

THE LANE LAW LETTER

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No Negligent Spoliation Claim in New York

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.

Questions or Comments?

Contact us at 201-848-6000, or email us at lan@jclane.com.

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"While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world." That sentence, quoted by the New York Court of Appeals from an earlier case, is the driving force behind the decision in *Ortega v. City of New York*, 9 N.Y.3d 69 (October 2007). The Court held that a plaintiff may not bring a negligent spoliation claim against a party that had carelessly destroyed the essential evidence in plaintiff's tort case. By this ruling, New York joins the majority of the states on the issue.

Plaintiff Castella Ortega purchased a 1987 Ford Minivan from a private owner in October 2003. She brought it to a licensed service station for an inspection and tune-up. On the following day, Ms. Ortega and fellow plaintiff, Manuel Peralta, were traveling on the Ocean Parkway in Brooklyn, New York, when Ortega smelled fumes and pulled the minivan to the side of the road. The van burst in flames, causing both occupants to suffer severe burns. The van was removed to a facility in Brooklyn and then moved in early November to a New York City Police Department auto pound.

Peralta's attorney took all the right steps. He obtained a court order directing that the van not be destroyed until the plaintiffs could undertake a proper inspection. Internal memos were circulated in the police department to bring about the protection, but they were ignored. The pound followed its ordinary procedures. The van was placed in a salvage auction, and then crushed for scrap

metal in December 2003. The critical evidence needed to pursue personal injury claims against Ford Motor Company, the previous owner, and the service station that had inspected the van, was destroyed. Plaintiffs did not sue those parties, but rather commenced an action against the City of New York, seeking compensation for injuries that they sustained as a result of the automotive fire. They asserted that the City of New York, by negligently destroying the critical evidence (the spoliation of evidence) should be required to compensate the plaintiffs fully for their burn injuries.

The Court of Appeals conducted the study of similar theories raised in case law across the country. It noted that California had ended its "15-year experiment with the tort," in 1999 "because third-party spoliation has not appeared to be a significant problem in our [California's] courts." To allow the tort would be to recognize a claim that, by definition, could not be proved without resort to multiple levels of speculation. It would require a showing of proof of the very thing that can no longer be proved: the precise nature of the original item. In other words, the jury would have to speculate that the item in its original state would, in fact, have been favorable to the party now claiming to have suffered the loss on account of that spoliation.

That very concern caused the California Supreme Court to limit the tort of negligent spoliation. Now, the New York Court of Appeals has joined in that position.

Be sure to visit us on the web, www.thelanelawfirm.com, for current updates of developments in the law and for additional featured articles.



Personal and Personnel

Katherine M. Romanek (nee Dunn) has been admitted to practice before the courts of the State of New York. Katie, as we all know her, is now Katherine M. Romanek, Esquire.

Peter Bobchin and John Lane attended the annual meeting of the Trucking Industry Defense Association, held in Atlanta in October 2007. John has been asked to serve as a speaker/moderator for the 2008 program, to be held in San Diego in October. Our entire staff will be assisting in the preparation for the TIDA meeting.

John Lane attended the Winter Meeting of the Conference of Freight Carriers in Atlanta. Featured at the meeting was John's case of *Travelers Ins. a/s/o Summit Transportation v. A.D. Transport Express*, in which the court determined that a course of dealing, especially with a sophisticated shipper, can provide the details of an agreement to limit liability, just as a written contract. John's article describing the case appeared in the February 2008 issue of *The Transportation Lawyer*, the magazine of the Transportation Lawyers' Association, and is reprinted with the TLA's permission on our website, www.thelanelawfirm.com, as is the opinion of the federal court and our brief.

No Jurisdiction Over California Grower

Jean DiPaolo and John Lane had a recent victory for a California produce distributor caught in the middle of a dispute between its consignee and the trucker that carried a load of broccoli to Massachusetts. The broccoli was delivered in fine condition, and the consignee paid for the load. Unfortunately for the shipper, the consignee did not pay the trucker, because of a wholly unrelated dispute between the receiver and the trucking company. The bill of lading, on the form of the Western Growers' Association, contains a very clearly worded non-recourse provision to protect the shipper.

The trucker sued the Massachusetts consignee, and a foursome of California growers who were all in the same situation, having been paid for their product and believing that the transportation would be paid by the consignee, as agreed. The suit, however, was brought in New Jersey, which had no contacts with any of the defendants, or with the transaction. The wily collection attorney alleged that the shippers were liable for the freight charges (despite the non-recourse provision in the bill) and obtained default judgments against all of the defendants, in the New Jersey courts. That was easy, since no one opposed his applications, and the Clerk made no inquiry to see if these defendants were subject to jurisdiction in this State. Then, the attorney "served" the default judgments on the defendants, includ-

ing our client. On sound advice from their attorneys, they all ignored the judgments because they knew the California courts would not enforce them.

Then things got worse. The attorney began attempting to serve information requests upon our client's financial contacts, including their banks. When that conduct began to cause financial embarrassment, our client took action.

And then, things got better. We first moved to set aside the default judgment. That motion was granted, and plaintiff's attorney was admonished to cease all collection activity. We then moved to dismiss the complaint for lack of personal jurisdiction over our client. That motion, too, was granted. In both instances the plaintiff's attorney insisted upon oral argument despite the judge's pointed instruction that she needed no oral argument. And in both instances, the judge excoriated the attorney for the procedures that he followed. Afterward, he filed a letter brief agreeing to cease all collections activity on the inappropriately granted default judgment, a concession hardly needed since he had already been ordered by the court to do so. Sometimes a party just needs to stand its ground, which is exactly what our client chose to do.

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New York Law Applied in New Jersey Trucking Accident Case

It was a freak accident in New Jersey that left Paul Dolan disabled and led the Appellate Division of the New Jersey Superior Court to apply New York's Vicarious Liability Law to assess liability against a party that was absolutely free from negligence. The case is *Dolan v. Sea Transport, Inc.*, decided February 20, 2008.

Paul Dolan was driving his automobile home from his job in New York. He had crossed the George Washington Bridge and entered onto Route 46, a heavily traveled commuter artery with two lanes in each direction. As he moved along, a shipping container being hauled in the opposite direction fell off an intermodal chassis and into Mr. Dolan's lane of traffic. He hit the container head-on, suffering debilitating injuries, according to the Court. Evidence showed that the truck driver failed to securely lock the ocean container onto the intermodal chassis. Worse, he knew that it was not secure and chose to go onto the highways without stopping to secure the lock.

Mr. Dolan brought suit in New York State Court against the truck driver and his employer, as well as the owner of the chassis and container (a steamship company) and the

ocean terminal from which the chassis and container had been dispatched. The New York Court transferred the case to New Jersey, opining that there were more New Jersey contacts involved in the suit. The New Jersey Court, however, applied New York's Vicarious Liability Law, Vehicle & Traffic Law §388, to invoke liability against the steamship company, as owner of the intermodal chassis. Section 388 imposes liability on the owner of a trailer, even for the negligence of the tractor owner and operator, though not related. The fact that the owner of the trailer was not negligent is not material, although there would be no liability under New Jersey law.

The Court assigned several factors to support the use of New York law. The trucking company and driver are from New York, and the tractor is registered there. The container and chassis had departed an ocean terminal on Staten Island. The Court applied the "governmental interest" test, finding that Mr. Dolan's New Jersey domicile, and the location of the accident in New Jersey, did not support application of that state's law.

An appeal is contemplated to the Supreme Court of New Jersey. We will follow the progress of this case.

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New Jersey's Governor Vetoes Expansion of Wrongful Death Damages

It was a surprise nobody expected. For years the New Jersey Legislature worked on a change to the Wrongful Death Act to allow a recovery for the grief of surviving family members. Late in 2007 the bill passed, with urging from the State Bar Association and the State's branch of the Association of Trial Lawyers of America. This new measure of damages would have no limit, although a \$250,000 cap had been discussed. Business and insurance groups fought against the expansion, pointing to increased insurance premiums and higher exposures for self-insureds, all of which would ultimately affect employment and the economy in the Garden State.

None of the negatives of the new law seemed to impress Governor Jon Corzine, a fellow Democrat seen as ready to sign the bill,

despite his own business career on Wall Street. But then his advisors and representatives of the State's municipalities and counties pointed out that the same adversities would befall New Jersey's communities and their governments, ultimately hurting the citizens through increased taxes. Governor Corzine came to the rescue, using his "pocket veto" allowing the bill to die when the Legislature was in recess. Reports suggest that it will take another year for the bill to be resurrected in the Legislature.

At present, New Jersey permits recovery for economic damages, including loss of support, and the value of lost companionship, nurture and guidance, but not for grief and suffering of survivors. New York law is virtually identical. We will watch developments.





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NYU Not Liable to Student Injured in Jell-O Wrestling Incident

College students apparently do not like to take responsibility for injuries they should have anticipated. Recall the New Jersey student who sued the manufacturer of his dormitory bunk bed, for failing to warn him that a fall from the top bunk could be injurious. See *The Lane Law Letter*, Holiday Issue 2006, at page 4. Well, now the scene shifts to the venerable New York University, and the Supreme Court of New York, New York County, in *Wisnia v. NYU*, decided February 5, 2008.

Avram Wisnia served on the planning committee for a dormitory fun day, dubbed a "Beach Bash Event" to take place in the dormitory courtyard. Activities would include a DJ, a "moon-bounce," volleyball, water guns, and water balloons. It would also include "jell-o wrestling in a kiddie pool." That was Avram's undoing. He sustained an injury to his hip when he and some friends were involved in horse-play around, and in, the jell-o-

filled kiddie pool.

Avram sued NYU, of course, alleging that the University had a duty not to permit and sanction a dangerous condition as a pool of watery jell-o set up on concrete for jell-o wrestling. It made no difference to Avram that he was on the committee that dreamed up and designed this very activity, as part of an event intended, no doubt, to relieve students from the pressures of university studies. The Supreme Court was not impressed. The judge ruled that NYU had no duty to Mr. Wisnia in the first place, and that Avram had assumed the risk. "[I]t is difficult to imagine a more compelling set of facts for the application of the doctrine of primary assumption of the risk."

Except maybe sleeping in the top bunk in the dorm.

