To Be Argued By:
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Appellate Division, Second Department Docket No. 2018-01021

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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

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]?

FACTS

The relevant facts are as stated in the Brief of Defendant-Appellant Commack Fire District.

POINT I

CONTRARY TO PLAINTIFF-RESPONDENT'S ASSERTION, THIS COURT'S DECISION IN *THOMAS* EXPANDED THE LAW OF VICARIOUS LIABILITY ONLY, AND HAD NO IMPACT ON THE RULES OF THE ROAD.

The brief of Plaintiff-Respondent evinces her misapprehension of the rule of law established by this Court in *Thomas v Consol. Fire Dist. No. 1 of Town of Niskayuna* (50 NY2d 143, 146-148 [1980]) [Respondent's Brief, at 13-17]. Contrary to the argument made by plaintiff, the so-called "expansion of liability" created by General Municipal Law § 205-b was to create an exception to sovereign immunity and render a fire district vicariously liable for its firefighters. Prior to the enactment of General Municipal Law § 205-b, a fire district was not vicariously liable for the acts of its firefighters while driving. General Municipal Law § 205-b does not 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 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).

The issue in *Thomas* was whether General Municipal Law § 205-b created vicarious liability for a fire district arising out of accidents occurring outside the boundaries of the fire district (*Thomas v Consol. Fire Dist. No. 1 of Town of Niskayuna*, 50 NY2d at 145). This Court's decision in *Thomas* expanded the law of vicarious liability, only. *Thomas* held a Fire District vicariously liable for the acts of volunteer firefighters in privately-owned vehicles outside of the geographical borders of the fire district. Neither General Municipal Law § 205-b nor *Thomas* modified the rules of the road or impose a lesser legal standard upon a fire district than that applicable to individual firefighters.

Justice Barros of the Second Department correctly identified the error of that Court's application of General Municipal Law § 205-b to this case. 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 correctly 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).

Plaintiff-Respondent incorrectly claims that imputing the reckless disregard standard Vehicle and Traffic Law § 1104 to a fire district "forecloses any civil remedy for a plaintiff injured in an accident involving a fire district vehicle" [Respondent's Brief, at 15]. To the contrary, the fire district remains vicariously liable for the acts of its firefighter, subject to the same legal standard applicable to its firefighter. The brief of Plaintiff-Respondent asks this Court to disregard the Vehicle and Traffic Law and, in an action rooted solely in vicarious liability, impose a lesser standard of liability upon the Fire District than its employee-driver was subject to.

Finally, plaintiff-respondent's claim that volunteer firefighters should be treated differently than paid firefighters for purposes of this Court's analysis is without basis in law and irrelevant to the issue at bar [Respondent's Brief at 15-17]. The issue before the Court is whether the municipal owner – the fire district – is subject to the same standard of liability as its firefighter-driver for purposes of vicarious liability for the operation of a district-owned vehicle. There is no

distinction in the law with respect to emergency response by volunteer firefighters, paid firefighters, or firefighters of combination departments (combination of volunteer and paid firefighters). It is noted that this Court recently discussed the formation and powers of fire districts in Matter of Waite v Town of Champion (31 NY3d 586, 590 [2018]; *see also* Town Law §§ 174, 176). Fire Districts can have paid and volunteer firefighters, or contract with an outside municipality or private "fire company" to furnish fire protection (General Municipal Law § 100; *see* Town Law § 176 [22]).

Similarly, plaintiff's use of the phrase "a fire department proper" has no basis in the law [Respondent's Brief at 15-17]. The term "fire department" denotes that more than one "fire company" acts under the auspices of a single authority having jurisdiction (a city, town, village, or fire district) (*see* Town Law § 176 [11]; Volunteer Firefighters' Benefit Law § 3 [2] [c]). Plaintiff-Respondent's argument is contrary to law, unsupported by this Court's decision in *Thomas*, and must be rejected.

POINT II

THE BRIEF OF PLAINTIFF-RESPONDENT FAILS TO ADDRESS THE MOST CRITICAL POINT ON APPEAL, WHICH IS THAT THE FIRE DISTRICT FIRE VEHICLE WAS ENGAGED IN PRIVILEGED EMERGENCY OPERATION UNDER VEHICLE AND TRAFFIC LAW § 1104 AT THE TIME THAT PLAINTIFF STRUCK THE FIRE VEHICLE.

Plaintiff-Respondent incorrectly asserts that "Vehicle and Traffic Law § 1104 does not apply to fire districts" [Respondent's Brief, at 18]. The plain language of the Vehicle and Traffic Law demonstrates that it applies to fire districts and their fire vehicles. Section 1104 states "the exemptions herein granted to an "authorized emergency vehicle" apply only when lights and sirens are activated (Vehicle and Traffic Law § 1104 [a-d]). 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). 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). By definition, fire districts 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.

Plaintiff-Respondent also misapprehends and misstates the argument made by the Fire District regarding General Municipal Law § 205-b. General Municipal Law § 205-b remains valid and applies when a fire district fire vehicle:

- is not engaged in "emergency operation" (Vehicle and Traffic Law § 114-b);
- is engaged in "emergency operation" but does not have its lights and sirens activated; or
- when a fire district fire vehicle is engaged in emergency operation, has its lights and sirens activated, but does not perform one of the four enumerated privileged operations stated in Vehicle and Traffic Law § 1104 (b) (*see* Vehicle and Traffic Law § 1104 [b-c]).

While General Municipal Law § 205-b remains valid, it is irrelevant here because the undisputed facts are that the collision occurred while fire vehicle was engaged in emergency operation with lights and sirens activated, and performed one or more of the privileged operations stated in Vehicle and Traffic Law § 1104 (b) . Accordingly, the heightened standard of reckless disregard set forth in Vehicle and Traffic Law § 1104 applies.

The cases cited by plaintiff-respondent – *Sikora v Keillor* (17 AD2d 6 [2d Dept 1962]), *Thomas v Consol. Fire Dist. No. 1 of Town of Niskayuna* (50 NY2d 143, 146-148 [1980]), and *Schleger v Jurcsak* (108 AD3d 515 [2d Dept 2103]) –

stand for the same proposition; a fire vehicle that is not engaged in emergency operation, operates without lights and sirens activated, and/or does not perform one of the four enumerated privileged operations contained at Vehicle and Traffic Law § 1104 (b) is subject to the ordinary negligence standard set forth in General Municipal Law § 205-b, and not the heightened standard of "reckless disregard" provided in Vehicle and Traffic Law § 1104 (*see Kabir v County of Monroe*, 16 NY3d at 217). The critical distinction between the vehicles in *Thomas* and *Sikora* and the fire vehicle here is that the Fire District's fire vehicle performed one of the enumerated driving operations set forth in Vehicle and Traffic Law § 1104 with its lights and sirens activated, thereby availing the driver and the Fire District of the reckless disregard standard under Section 1104 (*see* Vehicle and Traffic Law §§ 114-b; 115-a; 1104 [c]).

The import of *Kabir* in this case is that the heightened standard of reckless disregard applies if one (or more) of the four enumerated driving operations contained at Vehicle and Traffic Law § 1104 (b) is performed. *Kabir* is the controlling precedent on point with respect to determining whether an emergency vehicle is engaged in privileged emergency operation under Vehicle and Traffic Law § 1104. The Fire District proved – and Supreme Court expressly held – that the manner in which the Fire District fire vehicle was operated in this case satisfied Vehicle and Traffic Law § 1104 (b). Plaintiff-Respondent did not appeal that

order, and advances no argument in its brief relative to the Fire District's satisfaction of every element necessary to entitle it to the heightened standard of reckless disregard under Vehicle and Traffic Law § 1104.

Finally, plaintiff-respondent failed to address the Fire District's argument with respect to the Second Department's flawed reliance on *DiFranco v Essig* (2 AD3d 669 [2d Dept 2003]). *DiFranco* is based entirely upon the decision of Supreme Court, Suffolk County in *Tobacco v North Babylon Volunteer Fire Dept.* (182 Misc 2d 480, 485 [Sup Ct, Suffolk County 1999]) and, as a result, should not be followed. The decision in *Tobacco* is incorrect because that court failed to identify a fire district as a political subdivision of New York State. To wit, Supreme Court stated that 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). However, as this Court recognized in *Matter of Waite v Town of Champion* (31 NY3d at 590), "a fire district is a political subdivision of the State" (Town Law § 174 [7]). Accordingly, this Court should correct the error of the Second Department made in *DiFranco* and compounded by the underlying decision here, and reverse.

POINT III

PLAINTIFF-RESPONDENT CONCEDES THAT FIRE DISTRICT VEHICLE OPERATOR JOHN MUILENBURG WAS ENTITLED TO THE HEIGHTENED STANDARD OF RECKLESS DISREGARD UNDER VEHICLE AND TRAFFIC LAW § 1104.

Notably absent below was any appeal taken by Plaintiff-Respondent from Supreme Court's order dismissing the complaint as to defendant-driver John Muilenburg based upon his entitlement to the heightened standard of reckless disregard. Accordingly, there is no dispute that Fire District fire vehicle was operated in a manner that satisfied all conditions necessary to avail it of the heightened standard of "reckless disregard", which is the same standard that Supreme Court should have imputed to the Fire District based upon Plaintiff-Respondent's lone cause of action against the Fire District under respondeat superior.

Despite the absence of any dispute regarding the applicability of the heightened standard of "reckless disregard" to Firefighter Muilenburg, Plaintiff-Respondent's Brief engages in a purported analysis of Firefighter Muilenburg's actions under a theory of ordinary negligence [Respondent's Brief, at 20]. Plaintiff-Respondent's analysis in this regard underscores the inconsistency and fallacy of her position, which would require the invention of 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. Any analysis or consideration of Firefighter Muilenburg's actions here under a theory of ordinary negligence is contrary to law given the undisputed facts in the record entitling the Fire District fire vehicle to the heightened standard of "reckless disregard". Plaintiff-Respondent's improper interpretation of the plain statutory language frustrates the public policy behind Vehicle and Traffic Law §1104, invites "judicial 'second-guessing' of the many split-second decisions that are made in the field under highly pressured conditions" (*Saarinen v Kerr*, 84 NY2d at 502), and violates the "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]).

POINT IV

PLAINTIFF-RESPONDENT'S MISAPPREHENSION OF THE ARGUMENT ADVANCED BY THE FIRE DISTRICT DOES NOT AMOUNT TO ANY WAIVER BY THE FIRE DISTRICT.

Plaintiff-Respondent misstates the argument made by the Fire District by incorrectly claiming that General Municipal Law § 205-b was "erased" by *Kabir* [Respondent's Brief, at 26]. That is not the case. The point made by the Fire District on appeal is as follows: "[t]he 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" [Appellant's Brief, at 24]. The Fire District's argument was made in the context of the flawed analysis of the trial-court level decision in *Tobacco v North Babylon Volunteer Fire Dept.* (182 Misc 2d 480, 485 [Sup Ct, Suffolk County 1999]), upon which Supreme Court relied. The unsustainable underpinnings of the trial court decision in *Tobacco* and its faulty analysis of General Municipal Law § 205-b were refuted by the Court of Appeals in *Thomas* and, most recently, in *Kabir*. Contrary to Plaintiff-Respondent's contention, the Fire District waived no argument in this regard.

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 improperly and imprudently excludes 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 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. Well-established rules of statutory construction dictate that the later, specific statute of Vehicle and Traffic Law § 1104 applies here to the exclusion of General Municipal Law § 205-b. 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: August 25, 2022

By: _____

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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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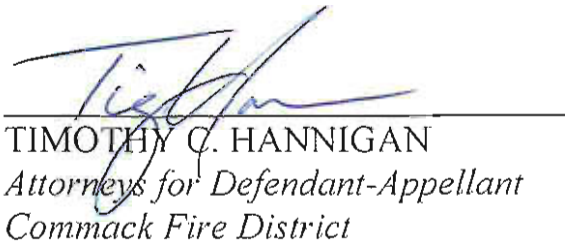

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