ANDRIS ARIAS, *Plaintiff-Petitioner*, VS. COUNTY OF BERGEN, JOHN DOES-15, ABC CORPORATIONS 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 Civil Action 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

DEFENDANT-RESPONDENT COUNTY OF BERGEN'S BRIEF IN OPPOSITION TO PLAINTIFF-PETITIONER'S PETITION FOR CERTIFICATION

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PRELIMINARY STATEMENT

This Court should deny Petitioner, Andris Arias' (hereinafter "Petitioner"), request for Certification for one simple reason: their primary challenge is that the courts should continue to use the standard created prior to the 1991 legislative amendments to the New Jersey Landowner's Liability Act, N.J.S.A. 2A:42A-2, et seq. (the "LLA"). In their Petition for Certification, Petitioner advances exactly the same arguments they unsuccessfully raised below in the Superior Court and Appellate Division. For the third time, Petitioner argues that Harrison v. Middlesex Water Co., 80 N.J. 391, 401 (1979), decided twelve years prior to the 1991 statutory amendments to the LLA, invalidates the court's present-day interpretation of the 1991 statutory amendments to the LLA. Petitioner has repeatedly asked the courts to apply judicial precedent which predates the statutory amendments instead of assessing whether and to what extent the statutory amendments supersede the prior judicial analysis.

The Appellate Division, like the trial court before it, agreed with Respondent, County of Bergen (hereinafter "Respondent"), that Van Saun County Park is a "premises" under N.J.S.A. 2A:42A-3(a) and thus was entitled to LLA immunity. This Court should deny Certification because there is no pressing need for the New Jesey Supreme Court to rule on the matter: no further

guidance is required at this time, and no conflicts between lower courts need to be resolved. Moreover, the reasons advanced by Petitioner in an effort to overturn the entire weight of authority already extensively considered and established by both the Appellate Division and the Superior Court are without any basis in law. Lastly, this Court should deny Certification because Petitioner is simply repeating the claims that were soundly rejected by the trial court, whose decision was then affirmed by the Appellate Division. For these reasons, the respective Certification should be denied.

PROCEDURAL HISTORY

On the evening of April 24, 2021, Petitioner went to Van Saun County Park located at 216 Forest Avenue, Paramus, New Jersey, to rollerblade along the pedestrian/bike path. (Pa20)[1]. Van Saun County Park is a park located, owned and maintained by Respondent. (Pa84). While rollerblading along the pedestrian/bike path in the park, Petitioner fell, sustaining bodily injuries. (Pa20).

On December 13, 2022, Petitioner filed a Complaint against Respondent alleging that Respondent was careless, negligent, and reckless in failing to

[1] Respondent hereby adopts Petitioner's Appendix citations and adds the following:
"Pb" refers to Petitioner's brief.
"Op" refers to the Appellate Division's Opinion.

remedy, properly inspect, repair and/or warn of an alleged dangerous and hazardous condition on the premises. (Pa1).

On January 11, 2023, Respondent filed a notice of motion to dismiss for failure to state a claim upon which relief can be granted pursuant to N.J.C.R. 4:6-2(e). The motion was originally returnable on February 17, 2023. (Pa16).

On February 9, 2023, Petitioner filed an Amended Complaint against Respondent. The Amended Complaint added fictitious parties to the caption, "JOHN DOE CONTRACTORS 1-5", and a second count "II. CONTRACTOR LIABILITY FOR DEFECTIVE WORK." (Pa8).

On March 20, 2023, the trial court heard oral argument on Respondent's motion to dismiss for failure to state a claim upon which relief can be granted. The trial court granted Respondent's motion to dismiss Petitioner's Amended Complaint. (Pa62). The Court explained its reasoning on the record during oral argument. (Pa107).

On or about April 30, 2023, Petitioner filed a Notice of Appeal, challenging the trial court's March 20, 2023 Order. (Pa64).

On or about June 14, 2024, the Appellate Division, in a published decision, Arias v. Cnty. of Bergen, __ N.J. Super. __ (App. Div. 2024), affirmed the dismissal of Petitioner's Amended Complaint. The panel stated that, "as we held in Toogood, the 1991 LLA 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.'…the proper inquiry for determining whether a property is entitled to immunity under the 1991 LLA amendment requires an analysis of the prevailing character of the land where the plaintiff suffered injury…" (Op. 19). Applying the dominant character of the land analysis, the panel listed the many free sport and recreational activities offered by Van Saun County 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." (Op. 27-28).

In reaching its conclusion, the panel thoughtfully and carefully analyzed the LLA, including each and every case cited by Petitioner. The panel, "reviewed the history leading to the enactment of the current version of the LLA." (Op. 9). The panel explained that, "because there is no detailed legislative history or committee report regarding the 1991 LLA amendment, the panel considered published out-of-state judicial decisions as part of their analysis in determining landowner immunity for premises associated with sport and recreational activity." (Op. 25).

LEGAL ARGUMENT

POINT I

CERTIFICATION SHOULD BE DENIED BECAUSE THERE IS NO "SPECIAL REASON" FOR THIS COURT'S DISCRETIONARY REVIEW

In deciding whether to hear an appeal, this Court is guided by the standards in N.J.C.R. 2:12-4, which instructs that "[c]ertification will not be allowed on final judgments of the Appellate Division except for special reasons." N.J.C.R. 2:12-4 provides a discretionary grant of certification under three limited circumstances: (1) where the appeal "presents a question of general public importance which has not been but should be settled by the Supreme Court"; (2) where the decision below conflicts with the precedent of a same or a higher court "or calls for an exercise of the Supreme Court's supervision"; and (3) in any other situation "if the interest of justice requires." Ibid.

Petitioner has not presented any "special reasons" justifying Certification to this Court. Their Petition for Certification does not present a question similar to any that is currently on review before the Supreme Court. Additionally, the Appellate Division's opinion does not conflict with any other decision of either the Appellate Division or the Supreme Court. Id.

With regard to the first factor, Respondent agrees that the opinion by the Appellate Division resolved a question of public importance, but here, the Appellate Division merely applied established case law to the specific facts of

the case. See Bandel v. Friedrich, 122 N.J. 235, 237 (1991). Petitioner heavily relied on Harrison which was decided prior to the statutory amendments, but the decision by the Appellate Division properly applied both precedent and persuasive case law to the specific facts of this case.

Next, as to the second factor, cases generally do not implicate the Court's "supervisory powers" unless they conflict with another decision of an appellate court or otherwise "transcend the immediate interests of the litigants." See Mahony v. Danis, 95 N.J. 50, 51 (1983). Finally, appeals do not warrant "invocation of the Court's certification authority in the interest of justice" unless the decision below is "palpably wrong, unfair or unjust." Bandel, supra, 122 N.J. at 237. "Typically, a case for certification encompasses several of the relevant factors controlling the exercise of the Court's discretionary appellate jurisdiction." Mahoney, supra, 95 N.J. at 53.

Here, as argued below, with the exception that the opinion issued by the Appellate Division is a matter of public importance, none of the remaining factors are present to warrant review by this Court. In reaching a decision, the Appellate Division relied on (1) binding precedent decided after the 1991 statutory amendments to the LLA; (2) the legislative history of the LLA; and (3) the plain language of the LLA. Petitioner simply disagrees with the outcome and wants to relitigate the matter. Accordingly, there is no issue of general

importance that must be resolved by this Court and Petitioner has not established that the Appellate Division's decision is in any way "palpably wrong, unfair or unjust." Bandel, supra, 122 N.J. at 237. The findings of the Appellate Division are correct and as such, there is no necessity for Supreme Court supervision over this matter and Certification should be denied.

POINT II

A. THE APPELLATE DIVISION RELIED ON BINDING PRECEDENT TO DETERMINE THAT THE LLA APPLIES TO VAN SAUN COUNTY PARK

The Appellate Division properly held that Van Saun County Park is a covered premises under the LLA. The LLA, N.J.S.A. 2A:42A-2 to 42A-8.1 as amended in 1991, effective January 18, 1992, provides:

a. An owner ... of premises ... whether or not improved or maintained in a natural condition, or used as part of a commercial enterprise, owes no duty to keep the premises safe for entry or use by others for sport and recreational activities, or to give warning of any hazardous condition of the land or in connection with the use of any structure or by reason of any activity on such premises to persons entering for such purposes.

b. An owner ... of [the] premises who gives permission to another to enter upon such premises for a sport or recreational activity or purpose does not thereby (1) extend any assurance that the premises are safe for such purpose, or (2) constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.

N.J.S.A. 2A:42A-3.

Further, "sports and recreational activities" were defined broadly by the legislature in 1991 to essentially include all recreational activity:

> "[S]port and recreational activities" means and includes: hunting, fishing, trapping, horseback riding, training of dogs, hiking, camping, picnicking, swimming, **skating**, skiing, sledding, tobogganing, operating or riding snowmobiles, all-terrain vehicles or dirt bikes, and any other outdoor sport, game and recreational activity including practice and instruction in any thereof….
>
> N.J.S.A. 2A:42A-2 (emphasis added).

The Appellate Division recognized that the New Jersey Legislature expressed its desire to restrict liability by a subsequent section of the Act:

> The provisions of [Sections] 2A:42A-2 et seq. shall be liberally construed to serve as an inducement to the owners, lessees and occupants of property, that might otherwise be reluctant to do so for fear of liability, to permit persons to come onto their property for sport and recreational activities.
>
> N.J.S.A. 2A:42A-5.1.

As the Appellate Division recognized, prior to the 1991 amendments to the Act, courts focused primarily on whether the land was "improved" versus "unimproved" to determine whether the land is "nonresidential, rural or semi-rural." See Primo v. City of Bridgeton, 162 N.J. Super. 394, 401, 403 (Law. Div. 1978) (denying summary judgment because the "slide represents both an improvement and an artificial condition and as such the [Act] does not create immunity"); see also Odar v. Chase Manhattan Bank, 138 N.J. Super. 464, 468 (App. Div. 1976) (affirming that defendant was entitled to immunity from

liability because 'skating' is an enumerated sport under N.J.S.A. 2A:42A-2 and the pond and the ice were natural conditions; neither of which was created or maintained by defendant).

Now, the focus of the inquiry is on the dominant character of the land. Toogood v. St. Andrews at Valley Brook Condominium Association, 313 N.J. Super. 418, 425-426 (App. Div. 1998) (suburban landowner held not entitled to LLA immunity). Since the 1991 amendments, the courts have liberally construed the LLA in furtherance of the legislative intent.

As explained by the Appellate Division, Van Saun County Park is exactly the type of premises the LLA was created to protect. Each year, visitors go to Van Saun County Park, free of charge, to avail themselves of the recreational lands provided by Respondent.

Here, Petitioner had no other purpose for going to Van Saun County Park except for recreation. Further, the LLA, in its liberal construction, applies to "premises…whether or not improved or maintained in a natural condition, or used as part of a commercial enterprise." The Appellate Division correctly accepted the broad protections afforded to owners, lessees and occupants of property in situations where individuals such as Petitioner assume the risk of engaging in certain specifically defined recreational activities on the property of

others. Because Petitioner does not raise any new issues that justifies this Court hearing this case, Certification should be denied.

B. TOOGOOD EXPANDED THE APPLICATION OF HARRISON AS A RESULT OF THE 1991 AMENDMENTS TO THE LLA

As the Appellate Division noted, Petitioner's reliance on Harrison v. Middlesex Water Co., 80 N.J. 391, 394 (1979), is critically misplaced as it was decided *before* the 1991 amendments to the LLA. Although the New Jersey Supreme Court has not revisited the scope of the LLA since Harrison, the Appellate Division has done so in several instances: Toogood v. St. Andrews at Valley Brook Condominium Association, 313 N.J. Super. 418, 425-426 (App. Div. 1998) , Mancuso ex rel. Mancuso v. Klose, 322 N.J. Super. 289 (App. Div. 1999), Benjamin v. Corcoran, 268 N.J. Super. 517 (App. Div. 1993), Tompkins v. County of Mercer, 2020 WL 4647867 (App. Div. 2020), Vaxter v. Liberty State Park, 2010 WL 4237242 (App. Div. 2010), and now Arias (2024)[2].

In its decision here, the Appellate Division reasoned that, “Given the diminishing open tracts of land in New Jersey, we are persuaded that the four-factor test in Harrison, a case decided twelve years prior to the 1991 LLA amendment, is incongruous with the "dominant character" of the land analysis

[2] Respondent briefed each of these cases in detail in its Appellate Brief and hereby incorporates by reference the arguments set forth therein.

under Toogood in determining whether a specific "premises" is entitled to immunity under the LLA." (Op. 21).

Contrary to Petitioner's arguments, the legislature, not the Appellate Division, "expanded" or "overruled" the Supreme Court precedent in Harrison. Because Petitioner has failed to show this Court that the lower courts "refused to apply binding precedent" in their decisions, this argument must be rejected for a third time.

POINT III

THE APPELLATE DIVISION'S REVIEW OF OUT OF STATE CASE LAW WAS APPROPRIATE

As the Appellate Division recognized, the court may consider out-of-state published judicial decisions, which, "although persuasive rather than binding, carry great weight." State v. Pickett, 466 N.J. Super. 270, 316 (App. Div. 2021). Petitioner's argument that the Appellate Division, or any state court for that matter, cannot consider persuasive authority is inconsistent with judicial practice. Further, Petitioner has not cited any New Jersey case or Court Rule that prohibits the Appellate Division from considering persuasive authority in its analysis.

Here, the Appellate Division's decision was not based solely on how other state courts interpreted their recreational use statutes (the equivalent to the LLA). The Appellate Division reviewed out-of-state published judicial

decisions in Ohio and Nevada as a part of its analysis "[b]ecause there is no detailed legislative history or committee report regarding the 1991 LLA amendment…" (Op. 23). Notwithstanding the analyses of the Ohio and Nevada courts, the Appellate Division based its decision on how New Jersey courts have interpreted the LLA, i.e., Toogood. On one hand, Petitioner attempts to suggest to this Court that there was no New Jersey precedent for their decision, but on the other attempts to suggest that the outdated precedent they relied on is controlling. Petitioner cannot have it both ways.

Here, the Appellate Division carefully considered all cases decided before and after the 1991 amendments. In addition to considering all cases decided before and after the 1991 amendments, the Appellate Division reviewed the history of our Legislature when it enacted the LLA's predecessor statute (1962 statute) and the then relevant case law. (Op. 9). The Appellate Division then reviewed the first enactment of the LLA (1968 LLA) and the then relevant case law. (Op. 10). Thereafter, the Appellate Division reviewed the 1991 LLA Amendments as well as the Assembly Judiciary, Law and Public Safety Committee Statement to the 1991 LLA Amendments. (Op. 17). It was only after a detailed review of the history of the LLA (and its predecessor statute) that the Appellate Division considered published out-of-state judicial decisions as part of its analysis.

There is no dispute that decisions of other states' courts are only considered persuasive authority. Nonetheless, the decision of the Appellate Division was not based solely on decisions of other states' courts and thus the representation of Petitioner that it was, must be rejected by this Court. The Appellate Division made it explicitly clear that their analysis was based off of the analysis in Toogood, not on decisions of other states' courts.

Ultimately, the Appellate Division thoroughly considered the record, Petitioner's arguments, and properly deferred to the legislative intent of the 1991 amendments to the LLA. In spite of all of the factual and legal findings supporting the decision made (with a thorough analysis by the panel), Petitioner seeks the opposite ruling. However, to be worthy of Certification, the decision must reach a result that is "palpably wrong, unfair or unjust." Mahony, 95 N.J. at 52; see also Bandel v. Friedrich, 122 N.J. 235, 237 (1991). Moreover, Petitioner must show "an egregious miscarriage of justice." Mahony, 95 N.J. at 52. Here, Petitioner cannot make the appropriate showing and further review by this Court is unwarranted. As a result, there is no certifiable issue in this matter, and Certification should be denied.

POINT IV

THE APPELLATE DIVISION DID NOT ENGAGE IN "LEGISLATIVE EXPANSION"

Petitioner further argues that 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." (Pb. 18). Here, the Legislature's intent could not be clearer, because its language could not be plainer. The 1991 amendments to the LLA were intended to be liberally construed to serve as an inducement to the owners, lessees and occupants of property, that might otherwise be reluctant to do so for fear of liability, to permit persons to come onto their property for sport and recreational activities. N.J.S.A. 2A:42A-5.1. Had the Legislature intended for the application of the LLA to be guided by something other than liberal construction, then the amendments would not have been included. See State v. Vonderfecht, 284 N.J. Super. 555, 559 (App. Div. 1995) ("The Legislature is presumed to be familiar with its own enactments and to have passed them with the intention that they be construed to serve a useful and consistent purpose").

Furthermore, the Appellate Division's dicta about the protection of open space were also addressed by this Court in Harrison in 1979. The Appellate Division acknowledged that, "as the Harrison Court noted, the protection of open space was "a concern well known to the Legislature and the preservation

of such lands [was] very much an integral part of our governmental and public policy. Th[at] purpose was assuredly intended to be served by the Legislature in structuring the [1968 LLA]." Ibid. (citations omitted)." (Op. 14-15). Under Petitioner's reasoning, then the decision in Harrison was also based on "an inappropriate policymaking reserved for the Legislature" (Pb. 19).

Ultimately, the findings of the Appellate Division are correct and as such, Certification should be denied.

CONCLUSION

For all of the above-stated reasons, it is respectfully submitted that Petitioner's Petition for Certification should be denied.

Dated: July 30, 2024

Respectfully submitted,

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