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COURT OF APPEALS

STATE OF NEW YORK

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GRANATH,

Appellant,

-against-

NO. 17

MONROE COUNTY,

Respondent.

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20 Eagle Street  
Albany, New York  
February 10, 2026

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 case on the calendar is  
2 Granath v. Monroe County.

3 MR. SCHWARZ: May it please the court. I'd like  
4 to reserve two minutes.

5 CHIEF JUDGE WILSON: Yes.

6 MR. SCHWARZ: Thank you. The issue presented on  
7 this appeal is whether the determination of recklessness  
8 under - - - as a matter of law under Section 1104(e) on a  
9 motion for summary judgment must still be a fact-based  
10 analysis performed by considering all factual circumstances  
11 and viewing the evidence in a light most favorable to the  
12 nonmoving party and granting the nonmoving party reasonable  
13 inferences, or is it a litmus test where only one fact  
14 matters, and that fact is that the deputy stopped her  
15 vehicle before she caused the accident.

16 This court has consistently held that all of the  
17 facts matter. The facts - - -

18 JUDGE RIVERA: Well, she did more than that,  
19 right?

20 MR. SCHWARZ: Excuse me?

21 JUDGE RIVERA: She didn't just stop the vehicle.  
22 Didn't she do more than that?

23 MR. SCHWARZ: Oh, absolutely. First of all, she  
24 didn't do all the precautionary steps that could have  
25 alerted the Plaintiffs to this - - - her intention to go

1 through the red light. She never put on her siren or horn,  
2 and - - -

3 JUDGE RIVERA: But no, I was asking about what  
4 she did do. What else did she do?

5 MR. SCHWARZ: She did nothing. I mean, she - - -

6 JUDGE SINGAS: Well, she's - - -

7 JUDGE RIVERA: Okay. That was my question.

8 MR. SCHWARZ: Okay. I - - -

9 JUDGE RIVERA: I - - - I asked - - -

10 MR. SCHWARZ: I apologize, Your Honor.

11 JUDGE RIVERA: - - - is it your point that all  
12 she did was stop, that there's nothing else that she did?

13 MR. SCHWARZ: She turned on her emergency lights  
14 a second before she entered the intersection.

15 JUDGE SINGAS: No, but she stopped. She looked  
16 both ways. She thought it was clear, and then she  
17 proceeded.

18 MR. SCHWARZ: Well, again, reasonable inferences,  
19 Your Honor. If she looked both ways and saw a car coming,  
20 she would not have pulled in front of it. She had - - -  
21 her view was obstructed by both vehicles that were stopped  
22 on - - - to her right, and there was a vehicle that was  
23 making a left-hand turn from the - - - the way the  
24 Plaintiffs were coming that was stopped. All of that  
25 obscured her vision. Even Sgt. Mackenzie, who did the

1 investigation, said that he thought both the Plaintiff's  
2 view of her and - - -

3 JUDGE RIVERA: Is that an inference, or there's  
4 evidence to the effect that she definitely could not see,  
5 that her sight - - - vision was blocked?

6 MR. SCHWARZ: Well, again, I think it's an  
7 inference to say that - - - that a - - - a reasonable  
8 sheriff's deputy would not pull in front of a - - - of a  
9 car with the right-of-way if she had actually seen it and  
10 looked in that direction, so I think that's the reasonable  
11 inference.

12 JUDGE RIVERA: Did she have - - - believe that  
13 they would stop - - -

14 MR. SCHWARZ: Well, again, I - - -

15 JUDGE RIVERA: - - - once they saw her pulling  
16 into the intersection?

17 MR. SCHWARZ: I don't know how she could believe  
18 that when she didn't see the vehicle, and the vehicle - - -

19 CHIEF JUDGE WILSON: Well, aren't there - - -

20 MR. SCHWARZ: - - - couldn't see her.

21 CHIEF JUDGE WILSON: Aren't there plenty of  
22 accidents that are caused by somebody looking, but they  
23 don't see something? They're in a blind spot or they - - -  
24 something like that, and does that meet the standard here?

25 MR. SCHWARZ: Well, I think, Your Honor, what I'm

1 saying is that there's a - - - all of the facts have to be  
2 considered, and we all know that when you can't necessarily  
3 see a emergency vehicle, but you can hear a siren, that is  
4 an important step for everyone to slow down and be aware  
5 that there's something going on.

6 CHIEF JUDGE WILSON: Well, that's - - -

7 JUDGE CANNATARO: Counsel, what's the foundation  
8 of your argument that all of the facts were not considered?  
9 Is it because the court relied on the fact of the stopping  
10 and turning on the lights and didn't engage in discussion  
11 about other factors, or is there more to it than that?

12 MR. SCHWARZ: Well, I believe, Your Honor, that  
13 that - - - at oral argument, in fact, one of the majority  
14 judges specifically said there's no case that says that if  
15 policeman stops, that they can still be reckless, and it  
16 basically became a one-issue case, which is because she  
17 stopped and she said she looked, then that's - - - that's  
18 all that matters. And what we have here - - -

19 CHIEF JUDGE WILSON: I mean, that - - - I mean,  
20 put aside what that argument was. I mean, that can't be  
21 right, right? Because if she stopped and saw a car coming  
22 and drove in front of it, we would clearly have a different  
23 case here, right? So the thing you're articulating is a  
24 rule from the Appellate Division can't actually be a rule.

25 MR. SCHWARZ: Well, that's right, Your Honor, and

1 - - - and that's what is troubling about - - -

2 CHIEF JUDGE WILSON: I mean, it can't be their  
3 position, either.

4 MR. SCHWARZ: - - - the decision from the  
5 Appellate Division is that that's exactly what - - - what  
6 the court held, and that's why the dissent said that there  
7 were facts in this case that were not considered and should  
8 have been considered.

9 And one of the facts that should be considered  
10 under this court's ruling in the Campbell v. Elmira case is  
11 the degree of concern that the driver has to get to  
12 whatever the call is. That has to be considered as well.  
13 And - - - and whether the - - -

14 CHIEF JUDGE WILSON: Well, but you're not  
15 disputing this is an emergency situation, right?

16 MR. SCHWARZ: No. That is a litmus test. In  
17 other words, the litmus test that is applied by the courts  
18 is if they put on - - - if they decide that it's an  
19 emergency, then it's an emergency, and that, really, is  
20 all.

21 JUDGE CANNATARO: And this was an emergency?

22 MR. SCHWARZ: Well, according - - - again, yes,  
23 it does - - - we're not arguing that recklessness doesn't  
24 apply here, but what we're arguing is that the - - - this  
25 court held, in Campbell v. Elmira, that you have to weigh

1 that against disproportionate overreactive conduct. In  
2 other words, the degree of - - -

3 JUDGE CANNATARO: So there's a sliding scale of  
4 risk you can take before you cross over into the  
5 recklessness realm. Is that your argument?

6 MR. SCHWARZ: No. What I'm arguing is that in  
7 order to risk the danger to the public of going through a  
8 red light at a busy intersection where you can't see, then  
9 one of the considerations is what's the importance of me  
10 getting to whatever I'm getting to. And when this call  
11 came in - - -

12 JUDGE CANNATARO: But wait. The level of force -  
13 - -

14 JUDGE RIVERA: Or the likelihood of making it  
15 through because if there's an accident, you're not going to  
16 get to that emergency.

17 MR. SCHWARZ: Well, again - - -

18 JUDGE RIVERA: The point is I've got to get to  
19 this emergency as quickly as possible - - -

20 MR. SCHWARZ: Well, that - - - okay.

21 JUDGE RIVERA: - - - right? It would be reckless  
22 to get - - -

23 MR. SCHWARZ: Okay.

24 JUDGE RIVERA: - - - into an accident.

25 MR. SCHWARZ: If that were the case, then why did

1 all three deputies not go into emergency mode as soon as  
2 they got the call? All three deputies got the same call  
3 about an accident. Two of them testified they thought they  
4 were going to this accident to direct traffic.

5 So what this court has held in the past is that  
6 the degree of danger that they're going to deal with,  
7 whether it's a man with a gun or whether it's - - - they're  
8 chasing somebody who's driving erratically, that dictates  
9 how much risk they should take.

10 And here, they could have put their lights and  
11 siren on immediately when they got the call. They didn't  
12 do that. In fact, two of them never put their lights and  
13 sirens on, and one of them testified specifically they were  
14 waiting for the light to turn green before they were going  
15 to go through the intersection.

16 JUDGE CANNATARO: But Counsel, I still don't  
17 understand how that negates - - - you say that - - - you  
18 acknowledge that this was an emergency, that they were  
19 responding to that, and I think what you're saying is, but  
20 it wasn't a very serious emergency, and they should have  
21 done - - - I don't know if you're saying they should have  
22 done more or they should have done less. I mean - - -

23 MR. SCHWARZ: Well, again, only one of them did  
24 this. The other - - - the other two did not do anything  
25 that endangered the public.

1 JUDGE CANNATARO: Well, only one was involved in  
2 the collision, but there were others following behind,  
3 right?

4 MR. SCHWARZ: Well, no, they were stopped, and  
5 they - - - they didn't go through the intersection. Only  
6 the one went through the intersection.

7 CHIEF JUDGE WILSON: Well, they didn't go through  
8 the intersection - - -

9 MR. SCHWARZ: Neither of them ever put their  
10 lights on.

11 CHIEF JUDGE WILSON: They didn't go through the  
12 intersection because there was a crash right there.

13 MR. SCHWARZ: Well, but again, they never put  
14 their lights on. They never put their siren on. They  
15 never showed any intention. And one testified specifically  
16 she had no intention of going through the - - -

17 JUDGE SINGAS: So it seems to me that you're  
18 asking for a rule that says if you don't put on your lights  
19 and sirens, that - - - that's equal to a reckless  
20 disregard.

21 MR. SCHWARZ: Not in every case, Your Honor, but  
22 in a case like this where the intersection - - - all the  
23 testimony is this intersection had elevation changes that  
24 made it very difficult for anyone to see in any direction  
25 where anybody else was coming.

1 JUDGE SINGAS: Right. But there's testimony that  
2 she stopped, she looked, she thought it was clear. How is  
3 that incompatible with reckless disregard? I mean, it  
4 seems to me you're just saying the one factor of her  
5 failure to put on her lights and sirens - - -

6 MR. SCHWARZ: Well - - -

7 JUDGE SINGAS: - - - gets you there.

8 MR. SCHWARZ: - - - the failure to put on her  
9 lights and siren in an intersection that was very crowded,  
10 that was - - - that had traffic in all directions, and that  
11 her - - - her vision was blocked by the vehicles that were  
12 to her right.

13 JUDGE RIVERA: Yes. Well, see, I thought that  
14 was the nature of your argument, not actually what you're  
15 trying to say in response to Judge Singas. I thought the  
16 nature of your argument - - - it's summary judgment. It's  
17 a credibility decision. They might - - - credibility  
18 question. They might not believe her when she says she  
19 looked through given everything else that occurred.

20 MR. SCHWARZ: Exactly.

21 JUDGE RIVERA: Whether that was - - -

22 MR. SCHWARZ: Your Honor - - -

23 JUDGE RIVERA: - - - your argument and that there  
24 is this other - - -

25 MR. SCHWARZ: Again, there's all - - -



1 JUDGE RIVERA: - - - testimony and evidence about  
2 what you just described.

3 MR. SCHWARZ: There are all kinds of facts that  
4 create questions of fact as to whether her actions were  
5 reckless. That's - - - that's my point.

6 JUDGE RIVERA: Well, I thought, in part, your - -  
7 - well, I'm not communicating well here. I thought, in  
8 part, your argument - - - and perhaps I've misunderstood  
9 your argument - - - you can correct me - - - was that it's  
10 not only that those were factual issues in the vein that  
11 you've just described but that there are credibility  
12 questions as to whether or not how she describes what she  
13 did is something that the jury would actually accept.

14 MR. SCHWARZ: Absolutely. And again, it's a  
15 summary judgment standard where all of the facts are to be  
16 viewed in a light most favorable to the nonmoving party.  
17 What the court below did is accept the view of the driver,  
18 Dep. Fong, and excluded all other facts, and that's - - -

19 JUDGE CANNATARO: Was - - - was there - - -

20 MR. SCHWARZ: - - - that's the opposite of the -  
21 - - of the - - -

22 JUDGE CANNATARO: Was there contradictory  
23 testimony with respect to what she said she did, went to  
24 the intersection, turned on her - - - looked and then  
25 turned on her lights and proceeded through?

1 MR. SCHWARZ: Well, she testified that she put on  
2 her lights well before the intersection, and her testimony  
3 was contradicted by the other two deputies who said she  
4 never put on her lights until she stopped, and she never  
5 put on her siren.

6 JUDGE CANNATARO: Okay.

7 MR. SCHWARZ: She testified she put on her siren,  
8 too.

9 JUDGE CANNATARO: So let's take the deputy - - -  
10 the other deputy's version of it, which is she put her  
11 lights on immediately before proceeding into the  
12 intersection. Was that contradicted at all?

13 MR. SCHWARZ: No, but again - - -

14 JUDGE CANNATARO: Was there any testimony that  
15 she didn't have her lights on?

16 MR. SCHWARZ: No, she - - - there's no testimony  
17 that - - - well, first of all, the Plaintiffs never saw her  
18 lights, and the reason they didn't is because she was  
19 behind two lines of cars and a car turning a left - - -  
20 making a left turn.

21 JUDGE CANNATARO: But that doesn't - - - that  
22 doesn't get to whether or not she turned them on.

23 MR. SCHWARZ: Well, what's - - - what's the - - -

24 JUDGE CANNATARO: That just says they didn't see  
25 it.

1 MR. SCHWARZ: - - - what's the purpose of having  
2 the lights and siren but to warn people like the Plaintiffs  
3 who are coming and can't see her and can't hear anything?

4 JUDGE CANNATARO: Well, on that, let me ask you a  
5 question. VTL 1104(b)(2) with respect to officers in an  
6 emergency operation simply says that someone who's involved  
7 in an emergency operation can proceed past a red signal,  
8 flashing red signal, or stop sign, but only after slowing  
9 down as may be necessary for safe operation. It doesn't  
10 speak about lights. It doesn't speak about air horns. It  
11 doesn't even speak about looking both ways. Just says slow  
12 down before you go into the intersection.

13 MR. SCHWARZ: Right.

14 JUDGE CANNATARO: So how does - - - how do all  
15 these factors overcome this broad statutory entitlement?

16 MR. SCHWARZ: Because Section (e) of 1104, below  
17 the section you just quoted, says, "The foregoing  
18 provisions shall not relieve the driver of an authorized  
19 emergency vehicle from the duty to drive with due regard  
20 for the safety of all persons, nor shall such provisions  
21 protect the driver from the consequences of his reckless  
22 disregard for the safety of others."

23 She drove into that intersection without knowing  
24 whether there were cars coming in that direction with the  
25 right-of-way, and therefore, Section (e) overrules the

1 provision above.

2 JUDGE CANNATARO: It might, but it sounds to me  
3 like that only works if your position is those things that  
4 you just said she failed to do amount to recklessness.

5 MR. SCHWARZ: Okay. So that's the point, Your  
6 Honor. If you don't have your lights on in advance of  
7 going into an intersection, you just put them on just as  
8 you pull in front of a vehicle that's going forty miles an  
9 hour, that is not a reasonable action to be taken.

10 JUDGE CANNATARO: Reasonableness is not the  
11 standard. Is it a reckless - - - is it - - - is that  
12 reckless?

13 MR. SCHWARZ: Well, it's basically reckless  
14 because you can't pull into an intersection with the other  
15 side, get in the right-of-way without being able to see if  
16 there are cars there.

17 JUDGE HALLIGAN: So if the fact that she says she  
18 looked both ways and put the lights on, at a minimum, when  
19 she stopped, if that's not controverted, and I don't think  
20 it is controverted in the record, then I think you're  
21 asking us to hold that that's reckless as a matter of law.

22 MR. SCHWARZ: No, I'm not. In other words, it's  
23 the opposite. The ruling here was it was - - - it was not  
24 reckless as a matter of law. This is a question of fact.

25 JUDGE HALLIGAN: Yes.



1 MR. SCHWARZ: And if she could not see what was  
2 coming in the intersection and she didn't put her lights  
3 and siren on to warn people, then it is reckless, yes, and  
4 - - -

5 JUDGE HALLIGAN: But - - -

6 MR. SCHWARZ: - - - and a jury could find it to  
7 be reckless.

8 JUDGE HALLIGAN: Okay. But that's different.

9 JUDGE RIVERA: Is the only evidence that she  
10 looked both ways her own testimony?

11 MR. SCHWARZ: That's the only testimony there is.  
12 It's only her testimony. And again, as you pointed out,  
13 Your Honor, her test - - - her credibility is at issue  
14 because she said she had her lights and siren on, and her  
15 two compatriots both said that she didn't. Until she got  
16 to the intersection, she never had her siren on.

17 JUDGE HALLIGAN: They don't dispute that she put  
18 the lights on when she stopped, right? There's not - - -

19 MR. SCHWARZ: Right. But she testified she had  
20 the lights on driving up to the intersection - - -

21 JUDGE HALLIGAN: Yes.

22 MR. SCHWARZ: - - - and she also said she used  
23 her air horn and her siren, which her two deputies said she  
24 didn't. So there's certainly credibility issues as to  
25 whether she looked both ways. And she also testified that

1 there was a car coming from her left and that she waited  
2 for that car to stop, and then she pulled out. She never  
3 really specifically testified that she looked back to her  
4 right after she watched that car stop. So there are so  
5 many questions of fact here.

6 JUDGE CANNATARO: Why would she wait for that car  
7 to stop if that car had a green light and she was stopped  
8 at a red light?

9 MR. SCHWARZ: Because she was in the far left  
10 lane, and tho - - - that car was coming from her left, so  
11 that car could see her. She wanted to make sure that car  
12 could see her.

13 JUDGE CANNATARO: So she did have her lights on  
14 because that would be the only alert to the car that it  
15 needed to stop.

16 MR. SCHWARZ: Well, she was in a left-hand turn  
17 lane with a - - - a police car was there. So again, I  
18 don't know exactly - - - there's no testimony that says - -  
19 -

20 JUDGE CANNATARO: I mean, drivers don't normally  
21 stop going through a green light just because they see a  
22 police car, right?

23 MR. SCHWARZ: Well, I mean, but police cars don't  
24 normally drive through a red light without their lights and  
25 siren on, either.

1 JUDGE CANNATARO: Right. And this - - - that  
2 other driver who she waited for to stop and who did stop -  
3 - -

4 MR. SCHWARZ: Okay. Well - - - right.

5 JUDGE CANNATARO: - - - must mean that the lights  
6 were on, doesn't it?

7 MR. SCHWARZ: She put her lights on at the last  
8 second, and the car stopped, yes. That doesn't relieve her  
9 of the responsibility of looking the other way before she  
10 pulls out in front of another car.

11 JUDGE RIVERA: Was there a different sight view  
12 for that car?

13 MR. SCHWARZ: Excuse me?

14 JUDGE RIVERA: Was there a different sight view  
15 for the car on the left - - -

16 MR. SCHWARZ: Oh, absolutely, because - - -

17 JUDGE RIVERA: - - - on her left?

18 MR. SCHWARZ: - - - this is a - - - this is three  
19 lanes going in that direction. There's a right turn only  
20 lane. There was a line of cars there. There's a center  
21 lane that goes straight. There's a line of cars there.  
22 There was nobody in the left-hand turn lane. She pulled  
23 into the left-hand turning lane, and the other cars coming  
24 from - - - coming from the south going north - - -

25 JUDGE RIVERA: Opposite direction? Oh, I'm

1           sorry.

2                   MR. SCHWARZ: - - - had clear view of her car,  
3           and she could see them, and as soon as that car stopped,  
4           that's when she pulled out. And I think that a jury could  
5           reasonably conclude that a reasonable driver would not pull  
6           out in front of another car if they saw it.

7                   So she never looked back to her right, and that's  
8           a credibility question. Just because she says she looked  
9           both ways and she put on her lights and siren doesn't mean  
10          it happened, and there's so much evidence that - - - that a  
11          jury could reasonably conclude that it didn't happen, and  
12          if it didn't happen, then - - -

13                   JUDGE RIVERA: Did your clients testify they saw  
14          that car that was coming, as you say, the other way, that  
15          could see her?

16                   MR. SCHWARZ: No, they - - - the only thing that  
17          they testified to is that they saw this car pull in front  
18          of them at the last second - - -

19                   JUDGE RIVERA: Just her at the last second.

20                   MR. SCHWARZ: - - - right under - - -

21                   JUDGE RIVERA: Okay.

22                   MR. SCHWARZ: - - - right under the traffic  
23          light.

24                   JUDGE RIVERA: So they didn't see the other car  
25          that did stop?

1 MR. SCHWARZ: No. No.

2 JUDGE RIVERA: Okay. Thank you.

3 CHIEF JUDGE WILSON: Thank you.

4 MS. BRENNAN: May it please the court, good  
5 afternoon. My name is Alissa Brennan. I am with the  
6 Monroe County Law Department, and I am appearing today on  
7 behalf of defendant-respondent, Monroe County Sheriff's  
8 Deputy Khadija Fong.

9 Defendant-respondent Dep. Fong seeks affirmance  
10 of the underlying order of the Appellate Division, Fourth  
11 Department. As this court is well aware, the sole question  
12 before it today is whether Dep. Fong established, as a  
13 matter of law, that her conduct did not rise to the level  
14 of reckless disregard for the safety of others.

15 JUDGE RIVERA: Why are there no questions of fact  
16 regarding the sight visibility?

17 MS. BRENNAN: Your Honor, Plaintiffs maintain,  
18 and the dissent as well, that there are issues - - -  
19 triable issues of fact with respect to an alleged  
20 obstruction. As an initial matter, there is absolutely  
21 nothing in the record that controverts Dep. Fong's  
22 testimony that was under oath that said she looked in all  
23 directions, and she believed it was clear - - -

24 JUDGE RIVERA: But there's - - - but there's  
25 other testimony that controverts other things she said, and

1 we all know that that might raise credibility issues  
2 regarding the entire testimony.

3 MS. BRENNAN: Your Honor, Plaintiff - - -

4 JUDGE RIVERA: She'll be the only one who knows  
5 if she looked either way if no one else could actually see  
6 her.

7 MS. BRENNAN: Your Honor, I believe what the  
8 testimony was with - - - for Dep. Fong was that she  
9 believed that her air horn was sounded. I think that's  
10 what the Plaintiff was referring to. She believed that she  
11 had turned on her lights earlier. But what we do know is -  
12 - - and what Plaintiff has agreed, is that she turned her  
13 lights on at the intersection while she was stopped before  
14 she proceeded through. We know - - -

15 JUDGE RIVERA: Does it matter how long before she  
16 proceeded through?

17 MS. BRENNAN: It does not matter, Your Honor.

18 JUDGE CANNATARO: Was there any development in  
19 the record of what she - - - she says she looked both ways,  
20 and let's say we agree that that testimony is not  
21 contradicted, but there's still a question that your  
22 adversary raised about what she could see when she looked  
23 both ways.

24 He referred to it as sight lines, and I think - -  
25 - I may have it wrong, but he can correct me - - - is that

1 even if she looked one way, there wasn't much for her to  
2 see because there were a bunch of cars right next to her  
3 blocking her view of what we now know was coming in the  
4 other direction and not stopping, and maybe not stopping  
5 because they couldn't even see the lights. Was any of that  
6 developed as part of the summary judgment record?

7 MS. BRENNAN: Absolutely, Your Honor. So what  
8 was established was that she pulled, purposely, into a  
9 nonoccupied lane, which was the left-hand turn lane, so  
10 that she could see the traffic and be seen.

11 JUDGE CANNATARO: But weren't there cars next to  
12 her?

13 MS. BRENNAN: There were cars in the lanes to the  
14 right. However, she has never testified that her view was  
15 obstructed, and there's nothing that contradicts that.

16 JUDGE HALLIGAN: She testified that it wasn't  
17 obstructed, that it was clear? Are those - - -

18 MS. BRENNAN: She said her - - - she said her  
19 view was clear, and she believed, at the point that she  
20 went through the intersection, that all lanes of traffic  
21 had stopped.

22 JUDGE HALLIGAN: So her view to - - - through the  
23 lanes to her - - - I think it was to her right, yes, still  
24 allowed her to see who was coming down - - - I think it was  
25 Turk Hill Road, if I'm remembering - - - who was coming

1 down the road. She testified to that exactly?

2 MS. BRENNAN: I don't know if it was those exact  
3 words, but essentially, that she was able, from her  
4 position in the nonoccupied lane at the front of that - - -

5 JUDGE RIVERA: The left-turn lane, yeah. Okay.

6 MS. BRENNAN: Yes, the left-turn lane to see to  
7 her right to check the - - -

8 JUDGE RIVERA: Okay. So she saw the defendant's  
9 car?

10 MS. BRENNAN: She did not see the defendant's  
11 car.

12 JUDGE RIVERA: So how did - - - I don't  
13 understand that.

14 JUDGE CANNATARO: How does that happen?

15 JUDGE RIVERA: How can that be?

16 MS. BRENNAN: She believed that she had cleared  
17 it. She did not. But this would be what is referred to in  
18 the case law as a momentary judgment lapse, and that is a  
19 negligence standard.

20 JUDGE RIVERA: Isn't - - - well, doesn't that  
21 question - - - isn't it really the issue whether or not  
22 that question goes to the jury, whether or not for the jury  
23 to decide, well, that was a momentary judgment lapse  
24 versus, oh, no, that was really reckless?

25 MS. BRENNAN: Your Honor, I think the claimed

1 issues of fact need to be discussed in relation to the  
2 reckless disregard standard - - -

3 JUDGE RIVERA: Right.

4 MS. BRENNAN: - - - in the balancing test - -

5 JUDGE RIVERA: Right.

6 MS. BRENNAN: - - - and here, the reckless  
7 disregard standard is an incredibly high bar. It requires  
8 - - -

9 JUDGE RIVERA: Well, let me ask you this. If the  
10 record was such that you would concede that - - - a driver  
11 positioned exactly where she was before she, then, went  
12 into the intersection looking to the right, because that's  
13 what we're most concerned about in this moment, had a  
14 blocked sight lane, you concede that there, you would not  
15 be able to get a summary judgment motion granted?

16 MS. BRENNAN: No, Your Honor. There is actually  
17 several cases that - - - at the appellate level - - -

18 JUDGE RIVERA: From this court?

19 MS. BRENNAN: Well, so I do not recall at this  
20 moment - - -

21 JUDGE RIVERA: Okay. Fair.

22 MS. BRENNAN: - - - a decision that's right on  
23 point with respect to this court, but I do know that there  
24 are many Appellate Division-level cases that - - -

25 JUDGE RIVERA: That you can pull out - - - under

1 the statute, you can pull out even if you can't see if a  
2 car is coming and they can't - - - and they can't see you?

3 MS. BRENNAN: There is an instructive case at the  
4 Fourth Department, Nikolov v. Town of Cheektowaga. The  
5 officer, even assuming he experienced a short-term  
6 reduction in visibility of the intersection where the  
7 collision occurred, such factor would not constitute  
8 reckless disregard for the safety of others under the  
9 circumstances of the case.

10 JUDGE CANNATARO: And was that a case involving a  
11 car that actually turned out to be proceeding through an  
12 intersection?

13 MS. BRENNAN: It was. It was a case involving an  
14 officer who proceeded through a red light.

15 JUDGE CANNATARO: No, I'm talking about the other  
16 - - -

17 MS. BRENNAN: I'm sorry.

18 JUDGE CANNATARO: Is this a car that has a green  
19 light that's coming through an intersection?

20 MS. BRENNAN: Yes, that's correct.

21 JUDGE CANNATARO: And this officer failed to  
22 perceive it?

23 MS. BRENNAN: That's correct. Apparently, it  
24 wasn't just failure to perceive. That there was a question  
25 of fact about visibility, and - - -



1 JUDGE RIVERA: Well, how was there a summary  
2 judgment granted if there's a question of fact?

3 MS. BRENNAN: That's essentially why I wanted to  
4 get into the reckless disregard standard. It is a high  
5 bar, like I said, and it's purposely a heightened standard.  
6 It's grounded in the legislature's recognition that the  
7 possibility of incurring civil liability for what amounts  
8 to a mere failure of judgment could deter emergency  
9 personnel from acting decisively and taking calculated  
10 risks.

11 JUDGE SINGAS: Well, what are we to do about the  
12 violation of the police department policy that says you  
13 have to turn on your siren when going through - - - you  
14 know, in an emergency operation? Where does that fall in  
15 our analysis?

16 MS. BRENNAN: Your Honor, as an initial matter,  
17 the sheriff's general order on emergency response, the  
18 court does not even have a copy of it in front of it. It's  
19 not in the record. But it imposes a higher burden than VTL  
20 1104. For example, the general order requires lights and  
21 sirens for an emergency response, but VTL 1104 does not,  
22 and this - - -

23 JUDGE CANNATARO: But couldn't it be some  
24 evidence of recklessness?

25 MS. BRENNAN: Well, this court had stated, in

1 Gilson v. Metropolitan Opera, that an internal policy that  
2 goes beyond the standard of ordinary care cannot serve as a  
3 basis for imposing liability.

4 JUDGE RIVERA: Yeah, but whether or not - - -

5 JUDGE SINGAS: We're not saying it's the - - -

6 JUDGE RIVERA: - - - sirens and lights should - -  
7 - should be turned on - - - I mean, these are highly fact-  
8 specific cases. Doesn't it depend on the circumstances?  
9 Even the - - - what you read from that case from - - - the  
10 other case from the Fourth Department said, under the  
11 circumstances, so there must be some other circumstances by  
12 which to measure whether or not putting on lights or the  
13 timing of when you put on lights and whether you do the fog  
14 horn or some other horn or no horn is relevant.

15 MS. BRENNAN: Your Honor, you're right. The  
16 reckless disregard analysis requires a weighing of the  
17 precautionary measures that were taken by the officer to  
18 avoid harm to the public against the officer's duty to  
19 respond. Here, Dep. Fong was duty-bound to respond quickly  
20 to a motor vehicle accident with heavy damage - - -

21 JUDGE RIVERA: Yeah, but it sounds like the only  
22 thing that's undisputed is that she did stop. That sounds  
23 like it's it. Unless there's something else that you say  
24 is undisputed that she did to take into consideration  
25 public safety going through that red light.



1 MS. BRENNAN: Your Honor - - -

2 JUDGE RIVERA: I mean, is there something else  
3 that's - - -

4 MS. BRENNAN: Yes.

5 JUDGE RIVERA: - - - undisputed? I'm not talking  
6 about - - -

7 MS. BRENNAN: Dep. - - -

8 JUDGE RIVERA: - - - stuff they dispute.

9 MS. BRENNAN: Dep. Fong observed the red light.

10 JUDGE RIVERA: Yeah, yeah.

11 MS. BRENNAN: She was paying attention to the  
12 road.

13 JUDGE RIVERA: Yeah, yeah.

14 MS. BRENNAN: In order to see and be seen, she  
15 testified that she pulled into the nonoccupied lane.

16 JUDGE RIVERA: Yes.

17 MS. BRENNAN: She turned on her emergency  
18 operation lights.

19 JUDGE RIVERA: Okay.

20 MS. BRENNAN: She looked in all directions. When  
21 she believed - - -

22 JUDGE RIVERA: Okay. But what's the one that's  
23 undisputed?

24 MS. BRENNAN: The - - -

25 JUDGE RIVERA: As far as I can tell is that she

1 stopped.

2 MS. BRENNAN: Your Honor, the Plaintiff has also  
3 conceded here today - - -

4 JUDGE RIVERA: Yes.

5 MS. BRENNAN: - - - that the lights were turned  
6 on before - - -

7 JUDGE RIVERA: Yes, but she testified it was  
8 quite some period before, not in the moment she went  
9 through. That might make a difference.

10 MS. BRENNAN: But there's nothing disputing that  
11 her lights weren't on at the point she was stopped.  
12 Everyone who testified under oath said that at the point  
13 she was stopped at the light, her lights were on, so at a  
14 minimum, we know that she had her lights on. And in fact,  
15 what is also undisputed is that traffic did see her and  
16 traffic did yield to her, so we know - - -

17 JUDGE CANNATARO: Did she sound her air horn  
18 prior to entering the intersection?

19 MS. BRENNAN: She says she believes she did, but  
20 the other testimony of the officers was that they could not  
21 recall hearing her air horn.

22 JUDGE CANNATARO: So - - -

23 JUDGE HALLIGAN: So I take it you're not asking  
24 us to rely on that in making this determination, the air  
25 horn?

1 MS. BRENNAN: That's correct, Your Honor.

2 JUDGE HALLIGAN: Because that's clearly  
3 contested, right?

4 MS. BRENNAN: We don't need to - - - our position  
5 is it - - - this is a balancing test. There are seven  
6 factors that are usually analyzed.

7 JUDGE RIVERA: But if she stops - - - let's go  
8 with it. She's put on her lights before she actually  
9 starts going through. Let's go with that one for a moment.  
10 But if she cannot see - - - let's believe - - - she looked  
11 left, she looked right, but she really can't see. Her  
12 sight line is blocked. Why isn't that, then, some - - - a  
13 question that goes to the jury, whether or not going  
14 through, under those circumstances when you cannot see to  
15 your right - - -

16 MS. BRENNAN: Your Honor, it's a weigh - - -

17 JUDGE RIVERA: - - - is reckless?

18 MS. BRENNAN: Your Honor, it's a weighing of  
19 factors, and when you look at what she did, she was  
20 purposeful in - - - in her approach to the intersection  
21 because she was aware that it would cause harm if she  
22 didn't get this right.

23 JUDGE RIVERA: What would go to a jury? Let me  
24 try it the other way.

25 MS. BRENNAN: Sure.



1 JUDGE RIVERA: From your perspective, what - - -  
2 because your view, of course, is that very few cases are  
3 ever going to go to a jury. What would go to a jury?

4 MS. BRENNAN: Well, for example, this Campbell  
5 case that was before - - -

6 JUDGE RIVERA: Yes.

7 MS. BRENNAN: - - - the Court of Appeals in '94 -  
8 - -

9 JUDGE RIVERA: Yes.

10 MS. BRENNAN: - - - it was evaluating a jury  
11 verdict, and in that case, the emergency driver, which was  
12 a fire truck, went through a red light at ten to fifteen  
13 miles per hour - - -

14 JUDGE HALLIGAN: Would you agree if it was  
15 contested that she had her lights on when she stopped that  
16 it should go to the jury? You told us just now that  
17 there's no disagreement that by the time she stopped, her  
18 lights were on, right? If that was contested and someone  
19 else had testified that she did not have her lights on,  
20 would that go to the jury?

21 MS. BRENNAN: It is our position that it still is  
22 not enough because the precautionary measures she took were  
23 meaningful enough - - -

24 JUDGE HALLIGAN: Well, wait a minute. If she  
25 didn't have her lights on, what would the precautionary

1 measure be? Just that she stopped?

2 MS. BRENNAN: And she looked in all directions.

3 JUDGE RIVERA: But that's disputed.

4 MS. BRENNAN: It - - - Your Honor, respectfully -  
5 - -

6 JUDGE RIVERA: It's her own testimony. A jury  
7 could reject that.

8 MS. BRENNAN: But the - - - this isn't - - - the  
9 Plaintiff didn't raise credibility until Your Honor first  
10 mentioned the word today. This credibility has never been  
11 at issue in this case.

12 CHIEF JUDGE WILSON: So suppose she didn't stop,  
13 and she went through the intersection with her lights off  
14 at forty miles an hour. Does that get you to the standard?

15 MS. BRENNAN: Your Honor, if she didn't have her  
16 lights on and went through?

17 CHIEF JUDGE WILSON: Exactly. At forty - - -  
18 she's blasting through at forty miles an hour, doesn't look  
19 either way, has - - - doesn't have her lights on, doesn't  
20 stop.

21 MS. BRENNAN: From my review of the case law,  
22 that may be an issue. That - - -

23 JUDGE CANNATARO: Well, that's a clear violation  
24 of 1104. That completely contradicts the language. It  
25 says, at the very least, you have to slow down.

1 MS. BRENNAN: Slow - - -

2 JUDGE CANNATARO: I understand your argument to  
3 be - - - and I don't want to mischaracterize it, but as  
4 long as you slow down or, in your case, stop before  
5 proceeding into the intersection, you're not reckless. Is  
6 - - - or is it - - - am I overstating your argument?

7 MS. BRENNAN: No, that - - - that's not the case,  
8 Your Honor. We have to weigh all of the factors. There  
9 are more factors that we have yet to discuss today and that  
10 the Fourth Department and the trial court addressed. It is  
11 the nature of the underlying call. The Plaintiffs agree -  
12 - -

13 JUDGE RIVERA: I thought she didn't know.

14 MS. BRENNAN: Oh, no, Your Honor, she very much  
15 knew that it was a - - -

16 JUDGE RIVERA: What - - - what was it?

17 MS. BRENNAN: It was a - - -

18 JUDGE RIVERA: What was she responding to?

19 MS. BRENNAN: It was a motor vehicle accident  
20 with heavy damage and unknown injuries, and so it was  
21 incumbent upon her - - -

22 JUDGE RIVERA: She knew what about that? Did she  
23 know it was over and they were going to direct traffic the  
24 way, apparently, other members of the team thought that  
25 they were going to do?

1 MS. BRENNAN: She received the call that they  
2 needed - - - that the sheriff's department needed a  
3 response, and so she and her co-deputies all called in that  
4 they were going to respond.

5 Here, there are other factors that we have yet to  
6 discuss. The roads were dry. There is no evidence that  
7 there were any road defects or obstructions. With respect  
8 to the speed of the vehicle, there was no evidence that she  
9 was speeding or that speed was a factor in the accident.

10 The time of day. It was not nighttime. It was  
11 not completely dark. It was dusk. There was still light  
12 in the sky. The weather was clear. There was no  
13 precipitation, and there was good visibility. There are -  
14 - -

15 JUDGE RIVERA: Well, but there is a dispute  
16 whether or not there's a good visibility, but she couldn't  
17 see. When she looked to the right, if she looked to the  
18 right, she couldn't see the oncoming traffic.

19 MS. BRENNAN: Your Honor, what is undisputed is  
20 her testimony under oath that she looked, and she didn't  
21 see it, but just because she looked and didn't see it, that  
22 is not reckless conduct. She says she looked, and she must  
23 have made a lapse in judgment - - -

24 JUDGE RIVERA: So - - - on a summary judgment,  
25 the court must accept the testimony of the officer, in this

1 case, the sheriff - - - deputy sheriff, I think, who says,  
2 yeah, I looked?

3 MS. BRENNAN: Unless there's - - -

4 JUDGE RIVERA: You just accept it?

5 MS. BRENNAN: Yes, Your Honor. Unless there's  
6 record evidence that establishes that it's controverted, I  
7 believe so.

8 JUDGE RIVERA: Even if other parts of the  
9 testimony are put in question by other testimony?

10 MS. BRENNAN: I don't believe other parts of her  
11 testimony were actually controverted. I believe it was not  
12 a - - -

13 JUDGE RIVERA: I thought there was a question  
14 about when she actually put on the lights.

15 MS. BRENNAN: I believe it was equivocal. She  
16 quite sure. She could - - - she said she believed and she  
17 recalled that - - -

18 JUDGE RIVERA: Does she believe she looked left  
19 and right?

20 MS. BRENNAN: No, not with respect to that part,  
21 Your Honor. It was with respect to exactly the timing when  
22 she put on her lights - - -

23 JUDGE RIVERA: Okay.

24 MS. BRENNAN: - - - and when she might have  
25 sounded her air horn.

1 CHIEF JUDGE WILSON: Thank you.

2 MS. BRENNAN: Thank you very much. If I may just  
3 make one final statement?

4 CHIEF JUDGE WILSON: Sure.

5 MS. BRENNAN: Thank you. Taking the record as a  
6 whole, the balancing test for reckless disregard weighs in  
7 favor of Dep. Fong. It is respectfully requested that this  
8 court uphold and affirm the lower court's order. It is  
9 respectfully submitted that the court's failure to do so  
10 may deter emergency personnel from acting decisively and  
11 taking calculated risks to save life or property. Thank  
12 you for your time.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. SCHWARZ: I just wanted to clarify two points  
15 of fact that were stated. The first one was that there was  
16 some equivocal testimony about whether she had her siren on  
17 or whether they could recall it. On page 118 of the  
18 record, this is Dep. Palermo's testimony, and he's asked  
19 the question, at the time that Dep. Fong was proceeding  
20 through the intersection, did she have emergency sirens on?  
21 Answer, no. Question, at the time - - -

22 JUDGE RIVERA: I'm sorry. Proceeding through?  
23 Proceeding through?

24 MR. SCHWARZ: Yes. At the - - -

25 JUDGE RIVERA: Thank you.



1 MR. SCHWARZ: At the time Dep. Fong was  
2 proceeding through the intersection, did she utilize her  
3 air horn? Answer, no.

4 The other testimony I'd like to point out to the  
5 court is the testimony of Sgt. Mackenzie, who investigated  
6 the accident. He was asked the question, during your  
7 investigation, did you determine at any point that Dep.  
8 Fong's view of the Plaintiff's vehicle was obstructed in  
9 any way? He answered, I believe that both of their views  
10 could have been obstructed. They both were dealing with  
11 the southbound - - -

12 JUDGE TROUTMAN: Isn't that speculation?

13 MR. SCHWARZ: Excuse me?

14 JUDGE TROUTMAN: I - - - he believed. Isn't that  
15 speculation?

16 MR. SCHWARZ: Sure. But it's based on the  
17 investigation. It's the investigation of the - - -

18 JUDGE HALLIGAN: Do you know what page - - -

19 MR. SCHWARZ: - - - of the Monroe County - - -

20 JUDGE HALLIGAN: Do you know what page of the  
21 record that's from?

22 MR. SCHWARZ: Yes. That's on page - - - 149,  
23 transcript page 91.

24 JUDGE HALLIGAN: Thank you.

25 MR. SCHWARZ: And it should be pointed out that



1 Sgt. Mackenzie found that she was contributory to the  
2 accident because she failed to put on her siren and her air  
3 horn in an - - -

4 JUDGE TROUTMAN: But does contributory rise to  
5 the level of reckless?

6 MR. SCHWARZ: No, but it's another factor. And  
7 again, this court held in both Saarinen and in - - - in  
8 Criscione that violation of departmental policy would be an  
9 important but not dispositive factor. Here, she clearly  
10 violated the policy, and the policy is designed to warn the  
11 public that an officer may be running through a red light,  
12 and - - -

13 JUDGE TROUTMAN: But what about Gary Granath, who  
14 said that there were other - - - there were three - - -  
15 three of the corners at the intersection were blind, but  
16 one had visibility. So not all the corners were - - - that  
17 at least one corner had visibility.

18 MR. SCHWARZ: Yes. The one that - - - in other  
19 words, she pulled to her left and into the left-turn-only  
20 lane, so the car coming from her left had clear visibility  
21 because there was nothing blocking that. But everything  
22 else - - - everything coming from her right was blocked not  
23 only by the two lines of cars, but also by a car that was  
24 going to be turning left into the - - - into the lane next  
25 to her, so she had two lines of cars plus a car that was

1 stopped. And of course, the Plaintiff was coming to the  
2 right of that car that was stopped and had no ability to  
3 see her.

4 Whether she put her lights on - - - if she had  
5 had her lights on when she left, when she got the call and  
6 the other officers had their lights on and the other  
7 officers had their sirens, this accident never would have  
8 happened. So departmental policy requiring them, when they  
9 go into emergency mode, to have lights and siren on has a  
10 purpose, and that's to notify the public of incidents that  
11 might happen like this. And this officer failed to do  
12 that. Her two other officers failed to do it because they  
13 had no intention - - -

14 JUDGE CANNATARO: Counsel, can I just ask you, is  
15 the departmental policy that when you're in emergency  
16 operation, you must have lights and sirens on at all times?

17 MR. SCHWARZ: Yes, and that is what the testimony  
18 of all three deputies plus Sgt. Mackenzie said. Yes. If  
19 they go into emergency mode - - - they're supposed to  
20 notify the dispatcher and put their lights and siren on in  
21 an emergency mode. And again - - -

22 JUDGE CANNATARO: Is your adversary right? We -  
23 - - we don't have that, though, right?

24 MR. SCHWARZ: Oh, it's in the testimony.

25 JUDGE CANNATARO: But is it in the record?

1 JUDGE HALLIGAN: Well, we don't have the - - -

2 MR. SCHWARZ: Yes, the testimony in the record.

3 Yes, absolutely.

4 JUDGE CANNATARO: No, no, no. Is the - - -

5 JUDGE RIVERA: But the written policy.

6 JUDGE CANNATARO: Is the written policy in the  
7 record?

8 MR. SCHWARZ: No, but the testimony from all  
9 three deputies is in the record about what the policy is.  
10 They all admit that that's their policy.

11 JUDGE RIVERA: Did defendant, Fong, testify about  
12 the policy - - -

13 MR. SCHWARZ: She - - -

14 JUDGE RIVERA: - - - or dispute that that was the  
15 policy?

16 MR. SCHWARZ: No. She testified that when in  
17 emergency mode, she's supposed to have her lights and siren  
18 on, and she testified she did, which, of course, is the  
19 question of fact.

20 JUDGE RIVERA: Okay.

21 CHIEF JUDGE WILSON: And how does the  
22 notification requirement play into this, if at all?

23 MR. SCHWARZ: It's only a piece of it, but the  
24 point is that none of them considered this to be an  
25 emergency in order - - -

1 CHIEF JUDGE WILSON: But that goes to whether  
2 this is an emergency or not, and I thought you already said  
3 we're dealing with this as if it's an emergency.

4 MR. SCHWARZ: Right. I admit that, Your Honor,  
5 but what I'm saying is that this court in Campbell said  
6 that - - - that factors such as what the emergency is, is  
7 something that should be weighed by the court in  
8 determining what risk the - - - the officer took.

9 CHIEF JUDGE WILSON: I'm still struggling with  
10 why the failure to notify dispatch or headquarters that  
11 you're in emergency mode has anything to do with causation  
12 or anything, really, in this case.

13 MR. SCHWARZ: No, the point I raise it for is - -  
14 - is that going through the intersection in emergency mode  
15 was an afterthought for this deputy. In other words, she  
16 had no intention of doing that, and she made a split-second  
17 decision to decide to do that. The other two deputies  
18 never decided to do that.

19 So that's the only thing it's relevant to is - -  
20 - is not - - - is whether she had an intention of being in  
21 an emergency mode for the entire time since she got the  
22 call or if it just struck her that she was going to go  
23 through that red light, and I think that's a question of  
24 fact that the jury should be able to consider as to whether  
25 this was a - - -

1 CHIEF JUDGE WILSON: That's really going to  
2 whether - - - that's - - - I think, now, you're then  
3 disputing whether the - - - she's actually - - - should be  
4 treated as an emergency mode.

5 MR. SCHWARZ: No, I - - - again, I think that - -  
6 - I mean, I don't agree with the case law, but the case law  
7 is very clear that - - - that the benefit of the doubt goes  
8 to the deputy that the recklessness standard is always  
9 going to apply if they have any intention of being in  
10 emergency mode.

11 But as I said, the Campbell case talks about  
12 overreaction, and that is exactly what happened here. In  
13 other words, that is something that can be considered by  
14 the court. Even if she's in emergency mode, whether the  
15 risk she took is a reasonable risk based upon what she's  
16 going to respond to is something that should be considered,  
17 and that - - - that should be considered by the jury in  
18 this case to determine whether she was reckless along with  
19 all of the other things that we've talked about.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. SCHWARZ: Thank you, Your Honor.

22 (Court is adjourned)

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

I, Donna Gould, certify that the foregoing transcript of proceedings in the Court of Appeals of Granath v. Monroe County, No. 17 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Donna Gould*

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