To be argued by:
Norman S. Greene, Esq.
(Time requested: 15 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 TOWN OF WEST SENECA

BOUVIER LAW LLP
Norman E.S. Greene, Esq., of Counsel
Attorneys for Defendant-Respondent Town of West Seneca
350 Main Street, Suite 1800
Buffalo, New York 14202
(716) 856-1344
ngreene@bouvierlaw.com

August 4, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES……...ii-iii

PRELIMINARY STATEMENT…….....1

STATEMENT OF FACTS……....3

QUESTIONS PRESENTED…….8

SHORT ANSWER TO QUESTION PRESENTED…….....……....8

LEGAL ARGUMENT……...……...9

POINT I

THE DETERMINATION OF THE COURT OF ORIGINAL JURISDICTION AS WELL AS THE APPELLATE DIVISION FOR THE FOURTH JUDICIAL DEPARTMENT AWARDING SUMMARY JUDGMENT TO THE TOWN OF WEST SENECA WAS PROPERLY MADE, INASMUCH AS THE TOWN OF WEST SENECA HAD NO LEGAL DUTY PERTAINING TO OPERATION OR MAINTENANCE OF THE LOW-HEAD DAMS OR SILLS LOCATED IN BUFFALO CREEK…….9

CONCLUSION…….…….22

CERTIFICATE OF COMPLIANCE……...……..23

TABLE OF AUTHORITIES

CASES

Adirondack League Club v Sierra Club, 92 NY2d 591, 684 NYS2d 168, 706 NE2d 1192 (1998)……19, 20

Caldwell v Island Park, 304 NY 268, 107NE2d 441 (1952)……..20

Carlo v Town of E Fishkill, 19 AD3d 442, 798 NYS2d 64 (2nd Dept. 2005)…….14

Cleary v Harris Hill Golf Ctr., Inc., 23 AD3d 1142, 804 NYS2d 202 (4th Dept. 2005)……12

Coogan v D'Angelo, 66 AD3d 1465, 886 NYS2d 306 (4th Dept. 2009)……12

CPC Int'l, Inc. v. McKesson Corp., 70 NY 268, 519 NYS2d 804, 514 NE2d 116 (1987)……..1

Cupo v Karfunkel, 1 AD3d 48, 767 NYS2d 40 (2nd Dept. 2002)……....20

Dale v Chisholm, 67 AD3d 626, 889 NYS2d 58 (2nd Dept. 2009)……..19

Darby v Compagnie Natl. Air France, 96 NY2d 343, 753 NE2d 160, 728 NYS2d 731 [2001]……...16

Galindo v. Town of Clarkstown, 2 NY3d 633, 781 NYS2d 249, 814 NE2d 419 (2004)…….....10, 11, 12

Garner v. City of New York, 6 AD3d 387, 775 NYS2d 335 (2nd Dept. 2004)……..……...…13

Hough v Hicks, 160 AD2d 1114, 554 NYS2d 340 (3rd Dept. 1990)……...17

Ledet v Battle, 231 AD2d 884, 647 NYS2d 601 (4th Dept. 1996)……...15

Mattice v Wilton, 160 AD2d 1195, 555 NYS2d 461 (3rd Dept. 1990)……16

Melby v Duffy, 304 AD2d 33, 758 NYS2d 89 (2nd Dept. 2002)……..18

Miller v. Tuchols, 90 AD2d 957, 456 NYS2d 546 (4th Dept. 1982)……...13, 14

Mohawk Valley Ski Club, Inc. v Town of Duanesburg, 304 AD2d 881, 757 NYS2d 357 (3rd Dept. 2003)……..19

O'Keeffe v. State, 140 AD2d 998, 530 NYS2d 911 (4th Dept. 1988)……..21

Oxman v. Mountain Lake Camp Resort, Inc., 105 AD3d 653, 963 NYS2d 262 (1st Dept. 2013)……...14

Pulka v. Edelman, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019, (1976)…….10

Stagnitta v. County of Onondaga, 147 AD2d 935, 537 NYS2d 95 (4th Dept. 1989)…….13

Vestal v County of Suffolk, 7 AD3d 613, 776 NYS2d 491 (2nd Dept. 2004)…..…20

We're Assoc. Co. v. Cohan, *Stracher & Bloom*, 65 NY2d 148, 490 NYS2d 743, 480 NE2d 357 (1985)……..…1

Other

Section 15-0103 of the New York State Environmental Conservation Law.....17

PRELIMINARY STATEMENT

This brief is submitted on behalf of the defendant-respondent Town of West Seneca ("Town") with respect to a segment of the brief submitted on behalf of the Plaintiff-Appellant Suzanne P., Administratrix of the Estate of Mitchell Pearce, Deceased ("Pearce"). While the plaintiff's brief raises various issues pertinent to the codefendants in this action, our brief will be confined to a response to the issue raised by the Appellant in Point 6 of their brief, namely that the lower courts erred in granting the motion for summary judgment filed on behalf of the Town.

In that respect, reference will be made to relevant aspects of the plaintiff's brief regarding the legal responsibility of the defendant Town. Given the uncontroverted applicable law in view of all testimony set forth in this Record, it is crystal clear that both the trial court and the Appellate Division for the Fourth Judicial Department properly granted summary judgment to the Town for the reasons set forth in their Memorandum and Order.

While not set forth at length herein, the Town joins in any arguments posited relative to the untimeliness of the plaintiff's appeal *We're Assoc. Co. v. Cohan*, *Stracher & Bloom*, 65 NY2d 148, 490 NYS2d 743, 480 NE2d 357 (1985); *CPC Int'l, Inc. v. McKesson Corp.*, 70 NY 268, 519 NYS2d 804, 514 NE2d 116 (1987).

The Memorandum and Order of the Fourth Department granting dismissal of the plaintiff's complaint was a final determination and was not timely appealed by the plaintiff.

Nonetheless, we will address the issues raised by the plaintiff-appellant, even if their appeal involving the Town is deemed untimely as a matter of law, given the procedural history evident in the Record.

STATEMENT OF FACTS

The plaintiff alleges that the Town was negligent and violated legal duties and responsibilities pertaining to maintenance and repair of the low-head dam or sills, thus permitting the structure to remain in an unsafe, defective and dangerous condition. There is also the contention in plaintiff's complaint that the Town failed to warn of latent dangers and defects concerning the dam's structures. Additionally, the complaint alleges that the Town had actual knowledge of the dangers posed by this structure. The Town denied all material allegations of the plaintiff's complaint.

Plaintiff's brief references portions of in the Record but ignores other facts and circumstances supporting the Town's position that no legal duty exists. Reference is made to the testimony of Evelyn Hicks (304-491). Her testimony taken in March 2017 acknowledges that she had previously been the West Seneca chairperson of the Environmental Commission for many years. She was queried about the 1987 death of a firefighter in Buffalo Creek at or near one of the sills. When asked why the Town failed to post any signs, she responded that "the Town was not responsible for posting signs or for activities at that sill." (344).

She testified unequivocally that the Town "didn't own, maintain or have any control over that low-head dam system." (344-345). She identified an individual named Mark Gaston as a person employed by the Erie County Soil & Water

Conservation District, and again verified that the Town had "no authority over the low-head dam system." (346-350). She testified that West Seneca in no way or respect either encouraged or contemplated that its residents would utilize Buffalo Creek for recreational purposes. (351). Property on both sides of Buffalo Creek at or near the point where the accident occurred was privately owned. (381-383).

This witness testified that "people that enter the creek, or any water body, do so at their own peril and at their own discretion. You can't control what people do. Any people know that water can be dangerous, and common sense must prevail when anybody enters any body of water, whether it be a swimming pool, a creek or any other water body." (386). She testified without reservation that the area where the incident occurred was "not a recreational area, so to speak." (387).

This witness verified that prior to the accident there had been requests made to the Joint Board, the Erie District, the Wyoming District and other responsible governmental entities to address and review any safety issue regarding the sills. (438-439). She stated that any individuals who entered the water in the area where the sills were located were not the Town's legal responsibility and beyond the ability of the Town to control or supervise (448-449).

With respect to the issue of the legal responsibility of the Town, Mark C. Gaston testified at length. (1029-1331). When his deposition was taken, Gaston was the District Fieldman for the Erie County Soil & Water District. (1049-1051).

He identified the location of the five fills and acknowledged that their purpose was to reduce potential localized flooding. (1113). He testified under oath that the Joint Board had complete responsibility for operating and maintaining all aspects of the originally constructed flood control project, including the sills. (1113-1114).

He also conceded that following a 1991 incident when an individual drowned, the Joint Board petitioned the USDA Natural Resources Conservation Service on multiple occasions "to review, modify, design and offer changes that might be considered in order to make the area safer." (1148). He stated that the Joint Board reached out to the NRCS because an Operation and Maintenance Agreement charged the Joint Board with exclusive operation and maintenance of the sill structures, and the Board relied upon the technical expertise of the Conservation Service, inasmuch as "they have ultimate review and approval over that." (1149).

He also testified that all of the property adjacent to the location of the sills in Buffalo Creek was owned by private landowners rather than any public entity, for the most part (1153-1154). He acknowledged that prior to this unfortunate accident occurring, the Joint Board or Erie District sought permission from the County in order to erect signs in the area, but no permission was granted. (1223-1230).

Gaston asserted that the Town had absolutely nothing to do with respect to either the design of these sills or with their construction. (1282-1283). Even more importantly, the Town had absolutely no responsibility for maintenance or operation of the sills at any time. (1283). Even following the accident when signs were posted, the Town had absolutely no responsibility or input with regard to their placement. (1283-1284).

It was noted that the Town owned a landlocked 14-acre parcel near where sill #1 was located, but the Town was approached like any other landowner with regard to granting permission to the Joint Board to erect post-accident signs on their property. (1284). He considered the Town to be simply like any other private landowner with regard to the necessity to obtain permission, including such adjacent landowners as National Fuel and Canisius College. (1285-1286).

Gaston referenced the Operation and Maintenance Agreement between the Joint Board and the NRCS as well as related correspondence from these governmental entities pertaining to assistance with maintenance and operation of the sills. (1333-1374). There was nothing in this written material whatsoever that permitted any basis to conclude that the Town was in any way or respect either the owner or otherwise responsible for the repair, maintenance, operation or control of the sills in Buffalo Creek.

An affidavit of Shelia M. Meegan (280-281) verified that the Town of West Seneca neither owned nor maintained the area of Buffalo Creek where the dams/sills were located adjacent to the Earsing Sills Oxbow near Lexington Green. (280-281). The contents of that affidavit was uncontroverted in this Record.

QUESTION PRESENTED BY APPELLANT

6. Did defendant, Town of West Seneca fail to uphold a duty to warn of the concealed dangers purposed with the subject low-head dam.

SHORT ANSWER TO QUESTION PRESENTED

The Town of West Seneca had no legal duty with regard to any aspect of the operation, maintenance or control of the low-head dam or sills.

LEGAL ARGUMENT

Point I

The determination of the court of original jurisdiction as well as the Appellate Division for the Fourth Judicial Department awarding summary judgment to the Town of West Seneca was properly made, inasmuch as the Town of West Seneca had no legal duty pertaining to operation or maintenance of the low-head dams or sills located in Buffalo Creek.

Inter alia, the Fourth Department in a Memorandum and Order entered August 22, 2019 affirmed the lower court's granting of the Town's motion for summary judgment dismissing the complaint against that defendant. That Memorandum and Order was properly based on the well-settled law in New York, and must be affirmed in all respects by this Court.

There is absolutely no question that the Town did not own, operate, manage, supervise, control or administer all or any portion of the low-head dam or sills located on Buffalo Creek. The uncontroverted testimony is that original construction of the sills was a project undertaken by the federal government and thereafter solely administered by the Joint Board of Directors of the Erie-Wyoming County Soil Conservation District, also known as the Erie-Wyoming Joint Watershed Board. ("Joint Board").

A review of all relevant deposition testimony requires the conclusion that construction of the sills was at the sole aegis of the federal government in furtherance of their intent to control flooding along the banks of Buffalo Creek. In

that respect, the project targeted Buffalo Creek from its headwaters in Wyoming County and flowing through West Seneca into the Buffalo River and Lake Erie. There is absolutely no testimony in this Record that West Seneca had any responsibility with regard to maintenance, operation or control of the sills. In the absence of a legal duty, there can be no breach or resultant liability. *Pulka v. Edelman,* 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (1976).

There is absolutely no testimony suggesting that this incident occurred adjacent to any designated West Seneca recreational area, and the Town was under no legal duty above and beyond that of any other landowner. While it is clear from the deposition testimony that the youngsters entered the creek from private property, even if they had somehow entered through property that had been owned by the Town there would be no liability purely and simply as a landowner, any more than a private landowner would be responsible for operation or maintenance of the sills simply because that owner is vested in property adjacent to Buffalo Creek.

Language employed by this Court in *Galindo v. Town of Clarkstown*, 2 NY3d 633, 781 NYS2d 249, 814 NE2d 419 (2004) is most instructive. This Court acknowledged that a landowner had a duty to exercise reasonable care in maintaining his own property in a reasonably safe condition. As such, the nature and scope of that duty and the individuals to whom the duty is owed require

consideration of the likelihood of injury to another from a dangerous condition existing on the owner's property itself.

Most importantly, the Court stated as follows, at 2 NY3d 636:

> "However, as a general matter, an owner owes no duty to warn or to protect others from a defective or dangerous condition on neighboring premises, unless the owner had created or contributed to it (see *Gehler v City of New York, 261 A.D.2d 506, 692 N.Y.S.2d 397 [2d Dept. 1999]; Pensabene v. Incorporated Vil. Of Val. Stream, 202 A.D.2d 486, 609 N.Y.S.2d 75 [2d Dept. 1994]; Gipson v. Veley, 192 A.D.2d 826, 596 N.Y.S.2d 548 [3d Dept. 1993])*. The reason for such rule is obvious—a person who lacks ownership or control of property cannot fairly be held accountable for injuries resulting from a hazard on the property. We hold that this rule requires a dismissal of plaintiff's claim against Clark."

It is clear beyond cavil that the Town of West Seneca neither created nor contributed to any condition existing relative to the sills. The decedent in *Galindo*, unlike here, was actually present on the defendant's property when an adjacent landowner's tree fell and struck him. This Court rejected the argument posed by the plaintiff that the defendant had a legal duty to warn of such a danger. The very argument propounded by plaintiff's counsel in this case was unequivocally rejected by this Court in *Galindo.*

In a compelling *dictum*, this Court acknowledged that it would constitute an unreasonably onerous burden to require a landowner to evaluate and warn others concerning a danger caused by a condition present on adjoining property. While

the decision in *Galindo* related to a private adjacent landowner, the language would apply *a fortiori* to the Town here, since it is evident that the Town was not an adjacent landowner whose property was crossed by the youngsters in order to obtain access to the sills.

In *Cleary v Harris Hill Golf Ctr., Inc.*, 23 AD3d 1142, 804 NYS2d 202 (4th Dept. 2005), the plaintiff sustained injury on property directly adjacent to a golf course. The plaintiff claimed that the golf course operators were negligent by reason of their failure to guard and warn against a dangerous condition on adjacent property. The Fourth Department reasoned as follows, at 23 AD3d 1142:

> "Under the circumstances of this case, defendant had no duty to guard or warn plaintiff against the hazardous condition of a property that it did not own or control and over which it exercises no special use (*see* *Kaufman v Silver, 90 NY2d 204, 207-209, 681 NE2d 417, 659 NYS2d 250 [1997]; Brown v Congel, 241 AD2d 880, 881, 660 NYS2d 507 [1997])*. "[A]s a general matter, an owner owes no duty to warn or to protect others from a defective or dangerous condition on neighboring premises, unless the owner had created or contributed to it…."

Where a defendant established that he did not own property where an accident occurred and that he neither created nor contributed to the alleged dangerous condition on such adjacent property, no liability will result. *Coogan v D'Angelo*, 66 AD3d 1465, 886 NYS2d 306 (4th Dept. 2009).

In *Stagnitta v. County of Onondaga*, 147 AD2d 935, 537 NYS2d 95 (4th Dept. 1989), the Town of Cicero sought summary judgment with respect to a motor vehicle accident. Their argument was predicated upon the fact that the Town did not own, control or maintain all of the roads comprising the intersection. The trial court had denied summary judgment but the Fourth Department reversed, holding that a municipality cannot be held liable for maintenance of a roadway or adjacent property which it does not own, maintain or control. See also *Miller v. Tuchols*, 90 AD2d 957, 456 NYS2d 546 (4th Dept. 1982).

Other departments concur with the limitation of liability in the absence of a clearly defined legal duty. In *Garner v. City of New York*, 6 AD3d 387, 775 NYS2d 335 (2nd Dept. 2004), the Second Department held that the City of New York was a mere adjacent property owner and thus had no duty to warn of, much less remedy, a dangerous or defective condition existing on adjacent property unless it actively caused or contributed to that condition. There is no evidence in our case that the Town either caused or contributed to any condition leading to this unfortunate tragedy.

As was noted in *Garner*, the plaintiff attempted to establish that the City may have been negligent in maintaining a bulkhead near the premises, which arguably caused or contributed to the alleged dangerous condition at issue in that case. The Second Department rejected expert affidavits relied upon by the plaintiff,

concluding that they were legally insufficient to establish that any condition related to the bulkhead had any effect whatsoever on the occurrence of the accident. Again, there is no basis to suggest that the Town of West Seneca in any manner was responsible for maintenance or operation of the sills.

In *Oxman v. Mountain Lake Camp Resort, Inc.*, 105 AD3d 653, 963 NYS2d 262 (1st Dept. 2013), the First Department stated as follows, at 105 AD3d 654:

> "The fact that Ulster Heights, and not defendants, owned the beach, coupled with the testimony of defendant Parzoch, the owner of defendant Mountain Lake Camp Resort, Inc. that Ulster Heights managed the lake and controlled access to it, that he did not maintain, manage or inspect the beach, that he had no obligation to do so, and that Mountain Lake never told its guests that it maintained the beach, establishes prima facie that defendants had no duty to plaintiff to maintain the beach (see *Lopez v Allied Amusement Shows, Inc., 83 AD3d 519, 921 NYS 2d 231 [1st Dept. 2011])*. In any event, there is no evidence that defendants created the condition complained of or had notice of it, and no evidence, contrary to plaintiff's contention, that the condition resulted from any negligence on their part in maintaining the beach gratuitously (see *Darby v Compagnie Natl. Air France, 96 NY2d 343, 753 NE2d 160, 728 NYS2d 731 [2001]; Garner v City of New York, 6 AD3d 387, 775 NYS2d 225 [2d Dept. 2004]), lv denied 3 NY3d 609, 820 NE2d 291, 786 NYS2d 812 [2004])."*

In *Carlo v Town of E Fishkill*, 19 AD3d 442, 798 NYS2d 64 (2nd Dept. 2005), the Second Department also followed the controlling case law, holding that a municipality was not responsible for the negligent design of a facility that it does not

own. Consequently, the Town here cannot be held responsible for failure to maintain an instrumentality that it neither owns nor controls.

In *Ledet v Battle*, 231 AD2d 884, 647 NYS2d 601 (4th Dept. 1996), the Fourth Department determined that a trial court committed reversible error by denying a motion for summary judgment filed by the Town of Sodus. Interestingly enough, the plaintiff was driving his automobile on Route 104 and the defendant was driving on an intersecting town road. The testimony in the case revealed that the town did not control or maintain traffic signs at or near the intersection, since Route 104 was a State road. As such, the State had exclusive jurisdiction. The Fourth Department stated as follows, at 231 AD2d 884-885:

> "Although a municipality owes a duty to the traveling public to keep its highways in a reasonably safe condition, such duty extends only to the areas of those highways that the municipality owns or controls (*see, Nurek v Town of Vestal, 115 AD2d 116, 116-117).* Under the Vehicle and Traffic Law, the State Department of Transportation has jurisdiction over all State highways and the obligation to maintain and sign "any highway intersecting or meeting a state highway maintained by the state for a distance not exceeding one hundred feet from such state highway" (Vehicle and Traffic Law §1621 [a]; *Miller v Tuchols, 90 AD2d 957, 958).* "Nothing contained in *[Vehicle and Traffic Law] section 1682* grants local authorities the right, or imposes upon them the duty, to regulate traffic on state highways or roads intersecting State highways" (*Miller v. Tuchols, supra, at 958).*"

In that Fourth Department decision, it was noted that even though the Town of Sodus had previously passed a resolution requesting that additional safety measures be taken, that legislative action would not result in arguable imposition of liability on the Town, much less serve as a basis to somehow create any legal duty where none had previously existed.

In *Mattice v Wilton*, 160 AD2d 1195, 555 NYS2d 461 (3rd Dept. 1990), contrary to the appellant's arguments, the Third Department affirmed the well-settled law that post-accident requests by the municipality directed to another governmental entity, such as the State, to conduct an investigation did not in any way constitute conduct which served to impose a legal duty on the Town.

In a decision published by the Court of Appeals in 2001, *Darby v Compagnie Nat'l Air France*, 96 NY2d 343, 728 NYS2d 731, 753 NE2d 160 (2001), this Court held that a hotel which had even gone so far as to encourage and facilitate the use of a beach in the area, but for which it had no ownership interest or control, did not by such unquestioned encouragement somehow create any legal duty, much less make it an insurer of the safety of guests who utilized that beach.

This Court stated in unequivocal terms that "an entity which does not control the area or undertake a particular responsibility to do so has no common law duty to warn, correct, or safeguard others from naturally occurring, even if hidden, dangers common to the water in which they are found." (96 NY2d at 348).

In accordance with Section 15-0103 of the New York State Environmental Conservation Law, the State has jurisdiction, ownership, control, and responsibility to maintain all natural waterways. Therefore, even if the Town had joined with the State or any other governmental authority to improve the safety of the area following the accident in question, which it did not, that action would not in any event give rise to any pre-accident legal duty on the Town.

In *Hough v Hicks*, 160 AD2d 1114, 554 NYS2d 340 (3rd Dept. 1990), following a motor vehicle accident the Town joined with the State in order to improve safety at the intersection where it occurred. The Third Department held in accordance with applicable law that the fact that the Town engaged in post-accident activity to make the intersection safer did not thereby subject the Town to potential liability. No duty arose even if it was established that a request was made to those who in fact owned and controlled Buffalo Creek to consider addressing any potential dangers, including the posting of signage.

There is no testimony in this case that this section of Buffalo Creek was in any way "navigable" within the meaning of the applicable law. Even it if were, the shores of navigable rivers and streams, as well as the land beneath the waters, clearly belong to the State.

It is also uncontroverted that the Town played absolutely no role or assumed any responsibility for re-design of the sills during the 1980s. After this accident,

the Town had absolutely nothing to do with construction, erection or establishment of any warning signs placed by the County on adjacent private property.

Where a town exercised more proprietary authority over an area where an accident occurred and where the area was not part of a public park, there was no liability, since the municipal responsibility was considered governmental rather than proprietary. *Melby v Duffy*, 304 AD2d 33, 758 NYS2d 89 (2nd Dept. 2002).

The rationale of the Second Department in *Melby* was abundantly set forth at 304 AD2d 39-40, as follows:

> "The plaintiff's claims against both the Town and the County are based upon an alleged breach of a governmental duty to warn of a hazardous condition created by a third party. A duty to warn and a duty to cordon off a zone of danger created by a third party fall within the governmental function of providing adequate police protection to the general public (see *Price v New York City Hous. Auth., 92 NY2d 553, 558, 684 NYS2d 143, 706 NE2d 1167 [1998]; Lorber v Town of Hamburg, 225 AD2d 1062, 1063, 639 NYS2d 607 [1996]; Dutton v City of Olean, 60 AD2d 335, 338, 401 NYS2d 118 [1978], afffd 47 NY2d 756, 417 NYS2d 463, 391 NE2d 299 [197]).* A municipality "remains immune from negligence claims arising out of governmental functions such as police protection unless a special relationship" exists between the plaintiff and the municipality (*see Price v. New York City Hous. Auth., supra at 558; Lorber v Town of Hamburg, supra at 1063; Dutton v. City of Olean, supra).*

The Court went on to set forth the elements of a special relationship, as follows, at 304 AD2d 39-40:

> "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" *(Cuffy v City of New York, 69 NY2d 255, 260, 513 NYS2d 372, 505 NE2d 937 [1987]).*
>
> In this case, there was no direct contact between the Town or the County and the plaintiff before the accident, and no evidence of an assumption of an affirmative duty to the plaintiff. In the absence of any indication of a special relationship between the plaintiff and the Town or the County, summary judgment was properly granted in their favor."

There is not a scintilla of evidence that Buffalo Creek afforded any capacity for transport, whether for trade or travel, much less limited recreation use. *Dale v Chisholm*, 67 AD3d 626, 889 NYS2d 58 (2nd Dept. 2009); *Mohawk Valley Ski Club, Inc. v Town of Duanesburg*, 304 AD2d 881, 757 NYS2d 357 (3rd Dept. 2003).

The appellant cites this Court's decision in *Adirondack League Club v Sierra Club*, 92 NY2d 591, 684 NYS2d 168, 706 NE2d 1192 (1998). The *sine qua non* of navigability is that the waterway must be useful as a means for transportation, and there is no proof in this Record that Buffalo Creek meets the "usefulness" test of

Adirondack League. Indeed, it is the existence of the sills themselves which in and of themselves prevent navigability.

The appellant also cites *Caldwell v Island Park*, 304 NY 268, 107NE2d 441 (1952). The factual context is materially different, inasmuch as the municipality was the actual operator of the beach park where the plaintiff was injured by fireworks. This Court determined that a jury question arose with respect to whether the injury resulted from the negligent failure of the municipality to take appropriate measures for prevention of such injuries. There is no evidence here that the incident incurred at or near a park or similar public property maintained by the Town.

Vestal v County of Suffolk, 7 AD3d 613, 776 NYS2d 491 (2nd Dept. 2004) is also cited. In that case, a child was injured while riding her bicycle on a pathway in a county park. The facts are materially at variance with the facts of our case. In *Vestal*, the Second Department rejected any argument that the county was entitled to governmental immunity, since the operation of a public park was not a governmental but rather a proprietary function.

To the same effect, in *Cupo v Karfunkel*, 1 AD3d 48, 767 NYS2d 40 (2nd Dept. 2002), the issue related to whether or not an alleged defect in a city sidewalk was open and obvious, and once again the factual context of that action makes any argument equally unavailing. The same conclusion is required after review of

O'Keeffe v. State, 140 AD2d 998, 530 NYS2d 911 (4th Dept. 1988), where the accident actually occurred in a park that was unquestionably owned by the State.

Other cases cited by appellant are irrelevant or inapposite and are based upon completely dissimilar factual contexts. There is also absolutely no evidence that the Town engaged in any post-accident activity whatsoever which somehow served to retroactively raise a question of fact with regard to existence of any legal duty here.

CONCLUSION

Based upon the foregoing, it is respectfully requested that the Memorandum and Order of the Appellate Division for the Fourth Judicial Department granting the Town of West Seneca's motion for summary judgment dismissing the complaint be affirmed by this Court, together with such other and further relief as may be appropriate.

Dated: August 3, 2022
Buffalo, New York

Respectfully submitted,

Norman E.S. Greene, Esq., *of Counsel*
BOUVIER LAW LLP
Attorneys for Defendant – Respondent – Town of West Seneca
350 Main Street, Suite 1800
Buffalo, New York 14202
(716) 856-1344

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 4,562 words.

Dated: August 3, 2022

Norman E.S. Greene, Esq., *of Counsel*
BOUVIER LAW LLP
Attorneys for Defendant – Respondent – Town of West Seneca
350 Main Street, Suite 1800
Buffalo, New York 14202
(716) 856-1344

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF MONROE	)		**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 4, 2022

deponent served the within: **BRIEF FOR DEFENDANT-RESPONDENT TOWN OF WEST SENECA**

Upon:

Paul William Beltz, P.C.
William A. Quinlan, Esq.
Attorney for Plaintiff-Appellant
36 Church Street
Buffalo, New York 14202
(716) 852-1000

Walsh Roberts & Grace
Mark P. Della Posta, Esq
Attorneys for Defendant-Respondent
Joint Board of Directors of Erie-Wyoming County Soil Conservation District
400 Rand Building, 14 Lafayette Square
Buffalo, New York 14203
(716) 856-1636

Barth Sullivan & Behr
Philip C. Barth III, Esq
Attorneys for Defendant-Respondent
Wyoming County Soil & Water Conservation District
43 Court Street, Suite 600
Buffalo, New York 14202
(716) 856-1300

Kenney Shelton Liptak Nowak LLP
Justin L. Hendricks, Esq.
Attorneys for Defendant-Respondent
Erie County Soil & Water Conservation District
The Calumet Building, 233 Franklin Street
Buffalo, New York 14202
(716) 853-3801

ERIE COUNTY ATTORNEY'S OFFICE
Jeremy C. Toth, Esq
Attorneys for Defendant-Respondent
County of Erie
95 Franklin Street, Suite 1634
Buffalo, New York 14202
(716) 858-2204

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 4, 2022

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

Jeremy Slyck

Job #511499