IN THE

Supreme Court of Virginia

RECORD NO. 110733

VIOLET SEABOLT,

Appellant,

V.

COUNTY OF ALBEMARLE,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is a premises liability personal injury suit against Albemarle County alleging that the County's gross negligence caused severe and permanent injuries to Violet Seabolt, a 67-year-old woman. Ms. Seabolt appeals the trial court's errors in granting the County's Demurrer to Gross Negligence and asks this Court to reverse the lower court's decision because: 1) gross negligence is a fact-specific determination ordinarily left to the jury; 2) the facts stated in Ms. Seabolt's Complaint must be deemed true at this juncture and state a cause of action for gross negligence when viewed in the light most favorable to Ms. Seabolt; 3) the premature dismissal of the case has prevented Ms. Seabolt from pursuing the discovery necessary for a final determination on the merits; 4) the trial court erred in its interpretation and application of City of Lynchburg v. Brown, 270 Va. 166, 613 S.E.2d 407 (2005); and, 5) the bright-line rule adopted by the trial court would prohibit any plaintiff from successfully bringing a premises liability claim against a County.

MATERIAL PROCEEDINGS BELOW

Violet Seabolt (Ms. Seabolt) brought this personal injury claim against the County of Albemarle due to injuries she sustained on July 2, 2005, as a result of the gross negligence of the County of Albemarle ("County"). Ms. Seabolt filed her original complaint against the County on January 8, 2007. The County filed a Plea of Sovereign Immunity and a Demurrer to the initial suit on February 5, 2007. After very limited discovery, Ms. Seabolt amended her complaint in April of 2009. The County responded on April 20, 2009, with another Demurrer. Ms. Seabolt suffered a Nonsuit of her Amended Complaint on September 10, 2009.

On December 23, 2009, Ms. Seabolt re-filed the Complaint at issue in this case. On January 20, 2010, the County responded with a flurry of procedural challenges including a Special Plea of Sovereign Immunity, a General Demurrer, a Demurrer to Gross Negligence, and a Plea of the Statute of Limitations. On August 27, 2010, the trial court, the Honorable Cheryl V. Higgins presiding, had a hearing concerning the County's various pleas and demurrers. On September 2, 2010, another hearing was conducted, at which Judge Higgins announced her ruling orally. The trial judge denied the County's Plea

of the Statute of Limitations. The lower court also declined to rule on the County's General Demurrer and Special Plea of Sovereign Immunity. However, the trial court erred in granting the County's Demurrer to Gross Negligence. Counsel for Ms. Seabolt objected orally at the proceeding. See App. p. 56–57.

On January 20, 2011, the trial court entered the final order in accordance with the earlier prior oral announcement. Counsel for Ms. Seabolt objected to the order. See App. p. 67. A timely Notice of Appeal was filed on February 7, 2011, from the Final Order dated January 20, 2011. This Court granted Ms. Seabolt's appeal. Ms. Seabolt asserts Virginia law allows her suit to withstand demurrer and to proceed through discovery and trial.

FACTS

Because Ms. Seabolt's case comes to this Court on appeal of the trial court's decision to sustain a demurrer, the facts must be considered in the light most favorable to the Plaintiff. Furthermore, this Court "accept[s] as true all properly pled facts and all inferences fairly drawn from those facts." Abi-Najm v. Concord Condo., LLC, 280

Va. 350, 357, 699 S.E.2d 483, 487 (2010) (citing Glazebrook v. Board of Supervisors, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003)).

The County controls and maintains the Scottsville Community Center at Dorrier Park for public use. See App. p. 1. On July 2, 2005, Violet Seabolt, a 67-year-old woman, was attending a rummage sale event that was open to the general public and held on the premises of the Scottsville Community Center at Dorrier Park in Scottsville, Virginia. See App. p. 2. While walking toward the entrance to the Scottsville Community Center, Ms. Seabolt walked up a wooden public access ramp specifically intended for use by the handicapped, the elderly, and the infirm to use as an entrance to the Center. See App. p. 2. As she reached the landing at the top of the handicapped access ramp, Ms. Seabolt's foot caught on nails protruding above the level of the handicapped access ramp, causing her to twist and fall down the steps adjacent to the access ramp and to strike her left wrist, her face, nose, and both hands on the concrete below. See id. Among other injuries, she fractured her left wrist, right thumb and nose. See id.

The rust and weathering of the nails protruding above the level of the handicapped access ramp and landing show that the nails had

been protruding above the handicapped access ramp and landing level for a considerable length of time. See id. On information and belief, a short time previously, another pedestrian sustained an injury on the same ramp by tripping on these same nails. See id. The County allowed the handicapped access ramp and landing to deteriorate in condition over such a period of time that nails protruded along the entire length of the handicapped access ramp and landing and were never replaced or hammered back into a flush, level position. See App. p. 2–3. The County and its employees knew that the hazardous condition existed. See App. p. 2–5. As a result, Ms. Seabolt caught her toe on a nail, tripped, and fell down the concrete steps, sustaining very serious injuries. See App. p. 3.

The County is charged with the responsibility of operating and maintaining parks and recreational facilities pursuant to Va. Code §15.2-1811(1) (2005). Virginia Maintenance Code § 302.3 requires the County to maintain all sidewalks, walkways, stairs, and similar spaces in a proper state of repair and free from hazardous conditions. See Virginia Maintenance Code § 302.3 (2003). The County committed gross negligence in allowing a handicapped access ramp—specifically constructed to allow disabled, elderly, and infirm

persons safe access to a public building—to fall into such disrepair that it posed a danger to any person using it. See App. p. 3. Although the dangerous condition had clearly existed for many months and most likely years, the County failed to warn the public of the dangerous condition presented by nails protruding from the ramp and landing. See App. p. 3. The County also failed to have a railing in place as required by law to prevent falls and injuries. See App. p. 3.

The County and its employees repeatedly and deliberately chose not to repair the dangerous series of nails protruding above the surface of the handicapped access ramp. See App. p. 3–5. County employees, including but not limited to Ronald Jones ("Jones"), visited the location of the handicapped access ramp three times each week for months prior to Ms. Seabolt's fall. See App. p. 3–5. On each occasion, Jones was charged with the duty and responsibility of inspecting, maintaining, and correcting any dangerous condition in need of repair or maintenance. See App. p. 4. In each instance, Jones possessed tools intended for use in repairing any dangerous conditions; he needed to exert only minimum time and effort, and no expense, to repair and to maintain the handicapped access ramp; and he had the authority necessary to repair and to maintain it. See

App. p. 4. Throughout this time, the Building and Maintenance Code of the Commonwealth of Virginia required the County to repair and maintain the handicapped access ramp. See App. p. 4; See also Virginia Maintenance Code § 302.3 (2003).

The County and Jones knew that the handicapped access ramp would be used by those members of the public who are the most handicapped, infirm, and elderly. See App. p. 4. On each occasion, the County and Jones knew that the series of nails protruding above the surface of the handicapped access ramp could serve as a trap to trip and to harm the very people the ramp was designed to protect. See App. p. 4–5. The County and Jones knew that there was no rail in existence to catch the elderly, disabled, and infirm when they tripped over the series of nails protruding above the surface of the handicapped access ramp. See App. p. 4–5. On each occasion, the County and its employees deliberately and repeatedly chose time and again not to make the repairs or perform the maintenance required by law. See App. p. 5.

As a result of these repeated decisions by the County and its employees, Ms. Seabolt suffered her terrible fall on July 2, 2005. Additional facts likely exist to establish further the County's liability in

this case, but no discovery has occurred since July of 2007 due to the series of defense tactics pursued by the County in the trial court.

ASSIGNMENTS OF ERROR

1. **THE TRIAL COURT ERRED IN DISMISSING VIOLET SEABOLT'S CASE BASED ON THE COUNTY'S DEMURRER TO GROSS NEGLIGENCE. (SEE APP. P. 56–57, 65–67).**

2. **THE TRIAL COURT ERRED IN ESTABLISHING A *PER SE* RULE THAT A PLAINTIFF WHO PLEADS THAT A PREMISES LIABILITY HAZARD WAS NOT OPEN AND OBVIOUS CANNOT ESTABLISH GROSS NEGLIGENCE AGAINST A COUNTY. (SEE APP. P. 56–57, 65–67.).**

QUESTIONS PRESENTED

1. Could a reasonable jury have found that Ms. Seabolt adequately established a claim of gross negligence against the County if they accepted as true all the facts alleged in Ms. Seabolt's Complaint and the inferences fairly drawn from those facts? (Assignment of Error Number 1)

2. Is a ruling sustaining the County's Demurrer to Gross

Negligence improper because Ms. Seabolt has had no opportunity to further develop her case through appropriate discovery? (Assignment of Error Number 1)

3. Did the trial court misinterpret City of Lynchburg v. Brown, 270 Va. 166, 613 S.E.2d 407 (2005) as creating bright-line rules that can be used to end a plaintiff's case without any evidence beyond the pleadings? (Assignment of Error Number 1)

4. Did the trial court err in ruling that Ms. Seabolt cannot establish gross negligence because she did not plead that the nails were open and obvious, despite the legal reality that Ms. Seabolt would then have pled the existence of an affirmative defense on the County's behalf? (Assignment of Error Number 2)

ARGUMENT

I. STANDARD OF REVIEW

This Court applies "well-established principles guiding [its] review of a trial court's judgment sustaining a demurrer." Abi-Najm v. Concord Condo., LLC, 280 Va. 350, 356, 699 S.E.2d 483, 486 (2010). "A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." Id. at 356–357. Accordingly, this

Court "accept[s] as true all properly pled facts and all inferences fairly drawn from those facts." Id. at 357. Furthermore, this Court reviews the circuit court's judgment *de novo* because "there is no discretion involved in ruling upon a demurrer. Such a ruling is confined to the legal sufficiency of a pleading, and does not involve a consideration of disputed facts." Hop-In Food Stores, Inc. v. Serv-N-Save, Inc., 237 Va. 206, 209, 375 S.E.2d 753, 755 (1989). In this case, these well-established principles compel this Court to reverse the trial court's ruling that sustained the County's Demurrer to Gross Negligence and dismissed Ms. Seabolt's case.

II. THE TRIAL COURT ERRED IN SUSTAINING THE COUNTY'S DEMURRER TO GROSS NEGLIGENCE BECAUSE GROSS NEGLIGENCE IS A QUESTION OF FACT THAT IS ONLY DECIDED ON DEMURRER IF THE ALLEGATIONS AND INFERENCES MADE IN THE COMPLAINT CANNOT PRESENT A JURY QUESTION.

The high level of deference owed to the plaintiff when challenged by demurrer dates back almost to this Court's origin as a judicial body. As this Court noted in Meade v. Grigsby's Adm'rs:

> Ordinarily, it is considered premature upon a general demurrer wholly to dismiss the bill, unless the complainant's case is from his own showing radically such, that no discovery or proof properly called for by, or founded upon the allegations in the bill, can possibly make it a proper subject of equitable jurisdiction.

Meade v. Grigsby's Adm'rs, 67 Va. 612, 614-15 (1875) (citing Pryor v. Adams, 5 Va. 382 (1798)).

The trial court "must consider the pleading in the light most favorable to the plaintiff [....]"Sanchez v. Medicorp Health Sys., 270 Va. 299, 303, 618 S.E.2d 331, 333 (2005). In this case, the trial court abandoned this fundamental requirement and instead ruled as a matter of law that Ms. Seabolt could not establish gross negligence. The trial court thus summarily deprived Ms. Seabolt of her right to bring her case before a jury even though reasonable people could differ as to whether the County committed gross negligence.

This Court should reverse the lower court because Ms. Seabolt's Complaint establishes a jury question on the issue of gross negligence. A county operating a park is "liable in damages for the gross negligence of any of its officers or agents in the maintenance or operation of any such park, recreational facility or playground." Va. Code § 15.2-1809 (2005). By state code, the County had a specific duty to maintain all sidewalks, walkways, stairs, and similar spaces in a proper state of repair and free from hazardous conditions. See Virginia Maintenance Code § 302.3 (2003).

Gross negligence is "that degree of negligence which shows an 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) (internal citations omitted). Gross negligence "amounts to the absence of slight diligence, or the want of even scant care." Id. (internal citations omitted). However, "[s]everal 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." Chapman v. City of Virginia Beach, 252 Va. 186, 190, 475 S.E.2d 798, 801 (1996). A number of negligent acts combined shows a form of recklessness or a total disregard of all precautions akin to willful and wanton misconduct. See Kennedy v. McElroy, 195 Va. 1078, 1082, 81 S.E.2d 436, 439 (1954). Also, deliberate conduct is important evidence of gross negligence. See Chapman, 252 Va. at 190; see also, Kennedy, 195 Va. at 1082. It is axiomatic that gross negligence is a fact-specific determination generally left for the jury to decide. See Chapman, 252 Va. at 190. As this Court expressed in Kennedy:

> Whether gross negligence has been proved depends on the facts and circumstances in each case and each case is governed by its own facts. Ordinarily the issue is for the jury, and it becomes a question of law for the court only when reasonable men should not

differ as to the proper conclusion to be drawn from the evidence. Kennedy, 195 Va. at 1082.

In Frazier v. City of Norfolk, this Court said that the court's duty to rule without a jury arose only "when persons of reasonable minds could not differ upon the conclusion" that gross negligence had not been established. See Frazier, 234 Va. at 393. That standard is even higher here because of the premature dismissal of Ms. Seabolt's claim as a result of the County's Demurrer. In this case, the trial court could only sustain the demurrer if reasonable minds could not differ that Ms. Seabolt failed to even plead a claim of gross negligence. Ms. Seabolt certainly pled such a claim.

III. THE TRIAL COURT ERRED IN SUSTAINING THE COUNTY'S DEMURRER TO GROSS NEGLIGENCE BECAUSE REASONABLE JURORS COULD FIND THAT MS. SEABOLT PLED GROSS NEGLIGENCE WHEN THE PLEADINGS ARE READ IN THE LIGHT MOST FAVORABLE TO HER.

In determining whether a plaintiff's claim rises to the level where reasonable persons could differ as to whether or not gross negligence occurred, the lower courts are guided by two contrasting opinions from this Court. In Frazier v. City of Norfolk, a divided Court held that reasonable minds could not conclude that Frazier had established a claim of gross negligence against the City of Norfolk.

See Frazier, 234 Va. at 393. The plaintiff in Frazier was a thirteen-year-old boy who was invited to play the drums for a church choir that was meeting in a publicly-owned building. See id. at 392. The drums were positioned at the rear of an orchestra pit. See id. The plaintiff alleged that the City failed to place a railing or warning signs around the pit. See id. When the plaintiff dropped his drumstick, he leaned backwards on his stool to find it and fell from the pit to the floor. See id. This Court held that the "failure to install protective devices or to post warnings for children at a platform edge which was open and obvious amounts, at the most, to ordinary negligence [....]" Id. at 393.

Nine years after Frazier, this Court found in Chapman v. City of Virginia Beach that the trial court erred in setting aside a jury verdict in favor of the plaintiff. See Chapman, 252 Va. at 191. In Chapman, the City owned and maintained a boardwalk that ran alongside the beach. See id. at 188. The City allowed a gate leading from the boardwalk to the beach to deteriorate to the point that the gate could swing freely over the sand. See id. Discovery revealed that the City had known about the condition of the gate for approximately four months. See id. at 190–191. The employee having authority to repair the gate decided to wait to fix the gate until immediately prior to the

spring tourist season. See id. at 191. During a family trip to Virginia Beach that December, eight-year-old Missy Chapman was swinging on the gate when her head became stuck in the gate's metal bars. See id. at 188. As a result, Missy perished when the gate swung away from the boardwalk, suspending her over the sand. See id.

In this case, the County's actions and omissions alleged by Ms. Seabolt are far more similar to Chapman than to Frazier. The wooden access ramp was specifically intended to be used by elderly, handicapped, and infirm people who needed assistance in accessing a public building. State law required the ramp to be properly maintained. The walkway was in a bad state of disrepair, and the rust and weathering of the nails show that this condition had existed for a considerable length of time. Protruding nails posed a dangerous hazard all along the access ramp. These nails posed the greatest hazard to the very people who were expected and invited to use the ramp. Another person had already been injured on the ramp. An employee with the responsibility, authority, and capacity to fix the ramp was at the park facility where the injury occurred three times a week. No warning or protective railing was put in place to protect against injury.

The County argues that Ms. Seabolt failed to plead a claim for gross negligence because the Complaint "does not allege that County employees had ever reported the alleged condition to the County." See Brief in Opposition to Petition for Appeal p. 3. However, Ms. Seabolt actually pled beyond mere notice. Ms. Seabolt repeatedly pled that the County and its employees had actual knowledge of the hazard. See App. p. 2–5. Because the County never filed an answer with admissions or denials, at this point it is uncontroverted in the pleadings that the County had actual knowledge, acted deliberately, and did so repeatedly.

The County attempts to distinguish Chapman by stating that a "supervisor in charge of maintaining the gate made a 'deliberate decision' not to order the gate repaired or secured [....]" See Brief in Opposition to Petition for Appeal p. 6. Indeed, the County admits, "The Court in *Chapman* noted that deliberate conduct is important evidence on the question of gross conduct [*sic*] [....]" See id. (italics in original). Yet, Ms. Seabolt specifically alleged that the County and its employees "deliberately chose time after time after time not to make the repairs or perform the maintenance required" by law. See App. p. 5; see also App. p. 3. As a direct result of those repeated, deliberate

decisions, Ms. Seabolt suffered a terrible fall and sustained serious and permanent injuries. A reasonable jury considering the pled facts in the light most favorable to the plaintiff could determine that the County's actions and omissions rose to the level of gross negligence.

Frazier is distinguishable because the only real claim there against the City of Norfolk was that it failed to have a railing or a warning in place on the orchestra pit. Even then, the Justices of this Court were divided on whether or not Frazier's case was sufficient to present a jury question. The County calls the facts in Frazier "substantially more egregious" than the facts in this case. See Brief in Opposition to Petition for Appeal p. 7. However, the allegations made by Ms. Seabolt, which at this early juncture must be accepted as true, go beyond the claims made in the Frazier case. Ms. Seabolt has alleged far more than the mere failure to warn or build a railing. Rather, Ms. Seabolt additionally alleges that the County knowingly, repetitively, and deliberately chose to allow the handicapped access ramp to deteriorate into and remain in a dangerous condition that eventually caused her violent fall and severe injuries. Thus, the Chapman decision should control this Court's analysis, and this Court should

find that reasonable minds could differ as to whether the County committed gross negligence.

IV. THE TRIAL COURT ERRED IN SUSTAINING THE COUNTY'S DEMURRER TO GROSS NEGLIGENCE BECAUSE MINIMAL DISCOVERY HAS OCCURRED AT THIS STAGE OF THE PROCEEDING AND NO APPLICABLE CASE LAW HAS EVER BEEN DECIDED AT THIS PREMATURE JUNCTURE.

This Court should also reverse the trial court's decision because no prior relevant case decided by this Court deprived the plaintiff of the ability to proceed with discovery and gather evidence to fully develop their claim of gross negligence. To dismiss Ms. Seabolt's Complaint at the premature stage of a demurrer hearing deprives Ms. Seabolt of the opportunity to even try to prove her claim. In Frazier, the plaintiff's evidence was struck at the close of the plaintiff's case. See Frazier, 234 Va. at 393; see also Frazier, 234 Va. at 395 (Thomas, J. concurring in part and dissenting in part). In City of Lynchburg v. Brown, discussed more fully below, the plaintiff proceeded to trial and received a jury verdict in her favor before this Court reversed the verdict. See City of Lynchburg v. Brown, 270 Va. 166, 167, 613 S.E.2d 407, 408 (2005). In Chapman, the plaintiff proceeded to trial and obtained a favorable jury verdict before the trial

judge errantly set aside the verdict and entered judgment for the City. See Chapman, 252 Va. at 187. In this case, the trial court ended Ms. Seabolt's case at a demurrer hearing based solely on the Complaint. Thus, the trial court deprived Ms. Seabolt of the opportunity realized by the plaintiffs in Frazier, Brown, and Chapman to fully pursue their claim and present all the evidence at trial before ending the proceeding.

A careful comparison with the Chapman case shows how detrimental the premature ending of litigation is to Ms. Seabolt. In Chapman, this Court essentially relied upon these five facts: 1) the boardwalk was constructed and maintained as a recreational facility; 2) the purpose of the boardwalk was to attract visitors; 3) the condition of the gate was a violation of a city rule; 4) city employees had knowledge of the hazard; and, 5) the decision not to repair the gate was deliberate. See id. at 191. In this case, the Center and the Park were maintained as recreational facilities. The purpose of the access ramp was to provide safe and easy access to the Center for elderly, handicapped, or infirm persons. The condition of the ramp was in violation of the Virginia Maintenance Code. Moreover, Ms. Seabolt specifically alleged that the County and its employees had

knowledge of the condition of the ramp and deliberately chose not to fix it. See App. p. 2–5. The only way to determine whether Ms. Seabolt can prove these allegations is to continue with this case, but at this juncture the trial court was required to accept the allegations as fact. At a later point, the trier of fact may determine that the County did not commit gross negligence. However, that decision is for another day after Ms. Seabolt has had the opportunity to pursue full discovery and present her case. This Court should reverse the trial court and give Ms. Seabolt that opportunity.

V. THE TRIAL COURT ERRED IN INTERPRETING CITY OF LYNCHBURG V. BROWN AS ESTABLISHING BRIGHT-LINE RULES TO DETERMINE GROSS NEGLIGENCE, WHICH IS A FACT SPECIFIC DETERMINATION THAT IS PROPERLY LEFT TO THE JURY.

The determination of gross negligence has long been a fact-driven inquiry. See Frazier, 234 Va. at 393; see also, Chapman, 252 Va. at 190. "Whether gross negligence has been proved depends on the facts and circumstances in each case and each case is governed by its own facts." Kennedy, 195 Va. at 1082. As discussed above, the fact-driven approach has long been guided by this Court's two seminal cases on the issue, Frazier and Chapman. However, the trial

court erred in abandoning the fact-driven approach of Frazier and Chapman and relied instead primarily on the case of City of Lynchburg v. Brown, 270 Va. 166, 613 S.E.2d 407 (2005). While the County now calls Lynchburg v. Brown one of the "two leading cases cited by the County," that case had not been cited or mentioned on the record by the court or any attorney until the trial judge misinterpreted the case at the September 2, 2010 proceedings. See App. p. 52–55; cf. Brief in Opposition to Petition for Appeal p. 2.

The trial court's interpretation and application of Brown is incorrect. The trial court interpreted Brown as replacing the traditional fact-driven gross negligence inquiry with bright-line rules regarding gross negligence. The trial court interpreted Brown as saying that "the Virginia Supreme Court has found that gross negligence cannot be present when a City lacks actual notice of a dangerous condition." See App. p. 52. The trial court also interpreted Brown as saying that, as a matter of law, a reasonable jury could not find gross negligence in absence of actual notice. See App. p. 53. The trial court also found, under Brown, that a jury could not base a finding of actual knowledge on employee presence near the hazardous condition. See id. The trial court erred in these interpretations.

In Brown, the plaintiff was walking on the bleachers at an athletic park in Lynchburg when she fell because she stepped onto a damaged portion of the bleachers. However, this Court did not abandon the fact-driven inquiry in its analysis in Brown, nor did it establish bright-line rules for future cases. This Court began its analysis in Brown by saying that the sole question it intended to answer was "whether the trial court erred by refusing to rule as a matter of law that a city was free of gross negligence *under the facts of this case*." See Brown, 270 Va. at 167 (emphasis added). This Court specifically recognized that Frazier and Chapman were the contrasting, controlling precedents. See id., at 169. This Court specifically stated, "We agree with the City; this is a *Frazier* case." Id. (italics in original).

Clearly, this Court was not changing the traditional analysis; rather, this Court merely agreed that the Brown case was closer to Frazier than Chapman. Also, this Court did not hold that gross negligence could not exist without proof of actual notice. This Court said, "Certainly, as the plaintiff argues, a jury could have found that the City should have known of the hazardous bleacher. But, *under these facts*, that is insufficient, *standing alone*, to present a jury issue

on gross negligence." See id. at 171 (emphasis added). Also, this Court did not hold that a jury could never find actual notice based on employee presence. Rather, this Court said that, in Brown, "[r]easonable persons would have had to speculate to reach such a conclusion." Id. The trial court's reading of Brown should not stand.

Even if this Court concludes that the trial court rightly interpreted Brown, this case is distinguishable from those facts. In Brown, "The evidence was uncontradicted that the City did not have actual notice of the damaged bleacher seat." Id. at 168. In addition, there was "no evidence of deliberate conduct by municipal employees or of a total disregard of all precautions by them." Id. at 171. The plaintiff in Brown had the opportunity to pursue her claim to a full trial.

In this case, Ms. Seabolt alleged that the County and the responsible employees had actual knowledge of the condition of the access ramp. That allegation has yet to be denied or contradicted and must be accepted as true. Ms. Seabolt alleged that the County and the responsible employees made repeated, deliberate decisions not to repair or maintain the access ramp. That allegation, too, has yet to be denied or contradicted and must be accepted as true. At this preliminary stage of litigation, these uncontested allegations must be

accepted as fact. Thus, even if the trial court's interpretation of Brown was correct, the trial court erred in its application of Brown to these facts and proceedings.

VI. THE TRIAL COURT'S BRIGHT-LINE RULE REQUIRING A PLAINTIFF TO PLEAD THAT A HAZARD WAS OPEN AND OBVIOUS WOULD PREVENT ANY PLAINTIFF FROM SUCCESSFULLY BRINGING A PREMISES LIABILITY CASE AGAINST A COUNTY.

On the basis of its misinterpretation of Brown, the trial court established its own bright-line rule that a plaintiff is required to plead that the hazard is open and obvious. The trial court stated that the court could not find gross negligence was pled because "even in the light most favorable to the plaintiff, [...] it was not an open and obvious condition; rather, according to the complaint, these nails were difficult to detect." App. p. 54. However, if the plaintiff must plead that a hazard is open and obvious to survive a demurrer for gross negligence, this Court will force the plaintiff to plead herself out of a case because an open and obvious hazard is an affirmative defense to premises liability claims. See S. Floors & Acoustics, Inc. v. Max-Yeboah, 267 Va. 682, 686, 594 S.E.2d 908, 910 (2004) ("When a plaintiff is injured by an open and obvious defect, it is his burden 'to show conditions outside of himself which prevented him seeing the

defect or which would excuse his failure to observe it [....]'") (internal citations omitted). However, even if the trial court was right about the need to plead that the hazard was open and obvious to find constructive notice, the trial court did not give the proper benefit to the allegations in the pleading. The trial court claimed "there's no allegation that Albemarle was ever informed of the condition of these nails." App. p. 54. Ms. Seabolt's Complaint specifically and repeatedly alleges that the County and its employees had actual knowledge of the dangerous condition of the access ramp. See App. p. 2–5. The trial court clearly erred in dismissing Ms. Seabolt's case on this basis and must be reversed.

CONCLUSION

When a trial court prematurely and summarily deprives a plaintiff of her right to a trial by jury due to a demurrer, this Court accepts as true all properly pled facts and all inferences fairly drawn from those facts. There is no discretion involved in the decision made below. Well-established principles compel this Court to reverse the trial court's ruling sustaining the County's Demurrer.

The trial court erred because it did not read, accept, and apply the pleadings in the light most favorable to Ms. Seabolt. Several acts of negligence which separately may not amount to gross negligence, when combined can have a cumulative effect showing a form of reckless or total disregard for another's safety. It is axiomatic that gross negligence is a fact-specific determination generally left for the jury to decide. The Chapman decision should control this Court's analysis, and this Court should find that reasonable minds could differ as to whether the County committed gross negligence, thereby creating a jury issue.

The trial court also erred in ending the proceeding at such an early stage. No prior relevant case decided by this Court deprived the plaintiff of the ability to proceed with discovery and gather evidence to fully develop their claim of gross negligence. The trial court deprived Ms. Seabolt of the opportunity realized by the plaintiffs in Frazier, Brown, and Chapman to fully pursue their claim and present their evidence before ending the proceeding.

The trial court again erred in its interpretation and application of Brown. The trial court wrongly interpreted Brown as replacing the traditional fact-driven gross negligence inquiry with bright-line rules

regarding gross negligence. Moreover, Ms. Seabolt specifically alleged that the County and its employees had actual knowledge of the condition of the access ramp and that the County and its employees made repeated, deliberate decisions not to repair or maintain the access ramp. Those allegations have yet to be denied or contradicted. At this premature juncture, those uncontested allegations must be accepted as fact.

The trial court erred in establishing its own bright-line rule that a plaintiff must plead that the hazard was open and obvious. If a plaintiff must plead that a hazard is open and obvious to survive a demurrer for gross negligence, this Court will force the plaintiff to plead herself out of a case because an open and obvious hazard is an affirmative defense to premises liability claims.

Violet Seabolt suffered major and permanent injuries as a result of the gross negligence of the County of Albemarle, and she has a valuable action at law deprived of her by the errors of the trial court. Ms. Seabolt prays this Honorable Court reverse the trial court below and allow her a trial by jury on her gross negligence claim against the County.

Respectfully Submitted,

Violet Seabolt

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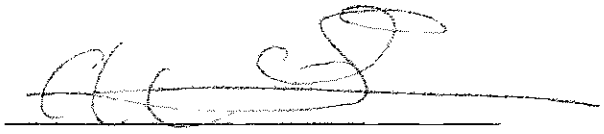
CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26 of the Rules of the Supreme Court of Virginia have been complied with and pursuant to the Rule, on August 30th, 2011, fifteen (15) copies of the foregoing Opening Brief of Appellant, along with an electronic copy of the Opening Brief and Appendix on CD were filed in the office of the clerk of the Supreme Court of Virginia and on the same day three (3) copies were mailed to John W. Zunka. Esquire, VSB #14368 of Zunka, Milnor & Carter, Ltd. P.O. Box 1567, Charlottesville, Virginia 22902, phone 434-977-0191, counsel of record for the Appellee.



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