# 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.*

# PLAINTIFF'S NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS WITH SUPPORTING PAPERS


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Date Completed: February 22, 2023

Appellate Division, Second Department, Docket Number 2020-06458
Supreme Court, Putnam County, Index No. 500842/2019


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COURT OF APPEALS
STATE OF NEW YORK

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| ANA ORELLANA,<br><br>Plaintiff-Appellant,<br><br>-against-<br><br>THE TOWN OF CARMEL, THE TOWN OF CARMEL HIGHWAY DEPARTMENT AND MICHAEL J. SIMONE,<br><br>Defendants-Respondents. | **NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS**<br><br>App. Div. Docket No.: 2020-06458<br><br>Putnam Cty. Index No.: 500842/2019 |

COUNSEL:

PLEASE TAKE NOTICE, that upon the annexed affirmation of ENOCH C. BRADY, attorney for the plaintiff-appellant, ANA ORELLANA, dated February 22, 2023, the exhibits annexed thereto, the Record on Appeal, and the briefs filed in the Appellate Division Second Department, the plaintiff-appellant will move this Court at the Courthouse located at 20 Eagle Street, Albany, New York 12207, on 6th day of March, 2023, at 10:00 a.m.:

(1) pursuant to CPLR §5602(a)(1)(i) and 22 NYCRR §500.22(b)(4) for an order granting permission to appeal to the Court of Appeals from the final Order of the Appellate Division Second Department dated January 25, 2023, on the grounds that this is an appeal from a final order which presents a novel issue, one that is of public importance and one which presents a conflict between the Appellate Divisions;

(2) and awarding such other, and further relief as the Court deems just and proper.

Dated: Port Chester, New York
February 22, 2023

Enoch C. Brady

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Clerk of the Court - Court of Appeals

COURT OF APPEALS
STATE OF NEW YORK

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|---|---|
| ANA ORELLANA,<br><br>Plaintiff-Appellant,<br><br>-against-<br><br>THE TOWN OF CARMEL, THE TOWN OF CARMEL HIGHWAY DEPARTMENT AND MICHAEL J. SIMONE,<br><br>Defendants-Respondents. | **AFFIRMATION IN SUPPORT OF NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS**<br><br>App. Div. Docket No.: 2020-06458<br><br>Putnam Cty. Index No.: 600842/2019 |

ENOCH C. BRADY, an attorney duly admitted to practice law before the Courts of the State of New York and a member of the firm of ENOCH BRADY & ASSOCIATES, attorneys for plaintiff-appellant herein, hereby affirms under the penalties of perjury and pursuant to §2106 of the CPLR that the following statements are true and correct:

1. I am fully familiar with the facts and circumstances set forth below, based upon the file maintained by my office.

2. I respectfully submit this affirmation in support of the motion by plaintiff-appellant, Ana Orellana ("plaintiff" or "Mrs. Orellana"), pursuant to CPLR §5602(a)(1)(I) and 22 NYCRR §500.22(b)(4) for an order granting permission to appeal to the Court of Appeals from the final Order of the Appellate Division Second Department dated January 25, 2023, which affirmed an order granting defendants-respondents, THE TOWN OF CARMEL, THE TOWN OF CARMEL HIGHWAY DEPARTMENT and MICHAEL J. SIMONE ("defendants" or "Simone") summary judgment dismissing plaintiff's complaint, on

the grounds that this appeal presents a novel issue, one that is of public importance and one that presents a conflict between the Appellate Divisions.

**PROCEDURAL HISTORY**

3. This motion for permission to appeal to the Court of Appeals is timely because it is made within the time prescribed by CPLR §5513(b). By decision dated January 25, 2023, the Appellate Division Second Department affirmed the order of the Supreme Court, Putnam County (Hon. Victor G. Grossman, J.S.C.) dated and entered July 24, 2020 (R3-10) which: denied Mrs. Orellana's motion for summary judgment based on defendants' violation of Vehicle and Traffic Law ("VTL") §§1142 and 1172; and granted defendants' motion for summary judgment, pursuant to VTL §1103(b) (R3-10).[1]

4. Defendants served the Appellate Division's January 25, 2023 Order with Notice of Entry on January 26, 2023. Copies of the Appellate Division Order, Notice of Entry and Affidavit of Service are annexed hereto as Exhibit "1." Annexed hereto as Exhibit "2" is the Order of Supreme Court, Putnam County, dated and entered July 24, 2020, which granted defendants summary judgement.

**JURISDICTIONAL STATEMENT**

5. This Court has jurisdiction over this motion and

[1] References to "( R**)" refer to the pages of the Record on Appeal.

proposed appeal because the Order of the Appellate Division Second Department dated January 25, 2023 is final; it affirmed an order granting summary judgment to defendants dismissing plaintiff's complaint. See Exhibit 1.

6. In compliance with 22 NYCRR §500.22(c), filed with this motion, are copies of the Record on Appeal, Appellant's Brief, Respondents' Brief and Appellant's Reply Brief.

**QUESTIONS PRESENTED FOR REVIEW**

- Whether, the Appellate Division erred in holding that, in a motor vehicle accident between a vehicle owned and operated by Mrs. Orellana and a Ford Explorer owned by the Town of Carmel and operated by Simone, the Superintendent of Highways, defendants are entitled to the VTL §1103(b) exemption from the rules of the road, when Simone testified that at the time of the accident, he was returning to the office, having already completed the task of mobilizing the Town's salting force?

- Alternatively, whether there is a triable question of fact as to whether defendants are entitled to the VTL §1103(b) exemption from the rules of the road, based on Simone's testimony that at the time of the accident, he was returning to the office, having already completed the task of mobilizing all of the Town's snow salting force?

- Whether there is a triable question of fact as to whether, at the time of the accident, Simone's conduct exhibited a reckless disregard for the safety of others?

- Whether the plaintiff is entitled to summary judgment on liability based on Simone's admitted violation of VTL §§1142 and 1172, when he ran a stop sign and collided with her vehicle?

7. These questions are preserved for review in the Record on Appeal at pages 14-24, 195-203, 205-223, 479-494, 497-505, 514-526, and 527-535 and in the briefs submitted in the Appellate Division.

8. These questions present a novel issue, one that is of public importance and one which presents a conflict between departments of the Appellate Divisions.

**Discussion Of Questions Presented For Review**

9. VTL §1103(a) states that its provisions 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).

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

> Unless specifically made applicable, the provisions of this title, . . . *shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on 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)

11. 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.

12. Under VTL §1103(b), drivers who are not actually engaged in work on a highway, who are simply traveling to or from such hazardous operation, must follow the rules of the road set forth in the Vehicle and Traffic Law, including §§1142 and 1172.

13. In its decision, the Appellate Division noted that at the time of the accident, defendant driver, Simone, the Town's Superintendent of Highways, had a stop sign, entered the intersection without looking to the right and struck plaintiff's vehicle, which had no stop sign. Citing this fact alone, the Appellate Division held that defendants had established that Simone was "actually engaged in work on a highway at the time of the accident" (see Exhibit 1 annexed hereto).

14. The Appellate Division did not describe the nature of the work that Simone was performing on the highway nor did they discuss whether he was traveling to or from such hazardous operation, leaving the bench and bar free to infer that the Superintendent of Highways was engaged in work on a highway and

exempt from the rules of the road under VTL §1103(b) simply because he was driving through town, and without considering whether he was *traveling to or from a hazardous operation*.

15. Therefore, the Appellate Division's decision on this case creates confusion for the bench and bar as to the application of VTL §1103(b) to drivers such as Simone, who according to its decision, was simply the Town Superintendent of Highways driving a Ford Explorer through an intersection. 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.

16. Simone, the Superintendent of Highways for the Town of Carmel for 18 years (R148), left his town garage base to investigate whether the snow flurries he'd seen that morning had resulted in any accumulation at his "bellwether" location of Kings Ridge Road and Prince Street (the Town's highest elevation) (R87-88, 74-77), mindful that the school buses transporting kindergarten students from Lakeview School left the school at 12 noon (128, 130-131).

17. Simone radioed his dispatcher from Kings Ridge Road at approximately 10:00 a.m., directing his 35 workers be sent out in their trucks to salt the 28 different routes which comprised the Town's roads. He knew it would take them approximately one hour

to salt all the Town's roads prior to the buses leaving the Lakeview School at 12:00 noon (R79-80, 83-85, 89, 91, 130-131). Just before the accident, there was no snow/ice emergency (R92). Based on Simone's testimony, he was simply driving back to his office over town roads (R76-77, 81, 88, 92, 151).

18. Simone admittedly caused the accident by failing to look to his right at the intersection even though he knew the Lakeview School was just 500 feet to his right (R129-130, 477). He struck Mrs. Orellana's vehicle, which had just left Lakeview School where she had attended her daughter's holiday pageant (R245-246, 341). His Ford Explorer was not equipped with a plow or a salt spreader, nor was he in a work zone. All the Town's trucks having been dispatched, there was nothing to distract him and he had every reason to be vigilant with a school 500 feet to his right, yet, Simone never looked right before entering the intersection (R477, 129). Proceeding into the intersection without looking right violates of one of the most basic rules of driving, as codified in CPLR §§1142 and 1172.

19. Simone was fully capable of obeying all the rules of the road and operating his Ford Explorer when he ran the stop sign. Running a stop sign while returning to his base was not related to Simone's prior inspection of his bellwhether location for snow (R79-80, 84-86). What Simone should have done that day was no different than what every other motorist should do when confronting a stop sign; look both ways before proceeding. He

did not have to undertake any hazardous maneuvers in order to return to his base as he had already radioed his office to mobilize his force to perform snow salting to address the one-quarter inch snow accumulation he'd observed five minutes earlier (R84-85). Applying VTL §1103(b) to these facts improperly expanded the scope of VTL §1103(b) far beyond what the legislature intended.

20. "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).

21. "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.

22. The logical result of 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).

23. The Appellate Division's decision also presents a novel issue that this Court should address because in our survey of caselaw, we were unable to locate any case with a comparable fact pattern that exempted the driver's conduct from the rules of the road under VTL §1103(b).

24. This 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 the "traveling to or from such hazardous operations" exception from its analysis and therefore conflicts with the caselaw in the Fourth Department.

25. 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, ___ A.D.3d ___ (4th Dep't 2023); 2023 NY slip Op. 00563; 2023 N.Y. App. Div. LEXIS 527; 2023 WL 1496314 (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).

**SUMMARY OF RELEVANT FACTS**

26. 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).

27. At the time of the accident, Mrs. Orellana was traveling on Highridge Road toward its intersection with Lakeview Drive and had the right of way - there was no stop sign for either direction of travel on Highridge Road (see police diagram R59). Simone was operating his Ford Explorer on Lakeview Drive heading toward its intersection with Highridge Road, where there were stop signs for both directions of travel on Lakeview Drive (R65-66, 73-74, 93; see police diagram R59).

28. Simone left his office and went out to inspect the roads because it was snowing lightly (R74-75). He had been the Town of Carmel Superintendent of Highways since 2000 (R148) and therefore knew his job well. As per his custom, he drove to his bellwether location at Kings Ridge Road, which is in a rural subdivision and the highest elevation in town (R78, 87, 128-131, 178, 141-142). He went there to determine whether to mobilize

his force for snow removal efforts because "if [the snow] is going to stick to the road, it is going to stick there first" (R75, 77, 87-88). Simone saw a quarter-inch of snow at Kings Ridge Road, radioed his office from that location and ordered all his men and trucks out (R79-80, 85-86).

29. Simone clearly and unequivocally testified that he was not in a rush to get back to his office (R92, 96) and he did not intend to spend anymore time inspecting roads before returning to the office (R151). Five minutes later, while on his way back to the office, the accident happened (R76-77, 88, 130, 151-153).

30. Simone 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?
>
> A. *Going back to my office* (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.*
>
> 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).

31. When Simone radioed his office, he communicated directly with the dispatcher (R81). He told them to "load up," which meant that all 35 men would load their trucks with salt and salt their 28 routes (R83). He anticipated that as an initial matter, his 35 men would be able to cover their 28 routes within an hour (R85) and 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)as the salting of the entire town would take about an hour and it was approximately two hours before kindergarten buses departed Lakeview School (R 85,130-131).

**ARGUMENT**

**THIS COURT SHOULD GRANT LEAVE TO APPEAL AND DECIDE WHETHER THE VTL §1103(b) EXEMPTION FROM THE RULES OF THE ROAD FOR VEHICLES ENGAGED IN WORK ON A HIGHWAY APPLIES TO A SUPERVISOR WHO HAD COMPLETED HIS TASK, MOBILIZED HIS FORCE AND WAS ON HIS WAY BACK TO HIS OFFICE AT THE TIME OF THE ACCIDENT**

32. In Riley v. County of Broome, supra, the Court of Appeals analyzed the types of vehicles and activities to which VTL §1103(b) applies. The Riley 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.

33. 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.

34. As the Riley Court explained:

> . . . the common law also recognized the

> level of care owned by emergency and road work vehicles must be tempered by the nature of their work. . . In addition, many emergency vehicles were, by statute, given the right of way. Nevertheless, the common law required that such vehicles exercise their right of way with care and caution measured by the purpose and necessity of right (citation omitted)" Riley v. County of Broome, 95 N.Y.2d at 460-462.

35. In Riley, two cases were decided - Riley v. County of Broome and Wilson v. State of New York. The Riley case involved a motor vehicle accident between a street sweeper and a passenger vehicle. The Wilson case involved a motor vehicle accident between a snowplow and a passenger vehicle. Both defendant's vehicles would be characterized as work and/or hazard vehicles.

36. Both Riley plaintiffs attempted to distinguish *work* vehicles from *hazard* vehicles and argued that VTL §1103(b) only exempted "hazard vehicles" from the stopping, standing and parking regulations of Vehicle and Traffic Law §1202(a), but did not exempt hazard vehicles from any other rules of the road.

37. The Riley Court refused to distinguish work and hazard vehicles (a street sweeper in Riley and a snow plow in Wilson).

38. Critically, the Riley Court did not address any issues similar to the situation at bar; namely whether a supervisor who left his office for the express purpose of inspecting his bellwether location of Kings Ridge Road to determine whether to dispatch his road salting force was "actually engaged in work on a highway" when involved in a motor vehicle accident (because he didn't look both ways at a stop sign) after he'd already

dispatched said force by two way radio five minutes earlier and was returning to his base.

39. Our survey of cases decided under VTL §1103(b) supports a conclusion that the question presented here is a novel one because typically, this section applies to vehicles involved in actual plowing, salting and sanding operations, street sweeping, or tractors mowing lawns and other trucks actually engaged in work on a highway at the time of the accident, keeping in mind that Simone's Ford Explorer had no equipment (plow, salt, spreader, etc.)which could have enabled such work. 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).

40. Defendants may refer to testimony by Simone that when he got back to his office he intended to make sure that his forces were out on their routes (R88), and that he'd check to make sure that someone addressed the 1/4 inch of slush he'd seen at the intersection of Highridge and Lakeview (R128). However, he also testified that nothing more needed to be done beyond what he had already done, which was to order his crews out to salt the roads, which would be completed well before the kindergarten buses departed ( R128-129).

41. Even if the court wanted to credit Simone with thinking about what he'd do when he got back to his base, that would not be enough to change the fact that he was traveling between an inspection/job site and his office when the accident occurred which would not entitle him to §1103(b)protection because traveling between work locations is not actual engagement in work on a highway. Snowplow operators and other vehicle operators are not entitled to the VTL §1103(b) exemption when traveling between routes. See Plummer v. Town of Greece, supra, and Lynch-Miller v.

State of New York, supra, where each defendant failed to eliminate a question as to whether driver was merely traveling from one route to another); Hofmann v Town of Ashford, 60 A.D.3d 1498, 1499 (4th Dept 2009)(driver 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).

42. Therefore, this Court should grant leave to appeal to the Court of Appeals in order to address the novel issue presented here, which is also one of public importance. To the extent that the Appellate Division Second Department applied VTL §1103(b) in a manner that conflicts with the analysis conducted by the Appellate Fourth Department, this Court should resolve that conflict.

43. Alternatively, there are at least triable issues of fact for a jury to resolve, including whether Simone was actually working on a highway at the time of the accident. Simone unequivocally testified that he was on his way back to the office, having already gone to his bellwether location of Kings Ridge Road, observed one-quarter inch of snow and radioed his dispatcher to mobilize his force. There was nothing further for him to do while out driving on town roads.

44. There is also a triable issue of fact as to 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 (R128-130), including Mrs. Orellana (222-223), he failed to look to his right in the direction of the school and entered the intersection, striking the Orellana vehicle. Entering the intersection, without a modicum of statutorily required attention raises a triable issue of fact as to whether Simone's conduct constitutes recklessness, particularly when Simone expressed concern for traffic traveling on the elementary school bus route. Riley v. County of Broome, supra. See also, Deleon v. New York City Sanitation Department, 25 N.Y.3d 1102 (2015).

45. There is also a triable issue of fact as to 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.

**WHEREFORE, for the foregoing reasons**, this Court should grant leave to appeal to the Court of Appeals, and such other, further and different relief as is just and proper.

Dated: Peekskill, New York
February 22, 2023

Enoch C. Brady

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# Exhibit 1

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-SECOND DEPARTMENT

----------X

ANA ORELLANA,

Plaintiff-Appellant

-against-

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

Defendants-Respondents.

----------X

Docket No.: 2020-06458

**ORDER WITH NOTICE OF ENTRY**

Index No.: 500842/2019

**PLEASE TAKE NOTICE**, that the within is a true copy of the Order of Supreme Court, State of New York, Appellate Division, Second Department dated January 25, 2023, and duly Entered in the Office of the Clerk of the within named Court on January 25, 2023.

Dated: Garden City, New York
January 26, 2023

Yours, etc.

GERBER CIANO KELLY BRADY LLP

*Brendan T. Fitzpatrick*

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Orellana v. Town of Carmel, et al.
Docket No.: 2020-06458
GCKB File No.: 1103.0147

## AFFIDAVIT OF SERVICE

**CHRISTINE KUBIC** being duly sworn deposes and says that deponent is not a party to this action is over 18 years of age and resides in Levittown New York. That on the 26TH day of January, 2023 deponent served a copy of the within **ORDER WITH NOTICE OF ENTRY, APPELLATE DECISION** upon:

Enoch C. Brady
ENOCH BRADY & ASSOCIATES
*Attorney for Plaintiff*
Office and PO Box Address
130 North Main Street
Port Chester, New York 10573
914.690.0800
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LYDECKER DIAZ
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VIA NYSCEF:

CHRISTINE KUBIC

Sworn to before me this
26 day of January, 2023

JESSIC COLANGELO

NOTARY PUBLIC, State of New York
Registration No.: 01C05087310
Qualified in Nassau County
Commission Expires: November 3, 2025

# Supreme Court of the State of New York
# Appellate Division: Second Judicial Department

D70917
I/htr

_____AD3d_____ Argued - November 7, 2022

MARK C. DILLON, J.P.
VALERIE BRATHWAITE NELSON
ROBERT J. MILLER
JOSEPH J. MALTESE, JJ.

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2020-06458 DECISION & ORDER

Ana Orellana, appellant, v Town of Carmel, et al., respondents.

(Index No. 500842/19)

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Enoch Brady & Associates (Marie R. Hodukavich, Peekskill, NY, of counsel), for appellant.

Lydecker Diaz (Brett Goldman and Gerber Ciano Kelly Brady LLP, Garden City, NY [Brendan T. Fitzpatrick, Brian W. McElhenny, and Jamie Prisco], of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Putnam County (Victor G. Grossman, J.), dated July 24, 2020. The order granted the defendants' motion for summary judgment dismissing the complaint, and denied, as academic, the plaintiff's cross motion, inter alia, for summary judgment on the issue of liability.

ORDERED that the order is affirmed, with costs.

This appeal concerns a two-vehicle accident that occurred on December 13, 2018, in the intersection of Lakeview Drive and Highridge Road in the Town of Carmel. At the time of the accident, the plaintiff was proceeding westbound on Highridge Road. Her vehicle was struck in the middle of the intersection by a vehicle owned by the defendant Town of Carmel, and operated by the defendant Michael J. Simone, the then Superintendent of Highways for the defendant Town of Carmel Highway Department, after Simone's vehicle entered the intersection from Lakeview Road. It is undisputed that the plaintiff's entrance into the intersection was not governed by a traffic control device. Simone's entrance into the intersection was governed by a stop sign, at which he stopped prior to entering the intersection. After stopping at the stop sign, Simone looked to his left, but not

to his right, toward the direction in which the plaintiff was proceeding, and entered the intersection where the collision occurred.

The plaintiff commenced this action against the defendants to recover damages for personal injuries alleging, inter alia, that the defendants were negligent in their ownership and operation of their vehicle. After discovery was complete, the defendants moved for summary judgment dismissing the complaint on the ground that at the time of the accident Simone was actually engaged in work on a highway and did not act with reckless disregard for the safety of others within the meaning of Vehicle and Traffic Law § 1103(b). The plaintiff cross-moved, among other things, for summary judgment on the issue of liability. In an order dated July 24, 2022, the Supreme Court granted the defendants' motion, and denied, as academic, the plaintiff's cross motion. The plaintiff appeals.

Vehicle and Traffic Law § 1103(b) exempts from the rules of the road all vehicles "which are 'actually engaged in work on a highway,' and imposes on such vehicles a recklessness standard of care" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1105 [citation omitted], quoting *Riley v County of Broome*, 95 NY2d 455, 460; *see Veralli v O'Connor*, 190 AD3d 783; *Ventura v County of Nassau*, 175 AD3d 620, 621; *Rockland Coaches, Inc. v Town of Clarkstown*, 49 AD3d 705, 706).

Here, 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 Vehicle and Traffic Law § 1103(b) (*see Riley v County of Broome*, 95 NY2d at 455; *Veralli v O'Connor*, 190 AD3d at 783; *Ventura v County of Nassau*, 175 AD3d at 621; *cf. O'Keeffe v State of New York*, 40 AD3d 607). In opposition, the plaintiff failed to raise a triable issue of fact. Thus, the defendants' potential liability in this case had to be considered under the recklessness standard of care, which the Supreme Court properly did.

To establish recklessness, a plaintiff must demonstrate that the vehicle operator "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" (*Deleon v New York City Sanitation Dept.*, 25 NY3d at 1105 [internal quotation marks omitted]; *see Saarinen v Kerr*, 84 NY2d 494, 501-502; *Veralli v O'Connor*, 190 AD3d at 783; *Ventura v County of Nassau*, 175 AD3d at 621). Thus, "[r]eckless disregard . . . requires more than a momentary lapse in judgment" (*Rockland Coaches, Inc. v Town of Clarkstown*, 49 AD3d at 707; *see Veralli v O'Connor*, 190 AD3d 783).

Here, Simone's deposition testimony established that after coming to a full stop at the stop sign on Lakeview Road, Simone looked to his left and entered the intersection without ever looking to his right, toward the direction in which the plaintiff was proceeding on Highridge Road. According to Simone, he traveled approximately nine feet into the intersection when the impact with the plaintiff's vehicle occurred and, while he admittedly never saw the plaintiff's vehicle prior to the impact, since he was looking straight ahead as he entered the intersection, Simone estimated that he was traveling between five to six miles per hour when the impact occurred. Under these circumstances, the Supreme Court properly determined that the defendants met their prima facie

burden of demonstrating that Simone's conduct did not rise to the level of reckless disregard, but rather evinced a momentary lapse in judgment (*see Veralli v O'Connor*, 190 AD3d at 783; *Matsch v Chemung County Dept. of Pub. Works*, 128 AD3d 1259, 1261; *Rockland Coaches, Inc. v Town of Clarkstown*, 49 AD3d at 707; *cf. Joya v Baratta*, 164 AD3d 772, 772). In opposition, the plaintiff failed to raise a triable issue of fact.

Since the plaintiff failed to raise a triable issue of fact in opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324), the Supreme Court properly granted the defendants' motion for summary judgment dismissing the complaint. As a result of that determination, the court properly denied, as academic, the plaintiff's cross motion, inter alia, for summary judgment on the issue of liability.

DILLON, J.P., BRATHWAITE NELSON, MILLER and MALTESE, JJ., concur.

ENTER:

Maria T. Fasulo
Clerk of the Court

# Exhibit 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

----------X

ANA ORELLANA,

Plaintiff,

Index No. 500842/2019

-against-

**NOTICE OF ENTRY**

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

Defendants.

----------X

**PLEASE TAKE NOTICE**, that the within is a true and correct copy of the Decision & Order of the Honorable Victor G. Grossman, J.S.C., dated July 24, 2020, which was duly entered by the Clerk of the Court, County of Putnam on July 24, 2020.

Dated: Melville, New York
July 27, 2020

LYDECKER DIAZ

By: /s/ Louis Brett Goldman
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Louis B. Goldman, Esq.
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To: Enoch Brady, Esq.
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*Attorneys for Plaintiff*

**To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties**

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF PUTNAM**

----------X

ANA ORELLANA,

Plaintiff,

-against -

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

Defendants.

----------X

**DECISION & ORDER**

Index No. 500842/2019
Sequence Nos. 1-2
Motion Date: 6/24/2020

**GROSSMAN, J.S.C.**

The following papers, numbered 1 to 38, were considered in connection with Defendants' Notice of Motion, dated June 6, 2020, for an Order, granting summary judgment and dismissing the complaint, and Plaintiff's Notice of Motion, dated June 8, 2020, seeking, *inter alia*, partial summary judgment on the issue of liability and setting the matter down for trial on the issue of damages.

| **PAPERS** | **NUMBERED** |
|---|---|
| Defendants' Notice of Motion/Goldman Affirmation in Support/Exhs. A-M/Defendants' Memorandum of Law | 1-16 |
| Plaintiff's Notice of Motion/Brady Affirmation in Support/ Plaintiff's Affidavit/Exhs. 1-11 | 17-30 |
| Brady Affirmation in Opposition/Plaintiff's Affidavit/Exh. 1/ Plaintiff's Memorandum of Law | 31-34 |
| Goldman Affirmation in Opposition to Plaintiff's Motion | 35 |
| Brady Reply Affirmation/Reply Memorandum | 36-37 |
| Goldman Reply Affirmation | 38 |

This is an action for personal injuries allegedly sustained by Plaintiff Ana Orellano as a result of a motor vehicle accident that occurred on December 13, 2018 at 10:05 a.m. on

Lakeview Drive at the intersection of Highridge Road in Carmel, New York. At the time of the accident, Plaintiff was proceeding westbound on Highridge Road when her vehicle was struck by Defendant Town of Carmel's 2015 Ford motor vehicle which was being operated by Defendant Michael Simone, Superintendent of Highways for Defendant Town of Carmel Highway Department, in the course of his employment (collectively "Defendants"). At the time, Simone had been driving northbound on Lakeview Drive, had the stop sign, and then proceeded northbound on Lakeview Drive, striking Plaintiff's car (Goldman Affirmation at ¶¶2-3).

On May 29, 2019, Plaintiff commenced this action, alleging that Defendants' negligence, recklessness and carelessness caused her serious injuries (Complaint at ¶¶21, 26). On July 9, 2019, Defendants interposed their collective Answer, generally denying the allegations and raising twenty (20) affirmative defenses, including they are exempt from liability pursuant to Vehicle and Traffic Law § 1103(b).

In the Verified Bill of Particulars, Plaintiff alleges that Defendants negligently operated their vehicle, and were in violation of, *inter alia*, Vehicle and Traffic Law §§ 1110A, 1140, 1141, 1142, 1146, 1163, 1172, 1180(a)(e), and 1212 (BOP at ¶4).

Discovery has been completed, and Plaintiff filed a Note of Issue and Certificate of Readiness for Trial on February 24, 2020.

Defendants move for summary judgment on the ground that their conduct did not breach the standard of care required of them set forth by Vehicle and Traffic Law § 1103(b). In response, Plaintiff asserts that Defendants have failed to establish that "Simone was not engaged in active highway maintenance the morning of the incident because he was merely driving around in what was essentially a passenger SUV looking at road conditions (he was not plowing, salting,

mowing, etc.)" (Brady Affirmation in Opposition at ¶25). Plaintiff also argues that even if Simone was involved in active highway maintenance, Defendants still failed to make a *prima facie* showing that they are entitled to the protections of VTL § 1103(b) "in that at the time of the accident Mr. SIMONE was just driving back to his base having already made the determination that he must send his crews out with salt to check their routes and had called the base to set this in motion five minutes before the accident occurred" (Brady Affirmation in Opposition at ¶25). As such, according to Plaintiff, Simone is subject to Article VII Rules of the Road including Vehicle and Traffic Law §§ 1172 and 1142. Moreover, Plaintiff asserts that it is undisputed that Simone failed to yield the right of way to her in the intersection, and as such, she is entitled to partial summary judgment on the issue of liability.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Initially, "the proponent... must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." However, once a movant makes a sufficient showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers (*id.*; *see also Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]).

"The Vehicle and Traffic Law sets forth a uniform set of traffic regulations known as the 'rules of the road'" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1104 [2015], citing *Riley v County of Broome*, 95 NY2d 455, 462 [2000]). In enacting Vehicle and Traffic Law § 1103(b), the Legislature intended "to create a broad exemption from the rules of the road for vehicles engaged in construction, maintenance, or repair of highways. Rather than the ordinary negligence standard, drivers engaged in such activities are held to a lesser standard of care: 'reckless disregard for the safety of others.' There are two initial questions, therefore. Was the driver engaged in a covered activity and, second, was that activity taking place on a highway? If so, the lesser standard applies" (Larry Cunningham, 2018 Practice Commentaries, McKinney's Cons Laws of NY, Vehicle and Traffic Law § 1103).

The sole issue before the Court is whether Simone was "actually engaged in work on a highway" at the time of the collision (*see Riley v County of Broome*, 95 NY2d at 463). The courts take an expansive view of what it means to be engaging in road maintenance (Larry Cunningham, 2018 Practice Commentaries, McKinney's Cons Laws of NY, Vehicle and Traffic Law § 1103, citing *Harris v Hanssen*, 161 AD3d 1531 [4th Dept 2018] [defendant was plowing streets as part of his assignment on behalf of town; fact that blade was up at time of collision was immaterial]). "[T]he history of section 1104(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" (*Riley v County of Broome*, 95 NY2d at 464). "In 1954, the Committee that proposed the original version of the statute stated that the law was intended to exempt from the rules of the road all teams and vehicles that 'build highways, repair or maintain them, paint the pavement markings, remove the snow, sand the

pavement and do similar work' (see, 1954 N.Y. Legis. Doc. No. 36, at 35). Thus, 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" (*Riley v County of Broome*, 95 NY2d at 464). Moreover, "the legislative history shows that the reference to 'hazard vehicles' in section 1103(b) is wholly unrelated to the provision excusing vehicles engaged in road work from the rules of the road" (*Riley v County of Broome*, 95 NY2d at 464). Finally, there is no requirement that the vehicle be located in a designated "work area" in order to be afforded protection (*Riley v County of Broome*, 95 NY2d at 468).

The Court finds Simone was "actually engaged in work on a highway" at the time of the collision. While he was not operating a snowplow, he was operating his work vehicle to assess the conditions of the road for snow treatment and possible removal (Simone EBT at 15-16, 25, 92). The Court finds that these actions constitute maintenance of the Town roads. It would be counterintuitive for the Court to conclude differently. The sole purpose of his assessment of the road conditions was to determine whether his employees needed to execute their duties due to the falling snow and impending snow storm (Simone EBT at 20-22, 24-35). The fact that he was not operating a snow plow is of no moment to the Court. He was performing his job in his official capacity at the time of the accident. In fact, although he was heading back to his office, he noted that there was a hazardous condition developing at the intersection of the accident (Simone EBT at 68-69, 70-72), which illustrates that he was still accessing the roads during his return drive (*cf Davis v Incorporated Vil. of Babylon, N.Y.*, 13 AD3d 331 [2d Dept 2004] [street sweeper merely traveling from one site to another; VTL § 1103[b] inapplicable], and *Zanghi v Doerfler*, 158 AD3d 1275 [4th Dept 2018] [VTL § 1103[b] exemption inapplicable where an empty town dump

truck was traveling between work sites, and was not plowing, salting, sanding or hauling snow]). As such, Defendants have established their entitlement to this exemption as a matter of law (*see Farese v Town of Carmel*, 296 AD2d 436, 437 [2d Dept 2002]).

Because the protections of VTL § 1103(b) apply, liability will only attach if Simone behaved recklessly (*Deleon v New York City Sanitation Dept.*, 25 NY3d at 1105; *see Howell v State*, 169 AD3d 1208, 1209 [3d Dept 2019]). "This standard demands more than a showing of a lack of 'due care under the circumstances' – the showing typically associated with ordinary negligence claims" (*Saarinen v Kerr*, 84 NY2d 494, 501 [1994]). "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 NY2d at 501; *see Bliss v State of New York*, 95 NY2d 911, 913 [2000]). "[A] reckless disregard for the safety of others 'requires more than a momentary lapse in judgment'" (*James v Town of Babylon*, 40 Misc3d 8, 10 [App Term, 2d Dept, 9th & 10th Jud Dists 2013], quoting *Rockland Coaches, Inc. v Town of Clarkstown*, 49 AD3d 705, 707 [2d Dept 2008]). "To find that there has been a reckless disregard for the safety of others, all the definitional prongs of that standard must be determined against the driver" (*James v Town of Babylon*, 40 Misc3d at 10).

Here, the undisputed evidence establishes that Simone stopped at a stop sign, failed to look to the right after looking to his left, and proceeded into the intersection without yielding to Plaintiff who did not have a traffic control device. While this alone constitutes *prima facie* negligence (*see* VTL §§ 1142[a], 1172[a]), Plaintiff has failed to proffer additional evidence to support a finding that she established a *prima facie* case that Simone's actions were reckless (*see*

*Skolnick v Town of Hempstead*, 278 AD2d 481, 482 [2d Dept 2000]). In fact, she admitted she did not even see Simone's vehicle until she felt the impact (50h transcript at 17, 20-21). Simone's actions, without more, while clearly negligent, are insufficient to constitute recklessness (*see State Farm Mut. Auto. Ins. Co. v City of Auburn*, 5 Misc3d 1016(A) [City Ct 2004] ["a misjudgment in clearance of a vehicle in an intersection was not a decision on [defendant's] part to ignore a grave risk likely to result in harm to others but rather a failure to observe and judge correctly the speed of a vehicle, and then pulling out into the intersection"]; *see McDonald v State*, 176 Misc2d 130 [Ct Cl 1998] [where snowplow collided with vehicle when it attempted to cross lanes of highway and reach U-turn area in median did not act with reckless disregard for safety of others, as required by VTL § 1103; while operator was negligent, nothing indicated she ignored grave risk likely to result in harm to others, as her observations did not disclose any other cars in the vicinity and all warning lights on snowplow were operating]). At most, Simone's failure to look right before proceeding into the intersection was no more than a momentary lapse in judgment (*see Rockland Coaches, Inc. v Town of Clarkstown*, 49 AD3d at 707 [where snow plow operator looked in this side view mirrors as he approached intersection, but he failed to look in them immediately before turning, did not constitute reckless disregard]).

In light of the above, the Court declines to address any remaining argument and finds that Plaintiff's motion is denied as moot.

Accordingly, it is hereby

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that Defendants' motion is granted and the Complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
July 24, 2020

HON. VICTOR G. GROSSMAN, J.S.C.

To: Robert J. Pariser, Esq.
Louis Brett Goldman, Esq.
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# AFFIDAVIT OF SERVICE

STATE OF NEW YORK )
) ss.:
COUNTY OF SUFFOLK )

Patricia Morrison, being duly sworn, deposes and says: I am not a party to this action, am over 18 years of age and I reside in Hudson County, New Jersey.

On the 28th day of July, 2020, I caused to be served upon Plaintiff, via her attorney, a true and exact copy of the annexed **NOTICE OF ENTRY WITH THE DECISION & ORDER OF THE HONORABLE VICTOR G. GROSSMAN, J.S.C., DATED JULY 24, 2020**, by filing the same via NYSCEF and sending the same via regular mail and email as indicated below:

Enoch Brady, Esq.
Enoch Brady & Associates
130 North Main Street
Port Chester, New York 10573
paralegal@bradygoldberglaw.com
*Attorneys for Plaintiff*

BY: Patricia Morrison
PATRICIA MORRISON

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

----------X

ANA ORELLANA,

Plaintiff, Index No. 500842/2019

-against-

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

Defendants.

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**NOTICE OF ENTRY**

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**LYDECKER | DIAZ**
200 Broadhollow Road – Suite 207
Melville, NY 11747
(631) 260-1110
File No.: 50135
*Attorneys for Defendants*

Pursuant to 22 N.Y.C.R.R. §130-1.1, the undersigned, an attorney duly admitted to practice law in the State of New York, certifies that, upon information and belief based upon reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: Melville, New York
July 28, 2020

/s/ Louis Brett Goldman
**Louis Brett Goldman, Esq.**

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## 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, February 23, 2023 deponent served 1 copies of the within

Brief [ ] Record [ ] Appendix [ ] Notice [ ] Other [X] Motion for Leave to Appeal

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, February 23, 2023

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

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