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

Spring 2018

CASE UPDATE

Methfessel & Werbel is pleased to present the Spring 2018 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

James Foxen and **Christian Baillie** have been promoted to Counsel. Jim and Christian have demonstrated rapid growth and exemplary performance in the liability and coverage work they have performed for our clients, and we congratulate them on their advancement.

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

New Jersey Monthly also designated **Joseph Castellucci**, **Sarah Delahant, James Foxen**, and **Jared Schure** as "Rising Stars" for 2018. The "Rising Star" award goes to promising attorneys under 40 years of age.

The New Jersey Supreme Court has appointed **Leslie Koch** to serve on the District Ethics Committee for Middlesex County for a four-year term through 2021.

On January 20, 2018, **Marc Dembling** continued his longstanding tradition of moderating NJICLE's annual "Insurance Law Update 2018."

In October of 2017, **Eric Harrison** presented on recent developments in public entity law at the Annual Tort Law Conference. Eric also presented at NJICLE's "2017 Hot Topics in Special Education." In December of 2017, Eric presented at the New Jersey Public Relations Association's workshop on "Social Media: Don't Delete that Comment! First Amendment Rights and Public Records."

On October 17, 2017, **Matthew Werbel** and **Stephen Katzman** presented on the keys to successful SIU testimony at the Annual New Jersey Special Investigators Association Convention, at Harrah's Resort in Atlantic City.

Also on October 17, 2017, **Richard Nelke** presented at the Annual NJSIA Convention in Atlantic City. Rich held a discussion on various types of claims that are grouped as "Mysterious Disappearances." He also reviewed case law concerning recorded statements and their effect on Examinations Under Oath.

In November of 2017, **Paul Endler** was a presenter for the Middlesex County Bar Association Seminar on "Litigating Public Entity Cases." Paul also presented at the Union County Bar Association Seminar on "Ethical Concerns in Municipal Court."

On November 6, 2017, the New Jersey Law Journal published "Appellate Division Further Refines 'Continuous Trigger' in Progressive Injury Claims," authored by **Ric Gallin** and **Alicia Langone**. The article analyzes the Appellate Division's recent decision in Air Master & Cooling v. Selective, which extended the "continuous trigger" approach to assessment of liability insurance coverage for construction litigation.

METHFESSEL & WERBEL WELCOMES NEW ATTORNEYS

Joseph Castellucci has joined Methfessel & Werbel as Counsel to the firm. Joe comes to the firm with over ten years of experience concentrated in school law, labor law, special education law and related litigation. Joe joins our employment/civil rights team under the supervision of Eric Harrison.

We are pleased to welcome **Ashley E. Malandre** to the firm. Ashley comes to the firm with experience concentrated in the representation of management in all aspects of labor law, municipal law, and related litigation. Additionally, Ashley has acted as an Alternate Prosecutor in various municipalities in Monmouth County. Ashley joins our employment/civil rights team under the supervision of Eric Harrison.

Sarah Delahant joins our general liability team under the supervision of Bill Bloom. Sarah has over ten years of experience litigating personal injury matters and most recently was the managing partner for the legal department of an insurance company. Sarah obtained her B.S. from Rutgers University, *magna cum laude*, in 2002 and her J.D. from New York Law School in 2005.

Jason Dominguez joins our general liability team under the supervision of Paul Endler, Jr. He most recently served as a judicial law clerk to the Hon. Yolanda Ciccone, A.J.S.C., in Somerset County Superior Court. Jason received his J.D. from Seton Hall Law School in 2016.

Alicia Langone joins our insurance coverage team under the supervision of Marc Dembling and Gina Stanziale. Prior to joining the firm, Alicia clerked in both the Somerset County Law Division and Chancery Division for the Hon. Yolanda Ciccone, A.J.S.C., the Hon. Thomas C. Miller, P.J.Cv., the Hon. Kevin M. Shanahan, J.S.C., and the Hon. Edward Coleman, J.S.C. Alicia obtained her B.A. degree from Rutgers University, *magna cum laude*, in 2010 and her J.D. from New York Law School, *cum laude*.

Olivia Licata also joins our insurance coverage team under the supervision of Marc Dembling and Gina Stanziale. Most recently, Olivia clerked for the Hon. Estela M. De La Cruz, J.S.C., in Bergen County Superior Court. She obtained her B.A. from Fordham University, *summa cum laude*, in 2013 and her J.D. degree from Seton Hall Law School in 2016.

James Mazewski joins our general liability team last fall under the supervision of Bill Bloom. James clerked for the Hon. Amy O'Connor of the New Jersey Appellate Division. James obtained a B.S. in 2010, *cum laude*, as well as his M.S. in 2012, *cum laude*, from Montclair State University. In 2016 he obtained his J.D., *cum laude*, from Rutgers Law School.

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.

THE TORT CLAIMS ACT - IMMUNITY

On February 21, 2018, the New Jersey Supreme Court issued Lee v. Brown, an important decision addressing qualified immunity under N.J.S.A. 59:3-3 and absolute immunity under N.J.S.A. 59:3-5 or 7, pursuant to the Tort Claims Act. A tragic fire broke out in a multi-unit home, claiming the lives of four residents and injuring several others. The plaintiffs alleged that both the City of Paterson and electrical inspector were at fault. The trial court held that the City was entitled to both absolute and qualified immunity and granted summary judgment. However, the trial court held that the inspector was only entitled to qualified immunity and that there existed a genuine issue of material fact as to whether he acted in good faith in failing to contact the appropriate official and secure an emergency power shut-off after inspecting the building and noting dangerously non-compliant electrical work. On reconsideration, the trial court vacated the summary judgment as to the City finding that both the inspector and the City were only entitled to qualified, not absolute, immunity. The Appellate Division affirmed the ruling, reasoning that qualified immunity was appropriate since the inspector was "enforcing" the law as opposed to "failing to enforce" the law.

A unanimous Supreme Court reversed, holding that the inspector was entitled to absolute immunity since the critical causative conduct was his failure to contact the appropriate official and secure an emergency power shut-off or to seek relief in court, not any affirmative action by him to enforce the law. As the City's liability was contingent on the inspector's liability, the City was also entitled to absolute immunity.

THE OPEN PUBLIC RECORDS ACT

In a matter handled by **Eric Harrison** and **Raina Pitts** of our firm, the Appellate Division published its long-awaited decision addressing the statewide practice of "The Innisfree Foundation" and other requestors under New Jersey's Open Public Records Act ("OPRA") demanding copies of student records, .e. special education settlement agreements, correspondence relating to the provision of special education, Harassment, Intimidation and Bullying reports and other evaluative records. L.R. and J.R. v. Camden City Public School District involved four consolidated cases in which school districts responded differently to such OPRA requests and the trial judges, thereafter, issued conflicting rulings regarding the school districts' responses and the accessibility of student records under OPRA.

The Appellate Division agreed with us that student records may not be redacted into "OPRA-ability" as public records to circumvent the privacy protections of the Family and Educational Rights and Privacy Act (FERPA) or the New Jersey Pupil Records Act ("NJPRA"). With respect to OPRA requests for student records, other than "bona fide researchers" and other qualifying entities as defined by the NJPRA, any requestors henceforth will be entitled to obtain records only if they obtain a court order based on a finding that a "wholesome public interest" or "a legitimate private interest" outweighs the District's legitimate interest in maintaining confidentiality. The Appellate Division further held that any records that are released should be redacted to the extent necessary to render the student unidentifiable, and that the parents of all students whose records fall within the scope of the request are entitled to three (3) days written notice and an opportunity to object. While the Appellate Division remanded the cases to the trial level for further proceedings to assess whether "The

Innisfree Foundation" qualifies as a bona fide researcher, the Foundation and its co-Plaintiff, along with amicus curiae, have petitioned the New Jersey Supreme Court in an effort to reverse the Appellate Division's decision. We have opposed the petition and will keep you updated as the cases progress.

INSURANCE LAW

In Air Master & Cooling, Inc. v. Selective Insurance Company of America, et al., the court addressed legal issues of property damage coverage under a Commercial General Liability insurance policy. The panel held a "continuous trigger" theory may be applied to third-party liability claims involving progressive damage to property caused by an insured's allegedly defective construction work; and (2) the "last pull" of that trigger occurs when the essential nature and scope of the property damage first becomes known, or when one would have sufficient reason to know of it.

In Keyko Gil v. Clara Maass Medical Center, the court examined clauses contained in insurance policies covering a hospital to determine whether the trial judge erred in rejecting plaintiffs' arguments that an allegedly negligent physician was also covered because he was the hospital's "employee" or a "leased worker," or because his limited liability company was "affiliated or associated" with the hospital. The court held that the policy language could not be plausibly interpreted to provide coverage to the physician or his limited liability company, and affirmed the summary judgment entered in favor of the insurers.

In Satec, Inc. v. The Hanover Insurance Group, Inc., the court held that plaintiff failed to demonstrate that its insurance agent was negligent by breaching a duty to procure, rather than just notify and recommend, flood insurance coverage. The court further held that plaintiff's expert did not provide objective support for the existence of a standard, but relied upon a standard that was personal, thus rendering his opinion a "net opinion."

In Mid-Century Insurance Co. v. Freeman, an unpublished decision, the court analyzed whether costs and expenses paid pursuant to an insured's Extended Medical Expense Coverage ("Med-Pay") are subject to the collateral source rule expressed in N.J.S.A. § 2A:15-97, and therefore not recoverable in a subsequent subrogation action. The Court held that Med-Pay payments are subject to the collateral source rule embodied in N.J.S.A. § 2A:15-97, and cannot be recovered by way of a subrogation action.

PERSONAL INJURY PROTECTION ("PIP")

In Hackensack Surgery Center v. Allstate Ins. Co., an unpublished decision, a non-party was involved in an automobile accident resulting in medical treatment from various providers. She was insured under a policy that provided personal injury protection (PIP) benefits. Appellant denied payment to respondent, as subrogee, based on its determination that the treatment rendered was not medically necessary but approved payment to another provider. One day prior, the arbitrator determined that the non-party's treatment was medically necessary and awarded respondent the full amount sought. The trial judge issued an order requiring appellant to pay respondent the remaining balance owed from the arbitration award. On appeal, the court affirmed holding respondent was entitled to the additional amount as its services were rendered first and the arbitration award stated that payment was due "at the time of the award".

In Haines v. Taft, et al., the court analyzed whether N.J.S.A. 39:6A-12 precludes the recovery of medical expenses above those collectible or paid under an insured's PIP provision in a standard automobile policy, including medical expenses exceeding any elected PIP option allowed in a standard policy pursuant to N.J.S.A. 39:6A-4.3(e). The court held it does not. The statutory language does not make medical expenses between the chosen limit and the statutory cap of 250,000.00 inadmissible. The court noted they are held to be an uncompensated economic loss that an injured party may seek to recover against a tortfeasor and as such, are admissible at trial.

PERSONAL INJURY

In Quiles v. Hector, an unpublished decision, defendant testified that he was responsible for snow removal on the premises, but that he did not begin snow removal until the next day if the snow stopped overnight. Plaintiff slipped and fell on a snow and ice covered portion of sidewalk, injuring her right hand and lower back. The trial court ruled that no duty of care was owed to plaintiff because it was still precipitating when plaintiff fell, noting local ordinances gave property owners 12 hours following a snowstorm to clear sidewalks. On appeal, the court affirmed on alternative grounds. The court noted that commercial landlords owed a duty to remove snow and ice from public sidewalks within a reasonable period of time, and that local snow and ice removal ordinances could be indications of what a reasonable period of time would be. However, the court further held that the reasonable period of time to act did not begin until after precipitation stops, and thus defendant's failure to clear snow and ice while it was still precipitating was not unreasonable

In Spataro v. Steakmaster, the Appellate Division, in an unpublished decision held that that injuries sustained at a driving range when one golfer accidentally hit another with the club while receiving instruction, was part and parcel of recreational activities. Therefore, the matter should not be decided on the standard of negligence, but one of recklessness. The Court was clear that the simple fact that the injury occurred on a driving range as opposed to a golf course is of no moment. The fact that it occurred during a practice session as opposed to an actual round of golf was equally irrelevant. However, the Court was clear that whether or not the defendant was reckless is a jury question, and very rarely should be decided on motion.

TORT CLAIMS ACT

In Edan Ben Elazar v. Marcietta Cleaners, Inc., the New Jersey Supreme Court held when a plaintiff is injured by a third party and has no reason to believe that a public entity is responsible, the discovery rule applies to toll the accrual date that triggers the notice-of-claim requirement.

In Twanda Jones v. Morey's Pier, Inc., the New Jersey Supreme Court dealt with whether or not a failure to timely serve a notice-of-claim on a public entity bars a defendant from making a cross-claim or third-party claim for contribution and common law indemnification against a public entity. The Court held when a defendant does not serve a timely notice of claim on a public entity, and is not granted leave to file a late notice of claim, the statute bars that defendant's cross-claim or third-party claim for contribution and common-law indemnification against the public entity.

PERSONAL INJURY – CHARITABLE IMMUNITY ACT

In Green v. Monmouth University, plaintiff fell on unsafe stairs while attending a music concert. The trial court granted summary judgment under the Charitable Immunity Act. On appeal, plaintiff conceded that defendant was a non-profit corporation organized exclusively for educational purposes, but argued that defendant failed to meet the third prong of the Act because it was not promoting educational objectives at the time of plaintiff's injury, nor was plaintiff a beneficiary of defendant's educational works. The court affirmed the grant of summary judgment, noting that providing concerts to the public was one of defendant's stated purposes. The court further noted that a non-profit corporation could provide educational experiences that were "recreational," and that these goals were served by the concert.

RECENT CASE RESULTS

Bill Bloom successfully obtained a no cause verdict in a slip and fall case. The 50-year-old plaintiff alleged a slip and fall on ice and claimed herniations in the neck and back, with treatment which included epidural injections, a medical branch block, and a radiofrequency ablation procedure. While there were no eyewitnesses to the incident, the plaintiff reported the incident soon after and took photos of the offending ice patch. However, the plaintiff had significant credibility issues resulting from statements made following a subsequent motor vehicle accident which occurred a year later, in which she repeatedly denied to her auto carrier and her treaters for the car accident any prior neck and back injuries. In light of the above, the jury rejected her testimony altogether, and returned a verdict of no cause on the issue of liability.

Marc Dembling obtained summary judgment dismissing the plaintiffs' case against the insurance carrier. Plaintiffs had made a first party claim, despite the insurance carrier paying the policy limit. Plaintiffs sought well over $160,000 in damages and alleged that a plumbing appliance breakdown caused an overflow of water, which is a covered loss under the policy. The argument was made that there was an "ambiguity" in the policy because of the insureds' reasonable expectation that a plumbing problem with water overflow would be covered. The Court rejected the plaintiff's argument, and granted summary judgment in favor of Defendant.

Paul Endler was able to secure a no cause of action while defending a counterclaim brought by defendant. Plaintiff had been sued on a counterclaim alleging a breach of contract arising from construction defects resulting in damages in excess of $1.3 million. Following a seven-day trial, the jury found that plaintiff had not breached the contract nor deviated from the construction plans and awarded no money to the counterclaimant.

Paul Endler successfully won a second jury trial in a suit brought by a plaintiff alleging injuries from a trip and fall. The jury found that the defendant was negligent and that the negligence was a proximate cause of the injury. However, the jury determined that the plaintiff had failed to establish that she sustained a substantial permanent injury as required under the Tort Claims Act.

Paul Endler and **Edward Dembling**, successfully obtained summary judgment on behalf of the defendant insured. Plaintiff, living in defendant's house for at least a year, fell down a flight of stairs going into the basement. Plaintiff claimed that the lack of railing going into the basement caused her to fall sustaining fractures to both elbows, which required open reduction and internal fixation on both arms. Paul and Ed argued that plaintiff, as a girlfriend living in the house, was a social guest and not a tenant in defendant's home.

Further, the railing, which had been missing for a year, was a patent defect of which plaintiff should have been aware. The Judge found that the defect alleged by the plaintiff was in fact a patent defect for which plaintiff should not be able to file suit. As to the allegation that the plaintiff was a tenant, the Judge found there may have been a question of fact, but the argument relative to the patent defect was clear and granted summary judgment in favor of the defendant.

Jim Foxen obtained summary judgment in a matter where plaintiff sustained significant injuries following a slip and fall in a vacant lot that abuts an insured commercial property in Passaic, New Jersey. The vacant lot was used by residents of the insured commercial property to park their cars free of charge. Our insured also owned that vacant lot through a different limited liability corporation. Summary judgment was obtained on behalf of the insured personally early on in litigation and on June 23, 2017 summary judgment was obtained for the insured Limited Liability Corporation despite attempts by plaintiff's counsel to pierce the corporate veil and to allege that defects on the insured's commercial property caused snow and ice to migrate to the vacant lot. Plaintiff had underwent four surgeries including the repair of a damaged ankle tendon, the repair of a torn meniscus, and a lumbar fusion. Plaintiff's demand to settle the matter was $475,000.00. The case arbitrated for $400,000.00. No money was ever offered to settle from the defense.

Ric Gallin successfully obtained summary judgment in favor of the insured. Plaintiff was working at a construction site when part of the steel framework collapsed, as it was improperly braced. Plaintiff was hit in the head with a column and suffered a fractured skull. Defendant had installed the foundations and anchor bolts for the columns. The Judge determined, as a matter of law, that the defendant's work had nothing do with the collapse.

Ric Gallin successfully obtained a significant six figure subrogation recovery on a fire loss. The insured purchased a house with a fireplace. The fireplace was improperly installed with a spark strip placed below combustibles instead of on top. Several years after construction there was a fire in the chimney chase, which also caused smoke and water damage throughout the house. Just before arbitration, Ric was able to obtain a settlement at 75% of ACV.

Ric Gallin and **Christian Baillie** obtained summary judgment in a first party claim against the defendant. The cause of loss was rain water getting into the basement through the foundation wall. The Court agreed with defendant's position that this loss fell unequivocally within the scope of the insurance policy's water intrusion exclusion. Therefore, the Court granted summary judgment in favor of the defendant.

Eric Harrison and **Boris Shapiro** obtained a favorable ruling following a lengthy special education hearing before the New Jersey Office of Administrative Law. The Administrative Law Judge credited the testimony of teachers and Child Study Team members to rule that the District offered an appropriate program to an autistic ninth grader and declined to award reimbursement for tuition to an out-of-district private school where her parents had placed her.

Steven Katzman successful obtained dismissal on behalf of his client in a large defamation case. Plaintiff was an elected school board member who sued the parents of a child at the school who allegedly made defamatory comments on social media shortly before the plaintiff ran for re-election. The first Complaint was filed in October of 2016 and pertained to school board issues in 2013. Thus, they were barred by the one year statute of

limitations for defamation. An Amended Complaint was filed in December of 2016 and pertained to statements made shortly before the November 2015 election. The plaintiff had to argue that the alleged defamatory statements in the Amended Complaint related back to the original Complaint in accordance with Rule 4:9-3. The Court agreed with Steven's argument that the defamatory statements in the Amended Complaint involved completely different subject matters than the original Complaint. The Court also agreed that the plaintiff could not bypass the one year statute of limitations by rebranding defamation and calling it malicious prosecution or intentional or negligent infliction of emotional distress.

Lori Brown Sternback and **Leslie Koch** were successful on their motion for summary judgment as the Court determined the defendants were entitled to immunity under the Tort Claims Act. The minor plaintiff who was a high school student, was injured while dancing in the locker room with other members of the girls' basketball team. It was alleged that another member of the basketball team, rolled a discus toward the plaintiff while she was on the floor causing a laceration requiring surgical repair. The Court agreed with defendants and found that a discus inside the locker room was not necessarily a dangerous condition and rolling that discus indoors was not reasonably foreseeable. The Court ultimately stated no rational jury could find that the coaches remaining just outside of the locker room within earshot of any potential problem is unreasonable.

Gerald Kaplan obtained Summary Judgment in a case where there had been a settlement offer of $80,000.00. Plaintiff fell on ice and snow on sidewalk in front of Port Authority in NY. NY has "storm in progress" doctrine which does not require removal of snow and ice during the storm. Port Authority also had contractor for all maintenance including snow removal. When plaintiff fell his hand felt ice under the snow and plaintiff argued the ice was there from prior snowfall two or three days prior based upon opinion of Michael Natoli, P.E. We argued that Natoli is an engineer and not a weather expert and there were no facts to substantiate theory that ice was there from before. The Court agreed and granted our motion.

Alicia Langone successfully obtained summary judgment in a first party property damage insurance dispute. Plaintiffs reported a claim to their insurance company, indicating that plaintiff sustained water damage to their property due to sewage overflow from the bathroom. Alicia argued the policy language was clear that coverage is excluded in the event of water that backs up or overflows from a sewer, drain or sump pump regardless of any other cause or event that contributes concurrently or in any sequence of the loss. The Judge agreed and granted summary judgment in favor of the defendant.

Vivian Lekkas and **Eric Harrison** obtained summary judgment in favor of a local school district. A special education teacher alleged that she was constructively discharged from her employment when she took a disability retirement. She alleged that she was forced to retire on account of the retaliation she endured after blowing the whistle on violations of special education laws. The Court originally found there was an issue of material fact as to the reason for plaintiff's retirement and denied summary judgment. Vivian and Eric filed a motion for reconsideration advising the Court that it failed to overlook our argument that Plaintiff did not suffer any adverse employment action under the Conscientious Employee Protection Act because she was offered a contract to work the following school year as a special education teacher, albeit for a different sub-class of special education students. The Court agreed with our arguments and overturned itself granting summary judgment to the district. The case is currently on appeal.

Richard A. Nelke successfully obtained summary judgment regarding a homeowner's claim. The homeowners claimed the weight of ice and snow on the roof of the subject building caused a parapet lining the roof to separate from the building. The Court found that the insureds failed to establish that the damage resulted from a sudden and accidental event, especially in light of the evidence Rich successfully demonstrated that the parapet wall was in the same condition prior to the subject loss.

Richard Nelke and **Christian Baillie** successfully defended an appeal of an order granting summary judgment in a first party insurance coverage dispute. Plaintiff's home was damaged during a windstorm and a claim was submitted to his homeowner's insurance carrier. A settlement was reached and plaintiff was paid the actual cash value. Thereafter, plaintiff hired a contractor to replace the roof at a cost which exceeded the actual cash value awarded. Plaintiff argued that the policy required the carrier to pay the difference, and further insisted that he was entitled to depreciation attributable to the roof. Rich and Christian moved for summary judgment, which was granted. Plaintiff appealed. On appeal, the Appellate Division affirmed. Significantly, the Appellate Division held, on an issue of first impression in New Jersey, that insureds are not entitled to piecemeal release of recoverable depreciation, and can only make a claim for the recoverable depreciation once all repairs within the scope of the claim have been made and proofs of payment exceeding the total actual cash value payment are provided. This was an important victory for the insurance industry; the Appellate Division's unequivocal ruling in Defendant's favor should resolve this long-standing debate regarding recoverable depreciation.

Brent Pohlman was successful in having the plaintiffs' Consumer Fraud Act Claim ("CFA") dismissed for failure to state a claim. Plaintiffs were former students of a college who instituted a two-count complaint alleging a violation of the CFA and breach of contract. Plaintiffs claimed they were unable to sit for a licensing exam following graduation. The Court agreed with Brent that the CFA does not provide a cause of action against a public entity and dismissed the claim.

Matthew Rachmiel successfully obtained summary judgment in a motor vehicle property damage subrogation matter. The client rented a van for a friend who either permitted another person to drive the van or another person stole the key to the van, drove the van, and caused an accident. Plaintiff sued to recover the money it paid to have its insured vehicle repaired. Matthew successfully obtained summary judgment on a lack of agency basis, asserting that the client did not give permission to the driver who caused the accident to drive the van, and the driver was not driving the van for any purpose related to the client when the accident happened.

Amanda Sawyer obtained summary judgment in a case in which the forty-nine-year-old plaintiff was injured as he attempted to stop a shoplifting in progress. The insured driver struck the pedestrian plaintiff with his vehicle as he attempted to flee the scene. Plaintiff alleged exacerbation of a prior lower back injury that required extensive treatment, including a lumbar laminotomy. The gross arbitration award was $300,000. However, the motion judge agreed that the verbal threshold applied and that plaintiff failed to demonstrate by credible, objective evidence that he suffered a permanent injury caused by the incident at issue. The motion judge further agreed that the diagnosis of plaintiff's medical experts was not based upon a comparative analysis of plaintiff's residuals prior to the accident with the injuries suffered in the accident at issue, and that the doctors' reliance on plaintiff's subjective representations did not constitute an adequate comparative analysis.

Ed Thornton and **Jason Dominguez** were successful on their motion for summary judgment brought on behalf of a local hospital involving a wrongful death action. The opposition argued that the treating doctor and

residents were the agents or apparent agents of the hospital, but the Court agreed with our position that proofs of same were lacking, especially in light of the defendant doctor having his office off-site and the residents not being employees.

Steven Unterburger obtained dismissal of a plaintiff's complaint in a property damage action. The complaint alleged that a large branch located on the insured's property fell onto a neighboring property causing damage to plaintiff's vehicle. Following plaintiff's presentation of proofs at trial, Mr. Unterburger made a motion for involuntary dismissal, arguing that plaintiff had failed to prove negligence. The plaintiff is required to prove either that the defendant was negligent or was conducting some sort of unreasonable activity that caused the tree to fall. The court agreed that the plaintiff's proofs were insufficient to prove negligence on the part of the insured and granted the motion dismissing her action.

Levi Updyke reached a $370,000 settlement in a subrogation matter whereby a gas company's technician, while repairing the insured's furnace, bypassed the high-limit switch resulting in a fire which caused extensive damage to the insured's home and personal property. The case further involved forensic testing which included the use of CAT scans to help retrace internal charred and damaged circuit wiring which ultimately aided in the successful resolution of the matter.