# LEGAL NEWS IN BRIEF

## News in a Flash for Subrogation and Insurance Professionals

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### UNLICENSED DRIVER

**Blanco-Sanchez v. Pers. Serv. Ins. Co.**
**NJ Appellate Division**
**A-5393-16T4**
**(February 28, 2019)**

An unlicensed driver unsuccessfully appealed her claim for PIP benefits, arguing that she was given permission by the vehicle owner with knowledge that the driver had never held a license. The Court ruled that as a matter of public policy, an owner cannot give permission to a driver who is known to be unlicensed, and therefore the unlicensed driver is barred from any recovery under the No Fault Act for PIP benefits under N.J.S.A. 39:6A-7(b)(2). This rationale applies regardless of whether the actual policy excludes PIP coverage for permissive drivers who were unlicensed. Finally, this matter is distinguishable from a claim by an unwitting injured party who was either a passenger in the vehicle operated by Plaintiff or otherwise struck by Plaintiff's vehicle. ■

### RES IPSA LOQUITUR

**Jovic v. Legal Sea Foods, LLC**
**U.S. Dist. Ct., D.N.J.**
**2:16-cv-01586 (WHW) (CLW)**
**(October 9, 2018)**

The District Court denied Defendant's summary judgment motion in a personal injury action brought by a restaurant patron who claims she struck her head on an unidentified instrumentality while walking in a hallway towards the bathroom. Plaintiff relied upon res ipsa loquitur, the legal principle which permits an inference of negligence that can satisfy her burden of proof where "(a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality was within the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own act or neglect." Here, the plaintiff's sustaining a head injury is not an occurrence which ordinarily occurs, so such an occurrence reasonably bespeaks negligence, and nothing on the record indicated that she acted in any way to cause her own injury. Although the instrumentality remained unidentified, Plaintiff described it sufficiently for the court's purposes, even though other jurisdictions outside NJ require a plaintiff to identify the object. Significantly, there was just one known similar incident complained of by another patron, and it occurred on the same day as Plaintiff's injury. In the absence of an alternative explanation by Defendant to counter Plaintiff, the Court denied Defendant's motion. ■

### "NAIL AND MAIL" SERVICE

**Martino Auto Concepts v. Berberich**
**NY Supreme Court, Nassau Cty.**
**608179/18**
**(January 24, 2019)**

The NY Supreme Court denied Plaintiff's motion for default judgment, finding that Plaintiff must first attempt service via CPLR 308(1) (personal delivery upon the defendant) or 308(2) (leaving the papers with a person of suitable age

and discretion at defendant's actual place of business, dwelling place, or usual place of abode, and then mailing another copy to his last known residence or actual place of business) with due diligence. Three of Plaintiff's four prior attempts at the residential address occurred during times when Defendant could reasonably be at work or in transit to or from work. Moreover, the process server did not make sufficient genuine inquiries as to Defendant's employment address, having asked only one neighbor. Finally, Plaintiff offered no reason for serving at a residential address different from the one on the Summons filed eight days prior to the first attempt at service. ■

## CONSUMER FRAUD ACT

**Jacobs v. Mark Lindsay and Son Plumbing & Heating**
**NJ Appellate Division**
**A-3854-16T1**
**___ N.J. Super. __**
**(February 20, 2019)**

Plaintiff in an action for violations of the Consumer Fraud Act successfully appealed the trial court's award which omitted any compensation for filing fees and costs of suit. Defendant had made three service calls to Plaintiff to repair a home air conditioning unit. After Defendant failed to repair the unit, Plaintiff refused to pay further and placed a stop-payment order on the two previously issued checks. Defendant then filed an incident report with the police, who formally charged Plaintiff with theft of services. After Plaintiff obtained a dismissal of the complaint, he filed a civil action against Defendant for, inter alia, CFA violations and malicious prosecution. The Appellate Division reversed the award and remanded the matter to the court for determination of Plaintiff's counsel fees, finding that the trial court had abused its discretion in failing to award such fees. N.J.S.A. 56:8-19 entitles a prevailing consumer to an award of reasonable costs of suit as well as counsel fees "that reflects the work performed to bring about a successful outcome for the consumer, independent of the 'proportionality between damages recovered and counsel-fee awards even if the litigation, as in this case, vindicates no rights other than those of the plaintiff.'" Moreover, Plaintiff also obtained a successful outcome for the consumer in extracting evidence of Defendant's history of instituting criminal actions as a means of collecting its unpaid invoices, and thus warrants such compensation under the CFA. ■

## FALLEN TREE

**Paloti v. Lyght**
**NJ Appellate Division**
**A-1323-17T2**
**(November 5, 2018)**

The Appellate Division reversed judgment entered against Defendant under both theories of negligence and strict liability, in an action for damages to a vehicle caused by a fallen tree on Defendant's property. There was no testimony at trial that the tree or its branch were dead, damaged, or in such a state that Defendant would have knowledge that the branch would fall onto Plaintiff's vehicle. Additionally, there was no evidence that Defendant had planted the tree or otherwise maintained it so that he would have knowledge of its condition or that he had negligently handled it so as to create the hazardous condition. Thus, not only was there no evidence of basic negligence, there was no indication of intentional or hazardous activity by Defendant which would subject him to strict liability. The trial judge had even relied upon Defendant's subsequent removal of the tree to find liability, in clear violation of NJ Rules of Evidence 407. ■

## NJ TORT CLAIMS ACT

**Teel v. Eliasen**
**U.S. Dist. Ct., D.N.J.**
**17-022153 (RBK/AMD)**
**(October 26, 2018)**

Plaintiff sued a police sergeant and the Borough of Glassboro for state law claims stemming from a purportedly false arrest, but did not file a Tort Claim Notice or a motion for leave to file a late notice of claim with the Borough. The Court found that the notice requirements of the NJ Tort Claims Act apply to Plaintiff's malicious prosecution, false arrest, false imprisonment, failure to train, and assault claims. However, both the Third Circuit and NJ Supreme Court have established that the NJTCA notice requirements do not apply to federal or state constitutional torts. Thus, Plaintiff could proceed on his claim for failure to intervene. ■

## OFFICE UPDATE

The ball's in our court: LOJM had fun at the bowling alley at the holiday party this season!