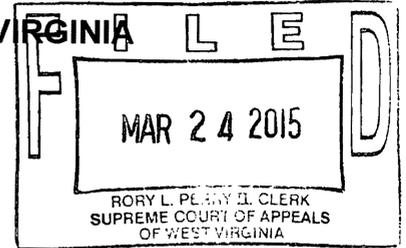


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel.
GREATER HUNTINGTON PARK
& RECREATION DISTRICT,

Petitioner,

v.

Upon Original Jurisdiction
In Prohibition No. 15-0049
(Civil Action No. 11-C-98
Circuit Court of Wayne
County, WV)

THE HONORABLE DARRELL PRATT,
Judge of the Circuit Court of Wayne County,
West Virginia, and SUMMER REYNOLDS,

Respondents.

PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

1. Whether the Trial Court exceeded its legitimate powers by erroneously ruling that the pending action may proceed to trial and denying the Greater Huntington Park & Recreation District the immunity to which it is entitled under the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.*?
2. Whether the Greater Huntington Park & Recreation District is statutorily immune from liability under the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-5(a)(7), because the claim asserted against it resulted from the natural condition of unimproved property of the petitioner?
3. Whether the Greater Huntington Park & Recreation District has no other adequate means to obtain the relief desired and will be irreparably damaged in a manner not correctable on appeal if a writ does not issue?

II. STATEMENT OF THE CASE

A. Procedural History

Plaintiff Summer Reynolds¹ sued petitioner, the Greater Huntington Park & Recreation District (the Park District), and CSX Transportation, Inc. seeking compensation for injuries she suffered on 19 September 2009 when she was struck by a train. She alleged that CSX failed in its duties to properly operate the train and maintain the premises where the accident occurred. She alleged that the Park District failed to properly operate Westmoreland Park, which abuts the area where Ms.

¹ At the time suit was brought, plaintiff/respondent was a minor and her name was Audrey Chapman. Suit was initially filed in her name by her birth mother, Allison Chapman. Later, Audrey Chapman became a ward of the State and the West Virginia Department of Health and Human Resources was substituted as plaintiff on her behalf. Still later, Audrey Chapman was foster parented by Jean and Raymond Reynolds and they were substituted as plaintiffs. When plaintiff was adopted by the Reynoldses, her name was changed to Summer Reynolds. She was recently named sole plaintiff in her own name when she reached the age of majority. For convenience, plaintiff will be referred to as Ms. Reynolds when referred to by name.

Reynolds was injured. Ms. Reynolds settled her claims with CSX and the case proceeded with the Park District as the sole defendant.

The Park District moved for summary judgment asserting that it is immune from Ms. Reynolds' claims under the Tort Claims Act. W. Va. Code § 29-12A-5(a)(7). By order entered 25 February 2015, the Trial Court denied the Park District's motion for summary judgment.

Discovery continues in accordance with the Amended Time Frame Order entered 21 November 2014, with trial set to begin on 21 September 2015.

B. Statement of Relevant Facts

1. The design and construction of Westmoreland Park began in 1982 under what appears to be the auspices of the Department of Community Development, City of Huntington, and without the involvement of the Park District. The Park District began maintaining the park by 1984; in 1995 the Park District received title to it. The park was intended for recreational use and includes a playground. (App. pp. 1, 23, 25-31, 74 and 295).

2. Near the south side of Westmoreland Park and running east and west along a CSX railroad track, the land rises about 6 to 8 feet in a fairly steep slope from what is a more or less level park field to the train tracks. The landscape architects who designed Westmoreland Park left in place the natural tree and brush line on the slope as a natural barrier and sound suppressor. Plans drawn in 1980 called for some trees to be planted on the flat portion of Westmoreland Park; none were proposed to be planted on the slope. During the time the Park District has maintained Westmoreland Park, the tree and brush border has always been permeable – that is a pedestrian or trail bike

rider who wanted to do so was able to walk or bike through the border from the park to the railroad right-of-way. It is possible that during the last 30 years the Park District removed a dead or dying tree from somewhere in the border, though it has no institutional memory of doing so. The Park District has neither added nor removed trees or brush in the area where Ms. Reynolds is said to have walked through the natural border. From time-to-time, the Park District removes trash from the natural border and trims back brush that would otherwise creep northward into the park field. It does not thin the trees or brush in the natural border. (App. pp. 2, 23-24, 74, 78, 295, and Map 4 – Planting Plan & Details).

3. The Trial Court took judicial notice that the CSX railroad tracks that run along the southern border of Westmoreland Park predate the development of Westmoreland Park and have been in place since sometime in the late 1800's. (App. pp. 2, 200, and 293).

4. The slope along the southern border of Westmoreland Park was heavily vegetated on 19 September 2009, the date of Ms. Reynolds' injury. Photographs taken about a month later show a path through the vegetation on the slope between the Park and the railroad bed. Some ballast from the railroad bed appears to have slid onto this path. The path was not created or maintained by the Park District. (App. pp. 2, 32-40, 202-203, 229-241, and 256-291).

5. Plaintiff named Thom Thompson as her liability expert. In his report, Mr. Thompson contends that the Park District is liable because the natural tree and brush border was not dense enough to keep children from walking from Westmoreland Park through the border onto the railroad right-of-way. He contends that because the border

was permeable, the Park District had a duty to install a fence between the park and the railroad track. (App. pp. 190-195).

6. The Park District is a political subdivision as defined by the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.* (App. p. 2).

III. SUMMARY OF ARGUMENT

Summer Reynolds, plaintiff below, alleges that the Park District is liable because the natural tree and brush border that fringes Westmoreland Park was not dense enough to keep her from walking from the park to an abutting railroad track. This case raises the question of whether the Park District, a political subdivision, is immune because Ms. Reynold's claim results from the natural conditions of unimproved property. Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-5(a)(7). While there may be improvements in the vicinity, railroad tracks on CSX's property to the south of the park and some facilities within the park, there are no improvements in the border – it is in its natural condition. It is this natural condition of the border which Ms. Reynolds' alleges gives rise to her claim against the Park District.

The immunity provided by the statute reflects sound public policy. In light of the limited resources available to political subdivisions, they might prohibit recreational use of public lands if they were put to the expense of making natural conditions safe, responding to tort actions, and paying damages.

Petitioner, the Greater Huntington Park & Recreation District, respectfully requests that the Court award to petitioner a Writ of Prohibition prohibiting the Honorable Darrell Pratt, Judge of the Circuit Court of Wayne County, from conducting

any further proceedings in this action; and that petitioner be dismissed from this action with prejudice.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to W. Va. R. App. P. 18(a) and 20(a), petitioner states that this case is appropriate for oral argument as it presents an issue of first impression and a matter of fundamental public importance. For these reasons, this is not an appropriate case for memorandum decision. W. Va. R. App. P. 21.

V. ARGUMENT

Standards of Review

This Court recently articulated the following standards applicable to the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.* and its enforcement via a petition for a Writ of Prohibition:

As we made clear in *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996), absolute statutory immunity, like qualified immunity, “is an *immunity from suit* rather than a mere defense to liability” that “is effectively lost if the case is erroneously permitted to go to trial.” *Id.* at 147, 479 S.E.2d at 657 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) and emphasis in original). We further recognized that “the need for early resolution in cases ripe for summary judgment is particularly acute when the defense is in the nature of an immunity.” 198 W.Va. at 147, 479 S.E.2d at 657. Elucidating on the significance of prompt resolution of immunity-related defenses, we stated:

Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.

Hutchison, 198 W.Va. at 148, 479 S.E.2d at 658.

In light of the clear public policy considerations that underlie the Legislature's decision to create immunity for specified types of governmental

conduct, this Court has stated that “[i]n absolute statutory immunity cases, the lower court has little discretion, and the case must be dismissed if one or more of the provisions imposing absolute immunity applies.” *Id.* at 148 n. 10, 479 S.E.2d at 658 n. 10. As a result, we held in syllabus point one of *Hutchison*:

The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

198 W.Va. at 144, 479 S.E.2d at 654, syl. pt. 1; accord *State ex rel. Charles Town v. Sanders*, 224 W.Va. 630, 687 S.E.2d 568 (2009) (granting writ of prohibition based on trial court's failure to grant immunity under W.Va.Code § 29–12–5(a)(6)); *State ex rel. Martinsburg v. Sanders*, 219 W.Va. 228, 632 S.E.2d 914 (2006) (granting writ of prohibition based on trial court's failure to recognize immunity under W.Va.Code § 29–12–5(a)(12)).

Given the clear grant of immunity to the petitioners pursuant to the provisions of West Virginia Code § 29–12A–5(a)(4) and (5), there is no question that the extraordinary relief sought by the petitioners is required in this case. The availability of an appeal wholly ignores the essence of absolute immunity—the avoidance of trial in the first instance. The legislative decision to clothe certain actions of governmental agencies and employees in a cloak of immunity is not one that should be casually disregarded. Without that promise of immunity, it is probable that many critical governmental decisions would cease to be made and the services that most citizens expect their government to provide would consequently be unavailable.

City of Bridgeport v. Marks, 233 W. Va. 449, 759 S.E.2d 192, 199-200 (2014)(granting writ of prohibition based on trial court's failure to grant immunity under W. Va. Code §29-12A-5(a)(4) and (5)). Emphasis in original.

- A. The Trial Court exceeded its legitimate powers by erroneously ruling that the pending action may proceed to trial and denying the Greater Huntington Park & Recreation District the immunity to which it is entitled under the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, et seq.**

When West Virginia enacted the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.*, the legislature stated the purpose and public policy underlying the Act:

Its purposes are to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability.

W. Va. Code § 29-12A-1. And,

The Legislature finds and declares that the political subdivisions of this state are unable to procure adequate liability insurance coverage at a reasonable cost due to: The high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services. Therefore, it is necessary to establish certain immunities and limitations with regard to the liability of political subdivisions and their employees, to regulate the insurance industry providing liability insurance to them, and thereby permit such political subdivisions to provide necessary and needed governmental services to its citizens within the limits of their available revenues.

W. Va. Code § 29-12A-2. As this Court observed in *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 600, 425 S.E.2d 551, 555 (1992)(footnote omitted):

The Tort Claims Act was the result of legislative findings that political subdivisions of the State were unable to obtain affordable tort liability insurance coverage without reducing the quantity and quality of traditional governmental services. W.Va.Code, 29-12A-2. To remedy this situation, the legislature specified seventeen instances in which political subdivisions would have immunity from tort liability. W.Va.Code, 29-12A-5(a).

The Tort Claims Act applies to political subdivisions, statutorily defined to include “any separate corporation or instrumentality established by one or more counties or municipalities, as permitted by law”. W. Va. Code § 29-12A-3(c). The Park District is such an entity. W. Va. Code § 8-21-1. It is entitled to the protection of the immunity

provided by W. Va. Code § 29-12A-5(a)(7), protection which the Trial Court erroneously denied.

B. The Greater Huntington Park & Recreation District is statutorily immune from liability under the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-5(a)(7), because the claims asserted against it resulted from the natural condition of unimproved property of the petitioner.

The Tort Claims Act absolutely immunizes the Park District from certain claims, including:

(a) A political subdivision is immune from liability if a loss or claim results from: ...

(7) Natural conditions of unimproved property of the political subdivision; ...

W. Va. Code § 29-12A-5(a)(7). Ms. Reynolds' claim – that she was injured because the natural condition of the tree and brush border fringing the southern border of Westmoreland Park allowed her to walk up to the railroad tracks – falls squarely within the plain language of the Tort Claims Act's natural conditions immunity.

This Court has not directly addressed the natural conditions immunity, though it has provided some relevant guidance. In *Stamper v. Kanawha County Bd. of Educ.*, 191 W. Va. 297, 445 S.E.2d 238 (1994), the Court considered whether W. Va. Code § 19-25-1, West Virginia's recreational property immunity statute, limited the BOE's liability to a child who was injured while playing on a BOE basketball court. The *Stamper* Court held that the recreational property act was not designed to cover property owned by a political subdivision. It reached this decision based on the language of the act and because the claim against the BOE was specifically covered by the Tort Claims Act. As the Court observed, the Tort Claims Act articulates both the basis for liability and the available immunities, including the "natural condition of unimproved property." *Id.*, at fn.

5. Additional guidance comes from the case law of other states where courts have applied a similar statutory immunity provision.

West Virginia enacted the Tort Claims Act in 1986. Insofar as petitioner can determine, it appears that the legislature was influenced by California's Governmental Tort Liability statute which was enacted more than twenty years earlier; at least the similarity in the two immunity provisions is unmistakable:

Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.

Cal. Gov. Code §831.2 (1963).

Over the years, California courts have had many opportunities to consider the application of the natural conditions immunity. One case, *Winterburn v. City of Pomona*, 186 Cal. App. 3d 878, 231 Cal. Rptr. 105 (1986), involved a small, lot-sized "greenbelt" located in an urban area. The greenbelt was covered in grass and trees and had a naturally occurring cave. Plaintiffs alleged that the city was liable when a roof collapse killed an 11-year old boy who had been playing in the cave. The city was granted summary judgment because of the natural conditions immunity. On appeal, plaintiffs argued that the natural conditions immunity was not intended to apply to urban areas, but only to rural lands set aside for recreational purposes. The appellate court rejected this contention noting that "public parks and beaches in urban areas are undeniably included" within the coverage of the immunity. *Id.* at 881. The Court observed that while the greenbelt might lack the usual park-like improvements such as restrooms, picnic sites and sporting facilities, it was nonetheless open to the public, maintained for the public benefit, and known to be used by the public. The natural conditions immunity

applied and barred plaintiffs' claim. In reaching its decision, the Court noted the public purpose served by the natural conditions immunity:

As the Supreme Court stated in *Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829, 833 [196 Cal.Rptr. 38, 670 P.2d 1121]: "The legislative policy underlying the immunity is clear. It is desirable to permit public use of governmental property but governmental agencies might prohibit such use if they were put to the expense of making the property safe, responding to tort actions, and paying damages. The comment concludes by pointing out the shortage of funds for improving property for recreational use and the fairness of requiring users to assume the risk of injury."

Id., at 881, brackets in original.

Winterburn harkened back to the first occasion on which a California court considered the application of the natural conditions immunity. *Rendak v. State of California*, 18 Cal. App. 3d 286, 95 Cal. Rptr. 665 (1971). The Rendak family went to New Brighton Beach Park with friends. According to the dissent,

The New Brighton Beach Park is not an area with primitive or pristine conditions distant from improvements. It is a relatively small parcel that has been improved as a recreational area. The improvements that may be put on a beach are necessarily limited as it is the beach and ocean, rather than a structure, that is sought for recreation. The improvements here, for which an admission fee was charged, are adequate for a beach and may be termed improvements. There were the barbecue pits, rest rooms, garbage disposal facilities and signs which permitted patrons to walk near the cliff but gave warning of the danger. The entire beach, including the cliff area, was within the inspection zone protected by the supervision of state employees.

Id., at 291. Mr. Rendak was killed when a portion of the cliff above the beach slipped as he walked underneath. Plaintiffs argued that improvements at the park excluded the entire park from the natural conditions immunity, even the park's unimproved areas. The Court rejected the argument and affirmed the trial court's grant of summary judgment for the State.

The natural conditions immunity was also considered in *Santa Cruz v. Superior Court*, 198 Cal. App. 3d 999, 244 Cal. Rptr. 105 (1988). The plaintiff, Magana, dove into the San Lorenzo River, struck his head on what was probably a sandbar, injured his spine and became quadriplegic. Plaintiff's liability expert argued that dangerous sandbars were present in the river, that there had been previous accidents there, and that it was the city's responsibility to assess changes in the sandbars and then do what needed to be done to make the river safe. The city presented evidence that the river had been in the same condition for some 57 years, that sandbar formation fluctuated with the weather and tides, and that any work performed by the city in the area would not have had a lasting effect on these natural processes. The Court observed that such minor man-made alterations were temporary and would not affect the buildup of sandbars and that the city's statutory immunity was not abrogated by the presence or absence of warning signs in the area. The Court held that § 831.2 immunized the city from Magana's claim. *Accord, Rombalski v. City of Laguna Beach*, 213 Cal. App. 3d 842, 261 Cal. Rptr. 820 (1989)(although city constructed a stairway giving access to the beach and provided lifeguards, no conduct by the city induced the 13-year old plaintiff to be victimized by hidden dangers and no evidence demonstrated conduct by the city that actively increased the degree of dangerousness of the rock from which plaintiff dove into the ocean); *Bartlett v. State*, 199 Cal. App. 3d 392, 245 Cal. Rptr. 32 (1988)(natural conditions immunity was not abrogated by either the presence of some improvements on the property or the assertion that the operation of recreational vehicles changed the condition and contours of the dunes; plaintiff must show an unnatural change in the condition of the property at the location of the injury); *Mercer v. State*, 197 Cal. App. 3d

158, 165, 242 Cal. Rptr. 701, 705 (1988)(“Not only must improvements change the physical characteristics of property to avoid the immunity, they must do so at the location of the injury. Thus, improvements of a portion of a public park do not remove the immunity from the unimproved areas. The reasonableness of this rule is apparent. Otherwise, the immunity as to an entire park area improved in any way would be demolished. This would, in turn, seriously thwart accessibility and enjoyment of public lands by discouraging the construction of such improvements as restrooms, fire rings, camp sites, entrance gates, parking areas and maintenance buildings.” Internal citations omitted.)

The plaintiff in *Schooler v. State*, 85 Cal. App. 4th 1004, 102 Cal. Rptr. 2d 343 (2000), owned a residence located on a bluff adjacent to a bluff and beach area owned by the State. Schooler sued the State alleging that over the course of 20 years, pedestrian traffic and natural elements (including rain, tide, wave action and wind) eroded the State’s bluff and compromised the lateral support for his residence. He contended it was the State’s duty to maintain its bluff in a safe condition and that a natural conditions immunity provision applicable to land, § 831.25, did not bar his claim. Applying § 831.2 case law by analogy, the Court held that Schooler’s claim was barred by the natural conditions immunity which the State did not lose because human activity contributed to the condition:

Generally, conditions that occur in nature but happen to be produced by a combination of human and natural forces are natural conditions as a matter of law. (*Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, 194, 263 Cal.Rptr. 479; *Tessier v. City of Newport Beach* (1990) 219 Cal.App.3d 310, 314, 268 Cal.Rptr. 233; *Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 928, 6 Cal.Rptr.2d 874.) In both *Tessier* and *Morin*, the courts concluded injury-causing sandbars were natural conditions for purposes of section 831.2, even though

they formed due to a combination of wave action, tides, and human activity. (*Tessier*, at p. 314, 268 Cal.Rptr. 233; *Morin*, at p. 194, 263 Cal.Rptr. 479.) The courts reasoned that because sandbar formations occur in nature even in the absence of human activity, any contributing human activity does not alter the natural character of the condition. (*Tessier*, at p. 314, 268 Cal.Rptr. 233; *Morin*, at pp. 190–191, 263 Cal.Rptr. 479.)

Even though section 831.2 is distinguishable from section 831.25, subdivision (a) in that the former addresses the natural character of the land condition while the latter addresses the natural character of the *causes* that produce land failure, the reasoning used in *Tessier* and *Morin* is applicable here. The bluff erosion is alleged to be due to a combination of environmental factors and human activities. Schooler agrees wind, water and wave action are separate influences that by themselves are causing erosion. Like the sandbar formation in *Tessier* and *Morin*, the bluff erosion is occurring naturally.

The bluff erosion does not lose its natural character just because human activity is one of its contributing causes. The natural character of a resulting condition is ultimately derived from the natural character of its causes. Here, in light of the factual circumstances presented, pedestrian traffic that supplements the natural forces does not materially change the natural character of the erosion. Thus, the human activity does not affect the natural character of the resulting condition. Consequently, the bluff erosion is a “natural condition” as a matter of law for purposes of section 831.25, subdivision (a).

Id., at 1009-1010, footnotes omitted.

Authority from the State of New Jersey – whose tort claim act² was modeled on California’s – also provides helpful guidance. In *Troth v. State of New Jersey*, 117 N.J. 258, 566 A.2d 515 (1989), plaintiff alleged that the State was liable when a fishing boat which she and her husband were using was swept over a spillway on an artificial lake

²In relevant part:

Neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.

N.J.S.A. 59:4-8.

causing his death and her serious injury. In determining whether the State was immune to the claim, the Court considered authority from New Jersey and California:

Professor Arvo Van Alstyne, who served as a consultant to the Commission that drafted the California Tort Claims Act of 1963, *Cal. Gov't Code* §§ 810 to 946, and to the New Jersey Attorney General's Task Force on Sovereign Immunity, offers an analysis similar to that of the Appellate Division in *Freitag*. He observes that property loses its "unimproved" status when there is "some form of physical change in the condition of the property at the location of the injury, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area." A. Van Alstyne, *California Government Tort Liability Practice* § 3.42 (1980) (hereinafter Van Alstyne).

The California courts offer an additional clarification of the term "unimproved public property." Under their rulings, an improvement of a portion of public property does not remove the immunity from the unimproved areas. *Geffen v. County of Los Angeles*, 197 *Cal.App.* 3d 188, 192, 242 *Cal.Rptr.* 492, 496 (1987); *Rendak v. State*, 18 *Cal.App.* 3d 286, 288, 95 *Cal.Rptr.* 665, 667 (1971); *accord Fuller v. State*, 51 *Cal.App.* 3d 926, 932, 125 *Cal.Rptr.* 586, 592 (1975). As the California Court of Appeals observed in *Rendak v. State*, *supra*:

Appellants' argument would demolish the immunity as to an entire park area improved in any way * * *. An entrance gate, a parking area adjoining it, or residential provision for park employees would wholly destroy the immunity. * * * It follows that improvement of a portion of a park area does not remove the immunity from the unimproved areas. [18 *Cal.App.* 3d at 288, 95 *Cal.Rptr.* at 667.]

Thus, under the California decisions, a holding that the Union Lake Dam is "improved" public property would not foreclose the statutory immunity from applying to Union Lake and the balance of the 4,300-acre preserve. ...

In the context of the public policies underlying the statutory immunity for unimproved public property, it is not difficult to identify the factors that determine when property is improved to an extent sufficient to eliminate the immunity. Public property is no longer "unimproved" when there has been substantial physical modification of the property from its natural state, and when the physical change creates hazards that did not previously exist and that require management by the public entity. See Van Alstyne, *supra*, at § 3.42; *Freitag*, *supra*, 177 *N.J.Super.* 234, 426 *A.2d* 75. Obviously, in order for liability to be imposed on the public entity there must be a causal connection between the "improvement" and the alleged injury. *Cf. Keyes v. Santa Clara Water Dist.*, 128 *Cal.App.* 3d 882, 180 *Cal.Rptr.* 586 (1982) (where plaintiff struck submerged object while swimming in man-made lake created by dam, public entity retains

immunity based on unimproved public property in absence of causal nexus between dam and hazardous condition that caused injury).

Id., at 268-269, brackets in original. The *Troth* Court held that the dam and its spillway were improved property and since these improvements were alleged to have caused plaintiff's injuries, the immunity did not apply to her claim. However, while the natural conditions immunity did not apply to the dam and spillway, that finding did not cause the remainder of the man-made lake and preserve to lose its statutory immunity. The *Troth* Court noted the public policy underlying the immunity provision:

Sections 59:4-8 and 59:4-9 reflect the policy determination that it is desirable to permit the members of the public to use public property in its natural condition and that the burdens and expenses of putting such property in a safe condition as well as the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved public property to assume the risk of injuries arising therefrom as part of the price to be paid for benefits received. A similar statutory approach was taken by the California Legislature. ...

The exposure to hazard and risk involved is readily apparent when considering all the recreational and conservation uses made by the public generally of the foregoing acreages, both land and water oriented. Thus in sections 59:4-8 and 59:4-9 a public entity is provided an absolute immunity irrespective of whether a particular condition is a dangerous one.

Id., at 266-267, quoting the Attorney General's Task Force.

Courts that have considered how to apply a natural conditions immunity have held that it immunizes the public entity from claims that arise out of the natural character of the land. They have held that the public entity is immune even if there are improvements on the property. They have held that the public entity is immune even if the natural condition was affected by human activity.

The mere fact that Westmoreland Park has facilities – restrooms, a shelter, tennis courts – does not abrogate its natural conditions immunity; none of these facilities played a role in Ms. Reynold’s injury. Neither does the existence of an improvement to the south of the slope – CSX’s railroad tracks – preclude the operation of the immunity. The gravamen of plaintiff’s claim against the Park District is that the tree and brush border which fringes the park’s southern side and which had been in place for at least 29 years, was too porous to prevent children from walking from the park field up to the railroad right-of-way. She contends that the porous nature of the border was evidenced by the paths that some people have worn through it. The paths did not make the border porous – that is its natural condition. Plaintiff’s claim arises out of the natural character of the land and the Park District is immune to it. The plain language of the statute and rational public policy require the dismissal with prejudice of the pending claim against the Park District. As this Court observed only a few months ago, “[w]ithout that promise of immunity, it is probable that ... the services that most citizens expect their government to provide would consequently be unavailable.” *City of Bridgeport v. Marks*, *supra*, 759 S.E.2d at 200.

C. The Greater Huntington Park & Recreation District has no other adequate means to obtain the relief desired and will be irreparably damaged in a manner not correctable on appeal if a writ does not issue.

On numerous occasions, this Court has observed that immunities under West Virginia law are more than a defense to a suit. As this Court stated in *Hutchison v. City of Huntington*, 198 W. Va. 139, 147, 479 S.E.2d 649, 657 (1996):

Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the

burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.

Accord, City of St. Albans v. Botkins, 228 W. Va. 393, 719 S.E.2d 863 (2011). The natural conditions immunity is an absolute defense and, when it is denied, a writ of prohibition is an appropriate remedy. *City of Bridgeport v. Marks, supra; Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985).

VI. CONCLUSION AND RELIEF REQUESTED

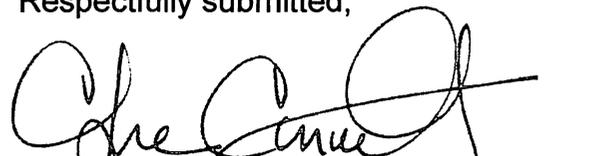
Petitioner, the Greater Huntington Park & Recreation District, respectfully requests that this Honorable Court issue a rule to show cause and an automatic stay pursuant to W. Va. R. App. P. 16 expeditiously and in advance of the 21 September 2015 trial.

Petitioner asks that the Court award to petitioner a Writ of Prohibition prohibiting the Honorable Darrell Pratt, Judge of the Circuit Court of Wayne County, from conducting any further proceedings in this action; and that petitioner be dismissed from this action with prejudice. The harm to petitioner would be irreparable and not correctable on appeal should a Writ of Prohibition not issue.

VII. VERIFICATION

Pursuant to W. Va. Code § 53-1-3 and W. Va. R. App. P. 16(d)(9), counsel verifies that the factual statements contained in this Petition are taken from the record in the proceedings below.

Respectfully submitted,


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Huntington Park & Recreation District**

CORRECTED VERIFICATION OF COUNSEL

Pursuant to W. Va. Code § 53-1-3, counsel verifies that the statements contained in the Petition for Writ of Prohibition are taken from the record in the proceedings below, including pleadings, affidavits, depositions and other documents filed therein.

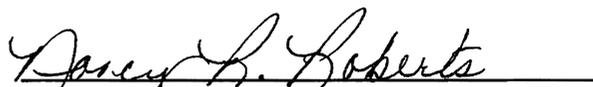
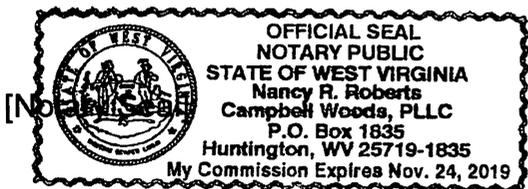


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STATE OF WEST VIRGINIA:
COUNTY OF CABELL, to wit:

Taken, subscribed, and sworn to before me this 24th day of March, 2015, by Cheryl Lynne Connelly, as counsel for Petitioner, Greater Huntington Park & Recreation District.

My commission expires November 24, 2019.



Nancy R. Roberts
Notary Public

CERTIFICATE OF SERVICE

I, Cheryl Lynne Connelly, counsel for Petitioner, do hereby certify that service of the foregoing **Petition for Writ of Prohibition** and **Appendix** has been made upon counsel of record and the following individuals by depositing true copies of the same in the United States Mail, first-class postage prepaid, addressed as follows:

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Honorable Darrell Pratt, Judge
Circuit Court of Wayne County, West Virginia
P.O. Box 68
Wayne, WV 25570
Respondent

Thomas M. Plymale, Esquire
Wayne County Prosecuting Attorney
P.O. Box 758
Wayne, WV 25570

Done this 23rd day of March, 2015.

A handwritten signature in black ink, appearing to read "Cheryl Connelly", written over a horizontal line.

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