



THE LANE LAW LETTER

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Supreme Court Watch: A Maritime Case About a Train Wreck...in Oklahoma

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.

In *Kawasaki Kisen Kaisha Ltd. v. Regal – Beloit Corp.*, decided June 21, 2010, the Supreme Court extended its decision in *Norfolk Southern R. Co. v. James N. Kirby* (2004). Both cases involved international intermodal shipments to the United States, with cargo damage occurring on inland rail segments of the through shipments. *Kirby* (“This is a maritime case about a train wreck”) held that the cargo claims were controlled by federal maritime law rather than contrary state law. *Kawasaki Kisen Kaisha* now holds that the Carriage of Goods By Sea Act (COGSA), and not the Carmack Amendment, governs the inland rail segment of the through shipment.

The cargo owners delivered four intermodal shipments to K-Line, for carriage by sea from China to Midwestern United States destinations. K-Line issued through bills of lading that required it to arrange delivery of the goods from China to their final destinations by any mode of K-Line’s choosing. The bills invoked the terms of COGSA and extended those terms to any of its subcontractors, so that COGSA would apply to the entire journey. Finally, the bills called for all disputes to be referred to the Tokyo District Court in Japan. That last provision is the crux of the dispute between the parties.

The four intermodal containers were safely transported across the Pacific Ocean to California by K-Line, and were then loaded onto a Union Pacific train. The train derailed in Oklahoma, allegedly destroying the cargo. The cargo owners sued K-Line and Union Pacific for their damages, in state court in Los Angeles. K-Line and UP removed the cases to federal court and then moved to dismiss because the forum-selection clause required any lawsuit to be brought in Japan. The cargo owners argued that the Carmack Amendment to the Interstate Commerce Act governed the inland leg. Under Carmack, unlike COGSA, the parties are limited in the terms to be included in a bill of lading. If Carmack is applicable, the forum-selection clause may not be enforced.

The Supreme Court majority sided with K-Line and UP. “It follows that Carmack does not apply if the property is received at an overseas location under a through bill [of lading] that covers the transport into an inland location in the United States.” Quoting *Kirby*, the Court added that “the international transportation industry clearly has moved into a new era – the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water, and land.”

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We've Been Busy . . .

Peter recently volunteered his time as a Judge in a National Moot Court Competition held at Pace University School of Law, in White Plains, New York. The competition was sponsored by the American Mock Trial Association and involved teams of undergraduates from colleges throughout the United States. The students had to prepare for both sides of a mock criminal trial and were not told whether they would be representing the defense or prosecution until moments before the trial was to begin. Peter found judging the competition to be rewarding, and a way to share with the students some of his experience and knowledge as a trial attorney. He was also impressed with the poise and level of professionalism displayed by the students during the competition.

In late April, John attended the annual meeting of the Transportation Lawyers' Association. The conference addressed a wide variety of topics, including insurance issues, development of intermodal facilities, alternative business structures, and legal updates in all modes of transportation. John also attended the annual meetings of the commercial and business litigation, casualty litigation, and freight claim committees. The TLA conference provides an opportunity to gather with transportation lawyers from throughout North America.

Florida is Proper Venue for NY Plaintiff Injured in Gulf of Finland

While plaintiffs, husband and wife, were on a Baltic cruise, Mrs. Hodder tripped on a 12-14 inch high ramp on the ship. The Hodders, who are New York residents, later sued the cruise line in New York state court. The cruise line moved to dismiss on the basis of the Florida forum selection clause contained in their travel contract. The New York state judge agreed, dismissing the complaint in *Hodder v. Norwegian Cruise Line Limited*.

A passenger ticket for a cruise on a ship is a maritime contract. The general maritime law applies to its terms, even in state court. Courts have universally enforced forum selection clauses in passenger tickets, whether or not the passenger reads the contract. In *Hodder*, the clause requires that any suit arising from the voyage must be brought in Miami-Dade County, Florida. The only procedural remedy available to the New York state court was to dismiss the lawsuit, which it did.

NJ Wrongful Death Action is Not Barred by Statute Violation

A New Jersey statute, N.J.S.A. 39:6A-4.5, bars uninsured drivers from suing for personal injuries resulting from a motor vehicle accident. Lawrence Aronberg lost his life in such an accident. Prior to the accident his automobile insurance policy was cancelled for non-payment of premiums. His heirs sued the alleged tortfeasor for Mr. Aronberg's pain and suffering prior to his death (inaptly known as the Survivorship Action because the claim for pain and suffering survives the death of the decedent), and for Wrongful Death economic damages suffered by his heirs, in *Aronberg v. Tolbert*.

The Appellate Court held that the Survivorship Action is barred by the statute, because Mr. Aronberg would have been barred from suing for pain and suffering, if he had lived. The court did not bar the wrongful death claim

of the family, however. The statute gives the uninsured driver a "powerful incentive to comply with compulsory insurance laws." A recovery under the Wrongful Death Act compensates the survivors of the decedent for their losses as a result of the tortious conduct of others. It does not accrue to the decedent or to his estate. The Wrongful Death Act is seen as remedial legislation and should be liberally construed, in this case to allow the innocent heirs to proceed with a claim for their own statutory economic losses. To do so does not interfere with the public policy reasons for barring personal injury claims by or on behalf of the uninsured driver.

Thus, the heirs were permitted to proceed with their Wrongful Death Act claim even though Mr. Aronberg was uninsured at the time of the accident which led to his death.

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NJ Allows Drunk Driver to Sue the Bar

Two New Jersey statutes collided in a drunk driving case, requiring an appellate court to make an equitable compromise between their competing interests, siding with a drunk motorcyclist, in *Voss v. Tranquilliano*. Mr. Voss alleges that he became intoxicated at Tiffany's Restaurant and then had a collision with a car driven by Mr. Tranquilliano, suffering personal injuries. He also pleaded guilty to DWI, with a blood alcohol content of .196 percent, two and a half times the legal limit of .08 percent. He sued Tranquilliano, and also Tiffany's Restaurant for negligent service of alcohol to Mr. Voss.

A 1997 statute aimed at quelling drunk driving provides that one who is convicted of DWI relating to a motor vehicle accident for-

feits any right to bring a lawsuit, regardless of who is at fault. A preexisting statute, the Alcoholic Beverage Server Fair Liability Act was enacted to restrict liability of a licensed server. It nevertheless permits the drunk driver to sue the server for his injuries resulting from negligent service of alcohol to him. The appellate court holds that the right of the drunk driver to sue the licensed server survives the 1997 law. While the drunk driver is not permitted to sue those involved in the accident, he may still bring a dram shop action under the Beverage Server Act. The court reasoned that both statutes had the public policy goal of reducing drunk driving on New Jersey's roadways.

On July 16, 2010, the State Supreme Court agreed to hear an appeal of this decision.



NJ's Punitive Damage Law Applied to NY Federal Court Case

Lawsuits were brought by surviving spouses in New York federal court for product liability against Novartis, a New Jersey-based drug manufacturer, whose products, Aredia and Zometa, allegedly caused the deaths of Helene Deutsch and John Napolitano, both New York residents. The lawsuits contained punitive damage claims, and the U.S. District Court for the Eastern District recently ruled New Jersey law, not New York law, would control the issue of punitive damages. New Jersey law limits such awards. The important motion decision was issued on July 16, 2010, in *Deutsch v. Novartis Pharmaceuticals Corp.*

There can be different decisions on choice of law within the same lawsuit, depending upon the particular issue. The parties agreed that New York law would apply to substantive issues, but not as to punitive damages. The federal court looked to New York's choice-of-law rule of "interest analysis" to decide that New Jersey had the greater interest in regulating the conduct of Novartis, since the allegedly tortious acts and omissions in developing and distributing the drugs occurred in New Jersey. "It is well-established in this Circuit that punitive damages are conduct-regulating issues. . . It follows, then, that the law of the jurisdiction where the conduct occurred should apply."

Judgment Vacated in NJ Wrongful Death Suit

Keith Orzech was a student and RA at Fairleigh Dickinson University (FDU) in New Jersey. He died in an alcohol-related fall from a fourth floor dormitory window. The trial court found in *Orzech v. Fairleigh Dickinson University*, that Keith violated FDU's alcohol policy prohibiting drinking to the point of intoxication in the dormitory, which, as an RA, he well knew. He and some friends were playing "drinking games" that included consumption of grain alcohol. Friends put him to bed between 2:00 and 2:30 a.m. His body was found at 9:00 a.m. on the ground below his dorm window.

At trial, Mr. Orzech and FDU were found

equally at fault, Keith for his voluntary intoxication and FDU for failing to enforce its alcohol policy. FDU argued that it enjoyed immunity under the Charitable Immunity Act. The trial court disagreed. The Appellate Division reversed. The only legal issue was whether Keith was, at the time of his fall, a "beneficiary" of FDU's charitable or educational works. The appellate court found that he was a beneficiary, as he was living in the FDU dorm and serving as an RA, both of which were part of his educational experience. The judgment for the estate, already reduced to reflect the comparative negligence, was vacated because of the Charitable Immunity Act.





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If the Duty Doesn't Exist, You Must Dismiss (*apologies to Johnnie Cochran*)

Two recent slip-and-fall cases decided by the same New York appellate court resulted in different outcomes for the plaintiffs. Both cases were brought in New York County — Manhattan — and appealed to the First Department of the Supreme Court, Appellate Division. One involved a slippery floor on a rainy day, in an A&P supermarket. The other portrays an equally slippery boathouse dock covered with algae. The cases demonstrate the importance of the element of duty in a tort claim.

In *Signorelli v. The Great Atlantic & Pacific Tea Company, Inc.*, Mr. Signorelli sued for injuries he sustained when he fell on a wet floor in the vestibule of the store. It had been “raining all day and coming in,” he testified, and he saw no mats or signs warning of a wet condition. A&P argued they had no duty to provide an ongoing remedy when a slippery condition is caused by moisture tracked in during a constant rainstorm. The lower court agreed and ordered a dismissal. The upper court disagreed. The visible hazardous condition had existed long enough “to permit A&P’s employees to

discover and remedy it.” The complaint was reinstated.

Susan Fox was not so lucky, in *Fox v. Central Park Boathouse, LLC*. She alleged that she slipped on a dock that was covered with algae, while disembarking from a rowboat she had rented. The Appellate Division affirmed the lower court’s dismissal of the complaint. In this case the court held that there was no breach of duty, as the presence of algae did not constitute an unreasonably dangerous condition; it is “inherent in the nature of a lake in the summer.” Plaintiff should have anticipated that it would be present, since the evidence showed that it covered the dock along the waterline for 150 feet.

A negligence claim has three elements: existence of a duty, breach of the duty, and resulting injury. If no duty exists, the inquiry ends, as it did for Ms. Fox.

