TO BE ARGUED BY:
ENOCH C. BRADY, ESQ.
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COURT OF APPEALS NO. APL-2023-00089

State of New York
Court of Appeals

ANA ORELLANA,

Plaintiff-Appellant,

-against-

THE TOWN OF CARMEL, THE TOWN OF CARMEL HIGHWAY DEPARTMENT AND MICHAEL J. SIMONE,

Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT ANA ORELLANA

PRELIMINARY STATEMENT

Plaintiff-Appellant, ANA ORELLANA, respectfully submits this Reply brief in further support of her appeal from the Order of the Appellate Division, Second Department, dated and entered January 25, 2023 (R539-541)[1] which affirmed the Supreme Court's order granting Defendants-Respondents, THE TOWN OF CARMEL, THE TOWN OF CARMEL HIGHWAY DEPARTMENT and MICHAEL J. SIMONE ("defendants" or "Simone") summary judgment pursuant to Vehicle and Traffic Law ("VTL") §1103(b) and denied as academic plaintiff's cross motion for summary judgment based on defendants' violation of VTL §1142 and §1172, as well as in reply to Respondents' opposition.

This Court should reverse the Appellate Division Order, deny defendants' motion for summary judgment and grant plaintiff's summary judgment motion in its entirety, including striking defendants First, Sixth and Eighteenth Affirmative Defenses, against defendants because Simone admitted that at the time of the accident he was traveling back to his office, having already sent out every driver and truck to salt the 28 preset routes which comprised the Town's roads, thereby addressing the two separate one-quarter inch accumulations of snow he had observed

[1] Unless otherwise indicated, references to "(R**)" refer to the pages of the Record on Appeal.

(R76-77, 81, 88, 92, 151-153). When Simone failed to look to his right at a stop sign and broadsided the minivan driven by the plaintiff (R127-129, 98-99, 112-114), he violated VTL §1142 and §1172, which violations constitute negligence *per se*.

In relieving Simone from obeying the rules of the road, the Appellate Division ignored the VTL §1103(b) provision and caselaw which state that the statute does not apply to vehicles "traveling to and from" such work.

The Appellate Division never discussed Simone's testimony that he relied on his 17 years of experience as Town Superintendent of Highways to check the Kings Ridge Road and Prince Road intersection, and radioed his crew at 10:00 a.m. from that location, knowing this would resolve any possible danger from the light snow that was falling before the first school buses left with kindergarteners at 12 noon (130-131, 84-85).

Simone left the Kings Ridge and Prince intersection to return to his base having accomplished what he set out to do, i.e. observe the conditions at his "bellwether" location, determine whether his crews needed to salt the town's 28 routes and, having determined this was necessary, Simone radioed his base from Kings Ridge-Prince to load up and salt the roads which would address any accumulation of snow before any icing could occur (R79-81, 84-86) an hour before the first buses left the nearby school.

Defendants' insistence that Simone was continuously inspecting the town roads because he happened to observe a one-quarter inch snow accumulation a second time and that Simone needed to develop a plan for addressing that condition is unsupported by Simone's actual testimony. Defendants' baseless contention makes Simone sound like a neophyte rather than the 17 year Superintendent who executed the plan he had in mind when he left his base and radioed his instructions to his crew from his bellwether location. Simone was merely traveling back to his base when he broadsided Mrs. Orellana.

The defendants reliance on Riley v. County of Broome, 95 N.Y.2d 455, 464 (2000) in this case is clearly misplaced. This Court's holding in Riley and the companion case Wilson v. State of New York, was about the defendants attempting to exclude the snowplow and street sweeper in their respective cases from VTL §1103(b) protection by claiming that they were "hazard vehicles" and therefore were only protected under VTL §1202(a). However, this Court held:

> "We reject claimants' contention that designated "hazard vehicles" are exempt only from the stopping, standing and parking regulations of section 1202(a), even when they are engaged in work on a highway. Section 1103(b) says no such thing. Rather, by its plain language, section 1103(b) excuses all vehicles "actually engaged in work on a highway" from the rules of the road, regardless of their classification. (Id. at 463).

Riley is all about whether the vehicles were to be excluded from VTL §1103(b) protection solely on the basis of the type of vehicles they were; our focus is on whether Simone was actually engaged in work on a highway at the time of the subject collision.

In exempting Simone from the rules of the road under the facts presented here, the Appellate Division violated the fundamental rules of statutory construction by failing to give full effect to the plain language of VTL §1103(b). Majewski v Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577 (1998) (as the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof).

"[M]eaning and effect should be given to all language in a statute, if possible, and "words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning." Hofmann v Town of Ashford, 60 A.D.3d 1498, 1499 (4th Dep't 2009) quoting Statutes § 231.

This Court should give meaning and effect to the "traveling to and from" such operations clause contained in VTL §1103(b), deny defendants' motion for summary judgment and grant plaintiff summary judgment based on defendants' violation of VTL §1142 and §1172.

REPLY POINT I

(In Reply to Respondents' Point I)

THIS COURT SHOULD REVERSE THE APPELLATE DIVISION AND DENY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO VTL §1103(b) BECAUSE SIMONE WAS NOT ACTUALLY WORKING ON A HIGHWAY AT THE TIME OF THE ACCIDENT

A. The Proof Shows That Simone Was Not Engaged in Work On A Highway; He Was Merely Traveling Back To His Office After Completing His Inspection and Mobilizing His Forces

VTL §1103(b) only exempts work and/or hazard vehicles from the rules of the road set forth in the Vehicle and Traffic Law while *actually* performing work on a highway. The Vehicle and Traffic Law *shall apply to such persons and vehicles when traveling to or from such hazardous operation*. VTL §1103(b).

Here, plaintiff was injured in a motor vehicle accident when her vehicle, which had the right of way, was struck by Simone's vehicle, which had a stop sign (R8, 539-541, see police diagram R59, R65-66, 73-74, 93). Supreme Court found that Simone was negligent (R8-9) and defendants freely admitted in the Appellate Division (Appellate Division Brief p. 26) and in their Respondent's brief (Resp. Br. P. 2) that Simone negligently operated his vehicle. Defendants concede that "Simone could be found to have failed to yield the right-of-way" and that this would constitute general negligence (Resp. Br. P. 2, 33) and there is no proof in the Record that plaintiff was comparatively negligent in the happening of this accident.

Therefore, the only way for defendants to avoid liability is to argue that Simone was actually engaged in work on a highway, and hence relieved from obeying the rules of the road pursuant to VTL §1103(b). In support of this argument, defendants have consistently misrepresented Simone's plain and unambiguous testimony that he was traveling back to his office, having already sent out every vehicle and every driver to treat Town roads:

Q. Okay. When you left Kings Ridge Road, after you made the call into your base, where was it that you were intending to go, at that point?

A. *Back to my office* (R88). (Emphasis added)

* * *

Q: How much more time did you intend to spend out on the roads, inspecting, prior to going back to the office?

A: *None*. (Emphasis added)

Q: So, you were on your way back to the office, at that time?

A: *I was on my way back to the office, yes*. (R151). (Emphasis added)

According to Simone, it was snowing lightly when he went on his inspection (R84). He first observed one-quarter inch of snow at the intersection of Kings Ridge Road and Prince Road and radioed his men from that location to load up their trucks and

salt their 28 routes, some five minutes before the accident (R76-77, 81, 84-85, 88, 92, 151). Notwithstanding, defendants argue that merely because Simone noticed a second one-quarter inch snow condition at the subject intersection on his way back to his office, this means that he was actually still engaged on work on a highway (Resp. Br. Pp. 8, 12, 21, 23).

However, after he sent out his forces, Simone expected that it would take approximately one hour for his men to salt all the roads in town (R130, 84-85) well in advance of the "impending" snow condition, which was the potential accumulation of a quarter inch of snow on the town roads beyond the two spots where he had seen that already. When Simone saw one-quarter inch of snow at the accident intersection, he did not pull over to radio his base because he did not need to change his orders as he knew the salting would do the job (R128-129). The quarter-inch of snow he observed on Highridge would be salted within the hour (R85).

Defendants argue, with mantra-like repetition, that Simone was "continuously", "continually", "actively", "constantly observing", "constantly observed", "making constant observations", "continuous observations", "continued to observe", "always inspecting", and that he "continued to inspect" road conditions (Resp. Br. P. 1, 17, 18, 21, 23, 24, 25, 26, 27, 28). These are gross misstatements of Simone's testimony and tellingly, defendants failed to cite a single page reference to

support these contentions. A simple word check of Simone's deposition transcript in the Record demonstrates that Simone never used these words or otherwise suggested during his testimony that he continuously inspected the Town's roads up until the time of the accident.

Defendants go on to contend that "Orellana demands that this Court ignore this testimony (that he was making constant observations of roadway conditions) because he had given instructions to the maintenance workers five minutes earlier" (Resp. Br. P. 23). Rather, plaintiff urges this Court to *accept* Simone's testimony that he had completed his inspection and was traveling back to his office when the accident happened (151-153).

In fact, Simone testified repeatedly that he radioed his workers *from Kings Ridge and Prince* regarding the quarter-inch accumulation he saw there, he was no longer communicating on his radio, he was traveling back to his office (R76-77, 79-81, 88, 151) and he did nothing when he saw the snow at the subject intersection (128-129). Therefore, Simone was not actually engaged in work on a highway at the time of the accident.

Defendants harp that there was an impending emergency snow situation in a desperate attempt to convince this Court that Simone was continuously working on a highway when he happened to notice the second one-quarter inch snow condition at the subject

intersection, *after* he had already sent out his forces (Resp. Br. P. 1, 6, 17, 21, 23, 24, 25, 26, 29, 44).

However, Simone's actual testimony was that his crews "would have addressed any potential emergency or impending emergency situation, under the weather conditions, as he observed them, at the time he called the base" (R85). As Simone explained, he did not consider there to be an emergency situation when he headed back to his office and he was not rushing back (R92).

Simone testified that even after he saw a scant one-quarter inch of slushy snow at the subject intersection, he did nothing about it. He merely entered the intersection to travel back to his office (R128-129). He testified that when he got back to his office that he intended to direct one of his workers to make sure this second quarter inch condition was addressed (R130-131).

Therefore, defendants are incorrect in arguing that Simone said that "he needed to have one of his workers immediately address it" (Resp. Br. P. 23). Contrary to defendants' argument, there is no proof in the Record that Simone needed to make continuous observations in anticipation of a snow emergency that they baselessly assert was to start in one hour (Resp. Br. P. 23).

Defendants' motivation in misrepresenting Simone's testimony is clear; it is the only way that they can avoid liability for Simone's admitted negligent conduct under prevailing caselaw

[which they are unable to distinguish]. See Zanghi v. Doerfler, 158 A.D.3d 1275 (4th Dep't 2018) (dump truck driver was traveling between work sites and the dump truck was empty; he was not plowing, salting, sanding or hauling snow; "the so-called 'rules of the road' exemption contained in Vehicle and Traffic Law § 1103 (b)" was inapplicable and the proper standard of care is negligence) and Davis v. Incorporated Village of Babylon, 13 A.D.3d 331 (2d Dep't 2004) (street sweeper driver was merely traveling from one worksite to another when he crossed a double yellow line separating eastbound and westbound traffic and struck the plaintiffs' vehicle; defendants were not entitled to invoke the exemption of Vehicle and Traffic Law §1103 [b]) (Resp. Br. P. 28). The courts in both Zanghi v. Doerfler supra and Davis v. Incorporated Village of Babylon supra found that the defendants in those cases were not actually working on a highway; they were traveling to and from their operations. Therefore, in each case, plaintiff was granted summary judgment on liability.

Defendants made no effort to distinguish Perez v. City of Yonkers, 204 A.D.3d 711 (2d Dep't 2022) (cited in our main brief at p. 27). In Perez, the snow plow operator was not driving a particular route; he was driving from complaint site to complaint site to salt and plow the roads as needed and was not at a complaint site at the time of the accident. The Court held that defendant failed to establish that the snowplow operator was

actually engaged in work on a highway. Similarly, at most, Simone was traveling from his observation site at Kings Ridge Road and Prince Road to his office; he was not actually engaged in work on a highway at the time of the accident.

Defendants argue that the snow condition at the intersection "triggered [Simone's] intent to direct one of his workers to address this specific area" and that he "intended to give specific orders . . ." when he returned to his office (Resp. Br. P. 9, 26).

However, and significantly, the accident happened at 10:05 a.m. (R56). Simone first observed the one-quarter inch of snow and radioed his men to load up their trucks and salt their 28 routes while he was at Kings Ridge Road and Prince Road, some five minutes before the accident (R76-77, 80-81, 84-85, 88, 92, 151) and well before school was dismissed two hours later, at 12 noon, at the nearby elementary school (128-129, 130-131). Notwithstanding, defendants argue that merely because Simone noticed a second one-quarter inch snow condition on his way back to his office means that he was actually still engaged on work on a highway (Resp. Br. Pp. 8, 12, 21, 23) simply because he "intended" to give some instructions regarding that condition when he got back to his office. Contrary to defendants' argument, there was no immediacy to Simone's "intention" to have one of his workers to address the subject intersection (Resp. Br.

23) because he did not immediately radio his office when he saw the snow at the subject intersection. There was no urgency as the roads would all be salted well before the 12 noon buses departed.

Intending to do something in the future is not the same as actually doing it. There must be more than a purported intent for Simone's conduct to constitute actually working on a highway. VTL §1103(b) only exempts from the rules of the road those vehicles that "build highways, repair or maintain them, paint the pavement markings, remove the snow, sand the pavement and do similar work" while "actually engaged in work on a highway." Riley v. County of Broome, 95 N.Y.2d 455 (2000). Riley says nothing about "intent" to perform work on a highway. Therefore, under Riley, Simone's conduct at the time of the accident does not fall under the protection of VTL §1103(b).

To accept defendants' argument would mean that anytime Simone (or any Highway Department employee) was traveling on Town roads, and he merely thought about what he was going to do when he got back to his office or to some work location, meant that he was actually engaged in work on a highway.

VTL §1103(b) and caselaw expressly state that the exemption from the rules of the road does not apply to workers/vehicles which are simply traveling to and from such operations. Riley v. County of Broome, 95 N.Y.2d 455, 460 (2000). Zanghi v. Doerfler,

158 A.D.3d 1275 (4th Dep't 2018). See also, Davis v. Incorporated Village of Babylon, 13 A.D.3d 331 (2d Dep't 2004); Hofmann v Town of Ashford, 60 A.D.3d 1498 (4th Dept 2009).

Equating mere intent to perform some task with actually performing that task, would rewrite the statute and caselaw, eliminate the "actually engaged in work on a highway" and "traveling to or from such hazardous operation" distinctions and allow workers who were traveling to or from a worksite, who were merely thinking about the work that they were going to perform when they got there, to claim protection under VTL §1103(b).

Contrary to defendants' contention (Resp. Br. P. 32), Riley v. County of Broome, supra, did not state that merely driving on Town roads and forming the intention to perform some act in the future constituted actual performance of work on a highway.

Every operator of a snowplow or street sweeper intends to do work on a highway, yet under the statute and caselaw, the exemption from the rules of the road under VTL §1103(b) does not apply to vehicles going to and from such operations.

Plaintiff had not abandoned her argument that Simone was not operating a "hazard vehicle" under VTL §1103(b) (Resp. Br. Pp. 22). Whether the ordinary Ford Explorer that Simone was operating on Town roads, outside a work zone, while traveling back to his office, was a work or hazard vehicle under the facts presented here is unsettled by Riley v. County of Broome, supra.

In fact, the Court's holding in Riley v. County of Broome, "comprises only those 'statements of law which address issues which were presented to the [Court] for determination'". Rodriguez v. City of New York, 31 N.Y.3d 312 (2018), citing Global Reins. Corp. of Am. v Century Indem. Co., 30 N.Y.3d 508, 517 [2017]) quoting Village of Kiryas Joel v County of Orange, 144 A.D.3d 895, 900 (2d Dep't 2016). Riley did not address the issues presented on this appeal.

Defendants argue that in determining whether Simone was engaged in work on a highway or returning to his office, "the Court would be forced to parse Simone's activities to before and after he gave his orders . . ." (Resp. Br. P. 23).

However, to determine the applicability of VTL §1103(b), Courts routinely scrutinize detailed facts and testimony. See Zanghi v. Doerfler, supra; Davis v. Incorporated Village of Babylon, supra; Hofmann v Town of Ashford, supra; O'Keefe v. State of New York, supra; Perez v. City of Yonkers, supra; Plummer v. Town of Greece, 213 A.D.3d 1236 (4th Dep't 2023); Lynch-Miller v. State of New York, 209 A.D.3d 1294 (4th Dep't 2022).

Parsing Simone's activities to before and after he directed his crews by two-way radio to salt the town roads (Resp. Br. P. 23) is exactly what is called for under the rationale employed in nearly all of the cases cited above. When Simone radioed his

base from Kings Ridge Road and Prince Road to send out his crews he had performed his inspection and had taken the action necessary to address the quarter inch snow condition he found at his bellwether location, as well as at the subject intersection.

All of the defendants' cases hinge on whether or not this Court accepts defendants' intentionally misleading version of Simone's testimony.

In Deleon v. New York City Sanitation Department, 25 N.Y.3d 1102 (2015) (Resp. Br. P. 21, 22), the Court reiterated the requirement that a vehicle actually be engaged in work on a highway in order for VTL §1103(b) to apply and found that the defendant driver was actually operating a street sweeper to clean the streets at the time of the accident. In sharp contrast, Simone was not actually engaged in work on a highway at the time of the accident, having already completed the job of evaluating the roads and mobilizing his forces.

In Matsch v. Chemung County Department of Public Works, 128 A.D.3d 1259 (3d Dep't 2015) (Resp. Br. P. 24), at the time of the accident, defendant driver was engaged in street sweeping operations, clearing debris from the highway. She needed to make several passes to complete her task and still needed to make another pass over the area. In fact, her task was so dangerous to the traveling public that she had her hazard lights and overhead beacon on and she had to be escorted by a state trooper

throughout these operations to get her in and out of traffic safely. Given the fact that the driver had to take a circuitous route to access the area and complete the work with these protections, the Court held that she was still actually engaged in protected work.

Here, Simone had already completed his operations and did not actually take any other steps to "maintain" Town roads after he radioed to his office to send out his forces. Simone was merely operating his Ford Explorer, with normal headlights on, traveling over the road just as any other driver would. Unlike Matsch, Simone's return route to his office was not dictated by the dangerous nature of his work or the need to inspect a particular location.

Contrary to defendants' contention, Sullivan v. Town of Vestal, 301 A.D.2d 824 (3d Dep't 2003) (Resp. Br. P. 24-27) demonstrates the circumstances under which a defendant who is actively inspecting a job site in a supervisory capacity may fall under the protection of VTL §1103(b) and supports granting summary judgment to plaintiff herein.

In Sullivan, a supervisor traveled from a worksite where he had worked during the day to a different site to ensure the second site was left in a safe condition, as was the practice amongst supervisory personnel in his town. The defendant was operating a truck and inspecting the second job site to make sure

it was clear of debris and other hazards. He drove slowly along the shoulder using the blinking yellow hazard light on top of his truck. He had not yet completed his inspection duties and was not yet on his way back to his office when the subject collision occurred.

In sharp contrast, Simone was not inspecting an actual job site or even the bellwether location he had set out from his office to inspect. He was not operating a truck on a highway shoulder and was not using hazard lights. Simone was simply traveling in a Ford Explorer through a rural subdivision back to his office, having completed his inspection at his bellwether location and having already dispatched his forces. Even after he noticed a slushy snow condition at the subject intersection he did nothing - he did not pull over to radio his office to give further instructions to his crew and he never testified that he was "worried" or "feared" that an icy condition could develop (Resp. Br. P. 25, 29). Rather, he was confident that his workers would get out and cover the Town's 28 routes in one hour (R84-85).

The facts in the case at bar are completely different than the facts in Sullivan. The facts in Sullivan would be comparable to the facts at bar had the Sullivan supervisor collided with the plaintiff's vehicle while he was traveling from the second construction site back to his base after having performed his

safety inspection of the second construction site. Then the Appellate Division, Third Department would have been required to deny the Sullivan defendants the VTL §1103(b) exemption from the rules of the road, as the lower courts in this case should have done, and as we are asking this honorable Court to do here.

Therefore, under the Sullivan analysis, this Court should reverse the Order appealed from, hold that Simone was not actually engaged in work on a highway and grant plaintiff summary judgment under VTL §1142 and §1172.

Allowing defendants to fall under the VTL §1103(b) exemption from the rules of the road would make the entire Town Simone's perpetual work site. Any time he operated his vehicle over Town roads and happened to observe a condition that might require his attention when he returned to his office, he would be held to the reckless standard under VTL §1103(b). This would fly in the face of the clear, unambiguous language of the statute, as well as the many cases which were correctly decided based upon the distinction between traveling to or from a worksite and actually working at a site, cited in our main brief and this Reply brief.

Plaintiff has never taken a position that a supervisor such as Simone could fall under the protection of VTL §1103(b) while on a "Sunday drive" (Resp. Br. P. 29). Plaintiff has always maintained that in order to come under the protection of VTL §1103(b) there must be more than the intention to address a

perceived problem on a Town road while traveling to one's office in order to be actually working on a highway.

Defendants' discussion of Ibarra v. Town of Huntington, 6 A.D.3d 391 (2d Dep't 22) (Resp. Br. P. 27) makes plaintiff's point that a defendant must make a *prima facie* showing that Simone was actually engaged in a work on a highway. Here, based on Simone's testimony and the facts surrounding the accident, defendants failed to establish that he was actually engaged in work on a highway when the accident happened. Therefore, this Court should reverse the Order appealed from, deny defendant summary judgment and grant summary judgment to plaintiff.

The only way that defendants can distinguish Lynch-Miller v. State of New York, 209 A.D.3d 1294 (4th Dep't 2022) and Plummer v. Town of Greece, 213 A.D.3d 1236 (4th Dep't 2023) (Resp. Br. Pp. 30) is to perpetuate their baseless contention that Simone was "constantly" observing road conditions (Resp. Br. Pp. 30-31), even though Simone's testimony does not support that contention.

Defendants' attempt to distinguish Hofmann v Town of Ashford, 60 A.D.3d 1498 (4th Dept 2009) (Resp. Br. P. 31) is also unavailing. Contrary to defendants' contention, at the time of the accident, Simone was not driving a specific inspection route, he was simply traveling back to his office. He was not rushing and did absolutely nothing, such as pull over to radio his office to change his instructions after observing the second one-quarter

inch of snow he saw on Highridge Road (92, 128-130, 151-153) as that condition would be addressed by the salting order he had already given. And, merely operating a vehicle owned by the Town is not sufficient to trigger VTL §1103(b) exemption from the rules of the road. All of the municipal defendants who were denied VTL §1103(b) protection while traveling to or from a worksite were driving vehicles owned by their municipal employers (See Resp. Br. P. 32).

B. Alternatively, This Court Should Find That There Are Questions of Fact For A Jury To Resolve As To Whether Simone Was Actually Performing Work On A Highway At The Time of The Accident

Alternatively, for the reasons set forth above and in Point III of our main Brief, this Court should hold that a jury should resolve the question of whether Simone was actually engaged on work on a highway or merely returning to his office at the time of the accident. See Ibarra v. Town of Huntington, 6 A.D.3d 391 (2d Dep't 2004); Lynch-Miller v. State of New York, 209 A.D.3d 1294 (4th Dep't 2022) and Plummer v. Town of Greece, 213 A.D.3d 1236 (4th Dep't 2023); Bicchetti v. County of Nassau, 49 A.D.3d 788 (2d Dep't 2008); O'Keefe v. State of New York, 40 A.D.3d 607 (2d Dep't 2007). Regardless of whether Bicchetti or O'Keefe describe the facts underlying those decisions, each case establishes that, in appropriate circumstances, a jury should resolve questions of fact as to whether the defendant driver was actually engaged in work on a highway or was reckless.

POINT II

THIS COURT SHOULD GRANT PLAINTIFF SUMMARY JUDGMENT AGAINST DEFENDANTS BECAUSE THEY HAVE FAILED TO REFUTE PLAINTIFF'S OVERWHELMING PROOF THAT SIMONE VIOLATED VTL §1142 AND §1172, WHICH VIOLATION CONSTITUTES NEGLIGENCE AS A MATTER OF LAW

In the event that this Court finds that Simone was not actually working on a highway at the time of the accident, this Court should grant plaintiff summary judgment on her negligence claims against defendants.

Defendants offered absolutely no explanation or justification for Simone's entering the subject intersection without looking to the right, in violation of VTL §1142 and §1172. In fact, defendants concede that "Simone could be found to have failed to yield the right-of-way" and that this would constitute general negligence (Resp. Br. P. 2, see also Resp. Br. P. 33). Therefore, this Court should grant plaintiff summary judgment against defendants based on Simone's negligence and violation of VTL §1142 and §1172.

Defendants allege that in the Appellate Division, plaintiff abandoned her request (made in Supreme Court) that the Court dismiss defendants' affirmative defense that she was negligent in the happening of the accident (Resp. Br. P. 14, 16). However, plaintiff has always argued that she is entitled to summary judgment pursuant to VTL §1142 and §1172 (R205, 207, 209-221) and

defendants have never offered a scintilla of proof that plaintiff was negligent.

In fact, and similarly, defendants failed to oppose that portion of plaintiff's motion for summary judgment which was to dismiss their First, Sixth and Eighteenth Affirmative Defenses (See R506-512). Having failed to oppose that portion of plaintiff's motion, Supreme Court should have dismissed those affirmative defenses. Clark v. New York City Health and Hospitals, 210 A.D.3d 631 (2d Dep't 2022); Elstein v. Hammer, 192 A.D.3d 1075 (2d Dep't 2021). However, finding that the "sole issue" was whether Simone was actually engaged in work on a highway (R6), Supreme Court never reached the issue of defendants' affirmative defenses.

In the event that this Court finds that Simone was not actually working on a highway and that defendants are not exempt from the rules of the road, this Court should grant plaintiff summary judgment on her negligence claims against defendants and dismiss defendants' affirmative defenses based on defendants total lack of any allegations that plaintiff was negligent and because defendants never opposed that portion of plaintiff's motion for summary judgment.

POINT III

(In Reply to Respondents' Point II)

ALTERNATIVELY, A JURY SHOULD DETERMINE WHETHER SIMONE'S CONDUCT CONSTITUTED A RECKLESS DISREGARD FOR THE SAFETY OF OTHERS

Defendant must submit proof that Simone's conduct was not reckless. Freitag v. Village of Potsdam, 155 A.D.3d 1227 (3d Dep't 2017).

Here, Simone's failure to obey the stop sign and yield the right of way was more than a momentary lapse in judgment, particularly when according to defendants, he was so concerned that the intersection was part of a bus route for a nearby elementary school (R130-131). Traffic leaving the school, such as Ms. Orellana, would approach Simone's vehicle from the right, the same direction where Simone failed to look. He also failed to activate his emergency flashers or the special flashing yellow and white lights in the grille (R95-96), to give warning to other drivers of his presence. Based on these facts, a jury should decide whether Simone's conduct was evidence of recklessness.

Defendants repeatedly state that Simone was particularly interested in the subject intersection because it was a bus route (Resp. Br. Pp. 1, 8, 12, 18, 21, 23, 26). However, Simone's concern about the bus route only amplifies his reckless disregard for the safety of others traveling from the elementary school which was just 500 feet away (R130), and the parents, teachers

and others who would travel that route each day for school.

Defendants quibble that Simone did not "run" the stop sign (Resp. Br. P. 33). However, he freely admitted that he violated VTL §1142 and §1172 by entering the intersection after a stop without looking to the right (R141-143, 129, 178) when it was obviously unsafe to do so.

While defendants argue that Simone was only traveling five to six mph (Resp. Br. P. 43), the photographs show that the impact to plaintiff's vehicle was significant (R116-117, 476). The entire front and rear door of plaintiff's vehicle were smashed in causing the plaintiff to undergo significant treatment, including a lumbar epidural injection, followed by a posterior fusion, including laminotomy, medical facetectomy, and microdiscectomy, with placement of an inter spinous stabilization device at L4 – L5 of the lumbar spine.

Contrary to defendant's erroneous contention, Simone did not testify that his right foot "remained on the brake" (Resp. Br. P. 9). He only testified that at the time of the accident, his right foot was on the brake, pressing hard at the time of impact (R116-117).

The cases cited by defendants do not support a finding, as a matter of law, that Simone was not reckless.

In Sullivan v. Town of Vestal, 301 A.D.2d 824 (3d Dep't 2003) (Resp. Br. P. 35-37), the Court found that defendant driver

was not reckless because he was driving slowly along the shoulder of the highway, using blinking yellow hazard lights on the top of his truck along with four-way flashers to warn of his slow travel and he frequently looked in his rearview mirror. Simone took no steps to warn of his approach and avoid the accident. He did the opposite, blithely entering the intersection without taking the most basic safety step of looking to the right toward traffic that would come from the elementary school.

In Yousef v. Verizon, Inc., 33 A.D.3d 315 (1st Dep't 2006) (Resp. Br. P. 34-37), the Court found no evidence of recklessness because there was only some evidence that a traffic light was present which, if observed, should have eliminated the risk of an accident such as the one alleged. The decision has no discussion of defendant driver's actual conduct. In sharp contrast, here there is additional proof that Simone was fully aware of the risk of entering the subject intersection which was a bus route in which he was "particularly" interested as it was near an elementary school (R130-131). Yet, he failed to look in the direction of elementary school traffic before entering the intersection.

Likewise, defendants failed to adequately distinguish Chase v. Marsh, 162 A.D.3d 1589 (4th Dep't 2018) and Bliss v. State of New York, 95 N.Y.2d 911 (2000) (Resp. Br. P. 38-39). In Chase and Bliss, each defendant driver violated the VTL and failed to

undertake basic safe driving measures. So too Simone, who was fully aware that there was an elementary school to his right, 500 feet away, failed to take the most basic safe driving practice of looking to his right before he entered the intersection.

Defendants also failed to adequately distinguish Deleon v. New York City Sanitation Department, supra on the recklessness issue (Resp. Br. P. 40-41) In Deleon, the driver was simply operating his street sweeper in the ordinary course of his duties. The street sweeper driver rear-ended plaintiff's vehicle. He admitted that he did not slow down or apply his brakes in an attempt to avoid the collision and blamed plaintiff for suddenly moving into his path. The Court held that there was a question of fact as to the street sweeper's recklessness - a jury could find that the street sweeper operator could have, but failed to take evasive action to avoid a forceful collision.

Defendants also failed to adequately distinguish Ryan v. Town of Smithtown, 49 A.D.3d 853 (2d Dep't 2008) (Resp. Br. Pp. 37-38). In Ryan, plaintiff had a green light at the intersection and defendant's dump truck backed into her path of travel. The truck was equipped with backup lights and a beeping device that would sound when the truck was in reverse, but the driver denied that his vehicle was moving. Plaintiff testified that she neither observed the illuminated reverse lights nor heard any warning sound as the truck backed up. Based on this proof, the

Court held that plaintiff raised a triable issue of fact as to whether the dump truck was backed up with a reckless disregard for the safety of others. As in Ryan, there are questions of fact as to whether Simone's conduct was reckless. Simone was not in a rush, he knew that the school was 500 feet away and school traffic would come from his right, yet he failed to illuminate his hazard lights or yellow and white flashers. Therefore, there is a triable issue of fact as to whether Simone was reckless that day.

CONCLUSION

For the foregoing reasons, this Court should reverse the Order appealed from and grant Mrs. Orellana summary judgment against defendants.

Dated: Port Chester, New York
January 10, 2024

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State of New York }
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ANA ORELLANA,

-AGAINST-

THE TOWN OF CARMEL, THE TOWN OF CARMEL HIGHWAY DEPARTMENT AND MICHAEL J. SIMONE

CHRIS KATSIMAGLES being duly sworn, deposes and says that he is over 18 years of age, and is not a party to the action, on Thursday, January 11, 2024 deponent served 3 copies of the within Brief upon

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by dispatching the paper to the person(s) by overnight delivery service at the address(es) designated by the person(s) for that purpose, pursuant to CPLR 2103(b)(6).

Sworn to before me
Thursday, January 11, 2024

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 01BA6311581
Qualified in Richmond County
Commission Expires Sept. 15, 2026

CHRIS KATSIMAGLES

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