

# LEGAL News IN BRIEF

## News in a flash for Subrogation and Defense Adjusters

JAN MEYER, ESQ.

Richard A. Hazzard  
Noah Gradofsky  
Stacy P. Maza  
Daniel T. Gluck  
Richard L. Elem

Elissa Breanne Wolf  
Solomon Rubin

Joshua Annenberg

NEW JERSEY OFFICE:

1029 Teaneck Road  
2nd Floor  
Teaneck, NJ 07666  
Tel. 201.862.9500  
Fax 201.862.9400  
www.janmeyerlaw.com

NEW YORK OFFICE:

50 East 42nd Street  
Suite 1809  
New York, NY 10017

LEGAL NEWS IN BRIEF IS PREPARED  
AND PUBLISHED BY THE LAW OFFICES  
OF JAN MEYER AND ASSOCIATES, P.C.

Volume 7 • Issue 2

### CONTENTS

☞ Trial Court Judge Has Discretion to Grant Leave to Amend Complaint, and to Deny New Trial Where the Amount of Damages is Determinable

☞ Extraordinary Circumstances Surrounding the Death of Plaintiffs' Son Warranted the Late Filing of a Notice of Claim

☞ No Coverage of Vehicle Where Misrepresentation Was Made That the Insured Was Alive

☞ Prima Facie Case of Non-Serious Injury Made Where Plaintiff Has Full Range of Motion and Lacks Disabilities

#### **Trial Court Judge Has Discretion to Grant Leave to Amend Complaint, and to Deny New Trial Where the Amount of Damages is Determinable**

Grendysa v. Roseworth  
Construction Co.

New Jersey Appellate Division  
2008 WL 4682004  
Docket No. A-0131-07T2  
(October 8, 2008)

Defendant, a contractor, left the construction site when Plaintiff failed to make certain interim payments. Plaintiff filed breach of contract and negligence claims against Defendant, which counterclaimed for breach of

contract as well. Two years later, after the completion of discovery and the scheduling of a date for mandatory arbitration, Plaintiff moved unsuccessfully for leave to file an amended complaint, which would assert new claims based on the Consumer Fraud Act. At trial's end, the jury found in favor of Defendant's claim and awarded \$100,000. The judge then denied Plaintiff's motion for a new trial, but reduced the damages award to the amount which Defendant actually incurred.

In upholding the lower court's decisions, the Appellate Division found that Plaintiff failed to indicate what underlying facts she learned in discovery and when she learned them. Moreover, Plaintiff omitted to include either her motion or the proposed amended complaint within her appeal. Compounded with impending arbitration and trial, these factors did not warrant leave to amend the complaint at that late stage. Although by statute, such leave "shall be freely given in the interest of justice," the trial court judge had the ultimate discretion to grant it, if reasonable.

A new trial is necessary "if, having given due regard to the

opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." Such miscarriage exists in the presence of a "pervading sense of 'wrongness'" in the jury's decision. Again, the Court deferred to the judge's presumably sound discretion. Here, although the jury's award exceeded the damages Defendant sought, it could reasonably have included additional damages, such as interest or counsel fees. As such, the judge's reduction of the award to the amount demanded by Defendant obviated any need to retry the matter as to liability.

#### **Extraordinary Circumstances Surrounding the Death of Plaintiffs' Son Warranted the Late Filing of a Notice of Claim**

Estate of Valente v. Toms River  
Board of Education

New Jersey Appellate Division  
2008 WL 4682268  
Docket No. A-1790-07T3  
(September 17, 2008)

On December 19, 2006, sixth-grader Nicholas Valente collapsed

in his elementary school and subsequently died. Thereafter, his father learned that although the school was equipped with a defibrillator, it failed to apply the device because the only adult present at the time of the collapse did not know how to use it. In March 2007, Debra McKenna, the school board's assistant superintendent, offered the family \$2,000 to help pay the decedent's medical bills, but required that his father sign a release. Joseph Valente refused, insisting on first seeing the autopsy report; upon receiving said report in late March or early April 2007 and learning the cause of death to be cardiac arrhythmia, he insisted on more money. After being directed to the Board's attorney and discussing the matter with him, the decedent's father waited five weeks, then re-contacted McKenna, only to learn that the Board had not yet addressed his request. Not until the end of June 2007 did Joseph Valente learn that the Board had denied his request.

On September 26, 2007, the decedent's parents moved for leave to file out of time the notice of claim required by the New Jersey Tort Claims Act (TCA). Although McKenna's attorney claimed that he had advised Joseph Valente to retain an attorney, the latter insisted that he was never informed by a Board representative as to the ninety-day notice requirement of the TCA. Moreover, Valente claimed that he did not realize that he might have a claim until after receiving the autopsy report, the police report and the doctor's report, all of which he received more than ninety days after Nicholas' death.

The Appellate Division cited the TCA as mandating that

Plaintiff seek leave of court to file a late notice of claim within one year of the accrual of the claim, and only if there were "sufficient reasons constituting extraordinary circumstances for his failure to file [a timely] notice of claim...or to file a motion seeking leave to file a late notice of claim within a reasonable time thereafter." Here, the Court decided that the "collective impact" of the circumstances here, including the parents' previous loss of a child in a tragic accident, their impaired mental state whereby they faced financial difficulties, were deeply depressed and "heavily medicated" during this time, as well as their negotiations with the Board for about four months prior to receiving the autopsy report, were of such nature as to allow the parents to file a late notice of claim against the Board.

---

**No Coverage of Vehicle Where Misrepresentation Was Made That the Insured Was Alive**

In the Matter of Geico Ins. Co. v. Battaglia

New York Appellate Division  
2008 NY Slip Op 07736  
(October 10, 2008)

Samuel Battaglia, Petitioner's insured, sustained injuries in an automobile collision with a vehicle registered to James P. O'Donnell and operated by Jeffrey R. Ramos. At the time of the collision, Battaglia had supplemental uninsured motorist (SUM) coverage with Geico Insurance Company. Although O'Donnell was insured with New York Central Mutual Fire Insurance Company (NYCM), said insurer subsequently learned that O'Donnell had died in 1998

and thereby disclaimed coverage for Ramos. As the adverse vehicle was thus uninsured, Battaglia requested SUM arbitration with Geico. Geico brought a petition against NYCM, and the latter insurer prevailed on its motion to dismiss all claims against itself. The Appellate Division upheld dismissal, reasoning that NYCM's cancellation of the policy was proper. Because NYCM had insured the vehicle based on the material omission of O'Donnell's being deceased, the policy was void *ab initio*.

---

**Prima Facie Case of Non-Serious Injury Made Where Plaintiff Has Full Range of Motion and Lacks Disabilities**

Johnson v. County of Suffolk  
New York Appellate Division  
2008 NY Slip Op 08295  
(October 28, 2008)

Defendants in an automobile accident case prevailed on their motion for summary judgment on the appellate level, having alleged that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d). Proof submitted by Defendants comprised reports of an orthopedic surgeon who held that the range of motion in Plaintiffs' spines was normal and that neither had sustained a disability. Case law indicates that both elements together establish a prima facie case of non-serious injury, even where evidence exists of the injured party's bulging or herniated discs. The Court did not find any triable issue of fact within Plaintiffs' evidence, which derived from treatment no later than 75 days after the accident.