METHFESSEL & WERBEL

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CASE UPDATE

April 2004

M&W's MARTIN McGOWAN TO APPEAR BEFORE SUPREME COURT ON CONSTITUTIONAL APPEAL

The 2003-2004 court year has seen many carrier-friendly decisions, most notably in the area of auto insurance law. We begin this edition of the Case Update with a review of several important published decisions, the first of which raises constitutional questions regarding a prevalent trial practice.

CIVIL PRACTICE – JURY VERDICTS

Martin McGowan of Methfessel & Werbel will soon appear before the New Jersey Supreme Court to defend a no-cause verdict against a constitutional challenge.

In Lamanna v. Proformance Martin obtained a no cause verdict by a jury vote of 6 to 2. As often occurs, the parties agreed to let all eight jurors deliberate rather than require the exclusion of two jurors at the close of the case. After the jury returned its verdict, however, plaintiff complained that the 6-2 vote violated the New Jersey Constitution. The trial court rejected the challenge and a divided panel of the Appellate Division affirmed, the majority finding no constitutional violation under the plain-error rule.

Appellate Judge Fischer dissented, ensuring that Lamanna will proceed to an appeal as of right before the New Jersey Supreme Court. We will keep you posted.

AUTO INSURANCE – SURVIVOR AND WRONGFUL DEATH ACTIONS

In January the New Jersey Supreme Court unanimously overruled the Appellate Division to hold in Vassiliu v. Daimler Chrysler that an auto liability policy will not provide separate "per person" coverages to wrongful death and survivorship claims following a fail auto accident. Citing the reasonable expectations

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of the parties, the Court held that despite their legal status as discrete causes of action, wrongful death and survivorship claims arising out of a single person's death will trigger total available coverage in the amount of the policy's "per person" limit.

AUTO INSURANCE – RECOVERY BAR FOR UNINSURED MOTORISTS

The Supreme Court unanimously reversed Judge Pressler's holding in Caviglia v. Royal Tours of America. The High Court upheld the constitutionality of N.J.S.A. 39:6A-4.5, which precludes recovery of any economic or non-economic damages by uninsured vehicle owners.

AUTO INSURANCE – UM BENEFITS – STEP-DOWN CLAUSES

The Appellate Division in Pinto v. NJM continued the trend favoring step-down clauses which reduce the coverage available to non-named insureds. The plaintiff was injured while driving his employer's vehicle. As a named insured under his own policy with lower UM limits, the plaintiff was "stepped down" by NJM to coverage limits equal to those of his own policy.

AUTO INSURANCE – UM BENEFITS – COMMERCIAL POLICIES

In Dickson vs. Selective, Judges Stern, Rodriguez and Lefelt ruled that the plaintiff, one of four equal shareholders in the defendant corporation, was not entitled to assert a UIM claim for injuries sustained while occupying another vehicle because he was neither specifically named in the auto policy nor personally listed in the UM endorsement. Plaintiff was not riding in a business-owned or covered vehicle or engaged in the insured's business at the time of the accident. Accordingly, he was held unentitled to UIM motorist protection under the policy – despite his designation as an authorized or principal driver of a covered vehicle.

AUTO INSURANCE – PIP BENEFITS – STATUTE OF LIMITATIONS

In Everett v. State Farm the Appellate Division ruled that a fee schedule adjustment and application of a bill's residual balance to the claimant's deductible constituted a "last payment of benefits" for purposes of the limitations period, rendering timely a Complaint filed within two years.

AUTO INSURANCE – PIP BENEFITS AND WORKERS COMPENSATION

The New Jersey Supreme Court recently reaffirmed in NJM v. Hardy that an insured's entitlement to PIP benefits turns on the involvement of an "automobile" as defined in the PIP endorsement. In this case a Newark police officer was denied PIP benefits because his injury arose out of an accident on the job while he was occupying a squad car. A divided appellate panel upheld a denial of coverage on the grounds that the squad car was not a "private" vehicle.

As we anticipated when we reported the decision several months ago, the Supreme Court reversed. While the squad car may not be "private", held a unanimous Court, the controlling inquiry should be whether the vehicle qualifies as a "private passenger vehicle" not used as a public or livery conveyance. The squad car fit this definition, entitling the officer to PIP benefits.

Of course, auto carriers who pay PIP benefits to claimants injured in the course of employment are typically entitled to file a workers compensation claim for reimbursement. However, the right to reimbursement does not relieve the auto carrier of the duty to pay PIP benefits.

AUTO INSURANCE – INITIAL PERMISSION RULE

The New Jersey Supreme Court has reversed the Appellate Division's dubious holding in Jaquez v. National Continental Insurance Company to hold that where the owner of the car gave her keys to her boyfriend's nephew

in order to retrieve a pack of cigarettes, she did not give him permission to use the vehicle sufficient to trigger liability coverage under her auto policy. A reasonable factfinder, held the Court, could not conclude that the nephew was a "permissive user" of the vehicle. In so holding the Supreme Court adopted Justice Clifford's dissent in Motor Club v. New Jersey Manufacturers that the expression "theft or the like" encompasses conduct less than traditional theft.

In contrast, the Appellate Division in Atlantic Mutual v. Palisades Safety and Insurance Assn. arguably stretched the definition of "borrowed" vehicles to hold that an employee's vehicle used to perform a personal error for the company president was effectively "borrowed" by the company and "used" by the president, triggering liability coverage under the employer's commercial policy.

AUTO INSURANCE – VERBAL THRESHOLD – PHYSICIANS

When the New Jersey legislature passed the convoluted Automobile Insurance Cost Reduction Act of 1998 (AICRA) the legal community debated many issues, including whether or not a treating chiropractor would constitute a "physician" qualified to provide a certification of permanency as required by the statute. In our experience, trial judges have almost universally held that a treating chiropractor does qualify as a physician. In Olarte v. Crocker Judge De Luccia of Passaic County analyzed not only AICRA, but also common law dating to the 1800s to conclude that a chiropractor does indeed qualify as a physician under state law.

In Hernandez v. Stella the plaintiff was subject to the verbal threshold and failed to file a physician's certification. Nevertheless, defendants did not raise plaintiff's failure to submit a certification until discovery and non-binding arbitration were completed. Following Konopka v. Foster, the Appellate Division reversed summary judgment and ruled that the defendants waived the certification defense by failing to raise it in a timely manner.

AUTO INSURANCE – VERBAL THRESHOLD – DEFINITION OF "AUTOMOBILE"

The Appellate Division in Thompson v. Potenza wrestled with the often confusing definition of "automobile" under the No Fault law. The plaintiff was injured in an accident involving a van operated by defendant Potenza, such van being owned by defendants Nicolini, whose son owned a courier service which used the van to make deliveries approximately once a week.

At the close of discovery defendant filed a motion for Summary Judgment based on the verbal threshold. Plaintiff contended that the threshold should not apply since the van did not qualify as an "automobile." The trial court accepted the defendant's argument that the van qualified as an automobile and the Appellate Division affirmed, ruling as a matter of law under N.J.S.A. 39:6A-2a that the van was not "customarily used" in the occupation, profession or business of the insured.

AUTO INSURANCE – DEEMER STATUTE – OUT-OF-STATE CAR RENTAL COMPANIES

The U.S. Court of Appeals for the Third Circuit has authored an unprecedented expansion of the "Deemer" statute, N.J.S.A. 17:28-1.4, which requires insurers transacting business in New Jersey to include New Jersey PIP benefits in policies sold in other states. In Dieng v. Enterprise Rent-A-Car the Third Circuit construed the term "insurer" to include an out of state car rental company that profited from business in New Jersey.

The vehicle in question was rented from a Virginia-based subsidiary of Enterprise. Virginia does not require no-fault insurance. Nevertheless, Enterprise had filed a certificate of self-insurance that covered the use of Virginia cars in New Jersey. The Court held that the certificate of self-insurance was, for deemer purposes, identical to an insurer's authorization to write automobile insurance in New Jersey.

JURISDICTION -- WEBSITES

The Third Circuit has issued an important decision governing long-arm jurisdiction over the operators of websites.

In Toys "R" Us v. Step Two the Court held that in order to exercise personal jurisdiction over the operator of a commercially interactive website, the Court must be presented with evidence that the defendant has "purposefully availed" itself of the privilege of engaging in business activity in that state. Intentional focus on potential customers in the forum state or direct business through the site will normally satisfy this requirement.

In this case the defendant company's website text was entirely in Spanish, its prices were listed in foreign currency and merchandise was shipped only to addresses within Spain. Nevertheless, Toys "R" Us contended that the company engaged in mimicry of its internet ventures and "copycat marketing efforts," requiring a remand to permit more detailed discovery into the defendant company's business plans.

TRIAL – JURY SELECTION – PEREMPTORY CHALLENGES

In State v. Fuller the Appellate Division handed down a criminal decision which could very well impact the jury selection process in civil cases. In this criminal prosecution for robbery and receiving stolen property, the prosecutor exercised a peremptory challenge to excuse a potential juror who appeared to be demonstrative about his Muslim faith. Five of the prosecutor's six peremptory challenges were directed at African Americans, one of whom wore a long black outer garment and skull cap indicative of his religion. When the criminal defense attorney challenged the prosecutor's peremptory dismissal of this juror, the prosecutor explained to the judge that in his experience, "people who tend to be demonstrative about their religion tend to favor the defendant to a greater extent then do persons who are . . . not as religious."

On appeal of his conviction the criminal defendant argued that he was denied a fair trial. The Appellate Division disagreed, accepting the rationale of the prosecutor as not discriminatory because "individuals who are religiously demonstrative" do not constitute a cognizable minority group and the potential juror in question was not excused based on group bias.

The Supreme Court has granted certification. We will keep you posted.

PRODUCTS LIABILITY – STATUTE OF REPOSE – FIXTURES

In Dziewiecki v. Bakula the Appellate Division confronted a novel argument by the manufacturer of a pool that the pool's incorporation into an improvement in real estate entitled the manufacturer to avail itself on the ten year statute of repose under N.J.S.A. 2A:14-1.1. Reviewing the legislative history, the appellate panel reversed the trial court's grant of summary judgment to the pool manufacturer. The Court held that the statute was never intended to insulate the manufacturer whose completed product is subsequently installed to improve real property. The ruling rested on the court's conception of the "swimming pool kit" as a discrete product.

LEGAL MALPRACTICE

In Distefano v. Greenstone the Appellate Division ruled that in a malpractice action against an attorney who mishandled a personal injury case, the plaintiff was entitled to recover not only the entire compensatory damage settlement from the underlying tortfeasor's carrier without reduction or setoff for the original contingent fee, but also his current attorney's contingent fee as consequential damages. The Court held such a double recovery required by the Supreme Court's decision in Saffer v. Willoughby.

TORT CLAIMS ACT- IMMUNITY

In Kepler v. Taylor Mills Developers the Township of Cherry Hill assigned uniformed officers to a special security detail outside a nightclub on a rotating, voluntary overtime basis. The police department regularly billed and received reimbursement from the nightclub for the amount paid to the officers. Confronting the claim of an injured nightclub patron that the police department failed to provide sufficient protection, the Appellate Division held that the police officers and their employer were entitled to Tort Claims Act immunity despite the nightclub's payment for the voluntary overtime police protection.

In Clarke v. Township of Mount Laurel another appellate panel refused to grant immunity as a matter of law to claims filed by the estate and heirs of a man shot to death by a Mount Laurel police officer in the course of a domestic violence call. Significantly, the decedent whose estate and heirs sued the city was, in fact, the hostage taker and not a hostage.

The officer who shot Clarke acknowledged that he had wilfully violated a known standing order to establish a perimeter outside the house rather than inside the house. In violating such a standing order, the Court concluded, the officer deprived himself of recourse to good faith immunity under the Tort Claims Act.

TORT CLAIMS ACT – DANGEROUS CONDITION

In Atalese v. Long Beach Township a three judge appellate panel addressed the TCA's requirement that to support a claim under the Act a condition of property must pose a "substantial risk of injury." While the Court acknowledged that the condition cannot be minor, trivial or insignificant and should also be considered together with the anticipated use of the property, in this case a 3/4" difference in the level a pavement occupying a significant portion of a bike lane and spanning an entire block could be accepted by a jury as creating a substantial risk of injury. The Appellate Division also ruled that the requirement that a public entity have actual or constructive notice of the condition does not apply where plaintiff alleges that public employees actually created it.

BUSINESS INSURANCE – EMPLOYEE DISHONESTY COVERAGE

In Auto Lenders Acceptance Corp. v. Gentilini Ford the insured auto dealership sought indemnification from its insurers for settlement payments it made in conjunction with a third party lawsuit filed by a commercial lender after one of its employees fraudulently induced the lender to finance car purchases by high risk customers. The Appellate Division overturned the trial court's application of the employee-dishonesty extension of the property insurance coverage to indemnification of a third party claim, as employee dishonesty policies clearly and unambiguously confine coverage to first party claims by the insured. Significantly, the Court rejected the liberal proximate cause analysis in Appleman's treatise which might otherwise convert a third party indemnification claim into a first party claim under tort concepts.

BUSINESS INSURANCE – INVENTORY

Most BOP and CGL policies require the insured to maintain an itemized inventory of individually insured pieces of property. In Sherwood Products, Inc. v. Connecticut Indemnity Company, the policy in question required the plaintiffs to maintain an itemized inventory of all their jewelry, purchases and sales as well as any merchandise

transported from its premises to another location. Following a theft at a trade show the carrier denied the insured's claim for failure to comply with the inventory requirements.

The Appellate Division reversed the trial court's judgment for the insureds, ruling that the insureds were not entitled to coverage because they provided only purchase and sales receipts for merchandise based on their memory of the items stolen at the trade show. This presentation did not constitute substantial compliance, entitling the insurance carrier to summary judgment.

PREMISES LIABILITY – DELIVERY PERSONS

The plaintiff in La Russa v. Four Points at Sheraton Hotel slipped and fell on a large puddle of snow and water which had been created by a beer vendor making a delivery during inclement weather. Because the vendor had an opportunity to notify the hotel management to ensure prevention of injury and failed to do so the Appellate Division reversed the trial court's dismissal and remanded the case for trial.

NEW YORK UPDATE

COVERAGE DENIALS – INVESTIGATIONS – TIMELINES

In a recent Court of Appeals decision, First Financial Insurance Co. v. Jetco Contracting Corp., the Court was presented with two issues: whether a carrier's investigation into alternate third-party sources of coverage for the insured's benefit justified its issuance of a denial of coverage and whether a 48 day delay for a carrier to issue its denial was unreasonable as a matter of law.

Here, an employee of Jetco's subcontractor was injured while restoring the facade of a building on July 9, 1998. Although Jetco was aware of the accident the day it occurred, it did not advise its commercial general liability insurer, First Financial, till February 23, 1999. On March 2, 1999, Jetco was advised by First Financial that this was a "late notice situation", reserving its right to deny coverage because Jetco failed to comply with the policy provision requiring Jetco to notify First Financial of the occurrence as soon as practicable. On March 30, 1999, First Financial confirmed that Jetco was aware of the accident on the day it occurred, but did not issue its denial of coverage for late notice of claim till May 17, 1999, 48 days after confirming the grounds for the denial. First Financial claimed that the delay was due to it's investigation into other sources of insurance for Jetco.

First Financial subsequently sought a declaratory judgment from the court wherein the policy did not cover Jetco for the party's injuries and that the 48 day delay was reasonable as a matter of law. In analyzing the statutory authority and case law, the Court stressed that New York Insurance Law § 3420(d) provides that a carrier shall give written notice of a disclaimer "as soon as reasonably possible," allowing the policyholder to pursue other avenues as quickly as possible. The Court also noted that an investigation into issues affecting an insurer's decision whether to disclaim coverage, such as reviewing a file or conducting legal research, may excuse delay in notifying the policyholder of a disclaimer.

The Court held that a delay in notifying a policyholder of a denial of coverage is unreasonable as a matter of law when the purpose of the delay is unrelated to the insurer's own decision to disclaim. In this case, the carrier's investigation into the potential existence of other third-party sources was deemed an insufficient justification for the delay. The Court noted that the insured, rather than a carrier, is in a better position to explore alternative coverage as the insured is motivated by its own self-interest. The Court also held that an unexplained 48 day delay in the issuance of a written denial is unreasonable as a matter of law.

Under the harsh terms of New York law, the only acceptable reason for a carrier's delay in issuing a denial is the pendency of a coverage investigation. Any other reason for the delay, even if likely to benefit the insured, will generally nullify a subsequent denial of coverage.

EDUCATION – RANDOM DRUG TESTING

In Joye v. Hunterdon Central Regional High School Board of Education a divided New Jersey Supreme Court upheld the defendant board's policy permitting random, suspicionless drug and alcohol searches. Reasoning that students have a diminished expectation of privacy on school grounds and acknowledging the school's demonstration of a substance abuse problem among its students, the majority found a special need to justify the privacy intrusion. The Court's long and detailed decision should not be construed as carte blanche for any school to adopt such a policy, though it provides a sufficient basis under the State Constitution to conduct suspicionless searches on school grounds when justified by a legitimate concern over substance abuse.

INSURANCE COVERAGE – INTENTIONAL ACT EXCLUSIONS

In Cumberland Mutual v. Dahl Judges King, Wecker and Lisa reversed an order granting summary judgment in favor of the estate of a murder victim against the murderer's insurance carrier. The trial court ruled that the murderer's crafting an unreasonable or irrational solution to an otherwise solvable problem demonstrated a mental defect sufficient to render his conduct "unintentional" for purposes of insurance coverage. The Appellate Division held that an intentional criminal act with the specific intent to kill will typically trigger the intentional acts exclusion, even if the actor's judgment is substantially clouded by a mental condition. It is only when the person is insane or so deranged that he or she cannot act rationally that his or her conduct will be considered "unintentional" for purposes of third party liability insurance coverage.

In Silvestri v. Dowdy a different appellate panel confronted a civil action by a woman against her former fiancee in which she alleged negligent infliction of emotional distress based on a failure to inform her that he was HIV-positive during the time they were involved in a sexual relationship. Ruling against insurance coverage for the HIV-infected defendant, the court held that the insured's intent to cause plaintiff severe emotional and psychological trauma may be presumed by his decision to engage in sexual relations with her while intentionally withholding knowledge of the infection. As to his adult children residing in his household, however, they were entitled to coverage as additional defendants in the lawsuit because their alleged failure to advise the plaintiff of their father's condition did not qualify as an intentional act sufficient to void coverage.

EMPLOYMENT LAW – PUNITIVE DAMAGES AGAINST PUBLIC ENTITIES

In a long-awaited set of decisions, the New Jersey Supreme Court held in Green vs. Jersey City Board of Education and Lockley vs. State of New Jersey Department of Correction that punitive damages may be awarded against public entity defendants under both the Conscientious Employee Protection Act (CEPA) and the Law Against Discrimination (LAD). In Lockley the Court held that a plaintiff will be entitled to punitive damages only when upper management actually participated in sufficiently "egregious" conduct.

WORKERS' COMPENSATION – OFF-PREMISES INJURIES

In Jumpp vs. City of Ventnor the plaintiff, a punting station operator employed by the city, stopped daily at a post office located on the way to one of his work sites to check his personal mail. After slipping and falling while returning to his vehicle from the post office he filed a workers' compensation claim. The

Appellate Division ruled that the plaintiff's daily trip to the post office was not a "minor deviation" to satisfy basic needs such as phone calls and coffee and lunch breaks. Rather, it constituted a personal errand which disqualified the plaintiff from asserting a workers' compensation claim.

TORTS – GO-PEDS

In a matter of first impression, a three judge appellate panel ruled in Cruz vs. Trotta that the plaintiff could be held comparatively negligent for obstructing traffic on a Go-Ped despite the fact that he was traveling as slowly as 10 mph in a 25 mph zone. The Appellate Division held that the trial judge did not err in charging the jury that it should determine whether the defendant would have been justified in crossing the double yellow line under the exception in NJSA 39:4-86, which permits crossing a "no passing" line when the driver's lane is obstructed and impassable. In this case the court upheld the jury verdict in favor of defendant, who was found justified for crossing the double yellow line in order to pass the Go-Ped on which plaintiff was obstructing the right lane of travel.

EMPLOYMENT LAW – TORT CLAIMS ACT - DISCRIMINATION

In Bonitsis vs. NJIT, an associate professor filed suit against his public employer for tortious interference with an employment contract and intentional infliction of emotional distress. The Appellate Division held that regardless of whether the alleged tortious conduct arose out of a simple want of due care or an intentional act, so long as the public employee committed the conduct within the scope of his employment. He was required to submit a notice of claim under the Tort Claims Act. Failure to file a notice of claim compelled dismissal of those common law claims.

Plaintiff's discrimination claim remained, however, based on the allegation of failure to accommodate a physical disability. The appellate court reversed dismissal of that cause of action based on the trial judge's erroneous exclusion of letters written by plaintiff's treating physician and offered into evidence to prove that plaintiff requested an accommodation. The trial judge barred the letters on grounds of inadmissable hearsay. The Appellate Division reversed because the letters were not submitted for the truth of the matter asserted; rather they were submitted to prove the plaintiff's affirmative request for the denied accommodation.

MEDICAL MALPRACTICE – AFFIDAVIT OF MERIT

In Ferreira v. Rancocas Orthopedic Associates the New Jersey Supreme Court fashioned a practical remedy to address the potential pitfalls of late Affidavit of Merit filings in medical malpractice cases. The Court created a bright line rule that where defense counsel files a Motion to Dismiss after the 120 day deadline and before the plaintiff has forwarded an Affidavit of Merit, the Complaint will be dismissed with prejudice so long as the doctrines of substantial compliance and extraordinary circumstances do not apply. In addition, case management conferences will now be required within 90 days of the service of an Answer in all malpractice actions to ensure compliance with the discovery process, including the service of an affidavit of merit. At that time the defendant will be required to advise the court of any deficiency in the affidavit to provide plaintiff an opportunity to cure any defect.

In Knorr v. Smeal the Supreme Court held a defendant doctor equitably estopped from obtaining dismissal of the Complaint based on plaintiff's failure to serve an Affidavit of Merit because the defendant let pass the deadline and engaged in extensive discovery and knew that his codefendant had obtained dismissal based on plaintiff's failure to serve an Affidavit of Merit on the codefendant. Citing the doctrine of laches, the Court reversed the Appellate Division's affirmance of the trial court's dismissal and ruled that the case should go forward.

TORTS - BAR SECURITY

In Kuehn v. Pub Zone the Appellate Division confronted a plaintiff's jury verdict in a case arising out of injuries sustained when plaintiff was attacked by members of a gang known by the owner to engage in random violence. Following a jury verdict the trial court granted judgment to the defendants notwithstanding the verdict. The Appellate Division reversed, holding that the likelihood of violence and the absence of security within the bar required reinstatement of the jury's liability verdict.

DAMAGES – COLLATERAL SOURCES – SOCIAL SECURITY

Addressing an issue of first impression in New Jersey, Judge Pressler of the Appellate Division held in Woodger v. Christ Hospital that in a personal injury action in which lost wages are awarded, plaintiff will be entitled to a credit fo the maximum social security contributions due from her for the exact period during which her disability payments have been deducted as collateral source payments. Plaintiff will not be entitled to a credit for the contributions she made to social security over her entire working life.

UNINSURED MOTORIST COVERAGE – OFFERS OF JUDGMENT

The Offer of Judgment Rule under New Jersey Rule 4:58-1 is available to litigants who wish to force an adversary's hand by formalizing an offer by filing it with the Court. The benefit to a defendant will be an award of reasonable fees and costs from the date of filing forward if the jury returns a verdict which is 80% or lower than the offered amount. The rule also offers benefits to a plaintiff who files an offer of judgment, as she will be entitled to reasonable fees and costs from the point of filing forward if the jury returns a verdict at least 20% higher than her demand.

In McMahon v. NJM the Appellate Division addressed the impact of an offer of judgment on a de novo UM trial. The plaintiff had $300,000 UIM limits with New Jersey Manufactures and accepted the tortfeasor's total liability limits of $125,000, leaving a remaining exposure to NJM of $175,000. Prior to trial the plaintiff filed an offer of judgment for $129,000.

The jury awarded $500,000, following which plaintiff moved to enter judgment against NJM for $175,000 plus interest, attorney fees and litigation costs from the point of filing forward. The trial court awarded approximately $17,000 in fees and costs.

The Appellate Division affirmed, applying the Offer of Judgment Rule to this de novo UM trial, which was a "hybrid" tort and contract action and thereby fell within the purview of the Offer of Judgment Rule. The absence of bad faith on the part of NJM was irrelevant; it simply took a risk and lost, thereby triggering responsibility under Rule 4:58-2.

FIRM NOTES

Methfessel & Werbel is pleased to welcome four new associates who will support our property, liability and employment practice groups.

Paul da Costa, a graduate of Seton Hall Law School and Rutgers University, joins the Bergen County liability team under the leadership of Don Crowley. In addition to receiving his J.D. from Seton Hall in 2003, Paul obtained a Master's Degree *cum laude* from the John C. Whitehead School of Diplomacy & International Relations.

Tracy Brooke Bussel, a 2003 *cum laude* graduate of Nova Southeastern University Law Center and a 1999 honors graduate of the University of Delaware, joins our Employment Practices Group under the tutelage of Eric Harrison. Tracy will handle the defense of employment matters, civil rights claims,

education disputes and professional liability cases in New Jersey Superior Court, federal court and the Office of Administrative Law.

The property team welcomes Stephen Dempsey, a member of the New Jersey and New York bars who obtained his undergraduate degree from St. John's University and his law degree from New York Law School. Stephen's experience includes more than two years as a civil litigation attorney in New York and New Jersey and several years as a legal assistant in the areas of labor law and corporate bankruptcy.

Danielle Lozito is a 2003 *magna cum laude* graduate of New York Law School who received her B.A. with honors from Rider University. Prior to joining M&W she clerked for Judge Ryan in Middlesex County. A member of the New Jersey and New York bars, Danielle will work on our property team under the direction of Jared Stolz.

Stephen Katzman recently delivered a lecture to a group of medical students and residents at the New Jersey University of Medicine and Dentistry in Newark on "Medical Ethics In The Context Of Billing and Health Care Fraud in New Jersey." The lecture was well received and stirred an extensive question and answer period after the talk.

John Knodel was recently re-certified by the New Jersey Supreme Court as a certified civil trial attorney.

Eric Harrison recently spoke to an audience of attorneys in a "Civil Discovery Workshop" sponsored by the Institute for Continuing Legal Education. Addressing practical challenges of written discovery and deposition practice, Eric represented the defense bar in a panel consisting of two members of the plaintiffs' bar, a corporate attorney and a Superior Court judge.

Selika Josiah and Eric Harrison recently obtained a significant unpublished ruling from the Appellate Division upholding application of a 15/30 step-down clause in a personal auto policy. Unlike many step-down clauses in current circulation, First Trenton's step-down clause reduces the limits available to unrelated vehicle occupants not merely to the lower limits of any other policies they may hold, but to the mandatory minimum limits of $15,000 per person/ $30,000 per accident. In German v. First Trenton the trial court accepted Selika's argument that the plain language of the UM endorsement, which offended neither public policy nor the cost-saving objective of AICRA, required that the plaintiff vehicle occupant be "stepped down" to UM limits of $15,000. A unanimous appellate panel affirmed. The plaintiff has petitioned for certification from the Supreme Court. We will keep you posted.

TRIAL NOTES

Ric Gallin recently settled a case during trial in New York Supreme Court, Orange County. The insured rear-ended the plaintiff, who obtained summary judgment on liability prior to trial. Plaintiff had been involved in a serious prior accident which resulted in a neck fusion. However, he had been cleared to return to construction work before the second accident involving the insured. He claimed to have developed intractable low back pain which necessitated a low back fusion. The Social Security Administration declared him disabled.

With $140,000 in lost wages and medicals and a $72,000 excess no-fault lien, plaintiff initially demanded the full $500,000 policy limits but dropped the demand to $350,000 before jury selection. As the case progressed, however, Ric presented proof that the low back surgery was necessitated by the progression of pre-existing degenerative disease and not the trauma of the accident. The plaintiff ultimately accepted the $200,000 the carrier had been willing to offer before trial.

John Knodel recently obtained summary judgment in a falldown case in which plaintiff claimed she fell on water and an unlevel elevator cab. She broke a metacarpal bone and refused surgery, leaving her with a deformed hand. Plaintiff also claimed the fall aggravated pre-existing migraine headaches resulting

in extensive diagnostic testing and a lenghtly hospitalization with over $30,000.00 in medical bills. At her deposition John elicited admissions that the plaintiff never saw any water on the floor where she fell and didn't know if the elevator cab was not flush with the floor at the time of her fall. John argued to the court there was no basis for liability and the affidavit plaintiff submitted in opposition was a "sham affidavit" not warranting consideration. The court agreed.

John also obtained summary judgment in an underinsured motorist claim in which plaintiff underwent extensive back and neck surgery as well as a third surgery for a urological problem plaintiff contended was brought on by neurological damage caused by the trauma. The named insured was plaintiff's niece, who lived in the first floor apartment of a two family house. Plaintiff lived in the second floor apartment but claimed that both families had open access to each apartment, thereby making plaintiff a "resident relative" of the named insured entitled to UIM coverage. John demonstrated to the court that although the two families were close, the existence of separate leases, separate insurance policies and separate driver's license addresses for each apartment demonstrated the existence of separate households. The court agreed.

Bill Bloom tried a combination dram shop/assault case in Gloucester County. The teenage plaintiff claimed that he and three other underage friends, including Bill's client, purchased two cases of beer from the co-defendant liquor store. The plaintiff and Bill's client subsequently became intoxicated and ended up fighting. Bill's client punched the plaintiff in the face and fractured his orbital bone, necessitating reconstructive surgery and the installation of a metal plate. The jury accepted Bill's provocation defense, finding all three parties responsible but also finding that the plaintiff was 60% at fault. As such, the plaintiff received no recovery.

Cynthia Richards recently obtained summary judgment on behalf of the Trenton Downtown Association. After a nine month round of summary judgment motions and requests for additional information and briefs from Mercer County Superior Court, Judge Jack Sabatino determined in a written opinion that the Trenton Downtown Association is entitled to the immunities set forth by the Tort Claims Act. Cynthia's victory was hard-fought and required refutation of a waiver defense, as prior counsel had failed to raise the manner of the Association's formation as a TCA defense.

ALERT ALERT ALERT ! ! !

This will be the final version of the Case Update sent via traditional mail. If you would like to continue to receive our quarterly update via e-mail, please forward your name and e-mail address to pagano@methwerb.com.

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