

Svetlana Tikhonova, Respondent, v. Ford Motor Company, et al., Appellants, et al., Defendants.

No. 54

COURT OF APPEALS OF NEW YORK

4 N.Y.3d 621; 830 N.E.2d 1127; 797 N.Y.S.2d 799; 2005 N.Y. LEXIS 1087

May 5, 2005, Decided

**PRIOR HISTORY:** [\*\*\*1] *Tikhonova v. Ford Motor Co.*, 10 A.D.3d 185, 779 N.Y.S.2d 47, 2004 N.Y. App. Div. LEXIS 8678 (N.Y. App. Div. 1st Dep't, 2004)

**DISPOSITION:** Order of the appellate division affirmed; certified question answered in the affirmative.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant car owner sought review of a decision of the Supreme Court, Appellate Division (New York), which reinstated plaintiff passenger's claim against the owner and found that the owner could be held vicariously liable for the passenger's claims even though defendant driver was subject to diplomatic immunity so that recovery against the driver was limited to recovery under 28 U.S.C.S. § 1364. A question was certified to the court.

**OVERVIEW:** The court was asked to address whether or not a vehicle owner could be vicariously liable, under *N.Y. Veh. & Traf. Law* § 388, for the negligence of the driver, who was a diplomat and who was thus immune from suit pursuant to 28 U.S.C.S. § 254d. The court held that the vehicle owner could still be held vicariously liable. The court acknowledged that the diplomatic mission was required to secure liability insurance for the driver, pursuant to 28 U.S.C.S. § 1364, but declined to hold that § 1364 was an exclusive remedy that precluded the injured passenger from pursuing recovery from the vehicle owner under *N.Y. Veh. & Traf. Law* § 388. The court held that § 388 was not written to absolve the owner of liability simply because the driver was immune from liability by statute. Section 388 hinged on the owner's liability because of the driver's negligence. There was nothing in the relevant sections of the Diplomatic Relations Act, 22 U.S.C.S. § 254e and 28 U.S.C.S. § 1364, that barred the passenger from suing the car owner in state court.

**OUTCOME:** The court affirmed the decision of the appellate division reinstating the passenger's suit against the car owner. The court answered the certified question in the affirmative, thus providing that a vehicle owner could be vicariously liable for the negligence of a diplomat when the diplomat was immune from suit.

**CORE TERMS:** diplomat, driver, immunity, vicariously liable, exclusive remedy, volunteer, carrier, mission, immune, diplomatic immunity, negligently, emergency, financially responsible, derivative liability, vicarious liability, statutory language, diplomatic mission, injured party, vehicle owner, co-employee, firefighter, compensate, foreclose, drive, jointly, lease

**LexisNexis(R) Headnotes**

*Insurance Law > Motor Vehicle Insurance > Coverage Generally*

*Insurance Law > Motor Vehicle Insurance > Limitations on Liability*

*International Law > Immunity > Diplomats & Consuls*

[HN1] 28 U.S.C.S. § 1364 requires members of a diplomatic mission to secure automobile liability insurance and gives

injured persons the right to sue the wrongdoers' insurance carriers in federal court.

***Civil Procedure > Dismissal of Actions > Involuntary Dismissal***

***International Law > Immunity > Diplomats & Consuls***

[HN2] Under the Diplomatic Relations Act, 22 U.S.C.S. § 254a et seq., an action against an individual entitled to immunity must be dismissed where immunity is established upon motion or suggestion by or on behalf of the individual. 22 U.S.C.S. § 254d

***Torts > Transportation Torts > Motor Vehicles***

***Torts > Vicarious Liability > Imputed Contributory Negligence***

[HN3] See *N.Y. Veh. & Traf. Law* § 388.

***Insurance Law > Motor Vehicle Insurance > Coverage Generally***

***Insurance Law > Motor Vehicle Insurance > Limitations on Liability***

***International Law > Immunity > Diplomats & Consuls***

[HN4] The federal statute providing diplomats' tort victims with a direct action against the diplomats' insurance carriers, 28 U.S.C.S. § 1364, contains nothing like the "exclusive remedy" clause specified in the Workers' Compensation Law.

***Insurance Law > Motor Vehicle Insurance > Coverage Generally***

***Insurance Law > Motor Vehicle Insurance > Limitations on Liability***

***International Law > Immunity > Diplomats & Consuls***

***Torts > Transportation Torts > Motor Vehicles***

[HN5] Congress has enacted 28 U.S.C.S. § 1364 to assure that deserving plaintiffs can look to financially responsible parties to answer for injuries negligently caused by diplomats. 22 U.S.C.S. § 254e requires members of the diplomatic mission to acquire liability insurance for risks arising from the operation in the United States of any motor vehicle, vessel, or aircraft, while 28 U.S.C.S. § 1364 authorizes an injured party to sue the diplomat's carrier directly in federal court.

***Insurance Law > Motor Vehicle Insurance > Coverage Generally***

***Insurance Law > Motor Vehicle Insurance > Obligations Generally***

***International Law > Immunity > Diplomats & Consuls***

***Torts > Transportation Torts > Motor Vehicles***

[HN6] The Diplomatic Relations Act, 22 U.S.C.S. § 254e, is designed, in part, to deal with the inequities associated with the immunity of members of diplomatic missions in civil court proceedings.

**COUNSEL:** Frank L. Amoroso, for appellants.

Brian J. Isaac, for respondent.

**JUDGES:** Opinion by Judge Rosenblatt. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Graffeo, Read and R.S. Smith concur.

**OPINIONBY:** ROSENBLATT

**OPINION:** [\*1127] [\*\*799] ROSENBLATT, J.:

On this appeal two statutes intersect: on the one hand, vehicle owners are vicariously liable for the negligence of those whom they allow to drive their vehicles [\*1128] [\*\*800] (*Vehicle & Traffic Law* § 388). On the other, a diplomat who drives a vehicle negligently is immune from suit (22 USC § 254d). The question before us is whether a vehicle owner is vicariously liable for the negligence of a diplomat, himself immune from suit. Put differently, when these two statutes go head to head, does the driver's immunity extinguish the vicarious liability of the owner?

At issue is the scope of 28 USC § 1364. [HN1] That statute requires members of a diplomatic mission to secure automobile liability insurance and gives injured persons [\*\*\*2] the right to sue the wrongdoers' insurance carriers in federal court. We must decide whether 28 USC § 1364 is an exclusive remedy that bars the action before us.

We hold that the driver's immunity does not shield the owner. Moreover, because 28 USC § 1364 does not provide an exclusive remedy, the suit before us is tenable.

Alexy Konovalov, a Russian diplomat driving in New York City, rear-ended another car. Konovalov's passenger, plaintiff here, was seriously injured and sued Konovalov and Ford, the car's owner. n1 Supreme Court dismissed the suit against Konovalov owing to his diplomatic immunity. By way of affirmative defense, Ford asserted that given the driver's immunity it could not be held vicariously liable. Plaintiff moved for summary judgment against Ford, which cross-moved to dismiss. Supreme Court agreed with Ford, concluding that the company could not be held vicariously liable, and further, that 28 USC § 1364 relegated plaintiff to a federal court action against Konovalov's insurance carrier.

n1 Ford Motor Company owned the car; Ford Motor Credit Corporation was the lessor, pursuant to a long-term lease with the Russian mission. For convenience, and because the defendants are jointly and severally liable if they are liable at all, we refer to both companies jointly as Ford.

[\*\*\*3]

The Appellate Division reversed and reinstated the complaint against *Ford* (10 AD3d 185, 779 N.Y.S.2d 47 [1st Dept 2004]). We affirm.

[HN2] Under the Diplomatic Relations Act (22 USC § 254a et seq) an action against an individual entitled to immunity must be dismissed where immunity is established "upon motion or suggestion by or on behalf of the individual" (22 USC § 254d). n2 Konovalov's diplomatic immunity is conceded.

n2 See generally Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AJIL 873 [2001]. Article 31 of the Vienna Convention on Diplomatic Relations, April 18 1961, 23 UST 3227, 3240-41, 500 UNTS 96, 112 forecloses suit against certain foreign agents in American courts.

[HN3] In pertinent part, *section 388 of the Vehicle & Traffic Law* provides that

"Every owner of a vehicle used or operated in this state shall be liable and responsible for death or [\*\*\*4] injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

In 1924, the Legislature enacted Highway Law § 282-e, the predecessor to *section 388*. In the 80 years since then, the Legislature has amended or consolidated the section 14 times, but never once has it retreated from its intention to assure injured plaintiffs that there will be a financially responsible party to provide compensation for negligent driving.

[\*\*801] [\*1129] In arguing against liability, Ford asserts that, in other contexts, this Court has declined to impose derivative liability where the tortfeasor enjoys immunity. In *Naso v Lafata* (4 N.Y.2d 585, 589, 152 N.E.2d 59, 176 N.Y.S.2d 622 [1958]), we explained that a worker injured in a car driven negligently by a co-employee (and in the course of their employment) may not resort to the *Vehicle & Traffic Law* for a cause of action against the car's owner. The *Workers' Compensation Law*, we held, offers the only remedy for injuries caused by the co-employee's negligence. This conclusion flowed [\*\*\*5] directly from the statutory language in what was then *Workmen's Compensation Law* § 29 (6), which stated that "the right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured or killed by the negligence or wrong of another in the same employ" [quoted in *Naso*, 4 N.Y.2d at 589 [emphasis omitted]]. Similarly, in the companion case of *Rauch v Jones* (4 N.Y.2d 592, 596, 152 N.E.2d 63, 176 N.Y.S.2d 628 [1958]), we confirmed that the statute prohibits any remedy but that provided by the *Workers' Compensation Law*.

Contrary to Ford's assertion, the basis for these decisions was not that derivative liability could never derive from an immune party's negligence. Rather, both decisions rest on the statutory language making plain that in the special context of workers' compensation, the system of remedies provided by the *Workers' Compensation Law* supplants all other statutory or common law causes of action. [HN4] The federal statute providing diplomats' tort victims with a direct action against the diplomats' insurance carriers contains nothing like the "exclusive remedy" clause specified in the [\*\*\*6] *Workers' Compensation Law* [see 18 USC § 1364].

Ford also argues that our precedents denying the liability of owners of cars lent to emergency workers should apply here. In *Sikora v Keillor* (13 N.Y.2d 610, 191 N.E.2d 88, 240 N.Y.S.2d 601 [1963] , affirming 17 A.D.2d 6, 8, 230 N.Y.S.2d 571 [2d Dept 1962]), we affirmed, without opinion, the Appellate Division's determination that no liability attaches to a vehicle owner where the negligent driver (a volunteer firefighter) was immune from suit under *General Municipal Law* § 205-b . That case does not govern the appeal before us. The Appellate Division reasoned that the owner's vicarious liability could derive only from a finding of liability against the driver. On policy grounds, a contrary result would have discouraged volunteers from responding to emergencies by reducing the number of people willing to lend vehicles to those volunteers. By interpreting *section 388* as we did, the Court stood behind the strong policy interest in protecting those who aid emergency workers. That result, however, is not compelled in every instance in which the vehicle's operator benefits from some immunity. We do [\*\*\*7] not see a strong State policy in favor of renting cars to diplomats.

Moreover, a finding that the owner was not liable did not leave the injured party without the opportunity to seek full compensation, because *GML* § 205-b holds the fire district liable for the negligence of its volunteer firefighters. Here, by contrast, the Russian Mission's insurance, although greater than the State minimum, would likely not suffice to compensate the victim in full.

Ford would have us interpret *section 388* to necessarily absolve the owner of liability whenever the driver cannot be held liable. The statute, however, is not written that way. It hinges the owner's liability not on the driver's liability but on the driver's negligence.

[\*1130] [\*\*802] As a final argument, Ford maintains that 28 USC § 1364 bars this action. [HN5] Congress enacted that statute to assure that deserving plaintiffs can look to financially responsible parties to answer for injuries negligently caused by diplomats. n3 Section 6 of the Act requires members of the diplomatic mission to acquire liability insurance for risks "arising from the operation in the United States of any motor vehicle, vessel, [\*\*\*8] or aircraft" (28 USC § 254e), while Section 7 authorizes an injured party to sue the diplomat's carrier directly in Federal court (28 USC § 1364).

n3 See *Windsor v State Farm Ins Co* (509 F. Supp. 342, 343 [DDC 1981] [[HN6] "*The Diplomatic Relations Act* (the Act) was designed, in part, to deal with the inequities associated with the immunity of members of diplomatic missions in civil court proceedings."]).

Ford argues that because plaintiff has this right, she is barred from suing the company in state court. We disagree. There is nothing in the federal statutes that can be read to prohibit this action. Allowing a federal suit against the driver's carrier does not foreclose a state court suit against another party-- in this case, Ford as the owner. n4

n4 Plaintiff also argues that the diplomat's minimum statutory insurance coverage is far short of what it would take to compensate her for her injuries. Further, she asserts that although the lease between Ford and the Russian mission obligates the mission to indemnify Ford for any losses in excess of the federally mandated insurance, diplomatic immunity would extend to any counterclaim or indemnification agreement. Given the grounds for our decision, we need not address these arguments.

[\*\*\*9]

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Graffeo, Read and R.S. Smith concur.

Decided May 5, 2005