ANDRIS ARIAS, *Plaintiff-Appellant,* vs. COUNTY OF BERGEN, JOHN DOES 1-5, ABC CORPORATIONS 1-5, JOHN DOE CONTRACTORS 1-5, JOHN DOE PROPERTY OWNER(S) 1-5, JOHN DOE LESSEE(S) 1-5, JOHN DOE PUBLIC ENTITIES 1-5 (fictitious designations), *Defendant-Respondent,*	Supreme Court of New Jersey Docket No.: 089642 ON PETITION FOR CERTIFICATION OF APPEAL FROM FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. 2574-22 Sat Below: Hon. Jessica R. Mayer Hon. James R. Paganelli Hon. Lorraine M. Augostini Civil Action

PLAINTIFF-APPELLANT'S PETITION FOR CERTIFICATION

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STATEMENT OF THE MATTER

The New Jersey Landowner's Liability Act, N.J.S.A. 2A:42A-2, et seq. (the "LLA") affords immunity from suit to owners of rural and semi-rural tracts of land in the state used by others for sporting and recreational activities. It has been forty-five years since Harrison v. Middlesex Water Co., where this Court last addressed the scope of the LLA and expressly rejected application of the statute to "lands freely used by the general public located in populated neighborhoods in urban or suburban areas." 80 N.J. 391, 401 (1979). Despite this Court's clear pronouncement, lower courts, including the Appellate Division in this case, have improperly broadened the scope of the LLA to immunize landowners in New Jersey's ever-urbanizing landscape. In doing so, the panel acted more as a legislature than a court in determining that the state's rapidly diminishing rural topography warrants broader immunities than previously granted to urban areas.

The Harrison Court looked at four factors to determine whether the LLA applies to certain lands: (1) the use for which the land is zoned; (2) the nature of the community in which it is located; (3) its relative isolation from densely populated neighborhoods; and (4) its general accessibility to the public at large. Ibid. The Appellate Division in this case rejected Harrison's four factor test and developed a new test which focuses on the "dominant character of the

land," relying on *other state courts* interpreting *other state recreational use statutes* to determine whether the LLA immunizes landowners in New Jersey. This decision ignores Supreme Court precedent and immunizes landowners in urban and suburban environments in ways never intended by the LLA.

QUESTIONS PRESENTED/ERRORS COMPLAINED OF

1. Whether the Appellate Division erred by granting immunity from suit under the LLA to Defendant when its property is located in a densely populated urban or suburban neighborhood.
2. Whether the Appellate Division erred by repudiating Supreme Court precedent in favor of its own test to determine whether a property is entitled to immunity from suit under the LLA.
3. Whether this Court's decision in Harrison, 80 N.J. 391, was abrogated by Toogood v. St. Andrews At Valley Brook Condominium Ass'n, 313 N.J. Super. 418, 425-26 (App. Div. 1998).
4. Whether the 1991 Amendments to the LLA expanded the scope of properties immune from suit to include properties located in urban or suburban neighborhoods.
5. Whether the urbanization within the state warrants judicial expansion of the LLA to apply to properties located in urban or suburban neighborhoods.

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

New Jersey Court Rule 2:12-4 provides that certification is warranted if the matter "presents a question of general public importance which has not been but should be settled by the Supreme Court." The Appellate Division's expansion of LLA immunity to include properties located in urban and suburban neighborhoods is of great public importance, as "immunity from liability for the negligent infliction of injury upon others is not favored in the law [because] [i]t leaves unredressed injury and loss resulting from wrongful conduct." Harrison, 80 N.J. at 401. Thus, "[s]tatutes such as the [LLA], granting immunity from tort liability, should be given narrow range" because they have the ability to thwart principles of fairness and justice. Ibid.

Although the Supreme Court has already addressed the scope of the LLA in Harrison, it has not addressed whether the 1991 Amendments to the LLA changed the scope of the law to allow broader application. As noted by this Court in Harrison, lower courts have "struggle[d] . . . to fashion a sensible and consistent approach in applying the Act." Ibid. That struggle has only worsened since the 1991 Amendments, resulting in inconsistent and diverging application of the LLA in the lower courts. Compare Toogood, 313 N.J. Super. 418; Mancuso v. Klose, 322 N.J. Super. 289, 296-97 (App. Div. 1999); Benjamin v. Corcoran, 268 N.J. Super. 517 (App. Div. 1993), with Weber v.

United States, 991 F.Supp. 694 (D.N.J. 1998); Tompkins v. County of Mercer, 2020 WL 4647867 (N.J. App. Div. 2020); Vaxter v. Liberty State Park, 2010 WL 4237242 (App. Div. 2010); Quan v. County of Bergen, Dkt. No. BER-L-887-22 (N.J. Law Div. June 24, 2022). The case here only adds to the conflicting decisions in the Appellate Division. Given the inconsistent applications of LLA immunity by the lower courts, it is clear that the Supreme Court should exercise supervision and offer guidance on the scope of the LLA.

Additionally, for these same reasons, Certification should be granted as the interests of justice compel it.

STATEMENT OF FACTS

This case arises from a serious incident that occurred on April 24, 2021, wherein the County of Bergen ("Defendant") allowed a large and dangerous crater to exist in the middle of a pedestrian pathway located in Van Saun Park, causing Plaintiff Andris Arias to fall and sustain serious personal injuries. (Pa1).

Van Saun Park is a 130-acre Bergen County park located in Paramus and River Edge, New Jersey. (Pa79). It is one of Bergen County's most utilized parks. (Pa84). The park is situated in the middle of a densely populated residential neighborhood and surrounded on all sides by densely zoned residential housing used exclusively for residential purposes. (Pa79).

On April 24, 2021, Ms. Arias was rollerblading on a pedestrian pathway in Van Saun Park, accompanied by her two-year-old daughter and her fiancé. (Pa1). While rollerblading, Ms. Arias fell in a large and dangerous crater in the middle of the paved pathway. (Pa1). As a result of the incident, Ms. Arias was diagnosed with an acute, comminuted, displaced fracture of the right distal radius. (Pa116). She was required to undergo Open Reduction Internal Fixation surgery with the insertion of plates and screws. (Pa118). She was further diagnosed with Complex Regional Pain Syndrome, a permanent and debilitating neurological condition. (Pa117). She was also diagnosed with permanent spinal injuries including a herniated disc at C4-5, an annular tear and herniated disc at C5-6, and an annular tear and herniated disc at C6-7. (Pa37). As a result of these spinal injuries, Plaintiff was required to undergo three cervical medial branch block injections under anesthesia, and three cervical epidural steroid injections under anesthesia. (Pa118).

PROCEDURAL HISTORY

Ms. Arias filed a Complaint against Defendant on December 13, 2022, and amended her Complaint on February 9, 2023, alleging that Defendant was careless, negligent, and reckless in failing to exercise reasonable care in the construction and/or maintenance of the pedestrian pathway, causing Ms. Arias' injuries. (Pa1-8).

On January 11, 2023, Defendant filed a motion to dismiss, claiming immunity from all liability under the LLA. (Pa16). The trial court heard oral argument on the motion on March 20, 2023. (1T). On the same day, the court ruled from the bench and granted Defendant's motion to dismiss without prejudice. (1T).

1. The Trial Court Decision

The Honorable Robert M. Vinci, J.S.C., held that the LLA shields Defendant from liability because Ms. Arias was injured in Van Saun Park and not an urban or residential area. (1T 12:10-23). The trial court noted that "courts have read into [the LLA] certain limitations relating to urban or residential areas," but reasoned that "those limitations have no application here" because the park itself is not an urban or residential area. (1T 13:9-12). Ms. Arias timely appealed to the Appellate Division.

2. The Appellate Division Decision

The Appellate Division affirmed the dismissal of Ms. Arias' Amended Complaint. Although the panel acknowledged the Legislature's intent to limit application of the LLA to rural or semi-rural lands and not suburban or urban lands, it notably remarked that "New Jersey's open spaces are diminishing rapidly" and that "[c]onsidering the density of development in this State, it is unlikely residents can find premises available for sport and recreational uses

not surrounded by existing residential or commercial development." (Op. 21-22). The Appellate Division concluded that "[g]iven the diminishing open tracts of land in New Jersey, we are persuaded that the four-factor test in Harrison . . . is incongruous with the 'dominant character' of the land analysis under Toogood in determining whether a specific 'premises' is entitled to immunity under the LLA." (Op. 23).

The Appellate Division then purported to "effectuate the [*New Jersey*] Legislature's intent," but "[b]ecause there is no detailed legislative history or committee report regarding the 1991 LLA amendment, [the panel] consider[ed] published out-of-state judicial decisions as part of [its] analysis." (Op. 23-24) (emphasis added). The panel proceeded to examine how the Ohio Supreme Court analyzed *Ohio's* recreational use statute and how the Nevada Supreme Court analyzed *Nevada's* recreational use statute. The panel concluded that it was persuaded by Ohio and Nevada's case law that the "dominant character of the land" analysis applies to the LLA and that the inquiry should not focus on the surrounding land uses. (Op. 26-27).

Applying the dominant character of the land analysis, the Appellate Division listed the many free sport and recreational activities offered by Van Saun Park, and held that the "dominant character as an open space for sport and recreational activities renders the Park the type of property entitled to the

protections under the LLA" and affirmed the dismissal of Ms. Arias' Amended Complaint. (Op. 27-28).

ARGUMENT

The LLA does not immunize Defendants from suit because Van Saun Park is located in a densely populated suburb and open to the general public. The Appellate Division eschewed the factors laid out by this Court in Harrison in favor of a test of its own design that focuses on the "dominant character of the land," wherever that property is situated, in a misguided attempt to adapt the LLA to New Jersey's urban growth. That is the role of the Legislature, not an intermediate state court. For the reasons discussed below, the Appellate Division decision must be vacated.

A. The Appellate Division refused to apply binding precedent to inquire into the nature of the surrounding area in which Van Saun Park is located.

The LLA exempts an owner, lessee, or occupant of a "premises" from liability to persons who use the property for "sport or recreational activities." N.J.S.A. 2A:42A-3. The term "premises" is not defined by the LLA, but this Court has held that the term was intended to include "only . . . rural or semi-rural tracts of land" used for sport or recreational activities, and not "land . . . in residential and populated neighborhoods." Harrison, 80 N.J. at 397 (agreeing with Boileau v. De Cecco, 125 N.J. Super. 263, 310 (App. Div.

1973), aff'd, 65 N.J. 234, 323 (1974)). This Court has not revisited the scope of the LLA since Harrison.

In Harrison, this Court declined to confer LLA immunity to the Middlesex Water Company after a man drowned in a man-made lake situated on a 136-acre property surrounded by a heavily populated residential community. Id. at 394. The property was "openly accessible to and used freely and frequently by the public," who often used the lake for swimming and ice skating. Id. at 394-95. The Court applied four factors to determine whether the property fell within the LLA's ambit: (1) the use for which the land is zoned; (2) the nature of the community in which it is located; (3) its relative isolation from densely populated neighborhoods; and (4) its general accessibility to the public at large. Id. at 401. The Court found that the property was "situated in a highly populated suburban community . . . surrounded by both private homes as well as public recreational facilities." Id. at 401-02. Accordingly, the Court reasoned that the concern the LLA was meant to address – the inability of the owners of rural and semi-rural lands to "guard[] against intermittent trespassers" – are "less substantial" in populous settings, and declined to extend immunity under the LLA. Id. at 399, 402.

The Appellate Division ignored Harrison entirely in favor of expanding upon its own decision in Toogood. In Toogood, the Appellate Division

interpreted the 1991 Amendments made to the LLA to determine whether a residential condominium development was entitled to immunity after a rollerblader slipped on sand in the road. 313 N.J. Super. at 420-22. The panel held that the 1991 Amendments, which added the language "whether or not improved or maintained in a natural condition, or used as part of a commercial enterprise," was not intended "to expand the scope of the premises subject to the Act but to enhance and remove impediments to the immunity already afforded to rural and semi-rural tracts of land." Id. at 425. In other words, the 1991 Amendments were not "intended to radically alter the law of premises liability by extending immunity to suburban or urban landowners." Id. at 426. Rather, the panel found that the 1991 Amendments were the Legislature's direct response to Whitney v. Jersey Central Power & Light Co., 240 N.J. Super. 420 (App. Div. 1990), an Appellate Division decision that focused on the improved nature of the property and commercial use to reject JCP&L's arguments that it was entitled to LLA immunity. Toogood, 313 N.J. Super. at 424-25.

Here, rather than adhere to the reasoning in Toogood, the Appellate Division focused and expanded on a single line from that case: "[T]he 1991 amendment was 'clearly designed to focus the inquiry on the dominant character of the land and to account for the evolving types of activities

considered recreational pursuits.'" (Op. 20) (quoting Toogood, 313 N.J. Super. at 425-26). The panel then proceeded to find "incongruity" between the Harrison four-factor test and the "dominant character of the land" analysis it read into the Toogood decision. (Op. 23). As discussed below, the panel determined that the "dominant character of the land" analysis was superior to the Harrison test, based on its survey of Ohio and Nevada laws. Applying its new test, the panel determined that Van Saun Park was the type of property entitled to protections under the LLA because its dominant character is "an open space for sport and recreational activities." (Op. 27-28).

The Appellate Division erred by expanding the scope of the LLA's immunity protections to include properties in urban and suburban settings that are open to the general public, like Van Saun Park. As discussed below, there is no incongruity between Harrison and Toogood that would allow a court to disregard the Harrison factors, a test that precludes granting LLA immunity to Defendant in this case.

1. Toogood did not displace the application of the Harrison factors to determine whether a property is entitled to LLA immunity.

It is a fundamental part of our state judicial system that the Appellate Division cannot overrule binding Supreme Court precedent. Liberty Mutual Ins. v. Rodriguez, 458 N.J. Super. 515, 521 (App. Div. 2019). Yet here, the

Appellate Division did exactly that in determining that the inquiry into the scope of the LLA's application "should not focus on the surrounding land uses" under Harrison, a longstanding Supreme Court decision, but rather apply a "dominant character of the land analysis" it purported to derive from Toogood, an Appellate Division decision. (Op. 27).

Moreover, the Appellate Division misconstrued case law to find a conflict between Toogood and Harrison that does not exist. Toogood explicitly reiterated the holding in Harrison that the LLA was never intended to immunize "land situate . . . in residential and populated neighborhoods." Toogood, 313 N.J. Super. at 422-23; accord Labree v. Millville Mfg., Inc., 195 N.J. Super. 575, 581 (App. Div. 1984) ("It is now beyond cavil that the immunity of the [LLA] does not extend to owners or occupiers of land situated in residential and populated neighborhoods, but was intended for undeveloped, open and expansive rural and semi-rural properties.") (internal quotation marks and citations omitted); Benjamin v. Corcoran, 268 N.J. Super. 517, 532 (App. Div. 1993); Mancuso ex rel. Mancuso v. Klose, 322 N.J. Super. 289, 295 (App. Div. 1999). Additionally, Toogood held that the 1991 Amendments did not "expand the scope of the premises subject to the Act," which was always limited "to rural and semi-rural tracts of land." Toogood, 313 N.J. Super. at 425; see also id. at 426 ("Nothing in the language of the Act or its legislative

history suggests these amendments were intended to radically alter the law of premises liability by extending immunity to suburban or urban landowners.").

The language that the Appellate Division here latches onto from Toogood, that the "1991 amendments to the Act are clearly designed to focus the inquiry on the dominant character of the land and to account for the evolving types of activities considered recreational pursuits" must be viewed in light of the Legislature's "reaction to Whitney," which "unnecessarily restricted the immunity afforded" by the LLA "by focusing on the activity and the presence or absence of improvements on the rural or semi-rural land." Toogood, 313 N.J. Super. at 424. Indeed, the panel in Whitney focused its analysis on the improved nature of the roadbed that JCP&L maintained for use in its commercial activities. Whitney, 240 N.J. Super. at 425-26. Thus, as the Toogood court understood, the 1991 Amendments were intended to abrogate Whitney's focus on whether the land was in its natural condition or improved, and whether it was used for commercial purposes, i.e., diversions from determining the dominant character of the land. Toogood, 313 N.J. Super. at 425. The amendments were not intended to supplant the analysis discussed in Harrison. See id. at 423 ("The Legislature is deemed knowledgeable of judicial interpretations of its enactments. Its failure to disagree with the long-standing judicial interpretation of the term and its consequent limitation of the

scope of the immunity afforded by the Act are powerful evidence that the Legislature agrees with the interpretation of "premises" offered by the Court.").

Thus, the Appellate Division erred by disregarding the Harrison four factor test in favor of a "dominant character of the land" analysis.

2. The Harrison four factor test precludes immunizing Van Saun Park from suit.

The first two Harrison factors look at the use for which the property is zoned and the nature of the community in which it is located. Van Saun Park is similar in size, buffer, and enveloping community to the property denied immunity in Harrison. 80 N.J. at 394 (describing 136-acre property surrounded by a heavily populated, residentially zoned community). Van Saun Park is a 130-acre property located in a community that is exclusively zoned for residential purposes. (Pa99) (Bergen County Master Plan stating that "the properties immediately surrounding the park are all residential, primarily built as single-family homes"); (Pa79-80) (Zoning maps demonstrating that the park is situated in suburban residential neighborhood). Therefore, the first two factors disfavor extending LLA immunity to Defendants.

The third Harrison factor looks at a property's "relative isolation from densely populated neighborhoods." Van Saun Park is in the heart of densely

populated neighborhoods, straddling residential neighborhoods in both Paramus and River Edge. (Pa81) (population map showing park is in one of the most densely populated areas of the state). The park is accessible from all sides, with no agrestic buffer between the tightly packed residential neighborhood and the park. The property denied immunity in Harrison was more isolated from densely populated neighborhoods, being "bound[] by a regional high school, several athletic fields, a tennis court, two social clubs, and a number of private homes." Harrison, 80 N.J. at 394. Thus, the third factor also disfavors LLA immunity.

The fourth Harrison factor focuses on the property's "general accessibility to the public at large." Id. at 401. The LLA does not immunize landholders that are "freely used by the general public located in populated neighborhoods in urban or suburban areas." Ibid. Rather, the LLA was intended to protect landowners "against intermittent trespassers" and invitees. Id. at 402 (emphasis added). Not only is Van Saun Park freely used by the general public, it is one of the most utilized parks in Bergen County. (Pa84). Nor is the park in a rural, isolated area where it would be difficult for the general public to access it. Instead, the park is easily accessible from three adjacent major highways and offers free access to the general public. (Pa99).

Accordingly, Van Saun Park fails every Harrison factor and should not be afforded immunity from suit under the LLA.

B. The Appellate Division erred by relying on out of state case law interpreting other states' statutes to discern the New Jersey Legislature's intent in passing the LLA.

When interpreting the language of a statute, a court must give effect to the intent of the legislature that enacted the statute, DiProspero v. Penn, 183 N.J. 477, 492 (2005), *not* the intent of a different state's legislature passing entirely different laws, Local 1804, Intern. Longshoremen's Ass'n, AFL-CIO v. Waterfront Comm'n of New York, 171 N.J. Super. 508, 514 (App. Div. 1979) ("[W]hile laws relating to the same subject matter should be read *in pari materia*, this rule of statutory construction does not apply with the same force when the statutes were enacted by different legislatures choosing separate, though similar, means of regulation") (internal citations omitted). Here, the Appellate Division inexplicably looked to *other state courts'* interpretations of *other states' recreational use statutes* for guidance on how the New Jersey Legislature wanted the LLA to be applied. (Op. 24-27) (discussing Ohio and Nevada's recreational use statutes). Equating one legislature's intent with another's is wholly irrational – courts do not even entrust the same state's legislature to interpret actions of their predecessors. State v. Serrone, 95 N.J.

23, 32 (1983) (Garibaldi, J., dissenting) ("The intent of a new and different legislature may not be imputed to a prior legislature's acts."). Thus, a separate sovereign's legislative decisions have no bearing on the New Jersey Legislature's policy decisions. See McClain v. Dep't of Labor, 451 N.J. Super. 461, 472 n.3 (App. Div. 2017) ("We also reject the Board's argument that the laws of other states support its interpretation of the amendment. Here, we interpret only the language in the amendment to [the New Jersey statute], which is different from the statutory language of the other states . . . .").

The Appellate Division's logic of using other state legislatures' intentions to discern the New Jersey Legislature's intent is, by itself, unsound. But it is made worse by the fact that, as highlighted by the panel, "New Jersey's open spaces are diminishing rapidly" and "the density of development in this State" makes "premises available for sport and recreational uses not surrounded by existing residential or commercial development" scarce. (Op. 21-22). The same cannot be said about the availability of open spaces in Ohio or Nevada. Thus, Ohio and Nevada's legislatures may have had widely divergent intentions in passing their respective recreational use statutes.

C. The Appellate Division engaged in an improper legislative expansion of the LLA in a misguided attempt to compensate for the overdevelopment in New Jersey's urban and suburban areas.

It is indisputable that courts "should not interfere with the policy choices made by the Legislature." DiProspero, 183 N.J. at 506. As discussed at length in Harrison and Toogood, the LLA was never intended to immunize landowners in populated neighborhoods in urban and suburban areas. Harrison, 80 N.J. at 401; Toogood, 313 N.J. Super. at 426. Rather, the LLA was intended to apply only to undeveloped, open, and expansive rural and semi-rural properties. Harrison, 80 N.J. at 400; Toogood, 313 N.J. Super. at 425.

These explicit judicial findings did not stop the Appellate Division from revisiting the Legislature's policy decisions in light of the widespread urbanization within the state. The Appellate Division made the following de facto legislative findings:

> New Jersey residents, particularly those living in cities and other densely populated communities, have limited access to nearby land for recreational and sport activities. Considering the density of development in this State, it is unlikely residents can find premises available for sport and recreational uses not surrounded by existing residential or commercial development.

(Op. 22). Based on its apparent findings, the panel relied on "the diminishing open tracts of land in New Jersey" to apply a "dominant character of the land analysis" and not the Harrison factors. (Op. 23). Thus, the entire basis for the

Appellate Division's decision is based on inappropriate policymaking reserved for the Legislature.

CONCLUSION

For the reasons set forth above, Plaintiff-Appellant Andris Arias respectfully requests that the Supreme Court grant this Petition for Certification and reverse the Appellate Division's June 14, 2024 decision.

CERTIFICATION

I certify that this Petition presents a substantial question and is filed in good faith and not for the purposes of delay. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully submitted,

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Dated: July 15, 2024