his custody in Edison, to which non-minority citizens in the Township of Edison would not be subjected, is a hostile issuance of police services and denial of public accommodation. (**Pa053-Pa055)**

Plaintiff was also denied of public accommodation from not being provided with an Order from which he could appeal his criminal conviction. Rule 3:23-4(a) requires that upon the filing of the notice of appeal, the clerk of the court below

SHALL forthwith deliver to the criminal division manager's office the complaint, the judgment of conviction and a transcript of the entire docket in the action.

Rule 3:23-7 requires "execution of the judgment" by the municipal court from which the appeal was taken. This could not be done because plaintiff had no order from which he could appeal. (**See**Pa505; Pa469). Rule 3:24 entitled "appeals from orders in courts of limited criminal jurisdiction" states that appeals pursuant to this rule shall be taken within 20 days after the entry of such order. Thus, plaintiff was denied of public accommodation by the Township of Edison and Highland Park and the Court Clerk who failed to COMPLY with New Jersey's Rules of Court to ensure that there was an Oder from which plaintiff could appeal his criminal conviction. An Appeal cannot be taken from transcripts despite the defendants' contentions.

Based on this the Court erred in granting Summary judgment to the defendants. **(Pa533; Pa534)**

POINT FIVE
THE COURT ERRED IN NOT CONCLUDING THAT THE DEFENDANTS VIOLATED N.J. CONSTITUTION VIOLATION OF ARTICLE PARAGRAPHS 1, 5, 6, 7, 10, 18, 20 , 22 (Pa319; Pa533; P534; Pa469; Pa505; (Pa185-Pa189; Pa218, Pa309)

Article 1 para 1 of the New Jersey Constitution affords due process and equal protection rights to citizens. Lewis v Harris, 188 N.J. 415, 434-35 (2006) Article I of the New Jersey Constitution provides in part:

> A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the legislature. For the purposes of this paragraph, "victim of a crime" means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime

In examining a procedural due process claim, courts first assess whether a liberty or property interest has been interfered with by the government, and second, whether the procedures attendant upon that deprivation are constitutionally sufficient. Doe v. Poritz, 142 N.J. at 99 (citing Valmonte v. Bane, 18 E. 3d 992, 998, (2d. Cir. 1994) (quoting Kentuck v Dept. Of Corrections v. Thompson, 490 U.S.454, 460, (1989)).

Substantive due process "is reserved for the most egregious Governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend judicial notions of fairness and that are] offensive to human dignity. Rivkin v. Dover Township Rent Leveling Bd., 143 N.J. 352,366 (1996)"(citing Weimer v. Amen, 870 E. 2d 7400, 1405 (8th Cir. 1989). See also United Artists Theatre Circuit. Inc. v. Township of Warrington, PA, 316 F.3d 392, 399-400 (3d Cir. 2003).

Only the most egregious official conduct is conscience shocking. Eichenlaub v. Twp. Of Indiana, 385 F.3d 274, 285 (3d Cir. 2004). In Rochin, Justice Frankfurter equated substantive due process violations with government abuses that "are . . close to the rack and the screw to permit constitutional differentiation. " Rivkin, 143 N.J. at 366 (citing Rochin v. California, 342 U.S. 165 (1952).

The egregious beating and choking of the plaintiff by the police while he attended to his business for no logical reason is an abuse that is "close to the rack and the screw to permit constitutional differentiation." These acts constitute a deprivation that are constitutionally sufficient. Based on this plaintiff was denied of substantive due process.

Plaintiff became a victim of a crime by the criminal justice system of the Edison Police Department. Pepper v. Princeton, 77 NJ 55 (1978) allows a court to rectify Constitutional violations directly. The Court was allowed under Peper to declare that Plaintiff was improperly seized, arrested without probable cause and without due process. Plaintiff, as a victim of crime was not treated with fairness or respect by the justice system. Because this was not done, Plaintiff has a constitutional cause of action against the defendants under Pepper v. Princeton, 77 NJ 55 (1978).

The defendant police officers (upon information and belief) have stopped and searched other nonwhite persons throughout Edison utilizing the same reasoning that they saw someone looking suspicious (without actually observing a crime) and end up charging the generally nonwhite males with similar charges: possession, resisting arrest and interference with the police function.

The criminal defendant now plaintiff, also has a constitutional right to an Appeal. " State v. Bianco, 103 N.J. 383, 391(1986); State v. Molina, 187 N.J. 531 (2006).

Pursuant to Rule 3:21-5:

> The judgment shall be signed by the judge and entered by the clerk. A judgment of conviction shall set forth the plea, the verdict or findings, the adjudication and sentence, a statement of the reasons for such sentence, and a statement of credits received pursuant to R. 3:21-8. If the defendant is found not guilty or for any other reason is entitled to be discharged judgment shall be entered accordingly. The Criminal Division Manager shall forward a copy of the judgment forthwith to all parties and their counsel.

A judgment prepared by the clerk and signed by the judge provides “finality.” See R.3:21-5 (final judgment). State v. Pratts, 145 N.J. Super. 79, 93-94 (App. Div. 1975), aff'd o.b. 71 N.J. 399 (1976). Morrissey v. Brewer, 408 US 471 (1972) requires due process at all stages of a criminal matter. Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." Id. (internal citations omitted).

An appeal from a criminal conviction specifically requires a judgment order from which an appeal may be taken. A signed order of judgment starts the appellate process. The inability to have an invalid criminal conviction reversed is a grievous loss to a defendant that warranted procedural protections pursuant to Morrissey. Plaintiff has no due process within the meaning of Morrisey related to his criminal matter because he had no signed order from which to take an appeal. Though Plaintiff's Counsel filed timely filed his appeal with JEDS and attempted to file with both the Superior Court criminal as well as civil, both efforts were rejected, which has disallowed Plaintiff to perfect his appeal from the Highland Park Clerk's apparent failure to file the final judgment. (**Pa185-Pa189; Pa218, Pa309).** The highland park judge, the clerks, and administrative staff, by not rendering the decision as a judgement filed with the courts disenabled plaintiff Howard from effectuating the appeal of his criminal matter. **(Pa469; Pa505).** The Superior Court Judge finally dismissed the appeal after JEDS had already rejected it due to the lack of an Order. **(Pa319)**

Contrary to the arguments that plaintiff's appeal was dismissed because he did not have transcripts, an appeal cannot be taken from transcripts.

As a consequence of the actions of all defendants, plaintiff was deprived of procedural and substantive due process, equal protection and his rights under Article

1 para 1 of the New Jersey Constitution, and his rights under Paragraphs 1,5,7,8,9,10,18, 20,22.

Based on this, plaintiff was also entitled to declaratory and injunctive relief and erred in granting summary judgment to defendants. **(Pa533; P534)**

POINT SIX

THE COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM FOR RECKLESS AND INTENTIONAL INFLICTION OF EXTREME EMOTIONAL DISTRESS BECAUSE ALL ELEMENTS WERE MET

(Pa093; Pa471; Pa017; Pa533; Pa534)

A plaintiff may state a claim for intentional, infliction of severe emotional distress under New Jersey law, by showing that the defendant (1) acted intentionally or recklessly and (2) outrageously, and (3) proximately caused (4) severe distress. Buckley v. Trenton Saving Fund Soc., 111 N.J. 355, 366 (1988). Regarding the first element, the defendant "must intend both to do the act and to produce emotional distress." Id. Next, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id.

If the Court determines that the defendant's actions proximately caused the plaintiff's emotional distress, the plaintiff must then show the distress suffered was "so severe that no reasonable man could be expected to endure it." Buckley, 111 N.J. at 366-67. Defendants who have no knowledge of how it feels to be in plaintiff's

shoes state that the "demonstrated effect of the conduct of the police officers" does not allow plaintiff to establish a prima facie of either intentional or negligent infliction of emotional distress under state law."

Here, the police acted recklessly and outrageously by beating the Plaintiff for no explained reason, proximately causing him to fear for his life and to cry hysterically. **(Pa471).** Plaintiff was forced to seek medical and other help to try and assist him in not having the constant intrusive thoughts of the outrageous police beating. **(Pa017).** Plaintiff suffers from continuing the pain which prevents him from having peace and sleep. **(Pa093).** The defendants violated the plaintiff and have caused him to lose his enjoyment of life which is guaranteed to him under New Jersey Constitution, Article 1, para 1 and were not entitled to summary judgment. **(Pa093; Pa471; Pa017)**

Plaintiff does not need any psychological report to reflect the terror and dread that he endured by being assaulted and beaten by the notorious Edison police for no legitimate reason. **(Pa471).**

POINT SEVEN

THE COURT ERRED IN DISMISSING PLAINTIFF'S CAUSE OF ACTION FOR CLASS OF ONE ENDANGERMENT; RES IPSA LOQUITUR. (Pa022-Pa023; Pa533; Pa053; Pa534; Pa093-Pa096; Pa505; Pa469)

A class of one violation occurs when one has been (1) intentionally treated differently from others similarly situated (2) there is no rational basis for the difference in treatment, or that he was treated differently because of the Defendants' "totally illegitimate animus" toward him. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

Plaintiff made a cognizable **class**-of-**one** equal protection claim by showing that he had been intentionally treated differently from others similarly situated by the Township of Edison and there was no rational basis for the difference in treatment. **(Pa505; Pa469; Pa053; Pa093-Pa096).** Plaintiff, a young black man wearing a hoodie in the Township of Edison, was stopped by the police while transferring items from one car trunk to another. **(Pa022-Pa023).** Plaintiff was picked up from the ground then thrown to the ground again, beaten and choked by the Edison Police, warranting that he be treated in an Emergency room for injuries because he not give Amanda's car keys to the police who had no warrant to search her car. **(Pa053; Pa469; Pa093-Pa096)**

Plaintiff made a cognizable **class**-of-**one** equal protection claim by showing that he had been intentionally treated differently (without rational basis) from other similarly situated litigants by the Township of Edison and Highland Park wherein

he was not provided with an order from which he could appeal his conviction after he filed a Notice of claim against the Township of Edison. **(Pa505; Pa469)**

Defendants are also incorrect in contending to the court that plaintiff cannot make a res ipsa loquitor claim. Res ipsa loquitur is ordinarily impressed where the injury more probably than not has resulted from negligence of the defendant, Germann v. Matriss, 55 N.J. 193 (1970), and defendant was in exclusive control of the instrument. Magner v. Beth Israel Hospital, 120 N.J. Super. 529 (App. Div. 1972), certif. den. 62 N.J. 199 (1973); Rose v. Port of New York Authority, 61 N.J. 129 (1972). The doctrine has been expanded to include, as in the instant matter, multiple defendants, Jackson v. Magnavox Corp., 116 N.J. Super. 1, 17 (App. Div. 1971).

Res ipsa loquitur has also been expanded to embrace cases where the negligence caused was not the only or most probable theory in the case, but where the alternate theories of liability accounted for the only possible causes of injury. See Dierman v. Providence Hospital, 31 Cal.2d 290 (Sup. Ct. 1947); Burr v. Sherwin Williams Co., 258 P.2d 58 (Cal. Dist. App. 1953), rev'd 42 Cal.2d 682 (Sup. Ct. 1954). That is the situation in this case, because there are various theories under which the defendants in this case may be held liable. A jury may infer such negligence by the actions of these particular defendants.

Defendants were in the full control of defendant Edison police when they attached him and beat him, choked his and dislocated his lower jaw. **(Pa093-Pa096).** Defendants created a clear and present danger to plaintiff by their actions done under color of state law when he was under their full control and authority. Negligence in this case may be considered more of an alternative pleading, since the defendants acted with malice and intent in causing injuries to the plaintiff. Based on this, plaintiff made a cognizable claim for violations pursuant to Resp isa loquitur and his complaint should not have been dismissed. (**Pa533; Pa534)**

POINT EIGHT

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS INCLUDING OFFICERS MICHAEL KOHUT AND MICHAEL GEIST BECAUSE THE GRANT OF SUMMARY JUDGMENT WAS INCONSISTENT AND INAPPROPRIATE WITH THE STANDARDS ESTABLISHED FOR GRANTING SUCH RELIEF (. (Pa030; Pao031; Pa168; Pa453;Pa505; Pa507; P546; 1T40-1to 2; Pa022-Pa23; Pa303; Pa453; Pa471; 1T5-12 to 18; Pa078; Pa535; 1T42-6 to14; Pa053; Pa041; Pa488; Pa001; Pa507; Pa505; Pa053; Pa533; Pa534)

In considering a motion for summary judgment, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to

resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995).

When a party comes forth with competent evidence that creates a genuine issue of material fact that would warrant resolution in favor of the nonmoving party, summary judgment must be denied. Id. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. Rule 4:46-2 (c).

In reviewing a trial Court's grant of summary judgment, the Appellate Court uses the same standards of review as the trial court. Prudential Prop & Cas. Ins. Co. V. Boylan, 307 N.J. Super. 162, 167 (App. Div.) certif. denied, 154 N.J. 608 (1998). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill, supra. 142 NJ at 536. The court must also look at "all favorable inferences that may be deduced in a light favorable to the plaintiff and if reasonable minds may differ then the grant of summary judgment was not appropriate." See Id.

A party may defeat a motion for summary judgment by demonstrating that

the evidential materials relied upon by the moving party, considered in light of the applicable burden of proof, raise sufficient credibility issues "to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." D'Amato ex. rel. McPherson v. D'Amato, 305 N.J. Super. 109, 114 (1997).

A party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact. At the same time, the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 74 (1954).

Thus, it is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact, Judson 17 N.J. AT 74 (citing 6 Moore's Federal Practice, par. 56.15(3)). The absence of undisputed material facts must appear "palpably." All inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated, Templeton v. Borough of Glen Rock, 11 N.J. Super. 1, 4 (App. Div. 1950). And it is not to be concluded that palpably no genuine issue as to any material fact exists solely because the evidence opposing the claimed fact strikes the judge as being incredible. Judson 17 N.J at 75.

Pursuant to our laws, the moving party has the "burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact"

regarding the claims asserted. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954). The plaintiff, as the party opposing the motion for summary judgment, must be accorded all favorable inferences. Judson v. Peoples Bank & Trust Co. of Westfield, supra, 17 N.J. at 75. The Supreme Court also held that if exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Anderson v Liberty Lobby, 477 U.S. 242, 250 (1986). Moreover, the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 536 (1995).

Here, there were numerous material facts in dispute and contested and credibility issues that precluded the grant of summary judgment to the defendants. The evidence that the defendant Edison failed to have policies in place that led to the use of excessive force, false imprisonment and denial of plaintiff's substantive and procedural due process rights should have lead to judgment in the plaintiff's favor. In Upchurch, the Appellate Court affirmed denial of summary judgment in the plaintiff's favor because the City of Orange stated that it was unaware of the harassment against plaintiff. Pursuant to the Appellate division in ruling in plaintiff's favor, the failure to have policies was a **fatal flaw. (Pa546)**

At summary judgment in this matter, the trial judge dismissed Highland Park on one basis that it was not served with a notice of Tort claim. (**1T40-1to 2).** The Notice of claim dated June 24, 2022, clearly showed that Highland Park was served with a Notice of claim warranting judgment in plaintiff's favor. **(Pa505)**.

The case was replete with credibility issues that warranted that the matter be submitted to a jury. The Supreme Court has long held that issues of credibility are ordinarily for the trier of facts, and the judge does NOT function as a trier of fact in determining a motion for summary judgment. Judson v People's Bank, 17 NJ 67, 75 (1954).

From the moment that the trial judge read office Kohut's statement wherein he declared that he was in his patrol car but could somehow see the hole where the spare tire was kept under the floorboard from where he was seated, and that he that he needed Amanda's keys to determine whether she owned the car, the judge should have concluded that Officer Kohut was not a credible witness. **(Pa022).** From the moment the Judge read Officer Kohut's report wherein he states that he asked plaintiff for Amanda's car keys so that he could make sure that the vehicle belonged to Amanda, he should have known that Officer Kohut was not a credible person. **(Pa023).** The story about a key sticking out of each hand poking through each knuckle which could be used as a weapon sound completely concocted. **(Pa023).** The maxim 'falsus in uno falsus in omnibus, while not mandatory rule of evidence,

may be used as presumable inference as to the truthfulness of an individual. Capell v. Capell, 358 N.J. Super. 107, 111 (App. Div. 2003).

Additionally, the amount of force used along with credibility and *motive* and are determinations for the jury. The evidence was clearly in the plaintiff's favor regarding the alleged the two charges against the plaintiff.

NJSA 2C:29-2 (a)1 state as follows:

> Except as provided in paragraph (3), a person is guilty of a disorderly persons offense if he purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest.

Plaintiff could not reasonably be charged with resisting arrest when *he was never told* that he was under arrest. (**See Pa022-Pa23; See Pa303; Pa453; Pa471).** The allegations of resisting arrest require the Police to make a Defendant (victim) aware he is being placed under arrest and statement of the crime alleged.

NJSA **2C:29-2 (a)1 and** NJSA 2C 29:1a.

Pursuant to NJSA 2C 29:1a

> A person commits an offense if he purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act

Based on the statue, in order to "Obstruct" the defendant must engage in "flight, intimidation, force, violence, or physical interference or obstacle, or by means of

any independently unlawful act." "If the police are performing a law enforcement function in an appropriate manner, *i.e.,* not with an excessive use of force, then a citizen is obligated to comply with the directions of the police. State of New Jersey v. Camillo, 382 NJ Super 113 (2005). Under State of New Jersey v. Camillo, 382 NJ Super 113 (2005) a Defendant must have "obstructed" by means of "flight" (not attempted flight).

In State v. Perlstein, 206 N.J.Super. 246, 502 A.2d 81 (App.Div.1985) the appellate court affirmed a charge for obstruction because there was an independent unlawful act where by plaintiff refused to display her driver's license and insurance card. The law requires the display of these items. The narrative report in our case clearly states that the officer tried to handcuff plaintiff after he refused to hand over Amanda's keys to the police who had no warrant or consent at the time. **(Pa023**). Plaintiff had no duty to hand over keys if he was not told that he was under arrest or that the police had a warrant or right to search. Plaintiff had no duty to hand over the keys after he was unlawfully beaten without probable cause.

The crime alleged certainly could not have been 2C:35-10a(4) since CDS was not found until the car was later searched and the police had no reason to believe that CDS existed until they searched the car unlawfully, even though they later obtained consent after they had already conducted a warrantless search. The plaintiff must have obstructed the investigation of plaintiff's own unlawful act. Thus, the

crime being obstructed could not have been the crime or offense of "Obstruction" itself. Thus, there was no indication that the officers had probable cause related to the presence of CDS.

The use of force forms signed by both Officers Geist and Kohut describes the "type of incident" as a "suspicious person" incident. **(Pa030; Pao031).** The police cannot develop probable cause because a person looks "suspicious" **(Pa30).** Based on this all-reasonable inference should have been in the plaintiff's favor as the party opposing summary judgment. The camcorder videos that were turned over to Howard's Counsel were incomplete and did not fully show who did what to whom. "The defendants knew that the body cam and dash cam were necessary for plaintiff's case. The scenes showing force admittedly stated by police in *video* and the choke hold by which many black men have died at the arms of the police were not revealed." (**1T5-12 to 18; Pa078)**

The Highland Park Judge refused to grant the Plaintiff's Counsel request for an Order dismissing the charges due to the the unlawful destruction of the recordings which the city was put on Notice to save and not destroy. Because the amount of force utilized is hidden by not turning over or cutting out of the video. This also requires a jury determination pursuant to Judson.

There was other evidence from which the Court could infer that the charges against the plaintiff were invalid. Here, police office Kohut's report clearly states

that his second reason for wanting the keys was to check the bag to determine if the bag contained proceeds from burglary after he had already stated that the bag was UNDER the floor board "where any knife or gun that were the proceeds of a robbery" [that could be used to HARM HIM], were in the bag, under the floor board out of the plaintiff's reach. **(Pa022).**

Officer Kohut knew that the scope of the search without a warrant must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible." Warden v. Hayden, 387 U. S. 294, 310 (1967). Officer Kohut knew that the scope of the investigatory detention must be "the least intrusive investigatory technique reasonably available to verify or dispel [the officer's] suspicion in the shortest period of time possible. State v. Davis, 104 N.J. at 504; See also Minnesota v. Dickerson, 508 U.S. 366 (1993). Officer Kohut knew that the purpose of a search "is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." Adams v. Williams, supra, 407 U.S. at 146. Thus, officer Kohut clearly was not seeking to conduct a limited search that was confined to an intrusion designed to discover weapons that could be used to assault him as required under Terry. Either way, this created a dispute that warranted that this matter be sent to a jury, or that summary judgment be awarded to the plaintiff. (See **Pa022)**

Based on all this, the court should have concluded that Officer Kohut was either lying about his interaction with the plaintiff, or it was his specific intent to violate the plaintiff's rights under the New Jersey Constitution and the 4th Amendment, as well as Amanda's rights, with wanton disregard, warranting that plaintiff's matter be sent to a jury. Either way, this created a dispute that warranted that this matter be sent to a jury, or that summary judgment be awarded to the plaintiff. The court also improperly denied consolidation of plaintiff's two cases as the law supporting consolidation was in the plaintiff's favor. (**Pa535; 1T42-6 to14).**

Pursuant to our Courts "the entire controversy doctrine embodies the principle that the adjudication of a legal controversy should occur in one litigation in only one court. Accordingly, all parties involved in a litigation should at the very least be present in that proceeding with all of their claims and defenses that are related to the underlying controversy." Cogdell v Hospital Ctr., 116 NJ 7, 15 (1989); Rule 4:30A.

Here, both complaints arose from the same matter and contained the same defendants and or witnesses which triggered the entire controversary doctrine. (**See Pa053; Pa041; Pa488; Pa001**)

On denying the motion to consolidate, the Court stated as follows:

> With respect to plaintiff's motion to consolidate, that will be denied at this point there appears to be some question as to when the plaintiff had access to discovery. As to the issue that he now claims is newly discovered, that is best to be reviewed in a **separate proceeding.** As to whether or not that case will

> go forward or not, that's not for me to say at this point, other than to say the motion to consolidate is denied.

(1T42-6 to14)

Based on the facts that the parties/individuals belonged to both cases and because there was no **separate proceeding *afforded*** by the Court whereby there was an opportunity to review the discovery, consolidation should have been granted.

Summary Judgment should have been granted to the plaintiff on the issue of Malicious prosecution. A malicious prosecution action arising out of a criminal prosecution may be alleged by showing that; (1) that the criminal action was instituted by the defendant against the plaintiff, (2) that it was actuated by malice, (3) that there was an absence of probable cause for the proceeding, and (4) that it was terminated favorably to the plaintiff. Lind v. Schmid, 67 N.J. 255, 262 (1975); Muller Fuel Oil Co. v. Ins. Co. of N. Am., 95 N. J. Super. 564, (1967).

Malice is defined as reckless disregard of the law or of a person's legal rights. Black's Law Dictionary p. 776 (2000 Ed). A Malicious Act is an act without just cause or excuse. Id. Here the criminal action was initiated against plaintiff based on his race. There was no probable cause for the stop, the brutal beating or the arrest or any of the false charges against plaintiff. The CDS charge was dismissed in plaintiff's favor. **(Pa412)** There was no legal basis for a charge of "Obstruction" without an independent underlying act. Moreover, the police did not show that plaintiff engaged in actual flight to satisfy the Obstruction. There was no legal basis

for a charge of resisting arrest unless plaintiff was told that he was under arrest. Moreover, because there was no signed order of conviction from which plaintiff could have appealed within the requisite time frame, then arguably the outcome was in plaintiff's favor.

At the police station the defendants displayed further malice by falsely accusing -plaintiff of being under the influence. Hate and malice are the same. Hate crimes are usually committed against others based on factors such race and religion. In McQurter v. City of Atlanta, Ga., 572 F.Supp. 1401, 1414 (N.D.Ga.1983), the court held that use of chokehold was "excessive and malicious" when used after victim was "manacled" and "effectively restrained" Here plaintiff was already on the ground when the police choked him and dislocated his jaw.

Additionally, all reasonable inference should have been in plaintiff's favor that plaintiff was denied of his due process right to appeal his criminal conviction by the defendants. The record demonstrates that the certified disposition record was certified in 2022. The original appeal was taken to JEDS on November 16, 2021. There is no record anywhere demonstrating that any disposition or order entering judgment against Howard was sent anywhere as a result of examining the entire file turned over to Edison, which was subpoenaed and made a record in these proceedings. **(Pa505).** The undated order bearing what purports to be the Judge Herman's signature and no defendant signature on the defendant's signature line

was never before produced until 2023 attached to defense counsel's motion for summary judgment. (**Pa168**). Another unsigned undated Order finding plaintiff guilty was also attached for the Court's review. **(Pa507)** This is absolute proof that there was no forwarding of the record to the appellate review court within 20 days of the receipt by Edison of the notice of appeal as required by rules of court.

Rule 3:23-4(a) states that upon the filing of the notice of appeal, the clerk of the court below shall forthwith deliver to the criminal division manager's office the complaint, the judgment of conviction, the exhibits retained by the clerk, and a transcript of the entire docket in the action, and the criminal division manager's office shall deliver copies thereof to the prosecuting attorney on request.

Rule 3:23-7 requires "execution of the judgment" by the municipal court from which the appeal was taken. Rule 3:24(c) states in relevant part that Appeals pursuant to this rule shall be taken within 20 days after the entry of such order by filing with the Superior Court, Law Division in the county of venue a notice of motion for leave to appeal under paragraph (a) or the notice of appeal under paragraph (b).

There was no such order. Thus procedurally, the appeal was not yet ripe.

No record anywhere demonstrates there was never an order or judgment sent to the criminal case management office in the county. Such explains the extreme frustration of undersigned counsel when he was told by the staff of JEDS

that there was no record. Most importantly is the fact that neither municipal court personnel ever turned over to Howard or his attorney a copy of the signed order entering judgment which is the sine qua non of being able to appeal.

The evidence of defendants' violation of plaintiff's due process rights relayed to his inability to Appeal his record of conviction was so lop sided that summary judgment should have been granted to the plaintiff on this issue pursuant to Brill.

CONCLUSION

Based on all the above, the Trial Court's decision awarding summary judgment to the defendants and denying consolidation should be reversed.

/s/ Cecile D. Portilla
CECILE D. PORTILLA, ESQUIRE

Dated: February 6, 2024

TREMAYNE HOWARD, Plaintiff, v. TOWNSHIP OF EDISON, BOROUGH OF HIGHLAND PARK, OFFICER MICHAEL KOHUT,OFFICER MICHAEL GEIST, HEAD DOE AND JOHN DOES 1-10, JOHN DOES 1-10 (DOES IDENTITIES UNKNOWN), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000836-23 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY DOCKET NO.: MID-L-765-22 SAT BELOW: HON. ALBERTO RIVAS, J.S.C.

BRIEF AND APPENDIX OF DEFENDANT/RESPONDENT BOROUGH OF HIGHLAND PARK

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PRELIMINARY STATEMENT

Plaintiff, Tremayne Howard, filed a civil complaint in the Superior Court of New Jersey against, inter alia, Defendants Township of Edison ("Edison"), Edison Police Officers Michael Geist and Michael Kohut and the Borough of Highland Park (improperly pled as "Township of Highland Park," and sometimes referred to herein as "Highland Park" or "the Borough") following his February 20, 2020, arrest in Edison by Defendants Geist and Kohut. Plaintiff's Complaint alleged that he was deprived of constitutional rights. The headings of the various counts of Plaintiff's complaint were:

> Count I: N.J. Constitution Violations of Article I, Paragraphs 1, 6, 7, 10, 18, 20, 22
>
> Count II: Violation of N.J.S.A. 10:6-2(c)
>
> Count III: Violation of N.J.S.A. 10:5-4, 12(d)(e)(f), N.J.S.A. 10:1-2, Place of Public Accommodations
>
> Count IV: Wrongful Arrest, False Imprisonment, Malicious Prosecution, Assault and Battery, Excessive Force
>
> Count V: Reckless and Intentional Infliction of Extreme Emotional Distress
>
> Count VI: Class of One Endangerment; Re Sipsa [sic] Loquitur

The only count that mentioned Highland Park was Count I (New Jersey Constitution), wherein Plaintiff stated:

> 7. THE HIGHLAND PARK JUDGE and clerks and administrative staff, by not rendering the decision as a judgement filed with the courts

> has disenabled plaintiff HOWARD from effectuating his appeal, though Plaintiff's Counsel filed timely with JEDS AND ATTEMPTED to file with both the Superior Court criminal as well as civil which both efforts were rejected, which has disallowed Plaintiff to perfect his appeal from the Highland Park Judge's apparent failure to file the final judgment.
>
> 8. As a consequence of Defendant's actions, plaintiff has been deprived of procedural, substantive due process, equal protection, the right to a fair trial by an impartial entity in accordance with MORRISSEY v. BREWER, 408 US 471 (1972). (Capitalizations in the original)

Plaintiff's brief on this appeal, however, appears to suggest that Counts II (New Jersey Civil Rights Act), III (New Jersey Law Against Discrimination) and VI (Class of One-Equal Protection) also assert claims against Highland Park.

Stated simply, the allegations in the Complaint regarding Highland Park were patently and demonstrably false as demonstrated by the unrefuted documents and certifications submitted in support of Highland Park's summary judgment motion. Allegations in Plaintiff's appellate brief are similarly patently and demonstrably false. For example, despite claims to the contrary on both Plaintiff's opposition to summary judgment and in Plaintiff's appellate brief, Plaintiff's municipal appeal, which was accepted and filed by the Criminal Division out of time, was dismissed, not for lack of any judgment of conviction or wrongdoing on the part of the Defendant Borough or its Municipal Court Judge, or court staff, but because Plaintiff failed to either order transcripts of the municipal court proceedings or to file a timely, complete indigency application as per the instruction of the Court. In addition to the

basic defect in Plaintiff case, and in his appeal, Plaintiff's claims against Highland Park fail to state a claim and/or would be barred, as hereinafter set forth, on numerous additional grounds. As to most of Plaintiff's claims, they were directed to the Township of Edison, where the arrest took place, and to the Edison police officers who made the arrest. To the extent that these claims could possibly be construed to apply to Highland Park, they are subject to various immunities and defenses, as set forth below.

If should be noted that Plaintiff's briefing style makes it difficult to separate out the arguments made against Edison and its police officers from those made against Highland Park. It appears that Points Four, Five, Seven and Eight of the brief attempt to set out allegations of error relating to Highland Park, and that Points One, Two, Three and Six do not.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

Plaintiff's complaint was filed on February 14, 2022 (Pa1). The answer of Defendant Borough of Highland Park was filed on October 17, 2022 (Da1). Discovery ensued. On August 11, 2023, Defendant Borough of Highland Park filed a motion for summary judgment of dismissal, with prejudice (Pa137). The motion was opposed (Pa469). On September 26, 2023, Plaintiff filed what was called a "Cross Notice of Motion to Consolidate" the matter with another case filed by Plaintiff on September 26, 2023, against some of the same defendants, and making

many of the same claims made in the case which is the subject of this appeal (Pa485). Oral argument was held on October 6, 2023, before Hon. Alberto Rivas, J.S.C. On that date, Judge Rivas entered orders denying Plaintiff's cross motion to consolidate[1] and granting Highland Park's motion for summary judgment, dismissing Plaintiff's Complaint, with prejudice (Pa533, 534, 535).

COUNTERSTATEMENT OF FACTS

Most of Plaintiff's Statement of Facts pertains to his interactions with the Edison police officer defendants. Only those facts germane to Plaintiff's claims against Highland Park are addressed here.

On February 20, 2020, Plaintiff was stopped and arrested by Edison Police Officers Michael Kohut and Michael Geist in the Township of Edison. (Pa1, ¶ 5). Plaintiff was charged in Complaint-Summons No. 1205-S-2020-00259 by Edison Police Officer Geist with possession of a controlled dangerous substance CDS (Marijuana), obstructing the administration of law, and resisting arrest, in violation of N.J.S.A. 2C:35-10A(4), 2C:29-1A and 2C:29-2A(1), respectively. (Pa1,

[1] Although Plaintiff attached two orders dated October 6, 2023, denying Plaintiff motion to consolidate the instant case with Howard v. Township of Edison, et al, Docket No. MID-L-5427-23, to his Notice of Appeal and Case Information Statement, Plaintiff's brief contains no argument concerning the cross motion to consolidate. Issues not briefed are considered abandoned or waived. Gormley v. Wood-El, 218 N.J. 72, 95, n. 8 (2014), W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 459 (App.Div.2008); Pressler & Verniero, Current N.J. Court Rules, comment 5, R. 2:6-2. We have not, accordingly, addressed consolidation in this brief.

Attachment A.) He was also charged by Edison Police Officer Kohut in Complaint No. 1250-S-2020-000796 with possession of CDS (Methamphetamine), in violation of N.J.S.A. 2C:35-10A (Pa1). The criminal charges against Plaintiff were downgraded to disorderly persons charges. (Pa1, ¶ 18).

The pending charges against Plaintiff were transferred from the Municipal Court of the Township of Edison to the Municipal Court of the Borough of Highland Park due to a conflict. (Pa322, ¶ 15). The case was tried virtually in the Highland Park Municipal Court over the course of several trial days, June 23, 2021, July 20, 2021, September 22, 2021, and October 27, 2021. (Pa322-335). On October 27, 2021, after trial, Hon. Edward Herman, Judge of the Highland Park Municipal Court, found Plaintiff guilty of violating N.J.S.A. 2C:29-1(a) and 2C:29-2(a)(1). (Pa151, T3:3, 6:4). On each of the two counts, Plaintiff was fined three hundred dollars ($300.00), thirty-three dollars ($33.00) in costs, fifty dollars ($50.00) for fees for Violent Crimes Compensation Board and seventy-five dollars ($75.00) for safe neighborhoods. (Pa151, T9:2, 9:9).

Plaintiff was informed by Judge Hermann of his right to appeal and the method of doing so. (Pa151, T9:16, 10:9). The Highland Park Municipal Court Clerk/Court Administrator advised those present on the record that the case would be delivered back to Edison (Pa151, T12:1, 13:1). Judge Hermann also stated on the record that he had signed “the actual disposition page” and said, “I’m sure Edison

can get you a certified copy of the disposition upon your request." (Pa151, T13:3, 13:16).

On October 28, 2021, the next day, Tracey Horan, Highland Park's Certified Municipal Court Administrator, returned the entire file concerning the municipal court matter to the Edison Municipal Court. (Pa322, ¶ 18.) Returning the entire file to the municipal court of the originating municipality is in accordance with recognized and approved court procedure and is the normal process when municipal court complaints are transferred from an originating municipal court to a receiving municipal court. (Pa322, ¶ 11-13).

The Edison Municipal Court file was subpoenaed by Highland Park's attorney during discovery in the case below. During the discovery period (not, as has been repeatedly and falsely stated in Plaintiff's brief on this appeal and below, at the time of summary judgment) on May 2, 2023, Plaintiff was provided by Highland Park's counsel with the entire Edison Municipal Court file (Da19, ¶¶ 5-7, Da24-33). That file shows that Judge Hermann entered an Order permitting time payments of the fines and penalties (Pa168). The same file of the Edison Municipal Court also confirms that Judge Hermann entered the dispositions of the charges against Plaintiff, showing that a CDS charge, N.J.S.A. 2C:35-10A (4), was dismissed, and that Plaintiff was found guilty on N.J.S.A. 2C:29-1A and N.J.S.A. 2C:29-2A (1) (Pa170). The file also shows that the reason the case had been transferred from the

Edison Township Municipal Court was that the Defendant (Plaintiff in the instant case) filed a Tort Claim notice against Edison Township for excessive force and false arrest (Pa166).

On December 14, 2021, Plaintiff, through his attorney, Eldridge Hawkins, Esq., filed a notice of appeal of his municipal court convictions, a notice of motion to permit filing of the notice of appeal out of time, and a notice of motion for waiver of transcript fees and costs, in the Superior Court of New Jersey, Law Division, Middlesex County (Pa185). By Order entered and filed on February 4, 2022, the municipal appeal, which had been filed in the (wrong) Civil Division, was transferred to the Criminal Division. (Pa312).

By letter dated March 17, 2022, from the Criminal Division Manager's Office, Plaintiff's counsel, Eldridge Hawkins, Esq., was advised that Judge Jones (Hon. Robert J. Jones, J.S.C.) granted Plaintiff's application to accept the previously filed notice of municipal appeal out of time. In the same letter, however, Plaintiff's attorney was advised that the application for indigency was denied and that additional documents were required to complete the request (Pa314).

By email dated April 12, 2022, Mr. Hawkins was again advised by the court staff that the additional information requested to consider the application for indigency had not been received, that the application was already out of time and

that the appeal was not considered filed until the indigency request was decided by Judge Jones and/or Plaintiff decided to pay the fee and order the transcripts. (Pa317). On April 2, 2022, Hon. Robert J. Jones, J.S.C., entered an Order dismissing Defendant's (Plaintiff in the instant case) municipal appeal. The statement of reasons in the order said:

> The Court's scheduling Order for March 9, 2022, required Howard to file one copy of all municipal-court transcripts with this Court by 4/08/22. The Order stated that if the transcript was not filed with the Court by this date, or an extension not obtained from this Court, the matter would be dismissed without further notice. As of 4/22/2022, Howard has not filed a copy of the municipal court transcripts with the court or requested an extension. Therefore, his appeal is dismissed. (Pa319).

A letter dated April 22, 2022, enclosing Judge Jones' April 22, 2022, Order was sent to the Edison Municipal Court and a copy was sent to Plaintiff's counsel Eldridge T. Hawkins, Esq. (Pa321).

Plaintiff's complaint stated, "Plantiff's (sic) counsel attempted to file a timely appeal, but same were (sic) rejected by the Criminal Division of the Superior Court after multiple attempts." (Pa1, ¶ 58c). The complaint further stated that his appeal was rejected and that he was "disallowed" from perfecting his appeal. (Pa1, Count One, ¶ 7). Both statements are false as the appeal was accepted as filed and the appeal was <u>not</u> rejected due to any lack of a written disposition. (Pa314-321). Plaintiff's filed appeal was dismissed, not for lack of any judgment of conviction (which was,

in fact, in the Edison Municipal Court file), but because Plaintiff failed to either order transcripts or file a complete indigency application. (Id.)

It must be noted that all statements of Plaintiff and his attorney contained in the motion papers below, and repeated in Plaintiff's brief (Pb2, Pb6-7), to the effect that Plaintiff and his attorney went to the Edison Municipal Court, spoke to unnamed "staff," and were told that "there was no such signed order from Judge Herman," are classic inadmissible hearsay as against Highland Park, could not be considered by the Court below on the summary judgment motion, and cannot be considered by the Court on this appeal. Highland Park's evidence, unrefuted by any evidence admissible on the motion, clearly showed that a judgment was entered in writing and was contained in the Edison Municipal Court file.

STANDARD OF REVIEW

The appellate court employs the same standard as the trial court in reviewing a grant of a summary judgment motion. Prudential Property & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998), Brill v. Guardian Life Ins. Co., 142 N.J. 520, 536-527 (1995), Polzo v. County of Essex, 209 N.J. 51, 56, n. 1 (2012), Lee v. Brown, 232 N.J 114, 126 (2018). Conclusions of law are reviewed de novo, without deference given to the motion judge. Calco Hotel Management Group, Inc. v. Gike, 420 N.J. Super. 495, 503, (App. Div. 2011), Balsamides v. Protameen Chemicals, 160 N.J. 352, 372 (1999).

Prior to 1995, summary judgment motions in New Jersey under *R*. 4:46-1, et seq., were governed by the standard expressed in Judson v. Peoples Bank & Trust Company of Westfield, 17 N.J. 67 (1954). In Judson, the Court stated that the moving party has "the burden of clearly showing the absence of a genuine issue of material fact." This required the moving party to "exclude any reasonable doubt as to the existence of any genuine issue of material fact[.]" Id. at 74. The standard was refined by the Supreme Court's decision in Brill v. Guardian Life Ins. Co., supra, 142 N.J. 520. Brill shifted the standard for summary judgment motions somewhat in that the focus has moved from the moving party's burden to show the absence of a genuine issue of material fact, to the opposing party's burden to show the existence of a genuine issue of material fact which would preclude summary judgment. Id. at 529. The summary judgment procedure, as explained in Judson, "is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits ... clearly shows not to present any genuine issue of material fact requiring disposition at trial." Judson, 17 N.J. at 74.

R. 4:46-2(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." When viewing the competent evidential material presented to determine

whether or not a genuine issue of material fact exists, the motion judge views the evidence in the light most favorable to the non-moving party, in consideration of the applicable evidentiary standard, to determine if the evidence presented is sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. Brill, 142 N.J. at 523.

The non-moving party has the burden of presenting evidence to demonstrate the existence of a genuine issue of material fact. Id. at 529. The non-moving party, however, has to do more to defeat a motion for summary judgment than merely point to any fact in dispute. Id. "Where the party opposing summary judgment points only to disputed issues of fact that are 'of an insubstantial nature,' the proper disposition is summary judgment." Id. quoting Judson, 17 N.J. at 75. A motion for summary judgment cannot be defeated if the non-moving party does not "offer any concrete evidence from which a reasonable juror could return a verdict in his favor." Housel for Housel v. Theodoridis, 314 N.J. Super. 597, 604(App. Div. 1998) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)). "Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." United States Pipe & Foundry Co. v. American Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961). Summary judgment is appropriate where there is no genuine issue of material fact,

and the moving party is entitled to a judgment as a matter of law. Lee v. Brown, supra, 232 N.J., 126.

ARGUMENT

POINT I: PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED ON SUMMARY JUDGMENT BECAUSE THE FACTUAL UNDERPINNING OF PLAINTIFF'S COMPLAINT, TO THE EFFECT THAT HE WAS UNABLE TO APPEAL, WAS PATENTLY FALSE.

Plaintiff's claim against the Borough of Highland Park, as set forth in the "FACTS" and in Count One of the Complaint, is that:

> 58a. PLANTIFF was tried over multiple days in Highland PARK with the Judge denying all substantive motions brought by HOWARD'S Counsel and finding HOWARD GUILTY of possible possession of that CDS pill of resisting arrest and interfering with the police in their official functions (trying to protect himself from his perceived SURE ENOUGH COMING BUT WHOOPING).
>
> 58b. DEFENDANT NEVER RECEIVED A COPY OF THE JUDGES CONVICTION WHICH ALSO MADE IT VERY DIFFICULT TO APPEAL. Exactly from whatever the court's decision was as Plaintiff was filing his appeal in forma pauperis because he could not afford to purchase the transcripts.
>
> 58c. PLANTIFF'S COUNSEL ATTEMPTED TO FILE A TIMELY APPEAL, BUT same were rejected by the CRIMINAL division of the SUPERIOR COURT after multiple attempts.
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> 58d. PLANTIFFS FILING WITH JEDS WAS ACCEPTED, but that is not the NJ SUPERIOR COURT where the municipal appeals were accepted.

> 58e. PLANTIFF OUT OF DESPERATION EVEN FILED WITH THE MUNICIPAL APPEAL WITH THE CIVIL DIVISION WHICH ALSO REJECTED SAME
>
> 58f. APPARENTLY, the Highland Park JUDGE OR CLERK, never forwarded the judge's guilty findings to Mr. HOWARD OR either EDISON TOWNSHIP OR THE SUPERIOR COURT AND THUSLY THERE WAS NO RECORD FROM WHICH THE UNDERSIGNED ATTORNEY FOR APPELLANT HOWARD COULD TAKE HIS APPEAL.
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> 7. THE HIGHLAND PARK JUDGE and clerks and administrative staff, by not rendering the decision as a judgement filed with the courts has disenabled plaintiff HOWARD from effectuating his appeal, though Plaintiff's Counsel filed timely with JEDS AND ATTEMPTED to file with both the Superior Court criminal as well as civil which both efforts were rejected, which has disallowed Plaintiff to perfect his appeal from the Highland Park Judge's apparent failure to file the final judgment. (Capitalizations in the original)

Plaintiff's Statement of Facts on this appeal repeats these same allegations. These alleged facts are, however, virtually all false, as demonstrated by indisputable Court records and by undisputed facts which were not refuted by any competent evidence. Plaintiff continues to repeat the same false statements in his appeal, regardless of having been confronted with the true facts on multiple occasions.

A review of records of the Civil and Criminal Divisions of the Superior Court, included in the Edison Municipal Court file (Pa179-187, Pa309, 314-321), clearly shows that Plaintiff's municipal appeal, which had been filed by Howard's attorney in the (wrong) Civil Division, was transferred to the Criminal Division. Further, by letter dated March 17, 2022, from the Criminal Division Manager's Office,

Plaintiff's counsel, Eldridge Hawkins, Esq., was advised that Judge Jones (Hon. Robert J. Jones, J.S.C.) granted Plaintiff's application to accept the previously filed notice of municipal appeal out of time. (Pa314-318). In the same letter, however, Plaintiff's attorney was advised that the application for indigency was denied and that additional documents were required to complete the request (Pa314). By email dated April 12, 2022, Mr. Hawkins was again advised by the court staff that the additional information requested to consider the application for indigency had not been received, that the application was already out of time and that the appeal was not considered filed until the indigency request was decided by Judge Jones and/or Plaintiff decided to pay the fee and order the transcripts. (Pa317).

On April 2, 2022, Hon. Robert J. Jones, J.S.C., entered an Order dismissing Defendant's (Plaintiff in the instant case) appeal. The statement of reasons recited:

> The Court's scheduling Order for March 9, 2022, required Howard to file one copy of all municipal-court transcripts with this Court by 4/08/22. The Order stated that if the transcript was not filed with the Court by this date, or an extension not obtained from this Court, the matter would be dismissed without further notice. As of 4/22/2022, Howard has not filed a copy of the municipal court transcripts with the court or requested an extension. Therefore, his appeal is dismissed. (Pa319)

The complaint is replete with false statements regarding Plaintiff's municipal appeal. Plaintiff's complaint alleges that his municipal appeal was rejected by the Criminal Division of the Superior Court. It was not! It was filed by the Criminal

Division. The Complaint states that the Civil Division rejected the appeal. It did not! It transferred the appeal to the Criminal Division. The Complaint states that Plaintiff was "disenabled" from "effectuating" his appeal, because of "the Highland Park Judge's apparent failure to file the final judgment." He was not! The appeal was filed but was dismissed for failure to file transcripts or to request an extension.

Since the entire basis of Plaintiff's claim against Highland Park is that he could not appeal because no judgment of conviction was entered, and because Highland Park has indisputably shown that Plaintiff did, in fact appeal, and his appeal was filed (and dismissed for reasons unrelated to any judgment of conviction or lack thereof), Plaintiff's claim against this Defendant failed and was properly dismissed.

Moreover, Plaintiff's claim that there was no judgment of conviction in the Edison Municipal Court file cannot be considered by the Court. Plaintiff's proofs in this regard consist solely of Plaintiff's statement about the alleged statement of unnamed Edison Court "staff" that "there was no such signed order from Judge Herman" (Pb2, Pb6-7). That statement is clearly inadmissible hearsay as to the Borough. It is clearly hearsay as to Highland Park under N.J.R.E. 803 and does not

fall under any exception in N.J.R.E. 803. Additionally, Plaintiff apparently failed to make a formal, proper request to the Edison Municipal Court for documents.[2]

Plaintiff makes these claims about being unable to appeal in Points Four, Five, Seven and Eight of his brief. In Point Four, New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1, et seq., Public Accommodations, Plaintiff asserts that he could not appeal his conviction because R. 3:23-4(a), R. 3:23-7, and/or R. 3:24 required him to attach a copy of the judgment of conviction to his municipal appeal. (Pa27-28) All of those claims are incorrect as there is no such requirement in any of those Rules.[3] Plaintiff makes the same claim in Point Five (N.J. Constitution-Procedural Due Process and Equal Protection)[4] (Pb31-32). Plaintiff states, "An appeal from a criminal conviction specifically requires a judgment order from which an appeal may be taken" (Pb32). That may be the case, pursuant to Part II of the Court Rules, pertaining to appeals from criminal convictions. Plaintiff's appeal, however, was from a disorderly persons conviction in a court of limited jurisdiction governed by R. 3:23, and a judgment of conviction was not required to be included in the notice of appeal. Plaintiff makes similar claims in Point Seven (Class of One

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[2] A proper records request is found at: Chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.njcourts.gov/sites/default/files/forms/10200_records_req.pdf

[3] R. 3:24 requires attaching the order appealed from for an interlocutory appeal from a court of limited jurisdiction.

[4] Procedural due process and procedural equal protection claims are not cognizable under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2.

Equal Protection) (Pb35-36) and Point Eight (again, Procedural Due Process) (Pb48-50).

At the risk of being unduly repetitious, Plaintiff's appeal was dismissed after it was accepted by the Court as filed because Plaintiff did not file transcripts or a proper indigency application or an application for an extension to do so. (Pa319-321). As to the NJLAD Public Accommodations claim and the Class of One-Equal Protection claim, putting aside the lack of a factual basis in that Plaintiff cannot show either that there was no judgment of conviction entered or that he needed one to appeal, Plaintiff has failed to produce any evidence whatsoever that he was treated differently than anyone else. Both the NJLAD claim, and the Equal Protection claim would require some proof of differential treatment, which proof is wholly lacking in this case.

A public accommodations claim requires proof of differential treatment. A Plaintiff is required to show that he was denied "accommodations, advantages, facilities or privileges … on account of race." Ptaszynski v. Uwaneme, 371 N.J. Super 333, (App Div 2004), citing N.J.S.A. 10:5-12f(1). Similarly, an equal protection claim requires evidence of differential treatment of persons similarly situated. Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295 (App. Div. 2000). Plaintiff has produced no evidence that he was treated differently because of race or,

in fact, that he was treated differently at all. Accordingly, both of those claims were properly dismissed on Summary Judgment.

POINT II. DEFENDANT HIGHLAND PARK WAS PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE UNDISPUTABLE FACTS SHOW THAT THE JUDGE OF THE HIGHLAND PARK MUNICIPAL COURT ENTERED A JUDGMENT OF CONVICTION AND THE COURT ADMINISTRATOR OF THE HIGHLAND PARK MUNICIPAL COURT RETURNED THE COURT FILE TO THE EDISON MUNICIPAL COURT, WHERE THE CASE ORIGINATED.

Here, Plaintiff continues to make numerous false claims concerning the Municipal Court proceedings that took place before the Highland Park Municipal Court, the return of the case file to Edison Municipal Court following completion of the trial before the Highland Park Municipal Court, and the filing of and failed perfection of Plaintiff's appeal. In the Complaint, Plaintiff alleged the following:

> 19. Plaintiff was required to make several general appearances before the downgraded Court before the Judge entered dismissal of certain charges (possession of marijuana) charges against Plaintiff, and same is favorable result for Plaintiff. The trial before the Highland Park judge resulted in guilty findings in other charges that were brought against Plaintiff, BUT THE GUILTY FINDINGS WERE NOT TURNED OVER TO THE DEFENDANT OR HIS ATTORNEY AS IS THE usual custom so the found guilty party has a record of from what he is appealing. Notwithstanding, Plaintiff's Counsel attempted to file appeals in three different jurisdictions: JEDS; SUPERIOR COURT CRIMINAL DIVISION WHICH REJECTED SAID APPEAL WITH INDICATION THAT THEREWAS NO RECORD OF CONVICTION; AND SUPERIOR COURT CIVIL, WHICH SHORTLY AFTER RECEIVNG SAID PAPERWOK DISMISSED SAME WITH INDICATION THAT CIVIL WAS NOT THE PROPER DIVISON.

20. Thus, Plaintiff was maliciously and wrongfully prosecuted. AND NOT ENABLED TO APPEAL BY THE HIGHLAND PARK TOWNSHIP OFFICIALS WHICH APPARENTLY NEVER FILED THE PAPERS OF CONVICTION AND NEVER PROVIDED COPIES OF SAME TO THEN DEFENDANT HOWARD. SAME VIOLATED PLAINTIFF'S BASIC DUE PROCESS RIGHTS TO APPEAL AND UPON INFORMATION AND BELIEF THE SUPRME COURT'S DIRECTIVES TO ITS MUNICIPAL COURT JUDGES to physically give the conviction paperwork to the party before the court.

21. The Highland Park Municipal Court employees had a duty to turn over the written findings and sentence to Howard and they failed in that duty, causing plaintiff harm and deprivation of constitutional due process.

22. The Highland Park court staff, either negligently, recklessly, or purposefully and intentionally failed in its procedural duty to provide the party convicted of the documentary proof from which it could take the appeal and know the details of the conviction and penalty.

58a. PLAINTIFF was tried over multiple days in Highland Park with the Judge denying all substantive motions brought by HOWARD'S Counsel and finding HOWARD GUILTY of possible possession of that CDS pill of resisting arrest and interfering with the police in their official functions (trying to protect himself from his perceived SURE ENOUGH COMING BUT WHOOPING).

58b. DEFENDANT NEVER RECEIVED A COPY OF THE JUDGES CONVICTION WHICH ALSO MADE IT VERY DIFFICULT TO APPEAL. Exactly from whatever the court's decision was as Plaintiff was filing his appeal in forma pauperis because he could not afford to purchase the transcript.

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> 58e. PLAINTIFF OUT OF DEPERATION EVEN FILED WITH THE MUNICIPAL APPEAL WITH THE CIVIL DIVISION WHICH ALSO REJECTED SAME.
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> 58f. APPARENTLY, the Highland Park JUDGE OR CLERK, never forwarded the judge's guilty findings to Mr. HOWARD OR either EDISON TONWHSIP OR THE SUPERIOR COURT AND THUSLY THERE WAS NO RECORD FROM WHICH THE UNDERSIGNED ATTORNEY FOR APPELLANT HOWARD COULD TAKE HIS APPEAL. (Capitalization in original)

The factual record shows that the criminal charges against Plaintiff were transferred from the Municipal Court of the Township of Edison, where Plaintiff was arrested and charged, to the Municipal Court of the Borough of Highland Park, due to Plaintiff's filing of a Notice of Tort Claim against the Township of Edison alleging excessive force and false arrest. See Horan Certification (Pa322, ¶ 15). Plaintiff's case was tried in the Highland Park Municipal Court over the course of several trial days. (Pa 328-334). On October 27, 2021, after a virtual (Zoom) trial, the Highland Park Municipal Court Judge, Hon. Edward Hermann, found Plaintiff guilty of violating N.J.S.A. 2C:29-1(a), Obstructing the Administration of Law, and 2C:29-2(a)(1), Resisting Arrest. Renaud Cert., Pa151, T3:3, 6:4. Plaintiff was informed on the record by Judge Hermann of his right to appeal and the method of doing so. (Pa151, T9:16, 10:9). The Highland Park Municipal Court Administrator advised those present, on the record, that the case file would be delivered back to Edison. (Pa151, T12:1, 13:1). Judge Hermann also stated on the record that he had signed

"the actual disposition page," and further stated "[i]'m sure Edison can get you a certified copy of the disposition upon your request." (Pa151, T13:3, 13:16).

On October 28, 2021, Tracy Horan, Highland Park's Certified Municipal Court Administrator, personally delivered the entire file concerning the Municipal Court matter to the Edison Municipal Court. (Pa322, ¶ 18). Returning the entire file to the Municipal Court of the originating municipality is in accordance with recognized and approved court procedures and is the normal process where municipal court complaints are transferred from an originating municipal court to a receiving municipal court. (Pa322, ¶¶ 11-13). The file maintained by the Edison Municipal Court shows that Judge Hermann entered an Order permitting time payments of the fines and penalties against Mr. Howard (Pa168). Judge Hermann also entered the dispositions of the charges against Plaintiff, showing that a CDS charge, N.J.S.A. 2C:35-10(a)(4) was dismissed, and the Plaintiff was found guilty on N.J.S.A. 2C:29-1(a) and N.J.S.A. 2C:29-2(a)(1). (Pa160).

Clearly, Plaintiff's allegations, and the basis of Plaintiff's claims against Highland Park, regarding the actions of Highland Park's Municipal Court Judge and Municipal Court Administrator are untrue. The transcript of proceedings and the records maintained by the Edison Municipal Court clearly demonstrate that they are untrue. The file was held by the Edison Municipal Court and contained the judgment of conviction. Plaintiff's claim that he went to the Edison Municipal Court and was

unable to obtain records he sought there from the court file that Edison maintained may or may not be true, but even if true, it would not impose liability on Highland Park. The file maintained by the Edison Municipal Court clearly shows that the disposition of the charges, signed by the Highland Park Municipal Court Judge, was contained in the court file maintained by Edison. (Pa151-300 and Pa306). Accordingly, Highland Park was properly granted summary judgment because Plaintiff's allegations are demonstrably untrue.

POINT III: EVEN IF THE ALLEGATIONS OF PLAINTIFF'S COMPLAINT WERE FACTUALLY CORRECT, PLAINTIFF'S CLAIMS AGAINST THE BOROUGH OF HIGHLAND PARK WERE BARRED BY JUDICIAL IMMUNITY.

Plaintiff failed to present any evidence, admissible on the summary judgment motion under R. 1:6-6, of a wrongful act on the part of the Borough of Highland Park, the Highland Park Municipal Court or any Borough employee. Plaintiff's Complaint misrepresents facts in an attempt to avoid his or his counsel's failure to properly perfect Plaintiff's appeal. Even if the facts asserted by plaintiff were true, however, the doctrine of judicial immunity applies, and Highland Park was properly granted summary judgment.

Judicial immunity is a cornerstone of American law. It has been held to apply to claims pursuant to 42 U.S.C. § 1983 and the New Jersey Civil Rights Act (NJCRA), N.J.S.A. 10:6-1, et seq. It has been stated that Congress intended that

§1983 be construed in light of common law principles that were well settled at the time of its enactment in 1871. Where an immunity claimed by a defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, courts have construed the statute to incorporate that immunity. Owen v. Independence, 445 U.S. 622, 639 (1980). Common law immunities that were preserved include judicial immunity. Burns v. Reed, 500 U.S. 478, 499 (1971).

> It is a well-settled principle of law that judges are generally "immune from a suit for money damages." Mireles v. Waco, 502 U.S. 9, 9, 116 L. Ed. 2d 9, 112 S. Ct. 286 (1991) (per curiam); see also Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536, 19 L. Ed. 285 (1868) ("This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice."). The doctrine of judicial immunity is founded upon the premise that a judge, in performing his or her judicial duties, should be free to act upon his or her convictions without threat of suit for damages. See Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, 20 L. Ed. 646 (1872).
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> Figueroa v. Blackburn, 208 F.3d 435, 440 (3d Cir. 2000).

Judicial immunity is "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. " Loigman v. Twp. Comm., 185 N.J. 566, 581 (2006) citing Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288, 294 (1967). The price paid for that public benefit is that even a "judge . . . accused of acting maliciously and corruptly" receives the protection of the immunity. Ibid. The

purpose of the privilege is not to protect the few judges who may be corrupt, but to encourage fearless decision-making by the vast majority of judges who are honest. See Ibid.

Judicial immunity applies to constitutional claims in New Jersey law as well. As was stated by the Supreme Court:

> "If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits." *Forrester v. White*, 484 U.S. 219, 226-27, 108 S. Ct. 538, 544, 98 L. Ed. 2d 555, 565 (1988). Accordingly, "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 1105, 55 L. Ed. 2d 331, 339 (1978) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351, 20 L. Ed. 646, 651 (1872)).
>
> Pasqua v. Council, 186 N.J. 127, 150 (2006).

New Jersey frequently follows federal law with respect to civil rights claims. The NJCRA was modeled after the Federal Civil Rights Act of 1871, 42 U.S.C.A. §1983. Filgueiras v. Newark Pub. Sch., 426 N.J. Super. 449 (App. Div. 2012); Trafton v. City of Woodbury, 799 F. Supp. 2d 417, 443 (D.N.J. 2011). The NJCRA has been interpreted analogously with § 1983 and New Jersey courts have routinely looked to cases analyzing § 1983 claims to assist in its interpretation and scope. See e.g., Ramos v. Flowers, 429 N.J. Super. 13 (App. Div. 2012). “Given their similarity,

our courts apply § 1983 immunity doctrines to claims arising under the Civil Rights Act." Gormley v. Wood–El, 218 N.J. 72, 113–15 (2014). The same standards and framework would apply under the NJCRA as under § 1983.

Judicial immunity is also applicable to common law claims in New Jersey. See, N.J.S.A. 59:2-3(b) and 59:3-2(b) of the New Jersey Tort Claims Act. Neither a public entity nor a public employee is liable for judicial action or inaction. Figueroa v. Blackburn, 208 F.3d 435, 440 (3d Cir. 2000).

Even if the claims made by Plaintiff with respect to the Highland Park Municipal Judge were true, they were barred by the doctrine of Judicial Immunity. Since the claims against Highland Park relate to the alleged action or inaction or the municipal court judge in his judicial capacity, the claims against Highland Park were properly dismissed on summary judgment.

POINT IV: DEFENDANT BOROUGH OF HIGHLAND PARK WAS PROPERLY GRANTED SUMARY JUDGMENT ON PLAINTIFF'S CLAIMS UNDER THE NEW JERSEY CONSTITUTION AND THE NEW JERSEY CIVIL RIGHTS ACT (COUNTS I AND II)

A. DEFENDANT BOROUGH OF HIGHLAND PARK DID NOT ARREST OR INTIATE CRIMINAL PROEEDINGS AGAINST PLAINTIFF

Putting aside the claims addressed above, Plaintiff's constitutional and NJCRA claims, including but not limited to unlawful search/seizure, wrongful arrest, false imprisonment, assault and battery, excessive force, and conspiracy, were properly dismissed on summary judgment because neither Defendant Borough of

Highland Park nor any of its officials or employees searched, seized, used force against, arrested or charged Plaintiff. Plaintiff does not allege that they did. Accordingly, Highland Park was properly granted summary judgment on Counts One and Two.

B. SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE PLAINTIFF FAILED TO DEMONSTRATE ANY UNDERLYING CONSTITUTIONAL VIOLATION COMMITED BY ANY EMPLOYESS OF DEFENDANT BOROUGH OF HIGHLAND PARK.

Plaintiff failed to present evidence to the court below of a constitutional violation on the part of a Highland Park employee. Given that there is no underlying constitutional violation, there can be no liability visited on the Borough, nor the Municipal Court, under Monell v. Dept. of Social Services, 436 U.S. 658, 690 (1978). If a person has suffered no constitutional injury at the hands of an individual defendant, there will be no entity liability. City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986).

To state a claim under §1983, a plaintiff must allege the violations of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person acting under the color of state law." West v. Atkins, 487 U.S. 42, 48 (1988). A local governmental entity is considered a "person" under § 1983 only where the action alleged to be unconstitutional "implements or executes a policy statement, ordinance, regulation, or decision

officially adopted and promulgated by that body's officers." Monell, 436 U.S. at 690. Therefore, to make out a claim under § 1983 against a local government entity, there must be an individual that commits the unconstitutional action. If the Court dismisses Plaintiff's allegations of alleged underlying constitutional injuries against the individual defendants, Plaintiff cannot maintain a Monell claims against a municipal entity. See Marable v. West Pottsgrove Twp., 176 Fed. App'x 275, 283 (3d Cir. 2006) (stating that "a municipality may not incur Monell liability as a result of the actions of its officers when its officers have inflicted no constitutional injury."); Williams v. Borough of West Chester, Pa., 891 F.2d 458, 467 (3d Cir. 1989) (stating that a municipal defendant "cannot be vicariously liable under Monell unless one of [its] employees is primarily liable under section 1983 itself."); see also City of Canton v. Harris, 489 U.S. 378, 385 (1989) (stating that a there can be no Monell or supervisory liability if there is no underlying constitutional injury); Mattern v. City of Sea Isle, 131 F. Supp. 3d 305, 318 (D.N.J. 2015) (reasoning that every Monell claim requires an underlying constitutional violation).

As was addressed above, Plaintiff's allegations regarding the Defendant Borough were patently false. Plaintiff failed to present evidence to the court below that would amount to a constitutional violation on the part of any Defendant Borough of Highland Park agent or employee. Accordingly, pursuant to Monell, Plaintiff may

not maintain his claims against the municipality, and the claims were properly dismissed on Summary Judgment.

POINT V: HIGHLAND PARK WAS PROPERLY GRANTED SUMMARY JUDGMENT ON COUNT III, ALLEGING A VIOLATION OF THE NEW JERSEY LAW AGAINST DISCRIMINATION.

Plaintiff's Complaint included claims of racial discrimination in a place of public accommodation pursuant to N.J.S.A. 10:5-4; 10:12(d)(e)(f); and 10:1-2. Generally, the New Jersey Law Against Discrimination (NJLAD) prohibits discrimination. See Lehmann v. Toys 'R' Us, 132 N.J. 587, 600 (1993). Each referenced statute states, in effect, that all persons shall have the opportunity to obtain all accommodations, advantages, facilities, and privileges of any place of public accommodation without discrimination because of, inter alia, race. This opportunity is recognized as and declared to be a civil right.

The Complaint intimates that Plaintiff was not afforded privileges and immunities in a place of public accommodation due to his race. While not specifically pled against the Defendant Borough, Plaintiff lacked any factual or evidentiary basis to maintain such a claim against the Defendant Borough. As has been addressed above, Defendant Borough of Highland Park had no role in Plaintiff's arrest, charging, or prosecution and have committed no violation of Plaintiff's civil rights. To the extent Plaintiff seeks to impute such liability on the Defendant Borough, Plaintiff did not plead or produce any facts to demonstrate that

the Defendant Borough, its Municipal Court, or any member of the Municipal Court staff treated Plaintiff differently based on his race, or reached a decision based on racial animus. The fact that Plaintiff is African American alone does not give rise to an NJLAD claim. Plaintiff conducted no discovery on the issue of differential treatment. Plaintiff cannot proceed on a claim that he was discriminated against on the basis of race without evidence that he was denied "accommodations, advantages, facilities or privileges … on account of race." Ptaszynski v. Uwaneme, supra, 371 N.J. Super., 348. Accordingly, Plaintiff's public accommodation claim was properly dismissed as to the Defendant Borough on summary judgment.

POINT VI: HIGHLAND PARK WAS PROPERLY GRANTED DISMISSAL OF COUNT IV, ALLEGING RECKLESS AND INTENTIONAL INFLICTION OF EXTREME EMOTIONAL DISTRESS.

Again, Plaintiff did not plead a cause of action against Highland Park on Count Four. For a plaintiff to prevail on an intentional infliction of emotional distress claim, he must show: (1) intentional conduct; (2) the conduct was extreme and outrageous ("as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"); (3) the conduct proximately caused plaintiff's emotional distress; and (4) the emotional distress was severe. DeAngelis v. Hill, 180 N.J. 1, 20 (2004) quoting Buckley v.Trenton Sav. Fund Soc'y., 111 N.J. 355, 366, 544 A.2d 857, 863 (1988).

"For an intentional act to result in liability, the defendant must intend both to do the act and to produce emotional distress." Buckley v. Trenton Sav. Fund Soc'y., 111 N.J. 355, 366 (1988). Liability may also attach to a reckless act "when the defendant acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow." Ibid. The distress caused by defendant's conduct must be "so severe that no reasonable man could be expected to endure it." Ibid. "Severe emotional distress is a severe and disabling emotional or mental condition which may be generally recognized and diagnosed by trained professionals." Turner v. Wong, 363 N.J. Super. 186, 200 (App. Div. 2003).

Here, nothing was alleged to suggest that any employee or agent of the Defendant Borough acted in an extreme and/or outrageous fashion which would go beyond the bounds of common decency or that Plaintiff has suffered severe emotional distress as defined above. If Plaintiff is understood to have made such a claim against the Borough, the claim was properly dismissed on summary judgment.

POINT VII: COUNT FIVE, "CLASS OF ONE ENDANGERMENT RES IPSA LOQUITUR," WAS PROPERLY DISMISSED AS TO HIGHLAND PARK.

First, it should be noted that "Res Ipsa Loquitur" is not a claim, it is a doctrine which permits an inference of a defendant's negligence. A jury may infer such negligence:

> "[W]here (a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality was within the defendant's exclusive control; and (c) there is

> no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect." Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 269 (1958).
>
> Res ipsa loquitur is grounded in probability and the sound procedural policy of placing the duty of producing evidence on the party who has superior knowledge or opportunity for explanation of the causative circumstances. Id. The effect of the doctrine is to establish a prima facie case by permitting the jury to infer negligence. Id. This inference, however, is purely a permissive one that the jury is free to accept or reject. Kahalili v. Rosecliff Realty, Inc., 26 N.J. 545, 606 (1958). Furthermore, the rule does not shift the burden of persuasion; the most that is required of defendant is explanation, not exculpation. Id.

Buckelew v. Grossbard, 87 N.J. 512, 525-526 (1981).

For the same reasons as set forth above, Plaintiff failed to make a prima facie showing of "Class of One Endangerment" under the theory of res ipsa loquitur against the Defendant Borough. Plaintiff has failed to identify any act of Defendant Borough which would give rise to such liability and does not appear to have pled this claim against Highland Park. This claim was properly dismissed on summary judgment as to Defendant Borough of Highland Park.

POINT VIII. DEFENDANT HIGHLAND PARK WAS PROPERLY GRANTED SUMMARY JUDGMENT ON ALL TORT CLAIMS, COUNTS FOUR, FIVE, AND SIX BECAUSE PLAINTIFF FAILED TO MEET THE VERBAL AND MONETARY THRESHOLDS OF THE TORT CLAIMS ACT.[5]

[5] This Defendant initially also argued on summary judgment that Plaintiff failed to plead that he provided notice of claim. In Plaintiff's responsive papers, Plaintiff provided proof of notice of claim. This defendant withdrew that argument it its reply brief. The Trial Court apparently did not so note and mistakenly stated in its opinion that notice of claim had not been provided.

The New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1, et seq., was enacted in 1972 as a mandate by the New Jersey Legislature to bring uniformity to the law in this state with respect to sovereign immunity. As the Supreme Court observed in Kahrar v. Borough of Wallington, 171 N.J. 3, 9-10 (2002):

> In *Willis v. Department of Conservation & Economic Development,* 55 *N.J.* 534, 540, 264 *A.*2d 34 (1970), this Court abrogated the doctrine of sovereign immunity for tort claims. In response, the Legislature adopted the Tort Claims Act in 1972, primarily to "re-establish immunity of public entities in New Jersey, on a basis more current and equitable than that which had obtained prior to *Willis.*" Harry A. Margolis & Robert Novack, *Claims Against Public Entities,* Introduction, at ix (2001). What emerged is the general rule that public entities are immune from tort liability unless there is a specific statutory provision imposing liability. *Collins v. Union County Jail,* 150 *N.J.* 407, 413, 696 *A.*2d 625 (1997).

At no time while discovery was open, nor on the summary judgment motion, did Plaintiff serve a report of any expert opining that Plaintiff suffered a permanent injury or otherwise met the verbal threshold provisions of the New Jersey Tort Claims Act. N.J.S.A. 59:9-2(d) provides:

> d. No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00. For purposes of this section medical treatment expenses are defined as the reasonable value of services rendered for necessary surgical, medical and dental treatment of the claimant for such injury, sickness or disease, including

> prosthetic devices and ambulance, hospital or professional nursing service.

It is axiomatic that a claim for permanent loss of a bodily function under the Tort Claims Act (there is no issue of disfigurement or dismemberment) may be asserted and proven only through expert testimony and that claims for emotional distress, including such items as depression, fear and anxiety, are barred by the verbal threshold provisions of the TCA. Ayers v. Jackson Township, 106 N.J. 557, 577 (1987); Srebnik v. State, 245 N.J. Super. 344, 352 (App.Div.1991); Collins v. Union County Jail, 150 N.J. 407 (1997) is not to the contrary. In that case, the Supreme Court determined that where there was a physical invasion in the nature of a rape, emotional distress damages could be recoverable. Id., 422-423. The physical invasion in the nature of the rape was the distinguishing characteristic of the Collins case. No such physical injury or invasion took place here.Expert proofs are needed to avoid summary judgment on the verbal threshold issue.

For example, where a plaintiff alleged that she was subjected to an unlawful and intrusive strip search (but no rape) and suffered from emotional distress and produced some medical records, the Appellate Division first looked at the verbal threshold under Title 39, and then said:

> Applying that test to the similar Tort Claims Act verbal threshold, we conclude that not only must there be verifiable objective manifestations of emotional distress, but those manifestations must be verified "by

> physical examination and observation" of a physician. Dr. Fox did not claim in his reports that he verified plaintiff's complaints by examination or observation. He simply accepted her complaints as true. Particularly in the area of a patient's state of mind, an expert's opinion is not admissible if it merely parrots what is said by the patient. Saunderlin v. E. I. DuPont Co., 102 N.J. 402, 416-17, 508 A.2d 1095 (1986).
>
> The doctor's reports suffer from another defect that prevents them from being used as evidence to support plaintiff's claims. His stated opinions that plaintiff's reported symptoms were caused by the intrusive search and that they are permanent constitute inadmissible "net opinions" because they are purely conclusory, being unsupported by any explanation of how, from a medical point of view, the search caused the symptoms plaintiff describes and why, from a medical point of view, they are considered permanent. Buckelew v. Grossbard, 87 N.J. 512, 524-25, 435 A.2d 1150 (1981). Inadmissible evidence may not be used to affect the outcome of a summary judgment motion. R. 1:6-6.
>
> Randall v. State, 277 N.J. Super. 192, 197-198 (App. Div. 1994).

Here, Plaintiff did not allege a qualifying injury with respect to any claim against Highland Park. Even if emotional distress qualified as a compensable injury, which it does not, plaintiff failed to provide any medical reports which would satisfy the “objective manifestations” test or the “physical examination and observation” test, nor was there a report supporting any claim of a permanent loss of a bodily function.

Additionally, Plaintiff failed to meet even the monetary threshold or allege that he did so. His complaint admits that Plaintiff did not incur medical treatment expenses of at least $ 3,600. (Pa1, Count Four, ¶ 12). Due to Plaintiff’s failure to

vault both the verbal threshold and the monetary threshold, Defendant Highland Park was entitled to summary judgment on Counts Three through Six, and summary judgment was properly granted.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the summary judgment granted in favor of Defendant Borough of Highland Park, and against Plaintiff, dismissing Plaintiff's Complaint, with prejudice, be affirmed.

Respectfully Submitted,
RENAUD COLICCHIO LLC
Attorneys for Defendant Borough of Highland Park

/s/ Robert F. Renaud
Robert F. Renaud

Dated: April 5, 2024

TREMAYNE HOWARD, Plaintiff-Appellant, vs. TOWNSHIP OF EDISON, TOWNSHIP OF HIGHLAND PARK, OFFICER MICHAEL KOHUT, OFFICER MICHAEL GEIST, HEAD DOE AND JOHN DOES 1-10, (DOES IDENTITIES UNKNOWN), Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-000836-23 Sat Below: Hon. ALBERTO RIVAS, J.S.C. Docket No. MID-L-00765-22 *Civil Action* Submitted: April 8, 2024

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS TOWNSHIP OF EDISON AND POLICE OFFICERS MICHAEL KOHUT AND MICHAEL GEIST IN OPPOSITION TO THE APPEAL OF PLAINTIFF-APPELLANT TREYMANE HOWARD

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PRELIMINARY STATEMENT

Plaintiff-Appellant, Tremayne Howard ("Plaintiff"), brought civil rights, false arrest, excessive force and tort claims against Defendants-Respondents, Township of Edison ("Edison") and Police Officers Michael Kohut ("Kohut") and Michael Geist ("Geist") (collectively, "Edison Defendants"). Plaintiff also brought claims against the Borough of Highland Park ("Highland Park") where he was found guilty of criminal charges in its Municipal Court after his arrest. All claims were dismissed on summary judgment, and that ruling should be affirmed.

The Complaint filed by Plaintiff stems from his arrest on February 20, 2020. At about 12:30 a.m., Officers Kohut and Geist were patrolling in an area where motor vehicle burglaries had previously been reported. They saw Plaintiff transfer a backpack from one Jeep vehicle into a second Jeep. When the officers inquired, Plaintiff said that he did not have identification because he left it in a nearby tavern. Plaintiff had keys to both vehicles in his hands, but could not provide the last name of an owner. The officers could not see the backpack that Plaintiff placed inside the vehicle. When questioned, Plaintiff expressed that he placed it under the floorboard of the rear cargo area because it contained alcohol.

The officers saw objects in Plaintiff's pockets, and a pat down search uncovered two knives. Plaintiff then sat down on the ground and inexplicably became agitated and began crying. The officers asked Plaintiff for the keys to the

vehicles so that they could determine the identity of the owners and ascertain if any stolen property was in the vehicles. Plaintiff refused to turn over the keys. Instead, Plaintiff began to run away but the officers were able to pull him back. A scuffle ensued, and Plaintiff resisted the officers' attempts to restrain him and handcuff him. The officers had to strike Plaintiff several times to subdue him, gain control of his hands and place him in handcuffs.

After the arrest, the officers learned that Plaintiff had an outstanding warrant for child support and his backpack contained a small amount of marijuana and a methamphetamine tablet. Plaintiff undoubtedly tried to escape because he knew that he would be arrested for these violations.

After a trial in the Highland Park Municipal Court, Plaintiff was found guilty of obstruction of justice and resisting arrest, and he was given a fine. Plaintiff's appeal of the Municipal Court conviction to Superior Court was not perfected and as a result was dismissed.

Plaintiff brought civil rights and state law tort claims against the Edison Defendants. The entire episode was captured on the officers' body worn cameras ("BWC"). The video and all documentary evidence objectively demonstrate that the officers acted reasonably, had good cause to arrest Plaintiff, and only used the amount of force that was reasonably necessary to subdue him after he tried to escape and resisted arrest.

Plaintiff did not take any depositions and did not retain any experts. Although Plaintiff claimed that the Edison Defendants tampered with the BWC imaging, he did not produce any expert or forensic analysis to substantiate that baseless allegation. Further, on summary judgment Plaintiff did not cite any facts as evidence in response to the Edison Defendants' Statement of Undisputed Facts, thereby permitting the court to consider the Defendants' statements to be "deemed admitted" under R. 4:46-2(b) for purposes of the motion.

The actions of the Edison Defendants were lawful and satisfied the standards established by the N.J. Constitution and U.S. Constitution. The record shows that summary judgment was properly granted, and that ruling should be affirmed.

PROCEDURAL HISTORY

On February 14, 2022 Plaintiff filed his Complaint. Pa001-Pa019. On May 4, 2022 the Edison Defendants filed their Answer. Pa370-Pa380. On October 17, 2022 Highland Park filed its Answer. See a1-a22 (attached to supplemental appendix submitted by Codefendant Highland Park).

The resolution of criminal charges proffered against Plaintiff arising from the subject appeal is indeed noteworthy. As referenced in the Preliminary Statement, charges were proffered against Plaintiff for possession of CDS, obstruction of justice and resisting arrest stemming from his arrest on February 20, 2020. On October 27, 2021, following a trial which took place over several court sessions, Hon. Edward

Herman, J.M.C. in Highland Park Municipal Court found plaintiff guilty of obstruction of justice, and of resisting arrest. The other pending charges were dismissed. Pa467. On April 22, 2022, Hon. Robert J. Jones, J.S.C. of the Superior Court (Middlesex County) entered an Order dismissing Plaintiff's appeal of his municipal court convictions for failure to file the necessary transcripts or obtain an extension. Pa284-Pa285.

With regard to the pending civil matter, the parties exchanged written discovery and the deposition of Plaintiff was taken. Plaintiff did not take any depositions, and did not disclose any expert.

On August 10, 2023 the Edison Defendants filed a motion for summary judgment. On August 11, 2023 Highland Park filed a motion for summary judgment.

Plaintiff opposed both motions. In addition, on September 26, 2023 Plaintiff filed a cross-motion seeking to consolidate the pending matter (Docket No. MID-L-765-22) with a new lawsuit (Docket No. MID-L-5427-23)(Pa488-Pa504) that Plaintiff had just filed against the Township of Edison, the Borough of Highland Park and Hon. Edward Herman, J.M.C., who previously found Plaintiff guilty of obstruction of justice and resisting arrest in the Highland Park Municipal Court.

On October 6, 2023 all motions were heard by Hon. Alberto Rivas, J.S.C. Judge Rivas granted summary judgment to all Defendants and dismissed the

Complaint with prejudice. Pa533-Pa534. Judge Rivas also denied Plaintiff's motion to consolidate. Pa535.

On November 18, 2023, Plaintiff filed a Notice of Appeal and his subject appeal followed. Pa551-Pa560.

STATEMENT OF FACTS

A. The Incident of February 20, 2020 and Plaintiff's Arrest

On February 20, 2020 at about 12:23 a.m., Officers Kohut and Geist were on patrol in Edison in an area that had experienced motor vehicle burglaries. Pa021-Pa23; Pa302-Pa304. They observed Plaintiff remove a backpack from the passenger side of a green Jeep vehicle and place it in the trunk area of a black Jeep vehicle. Id.

The officers exited their vehicle and approached Plaintiff, who was standing outside the black Jeep. The officers wore vests that were marked "Police," and their badges were affixed to the vests. They informed Plaintiff that there had been a number of motor vehicle burglaries in the area. See Edison Supp. Appendix 001 (BWC 2020-02-0020 at 1:44; BWC 2020-02-0021 at 00:52).[1] Plaintiff had two sets of keys in his hands. Geist asked Plaintiff who owned the two vehicles. Plaintiff tentatively replied "uhh Amanda?," but could not provide a last name. Pa022; Pa303.

[1] Edison Supp. Appendix 001is a DVD which contains the video and audio recordings from the body worn cameras worn by Officers Kohut and Geist during the incident. The two files on the DVD are BWC 2020-02-0020 and BWC 2020-02-2021.

The officers asked Plaintiff for his identification and Plaintiff replied that it was inside the Chestnut Bar, which was a nearby tavern. That response was false because a post-arrest search revealed that Plaintiff had his identification in his pocket. Pa303.

Geist saw that Plaintiff had a suspicious object in each of his two front pockets. Geist removed both objects, which were knives, and patted down Plaintiff to ensure that he did not have any other weapons. Pa303.

A bottle of Whiskey was seen lying on top of the floorboard in the trunk area of the black Jeep. Pa022. The officers could not see the backpack that Plaintiff had placed into the black Jeep. When the officers inquired, Plaintiff responded that he had placed the backpack under the floorboard of the rear cargo area where the spare tire is stored. Plaintiff said that he placed the backpack in that spot because it contained an alcoholic beverage. Pa303.

As can be seen from the imaging captured by the officers' body-worn cameras ("BWC"), the two police officers were professional and non-confrontational throughout their inquiry. Nonetheless, Plaintiff inexplicably became agitated, began crying and sat down on the ground. Edison Supp. Appendix 001 (BWC 2020-02-0020 at 3:40; BWC 2020-02-0021 at 2:45).

One of the officers helped Plaintiff get up. Pa451, T60:16-19. According to Plaintiff, he then "fell over" into one of the officers. However, Plaintiff could not

offer any explanation of what made him fall. Pa451-Pa452 (T61:17-T62:8). The BWC imaging clearly shows that Plaintiff attempted to run through the officers. Edison Supp. Appendix 001 (BWC 2020-02-0020 at 4:02; BWC 2020-02-0021 at 3:10).

The officers asked Plaintiff for the keys to the Jeep so they could confirm the name of the owner, and ensure that it did not contain property from any motor vehicle burglaries. Plaintiff refused to hand over the keys and became irate and uncooperative. The officers attempted to place Plaintiff in handcuffs due to his abrupt change in demeanor and refusal to provide the keys. Pa022-Pa023; Pa303-Pa304.

Plaintiff then began to suddenly pull away from the two officers, and attempted to run away and flee the scene. Edison Supp. Appendix 001 (BWC 2020-02-0020 at 4:00; BWC 2020-02-0021 at 3:10). The officers were able to maintain hold of Plaintiff's arms to prevent him from escaping. Plaintiff testified that he knew the officers were attempting to handcuff him, and he admitted that he resisted and "didn't allow them to do so[.]" Pa454 (T64:15-18).

The police officers took Plaintiff to the ground as they attempted to handcuff him, and Plaintiff's knee and hands came into contact with the ground. Pa454 (T64:22-T65:2). Plaintiff resisted, screamed and refused to comply. Plaintiff

continued to struggle and tried to prevent the officers from placing his arms behind his back. Pa455 (T65:9-16).

Kohut "placed two closed fist strikes" to the left side of Plaintiff's body to gain control of him. Pa023. Geist likewise had to strike Plaintiff on his right ribs to subdue him. Pa304. Plaintiff testified that the officers struck him five or six times. Pa456 (T66:1-13). Plaintiff also claimed that the officers choked him, id., although there is no imaging or other documentary evidence in the record to support that contention. Edison Supp. Appendix 001 (BWC 2020-02-0020; BWC 2020-02-0021); Pa022-Pa023; Pa031-Pa032; Pa302-Pa303.

Plaintiff still had a set of keys in each hand "with the keys poking through his knuckles which could be used as a weapon" while the officers were attempting to cuff him. Pa023. See also Pa304. After nearly three minutes, Kohut and Geist were able to place the handcuffs on Plaintiff. They thereafter prepared Use of Force reports documenting their actions. Pa023; Pa30-Pa31; Pa304.

An ambulance transported Plaintiff to Robert Wood Johnson Medical Center for treatment, and he was thereafter taken to the Middlesex County Correctional Facility without incident. Pa023.

Several other officers responded to the scene. The owner of the green Jeep vehicle arrived at the scene while the officers were searching the black Jeep. The

owner consented to a search of his vehicle (i.e., the green Jeep), but no contraband was found. Pa029; Pa304.

Geist retrieved Plaintiff's backpack from the black Jeep and detected the odor of raw marijuana. Geist searched the backpack and found under 50 grams of marijuana in a Ziploc bag. Pa025; Pa032; Pa304. Plaintiff's backpack also contained an unmarked orange tablet. Pa026; Pa033. The New Jersey State Police later performed an analysis of the orange tablet and determined that it contained methamphetamine, which is a Schedule II narcotic. Pa383.

The Edison Police Department ran a search of the National Crime Information Center database and learned that Plaintiff was wanted on an outstanding warrant for non-payment of child support. Pa038. It became clear that Plaintiff had attempted to flee the scene because he had an outstanding warrant and possessed illegal substances.

B. The Municipal Court Prosecution

On February 20, 2020 a criminal Complaint was issued against Plaintiff which charged him with the following disorderly persons offenses: (1) possession of marijuana, a controlled dangerous substance, in violation of N.J.S.A. 2C:35-10(a)(4); (2) obstruction of justice in violation of N.J.S.A. 2C:29-1(a); and (3) resisting arrest in violation of N.J.S.A. 2C:29-2(a)(1). Pa041-Pa042.

On November 4, 2020, a criminal Complaint was issued against Plaintiff which charged him with possession of methamphetamine, a controlled dangerous substance, in violation of N.J.S.A. 2C:35-10(c). Pa170.

Over the period of several days in 2021 (June 23, July 20, September 22 and October 27), the criminal matter was tried at the Highland Park Municipal Court. Pa224-Pa227. After considering the testimony of the witnesses and reviewing the BWC video, Judge Herman found Plaintiff guilty of: (1) obstruction of justice in violation of N.J.S.A. 2C:29-1(a); and (2) resisting arrest in violation of N.J.S.A. 2C:29-2(a)(1). Pa153-Pa154 (T5:17-T6:4). The charges related to Plaintiff's possession of controlled dangerous substances were dismissed. Pa467.[2]

Judge Herman imposed a fine in the amount of $916.00 including costs. Pa168. Judge Herman did not order a jail sentence and did not place Plaintiff on probation. Pa155-Pa156 (T9:2-T11:14). Judge Herman specifically informed Plaintiff and his counsel of his right to appeal, and the need for Plaintiff to obtain a complete transcript of the entire case in order to file an appeal. Pa155-Pa156 (T9:16-T10:9). Judge Herman also informed Plaintiff that he had "20 days in which to file an appeal from any decision that I rendered in your entire case," and indicated that

[2] It appears that the methamphetamine charge was dismissed because the witness from the N.J. State Police Laboratory did not appear at trial. The municipal prosecutor apparently did not pursue the marijuana charge due to the subsequent statutory amendment and the liberalization of the marijuana laws.

such appeals are "heard in the Superior Court in New Brunswick." Pa155 (T9:16-18).

On April 22, 2022, Hon. Robert J. Jones, J.S.C. entered an Order which dismissed Plaintiff's appeal of his municipal court convictions. Pa284-Pa285. The Order made reference to the prior Scheduling Order dated March 9, 2022 which: (1) required Plaintiff to file a copy of all municipal court transcripts with the Superior Court by April 8, 2022; and (2) notified Plaintiff that the matter would be dismissed if the transcripts were not filed, unless an extension was obtained. Pa285. According to the Order, as of April 22, 2022 Plaintiff had not filed the transcripts and had not obtained an extension, and his appeal was therefore dismissed. Pa285.

C. <u>The Superior Court Litigation</u>

On February 14, 2022 Plaintiff brought the following claims against the Edison Defendants: (1) false arrest in violation of his civil rights; (2) excessive force in violation of his civil rights; (3) a denial of public accommodations under the N.J. Law Against Discrimination, N.J.S.A. 10:5-1 et seq.; and (4) common law tort claims. Pa001-Pa020.

With respect to Highland Park, Plaintiff seems to claim that the municipal court improperly processed the judgment and conviction records, which allegedly

"procedurally disallowed [Plaintiff] from successfully filing an appeal in the Superior Court Criminal Law Division." Pa002 (¶4).[3]

A few points should be made regarding the discovery and litigation that took place in the Law Division. First, Plaintiff did not take any depositions, Pa338, ¶4, nor did he retain any liability or damages experts. Pa341, ¶¶20, 21. Second, Plaintiff never documented any treatment for injuries claimed to have been suffered at the time of his arrest. On the night of his arrest, Plaintiff was taken to Robert Wood Johnson Medical Center and was "medically cleared and then transported to The Middlesex County Correctional Facility without incident." Pa023. Plaintiff did not provide documentation or description of any treatment at Robert Wood Johnson in discovery. About three or four months after his arrest in February 2020, Plaintiff testified that he had a single medical evaluation at the Jewish Renaissance Center in Perth Amboy for problems that he claims to have experienced with his neck, hands, lower back and knee. Pa342, ¶22; Pa439-Pa440 (T35:11-T36:21). Plaintiff admitted that he did not receive any treatment for any alleged emotional distress. Pa342, ¶23; Pa439 (T35:3-8).

The Edison Defendants properly documented their entitlement to summary judgment before the trial court in accordance with the N.J. Court Rules. The Edison Defendants included a 25-paragraph Statement of Uncontroverted Facts ("SUF"),

[3] This portion of the Complaint was in capital letters, which have not been used here.

which was fully supported with citations to the record as required by R. 4:46-2(a). Pa337-Pa343.

Importantly, Plaintiff did not submit a counterstatement in response to the SUF as provided by R. 4:46-2(b). Instead, Plaintiff filed an unfocused document which admitted some paragraphs of the SUF, denied others (but without a citation to the records as required by R. 4:46-2(b)), ignored several others and objected to a few more. Pa480-Pa482. Due to Plaintiff's non-compliance with R. 4:46-2(b) and the case law, infra, every paragraph in the Edison Defendants' SUF should be deemed admitted. The motion judge expressly noted Plaintiff's failure to comply with R. 4:46-2(b). See Transcript of Summary Judgment Hearing (T11:18-T12:8).

Further, Plaintiff argued at summary judgment that someone had tampered with the BWC video and "cut[ ] out of the video the scenes showing force." However, Plaintiff did not submit any expert report or forensic analysis to support that claim, a point which was correctly addressed by the motion judge at some length. See Transcript of Summary Judgment Hearing (T5:12-T11:12).

The Law Division entered an Order dismissing all claims as pled against the Edison Defendants pursuant to R. 4:46. Pa534. It is evident that the Law Division properly entered summary judgment in favor of the Edison Defendants, and that ruling should be affirmed.

STANDARD OF REVIEW

As the subject appeal addresses an Order dismissing the Complaint with prejudice on summary judgment, it is subject to de novo review. The appellate court must "review the grant or denial of summary judgment de novo and apply the same legal standard as the trial court." Crisitello v. St. Theresa School, 255 N.J. 200, 218 (2023).

The entry of summary judgment is appropriate "when 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Id. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1996)(quoting R. 4:46-2)). A de novo review of the record by an appellate panel will show clearly that summary judgment was properly entered. It is respectfully submitted that the Law Division ruling should be affirmed, and that Plaintiff's appeal should be dismissed.

LEGAL ARGUMENT

POINT I

THE SUMMARY JUDGMENT DECISION SHOULD BE AFFIRMED

The summary dismissal of the Complaint should be affirmed because Plaintiff's opposition papers did not comply with R. 4:46-2(b).

A. The Statement of Uncontroverted Facts Should be Deemed Admitted

The Edison Defendants submitted a motion for summary judgment with a 25-paragraph Statement of Uncontroverted Facts ("SUF") in compliance with R. 4:46-2(a). Pa337-Pa343. Plaintiff was required to submit a responding statement conforming to the provisions of R. 4:46-2(b):

> A party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. Subject to R. 4:46-5(a), all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact.

R. 4:46-2(b).

Plaintiff did not file a response as required by R. 4:46-2(b). Instead, Plaintiff submitted a jumbled document which: (1) admitted several statements in the SUF; (2) denied others, but *without* including "a citation to the portion of the motion record" as required by R. 4:46-2(b); (3) made vague objections to several others; and (4) made no response whatsoever to SUF ¶¶22 and 23. Pa480-Pa482.

It is clear that Plaintiff did not submit a responding statement to the Edison Defendants' SUF as required by R. 4:46-2(b). Consequently, the statements contained in the SUF, all of which were properly supported with citations to the evidential record, should be "deemed admitted" for purposes of the motion. R. 4:46-2(b).

The reported case law confirms that the movant's statement of material facts, if properly supported, is deemed admitted when the non-moving party does not provide a response that complies with R. 4:46-2(b). In Housel v. Theodoridis, 314 N.J. Super. 597 (App. Div. 1998), the plaintiff filed a cross-motion for summary judgment that was supported by a statement of material facts in compliance with R. 4:46-2(a). The defendant did not submit a response as required by R. 4:46-2(b), but the Law Division judge nonetheless denied the motion. Id. at 600-01.

The Appellate Division in Housel reversed and granted the motion. The appellate panel described the requirements of R. 4:46-2 and ruled that the failure to respond to a properly supported statement of material facts was "significant" and required the movant's factual statements to be "deemed admitted." Id. at 602.

Other courts have reached the same conclusion. For example, in Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 357-58 (App. Div. 2004), the Appellate Division affirmed summary judgment when the non-moving party provided a "one-page conclusory and unsworn letter" from an attorney in response to the movant's properly-supported statement of material facts. In Sanducci v. City of Hoboken, 315 N.J. Super. 475, 487 (App. Div. 1998), the court accepted a factual statement in the moving party's statement of material facts because the non-movant disputed the fact without providing any supporting evidence. In Papergraphics Intern., Inc. v. Correa, 389 N.J. Super. 8, 10-11 (App. Div. 2006), the court affirmed

summary dismissal when the movant supported its factual contention with an expert opinion, while the non-movant "failed to establish any contrary contention."

Herein, Plaintiff plainly did not respond to the Edison Defendants' SUF as required by R. 4:46-2(b). Plaintiff's omissions were not a minor lapse or a petty, technical oversight. Plaintiff's failure to submit an appropriate response was a substantial, critical omission that went to the very center of the summary judgment motion. Plaintiff's failure in this regard, standing alone, warranted the entry of summary judgment on this record. The summary dismissal should be affirmed and the appeal should be dismissed on that basis alone.

B. The Video Evidence from the Officers' Body Worn Cameras is Undisputed and Should be Accepted

Supporting their summary judgment motion, the Edison Defendants submitted a DVD, which contained the video evidence from the body worn cameras worn by Officers Kohut and Geist on the night of the incident. Pa406.[4] The imaging clearly shows that the two police officers were professional, respectful and non-confrontational. In fact, after the trial at the Highland Park Municipal Court, Judge Herman commented that he viewed the video, and found Kohut and Geist to be "polite … calm … and reasonable." Pa152 (T3:21-22).

[4] Plaintiff's appendix contains a photocopy of the DVD. Pa406. A copy of the DVD has been attached as Edison Supp. Appendix 001.

At summary judgment, Plaintiff argued that the video recordings had been altered or manipulated. Specifically, Plaintiff contended – without support – that "[t]he amount of force utilized is hidden by not turning over or cutting out of the video the scenes showing force, admittedly stated by police in video and the choke hold by which many a black man has died in the arms of police." See Summary Judgment Hearing (T5:12-18). Yet, as pointed out by the motion judge, Plaintiff did not have an expert witness or a forensic examination of the video recordings that would substantiate such a serious allegation. The Law Division judge noted that Plaintiff had received the recordings as part of discovery production, yet produced no evidence at summary judgment challenging the validity or authenticity of the recordings. See Summary Judgment Hearing (T8:1-T11:12).

On this record, it is clear that the video recordings are reliable and trustworthy and were properly considered on summary judgment. Plaintiff's objection to the video evidence lacks any support whatsoever, and should be disregarded.

POINT II

THE FALSE ARREST CLAIM WAS PROPERLY DISMISSED AND THE OFFICERS HAD QUALIFIED IMMUNITY

The Edison police officers had probable cause to arrest Plaintiff and they cannot be liable for false arrest on this record because they have qualified immunity.

A. The New Jersey Civil Rights Act and Section 1983

Plaintiff has brought false arrest and excessive force claims under the NJCRA. The operative language of the statute provides as follows:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.

N.J.S.A. 10:6-2(c).

"The [NJCRA] was modeled after the federal Civil Rights Act of 1871," which is codified at 42 U.S.C. §1983. Filgueiras v. Newark Public Schools, 426 N.J. Super. 449, 468 (App. Div. 2012), certif. den. 212 N.J. 460 (2012). See also Trafton v. City of Woodbury, 799 F.Supp.2d 417, 443 (D.N.J. 2011). "Courts have repeatedly construed the NJCRA in terms nearly identical to its federal counterpart." Chapman v. New Jersey, 2009 WL 2634888, *3 (D.N.J. 2009).

Accordingly, the analysis of Plaintiff's false arrest and excessive force claims should be analyzed under 42 U.S.C. §1983, which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. §1983.

"To establish a §1983 claim, 'the first task … is to identify the state actor, 'the person acting under color of law,' that has caused the alleged deprivation.' The second task is to identify a 'right, privilege or immunity' secured to the claimant by the Constitution or other federal laws of the United States." Filgueiras, supra, 426 N.J. Super. At 468 (internal citations omitted). "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method [for] vindicating federal rights elsewhere conferred …" Id. at 468-69 (quoting Baker v. McCollan, 443 U.S. 137, 144, n. 3 (1979)).

B. The False Arrest Claim

The Constitution of the State of New Jersey provides for "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized." New Jersey Constitution, Article I, ¶ 7. See also State of New Jersey v. Ingram, 474 N.J. Super. 522, 533 (App. Div. 2023).

The Fourth Amendment of the U.S. Constitution contains a parallel provision and guarantees "[t]he right of the people to be secure in their persons, houses, papers,

and effects, against unreasonable searches and seizures … and no warrant shall issue, but upon probable cause." U.S. Constitution, Amendment IV; Ingram, supra.

An arrest without probable cause is a constitutional violation actionable under §1983. Walmsley v. Philadelphia, 872 F.2d 546 (3d Cir. 1989). A §1983 claim for false arrest may be based upon an individual's Fourth Amendment right to be free from unreasonable seizures. Albright v. Oliver, 510 U.S. 266, 274 (1994). Under New Jersey law, a false arrest has been defined as "the constraint of the person without legal justification." Ramirez v. United States, 998 F.Supp. 425, 434 (D.N.J. 1998)(quoting Fleming v. United Postal Services, Inc., 255 N.J. Super. 108, 155 (Law Div. 1992)).

The elements of a §1983 claim for false arrest are: "(1) that there was an arrest; and (2) that the arrest was made without probable cause." James v. City of Wilkes-Barre, 700 F.3d 675, 680 (3d Cir. 2012). See also Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988).

The standard in establishing a probable cause defense in the context of a false arrest claim is "objective reasonableness." Hayes v. Mercer County, 217 N.J. Super. 614, 622-23 (App. Div. 1987), certif. den. 108 N.J. 643 (1987). A police officer can defeat a claim by establishing probable cause, or even absent same, if a reasonable officer similarly situated would have believed in its existence. See Wildoner v.

Borough of Ramsey, 162 N.J. 375, 386 (2000); Kirk v. City of Newark, 109 N.J. 173, 184 (1988); Malley v. Briggs, 475 U.S. 335, 337 (1986).

Although it eludes precise definition, probable cause "is not a technical concept but rather one having to do with 'the factual and practical considerations of everyday life' upon which reasonable men, not constitutional lawyers, act." State v. Waltz, 61 N.J. 83, 87 (1972)(quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)). Thus, "the common and specialized experience and work-a-day knowledge of police [officers] must be taken into account." State v. Contursi, 44 N.J. 422, 431 (1965). Moreover, "[a]bstract contemplation will not suffice because the decisions of police officers must be made on the spur of the moment and cannot be viewed fairly from the vantage point of twenty-twenty hindsight." Sanducci v. City of Hoboken, 315 N.J. Super. 475, 481 (1998).

C. The False Arrest Claim Should be Dismissed because the Underlying Conviction has not been Reversed as Required by Heck v. Humphrey

According to U.S. Supreme Court precedent, Plaintiff here cannot maintain a false arrest claim because his underlying municipal court convictions have not been reversed or otherwise held invalid. In Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), the U.S. Supreme Court held that "a §1983 plaintiff must prove that the [underlying] conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such

determination, or called into question by a federal court's issuance of a writ of *habeas corpus* …"

Heck requires courts to:

> consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Put simply, "a §1983 action that impugns the validity of the plaintiff's underlying conviction cannot be maintained unless the conviction has been reversed on direct appeal or impaired by collateral proceedings." Gilles v. Davis, 427 F.3d 197, 209 (3d Cir. 2005).

In the pending case, to present a false arrest claim, Plaintiff would have to first secure a reversal or other dismissal of his convictions in the Highland Park Municipal Court. It is undisputed that Plaintiff has not obtained a reversal or any other ruling declaring those convictions to be invalid. In fact, Plaintiff's appeal of those convictions to the Superior Court have been dismissed. Pa284-Pa285. Consequently, on this record, Plaintiff's false arrest claim was properly dismissed and cannot be considered on appeal due to the Heck doctrine.

D. Qualified Immunity

"The doctrine of qualified immunity operates to shield government officials performing discretionary functions 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." Morillo v. Torres, 222 N.J. 104, 116 (2013)).

Qualified immunity interposes a significant hurdle for plaintiffs seeking to recover for asserted civil rights violations at the hands of law-enforcement officials. Morillo v. Torres, 222 N.J. at 116. By deliberate design, qualified immunity is an exacting standard. It "gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

Whether an official is covered by qualified immunity is a matter of law to be decided by the court "preferably on a properly supported motion for summary judgment or dismissal." Gormley v. Wood-el, 218 N.J. 72, 113 (2014); Doner v. Borough of Ramsey, 162 N.J. 375, 387 (2000). Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009). See also Gormley v. Wood - el., 218 N.J. at 113.

Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) immunity from suit rather than a mere defense to liability." Id. Moreover, qualified immunity, like absolute immunity, "is effectively lost if a case is erroneously permitted to go to trial." Id.

The purpose of qualified immunity is to:

> [permit courts [to] expeditiously] …….weed out suits, which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out suit."

Siegert v. Gilley, 500 U.S. 226, 232 (1991).

Qualified immunity protects all but the plainly incompetent, or those who knowingly violate the law. Malley v. Briggs, 475 U.S. 335 (1986). As such, the protection afforded a defendant should be denied only in the most exceptional instances. Lassiter v. Alabama A&M University, 28 F.3d 1146, 1149 (11th Cir. 1994).

E. The Edison Defendants are Entitled to Qualified Immunity

"There are two related but distinct inquiries in a qualified immunity case. One is whether the defendant's conduct violated the plaintiff's civil rights; the other is

whether the right in question was clearly established at the time of the violation." Schneyder v. Smith, 653 F.3d 313, 318 (3d Cir. 2011). "The court may address the steps in either order." Pearson v. Callahan, 555 U.S. 223, 236 (2009).

With respect to the second prong, for purposes of the pending appeal, the Edison Defendants concede that the right of an individual to be free from arrest *without* probable cause was a clearly established right when this incident took place on February 20, 2020. The Edison Defendants likewise concede that an individual's right to be free from physical force when *not* resisting arrest by the police was clearly established at the time of the incident.

Turning to the first prong, the undisputed factual record shows that the Edison Defendants did not violate Plaintiff's civil rights when they arrested him and they are entitled to qualified immunity. Here, Officers Kohut and Geist clearly had probable cause and are entitled to qualified immunity. As evidenced by the BWC video and the documentary record, the officers observed Plaintiff in the early morning hours in a location which had experienced motor vehicle burglaries. Plaintiff was observed moving a backpack from a green Jeep into a black Jeep. The officers approached Plaintiff and explained that they were making an inquiry due to the rash of motor vehicle burglaries in that area. Plaintiff tentatively claimed that one of the vehicles belonged to someone named "Amanda," but did not provide a last name. When asked for identification, Plaintiff said that he left it at a nearby

tavern, the Chestnut Bar, which was certainly a peculiar explanation. Plaintiff also had two knives in his pockets.

The backpack which Plaintiff placed into the black Jeep was not visible to the officers because he had placed it under the floorboard. The officers began to further investigate the matter. As evidenced by the BWC video, both officers were professional and non-confrontational. Yet, Plaintiff became agitated and began crying and sat down on the ground. Plaintiff would not give the keys to the officers and he became irate and uncooperative. The Plaintiff suddenly tried to pull away from the officers and run away. The officers were able to keep hold of Plaintiff's arm, but he resisted arrest, screamed and would not comply. The officers had to strike Plaintiff to gain physical control and were ultimately able to handcuff him after a scuffle which lasted about three minutes.

There was an outstanding warrant for Plaintiff due to his failure to pay child support. Pa038. Plaintiff's backpack contained marijuana and a tablet of methamphetamine. After a trial in municipal court, Plaintiff was found guilty of: (1) obstruction of justice in violation of N.J.S.A. 2C:29-1(a); and (2) resisting arrest in violation of N.J.S.A. 2C:29-2(a)(1). Pa153-Pa154 (T5:17-T6:4).

Under all the facts and circumstances, particularly the fact that Plaintiff said that he had no identification, carried two knives and attempted to flee, it is evident

that the Edison Defendants acted reasonably and complied with the case law. Consequently, the summary dismissal should be affirmed.

POINT III

THE EXCESSIVE FORCE CLAIM WAS PROPERLY DISMISSED AND THE OFFICERS HAD QUALIFIED IMMUNITY

The Edison police officers used reasonable force necessary to restrain Plaintiff and they cannot be liable for an excessive force claim on this record because they have qualified immunity.

A. The Excessive Force Claim

The same principles that govern Plaintiff's false arrest claim under the NJCRA and §1983 apply to his excessive force claim under those same statutes. An excessive force claim stemming from an investigatory stop or arrest arises under the Fourth Amendment. "The use of excessive force is itself an unlawful 'seizure' under the Fourth Amendment." Couden v. Duffy, 446 F.3d 483, 496 (3d Cir. 2006).

> Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons … against unreasonable … seizures' of the person.

Graham v. Connor, 490 U.S. 386, 394 (1989).

The "reasonableness" test of the Fourth Amendment utilizes an objective standard. "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard

to their underlying intent or motivation." Id. at 397. "[I]t is imperative that the facts be judged against an objective standard." Id. (internal citations omitted). "Courts evaluate the reasonableness of 'a particular use of force … from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" Ansell v. Ross Twp., Penn., 419 Fed. Appx. 209, 212 (3d Cir. 2011)(citing Graham at 396).

The Third Circuit has held that courts should "consider[ ] all of the relevant facts and circumstances leading up to the time that the officers allegedly used excessive force." Rivas v. City of Passaic, 365 F.3d 181, 198 (3d Cir. 2004).

Under Graham, the following factors should be considered to determine the objective reasonableness of the officer's actions: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is *actively resisting arrest or attempting to evade arrest by flight*." Graham, 4909 U.S. at 396 (emphasis added).

The Fourth Amendment permits the use of "reasonable" force. Id. at 396. "[E]ach case alleging excessive force must be evaluated under the totality of the circumstances." Sharrar v. Felsing, 128 F.3d 810, 822 (3d Cir. 1997). The factors identified by Sharrar were "the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed,

and the number of persons with whom the police officers must contend at one time." Id. at 822.

B. The Edison Defendants are Entitled to Qualified Immunity

In the pending case, the video recordings and documentary evidence make clear that the Edison Defendants only used the amount of force necessary to subdue Plaintiff and arrest him. Importantly, Plaintiff tried to run and escape from the police and then actively resisted the officers' efforts to make the arrest. In Graham v. Connor, the U.S. Supreme Court specifically held that "resisting arrest or attempting to evade arrest by flight" were factors to be considered when assessing the reasonableness of the force used to "effect a particular seizure[.]" Graham, 490 U.S. at 396.

It is also significant that Plaintiff "had a set of keys clinched in each hand specifically with the keys poking through his knuckles which could be used as a weapon." Pa023. See also Pa304. Based upon this aggressive behavior, the Plaintiff "pose[d] an immediate threat to the safety of the officers[,]" which is another Graham factor, and further supported the officers' actions in this case. Graham, 490 U.S. at 396.

Lastly, although Plaintiff has made an excessive force claim, he has not presented any evidence or any injury, aside from some minor, undocumented treatment. After the arrest, Plaintiff was transported to Robert Wood Johnson

Medical Center. After Plaintiff was "medically cleared" for release, he was transferred to the Middlesex County Correctional Facility "without incident." Pa023. At his deposition, Plaintiff testified that he underwent one medical evaluation at the Jewish Renaissance Center about three or four months after his arrest in February 2020. Pa439-Pa440 (T35:11-T36:21). Plaintiff did not receive any treatment for alleged emotional distress. Pa349 (T35:3-8).

Had Plaintiff actually sustained injuries as a result of the officers' conduct, he would have had some medical documentation of treatment. The absence of any such evidence further disproves Plaintiff's claim. There is no doubt that the officers acted reasonably and are entitled to qualified immunity and the claim was properly dismissed on summary judgment.

POINT IV

THE TOWNSHIP OF EDISON, AS A PUBLIC ENTITY, IS NOT LIABLE UNDER THE NJCRA

The Edison Defendants incorporate herein the case law cited in Point II above concerning claims of violation of the New Jersey State Constitution under the NJCRA and their interpretation consistent with established doctrine under our federal Civil Rights Act. As explained below, the Township of Edison cannot be liable under the NJCRA.

The case law in New Jersey is fully consistent with federal court decisions concerning municipal liability for false arrest and excessive force by law

enforcement officers. Indeed, over four decades ago, the U.S. Supreme Court made clear that plaintiffs may not depend on a theory of *respondeat superior* to support a §1983 claim, but rather need to prove that the municipality supported the alleged violation of civil rights. Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 690 (1978). The liability of a public entity under §1983 only attaches when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. at 694.

A policy is created when a decision-maker with authority "issues an official proclamation, policy, or edict." Bielevicz v.Dubinion, 915 F.2d 845, 850 (3d Cir. 1990). A course of conduct may be considered a custom when the practice of municipal officials, though not authorized by state law, is "so permanent and well-settled" that it constitutes law. Monell, supra, 436 U.S. at 691. See also Torres v. Kuzniasz, 936 F.Supp. 1201, 1206 (D.N.J. 1996).

A policy cannot be established by a plaintiff's naked allegation. Rather, policies are made "when a decision maker possessing final authority to establish municipal policy with respect to the action, issues on an official proclamation, policy or edit. Hansel v. City of Atlantic City, 152 F. Supp. 2d 589, 609 (D.N.J. 2001). Thus, a plaintiff must prove that a municipal official, who had the power

to set policy, was responsible for the policy or acquiescence in a well-settled custom.

The plaintiff then must show a causal nexus between such proof and his injury. Bielevicz, supra, 915 F.2d at 850. Moreover, the official policy or unofficial custom claimed by any plaintiff in an effort to establish municipal liability under 42 U.S.C. §1983 must be specifically identified. Skevofilax v. Quigley, 586 F.Supp. 532, 544 (D.N.J. 1984). None of these legal predicates were established by Plaintiff in this case.

Obviously, a single unlawful act of a public employee does not imply a policy, practice or custom. City of Oklahoma v. Tuttle, 471 U.S. 808 (1985), rehearing denied, 472 U.S. 925; Wedemeir v. Ballwin, 931 F.2d 24 (8th Cir. 1991); Ramie v. City of Heding Village, 742 F.2d 490 (5th Cir. 1985). In other words, a single incident of misconduct by an individual officer is insufficient to impose entity liability under Monell. Erdman v. Cochise County, 926 F.2d 877, 882 (9th Cir. 1991); Whitted v. City of Philadelphia, 744 F. Supp. 649, 657 (E.D. Pa. 1990) (failure of police officer to obey regulation on use of baton not shown policy or custom); Powe v. City of Chicago, 664 F.2d 639, 648-49 (7th Cir. 1981); Gilmore v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984): Crane v. Alexander, 756 F.2d 1070, 1073 (5th Cir. 1985); Burnett v. Ciolino, 750 F.Supp. 1562, 1564 (M.D. Fla. 1990).

The Supreme Court in Oklahoma City v. Tuttle, 471 U.S. 808, 824 (1985) stated the following:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policy maker. Otherwise, the existence of an unconstitutional policy and its origin must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the policy and the constitutional deprivation.

When a failure to train is alleged as a Monell deficiency, the plaintiff must show under Section 1983 that an entity's failure amounts to "deliberate indifference to persons with whom these employees will come in contact with." Carter v. The City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999). Case law has further established that any identified deficiency in an entity's training program must be closely related to the ultimate injury, or in other words the deficiency in training must have actually caused the constitutional violation. City of Canton, Ohio v. Harris, 449 U.S. 378, 389 (1989).

Moreover, it must be shown that the training at issue was so inadequate as to make the alleged misconduct almost inevitable. Popow v. City of Margate, 476 F.Supp. 1237, 1246 (D.N.J. 1979). Liability against a municipal defendant under Section 1983 for an alleged failure to train its employees is only established if the

"policymaker failed to train its employees in deliberate indifference to the potential for violation of the constitutional rights of those with whom the employees come into contact." Kadetsky v. Egg Harbor Township Board of Education, 164 F.Supp.2d 425, 432 (D.N.J. 2001); Garcia v. County of Bucks, PA, 155 F.Supp.2d 259, 268 (E.D. Pa. 2001). A municipality is only liable for a failure to train if there is a pattern of similar incidents in which citizens were injured. See Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983); Mateyko v. Felix, 924 F.2d 824 (9th Cir. 1990); Lewis v. City of Irvine Kentucky, 899 F.2d 451 (6th Cir. 1990); Sprecht v. Jensen, 863 F.2d 700 (10th Cir. 1988); Hayes v. Jefferson County, 668 F.2d 869 (6th Cir. 1982).

In the pending case, there is no evidence that any decision-maker from the Township of Edison created a policy or custom permitting its police officers to make arrests without probable cause or use excessive force. To the contrary, the Township of Edison uses BWCs which record interactions between the police officers and the public. Here, the BWC video clearly shows that Kohut and Geist acted in a professional and responsible manner.

Further, Plaintiff took no discovery whatsoever concerning the training that Edison Township offered to its police officers, including Officers Kohut and Geist, at any relevant time. Plaintiff did not retain an expert witness on the subject of police training, policies or the use of force when making arrests. Plaintiff has no factual

foundation whatsoever to show that the Township was liable and this claim was properly dismissed on summary judgment.

POINT V

THE DENIAL OF PUBLIC ACCOMMODATION CLAIM WAS PROPERLY DISMISSED

Count 3 of the Complaint alleges that the Edison Defendants arrested and prosecuted Plaintiff because he was Black in violation of the public accommodations provisions of the N.J. Law Against Discrimination, N.J.S.A. 10:5-1 et seq.; N.J.S.A. 10:5-4; N.J.S.A. 10:5-12(f)(1). Pa15-Pa16. The purported factual basis for this allegation is that the Edison Police Department was "fully aware of [the officers'] propensity to engage in said unlawful activities and never properly trained and supervised them." Pa015, ¶¶3, 4.

There are several reasons to affirm the dismissal of this claim. First, as explained supra, Officers Kohut and Geist had valid reasons for questioning Plaintiff during the early morning hours of February 20, 2020, and they were fully justified in making the arrest and applying limited force to restrain and handcuff Plaintiff.

Second, although the Complaint contends that the Edison Police Department had notice of the alleged "propensity" of Kohut and Geist to discriminate and nonetheless failed to train them, Plaintiff has produced no evidence whatsoever to support this claim. As mentioned supra, Plaintiff did not take any depositions, nor

did he present any evidence of notice of the alleged propensity, nor did he retain an expert witness on the issue of inadequate training.

Lastly, Plaintiff is relying on hearsay to support this claim. Plaintiff's appendix includes several newspaper articles, dating back as far as 2012, concerning Edison police officers who allegedly engaged in misconduct in the past. Pa561-Pa625.

This appeal pertains to a review of a summary judgment in favor of the Edison Defendants. To defeat the motion, Plaintiff was required to respond with "relevant and admissible evidence." El-Sioufi v. St. Peter's University Hospital, 382 N.J. Super. 145, 164 (App. Div. 2005). "[N]ewspaper articles are obvious and unreliable hearsay." State v. Smith, 306 N.J. Super. 370, 377 (App. Div. 1997). "The general rule is that articles in newspapers and periodicals are inadmissible because of their hearsay character." State v. Banta, 188 N.J. Super. 115, 117 (Law Div. 1982).

It goes without saying that Plaintiff's reliance upon newspaper reports is improper and the articles should be disregarded. There was a complete absence of proofs on this cause of action and this claim was properly dismissed on summary judgment.

POINT VI

THE COMMON LAW CLAIMS WERE PROPERLY DISMISSED ON SUMMARY JUDGMENT

The Law Division had ample reason to dismiss Plaintiff's common law claims. As explained below, Plaintiff's tort-based claims were insufficient under the Tort Claims Act, N.J.S.A. 59:1-1 et seq., as well as other reasons, and they were properly dismissed.

A. The New Jersey Tort Claims Act

The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq., defines the parameters within which recovery for tortious injury may be had against public entities. The New Jersey Tort Claims Act became effective on July 1, 1972, and applies to all such claims related to injuries sustained after its effective date. Barney's Furniture Warehouse v. Newark, 62 N.J. 456, 470 (1973). Significantly, the Act supersedes all prior common law causes of action for the negligence of public entities in the State of New Jersey. Tower Marine, Inc. v. New Brunswick, 175 N.J. Super. 526, 531 (Ch. Div. 1980). The former governmental-proprietary distinction, for example, was eliminated under the Act. Tower Marine, Inc. v. New Brunswick, 175 N.J. Super. at 533.

The Legislative Declaration codified in N.J.S.A. 59:1-2 provides in pertinent part the following:

> On the other hand the 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 of the provisions of this act should be construed with a view to carrying out the above legislative declaration.

Our Supreme Court has recognized, and in fact emphasized, that the approach of the Act is to broadly limit public entity liability. Manna v. State, 129 N.J. 341, 346 (1992).

The various provisions of the Act were intended by our Legislature to be strictly construed to effectuate its purpose of broadly limiting public entity liability. Hawes v. New Jersey Dept. of Trans., 232 N.J. Super. 160 (Law Div.) aff'd. o.b. 232 N.J. Super. 159 (App. Div. 1988). For that very reason our Supreme Court has cautioned that trial courts should be cautious in sanctioning novel causes of action against public entities of the State. Ayers v. Jackson Twp., 106 N.J. 557, 574-575 (1987).

The Supreme Court has instructed our trial courts that they are generally required to find public entity immunity, unless there is a specific provision for the imposition of liability codified in the Act. Pico v. State, 116 N.J. 55, 59 (1989). Not surprisingly, the case law that has developed over the years has reiterated and reaffirmed the above legislature declaration. See Ball v. New Jersey Bell Telephone Co., 207 N.J. Super. 100, 107, 108 (App. Div. 1986)(...the plainly expressed

legislative mandate...is to immunize public bodies except where there is a statutory declaration to the contrary.); Kolitch v. Lindedahl, 193 N.J. Super. 540, 546 (App. Div. 1984) aff'd 100 N.J. 485 (1985)(immunity is the rule except as expressly provided for in N.J.S.A. 59:1-1 et seq.); Guerriero v. Palmer, 175 N.J. Super. 1, 4 (App. Div. 1979)("the act proceeds from an assumption of immunity subject to any liability provided in the act"); McGowen v. Borough of Eatontown, 151 N.J. Super. 440, 446 (App. Div. 1977) ("there is no liability except as provided by the act"); and Tower Marine, Inc. v. New Brunswick, 175 N.J. Super. 526, 531 (Chan. Div. 1980) ("The act purports to circumscribe all governmental tort liability").

N.J.S.A. 59:2-1(a) specifically sets forth the re-establishment of governmental immunity by providing that:

> (e)xcept as otherwise provided by this act, a public entity is not liable for any such injury arising out of an act or omission of the public entity or a public employee or any other person.

A limitation on recovery of damages was also incorporated in the New Jersey Tort Claims Act at N.J.S.A. 59:9-2(d), which provides as follows: "No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on recovery of damages for pain and suffering shall not apply in cases of "permanent loss of a bodily function, permanent disfigurement or dismemberment for the medical treatment expenses are in excess of $3,600.00."

N.J.S.A. 59:9-2(d) mandates that in order to recover any non-economic damages, a plaintiff must meet, in addition to a monetary medical expense threshold, one of two threshold requirements. First, a plaintiff must show a permanent loss of a bodily function. Alternatively, a plaintiff must show permanent disfigurement or dismemberment. Very significantly, plaintiff has not disclosed any medical expert causally relating any claimed injury to the force employed to effectuate his lawful arrest in February 2020, or establish any permanency of his claimed injuries. In fact, he readily admitted at his deposition that other than a single evaluation at Jewish Renaissance Center in Perth Amboy some three or four months after his February 2020 arrest, he never received any professional treatment or evaluation for any injuries that he claims to have suffered to his neck, his hands, his lower back, or his knee at the time of his arrest. Pa439-Pa440 (T35:3-T36:21).

Putting aside the issue of permanency, by his own admission, Plaintiff has failed to meet the medical treatment expense threshold of N.J.S.A. 59:9-2(d) for recovery of any non-economic damages. However, even if he were to treat with some medical professional for his claimed injuries and incur medical treatment expenses in excess of $3,600 prior to trial, he clearly is unable to meet the verbal threshold of the statute by establishing the permanent loss of a bodily function, which requires a demanding set of proofs.

The issue of what constitutes a "permanent loss of a bodily function" was the subject of a unanimous New Jersey Supreme Court decision rendered in Brooks v. Odom and New Jersey Transit, 150 N.J. 395 (1997). In that case, plaintiff, a pedestrian, was struck by a New Jersey Transit bus driven by Odom as the plaintiff was entering her parked car. Id. at 398. Plaintiff's treating physicians offered several diagnoses, including myositis, fibromyositis of the spine, post-traumatic headache syndrome, disc space narrowing, reversal of normal lordosis of the spine, and chronic pain exacerbated by the usual activities of daily living. Id. at 390-400. The plaintiff in Brooks complained that although she had returned to work as a teacher's aide, she could not stand or sit for prolonged periods without pain. Id. at 400. She also claimed continuing headaches, dizziness, and severe, radiating low back pain. Id.

The Supreme Court in Brooks held that the itemization of plaintiff's alleged permanent injuries and limitations failed to satisfy the N.J.S.A. 59:9-2(d) threshold, requiring permanent loss of a bodily function. Id. at 406. Although the Court also accepted plaintiff's claim that she experienced pain and limitations of the ranges of motion of her neck and back, the Court specifically found that plaintiff's ability to function, both in her employment and as a homemaker, led to the conclusion that the loss of function she experienced was not "substantial." Id.

It is absolutely critical to a plaintiff's ability to meet the Tort Claims Act's injury threshold that plaintiff present expert opinion testimony supporting at the very

least a claim of some permanent injury. Gilhooley v. County of Union, 164 N.J. 533, 536 (2000). In the pending case, Plaintiff has not produced any expert report or testimony from a medical provider to opine that he suffered any permanent injury, nonetheless the permanent loss of a bodily function.

B. Intentional Infliction of Emotional Distress

A plaintiff's burden in making a prima facie case for intentional infliction of emotional distress (also known as the tort of "outrage" in New Jersey's jurisprudence) is significant. In Buckley v. Trenton Saving Fund Soc., 111 N.J. 355 (1988), Justice Pollock authored the New Jersey Supreme Court's test for making a prima facie case of intentional infliction of emotional distress. The Buckley test provides as follows:

> Generally speaking, to establish a claim for intentional infliction of emotional distress, the plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe. [Citation omitted]. Initially, the plaintiff must prove that the defendant acted intentionally or recklessly. For an intentional act to result in liability, the defendant must intend both to do the act and to produce emotional distress. [Citation omitted]. Liability will also attach when the defendant acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow. [Citation omitted].
>
> Second, the defendant's conduct must be extreme and outrageous. [Citation omitted]. The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. [Citation omitted]. Third, the defendant's actions must have been the proximate cause of the plaintiff's

> emotional distress. [Citation omitted]. Fourth, the emotional distress suffered by the plaintiff must be so severe that no reasonable person could be expected to endure it. [Citation omitted]. *By circumscribing the cause of action with an elevated threshold for liability and damages, courts have authorized legitimate claims while eliminating those that should not be compensable.*

Buckley, 111 N.J. at 366-367 (emphasis added). See also Hill v. N.J. Dept. of Corrs. Com'r., 342 N.J. Super. 273, 297 (App. Div. 2001); Flizack v. Good News Home for Women, Inc., 346 N.J. Super. 150, 162 (App. Div. 2001).

In the pending case, a dispassionate review of the discovery record demonstrates that the actions of Officers Kohut and Geist did not even remotely approach the type of conduct required to establish intentional infliction of emotional distress. Even for claims alleging negligent infliction of emotional distress, which are not asserted in Count Five of plaintiff's Complaint (Pa017), a plaintiff must show that his emotional distress "was so severe that no reasonable man could be expected to endure it." Shillaci v. First Fidelity Bank, 311 N.J. Super. 396, 406 (App. Div. 1998).

In Taylor v. Metzger, our Supreme Court defined severe emotional distress as "a severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so. Taylor v. Metzger, 152 N.J. 490, 515 (1998). Neither the conduct of the defendant officers, nor the demonstrated effect that their conduct has had on Plaintiff, establishes a prima facie case of intentional or negligent infliction of emotional distress.

Not only has Plaintiff not provided any medical or psychological expert evidence, but he admitted that he was never even evaluated by any professional for any emotional injury that he claims to have been related to the force that was employed to effectuate the subject arrest. Pa439 (T35:3-8).

C. Res Ipsa Loquitur

Count 6 of the Complaint asserts a claim entitled "Class of One Endangerment; Res Ipsa Loquitur." Pa018. Res ipsa loquitur is not a cause of action and it should not be considered in this case. "*Res ipsa Loquitur* is not a theory of liability; rather, it is an evidentiary rule that governs the adequacy of evidence in some negligence cases." Myrlak v. Port Authority of New York and New Jersey, 157 N.J. 84, 95 (1999). Since *res ipsa loquitur* is not a recognized cause of action, Count 6 was properly dismissed on summary judgment.

CONCLUSION

For the foregoing reasons, it is clear that the Complaint was properly dismissed against the Edison Defendants on summary judgment, and that ruling should be affirmed.

Respectfully submitted,

WEINER LAW GROUP LLP
Attorneys for the Township of Edison and Police Officers Michael Kohut and Michael Geist

By: *s/ Sandro Polledri*
Sandro Polledri, Esq.

Dated: April 8, 2024

3527834

TREMAYNE HOWARD **PLAINTIFF** **vs.** **TOWNSHIP OF EDISON, TOWNSHIP OF HIGHLAND PARK, OFFICER MICHAEL KOHUT, OFFICER MICHAEL GEIST, HEAD DOE AND JOHN DOES 1-10, (DOES IDENTITIES UNKNOWN)** **DEFENDANTS**	**SUPERIOR COURT NEW JERSEY APPELLATE DIVISION-0836-23** **Sat Below** **Hon. HON. ALBERTO RIVAS, J.S.C.** **Docket No: MID-L- 00765-22** **Civil Action** **Submitted: July 8, 2024**

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NEW JERSEY COURT RULES

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FEDERAL STATUTES

NEW JERSEY CONSTITUTON

UNITED STATES CONSTITUTION

APPENDEX INDEX[1]

[1] Multiple documents are attached under exhibit cover pages.

[2] The various summonses and criminal records are different because some have notations and others don't, thus they should not be considered duplicates.

[3] Attorney Renaud used the exhibits from Attorney Hawkins under his own exhibits so there are no duplicate exhibit letters

EPP

CR

[4] This should not be considered a duplicate because it has an additional recipient.

CK

Exhibit C-10 to Renaud's Certification

Consent to Search Vehicle 2/20/20-00:47 (Attached at Pa029)
Use of Force Report by Officer Geist (Attached at Pa030)

Use of Force Report by Officer Kohut (Attached at Pa031)

Evidence Form (Marijuana) (Attached at Pa032)

Evidence Form (Orange Pill) (Attached at Pa033)

Evidence Form (Money) (Attached at Pa034)

Evidence Form (1 Key and other items) (Attached at Pa035)

Evidence Receipt from Lab (Tab/Marijuana) (Attached at Pa036)

Exhibit C -11 to Renaud's Certification

Complaint Summons 2/20/20 (Attached at Pa041)

Discovery Desk Central Records (Attached at Pa069)

Letter from Edison Public Safety to Hawkins

Dated Sept 30, 2020 (Pa068)

HIT Confirmation Wanted Person 02/20/2020 (Attached at Pa040)

CJIS Transmittal Form 2/20/20 (Attached at Pa038)

Wanted Person Picture of Plaintiff (Attached at Pa039)

Discovery Checklist (billing date 5/5/2020) (Attached at Pa070)

Police Department Record of Booking 2/20/22 (Attached at Pa074)

Officer Report by Michael Geist 2/20/20 (Attached at Pa303)

Incident Data Type/Offense as of 3/6/2020 involving Tremayne Howard (Attached at Pa302)

Officer Report by Michael Kohut 2/20/20 (Attached at Pa022)

HIT Confirmation Wanted Person 02/20/2020 (Attached at Pa040)

Letter From Edison Police Records to Hawkins 7/29/2020 (Attached at Pa051)

Letter From Edison Police Records to Hawkins 7/07/2020 (Attached at Pa071)

Letter From Hawkins to Highland Park 9/25/2020 (Attached at Pa056)

Exhibit C-12 to Renaud's Certification

Letter From Hawkins to Highland Park 9/25/2020 (Attached at Pa056)

Hawkins Notice of Claim to Edison Clerk 2/27/2020 (Attached at Pa053)

Letter From Hawkins to Edison Municipal Complex 6/19/2020 (Attached at Pa084)

Letter From Hawkins to Edison Municipal Complex 6/22/2020 (Attached at Pa078)

Letter From Edison Public Safety to Hawkins 7/7/2020 (Attached at Pa071)

Discovery Checklist (billing date 7/7/2020) (Attached at Pa028)

Consent to Search Vehicle 2/20/20-00:47 (Attached at Pa0029)

Use of Force Report by Officer Geist (Attached at Pa0030)

Use of Force Report by Officer Kohut (Attached at Pa0031)

Evidence Form (Marijuana) (Attached at Pa0032)

Evidence Form (Orange Pill) (Attached at Pa0033)

[5] Also on Pa218 but should not be considered duplicate since the submitted button does not clearly reflect that it was in fact submitted

[6] The signature lines for the trial judge and defendant are not visible but they are unsigned by both

Exhibit E to Hawkins' Certification

Notice of Appeal to NJ Superior Court 11/05/2021 (Attached at Pa185)

Notice of motion for wavier of transcript fees and cost
Dated 11/05/2021 (Attached at Pa186)

Application in Support of a Support Fee Waiver
Dated 11/11/2021 (Attached at Pa187)

State v. Rosalina F. Melina (Attached at Pa190)

Documents Submitted on JEDS by Hawkins (Attached at Pa218)

Complaint Summons 2/20/2020 (Attached at Pa0041)

Exhibit K to Certification of Renaud [7]
Pa523
Hawkins Letter to Judge Hernan and Edison Prosecutor
12/24/2020 (Attached at Pa108)

Certification of Eldridge Hawkins to Motion to
Dismiss and suppress 10/14/2020 (Attached at Pa229)

Statement of Facts - Police Reports Attached 10/13/2020
(Attached at Pa232)

Notice of Motion to Suppress and Dismiss by Hawkins
10/13/2020 (Attached at Pa059)

Hawkin's Letter to Judge Hernan Regarding Submission of Copies to
Prosecutor and Hernan 4/15/2021 (Attached at Pa245)

Certification of Hawkins 4/15/2021 (Attached at Pa247)

Order Brought by Hawkins (Attached at Pa249)

Notice of Claim to Edison 2/27/2020 (Attached at Pa053)

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[7] Multiple documents under one exhibit cover page

Dismiss and suppress 10/14/2020 (Attached at Pa229)

Statement of Facts - Police Reports Attached 10/13/2020 (Attached at Pa259)

Hawkins' Letter to Highland Park Prosecutor and Court Administrator 9/25/2020 (Attached at Pa0056)

Notice of Claim to Edison 2/27/2020 (Attached at Pa053)

Letter From Hawkins to Edison Municipal Complex 6/19/2020 (Attached at Pa084)

Letter From Hawkins to Edison Municipal Complex 6/22/2020 (Attached at Pa078)
Letter from Public Safety to Hawkins 7/7/2020 (Attached at Pa0071)

Discovery Checklist (billing date 7/7/20) (Attached at Pa0028)

Consent to Search Vehicle 2/20/20-00:47 (Attached at Pa0029)

Use of Force Report by Officer Geist (Attached at Pa0030)

Use of Force Report by Officer Kohut (Attached at Pa0031)

Evidence Form (Marijuana) (Attached at Pa0032)

Evidence Form (Orange Pill) (Attached at Pa0033)

Evidence Form (Money) (Attached at Pa0034)

Evidence Form (1 Key and other items) (Attached at Pa0035)

Evidence Receipt from Lab (Tab/Marijuana) (Attached at Pa0036)

Use of Force Report by Officer Kohut (Attached at Pa0031)

Use of Force Report by Officer Geist (Attached at Pa0030)

CJIS Transmittal Form (Attached at Pa0038)

Wanted Person Request (Mugshot) (Attached at Pa0039)

HIT Confirmation Response (Attached at Pa040)

Hawkins' Letter to Highland Park Prosecutor and Court Administrator, Dated 9/25/2020 (Attached at Pa0056)

Order Brought by Hawkins (Attached at Pa256)

Notice of Motion to Suppress and Dismiss by Hawkins 10/13/2020 (Attached at Pa059)

Evidence Receipt from Lab (Tab/Marijuana) with "NOTICE PER PROSECUTOR" written (Attached at Pa266)

Letter dated 9/29/20 from Highland Park Municipal Court To All parties regarding 10/14/20 Hearing (Attached at Pa269)

Letter dated 9/29/20 from Highland Park Municipal Court to all parties regarding Nov 18, 2020 Trial (Attached at Pa270)

Letter dated 11/23/20 from Highland Park Municipal Court regarding Trial via Zoom Jan 13, 2021 (Attached at Pa271)

Letter dated 12/22/20 from Highland Park Municipal Court regarding February 10, 2021 hearing (Attached at Pa272)

Letter dated 1/22/21 from Highland Park Municipal Court regarding March 17, 2021 hearing (Attached at Pa273)

Letter dated 1/25/21 from Highland Park Municipal Court regarding 4/14/2021 hearing (Attached at Pa274)

Letter dated 4/26/21 from Highland Park Municipal Court Regarding hearing scheduled for June 23, 2021 (Attached at Pa275)

Letter dated May 4, 2021 from Highland Park Municipal Court regarding hearing scheduled for June 23, 2021 (Attached at Pa276)

Letter dated June 24, 2021 from Highland Park Municipal Court regarding hearing scheduled for July 20, 2021[8] (Attached at Pa277)

Letter dated June 24, 2021 from Highland Park Municipal Court regarding hearing scheduled for July 20, 2021 (Attached at Pa278)

Letter dated July 21, 2021 from High land Park Municipal Court regarding Trial scheduled for August 17, 2021 (Attached at Pa279)

Letter dated August 2, 2021 from High land Park Municipal Court regarding Trial scheduled for August 25, 2021 (Attached at Pa280)

Letter dated August 19, 2021 from High land Park Municipal Court regarding Trial scheduled for September 22, 2021 (Attached at Pa281)

Letter dated May 15, 2020 from Weiner Law Group to Edison Township Court Administrator regarding investigating Notice of claim received from Tremayne Howard (Attached at Pa282)

Letter sent March 16, 2020 from Qual Lynx (Third Party Administrator) requesting status on the hearing scheduled for March 2, 2020 (Attached at Pa283)

Letter from Judge Rogert Jones dated April 22,2022 to Edison Municipal Court Administrator advising that Order of that same date was enclosed in letter (Attached at Pa284)

Order dismissing Appeal by Judge Jones dated 4/22/2022 (Attached at Pa285)

Exhibit L to Certification of Renaud **Pa525**

Handwritten Notes 6/3/21 regarding Tremayne Howard's Incident with police (Attached at Pa287)

Subpoena served on police Officers by Hawkins

[8] This should not be considered a duplicate because it has an additional recipient.

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APPENDIX INDEX TO VOLUME FOUR OF APPENDICES

[1] Corrected Exhibit H to Certification of Baratz, Esquire in Support of Summary Judgment

Procedural History

Plaintiff hereby incorporates the Appellate Brief's procedural History here.

Statement of Facts

Plaintiff hereby incorporates the Appellate Brief's Statement of Facts here.

Point I: Counterstatement of Facts (Pa022-023, Pa676, Pa303-304, Pa54, Pa561-Pa625, Pa93-Pa97, Pa488, Pa652-Pa654 Pa45, Pa53)

On February 20, 2020, plaintiff, a 30years old, dark skinned African American male, wearing a hoodie, was lawfully in the township of Edison with his friend Amanda at the Chestnut bar. Plaintiff then went outside to transfer his backpack from his friend's car to his car. After the transfer, plaintiff was approached by the Edison police who had no reasonable suspicion or probable cause to stop him, who claimed that plaintiff was approached because "this specific neighborhood is an area known for motor vehicle burglaries." (**Pa022**). The Supreme court has stated that "the constitutional right to be free from arbitrary [interference with people's liberties] is not suspended in high-crime neighborhoods where ordinary citizens live and walk at all hours of the day and night." State v Gibson, 218 N.J. 277 (2014).

Plaintiff had two sets of keys as observed by the police, evidencing that he was privileged to enter both cars, thus he could not have been committing a burglary. **(Pa023).** In addition to needing reasonable suspicion that criminal activity is afoot, the officer must also be able to articulate reasonable suspicion that the suspect is armed and dangerous. Terry v. Ohio, 392 U.S. 1, 30 (1968). The police report by Officer Geist states that he observed that the plaintiff had a knife in each pocket.

(Pa303, Pa022). The carrying of pocketknives is not a violation of any laws. NJSA 2C:39-3 (e) prohibits possession of a gravity knife, switchblade knife, dagger, dirk, stiletto, . . . or . . . ballistic knife, without any explainable lawful purpose. Id. Plaintiff was not carrying any of these types of knives. A pocketknife is not considered dangerous warranting a Terry pat down. See State v. Irizarry, 270 N.J. Super. 669, 673 (App. Div. 1994)(citing N.J.S.A. 2C:39-1(r) (defining weapon as "anything readily capable of lethal use or inflicting serious bodily injury"). A "Dangerous knife" must be dangerous per se and embraces only knives with fixed or locked blades to the exclusion of folding-blade knives. State v. Green, 62 N.J. 547(1973).

Officer Geist stated that he removed plaintiff's knives then patted plaintiff down for *additional weapons* for officer safety**. (Pa303).** "[I]f there's one weapon, there could be more," is insufficient to justify a Terry frisk." See Dwayne Scott Lockard v. State of Maryland **(Pa676);** Terry v. Ohio, 392 U.S. 1 (1968). Here, the plaintiff was not armed and not dangerous and "officer safety" alone will not justify a frisk. The officer must articulate "why" officer safety was an issue (exactly what risk / danger to the officer or others existed). United States v. Brown, 334 F.3d 1161, 1164 (D.C.Cir.2003). Moreover, if the pocketknives were weapons as stated in the police report, plaintiff would have been charged with unlawful possession of the knives. Pursuant to the police report, Officer Geist stated that he requested the car key from the plaintiff to determine if the car belonged to Amanda and to search

plaintiff's bags WITHOUT A WARRANT to confirm there were no proceeds from motor vehicle burglaries inside. **(Pa22)** Plaintiff knew that a key was NOT required to determine whether the car belonged to Amanda. A reasonable person being requested to turn over a car key to the police would have believed that he was "not free to leave" which constitutes a "seizure" under the 4th Amendment. United States v. Mendenhall, 446 U.S. 544, 554 (1980). Although the officers could easily run the license plate to determine the owner, they assaulted and battered the plaintiff, took the keys from him, claiming that he sounded unsure of the owner, although the owner identified by plaintiff later came out of the Chestnut bar. **(Pa303-304; Pa22).**

Officer Geist did not indicate that the police had need to search the car due to weapons within plaintiff's reach that could be used to harm the police, or that there were items inside the car subject to a search based on exigent circumstances. It is noteworthy that neither of the police reports expressly state that any officer asked the plaintiff for the owner's last name. Officer Geist and Kohut both have matching sentences in their reports (even with the same typo) as follows:

> *Howard refused to hand the keys to officer's (sic) and immediately became irate. We stood him up and attempted to place him in handcuffs due to his change in demeanor and the fact that he had a set of keys in each hand.* **(Pa303-Pa304; Pa022)** *. . .Howard tightened his body and put his arms under himself, making it difficult to pull his arms behind his back. Howard then used the ground to try to push himself up.* **(Pa304; Pa023)**

The officers provided inconsistent stories regarding plaintiff's backpack

that contained a bottle with alcohol (which is legal) that plaintiff did not want to keep in the passenger compartment. **(Pa054).** Officer Kohut stated in his report that he observed the plaintiff *lift the trunk floorboard* and place the backpack in where the spare tire would be located. **(Pa022).** He then contradicts himself by stating that upon making contact with the plaintiff he *observed the bottle with alcohol* (that was inside the backpack under the floorboard) *on top of the floorboard.* **(Pa022).**

In contrast, Officer Gist who stated that he was also present at 0023 states:

> We observed there was no backpack in the trunk area of the Jeep. When asked where he placed it, Howard stated that it was under the floor in the trunk area where the spare tire is stored. Howard explained he put it there due to an alcoholic beverage inside of the backpack. **(Pa303)**

This clearly meant that Officer Gist did not see a bottle of Alcohol *on top of the floorboard* although Officer Kohut contends that he saw it. The bottle with alcohol was either *under the floor**board*** (in the back pack as plaintiff stated) or *on top of the floor board.* ***It* cannot be both!** Thus, one police officer was lying. Their story about plaintiff stating "uuh Amanda" (justifying reasonable suspicion?) sounds totally concocted. What are the odds of plaintiff not knowing his friend's first name? The maxim 'falsus in uno falsus in omnibus,' while not a mandatory rule of evidence, is clearly applicable in this case. State v. Guida, 118 N.J.L.289, 297 (Sup. Ct. 1937). Here, the police documented that 'the owner came out' Of the bar as opposed to 'Amanda came out,' clearly intending to mislead others into believing Amanda was not the owner. **(Pa304).**

Words matter, especially words used in police reports that are capable of destroying people's lives and liberties. Note carefully that the police reports state that plaintiff was observed to remove a back pack from a green jeep and transfer it to the trunk area of a black jeep. **(Pa303).** The same reports then state "***it is uncommon for individuals to rummage through multiple vehicles at this time of night***" **(Pa303).** According to Webster's dictionary, the word **rummage** means to *make a thorough search or investigation or to engage in an undirected or haphazard search.* Why was the word RUMMAGE used in the police reports when it did not describe plaintiff's act in **transferring one bag from one car to another**? The word **RUMMAGE** was clearly used by the police officers in each report to mislead.

Furthermore, an officer's subjective, good-faith hunch does not justify an investigatory stop — even if that hunch proves correct. See State v. Arthur, 149 N.J. 1, 8 (1997). Plaintiff was not observed engaging in any illegal activity. Moreover, a field inquiry has certain requirements which include asking the individual "if the person is willing to answer some questions." State v. Pineiro, 181 N.J. 13, 20 (2004) So long as the questioning "is not harassing, overbearing, or accusatory in nature," State v Nishina, 175 N.J. 502 (2003) and the person is free to refuse to answer and "go on his way," Florida v. Royer, 460 U.S. 491, 498 (1983).

Being told by the police (who had no WARRANT) to "hand over the car keys" to someone else car, is not considered a question. Moreover, those words would not

allow any reasonable citizen to believe that he was free to leave or free to refuse to answer and go on his way. Such words are harassing, overbearing and accusatory to an Adult Citizen. The US Supreme Court has expressed that "Absent special circumstances the person approached [by the police] may not be detained or frisked but may refuse to cooperate and go on his way." Terry v. Ohio, 392 U.S.at 34. Here, the police would not allow plaintiff to refuse and go on his way. The police officers "stood him up" and attempted to place him in handcuffs. **(Pa22).**

Warrantless seizures and searches are presumptively invalid as contrary to the United States and the New Jersey Constitutions. State v. Patino, 83 N.J. 1, 7, (1980). Both constitutional standards require that such seizures or searches be conducted pursuant to a warrant issued upon a showing of probable cause. U.S. Const. Amend. IV; N.J. Const. Art. I, para 7; State v Pineiro, 181 N.J. 13 (2004).

Detention via handcuffs because of plaintiff's demeanor is a seizure requiring probable cause. Refusal to hand over car keys to allow a warrantless search and becoming irate upon being violated and harassed by one of the most **BRUTAL** police forces in New Jersey, does not give rise to probable cause. **(Pa561-Pa625, Pa303-Pa304).).** "[The Court] cannot allow the police to randomly `encounter' individuals without any objective basis for suspecting them of misconduct and then place them in a coercive environment in order to develop a reasonable suspicion [or probable cause] to justify their detention." State v Carty, 170 N.J. 632, 910 (2002). The police

in this case had no basis to stop, beat and imprison the plaintiff. **(Pa93, Pa96-Pa97)**

Prior to the trial for the criminal charges related to the unlawful arrest, plaintiff served a notice of claim (NOC) upon the Township of Edison advising same of a lawsuit against Edison and its police for multiple civil, NJLAD, Constitutional violations as well as false arrest and other claims. **(Pa45, Pa53**). Edison, in response to the NOC, transferred plaintiff's criminal matter to the Township of Highland Park.

Point II:Summary Judgment To Defendants Should Be Vacated (Pa480-85, Pa535,Pa93-97, Pa53-54, Pa41, Pa152, 1T42-6 to 14, 1T5-12 to 18, 1T3-21 to 22)

Defendants for the first time asks the appellate Court to grant Summary Judgment alleging that *plaintiff did not respond to their statement of material facts*, although plaintiff responded to all defendants. **(Pa480-Pa484)**. An appellate court ordinarily will not consider issues that were not presented to the trial court, Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973), and an appellate court should be even more hesitant to raise an issue sua sponte that the parties have not had an opportunity to address, See Robbiani v. Burke, 77 N.J. 383, 395 (1978). More significantly, in Leang v Jersey City Board of Education, the Appellate Division said that a respondent's failure to comply with R. 4:46-2(b) will not justify a grant of the motion based on the assumption that the movants' statement of material facts is true **when the record as a whole clearly shows a material dispute**. Id at 399 NJ Super 329, 356-357 (App. Div 2008). Defendants' **facts were not sufficiently supported, and the records as a whole showed a material dispute**.

The Court in denying Plaintiff's Motion for Consolidation **(Pa485, Pa535)** stated:

> With respect to plaintiff's motion to consolidate, that will be denied at this point, there appears to be some question as to when the plaintiff had access to discovery. As to the issue that he now claims is newly discovered, that is best to be reviewed in a **separate proceeding.** As to whether or not that case will go forward or not, that's not for me to say at this point, other than to say the motion to consolidate is denied. **(1T42-6 to14)**

Here, the issue of discovery was never resolved and contrary to the defense, videos can be tampered, cut and edited, because as plaintiff's counsel stated, the video certainly did not show the amount of force used. **(1T5-12 to 18).** Had officers Kohut and Geist been **"polite** … **calm** … and **reasonable"** as the judge contented, plaintiff would not have sustained a dislocated jaw, multiple cuts and bruises, and injuries to neck from being choked, warranting treatment in the ER, as well as PTSD from psychological trauma **(Pa093- Pa097, Pa053-Pa054; Pa041, Pa152, 1T3-21 to 22).** If the video was so helpful, defendants would have attached it on appeal.

Point III: Plaintiff Showed False Arrest, Violation of 42 USC §1983 and NJSA 10:6-2(c) and No Basis for Qualified Immunity to The Police (Pa303-Pa304, Pa22-Pa23, Pa453, Pa471, Pa653, Pa96, Pa054)

A. False Arrest: False arrest occurred which was the constraint of the plaintiff without legal justification. Pine v. Okzewski, 112 N.J.L. 429, 431 (E. & A.1934). An arrest without probable cause or independent basis to believe that the marijuana that was later found existed, is a constitutional violation actionable under 42 USC §1983. Walmsley v. Philadelphia, 872 F.2d 546 (3d Cir. 1989). **(Pa304).** Only a legal seizure of an arrestee may justify the warrantless search of his person and the **area within**

his immediate grasp Chimel v. California, 395 U.S. 752, 762-63 (1969) and exigency above and beyond the mere mobility of the vehicle is required. An officer must "articulable" reasons to believe that the evidence would be at risk if a search was delayed. State v. Colvin, 123 N.J. 428 (1991). As stated in State v Penna Flores:

> The warrantless search of an automobile in New Jersey is permissible where (1) the stop is unexpected; (2) the police have probable cause to believe that the vehicle contains contraband or evidence of a crime; and (3) exigent circumstances exist under which it ***is impracticable to obtain a warrant***." Id at 198 N.J. 6, 20 (2009)

Here, either Sergeant Duffy, Officer's Farrell, Cercatore, Richard and Bertucci who had arrived on the scene prior to the search of the car trunk could have called for a warrant. **(Pa303-304).** As Plaintiff was handcuffed, he could not reach into the backpack under the floorboard in the car trunk to pull out any weapon to injure any officer. See State v. Dunlap, 185 N.J. 543, 548-549 (2006). Thus, there were no exigent circumstances for a warrantless search of the car trunk.

The fruit-of-the-poisonous-tree doctrine denies the prosecution the use of the marijuana obtained as a result of a 4th or 5th Amendment violation. United States v. Patane, 542 U.S. 630, 642-44 (1963); See NJ Const. Art 1 para7. Based on this doctrine, the marijuana could not have been used as grounds for plaintiff's prosecution. An arrest for Obstruction and resisting arrest are supplemental charges with certain requirements. *Plaintiff was not told (a requirement) that he was under arrest when he was thrown to the ground and handcuffed due to "refusing to hand*

over keys" and "change in demeanor," thus the charge for resisting is invalid. (**See Pa022-Pa23; See Pa303; Pa453; Pa471).** Plaintiff was arrested for marijuana (at which time he did not resist) which was found **after** his car trunk was searched, which is not an independent underlying charge to justify an Obstruction charge. State v. Perlstein, 206 N.J. Super. 246 (App. Div.1985). Moreover, the **Marijuana charge was dismissed after the arrest. (Pa653)**

B- No Qualified Immunity, Violation of 42 USC §1983 and NJSA 10:6-2 (c)

NJSA 59:3-3 and NJSA 59:3-14 did not immunize the police officers from charges of false arrest, false imprisonment and excessive force because they acted with willful misconduct and excessive force. Pisano v. City of Union City, 198 N.J. Super. 588, 590 (Law Div.1984); Valencia v Wiggins, 981 F.2d 1440 (5thCir. 1993). **(Pa54, Pa96, Pa471).** The police also violated plaintiff's 4th Amendment and Art 1 para 7 rights to be free from unlawful searches. The police acted willfully then falsely charged plaintiff for obstruction when there was no independent underlying act, or lawful official duty. Plaintiff could not "obstruct a false arrest." He was deprived of his rights under the privileges and immunities clause. State v Perlstein, 206 Super. 246 (App.Div.1985); Art 1 para 1,7, 42USC 1983 and NJSA 10:6-2 (c). Thusly, Qualified immunity did not attach.

C-Excessive Force was Used: As occurred here, the officers' use of a **chokehold** on an unresisting and even initially resistant detainee violates the 4th and 14th

amendments. See Valencia 981 F.2d at 11447-1449. The punching, kneeling in the ribs, choking and dislocating of plaintiff's jawbone was brutal and excessive. **(Pa96, Pa471, Pa54**). The police then falsified a story that the car keys were suddenly sticking out between plaintiff's fingers in a weaponlike fashion. Cortez v. McCauley, 478 F.3d 1108, 1127 (10th Cir. 2007); Hudson v. McMillian, 503 U.S. 1, 8 (1992).

Point IV: Edison Is Liable Under The NJCRA(Pa561-625, Pa22-Pa23, Pa303-Pa304, Pa093-Pa097, Pa Pa471, Pa054, Pa96)

"A municipality may be sued directly . . . . where 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers.'" Bocchino v. City of Atl. City, 179 F. Supp. 3d 387, 400 (D.N.J. 2016). Municipal liability may be premised on a custom or policy. See McTernan v. City of York, 564 F.3d 636, 657 (3d Cir. 2009). "Policy is made when a decisionmaker possessing final authority to establish a municipal policy with respect to the action issues an official proclamation, policy, or edict." Andrews v. City of Phila., 895 F.2d 1469, 1480 (3d Cir. 1990). Conduct is considered a custom "when, though not authorized by law, such practices of state officials [are] so permanently and well-settled as to virtually constitute law." Id. at 1480. "Custom is shown by knowledge and acquiescence by the decisionmaker." McTernan, 564 F.3d at 658.

Edison is aware that its police officers have frequently engaged in the conduct of imposing brutal beatings upon citizens. **(Pa561-Pa625).** See Brown v.

Muhlenberg Township, 269 F.3d 205, 215 (3d Cir. 2001). The city's failure to properly train and reinforce reflects "deliberate indifference to the rights of persons with whom the police come into contact." and subject the Municipality to a 1983 claim. Id. A Municipality's knowledge that the police will confront a particular situation, a history of police mishandling and wrong choices, cause the deprivation of constitutional rights. Doe v. Luzerne County, 660 F.3d 169, 180 (3d Cir. 2011).

These criminal beatings by Edison police have been ongoing for over 30 years (**Pa621**). Within one four-year span six Edison police officers were criminally charged. **(Pa591)**. Investigation shows that Edison has a record of Misconduct that far outstrips department of similar sizes in New Jersey. (**Pa588, Pa591**). According to the Star Ledger, Edison has an astonishing record of misconduct unmatched by any department of equivalent size in New Jersey. **(Pa562). "The misconduct in Edison is even more stark when compared with New Jersey's Biggest Law Enforcement Agency the State Police." (Pa562). Edison has officers on drugs (trading cocaine for sex) (Pa573), Officers who lie under oath (Pa574), use racial slurs (Pa571). Investigation reveals a pattern of violence that gives others in the department a feeling that "I am going to get away with it" (Pa577, Pa578)**

Edison's internal affairs have exonerated officers who use excessive force leading to brain injury, broken bones, lacerated ear and cuts and bruises. **(Pa579).** Edison police force document falsely. One police officer checked a box on the

use of force, indicating that he used a compliance hold and other force which he did not elaborate. **(Pa580)**. In truth, the officer kicked the man in his head and threw at least one punch **(Pa580).** Another severe beating at Edison police headquarters was not recorded. **(Pa581).** Plaintiff's brutal beating is part of Edison's custom**. (Pa22-23, Pa303-304, Pa93-97; Pa471, Pa054).** Edison is liable under the NJCRA.

Point V:Edison Denied Plaintiff Public Accommodation(Pa41, Pa52, Pa22-23)

Pursuant to Ptaszynski v. Uwaneme the Township of Edison, its buildings and the individual staff are places of public accommodation. Id. 71 N.J. Super. 333, 853 (App. Div. 2004). See NJSA 10:5-4 requiring public accommodation in providing services in a non-disparate fashion and equal rights to all. Pursuant to the NJ Appellate Division, a place of public accommodation is not free to offer its services in a hostile fashion. Holmes v. Jersey City Police Dep't, 449 N.J. Super. 600 (App. Div. 2017). Edison/Police officers were ineligible for summary judgment because they provided hostile services to plaintiff and denied him public accommodation by the unlawfully stopping, searching, beating and arrest. **(Pa41, Pa52, Pa22-23)**

Point VI: The Common Law Claims were Unjustly Dismissed(Pa94-97, Pa52)

A public entity is liable for injury proximately 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. NJSA 59:2-2 (a). A factfinder is permitted "to infer negligence in certain circumstances, effectively reducing the plaintiff's burden of persuasion, although not shifting the burden of

proof." See Khan v. Singh, 200 N.J. 82, 91 (2009). Plaintiff sustained serious injuries proximately caused by the beatings received from the police from which he still has discomfort. *But for* the acts of the police, Plaintiff would not have been diagnosed with a dislocated jaw, walks with a limp, has pain to his neck, back, leg, jaw, knee, and is suffering from PTSD and Depression. **(Pa094-Pa097; Pa052).** The ER bills for a visit of that nature would exceed the statutory amount. Had the matter been tried, plaintiff would have provided his proofs related to any permanency.

Point VII: Highland Park Denied Plaintiff of Public Accommodation And was Not Entitled To Summary Judgment As Shown In Plaintiff's Appellate Brief and Complaint (Pa652-54, Pa470-488, Pa344, Pa41, Pa533, Pa505, Pa511-515)

Pursuant to the Appellate Division, a place of public accommodation is not free to offer its services in a hostile fashion. Holmes v Jersey City Police Department, 449 N.J. Super. 600 (App. Div. 2017). By refusing to provide plaintiff with a signed Order from which he could appeal his unlawful conviction that would forever cause a stain and blight upon his reputation, the defendants provided plaintiff with hostile services and denied him of public accommodation. R. 3:21-5(b) **(Pa41)**

Contrary to the defendants, there was no signed order of conviction given to the plaintiff or his attorney when previously requested. **Pa470-Pa484).** The undated order with Judge Herman signature, was attached to defense counsel's submissions on his motion for summary judgment over one year later. **(Pa652-Pa654, See Pa505, Pa488, Pa511-515**). If a properly signed order truly existed, defense Counsel who

produced the undated copy, would have attached **a signed and dated** copy to his "Exhibit H" in support of his certification. **(Pa652-54, Pa344**). Moreover, the defendants cite to no rule that supports their contention that a properly signed order of conviction was not required to appeal plaintiff's criminal matter.

Plaintiff's lack of an order from which he could appeal his conviction. carried plaintiff's burden of proving a prima facie case that he was denied full and equal qual accommodations, advantages, facilities and privileges of places of public accommodation. Same carried plaintiff's burden of proving a prima facie case warranting denial of summary judgment. See Zive v Stanley Roberts, Inc.182 NJ 436 (2005) **(Pa470-Pa471, (Pa533). See also** NJSA 10:1-2; Ptaszynski v. Uwaneme, 71 N.J. Super. 333, 853 (App. Div. 2004); NJSA 10:5-4.

Point VIII: Summary Judgment Was Improperly Granted Because Highland Park Violated NJSA 10:6-2 And The New Jersey Constitution By Failing To Provide The Plaintiff With An Order From Which He Could Appeal His Conviction (Pa652-654, Pa533, Pa501, Pa499, Pa494, Pa498, Pa485, Pa488, Pa470, Pa471, Pa137, Pa41)

NJSA 10:6-2 (c) in fact protects the rights afforded under the New Jersey constitution. Equal protection as well as procedural and substantive due process are among the rights outlined in Article 1 para 1. See Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985) (Article 1, paragraph 1, like the fourteenth amendment, seeks to protect against injustice and against the unequal treatment of those who should be treated alike). When no one could turn over an Order from which an Appeal of a

Criminal Conviction could be obtained the above provisions were violated (**Pa470-471, Pa41**). The matter was in fact heard in Highland Park, thus Highland Park was responsible for ensuring that a signed order was able to plaintiff at the end of Plaintiff's criminal trial. Contrary to defense Counsel on page 21 of his brief, the undated order was seen for the first time on August 10, 2023, when it was noted attached to defense Counsel's certification in support of summary Judgment. **(Pa137, Pa652-654**). The undated order that is bate stamped at **Pa654,** bearing Judge Herman's signature was the reason why plaintiff filed a new complaint on September 26, 2023, alleging fraud and adding Judge Herman as a defendant. (**Pa488**).

On September 26, 2023, Plaintiff filed a motion to consolidate the 2023 complaint with the 2022 complaint on summary judgment. **(Pa485, Pa488).** The complaint filed on 9/26/2023 that added Judge Herman as a defendant is docketed at MID-L- 5427 -2023.[1] **(Pa488).** In the complaint, the Plaintiff expressly denied receipt of the undated order. (**Pa494, Pa471, Pa654**). Contrary to defense Counsel, the disposition sheet, signed by Court Administrator Michelle Kaskerspi, is not an Oder signed by a Judge. **(Pa653).** Moreover, a properly executed Order requires the defendant's signature and the date signed by the defendant which was not done. (**See Pa654).** Plaintiff also alleged that defendants misused process and that all did not

[1] Please note that the new LCV number and docket number MID-L-5427-2023 for the new complaint are not shown at the top of Pa488 that was filed as an attachment on the summary judgment motion.

turnover to plaintiff Howard or his attorney prior to Judge Jones' order dismissing plaintiff's complaint, a copy of judge Herman' s signed order entering the disposition. **(Pa498).** Plaintiff stated in his new complaint that in August 2023, defendant's counsel submitted to the NJ Superior Court Civil division for the first time the alleged signed undated order that did not previously exist **(Pa499).**

Defendants have not sufficiently disputed plaintiff's contention that an undated order bearing Judge Herman's signature *suddenly* appeared among defendants' summary judgment submissions for inappropriate reasons. Plaintiff also stated in Count one of his new complaint, that *the signatory of the undated order, assumed presently to be defendant Herman, had no jurisdiction to sign the order after the appeal was dismissed by Judge Jones. Plaintiff expressed that the signature was a pretense of legitimacy, intentionally done by the signatory to fabricate evidence that would assist defendants in their defense of plaintiff's complaint.* **(Pa500).**

The appearance of the signed order among the summary judgment documents, has **not been explained** as to when that order came into Edisons' possession. The signature was either Judge Herman's signature or it was not. Issues of credibility are ordinarily for the trier of fact, and the judge does not function as a trier of fact in determining a motion for summary judgment. See Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 75 (1954). If this signature was placed on the order by

Judge Herman without a date, he knew that it could facilitate a fraud in these Superior Court civil proceedings in favor of Edison Municipality and the police agents. Discovery is needed to explain the obvious conflicting positions.

Point IX: Defendants Are Incorrect In Stating That The Borough of Highland Park Is Protected By Judicial Immunity (Pa654, Pa533; Pa91, Pa52, Pa41)

Judicial immunity only extends to the process of "resolving disputes between parties who have invoked the jurisdiction of a court," Forrester v. White, 484 U.S. 219, 227 (1988). When a judge acts as a trespasser of the law, when a Judge does not follow the law, the judge loses subject matter jurisdiction. Simmons v United States, 390 US 377 (1968). A judge is not immune from liability for actions, though judicial in nature, taken in the complete absence of all jurisdictions. Stump v. Sparkman, 435 U.S. 349, 356-57 (1978); Forrester v. White, 484 U.S at 227-229. A judge must be acting within his jurisdiction as to the subject matter and person, to be entitled to immunity from civil action for his acts. Davis v Burris, 51 Ariz, 220 75 P2d 689 (1938).

Acts in excess of judicial authority constitute misconduct, particularly when a judge deliberately disregards the requirements of due process. Cannon v Commission on Judicial Performance, 33 Cal 3d, 359, 371, 374. (1983). The Highland Park Judge and staff, by not filing a judgment, blocked plaintiff from appealing his criminal matter in violation of Art 1 para 1 and Morrisey v Brewer, 408 US 471 (1972) for filing a NOC against the sister Municipality of Edison.

(Pa052;Pa91, Pa41). Highland Park causing Judge Herman's signature to appear on an undated Order, over one year after it was lawfully required, that misleads others into believing that an order was signed all along, is an act, although judicial in nature, outside of a judge's jurisdiction and does not allow immunity. **(Pa654; Pa533).**

Point X: Highland Park is liable for Constitutional, NJCRA, NJLAD and other Violations Under Counts I, II, IV, & Reckless Intentional Infliction of Extreme Emotional Distress (Pa21-23;Pa41, Pa96, Pa54, Pa303-304, Pa470-471, Pa653)

Judge Herman, the only one who could submit a valid Rule1:6-6 verification of the undated Order, never came forward acknowledging that he had in fact signed the undated order creating credibility issues and issues of facts, warranting Jury submission. While Highland Park did not physically assist the police in stopping and beating the plaintiff, it participated in the conspiracy to allow the false charges brought by the Edison police to stick. It is Highland Park and its staff that facilitated the blockage of plaintiff's ability to appeal his unlawful criminal conviction caused by the unlawful acts of the Edison defendants. This violated NJ Constitution Art 1 para 22 that provides that plaintiff (a victim of crime by the Edison Police), was to be provided fairness, compassion and respect by the criminal justice system in being allowed to vindicate the wrongs of Edison by appealing his conviction. **(Pa21-Pa23; Pa303-Pa304, Pa470, Pa471).** Disallowance of a right to appeal, was denial of due process, the right to grieve and the right to equal protection. See Art 1 par 1, 5,18; NJSA 10:6-2 (c). **(Pa470, Pa471).** Discrimination based on race under NJSA 10:5-4 may be proven by circumstantial evidence. See Zive v Stanley Roberts,182 NJ

447 (2005). Plaintiff, a criminal defendant was told in an unequal disparate fashion, by Highland Park, a place of public accommodation, that there was no Order from which he could appeal his criminal conviction. Plaintiff inferred that discrimination could be the only reason for Highland Park's action.

The sudden production of an *undated* Order over one year later in 2023, by defendants, did not satisfy their McDonnel Douglas' burden of production of a nondiscriminatory reason for not providing plaintiff with the order from which he could have appealed his conviction in 2021. Being told by Highland Park that there was no order from which plaintiff could appeal his criminal conviction after he was unlawfully beaten and choked, causing him to be unjustly and falsely labelled with a crime of which he was falsely arrested and charged by the police *for the **rest of his life,** was so extreme and outrageous going beyond all bounds of decency, and was so atrocious, and utterly intolerable in a civilized community where there is a Constitution and laws prohibiting discrimination based on race.* Buckley v. Trenton Sav. Fund Soc'y., 111 N.J. 355 (1988). Defendants proximately caused plaintiff's emotional distress that was so severe that no reasonable person could endure it. **(Pa653, Pa041, Pa471, Pa22-Pa23, Pa54, Pa96, Pa303-Pa304, Pa533)**

CONCLUSION

Based on all the above the trial Court's Orders should be vacated.

/s/ Cecile D. Portilla
CECILE D. PORTILLA, ESQ

/s/ Eldridge Hawkins
ELDRIDGE HAWKINS, ESQ