To Be Argued By:
Ellen Buchholz
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APL-2022-00005

Suffolk County Clerk's Index No. 36752/2012
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. MUILENBERG,

Defendants.

BRIEF FOR PLAINTIFF-RESPONDENT

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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 (192 A.D.3d 779 [2nd Dept. 2021]) properly made?

PRELIMINARY STATEMENT

General Municipal Law (GML) § 205-b is unequivocal in holding fire districts liable for the negligence of their volunteer fire fighters. Here, both the Supreme Court and the Second Department considered the underlying intent of GML § 205-b [which was enacted some 25 years prior to the enactment of Vehicle and Traffic Law (VTL) § 1104]. The Supreme Court held, "The plain language of the statute reflects the Legislature's dual purpose in enacting section 205-b; first to immunize volunteer fire fighters from civil liability for ordinary negligence and second, to shift liability for such negligence to the fire districts that employ them." (*Lynch v. Waters*, 82 A.D.3d 1719, 1722 [4th Dept. 2011]) (RA 4-9)

The Second Department agreed, and explained the standard of care to be applied under §205-b: "Pursuant to General Municipal Law 205-b, 'fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters duly appointed to serve therein in the operation of vehicles owned by the fire district upon the public streets and highways of the fire district, provided such volunteer firefighters, at the time of any accident or injury, were acting in discharge of their duties.' Thus, contrary to the Fire Department's contention, it was not limited to liability for conduct rising to the level of 'reckless disregard'

under Vehicle and Traffic Law §1104(e), and could be held liable for the ordinary negligence of a volunteer firefighter operating the Fire District vehicle. (See, *DiFranco v. Essig*, 2 A.D.3d 669; see also *Lynch v. Waters*, 82 A.D.3d 1719, 1722)." (RA 862-867)

The gravamen of the Fire District's appeal is that the interpretation of the law in the underlying decisions constitutes "conflation and misapprehension of the distinction between GML §205-b and VTL §1104." Citing this Court's decision in *Kabir v. County of Monroe*, 16 N.Y.3d 217, 227 (2011), and relying on the dissent to the Appellate Court decision here, the Fire District continues to argue that the heightened standard enumerated in VTL §1104 applies at bar and that GML §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 to any particular circumstance." (RA 866, 867, dissent of Barros, J.) Notably, although the Fire District argued on appeal that GML §205-b was abrogated or repudiated by *Kabir*, that argument was raised for the first time on appeal and was not addressed by the Supreme Court in the underlying decision.

The plain language of the statute is unambiguous. GML §205-b was enacted "to expand rather than to limit liability of municipal defendants". *Thomas v.*

Consol. Fire Dist. No. 1, 50 N.Y.2d 143, 148 [1980] Further, notably, in *Lynch*, which was decided after *Kabir*, the Appellate Court stated: "[t]he policy reasons underlying the immunity afforded to volunteer firefighters individually, i.e. [is] to encourage individuals to volunteer for public service and to protect their personal assets from liability do not apply to the entities that employ them." This is consistent with decisional precedent and the stated intent of §205-b.

The legislative intent of section GML §205-b is crystal clear from the transmittal letter of the Chairman of the Law Committee for the Fireman's Association of the State of New York to the then Governor Lehman, for Assembly Bill A1341(now sec. 205-b), which stated: "The bill under consideration relieves the fireman from liability but makes fire districts liable. It places the liability where it belongs....This bill takes the liability entirely off the shoulders of the volunteer fireman but insures that the injured party shall have the right to recover from the governmental agencies served by them." (Letter of 4/28/34, Bill Jacket, L.1934, ch. 489)

The Fire District's assertion that the "reckless disregard" standard enumerated in VTL§1104(e) applies to all municipal entities including Fire Districts, is belied by the statute(s), the evinced legislative intent and legal

precedent. The Fire District cannot cite to even one case where the "reckless disregard" standard was applied to exempt a Fire District from liability where, as at bar, a volunteer firefighter operating a fire district vehicle, was involved in a motor vehicle accident. As the Court held in *Tobacco v. North Babylon Volunteer Fire District*, 251 A.D.2d 398 (2nd Dept. 1998), aff'd 276 A.D.2d 551 (2000), remanded 182 Misc. 2d 480 (Sup. Ct, Suffolk County 1999), there is no conflict between GML §205-b and VTL §1104. The Court stated: "While General Municipal Law §205-b specifically defines the liability of fire districts, there is simply no reference in Vehicle and Traffic Law §1104 at all. The court will not read such protection for fire districts in Vehicle and Traffic Law §1104, as such a reading would bring the statute into direct conflict with the plain language of §205-b which specifically provides for liability of fire districts."

GML §205-b applies at bar, and has not been abrogated or eviscerated by *Kabir*. The Supreme Court properly denied the Fire District's motion for summary judgment and the Second Department properly affirmed, holding that the Fire District's liability is not limited to the "reckless disregard" standard of VTL §1104(e). The Second Department correctly held that the Fire District "failed to eliminate triable issues of fact as to whether Muilenburg was negligent in the

operation of the fire truck and if any such negligence contributed to the accident." (RA 865) Thus, the decision of the Second Department should be affirmed in all respects.

STATEMENT OF FACTS

Plaintiff-Respondent Courtney Anderson ("Plaintiff") sustained severe injuries in an accident that occurred on June 22, 2012, when the plaintiff's vehicle, which was lawfully proceeding eastbound on Jericho Turnpike in Commack pursuant to a green light, was struck by a fire truck owned by the Defendant-Appellant, Commack Fire District (the "Fire District"). The Fire District fire truck was operated by Defendant John M. Muilenburg, a volunteer firefighter for the Fire District ("Muilenburg" or the "defendant/driver").

The facts are not disputed. The accident occurred when the fire truck proceeded southbound on Harned Road through a steady red light and through the intersection. The defendant/driver testified that when he entered the intersection, the light was red. He stopped at the white stop lines prior to entering the intersection "[j]ust long enough to observe traffic heading westbound on Jericho Turnpike" and to make sure that westbound traffic was stopped. (RA 308, 309, 318) But his view of eastbound traffic was obstructed ("obscured") by a tractor trailer in the left turn lane so that he couldn't see any traffic behind it in the left eastbound travel lane (where plaintiff's vehicle was traveling). (RA 319, 359, 361) Nonetheless, despite the fact that his view of eastbound traffic was obstructed by

the tractor trailer, he continued through the intersection, through the red light, and struck plaintiff's vehicle. He never saw plaintiff's vehicle before he struck it with the fire truck. (RA 322, 723-725) Alan Blatt, the officer on the fire truck testified that his view of the straight travel lanes of eastbound Jericho Turnpike was obstructed by the garbage truck in the left turn lane of eastbound traffic. (RA 478)

The plaintiff testified that prior to the accident, she heard sirens and looked in every direction, but didn't know where they were coming from. She reduced her speed when she heard the sirens. She didn't see any lights, and the sound of the sirens did not appear to be getting any closer or further. She didn't hear any horns. She didn't see the fire truck until after it struck her vehicle. (RA 112, 115, 168, 201, 202, 203)

The Fire District moved for summary judgment dismissing the complaint. The Supreme Court granted summary judgment in favor of the firefighter/operator Muilenburg, holding that he was entitled to the exemption of VTL § 1104, the codification of the "reckless disregard" standard. But the Supreme Court properly denied the motion as to the Fire District, citing GML § 205-b, which holds fire districts liable for the negligence of their volunteer firefighters. The Supreme Court noted the underlying Legislative intent of GML §205-b (which was enacted some

25 years prior to the enactment of VTL § 1104), and held: "The plain language of the statute "reflects the Legislature's dual purpose in enacting section 205-b; first to immunize volunteer firefighters from civil liability for ordinary negligence and second, to shift liability for such negligence to the fire districts that employ them." (citation omitted) (RA 4-10)

The Supreme Court properly denied the Fire District defendants' summary judgment motion, holding that, as GML §205-b applies in all respects at bar, there are triable issues of fact "as to whether Firefighter Muilenburg was negligent in failing to see plaintiff's vehicle approaching from the west before moving the fire truck through the east bound lanes of Jericho Turnpike." (RA 4-11)

The Fire District appealed, presenting a new argument for the first time on appeal, i.e., that GML §205-b, which imposes liability of fire districts for the ordinary negligence of their volunteer firefighters, was "[e]rased" by the Court of Appeals decision in *Kabir v. County of Monroe*, 16 N.Y. 3d at 230. (Appellants' Brief, p. 24) Plaintiff argued on the appeal that those portions of Appellants' Brief should be stricken as they contain or refer to matters dehors the record. [While *Kabir* was not considered in the Second Department decision, it was discussed in the dissent.]

The Appellate Division affirmed the holding of the lower court that while Muilenburg could not be held liable under VTL §1104 for reckless disregard in operation of the fire truck, "the Fire District could be held liable for Muilenburg's ordinary negligence pursuant to General Municipal Law §205-b, and that the Fire District failed to eliminate triable issues of fact as to whether Muilenburg was negligent in the operation of the fire truck." (RA 865)

The Second Department clarified that the liability of fire districts is not limited to "conduct rising to the level of "reckless disregard" under Vehicle and Traffic Law 1104(d) and [fire districts] could be held liable for the ordinary negligence of a volunteer firefighter operating the Fire District's vehicle (See, *DiFranco v. Essig*, 2 A.D.3d 669; see also *Lynch v. Waters*, 82 A.D.3d 1719, 1722)." (RA 864-867) Notably, *Lynch* was decided after *Kabir*.

Thereafter, the Fire District sought leave of the Second Department to appeal to this Court, which was granted. (RA 861) This appeal ensued.

ARGUMENT

POINT I

A. THE SUPREME COURT AND THE SECOND DEPARTMENT CORRECTLY APPLIED THE ORDINARY NEGLIGENCE STANDARD OF GENERAL MUNICIPAL LAW §205-b

The Fire District incorrectly argues that the protections provided to emergency vehicles contained in VTL §1104, which is wholly applicable to fire departments, also shields fire districts from liability arising from a volunteer firefighter's ordinary negligence. This argument is contradicted by the plain language of the statutes, the legislative history and legal precedent. GML §205-b intentionally imposes vicarious liability upon fire districts for injuries arising from the ordinary negligent conduct of their volunteer firefighters while operating a fire district vehicle.

GML §205-b, is unequivocal. Written in 1934, it established that "Fire Districts… shall be liable for the negligence of volunteer firefighters…in the operation of vehicles owned by the fire district upon the public streets." Here, the Second Department affirmed the Supreme Court's decision that GML §205-b is applicable at bar as it is the exact scenario contemplated by the statute. The Second Department confirmed and clarified that a fire district's liability "was not limited

to conduct rising to the level of "reckless disregard under Vehicle and Traffic Law 1104(e)", rather GML §205-b created an ordinary negligence standard whereby a fire district "could be held liable for the ordinary negligence of a volunteer firefighter operating the Fire District's vehicle." [citing and relying upon *Difranco v. Essig*, 2 A.D.3d 779 (2nd Dept. 2013)]

Difranco, is directly on point as the facts there are strikingly similar to those at bar. There, the Second Department held that "pursuant to General Municipal Law §205-b, the standard to be applied with respect to the defendant…Fire District is that of ordinary negligence…That statute [GML §205-b] states unambiguously that fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters…in the operation of vehicles owned by the fire district upon the public streets." Id., *see also Tobacco v. North Babylon Fire District*, 251 A.D.2d 398 (2nd Dept. 1998), aff'd 276 A.D.2d 551 (2000), remanded 696 N.Y.S.2d 340 (Sup. Ct. 1999).

The stated purpose of GML §205-b, was to shift liability away from volunteer firefighters and impose it upon the fire districts for which they volunteer. GML §205-b specifically established a standard of care where: "Fire districts…shall be liable for the ***negligence*** of volunteer firefighters…" This

operative sentence not only shifts the liability of volunteer firefighters' conduct onto fire districts, but it also provides the standard to be applied, as it states that fire districts will be liable for the "negligence" of their volunteer firefighters.

Subsequent case law dealing with GML §205-b also establishes how the statute operates and its expansive breadth. In *Thomas v. Consolidated Fire Dist. No. 1 of Town of Niskayuna*, 50 N.Y.2d 143 (1980), this Court examined whether a fire district could be held liable for the negligence of one of its firefighters committed in the course of their duty while operating a private vehicle outside of the fire district's borders. The Court held that GML §205-b applied because "…the Legislature had intended to expand, not restrict the liability of fire districts (citations omitted)…In other words, 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. To now read [GML §205-b] as restricting liability – as exempting a fire district from liability other than that prescribed in the section- would be error."

This Court's view in *Thomas* was that this statute operated to expand "liability in situations where none had existed previously, i.e., to expand rather than limit liability" Id. With this view, this Court in *Thomas* held that GML §205-b imposed

liability on the Fire District **even** when the volunteer was operating a private vehicle outside of the borders of the Fire District's jurisdiction. The Fire District's assertion here that *Thomas* did not preclude application of VTL §1104 to fire districts, is contradicted by the holding of this Court. Further, "[t]he plain language of section 205-b 'reflects the Legislature's dual purpose in enacting [it]...: first, to immunize volunteer firefighters for ordinary negligence, and second, to shift liability for such negligence to the fire districts that employ them.'" *Lynch v. Waters*, 82 A.D.3d 1719 (4th Dept. 2011)

The Fire District's flawed assertion regarding the decision in *Thomas*, is that this Court applied GML §205-b rather than VTL §1104 because *Thomas* did not involve privileged emergency operation under VTL §1104. This is a complete misreading of *Thomas*, as the gravamen of the decision imposed liability upon the fire district in that case. GML §205-b was **expanded** to apply there, despite the fact that the volunteer firefighter in that case was not operating a fire district vehicle, nor was he within the borders of the fire district, when the accident occurred. The intent wasn't restriction and limitation; it was expansion. Those unique facts do not apply here as the facts at bar fall squarely within the purview of GML §205-b. At the time of this accident, the defendant/driver was operating a

fire district vehicle within the borders of the fire district, in the discharge of his duties. This is the exact type of incident the legislature described in the language of GML §205-b; especially considering that among a volunteer firefighter's duties, the one of paramount importance is responding to emergency calls.

Adopting the Fire District's argument that VTL §1104 applies to fire districts would eviscerate the intent and purpose of GML §205-b, foreclosing any civil remedy for a plaintiff injured in an incident involving a fire district vehicle. This result is simply untenable, as it would leave a gap in the legislation where volunteer firefighters would not be insulated from responsibility for incidents occurring while in the discharge of their duties. Further, *Thomas* was decided in 1980, well after VTL §1104 was enacted. If VTL §1104 was intended to curtail or affect GML §205-b in any way, this Court would have considered that in *Thomas*, or in its progeny.

The Fire District's argument here that volunteer firefighters should be treated the same as members of a fire department proper, subverts the intention of the legislature in enactment of GML §200–205-g, which was to establish regulations governing volunteer firefighters explicitly. These statutes make it clear that the law treats volunteer firefighters differently than non-volunteer. This

distinction is made clearest in GML §205 and 205-a. These two statutes describe the payments to be made to the injured or deceased firefighters in the performance of their duties. GML §205 deals **only** with volunteer firefighters, while GML §205-a deals with firefighters employed by a fire department proper. The legislature saw fit to make clear distinctions in regulations between volunteer and non-volunteer firefighters, and to treat them differently under the law. The Appellant Fire District has failed to make any cogent argument or provide a legal basis to overcome these legislative distinctions in case law or in any subsequent legislation.

In *Sikora v. Keillor*, 17 A.D.2d 6 (2nd Dept. 1962), *aff'd* 13 N.Y.2d 610 (1963), this Court affirmed the Second Department's dismissal of an action against the owner of a private motor vehicle that was operated by the defendant firefighter while he was in the course of his duties as a volunteer firefighter. The Court held that the fire district was liable for the volunteer firefighter's negligence, and reiterated that the intent and purpose of GML §205-b was to confer immunity onto volunteer firefighters, and shift the liability onto the fire districts. This was to protect volunteer firefighters while performing a service for the benefit of the community. As the latter is the exact circumstance at bar, GML §205-b applies in

all respects. See also, *Schleger v. Jurcsak*, 108 A.D.3d 515 (2nd Dept. 2013), with similar facts, where the Court held that the applicable standard to be applied, ordinary negligence, was provided in GML §205-b.

Here, the Fire District argues that fire districts are disparately impacted by GML §205-b because the section only applies to volunteer fire companies. The Fire District further argues that §205-b does not establish a particular standard of care. But these assertions are contradicted by the Legislature's clear intention in enacting this section (which was to protect volunteers providing a service to the community); and the phrase "fire districts…shall be liable for the negligence of [their] volunteer firefighters", which clearly establishes negligence as the standard of care.

The ultimate remedy sought at bar by the Fire District lies in the Legislature, which has not modified, repealed or otherwise vitiated this section of the General Municipal Law since its enactment. The Fire District is asking the Court to legislate from the bench. As it stands, GML § 205-b is unequivocal in holding fire districts liable for the ordinary negligence of their volunteer fire fighters, and the decision of the Second Department should be affirmed in all respects.

B. VEHICLE AND TRAFFIC LAW §1104 DOES NOT APPLY TO FIRE DISTRICTS, NOR DOES IT ABROGATE GENERAL MUNICIPAL LAW §205-b

VTL §1104 permits the driver of an "authorized emergency vehicle", when involved in an "emergency operation", to engage in privileged conduct that would normally be in violation of the VTL. The privileged conduct explicitly enumerated in VTL §1104(b), is:

1. Stop and stand or park irrespective of the provisions of this title [VII];
2. Proceed 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;
3. Exceed the maximum speed limits so long as he does not endanger life or property;
4. Disregard regulations governing directions of movement or turning in specified directions.

In *Kabir v. County of Monroe*, 16 N.Y.2d 217 (2011), this Court held that VTL §1104(e) establishes that a driver, when engaging in the specified conduct enumerated in the statute, will not be protected if they act with "reckless disregard" in their operation of an emergency vehicle. The Court held that the enumerated actions listed in VTL §1104(b) were the only privileged actions that would subject the operator of an emergency vehicle performing an emergency operation to the "reckless disregard" standard of VTL §1104(e), and any actions falling outside of VTL §1104(b) would be subject to the "ordinary negligence" standard. *Id.* Through

an examination of all of the legislative history and intent available for this legislation, this Court found that "the provisions are interrelated such that subdivision (e) does not create a reckless disregard standard of care independent of the privileges enumerated in subdivision (b)." *Id.* at 228. VTL §1104 is not meant to be an expansive statute that a court can read in different provisions that are not explicitly listed, but rather a narrow statute that fully encompasses the legislature's intent in the clear language. *See, Id.*

Here, the Fire District argues against the plain language of the GML §205-b, against legislative intent, and against legal precedent, that the "reckless disregard" standard of VTL §1104 applies to fire districts. The Fire District's argument largely relies on the dissenting opinion in *Kabir*, *supra*., which is not binding authority on this Court. Nor is it relevant as the dissent did not seek to extend VTL §1104 protection to fire districts. In fact, the term "fire district" is not found **once** in the dissenting opinion. Notably, in *Lynch*, which was decided **after** *Kabir*, the Appellate Court reiterated the underlying purpose of GML §205-b: "Here, the policy reasons underlying the immunity afforded to volunteer firefighters individually, i.e., to encourage individuals to volunteer for public service and to protect their personal assets from liability do not apply to the entities that employ

them." This is consistent with decisional precedent and the stated intention of §205-b.

The Fire District's effort to expand the reach of VTL §1104, properly fails. Reliance on *Kabir* and *Saarinen v. Kerr*, 84 N.Y.2d 494 (1994), is misguided, as neither case deals with fire districts, nor is the term "fire district" mentioned. Due to the unequivocal absence of "fire districts" in the statutory language, as well as the seminal case interpreting VTL §1104 (*Kabir*), terms not specified in the text of the statute cannot be read into it, VTL §1104 cannot be expanded to shield fire districts from liability, and thus GML §205-b is the applicable statute. *See*, Id., and VTL §1104.

POINT II

THE SECOND DEPARTMENT PROPERLY HELD THAT THERE ARE TRIABLE ISSUES OF FACT AS TO THE NEGLIGENCE OF THE FIREFIGHTER/FIRE TRUCK OPERATOR

The record evidence demonstrates that Muilenburg, the defendant/driver negligently operated the fire truck as he turned onto Jericho Turnpike, as he admitted that he made the turn while his vision of the eastbound left lane on Jericho Turnpike was obstructed. Neither the defendant/driver nor the non-party witness/firefighter on the truck, recalled whether the manual ("louder") alarm was

sounded. Plaintiff did not hear any increase or decrease of the siren to indicate its approach before the accident occurred, nor did she hear any honking. At the very least, summary judgment was properly precluded by triable issues of fact as to which sirens were activated at the time of the accident.

Moreover, although the defendant/driver testified that lights were activated on the truck, plaintiff testified that she looked for lights, but did not see any. She heard the sirens but was not able to tell where they were coming from and how close they were. Despite exercising due care, the plaintiff could not avoid the happening of the accident. The plaintiff was operating her vehicle in a cautious manner, pursuant to a steady green light when she was struck by the Fire District's fire truck. See, *Skerret v. Nixon*, 290 A.D.2d 500 (2nd Dept. 2002); *Pugh v. Chester Cab Corp.*, 41 A.D.2d 615 (1st Dept. 1973) and *Darmento v. Pacific Molasses Company, Inc.*, 81 N.Y.2d 985 (1993)

Liability here must be imposed upon the Fire District for the driver's negligence in going through a steady red light; going through the intersection despite the fact that his vision of eastbound traffic was (admittedly) obstructed; accelerating and increasing his speed as he plowed through the intersection; and in failing to yield the right of way to oncoming traffic. At the very least, the Second

Department correctly held that there are triable issues of fact as to whether Muilenburg was negligent in the operation of the fire truck and if so, whether such negligence caused or contributed to the injuries sustained by the plaintiff.

POINT III

THE FIRE DISTRICT'S ASSERTION THAT THE DECISIONS IN *DIFRANCO* AND *TOBACCO* REFUTED THIS COURT'S RULING IN *THOMAS*, IS INCORRECT

The Fire District argues that *DiFranco* and *Tobacco* eschewed the ruling of this Court in *Thomas* by failing to reference or cite it in those decisions. However, this argument is a red herring. The Court in *Tobacco* discussed GML §205-b at length, including an analysis of the legislative history and intent of the statute. *Tobacco*, at 483. The Court noted that in granting immunity to individual firefighters for negligent acts (GML §205-b), the legislature specifically acted to make fire districts liable for such negligence. It noted that the legislature's intent was that independent fire districts could pay for any judgment via their taxing authority. The Court in *Tobacco* held that there was no conflict between GML §205-b and VTL §1104, stating that "General Municipal Law §205-b specifically defines the liability of fire districts, there is simply no reference in Vehicle and Traffic Law §1104 at all" and that to "read such protection for fire districts in

Vehicle and Traffic Law §1104…would bring the statute into direct conflict with the plain language of §205-b which specifically provides for liability of fire districts." Id. The Court in *Tobacco*, held that the circumstances there, which were nearly identical to those at bar, fell within the purview of GML §205-b and that the Fire District's reliance on VTL §1104 there was a red herring (as it is here). Id. Relying upon the "wholly unambiguous terms" of GML §205-b, the Court held the employing fire district liable for the ordinary negligence of its volunteer firefighter. Id. at 484.

Subsequently, in *DiFranco*, the Second Department cited *Tobacco* and, reiterated that GML §205-b "states unambiguously" that "the standard to be applied with respect to the defendant …Fire District is that of ordinary negligence."*DiFranco*, at 670 (citation omitted). There, as at bar, the Second Department correctly held that GML §205-b was properly applied to the Fire District. Further, the Court held that that summary judgment was precluded by issues of fact as to whether the firefighter/truck operator (Essig) was negligent in the operation of a fire truck, and if so, whether such negligence contributed to the injuries sustained by plaintiff's decedent. See also, *Knapp v. Union Vale Fire Co.*, 141 A.D.2d 509 (2nd Dept. 1988).

The *Thomas* case was unique in its fact pattern as there, an accident occurred while a volunteer firefighter was operating his own vehicle outside the borders of the fire district. There, this Court discussed the expansive intent of GML §205-b, holding that, "...the Legislature had intended to expand, not restrict the liability of fire districts [citations omitted]…In other words, the Legislature sought to assure that there would be some liability on the part of fire districts where previously had been some doubt. To now read section 205-b as restricting liability as exempting a fire district from liability in all situations other than that prescribed in the section would be error." Id. at 147-148. The Fire District's assertion here that GML §205-b was applied by the *Thomas* Court solely because the firefighter there was operating his own vehicle beyond the borders of the fire district is unsupported by the facts and the law.

The Courts in *Tobacco* and *DiFranco* did not mention the *Thomas* decision because it did not change, alter, or abridge the clear language of GML §205-b. In both *Tobacco* and *DiFranco*, the facts were straightforward. The accidents in those cases occurred while volunteer firefighters were operating fire district vehicles within the boundaries of their fire district. Both cases relied on the "unambiguous" language of GML §205-b, and did not need to utilize the *Thomas* decision to

impose liability on the fire district there, as the circumstances fell precisely within the purview of the statutory language. *See, Tobacco,* at 484; *DiFranco* at 670. As such, the Fire District's argument that the decisions in those cases are distinguishable from the decision in *Thomas* is erroneous and misleading. Just as you don't need a chainsaw to cut a cheesecake, those Courts did not need to use the expansive language in *Thomas* in order to impose liability on the respective fire districts where both *Tobacco* and *DiFranco* fell squarely within the plain meaning of the statute.

The Fire District's appeal relies on dicta from the dissenting opinion in *Kabir* as basis for its argument that VTL §1104 applies to all municipal entities, including fire districts. This argument is unsupported in fact or law. The Fire District's appeal points to the statement in the dissent that: "…the privileges [of VTL §1104] provide a significant benefit for drivers (and the state and municipal entities that are vicariously liable for their conduct) in civil actions." *Kabir* at 237. Notably, the majority decision in *Kabir* did not make any determination as to whether fire districts are protected under VTL §1104 (and the above precedent confirms that they are not). And the dissent did not discuss or even mention GML §205-b. *Kabir* does not address, nor does it affect the application of GML §205-b

to fire districts, and it is a high reach for the Fire District to argue that it does. The Fire District even admits in its brief that VTL §1104 has never been applied to a Fire District in New York. (Appellant's Brief, p. 29). And none of the cases Appellant cited for application of VTL §1104 involved fire districts.

For all the foregoing reasons, the decision of the Second Department must be affirmed.

POINT IV

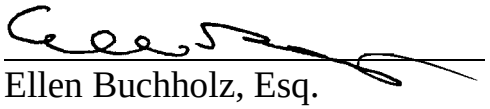
THE FIRE DISTRICT'S ARGUMENTS MADE FOR THE FIRST TIME ON APPEAL DEHORS THE RECORD AND MUST NOT BE CONSIDERED

The Fire District raised and argued an issue on appeal not raised in the record below - that GML §205-b, which imposes liability of fire districts for the ordinary negligence of their volunteer firefighters, was "[e]rased" by the Court of Appeals decision in *Kabir v. County of Monroe*, 16 N.Y. 3d at 230. (Appellant Brief p. 24) This argument is not only incorrect; it dehors the record as it was improperly raised for the first time on appeal. Thus, any portions of the Appellant's brief relating to this argument should be stricken and disregarded by this Court. (*Matter of AAA Carting and Rubbish Removal, Inc. v. Town of Clarkstown*, 132 A.D.3d 857 (2nd Dept. 2015)

CONCLUSION

General Municipal Law §205-b applies here in all respects. The Commack Fire District is liable to Courtney Anderson for the ordinary negligence of the defendant/operator of the fire truck, who admitted that he operated the fire truck through a steady red light at the subject intersection despite the fact that his vision was obstructed and he could not see eastbound traffic (where plaintiff was traveling) as he entered the intersection. Thus, *negligence per se* applies and the Fire District is liable to plaintiff for the defendant/driver's violation of Vehicle and Traffic Law § 1110, 1111, 1140, 1146, and 1180. For all the above reasons, the decision of the Second Department should be affirmed in all respects.

Dated: Woodbury, New York
July 21, 2022

By: 

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CERTIFICATE OF COMPLIANCE

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A proportionally spaced typeface was used, as follows:

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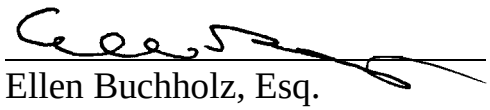
Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by § 500.1(h) is 5,355.

Dated: July 21, 2022

For the Firm: 

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