To be argued by:
Justin L. Hendricks
(Time requested: 20 minutes)

APL No. APL-2022-00033
Appellate Division Docket Nos. CA 18-01647, CA 18-01648, CA 18-01589, CA 18-01649, CA 18-01650, CA 18-02015,
Erie County Clerk's Index No. 805498/2014

Court of Appeals

of the

State of New York

SUZANNE PEARCE, 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 ERIE-WYOMING JOINT WATERSHED BOARD), ERIE COUNTY SOIL & WATER CONSERVATION DISTRICT, WYOMING COUNTY SOIL & WATER CONSERVATION DISTRICT, COUNTY OF ERIE, and TOWN OF WEST SENECA,

Defendants-Respondents.

BRIEF FOR DEFENDANT-RESPONDENT ERIE COUNTY SOIL & WATER CONSERVATION DISTRICT

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August 8, 2022

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PRELIMINARY STATEMENT

Plaintiff-Appellant, Suzanne Pearce, Administratrix of the Estate of Mitchell Pearce, deceased, (hereinafter "Pearce" or "plaintiff"), appealed from an Order of the Supreme Court, Erie County (Hon. Mark J. Grisanti, J.S.C.), which was e-filed with the Erie County Clerk's Office on April 10, 2018. R. 140. The Order granted the motion for summary judgment of Defendant-Respondent Erie County Soil & Water Conservation District (hereinafter "ECSWCD"). Notably, the lower Court granted ECSWCD's motion for summary judgement on the basis that ECSWCD is separate and apart from the Joint Board and that ECSWCD did not owe a duty to the plaintiff. R. 140-144. Relatedly, Pearce also appealed the respective Orders that granted summary judgment to Defendant-Respondent Town of West Seneca, Defendant-Respondent Wyoming County Soil & Water Conservation District (hereinafter "WCSWCD"), and Defendant-Respondent County of Erie. R. 108, 124, and 149, respectively. Defendant-Respondent Joint Board of Directors Erie-Wyoming County Soil Conservation District (hereinafter "Joint Board") also moved for summary judgment, but its motion was denied by the Court below, which the Joint Board appealed. R. 180. All of which was consolidated into one appeal pursuant to Orders of Appellate Division, Fourth Judicial Department. R. 188 and 192. The Appellate Division heard oral arguments by all parties for the appeals on May 22, 2019, and issued a Memorandum and Order that was granted on August 22,

2019, in which the Appellate Division unanimously affirmed the Orders of the Supreme Court in all respects. R. 2203-2206. Specifically, the Appellate Division noted within its Memorandum and Order that "Plaintiff reasons that the Board has no separate existence and cannot act independently of the Districts. We reject that contention." R. 2205. Explicitly, the Appellate Division held that "although there is necessarily some degree of relationship between the Board and the abovementioned Districts, the legislation creating the Board established that it exists as an entity that is separate and distinct from the Districts." R. 2206. Finally, the Appellate Division held that "[t]o the extent that plaintiff further contends that ECSWCD may otherwise be liable, we conclude that her contention lacks merit."

Subsequent thereto, ECSWCD, WCSWCD, Town of West Seneca, and County of Erie were dismissed from the action and had no further interaction with the plaintiff's claims until November 3, 2021, when the plaintiff brought a motion to this Court for leave to appeal to the Court of Appeals. More than three years after the Appellate Division affirmed their dismissal from the plaintiff's action, ECSWCD, WCSWCD, Town of West Seneca, and County of Erie were suddenly and unexpectedly preparing opposition papers to the plaintiff's motion. For the reasons outlined below, the plaintiff's motion was untimely pursuant to CPLR § 5602(a), 22 NYCRR § 1250.16(d)(1), and 22 NYCRR § 500.22(b)(2)(ii)(b).

If this Court should somehow find that the plaintiff's instant appeals against ECSWCD, WCSWCD, Town of West Seneca, and County of Erie were timely, the instant appeal should be denied because the Supreme Court properly granted the summary judgment motion of ECSWCD, and the Appellate Division properly affirmed. As both the lower Courts highlighted in their respective decisions, and contrary to the plaintiff's contention, ECSWCD is a distinct legal entity from the Joint Board, which is evidenced by the fact that both were sued by the plaintiff. R. 143 and 2205-6. As a distinct legal entity, ECSWCD did not have any responsibility for maintaining the low head dam, which is at issue in the underlying action. The lower Courts reached this determination because the contracts at issue in the underlying action were between the Joint Board and the United States Department of Agriculture Natural Resource Conservation Service (hereinafter "NRCS"). R. 1335-54. ECSWCD was not a party to any of those contracts, which necessarily means that ECSWCD did not have any maintenance responsibilities and thus could not have owed the plaintiff a duty.

QUESTIONS PRESENTED

1. Did the Appellate Division, Fourth Judicial Department, properly affirm the Supreme Court's grant of summary judgment to ECSWCD in holding that ECSWCD did not owe the plaintiff a duty of care?

   Answer: Yes.

STATEMENT OF FACTS

Underlying Facts

This action arises from a tragic incident that occurred on June 12, 2012, wherein the plaintiff's decedent, Mitchell Pearce, died as a result of injuries he sustained while in Buffalo Creek. R. 1011-17. The plaintiff alleged that Mitchell Pearce was caught in a hydraulic-like effect created by the low head dam located at or adjacent to the Earsing Sills Oxbow near Lexington Green in the Town of West Seneca. R. 1013.

Procedural History

ECSWCD moved for summary judgment to the Supreme Court via a Notice of Motion dated December 1, 2017. R. 995. The Supreme Court granted ECSWCD's motion for summary judgment via an Order that was e-filed on April 10, 2018. R. 140. The plaintiff appealed to the Appellate Division via a Notice of Appeal dated April 19, 2018. R. 136. The Appellate Division affirmed the Supreme Court's Order via a Memorandum and Order granted August 22, 2019. R. 2202.

The Joint Board received a jury verdict in their favor on October 29, 2019. R. 2189. However, Supreme Court set aside the verdict and granted the plaintiff's motion for a directed verdict. R. 2184. The Supreme Court's Order was filed December 3, 2019. R. 1912. The Joint Board appealed to the Appellate Division

via a Notice of Appeal dated December 9, 2019. R. 1908. The Appellate Division reversed the Supreme Court and granted the Joint Board's motion for a directed verdict via a Memorandum and Order granted May 7, 2021, with Notice of Entry dated May 10, 2021. R. 2199. The plaintiff moved to the Appellate Division seeking re-argument or leave to appeal to the Court of Appeals on June 9, 2021, which was unsurprisingly denied via an Order of the Appellate Division dated October 1, 2021, with Notice of Entry dated October 4, 2021. However, the plaintiff's motion only sought re-argument and/or leave to appeal to the Court of Appeals with respect to the Joint Board; the plaintiff did not move regarding ECSWCD, WCSWCD, Town of West Seneca, or County of Erie. Thereafter, the plaintiff moved for leave to appeal to the Court of Appeals via a motion dated November 3, 2021. ECSWCD, WCSWCD, Town of West Seneca, and County of Erie all opposed the motion on the grounds that the plaintiff's motion was procedurally defective and untimely, as well as opposing the plaintiff's motion on the merits. Ultimately, leave for the instant appeal was granted on March 17, 2022. R. 2198.

Relevant Deposition Testimony – Mark C. Gaston

On October 4, 2016, Mark C. Gaston gave testimony relevant to this matter. R. 1023-1331. As of June 12, 2012, Mr. Gaston was the District Field Manager for ECSWCD. R. 1069. Soil and Water Conservation Districts are governed by a Board

of Directors, and the Joint Board is a combination of the Erie District Board of Directors and the Wyoming District Board of Directors. R. 1051-52. The Joint Board was enacted through NYS Law for the purpose of being the local sponsor for the 1944 project funded under the 1944 Flood Control Act. R. 1103. The Joint Board does not own the lake and stream beds/banks, but it provided technical assistance to landowners and units of government. R. 1055. In the 1950s there was a project that involved the installation of five (5) sills/low head dams. R. 1105. The portion of Buffalo Creek where these five (5) sills are located is all privately owned. R. 1153. The sills/low head dams were designed by NRCS. R. 1148-49 and 1200-01. NRCS provided all the technical and engineering regarding the structures that were included within the project. R. 1281. NRCS contracted out the construction of the sills to private contractors; neither ECSWCD, nor WCSWCD, nor the Joint Board had anything to do with hiring these contractors. R. 1281. NRCS also contracted out the construction of Sill No. 1 when it was redesigned in the 1980s, and NRCS oversaw that construction. R. 1174-75 and 1283. The Joint Board relied upon NRCS for technical engineering expertise since NRCS originally designed the structures and then redesigned the structures. R. 1152, 1174-75, and 1283. He did not know who owned the sills, but he knew that the Joint Board was responsible only for operation and maintenance. R. 1286. The Joint Board had an agreement with NRCS to operate and maintain the structures. R. 1114, 1181-82, and 1286.

Documentary Evidence

Copies of the Operation and Maintenance Agreements between the Joint Board and NRCS were attached as "Exhibit 5" to ECSWCD's motion for summary judgment. R. 1333-54. Pursuant to the December 23, 1959, Agreement, NRCS was responsible to construct the Works of Improvements insofar as funds are made available when the necessary easements and agreements are provided. R. 1337. NRCS was to provide through the Joint Board such technical services as are available for assistance in the proper operation of the Works of Improvements. R. 1337. NRCS was also to provide such technical services as are needed and available for preparing plans, designs, and specifications for maintenance items requiring this service. R. 1338. The Agreement further provided that NRCS was to provide additional new construction on eroding streambanks in an area that was previously turned over to the Joint Board for maintenance if funds were available. R. 1338.

In return, the Joint Board was to be responsible for the entire cost of maintenance and operation. R. 1338. Maintenance was agreed to entail the following: removal of gravel bars when their formation will interfere with the proper functioning of the channel; removal of all fallen trees, snags, brush, and other debris; replacement or repair or riprap and other bank revetment when damaged; re-establishment of grass and legume vegetation where such vegetation is of primary import to protecting streambanks, dikes, and floodways; removal of volunteer

woody vegetation or trimming of planted willow trees when their growth is considered to have an adverse affect upon the function of the structural measures; backfill around any structures that have been exposed by erosion in such a way that the structure may fail; and, repair any structure that may have been damaged by ice, other debris, or by other causes. R. 1338-39.

A Supplemental Operation and Maintenance Agreement was entered into on February 8, 1962. R. 1343.

On October 6, 1975, a new agreement was entered into that superseded the 1959 agreement, "Operation and Maintenance Agreement for Structural Measures." R. 1344 and 1346. This new agreement required NRCS to provide consultative assistance in the operation of the structural measures, and to provide consultative assistance in the preparation plans, designs, and specifications for needed repair of the structural measures. R. 1345. In response, the Joint Board was responsible to operate, without cost to NRCS, the structural measures in compliance with any applicable Federal, State, and local laws, and in a manner that will assure that the structural measure will serve the purpose for which installed as set forth in the Work Plan. R. 1345. The Joint Board was also responsible to promptly perform, without cost to NRCS, all maintenance of the structural measures determined by either the Joint Board or the NRCS. R. 1345. However, the Joint Board was required to obtain prior NRCS approval of all plans, designs and specifications for maintenance work

involving major repair. R. 1346. The Joint Board was prohibited from the installation of any structures or facilities that will interfere with the operation or maintenance of the structural measures. R. 1346. The Joint Board was to obtain prior NRCS approval of the plans and specifications for any alteration or improvement to the structural measures. R. 1346. Lastly, the Joint Board was to obtain prior NRCS approval of any agreement to be entered into with other parties for the operation or maintenance of all or any part of the structural measures and provide NRCS with a copy of the agreement after it has been signed by the Joint Board and the other party. R. 1346.

The final agreement was signed between the Joint Board and NRCS on September 14, 1984. R. 1347. This final agreement reiterated many of the principles of the 1975 Agreement, including that the Joint Board must obtain prior approval from NRCS of all plans, designs, and specifications for maintenance work. R. 1347. Additionally, the Joint Board was required to obtain prior NRCS approval for the plans and specifications for any alteration or improvement to the structural measures, as well as obtain prior approval from NRCS of any agreement to be entered into with other parties for the operation or maintenance of all or any part of the structural measures, and provide NRCS with a copy of the agreement after it has been signed by the Joint Board and the other party. R. 1349.

ARGUMENT

THE APPELLATE DIVISION PROPERLY AFFIRMED THE SUMPREME COURT'S ORDER WHICH GRANTED THE MOTION FOR SUMMARY JUDGMENT OF ECSWCD IN HOLDING THAT ECSWCD DID NOT OWE THE PLAINTIFF A DUTY OF CARE.

1. The plaintiff's motion for leave to appeal to the Court of Appeals was procedurally defective and untimely.

The plaintiff's motion was untimely pursuant to CPLR § 5602(a), 22 NYCRR § 1250.16(d)(1), and 22 NYCRR § 500.22(b)(2)(ii)(b). In response to the Memorandum and Order of the Appellate Division, Fourth Judicial Department, entered May 7, 2021, the plaintiff moved to the Appellate Division seeking re-argument or leave to appeal to the Court of Appeals on June 9, 2021. However, the plaintiff's motion only sought re-argument and/or leave to appeal to the Court of Appeals with respect to the Join Board regarding the Appellate Division's reversal of the underlying motions for directed verdict at the conclusion of trial proof before the Supreme Court. The plaintiff did not move regarding the Appellate Division's 2019 affirmances of the Supreme Court's 2018 Orders granting summary judgment to ECSWCD, WCSWCD, Town of West Seneca, and County of Erie.

While CPLR § 5602(a) authorizes the plaintiff to make application for permission to appeal to the Court of Appeals to the Appellate Division first and then to the Court of Appeals second, and CPLR § 5602(a) further authorizes the plaintiff to move for permission to the Court of Appeals following a refusal by the Appellate

Division, it does not and did not toll the 30-day deadline of 22 NYCRR § 1250.16(d)(1) regarding ECSWCD, WCSWCD, Town of West Seneca, and County of Erie. In short, pursuant to CPLR § 5602(a) and 22 NYCRR § 1250.16(d)(1) the plaintiff needed to move regarding ECSWCD, WCSWCD, Town of West Seneca, and County of Erie to the Appellate Division or the Court of Appeals within thirty (30) days of the Notice of Entry on May 10, 2021, of the Memorandum and Order of the Appellate Division, entered May 7, 2021. However, the plaintiff did not move against ECSWCD, WCSWCD, Town of West Seneca, and County of Erie until the notice of motion to the Court of Appeals, dated November 3, 2021, which was nearly five (5) months late.

Consequently, the plaintiff could not meet the requirements of 22 NYCRR § 500.22(b)(2)(ii)(b), which requires that "[i]f a prior motion for leave to appeal to the Court of Appeals was filed at the Appellate Division, movant's papers filed in this Court shall demonstrate that the timeliness chain is intact by stating: . . . (b) the date movant served the notice of motion addressed to the Appellate Division upon each other party . . ." (emphasis added). Here, the plaintiff never served the notice of motion addressed to the Appellate Division upon ECSWCD, WCSWCD, Town of West Seneca, and County of Erie, but only upon the Joint Board.

This Court has recently denied a motion for leave to appeal on similar grounds. *See Mooney v BP/CG Ctr. II, LLC*, 35 N.Y.3d 1125 (2020).

2. The Joint Board is a separate and distinct legal entity from ECSWCD and WCSWCD.

In 1949, the New York State Legislature passed, and the Governor signed, Chapter 374 which created the Joint Board of Directors of the Erie County and Wyoming County Soil and Water Conservation Districts. R. 78. As indicated within the text of Chapter 374, the Joint Board has all the powers and duties of a Soil and Water Conservation District. As such, the Joint Board is a separate and distinct legal entity, the purpose of which is "to receive moneys within the Buffalo creek watershed available from the federal or state government or any source and to expend the same within their discretion on any portion or portions of the watershed regardless of the source of the funds." R. 78. Additionally, Chapter 374 specifically delineates that the Joint Board has "the power to engage in stream bank maintenance work within the Buffalo creek watershed and do other maintenance work thereon." R. 78.

The plaintiff's argument that the Joint Board should be held akin to a partnership is specious at best. Without offering any support that is specific to municipal entities, generally, let alone Soil and Water Conservation Districts, specifically, the plaintiff would have this Court usurp the clear province of the NYS Legislature in deeming the individual municipal entities of a statutorily created joint watershed board as individually and severally liable. If the NYS Legislature intended for ECSWCD and WCSWCD to be individually responsible for the Buffalo

Creek Watershed Project, then it need not have created the Joint Board in the first place.

The Appellate Division agreed when it specifically noted within its Memorandum and Order that "Plaintiff reasons that the Board has no separate existence and cannot act independently of the Districts. We reject that contention." R. 2205. The Appellate Division then set forth the relevant legislative history of the Joint Board, which included three separate citations to the 1949 Bill Jacket for Chapter 374. R. 2205. Further, the Joint Board was empowered by the legislature to engage in maintenance work, receive monies, and expend monies in its discretion. R. 2206. Crucially, the Appellate Division noted that "the record establishes, and plaintiff does not dispute, that the Board is capable of entering into contracts and being sued." R. 2206. Moreover, the Appellate Division held that "although there is necessarily some degree of relationship between the Board and the abovementioned Districts, the legislation creating the Board established that it exists as an entity that is separate and distinct from the Districts." R. 2206. Finally, the Appellate Division held that "[t]o the extent that plaintiff further contends that ECSWCD may otherwise be liable, we conclude that her contention lacks merit."

The Supreme Court similarly agreed when it explicitly noted in its decision on the underlying summary judgment motions of ECSWCD and WCSWCD that "[t]here's no agreement between [ECSWCD and/or WCSWCD] and the Joint Board,

there's no profiteering together. The Joint Board can be sued on its own, as taken place here." R. 143.

Importantly, the plaintiff's *Brief on behalf of Plaintiff-Appellant* is replete with admissions to the fact that the Joint Board is a separate legal entity from ECSWCD and WCSCWD, that it is capable of entering a contract, and that it is capable of being sued. At page 9, the plaintiff acknowledges that the Joint Board entered into a contract with NRCS. At page 10, the plaintiff stated that ". . . the Joint Board has the formal status of a legal entity . . ." At page 16, the plaintiff stated that ". . . the Joint Board bore responsibility for the subject low head dam . . ." At page 26, the plaintiff reiterated that ". . . the Joint Board is a legal public entity in its own right . . ."

3. The Joint Board is not a "joint venture" of ECSWCD and WCSWCD, but a legislatively created joint board of directors of Erie-Wyoming county soil conservation district overseeing the Buffalo creek watershed.

The plaintiff's own arguments within their *Brief on behalf of Plaintiff-Appellant* refutes their claim that the Joint Board should be considered a "joint venture" of ECSWCD and WCSWCD. Namely, at page 49 the plaintiff defines a "joint venture" as "an association of two or more persons to carry out a single business enterprise <u>for profit</u> . . ." (emphasis added). The plaintiff further details the essential elements of a "joint venture," which included "a provision for the sharing of profits and losses." Both ECSWCD and WCSWCD are public entity not-for-

profits, as well as the Joint Board. It should go without saying that their purpose is to benefit the public, not generate profits. Specifically, it is the mission of ECSWCD to protect and promote the health, safety, and general welfare of the present and future generations of Erie County residents through the conservation of soil, water, air, plant, and animal resources by delivery of sound, science-based, locally-directed, technical and educational assistance. Obviously, there are no provisions for the Joint Board, or ECSWCD and WCSWCD, to share profits or losses. Tellingly, the plaintiff does not even allege that there are. The plaintiff's Brief simply glosses over this element of "joint ventures" with vague references to statutory provisions seemingly in hopes that they can manifest a "joint venture" into being through wishful repetition. The plaintiff offers no actual facts or examples as there are none. Instead, the plaintiff continues to argue against ECSWCD and WCSWCD as if the Joint Board is not a separate legal entity that can be sued, even though they sued the Joint Board and had a jury trial against the Joint Board.

Next the plaintiff endeavors to proffer examples of governmental entities that were found to be "joint ventures" by various courts in New York and throughout the United States. First, the plaintiff cites to *Bogart v. Town of New Paltz*, 145 A.D.2d 110 (3d Dept. 1989), in which the Town of New Paltz and Village of New Paltz were noted to be in a "joint venture" regarding the New Paltz Emergency Communications Center. Even a cursory review of *Bogart* reveals that it is readily

distinguished from the case before this Court. First, the New Paltz Emergency Communications Center was not created by the New York State Legislature. Second, The Village of New Paltz is completely contained within the Town of New Paltz. Third, the reference to a "joint venture" within *Bogart* is a plainly stated fact; it was not an issue under dispute that was determined by the Court. The Village and the Town were clearly in agreement that their Emergency Communications Center was a joint venture between them. Obviously, the case before this Court is completely the opposite. The second case cited by the plaintiff, *DeLong v. Erie County*, 89 A.D.2d 376, 381 (4th Dept. 1983), is the same situation as *Bogart*. In *DeLong*, the County of Erie and City of Buffalo operated their 911 center as a "joint venture." It was not created by the New York State Legislature; the City of Buffalo is entirely contained within Erie County, and the "joint venture" is a plainly stated, undisputed fact. Again, the case before this Court is completely the opposite. The Joint Board was created by the New York State Legislature. ECSWCD and WCSWCD are neighboring conservation districts, not a smaller municipality contained within a larger municipality. Lastly, it is very much disputed that the Joint Board was a "joint venture" because it was not. Rather, the Joint Board is a legislatively created joint board of directors of Erie-Wyoming county soil conservation district overseeing the Buffalo creek watershed.

Lastly, the plaintiff cites to a number of cases from other states. Putting aside the obvious fact that these cases are at best persuasive authority, they are readily distinguished factually and legally. These cases do not hold for the position that the plaintiff is putting forth to this Court. They do not deal with a statutorily created governmental entity, which a state court later determined was a "joint venture" of two other governmental entities. If any of these out-of-state cases actually contained such a holding, they would not have been unceremoniously buried within a string citation without so much as a parenthetical phrase for explanation.

Even the plaintiff's citation to *Martin v. County of Los Angeles*, 2002 WL 31117056 (Cal. Ct. App. Second District, Division 4, 2002) does not hold what the plaintiff is suggesting to this Court. In *Martin*, the California Court of Appeal found that "Where public agencies enter into an agreement to perform the duties of each other--as this Court finds the County and the District have done here--they are jointly and severally liable for injuries arising from the acts done pursuant to such agreement. (Gov. Code, § 895.2.)." Notably, the California Court of Appeal actually addressed our situation later in its opinion when it noted that "This case is clearly distinguishable from *Los Angeles County v. Continental Corp.*, 113 Cal.App.2d 207, 218 (1952), wherein a corporation sued by the County for back taxes sought to assert that the County and the Los Angeles Flood Control District were the same entity, solely on the basis that the County Board of Supervisors had the same members as

the District's Board of Directors." Thus, California acknowledged that simply because two municipal entities have the same members, does not mean that those two entities should be treated as the same entity. Rather, California held that when two entities enter into an agreement to perform the duties of each other, they will be held jointly and severally liable for any injuries resulting therefrom. The Joint Board is not the result of an agreement between ECSWCD and WCSWCD, but of the New York State Legislature, which decided to create a separate legal entity whose sole province was overseeing the Buffalo creek watershed.

4. The plaintiff's proffered explanation of the "Public Benefit" contract between County of Erie and ECSWCD is contrary to law and fact.

The plaintiff's final argument against ECSWCD is unsupported by any case law whatsoever, whether from New York State or any other State. The plaintiff attempts to argue that there should be liability against ECSWCD because their "Public Benefit" contract with County of Erie includes the words "protect the health, safety and general welfare of the present and future generation of Erie County residents . . ." Obviously, this position is utterly contrary to New York State jurisprudence. At a minimum, for the plaintiff's half-baked legal theory to move forward, they would need to meet the requirements of non-contracting third parties under *Espinal v. Melville Contrs.*, 98 N.Y.2d 136 (2002), which they obviously have not, and cannot, do against ECSWCD in this action, as they have not even bothered to allege that their case falls within one of the three enumerated exceptions.

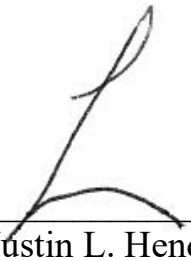
CONCLUSION

Based on the foregoing, it is respectfully submitted that the Supreme Court properly granted the summary judgment motion of ECSWCD in that ECSWCD did not owe the plaintiff a duty of care, and that the Appellate Division properly affirmed same. Accordingly, Defendant-Respondent Erie County Soil & Water Conservation District respectfully requests that the Memorandum and Order of the Appellate Division, Fourth Judicial Department, affirming the grant of summary judgment by the Supreme Court, Erie County, to ECSWCD be wholly affirmed.

Dated: August 8, 2022
Buffalo, New York

Respectfully submitted,

KENNEY SHELTON LIPTAK NOWAK LLP



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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.13 that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

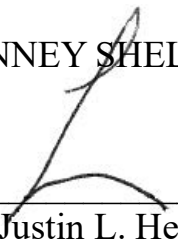
Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc. is 4,508 words.

Dated: August 8, 2022
Buffalo, New York

Respectfully submitted,

KENNEY SHELTON LIPTAK NOWAK LLP



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STATE OF NEW YORK)
) ss.:
COUNTY OF MONROE)

AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS DELIVERY

I, **Jeremey Slyck**, of Rochester, New York, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On August 8, 2022

deponent served the within: **BRIEF FOR DEFENDANT-RESPONDENT ERIE COUNTY SOIL & WATER CONSERVATION DISTRICT**

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the address(es) designated by said attorney(s) for that purpose by depositing **three (3)** true copies of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on August 8, 2022

Andrea P. Chamberlain
Notary Public, State of New York
No. 01CH6346502
Qualified in Monroe County
Commission Expires August 15, 2024

Jeremy Slyck

Job #511522