

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

573

CA 08-02339

PRESENT: HURLBUTT, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

WALTER OSTROWSKI AND ARLENE M. COLLINS,
INDIVIDUALLY, AND ARLENE M. COLLINS, AS
ADMINISTRATRIX OF THE ESTATE OF SEAN
CHRISTOPHER OSTROWSKI, DECEASED,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

THOMAS C. BALDI, ET AL., DEFENDANTS,
AND TOWN OF WEST SENECA, DEFENDANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL),
FOR PLAINTIFFS-APPELLANTS.

LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered February 13, 2008 in a wrongful death action. The order, insofar as appealed from, granted the motion of defendant Town of West Seneca for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for the wrongful death and conscious pain and suffering of their son (decedent), who was killed while snow tubing down a hill. The accident occurred when decedent failed to stop at the bottom of the hill and was struck by a truck on Indian Church Road. Supreme Court properly granted the motion of defendant Town of West Seneca (Town) seeking summary judgment dismissing the complaint against it. The Town met its initial burden by establishing that it had no duty with respect to Indian Church Road, which it did not own, control or maintain (see *Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 675, *rearg denied* 93 NY2d 1042; *Ossmer v Bates*, 97 AD2d 871). The Town further established that it did not owe decedent any duty to maintain the hill in question because it did not own, occupy or control that property (see *Battaglia v Town of Bethlehem*, 46 AD3d 1151, 1154; *Ajlouny v Town of Huntington*, 184 AD2d 486, 487). The evidence submitted by plaintiffs in opposition to the motion establishing that the Town undertook actions that it had no legal obligation to perform by erecting barriers at the bottom of the hill following the accident

is insufficient to raise a triable issue of fact whether the Town owed a duty to decedent at the time of the accident (see generally *Castiglione v Village of Ellenville*, 291 AD2d 769, 770-771, lv denied 98 NY2d 604).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court