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

Spring 2017

CASE UPDATE

Methfessel & Werbel is pleased to present the Spring 2017 edition of our Case Update. Click on the case names to view the complete decisions; click on attorney names to view their profiles and contact information. As always, we welcome your questions and feedback.

METHFESSEL & WERBEL NEWS

Congratulations to **Matthew Werbel**, **William Bloom**, **Marc Dembling**, **Eric Harrison**, and **Edward Thornton**, all of whom have been designated "Super Lawyers" for 2016 and 2017 by New Jersey Monthly Magazine. Only approximately 5% of New Jersey attorneys are selected by their peers as Super Lawyers.

The New Jersey Defense Association recently published two articles by M&W attorneys. **Nabila Saeed** and **Christian Baillie** published "Sever Early and Sever Often: Practical Considerations on Severing Bad Faith Claims in Superstorm Sandy and Other First Party Insurance Cases." In a separate article, **Nabila Saeed** and **Jim Foxen** reviewed the current state of the law governing "Status of Residential Sidewalk Liability."

On April 10, 2017 the New Jersey Law Journal published "Sovereign Immunity and Claims Against the State Under the New Jersey Law Against Discrimination," authored by Emily Kornfeld and **Eric Harrison**. The article discusses sovereign immunity for the State when LAD claims are brought in federal court.

In January of 2017, several of our attorneys served as mock trial judges for local high school teams in the annual competition sponsored by the New Jersey State Bar Association. The Union County Bar Association also invited **Ed Thornton**, **Eric Harrison**, **Paul Endler**, and **Jared Kingsley** to preside over a civil jury trial involving claims of defamation through social media.

In keeping with the firm's commitment to outstanding civil trial litigation and client service, we are pleased to report that **Brent Pohlman** and **Vivian Lekkas** will be co-chairing a year-long continuing legal education class in "The Art and Practice of Litigation." The program is centered around a legal case-study focusing on the improvement of legal skills and attorney responsibilities through the lens of the firm's clients and the insurance industry the firm serves. The courses will highlight the various stages of litigation from the initial opening of a file, through discovery, and trial all while also earning continuing legal education credits for the attorneys. The seminars will be held monthly and will be led by the firm's more experienced attorneys. The first course, which was presented by **Paul Endler**, was held on March 22, 2017, and focused on professionalism, reporting, and communicating with insurance carriers. Clients interested in obtaining course materials should contact **Brent** or **Vivian**.

UPDATES IN NEW JERSEY LAW

*Note – Case names are hyperlinks. Clicking on the case name will take you to a complete copy of the decision.

TRANSPORTATION NETWORK COMPANY LEGISLATION

In February of 2017 Governor Christie signed into law the Transportation Network Company Safety and Regulation Act. The law seeks to regulate popular transportation companies such as Uber, Lyft, and other ride-sharing businesses. In part, the Act mandates drivers and the companies that employ them to meet insurance coverage standards and undergo a driving and criminal background check. This makes New Jersey one of several other states to pass such a law.

INSURANCE – COVERAGE – ANTI-ASSIGNMENT CLAUSES AND WAIVERS

In Givaudan v. Aetna, the New Jersey Supreme Court held that New Jersey would adhere to the doctrine that an anti-assignment clause in an insurance policy may not bar the assignment of a post-loss claim, noting that an overwhelming number of jurisdictions around the country accept this legal rule voiding restrictions on post-loss claim assignments. In this case, Givaudan, the world's largest manufacturer of flavors and fragrances, caused environmental damage at its operations in Clifton, New Jersey. The Court held that it could demand up to $500 million in insurance coverage for the environmental damage even though one of its units transferred its coverage to another unit.

On December 29, 2016, in Everest Indemnity Ins. Co. v. Tim Tiger Enterprises, LLC, an unpublished decision, the Appellate Division addressed whether an injured party's subrogee may seek relief from a tortfeasor's liability insurer regardless of the outcome of litigation between the tortfeasor and its insurer. Significantly, the Court held that the subrogee may continue to seek indemnification even though, in the same suit, the insurer obtained rescission of its policy by default.

In Allstate New Jersey Insurance Company v. AvalonBay Communities, the U.S. District Court held that subrogation waivers which were buried in the residents' leases were not enforceable, as there were significant questions as to the choice afforded to the residents and the validity of the waivers themselves. The court did recognize that subrogation waivers are generally enforceable where parties clearly intended to shift the risk of loss to insurers.

PERSONAL INJURY PROTECTION ("PIP")

In Viruet v. Maione, a trial judge in Cumberland County ruled on an issue involving the introduction of evidence relating to medical bills above the Personal Injury Protection limit of the plaintiff. Plaintiff had a $15,000 PIP limit and medical bills of $56,000. Plaintiff sought to introduce the $41,000 in bills, which were in excess of what was paid by the PIP carrier. The trial judge ruled that the bills could be submitted, that they would not be subject to the fee schedule because they were not paid or payable by a carrier, and importantly, that it was up to the jury to decide the fair and reasonable value of such expenses. We suggest hiring an expert witness to review such bills and opine on their reasonableness.

INDEPENDENT MEDICAL EXAMINATION

In McInroy v. Village Supermarket, Inc., the Court addressed whether a plaintiff who does not appear for a properly scheduled Independent Medical Examination ("IME") may be compelled to reimburse defense counsel for any fee incurred as a result. The Court found reimbursement to defense counsel a reasonable discovery sanction to make the non-delinquent party, who had no control over whether plaintiff appeared for the IME, whole.

CIVIL PROCEDURE

In Crepy v. Reckitt Benckiser, the trial court addressed the sufficiency of a company's contacts in a particular county to determine whether it does business there for purposes of venue. The trial court found that the company's business contacts with Essex County were insufficient to support the filing in that county and granted the motion to transfer venue to Morris County.

UNINSURED MOTORIST CLAIMS-JURY TRIALS

In Krzykalski v. Tindall, the Appellate Division addressed the issue of a phantom vehicle in the context of civil litigation involving a UM claim. In this case it was undisputed that plaintiff was cut off by a phantom driver and rear-ended by defendant Tindall. Plaintiff did not settle with his UM carrier so the phantom vehicle's negligence was sent to the jury and it was found that the phantom vehicle was 97% at fault and Tindall only 3% at fault, resulting in a 3% recovery for the plaintiff. The Appellate Division affirmed, holding that the defendant was appropriately afforded an opportunity to allocate liability to the driver of the phantom vehicle.

OFFER OF JUDGMENT RULE – HIGH/LOW AGREEMENTS

In a published opinion, Serico v. Rothberg, the Appellate Division considered the interplay between an offer of judgment and a high-low agreement. In this medical malpractice action, plaintiff filed a timely offer of judgment of $750,000.00. Defendant did not respond, equating to a rejection. When the jury was deliberating the matter, the parties entered into a high-low agreement of $300,000.00 and $1.0 million. The jury returned a verdict of $6.0 million. Plaintiff argued that because the verdict (or the settlement for that matter) was 120% or more of the $750,000.00 offer, the plaintiff should be entitled to the fruits of a successful offer, enhanced rate of interest, attorney's fees, expert expenses, etc. The Appellate Division affirmed the trial judge (although on different grounds), holding that because plaintiff had not specifically reserved any right beyond the high-low agreement, the ceiling amount of the agreement would control the exposure to the defendant. The Court acknowledged that public policy favors the goal of certainty for defendants willing to settle cases with firm consequences. In this case that included not only an agreement on a range of money damages, but a waiver of any appeal.

DEFAMATION

In Petro-Lubricant Testing Laboratories, Inc. v. Adelman, the Appellate Division addressed whether a second posting of an article on a website with only minor changes from the original posting was sufficient to categorize it as a separate publication and therefore subject to a new statute of limitations for defamation claims. The Court

held that the changes were immaterial and therefore, the Complaint was properly dismissed as untimely pursuant to the applicable one-year statute of limitations.

NEW JERSEY CIVIL RIGHTS ACT

On March 28, 2017, in Lapolla v. County of Union, the Appellate Division addressed whether the plaintiff's familial and social affiliations qualified as constitutionally protected status under the New Jersey Civil Rights Act. Plaintiff claimed to be the victim of political retaliation, in part, because his politically active brother had confrontations with the chairwoman of the Union County Democratic Party. The Appellate Division held that his familial and social affiliations were not constitutionally protected.

ALTERNATIVE DISPUTE RESOLUTION

In Bound Brook Board of Education v. Ciripompa, the New Jersey Supreme Court addressed whether an arbitrator exceeded his authority by applying the standard for proving a hostile work environment claim in a Law Against Discrimination case to a claim of unbecoming conduct in a tenured teacher disciplinary hearing. The Court found that the arbitrator's award was invalid, as he impermissibly converted the second charge of unbecoming conduct into one of sexual harassment.

UPDATES IN FEDERAL LAW

On March 22, 2017, in Endrew F. v. Douglas County School District, the United States Supreme Court rendered a decision addressing a claim brought under the Individuals with Disabilities Education Act ("IDEA"). The Supreme Court held that a school must offer an individualized education plan reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The Supreme Court vacated the Tenth Circuit's decision and remanded for further proceedings. While many view this case as a substantive change in the law, in many circuits, such as the Third Circuit, courts and hearing officers have adhered to this standard for several decades.

In Fraternal Order of Police, Lodge 1 v. City of Camden, the Third Circuit reversed summary judgment in favor of the city on the whistleblower claim brought under New Jersey's Conscientious Employee Protection Act ("CEPA") holding that CEPA did not require plaintiffs to show that the complained-of policy was illegal. However, the Third Circuit affirmed the dismissal of Plaintiff's First Amendment claim finding that although an issue of public concern was raised, plaintiffs were not speaking as citizens when objecting internally to the policy.

In Capps v. Mondelez Global, LLC, the Third Circuit affirmed the district court's dismissal of plaintiff's claims on summary judgment finding that the employer's honest belief that plaintiff was inappropriately utilizing leave under the federal Family Medical and Leave Act ("FMLA") was a legitimate reason for the plaintiff's termination. The Third Circuit also upheld the dismissal of the FMLA interference claim as plaintiff was not denied any FMLA benefits and also upheld the dismissal of the claim under the Americans with Disabilities ("ADA") as plaintiff was not denied any reasonable accommodations, even if one were to consider the request for FMLA leave a request for a reasonable accommodation.

RECENT CASE RESULTS

Marc Dembling successfully obtained a judgment in the amount of $232,568.71 against the insured for insurance fraud arising out of arson charges on the insured's premises. The insured appealed the judgment and the Appellate Division affirmed the award in favor of our client, the insurer.

Ric Gallin successfully defended a large property damage case pending in the Supreme Court, Suffolk County. The insured was retained to install solar panels at a private home. Electrical work was subcontracted out. Shortly after the electrician performed hook ups, the house burned to the ground. It turned out that the electrician made mistakes in making certain connections. The subrogated interests were well into a six-figure range and the homeowner had a large claim for uninsured losses. Total claims exceeded the electrician's one-million-dollar policy. Ric took a hard line towards settlement and assisted the electrician's attorney in debunking the uninsured losses. The case ended up settling within the electrician's policy without any contribution made by Ric's client.

Ric Gallin successfully defended a first party claim pending in the Superior Court, Middlesex County. Plaintiff had a fire at her home in January of 2014. She misrepresented that her mortgage was up-to-date when in fact it had been in arrears since 2009. She subsequently made misrepresentations about her employment and income. She submitted a contents claim of over $500,000, more than three times the company's inventory analysis. The claim was denied and the mortgage company was paid the actual cash value on the building. All building claims made by the insured were dismissed on motion because the insured did not demonstrate the wherewithal to rebuild. The jury agreed with Ric that the misrepresentations were material and thus a breach of the Concealment and Fraud clause. Plaintiff was awarded nothing on her contents claim.

Ric Gallin successfully defended an appeal of a grant of summary judgment. The Appellate Division agreed with the trial court that our client was properly granted summary judgment. A tenant had sued the insured landlord after there was a collapse in the rented warehouse space and the tenant suffered damages to stored goods. The lease required the tenant to have their own insurance and also required a waiver of subrogation. The tenant breached the lease provision. If the tenant had obtained the requisite insurance, their damages would have been paid by their own insurance company and all subrogation claims would have been barred. The Courts ruled that the insured should not face exposure for the damaged goods because if the tenant had not breached the lease, there would not have been a claim due to the waiver of subrogation.

Ric Gallin obtained a reversal from the Second Department of summary judgment in a New York subrogation case which involved payments made for property damage sustained as a result of a power surge caused after Superstorm Sandy. The public utility company and private entity that carried out the tasks of the public utility company were named as defendants in the action. Defense counsel made a motion for summary judgment based upon failure to serve a proper notice of claim. The lower court granted summary judgment to both the public utility company and private entity despite the motion for summary judgment only naming the public utility company and making no argument as to why the private entity was entitled to a notice of claim. The appellate panel agreed that there was a reasonable excuse for failing to oppose dismissal of the case against the private entity because the papers submitted in support of the motion for summary judgment did not clearly seek that relief for the private entity and that a potentially meritorious opposition was demonstrated as to any request

for summary judgment as to the private entity because the applicable notice of claim statutes do not apply to the private entity.

Eric Harrison obtained a defense verdict from a Middlesex County jury in an age discrimination case filed by a non-renewed custodian against the school district where he had worked for five years. The plaintiff asserted that he was non-renewed for discriminatory reasons because he received excellent evaluations during his first two years but his supervisor became increasingly critical after he shared that he suffered from a previously undisclosed disability. The defense demonstrated that while plaintiff's disclosure of his disability coincided with write-ups and poor performance reviews, this was because his performance had truly declined, as documented in numerous contemporaneous notes by not only his supervisors, but also his job coaches from the New Jersey Division of Vocational Rehabilitation.

Eric Harrison and Kegan Andeskie obtained summary judgment in an age discrimination case brought against a local school district and several individual defendants working for the district at the time. Plaintiff was employed as the Supervisor of Student Services in the high school, a tenured position overseeing the guidance department, among other responsibilities. After the high school principal was replaced, plaintiff claimed that the new principal attempted to force plaintiff into retirement by demanding impossible tasks based on plaintiff's age. Plaintiff also claimed that he was being forced into retirement because he was eligible for a raise, which would interfere with the other supervisors getting the salary increases they wanted. In granting summary judgment, the Court found that despite alleging isolated references to his age, plaintiff failed to demonstrate discrimination on the basis of age, and that even if defendants did attempt to force plaintiff into retirement, plaintiff did not come forth with sufficient evidence to demonstrate that defendants did so on the basis of any protected characteristic.

Ed Thornton tried a matter in the United States District Court in Camden, defending a rear-end hit suffered by a husband and wife. The post-accident photograph showed a violent impact caused by the insured driver. Liability was stipulated. The husband-driver presented a soft tissue case with non-operated herniated discs in the cervical spine (four discs), thoracic spine (one disc), and the lumbar spine (two herniated discs). The wife presented a claim of herniated cervical disc and bilateral torn rotator cuffs. She had arthroscopic surgery for each of the torn rotator cuffs. The main issue in dispute was the causal relationship of the surgeries and the attendant disabilities of the female plaintiff. The plaintiffs' unwavering joint demand was $600,000.00 with a final pre-trial offer of $225,000.00. The jury awarded $20,000.00 to the husband and $50,000.00 to the wife.

Ed Thornton tried a matter in the United States District Court defending a landscaper who had installed an accent exterior lighting system at plaintiff's home. A fire occurred when the halogen light in the fixture became covered with leaves, mulch, and debris and ignited the debris on fire. The fire communicated to the house, burning the house and contents, a total loss. The subrogating carrier paid $890,000.00. Suit was brought against the insured landscaper only, so we brought a third-party Complaint against the lighting manufacturer. Plaintiff settled with the third-party defendant for only $100,000.00, hoping to recoup the rest against the insured. The jury agreed that we proved a case of design defect against the lighting manufacturer, held the lighting manufacturer 80% at fault, the insured 20%, for a net verdict of $160,000.00 against the insured (we stipulated damages at $800,000.00). Thus, had the plaintiff simply gone along with our theory, plaintiff would have collected 100% of the loss and instead will now collect approximately 23% of the loss.

Ed Thornton and **Jim Foxen** recently obtained summary judgment in a large personal injury matter in the Bergen County Superior Court. The insured was a small local church and the case involved claims made by 32 plaintiffs (26 victims and 6 spouses of victims) who claimed to have been the victims of sexual, emotional, and physical abuse in the 1970s and early 1980s. The claims against the insured included active sexual abuse by volunteers and employees of the church, failure to act on notice of sexual abuse by others, and various other claims based on the Child Sexual Abuse Act. All claims were dismissed with prejudice. The Court found that the insured's church was not an active or passive abuser under the Child Sexual Abuse Act and therefore owed no duty to plaintiffs as the Child Sexual Abuse Act could not be applied to the insured church. Plaintiffs' original demand for settlement was two million dollars per plaintiff ($64,000,000.00). After negotiations the plaintiffs' demand was reduced to several million dollars before summary judgment motions were filed.

Ed Thornton and **Steve Unterburger** obtained summary judgment in a case where plaintiff, who was playing junior varsity high school baseball, broke his ankle while sliding into third base. Plaintiff underwent six surgeries. The basis of the Complaint was that the third base coach for his team gave him the signal to slide too late as he was approaching third base. He alleged that his cleats therefore got caught in the dirt, causing his ankle to turn over and snap. We argued that the coach's actions should be judged by the standard of reckless conduct, not negligence. There is no New Jersey case on this particular issue, but Judge Ciccone of the Somerset County Superior Court agreed with us that the standard should be one of recklessness, since he had the ability to influence the outcome of the game, not negligence. We pointed out that plaintiff's Complaint alleged only negligence and therefore, applying the standard of care to the facts and pleading, the Court agreed with our argument that the Complaint should be dismissed.

Paul Endler and **Jim Foxen** obtained an order granting summary judgment on behalf of an insured electrical company. At the time that Superstorm Sandy was expected to strike, the facility operator of a local halfway house rented a portable generator intended to power the building in case Sandy knocked out electrical service. Our client was hired by the facility operator to wire the generator to the building's main service panel to insure that there would be no disruption in service. When Sandy hit, power did in fact go out in the building and the employees had been instructed by our client how to turn on the generator. They were unable to start the generator because they were unaware of an interlock device on the door to the generator that would prevent it from operating unless the door was properly closed. Plaintiff alleged that as a result of there being no power in the building that inmates in an adjacent halfway house rioted causing him to be assaulted. He alleged injuries to his knees and shoulders which eventually required surgery. Neither plaintiff nor the facility operator were able to establish that our client deviated from an accepted standard of care within the electrical industry which would have been a proximate cause of plaintiff's alleged injuries. Summary Judgment was granted by the Hon. Stephanie Mitterhoff on March 17, 2017.

Jim Foxen recently obtained summary judgment following oral argument before Judge Farrington of the Bergen County Superior Court. The insureds owned two adjacent properties in Hackensack, New Jersey. One property was a two-family non-owner occupied house while the other property was a vacant lot. The vacant lot previously functioned as a two-family rental property and thus would be commercial in nature, but that structure burned down in 2006 and was never rebuilt. Plaintiff claimed that she tripped and fell in a hole on the driveway apron leading to the vacant property. The case was dismissed with prejudice after Jim argued that the property is residential in nature as it was a vacant lot with no capability to generate income. Jim further argued that the New Jersey unpublished decision of Nappi v. Township of Secaucus required that the driveway apron be treated

similarly to the public sidewalk and that the residential sidewalk immunity should apply. Judge Farrington agreed with the arguments and dismissed the claim with prejudice. Plaintiff's demand was $130,000.00 to settle the matter.

Jim Foxen and Emily Kornfeld recently obtained summary judgment in favor of an insured Condominium Association. Plaintiff claimed that she was walking on the public sidewalk abutting the insured Condominium Association when she tripped and fell on a portion of sidewalk that had been negligently patched. In New Jersey condominium associations are considered residential property and are entitled to the residential sidewalk immunity. Plaintiff claimed that the patch work had been done after the association was formed and therefore there should be a presumption that the work was completed by the association. Plaintiff also argued that the association bylaws named the sidewalk as a common element therefore establishing that the insured owed plaintiff a duty. The Court dismissed plaintiff's complaint with prejudice as plaintiff failed to meet her burden of establishing that the insured completed the patchwork. Plaintiff suffered significant injuries including a torn lateral meniscus requiring surgery. Plaintiff's demand for settlement at oral argument was $45,000.00.

Jim Foxen recently obtained summary judgment in a case that involved serious injuries and medical bills of $237,000.00. Plaintiff was a tenant living on the third floor of the insured's apartment building in Jersey City, New Jersey. Plaintiff, an 85-year-old female, claimed that she was startled in the middle of the night by a malfunctioning smoke detector. As she left her apartment, she fell down a set of stairs suffering extensive injuries including multiple facial fractures and a fracture of the dominant wrist requiring open reduction and internal fixation. Judge Lisa Rose of the Hudson County Superior Court agreed with our position that the insureds breached no duty to the plaintiff by failing to properly maintain the malfunctioning smoke detector as plaintiff failed to establish that the insureds had knowledge of any alleged defect. Judge Rose also agreed that the alleged malfunctioning smoke detector was not a proximate cause of plaintiff's injuries since no defect in the stairs could be established.

Maurice Jefferson successfully tried a case before Jude Randall Corman, Middlesex County Superior Court, involving a breach of contract claim and claims brought under the Consumer Fraud Act ("CFA"). The insured auto repair shop, which was represented by our firm under a reservation of rights, repaired two vans for plaintiff on two separate occasions. The plaintiff claimed that the first van was not repaired, and that the repairs to the second van did not outlast the six-month warranty period. Unfortunately for the plaintiff, he attempted to get the insured to honor the warranty after the six months had passed, though he claimed that he contacted the insured about the problems before the warranty's expiration, a contention disputed by the insured. The CFA violations stemmed from the insured's estimates being replete with deficiencies such as lacking details as to the work being done and as to the terms of the guarantee, both of which are clear violations of the CFA. The Court awarded only a $4,000 refund to plaintiff for the per se violations but found that the plaintiff had not proven his claim as to the breach of contract. The Court also found that the plaintiff sustained no ascertainable loss. This result was a success for the insured. If the Court had found that there had been an ascertainable loss, the damages would have been trebled and counsel fees would have also been awarded to plaintiff.

John Knodel obtained summary judgment in a case where the plaintiff was injured on a defective loading dock and underwent two surgeries to his ankle and shoulder. The plaintiff was in the course of his employment and had a worker's compensation lien of $162,971.17. The insured owned the building but leased it to the co-

defendant tenant. John got a principal of the tenant to admit the lease was a triple net lease and the tenant was responsible for maintaining the loading dock.

John Knodel obtained summary judgment in a case where the plaintiff fell on a patch of ice on the front sidewalk of the insured's mother's house fracturing and dislocating his ankle, undergoing four surgeries, and incurring $156,649.29 in medical bills. The plaintiff was out of work for one year and had lost wages of $59,263.18. The insured lived next door to his elderly mother and took care of her property, including snow and ice removal. The insured's mother's property was residential and she was entitled to residential sidewalk immunity. John established that as the agent of his mother he was entitled to the immunity as well. Additionally, the insured, who is in the construction business, replaced his mother's sidewalk in 2006. The plaintiff retained an expert who opined the insured should have covered the expansion joint filler material with an elastomeric sealant and his failure to do so allowed the material to deteriorate creating a dam-like effect allowing water to pool on the sidewalk. The expert cited no written standards, code violations, etc. At his deposition John got the expert to admit his opinion was his "personal engineering" opinion. An expert's personal opinion is a net opinion and inadmissible. The court agreed with us that without an expert opining that the insured negligently installed the sidewalk, there was no liability.

Vivian Lekkas and **Eric Harrison** obtained summary judgment on behalf of a local school district and Superintendent. Plaintiff's claims were brought under the New Jersey Law Against Discrimination. She alleged she was discriminated against on account of her gender and/or race when she was transferred from the position of high school principal to elementary school principal. Plaintiff also claimed that the former Superintendent created a hostile work environment on account of her protected classes and that the current Superintendent should be held individually liable for aiding and abetting the inappropriate conduct. Finally, Plaintiff also made claims under the tenure statutes. We argued that plaintiff suffered no adverse employment action as she was merely transferred resulting in no reduction in salary, the district had legitimate non-discriminatory reasons for the transfer, the conduct complained of did not rise to the level of a hostile work environment, the Superintendent did not engage in the active and purposeful conduct required to establish individual liability, and that the claims under the tenure statutes were moot as the Commissioner of Education, who has jurisdiction to hear such claims, already adjudicated the claims. The Court agreed with our arguments and dismissed the case in its entirety.

Richard Nelke and **Christian Baillie** successfully obtained summary judgment in a first-party insurance case on the basis of non-cooperation. Plaintiffs' commercial building suffered a loss as a result of sewage backing up from a sewer/toilet drain in the floor of a vacant unit and then a second loss several days later allegedly as a result of snow on the roof melting and seeping into the building. Cumberland's assigned independent adjuster inspected the plaintiffs' property and sent the public adjuster five letters, all of which were copied to the insureds/plaintiffs, requesting various documents as well as at least one email and one phone call. After receiving no response, defendant denied both claims for non-cooperation. Plaintiffs responded by filing suit. We filed a motion for summary judgment asserting non-cooperation, as well as various coverage issues with both claims. The Court granted summary judgment solely on non-cooperation and did not reach the other issues. The Court agreed with us that the plaintiffs materially breached the cooperation clauses of the policy, which were a condition precedent to filing a lawsuit, and that we did not need to demonstrate any particular prejudice. The matter is currently on appeal.

Richard Nelke and **Christian Baillie** successfully obtained summary judgment in a first party insurance case. Plaintiffs' home suffered damage as a result of Superstorm Sandy. Cumberland had the property inspected by an independent adjuster, and subsequently a licensed engineer and a building contractor. The engineer concluded that the vast majority of the damages claimed were not caused by Sandy, but rather long-term water infiltration, deterioration, and neglect of the property. The contractor prepared a repair estimate for those building materials actually damaged by Sandy, which Cumberland paid. Cumberland denied the balance of the claim. Plaintiffs filed suit pro se. Plaintiffs named two experts in discovery—one whose testimony was barred for failure to appear to a court-ordered deposition and the other who testified that he had no intention of being plaintiffs' expert. We filed a motion for summary judgment on the basis that it was undisputed that Cumberland paid all that was owed under the policy, and that the balance of plaintiffs' claim was unrelated to Sandy and excluded under the policy since plaintiffs had no expert opinions to contradict those of our experts. The Court agreed and dismissed the Complaint with prejudice. The Court had previously granted our motion for partial summary judgment, dismissing plaintiffs' bad faith claim, as well as all claims for extra-contractual damages and all claims asserted against the independent adjuster directly.

Gina Stanziale was successful in obtaining a no cause verdict on behalf of an automobile insurer on the issue of permissive use in a declaratory judgment action brought by the carrier who had entered a defense for the defendant. While fooling around with friends on graduation night in a high school parking lot, the defendant grabbed the keys from the insured's pocket and ran off. The insured, unable to catch her, jumped into her car after which the defendant jumped into the insured vehicle which was locked and which had a manual transmission. Thinking the insured was going to turn her car on, the defendant, who did not know how to operate a manual transmission, proceeded to turn on the insured vehicle. Upon doing so, the car lurched forward, striking the plaintiff pedestrian, pinning him between two cars, and causing serious injury to his leg including nerve damage. The jury found the defendant had neither express nor implied permission to operate the insured vehicle.

Gina Stanziale obtained summary judgment on two grounds in a declaratory judgment action filed in Gloucester County. In the underlying bodily injury case, the insured was involved in an accident while operating a vehicle owned by his employer after which he pled guilty to two counts of aggravated vehicular assault. The accident caused severe cognitive injuries to one of the plaintiffs. The carrier for the insured's employer filed suit against the insured's personal automobile carrier for coverage. First, the Court found that the subject vehicle did not qualify as a "non-owned" vehicle under the insured's personal automobile policy. Second, the Court further found that the intentional/criminal acts exclusion applied. Thus, there was no coverage under the personal automobile policy of insurance.

Lori Brown Sternback successfully obtained a no-cause jury trial. Plaintiff alleged a trip and fall as she was going up the stairs in a firehouse on the way to a baby shower being held in the hall on the second floor of the premises. Plaintiff initially claimed she was caused to fall because it was dark in the stairwell. Plaintiff not only changed the location of her fall toward the end of the discovery process, she also claimed a different reason for her fall. The plaintiff provided answers to interrogatories as well as deposition testimony indicating that she fell on the lower portion of the staircase, as a result of someone blocking the sun but later testified she fell on the upper portion of the stairs due to catching her foot on the nosing of the step. It seemed clear that both the plaintiff and her liability expert tried to come up with another reason, a safety issue, as the cause for the plaintiff's fall, rather than her own fault. The jury agreed with our position.

Lori Brown Sternback successfully defended a trial on liability only. The parties agreed to stipulate to an amount of damages due to the plaintiff's medical condition of dementia. Plaintiff alleged a trip and fall on sidewalk as a result of a dangerous condition. Defendant alleged there was no dangerous condition of the sidewalk and that the plaintiff just fell without reason. Plaintiff is now 90 years old and was walking with a walker at the time of the incident as she had recently undergone surgery on her hip three weeks prior. Plaintiff's granddaughter, an alleged witness to the incident, could not identify the specific area of sidewalk that contained the alleged defect upon which her grandmother tripped. However, she did state it was not in the area of the black and white photograph which was attached to plaintiff's answers to interrogatories. Another witness, the owner of the salon the plaintiff exited just prior to the fall, saw plaintiff's granddaughter holding plaintiff's arm while walking on the sidewalk. He then observed plaintiff's granddaughter let go of plaintiff's arm and begin walking away toward her left on the sidewalk, presumably to go to her car. He clearly recalled observing plaintiff's fall within moments of her granddaughter letting go; that plaintiff did not move after her granddaughter let go of plaintiff's arm; and that plaintiff fell in the same spot where her granddaughter let go of her. He also stated there was nothing wrong with the sidewalk in the area of the plaintiff when he ran to her immediately after watching her fall. The jury granted defendant a no-cause on the issue of liability.