

1 CV-03-0195804

:SUPERIOR COURT

2 HUGO JAIGUAY

:STAMFORD/NORWALK J.D.

3 v.

:AT STAMFORD

4 JOEL VASQUEZ, ET AL

:SEPTEMBER 11, 2006

5

6

7

8

B E F O R E

9

THE HONORABLE JOHN DOWNEY, JUDGE

10

11

12 A P P E A R A N C E S

13 For the Plaintiff:

14 BRENDEN LEYDON, ESQUIRE (Ordering Party)

15

16 For the Defendant(s):

17 FRANK BARTLET, ESQUIRE

18 LISA FARIS-MCNAMARA, ESQUIRE

19

20

21

22

23

24

25

26

27

FILED APR 26 2007

DONALD ACKER,

Court Monitor

1 THE COURT: Hugo Jaiguay versus Joel Vasquez.

2 MR. LEYDON: Parties are here.

3 THE COURT: And plaintiff's counsel.

4 MR. LEYDON: I'm Brenden Leydon for the
5 plaintiff.

6 THE COURT: Mr. Leydon. Next is defense
7 counsel.

8 MS. MCNAMARA: Good morning, Your Honor. Lisa
9 Faris-McNamara for the defendants, Percy Montes and
10 Primo's Landscaping, Inc.

11 THE COURT: Thank you, Attorney McNamara. Sir?

12 MR. BARTLET: And good morning, Your Honor.
13 Frank Bartlet for the defendant, Joel Vasquez.

14 THE COURT: Thank you. All right, there are
15 three files here. I only have two of them. The
16 third file would be the one that would contain, I
17 think, the motions in question. And there's a
18 motion for summary judgment?

19 THE CLERK: Part three is missing.

20 THE COURT: Part three is missing?

21 THE CLERK: (INAUDIBLE).

22 THE COURT: Okay, what we're going to do --
23 there's a -- I think these are the documents in
24 support of a motion for summary judgment?

25 MR. LEYDON: I believe those are in objection,
26 Your Honor.

27 THE COURT: No, these documents in support of

1 objection to motion for summary judgment, correct,
2 okay?

3 MR. LEYDON: Correct, Your Honor.

4 THE COURT: Here they are. I don't have the
5 original motion for summary judgment. What's the
6 date of that?

7 MR. BARTLET: I believe it was --

8 MS. MCNAMARA: There are two, Your Honor.
9 There's Joel Vasquez's motion for summary judgment,
10 it's dated January 18th, 2006. And then there is
11 mine that is dated January 26th, 2006. In addition
12 to the objection that you do have, there is Mr.
13 Vasquez's reply dated August 25th, my reply dated
14 September 8th, and I also believe today Mr. Vasquez
15 filed a supplemental memorandum.

16 MR. BARTLET: I actually have the supplemental
17 memorandum to submit to Your Honor.

18 THE COURT: You have to hold on a second while
19 I orient myself here, okay? All right, I have the
20 April 13th, '06 motion for summary judgment filed by
21 the defendant, Vasquez. Attorney Bartlet, that's
22 your motion, correct?

23 MR. BARTLET: That's correct. I believe it was
24 initially filed --

25 THE COURT: Number 176, right?

26 MR. BARTLET: Uh-huh.

27 THE COURT: Now, was that --

1 MR. BARTLET: I think that it starts before
2 that, Your Honor; I believe on January 18th. I have
3 the motion number here.

4 THE COURT: Now, was -- Attorney McNamara, was
5 your motion filed before or after that?

6 MS. MCNAMARA: After, Your Honor, January 26th.

7 MR. BARTLET: We were initially motion number
8 157.

9 THE COURT: Well, hey, wait a minute. I've got
10 a motion for permission to file a motion for summary
11 judgment by the defendant, Joel Vasquez, dated April
12 13th, '06. Was there an earlier one?

13 MR. BARTLET: There was, Your Honor. There's
14 initial motion for permission to file a motion for
15 summary judgment filed on January 18th, which motion
16 was objected to by the plaintiffs. Thereafter,
17 plaintiff's withdrew their objection to the motion
18 for permission to file for summary judgment when --

19 THE COURT: All right, I see it here. Motion
20 number 157. And you, in fact, renewed that motion
21 later on, right?

22 MR. BARTLET: That's correct, Your Honor.

23 THE COURT: All right, number 157 is here. Let
24 me just write these down, this was not done here.
25 Number 157. And, Attorney McNamara, you filed one
26 later?

27 MS. MCNAMARA: Yes, Your Honor.

1 THE COURT: What was the date of that?

2 MS. MCNAMARA: It's dated January 26th of 2006.

3 MR. BARTLET: And that was motion number 160,
4 Your Honor.

5 THE COURT: Motion for summary judgment,
6 January 26. Here we go. Usually the clerks do this
7 ahead of time for me, but having been an old clerk
8 myself I know these things, but it didn't happen
9 here. All right, and then what other motions in
10 support of a motion for summary judgment do I need
11 to address to evaluate everything in its entirety?
12 Then I'll go to you, Mr. Leydon, to make sure that I
13 have everything from your side, okay?

14 MS. MCNAMARA: On Friday, September 8, there
15 was fax filed my reply to the plaintiff's objection,
16 but without the exhibits due to the page limitation
17 of the facsimile filing. And I have today an
18 original copy of the reply with the exhibits that
19 I'd like to submit.

20 THE COURT: All right. Why don't -- because I
21 don't have them here in the file, at least I don't
22 see it.

23 MS. MCNAMARA: May I submit this to the Clerk,
24 Your Honor?

25 THE COURT: Excuse me?

26 MS. MCNAMARA: May I submit this to the Clerk?

27 THE COURT: Yes. Mr. Leydon, you've seen this

1 already?

2 MR. LEYDON: I have, Your Honor.

3 THE COURT: All right, very good. Now, is this
4 case down for trial?

5 MS. MCNAMARA: Yes, it is, Your Honor.

6 THE COURT: When?

7 MS. MCNAMARA: January.

8 THE COURT: All right.

9 MR. BARTLET: And, Your Honor, if I may if you
10 are still collecting documents?

11 THE COURT: Hold on a second. I'm still
12 reviewing all this. This is -- I'm sort of
13 surprised. There's a motion for summary judgment
14 here that is not coded in; I don't know why. It
15 would be your motion, Attorney McNamara, it was not
16 coded in.

17 MS. MCNAMARA: You have it as number 160?

18 MR. BARTLET: I have it down in my file as
19 motion number 160, Your Honor.

20 THE COURT: Well --

21 MR. BARTLET: I believe it was appended to
22 their motion for permission to file a motion for
23 summary judgment.

24 THE COURT: All right, let's see. All right, I
25 see. That's number 159. Motion plaintiff's
26 objection, all right.

27 MS. MCNAMARA: Court file was missing for

1 approximately six months, so I'm not surprised if
2 things might not be coded.

3 THE COURT: Motion for permission to file is
4 dated January 18th.

5 MR. BARTLET: That was defendant Vasquez's
6 motion, Your Honor.

7 THE COURT: All right. Well, in any event,
8 I've got them marked. I know where it is. All
9 right, now, there has been an augment to your
10 motion, Attorney McNamara, correct?

11 MS. MCNAMARA: Yes, Your Honor.

12 THE COURT: And that is here before me, just
13 received by the Clerk. It's the reply to objection
14 to motion for summary judgment. Is there anything
15 else that I needed to see, sir --

16 MR. BARTLET: Yes, Your Honor. On August 25th I
17 filed a similar reply to the plaintiff's objection
18 to the motion for summary judgment. I apologize, I
19 do not have that motion under --

20 THE COURT: I might have that. Let's see if I
21 have it here. Objection to motion for summary
22 judgment, August 18th, '06. That's the plaintiff's?

23 MR. BARTLET: That's the plaintiff's.

24 THE COURT: All right, let's see if there is --

25 MR. BARTLET: And then should be the next
26 motion.

27 THE COURT: Your motion was dated what?

1 MR. BARTLET: August 25th, Your Honor.

2 THE COURT: I don't see it.

3 MR. BARTLET: I do have a file copy if Your
4 Honor would like to receive that.

5 THE COURT: Hold on a second. Oh, I have
6 something here. Yes, I don't have it.

7 MR. BARTLET: Your Honor, may I submit my file
8 copy?

9 THE COURT: Yes, please. Thank you. All
10 right, so I have the underlying motion of January --
11 excuse me, of -- I thought I had it here. I have
12 the underlying motion from -- it's dated January
13 18th, '06, which is number 157, permission to file a
14 motion for summary judgment by the defendant, Joel
15 Vasquez. I also have the defendant, Joel Vasquez's,
16 reply to plaintiff's objection to motion for summary
17 judgment. Those are the two key documents from you,
18 sir, that I should be aware of, correct?

19 MR. BARTLET: And then, not to further
20 complicate things, but I do have a supplemental
21 memorandum that I'd like to file with the Court this
22 morning --

23 THE COURT: Oh, okay.

24 MR. BARTLET: -- which I've provided to all
25 counsel.

26 THE COURT: All right.

27 MR. BARTLET: But I believe that will be all.

1 THE COURT: Thank you, sir. All right, now,
2 does that do it, sir?

3 MR. BARTLET: Yes, Your Honor.

4 THE COURT: Very good. So I have three sets of
5 documents in regard to you. Now, in terms of Percy
6 Montes and Primo's Landscaping, I have original
7 motion for summary judgment dated January 26, '06.
8 And then I have your reply to the objection to the
9 motion for summary judgment dated September 8th, '06,
10 is that right?

11 MS. MCNAMARA: That's correct, Your Honor.

12 THE COURT: And that would complete the
13 submission that you had, right?

14 MS. MCNAMARA: Yes, Your Honor.

15 THE COURT: All right, now, that takes care of
16 the defendants. Now, from the plaintiff's side I
17 have the objection to motion for summary judgment
18 dated August 18th, '06, right, sir?

19 MR. LEYDON: Yes, Your Honor.

20 THE COURT: All right, I have that. Then have
21 what appears to be defendant's -- excuse me --
22 plaintiff's documents in support of that objection,
23 correct?

24 MR. LEYDON: Yes, Your Honor.

25 THE COURT: All right, I have that too. Then I
26 have what is entitled an August 23rd document, number
27 182, notice of filing unreported and out of state

1 cases.

2 MR. LEYDON: Yes, Your Honor.

3 THE COURT: All right. Does that conclude the
4 submissions that you have for this motion?

5 MR. LEYDON: No, Your Honor, there's an August
6 30th, 2006 supplemental memorandum.

7 THE COURT: Okay, and if you would, what was
8 the date of that?

9 MR. LEYDON: August 30, 2006. And it's
10 captioned supplemental memorandum in support of
11 objection to motion for summary judgment.

12 THE COURT: August 30th?

13 MR. LEYDON: Yes, Your Honor. I brought an
14 additional copy in case that hadn't caught up --

15 THE COURT: That was a good idea. I don't see
16 it.

17 MR. LEYDON: In addition to that memorandum,
18 Your Honor, there's a partial withdraw form that
19 goes with it, withdrawing just the single paragraph
20 in the complaint.

21 THE COURT: A paragraph of the complaint has
22 been withdrawn?

23 MR. LEYDON: Correct, Your Honor.

24 THE COURT: All right. You're entitled to do
25 that at any time, right?

26 MR. LEYDON: Yes, Your Honor.

27 THE COURT: All right.

1 MR. LEYDON: And at the risk of further
2 complicating things -- and I spoke to counsel about
3 this -- I just received their supplemental replies;
4 one on Saturday, one this morning, and they cite out
5 of state cases that I haven't had a chance to
6 review. By consent, counsel has agreed that I can
7 have until this Friday to submit no more than three
8 pages if I choose to or reply, just to address those
9 issues --

10 THE COURT: Yes, well, I'm not going to give
11 you that opportunity, all right? I've had enough.
12 All right, just from the volume alone. I mean, what
13 are you going to; (INDISCERNABLE) a little bit more
14 than you already have? I mean, folks, the issues
15 are here. And if there's an issue of fact that
16 underlies this that the trier of fact may struggle
17 with at the time of trial, then all of this is of no
18 consequence. Now, let me address this.

19 I have supplemental memorandum in support of
20 objection to motion for summary judgment dated
21 August 30th, '06, submitted by the plaintiff. Okay,
22 and if -- what I'd like to do now is indicate that I
23 think I have everything from your side --

24 MR. LEYDON: I believe so, Your Honor, yes.

25 THE COURT: All right. Now, tell me, Mr.
26 Leydon, what is this case about?

27 MR. LEYDON: It's a wrongful death action for

1 my client's decedent. Mr. Brito was killed in a
2 motor vehicle accident in Greenwich, Connecticut.
3 As a result of that action actually, the first named
4 defendant, Joel Vasquez, was criminally charged and
5 spent six months in prison.

6 THE COURT: Uh-huh.

7 MR. LEYDON: The defendant's are both claiming
8 worker's comp. exclusivity bar, and that's what the
9 summary judgment applies to; both issues of whether
10 New York or Connecticut law should apply to this
11 action, and if New York law applies to this action
12 whether there are still other exceptions even under
13 New York law that would still allow us to go
14 forward.

15 THE COURT: Where did the accident take place?

16 MR. LEYDON: It took place in Greenwich.

17 THE COURT: And when did it take place?

18 MR. LEYDON: June 19th, 2001.

19 THE COURT: At what time of the day?

20 MR. LEYDON: It was after they had left work.

21 I think 5:30, 5:45, something to that effect.

22 THE COURT: All right, so the plaintiff's
23 decedent leaves work. Was he driving a car or a
24 motorcycle?

25 MR. LEYDON: He was a passenger in a pickup
26 truck with nine people in a pickup truck that was
27 only built for five, which is some of the

1 allegations --

2 THE COURT: All right. So he's a passenger in
3 a car driven by which defendant?

4 MR. LEYDON: Joel Vasquez.

5 THE COURT: Did he own the car?

6 MR. LEYDON: No, Percy Montes owned the car.

7 THE COURT: All right. So he's in the car,
8 there's a horrific accident obviously, and plaintiff
9 dies. Did he die at the time or shortly thereafter?

10 MR. LEYDON: Yeah. He was, I believe,
11 pronounced dead at the scene or brought to the
12 hospital and pronounced dead there, but it was
13 relatively immediate.

14 THE COURT: All right, what was that person's
15 name again?

16 MR. LEYDON: Brito? Juan Rocado Brito was the
17 full name.

18 THE COURT: All right. And is he a resident of
19 the State of Connecticut?

20 MR. LEYDON: No, he's not; he's a New York
21 resident.

22 THE COURT: New York resident?

23 MR. LEYDON: Correct.

24 THE COURT: Okay. I presume that he had all
25 his documentation as to his being legal here in the
26 United States?

27 MR. LEYDON: I believe so. That hasn't been

1 raised as an issue by anyone.

2 THE COURT: Well, it might be an issue in Judge
3 Downey's court, because I believe that no one has a
4 right to sue in the State of Connecticut court
5 system unless they're duly authorized to sue. For
6 example, corporations have to be duly authorized to
7 sue otherwise they cannot bring a lawsuit in the
8 State of Connecticut. I presume that he was duly
9 authorized as a person here having the appropriate
10 documentation because I think citizens and people
11 here validly have a right to use the court system
12 and those who are here illegally do not.

13 MR. LEYDON: I presume he was also, I'm just
14 not prepared to represent it because nobody's
15 brought that up and I hadn't investigated --

16 THE COURT: Okay, but that might be an issue of
17 fact at some point. But in any event, they filed a
18 motion for summary judgment saying that there's a
19 bar because of the worker compensation statute.

20 MR. LEYDON: Correct.

21 THE COURT: And the worker compensation statute
22 says you can't sue your fellow employees, right?

23 MR. LEYDON: Potentially; I mean, there's a lot
24 of nuances to that.

25 THE COURT: Right, but there's an exception
26 when it involves a motor vehicle, correct?

27 MR. LEYDON: Correct.

1 THE COURT: All right, does that exception
2 apply here in your opinion?

3 MR. LEYDON: I believe it does. Their claim is
4 that New York law applies, which doesn't have the
5 same exception that Connecticut does.

6 THE COURT: Right.

7 MR. LEYDON: That's the choice of law issue.

8 THE COURT: All right, the accident occurs here
9 in this state?

10 MR. LEYDON: Correct.

11 THE COURT: The plaintiff's decedent was a
12 resident of the State of New York?

13 MR. LEYDON: That's correct, Your Honor.

14 THE COURT: Was he employed here in
15 Connecticut?

16 MR. LEYDON: He was employed in New York.

17 THE COURT: All right. Was this activity in
18 which he was involved with these other people in
19 furtherance of his employer's business?

20 MR. LEYDON: At the time of the accident our
21 contention is no, and that's one of the things that
22 we're fighting with.

23 THE COURT: All right, now --

24 MR. LEYDON: Because the work day ended and
25 they were going to a soccer game as the facts --

26 THE COURT: So a bunch of guys after they're
27 done from work they go out, they have a few

1 together, then they decide to go out to a soccer
2 game?

3 MR. LEYDON: There wasn't that having a few
4 together --

5 THE COURT: All right.

6 MR. LEYDON: I think they going to have a few
7 together; hadn't gotten there yet.

8 THE COURT: They hadn't gotten there?

9 MR. LEYDON: Right.

10 THE COURT: So they're in the car together, but
11 they all left the job together?

12 MR. LEYDON: Yes.

13 THE COURT: And the car is owned by the
14 employer or by another individual?

15 MR. LEYDON: By Percy Montes, who's a
16 shareholder of the employer, but not the actual --
17 the employer is a corporation, Primo's Landscaping,
18 Inc.

19 THE COURT: All right, is there any information
20 to indicate that the guy as a shareholder had
21 supervisory authority over the fellows in the car,
22 including the plaintiff's decedent?

23 MR. LEYDON: In a broader spec, yes; at the
24 time of the operation our contention is no. He was
25 the boss, but --

26 THE COURT: He was the boss?

27 MR. LEYDON: Correct.

1 THE COURT: He says: boys, we're going to the
2 soccer game, and off they go?

3 MR. LEYDON: Correct.

4 THE COURT: All right. Thank you, why don't
5 you have a seat?

6 MR. LEYDON: Sure.

7 THE COURT: Why should I grant your motion for
8 summary judgment? Attorney McNamara, you didn't
9 file first, he did.

10 MR. BARTLET: Your Honor, if you'd like to hear
11 from me first --

12 THE COURT: Yes.

13 MR. BARTLET: -- that would be fine with
14 Attorney McNamara. I have previously discussed this
15 and she was going to go first, but --

16 THE COURT: No, I'm asking you. He filed
17 first, okay --

18 MR. BARTLET: Well, Your Honor, I believe that
19 --

20 THE COURT: Why should I grant the motion for
21 summary judgment?

22 MR. BARTLET: I believe that Attorney Leydon
23 may have left out some certain facts that are very
24 pertinent to this motion.

25 THE COURT: Well, they might be in dispute.

26 MR. BARTLET: The facts that I'm going to
27 present, Your Honor, they're not in dispute. Your

1 Honor, Primo's Landscaping Incorporated, which is
2 the employer of both the defendant, my client, Mr.
3 Vasquez, and also the plaintiff's decedent, Mr.
4 Brito, is a New York corporation. Testimony was
5 elicited at the keeper of records of Primo's
6 Landscaping Incorporated's deposition that Primo's
7 Landscaping does business in New York State.

8 That jobs that where the employees were coming
9 from was in Rye, New York. They were traveling --
10 contrary to what he was saying and he has provided
11 no deposition testimony or affidavits otherwise --
12 the defendant, Mr. Vasquez, was driving all
13 employees back to the landscaping yard, which is
14 also in New York as previously stated.

15 Mr. Vasquez was acting within the scope of his
16 employment when he was driving the motor vehicle,
17 and this is evidenced by the fact that he did
18 receive worker's compensation benefits under the New
19 York State worker's compensation law, as did the
20 plaintiff's decedent's beneficiaries under New York
21 State law.

22 THE COURT: So they can't have it both ways
23 you're saying?

24 MR. BARTLET: That is correct, Your Honor.

25 THE COURT: All right. So either they're
26 covered by worker compensation and they're in
27 furtherance of their employer's business or they're

1 not?

2 MR. BARTLET: That is correct, Your Honor.

3 THE COURT: Can a New York entity of common
4 jurisdiction determine that this was in furtherance
5 and in the course of one's employment?

6 MR. BARTLET: Well, Your Honor, not only one
7 New York entity, the New York Worker's Compensation
8 Board, but also in two other judicial matters which
9 arose out of the accident. New York Supreme Court
10 decided that New York law applies and the cause of
11 action of fellow employees who were also in the
12 vehicle were barred at least on worker's
13 compensation exclusion. And also Judge Tyma, in a
14 similar action which was brought in the State of
15 Connecticut by I believe Mr. Brito's brother, Jaime
16 Brito, was also considered New York law applied and
17 this action was barred by the New York exclusivity
18 provision of the worker's compensation law.

19 So several competent jurisdictions have already
20 decided that these -- all individuals involved in
21 the accident were acting within the scope of their
22 employment.

23 THE COURT: Including the plaintiff's decedent,
24 who received death benefits associated with the
25 worker comp. law in the State of New York?

26 MR. BARTLET: The Worker's Compensation Board
27 of New York has already determined that the

1 plaintiff's decedent was acting within the scope of
2 his employment at the time of this accident and they
3 did award death benefits to Mr. Brito's alleged wife
4 and children as authorized under the New York State
5 worker's compensation law.

6 THE COURT: Why don't you have a seat?

7 MR. BARTLET: Thank you, Your Honor.

8 THE COURT: Mr. Leydon.

9 MR. LEYDON: Yes, Your Honor?

10 THE COURT: Is that true?

11 MR. LEYDON: What's that?

12 THE COURT: Is that true?

13 MR. LEYDON: That there was worker's comp.
14 awarded? Yes, Your Honor.

15 THE COURT: All right, so apparently a
16 commission of competent jurisdiction dealing with a
17 claim made by the decedent's estate has sought
18 worker comp. benefits under New York law, and that
19 those benefits were granted, correct?

20 MR. LEYDON: Yeah -- I think technically it was
21 the beneficiaries rather than the estate, but I'm
22 not making a lot out of that distinction. But
23 they're two separate legal entities. But there was
24 a finding of worker's comp. after that. Both New
25 York and Connecticut case law, as I believe, are
26 quite clear and it's set forth in the memos that
27 that's not dispositive and it could be found,

1 particularly when you're talking about a fellow
2 employee claim as opposed to suing against the
3 employer directly, that you can get benefits and sue
4 if you meet either the Connecticut exception or the
5 New York exception.

6 In Connecticut, you can get worker's comp.
7 benefits; this happens all the time. Bringing motor
8 vehicle accidents under 31-293a and the comp. comes
9 in in a search of lien. That's not inconsistent to
10 get those benefits and still bring a claim.

11 THE COURT: Thank you, you may continue with
12 your argument, sir.

13 MR. BARTLET: Your Honor, if I may just reply
14 to the last issue, which he has raised, that the
15 fact that the beneficiaries received benefits does
16 not bar the State from pursuing this action. In the
17 Schnall case -- which I apologize, I presented to
18 you with my file a copy of my motion; it is cited
19 and is attached to my reply which was dated, I
20 believe, August 25th. In that case it states that
21 even where there are no statutory beneficiaries
22 under New York worker's compensation law, the estate
23 of the decedent can not pursue an action directly
24 against the employer because the worker's
25 compensation law is the exclusive remedy. So in
26 this case an even stronger position is held that in
27 this case the plaintiff's decedent's beneficiaries

1 did receive worker's compensations benefits, and
2 therefore the estate is still precluded from
3 pursuing a claim based on the worker's compensation
4 exclusivity provision.

5 THE COURT: This is the case of Schnall versus
6 1918 Harmon Street Corporation, 26 Misc.2d 287 in
7 1960 New York Supreme Court case, correct?

8 MR. BARTLET: That is correct, Your Honor.

9 THE COURT: All right.

10 MR. BARTLET: So this was an issue which was
11 decided --

12 THE COURT: Well, let's talk about choice of
13 law.

14 MR. BARTLET: Certainly.

15 THE COURT: Does New York law apply in regard
16 to worker compensation. They were employed in New
17 York, they worked in New York, employer paid worker
18 comp. payments, made worker comp. payments to the
19 appropriate authority, (INDISCERNABLE) had insurance
20 coverage. Does worker comp. law apply in this
21 instance and it's been conclusively decided it does.
22 And, in fact, no such claim for worker comp.
23 benefits were made in Connecticut because there were
24 no real contacts with Connecticut in that regard.

25 But isn't this an interesting choice of law
26 circumstance where we've got an accident that occurs
27 in Connecticut where it's been our traditional

1 decision that if it happened here, well, we're going
2 to apply our Connecticut law. But in this instance,
3 the accident, while it occurs in Connecticut, a lot
4 of what took place in terms of determining rights
5 and benefits is governed under New York law,
6 especially when it comes to worker compensation,
7 correct?

8 MR. BARTLET: That is correct, Your Honor. If
9 I may point the Court to the Connecticut Appellate
10 Court decision of Snyder versus Seldin; in that case
11 there were even more significant contacts to the
12 State of Connecticut, yet the Courts decided that
13 New York law applied. In that situation there were
14 two employees that worked in New York, were
15 traveling to Connecticut to the corporation's
16 headquarters, on-job duties wherein they were
17 involved in a motor vehicle accident in the State of
18 Connecticut. They were granted worker's
19 compensation benefits under New York. Connecticut
20 Appellate Court therein decided that New York law
21 appropriately applies because New York has the most
22 significant contacts even though the accident did
23 occur in the State of Connecticut.

24 In the present case there are even more
25 significant contacts to the State of
26 Connecticut[sic]. There is no Connecticut
27 corporation headquarters. All activities are

1 incurring in New York, and the only reason why the
2 accident happened in the State of Connecticut is
3 because there is a brief stretch of the roadway on
4 the travel portion from the Rye, New York job site
5 back to the New York headquarters where it passes
6 through Greenwich, Connecticut.

7 THE COURT: And is that Route 84?

8 MR. BARTLET: Excuse me?

9 THE COURT: Route 84?

10 MR. BARTLET: No, I believe it's a back road in
11 -- it is on King Street.

12 THE COURT: Oh, yes, I know the area. Sure.
13 It does go through Connecticut, New York, yes.

14 MR. BARTLET: That is correct, Your Honor. So
15 in this case, there are almost no contacts to the
16 State of Connecticut except for the happenstance
17 that the road happened to pass through Greenwich,
18 Connecticut. Therefore, under the most significant
19 contacts test, which is the choice of law analysis
20 which has been adopted in the State of Connecticut,
21 New York law must apply to the situation. And as
22 I've stated before, several competent jurisdictions
23 have already decided, including Judge Tyma, that
24 under that most significant contacts test, New York
25 law should apply to this matter.

26 THE COURT: And if New York law applies, what's
27 the outcome?

1 MR. BARTLET: New York law differs from
2 Connecticut law in their worker's compensation
3 exclusivity bar in that New York law does not have
4 an exception, the motor vehicle exception that is
5 recognized in Connecticut. Therefore, under New
6 York law, as long as both employees are acting
7 within the scope of their employment, all claims are
8 barred. Therefore, the fact that they are driving a
9 motor vehicle is irrelevant to this matter and
10 summary judgment should enter.

11 THE COURT: Thank you. Attorney McNamara, I
12 co-opted your opportunity here by pressing the issue
13 with the (INDISCERNABLE) filed first. But just
14 because you filed first doesn't mean I won't listen
15 to you, all right?

16 MS. MCNAMARA: Thank you, Your Honor.

17 THE COURT: Now, what do you want to add to
18 what is -- beyond what has been previously discussed
19 that you think I need to know about?

20 MS. MCNAMARA: Okay, several things. First,
21 let me point out that the reference to the Snyder
22 case is important for two reasons. Number one, the
23 motion for summary judgment that was granted by
24 Judge Tyma followed that very decision and Judge
25 Tyma adopted that decision. And I have attached
26 Judge Tyma's memorandum of decision to my memorandum
27 in support of my motion as exhibit C so you

1 certainly can read it in its entirety --

2 THE COURT: Well, tell me about that factual
3 scenario. We had someone who was also in the car
4 make a claim here in Connecticut court and Judge
5 Tyma here in the motion said: no, no, no, you're
6 barred and under New York law you've already
7 received worker comp. benefits and we're not going
8 to -- you're barred from pursuing such a claim in
9 light of the New York law. And here in Connecticut
10 we're not going to create a new opportunity for you
11 to sue here.

12 MS. MCNAMARA: Well, what he did is he said:
13 look, the Appellate Court has said the place of
14 injury rule no longer is dispositive.

15 THE COURT: Right.

16 MS. MCNAMARA: What we have to do is go through
17 this balance and analysis of which state has the
18 most significant relationships. And he pointed out
19 that all the parties were residents of New York;
20 Primo's Landscaping is located in New York, it's a
21 New York corporation; the plaintiff's principal
22 place of employment was in New York; the vehicle
23 that's the subject of this accident was registered
24 and garaged in New York; Primo's never did any
25 business in Connecticut, the plaintiff was never
26 assigned to any job site in Connecticut. Basically
27 there were zero contacts with Connecticut other than

1 the fact that by happenstance they were on
2 Connecticut road for a very brief period of time.

3 The plaintiff's there oppose the motion saying
4 wait a minute, Connecticut has an interest in
5 regulating the conduct on its road ways and
6 furthermore, Mr. Vasquez was being criminally
7 prosecuted in Connecticut, so Connecticut's
8 interests are greater and Judge Tyma said: no can
9 do, that doesn't fly here.

10 And I take that one step farther here now that
11 the criminal action has been totally resolved; it's
12 not an issue at all. But I think --

13 THE COURT: But it was at one time.

14 MS. MCNAMARA: It was at one time, not now.
15 But the point is Judge Tyma has already gone through
16 this analysis. I don't see a reason why you should
17 have to re-invent the wheel.

18 THE COURT: Well, if I might, I really
19 appreciate that you're bringing it out the Judge
20 Tyma made this decision and he's a very bright and
21 able guy, but I'm not bound by any Superior Court
22 Judge's decision, am I, Mr. Leydon?

23 MR. LEYDON: No, Your Honor.

24 THE COURT: All right. I'm only bound by what,
25 the Supreme Court, the Appellate Court, and the
26 State statutes?

27 MR. LEYDON: Correct. As well as the Supreme

1 Court of the U.S. to the extent we get there.

2 THE COURT: Well, I don't get involved with
3 them unless I have to. But the point is Judge Tyma,
4 in what you regard is a well reasoned and thorough
5 decision, came to the conclusion that: hey, look,
6 Connecticut laws don't apply, right?

7 MS. MCNAMARA: That's correct. And I think it
8 -- certainly Your Honor is not bound by it. But the
9 fact that it arises out of the very same accident
10 and involves the very same defendants I think is
11 weighty. I'll leave it at that.

12 THE COURT: Something to think about.

13 MS. MCNAMARA: Something to think about;
14 certainly you're not bound by it. There is also two
15 other New York cases brought by other passengers in
16 this vehicle involved in this accident who brought
17 cases and New York dismissed both finding these
18 people were within the scope of their employment,
19 these injuries arose out of the employment --

20 THE COURT: And this is in this set of facts?

21 MS. MCNAMARA: Yes.

22 THE COURT: In the same set of facts?

23 MS. MCNAMARA: Yes, they allege recklessness,
24 they allege liability --

25 THE COURT: And it was brought forward in a New
26 York State Court?

27 MS. MCNAMARA: Yes.

1 THE COURT: And the New York State Court said:
2 look, this is a worker comp. case; therefore, these
3 claims are barred.

4 MS. MCNAMARA: Correct.

5 THE COURT: Fellow workers cannot sue fellow
6 workers.

7 MS. MCNAMARA: Correct. And I have attached
8 affidavits of the attorneys representing my clients
9 and those actions --

10 THE COURT: Right.

11 MS. MCNAMARA: -- together with the decisions to
12 my reply brief as exhibits A, B, and C.

13 THE COURT: Why don't you have a seat? Mr.
14 Leydon, I hear some really compelling arguments here
15 that would indicate that even the co-workers in this
16 same set of facts, who had brought their own actions
17 against basically the same defendants here, that
18 they've been barred by a State Court in New York
19 because of the bar of the worker comp. statute. Is
20 that a fair interpretation of the information that's
21 been presented here?

22 MR. LEYDON: It is true other than the
23 statement under the same facts as here, because I've
24 actually gone through the motions and objections
25 that were filed in those cases and a lot of the
26 issues, both factually and legal, weren't raised by
27 plaintiff's counsel in those cases. So I don't

1 think -- they kind of paint with a broad brush. And
2 it's interesting; what happened is they got disposit
3 motions against the less serious injury cases. I
4 think that build up against the death case to then
5 say: well, we have (INDISCERNABLE).

6 THE COURT: Well, that would be a good strategy
7 if, in fact, that it was their strategy. More often
8 that not, when I used to handle cases like this they
9 just sort of happen. But in any event, I've done
10 some plaintiff's work too and boy I'll tell you when
11 you got an opportunity to bring a wrongful death
12 action in the State of Connecticut you want to
13 pursue it for a whole host of reasons, not the least
14 of which is the right thing to do.

15 But what issues of fact that you found that you
16 should bring to my attention in my review of whether
17 or not I should allow this motion for summary
18 judgment to be granted or denied?

19 MR. LEYDON: The soccer game issue is a huge
20 one, and that was not raised in any of the prior
21 cases.

22 THE COURT: Did you submit an affidavit which
23 raises that as an issue?

24 MR. LEYDON: There are deposition transcripts,
25 and it's --

26 THE COURT: All right.

27 MR. LEYDON: -- going to take me a little

1 explaining as to how we get there.

2 THE COURT: All right, I -- you know, but there
3 is no supporting affidavit?

4 MR. LEYDON: It's unlikely Joel Vasquez was
5 going to sign the affidavit for me, so I'm --

6 THE COURT: No, I don't -- you know, obviously
7 he's dead. You know.

8 MR. LEYDON: No, Vasquez is the defendant who
9 was going to sign.

10 THE COURT: Excuse me, all right. But any
11 other affidavits from people who were there who
12 would be appropriate people to raise issues of fact
13 by way of affidavit that came from your side?

14 MR. LEYDON: Not by affidavit, no.

15 THE COURT: Okay.

16 MR. LEYDON: By deposition, which is just as
17 admissible.

18 THE COURT: Yes, depositions and other
19 documents. Sometimes undefined in a practice book --

20 MR. LEYDON: Correct.

21 THE COURT: -- are things that the Court can
22 review and analyze in determining whether or not
23 there is a genuine issue in material fact which
24 would be left to the trier of fact. And that's a
25 rule, right?

26 MR. LEYDON: Yes, Your Honor.

27 THE COURT: All right. So what are the genuine

1 issues of material fact that you think I should
2 assess and review to deny their motions for summary
3 judgment?

4 MR. LEYDON: That as -- and there's three key
5 people I'm going to be referring to: Percy Montes;
6 Barabara Montes, who are both fifty percent
7 shareholders of Primo's Landscaping, Inc.; and Joel
8 Vasquez, who's the driver of the vehicle.

9 THE COURT: Okay, what are the issues of fact?

10 MR. LEYDON: The soccer game issue. Both Percy
11 Montes and Barbara Montes said at their deposition
12 that the reason Joel Vasquez was racing this car and
13 overloaded nine people into it was because they were
14 going to this soccer game, which is -- had nothing
15 to do with furthering the interest of the employer,
16 it wasn't for the benefit of the employer, wasn't
17 the direction of the employer, and in fact was a
18 violation of company policy for him to overload that
19 vehicle --

20 THE COURT: Well, hold on a second here.
21 Aren't there cases in Connecticut which allow a
22 person to make a recovery, even under our
23 Connecticut worker comp. law, because they were
24 actually playing a pool game or that they wanted a
25 horse back riding trip as part of a firm party and
26 sustained injury?

27 MR. LEYDON: Correct. Yeah, and it gets a

1 detailed factual analysis it wasn't for the benefit
2 of the employer.

3 THE COURT: Right.

4 MR. LEYDON: In this case there's not even a
5 claim that the soccer game was for the benefit of
6 employer. You do have cases where there's a team
7 softball or something like that --

8 THE COURT: Well, don't we have situations too
9 where the boss says to the gang look, we're all
10 going to do this; let's all go out and do this.
11 Isn't that in furtherance of creating harmony and
12 sharing of events that would be beneficial to a more
13 cohesive and happy work place environment if they're
14 going out enjoying an athletic event with the boss
15 -- or whether it's theatrical events or a movie or
16 baseball game, aren't those things sometimes
17 considered in some instances where people get hurt
18 to be in furtherance of the overall business of the
19 employer because it creates a good work environment?

20 MR. LEYDON: At times there are. And I'm not
21 sure if I misstated it earlier, but Percy Montes was
22 not going to the soccer game or part of the soccer
23 game.

24 THE COURT: All right, I didn't hear that.
25 Okay.

26 MR. LEYDON: It was just other employees.

27 THE COURT: So Percy's not going to the game,

1 Barbara is not going to the game --

2 MR. LEYDON: Correct.

3 THE COURT: But yet they state there's some
4 issues relative to whether or not people are really
5 going to the soccer game, or --

6 MR. LEYDON: Yeah, they say the whole reason
7 the overload -- and what happens when you put nine
8 people in a vehicle only built for five -- there was
9 supposed to be another vehicle coming back for Percy
10 Montes, who wasn't at the site at the time.

11 THE COURT: Right.

12 MR. LEYDON: Vasquez didn't wait for him like
13 he was supposed to because all these people were
14 supposed to go to the game. At Vasquez's
15 deposition, he says, despite what Percy Montes and
16 Barbara Montes says: I was the only one -- oh and
17 the other thing they plea, that my client -- my
18 decedent, Mr. Brito, actually was encouraging Joel
19 Vasquez to speed because he was one of the people
20 going to the game and actually plea that as a
21 contributory negligence type of claim.

22 At Joel Vasquez's deposition, despite his
23 pleading to that effect, he says: Brito wasn't going
24 to the game, Brito didn't encourage me to speed, I
25 wasn't speeding, and by the time we got underway I
26 wasn't going to the game, directly contradicting
27 what had previously been said by the employers.

1 As I mapped it out with him where the soccer
2 game was to take place was on his way to the job
3 site -- to the yard where they said they would
4 return. So if the person is willing to violate all
5 these rules, our position is he was going directly
6 to that game. And when I asked Barbara Montes that
7 direct question to deposition: do you know if he was
8 going directly to the game, she said: I don't know.

9 This is an issue that they have the burden of
10 proof on as an affirmative defense, so we think it's
11 clear that he was going to that game. And even if
12 he wasn't going to the game, it's clear by what
13 they've said that his reason for speeding recklessly
14 -- in a vehicle that he also knew to have bad brakes
15 and said as much in his deposition; therefore, the
16 three weeks prior the brakes were bad -- he did that
17 not in furtherance of an employment interest. And
18 I'd just like to read a quote from a New York case.

19 THE COURT: Go ahead.

20 MR. LEYDON: While compensation law is designed
21 to ensure that an employee injured in course of
22 employment will be made whole and to protect a co-
23 employee, who acting within the scope within
24 employment causing injury, it has not protected the
25 co-employee even though the injured employers accept
26 compensation benefits when the co-employee was not
27 acting within the scope of his employment at the

1 time he inflicted the injury. That's *Maines v.*
2 *Cronomer Valley Fire Department*, cited on page 10 of
3 my initial objection.

4 THE COURT: And what jurisdiction is that from?

5 MR. LEYDON: That's New York Court of Appeals,
6 their highest court.

7 THE COURT: All right.

8 MR. LEYDON: And that --

9 THE COURT: Now, I'm sort of familiar with the
10 worker comp. laws here in Connecticut, I used to do
11 a fair amount of it. But I also, when I was in
12 corporate life, had to deal with some of the issues
13 where there were exceptions to prosecutions against
14 one's fellow employee when there was an outrageous
15 or outrageous comment on the part of the employer
16 creating an unsafe work environment. For example,
17 they had those claims made in -- certain cases in
18 Texas when people working in chemical factories
19 without proper respirators and/or other equipment to
20 protect them from exposure to toxic chemicals. Is
21 that the type of situation that exists here?

22 MR. LEYDON: Yes, sort of. It's not what we
23 call a *Swarez* case, the intentional act exception
24 under Connecticut law, because if Connecticut law
25 applies, we consume as a fellow employee as to that
26 issue. In New York they have a lower standard when
27 the employee who causes the injury is not acting in

1 furtherance of his employer's interest, and you
2 really have to show what seems like recklessness or
3 deliberate --

4 THE COURT: Right.

5 MR. LEYDON: -- choice to do the act which
6 causes the injury. So that is our claim: this guy
7 overloaded a vehicle with four more people that can
8 fit in it, he knew it had bad brakes, he was going
9 70 on a corner that's supposed to go 30, and for
10 reasons not in furtherance of an employer's
11 interest. So if New York law does apply, we believe
12 there's clearly an issue of fact of whether that's
13 that willful and wantonness conduct which would
14 cause that. In the Swarez case --

15 THE COURT: No. If I might, the gentleman, Mr.
16 Vasquez, actually went to prison?

17 MR. LEYDON: Correct, Your Honor.

18 THE COURT: And he was convicted here in
19 Connecticut?

20 MR. LEYDON: Yes, Your Honor.

21 THE COURT: So he went to jail?

22 MR. LEYDON: Yes.

23 THE COURT: And obviously -- was it after trial
24 or was it as a result of plea?

25 MR. LEYDON: It was a plea. He was charged
26 with manslaughter and then pled to homicide with a

1 motor vehicle; it's a 14 statute, I forget -- 22a I
2 believe --

3 THE COURT: Well, that's pretty outrageous
4 conduct, don't you think?

5 MR. LEYDON: Yes, Your Honor.

6 THE COURT: All right.

7 MR. LEYDON: And it's a severe -- it's not a
8 rear-ender case or maybe it's following too closely,
9 this is egregiousness conduct here.

10 THE COURT: Egregiousness conduct. Why
11 wouldn't the exception apply under New York law?

12 MR. LEYDON: I believe it does. If you're
13 asking me, it does apply.

14 THE COURT: All right, but --

15 MR. LEYDON: They may be arguing differently,
16 but --

17 THE COURT: But is there a pending action in
18 New York in this instance?

19 MR. LEYDON: There was no action brought in New
20 York.

21 THE COURT: Okay.

22 MR. LEYDON: Our action was brought in
23 Connecticut, so it's not a parallel New York civil
24 suit.

25 THE COURT: Right. Has the statute run in New
26 York?

27 MR. LEYDON: I would assume it has --

1 THE COURT: But you don't know for a fact? All
2 right, well, why wasn't this brought in Federal
3 Court?

4 MR. LEYDON: We brought it in State Court
5 because my office is over there. They didn't remove
6 it, so it's here.

7 THE COURT: Yes, okay.

8 MR. LEYDON: They could have removed it, but --
9 and maybe the reason they didn't remove it is there
10 is a Federal case that's exactly on point; a fairly
11 old one, Bourbon versus Green, under literally
12 identical facts and the District Court, in like I
13 believe it was 1959, said that you could sue under
14 Connecticut law and the New York fellow employee
15 (INDISCERNABLE) bar didn't apply.

16 Then in New York an action (INDISCERNABLE) in
17 New York Court of Appeals where they said: well,
18 since you did that, you can't get comp. and they
19 said: no, you can still get comp. too. So I don't
20 know if that went into the decision not to remove a
21 precedent or an earlier Federal case or just didn't
22 bother voting. So cited in my brief there's a case
23 that's exactly on point.

24 THE COURT: What other issues of fact are in
25 play here? You talked about the soccer game and
26 whether or not Mr. Montes and Ms. Montes were really
27 going to a soccer game or not and they ultimately

1 testify in a deposition that, well, no, they weren't
2 really going to a soccer game or they changed their
3 plans. I ask you a question: had they been at a job
4 site immediately prior to this accident?

5 MR. LEYDON: Yes.

6 THE COURT: And were they returning to the
7 place of employment?

8 MR. LEYDON: That's the dispute, whether they
9 were going to the yard, as it's called, or going
10 directly to the soccer game.

11 THE COURT: Well, whether they're going to the
12 yard or the soccer game, isn't the conduct of the
13 driver, in taking all the fellow employees or the
14 people that are reporting to him, isn't that all in
15 furtherance of the business of the employer?

16 MR. LEYDON: No, I think clearly not. And
17 Barbara Montes testified as such. I said: was he
18 doing this in furtherance of your interest, she
19 said: no.

20 THE COURT: Okay. That's what she said?

21 MR. LEYDON: Correct.

22 THE COURT: All right. But notwithstanding
23 that, I presume that this information is available
24 to the worker comp. commission, I don't know.
25 They've determined that this was a compensable case
26 because it was in furtherance of the employer's
27 business.

1 MR. LEYDON: There's like three facts that are
2 set in there, and I think compensability in New York
3 doesn't mean that you're barred from bringing a
4 suit. So they didn't, I believe, necessarily find
5 it was that Joel Vasquez was in furtherance of an
6 employer's interest in Brito's worker's comp. claim..

7 THE COURT: Okay. What other issues of fact
8 are there that I should address or bring my
9 attention to?

10 MR. LEYDON: It's probably more an issues of
11 law then issue of facts, I don't know if I should
12 flush that out or that's later in the argument --

13 THE COURT: Well, issues of fact -- if there
14 are disputed issues of fact it goes to the trier of
15 fact, not to me.

16 MR. LEYDON: Correct. And it's -- but the
17 reason it's an issue of law, I'm saying it's for
18 choice of law purposes --

19 THE COURT: Right.

20 MR. LEYDON: -- the whole recklessness, in
21 particular in the Connecticut 14-295, is a penal
22 statute --

23 THE COURT: Right.

24 MR. LEYDON: -- intended to regulate conduct.
25 That was not raised in any of the other actions that
26 have gone down on summary judgment. And it's set
27 forth in more detail in my brief where there's a

1 specific Connecticut Supreme Court case that said
2 that treble damages are awarded to punish them
3 essentially as a reward for convicting the defendant
4 of this violation is what the Connecticut Supreme
5 Court said.

6 In a choice of law analysis what you're
7 supposed to do is as to each separate issue, at a
8 very fine point, make an interest analysis. Their
9 claim broadly speaking New York law applies to this
10 case is a misstatement of what the Court's supposed
11 to do. You don't say New York law applies to this
12 case; it's as to this issue: 14-295 statutory
13 recklessness for an accident occurring on
14 Connecticut's highways when they were reckless, and
15 was actually went to jail.

16 Connecticut's interest in promoting safety on
17 it's highway clearly outweighs any interest that New
18 York may have, particularly when the immunity in
19 question is not for the employer, but someone other
20 than the employer themselves are not responsible for
21 contributing to the insurances.

22 There were statement of conflict -- conflicts
23 of law specifically draws that distinction. And
24 it's for statement section 184 of the -- it might be
25 the second conflicts of law. Again, it's cited in
26 my brief.

1 THE COURT: I'll tell you right now I don't
2 follow your of law in that regard, but why don't you
3 bring up something else, now?

4 MR. LEYDON: Okay.

5 THE COURT: I follow the Supreme Court of
6 Connecticut, the Appellate Court of Connecticut, the
7 statutes and the Practice Book as it relates to
8 issues of fact and to matters of law that I'm
9 compelled to decided in favor of one side or the
10 other. So what am I'm compelled to find in favor of
11 your client?

12 MR. LEYDON: For those reasons. And just to
13 follow up on that, the Connecticut Supreme Court and
14 the (INDISCERNABLE) O'Connor v. O'Connor looked to
15 the restatement of law in deciding how Connecticut
16 is going to attach to these things. So I think
17 there's reasons it's not just in the air, it's
18 something that's been followed.

19 As to the issues of fact; like I said, the
20 egregiousness of the conduct clearly, whether it
21 meets that willful and wanton threshold under New
22 York law or Connecticut law, there's an issue of
23 fact there. In and of itself that's sufficient to
24 deny the motion.

25 The other issue relates to Percy Montes, who's
26 also an individually named defendant. He owned the
27 vehicle. The employer was Primo's Landscaping,

1 Inc., a corporation. The vehicle in question had
2 bad brakes according to Joel Vasquez; three weeks
3 before this he told the sort of sub-foreman that the
4 brakes were bad and Percy Montes either knew or
5 should have known that. The vehicle was purchased
6 for \$300 like six months prior to this accident, so
7 it wasn't under any warranties; it's just a pretty
8 junky vehicle. And under New York law, when a
9 fellow employee is doing something that really isn't
10 in the scope of their employment, they have held
11 that the worker's comp. exclusivity bar doesn't
12 apply.

13 The most on point case is Costanzo versus
14 Mackler. In there somebody gave a truck or provided
15 the truck to their employer and it had a bad
16 floorboard, I think they said, that somebody got
17 hurt on. The New York Appellate Court said that his
18 providing that truck was not in the scope of the
19 employment and therefore the bar does not apply.
20 That Costanzo v. Mackler case -- which the
21 defendant's claim basically doesn't apply, you
22 should not look at it, it's bad law -- was cited by
23 the New York Court of Appeals in that Costanzo --
24 and the current Maines v. Cronomer quote that I just
25 read to you, they cited the Costanza case for that
26 proposition.

1 So he, Percy Montes, in providing a vehicle and
2 having it under a separate legal entity than the
3 employer is liable. New York has held that as to
4 somebody who is solely vicariously liable, you can't
5 get there through the worker's comp. bar even
6 thought that person might not be the employer. But
7 conversely they have held if that person is
8 independently negligent and not solely vicariously
9 liable, in this case providing a truck with bad
10 brakes, then he is liable and the New York comp. bar
11 does not apply.

12 So it's sort of a mixed issue of fact and law,
13 but there's definitely an issue of fact on there.
14 And the fact that it was a separate legal entity,
15 Primo's versus Percy, he's on the hook as well.

16 THE COURT: Well, you gave me a lot to think
17 about. Anything else you want to bring to my
18 attention, Mr. Leydon?

19 MR. LEYDON: I'm just going through the things
20 I --

21 THE COURT: Sure.

22 MR. LEYDON: -- wanted to hit. I would just
23 again highlight that Connecticut has a strongly
24 defined public policy of not providing immunity to
25 people who were driving motor vehicles and it's
26 expressed in a number of ways. 31-293a is the

1 worker's comp. exclusivity bar that, in the same
2 act, has an exception for motor vehicles.

3 THE COURT: Right.

4 MR. LEYDON: 74-65 is the parallel municipal
5 one. And there's a Connecticut Supreme Court case
6 that said 31-293a didn't apply to municipality, 74-
7 65 does and at that time it didn't have the motor
8 vehicle exception. Later on the legislature amended
9 that to put in a motor vehicle exception.

10 (INDISCERNABLE) was appealed in Connecticut.

11 Even against state employees where there's a
12 highest level of immunity you can sue for motor
13 vehicle accidents because Connecticut has decided
14 that giving people immunity when their behind the
15 wheel of a car is bad and it would be clearly
16 obnoxious to that public policy, particularly under
17 these facts of this case where you've got a death
18 for someone who's driving recklessly. It would be
19 completely obnoxious to that public policy.

20 THE COURT: A tragic, avoidable death.

21 MR. LEYDON: Correct, Your Honor.

22 THE COURT: For which someone served six months
23 in prison.

24 MR. LEYDON: Correct, Your Honor.

25 THE COURT: If that doesn't speak to the
26 severity and the extent to which someone's conduct
27 is beyond the norm, I don't know what does. So,

1 yes, there may be overwhelming policy reasons to
2 follow the argument that you advanced. But I have
3 to review everything.

4 MR. LEYDON: Yes, Your Honor.

5 THE COURT: Anything else you want to add to
6 the record, Attorney McNamara?

7 MS. MCNAMARA: Yes, I do, Your Honor.

8 THE COURT: Go ahead.

9 MS. MCNAMARA: I want to address some of the
10 comments and suggestions made and also point Your
11 Honor to another conclusion.

12 THE COURT: Can I give you -- I'm going to ask
13 you to give me two minutes on that, okay? And the
14 reason is we've got other people here and I'm sure
15 that these very issues have been well briefed and
16 the respective (INDISCERNABLE) that you've made.

17 MS. MCNAMARA: Okay. Whether the -- Mr.
18 Vasquez and the employees were driving back to the
19 yard or not, the standard that applies here is
20 different from the standard advanced by plaintiff's
21 counsel. It's not just an analysis of did it -- was
22 it in furtherance of the employer's business.

23 In New York, an outside employee, a landscaper,
24 is subjected to a different standard in terms of
25 evaluating what qualifies as being within the scope
26 of employment. And travel transportation to and
27 from job sites, whether they're paid or not, is

1 considered to be within the scope of employment and
2 is compensable under worker's comp. So that's not
3 addressed, but -- and it's not addressed in my brief
4 either because for three years the plaintiff has
5 alleged that these defendants were within the scope
6 of their employment.

7 Only on August 30th of 2006 did he withdraw that
8 allegation. So we've been defending this suit for
9 three years, all operating under the assumption that
10 these defendants were acting within their scope of
11 the employment. Only when he addressed the motion
12 for summary judgment and filed his objection one
13 week thereafter did he file a withdrawal of that
14 paragraph. So even the plaintiff thought they were
15 all acting within the scope of their employment.

16 THE COURT: Well, you don't have to hit them
17 too hard with that one, okay?

18 MS. MCNAMARA: Well, I -- you know, and while
19 he can withdraw what he wants --

20 THE COURT: Sure.

21 MS. MCNAMARA: There is a -- the Supreme Court
22 frowns on amendments to complaints in the face of
23 motions for summary judgment clearly designed to
24 foil the motion, and that's what that is in this
25 case; while it's not an amendment technically, the
26 withdrawal amends the complaint and deletes an

1 allegation that we've all assumed was true for three
2 years.

3 THE COURT: Okay, you've got about 30 seconds
4 left.

5 MS. MCNAMARA: Okay. Let me just address what
6 was and is not necessarily that clear in my brief
7 that relates to section 14-295 in Connecticut's
8 interests in regulating conduct on the highways.
9 What's being advanced is a theory that the nature of
10 the damages, in this case the death, and the cause
11 of action, recklessness, 14-295, that somehow those
12 things are relevant to a choice of law analysis.

13 If you look at what the Supreme Court said --
14 the Appellate Court says in Synder, that's not
15 relevant at all. It doesn't matter what cause of
16 action he alleges whether it alleges recklessness or
17 something else. It doesn't matter that the decedent
18 died. It doesn't matter that 14-295 is being
19 alleged under a choice of law analysis and if
20 there's an interest in Connecticut for Connecticut
21 to regulate conduct on a roadway, which I say of
22 course there is, that would apply more strongly to
23 Connecticut residents. These are people who were on
24 Connecticut road for about 20 seconds by
25 happenstance. I don't see how that interest is
26 going to regulate their conduct. So --

1 THE COURT: Well, let's suppose someone was
2 murdered here in Connecticut. We say because they
3 were only here for 15 seconds that we should not
4 prosecute the murder and otherwise don't have a
5 public policy and support the enforcement of the
6 murder statute?

7 MS. MCNAMARA: Well, no. In the criminal
8 context the place of the crime --

9 THE COURT: This was a criminal matter, wasn't
10 it; there was a crime that was committed here,
11 wasn't there?

12 MS. MCNAMARA: Yes.

13 THE COURT: A man served six months in prison?

14 MS. MCNAMARA: Yes.

15 THE COURT: Your client, right?

16 MS. MCNAMARA: No, his client.

17 MR. BARTLET: My client.

18 THE COURT: His client?

19 MS. MCNAMARA: Yes.

20 THE COURT: I'm pointing the finger at you,
21 sir, okay?

22 MS. MCNAMARA: Yes.

23 THE COURT: Significant or not?

24 MS. MCNAMARA: Significant.

25 THE COURT: All right, thank you.

26 MS. MCNAMARA: Disposed of.

1 THE COURT: Thank you. Why don't you have a
2 seat? Sir, two minutes --

3 MR. BARTLET: May I also have two minutes, Your
4 Honor?

5 THE COURT: Yes, you've got two minutes.

6 MR. BARTLET: Thank you very much, Your Honor.

7 THE COURT: By the way, Mr. Leydon, if you
8 would send me those additional cases you want to
9 submit, feel free to do so, all right?

10 MR. LEYDON: Okay, Your Honor.

11 THE COURT: Get it to me within the week, all
12 right?

13 MR. LEYDON: Yes, Your Honor.

14 THE COURT: All right.

15 MR. BARTLET: Your Honor, just very briefly
16 just on what she had stated. The fact that he did
17 withdraw the allegations within the complaint still
18 does not remove them from the fact that they are
19 factual admissions as it was stated in Danko versus
20 Redway, Connecticut Supreme Court case from 2000,
21 statements within withdrawn and superseded pleadings
22 are still factual admissions by the plaintiff.

23 As she had stated, we have been going under the
24 assumption that he was acting within the scope of
25 employment this entire time. And although as Your
26 Honor has stated, this does appear to be -- the
27 conduct in this case, he did serve six months time

1 for this; there was a death. This very same conduct
2 was a issue in each of the other three cases which
3 were brought in connection with this accident. His
4 conduct didn't change from action to action, it was
5 solely the damages which were sustained by the
6 plaintiffs.

7 In each of those three actions, the Court
8 determined that the conduct of the defendant, Joel
9 Vasquez, was within the scope of his employment.
10 The Worker's Compensation Board of New York, who is
11 in the best position to determine whether or not he
12 was acting within the scope of his employment, they
13 determined that Joel Vasquez was working within the
14 scope of his employment. They granted him worker's
15 compensation benefits.

16 At this point, the plaintiff's -- the decedent
17 is -- or the plaintiff is attempting to mount a
18 collateral attack on the New York Worker's
19 Compensation Board's decision, which stated that he
20 was acting within the scope of his employment, in
21 order to circumvent the clear --

22 THE COURT: Well, that's a done deal, isn't it?

23 MR. BARTLET: What's that, Your Honor?

24 THE COURT: That he was in the scope of his
25 employment --

26 MR. BARTLET: That is correct, Your Honor.

1 THE COURT: -- according to the New York
2 Commission?

3 MR. BARTLET: That is correct.

4 THE COURT: All right.

5 MR. BARTLET: And additionally, Your Honor,
6 there was no testimony elicited at any of the
7 depositions that Joel Vasquez was driving to a
8 soccer game. All the deposition testimony stated
9 that he was driving from the job site back to the
10 yard. The statement that he had made that -- the
11 plaintiff's attorney has stated that Barbara Montes
12 said they were going to the soccer game and that
13 wasn't in the furtherance of his duties, that is a
14 mis-interpretation of the deposition.

15 She was asked whether or not driving to the
16 soccer game would have been in furtherance of his
17 employment activities and she stated that it didn't
18 have any benefit to the company, but she never
19 stated that they were driving to the soccer game.

20 And Joel Vasquez stated clearly in his
21 deposition that it was his job to drive the
22 employees from the job site back to the yard and
23 that's what he was doing that day.

24 THE COURT: Thank you.

25 MR. BARTLET: And other than that, I'll rely on
26 my briefs, Your Honor. Thank you.

1 THE COURT: Thank you. Anything else you
2 wanted to say, Mr. Leydon?

3 MR. LEYDON: Yeah, very briefly though. On
4 this worker's comp. as to Vasquez conclusively
5 proves he acting in the scope of the employment;
6 both Vasquez and Montes has a serious personal
7 interest in having that finding be made in an action
8 in which we didn't have the right to appear, be
9 heard, present any of these issues, so to say that
10 they can do that and then turn around and say: we're
11 barred because an administrative finding and
12 proceeding, we have no ability to comment on it, is
13 clearly incorrect.

14 Snyder doesn't address in any manner -- and I
15 would request the Court to look at that -- it
16 doesn't say if there's 14-295, it still doesn't
17 matter; it doesn't address the issue at all one way
18 or the other. And on the pleading issue, it's
19 clearly an evidential admission, not a judicial
20 admission, which means for purpose of summary
21 judgment it's not binding. To the extent there are
22 issues of fact, which are shown by the testimony of
23 the people, that's what matters. And this isn't the
24 type of case where somebody adds something at the
25 last minute that the Courts are frowned upon.

26 And an allegation has been withdrawn. And the
27 reason it was withdrawn is I didn't get the

1 depositions of Joel Vasquez and Barbara Montes until
2 less than a week before I filed my objection. And
3 we've been seeking it for years and it had been just
4 marked off and motion for protective order; we had
5 to go to Danbury to take one of them --

6 THE COURT: Excuse me. The deposition, your
7 office didn't participate in it?

8 MR. LEYDON: No, we did. We got it less than a
9 month ago was my point.

10 THE COURT: Oh, I see.

11 MR. LEYDON: So that they've been making this
12 issue about you left that issue in the complaint
13 until now; well, we didn't have these depositions to
14 make these --

15 THE COURT: Excuse me. Did you or someone from
16 your office attend those depositions?

17 MR. LEYDON: Yes.

18 THE COURT: So someone in your office took
19 notes and heard what was stated to by the respective
20 deponents while they were under oath?

21 MR. LEYDON: Yes, Your Honor.

22 THE COURT: All right, so you waited until you
23 had a transcript which said oh, by way, this is what
24 it is, and that took a lot longer than you thought
25 it would?

26 MR. LEYDON: It was -- no, I think within two
27 weeks of a deposition --

1 THE COURT: All right, okay.

2 MR. LEYDON: -- was when I withdrew that
3 paragraph in my complaint.

4 THE COURT: Very good.

5 MR. BARTLET: Your Honor, if I just very
6 briefly --

7 THE COURT: Nope. Thank you.

8 MR. BARTLET: Thank you.

9 THE COURT: I'll review the papers. I'll
10 render my decision. Thank you.

11 MS. MCNAMARA: Thank you.

12 THE COURT: Well argued. Ms. McNamara, I
13 appreciate your time putting into this. Attorney
14 Bartlett, thank you. Attorney Leydon, a pleasure;
15 always a pleasure.

16 MR. LEYDON: Sure.

17 THE COURT: Say hi to the people back at the
18 office.

19 MR. LEYDON: Okay, thank you.

20 THE COURT: All right.

21 MR. BARTLET: Thank you, Your Honor.

22 MS. MCNAMARA: Thank you, Your Honor.

23 THE COURT: Thank you.

24 * * *

25

26

27

1 CV-03-0195804

:SUPERIOR COURT

2 HUGO JAIGUAY

:STAMFORD/NORWALK J.D.

3 v.

:AT STAMFORD

4 JOEL VASQUEZ, ET AL

:SEPTEMBER 11, 2006

5

6

C E R T I F I C A T I O N

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

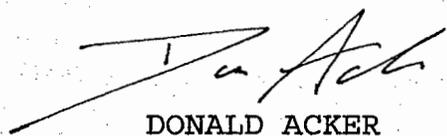
24

25

26

27

I, Donald Acker, hereby certify that the foregoing is a true and accurate transcription, to the best of my ability, of the above-entitled matter, heard on the 11th day of Septemer, 2006 before the Honorable John Downey, Judge of the Superior Court in Stamford, Connecticut, dated this 26th day of January, 2007, at Stamford, Connecticut.



DONALD ACKER

Court Monitor