The Lane Law Letter

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We are a litigation firm with a practice emphasizing transportation, insurance and construction law in New York and New Jersey.

We hope that you find The Lane Law Letter both enjoyable and useful in keeping you updated on legal developments important to you.

As always, we welcome questions and comments regarding our articles. Contact us by phone at 973-512-3244, or by email at law@jclane.com.

Inside this issue:

Limitation of Liability in Transportation Contract Does Not Extend to Subcontractor

A frightening truck crash killing the driver and causing a $750,000 cargo loss leads to a predictable contract-law decision from the Second Circuit Court of Appeals. The Court's decision in *Royal & Sun Alliance Ins. PLC v. Int'l Management Services Co., Inc.*, decided January 7, 2013, holds that a limitation of liability in a shipping contract does not automatically extend to subcontractors.

Ethicon, Inc., a pharmaceutical company, contracted with UPS for transportation and distribution of its various products. The agreement contained a limitation of liability for UPS and its designated third-party carriers, including its subsidiary, Worldwide Dedicated Services Company, Inc. Worldwide, in turn, contracted with International Management Services to provide drivers for Worldwide's trucks. A truck crash near Little Rock, Arkansas, in March 2009 killed the driver and destroyed over $750,000 worth of Ethicon's products. This case involved the destruction of that cargo. Royal & Sun Alliance insured Ethicon and paid its losses, and then sued for subrogation against UPS, Worldwide, International Management, and others, in federal district court in New York, under the Carmack Amendment and bailment theories under federal common law.

The district court found that UPS and Worldwide were protected by their limitation of liability. UPS paid Royal their limitation amount of $250,000. International Management argued for the same protection, even though they were not expressly covered under the Ethicon-UPS agreement, and had no limitation in their own agreement with Worldwide. The district court ruled against International, holding that it was not entitled to a limitation. International appealed. The Court of Appeals affirmed: "We decline to hold that third parties to shipping contracts are automatic beneficiaries of limitations on liability that by their terms only apply to the parties to the contract."

It Was Just Spine Surgery — Nothing Serious...

In a recent decision, the Appellate Division, First Department unanimously upheld the lower court's dismissal of an action under New York's serious injury threshold law, despite the fact that plaintiff had lumbar spine surgery.

The Court's opinion in *Brand v. Evangelista* is a little short on the historical facts of the case. At the heart of the issue before the Court, however, was defendant's expert physician's report. In his IME report, defendant's physician noted that during his post-surgery examination of plaintiff, he found that plaintiff exhibited only minor limitations in range of motion. The Court found that plaintiff's minor limitation was not sufficient to constitute a serious injury. Further, the Court notes, plaintiff failed to refute the defense report with an updated report from his own treating physician, prompting the Appellate Division to uphold the lower court's dismissal of plaintiff's case, finding that plaintiff "had recovered."

This is the first Appellate level case that we are aware of involving back surgery where the Court held the plaintiff did not sustain a serious injury. To put this decision in perspective, had plaintiff fractured his pinky on his non-dominant hand, and had it treated with a splint, his case would have survived summary judgment, as the no-fault statute defines a fracture as a serious injury.

In The News . . .

John and Peter attended the Trucking Industry Defense Association annual conference in Dallas in October.

John attended the winter regional meeting of the Transportation Lawyers Association in Chicago in January.

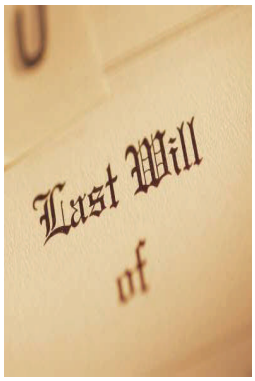
Congratulations to ***Sue Cawley*** on the successful completion of her Paralegal Studies program!

Waiver of Subrogation Enforced, Despite Tenant's Breach

The U.S. District Court for the Southern District of New York undertook the analysis of reciprocal waivers of subrogation in a lease, in a case involving a fire loss to an apartment building in Manhattan. Encompass Insurance insured the landlord, Stephen Isola, and paid his losses. It then brought a subrogation action against William English, the tenant, for his negligence in causing the fire, in *Encompass Ins. Co. v. William Todd English*. The district court issued its decision on these issues on March 13, 2013.

In the lease, both parties agreed to obtain insurance, and to waive subrogation of any claims against one another. The waivers were properly reported to the insurers, who gave their assent, at least tacitly. Mr. English asked for a dismissal of the lawsuit on the ground that Encompass had waived its right of subrogation. The Court agreed with English, even though he may have been in breach of his obligations to pay rent on time and to allow the landlord access to show the apartment to potential tenants. The Court found that the waiver is independent of these alleged breaches, "because the breached provisions do not affect the allocation of risk between the contracting parties and their insurers." The Court added that a waiver of subrogation allows the parties to "allocate the risk of liability between themselves to third parties through insurance."

"Equity Will Find a Way...."



Mr. Jack M. Murray executed a will drafted by Attorney Spiegel in New Jersey, on December 19, 2006, leaving his entire estate to family members and to trusts for their benefit. Two months later he walked into a bank in Florida and opened an account, containing one third of his estate, payable on his death to his New Jersey attorney. Mr. Spiegel knew nothing of the account's existence. Mr. Murray died exactly one year after executing his will, on December 19, 2007, leaving a mystery about his intent, and an issue over who should get the money, the attorney or the family.

The executor of the estate, Mr. Stephenson, learned about the account as he was marshaling the assets. He inquired of the bank for information about the "pay-on-death" account. The bank deferred so that they could speak with the New Jersey attorney. The executor urged that Mr. Murray had obviously intended to fund a family trust and left the account to his attorney for that very purpose. Mr. Spiegel suggested a different conclusion, that Mr. Murray clearly had a change of mind after going to Florida, and set up the account because, "for whatever reason – he wanted me to have the money."

The dispute went to court in the Chancery Division, New Jersey's general equity court, which heard the evidence and decided that the money should go to the estate, not the attorney. The judge struggled, however, to find an equitable remedy to support his decision. Courts of equity have power to resolve certain types of cases on fairness grounds, but each basic equitable tool has its own requirements. Most theories did not fit. Reformation requires mutual mistake, but Mr. Murray acted alone. Fraud and claims of Undue Influence require proof of wrongdoing by the attorney, but by the evidence, he did nothing wrong.

The Judge determined that he could rescind the bank account transaction, because it was the result of Mr. Murray's unilateral mistake, the mistake was material to the creation of the account, and rescission would not cause serious prejudice to the attorney. The Appellate Court agreed, adding that Mr. Murray mistakenly created a windfall for his attorney and that the error had to be corrected by the equity court. The upper court quoted from a 1930 opinion by New York's venerable Chief Judge (and later Supreme Court Associate Justice) Benjamin Cardozo, that "equity will find a way. . . ." And so it did, in *Stephenson v. Spiegle*, decided January 31, 2013.

2013 Legislature to *Clarify* What the 1985 Legislature *Intended?*

In our Summer 2011 Lane Law Letter, we presented to you the case of *Murray v. Plainfield Rescue Squad*, in which the Appellate Court affirmed the lower court's ruling that statutory immunity from civil liability is determined by the emergency services performed, not the type of rescue squad performing the services. Plaintiffs appealed to the NJ Supreme Court, and were heard in May 2012. The NJ Supreme Court held that the statute providing immunity to individual members of a rescue squad *did not* provide immunity to the rescue squad as an entity. In delivering the Court's opinion, Justice Albin writes that the Legislature, when enacting N.J.S.A. 26:2K-29 in 1985, "evidently intended to shield rescue squads rendering advanced life support services, and not rescue squads rendering intermediate life support services." (N.J.S.A. 26:2K-29 immunizes "officers and members" of rescue squads from liability when providing "intermediate life support services" in good faith. Plainfield Rescue Squad members were performing cardiac defibrillation, an intermediate life support service, upon Odis Murray.) The case has been remanded to Union County, and is currently awaiting a trial date.

The NJ Legislature seems to disagree with the Court's interpretation of the statute, and is seeking to clarify what *it* believes the 1985 NJ Legislature had intended. Committees in both houses of the current NJ Legislature have unanimously voted for proposed amendments that would extend the same statutory immunity that protects members of rescues squads, to the squads themselves, adding "first aid, ambulance or rescue squads" to the list of covered entities. In addition, coverage would be extended to non-volunteer squads and "hybrid" squads (those that are staffed by volunteers but receive government reimbursement). We await a floor vote.

Proposed Bad Faith Legislation Disguised as Relief for Sandy Victims

Also moving through the New Jersey State Legislature is bill S-2460 which is touted as Legislation to help those who have sustained losses from Hurricane Sandy. What the bill actually does is create a cause-of-action for policyholders to file "bad faith" claims against their insurers, and is not limited to policyholders that have sustained damage from the storm.

Presently under the common law, an insurer can be held liable to a policyholder for bad faith where there is "no debatable" reason for the denial of benefits, or where "no valid reasons" exist for delaying the processing of a claim and the insurance company "knew or recklessly disregarded" that fact. *Pickett v. Lloyd's*, 131 N.J. 457, 481, 621 A.2d 445, 457-58 (1993).

The proposed legislation would allow a private cause of action by the policyholder, if the policy holder can show that the insurance company failed to effectuate settlements promptly and fairly when liability is "reasonably clear," or for attempting to settle a claim for less than what a "reasonable man" would believe he is entitled to "by reference to written or printed advertising material accompanying or made part of an application." The proposed legislation would also allow recovery of damages in excess of coverage limits; recovery of prejudgment interest, reasonable attorney's fees, and all reasonable litigation expenses; and *punitive damages.*

Opponents of the bill argue that it will result in higher premiums in the homeowners' insurance market.

New York Attorney General's Office Hit for 7.7 Million

A Brooklyn dentist whose practice and career were ruined when then State Attorney General Elliot Spitzer prosecuted him for Medicaid fraud, was awarded $7.7 million in a civil suit he filed against the Attorney General's Office for malicious prosecution.

The dentist alleged that he was targeted by Spitzer's office in 2006, when Spitzer was running for Governor of New York, and had been accused by political opponents of being soft on Medicaid fraud.

The dentist further alleged that two members of the Attorney General's office fabricated evidence against him. The jury apparently agreed.

The Attorney General's office has vowed to appeal.

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Puppy Love

Joyce McDougall watched the mauling of her dog, Angel, a nine-year old "maltipoo" (a maltese/poodle mix) by a large dog belonging to her neighbor. The larger dog grabbed the smaller dog by the neck and shook it several times before dropping it. Angel died from the attack. Joyce sued the neighbor, alleging that she suffered severe emotional distress from the traumatic loss, asserting rights based on "bystander liability." The New Jersey Supreme Court ruled, in *McDougall v. Lamm* that the relationship of pet owner to pet, however genuine, will not support such a claim.

Traditionally, in New Jersey, a person could make a claim for negligent infliction of emotional injury only if that injury was accompanied by a physical injury. That rule was based on the policy concern that emotional injuries could be more easily feigned without detection. In a series of cases, culminating in *Portee v. Jaffee*, decided by the Supreme Court in 1984, a cause of action was judicially created to allow recovery for emotional injury under very narrow circumstances. Under *Portee*, a claimant must prove four elements: (1) the death or serious injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting in severe emotional distress.

Here, the sole element to be determined is whether there is an intimate, familial relationship between the dog and its owner recognizable in the law. Despite the special relationship that Joyce had with Angel, as so many of us have with a favorite pet, the Supreme Court declined to expand the class of individuals authorized to bring a *Portee* claim to include the death of a pet, even if that pet is a companion or working pet. Most states considering the issue, including New York, agree.