NEW HAMPSHIRE SUPREME COURT

Rebecca L. Coan and Micah Ciampi
Administrators of the Estate of Nicholas M. Lorette and as p/n/f of Jeffrey Lorette

and

Sharon Ciampi,
Administratrix of the Estate of Michael T. Squeglia

v.

The State of New Hampshire (New Hampshire Department of Environmental Services), and
Algonquin Power Systems, Inc.

Case No. 2009-0672

APPELLANTS' BRIEF

Benjamin T. King, Esquire, Bar #12888
DOUGLAS, LEONARD & GARVEY, P.C.
6 Loudon Road, Suite 502
Concord, NH 03301
(603) 224-1988

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QUESTIONS PRESENTED

1. Whether the trial court erred by dismissing the plaintiffs' claims against the State of New Hampshire Department of Environmental Services on grounds of recreational use immunity under RSA 212:34 and RSA 508:14. Appendix at pp. 211-231.

2. Whether the trial court erred by dismissing the plaintiffs' claims against Algonquin Power Systems, Inc. based on a finding that Algonquin owed no duty to warn and/or to place safety devices to prevent the injuries and deaths at issue. Appendix at pp. 140-149, pp. 186-193 and pp. 231-34.

3. Whether the trial court erred by dismissing the plaintiffs' claims without giving the plaintiffs leave to amend their writ to correct perceived deficiencies. Appendix at pp 338-340.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS INVOLVED IN THE CASE

RSA 212:34

RSA 508:14

The text of these statutes is contained in the Appendix, as permitted by Supreme Court Rule 16(c).

STATEMENT OF THE CASE

The plaintiffs Rebecca L. Coan and Richard F. Lorette, Jr., the co-Administrators of the Estate of Nicholas Lorette, and Sharon Ciampi, the Administratrix of the Estate of Michael T. Squeglia, originally filed this wrongful death action in Belknap County Superior Court on October 9, 2007. Appendix at pp 1-8. The action arises from a June 12, 2005, double drowning in Silver Lake in Tilton, New Hampshire, that cost 16-year-old Nicholas Lorette and 20-year-old Michael Squeglia their lives. In the original Writ and Declaration, the plaintiffs alleged

negligence against the State of New Hampshire Department of Environmental Services (NHDES), Algonquin Power Systems, Inc. (Algonquin), and the Towns of Belmont and Tilton. The Towns were released from the case by plaintiffs prior to the rulings on the motions to dismiss that this Appeal concerns.

In a nutshell, the plaintiffs' claim against NHDES is that NHDES is liable in negligence for the drowning deaths of Nicholas Lorette and Michael Squeglia (and for the injuries suffered by Nicholas' 9-year old brother Jeffrey Lorette when he nearly drowned and witnessed his brother drown) because NHDES negligently failed to warn the public that it had created lethal currents in a popular swimming area, causing the injuries and deaths at issue. The plaintiffs further claim that NHDES is liable in negligence because NHDES negligently failed to make safety devices available at Silver Lake, notwithstanding that NHDES knew or should have known that the area was a popular swimming area and knew or should have known that it had created dangerous conditions there.

The claim against Algonquin is essentially that Algonquin (as the operator of a hydropower plant next to the area of Silver Lake where the drownings occurred) is also liable in negligence for the injuries and deaths at issue because Algonquin negligently failed to warn the public and the plaintiffs of the lethal currents unleashed upon the popular swimming area, and negligently failed to make safety devices available to rescue swimmers who fell victim to the lethal currents. Algonquin bears liability, the plaintiffs contend, because: a.) Algonquin had actual prior knowledge of the release of the lethal currents; b.) Algonquin owed a contractual duty pursuant to its Operating Agreement to "comply with applicable safety Laws or other safety requirements to prevent accidents or injury to persons or damage to property on, about **or adjacent to the Site** [of the hydropower plant]; c.) Algonquin failed to take any steps to warn of

the lethal currents of which it was aware, nor did it take any steps to make safety devices available; and d.) Algonquin's breaches of its duties proximately caused the deaths of Nicholas and Michael and the injuries to Jeffrey.

Shortly after the case was filed, on or about January 9, 2008, NHDES unsuccessfully moved to dismiss the claims against it on grounds of discretionary function immunity and recreational use immunity grounds, citing RSA 508:14. Appendix at pp. 10-21. The plaintiffs objected. Id. at pp. 22-34. The trial court denied the Motion by an April 17, 2008, Order finding that NHDES was not entitled to discretionary function immunity on a motion to dismiss because "the pleadings are susceptible of a construction to allow recovery — the decision not to warn was not marked by any high degree of planning or discretion." Id. at p. 40.

The trial court also denied NHDES' motion to dismiss based on recreational use immunity, RSA 508:14, correctly holding that "RSA 508:14 does not apply because the defendants were not using land for recreational purposes; rather they were swimming in water." Id.

The trial court subsequently allowed the plaintiffs to amend their Writ by Order dated February 24, 2009. Id. at p. 71. The plaintiffs amended the Writ to bring claims on behalf of Jeffrey Lorette, who was nine (9) years old. Id. at pp. 57-70. Jeffrey survived his near-drowning but suffered injuries, both physical and psychological, as a result of nearly drowning himself and watching his brother drown. Id. at p. 68.

Following the trial court's allowance of the First Amended Declaration, the defendant Algonquin moved to dismiss. Id. at pp. 72-136. NHDES also filed a 2-page motion to dismiss "piggybacking" on Algonquin's Motion. Id. at pp. 137-139. Notably, NHDES' 2-page motion to dismiss said nothing with respect to NHDES' supposed entitlement to recreational use

immunity.[1] NHDES failed to brief its supposed entitlement to recreational use immunity at all in its Motion.

The Court held a hearing on the pending motions to dismiss on May 21, 2009. At the hearing counsel for NHDES (Attorney Mulholland) stated that he intended to seek summary judgment on recreational use immunity grounds. Transcript at p. 55. But he acknowledged that the State had not yet moved for summary judgment on these grounds.

Despite the fact that the State had no dispositive motions pending based on the recreational use statutes at the time of the May 21 hearing, the trial court attributed such a motion to the State its June 22, 2009, Order, and dismissed the claims against NHDES based on recreational use immunity. Appendix at pp. 202-204. The trial court issued its Order dismissing the plaintiffs' entire case against NHDES despite the fact that the parties had neither briefed nor argued the State's supposed entitlement to recreational use immunity. The trial court also dismissed claims against Algonquin, holding that Algonquin owed the plaintiffs no duty. Id. at pp. 204-207.

The plaintiffs moved for reconsideration and separately moved to amend their Writ to correct the perceived deficiencies identified by the trial court. Id. at pp. 208-358. By Orders dated August 18, 2009, the trial court denied both motions. Id. at pp. 359-367. This Appeal followed.

STATEMENT OF FACTS

The decedents Nicholas Lorette and Michael Squeglia were close friends. Appendix at p. 60. Nicholas was 16 years old on June 12, 2005, and would have been a junior at Belmont High

[1] Although NHDES stated in its Motion, without supporting argument, that it was entitled to "federal and state immunity," counsel for NHDES admitted at the May 21, 2009, hearing on the Motion that use of the word "immunity" was a typographical error. Said Attorney Mulholland to the trial court, "I meant to write—in my

School the following fall. Id. Michael, a 2003 graduate of Belmont High, was 20 years old on June 12, 2005. Id.

The afternoon of Sunday, June 12, 2005, was hot in the Belmont, New Hampshire, area, with the temperature hovering around 80 degrees Fahrenheit. Id. To seek relief from the heat, Nicholas and Michael walked to Silver Lake in Belmont, taking with them Jeffrey Lorette, Nicolas' 9-year old brother. Id. Silver Lake lies partially in Belmont, New Hampshire, and partially in Tilton, New Hampshire. Id.

Importantly, Silver Lake is a Great Pond. As NHDES conceded in its interrogatory answers, "Silver Lake is a Great Pond, held by the state in trust for the people of New Hampshire under the public trust doctrine." Id. at p. 242.

Furthermore, NHDES does not affirmatively permit people to use Silver Lake for purposes such as swimming and boating, as confirmed by the below interrogatory answer:

> 8. Do you contend that you have the power to permit a person to use Silver Lake or to exclude a person from Silver Lake? If so, please state all facts upon which you rely to support your contention, and please identify every instance in the past ten (10) years in which you have affirmatively permitted persons to use Silver Lake or affirmatively excluded persons from Silver Lake. Please attach to your answers to these interrogatories all documents that relate to your answer.
>
> **ANSWER**: DES has not, in the past ten years, affirmatively permitted anyone to swim in Silver Lake. Silver Lake is open to the general public for swimming and boating.

Appendix at p. 246. NHDES did state in this interrogatory answer that it may exclude persons from certain uses of Silver Lake pursuant to the police power. Id. But, importantly, the State nowhere contends that it ever has, or that it could, prevent a member of the public from exercising the right to swim in a Great Pond such as Silver Lake. Id.

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piggyback motion, in which I agreed with the arguments of Algonquin, I meant to write State and Federal preemption; I wrote immunity by accident." Transcript of May 21, 2009, hearing (Transcript) at p. 28.

Neither Silver Lake itself, nor the land where Nicholas, Michael and Jeffrey entered Silver Lake, qualifies as a State recreational area, as confirmed by the deposition testimony of Fish and Game Department Conservation Officer Michael Eastman.

> Q. Am I correct in understanding that the area of land at the mouth of the Winnipesaukee River on Silver Lake is not a Fish and Game boat ramp?
> A. No, it is not.
> Q. It's not a state recreational area?
> A. No, it is not.

Id. at p. 254 (emphasis supplied).

Swimming, wading and dunking in Silver Lake were common summertime activities for Nicholas, Michael and Jeffrey. Id. at p. 60. They had gone swimming in the lake frequently that summer and in prior summers, and in fact, they had been swimming in Silver Lake just the prior day — June 11, 2005. Id.

Silver Lake was not only a favorite spot for Nicholas, Michael and Jeffrey, but it was a popular destination for many area residents to do such things as swim, wade, or kayak. Id. On any given warm summer day, and particularly on June 11, 2005, and June 12, 2005, people gathered at Silver Lake in considerable numbers to enjoy water activities. Id.

NHDES owns and operates the Lochmere dam, which is located just north of Silver Lake. On or about June 11, 2005, NHDES decided to add 375 cfs to the flow out of the Lochmere dam into Silver Lake. Id. at p. 61. Increasing the flow by this magnitude transformed the waters in the north end of Silver Lake from safe to lethally turbulent. Id.; *see also* Appendix at p. 167 (the plaintiffs' liability expert, Stephen E. Fournier, P.E., opined that "[t]he cause of the drowning incident was the unnecessary exposure of young recreational users to a hazardous condition (deeper than normal water combined with a strong current").

NHDES unleashed these lethal currents upon the popular swimming area without warning the public, without undertaking any inquiry into the activities occurring downstream of the dam in the north end of Silver Lake, and without paying a scintilla of heed to any safety considerations—despite the fact that NHDES knew that increasing the flow through a dam by such a magnitude could have dangerous consequences downstream, as reflected by the fact that the State had issued warnings in the past when it had added to the flow through dams. Id. at p. 227-29.

State Civil Engineer Steve Doyon made the decision on or about June 11, 2005, to add 375 cfs to the flow out of the Lochmere dam. Id. at p. 257. Civil Engineer Doyon testified that the considerations that he undertook in effectuating the dramatic increase to the flow that day were essentially limited to managing the target levels for Winnipesaukee and Winnisquam. Id. at pp. 258-60. He did not take any public safety considerations into account. Id. He admitted that he "did not visit the site prior to making the decision." Id. at p. 260. He likewise admitted that he undertook no inquiry into the activities occurring in Silver Lake downstream of the dam.

> Q. ...Did you undertake any inquiry into the activities, if any, that were occurring in Silver Lake downstream of the dam when you made your decision to add 375 cubic feet per second to the flow out of the Lochmere?
>
> *****
>
> A. I did not.

Id. at pp. 261-62.

NHDES further admits that it failed to provide any warning of the dangers of swimming in Silver Lake on June 11 and 12, 2005, as a result of the increased currents. "No warnings were posted at the location at which Mr. Lorette and Mr. Squeglia entered the water," NHDES admitted in interrogatory answers. Id. at p. 247 at #11. NHDES failed to provide any warning of the dangerous conditions notwithstanding that it has issued warnings in the past associated with

increasing the flow through dams, demonstrating that NHDES is cognizant of the hazards that may result from such additions to the flow, as Chief Engineer Doyon admitted in his deposition.

> Q. In connection with making the decision to increase the flow out of a dam, have you ever caused a warning to be given with respect to swimming, boating or engaging in any recreational activity downstream of the dam?
> A. Actually, yes....

Id. at pp 228-29. NHDES likewise admitted in interrogatory answers that "DES has warned the public before adding to the flow through a dam," supporting a reasonable inference that NHDES is aware that dangerous conditions may result from increasing the flow through a dam where there are recreational users downstream, necessitating warnings. Id. at p. 247 at #12.

The evidence construed most favorably to the plaintiffs therefore establishes that NHDES added 375 cfs to the flow into a popular swimming area, transforming the waters from safe to lethally turbulent: a.) without warning the public; b.) without taking safety considerations into account at all, and c.) without paying any mind to the activities downstream of the dam. NHDES failed to warn the public notwithstanding that it had warned the public in the past and therefore knew the potentially dangerous consequences of its conduct.

Because NHDES failed to warn the public of the danger it had created by adding 375 cfs to the flow out of the Lochmere dam into Silver Lake, Nicholas, Michael and Jeffrey tragically had no way of knowing when they arrived at Silver Lake on June 12, 2005, that swimming there that day — where they had swum many times before — could cost them their lives. Id. at p. 61.

Jeffrey got caught in the deadly currents near the mouth of the river and screamed for help. Id. Nicholas and Michael raced to him but could not save him, and soon all three boys were flailing in the deadly currents, screaming for help. Id. Unfortunately, no one onshore could have come to their aid because the defendants had failed to place any safety devices on the shore,

notwithstanding the defendants' knowledge that the area was a popular swimming area and that it could become dangerous when flows into it were increased. Id.

A nearby resident raced to the boys in his kayak and was able to save nine-year-old Jeffrey. Id.

Tragically, however, Nicholas and Michael drowned in the fierce currents. Id. Later that evening, after NHDES cut back the flows from the Lochmere dam, Fish and Game divers recovered the lifeless bodies of Nicholas and Michael. Id.

The Estates of Nicholas and Michael, and Jeffrey Lorette's parents in their capacity as his parents and next friends, alleged liability in negligence against NHDES for the deaths of Nicholas and Michael and the injuries suffered by Jeffrey. Id. at pp. 62-69.[2]

The plaintiffs alleged that NHDES owed and breached a duty to warn Nicholas, Michael and Jeffrey of the dangerous currents NHDES had created in the popular swimming area.[3] The plaintiffs further alleged that NHDES owed and breached a duty to place safety devices on the shore of Silver Lake, "given that NHDES knew or should have known that the area downstream of the dam was a popular swimming area, and given that NHDES knew or should have known that its conduct releasing water from the Lochmere dam could make the waters turbulent, endangering swimmers."

NHDES' failure to warn of the lethal condition it created, and NHDES' failure to place safety devices in the vicinity of a popular swimming area where NHDES created lethal conditions, caused the deaths of Nicholas and Michael and the injuries suffered by Jeffrey, the plaintiffs contended.

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[2] A claim for intentional infliction of emotional distress was also brought on behalf of Jeffrey.
[3] The text of the claims alleged in the First Amended Declaration is contained at pages 62-69 of the Appendix.

The plaintiff further alleged claims against Algonquin Power Systems, Inc. (Algonquin). Algonquin operates the Lochmere hydroelectric station adjacent to the area of Silver Lake where Nicholas, Michael and Jeffrey became trapped in the lethal currents. The plaintiffs' First Amended Declaration alleges that Algonquin owed a duty to warn the plaintiffs and the public in general of the dangers of swimming in Silver Lake downstream of the dam, and/or a duty to make safety devices available, because "Algonquin knew or should have known that the area was a popular swimming area and that swimming conditions could be perilous in the vicinity of the dam and in the area adjacent to the generating station."

In fact, discovery established that Algonquin had actual prior knowledge of the increase in the flow through the Lochmere dam that caused or contributed to the deaths of Nicholas and Michael and the injuries suffered by Jeffrey. The dam operator for the defendant NHDES, Robert Fay, testified:

> Q. On or about June 11, 2005, do you recall notifying anyone associated with Algonquin Power that you would be increasing the flow through the Lochmere dam by 375 cubic feet per second?
>
> A. I—I would—I would think that I would have, yeah. I mean, it's something I do every time I make a change.

Appendix at p. 196.

Indeed, Algonquin conceded at the May 21, 2009, hearing on its motion to dismiss that it had actual prior knowledge of the June 11 increase in the flow through the Lochmere dam that caused the lethal condition that led to the drownings.

> The Court: Would Algonquin be aware that [the State would open three (3) floodgates on the afternoon of June 11]?
>
> Mr. Rouvalis: Yes. ...Algonquin and the State are in close contact with each other because water flows, fluctuation flows, and the hydro power has several turbines that are dependent and operated at different levels depending on how much water is available to it to generate power.

Transcript at p. 13.

Algonquin failed to give the public any warning, notwithstanding that Algonquin knew that the flow would dramatically increase through the Lochmere dam, and therefore knew or should have known that the currents in the popular swimming area adjacent to Algonquin's hydropower plant would become treacherous. Appendix at p. 145.

The plaintiffs further alleged that Algonquin owed a duty to warn the public of the dangerous condition in Silver Lake of which it had advance knowledge, and to make safety devices available in the vicinity of the lake, pursuant to the Operating Agreement that enabled it to operate the hydropower plant. This Operating Agreement obligated Algonquin to "comply with applicable safety Laws and other safety requirements **to prevent accidents or injury to persons** *or* damage to that property on, about **or adjacent to the Site** and on which Algonquin maintains control via limited access." Id. at p. 152 (emphasis supplied).

A June 20, 2005, e-mail issued by FERC to Algonquin after the drownings supports that Algonquin owed a duty to warn of the dangerous condition next to the hydropower plant Algonquin operated. In the e-mail, a FERC Senior Civil Engineer, James Wing, advised Algonquin Team Leader Sean Fairfield that "[t]here would definitely have been a turbulent condition from the dam spill." Id. at p. 198. Senior Civil Engineer Wing cautioned Algonquin that "a minimum of some warning signs should be placed on the south side of the bridge warning swimmers and shoreline fishermen of the danger of the turbulent waters from the dam...." Id.

By Order dated June 22, 2009, the trial court dismissed all claims against the State based on the recreational use immunity statutes and dismissed the claims against Algonquin based on a finding that Algonquin somehow owed the plaintiffs no duty. Id. at pp. 199-207. Following the

trial court's August 18, 2009, Orders refusing to reconsider the Order of dismissal and denying the plaintiffs leave to amend, the plaintiffs timely appealed.

SUMMARY OF ARGUMENT

The Court should reverse the trial court's Order dismissing the plaintiffs' claims based on the recreational use immunity statutes, RSA 212:34 and RSA 508:14, for several reasons. First, the trial court failed to require the State to prove that it met all the criteria for invoking recreational use immunity, misallocating the burden of proof to the plaintiffs.

As a threshold matter, the State cannot claim recreational use immunity because it failed to prove that it is an owner, occupier or lessee of Silver Lake within the meaning of the recreational use statutes. Kenison v. Dubois, 152 N.H. 448, 452 (2005). An owner, occupier or lessee of land must have the ability to permit a member of the public to use land for recreational purposes in order to qualify for recreational use immunity. *E.g.*, Id. at 454 ("Because we conclude that, in order to qualify for immunity under the recreational use statutes, one must at least have the ability or authority to permit persons to use or enter the land, the defendants are not occupants for the purposes of the recreational use statutes.").

The injuries and deaths at issue here occurred on Silver Lake — a Great Pond characterized as public waters. The law is well-settled that the public has the inalienable right to swim in public waters. The right to swim in public waters does not derive from State permission but from common law. Indeed, the State's rights in public waters are subject to the public's rights to enjoy common law rights in such waters. The State therefore does not permit the public to swim in Silver Lake. The State acknowledged as much in its interrogatory answers, stating that: "DES has not, in the past ten years, affirmatively permitted anyone to swim in Silver Lake. Silver Lake is open to the general public for swimming and boating." Appendix at p. 246. Because the public has the ability to swim in Silver Lake deriving from common law, and

because the State does not affirmatively permit the public to do so, the trial court erred in conferring recreational use immunity on NHDES for injuries and deaths occurring in Silver Lake.

The trial court likewise erred in granting the State recreational use immunity because the purposes of the statutes are not furthered by cloaking the State with immunity under the circumstances of this case. The recreational use statutes are in derogation of the common law and must be narrowly construed. They should not be applied if their purposes would not be served. The purpose of the recreational use statutes is to encourage landowners to permit the public to use private land for recreational purposes in exchange for immunity from liability for resulting injuries. Kenison, 152 N.H. at 453. Here, no such purpose would be served. The State needs no encouragement to permit the public to swim in Silver Lake. The public has the inalienable right to do so. Applying the recreational use statutes is therefore improper because doing so encourages the State to abrogate its duty of due care, imperiling the public, without conferring any benefit upon the public.

The individual recreational use statutes are also inapplicable for a variety of reasons. RSA 212:34 should not apply if the liability at issue arises from "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." RSA 212:34, III (a). Here, the facts demonstrate that NHDES created a hazardous condition in a popular swimming area by dramatically increasing the flow out of the Lochmere dam into the swimming area, creating lethal currents. The facts further reveal that NHDES caused this hazard without paying any heed to safety considerations, without visiting the site, without undertaking any inquiry into the activities occurring downstream of the dam in Silver Lake where the lethal currents would arise, and without warning the public.

These facts could certainly lead a trier of fact to conclude that NHDES willfully or maliciously failed to warn against a dangerous condition, rendering RSA 212:34 inapplicable (even if NHDES were somehow an owner, occupier or lessee of Silver Lake for purposes of the recreational use statutes, which it is not). The trial court thus erred by dismissing the plaintiffs' claims against NHDES, warranting reversal. The trial court further erred by refusing to allow the plaintiffs to amend their writ to allege with greater particularity facts concerning the State's willful or malicious failure to warn of a dangerous condition, likewise warranting reversal.

RSA 508:14 is also inapplicable for several reasons. First, the statute does not apply where, as here, the injuries occur on water as opposed to land. Furthermore, the statute does not apply where, as here, the injuries do not arise from any recreational use of land that the State permitted.

The Court should also reverse the trial court's Order dismissing the claims against Algonquin based on a finding that Algonquin somehow owed the plaintiffs no duty. The facts alleged in the pleadings amply support the existence of a duty. Algonquin had actual prior knowledge of the increase of the flow into Silver Lake. Algonquin therefore had a duty to warn based on well-established New Hampshire legal principles for determining when a duty arises, including the age old principle that "[a]ll persons have a duty to exercise reasonable care not to subject others to an unreasonable risk of harm," Remsburg v. Docusearch, 149 N.H. 148, 153 (2003), and the principle that "a defendant may be held liable when a reasonable person would customarily instruct a plaintiff in respect to the dangers inherent in an activity." Allen v. Dover Co-Recreational Softball League, 148 N.H. 407, 422 (2002). The Hungerford factors likewise militate in favor of imposing a duty upon Algonquin, given such factors as Algonquin's actual knowledge of the hazard, Algonquin's proximity to the site of the hazard (next to where the

drownings concerned), the slightness of the burden to Algonquin to exercise reasonable care to communicate warnings, the gravity of the interest involved (human life), and the high likelihood of grave harm, including loss of life, if the duty did not attach. *See* Hungerford v. Jones, 143 N.H. 208, 211 (1998). Furthermore, Algonquin owed a duty pursuant to its Operating Agreement to comply with applicable safety laws or other safety requirements, arising at common law or otherwise, to prevent injuries to people adjacent to Algonquin's site.

ARGUMENT

A. Standard of Review

1. Granting of the Motions to Dismiss

"In reviewing a motion to dismiss, [the Supreme Court's] standard of review is whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." Gen. Insulation Co. v. Eckman Constr., 2010 WL 308748 at *6 (N.H. Jan. 28, 2010). "We assume the [plaintiff's] pleadings to be true and construe all reasonable inferences in the light most favorable to [the plaintiff]." Id. "We then engage in a threshold inquiry that tests the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief, we must hold that it was improper to grant the motion to dismiss." Id. (emphasis supplied).

2. Denial of the Plaintiffs' Motion to Amend

The Supreme Court will reverse a trial court's decision to deny a motion to amend if the trial court commits an unsustainable exercise of its discretion. Cambridge Mut. Fire Ins. Co. v. Crete, 150 N.H. 673, 678 (2004). A trial court commits an unsustainable exercise of its discretion within this context where the trial court fails to give the plaintiff "leave to amend the writ to correct perceived deficiencies before an adverse judgment has preclusive effect." Id.

B. The Court Should Reverse The Trial Court's Order Granting NHDES Recreational Use Immunity

A defense on the grounds of the recreational use immunity statutes constitutes an affirmative defense. Seich v. Town of Canton, 686 N.E.2d 981, 982 (Mass. 1997) (stating that defendant raised the Massachusetts recreational use statute (which is comparable to New Hampshire's statute) as an "affirmative defense") (Appendix at p. 267). The statutory nature of recreational use immunity renders it an affirmative defense. Jakobsen v. Massachusetts Port Authority, 520 F.2d 810, 813 (1st Cir. 1975) (holding that "a statutory limitation on liability" constitutes an "affirmative defense") (Appendix at p. 274).

A party, such as the State, asserting an affirmative defense such as recreational use immunity bears the burden of proving all of its elements. Gephart v. Daigneault, 137 N.H. 166, 172-73 (1993) (holding that because "the defense of collateral estoppel is an affirmative one," "the party asserting it bears the burden of proving all of its elements."); *see also* State v. Soucy, 139 N.H. 349, 353 (1995) ("The burden of proof to establish an affirmative defense is on the defendant....").

Moreover, a court evaluating the application of recreational immunity must strictly interpret RSA 212:34 and RSA 508:14 to determine whether immunity applies. Kenison v. Dubois, 152 N.H. 448, 452 (2005). This is so because recreational use statutes "are in derogation of the common law." Id. The Court should reverse the trial court because, quite simply, the State failed to prove that the elements necessary to obtain recreational use immunity are satisfied.

1. NHDES Is Not Entitled To Recreational Use Immunity Because It Lacks The Ability or Authority To *Permit* The Public To Swim Or Boat In Public Waters Such As Silver Lake—The Public Enjoys Inalienable Common Law Rights To Do So.

The State has not proven, nor can it prove, that it meets all the criteria to entitle it to recreational use immunity. In order to qualify for immunity under either RSA 212:34 or RSA 508:14, a defendant must prove that it qualifies as an owner, lessee or occupant of land. Kenison,, 152 N.H. at 450 (2005) ("On appeal, the plaintiffs first argue that the defendants are not immune from liability under [RSA 508:14 or RSA 212:34] because they do not qualify as owners, lessees or occupants of land. ...[W]e agree...."). "[A]n owner, occupant or lessee is one who has the ability or authority to grant permission to use land." Id. at 452. The Kenison court therefore held that "in order to qualify for immunity under the recreational use statutes, one must at least have the ability or authority to permit persons to use or enter the land...." Id. at 454 (emphasis supplied).

The facts as alleged in the First Amended Declaration, construed most favorably to the plaintiffs, do not support that NHDES has the ability or authority to permit persons to swim in Silver Lake, or to traverse the land necessary to access it, rendering erroneous the trial court's decision to dismiss the plaintiffs' claims. The plaintiffs certainly did not allege this incorrect fact in their First Amended Declaration — the sole source of facts that the trial court should have examined in ruling on a motion to dismiss. *See* Gen. Insulation Co., 2010 WL 308748 at *6 (stating that the task of the court in ruling on a motion to dismiss is "to test the facts in the complaint against the applicable law").

The trial court's out-of-the-blue finding in its Order that the State somehow owns Silver Lake and "permitted the general public to use the lake and land for recreational purposes such as swimming," Appendix at p. 203, reveals the trial court drawing factual inferences in favor of the moving party, NHDES — exactly what the trial court must not do in ruling upon a motion to

dismiss. *See* Id. The trial court's incorrect inferences in favor of NHDES warrant reversal of the trial court's Order.

Moreover, the trial court's finding that the State owns Silver Lake, and somehow controls the public's right to swim in it, is incorrect as a matter of fact and law. NHDES admitted in its interrogatory answers that it does not affirmatively permit persons to swim in Silver Lake, but that "Silver Lake is open to the general public for swimming and boating." This is so because Silver Lake, based on its status as a Great Pond, belongs to the public, not the State. The State lacks the ability to permit the public to swim or boat or do similar activities in Silver Lake. The public enjoys these rights without the State's permission.

"Silver Lake is a Great Pond, held by the state in trust for the people of New Hampshire under the public trust doctrine," as the State conceded in interrogatory answers. Appendix at p. 242.

As a public water, Silver Lake "**belongs to the public** and is held in trust by the State for public use." Hartford v. Gilmanton, 101 N.H. 424, 425 (1958) (emphasis supplied). "**Any member of the public may exercise a common-law right to boat, bathe, fish, fowl, skate and cut ice in and on its public waters**." Id. at 425-26 (quoting Whitcher v. State, 87 N.H. 405, 409 (1935)) (emphasis supplied). Swimming is indistinguishable from bathing for purposes of this nonexhaustive list of activities people have a common law right to enjoy in and on public waters.

Importantly, the public's rights in Silver Lake supersede the rights of the State as a matter of law. "The public's rights to use the waters are inalienable except by legislative grant." Whitcher v. State, 87 N.H. 405, 409 (1935). The State has rights in the soil of the great ponds, but those rights are "**subject to the public rights named**," specifically, the common law rights enumerated above. Id. (emphasis supplied).

NHDES is therefore is not an owner, occupant or lessee of Silver Lake within the meaning of the recreational use statutes because — contrary to the trial court's unsubstantiated findings in its June 22, 2009, ruling — the State does not have the ability to permit persons to swim in Silver Lake, rendering the recreational use statutes inapplicable. The source of the public's right to swim in Silver Lake is common law, not the State's permission. Indeed, the State cannot deny the public the right to use waters such as Silver Lake for activities such as swimming and boating because the public has "inalienable" rights to use Silver Lake for such purposes absent some declared public health emergency.

The trial court thus erred by granting NHDES recreational use immunity based on a finding that the State somehow owns Silver Lake and permits the general public to use the lake and land for recreational purposes such swimming and boating. The finding is erroneous because the facts alleged in the First Amended Declaration, construed most favorably to the plaintiffs, do not support the finding. The finding is further erroneous because it ignores Silver Lake's status as a Great Pond. NHDES does not have the ability or authority to permit the public to exercise its common law rights in Great Ponds. The inalienable rights of Nicholas, Michael and Jeffrey to swim in such waters derived from common law and not from the State's permission. Because NHDES lacked the ability or authority to permit Nicholas, Michael or Jeffrey to swim in Silver Lake, NHDES does not qualify as an owner, occupier or lessee of land and cannot cloak itself in recreational use immunity.

2. NHDES Is Not Entitled To Recreational Use Immunity Because Applying Immunity Does Not Serve The Purposes Of The Statutes, Given That Silver Lake Constitutes Public Waters, Not Private Land, And NHDES Obtains No Incentive From The Statutes To Permit The Public To Swim There Because The Public Has Inalienable Rights To Do So, At Common Law.

Based on the principle that courts must strictly construe recreational use statutes because they are in derogation of the common law, the trial court committed further error by applying the statutes because doing so deprives the plaintiffs of the right to recover for their loss of life and other injuries without in any way effectuating the purpose of the statutes.

Statutes should be construed "so as to effectuate their evident purpose." Quality Carpets v. Carter, 133 N.H. 887, 889 (1991). Statutes should not be applied "in circumstances where neither the basic purpose of the statute, nor, indeed, any purpose could be served." Lorette v. Peter-Sam Inv. Properties, 140 N.H. 208, 213 (1995)(Batchelder, J., dissenting).

The purpose of the recreational use immunity statutes is to establish a quid pro quo policy: "namely, *permission* to the general public to use *private* land for recreational purposes in exchange for immunity from liability for resulting injuries." Kenison, 152 N.H. at 453 (emphasis supplied)(quotations omitted).

Cloaking the State in recreational use immunity to shield it from liability for the deaths of Nicholas and Michael, and the injuries suffered by Jeffrey, does not serve the purpose of the recreational use statutes. The State needs no incentive to permit the public to swim or boat in Silver Lake, which is not private land but rather public waters. The public enjoys the right to swim and boat in public waters as "inalienable" rights, without needing any permission from the State. Whitcher, 87 N.H. at 409. Applying recreational use immunity under circumstances such as these, as the trial court has erroneously done, unconscionably gives the State something for nothing while depriving the plaintiffs of the right to recover for the most grievous injury of all. The facts simply do not fit the quid pro quo outlined in Kenison. The State has no power to extend permission to the public to swim in Silver Lake because the public has an inalienable right at common law to so. Why give the State immunity for "permission" that the public neither

needs nor the State has the power to give? Under these circumstances, no justification exists for immunizing the State for failing to exercise due care and causing death as a result. Strict construction of the statutes, coupled with the principle that statutes should not be applied where their purpose will not be advanced, mandate that the statutes not apply here. The Court should reverse the trial court.

3. The Trial Court Erred By Dismissing The Plaintiff's Claims Against NHDES Based On RSA 212:34 Because Whether A Defendant's Conduct Was Willful Or Malicious Cannot Be Resolved By A Trial Court On A Motion To Dismiss.

The Court should also reverse the trial court because the trial court misallocated the burden of proof, and hijacked the role of the trier of fact, by dismissing the plaintiffs' claims against NHDES based on a finding that the exceptions to immunity set forth in RSA 212:34, III (a) somehow could not apply.

Even if NHDES somehow were an owner, occupant or lessee of Silver Lake (which it is not for purposes of the recreational use statutes), NHDES could not cloak itself in immunity under RSA 212:34 if NHDES willfully or maliciously failed to guard or warn against "a dangerous condition, use, structure or activity." RSA 212:34, III (a).

As stated above, NHDES bore the burden to prove that recreational use immunity applied. Gephart, 137 N.H. at 172-73. NHDES therefore bore the burden to prove that its conduct was not willful or malicious in order to avail itself of the RSA 212:34 affirmative defense. The trial court, however, erroneously shifted the burden to the plaintiffs, dismissing the case in part on a finding that "[t]he plaintiffs have alleged no facts that would allow the Court to conclude that the exceptions contained in RSA 212:34, III, apply in this case." (emphasis supplied).

Contrary to the trial court's reasoning, however, it is the State that bears the burden to prove that all elements required for immunity have been met: the onus is not on the plaintiffs to prove that the elements necessary to establish immunity have not been met. The Court should reverse the trial court because it misallocated the burden of proof.

Importantly, discovery completed after the February 10, 2009, filing of the First Amended Declaration provides ample support for a factual finding that NHDES engaged in willful or malicious conduct by failing to warn swimmers in Silver Lake that it had added 375 cfs to the flow out of the Lochmere dam, turning once safe currents lethal. State Civil Engineer Doyon testified at his April 22, 2009, deposition that he, unilaterally, made the decision to add 375 cfs to the flow out the Lochmere dam into Silver Lake. He also testified that he made the decision without taking safety considerations into account, without visiting the site, and without undertaking any inquiry into the activities occurring downstream of the dam.

Chief Engineer Doyon further admitted that the State had issued warnings in the past in connection with making the decision to increase the flow out of the dam, reflecting the State's awareness of the hazards such increases could create. Nevertheless, NHDES freely admits that it made no effort to warn summer swimmers in Silver Lake about the June 11, 2005, addition to the flow out of the Lochmere dam, which turned previously safe waters lethally turbulent.

A trier of fact could certainly find NHDES' conduct willful or malicious based on these facts, rendering erroneous the trial court's decision to grant NHDES recreational use immunity on a motion to dismiss. "Willful 'is a word of many meanings depending upon the context in which it is used.'" Appeal of Morgan, 144 N.H. 44, 52 (1999). A "willful and malicious injury"

"may involve merely a willful disregard to what one knows to be his duty, an act which is against good morals and wrongful in and of itself." Black's Law Dictionary 1600 (6th ed. 1990).[4]

Although the New Hampshire Supreme Court has yet to address the meaning of willful or malicious in the context of RSA 212:34, other courts around the country have done so for their States' recreational use statutes. California has a 3-part test for willful misconduct within the meaning of its recreational use statute, which contains the same language as ours: "(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." Spires v. United States, 805 F.2d 832, 834 (9th Cir. 1986) (citation omitted) (Appendix at p. 307).

Michigan likewise has a 3-part test for evaluating "willful and wanton misconduct" for purposes of its recreational use statute: "(1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." Burnett v. City of Adrian, 326 N.W.2d 810, 812 (Mich. 1982) (Appendix at p. 311). Under Texas law, a defendant cannot claim recreational use immunity if the defendant is grossly negligent, meaning that "the defendant knew about the peril, but his acts and omissions demonstrate that he did not care." State v. Shumake, 199 S.W.2d 279, 288 (Tex. 2006) (quotations omitted) (Appendix at p., 332).

A trier of fact could find NHDES' conduct willful or malicious, under all these tests therefore it should be left to trial before the triers of fact. The State had previously warned

[4] The New Hampshire Supreme Court has cited Black's Law Dictionary for its definition of "willful." Appeal of Morgan, 144 N.H. at 52.

persons downstream of increases in the flow because the State knew the perils that such increases could create. Yet the State willfully disregarded its duty here, failing to warn Nicholas, Michael or Jeffrey. The State failed to warn notwithstanding that it had actual or constructive knowledge of the perils it would create, and of the catastrophic harm that would likely ensue, as a result of dramatically increasing the flow of water into a popular swimming area. To quote the Burnett court, the State, "in its acts and omissions, was indifferent to the likelihood that catastrophe would come to a member of the public using the lake, an indifference essentially equivalent to a willingness that it occur." Burnett, 326 N.W.2d at 812. In other words, the State knew about the peril, but its failure to warn — coupled with its failure to take safety considerations into account at all in deciding to unleash the lethal currents upon Silver Lake — demonstrate that it did not care.

Because a trier of fact could find the State's conduct to have been willful or malicious, it was error for the trial court to hold that NHDES had proven its entitlement to recreational use immunity under RSA 212:34. This Court should reverse and permit the families to have their day in Court.

4. The Trial Court Unsustainably Exercised Its Discretion By Failing To Allow The Plaintiffs To Amend Their Writ To Allege Facts Pertaining To The RSA 212:34, III (a) Exception To Immunity.

The trial court further erred by denying the plaintiffs the opportunity to amend their writ before the trial court dismissed their claims against NHDES, thus failing to afford the plaintiffs the requisite opportunity to correct perceived deficiencies in the writ regarding the RSA 212:34, III (a) exception. Again, it is a misallocation of the burden of proof to hold, as Judge McGuire did, that a plaintiff making out a writ somehow bears the burden to plead facts sufficient to avoid the application of recreational use immunity. On the contrary, it is the defendant NHDES that

must prove the application of the asserted affirmative defense, which the trial court conspicuously did not ask NHDES to do here — instead ruling on legal arguments that the State only made in the trial court's imagination.

Nonetheless, the plaintiffs sought leave—before the June 22, 2009, Order took preclusive effect—to correct the perceived deficiencies by moving to amend. The plaintiffs filed a proposed Second Amended Declaration containing Paragraphs 26 and 27, which read as follows:

> 26. The defendant NHDES' act of increasing the flow into a public swimming area without issuing warnings and without placing safety devices was willful and malicious because the State acted with knowledge of the hazard it was creating and conscious failure to act to avoid the peril. The State knew that increasing the flow through a dam could have dangerous consequences downstream, as reflected by the fact that the State had issued warnings in the past. Yet, in this particular instance, the State increased the flow without taking any safety considerations into account, and without issuing any warnings, even though the State knew that downstream of the dam was a popular swimming area. The State, in its act of increasing the flow and its failure to warn, was indifferent to the likelihood that catastrophe would come to members of the public using the lake, an indifference equivalent to a willingness that the catastrophe occur.
>
> 27. The State intentionally caused the injuries and deaths at issue in this case, given the State's conscious failure to act to prevent the danger it knowingly created.

The trial court erroneously denied the motion to amend, finding that the allegations somehow "introduced an entirely new cause of action." This is wrong. The cause of action against NHDES is, and has always been, negligence. The plaintiffs did not allege any new count or cause of action by pleading facts relating to the RSA 212:34, III (a) exception. Rather, the plaintiffs simply pled facts to correct the court's perceived deficiencies in the pleading of their negligence claim against NHDES, so as to demonstrate that dismissing the case on the basis of RSA 212:34 was error.

Moreover, the facts alleged in the Second Amended Declaration relative to the State's willful or malicious failure to warn of a dangerous condition came from a recent deposition —

the April 22, 2009, deposition of Civil Engineer Steve Doyon — contrary to the trial court's findings.[5] Appendix at pp. 228-229, 256-62. These facts were not limited to the allegation that NHDES had issued warnings in the past when increasing the flow through a dam, as the trial court incorrectly found (Appendix at pp. 361-62), but rather also included the facts that the person who decided to increase the flow through Lochmere dam into Silver Lake on June 11, 2005 did so without taking safety considerations into account, without visiting the site, and without undertaking any inquiry into the public activities occurring downstream of the dam that could be impacted by the increase in the flow.

The trial court erred by failing to give the plaintiffs leave to amend before the June 22, 2009, Order took preclusive effect. Cambridge, 150 N.H. at 678 ("To assure that the opportunity for amendment has practical meaning, ...the plaintiff must be given leave to amend the writ to correct perceived deficiencies before an adverse judgment has preclusive effect."). The need to allow the amendment is particularly compelling here given that: 1.) the plaintiffs had notice before the trial court's June 22, 2009, Order that their lawsuit was somehow deficient because, while they may have adequately pled facts to support their claims, they had not adequately pled facts to trigger an exception to immunity; and 2.) the plaintiffs had recently discovered facts through pre-trial discovery at the time of the June 22, 2009, Order supporting that the State's failure to warn of a dangerous condition was willful or malicious and that the exception to RSA 212:34 immunity should apply, if indeed RSA 212:34 were otherwise applicable.

5. NHDES Is Not Entitled To Immunity Based On RSA 508:14.

[5] In its Order on the Motion to Amend, the trial court incorrectly found that the plaintiffs failed to cite to a deposition, interrogatory or other recently discovered source to support their allegations pertaining to NHDES' willful or malicious failure to warn of a dangerous condition. This is patently wrong. The plaintiffs cited the April 22, 2009, deposition testimony of State Civil Engineer Steve Doyon, who admitted that he added 375 cfs to the flow from the Lochmere dam into Silver Lake without taking safety considerations into account, without visiting the site, and without undertaking any inquiry into the activities occurring downstream of the dam. State Civil Engineer

a. RSA 508:14 Does Not Apply To Injuries Occurring On Water.

The trial court wrongly held that RSA 508:14 immunizes the State, ignoring the fact that the statute — which must be construed narrowly because it is in derogation of the common law — does not apply to injuries occurring on water. As the New Hampshire Federal District Court has specifically explained: "RSA 508:14 provides immunity for an 'owner, occupant, or lessee of *land*...who...permits any person to use *land* for recreational purposes...." Kantner v. Combustion Eng'g, 701 F.Supp. 943, 946 (D.N.H. 1988) (quoting RSA 508:14, I) (emphasis in original). "RSA 508:14, II also provides immunity only for owners of land." Id.[6]

The Kantner Court, noting that "recreational use statutes are normally construed narrowly since they are 'in derogation of common law rules of tort liability,' held that RSA 508:14 did not immunize the defendants from liability for the deaths of persons who drowned while swimming and canoeing in a river because the decedents "were not using land for recreational purposes." Id. at 946.

This Court should reverse the trial court's June 22, 2009, Order and reach the same principled result. The scope of the immunity conferred by RSA 508:14 is limited to circumstances where "private landowners permit members of the general public to use their land for recreational purposes." Soraghan v. Mt. Cranmore Ski Resort, 152 N.H. 399, 402 (2005) (emphasis supplied). The State did not permit the plaintiffs to use any land for recreational purposes. Nicholas Lorette and Michael Squeglia lost their lives, and Jeffrey Lorette suffered his injuries, because they used public waters — not land — for recreational purposes. RSA 508:14 therefore does not apply, warranting reversal.

Doyon likewise admitted that the State had given warnings in the past in connection with increasing the flow through a dam, although the State failed to do so in connection with the incident giving rise to this case.

[6] RSA 508:14, II, was redesignated RSA 508:14, III, in 2006.

Importantly, the trial court's reliance on Estate of Reyes v. State of New Hampshire Dep't of Resources & Economic Development, No. 07-C-355 (Rockingham County Super. Ct. Feb. 5, 2008) (attached hereto as an Addendum) to reach a contrary result is completely misplaced. In Reyes, the three (3) plaintiffs "were swimming and sunbathing at Hampton Beach," "which is a State-owned property open to the general public for free of charge for recreational use." Addendum at p. 40. At some point during the plaintiffs' visit to Hampton Beach, two (2) of the plaintiffs observed from the beach that the third was having trouble swimming. Id. The rescuers drowned while saving their friend. Id. The plaintiffs brought a wrongful death action, and the trial court granted the State summary judgment based on RSA 508:14.

The Reyes case is inapposite because the Reyes court did not address the issue raised here regarding the applicability of RSA 508:14 to injuries occurring on water. The plaintiffs did not raise the issue, nor did the issue apparently occur to the court. Reyes is devoid of any discussion of the issue of whether RSA 508:14 applies to injuries occurring on ocean water, ignoring Kantner and further ignoring that the plain language of RSA 508:14 only covers injuries occurring on land. Because Reyes does not address the challenges raised here to the applicability of RSA 508:14 to injuries occurring on water, Reyes provides no support for the trial court's erroneous conclusion that RSA 508:14 somehow immunizes the State.

Reyes is also distinguishable in material facts. In Reyes, the plaintiffs engaged in recreational activity not only in the Atlantic Ocean but on Hampton Beach as well. "Prior to the fatal incident, Casillas, Reyes and Tapia were swimming and sunbathing at Hampton Beach." Addendum at p. 43. "Reyes and Tapia's effort to save Casillas, therefore, arose from the recreational use of the property." Id.

Reyes is thus inapposite because the deaths of Nicholas Lorette and Michael Squeglia, and the injuries suffered by Jeffrey Lorette — as distinguished from the deaths and injuries in Reyes — bear no connection to any recreational activity on land. Nicholas, Michael and Jeffrey did not engage in any recreational activity on State land. They swam in public waters. Because Reyes is factually distinguishable, this Court should hold that the trial court's reliance upon it was misplaced and should reverse the trial court.

b. Nicholas, Michael And Jeffrey Held A Public Easement To Traverse NHDES Land To Exercise Their Common Law Rights In Public Waters, Barring NHDES From Claiming RSA 508:14 Immunity On The Grounds That It Somehow "Permitted" The Boys To Traverse Its Land.

This Court should also reverse the trial court's Order granting the State immunity under RSA 508:14 to the extent the Order is based on the erroneous notion that such immunity somehow arises from the State "permitting" Nicholas, Michael and Jeffrey to use State land to enter Silver Lake. This notion is wrong for at least two (2) reasons. First, the State does not "permit" persons to traverse its land to access public waters such as Silver Lake, given that the public holds a public easement to traverse any open or unposted land that the public must traverse in order to exercise its common law rights in public waters. Second, a landowner who does not permit recreational activity on land, but instead merely permits a person to traverse his land to engage in recreational activity on adjoining water, does not receive immunity under RSA 508:14.

RSA 508:14 is inapplicable because the State did not "permit" Nicholas, Michael and Jeffrey to access Silver Lake through its land, even if the State in fact does own the land the boys crossed to enter the lake. On the contrary, Nicholas, Michael and Jeffrey as members of the public enjoyed a public easement to cross public non-fenced land to enter Silver Lake to swim

there. They did not have, nor did they need, permission from anyone. This is so based on Silver Lake's status as a public water.

The case of Hartford v. Gilmanton, 101 N.H. 424 (1958), demonstrates the public's easement rights to access Silver Lake through the land abutting it, regardless of what entity holds title to that land. The Hartford case concerned the plaintiff private landowners' challenge to the public's right to access Loon Pond (one of the public waters of the State) through land the plaintiffs owned within the confines of Loon Pond Road, a public way laid out by the town selectmen in 1815. Id. at 424.

The Hartford court held that the public had an easement to access Loon Pond through the plaintiffs' land. "By virtue of its layout in 1815, there was created in Loon Pond Road, so-called, a **public easemen**t or right to use as a way all the land within its confines." Id. at 426 (emphasis supplied). "Any member of the general public therefore has the right of reasonably using the land within the borders of Loon Pond Road, as laid out in 1815 to reach the public waters of Loon Pond to exercise the common-law right to boat, bathe, fish, fowl, skate and cut ice in and on its public waters." Id. A statement by the trial court in Hartford is also instructive: "It is difficult to see how the public can be prevented from crossing the land in question to reach the waters of the pond to exercise its rights in the public waters...." Id. at 425.

The trial court was therefore wrong to find that the State somehow "permitted" the general public to use the land through which the boys accessed Silver Lake, just as the trial court was wrong to find that the State somehow "permitted" the boys to swim in Silver Lake. Nicholas, Michael and Jeffrey as members of the general public had a public easement right to cross the land abutting Silver Lake to exercise their common law rights to swim in Silver Lake. The State had no power to prevent the boys from crossing the land to exercise their common law

rights to enjoy Silver Lake, nor did the State "permit" the boys to cross the land to reach the public waters. The boys' right to cross the land to enter Silver Lake derived from a public easement, not the State's permission. Because the State did not "permit" the boys to cross its land to reach the public waters of Silver Lake, the Court should find RSA 508:14 inapplicable and should reverse the trial court.

Additionally, RSA 508:14 does not apply because the statutory language makes clear that a landowner must permit a person to engage in recreational activity on land in order to qualify for immunity under RSA 508:14. RSA 508:14 ("An owner, occupant, or lessee of land, including the state or any political subdivision, who without charge permits any person to use land for recreational purposes or as a spectator of recreational activity, shall not be liable for personal injury or property damage in the absence of intentionally caused injury or damage.").

The State did not permit Nicholas, Michael or Jeffrey to use the land adjoining Silver Lake for recreational purposes, nor did Nicholas, Michael and Jeffrey use such land for recreational purposes. Nicholas, Michael and Jeffrey merely traversed State land to reach a destination where they would engage in recreational activity on water. They did not engage in recreational activity on State land, nor did the State permit them to do so. Indeed, **neither Silver Lake nor the land surrounding it is a State recreational area**, as Fish and Game Department Conservation Officer Michael Eastman testified in his deposition. Appendix at p. 254. RSA 508:14 therefore does not provide immunity because its requirements are not met.

This construction of RSA 508:14 — mandated by the principle that the Court must construe the statute narrowly — is entirely consistent with the case law. In Reyes, the court granted the State immunity under RSA 508:14 because the court found that: a.) the State permitted the plaintiffs to use Hampton Beach for recreational use free of charge; b.) the

plaintiffs used Hampton Beach for recreational activities, including not only swimming but sunbathing on the beach; and c.) the plaintiffs' injuries arose out of their recreational use of Hampton Beach and its waters.

The material facts present in Reyes, demonstrating that a landowner permitted a person to use land (Hampton Beach) for recreational purposes, are not present here, such that Reyes provides no support for the grant of immunity that the trial court erroneously conferred in its June 22, 2009, Order. Further, this Court is not bound by a simple trial judge's ruling in any event.

Similarly distinguishable is the other case relied on by the trial court to support the erroneous proposition that the State somehow gets the cloak of immunity because it supposedly owns the land where the boys entered the water. In Collins v. Martella, 17 F.3d 1 (1st Cir. 1994), the court granted immunity under RSA 508:14 to the owners of a private beach whom the plaintiff sued for injuries he suffered when he dove off a dock into shallow water. As distinguished from this case, the beach in Collins was on land where the defendant owners affirmatively permitted recreation. That was unlike Silver Lake or the land surrounding it, neither of which is a State recreation area where the State permits recreation. Furthermore, the injury in Collins occurred as a direct result of the plaintiff engaging in recreational activity on land, to wit, diving. Nicholas, Michael and Jeffrey did not engage in any recreational activity on land.

The Court should thus reverse the trial court. Owning the land where the boys entered the water does not immunize the State from liability for creating the lethal condition that killed Nicholas and Michael and injured Jeffrey, where the boys held a public easement to traverse such land to exercise their common law rights to swim in Silver Lake, and where NHDES did

not permit any recreational activity on land that in any way gave rise to the plaintiffs' deaths and injuries. The fact that Silver Lake is not a State recreational area makes this especially true. The Court should find RSA 508:14 inapplicable, reversing the trial court.

C. The Court Should Reverse The Trial Court's Order Dismissing All Claims Against Algonquin On Grounds That Algonquin Somehow Owed No Duty.

Both the common law, and the Operating Agreement pursuant to which Algonquin operates the hydropower plant next to the area of the lake where Nicholas and Michael drowned, support that Algonquin owed a duty to warn of the hazardous condition resulting in the lethal currents that claimed the lives of Nicholas and Michael on June 12, 2005, and that caused Jeffrey's injuries. The Court should therefore reverse the trial court's finding that Algonquin somehow owed them no duty and should allow the plaintiffs' claims against Algonquin to proceed.

"All persons have a duty to exercise reasonable care not to subject others to an unreasonable risk of harm." Remsburg v. Docusearch, 149 N.H. 148, 153 (2003). "In New Hampshire, 'the test of due care is what reasonable prudence would require under similar circumstances.'" Powell v. Catholic Med. Ctr., 145 N.H. 7, 12 (2000) (citations omitted). "[W]hile a defendant generally has no duty to warn and instruct a plaintiff of obvious dangers about which the plaintiff's knowledge and appreciation equal the defendant's, **a defendant may be held liable when a reasonable person would customarily instruct a plaintiff in respect to the dangers inherent in an activity**." Allen v. Dover Co-Recreational Softball League, 148 N.H. 407, 422 (2002) (emphasis supplied). "When determining whether a duty is owed, we examine the societal interest involved, the severity of the risk, the likelihood of occurrence, the relationship between the parties, and the burden upon the defendant." Hungerford v. Jones, 143 N.H. 208, 211 (1998).

The Hungerford factors militate in favor of finding that Algonquin owed a duty to warn. The societal interest involved was human life itself. The risk could not have been more severe — loss of life. Given the strength of the currents resulting from the increase in the flow through the Lochmere dam, the likelihood that injury or death would befall swimmers was high. Finally, the burden on Algonquin was slight. Algonquin had actual prior knowledge of the increase in the flow through Lochmere dam into Silver Lake. Algonquin need only have posted signs warning of the danger or taken some steps to consult with NHDES with regard to giving such warnings. Yet, Algonquin did nothing.

Algonquin therefore owed a duty to warn, and/or place safety devices, due to the gravity of the societal interest involved, the strong likelihood of death or serious injury, and the slight burden to Algonquin. Algonquin breached its duty, failing to warn the public or place safety devices. The Court should therefore reverse the trial court and permit a jury to weigh these contentions not cut the families off prior to trial.

Restatement (Second) of Torts §302A provides additional support for the fact that Algonquin owed a duty to warn and/or place safety devices. The section states, "An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other **or a third person**." (emphasis supplied.) Comment (d) to the section contains language particularly applicable to the instant situation: "if the actor knows or should realize that there is a serious risk of grave harm to valuable interests of others, and the utility of his own conduct is less than the risk, **he is required to take precautions against the negligence of others which a reasonable man would take under like circumstances**." (emphasis supplied.) This Restatement provision is consistent with

New Hampshire law that "[a]ll persons have a duty to exercise reasonable care not to subject others to an unreasonable risk of harm." Remsburg, 149 N.H. at 153.

Algonquin therefore owed a duty to warn and/or place safety devices because: a.) Algonquin realized or should have realized that the State's conduct posed an unreasonable risk of harm to persons enjoying the popular swimming area adjacent to its power plant; and b.) a reasonable person in Algonquin's position would have taken appropriate action to prevent the injuries and deaths that the State's conduct would cause, placing warnings and/or safety devices, and/or admonishing the State to do so. Algonquin breached its duty, however, doing nothing to prevent the injuries and deaths that are the subject of this case. Restatement (Second) of Torts §302A therefore dictates that a negligence claim may lie against Algonquin.

The Court should also reverse the trial court because Algonquin owed a contractual duty arising from its Operating Agreement, above and beyond its common law duty, to take action to prevent the types of injuries and deaths that are the subject of this case. The Operating Agreement dictates in pertinent part that Algonquin "shall comply with applicable safety Laws or other safety requirements to prevent accidents or injury to persons or damage to that property on, about, or adjacent to the Site and on which [Algonquin] maintains control via limited access." Appendix at p. 152. The injuries and deaths at issue occurred adjacent to Algonquin's Site. Algonquin had actual prior knowledge of the deadly currents that would cause such injuries and deaths. The trial court therefore committed error finding that Algonquin owed no duty.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's Order dismissing the plaintiffs' claims against NHDES and Algonquin, allow the amended declaration and remand for trial.

Respectfully submitted:

REBECCA L. COAN and MICAH CIAMPI, Co-Administrators of the Estate of NICHOLAS M. LORETTE and as p/n/f of JEFFREY LORETTE

and

SHARON CIAMPI, Administratrix of the Estate of MICHAEL T. SQUEGLIA

By their attorneys:
DOUGLAS, LEONARD & GARVEY, P.C.

DATED: February 18, 2010 By: _____

Benjamin T. King, N.H. Bar No. 12888
6 Loudon Road, Suite 502
Concord, NH 03301
(603) 224-1988

CERTIFICATE OF SERVICE

I hereby certify that two copies of the within Brief was mailed this date, first class mail, to counsel of record for each appellee.

_____
Benjamin T. King

REQUEST FOR ORAL ARGUMENT

The appellants request fifteen (15) minutes oral argument and designate Benjamin T. King, Esquire, as the attorney to be heard.

_____
Benjamin T. King