To Be Argued By:
BRENDAN T. FITZPATRICK
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APL-2023-00089
Appellate Division, Second Department Docket No. 2020-06458
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Court of Appeals

STATE OF NEW YORK

ANA ORELLANA,

Plaintiff-Appellant,

—against—

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

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

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Summary of arguments

Vehicle and Traffic Law § 1103(b) excuses all vehicles, regardless of their classification, from the rules of the road when actually engaged in work on a highway. And in *Riley v. County of Broome*, 95 N.Y.2d 455, 464 (2000), this Court interpreted the legislative intent of § 1103(b) to *create a broad exemption* from the rules of the road for *all vehicles* engaged in highway construction, maintenance, or repair. The exception turns on the nature of the work being performed, not on the nature of the vehicle. And in cases where a vehicle is engaged in highway work at the time of the incident, liability may be imposed only if the employee operated the vehicle with reckless disregard for the safety of others.

Here, Michael J. Simone was the Superintendent of Highways for the Town of Carmel when the accident happened. On the morning of the incident, a major snow event was anticipated within an hour of the incident. In furtherance of his duties as Highway Superintendent, Simone drove his vehicle to inspect Carmel's roads to give instructions to his workers so that they can properly address the impending snowstorm. As he drove, Simone constantly observed weather and road conditions, including immediately before the incident at the intersection of High Ridge Road and Lakeview Drive. While stopped at a stop sign at the intersection, Simone observed slushy conditions on Lakeview Drive, which was on a school bus

route. As a result of seeing this condition, Simone needed to direct one of his workers to specifically address it. After coming to a complete stop at the intersection, Simone looked in one direction and proceeded slowly into the intersection. Unfortunately, Simone struck Ana Orellana's vehicle. The direction Orellana was driving through the intersection did not have a stop sign controlling her lane of travel. Despite failing to see Orellana's vehicle enter the intersection, the Supreme Court and unanimous Appellate Division, Second Department correctly applied this Court's holding in *Riley* and ruled that Simone was engaged in highway maintenance under § 1103(b), and this Court should affirm.

The second issue is whether Simone acted with reckless disregard for the safety of others under VTL § 1103(b), which requires conduct that is in conscious disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. Case law holds that a reckless disregard for the safety of others requires more than simply a momentary lapse in judgment. Here, Simone came to a complete stop at the intersection; he was not speeding; he was not using his cellphone; and he did not operate his vehicle recklessly. While Simone could be found to have failed to yield the right-of-way, this would constitute, at most, general negligence. As Simone did not act with reckless disregard as mandated by VTL § 1103(b), the unanimous Appellate Division

correctly affirmed the Supreme Court's dismissal of Orellana's complaint, and Carmel and Simone ask this Court to affirm.

Issues presented on appeal

Did the broad exception identified in VTL § 1103(b) apply to the facts of this case where Simone was operating a vehicle owned and maintained by Carmel at the time of the incident as the statute excuses all vehicles, regardless of their classification, from the rules of the road when actually engaged in work on a highway?

Where this Court in *Riley v. County of Broome*, 95 N.Y.2d 455, 464 (2000) held that the Legislature intended VTL § 1103(b) to create a broad exception from the rules of the road, did it apply where Simone—Carmel's Superintendent of Highways—was engaged in highway maintenance at the time of the incident as he was actively inspecting and monitoring highway conditions to give orders to his workers who were tasked to address deteriorating roadway conditions and a pending emergency snowfall?

Were Carmel and Simone entitled to summary judgment, dismissing the complaint as Simone demonstrated that he did not act in the reckless disregard for the safety of others as required by VTL § 1103(b) as his conduct constituted, at most, a momentary lapse in judgment?

Counter-statement of facts

The parties and overview of the accident location.

Michael Simone was the Superintendent of Highways for the Town of Carmel, and he operated a Ford Explorer owned by Carmel when the incident occurred. Ana Orellana operated a Toyota RAV4.

The accident occurred at the intersection of Lakeview Drive and High Ridge Road. Lakeview ran east and west, and High Ridge ran north and south. Lakeview was a two-way street with one lane in each direction. (R. 110) High Ridge was a two-way street with one lane in each direction. (R. 110) There were three stop signs controlling traffic at the intersection. (R. 112) Traffic on Lakeview was controlled by a stop sign. (R. 110) The speed limit was 30 miles per hour. (R. 112)

Simone was driving northbound on Lakeview, and Orellana was operating her vehicle westbound on High Ridge, which did not have a stop sign controlling her lane of travel.

Simone was engaged in highway work at the time of the incident.

Simone was Carmel's Superintendent of Highways in December 2018. (R. 65-6) His duties were to maintain the roads of Carmel, "both summer and winter, drainage in the summer, blacktopping in the summer, snow removal in the winter." (R. 66) His work was "(m)ostly supervisory." (R. 66) Secretaries generated crew

sheets for each of his crew chiefs "to lead a number of men on a certain task." (R. 67-9) Each crew sheet related to a different task at a different location. (R. 68)

Simone had 35 men working for him and 28 routes within his jurisdiction that needed to be maintained. (R. 79-80) The tasks for Carmel's highway workers were determined from inspections of the roadways. (R. 69-71)

On December 13, 2018 between 10:00 a.m. and 10:30 a.m., Simone was involved in an accident. (R. 74) He was driving a Ford Explorer that Carmel's Highway Department owned and maintained. (R. 93) Simone testified that he was working in his official capacity at the time of the incident, and he recalled it was snowing lightly. (R. 74-5, 84) At the time, Simone was inspecting the roadways to determine how the weather conditions were affecting them. (R. 75, 151) An emergency snow situation was "impending," and Simone expected it "probably within an hour." (R. 84) He was inspecting the roadways for 20 minutes before the incident. (R. 151)

Based upon the information he gathered from his inspections, Simone gave instructions to his workers to get in their trucks to go out and maintain Carmel's roads. (R. 79)

Simone testified that Kings Ridge Road had one of the highest elevations in Carmel, and he would go to the higher elevations because the snow accumulated faster at those locations. (R. 75) Kings Ridge Road was his "bellwether" to see

what could happen with road conditions around the rest of the town as this was the highest elevation. (R. 87-8) He was coming back from Kings Ridge Road and going to his office at 55 McAlpin, which also housed the highway garage. (R. 76-7, 88) He recalled the route he took was Kings Ridge Road "to Prince, Prince to Kennicut Hill" and then to High Ridge Road. (R. 77-8)

Simone was ordering his men out to load up their trucks with salt and check their routes when he was at Kings Ridge. (R. 79-80) While at Kings Ridge Road, Simone saw a quarter-inch build-up of snow on the roadway. (R. 85-6) Based on his experience as the Superintendent of Highways, Simone believed that the road temperature was under 30 degrees, and an icy condition could have developed based upon what he had seen. (R. 86-7) He explained at his deposition, these traffic conditions would have caused snow that had fallen on the pavement to freeze into ice. (R. 87)

Simone used his radio to order the men and spoke with his deputy or shop foreman. (R. 80-2) All 35 men and 28 routes and 28 trucks were involved in Simone's order. (R. 83-4, 91) He told the men to load their trucks and go out to their routes. (R. 91)

The incident occurred five minutes after he called his men on the radio. (R. 81) At the intersection of Lakeview and High Ridge, Simone came to a complete stop. (R. 126) When he looked to his left, he noticed no traffic, but Simone

"observed a snow condition on the lower half of" High Ridge Road. (R. 127-28) He saw a build-up of about a quarter-of-an-inch of snow. (R. 128) He testified it looked "like it was slushy snow." (R. 128) Simone knew High Ridge was "a bus route," and there was a school on High Ridge. (R. 128) He continued, "that to me is -- that's something that's going to trigger me to really look at something." (R. 128-29)

Simone testified that after observing the snow and slush on High Ridge Road, he wanted to "get back to the office, and get somebody to take of the snow in the bus route." (R. 130) This was because the Lakeview School was about 500 feet east of the intersection. (R. 130) And he knew the bus for the school's kindergarten was at 12:00 p.m. (R. 130-31) His office was less than a quarter-of-a-mile away, and as soon as Simone was back at his office, he was going to make sure that somebody went over to that area to address the slushy condition. (R. 131)

As forecasted, it snowed more intensely later that day. (R. 88)

The incident and proof that Simone did not act recklessly.

As Simone proceeded back to his office to give additional orders based upon roadway conditions he observed at the intersection, he was not communicating on the radio at the time of the incident, which occurred at the intersection of Lakeview and High Ridge. (R. 81, 97-8) While on his way back to his office, Simone never

exceeded the local speed limits. (R. 92) He never used his cell phone for any reason. (R. 121) Simone was traveling east on Lakeview. (R. 97)

At the intersection of Lakeview and High Ridge, Simone brought his vehicle to a complete stop. (R. 126, 153) He looked "(m)ore to [his] left" on High Ridge Road (R. 127) He saw no traffic coming. (R. 127) After observing the snow conditions at the intersection that triggered his intent to direct one of his workers to address this specific area, Simone began to slowly enter the intersection. (R. 129) He did not look to his right before doing so. (R. 129)

The front of Simone's vehicle struck the driver's side of the other vehicle. (R. 104, 112-13) Simone did not see the other vehicle before the incident. (R. 113) He was traveling approximately 5 to 6 miles per hour at impact, and his right foot remained on the brake pedal. (R. 113-14, 117)

Orellana recalled the accident on December 13, 2018 happened between 10:00 and 10:30 a.m. (R. 242, 340-41) Orellana was going home from Lakeview School where her daughter attended. (R. 245-46, 341) She testified the weather was overcast and denied precipitation was falling. (R. 248, 343-44) She denied it had snowed the night before or morning of the incident. (R. 344) The intersection of Lakeview and High Ridge was about one or two blocks from the school. (R. 342) She was traveling 25 or 30 mph. (R. 246)

Orellana was driving on High Ridge Road. (R. 368) Orellana said she "saw something" and "heard a boom." (R. 245) She did not remember anything about the collision. (R. 247) As she approached the intersection, Orellana did not see the other vehicle involved in the incident. (R. 247) She never saw Carmel's vehicle before impact. (R. 248) Carmel's vehicle struck the driver's side of Orellana's car. (R. 249) Orellana was already crossing Lakeview and was in the middle of the intersection. (R. 250)

The police arrived at the scene and prepared a report. (R. 56-9) The diagram prepared by the officer was an accurate depiction of the vehicles after the incident. (R. 107-09) It showed where the vehicles were located in the intersection at the moment of impact. (R. 115) Simone admitted the accident was his fault. (R. 136) In an incident report, Simone acknowledged that while he looked to his left, he neglected to look to his right before proceeding. (R. 141, 178)

Photographs depicted the damage to his vehicle, which amounted to the plastic frame of his license plate cracking, and the license plate falling out. (R. 99-101, 471-76) Carmel repaired it. (R. 101)

Orellana's allegations and motion practice.

Orellana filed a Notice of Claim against Carmel, the Town of Carmel Highway Department, and Simone. (R. 25-9) She then filed a complaint, alleging that Simone negligently operated his vehicle and struck her car at the intersection

of Lakeview Drive and Highbridge Road. (R. 36-9) She claimed that Carmel and Simone were negligent and that they violated VTL §§ 1110(a), 1140, 1141, 1142, 1163, 1172, 1180(a)(e), and 1212. (R. 181-83)

Carmel and Simone answered the complaint and asserted as affirmative defenses that Orellana's complaint was barred by VTL § 1103(b) as Simone did not act recklessly. (R. 48) They also alleged that the incident was caused by Simone's negligence and culpable conduct. (R. 46-7)

Carmel and Simone moved for summary judgment, arguing that VTL § 1103(b) applied, and Simone did not act recklessly in the operation of his vehicle. (R. 14-24, 195-203)

Orellana moved for summary judgment on the issue of liability, arguing that Simone was negligent and violated VTL §§ 1142 and 1172 and to dismiss various affirmative defenses concerning her negligence. (R. 205-21) Orellana submitted an affidavit in which she attested that she did not have a stop sign, but stop signs controlled all of the other directions of travel. (R. 222) She also attested that she entered the intersection and "saw a flash of movement" to her left and felt an impact. (R. 222) She never noted her speed, or if she ever saw the other vehicle before the impact.

Orellana separately opposed Carmel and Simone's motion and argued that VTL § 1103(b) was not applicable because Simone was not operating an

emergency vehicle and that he was not engaged in highway work at the time of the incident. (R. 478-94, 497-505) According to Orellana, Simone had radioed his instructions five minutes before the accident and was no longer working.

Carmel and Simone opposed Orellana's motion, arguing that negligence principles were not applicable as VTL § 1103(b) governed the facts of this case. (R. 506-12) In reply, Carmel and Simone again asserted that Simone was engaged in highway work at the time of the incident. (R. 527-35) They pointed out that Simone was continuing to observe the roadway conditions so he could direct his workers to address snow and slush conditions. This was especially true in the area of a school bus route. Carmel and Simone also demonstrated that he was operating a vehicle that was covered by § 1103(b). Therefore, because § 1103(b) applied, Orellana had to raise an issue of fact as to whether Simone was reckless in the operation of his vehicle. As she failed to do so, Carmel and Simone moved to dismiss the complaint.

The Supreme Court's decision.

The Supreme Court granted Carmel and Simone's motion and dismissed Orellana's complaint. (R. 3-13) The court noted that the sole issue before it was "whether Simone was 'actually engaged in work on a highway' at the time of the collision." (citation omitted) (R. 6) After reviewing the facts and controlling law, the court ruled "Simone was 'actually engaged in work on a highway' at the time

of the collision." (R. 7) The court explained that while he was not driving a snowplow, Simone was operating his work vehicle to assess the conditions of the road for snow treatment and possible removal, and that these constituted maintenance of Town roads. (R. 7) According to the court, to rule otherwise would be "counterintuitive" because "(t)he sole purpose of his assessment was to determine whether his employees needed to execute their duties due to the falling snow and impending snow storm." (R. 7) According to the court, the fact that Simone was not operating a snowplow was "of no moment" because he "was performing his job in his official capacity at the time of the accident." (R. 7) The court continued that even though Simone was heading back to his office, "he noted that there was a hazardous condition developing at the intersection of the accident" and this illustrated that he was "still" assessing the roads during his return drive. (R. 7)

Because VTL § 1103(b) applied, the court noted liability only attached if Simone drove recklessly. (R. 8) The court noted Simone stopped at the stop sign, he failed to look to his right after looking to his left and proceeded into the intersection, failing to yield the right-of-way to Orellana. (R. 8) While this constituted negligence, Orellana failed to prove that Simone's actions were reckless. (R. 8-9) The court dismissed the complaint and denied Orellana's motion as moot. (R. 9) Orellana appealed this order. (R. 1-2)

Orellana's appeal to the Appellate Division, Second Department.

Orellana perfected her appeal and argued that she was entitled to summary judgment against Carmel and Simone because Simone was negligent in failing to stop at a stop sign; that VTL § 1103(b) did not apply because Simone was not actually performing work on a highway at the time of the incident; or in the alternative, that triable issues of questions existed that precluded summary judgment. Orellana never demanded the dismissal of Carmel and Simone's affirmative defenses alleging she was negligent in the happening of the accident, thereby abandoning this argument.

In opposition, Carmel and Simone argued that the broad exception in VTL § 1103(b) supported the dismissal of the complaint because Simone—Carmel's Superintendent of Highways—was operating a vehicle owned and maintained by Carmel at the time of the incident. They argued that § 1103(b) excused all vehicles, regardless of their classification, from the rules of the road when actually engaged in work on a highway, and he was engaged in highway maintenance at the time of the incident as he was actively inspecting and monitoring highway conditions to address deteriorating roadway conditions and a pending emergency snowfall. They also argued that Carmel and Simone demonstrated their entitlement to summary judgment because under VTL § 1103(b), Simone did not act in the reckless disregard for the safety of others as his conduct constituted, at most, a momentary

lapse in judgment.

The unanimous Appellate Division, Second Department affirmed the dismissal of the complaint.

The Appellate Division, Second Department unanimously affirmed the Supreme Court's dismissal. (R. 539-41) The Appellate Division reviewed the facts and VTL § 1103(b). (R. 539-40) And based upon the facts in the record and the arguments made in the appellate briefs and at oral argument, the Appellate Division ruled, "contrary to the plaintiff's contention, the 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" VTL § 1103(b). (R. 540) Orellana failed to raise a triable issue of fact, and the Appellate Division held that liability had to be considered "under the recklessness standard of care, which the Supreme Court properly did." (R. 540)

The Second Department next summarized the facts and affirmed the Supreme Court's decision that "Simone's conduct did not rise to the level of reckless disregard, but rather evinced a momentary lapse in judgment." (R. 541)

Orellana's motion for leave and this Court's decision.

Orellana moved for leave to appeal to this Court, asking to review the Appellate Division's Decision and Order that found Carmel and Simone were entitled to have the recklessness standard set forth in VTL § 1103(b) apply to the

facts; or alternatively, whether issues were raised as to whether § 1103(b) applied; whether issues existed as to whether Simone's conduct exhibited a reckless disregard for the safety of others; and whether she was entitled to summary judgment on the issue of liability. Again, Orellana never sought review of Carmel and Simone's affirmative defenses alleging she was negligent in the happening of the accident, thereby abandoning this argument.

Carmel and Simone opposed the motion. They pointed out that this was not a novel issue for review by this Court and that there was no split in the Appellate Division departments as to the application of VTL § 1103(b). They argued that the unanimous Appellate Division correctly concluded the broad exception in VTL § 1103(b) applied because Simone was engaged in highway maintenance at the time of the incident as he was actively inspecting and monitoring highway conditions to address deteriorating roadway conditions and a pending emergency snowfall. They also argued that Carmel and Simone demonstrated their entitlement to summary judgment because under VTL § 1103(b) Simone did not act in the reckless disregard for the safety of others as his conduct constituted, at most, a momentary lapse in judgment.

This Court granted Orellana's motion for leave. (R. 542)

Point I

The Supreme Court and unanimous Appellate Division, Second Department correctly applied VTL § 1103(b) to dismiss the complaint as Simone was engaged in highway work at the time of the incident.

Simone was engaged in highway work at the time of the incident, and VTL § 1103(b) applies to bar Orellana's complaint because he did not recklessly operate his vehicle. Simone was engaged in highway work from the time he left his office to travel to Carmel's highest point until he returned to his office.

At the time of the incident, light snow had already begun to fall, and weather forecasts predicted an emergency snow event to commence within an hour. (R. 84) In his capacity as Carmel's Highway Superintendent, Simone went out to inspect Carmel's roads as he drove throughout the town to instruct his workers on which roadways needed ice, snow, or slush removal and keep Carmel's roadways as safe as possible. As he inspected the roadways, Simone headed to Carmel's highest point because the snow began to accumulate first at that location. And because of the low temperature, he was concerned about snow changing to ice.

Once he saw the conditions at the highest point, Simone then continually inspected the roadways as he drove back to his office. Simone testified that he was constantly observing the roadway conditions so he could direct his workers to

address the changing weather conditions. Specifically, at the intersection of High Ridge and Lakeview, Simone observed slushy conditions on Lakeview. He made particular note of this condition because High Ridge was on a school bus route with a school nearby, and when he returned to his office, he needed to direct one of his workers to specifically address it. Simone testified that the slushy condition was dangerously close to the intersection.

Simone was continually engaged in highway maintenance as he observed all the roadways as he traveled throughout Carmel in anticipation of this snowstorm. The Legislature enacted VTL § 1103(b) to protect municipalities like Carmel and their employees, who are engaged in highway maintenance under conditions like the inclement weather Carmel was experiencing on the accident date. The Supreme Court and unanimous Appellate Division, Second Department correctly applied VTL § 1103(b) to the highway maintenance work in this case, and this Court should affirm the Appellate Division's Decision and Order.

At common-law, all vehicles, including emergency vehicles, were held to an ordinary negligence standard. *See*, *Farley v. Mayor of City of New York*, 152 N.Y. 222, 227-28 (1897). In 1957, the Legislature enacted what is now title VII of the Vehicle and Traffic Law (§ 1100 *et seq.*), creating a uniform set of traffic regulations, or the "rules of the road." *See*, L 1957, ch 698. VTL §§ 1101 and 1103(a) provide that the rules of the road apply to all vehicles unless otherwise

provided by law. Except for the provisions regarding driving under the influence of drugs or alcohol, the rules of the road explicitly do *not* apply to "persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway." VTL § 1103(b). Section 1103(b) adds that VTL § 1202(a), which regulates stopping, standing, and parking, does not apply to hazard vehicles engaged in highway maintenance:

> (b) Unless specifically made applicable, the provisions of this title, except the provisions of sections eleven hundred ninety-two through eleven hundred ninety-six of this chapter, *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)

In cases where a vehicle is engaged in highway work at the time of the incident, like the work Simone was performing when the accident occurred, liability may be imposed only if the employee operated the vehicle with reckless

disregard for the safety of others. *See*, *Primeau v. Town of Amherst*, 5 N.Y.3d 844, 845 (2005); *Riley v. County of Broome*, 95 N.Y.2d 455, 465-66 (2000). "This standard demands more than a showing of a lack of 'due care under the circumstances'—the showing typically associated with ordinary negligence claims. It requires evidence 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." *Saarinen v. Kerr*, 84 N.Y.2d 494, 501 (1994), quoting Prosser & Keeton, Torts § 34 at 213 [5th ed. 1984].

Critically, in *Riley*, this Court discussed the legislative intent of VTL § 1103(b) and concluded that the statute excused all vehicles, regardless of their classification, from the rules of the road when "actually engaged in work on a highway." *Id.*, 95 N.Y.2d at 461, 463. Addressing the statutory intent, this Court held the legislative history of § 1103(b) "explicates the *legislative intention to create a broad exemption* from the rules of the road for all vehicles engaged in highway construction, maintenance or repair, regardless of their classification." *Id.*, at 464 (emphasis added). And based upon the statute's legislative history, this Court ruled, "the exemption turns on the nature of the work being performed (construction, repair, maintenance or similar work)--not on the nature of the vehicle performing the work." *Id.* This Court stated that the statute was not

intended to be interpreted to "curtail the exemption for any vehicles," regardless of whether or not it had flashing lights and applied to "all 'hazard vehicles.'" *Id.*, at 465.

Here, Carmel owned and maintained the vehicle Simone was driving. He testified without debate that he was engaged in work related to his obligations as the Superintendent of Highways when the accident happened—i.e., he was inspecting the roads to observe the snow conditions on the roadways and the pending snow emergency. After reaching Carmel's highest point, he worked back towards his office, always inspecting the road conditions in order to give his workers the correct directives. Immediately before the incident, Simone observed the conditions at the intersection so as to give further directions to the workers that would be performing highway maintenance. His observation at the intersection was especially important to Simone that morning because it was on a bus route. Indeed, after seeing the slush at the intersection, Simone testified that he wanted to "get back to the office, and get somebody to take of the snow in the bus route." (R. 130) This was because the Lakeview School was about 500 feet east of the intersection. (R. 130) His office was less than a quarter-of-a-mile away, and as soon as Simone was back at his office, he was going to make sure that somebody went over to the intersection to address the slushy condition. (R. 131) Thus, Simone was engaged in highway maintenance when the accident happened. *See*, *DeLeon v. New York City*

Sanitation Dep't, 25 N.Y.3d 1102 (2015) (holding that municipal employer operating a street sweeper was engaged in highway maintenance when the accident happened and thus subject to the recklessness standard or care).

Respectfully, Orellana's arguments fail to raise an issue of fact. While Orellana claimed that Simone was not operating a "hazard vehicle" as identified in VTL § 1103(b), she has apparently abandoned that argument on appeal. Even if this Court considered this issue, the undisputed facts and law undermine this contention as this Court in *Riley* held that § 1103(b) applies to *all vehicles* engaged in highway maintenance, regardless of their classification. *Id.*, 95 N.Y.2d at 464. Simone was operating a vehicle owned and maintained by Carmel in his capacity as the Superintendent of Highways to assess the conditions of the road for snow treatment and possible removal, and this constituted maintenance of town roads.

Orellana argues that Simone's actions in failing to yield the right-of-way to her at the intersection constitutes negligence *per se* under VTL §§ 1142 and 1172. Any negligence standard is inapplicable to the application of VTL § 1103(b) in this case. The controlling standard of care is reckless disregard which requires more than the lack of due care associated with ordinary negligence actions. *See*, *DeLeon*, *supra*.

On appeal, Orellana asserts that Simone was not engaged in work on a highway at the time of the incident. This ignores the facts and this Court's holding

in *Riley* that VTL § 1103(b) showed that the Legislature intended to "create a broad exception." *Id.*, 95 N.Y.2d at 464. Despite Simone testifying that he was making constant observations of roadway conditions in anticipation of a snow emergency that was to start within an hour of the incident, particularly regarding the intersection where the incident occurred as it was on a school bus route, Orellana demands that this Court ignore this testimony because he had given instructions to the maintenance workers five minutes earlier.

As the Supreme Court ruled, however, Orellana's interpretation of the statute would be "counterintuitive" because "(t)he sole purpose of his assessment was to determine whether his employees needed to execute their duties due to the falling snow and impending snow storm." (R. 7) In other words, the weather conditions existing at the time of the incident required Simone to make continuous observations to determine if he needed to alter his orders. And indeed, Simone noticed slush, which could have turned to ice, at the intersection, and he said he needed to have one of his workers immediately address it. The Appellate Division, Second Department unanimously affirmed this ruling.

The courts were correct because in demanding that this Court disregard Simone's testimony that he was going to give specific directions as to slushy conditions on Lakeview as it was a school bus route, the Court would be forced to parse Simone's activities to before and after he gave his orders, despite his

testimony that he continued to observe roadway conditions in case he needed to modify or change his orders. Indeed, Simone testified that he observed in particular the intersection immediately before the accident in which he intended to direct one of his workers to immediately address the condition. Thus, Simone was not simply traveling from one location to another, he was making constant observations to give specific orders to Carmel's maintenance workers to address the pending snow emergency. *See*, *Matsch v. Chemung County Dep't of Pub. Works*, 128 A.D.3d 1259, 1260-61 (3d Dep't 2015) (holding that the county's employee was engaged in her street sweeping work even though she was temporarily outside the debris area when the accident happened).

Sullivan v. Town of Vestal, 301 A.D.2d 824 (3d Dep't 2003) supports Carmel and Simone's arguments that § 1103(b) applied, and Orellana's attempts to distinguish it fail. In *Sullivan*, during the late afternoon of October 21, 1999, plaintiff was driving her husband's truck in an easterly direction on Castleton Road in the Town of Vestal. As she crested a hill, plaintiff observed a Town truck, also traveling east, which was being operated by Lloyd Wiland. Plaintiff immediately braked and swerved to avoid hitting the Town's vehicle, but this caused her to lose control of her vehicle.

According to Wiland, he was working on a highway project earlier that day. At approximately 4:15 p.m., he left his job site and, while he was returning to the

town offices, he traveled over Castleton Road where a different highway project had recently been completed. Wiland testified that it was the practice of all supervisors working for the Town to check on each other's job sites at the end of each day to make sure that the roads around the sites were clear of debris or other potential hazards. On the date of the incident, Wiland was driving slowly along the shoulder of the highway, using the blinking yellow hazard light on top of his truck along with the four-way flashers to warn of his slow travel. He frequently looked into his rearview mirror and, on one of the occasions, saw plaintiff's truck airborne as she crested the hill. The Town argued § 1103(b) applied to the incident because Wiland was performing his duties within the scope of his job as its highway supervisor, and the Third Department agreed. *Id.*, 301 A.D.2d at 824-25. While plaintiff argued that Wiland was not actually working on the highway, the Appellate Division held that nothing "contradicted Wiland's description of the scope of his duties and all indicia of his operation of the vehicle demonstrated that his work had not yet been completed for the day." *Id.*, at 825.

Similar to Wiland, Simone had not completed his work before this incident happened. Indeed, he said a snow emergency was forecasted to start within an hour of the incident. Simone testified the road temperature was under 30 degrees, and he was worried an icy condition could have developed based upon what he had seen. (R. 86-7) He constantly observed the roadway conditions, and when he reached the

intersection and came to a complete stop, he looked to his left and "observed a snow condition on the lower half of" High Ridge Road. (R. 127-28) He saw a build-up of about a quarter-of-an-inch of snow that looked "like it was slushy snow." (R. 128) And because this was "a bus route," and there was a school on High Ridge Road, this was "something that's going to trigger [him] to really look at something." (R. 128-29) Simone testified that after observing the snow on High Ridge Road, he wanted to "get back to the office, and get somebody to take care of the snow in the bus route." (R. 130) His office was less than a quarter-of-a-mile away, and as soon as Simone was back at his office, he was going to make sure that somebody went over to the area to address the slushy condition. (R. 131)

In her attempt to distinguish *Sullivan*, Orellana twists the facts and ignores Simone's testimony that he was continuously inspecting the roads and that he intended to give specific orders related to the slushy condition he observed at the intersection. Orellana asserts that Simone, who was always acting in his capacity as the Superintendent of Highways inspecting the roadways to develop a plan for his workers in anticipation of a snow emergency, was no different from any other motorist in Carmel as he was "traveling somewhere." She implies that Simone never stopped at the stop sign and merely drove through the stop sign. The facts show otherwise. And Carmel and Simone ask this Court to apply the broad

exception established in VTL § 1103(b) and as applied in *Riley* and *Sullivan*, and affirm the dismissal of the complaint.

Orellana's reliance upon *Ibarra v. Town of Huntington*, 6 A.D.3d 391 (2d Dep't 2004) does not support her position. In *Ibarra*, plaintiff was a passenger in a vehicle operated by Tricia A. Conenello. While driving on a road in the Town of Huntington, their vehicle collided with a street sweeper owned by the Town and operated by Orlando Hernandez. The Appellate Division affirmed the denial of the Town's motion under § 1103(b) because it failed to prove that the street sweeper was actually engaged in a hazardous operation at the time of the collision. *Id.*, 6 A.D.3d at 392. Unlike Simone in this case, Hernandez was not actually engaged in protected activity when the collision happened. Therefore, contrary to Orellana's contention, the Appellate Division affirmed the denial of the Town's motion because the vehicle was traveling to and from a hazardous condition.

Carmel and Simone submit *Sullivan* support the rulings by the Supreme Court and unanimous Appellate Division panel. Simone was not traveling to and from work sites. Rather, the entire purpose of Simone driving that morning was to inspect Carmel's roads to develop a plan of action for his workers. His inspection continued through the time he reached the intersection where he noticed a slushy condition and testified that he wanted to get back to his officer—less than a quarter-of-a-mile away—and direct one of his workers to immediately remedy this

area. Based upon the continuing nature of Simone's inspections, Orellana's reliance upon cases such as *Davis v. Inc. Vil. of Babylon*, 13 A.D.3d 331 (2d Dep't 2004) and *Zanghi v. Doefler*, 158 A.D.3d 1275 (4th Dep't 2018) cannot undermine the broad interpretation of § 1103(b) this Court required in *Riley*.

Orellana argues on page 25 that this Court in *Riley* "did not have the facts before it to provide guidance to future courts 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." Respectfully, this Court's ruling analyzed the statute's history and ruled that the legislature intended to create a "broad exception." *Id.*, 95 N.Y.2d at 462. The fact that Simone's vehicle did not have a snowplow on it does not change the statute's intent or application. Simone was operating his work vehicle to assess the conditions of the road for snow treatment and possible removal. His work constituted maintenance of town roads. To hold otherwise would conflict with the statute's intent as expressed in *Riley* because the sole purpose of Simone's work was to assess and determine whether his employees needed to execute their duties due to the falling snow and impending snowstorm. And while Simone was going back to his office, a snowstorm was imminent, and he was constantly assessing road conditions, including the hazardous condition developing at the intersection of the accident.

Orellana argues that if this Court applied § 1103(b) to the facts here, "anytime Simone was driving through town and happened to observe a crack, pothole, or any other road or sidewalk condition that might need attention, would mean Simone was always working on a highway." Carmel and Simone have never advanced such an argument, and the application of § 1103(b) to the facts in this case cannot be used to apply to her hypothetical. Contrary to Orellana's claims, Simone was not simply taking a Sunday drive in the country or going to grab lunch when he fortuitously noticed a pothole. Based upon *the facts*, and not counsel's assertions, there was a snow emergency that was to start within an hour of the incident. He believed that the road temperature was under 30 degrees and feared icy conditions could develop, including at the intersection. As part of his duties as the Superintendent of Highways, Simone drove to inspect Carmel's roadways to develop a plan of action for his workers that they would eventually follow.

While Orellana cites *O'Keeffe v. State of New York*, 40 A.D.3d 607 (2d Dep't 2007) and *Bicchetti v. County of Nassau*, 49 A.D.3d 788 (2d Dep't 2008) to support her argument that questions exist as to whether Simone was engaged in work on a highway, the rulings in *O'Keefe* and *Bicchetti* do not provide any analysis as to why the Appellate Division found the proof submitted by the municipalities lacking.

On appeal, Orellana cites *Lynch-Miller v. State of New York*, 209 A.D.3d 1294, 1295 (4th Dep't 2022), where the Fourth Department noted it was undisputed that defendant's "plow was in the raised position and that the operator was not plowing snow at the time of the accident." The Appellate Division noted that defendant's "own submissions raised a triable issue of fact whether the operator was salting the road at that time." *Id.* While the operator testified that he was actively salting the road at the time of the accident, claimant noticed no salt on the ground in front of her vehicle or to the side when she got out to survey the damage. *Id.*, at 1295-96. Claimant's son also averred that when he came upon the scene after the accident, he noticed no salt on the ground at the scene or surrounding area. *Id.*, at 1296. The Fourth Department also noted that the operator's "vague and equivocal" testimony that "did not even describe his route was insufficient to meet the State's initial burden." (citations omitted) *Id*.

Carmel and Simone are not akin to the State and its employee in *Lynch-Miller* as they proved Simone was not "'merely traveling from one route to another route' on a road that did not constitute part of his run or beat. *Id.* Rather, Simone was constantly observing the road conditions based upon the changing weather.

Nor do the facts in *Plummer v. Town of Greece*, 213 A.D.3d 1236 (4th Dep't 2023) support a different result. In *Plummer*, defendant's snowplow driven by a town employee, rearended plaintiff's vehicle. While defendant's snowplow may

have been "engaged in work" even if its plow blades were raised and no salting was occurring, the Appellate Division concluded that defendants "failed to establish as a matter of law that [Farraro] was working his 'run' or 'beat' at the time of the accident." (citations omitted) *Id.* According to the Fourth Department, the employee's testimony "was vague and equivocal with respect to whether the accident site was part of [the employee's] route on the day in question—[he] did not precisely describe the geographical contours of his route or state that the accident site was a part thereof—and was insufficient to satisfy defendants' initial burden." (citations omitted) *Id.*

Respectfully, there was nothing equivocal about Simone's testimony, and he detailed the route he took, the constant observations he made, and the intent to give additional orders to remedy the slushy condition at the intersection.

Hofman v. Town of Ashford, 60 A.D.3d 1498 (4th Dep't 2009) involved an intersection accident between plaintiff's vehicle and defendant's snowplow that was operated by a town employee. The sole issue was whether the employee was "actually engaged in work on a highway" at the time of the collision, and the Fourth Department ruled he was not. *Id.* The Fourth Department narrowly interpreted the language "actually engaged in work on a highway" and found that at the time of the collision, "[the employee] was not driving on part of his plow

route but instead was traveling from one part of his route to another by way of a county road that he was not responsible for plowing." *Id.*

Unlike the facts in *Hofman* where the determinative fact was that the accident did not occur on the county employee's assigned plow route, Simone was driving a specific route to review the roadway conditions before the arrival of the pending snowstorm.

Respectfully, Orellana's arguments never address the fundamental issues that control whether VTL § 1103(b) applies to the facts. First, there can be no debate that Simone was operating a vehicle owned and maintained by Carmel. Therefore, under *Riley*, he was operating a vehicle that was covered by the statute. Second, he was acting within the scope of his responsibilities as the Superintendent of Highways at the time of the incident, and he was engaged in highway maintenance based upon the broad statutory interpretation mandated by *Riley*. Finally, Simone noted that there was a hazardous condition developing at the intersection of the accident, and this demonstrated that he was still assessing the roads during his return drive. Therefore, the Supreme Court correctly ruled that VTL § 1103(b) applied, and this Court should affirm.

Point II

Simone did not act in reckless disregard with respect to the operation of his vehicle, and this Court should affirm the dismissal of Orellana's complaint.

The record shows that Simone did not drive his vehicle in a reckless manner. According to the uncontested testimony, Simone came to a complete stop at the intersection, but looked only in one direction before entering. He stopped at the stop sign where he observed the slush condition that were going to alter his original instructions to his workers. Simone did not run the stop sign and was not traveling at a high rate of speed at the time of impact. While Simone and Carmel have acknowledged that Simone may have failed to yield the right-of-way to Orellana, his actions do not meet the reckless disregard standard. Thus, the Supreme Court and Appellate Division, Second Department correctly ruled that Simone did not operate his vehicle recklessly and dismissed Orellana's complaint. And they ask this Court to affirm.

This Court has held on several occasions that the standard of reckless disregard for the safety of others, such as under VTL § 1103(b), requires conduct, that is, "in conscious disregard of 'a known or obvious risk that was so great as to make it highly probable that harm would follow.'" *Bliss v. State of New York*, 95 N.Y.2d 911, 913 (2000), quoting *Saarinen v. Kerr*, *supra* 84 N.Y.2d at 501; *see*

also Primeau v. Town of Amherst, *supra* 5 N.Y.3d at 845; and *Riley*, *supra*. A reckless disregard for the safety of others "requires more than a momentary lapse in judgment." *Rockland Coaches, Inc. v. Town of Clarkstown*, 49 A.D.3d 705, 707 (2d Dep't 2008). Indeed, in *Saarinen*, this Court ruled there must be 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." *Id.*, 84 N.Y.2d at 501, quoting Prosser & Keeton, Torts § 34 at 213 [5th ed. 1984].

The Appellate Division's decision in *Yousef v. Verizon, Inc.*, 33 A.D.3d 315 (1st Dep't 2006) is instructive. In *Yousef*, the Appellate Division ruled that there was no triable issue as to whether Verizon's employees acted recklessly because "(w)hile there was some evidence that Verizon may not have complied with all applicable safety standards, there was no evidence of intentional conduct by its employees committed in disregard of a known or obvious risk of highly probable harm." (citation omitted) *Id.*, 33 A.D.3d at 315. The First Department continued that even though "pedestrian and automobile traffic at the subject intersection was regulated by an admittedly unobscured traffic light, which, had it been uniformly observed, should have eliminated the risk of an accident such as the one alleged," Verizon's employee did not engage in reckless conduct sufficient to trigger VTL § 1103(b). *Id.*, at 315-16.

Like *Yousef*, the Appellate Division in *Sullivan* refused to find reckless conduct on the part of the Town's supervisor who was inspecting work on a highway project. In *Sullivan*, the Appellate Division noted that recklessness required evidence of "intentional" conduct that was of such 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." *Id.*, 301 A.D.2d at 825. The Appellate Division could "find no viable contention of recklessness considering the slow speed of Wiland's vehicle and his engagement of various emergency hazard lights, even acknowledging Wiland's testimony that it was common for people to speed when cresting the hill." *Id.*

The facts in *Rascelles v. State of New York*, 187 A.D.3d 953 (2d Dep't 2020) supports Carmel and Simone's arguments. In *Rascelles*, the two DOT workers in the dump truck were looking for and attempting to retrieve a deer carcass. The DOT dump truck collided with the claimant's moped while the claimant was traveling in the bike lane of a county highway. The Appellate Division detailed the actions of the DOT's workers: the driver and the passenger of the DOT vehicle were "traveling over the line partly in a bike lane"; they were "distracted by looking for the deer and watching the GPS map on the passenger's cell phone"; they "did not see the [claimant's] moped traveling in the bike lane"; they "were

traveling 30 to 35 miles per hour when they turned further into the bike lane"; and that "they sideswiped the claimant on his moped."

The Appellate Division initially held that the record supported the finding that the DOT workers were "actually engaged in work on a highway" at the time of the accident, and therefore, that defendant could only be held liable if the actions of the DOT employees constituted a "reckless disregard for the safety of others." *Id.*, 187 A.D.3d at 955.

The trial court concluded that the workers' actions constituted reckless disregard. The Appellate Division reversed, holding that "the evidence was insufficient to establish that the DOT workers exhibited a 'reckless disregard for the safety of others'" under VTL § 1103(b). *Id.* The Appellate Division ruled that despite the actions of the municipal workers, "claimant failed to establish that the DOT workers acted in conscious disregard of a known or obvious risk that was so great as to make it highly probably that harm would follow." *Id*.

Here, similar to the defendants in *Yousef*, *Sullivan*, and *Rascelles*, the evidence in this case shows that Simone did not act with reckless disregard. Simone was not speeding; he was not engaged in any illicit behavior; he was not using his cell phone or other device when the accident happened; and he did not disregard the stop sign at the intersection. Rather, Simone came to a complete stop at the stop sign at the intersection. His headlights and windshield wipers were one.

He observed the roadway conditions and did not see other vehicles. Indeed, Orellana acknowledged that she never saw Simone's vehicle before the incident either. Simone proceeded through the intersection well below the speed limit. Thus, considering that the Appellate Division did not find that the driver and passenger in *Rascelles*—who were looking for deer and watching the GPS map on the passenger's cellphone while driving—acted with reckless disregard for the safety of others, the courts in this case correctly concluded that Simone's actions were negligent, at best. Because Simone looked left and not right at the intersection and did not see Orellana's vehicle, his actions amounted to a momentary lapse in judgment. And Orellana cites no case that would support such a conclusion. Like the defendants in *Yousef*, *Sullivan*, and *Rascelles*, Simone's actions did not rise to the level of reckless disregard for the safety of others.

The case law Orellana cites does not support a different conclusion. For example, the Court in *Jaya v. Baratta*, 164 A.D.3d 772 (2d Dep't 2018) merely held that there were triable issues of fact as to how the incident occurred, and whether defendant's driver operated his vehicle in a reckless disregard for the safety of others. The decision provided no facts to support Orellana's arguments.

Orellana's reliance on *Ryan v. Town of Smithtown*, 49 A.D.3d 853 (2d Dep't 2008) does not support her arguments either. The incident in *Ryan* concerned a municipal dump truck backing up into plaintiff's vehicle at an intersection and not

using its reverse lights and beeping device. The vehicle was equipped with reverse lights and a beeping device that operated when the truck drove in reverse. In opposition to defendant's summary-judgment motion, plaintiff relied on her testimony that the dump truck backed up into her path of travel, causing her vehicle to collide with it. Plaintiff also testified that she neither observed any illuminated reverse lights nor heard any warning sound as the truck backed up into her car. The Appellate Division concluded that plaintiff raised a triable issue of fact as to whether the municipal employee operated the truck with reckless disregard for the safety of others. There is no comparison between the driver's actions in *Ryan* and Simone's actions in driving through the intersection. Simone merely drove through an intersection without looking to his right before doing so. Thus, *Ryan* is distinguishable.

Nor does Orellana's citation to *Chase v. Marsh*, 162 A.D.3d 1589 (4th Dep't 2018) warrant a different result. In *Chase*, there was evidence that the snowplow operator was driving "in reverse, in front of a hill that obscured his view of approaching traffic on a narrow, two-lane country road with a speed limit of 55 miles per hour, without first sounding his horn in warning." *Id.*, 162 A.D.3d at 1590. Additionally, the driver admitted that he did not realize he struck plaintiff's vehicle "until several seconds after the collision," which raised questions as to whether he was using his rearview mirrors while operating the snowplow in

reverse. *Id.* Therefore, the Appellate Division concluded that defendants failed to satisfy their initial burden of proof demonstrating that the driver was not reckless or that his decisions constituted a momentary lapse in judgment. *Id.*

The facts in *Bliss v. State*, *supra*, 95 N.Y.2d 911, are also dissimilar to those in this case. In *Bliss*, claimant was involved in an accident with a New York State Thruway Authority ("NYSTA") truck driven by John Lawler as part of dismantling a lane closure. Lawler was using the truck as part of construction of a highway. According to claimant, Lawler backed his truck, which had only side view mirrors and no rearview mirror, down a narrow decline on a bridge that was located on a heavily-traveled interstate highway, in excess of the maximum safe speed. There was no indication that Lawler attempted to slow down or sound his horn before colliding with claimant's automobile. Further, Lawler violated NYSTA safety directives by straying 100 to 250 feet from its cone truck instead of staying within the required 30 feet. There was no evidence that a required spotter was provided for the operation. But the evidence showed that the work crew was hurrying to dismantle the lane closure because they started late. Finally, Lawler pleaded guilty to a traffic offense—unsafe backing in violation of VTL § 1211(a)—from the incident. Therefore, factual and credibility issues remained that barred the defendants' entitlement to summary judgment. *Id.*, 95 N.Y.2d at 913. None of

Simone's actions here rises to the level of the conduct in *Bliss*, and it is distinguishable.

This Court's decision in *Deleon*, *supra*, 25 N.Y.3d 1102, does not support reversal in this matter either. In *DeLeon*, plaintiff was involved in an accident with a street sweeper owned by the New York City Department of Sanitation and operated by Robert Falcaro. This Court noted that plaintiff "was in his vehicle on the side of the street when Falcaro came along at a high rate of speed and hit his vehicle from behind." *Id.*, 25 N.Y.2d at 1103-04. Falcaro countered that he rear-ended plaintiff's car after he "abruptly entered the lane where Falcaro was driving the sweeper." *Id.*, at 1104.

This Court concluded, as an initial matter, that the reckless standard of § 1103(b) "should have applied" to the facts. *Id.* In finding that defendants failed to satisfy their burden that Falcaro did not operate his vehicle recklessly, this Court stated, "(u)nlike the majority of our reckless disregard cases, Falcaro was not responding to an emergency, but instead was operating a street sweeper during the ordinary course of his duties." *Id.*, at 1106-07. This Court concluded that defendants were not entitled to summary judgment because the parties disputed "critical factual details of the collision." *Id.*, at 1107. While photographs depicting the damage to the vehicles were "seemingly consistent with Falcaro's testimony," he "admitted that when he observed [plaintiff's] vehicle, he did not slow down or

apply his brakes in an attempt to avoid the collision, and 'hit [plaintiff] fairly well,' causing [plaintiff's] jeep to spin out 180 degrees." *Id.* And because a factfinder could conclude "that the driver could, but failed to, take evasive action to avoid a forceful collision, a reasonable jury could find that this conduct rises to the recklessness standard." *Id.*

In contrast to Falcaro's actions in *Deleon*, Simone's actions in this case were, at best, negligent. He admittedly failed to look to his right before slowly driving into the intersection and colliding with Orellana. Nevertheless, his actions constitute, at best, a momentary lapse of judgment and do not compare to the proof plaintiff submitted in *Deleon* related to Falcaro's operation of the street sweeper.

Orellana's reliance on *Frietag v. Village of Potsdam*, 155 A.D.3d 1227 (3d Dep't 2017), misses the mark as well. Indeed, *Frietag* proves Orellana submitted no evidence to counter Carmel and Simone's proof. In *Frietag*, Russell Crump was a heavy equipment operator employed by the Village of Potsdam's Department of Public Works ("DPW"). Crump worked the 11 p.m. to 7 a.m. shift. During the first part of his shift, he and a coworker were assigned to clean accumulated sand and debris from a municipal parking lot known as the Prosh lot. At the latter part of his shift, Crump backed a front-end loader away from a Village dump truck, striking and running over plaintiff as she walked across the lot. The Appellate Division first held that VTL § 1103(b) applied to the facts. *Id.*, 155 A.D.3d at 1230-31.

The court next addressed whether Crump acted with reckless disregard, reversing the trial court's grant of defendant's summary-judgment motion. *Id.* The Third Department noted that plaintiff submitted the expert affidavit of John Coniglio, who opined that Crump's conduct grossly deviated from fundamental safety standards and rose to the requisite level of recklessness. Coniglio explained that the operator's manual for the loader set forth numerous applicable standards of care for its safe operation and required Crump, as the operator, to ensure that pedestrians and other bystanders were kept clear of the loader's path before it was moved. Coniglio opined that the loader Crump operated had a number of known blind spots, and in order to comply with the applicable standard of care, defendants should have either placed barricades to prevent pedestrian access to the work area or placed a signal person to keep pedestrians away from the loader. *Id.*, at 1230.

The Third Department noted that plaintiff's burden at trial was "heavier," but it was not "impossible." *Id.*, at 1231. It ultimately held that defendants failed to establish their entitlement to summary judgment as a matter of law. *Id.* The court noted that the testimony of Bruce Henderson—the Village's DPW Superintendent—acknowledged that the Village had a safety-zone policy in place that called for the establishment of work zones when heavy machinery was being operated in parking lots during the daytime and chose not to implement it during nighttime operations. *Id.* Crump also admitted that a flag person "would have been

helpful and may have been able to stop plaintiff before she crossed behind the loader." *Id.* The Third Department also based its denial upon "the lack of any admissible expert opinion dispositive of defendants' claim that it did not act with recklessness." *Id.*

Comparing the facts in *Frietag* to the accident in this case demonstrates that Orellana did not raise an issue of fact on the recklessness issue. Indeed, Orellana submitted no evidence to counter Carmel and Simone's proof. Even considering the evidence in a light most favorable to Orellana, there are no similar facts in this case compared to the accident in *Frietag*. Simone was not speeding or driving in reverse like the driver in *Frietag*. He stopped at the stop sign. And while he admittedly only looked in one direction, the evidence showed that Simone did not speed into the intersection. Rather, he slowly entered the intersection with his foot on the brake, traveling at about 5 or 6 mph. (R. 113-14) Simone's actions do not constitute reckless conduct, and Orellana cites no caselaw to support a recklessness finding where Simone's actions merely amount to a momentary lapse of judgment.

As demonstrated, the cases upon which Orellana relies are distinguishable. The facts and law support the Supreme Court's conclusion that Simone's conduct did not constitute a reckless disregard for others, and Carmel and Simone ask this Court to affirm the dismissal of the complaint.

Conclusion

This Court in *Riley* held that New York enacted VTL § 1103(b) to create a *broad exception* from the rules of the road for all vehicles engaged in highway construction, maintenance or repair, regardless of their classification. Simone—Carmel's Superintendent of Highways—was engaged in highway maintenance at the time of the incident as he was actively inspecting and monitoring highway conditions in order to address roadway conditions as an emergency snow event was to commence within an hour of the incident. After stopping at a stop sign controlling the intersection, Simone continued to make observations about the roadway conditions to determine what work needed to be done. Simone looked but admittedly did not see Orellana before he entered the intersection, striking her vehicle. While arguably negligent, Simone demonstrated did not act recklessly as required by VTL § 1103(b), and Carmel and Simone respectfully ask this Court to affirm the Supreme Court and Appellate Division, Second Department's decisions that dismissed the complaint.

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