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 APPELLANTS

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I. STATEMENT OF THE CASE

A. MATERIAL PROCEEDINGS BELOW

S. Charles Volpe and Kim A. Volpe, Co-Administrators of the Estate of Charles Oliver Volpe (the "Volpes"), filed a Complaint in the Circuit Court of Rockbridge County against the City of Lexington (the "City") after their son, Charles, was swept over a lowhead dam and drowned while swimming at a City-owned park. (App. 1). The Amended Complaint contained three claims: gross negligence; willful and wanton conduct; and public nuisance.[1] (App. 37).

A jury heard evidence over the course of four days. At the conclusion of the case the trial court struck the Volpes' evidence of willful and wanton conduct. (App. 974). It also refused the Volpes' proposed jury instructions regarding their nuisance claim. (App. 713-14).

The trial court discharged the jury after it failed to reach a unanimous verdict on the gross negligence claim. The trial court then granted the City's motion to strike the Volpes' gross negligence claim, holding (1) that the City had no legal duty to warn Charles of the dangers associated with swimming near the dam, and (2) that the City's failure to warn Charles of the dangers

[1] The Volpes did not allege simple negligence, and therefore, the doctrine of sovereign immunity was inapplicable. Va. Code § 15.2-1809.

associated with swimming near the dam did not constitute gross negligence. (App. 751-57, 885).

B. FACTS

1. The City's Lowhead Dam Created Lethal Dangers

A small lowhead dam traverses the Maury River in the City of Lexington at an area known as Jordan's Point. The dam was constructed over 100 years ago in order to raise the level of the river, creating a pond, or "millpond," upriver of the dam, with the water being diverted into a parallel stream — a millrace — to power mills and other machinery. (App. 319, 514-21). On most days, the pooled water is calm and slow-moving, and the entire millpond, all the way to the dam itself, is an ideal and safe place for swimming, as very little water flows over the top of the dam. (App. 115-16, 464-65, 667-68, 680).

As the level of the river rises, more water flows over the top of the dam. (App. 462, 514-21). When this happens, the dam causes the water flowing overtop to accelerate, and although the surface of the millpond may still appear still and calm, the water below the surface can actually be moving much faster than it appears. (App. 464-65, 522). This current may only be perceptible immediately in front of the dam on the upriver side, but usually is not apparent at all. (App. 465, 522).

When strong enough, the water flowing over the top of the dam also generates a powerful current on the downriver side called a hydraulic. (App. 458-60). A hydraulic is a vertical whirlpool circulating in one area immediately below the dam. (App. 460). The current generated by a lowhead dam draws a swimmer toward the hydraulic, and the speed of the draw increases as a swimmer gets closer to the hydraulic. (App. 462-63).

Although boulders or other debris can create natural hydraulics, they differ from hydraulics created by a lowhead dam. (App. 470-71). Naturally occurring hydraulics are visible to swimmers and boaters because the water immediately before them is not pooled. (App. 469). They are also escapable because, unlike hydraulics created by a lowhead dam, naturally occurring hydraulics do not span the width of the river. (App. 470-71). Escape from a hydraulic created by a lowhead dam is practically impossible due to the strength and breadth of the re-circulating current, and is the reason such hydraulics are referred to as “drowning machines.” (App. 463-64, 470-71).

2. A Swimmer’s Ignorance of the Danger

A hydraulic current may or may not exist depending on the river’s level at a particular time, and the accelerated current upriver of a lowhead dam and the existence of a hydraulic on the downriver side of a lowhead

dam may not be apparent to common observation even when they do exist. (App. 462, 522). The flat, pooled water created by a lowhead dam appears "endless," as the downriver side of the dam cannot be seen from the pooled water upriver. (App. 315). The flat water also fails to provide an indication of the river's speed, strength, or elevation; in fact, 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. 467-68, 501).

Consequently, when the river is elevated, it might appear "normal" and safe and a swimmer may even safely swim in the millpond as long as he does not get too close to the dam, where, if the level is high enough, hidden and accelerating currents will sweep him over the dam. (App. 464-68, 522-24). Once a swimmer is swept over the dam and pulled into a hydraulic, its power is virtually inescapable. (App. 463). Often the rotating current of the hydraulic will severely beat the trapped swimmer against debris and the side of the dam. (App. 464).

On most days the flow of water over the top of the City's lowhead dam at Jordan's Point is minimal and nothing about swimming in the millpond or approaching the dam is unsafe. (App. 128, 520-21, 667-68, 680). Although few in number, there are days when elevated river levels

and the City's lowhead dam combine to create dangerous accelerated currents and a hydraulic, but a casual observer or unsuspecting recreational swimmer would not notice these currents and conditions of the millpond unless he swam too close to the dam – by which point it would be too late. (App. 462, 465, 501, 522-24). The effect was to lull swimmers into a false sense of safety and security that would lead them to believe that they could access all parts of the millpond – all the way to the dam itself – whenever the river looked safe, "normal" and calm. The City knew this was not true and it did nothing.

3. Proper Warnings to Protect Swimmers

At trial, a water safety expert testified that lowhead "[d]ams need to be marked" because, regardless of a swimmer's experience, the strength of the currents that can be generated by the dam are commonly misunderstood, and the dangers associated with the dam "aren't apparent." (App. 472). According to the expert, cables or buoys are often placed upriver of a lowhead dam to protect and warn swimmers and boaters of "misleading" currents and hidden hazards. (App. 464-65).

The expert also testified that signs need to be placed near a lowhead dam warning people of the dangerous currents and possible injury or death. (App. 467-68, 472). Because of the deadly, hidden currents a

lowhead dam creates, the warnings should emphasize: “This is not a place to play. This is not a place for activity. This is a dangerous location where there are currents that can injure or kill you.” (App. 473). According to the expert, such a warning “gets the attention of people, and usually they’ll heed that kind of message.” (App. 472).[2]

4. The City Encouraged Swimming Adjacent to its Lowhead Dam

The City desired to encourage recreational uses of the river at Jordan’s Point, including swimming (App. 203, 215-17), so the City began operating a public park there in the late 1990‘s (the “Park”). City officials Jon Ellestad (City Manager), David Woody (Director of Public Works), and Bill Blatter (Director of Planning and Development) all shared responsibility for the planning, development, and maintenance of the Park, and in 1997 the City formed the Jordan Point Committee (the “Committee”) to assist the City at Blatter’s direction. (App. 200, 344, 383).

To promote swimming at the Park, the City encouraged swimmers to use an existing boat ramp, referred to as the “tire dock,” and an adjacent grassy area as the sole access to the millpond. (App. 385-86). The tire

[2] None of the testimony by the plaintiffs’ experts regarding the hidden nature of the hazards, the millpond’s illusion of safety, or the need for warnings was refuted by a defense expert.

dock is located just 85 feet from the dam and the grassy area is even closer. (App. 206, 386).

5. The City's Knowledge of the Hidden Dangers

Although on most days the millpond is completely safe for swimming, City Manager Ellestad knew that the lowhead dam made the river at Jordan's Point particularly dangerous. (App. 367). He knew that dangerous conditions could exist even when the pooled water of the millpond appeared normal and safe. (App. 367, 370, 382). He also knew that the dangers were not apparent to everyone; as he testified, the river "can appear safe and be dangerous at the same time." (App. 382).

Woody, the Director of Public Works, admitted that he knew even more. He knew all about the "drowning machine" – that high water caused a hydraulic at the base of the dam, and that the dangers created by the dam could kill someone. (App. 394-95). Woody further knew that the millpond could be elevated and deadly because of the hydraulic downriver from the dam, yet still appear safe and calm. (App. 393-94). He was aware that even when the millpond appears peaceful, an accelerated current can exist near the dam and that anything caught in that current or the hydraulic could be swept over the dam and unable to escape. (App. 394-95). Woody

knew that these dangers were not present every day or under all conditions. (App. 395).

Blatter, the Director of Planning and Development, knew that "the river and dam" presented "risks." (App. 218). He also knew that strong currents at the tire dock and swimming access could sweep boats into the dam. (App. 248). Despite knowing of these risks, Blatter admitted that in its operation of the Park, the City invited less-experienced people to swim at that location. (App. 233-34).

In addition to the actual individual knowledge of City officials, safety was a frequent topic of Committee meetings regarding the Park; as a Committee member testified, "swimming and water safety was a continued conversation for years." (App. 324).[3] For example, on October 1, 1997, the Committee discussed swimmer safety and the need for a lifeguard. (App. 215-16). On December 3, 1997, the Committee discussed the hazards posed by high water. (App. 221-22). According to notes from its September 2, 1998 meeting, the Committee and the Park's architect were "concerned about safety from the beginning," but the City still "want[ed] swimming." (App. 230-31).

[3] City officials, including Blatter, attended all of the Committee's meetings. (App. 200).

Over the course of the “continued conversation” regarding swimming and water safety, the City knew that swimmers accessed the dam in apparent ignorance of any danger. Woody had observed people sitting and standing on the dam. (App. 392). Area youths, including City Manager Ellestad’s children, frequently swam to the dam. (App. 186, 351). Ellestad’s son, Ricky, would “hang out” in the river near the dam and even sit on the dam, and Ellestad’s daughter had jumped off the dam to the river below. (App. 186, 351). According to local residents, people swam to the dam “all the time” (App. 114, 311, 680); “kids” frequently could be observed swimming to the dam and jumping to the downriver side. (App. 668).

Andy Wolfe, a local resident and board member of the National Traditional Small Craft Association, specifically warned City officials about the hazards created by the dam and the risks posed by swimming in the millpond. (App. 314-15). Wolfe understood that anyone within 100 feet of the dam “would be in peril,” and because the location of the tire dock and swimming access were less than 85 feet from the dam, he presented the dangers of swimming in that portion of the river as “a life-and-death hazard.” (App. 315).

Wolfe recommended to City officials and the Committee the installation of a safety cable across the river near the dam. He explained

that swimmers and boaters could grab onto the cable in case the current threatened to sweep them over the dam. (App. 475-76). Wolfe specifically told City officials, including Blatter and Woody, that “someone could die” if they were carried over the dam. (App. 318, 387). He even suggested moving the swimming access away from the millpond and its accelerated currents in order to address these hazards. (App. 319-20).

Blatter knew that installing a cable across the river would give “people something to grab onto” for “safety reasons,” specifically preventing someone from being washed over the dam, (App. 253-54), and Ellestad briefly explored the installation of a safety cable in 2004. (App. 337-38). The City also recognized that moving the tire dock and sole swimming access away from the millpond would be “optimum for the benefit of the community” and alleviate the risk that someone would be swept over the dam. (App. 258, 352-53). Woody determined that moving the swimming access farther upriver would cost less than $2,000 and that it could be completed quickly. (App. 391). In fact, the City applied for grants based, in part, upon its expressed need to move the public access point for the river as a “safety improvement.” (App. 261, 391).

6. The City's Deliberate Decision Not to Address the Hidden Dangers Created by its Lowhead Dam

The City ultimately received $462,000 in grants for improvements to the Park, but it deliberately chose *not* to use any of those funds to implement any form of safety measure during the operation of the Park – even though the need for the safety improvements had been part of its reason for applying for the funding in the first place. (App. 266-67, 356-57). Despite its knowledge that the millpond could be a dangerous place for swimming even when the conditions appeared safe, the City chose to leave the Park's sole swimming access adjacent to the dam. The City deemed the risks "acceptable" because it "want[ed] swimming" in that portion of the river, and moving the tire dock "wasn't on the list as being a high priority." (App. 230-31, 267, 356).

Although the tire dock remained next to the dam, the City rejected the safety measures Wolfe proposed, as the Committee felt the cable and buoy system would not fit the Park's "aesthetic" theme, and the City did not believe such a system "was necessary." (App. 255, 318).

The City also chose to post no signs or warnings of the accelerated currents and hydraulic imperceptible to most people – including the less-experienced swimmers the City encouraged and invited to swim at the

Park. (App. 219, 233-34, 266-67). Although years before Charles' death, Wolfe posted a "no swimming" sign near the dam on his own initiative, the sign disappeared within a month, and it was never even replaced by the City. (App. 321-22).

7. Charles' Death

On a warm spring day in 2006, 16-year-old Charles Volpe and his friend, Bryc Talley, decided to go to the Park and swim. (App. 106).[4] The boys planned to swim to the dam and jump to the downriver side. They had safely swum to the dam and jumped into the water below many times, and they had observed other people swim to the dam and jump downriver often. (App. 113-14).

Bryc and Charles never had any reason not to use the entire millpond for swimming or to swim to the dam located less than 85 feet from the Park's sole swimming access. They often saw other people swim to and jump off the dam; they saw police or rangers patrolling the Park and had never noticed them telling anyone to get off or away from the dam; and no one had ever warned them that it was dangerous or unsafe. (App. 114-15). The City placed multiple signs warning of other dangers – e.g., hitting golf

[4] The parties stipulated that Charles used the Park and swimming area that day as the City's invitee, and the trial court instructed the jury accordingly. (App. 715).

balls (App. 268) and climbing trees (App. 274) – but it is undisputed that the City posted no sign warning of any danger associated with swimming near the dam.

Usually, swimming to the dam from the flat water of the millpond was "very easy." (App. 115). Once there, Bryc and Charles would climb onto the dam like they were "getting up on the side of a pool," and Bryc had never had any difficulty climbing up on the dam. (App. 116, 128-29).

The water immediately downriver from the dam was eight-feet-deep, the river bottom was flat, and the boys were unaware of anyone hurting themselves by jumping from the dam. (App. 134-36, 667). Normally, the boys could "stand or swim at the bottom," and the only current Bryc had ever felt below the dam was one "pushing away from the dam." (App. 130, 134-36).

Because of the Park's layout, swimmers had no reason or simple way to look at the water downriver from the dam before entering the millpond to swim. (App. 679). From the entrance, the parking area and the millpond, Bryc and Charles were unable to see the water downriver from the dam, but they did see other swimmers getting out of the water near the tire dock. (App. 116, 131).

Katie Hennis, who was lying out in the sun when Bryc and Charles arrived, saw “little kids” in the millpond earlier that day. Katie saw Bryc and Charles, she knew they were going swimming, and she was unconcerned because she had seen others swimming and the water appeared safe to her. (App. 175-77).

On their way to the millpond Bryc and Charles also passed an older teenager, Emily Heizer. She was wet and dressed in her bathing suit because she had been swimming near the tire dock. (App. 117). The three exchanged greetings, but Emily did not warn the boys about any hazardous swimming conditions. (App. 117).

To Bryc, the water looked “like it did on any other day.” (App. 118). The river was “smooth and flat, and it wasn’t especially muddy.” (App. 118). The water level was “normal-looking,” the water was not exceeding the river banks or even the first step of the tire dock, and Bryc did not notice any debris in the water. (App. 118, 121, 126).[5]

Bryc testified that Plaintiffs’ Exhibits 10 and 11 (App. 764-65) fairly and accurately represented the river as it appeared when he and Charles went swimming. (App. 118, 120). Other witnesses who also saw the water

[5] Although it had rained on the previous days, the water safety expert testified that the flow of water at Jordan’s Point remained within a range that would not have appeared abnormal. (App. 501).

immediately before and after Bryc and Charles went swimming pointed to Plaintiffs' Exhibits 10 and 11 as accurately reflecting the appearance of the river that day – a glassy-surfaced millpond that appeared to be gently flowing over the dam. (App. 166-68, 179, 554-55).[6]

Bryc jumped into the millpond first, entering from the swimming access at the grassy area between the tire dock and the dam. (App. 119-20). He swam out into the pond, then swam back upriver and climbed out without difficulty. The current felt like it had on the other days the boys had safely swam in the millpond. (App. 124-25).

Bryc and Charles then jumped into the millpond together and headed toward the dam less than 85 feet away, Bryc following Charles. (App. 126). Despite the river's "normal" appearance, once he and Charles "got right up next" to the dam Bryc noticed a "significant difference" in the current. (App. 127). Bryc watched in shock as Charles was swept over the dam, and before Bryc "had a chance to think" he too was swept over. (App. 127).

According to testimony from the water safety expert, Bryc and Charles could reasonably have relied on their prior experience to assume

[6] Additionally, an expert in civil engineering, hydraulics, hydrology and fluid mechanics testified that Plaintiffs' Exhibits 10 and 11 accurately represented the turbidity, or murkiness, of the river at the time Charles was swept over the dam. (App. 536-37).

that swimming to the dam was safe, and that they would be able to grab and climb up on the dam and look below before deciding to jump to the other side – indeed, the river would have appeared safe to the boys based on their prior experience. (App. 498-99). As Bryc testified:

> The water level was normal. The current looks normal. I see people coming out like they had been swimming. They don't seem to indicate that there's anything different. What reason would I have to think that the other side was going to be different than it was on any other day?

(App. 157).

Bryc did not realize the current was stronger than normal until he swam close to the dam and was caught in it. (App. 127-28). As Bryc approached the dam, the current "was just instant how it picked up," unlike any other time he had swum in the millpond. (App. 160). Bryc tried to grab the dam as he approached it, but he could not and the current swept him over the dam too. (App. 127-28).

Once over the dam, Bryc became trapped in a hydraulic current and was unable to swim away. (App. 129). According to the expert, Bryc's eventual escape was "pure luck." (App. 464). Charles never surfaced.

Lexington Police Department Lieutenant Steve Crowder coordinated the rescue effort, arriving on site approximately one hour after Charles was swept over the dam. (App. 411). Even Crowder observed that the millpond

appeared "flat and glassy." (App. 415). He noticed leaves near the swimming access that appeared to be floating upriver. (App. 415). There was nothing above the dam, such as a buoy or cable, to disturb the water, so the river "flow[ed] evenly" without "crests," "white caps," or other indications of its speed or strength. (App. 416-17). The water below the dam, however, was "markedly different." (App. 416).

Rescuers pulled Charles' body from the base of the dam approximately 22 hours after he was pulled over it. (App. 411-12). [7]

C. THE TRIAL COURT'S RULING

At the conclusion of all of the evidence, the trial court struck the Volpes' claim of willful and wanton negligence because it did "not believe a case ha[d] been made." (App. 707). The trial court also refused the Volpes' proffered jury instructions concerning their nuisance claim because "no jury instructions [had] been previously submitted to the [c]ourt or defendant about nuisance, although it was part of the claim," the City had proffered that it believed the claim was abandoned and that it would have presented

[7] In addition to the testimony of Bryc, Hennis, and Crowder, witnesses generally agreed that the millpond appeared calm on the day of Charles' death: Charles' father testified the water upriver of the dam appeared "calm," "smooth," and "wasn't muddy" (App. 552); Mez Welch testified the water "appeared slow" and looked "still", but was "brown" and "muddy" (App. 660, 661, 663-64); Bryc's mother testified the water appeared "very calm" and did not "look muddy or crazy" (App. 166, 174).

different evidence, and because the trial court mistakenly believed that "it was mentioned in opening statement that the plaintiffs were proceeding on their claims of gross negligence only." (App. 713).

The jury failed to reach a unanimous verdict on the remaining claim of gross negligence. (App. 887). After the trial court discharged the jury, the trial court granted the City's renewed motions to strike, "finding that under the facts presented by the [Volpes'] evidence the [City] had no legal duty to warn [the] decedent, and further the [Volpes'] evidence was not sufficient for a reasonable jury to find the [City] had acted in a grossly negligent manner." (App. 887).

Despite previously finding that "the plaintiff ha[d] put on evidence upon which a jury could decide that the danger posed by the dam was hidden and latent," (App. 582), the trial court based its decision to strike the gross negligence claim upon its interpretation of Washabaugh v. Northern Virginia Construction Co., 187 Va. 767, 48 S.E.2d 276 (1948), holding that "rivers and lakes present open and obvious dangers," (App. 753-54), and in reference to the hidden accelerated currents generated by the City's dam:

> [T]hat 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).[8]

II. ASSIGNMENTS 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).

2. The evidence of the City's gross negligence presented a jury question and the trial court erred by striking the claim. (App. 573-80, 592-626, 751, 756, 888).

3. The evidence of the City's willful and wanton conduct presented a jury question and the trial court erred by striking the claim. (App. 573-80, 707-08, 719, 888).

4. The trial court erred in rejecting the proposed nuisance instructions when the instructions were supported by the evidence and correct statements of law. (App. 710-11, 713-14, 716-19, 721-22, 888).

III. STANDARDS OF REVIEW

A. WHETHER THE CITY HAD A DUTY TO WARN CHARLES

"The issue whether a legal duty in tort exists is a pure question of law." Kellermann v. McDonough, 278 Va. 478, 487, 684 S.E.2d 786, 790

[8] In reaching its conclusion regarding the City's duty to warn of hidden dangers, the trial court offered this seemingly incongruous interpretation of Washabaugh: "But what I think the Court is saying is it's an open and obvious danger because of the very fact that the dangers [in water] are hidden and it may be that you don't know about it when you get in." (App. 584-85).

(2009). The Court reviews questions of law de novo. Keener v. Keener, 278 Va. 435, 441, 682 S.E.2d 545, 548 (2009).

B. WHETHER THE TRIAL COURT CORRECTLY STRUCK THE EVIDENCE

"Generally, negligence (whether ordinary, gross, or willful and wanton)," is an "issue[] for a jury's resolution." Griffin v. Shively, 227 Va. 317, 320, 315 S.E.2d 210, 212 (1984). Negligence only becomes a question of law to be determined by a court "when reasonable minds could not differ." Id. The standard is the same when granting a motion to strike after the jury has been unable to return a verdict. Austin v. Shoney's, Inc., 254 Va. 134, 138, 486 S.E.2d 285, 287 (1997).[9]

In reviewing the trial court's decision to strike the evidence, the Court "must consider the evidence and all reasonable inferences deducible therefrom in the light most favorable to the plaintiff. Furthermore, any reasonable doubt as to the sufficiency of the evidence must be resolved in the favor of the plaintiff." Waters v. Safeway Stores, 246 Va. 269, 270, 435 S.E.2d 380 (1993).

[9] However, it is "difficult . . . to say that reasonable minds may not differ when they have just done so." KENT SINCLAIR AND LEIGH B. MIDDLEDITCH, JR., VIRGINIA CIVIL PROCEDURE § 13.8, at 735 (4th ed. 2003) (citing BURKS, PLEADING AND PRACTICE § 284 (4th ed. 1952)).

C. WHETHER THE TRIAL COURT CORRECTLY REFUSED THE NUISANCE INSTRUCTIONS

"In reviewing [the] trial court's refusal to grant a proffered jury instruction, [the Court] examine[s] the evidence in the light most favorable to the proponent of the instruction." Honsinger v. Egan, 266 Va. 269, 274, 585 S.E.2d 597, 600 (2003). "If a proffered instruction finds any support in credible evidence, its refusal is reversible error." McClung v. Commonwealth, 215 Va. 654, 657, 212 S.E.2d 290, 293 (1975).

IV. ARGUMENT

A. THE TRIAL COURT ERRED IN HOLDING THE CITY DID NOT HAVE A DUTY TO WARN OF THE HIDDEN DANGERS CREATED BY THE DAM

To constitute actionable negligence, there must first be a legal duty. Artrip v. E.E. Berry Equip. Co., 240 Va. 354, 357, 397 S.E.2d 821, 823 (1990). The trial court incorrectly interpreted this Court's jurisprudence in holding that a natural body of water is an open and obvious danger, and therefore, that the City had no duty to warn invitees of hidden dangers it knew were associated with the millpond and its lowhead dam. Under Virginia law, landowners have a duty to exercise ordinary care, which includes warning invitees of dangerous conditions known to them but hidden to the invitee, regardless of whether the dangerous condition exists in a natural body of water or elsewhere.

1. The General Rule Regarding a Landowner's Duty Applied to the City

"A landowner must exercise ordinary care to see that his premises are in a reasonably safe condition for the use of an invitee in the manner, and to the extent, that he has invited their use." Indian Acres of Thornburg, Inc. v. Denion, 215 Va. 847, 849-50, 213 S.E.2d 797, 799 (1975). "The invitee is owed the duty of prevision, preparation, and lookout." Id. "[U]nless a dangerous condition is open and obvious, the invitee has the right to assume that the premises are in such condition." Roll 'R' Way Rinks, Inc. v. Smith, 218 Va. 321, 327, 237 S.E.2d 157, 161 (1977). "Notice or warning by the owner is required of an unsafe condition known to him and unknown to the invitee." Indian Acres, 215 Va. at 850, 213 S.E.2d at 799.

Here, the City operated a Park where it invited swimmers of all levels of experience to swim in a millpond with a lowhead dam less than 85 feet away. The City knew (1) that on most days the millpond was safe for swimming, but that under certain conditions the dam could generate currents in the millpond sufficient to pull a swimmer over the dam and into the hydraulic on the downriver side; (2) that these currents "could kill"; (3) that even to the experienced eye, the millpond would appear calm and safe despite the presence of these currents; and (4) that swimmers were likely to swim to the dam less than 85 feet from the swimming access unless

otherwise warned.[10] Under these circumstances, the City had a duty to exercise ordinary care to see that the Park was in a reasonably safe condition for its invitees, which included the duty to warn swimmers of the hidden dangerous currents created by the dam.

2. The City's Duty was not Lessened Simply Because the Dangerous Condition Existed in a Natural Body of Water

Contrary to the trial court's ruling, landowners do have a duty to warn invitees of hidden dangers existing in natural bodies of water that they open for swimming. In Knight v. Moore, this Court held that an owner of a lake open for swimming "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." 179 Va. 139, 146, 18 S.E.2d 266, 269 (1942).

In Washabaugh, the Court recognized the duty to protect swimmers using a natural body of water, holding, consistent with Knight, that the duty applies only when the danger is not open and obvious: "Whether the law imposes a duty upon a defendant to take precautions for the safety of

[10] The evidence at trial demonstrated that, at the very least, the City had actual notice that the dam created a dangerous condition and constructive notice that swimmers did regularly swim to the dam. Roll 'R' Way Rinks, 218 Va. at 327, 237 S.E.2d at 161.

swimmers depends upon whether the danger to which they are exposed is open, obvious, natural and common to all or whether it is hidden and latent." 187 Va. at 773, 48 S.E.2d at 279.

In Blacka v. James, the Court reiterated the general duty owed invitees to a swimming area, be it a swimming pool or a natural body of water:

> [T]he 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 . . . .

205 Va. 646, 649, 139 S.E.2d 47, 50 (1964).[11]

In ruling that "rivers and lakes present open and obvious dangers," (App. 753-54), and therefore the City did not have a duty to warn invitees of the hidden dangers existing in the millpond (App. 756), the trial court ignored Knight and Blacka, and misinterpreted Washabaugh in two ways.

[11] The status of an "invitee" is not limited to "patrons" who have paid a fee for access to the premises. This Court has "held one to be an invitee: (1) [w]here there is an express invitation to the visitor," and "(2) [w]here . . . the premises are thrown open to the public and the visitor enters pursuant to the purposes for which they are open." City of Richmond v. Grizzard, 205 Va. 298, 302, 136 S.E.2d 827, 830 (1964) (citations omitted). Accordingly, the rules enunciated in Knight and Blacka applied to the City.

First, Washabaugh did not address the duty owed to an *invitee* – Washabaugh dealt with a trespassing child who drowned while playing in a quarry pond. 187 Va. at 771-72, 48 S.E.2d at 278. Second, the defendant in Washabaugh had no duty to warn the decedent of any dangers associated with swimming in the quarry pond because the allegedly dangerous characteristics of that pond were not uncommon to ponds in general and did not present hidden dangers. Id. Thus, Washabaugh's holding – no duty to warn trespassers of the "natural, open, and obvious" danger of drowning in ponds – does not support the trial court's ruling here that the City had no duty to warn invitees of the hidden dangers that the City knew its lowhead dam created in the millpond.

Unlike the common quarry pond in Washabaugh, the Park and swimming area owned, maintained, and operated by the City presents increased risks that are not common to ponds generally, but unique, uncommon and latent risks arising from the City's lowhead dam. The City knew that its dam made that portion of the river more dangerous than other rivers – naturally occurring hydraulics, which are visible and do not span the width of a river, do not present the elevated risks of the hydraulic created by a lowhead dam. The City also knew that under certain

conditions those deadly currents would exist but would not be recognized by swimmers.

The City invited the public to swim just 85 feet from a potential death trap, while knowing that the danger presented by swimming there was not apparent. According to Knight, Washabaugh, and Blacka, the City had a duty to warn about the hidden danger.

3. Virginia Code § 29.1-509 Recognizes the City's Duty to Warn Invitees of Dangerous Conditions Existing at the Park

In addition to the decisions of this Court, Virginia Code § 29.1-509 expressly acknowledges the existence of the City's duty to warn its invitees of dangers posed by the dam. Code § 29.1-509(F) provides, in relevant part:

> Any owner of a low-head dam may mark the areas above and below the dam and on the banks immediately adjacent to the dam with signs and buoys . . . to warn the swimming, fishing, and boating public of the hazards posed by the dam. Any owner of a low-head dam who marks a low-head dam in accordance with this subsection shall be deemed to have met the duty of care for warning the public of the hazards posed by the dam. Any owner of a low-head dam who fails to mark a low-head dam in accordance with this subsection shall be presumed not to have met the duty of care for warning the public of the hazards posed by the dam.

Although subsection (F) was enacted after Charles' death, the statute recognizes an existing duty of care for owners of lowhead dams consistent

with this Court's decisions in Knight and Blacka. Regardless, Code § 29.1-509 recognized a duty to warn swimmers of hidden dangers even before the amendment.

For example, at the time of Charles' death, Code § 29.1-509(D) provided that a landowner is liable for "gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." Code § 29.1-509(A) included "waters" in its definition of the "land" or "premises" upon which a dangerous condition or activity could arise, and Code §§ 29.1-509(B) and (C) specifically referenced "participation in water sports" and "swim[ming]" as examples of activities. The protections embodied in Code § 29.1-509 both before and after Charles' death would be meaningless if a landowner who invites people to swim in a natural body of water has no duty to warn of known but hidden dangerous conditions existing therein.

B. THE TRIAL COURT ERRED IN STRIKING THE EVIDENCE OF GROSS NEGLIGENCE

The City had a duty to warn invitees of known but hidden dangers in the millpond, therefore, the City's failure to warn its invitees of the hidden dangers or take steps to protect them could constitute gross negligence. The City (1) knew of the lethal and hidden dangers created by the dam, (2)

knew that the millpond could appear normal and safe despite the existence of those dangers, and (3) repeatedly was informed of the proper measures to address those dangers in order to avoid an injury or death. Whether the City's knowing and deliberate decision to invite the public to swim next to the dam while providing absolutely no safety measure or warning to address the hidden dangers rose to the level of gross negligence presented a question for the jury.

Gross negligence is the "utter disregard of prudence amounting to complete neglect of the safety of another." Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987). "It is a heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence or the want of even scant care." Chapman v. City of Virginia Beach, 252 Va. 186, 190, 475 S.E.2d 798, 801 (1996). "Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety." Id. "Deliberate conduct is important evidence on the question of gross negligence." Id.

Here, the gross negligence should have been decided by a jury. For example, Woody, the City's Director of Public Works who had responsibility for operation and maintenance of the Park, testified that the City knew

about the hidden dangers existing in the millpond, but never took any action to address them:

Q: And you know that water behind the dam, even as it goes up, still looks calm and peaceful to a point?

A: To a point.

Q: And it can go up – goes up to a point where it looks calm and safe and peaceful, but if you get out close to the dam, there are very dangerous currents there?

A: That's true.

Q: And you knew that before Charles died?

A: Yes.

Q And before Charles died, you also understood that – that the current gets faster on those days when it's peaceful back behind the dam. It gets faster right up next to the dam?

A: That's true.

Q: And you also were aware that – before Charles died, and back, I guess, when you were developing the park, that in certain conditions with water going over that dam, my understanding is you were aware that there are conditions that can create a recirculating current at the base of the dam that will trap anything in it, and prevent it from escaping?

A: The hydraulic.

Q: Yes, sir.

A: That's true. That's true.

Q: And you were aware of that back when you were planning the dam – or planning the park, and prior to Charles' death?

A: That's true.

Q: And you knew that neither of those dangers, neither the accelerating current up at the top of the dam, or the recirculating current down below it, exists under all conditions, right?

A: Would you repeat that?

Q: Sure. I mean, there are days and water conditions in which you don't have either of those issues?

A: That's true.

Q: Some days where you may have one, but not the other?

A: That's true.

Q: And you don't know how – but if those dangers do exist, you understood before Charles died, that those dangers can kill you?

A: That's true.

(App. 393-95).

***

Q: Prior to Charles' death, the City never did anything to protect anybody from any hidden hazards connected with the dam and swimming near the dam, did they?

A: Not that I'm aware of.

Q: They never warned anybody, they never installed any safety devices, they never did anything, did they?

A: Not that I'm aware of, no.

(App. 398).

City Manager Ellestad testified that even before Charles' death the City knew that swimming in the millpond was dangerous and that the danger was not apparent, but he admitted that the City chose not to address the dangers:

> Q: Mr. Ellestad, does that refresh your recollection that even prior to Charles' death, you understood that the river could be up a foot or two, look normal, yet be very dangerous?
>
> A: Yes.

(App. 366).

***

> Q: You understood that the Maury River, the location of this park – you understood before Charles' death that it could be particularly dangerous, because of the location of the dam there?
>
> A: That it could be dangerous under certain conditions because of the location of the dam, as well as many other things in the river, yes.
>
> Q: Including the fact that the dam is there, the river can be up, can appear visually normal, yet be very dangerous?
>
> A: For a variety of reasons, of which all of those you mentioned is correct.

(App. 367).

***

Q: Am I correct in understanding that your position is that the only reason you didn't put a sign up – you didn't put a sign up there warning people about the dam, not because you didn't understand the hazard – because you did, right?

A: We understood that a dam could, in certain circumstances, be a hazard, yes.

Q: Even though it might appear very safe?

A: Even though the upper part of the river could appear relatively normal.

(App. 370).

***

Q: Before Charles was swept over the dam, did you do anything to warn people that the river could appear quite normal, yet be very dangerous?

A: No, we did not.

(App. 368).

Andy Wolfe also specifically warned City officials about the risks associated with inviting people to swim in the millpond and the steps necessary to make it reasonably safe:

Q: Did you tell members of the committee and the City employees who were there what the risk was to somebody who was carried over the dam?

A: We did. Well –

Q: What did you tell them?

A: that we thought someone could die.

(App. 318-19).

***

Q: What were the risks that you were concerned about that you talked to the committee about?

A: Oh, that the proposed launch and docking facilities were 90 degrees to the flow of the water of the river.

Q: All right.

A: And that any boat or individual that went loose would have less than 100 feet before capture and would be in peril to go over the dam. It was a human safety issue.

Q: And was your concern just for people who were in a boat, or was – did you articulate a concern for people who may be out of a boat?

A: In – both, in the water or – or in a boat. The danger, actually, I thought, was greater in the boat.

Q: All right. But did you talk to them about people in the water?

A: Specifically.

Q: And what did you tell the members of the committee about how great a hazard it was?

A: I believe that we presented it as a life-and-death hazard. . . . The proximity of the launch to the dam was a primary issue because . . . it being a low-head dam, it causes back water and a rip. That specifically means that the upper surface of the water has a more calm appearance than this actual turbulent speed of the water. The other is

> because it's like an endless pool in that you don't see the dam unless you know it's there. There w[ere] no indications or markings. And so our recommendations . . . were to build a . . . cable-and-float system . . . . And the specific purpose of it, it really doesn't stop much of anything, but it gives you the chance to hang on.

(App. 314-16).

Blatter, the City's Director of Planning and Development shared responsibility for the Park. Despite hearing Wolfe's presentation, Blatter admitted that the City did nothing to warn or protect swimmers from the hidden hazards at the millpond:

> Q. Let me just ask you, you never alerted people to any risks associated with the dam prior to Charles' death; is that right?
>
> A: That is correct, yes.

(App. 219).

***

> Q: Well, prior to Charles' death, what did you do to exercise any responsibility or care for people who stepped across the shoreline into the river? Nothing, did you?
>
> A: That's correct, nothing.

(App. 378).

Despite the City's admitted knowledge of the hidden dangers existing in the millpond, it continued to encourage swimming there and ignored specific advice that the City should warn or protect swimmers from the

hazards posed by the dam. The City knew these measures were a "life-and-death" necessity, particularly when it also knew that swimmers would and did access the dam from the millpond. Regardless of this knowledge, the City made a deliberate choice to do *nothing* to warn or protect the people it invited and encouraged to swim there. Reasonable minds could find that the City's conduct constituted "a form of recklessness or a total disregard of all precautions, an absence of diligence, or lack of even slight care." Chapman, 252 Va. at 191, 475 S.E.2d at 801.

For example, in Chapman, a child was injured while playing on a broken gate at the boardwalk in Virginia Beach. 252 Va. at 188, 475 S.E.2d at 799-800. The city employee in charge of maintaining the gate had been informed "on at least three occasions" prior to the accident that the gate was broken. Id. at 190, 801. Despite this prior notice and the boardwalk's purpose of attracting visitors, he made "a deliberate decision" not to order the gate's repair and subsequently a child was injured while playing with the broken gate. Id. Based on this record, the question of the city's gross negligence "was properly submitted to the jury." Id.

Similar to the boardwalk in Chapman, the Park's purpose was attracting visitors, including swimmers specifically. City officials received repeated warnings of the dangers posed by maintaining the swimming area

near the dam, and they knew that they needed to move the tire dock serving as the swimming access farther upriver, or place safety cables or warning signs near the dam to at least, in Wolfe's words, give swimmers "a chance." Despite discussing these safety issues for years, the City made the deliberate decision to subject the invited public to a hidden danger without providing any warning or safety precaution. The City also deliberately chose not to use any of the funds it received for the Park on safety improvements.

The City's knowledge that the deadly currents generated by the dam would not be apparent to swimmers visiting its Park distinguishes this case from Frazier, where the City of Norfolk was not grossly negligent for failing to install safety measures near a visible gap between an orchestra pit and a stage. The gap was an "open and obvious" condition, and the city's "acts of omission" – in other words, its failure to install protective devices or post warnings regarding an open and obvious condition – did not rise to the level of gross negligence. 234 Va. at 393, 362 S.E.2d at 691.

Unlike a visible gap, the evidence here demonstrated, and the trial court affirmatively found, that the accelerated current just before the dam and the hydraulic current immediately below the dam were "hidden and latent dangers" (App. 582), which the City knew were not apparent to

common observation, did not exist under most conditions, and could be present even when the millpond appeared normal. The City's failure to move the sole swimming access or to institute safety measures or even post signs warning swimmers of these hidden dangers were not acts of omission based on the City's "failing to observe" the dangerous condition, but a result of "deliberate conduct" in the face of repeated notice that it needed to take some action to make the millpond reasonably safe for swimmers; such conduct can support a jury finding of gross negligence. City of Lynchburg v. Brown, 270 Va. 166, 171, 613 S.E.2d 407, 410 (2005).

C. THE TRIAL COURT ERRED IN STRIKING THE EVIDENCE OF WILLFUL AND WANTON NEGLIGENCE

A jury also could find that the City was willfully and wantonly negligent. "Willful and wanton negligence is action taken in conscious disregard of another's rights, or with reckless indifference to consequences that the defendant is aware, from his knowledge of existing circumstances and conditions, would probably result from his conduct and cause injury to another." Alfonso v. Robinson, 257 Va. 540, 545, 514 S.E.2d 615, 618 (1999). "Willful and wanton negligence . . . requires an actual or constructive consciousness that injury will result from the act done or omitted." Id. "[A] defendant's entire conduct must be considered in

determining whether his actions or omissions present such a question for a jury's determination." Id.

The evidence at trial demonstrated that Ellestad, Woody, and Blatter were all intimately and directly involved in the operation and maintenance of the Park. They had actual knowledge that the currents generated by the lowhead dam made the river "particularly dangerous" (App. 367), presented "risks" (App. 218), were "a hazard" (App. 370), could "kill" (App. 395), and could "be deadly" (App. 396). They were specifically informed that the currents generated by the dam were a "life-and-death hazard" (App. 315), and that "someone could die" (App. 318) if they were carried over the dam. They also knew that people accessed the dam, apparently unaware of its dangers. (App. 392).

Despite this knowledge, the City operated and maintained the Park for swimming, and actually encouraged swimming at the Park's sole swimming access less than 85 feet from the dam. Although the City intended to move the swimming area, had received significant funding in order to enhance park safety by relocating the swimming access, and knew that the cost of moving the access would not exceed $2,000, the City deliberately chose to leave the sole swimming area near the dam.

Moreover, the City knew that modest and affordable safety measures, including safety cables or signs warning about the dangers of the dam, were necessary to prevent a death. In fact, a sign was posted – by a private citizen – but the City chose not to replace it after it disappeared. The evidence also showed that the Committee and the architect for the Park had always been concerned about safety, but the City insisted on promoting swimming in complete disregard of the measures necessary to make the millpond reasonably safe for that activity.

"The hallmark of [willful and wanton] conduct is the defendant's consciousness of his act, his awareness of the dangers or probable consequences, and his reckless decision to proceed notwithstanding that awareness." Infant C. v. Boy Scouts of Am., Inc., 239 Va. 572, 581-82, 391 S.E.2d 322, 327 (1990). The City's knowledge that the hidden accelerated currents existing in the millpond would be fatal to a swimmer is evidence of the City's actual or constructive consciousness of the injury that would probably result from its choice not to implement any safety measure or provide any warning, and raises the City's conduct to the level of willful and wanton.

For example, in Alfonso, the defendant had been warned against leaving his vehicle parked in the roadway without deploying safety flares

and reflective triangles. The defendant "knew that the purpose of such safety devices was to warn motorists that they were approaching a stopped vehicle." 257 Va. at 546, 514 S.E.2d at 619. Despite this knowledge, he parked and left his truck on Interstate 95 at night with only its "running lights" activated. Id. at 543, 617. The plaintiff collided with the darkened truck and sustained serious injury. Id. at 546, 619. The Court noted that the defendant "consciously elected" not to provide any warning when confronted with the very circumstances that he had been advised to prevent, and that his "prior knowledge or notice that his actions or omissions would likely cause injury to others" was a "significant factor" in concluding that the evidence of his "knowledge and conduct raised a question of willful and wanton negligence for the jury's determination." Id.

Like Alfonso, here the evidence showed that the City had prior knowledge and notice that placing the sole swimming access for the Park adjacent to the dam, without installing a safety cable or posting a warning regarding the strong currents, could cause a death. This evidence is significant, particularly when the circumstances surrounding Charles' death presented the exact situation the City knew it should endeavor to prevent. A reasonable jury could have found that the City's positive choice *not* to address the hidden hazards existing in the millpond constituted willful and

wanton negligence by exhibiting a conscious disregard for the safety of those it invited to the Park to swim, or a reckless indifference to the consequences of swimming at the Park.

D. THE TRIAL COURT ERRED IN REJECTING THE PROPOSED NUISANCE INSTRUCTIONS

"A cause of action for public nuisance is based on a claim of injury resulting from a condition which is dangerous to the public." Chapman, 252 Va. at 192, 475 S.E.2d at 802. The term "nuisance" embraces everything that endangers life or health. Barnes v. Graham Virginia Quarries, Inc., 204 Va. 414, 417, 132 S.E.2d 395, 397 (1963). Cities can be held liable for damages resulting from a nuisance when "the act creating or maintaining the nuisance was negligently performed." Chapman, 252 Va. at 192, 475 S.E.2d at 802.

The evidence at trial demonstrated that the currents created by the lowhead dam endangered life and health; that the City was aware of the dangerous conditions associated with the dam during the creation and operation of the Park and swimming area; and that the City took no steps to remedy or mitigate those dangerous conditions. This evidence supported the nuisance claim. "It is axiomatic that a party is entitled to have jury instructions that address his or her theory of the case so long as that theory

is supported both by law and fact," Honsinger, 266 Va. at 274, 585 S.E.2d at 600, and therefore, the trial court's failure to grant the instructions constitutes reversible error.

Although counsel failed to mention "nuisance" during opening statement, "[o]pening statements are not to be used for the purpose of arguing what may be the applicable law." Lam v. Lam, 212 Va. 758, 759, 188 S.E.2d 89, 90 (1972). The failure to mention a specific legal issue during opening statement is not a basis upon which to refuse jury instructions supported by the evidence.

The trial court's belief that counsel "mentioned in opening statement that the plaintiffs were proceeding on their claims of gross negligence only" is unsupported by the record, and regardless, the pre-trial scheduling order did not prohibit the parties from offering additional instructions at trial. Nuisance was alleged in the pleadings and supported by the evidence at trial, and the claim was never abandoned or waived. See Davis v. Powell, 142 Va. 711, 736, 125 S.E. 751, 758 (1924) (waiver found where the claim was not charged in the pleadings, established by the evidence, or submitted to the jury by an instruction). The Volpes' nuisance instructions should have been given to the jury.

V. CONCLUSION

The Volpes respectfully request that the Court reverse the trial court's decisions to strike the Volpes' evidence of gross negligence, to strike the Volpes' evidence of willful and wanton conduct, and to refuse the Volpes' proffered jury instructions concerning their nuisance claim and remand this proceeding for a new trial.

Respectfully submitted,

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CERTIFICATE

I hereby certify that, pursuant to Rule 5:26(h) on this 2nd day of August, 2010, fifteen bound copies of this Brief of Appellant and ten bound copies of the Appendix, along with ten copies on CD-ROM, have been hand-filed with the Clerk's Office of the Supreme Court of Virginia, and three bound copies of the Brief of Appellant and one bound copy of the Appendix, along with one copy on CD-ROM, have been served via UPS Ground Transportation upon:

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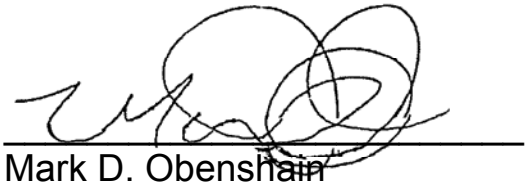

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