

To be Argued by:
BREANNA C. REILLY, ESQ.
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STATE OF NEW YORK
Court of Appeals

APL-2022-00033

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

Plaintiff-Appellant,

vs.

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.

—
Erie County Index No. 805498/2014.

**BRIEF FOR DEFENDANT-RESPONDENT
WYOMING COUNTY SOIL & WATER
CONSERVATION DISTRICT**

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PRELIMINARY STATEMENT

This Appeal arises from an action commenced in the Erie County Supreme Court, by the Plaintiff-Appellant, SUZANNE PEARCE, Administratrix of the Estate of MITCHELL PEARCE (hereinafter referred to as “Plaintiff-Appellant” and “Decedent” respectively) (R. 30-40). Upon completion of discovery, the Defendant-Respondent, WYOMING COUNTY SOIL & WATER CONSERVATION DISTRICT (hereinafter referred to as “the Wyoming District”) moved for Summary Judgement on the basis that it did not owe the decedent a duty of care (R. 768-778).

Following oral arguments, the Hon. Mark J. Grisanti issued an Order on April 10, 2018, granting the Wyoming District’s Motion for Summary Judgement (R. 124), on the grounds that the Wyoming District is a separate entity from the Joint Board of Directors of Erie-Wyoming County Soil Conservation District (hereinafter the “Joint Board”), and not responsible for the maintenance of the Earsing sills; thus, no duty was owed to the decedent. (R. 134). Following the entry of this Order, Plaintiff-Appellant filed Notice of Appeal of such order with the Appellate Division, Fourth Department. (R. 120). As it pertains to Defendant-Respondent Wyoming District, this Appeal arises from the Appellate Division, Fourth Department Memorandum and Order dated August 22, 2019, affirming the Order of Hon. Mark J. Grisanti, upholding the dismissal of the Complaint as against the Wyoming District. (R. 2203).

QUESTION PRESENTED

- 1.) Should the Summary Judgment Motion of defendant, the Wyoming District, have been granted?

Answer of the Appellate Division, Fourth Department: Yes

COUNTER STATEMENT OF FACTS

This action arises out of the death of Mitchell Peace which occurred on June 12, 2012, when the decedent was in the Buffalo Creek at or near the furthest west Earsing Sill near Lexington Green in the Town of West Seneca, County of Erie, State of New York. The decedent subsequently drowned, and Plaintiff-Appellant commenced the underlying action for wrongful death and conscious pain and suffering. (R. 30-40).

A 1944 flood control project had the goal of reducing sediment in the Buffalo Harbor by way of the Buffalo Creek. (R. 1103-1104). The Joint Board was established as a local project sponsor for the 1944 flood control project, and is a combination of the individual directors of the Erie County Soil & Water Conservation Districts (hereinafter the "Erie District") and the individual directors of the Wyoming District. (R. 1052).

During the 1950's, five sills/low head dams known as the Earsing Sills were installed in the Buffalo Creek to help reduce sediment in the Buffalo Harbor. (R. 1105). The Joint Board and the Natural Resource and Conservation Service would proceed to enter into multiple agreements that called for the Joint Board to be responsible for the operation and maintenance of The Buffalo Creek Flood Prevention Project. (R. 1335-54).

The Joint Board it is not a Partnership

Critical to understanding the nature of the Joint Board, and that it is **not a partnership between the Erie District and Wyoming District**, is the Joint Board's organic statute itself. The New York State Legislature created and organized the Joint Board by enacting a statute in 1949 (L. 1949 Ch. 374), providing in its first paragraph:

Section 1. The directors of the Erie and Wyoming County soil conservation districts, as now constituted under the soil conservation districts law shall constitute a joint board to be known as the joint board of directors of Erie-Wyoming County soil conservation district for the Buffalo Creek watershed and said joint board shall have the following duties and powers[.]

(R. 1794)

This statute clearly established the Joint Board as **comprised of specified, natural persons, individuals** – i.e., of “the directors” of the Erie and the Wyoming Districts – and not of a combination of those two districts themselves. The statute then proceeds, in five subparagraphs lettered (a) to (e), to grant the Joint Board those powers and creates those duties needed to carry out its mission, **acting independently** of both the Erie and Wyoming Districts. (R. 1794).

The Proceedings and the Decision Below

The Wyoming District moved for summary judgment arguing, based on undisputed, record evidence, that the Wyoming District played no part in the design, construction or maintenance of the Earsing Sills. (R. 774). It was demonstrated

further that the Joint Board, acting alone obtained the easements from riparian owners that were needed to provide access to Buffalo Creek for the operation and maintenance of the Earsing Sills. Further, it was proven that the Joint Board obtained permissions from the riparian owners to erect warning signs, and that the Wyoming District owned no land along Buffalo Creek, and did not participate in the effort to post warning signs. (R. 774). Only the Joint Board assumed a duty to maintain and replace the warning signs that it had installed. (R. 774).

Based on the foregoing undisputed facts, the Supreme Court granted summary judgment dismissing the complaint as against both Wyoming District and Erie District, on the grounds that “they are separate entities [from the Joint Board and] that they are not responsible for the maintenance” of the Earsing Sills. In further support of the Decision of the Supreme Court, Judge Grisanti stated: “there’s no agreement between the two [Districts] and the Joint Board, there’s no profiteering together. The Joint Board can be sued on its own...” (R. 134).

In a Memorandum and Order dated August 22, 2019, the Appellate Division, Fourth Department affirmed the decision of Hon. Mark J. Grisanti dismissing the action as against the Wyoming District and Erie District stating, in relevant part, “Plaintiff reasons that the Districts may be held liable for the actions of the Board because the Board has no separate existence and cannot act independently of the districts. We reject that contention.” (R. 2205). The Fourth Department states

“...the legislation creating the Board and abovementioned powers and capabilities of the Board establish that it exists as an entity that is separate and distinct from the Districts...” (R. 2206). Ultimately, the dismissal of the complaint as against Wyoming District was affirmed by the Fourth Department. (R. 2206).

ARGUMENT

POINT I

THE FOURTH DEPARTMENT’S MEMORANDUM AND ORDER AFFIRMING THE LOWER COURT’S GRANTING OF SUMMARY JUDGMENT IN FAVOR OF THE WYOMING DISTRICT ON THE GROUNDS THAT THEY DID NOT OWE A DUTY TO THE DECEDENT SHOULD BE UPHELD

“Before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff.” *Pulka v. Edelman*, 40 N.Y.2d 781, 782 (1976). A finding of negligence must be based only upon the breach of a duty. *Darby v. Compagnie Nat'l Air France*, 96 N.Y.2d 343, 347, 753 N.E.2d 160, 162, 728 N.Y.S.2d 731, 733 (2001). While it is the province of the jury to determine whether a duty has been breached, it is a question of law for the Court to first determine whether a duty exists. *Id.*

A landowner owes a duty to another on his land to keep it in a reasonably safe condition, considering all of the circumstances including the purpose of the person's presence and the likelihood of injury. *Weller v. Colleges of the Senecas*, 217 A.D.2d 280, 285, 635 N.Y.S.2d 990, 994 (4th Dept. 1995). The scope of a landowner's duty

to maintain property in a reasonably safe condition may also include the duty to warn of a dangerous condition. *Brzostowski v. Coca-Cola Bottling Co.*, 16 A.D.2d 196, 199, 226 N.Y.S.2d 464, 468 (4th Dept. 1962); *Cupo v. Karfunkel*, 1 A.D.3d 48, 51, 767 N.Y.S.2d 40, 42, (2nd Dept. 2003). It is well settled that liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of the premises. *Parslow v. Leake*, 117 A.D.3d 55, 60, 984 N.Y.S.2d 493, 498 (4th Dept. 2014). Furthermore, New York Courts have declined to extend the duty to warn to a non-owner where that individual or entity did not cause or contribute to the dangerous condition. *Galindo v. Town of Clarkstown*, 2 N.Y.3d 633, 636 (2004).

The Joint Board was a separate entity from the Erie Board and the Wyoming Board. (R. 2206). The Joint Board was formed particularly to sponsor the Buffalo Creek Project. (R. 1103). The Earsing Sills in question were installed in the Buffalo Creek in the 1950's in furtherance of the Buffalo Creek Project. (R. 1105). The sills were designed by the USDA Natural Resource Conservation Service. (R. 1148-49). The Natural Resource Conservation Service contracted out the construction of the sills to private contractors. (R. 1174-75, 1181, 1183). By the terms of the operation and maintenance agreements between the Joint Board and the Natural Resource Conservation Service, the Joint Board is responsible for the maintenance and operation of the sills while relying on the technical engineering expertise of the Natural Resource Conservation Service. (R. 1335-54).

The Plaintiff-Appellant argues that the Earsing Sills are located in Erie County, that sills are under the day-to-day supervision of the Erie District, and that the Erie District was responsible for the “operation and maintenance” of the low head dams. It is undisputed that the Earsing Sills reside in their entirety within Erie County. There is no evidence that the sills are under the day-to-day supervision of the Wyoming District. There is no evidence that the Wyoming District was responsible for the “operation and maintenance” of the low head dams. Furthermore, the Plaintiff-Appellant makes no claim that the Wyoming District has occupancy, ownership, control or a special use of the Earsing Sills.

Plaintiff-Appellant’s only contention against the Wyoming District is that they should be held jointly liable by reason of having a joint venture with the Joint Board. Conversely, the Joint Board in the case at hand is its own distinct legal entity evidenced by its ability to enter into contracts with other entities. Therefore, the Joint Board is not a partnership between the Erie District and the Wyoming District, but rather its own legal entity.

The Board was created by an act of the New York State Legislature (L 1949, ch 374). This legislation empowered the Board to engage in stream bank maintenance work within the Buffalo Creek watershed... (R. 2206). Further, as pointed out by the Fourth Department, the “Board is capable of entering into

contracts and being sued.” (R. 2206). As such, the Board is clearly a separate and distinct entity from the Wyoming District.

Based on the undisputed evidence, it is clear that the Wyoming District had no duty to the decedent to warn of any potential danger associated with the Earsing Sills. The Wyoming District is a separate entity from the Joint Board, and the Wyoming District did not build, occupy, own, control, maintain, or have a special use of the sills, nor were the sills located in Wyoming County. As a result, the Wyoming District has no duty to warn of any potential danger associated with the sills, nor did they have a duty to post signs regarding potential dangers associated with the sills.

The Wyoming District’s Motion for Summary Judgement was also on the grounds of primary assumption of the risk from the decedent, however, the Lower Court did not rule on that part of the motion due to granting summary judgment on the grounds that the Joint Board and the Wyoming District were separate entities. Additionally, and as such, the Fourth Department did not rule on such. Therefore, the Wyoming District does not waive the primary assumption of the risk portion of their Motion for Summary Judgement.

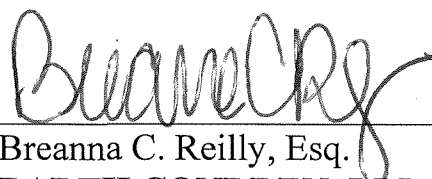
Based on the undisputed evidence, it is clear the Wyoming District owed no duty to Plaintiff’s decedent to warn of any potential danger associated with the Earsing Sills, or for any other purpose.

CONCLUSION

For the foregoing reasons and pursuant to the authorities cited herein, the Defendant-Respondent, WYOMING COUNTY SOIL & WATER CONSERVATION DISTRICT, respectfully requests that this Court affirm the May 7, 2021 Memorandum and Order of the Appellate Division, Fourth Department, which affirmed the grant of summary judgment, dismissing the Plaintiff-Appellant's Complaint and all cross-claims asserted against the WYOMING DISTRICT in the above-entitled action, with any further relief as the Court deems just and proper.

DATED: Buffalo, New York
September 7, 2022

Respectfully Submitted,



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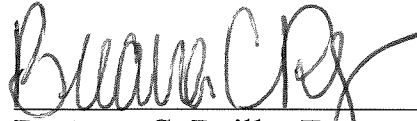
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