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COURT OF APPEALS
STATE OF NEW YORK

ORELLANA,

Appellant,

-against-

NO. 80

TOWN OF CARMEL,

Respondent.

20 Eagle Street
Albany, New York
September 11, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next matter on the calendar
2 is Orellana v. Town of Carmel.

3 MR. BRADY: Good afternoon, Your Honors. My name
4 is Enoch Brady. I'm here on behalf of the appellant, Ana
5 Orellana, today. Next to me is my appellate counsel, Marie
6 Hodukavich. I'm asking for five minutes for rebuttal.

7 CHIEF JUDGE WILSON: Yes.

8 MR. BRADY: We're asking that the Appellate
9 Division, Second Department decision be reversed and that
10 the summary judgment motion of the plaintiff be granted
11 because we feel that the 1103(b) exception was misapplied
12 in granting the summary judgment motion for the Town of
13 Carmel because defendant, Simone, was not actually engaged
14 in work on a highway at the time of the accident, but in
15 fact, was traveling from a work site back to his base of
16 operations.

17 JUDGE GARCIA: Now, as I understand it, counsel,
18 the - - - both the Supreme Court and the Appellate Division
19 held the opposite, right? And we would have to say, as a
20 matter of law, that determination based on this record is
21 incorrect?

22 MR. BRADY: Yes. That's exactly what we're
23 asking. And - - -

24 JUDGE GARCIA: And why, as a matter of law,
25 looking at these facts, is that incorrect?

1 MR. BRADY: Because the facts, as testified to by
2 defendant, Simone, support the finding that he, in fact,
3 was returning to his base of operations. On page 75 of the
4 record where I first - - -

5 JUDGE GARCIA: So your position would be there's
6 no support in the record at all for their conclusions of
7 the two courts? That would be the standard, right?
8 There's no support in the record for the factual, basing
9 that conclusion on what you said?

10 MR. BRADY: That is, in fact, what we're
11 supporting. For instance, in the respondent's opposition
12 brief in ten different places, they say that in fact, the
13 respondent was - - - the defendant, Simone, was actually
14 continuing his inspection, was always inspecting, but in
15 none of those ten locations where they state that, do they
16 cite anything in the defendant's transcript to support
17 that.

18 JUDGE CANNATARO: Counsel, you make some
19 arguments in the alternative, in the brief. And I just
20 want to try to get an idea of what you think the scope of
21 the 1103 protection that was available to Mr. Simone was.
22 So I want to ask you a hypothetical question. If this
23 accident had happened somewhat earlier in the day when
24 Simone was at the Kings Ridge Road location, his Bellwether
25 location, and he had stopped his car at that particular

1 location to really get a good appreciation for what the
2 snow accumulation was there and some sort of accident
3 occurred, in your view, would he be able to invoke the
4 protection of 1103 or is there something about the nature
5 of the entire task that he was doing that disqualifies him
6 from 1103 protection?

7 MR. BRADY: Well, that is certainly a different
8 set of facts because his - - - the location that he was
9 going to was, in fact, the Kings Ridge and Prince
10 intersection. And certainly, if the accident had occurred
11 there, that would be very different than the intersection
12 where it occurred five minutes after he had already left
13 that intersection. There would be a number of questions I
14 would ask. For instance, while he was asked - - - while he
15 was at Kings Ridge and Prince, when the accident occurred,
16 did it occur before or after he radioed into his base and
17 he directed his thirty-five workers to go out and address
18 the twenty-eight different routes in town. If he had
19 already made that radio call, that would certainly be an
20 important factor to discuss.

21 JUDGE CANNATARO: But would you be willing - - -
22 and you can say no, but would you be willing to concede
23 that there might - - - it's not - - - what I'm getting at
24 is it's not the nature of Mr. Simone's duties per se that
25 disqualify him for 1103 under these facts, it's just what

1 he was doing at the time of the accident that disqualifies
2 him.

3 MR. BRADY: Yes. That's exactly correct. And
4 that's what every court has had to do in every decision
5 that's been cited in our brief. They had to actually look
6 at what the individual was doing, the municipal employee
7 was doing at the time of the accident. So certainly,
8 changing the location to the area that he said he was going
9 to to perform his inspection, Prince and Kings Ridge, would
10 certainly make it a more difficult case for the plaintiff
11 in the sense that he was at the work location. However,
12 that would not end the inquiry. He would still have to
13 know exactly what he was doing had he made the call to his
14 base already or not and whatever other factors may have
15 existed at the time of your hypothetical.

16 JUDGE HALLIGAN: And what if he had, upon his
17 return - - - I understand there was an accident. But upon
18 his return, put in an order for an additional snowplow to
19 go to the area where he noticed the additional snow
20 accumulating?

21 MR. BRADY: That would really not change the
22 analysis in the sense that he would still have been at the
23 - - - at another work location. In other words, when he
24 left his base, he was at a work location. He went to Kings
25 Ridge and Prince which was a work location, and he was

1 ultimately heading back to another - - -

2 JUDGE HALLIGAN: So - - -

3 MR. BRADY: - - - work location.

4 JUDGE HALLIGAN: So it's your view that if - - -
5 if he is in the course of commuting, that he - - - you
6 know, returning to the office, that even if he sees
7 something which is relevant to his duties and then later
8 acts on it, that because he set out to return to the
9 office, that it can't be covered?

10 MR. BRADY: And when you say covered, you mean
11 covered by the 1103(b) exception?

12 JUDGE HALLIGAN: Yes. Yes. Meaning he's - - -

13 MR. BRADY: He certainly - - -

14 JUDGE HALLIGAN: - - - he's out looking - - -
15 he's out inspecting, right? He puts a call in, and I
16 believe he says then that he was returning to the office at
17 that point when the accident occurred, right? If he had,
18 in fact, observed snow in the course of his return to the
19 office and then acted upon it, would that be enough to
20 trigger coverage?

21 MR. BRADY: If he had act upon it - - - acted
22 upon it at the time he saw the snow then - - -

23 JUDGE HALLIGAN: Okay.

24 MR. BRADY: - - - that may have been different.

25 JUDGE HALLIGAN: Well, one might act on it a

1 little bit later because you're driving your car, and
2 you're going to wait until you pull over or you get back to
3 the office, but - - -

4 MR. BRADY: Well, the 1103(b) exception
5 specifically talks about traveling. So if, in fact, he was
6 just traveling between Kings Ridge and Prince and going
7 back to the office, then when he gets back to the office,
8 he is at a work location. I suppose a more informative
9 hypothetical, if I may, would be, let's say the accident
10 occurred when he somehow - - - he got back to his base of
11 operations.

12 JUDGE SINGAS: Isn't the work location more - - -
13 bigger when you're a supervisor as opposed to a confined
14 work area that a worker is going saying, fix this pothole?
15 As a supervisor, aren't you restricting work location too
16 much? I mean, his job is to go out and make sure the roads
17 are safe and that the kids can get to school and the busses
18 can go. It seems like the work location is pretty vast.

19 MR. BRADY: Well, unfortunately, what happens
20 then is you no longer have the distinction that the statute
21 lays out. You no longer have any way to distinguish
22 between whether he's actually engaged in highway work or
23 whether he's traveling. And the Third Department in the
24 Sullivan case, as we mentioned in our brief, they were
25 certainly able to do that. They looked at what was going

1 on with Mr. Wheeland, who was the supervisor in the
2 municipality. Their practice for supervisors was, once you
3 leave your job site, you go to another job site to make
4 sure that that job site was left in a safe condition.

5 JUDGE SINGAS: Well, you - - -

6 MR. BRADY: That's what he was doing when their
7 accident occurred. So we - - -

8 JUDGE SINGAS: Do you think that we should take
9 into account public policy issues? Because if he didn't go
10 out to check the road, the plows wouldn't go out, the roads
11 wouldn't be clear. Isn't that something that we should
12 consider when viewing this case? Because if he doesn't go
13 out, none of the work gets done.

14 MR. BRADY: Well, if I may, I think that sets up
15 a false choice because the choice is not that he never goes
16 out. The choice is that when he goes out, we look at what
17 he does when he goes out, the same way we look at any
18 frontline worker who's driving a snowplow or driving a
19 mower or a street sweeper.

20 JUDGE GARCIA: Let's say his duties were go out
21 and check the roads, all the roads, and see if there's
22 dangerous conditions, you know, requiring us to take - - -
23 and he's driving on the roads. And then he's on his way
24 back, but he's still doing that. Why isn't that covered?

25 MR. BRADY: That would be a different

1 hypothetical. That would be a different set of facts. So
2 that - - -

3 JUDGE GARCIA: That's a hypothetical. But what
4 would happen in that case?

5 MR. BRADY: Well, if his testimony was that he
6 was traveling a specific route and he had stopped at
7 several locations to check road conditions, then it would
8 depend on where the accident happened and what he was doing
9 at that time.

10 JUDGE GARCIA: So kind of a factual - - - fact-
11 specific analysis, again, but let's say in the policy
12 context these facts, except he's coming back and he looks
13 and he knows he's passing an elementary school. And he
14 sees the hazardous condition, and he looks to examine that
15 condition because there it is. Now, if he's not engaged in
16 this work, we just want him to go to this little one
17 location, you said, and then put your blinders on and go
18 home, go back to your base, because otherwise you're not
19 covered. Wouldn't that be a negative policy implication
20 here?

21 MR. BRADY: It wouldn't in the sense that he has
22 already said - - - he had testified in his deposition that
23 the orders that he gave at his - - - from the location of
24 Kings Ridge and Prince would be completed within an hour.
25 So all the roads in the town would have been salted within

1 an hour and that would - - -

2 JUDGE GARCIA: Let's say my hypothetical where
3 you see a hazardous condition in an elementary school, and
4 you're on your way back, you've done all these things the
5 way they were done here. You've done everything the same,
6 except now you look over, and wow, is that a bad condition
7 on that elementary school where children will be going to
8 school shortly. Should he just not look there, keep
9 driving, because it might be hazardous for him to do that?

10 MR. BRADY: I was getting to that because that
11 is, actually, in fact, what has happened. And if I may
12 answer the questions.

13 CHIEF JUDGE WILSON: Yes.

14 MR. BRADY: He knew that the elementary school
15 busses were not leaving until 12 noon. He gave his order
16 at about 10 a.m. His order was going to be completed by 11
17 a.m. There was no reason for him to take emergency - - -
18 take any emergency actions. And he knew that when he saw
19 that other slush at the incident - - - at the location of
20 the incident.

21 JUDGE GARCIA: My hypothetical is he does not
22 know that. He's going by an elementary school and he sees
23 this. What now - - - what about that case?

24 MR. BRADY: It's really hard to answer that
25 without knowing the facts that we have here, which is at 12

1 noon, the busses are going to leave and that the roads are
2 going to be salted including that location where he saw the
3 additional quarter inch of accumulation an hour before the
4 busses leave. So in that sense, there was no emergency.
5 There was no reason for him to have to take additional
6 action. And that is, again, why he was traveling between
7 work locations. If there was some reason that he had to
8 take that emergency action, then it might be a different
9 set of facts - - -

10 JUDGE RIVERA: So - - -

11 MR. BRADY: - - - but he knew that the busses
12 were going to - - -

13 JUDGE RIVERA: So I'm sorry. Let me follow up on
14 that. If indeed one would objectively look at that and say
15 he didn't need to take emergency action, it could have
16 waited a little bit, but he chooses to do so, and in the
17 course of choosing to do that, to take emergency action, he
18 has the accident. What about that case?

19 MR. BRADY: Well, again, that's a different set
20 of facts because he didn't - - -

21 JUDGE RIVERA: Yes.

22 MR. BRADY: - - - take emergency action. In
23 other words, there's nothing inherently necessary about
24 proceeding into an intersection without looking to your
25 right in the direction of the school, which is only 500

1 feet away. There's nothing necessary about pulling
2 straight into the intersection without looking to your
3 right. And there's nothing about that that was done
4 because there was no emergency, actually, when he's there.

5 JUDGE RIVERA: No. Let's say he sees it, and he
6 decides, you know what, I'm going to pull over and I'm
7 going to take some action even though there's - - - I have
8 a window of opportunity. I'd rather do it now and then
9 when I get back, I can handle other matters, and in the
10 course of this, he has the accident.

11 MR. BRADY: That would certainly - - -

12 JUDGE RIVERA: Doesn't he have the discretion to
13 decide whether or not to act in the moment?

14 MR. BRADY: Oh, he certainly does have that
15 discretion.

16 JUDGE RIVERA: Okay. So if - - - and if he does
17 that - - -

18 MR. BRADY: Well, that's a critical - - -

19 JUDGE RIVERA: - - - doesn't he engage in work on
20 a highway?

21 MR. BRADY: It might be but that is a very
22 different situation than what we have because he did not -
23 - -

24 JUDGE RIVERA: No, I understand that.

25 MR. BRADY: - - - make that decision. He did not

1 feel that there was anything necessary for him to do. If
2 he had remained stopped at the stop sign and got on his
3 radio, the incident wouldn't have occurred because Ms.
4 Orellana would have passed safely through the intersection.

5 JUDGE CANNATARO: Chief, can I ask one now?

6 CHIEF JUDGE WILSON: Sure.

7 MR. BRADY: So it's a critical difference.

8 JUDGE CANNATARO: Real quickly before you exit
9 the stage. What can you tell us the record shows about
10 when - - - the time that elapsed between when he observed
11 the snow accumulation down at the second location and when
12 the accident occurred? What's the interval between those
13 two events?

14 MR. BRADY: The - - - he said that it was - - -
15 that he radioed his base from the location of Kings Ridge
16 and Prince and then finished that radio communication from
17 that location, and then five minutes later, had the
18 accident.

19 JUDGE CANNATARO: No. Kings Ridge or High Ridge?
20 I wanted - - - so he observed a second accumulation of
21 snow. I thought that was at High Ridge.

22 MR. BRADY: At High Ridge, correct. Yes, you're
23 right. I'm sorry.

24 JUDGE CANNATARO: Okay. So it was five minutes
25 between when he saw the snow on High Ridge and when the

1 accident occurred?

2 MR. BRADY: No. He saw the snow on High Ridge
3 just before the accident occurred because he was - - -

4 JUDGE CANNATARO: Moments?

5 MR. BRADY: - - - at High Ridge.

6 JUDGE CANNATARO: Okay.

7 CHIEF JUDGE WILSON: Thank you.

8 MR. BRADY: Thank you.

9 MR. FITZPATRICK: Good afternoon, Your Honors.
10 May it please the court. Brendan Fitzpatrick, counsel for
11 the respondents. Your Honors, the Supreme Court and the
12 unanimous Appellate Division found that VTL section 1103(b)
13 apply to the facts of this case and dismissed this case.
14 And I would ask this court to affirm. Now, at the time of
15 this incident, Michael Simone was in - - - was in the Town
16 of Carmel, Superintendent of Highways. And his sole
17 purpose on the morning of the incident was to go out and
18 check the roads out there - - -

19 JUDGE HALLIGAN: Can I ask you, if he had said
20 that he was done for the day when he was driving and
21 noticed the snow, would you agree that the exemption would
22 not apply, but instead, he would have been traveling to or
23 from the hazardous location?

24 MR. FITZPATRICK: If I may, Your Honor, can I
25 just - - -

1 JUDGE HALLIGAN: Please.

2 MR. FITZPATRICK: - - - just ask just for a
3 little bit of clarification. Now, when you say he was done
4 for the day and then he saw the snow - - -

5 JUDGE HALLIGAN: Yes.

6 MR. FITZPATRICK: - - - so it's - - - he - - -
7 again, it's - - - not - - - he's just basically driving
8 around then he sees some snow?

9 JUDGE HALLIGAN: Let's say he was out, performing
10 his job, and then he understood himself to have finished
11 whatever he had to do. He called in whatever orders he
12 needed to call in, and he is driving wherever, he's driving
13 back to the office, to his home, whatever, but he testified
14 that - - - that he was done for the day, and then an
15 accident occurred. Would you agree that it - - - that
16 there would not be an exemption under that circumstance?

17 MR. FITZPATRICK: I think there's a closer call
18 for that and probably a factual issue. But I think under -
19 - - under that hypothetical - - -

20 JUDGE HALLIGAN: So I'm just trying to understand
21 what meaning do we assign to traveling to or from if we
22 rule for you? What exactly in the record confirms that
23 he's actually performing his job as opposed to going back
24 to the office, given that, I think he testified that he was
25 on his way back to the office?

1 MR. FITZPATRICK: He did. Page 151 when - - - in
2 response to questioning, he said he had been inspecting the
3 roads for the twenty minutes before the accident. So he
4 wasn't simply - - - at a moment in time, he made his one
5 determination then that was it. He was done for the rest
6 of the drive that he - - -

7 JUDGE HALLIGAN: But if he had indicated that he
8 was done and now he was going back to the office, there
9 would be no exemption, right?

10 MR. FITZPATRICK: Your Honor, I think that's a
11 little bit of a closer call. When you look at the ruling
12 from Riley from this unanimous court, the court, in looking
13 at the legislative intent, said this is to be a broad
14 exception. And I think that would be a closer call in - -
15 - under your hypothetical.

16 JUDGE HALLIGAN: So if you have a supervisor who
17 is driving to the office in the morning on the way to work
18 and sees, you know, a bunch of snow on the side of the
19 road, and when she gets to the office, she puts in an order
20 for a snowplow. Would that be covered?

21 MR. FITZPATRICK: Again, Your Honor, I think
22 that's a closer call. I think this is - - -

23 JUDGE HALLIGAN: Okay. But I'm looking for some
24 guidance about what you think the parameters of that rule
25 would be.

1 MR. FITZPATRICK: Right. But I believe that
2 would be a - - - probably a factual issue to go to a jury
3 as opposed to the situation like we have here or even like
4 that you had. And so - - - so - - -

5 JUDGE RIVERA: Well, what would the jury then
6 take into consideration to make the determination? What
7 more do you need to know?

8 MR. FITZPATRICK: What more do you - - - would
9 you need to - - - you would need to know what the normal
10 conditions were. Is - - - was there, like this case, an
11 imminent snowstorm coming? Was this something that the
12 supervisor did on a normal basis, whether they were looking
13 for snow conditions on their way to the office? Things of
14 that nature.

15 JUDGE HALLIGAN: I'm asking because I'm trying to
16 understand, if you have a supervisor, understanding that
17 they perform a very, you know, vital function, but if you
18 have a supervisor who is out driving around either before
19 or during the workday, and they see some condition on the
20 side of the road, even if they had not set out to inspect,
21 is it your view that the exemption applies or is it a
22 little bit narrower than that?

23 MR. FITZPATRICK: I think - - - again, Your
24 Honor, I think it's - - - on a situation like that, it's
25 probably going to be a question of fact as to what the

1 supervisor's normal course of actions were during the
2 course of the day. Again, when they're looking out - - -
3 when they're inspecting the roads, especially in this case,
4 when you have a snowstorm coming and he's out there
5 specifically looking at the conditions of the roads, yes, I
6 think it would - - - I think in this case, it falls
7 squarely within, especially under Riley in the broader
8 exception.

9 JUDGE RIVERA: But in this case, he did not
10 testify that he had finished his tasks. He had completed
11 the observations before he goes to the stop sign.

12 MR. FITZPATRICK: Yeah. But I think - -

13 JUDGE RIVERA: Then he's completed that task.
14 What - - - what he's going to do with the information, the
15 knowledge he's gathered from this observation is a
16 different story. But he's completed that part of the work
17 on the road even under your analysis. I'm having problems
18 seeing once that's finished, that's the stop sign, now he's
19 going through, and he has the accident. How's that still
20 engaged in work on a highway?

21 MR. FITZPATRICK: Judge Rivera, are you talking
22 about when he was on Kings Ridge or when he was at the
23 intersection in - - -

24 JUDGE RIVERA: When he's at the intersection of
25 the - - -

1 MR. FITZPATRICK: When he's at the intersection.

2 JUDGE RIVERA: - - - accident.

3 MR. FITZPATRICK: Your Honor, I think, again,
4 we're asking the courts to second-guess what these
5 municipal supervisors are doing and when - - -

6 JUDGE RIVERA: No. No. Based on his testimony.

7 MR. FITZPATRICK: His - - - on his - - -

8 JUDGE RIVERA: I'm not second-guessing his
9 testimony.

10 MR. FITZPATRICK: But based upon his testimony -
11 - -

12 JUDGE RIVERA: Yes. I saw it. I observed it. I
13 then intended to do something when I got to the office.

14 MR. FITZPATRICK: Exactly. He said that - - -

15 JUDGE RIVERA: Is he still - - - what else is he
16 doing when he goes through the stop sign that's engaged in
17 work on a highway?

18 MR. FITZPATRICK: Again, Your Honor, the - - -
19 the conditions that he is inspecting at the time, whether
20 it was all the way up to Kings Ridge and all the way back
21 to the office, that's what he was doing. That's what his
22 job was that day. And it was a continuation of what he's
23 doing.

24 JUDGE RIVERA: Oh, I'm - - - I'm sorry. I
25 misunderstood. I'm sorry.

1 MR. FITZPATRICK: Okay.

2 JUDGE RIVERA: I - - - I thought your argument
3 was he was engaged in work because he was observing this
4 particular problem. Now you're saying he observed that
5 problem, and then, as he's going through the stop sign - -
6 -

7 MR. FITZPATRICK: No.

8 JUDGE RIVERA: - - - he's still observing other
9 problems?

10 MR. FITZPATRICK: I don't believe that there's
11 any testimony that he was not going to continue to inspect
12 the roads. That's what was done that morning.

13 JUDGE HALLIGAN: So what testimony is there that
14 he was still inspecting the roads at that point as opposed
15 to done with the inspection and simply returning to the
16 office? Can - - - is there something in the record that -
17 - - that you can help us with there?

18 MR. FITZPATRICK: Again, I think, Your Honors,
19 pages 130, 131 of the record, when he sees it, his
20 immediate reaction was, I need to go make sure that someone
21 addresses this. And this was the first thing he was going
22 to do when he got back to the garage - - - his office. So
23 I think it's part and parcel. And I don't know - - -

24 JUDGE CANNATARO: Well, he didn't - - - when he
25 saw the High Ridge accumulation, he didn't do anything

1 about that, right? He didn't call it in the way he called
2 it in when he was on Kings Ridge, right?

3 MR. FITZPATRICK: Correct, Your Honor.

4 JUDGE CANNATARO: So - - - and my sense of what
5 was going on is there was nothing for him to do. He had
6 already made a call. He deployed all his - - - I think it
7 was thirty-five employees to do the town because he was
8 satisfied by what he saw up on Kings Ridge that it needed
9 to get done. Was there anything left for him to do at that
10 point?

11 MR. FITZPATRICK: Yes, Your Honor.

12 JUDGE CANNATARO: Which is what?

13 MR. FITZPATRICK: Because as he was - - - as he
14 sees this condition, he understands that there is a school
15 500 feet away.

16 JUDGE CANNATARO: Yeah.

17 MR. FITZPATRICK: He understands that within an
18 hour, there's going to be a snowstorm hitting. And he also
19 understands that probably within an hour, school busses are
20 going to start taking the kindergarten children out of that
21 school. Therefore, with the garage only about a - - - less
22 than a quarter mile away, he knows that the first thing he
23 does when he gets back to his office, he needs to go and
24 tell someone to immediately remedy - - -

25 JUDGE RIVERA: But that's the point. He's at the

1 intersection. He makes the observation. Let's assume for
2 one moment that is engaged in work on the highway. That
3 process of I stopped, I saw, okay. But then he makes a
4 decision that I'm going to follow this up back at the
5 office, and that's where he's going. I don't see, once he
6 goes through the stop sign, once he makes that decision,
7 that he continues to be engaged in work on the highway.
8 That is what I'm having difficulty with.

9 JUDGE GARCIA: How long after he observes that
10 condition does he get in the accident?

11 MR. FITZPATRICK: I think it's within moments. I
12 don't believe there's any - - - there was no question as to
13 how long were you stopped at the stop sign. There's no
14 debate. He was stopped at the stop sign, but no one
15 followed up with a question that - - -

16 CHIEF JUDGE WILSON: Let me give you a very
17 different hypothetical. He's driving to dinner on a
18 Saturday night and he - - - there's a dead deer in the
19 road. And he stops to inspect it. And somebody rear-ends
20 his car, and he didn't stop - - - he stopped his car in the
21 road. Covered?

22 MR. FITZPATRICK: So he's - - - okay. I believe
23 it's a - - - that's a tougher question.

24 CHIEF JUDGE WILSON: That's why we ask these
25 questions

1 MR. FITZPATRICK: I know. I know, Your Honor.

2 CHIEF JUDGE WILSON: We're still looking for
3 answers.

4 MR. FITZPATRICK: But I think, again - - -

5 CHIEF JUDGE WILSON: Does it matter that it's a
6 Saturday, that he's not actually at work, and that when he
7 set out, he was setting out to go to dinner, not to inspect
8 the road?

9 MR. FITZPATRICK: I think that's a factor that's
10 definitely going to weigh against the municipality. But
11 again, going back to Riley, this court said this is a broad
12 exception when supervisors are out there, when they are
13 doing work. There has to be the - - -

14 JUDGE TROUTMAN: So is he ever not working
15 because he is a supervisor?

16 MR. FITZPATRICK: No. I think that - - - I'm
17 sure there are hypotheticals that could be asked that, yes,
18 he was not working. But when something is directly related
19 to road work - - -

20 CHIEF JUDGE WILSON: When he sees the dead deer,
21 does it make any difference if in one circumstance, he gets
22 on his cell phone and calls it in right then, and the
23 other, he thinks, yeah, this will be okay till Monday.
24 I'll call in when we get to the office on Monday? Does
25 that make a difference to coverage?

1 MR. FITZPATRICK: But there - - - is there a stop
2 or there is no stop?

3 CHIEF JUDGE WILSON: No. There's an accident in
4 a way.

5 MR. FITZPATRICK: There is not.

6 CHIEF JUDGE WILSON: Yeah. It's dead. Nobody
7 cares about the deer. It is an accident.

8 MR. FITZPATRICK: Your Honor, I think it's a
9 tougher question. It probably would not be covered under
10 1103(b), but - - -

11 CHIEF JUDGE WILSON: Either way. That is, when
12 he either - - - whether he calls it in - - -

13 MR. FITZPATRICK: I think - - -

14 CHIEF JUDGE WILSON: - - - now or he calls it in
15 later, it's still - - -

16 MR. FITZPATRICK: I think the calling in later
17 because it's going to happen on Monday and it's a Saturday,
18 I think the attenuation of time is significant. Whereas
19 here, I think you're less than a quarter a mile away, and
20 he knows that with the storm coming, freezing temperatures,
21 he needs to get people out there right away.

22 JUDGE RIVERA: So if I can be clear as to the way
23 you viewed the application of the statute, if he gets to
24 the stop sign, had not observed anything, and he's just
25 going through to go to the office, is he engaged in work at



1 that moment?

2 MR. FITZPATRICK: With his testimony that he's
3 been inspecting the roads for the twenty minutes before the
4 accident - - -

5 JUDGE RIVERA: The testimony as it stands. I
6 haven't changed anything else.

7 MR. FITZPATRICK: Yes.

8 JUDGE RIVERA: Only change - - -

9 MR. FITZPATRICK: I think - - -

10 JUDGE RIVERA: - - - is that he didn't observe
11 the accumulation - - -

12 MR. FITZPATRICK: I - - -

13 JUDGE RIVERA: - - - that he was later going to
14 report.

15 MR. FITZPATRICK: I believe he's - - - I believe
16 he's still covered because he's - - -

17 JUDGE HALLIGAN: Why - - -

18 JUDGE RIVERA: So then your answer to Judge
19 Troutman would have been, yes, he's always working?

20 MR. FITZPATRICK: No. No. I don't believe he's
21 always working. This was a specific morning - - -

22 JUDGE HALLIGAN: But in Judge Rivera's
23 hypothetical, why is he not traveling to or from the
24 hazardous operation at that point in time?

25 MR. FITZPATRICK: Because his testimony is that

1 for the twenty minutes before the accident - - -

2 JUDGE HALLIGAN: Yes.

3 MR. FITZPATRICK: - - - he is inspecting. He may
4 have given an order - - -

5 JUDGE HALLIGAN: Yes. But - - -

6 MR. FITZPATRICK: - - - but he's continuing to
7 inspect. Sorry, Judge.

8 JUDGE HALLIGAN: Well, that - - - maybe that's
9 the crux of the question, right? If he has determined that
10 his inspection is done, and he is heading back to the
11 office, and he happens to see something just like you or I
12 would see something driving down the road, there's some
13 snow or ice over there, is the fact that he holds the job
14 sufficient to allow him to claim the exemption? I mean,
15 you or I could be driving down the road and see whatever
16 the weather situation is on the side of the road. Is he
17 like us when he is not - - - when he doesn't view himself
18 as in the middle of - - - of an inspection task or does he
19 have some different status?

20 MR. FITZPATRICK: No. I think, as the supervisor
21 performing this work, he is a little bit of a different
22 status. He is performing work on the roadway and - - -

23 JUDGE HALLIGAN: So any supervisor who's out
24 driving around, maybe at any time, maybe just during the
25 workday, if she sees something, dead deer, patch of ice,



1 snow, that's sufficient to invoke the exemption?

2 MR. FITZPATRICK: I think it's sufficient to
3 invoke it. Whether the municipality is going to be
4 entitled to summary judgment on the issue, I think is a
5 completely different - - -

6 JUDGE CANNATARO: Can I just ask you, getting
7 back to this policy discussion that some of us were having
8 with your adversary before, is - - - does the town take the
9 position that Mr. Simone wouldn't have been acting within
10 the scope of his duties if he's not entitled to the 1103
11 protection or are you satisfied that he's doing his job
12 regardless?

13 MR. FITZPATRICK: I believe he's doing his job.
14 He's doing his job. And I'm not sure I understand what you
15 just asked.

16 JUDGE CANNATARO: Basically, I'm asking, he's
17 going to be indemnified under - - - he's going to - - -
18 he's going to have to respond he had superior coverage,
19 whether he was - - - he had the 1103 protection or he was
20 just subject to the regular rules of the road, right?

21 MR. FITZPATRICK: Yes. He was within the course
22 of his employment. There's no debate about that.

23 JUDGE CANNATARO: Okay. That's all I wanted to
24 know.

25 MR. FITZPATRICK: Yes. But - - - and then,



1 again, getting back to, I think, Riley against County of
2 Broome, that's the controlling case for this matter. And
3 in writing for the unanimous court, Judge Kaye said, the
4 legislative intent - - - not just simply the statute, but
5 she went beyond that and looked at the legislative intent
6 and said the legislative intent is to create a broad
7 exception from the rules of the road for all vehicles
8 engaged in highway construction, maintenance, and repair.

9 JUDGE GARCIA: But there's the last part of that
10 quote, right? Regardless of classification - - -

11 MR. FITZPATRICK: Yes, regardless of
12 classification - - -

13 JUDGE GARCIA: - - - and I think that that was
14 something of a specific issue in that case. The problem
15 I'm having with some of your answers to the hypothetical
16 is, I think Judge - - - Chief Judge Kaye also says, this is
17 something of a balancing because you have a need for these
18 vehicles to go out in hazardous conditions, which may, in
19 itself, create a hazard. And courts, she notes, have
20 struggled with striking that balance. The statute was a
21 way to strike that balance. And I think if you over read
22 particularly by cutting the end of that quote off, that
23 broad language, you swallow this exception up and you
24 unsettle that balance.

25 MR. FITZPATRICK: I'm not sure, Judge Garcia. I

1 think when numerous of the examples and the concerns that
2 were raised when the initial legislation was entered - - -
3 was created, and Judge Kaye noted in 95 N.Y.2d 468, the - -
4 - there were concerns why, for example, should rural - - -
5 rural letter carriers and tow truck drivers be permitted in
6 the course of their work to speed, drive on the wrong side
7 of the road.

8 JUDGE GARCIA: Right.

9 MR. FITZPATRICK: And - - -

10 JUDGE GARCIA: That's a tow truck.

11 MR. FITZPATRICK: Yes.

12 JUDGE GARCIA: So the classification really
13 shouldn't matter if it's a tow truck - - -

14 MR. FITZPATRICK: Right.

15 JUDGE GARCIA: - - - or if it's another vehicle.
16 And I think that's why she was talking about
17 classification.

18 MR. FITZPATRICK: Right. And in response this
19 court wrote, apt those concerns may be, the legislator - -
20 - legislature has spoken clearly, giving - - - giving
21 vehicles engaged in road work the benefit of the same
22 lesser standard of care as emergency vehicles. Any change
23 to that standard, therefore, must come from the
24 legislature.

25 JUDGE GARCIA: Right. And I think what she was

1 getting at, though - - - and I don't - - - I'm not arguing
2 with you over broad in a sense, but I think that particular
3 point was classification as an emergency vehicle or a tow
4 truck, or, in this case, someone driving their own car.
5 That classification doesn't matter, right?

6 MR. FITZPATRICK: But this was a town car.

7 JUDGE GARCIA: Right. But it - - -

8 MR. FITZPATRICK: It wasn't his own.

9 JUDGE GARCIA: But it doesn't matter. It's the
10 function.

11 MR. FITZPATRICK: Right. But in your - - -

12 JUDGE GARCIA: But you seem to want to expand
13 that language to a blanket, broad interpretation of the
14 statute so that it fits into, you know, a deer on the road
15 when someone's going to dinner.

16 MR. FITZPATRICK: Your Honor, I think - - - on
17 those hypotheticals, I definitely think it is more of a
18 question of fact, but on these facts when he is engaged in
19 the work in order - - - without his - - - as I believe one
20 of the judges said, without his inspection and without his
21 instructions, these guys don't go out and maintain the
22 roads.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. FITZPATRICK: Thank you, Your Honors. I ask
25 this court to affirm. Thank you.

1 MR. BRADY: The reason that we're asking this
2 court to reverse the decision by the Appellate Division
3 Second Department is because we believe that it sets, at
4 the very least, an unclear and - - - and possibly even
5 consistent or inconsistent or contradictory precedent with
6 regard to the Sullivan case in the Third Department.
7 Because in the Sullivan case, the analysis is the same as
8 the analysis is in all these other cases, what exactly was
9 the municipal employee doing at the time of the accident?
10 Was he actually engaged in work on a highway or was he
11 traveling to or from a work site? And in this decision by
12 the Second Department, they do not discuss at all the
13 exception to the 1103(b) rule of if he was traveling, he's
14 not covered by 1103(b). If in fact - - - and they also do
15 not discuss anything that we've discussed here today about
16 what Mr. Simone was doing about his inspection.

17 JUDGE RIVERA: But you agree that if he's in the
18 course of traveling back, right? Traveling back to his
19 office, if he had actually testified I had finished with my
20 observations at the Bellwether. I was on my way back. I
21 was going to end the day, and I continued to observe the
22 roads on my way back. You agree that might very well
23 result in the exception applied?

24 MR. BRADY: Well, we would not expect any highway
25 worker to drive with blindfolds on so they don't see

1 anything other than what's directly ahead of them. So I
2 would say no, in the sense that the task he set out to
3 perform when he left his base of operations was, in his own
4 words, when I asked him at the deposition, were you going
5 to follow a particular route? Were you feeling your way
6 along? He said, no, I was going to Kings Ridge Road. And
7 I asked him specifically, an intersection Kings Ridge and
8 Prince. I was going there. It's one of the highest
9 elevations in town. That's where the snow is going to
10 accumulate first. And then when I said to him - - - I
11 asked him in the next question, so before the accident when
12 you were on your way, where were you coming from? Were you
13 coming from your office? He said, no, I was coming from
14 Kings Ridge. So he clearly thought that he went from his
15 office, to Kings Ridge, back to his office.

16 JUDGE RIVERA: So then that's a yes to my
17 question, right? That if indeed he had said I finished at
18 the Bellwether, I was on my way back, and I was continuing
19 to observe the roads as I went along, your answer is yes,
20 then yeah?

21 MR. BRADY: He never said that, but - - -

22 JUDGE RIVERA: Correct.

23 MR. BRADY: - - - in - - - in your - - -

24 JUDGE RIVERA: That's why I said - - -

25 MR. BRADY: - - - hypothetical - - -



1 JUDGE RIVERA: Correct.

2 MR. BRADY: - - - if he had said that - - -

3 JUDGE RIVERA: Yes.

4 MR. BRADY: - - - it would be contradictory, and
5 it might actually require a trial by jury to determine
6 whether he was actually traveling because he said he was on
7 his way - - - he was looking at the roads on his way back
8 or whether he had completed his task, which was, in fact,
9 completed when he radioed from the Kings Ridge location,
10 told his men to go out, and actually said on - - -

11 JUDGE RIVERA: Isn't - - - isn't the person
12 tasked with that job the one who decides whether or not
13 what they've finished at the Bellwether is enough if he is
14 saying I've finished what I wanted to do at the Bellwether,
15 and I was continuing to observe the roads as I went back?

16 MR. BRADY: Okay. But that is not what he said.
17 And when I asked him specifically - - -

18 JUDGE RIVERA: Okay. We're getting nowhere.

19 MR. BRADY: - - - on page 85 of the record, had
20 what you had done at the Bellwether location address the
21 conditions as you saw them at that time, he said yes. On
22 page 92 of the record, I asked him the same question. Was
23 there an emergency situation? No. Were you in a
24 particular rush to get back to the office? No. So we
25 would ask you to please reverse the - - - the Appellate

1 Division and grant summary judgment to the plaintiff in
2 this action.

3 CHIEF JUDGE WILSON: Thank you.

4 MR. BRADY: Thank you.

5 (Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Orellana v. Town of Carmel, No. 80 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

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