

1 COURT OF APPEALS

2 STATE OF NEW YORK

3 -----
4 FREZZELL,

5 Appellant,

6 -against-

7 No. 188

8 CITY OF NEW YORK, ET AL.,

9 Respondents.
10 -----

11 20 Eagle Street
12 Albany, New York 12207
13 October 15, 2014

14 Before:

15 CHIEF JUDGE JONATHAN LIPPMAN
16 ASSOCIATE JUDGE VICTORIA A. GRAFFEO
17 ASSOCIATE JUDGE SUSAN PHILLIPS READ
18 ASSOCIATE JUDGE ROBERT S. SMITH
19 ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
20 ASSOCIATE JUDGE JENNY RIVERA
21 ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

22 Appearances:

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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 - -

1 -

2 CHIEF JUDGE LIPPMAN: Your time is up.

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

5 CHIEF JUDGE LIPPMAN: Okay, thank you both.

6 MR. BREAKSTONE: Thank you, Your Honors.

7 CHIEF JUDGE LIPPMAN: Appreciate it.

8 (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.

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