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COURT OF APPEALS
STATE OF NEW YORK

SUZANNE P.,

Appellant,

-against-

NO. 8

JOINT BOARD OF DIRECTORS

Respondents.

20 Eagle Street
Albany, New York
January 5, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

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Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 Number 8, Suzanne P. v. Joint Board.

3 Just let the other counsel leave.

4 MR. QUIANLAN: Please the Court. William Quinlan
5 for Plaintiff Suzanne P.

6 I'd like to reserve three minutes in rebuttal, if
7 I may.

8 ACTING CHIEF JUDGE CANNATARO: You have three
9 minutes.

10 MR. QUIANLAN: This liability of five defendants
11 at issue, and I would like to start with the Joint Board
12 and the ownership issue.

13 This court resolved a similar owner issue in the
14 Metromedia case involving advertisements on the structure
15 of the L stations. And in that case, this court allowed
16 the parties to the agreement to structure their interests
17 in the property.

18 ACTING CHIEF JUDGE CANNATARO: Counsel, in this
19 case, a jury resolved the ownership issue, not - - - not a
20 court.

21 MR. QUIANLAN: No, the court did itself by
22 granting a motion for a directed verdict as a matter of
23 law.

24 ACTING CHIEF JUDGE CANNATARO: After a jury found
25 that the Joint Board wasn't the owner in this case, isn't



1 that correct?

2 MR. QUIANLAN: Yes.

3 ACTING CHIEF JUDGE CANNATARO: So are we not
4 really talking here about whether the jury's determination
5 should stand? Because we have competing directed verdicts
6 as far as I can tell.

7 MR. QUIANLAN: No, because I - - - there really
8 was no evidence that anybody other than the Joint Board was
9 the owner under the agreement.

10 JUDGE SINGAS: Counselor, isn't the fact that the
11 Appellate Division and the Supreme Court both directed
12 verdicts for different people - - - opposing parties here?
13 Couldn't that lead us to think that reasonable minds can
14 differ, and no one deserves a directed verdict?

15 MR. QUIANLAN: The tenor of this agreement was
16 such that the only person that could be the owner would be
17 the Joint Board, giving - - - given the definitions of the
18 agreements themselves. And the fact that there was no
19 issue in this case, that there weren't permanent - - -

20 JUDGE RIVERA: So let me ask you this - - -

21 MR. QUIANLAN: - - - easements.

22 JUDGE RIVERA: - - - let me ask you this,
23 Counsel. What - - - what has to be owned for your client
24 to be able to pursue this liability? Does it have to be
25 the dams, the land, the creek that - - - what has to be



1 owned?

2 MR. QUIANLAN: The structures, Your Honor. Well,
3 the structures - - -

4 JUDGE RIVERA: Because they cause the hydraulic
5 boil, or whatever it's called?

6 MR. QUIANLAN: Yeah, the hydraulic boil is caused
7 by the structures.

8 JUDGE RIVERA: I see.

9 MR. QUIANLAN: This is like an inherent nature of
10 such a low head damage to have that hydraulic boil.

11 JUDGE RIVERA: I see.

12 MR. QUIANLAN: And in the agreement, the
13 structures themselves are defined as real property.

14 JUDGE RIVERA: Okay.

15 MR. QUIANLAN: - - - just as was the case in the
16 Metromedia case.

17 And the issue was raised also regarding - - -
18 there's no transfer of ownership issue, that once these
19 things were built, they were owned by the Joint Board by
20 virtue - - - again, by virtue of the contract.

21 JUDGE GARCIA: Counsel, I have a procedural
22 question. If the Court were to agree that neither party's
23 entitled to a directed verdict, my understanding is that -
24 - - is this correct - - - that it would go back to the
25 trial court for a reinstatement of the jury verdict, right?



1 Is that correct?

2 MR. QUIANLAN: Well, I - - - I don't - - - well,
3 I don't know the answer to that off the top of my head, but
4 I don't - - - I just still believe that the only answer in
5 this case is for the agreement and its application. And
6 that there wasn't any other entity put forward besides the
7 Joint Board as the owner.

8 JUDGE TROUTMAN: So with respect to the evidence
9 that was presented at trial, is it your argument that that
10 which the plaintiff put forth established that - - - that
11 which caused harm was in fact owned by the defendant?

12 It was not rebutted by the other side, so they
13 shouldn't have been granted summary judgment - - - or I'm
14 sorry, directed verdict by the Appellate Division when it
15 then went up.

16 MR. QUIANLAN: Yes, because the Appellate
17 Division set forth a number of preconditions to which,
18 really, there was no point in going beyond the agreement in
19 this case. I do - - - they - - - they impose - - - they
20 imposed a condition that there had to be ownership of the
21 actual creek bed. And they imposed a condition that there
22 had to be transfer of ownership of the structure, when both
23 of those conditions were covered by the agreement.

24 So as was done in the Metromedia case, this court
25 should allow the parties to the agreement to have



1 structured the ownership of this structure as was their
2 intent.

3 JUDGE TROUTMAN: So do you always have to have
4 ownership in order to be potentially liable for a harm
5 cause?

6 MR. QUIANLAN: Yes. The - - - under the
7 agreement, the Joint Board owned the structure for the
8 purposes of ownership - - - purposes of operation and
9 maintenance.

10 JUDGE TROUTMAN: Right, but is that - - - is
11 ownership always required for potential liability?

12 MR. QUIANLAN: Well, I - - - no. I - - -
13 especially if you were talking about, for instance, the
14 town of West Seneca in this case.

15 Under the circumstances of the Galindo case, this
16 court held that under certain circumstances where the owner
17 has special knowledge of a danger, which the parties - - -
18 other parties would not have - - - the public would not
19 have, then the - - - rebutting owner would have a duty to
20 warn. And - - -

21 ACTING CHIEF JUDGE CANNATARO: But your theory of
22 liability against the Joint Board is that they were the
23 owner, and therefore liable by virtue of their ownership?

24 MR. QUIANLAN: No, they were an owner for
25 respective operation and maintenance, and so I would say



1 that putting a warning would be part of operation and
2 maintenance.

3 ACTING CHIEF JUDGE CANNATARO: They may have had
4 many duties that they breached - - -

5 MR. QUIANLAN: Yeah.

6 ACTING CHIEF JUDGE CANNATARO: - - - but - - -
7 but it all flows from the fact that they're the owner of
8 the dam? I'm just going to call it the dam for lack of a
9 better word.

10 MR. QUIANLAN: Yes.

11 JUDGE RIVERA: Is your position that under the
12 agreements, they - - - the Joint Board is the sole owner,
13 or are there other owners?

14 MR. QUIANLAN: I would say that the - - - for the
15 purposes - - - yeah. I believe that the NR - - - the NCRS
16 could also be viewed as being an owner of the structure for
17 the purposes of actual repairing and doing major repairs
18 upon the structure.

19 That this agreement divided up the - - -
20 ownership responsibilities regarding this dam.

21 JUDGE WILSON: I want to go back to Judge
22 Troutman's couple of questions, because you focused on
23 ownership and the Joint Board, but there's a whole lot of
24 other people sitting there behind you who don't represent
25 the Joint Board, and I believe you sued their clients.



1 What is - - - and are you saying that they are
2 also owners, or would you have different theories of
3 liabilities for each of them? And if I'm jumping too far
4 ahead of where you want to go, just tell me that.

5 MR. QUIANLAN: Sorry.

6 Regarding the Erie County district and the
7 Wyoming district, I'll refer to them shortly, they are- - -
8 - should be regarded as being a single unit with the Joint
9 Board.

10 The Joint Board itself is merely the boards of
11 the Erie district and the Wyoming district meeting jointly.
12 Other than their joint meetings, they have no tangible
13 existence. And if you - - -

14 JUDGE RIVERA: Is that your joint venture
15 argument?

16 MR. QUIANLAN: Yeah.

17 The joint venture were partnership in that they -
18 - - when you look at the - - - the - - - the bill jacket,
19 the way - - - it wasn't - - - the Joint Board wasn't
20 referring to it. They refer to them, meaning the joint
21 boards. So they were concerned with how the Joint Board
22 would further the interest of the respective entities.
23 Those boards were making it up.

24 JUDGE WILSON: I'm sorry. So let me just see if
25 I've got that the right way.



1 It sounds as if you're saying the real entities
2 are the two districts, and the Joint Board is sort of a
3 doing business as?

4 MR. QUIANLAN: Yeah. It's basically a conduit
5 through which moneys will be received for the - - - for the
6 projects of the Erie district and the Wyoming district.

7 ACTING CHIEF JUDGE CANNATARO: And I'm sorry.
8 What's your best case for the proposition, that the two
9 districts coming together with representatives on the Joint
10 Board are a joint venture?

11 MR. QUIANLAN: What I'm saying is that they
12 should be regarded as a single unit, that they're really
13 all one - - - I mean, like, well, for instance, if a
14 partnership, like the individual partners, are also
15 individual - - - specific individual legal entities, well,
16 that doesn't mean that the fact that their partnership is
17 also a legal entity, that the partners would not be liable
18 for the partnership. And - - -

19 ACTING CHIEF JUDGE CANNATARO: And what would the
20 - - - do either of those entities exercise some control
21 over the Joint Board? What's- - -

22 MR. QUIANLAN: Yes. They - - - the Joint Board
23 can do nothing without - - - without the boards. In fact,
24 the boards are the Joint Board.

25 JUDGE RIVERA: That's why it's a joint board.



1 MR. QUIANLAN: Yes.

2 So really, this is almost kind of a - - - a - - -

3 JUDGE RIVERA: So - - - I'm sorry. So if - - -
4 is that - - -

5 MR. QUIANLAN: It's like a - - - sorry.

6 JUDGE RIVERA: I'm sorry.

7 Let's say the Court agrees that the lower court
8 was correct to grant that directed verdict and the Joint
9 Board is an owner and the Joint Board is liable, then who
10 ends up paying, Erie and Wyoming district board members?
11 Who ends up - - - where's the money coming from?

12 MR. QUIANLAN: Well, the way that the Joint Board
13 is structured, there is no insurance. There are no assets.

14 JUDGE RIVERA: Right.

15 MR. QUIANLAN: So it would have to be the - - -
16 the Joint - - - the Erie and Wyoming districts.

17 JUDGE SINGAS: So how is it an owner then?

18 MR. QUIANLAN: Excuse me, Your Honor?

19 JUDGE SINGAS: How is it an owner then?

20 MR. QUIANLAN: It's an owner because it's a - - -
21 because it is a legal entity that was created by the
22 legislature.

23 JUDGE WILSON: Well, does it have the capacity -
24 - -

25 MR. QUIANLAN: And it was - - - it was created -



1 - -

2 JUDGE WILSON: - - - does it have the capacity to
3 sue and be sued?

4 MR. QUIANLAN: Yes, it mainly - - -

5 JUDGE WILSON: Or is just a doing business name
6 for the two districts?

7 MR. QUIANLAN: Well, I would almost say elements
8 of both really.

9 It was created - - - well, the reason it was
10 created - - - because the Buffalo Creek extends into both
11 Erie and Wyoming counties. So in order to have projects
12 for the Erie creek, you had to create an entity as a
13 conduit for the Federal Government to have projects on both
14 creeks - - - I mean in both counties. So the Joint Board
15 was - - - of the Erie and Wyoming district was created.

16 ACTING CHIEF JUDGE CANNATARO: That's
17 interesting.

18 MR. QUIANLAN: Now - - -

19 JUDGE RIVERA: Do you want to address the Town of
20 Seneca?

21 MR. QUIANLAN: Excuse me, Your Honor?

22 JUDGE RIVERA: Do you want to address the
23 liability for the Town of Seneca?

24 MR. QUIANLAN: Yes.

25 West - - - the Town of West Seneca - - - I mean,



1 it - - - the Town had cited this - - - the Galindo case I
2 mentioned earlier, that Evelyn Hicks, who was the chairman
3 of the Environmental Commission of the Town of West Seneca,
4 she had intimate knowledge about the nature of the
5 hydraulic boil being associated with these dams. And she
6 wanted warnings to be posted. But they ultimate - - -
7 they were not posted, and she also agreed that the general
8 public is not aware of these dangers associated with the -
9 - - with the low head dams.

10 JUDGE WILSON: But why does the Town of West
11 Seneca have a duty?

12 MR. QUIANLAN: Because they're an adjacent owner.
13 They own land adjacent to these dams, and they are in the
14 position of - - -

15 JUDGE WILSON: Would that be true of - - -

16 MR. QUIANLAN: - - - the landlord - - -

17 JUDGE WILSON: Would that be - - -

18 MR. QUIANLAN: - - - in the Galindo case.

19 JUDGE WILSON: Would that be true of a private
20 owner as well? I mean, if I owned a piece of the land - -
21 - repairing land there?

22 MR. QUIANLAN: Well, that was the situation in
23 the Galindo case, where they said there was potential
24 liability. But under the facts of that case, there wasn't
25 the kind of, like, exclusive knowledge possessed by the



1 landowner, you know, whose housekeeper's husband was killed
2 in the driveway by the falling tree as there is in this
3 case, where we have just what was absent here - - -

4 JUDGE TROUTMAN: So merely because it - - - does
5 - - - the structure is in the water. It abuts the land.
6 West Seneca is somehow - - - has a duty? They don't
7 control or maintain it.

8 MR. QUIANLAN: They don't control or maintain it,
9 but it is accessible from lands owned by the Town of West
10 Seneca.

11 JUDGE TROUTMAN: Accessibility creates the duty?

12 MR. QUIANLAN: That's part of it, but I believe
13 that the duty is the same that would exist in the Galindo
14 case, where there is - - -

15 ACTING CHIEF JUDGE CANNATARO: They had some
16 special knowledge about the risk - - -

17 MR. QUIANLAN: Special knowledge that is not
18 possessed by the public at large.

19 JUDGE TROUTMAN: And is that just because of the
20 location of their land - - -

21 MR. QUIANLAN: Yes - - -

22 JUDGE TROUTMAN: - - - and that structure?

23 MR. QUIANLAN: - - - the area - - - abutting.

24 And this also bears some similarity to the
25 attractive nuisance cases like Leone v. City of Utica,



1 Scurti v. City of New York, Gayden v. City of Rochester,
2 where basically, you have abutting - - - there's ways of
3 accessing areas that are attractive to children through
4 holes in fences or pathways which are known about. And was
5 - - - and it's held that there was a duty in those cases as
6 well.

7 ACTING CHIEF JUDGE CANNATARO: And the county?
8 Do you want to address the county at all?

9 MR. QUIANLAN: Well, the county is in this two
10 ways.

11 First, if it wasn't for the county, there
12 probably would have been warnings up, and maybe - - - and
13 probably this accident would never have happened.

14 What the county told Mr. Gaston from the Joint
15 Board or from the Erie district, don't put up - - - don't
16 put up warnings. It would be a - - -

17 JUDGE TROUTMAN: When you say the County, the
18 County as in - - -

19 MR. QUIANLAN: The county attorney. The Erie
20 County attorney.

21 JUDGE TROUTMAN: And isn't that different having
22 your legal adviser versus the entity itself do something?

23 MR. QUIANLAN: What I'm saying is that this is
24 analogous to the Davis case involving - - - the case where
25 there was medical malpractice committed by a hospital with



1 respect to allowing a patient to drive on medication. And
2 then the hospital was held liable to the person who was
3 injured by the patient.

4 JUDGE TROUTMAN: But the legal advice is
5 different. The giving of legal advice - - - you're saying
6 the faulty legal advice is the reason for liability here?

7 MR. QUIANLAN: That - - - well, the - - - to the
8 extent that there were no warnings posted, yes.

9 And I think really there should be - - - as a
10 matter of public policy, warnings should be encouraged, and
11 then if - - - in a case such as this, where a municipal
12 entity tells another quasi-municipal entity, don't put up
13 warnings, you'll - - - you'll - - -

14 JUDGE TROUTMAN: And it doesn't matter - - -

15 MR. QUIANLAN: - - - you'll to be liable.

16 JUDGE TROUTMAN: - - - that that was done through
17 their legal advisor?

18 MR. QUIANLAN: Yes.

19 JUDGE WILSON: Can you think of a case where a
20 lawyer gave advice to a client, and had the lawyer given
21 different advice, some third party would not have been
22 injured, and a duty in negligence was extended to the
23 lawyer?

24 MR. QUIANLAN: Well, I cited cases that were
25 analogous to that in the original brief.



1 You know, it was - - - it had a - - - the
2 assumption of a duty. If they assumed to give advice on
3 this subject, they'd have to give careful advice,
4 especially - - - when it's advice concerning an area that's
5 a known dangerous - - - where four people had already died
6 at that area, including a West Seneca firefighter who was
7 killed saving others there.

8 And they also had involved themselves through a
9 public benefit contract with the Erie district, in which
10 they basically assumed the duty of an owner when they
11 contracted to have the Erie district maintain these low
12 head dams. If they didn't have - - - if they didn't have
13 authority of an owner - - - in other words, they were
14 assuming the authority of an owner when they had made such
15 a contract with the Erie district to maintain the low head
16 dams.

17 So under these - - - so in other words, I - - -
18 under the totality of the circumstances, I think the county
19 bears responsibility for there being a failure to warn
20 regarding the dangers of these dams.

21 ACTING CHIEF JUDGE CANNATARO: Thank you.

22 We have a large group. My first listed is Erie
23 County.

24 Mr. Toth?

25 MR. TOTH: Yes. Thank you, Your Honor.



1 Jeremy Toth for Erie County proper.

2 Just to pick up the conversation. So under the
3 soil and water conversation law of New York State, the
4 directors may call upon the county attorney for such legal
5 services, and the district, as the district may require,
6 and the county attorney shall render such service.

7 This is not a voluntary assumption. This is not
8 something that we can decide not to do. This is not
9 stepping outside of our authority. We are required, when
10 called upon, to provide the best legal advice that we can.

11 JUDGE WILSON: So let me ask you about a
12 different part of the Soil and Water Conservation District
13 Law, which defines a district, and it's section 3. It
14 says, "District, or a soil and water conservation district,
15 means a county whose board of supervisors has by resolution
16 declared said county to be a soil and water conservation
17 district."

18 Do the - - - why do you think, if you do, that
19 the soil and water conservation district and the county
20 have its separate legal existences?

21 MR. TOTH: I mean, it would go back to the
22 creation of the soil and water conservation districts
23 themselves. And my understanding, this is pushing sort of
24 my historical knowledge, but my understanding was that it
25 was based on funding mechanisms created by the federal



1 government post-World War II as the expansion beyond urban
2 centers was growing, the concerns about the watersheds for,
3 in this case, Lake Erie, became a real concern.

4 And so in response - - -

5 JUDGE WILSON: That explains why the money got
6 there, why there was a need for money to go to certain
7 things, but why do you read the statute as creating a
8 separate legal entity out of these districts rather than
9 what it appears to say on its face, which is the county is
10 the district, if it so chooses?

11 MR. TOTH: I understand the question, and I think
12 - - - I think pretty clearly the legislature created what I
13 consider a separate and distinct entity; can sue or be
14 sued, has its own directors that act independently from the
15 county that sponsored them.

16 The closest analogy that I can come up with, and
17 this is fairly esoteric stuff, I think, but the community
18 college system is very similar, where a county sponsors the
19 creation of a community college, but then that community
20 college is ultimately an independent entity with its own
21 power, its own authority. And similarly, my office, and
22 other county attorneys, will provide legal services to that
23 community college. But it is a separate and distinct
24 entity.

25 It's - - - again, it's sort of an idiosyncratic



1 nature of the law, which doesn't apply often, but I think,
2 pretty clearly from the legis - - - from the plain reading
3 of the statute, you have to consider a soil and water
4 conservation district as an independent entity. I don't
5 think you could read that statute and conclude it is, in
6 fact, Erie County. It is a separate entity.

7 ACTING CHIEF JUDGE CANNATARO: Can I just ask you
8 with respect to the pleadings and the plaintiff's theory of
9 liability against the county, was this sort of - - - what I
10 think Judge Wilson might be getting to, is this sort of
11 vicarious liability for the district pled, or was the only
12 theory of liability against the county that was pleaded the
13 bad legal advice?

14 MR. TOTH: So the two theories that I recognize
15 from the pleadings over the past ten years, is the advice
16 from the County Attorney's Office, and then this concept -
17 - - and again, it gets to the ownership.

18 And that's essentially what we have. We have
19 this premises liability case where nobody actually owns the
20 premises. That's - - - again, that's a very idiosyncratic
21 nature of this case.

22 ACTING CHIEF JUDGE CANNATARO: Well, somebody has
23 to own this premises, right? That's the vexing part of
24 this case.

25 And I realize that two courts founded completely



1 opposite ways regarding the ownership, and a jury basically
2 signaled that the burden of proof as to ownership hadn't
3 been met. But somebody has to own this?

4 MR. TOTH: I mean, if you look at the actual
5 surveys, and I - - - quite frankly don't know if the
6 surveys are in the record, I believe they are, or some,
7 it's private landowners. The lines go to the center of the
8 - - -

9 ACTING CHIEF JUDGE CANNATARO: The landowners
10 from whom easements were taken?

11 MR. TOTH: Yes.

12 ACTING CHIEF JUDGE CANNATARO: So their property
13 became subject to an easement, and yet they own the dam
14 that's on it?

15 MR. TOTH: Again, it's an idiosyncratic and
16 difficult question to resolve. I think - - -

17 JUDGE RIVERA: But it's a little hard to square
18 with the fact that the - - - that the government that
19 designs it, funds it, builds it, doesn't think the
20 landowners own it.

21 MR. TOTH: And you're referring to the federal
22 government in that case?

23 JUDGE RIVERA: Correct.

24 MR. TOTH: Yes.

25 JUDGE RIVERA: Correct.



1 MR. TOTH: I mean, part of the sort of question
2 mark over this litigation is where is the federal
3 government in this? And what I've - - -

4 JUDGE RIVERA: Well, they're in an agreement - -
5 -

6 MR. TOTH: Why are they there?

7 JUDGE RIVERA: They're in an agreement that says
8 the Joint Board is the owner, that's where they are.

9 MR. TOTH: But that agreement - - - the use of
10 the word "owner", is that - - - does that convey the sense
11 of sort of a fee simple? And I feel like I'm going back to
12 the property law.

13 JUDGE RIVERA: But is that necessary for this
14 purpose?

15 MR. TOTH: For - - - I believe that it is. I
16 believe that it is if for no other reason than none of the
17 defendants at this table - - -

18 JUDGE RIVERA: By the way, it can't be a fee
19 simple because it's not real property.

20 MR. TOTH: I'm sorry?

21 JUDGE RIVERA: It's not real property, so it's
22 not a fee simple. It's not in the state in that way.

23 MR. TOTH: You're referring to the dam?

24 JUDGE RIVERA: The dam.

25 MR. TOTH: But if the dam is a fixture - - -



1 ACTING CHIEF JUDGE CANNATARO: It's part of the
2 land?

3 MR. TOTH: It's part of the land.

4 JUDGE RIVERA: See, a fixture when - - - again,
5 builder, designer, the person who paid for it, the entity
6 that paid for it doesn't view it that way, didn't negotiate
7 it that way.

8 MR. TOTH: How about - - - how about I - - - I -
9 - - I stand publicly - - - the County's not the owner, how
10 about that?

11 JUDGE RIVERA: Anyway, is there - - -

12 MR. TOTH: My client is not the owner.

13 JUDGE RIVERA: Fair enough.

14 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.
15 Toth.

16 MR. TOTH: Okay. Thank you.

17 JUDGE SINGAS: Can I just - - -

18 ACTING CHIEF JUDGE CANNATARO: Oh, go ahead.

19 MR. TOTH: Yes.

20 JUDGE SINGAS: I'm sorry.

21 Were any easements put into evidence?

22 MR. TOTH: The record is so big. I don't believe
23 so, but co-Counsel would be better - - -

24 JUDGE SINGAS: I'll ask again.

25 MR. TOTH: Yes.



1 JUDGE SINGAS: Thank you.

2 MR. TOTH: Thank you.

3 ACTING CHIEF JUDGE CANNATARO: Our next
4 respondent is Town of West Seneca.

5 MR. GREENE: Good afternoon.

6 May it please the Court. I'm Norm Green. I
7 represent the Town of West Seneca.

8 In addition to the use of the cane, I have a
9 little bit of a hearing problem, so speak up. And if I'm
10 inordinately loud, I apologize.

11 The first thing I want to mention is that
12 plaintiff's attorney mentioned the Galindo case. I hope
13 you folks are familiar with the facts in the case, because
14 Galindo supports the position of the county here.

15 The adjacent - - - the tree was on the Town of
16 Clarkson land. The tree was on town land, and Clark was
17 the adjacent landowner who the court determined, this
18 court, had no responsibility, even though he was an
19 adjacent land owner, because - - - and I could quote the
20 case for you, but I see that you're obviously familiar with
21 it, "As a general manner", Court of Appeals speaking, "an
22 owner has no duty to warn or protect others under the
23 circumstances portrayed there"; even though Clark, the
24 adjacent land owner, saw the tree was leaning and
25 recognized that it posed a danger.



1 Now the question arises here, as far as I can
2 see, these youngsters - - - this is a tragedy, there's no
3 question about that. That's not an issue. But the fact of
4 the matter is that these youngsters, full of life, entered
5 the area where the dam was from private property. They
6 didn't cross any town property, and even if they would,
7 there wouldn't have been necessarily liability under a
8 couple of cases that I'm going to refer to you and which
9 were in our brief.

10 In other words, the situation here is these
11 youngsters crossed private property, and as Mr. Toth
12 suggested, the private property on deeds and things extends
13 to the middle of this creek.

14 Now, you well know that most navigable waterways
15 in the State of New York are deemed owned by the state. In
16 other words, we go out here on the Hudson River, it isn't
17 that the City of Albany owns the Hudson River. But this is
18 a different situation here.

19 These low head dams, and the sills, had nothing
20 to do with the Town of West Seneca. The fact is that West
21 Seneca land was not adjacent.

22 There's a couple of cases that are cited. Lewis
23 against the Town of - - - City of Utica, a case where
24 there's a hole in fences, but that's directly adjacent to a
25 municipal use. A municipality has a park or something like



1 that, and, as a matter of fact, because of that, holes in
2 the fence permit access and liability can arise, and
3 probably should if there's irresponsibility with regard to
4 that. But the situation isn't present here.

5 The Town has a couple of tracts of land, but
6 they're not recreational areas. If you look at page 387 of
7 the Elizabeth - - - excuse me, Evelyn Hicks's testimony,
8 you will see that the area - - - areas adjacent to the
9 creek in the town were not recreational areas.

10 And so the main point that I want to raise is to
11 invite your attention to a couple of cases. I think
12 they're important, and they're interesting.

13 One of them is Garner v. the City of New York.
14 There, the city of New York owned a beach, and there was a
15 private beach right next to it, and some very serious
16 injuries were sustained by swimmers. Four youngsters in
17 water directly adjacent to the beach, as a result of a
18 steep drop off and unusually strong and hazardous currents,
19 were, as I say, very, very seriously injured. Four of
20 them.

21 And yet, there's a city beach right next door.
22 And as a matter of fact, one of the issues in the case that
23 the plaintiffs raised there was that there was a bulkhead
24 on the adjacent city property that might arguably, based on
25 a couple of expert affidavits that were proffered in the



1 course of the litigation - - - that might conceivably have
2 caused these currents.

3 That case a fortiori is much stronger for the
4 potential imposition of liability because A, the city did
5 own the adjacent property directly next to where these
6 youngsters were hurt; and B, there was conceivably, in
7 addition to ownership, the presence of a bulkhead.

8 I see that my argument time has expired.

9 I take it very often silence is golden. That's
10 not always the case. That's not always the case, Justice
11 Troutman would know.

12 And I will answer any questions that any member
13 of this inestimable court cares to pose for me. Otherwise,
14 I'll take a seat.

15 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.
16 Greene.

17 MR. GREENE: Thanks very much.

18 ACTING CHIEF JUDGE CANNATARO: The next
19 respondent is the Joint Board.

20 MR. DELLA POSTA: Good afternoon, Your Honors.

21 Mark Della Post on behalf of the Joint Board.

22 I've been with this case since the very
23 beginning. I think I'm the only one that's been with this
24 case since the very beginning. And I tried the case in
25 front of Judge Grisanti, and we're here today.



1 JUDGE GARCIA: Counsel, before you start on the
2 other arguments, do you know the answer to my question? If
3 we were to decide that a directed verdict is not
4 appropriate for either party, what would happen?

5 MR. DELLA POSTA: I believe it would go back to
6 the court, and they would reinstate the jury's verdict,
7 which was made after listening to the evidence.

8 JUDGE GARCIA: And then that could be appealed
9 under the standard for review of a jury verdict, right?

10 MR. DELLA POSTA: I guess it could, but I think
11 whatever is going to happen as a result of this will
12 probably take care of that no matter which way you decide,
13 I would think, but.

14 JUDGE GARCIA: Thank you.

15 MR. DELLA POSTA: Sure.

16 So in order to - - -

17 JUDGE RIVERA: So Counsel, if you're - - - if the
18 Joint Board is not the owner, who's the owner?

19 MR. DELLA POSTA: Well - - -

20 JUDGE RIVERA: Or owners if you think there's
21 more than one?

22 MR. DELLA POSTA: Or owners.

23 JUDGE RIVERA: Yeah.

24 MR. DELLA POSTA: Under riparian law, it's the
25 owner of the creek bed, which is the State of New York, if



1 it's a navigable waterway. Or it be the adjoining
2 landowners if it's an unnavigable waterway. This was a - -
3 - probably a navigable waterway.

4 The State of New York has been sued in the Court
5 of Claims. They had claims that still exist against the
6 State of New York. I don't know what is going on over
7 there, but my guess is it's - - - they're waiting - - - the
8 determination in this case is, as often happens in the
9 Court of Claims, before they make a decision.

10 JUDGE WILSON: What is the Joint Board? Does it
11 - - - is it a legal entity that has a capacity to sue and
12 be sued?

13 MR. DELLA POSTA: It is a legal entity that has
14 the capacity to sue and be sued.

15 JUDGE WILSON: And how do you know that?

16 MR. DELLA POSTA: I believe that's what the
17 legislature created in making the Joint Board, which is not
18 the entire boards of both the Erie and Wyoming, but members
19 of the boards. And they become the board for the Joint
20 Board.

21 They meet occasionally, and they oversee the
22 Joint Board's activities, which the Joint Board has no
23 employees, they have no land, they have no offices; they're
24 basically made up of Erie or Wyoming county individuals
25 that do the work, which in this case, the only work is the



1 operation and maintenance of this sill.

2 JUDGE WILSON: And there's nothing in its status
3 that expressly giving it the power to sue or be sued, is
4 that right?

5 MR. DELLA POSTA: Correct.

6 JUDGE WILSON: Okay. So it would have to be
7 implied?

8 MR. DELLA POSTA: Yes.

9 JUDGE WILSON: Okay.

10 MR. DELLA POSTA: But it is a separate entity
11 from the Erie and Wyoming, and I think it's treated as such
12 from what I've seen.

13 ACTING CHIEF JUDGE CANNATARO: Is it a separate
14 entity created out of the collaboration - - - joint venture
15 of two - - -

16 MR. DELLA POSTA: No.

17 ACTING CHIEF JUDGE CANNATARO: - - - districts?

18 MR. DELLA POSTA: I believe it would be what was
19 said previously, was that it was created as a funding and
20 oversight mechanism for the Flood Control Act that happened
21 after the second World War to improve the watersheds and
22 waterways, such as the Buffalo River and Lake Erie.

23 ACTING CHIEF JUDGE CANNATARO: It is true that
24 all the work that was done under the aegis of the Joint
25 Board was done by an employee of one or the other, is that



1 - - - is that the case?

2 MR. DELLA POSTA: That has to be correct because
3 there are no employees of the Joint Board. So I don't know
4 who would do it otherwise.

5 JUDGE RIVERA: Are all the board members of the
6 Erie and Wyoming districts members of the Joint Board?

7 MR. DELLA POSTA: I don't believe all of them
8 are, Your Honor. I believe certain - - - certain of them
9 are.

10 JUDGE RIVERA: So - - - I'm sorry. How do you
11 end up on the Joint Board?

12 MR. DELLA POSTA: How do you what?

13 JUDGE RIVERA: How do they end up on the Joint
14 Board if it's not all of them?

15 MR. DELLA POSTA: I think they - - - I don't know
16 the answer - - -

17 JUDGE RIVERA: Okay.

18 MR. DELLA POSTA: - - - I apologize.

19 But in order to qualify someone as an owner, you
20 either look at common law, which we've done in terms of
21 riparian rights, or you look at deeds or easements.

22 In this case, there's no easements in the record.
23 The easements, the only ones there are, just give
24 permission to the Joint Board to go over their property to
25 do the inspections they need to do on these sills.



1 JUDGE TROUTMAN: And the agreements here, what do
2 they do?

3 MR. DELLA POSTA: The agreement - - - if you look
4 at it, Your Honor - - - and I think the reason why it
5 wasn't - - - or should not have been decided in the - - -
6 in favor of the plaintiff as a directed verdict, was
7 because there's confusion or - - - it's not clear in terms
8 of what it is.

9 If you look at these - - - the agreements, which
10 I think is nine pages. The first four or five - - - the
11 first three are specific to this project. The other five
12 are - - - look like boiler plate type language.

13 And if you look at the definitions, and if you're
14 going to say there's no other way to read it other than
15 that, which is what Judge Grisanti did, real property is
16 "real property means land, including land improvement
17 structures and appurtenances". So they're treating them as
18 a single entity. Not, here's the dam, it's this structure;
19 here's the property, it's this structure. They're treating
20 them as a single entity together.

21 And if you look further down, it says, "Title to
22 all real property shall vest in the sponsor". Title is a
23 legal term, and you got to have a deed. You can't just
24 say, I'm the owner. And you can't two people - - -

25 JUDGE TROUTMAN: So the parties can't contract a



1 different definition and make the sponsor responsible?

2 MR. DELLA POSTA: I think they could, but I don't
3 think they'd get there on this agreement.

4 The word "owner" is never used in this agreement;
5 they call it sponsor. They talk about title, and they talk
6 about real property and appurtenances and structures.

7 So if you're going to make a decision that holds
8 my client responsible, abrogating common law and everything
9 else, it has to be clearly stated, and it isn't clearly
10 stated.

11 JUDGE TROUTMAN: So your client can be
12 responsible for overseeing the structure - - -

13 MR. DELLA POSTA: Operation and maintenance, yes.

14 JUDGE TROUTMAN: - - - but if something happens
15 based upon their directing how that's to be done, they're
16 not responsible for anything because they don't own it?

17 MR. DELLA POSTA: Well, if you look at the actual
18 testimony, the Joint Board has very little ability to do
19 anything other than make annual inspections. They have to
20 get permission from the federal government to do anything.
21 You can't redesign it. You can't add stuff on. It's very
22 unlike the Metromedia case where they really didn't have
23 the chance here to control or - - -

24 JUDGE TROUTMAN: How is that any - - -

25 MR. DELLA POSTA: - - - they couldn't even put-up



1 signs if they wanted to.

2 JUDGE TROUTMAN: How is that any - - -

3 JUDGE RIVERA: That didn't go to the merits of
4 liability, but the question is whether or not, right, they
5 can even be sued for it, no?

6 MR. DELLA POSTA: I guess I disagree. I don't
7 think they - - - they can sued; they have been sued,
8 obviously. But I don't think that they're responsible
9 under this agreement, under this agreement between the
10 Joint Board and the federal government.

11 JUDGE TROUTMAN: So you're saying the agreement
12 does nothing?

13 MR. DELLA POSTA: I'm sorry?

14 JUDGE TROUTMAN: The agreement isn't sufficient
15 to do what the plaintiff thinks it did?

16 MR. DELLA POSTA: Correct. It does something.
17 It gives them the opportunity to operate and maintain it,
18 and the government oversees that as well - - - the federal
19 government oversees that as well.

20 JUDGE RIVERA: Did I misunderstand you? I
21 thought you said that the agreement said all these things
22 are real property, and the title is in the sponsor. Did I
23 misunderstand you, that that's what the agreement says?

24 MR. DELLA POSTA: The agreement says, "Real
25 property means land, including improving structures and



1 appurtenances." So they're treating them as a single
2 entity.

3 JUDGE RIVERA: Yes, and didn't you say that the
4 sponsor holds title - - -

5 MR. DELLA POSTA: It says title - - -

6 JUDGE RIVERA: - - - to that property?

7 MR. DELLA POSTA: Yes, but - - -

8 JUDGE RIVERA: Yes. So don't we understand that
9 in the law to mean that one has an ownership, or some kind
10 of property-based legal interest that may then subject you
11 to liability? May, I didn't it should in this case, just
12 may.

13 MR. DELLA POSTA: If the federal government had
14 Title II vest, had title to transfer, I would agree with
15 you.

16 This seems to be triggered to a - - -

17 JUDGE RIVERA: Why wouldn't it - - - why wouldn't
18 it have - - - didn't it design it, build it, fund it, or
19 what did I miss?

20 MR. DELLA POSTA: Because they didn't title to
21 the property, and title to the property and the structure
22 go together. And they have to be able to transfer it over
23 - - -

24 JUDGE RIVERA: That's not the intent of the
25 parties to have that kind of ownership. I'm not really



1 clear how it rises to what you're saying.

2 The agreements are clear, but there's no intent
3 for anyone other than the sponsor to have the title.

4 MR. DELLA POSTA: But if the agreement says, You,
5 Joint Board, can't do anything, essentially, other than
6 inspect it once a year. How are you going - - - that seems
7 to go against common law in terms of the perception of what
8 owners responsibilities are.

9 If I can't go in there and improve this thing,
10 and put up signs and put up warning signs, now I'm going to
11 be held liable? It should be the federal government or the
12 state, but really the federal government who, for some
13 reason, didn't get sued here.

14 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.
15 Della Posta.

16 MR. DELLA POSTA: Thank you very much, Your
17 Honors.

18 ACTING CHIEF JUDGE CANNATARO: Next is Erie
19 County Soil and Water.

20 MR. HENDRICKS: Good afternoon, Your Honors.

21 Justin Hendricks on behalf of the Erie County
22 Soil and Water Conservation District.

23 Just wanted to start by saying that Justice
24 Wilson, I think you nailed the central question on the head
25 in that, is the Joint Board more than a simple DBA of the



1 underlying Erie County and Wyoming County and Soil and
2 Water Conservation districts? I think it sort of has to be
3 for no other reason than it is here and has been sued; it
4 has counsel; we have a trial verdict.

5 JUDGE WILSON: Well, I mean we have cases about -
6 - - we have cases about capacity where we hold that
7 somebody who's been sued can't be sued. I mean, our
8 District 37 case, for example, is a good example of that.
9 So the fact that they're here doesn't mean that they should
10 or can be here.

11 MR. HENDRICKS: True, but beyond that, you know,
12 the legislature specifically created it for the purpose of
13 administering this watershed. And it needed to be so
14 empowered to accomplish those ends.

15 JUDGE WILSON: Well, that's a question of whether
16 it needs to be empowered to sue and be sued, or whether it
17 really has no separate legal existence even though it's
18 sort of a noncorporate association or a DBA or something
19 like that.

20 But I mean, continue if you'd like. But I - - -

21 MR. HENDRICKS: Okay.

22 And then just the second point to touch on, the
23 Joint Board can't be considered a joint venture as
24 plaintiff is putting forward. First and foremost because
25 the legislature did specifically create it and, you know,



1 this wasn't similar to the cases that are cited by the
2 plaintiff where - - -

3 JUDGE WILSON: Well, you're not saying that
4 legislature couldn't create a joint venture I assume?
5 Maybe you're saying they didn't, but the fact that the
6 legislature created it, it could've created a joint
7 venture, right?

8 MR. HENDRICKS: The legislature is certainly
9 empowered to create a joint venture.

10 JUDGE WILSON: Okay.

11 MR. HENDRICKS: But you know, in this case, you
12 know, they did not. Again, because when you read the
13 generating document, it speaks for itself.

14 If there are any questions, otherwise co-counsel
15 certainly addressed most of the issues at hand, so.

16 Thank you.

17 ACTING CHIEF JUDGE CANNATARO: Thank you.

18 MS. REILLY: Good afternoon, Your Honors.

19 And it may please the Court. Breanna Reilly on
20 behalf of the Wyoming County Soil and Water Conservation
21 District. I will refer to it as Wyoming district.

22 A lot has been discussed so far. I'm going to be
23 direct in - - - this case was decided twice: The Supreme
24 Court, the Fourth Department. I ask that you uphold
25 decisions for this purpose.



1 Wyoming district - - - first of all, this
2 incident, this tragic incident, this happened in Erie
3 County. The structure is in Erie County. I understand
4 Wyoming water - - - county waters so that it would flow
5 through.

6 Ultimately, this Wyoming County district is
7 separate from this Joint Board. This Joint Board was
8 created because there was a project needed, this Buffalo
9 water creek project. They needed someone to - - - they
10 needed an entity, not someone - - - an entity - - -

11 ACTING CHIEF JUDGE CANNATARO: Is that the
12 opposite of what we just heard? Did I just hear from your
13 - - - the last attorney that the Joint Board is a DBA for
14 the districts?

15 MS. REILLY: You know, I'm not - - - I can't
16 speak for him - - -

17 ACTING CHIEF JUDGE CANNATARO: Okay.

18 MS. REILLY: - - - but just to be - - -

19 ACTING CHIEF JUDGE CANNATARO: Do you adopt that
20 position?

21 MS. REILLY: No. I would say that the Joint
22 Board is a separate and distinct entity. I would say that
23 it is an entity that clearly can enter into agreements
24 contracts as it did with the federal government. An entity
25 that, I know that question, can sue or be sued.



1 I am of the opinion, and I believe that the
2 surrounding circumstances support the position, that they -
3 - -

4 JUDGE RIVERA: And it can be liable. And then
5 how would it pay for any injuries, damages, that it has to
6 pay for?

7 MS. REILLY: Well, respectfully, whether they
8 choose to get some type of insurance, whether they choose
9 to - - - that's something - - -

10 JUDGE RIVERA: Well, they have none, correct?

11 MS. REILLY: To my knowledge, I don't want to
12 speak for them, but - - -

13 JUDGE RIVERA: Okay.

14 ACTING CHIEF JUDGE CANNATARO: Did the Joint
15 Board make any requests for indemnification in their
16 pleadings?

17 MS. REILLY: Your Honor, I'm not quite sure, but
18 to my knowledge, I don't believe so.

19 ACTING CHIEF JUDGE CANNATARO: Okay.

20 MS. REILLY: Ultimately, I will take any
21 questions from the panel, but - - -

22 JUDGE RIVERA: Do you know how people get on the
23 Joint Board? Do you agree that not everyone - - - not
24 every board member from the counties, soil districts, is on
25 the Board, yes?



1 MS. REILLY: I do agree with that. And to
2 address your question, I believe that they are - - - they
3 can be appointed. I believe it would be by these - - - the
4 members of independent boards can maybe appoint members to
5 create this Joint Board. But that's just not - - - you
6 know, it's not something I can quote from. But that's just
7 my understanding generally.

8 JUDGE WILSON: Are there bylaws or anything like
9 that that would shed light on that?

10 MS. REILLY: Are there - - - I'm sorry?

11 JUDGE WILSON: Bylaws.

12 MS. REILLY: Of the Joint Board?

13 JUDGE WILSON: Yeah.

14 MS. REILLY: To my knowledge - - -

15 JUDGE WILSON: Or of the - - - or of the Wyoming
16 district, let's say, that would specify how members are
17 appointed to - - - anything like - - - any document you've
18 ever seen?

19 MS. REILLY: Not to my knowledge. I don't
20 represent the Joint Board, respectfully, so I don't know
21 the particulars of their nature.

22 ACTING CHIEF JUDGE CANNATARO: Thank you.

23 MS. REILLY: Thank you, Your Honors.

24 MR. QUIANLAN: First, regarding the Town of West
25 Seneca, I'd just like to reiterate that there is a portion



1 of the Galindo case that does specifically reference this
2 type of situation; where there is some dangers from knowing
3 a neighboring property, which might be so clearly known to
4 the land owner, though not open or obvious to others, that
5 a duty to warn would arise. And I would say that this is
6 just such a case.

7 Regarding the issue of the easements, the
8 easements were not admitted into evidence. And the reason
9 why is because Mr. Gaston admitted to their existence in
10 the trial, page 2032 of the record.

11 And I would just say these easements were not
12 limited just to inspection. Those easements were a
13 condition precedent to these - - -

14 JUDGE GARCIA: I'm sorry. Counsel, is the - - -
15 are the - - - the scope of the easement, is that
16 information in the record in this admission?

17 MR. QUIANLAN: Well, the scope of the easements
18 is provided in the contracts, that they were necessary for
19 the construction. That's - - - that is - - -

20 JUDGE GARCIA: And those are in the record?

21 MR. QUIANLAN: Yeah. That's in the record.

22 As the original 1959 contracts provide that these
23 easements had to be obtained in order for there to be
24 construction of these low head dams.

25 JUDGE GARCIA: So your position is the scope of



1 the easements is what's represented in those contracts?

2 MR. QUIANLAN: Yes.

3 And there - - - yes, and it is true that this
4 other easements that were - - - are - - - were and our in
5 existence for inspection. But easements specifically - - -
6 permanent easements specifically had to be obtained in
7 order for these things to be constructed and reconstructed.

8 And I would just also say regarding some of the
9 statements by Counsel for the Town that they're getting
10 into issues of causation, where really this appeal is about
11 really whether there's a duty. So I think some of the
12 arguments are really kind of getting ahead of the issues
13 here.

14 And let's see. And that's all I have, Your
15 Honor.

16 ACTING CHIEF JUDGE CANNATARO: Thank you very
17 much.

18 Thank you, Counsel.

19 (Court is adjourned)

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C E R T I F I C A T I O N

I, Xavier Austin Reyna, certify that the foregoing transcript of proceedings in the Court of Appeals of Suzanne P. v. Joint Board of Directors, No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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