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Rosenthal v. Warren & New England Baptist Hospital

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RECENT DEVELOPMENTS

ROSENTHAL V. WARREN & NEW ENGLAND BAPTIST HOSPITAL

CONFLICT OF LAWS—475 F.2d 438 (2d Cir. 1973), *cert. denied*, 413 US —, 42 USLW 3197 (Oct. 9, 1973).

The federal diversity case of *Rosenthal v. Warren* afforded the United States Court of Appeals, Second Circuit, the opportunity to examine New York's choice-of-law rules.¹ In so doing, the Second Circuit failed to recognize the import of *Neumeier v. Keuhner*,² in which the New York Court of Appeals declared a change in its choice-of-law policy from an absolute "interest analysis" approach to one which in certain circumstances would cause courts to look automatically to the place of the alleged tort for the applicable law. The *Neumeier* holding may be read to limit this policy change to "situations involving guest statutes in conflict settings."³ However, when this limitation is viewed in light of the development of New York's choice-of-law theory, one has to conclude that the limitation was not meant to exist and that the *Neumeier* decision should be given broad controlling effect.⁴

In *Rosenthal*, the plaintiff, the widow and Executrix of the Estate of Dr. Martin C. Rosenthal, instituted a wrongful death action against the defendants, the New England Baptist Hospital and Dr. Kenneth W. Warren, alleging that they were negligent with respect to their examination, diagnosis, treatments and care of Dr. Rosenthal. The doctor died following surgery performed at the defendant hospital in Boston, Massachusetts. At the time of Dr. Rosenthal's death, he, his wife, and their three minor children were residents and domiciliaries of New York.

1. In a diversity case, a federal court must look to the choice-of-law theory of the forum state. *Klaxon v. Stenton Electric Manufacturing Co.*, 313 U.S. 487 (1941). At the time of *Klaxon*, most states followed the *lex loci delecti* rule. Under that rule, the substantive rights of the parties are governed by the law of the place where the wrong occurred. See, *Gray v. Blight*, 112 F.2d 696 (10th Cir. 1940). Thus, choice-of-law was not a serious problem. Today, however, with the fall of the *lex loci delecti* rule in many jurisdictions, see, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S. 2d 743 (1963), a serious problem results with the application of choice-of-law rules.

2. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

3. *Id.* at 128, 286 N.E.2d at 457, 335 N.Y.S.2d at 70.

4. Twerski, *Numeier v. Keuhner: Where are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 121 (1973). *Contra*, Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 562 (1971).

The plaintiff's action against New England Baptist Hospital was commenced in the Supreme Court of New York, Westchester County, by the personal service of a summons upon an officer of the hospital.⁵ The plaintiff obtained *quasi in rem* jurisdiction over Dr. Warren to the extent of the defendant's insurance coverage by means of a *Seider* attachment.⁶ The defendants removed the case to the United States District Court for the Southern District of New York on grounds of diversity of citizenship.⁷

The District Court, in determining whether New York or Massachusetts law should govern, held New York law applicable and granted the plaintiff's motion for partial summary judgment striking the defendant's affirmative defenses. These were based upon Massachusetts' \$50,000 limit on damages recoverable in death actions.⁸ An interlocutory appeal, pursuant to 28 U.S.C. §1292(b), was taken to the Court of Appeals, Second Circuit, by the defendants solely on the question of whether the courts of New York would apply a Massachusetts Wrongful Death Statute⁹ to the facts of this case. The Second Circuit affirmed the District Court's decision.¹⁰

Judge Oakes' majority opinion began by reviewing the development of New York's choice-of-law rules, and found that with *Kilberg v. Northeast Airlines, Inc.*¹¹ in 1961 and *Babcock v.*

5. The officer was served in New York City while soliciting funds for the Hospital. *Rosenthal v. Warren*, 475 F.2d 438, 440 (2d Cir. 1973); *Brief* for plaintiff, at 2.

6. The attached property was the obligation of the St. Paul Fire and Marine Insurance Company to defend and indemnify defendant Warren contained in a liability insurance policy issued to the Lahey Clinic Foundation and under which defendant was a covered insured.

A *Seider* attachment is a quasi-in-rem procedure whereby a New York plaintiff may obtain jurisdiction over a non-resident defendant regardless of the situs of the tort by attaching the defendant's insurance company's obligation to defendant. *See Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966); *Simpson v. Loehmann*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968); *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir.) (*en banc*), *cert. denied*, 396 U.S. 844 (1969). Thus, *Seider* attachments invariably involve choice-of-law questions. *See generally*, Carpenter, *New York's Expanding Empire in Tort Jurisdiction: Quo Vadis?*, 22 HASTINGS L.J. 1173, 1179 (1971).

7. 28 U.S.C. § 1441(a).

8. *Rosenthal v. Warren*, 342 F.Supp. 246 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 438 (2d Cir.), *cert. denied*, 413 U.S. —, 42 U.S.L.W. 3197 (Oct. 9, 1973).

9. Mass. Stat. 1965, ch. 683 § 1, *as amended* MASS. GEN. L. ANNO. ch. 229 § 2(Supp. 1973).

10. 475 F.2d 438 (2d Cir. 1973), *cert. denied*, 413 U.S. —, 42 U.S.L.W. 3197 (Oct. 9, 1973).

11. 9 N.Y. 2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). In *Kilberg*, plaintiff's decedent, a New York resident, purchased his ticket and boarded the defendant's aircraft in New York to fly to Nantucket, Massachusetts. The decedent was killed when the plane

*Jackson*¹² in 1963, the New York courts stopped using the traditional *lex loci delicti* rule and instead developed an interest analysis approach. Generally, this interest analysis approach has led to a refusal to apply the damage-limiting laws of other jurisdictions where one of the parties in an action is a New York domiciliary.¹³ However, Judge Oakes did not consider the latest case, *Neumeier v. Keuhner*¹⁴, to substantially change New York's choice-of-law policy. Thus, Judge Oakes found that the New York interest and public policy of not limiting damages in wrongful death actions as reflected in its state constitution,¹⁵ predominates over any interest which Massachusetts may have in protecting its defendants. Additionally, he found that whatever expectations the defendants had that Massachusetts law would be applied were "legally irrelevant" since New York no longer followed "this contractual type of approach to multistate tort problems."¹⁶

crashed in Nantucket. The New York Court of Appeals refused to apply the Massachusetts limitations on wrongful death damages. The Court expressed a paternalistic attitude toward its own citizens by saying "[In air travel]. . . The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters." 9 N.Y.2d at 39, 172 N.E.2d at 527, 211 N.Y.S.2d at 135.

12. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *Babcock* dealt with a guest-host relationship where both the driver and passenger of an auto were New York domiciliaries. During a weekend pleasure trip in Canada, they had an accident while passing through the province of Ontario. The question for the New York court was whether the Ontario Guest Statute should apply. In holding that it should not, the court used an "interest analysis" approach to the conflict of laws problem, saying that "controlling effect. . . [should be given]. . . to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

13. See *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968) (4-3 decision); *Tjepkema v. Kenney*, 31 App.Div.2d 908, 298 N.Y.S.2d 175 (1st. Dept. 1969), *appeal dismissed*, 24 N.Y.2d 942, 250 N.E.2d 68, 302 N.Y.S.2d 580 (1969).

In *Miller*, the New York Court of Appeals held that Maine's limitation of \$20,000 in wrongful death cases should not be applied where a New York resident was killed in Maine while a passenger in an automobile registered in Maine, and operated by a Maine resident. The court repeated its *Kilberg* approach and again New York's public policy against wrongful death limitations was stressed. Additionally, the court found that New York's "governmental interest" was based on the fact that an arbitrary limit on damages for the death of a New York resident constituted a financial burden on his New York dependent beneficiaries, which might ultimately have to be borne by the State of New York. The court saw no countervailing Maine "interest" which could displace New York law, noting that Maine's statute "dealing as it does with the nature of the remedy. . . is obviously not the kind of statute which regulates conduct." 22 N.Y.2d at 19, 237 N.E.2d at 881, 290 N.Y.S.2d at 740.

14. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

15. N.Y. CONSR. art. 1, § 16. (McKinney 1969).

16. 475 F.2d at 444.

Judge Lumbard, dissenting, characterized the majority opinion as an application of a per se rule rather than of an interest analysis approach.¹⁷ The dissent urged that an interest analysis approach would clearly have led to the application of Massachusetts law, since the decedent deliberately chose to go to the defendant Massachusetts Hospital for surgery performed by a doctor who did not practice outside of Massachusetts. Judge Lumbard stressed that the tort in *Rosenthal* was purely local, and thus, despite Dr. Rosenthal's New York domicile, Massachusetts interests should prevail. Surprisingly, the dissent did not rely on *Neumier* for support.

Skipping a Few Lines from the Fact Pattern

The importance of *Neumeier* cannot be overemphasized. *Neumier* was the product of New York's experience in the conflict-of-laws area and it reflects a sharp change in New York's choice-of-law policy from a pure "interest analysis" approach to a combination of "interest analysis" and "territorialism."¹⁸

In *Neumeier*, the plaintiff's intestate, an Ontario resident, was killed in that province while a guest in a car driven by the defendant, a New Yorker. The Special Term court denied the plaintiff's motion to strike an affirmative defense¹⁹ predicated upon Ontario's guest statute.²⁰ The Appellate Division, Fourth Department, reversed²¹ on the authority of *Tooker v. Lopez*.²² On

17. *Id.* A per se rule would require the application of New York law whenever the plaintiff was a New York resident. Such a rule raises serious constitutional questions. See generally, Carpenter, *New York's Expanding Empire in Tort Jurisdiction: Quo Vadis?* 22 HASTINGS L.J. 1173, 1179 (1971).

18. See generally, *Symposium, Neumeier v. Keuhner: A Conflicts Conflict*, 1 HOFSTRA L. REV. 93 (1973).

19. 63 Misc.2d 766, 313 N.Y.S.2d 468 (Sup. Ct. Erie Co. 1970) *rev'd* 37 App. Div. 2d 70, 322 N.Y.S.2d 867 (4th Dept. 1971) *rev'd* 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

20. Highway Traffic Act of Province of Ontario, ONT. REV. STAT., ch. 172, § 105(2) (1960), as amended, Stat. of 1966, ch. 64, § 20(2).

21. 37 App. Div.2d 70, 322 N.Y.S.2d 867 (4th Dept. 1971), *rev'd*, 31 N.Y.S.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

22. 24 N.Y.S.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

In *Tooker* the question was whether a Michigan Guest Statute should apply to a wrongful death action involving two New York domiciliaries, Michigan State University co-eds, where the guest-host relationship arose in Michigan and where the automobile trip and the fatal crash occurred entirely in Michigan. In a 4-3 decision, the New York Court of Appeals concluded that the Michigan statute did not govern. However, the real significance of *Tooker* lies in its implied rejection of the notion that in a death action New York would always apply the New York death statute, which further implies a fear of any per se rule (*dictum*). This significance became apparent in *Neumeier*.

appeal by permission to the New York Court of Appeals, the Appellate Division's decision was reversed and the Special Term's Order was reinstated.²³ The Court of Appeals, in the words of Chief Judge Fuld, stressed that:²⁴

. . . the Appellate Division misread our decision in the *Tooker* case . . . [I]n *Tooker*, the guest-passenger and the host-driver were both domiciled in New York, and our decision—that New York law was controlling—was based upon, and limited to, that fact situation.

* * *

What significantly and effectively differentiates the present case is the fact that, although the host was a domiciliary of New York, the guest, for whose death recovery is sought, was domiciled in Ontario . . . It is clear that, although New York has a deep interest in a foreign state, against unfair or anachronistic statutes of that state, it has no legitimate interest in ignoring the public policy of a foreign jurisdiction—such as Ontario—and in protecting the plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders.

Chief Judge Fuld then examined the consequences of earlier decisions stating that “our decisions in multi-state highway accident cases, particularly in those involving guest-host controversies, have . . . lacked consistency.”²⁵ While acknowledging the soundness of the court's abandonment of the *lex loci* doctrine, the noted jurist argued that “[t]here is, however, no reason why choice-of-law rules, more narrow than those previously devised, should not be successfully developed, in order to assure a greater degree of predictability and uniformity.”²⁶ He then quoted portions of his concurring opinion in *Tooker* which expressed the view that *Babcock*, and the decisions based on it, had given the court insight into the policies which should govern this area of the law. Therefore, he concluded, the court “may proceed to the next stage in the evolution of the law—the formulation of a few rules of general applicability, promising a fair level of predictability.”²⁷

23. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

24. *Id.* at 125-126, 286 N.E.2d at 455-456, 335 N.Y.S.2d at 67-68.

25. *Id.* at 127, 286 N.E.2d at 457, 335 N.Y.S.2d at 69.

26. *Id.*; for a discussion of the lack of consistency, the need for predictability, and the desirability of rules of general applicability, see Rosenberg, “Comments on *Reich v. Purcell*,” 15 U.C.L.A. L. Rev. 641 (1968).

27. *Id.*

Before listing the rules, however, Judge Fuld noted that "although . . . no rule may be formulated to guarantee a satisfactory result in every case," the principles announced by the court would be "sound for situations involving guest statutes in conflict settings."²⁸ The following rules were adopted by the *Neumeier* court:²⁹

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.

3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

The *Neumeier* rules pose a problem of interpretation in two areas. First, should they be limited in application to guest-host disputes and secondly should they be limited to questions of liability? It can be argued that a broad application was intended by the *Neumeier* court in spite of the lack of clarity in its language and that the rules are thus appropriate in settings such as *Rosenthal*.

In *Rosenthal*, the tort occurred in Massachusetts because the hospital was located and the surgery performed in that state. It

28. *Id.*

29. *Id.* at 128, 286 N.E.2d at 457-458, 335 N.Y.S.2d at 70. Surprisingly, the Second Circuit relied upon these "rules" [hereinafter referred to as the "Neumeier rules"] a year earlier in *Pryor v. Swarner*, 445 F.2d 1272 (2d. Cir. 1971). *Pryor* was not cited in either the majority or dissenting opinion in *Rosenthal v. Warren*. See generally, *Pryor v. Swarner: Guest Statute Interests Analysis, and Confusion in the Conflict of Laws*, 1972 UTAH L. REV. 312. Cf. *Chila v. Owens*, 348 F. Supp. 1207 (S.D.N.Y. 1972).

was Dr. Rosenthal's decision to seek medical attention in Massachusetts which brought about the involvement of the defendants in this case. There was nothing fortuitous in the situs of the wrong, in contrast to cases involving plane crashes and automobile accidents, which the *Babcock* court regarded as transitory torts.³⁰ When *Neumeier* rule II is applied to transitory torts, it becomes clear that a per se rule based solely on a plaintiff's New York residence should no longer be followed, as rule II dictates the application of the law of the defendant's domicile when the situs of the wrong was the defendant's home state. If a per se rule is, therefore, inappropriate in cases involving transitory torts, *a fortiori*, it is inapplicable in a case such as *Rosenthal* where the situs of the wrong was not at all fortuitous.

One might be troubled, however, by the application of the *Neumeier* rules to the *Rosenthal* case for the following reason. The *Neumeier* rules, which admittedly deal with questions of liability, might not be appropriate for questions involving limitations on recovery as is the case in *Rosenthal*. The authors submit, however, that limitations on damage awards in wrongful death actions are determinative of the extent to which a state casts liability on a defendant.

For example, State A imposes a \$100,000 limit on wrongful death recoveries. In a wrongful death action between two domiciliaries of State A, and thus in the absence of any choice-of-law problems, assuming that the plaintiff could prove actual damages in excess of \$100,000 the plaintiff could not recover such excess since State A does not cast the defendant in liability beyond the damage limitation. Taking this argument one step further by adding a choice-of-law factor—a New York plaintiff suing a State A defendant in a New York court on a cause of action for wrongful death which arose in State A—should not *Neumeier* rule II apply? State A does not cast the defendant in liability in excess of the damage limitation. If the wrongful death action is treated as a medical malpractice suit we then have the fact pattern of *Rosenthal v. Warren*.

In light of the foregoing arguments, it would have been appropriate for the Second Circuit, in deciding *Rosenthal*, to apply *Neumeier* rule II in the following manner:

When the [defendants'] conduct occurred in the state of his domicile and that state [Massachusetts] does not cast him in

30. 12 N.Y.2d 473, 480, 191 N.E.2d 279, 282, 240 N.Y.S.2d 743, 748 (1963).

liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state [New York] of the [plaintiff's] domicile.

Regretably, both the majority and dissenting opinions in *Rosenthal* failed to give weight to the *Neumeier* rules. As a result, it is probable that Federal District Courts sitting in New York will be faced with an increased diversity case load, which, by its very nature, involves choice-of-law questions. This result flows from the following factors: (1) The District Court and the Circuit Court of Appeals must apply the choice-of-law of the forum state;³¹ they are not able to announce new choice-of-law rules.³² Thus, a plaintiff would not run the risk of a change of choice-of-law policy which could only occur from litigation within the state court system.³³ (2) In Federal Court, should a diversity case be transferred on the grounds of *forum non convenience*, the transferee forum must apply the choice-of-law rules of the original forum.³⁴ Compare the result in state court, where *forum non convenience* could result in a dismissal and plaintiff would have to bring the action in the foreign state.³⁵ Thus, a plaintiff who faces a *forum non convenience* problem runs no risk of the application of foreign law if he brings his action in Federal Court.

In view of the foregoing, it would be advisable for the Second Circuit in handling diversity cases involving the application of New York's choice-of-law theory to take the initiative in giving the *Neumeier* rules the broad application which logic demands.

31. *Klaxon v. Stenton Electric Manufacturing Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941).

32. *Klaxon v. Stenton Electric Manufacturing Co.*, 313 U.S. 487, 496-497 (1941).

33. Compare *Chila v. Owens*, 348 F.Supp. 1207 (S.D.N.Y. 1972) with *Neumeier v. Keuhner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). In *Chila*, plaintiff was able to obtain the benefit of New York law by bringing the action in Federal court on diversity grounds. In *Neumeier*, the plaintiff, a Canadian, had to resort to the New York state courts and thus suffered the consequences of the policy shift by the New York Court of Appeals.

34. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

35. *Silver v. American Insurance Company*, 29 N.Y. 2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).