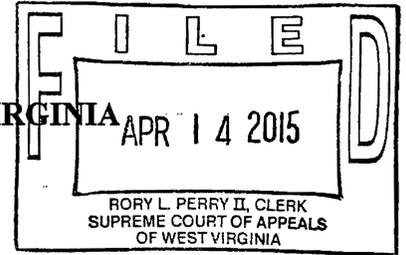


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

Petitioner,

v.

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

Respondents.

Upon Original Jurisdiction
In Prohibition No.: 15-0249
(Civil Action No.: 11-C-98
Circuit Court of Wayne
County, West Virginia)

RESPONDENT, SUMMER REYNOLDS' SUMMARY RESPONSE IN
OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF PROHIBITION

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I. RESPONSE TO QUESTIONS PRESENTED IN PETITION

The sole question here is whether, based upon the law and facts of this case, the trial court exceeded its legitimate powers in denying immunity and summary judgment to Petitioner under W.Va.Code § 29-12A-5(a)(7). Petitioner argues that the trial court acted erroneously in denying its assertions of immunity. Respondent disagrees. Under the law and facts of this case, Greater Huntington Park & Recreation District (hereinafter as “GHPRD”) is not immune under W.Va. Code § 29-12A-5(a)(7), and no relief is due to GHPRD because the trial court has not done anything that needs correcting.

II. STATEMENT OF THE CASE

A. Procedural History

Respondent takes a few issues with the procedural history set forth by GHPRD. First, GHPRD incorrectly limits and mischaracterizes Summer Reynolds’ claims. (See GHPRD’s Petition, p. 4, which reads as follows: “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.”). The claims of Summer Reynolds are not so constrained. Respondent’s case is premised upon the negligent design, construction, and maintenance of Westmoreland Park. In particular, Respondent claims that GHPRD failed to install a fence or impenetrable barrier between the playground and the adjacent high-speed double mainline railroad tracks to contain children and prevent them from accessing the tracks as required by West Virginia law and GHPRD’s adopted industry standards.

Second, GHPRD’s assertion that the southern border of Westmoreland Park was somehow in a natural state is false. As shown below, the property at issue was entirely designed,

created, maintained and improved by architects, engineers, landscapers, construction crews and park officials and their employees. It lies in the middle of an urban area of Huntington and is completely man-made.

Finally, GHPRD waited three and a half years into litigation before filing the underlying motion for summary judgment seeking dismissal of this civil action pursuant to W. Va. Code § 29-12A-5(a)(7), a fact that may speak to its merit and certainly undermines the judicial efficiency purpose of the statute invoked by Petitioner. Notwithstanding, GHPRD has now filed the instant petition. A Writ of Prohibition is not appropriate in this matter, either in fact or law, and the decision of the lower court was correct and should be affirmed.

B. Statement of Relevant Facts

As a young girl in 2009, Summer Reynolds and her friends were playing with a soccer ball in Westmoreland Park in Huntington, West Virginia, when the ball travelled through a large railroad rock ballast path stretching from inside Westmoreland Park to the abutting railroad tracks. The railroad tracks were mere feet from playground where the children were playing. (App. pp. 6, 39-40, 44, 74-80, 191, 295). The children, including Summer, went through the railroad rock ballast path to retrieve the ball. The other children returned, but Summer did not. Summer was struck by a CSX freight train. (App. pp. 6, 39-40, 44, 191). She suffered catastrophic brain and orthopedic injuries as result. (App. pp. 120-121)

The property at issue is known as “Westmoreland Park.” (App. p. 73: www.ghprd.org; last accessed on January 15, 2015). It is located at 810 Vernon St., Huntington, West Virginia. (App. p. 73). Westmoreland Park is a very small (approximately 3-acres), urban, public park and playground, wholly designed, engineered, created, and maintained by GHPRD and its developers for use by children and families. (App. pp. 74-80, 102-105, 125, 247, 295).

Designs on Westmoreland Park began in 1980, construction started in 1982, GHPRD took over full operational control and maintenance responsibilities of Westmoreland Park in 1984, and GHPRD acquired full title of Westmoreland Park in 1995 (App. pp. 84, 101-102, 104, 106; GHPRD's Petition, Statement of Relevant Facts, p. 2). GHPRD provided some oversight in reviewing the designs of Westmoreland Park, as it correctly anticipated that it would take over the operation and ownership of the park after its construction. (App. p. 84).

Prior to its design and construction, there was no Westmoreland Park, and there was nothing that remotely resembled a park, playground, or recreational area of any kind. (App. pp. 74-80, 84, 154-155, 295). The parcel was a vacant lot with a few random trees. (App. pp. 74-80, 84, 295). Approximately one-third of the land was just a gravel parking lot. (App. pp. 74-80, 84, 295).

Within this small, three (3) acre vacant lot, architects, planners, landscapers, construction crews, government officials and their employees set to designing and manufacturing Westmoreland Park, a small, urban public park and playground for children. (App. pp. 74-80, 84, 102-103, 105, 295). In fact, every detail of Westmoreland Park was designed and engineered by architects and planners from Pittsburg, PA, Seay and Ridenour Inc., which were employed the government. (App. pp. 74-80, 84, 295). Fifty-three (53) trees with detailed specifications were planted by GHPRD's predecessor along the southern border of Westmoreland Park abutting the railroad tracks. (App. pp. 74-80, 84, 95, 108-109, 112-113, 116, 157, 295). These trees were specially planted to act as a safety barrier between Westmoreland Park and the high-speed railroad tracks. (App. pp. 74-80, 84, 95, 108-109, 112-113, 116, 157, 295). The government and its developers also removed multiple trees from along the southern border abutting the railroad tracks. (App. pp. 74-80, 295). The property at issue was graded and new topsoil was added.

(App. pp. 74-80, 295). Grass was planted throughout. (App. pp. 74-80, 295). Curbs were cut out, and two new parking lots were built. (App. pp. 74-80, 295). A fenced-in basketball court was built. (App. pp. 73-80, 125, 295). A fenced-in tennis court was built. (App. pp. 73-80, 125, 295). A gazebo shelter and grilling station was designed and built. (App. pp. 73-80, 104, 125, 295). A playground area was designed and built. (App. pp. 73-80, 104, 125, 295). A large bathroom facility was built. (App. pp. 73-80, 149, 295). Sidewalks were added throughout the park. (App. pp. 73-80, 139, 295). Benches and picnic tables were installed in the park. (App. pp. 73-80, 125, 295). Light posts were installed. (App. pp. 73-80, 295). Gravel was added. (App. pp. 73-80, 295). Storm inlets were added. (App. pp. 73-80, 295). **In short, all of Westmoreland Park, was wholly and artificially designed, manufactured, maintained, and heavily improved by human beings.**

Even the trees planted and intended by the developers and GHPRD to create a safety barrier between Westmoreland Park and the high speed railroad tracks, and even the very railroad rock ballast path located at Westmoreland Park on which Summer Reynolds walked to access the railroad tracks on the day in question were wholly created and maintained by GHPRD and its developers. (App. pp. 44, 73-80, 95, 108-109, 112-113, 116, 133-151, 156-159, 295). In addition to maintaining every other feature of the park, GHPRD was also maintaining the brush and tree line that was planted along the southern border of Westmoreland Park, including mowing and cutting back the brush and trees all the way to the railroad's rock ballast line. (App. pp. 24, 43-44, 114-115, 125).

Westmoreland Park was wholly designed, built, and maintained by people at a site such that its southern confines were intended to border a set of pre-existing, active, high-speed, CSX Transportation double mainline railroad tracks. (App. pp. 73-80, 84, 105-106, 122, 182-189,

295; GHPRD's Petition, Statement of Relevant Facts, ¶ 3). Twenty-five (25) to thirty-eight (38) trains per day passed along the tracks that abutted the southern border of Westmoreland Park. (App. pp. 175-181). Trains were authorized to travel up to 79 mph along these tracks at the location of the park. (App. pp. 175-181). The railroad crossing located at the southeast quadrant of Westmoreland Park had seen no less than four (4) train-car collisions. (App. pp. 182-189).

As GHPRD admits, Westmoreland Park was built so dangerously close to the high-speed railroad tracks that Westmoreland Park was a "vulnerable play zone" presenting debilitating and life threatening features to children and GHPRD was required to install a fence according to established park safety industry standards. (App. pp. 103-104, 107-109, 192-193; ASTM F 2049-08a *Fencing*). The proximity to the railroad tracks, and the failure to install a fence also triggers liability under W.Va. Code § 29-12A-4(c), § 64-18-15.1, and § 64-18-15.5 ("A fence or barrier shall be provided around any outdoor playground or activity area located in an area where safety may be a concern and which is used by children or persons not capable of self preservation"). Yet as GHPRD further admits, no such fence was ever installed in violation of the safety standards. (App. pp. 103-104, 107-109, 192-193; see also, Report of Industry Expert Thom Thompson at App. pp. 190-195). It logically follows that the failure to install the fence was likewise a violation of the referenced code provisions. Inexplicably, there is still no fence.

Most shocking is GHPRD's latest definitive admission that the tree line that it and its developers intentionally designed, planted, and maintained along the southern edge of the park to act as a safety barrier against the railroad tracks has always been so *permeable* that "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." (App. pp. 23-24; GHPRD's Petition, Statement of Relevant Facts, ¶ 2). Prior to this latest admission, David Kinney, GHPRD's designated corporate representative,

testified that GHPRD recognized the serious dangers to children due to the proximity of the railroad tracks, defended the trees and vegetation along the south border as a planned and intended barrier against the serious dangers posed to children by the railroad tracks, and described the alleged barrier as *relatively impenetrable*. (App. pp. 108-109, 116).

Q. Does the park district agree that the picnic area and playground that we have been talking about was a vulnerable play zone due to its proximity to the railroad tracks?

A. Yes, it could be deemed a vulnerable play zone. And that's why the barrier of vegetation, trees and that kind of thing was dividing the two. (App. p. 108).

Q. But you would agree that it was a vulnerable play zone to start out with, right?

A. Yes. (App. p. 108).

Q. And since the park district saw that there were railroad tracks in close proximity to this playground and picnic area when it first started maintaining it in 1984, and then acquired it in 1995, did the park district consider different ways to meet the code and the ASTM standards?

A. The park district was satisfied that the barrier between the two – the picnic shelter and the playground area that exists with the trees and shrubs and vegetation was sufficient. (App. p. 109)

Q. Would you say that that barrier is impenetrable?

A. Relatively so. (App. p. 109)

Q. So at some point when you began maintaining Westmoreland Park and when you acquired it, the park had recognized that there was danger associated with the proximity of the railroad tracks and felt that there needed to be a barrier, but that this barrier of brush line was sufficient?

A. Yes. (App. p. 116)

Whether permeable or relatively impenetrable, GHPRD admits the tree line barrier on the southern border abutting the railroad tracks was planted there by its design.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is appropriate for a memorandum decision, affirming the decision of the Circuit Court of Wayne County, WV, pursuant to W. Va. R. App. P. 21(c)(1) and (c)(2).

IV. ARGUMENT

In dealing with statutory immunities, this Honorable Court has held as follows:

“Though it is the province of the jury to determine disputed predicate facts, the question of whether a constitutional or statutory right was clearly established is one of law for the court. In this connection, it is the jury, not the judge, who must decide the disputed foundational or historical facts that underlie an immunity determination, but it is solely the prerogative of the court to make the ultimate legal conclusion.”

Hutchinson v. City of Huntington, 198 W. Va. 139, 149, 479 S.E.2d 649 (1996).

The decision to deny GHPRD’s Motion for Summary Judgment (App. pp. 1-4, 199-200, 293-294) was based on fact and law. The decision was made after weighing the evidence and applying the persuasive authority on the alleged immunity. Just because the findings and conclusions of the trial court were contrary to the Petitioner’s unfounded position does not mean such findings and conclusions were based on an erroneous assessment of the evidence or law, or that they resulted in the trial court exceeding its legitimate powers.

Rather, to find the Petitioner immune from this suit based on the present circumstances would not only require an erroneous assessment of the fact and law, but also fly in the face of the general rule in West Virginia articulated by this Court:

The general rule of construction in governmental tort legislation favors liability, not immunity. Unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail. Marlin v. Bill Rich Const., Inc., 198 W.Va. 635; 643, 482 S.E.2d 620, 628 (1996); Calabrese v. City of Charleston, 204 W.Va. 650, 656, 515 S.E.2d 814, 820 (1999); Zirkle v. Elkins Road Pub. Serv. Dist., 221 W.Va. 409, 413, 655 S.E.2d 155, 159 (2007) (per curiam); Russell v. Bush & Burchett, Inc., 210 W.Va. 699, 705, 559 S.E.2d 36, 42 (2001).

The legislature has not clearly provided for immunity under the circumstances involved in this case, and the analysis should end in favor of holding GHPRD accountable for Summer Reynolds' injuries.

Even if the legislature had made the legal landscape murky in this regard, it is clear based on the evidence that the property at issue was wholly and heavily improved and was the sole design, engineering, and maintenance of GHPRD and its developers. The high-speed railroad tracks abutting the southern border of Westmoreland Park are not naturally occurring but were human-made for advanced economic transportation. The railroad rock ballast covered slope is also a product of the high-speed rails, which again, is not naturally occurring. The entire area of the specific railroad rock ballast-covered path used by Summer Reynolds to access the high-speed railroad tracks was also completely human-made. The fifty-three (53) trees planted by developers along the southern border of the park to act as safety barrier against the high-speed railroad tracks are also the product of human design, creation, and maintenance, and which is also a significant improvement of the property from its original condition. The whole of this little three-acre park, and all those areas where Summer Reynolds was playing with and retrieving the soccer ball when she was struck by a train was then and remains today the entire product of human design, manufacture, and maintenance. It is simply illogical to suggest that the area in question was a natural condition of unimproved property.

There is no West Virginia case supporting GHPRD's basis for relief. While cited by GHPRD, the Stamper v. Kanawha County Bd. of Educ. case lends no support for its petition. 191 W.Va. 297, 445 S.E.2d 238 (1994). Stamper involved a child injured while playing basketball at a public elementary school. This Court provided no immunity to the Board of Education in Stamper, and gave no suggestion that immunity was factually available.

Without case support from West Virginia, GHPRD highlights several cases from California, and one case from New Jersey. These cases lend no support to GHPRD's petition, but actually implore its denial. These out-of-state cases cited by Petitioner are factually different from the instant case, as properly recognized by the lower court. The Honorable Darrell Pratt easily and correctly distinguished these out-of-state cases from the present case.

In Winterburn v. City of Pomona, 186 Cal. App. 3d 878, 231 Cal. Rptr. 105 (1986), an 11-year-old was killed when rocks and debris fell from the roof of a natural geological cave (a natural condition). The natural cave was located on unimproved greenbelt land, and every aspect of the property naturally occurring. As the Court pointed out, the greenbelt was entirely "lacking the usual park-like improvements, such as restrooms, picnic sights and sporting facilities." Winterburn, at 880. By way of more background, a greenbelt is a land use designation used in land use planning to retain areas of largely undeveloped, wild, or agricultural land surrounding or neighboring urban areas. Thus, in Winterburn, the cave and the land on which the cave stood were all naturally occurring and undeveloped.

In Rendak v. State 18 Cal. App. 3d 286, 95 Cal. Rptr. 665 (1971), GHPRD must cite the dissent, as the majority and controlling opinion is contrary to the arguments it advances. In Rendak, a man was killed when a portion of a naturally occurring cliff located in an unimproved, "separate, distinct and remote" portion of a 64-acre state park, slipped into the sea as the man waded along the land below. The naturally occurring area in question was so far removed from any human improvements whatsoever that it was entirely submerged and inaccessible during high tides. In affirming a nonsuit, the Court in Rendak observed, as the basis of its holding, that "(h)ere, the natural and unimproved area is shown by the evidence and the aerial photograph to

be **separate, distinct and remote** from the improved portions, and thus clearly with Section 831.2” Rendak, at 289. (emphasis added).

In Santa Cruz v. Superior Court, 198 Cal. App. 3d 999, 244 Cal. Rptr. 105 (1988), Plaintiff was injured diving into the San Lorenzo River, striking his head on a naturally occurring sandbar, all at a point about 200 yards away from the Santa Cruz beach. The injury occurred in the San Lorenzo River, a naturally occurring river, and at a point of entirely unimproved property. The San Lorenzo River is not a human-made river, but a river that was created solely by natural conditions. According to Court and underlying record, the San Lorenzo River “is not substantially different now from what it ever was.” Santa Cruz, at 1002. Moreover, the uncontroverted evidence was that sandbar formations were the function of weather, rainfall, runoff, sediment movement, ocean tides, and the fluctuating water through the river. Id. at 1002-103. Further, the channel naturally reformed itself every one and half to two years. The river and the sandbar were all the product of naturally occurring conditions, and they were located on undeveloped land. Id. There were no facts showing that the San Lorenzo River or the sandbar was improved by the city, and that it was and had always been the product of natural conditions of unimproved property.

In Rombalski v. City of Laguna Beach, 213 Cal. App. 3d 842, 261 Cal. Rptr. 820 (1989), a 13-year-old boy dove into the Pacific Ocean from a rock located at Pearl Beach. The entire beach and the rock formations from which the young boy jumped were naturally occurring and located on unimproved property.

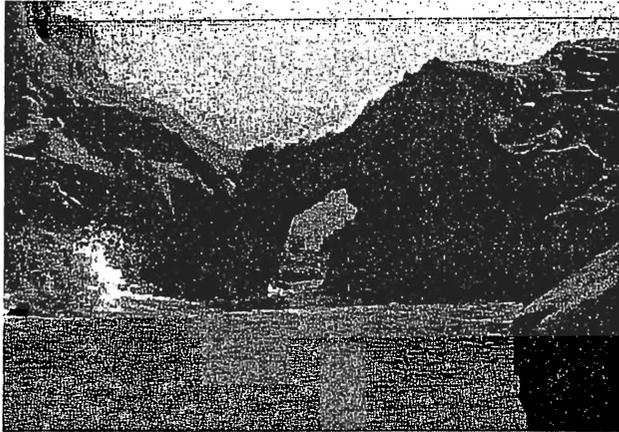


Photo: The Rocks of Pearl Beach, California.

In Bartlett v. State of California, 199 Cal. App. 3d 392, 245 Cal. Rptr. 32 (1988), Plaintiff was injured while riding her all-terrain vehicle on naturally occurring and active sand dunes at Pismo Beach. The recreational area is massive in scope, approximately 1,500 acres in size, containing a naturally occurring beach and naturally occurring sand dunes.

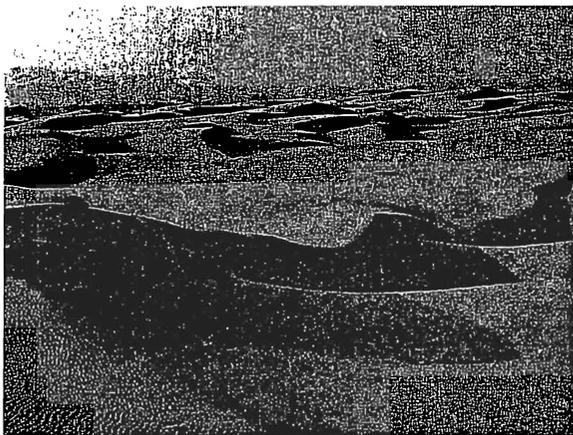


Photo: The Sand Dunes of Pismo

In Schooler v. State of California, 85 Cal. App. 4th 1004, 102 Cal. Rptr. 2d, 343 (2000), a homeowner was suing the government for the erosion of bluff that provided support for his home. The parties were in agreement that the bluff constituted unimproved public property. Moreover, the governmental entity had not done anything to alter, change, or improve the bluff or beach below. Rather, over time, all parties agreed that wind, water, and waves were causing

the very erosion at issue. Thus, not only was the land entirely unimproved, but the erosion of the bluff was also caused by natural conditions. The supplemental pedestrian traffic Plaintiff alleged contributed to some degree to the erosion did not “materially change the natural character of the erosion” that was already occurring naturally. Schooler, at 1010. Thus, the Court held that “the human activity does not affect the natural character of the resulting condition,” such that it could only be concluded that the “bluff erosion is a ‘natural condition’ as a matter of law.” Id.



Photo: The Solana Beach cliffs and beach

Plaintiff is unsure why GHPRD even cites Troth v. State of New Jersey, 117 N.J. 258, 566 A.2d 515 (1989). When compared to the other cases cited by GHPRD, Troth is even more damaging to GHPRD’s petition. In Troth a man was killed and his wife seriously injured when their small fishing boat was swept over the spillway on Union Lake Dam, located on a 4,300-acre recreational tract owned by the State of New Jersey. As stated by the Court, the “gist of the complaint” was that the “configuration of the spillway...created a dangerous condition.” Troth, at 260. Because the Union Lake Dam was a human-made condition and improved property (just as the entirety of Westmoreland Park was human made and improved property), the New Jersey Supreme Court, concluded, “that Union Lake Dam is not unimproved public property,” and that plaintiff’s lawsuit against the State could proceed. Id. at 272.

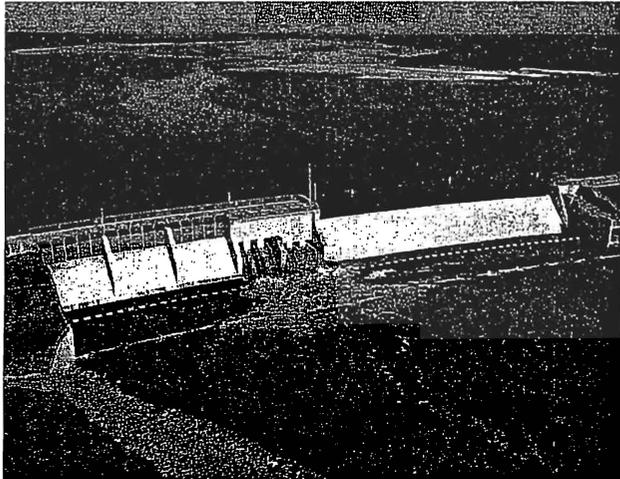


Photo: Union Lake Dam and Spillway

The out-of-state cases cited by GHPRD lend no support Respondent, not GHPRD. Whether it was a natural geological cave on entirely undeveloped land; whether it was a naturally occurring cliff that fell into the sea in remote area otherwise submerged during high tides; whether it was a man diving into a natural river striking a natural sandbar on unimproved property; whether it was a young boy diving from a large natural rock formation in the Pacific Ocean; whether it was the natural erosion of a natural bluff adjacent to a natural beach on unimproved property; and whether it was naturally occurring sand dunes in a 1500-acre recreational area; these cases do not compare to a case involving a small, 3-acre, urban park in Huntington, West Virginia that was wholly designed, engineered, built, and maintained on a daily basis by GHPRD and its developers, and whose playground and activity areas for children abutted active high speed double main line railroad tracks, which were also the product and improvement of human activity. (App. pp. 73-80, 85, 295).

Again, the **entirety of Westmoreland Park**, including the very trees planted along the southern border to act as a safety barrier against the railroad tracks, was wholly designed, built and maintained by GHPRD and its developers. The railroad rock ballast pathway in Westmoreland Park used by Summer Reynolds to access the railroad tracks in order to collect

her ball was also completely man-made. The elevated railroad tracks, and the train that ultimately struck Summer Reynolds, were likewise man-made. So was the decision not to install a fence. GHPRD's claim of immunity has no basis in law for fact.

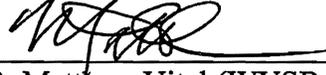
V. CONCLUSION AND RELIEF REQUESTED

In asking the Court to apply immunity to this small urban playground, Petitioner is asking this Court to do something no other court in this nation has done. GHPRD certainly cites no West Virginia or out-of-state case that supports its position. West Virginia's legislature has not clearly provided for immunity in the instant case. The entirety of the property at issue was the sole design, creation, and maintenance of human beings. Westmoreland Park and that abutting high-speed double mainline railroad tracks are all wholly human-made improved property. Even the fifty-three trees planted by design as a safety barrier against the railroad tracks along the southern border of Westmoreland Park were put there by people, and that border was maintained by GHPRD. The railroad rock ballast pathway used by Summer Reynolds to access to the railroad tracks was wholly human-made. The elevated railroad tracks and the train that struck Summer Reynolds were also the product of human creation and wholly improved property. The issue for the jury is whether GHPRD was negligent when it violated West Virginia law and the very industry standards that had adopted when it failed to install a fence at Westmoreland Park to protect children against the high-speed double mainline railroad tracks that abutted the "vulnerable play zones" of Westmoreland Park. GHPRD and its developers placed the playground in that precarious position; the least they could have done was put up a fence. Respondent respectfully requests that the Court deny GHPRD's Petition for Writ of Prohibition, and grant such other and further relief as the Court deems just and proper under the circumstances.

VII. VERIFICATION

Counsel verifies that the factual statements contained in the summary response are taken from the record in the proceedings below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Matthew R. Oliver, counsel for the Respondent, do hereby certify that service upon the foregoing **Respondent, Summer Reynolds' Summary Response in Opposition to Petitioner's Petition for Writ of Prohibition and Supplement to Petitioner's Appendix** has been made upon counsel of record and the following individuals by depositing the same in the United States Mail, first-class postage prepaid, addressed as follows:

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Done this 15 day of April, 2015.



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