The Law Offices of
METHFESSEL & WERBEL
A Professional Corporation

The Leading Insurance and Claims Attorneys

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CASE UPDATE

To Our Friends and Clients: Methfessel & Werbel is pleased to bring you our most recent Case Update. There are many new developments in the law and exciting news at Methfessel & Werbel. We hope this edition of our Case Update provides you with some insight as to the changing landscape in the law in both New York and New Jersey, as well as updates within the insurance community. As always, we welcome your comments, questions and feedback. As you are aware, Methfessel & Werbel considers itself an extension of the insurance industry and we would be happy to assist you with any seminar or training you require. Feel free to contact Matt Werbel at mwerbel@methwerb.com.

Methfessel & Werbel Welcomes Edward M. Tobin to its Subrogation Department

Methfessel & Werbel, PC is pleased to announce the hiring of Edward M. (Ted) Tobin to its Subrogation Department. Mr. Tobin has been practicing for 13 years with several firms in New York City concentrating on subrogation, with additional experience in litigation of first party insurance coverage matters.

Ted replaces Steve Kluxen, who, as many of you know, has been hired as Selective Insurance Company's Coordinating Counsel for Subrogation. We wish Steve all the best in his new position, and are sure he will enjoy tremendous success.

M&W welcomes Ted and looks forward with excitement to continuing to serve the needs of our subrogation clients. He will be responsible for handling large subrogation losses in New Jersey and New York. Ted will assume responsibility for claims previously handled by Steve Kluxen. Ted will also join M&W's highly regarded AIP (Accelerated Investigation Program) rotation, into which his transition will be seamless.

M&W SUPER LAWYERS AND RISING STARS

Once again, Don Crowley, Ed Thornton, Bill Bloom and Eric Harrison have been selected by their peers as "Super Lawyers." Don, who is a Partner of Counsel, was previously selected in 2006, 2008, 2009 and 2010. Ed was selected previously in 2005, 2007, 2009 and 2011. Bill and Eric were selected previously in 2009, 2010 and 2011. Similarly, Leslie Koch has been honored with the designation of "Super Lawyer Rising Star." Leslie also received this recognition in 2011. Selection as a "Super Lawyer" means recognition by one's peers, from both the defense and plaintiffs' bar, of professionalism and the complexity and quality of matters handled. All nominations come from professionals outside the practitioner's firm.

UPDATES IN NEW JERSEY CASE LAW

AFFIDAVIT OF MERIT

As you know, in certain cases of professional malpractice, an Affidavit of Merit is required within 120 days of the defendant's responsive pleading. The current procedure is for the trial court to conduct a Case Management Conference within 90 days of the answering pleading to resolve any questions about the sufficiency of the affidavit. In Buck v. Henry, the Supreme Court reviewed a case where the trial court failed to hold such a conference until after the 120 day term, later determining on motion that the affidavit submitted by plaintiff did not satisfy the statute, and dismissed the case. The Appellate Division affirmed, stating that the affidavit produced by the plaintiff was not from a practitioner of the same specialty as the defendant. The Supreme Court affirmed as well, ruling that from this time forward a defendant physician who admits treating the plaintiff must include in the answering pleading the medical specialty, if any, in which the defendant physician was involved when rendering treatment to the plaintiff. In other words, the Supreme Court does not want to see cases that may have merit dismissed, especially when parties play "hide-and-seek" with the Affidavit of Merit statute. It has been clear since 1995, when the statute was first enacted, that the Supreme Court has disfavored a hyper-technical application of the statute.

CONSUMER FRAUD – TITLE INSURANCE

In a case of first impression, U.S. District Judge Bumb held in Haskins v. First American Title Insurance Company that plaintiff home purchasers may sue their title insurer under the Consumer Fraud Act, which carries treble damages and fee shifting for successful plaintiffs, for allegedly misrepresenting the amount of money due for title insurance during the refinancing of their homes. Generally speaking, consumer fraud claims cannot be brought against learned professionals or semi-professionals, thereby barring class actions under the Consumer Fraud Act. Judge Bumb held that the writing of title insurance was encompassed with the CFA's protections. It remains to be seen whether Superior Court trial judges and/or appellate panels follow suit.

PREMISES LIABILITY

In D'Alessandro v. Hartzel, the Appellate Division once again addressed the duty owed by a landlord to a tenant in a short-term summer rental. In D'Alessandro, upon her arrival, plaintiff entered the house through the front door in an awkward, sideways manner, propping the door open with her left arm while pulling a suitcase with her right hand. Not looking where she was going, she failed to see a step leading from the foyer to a sunken living room and fell. Plaintiff alleged negligent design and a failure to warn. Applying the law set forth two years ago in Reyes v. Egner, the Appellate Division concluded that the landlord was not liable. As step one, the panel found that given the absence of any expert opinion asserting a violation of code, plaintiff could not even establish the existence of a hazardous condition. As step two, even assuming a hazardous condition existed, plaintiff's claim was further precluded by virtue of the fact that the plaintiff, who had viewed photos of the property, knew or should have known of the condition, which was visible and conspicuous. As step three, the claim was precluded because the landlord had no reason to expect that the lessee would not discover the condition and, moreover, the landlord had no reason to believe that the condition posed any risk given the open and obvious nature of the condition and the absence of prior falls.

NEGLIGENCE-IMMUNITY

A Law Division judge has held in Gronwald v. Modica, an unreported case, that a plaintiff who went to pick pumpkins at a "pick-your-own" farm could not bring a claim when she slipped on dew or frost. Statutory immunity for the natural condition of land trumps a separate legal duty to provide a reasonable means of ingress and egress for business invitees. The Court noted that it would be quite natural for patrons to walk across farm land to get to the field, and since dew and frost are natural conditions, and since pumpkins are a product of the farm in question, no duty was breached.

DUTY OF CARE – NEGLIGENCE - HOME APPLIANCES

In the absence of a duty of care, there cannot be an actionable breach of the duty of care. In an unreported case, Thorpe v. General Electric, the Appellate Division held that a consumer who had a refrigerator's ice maker installed with plastic tubing instead of the recommended copper tubing could not bring claim later against the manufacturer's servicing agency, who serviced the machine by service contract. During the term of the contract, the serviceman saw the plastic tubing, but there is no record that he recommended it be replaced. Approximately 16 months later, the plastic tubing ruptured and caused water damage in the home. The motion judge held that GE did not have a duty under the service contract or under tort law for the service technician to warn the homeowner again that copper tubing should have been used.

The Appellate Division affirmed, noting that whether a duty exists is a matter of law to be decided by the court. Whether a duty exists depends upon the nature of the risk, the public interest in the proposed solution, and whether imposing a duty satisfies an abiding sense of basic fairness. Cases decided with this reasoning are becoming commonplace, frankly leading to less stability in precedent. The court declined to impose an additional duty outside the contract upon GE, noting that it would not lessen litigation but actually cause more litigation, when parties would call into question the scope of inspection of automobiles, refrigerators and the like, and then the adequacy of any warning. Additionally, the risk does not necessarily involve personal injury, unlike warnings in industrial machine cases or home furnace cases or cases wherein a service provider also assumes a contractual role of assuring the safety of a machine.

DEFAMATION - ABSOLUTE LITIGATION PRIVILEGE

In an unreported defamation action opinion, the Appellate Division has affirmed a trial level grant of summary judgment in the matter of Lipsky v. Goldstone. Lipsky, a treating physician, treated someone involved in an automobile accident. Defendant, an independent examining physician, allegedly made disparaging remarks about the plaintiff and plaintiff's treatment during the independent medical examination. Citing the litigation privilege, available to litigants, their attorneys, and experts, the statements were held to be made in the context of an examination (calling the plaintiff a "quack", giving "unnecessary treatment" and treating "in order to make money") and granted summary judgment. The motion Court noted that as long as the statements made have some connection or logical relation to the litigation, made in the course of the proceedings, by a litigant or another authorized person and to achieve the objects of the litigation, the statements are absolutely privileged.

DISCOVERY-VIDEOTAPE

Conventional wisdom holds that the average American is videotaped, generally for security purposes, up to 20 times a day. Security videotaping is the norm for retailers. When sued in the matter of Inferrera v. Wal-Mart for a slip and fall in the store, Wal-Mart found that its security tape of the plaintiff did not match the plaintiff's description of the incident in answers to interrogatories. Wal-Mart disclosed the existence of the videotape, but wanted to withhold the tape until plaintiff's deposition. Plaintiff's motion to compel production of the videotape was granted by a United States Magistrate Judge, reasoning that if such delays were routinely permitted, important discovery could be withheld and impede the progress of the case.

CHARITABLE IMMUNITY/NON-DELEGABLE DUTY:

The New Jersey Supreme Court has held that charitable entities do not have a non-delegable duty to protect the developmentally disabled placed in their care. The Court ruled that traditional negligence principles would apply and that to have a cause of action, plaintiff would be obligated to prove lack of due care in hiring, training, retaining, or supervising an employee. In deciding Davis v. Devereux Foundation, the Court affirmed dismissal of negligence claims and, in a public policy decision, held that to impose vicarious liability could threaten the viability of many charitable organizations. Further, the employee's outrageous conduct in this case – throwing hot water on a developmentally disabled person – was so egregious and so unexpected that no reasonable juror could find the employee acted in the scope of employment, thereby eliminating a respondent superior claim as well.

CHARITABLE IMMUNITY ACT

The United States Court of Appeals, Third Circuit, has issued a lengthy opinion in the matter of Lomando v. United States of America ruling that the United States may be entitled to the protection of New Jersey's Charitable Immunity Act (the "Act"). The plain language of the Act affords protection only to a non-profit organization organized for religious, educational, hospital, or charitable purposes. The court recognized that Congress waived the sovereign immunity of the U.S. for tort actions against volunteer physicians "deemed' federal employees, thereby making a claim under the Federal Tort Claims Act the exclusive remedy against the U.S. However, the court reasoned that the FTCA allowed the U.S. to invoke the Charitable Immunity Act defense since the FTCA allows the U.S. to assert any defense based upon "judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim." In short, the court held that the United States was immune from the instant suit and entitled to the protections afforded by the Charitable Immunity Act because a similarly-placed private employer would be entitled to assert that defense and the government's "deemed" employees in this case, the physicians, would also be entitled to that defense. This ruling should be cited by the defense bar to invoke charitable immunity in negligence cases when necessary to complement the defenses afforded by the New Jersey Tort Claims Act.

TORT CLAIMS ACT - 911 IMMUNITY

A unanimous Supreme Court has held that the Legislature intended a very broad immunity when amending the Tort Claims Act to provide immunity to 911 dispatch operators and their employers for negligent mishandling of the emergency calls. In Wilson v. Jersey City, the 911 operator dispatched police officers to an incorrect address. Subsequently, 24 hours later, a second operator responding to a follow-up call for the same incident did not dispatch any police officers because there was no longer an emergency situation. The Court stated that as much as a botched response furthers tragic events, the Legislature has decided that the overall benefit of a 911 system requires that telecommunications providers, public entities, and their personnel be shielded from negligent mistakes.

POLICY DEFINITION - PROPERTY MANAGERS

The Appellate Division, in the published case of Cambria v. Two JFK Blvd., had occasion to review the policy definition and application of the phrase "your real estate manager" in a coverage dispute. The dispute began when a person fell in the parking lot of a strip mall. A tenant was supposed to name the landlord as an additional insured, but did not. Nonetheless, the motion judge found that there was coverage for the landlord's real estate manager because the tenant's policy provided coverage for "any person other than your employee or any organization while acting as your real estate manager." The Appellate Division rejected this argument, holding that the word "your" was very specific and unambiguous. The Appellate Division further held that there was no factual dispute that the landlord's real estate manager was not the tenant's retained real estate manager and therefore, no coverage ensued. The Appellate Division also noted that with regard to the area where the plaintiff fell, the real estate manager was the landlord's manager, not the tenant's manager, since the tenant had no responsibility for the common area where plaintiff fell.

PROPERTY COVERAGE – COLLAPSE

The United States District Court has agreed with defendant in the matter of Holiday Village v. QBE that plaintiff's Amended Complaint failed to allege a "collapse" within the meaning of the policy. The policy defined "collapse" as an "abrupt falling down, caving in, or flattening." The court found there was no coverage when the collapse was a slow process of deterioration.

DAMAGES

In the unreported decision of Toombs v. Pilato, the Appellate Division upheld a jury's award of no monetary damages for pain and suffering, notwithstanding its finding that the plaintiff suffered a permanent injury. This holding, which relied on a number of reported appellate decisions, reiterates the right of the jury to determine that even a permanent injury does not necessarily entitle a tort victim to monetary damages.

INSURANCE COVERAGE/TORTS

In an unreported opinion, Colon v. Liberty Mutual, the Appellate Division upheld a motion judge's conclusion that there was no "substantial nexus" between the ownership, maintenance, use, loading or unloading of a motor vehicle and its driver assaulting a police officer, thus requiring coverage under a homeowner's policy. The defendant sought to exclude coverage because of the automobile exclusion in the homeowner's policy which specifically did not cover claims arising out of the use of a vehicle. The motion judge reasoned that although the police officer stopped the policyholder's vehicle, the stop was a missing person alert generated when the driver left home without taking her medication, not a traffic stop. Thus, the use of the vehicle was not substantially connected to the tort when the unmedicated driver bit the responding police officer. As a result, the court did not enforce the homeowner's policy exclusion.

PUBLIC ENTITY - PAIN AND SUFFERING

Public entities are protected by the New Jersey Tort Claims Act, codified at Title 59. Plaintiff cannot recover for non-economic damages unless medical expenses exceed $3,600 and plaintiff demonstrates a permanent loss of use of a bodily function that is substantial. In deciding Tyree v. Orange Board of Education, the Appellate Division noted that a fracture of the base of the fifth metatarsal and subjective complaints of lingering pain and a diminished ability to perform certain tasks constitute only subjective feelings of discomfort, which do not meet the statutory criteria.

CLASS ACTION

The New Jersey Supreme Court has rejected plaintiff's Petition for Certification seeking certification of a class of persons (class action) who received junk faxes. In the 1990s Congress passed an Act mandating a $500 recovery for each instance of junk faxes received in violation of the Act. With the advent of software allowing for mass faxing, it is not unusual to have small operations send out, through third parties, thousands of faxes at a time. This means that for any one fax bulk sending, an entity may be responsible for millions of dollars in damages. By rejecting the potential for class action, the New Jersey Supreme Court has greatly reduced the potential for filing of these actions, since to prosecute one action at a time is simply too much time and effort for the plaintiff's bar.

ENVIRONMENTAL INSURANCE-POLLUTION EXCLUSION

In Newport Associates v. Travelers, a site cleanup coverage suit, Judge Sarkisian of Hudson County Superior Court ruled that the Supreme Court's "regulatory estoppel"-based circumvention of the pollution exclusion in the seminal case of Morton International v. General Accident applied only to CGL policies and not excess policies. As such, plaintiffs were not persons insured under the excess policies in question and summary judgment was granted to the defendants.

POLICE OFFICERS - FALL DOWN CLAIMS

One of the last actions of Governor Florio's administration was to abrogate the Fireman's Rule. The Fireman's Rule barred personal injury suits against property owners when police, fire, and other similar public officials were hurt on private property when responding to a call. Since then, courts have grappled with the question of whether such public employee responders should be considered licensees or invitees.

The duty owed to a licensee is to warn of any known danger that the licensee would not discover by simple observation. In essence, a licensee takes the property as a family member would. On the other hand, the duty owed to invitees is to search out the property for any potential hazard, warn of or correct same, while the duty owed to a trespasser is only to warn of artificial conditions that pose a risk of death or serious bodily harm. This is the classic common law approach to a person's status on the land of another.

While there has been much speculation over whether the Supreme Court was going to abrogate the classic perspective and institute some other standard, in a unanimous Supreme Court holding in Rowe v. Mazel, it appears the Court will not take that opportunity, at the same time holding that police officers who are making routine inspections are to be considered licensees. Public employees who are specifically called to a site, such as responding firemen or policemen,

will be considered invitees. It should also be kept in mind that the warning that is owed a licensee is commensurate with the situation; obviously a firefighter would know that there could be a significant risk of a floor or wall collapsing, and an officer responding to a report of a dangerous condition has already been warned of the condition.

DRAM SHOP – SPOLIATION

In a published opinion, Davis v. Barkaszi, the Appellate Division has provided guidance on issues of proximate cause and spoliation. Defendant Barkaszi was drinking at the tavern of defendant KC. Plaintiff was a passenger in Barkaszi's vehicle. Plaintiff's alcohol expert testified that Barkaszi would have shown signs of intoxication before he was last served because there is nothing in the record to indicate he was not of average tolerance to alcohol. This was held to be error. The trial judge did not allow testimony concerning Barkaszi's ability to appear sober when he was in fact drunk, which was held to be error as well. The defense also wanted to establish that Barkaszi may not have appeared intoxicated at the time he was served his last drink, he immediately left the bar, got in the accident almost immediately and before the alcohol would have had time to get in his system. Thus, the bar wished to argue that the judge should instruct the jury that the negligence, if any, was committed before service of the last drink if the jury found that the last drink did not have time to get into Barkaszi's system. The Appellate Division agreed.

The tavern had an in-house surveillance system. The bar received notice of the accident, and one of the owners looked at the computer stored images, decided that Barkaszi did not appear to be intoxicated when served, and therefore allowed the system to be taped over one week later. One year later when suit was filed, plaintiff wanted to review the images, which were no longer available. The judge gave a spoliation charge and did not allow KC's owners to testify at trial that they had in fact reviewed the tape and that there was nothing on the tape of any significance. The Appellate Division held this to be error as well, as the failure to preserve the tape, while a permissible factor in the jury's deliberation for which an instruction could be given, did not justify the extreme measure of barring testimony about its contents.

Regarding proximate cause, the Appellate Division emphasized that a licensed alcoholic beverage server is negligent only when the server serves a visibly intoxicated person or serves a minor. Barkaszi's drinking history and his ability to appear sober when he may not have been were factors to be considered by a jury, not the judge.

REPOSSESSION

The Appellate Division, in a published decision, Repossession Specialists v. GEICO, held that a vehicle repossession agent was not a person using a repossessed vehicle with permission. Annetta Jackson had signed a finance agreement, giving the financing agency the right to repossess the car upon default of the loan. When the loan defaulted, the finance company asked plaintiff to repossess the car, which they did. Upon hearing the tow truck, Jackson ran out to the car attempting to get her personal possessions out of the car and was hurt. The Appellate Division reasoned that the repossession agent was not a permissive user, having no permission from Jackson, and that Jackson lost all inference of permissive use when she defaulted and had no right to refuse repossession, therefore no right to give permission. This holding also gives further motivation for repossessors to conduct repossessions in an orderly manner. It is noted that she was the owner, not a lessee of the car. Please note that this decision does not directly implicate the initial permission rule, which generally holds that if permission is given to a third person to use a motor vehicle, any subsequent use short of theft or the like, even though not within the original contemplation of the parties, is a permissive use. In the instant case, of course, the question was whether there was any initial permission, not subsequent use of the vehicle.

TRENTON UPDATE - SEX ABUSE CASES

Wending its way through the State Legislature is a bill that would greatly expand victim's rights in sexual abuse cases. The Legislature has amended current legislation to reflect that a minor who is sexually abused may later bring his or her claim at any time. Currently, that time frame is two years from the realization of the repressed memory or

from the time of reasonable discovery of the injury and its causal relationship to the act of sexual abuse. Essentially, the legislation would eliminate the two-year statute of limitations on claims of sexual abuse of a minor, which under current law begins to run when the minor attains the age of majority. Further, the legislation greatly expands the scope of individuals who may be found liable, from a parent or a person standing in loco parentis to persons with supervisory or disciplinary power of any nature or in any capacity over the victim who knowingly permit or acquiesce to abuse. The bill would also subject public entities liable in certain circumstances.

These changes would apply to any action pending or filed after the statute takes effect, including matters in which the statute of limitations has otherwise expired and matters filed with a court that have not been finally adjudicated. The bill would also revive any action that was previously dismissed solely on limitations grounds.

The same bill also removes the expanded time frame for medical malpractice actions brought by or on behalf of a minor for injury sustained at birth, compelling that the action be commenced before the minor's 13th birthday.

TRENTON UPDATE – DRAM SHOP REFORM

As you may remember, last year the New Jersey Supreme Court went through tortured logic to allow a drunken motorcycle operator to bring suit against the bar where the operator drank to the point of intoxication. To most observers, this was in complete contradiction to statute.

In response, the New Jersey State Assembly has in committee a bill which, if passed and signed by Governor Christie, would effectively eliminate such a cause of action. We will follow this matter through the Assembly and Senate process.

UPDATES IN NEW YORK CASE LAW

LATE NOTICE

The First Department, overruling prior case law, held in George Campbell Painting v. National Union Fire Ins. Co. that if a disclaimer is going to be based on late notice, the carrier must disclaim immediately and cannot wait until it conducts its investigation into other grounds. If other grounds are also applicable, a supplemental disclaimer has to be issued. Carriers are reminded that they must disclaim as soon as they have knowledge of a basis for disclaimer. A reservation of rights will not protect a carrier against New York's prompt disclaimer requirements.

SEEKING EXTRA DAMAGES OUTSIDE OF POLICY

The Appellate Division allowed a first party claim for consequential damages to survive a motion to dismiss. The insured claimed in Gruenspecht v. Balboa Ins. Co. that he had an offer on his house and lost the opportunity to sell same because of the carrier's failure to promptly resolve a flood claim. This is an example of the increasing opportunity for an insured to seek extra damages outside of the policy based on claims adjustment practices.

LOSSES OVER AND ABOVE POLICY LIMITS

In another case seeking consequential losses over and above the policy limits, the Second Department ruled in 30-40 East Main Street Bayshore, Inc. v. Republic Franklin Ins. Co. that defendant carrier was not entitled to summary judgment. There was a fire loss in rental property. The parties disputed the extent of the damages. The insured sought appraisal and the carrier delayed appointing an appraiser. After the appraisal award, which was paid, the insured sought additional lost rent which it claimed was a consequence of the carrier's delays in resolving the case. The carrier claimed it had paid policy limits. The Court ruled that the insured could pursue the additional lost rent based on the carrier's delays in resolution. It also ruled that because the consequential damages were a "coverage issue" it was not subject to appraisal.

VERBAL THRESHOLD

Perl v. Meher involves recent pronouncements by the Court of Appeals as to the auto accident verbal threshold. It involved three consolidated appeals. In two of them plaintiffs made subjective complaints of limited activity. The Court reiterated that subjective complaints alone are not enough. The Court held however, that a doctor giving quantitative evidence in the form of numerical range of motions restrictions was sufficient, even if it was done at a later date. The defense doctor disagreed. The Court ruled it was an issue of fact for the jury. In the third, the evidence was fuzzy and did not satisfy the 90 out of 180 day prong, especially as plaintiff did not document that she could not work for the sufficient number of days.

SCAFFOLD LAW

In this case, Dahar v. Holland Ladder & Mfg. Co., the Court noted that the scope of the Scaffold Law continues to be one of the most litigated issues in New York. In this case plaintiff was injured while on a ladder at his employers manufacturing plant while cleaning a piece of equipment before it was shipped. He sued several entities in effect claiming that the purchasers of the equipment were the "owners" and subject to Labor Law 240 liability. The Court rejected the expansion of liability and was not going to find it applicable to every situation where someone was on a ladder cleaning something. While acknowledging that the scope of the law is not limited to construction sites, it did point out that the law's intent was directed toward the construction industry.

ELEVATION IN LABOR LAW

In Ortiz v. Varsity Holdings, LLC, the Plaintiff fell off a dumpster while performing demolition work. He had climbed into the dumpster to rearrange the debris because the dumpster was filling up. Because the work was taking place at a height, it was deemed elevation related and the Labor Law applied. Thus defendants were not granted summary judgment. However, neither was the plaintiff. He had to establish that the task he was performing required him to stand on the edge of the dumpster and he also had to enumerate safety devices which would have prevented the accident.

WORKPLACE LIABILITY

In this case, Salazar v. Novalex Contracting Corp., the Court indicated that a common sense approach to the realities of the workplace should be taken. Plaintiff was working in a basement which had some trenches for piping. Concrete was being pumped in to level the floor which included filling in the trenches. Plaintiff managed to fall in a trench and claimed that it was an elevation related hazard. The trenches should have been barricaded. The Court disagreed. It was illogical to require the property owner to barricade off trenches that were being filled with concrete - the barricades would prevent the work.

UPDATES IN PENNSYLVANIA CASE LAW

EXPERT'S ROLE PROTECTED AND DEFINED

Barrick v Holy Spirit Hospital - On November 29, 2011, the Superior Court determined that an opposing expert cannot be required to provide any discovery other than the facts and opinions that are expected to be testified about and to summarize the grounds to each such opinion. Pa. R. Civ. P. 4003.5(a)(1). The plaintiff fell in a cafeteria in the hospital. Defense counsel served discovery through a subpoena to a treating physician who also was identified as an expert witness, demanding all records, including all treatment which would include expert opinions of one of the treating physicians. The Superior Court reversed the Cumberland County trial judge determination that the subpoena overextends Pa. R. Civ. P. 4003.5(a)(1) and that such discovery is inappropriate without "cause shown." In addition, the party seeking the discovery must override any attorney work-product privilege protection. It is noted that the Pennsylvania state courts religiously protect experts and counsel from any discovery, including pre-trial deposi-

tions. Normally, the only discovery provided to an adversary is an expert's report and a CV. This year, Pennsylvania amended the rule to protect from "draft opinions" similar to the parallel rule in the Federal Civil Procedure.

EDITED VIDEO DISCOVERY

Van Why v. Foresman – On February 2, 2012, Judge Charles Saylor, sitting in Northumberland County held that the unedited version of a settlement video prepared to attempt to settle and which was sent to defense counsel and his insurer were unavailable to the defense. In many instances, plaintiff's counsel will send such packages as a dry run in an attempt to settle a matter with the defense carrier. Here, the insurer decided another tactic - demanding the full, unedited video as "discovery." Judge Saylor held that the decision to edit portions of the full version is rife of attorney work product and the anticipation of litigation.

SPOLIATION OF EVIDENCE

The Pennsylvania Supreme Court recently joined "the overwhelming majority" of states that have declined to recognize a separate cause of action in tort for negligent spoliation of evidence. In Pyeritz v. Commonwealth of Pennsylvania, the Court held that "Pennsylvania law does not recognize a cause of action for negligent spoliation of evidence." In the case against the Commonwealth due to actions of the State Police, a hunter, Daniel Pyeritz had been found dead and alone at the base of a tree. There were no witnesses to the incident and the only evidence was the remains of a black nylon belt found 15 feet up in a hunting tree stand. The two pieces of belt were taken and logged as evidence by the trooper investigating the death of Mr. Pyeritz.

The estate for Mr. Pyeritz retained a lawyer in order to investigate a civil suit. The lawyer had contacted the trooper and had asked if the evidence could be kept for the indefinite future after the inquest was completed. After determining the death was accidental, the counsel and the trooper agreed to retain the evidence. Seven months later the barracks were moved to another location and the original trooper had been reassigned to another post. A new trooper who was unaware of the agreement concerning the evidence had authorized that it be destroyed. All that remained were some photographs and two envelopes with names of two tree stand belt manufacturers written on them.

Mr. Pyeritz's estate filed suit and settled for $200,000 in an action against the two tree stand belt manufacturers. They also filed an action against the Commonwealth for negligence in their failure to preserve the evidence. A summary judgment was granted for the Commonwealth and affirmed by the intermediate appellate court. It was recognized by the Pennsylvania Supreme Court that because of the alleged negligence the Court needed to make a policy judgment whether it is in the public interest to impose damages for failure to conform conduct to a particular standard. The Court held "that as a matter of public policy, this is not a harm against which [a party] should be responsible to protect." The primary reason given by the Court for its findings was that due to the missing evidence, the potential for liability was impossible to determine the success of the underlying litigation. It was the opinion of the Court that sufficient protection of evidence already existed under current law and additional tort liability would impose an unnecessary financial burden which outweighed the benefit to encourage preservation of evidence.

M&W CASE RESULTS

Ed Thornton recently obtained a directed verdict in a death case in Morris County. Ed represented a property owner who was constructing a commercial building. The owner did nothing beyond engaging a general contractor. The decedent's vehicle ran off the road and struck a cement mixer, allegedly due to a dangerous condition at the worksite. Accordingly, at the close of plaintiff's case the judge granted Ed's motion since there was no proof that the client controlled the means, methods, manner, timing, or sequence of daily site work and dismissed this death case generated when deceased ran off the road and hit a cement mixer. Similarly, the co-defendants could put forth no factual basis for any cross-claims and thus all claims against Ed's client were dismissed.

Ed Thornton also tried a case in Morris County wherein the plaintiff alleged that Ed's client, a funeral home, mistakenly told the plaintiff that her husband's body had been lost by a crematory. Plaintiff alleged that her family members went to pick up her husband's cremains and were told the cremains were "not ready" and in a subsequent telephone call were told that the cremains were "lost." The client's representatives denied making any such statement but at trial the plaintiff, herself a lawyer, insisted that she was "1000% sure" that the statement had been made and she had no way of knowing if the cremains ultimately given to her were those of her husband. The jury found that the plaintiff did not prove that the statement had been made, resulting in a defense verdict.

Ric Gallin recently tried a case in the Supreme Court, Richmond County. Plaintiff was at a resort in Lake George when she took out a paddle boat. Upon her return she ended up in a different part of the beach. While walking with the boat she stepped into a culvert suffering a severe laceration. Ric convinced the jury that the accident was mostly plaintiff's fault and she was assessed 55% comparative negligence.

Eric Harrison defended an endocrinologist whose former technician accused him of harassment in violation of the Conscientious Employee Protection Act and in retaliation for her reporting what she suspected to be unlawful conduct—specifically, the backdating of medical reports and delayed reporting which, she contended, placed patients at risk. She also sought damages for defamation of character, tortious interference with economic advantage, and intentional infliction of emotional distress.

At trial Eric demonstrated through cross-examination and direct testimony from the doctor that the plaintiff's suspicions of unlawful activity were unfounded and that the doctor did not learn about the plaintiff's alleged "whistleblowing" until plaintiff had left the employ of the hospital. The Court dismissed the CEPA claim as time-barred, after which the jury found that the doctor had defamed the plaintiff in various e-mails but that she sustained no damages. The jury also returned defense verdicts on the emotional distress and tortious interference claims, resulting in judgment for the defendants. Plaintiff has appealed and we are cautiously optimistic that the dismissal of the CEPA claim and the jury verdict will be upheld.

Eric Harrison also obtained summary judgment in a federal class action lawsuit involving the provision of special education services to classified students. The lead plaintiffs in J.T. o/b/o A.T. v. Dumont Public Schools contended that the school district discriminated against A.T., a kindergarten student, by placing him in a "hybrid" class among both classified and non-classified peers because it was not located in his home school – the elementary school he would have attended if he were not disabled. After two years of discovery and motion practice, the District Court dismissed plaintiff's claims for lack of constitutional standing and failure to exhaust administrative remedies through the filing of a due process claim under the Individuals with Disabilities in Education Act. The plaintiffs have filed an appeal with the Third Circuit and a new discrimination lawsuit under the Law Against Discrimination in Superior Court.

Martin McGowan received a "no cause" verdict after a six day trial in Camden County. Martin represented a divorced mother who permitted a sleepover at her house wherein her younger son had friends over at the same time as the older son was there on visitation. The older son was almost thirteen, and the younger boys were between ages eight and nine. The older son sexually abused one of the younger guests, who sued nine years later. Plaintiff claimed that he continued to suffer from anxiety, insomnia and fear of the unknown. A forensic psychologist indicated that the Plaintiff's injuries were permanent, although he was unable to say what that meant as far as further exacerbations, treatment, etc. Plaintiff's demand had been the $500,000 policy limit, and he had written a Rova Farms letter. Martin was able to convince the jury that his clients' actions fell within the "Parental Immunity Doctrine," and that her actions or inactions were not willful or wanton.

John Knodel won a defense verdict in a case where the insured defendant homeowner hired plaintiff handyman to clean the gutters in the front and back of her house and hang her Christmas lights. Plaintiff claimed he asked the

insured for an extension ladder that she tried to borrow from her neighbor who was not home. Instead, plaintiff claimed the insured told him he could access the gutters from her second floor windows. Once she could not get the extension ladder the insured told plaintiff to come back another day but he told her he could climb on to the roof through the windows. Plaintiff also claimed the insured "supervised" his work, which she denied. While nailing a loose second story gutter, plaintiff fell off the roof.

Plaintiff suffered severe left elbow and right wrist fractures and ruptured his diaphragm. He was hospitalized for nine days where he underwent two surgeries on his elbow; one on his wrist; and an emergency laparotomy to repair his ruptured diaphragm. Approximately 1.5 years later plaintiff underwent a third surgery on his left elbow, including an ulnar nerve transposition. Plaintiff developed severe post-traumatic arthritis in his left elbow which our defense doctor conceded.

We obtained summary judgment on the basis that the insured was immunized by the independent contractor defense. The Appellate Division reversed, ruling that a jury question existed whether plaintiff was an independent contractor or a casual employee, to whom the insured would owe a duty to provide a reasonably safe workplace.

The jury found plaintiff was a casual employee but that he was 67% negligent, resulting in a defense verdict.

John Knodel also obtained summary judgment in a Title 59 case. The infant plaintiff was a first grader at the insured grammar school. There are aluminum bleachers in the playground that have been missing end caps for several years, leaving a sharp edge. During recess the infant plaintiff ran into the edge, lacerating her left thigh. Another student had been injured on the bleacher several years earlier. The insured complained to the codefendant city that owned the playground and was responsible for maintaining the bleachers, which did nothing until after plaintiff's accident when it repaired the bleachers.

The infant plaintiff suffered a 1.6 by .8 inch laceration that was sutured closed leaving her with a permanent scar that was quite visible. Her examining plastic surgeon opined it was permanent.

John moved for summary judgment arguing that although the scar was permanent it was not a "permanent significant disfigurement" as required by the Tort Claims Act. The court agreed, dismissing the complaint with prejudice.

Lori Brown Sternback tried a case before Judge Lisa Chrystal between March 5 and March 8, 2012. The jury returned a verdict at the end of the case in favor of the defendant. It was a unanimous verdict of no negligence on the part of Jersey Lanes. We were dealing with a fall down accident while the plaintiff was actually bowling in a league at the defendant's lanes. Plaintiff did sustain a significant injury but we were able to stipulate to an amount of damages. We agreed to an amount which covered the plaintiff's pain and suffering as well as her outstanding medical lien. That stipulated amount would then be subject to any comparative negligence for the plaintiff unless she was ultimately no caused by a jury.

During the trial we were able to establish the fact that the plaintiff did not know what it was that caused her to stumble and fall while throwing the bowling ball in the 4th frame of her first game. She had never seen the so called "substance" that caused her foot to stop short during her slide while bowling. Plaintiff could also not indicate where the so called substance came from. More importantly, she could not indicate to the jury how long that so called substance was even on the approach of the lanes. This gave the defense the opportunity to argue that there was no such substance on the floor and even if there was, the defendant had no actual or constructive notice of same.

However, in our defense, we also provided the jury with another reason for the plaintiff's fall. Since we had surveillance cameras of the actual fall down accident, we were able to show the jury that the plaintiff's fall did not occur exactly as she had said. Although the plaintiff claims that her foot stuck and she fell forward onto her face and stomach, the surveillance video clearly showed that she had slid past the foul line and ended up falling backwards

onto her buttocks and back. The plaintiff also indicated that she had not released the bowling ball before her fall occurred because she was still in midst of her back swing. However, the surveillance video clearly showed the plaintiff had followed through with her swing and had let go of the bowling ball before she slid past the foul line.

Lori Brown Sternback tried a case before Judge Mathias Rodriguez, Middlesex County, between March 27 and March 29, 2012. The jury returned a verdict at the end of the case in favor of the defendant. It was a unanimous verdict that the plaintiff did not sustain a permanent injury as a result of a motor vehicle accident. We were dealing with a motor vehicle accident that occurred on May 3, 2008 when the defendant was traveling in a northerly direction on Route 27 in Metuchen, NJ. He claims to have come to a stop behind some other cars for a red traffic light at the intersection with Grove Avenue. He claims that he then started sneezing and his foot slipped off of the brake causing him to roll into the car in front of him. The photographs of the vehicles involved in this accident did not show much damage, but the plaintiff was claiming he underwent back surgery as a result of this accident. The jury clearly believed that plaintiff did not suffer from an injury that required surgery based upon the lack of damage to the vehicles, some scratches to the rear bumper of the plaintiff's vehicle.

Despite the plaintiff's treatment including chiropractic, physical therapy, trigger point injections, epidural injections and eventually a lumbar discectomy, we were able to show the jury the plaintiff's actual complaints to his treating doctor did not show immediate claims of pain in his lumbar spine; the area where the surgery took place more than two years after the accident. Furthermore, even when there were claims of pain in the lumbar spine, they did not rise to a significant level, thus cutting off the causal connection between the surgery and the accident.

Matthew Rachmiel recently obtained summary judgment in the Superior Court in a PIP lawsuit. Plaintiff was involved in an automobile accident, but instead of submitting her medical bills to her automobile insurer, she submitted them to Medicare, which paid them and asserted a lien. Matthew then moved for summary judgment, asserting that the bills had never been submitted to the PIP carrier, that they had already been paid by Medicare, and that plaintiff's medical providers failed to notify the PIP carrier of their treatment of plaintiff as required by statute.

Although plaintiff's attorney argued that the PIP carrier should reimburse Medicare to satisfy its lien, the judge agreed with Matthew and found that plaintiff had no cause of action against the PIP carrier for the above reasons.

Matthew Rachmiel recently obtained a favorable PIP arbitration award in a matter in which an elderly patient either passed out or fell asleep while driving and had an automobile accident. The patient was transported from the accident scene to a local hospital, where he was admitted for several days for observation and tests, though he did not sustain any physical injury from the accident. The hospital sought payment from the patient's automobile insurer of the almost $20,000 bill.

Matthew successfully argued to the arbitrator that there was no evidence that the hospital admission and treatment was causally related to the accident. The arbitrator agreed, ruling that the hospital failed to sustain its burden of proof that its treatment was causally related to the accident. The arbitrator concluded that it appeared to be merely a coincidence that the patient passed out or fell asleep while driving and there were insufficient proofs to conclude that the patient sustained any injury from the accident to conclude that the hospital's treatment was causally related to the accident.

Allison Koenke successfully argued that an insured made material misrepresentations about her husband's residency, voiding an auto liability policy and dropping down the available coverage to the statutory minimum of $15,000. The insured's husband had 9 points on his license and the couple was dropped by their previous insurance carrier because of her husband's unacceptable driving record. The letter from the insured's previous carrier was part of the underwriting file of Mercury, and likely provided by the insured seeking NEW insurance. The insured included in the comments section of her application a sentence indicating that she was currently separated

from her husband and he was living at a different address. The insured provided the other address, which turned out to be her own parents' address. IFA, the UM carrier challenging Mercury's decision to void the policy, argued that Mercury did not do "enough investigation" regarding the red flags included in the application. IFA alleged that Mercury should have investigated where the insured's husband was living and visited the address provided. Mercury argued that the carrier is entitled to rely on the statements provided by the insured as truthful. Also, an insurance carrier would be unable to investigate every address of every insured and every relative or ex-husband of every possible insured under a cost/benefit analysis. The court accepted Allison's argument and the Appellate Division found that Mercury had the right to void the policy ab initio when a material misrepresentation was made. The misrepresentation was material because it influenced whether the carrier would accept the risk or when it decided on the amount of premium.

Jennifer Herrmann and **Adam S. Weiss** obtained summary judgment in favor of several members of a municipal board of education in a hotly-contested construction contract dispute. Plaintiff, a contracting company, filed suit against the Board seeking millions in damages. More than two years following the last event alleged in its Complaint, plaintiff filed an Amended Complaint naming individual members of the Board of Education. Notwithstanding the assertion of a contract claim against the board, the Superior Court granted Jennifer's motion to dismiss the tort claims against the individual board members pursuant to applicable two-year statute of limitations.

Vivian Lekkas prevailed on behalf of a local board of education in an employment dispute before both the Superior Court and the Commissioner of Education. Plaintiff Mindy Maranon, a non-tenured paraprofessional who was discharged by the Borough of Freehold School District for inappropriate behavior towards staff and students, filed a Complaint in Lieu of Prerogative Writ in Superior Court alleging that she was wrongfully terminated in violation of Title 18A and that the Board acted "arbitrarily and capriciously" when it terminated her employment. She further alleged a Rice violation. The Superior Court dismissed the Rice claim as a matter of law and ordered that the wrongful discharge claims be transferred to the Commissioner of Education on jurisdictional grounds. Plaintiff waited more than 90 days before filing a Petition with the Commissioner of Education. Once Ms. Maranon filed her Petition we moved to dismiss in lieu of filing an Answer as Petitioner was time-barred from bringing such a claim under N.J.A.C. 6A:3-1.3. The Administrative Law Judge rendered an initial decision in our favor dismissing the matter as time-barred. On March 29, 2012 the Commissioner of Education concurred with the ALJ and dismissed the Petition as time-barred.

Michael Poreda won a motion to dismiss for failure to state a claim in Whiting v. Vernon Township School District. The plaintiff, a substitute teacher, alleged various wrongful conduct culminating in his removal from the list of approved substitute teachers. The plaintiff had alleged that three district principals had defamed him when they reported to the Assistant Superintendent, at the plaintiff's request, the reasons why they removed the plaintiff from their list of substitute teachers. Michael argued successfully that a plaintiff cannot bring a cause of action for defamation when the statements are elicited on behalf of the plaintiff. The plaintiff alleged that the Assistant Superintendent and her secretary were negligent for not letting him know more promptly the reasons why he had been removed from the substitute teachers list. Michael argued successfully that the plaintiff could never prove that the delay caused him damages since a more prompt response would not have changed the ultimate outcome. The plaintiff alleged a breach of contract in the termination of his employment. Michael successfully argued that the plaintiff was an at-will employee who could be terminated for any reason or for no reason at all. Judge Gannon in Sussex County accepted Michael's arguments and dismissed the case with prejudice.