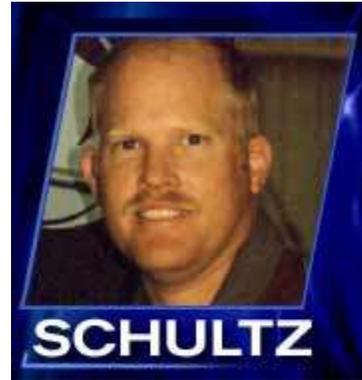


May 10, 2004 Phoenix, AZ - Officer - Don Schultz

Don Schultz

On May 10, 2004 at approximately 3:00 pm, Officer Don R. Schultz, #4410, was participating in a Dive Team search for evidence in the canal near 19th Avenue and Hatcher. He came loose from his tender line for unknown reasons and was found lodged in a canal gate by other members of the Dive Team, who freed him. The current was apparently so strong it may have pulled his regulator away.



He was pulled unconscious from the water and taken to John C. Lincoln hospital where on Wednesday,

May 12, 2004 at 7:10 PM, he passed away after being removed from life support.

Phoenix police officer involved in dive team incident

<http://kvoa.com/Global/story.asp?S=1855675&nav=HMO5N0C7>

May 10, 2004 updated at 5:16PM MST



**WE WILL
REMEMBER**

Phoenix police officer had to be pulled out of a north Phoenix canal Monday afternoon after becoming tangled in grates during a dive team exercise.

The officer's condition isn't known. The officer has been taken to John C. Lincoln Hospital.

The officer, along with three other dive team members, was diving at 19th Avenue and Hatcher in the Arizona Canal.

Just before three o'clock, police say four divers were looking for evidence from a drowning last March.

One of the officers came loose from a rope line and became stuck in a grate. The 43-year-old officer apparently lost his breathing apparatus.

He was pulled from the canal and transported to the hospital in critical condition.

Police diver is critical; was trapped in canal

<http://www.azcentral.com/news/articles/0511phxdiver11.html>

May. 11, 2004 Quynh Tran The Arizona Republic

A Phoenix police diver is in critical condition after being caught under a canal gate for as long as 15 minutes Monday afternoon.

Don Schultz, a 43-year-old officer with eight years of diving experience, was one of four divers searching the Arizona Canal at 19th Avenue and Hatcher Road. They were looking for clues in connection with the body of an unidentified woman discovered there March 27, Phoenix police Cmdr. Kim Humphrey said.

Each was tethered to a rope that ran across the canal, said Detective Tony Morales, a department spokesman. Officers observing the divers from the canal bank noticed that one was no longer attached to the line and a search began immediately, Humphrey said.

Schultz was found about 3 p.m. wedged underneath one of the four canal gates without his breathing device, Humphrey said.

"The extreme pressure of the water pulled his (breathing) apparatus loose, or something happened under the water," Humphrey said. The opening between the radial gate and the bottom of the canal is not large enough for a body to pass through, Humphrey said, forcing officers to pry open the gate to dislodge Schultz.

The radial gate is a pie-shaped solid plate about 6 by 10 feet in size that goes up and down to control the flow and water depth, said Jeff Lane, spokesman for the Salt River Project.

"Although canals seem like there's not a lot of rushing water, when it goes through grates, it's compressed through a small area and creates a strong pressure at that point," Humphrey said.

Even in daylight, water in the canal is murky, Morales said.

Schultz is a 20-year veteran and pilot assigned to Phoenix Sky Harbor International Airport. He was taken to John C. Lincoln-North Mountain.

Phoenix police officer involved in dive team incident

<http://www.phoenix360.com/news/index.asp?did=9821>

PHOENIX (AP) -- A Phoenix police officer was pulled out of a canal Monday after becoming tangled in grates during a dive team exercise.

The 43-year-old officer, whose name wasn't released, was taken to John C. Lincoln Hospital, where he was in critical condition.

The officer and three other dive team members were diving at the Arizona Canal on 19th Avenue and Hatcher just before 3 p.m. when the accident occurred.

Police say the four divers were looking for evidence from a drowning last March when one of the officers came loose from a rope line and became stuck in a grate. The officer apparently lost his breathing apparatus.

Police diver still critical at hospital

<http://www.azcentral.com/arizonarepublic/local/articles/0512diver12.html>

May. 12, 2004 **Quynh Tran** The Arizona Republic

Officer discovered without his mask - A Phoenix police diver remained in critical condition Tuesday, one day after nearly drowning in a local canal.

Don Schultz was one of four divers searching for a wheelchair belonging to Elizabeth Ann Fritz, 64, whose body was discovered in the canal at 19th Avenue and Hatcher Road on March 27.

Schultz was found in a 1-foot opening under a canal gate without his breathing mask after officers on the bank noticed his safety rope had floated to the surface, said police Cmdr. Kim Humphrey, a department spokesman. Divers hold onto the rope with one hand while searching for evidence in the water.

"There was about 10 minutes unaccounted for whether his breathing apparatus was working," Humphrey said.

Schultz, 43, remains unconscious at John C. Lincoln Hospital-North Mountain.

Schultz is a master diver with eight years of diving experience and flies a helicopter full time for the department.

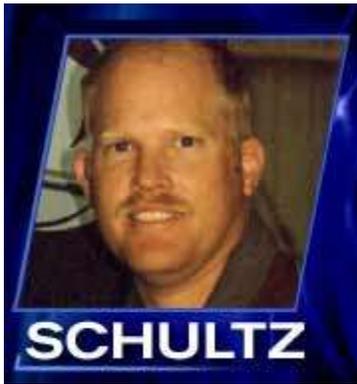
He is part of a nine-member diving squad that averages two to three dives per month. Each diver carries 80 pounds of gear, including radio equipment, masks, dry suits and oxygen tanks. Humphrey said the Arizona Canal where Schultz was diving Monday was 5 feet deep.

If Schultz had a problem with his regulator, the device through which divers breathe underwater, he would have had to remove his mask in order to use his spare, said Amy Lignoski, owner of El Mar Diving Center in Mesa and a former volunteer diver with the Maricopa County Sheriff's Posse.

Investigators have released no theories about why Schultz wasn't wearing his mask.

Police officer, Member of Dive Team Passes Away

<http://phoenix.about.com/gi/dynamic/offsite.htm?site=http%3A%2F%2Fwww.kphotv5.com%2F>



Phoenix police officer passes away after dive team incident

(Phoenix-AP) -- A Phoenix police officer and member of the department's dive team has passed away Wednesday evening.

Police spokesman Tony Morales says 43-year-old Officer Don Schultz was taken off life support this evening and passed away around 7:10 p-m at John C. Lincoln Hospital.

Last Tuesday, Schultz and three other divers were conducting a diving operation in the Arizona Canal at 19th Avenue and Hatcher.

Officers on the bank noticed Schultz's safety rope had floated to the surface. Divers hold onto the rope with one hand while searching for evidence in the murky water. Fellow officers found Schultz in a one foot opening under a canal gate without his breathing mask. A Phoenix police commander says there's ten minutes unaccounted for when Schultz's breathing mask wasn't working.

Schultz was a 20-year member of the department and spent the past eight years on the dive team.

Officer in dive-team mishap dies

<http://phoenix.about.com/gi/dynamic/offsite.htm?site=http%3A%2F%2Fwww.12news.com%2F>

May. 12, 2004 David J. Cieslak **Arizona Republic**

Phoenix police Officer Don Schultz, who was pulled from a west Phoenix canal after nearly drowning during a routine dive operation, died Wednesday night with family members and dozens of fellow officers at his side.

Schultz's family elected to remove the 20-year veteran officer from life support on Wednesday afternoon following two days of intensive efforts to revive him. Schultz, 3, was pronounced dead at John C. Lincoln Hospital-North Mountain at 7:10 p.m., officials said.

"It reminded me and hopefully all Valley residents that our officers risk their lives every day for us," said Phoenix Mayor Phil Gordon, who was at the hospital when Schultz died. "I feel sorrow for his wife and his family and all the officers. The hurt and grief on their faces .. the pain is hard to look at."

Schultz, a member of the police dive team for the last eight years, was pulled into a gate in the Arizona Canal near 19th Avenue and Hatcher Road during a routine operation on Monday. The divers were looking for a wheelchair belonging to Elizabeth Ann Fritz, 6, whose body was found in the water on March 27.

Investigators believe Schultz was under water for as long as 10 minutes without a breathing device before rescuers pried open the canal's gate and freed him from the 1-foot opening where he became trapped. Other officers on the canal bank detected a problem after noticing that Schultz's safety rope had drifted to the water's surface.

Schultz was a master diver and part of a nine-member squad that makes an average of two to three dives every month. A former motorcycle officer, Schultz served full time as a helicopter pilot for the police department.

Interim Phoenix police Chief Jack Harris said hundreds of officers and commanders rallied around Schultz and his wife, a former officer with the department who retired for medical reasons. "This is certainly a tragic and untimely death for such a young man, but he was doing what he had been sworn to do and that was to serve the community," Harris said. "He died doing something that he loved to do."

Phoenix police Detective Tony Morales said dozens of officers who served with Schultz on the helicopter unit and the dive team crowded the hospital on Wednesday, hoping for a miracle despite Schultz's worsening condition.

A distraught Morales, who knew Schultz for most of his career with the



Don Schultz was a 20-year member of the police department and spent the past eight years on the dive team.

department, described his colleague as a private man who loved being a police officer.

"He was a big, strong guy and everybody had hope up until the last minute, but it was his time to go," Morales said. "He was a unique, special guy."

Funeral services for Schultz are pending, Morales said.

Veteran police diver dies

<http://www.azfamily.com/news/local/stories/KTVKLNews20040513.1b98a13d6.html>

May 13, 2004 The Associated Press



NewsChannel 3/Phx. P.D.
Police say Officer Don Schultz lost his diving mask and became caught against a grate.



A Phoenix police officer who was found in a canal gate Monday while diving with three other officers near 19th Avenue and Hatcher Road died Wednesday after he was taken off life support.

PHOENIX -- A Phoenix police officer and member of the department's dive team has passed away.

Police spokesman Tony Morales says Officer Don Schultz, 43, was taken off life support and passed away at about 7:10 p.m. Wednesday at John C. Lincoln Hospital.

Schultz was surrounded by family and fellow officers when he died.

Schultz's family decided to remove the 20-year veteran officer from life support Wednesday afternoon following two days of intensive efforts to revive him.

Phoenix Mayor Phil Gordon says he feels sorrow for Schultz's wife, family and all the officers.

Last Monday, Schultz and three other divers were conducting a diving operation in the Arizona Canal at 19th Avenue and Hatcher Road when officers on the bank noticed Schultz's safety rope had floated to the surface.

Schultz was found without his breathing mask in a one-foot opening under a canal gate.

Phoenix police diver loses battle

<http://www.azcentral.com/news/articles/0513schultz13.html>

Officer was trapped underwater 10 minutes

May. 13, 2004 David J. Cieslak The Arizona Republic

Phoenix police Officer Don Schultz, who was pulled from a north Phoenix canal after nearly drowning during a routine dive operation, died Wednesday night with family members and dozens of fellow officers at his side.

Schultz's family elected to remove the 20-year veteran officer from life support on Wednesday afternoon following two days of intensive efforts to revive him. Schultz, 43, was pronounced dead at John C. Lincoln Hospital-North Mountain at 7:10 p.m., officials said.

"It reminded me and hopefully all Valley residents that our officers risk their lives every day for us," said Phoenix Mayor Phil Gordon, who was at the hospital when Schultz died.

"I feel sorrow for his wife and his family and all the officers. The hurt and grief on their faces . . . the pain is hard to look at."

Schultz, a member of the police dive team for the past eight years, was pulled into a gate in the Arizona Canal near 19th Avenue and Hatcher Road during a routine operation on Monday.

The divers were looking for a wheelchair belonging to Elizabeth Ann Fritz, 64, whose body was found in the water on March 27.

Investigators believe Schultz was underwater for as long as 10 minutes without a breathing device before rescuers pried open the canal's gate and freed him from the 1-foot opening where he had become trapped.

Other officers on the canal bank detected a problem after noticing that Schultz's safety rope had drifted to the water's surface.

Schultz was a master diver and part of a nine-member squad that makes an average of two to three dives every month.

Schultz, a former motorcycle officer, served full time as a helicopter pilot for the Police Department.

Interim Phoenix Police Chief Jack Harris said hundreds of officers and commanders rallied around Schultz and his wife, a former officer with the department who retired for medical reasons.

"This is certainly a tragic and untimely death for such a young man, but he was doing what he had been sworn to do and that was to serve the community," Harris said.

"He died doing something that he loved to do."

Phoenix police Detective Tony Morales said dozens of officers who served with Schultz on the helicopter unit and the dive team crowded the hospital Wednesday, hoping for a miracle despite Schultz's worsening condition.

A distraught Morales, who knew Schultz for most of his career with the department, described his colleague as a private man who loved being a police officer. "He was a big, strong guy and everybody had hope up until the last minute, but it was his time to go," Morales said. "He was a unique, special guy."

Funeral services for Schultz are pending, Morales said.

A Phoenix police officer and member of the department's dive team has died.

<http://kvoa.com/Global/story.asp?S=1864770>

May 13, 2004 at 7:40AM MST

Police spokesman Tony Morales says 43-year-old Officer Don Schultz was taken off life support and passed away around 7:10 Wednesday night.

Schultz was surrounded by family and fellow officers when he died. Schultz's family decided to remove the 20-year veteran officer from life support yesterday afternoon following two days of intensive efforts to revive him.

Phoenix Mayor Phil Gordon says he feels sorrow for Schultz's wife, family and all the officers.

Last Monday, Schultz and three other divers were conducting a diving operation in the Arizona Canal at 19th Avenue and Hatcher. Officers on the bank noticed Schultz's safety rope had floated to the surface. Fellow officers found Schultz in a one foot opening under a canal gate without his breathing mask.

1,000 mourners honor diver Officer Schultz

May. 18, 2004 Quynh Tran The Arizona Republic

<http://www.azcentral.com/news/articles/0518diver17.html>

One by one, mourners quietly walked into the Sun City church, their silence providing a stark contrast to the wails of a bagpipe outside.

Officers from departments around the state and Gov. Janet Napolitano were among the more than 1,000 people at United Church of Christ on Monday morning for a memorial service for Phoenix police Officer Don Schultz, who died last week after a diving accident.

They passed two mounted officers and a riderless horse with empty boots hanging backward from its stirrups, a symbol of a fallen warrior.

"This has been a very difficult time for my family and for me," interim Police Chief Jack Harris read from a statement from Schultz's wife, Lisa, after the service. "I have been overwhelmed by the outpouring of love, caring prayers and generosity shown to us. We prayed for a miracle, but it wasn't meant to be."

Police kept the media across the street during the service, though some were allowed inside afterward.

The memorial came one week after Schultz, 43, nearly drowned while diving for evidence in a Phoenix canal. Investigators said he may have been caught underwater for as long as 10 minutes without his breathing mask before rescuers freed him. Two days later, Schultz died after being removed from life support.

Schultz was a highly commended officer during his 20 years on the force. He received a Medal of Lifesaving in 1986 for kicking out a garage door panel to rescue a driver who was trying to commit suicide inside. Schultz received a Medal of Valor in 2000 and a Medal of Merit in 2002.

His primary job with the department was as a helicopter pilot, but the master diver had volunteered for the dive team the past eight years.

Outside the church, 40 police motorcycles stood guard for the ceremony inside.

Mourners filled the pews in the sunlit church. Flowers from the Phoenix Fire Department, white motorcycle and blue helicopter helmets, and a Bible opened to the Book of Isaiah flanked Schultz's picture on an altar table.

During the service, Phoenix police Sgt. Lauri Williams relayed to reporters comments from Chaplain Jim Fogle, a friend of Schultz's who spoke of his friend's love of the outdoors, flying, and their time spent at Fogle's cabin.

Fellow helicopter Officer Steve Konegui described Schultz as a private and quirky fellow who liked to play jokes on people.

In the church courtyard, seven officers fired three shots each in a 21-gun salute.

At 11:30 a.m. on all police frequencies, the dispatcher called, "Officer Schultz, rest in peace, 10-7, good night, sir."

The Officer Down Memorial Page Remembers . .

<http://www.odmp.org/officer.php?oid=17314>

Police Officer Don R. Schultz

**Phoenix Police Department
Arizona**

End of Watch: Wednesday, May 12, 2004



Biographical Info

Age: 43

Tour of Duty: 20 yr

Badge Number: 4410



Incident Details

Cause of Death: Drowned

Date of Incident: Monday, May 10, 2004

Weapon Used: Not available

Suspect Info: Not available

Officer Schultz drowned in a canal in North Phoenix while searching for evidence in a murder case.

Officer Schultz was a master diver and part the department's nine-member dive team. On May 10, 2004, the team entered a canal in North Phoenix, near 19th Avenue and Hatcher Road, to search for evidence in a murder investigation. While in the water Officer Schultz came loose from his tender line and was pulled into the canal gate. He was under water for as long as 10 minutes without a breathing device before rescuers pried open the canal's gate and freed him from the 1-foot opening where he had become trapped.

Officer Schultz was taken to John C. Lincoln Hospital-North Mountain where he remained in critical condition on life support. His family elected to remove him from life support on the afternoon May 12, 2004, following two days of intensive efforts to revive him.

Officer Schultz had served with the Phoenix Police Department for 20 years. In addition to his duties as a member of the dive team, Officer Schultz also served full time as a helicopter pilot for the Phoenix Police Department.

Agency Contact Information:

Phoenix Police Department

620 W. Washington Street
Phoenix, AZ 85003

Phone: (602) 262-7311 Please contact the agency for funeral information or to send condolences.

Phoenix PD fined in officer's diving death

Published: 10.08.2004

Phoenix police diver Don Shultz won't be coming home again.

"I'll be working away and I'll look down at my watch and go Don should be getting here pretty quick, then it's like no, he's not coming home and he's never coming home again," said his wife, Lisa, who experienced a resolution of sorts at the OSHA hearing into his death today.

The Phoenix Police Department was cited for a hazard during the dive that took Shultz's life.

"The divers themselves could communicate with each other but they could not communicate with the people on the surface," an OSHA member said.

Dive team members were looking for evidence in a murder case.

The divers' communication system with surface watchers malfunctioned during an earlier dive that day. However, the decision was made to continue on with the second dive.

According to OSHA's theory, when Schultz became unattached from his safety line, there was no way for the experienced diver to alert those on the surface.

"In some respects that closes one little part of that nightmare for me. Do I wish it was a little bit more, sure, but at least someone is holding them accountable," Lisa Shultz said.

Shultz said that's not bitterness in her voice, but a disappointment with the department her husband worked for for more than 20 years.

Instead of helping her mourn, she said, they've almost added insult to injury.

"After about a month and a half, everybody that had gathered around and was supportive and helpful ... I would say that 97 or 98 percent of the people in the department disappeared," she said.

Officer's drowning leads to fine

Oct. 8, 2004 Emily Bittner The Arizona Republic

A state workplace safety board cited the Phoenix Police Department for having inadequate communications equipment during an underwater search that resulted in the drowning death of a veteran officer.

The five-member Industrial Commission voted unanimously to cite the city and impose the maximum fine of \$7,000 after a few minutes of discussion in the death of Officer Don Schultz, 43.

Bill Cooper, a safety-compliance supervisor who testified in the hearing, called the lapse "a serious violation."

The dive team used its communication system on a search earlier in the day on May 10, but the equipment was malfunctioning and team members couldn't communicate with supervisors on the surface, Cooper said. The team decided to forgo the system on its second dive, at 19th Avenue and Hatcher Road.

Schultz, an eight-year member of the dive team and 20-year member of the Police Department, was a strong swimmer, said Sgt. Randy Force, a spokesman for the Police Department.

No one is sure how Schultz became trapped in a gate, but he was found without his breathing mask. His wife, Lisa Schultz, decided to take him off life support two days later.

The Police Department is putting several changes into place to make future dives safer. The department is planning to spend \$72,000 on new equipment, Force said.

Lisa Schultz said she believes more went wrong on the dive than the communications system and added that she is upset with the way the department has treated her. She said she was not taken to the hospital until two hours after her husband arrived. When she got there, both the mayor and police chief already were there. "I've gotten nothing from any of them," she said. "I really thought I'd be treated with a little dignity, a little respect."

The police will contest the decision at an informal meeting with the director of the Arizona division of the Occupational Safety and Health Administration, a common procedure, Force said.



For Immediate Release
Office of the Press Secretary
May 15, 2005

President Honors Annual National Peace Officers' Memorial Service

<http://www.whitehouse.gov/news/releases/2005/05/20050515.html>

United States Capitol
Washington, D.C.

1:14 P.M. EDT

 [Video \(Real\)](#)

THE PRESIDENT: Thank you all. Thank you for the warm welcome. It is an honor and a privilege to join you to pay our respects to our nation's fallen law enforcement officers. Every year at the National Law Enforcement Officers' Memorial, we add names of those who have been lost in the line of duty. All of these men and women served the cause of justice. Our nation stands in admiration and gratitude for their service, and we ask God's blessings for the families and friends they have left behind.

I want to thank Chuck Canterbury for his leadership of the National Fraternal Order of Police. He is a good friend and I value his friendship. I want to thank Aliza Clark for her leadership, as well; and Jim Pasco, who is the Executive Director of the National FOP. I want to thank Chaplain Ford for his beautiful blessings. I want to thank members of my Cabinet who are here: Attorney General Al Gonzales; Secretary Elaine Chao; Secretary Mike Chertoff. I thank the FBI Director, Bob Mueller; and the Director of ATF, Carl Truscott, for joining us.



I appreciate the members of Congress who are here. I want to thank Majority Leader Bill Frist; Senator Pat Leahy. Congressman Dave Reichert, from Washington, is here with us. He served as a law enforcement officer for over 30 years, and received the 2004 National Sheriffs Association Sheriff of the Year Award. Congressman, I appreciate you coming, along with other members of the Congress.

I especially want to thank Darryl Worley for his beautiful performance of "I Miss My Friend."

There are more than 800,000 men and women who serve as law enforcement in this country. When these brave Americans take the oath to serve and protect their fellow citizens, they answer a vital calling and accept a profound responsibility. Since America's early days, the badge has

represented a pledge to protect the innocent -- and Americans honor all who wear that badge.

The tradition of sacrifice and service runs strong amongst law enforcement. The fallen officers we honor this afternoon honored that tradition of service and sacrifice -- and the flag of the United States of America flies at half-staff today in memory of their courage.

I thank all the family members who are with us today. Our nation is grateful to you. We pray that you find strength to bear the loss. And you can know that our nation will always remember and honor the ones you loved.

I also thank all the law enforcement officers who have come here today to pay tribute to fallen comrades. The bonds between officers are strong -- and you look out for each other on sunny mornings and in the shadows of danger. Your loyalty to one another and your service to America do great honor to our system of justice. Thank you for your service.

We're a nation built on the rule of law, and the men and women who enforce those laws uphold America's role as a beacon for fairness and peace. And, today, we honor 415 new names added to the memorial wall.

Among them are Detroit police officers Matthew Bowens and Jennifer Fettig. The officers were making a routine traffic stop when the suspect opened fire. Though Officer Bowens had already been shot several times, himself, his first concern was for his injured partner. Both officers gave their lives in protecting each other and their fellow citizens, and this nation of ours will always honor them.



Danger to law enforcement can come from the outskirts of a community, as it did to Bradford County Pennsylvania Deputy Chris Burgert. He and his partner, Deputy Mike Van Kuren, were shot last March while trying to serve a bench warrant on a known criminal. Chris had been leading a drug investigation that often brought him face to face with danger on rural back roads. And his bravery had brought a string of successes against a dangerous and volatile set of criminals. His acts took unusual courage, and our nation will be always grateful for his sacrifice.

Danger can come even in what one thinks is routine investigation. Last May, Arizona police officer Don Schultz was diving for evidence in a murder case when he lost his life. Officer Schultz had been on the force for 19 years and was one of the department's master divers. He died in an act of devotion to duty that was common to him, and will always remain extraordinary to us.

These are just the examples of the brave we honor today.

Every generation of Americans has produced men and women willing to stand watch over the rest of us. Every generation has lived under the protection of law enforcement. We must never take for granted the police officers of America. (Applause.)

For each friend or family member here today, the engraving on the wall will always glow brightly around one name. We cannot soothe your grief or repay your loved one's sacrifice -- but their names are inscribed permanently on this memorial. We acknowledge the lasting debt we owe them, and offer the solemn thanks of a grateful nation.



May God bless you all, and may God continue to bless the United States of America. (Applause.)

IN THE COURT OF APPEALS

<http://www.cofad1.state.az.us/memod/CV/CV060757.pdf>

STATE OF ARIZONA DIVISION ONE

LISA A. SCHULTZ, Personal
Representative of the Estate of
DON R. SCHULTZ, Deceased; LISA A.
SCHULTZ, individually; and LISA A.
SCHULTZ, as representative of the
statutory survivor of Don R. Schultz,
Deceased,

Plaintiffs-Appellants,
v.
SALT RIVER VALLEY WATER USERS'
ASSOCIATION,

Defendant-Appellee.

1 CA-CV 06-0757

DEPARTMENT E

MEMORANDUM

DECISION

(Not for Publication -Rule
28, Arizona Rules of Civil

Appellate

Procedure)

Filed 10-25-07

Appeal from the Superior Court in Maricopa County

Cause No. CV2005-091809

The Honorable Helene F. Abrams, Judge

AFFIRMED

Gilcrease & Gorski PLC Tempe
by Glynn W. Gilcrease, Jr.
Attorneys for Appellants

Beale, Micheaels & Slack PC Phoenix
by Michael A. Beale
Tracy A. Gromer
Attorneys for Appellee

W E I S B E R G, Judge

¶1 Lisa A. Schultz appeals from the trial court's grant of summary judgment to Salt River Valley Water Users' Association ("Association") on her claim for negligence arising out of the death of her husband, Don R. Schultz. She argues that the court erred in granting summary judgment and in denying her motion to amend her complaint. For reasons that follow, we affirm.

BACKGROUND

¶2 Don Schultz was a member of the City of Phoenix Police Department Underwater Search and Rescue Dive Team ("Dive Team"). On May 10, 2004, the Dive Team searched two canals operated by the Association for evidence related to two criminal investigations. Each canal contains four water control gates that regulate the water flow through the canals.

¶3 The Dive Team first assembled at the Western Canal. Sergeant Jack Millward, the Dive Master, called the Association to tell it that the Team intended to search the canal. The Association sent a Water Master, and Millward informed him of the items sought but did not ask him to be present or to assist the divers. Millward also called the Association when the Dive Team began the dive and asked the Association close two nearby water control gates. The Association did so.

¶4 After the Team finished its search, Millward notified the Association that the Team would proceed to the second location, the Arizona Canal, and that he would call when the Team arrived. However, Millward did not call at any time before the Team entered the Arizona Canal. According to Millward, he and the Team members did not

believe they would be working close enough to the gates for the gates to pose a hazard.

¶5 The Dive Team entered the canal and searched an area approximately ten to twenty feet upstream of the control gates. During the dive, Officer Schultz became separated from his safety line and trapped under one of the partially open canal gates. The Dive Team alerted the Association, and it promptly raised the gates. Officer Shultz was unconscious when pulled from the water and died two days later.

¶6 Officer Schultz's surviving spouse, Lisa A. Schultz, filed this wrongful death action against the Association under Arizona Revised Statutes ("A.R.S.") sections 12-611 through 12-613 (2003). She alleged that the Association had been negligent in failing to still or slow the canal waters, to post warning signs, or otherwise to reduce the danger to the Dive Team in the area it knew the Team would be diving. She also alleged that the Association had negligently maintained and operated the canal and had thereby created an unreasonable risk of harm to Officer Schultz.¹

¶7 The Association moved for summary judgment, arguing that it had not breached its duty as the canal owner to Officer Schultz, a licensee. Its duty only required it to refrain from willfully or wantonly causing him harm or knowingly allowing him to contact a hidden peril. But because the canal operations were known to be

inherently dangerous, the Association's failure to warn Officer Schultz did not violate its duty of care. In addition, the Association relied on Arizona precedent that had accorded canal operators immunity from ordinary negligence in the operation, maintenance, and design of irrigation canals.

¹ Schultz also asserted a survival claim as personal representative of her husband's estate. We presume that the summary judgment disposed of this claim, and Schultz has not mentioned it on appeal.

¶8 Along with her response to the Association's motion, Schultz moved to amend her complaint to add allegations that the Association had negligently operated the canal gates and claims for breach of duty to a licensee and breach of duty to a police officer known to be on the

premises. The amended complaint alleged that the Association failed to warn the Dive Team of the precise “zone of danger” created by the gates or to take reasonable care to reduce the hazard they posed. It also alleged that the Association had a duty to operate the canal with reasonable care for a police officer exercising his duties when it was aware of his presence. The Association opposed the motion on grounds that the proposed amendments would be prejudicial and futile.

¶9 The court granted summary judgment to the Association and denied the motion to amend. Schultz timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

Propriety of Summary Judgment

A court may grant summary judgment when “there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(c). For a claim or defense to withstand a motion for summary judgment, however, the proponent must present evidence from which a reasonable jury could find, directly or by inference, that the probabilities favor the proponent. Orme Sch. v. Reeves, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).

¶10 To establish the Association’s negligence, Schultz had to prove: the existence of a duty requiring the Association to conform to a certain standard of care, the Association’s breach of that duty, a causal connection between the breach and Officer Schultz’s resulting injury, and actual damages. Piccola v. Woodall, 186 Ariz. 307, 309, 921 P.2d 710, 712 (App. 1996); Ontiveros v. Borak, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983), superseded by A.R.S. § 4-311, -312. We limit our inquiry to the elements of duty and breach, the basis for the grant of summary judgment.

¶11 Whether a party owes a duty is a legal question for the court to decide based upon the parties’ relationship. Markowitz v. Ariz. Parks Bd., 146 Ariz. 352, 356, 706 P.2d 364, 368 (1985), superseded on other grounds by A.R.S. § 33-1551 (2000), as recognized in Maher v. United States, 56 F.3d 1039, 1042 n.4 (9th

6 Cir. 1995). A duty exists if the “relationship of the parties was such that the defendant was under an obligation to use some care to avoid or prevent injury to the plaintiff.” Id.

¶12 Arizona defines a landowner's duty to persons coming onto the owner's premises based on the status of the visitor.² An invitee is one who enters the premises because they are held open to the public or for a purpose related to the landowner's business. The landowner has an "affirmative duty" to use reasonable care to make the premises safe for the invitee's use. *Id.* at 355, 705 P.2d at 367 (quoting *Tribe v. Shell Oil Co.*, 133 Ariz. 517, 519, 652 P.2d 1040, 1042 (1982)); *Hicks v. Superstition Mt. Post No. 9399, Vet. of Foreign Wars of the United States*, 123 Ariz. 518, 520, 601 P.2d 281, 283 (1979) (quoting Restatement (Second) of Torts (Restatement) §§ 343 & 343A (1965)). A landowner's duty to a trespasser, who has no legal right to enter the premises, is merely to refrain from willfully or wantonly disregarding his safety. *Webster v. Culbertson*, 158 Ariz. 159, 161, 761 P.2d 1063, 1065 (1988) (citing Restatement § 333).

² Schultz contends the Arizona Supreme Court abolished these categories in *Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228 (2007), and urges us to hold that the Association owed a duty of reasonable care to Officer Schultz because he was a public safety officer working for the community's benefit. *Gipson* held that even when parties occupy no other relationship, a duty of care may be based upon statutory or public policy considerations, *id.* at 145-46, ¶¶ 23, 25, 150 P.3d at 232-33, but the court did not abolish the connection between status and duty in premises liability cases.

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¶13 A licensee, on the other hand, is "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." *Hicks*, 123 Ariz. at 521, 601 P.2d at 284 (quoting Restatement § 330). Ordinarily, a landowner is not required to make the premises safe for a licensee but must neither wantonly nor willfully cause a licensee harm "nor knowingly permit him to innocently contact a hidden peril." *Mull v. Roosevelt Irr. Dist.*, 77 Ariz. 344, 347, 272 P.2d 342, 343 (1954). This is because a licensee takes the premises as he finds them and "assume[s] all risks incidental to such condition and the business conducted thereon." *Id.* Accordingly, a landowner need only warn a licensee of known hidden perils that the landowner cannot reasonably assume the licensee knows or "by reasonable use of his faculties would observe." *Shannon v. Butler Homes, Inc.*, 102 Ariz. 312, 317, 428 P.2d 990, 995 (1967).

¶14 The Association argued, and the trial court implicitly found, that Officer Schultz was a licensee to whom the Association owed only a duty to refrain from wantonly or willfully causing him harm or knowingly allowing him to come upon a hidden peril. This is correct because it was undisputed that Officer Schultz entered the canal not by invitation or for a reason connected to the Association's business but with the Association's consent.³

³ There is no evidence that the Dive Team obtained a search warrant for the canal, and thus, the Team likely did not enter with legal authority.

See Restatement § 330 cmt. c (failure to object to a visitor's entry may be sufficient evidence of landowner's consent if the owner knows of the intent to enter and has reason to believe his objection would prevent entry).

¶15 Nevertheless, Schultz argues that Officer Schultz should be regarded as an invitee because the Association was aware of his presence and he did not enter the canal for his own benefit but to perform a public service. Knowledge of Officer Schultz's presence, however, did not alter either his status or the Association's duty to him because every landowner who consents to a visitor's entry has knowledge of that person's presence. In addition, the fact that Officer Schultz entered the canal as part of his police duties does not change our analysis; the Restatement § 345 provides that a landowner owes the same duty of care to a licensee who enters upon a privilege, for example to protect a public interest, and in the performance of his public duties as it owes to an ordinary licensee. See also *Espinoza v. Schulenburg*, 212 Ariz. 215, 218, ¶ 12, 129 P.3d 937, 940 (2006) (under premises liability, firefighter who enters property is mere licensee and may recover only for landowner's willful acts). Therefore, because the undisputed facts showed that Officer Schultz was a licensee, as a matter of law the Association owed him a duty to refrain from wantonly or willfully causing him harm or knowingly permitting him to innocently contact a hidden peril.⁴

⁴ We decline to consider an argument raised for the first time in the Reply Brief that the Association created a duty to continue aiding the Dive Team by assisting the first dive. *Muchesko v. Muchesko*, 191 Ariz. 265, 268, 955 P.2d 21, 24 (App. 1997).

¶16 The existence of a duty, however, must not “be confused with details” of the conduct required to satisfy the duty. *Markowitz*, 146 Ariz. at 355, 706 P.2d at 367. While the Association’s duty remained constant, the conduct necessary to meet it depended upon the circumstances. *Beach v. City of Phoenix*, 136 Ariz. 601, 603, 667 P.2d 1316, 1318 (1983). Thus, we consider whether the Association’s conduct satisfied its duty as a matter of law.

¶17 The issue of whether a defendant has exercised the care required is generally a fact question for the jury. *Walker v. Montg. Ward & Co.*, 20 Ariz. App. 255, 258, 511 P.2d 699, 702 (1973). However, we may resolve the issue as a matter of law if “no reasonable juror could conclude that the standard of care was breached or that the damages were proximately caused by the defendant’s conduct.” *Gipson*, 214 Ariz. at 143 n.1, ¶ 9, 150 P.3d at 230 n.1; see also *Markowitz*, 146 Ariz. at 357-58, 706 P.2d at 369-70; *Rogers v. Retrum*, 170 Ariz. 399, 403, 825 P.2d 20, 23 (App. 1991) (“in approaching the question of negligence or unreasonable risk, the court sets outer limits,” and the jury cannot “require a party to take a precaution that is clearly unreasonable”).

¶18 The Association argues that by virtue of our supreme court’s decision in *Salladay v. Old Dominion Copper Mining & Smelting Co.*, 12 Ariz. 124, 100 P. 441, 442 (1909), it is immune from liability for ordinary negligence in the construction, maintenance, or operation of the canal and its equipment. In *Salladay*, a child died after falling into an uncovered flume built and used by the defendant. *Id.* at 126, 100 P. at 441. Although the child was a trespasser, the plaintiff urged the court to find the defendant had created an “attractive nuisance.” *Id.* at 128, 100 P. at 441-42. This theory, predicated upon the alluring nature of the flume and a child’s inability to appreciate the danger, might permit a child to recover for injuries that a mature person in the same status could not. *Id.* at 128-29, 100 P. 442. The court, however, declined to apply the doctrine because waterways are extensively used in Arizona, are “practically impossible to render harmless,[and yet] are indispensable for the maintenance of life and property.” *Id.* at 129, 100 P. at 442.

¶19 *Salladay* does not support immunizing canal owners but approved the general rule that an owner’s duty to all trespassers is to refrain from willfully and wantonly causing them harm. The case did not address a landowner’s duty to invitees or licensees.

¶20 Our supreme court did discuss the duty of care owed to licensees who enter a canal in Mull. The child plaintiff was severely injured while playing in a culvert when the water being ejected from a pipe reversed its flow and sucked her into the pipe. 77 Ariz. at 346, 272 P.2d at 343. The plaintiff alleged that the defendant had long known that others used the culvert for recreation but failed to warn or protect against the danger. Id. The court found that the facts would support the existence of a licensor-licensee relationship, id., but that under the general rule, a gratuitous licensee must take the premises "in the condition he finds it and must assume all risks incidental to such condition and the business conducted thereon." Id. at 346-47, 272 P.2d at 343.

Accordingly, the landowner was not required to keep the premises safe, even if his business operations were fraught with danger. Id. at 347, 272 P.2d at 343. Moreover, the owner was not obliged to warn of hidden dangers but only to advise of dangers that appeared innocent to an unwary licensee so that "failure to provide protection against injury from [the dangerous condition would] be the equivalent of a willful and wanton act." Id. at 347, 272 P.2d at 344.

¶21 Because reversal of the water flow was an ordinary part of the normal careful operation of the pump and a hazard incident to its operation, the "peril was one . . . that a gratuitous licensee must assume and there was no obligation . . . to give warning or provide protection." Id. Thus, requiring a landowner to warn of a natural hazard from the ordinary operation of the pumping equipment was "unwarranted and unreasonable." Id. at 348, 272 P.2d at 344.⁵

⁵ Schultz distinguishes Mull because the plaintiff was a "gratuitous licensee" who entered the canal for her own benefit while Officer Schultz entered the canal as part of his duties. A gratuitous licensee is one with "permission though not an invitation to come on to the property of another and who has furnished no consideration for such permission." Black's Law Dictionary at 484 (6th ed. (abridged) 1991). Thus Officer Schultz was a gratuitous licensee governed by Mull. Moreover, a landowner's duty to one who enters his property with a privilege and for a public purpose is no different than the duty owed to an ordinary licensee. Restatement § 345; Espinoza, 212 Ariz. at 218, ¶ 12, 129 P.3d at 940. Officer Schultz's entry for police purposes did not alter his status or the Association's duty.

¶22 Here, Schultz argues that the Association breached its duty because it was actively negligent in failing to close the gate that trapped Officer Schultz and because it failed to warn him of the precise peril posed by the gates. The Association responds that the risk posed by the gates was inherent in the canal's normal operation and that it had no obligation to operate the gates differently or to warn the Dive Team of known risks.

¶23 We are not persuaded that the Association was required to warn of the perils presented by the canal, including the open control gates. Our courts have long recognized that canals and open waterways are inherently dangerous and impossible to render harmless. *Salladay*, 12 Ariz. at 130, 100 P. 442; *Salt River Valley Users' Ass'n v. Sup. Ct.*, 178 Ariz. 70, 75, 870 P.2d 1166, 1171 (App. 1993). Further, because the divers could readily see that the gates were open, the Association could expect them to realize the danger they represented. See *Shannon*, 102 Ariz. at 317, 428 P.2d at 995 (adult licensees can be expected to realize extent of risk from obvious condition). The record indicates that the Dive Team realized that diving near open control gates was dangerous but proceeded because the Team believed that the gates would not pose a hazard on this occasion.⁶ Accordingly, the Association did not breach its duty of care to Officer Schultz by failing to warn him about the danger of the open canal gates.

⁶ Schultz argues that despite evidence that the Team generally understood the danger of the gates, the Association had to warn of the precise "location, size, and configuration" of the zone of danger. We disagree. The evidence showed that the Team knew of the peril but expected to avoid it. No reasonable jury could find that the Association's duty required it to warn of known dangers or to ensure that the Team worked at an appropriate distance from the canal gates. *Rogers*, 170 Ariz. at 403, 825 P.2d at 23.

¶24 Schultz insists, however, that the Team could not have appreciated the hidden peril caused by the partially open gate because it expected the Association to close the gates as the Association had for the first dive. This contention is unsupported by the record and by Millward's deposition testimony that the Team elected not to ask the Association to close the gates for their second dive. The canal gates were not a hidden peril.

¶25 Finally, we reject Schultz's assertion that the Association's failure to close the canal gates when it knew of the Dive Team's presence was the equivalent of willful or wanton conduct. No evidence showed that that the Association knew that the divers would be dangerously close to the gates or even that they had entered the canal. Moreover, even if we could infer that the Association was aware of the Dive

Team's activities, it was not required to alter its operations to accommodate the Team, and its maintenance of normal operations was not willful and wanton conduct. Mull, 77 Ariz. at 347, 272 P.2d at 344.

¶26 Accordingly, no reasonable jury could conclude from the evidence that the Association breached the duty of care it owed to Officer Schultz by failing to close or warn him about the partially open canal gate. The court properly granted summary judgment to the Association.

Motion to Amend

¶27 Schultz also challenges the court's denial of her motion to amend the complaint. The Association counters that denial was correct because amendment would have been futile. Although leave to amend should "be freely granted when justice requires," Ariz. R. Civ. P. 15(a), it is properly denied when amendment would be futile. Walls v. Ariz. Dep't of Pub. Safety, 170 Ariz. 591, 597, 826 P.2d 1217, 1223 (App. 1991)(upholding denial of request for leave to amend because new claim would not survive summary judgment).

¶28 The trial court considered Schultz's motion to amend along with the Association's motion. In defending against summary judgment, Schultz argued that her proposed amended complaint stated a claim that the Association had breached its duty to Officer Schultz. The Association argued that no facts showed that the Association had acted willfully or wantonly or that it had failed to warn Officer Schultz of a hidden peril. Thus, the parties treated the allegations in the proposed amended complaint as if they had been alleged in the complaint, and in ruling on the Association's motion, the court had an opportunity to consider Schultz's proposed amended complaint.

¶29 We have affirmed the grant of summary judgment to the Association because no reasonable jury could find that the Association breached the duty of care it owed to Officer Schultz. Therefore, we also affirm denial of permission to amend because the new claim could not survive summary judgment. Walls, 170 Ariz. at 597, 826 P.2d at 1223.

CONCLUSION

¶30 For the foregoing reasons, we affirm the trial court's judgment.

SHELDON H. WEISBERG, Judge
CONCURRING:

PATRICK IRVINE, Presiding Judge

JOHN C. GEMMILL, Judge
PSDiver Magazine

SURVIVOR HELP NETWORK

<http://www.survivorhelpnetwork.org/index.html>

Dedicated to helping families of Arizona law enforcement officers killed in the line of duty

When a law enforcement officer is killed, simple tasks can be overwhelming for the surviving family: Walking the dog. Preparing a meal. Cleaning the house.

Survivor Help Network (SHN) is here to lend a hand when families need it most.

Since 2004, the non-profit SHN has been helping families with household duties and other concerns after an Arizona law enforcement officer is killed in the line of duty.

Surviving family members receive a wide range of assistance including babysitting, pool service, carpet cleaning, home security systems, hair needs and more.

But SHN is not just a helping hand.

Families also receive grief counseling and other therapeutic services through SHN's generous provider network. SHN is proud to announce its new Hugs-n-Horses program that offers equine therapy to children, adults and families.

Survivor Help Network differs from other supportive agencies as it assists families with immediate and short term daily needs. Our agency works collaboratively with other law enforcement agencies and support agencies to ensure they are assisted during this tragic time.



About Us

Through their own personal losses, co-founders Lisa Schultz and Alissa Scott wanted to reach out to other surviving families.

The two police widows met at a memorial after Phoenix Police Officers Jason Wolfe and Eric White were killed while investigating a shooting in 2004. They discussed a gap in services for families struggling to cope immediately after losing loved one. While various agencies offered emotional support, none provided assistance for immediate and short term daily needs.

Determined to fill that void, they founded SHN. Today, SHN has a variety of corporate and business sponsors.

