THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: March 26, 2013)

BRETT A. ROY and DAWN K. ROY	:	
Each Individually, and as Natural Parents,	:	
Next Friends and Guardians of Minors	:	
JALYN ROY and BRETT A. ROY, JR.	:	
Plaintiffs	:	
	:	**C.A. No. PC-09-2874**
V.	:	
	:	
STATE OF RHODE ISLAND;	:	
THE RHODE ISLAND DEPARTMENT	:	
OF ENVIRONMENTAL	:	
MANAGEMENT; W. MICHAEL	:	
SULLIVAN, In His Capacity as Director	:	
of the Rhode Island Department of	:	
Environmental Management; and	:	
KENNETH HENDERSON, as an Employee,	:	
Agent or Servant of the State of Rhode	:	
Island DEM	:	
Defendants	:	

DECISION

MCGUIRL, J. Before this Court are the post-trial motions of Brett Roy ("Plaintiff" or "Mr. Roy") and the State of Rhode Island Department of Environmental Management ("Defendant" or "D.E.M." or "Department"). Plaintiff asserted a premises liability claim against Defendant under the Rhode Island Recreational Use Statute, G.L. 1956 § 32-6-1, et seq. Following a jury trial, a verdict was returned in favor of Defendant, and Plaintiff renewed his Motion for Judgment as a Matter of Law and moved for a new trial. Defendant also renewed its Motion for Judgment as a Matter of Law. Jurisdiction is pursuant to G.L. 1956 § 8-2-14, and R.I. Super. R. Civ. P. 50 and 59.

I

FACTS AND TRAVEL

The setting for the tragic story in this case is the World War II Memorial State Park (the "Park"), located in the City of Woonsocket (the "City"). The Defendant is responsible for operating the nearly sixteen acre park. (Def.'s Mem. in Supp. of Renewed Mot. for J. as a Matter of Law 3.) The Park contains a four acre man-made pond (the "pond") that has long provided local residents with free access to a beach front area, where they can enjoy swimming, walking, picnics, concerts and other recreational activities. Id. at 2; Def.'s Mem. in Supp. of Mot. for Summary J. 2-3. The "pond" is a unique combination of both naturally-occurring and man-made physical features.[1] It is designed like a basin, with a sandy bottom that slopes gradually downward from the surrounding walls and beach and becomes deeper in the middle. (Pl.'s Mem. in Supp. of Renewed Mot. 10.)

The "pond" is divided into roughly three areas: (1) a beach area; (2) an area for swimming laps—the so called "Olympic Pool"; and (3) the rest of the "pond," which is essentially a water basin. The beach area of the "pond" is located at the end of a walkway that leads to the parking lot. It consists of a sandy beach that slopes gently down into shallow water. The beach area was the primary area for swimming and bathing. (Def.'s Mem. in Supp. of Renewed Mot. 4.) At the outer boundary of the shallow water, a rope with several buoys attached marked the end of the designated lifeguard-supervised swimming and bathing area.

In front of the parking lot, and roughly ninety degrees to the right of the beach area, is the "Olympic Pool," the area of the "pond" that was used for lap swimming. Concrete bulkheads

[1] The jury in this case took a view of the "pond." Although this Decision attempts to describe some of the unusual features of the "pond," the "pond's" uniqueness can best be appreciated through a visual reference. To that end, photographs of the "pond" introduced as exhibits at trial are appended to this Decision. See Trial Exs. 20A, 20B, 20C, 20D, 21C.

border the "Olympic Pool" on two sides. Several buoy ropes strung in between the two bulkheads divided the "Olympic Pool" into lanes. Id. Although the exact depth of the water in the "Olympic Pool" generally is uncertain, and at the time of the incident was uncertain, it is somewhat deeper than the water in the beach area, but no greater than five or six feet.

Beyond the boundary ropes that enclosed the beach area and the "Olympic Pool" lies the rest of the "pond." This area is essentially a water basin. Up until approximately 1996, there was a "diving platform"—consisting of a concrete structure with a springboard attached—located near the middle of the "pond," outside the two swimming areas. (Lambert Dep., Def.'s Mem. in Supp. of Mot. for Summary J., Ex. A 28-29.) Sometime around 1996, the springboard was removed but the concrete "diving platform" remained in place. Id. Also located outside the two swimming areas is a concrete fountain that sprayed water skyward. The deepest part of the "pond" is located somewhere in the middle, but the exact depths are uncertain.

Restrooms, changing areas, and shower facilities are located adjacent to the "Olympic Pool"—roughly in between the "pond" and the parking lot. In front of these facilities, a concrete terrace with a railing juts out over the water. A stone wall with an asphalt pathway on top of it encircles part of the "pond's" perimeter.

To open the "pond" each year, the D.E.M. filled the "pond" with water from nearby Mill River and treated the water with chlorine, a process that usually took up to two weeks. (Def.'s Mem. in Supp. of Mot. for Summary J. 3.) In years prior to 2008, the Defendant traditionally opened the "pond" for public use on or around Memorial Day and closed the "pond" at the end of the summer season, on or around Labor Day. (Def.'s Mem. in Supp. of Renewed Mot. 4.) The Defendant would typically hire lifeguards and park rangers each season, and would have such staff in place prior to opening the "pond" to the public. (Def.'s Mem. in Supp. of Mot. for

Summary J. 3.) The lifeguards and staff would place buoy ropes in the "pond" to indicate areas where swimming was permitted. Id. at 4. Swimming was usually permitted in only two locations: the beach area and the "Olympic Pool." (Def.'s Mem. in Supp. of Renewed Mot. 4.) In 2008, however, the Defendant did not begin the process of opening the "pond" until unusually late in the season. Due to budget cuts, the D.E.M. had initially intended not to open the "pond" at all that year. Id. at 15. But after a hot and humid start to the summer, the Defendant—under public pressure and after receiving a specific legislative grant—ultimately decided to open the "pond" for the 2008 season. Id. On June 27, 2008, prior to hiring lifeguards, the State held a press conference to announce that it was opening the "pond." A local newspaper also covered the "pond's" opening. On or around June 27, 2008, the State immediately began the process of filling the "pond" and members of the public began to come to the "pond" to swim. (Sullivan Dep., Def.'s Mem. in Supp. of Mot. for Summary J., Ex. B 86-89.)

Thirteen days later, on July 10, 2008, Mr. Roy and his neighbor Hope Brayboy ("Ms. Brayboy") decided to take their children to the Park. (Def.'s Mem. in Supp. of Renewed Mot. 7.) On that fateful day, the restroom, changing areas and shower facilities were open; approximately thirty members of the public were swimming in and diving into the "pond"; and at least one D.E.M. employee, Kenneth Henderson, was on site; but there were no lifeguards present. (Pl.'s Mem. in Supp. of Obj. 5; Pl.'s Mem. in Supp. of Renewed Mot. 13; Def.'s Mem. in Supp. of Renewed Mot. 13.) Nor were there any lifeguard chairs set up in the vicinity of the "pond." (Def.'s Mem. in Supp. of Renewed Mot. 13.) Several "No Swimming" and "No Lifeguard on Duty" signs are posted around the "pond" nearly all year round and were in place on that day. (Def.'s Mem. in Opp'n 5; Lambert Dep., Def.'s Mem. in Supp. of Mot. for

Summary J., Ex. A 23, 90-91.) There were no signs warning of shallow water or prohibiting diving. (Pl.'s Mem. in Supp. of Renewed Mot. 8.)

Mr. Roy and Ms. Brayboy arrived at the Park sometime between 11:00 and 11:30 a.m. Ms. Brayboy got the children out of the vehicle and took them down to the beach area, while Mr. Roy had a cigarette. (Def.'s Mem. in Supp. of Renewed Mot. 7.) Mr. Roy walked from the parking lot to the edge of the "pond," looked at the water, and finished smoking his cigarette. Id. He then returned to the parking lot to place his wallet and other belongings in the vehicle. Id. Mr. Roy jogged back towards the "pond" and dove into the water. Id. Tragically, Plaintiff struck his head on the bottom of the "pond," resulting in his paralysis from the neck down.

Following discovery and pre-trial briefing, the long trial in this case commenced on May 9, 2011, and lasted more than four weeks. During that time, the jury heard testimony from the Plaintiff, fact witnesses, and an expert witness. The parties also presented numerous exhibits, including photographs and video, for the jury to consider. Prior to hearing the witness' testimony, the jury took a view of the "pond." The evidence developed during trial is extensive and will not be exhaustively repeated here. Accordingly, the facts most relevant to the parties' instant motions follow.

A

Trial Testimony

The jury heard testimony from seventeen witnesses. In addition to his own testimony, the Plaintiff presented seven employees from the D.E.M., one employee of the Woonsocket Fire Department, two people who were present at the "pond" on the day of the incident, an engineer, and an expert on liability. The Plaintiff's wife and several expert witnesses testified on injuries

and damages. The Defendant presented two witnesses to testify about the relationship between the Plaintiff and his wife as it pertained to the Plaintiff's loss of consortium claim.

The Plaintiff, Mr. Roy, testified about his conduct on the day of the incident and his experience swimming at the "pond" in past years.[2] According to Mr. Roy, on July 10, he hit his head on a "mound of sand" or a "sand bar" when he executed his dive. (Pl.'s Mem. in Supp. of Renewed Mot. for J. as a Matter of Law 11.) He testified that he believed the water was around four to six feet deep in the area where he dove and that he had formed this belief based on diving in the same spot in previous years. (Def.'s Mem. in Supp. 9.) Mr. Roy indicated that he was aware that the depth of the "pond" changed from year to year, and he believed this change in depth was due to soil erosion. (Def.'s Mem. in Opp'n 6.) The date of the incident was the first time in the summer of 2008 that Mr. Roy had visited the "pond" to go swimming. (Def.'s Mem. in Supp. 9.) Prior to that date, the last time Mr. Roy went swimming in the "pond" was sometime in August 2007. Id. Mr. Roy admitted that the water was a dark brown color in the area where he dove on the day of the incident and consequently, he could not see the bottom of the "pond." (Def.'s Mem. in Supp. 10-11.) Mr. Roy indicated that he saw many people swimming in different areas of the "pond" on the day of the incident and that he believed that the "pond" was open for full use. (Roy Answers to Interrogs., Pl.'s Mem. in Supp. of Summary J., Ex. 3 14-15.) He acknowledged, however, that he was aware that lifeguards were not on duty that day. (Def.'s Mem. in Opp'n 3.) He further admitted that he dove into an area that would have been outside the permitted swimming areas had the buoy ropes been in place. (Def.'s Mem. in Supp. 7-8.) Plaintiff agreed that his conduct on July 10 was "probably irresponsible." Id. at 11.

[2] Because Mr. Roy's physical injuries prevented him from testifying in court, his testimony was presented by way of video.

The Plaintiff presented expert witness Dr. Thomas Griffiths ("Dr. Griffiths"), whom the Court recognized as an expert in the field of aquatic safety. (Tr. 36, May 23, 2011.) Dr. Griffiths informed the jury that a swimming area frequented by children should be no more than five feet deep but gave the opinion that diving into less than five feet of water is almost always unsafe. Id. at 27, 98-99. According to Dr. Griffiths, nine feet of water is the minimum depth in which an individual can safely execute a dive from any height without striking his or her head on the bottom surface. Id. at 26-27. Dr. Griffiths acknowledged that a diver should always check the water's depth before diving into a location for the first time. Id. at 84-85.

Dr. Griffiths also gave his opinion about the conditions at the "pond" and the safety measures the D.E.M. had in place to protect patrons. He believed that the water in the location where Mr. Roy sustained his injury appeared to be about three feet deep. (Tr. 107, May 23, 2011.) He testified that the bottom of the "pond" in that location sloped upward—rather than downward—moving away from the wall, due to the formation of a sand bar. Id. at 51-52. He further opined that the sand bar combined with the shallow water constituted a hidden hazard such that a member of the public would not be likely to discover it without someone pointing it out. Id. at 54. According to Dr. Griffiths, the signage posted on the day of the incident was not adequate to warn the public that the "pond" was closed or to warn of any dangers. Id. at 55. He agreed, however, that the "No Swimming" signs that D.E.M. posted at the "pond" met his standard for being clear and concise. Id. at 103-04. Nonetheless, in his opinion, this was not sufficient warning under the circumstances. The D.E.M. could easily have spray painted depth-markers on the concrete bulkheads and stone walls and/or painted no diving signs using the universal symbol of a circle with a line through it. Id. at 47-48.

Over the course of four days—from Friday, May 13, 2011 to Wednesday, May 18, 2011—the Plaintiff presented seven witnesses from the D.E.M., representing various levels of authority within the Department: Director Michael Sullivan; Deputy Chief John Faltus; Associate Director Larry Mouradjian; Chief of Parks and Recreation Robert Paquette; Region One Manager William Mitchell; previous Caretaker/Supervisor of the WWII Memorial Park Peter Lambert; and employee Kenneth Henderson.

Director Michael Sullivan ("Mr. Sullivan") testified about the Department's usual safety policies at the "pond" in years prior to 2008. Specifically, Mr. Sullivan testified that the Department relies on lifeguards to ensure patrons' safety and that the Department will not operate the "pond" on a "swim at your own risk" basis. (Pl.'s Mem. in Supp. 5.) Lifeguards are usually stationed at the beach area of the "pond"—the area where swimming is permitted. (Def.'s Mem. in Supp. 4.) According to Mr. Sullivan, D.E.M. swimming facilities are not considered open to the public unless lifeguards are present. Id. at 5. Mr. Sullivan admitted that he was aware that patrons diving at the "pond" could seriously injure themselves but asserted that he had no knowledge of any diving injuries occurring at the "pond" prior to July 10, 2008. (Pl.'s Mem. in Supp. 5; Def.'s Mem. in Opp'n 5.)

Mr. Sullivan also testified about the circumstances surrounding the "pond's" opening in 2008 and about some of the steps the D.E.M. took to assure patrons' safety under those unusual circumstances. Specifically, Mr. Sullivan testified that in 2008, the General Assembly awarded the City of Woonsocket a $15,000 legislative grant, without which the D.E.M. would not have opened the "pond" that year. (Def.'s Mem. in Supp. 7.) Mr. Sullivan stated that he made the decision to fill and prepare the "pond" for opening while simultaneously searching for lifeguards, in part, because he did not want to delay the opening, and because he believed he would be able

to have lifeguards in place by the time the "pond" was ready for opening. Id. at 16-17. He admitted, however, that Larry Mouradjian had recommended that the Department not fill the "pond" until it had hired the necessary staff. (Pl.'s Mem. in Supp. 5.) After deciding to open the "pond" in 2008, the D.E.M. hired seasonal laborers and two rangers to prepare the Park. (Def.'s Mem. in Supp. 6.) According to Mr. Sullivan, these employees were responsible for park maintenance—primarily clearing bushes, shrubs, and weeds—and were not hired to perform lifeguard duties or supervise the Park. Id. at 6. However, he further testified that he had issued a directive to staffers on site to prevent the public from entering the water and to inform the public that the "pond" was closed. (Pl.'s Mem. in Supp. 5.) He admitted that this directive applied to all employees, including Kenneth Henderson. Id. at 5-6. Mr. Sullivan suggested that he had received assurances from the City that the Woonsocket Police Department would provide some assistance in enforcing park regulations until the D.E.M. was able to have lifeguards in place. (Def.'s Mem. in Opp'n 6.) Specifically, he alleged that the seasonal employees were supposed to contact the Woonsocket Police in the event of security issues or if they needed assistance with park patrons. (Def.'s Mem. in Supp. 6.) Mr. Sullivan admitted that the lack of staff meant that the D.E.M. could not safely operate the "pond" without these assurances from the City. (Pl.'s Mem. in Supp. 5.) Mr. Sullivan also claimed that he had ordered staff to post "appropriate" signs around the "pond," including "No Diving" signs, and that he was unaware that such signs were not in place at the "pond." Id. Finally, Mr. Sullivan generally alleged that Department members had performed at least some inspection of the bottom of the drained "pond" on June 27, 2008, and did not observe any dangerous conditions at that time. (Def.'s Mem. in Opp'n 6.)

Although Mr. Sullivan repeatedly insisted that the "pond" was not open on the date of the incident, there was no evidence that the public was aware that the "pond" was closed on that day.

Specifically, there were no signs posted to indicate that the "pond" was closed. Instead, the only signs in place were the English-Spanish "No Swimming" signs that were almost always posted and that remained in place at the time of the view.[3] There was also no evidence that any member of the public present at the "pond" on July 10, 2008 could conclude that it was not open.

Deputy Chief John Faltus ("Mr. Faltus") testified next and confirmed Mr. Sullivan's statement that the D.E.M. had, in seasons past, relied entirely upon lifeguards and staff to warn park patrons of dangerous conditions and to regulate patron conduct. (Pl.'s Mem. in Supp. 6.) According to Mr. Faltus, however, the D.E.M. had never posted "No Diving" signs because there has never been a department level prohibition on diving at the "pond." Id. Mr. Faltus asserted that the Department considered the area to be safe for diving and allowed lifeguards to permit diving at their discretion. Id. He admitted, however, that there is a serious risk of head injury from diving at the "pond." Id. Mr. Faltus explained that the "pond's" structures and characteristics make it a unique facility—as compared to other swimming facilities that D.E.M. operates—but that the Department does not follow any special policies to protect patrons at the "pond." Id.

Associate Director Larry Mouradjian ("Mr. Mouradjian") testified the following day. Mr. Mouradjian reiterated Mr. Faltus's testimony with regards to the "pond's" unique structures and features. In particular, Mr. Mouradjian indicated that certain structures that allow access to the water, in combination with the "pond's" shallow depths, could produce injuries. (Pl.'s Mem. in Supp. 7.) He also confirmed that the Department relied upon staff to use their personal knowledge of the "pond's" dangers in order to protect swimmers. Id. Mr. Mouradjian, however, specifically disagreed with Mr. Faltus with respect to the Department's policy on diving: Mr.

[3] At the time of the view, there was also a "Closed For Skating" sign posted directly below the "No Swimming" signs located in the beach area.

Mouradjian asserted that the D.E.M. had an absolute prohibition on diving at the "pond" because it was too dangerous. Id. He believed that the Department's rules on diving were clear and that there must have been a significant miscommunication within the Department. Id. Mr. Mouradjian further testified that he knew that filling the "pond" at a time when the Department was lacking the necessary staff was particularly dangerous. Id.

Chief of Parks and Recreation Robert Paquette ("Mr. Paquette") testified next about the Department's policies for protecting swimmers. He stated that the Department does not post "No Diving" signs at other D.E.M. swimming facilities, but admitted that the Department does post signs to warn patrons of dangers of which they may be unaware, such as rip tides. (Def.'s Mem. in Opp'n 9; Pl.'s Mem. in Supp. 8.) Mr. Paquette acknowledged that the D.E.M. often posts specific or unique signs when necessary and conceded that the Department should have posted signs at the "pond" prohibiting diving and warning the public of shallow water. (Pl.'s Mem. in Supp. 8.) Mr. Paquette confirmed that Mr. Mouradjian had expressed the opinion that the Department should not fill the "pond" until it had hired lifeguards. (Pl.'s Mem. in Supp. 8.) Mr. Paquette alleged, however, that the Department began actively searching for lifeguards as soon as the decision was made to open the "pond" in 2008. (Def.'s Mem. in Supp. 5.) He also acknowledged that it was important for the Department to employ a full-time caretaker or supervisor at the Park for the 2008 season and asserted that the Department hired Anthony Spardello to fill that position shortly after the D.E.M. decided to open the "pond." (Pl.'s Mem. in Supp. 8-9; Def.'s Mem. in Supp. 7.) Mr. Paquette explained that unfortunately, Mr. Spardello was involved in a car accident sometime on or around the July 4th weekend and therefore was not working at the "pond" on the day of the incident. Id. Mr. Paquette admitted that after Plaintiff's accident, Mr. Mouradjian told him that the D.E.M. should not have opened the "pond"

without lifeguards in place and further recommended draining the "pond." (Pl.'s Mem. in Supp. 9.)

William Mitchell ("Mr. Mitchell"), D.E.M.'s Region One Manager, testified on Tuesday, May 17. Mr. Mitchell corroborated much of the information that the previous D.E.M. witnesses had conveyed. Namely, Mr. Mitchell reiterated that the Department relied on staff and not signs to protect patrons at the "pond." (Pl.'s Mem. in Supp. 9.) He also confirmed that the Department had made no effort to hire lifeguards or other staff prior to June 27, 2008. Id. Mr. Mitchell further indicated that he was aware that the water at the spot where Mr. Roy testified he executed his dive was too shallow for diving. Id. More particularly, he conceded that Mr. Roy's injury was of the type which he specifically feared would occur when he was ordered to fill the "pond" prior to lifeguards being in place. Id. Had the decision been his, Mr. Mitchell admitted that he would not have filled the "pond." Id. at 10.

Peter Lambert ("Mr. Lambert"), the Park's prior caretaker and supervisor, gave extensive testimony about the presence of dangerous latent shallow spots in the "pond." The D.E.M. employed Mr. Lambert as the caretaker of the WW II Park for seventeen years prior to the spring of 2008, when it transferred him to another facility. (Pl.'s Mem. in Supp. 10.) According to Mr. Lambert, the water in the area where Mr. Roy testified that he executed his dive was usually around five feet deep. Id. at 11. He stated that he knew that the water in that particular spot was too shallow for diving because he is familiar with the contours of the bottom of the "pond" when it is drained. Id. at 10. More specifically, Mr. Lambert asserted that a sandbar repeatedly developed in the spot where Plaintiff testified he executed his dive, frequently making the depth less than five feet. Id. at 11. Mr. Lambert also stated that the shallow spots were hidden from view because despite the chlorination process, the "pond" water normally had a dark hue that

prevented swimmers from seeing the bottom. (Pl.'s Mem. in Supp. 10; Def.'s Mem. in Supp. 10.) According to Mr. Lambert's testimony, the D.E.M. considered the "pond" unsafe for diving because of these conditions. (Pl.'s Mem. in Supp. 10.) If lifeguards and staff observed patrons diving into the "pond," they would order such swimmers to stop. Id. Mr. Lambert testified that he had witnessed many swimmers dive into the same spot as Mr. Roy in past years, and indicated that swimmers were often unaware of the prohibition against diving until staff informed them. Id.

Mr. Lambert gave additional testimony about the steps he would take to make the "pond" safe for swimming each year: While the "pond" was drained, he would inspect the entire bottom surface of the "pond"—including the areas outside the buoy ropes where swimming was not permitted—in order to identify any hidden dangers. (Pl.'s Mem. in Supp. 12.) Specifically, Mr. Lambert informed the jury that he would drag a rake behind a large tractor across the bottom each year before filling the "pond."[4] Id. at 11. According to Mr. Lambert, the raking eliminated any shallow spots or areas of "strange accumulation" and maintained the normal sloping grade of the "pond." Id. Mr. Lambert admitted that the sandbar where Plaintiff dove was one of the areas he would attempt to correct with the rake.[5] Id. Mr. Lambert testified that in 2008, he did not rake the bottom of the "pond" because of his transfer. Id. at 12. He also stated that the Department did not contact him about the normal procedures for opening the "pond" but indicated that he had informed his superiors of how he typically prepared the bottom of the "pond." Id.

[4] Plaintiff's Exhibit 26 showed Mr. Lambert's monthly reports documenting his activities and the condition of the "pond." (Pl.'s Mem. in Supp. 12.)

[5] Plaintiff's Exhibit 15 depicted a sandbar. (Pl.'s Mem. in Supp. 11.) Mr. Lambert indicated that this was the sandbar to which he was referring and explained that sand would accumulate when patrons played on a rope normally secured at that location. Id.

Mr. Lambert clarified for the jury that in years past, lifeguards were not always present at the "pond" during the two week filling and chlorination process. (Def.'s Mem. in Supp. 14.) According to Mr. Lambert, the "pond" was considered closed during that time and the D.E.M. normally relied upon "No Swimming" and "No Lifeguard on Duty" signs to warn patrons. (Def.'s Mem. in Opp'n 5.) Mr. Lambert agreed that the Department could have easily posted depth-markers and signs to identify shallow areas or to prohibit diving. (Pl.'s Mem. in Supp. 12.) In his opinion, the Department also could have followed the procedures that he normally followed to prepare the bottom of the "pond" for opening. Id. Mr. Lambert agreed that the Department had not taken any of these steps because it relied on lifeguards and park staff to protect patrons when the "pond" was open. Id. He testified that had he been the Park's caretaker in 2008 and had he been present on the day of the incident, he would not have allowed swimmers in the "pond" prior to the "pond's" opening. Id.

Kenneth Henderson ("Mr. Henderson"), the D.E.M. staffer working in the Park on the day of the incident, also testified.[6] Mr. Henderson testified that he did not see Mr. Roy in the Park at any time before Mr. Roy dove into the "pond." (Def.'s Mem. in Opp'n 6.) Mr. Henderson admitted, however, that he did see numerous other patrons swimming in the "pond" that day and did not order them out of the water. (Pl.'s Mem. in Supp. 13.) He further admitted that he knew that the "pond" was too shallow for diving and that numerous shallow spots existed of which swimmers were unaware. Id. Mr. Henderson described the situation at the "pond" as "an accident waiting to happen." Id.

[6] Mr. Mitchell described Mr. Henderson as the senior D.E.M. staffer on-site on July 10, 2008. (Pl.'s Mem. in Supp. 13.) Other witnesses, however, referred to Mr. Henderson as a "seasonal laborer." Mr. Sullivan testified that his directive to order swimmers out of the "pond" applied to Mr. Henderson. Id. at 5-6.

In addition to the above testimony, the jury also heard from several other witnesses who were present at the "pond" on the day of the incident: Ms. Brayboy testified that she saw Plaintiff running towards the water and yelled to him not to dive into the "pond." (Def.'s Mem. in Supp. 8.) Carol Gear ("Ms. Gear") and Laura Oliver ("Ms. Oliver") were also present at the "pond" on July 10, 2008 and both testified that the water looked shallower than usual on that day. They indicated that if a seasonal laborer saw children jumping or diving into the "pond" on the day of the incident, the laborer would warn the children not to dive. (Def.'s Mem. in Supp. 6.) It was Ms. Oliver's and Ms. Gear's understanding that diving was not typically permitted in the "pond" because the "pond" was too shallow. Id. at 11. According to Ms. Oliver and Ms. Gear, frequent users of the "pond" were aware that diving was prohibited. Id. at 12. Both witnesses testified that at different times, prior to July 10, 2008, they had observed people diving into the "pond" from various locations, including from the concrete diving platform and the stone wall. If lifeguards were present and witnessed an individual diving, they would order him or her to stop. Ms. Oliver indicated that on the day of the incident, the Park and the "pond" appeared to be open for ordinary use. (Oliver Aff., Pl.'s Mem. in Supp. of Mot. for Summary J., Ex. 4 ¶ 5.) Ms. Oliver and Ms. Gear believed the "pond" was open to the public because they had heard on the news that the "pond" was opening. They indicated that there had been a prominent write-up in the local newspaper about the "pond's" opening. During the summer of 2008, Ms. Oliver had been to the "pond" three or four times prior to the date of Mr. Roy's accident. Other witnesses who witnessed Mr. Roy's dive and who came to his aid testified that he was found in about three feet of water. (Pl.'s Mem. in Supp. 11, n.2.) Finally, there was witness testimony from individuals who saw or spoke with Mr. Henderson on the morning of the

incident and who indicated that Mr. Henderson never informed them that the "pond" was closed. Id. at 13.

The jury also heard testimony on the issue of damages from Plaintiff, his wife, and other witnesses. They testified generally about Plaintiff's condition, the costs of his care, and the losses his wife and his child have suffered as a result of his injuries.

Both parties also presented numerous exhibits during the course of the trial. Relevant to the instant motions are several emails that were circulated between or among D.E.M. employees. Specifically, Plaintiff presented Exhibit 37, an email that Mr. Sullivan authored, referencing another diving incident that had occurred on July 6, 2008, four days prior to Mr. Roy's incident. (Pl.'s Mem. in Supp. 14.) Plaintiff's Exhibit 38 was an email that Mr. Mitchell authored only a few hours after Mr. Roy's injury. (Pl.'s Mem. in Supp. 9-10.) The email read, in pertinent part, "I really feel unless we can find certified lifeguards to be assigned to World War II that we should drain the "pond" to ensure the safety of the public and to release the state of any liability." Id. Plaintiff also presented Exhibit 42, an email dated July 21, 2008, sent from Mr. Mouradjian to Mr. Sullivan, describing the events in this case as "approaching a gross negligence threshold." Id. at 7. Mr. Mouradjian clarified at trial that he meant "something worse than regular negligence." Id. Additionally, Plaintiff showed the jury a news videotape of Mr. Henderson, filmed a few days after Mr. Roy's accident, saying that he was "supervising" swimmers. Id. at 13. The tape shows numerous people swimming in the "pond." Id. Defendants presented several exhibits showing the various "No Swimming" and "No Lifeguard on Duty" signs posted near or around the "pond." See Def.'s Exs. A, B, C, F, G, H, I, J, K, and Z; Def's Mem. in Opp'n 5. Defendant also showed the jury a photo that Ms. Oliver took on the morning of July 10, 2008 to illustrate that the water in the "pond" was a brownish color on the

day of the incident. See Def.'s Ex. W. Defendant used four or five children depicted in the photo in the general area where the incident occurred as a reference point to argue that the water in that spot was approximately three feet deep. (Def.'s Mem. in Supp. 10.)

B

The Jury's Verdict

On May 25, 2011, the presentation of evidence concluded, and the Court charged the jury. (Stipulated Facts ¶ 1.) The jury began deliberating the following day and continued to deliberate for seven days before reaching a verdict on June 6, 2011. (Trial Tr. May 26, 27, 31, and June 1, 2, 3, and 6, 2011.) During that time, the jury and the Court exchanged over sixty pages of notes. (Jury Notes, Stipulated Facts, Ex. A.)

Over the course of the first two days of deliberations, the jury and the Court exchanged approximately nineteen notes. (Stipulated Facts ¶¶ 3, 5.) Towards the end of the second day of deliberations, the Court placed information about the jurors' notes on the record. (Tr. 8-9.) The Court indicated that it had shared the jurors' questions thus far with counsel for both parties, discussed an appropriate response, and agreed upon an answer. Id. The Court further indicated that neither party had made an objection. Id.

Early on the morning of Tuesday, May 31, 2011—the third day of deliberations—a Sheriff informed the Court that Juror #109 appeared upset and/or appeared to have been crying. (Stipulated Facts ¶ 12.) Shortly thereafter, the Court received a note believed to have come from the Foreperson. Id. At the request of counsel, the Court twice questioned Juror #109 on the record and in the presence of counsel. (Tr. 18-20.) In response to the Court's questioning, Juror #109 indicated that she had been talking to a "higher power" to help her make the right decision and expressed her concern that this may have violated the Court's directive not to talk with

anyone about the case. Id. Nonetheless, Juror #109 stated that her decision in the case would be based on the law and the facts. Id. After Juror #109 left chambers, the Court discussed the matter with counsel for both parties. (Stipulated Facts ¶ 14.) At the behest of both attorneys, the Court agreed to meet with Juror #109 again. Id. During this second discussion, Juror #109 denied that the other jurors were mistreating her. (Tr. 33-37.) The Court chose not to excuse Juror #109 at this time because she indicated that she could decide the case based upon the law and the facts. (Tr. 38-39.) Counsel did not object. Id.

Again, at the beginning of the day on Wednesday, June 1, 2011, the Court noted for the record that it had placed on file all of the notes received from the jury as of that date, and that the Court had discussed its response to each of the notes with counsel for both parties. (Tr. 46.) Later that morning, the jury sent a note to the Court indicating that they were split six to two and asking the Court how they should proceed. (Jury Note 32.) The note did not indicate of which party the six jurors were in favor or of which party the two jurors were in favor. See id. The Court instructed the jury that their verdict must be unanimous. Id. In chambers, the Court discussed the possibility of a split decision with counsel for both parties and suggested counsel consider their options, including accepting a split decision or giving additional argument to the jury to help the jurors reach a unanimous verdict. (Stipulated Facts ¶ 23.)

On the following day, Thursday, June 2, 2011, the Court received a note indicating that Juror #109 wanted to leave. (Jury Note 43.) At a sidebar conference, the Court again questioned Juror #109 in the presence of counsel for both parties. (Tr. 52-62.) During the conference, Juror #109 was visibly upset and told the Court she had lied during their previous discussion in chambers: the other jurors were, in fact, mistreating her and pressuring her to change her position. (Stipulated Facts ¶ 27; Tr. 53-55.) Juror #109 indicated that she was not the only

member of the jury who held her position, but the Court instructed Juror #109 that she should not inform the Court or the attorneys as to specifically how many other jurors agreed or disagreed with her. (Tr. 55.) After Juror #109 left the sidebar, the Court again discussed with counsel the possibility of accepting a six-two split verdict, but no decision was reached at that time. (Tr. 61-63.) Immediately following the second sidebar, both parties agreed to excuse Juror #109 from further service. (Tr. 71-72.)

Towards the end of the day on June 2, 2011, the jury informed the Court that they were still having trouble reaching a unanimous decision and were split six to one at that time. (Jury Notes 46-47.) After sending the jury home for the day, the Court asked counsel to speak with their respective clients about whether or not they would accept a six to one split verdict. (Stipulated Facts ¶ 36.) The following morning—Friday, June 3, 2011—the Defendant and the Plaintiff indicated in chambers that they would accept a six to one verdict should the jury prove unable to reach a unanimous decision. Id. at ¶ 37. The parties understood that the Court would ask the jury to continue deliberating and would not disclose to the jury that the parties had agreed to accept a six to one decision. Id. at ¶ 38. Shortly before 10 a.m. that morning, the Court asked the jury to "take one more shot" at reaching a unanimous decision and sent the jurors back to the jury room to continue deliberating. (Tr. 77.)

Shortly after 1 p.m. on that same afternoon, the jury informed the Court that it had reached a unanimous decision and assembled in the courtroom to deliver its verdict. (Jury Note 51.) The jury found the Defendant liable, rejected the assumption of risk defense, and further found that the Plaintiff and the Defendant were equally 50% at fault. (Tr. 81-83.) However, they did not award the Plaintiff any damages. (Tr. 83-84.) The Court immediately held a sidebar with counsel. (Tr. 84.) The Court did not discharge the jury, but instead sent the jurors back to

the jury room and sent a note asking the jury to explain how they could find the Defendant 50% at fault but fail to award damages to the Plaintiff. (Jury Note 53.) In response, the jury sent a note explaining, in effect, that Plaintiff should not receive damages because the jurors felt that both parties were equally at fault. Id. After receiving this note, the Court verbally instructed the jury on the record that they were required to consider awarding Plaintiff some damages if they found Defendant even partially at fault—the issue of causation not having been submitted to the jury on the verdict form.[7] (Tr. 86-87.) The Court once again sent the jury back to deliberate further. (Tr. 87.)

After the jury exited the courtroom, counsel for the Defendant moved for a mistrial based on the inconsistency of the jury's verdict. (Tr. 88.) Plaintiff's counsel objected, and the Court denied the motion. (Tr. 88, 92.) The jury sent another note that read, "In questions 6, 7, 8 + 9 it says 'if any' – Doesn't that mean it is o.k. for 0? That is how we read the questions." (Jury Note 54.) The Court conferred with both attorneys and responded in writing that the jury should make a determination as to the amount of damages. (Tr. 90-92; Jury Note 54.) A short time later, the jury sent the Court yet another note that read, "The reason we reached a unanimous verdict was if no money was awarded. If we have to award monetary damages, part of this jury will have

[7] Although the State argues in support of its Motion for Renewed Judgment as a Matter of Law that the Plaintiff failed to prove proximate cause, neither party raised causation as an issue during trial or while discussing and submitting the agreed upon verdict form. During trial, there was never any question that the act of diving into the "pond" proximately caused the Plaintiff's injuries. The first time the State raised proximate causation as an issue appears to be in its Memorandum in Support of its Motion for Judgment as a Matter of Law, filed May, 23, 2011. Thereafter, State's counsel mentioned proximate causation on Friday June 3, 2011 at sidebar after the jury had announced its first verdict. Specifically, in attempting to explain the jury's inconsistent verdict, State's counsel stated, "I think the explanation is that although they found Question Number 2, I think proximate cause, the question was not on the jury questionnaire, I think you could still answer the question the way they did and not find proximate cause." (Tr. 85.) When State's counsel later moved for a mistrial based on the inconsistency of the jury's verdict, she made no further mention of proximate cause. (Tr. 88-92.)

one answer and part will have another. In other words, we will have to begin again." (Jury Note 55.) The Court inquired of the jury in writing, "[w]hen you say 'part of the jury' are you referring to the 6:1 split/vote you told us about yesterday?" Id. The jury replied, "yes!" Id. (emphasis in original.) Again, each time the Court sent a reply to the jurors, it conferred with counsel who agreed upon a response. A few minutes later, the jury returned to the courtroom and the Court told the jurors to go home for the weekend and return on Monday, June 6, 2011. (Tr. 92-93.) At no time did the Court discharge the jury or excuse the jury as a whole. (Stipulated Facts ¶ 52.) The Court then met with counsel in chambers and discussed four options that the parties should consider over the weekend: (1) a mistrial; (2) allowing the jury to continue deliberating with both parties agreeing to accept a six to one split verdict; (3) accepting half of the verdict; or (4) allowing the verdict to stand. (Stipulated Facts ¶ 51.)

On the morning of Monday, June 6, 2011, Plaintiff's counsel made a motion for additur, or in the alternative, for a new trial on damages. (Tr. 95.) Plaintiff's counsel argued that the jury's findings on liability should be allowed to stand and the Court should grant additur or order a new trial on the issue of damages only. (Tr. 95-98.) The State objected on the grounds that the inconsistency of the jury's verdict required the Court to set it aside in its entirety. (Tr. 98-100.) The Court denied the Plaintiff's motion and then gave both parties the option of accepting a six to one split verdict or a mistrial. (Stipulated Facts ¶ 54.) Plaintiff's counsel, the State, and Dawn Roy agreed to accept the split verdict. (Tr. 105-07.) The Court informed the jury that the parties had agreed to accept a six to one verdict in lieu of a mistrial and provided the jury with a new verdict sheet. (Stipulated Facts ¶ 56.) The jury subsequently returned a six to one verdict finding the Defendant not liable for Plaintiff's injuries. (Tr. 108-09.)

Both parties timely renewed their motions for judgment as a matter of law, and Plaintiff timely moved for a new trial.

II

ANALYSIS

Plaintiff and Defendant have renewed their respective Motions for Judgment as a Matter of Law. In addition, Plaintiff moves for a new trial on damages. In the alternative, Plaintiff moves for a new trial on all issues. The Court will consider each motion in seriatim.

A

The Rhode Island Recreational Use Statute, G.L. 1956 § 31-6-1, et seq.

Since the Rhode Island Recreational Use Statute G.L. § 31-6-1, et seq. ("Recreational Use Statute") governs Defendant's liability in this case, the trial court and the motion calendar justice heard and decided dispositive motions on the Recreational Use Statute, prior to empanelling the jury. In its second verdict, rendered June 6, 2011, the jury found that pursuant to the Recreational Use Statute, the Defendant was not liable for Plaintiff's injuries.

To make out a prima facie case of liability under the Recreational Use Statute, a plaintiff must establish that a landowner's actions fall outside the protections of section 32-6-3. This section provides that when landowners welcome members of the public onto their land without charge for recreational purposes, visitors will be afforded the status of trespassers and the landowner will not be liable for visitors' injuries.[8] Sec. 32-6-3; see Berman v. Sitrin, 991 A.2d

[8] In its entirety, R.I. Gen. Laws § 32-6-3 provides:

> Except as specifically recognized by or provided in § 32-6-5, an owner of land who either directly or indirectly invites or permits without charge any person to use that property for recreational purposes does not thereby:

1038, 1044 (R.I. 2010). The protections of section 32-6-3 are not limited to private landowners: the State is expressly included in the definition of an "owner" under section 32-6-3. See Lacey v. Reitsma, 899 A.2d 455, 457-58 (R.I. 2006). The legislative intent behind the Recreational Use Statute is to encourage more landowners to open their private property to the public for recreational use. See Smiler v. Napolitano, 911 A.2d 1035, 1038-39 (R.I. 2006).

The broad protections created for landowners under the Recreational Use Statute are not absolute. Berman, 991 A.2d at 1044. Section 32-6-5 provides that a landowner's liability will not be limited under section 32-6-3 in the case of a "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity after discovering the user's peril." Sec. 32-6-5. Our Supreme Court recently discussed the proper definition of these terms:

> Black's Law Dictionary defines 'willful' as '[v]oluntary and intentional,' * * * and 'malicious' as '[s]ubstantially certain to cause injury.' The term 'guard' means '[t]o protect from harm or danger, esp[ecially] by careful watching; * * * [t]o take precautions[.]' A 'warning' is defined as '[t]he pointing out of a danger, esp[ecially] to one who would not otherwise be aware of it.

Berman, 991 A.2d at 1052 (internal citations omitted). The duty of landowners to protect individuals visiting their property from hazardous conditions arises before the landowner actually discovers a person in danger. Smiler, 911 A.2d at 1041 ("It would be absurd to

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> (1) Extend any assurance that the premises are safe for any purpose;
>
> (2) Confer upon that person the legal status of an invitee or licensee to whom a duty of care is owed; nor
>
> (3) Assume responsibility for or incur liability for any injury to any person or property caused by an act of omission of that person.

Sec. 32-6-3.

conclude that the Legislature would require a landowner to sit idly by and wait until peril arose before a duty to warn the individual attached."). Specifically, the duty arises when the landowner becomes aware of a condition on his or her land that poses a risk of injury to members of the public. In other words, the landowner must know of a danger before the requirement to warn the public or otherwise protect visitors from injury arises. Berman, 991 A.2d at 1051.

In the instant matter, the Court ruled at the end of submission of evidence that there was sufficient evidence to submit the issue of Defendant's liability under the Recreational Use Statute to the jury. Prior to submitting the case to the jury, the Court denied both Plaintiff's and Defendant's motions for judgment as a matter of law. It is undisputed that the State owns the Park and the "pond"; that the Park and the "pond" are open to the public for recreational uses; and that admission is free of charge. Accordingly, the jury was instructed that under the Recreational Use Statute, the Defendant would be immune from liability for Mr. Roy's injury unless the jurors found that the Defendant fell within the exception for willful or malicious failures to guard or warn. On the agreed-upon verdict form, the jury was specifically asked to decide whether or not the Defendant did willfully or maliciously fail to guard against a non-obvious, latent dangerous condition, knowing that there existed a strong likelihood that a user of the "pond" would suffer serious injury or death. On June 6, 2011, the jury answered this question in the negative. Thus, the jury found that under the Recreational Use Statute, the Defendant was not liable for Mr. Roy's injuries. After the jury's verdict, both Plaintiff and Defendant renewed their respective Motions for Judgment as a Matter of Law and Plaintiff moved for a new trial.

B

Plaintiff's Renewed Motion for Judgment as a Matter of Law

Rule 50(a)(1) of the Rhode Island Superior Court Rules of Civil Procedure provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Super. R. Civ. P. 50(a)(1). When ruling on a motion for judgment as a matter of law, this Court "must consider the evidence in the light most favorable to the party against whom the motion is made without weighing the evidence or considering the credibility of the witnesses and extract from the record only those reasonable inferences that support the position of the party opposing the motion." A.A.A. Pool Serv. & Supply, Inc. v. Aetna Cas. & Sur. Co., 479 A.2d 112, 115 (R.I. 1984) (internal quotations omitted). This Court must deny the motion "if there are factual issues upon which reasonable people may have differing conclusions." Broadley v. State, 939 A.2d 1016, 1020 (R.I. 2008) (citing Trainor v. The Standard Times, 924 A.2d 766, 769 (R.I. 2007)).

When this Court denies a motion for judgment as a matter of law, "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Super. R. Civ. P. 50(b). The moving party may then renew his or her motion after the entry of judgment. Id. When ruling on a renewed motion for judgment as a matter of law, this Court may allow the verdict to stand or may direct the entry of judgment as a matter of law. Id. This Court may properly grant judgment as a matter of law when there is

uncontradicted testimony that clearly establishes the operative facts. See Franco v. Latina, 916 A.2d 1251, 1263 (R.I. 2007).

In support of his Renewed Motion for Judgment as a Matter of Law, Mr. Roy argues that Defendant's witnesses admitted sufficient facts at trial to establish Defendant's liability as a matter of law under the Recreational Use Statute. Specifically, Plaintiff claims that the testimonial admissions of the various D.E.M. employees established that the D.E.M. knowingly and voluntarily failed to guard or warn against known dangers when it knew those dangers were substantially certain to cause injury. Moreover, Plaintiff asserts that judgment as a matter of law is appropriate because these testimonial admissions were uncontradicted.

In response, Defendant argues that the evidence at trial failed to show that the D.E.M. had actual knowledge that swimmers had injured themselves while diving into the "pond" or that the D.E.M. was aware of any latent dangerous conditions. Furthermore, the Defendant claims that the evidence at trial proved that the D.E.M. took steps to warn patrons and guard against any known risks.

Plaintiff relies extensively on Berman in support of his motion. 991 A.2d 1038. In Berman—a recent Supreme Court case decided under the Recreational Use Statute—the plaintiff, Simcha Berman, was severely injured when he fell from the Cliff Walk in Newport. Id. at 1041. Mr. Berman strayed off the main walkway onto what appeared to be a "beaten path," but was actually earth weakened by water drainage defects on the Cliff Walk. Id. at 1042, 49. When the Plaintiff walked down the apparent path, the ground gave way beneath his feet, causing him to fall twenty-nine feet onto the rocks below. Id. at 1042. The City of Newport had been warned on numerous occasions that latent dangers were present on the Cliff Walk and that it was highly likely visitors would be injured by these conditions, but took no action to correct

the defects or warn visitors. Id. at 1049. Furthermore, several fatal accidents had occurred as a result of the same conditions that caused Mr. Berman's injury. Id. at 1049-50. On these facts, the court held that as a matter of law, the City of Newport could not avoid liability under the Recreational Use Statute. Id. at 1051.[9]

Specifically, Plaintiff argues that in his case, as in Berman, the Defendant had actual knowledge that users of the "pond" were in peril from non-obvious dangers. In contrast, Defendant argues that the instant case is distinguishable from Berman because here, the Defendant had no knowledge of any prior serious injuries occurring at the "pond." Instead, Defendant likens this case to other recent Recreational Use Statute cases: Lacey, 899 A.2d 455 and Smiler, 911 A.2d 1035. In Smiler, a woman was injured while fleeing a swarm of bees in a Providence park. 911 A.2d at 1037. The court in Smiler held that the park owner's duty to warn under the Recreational Use Statute would only arise when it discovered that a visitor "was approaching an area where there was a known risk of bees." Id. at 1041. In Lacey, a young boy riding a bicycle suddenly veered off a cliff in Fort Adams State Park. 899 A.2d at 456.

[9] After the City of Newport settled its dispute with the plaintiffs on the eve of trial, the case against the State of Rhode Island was tried before a jury, which found in favor of the State. After the trial, Simcha and Sarah Berman moved for judgment as a matter of law on the issues of the State's negligence and proximate causation and also moved for a new trial. In moving for judgment as a matter of law, the Bermans included a memorandum written by State personnel. This memorandum explicitly notes that the area where Mr. Berman fell posed a threat to public safety and that there was no railing or fence present to ameliorate this risk. (Pl.'s Simcha Berman and Sarah Berman Mem. in Supp. of Mot. for J. as a Matter of Law 5.) There was testimony from a State employee confirming that this memorandum referred to the area where Mr. Berman fell. Id. This employee testified that ongoing erosion was a problem in the area and that he personally knew it exposed the public to a risk of falls. Id. at 7. He also testified regarding his knowledge of numerous serious injuries that had occurred at the Cliff Walk prior to Mr. Berman's injury. Id. at 7-8. There was also a federal report that noted the same safety risks as did the State memorandum and the State employee. Id. at 9. The Bermans argued that this evidence, when combined with the fact that the State did not install safety fencing in the area, irrefutably established negligence. The trial justice denied the motion and the appeal is now pending before our Supreme Court.

Defendant specifically argues that the instant case is analogous to Lacey and Smiler because both cases involved a "single injury in a given location" not known to present a danger. See Berman 991 A.2d at 1051 (discussing Lacey and Smiler). Defendant points out that in both cases, the landowners were not liable because the plaintiffs failed to present evidence establishing that the defendant knew of the relevant danger and then failed to guard or warn against it. See id.

Taken as a whole, the evidence in this case clearly establishes the presence of latent dangers in the "pond" that posed a significant risk of injury to swimmers, including: 1) shifting shallow spots; 2) a sandbar that would historically develop in the area where Plaintiff dove; 3) murky water that prevented swimmers from seeing the bottom of the "pond"; and 4) various man-made structures that invited diving. (Pl.'s Mem. in Supp. 7, 10-11.) There is also evidence that Defendant's employees were aware of the risk posed by diving into the shallow "pond": the various admissions—in particular Mr. Mouradjian's email describing filling the "pond" without lifeguards as approaching "gross negligence"—showed the D.E.M.'s knowledge of these conditions. Id. at 7. Additionally, there was also an email referencing a prior diving injury that occurred on July 6, 2008. Id. at 14. Furthermore, multiple employees testified that they knew the area where Plaintiff dove was too shallow for diving and that filling the "pond" without first hiring lifeguards created a significant risk of injury to swimmers. Id. at 5-7, 9-10. Mr. Mouradjian specifically advocated draining the "pond" until qualified lifeguards were hired. Id. at 9-10.

There was also evidence tending to establish that the Department failed to take adequate steps to protect swimmers in 2008. The D.E.M. never posted signs warning of shallow water or prohibiting diving. (Pl.'s Mem. in Supp. 6, 8, 12.) The record clearly shows that instead, Defendant had a policy of relying on lifeguards and park staff to protect swimmers, but failed to

have such staff in place on the day of the incident. Id. at 5-7. In addition, Director Sullivan admitted that he knew that the Department was not following the usual procedure for preparing the "pond" during the summer of 2008. Mr. Sullivan acknowledged that he was aware that the Department could not safely operate the "pond" without assistance from the Woonsocket Police because of the lack of staff. Id. at 5. Moreover, Mr. Sullivan testified that Mr. Henderson was subject to a directive issued to all park staffers that they were to keep patrons out of the "pond" and to inform the public that the "pond" was closed. Id. at 5-6. Despite this directive, Mr. Henderson admitted that he took no action to prevent the public from swimming in the "pond" on the day of Plaintiff's injury. Id. at 13. Finally, Plaintiff's expert testified that the signage posted on the day of the incident was inadequate to warn the public that the "pond" was closed or to warn of any dangers. (Tr. 55, May 23, 2011.)

Based on the above admissions, the evidence of Defendant's negligence and willful failure to guard or warn the public of known dangers in the instant case seems as strong as that in Berman. 991 A.2d 1038. Here, the Court is presented with admissions from multiple employees who stated they knew about the risks posed by the shallow water in the "pond," in particular where Plaintiff dove, and that the safety system used in seasons past to protect swimmers from these risks was not in place in 2008. This evidence leads the Court to conclude that Defendant's reliance on Lacey and Smiler is misplaced: in contrast to those two cases, there is substantial evidence here that the Defendant was aware of the latent risks and hazards present in the "pond" and that Defendant failed to adequately protect the public from those risks.

Nonetheless, the evidence tending to establish Defendant's liability under the Recreational Use Statute is not—as Plaintiff argues—entirely uncontroverted. There were several factors presented at trial that had at least some tendency to refute or mitigate Defendant's

liability. First, there was testimony that D.E.M. staff performed some inspection of the bottom of the "pond" before the filling process began and that none of them observed what they considered to be a dangerous condition. (Def.'s Mem. in Opp'n 6.) Furthermore, although multiple witnesses testified that Defendant traditionally hired lifeguards and park staff before filling the "pond," Mr. Lambert clarified that such lifeguards would not always be present at the "pond" during the two week filling process. (Def.'s Mem. in Supp. 14.) The Defendant may have simply been fortunate that despite the lack of lifeguards, no injuries had occurred during the filling process in past years. Nevertheless, Mr. Lambert's statement has at least some tendency to suggest that the Defendant, in relying on past experience, did not have reason to believe that filling the "pond" without lifeguards present in 2008 was substantially certain to result in serious injury. The record also shows that Defendant relied on "No Swimming" and "No Lifeguard on Duty" signs to inform would-be swimmers the "pond" was closed. (Def.'s Mem. in Opp'n 5.) These signs were posted at the time of Plaintiff's injury and Plaintiff's expert admitted that these signs, while inadequate to warn the public of danger, were nonetheless clear and consistent. Id. at 3, 5. Finally, there is evidence that Defendant's employees were not aware of the prior diving injury at the time of Mr. Roy's injury. Id. at 7; Def.'s Mem. in Supp. 4. The employees' ignorance of the prior injury, however, likely was due to the D.E.M.'s failure to have adequate staff in place at the "pond" during the relevant time period.

When the Court draws all reasonable inferences in Defendant's favor—as it is required to do when ruling on a motion for judgment as a matter of law—the evidence shows: multiple "No Swimming" and "No Lifeguard on Duty" signs may have suggested that the "pond" was closed on the day of Plaintiff's injury; Defendant's employees did not observe a dangerous condition in the "pond" before it was filled; and the Plaintiff's actions were—to quote his own words—

"irresponsible." When these inferences are contrasted with the admissions tending to establish Defendant's negligence, the Court finds that reasonable minds could differ as to whether or not the Defendant is liable for the Plaintiff's injury under Recreational Use Statute. See Pimental v. D'Allaire, 114 R.I. 153, 156, 330 A.2d 62, 64 (1975). A weighing of the evidence is needed to decide the question of liability and such a weighing is impermissible on a motion for judgment as a matter of law. See A.A.A. Pool Serv., 479 A.2d at 115. Therefore, this Court denies Plaintiff's Renewed Motion for Judgment as a Matter of Law.

C

Defendant's Renewed Motion for Judgment as a Matter of Law

As discussed above, when ruling on a motion for judgment as a matter of law, this Court views the evidence in the light most favorable to the non-moving party without weighing the evidence or assessing credibility. A.A.A. Pool Serv., 479 A.2d at 115. This Court must deny the motion "if there are factual issues upon which reasonable people may have differing conclusions." Broadley, 939 A.2d at 1020 (citing Trainor, 924 A.2d at 769).

In support of its Renewed Motion for Judgment as a Matter of Law, the Defendant argues, inter alia, that it did not owe a duty to Mr. Roy because Mr. Roy engaged in highly dangerous conduct, and that the evidence at trial failed to establish Defendant's liability under the Recreational Use Statute. The Court will address each argument in turn.

First, Defendant specifically argues that it did not owe a duty to Mr. Roy because Mr. Roy dove into water of an unknown depth at a time when the "pond" was closed. The Defendant asserts that as a matter of law, such highly dangerous conduct vitiates any duty the Defendant may have owed Mr. Roy. In support of its argument, the Defendant cites case law from Rhode Island and other jurisdictions for the proposition that a landowner is not liable for a swimmer's

negligently diving into water of unknown depth. The majority of the cited cases follow the reasoning set out by our Supreme Court in Bucki v. Hawkins, 914 A.2d 491 (R.I. 2007) and Banks v. Bowen's Landing Corp., 522 A.2d 1222 (R.I. 1987).[10]

This Court finds Banks and Bucki inapposite: in both cases liability was determined according to general negligence principles, not according to the Recreational Use Statute. See Bucki, 914 A.2d at 497-98 (holding Recreational Use Statute inapplicable to private landowner because she had not opened her land to the public for recreational use); Banks, 522 A.2d at 1224-25. In contrast, the proper duty inquiry under the Recreational Use Statute is whether the landowner committed a "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity after discovering the user's peril." Sec. 32-6-5. In other words, the Recreational Use Statute imposes a duty on landowners opening their land to the public to warn visitors of hazardous conditions of which the landowner is aware. See Berman, 991 A.2d at 1051. Since the Recreational Use Statute governs the instant case, this Court must inquire as to whether dangerous conditions were present at the "pond," whether the Defendant knew about them, and whether the Defendant failed to warn users, irrespective of whether or not Mr. Roy engaged in dangerous conduct. Moreover, the Defendant has agreed that Mr. Roy's actions were, in part, due to the negligence of the D.E.M. If the D.E.M. had posted appropriate signage to properly warn of the danger and/or to close the "pond," Mr. Roy would not have acted as he did. Accordingly, this Court finds that Mr. Roy's conduct is not grounds for granting judgment as a matter of law in Defendant's favor.

[10] In addition to Bucki and Banks, the Defendant cites: Craig v. Lakeshore Marine, Inc., 491 S.E.2d 197 (Ga. Ct. App. 1997); Carr v. San-Tan, Inc., 543 N.W.2d 303 (Iowa Ct. App. 1995); Mosher v. State, 535 N.Y.S.2d 225 (N.Y. App. Div. 1988); and Biltmore Terrace Assocs. v. Kegan, 130 So.2d 631 (Fla. Dist. Ct. App. 1961).

Second, Defendant argues that the evidence at trial failed to establish its liability under the Recreational Use Statute as a matter of law. Defendant makes essentially the same argument in support of its Renewed Motion for Judgment as a Matter of Law as it makes in opposition to Plaintiff's renewed motion. In brief, Defendant claims that there was no evidence showing that the Defendant had knowledge of a dangerous condition from which it had not already adequately protected the public. The Defendant points to the undisputed evidence that it had posted "No Swimming" and "No Diving" signs as proof that it took adequate steps to warn or guard against those dangers of which it was aware. As evidence that it was unaware of the specific risk of spinal injuries from diving in the area where Mr. Roy sustained his injury, Defendant points to Mr. Sullivan's testimony that prior to the date of Mr. Roy's injury, no D.E.M. personnel had knowledge of the diving injury that occurred on July 6, 2008, or any other diving injuries at the "pond."[11]

Drawing all inferences in the Plaintiff's favor as it must under Rule 50, the Court finds that the collective admissions of the various D.E.M. witnesses clearly establish that Defendant was aware of the presence of multiple dangerous conditions in the "pond" and that it did nothing to warn the public about them. See A.A.A. Pool Serv., 479 A.2d at 115. The record also contains undisputed evidence that members of the public were swimming in the "pond" on the day of Plaintiff's injury and that Defendant's employees did nothing to stop them. Additionally, there is uncontradicted evidence proving that Defendant never posted any signs warning of shallow water or prohibiting diving. Based on this evidence, the Court cannot find as a matter of law that the Defendant is protected from liability under the Recreational Use Statute.

[11] In support of its argument, the Defendant again attempts to distinguish the facts in Berman, 991 A.2d 1038, and relies on Lacey, 899 A.2d 455, and Smiler, 911 A.2d 1035. For the reasons discussed above, the Court finds that the Defendant's reliance on Lacey and Smiler is misplaced.

In support of its renewed motion, Defendant sets forth several additional arguments pertaining to causation, Defendant's sovereign immunity, and Plaintiff's assumption of risk and status as a trespasser. With regard to proximate causation, the Court notes that neither party raised proximate cause as an issue at trial such that it was not specifically included for the jury's consideration in the agreed upon verdict form. (Tr. 80-84.) The State appears to have first argued that the Plaintiff failed to prove proximate cause in its Memorandum in Support of its Motion for Judgment as a Matter of Law. It offers no explanation as to why—at this late stage—it claims that proximate cause is an issue. Nevertheless, in considering the State's argument on the merits, this Court finds that it cannot agree. Although Defendant refers to proximate cause, its argument actually appears to address "cause-in-fact." Specifically, Defendant argues that Plaintiff failed to establish that "but for" the presence of the sandbar, Mr. Roy would not have been injured. The Defendant asserts that where Mr. Roy executed his dive was never established with certainty at trial. Thus, Defendant concludes that Mr. Roy could have injured himself despite diving into a different, deeper location of the "pond." Defendant's argument must fail because according to testimony, the water was not deep enough for diving anywhere. Specifically, there was testimony from Plaintiff's expert that the water was too shallow for diving not just in the location of the sandbar, but in the entire general vicinity of where Plaintiff could possibly have executed his dive. Moreover, when the expert's testimony along with the other evidence adduced at trial is viewed in the light most favorable to the Plaintiff, it demonstrates that Mr. Roy was injured when he hit his head on the bottom of the "pond," that the Defendant's employees knew of the danger posed by diving into the shallow "pond," that the danger was not obvious to swimmers, and that the Defendant's employees neither raked the bottom of the "pond" as they had in past years or warned swimmers not to dive into the "pond."

See Kurczy v. St. Joseph Veterans Assoc., Inc., 713 A.2d 766, 771-772 (R.I. 1998) (holding under general negligence principles that "[h]aving concluded . . . that [there was] a dangerous condition and that the [defendant] knew . . . of that dangerous condition and . . . failed to warn of or to remedy the situation, a jury could not . . . reach any conclusion other than that it was the dangerous . . . condition that was the proximate cause . . . ."). Accordingly, this Court cannot find that the Defendant is entitled to judgment as a matter of law on the grounds that the Plaintiff failed to prove causation.

The State asserts sovereign immunity as an affirmative defense, notwithstanding the fact that this Court, Stone J., granted summary judgment in favor of the Plaintiff on this issue and on the issue of the applicability of the Public Duty doctrine on March 15, 2011. Instead, the State suggests that this Court may deviate from the Law of the Case doctrine[12] and reconsider the State's affirmative defenses because the evidence introduced at trial expanded the record. Again, this Court cannot agree. The Sovereign Immunity doctrine was essentially abrogated by our Supreme Court and by the Legislature. See Laird v. Chrysler Corp., 460 A.2d 425, 428 (R.I. 1983); secs. 9-31-1 and 9-31-2. The Public Duty Doctrine does not shield the State from liability for the operation and maintenance of parks and beaches because those are the types of activities that a private person or corporation would carry out. See Delong v. Prudential Prop. & Cas. Ins. Co., 583 A.2d 75, 76 (R.I. 1990); O'Brien v. State, 555 A.2d 334, 338 (R.I. 1989). None of the evidence adduced at trial that the State points to in support of this argument convinces the Court

[12] The Rhode Island Supreme Court has stated that the Law of the Case doctrine requires that when "'a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a later stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling.'" Lynch v. Spirit Rent-A-Car, Inc., 965 A.2d 417, 424 (R.I. 2009) (quoting Chavers v. Fleet Bank, 844 A.2d 666, 677 (R.I. 2004) (internal quotation omitted)). The second judge, however, may disregard the Law of the Case doctrine "when a subsequent ruling can be based on an expanded record." Id. (citation and internal quotation omitted).

that it should deviate from the Law of the Case doctrine to reconsider the State's affirmative defenses of sovereign immunity or the Public Duty doctrine.

The Defendant also asserts that it is entitled to judgment as a matter of law because Mr. Roy was a trespasser. Defendant argues that it owed no duty or a limited duty to Plaintiff because he was a trespasser under common law principles of premises liability. The Court reiterates, however, that the Recreational Use Statute specifies the duty that the State owed Mr. Roy: to warn or guard against hazardous conditions of which the landowner is aware. See Berman, 991 A.2d at 1051. The Recreational Use Statute essentially codifies a landowner's common law duty as to trespassers. Tantimonico v. Allendale Mut. Ins. Co., 637 A.2d. 1056, 1060-61 (R.I. 1994) ("[T]o accomplish the objective of opening up land to meet the growing public demand for recreational space, the Legislature resurrected the landowner's common-law immunity as to trespassers . . . ."). Our Supreme Court has stated that in enacting the Recreational Use Statute, "'the obvious intention of the Legislature was to treat those who use . . . property for recreational purposes as though they were trespassers.'" Morales v. Town of Johnston, 895 A.2d 721, 730 (R.I. 2006) (quoting Tantimonico, 637 A.2d at 1060). In other words, the Recreational Use Statute allows landowners who open up their land for recreational purposes to treat all users as trespassers. Since all users are given the status of trespassers, the only duty the landowner owes them is to refrain from "willful and malicious failure[s] to guard or warn against a dangerous condition . . . after discovering the user's peril . . . ." Sec. 32-6-5. Thus, it is redundant for the Defendant to argue that Mr. Roy should be treated as a trespasser. As discussed above, when viewing the evidence in the light most favorable to the Plaintiff, this Court finds that there was sufficient evidence to establish that the D.E.M. employees were aware

of latent dangerous conditions in the "pond" and failed to take steps to adequately warn or guard against them.

Finally, Defendant argues that it is entitled to judgment as a matter of law because Mr. Roy assumed the risk of injury from diving into the "pond." In this complicated case, assumption of the risk was a factual question properly submitted to the jury. See Iadevaia v. Aetna Bridge Co., 120 R.I. 610, 615, 389 A.2d 1246, 1249 (1978). In its first verdict, rendered June 3, 2011, the jury rejected Defendant's assumption of the risk defense. (Tr. 82.) Since the jury did not find the Defendant liable in its second verdict, it did not render a decision on assumption of the risk. (Tr. 109.) In order to grant Defendant's renewed motion for judgment as a matter of law on the basis of Plaintiff's assumption of the risk, this Court would have to find that "the record . . . admit[s] of only one reasonable inference: namely, that [Mr. Roy] consented to running a risk after he actually knew and understood the magnitude of the risk he incurred." Iadevaia, 120 R.I. at 616, 389 A.2d at 1249-50. In light of this Court's earlier findings that the evidence viewed in the light most favorable to the Plaintiff establishes that there were latent dangers in the "pond" of which swimmers were unaware and that the Defendant failed to adequately warn patrons of the dangers, it finds that the Defendant did not establish as a matter of law that Mr. Roy actually knew of and appreciated the risk of diving into the "pond."

After considering all of Defendant's arguments and reviewing the evidence as a whole, this Court finds that it has no grounds to grant Defendant's motion.[13] Therefore, Defendant's Renewed Motion for Judgment as a Matter of Law is denied.

[13] In its Memorandum in Support of its Renewed Motion for Judgment as a Matter of Law, Defendant also argues that Jalyn Roy's claim for damages for loss of society should be dismissed because Mr. Roy did not equitably adopt her. Since this Court ultimately finds that a new trial on all issues is necessary, it will not address Defendant's argument on this issue.

D

Plaintiff's Motion for a New Trial on Damages

Plaintiff argues that the jury's June 6, 2011 verdict—finding the Defendant not liable—was invalidly rendered such that the appropriate remedy is for this Court to grant Plaintiff a new trial solely on damages. In support of his motion, Plaintiff asserts that this Court committed an error of law when it allegedly inquired into the validity of the jury's first verdict—finding Defendant liable—on June 3, 2011. According to the Plaintiff, the jury sent three notes after it had delivered its first verdict that revealed the jurors' thoughts and deliberative process. The Plaintiff essentially contends that the Court impermissibly inquired into the jury's verdict when it continued to communicate with the jury after it was in receipt of these three notes—jury notes no. 53, 54, and 55 ("Note 53," "Note 54," and "Note 55" respectively). Plaintiff argues that such an inquiry is contrary to the language of Rhode Island Rule of Evidence 606(b).

In response, Defendant argues that the Plaintiff waived his argument on this issue by failing to make a timely objection at trial and further argues that Plaintiff is bound by his stipulation in open court to accept a six to one split verdict. Defendant additionally argues that even if this Court finds that the Plaintiff did not waive his argument, Rule 606(b) is not applicable in the instant case.

For the reasons discussed below, this Court believes that the Plaintiff waived any argument he may have had that the June 6, 2011 verdict was improper. Alternatively, even if Plaintiff's conduct does not constitute a waiver, this Court finds no error of law necessitating the grant of a new trial on damages.

1

Waiver

It is well established in Rhode Island that a litigant must make a timely and appropriate objection during trial to preserve an issue for appellate review. State v. Stierhoff, 879 A.2d 425, 434 (R.I. 2005). General objections are insufficient: "'assignments of error must be alleged with sufficient particularity [to] call the trial justice's attention to the basis of the objection.'" Id. at 434 (quoting State v. Grant, 840 A.2d 541, 546-47 (R.I. 2004)). Although Super. R. Civ. P. 59 allows litigants to move for a new trial based on an alleged error of law, it does not allow the raising of "an entirely new issue at the Rule 59 stage." Tyre v. Swain, 946 A.2d 1189, 1202 (R.I. 2008). Additionally, litigants are bound by oral stipulations made in open court. See Hall v. Pryor, 108 R.I. 711, 715-16, 279 A.2d 435, 437 (1971) (holding that party was bound by counsel's oral stipulation that he would waive a jury trial in the event the parties failed to reach a settlement agreement where stipulation was "for the record" and was made in open court.).

In this case, the Court and the jury exchanged more than sixty pages of notes. The Court was completely transparent in considering these notes and in formulating its responses. As early as May 27, 2011, the second day of deliberations, the Court noted on the record that it had discussed all notes it had received as of that time with both attorneys and that both sides had stipulated to the contents of all of the notes.[14] (Stipulated Facts ¶ 8.) On Wednesday June 1, the

[14] On May 27, 2011, outside the presence of the jurors, the Court had the following discussion with counsel for both parties:

> THE COURT: All right. Just for the record . . . . The Court has several different notes during the course of the day starting at 10:30. The Court has spoken with the attorneys. On each one, the response was reviewed by the attorneys. And anyone want to put anything else on the record about the notes?

Court again reiterated on the record that it had placed on file all of the notes received from the jury as of that date. (Tr. 46.) Significantly, the Court further stated on record that it had consulted counsel for both parties in formulating its response to each of the notes.[15] Id. The Court continued to follow this practice for the duration of the trial.

The Court specifically discussed its response to Note 54—one of the three communications that Plaintiff points to as the basis of the Court's alleged error—with both attorneys on record. During the following exchange with counsel on Friday June 3, 2011 the Court read Note 54 aloud and discussed an appropriate response:

> THE COURT: All right. The question, the new [note], "Question 6, 7, 8, 9 says, 'If any,' does that mean it's okay for zero? That's how we read the question." So that's clearly how [the jury] came up with – the jury form was not clear enough. I intend to write back: "No. Once you reach a determination, you must answer those questions."
>
> Anything you want to add to that note?

> MR. BARRY: No, your honor.
>
> THE COURT: I'll have – give these to the clerk to mark.

(Tr. 8-9.)

[15] On June 1, 2011, the Court had the following exchange with counsel:

> THE COURT: . . . . Every time we get one of the notes I talk to the attorneys and write back to [the jury]. And the attorneys, I believe, have stipulated to everything that is in the notes thus far; is that correct?
>
> MS. PARTINGTON: Yes, your Honor.
>
> MR. BARRY: Yes.

(Tr. 46.)

> MS. PARTINGTON: The State would ask that they be allowed to consider the percentages of Question 5.
>
> MR. BARRY: I would object to that. I don't see any possible reason.
>
> THE COURT: I'm not going to tell them to do anything. We'll see what they do.

(Tr. 90.) The Plaintiff did not make any further objections at that time. Nor did Plaintiff move for a new trial on damages until the morning of the following Monday, June 6, 2011. Thus, the Court finds that Plaintiff's failure to make a timely objection constituted a waiver such that Plaintiff cannot raise this argument in his Rule 59 motion for a new trial. See Tyre, 946 A.2d at 1202.

Furthermore, Plaintiff is bound by his stipulation that he would accept a six to one split verdict. As early as the second day of deliberations, the jury indicated to the Court that it was having trouble reaching a unanimous verdict. (Stipulated Facts ¶ 4.) As deliberations continued, the jury communicated to the Court that they were split six to two, and later, six to one. Id. at ¶¶ 21, 34. Consequently, on more than one occasion, the Court informed counsel that they should discuss with their respective clients whether or not their clients would be prepared to accept a split verdict or a mistrial.[16] (Stipulated Facts ¶¶ 23, 36, 51.) In particular, before the jury rendered their first verdict on Friday June 3, 2011, both parties indicated that they would accept a six to one verdict if, after continued deliberations, the jury was still unable to reach a unanimous verdict. Id. at ¶ 37. The Court then asked the jury to take "one more shot" at reaching a unanimous decision. Id. at ¶ 39. Subsequently, at the end of the same day—after the jury's first verdict and after Plaintiff had failed to object to the Court's responses to Notes 53, 54,

[16] Under R.I. Super. R. Civ. P. 38, 39, and 48, litigants may waive a jury trial or agree with court approval to accept a less than unanimous verdict.

or 55—the Court instructed counsel on both sides to discuss four options with their clients over the weekend: (1) declare a mistrial; (2) let the jury deliberate again and accept a six to one split verdict; (3) accept half of the verdict; or (4) allow the June 3, 2011 verdict to stand. Id. at ¶ 51. The parties were dismissed for the weekend, and when they returned on Monday June 6, 2011, Plaintiff moved for a new trial on damages or an additur; the Court denied Plaintiff's motion. Id. at ¶ 53. The Court then gave the parties the option of accepting a split verdict or a mistrial. Id. at ¶ 54. Plaintiff elected to risk accepting the split verdict. Id. Because he gambled and lost, Plaintiff now attempts to claim that the Court erred by allowing further deliberation, in the face of the fact that he agreed at the time that allowing the jury to re-deliberate was the option he wanted to take. This Court respectfully finds Plaintiff's claim untenable. Accordingly, the Court finds that Plaintiff is bound by his stipulation and cannot now claim that the jury's June 6, 2011 verdict was invalid.

Thus, the Court finds that Plaintiff failed to make a timely objection and that Plaintiff is bound by his stipulation such that Plaintiff has waived any argument that the Court committed an error of law by communicating with the jury or allowing the jury to re-deliberate.

2

Applicability of Rhode Island Rule of Evidence 606(b)

Even if Plaintiff's actions did not constitute a waiver, the Court's conduct in the instant case was not in violation of R.I. Rule of Evidence 606(b). Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or her or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question of

> whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

R.I. R. Evid. 606(b). The primary policy objective underpinning Rule 606 is the promotion of the public interest by ensuring the termination of litigation and by further ensuring that jury verdicts will "possess a conclusiveness that will preserve the stability of the jury trial as an instrument for doing substantial justice." Roberts v. Kettelle, 116 R.I. 283, 300, 356 A.2d 207, 217 (1976) (citing Palumbo v. Garrott, 95 R.I. 496, 502, 188 A.2d 371, 374 (1963)). This Rule is also intended to prevent dissatisfied litigants from harassing or intimidating jurors following their discharge in an effort to effectuate a revised verdict. See Newport Fisherman's Supply Co. v. Derecktor, 569 A.2d 1051, 1052-1053 (R.I. 1990) (discussing Roberts).

Although Rule 606 does have limited exceptions,[17] our Supreme Court has steadfastly held that affidavits or testimony from jurors may not be admitted after a jury is discharged for the purpose of explaining an erroneous jury verdict. See Moynihan v. Yetra, 648 A.2d 1361, 1363 (R.I. 1994) (discussing Roberts). Furthermore, a trial court generally cannot recall a discharged jury in order to alter or amend a verdict. See Newport Fisherman's, 569 A.2d at 1053. However, the Supreme Court has stated that it is permissible to reconvene a jury in order to correct an erroneous verdict if there is no potential for violating the policy goals of Rule 606. See id. For example, in Newport Fisherman's, a discharged jury approached the trial justice sua

[17] Testimony or affidavits from former jurors may be admitted under Rule 606 "for the sole purpose of demonstrating that matters not in evidence reached the jury through outside communications or media contacts." State v. Drowne, 602 A.2d 540, 543 (R.I. 1992) (internal quotations omitted) (emphasis in original). Otherwise, the general proscription on the use of such evidence to impeach a jury verdict applies. Id.

sponte without any influence from the litigants to inform the court that they had "screwed [the verdict] up." Id. at 1052. The Supreme Court upheld the trial justice's decision to reconvene the jury, reasoning that "in this case there [is] no danger of intimidation or improper influence present." Id. at 1053.

Our Supreme Court "has recognized that the handling of extraordinary events that may occur during a trial is left to the sound discretion of the trial justice." Newport Fisherman's, 569 A.2d at 1053 (citations omitted). In situations where "it is clear to the trial justice that the jury has misconceived its task, it is his or her duty to take corrective measures." Id. at 1053 (citation omitted). Our Supreme Court first discussed this principle in Cote v. Holmes, 457 A.2d 1355. In Cote, the only issue for the jury to consider was damages,[18] but despite the trial judge's instructions, the jurors found for the defendant on the issue of liability. 457 A.2d at 1356-57. Instead of discharging the jurors, the trial judge reinstructed them on the scope of their inquiry and sent them back to the jury room to continue deliberating. Id. at 1357. The Supreme Court upheld the trial justice's actions. Id. at 1358. Reading this line of cases together, it appears that Rule 606 was primarily intended to apply in situations where a party seeks to admit juror testimony or affidavits to impeach the jury's verdict after the jury is discharged, and does not apply with equal force where there is no risk of juror intimidation or harassment, such as when the jury has not been discharged and remains under the court's control. Compare Newport Fisherman's, 569 A.2d at 1053, and Roberts, 356 A.2d at 217, with Cote, 457 A.2d at 1358.

This Court's reading of Rhode Island's version of Rule 606 is consistent with the law of other states, as well as with federal courts' interpretation of Fed. R. Evid. 606, on which our Rule is based. See State v. Drowne, 602 A.2d 540, 543 (noting that the Supreme Court of Rhode

[18] The defendant in Cote conceded liability. See 457 A.2d at 1356.

Island has relied on the federal approach to juror impeachment). For example, in Hafner v. Brown, a jury returned an incomplete verdict that erroneously calculated damages. 983 F.2d 570, 573-74 (4th Cir. 1992). Instead of discharging the jurors, the judge there conducted limited questioning of the jury forewoman in an effort to ascertain the basis of the jury's confusion. Id. Once it became clear that the jury did not understand the jury instructions, the judge reinstructed the jury and allowed them to deliberate further to reach a correct verdict. Id. at 574. The Court of Appeals for the Fourth Circuit upheld the actions of the trial justice, noting that "the incompleteness of the jury's first verdict justi[fied] [the] resubmission." Id. at 574. A review of analogous case law in other states confirms that under Rule 606, courts have the authority to question a verdict that appears to be compromised or incomplete, to reinstruct their juries, and to order them to deliberate further in order to reach a proper verdict. See, e.g., Morton Roofing, Inc. v. Prather, 864 So.2d 64, 66 (Fla. Dist. Ct. App. 2004) ("It is clearly the right and duty of the [c]ourt before discharging the jurors to call their attention to a defective verdict and give them an opportunity to return a proper verdict."); Sharrow v. Dick Corp., 653 N.E.2d 1150, 1153 (N.Y. 1995) (holding that the policies underlying Federal Rule 606 would not be violated "when the trial court itself, prior to discharge of the jury and entry of the verdict, undertakes a limited inquiry into an inconsistency or ambiguity in the jury's verdict that is apparent from the jurors' responses during polling."); State v. Manipon, 765 P.2d 1091, 1092-93 (Haw. 1989) ("When a verdict is rendered in improper form, is incomplete, is insufficient in substance, is not responsive to or does not cover the issues, or is otherwise defective, the trial court may recommit the verdict to the jury with proper instructions."); see also, Kelly v. Greitzer, 921 N.Y.S.2d 302, 303 (N.Y. App. Div. 2011) ("When a jury's verdict is internally inconsistent, the trial court must direct either reconsideration by the jury or a new trial . . . . On reconsideration, the jury [is] free to

substantively alter its original statement so as to conform to its real intention . . . ."). In all of these cases, the trial justices merely called the jury's attention to an erroneous verdict and conducted limited questioning regarding the basis of that confusion, without asking the jury to reveal their thought processes.

The Supreme Court of Rhode Island specifically discussed the permissible scope of inquiry in the case of an equivocal juror in Drowne, 602 A.2d 540. In that case, the court held that the proper approach for dealing with an equivocal juror was to question the juror out of the presence of the rest of the jury and to instruct "her that communications that were part of their deliberative process in attempting to reach a verdict on the issues they were charged to decide (including their efforts by permissible arguments on the merits to persuade each other) were secret and not to be disclosed to [the court]." 602 A.2d at 543-44 (quotation omitted); see also, Cote, 457 A.2d at 1358 (upholding a trial justice's limited inquiry into juror confusion without infringing the deliberative process). While Drowne presents a slightly different factual situation, this Court is satisfied that the requirement that the sanctity of the jury's deliberative process be preserved when inquiring into a compromised verdict applies with equal force in the instant matter. See Cote, 457 A.2d at 1357 (upholding a trial justice's ruling where he realized a jury's error and called the error to the jury's attention without inquiring into the deliberative process).

Here, after the jury announced their first verdict finding the Defendant liable but awarding the Plaintiff no damages, the Court did not discharge the jury but rather immediately called a sidebar and then sent the jury back to the jury room. (Stipulated Facts ¶ 45.); cf. Moynihan, 648 A.2d at 1363 (disallowing use of affidavits to explain verdict after jury discharged) (emphasis added). In an attempt to deal with the "extraordinary situation" that the jury's contradictory findings created, the Court sent the jury Note 53. See Newport Fisherman's,

569 A.2d at 1053 ("[T]he handling of extraordinary events that may occur during a trial is left to the sound discretion of the trial justice.") (citations omitted). In Note 53, the Court wrote to the jury: "I am puzzled by your verdict. Can you explain your findings of negligence 50/50 and no award of damages?" To which the jury responded, "[w]e felt they were both at fault. Award of damages should be zero because they were equally at fault." (Jury Note 53). The jury then wrote to the Court again in Note 54 stating, "[i]n questions 6, 7, 8 + 9 it says 'if any' – Doesn't that mean it is ok for 0? That is how we read the questions." Id. at 54. The Court responded by instructing the jurors that they had to consider awarding damages if they found any liability on the part of Defendant, since proximate cause was not a question on the verdict form. (Stipulated Facts ¶ 46.) The jury then wrote another note to the Court, which led to the following exchange of notes:

> [The jury:] The reason we reached a unanimous verdict was if no money is awarded. If we have to award monetary damages part of this jury will have one answer [and] part will have another. In other words we will have to begin again.
>
> [The Court:] When you say "part of the jury" are you referring to the 6:1 split/note you told us about yesterday?
>
> [The jury:] yes!

Id. at 55 (emphasis in original).

The deliberative process includes any matters or statements that occurred during the course of a jury's deliberation, as well as any of the juror's mental processes in connection with rendering a verdict. See R.I. R. Evid. 606(b). Having considered the matters discussed in the three notes highlighted by the Plaintiff, the Court finds that the jurors never revealed the merits of their deliberations. The notes exchanged between the Court and the jury following the June 3, 2011 verdict merely discuss the basis for the jury's confusion regarding the instructions on the

verdict form and their role in the case. There is no revelation of the jury's mental processes in connection with rendering a verdict.

Moreover, jury notes 54 and 55 were unsolicited: the jury sent those notes at their own initiative rather than in response to any specific inquiry from the Court. In fact, in every instance where the jury indicated their numerical split—other than the jury's response of "yes!" excerpted above—it was at their own initiative. See Jury Notes 32, 47; Stipulated Facts ¶¶ 21, 34. Finally, the Court took care not to allow the jury to reveal of which party the six jurors were in favor. (Tr. 55.) Thus, the Court's communication with the jury in this case did not exceed the permissible scope of inquiry under Rule 606(b).

In summation, this Court did not commit an error of law by inquiring into the basis for the jury's confusion, reinstructing them, and then ordering them to re-deliberate. Therefore, the jury's June 6, 2011 verdict was validly rendered. Accordingly, Plaintiff's motion for a new trial on damages is denied.

E

Plaintiff's Alternative Motion for a New Trial on All Issues

A litigant in Rhode Island may join his or her renewed motion for judgment as a matter of law with a motion for a new trial or may alternatively request a new trial. Super. R. Civ. P. 50(b). Rule 59 of the Rhode Island Superior Court Rules of Civil Procedure governs motions for a new trial. Rule 59 permits this Court to grant a new trial "on all or part of the issues for error of law occurring at the trial or for any of the reasons for which new trials have heretofore been granted in the courts of this state." Super. R. Civ. P. 59(a).

In this case, Plaintiff has requested a new trial on all issues under Rule 59 as an alternative if his motions for judgment as a matter of law and a new trial on damages are denied.

Having denied Plaintiff's first two motions, this Court will rule on Plaintiff's motion for a new trial on all issues. Plaintiff specifically argues that he is entitled to a new trial on the grounds that: (1) the Court made several erroneous rulings at trial that prejudiced the Plaintiff; and/or that (2) the jury's verdict finding the Defendant not liable for Plaintiff's injuries is against the weight of evidence and fails to do substantial justice.

1

Plaintiff's Alleged Prejudicial Errors at Trial

This Court may grant a motion for new trial when an "error of law occur[ed] at trial." Super. R. Civ. P. 59; see Tyre, 946 A.2d at 1202. When reviewing a trial justice's ruling on a motion for a new trial based on alleged errors of law, the Supreme Court "employs de novo review to determine whether the trial justice committed legal error." Riley v. Stone, 900 A.2d 1087, 1092 (R.I. 2006) (citing Votolato v. Merandi, 747 A.2d 455, 461 (R.I. 2000)).

Plaintiff contends that the Court committed multiple prejudicial errors at trial such that he is entitled to a new trial on all issues. First, Plaintiff contends that the Court improperly admitted evidence of his prior criminal convictions. Rhode Island Rule of Evidence 609 allows the admission of any conviction for impeachment purposes unless the trial justice finds that the prejudicial effect substantially outweighs its probative value. R.I. R. Evid. 609(a)-(b). Our Supreme Court has explained that Rule 609 recognizes:

> [a] basis in reason and experience why one may place more credence in the testimony of one who has lived within the rules of society and the discipline of the law than in that of one who has so demonstrated antisocial tendency as to be involved in and convicted of serious crime.

State v. Drew, 919 A.2d 397, 408 (R.I. 2007) (quotation omitted). Therefore, under Rhode Island law, the "'factfinder has a right to consider whether one who repeatedly refuses to comply

with the law is more likely to ignore the obligation of truthfulness than a law-abiding citizen.'" Id. (quoting State v. Pope, 414 A.2d 781, 784 (R.I. 1980), overruled on other grounds by State v. Acquisto, 463 A.2d 122 (R.I. 1983)).

Plaintiff asserts that this Court erred because it failed to determine whether the probative value of Plaintiff's convictions outweighed their prejudicial effect. The Court acknowledges that it is required to perform this balancing test before admitting prior convictions for impeachment purposes. State v. Camarind, 572 A.2d 290, 295 (R.I. 1990). However, the Court concludes that it properly conducted the required analysis. This Court held three hearings regarding the admissibility of Plaintiff's convictions and allowed extensive briefing from both sides. It then carefully reviewed the probative value of each conviction and determined that their probative value outweighed their prejudicial effect. It is well established in Rhode Island that admission of prior convictions for impeachment purposes lies within the discretion of a trial justice. Id. at 295 (citing State v. Maxie, 554 A.2d 1028, 1031 (R.I. 1989)). Accordingly, this Court did not abuse its discretion by admitting evidence of Plaintiff's prior convictions.

Second, Plaintiff argues that the admission of his prior convictions biased or prejudiced the jury against him, which he contends is a separate question from admissibility. The criminal convictions admitted at trial included evidence that Plaintiff had struck his wife. Plaintiff specifically argues that defense counsel went beyond the permissible scope of inquiry by discussing the nature of these criminal offenses. Again, this Court is not persuaded. Rule 609 clearly allows admission of criminal convictions for the purpose of impeaching credibility. Admittedly, this evidence may be highly prejudicial and bias jurors against a party. However, in this case, the Court gave multiple limiting instructions, and the evidence regarding Plaintiff's relationship with his wife was relevant because Plaintiff included a loss of consortium claim in

his suit. See Lounds v. Torres, 217 F. App'x 755, 758 (10th Cir. 2007) (upholding admission of evidence of domestic violence to rebut wife's claim of loss of companionship). Without these convictions, Defendant would have had no way to counter Plaintiff's depiction of a healthy relationship with his wife. Therefore, the Court finds that admission of this evidence did not improperly prejudice the jury.

Third, Plaintiff claims that this Court erred by refusing to admit evidence of a drowning incident that occurred on July 19, 2008, nine days after Plaintiff's injury. Specifically, he contends that this evidence was relevant and probative of the "stark difference in injury history between when the "pond" had been properly operated pursuant to protocol in the past . . . versus the injury history in the first three weeks of operation in 2008 . . . ." (Pl.'s Mem. in Supp. 46.) This Court disagrees. Rule 401 of the Rhode Island Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." R.I. R. Evid. 401. Put differently, relevant evidence is evidence "that tends to prove or disprove a point provable in [a] case." Abbey Medical/Abbey Rents, Inc. v. Mignacca, 471 A.2d 189, 194 (R.I. 1984) (citations omitted). As a complement to Rule 401, Rule of Evidence 402 provides that all irrelevant evidence is inadmissible. In this case, Plaintiff is alleging that Defendant knew of hazards posed by shallow water in the "pond" and willfully and maliciously failed to guard or warn swimmers of these conditions. This case centers on diving injuries caused by these conditions. The July 19, 2008 incident involved a swimmer drowning while he was swimming to a diving platform located in the center of the "pond." (Def.'s Mem. in Opp'n 14.) Moreover, no one had any information about the cause of that swimmer's drowning or the

specific circumstances surrounding the incident. The Court finds that the proffered evidence had minimal probative value and therefore was properly excluded.

Fourth, Plaintiff alleges that this Court erred in allowing defense counsel to question his wife and one of his treating physicians about hearsay statements contained in medical records. It is undisputed that the individuals who made these statements never testified at trial and the sole source of these statements was Plaintiff's medical records. Moreover, these statements were offered for the truth of the matter asserted. See Rule 801(c). Thus, these statements meet the definition of hearsay as set forth in R.I. R. Evid. 801(c). Nevertheless, Rule of Evid. 803(6) allows the admission of hearsay statements contained in records kept in the ordinary course of business, including medical records, provided a proper foundation is laid. See State v. Lemos, 743 A.2d 558, 563 (R.I. 2000). A proper foundation for such records is "the testimony of the custodian or other qualified witness" to show that the record is something "kept in the course of a regularly conducted business activity, and [that] it was the regular practice of that business activity to make" that record. R.I. R. Evid. 803(6). The testimony of a physician that treated a litigant at a hospital or other facility is sufficient to authenticate such documents. See Lemos, 743 A.2d at 564.

Fifth, the Court is not persuaded by Plaintiff's arguments with regards to defense counsel's closing argument. Plaintiff specifically contends that defense counsel prejudiced the jury by making inflammatory remarks and using statements from Plaintiff's medical records to show that Plaintiff had a history of violence. Plaintiff essentially claims that defense counsel's conduct was impermissible character assassination, tainting the jury's verdict, and necessitating a new trial on all issues. The Court disagrees. The Court notes that Plaintiff did not object to any of defense counsel's statements at the time but instead, raises these arguments for the first time

in the instant motions, several months after the trial concluded. Plaintiff's failure to raise a timely objection, in this Court's view, constitutes a waiver of any argument Plaintiff may have had on this issue. See Stierhoff, 879 A.2d at 431. Moreover, the Court gave the jury a proper limiting instruction. Thus, Defense counsel's closing argument did not improperly influence the jury.

Finally, Plaintiff argues that the jury was biased toward the Defendant because they knew the money they contributed to the State's treasury, as taxpayers, would be used to satisfy any judgment for Plaintiff. The Court finds this argument lacks merit. Jury selection in this case took two full days, during which time Plaintiff's attorney specifically questioned the prospective jurors regarding their attitudes toward the State. This questioning did not reveal any evidence of bias and Plaintiff did not act to remove any of the prospective jurors. Consequently, there is no reason for this Court to now find that the jury was biased against Plaintiff. To find that a jury is biased against a Plaintiff suing the State merely because the jurors are taxpayers would essentially prevent jury trials in any suit against the State. Thus, Plaintiff's argument on this point fails.

In sum, this Court does not find any of the above alleged prejudicial errors to constitute grounds for a new trial. This Court therefore denies Plaintiff's motion on that basis.

2

Plaintiff's Argument that the Verdict Is Against the Weight of the Evidence and Fails To Do Substantial Justice

Plaintiff also argues that he is entitled to a new trial because the jury's failure to find any liability on the part of the Defendant for his injuries is against the weight of evidence and fails to do substantial justice.

i

Standard of Review

It is well established in Rhode Island that when ruling on a motion for a new trial, this Court acts as a "super-juror" and must "independently weigh, evaluate, and assess the credibility of the trial witnesses and evidence." Marocco v. Piccardi, 713 A.2d 250, 253 (R.I. 1998). This Court's review is a three step process: this Court "'must (1) consider the evidence in light of the jury charge, (2) independently assess the credibility of the witnesses and the weight of the evidence, and then (3) determine whether [it] would have reached a result different from that reached by the jury.'" State v. Ferreira, 21 A.3d 355, 364 (R.I. 2011) (quoting State v. Prout, 996 A.2d 641, 645 (R.I. 2010) (internal quotations omitted)). In independently reviewing the evidence, this Court may reject testimony that is contradicted by other testimony or circumstantial evidence. Barbato v. Epstein, 97 R.I. 191, 193, 196 A.2d 836, 837 (1964). If this Court agrees with the jury's verdict or if "reasonable minds could differ as to the outcome," this Court must deny the motion for a new trial. Ferreira, 21 A.3d at 364-65 (quotation omitted). If, however, this Court disagrees with the jury's verdict, it must perform a fourth step of analysis whereby it must determine whether the jury's verdict is "against the fair preponderance of the evidence and fails to do substantial justice." Id. at 364 (citing State v. Guerra, 12 A.3d 759, 765-66 (R.I. 2011) (internal quotations omitted)). In the event this standard is satisfied, this Court must grant the motion for a new trial. Id.

When ruling on a motion for a new trial, this Court need not engage in an exhaustive review and analysis of all of the evidence and testimony. Reccko v. Criss Cadillac Co., Inc., 610 A.2d 542, 545 (R.I. 1992) (citing Zarrella v. Robinson, 460 A.2d 415, 418 (R.I. 1983)). This Court must, however, reference the facts that have motivated its conclusion with enough

specificity to allow the reviewing court to determine whether error was committed. Id. When this Court has properly performed the review required by Rule 59, the Supreme Court will afford this Court's decision great weight and will not overturn the decision unless this Court overlooked or misconceived material evidence, or was otherwise clearly wrong. Oliviera v. Jacobson, 846 A.2d 822, 826 (R.I. 2004) (citations omitted).

ii

Summary of Relevant Evidence

To perform the first step of the analysis required for ruling on a Rule 59 motion, this Court first considers the relevant evidence in the instant case in light of the charge to the jury on liability under the Recreational Use Statute. See Ferreira, 21 A.3d at 364. Accordingly, this Court considers all of the evidence relevant to whether a latent dangerous condition was present at the "pond," whether the Defendant was aware of the danger, and whether the Defendant voluntarily and intentionally failed to guard against the danger, knowing that the condition was substantially certain to cause serious injury. See Berman, 991 A.2d at 1052.

The evidence in this case established that there were latent conditions present at the "pond" that created a substantial risk of injury to users. Testimony and exhibits produced at trial show that the "pond" not only contained shifting shallow spots but also contained water of a brownish hue that obscured swimmers' ability to detect those shallow spots. (Pl.'s Mem. in Supp. 10-11.) Moreover, two of the D.E.M. witnesses admitted that certain structures allowing access to the "pond," in combination with the "pond's" shallow depths, made the "pond" a uniquely dangerous swimming facility with respect to diving injuries. Id. at 6-7. Mr. Lambert and Mr. Henderson indicated that swimmers were often unaware that it was unsafe to dive at the "pond." Id. at 10, 13.

There was also substantial evidence demonstrating that the Defendant was aware of the dangerous conditions at the "pond." Mr. Sullivan, Mr. Faltus, and Mr. Mouradjian all admitted that they were aware of a general risk of head injuries from diving into the "pond." (Pl.'s Mem. in Supp. 5-7.) Mr. Mitchell and Mr. Lambert testified that they were specifically aware of a risk of injury from diving into the particular location where Plaintiff testified that he dove. Id. at 9, 11. In particular, Mr. Lambert acknowledged that there was a recurring sandbar in the location of the "pond" where the Plaintiff sustained his injury that frequently made the depth of the water in that area less than five feet. Id. at 11. There was also testimony indicating that the Defendant was aware that filling the "pond" prior to having lifeguards in place increased the risk of injury. Both Mr. Sullivan and Mr. Paquette admitted that Mr. Mouradjian had expressed the opinion that the Department should not fill the "pond" prior to having lifeguards in place. Id. at 5, 8. Mr. Mitchell testified that Mr. Roy's injury was of the type he specifically feared would occur when he was ordered to fill the "pond" before the Department had hired sufficient staff. Id. at 9. Mr. Henderson characterized the situation at the "pond" as "an accident waiting to happen." Id. at 13. Finally, Plaintiff presented two emails admitting Defendant's awareness of the relevant dangers: the email from Mr. Mouradjian to Mr. Sullivan dated July 21, 2008, wherein Mr. Mouradjian characterized the events in this case as "approaching gross negligence" and the email Mr. Mitchell authored a few hours after Plaintiff's injury, wherein he advocated draining the "pond" unless lifeguards were hired. (Pl.'s Exs. 42, 38.)

Additionally, there was evidence at trial tending to show that Defendant voluntarily and intentionally failed to adequately warn or protect the public from the known dangers. Specifically, the Department failed to post any signs prohibiting diving or warning of shallow water. (Pl.'s Mem. in Supp. 6, 8, 12.) Mr. Sullivan claimed that he had ordered staff to post

"appropriate" signage around the "pond," and that he was unaware that such signs were not in place. Id. at 5. Mr. Faltus admitted that even though the "pond" poses a unique risk of injury, the Department does not implement any special safety policies at the "pond." Id. at 6. Mr. Paquette testified that at its other facilities, the D.E.M. will post signs to warn the public of dangers of which they may be unaware. Id. at 8. In his opinion, the Department should have posted signs warning of shallow water at the "pond." Id. Several D.E.M. witnesses confirmed that the Department exclusively relies on lifeguards and staff to protect patrons at the "pond" and it is undisputed that there were no lifeguards present on the day of the incident. Id. at 5-7; Def.'s Mem. in Supp. 13. Mr. Sullivan admitted that he decided to begin filling the "pond" without having hired the necessary staff, knowing at the time he made the decision that the Department could not safely operate the "pond" on its own. (Def.'s Mem. in Supp. 16-17; Pl.'s Mem. in Supp. 5.) Mr. Sullivan also testified that he had issued a directive to staff to inform the public that the "pond" was closed and to order swimmers out of the water, but video and witness testimony established that Mr. Henderson failed to order patrons out of the water on the day of the incident. (Pl.'s Mem. in Supp. 5, 13.)

The Court notes, however, that as discussed above, there was also evidence that while not entirely refuting liability, at least tends to show that a jury reasonably could conclude that the Defendant was not entirely responsible.[19] Mr. Sullivan testified that D.E.M. staff performed at least some inspection of the bottom of the drained "pond" in 2008 and did not observe any hazardous conditions. (Def.'s Mem. in Supp. 6.) Additionally, the Defendant had permanent "No Swimming" and "No Lifeguard on Duty Signs" around the "pond." Moreover, there was testimony that in years past, there had been a fortuitous lack of serious injuries at the "pond"

[19] See section II-B of this Decision for additional discussion of facts refuting liability.

during the filling process, despite the fact that lifeguards were not always present at the "pond" during those two weeks. (Def.'s Mem. in Supp. 14.) Furthermore, according to Mr. Sullivan, none of the Department's employees were aware of any other diving injuries occurring at the "pond" prior to the date of Plaintiff's injury.[20] (Def.'s Mem. in Opp'n 7; Def.'s Mem. in Supp. 4.) Finally and most importantly were the actions of Mr. Roy and his admission that diving into murky water of unknown depths was "irresponsible."[21]

iii

Assessment of Credibility and Weighing of Evidence

To fulfill its role as "super-juror," this Court must perform the next step of the analysis required under Rule 59 by independently weighing the evidence and assessing the credibility of the witnesses. See Marocco, 713 A.2d at 253.

This Court recognizes that credibility is typically a factual question for the jury to resolve. See State v. Pelliccia, 573 A.2d 682, 687 (R.I. 1990). As fact-finder, the jury may reject some or all of a witness's testimony as incredible. See Madeira v. Pawtucket Housing Auth., 105 R.I. 511, 515, 253 A.2d 237, 239 (1969). Nevertheless, the instant matter was not a case that necessarily turned on credibility. In independently assessing the credibility of the witnesses, this Court does not find it necessary to reject any of the witnesses' testimony for lack of credibility. The Court found the Plaintiff to be honest and forthright in his testimony, even acknowledging some fault in his own behavior. The Court was also impressed by the candor of

[20] This lack of knowledge, however, was likely due to the D.E.M.'s failure to have adequate staff at the "pond" during the relevant time period.

[21] Nonetheless, the jury was instructed on assumption of the risk and rejected it when they returned their first verdict.

the D.E.M. employees regarding their caution and knowledge.[22] Instead, liability in this case turns largely on the weight and balance of all of the relevant evidence. An independent weighing of the evidence in this case leads this Court to conclude that the evidence in Defendant's favor was equivocal at best and cannot overcome the lack of safety precautions and multiple admissions of liability from the D.E.M. employees.

After carefully considering and weighing all of the relevant evidence summarized above, the Court makes the following findings: the "pond" was popular among the people of Woonsocket as a welcome respite from hot summer days. The "pond" was unlike any other facility that the D.E.M. operates because it had several unique physical features—both naturally occurring and man-made—including the "Olympic Pool," a beach front area, a water basin, stone walls, a diving platform, a terrace jutting out over the water, a fountain, and an uneven sloping sandy bottom. For years, the "pond" had been used for both swimming and diving. Although the springboard was removed from the diving platform sometime around 1996, patrons continued to dive from the concrete platform, the stone walls, the terrace and various other locations that tended to invite diving and jumping.

Due to budget constraints, the State initially decided not to open the "pond" for the 2008 summer season. After receiving severe criticism, however, it ultimately decided to open the "pond" in late June 2008, approximately a month later than usual. In a rush to get the "pond" open and operational, the State did not follow its usual procedures for opening, preparing and staffing the "pond" that year. On June 27, 2008 the State announced publicly that it was opening the "pond" and immediately began filling it. The D.E.M. opened the locker rooms, restrooms

[22] The only real question of credibility was on the issue of the Plaintiff's relationships with his wife and children. Since this Court finds that a new trial on all issues is necessary, it need not resolve this issue.

and changing facilities, and members of the public began using the "pond." Prior to July 10, 2008, diving was already a problem. As of that date, the State did not have lifeguards in place.

The only signs posted were the English-Spanish "No Swimming" and "No Lifeguard on Duty" signs that were in place nearly year round and were not taken down even when lifeguards were on duty. There were approximately three of these signs posted around the "pond" and an additional two posted in the parking lot. There were no signs warning of shallow water, prohibiting diving or otherwise notifying the public of dangerous conditions. There were no signs or markings on the walls or the concrete platform to prohibit diving from these structures. Plaintiff's expert opined that the signage posted was not standard for aquatic facilities, was inadequate to protect users of the "pond," and was not consistently reinforced by staff.

D.E.M. employees allowed patrons to enter the "pond" and to swim without lifeguards present. The State knew that there were dangerous conditions present at the "pond," knew that people were swimming and diving there, knew that its failure to follow its usual opening procedures would jeopardize the safety of the public and nonetheless, opened the "pond" without proper signage or staff. As a result, someone was severely injured.

In light of these findings, the Court cannot agree with the jury's verdict finding no liability on the part of the Defendant for Mr. Roy's injury.

iv

The Jury's Verdict Is Against the Weight of the Evidence and Fails to Do Substantial Justice

Since this Court's independent weighing and assessment of the evidence leads it to disagree with the jury's decision, it must proceed to the fourth step of review for ruling on a motion for a new trial: namely, this Court must decide if the jury's verdict is against the fair preponderance of the evidence or fails to do substantial justice. See Ferreira, 21 A.3d at 364

(citing Guerra, 12 A.3d at 765-66). If the Court disagrees with the jury's verdict but finds that the evidence is nearly balanced such that reasonable minds "can naturally and fairly come to different conclusions thereon[,]" it must deny the motion for a new trial and uphold the jury's verdict. Fox v. Allstate Ins. Co., 425 A.2d 903, 907 (R.I. 1981). If, however, this Court's independent assessment leads it to conclude that the jury's verdict is against the great weight of the evidence, fails to respond to the merits, or fails to do substantial justice, it must order a new trial. Turgeon v. Davis, 120 R.I. 586, 591, 388 A.2d 1172, 1185 (1978) (citation omitted).

This Court finds that the collective weight of the Defendant's employees' repeated admissions of liability clearly tips the balance of the evidence in this case such that reasonable minds could not differ as to whether the Defendant is at all liable for Plaintiff's injuries under the Recreational Use Statute. See Fox, 425 A.2d at 907. In brief, the "pond" at the center of this tragic case has traditionally provided local residents with the only freely accessible beach-like area where they can swim, picnic, and generally escape the summer heat. After a hot and humid start to the summer of 2008, the Defendant publicly announced that it was going to belatedly open the "pond" for the season, with full awareness of the "pond's" dangers, and without having adequate staff in place. As a result, someone was injured. Reasonable jurors could certainly conclude that the Plaintiff was partially, or even significantly, at fault for his injuries. Nonetheless, in light of all of the D.E.M. employees' admissions of liability, the jury's finding of no liability at all on the part of the Defendant is contrary to the fair preponderance of the evidence and fails to do substantial justice between the parties. See Franco, 840 A.2d at 1111 (citing Perkins v. City of Providence, 782 A.2d 655, 656 (R.I. 2001) (internal citations omitted)).

When all of the D.E.M. employees' admissions are considered together, the Court must conclude that the evidence clearly proves that Defendant voluntarily and intentionally decided to

open the "pond" without sufficient staff to ensure patrons' safety, an action that according to testimonial admissions, was substantially certain to cause injury due to the significant hazards present in the "pond." Such a willful failure to protect visitors on one's property from harm is exactly the type of conduct the legislature intended to exclude from the protections of the Recreational Use Statute. See Berman, 991 A.2d at 1053 (discussing policies behind Recreational Use Statute). The Court finds that the weight of the evidence establishes that Defendant willfully and maliciously failed to guard against a non-obvious, latent dangerous condition, knowing that there existed a strong likelihood that a user of the "pond" would suffer serious injury or death. Accordingly, the failure of the jury's verdict to do substantial justice in this case requires this Court to grant Plaintiff's motion for a new trial on all issues. See Ferreria, 21 A.3d at 364.

III

CONCLUSION

Mindful of the foregoing and for the reasons set forth herein, this Court grants Plaintiff's Motion for a New Trial on all issues. Counsel shall present an appropriate order consistent with this Decision.

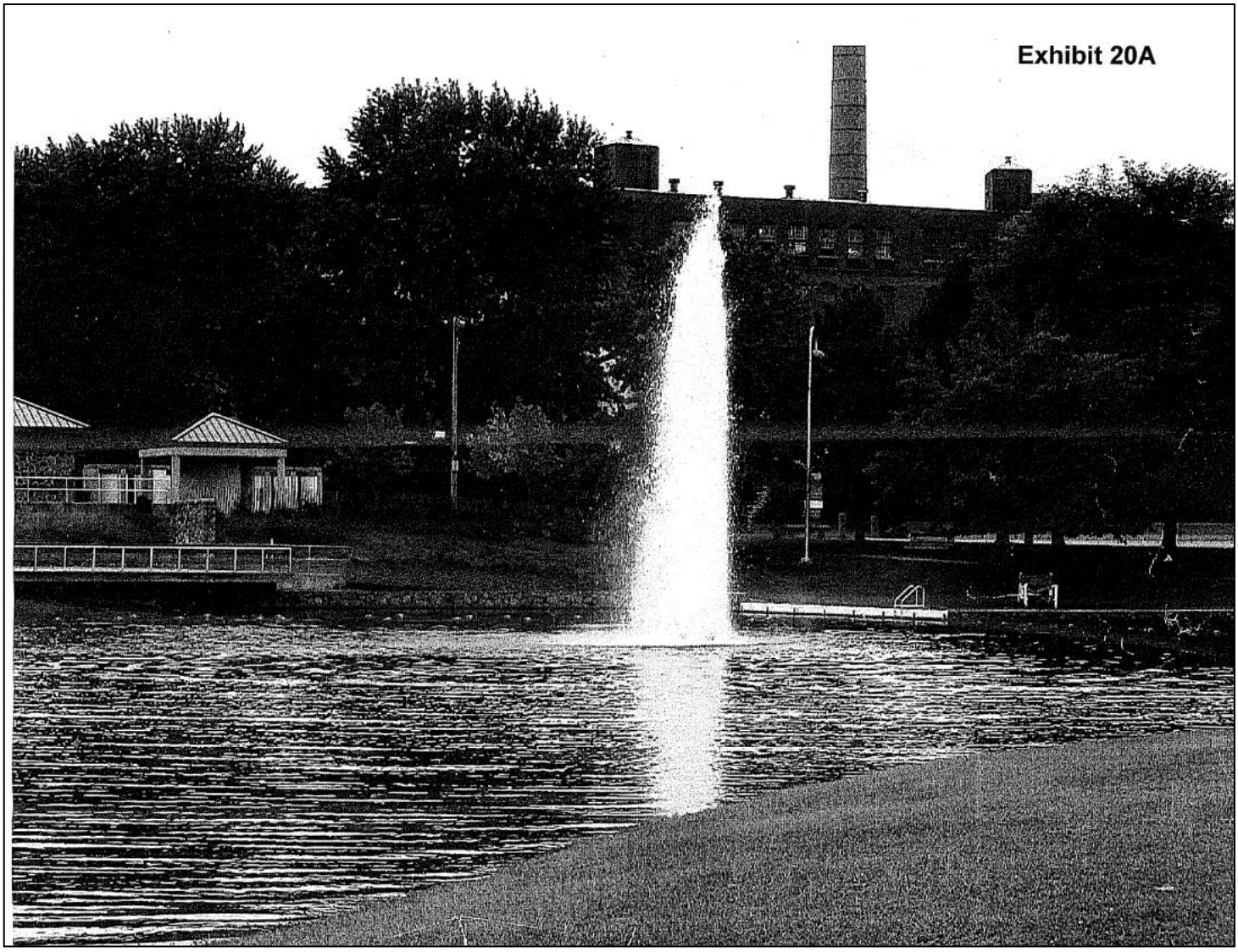
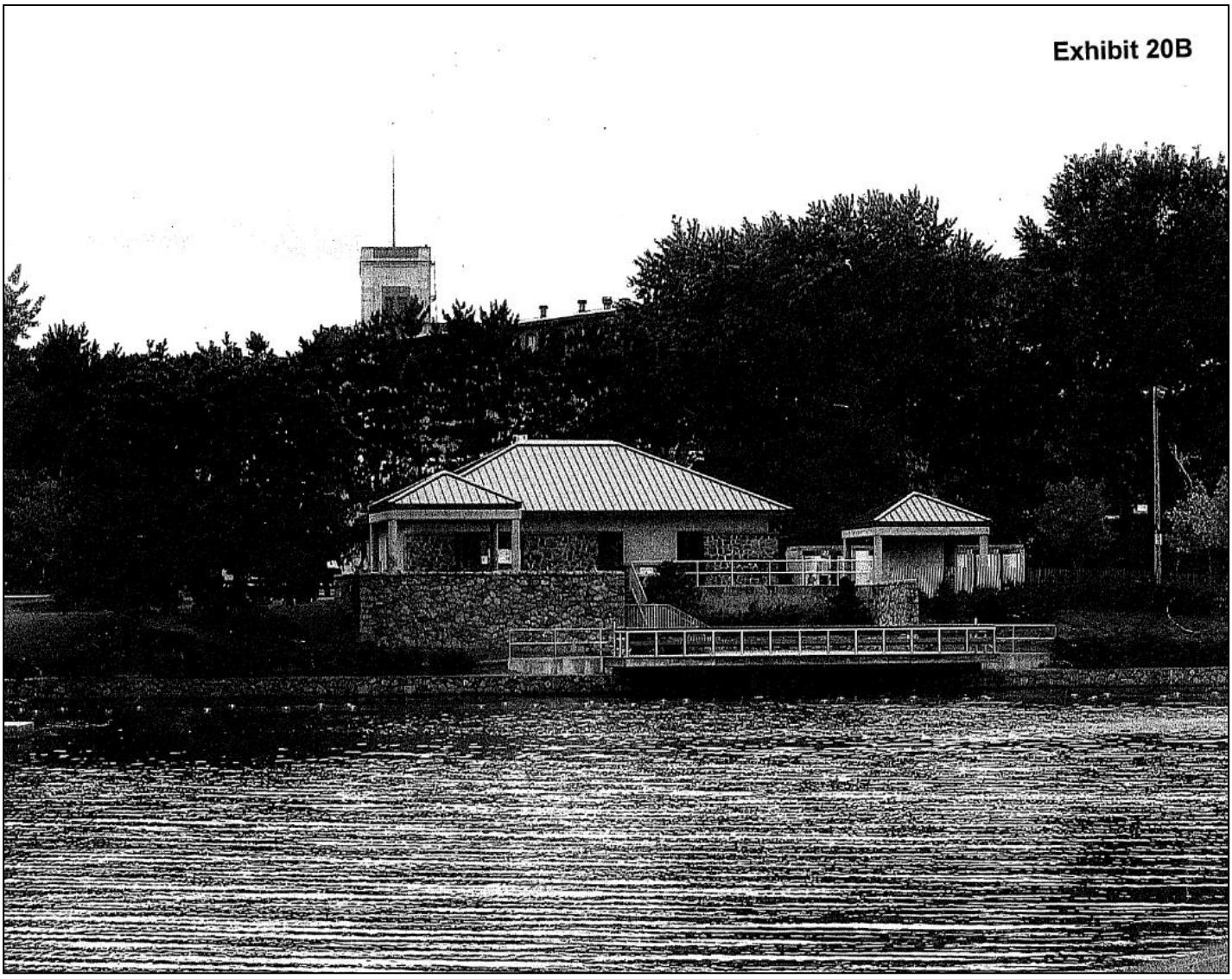


Exhibit 20A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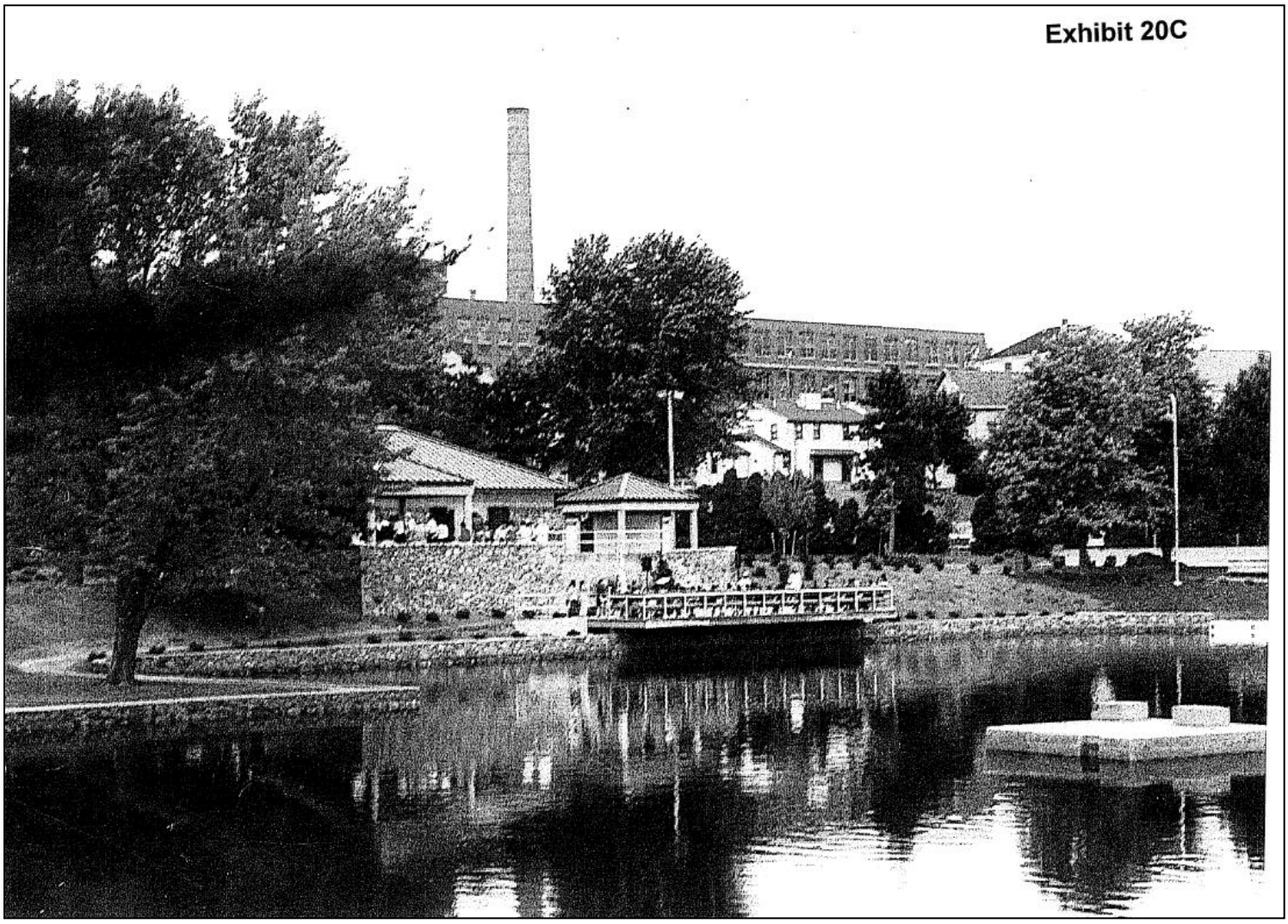
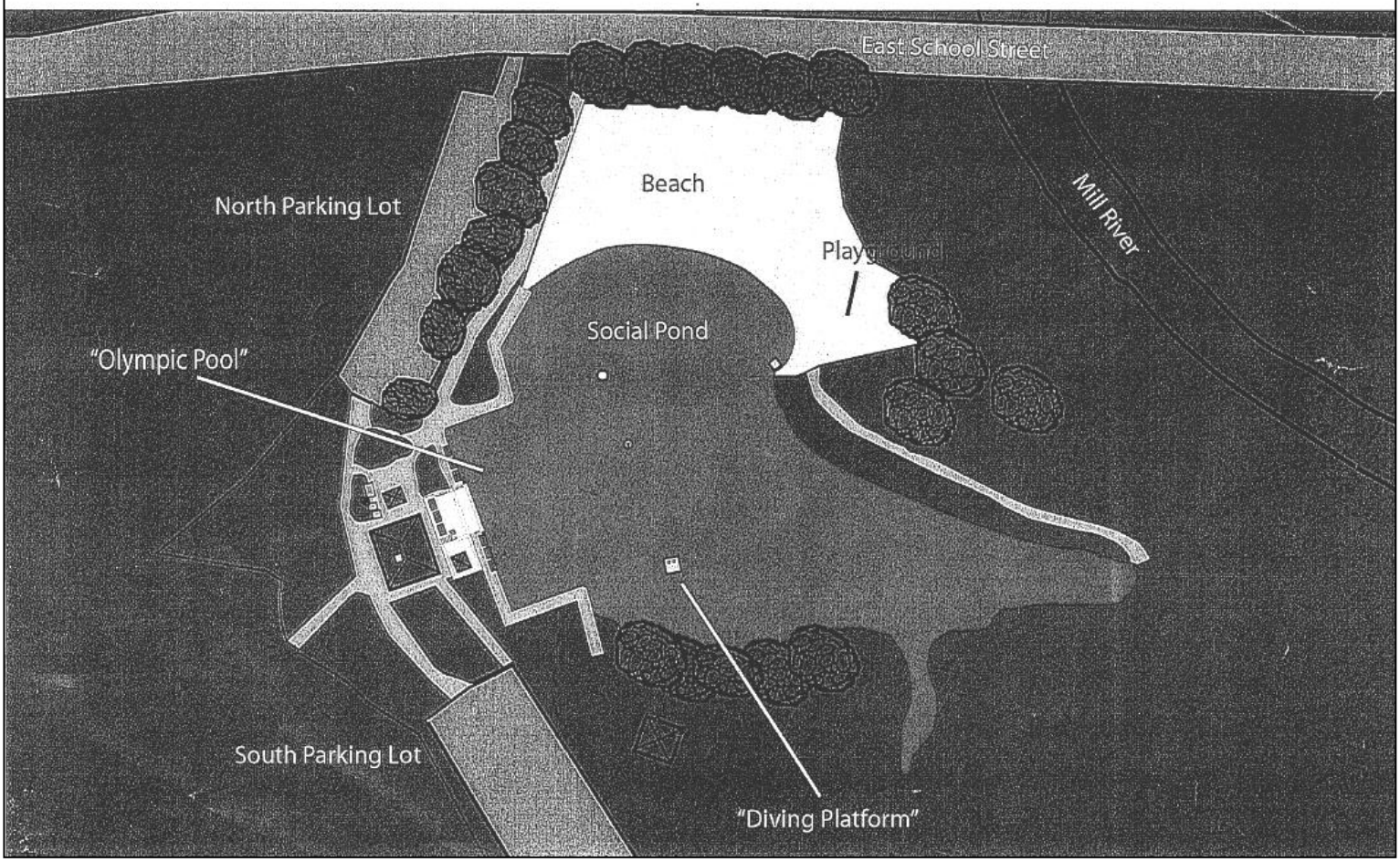


Exhibit 20C


Exhibit 20D

Exhibit 21C


East School Street
Beach
North Parking Lot
Mill River
Playground
Social Pond
"Olympic Pool"
South Parking Lot
"Diving Platform"

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Brett A. Roy and Dawn K. Roy Each Individually, and as Natural Parents, Next Friends and Guardians of Minors Jalyn Roy and Brett A. Roy, Jr., Plaintiffs v. State of Rhode Island Department of Environmental Management; W. Michael Sullivan, In His Capacity as Director of the Rhode Island Department of Environmental Management; and Kenneth Henderson, as an Employee, Agent or Servant of the State of Rhode Island DEM, Defendants
CASE NO:	PC09-2874
COURT:	Providence Superior Court
DATE DECISION FILED:	March 26, 2013
JUSTICE/MAGISTRATE:	McGuirl, J.
ATTORNEYS:	
For Plaintiffs:	Patrick C. Barry, Esq.
For Defendants:	Adam J. Sholes, Esq. Rebecca Tedford Partington, Esq.