TO BE ARGUED BY:
ENOCH C. BRADY, ESQ.
TIME REQUESTED: 15 MINUTES

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.

BRIEF FOR PLAINTIFF-APPELLANT

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BRIEF ON BEHALF OF PLAINTIFF-APPELLANT
ANA ORELLANA

PRELIMINARY STATEMENT

Plaintiff-Appellant, ANA ORELLANA, respectfully submits this brief in 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.

This is an action to recover damages for personal injuries sustained by Mrs. Orellana as a result of a motor vehicle accident which occurred between her minivan and a Ford Explorer owned by the Town of Carmel, and operated by Town of Carmel Highway Supervisor, defendant, Michael Simone (R44, 57-58).

The accident happened in an intersection when Ms. Orellana's vehicle, which had the right of way, was struck by Simone's vehicle, which had a stop sign (See Appellate Division Order 539-541, see police diagram R59, R65-66, 73-74, 93).

According to Simone, it was lightly snowing and he had

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

driven to his bellwether location at Kings Ridge Road and Prince Road, the highest elevation in town (R75, 77, 87-88) to determine whether to mobilize his forces for snow removal efforts. There, he saw a 1/4 of snow, radioed his office from the Kings Ridge Road-Prince Road location and ordered all his men out (R79-80, 85-86). Simone estimated it would take his 35 employees one hour to cover the Town's 28 routes, which would address the light snowfall and 1/4 inch of snow at Kings Ridge Road (R84-85).

The accident happened a full five minutes later, at a completely different location than Kings Ridge Road, when Simone was returning to his office after having already ordered all his men and trucks out (R76-77, 81, 88, 92, 151). Simone took Kings Ridge to Prince, Prince to Kennicut Hill and Kennicut Hill to Lakeview (R77-78). The accident happened at the intersection of Lakeview and Highridge (R77-78).

When Simone reached the intersection of Highridge Road and Lakeview Drive, he stopped at the stop sign, looked to his left for oncoming traffic and happened to notice a 1/4 inch of slushy snow on the lower half of Highridge Road which merely confirmed his observation at Kings Ridge and Prince five minutes earlier (R127-128). Simone did not radio his office to change or adjust his previous instructions or do anything else with respect to that 1/4 inch of slushy snow (128-129). There was no emergency situation and he was not rushing back to his office (R92).

Instead, Simone simply looked straight ahead and drove into the intersection, striking Mrs. Orellana's vehicle broadside in the middle of the intersection (R128-129, 98-99, 112-113, 250, 59). He never looked right before entering the intersection (R477), even though he knew that Highridge Road was a bus route for the elementary school 500 feet to his right (R128-131, 178, 141-142).

Defendants moved for summary judgment pursuant to VTL §1103(b), which exempts persons and vehicles who are actually performing work on a highway from the rules of the road, except for the consequences of a person's reckless disregard for the safety of others. Significantly the Statute only applies to hazard vehicles and vehicles actually engaged in work on a highway. It does not apply to vehicles traveling to and from such work. Plaintiff maintains that at the time of the accident, Simone was not engaged in "work on a highway;" he was traveling back to his office.

Mrs. Orellana moved for summary judgment on the grounds that defendants violated VTL §1142 and §1172, which require a driver facing a stop sign to stop and yield the right of way to any other vehicle which has entered the intersection from another highway or which is approaching so closely as to constitute an immediate hazard. Based on Simone's violation of these VTL sections, defendants are strictly liable in negligence.

Faced with certain liability for Simone's failure to yield the right of way to Mrs. Orellana, defendants argued that Simone was actually performing work on a highway at the time of the accident, even though he admittedly was returning to the office, having already radioed his dispatcher and mobilized all his trucks and drivers (R79-80, 85-86). He was not rushing back to his office and he did nothing after observing the 1/4 inch of slush he saw on Highridge Road (92, 128-130).

The next bus to leave the nearby school was 12:00 noon, 1½ to 2 hours after the accident (R131). Simone conceded that this was more than enough time for his men to salt all the roads in town, which would take approximately one hour (R130, 84-85).

Simone's Ford Explorer had no special tools or equipment. He was not in a work zone and he was not actually performing work on a highway at the time of the accident. There was nothing about his return to his office that prevented him from complying with the rules of the road. He was fully capable of returning to the office and obeying the stop sign just like any other motorist.

Simone's sighting of the 1/4 inch of slush at Highridge merely confirmed his earlier observation (R130). He did not radio his dispatcher to give additional instructions from the accident location (128-129). Simone's mere observation of a 1/4 inch of snow on Highridge Road and doing nothing further should not constitute "work on a highway" and defendants should not be

shielded from liability for Simone's negligence.

The Appellate Division's application of VTL §1103(b) to Simone's actions (539-541) violates fundamental rules of statutory construction, which require that, when interpreting a statute, the Court should attempt to effectuate the intent of the Legislature. 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.

Here, the Appellate Division improperly and unnecessarily could be seen to have expanded the scope of VTL §1103(b) to all municipal employees, or certainly to all supervisors, who have any responsibility for public roads. Any time such employees are driving through their town or city happens to notice a street or sidewalk condition that might need attention, he or she would be shielded from the rules of the road unless their conduct meets the reckless disregard standard.

The logical result of allowing Simone's conduct to fall under VTL §1103(b), as did the Supreme Court and the Appellate Division, is evisceration of the statute's express exception for travel to and from work sites. Simone himself testified in response to questioning from his own attorney, that prior to the accident he had been out for 20 minutes to perform his inspection and he was going to spend no more time doing so, as he was on his

way back to the office (R151). Therefore, this Court should reverse the Appellate Division's Order, deny defendants' motion for summary judgment and grant plaintiff summary judgment against defendants because Simone failed to yield the right of way to her at the intersection.

Alternatively, a jury should determine whether: Simone was actually working on a highway at the time of the accident; or whether Simone's conduct exhibited a reckless disregard for the safety of others when, knowing that Highridge Road was an elementary school bus route traveled by children, parents and teachers, he failed to look to his right then entered the intersection, and struck the Orellana vehicle; or whether Simone's conduct exhibited a reckless disregard for the safety of others when he failed to illuminate his flashing amber and white lights in the grille of his vehicle (R96) if, as it is claimed, he was working on a highway.

In fact, Simone testified that he had paid particular attention to the slushy snow to the left of the intersection because Highridge Road was an elementary school bus route (R128-129). Yet, knowing that, he failed to look right, colliding with Mrs. Orellana who was coming directly from the school (R245-246). Simone's conduct raises a triable issue of fact as to whether he was reckless, particularly when he expressed concern for traffic traveling on the elementary school bus route.

For these reasons, as demonstrated more fully below, this Court should reverse the Appellate Division's order granting summary judgment to defendants and grant Mrs. Orellana summary judgment against defendants based on Simone's violation of Vehicle and Traffic Law ("VTL") §§1142 and 1172.

JURISDICTION

In accordance with Court of Appeals rule 500.13, this Court has jurisdiction over this appeal pursuant to this Court's order dated and entered June 15, 2023, granting leave to appeal (R542) and because the Order of the Appellate Division Second Department dated January 25, 2023 is final; in that it affirmed an order granting summary judgment to defendants dismissing plaintiff's complaint. The questions presented on this appeal involve the same issues raised before the Supreme Court (R3-10) and decided by the Appellate Division (539-541).

ISSUES PRESENTED FOR REVIEW

1. Did the Appellate Division err in holding that in the motor vehicle accident between Mrs. Orellana and Simone, the Town of Carmel Highway Supervisor who was driving a Town-owned Ford Explorer, the defendants were entitled to the VTL §1103(b) exception from the rules of the road when, at the time of the accident, he was returning to the office after having radioed his base to dispatch the Town's salt trucks?

This question should be answered "Yes."

2. Did the Appellate Division err when it denied plaintiff's motion for summary judgment on liability when Simone violated VTL §1142 and §1172 and collided with plaintiff's vehicle, which had the right of way?

This question should be answered "Yes."

3. Alternatively, is there a triable issue of fact for a jury to resolve as to whether defendants were entitled to the VTL §1103(b) exemption from the rules of the road, when Simone was not actually engaged in work on a highway at the time of the accident?

This question should be answered "Yes."

4. Did the Appellate Division err when it held that Simone's conduct did not exhibit a reckless disregard for the safety of others when it should have found a question of fact on this issue?

This question should be answered "Yes."

STATEMENT OF FACTS

A. Nature of Claim

This is an action for damages for serious personal injuries sustained by Mrs. Orellana as a result of a motor vehicle accident which occurred between Mrs. Orellana's Toyota minivan and a Ford Explorer owned by the Town of Carmel and operated by Michael Simone (R44, 57-58). At the location of the accident, Simone, traveling on Lakeview Drive, had a stop sign and Mrs.

Orellana, traveling on Highridge Road, had the right of way (see police diagram R59).

Simone admitted in his Town of Carmel Highway Vehicle Accident Report that he "came to a stop sign and stopped but neglected to look to [his] right and proceeded to hit car head on" (R178).

Mrs. Orellana alleges that defendants violated, *inter alia* VTL §1142 and §1172 (R182-183).

As a result of the impact, Mrs. Orellana sustained multiple serious injuries, including a disc herniation at L4-L5 requiring an L4-L5 laminotomy, medical facetectomy, fusion and microdiscectomy with placement of an interspinous stabilization device, and bilateral carpel tunnel syndrome.

B. <u>Testimony of Plaintiff Ana Orellana</u>

The accident happened on December 13, 2018 at the intersection of Highridge Road and Lakeview Drive between approximately 10:00 a.m. and 10:30 a.m. (R242, 338, 341). She was driving a Toyota minivan on her way home from Lakeview School after attending her daughter's Holiday Pageant (R243, 245-246, 341). The weather was overcast, but the roads were not wet (R248). She was driving on Highridge Road within the speed limit (R246, 349). Highridge Road was slightly inclined (R349).

Mrs. Orellana did not see the Simone vehicle as she approached the intersection of Highridge and Lakeview (R247,

248). She was in the middle of the intersection when the collision happened (R250). It all happened very fast (R247, 350). She just saw a flash and felt a hit (R250). The front of the other vehicle struck her vehicle on the driver's side at her door and the back door (R249, 368-369).

After the accident, the other driver apologized and said it was his fault (R252). The police arrived very quickly (R253, 356). She heard the other driver admit to police that he did not see her vehicle (R254, 360-361).

C. Orellana Affidavit

On December 13, 2018, Mrs. Orellana was driving home from her daughter's school's Holiday Pageant on Highridge Road (R222).[2] There was no stop sign for her at the intersection of Highridge Road and Lakeview Drive, but there were stop signs for traffic traveling on Lakeview Drive (R222).

As she entered the intersection, she saw a flash of movement on her left and immediately felt an impact to the left front and back doors on the driver's side of her vehicle (R222).

She took photographs of the property damage to her vehicle and that of the other vehicle - a blue Ford SUV (R222).

[2] Plaintiff's Affidavit contains a typographical error, naming the road on which she traveled as Highland Avenue instead of Highridge Road.

D. Testimony of Defendant Michael J. Simone

Work Related Activity

Simone had been employed by the Town of Carmel as Superintendent of Highways for 18 years, since 2000 (R65-66, 148). Among other things, he supervises maintenance of Town of Carmel roads which included winter snow removal (R66).

Simone was involved in an accident on December 13, 2018, between 10:00 and 10:30 while driving a Ford Explorer owned by the Town (R73-74, 93). He left his office to inspect the roads because it was snowing lightly (R74-75). At the time of the accident he was coming from the intersection of Kings Ridge Road and Prince Road which is the highest elevation in town, and where the snow will accumulate first (R75, 77 and 87).

It bears noting here that in their opposition to plaintiff's leave motion, defendants misstated Simone's testimony, placing him at "High Ridge" (actually spelled "Highridge") Road as the Town's highest elevation and his "bellwether" location (Affirmation in Opposition para. 13) and the place from which Simone ordered his men to load their trucks and salt their routes (Affirmation in Opposition para. 14). They allege that he left "High Ridge" Road and traveled to the accident location (Affirmation in Opposition, para. 15), apparently in an attempt to place his bellwether location at or near the location of the accident. However, Simone's testimony establishes that he was at

Kings Ridge Road and Prince Road, which was the Town's highest elevation and the place from which he ordered his men out, not "High Ridge", [3] (R75, 77, 79-80, 85-88).

Simone saw a 1/4 inch of snow build up at Kings Ridge Road and Prince Road and ordered his men out to salt the roads using his two-way radio (R79-80, 85-86).

Q. When you say men out, how many men to do what?

A. I have 35 men and 28 routes. (R79)

Q. When you say 28 routes, is that 28 different routes within the area that falls under your jurisdiction? (R79-80)

A. Yes.

When Simone issued that order, he was still at Kings Ridge Road and Prince Road (R80-81).

Simone never testified that he was continuously inspecting the roads on his return to the office. In fact, his 18 years of experience as Superintendent of Highways established a specific intersection for where snow would accumulate first, Kings Ridge Road and Prince Road. Rather, he consistently testified that at the time of the accident, he was no longer inspecting roads for snow accumulation:

Q. . . . Where was it you were going to, at the time of the accident?

[3] Likewise, in defendants' Appellate Division Respondent's brief, they repeatedly conflated Kings Ridge Road, Simone's bellwether location where he radioed his dispatcher and sent out his snow/salting forces, and Highridge Road, where the accident happened five minutes later.

A. *Going back to my office.* (Emphasis added)

Q. When you say Kings Ridge Road is there a particular intersection you were at Kings Ridge Road that you recall?

A. Kings Ridge and Prince (R76-77).

* * *

Q. Was your vehicle moving on Kings Ridge Road or was it on its way from Kings Ridge or something else?

A. *On its way back in.* (Emphasis added)

Q. At the time of the accident, were you still communicating on the radio?

A. I was not.

Q. How long, before the accident occurred, would you say you stopped communicating on the radio?

A. Five minutes (R81).

* * *

Q. Okay. That Kings Ridge Road, I'm not familiar with it. Is that a heavily trafficked area?

A. No. Again, it's part of a rural subdivision. As I said, it is one of my higher elevations. If it is going to stick to the road, it's going to stick there first, so that's my indication (R87).

Q. So, would it be fair to describe that Kings Ridge Road as sort of your bellwether, you go there first to see what could happen - - (R87-88).

A. Yes.

Q. – – in the rest of the area?

A. Yes.

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)

Simone communicated with the dispatcher (R81), telling them to "load up," which meant that all 35 men would cover 28 routes (R83) in approximately one hour (R85), which would address any anticipated snowfall. In fact, his men loaded up their trucks and went out that day (R89, 91). When Simone headed back to his base, there was no emergency situation and he was not rushing back (R92).

Although the vehicle was equipped with flashing amber and white lights in the grille and on the rear of the vehicle, he could not recall whether these lights were on at the time of the accident (R95-96). Significantly, Simone did not consider the weather conditions at the time of the accident such that he would have activated those lights (R96).

Testimony Regarding the Traffic Incident

Simone had his headlights and his wipers on (R117-118). There was a stop sign at the corner for Simone's direction of travel; he came to a full stop at the stop sign before entering

the intersection, looked to his left and saw no traffic coming (R125-127). However, he saw a 1/4 inch of slushy-looking snow to his left, on the lower half of Highridge Road (R127-128).

"The reason I observed it, the reason I can truly recall it is that Highridge is a bus route" (R128). Lakeview School is at the top of Highridge, and that triggered him to really look "at something" (R128-129, 130).

Q: Okay. So, after you observed that condition, what did you do?

A: I believe I started, and went through the intersection (129).

After he saw that condition, he drove into the intersection, looking straight ahead, not to the right (R128-129, Town of Carmel Highway Vehicle Accident Report R178). He did not call his office to provide any further instructions to his crew upon observing the second 1/4 inch of snow at Highridge as it coincided with his earlier sighting at Kings Ridge and Prince.

It was approximately 10:30 a.m., and the next time buses were to arrive at Lakeview School was not until 12:00 for the kindergarten run (R131).

The front of Simone's Ford Explorer came into contact with the two driver's side doors of another vehicle (R98-99, 112-113). Simone never saw the other vehicle before the accident (R113-114). There was nothing about the condition of the roadway that

contributed to the accident happening (R148).

Simone admitted that the diagram of the accident location and position of the vehicles contained on the police report was accurate (R105, 107-109, 115). Highridge Road and Lakeview Drive are two-way streets with one lane for traffic in each direction (R110). The diagram shows stop signs for Lakeview Drive traffic (R109-110).

The Town of Carmel Highway Department Accident Report contains Simone's handwriting (R138-139). He wrote "I came to a stop sign, and stopped, neglected to look to my right, and proceeded to hit the car head-on" (R141-142). His description of the accident is accurate (R142-143).

On Simone's attorney's questioning, he testified:

Q: . . . Prior to the accident, you previously testified that you were out inspecting roads for any condition, is that correct?

A: Yes.

Q: How long had you been out inspecting the roads for that morning prior to the incident?

A: Probably 20 minutes.

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

A: None.

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).

* * *

Q: Okay. After the intersection at Lakeview and Highridge, did you intend to look at any of the other roads for conditions on the way back to the office? (R152).

A: No (R153).

E. Police Report

The Police Report contains a diagram that depicts the subject intersection as having three stop signs, including one for Simone's direction of travel, two stop signs for Lakeview traffic in the other direction and no stop signs for Highridge, including Mrs. Orellana's direction of travel (R56-59).

F. Town of Carmel Highway Department Vehicle Accident Report

Simone completed the Town of Carmel Highway Department Vehicle Accident report, in which he admitted that "I came to the stop sign and stopped but neglected to look to my right and proceeded to hit car head on" (R141-142, 477).

G. Photographs

Mrs. Orellana took photographs of the damage to her vehicle and the front and rear of the defendants' vehicle at the scene of the accident (R471-476). Her vehicle was a total loss (R243).

H. Motion History

Defendants moved for summary judgment pursuant to VTL

§1103(b) (R21, R14-24). They argued that: Simone was operating a vehicle owned by the Town of Carmel; he was actually engaged in work on a highway (R199-200); and they are exempt from the rules of the road because Simone was not reckless in the operation of his vehicle (R195-203).

Plaintiff moved for summary judgment under VTL §1142 and §1172 (R205-211) on the grounds that she had the right of way as she entered the intersection and Simone had a stop sign which required him to yield the right of way to Mrs. Orellana's vehicle; however, Simone failed to look right and proceeded into the intersection, striking the Orellana vehicle on the left side (R209-218).

Plaintiff opposed defendants' motion (R479-494, 497-505), asserting that VTL §1103(b) only applies when a vehicle is actually engaged in work on a highway and does not apply when the vehicle is traveling to and from the work location or hazardous operations and at the time of the accident, Simone was simply returning to his office (R498-503).

Further, there is proof that Simone was reckless (R479, 492-493-494) and defendants failed to establish that Simone's conduct was not reckless as a matter of law (R502-505).

Defendants opposed plaintiff's motion for summary judgment (R506-512) and submitted a reply in support of their summary judgment motion (R527-535).

Plaintiff submitted a Reply Affirmation in support of her motion, reiterating that VTL §1103(b) is inapplicable because Simone was not performing work on a highway at the time of the collision (R515-517). He had already radioed his office and mobilized all his forces five minutes before the accident (R516). Moreover, the proof shows, and defendants did not dispute, that Simone violated VTL §§1142 and 1172 (R514).

I. Supreme Court Order

The Supreme Court concluded that Simone was "actually engaged in work on a highway" when, while on his way back to his office, he observed the same 1/4 inch snow condition developing at the subject intersection (R7). The court also found that, although Simone's conduct constituted *prima facie* negligence, there was no proof that Simone was reckless (R8-9).

J. Plaintiff's Appeal To The Appellate Division

Plaintiff appealed to the Appellate Division Second Department, which affirmed Supreme Court's Order granting summary judgment to defendants pursuant to VTL §1103(b). In its decision, the Court simply noted that Simone was the Superintendent of Highways for the Town of Carmel and that although his entrance into the intersection was governed by a stop sign, he stopped, looked to his left, but not to his right in the direction in which plaintiff was approaching and a collision occurred. Citing these facts alone, the Appellate Division concluded that

"defendants established, *prima facie*, that Simone was actually engaged in work on a highway at the time of the accident and was therefore entitled to the protection of Vehicle and Traffic Law §1103(b)."

The Appellate Division's decision creates confusion for the bench and bar on the application of VTL §1103(b) for drivers such as Simone, as according to its decision, his simply driving on local roads as the Town Superintendent of Highways, *ipso facto* meant he was entitled to the protection of the Statute without ever discussing the work he was allegedly performing.

It is a matter of public importance to municipalities in the State of New York and all individuals who might be injured in a motor vehicle accident with a municipal employee that the applicability of VTL §1103(b) in circumstances such as those presented here be addressed and resolved by this Court in plaintiff's favor by holding that at the time of the accident, Simone was traveling back to his office and VTL §1103(b) is inapplicable.

In support of its decision, the Appellate Division cited Riley v. County of Broome, 95 N.Y.2d 455, 460 (2000), Veralli v. O'Connor, 190 A.D.3d 783 (2d Dep't 2021), Ventura v. County of Nassau, 175 A.D.3d 620 (2d Dep't 2019); and *cf.* O'Keefe v. State of New York, 40 A.D.3d 607 (2d Dep't 2007).

However, in Ventura v. County of Nassau, supra the snow plow operator was driving an actual snow plow with the blade down at the time of the accident. In Veralli v. O'Connor, supra, the defendant's driver was operating a snow plow equipped with a blade and sand/salt spreading capacity during his shift, on his assigned route, looking for snow and ice patches. In Veralli v. O'Connor, supra, there was an issue of fact as to whether the snow plow operator was engaged in work on a highway while making a U-turn. None of those cases involved a supervisor driving an ordinary passenger vehicle back to his office after radioing his dispatcher to send out his snow plow/salting trucks.

LEGAL ARGUMENT

POINT I

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

The fundamental issue presented on this appeal is the interpretation and application of VTL §1103(b) to the facts presented here.

The Appellate Division erred when it granted defendants' summary judgment pursuant to VTL §1103(b) because the proof shows that Simone inspected the intersection of Kings Ridge and Prince - the location he'd determined over his 18 years as Superintendent of Highways was the bellwether for predicting

whether there would be significant snow accumulation in the rest of the Town, and had already dispatched the Town's fleet of snow plow/salting vehicles five minutes before the accident. Having completed his task from Kings Ridge and Prince, the task he'd left his office to perform, he was returning to his office. He was not rushing back and did nothing but continue on his way after observing a second 1/4 inch of slush on Highridge Road (92, 128-130), which merely served to confirm his earlier findings. Therefore, based on the totality of the circumstances as presented by these facts, this Court should hold that Simone was not engaged in work on a highway at the time of the accident, reverse the order appealed from and grant plaintiff summary judgment pursuant to VTL §1142 and §1172.

A. Applicable Legal Principles

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature." Majewski v. Broadalbin-Perth Cent. School Dist., 91 N.Y.2d 577, 583 (1998), quoting Patrolmen's Benevolent Assn., v. City of New York, 41 N.Y.2d 205, 208 (1976).

"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." Majewski v. Broadalbin-Perth Cent. School Dist., supra.

Vehicle and Traffic Law Title VII, "Rules of the Road" governs drivers of vehicles on public highways (and certain other locations not relevant here). See VTL §1100.

VTL §1103(a) states that the provisions of this title shall apply to drivers of all vehicles owned or operated by the United States, New York, or any county, city, town, district, or any other political subdivision of the State of New York, except as provided in this section. Riley v. County of Broome, 95 N.Y.2d 455, 460 (2000).

However, VTL §1103(b) also provides certain exceptions to the requirement that all drivers obey the rules of the road. Specifically, VTL §1103(b) states:

> Unless specifically made applicable, the provisions of this title [the Vehicle and Traffic Law] . . . shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway *but shall apply to such persons and vehicles when traveling to or from such hazardous operation*. The foregoing provisions of this subdivision shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others. (Emphasis added)

Therefore, pursuant to VTL §1103(b), work and/or hazard vehicles and persons *actually* performing work on a highway are

exempt from the rules of the road, except for the consequences of a person's reckless disregard for the safety of others. Riley v. County of Broome, supra, 95 N.Y.2d at 465. [4] And, under VTL §1103(b), drivers who are not engaged in work on a highway and who are simply traveling to or from such hazardous operation, must follow the rules of the road contained in the remainder of the Vehicle and Traffic Law, including §1142 and §1172.

In Riley v. County of Broome, supra, the Court recognized that:

> Some degree of risk, of course, is inherent in travel on public highways. *Certain classes of vehicles--like snowplows and street* sweepers--are intended to minimize the risk by keeping the roadways clean and safe for everyone. While serving an important public function, however, *those vehicles may themselves cause risks to ordinary motorists* with whom they share the road. Over the years, courts and legislatures have struggled to define the rules under which these vehicles may operate and the standard of care they owe to others. (Emphasis added) Riley v. County of Broome, 95 N.Y.2d at 461.

Manifestly, the statute applies to those classes of vehicles (work and hazard vehicles) which increase the risk of harm to ordinary motorists while actually engaged in work on a highway.

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[4] VTL §117-a. defines "hazard vehicle" as:
Every vehicle owned and operated or leased by a utility, whether public or private, used in the construction, maintenance and repair of its facilities, every vehicle specially equipped or designed for the towing or pushing of disabled vehicles, every vehicle engaged in highway maintenance, or in *ice and snow removal where such operation involves the use of a public highway*, vehicles driven by rural letter carriers while in the performance of their official duties, and every sani-van and waste collection vehicle while engaged in the collection of refuse and/or recyclable materials on a public highway. (Emphasis added)

Critically, the Riley Court simply did not have the facts before it to provide guidance to future courts in deciding whether a supervisor returning to his base of operations after accomplishing the task he'd set out to perform or even whether a supervisor driving through town in a Ford Explorer was "actually engaged in hazardous operation[s]" on a highway.

Cases decided under VTL §1103(b) reveal that typically this section is applied to vehicles actually involved in plowing snow, salting and sanding operations, street sweeping, tractors mowing lawns and other trucks actually engaged in work on a highway at the time of the accident. See Riley v. County of Broome, supra (snowplow and street sweepers involved); Primeau v. Town of Amherst, 5 N.Y.3d 844 (2005) (snowplow vehicle in operation); Bicchetti v. County of Nassau, 49 A.D.3d 788 (2d Dep't 2008) (vehicle actually engaged in snow removal operations); Chase v. Marsh, 162 A.D.3d 1589 (4th Dep't 2018) (snowplow vehicle in operation); Ferrand v. Town of N. Harmony, 147 A.D.3d 1517 (4th Dep't 2017) (snowplow vehicle actually engaged in work on a highway); Howell v. State of New York, 169 A.D.3d 1208 (3d Dep't 2019) (snowplow vehicle actually clearing snow); Lobello v. Town of Brookhaven, 66 A.D.3d 646 (2d Dep't 2009) (dump truck spreading salt and sand over icy condition); Ryan v. Town of Smithtown, 49 A.D.3d 853 (2d Dep't 2008) (dump truck spreading sand during snowfall); O'Keefe v. State of New York, 40 A.D.3d

607 (2d Dep't 2007) (issue of fact whether snow plow engaged in work on a highway while making a U-turn); Deleon v. New York City Sanitation Department, 25 N.Y.3d 1102 (2015) (street sweeper engaged in street-sweeping); Faria v. City of Yonkers, 84 A.D.3d 1306 (street sweeper involved); Farese v. Town of Carmel, 296 A.D.2d 436 (2d Dep't 2002) (tractor was operating flail mower to mow grass); New York State Electric & Gas Corp., v. State of New York, 14 A.D.3d 675 (2d Dep't 2005) (tractor was mowing grass).

In Ventura v. County of Nassau, 175 A.D.3d 620 (2d Dep't 2019); cited by the Appellate Division (R540), the snow plow operator was driving an actual snow plow with the blade down at the time of the accident. In Veralli v. O'Connor, 190 A.D.3d 783 (2d Dep't 2021), also cited by the Appellate Division (R540), the defendant's driver was operating a snow plow equipped with a blade and sand/salt spreading capacity during his shift, on his assigned route, looking for snow and ice patches to treat. The Veralli Court found an issue of fact as to whether the snow plow operator was engaged in work on a highway while making a U-turn. Neither of those cases involved a supervisor driving an ordinary passenger vehicle back to his office after radioing his dispatcher to send out his snow plow/salting trucks.

In O'Keefe v. State of New York, 40 A.D.3d 607 (2d Dep't 2007) cited by the Appellate Division (R540), the Court found an issue of fact whether the snow plow operator was engaged in work

on a highway when he suddenly attempted to make a U-turn in front of plaintiff, who was attempting to pass him in the left lane.

Similarly, in Perez v. City of Yonkers, 204 A.D.3d 711 (2d Dep't 2022), the snow plow operator was not driving on a particular route; he was driving from complaint site to complaint site to salt and plow the roads as needed. At the time of the accident, he was not at a complaint site. Therefore, the Court held that defendant failed to establish that the snowplow operator was actually engaged in work on a highway. Applying Perez to the case at bar, this Court should hold that at the time of the accident, Simone was not at a worksite and was not actually engaged in work on a highway.

Significantly, when a work vehicle is traveling between work sites, the driver is not entitled to the protection of VTL §1103(b) and the rules of the road apply. 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) and O'Keefe v. State of New York, 40 A.D.3d 607 (2d Dep't 2007).

Moreover, under the plain language of VTL §1103(b), exemption from the rules of the road does not apply to hazard vehicles when traveling to or from such hazardous operation. See Ibarra v. Town of Huntington, 6 A.D.3d 391 (2d Dep't 2004) (Town and driver's motion for summary judgment denied because they

failed to make a *prima facie* showing that the street sweeper was actually engaged in a hazardous operation at the time of the collision); O'Keefe v. State of New York, supra.

We have been unable to locate an analogous case where VTL §1103(b) was applied to the facts presented here - a supervisor returning to the office after ordering out his snow/salt trucks, who incidentally noticed a road condition. However, Sullivan v. Town of Vestal, 301 A.D.2d 824 (3d Dep't 2003), exemplifies the type of showing necessary for a supervisor inspecting a jobsite to be protected by VTL §1103(b). In Sullivan, the defendant truck driver had left his own actual highway project and on his way back to the office he intentionally drove to another supervisor's active highway jobsite to make sure that the roads around the jobsite were clear of debris and other potential hazards as he testified was the custom and practice for supervisors in his department. To do this, the truck driver drove slowly along the shoulder of the highway using blinking yellow hazard lights on top of his truck and four-way flashers to warn of his slow travel. Plaintiff crested a hill, encountered defendant's truck, hit her brakes, lost control of her vehicle and was injured. The Sullivan Court held that the truck driver was actually engaged in work on a highway.

The Sullivan decision provides guidance to the Court here. In Sullivan, the defendant was slowly driving his truck on the

shoulder of an actual work zone, using flashers. The defendant driver was actually inspecting a job site to make sure it was left in safe condition when the accident occurred. Simone did none of these things (R95-96). Unlike the supervisor in Sullivan, Simone had already left Kings Ridge Road and Prince Road where he ordered out drivers and trucks in anticipation of the effects of an impending snow fall (R79-80, 85-86).

The Court in Sullivan would have come to the opposite conclusion had the town supervisor finished inspecting the highway work and was headed back to his base of operations. Such a set of facts would have made the facts in Sullivan the same as the facts in the case at bar where it should be found that Mr. Simone is not entitled to the protection of VTL §1103(b).

B. Simone Was Not Actually Performing Work On a Highway At The Time of The Accident, Therefore, VTL §1103(b) Does Not Apply Here

Five minutes before the accident, Simone had radioed his dispatcher and mobilized his forces when he was at Kings Ridge Road and Prince Road (R79-81, 85-86). He testified repeatedly that he was on his way back to the office at the time of the accident (R76-77, 88, 130, 151-153). He was not in a rush (R92, 96) and he did not intend to spend anymore time inspecting roads prior to the accident (R151). Simone never testified that he was "continuously" "actively" "making constant observations" "constantly" "always inspecting road conditions in order to give

his workers correct orders" and that he "continued to inspect" road conditions, as defendants deceptively argued below.

In fact, when he saw the snow at the subject intersection, Simone did not radio his base or turn left for a closer look because his job was done, his men were on their way, there was nothing more for him to do but return to his base. Instead, he proceeded straight into the intersection, neglecting to look to his right, and drove into the driver's side of the Orellana minivan (R128-130).

Manifestly, at the time of the accident, Simone was not actually working on a highway; he was simply driving over town roads, returning to his office. He was fully capable of obeying all the rules of the road and operating his Ford Explorer fully in his lane of travel when he ran a stop sign. Running a stop sign was not a necessary risk inherent in Simone's trip back to the office or even his road inspection. What Simone did that day is no different than what every other motorist must do when operating his vehicle. He did not have to undertake any hazardous maneuvers in order to observe road conditions. Applying VTL §1103(b) to these facts would improperly expand the scope of VTL §1103(b) far beyond what the legislature intended as exemplified by the plain language of the Statute.

Defendants argued, and the Appellate Division agreed, that Simone was performing work on a highway when he happened to

glance to his left (as he was required to do because he had stopped at a stop sign at an intersection) and saw a second 1/4 inch of snow (R14-24, 3-10). However, Simone did nothing about the snow condition he observed at the subject intersection (R129). He admittedly was on his way back to his office (R76-77, 88, 130, 151-153) and only in his "mind" had the intent to follow-up on the slushy snow at Highridge after he got back to his office (R130).

There should be more than intent for Simone's conduct to constitute actually working on a highway. Were intent sufficient to constitute "actually engaged in work on a highway," then every workman driving to a highway work site would fall under the protection of VTL §1103(b) because the driver intends to reach the work site and perform some assigned task. And yet, the statute carved out traveling to and from such hazardous operation. 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, 40 A.D.3d 607 (2d Dep't 2007).

Simone did not call his office to further instruct his forces, because he did not need to, the 1/4 inch of snow he observed on Highridge would be salted within the hour (R85). Therefore, contrary to the erroneous finding of the Appellate Division, Simone was not actually performing work on a highway at the time of the accident.

Taken to its logical conclusion, applying VTL §1103(b) to Simone's conduct in the case at bar, anytime Simone drove through town and happened to observe a crack, a pothole, or any other road or sidewalk condition that might need attention, he would be deemed to be working on a highway. Simone's conduct while driving through town would never be held to a negligence standard; he would always be subject to the recklessness standard regardless of where he was going. The statute was not intended to give carte blanche to supervisors such as Simone to drive negligently and never be held accountable for that negligence.

Allowing Simone's conduct to fall under the VTL §1103(b) exemption, as the Appellate Division did, is to eviscerate the portion of the statute which specifically prevents its application from travel to and from work sites. Simone testified repeatedly, particularly at the end of his deposition, in response to questioning from his own attorney, that prior to the accident he had been out for 20 minutes to perform his inspection of Kings Ridge Road and at the time of the accident it was unnecessary to inspect any further as he was on his way back to the office (R151).

The decision by the Appellate Division, Second Department failed to adhere to the standard of review used in determining applicability of VTL §1103(b), by omitting any consideration of the "traveling to or from such hazardous operations" exception

from its analysis and therefore conflicts with the caselaw in the Fourth Department.

For example, in Lynch-Miller v. State of New York, 209 A.D.3d 1294 (4th Dep't 2022), the Fourth Department held that the moving defendant must establish that it was engaged in work at the time of the accident and relatedly, that it was not "merely traveling from one route to another route." See also, Plummer v. Town of Greece, 213 A.D.3d 1236 (4th Dept 2023); (defendants' submission was vague and equivocal about the snowplow's route and failed to eliminate the question of whether the driver was "merely traveling from one route to another route"); Zanghi v. Doerfler, 158 A.D.3d 1275 (4th Dep't 2018) (defendant was traveling between work sites and his dump truck was empty); Hofmann v Town of Ashford, 60 A.D.3d 1498 (4th Dept 2009) (snow plow was driving from one part of his route to another part of his route; therefore, he was not actually working on a highway).

POINT II

THIS COURT SHOULD GRANT PLAINTIFF SUMMARY JUDGMENT AGAINST DEFENDANTS, BASED ON SIMONE'S UNEXCUSED VIOLATION OF THE VEHICLE AND TRAFFIC LAW, WHEN HE RAN A STOP SIGN AND ENTERED THE INTERSECTION WITHOUT LOOKING FOR TRAFFIC COMING FROM PLAINTIFF'S DIRECTION OF TRAVEL

Once this Court determines that VTL §1103(b) does not apply to these facts, the Court should grant plaintiff summary judgment on liability against defendants.

A. Applicable Legal Principles

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957).

In the case at bar, Mrs. Orellana made a *prima facie* showing that Simone violated VTL §§1142 and 1172 and therefore, she is entitled to summary judgment against all defendants.

VTL §1142 Vehicle entering stop or yield intersection, states as follows:

> (a) Except when directed to proceed by a police officer, *every driver of a vehicle approaching a stop sign shall stop* as required by section eleven hundred seventy two *and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard* during the time when such driver is moving across or within the intersection. (Emphasis added).

VTL §1172 Stop signs and yield signs, states as follows:

> (a) Except when directed to proceed by a police officer, *every driver of a vehicle approaching a stop sign shall stop* at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point

> nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and *the right to proceed shall be subject to the provisions of section eleven hundred forty-two*. (Emphasis added).

It is well-settled that a violation of a statute, such as the VTL, constitutes negligence as a matter of law. Belle-Fleur v. Desriviere, 178 A.D.3d 993, 995 (2d Dept 2019) ("as a general matter, a driver who fails to yield the right-of-way after stopping at a stop sign in violation of Vehicle and Traffic Law §1142(a) is negligent as a matter of law"); Watson v. Narayanan, 149 A.D.3d 1012 (2d Dept 2017) (defendant driver had a stop sign, looked both ways and entered the intersection; Court held that defendant violated VTL §§1142 and 1172 when she failed to yield the right of way to plaintiff bicyclist); Enriquez v Joseph, 169 A.D.3d 1008 (2d Dept 2019); Ming-Fai Jon v Wager, 165 A.D.3d 1253 (2d Dept 2018); Giannone v Urdahl, 165 A.D.3d 1062 (2d Dept 2018); Lebron v Mensah, 161 A.D.3d 972 (2d Dept 2018); Aponte v Vani, 155 A.D.3d 929 (2d Dept 2017).

The driver with the right-of-way is entitled to anticipate that the other motorist will obey traffic laws that require him or her to yield. Belle-Fleur v. Desriviere, supra; Yu Mei Liu v. Weihong Liu, 163 A.D.3d 611 (2d Dept 2018);

The question of whether defendant stopped at the stop sign is not dispositive, when the evidence establishes that he failed to yield even if he did stop. Belle-Fleur v. Desriviere, supra;

Maliza v. Puerto-Rican Transp. Corp., 50 A.D.3d 650 (2d Dept 2008); Gergis v Miccio, 39 A.D.3d 468 (2d Dept 2007).

B. Defendants Are Liable As A Matter Of Law Because Simone Had A Stop Sign And He Failed to Yield The Right of Way To Plaintiff, Who Had No Traffic Control For Her Direction of Travel

Here, Simone freely admitted that he stopped at the stop sign, looked to the left, but failed to look to the right before entering the intersection (R129). After looking to the left, he looked ahead and went through the intersection (R129). Simone admittedly never looked to the right before entering the intersection (R129, See also Simone's Town of Carmel Highway Vehicle Accident Report [R178]).

The Police Report shows that at this intersection, there was a stop sign that controlled Simone's direction of travel and no stop sign for Mrs. Orellana's direction of travel (R57). The Police report places the Orellana vehicle squarely within the intersection (R57), in a location that Simone should have seen before he entered the intersection. Simone also admitted that the Police Report diagram was accurate (R105, 107-109, 115).

Therefore, Simone, who had a stop sign, has freely acknowledged that he violated VTL §§1142 and 1172 by failing to yield the right of way to Mrs. Orellana, who had no stop sign.

In fact, on defendants' motion for summary judgment, they made no effort to explain Simone's failure to look right and his striking the Orellana vehicle broadside. The Supreme Court found

that Simone's conduct constituted *prima facie* negligence (R8-9) and this Court should grant Mrs. Orellana summary judgment on negligence because Simone violated VTL §§1142 and 1172.

As demonstrated below, this Court should reject defendants' attempt to escape liability for Simone's plainly negligent conduct by arguing that they are entitled to the protection of VTL §1103(b).

POINT III

ALTERNATIVELY, THIS COURT SHOULD FIND THAT THERE ARE TRIABLE QUESTIONS OF FACT FOR A JURY TO RESOLVE AS TO WHETHER SIMONE WAS OPERATING A VEHICLE THAT WAS ACTUALLY PERFORMING WORK ON A HIGHWAY OR WHETHER HE WAS MERELY RETURNING TO HIS OFFICE

In deciding a summary judgment motion, it is not the function of a court to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof). Vega v Restani Constr. Corp., 18 N.Y.3d 499, 505 (2012), citing Sillman v Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957).

On a motion for summary judgment under VTL §1103(b), defendant must always make a *prima facie* showing that VTL §1103(b) applied to the facts and that the driver did not operate the vehicle with reckless disregard of others. Here, at most, defendants' proof raises a triable issue of fact as to whether VTL §1103(b) applied to the facts.

There are numerous cases in which defendants' motion for summary judgment was denied due to the existence of triable issues of fact as to whether defendant was actually engaged in work on a highway.

For example, in O'Keefe v. State of New York, 40 A.D.3d 607 (2d Dep't 2007), the State was denied summary judgment because there was a triable issue of fact as to whether defendant's snow plow driver was "actually engaged in work on a highway" when he made a U-turn in front of plaintiff's vehicle.

In Ibarra v. Town of Huntington, 6 A.D.3d 391 (2d Dep't 2004), defendant's motion for summary judgment pursuant to VTL §1103(b) was denied because defendants failed to make a *prima facie* showing that the street sweeper was actually engaged in a hazardous operation.

Similarly, in Bicchetti v. County of Nassau, 49 A.D.3d 788 (2d Dep't 2008) defendant County failed to establish its *prima facie* entitlement to summary judgment as a matter of law because there were triable issues of fact as to "the County employee's conduct in the course of plowing snow, thereby precluding summary judgment."

The Appellate Division erred when it improperly made a factual determination that Simone was actually engaged in work on a highway when Simone's testimony provides proof from which a jury may determine that he was simply returning to his office.

Simone testified repeatedly that five minutes before the accident, when he was at Kings Ridge Road and Prince Road, he radioed his dispatcher to mobilize his forces (R79-81, 85-86). He was on his way back to his office at the time of the accident (R76-77, 88, 130, 151-152). He did not intend to spend any more time inspecting roads at that point (R151).

When Simone happened to notice a 1/4 inch slushy snow condition to his left on Highridge Road (R127-128), he did nothing because that 1/4 inch of snow would be addressed by the orders he had already given (R151). He simply looked ahead and attempted to cross the intersection and struck the Orellana vehicle (R129, 141, 142).

In making a conclusive finding that Simone was actually engaged in work on a highway, the Supreme Court and the Appellate Division both usurped the function of the jury as the finders of fact. This Court should find that Simone's testimony presents questions of fact for a jury to resolve as to whether he was actually engaged in work on a highway or whether he was merely traveling back to his office. Simone testified unequivocally that he had already called in to mobilize his forces and he did not intend to conduct any further road inspections after he radioed his instructions for his workers to salt the roads (R151).

There are also issues of fact and credibility for a jury to determine as to whether, on Simone's trip returning to his office

after mobilizing his forces, his simple act of glancing to the left, as he must to pass through the intersection, and noticing a slushy snow condition, transformed this momentary observation into being "actually engaged in work on a highway." Although he testified that in his "mind," he was going to have someone take care of the bus route (R130), he did not radio his dispatcher to provide any instructions to his driver (R129). Therefore, a jury should determine Simone's credibility with respect to this testimony.

Therefore, in the event that this Court does not grant plaintiff summary judgment and deny defendants' motion, the Court should find that there are triable issues of fact for a jury to resolve as to whether Simone was actually engaged in work on a highway at the time of the accident.

POINT IV

ALTERNATIVELY, THERE IS A TRIABLE ISSUE OF FACT AS WHETHER SIMONE'S CONDUCT CONSTITUTED RECKLESS DISREGARD FOR THE SAFETY OF OTHERS

Alternatively, in the unlikely event that this Court finds as a matter of law that, at the time of the accident, Simone was actually working on a highway and VTL §1103(b) applies, the Court should find that there is a triable issue of fact as to whether Simone's conduct demonstrated a reckless disregard for the safety of others.

To establish recklessness, a plaintiff must demonstrate that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome. Riley v. County of Broome, 95 N.Y.2d 455, 466 (2000). See also, Deleon v. New York City Sanitation Department, 25 N.Y.3d 1102 (2015).

In seeking summary judgment, these defendants had the burden of establishing that Simone's conduct did not rise to the level of reckless disregard for the safety of others. Freitag v. Village of Potsdam, 155 A.D.3d 1227 (3d Dep't 2017) (defendants failed to establish their entitlement to summary judgment as a matter of law under the reckless disregard standard).

In Deleon, the Court denied summary judgment to defendants, based on its determination that defendant was not responding to an emergency - he was simply operating a street sweeper in the ordinary course of his duties. The street sweeper operator who rear-ended plaintiff's vehicle admitted that he did not slow down or apply his brakes in an attempt to avoid the collision. The Court held that a jury could find that the street sweeper operator could have, but failed to take evasive action to avoid a forceful collision and that this conduct rises to the recklessness standard.

In Joya v Baratta, 164 A.D.3d 772 (2d Dept 2018), defendants failed to establish, *prima facie*, their entitlement to summary judgment as a matter of law; the proof they submitted failed to eliminate triable issues of fact as to whether the defendant driver operated the snowplow in reckless disregard for the safety of others.

Similarly, in Chase v. Marsh, 162 A.D.3d 1589 (4th Dep't 2018), defendants' motion for summary judgment was denied because defendants failed to make a *prima facie* showing that the snowplow operator was not reckless in the operation of his snowplow. Although the operator knew an intersection where he could safely turn around was less than a quarter mile away, he drove the snowplow in reverse, in front of a hill that obscured his view of approaching traffic, on a narrow, two-lane country road at a speed of 55 mph without sounding his horn in warning.

Moreover, when plaintiff raises a triable issue of fact as to defendant's recklessness, defendant's motion is properly denied. See Ryan v. Town of Smithtown, 49 A.D.3d 853 (2d Dep't 2008). In Ryan, plaintiff was proceeding through an intersection with a green light when defendant's dump truck backed into her path of travel. The dump truck was equipped with backup lights and a beeping device that would sound when the truck was in reverse. Plaintiff testified that she neither observed the illuminated reverse lights nor did she hear 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. See also Bliss v. State of New York, 95 N.Y.2d 911 (2000)(plaintiff raised a triable issue of fact as to defendant's recklessness with proof that defendant's truck was backing up on a bridge in excess of the maximum speed and violated several safety directives).

In fact, as the Superintendent of Highways, who had been assessing snow conditions on local roads and had already mobilized his forces, Mr. Simone was fully aware of the known dangers of entering an intersection without looking to the right and he ignored the grave risk of failing to look to the right, which was likely to result in harm to others. Cf. Campbell v. City of Elmira, 84 N.Y.2d 505 (1994) (experienced fire truck operator recklessly flaunted the risk of proceeding into an intersection in an emergency situation against a red light "in disregard of any modicum of statutory required attentiveness").

Here, Simone admitted that he was simply driving back to his office, after completing his road inspection. He was not in a rush (R92, 96) and he did not intend to spend anymore time to inspect roads prior to going back to the office (R151). He admittedly did not look to his right to see Mrs. Orellana's vehicle entering the intersection.

Every neophyte driver knows from the time that he takes his written permit test, that he must make a full stop at a stop sign and he must look both ways before entering an intersection because of the serious injuries that can result by the simple failure to do so. The fact that Simone failed to look to the right, even though he knew that vehicular traffic leaving the elementary school would come from his right, provides ample proof of recklessness.

While a momentary lapse of judgment does not constitute recklessness (Chase v. Marsh, supra), Simone's failure to look right, on a known school bus route, was more than a momentary lapse in judgment.

Simone knew that Highridge Road was a bus route for an elementary school that was located in the direction that Mrs. Orellana was coming from (R130-131). He claimed that he was particularly interested in this intersection because of the location of the elementary school (R128, 130-131). Yet, he failed to look in that same direction before entering the intersection. If Simone was actually concerned about traffic traveling on Highridge Road because this was an elementary school bus route and school traffic would approach him from his right (128-130, 141, 56-57), it was reckless for Simone not to look to his right before he entered the intersection.

Simone's reckless conduct is compounded by the fact that, in addition to his headlights, Simone's vehicle was also equipped with flashing amber and white lights in the grille and on the rear of the vehicle (R95-96). Although he could not remember whether he had these additional lights on, he did not consider the weather conditions such that prior to the accident he would have normally activated those lights (R95-96). The fact that Simone's use of warning lights depended upon the weather rather than what he was doing at the time of the accident also indicates that he did not believe he was working at the time of the accident.

The failure to illuminate flashing white and amber lights on the front and back of his truck raises a triable issue of fact for a jury to determine whether Simone was reckless in failing to do so, particularly because he knew that this was a school bus route.

Simone's testimony raises a question of fact as to when he first saw the Orellana vehicle and whether he could have avoided the collision. Simone testified that he never saw the other vehicle before the accident (R113-114). However, Simone also testified that his right foot was on the brake at the time of the impact, pressing hard (R116, 148), which means that he did see the Orellana vehicle before the accident. This conflicting testimony presents a triable issue of fact as to whether Simone

recklessly failed to see the Orellana vehicle on her approach to the intersection and took steps to avoid an impact.

A jury could find that Simone could have, but failed to take any action to avoid a forceful collision with Mrs. Orellana's vehicle and that this conduct rises to the recklessness standard.

Based on these facts, this Court should find that there is a triable issue of fact as to whether Simone's conduct was reckless at the time of the accident.

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
August 8, 2023

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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.

STATEMENT PURSUANT TO CPLR 5531

1. The Index Number for the above case is Supreme Court, Putnam County, Index No. 500842/2019.

2. The full names of the original parties are the same; there has been no change.

3. Action commenced in Supreme Court, Putman County.

4. Action was commenced by the filing of a Summons and Verified Complaint, dated May 29, 2019.

5. Nature of action: Torts

6. This appeal is from the Appellate Division, Second Department Order, dated January 25, 2023.

7. Appeal is on the Record (reproduced) method.

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email appeals@dickbailey.com
dickbailey.com

Affidavit of Service by Overnight Carrier

ANA ORELLANA v. THE TOWN OF CARMEL, THE TOWN OF CARMEL HIGHWAY DEPARTMENT and MICHAEL J. SIMONE

20-06458

State of New York }
County of Kings }

Jonathan Didia , being duly sworn, deposes and says that he is over the age of 18 years of age, is not a party to the action and is employed by Dick Bailey Service, Inc. That in the above case on Thursday, August 10, 2023 deponent served 3 copies of the within

Brief [X] Record [ ] Appendix [ ] Notice [ ] Other [ ]_____

upon

Lydecker Diaz, 200 Broadhollow Road, Suite 207, Melville, New York 11747

Brendan T. Fitzpatrick, Esq., 1325 Franklin Avenue, Suite 500, Garden City, NY 11530

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).

Jonathan Didia

Sworn to before me
Thursday, August 10, 2023

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

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