KELLEY V. UNITED STATES OF AMERICA: CREATING A TWO-PART TEST FOR IMMUNITY UNDER PENNSYLVANIA'S RECREATIONAL USE OF LAND & WATER ACT

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I. INTRODUCTION

In *Kelley v. United States of America*,[1] the United States District Court for the Eastern District of Pennsylvania held that a man-made walkway located in Valley Forge National Historical Park was within the scope of Pennsylvania's Recreational Use of Land and Water Act ("RULWA" or the "Recreation Act"),[2] and that the park's owner-operator was therefore immune from liability for injuries suffered by a pedestrian who slipped on the vinyl-covered surface.[3] The court reasoned that if the Recreation Act applies to the site as a whole, immunity extends to "ancillary structures" that support recreational activities at the site.[4] This two-part analysis resolved conflicting case law regarding the extent to which the character of an entire parcel should be taken into account and whether RULWA's negligence immunity covers man-made improvements and alterations to land. By significantly clarifying, and strengthening, the Recreation Act, the ruling should provide comfort to park and recreation providers and landowners.[5]

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1. Civil Action No. 11-5537, 2012 WL 1392520 (E.D. Pa. Apr. 20, 2012).

2. Recreational Use of Land and Water Act, 68 PA. STAT. ANN. §§ 477-1 to -7 (2004).

3. *Kelley*, 2012 WL 1392520, at *1, *5.

4. *Id.* at *4-5.

5. Pennsylvania's greenspaces and scenic waterways offer a variety of recreational opportunities that keep citizens healthy and generate millions of dollars in revenues. *See, e.g.*, PA. DEPT. OF CONSERVATION & NATURAL RES., PENNSYLVANIA OUTDOORS: THE KEYSTONE FOR HEALTHY LIVING, 2009-2013 STATEWIDE COMPREHENSIVE OUTDOOR RECREATION PLAN (2009), *available at* http://www.paoutdoorrecplan.com/cs/groups/public/documents/document/d_002750.pdf; Elana Richman, *Economic Benefits of Land Conservation*, PA. LAND TRUST ASS'N, http://conservationtools.org/libraries/1/library_items/1054-Economic-Benefits-of-Land-Conservation-A-Guide (last updated Apr. 6, 2012); Economy League of Greater Phila. et al., *Return on Environment: The Economic Value of Protected Open Space in Southeastern Pennsylvania*, CONSERVATIONTOOLS.ORG (Jan. 2011), *available at* http://conservationtools.org/libraries/1/library_items/804. But government has been unable to keep up with the growing demand for public recreational land. *See, e.g.*, JOHN D. COPELAND, RECREATIONAL ACCESS TO PRIVATE LANDS: LIABILITY PROBLEMS AND SOLUTIONS 4 (2d ed. 1998). Moreover, during the last few years, state funding for new park and trail acquisition has decreased dramatically. *See, e.g.*, *PRPS 2013-2014 Legislative Priorities*, PA. RECREATION & PARK SOC'Y, INC., http://www.prps.org/advocacy/advocacy-legislative.html (last visited Sept. 14, 2013) (noting that the current state

II. OVERVIEW OF PENNSYLVANIA'S RECREATION ACT

Like every state in the nation,[6] Pennsylvania has a statute that confers negligence immunity on landowners[7] who permit or invite[8] members of the general public[9] onto their properties for recreational purposes[10] free of

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budget reflects an 82% cut to Growing Greener, one of Pennsylvania's largest open space acquisition grant programs).

One way to make more recreational land available to the public is to rely on private lands to fill the gap. Recreational immunity statutes like RULWA incentivize landowners to open their lands for public recreational access by protecting them from negligence lawsuits. *See infra* Part II. This protection is an important reason why many landowners allow access on their lands. *See, e.g.*, B.A. Wright et al., *Rural landowner liability for recreational injuries: Myths, perceptions, and realities*, 57 J. SOIL & WATER CONSERVATION 183, 183 (2002) ("The fear of being sued or being held liable for injuries sustained by recreational users has consistently been cited as a primary concern of landowners[.]"). Since the statute's passage in 1965, RULWA has been held to apply to public landowners as well. *See* Dep't of Envtl. Res. v. Auresto, 511 A.2d 815, 817 (Pa. 1986).

6. All 50 states have recreational immunity statutes. Pennsylvania's Recreation Act was patterned on the model act promulgated by the Council of State Governments. Council of State Gov'ts, *Public Recreation on Private Lands: Limitations on Liability*, 24 SUGGESTED STATE LEGISLATION 150, 150-52 (1965). In 1979, a new model act was drafted to clarify and broaden several provisions of the earlier model act after a study showed that injured recreational users often were successful in their lawsuits, resulting in landowners closing their lands to the public. *See* W.L. Church, PRIVATE LANDS AND PUBLIC RECREATION: A REPORT AND PROPOSED NEW MODEL ACT ON ACCESS, LIABILITY AND TRESPASS 6, 14 (1979) [hereinafter 1979 Model Act].

Several states amended their recreational use acts to add provisions from the 1979 Model Act. Pennsylvania has not yet done so, although two bills were introduced in 2011 to address a number of the Recreation Act's weaknesses and ambiguities. *See* H.R. 1495, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S. 1029, 195th Gen. Assemb., Reg. Sess. (Pa. 2011). *See also infra* notes 10, 15, 46, and 70. At this time, the bills have not been successfully voted out of committee.

Pennsylvania's Recreation Act has been amended only three times since its passage in 1965: to explicitly cover off-site hunting injuries, 68 PA. STAT. ANN. § 477-4 (West Supp. 2013); *see also infra* note 12, and to expand the list of "recreational purposes" to include both "cave exploration" and "recreational noncommercial aircraft operations or recreational noncommercial ultralight operations on private airstrips." 68 PA. STAT. ANN. § 477-2(3).

7. "Owner" is defined as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises." 68 PA. STAT. ANN. § 477-2(2). Grantees of conservation easements and access easements also are protected under the Recreation Act if they exercise sufficient control over the land to be deemed "possessors." Stanton v. Lackawanna Energy, Ltd., 886 A.2d 667, 673 (Pa. 2005). If such grantees don't exercise enough control to be deemed possessors, under common law principles of negligence they would not be subject to liability. *Id.* at 677.

8. Landowners may be immune *even if they haven't expressly invited or permitted the public to enter their property*. *See* Friedman v. Grand Cent. Sanitation, Inc., 571 A.2d 373, 373, 375 (Pa. 1990) (stating that an owner of a landfill that displayed "no trespassing" signs, was not liable to a hunter who wandered onto the land, was overcome with fumes, and fell into trench).

9. RULWA immunity is not available when only a particular segment of the general public is permitted entrance. *See, e.g.*, Bolyard v. Wallenpaupack Lake Estates, Inc., Civil Action No. 3:10-CV-87, 2012 WL 629391, at *4-5 (M.D. Pa. Feb. 27, 2012) (holding that a defunct ski slope was not covered by RULWA where the slope was part of a private residential community).

10. RULWA's definition of "recreational purpose" includes, but "is not limited to . . . hunting, fishing, swimming, boating, recreational noncommercial aircraft operations or recreational noncommercial ultralight operations on private airstrips, camping, picnicking,

charge.[11] The Recreation Act is designed to encourage "owners of land to make land and water areas available to the public for recreational purposes by limiting their liability."[12] The statute provides that: "[A]n owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes."[13] Landowners can raise the Recreation Act[14] as a defense if they are sued for personal injury or property damage.[15]

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hiking, pleasure driving, nature study, water skiing, water sports, cave exploration, and viewing or enjoying historical, archaeological, scenic, or scientific sites." 68 PA. STAT. ANN. § 477-2(3).

The definition raises the question as to why certain activities were not included. Why is *water*skiing listed but *cross-country* skiing excluded? Is there a reason that jogging, horseback riding, and mountain biking are not on the list? Could a future court construe these omissions as deliberate drafting choices? The piecemeal manner in which this definition is structured ensures that every time a new recreational activity emerges there is pressure for the Recreation Act to be amended.

The 1979 Model Act, by contrast, defines "recreational use" as: "any activity undertaken for exercise, education, relaxation, or pleasure on land owned by another." 1979 Model Act, *supra* note 6, app. D at 29 § 2(3). The pending state House and Senate bills add this Model Act definition to RULWA's list of covered activities. H.R. 1495, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S. 1029, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

11. "Charge" is defined as "the admission price or fee asked in return for invitation or permission to enter or go upon the land." 68 PA. STAT. ANN. § 477-2(4).

12. *Id.* § 477-1. If this liability protection is ambiguous or reduced due to court decisions, it is reasonable that landowners would limit access. *Cf.* Wright, *supra* note 5, at 183. In 2007, RULWA liability protection for hunting lands was perceived to be weak when a farmer who allowed a hunter onto his property was found partially liable for injuries caused by an errant hunting bullet that struck a neighbor off of the farmer's property. *See Landowner liability protection major victory for hunters*, THE MORNING CALL, July 3, 2007, at C8, *available at* http://articles.mcall.com/2007-07-03/sports/3745308_1_liability-protection-hunters-landowners. The case caused consternation among the hunting and wildlife community, who feared that the public hunting access offered by over 29,000 private landowners would be limited as a result. *See id.* (noting that "thousands more acres" would be posted because of the ruling). Although it appears that the defendant farmer's attorney simply failed to raise the Recreation Act as a defense, Christian Berg, *Liability protection bill hailed: Hunters, landowners praise legislation headed for state Senate*, THE MORNING CALL, May 29, 2007, at C8, *available at* http://articles.mcall.com/2007-05-29/sports/3728787_1_liability-protection-hunting-landowners (noting that the Recreation Act defense was not raised in court or to the jury), there was widespread concern that the verdict indicated a deficiency in RULWA. The legislature responded to the perceived loophole in the Recreation Act by adding a provision specifically protecting hunters. *See* 68 PA. STAT. ANN. § 477-4.

13. 68 PA. STAT. ANN. § 477-3 (2004). The Recreation Act further provides, in pertinent part, that:

> an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:
>
> (1) Extend any assurance that the premises are safe for any purpose.
>
> (2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

> (3) Assume responsibility for or incur liability for any injury to persons or property caused by an act of omission of such persons.

68 PA. STAT. ANN. § 477-4.

14. Pennsylvania's Rails to Trails Act offers similar negligence immunity to rail-trail owners and operators:

> [A]n owner or lessee who provides the public with land for use as a trail under this act or who owns land adjoining any trail developed under this act owes no duty of care to keep the land safe for entry or use by others for recreational purposes, or to give any warning to persons entering or going on that trail land of a dangerous condition, use, structure or activity thereon.

32 PA. STAT. ANN. §§ 5611, 5621(a) (1997).

However, unlike the Recreation Act, there are no cases excluding man-made improvements from the scope of the Rails to Trails Act. In fact, the immunity provision of the Rails to Trails Act only makes sense if they *do* cover improvements because all railbeds were initially man-made. Further, turning abandoned railbeds into recreational trails necessitates additional improvements such as surfacing and bridges.

15. The Recreation Act does not prevent landowners from being sued; rather, it provides them with a defense to claims that their *negligence* caused plaintiff's injury. In any lawsuit claiming negligence, a plaintiff must demonstrate: (1) that defendant owed plaintiff a duty of care; (2) that defendant breached the duty of care; (3) a causal connection between the breach and the injury; and (4) damage. Farabaugh v. Pa. Tpk. Comm'n, 911 A.2d 1264, 1272-73 (Pa. 2006). The particular duty of care that landowners owe to entrants depends upon whether they are invitees, licensees, or trespassers. Trude v. Martin, 660 A.2d 626, 630 (Pa. Super. Ct. 1995). See RESTATEMENT (SECOND) OF TORTS § 332 (1965), defining an invitee as either "a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public[ ]" or "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land[;]" see also *id.* § 330, defining a licensee as one who may "enter or remain on land only by virtue of the possessor's consent[;]" *id.* § 329, defining a trespasser as one "who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Landowners owe a high duty of care to invitees and licensees, but owe trespassers only the duty not to deliberately or recklessly harm them. Oswald v. Hausman, 548 A.2d 594, 598-99 (Pa. Super. Ct. 1988). Recreational immunity acts essentially *reduce* the duty of care landowners would otherwise owe to recreational users to the lower duty owed to trespassers. RONALD A. KAISER & BRETT A. WRIGHT, LIABILITY AND IMMUNITY: A NATIONAL ASSESSMENT OF LANDOWNER RISK FOR RECREATIONAL INJURIES 10 (1994), *available at* http://www.tamu.edu/faculty//rakwater/research/Liability_and_Immunity.pdf.

Although RULWA immunizes negligence, it does not immunize "wilful [sic] or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." 68 PA. STAT. ANN. § 477-6(1) (2004). "Willful or malicious" means reckless or egregious behavior not necessarily rising to the level of "intentional" misconduct. *See* Evans v. Phila. Transp. Co., 212 A.2d 440, 443 (Pa. 1965) (distinguishing the lesser "wanton misconduct" from "willful misconduct," noting that "wilful [sic] misconduct means that the actor desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensue[ ]"). *See also* Ruspi v. Glatz, 69 A.3d 680, 690 (Pa. Super. Ct. 2013) (citing Livingston v. Pa. Power & Light Co., 609 F. Supp. 643, 649 (E.D. Pa. 1985), *aff'd*, 782 F.2d 1030 (3d Cir. 1986)) ("[W]illfulness under section 477-6 [of RULWA] contains two elements: (1) actual knowledge of a danger (2) that is not obvious to those entering the premises[.]").

The 1979 Model Act drops the term "willful" and imposes liability only for "malicious" conduct. 1979 Model Act, *supra* note 6, app. D at 30 § 5(1). The pending Pennsylvania Senate and House Bills would define "willful or malicious" as "an actual or deliberate intention by the

III. *KELLEY'S* FACTS AND PLEADINGS

In November 2010, the plaintiffs visited the 3,500-acre Valley Forge National Historical Park ("Park") in King of Prussia, Pennsylvania.[16] Mrs. Kelley was on a raised, man-made walkway constructed of recycled plastic, on her way from the parking lot to an overlook platform, when she fell on an alleged "slick, slippery" surface covered with leaves; she fractured her knee cap and suffered nerve damage, lacerations, and permanent scars.[17]

Mrs. Kelley and her husband[18] claimed that defendant, the United States, negligently maintained and inspected the walkway and failed to warn of the surface's dangerous condition.[19] The defendant filed a motion to dismiss, raising RULWA as a defense.[20] It asserted that it was immune under RULWA for its alleged negligent failure to guard or warn against a dangerous condition.[21] Plaintiffs countered that the Park was not within RULWA's scope because recreational users were charged fees for various activities[22] and that the defendant had a duty to adequately maintain recreational improvements it had built within the Park.[23]

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owner to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others." H.R. 1495, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S. 1029, 195th Gen. Assemb., Reg. Sess. (Pa. 2011). In addition to defining this phrase, the pending bills would add a powerful litigation disincentive by awarding attorney's fees and costs to landowners who are found immune under the Recreation Act. *See* H.R. 1495, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S. 1029, 195th Gen. Assemb., Reg. Sess. (Pa. 2011) (Both bills provide that: "The court shall award attorney fees and direct legal costs to an owner, lessee, manager, holder of an easement or occupant of real property who is found not to be liable for the injury to a person or property pursuant to this act."). Note that because political subdivisions also are covered by Pennsylvania's Political Subdivision Tort Claims Act, which immunizes local governments for their willful failure to guard or warn of hazards, the two statutes taken together provide an absolute defense to liability for injuries occurring on municipal or state land covered by the Recreation Act. Debra Wolf Goldstein, *The Recreation Use of Land and Water Act:* Lory v. City of Philadelphia, 35 DUQ. L. REV. 783, 783 (1997) (citing 42 PA. CONS. STAT. ANN. §§ 8541-8564 (1982 & Supp. 1996)).

16. Kelley v. United States, Civil Action No. 11-5537, 2012 WL 1392520, at *1 (E.D. Pa. Apr. 20, 2012).

17. *Id.*

18. Mr. Kelley claimed loss of consortium. *Id.*

19. *Id.* at *2.

20. *Id.*

21. *Id.* The defendant noted that plaintiffs did not allege that the Park acted willfully or maliciously. *Id.*

22. *See Kelley*, 2012 WL 1392520, at *1. Plaintiffs noted that visitors could pay for guided trolley tours and educational programs, among other activities. *Id.*

23. *Id.* at *2.

IV. THE COURT'S ANALYSIS

The *Kelley* court concluded that the test for RULWA immunity is a two-part test. It ruled that the threshold question is whether RULWA covers the entire tract of land.[24] If it does, then the specific structure or portion of the parcel involved in the injury needs to be assessed to determine if it is "ancillary" to the site's recreational purpose.[25] If it is deemed "ancillary," the defendant may claim immunity under RULWA.[26] In so ruling, the *Kelley* court gave cohesion to a confusing and conflicting body of case law about the proper area of the parcel to assess for RULWA eligibility, as well as the degree to which man-made improvements are covered by RULWA.

A. RULWA Must Apply to the Property as a Whole

On its face, the Recreation Act applies to "land," which is defined broadly as: "roads, water, watercourses, private ways and buildings, structures and machinery or equipment when attached to the realty."[27] The *Kelley* court noted, however, that the Pennsylvania Supreme Court has limited the Recreation Act[28] to "*outdoor* recreation on largely *unimproved* land."[29] The state supreme court explained this limitation by noting that the "need to limit owner liability derives from the impracticability of keeping *large tracts of largely undeveloped land* safe for public use."[30] Indoor recreation centers and fully developed outdoor recreational facilities, therefore, have been excluded from the Recreation Act's protection.[31]

Kelley began by analyzing whether the Park as a whole is the type of large, undeveloped tract to which RULWA applies.[32] In looking at the entire parcel, *Kelley* differed from several previous decisions that had held a RULWA inquiry should focus only on the specific injury site and not on the larger parcel[33] or

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24. *Kelley*, 2012 WL 1392520, at *3.

25. *Id.* at *5.

26. *Id.*

27. 68 PA. STAT. ANN. § 477-2(1) (2004).

28. *Kelley*, 2012 WL 1392520, at *4 (quoting Stone v. York Haven Power Co., 749 A.2d 452, 455 (Pa. 2000)) ("[W]here land devoted to recreational purposes has been improved in such a manner as to require regular maintenance in order for it to be used and enjoyed safely, the owner has a duty to maintain the improvements . . . .").

29. *Id.* at *2 (quoting Rivera v. Phila. Theological Seminary, 507 A.2d 1, 8 (Pa. 1986)).

30. *Rivera*, 507 A.2d at 8 n.17 (emphasis added).

31. *See* Mills v. Commonwealth, 633 A.2d 1115, 1118-19 (Pa. 1993) (concluding that Philadelphia's heavily paved waterfront park, Penn's Landing, is not covered by RULWA); Walsh v. City of Phila., 585 A.2d 445, 446, 450 (Pa. 1991) (stating that outdoor basketball courts are not covered by RULWA); *Rivera*, 507 A.2d at 8-9 (noting that indoor swimming pools are not covered by RULWA).

32. *Kelley*, 2012 WL 1392520, at *3.

33. *See, e.g.*, Davis v. City of Phila., 987 A.2d 1274, 1277 (Pa. Commw. Ct. 2010) (stating that there was no need to consider whether the entirety of Philadelphia's Fairmount Park—an urban park replete with roads, museums, and statues—was covered by RULWA, where the injury occurred in open field within park); Bashioum v. Cnty. of Westmoreland, 747 A.2d 441, 446 (Pa. Commw. Ct. 2000) (stating that the correct focus is on the "specific area

that it should be determined on a case-by-case basis.[34] The *Kelley* court, however, asserted that analyzing the whole tract is a necessary first step in a RULWA analysis.[35]

Whether examining an entire parcel or the injury site, a RULWA analysis typically would consider the land's primary use, size, location, degree of enclosure, and amount of development.[36] But the *Kelley* court noted that a previous case, *Blake v. United States*,[37] already had decided that the Act covered the Park, finding it was "precisely the kind of land to which RU[LW]A tort immunity should be applied."[38]

Plaintiffs argue, in their amended complaint, that two changes to the Park undermined its current eligibility for RULWA immunity. First, the Park collected fees for certain activities; plaintiffs characterized this as "charging,"[39] which would vitiate RULWA immunity.[40] Second, plaintiffs also pointed to new construction and renovation of walkways, waysides, and other structures at the Park.[41] This raised the question, stated the court, of whether the Park was still "largely unimproved land," or whether it now was so developed as to fall outside the scope of the Recreation Act.[42]

In response, the *Kelley* court noted that the Park still did not charge for general admission or for the specific activity in which plaintiffs had engaged.[43] It cited with approval *Blake's* explanation that RULWA's definition of "charge" meant "an actual admission price paid for permission to enter the land at the time of its use for recreational purposes[.]"[44] Fee-for-service

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which caused the injury" rather than on the entire site). At least one case subsequent to *Kelley* also has examined only the site of injury rather than the property as a whole. Ruspi v. Glatz, 69 A.3d 680, 688 (Pa. Super. Ct. 2013) ("Appellants' claim that the immunity provision is inapplicable because the *areas surrounding* Lake Wallenpaupack are highly developed is meritless and fails to recognize that this Court's focus must be on the specific land where the injury occurred, rather than on the property as a whole.").

34. Yanno v. Consol. Rail Corp., 744 A.2d 279, 283 (Pa. Super. Ct. 1999) (stating whether an analysis under the Recreation Act properly involves the whole property or only the portion where plaintiff was injured "cannot be fixed indelibly for every case. To date, our courts have made this determination on a case by case basis. . . . Thus, where the parties can make reasonable arguments for viewing the factors either in terms of the entire property or in terms of only the section where the injury occurred, a court should look to the intended purpose of the RULWA to guide its determination of the matter on a case by case basis.").

35. *See Kelley*, 2012 WL 1392520, at *3.

36. *Yanno*, 744 A.2d at 282. *See also* Pagnotti v. Lancaster Twp., 751 A.2d 1226, 1233 (Pa. Commw. Ct. 2000) (identifying the following factors in determining whether RULWA applies: (1) nature of the area; (2) entrance for recreational purpose; (3) extent of development; and (4) character of development).

37. No. Civ. A. 97-0807, 1998 WL 111802 (E.D. Pa. Feb. 6, 1998).

38. *Kelley*, 2012 WL 1392520, at *3 (quoting *id.* at *6).

39. *Id.*

40. *See* 68 PA. STAT. ANN. § 477-6(2) (2004).

41. *Kelley*, 2012 WL 1392520, at *1.

42. *Id.* at *3.

43. *Id.*

44. *Id.*

activities and other "commercial"[45] uses of the Park, held the court, were not the equivalent of a statutorily-defined "charge."[46]

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45. *Kelley*, 2012 WL 1392520, at *3 (noting that courts characterized certain Park uses in this way).

46. *Id.* The pending state House and Senate bills would add a second sentence to the Recreation Act's definition of "charge." "The term shall not include in-kind contributions or contributions made to an owner of real property which are de minimis and given in consideration for making the real property available for recreation purposes." H.R. 1495, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S. 1029, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

The 1979 Model Act goes even further by defining "charge" to allow fees in carefully delineated situations:

> [A]n admission fee for permission to go upon the land, but does not include the sharing of game, fish or other products of recreational use; or benefits to (or arising from) the recreational use; or contributions in kind, services or cash made to the sound conservation of the land; or amounts paid as fees, rents, purchase money or otherwise by or received by any governmental agency; or sums paid by private individuals or associations where the aggregate of such sums for comparable purposes does not exceed (insert amount) per calendar year.

1979 Model Act, *supra* note 6, app. D at 29 § 2(4).

A broad definition of charge could be helpful in compensating landowners for litter, petty vandalism, careless damage, or loss of privacy. *See* ALBERTA LAW REFORM INST., OCCUPIERS' LIABILITY: RECREATIONAL USE OF LAND, FINAL REPORT NO. 81 65-70 (2000) (discussing the various types of consideration that could be considered "charge").

Several jurisdictions permit owners to charge admission if the monies are used to maintain the property. *See, e.g.*, 745 ILL. COMP. STAT. ANN. 65/2(d) (West, Westlaw through P.A. 98-241 of 2013 Reg. Sess.) (permitting contributions to maintain recreational land); N.C. GEN. STAT. ANN. § 38A-3(1) (West, Westlaw through S.L. 2013-55 of 2013 Reg. Sess. Gen. Assemb.) (permitting fees and contributions to remedy property damage caused by educational or recreational use); VT. STAT. ANN. tit. 12, § 5792(1)(C) (West, Westlaw through law No. 53 of First Sess. of 2013-2014 Vt. Gen. Assemb.) (allowing payments to remediate property damage).

Certain states allow landowners to charge fees only for hunting or agricultural activities. *See, e.g.*, GA. CODE ANN. § 27-3-1(e) (West, Westlaw through end of 2013 Reg. Sess.) (permitting landowners to receive compensation from hunters and fishermen); KAN. STAT. ANN. § 58-3206(b) (West, Westlaw through 2012 Reg. Sess.) (explicitly excluding nonagricultural landowners who charge from liability coverage); OR. REV. STAT. ANN. § 105.682(1) (West, Westlaw through Ch. 787 of 2013 Reg. Sess.) (permitting charges for cutting and removing timber).

Some jurisdictions allow landowners to receive a capped amount of entrance fees without losing recreational immunity. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 75.003(c)(2) (West, Westlaw through end of 2013 Third Called Sess. of 83rd Legis.) (permitting charges not totaling more than twenty times the total amount of the landowner's annual property taxes); WIS. STAT. ANN. § 895.52(6)(a) (West, Westlaw through 2013 Wis. Act 19) (permitting entrance fees totaling less than $2,000 per year).

Other states, either by statute or judicial decision, allow parking fees but not entrance fees. *See, e.g.*, OR. REV. STAT. ANN. § 105.672(c) (West, Westlaw through Ch. 787 of 2013 Reg. Sess.) (allowing daily parking fees of fifteen dollars or less); Winebrenner v. United States, 389 F. Supp. 2d 716, 719 (S.D. W. Va. 2005) (finding three dollar fee imposed on plaintiff to be an allowable parking fee rather than a prohibited entrance fee, construing W. VA. CODE ANN. § 19-25-5).

Income from leasing land to a government agency is excluded from RULWA's definition of "charge," but certain states also permit other types of compensation. *See, e.g.*, VT. STAT. ANN. tit. 12, § 5792(1)(A) (West, Westlaw through law No. 53 of First Sess. of 2013-2014 Vt. Gen.

The court then examined whether the Park's recent improvements made it "developed" for purposes of RULWA. Interestingly, plaintiffs themselves had not argued that the Park as a whole was not entitled to RULWA protection. Their primary argument was that it was *irrelevant* whether the entire Park was covered or not, because they read prior case law to hold that only the injury site (i.e., the Park walkway) should be assessed for RULWA eligibility.[47] Nonetheless, the *Kelley* court took the opportunity to evaluate whether RULWA applied to the Park as a whole.[48]

The court noted the types of sites where recreational immunity had been denied[49]: a basketball court on an urban playground,[50] an indoor swimming pool,[51] and a mostly paved waterfront recreation area.[52] The *Kelley* court concluded succinctly that the Park's man-made features did "not make the [P]ark more developed than natural."[53] The fact that a tract of land contains improvements is alone insufficient to negate recreational liability. In short, wrote the court, only when the scales tip towards "more developed than natural" should a property be considered too improved to qualify for RULWA immunity.[54]

As a threshold matter, then, the overall Park was deemed to be covered by RULWA.

Assemb.) (allowing proceeds from the sale of a permanent recreational use easement); N.C. GEN. STAT. § 38A-3(2) (West, Westlaw through S.L. 2013-220 of 2013 Reg. Sess. Gen. Assemb.) (excluding from the definition of "charge" property tax abatements that landowners may have received for opening their lands to the public).

47. *See Kelley*, 2012 WL 1392520, at *3.

48. *Id.*

49. *Id.* at *4 n.6.

50. Walsh v. City of Phila., 585 A.2d 445, 446, 450 (Pa. 1991).

51. Rivera v. Phila. Theological Seminary, 507 A.2d 1, 8-9 (Pa. 1986).

52. Mills v. Commonwealth, 633 A.2d 1115, 1118-19 (Pa. 1993).

53. *Kelley*, 2012 WL 1392520, at *3.

54. *See id.*

B. RULWA Must Apply to the Site of the Injury

The *Kelley* court continued its two-part analysis,[55] reasoning that once an overall tract of land is deemed to be within RULWA's scope, the particular structure or area where the injury occurred also must be assessed to determine if it is eligible for immunity protection.[56]

1. Prior Case Law

Prior to *Kelley*, the test for determining if an improvement was covered by RULWA was unclear. As noted earlier, the Recreation Act's expansive definition of "land" specifically includes structures, roads, and buildings.[57] However, the Pennsylvania Supreme Court has concluded that because the policy underlying RULWA is to protect owners of large tracts of unimproved land, the legislature intended "land" to encompass only "*ancillary structures* attached to open space lands made available for recreation . . . ."[58] But that court also has stated, most recently in *Stone v. York Haven Power Co.*, that "*where land devoted to recreational purposes has been improved in such a manner as to require regular maintenance* in order for it to be used and enjoyed safely, the *owner has a duty to maintain the improvements*."[59]

How immunity for man-made ancillary structures could co-exist with a duty to maintain man-made structures was unclear. The very point of Recreation Act immunity is that owners of "land" owe no duty of care to keep that land safe by maintaining it or posting warning signs.[60]

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55. Even where previous courts had assessed both the entire parcel and the injury site, they did not make explicit the fact that they were applying a two-part test. *Cf.* Lingua v. United States, 801 F. Supp. 2d 320, 332 (M.D. Pa. 2011) (noting that the recreation site was the type of location RULWA was designed to protect and holding that the "simple foot trail" was within the Recreation Act's definition of "land"); Stanton v. Lackawanna Energy, Ltd., 951 A.2d 1181, 1187-88 (Pa. Super. Ct. 2008) (affirming that a rural easement property and gate was covered by RULWA immunity).

56. *Kelley*, 2012 WL 1392520, at *4 (citing Bashioum v. Cnty. of Westmoreland, 747 A.2d 441, 446 (Pa. Commw. Ct. 2000)) (offering support for a two-part test). In *Bashioum*, the defendant park was found liable for plaintiff's injuries, suffered while on a 96-foot "[g]iant [s]lide" located within an otherwise unimproved 400-acre park. *Bashioum*, 747 A.2d at 442, 446. However, the *Bashioum* court did not impose a two-part test; it held only that the RULWA analysis properly focused on the slide rather than on the larger park. *Id.* at 447.

57. *Kelley*, 2012 WL 1392520, at *4.

58. Rivera v. Phila. Theological Seminary, 507 A.2d 1, 8 (Pa. 1986) (emphasis added).

59. Stone v. York Haven Power Co., 749 A.2d 452, 455 (Pa. 2000) (emphasis added). *See also* Mills v. Commonwealth, 633 A.2d 1115, 1117 (Pa. 1993) (citing Walsh v. City of Phila., 585 A.2d 445, 450 (Pa. 1991) ("When a recreational facility has been designed with improvements that require regular maintenance to be safely used and enjoyed, the owner of the facility has a duty to maintain the improvements."). Thus, although *Kelley* calls it the "*Stone* duty to maintain" rule, 2012 WL 1392520, at *4, the court just as easily could have labeled it the "Mills" or "Walsh" rule.

60. *Kelley*, 2012 WL 1392520, at *2. *Cf. Stone*, 749 A.2d at 457 ("The burden of making a large body of water safe from inherent risks is too weighty to place on its owners. 'It is not reasonable to expect such owners to undergo the risks of liability for injury to persons

In any event, some courts effectively prioritized the duty to maintain rule over the ancillary structures rule, reasoning that any improvement requiring maintenance could not be covered by RULWA.[61]

In *Hatfield v. Penn Twp.*, the Pennsylvania Commonwealth Court went so far as to find that even raw land might be outside RULWA's immunity protection if it had been maintained in some fashion.[62] In *Hatfield*, the appellate court examined an unpaved, ungraded footpath connecting two municipal softball fields and found that the grass and dirt pathway had been "altered from its original state and, thus, constitutes an 'improvement' that required the Township to regularly maintain it in a manner safe for public use."[63] The court's conclusion implied that regular maintenance itself constituted an "alteration," taking property outside the scope of RULWA.[64]

On the other hand, the Pennsylvania Superior Court issued a seemingly conflicting decision in *Stanton v. Lackawanna Energy, Ltd.*, finding that a steel, swing-arm gate that injured a snowmobile user was covered by RULWA immunity.[65] That court noted:

> The words of [ ] RULWA specifically contemplate that owners may erect at least some type of structures on raw land without forfeiting the immunity protections [of] the Act. If the single, skeletal gate erected under the facts [of] this case were to remove [defendant] PP & L's property from the protection of the RULWA, it would be hard to envision a reasonable structure that could be built without losing the immunity of the Act. If virtually any structure could take property outside the immunity, the Act would have little utility or effect.[66]

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and property attendant upon the use of their land by strangers from whom the accommodating owner receives no compensation or other favor in return.'" (quoting *Rivera*, 507 A.2d at 8)).

61. *See, e.g.*, Davis v. City of Phila., 987 A.2d 1274, 1278 (Pa. Commw. Ct. 2010) (finding RULWA applied because there were no improvements at the field requiring maintenance).

62. Hatfield v. Penn Twp., 12 A.3d 482, 488 (Pa. Commw. Ct. 2010).

63. *Id.* at 483, 488. The township's maintenance consisted of "cutting the grass every two weeks and fixing defects in the path should they arise." *Id.* at 485. *But see Davis*, 987 A.2d at 1278 (discussing that where plaintiff was injured on a field that had been cleared of trees and was regularly mowed, the "analysis should not be on whether the land was maintained, but on whether there were *improvements* that *require* maintenance[ ]").

64. This case concerned those who feared that the act of maintenance might vitiate RULWA protection. *See also* Jacob Wyland, *The Retreating Recreational Land Use Immunity*, PRIMEWATCH: THE PENNPRIME LIABILITY AND WORKERS' COMPENSATION TRUST NEWSLETTER (May 2011), *available at* http://www.pennprime.com/index.asp?Type=B_BASIC&SEC=%7B74F19B15-9CDF-457B-A465-078E71F99597%7D ("[T]he pendulum has swung far from the broad grant of immunity originally provided for in the Act, as the courts have continued to carve away at the circumstances where it should be applied. . . . [S]imply allowing residents to use an open municipal field for soccer may lead to liability if there has been an effort to maintain the field in a usable state.").

65. Stanton v. Lackawanna Energy, Ltd., 951 A.2d 1181, 1183, 1187-88 (Pa. Super. Ct. 2008).

66. *Id.*

Other decisions also have found certain recreational improvements to be within RULWA's definition of "land," despite the "duty to maintain" rule.[67]

Uncertainty about application of the "duty to maintain" rule led to concern among landowners and recreation providers about which improvements, if any,[68] would qualify for RULWA immunity.[69] It also led to the introduction of legislation attempting to counter the judicial trend narrowing the Recreation Act's scope.[70]

2. *Kelley's* Holding

In the instant case, plaintiffs argued that the man-made walkway where Mrs. Kelley fell required regular maintenance to be safely used and that therefore, pursuant to the duty to maintain rule, it was outside of RULWA's scope.[71]

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67. Kniaz v. Benton Borough, 535 A.2d 308, 309, 310 (Pa. Commw. Ct. 1988) (holding that RULWA covers a picnic bench in a park); Brezinski v. Cnty. of Allegheny, 694 A.2d 388, 390 (Pa. Commw. Ct. 1997) (stating that a sculpted, earthen embankment and a picnic shelter were covered by RULWA; moreover, the court noted that a picnic shelter did not require "regular maintenance as [did the basketball court] in *Walsh*. . . . [S]uch a picnic shelter is a building within the [Recreation Act's] definition of land . . . ."); Rightnour v. Borough of Middletown, 48 Pa. D. & C.4th 117, 119, 124 (C.P. Dauphin 2000) (announcing that a dirt footpath leading to the Swatara Creek is covered by RULWA). *Cf.* Yanno v. Consol. Rail Corp., 744 A.2d 279, 282 (Pa. Super. Ct. 1999) (providing that the existence of improvements is only one factor to consider in determining RULWA applicability).

68. *See* Kelley v. United States, Civil Action No. 11-5537, 2012 WL 1392520, at *4 (E.D. Pa. Apr. 20, 2012).

69. For instance, the Pennsylvania Fish & Boat Commission issued a fact sheet on RULWA noting that:

> The uncertain state of the law on what constitutes an "improvement" [or "substantially improved property"] has raised legal questions. It has discouraged some landowners, clubs and organizations from going forward with proposed projects for persons with disabilities. Such projects may include installation of parking areas near fishing, boating or hunting opportunities, construction of paths, trails or ramps suitable for wheelchair use leading from parking areas to land and water areas, and installation of fishing piers and boat docks. Landowners considering adding these types of improvements to their property should consult their legal counsel.

PA. FISH & BOAT COMM'N, INFORMATION PAPER: RECREATION USE OF LAND AND WATER ACT (October 2009) (emphasis added), *available at* http://fishandboat.com/water/public/rec_use_land_water_act.htm.

70. H.R. 1495, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S. 1029, 195th Gen. Assemb., Reg. Sess. (Pa. 2011). The pending state House and Senate bills would add to RULWA's definition of "land": "amenities," "boating access and launch ramps, bridges, fishing piers, boat docks, ramps, paths, paved or unpaved trails," and "areas providing access to, or parking for, lands and waters, including, but not limited to, access ramps, trails or piers for use by persons with disabilities[.]" H.R. 1495, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S. 1029, 195th Gen. Assemb., Reg. Sess. (Pa. 2011). The bills would also amend the definition of "land" to apply to "such areas and physical objects whether they are in an unimproved condition or a condition improved by manmade effort, whether they are large or small in size and whether they are located in a rural or urban area." H.R. 1495, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S. 1029, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

71. *See Kelley*, 2012 WL 1392520, at *1.

Consequently, they contended, because allegedly improper maintenance or lack of warnings caused the injury, the defendant was liable in negligence.[72]

The *Kelley* court reasoned, however, that to negate recreational immunity for *all* man-made improvements would be contrary to RULWA's clear language covering "at least some buildings and structures."[73] To reconcile the "duty to maintain" rule with the Recreation Act's broad definition of "land," *Kelley* essentially interpreted the rule as applying only (1) to parcels of highly developed land that do not qualify for RULWA;[74] and (2) to highly developed recreational improvements.[75]

Kelley explained that the *Hatfield* decision denying RULWA coverage to a dirt path actually turned on a finding by that court that the "entire softball-field complex was a developed area not covered by RU[LW]A."[76] The defendant there had a "duty to maintain" the path because the parcel as a whole was not covered by the Recreation Act.[77]

However, assuming that a parcel is covered by RULWA, man-made improvements, as stated in *Kelley*, are not uniformly subject to the "duty to maintain."[78] *Kelley* noted that the Pennsylvania Supreme Court has ruled improvements to be within the scope of RULWA if they are "ancillary . . . to open space lands made available for recreation."[79] Although the Pennsylvania Supreme Court did not explain the meaning of the term "ancillary structures,"[80] *Kelley* described the kind of improvements that have been protected by the Recreation Act: a picnic pavilion;[81] a sculpted, earthen embankment;[82] a dirt path leading to a parking lot;[83] a metal entry gate;[84] and a

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72. *Kelley*, 2012 WL 1392520, at *1.

73. *Id.* at *5.

74. *Id.* at *4 n.6 (pointing out that the *Lingua* court stated that, while developing the duty to maintain rule, the *Stone* court cited only to cases that denied RULWA coverage to entire parcels).

75. *Id.* at *5.

76. *Id.* n.7 (interpreting the holding in Hatfield v. Penn Twp., 12 A.3d 482 (Pa. Commw. Ct. 2010)).

77. *Id. But see generally Hatfield*, 12 A.3d 482 (lacking any discussion on the parcel being excluded from RULWA coverage).

78. *Kelley*, 2012 WL 1392520, at *5.

79. *Id.* at *4 (quoting Rivera v. Phila. Theological Seminary, 507 A.2d 1, 15 (Pa. 1986)).

80. *See* Bashioum v. Cnty. of Westmoreland, 747 A.2d 441, 445 (Pa. Commw. Ct. 2000) (holding that "[a]lthough our Supreme Court in *Rivera* did not elucidate the meaning of 'ancillary structures', we must conclude that given the rationale underlying RULWA . . . an improvement such as the Giant Slide, requiring as it does, such intensive maintenance and inspection, does not fall within the meaning of 'ancillary structure' as contemplated by the court in *Rivera*[ ]").

81. Brezinski v. Cnty. of Allegheny, 694 A.2d 388, 390 (Pa. Commw. Ct. 1997) (stating that a picnic shelter is "certainly not more than an ancillary structure . . . .").

82. *See id.*

83. Lingua v. United States, 801 F. Supp. 2d 320, 332 (M.D. Pa. 2011).

man-made lake.[85] It contrasted those types of improvements with others not covered by RULWA: a giant slide,[86] and a hydropower dam.[87]

Kelley then opined about the nature of ancillary improvements.[88] The court found the raised, recycled plastic walkway where Mrs. Kelley was injured to be ancillary because it (1) "*supports the recreational activities available at the Park*[;]"[89] (2) did "*not create any recreational activity independent of those already available on the land*[;]"[90] and (3) was not a "'highly developed' structure[.]"[91]

In sum, the court held that improvements and structures that are not "highly developed" and do not create "independent recreational activity," but which merely support recreational activities at the site, are within RULWA's scope of immunity.[92] Landowners do not have a duty to maintain these ancillary recreational improvements if they are located on largely undeveloped lands.[93]

V. CONCLUSION

Kelley clearly articulated a two-step test for RULWA eligibility. Previous courts differed on whether the inquiry should focus only on whether the injury site was "developed" or whether the character of the entire parcel should be taken into account. *Kelley* clarified that the whole parcel first must be assessed to determine if it is "more developed than natural."

Additionally, previous courts disagreed about the degree to which man-made improvements were covered by RULWA immunity. The *Kelley* court held that, so long as the Recreation Act applies to the site as a whole, ancillary structures that support recreational activities are within RULWA's scope. The

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84. Stanton v. Lackawanna Energy, Ltd., 951 A.2d 1181, 1183, 1188 (Pa. Super. Ct. 2008).

85. Stone v. York Haven Power Co., 749 A.2d 452, 454 (Pa. 2000). *See also* Pagnotti v. Lancaster Twp., 751 A.2d 1226, 1234 (Pa. Commw. Ct. 2000) (ruling that RULWA applied to a low head dam on a creek in a community park); Yanno v. Consol. Rail Corp., 744 A.2d 279, 284 (Pa. Super. Ct. 1999) (providing that RULWA protected a defendant railroad from liability for an injury suffered by a hiker who fell from a railroad trestle); Gallo v. Yamaha Motor Corp., U.S.A., 526 A.2d 359, 364 (Pa. Super. Ct. 1987) (concluding that RULWA immunized liability for a paved road).

86. Bashioum v. Cnty. of Westmoreland, 747 A.2d 441, 447 (Pa. Commw. Ct. 2000).

87. *Stone*, 749 A.2d at 456.

88. Kelley v. United States, Civil Action No. 11-5537, 2012 WL 1392520, at *5 (E.D. Pa. Apr. 20, 2012).

89. *Id.* (emphasis added).

90. *Id.* (emphasis added).

91. *Id. See also* Sandra M. Renwand, *Beyond* Commonwealth v. Auresto*: Which Property is Protected by the Recreation Use of Land & Water Act?* 49 U. PITT. L. REV. 261, 281 (1987) (concluding that the state supreme court in Rivera v. Phila. Theological Seminary, 507 A.2d 1 (Pa. 1986), intended that: "ancillary structures, such as 'shelters, toilet facilities [and] fireplaces,' are not improvements, and thus will be treated as land under the [Recreation Act]. Conversely, if an addition is the type that would not commonly be found in the true outdoors, that is, not an ancillary structure, it should be defined as an improvement and not treated as land under the [Recreation Act]. For instance in a state owned park, additions such as swing sets, swimming pools, and tennis courts, would constitute improvements.").

92. *Kelley*, 2012 WL 1392520, at *5.

93. *Id.*

court refused to extend the duty to maintain rule to all man-made improvements on recreational land.

The ruling should provide comfort to landowners and park and recreation providers who have been concerned about the judicial trend limiting Recreation Act immunity. Many properties available for the public's recreational use contain manmade features: hiking trails typically require footbridges, culverts, erosion controls, or some form of surfacing to be safely used or to comply with laws such as the Americans with Disabilities Act; properties used by hunters often contain hunting blinds; and fishing access areas may have footpaths to the water, handicapped accessible parking or wheelchair ramps for disabled users. Under *Kelley*, these supporting, ancillary improvements are protected by RULWA immunity. This outcome seems to strike an appropriate balance between the expectations of users of recreational land and the goal of incentivizing landowners to keep their "largely undeveloped" properties open for free public recreation.