To be argued by
WILLIAM A. QUINLAN, ESQ.
Time Requested: 15 minutes

Court of Appeals

STATE OF NEW YORK

SUZANNE P., ADMINISTRATRIX OF THE ESTATE OF MITCHELL PEARCE, DECEASED,

Plaintiff - Appellant,

-against-

JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT (a/k/a THE ERIE-WYOMING JOINT WATERSHED BOARD), ERIE COUNTY SOIL & WATER CONSERVATION DISTRICT, WYOMING COUNTY SOIL & WATER CONSERVATION DISTRICT, COUNTY OF ERIE, TOWN OF WEST SENECA,

Defendants - Respondents.

APL-2022-00033
Erie County Index No. 805498/2014

REPLY BRIEF FOR PLAINTIFF-APPELLANT

PAUL WILLIAM BELTZ, P.C.
Attorneys for Plaintiff-Appellant
Suzanne P.
36 Church Street
Buffalo, NY 14202
(716) 852-1000
william.quinlan@paulbeltz.com

Brief Completed: September 21, 2022

Appeal Rite Printing
14 Lafayette Square • Buffalo, New York 14203 • (716) 361-8968

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. Cases

B. Statutes

POINT I

JUSTICE GRISANTI PROPERLY DETERMINED AS A MATTER OF LAW THAT THE JOINT BOARD WAS AN OWNER OF THE SILLS

In the instant case, the "ownership" issue is only relevant in terms of who had the duty and authority to post proper and adequate warnings regarding the latent hydraulic boil condition associated with the Earsing Sills low head dams (hereinafter "the Sills"). The plaintiff is not seeking to hold any of these defendant for negligence in the design or construction of the Sills.

The defendant, Joint Board of Directors of the of Erie-Wyoming County Soil Conservation Districts (hereinafter "JB") and what is now known as the Federal Natural Resource and Conservation Service (hereinafter "NRCS") charted their own course by means of a series of agreements in which they crafted their own definitions of "real property" and of an "owner" with responsibility for the operation and maintenance of the Sills. JB, as the "owner" responsible for operation and maintenance, would have the responsibility for placing warnings regarding the latent dangerous conditions associated with the Sills.

Therefore, the "hornbook law" precedents regarding fixtures to creekbeds and "transfer of ownership", relied upon by JB, are completely

negated by means of the agreements between JB and the NRCS.

A. Justice Grisanti Properly Granted Plaintiff's Motion For A Directed Verdict Following The Trial

JB would apparently have this Court believe that Justice Grisanti granted a CPLR 4404 motion for a new trial. However, the trial transcript makes it clear that Justice Grisanti granted plaintiff's CPLR 4401 motion for a directed verdict, after having reserved his decision upon the plaintiff's motion for a directed verdict until after the jury's verdict (R. 2184-2185).

Therefore, contrary the "Questions Presented" section of the brief submitted on behalf of JB, the issue which was before the Fourth Department, and is now before this Court, was not whether Justice Grisanti should have "set aside" the jury's verdict. Rather, the question was whether the plaintiff, through the proof before Justice Grisanti, had established as a matter of law that JB was an "owner" of the Sills (which Mr. Gaston referred to as "structures"), in accordance with the definition of the term "owner" in the Operation and Maintenance Agreement (R. 2016, 2018, 2032).

All that plaintiff needed to be entitled a directed verdict as a matter of

law were the following: First, that there was compliance with the Operation and Maintenance Agreement-Buffalo Creek Flood Project, dated December 17, 1959, requiring JB to obtain permanent easements for all properties on which construction will be performed. Second, that there was compliance with the the 1984 Operation and Maintenance agreement.

Contrary to the assertions made in JB's brief, Marc Gaston authenticated the JB-NRCS agreements and his testimony acknowledged that permanent easements were in fact obtained prior to construction of the Sills in accordance with the 1959 agreement (R. 1333 -1354, 2032, 2038-2039, 2090-2111).

Had Mr. Gaston denied the fact that permanent easements had been obtained on behalf of JB , plaintiff's counsel had already had those easement marked for identification and they could have been admitted into evidence, but Mr. Gaston's acknowledgment of the uncontested fact that easements had been obtained as a condition precedent to the construction of the dams going forward and were still in place obviated the necessity to introduce the permanent easements into evidence (R. **2032**, 2041-2042).

Mr. Gaston also testified that JB, through the Erie County Soil and

Water District (hereinafter "Erie District"), had complied with the 1984 Operation and Maintenance agreement. Mr Gaston testified he had himself performed the maintenance and inspection called for by the 1984 Agreement and that the Sills, since the time of their reconstruction in 1985, had been continuously been used for their original purpose. (R. 2051-2052, 2063-2066). Based upon the forgoing, the fact that JB had no title to the land upon which it was built was no impediment for it to be declared by Justice Grisanti to be an "owner" of the Sills as a matter of law.

It was not plaintiff's counsel intent to have Mr. Gaston testify to an "opinion" upon who owned the Sills. Rather, plaintiff's counsel walked Mr. Gaston through the 1984 Operation and Maintenance Agreement and sought to have Mr. Gaston admit, through the plain terms of 1984 Agreement , that JB was an owner under the agreement's definition. (R. 2049-2053, 2058). If he had testified forthrightly he could not have avoided acknowledging that JB was an owner under the terms of the agreement. However, he chose instead to deny the legal effect of the agreement itself, upon the specious reasoning that it was based upon a pre-printed government form, as are such unquestionably valid legal documents such as death certificates, deeds titles, income tax returns , and

the like. (R. 2058).

As was noted in plaintiff's prior brief to this Court, there was no need for there to be any "transfer of title" for JB to be an owner of the Sills upon their completion. As was noted by Justice Grisanti, under the terms of the agreement, ownership of the Sills "vested" in JB once their construction was completed . (R.2051, 2107, 2187). Under the agreement ,JB remained an owner of the Sills so long as they continued to be used for the "purposes for which they were acquired", which Mr. Gaston admitted was still the case through the time of trial (R. 2051-2052, 2079-2080, 2107).

The instant case is distinguishable from the cases cited in the Joint Board's brief.

In Bentley v City of Amsterdam, 170 AD2d 725 (3d Dept 1991) it was noted that deeds to the defendant's property were ambiguous and thus insufficient proof of ownership. By contrast, there is nothing at all "ambiguous" about the 1984 Operation and Maintenance Agreement, which clearly defines the "Sponsor", JB as an "owner" of "real property", the Sills' structures, "title to which shall vest in the sponsor subject to the condition that the sponsor shall use the real property as long as needed for the purpose for which it was acquired in accordance with the O & M

agreement." (R. 2104-2105, 2107).

The issues involving ownership of the structure of the Sills are distinguishable from the issues regarding title to real property involved in the cases of Herbold v LaBarre, 176 AD3d 1428 (3d Dept 2019) and O'Brien v Town of Huntington, 66 AD3d 160 (2d Dept 2009). By virtue of the 1984 Operation and Maintenance agreement, and the permanent easements obtained on behalf of JB pursuant to the December 17, 1959 Operation and Maintenance Agreement, title to the land underlying the Sills simply is not necessary in order for JB to be an "owner" of them for the purposes of operation and maintenance.

Rather, as was noted in plaintiff's prior brief, JB occupies the same status as a utility which owns a sewer pipe or a utility pole without having title to the surrounding land.

The instant case is analogous to construction cases brought under Labor Law §§240 (1) and 241 (6), in which multiple "owners" may be subject to liability. See Celestine v City of New York, 86 AD2d 592 [2d Dept 1982], affd. on memorandum below, 59 NY2d 938 (1983) (owner of fee an owner even if it did not contract for work and granted easement to others); Copertino v Ward, 100 AD2d 565. 567 (2d Dept 1984) (both the owner of

the fee and the grantees of the easement could be found liable, pursuant to section 241 of the Labor Law, as "owners" of the construction site) and Dedario v New York Tel. Co., 162 AD2d 1001 (4th Dept 1990) (joint owners of utility pole both liable as "owners" under Labor Law §240 (1)

B. Plaintiff's Position In The Case At Bar is Supported By This Court's Opinion In Metromedia, Inc. Case

JB's brief claims that its position is supported by the case of Metromedia, Inc. (Foster & Kleiser Div.) v Tax Com'n of the City of New York, 60 NY2d 85 (1983) (hereinafter "Metromedia, Inc."), even though its brief provides no discussion of the parties involved, the structures involved or the contracts involved in that case. Not one word is said about the analysis of the Metromedia Inc. case contained in plaintiff's original brief. All that is provided is a single slice of "hornbook law" regarding fixtures, provided without any context or analysis of its application to the facts of the Metromedia Inc. case. As was noted in plaintiff's prior brief, the holdings of this Court in the Metromedia Inc. actually support plaintiff's position in the case at bar.

The Metromedia Inc. court held that the company which owned advertising frames affixed to the structures of elevated railroad stations

operated by the New York City Transit Authority was an "owner" of "real property" (the advertising frames) despite the fact that the owner of the advertising frames owned neither the railroad stations to which they were affixed nor the land upon which the stations were built. This ruling was made notwithstanding the fact that the advertising frames were deemed to be "permanently affixed", and that the owner of the railroad station, rather than the owner of the frames, was the owner of the real property upon which the station was built. Metromedia Inc., 60 NY2d at 89-91.

There is a further portion of the Metromedia Inc. Court's opinion that is relevant to this appeal, namely, the discussion of the desire of the parties to the agreement to "structure interests in the property":

> Aside from a consideration of whether physical affixation has occurred, it appears here that the parties intended to structure their separate interests in the property, as they were entitled to do (see Matter of National Cold Stor. Co. v. Boyland, 16 A.D.2d 267, affd. 12 N.Y.2d 808; People ex rel. Muller v. Board of Assessors, 93 N.Y. 308; on separability of ownership see, generally, Taxation-Buildings on Leased Land, Ann., 154 ALR 1309), so that petitioner, the franchise holder, held a taxable interest in the frames even though the Authority held title to the appurtenant real property.

Metromedia, Inc. , 60 NY2d at 91.

In the instant case, JB and NCRS, through their agreements, did with respect to the Sills just what the Transit Authority and Multimedia, Ind.

did; they structured their interests in the property "as they were entitled to do." Thus, JB is an "owner" of "real property", the Sills, despite the fact that it does not own the lands upon which they are built, just as Metromedia Inc. was the owner of "real property", the advertising frames, despite the fact that it did not own "the appurtenant real property", the land upon which the elevated train station structures were built.

Based upon the foregoing, the May 17, 2001 order to the Appellate Division should be reversed and Justice Grisanti's Order granting plaintiff a directed verdict on the issue of JB's status as an owner of the Sills should be reinstated.

POINT II

THE SUMMARY JUDGMENT MOTIONS OF THE ERIE DISTRICT AND THE WYOMING DISTRICT SHOULD HAVE BEEN DENIED

A. JB, the Erie District and the Wyoming District Should All Be Considered to Be A Joint Venture a Partnership and /Or A Single Unit Jointly Liable For One Another

In the Fourth Department's August 19, 2019 Memorandum Decision, it cited to the Bill Jacket underlying the passage of Laws of 1949, Ch. 374 (R. 2205-2206). In contrast to the Fourth Department's statement regarding the nature of JB, the persons who proposed and supported the passage of the bill which created it considered JB to be the passive instrument of the two Boards which made it up, and at most merely a conduit for Federal and County moneys to fund the programs of the respective Erie District and Wyoming County Soil and Water Conservation District (hereinafter "Wyoming District").

Tellingly, the sponsors and supporters of the bill creating the "joint board of directors of Erie-Wyoming County Soil Conservation District did not refer to the Joint Board as "it"; they referred to "them": "AN ACT to create the joint board of directors of Erie-Wyoming county soil conservation district and to give **them** powers and duties." (Emphasis

added) (See pages 1, 4-6, 8 of the Bill Jacket regarding the passage of Laws of 1949, Ch. 374) . Thus, the separate nature of the Boards as representatives of their separate districts takes precedence of the "Joint Board" as a separate independent entity.

The main purpose behind the passage of the statute creating JB is given in a Resolution by the Chair of the Assembly Agricultural committee, at page 8 of the Laws of 1949, Ch. 374 bill jacket:

> WHEREAS the Federal Government has authorized streambank work in the Buffalo Creek watershed to the extent of approximately Two Million Dollars, by House Document #574 as amended, when the Erie and Wyoming County, County Soil Conservation Districts shall provide for future maintenance of these streambank measures, and
>
> WHEREAS, the Directors of the Erie and Wyoming County Soil Conservation Districts are charged with the responsibilities of cooperating with Federal and State governments , or any of their agencies, in connection with any soil conservation or erosion protection projects within their boundaries under the provisions of the soil conservation law, and
>
> WHEREAS, it is necessary for the Erie and Wyoming County Soil Conservation directors to act jointly on the Buffalo Creek watershed, which is a part of both Counties, therefore,
>
> BE IT RESOLVED, that this Board of Supervisors respectfully requests that the State Legislature to enact Assembly Bill No. 821 an act to create the Joint Board of directors of Erie-Wyoming County Soil and Conservation Districts and to give them powers and duties.

The overall tenor of the writings in support of the creation of JB is that JB is an instrumentality of the Erie and Wyoming Districts whose Boards of Directors comprise it, and that it is not to be considered, in practical terms, as having any kind of agenda independent of the Erie District and the Wyoming District. Given that the intention for creating JB was to have it serve as the instrumentality of the Districts whose Boards comprise it, for the purposes of determining liability for the ownership and maintenance of the low head dams, JB, the Erie District and the Wyoming District should be considered to be a single unit, jointly and severally responsible for one another's negligence in the joint operation and maintenance of the subject Sills, if JB is considered to be formally an "owner" of them.

Defendant Erie District contends it cannot be considered to be a part of a partnership or joint venture with the Erie District because the Joint Venture is a "separate and distinct legal entity ." Such contention merely begs the question, are not all joint ventures and partnerships made up of a combinations of pre-existing legal entities?

In the instant case, it is undisputed that the Erie District and Wyoming District were created prior to JB. Upon information and belief,

the Wyoming District was created in 1940 and the Erie District was created in 1943. JB was created out of the pre-existing Boards of Directors of the Erie District and the Wyoming District through L. 1949, Ch. 374. Contrary to the arguments raised on behalf of the Erie District, the Legislature did not create an entirely new entity out of whole cloth, but rather created an entity that consisted of the Boards of Directors of two pre-existing entities.

The Erie District claims that the case at bar is distinguishable from prior New York State cases cited in plaintiff's original brief because in Bogert v. Town of New Paltz, 145 AD2d 110 (3d Dept. 1989) and DeLong v. County of Erie, 89 AD2d 376 (4th Dept. 1983), the respective municipalities voluntarily sought to join together in a joint venture. The Erie District provides no evidence that its Board of Directors was involuntarily joined together with the Wyoming District's Board by the Legislature in some kind of shotgun wedding. Rather, the true state of affairs, is set forth above with respect to the Legislative history of Laws of 1949, Ch. 374 is that the respective counties in which the Erie and Wyoming Boards were located requested the Legislature to join their Soil and Water Districts' boards together. (See pages 10, 12, 13-15, 17-18 of the Bill Jacket regarding passage of L. 1959, Ch. 374).

Regarding the case of Martin v County of Los Angeles, 2002 WL 31117056 (Cal Ct App 2002) and the Martin court's reference to the case of Los Angeles County v Cont. Corp., 113 Cal App 2d 207, 248 P2d 157 (Cal Ct App 1952), the Erie District fails to recognize that the Martin court and the Cont. Corp. court were dealing with different issues. The Martin court had before it a claim that Los Angeles County and the Los Angeles County Flood Control District were jointly and severally liable for damages to home owners as a result of landslide damage.

In the Cont. Corp case, the issue was whether there was a valid res judicata claim against the City of Los Angeles based upon a prior action (referred to as "the Long Beach action") in which it was not named as a party. The Cont.Corp. court held that there was no res judicata because the County of Los Angeles was not a party to the Long Beach action. The Cont. Corp. case is thus not relevant because JB's liability herein is not based upon it being a defendant in a prior case, but it may be jointly and severally liable, as part of a partnership or joint venture with other parties in a case in which it is named as a defendant.

Regarding plaintiff's failure to address other out of state cases with factual detail, editorial decisions dictated the omission of many details that

plaintiff would have liked to add to her 13,937 word brief.

Even in the absence of an explicit written agreement, an agreement providing for a partnership may be implied by the actions of the individuals conducting an enterprise, even though no express agreement exists. See 1 N.Y. Prac., New York Limited Liab Companies and Partnerships §3:6 and Czernicki v Lawniczak, 74 AD3d 1121, 1124 (2d Dept 2010) (oral agreement to act as partners found to exist following appeal, despite denial of the existence of the partnership by one of the partners).

Pursuant to the NYPL, general partners are jointly and severally liable for the torts of any partners or of the partnership, and jointly liable for partnership contractual obligations unless otherwise provided in a contract.

Similar rules apply for drawing an inference that a joint venture exists herein.

The intent of parties to form a joint venture may be implied from the totality of their conduct. Schultz v Sayada, 133 AD3d 1015, 1016 (3d Dept 2015)

[T]he legal consequences of a joint venture are equivalent to those of a partnership. See Gramercy Equities Corp. v Dumont, 72 NY2d 560, 565

(1988) and Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off., 137 AD3d 1707 (4th Dept 2016).

Regarding the issue of profits, it should be noted that in other cases of Joint Boards or other joint enterprises, the absence of profits as a result of such municipal joint ventures or partnerships, both in this State and other States, as is set forth in plaintiff's previous brief.

The testimony of Mr. Gaston, to the effect that JB is an empty shell with no employees, no property or other assets, or any insurance, stands unrefuted. As a matter of public policy, such ghost entities should not be permitted to be used by the parties which dictate their actions as a shield from liability for their own actions or inactions with respect to deadly instrumentalities such as the Sills. Rather, public policy should require that the Erie District and the Wyoming District be held liable for the consequences of their Boards of Directors acting through the JB.

It should also be noted that it was Mr. Gaston, field manager of the Erie District, who made the request to the County of Erie that warning signs be placed regarding the dangers posed by the Sills. Thus, despite his testimony at trial, Mr. Gaston in fact recognized that it was JB that bore the responsibility for the Sills, but it was only through District employees such

as himself that JB's responsibilities could be met. (R. 93, 1180, 1209-1211, 1214, 2015, 2063). After the subject accident, Mr. Gaston erected warning signs (R. 1216-1217).

Finally, regardless of the precise nature of the relationship between JB, the Erie District and the Wyoming District, they should all be held vicariously liable for one another as a "single unit." See Mead v Bloom, 94 AD2d 423 (4th Dept 1983]) affd. upon Fourth Department opinion 62 NY2d 788 (1984) (defendant driver, defendant vehicle owner and defendant driver's employer all vicariously liable as a "single unit"). The essence of vicarious liability is control. "'Underlying the doctrine of vicarious liability * * * is the notion of control. The person in a position to exercise some general authority or control over the wrongdoer must do so or bear the consequences' (Kavanaugh v. Nussbaum, 71 N.Y.2d 535, 546)." L & L Plumbing & Heating v DePalo, 253 AD2d 517, 518 (2d Dept 1998).

In the case at bar, the Directors of the Erie District and the Wyoming District unquestionably controlled JB. It could only act on the basis of what the Directors decided it should do. Without those Directors meeting together, the Joint Board was an empty shell. Thus, the JB, Erie District and Wyoming District are vicariously liable for one another due to actions

or inactions for which JB is responsible, due to the control exercised by the Districts over it. Therefore, the Erie District and the Wyoming District should not have been dismissed from this case, and plaintiff's complaint against them should be reinstated.

B. The Erie District Should Be Held Liable As An Owner Based Upon"Public Benefit" Contract With The County of Erie

As was noted in plaintiff's prior brief, at page 55, Mr. Gaston testified that the Erie District agreed, under the terms of the Public Benefit Agreement, to undertake the same duties that JB had undertaken with respect to the 1984 Operation and Maintenance Agreement with the NCRS. Mr. Gaston testified that under the Public Benefit Agreement, "the operation and maintenance of the low head dams were part of the District's ongoing operations for Erie County." (R. 1746-1747).

POINT III

LIABILITY OF THE COUNTY OF ERIE

A. Negligent Advice To JB To Refrain From Posting Warning Signs

In its brief, the County of Erie alleges that, if this Court were to agree with plaintiffs that a duty of care was owed, it would be tantamount to a finding that the County of Erie owed a duty of care to the public at large. The instant case is far less likely to result in a "prohibitive number of possible plaintiffs" than would potentially result from this court's decision in Davis v. South Nassau Commnity Hosp., 26 NY3d 563 (2015).

As was explained in the plaintiff's prior brief, the reach of such a conclusion would be very limited, in that this case involves a unique instance in which one public entity advised another, in effect, to prioritize an attempt to immunize its exposure to liabilities over an effort to protect against known deadly dangers limited to one locality within one town within the County. Also, once the damage was done and Mitchell Pearce was killed due the absence of the warnings denied him by the County of Erie, warnings were posted regarding the latent dangers, thus hopefully preventing similar accidents at the Sills from happening again. It should be emphasized that Mitchell Pearce was the fifth person to die at the Sills.

This case presents a stronger argument, on grounds of public policy, for the relaxation of the rule of privity for liability for negligent legal advice than did the Davis case. The Davis case dealt with only a probability for danger to persons upon the roads if the defendant's patient was allowed to drive without being warned of the effects of medication upon her ability to drive. By contrast, the County of Erie knew to an absolute certainty, as a result of four prior deaths, that without warnings, the hydraulic boil associated with the subject low head dams would lead to death.

It is respectfully stated that on grounds of public policy, this Court should issue a strong statement that under no circumstances should any municipal entity advise another to prioritize its immunity from liability over the prevention of deaths through issuing warnings where deaths have already resulted from such a dangerous condition. Conceptually, there is little difference between creating such an exception to the rule of attorney client privilege and the exception to that rule for attorneys found guilty of participating in the crimes or frauds of their clients. The attorney-client privilege may give way to strong public policy considerations. It may not be invoked where it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or

an accusation of some other wrongful conduct. See Spectrum Sys. Intl. Corp. v. Chemical Bank, 78 N.Y.2d 371, 380 (1991) and Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 1 AD3d 223, 224 (1st Dept 2003).

The analogy drawn in the County of Erie's brief between the instant case and a lack of duty running from physicians to non-patients is unconvincing. In the Davis case, the plaintiff bus driver was not a patient of the hospital. However, liability was imposed due to the potential for harm to non-patient motorists upon the roads near the hospital caused by medical malpractice arising out of treatment of a patient. Using the same reasoning, the fact that Mitchell Pearce was not a client of the County of Erie Attorney's Office should not prevent liability of the County to his surviving mother.

B. Assumption of Duty Through "Public Benefit" Contract With Erie District

As was noted in plaintiff's prior brief, under Environmental Conservation Law §15-0507, the definition of an "owner" of a dam includes one who maintains the dam. Through the Public Benefit Contract with the Erie District, it contracted with the Erie District to maintain the subject low

head dams. By asserting a right to assign maintenance duties to the Erie District, the County of Erie was necessarily asserting its own right to maintain the dam, and thus, asserting a duty which signifies ownership under Environmental Conservation Law §15-0507. It should further be noted that, in the commentaries to this statute, a variety of possible owners are listed, including "a municipality." See Kevin Anthony Reilly, 2020 Update to Practice Commentaries to Environmental Conservation Law §15-0507.

The County of Erie holds that based upon a case cited previously by plaintiff, Environmental Conservation Law §15-0507 is violated only if the dam fails and there is flooding. See Hosmer v. Kubricky, 88 AD3d 1234 (3rd Dept. 2011). However, the text of Environmental Conservation Law §15-0507 does not limit the dangers to be apprehended merely to flooding.

The first sentence of Environmental Conservation Law §15-0507 (1) reads as follows: "Any owner of a dam or other structure which impounds waters shall at all times operate and maintain said structure and all appurtenant structures in a safe condition." The statute does not limit "safe condition" to an absence of flooding. Rather, the term safe condition could encompass the duty to post warnings of a latent dangerous condition, such

as the hydraulic boil associated with the Sills.

POINT IV

THE TOWN OF WEST SENECA HAD A DUTY TO WARN OF THE HIDDEN, DANGER POSED BY THE SILLS

As was noted in Evelyn Hicks, the Chair of the Town of West Seneca's Environmental Commission, admitted that the hydraulic boil effect associated with the low head dams is a latent condition, not immediately observable and constitutes a danger unknown to the public at large (R. 309, 317, 390-391). She admitted that person could access the Buffalo Creek for the purposes of recreating on the creek from town owned lands, and that it was also accessible by West Seneca residents whose lands abutted Buffalo Creek (R. 340-341, 351-355, 363-365, 384-385, 387, 391-392) .

At page 4 of West Seneca's brief, she is quoted as claiming that "the area where the incident occurred where the incident occurred was 'not a recreational area, so to speak' (387)" However this just begs the question, without warnings being posted explaining the danger of the hydraulic boil, how would anyone know that the Sills are not suitable to be used as a "recreational area?"

Contrary to the assertions made at page 4 of The Town of West Seneca's brief, it is asserted that "individuals who entered the water in the

area where the Sills were located were not the Town's responsibility and beyond the ability of the Town to control or supervise (448-449)." However, plaintiff's case against the Town of West Seneca is not premised upon it having a duty to control persons, but rather is based upon their duty to warn them.

After the subject accident, Marc Gaston of the Erie District actually placed signs warning of the danger posed by the hydraulic boil associated with the Sills on property owned by the Town of West Seneca, after obtaining its permission to do so. (R.1216-1218, 1256, 1284-1285). Thus, it was feasible for the Erie District, JB, or the Town of West Seneca itself, to have posted signs on its property warning of the dangers associated with the low head dams.

This Court has held that in a proper case, a landowner may owe a duty to warn of a dangerous condition on an adjacent property, in Galindo v Town of Clarkstown, 2 NY3d 633 (2004). The Galindo case involved the question of an individual landowner's duty to warn of the risk that a tree located on adjacent property, owned by the defendant, Town of Clarkstown, might fall and cause injury. In the Galindo case, the individual landowner was concerned about a tree on adjacent property, which, following a storm,

was leaning and posed a prospective risk of falling upon his own property. The tree did, in fact, fall upon his housekeeper's vehicle in his own driveway, killing his housekeeper's husband, who was within his wife's vehicle.

The Galindo case held that, under the circumstances of the case before it, the apparent danger posed by the leaning tree was not so severe that the defendant landowner owed a duty to warn his housekeeper about it. However, the Galindo court did not foreclose a duty to warn under all such circumstances involving dangers posed by conditions upon adjacent property: "We do not exclude the possibility that some dangers from neighboring property might be so clearly known to the landowner, though not open or obvious to others, that a duty to warn would arise." Galindo , 2 NY3d at 637 (2004).

Plaintiff herein respectfully contend that this is just such a case of a duty to warn of a danger on adjacent property as was referenced by the Galindo court. The Town of West Seneca, through Evelyn Hicks, was aware of four prior deaths associated with the hydraulic boil phenomena present at the Sills, and she admitted that such a hydraulic boil condition would not be obvious to the general public. Therefore, the conditions precedent for

there to be duty to warn of a dangerous condition upon adjacent property, set forth by the Galindo case, are present in the case at bar.

In addition to citing the Galindo case, the Town of West Seneca also cites the case of Cleary v Harris Hill Golf Ctr., Inc., 23 AD3d 1142 (4th Dept 2005). In the Cleary case, the Fourth Department held that a golf course had no duty to warn a firefighter fighting a fire upon the golf course's property of a hazardous condition, an excavation pit, on adjoining property.

Notwithstanding the forgoing, the Cleary court did acknowledge that the plaintiff had cited a number of prior cases in which landowner's were held to owe a duty of care with respect to dangerous conditions upon adjacent property, including Leone v. City of Utica, 66 A.D.2d 463 (4th Dept. 1979) affd. 49 N.Y.2d 811 (1980), Scurti v. City of New York, 40 N.Y.2d 433 (1976), Gayden v. City of Rochester, 148 A.D.2d 975 (4th Dept. 1989) and Licato v. Eastgate, 118 A.D.2d 904 (3d Dept. 1986). Cleary , 23 AD3d at 1143. The Cleary court held that the above cases were "distinguishable from the case herein." While the Cleary court did not specify how such cases were distinguishable, the appellant's brief submitted on behalf of the defendant noted that, unlike the Scurti and

Leone cases, the Cleary case did not involve prior notice of trespassing children and did not implicate the "well known propensities of children to climb about and play." (See page 7 of defendant appellant's brief in Cleary).

In both the Leone case and the Scurti case, adjacent owners knowingly provided access, by means of holes in fences, to dangerous conditions which constitute "attractive nuisances" to children, namely railroad yards, and were held to be potentially liable. As is noted in plaintiff's prior brief to this Court, the Town of West Seneca similarly was aware or should have been aware of how, through Town-owned lands adjacent to the Buffalo Creek, including the Charles E. Burchfield Art and Nature Center, or through bicycle trails, children and others gained access to the Earsing Sills, which the Town knew to be hazardous. (R. 299, 351-358, 365-366, 390-391)

Plaintiff cited the Gayden case to the Fourth Department in her brief dated March 21, 2019. In the Gayden case, the Fourth Department held that questions of fact existed regarding whether the owners of property adjacent to the waterway to a hydroelectric power plant could be liable for the death of seven year old boy in the waterway, citing the Scurti and Leone cases.

The Order which granted the Town of West Seneca summary judgment, dismissing plaintiff's complaint against it, should be reversed, and plaintiff's complaint against it should be reinstated.

POINT V

CONTENTIONS THAT PLAINTIFF'S MOTIONS FOR LEAVE TO APPEAL TO THE COURT OF APPEALS WERE "UNTIMELY" ARE WITHOUT MERIT

In briefs submitted on behalf of defendants, or, with respect to the Wyoming County District, in motion papers submitted to this Court, it has been argued that plaintiff's motion for leave to appeal was untimely. As is set forth below, there is no merit to these contentions.

A. Arguments Made on Behalf of the Joint Board and the Erie District

Plaintiff did not move before the Appellate Division, Fourth Department for leave to appeal to the Court of Appeals from prior, non-final orders of the Fourth Department which necessarily affected the final determination regarding defendants other than JB. Since no part of the motion before the Fourth Department, requesting reargument or leave to appeal to the Court of Appeals from its Order entered May 7, 2021, affected any defendant or prior defendant other than JB, plaintiffs were under no obligation to serve such motion papers on defense counsel for former defendants.

Regarding defendant, JB, plaintiff moved for leave to appeal to the

Court of Appeals from both the Fourth Department and the Court of Appeals, as is allowed under CPLR 5602 (a). With respect to defendants other than JB, plaintiff exercised her right under CPLR 5602 (a) to choose to limit her motion for leave to appeal to the Court of Appeals via direct application to the Court of Appeals alone.

In other words, with respect to all of the prior defendants who had previously been dismissed from this case, plaintiff chose to make only the single motion directly to the Court of Appeals.

Contrary to the contention made in the Erie District's brief, the timeliness issue it raises in the case at bar is not the same timeliness issue presented by the case of Mooney v. B/P/CG Ctr II, LLC, 35 NY3d 1125 (2020). In the Mooney case, the motion papers and exhibits upon plaintiff's motion for leave to appeal to this Court and the opposing motion papers reveal that summary judgment, dismissing the plaintiff's complaint, was granted against all defendants at once in the same order, which was affirmed by the First Department.

Although this Court's decision in the Mooney case did not specify the exact grounds of untimeliness, an examination of the motion papers submitted on plaintiff's behalf reveals the plaintiff failed to establish the

timeliness of the filing of the motion to reargue or leave to appeals to the First Department.

In the case at bar, plaintiff's motion papers to this Court demonstrated that the motion for reargument or leave to appeal to the Court of Appeals was timely served as to the only defendant made a subject of that motion, JB. The Mooney case provides no grounds for holding that plaintiff, at the time of the motion for reargument or leave to appeal to the Court of Appeals, was required to then move for leave to appeal the prior non-final orders at that time.

B. The Arguments based Upon "Party Finality" and "Implied Severance" Doctrine Made on Behalf of the Wyoming District and the County of Erie

The County of Erie's"timeliness" objection should not be heard because it did not even submit motion papers in opposition to plaintiff's motion to appeal to the Court of Appeals. If the County of Erie had wanted its opposition on this ground to be heard, the time to do it was prior to this Court granting leave to appeal. Had the County of Erie opposed plaintiff's motion for leave to appeal on this ground and had such opposition been successful, then plaintiff's would not have been obliged to take the time

and effort to write that portion of the plaintiff's original brief addressing the case against the County of Erie, and would have been able to spend more time on and employ more words upon the portions of plaintiff's original brief addressed to the liability of other defendants. Thus, the County of Erie's failure to raise this objection for this Court's consideration of plaintiff's appeal against it was prejudicial and should be rejected by and be deemed to be waived by this Court.

On the merits, defendants arguments also fail. Plaintiff respectfully contends that defendants have no right to assert, on behalf of plaintiffs, that Orders which manifestly do not determine all issues against all defendants nevertheless must be the subjects of motions to appeal to the Court of Appeals by plaintiffs, based upon the hope that this Court will apply the "Party Finality" or "Implied Severance" doctrine. Rather, plaintiffs should have the right to wait until there is a final Order or Judgment which may be the subject of a motion for leave to appeal to the Court of Appeals, and then seek to bring up the non-final orders for this Court's review.

Plaintiffs should not be forced into undertaking the time and expense of moving to appeal from such Orders under the "Party Finality" or the

"Implied Severance" doctrines, given prior uncertainties and inconsistencies in their application. See Powers of the NY Court of Appeals § 5:4 and Burke v Crosson, 85 NY2d 10, 16 (1995) : "The 'implied severance' doctrine has had a checkered history and our past articulations of the rule have been somewhat difficult to reconcile".

Further, the Orders which dismissed prior defendants did not "finally" determine this action because plaintiff's complaint against all the defendants consisted of the same two causes of action, one for the wrongful death of Mitchell Pierce and another for the survival action regarding the personal injury and pain and suffering sustained by Mitchell Pearce as a result of the subject accident. (R. 216-217). Thus, this is not a case in which dismissal of a case against some defendants but not all defendants will finally resolve any causes of action unique to those defendants. In other words, all causes of action apply to all defendants and all causes of action arise out of "the same transaction or continuum of facts."

The instant case is distinguishable from a case such as Gelbard v Genesee Hosp., 87 NY2d 691 (1996) , in which an order dismissing a case against one defendant was unique such that the order was final as against that defendant while the case continued on against others. See Powers of

the NY Court of Appeals § 5:9 and Gelbard (order dismissing physician's cause of action against hospital for restoration of his staff privileges which hospital had terminated, treated as final, even though his separate causes of action against another physician for defamation and tortious interference with contract remained undetermined).

Finally, in the case at bar, out of four defendants which raised a "timeliness" issue, only defendant Wyoming District had claimed in its papers opposing plaintiff's motion for leave to appeal that the "party finality" rule required plaintiff to have made a motion for leave to appeal to the Court of Appeals after Notice of Entry of the Fourth Department's memorandum and Order entered August 29, 2019. The other three defendants did not raise this issue until plaintiff went to the time and expense of perfecting this appeal upon a full record. Plaintiff submits that this circumstance should be considered one of the "instances" referred to at page 34 of this Court's Practice Guide where "countervailing policy considerations" make invocation of the doctrine of "party finality" unwarranted, citing Sunrise Auto Partners, L.P. v H.N. Frankel & Co., 90 NY2d 842 (1997).

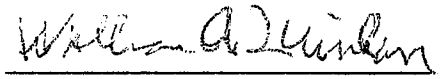
Based upon the forgoing, all the objections to the "timeliness" of

plaintiff's motion for leave to appeal to the Court of Appeals should be rejected.

Conclusion

The complaint of plaintiff, Suzanne Pearce as natural guardian of Mitchell Pearce, deceased, should be reinstated against all defendants.

Dated: September 21, 2022



William A. Quinlan

PRINTING SPECIFICATION STATEMENT

The foregoing brief was prepared on a computer. A proportionately spaced typeface was used as follows:

Name of Typeface: Georgia

Point Size:14

Line Spacing: Double

The total number of words in the brief, exclusive of point headings and exclusive of pages containing the Table of Contents, Table of Citations, Proof of Service Certificate of Compliance, or any authorized addendum containing statutes, rules, regulations, etc is 6979.