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COURT OF APPEALS

STATE OF NEW YORK

RHONDA WITTORF,

Appellant,

-against-

No. 101

THE CITY OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York 12207
April 30, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 101, Wittorf v. City
2 of New York.

3 Counselor, do you want any rebuttal time?

4 MR. SHOOT: Yes, Your Honor. May I reserve
5 four minutes?

6 CHIEF JUDGE LIPPMAN: Four minutes, sure.
7 Go ahead.

8 MR. SHOOT: Mr. Buskus will not be
9 speaking, but if I say something seriously wrong on
10 the law, he may write me a furious note.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MR. SHOOT: Seventeen years ago, Your
13 Honor, the City of New York appeared in this court
14 and successfully argued that the alleged negligence
15 of the police in failing to close a city street was
16 governmental conduct because the persons claimed to
17 be negligent were police, and that therefore the case
18 involved, quote, "police protection", and quote,
19 "allocation of scarce police resources".

20 In this case, Your Honors, the City
21 reverses course and argues that so-called traffic
22 control constitutes governmental conduct, no matter
23 who the municipal employee may be, and even if, as
24 here, the municipal employee is someone whose job,
25 whose very job function, whose only job function is

1 the repair of potholes. I - - -

2 JUDGE GRAFFEO: What are you saying that
3 the City employees should have told these bicyclists?
4 Should have not let them go down the road or should
5 have warned them - - -

6 MR. SHOOT: Well, he had two choices, and -
7 - -

8 JUDGE GRAFFEO: - - - or should have done -
9 - -

10 MR. SHOOT: - - - and either would have
11 been correct. One, don't go down the road. Or
12 second, go ahead, but you know, there's this huge
13 car-shaped crater, which we know because we've just
14 been there and I've just seen it, and you should look
15 out for that; it's under the second tunnel.

16 JUDGE PIGOTT: The transcript said there
17 were three holes.

18 MR. SHOOT: I'm sorry, Your Honor.

19 JUDGE PIGOTT: The transcript says three
20 holes. You said - - - you said there was one hole -
21 - -

22 MR. SHOOT: Well, there was - - -

23 JUDGE PIGOTT: - - - three feet. They say
24 - - -

25 MR. SHOOT: There were - - -

1 JUDGE PIGOTT: - - - three holes - - -

2 MR. SHOOT: - - - actually four holes, Your
3 Honor. But the one hole - - -

4 JUDGE PIGOTT: - - - two feet.

5 MR. SHOOT: - - - was the one that she
6 ended up in. And if you want to - - - to see it in
7 the photographs, to what we're looking - - - what
8 we're talking about, on page 1572, it's that pothole
9 there. And if you turn two pages more, you'll see
10 the same hole with a car in the background, which
11 gives you some idea of its size.

12 JUDGE GRAFFEO: You know - - -

13 JUDGE READ: You know, Mr. Shoot, this case
14 seems to me just to be a straight out premises
15 liability case, which you couldn't win on because of
16 the - - - because of the notice provisions in - - -
17 in New York City. So I mean, it just - - - isn't it
18 just a premises liability case, but you can't recover
19 on it? So I guess my - - - I go back to Judge
20 Graffeo's question, what was the neglige - - - what
21 was the duty? What was the negligent action?

22 MR. SHOOT: There were separate wrongs,
23 Your Honor. If, for example, there was no negligence
24 of the City, whatsoever, in allowing this defect to
25 exist over months; let's suppose, for example, there

1 was a water pipe explosion a half hour before, and
2 they react - - - and the highway crew ends up at the
3 scene almost instantaneously, within a half hour.
4 They know the defect is there, Your Honor, and yet
5 they say go ahead through, because they're not really
6 paying attention, according to the testimony at page
7 698, without providing any warning, whatsoever, of
8 what lay ahead.

9 JUDGE READ: Well, was it necessarily the
10 case that there would be an injury because of this
11 defect in the - - - in the highway? I mean, they - -
12 -

13 MR. SHOOT: It's - - -

14 JUDGE READ: - - - they - - - as I
15 understood, I guess - - - as I read it and I
16 understood the transcript, they see him putting up
17 the barricades. I guess they assume that this has to
18 do - - - or they - - - they testified they assume
19 this has to do with the upcoming marathon, or
20 whatever it's called, the race, the road race. And
21 they say, hey, can we go through? And he said sure.
22 I mean, you - - - you can go through; it's not closed
23 to traffic, basically, at that point.

24 MR. SHOOT: Your Honor, as we point out in
25 our brief, going back to the 1800s, highways have

1 been proprietary, and part of maintaining highways
2 and roads under safe condition is providing warning
3 of conditions that are unsafe - - -

4 JUDGE READ: That's absolutely - - -

5 MR. SHOOT: - - - and known to the
6 municipality.

7 JUDGE READ: That's absolutely true, but we
8 have this law in New York City that kind of alters
9 the - - - the ancient common law rule and says you
10 have to have this prior written notice, right?

11 MR. SHOOT: The law in New York City goes
12 to the different wrong of failing to repair this
13 defect over the past several months.

14 JUDGE SMITH: In general, if you - - -
15 would the pothole law cover - - - would the pothole
16 law provide a defense for failure to warn about a
17 pothole? It has to, otherwise you - - - otherwise
18 you've - - -

19 MR. SHOOT: It relates to - - -

20 JUDGE SMITH: - - - made a big pothole in
21 the pothole law.

22 MR. SHOOT: It relates to a different
23 wrong, Your Honor. It relates to the failure to
24 repair. And the distinction is, for example, suppose
25 that no one was there at the side. Of course, in

1 that instance, they probably wouldn't have been using
2 the roadway in the first place, if it was open to
3 vehicular traffic. But suppose that no one was
4 there, therefore, we wouldn't get into this duty of
5 failing to warn.

6 But that same point could be made of every
7 other case, at pages 74 to 75 of my brief, where you
8 have someone negligently waving a pedestrian across
9 into the street - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but does it
11 matter - - - does your argument really center on in
12 what capacity this fellow was acting when he told
13 them to - - - to go on? In other words, if he's
14 acting akin to a police function, you would agree
15 that - - - you know, then - - - then there's no
16 liability. But if he's acting part and parcel of
17 this crew that they're on that - - - that's supposed
18 to repair the potholes, then it - - - then it's in a
19 proprietary capacity?

20 MR. SHOOT: Not quite, Your Honor.

21 CHIEF JUDGE LIPPMAN: What is the exact - -
22 -

23 MR. SHOOT: We believe, because this court
24 has repeatedly said, in Sebastian and World Trade
25 Center, just last year in Applewhite, that you look

1 at two different things.

2 CHIEF JUDGE LIPPMAN: Right.

3 MR. SHOOT: You looked at, one, the nature
4 of the act or omission claimed to give rise to
5 liability. You also look at, two, the context in
6 which that act or omission occurred.

7 CHIEF JUDGE LIPPMAN: Right.

8 MR. SHOOT: There has never been - - -
9 never been, until this case, a case in which a DOT or
10 other highway worker, who was performing his or her
11 function with respect to the highways, was deemed to
12 be, like a police officer, entitled to governmental
13 immunity, because it touched on traffic control.

14 CHIEF JUDGE LIPPMAN: So his job - - -
15 again, let me understand what you're saying - - - his
16 job was not to direct traffic around this - - - this
17 pothole project that they had. That wasn't what - -
18 - what he was there for, right?

19 MR. SHOOT: What he was there for was to
20 set up the barricade to prevent traffic from going
21 through at the moment, and then they'd go the pothole
22 - - -

23 CHIEF JUDGE LIPPMAN: Right, but - - -

24 MR. SHOOT: - - - and put the 2.7 tons of
25 fill - - -

1 CHIEF JUDGE LIPPMAN: - - - but are you
2 arguing that that role and setting up the barricades,
3 right, is part and parcel of fixing the - - - the
4 road or the pothole?

5 MR. SHOOT: Yes, although that's not even
6 important to the point, because whether you call it
7 part and parcel of fixing the pothole - - -

8 CHIEF JUDGE LIPPMAN: So what is the point?

9 MR. SHOOT: - - - or part and parcel of
10 providing a warning, like any municipality is
11 supposed to do with respect to a dangerous condition
12 in the roadway, either one - - -

13 CHIEF JUDGE LIPPMAN: Yeah, but if the
14 police officer - - -

15 MR. SHOOT: - - - leads to the same
16 destination.

17 CHIEF JUDGE LIPPMAN: If the police officer
18 gave him directions, no liability, right?

19 MR. SHOOT: Because that would be - - -

20 CHIEF JUDGE LIPPMAN: Why - - -

21 MR. SHOOT: - - - a police officer.

22 CHIEF JUDGE LIPPMAN: Why is the police
23 officer different than the municipal - - -

24 MR. SHOOT: I would say that that's the
25 line that this court drew in cases like Balsam and

1 Kovit. And it drew it on the basis of the argument -
2 - - and in Applewhite, where it matters who the
3 individual is, that it matters that they're frontline
4 EMTs, for example in Applewhite, even if they're
5 performing the same act or omission that could give
6 rise to liability in an emergency room.

7 JUDGE SMITH: Let me ask you to back up a
8 minute. Where - - - why is it that police - - -
9 police directing traffic is governmental, and a road
10 worker - - - and road workers putting up barricades
11 is proprietary? Is it just - - - is it just a
12 historical development?

13 MR. SHOOT: It's not just historical, Your
14 Honor, in the sense that you can't have highways
15 without traffic control. You can't do that. And in
16 fact - - -

17 JUDGE SMITH: Yeah, but what - - - but why
18 - - - I guess my problem is I'm sort of used to the
19 idea the government fixes the highways. I would have
20 thought that was a governmental duty to begin with.

21 MR. SHOOT: It's always been a proprietary
22 function dating back, as the amicus has pointed out -
23 - -

24 JUDGE SMITH: So it's - - -

25 MR. SHOOT: - - - to the days of toll roads

1 and so forth.

2 JUDGE SMITH: So the answer really is you -
3 - - you have to resort to history. We - - - there's
4 no limpid logic that says - - -

5 MR. SHOOT: There is logic, Your Honor, in
6 the sense that when the legislature waived sovereign
7 immunity, whatever they meant or did not mean, they
8 certainly did not mean to extend immunity to acts
9 that gave rise to liability because they were
10 proprietary even before the waiver of sov - - - they
11 could not have meant that, Your Honor.

12 JUDGE GRAFFEO: If the boyfriend had not
13 asked this City employee if they could ride their
14 bikes down the road, if they had just gone around the
15 - - - these were orange cones, I think - - - if they
16 had just gone around the cones and went down the
17 street, would you still have the same lawsuit?

18 MR. SHOOT: No, we would not, Your Honor.
19 It turns upon - - - well - - -

20 JUDGE GRAFFEO: Well, why not - - -

21 MR. SHOOT: - - - let me correct myself.

22 JUDGE GRAFFEO: - - - if it's a - - -

23 MR. SHOOT: If in fact - - -

24 JUDGE GRAFFEO: - - - if it's a proprietary
25 function, why not?

1 MR. SHOOT: If in fact - - - because there
2 would simply be - - - factually, it would be the same
3 function. But factually, you wouldn't have the same
4 act of negligence.

5 JUDGE GRAFFEO: So it all hinges on the
6 fact that he said sure?

7 MR. SHOOT: It turns on that, or to correct
8 myself, Your Honor, if in fact they went to barricade
9 that side of the roadway, and let's just say did a
10 poor job of it; they didn't barricade it off, and so
11 it didn't look like it was barricaded, and though he
12 didn't say anything, he did an insufficient job of
13 barricading a roadway of which they were repairing.
14 That kind of act or omission has always given rise to
15 liability.

16 JUDGE SMITH: You say that - - - that would
17 be the same case, negligent barricading and saying go
18 on through is the same case?

19 MR. SHOOT: Yes, Your Honor. And again - -
20 -

21 JUDGE PIGOTT: But wait a minute, wait a
22 minute - - -

23 MR. SHOOT: - - - and - - -

24 JUDGE PIGOTT: - - - wait a minute. Isn't
25 barricading for - - - to stop the cars? It's not to

1 stop the pedestrians or bicycles.

2 MR. SHOOT: Well, it's not a pedestrian
3 way.

4 JUDGE PIGOTT: Right.

5 MR. SHOOT: So there are no pedestrians to
6 stop.

7 JUDGE PIGOTT: Or - - -

8 MR. SHOOT: In theory - - -

9 JUDGE PIGOTT: - - - or bicyclists.

10 MR. SHOOT: - - - bicyclists could use it.

11 JUDGE PIGOTT: Well, you said - - -

12 MR. SHOOT: But I wouldn't think - - -

13 JUDGE PIGOTT: - - - you said - - - you
14 said - - - you said - - -

15 MR. SHOOT: - - - bicycles would.

16 JUDGE PIGOTT: You said if - - - if the
17 cars were on it, they wouldn't have been on - - -
18 been on it.

19 MR. SHOOT: I think that's - - -

20 JUDGE PIGOTT: So they - - -

21 MR. SHOOT: - - - correct, Your Honor.

22 JUDGE PIGOTT: So here's an opportunity,
23 because the cars are off because they've got to fix
24 it for the cars for them to use it in a - - - in a
25 way that it was not normally meant to be used, and -

1 just be clear? You're saying that this is a failure-
2 to-warn case, and the noti - - - and you're not even
3 relying on notice here, even though they did have
4 notice, obviously, of the crater.

5 MR. SHOOT: That's correct, Your Honor.

6 JUDGE ABDUS-SALAAM: But you're not relying
7 on that.

8 MR. SHOOT: That's correct, Your Honor.

9 And - - -

10 JUDGE SMITH: Well, but - - - well, if he
11 didn't - - - but if the guy didn't know about the
12 crater, there's no case.

13 MR. SHOOT: I'm talking - - - what I mean
14 is the notice that it's been there for several
15 months. He had actual notice of it; that's what I'm
16 relying upon, that the individual who - - - who made
17 that statement actually knew it. It doesn't matter,
18 for my purposes of argument, how long that had
19 existed or whether there was - - -

20 JUDGE SMITH: And it also - - -

21 MR. SHOOT: - - - construct - - -

22 JUDGE SMITH: And it also doesn't matter
23 whether - - - whether there was any negligence on the
24 City's part in creating the hazard.

25 MR. SHOOT: Correct, Your Honor.

1 JUDGE SMITH: It could have been a hazard
2 created by a private person five minutes ago, but the
3 problem is that the City employee knew about it.

4 MR. SHOOT: Correct, Your Honor, and I'm
5 almost saying it's exactly the same as in all of
6 those cases from this court, Wager v. State, Canepa
7 v. State, Nowlin v. City, where its failure to post
8 warning of a condition known to the municipality to
9 be dangerous, irrespective of whether it was created
10 - - -

11 JUDGE READ: Well, that sounds like - - -

12 MR. SHOOT: - - - by the municipality.

13 JUDGE READ: That sounds like premises
14 liability again, and the jury didn't buy that. I
15 mean, they didn't buy that because there wasn't a
16 prior - - -

17 MR. SHOOT: But - - -

18 JUDGE READ: - - - written notice.

19 MR. SHOOT: We're talking about the
20 defendant here was charged with more than one wrong
21 in this case: A, failure to repair it over a course
22 of months; B, the statement made at the time of the
23 accident. One can exist without the other. If he
24 had never arrived there or they had never responded,
25 we wouldn't be in the second case. If, in fact, the

1 defect had been created a half hour earlier, we
2 wouldn't have the first case. They're independent.
3 They're different wrongs. And - - -

4 JUDGE SMITH: Judge - - - the suggestion
5 Judge Read made, essentially, if I'm understanding
6 her, is that this is - - - this is a pothole law
7 case, that there's a pothole law defense to this
8 claim. Assuming that to be meritorious, did they - -
9 - did the City preserve that?

10 MR. SHOOT: Not as to - - -

11 JUDGE SMITH: Not as to this claim?

12 MR. SHOOT: - - - the proposed conduct, no.
13 They never argued that their pothole law applied to
14 his wrong; they argued, successfully, as it turns
15 out, from the jury, that it applied to the failure to
16 repair over from July to November. The argument in
17 summation was - - -

18 JUDGE SMITH: But as to the "go ahead
19 through" part, the - - - the defense is simply no
20 duty.

21 MR. SHOOT: Yes, Your Honor. The defense
22 was - - -

23 JUDGE RIVERA: No duty?

24 MR. SHOOT: - - - governmental.

25 JUDGE RIVERA: Governmental duty?

1 MR. SHOOT: Therefore, we don't owe you a
2 duty - - -

3 CHIEF JUDGE LIPPMAN: Governmental versus
4 proprietary. Okay, counsel. You'll have your
5 rebuttal.

6 MR. STERNBERG: Good afternoon, Your
7 Honors. Ronald Sternberg from the Office of New York
8 City Corporation Counsel on behalf of the defendant-
9 respondent.

10 CHIEF JUDGE LIPPMAN: Counsel, staying on
11 government versus proprietary, why is this not a
12 proprietary function?

13 MR. STERNBERG: I would rely on - - -

14 CHIEF JUDGE LIPPMAN: This guy is part of
15 this crew, he just sees it, it's what they're doing.
16 Why is it in that capacity?

17 MR. STERNBERG: I would rely, Your Honor,
18 on this court's decision in Balsam. This is - - -
19 this is essentially the Balsam case - - -

20 JUDGE SMITH: He says you got us to decide
21 Balsam by saying sixteen times this is a police
22 officer; it's a whole different thing when it's a
23 police officer.

24 MR. STERNBERG: Your Honor, principled
25 consistency; that's what this court said in - - - in

1 the Sebastian case, 93 NY2d 790, 794. When you are
2 determining a negligence case against the City, you
3 look at the specific act and the capacity - - -

4 JUDGE SMITH: So you say the fact there was
5 a police officer was irrelevant in Balsam?

6 MR. STERNBERG: It's not - - - what - - -
7 what is relevant in Balsam is that the police officer
8 was controlling traffic. That's the way this court -
9 - -

10 JUDGE SMITH: Okay. And try answering me
11 directly; was it irrelevant in Balsam that the City
12 employee happened to be a police officer?

13 MR. STERNBERG: For the purposes of
14 deciding the case, yes, because what - - -

15 JUDGE SMITH: Isn't that rather different
16 from what you said in your brief in Balsam?

17 MR. STERNBERG: Your Honor, the law
18 matures; the law changes. We argue according to the
19 law as we understand it at a particular time. This
20 is a developing area of the law. This court has
21 stated in Valdez specifically what we need - - - what
22 plaintiff needs to prove. We are following the
23 decisions of this court and we argue according to the
24 law - - -

25 JUDGE SMITH: Well, what about - - -

1 MR. STERNBERG: - - - as we understand it.

2 JUDGE SMITH: What about the barricade
3 case. Suppose instead of orally communicating "go
4 ahead" to the bicyclist he had left - - - he had
5 failed to put down the barricade; he'd negligently
6 failed to put the barricade there, thereby leading
7 her to believe that it was safe to go through. Does
8 - - -

9 MR. STERNBERG: Well - - -

10 JUDGE SMITH: Does the City have immunity
11 in that case?

12 MR. STERNBERG: Well, Your Honor, you - - -
13 your questions were raised on plaintiff's case. We
14 would submit, Your Honor, that there is no duty to
15 warn here at all. There's two - - -

16 JUDGE SMITH: So the barricade case comes
17 out the same way?

18 MR. STERNBERG: The barricade case is
19 different. What we're talking about is a prior
20 written notice law. That makes all the difference in
21 the world. This case, as this court recognized - - -

22 CHIEF JUDGE LIPPMAN: Why isn't it two
23 different wrongs, as your adversary talked about?

24 JUDGE READ: Or I guess - - - or why - - -
25 was it preserved? Did you preserve that argument?

1 MR. STERNBERG: Well, we specifically
2 argued it in our motion for judgment after the jury
3 verdict. We - - -

4 JUDGE SMITH: As to this claim?

5 MR. STERNBERG: As to this claim. It was
6 specifically argued that there is no duty to warn.
7 It was raised periphera - - -

8 JUDGE SMITH: Well, no duty to warn is not
9 the same as a pothole law defense.

10 MR. STERNBERG: What we are saying when we
11 have a pothole law defense, there is no duty to warn
12 because a duty to warn in that case would abrogate
13 the defense.

14 JUDGE SMITH: Well, let me just be sure I
15 understand your answer to the question. Did you
16 argue that the failure to give prior written notice
17 provided you with a defense to the alleged negligence
18 of Mr. Bowles in telling the bicyclist to go on
19 through?

20 MR. STERNBERG: We - - - that's precisely
21 what we argued in our motion; I can get you the page
22 numbers - - -

23 JUDGE SMITH: Yeah.

24 MR. STERNBERG: - - - in a moment. We
25 presented that. Now, did we argue it in our brief to

1 this court? We did not present it as an alternative
2 argument in our brief to this court, I will concede
3 that, and perhaps would should have. But the fact is
4 it's in the record.

5 This whole concept of - - - of - - - this
6 case is about Mr. Bowles. It's only about Mr.
7 Bowles. And we know that because the jury exonerated
8 the City on every other issue: no prior written
9 notice, no cause and create.

10 JUDGE SMITH: I'm still now quite sure what
11 your position would be if Mr. Bowl - - - if Mr.
12 Bowles' negligence had been not in making the
13 statement but in failing to put down a barricade or a
14 stop sign or something.

15 MR. STERNBERG: Abso - - - no - - - no duty
16 - - - there was no duty on Mr. Bowles to do anything.
17 If - - -

18 JUDGE SMITH: So there would still be
19 governmental immunity?

20 MR. STERNBERG: Exactly. If - - -

21 JUDGE SMITH: Haven't we - - - aren't there
22 about a million cases saying the government can be
23 sued for failing to put up warning signs - - - road
24 workers failing to put up warning signs?

25 MR. STERNBERG: The distinction is prior

1 written notice; it makes all the difference in the
2 world.

3 And I would refer this case (sic) to
4 Rozell, and that's 98 AD3d 960, where the exact same
5 issue was raised. I would refer this court to
6 Balsam. There was a prior accident, the police came,
7 there was a second accident, and the claim was you
8 didn't do anything to protect those - - -

9 CHIEF JUDGE LIPPMAN: You don't agree that
10 the police have a different function than Bowles?

11 MR. STERNBERG: In this particular case,
12 with respect to what Bowles - - -

13 CHIEF JUDGE LIPPMAN: If it was a policeman
14 versus Bowles, they have two different roles. Isn't
15 Bowles intimately connected with - - - with this
16 roadway work, as opposed to the policeman - - -

17 MR. STERNBERG: Certainly - - -

18 CHIEF JUDGE LIPPMAN: - - - which is
19 clearly - - -

20 MR. STERNBERG: - - - but that's - - -

21 CHIEF JUDGE LIPPMAN: - - - a governmental
22 function?

23 MR. STERNBERG: But that - - - but in order
24 to maintain principled consistency, we don't look - -
25 -

1 CHIEF JUDGE LIPPMAN: What does that mean?

2 MR. STERNBERG: What it means is we are not
3 looking at - - - at Mr. Bowles as a - - - as an
4 employee of the DOT who is there. It's a - - -

5 CHIEF JUDGE LIPPMAN: Why aren't we looking
6 at him as an employee of the DOT? Isn't he an
7 employee of the DOT?

8 JUDGE RIVERA: He is an employee.

9 CHIEF JUDGE LIPPMAN: What is he doing
10 there? What is Bowles doing there? What's his role?
11 What's his capacity?

12 MR. STERNBERG: When he was at Central Park
13 West at the transverse, his capacity was to control
14 traffic, and only to control traffic.

15 CHIEF JUDGE LIPPMAN: His capacity was to
16 control traffic and he wasn't part of this team
17 that's doing the roadway work? Isn't it the way you
18 look at what he's doing? You're putting him as
19 almost - - -

20 MR. STERNBERG: But - - -

21 CHIEF JUDGE LIPPMAN: - - - he's aside from
22 the roadwork, as opposed to what the - - - the - - -
23 the dissent says in the Appellate Division that he's
24 part and parcel of - - -

25 MR. STERNBERG: That's precisely what we're

1 doing, Your Honor, because that's what this court
2 told us we should do in World Trade Center.

3 JUDGE GRAFFEO: Why are bicyclists not part
4 of traffic?

5 MR. STERNBERG: Bicyclists - - -

6 JUDGE GRAFFEO: Are you say - - -

7 MR. STERNBERG: - - - are - - - are part of
8 traffic. In fact, in this - - -

9 JUDGE GRAFFEO: Because you said he's there
10 controlling traffic. I presume you mean he's there
11 to not allow cars go down this particular road, but
12 aren't the bicyclists in that same category?

13 MR. STERNBERG: Absolutely, and in fact,
14 Your Honor, what was occurring right here, what was
15 occurring was Mr. Bowles was setting up barricades
16 only on the eastbound traffic. He - - - he was only
17 dealing with - - -

18 JUDGE GRAFFEO: But they were stopping
19 traffic so that they wouldn't go into the pothole.

20 MR. STERNBERG: No, they were stop - - -

21 JUDGE GRAFFEO: But isn't the repair of the
22 pothole kind of merge with the installation of the
23 barricade?

24 MR. STERNBERG: But that's not what we're
25 looking at. We're looking at - - - because

1 plaintiff, of necessity, must focus on what was Mr.
2 Bowles doing. Otherwise, we're not in this court.
3 Otherwise this - - -

4 JUDGE RIVERA: But counsel, I think the - -
5 -

6 JUDGE GRAFFEO: The only - - -

7 JUDGE RIVERA: - - - the whole point is
8 that you cannot - - - well, the argument is that you
9 cannot decouple setting up the barricades from,
10 number one, why he's there to begin with, number two,
11 why everybody else on this crew is there to begin
12 with, and I would now add to this, number three, they
13 can't actually repair that potwork (sic) - - - that
14 pothole or the potholes unless they barricade,
15 because then they're endangering their own crew as
16 well as everybody else if traffic actually goes
17 through. You must barricade. This is not a job that
18 can be done without the barricade. Do you concede
19 that?

20 MR. STERNBERG: Well, number one, that's
21 not at all clear from the record. And in fact, that
22 goes to the discretion that Mr. Bowles was exercising
23 when he was performing this governmental function.
24 He made the decision that in order to do what he had
25 to do, in order to protect the public - - -

1 JUDGE RIVERA: So then is - - - so then
2 it's part of the pothole repair work?

3 MR. STERNBERG: No, it's part of his cont -
4 - - yes, I agree with you that what we need to do is
5 segregate; we absolutely need to segregate.

6 CHIEF JUDGE LIPPMAN: Yeah, but you're
7 segregating; he goes and looks at the hole.

8 MR. STERNBERG: But the - - -

9 CHIEF JUDGE LIPPMAN: And he's part of this
10 roadway work, and you're saying that he's totally
11 distant from what they're doing in the road?

12 MR. STERNBERG: Well, in fact - - -

13 CHIEF JUDGE LIPPMAN: It's like - - -

14 MR. STERNBERG: - - - in fact, physically,
15 Your Honor - - -

16 CHIEF JUDGE LIPPMAN: It's like a cop who
17 doesn't know what's going on, and he's just standing
18 a block away, and - - - and diverting traffic isn't
19 different than this guy?

20 MR. STERNBERG: In - - - first of all,
21 physically, he is a considerable distance from the
22 pothole. The pothole is - - -

23 CHIEF JUDGE LIPPMAN: Yeah, yeah, but he
24 just went and saw the hole.

25 MR. STERNBERG: Yes, but if - - - if a - -

1 - plaintiff has conceded that if a police officer was
2 there - - - if Mr. Bowles had not gone there - - - if
3 Mr. Bowles had phoned ahead to - - - or somehow
4 communicated with the police officer, and a police
5 officer was standing at Central Park West and the
6 transverse, and the exact same thing happened,
7 plaintiff concedes - - -

8 JUDGE ABDUS-SALAAM: But then you're going
9 back to Bowles and you're saying because he was a
10 police officer directing traffic then - - - you know,
11 the claim doesn't - - -

12 MR. STERNBERG: I am saying because of what
13 the police officer would have been doing. Plaintiff
14 is not saying what I am saying - - -

15 JUDGE ABDUS-SALAAM: No, it sounds like
16 you're saying because Bowles is not a police officer,
17 then if he had called a police officer it would be a
18 governmental function. But he's not a police
19 officer; he's there to repair the potholes.

20 MR. STERNBERG: Your Honor, I'm trying not
21 to say that. I am saying that if a police officer
22 had done that - - - had done exactly what Mr. Bowles
23 had done, there would be no question that this would
24 be traffic control to which - - - which is a
25 governmental function.

1 JUDGE RIVERA: But - - - but - - -

2 MR. STERNBERG: Not because he's a police
3 officer but because of what he is doing.

4 JUDGE RIVERA: Well, because - - -

5 JUDGE ABDUS-SALAAM: Well, he wouldn't be
6 there to repair the pothole.

7 JUDGE RIVERA: - - - because the police
8 officer and the DOT - - - and the DOT person can do
9 it doesn't mean that in the moment that the DOT
10 person is doing it; it's not part of the proprietary
11 function that he's - - - he's only there to complete
12 that proprietary function.

13 But let me ask you this. I just want to go
14 back to something else you said. Are you saying that
15 it would have been possible to fix the potholes
16 without the barricades?

17 MR. STERNBERG: I am not saying that, Your
18 Honor. I'm just saying it's just not part of the
19 record. I am saying that he, Mr. Bowles, made that
20 decision, and I'm saying that's a critical decision
21 because that goes to - - -

22 CHIEF JUDGE LIPPMAN: What did he base that
23 decision on?

24 MR. STERNBERG: It's not part of the
25 record, Your Honor.

1 JUDGE SMITH: Didn't he say that because we
2 hadn't started doing the construction work yet I
3 might as well - - - they might as well - - -

4 MR. STERNBERG: Well - - -

5 JUDGE SMITH: - - - let them through?

6 MR. STERNBERG: In exercising his
7 discretion and letting the - - - again, to go back,
8 the barricades were solely to stop vehicle traffic.
9 It was only on the eastbound side. He specifically
10 did not put anything - - - he had closed off the
11 westbound side on the east side, closed on the
12 eastbound side on the west side to avoid vehicular
13 traffic.

14 JUDGE ABDUS-SALAAM: So bicycles are not -
15 - -

16 MR. STERNBERG: Bicyclists - - - by the
17 way, pedestrians - - - there is a pedestrian walkway
18 here; this is not solely a vehicle - - - for here.

19 JUDGE RIVERA: But the point of the
20 barricade is so that they could, themselves, safely
21 do the work and no one else get injured.

22 MR. STERNBERG: And - - -

23 JUDGE RIVERA: Isn't that the whole point
24 of it?

25 MR. STERNBERG: We have to presume, again,

1 because it's not in the record, Mr. Bowles - - - it
2 was an EBT which was read.

3 JUDGE RIVERA: Yes.

4 MR. STERNBERG: This was not part of what
5 he testified to. We could assume that there was
6 probably lots of reasons. One, to ensure that he
7 could - - - he could fix the highway safely. Two, to
8 ensure that the public was safe and - - - and not
9 proceeding through. So he made that decision - - -

10 CHIEF JUDGE LIPPMAN: But all of this - - -

11 MR. STERNBERG: He made that decision - - -

12 CHIEF JUDGE LIPPMAN: - - - is related - -

13 MR. STERNBERG: - - - but - - -

14 CHIEF JUDGE LIPPMAN: All of this is
15 related to fixing the road.

16 MR. STERNBERG: It is related, Your Honor,
17 but - - -

18 CHIEF JUDGE LIPPMAN: I mean, that's what
19 the capacity in which he did this.

20 JUDGE READ: You're saying that doesn't
21 make any difference.

22 MR. STERNBERG: The fact that he was there
23 to fix the roadway does not make any difference.

24 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
25 you're saying his decision to divert the traffic was

1 separate and apart from the roadwork, regardless of
2 what he was there for? Like - - - like it was a
3 policeman standing there and - - - and just directing
4 traffic?

5 MR. STERNBERG: Like it was a policeman
6 directing traffic, precisely.

7 JUDGE GRAFFEO: So you're saying it's
8 sequentially; you're saying we have to break it up
9 and - - -

10 MR. STERNBERG: Yeah, which is exactly what
11 the trial court did in - - -

12 CHIEF JUDGE LIPPMAN: This isn't different
13 than Balsam? This isn't different than Balsam?

14 MR. STERNBERG: The only difference between
15 this and Balsam is the fact that Balsam involved - -
16 - involved a police officer but - - -

17 CHIEF JUDGE LIPPMAN: Yeah, but Balsam you
18 said the police officer's very important.

19 MR. STERNBERG: As I said, we argued Balsam
20 at the time we argued Balsam.

21 CHIEF JUDGE LIPPMAN: Now you're arguing
22 this because it - - -

23 MR. STERNBERG: But many cases have come
24 after Balsam. We have - - - I cited cases where
25 there was an agent from the Department of

1 Environmental Conservation, the State Envi - - - and
2 he was directing traffic. That was found to be
3 immune.

4 The First Department has found that park
5 workers who come to - - -

6 JUDGE RIVERA: Okay. But you're saying we
7 look at what the action is of the actor, right? So
8 in this case, directing traffic, a cop can do that;
9 it's not proprietary. I get that argument.

10 Why is this then not like his highway
11 cases, because obviously a - - - an officer, a police
12 officer could direct traffic on a highway. We've all
13 seen an officer do that, or at least the - - - the
14 cars are there. Why is this not like his highway
15 cases? Why doesn't his analogy work?

16 MR. STERNBERG: His analogy doesn't work
17 because you start with the proposition. This court
18 said in Applewhite, the first question you have to
19 ask is was this a governmental function or a
20 proprietary - - -

21 JUDGE SMITH: But haven't we held that if
22 it's a proprietary function they had to put up stop
23 signs or traffic lights?

24 MR. STERNBERG: Again, now we're getting
25 involved with the prior written notice.

1 JUDGE SMITH: What's the answer to the
2 question?

3 MR. STERNBERG: This is different. This -
4 - - this is directing - - - this is directing traffic
5 the same way putting up barricades to - - - to - - -
6 to direct traffic is directing traffic. This is
7 directing traffic - - -

8 JUDGE SMITH: So you make a distinction
9 between a barricade and a stop sign?

10 MR. STERNBERG: What I'm making a
11 distinction between is what Mr. Bowles did and what -
12 - - and where liability might lie. All that Mr.
13 Bowles did here was answer a question: Can you - - -
14 can we - - -

15 JUDGE SMITH: To clarify, you're - - - are
16 you admitting, for the sake of the argument - - - I
17 understand you don't really admit it, but for the
18 sake of the argument, you admit that it could be
19 found to be negligent, what he did.

20 MR. STERNBERG: The - - -

21 JUDGE SMITH: Your defense is duty, not
22 negligence.

23 MR. STERNBERG: Exactly. We have a defense
24 to any possible negligence. We are - - - we have
25 governmental immunity defense - - -

1 JUDGE SMITH: It doesn't matter how
2 negligent he was, he had - - - there was no - - -
3 there was no duty. There was - - - or there's an
4 immunity; I'm sorry. It's governmental immunity.

5 MR. STERNBERG: Our argument, and the
6 argument we made in our brief, is that this is a
7 governmental function. Plainti - - - once it's a
8 governmental function, plaintiff has the obligation
9 to prove a special duty. Plaintiff did not prove a
10 special duty. Plaintiff did not plead or prove a
11 special duty. That ends the case according to this
12 court's analysis - - -

13 CHIEF JUDGE LIPPMAN: Okay.

14 MR. STERNBERG: - - - in Valdez.

15 CHIEF JUDGE LIPPMAN: Thanks, counselor.

16 MR. STERNBERG: And we have immunity.

17 CHIEF JUDGE LIPPMAN: Okay.

18 MR. STERNBERG: Thank you, Your Honor.

19 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

20 MR. STERNBERG: Thank you, Your Honor.

21 MR. SHOOT: Very briefly. From this
22 court's decision in Balsam, not from the City's brief
23 in Balsam, quote, "No claim is made here that the
24 police were charged with the responsibility to
25 physically maintain the property where plaintiff's

1 accident occurred - a proprietary duty." After
2 citations, that the tale (sic) - - - "that the
3 function has traditionally been assumed by police
4 rather than private actors is a tell-tale sign the
5 conduct is not proprietary in nature".

6 From the City's brief, page 9, "Issues not
7 briefed are deemed to be abandoned."

8 There's a lar - - - there's a different
9 point here, Your Honors. Where - - - the main
10 argument here, of course, is where this proprietary
11 governmental line is drawn. There's another dispute
12 here too, an underlying dispute, and it has to do
13 with the role of precedent or lack of precedent.

14 In our brief, we cited twenty-eight Court
15 of Appeals decisions that pre-dated the 1997 decision
16 in Balsam, most having to do with highways and
17 warnings and the like. The amicus cited forty-eight
18 Court of Appeals decisions other than ours that
19 predated the decision in Balsam.

20 The City's brief cites two Court of Appeals
21 decisions that were decided before Balsam. One is
22 Miller v. State, dealing with the allegedly negligent
23 failure to - - - negligent failure to prevent a rape.
24 And the other is Kenavan v. City, where the paragraph
25 to which they cite states this court stated that

1 firefighting is a governmental function where the
2 firefighters are not expected to exercise perfect
3 timing.

4 The City's obviously drawing an argument
5 that just cannot be - - - cannot be squared with a
6 century of precedent. And if you went down this
7 path, you reach indefensible distinctions. For
8 example, the argument is that this individual, acting
9 negligently, saying to go ahead, when he knows full
10 well what awaits down the path, that supposedly is
11 governmental. But if this individual's supervisor's
12 supervisor decides to place a stop sign, or not place
13 a stop sign, or place a traffic light, or not place a
14 traffic light, or maybe the case involves negligent
15 failure to install a median barrier on the Tappan Zee
16 Bridge, as in Friedman v. State. That's a different
17 case, and that's a different case we've heard. Both
18 are proprietary; they've always been proprietary.

19 All of the cases cited by the City, all of
20 the cases cited by the Appellate Division majority,
21 all of the cases cited by Supreme Court are one of
22 two kinds of case. One, cases that have absolutely
23 nothing to do with highways - - - McLean v. City,
24 Lauer v. City - - - or to cases where the negligent
25 actor - - - allegedly negligent actor just happened

1 to be a police officer: Balsam, Kovit. There is no
2 authority for the result that they seek in this case.

3 Thank you.

4 CHIEF JUDGE LIPPMAN: Thank you. Thank you
5 both.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Rhonda Wittorf v. The City of New York, No. 101, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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