

THE LANE LAW LETTER

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

Catch Us on the Web

We are proud to announce the launching of our firm's website, www.thelanelanfirm.com.

Please visit our website for the story of our firm and our talented people, the length and breadth of our practice, current updates of developments in the law, and tips we hope will be helpful to our friends.

Visit us often!

New Jersey Employers Beware: Appellate Court Orders Employers to Monitor Employees' Use of Inappropriate Website

An employer that suspects an employee of use of pornographic websites on the office computer has a right and a duty to investigate that conduct, and to put a stop to it. Moreover, the employee has no reasonable expectation of privacy at the office desktop. So says the New Jersey Appellate Division in a case so sordid and sensitive that it is entitled simply *Doe v. XYZ Corp.*, decided December 27, 2005. This is a clear expansion of employer liability. Once again, New Jersey is at the forefront of developing liability law.

For obvious reasons, no names are given. "Employee" worked at a small cubicle in the accounting department of XYZ Corp. When not working on ledgers, he utilized his company p.c. to access pornographic websites. In 1998 or 1999, XYZ's network administrator became aware of this conduct and told Employee to stop. In early 2000, his immediate supervisors got involved, and conducted a limited investigation. Concerns of privacy invasion led a higher-up to prohibit their access to Employee's computer logs.

Complaints from fellow employees emerged in late 2000 and early 2001. They were confirmed by the Director of Network Services, but no action was taken. Finally, when a family connection was discovered, Employee was arrested for child pornography. He had sent to one website some nude and semi-nude photos of his 10-year-old stepdaughter. After his arrest, officials found more than 1,000 pornographic images had been downloaded while Employee was working for XYZ.

Employee's wife sued XYZ on her daughter's behalf, alleging that they should be held liable for enabling this conduct, which caused emotional damages sustained by the girl. The court wrestled with competing interests of prevention of child abuse on the one hand, and protection of Employee's privacy on the other. The judges sided with child protection, finding that no right of privacy exists on the office computer. Employee's computer was visible, and company policy held that all emails were XYZ's property. Thus, there could be no legitimate expectation of privacy.

The Court held that the employer had a duty to investigate an employee's Internet activities, and to stop inappropriate activity either by terminating the employee or calling in law enforcement authorities. Failing that, an employer who is on notice of such conduct could face civil liability to one injured by the employee-predator. Here, XYZ had ample warnings of Employee's behavior, but took no real action until it gave Employee a serious admonition just three months before his arrest.

New Jersey employers will now face potential liability if they suspect possible inappropriate website use by an employee and fail to stop it. Suits on behalf of abused children or fellow employees could follow from lax enforcement. Even if the suits are defensible, that defense is expensive. Employers are well-advised to review their Internet procedures and to consult with human resources and employment law advisors.

Inside this issue:

New Highway Bill Ends State-Law Vicarious Liability for Equipment Lessors 2

New York Labor Law Does Not Apply to Injuries On Flat-Bed Trucks 2

Can an Injured Plaintiff Bring a Declaratory Judgment Action to Contest a Disclaimer of Coverage by Defendant's Insurer? 3

TIDA Lawyers Put "List-Serve" Network to Great Use in Upstate New York Trucking Defense Case 3

"God knows you don't go there for the food" 4

*The protection
was created by
Congress for
traditional leasing
companies.*

New Highway Bill Ends State-Law Vicarious Liability for Equipment Lessors

Deep in the 800-plus pages of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFTEA-LU”) of 2005, is a provision which preempts state laws which hold car-rental and equipment-leasing companies vicariously liable for accidents resulting from the negligent acts of the renters and lessees. This is especially important in New York where Vehicle & Traffic Law § 388 imposes vicarious liability upon owners of vehicles, including lessors.

The applicable section dictates that the owner of a motor vehicle who rents or leases it to another “shall not be liable under the law of any state” by reason of being the owner, for harm to persons or property arising from the use, operation, or possession of the vehicle during the rental or lease. This federal protection from state law exists only if (1) the owner-lessor is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or

criminal wrongdoing on the part of the owner. In other words, the protection was created by congress for traditional leasing companies – car rental companies, tractor, trailer and chassis lessors – to the extent that their own negligence does not contribute to an accident.

This is a significant benefit to lessors, who frequently have been sued in New York under “VTL 388”, incurring great cost before they are ultimately exonerated. If the responsible parties cannot be located, or are judgment-proof, the lessors were required to pay any resulting settlement or judgment. The new provision took effect immediately upon enactment of the highway bill, August 10, 2005, and applies to all lawsuits filed on or after that date. For aficionados, it is Section 10208 of SAFETEA-LU, and is codified as 49 U.S.C. § 30106.

New York Labor Law Does Not Apply to Injuries On Flat-Bed Trucks

A worker injured in New York while loading or unloading a truck trailer may not invoke the New York Labor Law injury-protection sections, which provide for absolute liability in height-related injuries (section 240(1)) and vicarious liability of owners and contractors (section 240 (6)).

A construction worker injured in New York while loading or unloading a truck trailer may not invoke the absolute liability provision of New York’s Labor Law § 240 (1). That statute is intended to protect workers hurt in “elevated height” accidents, either from “falling workers” or “falling objects.” The issue has been the subject of numerous conflicting lower court opinions. The Court of Appeals, New York’s highest court, laid the issues to rest in *Toefer v. Long Island Railroad*, 4 N.Y.3d 399 (2005), which actually involved two separate cases. In each, a worker was injured while unloading construc-

tion materials from a flat-bed trailer.

In the first case, Edwin Casey was so seriously injured that his lawsuit was brought by his guardian, Arlene Toefer. Casey was unloading steel beams from a trailer when he was inexplicably struck in the head and propelled to the ground. He became a paraplegic as a result. In the second case, Robert Marvin broke his ankle in a fall from a trailer after cutting steel straps that secured a load of paneling material.

The Court of Appeals dismissed the counts based upon Section 240(1). The Court concluded that flat-bed trucks do not present the kind of “elevation-related risk” that the statute contemplates, emphasizing that flat-beds are only four to five feet in height. They pose usual and ordinary dangers of construction work, “not the extraordinary elevation risks envisioned by Labor Law § 240 (1).”



Can an Injured Plaintiff Bring a Declaratory Judgment Action to Contest a Disclaimer of Coverage by Defendant's Insurer?

New York's Court of Appeals says **No**. The case of *Lang v. Hanover Ins. Co.*, 3 N.Y., 3d 350, 787 N.Y.S.2d 211 (2004) holds that only the insured has standing to bring a declaratory judgment action prior to entry of a judgment for damages against the insured. Once that judgment is entered and served on the insured (and after a waiting period of 30 days), the plaintiff may then sue the insurer to test the disclaimer of coverage and, if successful, to collect in the judgment. Following a logical, if not also restrained, path the Court of Appeals noted that at common law an injured person had no cause of action against an insurer, even to collect a judgment. Statutory enactments (Insurance Law § 3420, presently) now allow a suit to collect a judgment from the defendant's insurer, but the statute says nothing about permitting a prejudgment action by the injured plaintiff to test the validity of a disclaimer of

coverage. The Declaratory Judgment Act does not help, because the plaintiff still lacks standing to sue under the insurance contract.

So, in New York, unless the insurer brings a declaratory judgment action to enforce the disclaimer, plaintiffs must first obtain a judgment and then sue the insurer for collection. At that point the disclaimer will be tested. If the insurer loses, the Court of Appeals poignantly cautions it will not be permitted to relitigate the liability issues or the determination of damages.

The insurer has a dilemma. If it brings a declaratory judgment action to enforce its disclaimer, it may lose. If it does lose, the insurer must pay the insured's defense costs in the coverage action. So says the Court of Appeals in *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 789 N.Y.S.2d 470 N.Y. (2004), decided one month after *Lang v. Hanover Ins. Co.*



TIDA Lawyers Put "List-Serve" Network to Great Use in Upstate New York Trucking Defense Case

The Trucking Industry Defense Association (TIDA) maintains an email listing service, or list-serve, known as the TIDA eList. Late on a Thursday afternoon in early December, TIDA member Donna Burden of Buffalo, New York, issued an urgent email alert on this service for prior reports and transcripts involving a plaintiff's expert who had been identified just days before trial. The response from fellow TIDA lawyers was significant, but one, from our office, proved devastating to the witness. Our office had obtained an order three years earlier barring his testimony because his opinion was unsupported by any viable scientific methodology. We overnighted a copy of the expert's earlier report, and his deposition transcript. The signed order barring the testimony and granting summary judgment dismissing the complaint, however, was in storage. The best we could do was, on Monday, to send a computer printout of the order which he had submitted to the New Jersey judge.

The expert took the stand on Tuesday morning. On cross-examination by Donna, he denied that his testimony had ever been barred in any case including ours. Shown the unsigned version of the order, the expert insisted that it had never been signed by the New Jersey court. We received an urgent call at noon that Donna had to have the *signed* order faxed to the courtroom, by 2 p.m., or the line of cross-examination would be stricken. We contacted our off-site storage service and asked for an urgent delivery of the bankers' boxes containing the pertinent file. At 1:55 p.m., the delivery van arrived. By 2 p.m., the signed order was being faxed to Donna's trial judge.

Late that day John Lane received an email from Donna: "John - Thank you SO much!!! It was great! Really a shining moment since [the expert] continued to insist he had never been barred from testifying. A great moment."

We received an urgent call at noon that Donna had to have the signed order faxed to the courtroom, by 2 p.m., or the line of cross-examination would be stricken.

“God knows you don’t go there for the food” does not subject Zagat’s Restaurant Survey to Defamation Action

The 2004 Zagat Survey of New York City Restaurants, which features surveys from members of the public, included a review of a restaurant described by its owner as a “theme restaurant with a drag queen cabaret,” with female impersonators serving as waiters and performers. The Zagat Survey rated the food as “fair,” and the décor and service as “good.” The entry also included comments from the public, such as “weary well-wishers suggest that they ‘freshen

up the menu and their makeup.”

The restaurant owner sued Zagat, claiming that the comments were libelous. The New York Supreme Court, Appellate Division, disagreed, declaring that the comments “can only be construed as statements of opinion and thus are constitutionally protected.” The case, decided September 22, 2005, is *Themed Restaurants, Inc., doing business as Lucky Cheng’s v. Zagat Survey, LLC*.

