IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

ROBERT WILLIAM GREEN, A MINOR, BY HIS PARENT AND GUARDIAN, DEBORAH LABELLE, Plaintiff	:	
v.	:	No. 08-3372
GAME TIME, INC., A DIVISION OF PLAYCORE WISCONSIN, INC. AND STEPHEN CHRISTMAN, Defendants	:	
v.	:	
BOROUGH OF LEHIGHTON, Additional Defendant	:	

Daniel J. Mann, Esquire	Counsel for Plaintiff
Francis S. Blatcher, Esquire	Counsel for Defendant Game Time, Inc. a Division of Playcore Wisconsin, Inc.
William P. Barrett, Esquire	Counsel for Defendant Stephen Christman
Richard B. Wickersham, Jr., Esquire	Counsel for Defendant Borough of Lehighton

MEMORANDUM OPINION

Nanovic, P.J. – May 31, 2012

That government cannot be held responsible for the acts of third parties is a relatively simple statement which appears, on its face, to be easy to understand and to apply. However, in the context of governmental immunity under the Political Subdivision Tort Claims Act ("Tort Claims Act"), 42 Pa.C.S.A. §§ 8541-8564, this simplicity vanishes when the existence of third-

party conduct is examined in relation to that of government and the determination of liability for injuries sustained by others.

When so examined, our Supreme Court has made a distinction between government conduct which merely facilitates an injury caused by the acts of others and government conduct which joins with that of third parties in causing the injury.[1] Although this distinction may, at times, be difficult to make, where the government's conduct combines with that of others in causing injury, the government is subject to liability, provided such conduct falls within one of the eight enumerated exceptions to immunity found in Section 8542 (b) of the Tort Claims Act.

This case concerns such a dispute, one where the parties disagree whether the Defendant Borough of Lehighton's ("Borough") conduct caused or, at most, facilitated injuries to the Plaintiff Robert William Green. The Borough further contends it is relieved of liability under the Recreational Use of Land and Water Act ("RULWA"), 68 Pa.C.S.A. §§ 477-1 through 477-8.

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[1] As we believe the following discussion will show, use of the word "facilitate," as distinct from "cause," can be confusing when the conduct of third parties is involved. In those cases where government conduct was found to facilitate, rather than cause, injury, and for which damages might otherwise have been recoverable under the common law or statute, were it not that the defendant was a governmental agency, the basis of liability of the governmental agency appears to be its status as a person potentially vicariously or secondarily liable for the acts of others. *See* Crowell v. City of Philadelphia, 613 A.2d 1178, 1184 (Pa. 1992); *see also* Builders Supply v. McCabe, 77 A.2d 368, 370-71 (Pa. 1951) (discussing the meaning of indemnification and secondary liability) together with infra note 8 and accompanying text.

FACTURAL AND PROCEDURAL HISTORY

Plaintiff Robert William Green, a minor, was injured on March 31, 2006, when he fell from a playground merry-go-round being manually pushed by Defendant Stephen Christman ("Christman"). The merry-go-round was designed, manufactured and distributed by Defendant Game Time, Inc. ("Game Time") with certain safety equipment, including a governor to limit or restrict its rotational speed.

In the complaint which commenced this action, Plaintiff named Game Time and Christman as Defendants. Plaintiff's claim against Game Time was premised on a defective product (that the merry-go-round as designed, manufactured and distributed was unsafe; that it did not properly restrict the speed at which the merry-go-round could be safely operated) and against Christman for negligence (that Christman pushed the merry-go-round at an excessive speed so as to cause Plaintiff to lose his grip and be thrown off).

The merry-go-round was purchased by the Borough from Game Time. In Christman's joinder complaint against the Borough, Christman alleges the Borough was negligent in its installation, inspection and maintenance of the merry-go-round.[2] Additionally,

[2] Specifically, paragraph 14 of the joinder complaint alleges:
The negligence, carelessness, and recklessness of the additional defendant, Borough of Lehighton, consists of the following:
a. failing to install the product properly;

the complaint alleges that the merry-go-round had been in the Borough's custody since 1997, that the Borough's employees conducted the initial field assembly and installation of the merry-go-round, and that annually thereafter, around Labor Day, the Borough would disassemble the merry-go-round, service and store it for the winter months, and then reinstall the merry-go-round in the spring.[3] The merry-go-round was installed in Grove Park, a public park, which contains paved pathways, other commonly found outdoor playground equipment (*e.g.*, sliding board, swings, springy animals) in the same area as the merry-go-round, and an indoor recreational facility.

On the day of the incident, Christman was present in the park with his two-and-a-half-year-old son. Christman's son had been riding the merry-go-round, when Plaintiff, then six years old, asked if he could also get on. To permit this, the merry-go-round was stopped, Plaintiff got on, and Christman again began spinning the merry-go-round.

At some point, Christman stopped the merry-go-round for his son to get off. Before leaving with his son, Plaintiff asked if

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b. failing to inspect and properly maintain the product;
c. failing to service and maintain the braking system on the product;
d. removing the braking system on the product;
e. re-installing the product in an unsafe manner; and
f. allowing the product to spin at a dangerous rate of speed.

(Joinder Complaint, paragraph 14).

[3] In response to this averment, the Borough responded that once installed in 1997, the merry-go-round was never removed or reinstalled before the Green accident. (Answer to Joinder Complaint, paragraph 10).

Christman could spin the merry-go-round one more time. Christman agreed. Christman pushed the merry-go-round for three to four revolutions with Plaintiff on board. As he did so, Christman held on to the merry-go-round, running beside it. Christman then gave the merry-go-round one last fling before he left to follow his son. It was at this point that Plaintiff lost his grip and was thrown off. When Plaintiff hit the ground he allegedly sustained serious head and spinal injuries.

Before us is the Borough's Motion for Summary Judgment to Christman's joinder complaint. In this Motion, the Borough asserts it is immune from liability under both the Tort Claims Act and the RULWA.

DISCUSSION

Political Subdivision Tort Claims Act

With certain limited exceptions, local government agencies are generally immune from tort liability under the Tort Claims Act.[4] Mascaro v. Youth Study Center, 523 A.2d 1118, 1120 (Pa. 1987). However,

[4] Section 8541 of the Tort Claims Act provides:

> § 8541. Governmental immunity generally
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> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or *any other person*.

42 Pa.C.S.A. § 8541 (emphasis added).

> an injured party may recover in tort from a local governmental agency if:
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> > (1) damages would be otherwise recoverable under common law or statute; (2) the injury was caused by the negligent act of the local agency or an employee acting within the scope of his official duties; and (3) the negligent act of the local agency falls within one of eight enumerated categories.

LoFurno v. Garnet Valley School District, 904 A.2d 980, 983 (Pa.Cmwlth. 2006) (quoting Wells v. Harrisburg School District, 884 A.2d 946, 948 (Pa.Cmwlth. 2005)). Here, Christman relies upon the real property exception to governmental immunity.[5] This exception "provides that a local agency may be liable for its employees' or its own negligence related to the 'care, custody or control of real property' in its possession." Grieff v. Reisinger, 693 A.2d 195, 197 (Pa. 1997) (plurality decision) (quoting 42 Pa.C.S.A. §§ 8542 (a)(2), (b)(3)).[6]

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[5] There is no dispute that the Borough is a "local agency" and subject to the protections of the Tort Claims Act. Sider v. Borough of Waynesborg, 933 A.2d 681 (Pa.Cmwlth. 2007) (finding that a Borough was a "local agency" entitled to immunity under the Tort Claims Act), *appeal denied*, 940 A.2d 367 (Pa. 2007).

[6] Section 8542 of the Tort Claims Act provides in relevant part:

> § 8542. Exceptions to governmental immunity
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> (a) Liability imposed.--A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):
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> (1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

a) Joint Tortfeasor Liability

The Borough's argument, as we understand it, is that the direct and immediate cause of Plaintiff's fall from the merry-go-round was the high rate of speed at which Christman was spinning the merry-go-round, rather than any defect or malfunction in the merry-go-round itself. From this, the Borough argues that even if its installation, maintenance and repair of the merry-go-round may have been deficient and allowed the merry-go-round to spin at a speed faster than it was designed for, this conduct at most facilitated Plaintiff's injuries, but cannot be considered a cause of those injuries. On this, we disagree.

According to Game Time, the merry-go-round has a top speed of 8.9 miles per hour and will come to a stop within three revolutions of being last pushed. Although disputed, Game Time

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> (2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.
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> (b) Acts which may impose liability.--The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
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> . . .
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> (3) *Real property*.--The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency.

42 Pa.C.S.A. §§ 8542 (a), (b)(3).

denies that any defect existed in the design or manufacture of the merry-go-round. In joining the Borough in this suit, Christman, in effect, contends that if the manufacturer's assertions are correct, then, to the extent the merry-go-round was unsafe, the fault lies with the Borough's installation, inspection and maintenance. In effect, two general theories of liability are being pursued: a defect or malfunction in the braking system for which either Game Time, as the designer and manufacturer, or the Borough, as the installer and maintainer, or both, are responsible; and negligence in the operation of the merry-go-round by Christman.

At this stage of the proceedings, the Borough is potentially solely liable, not liable, or jointly liable with either Christman, Game Time, or both. As to liability, the Borough's attempt to characterize an alleged defect in the operation of the braking system attributable to its installation and maintenance of the merry-go-round as simply a facilitator, rather than a cause, of the merry-go-round spinning too fast, is confusing and meaningless under the facts before us.

Contrary to the ultimate conclusion reached by the Borough, the Tort Claims Act did not abolish joint tortfeasor liability against a governmental entity in those circumstances where the conduct of the governmental agency joins with that of other

parties in causing injury to another. This is to be contrasted with a claimant's reliance on vicarious and secondary liability to establish a claim against a local agency, which, when based on the acts of third parties, is barred under Section 8541 of the Tort Claims Act. Mascaro, 523 A.2d at 1124. ("[T]he Legislature has clearly precluded the imposition of liability on itself or its local agencies for acts of third parties by its language of § 8541, *supra*, and that it has not seen fit to waive immunity for these actors or their acts in any of the eight exceptions."). It is in this sense that the conduct of a local agency or its employees has been held to "facilitate," but not to "cause," a consequent injury for which recovery against the local agency is prohibited. *Id.* at 1124 (holding, where a detainee of a detention center for juvenile criminal offenders was able to escape, allegedly because of negligently maintained real estate, and thereafter broke into and seriously injured the inhabitants of a home, that "the real estate exception can be applied only to those cases where it is alleged that the artificial condition or defect of the land *itself* causes the injury, not merely when it facilitates the injury by the acts of others, whose acts are outside the statute's scope of liability").[7]

[7] On this issue, the Court in Mascaro, further stated:
We agree that the real estate exception to governmental immunity is a

"[A] fundamental principle governing the immunity exceptions [is] the elimination of the imputation of negligence back through a non-governmental actor to the governmental unit." Crowell v. City of Philadelphia, 613 A.2d 1178, 1183 n.9 (Pa. 1992). In other words, a direct causal connection must exist between the injury and, for our purposes, the government's care, custody or control of real estate within its possession.

> Consequently, as applied to cases where a plaintiff is injured and brings an action against a governmental unit, the governmental unit can be subjected to liability despite the presence of an additional tortfeasor if the governmental unit's actions would be sufficient to preclude it from obtaining indemnity from another for injuries rendered to a third person. This assumes, of course, that the specific facts fall squarely within one of the exceptions. Alternatively, if the claim against the governmental unit is dependent merely upon the unit's status, as opposed to the action fitting within one of the statutory exceptions, then the language of § 8541 would preclude the imposition of liability.

> narrow exception and, by its own terms, refers only to injuries arising out of the care, custody or control of the real property in the possession of the political subdivision or its employees. Acts of the local agency or its employees which make the property unsafe for the activities for which it is regularly used, for which it is intended to be used, or for which it may reasonably be foreseen to be used, are acts which make the local agency amenable to suit. Acts of *others*, however, are specifically excluded in the general immunity section (42 Pa.C.S. § 8541), and are nowhere discussed in the eight exceptions. On this basis alone, we must conclude that any harm that others cause may not be imputed to the local agency or its employees. This, of course, is a difference from the duties and liabilities of a private landowner who can be held accountable for the forseeable criminal conduct of others under *Ford v. Jeffries*, [379 A.2d 111 (Pa. 1977)].

Mascaro v. Youth Study Center, 523 A.2d 1118, 1123-24 (Pa. 1987); *see also* Jones v. Chieffo, 700 A.2d 417, 419 (Pa. 1997) ("[A] municipality cannot be vicariously liable for a third party's harmful acts under section 8541 of the Act. However, a municipality can be liable despite the presence of a third party if it is jointly negligent.").

Crowell, 613 A.2d at 1184 (citation omitted).[8]

Here, Christman claims the merry-go-round's braking system failed to work either because of improper assembly or maintenance by the Borough and that, in consequence, the merry-go-round was unsafe for its intended use. For purposes of its Motion, the Borough does not deny the defect but claims that the real estate exception does not apply because the merry-go-round

[8] In Builders Supply v. McCabe, cited for the same proposition in Crowell, the Pennsylvania Supreme Court explained further the difference between indemnity and joint liability:

> The right of *indemnity* rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which ensures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in *degrees* of negligence or on any doctrine of *comparative* negligence, ... It depends on a difference in the *character* or *kind* of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person.
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> [I]t is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized. But the important part to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible. In the case of *concurrent* or *joint* tortfeasors, having no legal relation to one another, each of them owing the same duty to the injured party, and involved in an accident in which the injury occurs, there is complete unanimity among the authorities everywhere that no right of indemnity exists on behalf of either against the other; in such a case, there is only a common liability and not a primary and secondary one, even though one may have been very much more negligent than the other. The universal rule is that when two or more contribute by their wrongdoing to the injury of another, the injured party may recover from all of them in a joint action or he may pursue any one of them and recover from him, in which case the latter is not entitled to indemnity from those who with him caused the injury.

77 A.2d 368, 370-71 (Pa. 1951).

did not act on its own to harm Plaintiff, but that its condition at most facilitated Plaintiff's injuries because of the speed at which Christman, a third party, spun Plaintiff.

This argument, we believe, is fundamentally flawed. This is not a case where Christman is claiming that the Borough failed to protect users of the merry-go-round from the manner in which it was used or against conduct of third parties beyond its control. *See* Mascaro, 523 A.2d at 1124 (noting the consistent refusal of Pennsylvania Courts to allow a cause of action under the real estate exception against "those whose claim of negligence consists of a failure to supervise the conduct of students or persons adequately"). This is a case where Christman is claiming a defect existed for which the Borough was directly responsible, a defect which did not facilitate injury by a third party, but one which was a separate and independent cause of that injury. *Cf.* Crowell, 613 A.2d 1178 (finding the action of a city employee in erecting a directional arrow pointing in the wrong direction was an actual cause and not merely a facilitator of a motor vehicle accident involving a drunk driver, who was also determined to be a cause of the accident and who, while following the arrow, crossed into the lane of on-coming traffic striking a car in which a three-year-old boy was killed).

According to Christman, the Borough negligently installed and maintained real estate under its care, custody and control, namely the merry-go-round, which conduct was a substantial contributing cause of Plaintiff's injuries, thus fitting squarely within the Supreme Court's decision in Grieff v. Reisinger (holding that a firechief's negligent use of paint thinner in removing paint from the floor of a fire station subjected the chief and the fire association to liability under the Tort Claims Act within the real property exception for negligence in the care of real property – the fire station floor – when the paint thinner ignited and caused severe injuries to plaintiff); *see also* City of Philadelphia v. Duda, 595 A.2d 206 (Pa.Cmwlth. 1991) (holding that the city's negligent conduct in covering or painting over depth markings and racing stripes on a city pool made the property unsafe for its intended use and did not merely facilitate injury by the acts of others).[9] Under these circumstances, Section 8541 does not insulate the Borough from liability.[10]

[9] In Grieff v. Reisinger, 693 A.2d 195 (Pa. 1997), unlike cases concerned with the real estate exception to sovereign immunity, it is not necessary that the cause of Plaintiff's injuries result from a defect in, or a condition of, the real estate itself. *See also* Hanna v. West Shore School District, 717 A.2d 626, 629 (Pa.Cmwlth. 1998) (holding that plaintiff's fall allegedly caused by a wet floor in a school hallway caused by damp-mopping was not barred by immunity). For liability to attach, it must only be shown that the harm was caused by municipal negligence in the care, custody or control of real property in the Borough's possession. Grieff, 693 A.2d at 197 n.3.

[10] The Supreme Court's conclusion precluding governmental liability for harm caused by third parties is rooted in its construction of the phrase "or any

b) Real Estate Exception

Beyond this requirement of direct liability, before a governmental unit may be held liable for its own negligence, or that of its employees acting within the scope of their authority, such conduct must specifically implicate one of the eight statutory exceptions to governmental immunity. Here, Christman claims exception three - that pertaining to real property - applies. Whether Christman is correct in this belief raises another question of fact which the parties appear not to have addressed: whether the merry-go-round is real estate. The real property exception to immunity does not apply where a person is injured by the negligent maintenance of personalty.

In Repko v. Chichester School District, the Commonwealth Court noted that determining whether certain property is personalty or real estate may, at times, be difficult and involves two separate approaches to making this determination. Specifically, the Court stated:

> At the outset, we recognize that there are two approaches that can be used to determine whether to apply the real estate exception to immunity under the Tort Claims Act, and that, at times, deciding which approach to apply under a given set of facts is challenging. Under the *Blocker*

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other person" in Section 8541, as opposed to common law principles of superseding cause. Crowell, 613 A.2d at 1183 n.7. Because Christman's conduct does not rise to the level of a superseding cause - since such conduct was clearly foreseeable - it does not form a basis to relieve the Borough of liability. Crowell, 613 A.2d at 1185 n.12 (citing Vattimo v. Lower Bucks Hospital, 465 A.2d 1231, 1237 n.4 (Pa. 1983)).

> approach, the determinative inquiry is whether the injury is caused by personalty, which is not attached to the real estate, or by a fixture, which is attached. Under the *Grieff* approach, the determinative inquiry is whether the injury is caused by the care, custody or control of the real property itself. Both approaches have been applied by the courts.

904 A.2d 1036, 1040 (Pa.Cmwlth. 2006).[11]

In Repko, the property involved was a folding table which fell on the plaintiff when she went to retrieve a basketball during gym class. The table was not affixed to the real estate, and the Commonwealth Court had little difficulty in determining that the table retained its status as personalty, reversing the decision of the trial court which had applied the analysis in Grieff believing that the question was whether the school had

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[11] In Blocker v. City of Philadelphia, 763 A.2d 373 (Pa. 2000), the Pennsylvania Supreme Court applied the traditional test set forth in Clayton v. Lienhard for determining whether a chattel used in connection with real estate is personalty or realty. This test provides:

> Chattels used in connection with real estate are of three classes: First, those which are manifestly furniture, as distinguished from improvements, and not peculiarly fitted to the property with which they are used; these always remain personalty.... Second, those which are *so annexed to the property*, that they cannot be removed without material injury to the real estate or to themselves; these are realty.... Third, those which, although *physically connected with the real estate, are so affixed* as to be removable without destroying or materially injuring the chattels themselves, or the property to which they are annexed; these become part of the realty or remain personalty, *depending on the intention of the parties at the time of annexation*....

167 A. 321, 322 (Pa. 1933). The Court in Repko further noted that "consideration of the intention of an owner regarding whether a chattel has been *permanently* placed on real property is only relevant where the chattel has, in fact, been affixed to the realty." Repko, 904 A.2d at 1039 (emphasis added); *see also* Rieger v. Altoona Area School District 768 A.2d 912 (Pa.Cmwlth. 2001) (holding that even if the school's failure to cover a gymnasium floor with mats during a gymnastic stunt was negligent, because the mats were not affixed to the real property, and as such, were personalty, the assumed negligent act would not fall within the real estate exception).

negligently cared for the gymnasium area by failing to remove a dangerous condition on the property, i.e., the table. Here, however, while the merry-go-round was attached to real estate at the time of Plaintiff's injury, a question remains whether it was attached year round or was annually removed by the Borough during the winter months and placed in storage. Under these facts, the intention of the Borough is neither clear nor ripe for decision. *See* LoFurno, 904 A.2d at 984 n.4 (noting that neither Clayton nor subsequent cases indicate what it is about the intention of the owner at the time of annexation which the court is supposed to ascertain and suggesting that to conclude that the chattel has been made part of the real estate, one should have to find an intent that the property would remain connected to the building (or land) even if the owner relocated).[12]

Recreational Use of Land and Water Act

Separate and apart from the Tort Claims Act, the Borough contends Christman has failed to set forth a *prima facie* cause of action for negligence in that the Recreational Use of Land and Water Act ("RULWA") eliminates the common law duties of a

[12] In his brief opposing the Borough's Motion for Summary Judgment, Christman also claims that the Borough was negligent in failing to provide or maintain proper and adequate fall protection material on the ground surrounding the merry-go-round onto which children could safely fall. Because we do not believe a fair and reasonable reading of paragraph 14 of the joinder complaint supports such a theory of liability, we do not address it here.

landowner to keep the land safe or to warn of dangerous conditions. The purpose of the RULWA is "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." 68 P.S. § 477-1. To accomplish this purpose, the RULWA grants immunity to owners who make their land available for use by the public for recreational purposes free of charge, unless injury is caused by the "wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." 68 P.S. §§ 477-4, 477-6. "The need to limit owner liability derives from the impracticality of keeping large tracts of largely undeveloped land safe for public use." Rivera v. Philadelphia Theological Seminary, 507 A.2d 1, 8 n.17 (Pa. 1986).

On this issue, the following are not disputed: that the Borough was the owner of Grove Park and the land upon which the merry-go-round was located; that this property was under the Borough's care, custody and control; that it was open to the public and used for recreational purposes; that the use being made of the merry-go-round at the time of Plaintiff's fall was recreational; and that the Green family, including Plaintiff, used the park free of charge. The difficulty with the Borough's argument is that the RULWA does not apply to improved land.

Stone v. York Haven Power Company, 749 A.2d 452, 455 (Pa. 2000) ("where land devoted to recreational purposes has been improved in such 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").

Grove Park is clearly no longer in the natural, untouched, forested state which once existed before human intervention. However, in light of the case law which has developed on this subject, whether the improvements made to the park exempt this property from the protections of the RULWA is not as simple a question as might at first appear.

Our Supreme Court has held that the RULWA must be interpreted with its overall underlying objective in mind – "to provide immunity to landowners as an incentive to them in exchange for their tolerance of public access to their lands for recreational pursuits," Mills v. Commonwealth of Pennsylvania, 633 A.2d 1115, 1119 (Pa. 1993) – and not simply by reference to the isolated meaning of certain language in the statute when read standing alone. Rivera, 507 A.2d at 8; Walsh v. City of Philadelphia, 585 A.2d 445, 449 (Pa. 1991). In this respect, the Court found that "[t]he intention of the Legislature to limit the applicability of the [RULWA] to outdoor recreation on largely unimproved land is evident not only from the Act's

stated purpose but also from the nature of the activities it listed as recreational purposes within the meaning of the statute." Rivera, 507 A.2d at 8. In the same vein, notwithstanding the statute's definition of the term "land", which includes "buildings, structures and machinery or equipment when attached to realty," the Court concluded that the Legislature intended "land" to encompass only "'ancillary structures attached to open space lands made available for recreation and not to [encompass] enclosed recreational facilities in urban regions' which presumably can be monitored and maintained unlike large expansive unimproved land." Bashioum v. County of Westmoreland, 747 A.2d 441, 444 (Pa.Cmwlth. 2000) (quoting Rivera, 507 A.2d at 8, which found that in the statute's protection did not apply to a seminary's indoor swimming pool).

"[O]ur courts have held that RULWA immunity applies to open land that remains in a mostly natural state, whether the property is located in rural, suburban or urban areas." Murtha v. Joyce, 875 A.2d 1154, 1158 (Pa.Super. 2005). They have also held that "an improvement" on certain parts of property does not necessarily remove the entire property from the protection of the RULWA, *see e.g.* Lory v. City of Philadelphia, 674 A.2d 673 (Pa. 1996) (holding RULWA immunity applied to natural pond

located in a remote and undeveloped portion of a city park), and that if a specific improvement on otherwise unimproved, undeveloped property is the cause of injury, "RULWA protection should not extend beyond its legislative intent and thus 'thwart basic principles of tort liability.'" Murtha, 875 A.2d at 1158 (quoting Mills, 633 A.2d at 1117); *see also* Bashioum (holding injury at man-made slide within approximately four hundred acres of largely unimproved land was outside the protection of the RULWA).

"[T]he intended beneficiaries of the [RULWA], in addition to the general public, are landowners of large unimproved tracts of land which, without alteration, is amenable to the enumerated recreational purposes within the act." Stone, 749 A.2d at 456. In particular, if the improvement is one requiring regular maintenance and monitoring for its safe use and enjoyment, the reasonable expectations of its users is a factor to be considered, as is the effect on landowners of imposing liability and whether the purpose of the RULWA (i.e., relieving landowners of large tracts of unimproved land from the duty to make those tracts safe for public use) will thus be thwarted. *See* Ithier v. City of Philadelphia, 585 A.2d 564, 567 (Pa.Cmwlth. 1991) (holding that an outdoor swimming pool, "filled and emptied as the City desires, and which can be monitored and supervised with

relative ease," does not fall within the protections of RULWA). These two interests are, in fact, compatible and explain, in part, why "the proper focus should be on the specific area where the injury occurred or the specific area which caused the injury." Bashioum, 747 A.2d at 446. "Moreover, the focus of [the court's] analysis should not be on whether the land was maintained, but on whether there were *improvements* that *require* maintenance." Davis v. City of Philadelphia, 987 A.2d 1274, 1278 (Pa.Cmwlth. 2010). "Where there are improvements on those lands that require regular maintenance to be safe, as is the case here, the purpose of RULWA is not served by granting immunity for such improvements." Bashioum, 747 A.2d at 447 n.5.

In Walsh v. City of Philadelphia, the Pennsylvania Supreme Court stated:

> 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. When such an improved facility is allowed to deteriorate and that deterioration causes a foreseeable injury to persons for whose use the facility was designed, the owner of the facility is subject to liability. We do not believe that the RUA [i.e., RULWA] was intended by the Legislature to circumvent this basic principle of tort law.

585 A.2d at 450-51. "Thus, it appears that pursuant to Walsh, the rationale in Rivera of wishing to relieve landowners of the burden of monitoring large tracts of undeveloped land to

encourage them to open the land to the public is rendered inapplicable in the context of those areas of land where there are improvements which require regular maintenance and inspection." Bashioum, 747 A.2d at 444.[13]

[13] Both the Commonwealth and Superior Courts have set forth a multi-factored test to determine the applicability of the RULWA. In Pagnotti v. Lancaster Township, the Commonwealth Court stated:

> [F]rom a review of the cases dealing with the [RULWA], we identify the following factors that the courts have considered in determining whether the [RULWA] was intended to apply to insulate a particular landowner from tort liability: (1) the nature of the area in question, that is, whether it is urban or rural, indoor or outdoor, large or small; (2) the type of recreation offered in the area, that is, whether persons enter to participate in one of the recreational purposes listed in section 2(3) of the [RULWA]; (3) the extent of the area's development, that is, whether the site is completely developed and/or significantly altered from its natural state; and (4) the character of the area's development, that is, whether the area has been adapted for a new recreational purpose or, instead, would be amenable to the enumerated recreational purposes of the [RULWA] even without alteration. We also deem it appropriate to consider any unique facts as additional factors where doing so would advance the purpose of the [RULWA].

751 A.2d 1226, 1233-34 (Pa.Cmwlth. 2000) (holding low head dam in creek following through 7.7 acre community park which consisted primarily of grass and trees did not remove property from RULWA's protection). In Yanno v. Consolidated Rail Corp., the Superior Court stated:

> [I]t is proper for a trial court to consider the following factors when deciding whether a landowner receives immunity under the RULWA: (1) use; (2) size; (3) location; (4) openness; and (5) extent of improvement. First, where the owner of the property has opened the property exclusively for recreational use, the property is more likely to receive protection under the RULWA than if the owner continues to use the property for business purposes. Second, the larger the property, the less likely that it allows for reasonable maintenance by the owner and the more likely that the property receives protection under the RULWA. Third, the more remote and rural the property, the more likely that it will receive protection under the RULWA because the property is more difficult and expensive for the owner to monitor and maintain and because it is less likely for a recreational user to reasonably expect the property to be monitored and maintained. Fourth, property that is open is more likely to receive protection than property that is enclosed. Finally, the more highly-developed the property, the less likely it is to receive protection because a user may more reasonably expect that the landowner of a developed property monitors and maintains it.

744 A.2d 279, 282-83 (Pa.Super. 1999) (holding railroad trestle located inside 9.6 mile swath of unimproved land did not remove property from RULWA's protection), *appeal granted*, 764 A.2d 1071 (Pa. 2000).

Grove Park is located at Seventh and Iron Streets within the Borough of Lehighton where it is surrounded by residential homes along its perimeter. It is evident from the photographs of record that Grove Park is cleared and improved land. *See e.g.*, photographs contained in the following: Christman's Response to the Borough's Motion for Summary Judgment (Exhibits A and B); Hudson Expert Report (Photo 1); Clauser Expert Report (Figure 1).

The park is a publicly accessible recreational facility having playground equipment outside for children, including the subject merry-go-round, paved pathways, and an indoor recreational facility with courts for basketball and volleyball, as well as pool tables. Further, the Borough maintained the park and did maintenance and repairs to the equipment. This included, at a minimum, annual inspections of the playground

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In Yanno the Court further stated:

> Whether the application of these factors involves the entire piece of property owned by the defendant landowner or only the section of the property upon which the plaintiff sustained the alleged injury, cannot be fixed indelibly for every case. To date, our courts have made this determination on a case by case basis. For example, in one instance this Court afforded protection to a landowner under the RULWA based on the fact that the injury occurred on 'a part of ... [the] land which remained unimproved.' *Redinger*, 615 A.2d at 750. However, in another instance, the Pennsylvania Supreme Court denied protection under the RULWA for injuries that occurred on the grassy area of a property that was otherwise highly developed. *See Mills*. 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. *See id.* at 526, 633 A.2d at 1119.

744 A.2d at 283.

equipment with the Borough testing, maintaining, and repairing, as required, hoses, oil levels, bearings, bolts, and hydraulic fluid on the merry-go-round. These facts preclude application of the RULWA to this case.[14]

CONCLUSION

In denying the Borough's Motion, we make no determination whether the Borough was in any manner negligent, whether such alleged negligence was a substantial cause of injury to Plaintiff, or whether the merry-go-round is real estate. These ultimately are factual questions for the jury.

We do conclude, however, that given the intended purpose of the RULWA, the improvements to Grove Park, including the merry-go-round, and the condition of the merry-go-round itself being claimed as a cause of Plaintiff's injuries, that the immunity

[14] The Borough also claims in its Motion for Summary Judgment that Christman should be sanctioned by dismissal of the joinder complaint because the verification to that complaint was not taken by Christman, but by his counsel; because Christman did not authorize or consent to his counsel filing the joinder complaint; and because Christman had no personal knowledge of the material facts alleged therein as establishing liability on the Borough. We have denied this request because the Borough, if it had so chosen, could have filed preliminary objections to the verification (having failed to do so, the issue is waived); the issue of what was authorized and consented to between Christman and his counsel, is a matter between them; and a party need not have personal knowledge of all material facts alleged in a pleading provided there is a good faith basis to believe that the facts therein exist or are likely to have evidentiary support upon further investigation. *See* Pa.R.C.P. 1023.1 (c) (3) and Explanatory Comment. In this case, evidence exists, if believed, that no defect existed in either the design or manufacture of the merry-go-round at the time it was purchased by the Borough and further, at the time of Plaintiff's accident, nearly nine years after the purchase, the braking system no longer functioned properly to limit spinning of the merry-go-round to a safe speed. Moreover, the relief sought ignores the direct claims created by the joinder in Plaintiff pursuant to Pa.R.C.P. 2255 (d) and the consequences of dismissal on such claims.

afforded by the RULWA does not apply. To extend the provisions of the RULWA to the merry-go-round and surrounding area under the facts of this case would be to ignore the purpose of the RULWA and to disregard the reasonable expectations of the users of the merry-go-round.

BY THE COURT:

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P.J.