VIRGINIA: IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

S. CHARLES VOLPE and KIMBERLY VOLPE, Administrators of the ESTATE OF CHARLES OLIVER VOLPE,

Plaintiff,

v. Case No. CL07000221-00

CITY OF LEXINGTON, VIRGINIA,

Defendant.

FINAL JUDGMENT ORDER

On July 6, 2009 through July 10, 2009 came the parties to this action in person and by counsel, and likewise came a jury, including one alternate, to wit: Barbara Hostetter, Winifred Ashworth, Christine Ferrebee, Tammy Montgomery, Tina Rankin, Robert Shafer, Mitzie Staton, and Natalie Broce, all of whom were duly sworn to try the issues raised by Plaintiffs' Amended Complaint;

Plaintiffs presented evidence and, at the conclusion of Plaintiffs' case in chief, Defendant's counsel made a Motion to Strike Plaintiff's evidence for the reasons stated in Court and such Motion was taken under advisement by the Court;

Defendant presented evidence. At the conclusion of Defendant's evidence, Defendant's counsel renewed Defendant's Motion to Strike Plaintiff's Evidence and Moved for a Directed Verdict in favor of the Defendant for the reasons stated in open Court, which Motions were granted in part, and taken under advisement in part by the Court. The Court struck the Plaintiffs' evidence on the Plaintiffs' claim of willful and wanton negligence; the remaining portions of the Motions were taken under advisement. The Plaintiffs objected to the ruling striking their claim of willful and wanton negligence.

Plaintiffs presented rebuttal evidence, and at the conclusion of Plaintiffs' rebuttal evidence Defendant's counsel renewed Defendant's Motion to Strike Plaintiff's Evidence and Moved for a Directed Verdict in favor of the Defendant for the reasons stated in open Court, which Motions were take under advisement by the Court;

The Court heard argument by counsel on instructions, whereupon the Court refused certain instructions proffered by counsel for each party, and granted certain other instructions proffered by counsel for each party, as shown in the record of this case by notation by the Court of refusal of such instructions, and given instructions. Included among the instructions rejected by the Court were all of the Plaintiffs' instructions on nuisance. The Plaintiffs objected to the rejection of the nuisance instructions. The Court instructed the jury on the law of the case.

As the jury included one alternate, the Clerk of the Court, by agreement of counsel, drew at random the name of one juror from a container including all of the jurors' names. The name drawn was Barbara Hostetter, who was declared to have been the alternate and therefore excluded from the jurors' subsequent deliberations.

The remaining seven jurors, having heard the evidence and argument of counsel and having received the instructions of the Court, retired to their room to consider their verdict on July 9, 2007. After some time the jurors were released by the Court for the evening, without having reached a verdict, and instructed to return on the morning of July 10, 2009 to continue their deliberations. All jurors returned on July 10, 2009 and again retired to their room to consider their verdict. After some time, the jurors provided the Court with a written statement that they were unable to reach a unanimous verdict. The Court convened the jurors in the courtroom and provided the jurors with the "Allen charge" as set forth in the Virginia Model Jury Instructions. After being so instructed, the jurors returned to their room to further consider

their verdict. After some time, the jurors again provided the Court with a written statement that they were unable to reach a unanimous verdict. The Court convened the jurors in open court, and polled the members of the jury regarding their statement that they were unable to reach a unanimous verdict; each juror responded that they believed they were deadlocked and no amount of time of continued deliberations would resolve the deadlock. The jurors were discharged. The Plaintiffs objected to the discharge of the jurors.

Defendant's counsel renewed Defendant's earlier Motions which had been taken under advisement by the Court. The Court granted Defendant's Motion to Strike the Plaintiffs' evidence, finding that under the facts presented by the Plaintiffs' evidence the Defendant had no legal duty to warn Plaintiffs' decedent, and further the Plaintiffs' evidence was not sufficient for a reasonable jury to find the Defendant had acted in a grossly negligent manner. The substance and basis for the Court's ruling is reflected in the transcript. The Plaintiffs objected to the Court's rulings.

NOW, THEREFORE, it is ADJUDGED and ORDERED, pursuant to the Court's aforesaid ruling that final judgment is entered in favor of the Defendant.

The Clerk is directed to send attested copies of this Order to counsel for the parties.

Entered this 25th day of September, 2009.

Circuit Court Judge

We ask for this:

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Seen and Objected to. The Plaintiffs object to the rejection of their nuisance instructions, effectively striking their nuisance claim. The Plaintiffs further object to the Court's ruling, striking their evidence on their claims of willful and wanton evidence and gross negligence as well as the Court's ruling that the Defendant had no legal duty to warn the Plaintiffs' decedent. The Court's ruling ignored the additional duty of an invitee to use ordinary care to have the premises in a reasonably safe condition for an invitee's use. The Plaintiffs further object to the discharge of the jury as premature and incorporate by reference the argument and authorities and objections set forth on the record.

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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.

2. The evidence of the City's gross negligence presented a jury question and the trial court erred by striking the claim.

3. The evidence of the City's willful and wanton conduct presented a jury question and the trial court erred by striking the claim.

4. The trial court erred in rejecting the proposed nuisance instructions when the instructions were supported by the evidence and correct statements of law.