Methfessel & Werbel is pleased to present the Fall 2013 edition of our Case Update. This issue covers several significant recent developments in relevant law and within the insurance community – most notably, the recent ruling regarding liability in accidents caused by third party texting. As always, we welcome your comments, questions and feedback.

WE'RE MOVING!!

In the Fall of 2013 Methfessel & Werbel will be moving its New Jersey offices to a larger facility at the Edison Square Office Complex at 2025 Lincoln Highway, adjacent to the Crowne Plaza Hotel. The new facility is one mile from our existing office.

We have outgrown our current building at 3 Ethel Road, which has served us well since 1998. Our new physical plant will span over 20,000 feet, providing additional office and conference space and facilitating an expansion within the office of the state of the art technology we strive to employ, both internally and externally.

The location on Lincoln Highway (Route 27) offers the convenience of accessibility to Routes 287 and 1 and guest accommodations available to visiting clients at the Crowne Plaza Hotel. The Edison location will continue to provide convenient access to courts throughout the state. Both of our additional offices, located in Manhattan and Wayne, PA, are similarly accessible within an hour.

In addition to physically relocating, we are utilizing the opportunity to upgrade our technology infrastructure to maintain the technological edge for which we have always strived. This move is much different than our last move 15 years ago, when a great deal of the material to be moved was in the form of physical files. Now that the office is paperless, the data center relocation becomes the focal point of the effort. We are anticipating downtime of less than six hours, and an enhanced network once the center is re-energized.

We are making this investment as part of our long-standing commitment to the managed risk industry through aggressive advocacy and resourceful consulting for our clients. As M&W approaches its 42nd year we will continue to manage our growth and make the investments necessary to serve your interests over the long term. We look forward to serving you from a new and improved home base and hope to see you soon at 2025 Lincoln Highway.

M&W'S "SUPER LAWYERS"

Once again, the editors of New Jersey Monthly have selected several of our attorneys as "Super Lawyers" in their respective fields. Partners Ed Thornton, William Bloom, Eric Harrison and Counsel Marc Dembling and Blake Johnstone were selected for 2013. Associate Adam Weiss received the designation of "Rising Star" for 2013. Only approximately 5% of New Jersey attorneys are selected by their peers as Super Lawyers. Congratulations to Ed, Bill, Eric, Marc, Blake and Adam for achieving this well-deserved accolade.

UPDATES IN NEW JERSEY CASE LAW

AUTO LIABILITY/ACCIDENTS CAUSED BY THIRD-PARTY TEXTING

In August 2013 the Appellate Division ruled, in Kubert v. Best, that the sender of a text message has a limited duty and may be held liable under common law for an accident caused by texting to a driver whom the remote texter knew or had special reason to know would view the text while driving and thus be distracted. Liability would not attach simply with evidence that the sender directed the message to a specific identified recipient, even if the sender knew the recipient was then driving. The record in this case established that the driver caused an accident resulting in injuries to plaintiffs immediately after receiving a text message. However, there was no evidence that the remote texter knew that the driver would view the text while driving.

New Jersey motor vehicle laws already require the use of a "hands free" device when communicating with third parties while driving, except in certain emergency situations. Under the "Kulesh, Kubert, and Bolis Law," the Legislature also enacted criminal penalties for those who are distracted by use of a cell phone while driving and who cause injury to others. The new law expressly permits a jury to infer that a driver who was using a hand-held cell phone may be guilty of assault by auto and subject to incarceration.

Although the Appellate Division in Kubert ultimately concluded that summary judgment in favor of the remote texter was warranted since plaintiff had not established that the texter had knowledge that the recipient would view the text while driving, the court expressly recognized a potential cause of action against such remote texters in future cases.

DISCOVERY / SURVEILLANCE

In a published decision of the Law Division, Herrick v. Wilson, the court addressed a dispute over whether or not security videotape had to be turned over to the plaintiff before plaintiff's deposition. Defendants relied on Jenkins v. Rainner, which involved surveillance tape prepared in anticipation of litigation or during litigation, also known as surveillance "sub rosa." The motion judge held that unlike surveillance recordings during the course of litigation, routine surveillance or security conducted in the normal course of business and outside the context of litigation, which depicts the actual incident, is discoverable.

DOG BITE / STATUTORY LIABILITY

Many years ago the New Jersey Legislature enacted a statute that rendered dog owners strictly liable for dog bites. Under the dog bite statute, liability will apply where the plaintiff can demonstrate that the defendant was the dog's owner, the dog bit the plaintiff, and the plaintiff was either in a public place or lawfully in a private place when bitten. Through the years some qualifications to strict liability have been carved out, such as exceptions to liability to veterinarians and contractors entrusted with the care of dogs that bite them and the application of contributory negligence when the plaintiff knows of a dog's vicious propensity and/or deliberately incites the animal.

In an unpublished decision, Aiges v. Fuccillo, the injured plaintiff was a local dog-sitter, against whom the defendant dog owner asserted the "assumption of risk" defense generally available to veterinarians and contractors entrusted with the care of defendant's dog. The Appellate Division held that the relationship between the parties was not sufficiently commercial to circumvent the dog bite statute. Plaintiff was an independent neighborhood dog sitter who cared for the defendant's dog when the defendant went on vacation. The plaintiff was not in the business on a full time basis, worked out of her own home, and the relationship developed through the neighborhood, not through commercial avenues. The arrangements were unwritten and informal and thus the court held that the Legislature did not intend to exclude such an incident from the statute's strict liability.

STATUTORY BAD FAITH

In the wake of Superstorm Sandy, the New Jersey Senate has been debating aspects of "the Consumer Protection Act of 2012" (actually introduced in 2013) which attempts to codify bad faith actions against carriers. N.J.S.A. 17:29B-4 already defines unfair methods of competition and unfair or deceptive acts in the insurance business, defining eleven forms of proscribed activity. Most notably, the Act lists Unfair Claims Settlement Practices such as failing to acknowledge and act promptly with respect to claims, failing to adopt reasonable standards for investigation of

claims, refusing to pay claims without a reasonable investigation, not attempting to effectuate a prompt, fair, and equitable settlement, delaying the investigation or payment of claims and failing to promptly settle claims where liability has become reasonably clear.

If passed, the Senate bill would establish a private cause of action for insureds notwithstanding the absence of serial violations with sufficient frequency to indicate a general business practice. This would apply equally to first party claims, essentially codifying and expanding the reach of Rova Farms. The law would contemplate as damages to the insured the full amount of damages from a final judgment, regardless of the coverage limit, prejudgment interest, reasonable attorneys and litigation fees, and punitive damages when the insurer's acts or admissions demonstrate clear and convincing evidence of malice or wanton and willful disregard.

As one might expect, numerous organizations and managed risk professionals have opposed the bill. We will continue to follow this legislation in the New Jersey Senate and keep you apprised of all developments.

HOMEOWNERS INSURANCE / NEGLIGENT ENTRUSTMENT OF VEHICLE

In an unpublished decision, Moren v. Beaulieu, the Appellate Division affirmed a grant of summary judgment to defendants' homeowners insurance company, who was sued on the theory that the defendant husband allowed his wife to drive her vehicle when she was intoxicated, killing plaintiff's decedent. The carrier pointed to the exclusion in its policy barring recovery "for injury or property damage arising from the ownership, maintenance, use, loading, or unloading of any motor vehicle." The Appellate panel reasoned, as did the motion judge, that the allegation that the husband was negligent fell within the plain and ordinary meaning of the policy exclusion.

SIDEWALK / ADJACENT TENANT

In an unpublished decision, Davidson v. City of Atlantic City, the Appellate Division held that a plaintiff who fell over the base of a traffic signal located on a sidewalk had no claim against the adjacent store owner, a tenant in a multi-tenanted building, for failing to maintain, repair, or paint the traffic light foundation which was owned and maintained by the City. The fact that the City may be immune from liability was found to not be a justification for imposing liability on a tenant where liability otherwise would not exist.

PIP / REIMBURSEMENT

In an unpublished decision, IFA Insurance Company v. Hill, the Appellate Division affirmed the trial court's dismissal of IFA's complaint. IFA sought reimbursement from Nationwide Insurance Company when Nationwide's North Carolina insured, whose policy did not provide PIP, injured IFA's insured in New Jersey. IFA sought reimbursement for PIP benefits paid by Nationwide; Nationwide objected, noting that its policy was reformed by operation of the Deemer Statute, N.J.S.A. 17:28-1.4, to include PIP coverage, and therefore PIP subrogation or reimbursement would be barred. The Appellate Division agreed.

RES IPSA LOQUITUR / PREMISES LIABILITY

In an unpublished decision, Gamez v. St. Edward The Confessor Parish, the Appellate Division rejected plaintiff's attempt to apply the doctrine of res ipsa loquitur to defeat the defense's Motion for Summary Judgment. Plaintiff was installing carpet at a church when a cross fell from a wall and struck him. Holding that the plaintiff is not required to exclude all other possible causes of the cross's fall, the court held that he was nonetheless required to establish that it was more probable than not that the defendant's conduct or the manner in which the cross was hung was a proximate cause of the incident. The cross was affixed to the wall for 14 years without incident and no meaningful discovery existed to show any circumstantial evidence that the church breached its duty of care to the plaintiff.

This unreported decision arguably departs from the Appellate Division's recent published decision in Mayer v. Once Upon a Rose, Inc., in which the plaintiff caterer was injured when a glass vase being carried by the florist broke and glass fragments struck and cut the caterer's hands. The Appellate Division overturned the trial judge's ruling and held that plaintiff did not need a liability expert because it is common knowledge that excessive pressure on glass would cause it to shatter and it is common knowledge that glass is fragile. The Appellate Division also disagreed with the trial court and held that the defendants failed to provide any support for a counter-theory that the vase was defectively manufactured, as it had been used many times before without incident.

PREMISES LIABILITY / TRAVEL AGENTS

In a published decision of the Law Division, Slotnick v. Club ABC Tours, Inc., the court addressed a relatively novel issue - under what circumstances may a travel agent or travel tour operator be held liable for the acts of independent contractors who interact with the traveler on their trip. The court discusses the scope of liability waivers and reaffirms the general rule that a defendant is not liable for the negligent acts of another person or entity, unless the first defendant selects/recommends/hires those entities and utterly fails to investigate them concerning their standards and prior history. Auto dealers who recommend a car stereo installer or insurance agents who recommend a body shop are two examples where the same analysis might be applicable.

INSURANCE / ARBITRATION DEMANDS

In a published decision, Vega v. 21st Century Insurance, the Appellate Division held that there are no "magic words" that must be communicated by an insurer in rejecting an arbitration award and demanding its right to trial. Although the insurer's letter, through counsel, did not expressly state a demand for a trial, the letter taken as a whole certainly showed the rejection of the award to a reasonable reader. Therefore, the Appellate Division rejected plaintiff's application to confirm the arbitration award. However, clearly the better practice is to note the policy provision in the letter wherein an arbitration award can be rejected and to specify the rejection and demand for trial.

TORT CLAIMS ACT / TITLE 59

In D.D. v. UMDNJ, the Supreme Court addressed Title 59 and the notice of claim requirement. A plaintiff bringing suit against a public entity must submit a notice of claim within 90 days of the alleged wrongful event. After that time, up to one year, a notice of claim may be filed but only for what a Court finds to be "extraordinary circumstances." The Supreme Court held that neither plaintiff's attorney's inattention nor incompetence constitutes an extraordinary circumstance to excuse the failure to file within the appropriate deadline. While this of course opens the door to potential attorney malpractice, it does not serve as a basis to bring a late claim against the entity.

In a published decision, Henebema v. South Jersey Transportation Authority, the Appellate Division has answered the question of whether or not it is for a judge or a jury to determine predicate facts in order for the Court to charge the jury with a discretionary duty or ministerial action. The distinction is critical since a public entity may be liable for simple negligence when performing ministerial actions, but discretionary actions must be proven to be palpably unreasonable to be actionable. Last year, in Konop, the Appellate Division held that the question of whether a statement can be attributed to a person on a hospital report, when the person denies making the statement, is to be submitted to the jury. The Henebema case is analogous in that the court held that it is not up to a judge to decide a factual issue related to establishing a certain defense or proof; the issue must be resolved by a jury.

OFFER OF JUDGMENT

In a published decision of the Law Division, Jacobsen v. Dara, Judge Gizinski ruled on a case where 90 separate plaintiffs filed a joint offer of judgment against defendants. The rule on offers of judgment allows a demand or offer to be made and, under certain circumstances if not accepted, the result can be an award of counsel fees and costs and an increased rate of prejudgment interest. However, the rule is silent as to whether or not multiple unrelated (not spousal) claimants can offer to settle without allocating individual demands. Judge Gizinski held that they could not and thus granted defendants' motion to strike the offer of judgment. Multiparty offers of judgment are allowed only for spousal per quod claims.

TORTS / RESPONDEAT SUPERIOR

In an unpublished decision, Coker v. Pershad, the Appellate Division reviewed the exceptions which would allow respondeat superior liability to attach to the principal for the actions of an independent contractor. Respondeat superior liability would attach where the principal retains control of the manner and means of doing work; where the principal engages an incompetent contractor; or where the activity constitutes a nuisance per se. If none of these exceptions are available, there should be no liability for the actions of an independent entity. In the Coker case, a tow truck driver hired by AAA assaulted the plaintiff and summary judgment was granted to AAA since none of the exceptions applied.

EXPERT WITNESSES / TRIAL / MEDICAL MALPRACTICE

In a published decision, McLean v. Liberty Health System, the Appellate Division reversed the trial court's decision because the trial judge improperly limited the number of expert witnesses plaintiff was prepared to call. The case involved the unfortunate death of a 16-year old due to an undiagnosed infection. As part of discovery, plaintiff retained and served reports from two emergency care physicians and two radiologists. Substantial harm was done to the plaintiff when, at the court's instruction, plaintiff's counsel chose only one emergency room physician to testify. Defense counsel's opening remarks to the jury advised that this chosen expert was the one and only expert in the world that held the opinion they would hear from the plaintiff.

The Appellate Division held that on the crucial issue of deviation from the accepted standard of emergency room care, the court exercised poor judgment in attempting to bar crucial evidence merely on the ground that it duplicates another witness's testimony. Prohibiting the second doctor to testify was considered reversible error. As an aside, the court also said that a trial court would likely abuse its discretion if it imposed a limitation on one witness on each side for a factual matter that is vital to the resolution of a disputed issue.

ADVERSE INFERENCE CHARGE / EXPERT WITNESSES

In a published decision, Washington v. Perez, the Appellate Division reversed a trial court judge who gave an adverse inference charge against defendants because they did not call medical experts to testify. The basis of the ruling was a bus accident, the second accident in plaintiff's life. Plaintiff declined medical treatment at the scene and did not see a treating physician for two months. Thereafter, plaintiff saw him infrequently for three months.

The plaintiff's treating physician was videotaped for trial presentation purposes, and before trial the defense sought to redact some of the doctor's testimony when he commented on the defense doctor's report. The trial judge refused and stated that the defense could call their own doctor to testify if they were troubled by the ruling. Defense counsel responded that it was inappropriate to put counsel in the position of calling the doctor simply to say that his report did not say what plaintiff's doctor had wrongly attributed to him. The defense witness was not called.

A missing witness instruction from the judge is different from allowing counsel to comment on a missing witness. The court charged the jury that they had a right to infer that from the non-production of the witness that the witness's testimony would be adverse to the interests of the defendant. Although different Appellate Division decisions in the past have reached different conclusions when the missing witness was an expert, the Washington court made it clear that since the plaintiff could have called the defense expert (although whether he would have had to give opinion as opposed to fact is not explored) and the defense expert's knowledge was not superior to the plaintiff's expert, only that he would not have conflicted with the plaintiff's expert. It would have therefore been merely corroborative or cumulative as opposed to superior.

The court also noted that since plaintiff could argue that his expert testimony was un-rebutted, plaintiff would have suffered no harm if the charge had not been given. On the other hand, the trial judge gave the weight of the court's authority behind the plaintiff's argument in summation about missing witnesses, improperly.

SUMMARY JUDGMENT

In a published decision, Alfano v. Schaud, the Appellate Division held that when there is uncontroverted physical evidence that disproves one party's story so that no reasonable jury could believe it, the court should not adopt that version of the facts when deciding a motion for summary judgment. In this case, plaintiff brought a civil rights action against a police officer alleging a 40-minute detention and confrontation. The police officer produced the audiotape of the event which showed a nine-minute event. Therefore, no "genuine issue" of material fact existed, and the court was free to determine summary judgment in favor of the defendant.

REMITTITUR

As you may recall, in 2011, the New Jersey Supreme Court decided Ming Yu He v. Miller, which held that a judge hearing remittitur motions must allow each side to raise relevant precedents in similar cases for the purpose of comparison and the trial judge must explain on the record which cases impact the remittitur decision and how.

Further, Appellate courts were instructed to give due deference to a trial judge's reliance on the judge's "feel of the case" based on firsthand courtroom observation, keeping in mind that the judge should not supplant the role of the jury. Two recent unpublished Appellate Division decisions, Reilly v. Village of Ridgewood and Newton v. Sam's Club, have put the ruling into question.

In Reilly, the Appellate Division affirmed the trial judge's reduction of a $3.5 million emotional distress award on a whistleblower claim to $500,000. The trial judge reviewed in detail similar cases with similar backgrounds, but distinguished the facts, strengths, and weaknesses of those cases in comparing the award.

In Newton, the Appellate Division held that the trial judge did not perform a detailed examination of the verdict and remanded the issue of damages back to the Law Division ordering the trial judge to provide a complete and searching analysis including a "factual analysis of how the award is different or similar to others to which it is compared…"

These rulings would seem to portend a trend that aberrant verdicts will not be upheld merely because the trial judge was carried away by emotion but also show that when it is properly supported, high verdicts will nonetheless stand.

EVIDENCE / EXPERT WITNESS

In an unpublished decision, Schwartz v. Goldberger, the Appellate Division upheld the dismissal of a medical malpractice action when the plaintiff failed to present expert testimony. The expert was out of state and refused to come to New Jersey to testify or participate in a de bene esse deposition. The plaintiff wanted to use the discovery deposition as trial testimony, but the Rules of Court clearly prohibit same. Further, the expert was not "unavailable" due to unforeseeable circumstances, but was voluntarily absent.

TORTS, THIRD PARTY CRIMINALITY, RESCUE DOCTRINE

In an unpublished decision, Desir v. Vertus, the New Jersey Supreme Court reversed the Appellate Division's ruling that the defendant violated a duty of care when the defendant's neighbor was shot by an unidentified third party. The Supreme Court noted that traditional concepts of trespasser/licensee/invitee law and the rescue doctrine may not fit the fact pattern on every occasion despite the Appellate Division's heavy reliance on same. The Supreme Court noted that the function of the law is not to achieve a result in any particular case but to establish generally applicable rules to govern societal behavior. Included in this analysis is the issue of foreseeability for all unanticipated fact patterns.

In the unfortunate factual background, defendant Vertus conducted a business out of his home. When showing a customer towards the living room in anticipation of leaving, the customer suddenly moved back from the living room as if "something was wrong." Vertus believed there may have been a robbery or some other incident in progress in his own home and quickly left through a side door. He went to a neighbor's home asked to use the telephone. The neighbor then left the apartment to go to the defendant's home. The neighbor was shot dead on the sidewalk.

The Supreme Court held that the business owner owed no duty of care to the neighbor, and particularly owed no duty to prevent the neighbor from going to the scene to attempt a rescue where the neighbor presumably encountered the fleeing thief. The fact that the incident occurred offsite, on the sidewalk, seems to have some play in the Supreme Court's analysis but not as much as an analysis of the rescue doctrine. The rescue doctrine rests on the recognition that when the rescuer is blameless, the rescuer has a cause of action for injuries sustained in the rescue, but the cause of action is against the party who created the peril, in this case the thief, not the property owner. Clearly danger invites rescue, but the danger, in order to be actionable, must be created by the person being sued.

Further, the fact that there could be third party criminal activity anticipated does not create a duty in every instance. This is where the Court entered into its "full duty" analysis instead of traditional concepts of the status of a person on the land, and in this case held that because the rescuer was not rescuing the defendant, the defendant could not have owed him any duty to protect against a criminal.

WORKPLACE ACCIDENTS/COMPARATIVE FAULT

In an unpublished decision, Fernandes v. Dar Development Corp., the Appellate Division has come very close to striking contributory negligence in work related accidents. The factual setting is not unfamiliar - a trench

collapsed at a construction site due to the failure of the employer to take proper safeguards. The employer was of course immune from suit and a claim was brought against the general contractor. The plaintiff was an illegal alien, but since he abandoned his future wage loss claim, that status was not evidentiary.

The plaintiff acknowledged that he was aware that the trench could be dangerous but testified that he could not give "too many suggestions" on the job because he feared he would be fired. Nonetheless, defense counsel elicited plaintiff's knowledge that he knew what trench boxes were and their importance. Nonetheless, the Court struck any contributory negligence, differentiating the case from Kane v. Hartz Mountain Industries, Inc., because in Kane the employee assumed risks not specifically intended as part of the employment. The Appellate Division found that in this case the risk was attendant to the employment. In short, the Appellate Division felt that there was no evidence that the plaintiff felt it was unsafe to get into the trench.

Assuming the Appellate Division's recitation of the facts was correct, the court held that because there was no evidence that the plaintiff voluntarily and unreasonably proceeded in the face of a known danger, contributory negligence would be stricken. This is basically the same rationale followed since 1979 for employees hurt on the job using unsafe machinery.

It therefore becomes all the more important to establish beyond any doubt that the plaintiff proceeded in the face of a known risk and that plaintiff's employer would not have fired the plaintiff had plaintiff refused to perform unsafe work. The decision is a clear signal that the economic realties of continued employment may be taken into account not just on factory/machinery cases, but in all workplace settings.

TORTS / SKI RESORTS

In a published decision, Angland v. Mountain Creek Resort, Inc., the New Jersey Supreme Court addressed whether or not the Ski Act, passed by the Legislature in 1978, applies to claims between skiers or just to claims between skiers and ski resorts. The Court unanimously held that the Act did not provide any immunity for a skier sued by a fellow skier, only providing immunity for claims of negligence brought against ski resorts. The standard of care for claims brought between skiers is not negligence, but recklessness - the same as all claims for persons participating in recreational sporting events.

PERSONAL INJURY PROTECTION BENEFITS – ARBITRATION REMANDS

In an unpublished decision, Kimba Medical Supply v. Allstate Ins. Co. of N.J., the Appellate Division addressed two separate cases involving contested automobile personal injury protection (PIP) benefits. The issue raised was whether the trial court, under the New Jersey Alternative Procedure for Dispute Resolution Act (APDRA), N.J.S.A. 2A:23A-1 to -19, and associated PIP regulations cross-referencing that statute, has the authority to remand unresolved questions to a dispute resolution professional (DRP) after the court has vacated or modified a DRP's decision. The Appellate Division affirmed the trial court's decisions remanding the cases to Forthright, the organization that contractually provides the Department of Banking and Insurance with the dispute resolution professionals (DRP's) who hear the PIP matters. The Appellate Division rejected Forthright's interpretation of the law and concluded that §§ 13 and 14 of the APDRA must be sensibly construed to authorize such remands to a DRP in certain limited situations where a PIP arbitration award has been judicially vacated or modified.

EMPLOYMENT LAW

In Battaglia v. United Parcel Service, the Supreme Court addressed the broad remedial scope of the New Jersey Law Against Discrimination ("LAD") and emphasized that one does not necessarily have to be discriminated against to bring a retaliation claim as long as the complaint was reasonable and made in good faith. A male employee alleged he was terminated as retaliation for reporting a male supervisor's vulgar comments about females. The Supreme Court found the reporting to be protected activity, even though no females heard the comments. The case also addressed plaintiff's burden to demonstrate future emotional distress damages in LAD claims and the need to show permanency. Finally, the case addressed whistleblower protection under the Conscientious Employee Protection Act ("CEPA") based upon a "reasonable belief" about fraudulent conduct. The Court emphasized its obligation to precisely identify the protected whistleblowing activity. In Battaglia, even though the trial court instructed the

jury about the improper use of credit cards, the court also utilized the words, "and other things," to describe the protected activity. The Supreme Court found that the language was open-ended and constituted an error of fact and law requiring a remand because the jury instruction did not precisely articulate the protected activity.

RECENT TRIAL RESULTS

Ed Thornton recently obtained summary judgment in a case wherein plaintiff was alleging permanent cognitive damage. Plaintiff and the insured were on the men's soccer team at Fairleigh Dickinson University. During an intrasquad game in which the insured was playing goalie, a teammate kicked the ball towards the insured, who kicked it away. It struck the plaintiff in the head and caused him permanent injury.

We argued that the insured, under Supreme Court rulings, should be immune from suit because the insured's conduct was not reckless or intentional nor, for that matter, was it negligent. We also argued that the insured should be entitled to the charitable immunity defense, as the insured was an agent of the university, promoting the university's mission of moral, educational, social, and physical advancement of people. Judge Brennan, sitting in Morristown, agreed with both of our points and granted judgment as a matter of law. The motion brought by Fairleigh Dickinson was denied as the actions it took in supervising the game and treating the plaintiff afterward may be thought of by a jury to constitute gross negligence where immunity would not apply.

Ed Thornton recently tried a case in Morris County defending a pharmacy being sued because a customer tripped over a mat. The mat was installed and maintained by a third party defendant. Plaintiff tripped over an upraised corner of the mat. The surveillance cameras recorded that the mat was upturned by an unidentified customer 35 seconds before the plaintiff fell. Plaintiff's expert claimed that the pharmacy should have known that the mats were not suitable for their purpose near a checkout counter. Plaintiff sustained a four part comminuted humeral fracture, torn rotator cuff, and underwent dominant arm shoulder replacement. The 78-year-old plaintiff also presented $95,000in medical bills. The jury agreed with Ed that the party to blame, if any, was the party who chose the rug, the third party defendant with whom Ed had settled. The jury accordingly returned a defense verdict.

Ed Thornton: As you may recall, we recently reported about a trial handled by Ed Thornton in Burlington County, wherein Ed represented a chemical product blender. The insured was sued along with the retailer by a customer who burned his foot on the concentrated roof cleaning product. The jury returned a very low verdict. The retailer, not being content with the verdict, filed a motion post trial for attorney's fees contending that it had to defend a product liability claim as a retailer and as such should be entitled to indemnification. The trial judge denied the motion and an appeal followed. The Appellate Division has agreed with our position that the case was not mere strict liability but also a claim of negligence, obviating any common law indemnity. Further, the Appellate Division agreed with us that the demand was not made in a timely manner and that any request for counsel fees has to be clearly apportioned between competing theories, which was not done. The Appellate Division therefore affirmed the trial judge's post trial decision absolving the insured from responsibility for fees.

Eric Harrison and Jennifer Herrmann obtained summary judgment dismissing plaintiff's claim under the Conscientious Employee Protection Act ("CEPA"). Plaintiff, a non-tenured middle school teacher, complained during his first year that he did not receive timely or effective mentoring or appropriate training. He complained in his second year about fraudulent grading practices. For the purposes of the motion, defendants accepted these as whistleblowing activities. Subsequently, plaintiff was arrested and charged with possession of marijuana. The Superintendent gave plaintiff several opportunities to meet with her, which he declined, so she recommended and the Board agreed that plaintiff be terminated. Plaintiff had a hearing before the Board, at which his attorney spoke on his behalf arguing that plaintiff should not be terminated unless the criminal charges are resolved against him. After the Board declined to reverse plaintiff's termination, plaintiff requested binding arbitration pursuant to his union's grievance procedure. In the interim, the charges were dismissed because the State failed to produce a timely lab report, but the report ultimately produced confirmed that the confiscated material was marijuana. At arbitration, plaintiff did not testify on his behalf, but he had an attorney; there were evidence, testimony, and cross-examination; the lawyers made arguments and submitted briefs; and the arbitrator issued a long, thoughtful

written opinion after a four-day hearing. The arbitrator found that plaintiff's possession of marijuana constituted unbecoming conduct amounting to just cause for termination. As to plaintiff's CEPA case, the Court gave preclusive effect to the arbitrator's finding that plaintiff possessed marijuana which was conduct unbecoming of a middle school teacher. The Court emphasized independently of the arbitrator's opinion that a middle school teacher's possession of marijuana is conduct unbecoming of a teacher, who is expected to be a role model for students and without regard for the procedural dismissal of the criminal charges. The Court found no evidence that plaintiff's arrest was pretext for a retaliatory reason for termination. Plaintiff's CEPA claim was therefore dismissed.

Eric Harrison and Leslie Koch obtained summary judgment at the trial level last year in Hahn v. Edison Township. A police officer claimed that his numerous and continuous complaints about fewer patrolmen on the road constituted both "whistleblowing" and a complaint of age discrimination in violation of the New Jersey Law Against Discrimination ("LAD") and the Conscientious Employee Protection Act ("CEPA"). He claimed that he was retaliated against through a variety of transfers and reassignments for his PBA activities and his vocal complaints to the Mayor. The Appellate Division recently affirmed the trial court's dismissal.

Eric Harrison, Vivian Lekkas, and Michael Poreda successfully obtained summary judgment dismissing plaintiffs' defamation claims as a matter of law. Plaintiffs, a land developer and his companies, sued the insured after she distributed letters to neighbors and government agencies regarding what she believed to be the dumping of contaminated and hazardous materials on plaintiffs' land adjacent to her summer home. Defendant continued to be vocal over many years and at council meetings continued to voice her concerns about the plaintiffs' property, including her concerns with flooding as his properties were to be raised several feet above her own property. Plaintiffs alleged that the insured's statements constituted defamation and defamation per se. The judge ruled that many of the statements were time barred pursuant to the one-year statute of limitations applicable to defamation cases and any statements that were not time barred were subject to a qualified privilege.

Eric Harrison and Michael Poreda: The Appellate Division affirmed the trial court's dismissal of plaintiff's claim under the Conscientious Employee Protection Act ("CEPA"), the judge's evidentiary rulings, and the jury's defamation verdict. Last year we reported favorable results after a jury trial in which Plaintiff alleged that she was retaliated against and defamed by her former supervisor after she complained about her supervisor's delays in reporting patients' bone density scans and altering the dates on the reports. Plaintiff resigned from her position and alleged that she was constructively discharged. Months later she became re-employed when she accepted a position under a different supervisor. At the conclusion of the trial, the judge granted a directed verdict as to the insured's CEPA claim. The Appellate Division upheld the trial judge's determination concluding that plaintiff was time-barred from utilizing retaliatory actions that occurred during the first period of employment and any retaliatory conduct that occurred during the second period of employment where she no longer reported to the same supervisor were not sufficient to create a hostile work environment. The Appellate Division also ruled that there was no reversible error with respect to the evidentiary rulings. Finally, the Appellate Division affirmed the trial judge's denial of a new trial on damages for defamation but remanded for entry of a judgment for nominal damages in the amount of $100. Plaintiff has petitioned the Supreme Court.

Eric Harrison and Raina Pitts obtained summary judgment on breach of contract and age discrimination claims of a non-renewed public school custodian. The plaintiff, who sought punitive damages, alleged that his non-renewal violated the New Jersey Law Against Discrimination because he was replaced by younger custodians. Eric and Raina presented compelling proof of poor performance over the course of several years, which they argued the plaintiff failed to rebut with evidence to demonstrate pretext to mask a discriminatory motive Judge Manahan of Morris County agreed and dismissed all claims.

Ric Gallin recently defended a cost recovery action in the Superior Court, Atlantic County. The plaintiff carrier had conducted a site remediation for years before putting our carrier on notice. They demanded that our client, who had been denied an opportunity to conduct their own investigation or participate in the remediation, pay the lion's share of the clean up costs. At a non-jury trial, the court agreed with Ric that our client had been prejudiced

by the plaintiff's action and reduced our client's allocated share by 40%. Negotiations after verdict further reduced the amount being sought and resulted in a settlement of approximately 25% of the total clean up costs and more than 50% less of the amount the plaintiff had originally sought.

Ric Gallin recently resolved a large subrogation case where he was defending in the District of New Jersey on very favorable terms. The plaintiff claimed that the insured started a fire at a food processing facility by defectively maintaining cooling equipment. The damage claim, including pre-judgment interest, approached $4 million. Ric was able to settle at approximately 20%. The insured had performed work on the equipment hours before the fire and the plaintiff claimed the insured failed to perform proper repairs and/or clean up oil which had escaped from the refrigeration lines and subsequently ignited. Ric was successful at a Rule 104 hearing in knocking out some of plaintiff's experts and putting doubt into plaintiff's theories of liability. The successful resolution of the 104 hearing established the groundwork for the subsequent settlement at a fraction of the insured's exposure.

Stephen Katzman successfully defended a first party suit for $750,000 of property damage allegedly caused by sinkhole collapse, a covered peril under a business owner's policy. The court agreed with our arguments that (1) an exclusion for earth movement (including soil erosion) applied and (2) there was a lack of credible evidence from the plaintiff that the loss was caused by a soluble geological formation (the sinking of land into empty spaces created by the action of water on limestone or dolomite) which was necessary to prove sinkhole collapse, as that term was defined in the policy.

Stephen Katzman has been managing all Superstorm Sandy related matters for the office. He has been actively working with investigators to reveal fraudulent conduct on the part of specific building contractors who have been entering into hidden contracts with insureds for less money than the contracts submitted to the insurance company.

William Bloom recently won a summary judgment motion on a cross-claim for contractual indemnification. The case involved a slip and fall on ice on in a parking lot in a large commercial/residential complex in which Bill's client was a supermarket that occupied the first floor of the building; the plaintiff suffered a very significant leg fracture. Pursuant to the lease, the landlord was responsible for the parking lot area. The lease further contained an indemnification agreement in favor of the supermarket. After obtaining summary judgment on the issue of liability as to the plaintiff, Bill moved for judgment on the claim for contractual indemnification against the landlord. In spite of the landlord's argument that the indemnification agreement was ambiguous and was not effective to indemnify the supermarket against allegations of independent negligence, the Court ruled otherwise and found Bill's client entitled to recoup defense costs and fees.

Adam Weiss has been appointed to the New Jersey State Bar Association's School of Law Committee for 2013-2014.

Gerald Kaplan received a summary judgment on July 2, 2013, when the Appellate Division affirmed the trial court's granting of our motion for summary judgment on September 28, 2012. Insureds were owners and the property manager of an apartment complex. Plaintiff was a tenant within the complex. Plaintiff alleged that lint accumulation in the clothes dryer in the basement of defendant Shafer's unit caused a fire to erupt.

Plaintiff looked through her window and saw smoke and flashing lights. She got dressed and exited her unit and stood next to defendant Shafer in the street conversing about the fire. Shafer had a cat in the unit and plaintiff went to speak to the firefighters about the cat. She then saw flames shooting out of the window of Shafer's unit and when she turned to run, she tripped and fell on a fire hose resulting in serious injuries.

The trial court ruled that plaintiff's injuries were not foreseeable and defendant's alleged negligence was not a proximate cause of the accident. The Appellate Division affirmed and stated that plaintiff's injuries were not foreseeable because her voluntary actions broke the chain of causation between defendants' alleged negligence and plaintiff's injuries.

Gina Stanziale was recently successful in having the Court grant our motion for reconsideration, vacating the prior denial of summary judgment and dismissing all claims for UIM coverage.

Upon reconsideration, we argued that the Court neglected to rule on two exclusions of a Mercury policy of insurance barring UIM benefits, which exclusions were already found to be unambiguous by the Appellate Division in an unpublished opinion (Green v. Mercury) also handled by Ms. Stanziale. The Court, having reviewed the transcript of the argument below, agreed and permitted us to proceed with our motion.

As for Exclusion 5, we were able to persuade the Court that the plaintiff was an insured with NJ Transit, a self-insured public entity, and, as such, the exclusion barring benefits applied. We argued to the Court that a self-insured public entity is the functional equivalent of a company having its own private automobile insurance policy. We also argued that no matter what, the plaintiff, as an employee of NJ Transit operating a bus on the roads of the State of New Jersey, would be entitled to indemnification for his negligence from NJ Transit which added more support for our position that he was in fact insured with NJ Transit.

As for Exclusion 2, we argued that the bus he was operating was not listed on the declarations page and that it was furnished for the plaintiff's regular use as he operated it everyday as an employee.

Most importantly, we emphasized the Green case wherein the Court found both exclusions to be clear and unambiguous. While that case was unpublished and, as such, not binding on the Court, we asked the Court to find it persuasive when rendering its opinion. Ultimately, the Court took note of the Green holding and vacated its prior Order as to these two exclusions.

John Knodel successfully defended the insured owner/operator of a motorcycle who was involved in a serious accident when the codefendant automobile driver made a sudden lane change from the right lane directly in front of the insured who was in the left lane. The plaintiff, the insured's nephew, was a passenger on the motorcycle. The insured suffered a catastrophic brain injury and had no memory of the accident. The plaintiff fractured his left patella, left femoral shaft, left fibula, left tibia tubercle and a tore his left patella. He was hospitalized for 9 days as Hackensack University Medical Center where he underwent multiple surgeries followed by a month in a rehabilitation facility. The plaintiff underwent another surgery approximately 2 months later to repair his fractured ankle. The plaintiff was left with significant residuals in his left leg that the defense doctor had to concede were permanent. The plaintiff had over $173,000 in outstanding medical bills that were stipulated to at trial. The codefendant deposited her policy limits in court. The insured's policy limits were also deposited in court. The plaintiff settled with the codefendant but refused to settle with the insured who offered $50,000 of his own money. The plaintiff was successfully crossed-examined by John with discrepancies in his trial testimony, deposition testimony and answers to interrogatories in which he initially blamed the codefendant for the accident but at trial blamed the insured for speeding and failing to take evasive action to avoid codefendant as well as statements the plaintiff made to medical personnel in the hospital that he was a passenger on a motorcycle that was cut-off by a car that made an abrupt lane change as well as a similar statement to the investigating police officer.

The jury found the insured not negligent.

John Knodel also obtained summary judgment in which the plaintiff, the wife of the insured's good friend, was injured when a stairway on the insured's back deck suddenly gave way. The deck was built approximately 1 year before the accident and passed inspection. The insured hired a local contractor who was unlicensed and did not have liability insurance that is required by the New Jersey Administrative Code. The insured, as well as the plaintiffs, had used the deck numerous times before without incident. The plaintiff's liability expert opined the stairs were improperly attached to the deck. The plaintiff suffered disc injuries and underwent an extensive course of conservative treatment including multiple injections. The plaintiffs refused an offer of $50,000. John argued the insured was a social host who had no knowledge of the latent defect in the stairs and therefore immune from liability. The plaintiffs' attorney argued the insured's hiring of an unlicensed, uninsured contractor superseded the social host immunity rendering the insured liable. The motion judge, a retired appellate judge on recall, agreed with John although she literally begged the plaintiff's attorney to appeal her ruling given the unresolved issue raised in this case. The plaintiffs did not appeal.

Lori Brown Sternback was awarded a split on liability between the plaintiff and the insured defendant. The insured driver was held 60% responsible for the accident and the plaintiff was 40% responsible for same. This matter arises out of a motor vehicle accident that occurred on December 13, 2008 involving a taxicab driven by the plaintiff and an ambulance driven by defendant Richard Thomas. Mr. Thomas was operating the ambulance during the course of his employment with defendant Absecon VFW Volunteer Ambulance Squad. The accident occurred at the intersection of Pacific Avenue and Kentucky Avenue in Atlantic City, New Jersey. The insured's ambulance was stopped at a red light and the taxicab was also stopped at that same red light but was traveling in the opposite direction of the ambulance. The ambulance was planning on turning left onto Kentucky Avenue. The taxicab was going to travel straight across the intersection when the light turned green. There is a video of the accident from the dashboard camera of the ambulance. After the light turned green, the ambulance waited perhaps one or two seconds before proceeding into the left turn because the taxicab had not moved. After proceeding partially through the turn, the taxicab began to enter the intersection toward the ambulance. The ambulance came to a stop and thereafter, the taxicab continued driving into the front of the ambulance. The jury also determined that the plaintiff did not meet the threshold requirement of the Tort Claims Act in order to award any damages. As such, a no cause will be entered in favor of the defendant insured.

Lori Brown Sternback and Kyle Vellutato defended a Summary Judgment on appeal in Irma Sanchez v. The Villages Association. The plaintiff, a unit owner in a condominium complex, slipped and fell on a walkway in the community while taking out her trash. The by-laws of the defendant condominium association included a provision pursuant to N.J.S.A. 2A:62A-13, which restricts tort claims brought by unit owners to bodily injuries caused by the "willful, wanton or grossly negligent act[s] of commission or omission" of the association. Ms. Sternbeck successfully obtained summary judgment prior to trial, asserting that plaintiff could not demonstrate any willful or grossly negligent action or inaction by the defendant condo association.

Plaintiff appealed the grant of summary judgment, asserting that the association could not demonstrate that this by-law was properly passed because it could not establish a record of the necessary 2/3 vote by the owners approving the by-law. The Appellate Division, affirming the trial court, agreed with the defense that there was a presumption of validity to the amended by-laws, and that the burden was on the plaintiff to establish its invalidity.

Michael Eatroff successfully defended an attempt by Forthright to severely limit an insurer's options when a PIP arbitration decision is to be vacated. In ROY PICKELL VS TRAVELERS, the Appellate Division ruled that a New Jersey trial court that overturns a dispute resolution professional's decision over contested personal injury protection benefits has the power to remand the case back to arbitration to settle unresolved factual questions.

Forthright fought to limit the trial court's options so that the court, rather than Forthright, would be compelled to resolve any factual issues left open after the initial PIP arbitration hearing. A decision to the contrary might have placed a substantial financial burden on a company in the form of trial expenses, including expert fees, whenever such additional fact finding is deemed necessary.

Forthright principally argued that the APDRA makes no specific allowance for such remands. However, both the trial court and the Appellate Division adopted the argument presented by Michael Eatroff. That was, that because the APDRA is partially incorporated into the PIP law, a "gap" was created in the PIP arbitration scheme; situations in which an umpire hadn't developed a suitable record for a trial court to issue its own ruling were not addressed. Therefore, either common law or sections of the APDRA not specifically incorporated would control and provide for remand in appropriate circumstances.

Michael Poreda successfully represented an insurance company in a subrogation case that went to a bench trial in Bergen County. The case involved damage to the insured's property caused by a kitchen fire. Michael successfully proved that the fire was caused by the negligence of the insured's tenant and won the full amount of damages sought.

Matthew Rachmiel recently obtained summary judgment in a PIP lawsuit by asserting that plaintiff had dual residency. Plaintiff, a 21-year old child of divorced parents, was involved in an auto accident while a passenger in the vehicle insured by the client. Neither plaintiff nor her mother, whom she primarily lived with, owned a car

and thus neither of them had auto insurance. Plaintiff's father did have auto insurance. Auto insurance policies in New Jersey must provide PIP benefits to "resident relatives" of the named insured in addition to the named insureds themselves. Thus, if plaintiff was deemed to also be a resident of her father's household, then the father's insurer would be responsible to pay her PIP bills. If plaintiff was deemed to not be a resident of the father's household, then the client, as the insurer of the vehicle in which plaintiff was in when the accident happened, would be responsible to pay her PIP bills. A person can legally be a resident of more than one household.

At the conclusion of discovery, plaintiff's father and the driver of the vehicle (the client's insured), the two insurers cross-moved for summary judgment on the narrow issue of whether plaintiff was a resident of her father's household. Some of the significant facts were that plaintiff generally slept one to two nights per week, usually on weekends, at the father's home; she also visited her father and brother at the father's home on days that she did not sleep there; she kept a small amount of clothes and toiletries at the father's home; she received mail at the father's home; she did not have her own bed or bedroom at the father's home; and she did not have a key to the father's home.

The court applied the specific facts of the case and concluded that plaintiff was a dual resident of both parents' homes. The father's insurer was thus obligated to pay plaintiff's PIP bills and the client was not.

Paul Endler successfully tried a case where plaintiff alleged that he was struck from behind by insured Ristagno. Ristagno alleged that he was struck from behind by an unidentified driver who left the scene. The investigating police officer testified that he was on the scene shortly after the accident and confirmed that there was damage to the back of Ristagno's vehicle which was consistent with fresh damage as if he had recently been struck from behind. Counsel for the unidentified driver argued that there were insufficient proofs as to the existence of an unidentified vehicle at the scene.

The plaintiff alleged an aggravation of pre-existing spinal injuries as well as a new disc herniation and a partial thickness tear of the rotator cuff in the shoulder of his dominant arm. The plaintiff had been involved in a prior accident where he had sustained injuries which included complaints of pain to the shoulder, although not necessarily the rotator cuff. Defendant's examining orthopedist, Dr. Sorger, did not find any permanent injury and could not confirm the diagnosis of the tear. He found degenerative disease which may have been subject to a temporary aggravation due to the accident.

The jury found defendant Ristagno 25% liable for being too close to the plaintiff when he was struck from behind and found the unidentified driver to be 75% responsible for the happening of the accident. The jury found that the plaintiff, who was subject to the verbal threshold, did not sustain a permanent injury and as such awarded no damages.

Raina Marie Pitts successfully defended against an appeal of an Ocean County Superior Court Law Division Order dismissing the contract claims of a school psychologist who alleged that prior to accepting her position she was promised certain salary increases by the Board of Education (employer) which was not consistent with the salaried contract amounts she later entered into. The trial court granted the Board's motion for summary judgment, which was later appealed by plaintiff. On appeal plaintiff argued that the trial judge erred by refusing to consider parole evidence regarding plaintiff's contract negotiations and salary calculations. The Appellate Division disagreed with plaintiff and affirmed the trial court's ruling.

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