DATE **NAME OF CASE (DOCKET NUMBER)**

8-31-18 DCPP VS. S.K. AND C.K., IN THE MATTER OF JE.K. AND JA.K. (FN-04-0619-15, CAMDEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-2734-15T2)

The Division of Child Protection and Permanency filed a Tile 9 abuse and neglect complaint against defendant alleging he sexually molested his biological daughter. Defendant argues the Family Part Judge improperly drew an adverse inference against him when he invoked his right against self-incrimination under the Fifth Amendment to the United States Constitution and this State's evidence rule N.J.R.E. 503 in response to the Division's request to call him as a witness in the fact-finding hearing. The Judge relied on this adverse inference of culpability to corroborate the child's hearsay statements. This issue has not been addressed in a published opinion by any court in this State.

This court holds that a Family Part Judge may not draw an adverse inference of culpability against a defendant who invokes his right against self-incrimination to refuse to testify at a Title 9 fact-finding hearing. This court also holds that defendant received ineffective assistance of counsel. The record shows defendant satisfied the two-prong standard established by the Supreme Court in Strickland v. Washington, 466 U.S. 688, 687 (1984), and adopted by the New Jersey Supreme Court in N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 311 (2007).

Jude Koblitz concurs in the result but does not agree that a parent is entitled to invoke the right against self-incrimination and decline to testify at a fact-finding hearing in an abuse or neglect matter. In Judge Koblitz's view, the parent's testimony may not subsequently be used by the prosecutor in a parallel criminal proceeding.

8-30-18 LISA BALDUCCI VS. BRIAN M. CIGE (L-1004-16, SOMERSET COUNTY AND STATEWIDE) (A-3068-16T2)

The court holds that if an attorney charges clients in LAD and other fee-shifting cases a fee based in whole or in part on an hourly rate, the attorney is ethically obligated to: disclose that the hourly rate-based fee could approach or exceed the client's recovery; provide examples of hourly rate-based fees in similar types of cases; and inform the client that other competent counsel represent clients in similar cases solely on a contingent fee basis.

Similarly, counsel who require clients to advance costs are ethically obligated to provide information about litigation costs such as deposition and expert fees, and provide examples of what costs have totaled in similar types of cases. An attorney is also ethically obligated to inform the client that other competent counsel who represent clients in similar cases advance litigation costs.

8-29-18 CHRISTOPHER C. CONA, ETC. VS. TOWNSHIP OF WASHINGTON SHARON DOWNS, ETC. VS. BOROUGH OF PAULSBORO WILLIAM R. BRODY, ET AL. VS. CITY OF WOODBURY, ET AL. (L-1602-15, L-0180-16, L-0487-16 AND L-1102-15, GLOUCESTER COUNTY AND STATEWIDE)(CONSOLIDATED) (A-5067-15T3/A-5615-15T3/A-0443-16T3)

In these appeals, the panel considered whether fees imposed by defendant municipalities on multi-family rental property owners were solely for revenue generation as prohibited under Timber Glen Phase III, LLC v. Township of Hamilton, 441 N.J. Super. 514 (App. Div. 2015), or if they were reasonably related to the municipalities' exercise of their regulatory powers as authorized by statute. In Timber Glen, the court held that a municipality's license fee was ultra vires because "the power to regulate and to license, although related, are discrete" and that the power to regulate did not include the power to require a license and payment of a fee. However, the court noted that its "opinion [was] confined to the authority to license and [did] not address [a municipality's] regulatory or inspection authority granted by other statutes designed to assure rental premises remain safe, building and fire code compliant and structurally sound."

The trial court judges who considered the underlying matters in the present appeals dismissed plaintiffs' complaints after they found that the challenged ordinances were distinguishable from the ordinance invalidated in Timber Glen, as the fees were permissible under a municipality's regulatory powers in order to defray costs for the inspections or registration of rental units. The panel agreed with the trial court judges' conclusions but remanded for entry of an order directing that the reference to "license fees" be removed from the challenged ordinances to avoid any confusion.

8-28-18 STATE OF NEW JERSEY VS. RICHARD W. BERNARDI, SR., ET AL. (16-02-0014, MORRIS COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0752-17T3)

By leave granted, the State appeals from the dismissal of second-degree false representations for a government contract, N.J.S.A. 2C:21-34(b), and second-degree theft by deception, N.J.S.A. 2C:20-4(a), charges in a multi-count indictment. The indictment alleged the New Jersey Department of Environmental Protection (NJDEP) entered into an Administrative Consent Order (ACO) with defendants in reliance on their misrepresentations concerning their financial condition and ability to operate a solar power generation facility on a landfill. The ACO authorized defendants' operation of the landfill and collection of millions of dollars in tipping fees and anticipated revenue from the solar power generation facility. The ACO required that defendants deposit portions of the fees and revenue in escrow for remediation of the landfill, but they failed to do so after entering into the ACO.

The trial court dismissed the count alleging second-degree false representations for a government contract, finding the ACO was not a government contract within the meaning of N.J.S.A. 2C:21-34(b) because it was not a contract for the procurement of goods and services. The trial court further dismissed the second-degree theft by deception charge, finding the contract did not have a value permitting the grading of the offense.

The court reverses, holding N.J.S.A. 2C:21-34(b)'s coverage is not limited to government contracts for goods and services, finding the ACO constitutes a government contract under the statute and determining there was sufficient evidence presented to the grand jury supporting the charge that defendants procured the ACO by making false representations to the NJDEP. The court also reverses the dismissal of the theft by deception charge, finding the evidence shows defendants procured contract rights – to operate the landfill and collect tipping fees and other revenue – that were worth millions of dollars and over which the NJDEP had a legal interest.

8-23-18 NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS VS. JOSEPH MAIONE (DEPARTMENT OF COMMUNITY AFFAIRS) (A-0712-15T4)

This is an appeal from the final decision of the Department of Community Affairs (DCA) that found appellant ineligible to receive two Superstorm Sandy recovery grants. The DCA awarded these grants to assist homeowners to remain in the county of their primary residence after the storm damaged their primary residence or to help them rebuild or repair their damaged primary residence. The DCA initially awarded appellant two grants totaling $85,000 based on his representation on the grant applications that his primary residence was a property he owned in Toms River.

The DCA thereafter found documentary evidence showing appellant's primary residence at the time of the storm was an apartment located in Hoboken and demanded that appellant refund the awards. The matter was transferred to the Office of Administrative Law for a hearing before an Administrative Law Judge (ALJ). Appellant argued the DCA should have applied the common law concept of domicile to determine what his primary residence was at the time of storm. The ALJ issued an Initial Decision rejecting appellant's argument. The DCA Commissioner accepted the ALJ's findings and conclusions of law without modification.

This court affirms the Commissioner's decision. These grants were created to assist a class of property owners whose "primary residence" was damaged or destroyed by Superstorm Sandy. The grant applications contain a list of specific documents that the DCA uses to make the eligibility determinations. Replacing the straightforward criteria for eligibility established by the DCA with the common law concept of domicile would compromise the essential purpose of these relief programs and inject needless ambiguity into the eligibility determination process.

8-22-18 JERRY ALLOCO, ET AL. VS. OCEAN BEACH AND BAY CLUB, ET AL. (C-000015-14, OCEAN COUNTY AND STATEWIDE) (A-0922-16T3)

Plaintiffs challenged rule changes by made by the board of trustee of a common-interest community, claiming they were incompetent and thus not protected by the business judgment rule. Plaintiffs cited a case stating: "Courts will not second-guess the actions of directors unless it appears that they are the result of fraud, dishonesty or incompetence." Papalexiou v. Tower W. Condo., 167 N.J. Super. 516, 527 (Ch. Div. 1979). The Appellate Division disapproves this statement in Papalexiou, and reiterates that the business judgment rule protects an authorized action by a board from judicial scrutiny unless the plaintiff shows that the challenged "action is fraudulent, self-dealing or unconscionable." E.g., Seidman v. Clifton Sav. Bank, 205 N.J. 150, 175 (2011). Plaintiffs failed to carry that initial burden.

8-17-18 I'ASIA MORELAND, ET AL. VS. WILLIAM PARKS, ET AL. (L-0227-11, MERCER COUNTY AND STATEWIDE) (A-4754-16T4)

Plaintiffs Valerie Benning and I'Asia Moreland were a same-sex couple who lived together with Moreland's two biological children, a boy who was nearly five years old and his two-year-old sister. On January 30, 2009, Benning was standing on the sidewalk holding the hand of the two-year-old girl, when a fire truck collided with a pickup truck, causing the pickup truck to strike and kill the child. Plaintiffs filed a civil action against the tortfeasors that included a claim by Benning for negligent infliction of emotional distress under Portee v. Jaffee, 84 N.J. 88 (1980).

The Law Division granted defendants' motion for summary judgment and dismissed Benning's Portee claim, finding she did not present sufficient evidence that she had an "intimate, familial relationship" with the two-year-old. This court denied Benning's motion for leave to appeal. The Supreme Court granted Benning's motion for leave to appeal and summarily remanded this matter for this court to decide this issue.

As ordered by the Supreme Court, this court's analysis is exclusively focused on the second element of the four elements of proof required to bring a negligent infliction of emotional distress claim, as clarified and expanded in Dunphy v. Gregor, 136 N.J. 99 (1994). Viewing the evidence under the standard codified in Rule 4:46-2(c), this court holds that Benning presented sufficient evidence from which a jury could find that she and the two-year-old decedent had an intimate familial relationship at the time of the child's tragic death. This court reverses the Law Division's order dismissing Benning's claim as a matter of law and remands the matter for trial by jury.

8-15-18 STATE OF NEW JERSEY VS. HASSAN A. REID (14-02-0224 AND 14-02-0234, MIDDLESEX COUNTY AND STATEWIDE) (A-0985-17T3)

The State appeals the trial court's dismissal of two Middlesex County indictments charging defendant with committing an armed robbery in Perth Amboy, conspiracy, and firearms possessory offenses. The court dismissed those charges because defendant had already pled guilty and been convicted in Monmouth County to having illegally possessed firearms in Asbury Park, weapons that were confiscated after the robbery in Perth Amboy occurred.

In particular, the victim of the robbery identified defendant as having brandished a silver or gray handgun and wearing a shoulder holster. Five days after the robbery, police officers executed a warrant for defendant's arrest issued by a judge in Middlesex County. The officers found defendant in a home in Monmouth County, along with two guns, one of which was silver or gray in color, and a shoulder holster.

The trial court reasoned that the Monmouth County and Middlesex County charges were sufficiently related to require them to be pursued in a single coordinated prosecution. Consequently, the court ruled the State's failure to combine the charges before the entry of the judgment of conviction in Monmouth barred his later prosecution in Middlesex.

The issues on appeal concern principles of mandatory joinder, double jeopardy, and continuing offenses. Applying those principles, the panel partially affirms the trial court's dismissal order with modification, reverses the order in part, and remand the matter for trial on certain counts of the indictments in Middlesex County. More specifically, and subject to certain caveats detailed in this opinion, the Middlesex prosecution on the armed robbery and conspiracy-to-rob counts is reinstated, but the weapons possession counts remain dismissed.

8-13-18 WANDA BROACH-BUTTS, ET AL. VS. THERAPEUTIC ALTERNATIVES, INC., ET AL. (L-2746-13, CAMDEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0755-16T2)

Plaintiff and her late husband's estate allege that defendant, a Division of Child Protection and Permanency contractor, negligently placed a dangerous child in the therapeutic foster home that plaintiff and her husband operated, and failed to warn them of the child's history of dangerous behavior. During the fifteen months following his removal from the home for misbehavior, the child illegally returned three times, ultimately killing the husband during a burglary. Reversing summary judgment to defendant, the panel holds that defendant owed a duty to the foster parents to exercise reasonable care in placing the child in their home, and to reasonably disclose the child's background to enable them to make an informed decision whether to accept him. Whether defendant breached that duty, and particularly whether that breach proximately caused the harm that followed, are jury questions on the record presented when viewed in a light most favorable to plaintiffs.

Judge Sabatino filed a concurring opinion, suggesting the State might utilize stringent regulations, contractual provisions requiring notification, or other measures and policies to avoid future repetition of the fatal tragedy that occurred in this case.

8-10-18 STATE OF NEW JERSEY VS. GERALD HILL-WHITE (12-05-0475, MERCER COUNTY AND STATEWIDE) (A-1486-15T4)

The court addressed the arson statute, N.J.S.A. 2C:17-1, and the rule against multiplicity, which prohibits the State from charging a defendant with multiple counts of the same crime, when that defendant's alleged conduct would only support a conviction for one count of that crime. The court held that when a defendant sets one fire, it is improper for the State to charge that defendant with multiple counts of arson based on the number of victims who were endangered by the fire. The court affirmed defendant's conviction for one count of second-degree arson, and for that conviction, the court affirmed the extended term sentence of twenty years subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. The court reversed defendant's remaining ten arson convictions and vacated the sentences imposed for those convictions.

8-9-18 MEPT JOURNAL SQUARE URBAN RENEWAL, LLC, ET AL. VS. THE CITY OF JERSEY CITY (L-3177-15, HUDSON COUNTY AND STATEWIDE) (A-2281-16T4)

In this appeal, this court determines that a municipality may not condition the grant of tax abatements pursuant to the Long Term Tax Exemption Law (LTTEL), N.J.S.A. 40A:20-1 to -22, upon the redevelopers paying two million dollars through Prepayment Agreements. These payments were characterized as "a portion" of the Annual Service Charge the redeveloper would pay in lieu of property taxes after the project was completed. This court thus affirms the part of the judgment entered by the Law Division that declared the Prepayment Agreements ultra vires and ordered the municipality to refund the two million dollars to the redeveloper.

This court also determines that pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -73, a municipality may require the redeveloper to contribute to an Affordable Housing Trust Fund (AHTF) established by the municipality as a condition for granting a tax abatement under the LTTEL. N.J.S.A. 40A:12A-4.1. This court thus reverses the decision of the Law Division that ordered the City to return to the redeveloper a combined $710,769 initial contribution it made to the municipal AHTF, as a condition for the municipality granting the tax abatement under the LTTEL.

8-6-18 IN THE MATTER OF REGISTRANT G.H. IN THE MATTER OF REGISTRANT G.A. (ML-00200521, UNION COUNTY AND STATEWIDE, AND ML-07130018, MIDDLESEX COUNTY AND STATEWIDE)(RECORD IMPOUNDED) (CONSOLIDATED) (A-2388-16T1/A-3132-16T1)

When enacted in 1994, Megan's Law, N.J.S.A. 2C:7-1 to -23, provided that any registrant could

- make application to the Superior Court . . . to terminate the [registration] obligation upon proof that the person has not committed an offense within 15 years following conviction or release from a correctional facility for any term of imprisonment imposed, whichever is later, and is not likely to pose a threat to the safety of others.
- [N.J.S.A. 2C:7-2(f).]

In 2002, in order to secure federal funding, the Legislature adopted N.J.S.A. 2C:7-2(g), which makes subsection (f) inapplicable to those convicted of more than one "sex offense" or those convicted of aggravated sexual assault, N.J.S.A. 2C:14-2(a), or sexual assault pursuant to N.J.S.A. 2C:14-2(c)(1).

The Legislature, however, chose not to amend N.J.S.A. 2C:43-6.4(c), by which an offender who has not committed a crime for fifteen years since his last conviction or release, and who no longer poses a threat to public safety, "may petition the Superior Court for release from" Community Supervision for Life (CSL) or Parole Supervision for Life (PSL).

Appellants were both convicted prior to 2002, and, after leading offense-free lives for more than fifteen years, applied to terminate their registration requirements and CSL. Although the Law Division judges relieved each of his CSL restrictions finding neither posed a public safety threat, the judges denied termination of appellants' registration pursuant to subsection (g).

The Court reverses, concluding the Legislature did not specifically intend the retroactive application of subsection (g), and, even if intended, retroactive application of subsection (g) to those convicted prior to its enactment results in a "manifest injustice."

8-6-18 ARTHUR G. WHELAN VS. ARMSTRONG INTERNATIONAL INC., ET AL. (L-7161-12, MIDDLESEX COUNTY AND STATEWIDE) (A-3520-13T4)

In this products liability case arising out of exposure to asbestos, we consider anew whether a manufacturer has a duty to warn about the risk of harm from exposure to asbestos-containing replacement parts integral to the function of the manufacturer's product, even if the manufacturer did not fabricate or distribute the replacement parts. We conclude that a duty to warn exists when the manufacturer's product contains asbestos components, which are integral to the function of the product, and the manufacturer is aware that routine periodic maintenance of its product will require the replacement of those components with other asbestos-containing parts.

In light of our determination that a manufacturer's product includes any replacement parts necessary to its function, defendants' duty to warn extends to any danger created by those replacement parts. A careful review of the record reveals plaintiff presented sufficient evidence detailing his exposure to asbestos, either from original parts supplied by defendants or replacement parts required for the function of defendants' products, to create issues of fact as to all defendants. The panel, therefore, reverses the orders granting summary judgment in favor of defendants and remands for trial.

8-6-18 S.T. VS. 1515 BROAD STREET, LLC, ET AL. VS. VIRGINIA GLASS PRODUCTS, ET AL. (L-1651-10, ESSEX COUNTY AND STATEWIDE)(RECORD IMPOUNDED) (A-5525-13T2)

Plaintiff's counsel informed the trial court of counsel's reasonable belief that plaintiff had diminished capacity. Under Rule 4:26-2(a)(4), a court may appoint a guardian ad litem if there is good cause to believe that a party lacks the mental capacity needed to participate in the litigation. Based upon the guardian ad litem's investigation or other information, the court may give the guardian ad litem the power to make specific decision(s) needed in the case if it finds clear and convincing evidence that the party is mentally incapable of making those decision(s). The Appellate Division disapproves older cases suggesting the court had to meet Rule 4:86's standard for appointing a guardian of the person or property. As the court found plaintiff lacked the mental capacity to decide whether to try or settle the case, the guardian ad litem could negotiate a settlement which the court properly found was fair and reasonable under Rule 4:44.

8-3-18 PERSONAL SERVICE INSURANCE COMPANY VS. RELIEVUS A/S/O RACHEL SACKIE (L-3544-16, CAMDEN COUNTY AND STATEWIDE) (A-2393-16T2)

The question presented is whether a Law Division summary action seeking to vacate an award by a dispute resolution professional (DRP) as well as an appeal award of a three-member DRP panel, which affirmed the DRP's decision, was timely made within the forty-five-day time frame under N.J.S.A. 2A:23A-13(a), when it was filed 159 days after the DRP's award, but forty-three days after the DRP panel's award. The trial court dismissed the summary action as untimely; finding it was not filed within forty-five days after the DRP's award. We reverse and remand because we conclude that, under the governing statutory and regulatory guidelines, the summary action was timely filed within forty-five days of the DRP panel's decision.

7-31-18 STATE OF NEW JERSEY IN THE INTEREST OF A.A. (FJ-09-0118-17, HUDSON COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4098-16T3)

This case presented a novel issue in the context of self-incrimination. The court determined that it is incongruous to require the presence of a parent prior to a waiver of Miranda rights to safeguard a juvenile's right against self-incrimination, yet allow police eavesdropping on the parent-child communication that proves antithetical to that right. The court also determined that this constituted the functional equivalent of police interrogation and therefore Miranda was implicated. Since Miranda warnings were not provided prior to the parent-child communication, the statements resulting from the communication were suppressed.

7-23-18 STATE OF NEW JERSEY VS. JEROME SHAW, JR. (13-04-0591, BERGEN COUNTY AND STATEWIDE) (A-2058-15T3)

The principal issue in this appeal from a conviction for conspiracy to commit burglary after a guilty plea pertains to the limits placed on a prosecutor to resubmit a case to a grand jury after a previous grand jury panel refused to indict. The court concludes that the prosecutor's power to resubmit is broad but not boundless. It is subject to review in light of the grand jury's role to protect the innocent from unfounded prosecution; and the court's power to review prosecutorial discretion for abuse, and to assure fundamental fairness. However, under the circumstances of this case, the court rejects defendant's challenge to the resubmission, and affirms the trial court's denial of the motion to dismiss the indictment.

7-23-18 STATE OF NEW JERSEY VS. KEVIN BROWN (08-12-2199, BERGEN COUNTY AND STATEWIDE) (A-0777-16T3)

In this appeal, defendant filed his first post-conviction relief (PCR) petition more than five years after the trial court signed the Judgment of Conviction. Despite this, neither the PCR court nor the State challenged the timeliness of the petition under Rule 3:22-12(a)(1)(A). At the conclusion of oral argument in this appeal, this court entered a sua sponte order directing the parties to submit supplemental briefs addressing: (1) whether the procedural bar in the Rule is subject to waiver if the State fails to raise it before the PCR court; and (2) if the Rule's preclusive injunction is not subject to waiver, what should be the remedy on appeal.

Based on the policy concerns expressed by the Supreme Court in State v. Mitchell, 126 N.J. 565, 575-76 (1992), this court holds that a PCR judge has an independent, non-delegable duty to question the timeliness of a petition and to require a petitioner to submit competent evidence to satisfy the standards for relaxing the time restrictions codified by the Court under Rule 3:22-12. Absent sufficient competent evidence to satisfy the standards for relaxing these time restrictions, the PCR judge does not have the authority to review the merits of the claims asserted therein.

7-20-18 THERESA WEAR, ET AL. VS. SELECTIVE INSURANCE COMPANY WOODBURY MEDICAL CENTER ASSOCIATES, LLP VS. SELECTIVE INSURANCE COMPANY (L-1583-13, GLOUCESTER COUNTY AND STATEWIDE)(CONSOLIDATED) (A-5526-15T1/A-0033-16T1)

In this appeal, the court held that it was premature to mandate the insurance carrier to provide a defense to an insured on an environmental claim where the unambiguous exclusion contained anti-concurrent and anti-sequential language. The proper remedy at that stage in the proceedings, given the uncertainty of coverage, was to convert the duty to defend to a duty to reimburse as in Grand Cove II. The court further held that it was premature to apply the Griggs analysis to a settlement reached between the insured and the claimants prior to a determination that the insurance carrier breached its duty to defend.

7-18-18 REGINAL LITTLE VS. KIA MOTORS AMERICA, INC. (L-0800-01, UNION COUNTY AND STATEWIDE) (A-0794-15T3)

In this class action against defendant Kia Motors America, Inc., (KMA) plaintiff class of 8455 Kia Sephia owners and lessees represented by Regina Little proved at a jury trial that the Sephia, model years 1997 through 2000, had a defective front brake system, which caused premature brake pad and rotor wear. Concluding that the defect amounted to a breach of express and implied warranties, and that all owners had suffered damage due to the defect, the jury awarded each member of the class $750 ($6.3 million total) in repair damages.

Determining for the first time post-trial that repair damages could not be awarded on a class-wide basis because they were dependent upon individual factors, the trial court granted KMA's motion for judgment notwithstanding the verdict on the repair damages award, decertified the class for purposes of damages, and ordered a new trial on repair damages only, to proceed by way of claim forms. With the advantage of recent case law unavailable to the trial judge, the court now reverses, reinstates the jury award and remands for determination of counsel fees.

7-16-18 IN THE MATTER OF BELLEVILLE EDUCATION ASSOCIATION AND BELLEVILLE BOARD OF EDUCATION BELLEVILLE EDUCATION ASSOCIATION VS. BELLEVILLE BOARD OF EDUCATION (PUBLIC EMPLOYMENT RELATIONS COMMISSION, AND L-7237-15, ESSEX COUNTY AND STATEWIDE)(CONSOLIDATED) (A-5104-14T3/A-2956-15T3)

This opinion involves two separate, but interrelated cases arising from the same core of operative facts. In the appeal filed by the local board of education under Docket Number A-5104-14, this court upholds the decision of the Public Employment Relations Commission (PERC) to assert its exclusive jurisdiction to decide complaints arising under the New Jersey Employer-Employee Relations Act (EERA), N.J.S.A. 34:13A-1 to -43, even when raised in the context of tenure charges. Applying the Supreme Court's holding in In re Local 195, IFPTE, 88 N.J. 393 (1982), this court also upholds the union's right to engage in good faith negotiations to ascertain the impact the installation of exposed cameras with both audio and video capabilities would have on the terms and conditions of employment for the employees.

In the separate, but related appeal filed by the union under Docket Number A-2956-15, this court holds the Law Division does not have jurisdiction under Rule 4:67-6 to enforce an order entered by PERC. Adhering to the Supreme Court's holding in Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25 (1978), this court holds that only PERC may file a motion before the Appellate Division to enforce its own order under the EERA. A prevailing party in a PERC proceeding only has the right to request that PERC enforce its own order.

7-13-18 STATE OF NEW JERSEY VS. PEDRO C. ANICAMA (06-16, HUDSON COUNTY AND STATEWIDE) (A-0452-16T4)

Defendant was convicted of a third or subsequent offense of driving while intoxicated (DWI). The Municipal Court allowed him to serve the mandatory 180-day sentence under N.J.S.A. 39:4-50(a)(3) two days per week. The Law Division reversed.

The Appellate Division holds a third or subsequent DWI offender is ineligible for periodic service. Michael's Law amended the DWI statutes to require the 180-day sentence be spent in jail, excepting only up to ninety days spent in inpatient drug or alcohol rehabilitation, and to preclude other options. The amendment to N.J.S.A. 39:4-51 was intended only to bar work release for such offenders, not to lift the prohibition on their release before the jail term had been served. The specific law governing DWI sentences governs over the general provision for periodic service in N.J.S.A. 2B:12-22. The court disapproves State v. Grabowski, 388 N.J. Super. 431 (Law Div. 2006), which permitted such periodic service.

7-10-18 EGG HARBOR CARE CENTER VS. PATRICIA SCHERALDI, ET AL. (L-0166-16, ATLANTIC COUNTY AND STATEWIDE) (A-2956-16T4)

After plaintiff Egg Harbor, a New Jersey nursing facility, commenced a collection action against various parties, the Californian defendant, Corey Pagano, moved to dismiss the case based upon a lack of personal jurisdiction. Defendant Pagano had not lived in New Jersey in over three decades and had not set foot in our state in seventeen years. Pagano's only connection to the forum stems from his mother, New Jersey and Egg Harbor resident Patricia Scheraldi, as he served as the payee for her incurred obligations, contacted plaintiff Egg Harbor surrounding her health care, and attempted to obtain her Medicaid coverage. In accordance with the purposeful availment requirement necessary to support minimum contacts, we conclude that it is inappropriate for a nonresident defendant to be subjected to personal jurisdiction based upon contacts with the forum state that cannot be reasonably prevented by the defendant. Based upon Pagano's contacts with New Jersey, it violates the longstanding principles of minimum contacts and reasonableness outlined in Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945) to hale him into our courts to defend this action. We affirm and remand with directions to amend the order to dismiss the case without prejudice.

7-10-18 STATE OF NEW JERSEY VS. JAMES T. DOUGHERTY (16-04-0407, BURLINGTON COUNTY AND STATEWIDE) (A-2045-16T4)

The court finds that the plain language of N.J.S.A. 2C:40-26(b), the fourth-degree offense of driving while suspended, includes both driving while under the influence (DWI), N.J.S.A. 39:4-50, and refusal to submit to breath testing (refusal), N.J.S.A. 39:4-50.4a. They are predicate offenses even where the prior conviction history consists of one conviction under the separate sections of the Motor Vehicle Code. In other words, one DWI and one refusal suffice for the criminal offense of driving while suspended.

7-9-18 JOY DESANCTIS, ET AL. VS. BOROUGH OF BELMAR, ET AL. (L-3550-15, MONMOUTH COUNTY AND STATEWIDE) (A-1074-16T3)

The mayor and council of the Borough of Belmar, in response to a protest petition seeking a referendum on an ordinance appropriating funds and authorizing the issuance of bonds and notes to construct a beach pavilion, passed a resolution to place the referendum on the ballot.

The court held a later-submitted permissive – not mandatory – interpretive statement of the ordinance was invalid because: 1) neither the borough administrator nor the borough attorney had authority to author and submit the interpretive statement to the county clerk without formal public approval of the mayor and counsel, and 2) the interpretive statement was misleading and contained extraneous language. The court also determined the interpretive statement's phraseology deprived plaintiffs of their substantive right of referendum protected by the New Jersey Civil Rights Act.

The court also upheld the trial judge's award of counsel fees and costs despite the absence of a retainer agreement between plaintiffs and counsel; and the judge's refusal to allocate fees and costs to beachgoers – not Belmar voters – as beneficiaries of plaintiffs' efforts.

6-29-18 MTK FOOD SERVICES, INC. D/B/A THE PALACE RESTAURANT VS. SIRIUS AMERICA INSURANCE COMPANY, ET AL. (L-1227-12, MONMOUTH COUNTY AND STATEWIDE) (A-1309-17T2)

The panel addresses whether New Jersey's six-year statute of limitations or Pennsylvania's two-year statute of limitations applies to a legal malpractice claim against a lawyer, who is licensed in both states and works in New Jersey, and his law firm, which has offices in both states. The legal services in question concerned a Pennsylvania lawsuit relating to a fire loss at a Pennsylvania restaurant. Applying the substantial-interest test for resolving statute-of-limitations conflicts, which our Supreme Court adopted in McCarrell v. Hoffman-La Roche, Inc., 227 N.J. 569, 574 (2017), we reverse the trial court's decision, which applied New Jersey law.

6-22-18 G.A.-H. VS. K.G.G., ET AL. (L-0418-15, OCEAN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-2126-16T4)

A forty-four-year-old emergency medical technician engaged in an unlawful sexual relationship with the then fifteen-year-old plaintiff, who, after the EMT was convicted, commenced this action for damages against the EMT, who defaulted, and against – among others – the EMT's employer and co-worker. In this appeal, the court held that the trial judge erroneously limited discovery from the prosecutor's office that investigated the crime and, also, prematurely granted summary judgment in favor of the co-worker and employer. These dispositions precluded a full and clear understanding of the extent to which the co-worker and employer knew or should have known of the EMT's unlawful acts, as well as the extent of the co-worker's relationship with the EMT. These limitations hampered the court's determination of whether it would be appropriate to extend the common-law duty imposed in J.S. v. R.T.H., 155 N.J. 330, 334 (1998) (holding that "a wife who suspects or should suspect her husband of actual or prospective sexual abuse of their neighbors' children has [a] duty of care to prevent such abuse") to a co-worker or employer or both. Thus, the orders under review were either reversed or vacated and the matter remanded for further proceedings.

6-20-18 STATE OF NEW JERSEY VS. TYRONE ELLISON (01-06-2564, ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-2216-16T3)

In a per curiam opinion, the panel affirms the denial of defendant's petition for post-conviction relief without an evidentiary hearing substantially for the reasons stated in the trial court's published opinion reported at 448 N.J. Super. 113 (Law Div. 2016).

6-20-18 PAOLO MARANO VS. CLIFFORD J. SCHOB, M.D., ET AL. (L-6604-12, ESSEX COUNTY AND STAEWIDE) (A-3915-16T2)

In Pool v. Morristown Memorial Hospital, 400 N.J. Super. 572, 577 (App. Div. 2008), this court ruled that a worker's compensation lien under N.J.S.A. 34:15-40 attached to funds that an injured plaintiff received from a defendant physician in a medical malpractice case pursuant to the terms of a "high/low" agreement. Pool held that the money paid to plaintiff as the negotiated "low" figure in accordance with the agreement was subject to the statutory lien, even though a jury had rendered a "no cause" verdict in favor of the physician and absolved him of liability. Id. at 575-77.

Similarly, in the present case, despite a "no cause" decision, an injured plaintiff recovered the "low" amount under a high/low agreement he entered into with defendants who provided medical treatment to him after a work-related accident. Relying upon Pool, his employer's workers' compensation carrier seeks to enforce its lien for compensation benefits it paid to plaintiff. Plaintiff argues that N.J.A.C. 11:1-7.3(a)(1), a regulation adopted by the Department of Banking and Insurance exempting certain payments made under a high/low agreement from physician reporting requirements, alters the analysis in Pool. Plaintiff claims the regulation renders the compensation lien unenforceable in this setting. In essence, plaintiff desires a lien-free "low."

The panel rejects plaintiff's novel argument. It concurs with the trial court that the regulation does not affect the validity and enforceability of the carrier's Section 40 lien, and that the lien applies to the proceeds collected by plaintiff from the medical malpractice defendants. A contrary result would allow plaintiff to retain an inappropriate double recovery.

6-19-18 CITY COUNCIL OF THE CITY OF ORANGE TOWNSHIP VS. WILLIS EDWARDS, III (L-1805-13, ESSEX COUNTY AND STATEWIDE) (A-3729-15T4)

The Mayor of the City of Orange Township appointed defendant as Acting Business Administrator. Plaintiff did not confirm the appointment, and the municipal ordinance required the mayor to remove acting persons after ninety days. In contravention of the Council's directive and the applicable law, the mayor appointed defendant as Deputy Business Administrator. Defendant thereafter performed functions, signed official documents and collected a salary as the Business Administrator. Following the entry of an order to show cause directing defendant to cease performing all functions of a Business Administrator, defendant left the position. The mayor then appointed him as chief of staff. A second judge vacated certain portions of the order to show cause, but left intact the provision that only a department director had authority to appoint a deputy. Nevertheless, defendant resumed the title and salary, and performed the functions of Business Administrator. N.J.S.A. 40:69A-43.1 provides that only the director of a department may appoint a deputy director. Therefore, the mayor had no authority to appoint defendant to the position. Furthermore, the City abolished the position of deputy business administrator in 1985 by municipal ordinance. The panel finds defendant's appointment as deputy was an illegal act — an act that was ultra vires in the primary sense and, therefore, void. The panel rejects defendant's argument that he accepted the position of Deputy Business Administrator in good faith and with the "reasonable understanding" that the mayor had the authority to appoint him to the post. Defendant is a highly educated man who had served in the state legislature and taught college courses in municipal government and public administration. He acknowledged having reviewed the Faulkner Act, N.J.S.A. 40:69A-1 to -210, and the City ordinances that pertained to his employment. Defendant did not demonstrate any factual dispute in the events surrounding his appointment, nor any ambiguity in the controlling statutes. Because he lacked good faith in accepting and remaining in the post, the panel rejects defendant's argument that he should be permitted to retain his salary under equitable theories of quantum meruit or equitable estoppel. The sole remedy to make the aggrieved taxpayers whole is to disgorge defendant of the monies paid to him during his service in the unlawful appointment.

6-18-18 WILLIAM F. BRUNT, JR. VS. BOARD OF TRUSTEES, POLICE & FIREMENS'S RETIREMENT SYSTEM, ET AL. (L-1573-16, MONMOUTH COUNTY AND STATEWIDE) (CONSOLIDATED) (A-1406-16T1/A-1457-16T1)

Absent a contract, statutory provision or court rule authorizing fee-shifting, New Jersey follows the so-called "American Rule," requiring litigants to bear their own litigation costs regardless of who prevails. In this consolidated action, the panel reverses an award of attorneys' fees, jointly and severally, against the Board of Trustees of the Police and Firemen's Retirement System, and plaintiff's former employer, the Township of Middletown.The panel concludes the trial court, in an action in lieu of prerogative writs against the Board, Middletown, and certain of their employees, erroneously awarded counsel fees to plaintiff on equitable grounds. Because there was no legal basis to support the award of those fees, the panel reverses.

6-18-18 CAPITAL ONE, N.A. VS. JAMES I. PECK, IV (F-005201-13, ESSEX COUNTY AND STATEWIDE) (A-0582-16T4)

In a residential foreclosure where an investor such as Freddie Mac owns the note but not the mortgage, the plaintiff must have both the note and a valid assignment of mortgage to have standing to foreclose. Given that defendant knew the servicer for Freddie Mac, given that Freddie Mac is a GSE (government-sponsored enterprise) that publicly declares its policy to foreclose through its servicers, and given that the servicer did possess the note at an earlier foreclosure proceeding and had a valid mortgage assignment, the irregularities are insufficient to defeat this foreclosure. Standing is not jurisdictional in New Jersey, and the equities here favor foreclosure.

6-14-18 BERNICE PISACK, ETC. VS. B&C TOWING, INC., ET AL. VS. THE CITY OF NEWARK EPTISAM PELLEGRINO, ETC. VS. NICK'S TOWING SERVICE, INC., A-5668-16T3 ET AL. CHRISTOPHER WALKER, ETC. VS. ALL POINTS AUTOMOTIVE & TOWING, INC., ET AL. (L-6501-13, L-1606-17 AND L-792 (A-2546-16T4/A-5399-16T3/A-5668-16T3)

These three appeals involve the non-consensual towing of vehicles and raise questions concerning the Predatory Towing Prevention Act (Towing Act), N.J.S.A. 56:13-7 to -23, the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, and the Truth-In-Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18. The court holds that: (1) the Towing Act does not require the exhaustion of administrative remedies before the Division of Consumer Affairs (Division) or dispute resolution procedures established by municipalities that have towing ordinances; (2) the Tort Claims Act (TCA) does not provide immunity against claims based on the fees companies charge for non-consensual towing of vehicles; and (3) the Towing Act and its regulations limit the services for which a towing company can charge. The court also holds that the TCCWNA applies to the non-consensual towing of vehicles because the bills issued by towing companies are contracts and notices within the definition of the TCCWNA. Finally, the court holds that class actions may, in the right circumstances, be appropriate for claims under the Towing Act, the CFA, and the TCCWNA. Accordingly, we reverse the orders on appeal in each of these three cases and remand for further proceedings.

6-13-18 STATE OF NEW JERSEY VS. J.T. (09-06-1113, BERGEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4041-11T4)

A jury found defendant guilty of aggravated manslaughter of her husband, as a lesser included offense of murder; first degree attempted murder and second degree endangering the welfare of her minor daughter; and second degree endangering the welfare of her minor son. Defendant asserted the affirmative defense of insanity under N.J.S.A. 2C:4-1. The central issue in this appeal concerns the proper assessment of this defense by the jury. This court reverses defendant's conviction and remands the matter for a new trial. As a matter of plain error under Rule 2:10-2, this court concludes that the State's expert witness' testimony usurped the jury's exclusive role to decide defendant's state of mind at the time she committed these offenses, rendering the verdict unsustainable. State v. Simms, 224 N.J. 393, 396 (2016); State v. Cain, 224 N.J. 410, 424 (2016). The trial judge also engaged in ex parte interactions with the pool of prospective jurors before the jury selection process had even begun. Although not outcome determinative, this court also holds that the trial judge's ex parte interactions with the pool of prospective jurors violated defendant's right under Rule 3:16(b) to be present "at every stage of the trial, including the impaneling of the jury," as well as the Supreme Court's holding in Davis v. Husain, 220 N.J. 270 (2014), not to engage in ex parte interactions with the jury at any stage of the trial. See also Rule 1:2-1.

6-13-18 KRISTY BOWSER VS. BOARD OF TRUSTEES, POLICE AND FIREMEN'S RETIREMENT SYSTEM (POLICE AND FIREMEN'S RETIREMENT SYSTEM) (A-0568-16T4)

The panel reverses the denial of an accidental disability pension to a corrections officer who was disabled after falling on ice near the parking lot on the grounds of jail where she worked. Unexpectedly directed to serve a second consecutive shift, the officer was on her way to retrieve feminine hygiene products from her car, because she was menstruating. In holding that her fall "occurr[ed] during and as a result of the performance of [her] regular or assigned duties," N.J.S.A. 43:16A-7(1), the panel concludes the officer took the equivalent of a restroom break, which the Court in Kasper v. Board of Trustees of the Teachers' Pension & Annuity Fund, 164 N.J. 564, 586 n.7 (2000), stated was included within "an employee's performance of his or her regularly assigned tasks," if "within the confines of the workday at the work location." The panel rejects the Board's statement that parking lot accidents are categorically not eligible for accidental disability pensions, and distinguishes a parking lot accident that occurs during the journey to or from work, such as the one presented in Mattia v. Board of Trustees, Police and Firemen's Retirement System, decided today.

6-13-18 PAUL MATTIA VS. BOARD OF TRUSTEES, POLICE AND FIREMEN'S RETIREMENT SYSTEM (POLICE AND FIREMEN'S RETIREMENT SYSTEM) (A-1182-16T2)

The panel affirms the final determination of the Board of Trustees of the Police and Firemen's Retirement System, finding former corrections officer Paul Mattia was not eligible for accidental disability retirement benefits, pursuant to N.J.S.A. 43:16A-7. The panel distinguished Kasper v. Board of Trustees, Teachers' Pension and Annuity Fund, 164 N.J. 564 (2000), where the Supreme Court determined an education media specialist, who was mugged on the steps of the school when she arrived early to distribute materials prior to the official start of classes, had finished her commute for purposes of pension analysis.Mattia suffered a disabling injury when he slipped and fell on ice in the parking lot of the jail where he was employed, before he was able to check in and receive his assignment. Because Mattia had not yet begun performing his regular assigned duties, the Board denied his claim for accidental disability retirement benefits, determining he was still commuting when he was injured. In doing so, the Board rejected the decision of an Administrative Law Judge granting Mattia's petition. The panel affirmed, finding he was still commuting when he fell in the parking lot.

6-11-18 DCPP VS. A.D, D.H. AND D.C. IN THE MATTER OF N.D., DI.C., DIA.C, L.C. AND A.C. (FN-07-0365-15, ESSEX COUNTY AND STATEWIDE)(RECORD IMPOUNDED) (A-3127-15T3)

In this Title Nine action, defendant appeals from a Family Part order finding he abused or neglected his fifteen-year-old stepdaughter by sexually assaulting her. Defendant principally argues the court erred by finding the child's statements concerning the assault were corroborated under N.J.S.A. 9:6-8.46(a)(4) based on her consistent repetition of what occurred, a doctor's report containing a diagnosis she was sexually assaulted, and a psychologist's report stating she suffered from post-traumatic stress disorder as a result of sexual abuse.The court found the child's consistent repetition of her version of the events did not constitute corroboration of her statements concerning the sexual assault under N.J.S.A. 9:6-8.46(a)(4), and the diagnoses contained in the doctor's and psychologist's reports did not provide corroboration because they constituted inadmissible complex diagnoses. The court, however, determined that admissible objective findings in the doctor's report, including descriptions of the child's physical injuries, and defendant's admissions concerning the circumstances surrounding the sexual assault provided some evidence supporting the child's sexual assault allegation, satisfied N.J.S.A. 9:6-8.46(a)(4)'s corroboration requirement, and permitted the court's reliance on the child's statements in making its abuse or neglect finding.

6-8-18 LEONARD YARBOROUGH VS. STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY (L-5629-16, ESSEX COUNTY AND STATEWIDE) (A-1343-16T4)

The court determined the entire controversy doctrine (ECD) did not preclude the State Operated School District of the City of Newark, Essex County from prosecuting a conduct-unbecoming tenure charge against a third-grade teacher stemming from his infliction of corporal punishment on two students, even though the corporal punishment predated — and the related charge was not joined with — tenure actions instituted against the teacher for inefficiency. The limited scope of the inefficiency arbitrations, considering the legislatively-mandated procedures specific to those arbitrations under the TEACHNJ Act, is not conducive to the inclusion of other charges, including conduct unbecoming. Further, there was little or no transactional nexus between the inefficiency and conduct-unbecoming charges to warrant application of the ECD.

6-6-18 STATE OF NEW JERSEY VS. STEPHEN MANDEL (16-067, MONMOUTH COUNTY AND STATEWIDE) (A-5442-16T1)

Defendant appeals the denial of his motion to suppress the warrantless seizure of a small amount of marijuana from his vehicle. A police officer seized the marijuana after stopping defendant's vehicle for an equipment violation. During the stop, the officer smelled the odor of marijuana coming from inside the car while questioning defendant through the open passenger side window.The State contends the officer's slight intrusion inside the vehicle's window, for the sole purpose of better hearing defendant over the noise of passing traffic, did not constitute a search. Defendant argues it was a search, and that it was unlawful because the officer was not legally in the "smelling area" when he detected the odor of marijuana and developed the probable cause to seize it. Assuming without deciding that the officer conducted a search when he leaned his head inside defendant's open window, the panel concludes that the officer's slight, momentary intrusion inside the car window to hear defendant's responses was reasonable. Consequently, the search did not violate the Constitutional protection against "unreasonable searches and seizures." The marijuana was then properly seized pursuant to the "plain smell" exception to the warrant requirement. The trial court order denying the suppression motion is affirmed.

6-5-18 BRIAN J. RICE VS. CHRISTINA M. MILLER, ET AL. (L-0451-14, CAMDEN COUNTY AND STATEWIDE) (A-2513-16T3)

Tried to a jury, this negligence case arose out of a motor vehicle accident in which the defendant driver struck plaintiff, a pedestrian, as he was attempting to walk one February evening across an eight-lane state highway. Plaintiff alleged defendant was not using her headlights and had failed to observe him in the road until it was too late for her to stop. Defendant asserted that plaintiff unreasonably failed to use a nearby crosswalk located up to about 150 feet from where he crossed. The jury found plaintiff was 75% at fault and defendant was 25%, producing a judgment in defendant's favor pursuant to the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to -5.8. On appeal, plaintiff argues, among other things, the trial court issued inappropriate jury instructions concerning the traffic laws and should have taken judicial notice concerning the asserted legality of his attempted crossing. Plaintiff further argues the court erred in allowing, over objection, an investigating police officer, who had not witnessed the accident, to render lay opinion testimony estimating the speed of defendant's car under what is known as the "Searle formula." The trial court properly charged the jury in this setting with both N.J.S.A. 39:4-33, which directs that "[a]t intersections where traffic is directed by a police officer or traffic signal, no pedestrian shall enter upon or cross the highway at a point other than a crosswalk," and N.J.S.A. 39:4-34, which provides that, in the absence of a traffic signal or police officer directing traffic, a pedestrian shall cross "where not prohibited, at right angles to the roadway." The question of whether plaintiff was obligated to use the crosswalk was a fact-dependent jury issue, turning on the actual proximity of the crosswalk, the lighting conditions, and whether it was too dangerous to reach from plaintiff's location. The matter was unsuitable for judicial notice under N.J.R.E. 201. The investigating police officer was not designated in discovery as a defense expert and had denied at his deposition having expert status. Given the esoteric nature of the Searle formula, the officer's testimony was inadmissible under the guise of the lay opinion rule, N.J.R.E. 701, but this error was harmless.

6-4-18 WILLIAM QUAIL, ETC. VS. SHOP-RITE SUPERMARKETS, INC., ET AL. (L-0606-14, SUSSEX COUNTY AND STATEWIDE) (A-1164-16T2)

Plaintiff in this wrongful death and survival action principally appeals from the trial court's ruling to exclude from evidence at trial a Certificate of Death that was issued following an examination by the county deputy medical examiner. On the date of the accident, decedent and plaintiff were shopping at defendant's supermarket. Decedent was using a motorized cart. As she went down a narrow aisle, her cart's basket caught on a cash register station, causing the station to fall on her. The accident injured her leg. Decedent stated she was fine and went home, but four days later she was taken to the hospital with complications. She died the following morning.After a deputy medical examiner inspected decedent's body, a Certificate of Death was issued. The Certificate stated that the manner of her death was an "accident" and that the cause of death was "complications of blunt trauma of [the] right lower extremity." The examiner's associated report reiterated these conclusions in more detail. The panel holds that the State Medical Examiner Act, N.J.S.A. 52:17B-92, despite its broad language, does not provide an absolute right to a civil plaintiff to admit the full contents of the Certificate of Death. The hearsay opinions within the Certificate were properly excluded by the trial court under N.J.R.E. 808, the net opinion doctrine, and pertinent case law. Further, the hearsay exception for vital statistics, N.J.R.E. 803(c)(9), does not require admission of the examiner's opinions.

6-1-18 R.A. FEUER VS. MERCK & CO., INC. (C-000042-16, UNION COUNTY AND STATEWIDE) (A-1262-16T3)

This appeal involves the scope of a shareholder's right to inspect a corporation's records under N.J.S.A. 14A:5-28 and the common law. Plaintiff, a Merck & Co., Inc. shareholder, appeals from the dismissal of his complaint seeking various Merck corporate records. The panel affirms. It concludes that plaintiff's demand exceeds the scope of "books and records of account, minutes, and record of shareholders," which the court was empowered to permit him to inspect under N.J.S.A. 14A:5-28(4). Plaintiff also misreads a 1988 amendment to the statute, which allows a court to limit a shareholder's inspection, rather than expand it as plaintiff contends. Finally, plaintiff misplaces reliance on the common law. To the extent N.J.S.A. 14A:5-28 does not abrogate residual common law rights of inspection, plaintiff's demand exceeds inspection previously allowed under the common law.

6-1-18 STATE OF NEW JERSEY VS. NOEL E. FERGUSON, ET AL. STATE OF NEW JERSEY VS. SHAMEIK BYRD (16-10-0171, PASSAIC COUNTY AND STATEWIDE)(CONSOLIDATED) (RECORD IMPOUNDED) (A-2893-17T3/A-2894-17T3)

These appeals address the issue of territorial jurisdiction in the context of the strict liability for drug-induced death statute, N.J.S.A. 2C:35-9(a), which provides that "[a]ny person who manufactures, distributes or dispenses . . . [a] controlled dangerous substance (CDS) classified in Schedules I or II . . . is strictly liable for a death which results from the injection, inhalation[,] or ingestion of that substance, and is guilty of a crime of the first degree. " New York has no comparable statute. In A-2893-17, the trial court dismissed the strict liability charge against defendants Noel E. Ferguson and Anthony M. Potts, New York residents who allegedly purchased heroin from defendant Shameik Byrd in Paterson and later distributed some of the heroin to the victim in New York, where he died of a heroin overdose. In A-2894-17, the trial court denied Byrd's motion to dismiss the same count of the indictment. The court found that, because Byrd allegedly distributed heroin in New Jersey that ultimately resulted in the user's death, Byrd's conduct fell within the purview of N.J.S.A. 2C:35-9(a). N.J.S.A. 2C:1-3(a)(1) confers territorial jurisdiction in New Jersey when "[e]ither the conduct which is an element of the offense or the result which is such an element occurs within this State." Here, the proofs before the grand jury established that, as to Ferguson and Potts, the distribution and ingestion of heroin and the victim's death all occurred in New York. Accordingly, the State is without territorial jurisdiction to prosecute Ferguson and Potts for strict liability drug-induced death under N.J.S.A. 2C:35-9. The panel concludes there is territorial jurisdiction to prosecute Byrd in New Jersey because his alleged distribution that ultimately resulted in the victim's death occurred in New Jersey, thus satisfying the "conduct" prong of N.J.S.A. 2C:1-3(a)(1). Consequently, the panel affirms the trial court orders.

5-29-18 VALERIE GIARUSSO VS. WILLIAM G. GIARUSSO, SR. IN THE MATTER OF CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO, PC (FM-02-1561-08, BERGEN COUNTY AND STATEWIDE) (A-1063-15T4)

The petitioning law firm made application against its former client in the Family Part seeking an award of attorney's fees and costs for post-judgment services rendered to the client to enforce alimony arrears, child support arrears, and equitable distribution owed to her by her ex-husband. The law firm also sought Imposition of a charging lien and entry of a judgment by the Family Part. The court holds the petitioning law firm was not entitled to a charging lien for unpaid services rendered post-judgment to enforce previously awarded relief obtained through the efforts of prior counsel.The court further holds that the petitioning law firm could obtain judgment in the Family Part against its former client for the reasonable amount of unpaid fees without filing a separate action in the Law Division. The court remanded the issue of the reasonableness of the fees sought by law firm to the Family Part for the development of a reviewable record.

5-22-18 TIMOTHY ELLIS VS. HILTON UNITED METHODIST CHURCH, ET AL. (L-6083-15, ESSEX COUNTY AND STATEWIDE) (A-0793-16T3)

In this appeal, the court was asked to determine whether sidewalk liability applies to an owner of a vacant church because in Gray v. Caldwell Wood Products, Inc., 425 N.J. Super. 496 (App. Div. 2012), we imposed liability on the owner of a vacant, boarded-up building that had been used for commercial purposes. For the reasons that follow, we hold that a vacant church maintains its status as a noncommercial property, not subject to a commercial property's sidewalk liability. We reject any reading of Gray that imposes liability on owners of vacant residential or noncommercial properties that have not been put to any commercial use.

5-21-18 E&H STEEL CORPORATION VS. PSEG FOSSIL, LLC, ETC. (L-0516-11, HUDSON COUNTY AND STATEWIDE) (A-1600-15T1)

The New Jersey Rules of Evidence and supporting case law do not require that lay testimony and even lay opinion testimony, although based on scientific, technical or even specialized knowledge, automatically triggers the need for the designation of the witness providing that testimony as an expert. The fact that a person with personal knowledge of facts relevant to a dispute may also qualify as an expert in the particular field associated with those facts does not convert his or testimony into expert testimony under N.J.R.E. 702 and 703.

5-18-18 STATE OF NEW JERSEY VS. MARIANNE MCINTYRE-CAULFIELD (17-09-0823, MIDDLESEX COUNTY AND STATEWIDE) (A-1277-17T1)

The legal question – when enrollment into the PTI program is contingent on a defendant pleading guilty to a second-degree charge – is whether the civil consequences of wreaking devastating personal financial havoc on a defendant constitutes good cause under Rule 3:9-2. This court held that such a financial circumstance establishes good cause permitting a civil reservation. The court emphasized that the civil reservation eliminated the obstacle to avoiding an unnecessary criminal trial against defendant, who feared that the civil claimants would later use her plea of guilty as a devastating admission of civil liability.

5-16-18 HARRY SCHEELER VS. ATLANTIC COUNTY MUNICIPAL JOINT INSURANCE FUND, ET AL. LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER THE LAW VS. ATLANTIC CITY BOARD OF EDUCATION, ET AL. BARRY SCHEELER VS. CITY OF CAPE MAY, ET AL. (L-0990-15, BURLINGTON COUNTY AND STATEWID (A-2092-15T2/A-2704-15T2/A-2716-15T2)

The right to request and obtain government records under the Open Public Records Act (OPRA) is not limited to citizens of New Jersey. According, the out-of-state plaintiffs had standing to pursue their OPRA claims against the public entity defendants in these three cases.

5-11-18 IN THE MATTER OF REQUEST FOR PROPOSALS #17dfPP00144, EMPLOYEE BENEFITS: PHARMACY BENEFIT MANAGEMENT CONTRACT (DEPARTMENT OF THE TREASURY, DIVISION OF PURCHASE AND PROPERTY) (A-4751-16T1)

The panel considers incumbent vendor Express Scripts, Inc.'s appeal of the Acting Director of the Division of Purchase and Property's final agency decision sustaining the Division's award of a three-year contract for Pharmacy Benefit Management to OptumRx, Inc. Although anticipated changes in Plan Design affecting the Contract make the question more difficult than it might otherwise appear, we conclude Optum's statement "reserv[ing] the right to modify Financial Contracted Terms based on changes by the State in formulary or any carve out of services set forth in the Agreement, including but not limited to Specialty Pharmacy services," constitutes a substantial deviation from a material, non-waivable price term in the Solicitation and thus reverse the decision of the Acting Director and order the Contract rebid as expeditiously as possible. Whether that can occur in sufficient time to allow the Vendor to prepare for open enrollment next October is a matter we leave to the Acting Director.

5-10-18 JOHN S. WISNIEWSKI, ETC. VS. PHIL MURPHY, ET AL. IN THE MATTER OF THE NJEDA/STATE LEASE REVENUE BONDS 2017 SERIES AND STATE LEASE REVENUE REFUNDING BONDS 2017 SERIES (STATE HOUSE PROJECT) AND IN THE MATTER OF STATE CAPITOL JOINT MANAGEMENT COMMISSION MOT (A-4689-16T2/A-4693-16T2/A-4698-16T2)

These consolidated appeals involve a challenge to decisions by two state agencies to finance a comprehensive renovation of the State Capitol complex. The agencies resolved to issue $300 million in bonds and to repay the bonds with rental payments pursuant to a lease of the State Capitol complex.

Plaintiff John S. Wisniewski, then a state legislator, filed a complaint challenging the agencies' actions on the basis that they violated the Debt Limitation Clause (DLC) of the New Jersey Constitution. At the time the complaint was filed, the bonds had already been sold and distributed into the marketplace. Consequently, the trial court dismissed the complaint as moot.

In No. A-4689-16, plaintiff appeals the trial court's determination that his complaint is moot. In Nos. A-4693-16 and A-4698-16, he appeals the final agency decisions. The panel finds the appeals are technically moot. Notwithstanding, the panel addresses the merits because the issue raised is a matter of significant public importance that is capable of repetition while evading review.

The panel concludes the issuance of the bonds to finance the renovations of the State Capitol complex did not violate the DLC. The panel further concludes the State Capitol Joint Management Commission acted within its delegated authority in approving the renovations and entering into the lease/leaseback agreement, and the New Jersey Economic Development Authority possessed the requisite authority to issue the bonds to fund the renovations.

5-9-18 STATE OF NEW JERSEY VS. ROBERT J. KOSCH, JR. (13-05-0188, SUSSEX COUNTY AND STATEWIDE) (A-2982-16T3)

In a prior appeal, State v. Kosch, 444 N.J. Super. 368 (App. Div.), certif. denied, 227 N.J. 369 (2016), the court vacated three of defendants' nine theft convictions and remanded for a new trial on those three theft-of-immovable-property counts; the court also held that "once those three counts are finally adjudicated, defendant should be resentenced on all " in light of potential merger issues, id. at 392-93. Without disposing of the three counts, which still remain unadjudicated, the judge reshaped the prior sentence and imposed the same aggregate prison term as before. Defendant appealed and the court reversed. Although the court recognized the new judgment was not a final order, the court granted leave to appeal out of time and reversed because the trial judge failed to comply with the "peremptory duty to obey" our mandate "precisely as it [was] written"; that mandate unambiguously precluded resentencing without an adjudication of the theft-of-immovable-property counts.

5-8-18 RAUL AUGUSTIN JIMENEZ, ET AL. VS. RAUL ANIBAL JIMENEZ (L-0025-12, MIDDLESEX COUNTY AND STATEWIDE) (A-2495-16T1)

This appeal poses the legal question of whether N.J.S.A. 46:3-17.4, a statute that became effective in 1988, precludes a spouse's unsecured creditor from obtaining the forced partition of real property the spouse and his non-debtor spouse own together as tenants by the entirety. The panel affirms the trial court's ruling that the statute prohibits such non-consensual partition. The statute supersedes and nullifies earlier case law, such as Newman v. Chase, 70 N.J. 254, 262 (1976), which had allowed such a creditor's remedy in certain equitable circumstances.

5-7-18 IN RE ADOPTION OF N.J.A.C. 17:1-6.4, 17:1-7.5 AND 17:1-7.10 (NEW JERSEY DEPARTMENT OF THE TREASURY, DIVISION OF PENSION AND BENEFITS) (A-2171-16T3)

The New Jersey Education Association challenged regulations pertaining to the disability retirement process for various State retirement systems. In upholding most of the regulations – except those requiring applicants to pay for subsequent independent medical examinations and related addenda – this court maintained the requirement that eligibility for disability retirement benefits requires members to show that they cannot work due to a disability.

5-7-18 STUART GOLDMAN VS. CRITTER CONTROL OF NEW JERSEY, ET AL. STUART GOLDMAN VS. MADISON CARLSTROM, ET AL. (L-1852-16 AND L-1173-16, MONMOUTH COUNTY AND STATEWIDE) (CONSOLIDATED) (A-1392-16T2/A-3906-16T2)

In these appeals, consolidated for our opinion, plaintiff sued defendants under the Prevention of Cruelty to Animals Act (PCAA), N.J.S.A. 4:22-11.1 to -60, to recover civil penalties for acts that he contended constituted animal cruelty under its provisions. Plaintiff lacked standing to sue in his individual capacity and the cases were dismissed. He contends the complaints were filed as qui tam actions under N.J.S.A. 4:22-26 which provided, in relevant part, that a person who violates the PCAA shall pay a civil penalty according to a schedule in the statute "to be sued for and recovered, with costs, in a civil action by any person in the name of the New Jersey Society for the Prevention of Cruelty to Animals".

We decline to interpret N.J.S.A. 4:22-26 as authorizing private citizens, who otherwise would not have standing, to sue for civil penalties under the PCAA in qui tam actions against other parties, who they alleged may have committed acts of animal cruelty. The language relied on by plaintiff does not signal authority for qui tam litigation in light of the PCAA's other provisions nor was it supported by the legislative history or case law. We affirm the dismissal of these cases for lack of standing

5-3-18 DCPP VS. T.D., R.C. AND R.G., IN THE MATTER OF THE GUARDIANSHIP OF M.G., B.C. AND A.G. (FG-20-0040-13, UNION COUNTY AND STATEWIDE)(CONSOLIDATED) (RECORD IMPOUNDED) (A-4918-15T1/A-4923-15T1)

The New Jersey Division Of Child Protection and Permanency (Division), and the Law Guardian on behalf of the two young children, appeal from the Family Part's order denying termination of parental rights following an extended eighteen-month trial at which twelve witnesses testified and hundreds of exhibits were admitted into evidence. This appeal involves the termination of parental rights of T.D., a mother suffering from multiple sclerosis and R.C., the father of her two youngest children, born in 2012 and 2014, and removed from the care of their parents shortly after birth. The trial judge found, in particular, that the Division did not provide meaningful services to the mother, who uses a wheelchair. Considering the limited standard of review of a decision not to terminate parental rights, we affirm.

5-1-18 ESTATE OF RONALD DOERFLER, ET AL. VS. FEDERAL INSURANCE COMPANY STEPHANIE E. DOERFLER VS. CHUBB INSURANCE COMPANY OF NEW JERSEY (L-2960-14 AND L-0483-14, OCEAN COUNTY AND STATEWIDE) (CONSOLIDATED) (A-3352-15T2/A-3353-15T2)

This court consolidates these two insurance coverage cases for purposes of this opinion. The parties filed cross-motions for summary judgment. The motion judge reserved decision at the conclusion of oral argument and entered orders that same day that granted the insurers' motions for summary judgment and denied the insureds' cross-motions. The judge did not issue a written opinion or oral decision, nor make factual findings or conclusions of law as required by Rule 1:7-4(a). In a Final Judgment entered a month later, the judge dismissed the insureds' complaints with prejudice "for the reasons set forth in [the insurers'] motion papers."

Although the standard of review from the grant or denial of summary judgment is de novo, the function of an appellate court is to review the decision of the trial court, not to decide the motion tabula rasa. The requirements of Rule 1:7-4(a) are unambiguous and cannot be carried out by the motion judge by a nebulous allusion to "the reasons set forth in defendant[s]' motion papers." Reversed and remanded.

4-30-18 STATE OF NEW JERSEY VS. ALLAQUAN JACKSON (00-03-0886, ESSEX COUNTY AND STATEWIDE) (A-1884-16T2)

Defendant was sentenced to life imprisonment for murder in 2001, filed his first post-conviction relief petition in 2007, and filed his second petition in 2015. The Appellate Division ruled defendant's second petition was untimely under Rule 3:22-12's time limits. Those limits cannot be relaxed by invoking Rule 1:1-2. In 2009, the Supreme Court amended Rule 1:3-4(c) to prohibit enlargement of the time limits in Rule 3:22-12, and added Rule 3:22-12(c) prohibiting relaxation except as provided by Rule 3:22-12 itself. Moreover, in 2010, the Supreme Court amended Rule 3:22-4(b) and Rule 3:22-12(a)(2) to require second petitions to be filed within one year of specified events. Because that time limit applies "notwithstanding any other provision of this rule," it cannot be relaxed by showing excusable neglect and a fundamental injustice, as permitted for first petitions under the 2010 amendment. These amendments to the procedural rules of court apply to previously-convicted defendant, who had no vested right to file a petition fourteen years out of time.

4-27-18 WILLIAM J. BRENNAN, ETC. VS. STEVEN LONEGAN (L-2169-11, MERCER COUNTY AND STATEWIDE) (A-1767-16T3)

In this case, we affirm the summary judgment dismissal of plaintiff's qui tam complaint which alleged defendant Steven Lonegan violated the New Jersey False Claims Act (FCA), N.J.S.A. 2A:32C-1 to -18, by submitting a false statement in a request for public campaign funds. Although the trial court dismissed on other grounds, we affirm the grant of summary judgment because we hold plaintiff lacks standing to bring the FCA complaint. We conclude the record clearly shows plaintiff is not the original source of the information supporting the allegations in his complaint.

4-27-18 FELICIA PUGLIESE VS. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY EDGARD CHAVEZ VS. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY (COMMISSIONER OF EDUCATION)(CONSOLIDATED) (A-3689-15T1/A-5527-15T1)

In Pugliese v. State-Operated School District of City of Newark, 440 N.J. Super. 501 (App. Div. 2015), the court vacated and remanded for reconsideration anew an arbitrator's award sustaining tenure charges against appellants. In this appeal, the court had to construe N.J.S.A. 18A:6-14 and determine what impact its decision to remand had on the suspended educators' entitlement to back pay while the remand was pending. The statute provides for an educator's suspension without pay for 120 days or until the issuance of a final determination of the disputed tenure charges, whichever is sooner. If the matter is not resolved within 120 days, compensation must resume until a determination is reached. In this case, the court concluded that the entitlement to compensation after 120 days continues under the statute despite the fact there was an initial award terminating employment that was vacated and remanded, without a dismissal of the tenure charges.

4-26-18 STATE OF NEW JERSEY VS. MICHAEL CLARITY (13-10-0621, SOMERSET COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4831-16T2)

N.J.S.A. 2C:44-3(a) permits imposition of an extended prison term when a defendant was convicted of at least two separate prior crimes but only if "the latest" of those crimes was committed or the defendant's "last release from confinement" occurred – "whichever is later" – within ten years of the charged crime. Because the last of defendant's prior crimes was committed in Florida ten years and three weeks before the crime charged here, and because defendant was not "confined" – he was sentenced in Florida to a probationary term and being on probation is not the same as being "confined" – the court reversed and remanded for further proceedings, including development of the State's late claim that the consequences of defendant's violation of the Florida probationary term within the ten-year period permits a finding of "confinement" within the meaning of N.J.S.A. 2C:44-3(a).

4-25-18 NRG REMA LLC, ET AL. VS. CREATIVE ENVIRONMENTAL SOLUTIONS CORP., ET AL. CREATIVE ENVIRONMENTAL SOLUTIONS CORP. VS. NRG REMA LLC, ET AL. (L-3587-15 AND L-0344-15, MIDDLESEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-5432-15T3/A-0567-16T3)

In these appeals, the court reviewed orders compelling arbitration because the automobile sales contracts executed by plaintiffs included an agreement to arbitrate all disputes. Although the record revealed disputed facts about contract-formation issues that the trial courts must be resolved before arbitration may be compelled, the court also recognized there was no dispute that the parties mutually agreed to rescind those sales contracts. Consequently, among other things, the court held that the trial judges erred in compelling arbitration of any claims relating to the agreements to rescind, which did not contain arbitration provisions. The orders under review were reversed and both cases remanded for trial court proceedings to determine, among other things, whether plaintiffs' claims were based on the sales contracts or on the agreements to rescind.

4-24-18 SAVE CAMDEN PUBLIC SCHOOLS, ET AL. VS. CAMDEN CITY BOARD OF EDUCATION, ET AL. (L-1552-16, CAMDEN COUNTY AND STATEWIDE) (A-0133-16T2)

In this appeal the court interprets two statutes concerning the right of Camden citizens to vote on the classification of their school district. That vote will determine whether members of the Camden City Board of Education (Board) are elected or appointed by the mayor. Plaintiffs contend that a vote on that issue was required in April 2014, under a 2010 amendment to the Municipal Rehabilitation and Economic Recovery Act (MRERA), N.J.S.A. 52:27BBB-63.1(c). Defendants counter that because the school district was placed into full State intervention in 2013, the classification vote is not required until the district satisfies certain performance indicators under the Quality Single Accountability Continuum Act (QSAC), N.J.S.A. 18A:7A-49(e). MRERA and QSAC contain provisions that set forth different frameworks for school district classification votes.

The court holds that the 2010 amendment to MRERA governs because its language is clear in granting Camden citizens the right to a school district classification vote, and nothing in QSAC restricts that right. Granting Camden citizens the right to a school district classification vote does not interfere with the State's full intervention because the Board will continue to serve in an advisory role until the conditions of QSAC are satisfied. Accordingly, the trial court's August 15, 2016 order dismissing plaintiffs' complaint is reversed. The case is remanded with direction that the trial court conduct a hearing within thirty days to determine when the school district classification vote will be held.

4-24-18 JANELL GOFFE VS. FOULKE MANAGEMENT CORP., ET AL. SASHA ROBINSON, ET AL. VS. MALL CHEVROLET, INC. (L-4162-16 AND L-4122-16, CAMDEN COUNTY AND STATEWIDE) (CONSOLIDATED) (A-2658-16T4/A-2659-16T4)

In these appeals, the court reviewed orders compelling arbitration because the automobile sales contracts executed by plaintiffs included an agreement to arbitrate all disputes. Although the record revealed disputed facts about contract-formation issues that the trial courts must be resolved before arbitration may be compelled, the court also recognized there was no dispute that the parties mutually agreed to rescind those sales contracts. Consequently, among other things, the court held that the trial judges erred in compelling arbitration of any claims relating to the agreements to rescind, which did not contain arbitration provisions. The orders under review were reversed and both cases remanded for trial court proceedings to determine, among other things, whether plaintiffs' claims were based on the sales contracts or on the agreements to rescind

4-23-18 STATE OF NEW JERSEY VS. LUIS MELENDEZ (11-02-0332, HUDSON COUNTY AND STATEWIDE) (A-1301-15T1)

The case concerns the State's use, in a criminal prosecution, of defendant's answer filed in a parallel civil forfeiture action. As part of its proof that defendant was the occupant of a bedroom in which drugs were seized, the State introduced in evidence the defendant's forfeiture answer, in which he asserted that he owned $2900 in cash seized from the same bedroom. While rejecting defendant's Fifth and Sixth Amendment arguments, the court held that the process by which defendant was induced to file his answer in the civil forfeiture action was fundamentally unfair. Although the State should have been barred from introducing the answer, it was harmless error in light of the other evidence linking defendant to the premises.

The court also provided some procedural guidance for future forfeiture cases, and referred the issue to the Criminal and Civil Practice Committees for their consideration

4-19-18 STATE OF NEW JERSEY VS. JOHN GORMAN (14-08-1450, OCEAN COUNTY AND STATEWIDE) (A-3481-16T4)

After determining defendant's plea allocution did not establish a factual basis for each element of theft by deception, N.J.S.A. 2C:20-4, because defendant did not admit he deceived the victims at the time he obtained their money, the court ruled the trial judge's reliance on the theft consolidation statute, N.J.S.A. 2C:20-2(a), to accept defendant's factual basis for a different form of theft was misplaced as that statute applies only in trial settings — not to plea proceedings.

4-19-18 STATE OF NEW JERSEY VS. A.T.C. (15-05-0305, WARREN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4302-15T4)

The court holds the Jessica Lunsford Act, N.J.S.A. 2C:14-2, which imposes mandatory minimum sentencing and parole ineligibility requirements for aggravated sexual assault of a victim less than thirteen years old, does not violate the separation of powers doctrine by impermissibly impairing the State's right to engage in plea bargaining, nor does it impermissibly limit the trial court's authority to reject the plea agreement.

The court further holds the Jessica Lunsford Act was not superseded by the earlier enacted and later effective amendment to N.J.S.A. 2C:14-2(a)(7).

4-16-18 STATE OF NEW JERSEY VS. JAMES HEMENWAY (12-10-1597, MIDDLESEX COUNTY AND STATEWIDE) (A-0622-15T2)

Defendant's putative paramour filed a complaint against defendant under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, alleging he forcibly entered her residence and assaulted and threatened her. After considering the victim's sworn testimony, a Family Part judge issued an ex parte temporary restraining order (TRO) under N.J.S.A. 2C:25-28(g) and a warrant to search defendant's apartment and seize any firearms as authorized by N.J.S.A. 2C:25-28(j).

The police arrested defendant on fourth degree contempt, N.J.S.A. 2C:29-9(b)(1), when he refused to permit the officers to enter his apartment to execute the domestic violence search warrant. Once inside, the officers found in plain view cocaine and drug paraphernalia. Based on the sworn testimony of a detective, a Criminal Part judge issued a telephonic warrant to search the apartment for narcotics.

4-16-18 IN RE: VICINAGE 13 OF THE NEW JERSEY SUPERIOR COURT; WARREN COUNTY OFFICE OF THE PROSECUTOR; NEW JERSEY OFFICE OF THE PUBLIC DEFENDER, WARREN REGION; WARREN COUNTY BOARD OF CHOSEN FREEHOLDERS (L-1806-12, MIDDLESEX COUNTY AND STATEWIDE) (A-4293-15T3)

The remodeling of Courtroom No. 2 in Warren County has been the subject of years of litigation. The matter was first initiated by the Office of Public Defender (OPD), when it successfully objected to a criminal trial being conducted there, after renovations made in 2008. The OPD took the position that a defendant's right to a fair trial was prejudiced by the design of the courtroom. Warren County eventually filed an action for judgment under the Declaratory Judgment Act, N.J.S.A. 2A:16-5 to -62, that more recent modifications satisfied any constitutional concerns. The panel reversed the judge's decision that the OPD lacked standing to participate in the proceedings, remanded the case, and suggested the appointment of a special master to make findings and develop a more complete factual record under Rule 4:41-1.

4-12-18 STATE OF NEW JERSEY VS. RENE M. RODRIGUEZ STATE OF NEW JERSEY VS. ELIZABETH A. COLON STATE OF NEW JERSEY VS. ERIC L. LOWERS STATE OF NEW JERSEY VS. STEPHEN E. NOLAN STATE OF NEW JERSEY VS. COURTNEY D. SWIDERSKI (14-01-0102, 14-04-1027, 14-07-2144, 13-04-1 (A-5077-15T3/A-5078-15T3/A-5146-15T3/A-5147-15T3/A-5160-15T3)

Each defendant in these five back-to-back appeals by the State was convicted of fourth-degree operating a motor vehicle during a period of license suspension. N.J.S.A. 2C:40-26. The statute prescribes a sentence of a "fixed minimum " term of at least 180 days without parole eligibility. N.J.S.A. 2C:40-26(c). The State contended the trial court exceeded its authority by imposing intermittent sentences under N.J.S.A. 2C:43-2(b)(7). The panel concluded that a minimum period of parole ineligibility measured in days requires service of continuous twenty-four-hour periods, but does not require an uninterrupted 180-day term. The panel rejected the State's argument that intermittent periods of release were akin to parole.The panel held the trial court was authorized to impose weekend sentences running from Friday night to the same time Sunday night. Such a sentence would allow a defendant to accrue two days of credit each weekend toward the 180-day sentence. But, a sentence of nights only was not an authorized sentence, as aggregation of part-days is not permitted. The panel therefore modified two sentences; reversed two others; and remanded one for reconsideration.

4-10-18 DWIGHT MORRIS VS. T.D. BANK, ET AL. (L-0796-15, UNION COUNTY AND STATEWIDE) (A-2268-16T1)

Plaintiff was in line at the bank behind a man of the same race who passed a note to defendant-bank's teller demanding money. The teller complied and the robber left. Another employee, seeing the note and believing the man in front of the teller's window — plaintiff — was the robber, called 9-1-1 and provided a description, including the race of the suspect. Police arrived and questioned defendant, who claimed he suffered from PTSD as a result of the incident.

Plaintiff sued the bank alleging negligence in the violation of bank policies and in his misidentification as the robber. The court concludes, consistent with decisions in several other states, that there is no cause of action for negligent identification/misidentification, nor should New Jersey recognize such a tort, given the state's strong public policy to foster cooperation between citizens and law enforcement.

4-4-18 STATE OF NEW JERSEY IN THE INTEREST OF T.C. (FJ-15-0859-16, OCEAN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1784-16T1)

To preserve its constitutionality, the Juvenile Justice Code (Code) must be interpreted to prevent incarceration of all developmentally disabled juveniles in county detention facilities, because not all counties have access to an approved post-disposition short-term incarceration program. Because the Code prohibits the incarceration of developmentally disabled youth in a State facility, the inequity must be avoided of developmentally disabled juveniles in one county facing incarceration while those similarly situated in another do not. T.C., who was seventeen at the time of the offense, admitted participating with two other juveniles in the unarmed forcible theft of marijuana from the backpack of a fourth juvenile. Although he has already served the thirty days of incarceration imposed, the matter is not moot because he is serving juvenile probation that he could violate, and the issue is one of public importance that may evade review in the future. The disposition is reversed.

3-29-18 TAMYRA L. COTTMAN VS. BOARD OF REVIEW, ET AL. (BOARD OF REVIEW, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT) (A-1908-16T2)

The panel reversed the Board of Review's denial of unemployment compensation. The Board affirmed the Appeal Tribunal's decision that the claimant voluntarily quit her job as a group home worker without good cause related to her work. Her child care fell through unexpectedly and she could not find a co-worker to cover her shift. The panel held that the Board overlooked evidence that the claimant was entitled to benefits under N.J.A.C. 12:17-9.5, because she quit in the face of imminent discharge: her supervisor threatened she might be fired if she did not come in. Had the claimant been fired for staying home, she would have been eligible for benefits. Although "good cause related to the work" under the voluntary quit statute, N.J.S.A. 43:21-5(a), excludes compelling personal reasons, "good cause for being absent from work," in the regulation defining simple misconduct, includes "any compelling personal circumstance, which would normally prevent a reasonable person under the same conditions from reporting work." N.J.A.C. 12:17-10.2(b). The panel concluded that, in order to be eligible for benefits, the claimant was not required to wait to be fired when discharge was imminent.

3-29-18 J.H. AND A.R. VS. R&M TAGLIARENI, LLC, ET AL. (L-4237-14, HUDSON COUNTY AND STATEWIDE) (A-0031-16T4)

The trial court granted summary judgment to defendants, landlord and property manager of a multi-family apartment building, on the basis that they did not owe a duty of care to plaintiff, who at the time was an infant staying in the apartment with the tenant's consent, to protect him from the apartment's excessively-hot-uncovered radiator. We conclude that, under the circumstances of this case, the radiator is part of the building's heating system that defendants have control of under common law and N.J.A.C. 5:10-14.3(d), and should have been covered, and reverse.

3-28-18 IN THE MATTER OF THE TRUST OF VIOLET NELSON (P-000001-15, BERGEN COUNTY AND STATEWIDE) (A-4004-15T1)

Applying the doctrine of probable intent, see Fidelity Union Trust Co. v. Robert, 36 N.J. 561 (1962), the panel reverses summary judgment and holds that the trial court was obliged to consider extrinsic evidence to interpret a trust, even though the language on its face appeared clear. Relying on extrinsic evidence, including the settlor's alleged personal usage of the apparently plain term, "grandchildren," the trustee contended the settlor's gift to her "grandchildren" was intended to exclude the children of her daughter who married outside the settlor's faith. The panel rejects, as contrary to caselaw, the dictum in In re Estate of Gabrellian, 372 N.J. Super. 432, 443 (App. Div. 2004) that "[t]he doctrine of probable intent is not applicable where the documents are clear on their face and there is no failure of any bequest or provision." The matter is remanded for trial on the issue of the settlor's intent.

3-28-18 NORTHFIELD INSURANCE COMPANY VS. MT. HAWLEY INSURANCE COMPANY, ET AL. (L-4617-15, MONMOUTH COUNTY AND STATEWIDE) (A-1771-16T4)

The court considered, among other things, whether a third party may take advantage of an estoppel doctrine – first recognized in Merchants Indemnity Corp. v. Eggleston, 37 N.J. 114 (1962) – that has been found to apply when an insurer, while reserving its rights or declining coverage, fails to clearly seek its insured's consent to the insurer's control of the defense. The court held that the insurer here could not, as a matter of law, be estopped from denying coverage because there was no clear evidence that the defunct insured changed its position to its detriment even if the insurer assumed the defense without consent. The court also rejected the argument that Eggleston permits avoidance of estoppel only if the insurer uses certain magic words in communicating with its insured; the insurer's disclaiming letter, which expressed the insurer's "willingness" to provide a "courtesy defense," could reasonably be interpreted as conveying an offer rather than a unilateral declaration of a right to control the defense. Consequently, the court reversed the summary judgment entered in favor of the parties seeking estoppel – the victim of the insured's alleged negligence and its property-damage insurer.

3-23-18 STATE OF NEW JERSEY VS. AMY LOCANE (10-12-0770, SOMERSET COUNTY AND STATEWIDE) (A-1990-16T4)

Defendant Amy Locane, who had been convicted of second-degree vehicular homicide, N.J.S.A. 2C:11-5(a), and third-degree assault by auto, N.J.S.A. 2C:12-1(c)(2), was sentenced on our remand to precisely the same three-year term of imprisonment as on the first occasion. The panel remanded the matter a second time because the trial judge again erred in the application of the downgrade statute, N.J.S.A. 2C:44-1(f)(2). The judge found mitigating factors not supported by the record, and accorded too much weight to them. Further, the judge failed to find aggravating factors that were present, and thus accorded them insufficient weight. Not only did the mitigating factors fail to substantially outweigh the aggravating, but there were no compelling reasons requiring a downgrade. See ibid.

The panel further found that double jeopardy barred the State from appealing the concurrent terms that were improperly imposed for the offenses. The panel nonetheless discussed State v. Carey, 168 N.J. 413, 428 (2001), concluding that it creates a rebuttable presumption favoring consecutive sentences when a drunken driver inflicts grave harm on more than one victim. Ultimately, a careful and close application of the Yarbough factors must be made in vehicular homicide cases, as in every other instance. State v. Yarbough, 100 N.J. 627, 643-44 (1985).

3-23-18 JAIME FRIEDMAN, ET AL. VS. TEODORO MARTINEZ, ET AL. VS. RUBEN SABILLON, ET AL. (L-0831-11, BERGEN COUNTY AND STATEWIDE) (A-4896-15T1)

In reversing a partial summary judgment entered in defendants' favor, the court rejected the notion that plaintiffs – in alleging an invasion of their privacy in an office building's restroom – could only claim the presence of a hidden recording device by demonstrating their images were actually captured. In adhering to the general principles delineated in Soliman v. Kushner Cos., 433 N.J. Super. 153 (App. Div. 2013), the court concluded that an intrusion on seclusion occurs when a recording device is surreptitiously present notwithstanding whether the victim was ever recorded because the tort is intended to protect the victim's peace of mind and the comfort associated with the expectation of privacy.

3-20-18 ESTATE OF FRANK P. LAGANO VS. BERGEN COUNTY PROSECUTOR'S OFFICE, ET AL. STATE OF NEW JERSEY VS. $1,297,522.20, ET AL. (L-0093-16, PASSAIC COUNTY AND STATEWIDE, AND L-0311-05, BERGEN COUNTY AND STATEWIDE) (A-1861-16T4)

A court issued wiretap orders pursuant to the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -37, which were later suppressed. The estate of an aggrieved person moved to unseal the intercepted conversations and evidence derived for use in a state civil forfeiture action and a federal civil rights action. The Appellate Division holds disclosure for use in civil litigation is permissible "upon a showing of good cause" under N.J.S.A. 2A:156A-17(c), and disapproves the contrary ruling in In re Disciplinary Proceedings Against Spinelli, 212 N.J. Super. 526 (Law Div. 1986). Section 17(c) has no federal counterpart under Title III, which does not prevent such disclosure of the fruits of a state wiretap order. Suppression does not preclude disclosure in these circumstances.

The trial court may order disclosure only if the need for disclosure outweighs the harms disclosure is likely to cause, subject to review for abuse of discretion. If a disclosure would reveal a person was a confidential informant for a particular agency, in a particular investigation, during a particular period, or in a particular way, the court must consider whether it is publicly known that the person cooperated with that agency, in that investigation, during that period, or in that way.

3-19-18 IN THE MATTER OF THE EXPUNGEMENT OF THE CRIMINAL RECORDS OF E.C. (02002649, UNION COUNTY AND STATEWIDE) (A-5175-15T4)

An individual who has been discharged from probation, albeit with an imperfect record while on probation, and who has subsequently paid all outstanding fines, is not barred from applying for expungement. The trial court erred in holding that petitioner was barred for applying for expungement under N.J.S.A. 2C:52-2(a)(2), because she was discharged from probation "without improvement."

3-19-18 NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES VS. R.R. (DEPARTMENT OF CHILDREN AND FAMILES, DIVISON OF CHILD PROTECTION AND PERMANENCY)(RECORD IMPOUNDED) (A-1236-16T1)

The panel reversed the Division of Child Protection and Permanency's administrative finding that an allegation a father abused or neglected his young daughter was "not established" rather than "unfounded." N.J.A.C. 3A:10-7.3(c)(3), (4). The finding meant there was some, but not a preponderance of evidence, he harmed her or "placed [her] at risk of harm." The Division's finding was unreasonable because its investigation was incomplete. The Division did not consider evidence related to an order to show cause the father's estranged wife filed in their pending divorce, or a video she took of the incident. A matrimonial judge ordered the Division to investigate both parents, but it only investigated the father. The Division's finding also lacked sufficient support in the record the Division did compile. The father tried to stop his daughter from throwing things during a tantrum by holding her arms. She broke free and fell, but suffered no injury. That evidence did not show that he placed her at risk of harm.

3-15-18 STATE OF NEW JERSEY VS. YOMAIRA SENCION STATE OF NEW JERSEY VS. JUAN F. SANTANA STATE OF NEW JERSEY VS. ROBERTO PEREZ-GARCIA STATE OF NEW JERSEY VS. WILLIAM R. JEREZ (13-08-1177, BERGEN COUNTY AND STATEWIDE) (CONSOLIDATED) (A-3138-15T3/A-3274-15T3/A-3328-15T3/A-3829-15T3)

The court reverses the denial of defendants' motion to suppress drugs and guns found after a plain view sighting through the open door of an apartment. The police used a tool to force entry into the locked apartment building twice before approaching the fourth-floor apartment door. The State, conceding a lack of probable cause, argued that the forced entry into the building did not violate defendants' expectation of privacy because of the size of the apartment building. The court refused to "condone the police forcing entry into a locked residential apartment building while on an investigative hunt for suspected criminal activity."

3-14-18 STATE FARM GUARANTY INSURANCE COMPANY VS. HEREFORD INSURANCE COMPANY, ET AL. (L-0018-14, MORRIS COUNTY AND STATEWIDE) (A-3749-16T3)

The court holds that the New Jersey Uniform Arbitration Act, N.J.S.A. 2A:23B-1 to -32, does not require an arbitrator to hold an in-person hearing at a physical location. Thus, unless the parties contract for an in-person arbitration hearing, or they show specialized need for such a hearing, arbitrators can conduct hearings by telephone conference or by other electronic means.

Accordingly, the court affirms an order that denied the application of defendant Hereford Insurance Company to compel an arbitration organization, Arbitration Forums, Inc., to hold an in-person arbitration hearing concerning the reimbursement of personal injury protection (PIP) benefits.

3-14-18 NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, ET AL. VS. E.L. AND K.L. (DEPARTMENT OF CHILDREN AND FAMILIES)(RECORD IMPOUNDED) (A-1823-16T2)

Finding the pace of the proceedings here to be glacial in comparison to that which the Court found "troubling" in Division of Child Protection and Permanency v. E.D.-O., 223 N.J. 166, 194 (2015), the court concluded that the Department of Children and Families' inexcusable failure to provide complete discovery for a period of years – a circumstance that delayed the start of an evidentiary hearing about events that occurred more than six years earlier – fully justified an ALJ's dismissal of the Department's abuse and license-removal proceedings against the defendant and warranted the court's conclusion that the Department's reversal of the ALJ's ruling was arbitrary, capricious and unreasonable.

3-8-18 STATE OF NEW JERSEY IN THE INTEREST OF N.P. STATE OF NEW JERSEY IN THE INTEREST OF D.S. STATE OF NEW JERSEY IN THE INTEREST OF A.W., J.D., J.DO., A.S. AND J.Z. STATE OF NEW JERSEY IN THE INTEREST OF N.P. (FJ-12-1462-17, FJ-12-1501-17, FJ-12-1415-17, FJ-12 (A-0135-17T1/A-0138-17T1/A-0308-17T1/A-0841-17T1)

The court granted the State's motion for leave to appeal in these four appeals involving seven juveniles, all charged with crimes or disorderly persons offenses under Title 35 and 36 of the Criminal Code. N.J.S.A. 2A:4A-71(b) provides such complaints "shall be referred for court action, unless the prosecutor otherwise consents to diversion." When the complaints were screened by intake services, the prosecutor did not consent.

In two of the appeals, the Family Part judge, without notice or hearing, diverted complaints charging the juveniles with criminal offenses, concluding that N.J.S.A. 2A:4A-73(a), vested the judge, not the prosecutor, with discretion to divert any juvenile complaint. The court reversed, noting that Rule 5:20-1(c) provides complaints charging juveniles with crimes "shall not be diverted unless the prosecutor consents thereto."

In the other two appeals, the juveniles were charged with disorderly persons offenses under Title 35 and 36 of the Criminal Code. In one of the appeals, the judge diverted the case without any hearing. The court reversed.

In the other appeal, the judge held a hearing, noted the prosecutor's objection and ordered diversion. The court affirmed, concluding that although the failure to include these offenses within the scope of Rule 5:20-1(c) may have been inadvertent, the plain language of the Rule did not limit the judge's discretion to divert the complaints over the State's objection. The court referred the opinion to the Committee on Practice in the Family Part for consideration.

3-8-18 EMPOWER OUR NEIGHBORHOODS VS. KIMBERLY GUADAGNO, ET AL. (L-3148-11, MERCER COUNTY AND STATEWIDE) (CONSOLIDATED) (A-0330-15T3/A-0331-15T3/A-0333-15T3)

Empower Our Neighborhoods (EON), a community based advocacy group, partially succeeded on an election law claim. They obtained a judgment eliminating the district residency requirements, pursuant to Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), for circulators of: recall petitions, petitions nominating independent candidates in general elections, petitions selecting candidates from local parties, and petitions nominating Board of Education members. The court affirmed Judge Mary Jacobson's decision that EON's success was sufficient to merit the award of counsel fees, apportioned among the defendants based on the extent of their responsibility for the constitutional tort.

3-8-18 STATE OF NEW JERSEY VS. JOEY J. FOWLER STATE OF NEW JERSEY VS. JAMIL L. HEARNS (11-08-0827, UNION COUNTY AND STATEWIDE) (CONSOLIDATED) (A-3393-14T3/A-4789-14T3)

The court remanded for a new trial a criminal matter in which the jury was instructed only as to murder, N.J.S.A. 2C:11 3(a)(1). One of two co-defendants testified at trial that he unwittingly killed the victim while struggling to take a gun away from someone——not the victim——who was trying to shoot him. He was convicted of murder, and his co-defendant was also convicted of murder as his accomplice. The court concluded the jury should have also been given a molded self-defense instruction, N.J.S.A. 2C:3-4(a), and been instructed as to the lesser-includeds of aggravated manslaughter, N.J.S.A. 2C:11 4(a)(1), and manslaughter, N.J.S.A. 2C:11-4(b)(1). The failure to do so prejudiced defendants' rights to a fair trial.

3-8-18 DCPP VS. S.D. IN THE MATTER OF A.D., W.D., K.D., SA.B., T.B., SE.B., AND M.B. (FN-09-0473-14, HUDSON COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1905-15T4)

The court addresses certain legal questions that arise when a case that involves the custody of a child under a Title 9 abuse or neglect FN complaint filed by the Division of Child Protection and Permanency is interrupted by a private custody case initiated by a member of the child’s family. To ensure legal protection for the parents, the court suggests a method of handling FD non-dissolution complaints when they are heard in the midst of FN abuse or neglect litigation. The FD hearing should be incorporated into the FN litigation and attorneys for the parents and children should participate. The court does not reverse here because the mother consented to the result. The court also affirms the finding of educational neglect and the dismissal of the FN litigation despite the objection of the mother.

3-8-18 T.L. AND M.L. VS. JACK GOLDBERG, M.D., ET AL. (L-7154-11, MIDDLESEX COUNTY AND STATEWIDE) (A-5544-14T1)

In this medical malpractice action, defendant's trial testimony concerning reliance on a medical publication in treating plaintiff was materially different from his denial during discovery of any knowledge of such literature. The court's majority holds defense counsel's failure to discharge his duty of candor to the court and counsel by disclosing the anticipated material change in defendant's testimony resulted in plain error, and the trial court erred by denying plaintiff's motion for a new trial.

The dissent concludes counsel's failure to object to defendant's testimony was part of a deliberate trial strategy, as the publication at issue supported plaintiffs' theory of the case. Considered in the context of the extensive expert testimony presented during a lengthy trial, defendant's testimony about the medical article did not constitute plain error, and the trial court did not err by so holding when it denied plaintiff's motion for a new trial.

3-5-18 STATE OF NEW JERSEY IN THE INTEREST OF N.C. (FJ-21-0126-17 AND FJ-21-0127-17, WARREN COUNTY AND STATEWIDE)(RECORD IMPOUNDED) (A-1713-17T1)

The court granted leave to resolve the issue of whether the competency statutes of the criminal code, specifically N.J.S.A. 2C:4-4 to -6, apply to juveniles. We conclude the statutes do apply to juveniles, and that N.J.S.A. 2C:4-5(a)(2) requires the Department of Human Services, or its successor, to provide or arrange for examination of a juvenile for fitness to proceed as DHS would for an adult, with such accommodation for the juvenile's youth as is necessary and appropriate.

3-2-18 MARIANA A. BAEZ, ETC. VS. JIMMY M. PAULO, M.D., ET AL. (L-2632-15, ESSEX COUNTY AND STATEWIDE) (A-3742-16T3)

In this medical malpractice case, the trial court ruled the fictitious pleading process under Rule 4:26-4 did not justify plaintiff's addition of three defendant physicians to the lawsuit after the statute of limitations had run. Nevertheless, the court equitably estopped the physicians from obtaining dismissal of the claims against them, finding they had had unduly delayed in moving for such dispositive relief after about a year of costly discovery had occurred.

The panel reverses the trial court's fictitious pleading ruling as to one of the three co-defendants, because decedent's hospital records did not legibly reveal that particular doctor's name and involvement in decedent's care. It was unreasonable to expect plaintiff to have ascertained that particular doctor's identity and negligent conduct until her counsel received a post-suit affidavit from the defense clarifying which doctors had actually been involved in treating decedent.

The panel affirms the trial court's fictitious pleading ruling as to the other two co-defendants. Plaintiff could have reasonably ascertained the respective identities and involvement of those two doctors who took part in decedent's care.

As an important caveat, the panel allows plaintiff's claims to proceed against those two doctors to the extent they may have acted as the decedent's "attending physician." The hospital records misleadingly and erroneously identified a different doctor, who was actually on vacation at the time, as decedent's attending physician.

Lastly, the panel overturns the court's application of principles of equitable estoppel. In the absence of a case management order or court rule prescribing an earlier deadline for filing such a motion, or an express misrepresentation made to plaintiff, defendants did not forfeit their rights to file a limitations-based dismissal motion near the end of the discovery period.

3-2-18 NEW BRUNSWICK MUNICIPAL EMPLOYEES ASSOCIATION VS. CITY OF NEW BRUNSWICK (PUBLIC EMPLOYMENT RELATIONS COMMISSION) (A-1041-16T2)

The court affirms the Public Employment Relations Commission's ruling that the contribution rates included in the Pension and Health Care Benefits Act (Chapter 78) L. 2011, c. 78, N.J.S.A. 52:14-17.28c, which top out at thirty-five percent, do not preempt the provision in the parties' contract requiring eligible retirees to contribute fifty percent of the costs of their health care coverage.

2-28-18 NEW GOLD EQUITIES CORP. VS. JAFFE SPINDLER COMPANY, ET AL. (C-000025-13, HUDSON COUNTY AND STATEWIDE) (A-0200-15T1)

The court affirmed a judgment finding an indenture trustee's duties are limited to the obligations spelled out in the bond documents, and to associated non-discretionary ministerial functions. Accordingly, the indenture trustee had no duty to advise the mortgagor regarding the deferred interest provision in the bond documents. Furthermore, the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to -5.8, did apply, and since the mortgagor's lack of familiarity with the terms of the financing agreement constituted negligence greater than that of the bank, the mortgagor could not recover against the bank. Finally, the bank was not entitled to counsel fees it incurred when defending against claims of its own ordinary negligence.

2-27-18 ESTATE OF DAVID ERIC YEARBY, ET AL. VS. MIDDLESEX COUNTY, ET AL. (L-5825-15, MIDDLESEX COUNTY AND STATEWIDE) (A-2477-16T2)

An alleged mentally ill man died strapped to a "restraint chair" in the Middlesex County Adult Correctional Facility, approximately twenty-four hours after he was arrested for assault and resisting arrest. Decedent's estate filed a multi-count civil suit against a number of public entities and their employees, including three nurses employed by the Correctional Facility. The trial court granted the nurses' unopposed motion to dismiss with prejudice the counts in the complaint alleging professional malpractice based on plaintiffs' failure to file a timely Affidavit of Merit (AOM). Represented by different counsel, plaintiffs argued they were entitled to serve the AOM 107 days after the expiration of the maximum statutory period based on the equitable doctrine of substantial compliance and "extraordinary circumstances." The court agreed and vacated the dismissal with prejudice.

2-26-18 CUSTOMERS BANK VS. REITNOUR INVESTMENT PROPERTIES, LP, ET AL. (F-031832-14, CAPE MAY COUNTY AND STATEWIDE) (A-0920-16T3)

In this mortgage foreclosure action, the trial court declared the foreclosure judgment satisfied and ordered plaintiff to refund an overpayment to defendant. Plaintiff appealed, arguing the trial court abused its discretion in finding equitable redemption by a third-party which was not a borrower or guarantor of the loan, and had no property interest in the mortgaged premises. Plaintiff also argued the trial court abused its discretion by not enforcing the cross-collateralization clause and by not precluding redemption under the doctrine of unclean hands.

Pursuant to the merger doctrine, the panel held plaintiff is precluded from demanding payment of the aggregate loan balance under a cross-collateralization clause beyond the amount reflected in the foreclosure judgment. The merger doctrine also precluded enforcement of restrictions imposed in the note's prepayment clause.

Since plaintiff retained, deposited, and threatened to apply the allegedly unacceptable check to the balances owed on the other cross-collateralized loans in its sole discretion, rather than returning the check to the payor, the panel held plaintiff had accepted the payment, thereby satisfying the loan and foreclosure judgment. In light of this ruling, the panel did not reach the issue of whether the payor could redeem the property.

Finally, the panel held that defendants were not guilty of unclean hands merely because they had defaulted.

2-26-18 STATE OF NEW JERSEY VS. W.S.B. (17-03-0371, MONMOUTH COUNTY AND STATEWIDE) (A-5569-16T1)

In this case of first impression, this court interprets and applies the Overdose Prevention Act (the "OPA" or "the Act"), N.J.S.A. 2C:35-30 to -31; N.J.S.A. 24:6J-1 to -6, a statute enacted in 2013. The OPA is intended to save lives by "encouraging witnesses and victims of drug overdoses to seek medical assistance." N.J.S.A. 24:6J-2.

Among other things, the statute confers immunity upon two categories of qualifying persons from being "arrested, charged, prosecuted, or convicted" for certain enumerated possessory drug offenses. The immunity covers persons: (1) who act in good faith to request medical assistance for individuals perceived to be experiencing a "drug overdose," as defined by N.J.S.A. 24:6J-3; or (2) who experience a drug overdose and have been the subject of such a good faith request for medical assistance by others, or who have sought such assistance themselves. See N.J.S.A. 2C:35-30 (granting immunity for the persons making such requests for assistance); N.J.S.A. 2C:35-31 (granting immunity for the persons who are the subject of such eligible requests).

The panel rejects the State's argument that the immunity conferred by the Act contains an implied exception for persons who are only "intoxicated." Instead, courts applying the statute must address the specified terms of the definition of a "drug overdose" set forth in N.J.S.A. 24:6J-3. That definition requires that the person be in "an acute condition including, but not limited to, physical illness, coma, mania, hysteria, or death resulting from the consumption or use of a controlled dangerous substance [CDS] or another substance with which a [CDS] was combined and that a layperson would reasonably believe to require medical assistance." (emphasis added).

The panel further concludes that, as the words of the statute specify, the protection of the OPA's immunity extends to all phases of the criminal process, including arrest, charge, prosecution, and conviction.

Because the sparse factual record in this case is unclear in several respects and inadequate to resolve the disputed immunity issues, the panel remands this case for further proceedings to develop the facts in greater depth.

2-21-18 BRUNSWICK BANK & TRUST VS. HELN MANAGEMENT LLC, ET AL. (F-30990-10 AND F-21231-13, MIDDLESEX COUNTY, AND F-26278-10, MONMOUTH COUNTY AND STATEWIDE) (A-1345-15T3)

In these consolidated foreclosure actions, the trial judge conducted – as required by our earlier decision, Brunswick Bank & Tr. v. Affiliated Bldg. Corp., 440 N.J. Super. 118 (App. Div. 2015) – an evidentiary hearing to determine whether plaintiff, during its serial collection efforts, had recouped more than it was owed. The trial judge concluded that defendants failed to provide "competent" evidence on the fair market value of properties plaintiff obtained at sheriff sales at or about the time plaintiff neared a 100% recoupment of the money due on the combined loans. In remanding again, the court held, among other things, that the judge erred in concluding defendants' evidence was incompetent, that there was admissible evidence suggesting a fair market value in excess of the amount still owed to plaintiff, and that the trial court is authorized, in the absence of the parties' production of expert testimony, to retain its own expert to opine on these relevant subjects to ensure plaintiff does not receive an undue windfall.

2-16-18 TASHICKA HAYES VS. TURNERSVILLE CHRYSLER JEEP (L-0489-16, GLOUCESTER COUNTY AND STATEWIDE) (A-2063-16T1)

Defendant filed a motion for reconsideration 101 calendar days after the trial court's order denying its motion to enforce an arbitration agreement. Although facially untimely, the motion judge denied the motion on its merit. Defendant appealed. This court affirms for reasons other than those expressed by the trial court. This court holds that a decision to deny a motion to enforce an arbitration agreement is a final order subject to the 20-day time restraints for filing a motion for reconsideration under Rule 4:49-2. Neither the parties nor the trial court may enlarge the time specified by Rule 4:49-2. See R. 1:3-4(c). The trial court's order denying defendant's motion to compel arbitration was appealable as of right. R. 2:2-3(a)(3). Defendant's only legally cognizable recourse after the time to file a motion for reconsideration expired was to file a timely direct appeal to this court. GMAC v. Pitella, 205 N.J. 572, 586-87 (2011).

2-16-18 STATE OF NEW JERSEY VS. BRANDON M. WASHINGTON (17-05-0471, BURLINGTON COUNTY AND STATEWIDE) (CONSOLIDATED) (A-1780-17T6/A-2051-17T6)

The Appellate Division ruled that the State Police Lab's draft DNA report was not "within the possession, custody or control of the prosecutor" until the lab sent it to the county prosecutor, and in any event was not discoverable until the report was reviewed and approved by the lab. R. 3:13-3(b)(1)(C). Regardless of the speedy trial provisions, the court abused its discretion by excluding the DNA evidence rather than granting a continuance of trial under Rule 3:13-3(b)(1)(I) and -3(f), given the evidence's importance and the absence of surprise, prejudice, or a design to mislead.

Under the speedy trial rule and statute, a case may be "complex" if it has "complicated evidence," but time is excludable only if the complexity makes it unreasonable to expect adequate preparation for trial in the speedy trial period. R. 3:5-4(i)(7); N.J.S.A. 2A:162-22(b)(1)(g). The provision addressing failures to produce discovery is a limit on excludable time. N.J.S.A. 2A:162-22(b)(2). The court properly excluded time sua sponte under N.J.S.A. 2A:162-22(b)(1)(c), and retained jurisdiction to do so after the State sought and obtained leave to appeal. That provision excludes the time while an emergent relief request, or interlocutory appeal, is pending in this court. Time while the trial is stayed is excludable under N.J.S.A. 2A:162-22(b)(1)(l).

2-14-18 K.K. VS. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, ET AL. (DEPARTMENT OF HUMAN SERVICES) (A-5447-15T3)

K.K., an eighty-eight-year old legal permanent resident who entered the country in 1991, left in 2007 and returned in 2014, is entitled to Medicaid payments without waiting five years because he entered the country before August 22, 1996. The agency's ruling to the contrary is reversed based on a de novo interpretation of federal statutory requirements.

2-13-18 BERYL ZIMMERMAN, ET AL. VS. SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION, SUSSEX COUNTY (COMMISSIONER OF EDUCATION) (A-1003-16T4)

In this appeal from a final agency decision by the Commissioner of Education, the court addresses the rights that part-time tenured teachers in the non-public school setting enjoy pursuant to the New Jersey Tenure Act, N.J.S.A. 18A:28-1 to -18. The court held that the omission of a contractual guaranteed number of minimum hours per year did not deprive them from the protection against a reduction in compensation or of their seniority rights. Because the record was incomplete, the court remanded with instructions to determine whether the reduction in hours constituted a reduction in their compensation and a reduction in force under the Tenure Act.

2-12-18 NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION VS. EXXON MOBIL CORPORATION (L-3026-04 AND L-1650-05, UNION COUNTY AND STATEWIDE) (CONSOLIDATED) (A-0668-15T1/A-0810-15T1)

Following a sixty-six day bench trial, and before the judge ruled on the admissibility of the experts' testimony and rendered a verdict, the Department of Environmental Protection (DEP) and Exxon Mobil Corporation settled DEP's lawsuit seeking natural resource damages (NRD) caused by pollution at Exxon's refinery in Linden and facility in Bayonne. DEP provided public notice of the proposed consent order pursuant to N.J.S.A. 58:10-23.11e2, and received 16,000 comments, mostly objections, including those of appellant State Senator Raymond Lesniak and appellants, a number of public interest environmental groups.

Before DEP responded to the comments, both appellants sought to intervene in the trial court; Judge Michael J. Hogan denied their motions without prejudice, and he permitted them to file opposition as amici and argue against the proposed settlement at a subsequent hearing. After Judge Hogan approved the settlement, appellants again sought to intervene for purposes of appeal. Judge Hogan denied their motions.

The court holds that a party must have standing before it can intervene at trial under our Court Rules. Because appellants cannot bring suit for NRD under the Spill Compensation and Control Act (the Spill Act), N.J.S.A. 58:10-23.11 to 23.24, the Environmental Rights Act, N.J.S.A. 2A:35A-1 to -14, or the common law, the court affirmed Judge Hogan's denial of their motions for intervention at trial.

However, because the Appellate Division alone can decide whether an appellant has standing to appeal, and because the environmental groups have standing to assert the public's interest in challenging DEP's decision to settle the lawsuit, the court considered the merits of Judge Hogan's decision to approve the settlement.

Applying the rationale of federal decisions interpreting the Spill Act's federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-675, the court concluded the appropriate standard of review is whether the judge mistakenly exercised his discretion in concluding the settlement was fair, reasonable, consistent with the Spill Act's goals, and in the public interest. The court affirmed Judge Hogan's approval of the settlement.

2-9-18 STATE OF NEW JERSEY VS. R.J.M. (15-07-0832, MIDDLESEX COUNTY AND STATEWIDE) (A-5306-15T1)

The court construed N.J.R.E. 609(b), which addresses the admissibility, for impeachment purposes, of remote convictions, i.e., those over ten years old. The ten-year period is calculated from the date of the conviction or release from confinement for it, whichever is later. The court held that civil commitment, pursuant to the Sexually Violent Predator Act, is not "confinement for" a criminal conviction. Therefore, a period of civil commitment may not be excluded in calculating whether a conviction is more than ten years old.

Defendant, a resident of the Special Treatment Unit (STU), was on trial for assaulting a corrections officer at the STU. Defendant had been convicted of a sexual assault in 1990, completed his sentence in 2000, and was then civilly committed to the STU. The trial court erred in determining that, due to defendant's ongoing civil commitment, his 1990 sexual assault conviction was not remote under N.J.R.E. 609(b).

2-8-18 ANTHONY Y. KITE VS. DIRECTOR, DIVISION OF TAXATION (TAX COURT OF NEW JERSEY) (A-3349-15T3)

Money recovered from a qui tam action brought pursuant to a provision of the federal False Claims Act, 31 U.S.C. § 3730, is a "prize or award" under N.J.S.A. 54A:5-1(l) that is subject to taxation under the New Jersey Gross Income Tax Act, N.J.S.A. 54A:1-1 to 10-12; and the taxpayer may not deduct the fees he paid to his attorneys to prosecute the action, or the amounts he paid to the plaintiffs in related qui tam actions pursuant to their joint prosecution and sharing agreement.

2-8-18 ROBERT J. CURRAN VS. DEBRA CURRAN (FM-13-1321-13, MONMOUTH COUNTY AND STATEWIDE) (A-3968-15T2)

The parties in this matrimonial action agreed to submit issues incident to their divorce to binding economic arbitration pursuant to the New Jersey Arbitration Act (Act), N.J.S.A. 2A:23B-1 to -32. A handwritten provision inserted into the arbitration agreement read: "The parties reserve their rights to appeal the arbitrator's award to the appellate division as if the matter was determined by the trial court."

Appellant does not contend that he has satisfied any of the grounds enumerated under Section 23 of the Act to vacate the award. He argues instead, that the provision is illegal and therefore, it renders the arbitration award void in its entirety.

The court confirms that the parties cannot create subject matter jurisdiction by agreement and bypass the trial court to seek immediate appellate review.

The court concludes that striking the illegal clause does not defeat the primary purpose of the contract, which was to resolve the parties' matrimonial issues through binding arbitration pursuant to the Act. The remainder of the arbitration agreement is valid and enforceable and we confirm the arbitration award.

2-5-18 SHARON BEN-HAIM VS. DANIEL EDRI, ET AL. (L-3502-15, BERGEN COUNTY AND STATEWIDE) (A-2247-15T4)

We hold that New Jersey courts do not have jurisdiction to hear civil claims against foreign officials when the United States, through the State Department, has issued a suggestion of immunity (SOI) determining that those officials are entitled to conduct-based immunity. Therefore, we affirm a December 9, 2016 order dismissing plaintiff's civil complaint against six Israeli rabbinical judges and an official of the Rabbinical Religious Courts Administration of Israel after the State Department determined that the judges and official were acting within the scope of their duties for a foreign sovereign nation.

2-2-18 STATE OF NEW JERSEY VS. WILLIAM T. LIEPE (12-12-2766, ATLANTIC COUNTY AND STATEWIDE) (A-4431-14T4)

Defendant was sentenced to consecutive prison terms of twenty, seven, and five years, for first-degree aggravated manslaughter and two counts of second-degree aggravated assault, resulting from his having caused, while intoxicated, an auto accident that killed a nine-year old and seriously injured two others.

In State v. Carey, 168 N.J. 413, 429 (2001), a divided Court determined that in multiple-victim vehicular-homicide matters, sentencing judges should "ordinarily" impose "at least two consecutive terms." The Court, however, also emphasized that it had not "adopt[ed] a per se rule" and the decision to impose consecutive terms remained in the discretion of sentencing judges. Id. at 419. In considering Carey's influence here, the court remanded for resentencing because, among other things, the sentencing judge appeared to have viewed Carey as imposing a presumption in favor of consecutive terms and because the judge did not fairly consider the real-time consequence of the aggregate thirty-two year sentence, all subject to an eighty-five percent period of parole ineligibility, imposed on an offender who was fifty-eight at the time of the incident and sixty-two at the time of sentencing.

2-2-18 IN RE MIDDLESEX REGIONAL EDUCATIONAL SERVICES COMMISSION NAME CHANGE REQUEST (NEW JERSEY STATE BOARD OF EDUCATION) (A-3359-15T4)

The court, after determining the New Jersey Council of Educational Services Commission – which represents the interests of eight educational services commissions – had standing to challenge the New Jersey State Board of Education's approval of the Middlesex Regional Educational Services Commission's request to change its name to the Educational Services Commission of New Jersey, held the State Board has the statutory authority to approve an educational services commission's name-change application even absent a concomitant application to change the scope of its services, and the State Board's action was not arbitrary and capricious.

2-1-18 A.W., ETC. VS. MOUNT HOLLY TOWNSHIP BOARD OF EDUCATION IN THE MATTER OF COSTELLO & MAINS, LLC (L-0703-14, BURLINGTON COUNTY AND STATEWIDE) (A-0165-16T2)

In this statutory discrimination action under the Law Against Discrimination, the minor plaintiff retained appellant law firm to represent her against a Board of Education for failing to take appropriate steps to address bullying by other students. The retainer agreement provided for a forty-five percent contingent fee or a fee based on hourly rates, whichever was higher. After conducting discovery and surviving a defense summary judgment motion, the case settled pre-trial for $100,000, inclusive of attorney's fees and costs, with plaintiff waiving the right to make application for a fee-shifting award against defendant. Plaintiff then sought approval of the settlement at a friendly hearing without the law firm seeking approval of a contingent fee higher than twenty-five percent of the net recovery pursuant to Rule 1:21-7(f).

The trial court approved the settlement amount and costs, but reduced the contingent fee to twenty-five percent of the net recovery. The court affirmed, holding that in the absence of an application for a fee-shifting award, the contingent fee is limited to twenty-five percent of the minor plaintiff's net recovery in the absence of a successful application for an enhanced fee under Rule 1:21-7(f).

1-31-18 THE NEW JERSEY SPINE SOCIETY VS. NEW JERSEY SMALL EMPLOYER HEALTH BENEFITS PROGRAM BOARD (DEPARTMENT OF BANKING AND INSURANCE) (A-1723-16T4)

The New Jersey Department of Banking and Insurance, Small Employer Health Benefits Program Board (the SEH Board), engaged in rulemaking in accordance with the expedited procedure established by N.J.S.A. 17B:27A-51 (Section 51), rather than pursuant to the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -31. In doing so, the SEH Board repealed an administrative rule pertaining to out-of-network benefits under certain health insurance plans. We held that the repeal constituted an "action" under the plain language of Section 51, and concluded that the SEH Board correctly relied on Section 51 rather than the APA.

1-31-18 SHULAMIS ADELMAN, ETC. VS. BSI FINANCIAL SERVICES, INC., ET AL. (L-3143-11, MONMOUTH COUNTY AND STATEWIDE) (A-3197-15T2)

A defendant in a foreclosure case may not fail to diligently pursue a germane defense and then pursue a civil case against the lender alleging fraud by foreclosure. The court affirms the dismissal of a fraud complaint alleging the lender pursued a foreclosure on the original mortgage after the mortgage was modified where the homeowner failed to object to the entry of final judgment in the foreclosure case.

1-26-18 COLLENE WRONKO VS. NEW JERSEY SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (L-11721-14, MIDDLESEX COUNTY AND STATEWIDE) (A-1737-15T1)

In this Open Public Records Act (OPRA) litigation, the court considers whether the New Jersey Society for the Prevention of Cruelty to Animals (NJSPCA) should be exempt from complying with OPRA requests because it does not receive public funds and, staffed only with volunteers, it lacks the monies and personnel to facilitate the requests.

Discovery revealed that the NJSCPA had a budget of over $300,000 consisting of private donations and monies collected from municipal fines and penalties assessed on violators of animal cruelty laws. The trial judge determined that the OPRA request was not burdensome; most of the information sought could be found in NJSPCA's tax returns and reports.

The court concluded that because the NJSPCA is a public agency that receives public funds and performs a traditional government function, it is subject to OPRA, and must comply with requests made under the Act. It is the province of the Legislature to exempt the agency from OPRA's mandate. The court affirmed the orders compelling NJSPCA to comply with the Act and awarding plaintiff counsel fees.

1-26-18 LIBERTARIANS FOR TRANSPARENT GOVERNMENT, ETC. VS. GOVERNMENT RECORDS COUNCIL, ET AL. (L-0813-16, MERCER COUNTY AND STATEWIDE) (A-5563-15T4)

In this appeal the court considers whether draft minutes prepared for a public body's approval and adoption must be provided in response to a request under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. The Government Records Council denied the Libertarians For Transparent Government's OPRA request for unapproved minutes, contending they were records exempted from disclosure under the Act as "advisory, consultative, or deliberative material."

As the exemption under OPRA has been construed to encompass the deliberative process privilege, the court evaluated the documents under the privilege's two-pronged test, and determined that the unapproved minutes were both pre-decisional and deliberative. Because draft minutes are a preliminary document subject to revision, they remain "deliberative material" and exempt from the disclosure requirements of OPRA until approved by the public body.

1-23-18 STATE OF NEW JERSEY VS. A.M. (12-08-1150, BERGEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-2090-13T2)

Defendant pled guilty to second degree sexual assault, N.J.S.A. 2C:14-2(c)(4), reserving his right to appeal the denial of his motion to suppress the inculpatory statement. This court reverses the trial court's order denying defendant's motion to suppress his inculpatory statement. The evidence presented by the State at the N.J.R.E. 104(c) hearing does not support the motion judge's findings that the State satisfied "the heavy burden" of proving, beyond a reasonable doubt, that defendant made a knowing, intelligent, and voluntary decision to waive his constitutional rights under Miranda. The motion judge's decision upholding the methods used by the interrogating detectives improperly shifted this burden of proof to defendant.

Judge Fuentes wrote a separate concurrence addressing the use of police officers as interpreters when interrogating a suspect who is limited English proficient.

1-19-18 STATE OF NEW JERSEY VS. DAKEVIS A. STEWART (W-2017-000472-1708)(SALEM COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0562-17T6)

At a detention hearing held pursuant to the Criminal Justice Reform Act, N.J.S.A. 2A:162-15 to 2A:162-26 (the CJRA), the State proceeded by proffer. Defendant subpoenaed the police officer, who prepared the affidavit of probable cause as a witness, and sought to subpoena other officers. Over the State's objection, the judge entered an order that permitted defendant "to subpoena the [police] officers at the scene of the incident to testify at the [d]etention [h]earing." The court granted the State's motion for leave to appeal and reversed.

The CJRA provides that at a pretrial detention hearing, a "defendant has the right to be represented by counsel, and . . . shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." N.J.S.A. 2A:162-19(e)(1) (emphasis added). However, federal courts interpreting the Bail Reform Act that contains similar language have recognized the defendant's right to produce adverse witnesses is conditional, not absolute.

The court adopts the reasoning of the majority of federal courts, which require a defendant make a proffer as to how the anticipated testimony of an adverse witness, i.e., police officers, victims, and State's witnesses, would 1) negate the State's evidence as to probable cause; or 2) rebut or diminish the State's proffered clear and convincing evidence supporting detention.

1-17-18 G.M. VS. C.V. (FV-14-0182-05, MORRIS COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4820-15T4)

This appeal requires the court to determine the procedures that should be followed by the Family Part where a person, restrained by a final restraining order (FRO) entered under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, requests to modify or dissolve the FRO, but the transcript of the FRO hearing is not available through no fault of the defendant. We hold that due process requires the Family Part judge to reconstruct the record if the court cannot assess whether to deny the application or is otherwise satisfied that the record before it presents a prima facie showing of changed circumstances. We reverse and remand to the Family Part for proceedings consistent with this opinion.

1-17-18 NEWTON MEDICAL CENTER VS. D.B. (DC-1810-14, WARREN COUNTY AND STATEWIDE) (A-5101-15T4)

In this appeal, this court was asked to determine whether a patient who requires emergent psychiatric treatment, resulting in his involuntary commitment to a hospital, should be treated differently for charity care purposes than a patient who suffers a physical injury or illness. This issue of first impression arose from a dispute regarding a hospital's attempt to recover payment from an indigent mental health patient, who was involuntarily committed to its facility after being screened by a psychiatric emergency screening service, when the hospital followed the charity care procedures applicable to a non-emergent admission instead of those applicable to an admission through the hospital's emergency room. The trial court determined on summary judgment that the procedures governing a regular admission applied, and the hospital was entitled to recover from the patient based on a theory of quasi-contract.

This court reversed, holding that when a mental health patient is admitted to a hospital on an emergent basis through the referral of a psychiatric emergency screening service, the provisions of the charity care regulations dealing with emergency room admissions applied.

1-17-18 A.E.C. VS. P.S.C., IN THE MATTER OF J.S.E. (FD-11-0394-17, MERCER COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1290-16T4)

Following O.Y.C.P. v. J.C.P., 442 N.J. Super. 625 (App. Div. 2015), the court further addressed the Family Part's jurisdiction over person between the ages of eighteen and twenty-one who apply to the Family Part for predicate findings in special immigrant juvenile (SIJ) cases. In this case, the court addressed the Family Part's jurisdiction to grant an application for child custody, made in connection with an SIJ-related application. The court held that, pursuant to N.J.S.A. 9:17B-3, the Family Part has jurisdiction to grant a parent custody of an unemancipated child who is over eighteen, but under twenty-one, and to issue a declaratory ruling that the child is dependent on the parent and is not emancipated.

1-12-18 KEVIN CONLEY VS. NEW JERSEY DEPARTMENT OF CORRECTIONS (GOVERNMENT RECORDS COUNCIL) (A-4754-14T3)

This appeal requires this court to determine whether certain data the Department of Corrections (DOC) is required to maintain by federal and State regulations is no longer subject to disclosure as a "government record" under the Open Public Records Act (OPRA). Specifically, whether data previously provided to the public in monthly reports is no longer available because the DOC implemented a new data collection system that does not generate these reports. The Government Records Council (GRC) upheld the DOC's denial of these records because they are no longer available in this format. This court reverses the GRC and holds that technological advancements in data storage should enhance, not diminish, the public's right to access "government records" under OPRA. Acceptance of the DOC's argument would leave the public policy of transparency and openness codified in OPRA unacceptably vulnerable to bureaucratic manipulation.

1-9-18 ALL THE WAY TOWING, LLC, ET AL. VS. BUCKS COUNTY INTERNATIONAL, INC., ET AL. (L-1865-12, OCEAN COUNTY AND STATEWIDE) (A-4825-15T2)

In reversing the summary judgment entered in favor of defendants on both plaintiffs' breach of contract and consumer fraud claims, the court held, among other things, that the sale of a tow truck constituted a "sale of merchandise," as defined by N.J.S.A. 56:8-2, even though it was custom built.

1-8-18 FRANCES GREEN VS. MONMOUTH UNIVERSITY, ET AL. (L-2538-14, MONMOUTH COUNTY AND STATEWIDE) (A-1652-15T2)

Plaintiff fell at a concert at a university's multipurpose center. The Appellate Division agreed the university had charitable immunity. Holding concerts open to the public to advance education was one of the university's purposes. The concert served that purpose regardless of the music's genre. The university remained immune though the performer, and the entities which selected and booked her and rented the center, were for-profit. Even a charity can rent its facilities to for-profit entities unless non-charitable activities become its dominant motive, which was not shown here. As an audience member, plaintiff was a beneficiary regardless of whether she viewed the concert as educational.

Judge Fisher dissents.

1-2-18 M.C. VS. G.T. (FV-20-1510-16, UNION COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4781-15T4)

Plaintiff failed to prove defendant committed an act of domestic violence but the judge – after acknowledging the Prevention of Domestic Violence Act did not permit issuance of a final restraining order – relied on P.J.G. v. P.S.S., 297 N.J. Super. 468 (App. Div. 1997), invoked her "inherent equitable powers," and entered restraints in plaintiff's favor. The court reversed, holding that even if it represents good law, P.J.G. requires that some other vehicle – such as another pending action between the parties – must be available for the issuance of restraints based on the trial court's inherent equitable powers. There being no action between the parties except the domestic violence action in question, the trial court was not authorized to impose restraints or do anything but dismiss plaintiff's domestic violence action without granting affirmative relief.

1-2-18 BANC OF AMERICA LEASING AND CAPITAL, LLC VS. FLETCHER-THOMPSON INC., ET AL. (DJ-171959-15, MERCER COUNTY AND STATEWIDE) (A-0848-16T4)

The court reverses an order granting the judgment creditor's motion to turn over the funds in a joint marital account without a determination of whether the funds belonged to the debtor husband alone. The court notes that the wife was not a judgment debtor, did not sign the agreement with the creditor to make payments to avoid the levy, and claimed the funds were exempt pension funds.

12-29-17 JOHN WATSON VS. NEW JERSEY DEPARTMENT OF THE TREASURY (L-0889-16, MERCER COUNTY AND STATEWIDE) (A-5627-15T4)

Plaintiff appealed the dismissal of his complaint under N.J.S.A. 52:4C-1, the Mistaken Imprisonment Act. Plaintiff was convicted in 1988 of possession of cocaine and weapons. He served five and one half years and was released from prison in 1996. In April 1999, the New Jersey Office of the Attorney General issued a report acknowledging the State Police's use of racial profiling on the Turnpike from 1988 to 1999 and in 2000, agreed to vacate convictions and dismiss charges for certain cases.

In November 2011, plaintiff was convicted in the United States District Court for the Middle District of Pennsylvania for another narcotics offense and sentenced to thirty years. The federal court used plaintiff's New Jersey convictions to enhance his federal sentence because he qualified as a three-strike "career offender".

On May 2, 2014, the New Jersey court consented to order vacating defendant's 1988 New Jersey conviction because it was subject to inclusion in the aforementioned State Police racial profiling consent order. In light of the vacated conviction, the federal court resentenced plaintiff to a shorter term as he no longer qualified as a "career offender." Plaintiff filed suit under the Act on April 27, 2016.

The trial judge dismissed plaintiff's complaint. The panel affirmed the dismissal of plaintiff's complaint because the plain language of N.J.S.A. 52:4C-4 identifies two triggering events from which to calculate the two-year statute of limitations: release from imprisonment or a pardon. Because plaintiff's complaint was filed beyond the two years after his release from prison in New Jersey and the vacatur of his conviction was not a pardon, his complaint was not timely filed.

12-29-17 THOMAS G. LECHLER, ET AL. VS. 303 SUNSET AVENUE CONDOMINIUM ASSOCIATION, INC., ET AL. (L-0466-15, HUDSON COUNTY AND STATEWIDE) (A-1095-16T3)

In this premises liability case, we reverse a Law Division order granting a directed verdict to defendants, a condominium association and its property manager, and dismissing with prejudice the negligence claim of plaintiff, a condominium resident. We hold that the association had a statutory duty to maintain the common areas, including a duty to identify and correct dangerous conditions, and that duty extended to residents of the condominium building, regardless of their characterization as licensees or invitees. While the condominium association has a statutory right to adopt a by-law precluding residents from suing the association for negligence, the association did not adopt such a by-law. Because plaintiff's evidence, if credited by the jury, established a prima facie case of negligence, we reverse and remand for a new trial.

12-26-17 STATE OF NEW JERSEY VS. ANWAR H. BELTON (10-09-2272, ATLANTIC COUNTY AND STATEWIDE) (A-0971-16T1)

In this PCR appeal, defendant collaterally challenged his conviction, after a guilty plea, to aggravated manslaughter. The panel concludes that defendant, in the course of his allocution, suggested a defense of others that was inconsistent with guilt; his waiver of that defense was not knowingly made; therefore, he did not present a sufficient factual basis of guilt. In reaching this conclusion, the panel applies the principles set forth in State v. Urbina, 221 N.J. 509 (2015), although that case involved a claim of self-defense, rather than the defense of others, suggested in the course of a guilty plea. In view of defendant's contemporaneous claim of innocence, the panel held that the failure to elicit a sufficient factual basis was of constitutional dimension and warrants PCR.

12-19-17 DCPP VS. N.B. IN THE MATTER OF D.B. (FN-12-0185-15, MIDDLESEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4562-15T1)

Defendant appealed from an order terminating litigation after a fact-finding hearing wherein a Family Part judge determined she had abused or neglected her son by exposing him to domestic violence and suggesting she wanted to commit suicide. The panel reversed because the trial judge impermissibly admitted and relied on insufficiently corroborated statements of the child, as well as facts and complex diagnoses within a hearsay report of a psychologist consultant of the Division of Child Protection and Permanency. In particular, the panel noted the corroboration necessary to rely on the hearsay statements of the child, N.J.S.A. 9:6-8.46(a)(4) must be direct or circumstantial and corroboration should not be conflated with reliability. The panel also reiterated when an expert is not produced as a witness, N.J.R.E. 808 requires exclusion of the expert's complex disputed opinion, even if the opinion is contained in a business record, unless the trial judge makes specific findings regarding trustworthiness.

12-11-17 DCPP VS. C.J.R. AND C.R.A. IN THE MATTER OF THE GUARDIANSHIP OF A.A.R., C.L.A., AND C.A. (FG-07-0117-16, ESSEX COUNTY AND STATEWIDE)(CONSOLIDATED)(RECORD IMPOUNDED) (A-3884-15T1/A-3885-15T1)

Defendants appeal from an April 27, 2016 judgment of guardianship terminating their parental rights to their three biological children. Because the trial court erred in giving preclusive effect, in the guardianship proceeding, to the prior finding of abuse and neglect based upon the burden shifting provisions of Title Nine, the panel reverses and remands for a new guardianship trial. N.J.S.A. 9:6-8.46(a)(2) provides proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or guardian shall be prima facie evidence that a child of, or who is the responsibility of such person is an abused or neglected child. In such circumstances, the burden shifts to those who have had access to the child to prove non-culpability. Title Thirty contains no such similar burden shifting provisions. Therefore, the trial court's decision to give the Title Nine fact-finding preclusive effect in the Title Thirty proceedings, shifting the burden to defendants and requiring them to rebut the presumption of abuse and neglect through their own evidence, created an unconstitutional asymmetry that the panel considers plain error on a critical question of law warranting reversal.

12-11-17 JENNIFER KOCANOWSKI VS. TOWNSHIP OF BRIDGEWATER (DIVISION OF WORKERS' COMPENSATION, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT) (A-3306-15T2)

Appellant was a volunteer firefighter when she was injured responding to a fire. She was unemployed at the time of the injury and received no wages. Following a hearing, a Workers' Compensation judge denied appellant's application for temporary total disability benefits. The panel agreed that payment of temporary disability benefits depended upon proof of lost wages. Temporary disability is intended to replace lost wages. Without proof of lost wages, appellant had no entitlement to temporary disability benefits under the Workers' Compensation Act.

12-7-17 NANCY JACOBS VS. JERSEY CENTRAL POWER & LIGHT COMPANY (L-0813-14, OCEAN COUNTY AND STATEWIDE) (A-0255-16T3)

After a streetlight fell on the corner of plaintiff's property, an employee of the defendant electric company disconnected the power, removed the light pole, pushed the wires into a hole in the ground, and covered the hole with dirt. He placed over the hole an orange safety cone, which disappeared within a few days. White markings painted by the hole faded in the ensuing weeks.

Nearly two months later, plaintiff inadvertently stepped into the hole and injured herself, resulting in lumbar and knee surgeries. She brought a negligence case against the utility for creating and failing to timely repair a dangerous condition. A jury found the utility primarily at fault in causing the accident. It awarded plaintiff damages, which were reduced by her own percentage of fault. The utility appeals and asserts multiple trial errors.

12-6-17 JANET HENEBEMA VS. DOMENICO RADDI, JR. (L-0964-07, ATLANTIC COUNTY AND STATEWIDE) (A-2460-15T4)

On remand, and ten years after a serious car accident, defendants raised for the first time the affirmative defenses of N.J.S.A. 52:17C-10 (9-1-1 dispatcher immunity) and N.J.S.A. 59:5-4 (failure to provide police protection). We concluded that the judge erred by (1) failing to resolve whether defendants waived the new defenses; and (2) dismissing the complaint relying on Royster v. N.J. State Police, 439 N.J. Super. 554 (App. Div. 2015), aff'd as modified, 227 N.J. 482 (2017) (dismissing a claim under the Americans with Disabilities Act).

12-5-17 STATE OF NEW JERSEY VS. DONOVAN WHITE STATE OF NEW JERSEY VS. LARRY BOSTIC (17-05-1216, ESSEX COUNTY AND STATEWIDE AND W-2017-1470-0614, CUMBERLAND COUNTY AND STATEWIDE)(CONSOLIDATED)(RECORD IMPOUNDED) (A-4778-16T6/A-5364-16T6)

In these two appeals from orders of detention pursuant to the Criminal Justice Reform Act, N.J.S.A. 2A:162-15 to -26 (the CJRA), the Law Division revoked defendants' pretrial release for violations of conditions.

In White, although defendant received notice that the hearing on the State's motion to revoke would occur on a different date, the judge refused to grant a short extension of the hearing when defendant appeared in court so defendant could call a witness and produce other evidence. The panel concluded the judge mistakenly exercised his discretion and reversal was required because the denial of the adjournment was prejudicial to defendant's ability to rebut the State's proffered evidence of a violation.

In Bostic, defendant was immediately arrested when he reported for the first time to Pretrial Services. The State alleged defendant violated conditions of his release, specifically leaving his home and entering a "victim exclusion zone" for one minute. The Law Division judge revoked defendant's release.

The panel reversed, concluding there was no authority for defendant's immediate arrest, because he committed no new offense and the court had issued no warrant for his arrest based upon alleged violations of conditions. The panel also concluded the State failed to prove by preponderance of the evidence that defendant knew the parameters of the victim "exclusion zones," or that his failure to remain in his home, when specifically ordered to report to Pretrial Services, was a violation of his conditions of release.

12-5-17 EDWARD GRIMES VS. NEW JERSEY DEPARTMENT OF CORRECTIONS (NEW JERSEY DEPARTMENT OF CORRECTIONS) (A-1826-15T4)

Appellant, an inmate at the New Jersey State Prison, challenged the final decision of the Department of Corrections (DOC), which reiterated DOC's informal policy (the calling policy) prohibiting inmates from making phone calls to cell phones and "non-traditional telephone service numbers." He asserted the calling policy violated the United States Constitution and DOC's informal implementation of the calling violated the Administrative Procedures Act, N.J.S.A. 52:14B-1 to -31 (the APA).

The court concluded DOC's adoption and implementation of the calling policy violated the rulemaking procedures required by the APA. The court recognized the likely disruption that immediate invalidation of the policy would cause, and left the policy in place, pending DOC's commencement of rulemaking without delay.

12-5-17 FWDSL & ASSOCIATES, LP VS. RICHARD BEREZANSKY, ET AL. (F-033373-15, SOMERSET COUNTY AND STATEWIDE) (A-5385-15T2)

Plaintiff, a tax sale certificate holder, appealed an order which permitted a party to intervene in this foreclosure action and redeem based on its having obtained title pursuant to its profit-sharing agreement with the property owners. The intervenor agreed to pay the owners $10,000 for clear title and, by way of the profit-sharing agreement, promised to: pay all outstanding property taxes; satisfy a $70,000 judgment against one of the owners; allow the owners free use and occupancy until the property's eventual sale; and consented to a thirty-five/sixty-five split of the net proceeds, with the owners receiving the larger share. Plaintiff argued the consideration received by the owners was illusory or was only nominal because the profit-sharing agreement called for reimbursement to the intervenor of its payment of the taxes, of the $70,000 judgment, and of all repairs made to the premises. In affirming, the court held that the owners received more than nominal consideration – thereby satisfying N.J.S.A. 54:5-89.1's requirements – and rejected plaintiff's contention that Simon v. Cronecker, 189 N.J. 304 (2007) imposed a blanket prohibition on all profit-sharing agreements in this setting.

11-29-17 STATE OF NEW JERSEY VS. LEON FAISON (13-11-2820, ESSEX COUNTY AND STATEWIDE) (A-3629-15T4)

In this case, we reverse defendant's conviction for operating a motor vehicle while his license was suspended for a second or subsequent driving while intoxicated (DWI) conviction, N.J.S.A. 2C:40-26(b). While defendant's license was suspended for a second DWI conviction when the police stopped him, before trial he successfully petitioned for post-conviction relief (PCR). The order granting PCR vacated his prior DWI convictions and remanded both matters to the municipal court for new trials. On remand, the municipal court dismissed one DWI charge, and defendant pled guilty to the other.

As a result of defendant's PCR and remand proceedings, at the time of his trial for violating N.J.S.A. 2C:40-26(b), he had only one prior DWI conviction. Accordingly, the State could not prove an element of the crime charged — a second DWI conviction — a prerequisite to the mandatory 180-day incarceration period imposed by N.J.S.A. 2C:40-26(b) and (c).

11-29-17 State of New Jersey v. Rolando Terrell (A-0492-11/A-1593-12)

Defendant appeals from his convictions and sentence asserting several arguments, which challenge evidentiary determinations by the trial judge. Specifically, defendant characterizes the errors as: (1) the exclusion of defense expert testimony evaluating the reliability of voice identification evidence and discussing factors affecting the reliability of what was termed "earwitness" identification; (2) the admission of what he characterizes as the State's prejudicial, irrelevant gang expert evidence; and (3) the admission of the State's misleading expert testimony pertaining to the chemicals Toluene and D5 found at the scene.

The court affirmed the evidentiary rulings, noting the judge fully determined the limits of admissibility of all evidence. When deeming certain subjects inadmissible, the trial judge's detailed findings including: the expert was found not to be qualified to address the area; the testimony risked misleading the jury; the concepts related to matters of common sense; and the opinion tended to tread on the jury's credibility determinations.

Judge Higbee dissents rejecting the limitations placed on the proffered evidence.

11-21-17 STATE OF NEW JERSEY VS. SUSAN HYLAND (16-06-1879, CAMDEN COUNTY AND STATEWIDE) (A-2530-16T2)

The State appeals a special probation Drug Court sentence imposed under N.J.S.A. 2C:35-14 following defendant's conviction for second-degree leaving the scene of a fatal accident, N.J.S.A. 2C:11-5.1, third-degree causing death while driving with a suspended or revoked license, N.J.S.A. 2C:40-22(a); and third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2(a). The State contends the court erred in its assessment of the factors required for imposition of a special probation sentence under N.J.S.A. 2C:35-14.

The court concludes it is without jurisdiction to hear the appeal, finding the State lacked authority to appeal because the sentence is not illegal and N.J.S.A. 2C:35-14 does not authorize the State to appeal a special probation sentence. The court rejects the contention that N.J.S.A. 2C:44-1(f)(2) authorizes the State's appeal because defendant received a probationary sentence for a second-degree crime that is otherwise subject to a presumption of imprisonment under N.J.S.A. 2C:44-1(d). The court determines that the State's appeal authorized by N.J.S.A. 2C:44-1(f)(2) is limited to challenges to sentencing determinations under N.J.S.A. 2C:44-1(d), and does not apply to sentencing decisions made under N.J.S.A. 2C:35-14.

11-17-17 AZIZ M. THABO VS. Z TRANSPORTATION(L-3296-15, PASSAIC COUNTY AND STATEWIDE) (A-0034-16T1)

In this breach of contract case, the Law Division judge dismissed with prejudice plaintiff's complaint by imposing the ultimate discovery sanction provided in Rule 4:23-5. This court reversed and remanded this matter for further proceedings because the party who filed the motion and the Law Division judge who imposed the sanction failed to follow the procedural safeguards codified in Rule 4:23-5. The attorney representing the moving party did not disclose to the motion judge that he had received the outstanding discovery which formed the basis of the sanction a month before the judge dismissed plaintiff's complaint with prejudice. This wholesale disregard for the due process protections embodied in Rule 4:23-5 can occur only when the trial court fails to perform its basic gatekeeping function.

11-16-17 STATE OF NEW JERSEY VS. NICHOLAS MASCE (16-01-0001, GLOUCESTER COUNTY AND STATEWIDE) (A-1967-16T1)

The State of New Jersey appealed from the sentencing judge's order denying its request to enter, as part of the plea agreement reached between it and defendant, a civil consent judgment for restitution due the victims of defendant's theft, and from an order denying reconsideration. The court affirmed, concluding the Legislature did not confer statutory authority on a sentencing judge to enter a civil consent judgment in favor of a crime victim.

11-16-17 GREENBRIAR OCEANAIRE COMMUNITY ASSOCIATION, INC., ETC. VS. U.S. HOME CORPORATION, ET AL.(L-2105-15, OCEAN COUNTY AND STATEWIDE) (A-2653-16T1)

Plaintiff homeowners association filed a complaint against the defendant developer alleging various claims on its own behalf and on behalf of the homeowners. The homeowners had agreed when purchasing their properties from the developer to arbitrate any disputes; the association had entered into no such agreement with the developer. The trial court granted the developer's motion to compel arbitration of all the disputes, and the association appealed. The court remanded with a direction that plaintiff file an amended complaint that separated the claims the association brought on its own behalf from those it brought on behalf of the homeowners so the trial court might better ascertain which claims were subject to the arbitration agreement and which were not.

11-15-17 EQR-LPC URBAN RENEWAL NORTH PIER, LLC AND EQR-LINCOLN URBAN RENEWAL JERSEY CITY, LLC V. CITY OF JERSEY CITY (A-5231-14T3)

On leave granted, we reverse an April 10, 2015 Law Division order granting partial summary judgment in favor of plaintiffs, limited liability companies that qualify as urban renewal entities under the Long Term Tax Exemption (LTTE) Law, N.J.S.A. 40A:20-1 to -22. The City of Jersey City (City) claims that plaintiffs attempted to circumvent a tax abatement agreement by improperly changing their allowable profit rate so as to avoid paying the City any excess net profit. Plaintiffs' complaint sought a declaratory judgment against the City declaring that the parties' financial agreements incorporate future changes to the LTTE law, such that plaintiffs may calculate their "allowable profit rate" in accordance with the 2003 amendments to the LTTE Law. The City argued that the motion court misinterpreted the 2000 and 2001 financial agreements, warranting reversal. We find it contrary to fundamental public financing concepts for the Legislature to adjust the terms of municipal tax abatement contracts after the fact. See N.J.S.A. 40A:20-2, N.J.S.A. 40A:12A-2. We further find the Legislature did not intend to do so in the 2003 LTTE amendments.

We issued our unpublished opinion on July 22, 2016. At the direction of the Court, we now publish our opinion.

11-14-17 SPARROWEEN, LLC D/B/A CIGAR EMPORIUM, ET AL. VS. TOWNSHIP OF WEST CALDWELL, ET AL.(L-1966-16, ESSEX COUNTY AND STATEWIDE) (A-4083-15T1)

We hold that a municipal health ordinance that imposes time limitations on indoor smoking in a tobacco retail establishment is not superseded by the New Jersey Smoke-Free Air Act (the Smoke-Free Act), N.J.S.A. 26:3D-55 to -64. Appellants operated a cigar emporium where customers could purchase and smoke cigars and pipe tobacco. The store qualified as a "tobacco retail establishment" under the Smoke-Free Act. Thus, the Smoke-Free Act did not prohibit indoor smoking in such an exempt establishment.

The Township of West Caldwell, where the store operated, passed a health ordinance that limited indoor smoking to pre-purchase sampling not to exceed two minutes. Appellants challenged that ordinance arguing that the Smoke-Free Act superseded it. Appellants also argued that the ordinance was really a land use ordinance that did not apply to their pre-existing non-conforming use.

The Smoke-Free Act states that it supersedes "any other statute, municipal ordinance and rule or regulation adopted pursuant to law concerning smoking in an indoor public place or workplace . . . ." The provision, however, identifies three exceptions, which include: (1) "where smoking is prohibited by municipal ordinance under authority of [N.J.S.A.] 40:48-1 or 40:48-2[;]" (2) where smoking is prohibited "by any other statute or regulation adopted pursuant to law for purposes of protecting life and property from fire or protecting public health[;]" and (3) "provisions of a municipal ordinance which provide restrictions on or prohibitions against smoking equivalent to, or greater than, those provided under this act." Here, the municipal ordinance was within the ambit of all three exceptions.

We also hold the ordinance is a valid municipal health ordinance and it is not a land use ordinance. Accordingly, we affirm the dismissal of appellants' action in lieu of prerogative writs, and the denial of their request to invalidate the municipal smoking ordinance.

10-31-17 STEVEN KADONSKY VS. STEVE C. LEE (Division of Consumer Affairs) (A-3324-14T4)

An inmate serving a sentence for marijuana trafficking, filed a petition with the Director of the Division of Consumer Affairs seeking to have marijuana rescheduled from a Schedule I controlled dangerous substance to Schedule IV. The Director denied the petition, interpreting N.J.S.A. 24:21-3(c) as requiring that New Jersey to adhere to the federal Controlled Substances Act, 21 U.S.C.A. § 812(c), which lists marijuana as a Schedule I substance.

The court granted leave to appear as amicus curiae to L.B. on behalf of G.B., a minor child who takes medical marijuana to control epileptic seizures. When G.B.'s parents requested that the nurse at G.B.'s special education school administer her prescribed dosage of medical marijuana, the school refused citing marijuana's Schedule I classification which prohibits it on school grounds. G.B. was required to leave school at lunchtime to receive her medication and did not return to school, causing her to miss a half day of school each day. Amicus argued that the continued scheduling of marijuana as a Schedule I narcotic frustrates the purposes of the New Jersey Compassionate Use Medical Marijuana Act N.J.S.A. 24:6I-1 to 24:6I-16 and denies her the constitutionally protected right to a free and appropriate education.

The court found the Director erred in concluding that he lacked the authority to reclassify marijuana without a change in existing federal law and remanded the matter for a determination of whether marijuana has a high potential for abuse and, if so, whether that factor justifies continued classification as a Schedule I substance in the face of compelling evidence of accepted medical use and impediments to its legal use which may be attributable to its classification.

Judge Espinosa dissents, concluding that because the plain language of N.J.S.A. 24:21-3(c) requires the Director to adhere to federal schedules, his denial of the petition to remove marijuana from Schedule I was not arbitrary, capricious or unreasonable and should be affirmed. In addition, a review of extrinsic evidence, including New Jersey's legislative scheme and the federal Controlled Substances Act, 21 U.S.C.A. § 801 to § 904, support the conclusion that the Director lacks the discretion to change the classification of a controlled dangerous substance under the circumstances here.

10-26-17 SETH POLLACK, ET AL. VS. QUICK QUALITY RESTAURANTS, INC.(L-1000-14, BERGEN COUNTY AND STATEWIDE) (A-1967-15T2)

In this appeal, the panel considered whether a tenant, exercising under its lease a contracted right of first refusal to adopt terms of a purchase contract for premises, is obligated to pay a commission to a broker who secured the prospective buyer for the landlord/seller.

The broker secured a prospective purchaser, who orally represented it would enter into a written commission agreement, separate and apart from the purchase contract, to pay the broker 1.5% of the purchase price. When the tenant exercised its option to purchase the premises, no commission agreement was included in the sales contract.

Because there was no contractual relationship, either express or implied, between the broker and the tenant, nor any other basis to impose an obligation to pay the commission, the panel affirmed the trial court's grant of summary judgment for the tenant. The panel also affirmed the dismissal of the tenant's counterclaim against the broker.

10-20-17 STATE OF NEW JERSEY VS. CARLOS B. GREEN(15-10-2268, ESSEX COUNTY AND STATEWIDE) (A-1809-16T1)

The trial court prohibited the admission of defendant's two prior drunk driving convictions, which the State sought to admit to prove defendant acted recklessly in his pending trial on the charge of first-degree vehicular homicide while intoxicated within 1000 feet of a school. On interlocutory appeal, the Appellate Division affirms due to the statutory inference of recklessness that arises when driving drunk, N.J.S.A. 2C:11-5(a), as well as the deferential review standard applied to a N.J.R.E. 404(b) decision.

10-20-17 DCPP VS. P.D. AND A.W.IN THE MATTER OF THE GUARDIANSHIP OF S.D.(FG-02-0082-14, BERGEN COUNTY AND STATEWIDE)(RECORD IMPOUNDED) (A-5437-14T4)

In this appeal, we hold: (1) the Division of Child Protection and Permanency (Division) established all of the criteria for termination of parental rights in N.J.A.C. 30:4C-15.1(a), where defendant father essentially abandoned the child to the care of others, was deported and failed to maintain contact with the child for several years, the child formed a bond with her foster parent, and the Division's expert testified that the child would suffer severe and enduring harm if removed from the foster home, which defendant could not ameliorate; (2) the Vienna Convention of Consular Relations, April 23, 1963, 21 U.S.T. 77, did not require consular notice in this matter or the prior child protection proceedings because the child was a citizen of the United States; and (3) defendant father failed to establish that he was denied the effective assistance of counsel in the guardianship action.

10-16-17 <u>L.R., ETC. VS. CAMDEN CITY PUBLIC SCHOOL DISTRICT, ET AL. L.R., ETC. VS. PARSIPPANY-TROY HILLS TOWNSHIP PUBLIC SCHOOL DISTRICT, ET AL. THE INNISFREE FOUNDATION VS. HILLSBOROUGH TOWNSHIP BOARD OF EDUCATION, ET AL.THE INNISFREE FOUNDATION VS. CHERRY HI</u> (A-3972-14T4/A-4214-14T4/A-2387-15T4/A-3066-15T4)

These four related appeals from three vicinages concern efforts by plaintiffs (a nonprofit advocacy organization for disabled students, and the mother of a disabled student in the Camden City Public Schools) to obtain from several school districts copies of settlement agreements and records reflecting the provision of special services to other qualified students. The respective school districts resisted disclosure, citing statutory and regulatory provisions that generally safeguard the privacy of students in their records. The four cases generated conflicting decisions in the Law Division.

Plaintiffs' requests for records raise several novel issues of access under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13, the New Jersey Pupil Records Act ("NJPRA"), N.J.S.A. 18A:36-19, and the Federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. The requests also implicate administrative regulations adopted under both the NJPRA and FERPA.

The panel holds that the respective plaintiffs in the Hillsborough, Parsippany-Troy Hills, and Cherry Hill cases are entitled to appropriately-redacted copies of the requested records, provided that on remand those plaintiffs either: (1) establish they have the status of "bona fide researchers" within the intended scope of N.J.A.C. 6A:32-7.5(e)(16); or (2) obtain from the Law Division a court order authorizing such access pursuant to N.J.A.C. 6A:32-7.5(e)(15). The school districts shall not turn over the redacted records until they first provide reasonable advance notice to the affected student's parents or guardians.

We remand the Camden City case for further proceedings with respect to requested documents that also could refer to other students, but affirm the trial court's grant of access concerning records that exclusively mention the requestor's child.

10-16-17 Mellet v. Aquaside, LLC (A-4438-15)

Plaintiffs entered into health club contracts, which charged various forms of fees including late fees, collection administrative fees, in addition to dues. Plaintiffs filed suit asserting the form of their membership contracts and the fees defendant charged violated RISA, the Consumer Fraud Act (CFA), the Health Club Services Act (HCSA), and the Truth in Consumer Contract, Warranty, and Notice Act (TCCWNA). Plaintiffs sought class certification for all persons who entered into a membership agreement with defendant. Plaintiffs were denied class certification and defendant was granted summary judgment dismissing plaintiffs' complaint.

The Retail Installment Service Act (RISA), N.J.S.A. 17:16C-1(b) to -50, is a remedial act regulating charges associated with contracts entered into in New Jersey between a retail seller and a retail buyer evidencing an agreement to pay the retail purchase price of goods or services, which are primarily for personal, family or household purposes, or any part thereof, in two or more installments over a period of time. RISA applies to security agreements, chattel mortgages, conditional sales contracts, or other similar instruments, and any contract for the bailment or leasing of goods. RISA is to be construed liberally in favor of the consumer. Notwithstanding, the panel concluded health club contracts are not covered by RISA because they do not fall within the definition of "other similar instruments" of the sort contemplated by the statute.

10-10-17 AIR MASTER & COOLING, INC. VS. SELECTIVE INSURANCECOMPANY OF AMERICA, ET AL.(L-6861-14, ESSEX COUNTY AND STATEWIDE) (A-5415-15T3)

In this declaratory judgment action, the court addresses legal issues of property damage coverage under a Commercial General Liability ("CGL") insurance policy. The coverage issues stem from lawsuits brought by a condominium association and unit owners to remediate construction defects within a residential building. The insured, an HVAC subcontractor, worked on the roof and elsewhere in the building. The defects concern the progressive infiltration of water within the building.

After the contractor was named as a third-party defendant in the underlying construction defect cases, it sought a defense and indemnity from the insurers that had issued CGL policies to it over successive policy periods. The trial court granted summary judgment to Selective, one of those insurers, finding that the property damage had already manifested before its policy period commenced.

In reversing summary judgment and remanding for further development of the record, the panel held: (1) a "continuous trigger" theory may be applied to third-party liability claims involving progressive damage to property caused by an insured's allegedly defective construction work; and (2) the "last pull" of that trigger occurs when the essential nature and scope of the property damage first becomes known, or when one would have sufficient reason to know of it.

The panel rejected the subcontractor's novel argument that the last pull of the trigger does not occur until there is proof that "attributes" the property damage to faulty conduct by the insured.

10-4-17 STATE OF NEW JERSEY VS. EUGENE RICHARDSON (14-07-0587, CUMBERLAND COUNTY AND STATEWIDE) (redacted) (A-2023-15T2)

The court reverses defendant's drug possession conviction and holds that when the State refuses a defense attorney's diligent pre-indictment request to preserve and produce recordings, which the State or its law enforcement agencies created and are directly relevant to adjudicating an existing charge, the defendant is entitled to an adverse inference charge. In this drug case, despite the attorney's timely preservation request, the State allowed the automatic erasure of a booking room video that likely recorded the search of defendant, which allegedly uncovered the drugs he was charged with possessing. The court also holds the court erred by allowing the State to introduce evidence that defendant gave a false name during the earlier traffic stop.

9-29-17 STATE OF NEW JERSEY VS. IMANI WILLIAMS(W-2017-000508-317, BURLINGTON COUNTY AND STATEWIDE)(RECORD IMPOUNDED) (A-4417-16T6)

In this appeal, the court addresses whether, in a pretrial detention hearing, defendant's pregnancy should be given greater consideration than any other pretrial detention factor in a judge's assessment under the Criminal Justice Reform Act (Act), N.J.S.A. 2A:162-15 to -26.

At the detention hearing, the trial judge noted defendant's extensive juvenile history, current serious second-degree charges and multiple failures to appear, and considered the Pretrial Services recommendation for no release. Although stating that all pertinent factors under N.J.S.A. 2A:162-20 weighed in favor of detention, the judge concluded that defendant's eight-week pregnancy required her release with conditions.

Because the trial judge abused his discretion in giving defendant's pregnancy greater weight than all other pertinent factors in his determination to release her, we reverse. Pregnancy, like any other medical condition, is considered only for its impact on the risk of a defendant posing a danger to the community, obstructing justice or failing to appear in court. N.J.S.A. 2A:162-20.

9-28-17 CYNTHIA M. BLAKE VS. BOARD OF REVIEW, ET AL.(BOARD OF REVIEW, DEPARTMENT OF LABOR) (A-2940-15T3)

Appellant resigned in anticipation of employment with a different employer. However, before she began work with the second employer, it withdrew the offer and appellant applied for unemployment benefits. The Appeal Tribunal disqualified appellant from receiving benefits because she left employment without good cause attributable to the work. N.J.S.A. 43:21-5(a). Appellant argued she was eligible for benefits pursuant to a 2015 amendment, which provides the disqualification

shall not apply to an individual who voluntarily leaves work with one employer to accept from another employer employment which commences not more than seven days after the individual leaves employment with the first employer, if the employment with the second employer has weekly hours or pay not less than the hours or pay of the employment of the first employer, except that if the individual gives notice to the first employer that the individual will leave employment on a specified date and the first employer terminates the individual before that date, the seven-day period will commence from the specified date.

[L. 2015, c. 41 (emphasis added).]

The Board of Review affirmed, concluding the exception only applied if the employee "commences" work with the second employer.

The court affirmed, concluding the plain language of the statute and relevant legislative history demonstrated the exception applied only if the employee started employment with the second employer and was subsequently terminated. The court's opinion disagrees with another panel's interpretation of the amendment in McClain v. Board of Review, ___ N.J. Super. ___ (App. Div. 2017).

9-26-17 J.S. VS. NEW JERSEY STATE PAROLE BOARD(NEW JERSEY STATE PAROLE BOARD) (A-2203-15T1)

Appellant is subject to community supervision for life (CSL) under the Violent Predator Incapacitation Act, N.J.S.A. 2C:43-6.4. His application to live in Sweden with his wife and children was summarily denied by the Parole Board, which treated it as a request to terminate CSL. The court reverses and remands to the Parole Board to consider the merits of appellant's application, including whether the Board could supervise or monitor his compliance with the conditions of CSL or impose special conditions.

9-21-17 BBB VALUE SERVICES, INC. VS. TREASURER, STATE OF NEW NEW JERSEY, DEPARTMENT OF THE TREASURY, ETC.BED BATH & BEYOND, INC. VS. TREASURER, STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY, ETC.(NEW JERSEY DEPARTMENT OF THE TREASURY, UNCLAIMED PROPERTY ADMINI (A-2973-14T3/A-4880-14T3)

In these back-to-back appeals, Bed Bath & Beyond, Inc. (BB&B) and its subsidiary BBB-VSI appeal the denial by the Treasury Department's Unclaimed Property Administration (UPA) of their claim for a refund of the value of certain unclaimed merchandise return certificates. These certificates were provided by BB&B and BBB-VSI to customers who returned merchandise without a receipt. They could only be redeemed for other merchandise or services, and not for cash. The court concludes that for BB&B certificates issued between July 1, 1999 to June 30, 2010, the unused balances of these certificates should have been refunded by the UPA because they were not "property" within the scope of New Jersey's Uniform Unclaimed Property Act, N.J.S.A. 46:30B-1 to -109 (UUPA). UPA's denial of a refund is reversed. For certificates issued by BBB-VSI from July 1, 2010 to June 30, 2011, the certificates are not "credit memoranda" but rather constitute "stored-value cards" under the plain language of the UUPA as it was amended in 2010. The UPA erred in not refunding the value of these certificates because they were prematurely remitted by BBB-VSI.

9-20-17 L.C. VS. M.A.J. (FV-14-0952-16, MORRIS COUNTY AND STATEWIDE)(RECORD IMPOUNDED) (A-4933-15T2)

On the day of the final hearing, defendant filed an in limine motion that sought dismissal of plaintiff's complaint, arguing the alleged facts suggested only parenting differences and not domestic violence. The trial judge considered and granted the motion without taking testimony or providing plaintiff a full and fair opportunity to meaningfully respond. In condemning the filing of in limine motions that seek disposition of an action, particularly in domestic violence actions, and in finding the motion's rapid consideration and disposition-deprived plaintiff of due process, the court reversed and remanded for a final hearing.

9-13-17 JEFFREY SAUTER VS. COLTS NECK VOLUNTEER FIRE COMPANY NO. 2 (L-2637-13, MONMOUTH COUNTY AND STATEWIDE) (A-0354-15T1)

The court affirms the dismissal on summary judgment of a volunteer firefighter's whistleblower claim against Colts Neck Volunteer Fire Company No. 2, and several individual officers and members of the fire company, finding volunteer firefighters are not entitled to the protections of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. Because plaintiff is not an employee of the fire company, its vote to strip him of his membership in the organization in alleged retaliation for his letters to the fire company's fidelity carrier and Colts Neck's Executive Fire Council, even if true, is not a violation of CEPA.

9-13-17 STATE OF NEW JERSEY VS. EDWARD FORCHION A/K/A NJ WEEDMAN(17-02-0105, MERCER COUNTY AND STATEWIDE)(RECORD IMPOUNDED) (A-0161-17T6)

Following a defendant's detention under the Criminal Justice Reform Act (CJRA), N.J.S.A. 2A:162-15 to -26, the State generally has ninety days to indict defendant, N.J.S.A. 2A:162-22(a)(1)(a), and 180 days after the indictment to try defendant, N.J.S.A. 2A:162-22(a)(2)(a). Both periods allow for "excludable time" and for the State to move to continue detaining defendant provided the State can make certain showings. N.J.S.A. 2A:162-22(a)(1), (2).

In accordance with the CJRA, defendant has been detained in jail since early March 2017. He contends that the time for his trial under the speedy trial provisions of the CJRA is about to be reached. On leave granted, he appeals three orders that found a total of sixty-seven days of "excludable time," N.J.S.A. 2A:162-22(a), under the CJRA. We hold that our standard of review of the period to "be excluded in computing the time in which a case shall be indicted or tried" under N.J.S.A. 2A:162-22(b) is de novo. We also hold that we apply the traditional deferential standard of review to the trial court's factual findings concerning the amount of time excluded. Applying these standards, we affirm the orders that found sixty-seven days of excludable time.

9-11-17 STATE OF NEW JERSEY VS. CARLIA M. BRADY (15-05-0240, SOMERSET COUNTY AND STATEWIDE) (CONSOLIDATED)(RECORD IMPOUNDED) (A-0483-16T4/A-0484-16T4)

The grand jury indicted defendant, a sitting Superior Court judge, for official misconduct, N.J.S.A. 2C:30-2b, and two counts of hindering the apprehension of her boyfriend, the subject of an active arrest warrant for robbery. N.J.S.A. 2C:29-3a(1) and (2). The indictment alleged that with a purpose to benefit herself and her boyfriend, defendant refrained from performing a duty inherent in the nature of her office, i.e., to "enforce an arrest warrant . . . by failing to adequately notify the . . . Police Department of . . . [her boyfriend's] intended appearance or presence at her residence." The hindering counts alleged defendant "harbored or concealed" her boyfriend and offered or provided aid to avoid discovery or apprehension or to effect escape. The Law Division judge granted defendant's motion to dismiss the official misconduct charge but denied her motion as to the two hindering counts. The court granted each party's motion for leave to appeal.

The court affirmed, holding that under the circumstances presented, the judge did not have a duty, inherent in her office, to notify police of her boyfriend's location or that he was shortly appearing at her home. The court also concluded the State had produced some evidence before the grand jury to support the indictment on the hindering counts.