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 APPELLEE

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STATEMENT OF THE CASE

The trial court granted the City of Lexington's (the "City") renewed Motion to Strike the evidence for all of the reasons argued by the City. (756).

The trial court granted the Motion to Strike not only because there was no duty to warn of the dangers of a natural body of water, and reasonable persons could not have found the City grossly negligent, but also because:

i) Charles Volpe ("Volpe") exceeded the scope of the City's invitation and went to a place where he was not reasonably expected to go (562); and

ii) sovereign immunity barred the negligence claims. (565-567).

STATEMENT OF THE FACTS

Volpe Was Very Familiar With The Dam

Volpe had ample experience swimming in the Maury River (the "River") near the Dam, and had swum to and jumped off the Dam some 20 to 30 times prior to the day of the accident. (143-144). On these 20 to 30 prior occasions, the speed of the River's

current increased about 5 feet before the Dam. (160). On the day of the accident, the speed of the River's current increased, as it had on the 20 to 30 prior occasions, about five feet before the Dam. (160).

Lexington Had No Knowledge That Individuals Jumped Off the Dam

The City had no knowledge that individuals jumped off the Dam under any circumstances, much less the circumstances present on the day of the accident.[1] (305; 393).

Volpe Received Training Regarding the Dangers of Hydraulic Currents

Although only 16 years old, Volpe was already certified as a rescue scuba diver and master scuba diver by the National Association of Underwater Instructors (NAUI). (871-872). As part of his training towards certification, Volpe received written

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[1] At trial, there was no evidence that Lexington knew individuals jumped off the Dam. Moreover, Volpe's statement that Andy Wolfe "specifically warned City officials about . . . the risks posed by swimming in the millpond", *Appellant's Brief*, p. 9, is not supported by the record as Wolfe's testimony regarding discussion of swimmer safety (as opposed to boating safety, which was his area of interest) was stricken from the record because he did not remember it, but rather was "reconstructing it". (322-326).

warnings regarding the dangers of hydraulic currents below low head dams. (879). Indeed, Volpe was provided a diagram showing how the currents could "trap the unwary" and entitled "Dams Are Drowning Machines". (879).

Deadly Hydraulics Naturally Occur in Rivers

Swimming in a river involves inherent risks. (476-477). Water flowing over large rocks and boulders in a river will create naturally occurring hydraulic currents, sometimes called "keepers", which can trap and drown both swimmers and boaters. (470, 478).

The River on the Day of the Accident

<u>The Volpes' Fact Witnesses' Description of the River</u>

The Volpes[2] called Katie Hennis as a witness. Hennis could tell the River was high and muddy by looking from the spot where Volpe jumped into the River. (182). While she thought about swimming that day, after seeing the River she decided against it. (182-183).

[2] S. Charles Volpe and Kim A. Volpe, Co-Administrators of the Estate of Charles Oliver Volpe shall be referred to, throughout, as "the Volpes".

Andy Wolfe, also called by the Volpes, described the River as "flowing high, hard and fast" on the day of the accident. (331).

The Volpes' Expert Witness' Description of the River and Dam

It rained heavily in the days leading up to Volpe's drowning in the River. (529). On the day of the accident, four to five times the normal volume of water was flowing in the River and rushing over the Dam. (529). The water level in the River was about twice as high as normal. (529).

Under normal flow conditions, there was no hydraulic at the base of the Dam. (130; 461-462). The volume of water in the River determines the power of the hydraulic at the base of the Dam. The greater the volume of water, the more powerful the hydraulic becomes. (461).

The City's Witnesses' Description of the River

The City's witnesses, Sgt. Robert Bedell (who responded to the accident scene), A.J. Back, and Mez Welch described the water in the River as being "high", "brown", "muddy", and "discolored". (684-685, 674-675, 659-660).

Emily Heizer

Emily Heizer went to the River, on the day of the accident, to swim. (629). Heizer got in the River at approximately the same spot where Volpe jumped into the River. (630, 634). From that vantage point, Heizer could see the River downstream of the Dam. (635). Heizer intended to swim only some 5-10 feet into the River, but as soon as she got in her feet were swept from underneath her, she "freaked out", turned around, and got out of the River. (630-631).

The Accident

During the time the River's flow peaked and the water reached its highest level (539), Volpe jumped into the River from the grassy bank next to the boat dock[3] and purposefully swam some 85 feet towards the Dam with the intention of jumping off the Dam towards the down-river side of the Dam. (146-149).

The Volpes' river safety expert testified that Volpe should have looked below the Dam, and determined the water conditions

[3] The boat dock had existed, and been used by boaters and swimmers for access to the River, long before the City developed Jordan's Point Park. (203-204; 278-279).

below the Dam, prior to swimming out to the Dam. (490-491). Volpe could have walked less than 50 steps and seen the water conditions below the Dam. (152-153; 491).

Had he looked below the Dam, Volpe would have seen an abnormally large amount of water rushing over the Dam and churning at the base of the Dam. (132-133). The water conditions below the Dam were the second highest that Volpe's companion had ever seen on the River.[4] (153-154).

Volpe did not look at the water conditions below the Dam prior to getting into the River and swimming directly towards the Dam with the intention of jumping off to the River below. (131; 151-152; 157).

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[4] Seventeen (17) year old Bryc Talley, who jumped into the River with Volpe, testified that on the worst day he had ever seen, the water was so high that you "could barely even tell that there was a dam there." (153-154).

ARGUMENT

I. THERE IS NO DUTY TO PROTECT OR WARN AGAINST THE DANGERS OF SWIMMING IN A RIVER

The trial court's ruling that the City did not owe Volpe a duty to warn involves a pure question of law and is reviewed under a *de novo* standard. *Keener v. Keener*, 278 Va. 435, 441, 682 S.E.2d 545, 548 (2009).

A. *Washabaugh* controls.

There is no duty to take precautions against the dangers associated with natural bodies of water because such dangers are (as a matter of law) natural, open, and obvious. *Washabaugh v. Northern Virginia Construction Company*, 187 Va. 767, 773, 48 S.E.2d 276 (1948).

Seeking to undercut *Washabaugh*, the Volpes cite *Knight v. Moore*, 179 Va. 139, 18 S.E.2d 266 (1942) for the proposition that "an owner of a lake open for swimming . . . has a duty to give notice or warning of an unsafe condition which is known to him and unknown by the invitee." *Brief of Appellant*, p. 23 (internal quotation marks omitted). Not surprisingly, the Volpes fail to discuss the unsafe condition implicated in *Knight*, which

had nothing to do with the dangers inherent in natural bodies of water.

Knight involved the proper installation and operation of an amusement device at a swimming lake; two parallel wire cables extended from this device and were anchored at the shore of the lake. *Knight* at 143. The plaintiff was injured when she tripped over one of these cables as she walked along what appeared to her to be a narrow walkway on the edge of the water. *Knight* at 144. *Knight* did not involve a danger associated with a natural body of water, and has no application to the case at bar.

The Volpes fail to appreciate the import of *Washabaugh* when arguing that the case recognizes a duty to warn swimmers of the dangers of swimming in natural bodies of water, unless the specific danger is found to be open and obvious. A fair and careful reading of *Washabaugh* leaves no doubt as to the import of its holding: there is no duty to warn of the inherent dangers of swimming in a natural body of water because such dangers are *as a matter of law*, natural, open, and obvious. *Washabaugh* at 773.

The *Washabaugh* Court did not make a factual finding that the particular dangers associated with the quarry pond were, under the evidence presented, open and obvious. Rather, its ruling was based on the principle that, as a matter of law, there is no duty to warn of the dangers of swimming in a natural body of water.

The procedural posture of the case demonstrates this critical point. The Court affirmed the trial court's granting of a demurrer even though there were allegations that the deep holes in the quarry created hidden and latent dangers. *Id.* at 771.

The *Nyazie v. Kennnedy, et al.*, 1998 U.S. Dist. Lexis 13280 (a federal case applying Virginia substantive law) court correctly interpreted and relied on *Washabaugh* when stating, as a basis for its ruling, that "natural bodies of water have repeatedly been deemed, as a matter of law, open and obvious dangers."[5] *Id.* at 14. The *Nyazie* plaintiffs argued, as the Volpes argue in the case at bar, that the hidden undertow and currents in the river were not open and obvious. In response, the court noted that in

[5] The court also cited cases from various other jurisdictions in support of this principle of law.

making such an argument the "plaintiffs ignore the essence behind the natural bodies of water doctrine which recognizes the varying hazards involved in natural bodies of water, be they unknown depths, undertow or concealed objects." *Id.* at 21. The *Nyazie* court's comments are equally applicable to the Volpes' argument regarding the hydraulic current.

The Volpes also attempt to distinguish *Washabaugh* on the basis that its holding is limited to the duty owed by a landowner to a trespassing child. However, in *Washabaugh* the plaintiff alleged the defendant knew children were trespassing and swimming in the pit; on demurrer such allegations were taken as true. Once a defendant has knowledge of the presence of trespassers, he has the duty of ordinary care to warn or protect the trespasser of a danger, unless the danger is open and obvious. *Appalachian Power Co. v. LaForce*, 214 Va. 438, 441, 201 S.E.2d 768, 770 (1974)(citing *Norfolk Southern Ry. v. Fincham*, 213 Va. 122, 189 S.E.2d 380); *Virginia Model Jury Instruction*, No. 23.090.

Accordingly, despite the child's trespasser status, because the landowner knew of the child's presence on the property and specifically knew children were swimming in the pit, it still had a duty to warn and protect the child of the dangers of swimming in the pit *unless* the alleged danger was open and obvious. Thus, *Washabaugh's* holding was not dependent upon the child's status as a trespasser.

Finally, the Volpes seek to factually distinguish *Washabaugh* by stating that the Dam's hydraulic currents presented risks not common or inherent in natural bodies of water. However, Volpe's water safety expert acknowledged that hydraulics naturally occur in rivers; water flowing over large rocks and boulders in a river will create hydraulic currents that can trap and drown swimmers. (470, 478). Moreover, the Volpes' argument ignores the facts of *Washabaugh*, and a critical aspect of the Court's ruling.

In *Washabaugh*, the quarry pit in which the child drowned was excavated and maintained by the defendant construction company. The land around the pit sloped gently towards shelves that projected into the pit, from these shelves the walls of the pit

dropped perpendicularly to a depth of 25 feet. *Id.* at 768. At times, because of the condition of the water, it was "impossible to distinguish by sight the shallow from the deep water", which the Plaintiff argued presented hidden and latent dangers not commonly present in ponds. *Id.* at 768, 771.

The Court disagreed, stating that the quarry pit "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 . . . Such danger is natural, open, and obvious . . . " and therefore there was no duty to warn or protect from such danger. *Id.* at 773.

B. *Blacka* is a lifeguard case and does not involve the dangers of swimming in a natural body of water.

1. *Blacka* involved a lake specifically developed and managed for swimming, at which lifeguards were provided for the paying customers.

Blacka v. James, 205 Va. 646 (1964) involved a lake owned and operated by a private owner, and which the general public was invited to use upon the payment of an entrance charge. The owner had developed the lake to include a variety of facilities, and provided lifeguards for the paying patrons. *Id.* at 648-650.

As part of the development of the swimming area, the owner had built 35 foot high towers, with three different platforms or levels, accessed by a series of ladders. The platforms had a diving board, and a zip line that allowed swimmers to ride from the tower to the surface of the lake. *Id.* The swimming area also had a concession stand and cottages. *Id.* The owner provided qualified lifeguards at the lake, who wore senior life-saving emblems on their swimsuits. *Id.* at 649.

2. *Blacka's* general rule.

Blacka's general rule applies only to the "owner of a swimming pool or lake to which the general public is invited **for a consideration** . . . **"** when the paying patrons are "engaged in swimming and other aquatic sports **for which [the owner] has provided facilities** . . .." *Id.* (emphasis added).

3. *Blacka* is a lifeguard case; it does not involve the dangers of natural bodies of water.

The issue in *Blacka* was whether the owner was "negligent in failing to have a sufficient number of trained lifeguards on duty at the time of the drowning . . .." *Id.* at 647. The Court therefore was simply recognizing that once the owner charged a fee for

entry to the swimming area, and provided lifeguards as part of the swimming facilities, he had a duty to have a sufficient number of trained lifeguards on duty. *Blacka* is a lifeguard case; it does not involve a duty to warn of the dangers of swimming in a natural body of water.

Indeed, in *S & C Co. v. Horne*, 218 Va. 124, 235 S.E.2d 456 (1977) this Court clarified the holding in *Blacka* and made clear that it was limited to lifeguard cases involving paying patrons.

The Court noted that the *Blacka* opinion implicitly acknowledged the common law rule that "depending on the circumstances involved, an owner's duty to provide for the safety of **paying patrons** may include a duty to station qualified lifeguards at the pool . . . In such case, the pool owner is liable for the negligence of lifeguards in the performance of their duties." *Id.* at 128 (emphasis added).

The Court went on to analyze the particular language in *Blacka*, and stated:

> What that language implies we now hold expressly. When the owner of a swimming pool to which **patrons for a consideration** are invited is required by law to employ a

> qualified lifeguard, or when in the exercise of his common law duty to provide for the reasonable safety of his patrons, such owner is required by circumstances to do so, the standard of care required of the lifeguard is the care ordinarily exercised in similar circumstances by a qualified lifeguard to detect signs of distress; when distress is discovered, or in the exercise of care should have been discovered, the same standard of care applies to the duty to attempt a rescue; and if the breach of such duty proximately results in injury or death, the owner is liable for the lifeguard's negligence.

Id. at 129-130 (emphasis added).

The Court recognized that *Blacka's* "general rule" is limited to paying patrons, both by repeatedly limiting its holding to paying patrons, and also by stating that by "parallel logic, the same rule applies to a landlord-owner of an apartment complex who, as **part of the consideration for rental payments**, provides a swimming pool for the use of his tenants." *Id.* at 128 (emphasis added).

Blacka is limited to factual situations involving lifeguards provided for paying patrons; it does not involve a duty to warn of dangers in natural bodies of water and is not applicable in the case at bar.

C. Virginia Code § 29.1-509(F) was not in effect at the time of the subject incident; Section 29.1-509(D), which was in effect, did not alter or modify existing case law.

The Volpes argue that Va. Code § 29.1-509(F) recognizes an existing duty of care for owners of low-head dams. As they acknowledge however, this Code sub-section became effective on January 1, 2008 and therefore has no applicability to this claim.

The Volpes' reliance on Va. Code § 29.1-509(D), which was in effect at the time of Volpe's drowning, is misplaced. Sub-section 509(D) states that Code § 29.1-509 shall not limit the liability of a landowner "**which may otherwise arise or exist** by reason of his gross negligence or willful or malicious failure to guard or warn . . .." (emphasis added). Sub-section 509(D) merely excludes matters in which liability could otherwise arise due to gross negligence and willful or malicious conduct from its scope. It does not purport to recognize the situations in which liability "may otherwise arise or exist", and the Volpes' strained argument based on the sub-section is not plausible.

II. THE TRIAL COURT GRANTED THE CITY'S MOTION TO STRIKE ON GROUNDS TO WHICH THE VOLPES HAVE NOT ASSIGNED ERROR

The trial court granted the City's renewed Motion to Strike the evidence for all of the reasons argued by the City. (756, lines 11-14). The trial court granted the Motion to Strike because i) Volpe exceeded the scope of the City's invitation and went to a place where he was not reasonably expected to go (562); and ii) sovereign immunity barred the negligence claims. (565-567).

Any alleged error in the trial court's ruling regarding the lack of duty to warn of dangers in a natural body of water, or the sufficiency of the evidence to establish gross negligence was, at most, harmless error and cannot be the basis for a reversal because the ruling was properly supported by the two additional grounds set forth above, to which the Volpes have not assigned error.

A. The Doctrine of Harmless Error, and the Standard of Review.

To establish harmless error, the City must show that the Volpes "had a fair trial on the merits and substantial justice has been reached." Va. Code § 8.01-678; *Lawrence v.*

Commonwealth, 279 Va. 490, 497, 689 S.E.2d 748, 752 (2010). If this Court can be sure that any alleged error only had a slight effect, or no effect, it should not reverse the trial court's judgment. *Id.*

B. The trial court granted the Motion to Strike because Volpe exceeded the scope of the invitation and went to a place where he was not reasonably expected to go.

Lexington moved to strike the evidence, and the trial court granted the Motion, because Volpe exceeded the scope of the invitation and went to a place where he was not reasonably expected to go. A landowner owes an invitee a duty of care only to the extent that the invitee uses the property in the manner, and to the extent, that the owner has invited their use. *Indian Acres of Thornburg, Inc. v. Denion*, 215 Va. 847, 849-850, 213 S.E.2d 797, 799 (1975). A property owner owes no duty to an invitee who goes to a place on the property where he is not reasonably expected to go. *Franconia Associates, et al. v. Algernon Clark*, 250 Va. 444, 446, 463 S.E.2d 670, 672 (1995).

The Volpes had the burden, in establishing the existence of a duty, to present evidence that Volpe had used Jordan Point Park

in the manner, and to the extent, that the City had invited his use. The Volpes failed to do so.

Indeed, the Volpes' own evidence established that Volpe swam directly towards the Dam with the intention of jumping off the Dam on a day when the River's flow was four to five times normal, during the time the water flow and river height peaked, and when the water conditions created a hydraulic, which normally did not exist, at the base of the Dam.

The City did not invite Volpe to use Jordan's Point Park in this manner or to this extent. Indeed, the City had no knowledge that individuals jumped off the Dam under any circumstances, much less the circumstances present on the day of the accident.[6]

The City could not have reasonably have expected anybody, under these circumstances, to attempt to swim to the Dam with the intention of jumping off. The trial court's ruling on the Motion

[6] The Volpes' reliance on Andy Wolfe's testimony for the proposition that City officials were warned about the dangers of swimming near the Dam is misplaced and not supported by the cited Appendix pages. Indeed, almost all of Wolfe's testimony regarding discussion of swimmer safety (as opposed to boating safety, which was his area of interest) was stricken from the record because he did not remember it, but rather was "reconstructing it". (325-326).

to Strike is correctly and independently supported on this basis, and the Volpes have not assigned error to this portion of the ruling.

C. The trial court granted the Motion to Strike because the Volpes' negligence claims were barred by sovereign immunity.

The Volpes' negligence claims (both gross, and willful and wanton) were based on, and presented as, theories of negligent design, and failure to install safety devices including warning signs. (40-43). The City asserted a sovereign immunity defense[7] to the negligence claims. (14).

Claims, against municipalities, based on negligent design and negligent failure to install safety devices or warning signs are barred by the doctrine of sovereign immunity. *See e.g.*, *City Of Chesapeake v. Helen Cunningham*, 268 Va. 624, 604 S.E.2d 420 (2004); *Freeman v. City of Norfolk*, 221 Va. 57, 60, 266 S.E.2d 885, 886 (1980).

[7] The City's Answer to the Complaint was adopted as its responsive pleading to the Amended Complaint by Consent Order. (47).

The Volpes' assertion that the doctrine of sovereign immunity is applicable only to simple negligence claims[8] is incorrect. *Niese v. City of Alexandria*, 264 Va. 230 (2002). When a governmental function is involved, a municipality is immune from liability for all levels of negligence as well as intentional torts. *Id.* at 239.

The Volpes are correct in asserting the immunity provided by Va. Code § 15.2-1809 applies only to claims of simple negligence. Indeed, the trial court so ruled in its letter opinion denying the City's Demurrer. (29). However, the City asserted both the immunity provided by Va. Code § 15.2-1809 (through a Special Plea), and a sovereign immunity defense through its Answer (21; 14). The trial court correctly ruled that the negligence claims were barred by sovereign immunity.

The trial court's ruling on the City's Motion to Strike is properly supported by additional grounds to which the Volpes have not assigned error. Therefore, any alleged error in the ruling to the extent it is based on a lack of duty to warn of the

[8] *Brief of Appellants*, p. 1, fn. 1.

dangers in natural bodies of water, or the sufficiency of the evidence, had no effect on the judgment, and cannot be the basis for a reversal.

III. NO REASONABLE JURY COULD HAVE FOUND, BASED ON ALL THE EVIDENCE, THAT THE CITY OF LEXINGTON WAS GROSSLY NEGLIGENT, OR WILLFULLY AND WANTONLY NEGLIGENT

The trial court's ruling on the Motion to Strike is reviewed *de novo*, and the evidence and inferences reasonably raised by the evidence are viewed in the light most favorable to the Volpes. *Austin v. Shoney's, Inc.*, 254 Va. 134, 135, 486 S.E.2d 285 (1997).

When a motion to strike the plaintiff's evidence is made or renewed at the end of all evidence, the trial court may consider the evidence presented during the defendant's case in considering the motion. *Id.* at 138.

A. No Reasonable Juror Could Have Found the City Grossly Negligent.

This Court has instructed that to rise to the level of gross negligence, a defendant's actions must show an utter disregard of prudence that amounts to a complete neglect of the safety of

other persons, and must be such that they would shock fair-minded persons. *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 486, 603 S.E.2d 916, 918-919 (2004); *Frazier v. City of Norfolk*, 234 Va. 388, 362 S.E.2d 688 (1987).

Recognizing the high hurdle established by *Frazier* with respect to the conduct necessary to establish gross negligence, the Volpes seek to distinguish the case by arguing that the currents generated by the Dam would not be apparent to swimmers, whereas in *Frazier* the gap was visible, open, and obvious.

Even in the light most favorable to Volpe, the evidence a trial established the following facts. Volpe had swum to the Dam at least 20-30 times prior to the day of the accident. On those prior occasions, the speed of the current increased within approximately five feet of the Dam. The hydraulic at the base of the Dam was created by high water conditions. Volpe should have looked at the water conditions below the Dam prior to attempting to jump off the Dam. Had Volpe looked at the water conditions below the Dam he would have recognized the high

volume of water rushing over the Dam and the unusual "churning" below the Dam. Volpe could have walked less than 50 steps and determined what the water conditions were like, but failed to do so before purposefully swimming to the Dam with the intention of jumping off.

In other words, the evidence established not only that Volpe had actual knowledge of the currents above the Dam, but also that the dangerous water conditions that created the hydraulic currents at the base of the Dam were open and obvious.

Moreover, the evidence established the City had no notice that individuals were jumping off the Dam or swimming at the downriver base of the Dam.

Based on this evidence, no reasonable jury could have concluded that the City's failure to warn of, or protect from, the dangers of jumping into the River and swimming to the Dam constituted gross negligence.

B. No Reasonable Juror Could Have Found the City Guilty of Willful and Wanton Negligence.

Willful and wanton negligence is defined as acting consciously in disregard of another person's rights or acting with

reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another. *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 486, 603 S.E.2d 916, 918-919 (2004). As the evidence presented at trial was insufficient for a jury to conclude that the City was grossly negligent, it was even more inadequate to establish willful and wanton negligence.

The trial court correctly held that the Volpes' evidence was insufficient, as a matter of law, to establish either gross negligence, or willful and wanton negligence.

IV. THE VOLPES WAIVED THEIR RIGHT TO HAVE THE JURY INSTRUCTED ON NUISANCE, AND WERE EQUITABLY ESTOPPED FROM SUBMITTING NUISANCE INSTRUCTIONS

A. Standard of Review.

The Volpes seek to frame the question presented by their Assignment of Error No. 4 as one regarding the sufficiency of the evidence to support nuisance instructions. However, the questions presented by this assignment of error are whether the Volpes i) waived their right to have the jury instructed on

nuisance, or ii) were equitably estopped from having the jury instructed on nuisance.

The trial court rejected the Volpes' proposed nuisance instructions because Volpe's counsel expressly limited the claims upon which they proceeded to the negligence claims, and thereby waived the right to have the jury instructed on nuisance. (713-714). Moreover, as a result of Volpe's representations and the City's reliance thereon, the Volpes were equitably estopped from having the jury instructed on nuisance. The facts relevant to the waiver and equitable estoppel issues are not in dispute, and thus the trial court's ruling, made as a matter of law, is reviewed *de novo.*

B. The Volpes abandoned their nuisance claim, and waived their right to have the jury instructed on nuisance.

The trial court's pre-trial scheduling order (the "Order") required the parties to exchange proposed jury instructions two days before trial. The Volpes submitted numerous instructions addressing negligence theories of recovery, but did not include any instructions regarding nuisance. While the Order did not

prohibit the parties from offering additional instructions at trial, such additional instructions are meant to address issues that have arisen during trial, not a theory of recovery the plaintiff intends to pursue. Moreover, Volpe's failure to submit nuisance instructions pursuant to the Order is particularly significant given counsel's statements and representations during trial.

At trial, the Volpes' counsel expressly limited, in his opening statement, the theories of liability on which the Volpes would proceed. The Volpes' counsel stated to the jury, to the Court, and to opposing counsel:

> . . . we have asserted two grounds of recovery. We've sued the city on the basis of what we claim is their gross negligence and also for willful and wanton misconduct that caused the death of Charles Volpe. . . . And I submit to you that the evidence you're going to hear is that both of those are theories that the evidence will establish. (78) . . .
>
> At the end of this case, if you find that the city needlessly endangered Charles through its gross negligence or through its willful and wanton conduct, then you're going to be asked to return a verdict for this family . . .. (89).

In his argument opposing the City's Motion to Strike the Volpes' counsel again expressly limited the theories of liability on which the Volpes relied, and abandoned the nuisance claim, stating:

> We understood this had to be a grossly negligent case in which we have to establish gross negligence or willful and wanton conduct. And that's all we've alleged. We did allege the simple negligence with respect to the nuisance; **however, we've pursued and have proceeded on the basis of presenting evidence of willful and wanton and gross negligence**. And I respectfully submit that we have. (573; emphasis added)

The Volpes correctly state that the mere "failure to mention a specific legal issue during opening statement is not a basis upon which to refuse jury instructions supported by the evidence." *Brief of Appellant*, p. 42. However, counsel did much more than simply fail to mention a legal issue. Rather, counsel expressly limited the theories of recovery upon which the Volpes proceeded both in his opening statement, and the argument on the City's Motion to Strike. Indeed, counsel stated that while they had pleaded a cause of action for nuisance, they had

"pursued and . . . proceeded" only on gross negligence and willful and wanton conduct.

Waiver is the voluntary and intentional abandonment of a known legal right, advantage, or privilege. *Weidman v. Babcock*, 241 Va. 40, 45, 400 S.E.2d 164, 167 (1991). The essential elements of waiver are i) knowledge of the facts basic to the exercise of the right, and ii) intent to relinquish that right. *Id*. Waiver of a legal right will be implied only upon clear and unmistakable proof of the intention to waive such right for the essence of waiver is voluntary choice. *Id*.

The Volpes, through counsel, knew he had the right to submit jury instructions on nuisance. By failing to submit nuisance instructions pursuant to the Order, by expressly limiting his claims against the City to gross negligence and willful and wanton conduct in opening, and by expressly stating to the Court that he was pursuing and proceeding only on willful and wanton and gross negligence, the Volpes clearly and unmistakably demonstrated his intent to abandon the nuisance claim.

C. The Volpes Were Equitably Estopped From Submitting Nuisance Instructions.

Absent a showing of fraud and deception, the elements necessary to establish equitable estoppel are: (1) a representation to a party, (2) upon which the party relied, and (3) upon which the party changed his position (4) to the party's detriment. *Waynesboro Village, L.L.C. v. BMC Props.*, 255 Va. 75, 82, 496 S.E.2d 64, 68 (1998) (citing T… v. T…, 216 Va. 867, 872-73, 224 S.E.2d 148, 152 (1976).

As set forth above, the Volpes repeatedly represented to the Court and to the City that they were proceeding solely on the negligence claims. The City relied on the Volpes' representation and changed its position both in the manner that it presented its case, and by not moving to strike the nuisance claim. (718). Had the Volpes not represented that he was proceeding solely on the negligence claims, the City would have moved to strike the nuisance claim as there was no evidence that the Dam was dangerous in and of itself. Rather, the Volpes' own evidence established the Dam was dangerous only under high water conditions, and because Volpe purposefully went to the Dam.

The City relied upon the Volpes' representation, changed its position based on the representation, and such reliance should not be to its detriment. The Volpes were equitably estopped from having the jury instructed on nuisance.

D. Any alleged error in failing to instruct the jury on nuisance was, at worst, harmless error.

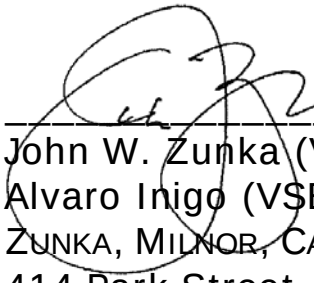
The Volpes' proposed nuisance instruction stated that the City could be "held responsible for creating or maintaining a nuisance if the act of creating or maintaining the nuisance was performed with gross negligence." (721).

The trial court correctly ruled that the Volpes had failed to present evidence from which "reasonable persons could find that the City's failure to warn under those circumstances constituted gross negligence." (756). Because the Volpes' proposed nuisance instruction required the jury to find gross negligence before holding the City responsible for any alleged nuisance, and the trial court correctly ruled as matter of law that there was insufficient evidence for a finding of gross negligence, any alleged failure to warn on nuisance was harmless error.

CONCLUSION

The Court should affirm the trial court's rulings in all respects.

Respectfully Submitted,



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CERTIFICATE

I hereby certify that, pursuant to Rule 5:26(h) on this 27th day of August, 2010, fifteen bound copies of this Brief of Appellee, along with one copy 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 Appellee, have been served via UPS Ground Transportation upon:

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