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Timothy C. Hannigan
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Court of Appeals

STATE OF NEW YORK

COURTNEY ANDERSON,

Plaintiff-Respondent,

against

COMMACK FIRE DISTRICT,

Defendant-Appellant,

and

COMMACK FIRE DEPARTMENT and JOHN M. MUILENBURG,

Defendants.

BRIEF FOR DEFENDANT-APPELLANT

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STATE OF NEW YORK
COURT OF APPEALS

COURTNEY ANDERSON, Plaintiff-Respondent, -against- COMMACK FIRE DISTRICT, COMMACK FIRE DEPARTMENT and JOHN M. MUILENBURG, Defendants, Appellant.	APPL: 2022-00005 Appellate Division Docket No.: 2018-01021 Suffolk Co. Index No.: 36752/12

STATEMENT OF RELATED LITIGATION PURSUANT TO RULE 500.13

1. There is no related litigation ongoing at this time. The trial in this matter was adjourned by Supreme Court, Suffolk County pending the decision of this Court.

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QUESTION PRESENTED

1. The Appellate Division, Second Department certified the following question to this Court: Was the decision and order of the Appellate Division, Second Department in *Anderson v Commack Fire District* (195 AD3d 779 [2d Dept 2021]), properly made [861]?

PRELIMINARY STATEMENT

"The Legislature's choice of words in Vehicle and Traffic Law § 1104 (e) reflects a carefully calibrated standard. Subdivisions (a) through (d) relieve emergency vehicle personnel and their municipal employers of ordinary traffic observance responsibilities" (*Campbell v City of Elmira*, 84 NY2d 505, 512 [1994] [emphasis added]). While this Court has, time and again, properly interpreted and applied Vehicle and Traffic Law § 1104, the decision appealed from nullifies the express language of Vehicle and Traffic Law § 1104 with respect to emergency operation of an authorized emergency vehicle owned by a Fire District, and should be reversed.

The central question of law on appeal stems from plaintiff's improper conflation and misapprehension of the distinction between General Municipal Law § 205-b and Vehicle and Traffic Law § 1104, the facts necessary to trigger application of the heightened standard of "reckless disregard" set forth in Vehicle and Traffic Law § 1104, and the fact that the heightened standard conferred by Vehicle and Traffic Law § 1104 is available to all police, fire, ambulance, and emergency service vehicles, regardless of the entity that owns the vehicle. Justice Barros of the Second Department identified the proper result in her dissent, writing "application of the reckless disregard standard of care to Muilenburg's operation of the fire truck compels the conclusion that there is no liability of Muilenburg for

which to hold the Fire District vicariously liable. Therefore, the complaint should be dismissed as against the Fire District" (*Anderson v Commack Fire Dist.*, 195 AD3d 779, 783 [2d Dept 2021]).

The error of the lower courts reveals itself through this real-world example: if a fire district fire vehicle, a city fire vehicle, a police vehicle, and an ambulance – publicly or privately owned – responded to the same emergency call while engaged in privileged "emergency operation" as defined in Vehicle and Traffic Law § 1104 (b), all of the aforesaid vehicle owners – including a private ambulance company (*see Shalom v E. Midwood Volunteer Ambulance Corp.*, 138 AD3d 724 [2d Dept 2016]) – would be entitled to the heightened standard of "reckless disregard" except the fire district.

The anomalous outcome created by the Second Department is contrary to the specific purpose of Vehicle and Traffic Law § 1104. If the present decision is permitted to stand, it will require confusing and illogical civil jury instructions and verdict sheets that will require a jury to apply different legal standards to evaluate the *same act* to determine the liability of the employee-operator and the fire district-employer under a theory of vicarious liability. The decision appealed from creates an improper distinction that does not exist in the law, and significantly prejudices the roughly 900 fire districts – political subdivisions of the State of New

York – statewide that have the primary obligation of furnishing fire protection to the public within their geographical boundaries.

The decision appealed from is further troubling given that the underlying facts are undisputed. All parties – and both lower courts – agree that Fire District fire vehicle driver Muilenburg was entitled to the heightened standard of reckless disregard. As this Court observed, it "is common in section 1104 cases" to have issues of fact as to whether the operator's "conduct met the reckless disregard standard" (*Kabir v County of Monroe*, 16 NY3d 217, 234 [2011]). However, the "common" questions of fact are not present here. The facts are undisputed. Rather, the present appeal arises out of the denial of the Fire District's motion for summary judgment on the basis that the Fire District is not entitled to the same standard of care – "reckless disregard" – as was the operator of its emergency fire vehicle [1].[1] The practical issues created by the present decision of the Second Department – that a different standard of negligence applies to the municipal employer under a theory of vicarious liability – for the trial bench and bar are legion, and warrant reversal.

[1] Unless otherwise indicated, all references contained in brackets are to the consecutively paginated, two-volume set entitled "Record on Appeal".

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to CPLR 5602 (b) in that leave to appeal to this Court was granted by the Appellate Division, Second Department upon the Fire District's motion for such relief [860-861].

FACTS

The facts of this case are undisputed. On June 22, 2012, the Fire District was dispatched to an alarm of fire [292-293]. The driver of the Fire District fire vehicle, John Muilenburg, activated the lights and sirens of the fire vehicle at the Fire District firehouse and drove toward the address indicated for the alarm [454; 654-655, 665-667; 708, ¶4]. While in route to the location of the alarm, the Fire District fire vehicle came to an intersection controlled by a traffic light [308]. Muilenburg slowed the Fire District fire vehicle down to a stop at the white line immediately prior to the intersection, and proceeded slowly into and through the intersection [309]. At the time that the Fire District fire vehicle proceeded through the intersection, the traffic signal showed "red" in its direction of travel [308].

From Muilenburg's position in the driver's seat, traffic was stopped in all directions for the fire vehicle [361, 708]. The fire vehicle then slowly proceeded through the steady red signal [361]. As the fire vehicle proceeded through the intersection, a vehicle driven by plaintiff Anderson struck it broadside [119, 205]. A witness observed plaintiff's vehicle travelling at a rate of approximately 40

miles per hour through the time of impact, and stated that plaintiff's vehicle "never slow[ed] down" [709]. The witness honked his horn and flashed his lights at plaintiff in an attempt to get her attention and alert her of the presence of the Fire District fire vehicle [709]. Plaintiff heard the sirens of the Fire District fire vehicle but proceeded through the intersection because the traffic signal showed green for her direction of travel [201].

Following the collision, plaintiff commenced suit against the Fire District, Muilenburg, and defendant Commack Fire Department [28]. Following the completion of discovery, defendants moved for summary judgment dismissing the complaint against them [14]. Supreme Court granted the motion of the Commack Fire Department, finding that entity to be non-liable as a matter of law for the acts of firefighters engaged in firematic activity [9]. The court also granted the motion as to the driver of the fire vehicle, Muilenburg, finding that he engaged in the privileged operation of an emergency vehicle in accordance with Vehicle and Traffic Law § 1104 and was therefore subject to the heightened standard of "reckless disregard," and that his conduct did not amount to reckless disregard [4-9]. However, Supreme Court denied the Fire District's motion seeking dismissal of plaintiff's action under the theory of respondeat superior against it, finding that the Fire District was not entitled to the same standard – "reckless disregard" – that applied to its driver, Muilenburg [9].

The Appellate Division, Second Department affirmed that order, with one Justice (Barros, J.) dissenting [864-867]. Thereafter, the Fire District sought leave of the Second Department to appeal to this Court, which was granted [861]. The Fire District now appeals [860].

POINT I

IN VIEW OF THE FACT THAT THE FIRE DISTRICT FIRE VEHICLE WAS ENGAGED IN EMERGENCY OPERATION AND PERFORMED ONE OF THE ENUMERATED PRIVILEGES OF VEHICLE AND TRAFFIC LAW § 1104 WITH LIGHTS AND SIRENS ACTIVATED, THE SECOND DEPARTMENT ERRED IN FAILING TO APPLY THE RECKLESS DISREGARD STANDARD MANDATED BY VEHICLE AND TRAFFIC LAW § 1104 TO PLAINTIFF'S VICARIOUS LIABILITY CAUSE OF ACTION AGAINST THE FIRE DISTRICT.

In denying the Fire District's motion for summary judgment, the lower courts misapprehended the law relative to the privileged "emergency operation" of an emergency vehicle set forth in the Vehicle and Traffic Law and the imputation of the privileges of that law to the municipal owner of the emergency vehicle (*see* Vehicle and Traffic Law §§ 114-b; 115-a, 1103; 1104 [a], [b]). The court's reliance upon General Municipal Law § 205-b in support of the proposition that fire districts are subject to a different standard of liability than every other emergency response agency operating emergency vehicles is contrary to the law and warrants reversal. Additionally, well settled case law of this State makes clear that when an emergency vehicle is engaged in privileged "emergency operation",

the owner of that vehicle (or the employer of the driver) that is vicariously liable for the driver's actions is entitled to the benefit of the same heighted standard of care – reckless disregard – that would be imposed upon the driver but for the partial immunity from suit under Vehicle and Traffic Law § 1104. This Court and the various Appellate Departments have held as follows:

- "Fire Vehicle" (Vehicle and Traffic Law §115-a): The City of Elmira was entitled to the standard of reckless disregard based upon the actions of its firefighter-driver (*see Campbell v City of Elmira*, 84 NY2d 505, 508-509 [1994]).

- "Ambulance" (Vehicle and Traffic Law §100-b): A private, not-for-profit ambulance corporation is entitled to the standard of "reckless disregard based upon the actions of its employee-driver (*see generally Abood v Hosp. Ambulance Serv., Inc.*, 30 NY2d 295 [1972]; *Shalom v E. Midwood Volunteer Ambulance Corp*., 138 AD3d 724 [2d Dept 2016]).

- "Police Vehicle" (Vehicle and Traffic Law §132-a): City and its police officer, who drove the wrong way down a one-way street with lights and sirens activated, were entitled to the heightened "reckless disregard" standard set forth in Vehicle and Traffic Law § 1104 (e) (*see Frezzell v City of New York*, 24 NY3d 213, 217 [2014]).

- "Police Vehicle" (Vehicle and Traffic Law §132-a): Village of Massena entitled to heightened standard of "reckless disregard" and judgment as a matter of law based upon the actions of its officer while engaged in privileged "emergency operation" of a police vehicle at 60 miles per hour. This Court explained "[w]ith respect to the Village's vicarious liability for [the police officer's] conduct, the initial critical question is what standard should be applied in evaluating the culpability of that conduct. The touchstone for our analysis is Vehicle and Traffic Law § 1104" (*Saarinen v Kerr*, 84 NY2d 494, 497-99 [1994]; *see also Kabir v County of Monroe*, 16 NY3d 217, 234 [2011] [Graffeo, J., dissenting, discussing *Saarinen*]).

- "Police Vehicle" (Vehicle and Traffic Law §132-a): County and its Sheriff's Deputy would have been entitled to heightened standard of "reckless disregard" had Deputy engaged in "emergency operation" by activating the lights and sirens of the emergency vehicle (*see Kabir v County of Monroe*, 16 NY3d 217, 227 [2011]).

The plain language of Vehicle and Traffic Law § 1104 demonstrates that fire districts and their fire vehicles are included within the class of owners and vehicles subject to the heightened standard of reckless disregard. Section 1104 states that "the exemptions herein granted to an authorized emergency vehicle apply only

when" lights and sirens are activated (Vehicle and Traffic Law § 1104 [a-d] [emphasis added]). The Vehicle and Traffic Law defines "authorized emergency vehicle" as "[e]very ambulance, police vehicle or bicycle, correction vehicle, fire vehicle …" (Vehicle and Traffic Law § 101 [emphasis added]). The Vehicle and Traffic Law defines "fire vehicle" as "[e]very vehicle operated for fire service purposes owned and identified as being owned by the state, a public authority, a county, town, city, village or fire district . . ." (Vehicle and Traffic Law § 115-a). Thus, fire districts – and their fire vehicles – are specifically included within the class of vehicle owners subject to privileged operation and the heightened standard of "reckless disregard" as defined in Vehicle and Traffic Law § 1104.

Despite the clear language of the statute, the decision appealed from eviscerates the statutory protections set forth in Article 23 of the Vehicle and Traffic Law for a lone class of emergency service provider agencies: fire districts. This anomalous outcome is not sanctioned by any statue and is contrary to the precedent of this Court. In her dissenting opinion in in *Kabir v County of Monroe* (16 NY3d 217), Justice Graffeo aptly summarized the applicability of the "reckless disregard" standard to all state and municipal entities having vicarious responsibility over emergency vehicles engaged in emergency operation as follows:

> "The privileges [of Vehicle and Traffic Law § 1104] prevent police officers, firefighters and ambulance drivers from being prosecuted when they find it necessary to violate certain vehicle and traffic laws during emergency operations. Moreover, the privileges provide a significant benefit for drivers (**and the state and municipal entities that are vicariously liable for their conduct) in civil actions**" (*Kabir v County of Monroe*, 16 NY3d at 237) (emphasis added). "By creating the privileges, the Legislature has precluded a plaintiff from relying solely on the fact that an emergency responder drove through a red light or exceeded the speed limit to establish a prima facie case. Because the statute [Vehicle and Traffic Law § 1104] expressly permits this conduct, a plaintiff must offer additional evidence demonstrating why the emergency responder's actions rose to the 'reckless disregard' standard under the circumstances presented" (*Kabir v County of Monroe*, 16 NY3d at 238).

In this case, the complaint alleges a single cause of action against the Fire District under the theory of respondeat superior [31, ¶10]. Plaintiff's action against the Fire District under the theory of respondeat superior is based solely upon the Fire District's ownership of the fire vehicle involved in the collision [31, ¶10]. Plaintiff advanced no argument that the Fire District itself committed any tort

independent of those alleged against volunteer firefighter Muilenburg, its driver. Accordingly, the only basis for any finding of liability against the Fire District is vicarious in nature arising out of volunteer firefighter Muilenburg's emergency operation of the Fire District fire vehicle.

Both of the lower courts properly applied the correct "reckless disregard" standard of care to Firefighter Muilenburg and dismissed the complaint against him on the basis that his conduct did not rise to the level of reckless disregard for the safety of others. The same heightened standard of "reckless disregard" should have been applied to the plaintiff's claim of vicarious liability against the Fire District. Applying well settled principles of vicarious liability, it is submitted that application of the reckless disregard standard of care to Muilenburg's operation of the fire vehicle "compels the conclusion that there is no liability of Muilenburg for which to hold the Fire District vicariously liable" (*Anderson v Commack Fire Dist.*, 195 AD3d 779, 783 [2d Dept 2021, Barros, J., dissenting]).

The undisputed facts of this case demonstrate that the Fire District fire vehicle driven by volunteer firefighter Muilenburg was engaged in "emergency operation" with its lights and sirens activated [454; 665-667; 708, ¶4] (*see* Vehicle and Traffic Law §§ 114-b; 115-a; 1104 [c]). Despite finding that defendant Muilenburg was engaged in privileged "emergency operation" of the fire vehicle and thus subject to the heightened standard of "reckless disregard" pursuant to

Vehicle and Traffic Law § 1104, the lower courts failed to apply this standard to the Fire District that was vicariously liable for Muilenburg's operation of the Fire District's fire vehicle, as explained by Justice Barros of the Second Department (see *Anderson v Commack Fire Dist.*, 195 AD3d at 783 [Barros, J., dissenting]).

Vehicle and Traffic Law § 1104 grants an authorized emergency vehicle special driving privileges when involved in "emergency operation" (Vehicle and Traffic Law §§ 114-b; 1104 [a], [b]). Those privileges include passing through red lights and stop signs, exceeding the speed limit and disregarding regulations governing the direction of movement or turning in specified directions (*see* Vehicle and Traffic Law § 1104 [a], [b]). Vehicle and Traffic Law § 1104 (b) (2) provides that, when involved in an emergency operation, the driver of an emergency vehicle has the privilege to "[p]roceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation." Other motorists – like plaintiff, here – faced with an approaching emergency vehicle that is operating its lights and sirens "shall yield the right of way and shall immediately drive to a position … clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed" (Vehicle and Traffic Law § 1144 [a]). These two provisions jointly operated to give the fire district's emergency fire vehicle a preemptive right of way, regardless of whether it faced a signal to stop.

In this case, the Fire District fire vehicle operated in accordance with traffic regulations and the statutory requirements. It did not strike anything. It proceeded into the intersection slowly with the right-of-way and was struck by a vehicle that failed to yield the right-of-way [119, 205]. In these circumstances, the Fire District fire vehicle had the right of way (*see* Vehicle and Traffic Law § 1144 [a]) and defendants cannot be held liable for Muilenburg's inability to anticipate that, although other traffic had stopped at the intersection [309, 318, 319, 323, 324], plaintiff would fail to comply with her statutory obligation to stop her vehicle clear of the intersection (*see Garrett v City of Schenectady*, 268 NY 219, 223 [1935]).

Upon disregarding the applicable provisions of the Vehicle and Traffic Law, the lower courts then errantly applied the ordinary negligence standard of General Municipal Law § 205-b to the Fire District to determine whether the Fire District was vicariously liable for the acts of Muilenburg [8-9]. In doing so, the lower courts misapprehended the purpose, legislative history, and relevant case law applicable to General Municipal Law § 205-b.

POINT II

THE SECOND DEPARTMENT'S APPLICATION OF THE ORDINARY NEGLIGENCE STANDARD CONTAINED IN GENERAL MUNICIPAL LAW § 205-B TO THE FIRE DISTRICT WAS IMPROPER.

A. The legislative intent of General Municipal Law § 205-b demonstrates that the ordinary standard of negligence set forth therein is inapplicable to the present case.

At the time General Municipal Law § 205-b was enacted in 1934, local governments like the Fire District were immune from civil liability under the doctrine of "sovereign immunity". General Municipal Law § 205-b was enacted as an exception to the sovereign immunity of fire districts in order to "expand" the scope of civil liability by shifting liability from individual volunteer firefighters to fire districts having jurisdiction and control over such volunteer firefighters (*Thomas v Consol. Fire Dist. No. 1 of Town of Niskayuna*, 50 NY2d 143, 146-148 [1980]). The reasoning underlying the enactment of General Municipal Law § 205-b was to "expand rather than to limit liability" in an era of sovereign immunity. However, the statute's purpose to "expand rather than to limit liability" was misapplied and used in an improper context by the lower courts in denying the Fire district's motion. As explained by this Court in *Thomas*, "[t]he Legislature when it enacted section 205-b was acting in the apparent belief that the waiver of immunity effected by the Court of Claims Act did not affect the pre-existing municipal liability. Viewed in this light section 205-b may be seen as an attempt to provide for liability in situations where none had existed previously, i.e., to expand rather than to limit liability" (*Thomas v Consol. Fire Dist. No. 1 of Town of Niskayuna*, 50 NY2d at 148). *Thomas* remains good law, but did not involve privileged emergency operation under Vehicle and Traffic Law § 1104.

Contrary to the argument raised by plaintiff here, the so-called "expansion of liability" created by General Municipal Law § 205-b was to create an exception to sovereign immunity and provide an avenue for recovery against a fire district for the ordinary negligence of its firefighters that did not previously exist in law. General Municipal Law § 205-b was not, as plaintiff contends, designed to institute differing standards of care for liability for the operation of fire district vehicles on roadways applicable to the master and the servant, the fire district and its volunteer firefighter. As this Court wrote in *Thomas,* "the Legislature sought to assure that there would be some liability on the part of the fire districts where previously there had been some doubt" (*Thomas*, 50 NY2d at 146).

It is noted that the Vehicle and Traffic Law did not exist in 1934, when General Municipal Law § 205-b was enacted. As this Court has observed, the emergency operation privileges contained in Vehicle and Traffic Law § 1104 were first proposed and adopted in the 1950s (*see* 1954 NY Legis Doc No. 36, at 35; L 1957, ch 698; *Kabir v County of Monroe*, 16 NY3d at 222, 226-227). To wit, "Section 1104 was put in place in 1957 as part of what is now title VII of the Vehicle and Traffic Law, which was intended to "create a uniform set of traffic regulations, or the 'rules of the road' to update and replace the former traffic regulations, and bring them into conformance with the Uniform Vehicle Code adopted in other states" (*Kabir v County of Monroe*, 16 NY3d at 222). In this

regard, it is a "well-established rule of statutory construction that a 'prior general statute yields to a later specific or special statute'" (*Matter of Dutchess County Dept. of Social Servs. v Day*, 96 NY2d 149, 153 [2001]). To the extent that the lower courts perceived some conflict between General Municipal Law § 205-b and Vehicle and Traffic Law § 1104, those Courts violated the "well-established rule of statutory construction" by failing to yield to the later, specific, and special statute of Vehicle and Traffic Law § 1104 (*Matter of Dutchess County Dept. of Social Servs. v Day*, 96 NY2d at 153). "Use of the undemanding ordinary negligence test" of General Municipal Law § 205-b to the Fire District despite the fact that all elements of the specific, special, later-enacted statute of Vehicle and Traffic Law § 1104 were met was improper and should be reversed (*Saarinen v Kerr*, 84 NY2d at 502).

B. The legislative history of General Municipal Law § 205-b demonstrates that the statute and the ordinary standard of negligence set forth therein are inapplicable to the present case.

Before the 1934 enactment of General Municipal Law § 205-b, volunteer firefighters were held personally liable for all manner of "negligent acts occurring in the performance of their duties", while fire districts enjoyed sovereign immunity from suit (Sponsor's Mem, Bill Jacket, L 1934, ch 489; Letter from Firemen's Assn of State of NY, Apr. 28, 1934, at 1). The legislative record underpinning General Municipal Law § 205-b noted that a previous version of the bill relieved

volunteer firefighters of liability for negligence, but would have resulted in an injured person having no legal recourse as a result of the lack of any provision waiving the sovereign immunity of fire districts (Sponsor's Mem, Bill Jacket, L 1934, ch 489; Letter from Firemen's Assn of State of NY, Apr. 28, 1934, at 2). The absence of any measure in the bill waiving the fire district's sovereign immunity resulted in the veto of that bill by Governor Franklin D. Roosevelt (Sponsor's Mem, Bill Jacket, L 1934, ch 489).

The enactment of General Municipal Law § 205-b "erased any (sovereign) immunity formerly extended to fire districts and replaced it with the common-law rule of master and servant and the doctrine of respondeat superior" (*Nardone v Milton Fire Dist.*, 261 AD 717, 720 [3d Dept 1941]). It is hornbook law that the "doctrine of respondeat superior renders a master vicariously liable for a tort committed by his servant while acting within the scope of his employment" (*Riviello v Waldron*, 47 NY2d 297, 302 [1979]). The doctrine of vicarious liability "imputes" – not enlarges or enhances – "liability to a defendant for another person's fault" (*Feliberty v Damon*, 72 NY2d 112, 117-118 [1988]).

Contrary to the caselaw cited by the majority in the decision appealed from, General Municipal Law § 205-b was not designed to "expand liability" for fire districts in the context of the privileged "emergency operation" of a "fire vehicle" (Vehicle and Traffic Law §§ 115-a; 1104). Rather, the intent of the statute was to

carve out an exception to the sovereign immunity of fire districts and create an avenue of recovery for an injured party while ensuring that the individual volunteers were immune from suit [Appendix A: Sponsor's Mem, Bill Jacket, L 1934, ch 489; Letter from Firemen's Assn of State of NY, Apr. 28, 1934]. Prior to 1934, no such immunity from suit existed for individual volunteer firefighters.

Justice Barros of the Second Department correctly identified the error of that Court's reliance on General Municipal Law § 205-b. To wit, "[t]he use of the words 'for the negligence of' in General Municipal Law § 205-b merely describes the condition for the imposition of vicarious liability upon the fire districts, i.e., ordinary negligence of its volunteer firefighters . . .the purpose of the statute is to 'immunize volunteer firefighters from civil liability for ordinary negligence and to shift liability for such negligence to the fire districts that employ them'" (*Anderson v Commack Fire Dist.*, 195 AD3d 779, 782 [2d Dept 2021]). Justice Barros also properly explained "General Municipal Law § 205-b functions merely as a liability shifting statute, and does not purport to define the rules of the road or the standard of care to be applied in any particular circumstance. Indeed, the rules of the road and the appropriate standards of care that apply to all vehicles are found in the Vehicle and Traffic Law" (*Anderson v Commack Fire Dist.*, 195 AD3d at 782).

Consistent with the dissenting opinion of Justice Barros, all references to General Municipal Law § 205-b made by the lower courts here are misplaced. To

wit, Supreme Court quoted a portion of the statute relating to "volunteer firefighters, at the time of any accident or injury . . . acting in the discharge of their duties" [9] (emphasis added). While the mere fact that a volunteer firefighter acts "in the discharge of their duties" while driving a vehicle is consistent with this Court's decision in *Thomas*, it is separate and distinct from "emergency operation" of a "fire vehicle" and performance of one of the four enumerated acts under Vehicle and Traffic Law § 1104 (Vehicle and Traffic Law §§ 115-a; 1104[b]). As this Court held in *Kabir*, even if an emergency vehicle is operated in the discharge of official duties, the vehicle owner and driver cannot avail themselves of the heightened standard of "reckless disregard" set forth in Vehicle and Traffic Law § 1104 (e) unless the vehicle is engaged in "emergency operation", the emergency lights and siren of the emergency vehicle are activated, and the vehicle performs one of the four specifically enumerated acts set forth in the statute (*see Kabir v County of Monroe*, 16 NY3d at 226-227).

In this case, both lower courts held that the Fire District fire vehicle was engaged in "emergency operation" pursuant to Vehicle and Traffic Law §§ 114-b and 1104 [8-9]. Plaintiff testified that she heard the sirens of the Fire District's fire vehicle [112, 115, 201], and knew that they came from the fire vehicle that she ultimately struck [205]. Numerous witnesses testified that the lights and sirens of the Fire District fire vehicle were on "as soon as [the fire vehicle] left the

firehouse" and through the time of the collision [454; 665-667; 708, ¶4]. Given the clear evidence demonstrating that the Fire District fire vehicle was engaged in "emergency operation" and Supreme Court's conclusive finding of "emergency operation" pursuant to Vehicle and Traffic Law Sections 114-a, 115-a, and 1104, the lower courts erred in disregarding the statutory privileges afforded under the Vehicle and Traffic Law and mistakenly applied General Municipal Law § 205-b to the circumstances of this case. Because the Second Department incorrectly applied General Municipal Law § 205-b to the facts of this case, its decision should be reversed as to the Fire District, and the complaint dismissed.

C. Supreme Court's reliance upon this Court's decision in *Thomas v Consolidated Fire Dist. No. 1 of Town of Niskayuna* was misplaced, as *Thomas* did not involve privileged "emergency operation" of a fire vehicle as defined by Vehicle and Traffic Law § 1104.

Supreme Court's reliance on *Thomas v Consolidated Fire Dist. No. 1 of Town of Niskayuna* (50 NY2d at 146) was misplaced and does not support its application of General Municipal Law § 205-b to the Fire District, here. While *Thomas* is a critically important case in the analysis of the legislative purposes for the enactment of General Municipal Law § 205-b, Supreme Court misapplied the facts in the instant case to those in *Thomas*.

The facts in *Thomas* were significantly different from the case at bar. In *Thomas,* the plaintiff was struck and killed outside of the geographic boundaries of

the fire district (*Thomas v Consol. Fire Dist. No. 1 of Town of Niskayuna*, 50 NY2d at 145). As noted by this Court in *Thomas,* the central issue was "whether a fire district may be held liable for the negligent acts of one of its volunteer firemen committed in the course of duty while operating a privately owned vehicle outside the borders of the fire district" despite the language of General Municipal Law § 205-b limiting a fire district's liability for the operation of vehicles "upon the public streets and highways of the fire district…" (*Thomas v Consol. Fire Dist. No. 1 of Town of Niskayuna*, 50 NY2d at 145).

However, the most significant distinction of *Thomas* is that the vehicle involved in the accident there was a privately-owned vehicle that was <u>not</u> engaged in privileged "emergency operation" (*Thomas v Consol. Fire Dist. No. 1 of Town of Niskayuna*, 50 NY2d at 145). Notably absent in *Thomas* is any evidence that the volunteer firefighter's privately-owned vehicle had emergency lights or sirens, or that it was operated with any lights and sirens activated (*see* Vehicle and Traffic Law § 1104). Indeed, neither "emergency operation" nor Vehicle and Traffic Law § 1104 are referenced by this Court in *Thomas*.

It is also noted that the complaint in *Thomas* alleged that defendants – the driver of the car, the owner of the car, and the fire district – were liable in negligence, only (*see Thomas v Consolidated Fire Dist. No. 1 of Town of Niskayuna*, 50 NY2d at 145). Consequently, the issue in controversy in *Thomas*

was over the interpretation of General Municipal Law § 205-b as to a fire district's liability for accidents occurring beyond the boundaries of the fire district (50 NY2d at 145). There was no discussion in *Thomas* as to whether the privately-owned vehicle was engaged in privileged "emergency operation" at the time of the collision, which is the issue in this case. *Thomas* correctly interprets General Municipal Law § 205-b, and stands for the proposition that a fire district is vicariously liable for the negligence of its volunteer firefighters in the operation of their motor vehicles beyond the borders of the fire district – notwithstanding the express language of the statute – when those firefighters would otherwise be personally liable themselves in negligence (*see also Sikora v Keillor*, 17 AD2d 6 [2d Dept 1962], *affd* 13 NY2d 610 [1963]). Contrary to the decisions of the lower courts, *Thomas* neither precludes application of Vehicle and Traffic Law § 1104 to fire districts nor establishes any rules governing the operation of fire vehicles on public roadways.

D. Reliance upon the Fourth Department's decision in *Lynch v Waters* by the lower courts was misplaced, as *Lynch* did not involve privileged "emergency operation" as defined by Vehicle and Traffic Law § 1104.

Supreme Court's citation to the decision in *Lynch v Waters* (82 AD3d 1719 [4th Dept 2011]) is also misplaced. Unlike *Thomas*, *Lynch* does not involve the operation of an emergency vehicle whatsoever. In *Lynch,* the plaintiff commenced a wrongful death action as the administrator of the estate of a volunteer firefighter

who was killed while fighting a fire (*see Lynch v Waters*, 82 AD3d at 1720). Relying on *Thomas,* the defendants contended that their vicarious liability was limited to the negligent operation of vehicles by volunteer firefighters, and argued that they could not be held liable in negligence for the death of the firefighter. Vehicle and Trffic Law § 1104 was not implicated in *Lynch.* Accordingly, *Lynch* is not sufficiently analogous from a factual standpoint to lend any support to the case at bar.

POINT III

THE RELIANCE OF THE LOWER COURTS UPON *DIFRANCO V ESSIG* WAS ERROR BASED UPON THE FUNDAMENTALLY FLAWED ANALYSIS OF THE CENTRAL CASE RELIED UPON BY THE SECOND DEPARTMENT IN *DIFRANCO* AND THE CLEAR LANGUAGE OF THE MORE RECENT DECISION OF THIS COURT IN *KABIR*.

The rationale relied upon by the Second Department in *DiFranco v Essig* (2 AD3d 669 [2003]) fails scrutiny and would not be decided in the same manner today in light of this Court's more recent decision in *Kabir*. The lower courts relied heavily upon *DiFranco* in denying the Fire District's motion for summary judgment here. However, *DiFranco* is based entirely upon the decision of Suffolk County Supreme Court in *Tobacco v North Babylon Volunteer Fire Dept.* (182 Misc 2d 480, 485 [Sup Ct, Suffolk County 1999]). The unsustainable underpinnings of the trial court decision in *Tobacco* and its faulty analysis of General Municipal Law § 205-b were refuted by this Court in *Thomas* and, more

recently, in *Kabir*. The flawed analysis of General Municipal Law § 205-b by the trial court in *Tobacco* – which completely disregards the privileged "emergency operation" provisions of Vehicle and Traffic Law § 1104 – serves as the singular authority for the Second Department's decision in *DiFranco*. Significantly, no authority other than the trial-level *Tobacco* decision is cited as authority in *DiFranco* relative to the question presented on this appeal.

The interpretation of General Municipal Law § 205-b in *DiFranco* was premised upon the *Tobacco* court's decision on a post-trial motion that failed to mention – let alone give any consideration to – the analysis of General Municipal Law § 205-b set forth in *Thomas v Consol. Fire Dist. No. 1 of Town of Niskayuna* (50 NY2d 143). Following remand, the trial court in *Tobacco* purportedly engaged in an examination of the legislative history and the application of General Municipal Law § 205-b in its consideration of a post-trial motion brought by a defendant "fire department" (*Tobacco v N. Babylon Volunteer Fire Dept.*, 182 Misc 2d at 481). However, in the course of its consideration of the statute, the court in *Tobacco* made no mention and gave no consideration to *Thomas*, which explains the purpose and legislative history of General Municipal Law § 205-b. The court in *Tobacco* ignored this Court's interpretation of the plain language of the statute in *Thomas*, particularly as to the "expansion" of liability for fire districts created only as an exception to sovereign immunity.

In addition to ignoring this Court's analysis of General Municipal Law § 205-b in *Thomas*, the trial court in *Tobacco* also failed to properly identify a fire district as a political subdivision of the State. To wit, in *Tobacco v North Babylon Volunteer Fire Dept.*, the trial court stated its "research has failed to disclose a single Second Department or Court of Appeals case that extended the statutory immunities afforded under Vehicle and Traffic Law § 1104 to a fire district as opposed to a municipality or subdivision of the State" (182 Misc 2d at 485) (emphasis added).

However, it is beyond cavil that "a fire district is a political subdivision of the State" (Town Law § 174 [7]; *see Nelson v Garcia*, 152 AD2d 22, 25 [4th Dept 1989] ["when a town establishes a fire district, it creates a wholly independent political subdivision"]). As defined in the General Construction Law, a fire district is a "district corporation" that is a subdivision of the state (General Construction Law §66 [3]). A fire district "is vested with total supervision and control over virtually all aspects of the staffing of fire companies, as well as over the rules and regulations governing firefighting practices and procedures" (*see* Town Law § 176; see also N-PCL 1402 [e] [1]). As a "district corporation" (Town Law § 174 [7]), a Fire District also possesses the power to contract indebtedness and levy taxes (*see* General Construction Law § 66 [3]), and is solely responsible for overseeing the expenditures used to provide fire protection services within its geographical

boundaries (*see* Town Law § 176; *Matter of Hayes v Chestertown Volunteer Fire Co., Inc.*, 93 AD3d 1117, 1120-1121 [3d Dept 2012]).

The trial-level court in *Tobacco* inexplicably engaged in sophistry that resulted in the creation of an unwarranted, unlegislated exception to the Vehicle and Traffic Law that purported to deny fire districts the statutory privileges ancillary to emergency operations that are intended to benefit governmental and private emergency vehicle operators and owners alike. The *Tobacco* trial court's flawed analysis of General Municipal Law § 205-b directly led to it improperly vitiating the statutory privileges that were to be afforded for "emergency operation" of all emergency vehicles under Vehicle and Traffic Law §1104. The *Tobacco* court did so by inventing a rule imposing differing standards of care for the operator and the vicariously responsible owner of fire vehicles, and then making it applicable only to fire districts, and thus, inapplicable to every other governmental subdivision of the state or private emergency vehicle operator.

The sole basis for the decision of the Second Department in *DiFranco* was the interpretation of General Municipal Law § 205-b as articulated in the aforesaid trial-level decision in *Tobacco* (*see DiFranco v Essig*, 2 AD3d at 670). The findings and rationale set forth in the more recent Court of Appeals decision in *Kabir v County of Monroe* undermine *Tobacco* and thus, the entire basis for the Second Department's decision in *DiFranco*.

Kabir demonstrates that the analysis of General Municipal Law § 205-b in *Tobacco* was fatally flawed. *Kabir* cites the relevant legislative history and explains that "the reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)" (*Kabir v County of Monroe*, 16 NY3d at 220). Because the emergency vehicle in *Kabir* was not engaged in privileged "emergency operation", the concomitant privileges afforded under Vehicle and Traffic Law Section 1104 did not apply. As a result, the heightened standard of "reckless disregard" did not apply to either the operator or municipal owner of the police vehicle in *Kabir*. *Kabir* clearly states the rule of law applicable to the privileged emergency operation of an emergency vehicle as follows:

> "Simply put, section 1104 (e) establishes a reckless disregard standard of care 'for determining … civil liability for damages resulting from the privileged operation of an emergency vehicle' . . . if the conduct causing the accident resulting in injuries and damages is not privileged under Vehicle and Traffic Law § 1104 (b), the standard of care for determining civil liability is ordinary negligence"

(*Kabir v County of Monroe*, 16 NY3d at 230-231).

The underlying premise of the trial court's decision in *Tobacco* is erased by the decision of the Court of Appeals in *Kabir*. The contention that the *Tobacco* court's analysis could discern no Court of Appeals case on point addressing the applicability of Vehicle and Traffic Law § 1104 has been eliminated.[2] Addressing the application of Vehicle and Traffic Law § 1104 in her dissenting opinion, Judge Graffeo opined that the "reckless disregard" standard applies to <u>all</u> state and municipal responsible and vicariously liable for the operation of emergency vehicles engaged in emergency operation as follows:

> "The privileges [of Vehicle and Traffic Law § 1104] prevent police officers, firefighters and ambulance drivers from being prosecuted when they find it necessary to violate certain vehicle and traffic laws during emergency operations. Moreover, the privileges provide a significant benefit for drivers (**and the state and municipal entities that are vicariously liable for their conduct) in civil actions**" (*Kabir v County of Monroe*, 16 NY3d at 237) (emphasis added).

Kabir remains controlling precedent on point with respect to determining whether an emergency vehicle is engaged in privileged emergency operation under Vehicle

[2] As noted above, the trial court in *Tobacco* gave no credence to this Court's decision in *Thomas v Consol. Fire Dist. No. 1 of Town of Niskayuna* (50 NY2d 143 [1980]) for the Court's explanation of the purpose and legislative history of General Municipal Law § 205-b, or in attempting to distinguish emergency operations of "fire vehicles" as opposed to privately-owned vehicles.

and Traffic Law § 1104 (*see Oddo v City of Buffalo*, 159 AD3d at 1520-1521; *Reid v City of New York*, 148 AD3d at 740; *Perkins v City of Buffalo*, 151 AD3d at 1942). ‘

The departure from this Court’s precedent appears to be contained to the Second Department. The First, Third, and Fourth Departments have generally applied the rule correctly, albeit none in the context of a fire district as the municipal owner of the vehicle (*see generally Santana v City of New York*, 169 AD3d 578, 578 [1st Dept 2019]; *Oddo v City of Buffalo*, 159 AD3d 1519, 1520-1521 [4th Dept 2018]; *Rouse-Harris v City of Schenectady Police Dept.*, 124 AD3d 1124 [3d Dept 2015]). It is noted that the Second Department has previously, and correctly, applied the reckless disregard standard to the City of New York arising out of collisions involving fire vehicles owned by that city (*see Jobson v SM Livery, Inc.*, 175 AD3d 1510 [2d Dept 2019]; *Reid v City of New York*, 148 AD3d 739, 740 [2d Dept 2017]).

In view of the failure of the lower courts to apply the clear rule of law set forth in *Kabir*, it is respectfully submitted that this Court should reverse the denial of the Fire District’s motion, grant the Fire District’s motion in all respects, and dismiss the complaint.

CONCLUSION

Kabir and its progeny make clear that the privileges of Vehicle and Traffic Law § 1104 apply to prevent police officers, firefighters, ambulance drivers, and the state and municipal entities that are vicariously liable for their conduct from being prosecuted when it becomes necessary to violate certain vehicle and traffic laws during emergency operations. Despite this clear rule of law, the decision appealed from represents an improper and imprudent exclusion of fire districts – political subdivisions of the State of New York – from availing themselves of the privileges accorded to every other state and municipal entity pursuant to Vehicle and Traffic Law § 1104. The decisions of the lower courts turn the law of vicarious liability on its head by citing to a statute – General Municipal Law § 205-b – which, as explained by this Court in *Thomas,* applies to fire district fire vehicles only when such vehicles are engaged in non-privileged emergency operation, or non-emergency operation altogether. It is respectfully submitted that this Court should continue to apply the clear rule of law set forth in *Kabir*, reverse the denial of the Fire District's motion, grant the Fire District's motion in all respects, and dismiss the complaint in its entirety.

Dated: April 28, 2022

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CERTIFICATE OF COMPLIANCE

TIMOTHY C. HANNIGAN, ESQ., an attorney duly licensed to practice law in the State of New York, does herby certify that the foregoing brief complies with the Rules of Practice of the New York Court of Appeals, 22 NYCRR § 500.13 (c) (1), as follows:

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