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.

REPLY BRIEF OF APPELLANTS

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I. THE VOLPES ASSIGNED ERROR TO ALL GROUNDS FOR THE RULING

The City ignores the final order in incorrectly contending that the Volpes failed to assign error to independent bases for the trial court's ruling. "This Court has said on numerous occasions that trial courts speak only through their written orders and that such orders are presumed to reflect accurately what transpired." McMillion v. Dryvit Sys., 262 Va. 463, 469 (2001). The final order reflects that the trial court struck the evidence of gross negligence because "under the facts presented by the [Volpes'] evidence the [City] had no legal duty to warn [Charles], and further the [Volpes'] evidence was not sufficient for a reasonable jury to find the [City] had acted in a grossly negligent manner. The substance and basis for the Court's ruling is reflected in the transcript." (App. 887).

The "substance and basis" of the transcript shows that the trial court's decision to strike the Volpes' evidence of gross negligence was based on its belief that, under Virginia law, "rivers and lakes present open and obvious dangers," (App. 753-54), and therefore, the City had no duty to warn Charles of the danger associated with swimming at the Park. (App. 756). The trial court's discussion of this issue and no other encompasses the entirety of the four transcript pages memorializing the "substance and

basis" of its decision to strike the evidence, which concludes with this summation:

> And I basically find, gentlemen, that under the facts and circumstances of this case, that the City did not have a duty to warn of that danger there, whether it be hidden, or whether it be open and obvious. I don't think the City did have a duty to warn. And I also don't think that the case has been made out where reasonable persons could find that the City's failure to warn under those circumstances constituted gross negligence.

(App. 756).

After distilling its ruling to the City's duty to warn of hidden conditions, the trial court stated, "So for those reasons, and the other reasons stated by the plaintiff [*not* the City] in their argument, the [c]ourt is going to rule on the motion to strike the evidence." (App. 756). The City contends that this statement from the trial court encompasses two additional grounds it raised two days earlier during its *first* motion to strike at the close of the plaintiffs' evidence. (City Br. 17). In that motion, the City asserted multiple grounds,[1] including those articulated in its brief: that Charles went to a place he was not reasonably expected to go, (App. 562), and that it was sovereignly immune because the design of the Park was a governmental function.

[1] The City asserted at least five grounds during its initial motion to strike. If it believed that the trial court granted its motion on those grounds despite its discussion of just one issue, then it should have articulated them for the trial court at the time of the ruling or included them in the final order, instead of arbitrarily choosing to raise just two of those grounds on appeal.

(App. 565). The City's contention that these arguments were independent grounds for the ruling fails for three reasons.

First, these arguments were never addressed by the trial court and were never bases for the trial court's decision. Not once did the trial court mention the City's expectation of Charles' decision to access the dam, or sovereign immunity. The record does not support the City's assertion of independent bases for the trial court's decision.

Second, the Volpes have adequately addressed each of the "independent grounds" cited by the City. The assignments of error are sufficiently broad to encompass these issues without being overbroad. Additionally, the arguments in support address the City's awareness that swimmers would venture to the dam, whether intentionally or unintentionally (Volpe Br. 8-9), and its grossly negligent operation and maintenance of the Park as a recreational facility (Volpe Br. 27-41), which renders any sovereign immunity argument inapplicable. Code § 15.2-1809.

Third, the City abandoned the arguments made in its first motion to strike when it failed to clearly articulate those bases in its "renewed" motions to strike at the conclusion of all the evidence. This Court recently emphasized that a motion to strike at the close of all the evidence is separate and distinct from a motion to strike made at the close of the

plaintiff's case, and that a general renewal of a motion to strike made before the introduction of all the evidence cannot be an adequate basis for the trial court's final decision absent some express indication from the trial court. United Leasing v. The Lehner Family Business Trust, 279 Va. 510, 518-19 (2010).

In United Leasing, the defendant moved to strike the plaintiff's evidence on two grounds. Id. at 514-15. The trial court overruled the motion, the defendant presented evidence, and the plaintiff then presented rebuttal evidence. Id. at 515. After the jury retired at the conclusion of the evidence, the defendant stated: "Renew my motion to strike. For the record, I wanted to renew my motion to strike." Id. The defendant did not argue in support of the motion and the trial court did not rule on the motion at that time. Id.

Following closing arguments, the defendant stated: "I wanted to renew my motion to strike at the end as we had stated, stating that the plaintiff did not prove that there was a deficiency in this situation." Id. In support, the defendant argued only the second issue raised in its first motion to strike. Id.

On appeal, this Court held that the defendant could not rely on its first motion to strike, "because any challenge to the sufficiency of the evidence,

which includes evidence presented by the defense, will necessarily raise a new and distinct issue from the issue presented by the denied motion to strike." Id. at 517 (citation omitted). The Court explained:

> When a defendant chooses to introduce evidence in his or her defense, the defendant demonstrates by his conduct the intent to abandon the argument that the plaintiff failed to meet its burden through the evidence presented in its case-in-chief. Thus, the defendant must inform the circuit court of the grounds upon which he or she relies in making a new motion to strike so the circuit court has the opportunity to consider the asserted grounds for the defendant's belief that the plaintiff's evidence is insufficient in light of all the evidence presented.

Id. (citations and alterations omitted).

Renewing a motion to strike at the conclusion of all the evidence requires a defendant "to identify the grounds upon which that relief was sought in order for the court to be apprised of what arguments [are] being renewed." Id. at 519. If the defendant fails to adequately inform the court of the grounds underlying the renewed motion, then any arguments formerly made are waived. Id.

This rule is particularly apt after the trial court "implicitly denies" a motion to strike by taking it under advisement, allows the movant to present evidence, and submits the case to the jury, Murray v. Hadid, 238 Va. 722, 728 (1989), which is exactly what the trial court did in this case. (App. 590, 626, 706). In that situation, the defendant must inform the trial court of the

particular bases and reasoning for its motion to strike in light of all the evidence that the court must consider. United Leasing, 279 Va. at 519. If the defendant fails to do so with reasonable certainty in light of the changed circumstances of the case, then "there is no ruling by the trial court on the issue, and thus no basis for review or acting by this Court on appeal." Riverside Hosp., Inc. v. Johnson, 272 Va. 518, 526 (2006) (discussing the failure to properly renew an objection to evidence).

In this case, the City's renewed motions to strike are identical to those made by the defendant in United Leasing. After the City presented evidence in its own defense, the City's counsel stated: "Your Honor, we renew the City's motion to strike for all the reasons argued earlier, and also specifically for the reasons discussed yesterday afternoon, that there's simply no duty here. It's an open and obvious condition." (App. 704-05).

Just like the defendant in United Leasing, the City made a general renewal of its first motion to strike and then specifically argued the one issue – the City's duty to warn invitees of hidden dangers – that the trial court had raised and discussed in depth the previous day. The trial court again "implicitly denied" the motion by taking it under advisement (App. 706) without addressing the City's renewed argument. Murray, 238 Va. at

728. The Volpes presented rebuttal evidence, the parties made closing arguments, and the gross negligence issue was submitted to the jury.

The trial court discharged the jury once it was unable to reach a decision. At that time, the City's counsel stated: "Your Honor, we'll renew our earlier motions and ask the judge to – ask the [c]ourt to enter a directed verdict in favor of the defendant." (App. 751). Just like the defendant in United Leasing, the City again made a general renewal of its first motion, which is a separate and distinct motion inapplicable to the new quantum of evidence, without identifying the grounds upon which its motion rested.

The City's failure to clearly identify the specific grounds for its motion in light of all the evidence demonstrates that its prior arguments had been abandoned. The trial court's ultimate decision and explanation was not based on any of the arguments articulated by the City in its first motion to strike, indeed, no one – party or court – mentioned them again during the course of trial. The final order, and the "substance and basis" for that ruling reflected in the transcript, reveals that the trial court's decision on the motion to strike was motivated by one issue, the only issue the City specifically addressed in its renewed motions – that the evidence of gross negligence was insufficient because the City did not have a duty to warn Charles of the dangers associated with swimming near the dam.

A. The City's Sovereign Immunity Argument Fails Anyway

Regardless, to argue that the Volpes' case was all about planning and design is incongruous with the evidence presented at trial. The City had maintained and operated the Park for swimming since before 2000, and was still maintaining and operating it for swimming when Charles died – a timeframe of approximately six to seven years. (App. 201). Unless the City is arguing that it was simply planning and designing the Park that whole time and was not operating or maintaining the Park, an impossible argument in light of the evidence, then its sovereign immunity argument is a non-starter.[2]

B. The Evidence Demonstrated that the City Should Have Reasonably Expected People to Access the Dam

The City erroneously contends that Andy Wolfe's testimony, which demonstrated that the City knew about the hidden dangers and their likely consequences, was stricken by the trial court because he was "reconstructing it." (City Br. notes 1 and 6). The trial court did not strike Wolfe's testimony, instead, it instructed the jury to "disregard anything that

[2] The City is correct that it filed a plea in bar based on Code § 15.2-1809 and asserted sovereign immunity in its answer. The City neglects to mention that it also filed a plea in bar with respect to the sovereign immunity issue that it argues on brief. (App. 19). If the trial court had agreed with the City and found the doctrine of sovereign immunity applicable, then it would have granted the City's plea in bar instead of presiding over four days of trial.

the witness has testified to that he does not recall." (App. 326). Wolfe never testified that he did not recall any of the events that he described, including specifically telling City officials that maintaining the millpond for swimming presented a life-and-death hazard because of the hidden currents generated by the dam. (App. 315).

The City also attempts to persuade the Court that it had no knowledge that people swam to the dam, while ignoring Bryc Talley's testimony that City officials saw people swim to the dam (App. 114-15), and the testimony from its own witness, Emily Heizer, that she was "sure" that City officials had seen people on the dam during the City's operation of the Park as a swimming area. (App. 648).[3]

Moreover, City official David Woody admitted that he had observed people sitting and standing on the dam before the Park was opened for swimming. (App. 392). If the City knew that people accessed the dam even before the City opened the Park for swimming, then it must have known that people would access the dam if they were allowed to swim beside it.

City officials also testified that they *knew* currents generated by the dam existed in the millpond and drew swimmers toward the dam. (App.

[3] It is difficult for the City to discredit Heizer's testimony with respect to the City's knowledge of swimmers accessing the dam, since Heizer admitted at trial, "I hope the City wins." (App. 649).

394). On most days, the entire millpond, including the area up to the dam, was safe for swimming, (App. 128, 520-21, 667-68, 680), and the evidence showed that Charles was trapped in currents from which he could not escape *before* he ever touched the dam. (App. 127). The current, which was a danger that was a proximate cause of Charles' death, therefore existed in an area where swimmers were clearly allowed. The City uses the location where Charles ended up *after* being trapped in the current to support its argument that Charles entered an area where he was not permitted to go. Charles, however, died because he swam toward the dam from the millpond, the very place the City encouraged him to swim.

II. THE CITY'S INTERPRETATION OF VIRGINIA LAW WITH RESPECT TO HIDDEN DANGERS IN NATURAL BODIES OF WATER IS INCORRECT

The City misinterprets this Court's decisions in arguing that there is *never* a duty to warn swimmers of hidden dangers in natural bodies of water.[4] The City contends that there is no duty to warn or protect swimmers against hidden dangers found in natural bodies of water open for swimming because, according to the City, this Court found in Washabaugh that the quarry pit at issue "'exposed a child playing in or around it to more peril or danger than if he had been playing in or around a natural body of water . . .

[4] If the City has accurately quoted and interpreted Virginia case law with respect to this issue, then those decisions should be overturned.

Such danger is natural, open, and obvious . . .' and therefore there was no duty to warn or protect from such danger." (City Br. 12).

The City misquotes this Court's decision. Washabaugh actually states that the quarry pit at issue "exposed a child playing in or around it to ***no*** more danger than if he had been playing in or around a natural body of water," 187 Va. at 773 (emphasis added), and therefore the owner of that "business enterprise," the quarry, did not have a duty to warn of the allegedly dangerous conditions of the quarry pit. Id. Washabaugh is clear in its holding – when a natural body of water open for swimming is no more dangerous than any other, there is no duty. But when a natural body of water presents "hidden and latent" dangers, id., a duty does exist.

Here, the evidence at trial demonstrated that the dam was an artificial component of the millpond, which created hidden and latent dangers *not* existing in typical rivers. The City attempts to distinguish this by arguing that hydraulics do occur naturally, but the City omits the key portion of the evidence following – naturally occurring hydraulics, *unlike* hydraulics created by lowhead dams, are visible, escapable, and usually much less potent than the artificially created hydraulics of a lowhead dam. (App. 463-64, 469-71).

Moreover, the City's assertion that Blacka v. James, 218 Va. 214 (1964), "is limited to factual situations involving lifeguards provided for paying patrons" (City Br. 15) construes that case and Virginia law far too narrowly. Blacka sets forth the rule with respect to invitees consistent with this Court's holding in Knight v. Moore, 179 Va. 139, 146 (1942), specifically, that an owner of a swimming area "must use ordinary care to render the premises safe for the invitee's visit," and has a duty to "give notice or warning of an unsafe condition which is known to him and is unknown by the invitee."

The decedent in Blacka used the swimming pool at issue as a paying customer, thus triggering the common law duty owed to *invitees*. In discussing this duty, the Court held that a defendant must "provide for the reasonable safety of his patrons," *i.e.*, those using his facility as invitees, "in the exercise of his common law duty to provide for the[ir] reasonable safety." S & C Co. v. Horne, 218 Va. 124, 129 (1977). This is simply a restatement of the duty toward invitees, which was applicable in Blacka because the decedent had invitee status as a paying customer.

Knight also involved an invitee who was injured as a result of an artificial danger placed in a lake open for swimming. The Court held that if the danger was not "open and obvious," or in other words, if the danger

was hidden and latent, then the owner or operator of the lake had a duty to provide a warning of the danger. 179 Va. at 147-48; see also Piggott v. United States, 480 F.2d 138 (4th Cir. 1973) (citing Blacka and Washabaugh in holding that invitees using a natural body of water are owed notice or warning of hidden dangerous conditions).

Here, the City stipulated that Charles was the City's invitee. (App. 715). "[U]nless a dangerous condition is open and obvious, the invitee has the right to assume that the premises are in [a reasonably safe] condition." Roll 'R' Way Rinks, Inc. v. Smith, 218 Va. 321, 327 (1977). "Notice or warning by the owner is required of an unsafe condition known to him and unknown to the invitee." Indian Acres of Thornburg, Inc. v. Denion, 215 Va. 847, 850 (1975). Whether Charles paid for the use of the millpond is irrelevant, since his invitee status triggers the issue whether the City's failure to warn of a hidden and latent danger created by an artificial condition placed in the millpond constitutes gross or wanton negligence.

III. THE VOLPES' EVIDENCE PRESENTED A JURY QUESTION

In its facts section and argument that the evidence failed to demonstrate gross or wanton negligence, the City directs the court's attention to evidence from which it would like the Court to view Charles as careless – in essence making a contributory negligence argument. All such

evidence, however, is controverted or taken out of context and at most it illustrates that the factual disputes at hand should have been resolved by a jury. This point, the Volpes would not dispute.

For example, although rain had fallen on the days preceding Charles' death, the City never introduced into evidence a true and accurate measure of the river's height or flow at the Park on the day Charles drowned. Instead, the City introduced measurements its witness had "pulled . . . off the internet." (App. 444). The witness admitted that he did not know where the gauge providing the measurements was located, or whether the measurements accurately reflected the conditions of the millpond on the day Charles drowned. (App. 444-46). Moreover, when asked what the measurements meant, the City's witness testified, "Don't ask me," (App. 436), and, "I have no clue." (App. 445).

In further confusion of the issue, the City asserts that Katie Hennis, who was at the Park when Charles arrived, decided not to swim "after seeing the river."(City Br. 3). But Hennis clearly stated at trial that she "would most likely have swam" if the water had been warmer when she tested it with her foot (App. 175), and that the river did not appear unsafe for swimming. (App. 177).

The City cites the Volpes' expert as testifying that the water level was twice as high as normal (City Br. 4), but the City inaccurately portrays the expert's testimony – when asked whether the river was twice as high as normal, the expert replied, "*I'm not sure*, but that may be *not bad*." (App. 529). The City also cites the Volpes' expert as testifying that Charles should have looked below the dam before swimming to it (City Br. 5), but the City omits the expert's reasoning for why Charles did not – since the river appeared normal, Charles could have expected to safely swim to the dam, *stop*, and look below before deciding to jump, just like any other time he had swum in the millpond. (App. 498-99).

Despite the City's emphasis that Charles had jumped off the dam 20-30 times, Bryc said that he and Charles had only swam in the millpond on two or three occasions – Charles did not have the experience of 20-30 different days of river conditions. (App. 142-43). The testimony the City cites, as well as the rest of the evidence, created a question for the jury.

Respectfully submitted,

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CERTIFICATE

I hereby certify that, pursuant to Rule 5:26(h) on this 10th day of September, 2010, fifteen bound copies of this Reply Brief of Appellant and one electronic copy on CD, have been hand-filed with the Clerk's Office of the Supreme Court of Virginia, and three bound copies of the Reply Brief of Appellant have been served via UPS Ground Transportation upon:

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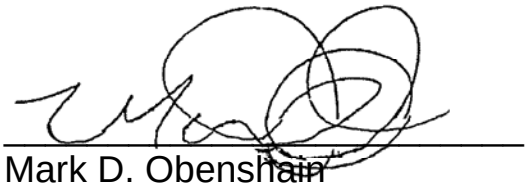

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