

THE LANE LAW LETTER

Law Offices of John C. Lane
 The Grace Building, 191 Godwin Avenue, Wyckoff, New Jersey 07481

New York Federal Court Adheres to State's Harsh "No Prejudice" Rule

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.

Questions or Comments?

Contact us at 201-848-6000, or email us at lan@jclane.com.

In *Briggs v. Ins. Corp. of Hannover* (S.D.N.Y., May 30, 2006), a federal court judge in Manhattan barred liability insurance coverage for a building owner because of an eight-month delay in notifying the insurance company of the service of suit papers in a personal injury lawsuit. The problem for the insured, a corporation, was that it did *not know* about the lawsuit. The suit papers were served upon the Secretary of State – the statutory agent for service of process – which mailed them to the insured's *old* address. The insured had moved its business office and had inadvertently failed to notify the Secretary of the address change even though its principal had diligently informed various city agencies, the IRS, and the tenants. Ultimately the suit papers caught up to the insured, eight months later, and the insured immediately gave notice to the insurer. The insurer disclaimed coverage for the late notice, asserting that under New York law it was prejudiced by the delay.

The Court of Appeals, New York's highest court, recently reaffirmed New York's "no prejudice" rule, in *Argo Corp. v. Greater N.Y. Mutual Ins. Co.* (2005) (digested in *The Lane Law Letter*, Winter 2006). But the high court had not ruled on the specific issue of a delay caused by the insured's failure to notify the Secretary of State of a change of address. Therefore the federal court referred to a lower appellate court decision in *26 Warren Corp. v. Aetna Cas. & Sur. Co.*, (App. Div. 1998), which had ruled on the precise issue (the insured's failure to notify the Secretary of its address change does not excuse compliance with the insurance policy requirements).

The federal court was satisfied that the New York Court of Appeals would come to the same conclusion and therefore dismissed the insured's coverage lawsuit with prejudice.

Inside this issue:

Personal and Personnel	2
New Jersey Appellate Court Addresses Measure of Damages in Construction Defect Claims	2
New York Appellate Division Takes Cooper Tire To Task for Over-Use of Trade Secret Claim to Thwart Discovery	3
A Terrible Injury and No Liability: A Motion for Summary Judgment is Worth the Effort	3
New Jersey Legislature Saves Baseball	4

The Fireman's Rule in New Jersey: Is It Finally Dead?

Two recent cases say "Yes." The Fireman's Rule, as it has been known in many jurisdictions, bars a fireman, policeman or other emergency responder from suing a premises owner for injuries resulting from negligence in causing the fire or other condition requiring the emergency response. Traditionally, a suit could still be brought for negligence unrelated to the cause of the fire or emergency. The Supreme Court's 1991 decision in *Rosa v. Dunkin Donuts*, 122 N.J. 66, extended the rule to a police officer who fell on a negligently maintained floor while carrying an injured person from the scene.

In 1994 the Legislature adopted a statute which permits a fireman, policeman or other

emergency responder to seek recovery if injured as the result of neglect of any person. It was thought that the statute ended the Fireman's Rule, but an appellate court decision in 2001, *Kelly v. Ely*, held that the intent of the statute was to return to the prior rule, barring suits if the injury resulted from the negligence, for example, in starting the fire itself. In May 2006, another panel of the Appellate Division decided the case of *Ruiz v. Mero* (385 N.J.Super. 382), disagreeing with *Kelly* and holding that the statute is to be taken literally: "the common law fireman's rule was abrogated by" the 1994 statute. In an unpublished opinion in June, *Smith v. Bradley*, another appellate panel agreed that *Ruiz* is now the law.



Personal and Personnel

Family Addition

Joshua John Enberg was born on March 31, 2006, to paralegal Jennifer Enberg and husband Bryan Enberg. The happy maternal grandparents are Louise and John Lane. For those who will ask, Joshua weighed 9 pounds, 5 ounces, and was 21½ inches long. Everyone is doing just great.

Firm Addition

Katherine M. Dunn, a senior law student at Quinnipiac University in Connecticut, joined us as a law clerk for the summer. Katie is continuing with us, part time, as the school year commences. We are thrilled to have her with us.

Continuing Education

John Lane attended the recent DRI Trucking Law Seminar in Chicago in March. He also attended the Summer 2006 meeting of the Conference of Freight Counsel in Kansas City, on June 25 and 26.

New Jersey Appellate Court Addresses Measure of Damages in Construction Defect Claims

This was not an ordinary dream house. The house had a footprint one-third longer than a football field...

The cost of repairs resulting from a construction defect can be a fair measure of the recoverable damages, even though the repair cost may far exceed the reduction in the market value of the building. That is the ruling of the Appellate Division of the Superior Court in *St. Louis, LLC v. Final Touch Glass & Mirror, Inc.* (June 12, 2006). The court used an amazing residential construction project to review New Jersey law of damages, and the law of ten other states and the District of Columbia, to reach its decision.

This was not an ordinary dream house. John and Prudence Boulton formed St. Louis, LLC, to build an enormous 36,000 square-foot house on a 48-acre tract, at a cost of \$8.5 million. The house had a footprint one-third longer than a football field, a flat-roof design with membrane roofing system and an interior with no interior walls. It had two stories, one of which was underground. Support was provided by a series of steel columns, all at the perimeter of the building, to which a glass wall system would be affixed. The steel columns were also designed to house the roof-drain pipes, plumbing vent pipes, and two electrical raceways, as there was nowhere else to put them. When the defendant installed the glass walls, the screws used to affix the glass frames to the steel columns “punctured every drain pipe, all but one of the vent pipes, and both electrical raceways.” As a

result, rain water leaked out of the pipes and into the house. All of the pipe and electrical raceways had to be removed through the roof, and replaced. The jury placed the blame on the glass installer and the construction manager.

The issue before the appellate court was the choice of the proper measure of damages. The repairs would cost some \$774,000, plus \$100,000 to \$200,000 to replace the roof membrane if it became damaged during the repair efforts. The Boultons sued for that amount. Final Touch urged a different approach. Their expert valued the house in an unimpaired state at only \$2.8 million since it had a “built-in incurable obsolescence.” As the Boultons had sold the house in its unrepaired condition during the lawsuit for \$2.5 million, Final Touch argued that the loss was just \$300,000. The trial judge and jury sided with the Boultons.

The appellate court agreed. Normally, the cost of repairs in a construction damage claim is a reasonable means of compensation unless the costs would constitute unreasonable economic waste. Here, the court held that only the cost of repairs could make the plaintiff whole, and that cost is not clearly disproportionate to the property’s probable loss of value. In such a case, the “diminution in value could be established by cost of repairs.”

New York Appellate Division Takes Cooper Tire To Task for Over-Use of Trade Secret Claim to Thwart Discovery

In a product liability lawsuit, *Raman Mann v. Cooper Tire* (June 1, 2006), the Appellate Division slammed Cooper Tire for “trying to roll back the clock on liberal disclosure,” and for “willful disobedience, bad faith and gross indifference to plaintiffs’ [discovery] rights” in this and other litigation. The court particularly criticized Cooper Tire’s “trade secret” discovery objections in the lower court.

Plaintiffs’ attorney had sought discovery of certain ingredients in the manufacture of a tire which allegedly sustained a tread separation and caused a vehicle to roll over. That accident killed the driver and seriously injured the infant plaintiff. In the resulting lawsuit in Bronx County against Cooper Tire Company, Cooper persuaded the trial court that its trade secrets concerning the “crown jewel” scientific information, the “lifblood” of the company, would be at risk. These general statements were apparently not backed up. One in-house expert even said in a conclusory affidavit that the disclosure would “put the company out of business.”

The Bronx County judge gave Cooper Tire nearly free reign to draft a protective order, which the judge signed. Then came the appeal.

The Appellate Division would have none of it. The appellate court recited the New York law as to trade secrets – that the objectant to a discovery disclosure must establish that the information sought is a trade secret. If the burden is met, the party seeking the disclosure must show that the information is indispensable and cannot be acquired in another way. At that point it is appropriate to craft a reasonable protective order. Cooper’s view was that to protect its secrets the protective order would have to permit almost no disclosure. The Appellate Division disagreed, discrediting the affidavit of the in-house expert, and labeling as “draconian” the protective order drafted by Cooper. The order, which allowed Cooper unilaterally to designate any document as confidential, was vacated and ordered to be re-drafted to allow substantial disclosure of specific information. Plaintiffs were awarded costs.

Cooper’s view was that to protect its secrets the protective order would have to permit almost no disclosure. The Appellate Division disagreed...

A Terrible Injury and No Liability: A Motion for Summary Judgment is Worth the Effort

Too often we hear that summary judgment is not obtainable in New York. That is not true, in our experience. A motion for summary judgment is a powerful weapon. But should it fail in the trial court, have the appeal ready to gain the victory. Consider the case of the careful trucker, the drunken car driver, and the beautiful girl.

Our trucker client had a mechanical breakdown on the Brooklyn-Queens Expressway at 4:30 a.m., an unusual event for his well-maintained rig. He pulled completely off the road, lit his four-ways, and set out flares and triangles behind the trailer. He then summoned help with his cell phone. Instantly, a Jeep Liberty with three occupants came speeding around a bend out of control, zig-zagged from right to left, caromed off the center divider and back to the right shoulder, and slammed into the rear of the parked trailer. The driver was drunk, nearly dead drunk. An attractive young woman in the

front passenger seat suffered terrible, disabling and disfiguring injuries. She sued the trucker, the Jeep driver, and his employer, a Chrysler-Jeep dealership which owned the Jeep, used by the driver as a “company car.” Suit was in Kings County (Brooklyn).

After depositions were completed, and plaintiff’s attorney demanded \$300,000 from our client, we moved for summary judgment. New York case law was solidly on our side. The motion judge issued a terse opinion denying our motion because there were “genuine issues of fact.” He was dead wrong, and plaintiff’s attorney knew it. We appealed. At a pre-argument conference in the Appellate Division the appellate court brusquely told plaintiff’s attorney that we would win on appeal, and suggested a nominal settlement. We settled at a very advantageous figure. Plaintiff ultimately settled with the Jeep driver and dealership for \$1.9 million.



The New Jersey Legislature Saves Baseball

Professional baseball is a unique sport...fans engage actively in the game, catch foul balls, “dive over walls and rows of seats, risking life and limb” to retrieve an errant baseball. The potential of being hit by a foul ball is “an inherent, expected, and even desired” part of the fans’ day at the ball park. Baseball owners enjoy a broad immunity from suit if they take minimal protective steps, such as screening in the seats behind home plate. Last year the New Jersey Supreme Court reigned in the limited duty rule, in *Maisonave v. The Newark Bears*. Mr. Maisonave was hit by a foul ball while he bought a beverage on the concourse of the Bears’ stadium in Newark, New Jersey. In his lawsuit, the Court ruled that owners must follow the busi-

ness invitee rule of liability in areas of a stadium away from the seating areas.

The increased liability facing the baseball owners (and with minor league baseball becoming more popular in the state) led the Legislature to overturn the rule in *Maisonave* and grant immunity to the owners for all such injuries, as long as they post prominent signs in all areas advising spectators that they assume the risk of getting beamed while waiting for a beer. And so, the Bears, Riversharks, Skyhawks, BlueClaws, Jackals, Patriots, Thunder, and Surf can “Play Ball!”

