FILED, Clerk of the Supreme Court, 28 Jan 2025, **089642**

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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Publications

ARGUMENT

A. The decision below is egregiously wrong and radically altered forty-five years of premises liability law

The decision below marks the first time in forty-five (45) years, since this Court's decision in *Harrison*, that a court in the State of New Jersey blatantly refused to consider the nature and character of a land's surrounding community when determining if that land qualified as "premises" under the LLA. Importantly, this also includes every court decision following the 1991 amendments to the LLA. *See Benjamin v. Corcoran,* 268 N.J. Super. 517, 532 (App. Div. 1993); *Toogood v. St. Andrews At Valley Brook Condominium Ass'n*, 313 N.J. Super. 418, 425-26 (App. Div. 1998); *Weber v. U.S.*, 991 F. Supp. 694 (D.N.J. 1998; *Tompkins v. County of Mercer*, 2020 WL 4647867 (App. Div. 2020); *Vaxter v Liberty State Park*, 2010 WL 4237242 (App. Div. 2010).

In each of the cases referenced above, each and every court properly analyzed whether a particular parcel of land was surrounded by populated residential neighborhoods which would render the LLA inapplicable. This changed with the Appellate Division's unprecedented decision to focus solely on the character of Van Saun Park itself, and not the nature and character of Van Saun Park's surrounding community, which is undeniably residential. As will be demonstrated below, such an approach is inherently flawed, inconsistent with decisions of this Court, and inconsistent with the intent of the Legislature.

i. The decision below ignores binding precedent and conflicts with decisions of this Court and decisions of the Appellate Division

First, the decision below directly conflicts this Court's decision in *Harrison* where it was held that the Act does not immunize owners of land situated in residential and populated neighborhoods. *Harrison*, 80 N.J. at 397. In so holding, the LLA was to be given "narrow range" and not "accorded a broad application." *Id.* Here, the decision below deviated from the dictates of *Harrison* in several ways. First, the Appellate Division did not narrowly construe the Act as required in *Harrison*. Instead, the Appellate Division engaged in a improper legislative expansion of the Act in ways never intended by the legislature. Second, the Appellate Division blatantly disregarded the *Harrison* factors which this Court specifically established to guide courts in determining whether land qualified as "premises" under the Act. Had the Appellate Division relied on these factors and properly considered that Van Saun Park was: 1) surrounded by areas zoned for residential purposes, 2) located in a suburban community, 3) not isolated from densely populated neighborhoods, and 4) generally accessible to the public, it would have reached the inescapable conclusion that Van Saun Park is located in a populated suburban neighborhood and not subject to the Act.

In addition to *Harrison*, the decision below directly conflicts with *Toogood*, the very decision that it purports to rely upon in support of its new "dominant character of the land test." First, in *Toogood,* the Appellate Division held that the 1991 amendments were not "intended to radically alter the law of premises liability by extending immunity to suburban or urban landowners." *Toogood,* 313 N.J. Super. at 426. Yet, here, the decision below extended immunity to Van Saun Park, precisely the type of land that was never intended to be immunized. In fact, according to the County of Bergen's own website, "the properties immediately surrounding the park are all residential, primarily built as single-family homes." (Pa99). Given this irrefutable fact, which has been historically crucial to every court's determination of the Act's applicability, the LLA should have never been applicable to Van Saun Park.

ii. The decision below employed an exceedingly literal and narrow interpretation of *Toogood's* reference to "the dominant character of the land" by improperly limiting it's analysis to the character of Van Saun Park itself and not the character of the land in Van Saun Park's surrounding community

In addition to this undeniable deviation from binding precedent, the decision below interpreted *Toogood's* reference to the "dominant character of the land" in an exceedingly literal and narrow fashion. First, by referencing the dominant character of the "land," the *Toogood* Court was merely attempting to shift the focus of a court's analysis from improvements and activities to "land"

in general. This shift in focus was in direct response to *Whitney v. Jersey Cent. Power & Light Co.*, 240 N.J. Super. 420 (App. Div. 1990). There, a decedent was killed while operating an ATV on a roadway located in a wildlife preserve. *Whitney*, 240 N.J. Super. at 422. This roadway was situated within a large rural area unaccompanied by residential homes. *Id.* In finding that the LLA did not apply, the court disregarded the land's presence in a rural area and instead focused on the presence of improvements on the land. Consequently, this result conflicted with the intent of the Legislature as the land at issue was precisely the type of land the Legislature intended to immunize and the activity involved was precisely the type of activity that the Legislature intended to promote on those rural lands. *Toogood*, 313 N.J. Super. at 425-426. Therefore, in an effort to remedy this unintended result, the Legislature passed the 1991 amendments which were merely intended to shift the focus from activities and improvements to the character of the land in general. *Id.* They were not designed to radically alter premises liability law by extending immunity to suburban and urban landowners, which is precisely what occurred in this case. *Id.* Second, contrary to the decision below, *Toogood* did not stand for the proposition that courts should wholly disregard the nature and character of a given land's surrounding community as the Appellate Division did in this case. This is confirmed in *Mancuso*, which was

decided after *Toogood*. There, in analyzing the nature and character of the land at issue, the Appellate Division did not focus solely on the character of the parcel of land where the injury occurred. *Mancuso*, 322 N.J. Super. at 297. Instead, the Appellate Division focused on the nature and character of the land in the general community where the parcel was located. *Id.* In finding that the LLA did not apply, the Appellate Division observed that the parcel of land was situated in a "classic residential neighborhood where children traversed through backyards." *Id.* By considering the nature and character of the land's surrounding community, the Appellate Division confirmed that *Toogood*'s dominant character of the land analysis requires court's to consider the nature and character of a parcel of land's surrounding community. Otherwise, the result would have been different in *Mancuso* and the rural v. suburban dichotomy, which has been the cornerstone of LLA decisions for forty-five years, would be rendered a distinction without a difference. The instant matter is a perfect illustration.

In this case, the Appellate Division focused solely on the character of Van Saun Park itself. In utilizing this literal and excessively narrow approach, the Appellate Division concluded that the LLA applied to Van Saun Park. However, the Appellate Division's approach is flawed for several reasons. First, the Appellate Division's test failed to take into account whether land is

situated in a populated suburban area. This result directly conflicts with *Toogood*, the very case it purports to derive the test from. It further conflicts with virtually every LLA decision rendered in the last forty-five years which all consider the nature and character of a parcel's surrounding community. Next, the Appellate Division's test would effectively eliminate the *Harrison* factors established by this Court. Again, this result would directly conflict with *Toogood* where the court specifically reinforced the continuing viability of *Harrison's* definition of "premises." Further, a review of the *Harrison* factors demonstrates that these factors all relate to characteristics of land. Therefore, *Toogood's* pronouncement that the focus of a court's analysis should be on the dominant character of land is entirely consistent with the *Harrison* factors which also relate to the character of land.

Additionally, the Appellate Division's test fails to narrowly construe the immunity conferred under the Act as required by *Harrison*. Instead, under the Appellate Division's test, all owners of land used for recreational purposes would be afforded immunity regardless of geographic location. This overbroad bestowment of immunity effectively immunizes every park, field, court, rink, playground, and campground from liability in the entire State of New Jersey. Such an overbroad application of immunity is not only disfavored under the

law, it directly conflicts with the intent of the Legislature and radically alters forty-five years of existing premises liability law.

Finally, contrary to Respondent's misguided assertion, the 1991 amendments did not abrogate *Harrison* and did not expand the scope of the LLA. This is evidenced by three published Appellate Division cases that were decided after the 1991 Amendments were enacted. *See Benjamin,* 268 N.J. Super. at 517 (immunity was not appropriate since *Harrison* found that the statute should be given narrow range); *Toogood,* 313 N.J. Super. at 425 (the 1991 amendments did not announce a departure from *Harrison's* narrow interpretation of "premises"); *Mancuso*, 322 N.J. Super. at 295 (immunity did not extend to property located in residential and populated neighborhoods); *See also* Gerald H. Baker & Dennis A. Drazin, NEW JERSEY PREMISES LIABILITY 551 (2024 ed.)("a city park" is unlikely to qualify as "premises" under the *Harrison* test).

iii. The decision below is inconsistent with the intent of the legislature and inconsistent with the legislative objectives associated with the enactment of the LLA.

Given the inherent difficulties associated with policing large and expansive territories, the Legislature chose to immunize rural landowners from liability in order to promote the pursuit of recreational activities on those lands. *Id.* However, at the same time, the Legislature also recognized that those

same legislative objectives would not be advanced in populated suburban areas where the concerns associated with supervising activities and guarding against trespassers "are less substantial. *Harrison*, 80 N.J. at 402. Here, Van Saun Park is situated nine (9) miles west of New York City in one of the most densely populated areas in the State. Unlike a rural setting, where a single landowner is responsible for policing a vast and expansive area, here, the County of Bergen is already allocated considerable public resources, via taxpayers, to employ personnel and perform the maintenance and repairs needed to render the park safe for patrons. Lastly, under the Tort Claims Act, Van Saun Park is already afforded immunities and heightened protections that encourage use of the property without fear of liability. As such, the park is not the type of premises intended to be immunized from liability.

B. The issues presented are exceptionally important

i. The decision below disregards important public safety policies, disincentivizes safety in New Jersey's parks, and leaves severely injured individuals without recourse

Contrary to Respondent's argument that no "special reasons" exist for this Court to grant certification, that same argument is belied by Respondent's own opposition. In said opposition, by Respondent's own admission, Respondent admits that the questions presented involve matters of great public importance.

In this case, the Appellate Division attempted to resolve concerns related to the shrinkage of public spaces in New Jersey by engaging in an improper legislative expansion of the LLA to include urban and suburban areas. However, in attempting to do so, the Appellate Division eviscerated other, arguably more important, public safety policies. For example, given that the LLA cloaks landowners with virtual absolute immunity, absent intentional conduct, the decision below effectively disincentivized safety on all lands used for recreational purposes in the entire State of New Jersey. This includes all parks in the State of New Jersey where landowners are no longer required to render the premises safe for patrons. Of particular concern, inspections, maintenance and repairs, which were once incentivized through liability, are no longer required even in urban and suburban parks highly utilized by children. The instant matter is illustrative.

Here, Van Saun Park offers year-round amenities, attractions, and events catered specifically to children. Inside the park are numerous attractions including a zoo, train, a carousel, pony rides, and a playground with a water sprinkler. Throughout the year, the park also hosts seasonal events and activities designed for children. Yet, based on the decision below, Van Saun Park no duty whatsoever to render the park safe for those children. Moreover, the decision below will deprive deserving litigants of their day in court. Under the LLA, landowners have no duty to render their premises safe for visitors. Therefore, upon being

served with a complaint, a defendant will likely immediately file a motion to dismiss in lieu of filing an Answer. Given the early stage of litigation, it would be extremely improbable that a plaintiff would be in possession of evidence demonstrating that a defendant engaged in malicious or intentional act. Therefore, based on the lack of evidence demonstrating that an exception applies to the LLA, a court will likely dismiss the case thereby depriving a plaintiff of any opportunity to investigate the actions of the landowner. Such a result is precisely what occurred in this case. As such, the exceptions to the LLA for intentional or malicious conduct are essentially illusory and provide no protection for litigants. As a result, individuals that have been severely harmed by the negligence of another will be left without recourse – a result that defies the very logic and rationale of premises liability law.

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.

Respectfully submitted,

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Dated: August 12, 2024