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COURT OF APPEALS

STATE OF NEW YORK

DELEON,

Respondent,

-against-

No. 79

NEW YORK CITY SANITATION DEPARTMENT,

Appellant.

Judicial Institute
84 North Broadway
White Plains, New York 10603
April 29, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 79.

2 Counselor, would you like any rebuttal
3 time?

4 MS. FREEDMAN: Yes, please, two minutes
5 rebuttal. Thank you, Your Honors.

6 CHIEF JUDGE LIPPMAN: Go ahead, counsel;
7 you're on.

8 MS. FREEDMAN: Good afternoon. My name is
9 Elizabeth Freedman, and I am appearing for the
10 defendants-respondents in this matter.

11 Your Honor, the court below incorrectly
12 found that the City's rules did not apply the subject
13 accident due - - -

14 CHIEF JUDGE LIPPMAN: Why - - - why - - -
15 why reckless disregard, when later on it became clear
16 that there was a change in - - - in the standard?
17 Why do you say at this point, it wasn't ordinary
18 negligence?

19 MS. FREEDMAN: Your Honor, there certainly
20 wasn't a standard. At the time of this accident in
21 2010, the rule - - - the relevant City Rule - - -
22 Section 4-02, had been amended as of 2007 to
23 expressly apply the reckless disregard standard that
24 was in Vehicle and Traffic Law, Section 1103(b). The
25 Rule was amended at that time to expressly

1 incorporate that provision that was under (d) (1) (iv)
2 of the City's Rules Section 4-02, and that did not
3 change in the 2000 - - - 2013 amendment.

4 JUDGE ABDUS-SALAAM: Counsel, did part - -
5 -

6 MS. FREEDMAN: That rule stayed the same.

7 JUDGE ABDUS-SALAAM: Did subdivision (iii)
8 have any kind of standard or not?

9 MS. FREEDMAN: No, Your Honor.

10 JUDGE ABDUS-SALAAM: So - - -

11 MS. FREEDMAN: Subdivision (iii) had no
12 standard whatsoever.

13 JUDGE ABDUS-SALAAM: So there would be no
14 conflict between (iii) and - - - subdivision (iii)
15 and (iv) - - -

16 MS. FREEDMAN: Absolutely.

17 JUDGE ABDUS-SALAAM: - - - if (iv) had a
18 standard and (iii) did not.

19 MS. FREEDMAN: That's correct, Your Honor,
20 absolutely. The standard was set in subdivision
21 (iv), at least as of 2007, maybe even before, but at
22 least as of 2007, when it was expressly made - - -
23 when it referenced Section 1103.

24 JUDGE RIVERA: So - - - so when you say - -
25 - because that's the dissent's position that (iii)

1 has no standard. What - - - what does that mean in
2 practice - - -

3 MS. FREEDMAN: Subdivision - - -

4 JUDGE RIVERA: - - - what does that really
5 mean?

6 MS. FREEDMAN: Subdivision (iii) simply
7 applies to - - - is titled - - - as it existed at the
8 time of this accident.

9 JUDGE RIVERA: Yes, yes, yes.

10 MS. FREEDMAN: "Snowplows and sandspreaders
11 and sweepers" - - -

12 JUDGE RIVERA: Yes.

13 MS. FREEDMAN: - - - "and refuse trucks" -
14 - -

15 JUDGE RIVERA: Yes.

16 MS. FREEDMAN: - - - talking about the
17 direction of travel - - -

18 JUDGE RIVERA: Yes.

19 MS. FREEDMAN: - - - this specific
20 provision specifically deals with directions of
21 travel and turns, subject - - - in order to complete
22 their work - - - subject to superior's directions and
23 subject to a police officer's - - -

24 CHIEF JUDGE LIPPMAN: Why is - - - why is -
25 - -

1 JUDGE RIVERA: I understand. But why does
2 that mean there's no standard? In Kabir, didn't we
3 say the default is - - -

4 MS. FREEDMAN: No, Your Honor.

5 JUDGE RIVERA: - - - ordinary negligence?

6 MS. FREEDMAN: There's no standard, because
7 in the very next provision - - -

8 JUDGE RIVERA: Uh-huh.

9 MS. FREEDMAN: - - - the standard states
10 that all highway workers are subject to a reckless
11 disregard standard.

12 JUDGE RIVERA: Understood. But then what's
13 the point of (iii)?

14 MS. FREEDMAN: Well, because those - - -

15 JUDGE RIVERA: What - - - what - - - what
16 conduct are you covering in (iii)?

17 MS. FREEDMAN: Directions and turns. And
18 it's basic - - -

19 JUDGE RIVERA: And isn't that what people
20 do under (iv) as highway workers?

21 MS. FREEDMAN: It's an absolute - - -
22 essentially, in that provision, it's an absolute
23 privilege. It simply dealt with those particular
24 directions - - - with those particular actions of a
25 vehicle under - - -

1 JUDGE RIVERA: But I - - - I'm not
2 understanding; what is the conduct in (iv) that you
3 say is different from the conduct in (iii)? Because
4 that seems to be the core of your argument.

5 MS. FREEDMAN: Yes. In subdivision (iv),
6 it would apply to any action. It would apply to any
7 action taken by a highway worker and any action - - -

8 JUDGE RIVERA: Whether it's - - - right,
9 the sanitation worker - - -

10 MS. FREEDMAN: - - - subject to the
11 reckless disregard standard.

12 JUDGE RIVERA: The sweeper falling one - -
13 - under that category.

14 MS. FREEDMAN: Exactly, the sweeper would
15 fall under that category. Any - - -

16 CHIEF JUDGE LIPPMAN: Counsel, why - - -
17 why is there a need for the 2013 amendment?

18 MS. FREEDMAN: The - - -

19 CHIEF JUDGE LIPPMAN: What did that do?

20 MS. FREEDMAN: The 2013 amendment, as to
21 subdivision (iii), it deleted that provision, and
22 basically, the provision was pretty much deleted, and
23 it was changed a little bit as to refuse trucks, but
24 - - -

25 CHIEF JUDGE LIPPMAN: What do you think

1 they were trying to accomplish by the 2013 amendment?

2 MS. FREEDMAN: According to the statement
3 of basis and purpose in the explanatory note, the
4 note says that now the - - - everybody - - - all the
5 highway workers and these particular categories of
6 workers would be subject to the recklessness standard
7 in 1103. It also referred to eliminating a
8 redundancy, but it was - - -

9 JUDGE FAHEY: Well, it - - - it did say,
10 too, that it wanted to clarify it, didn't it?

11 MS. FREEDMAN: Well, that was in the 20 - -
12 -

13 JUDGE FAHEY: I don't know if it clarified,
14 but - - -

15 MS. FREEDMAN: That was in actually in the
16 2007 statement of basis - - -

17 JUDGE FAHEY: Yeah - - -

18 MS. FREEDMAN: - - - and purpose, to
19 clarify - - -

20 JUDGE FAHEY: - - - right.

21 MS. FREEDMAN: - - - that Section 1103(b)
22 applies.

23 JUDGE RIVERA: What's the redun - - - what
24 does - - -

25 MS. FREEDMAN: That wasn't changed in the

1 2013 amendment.

2 JUDGE RIVERA: What does that word
3 redundancy refer to?

4 MS. FREEDMAN: Well, it probably meant that
5 you don't need a separate provision relating to
6 refuse trucks and sanitation workers and snowplows
7 and street sweepers if you've already covered them in
8 the subdivision (iv).

9 JUDGE RIVERA: So you're - - - you're - - -
10 you're saying that the - - - right. But this is my
11 problem. You're saying that under (iii), there's no
12 standard that applies - - -

13 MS. FREEDMAN: That's right.

14 JUDGE RIVERA: - - - and then they decided
15 we're going to get rid of the redundancy, the
16 redundancy being that there's two provisions that ap
17 - - - that apply to the same category, these
18 sweepers, but your argument is that yes, it's
19 applying to the same - - - let's just say the same
20 vehicles for one moment - - - the operators of those
21 vehicles, but it's a different - - - well, one has no
22 standard and one has a standard. So I don't really
23 understand the redundancy part of that.

24 MS. FREEDMAN: Well, the - - -

25 JUDGE RIVERA: What's redundant in that?

1 It's actually very different.

2 MS. FREEDMAN: Because they both apply to
3 different - - -

4 JUDGE RIVERA: No, but it's - - - but it's
5 applying - - - in your argument - - -

6 MS. FREEDMAN: Yes.

7 JUDGE RIVERA: - - - no standard here and a
8 standard here, so that's not a redundancy.

9 MS. FREEDMAN: No, and - - - and that's
10 correct. And pointing out really isn't a redundancy,
11 and basically pointing out that the two provisions -
12 - - it doesn't make - - - one doesn't make the other
13 superfluous. That really they coexisted from 207 - -
14 - from 2007 to 2013 - - -

15 JUDGE RIVERA: So - - - so let me ask you
16 why - - -

17 MS. FREEDMAN: - - - and it - - -

18 JUDGE RIVERA: - - - I'm still not
19 comfortable with this argument - - - I don't fully
20 appreciate or understand your argument, and maybe you
21 can help me here - - - on (iii), that there's just no
22 standard, taking into consideration our determination
23 in Kabir, but just looking at the language that
24 existed under the older version, which is what
25 applies in this case - - -

1 MS. FREEDMAN: Yes, the older version
2 applies.

3 JUDGE RIVERA: - - - there - - - there's at
4 least one other provision under those exceptions that
5 says that the category to which it applies, which I
6 believe is traffic vehicles, is not subject to the
7 rules. So if they really meant there's no standard,
8 and you're not subject to the rules, if they've used
9 that language in one provision, right before (iii),
10 why wouldn't they use the exact same language, if
11 they mean what you suggest they mean?

12 MS. FREEDMAN: Why wouldn't they use the
13 language in - - -

14 JUDGE RIVERA: Yes, if - - - if they really
15 mean you're not subject to any standard, and - - -
16 and right before this, I believe it's (ii), they say
17 this category is not subject to the rules, which
18 sounds to me the functional equivalent of saying
19 there's no standard. You're just not subject to
20 these traffic rules.

21 MS. FREEDMAN: Well, I think that - - -

22 JUDGE RIVERA: Why would they not repeat
23 that language?

24 MS. FREEDMAN: Because I think that's what
25 happened in 2013. In fact, the amendments in 2013,

1 taking away that provision relating to the turns and
2 directions of travel, then became incorporated into
3 the - - -

4 JUDGE RIVERA: No, I don't think 2013
5 changed (ii), which is the one I'm talking about.

6 MS. FREEDMAN: Roman - - -

7 JUDGE RIVERA: I don't think so.

8 MS. FREEDMAN: Romanette - - -

9 JUDGE RIVERA: What I'm saying is another
10 provision in the exceptions uses language that says
11 the - - - the rules will not apply. The rules of the
12 road will not apply. Right? It's - - - it sounds to
13 me like a blanket exception.

14 MS. FREEDMAN: The rule - - -

15 JUDGE RIVERA: Which sounds to me exactly
16 like what you're arguing that in (iii), these
17 sweepers and the other categories - - - we're just
18 talking about the sweepers right now - - -

19 MS. FREEDMAN: We're talking about - - -

20 JUDGE RIVERA: - - - are not subject to any
21 standard.

22 MS. FREEDMAN: We're talking about
23 d(1) (iii) (A), is that - - -

24 JUDGE RIVERA: Right, exact - - -

25 MS. FREEDMAN: Okay.

1 JUDGE RIVERA: So I'm - - - I'm trying to
2 understand how in (ii), you use what sounds to me
3 like language that's basically saying - - -

4 MS. FREEDMAN: (iv).

5 JUDGE RIVERA: - - - no standard applies -
6 - -

7 MS. FREEDMAN: Ab - - -

8 JUDGE RIVERA: - - - and in (iii), you're
9 not using that language, and you want us to read into
10 (iii), oh, they really meant no standard applies.

11 MS. FREEDMAN: And you're talking about sub
12 (iv) - - - subdivision (iv)?

13 JUDGE RIVERA: No, subdivision (iv) is the
14 recklessness standard.

15 MS. FREEDMAN: That is the recklessness
16 standard.

17 JUDGE RIVERA: I'm not talking about the
18 subdivision (iv).

19 MS. FREEDMAN: You're talking about the
20 subdivision (ii) - - -

21 JUDGE RIVERA: Correct.

22 MS. FREEDMAN: - - - in the - - - 4-02.

23 JUDGE RIVERA: But I'm - - - because
24 obviously (iii) and (iv) have different language;
25 (iv), I - - - is very clear that it is applying a

1 reckless standard.

2 MS. FREEDMAN: Right.

3 JUDGE RIVERA: And your argument is (iii)
4 applies - - - which is the dissent's argument below -
5 - - absolutely no standard.

6 MS. FREEDMAN: Right, and there's nothing
7 in (ii) - - -

8 JUDGE RIVERA: Which I think, in light of
9 Kabir, is not so clear about that. But I'm trying to
10 understand it in the structure of the statute itself.
11 If (ii) says this category is not subject to any - -
12 -

13 MS. FREEDMAN: Shall not apply to - - -
14 right, of designate - - - right.

15 JUDGE RIVERA: - - - rules, why would you
16 not use that language? Or are you suggesting that
17 (ii) means something else?

18 MS. FREEDMAN: Well, subdivision (ii) is
19 talking about parking, control vehicle - - - okay,
20 and tow trucks, "while actually engaged necessary to
21 perform their duties". There's no particular
22 standard set forth in that provision either. And
23 it's just - - -

24 JUDGE RIVERA: Well, and that's what I'm
25 saying. If that's the language you've been using,

1 why would you use something different in (iii)?

2 MS. FREEDMAN: Because they're talking
3 about different vehicles. They're talking about
4 particular vehicles doing particular things, and
5 that's basically - - - that was carved out in that
6 provision to - - - for snowplows, sand spreaders,
7 sweepers and refuse trucks, par - - -

8 JUDGE RIVERA: And what about Kabir? How
9 can we harmonize Kabir with your argument?

10 MS. FREEDMAN: Well, Your Honor, I actually
11 would think that the court should look more to Riley
12 v. County of Broome, which is what we were relying on
13 here, and we certainly relied on it below. And the
14 similar argument was made in Riley v. County of
15 Broome, and this court rejected the contention that
16 the narrower provision, where the hazard vehicles are
17 exempt only from stopping, standing, and parking
18 regulations, of Section 1202(a) of the Vehicle and
19 Traffic Law, was then somehow carved out from the
20 1103(b) prescription. And in Riley v. County of
21 Broome, this court expressly rejected that reasoning.

22 CHIEF JUDGE LIPPMAN: Okay, counsel.
23 Thanks, counsel.

24 MS. FREEDMAN: Thank you, Your Honor.

25 CHIEF JUDGE LIPPMAN: You'll have your

1 rebuttal time.

2 MS. FREEDMAN: Thank you, Your Honor.

3 CHIEF JUDGE LIPPMAN: Thank you, counsel.

4 MR. SCHER: May it please the court, David
5 Scher for the respondent. Your Honors, the City made
6 an intentional decision not to fully adopt 1103, and
7 made an intentional decision to craft this section 4-
8 02, which is before us today, and we have to assume
9 that they meant what they said when they wrote it.
10 And Your Honor is exactly correct. The problem with
11 the City's position here - - - I would say there are
12 two major problems.

13 The first is this. Under the reading of
14 the statute the City asks you to adopt, subsection
15 (iii) is meaningless. And the City actually concedes
16 as - - - as much in its reply brief.

17 JUDGE ABDUS-SALAAM: Well, if it doesn't
18 have a standard, why is it meaningless, if it can
19 coexist with another subdivision that does have a
20 standard? I'm sure that's not the first time we've
21 ever seen that situation in a statute.

22 MR. SCHER: This is what I would submit,
23 Your Honor, is this. Subdivision (iii) essentially
24 says that sweepers and the other vehicles listed are
25 allowed to make the turns necessary and proceed in

1 directions necessary to perform their work, which
2 probably makes sense, okay; which basically means
3 that the other rules that you and I would be
4 violating in making turns and traveling in - - - in
5 going in the wrong direction, they're not going to be
6 held to that same standard.

7 The problem is, if the City's correct that
8 subdivision (iv) also covers that same - - - those
9 same vehicles, subdivision (iv) says, they don't have
10 to obey any rules at all. So why would you say, the
11 sweeper - - - they can make any turns they want in
12 one subsection, and then in another subsection, say,
13 oh, by the way, they can violate any rule at all.

14 It doesn't make sense, and it does render -
15 - - as the City said in their reply brief at page 4,
16 they called subdivision (iii), as it existed at the
17 time of this accident, "vestigial", which means
18 functionless. And I don't think that we can read a
19 statute and assume that the City intended to draft a
20 subsection that was vestigial.

21 CHIEF JUDGE LIPPMAN: What - - - what
22 happened in 2013? What was that all about?

23 MR. SCHER: In 2013, the City realized that
24 sweepers did not get the benefit of the reckless
25 standard, and they changed it. And we would fully

1 concede that as of April '13 up until today - - -

2 CHIEF JUDGE LIPPMAN: So - - - so does
3 2013, in your view, prove your case, that if they
4 didn't need to do that, why did they need to do the
5 amendment in '13?

6 MR. SCHER: I - - - I think you're right,
7 Your Honor, and I can't imagine, frankly, a stronger
8 piece of evidence of legislative intent, and it
9 frankly goes above and beyond that; I believe it's an
10 admission by the City. When you look at the
11 statement of the basis and purpose for that
12 amendment, and they say that "sweepers will now be
13 subject" - - - will now be subject to the reckless
14 standard, I don't know how else to read that.

15 JUDGE RIVERA: Well, what is the reference
16 for redundancy? What is that referring to?

17 MR. SCHER: I'll be honest with you. I
18 don't understand.

19 JUDGE RIVERA: When we're resolving this
20 redundancy, what is that?

21 MR. SCHER: I don't understand what they
22 meant by that. I think you could read it a couple of
23 different ways, but I think what is impossible to
24 argue about is what "will now be subject to" means.

25 JUDGE STEIN: Well, could they mean that,

1 and now we can lump turns and directions in with what
2 - - - what already was with regard to other conduct?

3 MR. SCHER: Well, if they - - -

4 JUDGE STEIN: So - - - so now - - - the
5 word - - - so the word "now" would mean now,
6 everything that the street sweepers do would be
7 covered under (iv), rather than just everything other
8 than turns and directions.

9 MR. SCHER: I - - - I think that if - - -
10 there were - - - there would have been plenty of ways
11 for the City to express they've always been entitled
12 to (iv) if they had wanted to, and they just didn't
13 do that. I mean, we didn't write this statement of
14 basis and purpose; they did. And I think it's only
15 fair to the City to assume that they meant what they
16 said and they said what they meant.

17 JUDGE ABDUS-SALAAM: But what about your
18 adversary's argument that as of 2007, you know, the -
19 - - the recklessness standard existed for these
20 sweepers - - - these street sweepers? At least as of
21 2007.

22 MR. SCHER: What - - - as - - - as the
23 statute existed from 2007 up to and including the
24 date of the subject accident, based upon our
25 interpretation as adopted by the First Department,

1 sub-category (iv), highway workers, yes, were to
2 entitled to the reckless exemption, and we're not
3 arguing that. But the City, with the construction of
4 the statute, by listing above it - - - in an equal
5 Roman numeral - - - different vehicles, intended to
6 have different standards for each of the vehicles
7 that are listed.

8 And when you read the statute that way - -
9 - the way that we suggest it should be read - - - it
10 just happens to make perfect sense, in other words,
11 that the emergency vehicles, they're very, very
12 clear; they get the privileges of 1104. They get the
13 privilege of reckless.

14 The City knew full well how to express that
15 a particular vehicle should get the recklessness
16 standard. They did it. They did in (i). Why didn't
17 they do it in (iii) if that's what they meant?

18 JUDGE RIVERA: Wait, wait. So let me ask
19 you what I was asking your adversary here, on
20 Romanette - - - Romanette (iii) about her argument
21 that it has - - - it means there's no standard that
22 applies and I'm reading this language in (ii) that
23 strikes me as the functional equivalent of saying
24 there's no standard that applies, but it's not used
25 in (iii).

1 Is your argument - - - well, I know what
2 the AD held and I understand your argument there.
3 But now how - - - how do you harmonize this (ii) and
4 (iii)?

5 MR. SCHER: I - - - you know, I - - - I
6 don't think we have to take a position on exactly
7 what (ii) means. I don't know that it's entirely
8 clear. I - - - but I - - - but I do think that we're
9 in much better shape making our argument with respect
10 to (iii) than we would have been to (ii), simply
11 because (ii), at least there, the City is - - - is -
12 - - is clear that they don't want the rules to apply
13 to them at all.

14 In (iii) - - - and again, this is more
15 evidence of their intent - - - they knew how to say
16 that in (ii), right? That those vehicles, they can
17 disobey all the rules. Then they go to (iii). They
18 list very specific vehicles, and say, they can't
19 break all the rules. What they can do is make the
20 turns and go in the directions necessary to provide
21 the routine street maintenance work.

22 So I do think that (ii) helps to reveal the
23 City knew how to do it, and chose not to do it with
24 respect to sweepers. And by the way, look at the
25 list - - -

1 JUDGE RIVERA: Yeah, but she's arguing no
2 standard applies versus a - - - a negligent standard
3 applies. What's the argument for the negligent
4 standard applying?

5 MR. SCHER: Well, that's the Common Law
6 standard that we have to default to, absent a very
7 specific - - -

8 CHIEF JUDGE LIPPMAN: So when there's no
9 standard, that's the standard?

10 MR. SCHER: I - - - I don't think there's
11 any doubt about that. I think that my adversary
12 would even concede that.

13 JUDGE RIVERA: Is that the way you read
14 Kabir?

15 MR. SCHER: That's exactly how we read
16 Kabir, and that's - - - it even transcends Kabir. We
17 always default to the Common Law standard.

18 JUDGE RIVERA: Well, she - - - she says
19 Riley addresses that.

20 MR. SCHER: Who - - -

21 JUDGE RIVERA: What's - - -

22 MR. SCHER: Riley's an important case, if I
23 may just - - - just for a moment on Riley, okay.
24 There's this thread in my adversary's papers that
25 somehow upholding the First Department's decision

1 here would contradict Riley. That's not so at all.

2 What Riley did was look at a sweeper
3 outside of New York City and determined whether or
4 not under the VTL, that sweeper was entitled to a
5 reckless standard, okay? And in doing so, this
6 Honorable Court went through a process and
7 determined, yes, the Vehicle and Traffic Law does - -
8 - is structured in such a way that sweepers are
9 covered, okay.

10 Here, of course, you're looking at an
11 entirely different statute. There's no doubt,
12 there's no contest that this law, the City law, was -
13 - -

14 JUDGE ABDUS-SALAAM: So you're saying 1103
15 is not incorporated into the City's regs?

16 MR. SCHER: It's selectively incorporated
17 and tellingly so. It's incorporated when they want
18 to imply it - - - apply it. They apply it to
19 emergency vehicles and they apply it to work
20 vehicles, and they don't apply it to sweepers. So
21 they - - - they do selectively reference it. Again,
22 they're able to do that. They know how to do it.

23 JUDGE RIVERA: So they don't apply to
24 sweepers. Why do they have that language about, when
25 you're making turns, when you're proceeding in a

1 direction pursuant to a superior's directive? Why -
2 - - why have that? Why not just say, sweepers are
3 not - - - sorry for the pun - - - covered by (iv)?

4 MR. SCHER: I'm sorry why not say - - -

5 JUDGE RIVERA: Why not just say that? Why
6 do they have this other language? She's suggesting
7 that that's covering certain kinds of conduct.

8 MR. SCHER: True. I - - - I think the most
9 logical interpretation - - -

10 JUDGE RIVERA: And your - - - you seem to
11 be saying it covers the sweeper, period. It doesn't
12 - - - regardless of the conduct. Of course, we're
13 talking about conduct in furtherance of the work
14 coming to that - - -

15 MR. SCHER: Right. I mean, I - - - I - - -
16 I think the logical reading is, there was a decision
17 by the City that these vehicles, they have to go in
18 certain directions and make turns that they need to.
19 And if perhaps there came to be a negligence case out
20 of an accident where they made a turn, I think the
21 jury would probably be entitled to hear this charge
22 and consider that.

23 JUDGE RIVERA: Okay, so let me ask it a
24 different way. Are - - - is your position that (iv)
25 covers conduct that's not covered in (iii) by a

1 sweeper?

2 MR. SCHER: Absolutely. I'm sorry if I
3 didn't understand your question up until now.

4 JUDGE RIVERA: I'm so - - - it's mine - - -
5 I may not have been clear.

6 MR. SCHER: That - - - no, my fault, and
7 yes, absolutely, they're - - - they're talking about
8 two different classes of vehicles. That's the only
9 way to read this and have it make sense, particularly
10 - - - particularly in light of the 2013 amendment.

11 JUDGE RIVERA: Well, you mean, conduct - -
12 - not vehicle. I'm sorry.

13 MR. SCHER: I'm sorry.

14 JUDGE RIVERA: No, my question was, are you
15 saying it's different conduct by the same vehicle
16 operator - - -

17 MR. SCHER: I'm saying - - -

18 JUDGE RIVERA: - - - in (iii) and (iv)?

19 MR. SCHER: I'm saying that (iv), as it
20 existed at the time of the accident - - -

21 JUDGE RIVERA: Yes.

22 MR. SCHER: - - - would not have applied to
23 any street sweeper driver in the City of New York,
24 period.

25 JUDGE RIVERA: Okay, so you're saying (iii)

1 covers all sweeper conduct, because her argument is
2 there's other conduct that would not be included in
3 the description set out in (iii).

4 MR. SCHER: Correct, (iii) was intended to
5 cover what sweepers can and cannot do, and that is
6 the beginning and the end of it. Again - - -

7 JUDGE RIVERA: And that's what they do,
8 okay.

9 MR. SCHER: Because otherwise why would
10 (iii) have been necessary if they meant to say in
11 (iv), they can break all the rules? Why would we be
12 just talking about turns - - -

13 JUDGE RIVERA: You're saying there's other
14 kind of conduct that's subject to recklessness.
15 That's - - - that's her argument, other kinds of
16 things that sweepers do, that's covered by
17 recklessness. That - - - I believe that's her
18 argument.

19 MR. SCHER: I understand, but there's just
20 no indication that they intended to confer this
21 higher or lower standard, rather, that their sweepers
22 are allowed to drive negligently. I just don't know
23 how you can read this and come away with that.

24 JUDGE PIGOTT: Let's assume that - - -
25 let's assume that reckless applies. Are there

1 questions of fact for a trial?

2 MR. SCHER: We believe that there are. And
3 obviously, that's a - - - that's an arguendo fallback
4 position, but - - - but yes, we absolutely believe
5 that there are. If you read the record in the light
6 most favorable to the plaintiff, what we have here is
7 a defendant street sweeper driver who's leaving for
8 lunch; he's not on his route, and that's another
9 important point that we make in the papers. He
10 decides to sweep even though he's going down a one-
11 way street in a direction where all of the sweepers
12 from his yard have to go.

13 So this thing's getting swept over and over
14 and over again. It's completely unnecessary. To say
15 that he should be able to drive negligently in that
16 scenario in the first place, I think, is - - - is
17 also part of - - - part of our argument here. It - -
18 - there's problems.

19 Then he admits that he sees our vehicle
20 more than 200 feet away, and from that time up until
21 the accident, he takes no evasive measures. He
22 doesn't slow down. He doesn't honk his horn. And
23 the comeuppance of his testimony is basically, I
24 assumed he was going to get out of my way, I assumed
25 I could just go by him to the right.

1 And yes, we believe that if the jury
2 accepts all those facts in the light most favorable
3 to the plaintiff, they could absolutely find that in
4 this scenario, the driver was reckless. He didn't -
5 - - literally admittedly did nothing to avoid an
6 impact with a stopped vehicle he saw in front of him.

7 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
8 you.

9 MR. SCHER: Thank you very much for your
10 time.

11 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

12 MS. FREEDMAN: Yes. Very briefly, Your
13 Honor. The same argument that counselor is making
14 was expressly repudiated by this court in Riley v.
15 County of Broome. There is no distinction between
16 work vehicles and hazard vehicles in terms of the
17 applicability of the reckless - - - recklessness
18 standard. Riley v. County of Broome was decided by
19 this court in 2000 and the rules were enacted - - -

20 JUDGE RIVERA: Yeah, but his ar - - - his
21 argument is that because New York City could choose
22 its own rules, that New York made a particular choice
23 - - -

24 MS. FREEDMAN: And New York City - - -

25 JUDGE RIVERA: - - - and excluded sweepers

1 from that recklessness standard.

2 MS. FREEDMAN: Absolute - - -

3 JUDGE RIVERA: That - - - you're correct,
4 otherwise Riley has said applies to the sweepers.

5 MS. FREEDMAN: Absolutely not, Your Honor,
6 because 1103(b) was expressly made applicable in
7 2007. And if you look at the language, it has
8 virtually identical language to the language in the
9 Vehicle and Traffic Law Section 1103(b), and it
10 described the reckless standard of care - - -

11 JUDGE RIVERA: But then why have - - -

12 MS. FREEDMAN: - - - in virtually the same
13 language.

14 JUDGE RIVERA: - - - but - - - but that's
15 where we get back to my question about this
16 redundancy and what does that mean. Why keep (iii)?
17 I understand your point, but why keep (iii)?

18 MS. FREEDMAN: Well, you have in - - - in -
19 - - in subdivision (iii), even now - - - even right
20 now in 2013, it applies to refuse collection
21 vehicles. And it talks about what refuse collection
22 vehicles can do, temporarily stand on the roadway - -
23 -

24 JUDGE RIVERA: Right, but that was
25 originally (B) anyway.

1 MS. FREEDMAN: Well, that was part of (B).

2 JUDGE RIVERA: But that was a different
3 provision anyway, so why is keeping (iii) (A)?

4 MS. FREEDMAN: Because for the same reason
5 that that provision is not redundant either because
6 it specifically allows particular actions to be taken
7 by those particular vehicles, and the subdivision
8 (iv) is more expansive - - -

9 JUDGE RIVERA: So let me ask you - - -

10 MS. FREEDMAN: - - - and it actually
11 expanded - - -

12 JUDGE RIVERA: Okay.

13 MS. FREEDMAN: - - - the recklessness
14 standard to apply to them.

15 JUDGE RIVERA: So the sweeper - - - the
16 operator of the sweeper's action here falls under
17 what, (iii), no standard applies, or (iv)
18 recklessness?

19 MS. FREEDMAN: A recklessness standard
20 applies. In this partic - - -

21 JUDGE RIVERA: What's the conduct? What's
22 the conduct that - - -

23 MS. FREEDMAN: The conduct in this case,
24 well, sweeping - - -

25 JUDGE RIVERA: Because they weren't

1 proceeding in a direction or making turns?

2 MS. FREEDMAN: Basically that's correct,
3 Your Honor.

4 JUDGE RIVERA: What were they doing, then?

5 MS. FREEDMAN: They were going along the
6 road sweeping, and then the plaintiff - - -

7 JUDGE RIVERA: Well, isn't that proceeding
8 in a direction?

9 MS. FREEDMAN: Proceeding in a direction,
10 but basically in sweeping and - - - and going along,
11 but the recklessness standard applied at that point
12 as well. So in other words, it's not - - - and that
13 referred to - - - in 2007 - - - referred to operating
14 under a superior's orders, and subject to direction
15 of a police officer. It's a very specific thing.
16 We're talking about a street sweeper who was engaged
17 in the operation of his broom, his mechanical broom.

18 JUDGE RIVERA: I thought that's what he was
19 doing here.

20 MS. FREEDMAN: And he was sweeping - - -

21 JUDGE RIVERA: Is that not what he was
22 doing here?

23 MS. FREEDMAN: He was doing that here, so
24 we're not talking - - -

25 JUDGE RIVERA: So again, I don't understand

1 why it doesn't fit under (iii).

2 MS. FREEDMAN: Because if you're doing
3 other things that are necessary for your job, other
4 additional things, other than just dealing with the
5 work that you have to do, subdivision (iii) - - - in
6 other words, if you have to make a turn necessary - -
7 - or a snowplow would sometimes have to make a turn,
8 or proceed in a direction to complete the cleaning,
9 it's different when you've got specific situations.

10 Here, you just have a street sweeper going
11 about his business on his regular tour of duty.

12 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
13 you.

14 MS. FREEDMAN: And we ask that the
15 recklessness standard be applied here to grant
16 summary judgment to the City.

17 CHIEF JUDGE LIPPMAN: Thank you both.
18 Appreciate it.

19 MS. FREEDMAN: Thank you.

20 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Deleon v. New York City Sanitation Department, No. 79, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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