In The

Supreme Court of Virginia

RECORD NO. 092583

S. CHARLES VOLPE, Co-Administrator of the Estate of Charles Oliver Volpe, et al.,

***Appellants*,**

v.

CITY OF LEXINGTON, VIRGINIA,

Appellee.

BRIEF OF *AMICUS CURIAE* THE VIRGINIA TRIAL LAWYERS ASSOCIATION

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BRIEF *AMICUS CURIAE*

This Brief *Amicus Curiae* is submitted by the Virginia Trial Lawyers Association in support of Appellant with respect to the issues relating to the duty owed by a landowner to warn of dangers existing in natural bodies of water, which are raised by the first Assignment of Error in this case.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

The Statement of the Case and Material Proceedings are adequately set forth in the Opening Brief of Appellants, and are adopted fully herein.

ASSIGNMENT OF ERROR

1. The trial court erred in holding that a landowner has no duty to warn its invitees of hidden dangers when those dangers exist in natural bodies of water. (App. 573-80, 592-626, 751, 756, 888).

QUESTION PRESENTED

Whether the trial court properly created a new exception to the longstanding Virginia law establishing that a landowner owes a duty to warn invitees of hidden dangers known to them if those dangers exist in water rather than on land?

SUMMARY OF ARGUMENT

This case presents the Supreme Court of Virginia with an opportunity to clarify the scope of the rule limiting an owner's duty to warn invitees of dangers which are open and obvious. In Washabaugh v. Northern Virginia Const. Co., 187 Va. 767, 48 S.E.2d 276 (1948), in which a child drowned in pooled water in a rock quarry, this court ruled that water in a pond, be it natural or manmade, poses an open and obvious risk. Washabaugh should not be interpreted to create a blanket immunity from all owners and occupiers for any danger associated with water, even latent dangers created or maintained by them.

The trial court acknowledged that there was an argument to be made that the dam created latent, hidden dangers. The trial court further acknowledged that the City of Lexington may have had to warn of such dangers. However, the trial court then held that the law in Virginia is that such dangers, even hidden dangers, existing in natural water are, as a matter of law, open and obvious. The trial court granted Defendant's Motion to Strike this case finding there was no duty owed to the Plaintiffs' decedent, citing Washabaugh. In its ruling the trial court misinterpreted and misapplied the ruling in Washabaugh and failed to recognize that the condition which caused Volpe's death was not itself open and obvious.

The Virginia Trial Lawyers Association respectfully suggests to the Court that it use this case as an opportunity to clarify the law in regard to these important issues.

STATEMENT OF FACTS

The facts set forth in the Statement of Facts contained in the Opening Brief of Appellant are adopted fully herein.

The trial court relied in its ruling on its understanding of Washabaugh, stating, "I keep getting back to the fact that Virginia, through that Washabaugh case, said - - and it's not been overturned by a Virginia court - - that rivers and lakes present open and obvious dangers because of their

very nature." App. at 753-754. "And the law in Virginia is clear because the Virginia Supreme Court has specifically ruled that natural bodies of water, including rivers and lakes, are deemed, as a matter of law, to be open and obvious dangers. And therefore there is no duty to warn of such dangers." App. at 581.

The trial court acknowledged that there are circumstances where a landowner could owe a duty to warn of a hidden danger existing on a river.

> If I'm canoeing down the river, which I've done, and I'm unaware of a dam ahead, as you're canoeing down, you see just everything looks flat, and suddenly I'm faced with going over a dam without warning, it seemed to me that whoever owned that dam should tell me about it.

App. at 583.

Although the evidence showed that Volpe was aware that the dam was there and had swum there previously, the trial court suggested that the dam could still pose hidden dangers.

> So the issue in this case is not whether there was a duty to warn of the presence of the dam, but whether there was a duty to warn of the dangers associated with the dam. And in this case, there certainly is some evidence that those dangers . . . the dangers were hidden from common observation.

App. at 583-584.

Nevertheless, the trial court again citing Washabaugh went on to find that such "hidden dangers" are inherent in rivers, explaining its reasons as follows:

> But what I think the Court is saying is it's an open and obvious danger because of the very fact that dangers are hidden and it may be that you don't know about it when you get in; that there are things under the surface, could be rocks under the surface that you dive in and jump in and hit. Could be a tree that you get stuck on. Could be deeper than you think.

App. at 584-585.

ARGUMENT

I. Any dangerous condition created or existing in water is not ipso facto open and obvious.

a. The common law in Virginia makes clear that a landowner has a duty to warn invitees of dangers which are not open and obvious.

Volpe was an invitee and there is no dispute as to what duty was owed to him by the City. As the trial court noted, "it's been stipulated that the decedent was an invitee of this park for the purpose of going swimming." App. at 754.

As this Court has stated, "The principles governing the liability of an owner of premises to an invitee are well settled in this State." Culpepper v. Neff, 204 Va. 800, 804, 134 S.E.2d 315, 318 (1964). The owner must use ordinary care to make the premises reasonably safe for an invitee. The

owner must give adequate warning of an unsafe condition which is known to him, and unknown to the invitee, unless the dangerous condition is open and obvious. An invitee has a right to assume that the premises are reasonably safe for his use, and, without knowledge of danger, he is not required to be on the lookout for it. Id. at 804-05, 134 S.E.2d at 318-19.

There was ample evidence presented to show the conditions at the dam created a serious danger that was known to the City but not obvious to Volpe. See statement of the facts in Appellant's Brief at pp. 2-10. The evidence showed that the City had knowledge that the dam posed a greater risk depending on the amount of water flow, could create a deadly hydraulic at the lower level of the dam, and that even when the pond appeared calm an accelerated current could sweep swimmers over the dam. App. at 394-396. Volpe visited and swam near this dam in the past without difficulty, even jumping off the dam and swimming below it. App. at 113-114. While there was evidence that Volpe knew of the dam, there was no evidence that Volpe knew or should have known of the current which could, when the water was higher, sweep him over the dam and catch him in an inescapable hydraulic. It was that condition, not the dam itself, that caused his death.

The law in Virginia has never been that if an object is obvious, any condition of the object which creates a danger is also open and obvious. For example, while a hole in a walkway may be open and obvious the condition of the adjoining area may pose a latent danger. See, e.g., Nolan v. Richmond, 194 Va. 943, 76 S.E.2d 126 (1953). Similarly a chair is clearly open and obvious but when the condition of the chair is deteriorated, the latent dangerous condition of the chair may not be open and obvious. See, e.g., Eastern Shore of Va. Agricultural Ass'n v. LeCato, 151 Va. 614, 144 S.E. 713 (1928). In Chapman v. City of Virginia Beach, 252 Va. 186, 475 S.E.2d 798 (1996), a gate was clearly open and obvious; the plaintiff's decedent in that case was pushing the gate while her sister swung on top of it. But the condition of the gate rendered it unsafe for the use to which it was put. And in the instant case the dam itself was clearly known to Volpe but the latent conditions that rendered it unsafe- the strong current beneath the calm water surface and the deadly hydraulic below the dam on that day- were not.

Prior to this Court's decision in Washabaugh in 1948, the common law in Virginia recognized that an owner of a lake owed the same duty to warn an invitee of an unsafe condition existing in the lake. Knight v. Moore, 179 Va. 139, 18 S.E.2d 266 (1942).

> We think it was a question for the jury as to whether the location of the cables across the edge of the lake created a dangerous situation at a place where patrons of the lake were invited or had the right to go, or whether the area surrounding the cable anchorage was sufficiently lighted to give the patrons of the lake sufficient notice of the situation, or whether this area was sufficiently guarded.

Id. at 146-47, 18 S.E.2d at 270.

A latent danger, be it in water or on land, may create a duty to warn.

b. Washabaugh was inapposite.

Washabaugh involved a trespasser, and the duty owed by a landowner to a trespasser is far more limited than the duty owed to Volpe, an invitee. The rule of law applied in that case dealt with a landowner's duty to a trespasser who was likely to expose himself to hidden and latent dangers and discussed the law applied elsewhere of attractive nuisance. The court listed examples of the dangers: explosives, gasoline, electricity and barbed wire. The court distinguished from those types of dangers an open water-filled rock quarry which, like any pond filled with water, presents an open and obvious risk of drowning. That line of cases can be distinguished from the duty owed to an invitee swimming in a park river which has been dammed up, creating a hidden, deadly current and hydraulic.

In Washabaugh the issue as the court framed it was "whether an artificial pond of water created in the operation of an ordinary business enterprise is such a dangerous instrumentality that the law imposes upon the owner the duty to take proper precautions to prevent children from using the same." Washabaugh v. Northern Virginia Const. Co.,187 Va. 767, 770, 48 S.E.2d 276, 277 (1948). The court rejected the doctrine of attractive nuisance, but recognized that it was negligence for owners or occupiers of land to leave on their premises, easily accessible to children of tender years, an instrument, machine, or appliance which contains hidden, concealed, or latent danger when handled by one unfamiliar with its use. Id.

In the opinion the Supreme Court wrote the following which the trial court in this case relied on in finding any danger in water to be open and obvious:

> Plaintiff concedes that a natural pond . . . is not regarded as a dangerous instrumentality and that the owners of the same are not required to take any precautions to *prevent children from using them*. He contends that the natural slope of the land around the pit, and the inability of one by sight to distinguish the shallow places from the deep holes created a hidden or latent danger that imposed upon the owner the duty to prevent children from using it.
>
> Similar conditions exist on the banks of streams and rivers, natural and artificial ponds and lakes, which are found in every section of Virginia. We know boys, younger and older than

> plaintiff's decedent, who fish, hunt, swim, and climb trees on lands other than the lands of their parents. All of these activities are attended with some degree of peril or danger. Boys fall out of trees, and into streams and ponds. Fortunately, fatal accidents are rare. It is a boy's nature to see what is farther down or up-stream, what is just over the hill, or on the other side of the pond. Most land owners know this, and, so long as no serious damage is done to property, little if any complaint is made about trespassing boys. It would take more than a mere warning sign, fence, or any ordinary barricade to prevent adventurous boys from fishing in a still pool, or taking a swim in a natural or artificial pond.

Id. at 771-72, 48 S.E.2d at 278.

Washabaugh addressed a duty to prevent a trespassing child from reaching a danger, not the duty to warn an invitee of a latent danger. Id. at 773, 48 S.E.2d at 279 ("To require the proprietor of such a business enterprise to erect a fence or barricade around a pond and across a private road of such a character that it would prevent adventurous youth from entering, would impose such a burden that would unduly interfere with the lawful use of the property."). There is a marked difference in an owner's duty when he invites children onto his property while knowing that there are dangers existing thereon which are not open and obvious.

c. Washabaugh did not alter the common law duty to warn invitees of latent dangers existing in water.

Since the ruling in Washabaugh, the Supreme Court of Virginia has continued to recognize a duty to warn invitees of hazards existing in water.

Therefore the holding in Washabaugh did not represent a marked change in the common law or create a rule of law that any danger in water is open and obvious as a matter of law, as the trial court interpreted it. In Blacka v. James, 205 Va. 646, 139 S.E.2d 47 (1964), this Court recognized that a landowner owed the same duty of provision to its invitees for dangers existing in a lake.

> The general rule is that the owner of a swimming pool or lake to which the general public is invited for a consideration must exercise ordinary care for the safety of his patrons. He must make reasonable provisions to guard against those accidents which common knowledge and experience teach are likely to befall those engaged in swimming and other aquatic sports for which he has provided facilities.

Id. at 649, 139 S.E.2d at 50.

The court held that while there was evidence of negligence by the owner, which presupposes a duty, the plaintiff had failed to establish that the lack of lifeguards was a proximate cause of James' drowning.

The above rule in Blacka was adopted by the Fourth Circuit in Piggott v. United States, 480 F.2d 138 (4th Cir. 1973). Like Volpe, the plaintiff's decedents in Piggott were swimming off a park beach where swimming was not expressly prohibited, and the United States stipulated they were invitees. The defendant therefore owed the same duties of provision as would a private landowner.

> The deceased children were invitees of the park and as such were entitled to use the park facilities, which included the use of any designated swimming area, including Archer's Hope Landing. Thus, the United States was in the same position as any private owner of a beach to which the general public was invited to use for picnicking, sunbathing, and swimming.

Id. at 141.

Reversing a judgment for the United States, the Court in Piggott rejected the limitation of Washabaugh which the defendants urged and applied the duties of provision to the governmental owner. Id. ("We believe [the rule enunciated in Blacka] by the Virginia Supreme Court sets out the duty owed in Virginia to an invitee by the owner of a public beach."). Therefore the law in Virginia provides a landowner with a duty to warn invitees of dangers existing even in natural water which are known to the owner but not open and obvious to the invitee. Based on the holdings in Blacka and Piggott, there can be dangers existing in natural water which are not open and obvious as a matter of law. The current created by the dam in the instant case was such a latent danger, and the court erred in holding that the danger was open and obvious as a matter of law simply because it existed in water.

II. The danger posed by the dam in this case was not open and obvious and therefore the City owed a duty to warn Plaintiffs' decedent of the hazard.

The trial court acknowledged that there are circumstances where a landowner could owe a duty to warn of a hidden danger existing on a river.

> If I'm canoeing down the river, which I've done, and I'm unaware of a dam ahead, as you're canoeing down, you see just everything looks flat, and suddenly I'm faced with going over a dam without warning, it seemed to me that whoever owned that dam should tell me about it.

App. at 583.

Although the evidence showed that Volpe was aware that the dam was there and had swum there previously, the trial court suggested that the dam could still pose hidden dangers.

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Nevertheless, the trial court again citing Washabaugh went on to find that such "hidden dangers" are inherent in rivers, explaining its reasons as follows:

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> are things under the surface, could be rocks under the surface that you dive in and jump in and hit. Could be a tree that you get stuck on. Could be deeper than you think.

App. at 584-585.

The trial court ruling applied the wrong standard of care under Washabaugh for the reasons stated above. Moreover, the trial court failed to distinguish that the condition which caused Volpe's death was not a naturally existing river or even the dam, the presence of which was known to Volpe, but the current and hydraulic which were known to the City but not obvious to Volpe. Under the examples cited by the trial court- the rocks and trees lying below the surface of the river- the plaintiff would have to prove the landowner had actual or constructive notice of the condition, while the same condition would not be visible to his guest. If the landowner knows of the condition, knows it poses a danger which his invitee could not see, and has notice of the danger such a condition will create, he indeed has a duty to warn.

There was ample evidence that the current and hydraulic created by the dam were not open and obvious to Volpe. A hydraulic may or may not exist depending on the river's level at a particular time, and neither the accelerated current upriver of a lowhead dam nor the existence of a hydraulic on the downriver side of a lowhead dam are apparent to common

observation. App. at 462, 522. The water pooled upriver of the dam will not appear higher than normal even when the amount of water flowing over the dam is four times greater than its usual rate. App. at 467-468, 501.

On April 23, 2006, 16-year-old Charles Volpe and his friend, Bryc Talley, decided to go to the park and swim. App. at 106. They had safely swum to the dam, jumped into the water below, and swum below the dam many times before without incident. App. at 113-114. The only current Talley had ever felt below the dam was one "pushing away from the dam." App. at 130, 134-136. To Talley, the water looked "like it did on any other day." App. at 118. The river was "smooth and flat, and it wasn't especially muddy." App. at 118. The water level was "normal-looking," and the water was not exceeding the river banks or even the first step of the tire dock. App. at 118, 121, 126. Despite the river's "normal" appearance, Talley suddenly noticed a "significant difference" in the current once he and Volpe "got right up next" to the dam. App. at 127. Talley watched Volpe get swept over the dam, and before Talley "had a chance to think" he was swept over too. App. at 127.

There was evidence to establish that the danger of getting swept over the dam, caught in the hydraulic below and drowned was not open and obvious to Volpe. It was not the river unaffected by man which created the

danger at issue in this case. Rather it was the dam maintained by the City which created the currents and hydraulics that took the life of plaintiffs' decedent. The underlying current and hydraulics below the dam, not the river or dam itself, were the danger, and they were not open and obvious. Volpe should have been warned and the City may be found liable for failing to warn him of those dangers.

III. The City owed a duty to guests invited to swim in the millpond and play on the dam, to the extent they were invited to engage in such conduct.

By inviting the public to swim in its river and knowing such invitation included swimming up to and even jumping off the dam, the City had a duty to protect its invitees or warn them of the dangers posed by the latent condition created by the dam.

In Nelson v. Great E. Resort Mgmt., Inc., 265 Va. 98, 574 S.E.2d 277 (2003), this Court had occasion to examine the duty owed to an invitee snowtubing at Massanutten when defendant allowed another sledder to collide with her. While Nelson addresses the assumption of the risk defense, which is not an issue before the Court in this appeal, Nelson is instructive on the duty owed by the City. Among the concerns in Nelson was a proposed jury instruction describing the duty owed to its invitee.

> Massanutten's instruction told the jury that Massanutten's only duty of care with regard to Nelson's use of the slide was "to use ordinary care not to increase the risk beyond what [was] inherent in the activity" without a further instruction of what risks were to be considered inherent. Thus, the jury could have determined that it was required to find in favor of Massanutten under this instruction even though it also found that Massanutten negligently permitted another rider to use Nelson's lane on the slide before she exited from it and that Nelson had not assumed that risk. In this context, Massanutten's instruction was at best confusing.

Id. at 106, 574 S.E.2d at 281.

Nelson illustrates what appears to be the point of confusion in the instant case. Clearly Volpe made the decision to swim in the millpond and approach the dam. But unless he knew or should have known that within a few feet of reaching it he would be swept over it and caught in the hydraulic invisible to him from above, it was not an inherent risk which was open and obvious and to which he voluntarily and knowingly exposed himself.

Similarly in this case, in swimming in the river, Volpe had a duty to act as a reasonably prudent swimmer and see those conditions which were open and obvious. While swimming involves an inherent risk of drowning, the danger is one the swimmer can expect to guard against by being a competent swimmer; the evidence showed Volpe was capable and experienced. However swimming does not involve an inherent risk of being thrown over a dam, caught in an inescapable hydraulic and slammed

against the dam. Volpe knew of the existence of the dam itself. But the danger posed by the currents created by the dam were not obvious, open or known to the decedent. The danger to which he was exposed was not one that was or should have been open and obvious.

IV. Affirming the trial court would create a dangerous immunity for landowners.

The evidence was not struck based on a defense – be it an objective standard of care for contributory negligence, or a subjective standard of care for assumption of the risk. Instead it was found that there was no *prima facie* negligence because there was no evidence of any duty owed to plaintiff. The trial court essentially held that any river or lake could contain hidden, deadly dangers and consequently even when the landowner invites people to expose themselves unknowingly to it, the landowner has no liability for any harm caused thereby.

> [T]his rule that Virginia has stated, that swimming in rivers and lakes is an open and obvious danger and for which there is no duty to warn, and that that open and obvious danger exists or is there *because of the latent or hidden dangers*, it's - - that's what our Supreme Court has said.
> …
> But it does occur to me that every time you go fishing at one of these pull-off places . . . or in the city or in the park, and you put on the waders and you wade out into that stream, there's some danger involved. I know that every time I go.

App. at 587, 754-755.

The trial court suggested that by voluntarily swimming in a river, Volpe acquiesced to any harm that could conceivably befall him while in water as any such harm was open and obvious. That cannot be the law in Virginia. The consequences of such a complete lack of accountability and potential liability would be dire. Under that rule an owner could fill his pond with piranhas and invite his pesky neighborhood kids over for a swim without any risk of civil liability. Under the trial court's ruling, by exposing themselves to water they have necessarily agreed to expose themselves to any and every conceivable and inconceivable risk that could lie in wait. Surely a landowner should owe his invitees a greater duty of care, even when exposing them to water hazards.

CONCLUSION

The trial court's ruling in this case should not be allowed to stand. The trial court misapplied Washabaugh and ignored the standard of care applicable to invitees. More importantly the cases cited here do not hold that there is no danger in natural or man-made waters that could ever give rise to a duty to warn his invitee. No invitee, even one who chooses to swim, has a duty to discover that which is hidden and not open and obvious. This dam created a risk of deadly currents and hydraulics which were known to the City but not open and obvious to Volpe. Because they

failed to warn him of the risk or make the premises safe for his use, they may be held liable for his death. Consequently the trial court erred when it granted summary judgment to the City, and the Virginia Trial Lawyers Association respectfully requests that the Virginia Supreme Court reverse that holding and remand the case for a decision on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that undersigned counsel has complied with the requirements of Rule 5:26(h), and that on this 2nd day of August, 2010, fifteen copies, with one copy on CD-ROM, of the foregoing Brief *Amicus Curiae* were hand-delivered to the Clerk of the Supreme Court of Virginia. An electronic copy was also sent via email. Three copies of the Brief *Amicus Curiae* were served, via UPS Ground, to counsel for all parties, specifically to:

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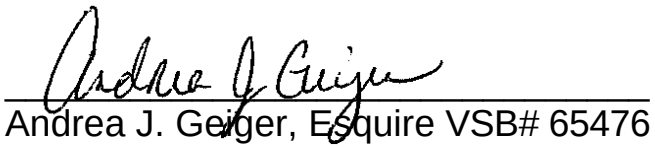

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