Admiralty Practicum

Volume 2006
Issue 1 *Fall 2006*

Article 8

March 2018

Kelly v. Di Cerbo Supreme Court of New York, Appellate Division, Fourth Department 27 A.D.3d 1082 (Decided March 17, 2006)

John D'Ambrosio, Class of 2009

at the same time, permitting a shipowner to limit its liability on that claim to the value of the ship. In that case, the Supreme Court upheld a district court's dissolution of an injunction that had prevented petitioner from pursuing state court claims, concluding that respondent's right to seek limitation of liability would be adequately protected by petitioner's stipulation that his claim did not exceed the limitation fund, petitioner's waiver of any defense of res judicata with respect to limitation of liability, and the district court's decision to stay the Limitation Act proceedings pending state court proceedings. The Court in *Lewis* added that "state courts, with all their remedies, may adjudicate claims like petitioner's against vessel owners so long as the vessel owner's right to seek limitation of liability is protected."

Turning to the facts of the case at bar, the Court of Appeals concluded that Wiley's stipulations preserved Norfolk's Limitation of Liability right. To wit, Wiley had agreed that Norfolk's liability would be limited to the amount of the limitation fund in whatever amount the district court fixed. The failure of Wiley to agree to the amount of the limitation fund did not prejudice Norfolk's Limitation of Liability right. The Court held that the district court's decision to postpone determination of the liability fund was consistent with the district court's broad power to manage cases and reserve determination of important yet potentially irrelevant issues until later in the proceedings. Accordingly, the Court of Appeals affirmed the district court's order.

Charles I. Steerman
Class of 2008

DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN NEGLIGENT ENTRUSTMENT CASE AFFIRMED IN PART AND MODIFIED IN PART.

Plaintiffs commenced an action seeking damages for injuries sustained by their daughter when the power boat on which she was a passenger collided with another power boat operated by a minor defendant and owned by another defendant. The Appellate Division held that the Supreme Court properly denied the motion of the parents of the boat operator (also named as defendants) for summary judgment on the claim of negligent entrustment, but erred in denying that part of the motion with respect to the boat owner.

Kelly v. Di Cerbo
Supreme Court of New York, Appellate Division, Fourth Department
27 A.D.3d 1082
(Decided March 17, 2006)

Plaintiffs Shelly Kelly and Thomas Kelly brought suit in the Supreme Court, Cattaraugus County, against Christopher Di Cerbo, a minor, his parents ("the Di Cerbos") and Jerome T. Morgan ("Morgan"), after the Kellys' infant daughter was injured when the power boat on which she was a passenger collided with a power boat operated by Christopher DiCerbo ("Christopher") and owned by Morgan.

The Di Cerbos and Morgan moved for summary judgment seeking to dismiss the claim against them that they negligently entrusted the boat to Christopher. The Appellate Division concluded that the Supreme Court properly denied summary judgment with respect to the Di Cerbos, but erred in denying summary judgment with respect to Morgan.

The Appellate Division noted that "it is well established that a parent owes a duty to protect third parties from harm that is clearly foreseeable from an infant child's improvident use of a dangerous instrument...when the parent is aware of and capable of controlling its use." *Merle v. Baderman*, 305

A.D.2d 1059, 1059, quoting *Nolechek v. Gesuale,* 46 N.Y.2d 332, 338. The Court further noted that "the owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others." *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 236.

The Court rejected as a matter of law the Di Cerbos' contention that the boat operated by Christopher was not a dangerous instrument, and held that a genuine issue of fact existed regarding the issue, based on Nicholas Di Cerbo's admission that the boat could be dangerous if operated in an unsafe manner.

Although the Court agreed with the Di Cerbos that they had established that, to their knowledge, Christopher had always operated the boat in a safe and prudent manner, it concluded that plaintiffs had raised a triable issue of fact whether the Di Cerbos could have "clearly foreseen" that Christopher's use of the boat could have exposed others to injury or whether they "should have known" that Christopher was likely to use the boat in a dangerous manner. *Rios v. Smith*, 95 N.Y.2d 647, 652; *Larsen v. Heitmann*, 133 A.D.2d 533, 533.

The Court's finding of the existence of a question of fact rested on the affidavits of three of the Di Cerbos' neighbors which plaintiffs submitted to the court. These affidavits averred that Christopher had been seen using the boat in a reckless manner on multiple occasions. The affidavits, coupled with Christopher's admission that his parents' permission was needed for him to operate the boat, and that while he used the boat they were often present at their cottage, located in close proximity to the water, were held to be sufficient evidence for a factfinder to infer that the Di Cerbos should have known that it was likely for Christopher to use the boat in a reckless manner.

However, the Appellate Division concluded that plaintiffs failed to raise a triable issue of fact whether Morgan "could have clearly foreseen" that Christopher's use of the boat could have exposed others to injury, or whether Morgan "should have known" that Christopher was likely to use the boat in a dangerous manner, because nothing in plaintiffs' submissions established that Morgan was present when Christopher operated the boat or that Morgan knew of the neighbors' complaints; thus there was no evidence from which a factfinder could infer that Morgan should have been aware of Christopher's reckless operation of the boat.

John D'Ambrosio
Class of 2009

NEGLIGENCE CLAIM ARISING FROM AN ACCIDENT OCCURRING ON A VESSEL NOT "UNDER SAIL" BUT IN NAVIGABLE WATERS CONSTITUTES A MARITIME TORT

Because Plaintiff's tort claim was time-barred by the three-year statute of limitations under federal maritime law, he could not prevail on his assertion that the Outer Continental Shelf Lands Act incorporated Louisiana's one-year statute of limitations which, in turn, was tolled while he received benefits under the Longshore and Harbor Workers' Compensation Act.

Strong v. B.P. Exploration & Production, Inc.
United States Court of Appeals for the 5th Circuit
440 F.3d 665
(Decided February 15, 2006)

Defendant-appellant B.P. Exploration & Production, Inc. ("B.P.") appealed the district court's denial of its motion for summary judgment, asserting that appellee's cause of action in negligence was time-barred.