SHORT FORM ORDER

INDEX NO.: 006837/2006
SUBMIT DATE: 004 - 11/14/2007
005 - 1/6/2010
MTN. SEQ.#: 004; 005

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:
HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 004 - 8/10/2007
005 - 10/15/2009
MOTION NO.: 004 - MG 005 - WDN

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ANNE L. RYAN, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM ANTHONY STONE, and ANNE L. RYAN, INDIVIDUALLY, JOSEPH WOWAK, JUNE T. BEHR, AS ADMINISTRATRIX OF THE ESTATE OF HEIDI J. BEHR, DECEASED and JUNE T. BEHR, INDIVIDUALLY,

Plaintiffs,

-against-

TOWN OF RIVERHEAD, ERIC MAAS, JOHN WHITE, WINE SERVICES, INC. & RIVERHEAD VOLUNTEER AMBULANCE CORP., INC.,

Defendants.
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Upon the following papers numbered 1 to 35 read on this motion for leave to amend answer and separate motion to substitute a proper party; Notice of Motion/Order to Show Cause and supporting papers 1-12; 28-32; 33 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13-19; 20-22; 23-25 ; Replying Affidavits and supporting papers 26-27 ; Other 34-35 ; it is

ORDERED that this motion by Town of Riverhead and Eric Maas, defendants in this consolidated action, for an order granting leave to amend their answer(s) to add

an affirmative defense invoking the qualified privilege under Vehicle and Traffic Law § 1104 (e) is granted, and the defendants shall serve their amended answer(s) within twenty (20) days from the date of this order; and it is further

ORDERED that the separate motion by plaintiff, Anne L. Ryan, as Administratrix of the Estate of William Anthony Stone, and Anne L. Ryan, individually, for an order substituting a proper party has been withdrawn by letter dated February 8, 2010; and it is further

ORDERED that the caption is amended in accordance with the stipulation of counsel dated January 5, 2010 to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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ANNE L. RYAN, as Administrator of the Estate of WILLIAM ANTHONY STONE, and ANNE L. RYAN, Individually, GLEN MEYER, as Executor of the Estate of JOSEPH R. WOWAK, JUNE T. BEHR, as Administratrix of the Estate of HEIDI J. BEHR, Deceased, and JUNE T. BEHR, Individually,

Plaintiffs,

- against -

TOWN OF RIVERHEAD, ERIC MAAS, JOHN WHITE, WINE SERVICES, INC., and RIVERHEAD VOLUNTEER AMBULANCE CORP., INC.,

Defendants.

----------X

; and it is further

ORDERED that this matter is restored to active status and the attorneys for the parties are directed to appear for a compliance conference before this Court on March 24, 2010 at 10 AM to establish a schedule for the completion of all discovery proceedings within sixty (60) days from the date of this Order.

This consolidated action arises from a tragic accident that occurred on May 3, 2005 involving an ambulance allegedly owned by the defendant, Town of Riverhead, and operated by the defendant, Eric Maas, as it traveled in a westerly direction on Main Road

in Aquebogue, Suffolk County, New York. It is alleged by plaintiffs that the Town of Riverhead, as owner of the ambulance, bears vicarious liability arising from the driver's operation of the vehicle. According to the affidavit of defendant Maas which was submitted in support of the motion, at the time of the accident he was a volunteer member of the Riverhead Volunteer Ambulance Corporation who was operating the ambulance in response to an emergency "and the emergency lights and siren of the ambulance were activated and operational." Defendants now move for leave to serve an amended answer which adds the following as an affirmative defense:

> That the subject vehicle was an authorized emergency vehicle as defined under Vehicle and Traffic Law § 101 and that the acts complained of occurred while Defendants were engaged in an emergency operation with lights and sirens activated. Accordingly, Defendants are afforded qualified privilege under Vehicle and Traffic Law § 1104.

The plaintiffs have opposed the application.

"Leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment" (***Alatorre v Hee Ju Chun***, 44 AD3d 596 [2d Dept 2007], quoting ***Maloney Carpentry, Inc. v Budnik***, 37 AD3d 558, 558, 830 NYS2d 262). While the courts of this state are not in agreement whether Vehicle and Traffic Law § 1104 must be plead as an affirmative defense (*compare* ***Culhane v State***, 180 Misc2d 61, 687 NYS2d 542 [Ct. Claims 1999] *with* ***McDonald v State***, 176 Misc2d 130, 673 NYS2d 512 [Ct. Claims 1998]), this Court is of the opinion that it is better practice to plead the applicability of a statute in appropriate instances in the interests of fairness and to avoid surprise (*see* ***Culhane v State***, *supra* at 180 Misc2d 61). Here, plaintiffs have not demonstrated that they suffered or will suffer prejudice or surprise as a result of the defendants' delay in seeking the amendment, and discovery proceedings have not concluded. The core issue before this Court, therefore, is whether the assertion by defendants of the proposed affirmative defense relating to the "reckless disregard" standard of care is "palpably improper."

In recognition that drivers of emergency vehicles have a primary obligation to respond quickly to preserve life and property, and to afford them the freedom to perform their duties unhampered by the normal rules of the road, there is a qualified exemption from certain traffic laws when the driver is involved in an emergency operation (***Saarinen v Kerr***, 84 NY2d 494, 644 NE2d 988, 620 NYS2d 297 [1994]). Vehicle and Traffic Law § 1104 recites the privileges that may be exercised by the driver of an emergency vehicle, for example, to proceed through a red light and to exceed the speed limit. Subsection (e) of the statute establishes the standard of care to be applied to authorized emergency vehicles:

> The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

This standard has been interpreted as requiring evidence that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" and has done so with conscious indifference to the outcome (*see* ***Saarinen v Kerr***, *supra* at 84 NY2d 500, quoting Prosser and Keeton, Torts § 34, at 213 [5th ed]).

While the courts of this state consistently have held that the standard of "recklessness" applies to the operator of an authorized emergency vehicle, General Municipal Law § 205-b has been interpreted to require the application of a different standard when a fire district owns the vehicle. The enactment in 1934 of General Municipal Law § 205-b erased any immunity formerly extended to fire districts and replaced it with the common-law rule of master and servant and the doctrine of *respondeat superior* (***Nardone v Milton Fire Dist.***, 261 AD 717, 27 NYS2d 489 [3d Dept 1941] *aff'd* 288 NY 654 [1942]). The statute states, in pertinent part:

> Members of duly organized volunteer fire companies in this state shall not be liable civilly for any act or acts done by them in the performance of their duty as volunteer firefighters, except for wilful negligence or malfeasance. Nothing in this section contained shall in any manner affect the liability imposed upon cities, town and villages by sections fifty-a and fifty-b of this chapter, but fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters duly appointed to serve therein in the operation of vehicles owned by the fire district upon the public streets and highways of the fire district, provided such volunteer firefighters, at the time of any accident or injury, were acting in the discharge of their duties.

In *Sikora v Keillor*, 17 AD2d 6, 230 NYS2d 571 (2d Dept 1962), *aff'd* 13 NY2d 610, 191 NE2d 88, 240 NYS2d 601 (1963), the vicarious liability of the owner of a private vehicle operated by a volunteer firefighter in the performance of his duties was held to be measured by the same standard of care as the volunteer firefighter under Vehicle and Traffic Law § 1104. In so holding, however, the Court recognized that while a volunteer firefighter is exempted from liability for ordinary negligence, the injured party can seek redress from the municipality pursuant to the transfer of liability provisions of General Municipal Law § 205-b. Moreover, in ***Tobacco v North Babylon Vol. Fire Dept.***, 182 Misc2d 480, 696 NYS2d 340 (Suffolk Supreme Ct 1999), *aff'd* 276 AD2d 551, 714 NYS2d

450 (2d Dept 2000), the Court considered whether there was a conflict between Vehicle and Traffic Law § 1104 and General Municipal Law § 205-b and, after reviewing the legislative history of General Municipal Law § 205-b and noting that the statute is unambiguous in its application to fire districts, it concluded that while the qualified privilege applies to the volunteer firefighter, a fire district can be held liable for the negligence of its volunteer firefighter. The Appellate Division endorsed such conclusion in ***DeFranco v Essig***, 2 AD3d 669, 768 NYS2d 633 (2d Dept 2003), noting that in view of the specific reference to "fire districts" in General Municipal Law § 205-b, the standard to be applied with respect to a fire district is that of ordinary negligence. It is noted, however, that in his affidavit submitted in support of the motion, defendant Maas does not aver to be a "volunteer firefighter" but, rather, a "volunteer member of the Riverhead Volunteer Ambulance Corporation," nor does he assert that the vehicle he was operating was "owned by [a] fire district." In cases where the emergency vehicle was owned by a municipality but not a fire district, the courts have indicated that the vicarious liability of the municipality is to be measured by the standard applicable to the driver (*see*, e.g., ***Samuel v New York City Health and Hosp. Corp.***, 266 AD2d 447, 698 NYS2d 867 [2d Dept 1999]; *see also* ***Campbell v City of Elmira***, 84 NY2d 505, 644 NE2d 993, 620 NYS2d 302 [1994]; ***Tutrani v County of Suffolk***, 64 AD3d 53, 878 NYS2d 412 [2d Dept 2009]). Accordingly, it can not be said that, as a matter of law, the proposed affirmative defense is "palpably improper."

DATED: 23 March 2010

HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

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