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GEORGE NICHOLSON, JR.,[1] INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS/APPELLANTS[2], V. BOROUGH OF NATIONAL PARK, DEFENDANTS/RESPONDENTS. BOROUGH OF NATIONAL PARK, DEFENDANT/THIRD PARTY PLAINTIFF/RESPONDENT, VS. SOLVAY SPECIALTY POLYMERS, SOLVAY SOLEXIS, INC., ARKEMA, INC. THIRD-PARTY DEFENDANTS/RESPONDENTS.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-1867-23 CIVIL ACTION ON APPEAL FROM ORDER FILED 2-1-23 IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CIVIL PART GLOUCESTER COUNTY DOCKET NO.: GLO-L-2-23 SAT BELOW: THE HONORABLE, ROBERT MALESTEIN, P.J.CH. DATE BRIEF SUBMITTED: 5-27-24 DATE AMENDED BRIEF SUBMITTED: 5-30-24 DATE SECOND AMENDED BRIEF SUBMITTED: 6-4-24

PLAINTIFF/APPELLANT'S SECOND AMENDED APPELLATE BRIEF	
Of record & on the brief:	Paul DePetris
Of record:	Lewis G. Adler

[1] In its brief deficiency letter filed 5-28-24, the Appellate Division clerk's office directed plaintiff to modify the caption to reflect the order that is being appealed (931a)(i.e., using an incomplete caption) instead of using the full title of the action pursuant to R. 2:6-6(a)(3). 415a.

[2] As used in this document, use of the plural includes the singular, where applicable. The parties are referred to in the plural regardless of their actual number.

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E. ABBRIEVIATED TERMS

For brevity's sake, hereafter the following abbreviated terms are used in this document:

- The Superior Court of New Jersey, Law Division, Civil Part, Camden Vicinage – the trial court.
- The Superior Court of New Jersey, Appellate Division – the court or this court.
- This particular case - this case or the case.
- Plaintiffs GEORGE NICHOLSON, JR.- plaintiffs.
- Defendant BOROUGH OF NATIONAL PARK, NEW JERSEY – defendants.
- John Does 1-10 – fictitious parties named to the complaint – the Does.
- Plaintiffs and defendants collectively – the parties.
- The complete geographical confines of the Borough Of National Park, New Jersey – the Borough.
- All the residents of the Borough collectively, inclusive of plaintiffs – the residents.
- John Does 1-10 – fictitious parties named to the complaint – the Does.
- Plaintiff and defendant collectively – the parties.
- All the residents of the City collectively, inclusive of plaintiff – the

residents.

- The drinking water sold and delivered to plaintiffs by defendants and that is the subject of this case - the water.
- The sale that is the subject of this case - the sale.
- Department of Environmental Protection – DEP.
- Environmental Protection Agency – EPA.
- Science Advisory Board of the EPA – SAB.
- Safe Water Drinking Act, N.J.S.A. 58:12A-1, et seq. – SWDA.
- County and Municipal Water Supply Act, N.J.S.A. 40A:31-1 et seq. - CMWSA.
- Uniform Commercial Code, N.J.S.A. 12A:2-101, et seq. - UCC
- Tort Claims Act, N.J.S.A. 59:1, et seq. – TCA.
- Products Liability Act, N.J.S.A. 2A:58C-1, et seq. – PLA.
- Economic Loss Doctrine – ELD.
- The well or wells from which the water is sourced by defendants in whole or part collectively and regardless of their actual number – "the wells".
- The notice that defendants issued to the residents about the water being contaminated – the notice.
- Plaintiffs' property located in the Borough – the property.

PRELIMINARY STATEMENT

In this putative class action involving the sale of water delivery services to the residents of the Borough, plaintiff sued defendant for breaching the contract, violating the covenant of good faith and fair dealing and promissory estoppel by selling plaintiff contaminated water. Defendant failed to plead a TCA defense and therefore waived same. Even had defendant done so, this case started as and remains a breach of contract dispute no matter how defendant tries to recast it and no court rule permits defendant to amend the complaint to comport with defendant's efforts to dismiss it. Contract claims like those pled in the complaint aren't subject to and therefore barred by the TCA or any other statute, which don't bar or otherwise address the causes of action pled in the complaint. Instead, in the face of many contract complaints filed against municipalities over the decades – many of which involved water disputes – there is no authority for the sea change in the law of municipal contracts. If they be issues other than the constitutionality of the claims, such matters are better left to the Legislature. If they be issues of the constitutionality of the claims, such matters are better left to the Supreme Court.

STATEMENT OF FACTS

This putative class action involves defendant's sale and delivery of water to plaintiff and the other residents of the Borough of National Park, New Jersey containing contaminants that are harmful to humans. 31a-148a. The Borough is a Gloucester County municipality that supplies and sells potable water services to the residents, for which defendant issues the residents bills quarterly. 6a-10a; 166a, §4, 8-9. The Borough acknowledges that the residents purchasing water from the Borough are its "customers" and describes them as "consumers", with the latter term describing "[a]ny party obtaining water service from the Water Department for a physical unit.". 173a; 181a. A Borough ordinance sets a fee schedule of quarterly charges for the delivery of water to the residents. 173a-179a. Plaintiff is a Borough resident and owner of a property located in the Borough to whom defendant sold and delivered water services to plaintiffs and plaintiffs believed that the water was potable or uncontaminated with any chemical contaminants posing any health risk to humans. 6a-10a. However, from 2-13-20 forward, defendant issued plaintiff and the residents multiple notices that the water exceeded maximum contaminant levels for PFNA and thereby posed potential health risks to humans. 111a-137a. From the beginning of 2022, plaintiff has been using nothing but bottled water for drinking at his home and even uses bottled water in his dogs' water bowl. 7a-8a, §15-17.

PROCEDURAL HISTORY[1]

On 1-2-23, plaintiff filed the complaint, which includes a jury demand. 31a-110a. The complaint is pled as a putative class action, pleading these causes of action: (1) breach of contract; (2) violation of the covenant of good faith and fair dealing; (3) promissory estoppel; and (4) claims against the does only. 31a-110a. The complaint doesn't seek damages for personal injuries but economic loss in the form of paying out of pocket for: (1) water known to be contaminated by chemicals at unacceptable levels; (2) other sources of water to replace the water sold; and (3) home water filtration systems or other kinds of filtration products to treat the water so that its contaminants are eliminated or alleviated. 35a-36a, §12-13. The complaint also seeks injunctive remedial and other equitable remedies. 36, §14.

On 1-6-23, defendant was served with the complaint (which included a notice to produce) and interrogatories and when responses weren't forthcoming, plaintiff demanded the overdue responses. 31a-110a; 305a-324a. On 4-24-23, defendant filed an answer with jury demand with affirmative/separate defenses but without any statement of facts pursuant to R. 4:5:4 or TCA affirmative/separate defenses. 377a-414a. On 9-12-23, defendant filed a third party complaint against third party defendants Solvay Specialty Polymers, USA, LLC, Solvay Solexis,

[1] 1T = Transcript of Summary Judgment And Class Certification Motion Hearings Of 9-22-23.

Inc., And Arkema, Inc. 415a-430a.

On 5-24-23, plaintiff filed a motion to certify a class action and on 9-14-24, defendant filed opposition thereto. 1a-151a; 613a-686a. On 8-25-23, defendant filed a summary judgment motion and on 9-12-23, plaintiff filed opposition thereto and a cross motion to suppress defendant's responsive pleading for failure to provide discovery. 290a-612a. On 9-18-23, defendant filed opposition to said cross motion and a reply to plaintiff's summary judgment opposition. 862a-924a. On 9-21-23, plaintiff filed a letter with the trial court withdrawing said cross motion. 925a. The trial court heard oral argument on the motions and over 8 months before discovery's completion and on 2-1-24, filed an order (with accompanying opinion) denying the class certification motion and granting the summary judgment motion. 300a; 931a-954a. Third party defendants Solvay and Arkema filed motions to dismiss the third party complaint and via the aforesaid order, the trial court didn't deny those motions but rather, "dismissed" said motions as moot. 932a. On 2-6-24, the trial court filed an order dismissing the third party defendants ruling that, with the entry of the order granting summary judgment against plaintiff, the trial court dismissed "the entire action" 973a-975a.

On 2-23-24 and 3-4-24 respectively, plaintiff filed a notice of appeal and amended notice of appeal with the court and on 4-10-24, the court filed a scheduling order. 926a-971a.

LEGAL ARGUMENT

i. STANDARD OF REVIEW

The standard of review for summary judgment is the same as that employed by the trial court[2] - i.e., the court considers the factual record and reasonable inferences drawn from those facts, "in the light most favorable to the non-moving party," to decide if the moving party was entitled to judgment as a matter of law.[3] The standard of review for class certification denial is an abuse of discretion.[4] When deciding the summary judgment and class action motions, the trial court made its findings of facts without a jury, so review is de novo[5] and its decisions are binding only if supported by adequate, substantial and credible evidence on the record below,[6] with its interpretation of the law and the legal consequences that flow from established facts not being entitled to any special deference.[7]

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[2] *RSI Bank v. Providence Mut. Fire Ins. Co.*, 234 N.J. 459, 472 (2018).
[3] *IE Test, LLC v. Carroll*, 226 N.J. 166, 184 (2016).
[4] *Dugan v. TGI Fridays, Inc.,* 445 N.J. Super. 59, 71-73 (App. Div. 2016), aff'd in part, rev'd in part on other grounds, 231 N.J. 24 (2017).
[5] *Toll Bros., Inc. v. Twp. of W. Windsor*, 173 N.J. 502, 549 (2002).
[6] *Rova Farms Resort v. Investors Ins. Co.*, 65 N.J. 474, 483-484 (1974).
[7] *Manalapan Realty v. Manalapan Twp. Comm.*, 140 N.J. 366, 378 (1995).

I. BY GRANTING THE SUMMARY JUDGMENT MOTION, THE TRIAL COURT COMMITTED REVERSIBLE ERROR

(931a-954a)

There never was a viable TCA defense because defendant waived defenses predicated on the TCA by failing to plead a statement of facts per R. 4:5-4 or any TCA affirmative defenses. 377a-414a. Applying the TCA as a bar is contrary to the Supreme Court's view that "the notice provisions of the [TCA] were not intended as a 'trap for the unwary.'"[8] In the context of TCA claims, "[a] public entity does not automatically receive the benefit of that immunity."[9] "It is well established that the burden is on the public entity both to plead and prove its immunity under [the TCA], . . . and that to succeed on a motion for summary judgment, the entity must 'come forward with proof of a nature and character [that] would exclude any genuine dispute of fact . . . ."[10] A defense based on a plaintiff's alleged failure to timely notify a public entity of a tort claim is an affirmative defense.[11] Defendant bears the burden of pleading and proving a failure to comply with the TCA's notice requirements.[12] A defense based on the TCA's notice

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[8] *Lowe v. Zarghami*, 158 N.J. 606, 629 (1999) (citation omitted).
[9] *Wymbs v. Twp. of Wayne*, 163 N.J. 523, 539 (2000).
[10] *Kolitch v. Lindedahl*, 100 N.J. 485, 497 (1985)(citation omitted).
[11] *Hill v. Middletown Bd. of Educ.*, 183 N.J. Super. 36, 40 (App. Div. 1982).
[12] See *Hill v. Board of Educ. of Middletown Tp.*, 183 N.J. Super. 36, 40-41 (App. Div. 1982); *Kolitch v. Lindedahl*, 100 N.J. 485, 497 (1985) ("the burden is on the public entity both to plead and prove its immunity under [the TCA] . . . .").

requirements is subject to waiver.[13] Waiver negates the affirmative defense and our courts must determine if defendant waived the TCA notice defense before they are being entitled to prosecute that defense on summary judgment, "because waiver negates reliance on the defenses".[14]

To provide sufficient notice to a plaintiff, an affirmative defense requires a "statement of facts constituting an avoidance or affirmative defense and not merely by legal conclusion."[15] "A responsive pleading shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defense . . . ."[16] Did the affirmative defense "set forth specifically ... a statement of facts constituting [the] affirmative defense" sufficient to be taken seriously by plaintiff?[17] The reason a defendant must plead "facts" supporting an affirmative defense is "to avoid surprise" to the plaintiff so they may promptly take action to counter the defense – be it via the taking of depositions, the issuance of records subpoenas or the propounding of paper discovery tailored to determine the facts

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[13] See, e.g., *Hill v. Board of Educ. of Middletown Tp.*, 183 N.J. Super. 36, 40 (App. Div. 1982)(defendant failing to plead TCA defense "may be found to have waived the protection thereof"); *Buteas v. Raritan Lodge* #61 F. & A.M., 248 N.J. Super. 351, 363-64 (App. Div. 1991)(explaining a defendant who fails to plead an affirmative defense ordinarily waives it).

[14] *Henebema v. Raddi*, 452 N.J. Super. 438 (App. Div. 2017).

[15] *JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass'n*, 431 N.J. Super. 233, 250 (App. Div. 2013)(citation omitted).

[16]. R. 4:5-4.

[17] *White v. Karlsson*, 354 N.J. Super. 284 (App. Div. 2002).

behind a given defense.[18] Rule 4:5-4 is only relaxed when its enforcement would do grave injustice to public policy[19] and injustice would occur if the court relaxed the Rule here. For example, the Appellate Division refused to apply a perfunctory Tort Claim Act defense because of a want of a statement of facts explaining the basis for said defense:[20]

> Defendant filed an answer denying the allegations of the complaint. The answer set forth as a separate defense that "(t)he plaintiff has failed to comply with the provisions of the Municipal Tort Claims Act N.J.S.A. Title 59 and is therefore barred from bringing this cause of action." Thereafter, plaintiffs answered defendant's interrogatories and defendant obtained an order compelling more specific answers to its interrogatories. These events transpired before Kathleen's 19th birthday. The parties then engaged in further discovery consisting of depositions and a physical examination. In August 1980, over 21/2 years after the complaint was filed, defendant brought a motion for dismissal based on plaintiffs' failure to comply with the notice requirements of the Tort Claims Act. The trial judge granted the motion and this appeal followed.

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[18] See *Jackson v. Hankinson*, 94 N.J. Super. 505, 514 (App. Div. 1967), aff'd, 51 N.J. 230 (1968).
[19] *Douglas v. Harris*, 35 N.J. 270 (1961).
[20] *Hill v. Board of Educ. of Middletown Tp.*, 183 N.J. Super. 36, 38-41 (App. Div. 1982), certif. denied, 91 N.J. 233 (1982)(additional citations omitted)(emphasis added).

We agree with the trial judge's conclusion that there was no substantial compliance with the notice requirements of the act. In our view, however, the circumstances are such that defendant is equitably estopped from relying on the consequences of plaintiffs' failure to give notice.

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If the present controversy arose, without more, only out of plaintiffs' failure to give notice, unaffected by other considerations, the foregoing principles would mandate dismissal of their suit. But that is not the case here. It is well settled that the notice requirements, being in the nature of limitations provisions, are subject to the application of estoppel principles. Hence, even if there is no substantial compliance with the notice provisions of the Tort Claims Act, a public entity will be estopped from asserting this defense "where the interests of justice, morality and common fairness dictate that course."...

***

The defense of failure to file notice under the Tort Claims Act is an affirmative one which must be pleaded in order to avoid surprise, and a defendant may be found to have waived the protection thereof by failing to plead it as a defense.

***

In the instant matter defendant did not specifically plead that plaintiffs failed to comply with the notice provisions of the Tort Claims Act nor did it cite the

applicable section of the statute. Rather, defendant's answer merely stated without specification that plaintiffs failed to comply with the provisions of the Municipal Tort Claims Act and were therefore barred from bringing suit.

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Clearly, defendant failed to comply with this rule since its affirmative defense did not set forth a statement of facts sufficient to show that it was the notice provisions of the Tort Claims Act with which plaintiffs had not complied and which therefore acted as a bar to suit.

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Thus, the pleading of affirmative defenses must be, not merely by legal conclusion, but by a statement of facts.

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Equitable estoppel embodies the doctrine "that one shall not be permitted to repudiate an act done or position assumed where that course would work injustice to another who, having the right to do so, has detrimentally relied thereon."

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…Estoppel is conduct, either express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in

> the eyes of the law. Such estoppel is grounded not on subjective intent but rather on the objective impression created by the actor's conduct.

Therefore, the failure to properly plead the TCA defense is fatal to its being applied against plaintiff.

Since defendant failed to plead the defense, waiver and estoppel bar the TCA defense from being used to defend the case.[21] Waiver is the intentional relinquishment of a known right.[22] "The intent to waive [a right] need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference."[23] That is what occurred here. Equitable estoppel is defined as:[24] "The effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might otherwise have existed. . . , as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse. . . ." Under equitable estoppel: "[a] party asserting equitable estoppel may rely upon 'conduct, inaction, representation of the actor, misrepresentation, silence or omission.'"[25] Likewise, judicial estoppel, "looks to the connection between the litigant and the judicial system" rather than

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[21] *Konopka v. Foster*, 356 N.J. Super. 223 (App. Div. 2002).
[22] *Shebar v. Sanyo Bus. Sys. Corp.*, 111 N.J. 276, 291 (1988).
[23] *Knorr v. Smeal*, 178 N.J. 169, 177 (2003).
[24] *County of Morris v. Fauver*, 153 N.J. 80, 104 (1998)(citation omitted).
[25] *Ridge Chevrolet-Oldsmobile, Inc. v. Scarano*, 238 N.J. Super. 149, 154 (App. Div. 1990)(citation omitted).

the relationship between the parties.[26] Judicial estoppel "precludes a party from assuming a position in a legal proceeding totally inconsistent with the one previously asserted in the same or another proceeding."[27] Its fundamental premise is to protect the integrity of the judicial system by preventing litigants from "'playing fast and loose'" with the court "to suit the exigencies of self interest."[28] Moreover, under estoppel:[29]

> plaintiff need not demonstrate intentional conduct by defendant. The applicable standard requires only that plaintiff show conduct on the part of the defendant occurring intentionally or under such circumstances that it is both natural and probable that the conduct would induce inaction, together with reasonable detrimental reliance on plaintiff's part.

At a minimum, before delving into the nuances of the TCA, trial courts should make findings of fact and conclusions of law per R. 1:7-4(a) as to whether the defense was properly pled and if so, abandoned. "Rule 1:7-4(a) states '[t]he court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury, on every motion decided by a written order that is appealable as of right." "Naked

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[26] *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3rd Cir.), cert. denied, 488 U.S. 967, 109 S. Ct. 495, 102 L. Ed. 2d 532 (1988).
[27] *Bahrle v. Exxon Corp.*, 279 N.J. Super. 5, 22-23 (App. Div. 1995), aff'd, 145 N.J. 144 (1996).
[28] *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3rd Cir. 1953).
[29] *Konopka v. Foster*, 356 N.J. Super. 223 (App. Div. 2002).

conclusions do not satisfy the purpose of [Rule] 1:7-4."[30] These requirements are unambiguous.[31] "Meaningful Appellate review is inhibited unless the judge sets forth the reasons for his or her opinion."[32] The trial court's opinion didn't refer to the threshold pleading issue, thereby violating R. 1:7-4. 931a-954a.

Even if defendant didn't waive the TCA defense, since this case focuses on contract claims and not claims regulated by the TCA,[33] the TCA is inapplicable. The complaint doesn't plead tort causes of action and doesn't seek personal injury damages. 31a-110a. Municipalities are authorized to enter into contracts.[34] Municipalities routinely contract to obtain water supply, sewage and garbage disposal services from third parties for resale to municipal residents.[35] When the State of New Jersey enters into contracts, it is subject to suit under the Contractual

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[30] *Curtis v. Finneran*, 83 N.J. 563, 570 (1980).
[31] See *Romero v. Gold Star Distrib, LLC*, 468 N.J. Super. 274, 304 (App. Div. 2021).
[32] *Giarusso v. Giarusso*, 455 N.J. Super. 42, 53 (App. Div. 2018).
[33]See N.J.S.A. 59:1-4 ("Nothing in [the Tort Claims Act] shall affect liability based on contract or the right to obtain relief other than damages against the public entity or one of its employees."); see also *Owens v. Feigin*, 194 N.J. 607, 613-14 (2008) (finding the notice of claim requirement in the Tort Claims Act does not apply to causes of action under New Jersey's Civil Rights Act); *Greenway Dev. Co. v. Borough of Paramus*, 163 N.J. 546, 557 (2000) (stating "the notice provision of the TCA does not apply to inverse condemnation claims"); *Brook v. April*, 294 N.J. Super. 90, 101 (App. Div. 1996) (stating that the TCA didn't apply to workers' compensation claims).
[34] See, e.g., N.J.S.A. 19:44A-20.5; *Asphalt Paving Sys., Inc. v. Borough of Stone Harbor*, 474 N.J. Super. 56 (App. Div. 2022); *Verry v. Franklin Fire Dist. No. 1*, 230 N.J. 285 (2017).
[35] *Ferraro v. Zoning Bd. of Adjustment of Tp. of Holmdel*, 119 N.J. 61 (1990).

Liability Act, N.J.S.A. 59:13-1 to -10 (CLA) and therefore, the fact that the State acts in some official capacity doesn't absolve it from contract claims. A state entity may be held liable for breach of an express written, oral or implied in fact contract.[36] New Jersey law permits recovery "to the extent of [any] benefit conferred upon and knowingly accepted by the municipality."[37]

All elements of a contract between the parties are present in this case.[38] Defendant failed to establish that the services were provided to plaintiff or the residents free of charge. Per the Supreme Court, the purchase of an item of dubious utility fits the basis for breach of contract damages.[39] Nor must a contract be reduced to a writing to be enforceable.[40] "[I]f [the] parties agree on essential

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[36] *75 Spruce St., LLC v. N.J. State Bd. of Educ.*, 382 N.J. Super. 567 (Law Div. 2005)(citing *Wanaque Borough Sewerage Auth. v. Twp. of West Milford*, 144 N.J. 564, 574 (1996)("Contracts implied in fact are no different than express contracts, although they exhibit a different way or form of expressing assent than through statements or writings.").

[37] *Wanaque Borough Sewerage Auth. v. Twp. of West Milford*, 144 N.J. 564, 573, (1996) (citation omitted).

[38] Model Civil Jury Charge 4.10C.

[39] See, e.g., *Lee v. Carter-Reed Co.*, 203 N.J. 496 (2010).

[40] *Pami Realty, LLC v. Locations XIX Inc.*, 468 N.J. Super. 546 (App. Div. 2021); *Leodori v. Cigna Corp.*, 175 N.J. 293, 304-05 (2003) ("[u]nless required by the Statute of Frauds, N.J.S.A. 25:1-5 to -16, or as otherwise provided by law, contracts do not need to be in writing to be enforceable"); *Williams v. Vito*, 365 N.J. Super. 225, 232 (Law Div. 2003) ("absent a statute to the contrary," the enforceability of an oral contract was "central to American contract law")); *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 436 (1992) ("An offeree may manifest assent to the terms of an offer through words, creating an express contract, or by conduct, creating a contract implied-in-fact.").

terms and manifest an intention to be bound by those terms, they have created an enforceable contract."[41] This court explained:

> Over forty-five years ago, Judge Conford, joined by Judges Goldmann and Freund, stated:
>
> > On this appeal, however, plaintiff's principal contention is that the parties did not intend to be bound at all unless a formal contract were drawn and executed; and since that contingency never eventuated plaintiff was free at any time and for any reason to terminate the negotiations and have her deposit back.... However, parties may orally, by informal memorandum, or by both agree upon all the essential terms of a contract and effectively bind themselves thereon, if that is their intention, even though they contemplate the execution later of a formal document to memorialize their undertaking.
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> > ***
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> This statement of the law remains valid today.

McBarron v. Kipling Woods, 365 N.J. Super. 114 (App. Div. 2004)(citations omitted). Further, performance routinely supports a finding of a valid services contract.[42] The same was true in contracts for the sale of goods where there is

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[41] *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435 (1992).

[42] See *Smith v. Squibb Corp.*, 254 N.J. Super. 69 (App. Div. 1992)(oral employment contract); *Edwards v. Wyckoff Elec. Supply Co.*, 42 N.J. Super. 236 (App. Div. 1956)(same); *Klockner v. Green*, 54 N.J. 230 (1969)("Oral contracts which have been performed by one party are frequently enforced where to do

acceptance of the goods and payment for same.[43] Private entities routinely sell water delivery services via contracts with residents, municipalities, authorities and public utilities: "American Water provides water and sewer service to approximately 346,000 customers in 117 municipalities throughout New Jersey. American Water also sells water for resale to various municipalities, authorities and public utilities."[44] There is no evidence before the court of confusion about what was being sold in this case – i.e., potable water at rates set by defendant.[45] Since the parties are bound by privity of contract via performance of an express service contract, in the absence of a statute imposing an implied warranty of merchantability,[46] implied warranties are ruled out:[47]

> "It is a 'well settled rule that an express contract excludes an implied one. An implied contract cannot exist when there is an existing express contract about the identical subject. The parties are bound by their agreement, and there is no ground for implying a promise."

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otherwise would work an inequity on the party who has performed. Thus, the cases hold that such performance takes the contract out of the statute of frauds.").

[43] *Duff v. Trenton Beverage Co*., 5 N.J. Super. 283 (App. Div. 1949)(citations omitted).

[44] *In Re New Jersey-American Water Co.*, 333 N.J. Super. 398 (App. Div. 2000).

[45] "A contracting party is bound by the apparent intention he or she outwardly manifests to the other party. It is immaterial that he or she has a different, secret intention from that outwardly manifested." *Hagrish v. Olson* , 254 *N.J. Super.* 133, 138 (App. Div. 1992).

[46] See, e.g., *Realmuto v. Straub Motors, Inc.*, 65 N.J. 336 (1974).

[47] *Moser v. Milner Hotels*, 6 N.J. 278 (1951).

We are dealing here with an express contract:[48]

> An express contract is one in which the parties have shown their agreement by words. Express contracts include those in which the parties have orally stated the terms to each other or have placed the terms in writing.

Nor does defendant deny the predicates to a breach of contract – i.e., defective performance[49] via furnishing of contaminated water failing to meet statutory requirements[50] - defendant admits selling contaminated water. 111a-137a.

The case couldn't be adjudicated at the pleading stage or on summary judgment given the meager record, because discovery was never completed[51] and whether a party breached the agreement is "a question for the factfinder, not the court."[52] 300a. There is no evidence in the record that complete answers to plaintiff's interrogatories or notice to produce were furnished or that depositions were taken by plaintiff. 1a-995a.

Moreover, given defendant's continuing sale of contaminated water after defendant confirmed that the water was contaminated, this case involves a classic

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[48] Model Civil Jury Charge 4.10E.
[49] See *Franconia Assocs. v. United States*, 536 U.S. 129, 142-43, 122 S. Ct. 1993, 2002, 153 L. Ed. 2d 132, 146 (2002).
[50] *City of Newark v. Department of Health of State of N. J.*, 109 N.J. Super. 166 (App. Div. 1970).
[51] *See Salomon v. Eli Lily and Co.*, 98 N.J. 58 (1984).
[52] *Murphy v. Implicito*, 392 N.J. Super. 245, 265 (App. Div. 2007); See also *Mango v. Pierce-Coombs*, 370 N.J. Super. 239, 257 (App. Div. 2004) (("Whether conduct constitutes a breach of contract and, if it does, whether the breach is material are ordinarily jury questions.").

violation of the implied covenant of good faith and fair dealing claim – a claim independent of any unpled implied warranty claims manufactured by defendant.[53] "Every party to a contract... is bound by a duty of good faith and fair dealing in both the performance and enforcement of the contract" and "[a] defendant may be liable for a breach of the covenant of good faith and fair dealing even if it does not 'violat[e] an express term of a contract.'"[54] The implied covenant claim focuses on whether defendant "'engaged in some conduct that denied the benefit of the bargain originally intended by the parties'"[55] Defendant sold polluted water to plaintiff and failed to source potable water, such as by buying water from alternate providers and thereby denying plaintiff the very benefit of their bargain with defendant. The case shouldn't be decided on summary judgment because violation of the duty of good faith and fair dealing necessarily depends upon the facts of the particular case and is ordinarily a jury question.[56]

In addition to paying defendant for contaminated water, plaintiff has an out of pocket loss from buying bottled water, because from the beginning of 2022, plaintiff has been using nothing but bottled water for drinking at his home and

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[53] Model Civil Jury Charge 4:10J.
[54] *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 182 N.J. 210, 224, 226 (2005)(citations omitted).
[55] *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 182 N.J. 210, 225 (2005).
[56] *Grobarchik v. Nasa Mortgage and Investment Company*, 186 A. 433, 117 N.J.L. 33 (1936)(citation omitted).

even uses bottled water in his dogs' water bowl. 6a-10a. Under either a breach of contract or violation of the covenant of good faith and fair dealing claim, the traditional remedy is an award of expectation damages "is to put the injured party in as good a position as if performance had been rendered."[57] Therefore, clearly, the TCA, predicated as it is on tort damages for personal injury type claims, doesn't apply to this contract case.

This case also involves a promissory estoppel claim – another claim aligned with contract claims as shown by the grouping of that claim with the other contract Model Civil Jury charges. Promissory estoppel is well established in New Jersey.[58] The allegations that plaintiff was promised uncontaminated water and didn't receive it meet the requirements for a promissory estoppel claim.[59] The Supreme Court rejects the view that, in the absence of an unwritten contract and in the face of a comprehensive statutory scheme, a promissory estoppel claim is untenable: "Key to defendant's argument that plaintiff may not bring an action based on an unwritten contract is the present Securities Law, New Jersey's 'comprehensive statutory scheme of securities regulation and investor protection.'"[60] Under promissory estoppel, to make them whole, plaintiff would be entitled to a refund of

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[57] *Goldfarb v. Solimine*, 245 N.J. 326 (2021)(citation omitted). See also Model Civil Jury Charge 8.45.
[58] *Pop's Cones, Inc. v. Resorts Intern. Hotel, Inc.*, 307 N.J. Super. 461 (App. Div. 1998).
[59] Model Civil Jury Charge 410K (citations omitted).
[60] *Goldfarb v. Solimine*, 245 N.J. 326 (2021)(citation omitted).

sums paid to defendant: "If a promisee proves those elements of a promissory estoppel claim, the promisee may be awarded reliance damages so as to restore him or her to the position he or she was in before the parties met." [61] Therefore, the TCA doesn't apply to the promissory estoppel claim.

Per our Supreme Court, a municipality's sale of water to its residents is an issue of contract:[62]

> Our conclusion is that a charge for water furnished by a municipality to an owner or occupant of lands is not a tax, but is the subject of a contract, the sale of a commodity, creating the relationship of seller and purchaser as between the municipality and the consumer.
>
> ***
>
> The providing of water for extinguishing fires and electricity for lighting streets and public places are governmental functions, while the distribution of water and furnishing of electricity to its inhabitants, for a price, is the exercise of a private or proprietary function by the municipality, and is governed by the same rules as apply to private corporations.

Our Supreme Court further explained:[63]

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[61] *Goldfarb v. Solimine*, 245 N.J. 326 (2021)(citation omitted).
[62] *Lehigh Valley Railroad Company v. Jersey City*, 138 A. 467, 103 N.J.L. 574 (1927).
[63] *Austin v. Mayor and Common Council of The Borough of Union Beach*, 160 A. 318, 10 N.J. Misc. 670 (1932).

> Under *Jersey City v. Morris Canal*, 41 N.J.L. 66; *Karpenski v. South River*, 85 N.J.L. 208; 88 Atl. Rep. 1073; *Ford Motor Co. v. Kearney*, 91 N.J.L. 671, 103 A. 254; *Olesiewicz v. Camden*, 100 N.J.L. 336; 126 A. 317; and *Lehigh Valley Railroad Co. v. Jersey City*, 103 N.J.L. 574; 138 A. 467, it is established that a municipality engaging in the sale of water for profit is exercising proprietary and business powers and is governed by the same rules as control an individual or business corporation under like circumstances.

Daniel v. Borough of Oakland, 124 N.J. Super. 69, 304 A.2d 757 (App. Div. 1973) further explains:

> **Charges by a municipality for water furnished to its customers involve a sale and arise from a contractual relationship between it and the customer.** As the court stated in *Lehigh Valley R.R. Co. v. Jersey City*, 103 N.J.L. 574, 576, 138 A. 467, 468 (Sup. Ct. 1927), aff'd 104 N.J.L. 437, 140 A. 920 (E. & A. 1927):
>
> Our conclusion is that a charge for water furnished by a municipality to an owner or occupant of lands is not a tax, but is the subject of a contract, the sale of a commodity, creating the relationship of seller and purchaser as between the municipality and the consumer. * * *
>
> See also *Ford Motor Co. p. Kearny*, 91 N.J.L. 671, 672, 103 A. 254 (E. & A. 1917).

> In the present case the ordinance itself uses the language of contract. It refers to the 'sale' of water to its customers. It requires the customer requesting service to make a written application for such service and to enter into an agreement for its continuance. It describes that agreement as a 'contract.' The conclusion that a contractual relationship existed between the Borough and its customers is inescapable.
>
> Such contract, as other contracts, was entitled to the protection provided by the Federal Constitution and the State Constitution. Both prohibit the adoption of any law impairing the obligation of contract. U.S. Const., Art. I, § 10; N.J. Const. (1947), Art. IV, § VII, par. 3.

Emphasis added. *State v. East Shores, Inc.*, 164 N.J. Super. 530 (App. Div. 1979)(citations omitted) explains: "But there is a general agreement that the distribution of water by a municipality to its inhabitants for domestic and commercial uses is a private or proprietary function which in its exercise is subject to the rules applicable to private corporations. This is the rule in New Jersey." *Ford Motor Company v. Kearny*, 103 A. 254, 91 N.J.L. 671 (1918) explains:

> The sale to a consumer of water by measure at a fixed price per thousand cubic feet, is obviously not a tax dependent in amount in any way either upon the true value of the property which he occupied or upon any special benefit to that property. Such a consumer might be a banker occupying a property worth a

> hundred thousand dollars, but using only fifty dollars' worth of natural water a year; or he might be a bottler or a milkman in a twenty-foot store (with a basement), in the same block, which was worth only a thousand dollars, but using a thousand dollars' worth of water per annum.
>
> The lien given by the statute, therefore, in case of water sold by measure, must derive its vitality from the sale itself, as such; that is, from contract. Whatever the purchaser of the water had authority, express or implied, to bind by his contract, to that the lien under the statute will attach. Further than that it cannot go.

Historically, municipalities' power to contract to supply water derives from statute.[64] Therefore, the sale of water services is "an obligation which arises out of a statutory contract rather than tort. Accordingly, the Tort Claims Act does not apply to this case."[65] Municipal sale of water is akin to sale of services that are the subject of common law contract law: "[f]urnishing water might be considered as a sale of a 'service', as distinguished from the sale of 'goods', on the theory that

[64] *Yardville Estates, Inc. v. City of Trenton*, 66 N.J. Super. 51 (App. Div. 1961)(quoting *Woodside Homes, Inc. v. Morristown*, 26 N.J. 529 (1958)).
[65] *Rox v. Allstate Ins. Co.*, 250 N.J. Super. 536 (Law Div. 1991).

water is a naturally produced item which is simply being distributed."[66] Taxes are distinguished from water charges:[67]

> As to plaintiff's first contention, it is clear in New Jersey that charges for water usage may be distinguished from taxes in certain kinds of cases. However, examination of cases making such a distinction reveals that these cases have focused on the contractual nature of the relationship between the municipality providing water and the residents consuming that water rather than on the procedure for collecting water charges.

The sale of water is clearly performed via a service contract:[68]

> a property owner cannot be compelled to pay for water he does not use unless he enters into a service contract…. We agree with the trial judge that nonusers of the system cannot be compelled to pay a minimum fee based on operating costs and expenses as well as debt service without contracting for the use of the system.

There exists a contract between plaintiff and defendant which is subject to the constitutional protections of freedom of contract:[69]

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[66] *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Commission of State of N.J.*, 75 N.J. 272 (1977), appeal dismissed, 435 U.S. 982, 98 S. Ct. 1635, 56 L.Ed.2d 76 (1978).
[67] *Lamb v. City of Ventnor*, 161 N.J. Super. 140 (Law Div. 1978).
[68] *Ivan v. Marlboro Tp. Municipal Utilities Authority*, 162 N.J. Super. 466, 468 (App. Div. 1978).
[69] *Weidling v. Borough of Manville*, 412 A.2d 133, 172 N.J. Super. 371

The New Jersey Constitution (1947) provides that the ". . . Legislature shall not pass any . . . law impairing the obligation of contracts." Art. IV, § VII, par. 3. The United States Constitution has a similar clause. Art. I, § 10, cl. 1. Our courts will enforce both guarantees. *P. T. & L. Constr. Co. v. Transportation Dep't Comm'r*, 60 N.J. 309 (1972).

The purpose of the federal and state clauses is to make contracts inviolate from state action and thereby strengthen the confidence of our citizens in its sanctity. Our forefathers believed that "one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding."

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First, does a contract exist here? Plainly, one does. As stated in *Daniel v. Oakland*, 124 N.J. Super. 69, 72 (App. Div.1973), "(c)harges by a municipality for water furnished to its customers involve a sale and arise from a contractual relationship between it and the customer."

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It is now well established that contracts between the State, or its subdivisions, and individuals are "within the protection of Article I, sec. 10."

(Law Div. 1979)(additional citations omitted).

Water service contracts are entitled to the protection provided by the Federal and State Constitutions, both prohibiting laws impairing the obligation of contract:[70] "There is nothing in our law, decisional or statutory, which supports the argument that the constitutional proscription against impairment of contract is not applicable to laws relating to agreements of sale to furnish water." In *Daniel*, the TCA failed to pose a problem for plaintiff, who prevailed in their water billing dispute against the municipality based on it being an issue of contract.[71]

By its express language, the TCA doesn't cover contract claims. New Jersey public entities are subject to suit. See, e.g., N.J.S.A. 59:13-3, waiving as it does "the defense of sovereign immunity for contract claims against the State, specifically precludes the recovery of punitive damages."[72] The TCA notice requirement only applies to personal injury and property damage claims and the complaint doesn't relate to "a cause of action for death or for injury or damage to person or to property…." N.J.S.A. 59:8-8. N.J.S.A. 59:1-4…states, "[n]othing in this act shall affect liability based on contract or the right to obtain relief other than damages against the public entity…" "The word "injury" is used * * * to denote the fact that there has been an invasion of a legally protected interest which, if it were the legal consequence of a tortious act, would entitle the person suffering the

[70] *Daniel v. Borough of Oakland*, 124 N.J. Super. 69 (App. Div. 1973).
[71] *Daniel v. Borough of Oakland*, 124 N.J. Super. 69 (App. Div. 1973).
[72] *Barry by Ross v. New Jersey State Highway Authority*, 245 N.J. Super. 302 (Ch. Div. 1990).

invasion to maintain an action of tort."[73] "The history of the TCA demonstrates that it was intended to apply only to civil actions seeking damages for tortious conduct" and "[b]y adopting the proposed sections, the Legislature manifested its intent that the TCA only apply to civil claims for compensatory damages for tortious conduct. Limiting the duty to defend to civil claims for tort damages is also consistent with the underlying legislative intent that courts make a 'chary interpretation of a public entity's exposure to liability' that is called for under the TCA."[74] Moreover, as with contract claims, equitable relief claims aren't covered by the TCA.[75] This reasoning is consistent with the common law. See, e.g., *Ramapo Brae Condo. Ass'n v. Bergen Cty. Hous. Auth.*, 328 N.J. Super. 561, 576 (App. Div. 2000)(breach of contract claims don't fall under TCA), aff'd, 167 N.J. 155 (2001); *Slocum v. Borough of Belmar*, 233 N.J. Super. 437, 438-40 (Law Div. 1989)(action for injunctive relief requiring a township to set its future beach fees at a level that generates revenue to match expenses didn't fall under TCA because it was "not an action for negligence, loss or destruction of property or any other type of 'tort liability'" and instead "could be classified as equitable relief for defendant's unjust enrichment."); *Marley v. Borough of Palmyra*, 193 N.J. Super. 271 (Law Div. 1983)(Haines, A.J.S.C.)("Finally, the carrier suggests that it has an alternative

[73] *Ayers v. Jackson*, 106 N.J. 557, 591-92 (1987).
[74] *Chasin v. Montclair State University*, 159 N.J. 418 (1999).
[75] *Chasin v. Montclair State University*, 159 N.J. 418 (1999).

contractual basis for its suit against Marley. I agree. The Tort Claims Act does not apply to contract claims. N.J.S.A. 59:1-4."). For example, the Supreme Court refused to bar an insurance contract benefit claim via the TCA.[76]

The TCA's statutory framework likewise supports plaintiff's position. Title 59 is comprised of two distinct subtitles: the TCA, N.J.S.A. 59:1-1 to 59:12-3, and the Contractual Liability Act, N.J.S.A. 59:13-1 to-10.[77] The TCA affords State government bodies advance notice of tortious claims only so that they may perform timely investigations, compelling "a claimant to expose his intention and information early in the process in order to permit the public entity to undertake an investigation while witnesses are available and the facts are fresh.'"[78] No investigation is implicated by contract claims. Any contract claim (including refunds for money paid to a municipality as are sought via the complaint) is outside the TCA's scope.[79] The purchase of services not meeting the terms of the

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[76] *Prudential Property & Cas. Ins. Co. v. Monmouth County Mun. Joint Ins. Fund*, 141 N.J. 235 (1995)(because UM claims are contractual obligations, the TCA was inapplicable).

[77] See, e.g., *Allen v. Fauver*, 167 N.J. 69, 75 (2001)("The legislative response to the issue of abrogation of sovereign immunity for tort and contract liability came in 1972 in the form of the Tort Claims Act... and the Contractual Liability Act...."); *N.J. Educ. Facilities Auth. v. Gruzen P'ship*, 125 N.J. 66, 69 (1991) ("The Legislature responded by enacting the Tort Claims Act... and the Contractual Liability Act....").

[78] *D.D. v. UMDNJ*, 213 N.J. 130, 146 (2013)(citation omitted).

[79] *Petak v. City of Paterson*, 291 N.J. Super. 234 (App. Div. 1996)("Because the Borough's accountability to the plaintiff is based on contract, the Borough is not immunized from liability for its failure to comply with the statutory mandates

contract – i.e., delivery of potable water - fits the basis for breach of contract damages.[80]

Were plaintiff to couch their claim as a tort subject to the TCA, that claim would fail because of the economic loss doctrine. The ELD bars a plaintiff from recovering in tort for purely economic injuries incurred when a contract is breached.[81] Under the ELD "conduct within a relationship defined solely by contract cannot give rise to a tort claim against the allegedly breaching party or its agent unless that party has some independent duty to the aggrieved party outside the scope of the contract."[82] Implicit in the distinction between tort and contract causes of action is the doctrine that a tort duty of care protects against the risk of accidental harm and a contractual duty preserves the satisfaction of consensual obligations.[83] Contract principles more readily respond to claims for economic

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concerning tax sale certificates"); *Dubin v. Hudson County Probation Dept.*, 267 N.J. Super. 202 (Law Div. 1993)("As stated above, I find that this was an issue based on contract concepts and the Uniform Commercial Code."); *Tontodonati v. City of Paterson*, 229 N.J. Super. 475 (App. Div. 1989)(assignee's claim that municipal tax sale certificate was invalid from municipal error involve contract claims); *Simon v. Oldmans Tp.*, 203 N.J. Super. 365 (Ch. Div. 1985)(action for rescission and restitution).

[80] See, e.g., *Lee v. Carter-Reed Co.*, 203 N.J. 496 (2010).

[81] *Alloway v. Gen. Marine Indus., L.P.*, 149 N.J. 620, 624 (1997).

[82]. *Highlands Ins. Co. v. Hobbs Grp., LLC*, 373 F.3d 347, 356 (3d Cir. 2004) (citing *Saltiel v. GSI Consultants, Inc*., 170 N.J. 297, 315 (2002)).

[83]. *See Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 579 (1985).

loss.[84] An independent tort action is often "not cognizable where there is no duty owed to the plaintiff other than the duty arising out of the contract itself."[85]

Nor is the specter of the bar against implied warranty claims per N.J.S.A. 59:9-2(b), which prohibits judgments "on the basis of strict liability, implied warranty or products liability" applicable to the complaint. None of those claims are pled in the complaint. 31a-110a. All three of those claims – including that of implied warranty – deal with tort injuries, i.e., injuries to the person. For example, implied warranty claims in this context involve strict liability claims for injuries to the person and not breach of contract claims for benefit of the bargain damages.[86] The TCA's tort related notice provisions are designed to "'compel a claimant to expose his intention and information early in the process in order to permit the public entity to undertake an investigation while witnesses are available and the

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[84]. *See Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 580 (1985).

[85]. *International Minerals & Mining Corp. v. Citicorp N. Am., Inc.*, 736 F. Supp. 587, 597 (D.N.J. 1990). S*ee also Alloway v. Gen. Marine Indus., L.P.*, 149 N.J. 620 (1997); *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 116 N.J. 517, 535 (1989) (a title company's liability is limited to the policy and isn't liable for negligence unless the company engaged in conduct beyond the policy).

[86] See *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434 (1965)(passenger injured in a defective truck leased by a third party); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358 (1960)(personal injury claim against automobile manufacturer in the absence of privity between injured party and manufacturer); *Collins v. Uniroyal, Inc.*, 64 N.J. 260 (1974)(personal injury claim against tire manufacturer in the absence of privity between injured party and manufacturer).

facts are fresh.'"[87] No such investigation is implicated by contract claims pled in this case for economic damages, such as a refund of the money that plaintiffs paid for polluted water. We have an express statutory requirement under the SWDA that the water defendant delivered to plaintiff meet minimum standards - standards clearly not met by defendant. There are no facts indicating an absence of privity requiring plaintiffs to rely on a gap filler statute applying an implied warranty to the sale.[88] Express and implied contracts share the same jury charges,[89] whereas implied warranties have a different set of jury charges – all of which deal with implied warranties arising not via service contracts but via warranties arising from the sale of goods as a matter of law.[90] The sale of the services is clearly distinct from the sale of goods: [91]

> [t]he Uniform Commercial Code-Sales (UCC-Sales), N.J.S.A. 12A:2-101 to -725, applies to 'transactions in goods.' N.J.S.A. 12A:2-102. The UCC-Sales does not, however, apply to service contracts.

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[87] *D.D. v. UMDNJ*, 213 N.J. 130, 146 (2013)(citation omitted).
[88] See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358 (1960).
[89] Model Civil Jury Charge 4.10E.
[90] Model Civil Jury Charge 4.22A-B.
[91] *Quality Guaranteed Roofing, Inc. v. Hoffmann-La Roche, Inc.*, 302 N.J. Super. 163 (App. Div. 1997).

This case involves the sale of services and not of goods.[92] Therefore, a breach of a service contract occurred and no UCC implied warranty claims are implicated.

A related argument that fails to defeat the complaint is that the Product Liability Act bars the complaint - remedial legislation regulating actions for damages for harm caused by products.[93] No cases hold that the PLA applies to sale of water services and out of pocket losses associated with the breach of a contract for their sale is a PLA claim. Trial courts have no license to amend statutes[94] and it isn't the duty of this court to rewrite or pervert what the Legislature enacted.[95] The only right courts have to engage in "statutory surgery" is to preserve a legislative enactment from some unconstitutional taint – something not called for in this case.[96] The court's role is to effectuate legislative intent and not to alter it.[97] A sea change in policy, as suggested by defendants, lies with the Legislature and not the courts. Given the decisions that we do have routinely refusing to dismiss breach of

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[92] See, e.g., *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Commission of State of N. J.*, 75 N.J. 272 (1977), appeal dismissed, 435 U.S. 982, 98 S. Ct. 1635, 56 L.Ed.2d 76 (1978); *Ivan v. Marlboro Tp. Municipal Utilities Authority*, 162 N.J. Super. 466, 468 (App. Div. 1978).

[93.] See N.J.S.A. 2A:58C-1, et seq.

[94] See *DiFiore v. Pezic*, 254 N.J. 212 (2023).

[95] *Plastic Surgery Ctr., PA v. Malouf Chevrolet-Cadillac, Inc.*, 457 N.J. Super. 565, 574 (App. Div. 2019).

[96] *Plastic Surgery Ctr., PA v. Malouf Chevrolet-Cadillac, Inc.*, 457 N.J. Super. 565, 575 (App. Div. 2019).

[97] See *Morristown Assocs. v. Grant Oil Co.*, 220 N.J. 360, 380 (2015)("When construing a statutory provision, a court's role is to discern and give effect to the Legislature's intent.").

contract claims pled against municipalities, there is no reason to read into the TCA protections that it fails to expressly include. "One would therefore fairly expect that if the Legislature intended such a sea change it would have done so directly, not inferentially."[98] As detailed above, contract cases routinely come up in the context of the TCA's notice requirement and those cases survive dismissal based on the supposed failure to meet that requirement. Such long-standing custom in how the TCA is interpreted and applied and the fact that the Legislature has not amended the law to interfere with such traditional practices, support plaintiff's position.[99] The Legislature is presumed aware of statutory interpretation by the State's courts.[100] In the face of the many cited cases denying dismissal of contract claims brought against government entitles, the Legislature intended to leave unaltered the present statutory scheme.[101] Since the Legislature - presumed as it is to be aware of its laws and how they are being litigated - never took steps to amend the TCA to refine the contract exclusion clearly indicates its satisfaction with the

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[98] *Plastic Surgery Ctr., PA v. Malouf Chevrolet-Cadillac, Inc.*, 457 N.J. Super. 565 (App. Div. 2019).

[99] *Chase Bank USA, N.A. v. Staffenberg*, 419 N.J. Super. 386 (App. Div. 2011)("Like all precedents, where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time it will be regarded as of great importance in arriving at the proper construction of a statute.")(citations omitted).

[100] *State v. Fleischman*, 189 N.J. 539, 550 (2007).

[101] *Plastic Surgery Ctr., PA v. Malouf Chevrolet-Cadillac, Inc.*, 457 N.J. Super. 565, 572 (App. Div. 2019).

statutory scheme as implemented by the courts.[102] Even were it appropriate for a court to carve out a new area contradicting the presently settled caselaw on contract claims being excluded from the TCA, such a sea change is the Supreme Court's domain.[103] For example, were the court to hold the TCA applied to the complaint, the holding would violate the Federal and State Constitutions' guarantees of freedom of contract.[104] Such a sea change in the law is for the Supreme Court, as was the case in *Sun Chem. Corp. v. Fike Corp*., 243 N.J. 319 (2020), circumscribing limits on the PLA's reach relative to consumer claims. As with the TCA claims, PLA claims focus on personal injuries and product injuries and not out of pocket monetary losses for the sale of services such as delivery of water by a municipality. All agree that water isn't a product owned by any one person and that a service and not a product is involved here. Nothing in the complaint speaks of negligence resulting from use of a product or the type of injuries covered by the PLA. This is not a claim involving harm caused by any

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[102]. *See Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liab. Ins. Guar. Ass'n*, 215 N.J. 522, 543-44 (2013).

[103] See *Alexander v. Seton Hall Univ.*, 204 N.J. 219, 234 (2010)(rejecting sea change to wage discrimination claims under the Law Against Discrimination and reversing trial court's decision to apply Supreme Court of United States caselaw).

[104] *Daniel v. Borough of Oakland*, 124 N.J. Super. 69 (App. Div. 1973)("Such contract, as other contracts, was entitled to the protection provided by the Federal Constitution and the State Constitution. Both prohibit the adoption of any law impairing the obligation of contract").

defective product[105] but rather money paid for contaminated water. The complaint's claims exist outside the PLA[106] and dismissal before discovery's conclusion based on the PLA is premature.[107]

Another argument frequently used against suits such as the complaint appears to be couched in terms of subsumption and preemption via another statutory scheme purportedly consuming the field of water supply sales, e.g., the Safe Water Drinking Act or the County and Municipal Water Supply Act. Those statutes don't include express bars to liability nor provide private causes of action to plaintiff and the residents to replace those sounding in contract. The CMWSA doesn't focus on contracts between municipalities and their residents but rather, on municipalities' efforts to "acquire, construct, maintain, operate or improve facilities for the accumulation, supply or distribution of water and to provide for the financing of these facilities." N.J.S.A. 40A:31-2. Preemption is the exception and not the rule. As our Supreme Court explained when deciding that consumer statutory claims involving the sale of insurance products weren't preempted by

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105. *Tirrell v. Navistar Int'l, Inc.*, 248 N.J. Super. 390, 398 (App. Div. 1991).
106 *Gorczynski v. Electrolux Home Prods., Inc.*, No. 18-10661 (D.N.J. Apr. 29, 2019) ("Plaintiff seeks economic damages associated with the cost of repair or replacement of the Microwave. Plaintiff neither alleges nor seeks any damages for physical harm caused by the handle defect (such as burns to his hand). Plaintiff also does not seek any damages for other harms under the purview of the PLA, such as emotional distress.").
107 *Shannon v. Howmedica Osteonics Corp*., No. 09-4171 (D.N.J. Apr. 14, 2010).

other statutory or regulatory schemes,[108] the Legislature, presumed familiar with its laws, took no action to write into the SWDA or CMWSA special protections for municipalities facing contract claims.

Yet another common argument used to defeat claims such as those pled in the complaint is that residents aren't entitled to relief against their own municipalities because the residents are essentially suing themselves. New Jersey's laws allow residents to sue municipal entities for breach of contract. See N.J.S.A. 59:13-1 to-10. Plaintiff spent money and paid defendant for services delivering contaminated water. New Jersey courts view standing liberally.[109] Standing requires "a sufficient stake and real adverseness with respect to the subject matter of the litigation" and a "substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision."[110] By being sold services that failed to deliver uncontaminated water, plaintiffs suffered damages for a breach of contract, violation of the covenant of good faith and fair dealing and promissory estoppel.

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[108] *Lemelledo v. Beneficial Management Corp. of America*, 150 N.J. 255, 271, 696 A.2d 546 (1997).

[109.] *Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y.*, 58 N.J. 98, 101 (1971).

[110.] *In re Adoption of Baby T.*, 160 N.J. 332, 340 (1999).

II. BY DENYING THE CLASS CERTIFICATION MOTION THE TRIAL COURT COMMITTED REVERSIBLE ERROR

(931a-954a)

As with the affirmative defense issue discussed above, on the issue of class certification, the trial court violated R. 1:7-4(a) by failing to make findings of fact and conclusions of law on whether a class action should be certified. 931a-954a. The trial court didn't engaged in the required rigorous factual and legal analysis.[111]

Class certification is to be decided as early as practicable. R. 4:32-2(a). Plaintiff was entitled to favorable view of the complaint and record[112] and didn't have to prove liability or damages and the court doesn't have to delve into the merits of the suit: "Ordinarily, the merits of a complaint are not involved in the determination as to whether a class action may be maintained, unless of course the allegations are patently frivolous."[113] Courts deciding class certification consider an overarching principle of equity—that class actions should be liberally allowed where consumers seek to redress a common grievance under circumstances making individual actions uneconomical.[114] Falling in that category of cases are those where each claimant shares a common grievance and incurs relatively small

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[111] *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 106-07 (2007).
[112] *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 96 (2007).
[113] *Olive v. Graceland Sales Corp.*, 61 N.J. 182 (1972).
[114] *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 332 N.J. Super. 31, 45 (App. Div. 2000).

amounts of damages.[115] Problems that may arise in the future if the case is certified, such as procedures governing the allocation of damages, don't necessarily preclude certification.[116] If there is any doubt as to class certification, the court should certify the class.[117] Certification is granted absent a clear showing it is inappropriate or improper.[118]

Rule 4:32-1(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Numerosity is amply satisfied because the water charges are uniform as is the contamination and the number of residents is in the hundreds as indicated from defendant's own records. 149a-151a; 690a-846a. Forty or more class members will suffice.[119] The number of class members is "not wholly dispositive of the analysis, "and plaintiffs do not have "to show the exact size of the class in order to satisfy numerosity" and an equal part of the inquiry centers around whether 'the difficulty and or inconvenience of joining all members

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115. *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 332 N.J. Super. 31, 45 (App. Div. 2000).

116. *Strawn v. Canuso*, 140 N.J. 43, 67-69 (1995), superseded by statute on other grounds by N.J.S.A. 46:3C-1 to -12.

117 *See Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 103 (2007)("[I]f there is to be an error made, let it be in favor and not against the maintenance of the class action.").

118 *Beegal v. Park West Gallery,* 394 N.J. Super. 98, 110 (App. Div. 2007).

119 *Stewart v. Abraham,* 275 F.3d 220, 226-27 (3d Cir. 2001)("[G]enerally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met."); *Saldana v. City of Camden*, 252 N.J. Super. 188, 193 (App. Div. 1991)(eighty members).

of the class calls for class certification.'"[120] "Impracticability does not mean impossibility."[121] It isn't necessary that the exact number of class members be known during certification or that the members be identified by name at certification[122] or to show the identities of every class member is ascertainable.[123]

Rule 4:32(1)(a)(2) requires that there be "questions of law or fact common to the class." The commonality requirement with other members of the class is met if a plaintiffs' grievances share a common question of law or fact and plaintiff isn't required to show that all class members' claims are identical to each other as long as there are common questions at the heart of the case; "factual differences among the claims of the putative class members do not defeat certification."[124] "Commonality does not require an identity of claims or facts among class members; instead, 'the commonality requirement will be satisfied if the named

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[120] *W. Morris Pediatrics, P.A. v. Henry Schein, Inc.*, 385 N.J. Super. 581, 595 (Law. Div. 2004), aff'd, No. A-3595-04 (App. Div. Mar. 30, 2006)(citations omitted).

[121] *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 73 (D.N.J. 1993)("precise enumeration of the members of a class is not necessary."); see also *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 405 (D.N.J. 1990)("It is proper for the court to accept common sense assumptions in order to support a finding of numerosity.")

[122] See *Kronisch v. Howard Savings Institution*, 133 N.J. Super.124, 132 (Law Div. 1975)("It is not necessary that the exact numbers comprising the class be specified or that the members be identified."); *Gallano v. Running*, 139 N.J. Super. 239, 245 (Law Div. 1976) ("This court makes no effort to determine the exact number of members nor their identity, since such an exercise goes well beyond the court's duties so long as the class itself is well defined.").

[123] See e.g. *Daniels v. Hollister Co.*, 440 N.J. Super. 359, 369-70 (App. Div. 2015).

[124] *Baby Neal v. Casey*, 43 F.3d 48 (3d Cir. 1994).

plaintiffs share at least one question of fact or law with the grievances of the prospective class.'"[125] This requirement is easily met in this case, as there is a question of law or fact common to all class members – the sale of the same water at the same rates with the same contamination. There only need be one common issue of law or fact out of many for the "commonality" prerequisite to be met.[126]

Rule 4:32(1)(a)(3) also requires that the lead class plaintiff's claims be "typical" of those of other class members. Typicality is met here because the claims of a putative class representative have the essential characteristics common to the claims of the class and since the claims only need share the same essential characteristics and need not be identical, the typicality requirement isn't highly demanding.[127] Cases challenging the same unlawful conduct affecting both the named plaintiff and the putative class usually satisfy the typicality irrespective of the varying fact patterns underlying the individual claims.[128] Actions like this one requesting declaratory and injunctive relief to remedy conduct suffice.[129] "Factual differences will not render a claim atypical if the claim arises from the same event or practice of course of conduct that gives rise to the claims of the class

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[125] *Johnston v. HBO Film Mgmt.,* 265 F.3d 178, 184 (3d Cir. 2001)(citation omitted).
[126] See *Delgozzo v. Kenny*, 266 N.J. Super.169, 185 (App. Div.1993).
[127] *Laufer v. U.S. Life Ins. Co. in N.Y.*, 385 N.J. Super. 172 (App. Div. 2006).
[128] *Laufer v. U.S. Life Ins. Co. in N.Y.*, 385 N.J. Super. 172 (App. Div. 2006).
[129] *Laufer v. U.S. Life Ins. Co. in N.Y.*, 385 N.J. Super. 172 (App. Div. 2006).

members, and it is based on the same legal theory."[130] "[T]he threshold for satisfying the typicality prong is a low one."[131] Even relatively pronounced factual differences won't preclude a finding of typicality where there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct."[132] Plaintiff demonstrated that plaintiff shares common issues of law and fact with the other class members.[133] 6a-10a; 31a-110a. Plaintiff's claims arise from the same course of events as those facing the class and plaintiff must make the same – or effectively the same – arguments to prosecute their claims as would be made by members of the proposed class in any individual cases.[134] Because defendant concede typicality with the correspondence that defendant issued to the residents (111a-137a), typicality is easily satisfied by this proposed class action.

Rule 4:32(1)(a)(4) requires that the class representative "fairly and adequately protect the interests of the class." "Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the plaintiff must not have interests antagonistic to those of the class."[135] The two attorneys representing plaintiff certified to their significant experience with class action

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[130] *Hayworth v. Blondery Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992).
[131] *Weisfeld v. Sun Chemical Corp.*, 210 F.R.D. 136, 140 (D.N.J. 2002).
[132] *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994).
[133] *Weiss v. York Hosp.*, 745 F.2d 786, 809-10 (3d Cir. 1984).
[134] See *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 140 (D. N.J. 2002)
[135] *Weiss v. York Hosp.*, 745 F.2d 786, 809-10 (3d Cir. 1984).

representation, having certified many class actions. 14a-28a. These attorneys: (1) have done extensive work identifying and investigating their claims; (2) have experience prosecuting consumer class actions; (3) have been designated as class counsel in state and federal courts; (4) are knowledgeable in class action and consumer law; (5) expended significant resources in representing the class, which evidences that they are willing to continue to do so. 14a-28a; 31a-110a. Plaintiff certified to his interests being aligned with the other class members. 6a-10a. As to these issues of attorney and lead class plaintiff sufficiency, defendant offered no contrary proofs. 613a-686a. Therefore, adequacy is amply satisfied.

Rule 4:32(1)(b)(3) requires that the party proposing a class action establish that issues common to the class predominate over the individual issues of particular class members.[136] In this case, trial issues are synergistic between the plaintiff and class members because the class is challenging a uniform policy.[137] However, "[P]redominance does not require the absence of individual issues or that the common issues dispose of the entire dispute" and "[i]ndividual questions of law or fact may remain following resolution of common questions", especially when remainder issues go to damages.[138] Moreover, evem of different factual situations

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[136] See *Amchem Prod. V. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 68 (1997).
[137] See *Amchem Products, Inc., v. Windsor,* 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).
[138] *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 108-113 (2007).

arise with respect to the defenses as to different plaintiffs, such won't derogate from the fact that the affirmative cause of action itself has the community of interests and of questions of law or fact justifying class treatment.[139] This case presents a "common nucleus of operative facts" lending itself to class treatment – uniform charges for water that is contaminated by the same contaminant.[140] At the core of this case are consumers seeking to redress a "common legal grievance".[141] A party's common course of conduct alone may support a finding of predominance.[142] It is unquestioned that defendant conducted themselves in a uniform manner given that hundreds of customers faced the same harm.

Individual determinations of damages for each class member won't derail certification, because damages are clearly ascertainable from defendant's own billing records and there are core common liability issues to be determined.[143] Only the putative class representative must satisfy standing requirements.[144]

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[139] *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 112 (2007).
[140] *Lee v. Carter-Reed Co.*, LLC, 203 N.J. 496, 520 (2010).
[141] *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 431 (1983)(class certified, even though individual defenses relating to causation, reliance and damages would remain as to each class member).
[142] S*ee, e.g., Varacallo v. Massachusetts Mutual Life Ins. Co.,* 332 N.J. Super. 31 (App. Div. 2000); *Elias v. Ungar's Food Prod., Inc.,* 252 F.R.D. 233, 238 (D.N.J. 2008).
[143]. *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 332 N.J. Super. 31, 45 (App. Div. 2000).
[144]. *Laufer v. U.S. Life Ins. Co. in N.Y.*, 385 N.J. Super. 172, 186 (App. Div. 2006). *Muise v. GPU, Inc*., 391 N.J. Super. 90 (App. Div. 2007)(commonality is not affected by the obligation of each class member to prove individual damages).

Unnamed class plaintiffs need not make any individual showing of standing, because the standing issue focuses on whether the claimant is properly before the court, rather than if absent class members are properly before it.[145] Even were there individualized damage issues, court can utilize various "management tools … to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damages trial with the same or different juries; (2) appointing a particular judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the case."[146] The New Jersey Supreme Court has repeatedly found predominance to be met and affirmed certification under R. 4:32-1(b)(3) in cases despite specifically noting that numerous individual issues and potential individual defenses existed.[147]

Thus, the question the "predominance" prong seeks to answer is not whether there are any individual issues or defenses, but rather does "the core of the case concern common issues of fact and law"[148] and this case involves common issues.

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145. *Laufer v. U.S. Life Ins. Co. in N.Y.*, 385 N.J. Super. 172, 186 (App. Div. 2006).
146 *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001). See also *Fiore v. Hudson Cty. Emps. Pension Com.*, 151 N.J. Super. 524, 528-29 (App. Div. 1977).
147 See, e.g., *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 431 (1983).
148 *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88 (2007).

Rule 4:32-1(b)(3) superiority requirement asks a court to balance, in terms of fairness and efficiency, the merits of a class action against alternative available adjudication methods.[149] Prosecution of this litigation as a class action is the superior method of proceeding with this case as the claims of each individual claimant would be small and it is doubtful any claimant would undergo the time and expense of a lawsuit to enforce his or her rights for such small sum(s) because litigation costs would exceed the benefit of the recovery - exactly the sort of claim class actions are designed to address.[150] Public policy also favors a class, as a great deal more judicial resources would be expended in managing and trying thousands of Small Claims or Special Civil Part cases. To require hundreds or thousands of identical individuals, repetitive cases to be filed to address the claims in this – all with the attendant possibility of inconsistent adjudications – verges on the absurd.[151] The class action device is designed for this very situation where an individual seeks to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[152]

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[149] *Georgine v. Amchem Products, Inc.,* 83 F.3d 610, 632 (3d Cir. 1996).
[150] *Lee v. Carter-Reed Co.*, LLC, 203 N.J. 496, 518 (2010) (quoting *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 120 (2007)).
[151] See *California v. Yamaski*, 42 U.S. 682, 700-01 (1970).
[152] *Amchem Products, Inc., v. Windsor,* 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

Class certification is superior because of the modest value of individual claims.[153] Since defendant never came forward with evidence of other complaints against defendant raising the claims presented here, there is no evidence of interest in individually prosecuted claims. 613a-686a.

Another factor to consider is manageability. Because the same contract clauses apply to all class members, any manageability issues presented will be minimal and do not justify denial of class certification. This case focuses on core questions of law and fact which will resolve liability for the entire potential class.

[153] *In re Prudential Inc. Co. of Am. Sales Practice Litigation Agent Actions,* 148 F.3d 283, 316 (3d Cir. 1998).

CONCLUSION

Defendant failed to properly plead and therefore waived the TCA defense. Moreover, the above caselaw and the TCA's language show that the complaint isn't subject to the TCA. Regardless of how a municipality sells water services, "[t]he conclusion that a contractual relationship existed between the Borough and its customers is inescapable."[154] As the Supreme Court explained, whether the sale of water services is a governmental or proprietary function isn't relevant to this case:[155]

> (W)e cannot agree that the distinction between governmental and proprietary functions is relevant to this controversy. The distinction is illusory; whatever local government is authorized to do constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur. The distinction has proved useful to restrain the ancient concept of municipal tort immunity, not because of any logic in the distinction, but rather because sound policy dictated that governmental immunity should not envelop the many activities

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[154] *Daniel v. City of Oakland*, 124 N.J. Super. 69 (App. Div. 1973)(discussing the sale of water under municipal water ordinance).

[155] *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Commission of State of N. J.*, 381 A.2d 774, 75 N.J. 272 (1977), appeal dismissed, 435 U.S. 982, 98 S. Ct. 1635, 56 L.Ed.2d 76 (1978).

> which government today pursues to meet the needs of the citizens. (Id. at 584, 141 A.2d at 311)
>
> Furthermore, this distinction, once useful in the field of municipal tort immunity, has been discarded even for that purpose.
>
> ***
>
> Furnishing water might be considered as a sale of a "service", as distinguished from the sale of "goods", on the theory that water is a naturally produced item which is simply being distributed.
>
> ***
>
> A (water) public utility is selling a service.

Since then, the governmental-proprietary fiction continues to be rejected as relevant:[156]

> Since the enactment of the Tort Claims Act the Supreme Court, in *K.S.B. Tech. Sales v. North Jersey Dist. Water Supply*, 75 N.J. 272, 381 A.2d 774 (1977), rejected the governmental-proprietary distinction in holding that a district water supply commission is a governmental agency acting in furtherance of a governmental purpose in distributing water for sale at cost within eight municipalities.

[156] *Tower Marine, Inc. v. City of New Brunswick*, 175 N.J. Super. 526 (Ch. Div. 1980).

Moreover, dismissal of the complaint offends constitutional protections for freedom of contract[157] – the very reason the TCA carves out an exception for contract claims, lest it be declared unconstitutional. Therefore, the residents are entitled to refunds for contaminated water charges and to recover bottled water and water treatment expenses.

A class action would achieve the greatest goods for the residents to address the damages suffered from defendant's breach of contracts between it and the residents and there are no issues thwarting class certification. The issues for plaintiff and the class are synergistic and the claims are too small for individual adjudications.

The court should reverse the trial court's order granting summary judgment and denying class certification, order the granting of certification and remand the case to the trial court for adjudication on its merits.

DATED: June 4, 2024

/S/ PAUL DEPETRIS
PAUL DEPETRIS

[157] See *Daniel v. Borough of Oakland*, 124 N.J. Super. 69 (App. Div. 1973).

GEORGE NICHOLSON, JR., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS/APPELLANTS, v. BOROUGH OF NATIONAL PARK, DEFENDANT/THIRD-PARTY PLAINTIFF/RESPONDENT, v. SOLVAY SPECIALTY POLYMERS, SOLVAY SOLEXIS, INC., ARKEMA, INC., THIRD-PARTY DEFENDANTS/RESPONDENTS.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-1867-23 CIVIL ACTION ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, GLOUCESTER COUNTY, NO. GLO-L-2-23 SAT BELOW: HON. ROBERT MALESTEIN, P.J. CH. DATE BRIEF AND APPENDIX SUBMITTED: 7/5/2024 DATE AMENDED BRIEF AND APPENDIX SUBMITTED: 7/9/2024

AMENDED BRIEF AND APPENDIX (Da1-Da33) OF RESPONDENT BOROUGH OF NATIONAL PARK IN OPPOSITION TO APPEAL OF APPELLANT GEORGE NICHOLSON, JR.

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PRELIMINARY STATEMENT

Appellant George Nicholson, Jr.'s ("Nicholson") appeal should be denied because the trial court properly found that there was no implied contract between Nicholson and Respondent Borough of National Park, New Jersey (the "Borough" or "National Park"). The Borough provides potable water to Nicholson and its other residents not through a contractual relationship, but as a governmental function. The provision of potable water service and other essential government services does not create a commercial-type relationship between a municipality and each resident.

A. Old Case Law Treating Municipal Water Supply as a "Proprietary" Function is No Longer Good Law.

Nicholson does not allege that he and the Borough entered into an express contract. Instead, Nicholson relies on an old, now defunct line of case law in which courts held that a municipality's supply of water created an "implied contract", on which the municipality could sue to recover unpaid water charges. When that line of cases arose in the 1870s, municipalities lacked a statutory basis to recover such charges, so the courts created a judicial remedy. Courts held that a municipality's supply of water was a "proprietary" rather than "governmental" function, and created an implied contract obligating the recipient of water service to pay for water received.

Many decades later, New Jersey's legislature enacted statutes to comprehensively govern and regulate the supply of potable water. Statutory provisions now authorize municipalities to assess charges to recoup their expenses in providing potable water service, and expressly allow placement and enforcement of liens to recover unpaid water charges.

Moreover, New Jersey's Supreme Court held nearly 50 years ago that municipal supply of water is ***not*** a "proprietary" function, dismissing the former "proprietary" vs. "governmental" dichotomy as an antiquated and invalid legal fiction. The Supreme Court reversed what the Appellate Division (citing the same cases that Nicholson relies upon) had termed the "rule in New Jersey" that municipal water supply was a proprietary function governed as if it was a commercial transaction. The Supreme Court's reversal of that ruling, and holding that municipal water supply is a governmental function, made clear that the proprietary function/implied contract line of cases is no longer good law.

Nicholson not only relies on that defunct line of cases, but seeks to expand its scope beyond collection of unpaid water charges. Nicholson seeks to use the supposed implied contract created by Borough water service to enforce implied warranties as to the quality of the water being provided. However, Nicholson's fundamental premise that municipal water service created a commercial-type relationship between him and the Borough is meritless as a matter of law.

B. Nicholson's Claims Are Disguised Tort Claims.

Nicholson spends much of his brief addressing the Tort Claims Act. However, the only relevance of the Tort Claims Act is that Nicholson's claims really are tort claims that Nicholson has disguised as contract claims in an attempt to circumvent Tort Claims Act prohibitions.

Nicholson's Complaint does not purport to assert any claims under the Tort Claims Act. Indeed, Nicholson's proprietary function/implied contract theory was intended specifically to try to ***circumvent*** the Tort Claims Act. Nicholson's contention that the water supplied by National Park was unfit for its intended purpose is a quintessential product liability claim. Knowing that the Tort Claims Act precludes such claims, and that such a claim would be further barred by Nicholson's failure to comply with the Tort Claims Act's mandatory pre-suit notice requirements, Nicholson attempted to circumvent those bars by pleading his claims as supposedly founded in contract. However, the law is clear that a plaintiff cannot pursue claims barred under the Tort Claims Act by recasting those claims as other causes of action. Regardless, the proprietary function/implied contract line of cases Nicholson relies upon is no longer is good law.

For these reasons, the Borough respectfully requests that this Court affirm Judge Malestein's grant of summary judgment dismissing Nicholson's Complaint.

STATEMENT OF FACTS

A. National Park's Supply of Water to Borough Residents

National Park is a municipality located within Gloucester County, New Jersey. Pa166 at ¶ 4. National Park provides its residents and businesses with a variety of governmental services, including the supply of potable water. Id. The National Park Water Treatment Plant (PWSID No. NJ0812001) (the "Plant") is located at 7 South Grove Avenue, directly behind National Park Borough Hall and services approximately 3,200 residents. Id. at ¶ 5. National Park currently relies on two groundwater production wells (Well No. 5 and Well No. 6) to meet 85 percent (271,000 gallons per day ("gpd")) of its total daily water demand of 321,000 gpd. Id. at ¶ 6.

National Park's supply of water is authorized and governed by statutory and ordinance provisions. Id. at ¶ 7. Water bills are issued by National Park on a quarterly basis. Id. at ¶ 8. Residential properties are billed a minimum flat rate of $40.00 per quarter for up to 7,500 gallons of water. Id. at ¶ 9.

B. Government Regulation of Public Water Supply

National Park's supply of water is regulated by federal and state entities such as the United States Environmental Protection Agency and the New Jersey Department of Environmental Protection ("NJDEP"). Among the regulations imposed by federal and state agencies are maximum contaminant levels ("MCLs") for various contaminants found in public water supplies. See 40 C.F.R. 141;

N.J.A.C. 7:10–5.1. Included is an MCL for perfloronononanoic acid ("PFNA"), which is one of several per- and polyfluoroalkyl substances ("PFAS") recently recognized as emerging contaminants of concern. See N.J.A.C. 7:10- 5.5(2)a5. For PFNA, NJDEP has adopted an MCL of 13 parts per trillion ("ppt"). Id. When NJDEP adopted its MCL for PFNA in 2018, it was the first drinking water MCL for PFNA anywhere in the United States.

C. National Park's Detection of PFNA in Excess of the MCL

National Park continually monitors for the presence of drinking water contaminants, including PFNA. Pa166-67 at ¶ 10. On January 22, 2020, the results of routine testing showed that the wells from which National Park draws its water supply contained PFNA in excess of the MCL. Id. NJDEP immediately became involved in the situation. On February 13, 2020, in compliance with applicable state and federal regulations, National Park issued an advisory notice to all residents stating that samples collected for the previous quarter (10/1/19 to 12/31/19) showed the presence of PFNA exceeding the MCL. Pa167 at ¶ 11. This advisory notice was reviewed and approved by NJDEP before dissemination to Borough residents. Pa167 at ¶ 10.

National Park continued to send its residents update notices on the sampling results and the status of the efforts to address the PFNA MCL exceedances, with each such notice being subject to NJDEP review and approval. Pa167 at ¶¶ 10-12,

Pa170 at ¶ 29, Pa112-137. The advisory notices complied with NJDEP requirements for circumstances that ***do not involve acute health risks***. See 40 C.F.R. 141.205; see also Pa112. In such situations, where there is no immediate risk to human health, the water supplier must notify residents of the issue within 30 days. See 40 C.F.R. 141.203. The advisory must remain in effect until the issue is resolved. See id.

NJDEP adopted its MCL for PFNA based upon recommendations by the New Jersey Drinking Water Quality Institute. See 50 N.J.R. 1939(a) (September 4, 2018) and 51 N.J.R. 437(a), 437 (April 1, 2019). The MCLs set forth in NJDEP's regulations are "health-based level[s]" that are "based on ***lifetime exposure***" and are "expected to be protective of all age groups." 50 N.J.R. at 1945 (emphasis added). Thus, the MCL for PFNA was intended to protect against health risks that could arise after a ***lifetime of exposure***, i.e., exposure over many decades. So, NJDEP deemed that the presence in National Park's water supply of PFNA exceeding the MCL posed no immediate, acute threat.

Accordingly, the NJDEP-approved advisory notices issued by National Park expressly informed residents: "***There is nothing you need to do. You do not need to boil your water or take other corrective actions***." See Pa112.

D. Design and Construction of the GAC Treatment System

On February 27, 2020, NJDEP's Bureau of Safe Drinking Water issued a Notice of Non-Compliance letter to National Park that established a deadline for the Borough to come into compliance with the PNFA MCL. Pa167 at ¶ 11. On March 30, 2020, National Park submitted a letter to NJDEP explaining that it would not be able to meet that original deadline due to the time needed to evaluate treatment options and secure funding. Id. at ¶ 12.

National Park determined to install a Granular Activated Carbon Filtration water treatment system (the "Treatment System") to remove PFNA from the water being drawn from National Park's wells. Id. at ¶ 13. The Treatment System was designed to be capable of removing all PFAS compounds to non-detection levels. Id. In order to construct the Treatment System, National Park had to obtain NJDEP approval. Pa168 at ¶ 15. National Park applied on October 21, 2020 for a "Treatment Plant Permit" to construct, modify and operate a Public Water Works Facility. Id. On November 23, 2020, the NJDEP deemed the application administratively complete. Id. at ¶ 16. On April 7, 2021, the NJDEP provided final approval and issued permit #WCP200001. Id. at ¶ 17.

On June 11, 2021, National Park received approval from the United States Department of Agriculture to advertise for bids for the construction of the Treatment System. Id. at ¶ 18. On June 16, 2021, the NJDEP, Municipal Finance

and Construction Element, also approved National Park to advertise for bids for the construction of the Treatment System. Id. at ¶ 19. The project was advertised for bids on August 10, 2021. Pa169 at ¶ 20. And, on September 8, 2021, National Park adopted Resolution 51-2021, which identified Quad Construction as the winning bidder for the construction of the Treatment System. Id. at ¶ 21.

To ensure that National Park would promptly complete its work to address the PFNA MCL exceedances, in December 2021, NJDEP required that National Park enter an Administrative Consent Order ("ACO") that set a series of deadlines for National Park to take the steps necessary to address the PFNA MCL exceedances. Id. at ¶ 25. By August 2022, the construction of the Treatment System was 80% complete. Id. at ¶ 23. However, the completion of construction was slowed due to delays in receipt of materials. Id. at ¶ 24.

On August 31 and September 1, 2022, National Park submitted requests to NJDEP to grant force majeure under the ACO to address the delays in construction of the Treatment System. Id. at ¶ 25. Recognizing good cause, NJDEP granted the requests and extended the deadline to January 10, 2023 for National Park to complete construction and installation of the GAC Treatment System. Id. at ¶ 26. National Park completed construction by January 18, 2023 and the Treatment System was fully operational by February 2, 2023. Pa170 at ¶ 28.

E. The Treatment System Resolved the PFNA MCL Exceedances

NJDEP required National Park to sample for PNFA on a weekly basis for the first four weeks that the Treatment System was operational. Id. at ¶ 29. Samples were taken on 2/2/2023, 2/7/2023, 2/14/2023 and 2/21/2023. Id. at ¶ 30. All of these samples verified that the Treatment System was effective to remove PNFA from the water. Id. at ¶ 31. Since the Treatment System went online in February 2023, all samples have been non-detect for PFNA, and thus well below the MCL for PNFA. Id. at ¶ 34. National Park's drinking water report to its residents, dated May 1, 2023, advised: "The PNFA chemical is being effectively removed in our water treatment process now that the new Granular Activated Carbon Filters have been placed into service." Pa170-71 at ¶ 35.

On June 26, 2023, NJDEP sent National Park a letter stating that all conditions of the ACO were satisfied and, therefore, the ACO was terminated. Id. at ¶ 36.

F. Nicholson's Complaint

Nicholson, a Borough resident, alleges that he continued to drink unfiltered tap water for nearly two years after receipt of the initial advisory notice of the MCL exceedance, as he had done since first moving into his home in 2012. Pa36 at ¶ 18. Eventually, however, at the beginning of 2022, Nicholson conducted his own "research" regarding PFNA. Pa37 at ¶ 23. After doing that "research",

Nicholson subjectively decided – contrary to the NJDEP-approved advisory notices that National Park sent to residents – that the water National Park supplied was not fit to drink. Id. at ¶¶ 23, 24. Nicholson decided that he would no longer drink the water supplied by National Park, and instead would drink bottled water. Id. at ¶¶ 24, 25.

PROCEDURAL HISTORY

On January 2, 2023, Nicholson filed a three-count Complaint against the Borough in the Superior Court of New Jersey, Law Division, Gloucester County. Pa32. The Complaint alleged breach of contract (Count 1), breach of the implied covenant of good faith and fair dealing (Count 2) and promissory estoppel (Count 3). Pa75-81. Nicholson alleged that National Park provided residents with drinking water containing PFNA at levels above the NJDEP-established MCL, which –in Nicholson's subjective view – rendered the water unfit for consumption. Id.

Nicholson sought relief focused "strictly on economic loss in the form of paying out of pocket for: (1) water known to be contaminated by chemicals at unacceptable levels; (2) other sources of water to replace the water sold by defendants; and (3) home water filtration systems or other kinds of filtration products to treat the water so that its contaminants are eliminated or alleviated." Pa35-36 at ¶ 13. Nicholson also sought injunctive relief "compelling defendants to

provide water without the contaminants that are the subject of this case and to enjoin defendants from using the wells as a source for water sold and delivered to the residents." Pa36 at ¶ 14. That demand for injunctive relief was mooted when the Borough's Treatment System became operational.

The Complaint did not purport to assert any claims under the Tort Claims Act. See generally Pa32-82. The Borough never received a claim notice from Nicholson pursuant to the Tort Claims Act, N.J.S.A. 59:1-1, et seq. Pa171 at ¶ 37.

On April 24, 23, the Borough filed an Answer with jury demand and affirmative/separate defenses. Pa378.

On May 24, 2023, Nicholson filed a motion to certify a class action. Pa1.

On June 6, 2023, the Borough filed a Third-Party Complaint against Solvay Specialty Polymers, USA, LLC, Solvay Solexis, Inc. and Arkema, Inc. (collectively, the "Third-Party Defendants") – whose operations the Borough believed to be the source of the PFNA impacting the Borough's supply wells – seeking indemnification and contribution for all alleged damages Nicholson was seeking from the Borough. Pa415. On August 11, 2024, the Third-Party Defendants each filed separate motions to dismiss the Third-Party Complaint, and the Borough subsequently opposed those motions. Pa935.

On August 25, 2023, the Borough filed a motion for summary judgment seeking to dismiss Nicholson's Complaint with prejudice. Pa152. On September

12, 2023, Nicholson filed opposition to the Borough's motion for summary judgement and a cross-motion to suppress the Borough's responsive pleading. Pa290. The cross-motion was later withdrawn by Nicholson. Pa925. On September 14, 2023, the Borough and the Third-Party Defendants each filed separate oppositions to Nicholson's motion to certify a class. Pa935-36.

On September 22, 2023, the Honorable Robert Malestein, P.J. Ch. heard oral argument on the Borough's motion for summary judgment, Nicholson's motion to certify a class action, and the Third-Party Defendants' motions to dismiss the Borough's Third-Party Complaint. See generally, Tr.[1]

On February 1, 2024, Judge Malestein issued a 22-page written decision and corresponding Order. Pa931-54. Nicholson failed to identify or allege any express "written contract" between himself and the Borough, thereby leaving the court to evaluate whether the parties had an implied contract related to the provision of water service. Pa947. Judge Malestein recognized that Nicholson was relying upon a line of cases that allowed municipalities to recover for unpaid water charges under a theory that the provision of water was a "proprietary" rather than a "governmental" function, and that the provision of water was a sale that gives rise to an implied contract. Id.

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1 Tr. Refers to the transcript from the trial court's decision on the Borough's motion for summary judgment, dated September 22, 2023.

Judge Malestein recognized that the water under the ground belongs to all citizens of the State, and the Borough is not acting as if it was a private corporation seeking to make a profit from the sale of water. Pa946. Judge Malestein found that the Supreme Court's decision in K.S.B. Tech. Sales Corp., v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272 (1977), to be controlling. Pa946. Relying on that decision, Judge Malestein observed that when the Borough distributes water for its residents, it is not acting in a "proprietary" capacity, but rather as "a public body, politic and corporate, exercising public and essential government functions in the interest of the public health and welfare." Id. Thus, Judge Malestein found that there was no implied contract or proprietary relationship between Nicholson and the Borough to support Nicholson's claims. Pa953.

The court also agreed with the Borough that Nicholson's Complaint read as a complaint for an implied warranty or a products liability claim. Pa949. Judge Malestein observed that Nicholson's alleged contract-type claims were "nothing more than a mischaracterization of the nature of the complaint to avoid the well-established sovereign immunity afforded the municipality" for tort claims under the Tort Claims Act. Id. Moreover, the court ruled that to the extent Nicholson had a claim in equity for injunctive relief, that claim was rendered moot by the Borough's Treatment System. Id. Nicholson had not contested the Borough's

arguments that installation of the Treatment System mooted his injunctive relief claims. See generally, Tr.

The court held that its dismissal of the Complaint rendered Nicholson's motion for class certification and the Third-Party Defendants' motions to dismiss moot. Pa953.

On February 1, 2024, Judge Malestein entered an Order: (1) granting the Borough's motion for summary judgment and dismissing Nicholson's Complaint in its entirety; (2) denying Nicholson's motion to certify a class action; and (3) denying the Third-Party Defendants' motions to dismiss as moot. Pa931-54. Nicholson's first notice of appeal was filed on February 23, 2024. Pa926. Nicholson filed an amended notice of appeal on March 4, 2024. Pa962.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY RULED THAT NICHOLSON'S COMPLAINT LACKED MERIT AS A MATTER OF LAW (Pa949-953).

A. The Standard of Review

The standard for appellate review of the grant or denial of summary judgment is de novo, using the same legal standard as the trial court. See Dugan Constr. Co. v. N.J. Tpk. Auth., 398 N.J. Super. 229, 238 (App. Div.), certif. denied,

196 N.J. 346 (2008); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

Summary judgment is appropriate and should be granted when the pleadings and admissible evidence submitted show "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law." R. 4:46-2(c). The purpose of the summary judgment procedure is to eliminate needless trials. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 521, 540-42 (1995). New Jersey's Supreme Court encourages trial courts to grant summary judgment "when the proper circumstances present themselves." Id. at 541.

To avoid summary judgment, the non-moving party must submit properly admissible evidence that creates a genuine issue of material fact for each challenged essential element of their claims. Id. at 529, 540 (citing R. 4:46-2). The evidence must be "sufficient to permit a rational factfinder to resolve the alleged dispute" in the non-moving parties' favor. Id. at 540. Here, there were no material facts in dispute, and Nicholson's claims were invalid as a matter of law. Therefore, Judge Malestein's entry of summary judgment was proper and should be affirmed.

B. No Proprietary/Contractual Relationship Exists Between Nicholson and the Borough.

Nicholson's entire Complaint is premised on the notion that the Borough, in providing potable water service to its residents, acts in a proprietary/commercial

capacity by "selling" water to residents, thus creating a commercial/contractual relationship between the Borough and each resident. Pb20-26. That premise is wrong. The Borough supplies water to its residents not as a commercial enterprise, but as a ***governmental*** function. Pa166 at ¶ 7. Thus, Judge Malestein correctly ruled that, as a matter of law, no commercial/contractual relationship exists between Nicholson and Borough so as to support the claims alleged in Nicholson's Complaint.

1. Potable Water is a Public Trust Resource, Not a Commercial Commodity.

The PFNA-impacted water that is the subject of Nicholson's Complaint is groundwater pumped from two wells. See Pa166 at ¶ 6. New Jersey's Legislature has recognized that groundwater is a ***resource owned by the collective public, held in trust and managed by the government for the people***:

> (a) ***The Legislature finds that the people of the State have a paramount interest in the restoration, maintenance and preservation of the quality of the waters of the State for the protection and preservation of*** public health and welfare, food supplies, ***public water supplies*** . . . . The Legislature further finds that ***the State's groundwaters are a precious and vulnerable resource***.
>
> (b) The Legislature declares that the objective of this act is, wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State, ***including groundwaters, and the public trust therein***; . . . .

N.J.S.A. 58:11A-2(a), (b) (emphasis added).

The Legislature also has declared water resources in general to be within the public trust:

> ***The Legislature finds and declares that the water resources of the State are public assets of the State held in trust for its citizens*** and are essential to the health, safety, economic welfare, recreational and aesthetic enjoyment, and general welfare, of the people of New Jersey; ***that ownership of these assets is in the State as trustee of the people***; . . . .

N.J.S.A. 58:1A-2 (emphasis added).

Courts likewise have recognized public water supplies as public trust resources:

> ***Water is an essential commodity which all of nature requires for survival.*** Our food supply is derived through water which combines with nutrients and minerals to form the fruits and vegetables which become part of our daily diet. The plants of the soil, nurtured by water and consumed by animals, provide our main staple of meat. Like the plants and animals, we too must be nurtured by water.
>
> ***Potable water, then, is an essential commodity which every individual requires in order to sustain human existence.*** Frequently, residents in rural areas have individual wells and thus become somewhat self-sufficient and independent with respect to their water supply. However, ***residents in urban and suburban areas are dependent upon the agency or institution which supplies potable water.***
>
> While the original purpose of the public trust doctrine was to preserve the use of the public natural water for navigation, commerce and fishing, Arnold v. Mundy, 6 N.J.L. 1, 69–78 (Sup.Ct.1821), it is clear that since water is essential for human life, ***the public trust***

> ***doctrine applies with equal impact upon the control of our drinking water reserves***. . . .

Mayor and Mun. Council of City of Clifton v. Passaic Valley Water Comm'n, 224 N.J. Super. 53, 63-64 (Law Div. 1987) (emphasis added). "It is clear that the broad doctrine acknowledging the public nature of the resource pertains to the water gathered and distributed by the Commission. ***It belongs to, and is for the common use of, the public, and those who take it into their possession hold it in trust for the public good***." Id. at 65 (emphasis added); see also K.S.B. Tech. Sales Corp., v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 285-86 (1977) (recognizing water resources as "common property" and that "[u]ltimate ownership rests in the people and this precious natural resource is held by the State in trust for the public's benefit").

Thus, Judge Malestein correctly recognized that the groundwater drawn from National Park's wells is not a private commodity, and that the Borough – by distributing that water to its residents – is not acting in the capacity of a private corporation seeking to make a profit from the sale of water. Pa946.

2. Municipal Distribution of Potable Water is an Essential Government Function.

Consistent with the crucial importance that supply of potable water has for the public health and welfare, and its status as a public trust resource, a municipality's supply of water to residents has been recognized as an ***essential***

government function. For example, New Jersey's Supreme Court has recognized that municipal supply of water implicates the State's

> ***overriding concern and obligation to safeguard the public health. This encompasses a comprehensive power, coupled with a correlative duty, to control and conserve the use of its water resources for the benefit of all its inhabitants.*** It is a paramount governmental policy that such water supplies must be pure in quality, and be economically and prudently managed for the benefit of the public. ***Designed to protect and promote the general health, safety and welfare***, statutes regulating public water resources must be liberally construed to advance and achieve this underlying beneficent policy.

K.S.B. Tech. Sales, 75 N.J. at 287 (internal citations omitted); see also State ex rel. Dept. of Health v. North Jersey Dist. Water Supply Comm'n, 127 N.J. Super. 251, 260 (App. Div. 1974). Courts have also recognized that a municipal water supply commission "is a public body, politic and corporate, ***exercising public and essential government functions in the interest of the public health and welfare***." North Jersey Dist. Water Supply Comm. v. Newark, 103 N.J. Super. 542, 549 (Ch. Div.), aff'd 52 N.J. 134 (1968) (emphasis added).

As summarized by the Supreme Court, a governmental entity's "activities in harnessing, treating and channeling" water "***constitutes appropriate governmental functions and purposes***" because it involves "transmitting 'common' property, potable water . . . for the use of . . . inhabitants – a necessity upon which their very existence depends." K.S.B. Tech. Sales, 75 N.J. at 288 (emphasis added).

Thus, Judge Malestein correctly observed that when the Borough harnesses and distributes water for its residents, it is "a public body, politic and corporate, exercising public and essential government functions in the interest of the public health and welfare." Pa946.

3. Municipal Charges to Defray the Expense of Water Supply Services Do Not Constitute a Commercial "Sale" of a Good or Service.

As with many other government functions, municipalities are entitled (by statute) to defray or recoup the associated costs by imposing certain charges. Municipalities may impose periodic service charges to defray costs associated acquisition, construction, and operation of water supply facilities:

> After the commencement of operation of water supply facilities, the local unit or units may prescribe and, from time to time, alter rates or rentals to be charged to users of water supply services.
>
> . . . .
>
> In fixing rates, rental and other charges for supplying water services, the local unit or units shall establish a rate structure that allows, within the limits of any lawful covenants made with bondholders, the local unit to:
>
> (1) Recover all costs of acquisition, construction or operation, including the costs of raw materials, administration, real or personal property, maintenance, taxes, debt service charges, fees and an amount equal to any operating budget deficit occurring in the immediately preceding fiscal year;
>
> (2) Establish a surplus in an amount sufficient to provide for the reasonable anticipation of any contingency that

> may affect the operation of the utility, and, at the discretion of the local unit or units, allow for the transfer of moneys from the budget for the water supply facilities to the local budget in accordance with section 5 of P.L.1983, c. 111 (C.40A:4-35.1).

N.J.S.A. 40A:31-10.a., c.

As is clear from the above-quoted statutory provision, the only purpose for which a municipality can impose a charge on residents in relation to supply of water is to "recover" actual costs and to establish a reasonable surplus to pay for contingencies that may arise. See id. Contrary to a private corporation engaged in the sale of goods or services, a municipality cannot seek a profit through supplying water to residents. See K.S.B. Tech. Sales, 75 N.J. at 288 (recognizing that government entities involved in supplying potable water "operate[] at cost"); Mayor & Mun. Council of Clifton, 224 N.J. Super. at 66 ("***The Commission must operate for the benefit of the public it serves and not for the purpose of collecting profits . . . . The concept of profit is anathema to the public interest.***") (emphasis added); North Jersey Dist. Water Supply Comm'n, 103 N.J. Super. at 549 ("***It is, of course, clear that the North Jersey District Water Supply Commission is not a private corporation seeking to make a profit.***") (emphasis added).

Thus, a municipality distributing water – a resource within the public trust, held and managed for the benefit of the public – ***is engaged in an essential government function performed for the public benefit, not in the proprietary***

"sale" of a good or service for profit. See K.S.B. Tech. Sales, 75 N.J. at 288 (recognizing government treatment and supply of potable water to be a "governmental function", not a "commercial enterprise").

4. Case Law Discussing Municipal Supply of Water as a Proprietary Function is Outdated and Distinguishable.

Nicholson bases his contention that National Park's distribution of potable water to Borough residents involves a proprietary, commercial-like relationship, and gives rise to an implied contract upon a certain line of cases originating in the 1870s – shortly after the Civil War. See Pb.20-26. Those cases primarily involved municipalities' attempts to recover unpaid water charges, a very different issue from the instant case, which involves suit ***against*** a municipality regarding the ***quality*** of water supplied to residents. Thus, as a threshold matter, those cases are distinguishable and do not apply.

More fundamentally, however, the reasoning upon which those case decisions concluded that municipal water service involves an implied contract is ***no longer valid*** and the line of cases is no longer good law.

a. The Cases Upon Which Nicholson Relies Originated to Provide a Basis for Municipalities to Recover Unpaid Water Charges.

As briefly summarized below, the cases upon which Nicholson relies originated as a judicially-created means for municipalities to recover unpaid water

charges, in the absence of statutory authority allowing such charges to be recovered in the same manner as taxes.

Jersey City v. Morris Canal & Banking Co., 41 N.J.L. 66 (1879), involved suit by Jersey City to collect unpaid water usage charges. There, Jersey City sought to recover the unpaid debt from the defendants, even though the water had actually been drawn from the main and used (without the defendants' knowledge or permission) by a third party on an adjacent property. Id. at 68-69. The Court reasoned that in the absence of a statute authorizing Jersey City to impose water charges on property owners in the manner of a tax, the only legal basis upon which the municipality could seek to collect unpaid water charges was through an implied contract arising from usage of the water:

> But ***independent of a statutory provision making the owners*** of lands fronting on a street on which water is supplied, ***liable to assessment under a system of taxation for providing the means to defray the expenses of bringing water into a city, the obligation to pay water rates will arise only upon a contract express or implied***. Such a contract will arise from the actual use of water by the party sought to be charged, and may be implied from the circumstances under which it was furnished, ...

Id. at 69 (emphasis added).

Ford Motor Co. v. Mayor & Town Council of Kearny, 91 N.J.L. 671 (1918), similarly involved efforts by a municipality to collect unpaid water charges from an entity other than the one that used the water. A municipality attempted to

impose a lien on a landlord's real property, after the tenant – which had obtained and used municipal water service without the landlord's knowledge – failed to pay water charges. Id. at 672. As in the Morris Canal case, the Court reasoned that "[s]tatutory liens upon the landlord's estate in leased real property for water rents or for water charges for water supplied thereon to the tenant must depend for their validity either upon the taxing power or upon contract." Id. Finding that the unpaid charges had not been assessed in the nature of a tax based upon the value of the landlord's real property, but instead purely based on the gallonage of water used by the tenant, the Court explained that "***in case of water sold by measure must derive its vitality from the sale itself***, as such; that is, from contract." Id. at 672-73 (emphasis added).

Lehigh Valley R. Co. v. Jersey City, 103 N.J.L. 574 (1927), aff'd, 104 N.J.L. 437, 140 A. 920 (E. & A. 1928), involved an attempt by Jersey City to seize and sell property of the Lehigh Valley Railroad Co., which allegedly was in arrears for a substantial amount of both "water rents" and unpaid taxes. Relying upon the Morris Canal and Ford Motor Co. decisions, the Court similarly concluded "that a charge for water furnished by a municipality to an owner or occupant of lands is not a tax, but is the subject of a contract, ***the sale of a commodity***, creating the relationship of seller and purchaser as between the municipality and the consumer." Lehigh Valley R. Co., 103 N.J.L. at 576-77 (emphasis added). The

Court drew a distinction between water supplied by municipalities "for extinguishing fires" which it acknowledged to be a "governmental function", and water provided "***for a price***", which it regarded as "the exercise of a private or ***proprietary function***" by municipalities acting in the same manner as "private corporations". Id. at 577 (emphasis added).

Citing the three above-discussed cases, the court observed in Daniel v. Borough of Oakland, 124 N.J. Super. 69, 72 (App. Div. 1973) that "[c]harges by a municipality for water furnished to its customers involve a ***sale*** and arise from a contractual relationship between it and the customer." (Emphasis added). The court therefore held that the municipality's attempt to retroactively increase charges for water already used and paid for would unconstitutionally impair contractual rights. Id. at 73.[2]

b. The Concept of Municipal Supply of Water as a "Proprietary" "Sale" is No Longer Valid.

By the time of Daniel, the underpinnings for this line of cases had already started to erode. As discussed above, courts started to recognize groundwater and

[2] Notably, Daniel involved actual ***express contracts***, because the local ordinance governing water supply "require[d] the customer requesting service to make a written application for such service and to enter into an agreement for its continuance. It describes that agreement as a 'contract.'" Id. Here, the Borough's water ordinance does not refer to "sales" or the need for residents to enter contracts for water. Pa173-79. And, the regulations do not require that residents make a written application for water service. Id.

other public water supply sources as public trust resources belonging to the people. See, e.g., State ex rel. Dept. of Health, 127 N.J. Super. at 260; North Jersey Dist. Water Supply Comm., 103 N.J. Super. at 549.

And even before then, the supposed distinction that public entities sometimes act in a "proprietary", rather than "governmental", role started to be questioned by courts. By 1937, the U.S. Supreme Court had already rejected the notion that municipal supply of water to residents is sale of a commodity and thus a "proprietary", rather than "governmental", function:

> ***Respondent contends that the municipality, in supplying water to its inhabitants, is engaged in selling water for profit; and seems to think that this, if true, stamps the operation as private and not governmental in character.*** We first pause to observe that the overhead due to the enormous cost of the system, and the fact that so large a proportion of the water is diverted for public use, rather plainly suggests that no real profit is likely to result. And to say that, because the city makes a charge for furnishing water to private consumers, it follows that the operation of the water works is corporate and not governmental, is to beg the question. ***What the city is engaged in doing in that respect is rather rendering a service than selling a commodity. If that service be governmental it does not become private because a charge is made for it***, or a profit realized.

Brush v. Commissioner, 300 U.S. 352, 372-73 (1937) (emphasis added).

New Jersey courts also began to question the notion of municipal water service being a "proprietary" function. In a case where the plaintiff sought to compel a municipality to extend the municipal water system to accommodate a

proposed future development, the Appellate Division observed that municipal water supply is a ***governmental function*** involving exercise of governmental ***police power***:

> The defendant's water facility is a municipally owned public utility established under legislative authority of R.S. 40:62-47 et seq. ***There is authority for the position that the establishment of a water supply system and its operation for the protection of the public health and safety is a matter comprehended in the police power of a municipality and as such, is a governmental function.***

Reid Dev. Corp. v. Parsippany-Troy Hills Twp., 31 N.J. Super. 459, 462 (App. Div. 1954) (emphasis added).

A few years later, New Jersey's Supreme Court rejected the notion that municipal supply of water is a "proprietary" function, and skeptically referred to the proprietary/governmental distinction as "illusory":

> ***Plaintiffs urge that the supply of water is a "proprietary" rather than a "governmental" function*** and hence should be subject to the Ho-Ho-Kus ordinance.
>
> ***We cannot agree that the distinction between governmental and proprietary functions is relevant to this controversy. The distinction is illusory; whatever local government is authorized to do constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur.*** The distinction has proved useful to restrain the ancient concept of municipal tort immunity, not because of any logic in the distinction, but rather because sound policy dictated that governmental immunity should not envelop the many activities which

> government today pursues to meet the needs of the citizens.

Township of Wash. v. Village of Ridgewood, 26 N.J. 578, 584 (1958) (emphasis added).

The final blow was struck in 1977. The Appellate Division – citing and relying upon the same line of cases upon which Nicholson relies – asserted that it was "the rule in New Jersey" that municipal supply of water to residents was a "proprietary" (instead of "governmental") function, involving a commercial-type relationship just as if the municipality was a private corporation:

> It is clear that governmental units engaged in the purification and sale of water are considered to be in private business, operating in a proprietary and not a governmental capacity. As stated in Reid Development Corp. v. Parsippany-Troy Hills Tp., 10 N.J. 229 (1952):
>
> > * * * there is general agreement that the distribution of water by a municipality to its inhabitants for domestic and commercial uses is a private or proprietary function which in its exercise is subject to the rules applicable to private corporations. This is the rule in New Jersey.

K.S.B. Tech. Sales Corp. v. North Jersey Water Supply Comm'n, 151 N.J. Super. 218, 224-25 (App. Div.), rev'd, 75 N.J. 272 (1977) (footnote and citations omitted). ***However, the Supreme Court quickly reversed the Appellate Division's decision***.

c. The Supreme Court's Holding that Municipal Water Service is a Governmental Function.

The Supreme Court's opinion in K.S.B. Tech. Sales acknowledged that public water supplies are "common property" and that ***"[u]ltimate ownership rests in the people and this precious natural resource is held by the State in trust for the public's benefit***". K.S.B. Tech. Sales, 75 N.J. at 285-86 (emphasis added). The Court also recognized the "paramount governmental policy that such water supplies must be pure in quality, and be economically and prudently managed for the benefit of the public", and that statutes regulating public water supplies are "[d]esigned to ***protect and promote the general health, safety and welfare***". Id. at 287 (emphasis added) (internal quotations omitted).

Thus, the Supreme Court determined municipal supply of potable water to be an exercise of governmental authority, stating:

> harnessing, treating and channeling the water to eight municipalities ***constitute appropriate governmental functions and purposes***. It is transmitting "common" property, potable water, to municipalities for the use of their inhabitants a necessity upon which their very existence depends.

Id. at 288 (emphasis added).

The Supreme Court reiterated its earlier pronouncement that the supposed distinction between "proprietary" and "governmental" functions is "illusory". Id. at 287. The Court opined that "***whatever local government is authorized to do***

constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur." Id. at 287-88 (emphasis added) (internal quotation omitted). The Court explained that the proprietary/governmental distinction was a fiction invented long ago as a tool courts to could use to mitigate the consequences of municipal tort immunity, but now "has been discarded even for that purpose". Id. at 288; see also The Times of Trenton Pub. Corp. v. Lafayette Yard Cmty. Dev. Corp., 368 N.J. Super. 425, 437 (App. Div. 2004) ("As we noted in 1956, ***distinguishing between proprietary and governmental functions for the purpose of narrowing responsibility in the conduct of the public's business is artificial and outmoded***.") (emphasis added).

In reversing the Appellate Division and rendering this ruling, the Court made absolutely clear that treating municipal supply of potable water as a "proprietary" sale of a commodity was no longer "the rule in New Jersey", and that the premise of municipal distribution of water as being anything other than a municipality providing an essential governmental service was no longer valid. See id.

State of New Jersey v. East Shores, Inc., 164 N.J. Super. 530 (App. Div. 1979), also is instructive. Water supplied to residents in the Township of Jefferson was deemed by NJDEP to be "impure and unpotable", such that it had to be boiled before use, which is not the case here. Id. at 533-34. That situation had been

going on for eight years, with no solution in sight, prompting court intervention to order the municipality to implement corrective measures. Id. at 534. In explaining the court's authority "to compel the municipality to take some action to furnish an adequate and potable water supply for its deprived residents", the court cited municipalities' trustee responsibilities to protect public health and safety. Id. at 537-39.

The East Shores, Inc. court acknowledged the line of cases holding "that the distribution of water by a municipality to its inhabitants is a private or proprietary function", but that "establishment of a water system and its operation for protection against fire and other dangers to the public health and safety constitute a governmental function comprehended in the police power of the municipality". Id. at 539. However, the court rejected that supposed distinction: "***It is difficult for us to accept a thesis that providing water for the protection against fire and other dangers is a municipal function but that providing water for domestic use is not.***" Id. at 539-40 (emphasis added). The court further noted that the "proprietary function" cases were distinguishable, in that they did ***not*** involve issues associated with ensuring that municipal residents receive clean, potable water. Id. at 540. Rather, as discussed above, those cases involved municipalities' efforts to collect unpaid water charges. Id. at 540.

In short, New Jersey courts have made it clear that the line of cases upon which Nicholson relies is no longer valid. A municipality's provision of potable water is no longer considered a "proprietary" function that gives rise to a commercial-type relationship with the residents that receive water service.

The courts have correctly recognized that a municipality does not create an implied contract by providing a governmental service to residents. Otherwise, virtually every service provided by a municipality would create an implied contract with each resident. For example, trash collection would create an implied contract. By way of another example, police and fire service would create implied contracts. It would be completely unworkable to have individual implied contracts, with unknowable implied terms, with every resident.

C. Judge Malestein Properly Granted Summary Judgment Dismissing Nicholson's Complaint.

The Supreme Court's ruling in K.S.B. Tech Sales and the creation of a statutory basis for municipalities to collect unpaid water charges in the same manner as tax liens are, as Judge Malestein correctly recognized, are fatal to Nicholson's claims. Pa952. The latter eliminated the need that sparked creation of the legal fiction of municipal water service being a "proprietary" function. And, the former made clear that fiction was no longer accepted as valid by New Jersey courts.

With no express or implied contract between Nicholson and National Park, the Borough cannot possibly be liable to Nicholson for breach of contract, or for breach of the implied covenant of good faith and fair dealing. See Wade v. Kessler Inst., 343 N.J. Super. 338, 350-51 (App. Div. 2001) (finding breach of implied covenant claim is dependent on the existence of a contractual relationship); see also Cumberland Farms, Inc. v. New Jersey Dep't of Envtl., 447 N.J. Super. 423, 443 (App. Div. 2006) ("In the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing.") (quoting Noye v. Hoffmann–La Roche Inc., 238 N.J. Super. 430, 434 (App. Div. 1990)).

Nicholson's promissory estoppel claim is also premised on municipal water service being a "proprietary" function creating a commercial-type relationship between the municipality and each resident. See Pb19. Nicholson's promissory estoppel claim is essentially identical to his breach of contract claim. Nicholson simply recharacterizes his allegations that National Park breached implied contractual commitments as to water quality, rephrasing them as allegations of unfulfilled implied "promises" as to water quality. Pa80-81.

In short, all of Nicholson's claims lack merit as a matter of law for the same reason. They are all founded on the same defunct fiction that municipal distribution of potable water is a proprietary, commercial function, rather than a

governmental function. Thus, it was proper for Judge Malestein to grant summary judgment dismissing Nicholson's Complaint in its entirety.

D. The Court Did Not Grant Summary Judgment Prematurely.

Nicholson argues that the issue of whether National Park breached its contractual duties was an issue for the factfinder (i.e., a jury) to decide, not Judge Malestein. Pb17. That argument is misguided because Judge Malestein ruled as a matter of law that no contractual relationship existed between the Borough and Nicholson. Pa953. Because there was no contract, there was no need to consider whether National Park committed any breach.

Nicholson also claims that summary judgment was premature because National Park did not provide its discovery responses in the case. Pb17. However, that assertion is mistaken – the Borough served written responses to Nicholson's interrogatories and document production requests discovery requests. Pa881-922.

Moreover, "summary judgment is not premature merely because discovery has not been completed, unless the non-moving party can show with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." Friedman v. Martinez, 242 N.J. 449, 472-73 (2020) (internal quotes omitted) (emphasis added); see also Badiali v. New Jersey Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015) (same); Matter of Est. of Castellano, 456 N.J. Super. 510, 514 (App. Div. 2018) ("the opponent must demonstrate the

likelihood that unanswered discovery requests will provide information necessary to establish elements of the cause of action or a defense"). Thus, when arguing that ongoing discovery makes summary judgment premature, a party must identify specifically what discovery is needed that would have material impact the issues presented in the summary judgment motion. See, e.g., Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007) ("A party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete").

Here, Nicholson never identified any specific discovery that he intended to pursue that could materially advance Nicholson's defense against the Borough's summary judgment arguments. Indeed, logically, there is no discovery that Nicholson could have pursued that would have had any relevance, as summary judgment was granted on the basis of a purely legal issue – that municipal provision of potable water service is a governmental, rather than proprietary function.

In sum, Judge Malestein properly granted summary judgment dismissing Nicholson's Complaint, and that decision should be affirmed.

POINT II

NICHOLSON'S CLAIMS, HAD THEY BEEN BROUGHT UNDER THE TORT CLAIMS ACT, WOULD HAVE BEEN BARRED (Pa949).

Nicholson's lengthy arguments regarding the Tort Claims Act are essentially pointless. Nicholson's Complaint does not plead claims under the Tort Claims Act. Pa32. The only relevance of the Tort Claims Act is that Nicholson's claims really are tort claims that Nicholson has disguised as contract claims in an attempt to circumvent Tort Claims Act prohibitions.

A. Nicholson's Claims are Disguised Tort Claims, Which Were Barred by the Tort Claims Act.

Judge Malestein correctly recognized that Nicholson's contract claims were "nothing more than a mischaracterization of the nature of the complaint to avoid the well-established sovereign immunity afforded the municipality." Pa949. N.J.S.A. 59:9-2(b) mandates that "[n]o judgment shall be granted against a public entity or public employee on the basis of strict liability, ***implied warranty or products liability***." (Emphasis added.) While Nicholson alleges that a faulty "product," i.e., water, was provided, he then attempts to evade the Tort Claims Act bar by disguising his claims as "contractual." Courts have been quick to reject attempts by a party to pursue barred claims simply by recharacterizing them as something else.

1. Nicholson's Claims Are Quintessential Products Liability Claims.

In Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191 (1982), the Supreme Court summarized the principles of New Jersey product liability law. The Court explained that a product liability claim can be asserted under a strict liability theory, "'[i]f at the time the seller distributes a product, it is ***not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes*** so that users or others who may be expected to come in contact with the product are injured as a result.'" Id. at 199 (quoting Suter v. San Angelo Foundry & Machine Company, 81 N.J. 150, 169 (1979)) (emphasis added). The Court further explained that a product liability claim can be asserted under a negligence theory, "'***[o]nce given . . . notice of the dangerous condition of the [product], the question then becomes whether the defendant was negligent to people who might be harmed by that condition*** if they came into contact with it or were in the vicinity of it.'" Id. at 200 (quoting Cepeda v. Cumberland Engineering Company, Inc., 76 N.J. 152, 172 (1978)) (emphasis added). In short, "negligence is conduct-oriented, asking whether defendant's actions were reasonable; strict liability is product-oriented, asking whether the product was reasonably safe for its foreseeable purposes." Id.

In the Complaint, Nicholson alleges that "defendants expressly or impliedly promised that the water was ***fit for consumption by the residents*** or was not tainted with levels of chemicals unacceptable to DEP, when in fact th[e] water sold

to Nicholsons was not as promised" and was "unsafe for human consumption". See Pa64 at ¶ 65; Pa63 at ¶ 60 (emphasis added.). In other words, Nicholson practically quotes the definition of products liability from Suter in describing his cause of action.

Nicholson then doubles down on describing his claims in words that are used in products liability claims when he alleges, "***defendants had an express or implied obligation to source and sell uncontaminated water to Plaintiffs.***" See Pa75 at ¶ 146 (emphasis added.) In other words, Nicholson's allegations clearly fall into the products liability definitions in a well-developed body of caselaw. Pursuant to the Tort Claims Act, such claims are barred and cannot be brought against the Borough. See N.J.S.A. 59:9-2(b).

2. Nicholson Cannot Avoid the Tort Claims Act Bar by Recasting His Claims as Breach of an Implied Contract.

To avoid the Tort Claims Act bar against product liability and implied warranty claims, Nicholson attempted to portray his claims as "contractual" in nature.[3] However, Nicholson's allegations clearly sound in products liability, and Nicholson cannot change the nature of his claims merely by changing the labels

[3] Nicholson also failed to comply with the mandates in N.J.S.A. 59:8-8 that a plaintiff desiring to assert a claim against a public entity under the Tort Claims Act must first provide advance notice of the proposed claim within 90 days after its accrual, and then wait six months before filing suit. Nicholson never filed such a Tort Claims Act notice. See Pa171 at ¶ 37.

that he attaches to them in his Complaint. Judge Malestein recognized Nicholson's attempt to recast his claims to avoid the Tort Claims Act immunity bar. Pa949.

It is not uncommon for litigants to try and avoid statutory or other bars by trying to recharacterize their claims as different causes of action. New Jersey courts ***consistently reject*** such "word game" which attempt to circumvent legal bars that were created to advance specific policy goals and/or to protect litigants. See, e.g., Goldfarb v. Solimine, 245 N.J. 326, 350 (2021) ("[u]nder the Securities Law, an impermissible lawsuit based on an illicit oral agreement does not become permissible simply because it is recast as a promissory estoppel claim"); Wasserstein v. Kovatch, 261 N.J. Super. 277, 286 (App. Div. 1993) (acknowledging that although the complaint "sounded in tort," the claim arose in contract and not tort, and therefore contract principles applied); New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 494 (App. Div. 1985) (holding that a claim was essentially a contract claim and noting "[m]erely nominally casting this cause of action as one for negligent supervision does not alter its nature"); McCann v. Biss, 65 N.J. 301, 309 (1974), (citing Leimbach v. Regner, 70 N.J.L. 608 (Sup. Ct. 1904), and explaining that in Leimbach "a suit to recover for broker's services rendered pursuant to an oral agreement by casting the action as a claim in quantum meruit was an attempt to evade the statute which would not be countenanced"); Riggins v. Gullo's Hair Salon, LLC, 2016 WL 7469094, *16 (N.J. Super. Ct., Law

Div. Dec. 22, 2016) (noting "Plaintiffs cannot recast a products liability claim as a negligence claim or a breach of implied warranty claim to avoid the statutory language of the PLA [Products Liability Act]")[4]; Estate of Pauli v. Wachovia Bank, N.A., 2014 WL 8765427, at *9 (App. Div. May 5, 2015) (stating "[i]n the absence of an independent legal obligation, Plaintiffs cannot enhance their damages by disguising this contract action as a negligence claim").

Nicholson wants the Court to ***imply*** both the existence of, and all of the terms of, a contract between him and the Borough. ***In other words, Nicholson is asking the Court to invent a contract out of whole cloth in order to save Nicholson's Tort Claims Act-barred claims.*** However, it is well-established that a litigant cannot do indirectly what it cannot do directly. See, e.g., McCann, 65 N.J. at 310 (plaintiff who cannot pursue claim directly because of statutory bar could not accomplish same result indirectly based upon an alternative claim, because "[s]uch a claim . . . amounts to an effort to evade the statute, and . . . would substantially undercut the law and its spirit. It cannot be allowed."); Mina L. Smith, Inc. v. Cyprus Indus. Mins. Co., 178 N.J. Super. 7, 12 (App. Div. 1981) ("Plaintiff may not accomplish indirectly that which it cannot do directly."). Thus, Nicholson cannot finesse a way around the Tort Claims Act bar to product liability

[4] Pursuant to Rule 1:36-3, Respondent has included in its appendix copies of all unpublished decisions cited herein.

and implied warranty claims by creatively characterizing his claim as one for implied contract or promissory estoppel. To allow Nicholson to proceed with such a claim would be to allow the exact result the Legislature sought to prevent.

B. The Borough Never Waived Its Tort Claims Act Defense.

Nicholson argues that National Park waived its ability to argue that Nicholson's claims are barred under the Tort Claims Act because National Park's Answer does not expressly cite Tort Claims Act defenses in its Answer.[5] Pb6-12. Again, however, this argument is an irrelevant red herring, because Nicholson's Complaint does not purport to plead claims under the Tort Claims Act. Pa32. And, Judge Malestein granted summary judgment because Nicholson's claims were based upon a defunct theory that municipal water service is a proprietary function creating a commercial relationship between municipality and resident, ***not*** based on the Tort Claims Act. Pa953.

However, so as not to let an erroneous argument go unrebutted, the Borough notes that New Jersey law does not mandate that an affirmative defense can and must only be raised in a party's answer. "An affirmative defense is ordinarily

[5] National Park's Answer does, however, plead the defense that Nicholson's Complaint fails to state a valid claim upon which relief can be granted. Pa409 at Sep. Def. 1. And, the Answer also reserves National Park's right to amend its Answer to incorporate additional defenses as the litigation continues and the bases for such defenses become known to National Park. Pa412 at Sep. Def. 33.

waived if not pleaded ***or otherwise timely raised***." Buteas v. Raritan Lodge #61 F. & A.M., 248 N.J. Super. 351, 363 (App. Div. 1991) (emphasis added); see also Pressler & Verniero, Current N.J. Court Rules, Comment 2 to R. 4:6-7 (Gann) (same). Thus, an affirmative defense can be raised by motion, for example, so long as it is done in a timely manner.[6]

The case law that Nicholson cites ***confirms that a Tort Claims Act immunity defense raised in an early motion is timely.*** Those cases hold only that a Tort Claims Act immunity defense is untimely when raised ***years into a case***, after completion of discovery and on the eve of (or after) trial. See Hill v. Middletown Bd. of Educ., 183 N.J. Super. 36, 40 (App. Div. 1982) (defendant waived ability to raise failure of Tort Claims Act notice when defendant ***"waited until over 2 1/2 years after the complaint was filed before bringing its motion for summary judgment" and "[i]n the interim, defendant obtained complete discovery in the form of answers to interrogatories, depositions and a physical examination")*** (emphasis added); Henebema v. Raddi, 452 N.J. Super. 438, 450

[6] As Nicholson acknowledges, "[w]aiver is 'the intentional relinquishment of a known right.'" County of Morris v. Fauver, 153 N.J. 80, 104-05 (1998) (quoting West Jersey Title & Guar. Co. v. Industrial Trust Co., 27 N.J. 144, 152 (1958)) Pb 11. Under the circumstances here, where (1) Nicholson has attempted to disguise his product liability/tort claims by pleading them based on a theory of implied contract; and (2) National Park filed its summary judgment motion just months into the action, there is no basis to conclude that National Park ***intentionally*** relinquished a ***known*** right.

(App. Div. 2017) (immunities defenses waived where "***defendants raised them for the first time on remand, which occurred ten years after the accident; those ten years included three years of extensive pre-trial litigation, a lengthy and expensive trial, an appeal to [the Appellate Division], and an appeal to the Supreme Court")*** (emphasis added).

The circumstances of the present matter could not be more different from those of the cases Nicholson has cited. This matter was in its beginning stages when the Borough filed for summary judgment. National Park filed its Answer on April 24, 2023, and filed its summary judgment motion just four months later on August 25, 2023. Written discovery was still underway. No depositions had taken place. And, the court had not yet even held an initial case management conference. This situation clearly is not even remotely like those in which courts found that it was too late to raise an affirmative defense.

POINT III

THE COURT CORRECTLY DISMISSED NICHOLSON'S MOTION FOR CLASS CERTIFICATION (Pa953.)

Nicholson argues that the court committed reversible error in denying his class certification motion because, according to Nicholson, the court failed to make findings of fact and conclusions of law on whether a class action should be certified. Pb37-46. That argument misunderstands the reason for denial of the class certification motion. Judge Malestein did not purport to deny that motion on

its merits. ***Rather, Judge Malestein denied the class certification because the court's grant of summary judgment dismissing Nicholson's Complaint with prejudice rendered Nicholson's motion for class certification moot.*** Pa953. That was a proper decision. With Nicholson's Complaint having been dismissed with prejudice, there was no possible way Nicholson could have been certified as a class representative.

To the extent that any findings of fact and conclusions of law were required to support that determination that the class certification motion was moot, they are supplied by Judge Malestein's 22-page written opinion. Pa933-54. The purpose of Rule 1:7-4(a) is to ensure that the trial court judge sets forth their findings of fact and conclusions of law on the record so that if appealed, the Appellate Division has a basis on which to conduct a meaningful review of his decision to grant the dispositive relief of summary judgment. See Raspantini v. Arocho, 364 N.J. Super. 528, 532 (App. Div. 2003) see also Schwarz v. Schwarz, 328 N.J. Super. 275, 282 (App. Div. 2000) ("an articulation of reasons is essential to the fair resolution of a case."). Judge Malestein's written opinion, which indicated why Nicholson's class certification motion was moot, satisfied that goal.

* * *

In sum, the trial court's grant of summary judgment dismissing Nicholson's Complaint was appropriate. New Jersey's Supreme Court has made absolutely

clear that municipal supply of potable water is an essential government function and does not create any proprietary/commercial relationship between the municipality and its residents. Therefore, Nicholson's claims – all of which are founded upon and dependent on the premise of municipal water distribution being a proprietary/commercial function – fail as a matter of law.[7]

[7] Nicholson spends several pages of his brief discussing counters points to arguments the Borough never raised, including arguments under the Economic Loss Doctrine, the Uniform Commercial Code and the Products Liability Act. See Pb29-36. This Court should reject those arguments because, on appeal, it is improper to make legal arguments not raised below. See North Haledon Fire Co. No. 1 v. Borough of North Haledon, 425 N.J. Super. 615, 631 (App. Div. 2012) ("An issue not raised below will not be considered for the first time on appeal."); Brock v. Pub. Serv. Elec. & Gas Co., 149 N.J. 378, 391 (1997); Soc'y Hill Condo. Ass'n v. Soc'y Hill Assocs., 347 N.J. Super. 163, 177–78 (App. Div. 2002).

CONCLUSION

For the foregoing reasons, the Borough respectfully requests that the Court affirm the trial court's ruling granting the Borough's motion for summary judgment and dismissing Nicholson's Complaint with prejudice.

Respectfully submitted,

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Dated: July 9, 2024

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GEORGE NICHOLSON, JR., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS/APPELLANTS[1], V. BOROUGH OF NATIONAL PARK, DEFENDANTS/RESPONDENTS. BOROUGH OF NATIONAL PARK, DEFENDANT/THIRD PARTY PLAINTIFF/RESPONDENT, VS. SOLVAY SPECIALTY POLYMERS, SOLVAY SOLEXIS, INC., ARKEMA, INC. THIRD-PARTY DEFENDANTS/RESPONDENTS.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-1867-23 CIVIL ACTION ON APPEAL FROM ORDER FILED 2-1-23 IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CIVIL PART GLOUCESTER COUNTY DOCKET NO.: GLO-L-2-23 SAT BELOW: THE HONORABLE, ROBERT MALESTEIN, P.J.CH. DATE SUBMITTED: 7-22-24

PLAINTIFF/APPELLANT'S APPELLATE REPLY BRIEF	
Of record & on the brief:	Paul DePetris
Of record:	Lewis G. Adler

[1] As used in this document, use of the plural includes the singular, where applicable. The parties are referred to in the plural regardless of their actual number.

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E. ABBRIEVIATED TERMS

For brevity's sake, hereafter the following abbreviated terms are used in this document:

- The Superior Court of New Jersey, Law Division, Civil Part, Camden Vicinage – the trial court.
- The Superior Court of New Jersey, Appellate Division – the court or this court.
- This particular case - this case or the case.
- Plaintiff George Nicholson, Jr.- plaintiffs.
- Defendant Borough Of National Park, New Jersey – defendants.
- John Does 1-10 – fictitious parties named to the complaint – the Does.
- Plaintiff and defendants collectively – the parties.
- The complete geographical confines of the Borough Of National Park, New Jersey – the Borough.
- All the residents of the Borough collectively, inclusive of plaintiffs – the residents.
- John Does 1-10 – fictitious parties named to the complaint – the Does.
- Plaintiff and defendant collectively – the parties.
- All the residents of the City collectively, inclusive of plaintiff – the residents.

- The drinking water sold and delivered to plaintiffs by defendants and that is the subject of this case - the water.
- The sale that is the subject of this case - the sale.
- Department of Environmental Protection – DEP.
- Environmental Protection Agency – EPA.
- Science Advisory Board of the EPA – SAB.
- Safe Water Drinking Act, N.J.S.A. 58:12A-1, et seq. – SWDA.
- County and Municipal Water Supply Act, N.J.S.A. 40A:31-1 et seq. - CMWSA.
- Uniform Commercial Code, N.J.S.A. 12A:2-101, et seq. - UCC
- Tort Claims Act, N.J.S.A. 59:1, et seq. – TCA.
- Products Liability Act, N.J.S.A. 2A:58C-1, et seq. – PLA.
- Economic Loss Doctrine – ELD.
- The well or wells from which the water is sourced by defendants in whole or part collectively and regardless of their actual number – "the wells".
- The notice that defendants issued to the residents about the water being contaminated – the notice.
- Plaintiff's property located in the Borough – the property.

I. SINCE DEFENDANT NEVER PLED ANY AFFIRMATIVE DEFENSE PREDICATED ON THE TCA, THE DEFENSE WAS WAIVED

(931a-954a)

Defendant was obliged to plead in its answer plaintiff's alleged failure to comply with the TCA's notice requirements[1] and a defense based on the TCA's notice requirements is subject to waiver.[2] Defendant is unapologetic about failing to plead any TCA defenses in its answer or any statement of facts as mandated by R. 4:5-4 supporting such defenses. 377a-414a; defense brief, p. 41. The reason a defendant must plead "facts" supporting an affirmative defense is "to avoid surprise" to the plaintiff so they may promptly take action to counter the defense – be it via the taking of depositions, the issuance of records subpoenas or the propounding of paper discovery tailored to determine the facts behind a given defense.[3] For example, in *Hill v. Board of Educ. of Middletown Tp.*, 183 N.J. Super. 36, 40 (App. Div. 1982), cert den., 81 N.J. 233 (1982), the defendant township's answer didn't "specifically plead that plaintiffs failed to comply with the notice provisions of the Tort Claims Act nor did it cite the applicable section of

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[1] See *Hill v. Board of Educ. of Middletown Tp.*, 183 N.J. Super. 36, 40-41 (App. Div. 1982); *Kolitch v. Lindedahl*, 100 N.J. 485, 497 (1985) ("the burden is on the public entity both to plead and prove its immunity under [the TCA] . . . .").

[2] See, e.g., *Hill v. Board of Educ. of Middletown Tp.*, 183 N.J. Super. 36, 40 (App. Div. 1982)(defendant failing to plead TCA defense "may be found to have waived the protection thereof").

[3] See *Jackson v. Hankinson*, 94 N.J. Super. 505, 514 (App. Div. 1967), aff'd, 51 N.J. 230 (1968).

the statute" and failed to include in its answer any statement of facts supporting the defense and therefore, the court barred the TCA defense. The *Hill* court explained:

> The defense of failure to file notice under the Tort Claims Act is an affirmative one which must be pleaded in order to avoid surprise, and a defendant may be found to have waived the protection thereof by failing to plead it as a defense.

Hill v. Board of Educ. of Middletown Tp., 183 N.J. Super. 36, 40 (App. Div. 1982), cert den., 81 N.J. 233 (1982). It is arguably too late for plaintiff to file a late tort claim notice or to seek leave to do so[4] and:

> a public entity may be estopped from asserting a separate defense (such as notice requirements) when it fails to assert such a defense until it is too late for the plaintiff to satisfy a legal requirement.

Peskin v. Liberty Mut. Ins. Co., 520 A.2d 852, 214 N.J. Super. 686 (Law Div. 1986)(citing *Hill v. Board of Educ. of Middletown Tp.*, 183 N.J. Super. 36, 40 (App. Div. 1982), cert den., 81 N.J. 233 (1982)). The situation may have been different "[h]ad Defendants informed Plaintiff after the filing of the complaint that

[4] See *Hill v. Board of Educ. of Middletown Tp.*, 183 N.J. Super. 36, 39 (App. Div. 1982), cert den., 81 N.J. 233 (1982).

the notice was deficient" whereupon plaintiff might "still have had time apply for permission to file a late notice of claim."[5]

Nor does defendant point to any section of the record showing that the trial court even addressed that failure but rather, admits that the trial court sidestepped the issue without offering any caselaw showing that a trial court is permitted to disregard such a gateway issue. Defense brief, p. 41. Our courts must determine if defendant waived the TCA notice defense before defendant was entitled to prosecute that defense on summary judgment, "because waiver negates reliance on the defenses".[6] This court explained:

> In a TCA case, when a public entity substantially waits before raising the affirmative defenses…we hold that the judge must first determine whether defendants waived those defenses. That is so because waiver negates reliance on the defenses. If the judge concludes that a public entity timely raised, and has not waived these affirmative defenses, then the judge should address whether dispositive relief is appropriate.
>
> ***

[5] *Ewing v. Cumberland Cnty.*, 152 F.Supp.3d 269 (D. N.J. 2015)(" "For these reasons, the Court holds that Plaintiff's state law claims are not barred by the NJTCA's notice requirement. Defendants' dismissal motion on this ground is denied.").

[6] *Henebema v. Raddi*, 452 N.J. Super. 438 (App. Div. 2017).

In entering summary judgment, the judge should nevertheless have resolved whether defendants waived the new defenses, especially because he contemplated the issue would remain outstanding if we disagreed with him that Royster controlled. One cannot rely on a waived affirmative defense. Expressing a desire that we resolve the waiver issue in the first instance does a disservice to this court and the parties because "both Rule 1:7–4 and Rule 2:5–1(b) ... state that the court 'shall' set forth the facts and make conclusions of law to support the order or judgment." *Allstate Ins. Co. v. Fisher*, 408 N.J. Super. 289, 300–01 (App. Div. 2009). Compliance with these rules enables our full review of the judge's ruling.

***

Even if the judge erroneously concluded, as he did here, that Royster controlled, he still needed to address the waiver issue. That is so because waiver negates reliance, not on the general doctrine of state sovereign immunity, but rather on the limited immunity afforded under the TCA and 9–1–1 dispatcher liability statute.

The judge applied Royster, concluded he need not address the waiver issue because he had determined that defendants were entitled to state sovereign immunity, and granted summary judgment to defendants. The judge premised his ruling, however, on the misapplication of Royster. Reliance on

> the immunity afforded in the affirmative defenses and waiver of those defenses are logically connected. It would be illogical to dismiss a complaint relying on a ground that a defendant has waived. Therefore, the judge should have adjudicated whether defendants waived the affirmative defenses before dismissing the complaint.
>
> We conclude that defendants waived the new affirmative defenses.
>
> ***
>
> Public entities and public employees have the burden [to plead] that they are immune from suit." *Crystal Ice–Bridgeton, LLC v. City of Bridgeton*, 428 N.J. Super. 576, 585, 54 A.3d 848 (App. Div. 2012). Here, defendants had the burden of pleading the affirmative defenses they intended to raise…because the Legislature's waiver of sovereign immunity as to claims against public entities is not unlimited. It "is bound by the Legislature's declaration of purpose, see N.J.S.A. 59:1–2, and enforced through the application of numerous express limitations embodied in the statute's provisions."

Henebema v. Raddi, 452 N.J. Super. 438, 442, 451-453 (App. Div. 2017)(additional citations omitted).

To support the argument that defendant was free to ignore its obligation to timely plead TCA defenses, defendant cites *Buteas v. Raritan Lodge #61 F. &*

A.M., 248 N.J. Super. 351 (App. Div. 1991). Unlike this case, *Buteas* didn't involve TCA defenses but rather the imputed negligence defense or any suit against a municipality but rather, a suit against a fraternal organization by one of its members. *Buteas v. Raritan Lodge #61 F. & A.M.*, 248 N.J. Super. 351, 353, 364 (App. Div. 1991). Further, the *Buteas* court refused to find that the defendant was exempt from its obligation to timely plead the defense:

> even if the imputed negligence defense were theoretically available to this defendant, we are satisfied that it was waived by not having been timely raised. In this respect, we point out that nothing plaintiff did misled defendant. Plaintiff, indeed, was apparently relying on the deed defendant had accepted in determining defendant's associational status. If anything, it was defendant which misled plaintiff. We see no reason, therefore, to relieve defendant of its waiver of the defense. After all, it ought to have known who and what it was.
>
> The late raising of the defense in the context of defendant's identity confusion caused, moreover, unremediated problems of surprise and prejudice for plaintiff.

Buteas v. Raritan Lodge No. 61 F. & A.M., 248 N.J. Super. 351. 364-365 (App. Div. 1991).

The parties agree that an affirmative defense may be raised by motion but where they disagree is whether an affirmative defense may be raised after an answer is filed without the defense – i.e., the filing of the answer before the filing of a dispositive motion results in waiver of the late raised defense. Defendant filed an answer before filing any dispositive motion because on 4-24-23, defendant filed its answer with affirmative defenses that lacked any TCA defenses (377a-414a) and it wasn't until 8-25-23 and after plaintiff served discovery (31a-110a; 305a-324a) and filed their class certification motion (1a-151a) that defendant filed a summary judgment motion predicated on the unpled TCA defense (290a-612a), to which plaintiff responded by cross moving for more specific discovery responses (862a-924a), which was withdrawn when more specific responses were forthcoming. 925a. Defendant offers no cases holding that, where, as here, the TCA isn't pled as a defense in an answer filed before a dispositive motion, the defense may be relied on in subsequent motion practice.[7] For example, as in this case, in *Hill*, the defendant municipality filed its summary judgment motion belatedly raising the defense after it filed its answer. *Hill v. Board of Educ. of Middletown Tp.*, 183 N.J. Super. 36, 41 (App. Div. 1982), cert den., 81 N.J. 233 (1982). Likewise, in *Anske v. Borough of Palisades Park*, 139 N.J. Super. 342, 345, 351(App. Div. 1976) after failing to initially plead a TCA defense in its

[7] See *McShain v. Evesham Tp.*, 395 A.2d 251, 163 N.J. Super. 522, 529 (Law Div. 1978)(refusing to allow municipality to seek relief based on unpled TCA defense).

answer, the municipal defendant filed a summary judgment motion predicated on the TCA and the court held that "defendant is estopped to raise the defense of failure to comply with the notice provisions of the Tort Claims Act." Also, in *Peskin v. Liberty Mut. Ins. Co.*, 214 N.J. Super. 686, 704 (Law Div. 1986), the court denied a summary judgment motion predicated on failure to join a party defendant and filed after defendant filed its answer "without setting forth the affirmative defense of the entire controversy doctrine, as required by R. 4:5-4." These cases indicate that defendant cannot file an answer without pleading therein any TCA defense and months later and after facing a class certification motion, file a summary judgment motion.

Finally, defendant failed to point to the record to show it was prejudiced by any failure by plaintiff to timely file a TCA notice:

> Defendant does not assert that it did not have an opportunity to investigate the accident, prepare a defense or endeavor to negotiate a settlement before the action was commenced.

Hill v. Board of Educ. of Middletown Tp., 183 N.J. Super. 36, 42 (App. Div. 1982), cert den., 81 N.J. 233 (1982).

II. THE TCA DOESN'T APPLY TO THIS CONTRACT DISPUTE

(931a-954a)

Since this case focuses on contract claims and not claims regulated by the TCA,[8] the TCA is inapplicable. The complaint doesn't plead tort causes of action and doesn't seek personal injury damages. 31a-110a. Defendants clearly sold water services to plaintiff and billed plaintiff for same separately from any taxes and therefore, there is no evidence in the record that the water services were furnished for free or in exchange for municipal taxes collected. 6a-10a; 166a, §4, 8-9. The Borough acknowledges that the residents purchasing water from the Borough are its "customers" and describes them as "consumers", with the latter term describing "[a]ny party obtaining water service from the Water Department for a physical unit.". 173a; 181a. Defendant fails to point to any binding cases holding that the sale of water by a municipality involves anything other than a contract or that any tort claims against municipalities predicated on the sale of contaminated water were entertained by our courts. All elements of a contract

[8]See N.J.S.A. 59:1-4 ("Nothing in [the Tort Claims Act] shall affect liability based on contract or the right to obtain relief other than damages against the public entity or one of its employees."); see also *Owens v. Feigin*, 194 N.J. 607, 613-14 (2008) (finding the notice of claim requirement in the Tort Claims Act does not apply to causes of action under New Jersey's Civil Rights Act); *Greenway Dev. Co. v. Borough of Paramus*, 163 N.J. 546, 557 (2000) (stating "the notice provision of the TCA does not apply to inverse condemnation claims"); *Brook v. April*, 294 N.J. Super. 90, 101 (App. Div. 1996) (stating that the TCA didn't apply to workers' compensation claims).

between the parties are present in this case[9] and there is no obligation that a contract be reduced to a writing to be enforceable.[10] Since the parties agreed on essential terms and manifest an intention to be bound by those terms – e.g., the price at which the services would be sold to plaintiffs and the billing for same - they have created an enforceable contract.[11] Defendant's performance by furnishing water services to plaintiff and plaintiff's payment for same supports a finding of a valid services contract.[12] The mere fact that defendant sells water services in furtherance of any government functions fails to eliminate the express contract for the sale of the services as reflected by the billing for same. A state entity may be held liable for breach of an express written, oral or implied in fact

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[9] Model Civil Jury Charge 4.10C.

[10] *Pami Realty, LLC v. Locations XIX Inc.*, 468 N.J. Super. 546 (App. Div. 2021); *Leodori v. Cigna Corp.*, 175 N.J. 293, 304-05 (2003) ("[u]nless required by the Statute of Frauds, N.J.S.A. 25:1-5 to -16, or as otherwise provided by law, contracts do not need to be in writing to be enforceable"); *Williams v. Vito*, 365 N.J. Super. 225, 232 (Law Div. 2003) ("absent a statute to the contrary," the enforceability of an oral contract was "central to American contract law")); *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 436 (1992) ("An offeree may manifest assent to the terms of an offer through words, creating an express contract, or by conduct, creating a contract implied-in-fact.").

[11] *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435 (1992). See also *McBarron v. Kipling Woods*, 365 N.J. Super. 114 (App. Div. 2004)(citations omitted).

[12] See *Smith v. Squibb Corp.*, 254 N.J. Super. 69 (App. Div. 1992)(oral employment contract); *Edwards v. Wyckoff Elec. Supply Co.*, 42 N.J. Super. 236 (App. Div. 1956)(same); *Klockner v. Green*, 54 N.J. 230 (1969)("Oral contracts which have been performed by one party are frequently enforced where to do otherwise would work an inequity on the party who has performed. Thus, the cases hold that such performance takes the contract out of the statute of frauds.").

contract.[13] New Jersey law permits recovery "to the extent of [any] benefit conferred upon and knowingly accepted by the municipality."[14] Further, no controlling cases hold that a municipality must make a profit or operate as a business to be sued for breach of contract.

K.S.B. Tech. Sales v. North Jersey Dist. Water Supply, 75 N.J. 272, 381 A.2d 774 (1977) isn't controlling because there, the court wasn't concerned with a suit by a resident against its municipality for the sale of water services involving the delivery of contaminated water. Moreover, even to the extent that it is controlling, that case confirmed that "[f]urnishing water might be considered as a sale of a "service" and that "[a] (water) public utility is selling a service." *K.S.B. Tech. Sales v. North Jersey Dist. Water Supply*, 75 N.J. 272, 381 A.2d 774 (1977)

Were the court to hold that the TCA bars the complaint, such would be an unconstitutional interference with plaintiff's right to freedom of contract:

> **Charges by a municipality for water furnished to its customers involve a sale and arise from a contractual relationship between it and the customer.**

As the court stated in *Lehigh Valley R.R. Co. v. Jersey City*, 103 N.J.L. 574,

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[13] *75 Spruce St., LLC v. N.J. State Bd. of Educ.*, 382 N.J. Super. 567 (Law Div. 2005)(citing *Wanaque Borough Sewerage Auth. v. Twp. of West Milford*, 144 N.J. 564, 574 (1996)("Contracts implied in fact are no different than express contracts, although they exhibit a different way or form of expressing assent than through statements or writings.").

[14] *Wanaque Borough Sewerage Auth. v. Twp. of West Milford*, 144 N.J. 564, 573, (1996) (citation omitted).

576, 138 A. 467, 468 (Sup. Ct. 1927), aff'd 104 N.J.L. 437, 140 A. 920 (E. & A. 1927):

> Our conclusion is that a charge for water furnished by a municipality to an owner or occupant of lands is not a tax, but is the subject of a contract, the sale of a commodity, creating the relationship of seller and purchaser as between the municipality and the consumer. * * *
>
> See also *Ford Motor Co. p. Kearny*, 91 N.J.L. 671, 672, 103 A. 254 (E. & A. 1917).
>
> In the present case the ordinance itself uses the language of contract. It refers to the 'sale' of water to its customers. It requires the customer requesting service to make a written application for such service and to enter into an agreement for its continuance. It describes that agreement as a 'contract.' The conclusion that a contractual relationship existed between the Borough and its customers is inescapable.
>
> Such contract, as other contracts, was entitled to the protection provided by the Federal Constitution and the State Constitution. Both prohibit the adoption of any law impairing the obligation of contract.

Daniel v. Borough of Oakland, 124 N.J. Super. 69, 304 A.2d 757 (App. Div. 1973). Likewise, *State v. East Shores, Inc.*, 164 N.J. Super. 530 (App. Div. 1979)(citations omitted), discussing water services delivering contaminated water

explains: "But there is a general agreement that the distribution of water by a municipality to its inhabitants for domestic and commercial uses is a private or proprietary function which in its exercise is subject to the rules applicable to private corporations. This is the rule in New Jersey."

Defendants fail to point to any statute or regulation via which the freedom of contract between the parties and the right to sue thereon is somehow subsumed or preempted. As our Supreme Court explained when deciding that consumer statutory claims involving the sale of insurance products weren't preempted by other statutory or regulatory schemes,[15] the Legislature, presumed familiar with its laws, took no action to adopt special protections for municipalities facing contract claims.

Defendants sidestep plaintiff's arguments about the ELD, the UCC and the PLA. Defense brief, p. 45. Defendants mistakenly assume that defendants had to raise such arguments for plaintiff to brief them and further, failed to cite to the portion of the record indicating that plaintiff failed to brief them and therefore, that plaintiff failed to raise the arguments before the trial court. Defense brief, p. 45.

[15] *Lemelledo v. Beneficial Management Corp. of America*, 150 N.J. 255, 271, 696 A.2d 546 (1997).

III. BY DENYING THE CLASS CERTIFICATION MOTION THE TRIAL COURT COMMITTED REVERSIBLE ERROR

(931a-954a)

Contrary to defendant's confusion, a trial court doesn't dismiss a motion for class certification but either grants or denies the motion. Defense brief, p. 43. Other than pointing to the granting of summary judgment in defendant's favor, defendants offer no analysis or caselaw explaining why denial of class certification was proper, thereby waiving any arguments supporting denial of the class certification motion. New Jersey courts deem waived any unbriefed arguments potentially supporting the denial of the appeal[16] and neither the court nor plaintiff are obliged to guess as to the arguments that might support a party's position.[17] Defendant's failure to cite to any caselaw on point is fatal to the request for relief, as our legal system requires parties to support their position with an adequate legal argument[18] lest their arguments be considered "entirely inadequate" where they present no more than bare statements.[19]

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[16] *Zavodnick v. Leven*, 340 N.J. Super. 94, 103 (App. Div. 2001) (failure to present an argument relating to an appeal renders that appeal "abandoned").
[17] *State v. Lefante*, 14 N.J. 584 (1954).
[18] *700 Highway 33 LLC v. Pollio*, 421 N.J. Super. 231, 238 (App. Div. 2011).
[19] *Shaw v. Calgon*, Inc., 35 N.J. Super. 319, 329 (App. Div. 1955); *State v. Hild*, 148 N.J. Super. 294, 296 (App. Div. 1977) (holding parties have a duty to justify their positions by specific reference to legal authority).

CONCLUSION

The court should reverse the trial court's order granting summary judgment and denying class certification, order the granting of certification and remand the case to the trial court for adjudication on its merits.

DATED: July 22, 2024

/S/ PAUL DEPETRIS
PAUL DEPETRIS