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

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CASE UPDATE

Methfessel & Werbel is pleased to present the Spring 2014 edition of our Case Update. With this edition of our Case Update we have a new interactive feature. A hyperlink has been added for all cited cases and attorneys within the Update. You can click on any of the cases cited in the Update and it will take you to a complete copy of the case. As always, we welcome your comments, questions and feedback.

METHFESSEL & WERBEL ANNOUNCE PROMOTIONS

Methfessel & Werbel is proud to announce that Marc L. Dembling has been promoted to Partner. Also promoted from Associate to Counsel are Adam Weiss and Gina Stanziale. Marc is a leader of M&W's Insurance Coverage team. Gina has been with the firm for more than 20 years as a valuable member of our Insurance Coverage and Liability Teams. Adam is a member of the Civil Rights Defense Group, which has focused on the defense of public and private entities and individuals in state and federal court.

UPDATES IN NEW JERSEY CASE LAW

AUTO INSURANCE – STEP DOWN PROVISIONS

On February 3, 2014, in James v. New Jersey Mfrs. Ins. Co., the Supreme Court resolved a split in Appellate Division decisions and held that the commercial UM auto step-down prohibition at N.J.S.A. 17:28-1.1(f) did not apply retroactively to an accident that preceded the new legislation's effective date of September 10, 2007. The Supreme Court reversed the Appellate Division and found that the trial court's grant of summary judgment in favor of NJM was appropriate.

AUTO LIABILITY / ACCIDENTS CAUSED BY THIRD PARTY TEXTING

In our Fall 2013 Case Update, we reported Kubert v. Best, in which the Appellate Division held that the sender of a text message had a limited duty and may be held liable under the common law for an accident caused by texting a driver whom the remote texter knew or had special reason to know would view the text while driving and thus be distracted. Although the Appellate Division in Kubert ultimately ruled that summary judgment in favor of the remote texter was warranted, the court expressly recognized a potential cause of action against such remote texters in future cases. As a direct result of this ruling, two bills have been proposed. Bill A-4410 provides that anyone who sends a text message "shall not be liable for civil damages resulting from a motor vehicle accident caused by, either directly or indirectly, the message recipient's unlawful use of hand-held wireless telephone while driving." Bill A-4431 states that knowledge or constructive knowledge that the message recipient is driving does not trigger liability.

INSURANCE COVERAGE

In Potomac Ins. Co. of Illinois v. Pennsylvania Manufacturers Association Ins. Co., the New Jersey Supreme Court decided an issue of first impression and held that one insurer may file a direct claim against another insurer involved in the same action, even though that second insurer initially declined coverage. The Supreme Court noted that this will provide "strong incentive" for active involvement by all carriers and will lead to the efficient use of all parties' resources and promote early settlement. The Court reasoned, "If a carrier anticipates that it will be responsible for a portion of the defense costs, it is more likely to invest in a vigorous defense." The Court cited Owens-Illinois v. United Insurance and Carter-Wallace v. Admiral Insurance and the "continuous trigger" doctrine through which liability may be apportioned among multiple insurers who provide coverage during the relevant period of exposure.

In Farmers Mutual v. NJPLIGA, a case litigated by our firm which we first announced to you through a "Special Report," the New Jersey Supreme Court revised the Owens-Illinois/Carter-Wallace continuous trigger approach to hold that solvent carriers on the risk will now serve as guarantors for any insolvent carriers.

On appeal, the Third Circuit agreed that Nationwide had no duty to defend and therefore, no duty to indemnify because the insurer, although it may not have intended to violate the TCPA, did intend to send the faxes and knew that sending them would use the recipients' paper, toner, and time. The Third Circuit distinguished the facts of this case from a 2007 Pennsylvania trial court decision, Telecommunications Network Design Inc. v. Brethren Mutual Insurance Co., where the court found that the insurer had a duty to defend because without more information as to the relationship between the insurer and the third-party vendor that transmitted the faxes, the court could not find that the insurer acted intentionally. As there are no New Jersey cases addressing this issue and there have been conflicting issues throughout the country, this Third Circuit decision is important when addressing such claims.

In Citizens United Reciprocal Exchange v. Perez, the Appellate Division held that the auto policy obtained based on fraudulent information was void ab initio as a material misrepresentation. However, the policy was valid for the mandatory minimum liability coverage amount of $15,000/$30,000 for claims of "innocent third parties." The dissent opined that the policy should be only subject to the basic auto policy limit which was $10,000. In view of the modest differential, we do not anticipate an appeal.

In Allstate New Jersey Ins. Co. v. Lajara, the Appellate Division held that defendant insureds did not have a right to a jury trial for claims brought by carriers under the Insurance Fraud Prevention Act ("IFPA"). The insurer alleged that the insured engaged in a pattern of fraud which caused the carriers to pay out $8.2 million in fraudulent PIP benefits. The Appellate Division held that the IFPA did not imply a right to a jury trial and that there is no state constitutional right to a jury trial brought under the IFPA.

INSURANCE – PROPOSED LEGISLATION

Recently proposed bill, A-4382, would give New Jersey residents a private cause of action against insurance companies over improper handling of claims. This bill stems from the numerous complaints from victims of Hurricane Sandy. The bill would allow insureds to recover their full damages, regardless of coverage limits, as well as legal fees, expenses, and punitive damages. It would cover not only natural disasters like Hurricane Sandy but also technological and civil calamities that result in a declared state of emergency. Claims would be based upon the same type of conduct that is already defined as "unfair claim settlement practices." As to third party claims, the bill by law also would codify and strengthen the Rova Farms doctrine, by allowing an insured to recover the full amount of a verdict above the policy limits from an insurer which refuses to settle in bad faith. If passed, the bill would apply to all claims filed on or after October 1, 2012.

ENVIRONMENTAL

In New Jersey Schools Development Auth. v. Marcantuone, the Appellate Division held that liability exists under the New Jersey Spill Act for an owner who purchased previously contaminated property but failed to engage in due diligence with regard to environmental contamination prior to purchasing the property. The language "in any way responsible" was to be broadly construed. The Supreme Court has denied certiorari.

WORKERS' COMPENSATION

In Estate of Kotsovska ex rel. Kotsovska v. Liebman, the central issue on appeal was whether decedent's status as an employee or independent contractor should have been decided in the Division of Workers' Compensation. The Appellate Division held that the trial court should have transferred the case to the Division of Workers' Compensation, which has primary jurisdiction, to determine whether decedent was an employee or an independent contractor. The Division was best suited to make such a determination and there was no impediment in transferring the matter.

TORTS – PREMISES LIABILITY

In Arroyo v. Durling Realty the Appellate Division affirmed the trial court's grant of summary judgment to defendant. Plaintiff was injured after she slipped on a telephone calling card that had been discarded on the sidewalk outside of defendants' convenience store. Plaintiff claimed that this was an unreasonably dangerous condition and noted that the phone cards were displayed on racks near the store's cash register and exit doors. Plaintiff presented expert testimony which the Court found to be a net opinion incapable of withstanding summary judgment.

In Qian v. Toll Brothers, the Appellate Division held that condominium associations do not have a common law duty to remove ice and snow from their interior sidewalks. In deciding this case, the court found that the Supreme Court's 2011 decision in Luchejko v. City of Hoboken controlled, and there was no meaningful distinction between interior sidewalks in a condominium project and residential public sidewalks. While all property owners are governed by municipal ordinances that compel snow and ice removal, such ordinances do not create a tort duty. Since the association, being a non-profit organization, could not be compared to a commercial entity, the court declined to extend a duty to the association. The court also found that since the developer had given up title to the property many months earlier, the developer could not be found to be at fault, and individual unit owners, not being owners of the common areas, had no duty either.

TORTS - DEFAMATION

In NuWave Inv. Corp. v. Hyman Beck & Co., Inc., the Appellate Division held that both actual damages and presumed damages cannot be recovered in a defamation suit. The jury awarded $1.2 million in presumed damages and $1.4 million in actual damages for allegedly defamatory statements made in a background report produced on behalf of prospective investors.

CIVIL RIGHTS

The New Jersey Supreme Court is poised to render an important decision addressing whether the New Jersey Civil Rights Act ("CRA") may be applicable to private individuals not acting under color of state law. Following two Appellate Division decisions, Perez v. Zagami, LLC and Cottrell v. Zagami, LLC, on January 13, 2014, the Supreme Court granted certification to address this limited issue and oral argument was recently heard. An affirmance by the Supreme Court would alter New Jersey practice by presenting the risk of statutory CRA exposure in many traditional tort cases. Most significantly for the risk management industry, claims under the CRA are subject to fee-shifting and are often "fee-driven" when plaintiffs' attorneys seek to build the value of the claims by overlitigating rather than settling for a reasonable figure early in the litigation.

EMPLOYMENT LAW

A recently signed bill by Gov. Christie amended the New Jersey Law Against Discrimination ("LAD") and expanded the protected classes under the LAD to include pregnant women and those who recently gave birth. Employers are now required to make reasonable accommodations, including extended leave, for pregnancy-related medical issues when requested by the woman on the advice of her doctor.

In February of 2013, the Committee on Model Civil Jury Charges for the first time created jury charges on failure to accommodate claims under the New Jersey Law Against Discrimination ("LAD"), which were approved in August of 2013. The Committee also revised the jury charges related to claims for lost future wages and hostile work environment claims under the LAD.

In Lippman v. Ethicon, the Appellate Division parted company with the panel that decided Massarano v. New Jersey Transit which previously reasoned that compliance officers who simply do their jobs by reporting company

wrongdoing are not entitled to whistleblower protection under the Conscientious Employee Protection Act (CEPA). The Lippman Court disagreed and reasoned that such a holding would not be consistent with CEPA's broad remedial scope. The Appellate Division explained that "watchdog" employees such as compliance officers are the most vulnerable to retaliation. The Appellate Division declined to endorse any implicit or explicit notion that an employee's title or job responsibilities are outcome-determinative in establishing a whistleblower claim.

DAMAGES

Judge Sarkisian of Hudson County Superior Court has issued a non-binding yet well-reasoned unpublished opinion on the issue of hedonic damages in Johnson v. Redd, et. al. Hedonic damages are defined as those non-economic damages of pain and suffering that flow from physical impairments which limit plaintiff's capacity to share in the amenities of life. Although never squarely faced in New Jersey previously, many jurisdictions have disallowed expert testimony seeking to quantify such damages. The court found that damages to quantify loss of enjoyment of life are not amenable to the analytical precision plaintiff's expert advanced.

ALTERNATIVE DISPUTE RESOLUTION

In a published decision, Willingboro Mall LTD v. 240/242 Franklin Ave., LLC, the New Jersey Supreme Court upheld the Chancery Division and Appellate Division's enforcement of an oral agreement reached during mediation but held that prospectively a settlement reached at mediation that is not reduced to a signed written agreement will not be enforceable. The Supreme Court reasoned that mediation should help resolve disputes expeditiously and not spawn more litigation. This case signifies the importance of drafting a written agreement before leaving mediation.

RECENT TRIAL RESULTS

Bill Bloom had previously obtained summary judgment for his client, a church, under the Charitable Immunity Act. The decision was recently upheld by the Appellate Division. The plaintiff had suffered a broken elbow which required significant surgery as a result of a slip and fall while attending an adult education class sponsored by an outside organization but taking place at the church. Through a real estate expert, we established that the outside organization was renting the space from the church at a rate significantly below market rate. The appellate court concluded that by permitting the use of its facilities for this purpose and at a below market rate, the church was acting within the scope of its charitable purpose, and thus the plaintiff, clearly a beneficiary thereof, was barred from recovery.

Bill Bloom won partial summary judgment for a third-party defendant on a contractual indemnification claim arising from an incident in which the plaintiff, the client's employee, tripped and fell while exiting a rented photo booth at the client's holiday party, fracturing her hip and requiring a total hip replacement. The owner-operator of the photo booth brought a claim based on language in its contract with the insured which purported to require the client to defend and indemnify for all claims arising out of the client's holiday party except when the owner-operator was grossly negligent. Bill successfully argued that the language of the provision was not legally sufficient to require the client to indemnify the owner-operator for the owner-operator's own negligence, as the subject provision did not so explicitly require.

Bill Bloom also obtained an appellate affirmation of summary judgment in a case in which an elementary school girl alleged bilateral hip injuries requiring surgery on each hip as a result of a claimed slip and fall on water in a school cafeteria. The panel agreed that the plaintiff had failed to establish a prima facie showing that the school had notice, either actual or constructive, of the claimed condition, or that an employee of the school had created the condition.

Marc Dembling obtained summary judgment on plaintiff's claims against the insurance carrier made under a homeowner's policy. The policy had a "one year shortened suit clause" and the plaintiff insured filed suit one year and nine months after the denial of the claim by the carrier. The plaintiff was unsuccessful in arguing the clause should not be enforced.

Marc Dembling and **Chris Ward** successfully defended Quincy Mutual Insurance Company in a lawsuit brought by Ocean Property Management. Plaintiff argued that Quincy's policy was "ambiguous" and provided liability coverage for losses occurring anywhere. The court disagreed with plaintiff and granted summary judgment dismissing all claims against Quincy under the policy of insurance which excluded liability coverage for property management companies and limited liability for certain designated premises.

Marc Dembling and **Gina Stanziale** obtained summary judgment on behalf of Farmers Mutual in a coverage case asserting material misrepresentations were made in the application for insurance. The insured stated that it did no roofing work when in fact it did. The claims brought involved serious bodily injury to one claimant and a death claim for another claimant related to roofing accidents. The court agreed that the policy should be void ab initio because the carrier would not have written a roofer's policy or, in the alternative, would have charged an additional premium for such coverage.

Ric Gallin obtained summary judgment in the Supreme Court, Rockland County, dismissing an insured's first party claim. After Hurricane Irene the insured started to get water in their basement because the town's sewer system was overwhelmed and the water backed up. A plumber was called in who mistakenly thought there was a blockage in the system. He removed a toilet which relieved pressure holding the water back and the amount of sewage getting into the basement multiplied. The carrier denied the claim on a back-up of sewage exclusion. The insured contended that the actual cause of the loss was the plumber's negligence. The court pointed out that the plumber's negligence did not matter because of the concurrent causation language in the policy. At the end of the day, the source of the loss was the back-up of sewage, which was unambiguously excluded.

Ric Gallin recently obtained a large subrogation recovery in the Superior Court, Somerset County. An upscale house burned down. The fire was attributed to a dropped neutral in the utility lines feeding the house. Despite serious issues as to both causation and notice of the dropped lines, Ric was able to create a sufficient issue of fact that the public utility was willing to pay a significant percentage of the claim to settle before trial.

Eric Harrison obtained summary judgment in a hard-fought and highly-publicized disability discrimination lawsuit involving a high school football player with a learning disability who alleged that he was punished for a disability-related period of absence by not being returned to the starting lineup. In a lengthy written opinion, Judge Miller of Somerset County ruled that the plaintiff could not assert a viable claim under the Anti-Bullying statute and that the discrimination claims failed because the District had legitimate, nondiscriminatory reasons for starting other players ahead of the plaintiff and took swift action in response to his complaints of online bullying.

Eric Harrison and **Boris Shapiro** successfully defended a municipality in a Superior Court dispute under the Open Public Records Act ("OPRA") in which the plaintiff demanded police internal affairs materials. The Court determined that the materials were not public records under OPRA and that the equities favored non-disclosure under common law.

Eric Harrison and **Boris Shapiro** obtained summary judgment in a federal employment discrimination case filed by a maintenance worker. The court rejected claims that plaintiff was terminated in retaliation for taking FMLA leave and determined that he was lawfully terminated on account of excessive absenteeism, which left the maintenance department under-staffed and unable to meet the demands of the school district.

Eric Harrison and **Jennifer Herrmann** successfully litigated a combined age discrimination lawsuit and civil service challenge to the demotion of a custodian. After the Civil Service Commission denied the plaintiff's appeal and following full discovery, we moved for summary judgment, in response to which the plaintiff agreed to dismiss his suit with prejudice.

Eric Harrison, **Leslie Koch** and **Caitlin Lundquist** obtained summary judgment on two companion federal cases claiming retaliation against two women for the exercise of their free speech rights. The plaintiffs took photographs of off-duty firefighters working on the roof of a local politician and contacted a local news station, which reported on the events suggesting a misuse of public resources. One of the plaintiffs claimed she was intimidated by the Fire Chief. We successfully argued that discovery did not yield any evidence of a practice, policy or custom of the Fire District

which culminated in the violation of their constitutional rights; the Fire Chief was not a final policy maker, as the Fire District is controlled by an elected Board of Commissioners which sets policy, and the Fire Chief individually was immune from constitutional claims in his personal capacity because his actions did not, as a matter of law, violate a clearly established right.

Stephen Katzman, working in conjunction with Special Investigator James Herbert of Tower Insurance Group, successfully defeated the fraudulent insurance claim by a Newark police officer for the value of his fire-damaged SUV. Stephen conducted Examinations Under Oath of the police officer and his wife. The police officer made critical misrepresentations during the EUO. The police officer was indicted and subsequently pled guilty to third-degree insurance fraud. The police officer forfeited his $102,000 a year job and is now forever barred from law enforcement.

Stephen Katzman, successfully defended a $750,000 commercial property damage claim related to Hurricane Irene. There were multiple causes of loss, some of which were covered under the insurance policy and some of which were not covered. The preamble to the exclusions stated that the insurer would not pay for loss or damage which was excluded regardless of any other cause or event that contributed concurrently to the loss or in any sequence. The Camden County Superior Court agreed with federal and state precedent holding that such policy language is valid and enforceable. The court found that there was no coverage because of this language and dismissed the lawsuit with prejudice.

Stephen Katzman and **Christian Baille** obtained summary judgment dismissing bad faith claims related to the handling of a first party homeowner's claim for a water damage loss that resulted in extensive mold. The bad faith claim included bodily injury and emotional distress damages as a result of the alleged bad faith handling of the claim and delay in issuing payments. The court agreed that egregious conduct or overtly dishonest acts would have to be proven to obtain recovery for bodily injury and emotional distress and to recover punitive damages. The court found no such evidence and concluded that the insurance company had a fairly debatable basis for its actions, applying the bad faith standard from Pickett v. Lloyds.

Stephen Katzman and **Richard Nelke** successfully obtained summary judgment on behalf of Fitchburg Mutual Insurance Company in a coverage case. In our motion for summary judgment, we argued that the insured provided material misrepresentations in her application for insurance and committed equitable fraud in submitting it to the company.

Ed Thornton obtained a defense verdict in a case involving serious injuries in Bergen County. The plaintiff, a 24 year old self-employed floor refinisher, suffered second and third degree burns to 70% of his body as a result of an explosion. Plaintiff was hired to sand and finish a floor in a vacant apartment and was not told about an existing pilot light on the gas stove, which ignited the flammable product plaintiff was using. Plaintiff professed no knowledge about pilot light and admitted to not reading the label on the product. The insured's superintendent admitted that he knew plaintiff was using a flammable product and knew the pilot light was not extinguished. Plaintiff spent three and one half months in an induced coma in St. Barnabas Hospital, and one more month after coming out of the coma. His medical bills, repaid mostly by collateral sources, were $2.6 million. The jury found the insured 40% at fault and the plaintiff 60% at fault for his injuries, requiring entry of a no cause verdict.

Ed Thornton and **Amanda Sawyer** worked together on a case where the plaintiff, who was the victim of an explosion/fire and had medical bills of over $800,000, was suing his employer. The plaintiff, injured in the 2008 explosion, is no longer working and is still under treatment. Plaintiff brought a cross-motion for summary judgment, seeking to have the workers' compensation immunity defense stricken, but after extensive briefing and argument before Judge Coleman in Somerset County, the court agreed with us that the insured's actions did not create a virtual certainty of injury.

Ed Thornton and **James Foxen** obtained summary judgment on behalf of a building owner sued by a tenant claiming to be the victim of a sexual assault committed by a contractor's employee. Plaintiff claimed that the insured had failed to notify the plaintiff that work was going to be done, hired unlicensed workers, failed to complete any background checks, and alleged respondeat superior liability. The accused worker pled guilty to an array of sexual assault charges. The court decided that the contractor was not an employee, that the insured had no right of control over

the contractor's choice of employees, did not control the means, methods, or manner of the contractor's work and that there was no notice of any assault potential since even if a background check were done, we showed the court that no unsavory past would have been uncovered. Judge Schultz agreed with our arguments and granted summary judgment. The plaintiff has filed an appeal.

Lori Brown-Sternback received a jury verdict in favor of the defendant owner of premises in a case in which the plaintiff was significantly injured in a single car roll-over accident. Plaintiff's son was driving her SUV and alleged a defective condition on the insured's premises in the parking lot, a narrow area of the parking lot that did not permit two vehicles to pass each other, and when he reacted to the other vehicle, he lost control of his own SUV. The plaintiff appealed and alleged two reversible issues. The appellate panel found no rational jury could find in favor of Olivares on the first issue because there was no expert testimony that the roadway was improperly configured with respect to a driver's ability to regain control of a vehicle. Based on other testimony, the appellate panel also determined the trial judge could have found that there was sufficient testimony for the jury to find that the driver of plaintiff's SUV knew or should have known that he was speeding at the time of the accident and that his speeding contributed to the accident. In any event, any error on the part of the trial judge was deemed to be harmless and thus the panel affirmed the verdict.

Michael Eatroff obtained summary judgment in the matter of Gonzalez v. Liberty Mutual, an important ruling pertaining to the controversy regarding whether a carrier must extend PIP coverage to pedestrians struck by non-automobile highway vehicles. Plaintiff was struck by the defendant's insured commercial vehicle and incurred substantial medical expenses. Typically, such plaintiffs will accept coverage from PLIGA when offered. The plaintiff in this case moved for summary judgment seeking pedestrian PIP benefits from Liberty Mutual. We cross moved for summary judgment, contending that pedestrian PIP benefits were not deemed to be available to the plaintiff through the defendant's policy. The policy before the court was a typical commercial/highway vehicle (non-automobile) policy. Plaintiff's contention was that commercial/highway vehicle (non-automobile) policies should be deemed to include pedestrian PIP pursuant to N.J.S.A. 17:28-1.3. We argued that while this is a tempting interpretation to make initially when considering the less than precise language of N.J.S.A. 17:28-1.3 in a vacuum, the proper determination is easy to arrive at when the language of N.J.S.A. 17:28-1.3, N.J.S.A. 39:6-86.1, and N.J.S.A. 39:6A-4 is more closely analyzed; the position of the DOBI itself on the issue is understood; and pending legislation which would further clarify the issue is reviewed. The court issued a detailed opinion accepting all of our arguments

Paul Endler was able to secure a stipulation of dismissal on behalf of Accu-Flow Balancing Corp. in a product liability/negligence action brought on behalf of a plaintiff who had suffered an injury including the loss of several fingers on his dominant hand. Plaintiff alleged that due to the improper design, manufacture and/or maintenance of a HVAC unit, the plaintiff, who was working on the unit, suffered his injury. Paul provided sufficient proofs to plaintiff's counsel during a court ordered mediation that Accu-Flow, which had performed a balancing test on the building's HVAC system some weeks before the accident, could not have acted in any manner that would have proximately caused plaintiff's injury.

Jennifer Herrmann obtained a letter of dismissal from the Equal Employment Opportunity Commission ("EEOC") in a disability discrimination and retaliation claim. Over six years, complainant's emotional responses to seemingly innocuous workplace interactions alarmed her supervisors. When complainant submitted to Human Resources an article about workplace bullying, compared it to her own situation, and mentioned a television program regarding a man who committed suicide due to workplace bullying, the District placed complainant on paid administrative leave pending a psychological examination. She subsequently returned to work in the same position at the same rate of pay, suffering no damages. Complainant claimed that placing her on administrative leave was an act of discrimination against her for her disability or perceived disability, but the EEOC investigator disagreed and issued a finding of no probable cause.

Richard Isolde obtained summary judgment on a breach of contract and warranty claim against an automobile dealership. Judge Mongiardo ruled that summary judgment was appropriate because the plaintiff did not have an automotive expert. Judge Mongiardo held that issues related to the performance of an automobile were well beyond the scope of the common judgment and experience of the average juror and required the use of an expert. Additionally,

the court denied the plaintiff's request to reopen discovery after the discovery end date to name an expert where the plaintiff could not establish exceptional circumstances that would warrant the reopening of discovery.

Jared Kingsley was successful in prospectively shifting responsibility for personal injury protection (PIP) benefits to another PPA carrier and obtaining reimbursement of benefits paid to date by our client. Our client's insured's daughter and family were staying with the insured when the daughter was injured in a car accident in a vehicle insured by another carrier. During a bench trial, we successfully argued that the daughter's stay was transient in nature and therefore, she was not a resident relative. The court agreed and the other PPA carrier was ordered to assume coverage and care going forward.

John Knodel obtained summary judgment in a fall-down accident in which plaintiff tripped over the insured's uplifted sidewalk panel, suffering a trimalleolar fracture and dislocation of her ankle. The insured was the owner/occupier of a three-family house that she inherited from her parents, who purchased the property in 1956. No work was done on the sidewalk for over 50 years. In the recent 2013 case of Grijalba v. Floro, the Appellate Division ruled that whether a three-family house is residential is fact sensitive and the trial court must look to the nature of the ownership, including whether the property is owned for business or investment purposes; the predominant use of the property; whether the property has the capacity to generate income including a comparison between the carrying costs and the rents received; and any other relevant factors when applying commonly accepted definitions of "commercial" and "residential" property. John established through the insured that she occupies the property as her home, the rents did not exceed the carrying costs, and her parents purchased the property as the family home. The trial court ruled as a matter of law that the property was residential and applied residential sidewalk immunity since the dangerous condition resulted from ordinary wear and tear of the sidewalk. Plaintiff's motion for reconsideration was denied.

Vivian Lekkas successfully defended a Middlesex County Board of Education in a Charge of Discrimination filed by a former employee with the Equal Employment Opportunity Commission ("EEOC"). The employee alleged that she was being discriminated against on account of her disability in violation of the Americans with Disabilities Act ("ADA"). In addition to substantive arguments, we relied upon previous negotiations reached between the parties, while both were represented by counsel, to argue that the parties had entered into a private agreement resolving her claims even though there was no formal settlement agreement. She could not now bring a claim, after having receiving the benefit of the bargain, based upon the same underlying issues. The EEOC dismissed the charge allowing complainant 90 days to file in federal or state court. To date, the former employee has not filed a state or federal complaint and should now be time-barred from doing so.

Richard Nelke successfully defended a coverage claim on behalf of Tower Insurance related to Superstorm Sandy. Plaintiff submitted a claim seeking payment for a new roof and interior damages as a result of the storm. Tower denied the claim because the independent adjuster found that the roof was old and contained cracking throughout the entire surface due to wear and tear. As for the interior damages, the adjuster found that the amount of the damages was under the insured's deductible. Plaintiff filed suit seeking damages for the roof, interior damages, and contents. Plaintiff also alleged bad faith and a claim for attorney's fees. Our motion for partial summary judgment was successful in its entirety and the bad faith claim and the claim for attorney's fees were dismissed. The breach of contract claim was tried in Hudson County. The Judge agreed with our position and found that the roof fell under the wear and tear provision of the policy and found that the contents claim, which had not previously been articulated to the insurer, was suspicious and therefore, also denied that claim.

Matthew Rachmiel recently won dismissal of a Complaint for plaintiff's failure to state a claim upon which relief could be granted. Plaintiff and the client were neighbors and plaintiff alleged that the client negligently allowed her dog to go onto plaintiff's property. When it did, plaintiff shot at the dog. The police were called and plaintiff was found to be in possession of illegal hollow-point bullets and was arrested. Plaintiff sued the client seeking compensation for paying for his criminal defense attorney, lost wages for having to go to court for the criminal matter, and a hospital bill for alleged treatment relating to the incident. We successfully moved to dismiss the Complaint on the basis that, even assuming that the client was negligent for allowing her dog to go onto plaintiff's property, plaintiff's alleged damages

were proximately caused not by the client's negligence but by plaintiff's possession of the illegal bullets, his decision to shoot at the dog and his arrest for same.

Matthew Rachmiel recently obtained summary judgment in a sidewalk fall-down case. Plaintiff was walking on the sidewalk abutting a commercial property when he allegedly fell due to a crack in the sidewalk. Plaintiff was neither going to nor coming from the property when he fell. The co-defendant property owner leased the property to several tenants, including a portion of it to the insured who operated a convenience store. The lease between the insured and the co-defendant property owner required the insured to keep the sidewalk free from snow, ice and other debris but was silent as to cracks or other maintenance of the sidewalk. Matthew successfully obtained summary judgment by asserting that the lease did not require the insured to repair the crack in the sidewalk and that, as a lessee of a commercial property where other portions of it were leased to other tenants, the insured had no duty to maintain or repair the sidewalk. Moreover, because plaintiff was not going to or coming from the property when he fell, there was no substantial nexus between the accident, the crack in the sidewalk and the insured's leased premises to give rise to an independent duty of the insured to maintain or repair the crack.

Amanda Sawyer recently obtained summary judgment after successfully arguing that a special employment relationship existed between plaintiff and the insureds and, therefore, plaintiff was barred by New Jersey's Workers' Compensation Act from bringing tort claims against the insureds. Plaintiff's duties included taking care of the insureds' children, cleaning, doing laundry and cooking. The incident which formed the basis of plaintiff's complaint occurred in January of 2011 when plaintiff slipped on ice and snow which had accumulated on the rear deck of the insureds' house as she was on her way to pick up waste from the insureds' dog. The issue of whether a special employment relationship exists turns on a five-factor test. No single factor is dispositive and not all factors must be satisfied in order for a special employment relationship to exist While conceding that the insureds did not directly pay plaintiff for her work, we noted that it is not necessary, to be considered an employee, to receive compensation directly from an employer. Rather, indirect compensation for services is sufficient to establish the employment relationship. The court noted that even if the insureds had not paid plaintiff's wages, this would not be fatal to the finding of a special employment relationship.

Boris Shapiro obtained summary judgment in the case of Brennan v. Village of Stratford, et al. The case involved an elderly woman who suffered injuries as a result of two separate falls in the carpeted hallway of Defendant's apartment complex. Our client was brought in as a third-party defendant on account of having installed the carpeting in the subject hallway approximately two years before. Our client never received any complaint about the carpeting by property management prior to being sued. Plaintiff and her daughter both attested to having observed defects in the carpeting. Expert reports were prepared by both parties; neither expert, however, noted defects in the carpeting as described by plaintiff and her daughter and neither expert opined about any problem concerning the carpet's installation. The court entered summary judgment in favor of our client as the claimed defects were not causally connected by either expert to the manner in which the carpeting was installed.