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

Fall 2018

CASE UPDATE

Methfessel & Werbel is pleased to present the Fall 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

M&W Partner Gina Stanziale was asked to testify before the New Jersey Commerce Committee on Senate Bill 2144, titled "New Jersey Insurance Fair Conduct Act." The Bill would permit a claimant to file a civil action against an insurer for 1) unreasonable delay or unreasonable denial of a claim for payment of benefits under a policy; or 2) any act or omission in violation of the Unfair Claims Settlement Practices Act, regardless of whether such act or omission demonstrates a general business practice prohibited by the UCSPA. If enacted, this legislation would not only create a new cause of action for consumers to assert against insurance carriers; it would allow plaintiffs to seek treble damages, attorney fees and costs. Gina and Methfessel & Werbel mobilized with the insurance industry in opposition to the passage of this potentially dangerous bill.

M&W Partner Bill Bloom testified before the New Jersey Commerce Committee on Senate Bill 2432. The proposed bill would erode New Jersey's system of "no fault" auto insurance by allowing plaintiffs who select PIP limits below $250,000 to recover from tortfeasors any medical bills exceeding their chosen PIP limits.

In May 2018 the New Jersey Law Journal published "Appellate Division Clarifies a Liability Insurer's Right to Invoke Policy Defenses," authored by Nabila Saeed. The article analyzes implications of the recently published decision in Northfield Insurance Co. v. Mt. Hawley Insurance Co., 454 N.J. Super. 135 (App. Div. 2018), which rejected the assertion that prejudice to the insured is presumed as a matter of law when an insurer provides a courtesy defense under a clear reservation of rights.

On October 17, 2018, Matthew Werbel and Stephen Katzman discussed recent case law and legislation addressing insurance fraud at the New Jersey Special Investigators Association Convention in Atlantic City.

On October 8, 2018, Eric Harrison presented at the New Jersey Institute of Continuing Legal Education's Annual Tort Law Conference regarding recent developments under the New Jersey Tort Claims Act. Eric and Brent Pohlman also discussed recent litigation trends at ICLE's Employment Law update on October 19, 2018.

On October 30, 2018 Jared Schure spoke at ICLE's "Hot Topics in Special Education" seminar. Jared addressed recent changes in the laws governing the use of restraint and seclusion and mental health screenings.

METHFESSEL & WERBEL WELCOMES NEW ATTORNEYS

Natalie Donis joins our general liability team under the supervision of Bill Bloom. Natalie clerked for the Hon. M. Christine Allen-Jackson, J.S.C. of the Somerset County Superior Court. She obtained a B.A. in 2012, *cum laude,* from the University of Central Florida. In 2016 Natalie obtained her J.D. from Vermont Law School.

David Incle, Jr. joins our general liability team under the direction of Paul Endler. David clerked for the Hon. Dennis R. O'Brien, J.S.C. of the Monmouth County Superior Court. He obtained a B.A. from Marist College in 2014. In 2017 David obtained her J.D. from Rutgers University School of Law.

Scott Ketterer joins our employment/civil rights team under the supervision of Eric Harrison. Scott clerked for the Hon. Anthony M. Massi, J.S.C. in Mercer County Superior Court. He obtained a B.A. in 2011, *magna cum laude*, from Rider University. In 2017 Scott obtained his J.D. from Widener University – Delaware Law School.

Adam N. Levitsky joins our insurance coverage team under the direction of Stephen Katzman. Adam clerked for the Hon. Benjamin C. Telsey, A.J.S.C. of the Gloucester, Cumberland, and Salem County Superior Courts. He obtained a B.A in 2013 from Boston University. In 2017 Adam obtained his J.D. from Boston College Law School.

Kajal J. Patel joins our employment/civil rights team under the supervision of Eric Harrison. Kajal clerked for the Hon. Marie P. Simonelli, P.J.A.D. of the New Jersey Appellate Division. She obtained a B.A. in 2014, *magna cum laude,* from Rutgers University. In 2017 Kajal obtained her J.D., *cum laude*, from the University Of Illinois College Of Law.

Tiffany D. Tagarelli joins our employment/civil rights team under the supervision of Eric Harrison. Tiffany clerked for the Hon. Julie M. Marino, J.S.C. of Hunterdon County Superior Court and the Hon. Kathleen A. Sheedy, P.J.F.P. of Monmouth County Superior Court. She obtained a B.S. in 2009, *cum laude*, from Seton Hall University W. Paul Stillman School of Business. In 2016 Tiffany obtained her J.D. from Seton Hall University School of Law.

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.

ARBITRATION AGREEMENTS

In Roman v. Bergen Logistics, LLC, No. A-5388-16T3 (N.J. Super. Ct. App. Div. Aug. 23, 2018), the Appellate Division, in an unpublished decision, upheld an arbitration clause in a contract requiring a woman alleging sexual harassment and hostile working conditions, but found that a waiver of punitive damages was void as against public policy. The plaintiff was terminated from her position in human resources after repeatedly complaining that her supervisor, the director of human resources, was sexually harassing her. She filed suit, alleging sexual harassment, hostile work environment, and retaliation. The trial court dismissed the complaint based on a mandatory arbitration clause in her employment contract. The contract also purported to waive plaintiff's ability to seek punitive damages pursuant to the New Jersey Law Against Discrimination. The Appellate Division affirmed the trial court's dismissal of the complaint but modified the ruling by holding that plaintiff was entitled to seek punitive damages in arbitration. The court found that while an employee could contractually agree to submit LAD claims to arbitration, a waiver of punitive damages is unenforceable because it violates the public policy of the LAD to provide substantive remedies to victims of discrimination. The court also found that the punitive damages waiver "eviscerate[d] an essential element of the LAD's purpose—deterrence and punishment of the most egregious discriminatory conduct."

PUBLIC ENTITY LITIGATION – RICE NOTICES

In Kean Federation of Teachers v. Morell, 233 N.J. 566 (2018), the New Jersey Supreme Court reversed an unworkable published decision of the Appellate Division and refined the "Rice notice" doctrine, which requires that public employees receive reasonable notice before a public entity takes adverse employment action based on discussions to be held in closed session. The Court also addressed the requirements for the release of minute meetings and the appropriate remedy if the Open Public Meetings Act ("OPMA") is violated.

In Morell, two employees of Kean University and their union filed an action in lieu of prerogative writs, complaining that Kean, its Board of Directors, and Board Chairperson violated the OPMA by failed to issue Rice notices prior to a board meeting and for not making meeting minutes "promptly available." The trial court held that the Board was not required to issue Rice notices, but that it had violated the "promptly available" requirement of the statute. The trial court issued a permanent injunction requiring the Board to make minutes available to the public within 45 days.

On appeal, the Appellate Division affirmed the determination that the Board did not make the meeting minutes "promptly available." However, the court reversed and vacated the permanent injunction. As to the Rice notice issue, the Appellate Division held that Rice notices are required "in advance of any meeting at which a personnel decision may occur." The defense bar perceived this expansive holding as cumbersome, unworkable, and not necessary to further the due process aims of Rice.

Thankfully the Supreme Court agreed, holding that there was no obligation to send Rice notices whenever "a public entity already intends to take public action on a personnel matter implicating employees whose rights could be adversely affected by that action." A Rice notice must be sent only when the public entity is planning

to discuss an employee in closed session. As to the release of meeting minutes, the Court agreed that the delay at hand was unreasonable, modifying the Appellate Division's holding to require the Board to set a regular meeting schedule that would allow for the approval of minutes within a forty-five day time period.

TORT CLAIMS ACT IMMUNITIES – SCHOOL SECURITY

On October 5, 2018, the Appellate Division issued L.E. v. Plainfield Pub. Sch. Dist., No. A-3638-16T1 (N.J. Super. Ct. App. Div. Oct. 5, 2018), in which it addressed whether two provisions of the Tort Claims Act, N.J.S.A. 59:5-4, governing the failure to provide police protection services, and N.J.S.A. 59:3-5, governing the failure to enforce laws, shield defendants from liability for the negligent supervision of students preceding an assault. In this case, Plaintiffs asserted that L.E. suffered psychological injury as a result of a sexual assault by two male students on school grounds. The Court held that plaintiffs' claim flowed from the independent duty of a school and its staff to exercise reasonable care in supervising children entrusted to them. As such, neither the police protection immunity nor the law enforcement immunity applied.

THIRD PARTY COVERAGE – COVERAGE DECLINATION - ESTOPPEL

On March 28, 2018, the Appellate Division ruled in Northfield Insurance Co., v. Mt. Hawley Insurance Co., 454 N.J. Super. 135 (App. Div. 2018), that coverage will not ensue through estoppel when an insurer reserves its right to disclaim coverage while providing a courtesy defense.

Defendant Empress Properties, Inc. hired defendant CDA Roofing Consultants to perform roof installation. Following the installation, Superstorm Sandy caused damage to the roof, which caused further interior water damage. CDA was insured by plaintiff; however, CDA failed to notify plaintiff of the claims made by Empress and its insurer, defendant Mt. Hawley. Instead, Mt. Hawley's counsel contacted plaintiff directly. Plaintiff denied any claim after concluding that roof damage was caused by weather conditions and not by CDA's negligence.

Empress filed suit against CDA, claiming that cracks developed in the ceiling before Sandy struck, which led to the water damage caused by CDA's or its subcontractor's negligence. Plaintiff advised CDA that it was disclaiming any indemnification based on policy exclusions and CDA's failure to timely notify plaintiff; however, plaintiff provided CDA with a courtesy defense.

Plaintiff then filed an action, seeking a declaration that it was not obligated to defend or indemnify CDA. Empress and Mt. Hawley moved for summary judgment, arguing that Northfield was estopped from denying coverage. The trial court granted the motion, ruling that Northfield failed to seek CDA's consent to control the defense. On appeal, Northfield argued that estoppel was inapplicable because it applied to reservations of rights rather than denials of coverage, and that Empress and Mt. Hawley, who were not its insured, lacked standing to assert estoppel. The Appellate Division reversed, ruling that Northfield properly disclaimed coverage pursuant to Eggleston because there was no prejudice to CDA. The Court also noted in dicta that Mt. Hawley may have lacked standing to assert estoppel.

EXPERT TESTIMONY

On August 1, 2018, the New Jersey Supreme Court issued In re: Accutane Litigation, 234 N.J. 340 (2018), a landmark decision aligning the New Jersey standard for admission of expert testimony with the federal Daubert standard and incorporating the Daubert factors as guidelines for civil cases.

The case involved alleged side effects of Accutane, a prescription acne medication. The trial court barred testimony by the plaintiffs' experts, a statistician and a gastroenterologist who said Accutane was linked to Crohn's disease. The trial court took issue with the experts' methodology, pointing to specific internal inconsistencies in their analysis and highlighting their failure to publish that analysis outside the courtroom and subject their approach to peer review. The Appellate Division reversed and remanded. The New Jersey Supreme Court granted certification to address the appropriate standard for assessing the admissibility of expert testimony.

Justice LaVecchia, writing for a unanimous Court, expressly reconciled the New Jersey standard with the federal Daubert standard and incorporated the Daubert factors for use by trial courts. The Court found that carefully evaluating expert testimony and excluding testimony based on unreliable methodology "are not credibility determinations that are the province of the jury, but rather legal determinations about the reliability of the expert's methodology," and part of the trial court's responsibility for "advancing the truth-seeking function of our system of justice." The Court specifically recognized the danger of juries being exposed to unsound science "through the compelling voice of an expert." In the absence of a strong gatekeeper, the Court reasoned, there is a "substantial danger" that jurors would "accord excessive weight to unreliable expert testimony… precisely because the evidence is labeled 'scientific' and 'expert.'"

The Supreme Court also reaffirmed that the abuse of discretion standard must be applied by the Appellate Division to determine whether a trial court has properly admitted or excluded expert scientific testimony in a civil case. While the Appellate Division had held that the reviewing court owes "somewhat less deference to a trial court's determination" regarding expert testimony, the Supreme Court rejected this assertion, holding that a "pure" abuse of discretion standard applies and that the trial court did not abuse its discretion in barring the opinion of plaintiff's experts.

HIGH-LOW AGREEMENTS

In Serico v. Rothberg, 234 N.J. 168 (2018), the New Jersey Supreme Court held that parties who enter into a high-low agreement may not later seek additional counsel fees and litigation costs if the agreement is silent on the issue. In the trial court, the parties entered into a high-low agreement of $300,000/$1,000,000 on the plaintiff's medical malpractice claims. Prior to that, plaintiff filed an offer of judgment for $750,000, which defendant rejected. The jury returned a verdict for $6,000,000, which the trial court molded to $1,000,000. Plaintiff filed a post-verdict motion for litigation expenses, including attorney's fees, pursuant to Rule 4:58-2 (as the molded verdict was more than 120% of the offer of judgment). The trial court denied the motion and the Appellate Division affirmed. On certification, the Supreme Court affirmed the Appellate Division's decision, agreeing that the express intent of the parties in the high-low agreement was to limit the maximum recovery to $1,000,000. As the agreement superseded the effect of Rule 4:58, any right to fees or litigation expenses would have to be incorporated within the high-low agreement to be enforceable.

AUTOMOBILE INSURANCE – UNDERINSURED MOTORIST COVERAGE - LONGWORTH

On April 11, 2018, the Supreme Court ruled in Ferrante v. New Jersey Manufactures Insurance Group, 232 N.J. 460 (2018), that failure to provide Longworth notice to a UIM carrier before settling with a tortfeasor will forfeit UM coverage, even in the absence of prejudice to the carrier.

Plaintiff was involved in an automobile accident where the other driver was at fault. Without informing his insurer, plaintiff filed suit against the tortfeasor. Plaintiff participated in mandatory arbitration which set his damages at $90,000.00. Again, without informing the UIM insurer or allowing it to exercise subrogation rights, plaintiff rejected the award and sought a trial de novo, refusing a $50,000.00 settlement offer. Plaintiff entered into a high-low agreement without notifying the insurer and ultimately received a judgment of $100,000.00,

Following trial against the tortfeasor, plaintiff notified defendant of the accident for the first time, seeking UIM benefits. Plaintiff represented that the tortfeasor was willing to settle for $100,000.00, failing to mention the arbitration, high-low agreement, or jury verdict. The carrier permitted plaintiff to accept the "offer" and proceed to UIM arbitration. During discovery, plaintiff finally disclosed his dealings with the tortfeasor. The trial court granted defendant's motion to dismiss for plaintiff's failure to notify defendant of the underlying proceedings.

The Appellate Division reversed, with the majority holding that the trial court failed to consider whether defendant was prejudiced by the lack of notice. The dissent argued that plaintiff's failure to timely notify defendant caused it to "irretrievably" lose its subrogation rights. On appeal, the Supreme Court reversed the Appellate Division and held that prejudice to the UIM insurer was not relevant where it had no opportunity to exercise subrogation due to plaintiff's clear violation of the policy.

PROPERTY INSURANCE – FRAUD - INDEMNITY

In RSI Bank v. Providence Mutual Fire Insurance Company, 234 N.J. 459 (2018), a case argued before the New Jersey Supreme Court by M&W's Marc Dembling, the Court held that restitution and indemnity conditions of admission to a Pretrial Intervention Program are not admissible for any purpose in any subsequent civil or criminal proceeding against the applicant. In this case, Marc obtained a judgment against the named insured on account of funds paid to an innocent mortgagee following what was believed to be intentional destruction of the insured property in a fire. The Supreme Court ruled that the insured alleged arsonist's agreement to indemnify third parties through PTI would not automatically entitle the defrauded insurer to a judgment; the carrier would need to pursue judgment on the basis of common law indemnity.

LIABILITY INSURANCE – DUTY TO DEFEND – TOXIC TORTS

In Wear v. Selective Ins. Co., 455 N.J. Super. 440 (App. Div. 2018), the Appellate Division held that the determination that the defendant liability insurer owed a duty to defend its insured was premature without a review of the Complaint. Plaintiff worked in a building owned by Woodbury Medical Center Associates. Plaintiff claimed she suffered injuries from exposure to toxic conditions in the building, including mold and filer fragments from the HVAC system. Defendant had issued a commercial umbrella and business owner's insurance policy to Woodbury, which included liability for any bodily injury. However, this coverage included a fungi or bacteria exclusion. Selective denied coverage based on the exclusion in the policy. It did not issue a reservation of rights letter, as it contended that the anti-concurrent/anti-sequential language in the exclusion precluded coverage even if other causes contributed to plaintiff's injury.

Woodbury filed a declaratory judgment action and the trial court granted partial summary judgment to Woodbury, ordering Selective to reimburse Woodbury's defense costs. Plaintiff's claim against Woodbury proceeded to arbitration, which rendered an award in her favor for "workplace exposure to . . . mold." Plaintiff then intervened in Woodbury's declaratory judgment action, arguing that Selective was obligated to pay the arbitration award. The trial court declined to order Selective to pay the award. Plaintiff appealed, and defendant cross-appealed the order obligating it to provide defense.

On appeal, the Appellate Division held that Selective should not have been obligated to provide a defense because the anti-concurrent /anti-sequential language in the exclusion applied to loss arising in whole or in party out of mold exposure.

NEGLIGENCE – APPORTIONMENT TO NON-PARTIES

In April 2018, the Supreme Court, in Krzykalski v. Tindall, 232 N.J. 525 (2018), published an important decision regarding apportionment of fault to "John Doe" defendants. In Krzykalski, the plaintiff appealed from the Appellate Division's order affirming the jury verdict, finding defendant and a John Doe defendant negligent for a motor vehicle accident.

The defendant's car was behind the plaintiff's vehicle with both making left turns, when another vehicle to the right of both cars unexpectedly cut off the left-turn lane. Although plaintiff was able to stop his vehicle, defendant rear-ended plaintiff's vehicle. Plaintiff suffered serious injuries and filed an uninsured motorist claim with his insurer. Plaintiff also sued defendant and the driver of the other vehicle as a John Doe. Defendant asserted third-party negligence as a defense and cross-claimed for indemnity and contribution from any co-defendants. At trial, the court included John Doe on the verdict sheet over plaintiff's objection and instructed the jury to apportion fault between defendant and John Doe, if they found both negligent. The jury returned a verdict finding defendant three percent negligent and John Doe 97 percent negligent.

The Appellate Division affirmed, ruling that an alleged tortfeasor need not be an identified party for his or her negligence to be determined by the jury. The Court ruled that the jury in this case could apportion fault between defendant and John Doe, because the parties had acknowledged John Doe's role in the accident, plaintiff's insurer was aware of the litigation, and plaintiff had notice that defendant was asserting that John Doe caused the accident.

NEGLIGENCE – ONGOING STORMS

In Hill v. St. Barnabas Med. Ctr., No. A-0148-17T3 (N.J. Super. Ct. App. Div. July 16, 2018), the Appellate Division, in an unpublished decision, held that a commercial landowner did not have a duty to clear snow or ice from a walkway on its property while a snowstorm was ongoing. Plaintiff slipped on a patch of snow and ice on a crosswalk, outside the entrance of defendants' facility, suffering personal injuries. Defendants served an expert report detailing their snow and ice removal procedures, which included the use of 30 laborers to clear snow and ice and apply salt. The trial court granted defendants' summary judgment motion, finding that defendants breached no duty owed to plaintiff. The trial court found that it would be unreasonable to expect defendants to prevent accumulation of snow that continued to fall in increasing amounts.

On appeal, plaintiff argued that genuine issues of material fact existed as to whether defendants breached their duty of care. The Appellate Division rejected plaintiff's arguments and affirmed the grant of summary judgment. The Court noted that both the snowstorm and defendants' cleanup efforts were ongoing when plaintiff slipped and fell. The Court, citing to Bodine v. Goerke Co., 102 N.J.L. 642 (E. & A. 1926), reiterated that "[a] property owner has a reasonable time to act after [a] storm ends in which to clear accumulated snow and ice." Significantly, the Court found that "defendants were not obligated to remove ice and snow until after the storm ended [and thus] liability could not be imposed upon them in this matter."

NEGLIGENCE – AUTOMOBILE

In Taing v. Braisted, No. ATL-L-2689-15 (N.J. Super. Ct. Law Div. Oct. 23, 2017), the Law Division affirmed the trial court's decision precluding defense counsel from cross-examining the plaintiff about whether air bags deployed during an accident without expert testimony to support an inference that the lack of air bag deployment was indicative of a low impact collision. Defendant argued that the issue of whether the airbags deployed was analogous to the use of photographs in an automobile negligence case as permitted by Brenman v. Demello, 191 N.J. 18 (2006), and thus the jury should be able to factor whether the airbag deployed in their evaluation of the force of the impact. The trial court disagreed and precluded this line of questioning. The Appellate Division affirmed, finding that these type of questions could potentially misled a jury in the absence of expert testimony since the jury would lack an understanding about certain variables (i.e. the amount of force necessary to trigger the specific airbag in the subject vehicle, their functionality, and the location of the airbag sensors) that would provide an explanation as to why or why not an airbag failed to activate in the subject accident.

In Abdurraheem v. Koch, No. ATL-L-2190-16 (N.J. Super. Ct. Law Div. Mar. 19, 2018), a Law Division Judge in Atlantic County granted the plaintiff's request for a modified version of Model Jury Charge 5.34 "Photographic Evidence in Motor Vehicle Accidents." Neither party introduced any photographic evidence of the damage of the vehicles at trial; however, there was conflicting testimony regarding the scope of the damage to the subject vehicles. The court found that regardless of whether the evidence of vehicle damage was in the form of testimony or photographs, the charge (as modified) was appropriate because it would help the jury in evaluating the conflicting testimony as to the damage to the vehicles and its causal relationship to the alleged injuries.

QUALIFIED IMMUNITY

In Radiation Data, Inc. v. New Jersey Dept. of Envt'l Prot., No. A-1777-17T3 (N.J. Super. Ct. App. Div. Nov. 2 2018), the Appellate Division reversed the trial court's decision and remanded for further proceedings, ruling that the defendants were entitled to qualified immunity as to plaintiff's claims asserting violations of procedural and substantive due process, violation of the NJLAD, and tortious interference with prospective economic advantage. The court found that the NJDEP did not violate "clearly established" equal protection and due process rights by pursuing a regulatory enforcement action against plaintiff and by directing that communications between plaintiff and the agency be channeled through their respective attorneys while contentious administrative litigation were ongoing. Accordingly, the court held that the defendants were entitled to qualified immunity as to plaintiff's claims thereby protecting the agency (not only individual employees) from such claims.

PIP ARBITRATION

Michael Eatroff of Methfessel & Werbel's first party coverage team recently obtained a favorable ruling from the Appellate Division in Personal Service Ins. Co. v. Relievus, 455 N.J. Super. 508 (App. Div. 2018). The court clarified the options available to a party aggrieved by an erroneous arbitration ruling. Significantly, the court held that a party need not choose between an internal administrative appeal and an appeal to the Superior Court. Rather, a party may pursue an internal appeal and, if dissatisfied with that result, may then appeal to Superior Court within 45 days of the internal appeal decision.

In this case, Personal Service Insurance Company (PSIC) terminated benefits to its insured on the basis that she failed to attend an independent medical examination. The insured assigned her rights to her medical provider, Relievus. Relievus filed a demand for arbitration with Forthright and received a favorable DRP award. PSIC filed an internal appeal before a three-member DRP panel, pursuant to Forthright's internal policies, rather than filing a summary action with the court to vacate the initial award. The panel confirmed the initial award, and thereafter PSIC sought a summary action to vacate both the initial DRP award and the panel's decision. The trial court dismissed the action, holding that PCIC's suit was untimely because it did not file the action within 45 days of the initial DRP award, under N.J.S.A. § 2A:23A-13(a).

Mike appealed and the Appellate Division reversed. The Appellate Division disagreed with the trial court's ruling, finding that the internal and Superior Court appeals could be made consecutively as a "two-step process." The panel agreed with Mike's argument that affirming the trial court's decision would result in an incongruous result—one in which the appeal of the initial DRP award was untimely, but the appeal of the DRP panel's decision was timely under the statute. The intent of N.J.S.A. § 2A:23A13(a) and N.J.A.C. § 11:3-5.6(g) was to encourage parties to take advantage of the internal appeal process without forfeiting the right to seek Superior Court review thereafter.

RECENT CASE RESULTS

Christian Baillie successfully obtained dismissal of a Complaint for lack of personal jurisdiction. The client, a New Jersey auto dealership, loaned a New Jersey-registered vehicle to a customer who resided in New Jersey. The customer was involved in a motor vehicle accident causing injury in New York State. The plaintiff filed suit in New York, naming the driver/customer and the dealership. Christian Baillie moved to dismiss the Complaint based on a lack of sufficient contacts with New York. The court fully agreed.

Stephen Katzman and Christian Baillie obtained dismissal of a Complaint with prejudice for lack of personal jurisdiction and on *forum non conveniens* grounds. The plaintiffs, New York residents at the time, purchased a vehicle from a New York dealership (the firm's client). The vehicle had been purchased as a "lemon buyback" in a New Jersey auction. Plaintiffs later moved to New Jersey. Plaintiffs alleged that a document acknowledging that the vehicle was a "lemon," which was purportedly signed by them, was a forgery. They filed suit in New Jersey, alleging consumer fraud. Stephen and Christian filed a motion to dismiss, arguing that the matter did not belong in a New Jersey court on both personal jurisdiction and *forum non conveniens* grounds. The court granted the motion and fully agreed that there were insufficient contacts with New Jersey to bring the matter here. The court found that the matter was, at its core, a New York consumer fraud claim (known as unfair trade practices under New York law), which properly belonged in a New York court.

Paul Endler and Jason Dominguez obtained summary judgment in a case where it was alleged that a tenant had tripped over some construction debris left near the curb of the house, which she rented from defendants. Plaintiff argued that the defendants were on constructive notice of the fact that general construction work was ongoing at the property. However, defendants were able to successfully establish a timeline that showed a clean curbside only ten hours prior to plaintiff's fall. As there was no work being performed in that time period, the court agreed that there could be no way that defendants would be on notice of a potential hazard to the plaintiff.

Jim Foxen and Steve Unterburger obtained summary judgment in a matter where plaintiff sustained significant injuries following a slip and fall in a commercial parking lot. The insured was a commercial tenant in a multi-tenant facility. Co-defendant was the owner of the shopping center. Plaintiff was a patron of the insured's store. Under the lease agreement, co-defendant retained control and maintenance responsibility of the parking lot. Summary judgment was obtained on behalf of the insured based on the New Jersey Appellate Division case, Kandrac, and the Federal Court case of Holmes. Plaintiff had suffered a fractured hip requiring open reduction and internal fixation, leaving him with a significant limp and a one inch deviation between the length of his legs. Plaintiff's demand to settle the matter was $450,000.00. No money was ever offered to settle on behalf of the insured.

Gerald Kaplan and Jason Dominguez successfully obtained summary judgment in an action where plaintiff was significantly injured after tripping on a ramp after exiting a store. Defendant moved for summary judgment based upon the fact that defendant had no contractual or common law duty to maintain the ramp. Plaintiff and co-defendants (property owner and management company) opposed summary judgment, in part, based upon Nielsen v. Wal-Mart, which held that a commercial tenant of a multi-tenant shopping complex may be liable for accidents occurring on common areas of the property even absent a contractual obligation to maintain those common areas. Ultimately, the court agreed with defendants and held, absent a contractual obligation to do so, defendant had no duty to maintain the ramp. As such, the court found summary judgment was proper.

Christian Baillie successfully obtained summary judgment in a "lemon law" matter. The plaintiff purchased a vehicle from defendant's predecessor dealership. The asset purchase agreement explicitly stated that defendant was not assuming the predecessor's liabilities (with limited exceptions not relevant to the case). Plaintiff filed suit against both the predecessor and defendant claiming that the vehicle was a "lemon." Christian moved for summary judgment based on the non-assumption of lability provision in the asset purchase agreement and the case law in New York finding such provisions enforceable. The court fully agreed with Christian's position and dismissed the Complaint with prejudice as against defendant.

Gerald Kaplan and Steven Unterburger successfully obtained summary judgment in a matter involving a storm in progress, where plaintiff sustained serious injuries as a result of a fall on snow and ice. The court rejected the opinion of plaintiff's expert and found that there is no liability on the part of the condominium association or snow removal contractor since the storm was in progress.

Richard Nelke, Alicia Langone, and Christian Baillie successfully obtained summary judgment based on non-cooperation of the insured in a first party claim investigation. Plaintiff filed a claim with his homeowner's carrier, alleging that sports memorabilia mysteriously disappeared from his home. As part of its investigation, the carrier requested the Examination Under Oath of its insured. However, the insured did not appear for the continuation of his EUO, did not produce requested documentation, and did not produce an executed Proof of Loss. The claim was denied due to the insured's non-cooperation. The insured responded by filing suit alleging

breach of contract and bad faith. Rich filed for summary judgment based on the insured's violation of the cooperation clauses in the policy, arguing that same forfeited the insured's claim. The court fully agreed, finding that it was undisputed that the insured's cooperation was requested, required under the policy, and not provided, which forfeited coverage.

Eric Harrison obtained summary judgment in a $1.8 million declaratory judgment action based on an insured's material breach of its duty to cooperate under the policy. A police officer sued the Borough of West Wildwood under the Conscientious Employee Protection Act, alleging that disciplinary charges which resulted in her administrative conviction and termination had been filed by the Mayor in retaliation for whistleblowing activity. During the pendency of her CEPA lawsuit and her separate challenge to her termination (via action in lieu of a prerogative write), the Mayor lost re-election to a close personal friend of the plaintiff. The new mayor promptly vacated the termination, returned plaintiff to work with full back pay, promoted her to Chief of Police, and entered into a settlement agreement whereby the disciplinary charges could not be used against her in the pending CEPA lawsuit. The Borough forged this settlement agreement with plaintiff's attorney and provided no notice of its proposed terms to its liability insurer. Upon learning of the settlement agreement barring use of the disciplinary charges as the legitimate, nondiscriminatory reason for plaintiff's termination, the insurer disclaimed coverage for breach of the duty to cooperate and to refrain from action prejudicial to the insurer. The CEPA case then proceeded to trial, where the new Mayor and another Committee member testified in the plaintiff's favor. The jury awarded $1.165 million in damages, and the Court thereafter awarded $600,000, in attorney fees and costs. Thereafter, the court granted summary judgment to the insurer based on the Borough's prejudicial conduct.

Stephen Katzman obtained summary judgment on a declaratory judgment ("DJ") action and recovered our firm's legal fees for prosecuting the DJ Action and the legal fees of defense counsel on the underlying lawsuit. Our client, Great American Insurance Company issued an insurance policy to PEIO, the owner of a truck involved in a motor vehicle accident. New York Marine & General Insurance Co. ("NY Marine") issued a policy to Transport N.I., an interstate motor carrier. PEIO leased a tractor to Transport N.I. NY Marine refused to defend or indemnify the driver in the underlying personal injury lawsuit, and thus Great American assigned counsel to defend him. Stephen filed a DJ action on Great American's behalf, seeking a declaration that the driver of vehicle was an employee of Transport N.I. at the time of the accident and NY Marine was obligated to defend and indemnify him. The court agreed and granted summary judgment in Stephen's favor. Stephen then filed a motion for counsel fees seeking the reimbursement of attorneys' fees and costs for providing a defense to the driver in the underlying action. The court held that Great American was entitled to reimbursement of attorneys' fees and costs for providing a defense to the driver and for prosecuting the DJ action. No appeal was taken.

Jason Dominguez obtained a verdict of "no cause" on behalf of his client in a lawsuit initiated by the insured's tenant. The tenant sought damages relating to harassment, tampering, and failure to remediate an alleged bed bug infestation. Jason's cross-examination revealed that plaintiff had no competent evidence in support of her claims, resulting in a no cause verdict.

Ric Gallin and James Foxen successfully obtained summary judgment dismissing an environmental case in Camden County. The insured operated a dry cleaner which stopped operation in 2001. Unfortunately, it contaminated the neighborhood. A Memorandum of Agreement was reached with the NJDEP wherein the NJDEP took over remediation. As part of the clean-up, the NJDEP installed air sparging systems, similar to a radon system, in the basement of several homes. Plaintiff bought one of these houses in 2015. Although the

system was open and obvious, and there was some mention of the problem in the Real Estate Disclosure forms, plaintiff claimed she was unaware of the problem until after she bought the property. She claimed the property was not worth what she paid, as well as emotional distress, exposure to toxic fumes and that the condition of the property killed her dog. In addition to suing the parties to the real estate transaction, she also sued the dry cleaner on multiple causes of action. The court ultimately agreed with Ric and James' position that the dry cleaner was not responsible for plaintiff's predicament. Plaintiff could not sue for any contractual claims in the absence of a contract. Plaintiff could not sue for an intentional tort because the insured had left the neighborhood many years before and could not commit an intentional tort against an unforeseen person. Negligence also did not apply as there was no proof of negligent operation of the dry cleaner, no foreseeability as to this plaintiff, and no proximate cause. Plaintiff also could not sue under the Spill Act. Since the NJDEP was conducting the remediation, plaintiff had no Spill Act damages, nor could she challenge the NJDEP actions in the context of this court proceeding.

Bill Bloom, Lori Brown-Sternback, and Leslie Koch obtained summary judgment on behalf of a school board in a claim brought by a student who struck a wired-glass pane in a cafeteria door resulting in severe injuries to his dominant hand and a million dollar future wage loss claim. The plaintiff asserted that the pane constituted a dangerous condition as it was not sufficiently resistant to breaking. We filed a motion for summary judgment arguing an absence of a dangerous condition since the pane (which was part of the original construction in 1976) complied with all codes and that the board did not have notice of the condition. Defendants participated in a Rule 104 hearing which featured the live testimony of plaintiff's liability expert, from whom Bill obtained concessions that 1) the subject pane violated no codes and did not have to be retrofitted; and 2) that the scholarly articles relied upon by the expert demonstrated that the alleged dangerous nature of wired-glass panes was unknown in 1976 and the dangerousness of the glass was not widely known even among industry professionals in 2004. The court agreed with our position and granted summary judgment.

Marc Dembling obtained Summary Judgement in favor of our client, Fitchburg Mutual Insurance Company, in Monmouth County Superior Court. Fitchburg's insured, KLE, a landlord, was an additional insured on a policy issued by Mercer Insurance Company to a tenant of the insured, Juanito's Restaurant. Mercer had declined coverage based on a claim that the accident did not arise out of the use of the leased premises. We successfully argued both that the landlord was an additional insured under the Mercer policy and that a customer leaving the restaurant with a "take out order" who allegedly fell just after exiting the front door and alleged a defect in the doorway and stair was an injured party involved in an accident "arising out of the use of the leased premises." We obtained an Order declaring that Mercer owed both indemnity and defense to the Fitchburg insured landlord.