Supreme Court, Putnam County Clerk's Index No. 500842/19
Appellate Division, Second Department Docket Number 2020-06458

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.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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STATE OF NEW YORK
COURT OF APPEALS

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ANA ORELLANA,

Plaintiff-Appellant,

- against -

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

Defendants-Respondents.

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Docket #:
2020-06458

AFFIRMATION IN OPPOSITION

Return date:
March 6, 2023

Brendan T. Fitzpatrick, an attorney duly admitted to practice in the Courts of the State of New York, makes the following statements under the penalty of perjury:

1. I am a member of the law firm of GERBER CIANO KELLY BRADY, LLP, attorneys for the Defendants-Respondents, THE TOWN OF CARMEL, THE TOWN OF CARMEL HIGHWAY DEPARTMENT, and MICHAEL J. SIMONE ("the Town" and "Simone"), in this matter and as such, I am fully familiar with the facts and circumstances surrounding this case.

2. This affirmation is submitted in opposition to the motion by Plaintiff seeking leave to appeal to the Court of Appeals from the unanimous decision of the Appellate Division, Second Department dated January 25, 2023 that affirmed the Supreme Court's decision that dismissed the complaint. (Attached as Exhibit "A" is a copy of the Appellate Division's Order and as Exhibit "B" is a copy of the Supreme Court, Putnam County's decision that dismissed the complaint)

Summary of arguments.

3. The Town and Simone respectfully submit that the issues that Plaintiff rehashes on this motion related to Vehicle & Traffic Law § 1103(b) are not novel and

need not be addressed again by this Court, and the Appellate Division, Second Department's decision does not create a conflict within the Departments. Therefore, they ask this Court to deny Plaintiff's motion for leave to appeal.

4. The primary, and straightforward, issue that the Supreme Court and Appellate Division correctly ruled upon concerned VTL § 1103(b), which this Court addressed in *Riley v. County of Broome*, 95 N.Y.2d 455 (2000). According to the statute and this Court's decision, § 1103(b) excuses *all vehicles, regardless of their classification*, from the rules of the road when actually engaged in highway construction, maintenance, or repair work and that the statute *created a broad exemption* from the rules of the road for these vehicles. As the exception turns on the nature of the work being performed, not on the nature of the vehicle, 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.

5. Here, Michael J. Simone was the Superintendent of Highways for the Town of Carmel. On the morning of the incident, a major snow event was anticipated within an hour of the incident. Simone went out to inspect Carmel's roads in order to give instructions to his workers so that they can properly address the inclement weather conditions. He made continuous observations, including immediately before the incident at an intersection of High Ridge Road and Lakeview Drive. While stopped at a stop sign, Simone made particular note of a slushy conditions on Lakeview, which was on a school bus route, and he intended to direct one of his workers to specifically address this when he returned to his office. 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, which did not have a stop sign controlling her lane of travel. As Simone was engaged in highway maintenance, the Supreme Court and Appellate Division, Second Department correctly found that § 1103(b) applied.

6. Plaintiff fails to raise any facts or arguments that warrant this Court's review. The decisions of the Supreme Court and Second Department rested on well-settled law. This case does not raise any constitutional concerns; VTL § 1103(b) is not a novel issue for this Court's review as this Court recently addressed it in *DeLeon v. New York City Sanitation Dep't*, 25 N.Y.3d 1102 (2015); and there is no split in the Departments on the application of VTL § 1103(b). Therefore, the Town and Simone ask this Court to deny Plaintiff's motion for leave to appeal because she does not raise a leaveworthy issue.

Relevant evidence proving Simone was engaged in highway maintenance and VTL § 1103(b) was correctly applied.

7. On the date of the incident, Michael Simone—the Superintendent of Highways for the Town of Carmel—operated a Ford Explorer owned by the Town. Plaintiff operated a Toyota RAV4.

8. The motor-vehicle accident happened 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 on Lakeview, and Orellana was operating her vehicle on High Ridge, which did not have a stop sign controlling her lane of travel.

9. Simone's duties as Superintendent of Highways were to maintain the Town's roads, "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 the 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)

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

11. On December 13, 2018, Simone was driving a Ford Explorer that the Town owned and maintained, that he was working in his official capacity at the time of the incident, and he recalled it was lightly snowing. (R. 74-5, 84, 93) At the time, Simone was inspecting the roads to determine how the weather conditions were affecting the roadways. (R. 75, 151) The undisputed evidence was that an emergency snow situation was "impending," and Simone expected it "probably within an hour." (R. 84) He was inspecting the roads for 20 minutes before the incident. (R. 151)

12. And based upon his observations, Simone gave instructions to his workers with respect to the maintenance of the Town's roads. (R. 79)

13. According to Simone, High Ridge Road had one of the Town's highest elevations, and he travelled to the higher elevations because the snow accumulated faster

at those locations. (R. 75) High Ridge was his "bellwether" to see what could happen with road conditions as this was the highest elevation. (R. 87-8)

14. While at High Ridge, Simone ordered his men out to load up their trucks with salt and check their routes as he saw a quarter-inch build-up of snow on the roadway. (R. 79-80, 85-6) Based upon his years of experience, Simone believed that the road temperature was under 30 degrees. (R. 86) Based upon Simone's observations, he said an icy condition could have developed based upon what he had seen. (R. 87) Simone continued that the traffic conditions would have caused the snow to turn to and icy condition. (R. 87) He 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)

15. After going to High Ridge Road, Simone began to return to his office at 55 McAlpin, which also housed the highway garage. (R. 76-7, 88) The route he took was High Ridge to Prince to Kennicut Hill to Lakeview. (R. 77-8) The incident occurred five minutes after he called his men on the radio. (R. 81)

16. 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-inch of snow. (R. 128) He said 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)

17. Simone testified that after observing the snow on High Ridge 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) The bus for the school's kindergarten was at 12:00 p.m. (R. 130-31) His office was less than a quarter-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)

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

The Supreme Court's decision.

19. The Supreme Court granted the Town and Simone's motion and dismissed Plaintiff's complaint. (Exhibit "B") 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." 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" because 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. 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." 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." 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.

20. Because VTL § 1103(b) applied, the court noted liability only attached if Simone behaved recklessly. 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 Plaintiff. While this constituted negligence, Plaintiff failed to prove that Simone's actions were reckless. As it dismissed the complaint, the court ruled that Plaintiff's motion was denied as moot.

The Appellate Division, Second Department's Order.

21. After a review of the complete record on appeal and appellate briefs, the unanimous Appellate Division, Second Department affirmed the Supreme Court's decision. (Exhibit "A") The Second Department relied upon prior precedent, including this Court's decision in *Riley*, *supra* and held that "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)." And because Simone's conduct did not rise to the level of reckless disregard, but rather evinced a momentary lapse in judgment, the Appellate Division affirmed the dismissal of the complaint.

Legal argument: ***Plaintiff's motion concerns the complaint concerns the Supreme Court and Appellate Division, Second Department's correct application of well-settled law as applied to these unique facts.***

22. Plaintiff seeks leave to appeal from the unanimous ruling of the Appellate Division, Second Department that affirmed the dismissal of the complaint. But Plaintiff has merely repeated the identical arguments the Supreme Court and unanimous Appellate

Division rejected and makes no effort to demonstrate to this Court on what grounds leave would be warranted. Plaintiff does not demonstrate leave is warranted because the Appellate Division departed from well-settled precedent; there is no split in the Departments; and she does not claim this case presents a novel issue for this Court's consideration as this Court previously considered VTL § 1103(b) in *Riley* and *DeLeon*. Therefore, this Court should deny Plaintiff's motion for leave.

23. According to VTL § 1103(b), VTL § 1202(a), which regulates stopping, standing, and parking, does not apply to "hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway":

> (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.

24. 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. *See*, *Primeau v. Town of Amherst*, 5 N.Y.3d 844 (2005); *Riley v. County of Broome*, 95 N.Y.2d 455 (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].

25. As correctly found by the Supreme Court and Appellate Division, and contrary to Plaintiff's arguments, this Court's decision in *Riley* ruled that VTL § 1103(b) excused *all vehicles, regardless of their classification*, from the rules of the road when "actually engaged in work on a highway." (emphasis added) *Id.*, 95 N.Y.2d at 461, 463. This Court continued that the 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." (emphasis added) *Id.*, at 464. Based upon the statute's 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.*

26. In the Supreme Court and Appellate Division, Plaintiff argued that Simone was not operating a covered vehicle. She has abandoned that claim as there was no debate that Simone was driving his Town vehicle at the time of the incident. And in *Riley*, this Court held that § 1103(b) applies to *all vehicles* engaged in highway maintenance, regardless of their classification. *Id.*, 95 N.Y.2d at 464.

27. Plaintiff argues that VTL § 1103(b) is inapplicable because Simone was merely traveling from one place to another and nothing more. While a party opposing a

summary-judgment motion such as Plaintiff is entitled to the benefit of every inference, she is not entitled to have the complete record considered in a vacuum. What Plaintiff cannot overcome is that Simone testified without debate that he was engaged in work related to his obligations as the Superintendent of Highways: Simone was inspecting the roads to observe the snow conditions on the roadways and the impending emergency situation. As Simone worked his way back towards his office, he continuously inspected the road conditions in order to give his workers the correct orders. Critically, immediately before the incident, Simone observed the conditions at the intersection as it was a school bus route and he needed to give further direction to the workers that would be performing highway maintenance in that area. 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" because a school was about 500 feet east of the intersection. (R. 130) His office was less than a quarter-mile away, and as soon as Simone was back at his office, he was going to make sure that somebody went over to the are to address the slushy condition. (R. 131) Thus, he was engaged in maintenance. *See*, *Skolnick v. Town of Hempstead*, 278 A.D.2d 481 (2d Dep't 2000) and *DeLeon v. New York City Sanitation Dep't*, 25 N.Y.3d 1102 (2015).

28. Respectfully, Plaintiff's arguments ignore the facts and this Court's holding in *Riley* that the legislature intended VTL § 1103(b) 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, Plaintiff continues to assert that he had already

given his instructions to the maintenance workers five minutes earlier. Accepting Plaintiff's demand would force this Court to parse Simone's activities to before and after he gave his orders, despite his testimony that he continued to make observations of the highway in case he needed to modify or change his orders. As the Supreme Court held, to accept Plaintiff's arguments 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." Indeed, he made additional observations at 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 (*see*, *Matsch v. Chemung County Dep't of Pub. Works*, 128 A.D.3d 1259, 1260-612 (3d Dep't 2015)) as Plaintiff alleged. Rather, Simone was making constant observations to give specific orders to the Town's maintenance workers to address the pending snow emergency.

29. The Third Department's decision in *Sullivan v. Town of Vestal*, 301 A.D.2d 824 (3d Dep't 2003) supported the decisions that granted dismissal. 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 hit her brakes and swerved to avoid hitting it, but this caused her to lose control of her vehicle.

30. 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 as 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.

31. Similar to Wiland, Simone had not completed his work. A snow emergency was forecasted to commence within an hour. He made constant observations, 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-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, 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, he wanted to "get back to the office, and get somebody to take of the snow in the bus route." (R. 130) His office was

less than a quarter-mile away, and as soon as Simone was back at his office, he was going to make sure that somebody went over to the are to address the slushy condition. (R. 131)

32. The entire purpose of Simone driving that morning was to inspect the Town's roads in order to develop a plan of action for his workers. His inspection continued through the time he reached the intersection. At that point, Simone noticed a slushy condition and testified that he wanted to get back to his office—less than a quarter of a mile away—and direct that this area be remedied immediately. Based upon the continuing nature of Simone's inspections, the case law Plaintiff cites to does not support her arguments.

33. In support of her argument that the Second Department's decision in this case has created a split in the Departments, she cites to numerous Fourth Department cases. None, however, supports her claims. In *Lynch-Miller v. State of New York*, 209 A.D.3d 1294 (4th Dep't 2022), claimant was struck by the plow of a snowplow operated by an employee of the State of New York. The Appellate Division noted that the plow was in the raised position; the operator was not plowing snow at the time of the accident; and an issue as to whether the operator was salting the road at that time. In this case, there was no such discrepancy, as Simone testified that he was constantly observing the conditions, particularly where the incident occurred, in order to assess whether his orders needed to be changed.

34. *Plummer v. Town of Greece*, _ A.D.3d _, 2023 N.Y. App. Div. LEXIS 527 (4th Dep't 2023) involved a rear-end collision in which plaintiff's vehicle was struck by the front plow of a snowplow owned by the Town of Greece and operated by John Farraro—an employee of the Town. According to the Appellate Division's decision, the

deposition testimony "was vague and equivocal with respect to whether the accident site was part of Farraro's route on the day in question—Farraro 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." *Id.* at *3. The Fourth Department continued, the "defendants' initial submissions otherwise failed to eliminate the question whether Farraro was 'merely traveling from one route to another route' on roads that did not constitute part of his run or beat." *Id.*

35. The facts in this case are inapposite as Simone's testimony was not "vague and equivocal." He consistently testified as to his route and what he was doing.

36. Nor do *Zanghi v. Doefler*, 158 A.D.3d 1275 (4th Dep't 2018) and *Hofman v. Town of Ashford*, 60 A.D.3d 1498 (4th Dep't 2009) evidence a split as Simone was not merely traveling from one part of his route to another by way of a Town road that he was not responsible for inspecting.

37. 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, there was an imminent snow emergency, and as part of his duties as the Superintendent of Highways, Simone had to inspect the Town's roadways to develop a plan of action for his workers that they would eventually follow.

38. Plaintiff argues before this Court 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. Respectfully, 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*.

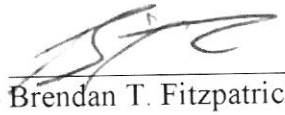
39. Plaintiff's arguments never address the fundamental issues that control whether VTL § 1103(b) applies to the facts. First, Simone was operating a covered vehicle under *Riley*. Second, he was acting within the scope of his responsibilities as the Superintendent of Highways at the time of the incident, and he was engaged in highway maintenance based upon the broad statutory interpretation mandated by *Riley* and *DeLeon*.

40. The Appellate Division, Second Department's unanimous decision rested on well-settled legal principles. Plaintiff has presented no issues worthy for review by this Court. She has identified no novel legal issue or any actual dispute within the Departments. This Court has considered VTL § 1103(b) in *Riley* and *DeLeon*, and the facts in this case do not warrant further review. Accordingly, the Town and Simone ask this Court to deny Plaintiff's motion.

WHEREFORE, the Town and Simone respectfully request that this Court deny Plaintiff's motion for leave to appeal to the Court of Appeals and for such other and further relief as this Court deems just, proper, and equitable.

Dated: Garden City, New York
March 3, 2023

Respectfully submitted,



Brendan T. Fitzpatrick

EXHIBIT A

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.

2020-06458

DECISION & ORDER

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

(Index No. 500842/19)

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

Maria T. Fasulo
Clerk of the Court

EXHIBIT B

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

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ANA ORELLANA,

Plaintiff,

-against -

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

Defendants.

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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.

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