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Friday, August 11, 2006

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## **Ninth Circuit Bars Suit Over U.S. Diplomat's Russian Accident**

By a MetNews Staff Writer

A U.S. consul general to Russia was acting within the scope of his employment when he allegedly caused an automobile accident abroad while driving home from a gym where he stopped after work, the Ninth U.S. Circuit Court of Appeals ruled yesterday.

The ruling effectively bars the Russian plaintiff from suing in U.S. courts, because federal employees are immune from liability for torts committed within the scope of their employment and the government is immune from suit for torts committed by its employees abroad.

The court reversed a contrary ruling by a district judge in the U.S. District Court for the Southern District of California and granted Californian Douglas B. Kent's petition for certification that he was acting within the scope of his employment. As a result, the United States will be substituted for Kent as the defendant in an action brought by a Russian national who was injured in the accident, and the suit will be dismissed.

Judge Stephen S. Trott, writing for the Ninth Circuit, explained:

“This is not a scope of employment case where the employee was off-duty, assaulted an individual in a fit of rage, or violated company policy. It is also far from the standard case involving an employee commuting in a company vehicle. Instead, this case involves a Consul General whom the Department of State assigned to work in Eastern Russia and who was on duty at all times.”

### **Consul General**

Kent was the U.S. consul general to the Republic of Russia in the Far East Consular District—the largest consular district in Russia. Kent was the highest ranking U.S. representative in that district, and was entitled to full diplomatic immunity, including immunity from criminal prosecution.

One night, just days after Kent started driving his own car instead of using a chauffeur-driven State Department car in an effort to save the department money, Kent drove to a gym from work. As he began driving home from the gym he pulled out in front of another vehicle, causing a chain of collisions which seriously injured Aleksandr Nikolaevich Kashin.

Under orders from the U.S. Embassy in Moscow, Kent did not submit to a blood alcohol test on the ground of his diplomatic status—the State Department prohibits foreign service officers from being injected with a needle by a foreign official.

After attempts to resolve the dispute in Russia failed, Kashin filed suit against Kent, the United States, and the Department of State in the United States. The United States and the

State Department were dismissed due to their sovereign immunity.

### **Scope of Employment**

Under the Federal Tort Claims Act, if the attorney general or a federal court certifies that a federal employee was acting within the scope of employment when a tort occurred, the United States is substituted as the defendant in a tort suit against the employee. Upon certification, the employee is dismissed from the suit, and is immune from civil actions arising from the alleged tort.

But the act does not waive the United States' sovereign immunity if the tort was committed abroad. If the employee obtains certification, the United States is substituted as the defendant, but the case will be dismissed because of the United States' sovereign immunity.

"Thus, a grant of certification sounds the death knell for lawsuits involving foreign torts," Trott said.

After the Department of Justice rejected his request for certification, Kent applied to the court where the action was pending.

U.S. District Judge Larry A. Burns, noting that the act has no choice of law provision when a tort is committed abroad, referred to the Military Claims Act, which provides that such cases shall be decided "by reference to general principles of tort law common to the majority of United States jurisdictions." Thus, Burns used the law as provided in the Restatement (Second) of Agency and found that Kent was not acting in the scope of his employment.

On appeal to the Ninth Circuit, Kent argued that the law of California, his state of domicile, should control.

But Trott disagreed with both Burns and Kent and applied the law of the District of Columbia. He said that, as home to the State Department where most of the decisions regarding Kent's mission to Russia were made, the district had a nexus, "albeit tenuous," to the tort in Russia, and also provided consistency which neither reference to the restatement or states' laws would provide.

Applying District of Columbia law, Trott noted that the State Department considered Kent "to be on duty twenty-four hours a day, seven days a week."

Quoting a section of the State Department's Foreign Affairs Manual which provides that using a vehicle to transport a consul general is considered a business use of the vehicle, Trott said that Kent was engaged in an act— transporting a consul general, i.e., himself—that had a "business purpose."

Trott noted that the State Department "exercises significant control over Kent, whether he is at or away from his office."

The judge also noted that Kent carried with him electronic equipment that enabled the State Department to contact him at any time and that Kent claimed he had been "required to attend to the business of the United States from my residence, or to leave my residence in the middle of the night on official business."

Kent argued that the Department of Justice denied him certification due to political considerations. He claimed that:

"[P]olitical forces in Russia launched a campaign to use the accident as an opportunity to

discredit the United States. False allegations that I was intoxicated and that I laughingly escaped the scene of the accident to a nearby nightclub were promulgated in both the local and official press. The matter, thus fraudulently characterized, allegedly was presented to the Russian Duma which purportedly passed a Resolution condemning the United States for the manner in which it was handling the matter.”

Trott said that the U.S. government’s motivations were irrelevant, but noted:

“[W]in or lose, the government faces no liability in this action. We can, however, comprehend that the government may in some circumstances, possibly as a matter of relations with foreign sovereigns or their citizens, wish to enforce its view that its officers or employees should not escape responsibility for particular tortious conduct committed abroad.”

But Trott concluded:

“Now that Kent has been sued in the United States, the Department of State has not only stopped fighting for a Consul General—who has served the Department of State in places such as Panama, Albania, Kosovo, Tajikistan, and Liberia—but it has joined the other team and is litigating for the benefit of the plaintiff. . . . [W]e cannot answer why the Department of State and the United States Attorney spent their precious and scarce resources opposing this petition for certification . . . .”

Judges Stephen Reinhardt and Kim McLane Wardlaw concurred in the opinion.

The case is *Kashin v. Kent*, 04-56703