The Law Offices of
METHFESSEL & WERBEL
A Professional Corporation

The Leading Insurance and Claims Attorneys

Winter 2016

CASE UPDATE

Methfessel & Werbel is pleased to present the Winter 2016 edition of our Case Update. Click on the case names to view the complete decisions; click on attorney names to view their profiles and contact information. As always, we welcome your questions and feedback.

METHFESSEL & WERBEL NEWS

Methfessel & Werbel is proud to announce that we have become a signatory to the Pledge for Change, promoted by the American Bar Association's Commission on Disability Rights. The Pledge affirms M&W's commitment to diversity, specifically disability diversity, and recognizes that diversity is in the best interest of the legal profession, those the profession serves, as well as our firm. The Pledge also announces that we will encourage others in the legal industry to make this commitment. In addition to our taking the Pledge, M&W is a proud member of the New Jersey Law Firm Group, a collection of New Jersey law firms committed to promoting inclusiveness and diversity in the New Jersey Bar. M&W recognizes that diversity and inclusion are vitally important to our industry in general and society as a whole, and we continue to make every effort to further the goal of becoming representative of the population we serve. To learn more about the ABA's Pledge for Change, click here. To learn more about the New Jersey Law Firm Group, visit http://www.njlawfirmgroup.org/.

Congratulations to **Bill Bloom**, **Marc Dembling**, **Eric Harrison**, **Ed Thornton and Matt Werbel**, all of whom have been designated "Super Lawyers" for 2015 and 2016 by New Jersey Monthly magazine. Only approximately 5% of New Jersey attorneys are selected by their peers as Super Lawyers.

Eric Harrison was appointed to the New Jersey State Bar Association School Law Committee. The committee monitors developments in education law, provides updates in education law, and recommends modifications to education law related regulations.

Bill Bloom recently served as a panelist for the Insurance Council of New Jersey on a presentation regarding general liability coverage for construction defect claims following the New Jersey Supreme Court's decision in Cypress Point Condominium Ass'n, Inc. v. Adria Towers, L.L.C.

On January 16, 2016, **Marc Dembling** moderated "Hot Buttons in Insurance Law 2016," an annual seminar presented by the New Jersey Institute for Continuing Legal Education in cooperation with the New Jersey State Bar Association. Marc prepared the course material on all the decisional law in the area of insurance coverage for last year and led the panel in a discussion of recent cases and issues affecting the insurance industry.

Leslie Koch was elected to a two-year term as secretary for the Appellate Practice Committee of the New Jersey Defense Association ("NJDA"). The NJDA establishes a community of New Jersey defense attorneys, insurance claim professionals, self-insurers and other corporations who devote a substantial portion of their time to the defense of damages suits or to claims administration. The Appellate Practice Committee concentrates on educating and hosting appellate practice seminars, offering guidance for appellate writing and drafting amicus briefs for cases of import to the defense bar and managed risk industry.

M&W WELCOMES MARC MUCCIOLO AS COUNSEL

We are pleased to welcome **Marc Mucciolo** as Counsel. Marc specializes in education law and the representation of school districts before the Office of Administrative Law. He will serve the firm's growing administrative practice on the firm's employment/civil rights team

NEW ASSOCIATES JOIN M&W

Janice Arellano has joined the employment/civil rights practice group following a clerkship with the Honorable Kevin M. Shanahan in Hunterdon/Somerset County Superior Court. Janice received her B.A. from Mount Holyoke College in 2007, her M.Ed. from the University of Pennsylvania in 2010, and her J.D. from Temple University in 2014.

Kurt Campanile has joined Bill Bloom's liability team following a clerkship with the Honorable Linda Grasso Jones in Monmouth County Superior Court. Kurt received his B.A. from Gettysburg College in 2011 and his J.D. from Rutgers School of Law in 2014.

Emily Kornfield has joined the employment/civil rights practice group following a clerkship with the Honorable Margaret Goodzeit of Somerset County Superior Court. Emily received her B.A. from Cornell University in 2011 and her J.D., *cum laude,* from George Mason University in 2014.

Ashlee Murph has joined Ed Thornton's liability team after completing a clerkship with the Honorable Phillip Lewis Paley in Middlesex County Superior Court. Ashlee received her B.A. from American University in 2009 and her J.D. from the Maurice A. Deane School of Law (formerly Hofstra University School of Law) in 2013.

Danielle Singer has joined Marc Dembling's insurance coverage team following a clerkship with the Honorable Joseph L. Rea in Middlesex County Superior Court. Danielle received her B.A., *summa cum laude,* from the State University of New York College at Cortland in 2011 and her J.D., *magna cum laude,* from the University of Miami School of Law in 2014.

UPDATES IN NEW JERSEY LAW

*Note – Case names are hyperlinks. Clicking on the case name will take you to a complete copy of the decision.

INSURANCE – DUTY TO DEFEND

In DeMarco v. Stoddard, the Supreme Court reversed the Appellate Division and held that the Rhode Island Medical Malpractice Joint Underwriting Association ("RIJUA') owed neither a duty to defend nor a duty to indemnify its insured who had misrepresented the proportion of his practice generated in Rhode Island, which was a representation that formed the basis for his eligibility for insurance through RIJUA.

INSURANCE - ARBITRATION

In State Farm Indem. Co. v. Nat'l Liab. & Fire Ins. Co., a case handled by our office, the Appellate Division held that all disputes between insurers that occur when more than one carrier could be responsible for paying personal injury protection benefits stemming from auto-related accidents must be settled through arbitration rather than through litigation in Superior Court.

INSURANCE – COVERAGE

In St. Surin v. Allstate Ins. Co., the Appellate Division held that plaintiff was not entitled to uninsured motorist ("UM") coverage when she was injured after the car she was driving struck an automobile tire and rim lying in the highway because plaintiff could not establish a "substantial nexus" between the injury and an accident with an uninsured motor vehicle. Plaintiff had not presented competent evidence from which a jury could rationally infer that the tire and rim were connected with or came from a motor vehicle some time before her car came into contact with them.

In a recent unreported case, the Appellate Division, deciding Essex Ins. Co. v. Newark Builders, Inc., reviewed the very frequently seen clause in construction contracts wherein one party agrees to defend, indemnify, and hold harmless the other for "any and all claims… caused in whole or part by any act or omission of (either general or subcontractor) its employees or agents, whether caused in part by a party indemnified hereunder or not." In this case, the construction contract further called for the subcontractor to name the general contractor as an additional insured. The additional insured clause added the general contractor "as an additional insured only as respects negligent acts or omissions of the named insured." The court disagreed with the carrier's refusal to provide a defense to the general contractor, which was named as an additional insured. The Appellate Division held that without the subcontractor's negligence there would be no injury to plaintiff and there would be no claim against the general contractor related to the subcontractor's negligence. Importantly, the Appellate Division noted that if the carrier intended to limit its policy coverage to the general contractor as the additional insured only for vicarious liability, it could have used clear policy language to that effect.

TORTS – NEGLIGENCE

In Qian v. Toll Brothers, the New Jersey Supreme Court reversed the Appellate Division and held that claims for personal injuries sustained on a private sidewalk controlled by a homeowners association are actionable and that the homeowners association had a duty to keep its private sidewalks reasonably safe. The key distinguishing point between a public and private sidewalk is who owns or controls the sidewalk, not who uses it. In this case the bylaws spelled out that the association was responsible for maintaining the common areas, including the sidewalks.

TORTS – MODE OF OPERATION DOCTRINE

In Prioleau v. Kentucky Fried Chicken, Inc., the Supreme Court held that the mode-of-operation jury instruction generally should be limited to self-service operations. Plaintiff had allegedly slipped and fallen on grease outside the restroom of the defendant fast food restaurant. The trial court was persuaded that if grease was present that it could have come from the food preparation method of the establishment warranting a mode-of-operation jury instruction, which eliminated plaintiff's burden of proving notice of a particular condition and shifted the burden of production to the defendant to show that it did all that a reasonably prudent person would do in light of the risk of injury the operation entailed. The Supreme Court made it clear that the plaintiff's theory of liability did not involve a self-service operation or any self-service component of defendant's business. Therefore, the mode-of-operation charge was improper.

INDEMNIFICATION / SUBCONTRACTOR

In Estate of D'Avila v. Hugo Neu, the Appellate Division addressed the long-standing thorny question of whether the employer of an injured construction worker who has agreed by contract to indemnify the general contractor may participate in the tort trial. The matter included numerous consolidated appeals and cross-appeals and over a dozen parties. The claims involved a wrongful death case against multiple defendants and a host of related insurance coverage issues, which were tried over four months before a jury. On appeal, the court held that, at least in complex cases, the proper procedure was to try the estate's negligence issues as well as the contractual indemnification issues simultaneously as the trial court had done. However, the trial court erred in omitting the worker's employer from the verdict form so as to assess the percentage of negligence against the employer, requiring a remand.

DISCOVERY

In Mernick v. McCutchen, the Appellate Division held that the trial court mistakenly exercised its discretion by requiring defendants to produce a surveillance video prior to plaintiff's deposition. The court upheld the general rule of Jenkins v. Rainner, a Supreme Court case which held that surveillance video does not have to be produced to a plaintiff until after the plaintiff's deposition. The defendant's ability to find inconsistencies between the testimony and the video should be maintained.

EXPERT FEES

In Jusino v. Lapenta, addressing an issue of first impression, the Law Division held that a $3,000 flat fee for an expert's deposition was unreasonable. The court rejected plaintiff's suggestion that defendant should be required to pay the expert for preparing for the deposition. The court also rejected the notion that an expert may charge a flat fee for attending a deposition as opposed to an hourly fee and ordered the payment of a fee of $750 per hour for attending the deposition by the defense. The court denied the plaintiff's request for an order requiring the pre-payment of the fee.

EVIDENCE – PATIENT/THERAPIST PRIVILEGE

Effective July 16, 2016 a new rule of evidence will be effective in New Jersey courts that applies to all confidential communications between a mental health service provider and a patient during the course of treatment or related to the patient's mental or emotional health. Currently, there are a variety of rules for different types of providers, but the new rule makes it clear that psychologists, physicians, psychiatrists, marital and family therapists, social workers, alcohol and drug counselors, nurses, professional counselors, psychoanalysts, midwives, physician's assistants, and pharmacists will be covered. Clergy have their own privilege. However, it is not the service provider who owns the privilege, but instead the patient. The patient can waive the privilege but the new rule is not expected to alter existing case law which stands for the proposition that in some instances, such as those involving a sex abuse therapist, the filing of litigation does not automatically waive the privilege. In essence the new rule expands and clearly identifies the scope of mental health providers with whom communications by a patient may be privileged.

EVIDENCE – EXPERT OPINION

In James v. Ruiz, the Appellate Division held that under N.J.R.E. 403, a trial attorney may not pose questions to a testifying expert which seek to "back door" the opinion of a non-testifying expert on a complex or disputed issue.

PENDING SUPREME COURT DECISIONS

On December 1, 2015, the Supreme Court heard arguments in the case of Rodriguez v. Raymours Furniture Co., Inc. The Supreme Court is considering whether employers may force employers or prospective employees to agree to a shortened time frame for filing workplace discrimination claims. Plaintiff filed suit under the New Jersey Law Against Discrimination nine months after he was fired by Raymour & Flanigan. While state law allows two years for such actions, the Appellate Division ruled that the suit was time-barred because of the contractual clause which stated that plaintiff agreed to file any lawsuit relating to his services no more than six months after the subject employment action was taken. This decision will obviously have a great impact on both employers and employees.

RECENT CASE RESULTS

Bill Bloom obtained a no cause verdict on behalf of a general contractor on the issue of proximate cause in a trial in Camden County. The 32-year-old construction laborer plaintiff alleged numerous orthopedic injuries including a ruptured brachialis muscle with surgery, a lumbar herniation, and bilateral carpal tunnel syndrome as a result of an alleged construction site incident in which the plaintiff claimed to have fallen into a collapsing trench. Plaintiff claimed to be permanently and completely disabled, presenting at deposition hobbling with a cane and wearing braces on both wrists. The defense centered on evidence that the incident did not occur based upon testimony from plaintiff's employer and co-workers that they were unaware of a trench collapse or the described incident and expert medical testimony indicating that that the alleged brachialis injury was in fact an old condition. The jury found the general contractor to have been negligent insofar as the trench was not properly shored, but found against the plaintiff on proximate cause, concluding that he had not proven that the described incident had in fact occurred.

Ric Gallin obtained summary judgment dismissing a large property damage claim in the Superior Court, Bergen County. The insured's tenant was in the food business and kept items stored on heavy pallets. The concrete floor collapsed because there was a hidden void area. The plaintiff suffered hundreds of thousands of dollars in lost stock as well as collateral damages. Pursuant to the lease, the tenant was obligated to have insurance protecting their interests, naming the landlord as an additional insured and the lease also had non- liability language. The lease also contained a waiver of subrogation. The tenant failed to have the requisite insurance in place. The court agreed with Ric that the lease effectively allocated risk of loss in this type of situation to the tenant. If the tenant had the insurance in place, the loss would have been paid by that insurance company, there would have been no subrogation, and the insured landlord would not have been sued. Therefore, the tenant's breach of the lease had significance and the case was dismissed.

Ric Gallin recently obtained a $750,000 subrogation recovery in a case pending in the Superior Court, Cumberland County. The loss arose out of a fire at a church in Vineland. The fire occurred when a piece of siding blew off during a storm and made contact with the power lines running in close proximity to the building. Ric was able to establish that when the electric utility arranged for replacement of utility poles adjoining the church, they had placed the new pole too close to the building in violation of applicable codes.

Stephen Katzman successfully obtained an order of dismissal in a defamation action involving representation of a blogger who commented on Hoboken politics. In granting the R. 4:40-1 motion during trial, the court agreed that plaintiff failed to allege evidence of actual malice and evidence of pecuniary or reputational harm to raise a jury question.

Stephen Katzman successfully defended an individual insured in this defamation action. Plaintiffs' case was dismissed pursuant to Rule 4:40-1. After trial, Mr. Katzman filed a motion for sanctions and attorney's fees under Rule 1:4-8 and N.J.S.A. 2A:15-59.1. The court granted the motion sanctioning plaintiffs' attorneys $4,000. The

court further ordered that plaintiffs pay attorney's fees and costs in the amount of $276,667, of which $26,033 was awarded to our insured. The court held that plaintiffs violated N.J.S.A. 2A:15-59.1(b) by commencing and continuing their claims in bad faith and solely for the purpose of harassment, delay, and malicious injury. The court explained that the plaintiffs acted in bad faith and knew or should have known that their Complaint was without any reasonable basis in law or equity and could not be supported by a factual basis and existing law.

Ed Thornton tried a matter in Middlesex County where he represented a home care agency and its employee against a claim that the aide negligently handled the 83-year-old plaintiff, who broke her leg when coming out of the shower. The claim focused on whether or not the client should have recommended a shower grab bar, insistence that no showers be taken before the grab bar was installed, and the actual physical handling of the plaintiff. After only 15 minutes of deliberation, the jury found that there was no negligence and entered a verdict in favor of the defense. The plaintiff had presented $51,000 in Medicare lien bills for hospital and rehabilitative care in addition to a claim for pain and suffering for a triple facture of the right leg.

Ed Thornton tried a case in Middlesex County involving an elderly plaintiff who fell down a staircase leading from a rear deck. The plaintiff was the father-in-law of the owner of the one-family home. Although ordinarily plaintiff would be considered a licensee and would not have had an actionable claim, the particular facts of the case did not allow for same. The insured bought the home as an investment but then rented the home to her son and daughter-in-law. The insured was told about a popped nail on the rear deck, which the insured assured she would fix prior to an upcoming religious blessing of the home the next day. The insured forgot to do so and the plaintiff tripped on the nail, fell down 13 steps, and sustained a three-part facture of his skull, fractured two cervical vertebrae, and had other injuries. Because the insured acknowledged that the nail was a dangerous condition and had promised to fix it, summary judgment was denied. Plaintiff demanded the $500,000 policy limit to settle the matter against an offer of $75,000. There was a Medicaid lien of $50,000 out of a gross medical billing of $123,000. The jury found the insured was not negligent and was undoubtedly persuaded that the factual scenario may have had some credibility issues even though there were four witnesses to the fall. A no cause was entered for the defense.

Ed Thornton and James Foxen obtained summary judgment in a case venued in Essex County where plaintiff claimed to have fallen down a set of concrete risers while exiting the insured's property late at night. Plaintiff sustained an ankle fracture which required open reduction and internal fixation. Plaintiff alleged various defects on the insured's property including lack of sufficient lighting, unsafe handrails, and uneven risers all of which contributed to her fall. At arbitration the case was valued at $100,000. It was argued on behalf of the insureds that although plaintiff's counsel alleged several defects on the insured's property, there was no indication that any of the alleged defects were actually the proximate cause of plaintiff's accident. Although proximate cause is typically a question of fact for the jury, Judge Rosenberg agreed with the arguments made on behalf of the insured and granted summary judgment dismissing all claims.

Richard Nelke and **Christian Baillie** successfully obtained partial summary judgment dismissing all claims of bad faith, all claims asserted against the client's independent adjuster, and all claims for extra-contractual damages, including consequential damages, punitive damages, and attorney's fees in the first-party case. The insureds' home suffered damage from wind and wind-driven rain during Superstorm Sandy. Their claim was partially denied, as most of the damage was caused by long-term wear and tear and neglect. The claim for personal property damage was closed based on non-cooperation. The court agreed that the client had a fairly debatable basis for their adjustment of the claim. The court also held that there was no basis for any claims of extra-contractual damages, and thus limited the Complaint to one for breach of contract and compensatory damages.

Richard Nelke, **Christian Baillie**, and **Charles McCook** successfully obtained summary judgment on a first impression PIP claim issue in the Law Division. The plaintiff/insured, who resides in New York, was severely injured when he was struck by a vehicle while crossing the street in New Jersey. The carrier paid the insured the

$50,000 statutory minimum for PIP in NY, which is lower than that required in NJ. Plaintiff argued that he was entitled to the benefit of NJ's higher mandatory PIP coverage pursuant to the Deemer Statute, which holds that an out-of-state resident is entitled to the higher NJ no-fault limits if the carrier writes auto policies in NJ and if the insured was "using or operating" the vehicle in NJ. Messrs. Nelke, Baillie, and McCook successfully convinced the court, on an issue of first impression, that in order for the Deemer Statute to apply, the insured must have been using or operating the vehicle at the time of the accident, i.e., it does not apply to a vehicle-on-pedestrian accident. Plaintiff had argued that the Deemer Statute only requires that the insured enter into NJ with a motor vehicle, a position which has some support in a few jurisdictions. However, Messrs. Nelke, Baillie, and McCook convinced the court that the most persuasive authority was a published case from the NY Appellate Division, Second Department, since (1) the plaintiff resided in Rockland County, which is located in the Second Department, and thus that case would be binding to the extent New York law applied and (2) the reasoning comported best with New Jersey law.

John Knodel obtained summary judgment on behalf of the insured, the snow & ice removal contractor for the co-defendant property owner. The plaintiff fell in the middle of a blizzard during the night of December 26, 2010, and suffered a comminuted, depressed fracture of her right tibial plateau incurring $87,696.00 in outstanding medical bills. A state of emergency had been declared earlier that day by the Governor of New Jersey. Weather records indicated 17.5 inches of snow fell on that date. The insured was out of business and could not be found. It was served by substituted service on its carrier. Legal research revealed the case of Jimenez v. Maisch, 329 N.J. Super 398 (App. Div. 2000), in which the Appellate Division upheld summary judgment granted to the defendant property owner ruling he owed no duty to the plaintiff, an invitee on his property, who fell on snow and ice four days after a major snow event while a state of emergency was still in effect. John argued Jimenez militated that the insured owed no duty to the plaintiff under the facts of the case and the court agreed.

John Knodel successfully tried a UM case in which plaintiff was rear ended by the uninsured tortfeasor while stopped in traffic. The impact propelled plaintiff's car into the vehicle directly ahead of her. Photographs of plaintiff's car showed extensive front and rear end damage; the car was totaled. Plaintiff alleged neck, back, and left shoulder injuries. MRIs revealed four cervical disc herniations, cervical and lumbar disc bulges. Plaintiff underwent a course of physical therapy that was unsuccessful followed by two lumbar injections and acupuncture. Plaintiff was subject to the verbal threshold. John established through plaintiff's hospital records that plaintiff had no neck or low back complaints in the emergency room; her lawyers referred her to the treating doctors; the films showed extensive degenerative changes and the herniations/bulges did not compress plaintiff's spinal cord or exiting nerves so plaintiff's complaints of radiating pain were inconsistent with the MRI findings. John argued that the accident did not proximately cause plaintiff's injuries and they were not permanent. The jury agreed.

Steven Parness and Kegan Andeskie successfully obtained a dismissal of all claims against the insured third-party defendants. A former student and his mother alleged that a school district took no action to address their complaints of bullying against their child. The district filed third-party complaints against eleven students and their parents, including our clients, C.W. and his parents. Following the court's denial of our motion to dismiss, the court granted our motion to preclude third-party discovery pending the district's demonstration of a *prima facie* case that each student violated a common law tort for which it could seek indemnification. In response to the district's motion, we demonstrated: (1) that the district was responsible for C.W. during the school day when the alleged incidents occurred, pursuant to the *in loco parentis* doctrine; (2) the parents were entitled to parental immunity because they did not demonstrate willful and wanton indifference; and (3) C.W.'s actions of alleged name-calling did not constitute a cognizable cause of action. The court agreed and dismissed C.W. and his parents from the case. The district filed an interlocutory appeal, which the court denied hearing.

Steven Parness and **Emily Kornfield** recently obtained a dismissal on the pleadings of all claims against the insured, the operator of the parking garage of the building where plaintiff worked. Plaintiff brought an employment discrimination suit under the New Jersey Law Against Discrimination and alleged that the insured aided and abetted

the discrimination. We moved to dismiss on the basis that (1) simply turning over a videotape to plaintiff's employer did not rise to the level of aiding and abetting; (2) there was no promissory estoppel because plaintiff's parking privileges were rescinded solely as a result of her loss of employment with another entity; and (3) plaintiff could not demonstrate a plausible *respondeat superior* claim against our insured since no master-servant relationship existed. The court agreed with our arguments.

Lori Brown Sternback obtained summary judgment in favor of the insureds, the landlords and owners of a residential property. Plaintiff alleged that the insureds were liable for injuries sustained when the insureds' tenant's dog bit the plaintiff. The court held that as a matter of law, the insureds were not strictly liable under the New Jersey Dog Bite Statute. In addition, the insureds were not negligent as they had no prior knowledge of the dog's viciousness.

Elizabeth Connelly and **Eric Harrison** obtained summary judgment in a case where a restaurant developer alleged inverse condemnation and equitable estoppel after the township planning board denied an amended site plan approval. The court concluded that the Board's denial of plaintiff's application was in furtherance of the Municipal Land-Use Law and significant and legitimate safety interests. Plaintiff's site plan changes were appropriately not addressed as "field changes." The court concluded that the plaintiff failed to demonstrate that it had lost all beneficial use of the property. Plaintiff further failed to exhaust all available remedies prior to making a claim for inverse condemnation.

Elizabeth Connelly and Eric Harrison obtained summary judgment in a case where a custodian alleged disability discrimination against the insured in violation of the New Jersey Law Against Discrimination. The court found that defendant demonstrated a legitimate, non-discriminatory reason for its decision to terminate plaintiff from his employment. Moreover, there did not exist a genuine issue of material fact regarding whether the employer displayed animus towards the plaintiff. Plaintiff's appeal is currently pending in the Appellate Division.

Jennifer Herrmann and **Eric Harrison** obtained a dismissal of all federal claims against a school district. A student with a history of ADHD enrolled with the District as a high school sophomore in September 2007. E.K. earned below average grades and by senior year was failing several courses. E.K.'s parents believed that he was receiving services to accommodate his ADHD. In October 2009, during E.K.'s senior year, plaintiffs discovered that E.K. was not receiving accommodations. Despite the institution of a 504 Plan in April 2010, E.K. failed two courses and did not graduate with his class. He received tutoring over the summer, graduated, attended Brandeis University, and was accepted into Georgetown University Law Center. In December 2011, E.K. and his parents filed suit alleging a violation of Section 504 of the Rehabilitation Act, the New Jersey Law Against Discrimination ("NJLAD"), and the Due Process Clause of the Fourteenth Amendment. We argued successfully that the Individuals with Disabilities Education Act ("IDEA") required that plaintiffs exhaust their administrative remedies prior to filing suit, requiring dismissal of plaintiffs' federal claims. The court declined to exercise supplemental jurisdiction over plaintiffs' NJLAD claims.

Richard Isolde obtained summary judgment in a recent case where the plaintiff alleged that he slipped on debris in the parking lot of a strip mall where the insured was hired to provide maintenance services. Plaintiff underwent two knee surgeries. Summary judgment was granted as plaintiff could not establish notice. The insured was hired to pick up debris on a weekly basis and not a daily basis. Through discovery we were able to determine the date in which the debris entered the parking lot.

Vivian Lekkas and **Eric Harrison** obtained summary judgment on behalf of a school district which employed plaintiff as a food services truck driver. The district subsequently decided to outsource its food program to an outside company. With the exception of plaintiff's position, the district eliminated all food service positions from its payroll and outsourced the positions. Plaintiff, however, continued working for another school year as a food services truck

driver. Following the 2009-10 school year, the district unanimously voted to abolish plaintiff's position for the 2010-11 school year just as it had done with all the other food service positions. Plaintiff filed a lawsuit in state court, which we removed to federal court. Plaintiff alleged claims for wrongful discharge, breach of contract, breach of the implied covenant of good faith and fair dealing, violations of due process, the New Jersey Law Against Discrimination, the Fair Labor Standards Act, the Employee Retirement Income Security Act, the Older Workers Benefits Protection Act, and the New Jersey State Wage Payment Law. We filed a motion for summary judgment which resulted in plaintiff voluntarily withdrawing four counts of the Complaint. The court agreed with our arguments and dismissed the remaining counts in their entirety.

Vivian Lekkas and Eric Harrison obtained summary judgment against an African American school administrator. In 2007, he temporarily became the Acting Superintendent where he remained for approximately 27 months until a new Superintendent was hired. After the hiring of a new Superintendent, who was also African American, Plaintiff filed suit alleging race discrimination, hostile work environment, and retaliation under the New Jersey Law Against Discrimination ("LAD") both against the District and Superintendent. Plaintiff also alleged a breach of contract claim and various torts, including false light, conspiracy, and wrongful discharge. The crux of plaintiff's complaints stemmed from his failure to obtain the permanent Superintendent position, a transfer from a high school vice principal position to the middle school, and the promotion of a white candidate to the high school principal position over the plaintiff. Following our summary judgment briefing, at oral argument plaintiff voluntarily withdrew all tort claims on account of failing to file a proper notice of tort claim and also withdrew the breach of contract claim. Following a lengthy oral argument, the Judge granted our motion for summary judgment and dismissed the remaining LAD claims in their entirety.

Raina Pitts and **Eric Harrison** obtained summary judgment in favor of the insured Board of Education. Plaintiff, a custodian, was terminated from his position in March 2012 four months shy of vesting into the retirement system. The Board maintained that his termination was the result of his failure to adhere to a repeated administrative directive to secure the front main entrance doors at its middle school. Plaintiff, however, alleged that the Board's reason for his termination was pre-textual and that his termination was actually the result of a whistleblowing complaint he made five years prior to his termination to the Occupational Safety and Health Administration ("OSHA") while he worked in a completely different school building and under a completely different set of supervisors than those who recommended his termination in 2012. After three years of litigation concerning his four-count Complaint which alleged wrongful termination in violation of the New Jersey Conscientious Employee Protection Act, the New Jersey Law Against Discrimination, and the New Jersey Constitution, the court granted our motion for summary judgment in its entirety.

Matthew Rachmiel obtained summary judgment in a property damage case involving public entities and the Tort Claims Act. Plaintiffs alleged that a portion of the street in front of their residence in a major urban city was uneven and vehicles travelling over it caused vibrations to travel to and cause cracks in their residence. Plaintiffs sued the city, which brought a third-party Complaint against our client, the public entity that maintained the city's water and sewer systems. The client had performed work under the street and there was a factual dispute between the city and our client as to which of them was responsible for final repair of the street after the client had performed its work. We moved for summary judgment based on the defenses provided to public entities under the Tort Claims Act. The court dismissed the plaintiffs' Complaint finding that the unevenness of the street was not a dangerous condition and our client did not act palpably unreasonably in not repairing the street.

Jared Kingsley and **Gina Stanziale** obtained summary judgment in a declaratory judgment action where plaintiff was seeking first party coverage under his wife's automobile policy of insurance. Relying upon the principles established in Palisades Safety v. Bastien, the Court found that the plaintiff and his wife had misrepresented their marital status at the inception of the policy and also failed to disclose a change in address, both of which were material to the determination of the premium.

John Knodel obtained summary judgment in a one-vehicle motorcycle accident. The insured was the owner and operator of a motorcycle with his plaintiff girlfriend riding as a passenger. The insured suddenly and unexpectedly hit a large pothole, causing the motorcycle to go airborne, but the insured was able to keep the bike upright. Plaintiff suffered a compression fracture as well as aggravation of pre-existing disc herniations, incurred approximately $25,000 in medical bills, and missed six months from work. At plaintiff's deposition, John elicited an admission that the insured never operated his motorcycle in a dangerous or hazardous manner before and that at the time of the accident he was driving safely and within the speed limit. John moved for summary judgment, arguing the insured was not operating his motorcycle negligently but came upon a sudden, unexpected, and unavoidable situation. The Court agreed and granted summary judgment.

Richard Nelke and **Christian Baillie** obtained summary judgment in a Superstorm Sandy-related first party case. The insured sustained wind-driven rain damage to its business. The insurer denied coverage pursuant to a windstorm exclusion, which excluded coverage for property damage caused by windstorm, including water infiltration. The policy also contained a one-year shortened suit clause. The insured filed suit 13 months after the formal denial of coverage. The insured file a motion for summary judgment alleging that the windstorm exclusion was not applicable. The insured also argued that there were no genuine issues of material fact as to whether the insurer engaged in bad faith. Our office filed a cross-motion for summary judgment arguing that the claims were barred pursuant to the shortened suit clause. The court agreed with our position and granted the cross-motion for summary judgment, dismissing the Complaint with prejudice in its entirety.

Lori Brown Sternback tried a case in Middlesex County involving a plaintiff driver who contended that the defendant driver of an ambulance in a non-emergency situation negligently failed to yield before turning left out of a driveway, causing the collision. The defendant maintained that the plaintiff jumped out of a line of cars into a turn-only lane and that he failed to pay adequate attention and was comparatively negligent. The plaintiff contended that he suffered a SLAP tear to the right dominant shoulder that was treated by way of arthroscopic surgery. He also alleged cervical disc pathology that required injections and radio frequency ablation. The plaintiff maintained that although he experienced improvement in the pain, he would permanently suffer significant restriction. The defendant denied that the shoulder tear was causally related, pointing to a five-week delay before the plaintiff complained of any shoulder symptoms. Defendant also maintained that any disc pathology was related to degenerative disc disease. The plaintiff's pre-trial demand was $250,000. The jury found the defendant 80% negligent, the plaintiff 20% comparatively negligent, and rendered a gross award of $50,000.

Lori Brown Sternback and **Lindsay Spero** obtained summary judgment in a case involving a slip and fall in the parking lot of a shopping center. The third party plaintiff and property manager of the shopping center alleged that the insured owners of a hair salon were required to indemnify the property manager for the plaintiff's accident. Lori and Lindsay were successful in convincing the Court that the property manager was not a named party to the indemnification agreement between the insured and the property owner of the shopping center, and thus was not entitled to be indemnified.

James Foxen obtained summary judgment on behalf of an insured homeowner who was sued when a tree fell on plaintiff's Maserati, which was parked on the insured's property, during Hurricane Sandy. Plaintiff had struck a deal with the insured's son in which plaintiff would pay $100.00 per month for storage of the vehicle. Plaintiff alleged that a bailment was created thus creating a duty on the insured. Approximately $54,000 in damage was caused to plaintiff's Maserati during the hurricane and subsequent cleanup. Summary judgment was granted in favor of the insured.

Jennifer Herrmann and **Eric Harrison** successfully obtained a dismissal of all claims in a widely publicized civil rights case involving the former Sheriff of Hunterdon County and two of her employees. The plaintiffs sued the County and several public officials for alleged discrimination, violations of their state and federal constitutional rights, and malicious prosecution. Our firm first represented two former prosecutors, against whom the Complaint was dismissed in March of 2013. We later represented two Prosecutor's Office detectives, against whom the Complaint was dismissed in November of 2014.

Jennifer Herrmann obtained summary judgment in a sexual harassment case. Seven male plaintiffs who worked in a bus garage alleged that another male garage employee sexually harassed them in violation of the New Jersey Law Against Discrimination. In granting summary judgment, the Superior Court accepted all of our arguments, including that the alleged harassment, even if it occurred as plaintiffs described, was not because of plaintiffs' sex but because of an overall vulgar work environment, to which plaintiffs themselves contributed.

Richard Isolde obtained summary judgment in a fall-down accident where the insured owned a deli next to a parking lot where the plaintiff sustained a trimalleolar fracture of his left ankle. Due to the landlord's delays in filing a third-party complaint, we successfully barred the landlord from making the breach of contract and common law indemnity claims against the insured in the underlying case. We also successfully prevented the plaintiff from amending the Complaint to name our insured in the underlying case due to the statute of limitations. Thereafter the landlord filed a separate action against the insured. Summary judgment was granted against the landlord in the second action as the insured had no duty to maintain the area where the plaintiff fell and the indemnity provi- sion of the lease did not cover the landlord for the landlord's own negligence.

Richard Isolde obtained summary judgment in a case involving a dispute between a farmer and an environmental action group that opposed the insured's projects to build a farm stand and a barn. The Highlands Coalition awarded the group a grant to hire a lawyer and engineer to set precedent to create municipal responsibility for storm water management. The environmental group filed a multi-party complaint against the insured that included a prerogative writ action and common law claims related to the erection of a barn. The plaintiff alleged that the barn had changed the course of the Delaware River in such a way as to cause property damage to neighboring land owners. The claims related to the prerogative writ action resolved and we solely defended the negligence claim. Summary judgment was granted against the environmental action committee. While the committee had standing to make Environmental Rights Act claims related to the prerogative writ action, the committee had no standing to assert the negligence claims under the Environmental Rights Act. Rich also successfully defeated a motion to amend for the committee to assert time-barred prerogative writ claims and to name the property owners as the plaintiffs for the negligence claims.

Caitlin Lundquist obtained a dismissal of an EEOC complaint filed by a former teacher against a local board of education alleging disability discrimination and failure to accommodate in violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. While the complainant asserted that the Board should have granted her request for various accommodations, particularly a transfer to a vacant teaching position at another elementary school located closer to her home, the EEOC determined that she had failed to establish any violation of the ADA or Section 504, and dismissed the complaint and closed its file.

Matthew Rachmiel recently obtained summary judgment in a multi-vehicle car accident case. The insured was traveling on an interstate when a vehicle in front of his, in the lane to his right, changed lanes suddenly and without signaling. In order to avoid being struck by that vehicle, which was now directly in front of his, the insured slowed his vehicle down. The vehicle travelling directly behind the insured was unable to slow down in time and rear-ended the insured's vehicle. That collision forced the trailing vehicle to the lane to its left where it struck the plain-

tiff's vehicle and pushed it into the guardrail. Matt successfully moved for summary judgment asserting that the insured did not drive negligently and was not the proximate cause of the impact to plaintiff's vehicle. The causes of the accident were the vehicle that changed lanes and cut off the insured's vehicle and the vehicle that was directly behind the insured's vehicle and was unable to avoid rear-ending it when the insured was forced to slow down.

Matthew Rachmiel and **James Foxen** obtained summary judgment in a sidewalk fall-down case on behalf of their public entity client. Plaintiff claimed that he fell due to a poorly maintained, broken portion of sidewalk. Plaintiff never served our client, the entity that handled the water and sewer systems, with a notice of tort claim as required by the New Jersey Tort Claims Act. Plaintiff opposed the insured's summary judgment motion and argued that his service of a notice of tort claim on the city, which was a co-defendant, was also sufficient as to our client because the city and our client were essentially the same legal entity and that plaintiff had thus substantially complied with the notice requirement. The court agreed with our arguments that the two entities were not the same, our client was not a department of the city, and rather was an autonomous legal entity not based at City Hall.

Bill Rada and **Lindsay Spero** obtained summary judgment in a construction defect case where the plaintiffs alleged that the insured contractor was liable for damages to her residential septic system. Bill and Lindsay were successful in convincing the Court that plaintiff's five-count Complaint should be dismissed as there was no evidence that the insured's repair work contributed to the failure of the plaintiffs' septic system. In addition, the court was convinced that the plaintiffs were partially at fault due to their failure to authorize and pay for the additional work which was required to fix the septic system.

Boris Shapiro and **Eric Harrison** obtained summary judgment in federal court on behalf of a board of education. Plaintiff, a substitute teacher, had been involved in a physical altercation with a female 10th grade student. The teacher was arrested several days later but ultimately acquitted. He brought a civil action against his employer board of education, the police department, and the female student alleging race discrimination and violations of constitutional rights. The crux of plaintiff's argument was that the Board failed to investigate the student's allegations, which ultimately led to his arrest. The evidence demonstrated, however, that the Board performed a thorough investigation. The court agreed with our position and granted summary judgment, finding absolutely no evidence of discrimination or any violation of plaintiff's constitutional rights.

Boris Shapiro and **Eric Harrison** obtained dismissal of all claims against our insured, the former Superintendent of a North Jersey school district. Plaintiff filed a lawsuit against our insured as well as the employer board of education and plaintiff's union, both represented by separate counsel, contending that he was forced to resign under false pretenses. Specifically, plaintiff alleged that defendants conspired to create a fraudulent grievance, which left him no choice but to sign a separation agreement from the Board. As to our insured, plaintiff alleged various causes of action, including fraudulent inducement, tortious interference, and a violation of free speech. We filed two motions to dismiss for failure to state a claim on behalf of the insured. Following the second motion, all claims were dismissed with prejudice.