The Law Offices of
METHFESSEL & WERBEL
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The Leading Insurance and Claims Attorneys
Fall 2012

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 mwebel@methwerb.com.

PAUL ENDLER JR. RECEIVES AWARD

Paul Endler Jr. will be honored by the New Jersey Commission on Professionalism in the Law and the Union County Bar Association with the 2012 Professional Lawyer of the Year Award.

The awards are given annually to lawyers from bar associations across the state that, by virtue of their conduct, competence and demeanor, set a positive example for others in the profession.

Paul joined Methfessel & Werbel in 2007. Paul has spent the bulk of his career as an attorney involved in litigation. From his early years defending architects and engineers in malpractice actions, through many years defending a variety of entities in personal injury matters, Paul has always been devoted to trial work. Paul has tried dozens of cases to conclusion including premises liability, automobile negligence, professional malpractice, and products liability matters. Paul also has extensive experience representing municipalities in the defense of personal injury, wrongful arrest and civil rights actions in both the state and federal courts. The firm congratulates Paul in receiving this prestigious honor.

STEPHEN KATZMAN & MATT WERBEL TO PARTICIPATE IN THE NJSIA CONFERENCE

Stephen Katzman and Matt Werbel once again plan to speak at the New Jersey Special Investigation Association Conference in October. The conference is typically attended by more than 700 insurance professionals and attorneys who specialize in combating insurance fraud.

MARC DEMBLING TEACHES COURSE ON MEDICAL MALPRATICE

Marc Dembling is teaching a course for the Dental and Medical Staff at Monmouth Medical Center in Long Branch on Basics of Medical Malpractice on September 20, 2012.

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UPDATES IN NEW JERSEY CASE LAW

APPELLATE DIVISION CLARIFIES STANDARDS GOVERNING PUBLIC ACCOMMODATION CLAIMS

On May 12, 2012 the Appellate Division published three important decisions following trials and motions handled by Eric Harrison of our office, defining the standards to be applied to lawsuits under the Americans with Disabilities Act and the New Jersey Law Against Discrimination on behalf of disabled individuals seeking damages and equitable relief from places of public accommodation.

In Lasky v. Hightstown, Lasky v. Moorestown and Stoney v. Maple Shade, the Appellate Division ruled that a disabled plaintiff alleging inaccessibility within a place of public accommodation need not demonstrate that he or she requested an accommodation before filing suit. However, a defendant facing such a lawsuit may rely on a substantive defense that the plaintiff would have been accommodated if only he or she had asked.

All three cases were filed by serial ADA litigants who did not reside in New Jersey. Their attorney had offices in the three states where they regularly filed suit. A jury rejected the plaintiff's demands for damages and equitable relief in the Moorestown case. Another jury rejected the plaintiff's damage claims and 73 of her 75 demands for equitable relief in the Maple Shade case. The trial court dismissed the Hightstown case before it could get to a jury.

These decisions make clear that with respect to equitable relief under the ADA or LAD, the Court must consider a number of factors including whether failure to remedy a perceived deviation from accessible construction standards would cause "irreparable harm" to the plaintiff, as well as whether the relief proposed would pose an "undue burden" on the place of public accommodation.

One of the most important distinctions between the ADA and the LAD is that the latter carries an absolute right to a jury trial even if the plaintiff is not seeking damages. A serial litigant may avoid the risk of a jury trial by dropping claims for damages in a purely ADA lawsuit.

Taken together, these cases reinforce our approach to accessibility litigation in both the public and private sectors: Early efforts should be made to settle on reasonable terms that assist the disabled but do not invite repeat litigation and do not overburden the defendants either financially or administratively. If these efforts fail then the case should be defended vigorously, ideally before a jury of the plaintiff's peers, which is generally less likely to be sympathetic to the strategies of serial plaintiffs with little or no real interest in accessing the defendant's facilities beyond the pursuit of fee-shifting litigation.

BUSINESS INVITEES/REMOTE PARKING LOTS

The Appellate Division, ruling in Ciarrocca v. Higgins Funeral Home, an unpublished decision, held that a business patron who was directed to a parking lot over which the business has no control and was using as an overflow parking lot can nonetheless bring claim against the funeral home even though it had no authority to remedy the icy condition on the overflow parking lot. The Court held that the funeral home had a duty to either warn guests of the dangerous condition or to avoid the use of the offsite parking if a warning was inadequate or impossible.

DRUNKEN DRIVER STATUTE

Last year in Voss vs. Tranquilino, the New Jersey Supreme Court arguably engaged in tortured logic to allow a drunken motorcycle operator to bring suit against the bar where he drank to the point of intoxication. To most commentators, this decision contradicted the intent of the DUI statute and common sense. In response, the New Jersey State Assembly has in committee a bill which, if passed and signed by Governor Christie, would effectively eliminate a cause of action by an intoxicated auto accident victim against the bar that served him. We will continue to follow the progress of this bill, currently under consideration by the Assembly Law and Public Safety Committee.

GOOD SAMARITAN BILL

Governor Christie has signed a bill extending the Good Samaritan law to include those persons who inadvertently cause injury while attempting to give Automatic External Defibrillator (AED) aid during a cardiac arrest. New Jersey is the 44th state to pass such a Good Samaritan law.

LAW AGAINST DISCRIMINATION

The Appellate Division, in Cowher v. Carson & Roberts, held that the plaintiff employee could bring suit against

his employer based on anti-Semitic comments of a supervisor, even though he was not Jewish. The point of the Law Against Discrimination is that the supervisors engaged in "real" discrimination and harassment which the statute was designed to eliminate, and their harassment was motivated by their belief that Cowher was Jewish. The fact that he happened not to be Jewish does not excuse their conduct or eliminate a cause of action.

PUBLIC UTILITY/UTILITY POLE LOCATION

In 1994 the New Jersey Supreme Court decided Contey v. New Jersey Bell, holding that a utility company that is directed by a public body through ordinance to place its utility poles in a particular location should not be held liable for a decision beyond its control. However, the Court in Seals v. County of Morris held that a utility that places a pole in an unsafe location without any direction or involvement from the public entity is not entitled to immunity. In deciding the case, the Court noted that JCP&L had placed a pole in 1937, and since then there had been numerous accidents at that specific spot involving the pole. As to the public entity, in this case the County of Morris, it would be up to a jury to decide whether or not the roadway near the location of the pole constituted a dangerous condition of public property, N.J.S.A 59:4-2 (Tort Claims Act).

SNOW AND ICE/SIDEWALKS

In Gray v. Caldwell Wood Products the Appellate Division held that a commercial property owner has a duty to maintain and remove ice and snow from the sidewalk in front of a vacant commercial building – even if the building is vacant. In 1995, the Appellate Division held that the owner of vacant commercial property could not be held liable because the property was not owned by or used as part of a contiguous commercial enterprise, there was no daily business activity, and the owner had no means of generating income to purchase liability insurance or spread the risk of loss. In the Gray matter, the trial court held that the defendant would therefore be entitled to summary judgment, but the Appellate Division disagreed, holding that since the property had the capacity to generate income and therefore purchase insurance and spread the risk of loss to offset any damage award, the fact that the building was vacant was irrelevant.

SOCIAL SECURITY DETERMINATION/EVIDENCE

Judge Bumb of the United States District Court, ruling in Orber v. Jain, held a Social Security Administration's disability determination excluded from introduction in evidence because its basis would be cumulative of evidence already introduced and its probative value was substantially outweighed by the danger of unfair prejudice to the defendants. Quite often, a plaintiff may attempt to introduce such evidence, whether from Social Security Administration or Worker's Compensation findings, in order to bolster or substantiate the claims. However, this decision should serve as a basis to exclude the findings and determination.

DUTY OF CARE/TORTS

The Third Circuit Court of Appeals held in Abramson v. Ritz Carlton Hotel Co., LLC that a defendant who improperly maintained its emergency medical equipment could not be found liable to a guest for the improper maintenance of the equipment because the only duty a business owner has to a guest is the provision of basic first aid until medical help arrives. The availability of a defibrillator would not elevate the hotel's legal duty. Further, the New Jersey Good Samaritan Act barred any negligence claim because there was no duty to act, and persons who may commit negligence when there is no duty may not be found at fault.

TEXTING WHILE DRIVING/MOTOR VEHICLE

As you may have read, Judge Rand, sitting in Morris County, ruled in Kubert v. Best that a teenager who texted her boyfriend while he was driving cannot be held liable in a civil action for aiding and abetting the conduct of the driver, who was distracted and crashed, causing severe injuries to a couple on a motorcycle. Judge Rand held that there was no "electronic presence" of the teenage girl and he declined to extend any theory of liability. Plaintiff has settled with the driver and appealed the adverse ruling with respect to the absent texting defendant. We will advise of the outcome.

DEFAMATION/DAMAGES

The Supreme Court has held that when a claimant proves defamation, the doctrine of presumed damages will apply to claims made by private figures. Presumed damages relieve a plaintiff from proving specific damages. In

the case of W.J.A. v. D.A., the New Jersey Supreme Court held that internet postings constitute libel rather than slander, rendering the doctrine applicable. Presumed damages may support an award of nominal damages, which may not be the foundation of a punitive damage award.

RENTAL CAR INSURANCE

In a published decision, the Appellate Division, in deciding Khandelwal v. Zurich Insurance, held that a rental car insurance policy intra-family exclusion is unenforceable. The Court further held that whether it was basic coverage or the optional excess policy, the cause was unenforceable as against statute and public policy. Such exclusions are enforceable in boat policies and homeowner's insurance, but not for mandatory auto insurance.

DAMAGES/WRONGFUL DEATH

In a published opinion, Beim v. Hulfish, the Appellate Division held that under New Jersey's Wrongful Death Act, pecuniary injuries may include a diminishment in a prospective inheritance to the heirs caused by increased estate taxes incurred due to the premature death of the decedent. Although the issue of estate taxes seems to be in play this year in Washington, and this issue may become moot, the concept of estate tax liability is always a consideration in wrongful death cases. Plaintiff's decedent was killed in a car accident in 2008. The estate had to pay large inheritance taxes, much larger than had the decedent lived until 2009, and in 2010 there would have been no estate taxes.

Noteworthy is that the estate tax elimination was a continuation of the then existing law, but was not in effect on the date of the death. Accordingly, the motion judge granted summary judgment on this claim to defendant, holding that the liability of the parties was fixed as of the date of death and could not be fixed by a subsequent event. The Appellate Division reversed, noting that the very purpose of the wrongful death act is to compensate survivors for pecuniary loss that would have resulted by the continuance of the life of the deceased.

WORKER'S COMPENSATION IMMUNITY

In an unreported Appellate Division opinion, Floyd v. Von Neudeck, the Appellate Division affirmed prior case law that an employee hurt in a parking lot accident by a fellow employee, when both were starting their work day, could not bring a civil action against the fellow employee, being barred by the worker's compensation exclusivity provision. The Court noted that the employer owned the property, controlled the parking lot, and that both employees were on the premises to begin their work day.

POLICY INTERPRETATION/POLLUTION EXCLUSION

In an unpublished opinion, Spartan Oil v. NJPLIGA, the Appellate Division has affirmed the grant of summary judgment to the defendant. The defendant is the successor in interest to an insurance company which wrote a commercial motor vehicle policy covering plaintiff's vehicles in the mid 1990s. Plaintiff had delivered oil to a customer who was later found to have a corroded fuel line from the delivery port to the tank. This was not discovered until 2003.

Although generally insurance policies are placed alongside the Complaint to determine if coverage is owed, in this case discovery showed that the oil seeped from the fuel line. Taking this into account and comparing that to the policy language which excluded any coverage to property after the oil was delivered from the covered auto to its final destination point, the Appellate Division reasoned that final delivery occurred when the fuel was put into the intake port, because from that point on the oil company could not recapture it.

COVERAGE/SEXUAL ABUSE

In an unreported Appellate Division opinion, State Farm v. Gregory, the Appellate Division upheld precedent in deciding that no coverage would ensue to a spouse against whom a claim was made that she knew or should have known of her husband's propensity for child abuse and the resultant risks and hazard presented to the victim. Specifically, plaintiff alleged that the wife had a duty to warn the child, her parents, or authorities, and the wife sought coverage, her argument being that the policy did not unambiguously exclude coverage of an innocent spouse and that the public policy against permitting insurance coverage in child abuse matters should not apply in this circumstance. The court found no merit in her arguments, noting that coverage did not turn on whether the injured person could ultimately prove the allegation, but whether the allegations fell within the coverage defined by the policy and public policy.

COVERAGE/CEMETERY/CREMATORY/ORGAN HARVESTING

The Supreme Court has upheld the Appellate Division decision in Memorial Properties v. Zurich American Insurance, holding that neither of two insurance policies covered a cemetery/crematory which was sued for alleged participation in a scheme to remove body parts from corpses entrusted to its care. The Court decided that neither of two policies applied. First, although the harvesting took place in 2003-2005, it was held that the occurrence did not occur until 2006, when the underlying scheme was discovered. The Court held that the claim occurred when the complaining families were actually damaged, which was therefore outside of the policy term.

The second policy was held not to apply because it had a clear exclusion for improper handling of remains, including distribution, sale, loaning, donating or giving away parts of a deceased body and any criminal act. The Court reasoned that such exclusionary clause would be presumed valid since it was written in specific, plain, and clear language, and if ambiguous, courts would apply them any meaning that supported coverage. In this case the clause plainly encompassed all claims asserted against the cemetery/crematory, and accordingly coverage was not found.

NEGLIGENCE — PREMISES LIABILITY

Maloy v. Schneider affirmed summary judgment in favor of defendants. The case involved the negligence claim of a letter carrier who was injured after he tripped on a raised slab of the public sidewalk in front of defendants' house. The sidewalk's uneven condition apparently had been caused by roots growing from a tree located in defendants' front yard. The trial judge granted defendants summary judgment because there was no evidence they had planted the tree; nor had they undertaken any other affirmative conduct to produce the dangerous condition.

For decades, the New Jersey Supreme Court has declined to impose a common law duty upon residential property owners to maintain the public sidewalks in front of their homes. Since the trial judge's legal analysis was consistent with New Jersey's published case law, Judge Sabatino concurred but wrote separately to offer comments regarding the potential prospective implications of the forthcoming Restatement (Third) Torts. Section 54 departs from existing case law by recommending tort liability on the part of a non-commercial property owner for a natural condition that causes a hazard to pedestrians on an adjacent public walkway, where it is proven that the owner "knows of the risk or if the risk is obvious." It remains to be seen whether the New Jersey Supreme Court accepts the Restatement revisions as a basis to expand New Jersey law.

ATTORNEY-CLIENT PRIVILEGE/INDEPENDENT CONTRACTORS

A federal judge in Philadelphia has extended the attorney - client privilege to employees of an outsource contractor. Deciding the issue in the matter of In Re Flonase Anti Trust Litigation, Judge Brody of U.S. District Court held that where a third party's contractor is the substantial equivalent of an employee who had communications with company attorneys, and given the widespread use of independent consultants by corporations, the Court adopted a broad practical approach to determining whether the contractor was the functional equivalent of an employee, applying attorney-client privilege to communications. Just how far this ruling extends will be an interesting question, in that many companies hire third party consultants and independent contractors on a routine basis for such matters as property appraisal, first and third party investigation, etc.

RESCUE SQUADS/IMMUNITIES

The Supreme Court reversed the Appellate Division in Murray v. Plainfield Rescue Squad, holding that the squad, as an entity, did not enjoy immunity when providing intermediate life support services in good faith. While officers and members of the squad would be immune, the plain language of the statute does not provide immunity to the squad as an entity. While this would seem to be a legislative oversight because basic volunteer, individuals and squads are immunized and advanced life support squads, officers, and members are immunized; nevertheless, the court expressed an obligation to enforce the statute as written. The legislative response has been swift: a bill to immunize intermediate squads is likely to become law this Fall.

AUTOMOBILE/CHIROPRACTOR/MRI

The Appellate Division, in an unreported case, has held that a chiropractor may be qualified to read MRI films. In deciding Capasso v. Cavaluzzo, the Court held that merely because the witness is a chiropractor does not mean he does not have the proper education, training, or experience to interpret MRI films. A chiropractor would not

be allowed to simply read from a radiologist's MRI report, as that would be hearsay, but if the witness reviews the films himself and is otherwise qualified, a court should be inclined to allow the expert testimony, subject to cross-examination, as opposed to barring the testimony.

EMOTIONAL DISTRESS/DEATH OF PET

The Supreme Court has unanimously held in McDougall v. Lamm that owners who witness the tortious death of their pet do not have a cause of action against the person causing the death. The Supreme Court specifically declined to extend the Portee v. Jaffee doctrine, which allows suits for emotional distress when a plaintiff witnesses the death or serious injury of a family member or intimate acquaintance. The court noted that it would be inequitable to allow no recovery for witnessing the death of a human except in specific circumstances, while permitting recovery for witnessing the death of a pet, no matter how beloved.

PIP/ASSIGNEE/DISCOVERY

The Supreme Court has held that healthcare providers who are assigned rights by persons treated due to automobile accidents do not have to disclose information regarding ownership, billing practices, or referral methods during discovery propounded by an insurer.

The carrier, in Selective Insurance v. Hudson East Pain Management, cited the provision of the policy regarding cooperation, but the court held that although the rights of an assignee can rise no higher than the rights of the assignor, the assignee can have no greater duty than the assignor. The insured would have no obligation to provide such information, therefore the assignee did not. Significantly, this was a declaratory judgment action, not an action seeking damages, which would have allowed for discovery outside the PIP statute.

DISCOVERY/PRIVILEGE

In 2004 the New Jersey Legislature passed the Patient Safety Act, which allowed hospitals to report serious mistakes to the state without fear that their internal investigation would be disclosed in subsequent lawsuits. The PSA's confidentiality insulates documents from outside access regardless of plaintiff's asserted need for disclosure and regardless of whether the documents contained factual information in addition to opinion.

However, the Appellate Division has ruled in Applegrade v. Bentolila that the privilege is lost when PSA procedures are not followed or if the documents are generated for non-PSA purposes. Many times hospitals will conduct their own quality assurance responses, and documents generated in response can be accessed for factual information, but not evaluative or deliberative materials pursuant to an earlier Appellate Division decision. In Applegrade, the Court specifically held that only items developed exclusively through the PSA process are immune, and facts or opinions from independent sources are not immunized.

UPDATES IN NEW YORK CASE LAW

FIRST PARTY COVERAGE/OWNER-OCCUPIED

Tower Insurance has had success in contending that there is no first party coverage for an insured under a home-owner's policy where the insured does not live at the property. This defense is based not on material misrepresentation in the application process, but on the policy definition of "resident premises". The homeowner form limits the scope of coverage to the resident premises, which is defined clearly as where the insured lives. If the insured is not living at the loss location, it therefore does not qualify as the resident premises and thus there is no coverage under the policy. This principal, addressed in Neary v. Tower Insurance Company, has been accepted for argument by the Court of Appeals.

To the contrary, in Dean v. Tower Ins. Co. of New York the Court found coverage where the insured intended on moving into the premises but were delayed in occupying the house because they had to remediate termite damage.

This case law needs to be monitored as it may continue to provide relief for carriers where insureds obtain home-owners policies on property they do not live at.

INSURANCE/BAD FAITH

The fallout from the Bi-Economy case continues. In Gruenspect v. Balboa Ins. Co., the court allowed a bad faith claim against a defendant carrier to continue where it was alleged that the failure to timely pay a claim caused the

loss of a sale of a house. Although New York was not previously a strong "bad faith" state, it appears that it is developing case law where insureds will be able to obtain extra-contractual damages due to breach of an insurance contract. Unlike New Jersey, which has developed a higher standard for bad faith claims, New York seems to be allowing these claims for any wrongful denial of coverage by a carrier, and not limiting the claims to those where the denial was baseless.

In K.J.D.E. Corp. v. Hartford Fire Ins. Co., the Appellate Division reversed a finding in favor of an insured in a flood case. Due to heavy rain, and a clogged culvert, the insured's property was flooded. The Court held that the flood exclusion was applicable as the damage was caused by surface water. The fact that the clogged culvert contributed to the claim was not a factor taking the loss outside the scope of the exclusion.

In Lobell v. Graphic Arts Mut. Ins. Co., the insureds were renovating their house and adding a second floor. With an imminent rainstorm, tarpaulins were placed over the opening. The carrier paid the building claim but denied the contents claim because the specified peril was rain, which entered through a hole in the roof. The tarps did not qualify as a roof.

RECENT TRIAL RESULTS

Mark M. Bridge settled a $425,000.00 "careless smoking" fire loss through mediation in August in which the fire occurred in a strip mall, originating in a paint store. Many of the employees told fire investigators at the fire scene that they were smoking at a break area but had differing memories of what they did with their discarded smoking cigarettes. Our fire investigators and those of other plaintiffs' investigators eliminated electrical devices and determined that the fire occurred in a discrete part of the break area where the employees discarded smoking materials, most likely into a plastic waste basket.

The local fire marshal found the cause of the fire "undetermined" and the fire investigators for the paint store contended that the other investigators failed to heed NFPA 921, and thus the plaintiffs' investigation was unreliable. During their depositions, the paint store employees told elaborate stories of how they protected the store from fire, including dumping the loaded ceramic ashtray into the toilet and not into a waste basket. After lengthy mediation, the clients settled the contested claim for $425,000.00.

Mark M. Bridge also obtained dismissal of a homeowner's claim in Hackettstown. Instead of going through the appraisal mechanism between her public adjuster and the company adjuster, her public adjuster hired a Philadelphia attorney and filed suit in the Philadelphia Common Pleas. We immediately filed Preliminary Objections, effectively a Motion to Dismiss, claiming that the plaintiff's Complaint was without legal basis since the venue was improper. We argued that the plaintiff's residence and the location of the loss, the defendant's home office, and all of the salient witnesses were within one or two counties in New Jersey. The Court agreed and granted the Defendant's Preliminary Objections. The plaintiff now may file suit in New Jersey. However, she will be required to submit to appraisal, which she had sought to avoid by filing suit in Pennsylvania.

Ric Gallin defended a case in Atlantic County involving a claim by a current insurance carrier to recover remediation costs from a prior carrier. The current carrier did not give timely notice and had expended almost two hundred thousand dollars and waited four years before giving the client notice. The court found that there was untimely notice and prejudice because the extent of the remediation interfered with the ability to defend the case. Having found late notice, however, the court did not dismiss the case but merely penalized the current carrier a percentage of their claim. The court also made disputed conclusions regarding the age of the spill. A motion for post trial relief is pending and an appeal is anticipated.

Eric Harrison and **Leslie Koch** obtained summary judgment on an employment case involving the Law Against Discrimination and the Conscientious Employee Protection Act ("CEPA"). In Hahn v. Edison Township, a police officer claimed that his numerous and continuous complaints about fewer patrolmen on the road constituted both 'whistle blowing' and a complaint of age discrimination. He claimed he was retaliated against by a variety of transfers and reassignments for his PBA activities and his vocal complaints to the Mayor. The trial court dismissed the claims via summary judgment, plaintiff appealed and the Appellate Division remanded for more detailed findings of fact regarding plaintiff's CEPA claim.

On remand, the Superior Court Judge reiterated his grant of summary judgment to the defendants and provided a written opinion finding that Plaintiff's PBA grievances were not recognizable whistle-blowing activities under CEPA. Additionally, the trial court agreed with defendants that plaintiff's generalized complaints of a "top-heavy" administration were not complaints of age discrimination. The court found no adverse employment actions in plaintiff's reassignment within the police department as "certainly the law could not countenance such interpretation of CEPA under which the individual desires of officers would dictate assignments" over the Chief's decisions on how to effectively run his department. Finally, the Judge opined that plaintiff's alleged retaliation failed to constitute a material change in the terms and conditions of his employment.

John Knodel obtained summary judgment in a case in which plaintiff fell in the insured's parking lot on a Sunday morning in early December. Plaintiff was walking his dog and slipped on snow and ice. Plaintiff claimed it snowed approximately four to five inches the day before and the lot was poorly plowed leaving snow and ice throughout it. Photographs taken later that day by plaintiff's son-in-law depicted a poorly plowed lot with large sections of snow and ice. The insured's snow contractor claimed he was called by the insured after the accident to plow and salt. The insured denied any knowledge of the accident until receiving notice from plaintiff's attorney.

After entering the parking lot, plaintiff testified, he observed the snow and ice and decided it was too dangerous to proceed. He slipped and fell while exiting the lot. Plaintiff suffered a comminuted fracture of his left humeral head that required an open reduction and internal fixation but due to an underlying heart condition could not undergo the surgery, leaving him with significant loss of range of motion and pain confirmed by the defense orthopedist. John established that plaintiff entered the insured's property without express or implied permission and was either a trespasser or licensee to whom the insured owed a lesser duty of care: to warn of any artificial hazards (trespasser) or to warn of any dangerous conditions of which the insured had knowledge and plaintiff was unaware (licensee). Since there were no artificial dangerous conditions and plaintiff was aware of the dangerous condition, the court agreed with John's argument that the insured was not liable. Plaintiff's motion for reconsideration was denied.

John Knodel also obtained summary judgment in a case in which the insured was a group of cardiologists who own a business condominium where they had their medical office. Plaintiff was a patient of the insured. Plaintiff had a host of preexisting problems including residuals from a previous stroke, leaving her institutionalized and wheelchair-bound. While leaving the insured's office she fell out of her wheelchair when it hit a raised lip at the junction of the handicap ramp and parking lot and because the attendant did not properly strap her in. Plaintiff suffered a comminuted fracture of her right humeral head and a trimalleolar fracture/dislocation of her left ankle. John established through the master deed and property owners' association by-laws that the association was responsible for maintaining the exterior common areas. The court agreed and granted his motion for summary judgment.

Gerald Kaplan received Summary Judgment in a case involving a fall on snow and ice on a sidewalk of the insured church. In response to a Motion for Summary Judgment on the basis of charitable immunity, plaintiff asserted that the church conducted or had the capacity to conduct a commercial enterprise on the premises. The court found that the factual record did not support this contention and granted summary judgment.

In July, **Michael Eatroff** obtained Summary Judgment in a matter of first impression in New Jersey on an unusual coverage issue. The Superior Court, Essex County, addressed a commercial carrier's responsibility to provide PIP-type coverage under N.J.S.A. 17:28-1.6.

Plaintiff Mourad Lahlali was involved in a motor vehicle accident in September of 2008 while operating a motor bus on Dyer Avenue in New York City. A complaint was filed in September of 2010 in Essex County Superior Court naming the insurer of the motor bus as a Defendant. Specifically, the Complaint alleged that carrier refused to provide PIP benefits to the Plaintiff. The damages claimed would ultimately approach $100,000.00

The policy of insurance issued by the carrier did not include PIP coverage. However, claimants typically are successful in arguing that N.J.S.A. 17:28-1.6 requires that "no-fault" type medical expense benefits be provided to "passengers" of commercial buses. Claimants are also typically successful in arguing that any insurance policy insuring a "motor bus" that does not include medical expense benefits coverage must be deemed conformed by operation of law to afford medical expense benefits under the doctrine of Sotomayor v. Vasquez.

Michael argued that in this case, the Plaintiff's Complaint, on its face, set forth no cause of action against the carrier. The Plaintiff here was the operator of the accident vehicle, and thus, Michael alleged, was not a "passenger." We asserted that since the statute does not mandate coverage for an operator, the policy may not be deemed conformed for the benefit of this Plaintiff.

While commercial carrier policies now typically include PIP-type coverage, it appears that a carrier is not obligated to write such coverage for operators. Carriers should consider reviewing their policies to determine if they afford coverage beyond that required by N.J.S.A. 17:28-1.6.

Jennifer Herrmann recently won summary judgment in Kownacki v. Saddle Brook Board of Education, a Conscientious Employee Protection Act claim. The plaintiff was a custodian/electrician who remained employed by the defendant school. He claimed that adverse job events occurring between 2003 and 2009 amounted to a hostile work environment in retaliation for internal and external complaints he made between 2003 until 2008 about mold, asbestos, and an undersized transformer.

Agreeing with our statute of limitations arguments, the Court held that most of the plaintiff's grievances were isolated and sporadic, did not combine to form a continuing tort, and were time-barred. Regarding the plaintiff's timely grievances, the Court found that the defendants offered legitimate, nondiscriminatory reasons for their actions. Ultimately, the plaintiff failed to meet his burden of proving a causal connection between his whistle blowing and any alleged adverse action.

Marissa Keddis, in Santo v. Lacey Township Board of Education, obtained Summary Judgment dismissing a Complaint filed under the New Jersey Law Against Discrimination. The plaintiff, a school bus driver, tragically struck and killed a pedestrian while operating a school bus. After the plaintiff pled guilty in municipal court to various driving offenses, her license was suspended for a period of six months. The Board subsequently voted to terminate the plaintiff's employment, pursuant to N.J.S.A. 18A:39-19.1, as she was statutorily ineligible for employment as a school bus driver without the required "S" endorsement. The plaintiff, who suffered from PTSD, anxiety, depression and, notably, a fear of driving after the accident, brought forth allegations that she was discriminated against due to mental disabilities which were exacerbated by the trauma of the accident. After four motion hearings, the Court dismissed the plaintiff's Complaint with prejudice, concluding that there was no way for the Board to reasonably accommodate her disability and that she was not objectively qualified for her position at the time of her termination.

Jason M. Judovin obtained a verdict on a construction defect subrogation claim brought by an insurer on behalf of a condominium association and by the condominium association, individually, against a roofing contractor. In March of 2003, the condominium association entered into a contract with a roofing contractor for the construction and installation of a new roof. In early 2006, the condominium noticed that the roof was leaking. After notifying the roofing contractor, a "cricket" was constructed along the roof for an additional significant fee. In January 2009, several units suffered water damage due to leaks along the roof and reported to the condominium's insurer. The insurer hired an expert to determine the cause of the loss, but by the time of trial, that expert had passed away. In order to prove liability, Mr. Judovin had a subsequent roofing contractor, who had repaired the roof in February 2009, admitted as an expert at trial. In addition to allowing the subsequent contractor to testify as to the defendant's negligence and the cause of loss, the court also granted Mr. Judovin's motion to bar the proposed expert testimony of the defendant. After a bench trial, the Court awarded the insurer and the condominium association the full amount demanded.

Danielle Lozito recently won a Motion for Summary Judgment which resulted in adjudication in favor of the carrier on a coverage dispute concerning application of the work product exclusion, as well as an unusual policy form used in the surplus lines insurance industry for subsidence. The insured was a bulkhead contractor. After he installed a defective bulkhead at a client's home, the sand being retained by the bulkhead started to erode due to the defect. Over vehement argument from the insured running the range of ambiguity to violation of public policy, the Court ultimately agreed with Danielle that the work product and erosion/subsidence exclusions precluded coverage.

Adam S. Weiss successfully defended a Board of Education President whose colleague accused her of violating the School Ethics Act during the hiring of a new Superintendent of Schools. Specifically, it was alleged that the Board

President took actions that were beyond the scope of her authority, which amounted to "private action," in violation of the Act.

At the hearing before the School Ethics Commission, Adam demonstrated through cross-examination and direct testimony that the complainant's allegations of unethical activity were unfounded and that the Board President acted appropriately and within her authority at all times during the search for a new Superintendent.

In a published decision in favor of the defense, the School Ethics Commission determined that based upon the testimonial and documentary evidence presented, the complainant failed to establish that the Board President violated any provisions of the School Ethics Act and dismissed the Complaint in its entirety.

Maurice Jefferson obtained summary judgment dismissing the claim of a 15 year old sophomore at North Middletown High School who was assaulted by the codefendant. We represented the District. The plaintiff allegedly sustained a TMJ injury, facial contusions and psychological trauma. He claimed that the District was negligent because it hadn't properly classified the co-defendant to take her out of the mainstream due to her propensity for violence. The plaintiff also alleged that the school teachers who restrained the co-defendant after the assault were negligent in letting the co-defendant go too early and without taking proper precautions for the safety of the plaintiff. After the co-defendant was let go, she went straight for the plaintiff again, knocked her down and kicked her in the head several times.

We argued that the plaintiff needed an expert to establish negligence on the basis of failure to classify the co-defendant, and the judge agreed. The plaintiff had no expert as to classification, so that part of the case was dismissed. The second part of her case was fact sensitive, but the depositions of the plaintiff and of the codefendant elicited very detailed testimony which gave us ground to convince the judge that as in the seminal case of Doktor v. Greenberg, the teachers had no prior notice of the impending assault and accordingly had done all they could reasonably do in terms of responding to the situation, warranting summary judgment.

Matthew Rachmiel recently won a significant PIP arbitration in which claimant, a hospital, sought payment of its $60,000 bill from Matthew's client, the patient's auto insurer. Matthew successfully convinced the arbitrator that claimant submitted insufficient evidence that the patient's bills were accident-related. There was no police report for the alleged accident and claimant's records showed that the patient was a drug addict who tested positive for opiates following the accident; thus the patient's need for hospital treatment may have been the result of a drug overdose while driving rather than the accident itself.

In a matter involving a New Jersey accident involving a New Jersey-insured driver under a New Jersey policy, **Richard Nelke** filed a motion to dismiss in lieu of answer and argued that the New York courts did not have jurisdiction over our client, that there was no subject matter jurisdiction and that the complaint failed to state a cause of action because the insured did not comply with the terms of the policy by submitting to an Examination Under Oath. After oral argument, the judge granted our motion to dismiss and found that the plaintiff did not establish New York jurisdiction.