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COURT OF APPEALS

STATE OF NEW YORK

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FREZZELL,

Appellant,

-against-

No. 188

CITY OF NEW YORK, ET AL.,

Respondents.

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20 Eagle Street  
Albany, New York 12207  
October 15, 2014

Before:

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

Appearances:

JAY L. T. BREAKSTONE, ESQ.  
PARKER WAICHMAN, LLP  
Attorneys for Appellant  
6 Harbor Park Drive  
Port Washington, NY 11050

VICTORIA SCALZO, ESQ.  
CORPORATION COUNSEL OF THE CITY OF NEW YORK  
Attorneys for Respondents  
100 Church Street  
New York, NY 10007

Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 188, Frezzell v. City  
2 of New York.

3 Counselor, do you want any rebuttal time?

4 MR. BREAKSTONE: Two minutes, Your Honor,  
5 if you please.

6 CHIEF JUDGE LIPPMAN: Two minutes, you have  
7 it. Go ahead, counsel.

8 MR. BREAKSTONE: Thank you. Good  
9 afternoon, Your Honors, my name is Jay Breakstone. I  
10 represent the plaintiff-appellant Kent Frezzell.

11 CHIEF JUDGE LIPPMAN: Counsel, what's the -  
12 - - the triable issue here?

13 MR. BREAKSTONE: Everything.

14 CHIEF JUDGE LIPPMAN: Tell us. What is it?

15 MR. BREAKSTONE: Other - - - other - - -

16 CHIEF JUDGE LIPPMAN: What's everything?

17 MR. BREAKSTONE: Other than, Your Honor,  
18 the fact that car 1 hit car number 2, everything else  
19 is a question of fact. I don't think I've seen a  
20 record - - - at least getting to this level - - -  
21 where there are so many questions of fact.

22 JUDGE READ: Well, you're talking about  
23 things like whether there was an emergency vehicle,  
24 where it was parked - - -

25 MR. BREAKSTONE: Well, no, obviously we

1 concede they're both emergency vehicles - - -

2 JUDGE READ: So what are the questions - -

3 - what are the questions - - -

4 MR. BREAKSTONE: - - - they're both RMPs.

5 JUDGE READ: There are questions of fact

6 that bear on whether or not the emergency - - -

7 whether or not the standard would be reckless

8 disregard?

9 MR. BREAKSTONE: Exactly. Those are the -

10 - -

11 JUDGE READ: What are the questions of fact

12 that you see?

13 MR. BREAKSTONE: The questions of fact are

14 as follows, and - - - and a lot of them are - - - are

15 enumerated in the dissent, which is, I think,

16 obviously an excellent answer.

17 CHIEF JUDGE LIPPMAN: Tick off your best

18 triable issues.

19 MR. BREAKSTONE: It's probably the lights

20 and siren issue, Your Honors. And I - - - and I talk

21 about that one because it starts off with the

22 respondent saying that, you know, it's absolutely

23 uncontradicted here, that - - - that lights and

24 sirens were on both vehicles. And that is absolutely

25 false.

1 JUDGE SMITH: Who contradicts it?

2 MR. BREAKSTONE: It's not.

3 JUDGE SMITH: Who contradicts it?

4 MR. BREAKSTONE: Who contradicts it?

5 JUDGE SMITH: Which witness says they were  
6 off?

7 MR. BREAKSTONE: Well, interestingly  
8 enough, the driver of the car, Tompos, says that, I  
9 had nothing to do with it; it was Brunjes' job.

10 JUDGE SMITH: But he - - - no, but he said  
11 the lights and sirens were on, didn't he?

12 MR. BREAKSTONE: No, he did not say that,  
13 Your Honor. What he says is that he doesn't know.  
14 He thinks - - - he thinks that Brunjes turned them on  
15 because - - -

16 JUDGE SMITH: Well, I know - - - well, I -  
17 - - he didn't know who turned them on, but I - - - I  
18 thought he was pretty definite, certainly about the  
19 sirens. He says, absolutely, they were on.

20 MR. BREAKSTONE: No, in fact what he  
21 testifies to, Your Honor - - -

22 JUDGE SMITH: So you and I read different  
23 depositions.

24 MR. BREAKSTONE: - - - and I can - - - and  
25 I can indicate the page references, but - - -

1 CHIEF JUDGE LIPPMAN: What about the issue  
2 of whether his - - - his sight was obstructed?

3 MR. BREAKSTONE: That's another - - - it's  
4 another material question of fact - - -

5 JUDGE READ: That's the vehicle - - -

6 MR. BREAKSTONE: - - - that I don't know  
7 the answer to.

8 JUDGE READ: That's the vehicle.

9 MR. BREAKSTONE: That's the ESU truck, now  
10 we're talking about, obviously, a large ESU truck.  
11 When you get to the ESU truck, Your Honors, you  
12 discover that - - - that the - - - Tompos, the driver  
13 says, I don't know. And Brunjes says, well, I told  
14 the sergeant, because it's Brunjes' testimony that's  
15 in that police report.

16 JUDGE PIGOTT: Well, if we take all of that  
17 to be true, and - - - and you've got a situation  
18 where apparently there's someone with a gun who's  
19 being pursued by the police. At what point in your  
20 view, were - - - if you were to prove your case, was  
21 it a reckless conduct on the part of the defendant?

22 MR. BREAKSTONE: Well, I would agree, Your  
23 Honor, for the purposes of argument, that no single  
24 thing here makes reckless conduct, because it's a  
25 very high standard. And there are cases cited by

1 respondent talk about single-incident cases, for the  
2 most part: running a red light, high speed - - -

3 JUDGE GRAFFEO: So - - - so what - - - what  
4 pushes this - - -

5 MR. BREAKSTONE: - - - lights, et cetera.

6 JUDGE GRAFFEO: What pushes this out of the  
7 realm of negligence to reckless?

8 MR. BREAKSTONE: The sheer volume of  
9 reckless conduct, of - - - of possibly reckless  
10 conduct, because remember these are all material  
11 questions of fact.

12 JUDGE GRAFFEO: So is it - - - is it  
13 reckless that he went down a one-way street?

14 MR. BREAKSTONE: Well, Your Honor, that's,  
15 in fact, what the dissent says. It's reckless that  
16 he went down a one-way street. It's reckless that he  
17 had no know - - -

18 JUDGE GRAFFEO: Well, in - - - in  
19 responding to an emergency call - - -

20 MR. BREAKSTONE: Had he would be permitted  
21 to do that under 1104 - - -

22 JUDGE GRAFFEO: - - - no - - - no police  
23 off - - - if we agree with you on that point, then no  
24 - - - no emergency vehicle can go down the wrong way  
25 on a one-way street in responding to an emergency

1 call.

2 MR. BREAKSTONE: But Your Honor, I'm not  
3 saying - - -

4 JUDGE GRAFFEO: Does that make any sense?

5 MR. BREAKSTONE: No, of course of not. And  
6 I'm not saying to agree with me on that one issue.  
7 But I'm saying that you have to consider all of the  
8 issues together.

9 CHIEF JUDGE LIPPMAN: And what's the test  
10 when you consider all of the issues? Whether he  
11 could, with a clear head, manage this risk, whether  
12 he's oblivious to the risk? What's the test?

13 MR. BREAKSTONE: Well, the test - - - and  
14 the court - - - the court enunciated it in Saarinen.  
15 It says it's not a separate - - - it's not a - - - a  
16 general negligence test. It's got to be an  
17 intentional act of unreasonable character. It has to  
18 disregard the known risk or a risk so great that it's  
19 highly probable that harm will occur.

20 JUDGE SMITH: Can you identify one  
21 intentional act and one known risk that he  
22 disregarded? Or you say you can't isolate it?

23 MR. BREAKSTONE: I think that - - - I think  
24 the case doesn't rely on one factor. If it relied on  
25 one factor, we'd have a similar case to all the cases

1 the court's seen before.

2 JUDGE SMITH: Okay, but you - - - but you  
3 got - - - don't you have - - - I mean, I understand  
4 you have a lot of acts, but don't you have - - - have  
5 one intentional and one - - - at least one  
6 intentional act in which he - - - in which he  
7 knowingly disregarded a risk?

8 MR. BREAKSTONE: Well, they're all  
9 intentional.

10 JUDGE SMITH: Let's say give me - - - just  
11 - - - just pick one - - - start with your best.

12 MR. BREAKSTONE: Your Honor, we don't know  
13 whether or not he has the lights and sirens on. We  
14 don't know whether or not - - -

15 JUDGE SMITH: He - - - isn't it pretty  
16 clear that the sirens wouldn't have made much  
17 difference, because there were sirens going from  
18 several different cars anyway? The - - - your  
19 clients says, I don't know whether the sirens were  
20 on.

21 MR. BREAKSTONE: No, in fact, the  
22 testimony, Your Honor, is that Tompos says he doesn't  
23 even know if his siren was on, because there were so  
24 many sirens, he couldn't tell it was his.

25 JUDGE SMITH: Okay, we - - - we already



1 know - - - we already debated that - - -

2 MR. BREAKSTONE: That's right, Your Honor.

3 JUDGE SMITH: What about what your client  
4 said? What did he - - - what - - - did we read  
5 different depositions by him too?

6 MR. BREAKSTONE: No. In fact, he - - -

7 JUDGE SMITH: He - - - he said he didn't  
8 know, right?

9 MR. BREAKSTONE: He said he didn't know.

10 JUDGE SMITH: So - - -

11 MR. BREAKSTONE: He - - - he knew that his  
12 lights were on. So essentially - - -

13 JUDGE SMITH: Did he know - - - did he know  
14 - - - I'm trying to ask you as simply and clearly as  
15 I can - - - did Frezzell know whether Tompos' sirens  
16 were on?

17 MR. BREAKSTONE: No. So - - -

18 JUDGE SMITH: Okay. If he didn't know,  
19 what difference does it make whether they're on or  
20 not?

21 MR. BREAKSTONE: Well, and the dissent  
22 talks about that, because Tompos is coming down the  
23 street. He can see all the way down the street. So  
24 that's why I say it's not one factor. There's no way  
25 - - - I mean, these are jury questions.

1                   JUDGE PIGOTT: What I think you're arguing  
2 about - - - and correct me if I'm wrong - - - is that  
3 for the - - - for - - - for your opponent to prevail,  
4 they must establish their entitlement to judgment as  
5 a matter of law before you even have to respond, and  
6 you're saying they have not, through whatever  
7 testimony and facts they've put forward, established  
8 that they're entitled to a judgment as a matter of  
9 law.

10                   MR. BREAKSTONE: Precisely, Your Honor.  
11 It's a summary judgment motion. And - - - and to use  
12 a baseball metaphor, the tie goes to the runner here.  
13 And all the inferences that can be drawn have to be  
14 drawn in favor of the plaintiff.

15                   And when we go through the factors of - - -  
16 of the - - - of no lights and sirens, of - - - of the  
17 obstructing ESU truck, which would cause Tompos to  
18 have to swerve away, and one could easily view that  
19 as a problematic - - -

20                   JUDGE SMITH: I guess what's - - - what's  
21 bothering some of us is that - - - yeah, I can  
22 understand how all of these could be negligent. He  
23 could have been negligent six different times. Does  
24 being negligent six times add up to being reckless?

25                   MR. BREAKSTONE: No, it's not mere

1 negligence. These were two officers that were  
2 sitting in the Central Park Precinct. They overhear  
3 this - - - this - - - this huge - - - just incredibly  
4 large chase going on. They insert themselves as  
5 rogues into this chase.

6 JUDGE ABDUS-SALAAM: Counsel, what if - - -  
7 what if only two other police vehicles responded, not  
8 several; would your argument be the same?

9 MR. BREAKSTONE: Well, it would have - - -

10 JUDGE ABDUS-SALAAM: If there were more  
11 than two on the street?

12 MR. BREAKSTONE: Your Honor, I'm not a  
13 jury. It might very well be. But in terms of a  
14 material question of fact and of an incident created  
15 and intentional conduct, inserting themselves into  
16 this chase, without letting anybody know they were  
17 there, heightened the risk.

18 It is dangerous. It is so dangerous, Your  
19 Honor, that Tompos' testimony is that even though - -  
20 - and by the way, he never travels the right way on  
21 any street in this entire day, in this entire time  
22 period.

23 It - - - there are so many police cars and  
24 scooters and trucks involved in this chase, he can't  
25 even get on this - - - towards the side of the

1 street; he's got to ride right down the center of the  
2 avenue, because that's how many double-parked  
3 vehicles there are all over the place.

4 And he comes through that traffic light on  
5 104th street. He can't see the light, his testimony.  
6 He can't see the light. He turns into that street,  
7 not knowing if it's green for the traffic coming up  
8 the other way, Frezzell. He doesn't know. He  
9 doesn't have any single idea. That's reckless.

10 The testimony that he reduced speed, which  
11 the majority felt, by the way, that Frezzell didn't  
12 have the ability to red - - - to judge speed - - -  
13 though it's interesting that Brunjes, who talks about  
14 speed, gives twenty, thirty, and forty miles per  
15 hour, and says, by the way, I'm a lousy guesstimator  
16 of speed. So that for the majority is okay.

17 CHIEF JUDGE LIPPMAN: Okay, counselor.  
18 You'll have rebuttal. Let's hear from your  
19 adversary.

20 MS. SCALZO: May it please the court, my  
21 name is Victoria Scalzo, appearing for the  
22 defendants. Your Honor - - -

23 CHIEF JUDGE LIPPMAN: Counsel, why - - -  
24 why can't we - - - we get to trial here, when you  
25 have so many issues that seem to be out there, as to

1           whether or not he was reckless or almost  
2           intentionally disregarded the risk? Why isn't that  
3           at least triable? Is it so black and white, what - -  
4           - the way you see it?

5                       MS. SCALZO: Your Honor, plaintiff failed  
6           to identify anything that the - - - that Officer  
7           Tompos did in his operation of his vehicle - - -

8                       JUDGE PIGOTT: Is that - - - is that - - -

9                       MS. SCALZO: - - - that was reckless.

10                      JUDGE PIGOTT: - - - his burden at this  
11           point, or is it your burden because you brought the  
12           motion for summary judgment?

13                      MS. SCALZO: It - - - it was the City's  
14           burden to establish the absence of a triable issue of  
15           fact, which the City did - - -

16                      JUDGE PIGOTT: And you - - - and you showed  
17           there - - -

18                      MS. SCALZO: - - - which defendants did.

19                      JUDGE PIGOTT: And you showed there was no  
20           recklessness by - - -

21                      MS. SCALZO: Yes, Your Honor. The - - -  
22           the - - - first, the - - - the only predicate in this  
23           case for plaintiff's General Municipal Law Section  
24           205-e cause of action is the VTL. So the only  
25           actions - - - or the only issue - - - that is

1 properly before the court in assessing the issue of  
2 recklessness is the manner in which the officer  
3 operated his vehicle.

4 JUDGE SMITH: So you're saying that even if  
5 he did leave - - - even if did fail to turn on the  
6 sirens and failed to turn on the lights and - - - and  
7 hadn't ob - - - and made a turn with an obstructed  
8 view, that doesn't count?

9 MS. SCALZO: No, Your Honor. First with  
10 respect to the lights and sirens, Officer Tompos did  
11 testify - - -

12 JUDGE SMITH: Okay, but I - - - I'm putting  
13 aside the facts. You're saying it's irrelevant  
14 because the only thing that matters is going down the  
15 one-way street?

16 MS. SCALZO: No, there is no material issue  
17 of fact. All we have here and all the plaintiff is -  
18 - - has shown is that the officer exercised certain  
19 privileges. He was entitled to exercise those  
20 privileges because he was operating an emergency  
21 vehicle - - -

22 JUDGE SMITH: Okay, if I - - - if I could  
23 back for a minute to Judge Pigott's question, which  
24 is how did you meet your burden, are you saying,  
25 essentially, we put in the whole record, and on the

1 whole record, you can't find recklessness. Is that  
2 what it comes down to?

3 MS. SCALZO: The - - - well, yes, because  
4 the - - - well, the testimony in this case  
5 demonstrated that there was no evidence of  
6 recklessness.

7 JUDGE SMITH: So you're - - - so you're  
8 saying if - - - if you take this whole thing, which  
9 you put in, and you can't find recklessness from  
10 reading everything in front of us, then you win.

11 MS. SCALZO: Yes, on this record, yes,  
12 because - - -

13 JUDGE SMITH: That a jury could not find  
14 recklessness from that?

15 MS. SCALZO: Be - - - because - - - because  
16 all that has been shown is that the officer exercised  
17 a privilege, first in traveling against the direction  
18 of light - - - of the - - - of the movement of  
19 traffic. That is an exercise of a privilege that he  
20 was entitled to - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but we know  
22 that they can do certain things in an emergency  
23 situation. The issue is, based on our precedents,  
24 is, was it so obvious to him that it showed a  
25 deliberate disregard of what the consequences might

1 be? Was it a manageable risk and does the - - - all  
2 these different circumstances that the plaintiff is  
3 alleging, do they at least raise a triable issue as  
4 to whether he didn't care about the consequences in  
5 exercising those privileges?

6 MS. SCALZO: No, Your Honor, there are no  
7 other factors that have present - - - that have been  
8 presented that would be any impediment to the  
9 exercise of the privilege. There - - - there was not  
10 - - -

11 CHIEF JUDGE LIPPMAN: Obstructed view, the  
12 lights, what he can see ahead of him - - -

13 MS. SCALZO: Taking - - -

14 CHIEF JUDGE LIPPMAN: - - - what he can't -  
15 - -

16 MS. SCALZO: Taking - - -

17 CHIEF JUDGE LIPPMAN: - - - everything  
18 that's going on around him.

19 MS. SCALZO: I - - - taking each of these  
20 one at a time. First with respect to the - - - the  
21 direction of - - - of movement, that's a privilege.  
22 The - - - the color of the light - - -

23 CHIEF JUDGE LIPPMAN: We know it's  
24 privileged.

25 MS. SCALZO: I know, yes, Your Honor.



1 CHIEF JUDGE LIPPMAN: I get that.

2 MS. SCALZO: The - - - the - - - whether  
3 the light was red or green for either direction, that  
4 is not a material issue of fact.

5 JUDGE SMITH: Well, well, wait.

6 JUDGE ABDUS-SALAAM: What would you say  
7 would be reckless?

8 JUDGE SMITH: The - - - the going the wrong  
9 way may be privileged, that is, that's what the  
10 statute privilege is, but isn't - - - doesn't the  
11 statute say, in effect, you're privileged to do it,  
12 but if you're crazy to do it, you're not privileged?

13 MS. SCALZO: And there's no evidence of  
14 that, Your Honor. There's nothing - - -

15 JUDGE SMITH: Isn't that - - - isn't that  
16 what it comes down to? If he made a mistake in doing  
17 it, he's privileged; if he's out of his mind in doing  
18 it, he's not privileged. Is that a fair summary?

19 MS. SCALZO: That is - - - that is correct,  
20 and there is absolutely no evidence in this record  
21 that would rise to such a level. He - - -

22 JUDGE ABDUS-SALAAM: But what would you  
23 say, counsel, would be reckless in a situation like  
24 this?

25 MS. SCALZO: Well, no - - - if the speed

1           were at - - - were very high, if the officer were  
2           traveling in very bad weather conditions, snow, ice,  
3           wet pavement, many, many pedestrians, too much  
4           traffic - - -

5                         JUDGE ABDUS-SALAAM: So if you added a high  
6           speed to all the other things that are here, you  
7           would say that's - - -

8                         MS. SCALZO: Those would be - - -

9                         JUDGE ABDUS-SALAAM: - - - reckless?

10                        MS. SCALZO: Those would be among the  
11           factors that would - - - would be relevant, but we  
12           don't have any of those things. The officer slowed  
13           at - - - slowed the rate of speed as he went around  
14           the corner. The - - - the color of the traffic light  
15           is not relevant for a couple of reasons. First,  
16           plaintiff himself does not know what the color it  
17           was, there - - - so there is no - - -

18                        JUDGE PIGOTT: But that - - - that gets - -  
19           -

20                        MS. SCALZO: - - - question.

21                        JUDGE PIGOTT: - - - us back to - - - you  
22           know, you can't say the plaintiff can't prove. It  
23           seems to me, you've got to say, I can prove. You  
24           don't need a jury. I can establish that - - - that  
25           my officer wasn't reckless, and here's how I'm going

1 to do it.

2 MS. SCALZO: Well, we - - -

3 JUDGE PIGOTT: And you can't simply say  
4 that because they can go down the wrong way on a - -  
5 - on a one-way street, that they can do that at any  
6 time. Just as you said, there are certain  
7 circumstances when you can't. But if he's firing his  
8 weapon while he's driving the - - - the car, you  
9 can't say, well, they have a right to fire their  
10 weapon in pursuit of a - - - of a perpetrator, but  
11 that doesn't answer the question.

12 MS. SCALZO: The exercise of the - - - of  
13 the privilege alone is not enough, and there are no  
14 other factors in this case that would take it away.  
15 That would - - -

16 JUDGE PIGOTT: Well, that's - - - that's  
17 why - - -

18 MS. SCALZO: - - - that would undermine it.

19 JUDGE PIGOTT: - - - I wonder when you say  
20 it doesn't make any difference what color the light  
21 is. You can say that. I can say that. But maybe  
22 there's six people sitting inside of a courtroom that  
23 might disagree.

24 MS. SCALZO: Well, Your Honor, the - - -  
25 because - - -

1 CHIEF JUDGE LIPPMAN: I think your argument  
2 makes it almost impossible to ever find liability in  
3 an emergency situation, because you're always okay if  
4 you drive - - - because you're privileged - - - if  
5 you drive the wrong way, if you disregard an obstacle  
6 that totally blocks your vision, if you throw  
7 yourself into a situation that is just, as Judge  
8 Smith indicated, you've got to be crazy to do. You  
9 still can't have liability because you're in an  
10 emergency situation.

11 We understand he's in an emergency  
12 situation. But why aren't there, in this kind of  
13 situation - - - your adversary mentioned three, four,  
14 five different issues that - - - that are necessary  
15 in order to determine whether he's crazy or just  
16 exercising his emergency prerogatives.

17 MS. SCALZO: There are no factors that have  
18 been shown that would undermine the exercise of the  
19 privilege.

20 CHIEF JUDGE LIPPMAN: You - - - you say  
21 that.

22 MS. SCALZO: The - - - first with the  
23 respect to the issue of whether the officers just  
24 decided to get involved or not, that is not a  
25 preserved issue, and that is not an issue that has

1 any relevance with respect to the officer's operation  
2 of the vehicle. The whole - - -

3 JUDGE SMITH: Well, there - - - there might  
4 be - - - if they were claiming that, there might be  
5 governmental function immunity problems, wouldn't  
6 there? If that is a decision of a police officer,  
7 and whether he's going to get involved in an  
8 incident, that's not like - - - that's not like  
9 negligent driving.

10 MS. SCALZO: Well, Your Honor, the - - -  
11 one of the problems with that whole issue is that it  
12 was introduced or raised as a possibility of having  
13 some bearing on the issue of recklessness on - - - in  
14 the plaintiff's reply in the Appellate Division. It  
15 was never developed in the Supreme Court. It was  
16 never raised. No rule was identified.

17 So it's really just speculation that there  
18 is some rule out there that may have been violated.  
19 And because VTL 1104 is the only predicate in this  
20 case, only the officer's operation of the vehicle and  
21 the manner in which he operated the vehicle are  
22 relevant.

23 JUDGE PIGOTT: Isn't it conceivable that  
24 all these facts that we keep kicking around could add  
25 up to being reckless conduct, depending on the

1 circumstances that develop at trial?

2 MS. SCALZO: No, I would say, no, Your  
3 Honor, because nothing has been shown here. With  
4 respect - - - as an example to the - - - to the  
5 presence of the - - - of the ESU truck, there - - -  
6 as the majority in the Appellate Division stated,  
7 there is no evidence that the officer's view was  
8 obstructed. The report that the - - -

9 JUDGE SMITH: Why does - - - why does the  
10 report mention the truck then?

11 MS. SCALZO: It mentions that the - - -  
12 well, actually the mention of the truck is - - - the  
13 description of the officer's movement when he reached  
14 the truck is that he negotiated around the truck.  
15 The use of the word "negotiated" would certain - - -  
16 would suggest - - -

17 JUDGE SMITH: Well, but, yeah - - - but  
18 when you're - - - when - - - this is a - - - this is,  
19 I gather, another - - - the - - - an officer came on  
20 the scene writing down Mr. - - - Officer Tompos'  
21 description of what happened. Can't we infer from  
22 the fact that he said he was negotiating around a  
23 truck, that maybe that had something to do with the  
24 accident?

25 MS. SCALZO: Well, Your Honor, the - - -

1 when - - - when you look at his reaction or his  
2 response to the presence of the truck, I would say  
3 there is nothing that he did that was reckless, in  
4 that negotiating around the truck is - - -

5 JUDGE SMITH: You're not saying it wasn't  
6 negligent, are you?

7 MS. SCALZO: It - - - it didn't rise to the  
8 level of recklessness, because - - -

9 JUDGE SMITH: Yeah, but you're not saying  
10 it wasn't negligence.

11 MS. SCALZO: I'm - - - it could - - - it  
12 could be - - - it's not developed very well, but - -  
13 -

14 JUDGE SMITH: And what's - - - what's the  
15 difference between negligence and recklessness?  
16 Isn't that what this case comes down to? What - - -  
17 what is the difference?

18 MS. SCALZO: Well, it's very extreme - - -  
19 it's a very difficult standard for a plaintiff to  
20 meet. An intentional commission of an act of a - - -  
21 of an unreasonable character that is so great that  
22 it's highly likely that harm will follow. The - - -  
23 that's not be shown here. And - - -

24 JUDGE PIGOTT: Well, the sense that "a jury  
25 could certainly find that the entry into a one-way

1 street in disregard of a traffic signal, the absence  
2 of lights and sirens, and in the presence of an  
3 obstructing truck, when other units were already in  
4 pursuit of the suspect, and had undertaken, on his  
5 own initiative, to pursue the case, counts as  
6 reckless disregard."

7 MS. SCALZO: Now, Your - - - Your Honor,  
8 that last paragraph of the - - - of the dissenting  
9 opinion point - - - is what I was referring to  
10 earlier, in that at least two of the - - - those  
11 portions of that paragraph relate to unpreserved  
12 issues. The issue of whether the - - - the officers  
13 got involved on their own initiative, that had - - -  
14 that is not something that was properly preserved and  
15 has no bearing on - - -

16 JUDGE PIGOTT: I don't understand  
17 preservation. You - - - oh, never mind, okay.

18 CHIEF JUDGE LIPPMAN: Okay, counsel,  
19 thanks.

20 Counselor, rebuttal.

21 MR. BREAKSTONE: The - - - according to the  
22 respondent, you can't prove recklessness under these  
23 situations. No lights, that's okay. If it's a  
24 question of fact, that's okay. Question of fact on -  
25 - - on siren, that's okay. The ESU truck, that's



1           okay. The - - - the - - - the color of the light,  
2           that's okay. Informing your superiors that you're on  
3           the chase, that's okay. What's left?

4                    JUDGE SMITH: Well, that's - - - well, I  
5           mean, you - - - that - - - you're more or less right.  
6           That is - - - that is what she's saying, as I  
7           understand it. She's saying each one of them is - -  
8           - could be found negligent, but - - - and maybe  
9           you've got six, maybe you've got ten things that  
10          could be negligent, but is that what recklessness is,  
11          or do you need something more?

12                   MR. BREAKSTONE: Well, Your Honor, if we  
13          take a look at - - - and a quick look, it'll have to  
14          be - - - at some of the cases involved, it seems to  
15          me that one or two, you can probably get away with.  
16          But more than that, you cannot.

17                   JUDGE SMITH: So you're - - - you're saying  
18          basically a lot - - - a lot of negligence adds up to  
19          recklessness.

20                   MR. BREAKSTONE: Well, not a lot of  
21          negligence, because these things don't really arise  
22          that way in merely negligent cases. But - - -

23                   CHIEF JUDGE LIPPMAN: You're saying it  
24          might add up to recklessness?

25                   MR. BREAKSTONE: Yes, exactly. When you

1 take a look, Your Honor, at cases like, Badalamenti,  
2 which is in the Second Department. They - - -  
3 summary judgment denied.

4 JUDGE SMITH: Okay, we're not - - - we're  
5 not bound by those. We might - - -

6 MR. BREAKSTONE: Not at all, but they're  
7 instructive. But even if you take a look at  
8 Saarinen, right? Basically a single issue.  
9 Basically a single issue, and that's what I'm talking  
10 about here.

11 Your Honor, asked a question early on about  
12 - - - about the evidence as to the lights. And I  
13 promised you page references. At 317, Brunjes is  
14 asked, "Do you recall if your lights and sirens were  
15 on at any point prior to the impact?" Answer, "I  
16 don't recall."

17 And if you remember, in Christiani - - -

18 JUDGE SMITH: Okay, you're reading from  
19 Brunjes' testimony.

20 MR. BREAKSTONE: This is Brunjes'  
21 testimony.

22 JUDGE SMITH: I was asking about Tompos'  
23 testimony. He - - -

24 MR. BREAKSTONE: Tom - - - Tompos'  
25 testimony says it's Brunjes' job.

1 JUDGE SMITH: I think Tom - - - I think  
2 you'll find that Tompos said the sirens were on, very  
3 unequivocally.

4 MR. BREAKSTONE: He talks about - - - he  
5 says, he doesn't know about the sirens, but he had  
6 the intermittent horn button to turn the siren on,  
7 but there's no testimony in the record as to whether  
8 he ever did, whether he ever pushed that intermittent  
9 button. It's not in the record.

10 You talk about the ESU truck.

11 CHIEF JUDGE LIPPMAN: Counsel, how do you  
12 get to trial on recklessness? What distinguishes one  
13 case from another? It's - - - in a nutshell, your  
14 argument is there are so many things here that you  
15 might be able to show recklessness?

16 MR. BREAKSTONE: Indeed, it can't just be  
17 quantity. It's - - - but it is. It's - - -

18 CHIEF JUDGE LIPPMAN: So what is it?  
19 What's - - - how do you get - - -

20 MR. BREAKSTONE: It's volume and the  
21 character of what occurred. If a person is - - - and  
22 I can make up a thousand different examples, but  
23 these are the type of things that the court sees each  
24 and every time in an 1104 case.

25 CHIEF JUDGE LIPPMAN: So here's there's

1           enough - - -

2                   MR. BREAKSTONE: Right.

3                   CHIEF JUDGE LIPPMAN: - - - to get you to -

4           - -

5                   MR. BREAKSTONE: Yes, Your Honor, and also

6           - - -

7                   JUDGE SMITH: And - - - and - - -

8                   MR. BREAKSTONE: I'm sorry.

9                   JUDGE SMITH: Isn't that the problem that  
10           you see it each and every time in an 1104 case, and  
11           the whole point of 1104 is to - - - is to - - - is to  
12           - - - should - - - has got to be to wash out most of  
13           the cases where an officer is op - - - is operating  
14           an emergency vehicle. If every one of them gets to a  
15           jury, they're wasting their time passing 1104.

16                   MR. BREAKSTONE: But we have 1104(e). And  
17           that was the City's burden, 1104(e).

18                   JUDGE SMITH: But - - - but 1104(e) wasn't  
19           intended to say you can skip reading a, b, c, and d,  
20           because they don't mean anything.

21                   MR. BREAKSTONE: No, it says in certain  
22           situations, those being the reckless ones - - -

23                   JUDGE SMITH: Yeah, okay.

24                   MR. BREAKSTONE: The mere fact that - - -

25                   JUDGE SMITH: How - - - how - - -

1 MR. BREAKSTONE: - - - you can do something  
2 means you have to do it - - -

3 JUDGE SMITH: And those - - - and those - -  
4 - but those have to be - - - I mean, you say it's in  
5 every 1104 case, and that's - - - you - - - you've  
6 summed up my problem in a nutshell. Yeah, it sure is  
7 in every 1104 case.

8 In every 1104 case, there's a talented  
9 plaintiff's lawyer like you, who could make the  
10 defendant's ca - - - conduct sound pretty bad. Does  
11 it - - - if all our cases, where - - - where a police  
12 officer was exercising his emergency privilege get to  
13 a jury, what is 1104 for?

14 MR. BREAKSTONE: Well, thank you for the  
15 compliment. I should have ducked when it came, but  
16 the fact - - - the fact of the matter becomes that  
17 the cases that the court has dealt with, always deal  
18 with one or two of the 1104 violations - - - not  
19 violations, permitted behaviors. This one - - - and  
20 there's no case cited like this by respondent - - -  
21 deals with five, six, seven of them.

22 CHIEF JUDGE LIPPMAN: So it's the totality  
23 of these different circumstances.

24 MR. BREAKSTONE: It is the totality and the  
25 character, and if Your Honors - - - my time is up - -

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CHIEF JUDGE LIPPMAN: Your time is up.

MR. BREAKSTONE: On the preservation issue,  
it's dealt with at footnote 1 of our reply.

CHIEF JUDGE LIPPMAN: Okay, thank you both.

MR. BREAKSTONE: Thank you, Your Honors.

CHIEF JUDGE LIPPMAN: Appreciate it.

(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 Frezzell v. City of New York, No. 188, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street

Suite # 607

New York, NY 10040

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