The Lane Law Letter

Our Spring 2015 issue is dedicated to The Garden State's latest hot topic decisions

Law Offices of John C. Lane
48 Woodport Road, Suite 1, Sparta, New Jersey 07871

Courts Actively Limit Plaintiff's Expert Testimony

We are a litigation firm with a practice emphasizing transportation, insurance and construction law in New York and New Jersey.

We hope that you find The Lane Law Letter both enjoyable and useful in keeping you updated on legal developments important to you.

As always, we welcome questions and comments regarding our articles. Contact us by phone at 973-512-3244, or by email at law@jclane.com.

Inside this issue:

In The News	2
"Windstorm" vs. "Flood" Damage	2
Courts Actively Limit Plaintiff's Expert Testimony *(cont.)*	3
Traffic Offense Guilty Plea Barred as Evidence in a Civil Action?	4

Three appellate cases decided in just over one month in March and April, 2015, demonstrate the care with which the courts superintend the use of expert testimony at trial. Two cases demonstrate the State's adherence to the "Net Opinion" Rule, which frowns on testimony from an expert who does not explain the basis and reasoning for his opinion. The third case addresses an increasing use by plaintiffs' attorneys of questions to a testifying expert to try to incorporate the hearsay opinion of an expert who is not present in court.

The Net Opinion Cases

"Expert opinion is valueless unless it is rested upon the facts which are admitted or are proved. Consequently, a hypothetical question cannot be invoked to supply the substantial facts necessary to support the conclusion." With those two statements, the Supreme Court of New Jersey reaffirmed the State's Net Opinion Rule in *Townsend v. Pierre*, a decision involving a fatal automobile-motorcycle accident, decided March 12, 2015. In so doing, the Court barred an expert from rendering an opinion based upon a premise which was contrary to the uncontroverted factual evidence.

The tragic accident occurred at an intersection in Willingboro, New Jersey. A lot to the left of Noah Pierre's lane of travel had overgrown shrubbery. Pierre stopped on Garland Drive at a stop sign at its intersection with Levitt Parkway. The shrubbery was to her left and blocked her view of Levitt Parkway traffic from that direction. She "edged up" four times until she had what she described as an unimpeded view, and testified at deposition that she saw no traffic to the left or to the right. When Pierre moved forward to turn left, her vehicle collided with a motorcycle coming from her left. The motorcyclist died as a result of the collision.

The administrators of the motorcyclist's estate filed suit against Pierre, for negligence, and against the owner and lessee (a dental firm) of the property containing the overgrown shrubbery, for negligent failure to maintain the shrubbery so as not to block a motorist's view. They also sued the municipality alleging that it was negligent in the maintenance of the intersection. In depositions, Pierre and her passenger testified that Pierre's view was not impeded at the crucial point. Plaintiffs' expert offered an opinion that "the restricted substandard and unsafe intersection sight distance was a significant contributing cause" of the accident. But the uncontroverted testimony was that it was not. The lower court granted the property defendants' pre-trial motion to bar the expert opinion as an unsupported net opinion, unreliable under the Rules of Evidence, and for summary judgment.

Continued on page 3

In The News...

John Lane attended the Trucking Industry Defense Association Advanced Seminar in Tampa, Florida, in January. John also attended the Transportation Megaconference, sponsored by the American Bar Association's Commercial Vehicle Litigation Committee, in New Orleans in March. Most recently, he attended the annual conference of the Transportation Lawyers' Association, held in Scottsdale, Arizona in May.

This spring, **John** completed mediation training offered by the NJ Association of Professional Mediators. He now serves as a mediator for the Superior Court of New Jersey, Sussex County vicinage.

John with his grandson, Joshua

Peter Bobchin has undertaken to update the TIDA State Law Survey for New York. Our firm has authored and edited the New York State Law Survey, continuously, since 1997.

In April, **John** and his family traveled to Lexington, Virginia to attend Legacy Day at his alma mater, Virginia Military Institute. Children and grandchildren of alumni were given a behind-the-scenes view of VMI, including the Challenge Course, the barracks, and the chemistry lab.

"Windstorm" vs. "Flood" Damage

In a ruling of importance throughout New Jersey, Superior Court Judge Thomas Vena issued an opinion on March 23, 2015, likely to please many insureds and displease insurers, in *PSEG v. Ace Am. Ins. Co*.

Super Storm Sandy, which hit New Jersey and New York with a vengeance on October 31, 2012, spawned more than just a record-breaking storm surge. It has also has led to a volume of insurance claims and first-party coverage lawsuits. Public Service Electric and Gas, New Jersey's largest utility, sustained damages to eight large generating stations used to make electricity, and a number of substations and switching stations that distribute electricity to consumers. Public Service asserted insurance claims for $500 million under its first-party insurance policies. The total coverage under the policies is $1 billion, but the principal policies have sublimits of $250 million for losses caused by "flood," and $50 million for losses to property "located in Flood Zones A & V." There is no sublimit for "named windstorms." The main issue before the Essex County Superior Court was whether the damage arose from a "flood," thus limiting coverage to $250 million, or from a "named windstorm," therefore giving the utility its full coverage to $1 billion.

In deciding cross motions for summary judgment, Judge Vena ruled that in this case, "wind caused the storm surge and wind is a covered peril other than flood. As such, storm surge is not subject to the flood sublimits under . . . the flood definition." In a 29-page opinion, Judge Vena relied heavily for guidance on the Fifth Circuit case of *SEACOR Holdings, Inc. v. Commonwealth Ins. Co.*, decided in 2011, which held as to Hurricane Katrina that "windstorm" included all damage caused directly by a "named windstorm," both rain and storm surge. Therefore, the flood sublimit in the relevant policies there did not apply to water damage caused by Hurricane Katrina.

Because the damages to Public Service's property were not caused by a "flood," there was no reason for the court to consider the $50 million sublimit applicable to "Flood Zones A & V." The decision is most likely to lead to an appeal by the insurers. We will continue to follow and report on further developments.

Courts Actively Limit Plaintiff's Expert Testimony

Continued from page 1

On appeal, the Appellate Division reversed that ruling and suggested that at trial the plaintiffs could use a hypothetical question to the expert, to allow him to "reject a credibility-based recollection of a fact witness." The Supreme Court boldly rejected that suggestion, reversing the Appellate Division's decision and reinstating the trial court's ruling which originally barred the expert's opinion and granted summary judgment. "The hypothetical question suggested by the Appellate Division – in which the expert would be asked to assume that Pierre's account of the accident was mistaken . . . is premised on a rejection of uncontroverted testimony." The hypothetical question cannot serve to change the facts, or to make admissible an otherwise inadmissible net opinion.

Hardly more than a month later, the Appellate Division issued a strikingly similar opinion, relying on the *Townsend* case, in *Faccas v. Young*, dated April 16, 2015. Another intersection accident, another purported obstruction – this time a utility pole – and another questionable expert opinion, set the stage for the barring of expert testimony of Wayne Nolte, Ph.D., with whom we have often grappled. As the Court said, "Dr. Nolte's opinion that the pole should be moved twelve inches was not persuasive." He failed to demonstrate how moving the pole backward twelve inches would eliminate the obstruction, and cited no industry standard or governmental regulations for doing so. He failed to offer the "why and wherefore" to show that moving the pole twelve inches would eliminate the obstruction. "We therefore conclude that the [trial] court did not err in determining that Dr. Nolte's expert opinion is a net opinion."

This opinion is of interest to us in that we obtained an order barring Dr. Nolte's testimony about a fall from a ladder leading to the roof of a building. The expert opinion declared that the ladder violated an OSHA regulation. We argued that Dr. Nolte did not explain the "why and wherefore" of that conclusion, and that he failed to explain how it may have led to the plaintiff's fall. The Superior Court granted our motion and barred the expert testimony, on May 11, 2007.

"Bootstrap" Hearsay Opinion

March 25, 2015 saw another Appellate Division opinion that favored the defense, in *James v. Ruiz*. James claimed that Ms. Ruiz backed into him at an Atlantic City Expressway toll booth, causing a painful disc bulge in his lower back. At trial, each party called a board-certified orthopedic surgeon to testify that Mr. James did, or did not, suffer a permanent bulging lumbar disc. Plaintiff's expert testified that he had seen the bulging disc on plaintiff's CT scan, but the radiologist who performed and read the scan was not called. Plaintiff's counsel asked his expert whether his finding was consistent with what the radiologist – who was not present to testify – saw according to the CT report. That question brought an emphatic objection from defense counsel, as it should. The trial judge sustained the objection, saying that the radiologist's report was hearsay, because "the radiologist did not testify here." The jury found that James did not prove a permanent injury caused by the accident.

The Appellate Division affirmed that ruling. The radiologist's CT report contained expert opinion, not merely facts and data, which was hearsay because the report cannot be cross-examined. It, therefore, could not be offered or referred to by the orthopedic surgeon, unless the radiologist also testified. The Rules of Evidence hold that, generally, an out-of-court expert opinion "shall be excluded if the declarant has not been produced as a witness." The Court cited two prior appellate cases having the same "overarching principle, . . . to disallow the substantive admission of hearsay assertions of a non-testifying radiologist for their truth, at least as to disputed or complex matters." The Court would not allow plaintiff's counsel to slip in the hearsay opinion "through the proverbial back door" using the testimony of the orthopedic surgeon as a conduit.

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48 Woodport Road, Suite 1
Sparta, NJ 07871

Phone: 973-512-3244
Fax: 973-512-3245
Email: law@jclane.com

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Traffic Offense Guilty Plea Barred as Evidence in a Civil Action?

A long-standing practice in New Jersey traffic courts allows a defendant to plead guilty and have the court bar the guilty plea from evidence in a related civil lawsuit. This "civil reservation" is discretionary with the Municipal Court Judge and is authorized by the Court Rules. The Supreme Court of New Jersey has now placed limitations on the procedure, in *Maida v. Kuskin*, decided March 19, 2015.

A defendant's plea of guilty to a traffic offense *is* admissible in a later civil action if the offense is relevant to the issues of negligence and proximate cause. But to encourage guilty pleas in Municipal Court, the law permits the Municipal Judge to exercise discretion to order that the guilty plea not be used in civil court, unless the prosecutor or the person injured in an accident objects and demonstrates good cause to bar such an order. To give the injured person and the prosecutor the opportunity to object, the request to seal the plea must be made in open court, and at the time of the guilty plea.

In this case, the civil reservation was granted after the Municipal Court had closed, giving the injured person no opportunity to object, the very infirmity which the Supreme Court seeks to remedy.