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

8-29-19 STATE OF NEW JERSEY VS. TEOSHIE WILLIAMS (14-09-0992, MIDDLESEX COUNTY AND STATEWIDE) (A-3944-16T2)

In this appeal, the court addressed whether police officers must inform the occupant of a residence that he or she has the right to refuse the officers' request to enter the residence. The court determined that while officers are required to inform the occupant of the right to refuse to consent to a search of the premises, a similar requirement does not apply to requests to simply enter the residence. Finding that the initial entry into defendant's apartment based on her consent to enter was permissible, the court affirmed the trial court's denial of defendant's motion to suppress evidence seized in a subsequent consent search of the apartment following a lawful protective sweep.

8-29-19 IN THE MATTER OF THOMAS ORBAN/SQUARE PROPERTIES, LLC, FRESHWATER WETLANDS GENERAL PERMIT 6 NO. 1103-03-0003.1 FWW070001, CHALLENGED BY SAVE HAMILTON OPEN SPACE (DEPARTMENT OF ENVIRONMENTAL PROTECTION) (A-3072-16T2)

Save Hamilton Open Space, a local citizens group, challenged the Department of Environmental Protection's issuance of a freshwater wetlands general permit 6 to Thomas Orban/Square Properties, LLC in connection with the construction of a shopping center in Hamilton Township

The court affirms the Commissioner's decision that SHOS is not entitled to an adjudicatory hearing. Because the court is unable, however, to discern where the agency has explained why Square Properties' use of the GSR-32 methodology to calculate recharge is consonant with the Department's regulations, which appear to expressly prohibit its use in these circumstances, it vacates the GP6 permit and remands for further fact-finding. In light of this disposition, the court does not address SHOS's argument that the agency needed to proceed through rulemaking.

8-22-19 SCOTT ROGOW (DECEASED) V. BOARD OF TRUSTEES, POLICE AND FIREMEN'S RETIREMENT SYSTEM (A-1346-17T2)

Scott Rogow was a firefighter with the City of Paterson who retired on an accidental disability retirement allowance under N.J.S.A. 43:16A-7 and received his monthly accidental disability retirement allowance until his death approximately six years later. Approximately four years after his death, Rogow's widow, who had already received her survivor accidental disability benefits under N.J.S.A. 43:16A-7(3), filed a request with the Board to amend Rogow's pension status so that she could receive the enhanced survivor accidental death benefits under N.J.S.A. 43:16A-10.

N.J.S.A. 43:16A-10(1) provides for payment of survivor accidental death benefits "[u]pon the death of a member in active service as a result of . . . an accident met in the actual performance of duty at some definite time and place[.]" The court held that a PFRS member who is retired and receiving a retirement allowance from the PFRS at the time of his death is not a "member in service" and thus is not entitled to accidental death benefits under N.J.S.A. 43:16A-10.

8-22-19 MERRILL CREEK RESERVOIR C/O PROJECT DIRECT VS. HARMONY TOWNSHIP (TAX COURT OF NEW JERSEY) (CONSOLIDATED) (A-1498-16T3/A-1500-16T3/A-1509-16T3)

Plaintiff Merrill Creek Reservoir c/o Project Direct, a consortium of electric utility companies and owner of the Merrill Creek Reservoir in Harmony Township, challenges three 2016 Tax Court judgments affirming the 2011-2013 tax assessments on its property. Harmony cross-appeals alleging error in adjustments the Tax Court made to value. Merrill Creek concedes the improvements should be valued using the cost approach the Tax Court employed but argues the Tax Court erred in accepting the Township's trend analysis, which it characterized as "a rarely used valuation methodology, discredited by New Jersey Tax Court precedent," instead of its own quantity survey method. Finding no error in the court's acceptance of a trend analysis in this case or its adjustments to value based on the evidence adduced at trial, we affirm the opinion of the Tax Court whose opinion is reported at 29 N.J. Tax 487 (Tax 2016).

8-21-19 MOSHE ROZENBLIT, ET AL. VS. MARCIA V. LYLES, ET AL. (C-000002-17, HUDSON COUNTY AND STATEWIDE) (A-1611-17T1)

This appeal challenges the legality of a section in the collective bargaining agreement (CBA) entered into between the Jersey City Board of Education and the Jersey City Education Association, Inc., which requires the Board to pay the salaries and benefits of two teachers who were selected by the members of the union to serve as "president and his/her designee," during the three-year term of the CBA, and to allow them to devote all of their work-time to the business and affairs of the union.

The Chancery Division, General Equity Part found this contractual arrangement did not violate Article VIII, § 3, ¶ 3 of the New Jersey Constitution, commonly referred to as the "gift clause." The court found the Board was authorized to enter into this arrangement with the union under N.J.S.A. 18A:30-7, which permits the payment of salary in cases of absence not constituting sick leave.

This court adheres to jurisprudential principles established by our Supreme Court and declines to reach the constitutional question raised by plaintiffs in this case because there are sufficient statutory grounds to definitively decide this appeal. In re Plan for the Abolition of the Council on Affordable Hous., 214 N.J. 444, 461 (2013). This court holds that in adopting N.J.S.A. 18A:30-7, the Legislature did not expressly or implicitly intend to authorize boards of education to enter into this type of contractual arrangement. The disbursement of public funds pursuant to this contractual arrangement was an ultra vires act by the Board.

8-19-19 DCPP V. K.G., IN THE MATTER OF M.G. AND J.C.W., MINORS (FG-19-0024-16, SUSSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1556-17T2)

This appeal involves the trial court's denial of defendant's request to have the same counsel represent him in Title Nine abuse and neglect proceedings and a criminal matter arising from the same allegations of sexual abuse of a child. In N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593 (App. Div. 2010), we held that simultaneous representation is permissible where the trial court is able to implement measures sufficient to protect the confidentiality of DCPP records disclosed during the Title Nine proceedings. We directed courts to undertake a case-by-case analysis when deciding requests for simultaneous representation.

The panel held that the trial court failed to undertake the analysis required by N.S. and summarily denied defendant's request for simultaneous representation. In addition, the panel clarified that N.S. applies to both Title Nine dispositional hearings and Title Nine fact finding hearings. Finally, the panel held that the denial of defendant's choice of counsel was a structural error requiring reversal of the abuse and neglect finding reached after a hearing at which defendant was represented by counsel that was not his choice.

8-19-19 STATE OF NEW JERSEY VS. LOUIS V. WILLIAMS (16-11-0834, MERCER COUNTY AND STATEWIDE) (A-2490-17T4)

In this appeal, we address whether a resident of a boarding house has a reasonable expectation of privacy in a common hallway accessible by other residents. The court determined that the Law Division improperly denied defendant's motion to suppress evidence seized from his bedroom after the police observed contraband while standing in a hallway in front of defendant's bedroom door. The court concluded that boarding house residents have a reasonable expectation of privacy in the hallways linking their bedrooms to areas traditionally contained within one living unit, such as a bathroom or kitchen, and the warrantless police entry into the home was not justified by the plain view doctrine because the officers did not have a lawful right to enter.

According to the court, whether the residential structure's front door was locked was not dispositive of whether defendant's reasonable expectation of privacy extended beyond his bedroom door, as the exterior door was equipped with a lock and the evidence showed only that the door was unlocked when the police made their warrantless entry, but not at any other time. In addition, drawing on a distinction recognized by courts in other states between apartment buildings and boarding or rooming houses, the court concluded that a boarding house resident's need to use a shared hallway to access his or her bathroom supports a reasonable expectation of privacy in that hallway notwithstanding an unlocked front door. Accordingly, the court held that the trial court should have granted defendant's motion to suppress because he had a reasonable expectation of privacy in the place searched, and the State did not establish the warrantless search of the home was justified by the plain view doctrine or any other exception to the warrant requirement.

8-15-19 JODI SHAW, ET AL. VS. BRIAN SHAND, ET AL. (L-0408-16, SUSSEX COUNTY AND STATEWIDE) (A-5686-17T1)

In this interlocutory appeal, the court considers whether a licensed home inspector home inspector is a "learned professional" and therefore excluded from liability under Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -210.

Considering the CFA's remedial purpose and applying well-established canons of statutory construction, the court concludes that the judicially created learned professional exception must be narrowly construed to exempt liability only as to those professionals who have historically been recognized as "learned" based on the requirement of extensive learning or erudition. To the extent this court's prior decisions, including Plemmons v. Blue Chip Insurance Services, Inc., 387 N.J. Super. 551 (App. Div. 2006), have applied the learned professional exception to "semi-professionals" who are regulated by a separate regulatory scheme, we are constrained to depart from that reasoning as inconsistent with the Supreme Court's decision in Lemelledo v. Beneficial Management Corp. of America, 150 N.J. 255 (1997). As the Court explicitly held in Lemelledo, the existence of a separate regulatory scheme will "overcome the presumption that the CFA applies to a covered activity" only when "a direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes." 150 N.J. at 270. The court's decision today comports with the amicus curiae Attorney General's persuasive interpretation of the CFA and addresses the Attorney General's policy concern that an expansive interpretation of the learned professional exception unduly curtails the authority of the Attorney General and the Division of Consumer Affairs to protect New Jersey consumers and limits the redress available to private litigants.

Accordingly, because home inspectors are not historically recognized learned professionals and because no direct and unavoidable conflict exists between the CFA and the regulations governing home inspectors, the court concludes that the CFA applies to the activities of licensed home inspectors and reverses the trial court's summary judgment dismissal of the CFA claim against defendants.

Judge Sabatino filed a concurring opinion.

8-12-19 KEVIN HARVARD V. STATE OF NEW JERSEY JUDICIARY, ATLANTIC-CAPE MAY VICINAGE (A-5091-15T1)

This case stemmed from the termination of the appointment of a Special Civil Part Officer (SCPO) following the discovery of numerous violations of AOC directives. The SCPO filed a Law Division complaint against the State, the Judiciary, and the Atlantic/Cape May vicinage alleging violations of CEPA and related claims. We affirm the summary judgment dismissal of plaintiffs' claims since plaintiff was not a Vicinage employee for CEPA purposes and plaintiff failed to establish a whistle-blower claim under CEPA. This opinion was originally issued in January 2018 as an unpublished opinion. We now publish this opinion, following a request from the Committee of the Special Civil Part Supervising Judges, which submitted "that the publication of this opinion will provide important precedent to our records, practitioners and the public with regard to [SCPOs] and their status as independent contractors."

8-12-19 MONMOUTH MEDICAL CENTER VS. STATE FARM INDEMNITY COMPANY SAINT BARNABAS MEDICAL CENTER VS. STATE FARM INDEMNITY COMPANY (L-2482-17 AND L-0126-18, MORRIS COUNTY AND STATEWIDE) (CONSOLIDATED) (A-3004-17T1/A-4208-17T1)

In these back-to-back appeals, State Farm Indemnity Company (State Farm) appeals from two trial court orders that vacated awards entered by dispute resolution professionals (DRP) pursuant to the Alternative Procedure for Dispute Resolution Act (APDRA), N.J.S.A. 2A:23A-1 to -30, in connection with payment for out-patient hospital services provided to two claimants involved in separate automobile accidents. In each appeal, the trial court entered a modified judgment against State Farm, finding that the DRP committed prejudicial error. The court determined that the trial court properly exercised the authority granted to it under the APDRA, adhered to the statutory grounds in vacating the DRPs' awards, and provided rational explanations of how the respective DRPs committed prejudicial error within the meaning of N.J.S.A. 2A:23A-13(c)(5). Because there was no principled reason for the exercise of the court's supervisory jurisdiction, or any unusual circumstances where public policy required the court's intervention, the court adhered to the strictures of N.J.S.A.2A:23A-18(b), barring further appeals or reviews of trial court judgments, and dismissed the appeals.

8-9-19 SUSAN LUCAS VS. 1 ON 1 TITLE AGENCY, INC., ET AL. SUSAN LUCAS VS. NEW JERSEY DEPARTMENT OF TRANSPORTATION, ET AL. (L-3144-13 AND L-0701-14, OCEAN COUNTY AND STATEWIDE) (A-2217-16T2)

Appellant is a law firm who successfully represented plaintiff in the prosecution of a legal malpractice action. Appellant sought counsel fees from plaintiff that exceeded the amount of consequential damages proximately caused by the attorney/tortfeasor. Saffer v. Willoughby, 143 N.J. 256, 272 (1996). When plaintiff and appellant were unable to agree, the trial judge who presided over the legal malpractice action sua sponte decided to adjudicate the fee dispute over appellant's objection. This court reverses and holds the trial judge did not have subject matter jurisdiction to adjudicate this counsel fee dispute. Appellant was not a party in the case, had not filed a collection action against plaintiff, nor sought relief under N.J.S.A. 2A:13-5, commonly known as the Attorney's Lien Act.

8-8-19 NOEMI ESCOBAR VS. DAVID A. MAZIE, ET AL. (L-8329-17, ESSEX COUNTY AND STATEWIDE) (A-2509-18T1)

The court reverses an order entered under RPC 3.7 barring a lawyer and every lawyer in his firm, save one, from representing themselves at deposition and trial in defense of a malpractice action brought against them by a former client. The court follows established federal authority in this circuit holding RPC 3.7 is a rule addressed only to a lawyer acting as an advocate at trial. Thus there is no ethical prohibition against a lawyer acting as an advocate in a deposition in a case in which the lawyer is likely to be a necessary witness at trial.

The court further holds that RPC 3.7 does not apply to a lawyer who is a party in the case. As lawyers have the same rights as other individuals appearing in our courts, they may appear in their own behalf at trial even if likely to be a necessary witness. Law firms, likewise, are to be treated as other entities, and thus must appear through counsel to the same extent. RPC 3.7 is fully applicable to lawyers appearing on the firm's behalf, even if the lawyer is employed by the firm. Imputed disqualification is limited as set forth in RPC 3.7.

7-31-19 STATE OF NEW JERSEY VS. R.G. (17-04-0189, SOMERSET COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3090-18T3)

The court affirms an order of the trial court that denied the State's request to medicate defendant involuntarily with antipsychotic medication to restore him to competency to stand trial. The court agrees with the trial court that the State did not satisfy the test under Sell v. United States, 539 U.S. 166 (2003), because the first factor is determined by consideration of defendant's probable sentence not simply the maximum sentence exposure for the offense charged. The trial court also must consider the potential effect of the medication on defendant's right to a fair trial when applying Sell. Because the Sell test was not satisfied, we have no occasion to determine whether our State Constitution would afford a defendant greater protection of individual liberty and privacy rights.

7-26-19 ADP, LLC VS. ERIK KUSINS ADP, LLC VS. RYAN HOPPER ADP, LLC VS. ANTHONY M. KARAMITAS ADP, LLC VS. NICK LENOBLE ADP, LLC VS. MICHAEL DEMARCO ADP, LLC VS. DANIEL HOBAICA (C-000264, C-000023-16, C-000143-16, C-000117-16, C-000120-16, AND C-000118-16, ESSEX CO (A-4664-16T1/A-0692-17T3/A-0693-17T3/A-2990-17T4/A-4407-17T4/A-4527-17T4)

In these consolidated appeals, the court considers the enforceability of the restrictive covenant agreements (RCAs) executed by the six defendants during their employment with plaintiff ADP, LLC. Each defendant was a top-performing sales representative. To award and incentivize their success, ADP invited defendants to participate in a stock award incentive program conditioned on their acceptance and execution of an RCA. The RCA included non-solicitation and non-compete provisions that restricted an employee from soliciting ADP's clients and competing with ADP upon leaving the company. The defendants left ADP at varying times and each accepted employment with the same direct competitor.

The court concluded that ADP demonstrated a legitimate and protectable interest in its customer relationships sufficient to justify enforcing the RCAs. However, the court also found the RCAs were overly broad and imposed an undue hardship on defendants. Therefore, the court blue-penciled the non-solicitation and non-compete provisions.

The court held that ADP may only prohibit its employees, upon separation from the company, from soliciting any of ADP's actual clients with whom the former employee was directly involved or who the employee knew was ADP's client.

As to the solicitation of prospective clients, the court found it unreasonable and onerous to restrict defendants from soliciting clients unknown to them while at ADP. Therefore, when working for a competitor, a former employee is only prohibited from soliciting a prospective ADP client if the employee gained knowledge of the potential client while at ADP and directly, or indirectly, solicits that client after leaving.

In considering the non-compete provision, the court determined it was reasonable for ADP to restrict its former employees, for a reasonable time, from providing services to a competing business in the same geographical territory in which the employee operated while at ADP.

The court reverses the summary judgment orders in favor of each defendant. Because each defendant breached the RCAs to some extent, the court remands the cases to the trial court to determine the appropriate remedy for the breach and to consider ADP's applications for counsel fees.

7-24-19 CENTRAL 25, LLC VS. ZONING BOARD OF THE CITY OF UNION CITY (L-1246-16, HUDSON COUNTY AND STATEWIDE) (A-0263-17T1)

The Union City Zoning Board of Adjustment denied plaintiff's application for preliminary and final site plan approval, which required a number of bulk variances and a use variance. In an action in lieu of prerogative writs, the Law Division rejected plaintiff's claim that the two members of the Board should have recused themselves due to a conflict of interest. Applying the Supreme Court's recent decision in Piscitelli v. City of Garfield Zoning Bd. of Adjustment, 237 N.J. 333 (2019), this court reverses and remands the matter for the Law Division to conduct an evidentiary hearing to determine whether the two Board members should have recused themselves.

7-22-19 RICHARD MARCONI VS. UNITED AIRLINES (DIVISION OF WORKERS' COMPENSATION) (A-0110-18T4)

Petitioner, a New Jersey resident, sought benefits under the Workers' Compensation Act (WCA), N.J.S.A. 34:15-1 to -128, alleging injuries both as the result of a specific incident, and occupational injuries "while performing repetitive duties" as an aircraft technician while employed by United Airlines at the airport in Philadelphia. The judge of compensation dismissed both petitions for lack of jurisdiction.

Relying on dicta in Bunk v. Port Authority of New York & New Jersey, 144 N.J. 176, 180-81 (1996), petitioner claimed residency alone was sufficient to confer jurisdiction. Alternatively, he argued that United's business was "localized" in New Jersey, and combined with his residency, New Jersey should exercise jurisdiction over his petitions.

The court affirmed the dismissal for lack of jurisdiction, concluding the dicta in Bunk was not controlling, and residency alone is insufficient to confer jurisdiction. The court also concluded that although United maintained a "localized" presence in New Jersey, petitioner lacked any employment relationship to that presence.

7-22-19 STATE OF NEW JERSEY VS. PAUL TIMMENDEQUAS (15-11-1377, MIDDLESEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1243-16T2)

The State appeals the dismissal of two counts in the indictment that charged defendant with third-degree failure to register upon relocation as required by Megan's Law, N.J.S.A. 2C:7-2(a) and (d). When defendant was sentenced in 1999, the penalty imposed was a fourth-degree crime. The Law Division judge held the increased penalty violated the Ex Post Facto Clauses of the federal and state constitutions and dismissed those counts without prejudice to the State re-presenting the matter before a grand jury.

The court affirmed, but modified the order under review to permit amendment of the indictment to charge fourth-degree crimes.

7-19-19 STATE OF NEW JERSEY VS. MARK JACKSON STATE OF NEW JERSEY VS. JAMIE MONROE, ET AL. (18-04-0555 AND 18-05-0834, MIDDLESEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-0022-18T2/A-2586-18T2)

On leave granted, the Middlesex County Prosecutor's Office appealed from the suppression of inmate telephone calls recorded by the Essex County Correctional Facility and the Middlesex County Department of Adult Corrections. The court held that the production of the recordings by the jails pursuant to the authority of grand jury subpoenas served upon them by the Prosecutor's Office did not violate an inmate's reasonable expectation of privacy, as they were advised at the beginning of every phone call that the conversations would be monitored and recorded. The court further held that the investigation and process did not violate the New Jersey Wiretapping and Electronic Surveillance Control Act (the Act), N.J.S.A. 2A:156A-1 to -37, Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, and Article I Paragraph 7 of the New Jersey Constitution. The Act and Title III were not implicated by the sharing of the lawfully obtained information for lawful purposes by law enforcement agencies.

7-19-19 LILLIAN COLLAS VS. RARITAN RIVER GARAGE, INC. (DIVISION OF WORKERS' COMPENSATION) (A-3103-17T4)

After awarding dependent benefits under N.J.S.A. 34:15-13 to the surviving spouse of a worker who succumbed to an occupational disease, the judge of compensation awarded counsel fees based on the spouse's expected lifetime – in accordance with a 1995 amendment to N.J.S.A. 34:15-13(j) which provided that compensation shall be paid to a surviving spouse "during the entire period of survivorship" – as determined from the table of mortality and life expectancy printed as Appendix I to the New Jersey Rules of Court.

The court rejected the employer's argument on appeal that the proper calculation should have been based on the long-standing basis for counsel fee awards: the 450-week period of payments provided in N.J.S.A. 34:15-12(b) and portions of N.J.S.A. 34:15-13. N.J.S.A. 34:15-64 authorizes a judge of compensation to allow a prevailing party "a reasonable attorney fee, not exceeding [twenty percent] of the judgment." Although the court did not hold the use of the 450-week method traditionally used to calculate counsel fees was improper, it concluded the use of the table to calculate counsel fees was reasonable because it is designed to actuarially calculate the amount of time over which a surviving spouse can expect to receive benefits; in other words, it is based on the judgment amount calculated using the spouse's projected lifespan.

7-18-19 ALCATEL-LUCENT USA INC. VS. TOWNSHIP OF BERKELEY HEIGHTS (TAX COURT OF NEW JERSEY) (A-0743-16T1)

Alcatel-Lucent USA Inc. (Alcatel), is the owner of real property in the Township of Berkeley Heights on which is located its North American headquarters.1 There are approximately 1.5 million square feet of improvements on the 153.4 acre Berkeley Heights property – of which Alcatel contends 53 acres are woodlands.

N.J.S.A. 54:4-34 – commonly referred to as Chapter 91 (you have to read the decision to find out why) – requires every real property owner to provide "a full and true account of his [or her] name and real property and the income therefrom, in the case of income-producing property" to the municipal tax assessor upon the assessor's written request. The statute also precludes the owner from appealing the assessor's valuation and assessment if the owner fails or refuses to respond to the Chapter 91 request.

After Alcatel failed to respond to the tax assessor's request for information pertaining to its Berkeley Heights property, LTI filed a farmland assessment application for the woodland portion of the property. The assessor denied the application concluding agriculture was not the dominant use of the property; Alcatel filed a complaint with the Tax Court challenging the denial. The Tax Court dismissed the complaint holding it was precluded under Chapter 91 because Alcatel failed to respond to the assessor's Chapter 91 request.

The court rejected Alcatel's arguments that the Tax Court erred in: extending the application of the Chapter 91 preclusion penalty to its farmland assessment appeal; applying the Chapter 91 preclusion penalty to the woodland property because it is not income producing; and formulating a new rule that misinterprets our prior holding and undermines the legislative purpose of Chapter 91 and the Act. It also argued that technical deficiencies in the Township's Chapter 91 request bar preclusion of its claim.

The property was conveyed by Lucent Technologies, Inc. (Lucent) to LTI NJ Finance LLC (LTI), which simultaneously entered into a twenty-year agreement with Lucent, the sole member of LTI, pursuant to which Lucent was considered the "beneficial owner." Lucent merged with Alcatel, a French company, in 2006, to form Alcatel-Lucent USA Inc. The agreement between LTI and Lucent was terminated in 2013 and LTI was merged into Alcatel. The court was informed by Alcatel's merits brief that it is now known as "Nokia".

The court perceived no reason why Chapter 91's preclusion should not apply to Alcatel's farmland assessment complaint and affirmed Judge Joshua D.Novin's dismissal. The court recognized that the comprehensive

statutory scheme requires tax assessors to assess every property at its full and fair value each year. Inasmuch as the Chapter 91 data is essential to the valuation of a split-use property, and, in turn, to the fulfillment of the assessor's statutory duties for the entire municipality, the court agreed with Judge Novin that the statute's preclusion provision should be applied to owners who fail to respond to the assessor's request.

7-17-19 ANASIA MAISON VS. NJ TRANSIT CORP., ET AL. (L-3535-14, ESSEX COUNTY AND STATEWIDE) (A-3737-17T2)

A jury awarded plaintiff $1.8 million in damages against New Jersey Transit and its bus driver for injuries she sustained when an unidentified bus passenger struck plaintiff in the head with a thrown glass bottle. We affirm the trial court's determination to hold defendants to the common carrier standard of negligence but conclude the trial court misinterpreted applicable statutes when it denied defendants' request to include the bottle thrower on the verdict sheet.

We hold that joint tortfeasors are not required to apportion liability in cases involving a public entity. Instead, a jury should be permitted to apportion liability when a public employee or entity is determined to be a tortfeasor in a cause of action with one or more other tortfeasors.

We therefore affirm the liability verdict and award of damages but vacate the final judgment and remand for another jury to address the issue of allocation of fault between the bottle thrower and defendants.

7-12-19 IN THE MATTER OF CHANGES IN THE STATE CLASSIFICATION PLAN, COMMUNICATIONS OPERATOR, DEPARTMENT OF CORRECTIONS (NEW JERSEY CIVIL SERVICE COMMISSION) (A-5150-16T1)

The court held that the Chairperson of the Civil Service Commission was authorized to approve the creation of a new job title and did not act arbitrarily in approving the title at issue in this case.

this appeal, plaintiff's claims were similar to those considered by the New Jersey Supreme Court in Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017), as they related to defendant's sale of beverages from menus that did not include prices for the items sold. The court's majority determined that the Law Division improperly denied plaintiff's motion for class certification under Rule 4:32-1(b)(2). The majority concluded that the concerns raised by the Dugan Court about class certification under Rule 4:32-1(b)(3) of claims for damages under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -210, and the Truth in Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18, did not apply to plaintiff's class action for injunctive relief under (b)(2) in this case.

According to the majority neither the Dugan's Court's concern about whether plaintiff could make a showing that members of the putative class sustained an ascertainable loss under the CFA, nor its trepidation that certifying a (b)(3) class exposed the Dugan defendant to a disproportional amount of civil penalties under the TCCWNA were considerations applicable to plaintiff's motion in this case. Here, the majority held that in determining whether cohesiveness existed among class members, the trial court should have considered whether the remedy sought would be applicable to all members or to none of them.

The dissenting opinion concludes that the trial court correctly denied the motion for class certification under Rule 4:32-1(b)(2). According to the dissent, certification of the class for the CFA claims was not warranted because plaintiff would be required to establish that all members of the class sustained a bona fide ascertainable loss, which is an essential element of a claim under the CFA. Such claims are not cohesive since they depend on the individual's experience in purchasing beverages at defendant's restaurants. The claims under the TCCWNA also lack cohesion because relief could only be awarded to members of the class are "aggrieved consumers," and such claims also are dependent upon the class members' personal experiences.

7-11-19 CHARLES L. BOVE VS. AKPHARMA INC., ET AL. (L-0982-15, ATLANTIC COUNTY AND STATEWIDE) (A-2342-17T3)

In this appeal, the court considered whether an employee could seek damages from a former employer in a civil suit or was limited to recovery under the Workers Compensation Act (WCA) for injuries allegedly sustained from use of a nasal spray product developed by the employer. The court also examined whether frivolous litigation sanctions could be imposed, absent a finding the employee's attorneys acted in bad faith, particularly when the prevailing party's "safe harbor" letter failed to alert the employee's attorneys about the immunity.bar under the WCA and the prevailing party's initial motion for summary judgment was denied on all but one cause of action. The court affirmed the grant of summary judgment in the employer's favor, due to the employee's inability to demonstrate his employer had committed an "intentional wrong" under the two-prong test outlined in Millison v. E.I. du Pont de Nemours & Co.,101 N.J. 161, 178-79 (1985) and reversed the frivolous litigation sanction

7-10-19 FRANK HOLTHAM, JR. VS. KATHERINE LUCAS (FM-02-1695-14, BERGEN COUNTY AND STATEWIDE) (A-3073-17T1)

In this post-judgment matrimonial case, the trial court imposed a penalty on plaintiff, in accord with his matrimonial settlement agreement (MSA), for violating one of the MSA's terms. On appeal from the award, plaintiff invoked the contract law principle that bars, as an unenforceable penalty, liquidated damages that unreasonably exceed normally compensable contract damages. The court concludes that the contract rule against penalties does not apply with equal force to MSAs. The court emphasizes that family judges retain the authority to modify an MSA's penalty provision to assure fairness and equity. Since no modification was warranted under the facts of the case, the court affirms the penalty award.

7-8-19 F.K. VS. INTEGRITY HOUSE, INC., ET AL. (L-2239-16, ESSEX COUNTY AND STATEWIDE) (A-1862-18T1)

Plaintiff F.K. appeals the trial court's December 11, 2018 order granting summary judgment to defendant Integrity House and dismissing her complaint with prejudice. The trial court determined that defendant was entitled to immunity from plaintiff's negligence action under New Jersey's Charitable Immunity Act ("the Act"), N.J.S.A. 2A:53A-7 to -11. On appeal, plaintiff contends that the amount of private contributions received by defendant, roughly $250,000 or 1.26% of annual revenue, is too insignificant to entitle defendant to charitable immunity.

"Charitable immunity is an affirmative defense, as to which, like all affirmative defenses, defendants bear the burden of persuasion." Abdallah v. Occupational Ctr. of Hudson Cty., Inc., 351 N.J. Super. 280, 288 (App. Div. 2002). The court concludes that defendant did not present sufficient evidence to support its entitlement to the affirmative defense of charitable immunity. The summary judgment record does not allow for a conclusive determination as to the source and use of Integrity House's funding. Therefore, the court is unable to determine whether Integrity House receives substantial funding from private contributions or relieves the government from a burden it would otherwise have to perform, as is required to be entitled to charitable immunity.

In addition, although a determination of the specific percentage of funding Integrity House receives from private contributions is not necessary for the court's analysis, the court notes that no published case has granted charitable immunity to a non-religious, non-educational entity with such a small portion of funding from private contributions.

Accordingly, the court reverses the trial court's grant of summary judgment.

6-28-19 STATE OF NEW JERSEY VS. SUI KAM TUNG (13-06-0793, BERGEN COUNTY AND STATEWIDE) (A-3692-15T1)

The court reverses defendant's conviction after trial for murder of his estranged wife's lover. The court determines that testimony and an unabridged audiotape of defendant's invocation of the right to counsel, his refusal to consent to a search of his computer and car, and the interrogating officer's opinion that defendant was lying cumulatively constitute plain error. The court relies on federal and out-of-state case law to decide that a refusal of consent to search is inadmissible in these circumstances. Given the paucity of direct evidence of defendant's guilt, this improperly admitted evidence undermines the integrity of the verdict.

6-27-19 DAVID F. CALABOTTA VS. PHIBRO ANIMAL HEALTH CORPORATION, ET AL. (L-1979-17, BERGEN COUNTY AND STATEWIDE) (A-1576-17T3)

This lawsuit is brought by an Illinois resident against his New Jersey-based former employer. Plaintiff alleges the company wrongfully denied him a promotion to a position in New Jersey and thereafter wrongfully terminated him from his job with its subsidiary in Illinois.

Plaintiff claims the company engaged in "associational" discrimination against him, in violation of the New Jersey Law Against Discrimination ("NJLAD"), based on the fact that his wife was then terminally ill with cancer. The company maintains it treated plaintiff fairly, and that it justifiably discharged him for engaging in inappropriate conduct at a trade show.

The trial court concluded that Illinois law, rather than the NJLAD, must apply to plaintiff's claims of discrimination because he lived in Illinois and worked for defendants' subsidiary in Illinois. Given that Illinois law has yet to recognize a cause of action for associational discrimination, the court granted defendants' motion to dismiss plaintiff's claims with prejudice.

On appeal in this case of first impression, this court holds that the NJLAD, notwithstanding the solitary reference to "inhabitants" in its preamble, can extend in appropriate circumstances to plaintiffs who reside or work outside of this state. However, whether the NJLAD applies to a particular nonresident plaintiff's claims turns upon a weighing of the multiple choice-of-law factors set forth in the Restatement (Second) of Conflicts of Laws (Am. Law Inst. 1971), as adopted and construed by the New Jersey Supreme Court.

The court concludes that New Jersey law (specifically the NJLAD's ban against associational discrimination) applies to defendants' alleged failure to give plaintiff fair consideration for a promotion to a position in New Jersey. The Second Restatement factors strongly weigh in favor of applying New Jersey law, not Illinois law, to this failure-to-promote claim. This court therefore reverses the trial court’s dismissal of that discrete claim and reinstate it.

As for plaintiff's wrongful discharge claim, this court vacates its dismissal and remands the choice-of-law issue pertaining to that claim to the trial court, to enable the further development of critical facts and analysis bearing on the Second Restatement factors.

6-26-19 JED GOLDFARB VS. DAVID SOLIMINE (L-3236-14, ESSEX COUNTY AND STATEWIDE) (A-3740-16T2)

Plaintiff appeals from the trial court's denial of his recusal motion. Before trial of this commercial dispute, plaintiff learned that the judge secured the trial assignment in response to an ex parte communication from a former law clerk, who was an attorney with the law firm for defendant. The attorney asked the judge if she was available to preside, and identified the partner who would try the case. The judge said the partner "likes appearing before me." Plaintiff unsuccessfully argued this amounted to "judge shopping."

On appeal, the court concludes that an ex parte communication to have a case assigned to a particular judge is not a mere scheduling matter. The judge's affirmative response to the communication in this case created an appearance of impropriety. As for remedy, the court holds that less than a complete retrial can restore public confidence in the proceedings' integrity and impartiality. The court affirms the jury's verdict on liability. It decides de novo, or as a matter of original jurisdiction, the remaining evidentiary and legal issues on appeal, and remands for a new trial on damages before a new judge.

6-25-19 CATALINA MARKETING CORPORATION VS. LOUIS HUDYMAN (C-000129-18, MORRIS COUNTY AND STATEWIDE) (A-3044-18T4)

Defendant was sued by his former employer, a foreign corporation, and moved to quash two sets of subpoenas duces tecum and ad testificandum served on defendant's current employer, an out-of-state corporation, in New York and California. Defendant argued the discovery sought was not relevant, Rule 4:10-2(a), or otherwise burdensome or sought for annoyance or embarrassment. R. 4:10-3. Defendant alternatively sought a protective order. Plaintiff opposed the motion, arguing the court lacked jurisdiction to rule on the motion to quash.

The trial judge denied the motions without prejudice, reasoning she lacked jurisdiction under the Uniform Interstate Depositions and Discovery Act (UIDDA), as adopted in New Jersey by Rule 4:11-5(c). However, while defendant's motion for leave to appeal was pending, the judge supplemented her statement of reasons, clarifying that she did not lack jurisdiction to reach the merits of defendant's motion, but rather, that she lacked jurisdiction to compel out-of-state witnesses to appear for the depositions. See R. 4:11-5 ("A deposition for use in an action in this state . . . may be taken outside this state .. . pursuant to a subpoena issued to the person to be deposed in accordance with Rule 4:14-7 and in accordance with the procedures authorized by the foreign state . . . .").

The court affirmed the orders as modified, holding that a New Jersey court always has jurisdiction to decide the merits of a discovery dispute between parties to the litigation, and that the UIDDA and the express language of Rule 4:11-5 do not compel a contrary result.

6-25-19 RICHARD CAPPARELLI VS. MATT LOPATIN (C-000153-17, MIDDLESEX COUNTY AND STATEWIDE) (A-1948-17T4)

Business partners entered into two separate settlement agreements to resolve disputes arising from the dissolution of their jointly-owned companies. The first agreement provided for binding arbitration of all disputes before a three-person arbitration panel, one of whom had served as the parties' corporate counsel and was designated as the neutral arbitrator on the three-person panel. In the event he withdrew or was dismissed from the panel by one of the parties, the agreement specified a mechanism for the selection of his replacement.

The second agreement provided for the resolution of disputes pertaining to the collection of accounts receivable from third-party debtors only, and designated corporate counsel as the sole final decision maker. Unlike the first agreement entered two years earlier, the second agreement made no mention of arbitration and provided no mechanism for the replacement of corporate counsel in the event he became unavailable.

When corporate counsel resigned his role as final decision maker under the second agreement, and the parties were unable to agree on a replacement, plaintiff filed an order to show cause and verified complaint, seeking to compel the appointment of a replacement. The court affirmed the Chancery Division's decision that, based upon the doctrines of impossibility and frustration of purpose, corporate counsel's unavailability rendered the second agreement void. Further, because there was no mention of arbitration in the second agreement, it was not an arbitration agreement governed by the New Jersey Uniform Arbitration Act, N.J.S.A. 2A:23B-1 to -32.

6-25-19 DCPP VS. B.H., H.S., AND T.S., IN THE MATTER OF M.S. (FN-13-0236-17, MONMOUTH COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4179-17T2)

The court reversed the abuse or neglect finding under Title 9 against defendant, who was the boyfriend of the child's biological mother. During the eighteen months that defendant dated the child's mother, he provided no financial support for the child or the mother; never lived in the same house as the child and the mother; and the child never described defendant using any parental terms. Based on the unrefuted testimony, defendant had no ongoing responsibility or obligation to provide regular care or supervision for the child. The court held that a person who assumes brief or temporary supervision or care of a child, such as a one-time request to babysit or drive a child to a designated location at the request of a biological parent, does not impose a general and continuing obligation between the adult and the child to trigger the requisite duty of care to charge abuse or neglect under Title 9.

6-24-19 TRACEY L. VIZZONI, ETC. VS. B.M.D., ET AL. (L-0575-15, SOMERSET COUNTY AND STATEWIDE) (A-1255-18T3)

In this case, the court affirms the entry of judgment for the defendant, a psychiatrist, and dismissal of the personal injury case against him. Plaintiff is the estate of a woman killed by the psychiatrist's patient when the patient hit the woman with her car while the woman was riding a bicycle on a narrow country road. Plaintiff sued the psychiatrist after learning the driver was his patient and he had prescribed numerous medications that had the capacity to impair driving.

Plaintiff asserted the psychiatrist's negligent prescription of medications without a warning not to drive was the proximate cause of the fatal crash. Plaintiff argued the psychiatrist had a duty to warn for the benefit of third parties. The trial court's order was affirmed because the court concluded the record did not establish the patient was impaired by the medications prescribed by the psychiatrist when she caused the fatal injury.

6-21-19 STATE OF NEW JERSEY VS. JUAN E. CRUZ-PENA (14-11-0932, PASSAIC COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3775-16T3)

The jury in this case found defendant guilty of first-degree kidnapping, N.J.S.A. 2C:13-1(b), when he subjected his victim to four to five hours of uninterrupted sexual abuse. On appeal, defendant contended that the kidnapping charge should not have been presented to the jury because, notwithstanding the extended duration of the criminal attack, the victim's confinement was incidental to, and not independent from, the underlying sex crime with which defendant was separately charged.

Authoritative precedent interpreting the kidnapping offense defined in the New Jersey Code of Criminal Justice makes clear that not every confinement is a kidnapping. State v. LaFrance, 117 N.J. 583, 586 (1990). N.J.S.A. 2C:13-1(b) has been interpreted to require the State to prove that the victim's restraint was not merely incidental to the underlying substantive crime. Id. at 591. A key question is whether the circumstances of the confinement created a significant danger to the victim independent of the risk of harm posed by the underlying offense. Id. at 587.

Applying those legal principles to the particular facts of this case, this court concluded that the force and threats defendant used to physically restrain the victim were the same force and threats he used to commit the underlying sex crime. A close review of the proofs presented by the State at trial show there was never a point during the prolonged criminal episode when the victim was being restrained but was not being sexually abused. In other words, the acts constituting the alleged kidnapping were coextensive and coterminous with the acts constituting the alleged sexual assault. This court also concluded that the risk of harm the victim faced throughout her hours-long ordeal, while substantial, was not independent of the danger posed to her by defendant's continuous sexual attack.

Accordingly, the State failed to present sufficient evidence to submit the kidnapping count to the jury, and defendant was therefore entitled to a directed verdict of acquittal on that charge. This court's ruling with respect to the kidnapping charge does not affect defendant's convictions for aggravated criminal sexual contact and aggravated assault, and does not affect his sentence to parole supervision for life as a convicted sex offender.

6-19-19 ENDO SURGI CENTER A/S/O BERNADETTE HARPER V.NJM INSURANCE GROUP (A-1934-17T3)

Defendant New Jersey Manufacturers appeals an order requiring it to reimburse an ambulatory surgical center (ASC) for a Current Procedural Terminology (CPT) code. The Department of Banking and Insurance's medical fee schedule listed the designation "N-1" for this CPT code, meaning it could be performed at an ASC but was "not separately reimbursable because the service [was] included in another procedure." In accord with N.J. Manufacturers Ins. Co. v. Specialty Surgical Center, 458 N.J. Super. 63 (App. Div. 2019), the court holds that the insurer was not required to reimburse the ASC for this CPT code, even though Medicare would permit reimbursement, because the Department's fee schedule did not list any payment amount for the code.

6-19-19 ELMER BRANCH, ETC. VS. CREAM-O-LAND DAIRY (L-4744-16, HUDSON COUNTY AND STATEWIDE) (A-1313-17T1)

Plaintiff Elmer Branch and the putative class of similarly situated truck drivers appeal the trial court's grant of summary judgment in favor of defendant Cream-O-Land Dairy and dismissal of their class-action complaint alleging a failure to pay overtime wages in violation of the New Jersey Wage and Hour Law ("WHL"), N.J.S.A. 34:11-56a to -56a38. Under the WHL's good-faith defense, an employer is entitled to a complete bar on liability for violations of the WHL if it acted "in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation by the Commissioner of the [Department of Labor and Workforce Development] or the Director of the Wage and Hour Bureau, or any administrative practice or enforcement policy of such department or bureau with respect to the class of employers to which he belonged." N.J.S.A. 34:11-56a25.2. The trial court determined that defendant was entitled to the good-faith defense based on its reliance on three determinations made by the New Jersey Department of Labor and Workforce Development ("DOL") officials in response to complaints brought by individual employees.

Considering the legislative purpose and the plain language of the WHL, the court holds, in this matter of first impression, that such discrete determinations by DOL officials – which do not rise to a degree of formality so as to constitute broadly applicable guidance by the DOL and are in any event subject to further administrative appeal – do not constitute an "administrative practice or enforcement policy" and are thus insufficient to invoke the good-faith defense. N.J.S.A. 34:11-56a25.2. Accordingly, the court reverses the trial court's grant of summary judgment and remands for further proceedings..

6-19-19 BRENDA CUMMINGS v.RAHWAY BOARD OF EDUCATION, RAHWAY MIDDLE SCHOOL, RAHWAY 7TH AND 8TH GRADE AND ACADEMY GARRY MARTIN (A-0271-17T2)

Plaintiff, a middle school student, was injured while playing in a student-teacher fundraising basketball game. She appeals from an order granting summary judgment and dismissing her claims against defendants, who were her school, the school board, and a teacher. The court affirms because the undisputed facts establish that defendants did not breach a duty of care to plaintiff.

School officials have a duty to supervise the children in their care. Here, there was no showing of a breach of that duty because the basketball game was officiated by a referee and additional supervision was provided by approximately five teachers who did not participate in the game. Moreover, there were no facts showing that the game was being conducted in a reckless or out-of-control manner.

"[T]he duty of care applicable to participants in informal recreational sports is to avoid the infliction of injury caused by reckless or intentional conduct." Schick v. Ferolito, 167 N.J. 7, 12 (2001) (alteration in original) (quoting Crawn v. Campo, 136 N.J. 494, 497 (1994)). Here, there was no showing that the teacher-player was intentionally trying to injure plaintiff or acting recklessly.

6-18-19 FRATERNAL ORDER OF POLICE, NEWARK LODGE NO. 12 VS. CITY OF NEWARK (C-000177-16, ESSEX COUNTY AND STATEWIDE) (A-3298-17T3)

With two limited exceptions, this court upheld the validity of an Ordinance enacted by the City of Newark, which created a civilian complaint review board (CCRB) in response to an alarming "pattern or practice of constitutional violations" by the Newark Police Department. First, the Ordinance improperly required the Chief of Police to accept the CCRB's findings of fact, absent clear error; and second, it allowed for disclosure of complainant and police officer identities. The practical impact of upholding the Ordinance means that the CCRB can function as intended – providing a vital oversight role – by investigating alleged police misconduct, conducting hearings, developing a disciplinary matrix, making recommendations, and issuing subpoenas.

6-17-19 CERTAIN UNDERWRITERS AT LLOYDS SUBSCRIBING TO POLICY PLH-0013397, ETC. VS. PUBLIC SERVICE ELECTRIC AND GAS (L-2040-14, L-2041-14, L-2402-14, L-2405-14, L-1918-15 AND L-0752-16, BURLINGTON COUNTY AND STATEWIDE) (A-4128-17T4)

In this appeal, the court examined the scope of available damages when a defendant's negligence has caused a homeowner to be displaced; that is, the court considered whether a homeowner's damages are generally limited to the cost of alternate shelter or whether the homeowner may also seek additional damages based on a broader concept of inconvenience. In adhering to the legal concepts expressed in Camaraza v. Bellavia Buick Corp., 216 N.J. Super. 263, 265 (App. Div. 1987), where the court held a motor vehicle owner's damages were not necessarily limited to the rental cost of a replacement, and in expanding Camaraza to claims other than those involving the loss of use of a motor vehicle, the court reversed the summary judgment entered in favor of the defense and remand for trial.

6-17-19 NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, ET AL. VS. L.O. (DIVISION OF CHILD PROTECTION AND PERMANENCY) (RECORD IMPOUNDED) (A-0007-15T2)

In this appeal, the court considered whether indigent parents and guardians – once notified that an investigation has substantiated them for child abuse or neglect – are entitled to the appointment of counsel when exercising their right to an administrative hearing to challenge that determination. The court held that, because the potential consequences of such administrative proceedings – including permanent listing in the Child Abuse Registry – are of significant magnitude, counsel must be made available for indigent parents and guardians both at the administrative level and in any appeal of right to this court, just as that right exists in Title Nine actions commenced in Superior Court. The court also determined that until such time as the Legislature addresses this constitutional right, the Madden list may be utilized for the appointment of counsel.

6-12-19 STATE OF NEW JERSEY VS. KENNETH D. THOMAS (17-06-0548, CUMBERLAND COUNTY AND STATEWIDE) (A-4540-17T4)

The State filed an appeal from a judgment of conviction imposing a probationary sentence on defendant for third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2), involving domestic violence, although aggravating factor fifteen, N.J.S.A. 2C:44-1(a)(15), was found by the court and thus a presumption of incarceration applied, N.J.S.A. 2C:44-1(d). Because the State has no authority to appeal from a sentence for a third-degree crime that is statutorily permitted, the court dismissed the appeal.

6-11-19 MARY RICHTER VS. OAKLAND BOARD OF EDUCATION, ET AL. (L-0742-15, PASSAIC COUNTY AND STATEWIDE) (A-0102-17T2)

Plaintiff Mary Richter, a middle school teacher who suffers from diabetes, alleges she fainted while teaching due to low blood sugar levels when she was unable to eat lunch at an earlier class period and suffered significant and permanent injuries. She contends the accident would not have occurred had defendants Oakland Board of Education (the Board) and Gregg Desiderio granted her accommodation request to eat lunch earlier. The motion judge granted defendants' motion for summary judgment dismissing Richter's complaint, denied Richter's cross-motion for summary judgment, and denied reconsideration of the dismissal. The judge held that as a matter of law, Richter failed to prove a prima facie case of failure to accommodate her disability because she did not establish an adverse employment action. Thus, her bodily injury claim, which is the subject of the Board's cross-appeal, was denied as moot.

Under the circumstances of this case, the court reverses the motion judge's grant of summary judgment dismissing Richter's complaint. Based on our consideration of Supreme Court decisions in Victor v. State, 203 N.J. 383 (2008) and Royster v. N.J. State Police, 227 N.J. 482 (2017), the court concludes that Richter need not demonstrate an adverse employment action to establish a prima facie case of a failure to accommodate claim under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Because there were genuine issues of material facts concerning whether Richter was provided an accommodation and whether the accommodation was adequate, which must be determined at a trial, the court affirms the denial of Richter's cross-motion for summary judgment. As to the Board's cross-appeal, the court concludes the Workers' Compensation Act, N.J.S.A. 34:15-1 to -146, does not bar Richter's bodily injury claim, but should she prevail at trial, the Board should receive a credit based on the amount of medical bills and lost wages it paid in her workers' compensation claim in accordance with N.J.S.A. 34:15-40..

6-10-19 DCPP VS. J.B. AND C.R., IN THE MATTER OF CA.R. AND C.R., JR. (FN-13-0079-18, MONMOUTH COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3019-18T3)

In this case, two children under the age of five have been in the continuous care, custody, and supervision of the Division of Child Protection and Permanency due to the abuse and neglect of their parents. The trial court granted the Division's application to vaccinate the children with age-appropriate immunizations over the religious-based objections of the parents. The court granted the mother leave to appeal.

The children are not students. Therefore, the religious-based exemption to immunization of students afforded by N.J.S.A. 26:1A-9.1 and N.J.A.C. 8:57-4.4(a) does not apply. Rather, the matter is governed by the Child Placement Bill of Rights Act, N.J.S.A. 9:6B-1 to -6, and N.J.S.A. 9:6-8.86(b), which collectively require that children in placement receive adequate and appropriate medical care to maintain and advance their mental and physical well-being, and N.J.A.C. 3A:51-7.1(a)(2), which specifically requires the administration of all age-appropriate immunizations.

Parental rights are not absolute and must yield to the safety and well-being of the children. While parents do not lose all of their parental rights when their children are placed in the custody of the Division, they are situated differently than parents who retain legal and physical custody. Pursuant to the State's parens patriae responsibility to protect the welfare of children, the Division has a duty to provide appropriate medical care and treatment to children in its custody. This duty encompasses the authority to administer age-appropriate immunizations over the religious objections of the parents. The court perceives no meaningful distinction between the power to order prophylactic medical care in the form of vaccinations to prevent a child from contracting infectious diseases and medical treatment for diseases already contracted.

6-6-19 CAROLINE PALADINO, ET AL. VS. AULETTO ENTERPRISES, INC., ETC. (L-2574-17, CAMDEN COUNTY AND STATEWIDE) (A-0232-18T1)

In this appeal, the court clarifies the standard for evaluating a claim of the work-product privilege. Consistent with the language of Rule 4:10-2(c), the court holds that there is no per se or presumptive rule that materials prepared or collected before litigation are not prepared in anticipation of litigation. Instead, as set forth in Rule 4:10-2(c), there is a multi-part, fact-specific test. The first inquiry is whether the materials were prepared or collected in anticipation of litigation or trial by another party or that party's representative. If so, to obtain the materials, a party must satisfy a two-part standard. The party seeking the materials must (1) show a substantial need for the discovery, and (2) demonstrate that he or she is unable, without undue hardship, to obtain the substantial equivalent of the materials

6-6-19 ESTATE OF BRANDON TYLER NARLESKI, ET AL. VS. NICHOLAS GOMES, ET AL. (L-7085-15, MIDDLESEX COUNTY AND STATEWIDE) (A-5144-17T4)

In this wrongful death case, the defendant liquor store sold vodka and beer to the nineteen-year-old decedent without checking his identification. Decedent and a group of his friends – all of whom were likewise young adults under the legal drinking age of twenty-one – then converged at the home of one of the youths. They drank the purchased alcohol in the young host's bedroom. Decedent then left the house as a passenger in the car of one of the inebriated youths. He died when the driver lost control of the car and it flipped over.

The decedent's estate sued the car driver and its owners for negligence and the liquor store under the Dram Shop Act. The liquor store pled a third-party complaint against the young man who had hosted the gathering and his parents. The trial court granted them summary judgment, finding they had not violated any established legal duty.

Under the circumstances presented, the parents had no statutory or common law duty to prevent their adult son from allowing his adult underage friends to drink alcohol in their home without their proven knowledge or consent. Nor did the son who hosted the gathering have a duty of care under current law.

6-5-19 STATE OF NEW JERSEY VS. MORGAN G. MESZ (11-07-0761, UNION COUNTY AND STATEWIDE) (A-4534-15T3)

A jury convicted defendant of, among other offenses, two counts of attempted murder. Defendant raised pathological intoxication, N.J.S.A 2C:2-8(e)(3), as a defense, attributable to his use of then legally available synthetic marijuana. The prosecutor, while examining the State's psychopharmacology forensic expert, played portions of defendant's four-hour recorded interview. In summation, the prosecutor played portions of defendant's interview again, arguing that defendant's statements directly undercut the defense. The trial judge did not instruct jurors to limit their use of defendant's statements to assessing the merits of the expert's opinion.

The court vacated the conviction and remanded for a new trial, on the basis that the uncounseled statements were used as direct evidence in the absence of any limiting instruction, thereby violating long-standing precedent. A jury must be told that they may not use as direct evidence information provided by a defendant during a mental status interview with a State's expert.

6-5-19 STEVEN I. GROSS, ET AL. VS. KEVIN A. IANNUZZI, ET AL. (L-3360-14 AND L-6543-14, ATLANTIC COUNTY AND STATEWIDE) (A-0018-16T2)

Addressing 2017 amendments to N.J.S.A. 58:16A-103 (the Act), the court held that the Act allowed defendant to elevate his Sandy-damaged oceanfront townhome for flood safety, despite prohibitions contained in a Declaration of Covenants governing the townhome development. The court rejected plaintiffs' argument that, even if defendant was allowed to raise the elevation of the townhome's first floor, he must maintain the existing height of the roofline by reducing the living space within the townhome. That cramped interpretation, aimed at preserving plaintiffs' ocean view, would defeat the legislative purpose to encourage flood-safe construction after Superstorm Sandy.

6-4-19 GLORIA COLON, ET AL.VS. STRATEGIC DELIVERY SOLUTIONS, LLC, ET AL. (L-3994-16, UNION COUNTY AND STATEWIDE) (A-2378-17T4)

The court holds that the New Jersey Arbitration Act (NJAA), N.J.S.A. 2A:23B-1 to -32, applies to require arbitration of plaintiffs' wage, hour and payment claims if the Federal Arbitration Act (FAA), 9 U.S.C. §§1-16 does not apply.

Plaintiffs are truck drivers under contract with defendant Strategic Delivery Solutions, LLC (SDS) to deliver products to SDS's customers. The contract provides that disputes are to be arbitrated under the FAA. Plaintiffs contend they are not required to arbitrate their claims because they are engaged in interstate commerce, making them exempt from the FAA under Section one.

The complaint is reinstated and remanded for the trial court to determine if plaintiffs are exempt under section one of the FAA. If the FAA does not apply, the court holds that the FAA does not preempt arbitration under the NJAA. The court also holds that plaintiffs waived a jury trial and the ability to proceed as a class on their wage, hour and payment claims.

6-3-19 ABC BAIL BONDS, INC. VS. GLENN A. GRANT (C-000075-17, MERCER COUNTY AND STATEWIDE) (A-3961-17T2)

ABC Bail Bonds appealed from Judge Paul Innes's decision that Administrative Directive #22-17, "Bail and Bail Forfeitures -- Revisions to Procedures and Forms" (Aug. 7, 2017), was not unconstitutional, could be applied prospectively, and did not effectuate an unlawful material change in the terms of existing surety bond contracts. The panel affirmed, finding the Directive was a lawful exercise of the Supreme Court's authority to administer the criminal justice system, should be applied retroactively, and did not result in a material change to existing contracts, despite the one-year limitation to remission after a defendant fails to appear. In accord with N.J.S.A. 2A:162-8, the Directive retains a trial judge's discretion to decide remission. A judge may, where "exceptional circumstances" can be demonstrated, allow remission beyond a year from the failure to appear.

5-31-19 GOURMET DINING, LLC VS. UNION TOWNSHIP, ET AL. (TAX COURT OF NEW JERSEY) (A-4799-17T3)

The premises on the campus of Kean University where Gourmet Dining, LLC, manages and operates a restaurant and catering facility are exempt from local property taxes because, while Gourmet Dining is a private, for-profit entity, the evidence presented to the trial court establishes that the premises are being used for a public purpose. That evidence shows, among other things, that: Gourmet Dining uses the premises pursuant to a management agreement, not a lease; students and other members of the University community regularly dine at the restaurant; the University views the restaurant as an important recruiting tool for students and faculty members; the restaurant generates management fees which are used for University scholarships; and a substantial percentage of the restaurant's employees are University students.

5-28-19 THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY VS. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY POLICE BENEVOLENT ASSOCIATION, INC. (L-4541-17, HUDSON COUNTY AND STATEWIDE) (A-3104-17T2)

The Port Authority Police Benevolent Association, Inc. appealed from an order of the trial court vacating an arbitration award in favor of one of its members. The arbitration award was entered pursuant to the collective bargaining agreement between the Association and plaintiff The Port Authority of New York and New Jersey. The panel determined the Port Authority, as a bi-state public corporate instrumentality, is subject to New Jersey arbitration law and reinstated the award

5-23-19 LIBERTY MUTUAL INSURANCE COMPANY, ET AL. VS. PENSKE TRUCK LEASING, CO., ET AL. (L-3377-17, MONMOUTH COUNTY AND STATEWIDE) (A-5624-17T3)

Section 9.1 of the New Jersey Automobile Reparation Reform Act (the No-Fault Act), N.J.S.A. 39:6A-1 to -35, provides insurers, which have paid personal injury protection (PIP) benefits to their insured, with the statutory right to seek reimbursement against certain tortfeasors. N.J.S.A. 39:6A-9.1. If the tortfeasor is insured, the determination whether the insurer that paid the PIP benefits is entitled to recover those payments and the amount of the recovery is by agreement of the parties, and, if they are unable to agree, by arbitration. Ibid.

In this appeal, the non-PIP insurer disputes whether its insured was a tortfeasor. Thus, the question presented is whether that dispute must be arbitrated under Section 9.1 of the No-Fault Act or resolved in a court proceeding. The court holds that the issue of whether a party is a tortfeasor is to be resolved at arbitration when that issue involves factual questions as to the fault or negligence of the insured.

5-16-19 STEPHEN D. PERRY VS. NEW JERSEY STATE PAROLE BOARD (NEW JERSEY STATE PAROLE BOARD) (A-1338-17T4)

Appellant was serving a life sentence imposed in 1979 for murder, and a consecutive four-year term of incarceration imposed in 2003, for a 2001 drug offense committed during his incarceration. When appellant became parole eligible, the Parole Board aggregated his sentences pursuant to N.J.S.A. 30:4-123.51(h), denied appellant parole, and imposed a 240-month future eligibility term (FET).

The Legislature amended N.J.S.A. 30:4-123.53, promulgating a new standard for parole eligibility for offenses committed after August 18, 1997. Prior to the amendment, the Board could deny parole release if it appeared from a preponderance of the evidence that there is a substantial likelihood the inmate will commit a crime under the laws of this State if released on parole at such time. Following the amendment, the parole eligibility standard changed and now states the Board may deny parole where it appears by a preponderance of the evidence the inmate has failed to cooperate in his or her own rehabilitation or that there is a reasonable expectation the inmate will violate conditions of parole if released on parole at that time

The question on appeal is what standard for parole eligibility should apply where a parole eligible inmate is serving sentences for offenses committed before and after the effective date of the statute promulgating the new standard. The court holds the new standard does not apply to parole determinations for inmates eligible for parole who are serving sentences entered prior to August 18, 1997. The Board must determine parole eligibility for such inmates by considering the pre-amendment standard.

The court remanded the matter to the Board to reconsider its decision applying the proper standard. The court also directed the Board to correlate its findings with the length of the FET imposed, considering the sentence for the 2001 offense, which drew the lengthy FET, was just four years.

5-16-19 CLARKSBORO, LLC VS. MARK KRONENBERG, ET AL. (F-031537-16, MORRIS COUNTY AND STATEWIDE) (A-3572-17T4)

In this tax foreclosure matter, defendant, U.S. Bank-Cust/Sass Muni VI DTR (U.S. Bank), a large tax lien investment fund, appeals from final judgment and an order denying its motion to vacate final judgment. U.S. Bank had previously obtained ownership of real property by foreclosing on a tax sale certificate, and then failed to pay property taxes. The Chancery Division granted the opposed motion for final judgment without affording the requested oral argument or providing a cogent reason to deny argument. U.S. Bank thus was not told when final judgment would be entered, which would also end its redemption period. Because oral argument was not provided, the court reverses.

5-13-19 STATE OF NEW JERSEY VS. DEANDRE PARKER (16-04-1096 AND 16-04-1097, ESSEX COUNTY AND STATEWIDE) (A-2026-17T2)

Defendant is charged with second degree unlawful possession of a handgun and related charges. The trial court granted defendant's motion to suppress the physical evidence without conducting an evidentiary hearing or considering oral argument from counsel. This court granted the State's motion for leave to appeal and now reverses the trial court's ruling. Pursuant to Rule 3:5-7(c), "[i]f material facts are disputed, testimony thereon shall be taken in open court." When the material facts are contested, the parties must be given the opportunity to probe the veracity of the State's witnesses.

5-10-19 STATE OF NEW JERSEY VS. LEWIS HOOPER (13-06-0768, MIDDLESEX COUNTY AND STATEWIDE) (A-3436-16T3)

After allegedly rejecting a recommended thirty-year NERA term and entering an open plea to a nine-count indictment, defendant Lewis Hooper was sentenced to sixty years in State prison, forty-four of which were to be served without parole. He appeals his sentence and the denial of his motion to withdraw his open plea after sentencing based on a claim of ineffective assistance of counsel.

Because defendant established a prima facie case of ineffective assistance of counsel, we conclude the trial court erred when it refused to consider defendant's claim merely because it was raised in conjunction with a motion to withdraw his plea after sentencing and not in a PCR proceeding. In this case, there was no good reason for the trial court to have insisted that defendant file an appeal and then a petition for PCR in order to have his ineffective assistance claim heard, instead of hearing it along with defendant's Slater motion

We also vacate defendant's sentence on account of the court's failure to address the Yarbough factors after determining to impose an extended-term sentence and remand for resentencing, if necessary, following the hearing on defendant's motion to withdraw his plea.

5-8-19 CHRISTOPHER LUSKEY VS. CARTERET BOARD OF EDUCATION (C-000009-18, MIDDLESEX COUNTY AND STATEWIDE) (A-3035-17T2)

A dispute over the termination of a tenured public school janitor is subject to arbitration under the jurisdiction of the Commissioner of Education and not the Public Employment Relations commission, even if a collective negotiations agreement dictated the length of service required to attain tenure.

5-7-19 IN RE RENEWAL APPLICATION OF TEAM ACADEMY CHARTER SCHOOL IN RE RENEWAL APPLICATION OF ROBERT TREAT ACADEMY CHARTER SCHOOL IN RE RENEWAL APPLICATION OF NORTH STAR ACADEMY CHARTER SCHOOL OF NEWARK IN RE AMENDMENT REQUEST TO INCREASE ENROLLMENT OF MARIA L. V (A-3416-15T1/A-4384-15T1/A-4385-15T1/A-4386-15T1/A-4387-15T1/A-4388-15T1/A-4398-15T1)

The Education Law Center, a non-profit organization, was found to have standing to appeal the Commissioner of Education's final decisions approving increases in enrollment and the expansion of physical plants for seven Newark charter schools.The panel held that even in former Abbott districts, it is the district that bears the burden of demonstrating that charter school funding will prevent delivery of a thorough and efficient education. Furthermore, the panel decided the Commissioner's interpretation of the relevant regulation authorized the grant of approval for expansions that would require satellite campuses, in as yet undetermined locations.charter schools.

5-7-19 JOANNA B. ORLOWSKI VS. ROBERT ORLOWSKI (FM-02-1778-14, BERGEN COUNTY AND STATEWIDE) (A-2969-16T4)

Plaintiff ex-wife appeals from post-judgment orders denying her application for a QDRO payable to plaintiff from defendant's ERISA protected annuity funds to enforce unpaid counsel fee, expert fee, and tuition reimbursement awards. She also appeals from the denial of enforcement of counsel fee judgments by an enhanced wage garnishment. The court reverses, finding the counsel fees, expert fees, and tuition reimbursement related to child support or property distribution, and enforcement of those awards by a QDRO payable to plaintiff did not violate ERISA's anti-alienation provision. The counsel fee judgments were also enforceable by an enhanced wage garnishment to the extent they related to an underlying support obligation

5-3-19 IN THE MATTER OF RIDGEFIELD PARK BOARD OF EDUCATION AND RIDGEFIELD PARK EDUCATION ASSOCIATION (PUBLIC EMPLOYMENT RELATIONS COMMISSION) (A-1694-17T4)

This dispute concerns the allowable scope of negotiations for employee contributions to health care and prescription coverage (collectively health insurance) costs in accordance with L. 2011, c. 78, §§ 39 and 41 (Chapter 78), codified at N.J.S.A. 52:14-17.28c and N.J.S.A. 18A:16-17.1. Chapter 78 prescribed health insurance contribution rates for public employees over a four-year period beginning July 1, 2011 and ending June 30, 2015, at gradually increasing rates designated Tier 1, Tier 2, Tier 3 and Tier 4.

Petitioner Ridgefield Park Education Association appealed the scope of negotiations ruling by the Public Employment Relations Commission (PERC) in favor of respondent Ridgefield Park Board of Education, that Chapter 78 preempted the terms of the parties' collective negotiations agreement (CNA) for the period July 1, 2014 to June 30, 2018, such that the Association members were required to contribute at the Tier 4 rate throughout the remaining three years of the 2014-2018 CNA and not just for the first year – July 1, 2014 - June 30, 2015. The court reverses the final agency decision because under the circumstances presented PERC's interpretation of Chapter 78 is contrary to the Legislature's intent since it creates the absurd result of a financial hardship of having Association members contribute at the Tier 4 level for three additional years. The court further remands the matter to PERC to fashion and implement an appropriate remedy within sixty days to refund Association members their health insurance contributions that were improperly deducted.

5-3-19 STATE OF NEW JERSEY VS. JUAN RODRIGUEZ (18-04-0195, SOMERSET COUNTY AND STATEWIDE) (A-0180-18T4)

In State v. Witt, 223 N.J. 409, 415 (2015), the Supreme Court revised the standards under New Jersey law governing police searches of motor vehicles that have been lawfully stopped at the roadside. The Court held such roadside searches may be conducted without a warrant if: (1) the police have probable cause to believe the vehicle contains evidence of criminal activity; and (2) the situation arose from unforeseeable and spontaneous circumstances. Id. at 446-48.

The appellate court declines to engraft upon Witt a limitation that would disallow such otherwise-permissible roadside searches in situations where the police have a basis to tow away and impound the vehicle. Consequently, the trial court's suppression order that was founded upon such a rationale is reversed. Moreover, there was no unreasonable delay in this case by the officers in making their decision to proceed with the search at the scene based on probable cause.

5-2-19 STATE OF NEW JERSEY VS. ANDRE COCLOUGH (17-02-0070, HUDSON COUNTY AND STATEWIDE) (A-5142-16T4)

The court affirmed defendant's burglary and criminal mischief convictions, rejecting his contentions, raised as plain error, regarding the court's jury instructions and police witnesses' identification-related testimony. The court also rejected defendant's argument that he must be resentenced because of a breakdown in his relationship with his trial counsel. Although a defendant is entitled to conflict-free representation, the court holds that he may not profit from undermining his attorney-client relationship through his own abusive or threatening conduct. Despite defendant's insults and threats, defense counsel wished to proceed, as did defendant. The court discerned no basis for resentencing.

4-29-19 IN THE MATTER OF THE ADOPTION OF AMENDMENTS TO N.J.A.C. 11:22-1.1 (DEPARTMENT OF BANKING AND INSURANCE) (A-2828-17T2)

Regulations adopted by the Department of Banking and Insurance to implement the provisions of the Health Claims Authorization, Processing and Payment Act (HCAPPA), L. 2005, c. 352 (codified as amended in various sections of titles 17, 17B, and 26 of the New Jersey Statutes Annotated), are valid because: HCAPPA permits payers to obtain reimbursement of overpayments of claims paid, including claims under "stand-alone" or "dental-only" plans, and allows payers to offset overpayments to a provider against future claims the provider submits for other persons

4-26-19 MEDFORD TOWNSHIP SCHOOL DISTRICT VS. SCHNEIDER ELECTRIC BUILDINGS AMERICAS, INC. (L-0787-18, BURLINGTON COUNTY AND STATEWIDE) (A-5798-17T4)

At issue in this appeal is an arbitration clause of a contract for work performed by a general contractor to implement an energy services program for a school district. The arbitration clause provided disputes "may be settled by binding arbitration." In that respect, it conflicted with a request for proposals for the contract and another prior agreement between the parties for the same project, both of which mandated litigation of disputes in a judicial forum.

The court concludes the terms of the arbitration clause, when read in pari materia with the mandatory governing law provisions of the prior documents between the parties are permissive and not mandatory. Accordingly, the court affirms the Law Division order enjoining and dismissing the arbitration proceedings filed by defendant.

4-25-19 GONZALO CHIRINO V. PROUD 2 HAUL, INC., (A-0703-15T2)

The panel publishes this opinion at the Supreme Court's request. Trucking companies registered with the Federal Motor Carrier Safety Administration, subject to the Truth in Leasing regulations, 49 C.F.R. pt. 376, in conjunction with the Motor Carrier Act, 49 U.S.C. §§ 13901, 13902, 14102, and 14704, are required to have lease agreements in place with independent drivers enumerating all deductions taken from their pay. The Truth in Leasing requirements apply even if the trucking company retains a third party to manage payments to drivers and to manage delivery paperwork. The trucking company's purpose in contracting the functions to a third party was to avoid the perception it was the drivers' employer, and to maintain the drivers' status as independent contractors. The trucking company alone, however, scheduled deliveries. That the trucks were "leased," to the third party was inconsequential so long as the trucking company retained exclusive control over the shipping schedule.

The majority further found that defendant's failure to raise a new fact-sensitive argument to the trial judge, based on records not available to the trial court, precluded the issue from being considered on appeal. Judge Accurso dissented on that point.

4-24-19 STATE OF NEW JERSEY VS. ZARIK ROSE (06-04-0377, GLOUCESTER COUNTY AND STATEWIDE) (A-4915-16T2)

In this post-conviction relief appeal, defendant asserts he was denied his right to represent himself under Faretta v. California, 422 U.S. 806 (1975). Defendant timely, clearly, and unequivocally asserted his right to represent himself, orally and in writing, but the court failed to rule on it. Defendant claims he believed his request was denied, and proceeded to trial with counsel. The PCR court denied relief, concluding defendant waived his right to represent himself. On appeal, the court holds that a defendant may, by conduct, waive a previously asserted right to represent himself, but the evidence must clearly demonstrate that the defendant intentionally relinquished the known right of self-representation. Proof that defendant went to trial with counsel is, on its own, insufficient proof of waiver. The court remands for an evidentiary hearing on whether defendant waived his right to represent himself

4-24-19 ADRIAN SOSA VS. MASSACHUSETTS BAY INSURANCE COMPANY (L-0160-16, BERGEN COUNTY AND STATEWIDE) (A-5349-16T3)

In this insurance coverage dispute, the court interprets a homeowner's insurance policy's water-damage exclusion. The court holds that damage caused by a water-main break under a public street, which released water that flowed down a driveway into plaintiff's first-floor apartment, was not excluded as a loss caused by "flood," "surface water," or "water below the surface of the ground." Therefore, the court reverses the trial court's order granting summary judgment dismissal of the homeowner's complaint for coverage, and remands for further proceedings.

4-22-19 JOHN E. SUSKO, ET AL. VS. BOROUGH OF BELMAR, ET AL. (L-1427-15, MONMOUTH COUNTY AND STATEWIDE) (A-3059-16T2)

The Appellate Division held that when a municipality violates the beach fee statute, N.J.S.A. 40:61-22.20, by charging unreasonable beach fees, that violation constitutes the deprivation of a substantive civil right under the New Jersey Civil Rights Act (CRA), and a successful plaintiff is entitled to counsel fees. However, because the CRA requires the violation of an unambiguous, specific statutory or constitutional provision, most of the conduct plaintiffs proved in this case, while wrongful, did not establish CRA violations or entitle them to counsel fees.

4-15-19 IN THE MATTER OF THE CIVIL OF COMMITMENT OF C.M. IN THE MATTER OF THE CIVIL COMMITMENT OF M.H. IN THE MATTER OF THE CIVIL COMMITMENT OF C.R.(CASC-561-18, CASC-426-18, AND SACC-168-18, CAMDEN COUNTY, SALEM COUNTY AND STATEWIDE) (CONSOLIDATED) (RECORD IMPOU (A-4684-17T2/A-4699-17T2/A-0015-18T2)

In these three similar matters, appellants were involuntarily held for longer than the law permits prior to entry of a temporary commitment order. By the time their motions to vacate could be heard, they were discharged from confinement; the trial judge thus denied the motions on mootness grounds. In these appeals, which were consolidated, the court held that, even if appellants' motions were technically moot because they had been released, they were entitled to a ruling on the merits because of the significant liberty interests at stake and because such occurrences were capable of repetition yet likely to evade review.

4-11-19 EDWARD CORREA AND NEW JERSEY DEMOCRATIC STATE COMMITTEE (A-4883-17T4)

The court holds that where N.J.S.A. 19:23-22.4 requires that sample primary ballots be printed in Spanish and English, the official primary ballots, including mail-in ballots, must also be printed in Spanish and English.

4-8-19 JOSIE SALAZAR, ET AL VS. MKGC + DESIGN, ET AL. (L-3095-16, HUDSON COUNTY AND STATEWIDE) (A-3617-17T2)

In this action arising out of the alleged breach of a home improvement contract, a Law Division judge granted defendants' belated motion for discovery sanctions. The court barred plaintiffs from presenting expert testimony or evidence of damages at trial, resulting in the involuntary dismissal of plaintiffs' case. Defendants filed the motion in disregard of discovery rules requiring them to file the motion before the discovery end date, certify they had made a good faith effort to obtain the delinquent discovery, and certify they were not delinquent in their discovery obligations. In addition, defendants had never demanded expert reports in discovery.

On appeal, the court vacated the discovery sanction and dismissal orders. The court held that a trial court abuses its discretion by effectively barring claims as a discovery sanction without explaining its reasons for overlooking the discovery rules intended to assure uniformity and fairness in such matters.

4-4-19 ACE AMERICAN INSURANCE COMPANY VS. AMERICAN MEDICAL PLUMBING, INC. (L-0299-17, UNION COUNTY AND STATEWIDE) (A-5395-16T4)

Affirming the grant of summary judgment dismissing the plaintiff-insurer's subrogation action, the court broadly interprets the waiver-of-subrogation provisions of a widely used American Institute of Architects (AIA) form construction contract. The court relies on the contract's plain language, the majority view of other states' courts, and the evident goal to transfer the risk of construction-related losses to insurers and preclude lawsuits among contracting parties. In particular, the court rejects the insurer's argument that the subrogation waiver was limited to damages to the "Work" incurred during construction. Rather, the subrogation waiver extended to claims related to damages to property outside the Work, incurred after completion, because the insurance the owner obtained to comply with the contract also provided coverage for those damages.

4-4-19 COREY DICKSON VS. COMMUNITY BUS LINES, INC., ET AL. (L-0633-16, PASSAIC COUNTY AND STATEWIDE) (A-3857-17T3)

In this case, the court holds that a perceived disability claim based on obesity under the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, must be grounded upon direct or circumstantial evidence that defendants perceived the plaintiff to be disabled due to a medical condition that caused him or her to be overweight. Such proof is absent from this record and, accordingly, the court determined that summary judgment was correctly granted.

4-2-19 LIBERTY MUTUAL INSURANCE, ETC. VS. JOSE R. RODRIGUEZ (L-2564-17, MIDDLESEX COUNTY AND STATEWIDE) (A-0112-17T4)

In this appeal, the court held that reimbursement of a section 40 workers' compensation lien following a recovery in a third-party action should be based on the fee ratio calculated for the overall settlement and not the sliding contingent fee scale set forth in Rule 1:21-7. Our Supreme Court's holding in Caputo v. Best Foods, Inc., 17 N.J. 259 (1955) is still controlling law.

4-1-19 ROSANNA PRUENT-STEVENS VS. TOMS RIVER TWP. (TAX COURT OF NEW JERSEY) (A-1264-17T2)

N.J.S.A. 54:4-3.30(b) provides that the surviving spouse of a military veteran who meets the statutory requirements for a property tax exemption is also entitled to the exemption which "shall continue during the surviving spouse's widowhood or widowerhood."

Plaintiff was married to a veteran who met all the statutory requirements except that he was not "declared to have suffered a service-connected disability." Although the veteran passed away in 1989, the United States Veteran's Administration declared in 2014 that he suffered from a service-related disability as a result of his exposure to Agent Orange, thus qualifying him for an exemption. As a result, plaintiff filed for a surviving spouse exemption.

Because plaintiff had remarried in 1993, the court determined plaintiff did not qualify for the exemption. The court interpreted the property-tax-exemption statutory scheme and concluded the Legislature intended the right to an exemption for a veteran's surviving spouse continued only during her widowhood from the veteran. The right to the exemption was extinguished upon her remarriage notwithstanding that she, at the time of her application for the exemption, was again widowed after the passing of her second husband in 1997. Recognizing that statutes granting property tax exemptions are subject to strict construction, the court held: "It is not our intent to deny a tax exemption to the widow of a disabled combat-veteran. But it is not our role to amend statutes to ordain what we may deem laudable."

3-29-19 STATE OF NEW JERSEY VS. ANTOINE MCCRAY STATE OF NEW JERSEY VS. SAHAILE GABOUREL (17-11-1346, MIDDLESEX COUNTY AND STATEWIDE; W-2018-3276-0906, HUDSON COUNTY AND STATEWIDE) (CONSOLIDATED) (RECORD IMPOUNDED) (A-3745-17T6/A-0358-18T6)

A defendant who violates a condition in a pretrial release order entered pursuant to the Criminal Justice Reform Act (CJRA or the Act), N.J.S.A. 2A:162-15 to -26, may be charged with contempt of court under N.J.S.A. 2C:29-9(a). Moreover, double jeopardy principles do not preclude the State from charging the defendant with contempt based on his or her failure to comply with the "no-new offense" condition of the release order, and also charging the defendant with commission of that new offense.

3-29-19 PARK CREST CLEANERS, LLC, ET AL. VS. A PLUS CLEANERS AND ALTERATIONS CORP., ET AL. (C-000078-14, CAMDEN COUNTY AND STATEWIDE) (A-1867-17T4)

Defendants failed to perfect a prior appeal, which the court dismissed on its own motion, leaving for disposition only issues raised by a non-party in a cross-appeal, to which only plaintiffs responded. The cross-appeal was decided on its merits, with the court remanding only for entry of an amended judgment in the cross-appellant's favor.

After entry of the amended judgment, defendants filed an appeal. The court dismissed the appeal because the arguments posed by defendants in the new appeal – arguments that challenged evidence rulings made during a trial that occurred more than two years earlier, as well as the trial judge's disposition of pretrial and post-trial motions – could have been pursued and decided in defendants' prior, abandoned appeal.

3-27-19 STATE OF NEW JERSEY VS. G.E.P. STATE OF NEW JERSEY VS. R.P. STATE OF NEW JERSEY VS. C.P. STATE OF NEW JERSEY VS. C.K. (11-02-0138, MORRIS COUNTY, 07-11-1924, BERGEN COUNTY, 13-08-0761, GLOUCESTER COUNTY, AND 15-09-2680, CAMDEN COUNTY AND STATEWIDE) (CONSO (A-2065-15T2/A-0556-16T1/A-1455-16T3/A-3280-16T1)

The court consolidates these four appeals for the purpose of writing a single opinion because they all present the issue of whether State v. J.L.G., 234 N.J. 265, 272 (2018), should be applied retroactively to reverse defendants' convictions of child sexual assault where an expert in "Child Sexual Assault Accommodation Syndrome" (CSAAS) was permitted to testify at trial. We accord J.L.G. pipeline retroactivity and reverse, because, given the State's reliance on the credibility of the victims and the paucity of other supporting evidence, the admission of CSAAS expert testimony in these four cases calls into question the validity of the guilty verdicts.

3-27-19 JUSTIN WILD VS. CARRIAGE FUNERAL HOLDINGS, INC., ET AL. (L-0687-17, BERGEN COUNTY AND STATEWIDE) (A-3072-17T3)

Plaintiff appeals the dismissal, pursuant to Rule 4:6-2, of his complaint, which alleged defendant terminated his employment as a funeral director because, as a cancer sufferer, he was prescribed and used medical marijuana in conformity with the Compassionate Use Act, N.J.S.A. 24:6I-1 to -16. Plaintiff claimed his termination violated the Law Against Discrimination, N.J.S.A. 10:5-1 to -49. The trial judge dismissed the action, concluding that the Compassionate Use Act does not require employers to accommodate an employee's use of medical marijuana. The court reversed because the Compassionate Use Act only declares that "nothing" in that Act "requires" such an accommodation, N.J.S.A. 24:6I-14; while that language plainly expressed that the Compassionate Use Act had not created such an obligation, it also plainly did not foreclose the existence of such an obligation elsewhere, such as in the Law Against Discrimination, which makes it unlawful for an employer to discriminate because of an employee's disability, N.J.S.A. 10:5-12(a). Moreover, the Compassionate Use Act expressly disavowed in that Act only an obligation to accommodate the use of medical marijuana "in any workplace," N.J.S.A. 24:6I-14, and plaintiff alleged he sought an accommodation for his use "off site" and after hours.

3-22-19 STATE OF NEW JERSEY VS. B.A. (13-08-2454, CAMDEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4214-15T4)

Defendant was convicted of third-degree stalking and he appealed. The court affirms the constitutionality of the anti-stalking statute as it was amended in 2009, N.J.S.A. 2C:12-10, holding that it is not facially overbroad nor unconstitutionally broad or vague as applied to defendant. The court rejects defendant's other claims that he was deprived of a fair trial.

3-22-19 STATE OF NEW JERSEY VS. NASIR A. FINNEMAN (32-15, CAMDEN COUNTY AND STATEWIDE) (A-1465-16T2)

The court held this indigent defendant should not have been required to proceed unrepresented in his appeal of a municipal court conviction. It resulted in a consequence of magnitude. Defendant did not waive his right to counsel, assumed he would be assigned a third attorney after two were relieved, and did not engage in such egregious conduct as to constitute a forfeiture of his right to representation. The conviction was thus reversed and the matter remanded for a new trial de novo in the Law Division.

3-20-19 STATE OF NEW JERSEY VS. THOMAS H. OUTLAND (14-08-0751, UNION COUNTY AND STATEWIDE) (A-1307-16T3)

During defendant's robbery trial, in his case-in-chief, he moved into evidence a 9-1-1 tape of his call to police. The trial judge admitted the evidence under two exceptions to the hearsay rule: present sense impression, N.J.R.E. 803(c)(1), and excited utterance, N.J.R.E. 803(c)(2). The judge allowed the State, in rebuttal, to introduce defendant's sanitized criminal history for impeachment purposes pursuant to N.J.R.E. 806 and gave the Model Jury Charge (Criminal), "Credibility - Prior Conviction of a Defendant," (rev. Feb. 24, 2003). The court concluded that the admission of the prior criminal history was proper, accompanied by the limiting instruction. Although defendant did not testify, the rule allows the use of impeaching material when hearsay is introduced.

3-12-19 STATE OF NEW JERSEY VS. ROBERT J. KOSCH, JR. (13-05-0187 AND 13-05-0188, SUSSEX COUNTY AND STATEWIDE) (A-0520-18T1)

In defendant's original appeal, the court reversed three convictions of theft of immovable property and remanded for a new trial, leaving the other six convictions intact. State v. Kosch, 444 N.J. Super. 368 (App. Div.), certif. denied, 227 N.J. 369 (2016). The trial judge then resentenced defendant on the other six convictions – to the same aggregate sentence – without disposing of the three remanded charges; the court reversed because, among other things, the trial judge failed to comply with the prior mandate. State v. Kosch, 454 N.J. Super. 440 (App. Div. 2018). The State then voluntarily dismissed the three remanded charges, and the judge resentenced defendant; to reach an aggregate sentence the equivalent of the original sentence, the judge imposed for the first time a fifteen-year extended term on one of the remaining convictions – to which defendant had originally been sentenced to a non-extended seven-year term.

In this third appeal, the court followed State v. Rodriguez, 97 N.J. 263 (1984), and adhered to State v. Young, 379 N.J. Super. 498 (App. Div. 2005), in finding no double jeopardy or due process violations because the new sentence did not exceed in the aggregate that which was originally imposed and which defendant had begun serving. But the court also held that just because the sentencing judge possessed the constitutional authority to impose the same aggregate sentence didn't mean he should have. The court remanded for resentencing because, by imposing the same sentence, the judge failed to adequately appreciate the impact caused by the absence of three convictions on which the original sentence was imposed.

3-5-19 JOANN MONDSINI VS. LOCAL FINANCE BOARD (NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS) (CONSOLIDATED) (A-4482-16T4/A-4504-16T4)

In the aftermath of Super Storm Sandy and the ensuing statewide gasoline shortage, appellant, the executive director of a regional sewerage authority, permitted some essential employees to fuel their private vehicles from the Authority's gasoline pump. She also permitted a member of the Authority's board of commissioners, who was an employee and authorized to sign authority checks, to gas up his private vehicle after asking him to find food for the Authority's employees at nearby restaurants and to "commandeer" a local gas station to meet the needs of the essential employees.

By permitting the board member to use Authority gas, the Local Finance Board (LFB) concluded appellant violated N.J.S.A. 40A:9-22.5(c), a provision of the Local Government Ethics Law (LGEL), N.J.S.A. 40A:9-22.1 to -22.25, which provides: "No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others."

The court reversed, concluding that this provision of the LGEL, unlike others, requires proof of a specific intent on the part of the local officer to secure the unwarranted privilege or advantage. In addition, the court concludes the gasoline appellant secured for the board member and employee was not an "unwarranted privilege or advantage" under the statute.

3-1-19 STATE OF NEW JERSEY VS. MATTHEW L. WILLIAMS (16-06-0427, SOMERSET COUNTY AND STATEWIDE) (A-5629-17T4)

The court granted the State leave to appeal from an order granting defendant's motion to withdraw his guilty plea prior to sentencing.

Defendant entered into a plea agreement calling for a five-year Drug Court probationary term with an alternate sentence of a four-year prison term subject to an eighteen-month period of parole ineligibility if he was terminated from Drug Court. Before sentencing, defendant was charged with armed robbery and related weapon offenses. Defendant remained incarcerated on the new charges while awaiting trial. After being acquitted of the new charges, he moved to withdraw his guilty plea. By the time the motion was heard, defendant had accrued an additional 366 days of jail credit. The trial court granted the motion, finding defendant's reasonable expectations at the time of his plea were not met because of the additional jail credit.

The court reverses and remands for sentencing, finding the trial court abused its discretion in granting the motion. Defendant did not present a colorable claim of innocence. His reasonable expectations as they existed at the time of the plea hearing were met by enforcing the plea agreement despite the unanticipated accrual of additional jail credit before sentencing.

3-1-19 IN THE MATTER OF ROBERT BROWN, POLICE SERGEANT (PM0622N), CITY OF SALEM (NEW JERSEY CIVIL SERVICE COMMISSION) (A-5470-16T1)

Appellant was denied promotion to the position of sergeant when his employer chose the first, third and fourth police officers from a certified list, skipping over appellant who placed second; the first and third are Caucasian officers, while appellant and the fourth are African-American. The Civil Service Commission denied appellant's claim of retaliation arising from grievances about an earlier promotion; in so acting, the Commission did not conduct an evidentiary hearing but simply rejected what it called appellant's "mere allegations" that the employer retaliated against him. The court remanded for an evidentiary hearing so the parties' factual disputes could be resolved and so the Commission might determine – even if not expressly or clearly raised previously – whether the employer's reasons for skipping over appellant were unlawfully pretextual.

3-1-19 ISAIAH CARDINALE VS. BOARD OF TRUSTEES, POLICE AND FIREMEN'S RETIREMENT SYSTEM (POLICE AND FIREMEN'S RETIREMENT SYSTEM) (A-1997-17T1)

The legal question in this appeal is whether, as a matter of law, a police officer is ineligible for ordinary disability benefits as a member of the Police & Firemen's Retirement System (PFRS) if the officer separates from service by irrevocably resigning from employment to resolve pending drug-related disciplinary charges. Recognizing that N.J.S.A. 43:16A-8(2) requires disability retirees to return to duty once their disability has "vanished or has materially diminished," and emphasizing that an irrevocable resignation makes returning to duty impossible and therefore deprives the PFRS Board of Trustees from terminating benefits, this court held that such a member is ineligible.

2-28-19 FINANCIAL SERVICES VEHICLE TRUST VS. JAMES PANTER NISSAN INFINITY LT VS. BENJAMIN A. FRATTO SANTANDER CONSUMER USA VS. ALBARI M. EL FINANCIAL SERVICES VEHICLE TRUST VS. DEBORAH MOORE (SC-002133-17, SC-002646-17, SC-002661-17 AND SC-000367-18, CAMDEN COUNT (A-2142-17T3/A-2691-17T3/A-2709-17T3/A-3487-17T3)

In these four small claim suits, plaintiffs sought relief from defendants because their negligence caused damage to plaintiffs' vehicles. Of interest, plaintiffs sought damages because databases like CarFax mention the vehicles' newly-acquired accident histories that – plaintiffs claimed – diminished the vehicles' value even though they were repaired to their pre-accident condition and function. In finding these damages recoverable, the court held that fixing an amount for the stigma of this accident history did not require undue speculation. Such a claim, the court held, is merely subject to proof, which plaintiffs provided via an expert who testified that the "scarlet letter" of an accident history reduces a vehicle's value; in other words, the court found the claim cognizable because it is reasonable to assume that, all other things being equal, a buyer will likely pay less for a vehicle with an accident history than a vehicle without.

2-26-19 STATE OF NEW JERSEY VS. ROBERT ALOI (18-02-0295, MIDDLESEX COUNTY AND STATEWIDE) (A-5669-17T1)

Defendant is charged in an indictment with attempted theft by extortion, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:20-5(c). The evidence presented to the grand jury shows that while defendant was located in Maryland, he called and emailed the victim's attorney in New Jersey and communicated threats to disclose private facts about the victim, who resided in New York, unless the victim agreed to contribute monies to an alleged charity defendant operated. The Law Division judge dismissed the indictment, finding New Jersey lacked territorial jurisdiction over the alleged crime, N.J.S.A. 2C:1-3.

The court reverses the dismissal of the indictment. The court concludes that defendant's delivery of the threats into, and the victim's attorney's receipt of the threats in, New Jersey constitute conduct occurring in New Jersey that is an element of the crime of attempted theft by extortion, and therefore there is territorial jurisdiction over the crime charged in the indictment under N.J.S.A. 2C:1-3(a)(1).

2-26-19 MARY C. DUTTON, ETC. VS. STEPHEN V. RANDO (L-6051-13, ATLANTIC COUNTY AND STATEWIDE) (A-1049-16T1)

This appeal arises from a tragic highway collision in which defendant Stephen Rando's sports utility vehicle fatally struck plaintiff's son, Patrick Dutton, as he was riding his bicycle. Following a trial, the jury found that defendant was sixty percent responsible for the accident while Patrick was responsible for the remaining forty percent. The jury awarded plaintiff Mary Dutton, representing her son's estate, $500,000 in wrongful death damages and $108,000 in survivorship damages. The trial court entered judgment in the sum of $364,800 in damages and additional interest, fees, and costs.

Defendant appeals from the judgment memorializing the verdict and from the trial court's order denying his motion for a new trial. Among other things, defendant contends that the jury's award of wrongful death damages is unsupported by the evidence, particularly without any expert testimony to substantiate the pecuniary value of the loss of Patrick's advice, guidance, and companionship. This court rejects defendant's contention and reaffirms the long-standing principle, as expressed in Lesniak v. County of Bergen, 117 N.J. 12, 32-33 (1989), that expert testimony is not required to establish the pecuniary value of such services in claims for wrongful death. This holding is consistent with the common law in the fourteen other jurisdictions that, like New Jersey, restrict recovery in wrongful death actions to pecuniary loss, but do not require expert testimony to substantiate damages.

2-21-19 IN RE ADOPTION OF N.J.A.C. 17:2-3.8 AND 17:2-3.13 (DIVISION OF PENSIONS AND BENEFITS) (A-4327-17T4)

This appeal affects members of the Public Employees' Retirement System (PERS) who converted their group life insurance policy into an individual policy, but died while their retirement applications were pending and whose beneficiaries chose "retired" benefits. In upholding N.J.A.C. 17:2-3.8(b) (clarifying the effective date for converted individual insurance policies) and N.J.A.C. 17:2-3.13 (addressing benefits payable to beneficiaries when members die with retirement applications pending), this court recognized the longstanding practice that beneficiaries of PERS members may receive either a "retired" benefit or an "active" benefit, but not both.

2-20-19 JEFFREY S. JACOBS VS. MARK LINDSAY AND SON PLUMBING & HEATING, INC., ET AL. (L-3120-14, ESSEX COUNTY AND STATEWIDE) (A-3854-16T1)

In this Consumer Fraud Act action, the Law Division found defendants engaged in an unconscionable commercial practice by filing a criminal complaint against plaintiff as a means of collecting a consumer debt. The parties settled on damages and defendants reserved the right to appeal the summary - judgment decision on liability. A different judge awarded plaintiff six percent of the counsel fees requested and no costs of suit or filing fees. Both parties now appeal.

This court holds defendants bargained away their right to challenge the summary judgment decision and dismisses their appeal pursuant to Winberry v. Salisbury, 5 N.J. 240, 255 (1950). With respect to the award of counsel fees, this court holds the Law Division did not follow the standards established by the Court in Rendine v. Pantzer, 141 N.J. 292, 316-45 (1995) and violated N.J.S.A. 56:8-19 because it failed to award plaintiff costs of suit and filing fees.

2-15-19 CASINO REINVESTMENT DEVELOPMENT AUTHORITY VS. CHARLES BIRNBAUM, ET AL. (L-0589-14, ATLANTIC COUNTY AND STATEWIDE) (A-0019-16T1)

Atlantic County Assignment Judge Julio Mendez dismissed the condemnation complaint as a manifest abuse of power because the Casino Reinvestment Development Authority (CRDA) did not provide reasonable assurances that the proposed redevelopment would come to fruition in the foreseeable future. The CRDA sought to condemn the property in furtherance of its mandate to promote tourism in Atlantic City. At the time of the decision under review, the CRDA had no specific redevelopment plans under consideration for the Project; it had not issued a request for proposals (RFP) to prospective developers, and no developer had committed to redeveloping within the South Inlet Mixed Use Development Project area. Nevertheless, the CRDA maintained it had a right to "bank" the property for redevelopment at some unspecified time in the future. Agreeing with Judge Mendez, the court affirms.

2-14-19 IN THE MATTER OF THE CIVIL COMMITMENT OF A.Y. SVP-545-09 (ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-5240-16T5)

Appellant A.Y. appeals from a judgment civilly committing him to the Special Treatment Unit (STU) as a sexually violent predator pursuant to the Sexually Violent Predator Act, N.J.S.A. 30:4-27.24 to -27.38. He was convicted of the predicate act of second-degree sexual assault, N.J.S.A. 2C:14-2(c), and was diagnosed as suffering from Antisocial Personality Disorder and other conditions.

The State's experts opined appellant's personality disorder affects his cognitive, volitional, or emotional capacity, making it highly likely he will sexually reoffend if not kept under the care, control and treatment of a secure facility such as the STU. The State's experts relied, in part, on the results of the MnSOST-R and Static-99R actuarial instruments to determine whether A.Y. was highly likely to sexually reoffend.

Appellant argued he had regained volitional control over his sexually assaultive behavior through treatment and medication compliance. Appellant further argued the State's experts rendered inadmissible net opinions lacking any probability basis to find him highly likely to sexually reoffend. Appellant also argued the State's experts could not point to any methodology or objective standards used to reach their sexual recidivism risk findings.

The court found the State's experts relied on information reasonably relied on by experts in the field, the State's experts did not render inadmissible net opinions, the actuarial instruments were properly used by the State's experts in the formation of the basis of their opinions, and the methodology utilized by the State's experts satisfied the requirements imposed by the Court in In re Accutane Litig., 234 N.J. 340 (2018). Accordingly, the court determined the trial court did not abuse its discretion in admitting and considering the testimony of the State's experts, including their use and reliance upon the MnSOST-R and Static-99R actuarial instruments.

The court affirmed, finding the credible evidence in the record supported the trial court's finding that appellant suffered from a personality disorder that makes it highly likely he will not control his sexually violent behavior and will reoffend if not confined to the STU for treatment.

2-11-19 NEW JERSEY LAND TITLE ASSOCIATION VS. DANA RONE, COUNTY REGISTER OF THE COUNTY OF ESSEX (L-2077-17, HUDSON COUNTY AND STATEWIDE) (A-5028-16T1)

The issue presented on this appeal is whether a county register or clerk has the authority to charge a "convenience fee" or surcharge for the electronic filing of documents concerning real property. The Legislature has prescribed the fees a county register or clerk may charge for the filing of documents, and a convenience fee is not one of the legislatively authorized fees. Accordingly, the court holds that a county register or clerk cannot impose such a fee. The court therefore reverses a June 23, 2017 order granting summary judgment to the Essex County Register of Deeds and Mortgages (Essex Register) and dismissing the complaint of plaintiff, the New Jersey Land Title Association (Association). The court remands with direction that the Association be granted partial summary judgment on its claim to enjoin, prospectively, the Essex Register from collecting the convenience fee. On remand, the trial court will also address the Association's claim for disgorgement of the fees previously paid.

2-11-19 MARIA I. TIRPAK VS. BOROUGH OF POINT PLEASANT BEACH BOARD OF ADJUSTMENT, ET AL. (L-2918-17, OCEAN COUNTY AND STATEWIDE) (CONSOLIDATED) (A-5088-17T1/A-5147-17T1)

Defendants, the Borough of Point Pleasant Beach and the Borough's Zoning Board of Adjustment, appeal the trial court's May 3, 2018 decision in this land use case. The court declared invalid and unenforceable a variance provision and associated deed restriction that requires one unit of the subject two-family dwelling to be occupied by the owner and not rented to a third-party tenant.

These owner-occupancy limitations were imposed by the Board in 1999 as a condition of approving a variance allowing plaintiff Maria I. Tirpak and her now-deceased husband to raze their then-existing dwelling and construct a new two-family dwelling in a zone limited to single-family residences. The Board also required the Tirpaks to memorialize the condition as a recorded deed restriction.

The trial court concluded the variance condition and deed restriction impermissibly discriminated against renters, and wrongfully predicated the allowable use of the property upon the identities of its occupants.

On appeal, defendants argue the trial court should have dismissed plaintiff's challenge to the restrictions as untimely. They further contend the trial court misapplied the law and principles of equity in nullifying the variance condition and deed restriction.

This appellate court rejects defendants' arguments, substantially for the sound reasons expressed in Assignment Judge Marlene Ford's May 3, 2018 written decision, which is published in tandem with this opinion at ___ N.J. Super. ___ (App. Div. 2019).

2-7-19 STATE OF NEW JERSEY VS. ZIA BERISHA (09-09-1595, HUDSON COUNTY AND STATEWIDE) (A-2496-16T1)

Defendant was charged with first-degree murder but convicted of aggravated manslaughter. He argued in his direct appeal that the trial judge should have severed his charges from those brought against a co-defendant and that, even though not requested, the trial judge should have sua sponte instructed the jury on self-defense. In rejecting his severance argument, the court recognized a self-defense theory was "presented" and defendant received its benefit when the jury convicted him "of aggravated manslaughter rather than first-degree murder." But, in rejecting the other argument, the court held that the judge was not required to instruct on self-defense because "the defense of self-defense would likely have been unsuccessful."

In appealing the later denial of his post-conviction relief petition after an evidentiary hearing, defendant argued his trial counsel was ineffective for failing to request jury instructions on self-defense. In reversing and remanding for a new trial, the court held that trial counsel should have requested those instructions and defendant was prejudiced as a result. Even though, in the direct appeal, the court inconsistently considered the role self-defense played at trial, the court in this post-conviction relief appeal concluded that the evidence supported a self-defense theory and appropriate jury instructions might have provided benefits for defendant even greater than he received when the jury found him guilty on a lesser-included offense of first-degree murder.

2-6-19 LEWIS STEIN VS. DEPARTMENT OF LAW & PUBLIC SAFETY, NEW JERSEY RACING COMMISSION (NEW JERSEY RACING COMMISSION) (A-5589-16T3)

The Off-Track and Account Wagering Act, N.J.S.A. 5:5-127 to -160, does not permit persons with accounts in New Jersey's account-wagering system (AWS) from placing wagers with the AWS while located outside the State, and this restriction on wagering does not violate the Commerce Clause of the United States Constitution.

2-6-19 STATE OF NEW JERSEY IN THE INTEREST OF C.F. STATE OF NEW JERSEY IN THE INTEREST OF A.G. STATE OF NEW JERSEY IN THE INTEREST OF T.S. (FJ-12-0124-19, FJ-12-1196-18, AND FJ-12-1197-18, MIDDLESEX COUNTY AND STATEWIDE) (CONSOLIDATED) (RECORD IMPOUNDED) (A-0326-18T3/A-0329-18T3/A-0330-18T3)

In State in the Interest of N.P., 453 N.J. Super. 480 (App. Div. 2018), the court determined a Family Part judge may not divert juvenile complaints from court action without first affording the State an opportunity to be heard. Following that decision, the Family Part judge duly noticed the State of its intention to divert complaints filed against C.F., A.G., and T.S., but conducted the hearings without providing notice to the juveniles.

In these three consolidated appeals, the court reverses the trial judge's orders. Because the matters were heard in open court, due process mandates notice to the juveniles, affording them the opportunity to be heard and to consult with counsel before their complaints are diverted from court action.

2-5-19 MARGARET FATTORE VS. FRANK FATTORE (FM-11-0224-97, MERCER COUNTY AND STATEWIDE) (A-3727-16T1)

In Mansell v. Mansell, 490 U.S. 581 (1989), the United States Supreme Court held the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408, federally preempted state family courts from equitably distributing a disability retirement pension in a divorce. In 2017, the Court in Howell v. Howell, __ U.S. __, 137 S. Ct. 1400 (2017), held family courts are federally preempted from indemnifying a spouse for the inability to distribute disability benefits, but could take such a contingency into consideration by other means, including modifying or awarding alimony.

In this case, the court reverses the trial court's order, which required the spouse receiving disability benefits to indemnify the payee spouse by paying her a hypothetical value of her share of the pension, because indemnification was preempted by Howell. However, the court holds conversion of the pension into a disability benefit was a substantial and permanent change in circumstances, which invalidated the parties' alimony waiver, and accordingly reverses the trial court's order denying alimony for consideration of such an award.

1-29-19 NEW JERSEY MANUFACTURERS INSURANCE COMPANY VS. SPECIALTY SURGICAL CENTER OF NORTH BRUNSWICK, ET AL. (L-3647-17 AND L-4927-17, BERGEN COUNTY AND STATEWIDE) (CONSOLIDATED) (A-0319-17T1/A-0388-17T1)

In these back-to-back appeals involving automobile insurance, consolidated for purposes of this opinion, defendants appeal from Law Division orders vacating binding arbitration awards entered in their favor against plaintiff New Jersey Manufacturer's Insurance Company (NJM). In both cases, the Law Division held the PIP fee schedule does not provide for payment to an ambulatory surgical center (ASC) for procedures not listed as reimbursable when performed at an ASC. Defendants argue that N.J.A.C. 11:3-29.4(g) requires insurance companies to reimburse ASCs for any procedures performed under Current Procedural Terminology (CPT) codes subsequently approved by Medicare. Defendant's arguments are rejected and the trial court orders are affirmed.

1-28-19 REGINA TASCA VS. BOARD OF TRUSTEES, POLICE AND FIREMEN'S RETIREMENT SYSTEM (POLICE AND FIREMEN'S RETIREMENT SYSTEM) (A-4028-15T1)

The court rejects Regina Tasca's appeal of the final agency decision of the Board of Trustees (Board), Police and Firemen's Retirement System (PFRS), denying her twenty-year service (early) retirement pension benefits under N.J.S.A. 43:16A-5(3). Tasca's transfer of six years of service credit that gave her more than the twenty-year service credit threshold needed for early retirement did not qualify her for early retirement pension benefits. The Board properly interpreted N.J.S.A. 43:16A-5(3) in determining that because she was not a PFRS "member" at the critical time of the statute's January 18, 2000 effective date, she was ineligible for early retirement pension benefits. The court also concludes that the doctrine of equitable estoppel does not afford Tasca relief against a governmental body, such as the Board, and there was no misrepresentation by the PFRS staff that she was eligible for early retirement pension benefits under N.J.S.A. 43:16A-5(3). The court further concludes that even though the Law Division action settlement with her former employer include her seeking early retirement pension benefits based on the good faith belief that she was eligible for the benefits, the public policy favoring settlements against parties who have entered into them serves no basis for granting her the benefits in this matter. The Board's decision is affirmed.

1-24-19 K.G. VS. NEW JERSEY STATE PAROLE BOARD C.C. VS. NEW JERSEY STATE PAROLE BOARD J.L. VS. NEW JERSEY STATE PAROLE BOARD D.C. VS. NEW JERSEY STATE PAROLE BOARD (NEW JERSEY STATE PAROLE BOARD) (CONSOLIDATED) (RECORD IMPOUNDED) (A-0042-16T2/A-4339-16T1/A-4343-16T4/A-4797-16T3)

Appellants K.G, C.C., J.L., and D.C. are convicted sex offenders who are monitored by respondent New Jersey State Parole Board (the "Board") as offenders who are subject to parole supervision for life ("PSL") under N.J.S.A. 2C:43-6.4. Each appellant challenges certain conditions of PSL, most of which restrict Internet use, that the Board has imposed upon them. The instant appeals follow in the wake of the New Jersey Supreme Court's decision in J.I. v. N.J. State Parole Bd., 228 N.J. 204 (2017), which addressed the parameters of the Board's authority to impose conditions restricting Internet access.

We affirm in part, reverse in part, and remand in part. In particular, we reach the following major legal conclusions: (1) the Board's imposition of Internet monitoring conditions upon PSL offenders, including the use of monitoring software, mandatory password disclosure, and unannounced device inspections, does not facially violate the constitutional protections against unreasonable searches or the constitutional rights to privacy; (2) the Board's use of the terms "Internet-capable device," "social networking service," "frequenting establishments whose primary purpose is the sale of alcohol," and "sexually-oriented websites, material, information or data" does not violate due process under the void for vagueness doctrine; (3) all conditions restricting Internet access, including monitoring conditions, should be reasonably tailored to the circumstances of the individual offender, "taking into account such factors as the underlying offense and any prior criminal history, whether the Internet was used as a tool to perpetrate the offense, the rehabilitative needs of the offender, and the imperative of public safety[,]" J.I., 228 N.J. at 224; and (4) in the administrative appeals process, PSL offenders are not entitled to discovery and are only entitled to a hearing when warranted based on "the timing of and justification for the Internet restriction, the severity and length of the restriction, whether facts are contested or uncontested, and whether credibility determinations must be made." Id. at 233.

1-23-19 DCPP V. E.M.C., IN THE MATTER OF THE GUARDIANSHIP OF A.E.C. (A-4577-15T2)

The court affirms the trial court's termination of E.M.C.'s parental rights to his child, A.E.C. The child's mother did not appeal the judgment terminating her parental rights. The trial record supported that E.M.C. was given a meaningful opportunity to reunify with his child. The Division of Child Protection and Permanency's (Division's) requirement that E.M.C. attend a psychological and bonding evaluation was not unreasonable nor did it thwart his relationship with the child or reunification efforts. The Division made reasonable efforts to locate E.M.C., especially where, as here, E.M.C. was aware the child was in placement and had a phone number to contact him. The records supported the trial court's finding that E.M.C.'s absence from the child was voluntary. The court distinguishes this case from N.J. Div. of Youth & Family Servs. v. I.S., 202 N.J. 145 (2010), where the parent took affirmative steps to satisfy the conditions the Division set for him, which was not the case here for E.M.C.

Judge Guadagno wrote a dissent.

1-22-19 ROBERT KATCHEN VS. GOVERNMENT EMPLOYEES INSURANCE COMPANY, ET AL. (L-2766-16, MORRIS COUNTY AND STATEWIDE) (A-5685-16T4)

The primary question raised in this appeal is whether an auto insurer may combine uninsured and underinsured motorist coverage in a single section and include exclusions not listed on the policy's declaration page. We also consider if an insurer may exclude underinsured motorist coverage for an accident involving a vehicle owned by the insured but not covered under the subject policy. Because we find the exclusion does not violate public policy or result in ambiguity, we reverse.

Judge Suter wrote a dissent.

1-22-19 DCPP VS. V.F., IN THE MATTER OF T.Q., A.Q., S.F., AND VI.F. (FN-15-0061-17, OCEAN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1343-17T1)

In this appeal, the panel extends to a Family Part context the ruling in State v. Doriguzzi, 334 N.J. Super. 530, 536 (App. Div. 2000) holding that a HGN test is not admissible at a trial to show an individual is guilty of driving under the influence. The court now holds that HGN test results cannot be considered in a Title 9 abuse or neglect hearing to establish that defendant was under the influence when supervising his four minor children while the mother was unconscious. However, the panel concludes the order finding abuse or neglect was consistent with the law because it was supported by substantial independent credible evidence that defendant was under the influence and that his conduct created a substantial risk to the children's mental health and physical safety. The panel affirms the order.

1-18-19 LLEDON JAMES, ET AL. VS. STATE FARM INSURANCE COMPANY (L-5051-15, ESSEX COUNTY AND STATEWIDE) (A-4761-15T2)

Plaintiffs purchased an auto policy from State Farm that provided $15,000 in PIP coverage and designated a private health insurance provider as primary. They filed a verified complaint seeking to reform their auto policy to provide the maximum $250,000 PIP benefits, claiming: (1) the policy was invalid because their adult son was not insured by private health insurance; (2) the State Farm agent required them to sign a blank coverage selection form and thereafter selected the lower PIP coverage option; (3) this act by the agent was willful, wanton, intentional, or grossly negligent. On cross-motions for summary judgment, the trial court found State Farm is entitled to immunity under N.J.S.A. 17:28-1.9.

This court affirms and holds that insureds are under a duty to examine their insurance documents and to notify the insurer if there is a discrepancy between what they initially requested and what the insurer has actually provided. State Farm met all of the requirements for immunity under N.J.S.A. 17:28-1.9.

1-17-19 THE PLASTIC SURGERY CENTER, PA VS. MALOUF CHEVROLET-CADILLAC, INC. THE PLASTIC SURGERY CENTER, PA VS. LEONE INDUSTRIES THE WOODS O.R., INC. VS. LEONE INDUSTRIES STEVEN J. PARAGIOUDAKIS, M.D. VS. CAFÉ BAYOU MARC MENKOWITZ, M.D. VS. CAFÉ BAYOU (DIVISION O (A-5597-16T1/A-5603-16T1/A-5604-16T1/A-0151-17T1/A-0152-17T1)

In 2012, the Legislature amended N.J.S.A. 34:15-15, granting the Division of Workers' Compensation exclusive jurisdiction over claims brought by medical providers for payment of services rendered to injured employees. These appeals questioned whether, through its silence, the Legislature intended – via this 2012 amendment – to apply the two-year statute of limitations, N.J.S.A. 34:15-51, contained in the Workers' Compensation Act, or whether the Legislature intended to leave things as they were and continue to apply the six-year statute of limitations for suits on contracts, N.J.S.A. 2A:14-1, to such claims. The court concluded that subjecting medical-provider claims to the two-year time-bar would be like jamming a square peg into a round hole, and that to reinterpret the two-year time-bar to fit such claims would require the reshaping of the edges of this square peg contrary to principles of judicial restraint. The court reversed the judgments that dismissed these medical-provider claims.

1-16-19 AMY SKUSE VS. PFIZER, INC., ET ALS. (L-2374-17, MERCER COUNTY AND STATEWIDE) (A-3027-17T4)

This case exemplifies an inadequate way for an employer to go about extracting its employees' agreement to submit to binding arbitration for future claims and thereby waive their rights to sue the employer and seek a jury trial.

The employer in this case emailed to its workforce what it called a "training module" (or "activity" or "course"). The module described the company's mandatory arbitration policy, as presented in a series of slides on computer screens. One screen provided employees with the opportunity to access a "Resource" link to the full text of the policy. In a separate email, the employer supplied a computer link to Frequently Asked Questions ("FAQs") concerning the policy.

On the third slide of the module presentation, the employees simply were asked to "acknowledge" it with the click of an electronic button. The module declared that if an employee did not click the acknowledgement, but continued to work for the company for sixty or more days, the employee would be "deemed" to be bound by the arbitration policy.

Although the arbitration policy is labeled an "agreement" and that word appears multiple times on the slides and within the linked policy, the module did not request employees to provide signatures conveying their agreement. Nor were the employees asked – within the four corners of the pivotal "click" box at the end of the presentation – to memorialize that they expressly agreed to the policy. They were only asked within the box to "acknowledge" it.

This oblique procedure does not yield the valid personal agreement of an employee to give up his or her statutorily protected rights to litigate claims against an employer in a public forum and seek a trial by jury. The procedure falls short of the requirements of New Jersey contract law, particularly the Supreme Court's longstanding precedent in Leodori v. CIGNA Corp., 175 N.J. 293, 303 (2003) (holding an employee's valid waiver of statutory rights, there in the context of an employer's binding arbitration policy, "results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent") (emphasis added), as well as the Court's more recent opinion in Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 447 (2014) (holding the words of an arbitration agreement "must be clear and unambiguous that a [person] is choosing to arbitrate disputes rather than have them resolved in a court of law") (emphasis added).

1-14-19 JOSEPH J. NORMAN VS. NEW JERSEY STATE PAROLE BOARD (STATE PAROLE BOARD) (RECORD IMPOUNDED) (A-3920-17T4)

The primary question raised in this appeal is whether an appellant, who has served his sentence pursuant to the Sex Offender Act (SOA), N.J.S.A. 2C:47-1 to -10, can be compelled to undergo a psychological evaluation, pursuant to N.J.A.C. 10A:71-3.54(i)(3) and 10A:71-7.19A, for violation of certain conditions of parole supervision for life (PSL), and mandatory parole supervision (MPS), imposed outside the SOA.

The panel reverses the Board's decision in part, holding it cannot compel such an evaluation. Absent further comment by the Legislature, these regulations only apply to individuals who have been released on parole before completing their sentence.

1-10-19 STATE OF NEW JERSEY VS. OLAJUWAN HERBERT (12-11-2693, ESSEX COUNTY AND STATEWIDE) (A-5096-14T1)

The court reverses defendant's conviction of purposeful murder and related firearms offenses. The court concludes that defendant's trial was tainted by a detective's reference, in violation of a prior court ruling, to defendant's alleged gang membership and the presence of gangs in the area of homicide. The panel concludes that the court's curative instruction was insufficient to alleviate the prejudice caused by the detective's remarks.

Judge Ostrer wrote a separate, unpublished concurrence.

1-8-19 JAMES MURRAY VS. COMCAST CORP., ET AL. (L-2552-16, ATLANTIC COUNTY AND STATEWIDE) (A-1987-17T4)

Plaintiff filed a civil action against his employer alleging wrongful termination. The Law Division granted defendant's motion to compel arbitration. Plaintiff filed a motion for reconsideration pursuant to Rule 4:49-2 that was received by defendant and the trial court more than twenty days from the date defendant's served plaintiff with the order compelling arbitration. The trial court nevertheless granted plaintiff's motion and directed the matter to proceed to trial.

Subject matter jurisdiction cannot be waived by the parties' failure to object, nor conferred upon the court by the parties' agreement. Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 65-66 (1978). This court holds that judges have an independent, non-delegable duty to raise and determine whether the court has subject matter jurisdiction over the case whenever there is a reasonable basis to do so. Here, the Law Division did not have subject matter jurisdiction at the time it granted plaintiff's untimely motion for reconsideration under Rule 4:49-2.

1-7-19 BOROUGH OF GLASSBORO VS. JACK GROSSMAN, ET AL. (L-0075-18, GLOUCESTER COUNTY AND STATEWIDE) (A-4556-17T2)

The panel addresses the evidentiary implications of a key provision within the Local Redevelopment and Housing Law ("LRHL"), N.J.S.A. 40A:12A-1 to -49. The provision in question, N.J.S.A. 40A:12A-8(c), authorizes a municipality or redevelopment agency to acquire by condemnation any lands or buildings which are "necessary for the redevelopment project."

The panel holds that if a landowner within the redevelopment area contests the necessity of a condemnation pursuant to N.J.S.A. 40A:12A-8(c), the statute logically requires the condemning authority to articulate a definitive need to acquire the parcel for an identified redevelopment project. That articulated need must be more specific than the mere "stockpiling" of real estate that might hypothetically be useful for a redevelopment project in the future.

In addition, the condemning authority in such a contested case must present to the court at least some evidence – consisting of facts, expert opinion, or both – that provides reasonable substantiation of the need. To hold otherwise and allow the condemning authority merely to proclaim a need, without having any obligation to substantiate its existence, would improperly read the term "necessary" out of the Legislature's enactment.

1-4-19 MATTHEW P. TERRANOVA, ET AL. VS. GENERAL ELECTRIC PENSION TRUST, ET AL. (L-6691-15, MIDDLESEX COUNTY AND STATEWIDE) (A-5699-16T3)

Plaintiffs, after prevailing in an action against property owners they alleged were the sole dischargers liable pursuant to the New Jersey Spill Compensation and Control Act, brought suit seeking clean-up contribution under the Spill Act from other owners of the same property.

The court affirmed the trial court's grant of summary judgment, holding the doctrine of judicial estoppel was a defense to Spill Act claims. Although plaintiffs possessed information sufficient to put them on notice of possible Spill Act claims against other property owners, they did not name those owners as defendants in the first action. The court held the application of judicial estoppel to Spill Act claims compels plaintiffs to pursue in a single action all dischargers that are known or knowable. Plaintiffs' subsequent action against the dischargers of which they had notice was precluded.

1-2-19 J.G. VS. J.H. (FD-21-0329-14, WARREN COUNTY AND STATEWIDE) (A-1326-17T2)

Because the welfare of children is paramount whether the parents are married, divorced or never-married, the court reverses and remands for a plenary hearing in this non-dissolution, FD, child custody matter. The mother, J.G. (Jane) appeals from a custody and parenting time order entered after the judge denied discovery, denied Jane's lawyer the right to participate in the proceedings, did not afford cross-examination or an opportunity to call witnesses and decided the issues without fact-finding or a consideration of the statutory custody factors, N.J.S.A. 9:2-4(c). The court reviews the appropriate way to handle FD custody matters, pursuant to Administrative Directive #01-02, "Standards for Child Custody and Parenting Time Investigation Reports" (Apr. 2, 2002), the Rules of Court and relevant statutes.

12-31-18 INTERACTIVE BROKERS, LLC, ET AL. VS. RICHARD W. BARRY, ETC. (C-000036-18, HUDSON COUNTY AND STATEWIDE) (A-4197-17T4)

In this action arising out of the aftermath of a Ponzi scheme operated through a hedge fund, a Receiver was appointed on behalf of the fund and authorized to pursue all causes of action belonging to the fund.

The hedge fund operated through the securities trading platform of plaintiffs Interactive Brokers, and its employee, Kevin Michael Fischer. The Receiver instituted suit against plaintiffs, alleging they aided and abetted the breach of fiduciary duty and common law fraud and initiated arbitration proceedings under the Financial Industry Regulatory Authority (FINRA) Code and the Customer Agreement executed between plaintiffs and the hedge fund's founder.

Plaintiffs moved for injunctive relief, arguing the claims asserted by the Receiver were beyond the scope of his authority because they were grounded on the damages suffered by the hedge funds' defrauded investors, rather than the hedge fund itself.

The court concluded the Receiver acted within the statutory authority granted him under N.J.S.A. 49:3-69(c) and (d) and N.J.S.A. 14A:14-1 to -27. The Statement of Claims submitted to FINRA listed the hedge fund as its sole claimant. A receiver's action is not invalidated, even if the return of the assets to the receivership may ultimately benefit its investors.

As the dispute fell within the Agreement, the parties were mandated to arbitrate the dispute in FINRA.

12-27-18 STATE OF NEW JERSEY VS. SIWAN R. BROWN (15-09-1253, HUDSON COUNTY AND STATEWIDE) (A-2838-16T1)

Among other things, the panel holds that trial courts in our State have the discretion, in appropriate circumstances, to grant requests by deliberating jurors to have the closing arguments of all counsel played back or read back to them, in full or in part. In recognizing this discretionary authority, the panel follows other jurisdictions that have acknowledged the discretion of judges to allow such summation playbacks or readbacks. The panel rejects, however, defendant's contention that the denial of the jury's playback request in this case was unduly prejudicial and requires a new trial.

12-26-18 M.G. VS. S.M. (FM-12-0446-15, MIDDLESEX COUNTY AND STATEWIDE) (A-1290-17T1)

The court addresses and establishes the factors a trial court should consider in determining whether to make an equitable distribution of restricted stock units where the stock vests post-complaint and the employed spouse asserts the vesting is attributable to that spouse's future employment efforts.

The court holds that the party seeking to exclude assets from equitable distribution on such grounds bears the burden to prove the stock award was made for services performed outside of the marriage. That party must adduce objective evidence to prove the employer intended the stock to vest for future services and not as a form of deferred compensation attributable to the award date.

12-24-18 DIAMOND BEACH, LLC VS. MARCH ASSOCIATES, INC., ET AL. (L-0203-08, MONMOUTH COUNTY AND STATEWIDE) (A-1704-17T1)

In 2011, the Legislature substantially amended multiple sections of the Construction Lien Law, N.J.S.A. 2A:44A-1 to -38 (the 2011 amended CLL). This appeal requires the court to decide whether N.J.S.A. 2A:44A-6(a)(1) and N.J.S.A. 2A:44A-8 the (signatory-requirement amendments) apply retroactively. This court limited its holding to the retroactive effect of that part of the signatory-requirement amendments that replaced the previous mandate that a "duly authorized officer" sign a corporate construction lien. This court concluded that the signatory-requirement amendments at issue are not "curative" for purposes of retroactivity analysis, and held that they applied prospectively.

12-20-18 H.R. AND I.R. VS. THE NEW JERSEY STATE PAROLE BOARD (C-000048-15, MERCER COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (CONSOLIDATED) (A-2843-16T3/A-2987-16T3)

In these two appeals, the court concludes that continuous satellite-based monitoring under the Sex Offender Monitoring Act (SOMA), N.J.S.A. 30:4-123.89 to -123.95, is a "special needs search," which may be justified only if the governmental need to monitor convicted sex offenders outweighs their privacy interests. That balancing of interests favors monitoring of H.R., whose expectation of privacy is limited because he is on parole supervision for life. However, monitoring violates the rights of I.R., who has greater expectation of privacy than H.R., because he is not on parole supervision. Therefore, the court affirms the trial court's order sustaining SOMA monitoring in H.R.'s case, but not in I.R.'s case.

12-19-18 RESIDENTIAL MORTGAGE LOAN TRUST 2013-TT2, BY U.S. BANK NATIONAL ASSOCIATION VS. MORGAN STANLEY MORTGAGE CAPITAL, INC., ET AL. (C-000108-15, UNION COUNTY AND STATEWIDE) (A-0423-17T4)

Where the chain of title was unclear, N.J.S.A. 46:18-13(b)(2) authorized plaintiff, the claimed "established holder" of the mortgage, to file a General Equity lawsuit to establish its status as the mortgage holder, and hence, its standing to foreclose the mortgage. The Appellate Division rejected defendant-mortgagors' argument that plaintiff could only seek that relief in the context of a foreclosure action. Plaintiff filed a separate civil action joining as defendants the mortgagors and all known entities that may have had an interest in the note and mortgage. The trial court granted plaintiff relief, but also required plaintiff to indemnify defendants against any future claims by other entities seeking to enforce the mortgage or the note.

12-13-18 NJ HIGHLANDS COALITION V. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION (A-3180-14T1)

This opinion, decided on August 4, 2017, is being published at the request of the Supreme Court. Appellants N.J. Highlands Coalition and Sierra Club N.J. challenged a settlement agreement between the NJDEP and a developer relating to the development of a 204-unit inclusionary housing project in the Borough of Oakland. Pursuant to the settlement agreement, the NJDEP issued two freshwater general permits and a transition area waiver, which appellants also challenge. We held that the NJDEP correctly concluded the developer was entitled to an exemption under N.J.S.A. 13:20-28(a)(17), and the NJDEP's decision to approve the general permits and transition area waiver was not arbitrary, capricious, or unreasonable.

12-10-18 OASIS THERAPEUTIC LIFE CENTERS, INC. VS. PETER G. WADE, ET AL. (L-1287-17, MONMOUTH COUNTY AND STATEWIDE) (A-0711-17T3)

Plaintiff's complaint alleged that defendants' interference with plaintiff's efforts to purchase property for use as a group home for autistic individuals violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The court concluded, as the LAD makes clear, that it is, in fact, unlawful to discriminate against a buyer because of the disability of a person intending to live on the premises, even if the buyer does not fit within a protected class, N.J.S.A. 10:5-4.1, and that it is, with a discriminatory intent, unlawful to interfere with another's transaction, N.J.S.A. 10:5-12(n). In reversing the motion judge's dismissal of the complaint pursuant to Rule 4:6-2(e), the court also rejected the application of the Noerr-Pennington doctrine to the claim that defendants sabotaged plaintiff's efforts to secure a grant from the Monmouth Conservation Fund; that nonprofit foundation was not shown to be a governmental or quasi-governmental body.

12-7-18 IN THE MATTER OF REGISTRANT H.D. IN THE MATTER OF REGISTRANT J.M. (ML-98-07-0091 AND ML-98-17-0002, ESSEX COUNTY, SALEM COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (CONSOLIDATED) (A-5321-16T1/A-5322-16T1)

Within fifteen years of having been convicted of "sex offenses," see N.J.S.A. 2C:7-2(b), and sentenced to probation, each registrant was convicted of another offense. After fifteen offense-free years following those convictions, registrants moved to be relieved of their registration obligations pursuant to N.J.S.A. 2C:7-2(f), which provides in relevant part:

> [A] person required to register under this act may make application to the Superior Court of this State to terminate the 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.

The Law Division judges denied relief, concluding essentially that conviction for any offense within fifteen years of the conviction of or release from imprisonment for the underlying sex offense permanently barred relief.

The court reversed, concluding that although the statute was ambiguous, permanently barring relief was 1) contrary to the Legislature's intent and the remedial purposes of Megan's Law; and 2) inconsistent with N.J.S.A. 2C:43-6.4(c), which permits termination of community/parole supervision for life "upon proof . . . that the person has not committed a crime for [fifteen] years since the last conviction or release from incarceration, . . . and . . . is not likely to pose a threat to the safety of others if released from parole supervision."

12-6-18 JUAN MORALES-HURTADO VS. ABEL V. REINOSO, ET AL. (L-1450-13, BERGEN COUNTY AND STATEWIDE) (A-2120-15T3)

In this vehicular negligence action, the court holds that the cumulative impact of multiple errors, including defense counsel's improprieties, the trial court's denial of a directed verdict as to defendant's negligence, and the trial court's grant of defendant's in limine motion to bar plaintiff's life care expert, deprived plaintiff of a fair trial. The court reverses the order of judgment entered on the jury's verdict and remands for a new trial.

12-4-18 NEW JERSEY TRANSIT CORPORATION, ETC. VS. SANDRA SANCHEZ AND CHAD SMITH (L-8504-16, BERGEN COUNTY AND STATEWIDE) (A-0761-17T3)

Plaintiff New Jersey Transit Corporation appealed from the summary judgment dismissal of its subrogation action against the tortfeasors for reimbursement of the workers' compensation benefits paid to an injured employee for wage loss and medical expenses resulting from a work-related automobile accident. Plaintiff did not sustain a permanent injury within the meaning of the limitation on lawsuit option under AICRA, and did not seek recovery from the tortfeasors. The motion judge held AICRA trumped the WCA, ruling that N.J.S.A. 39:6A-8(a) barred NJ Transit's claims because NJ Transit, as subrogee, stands in the shoes of the injured employee, and has no rights superior to the injured employee under AICRA. Since the injured worker was compensated by workers' compensation benefits for his medical expenses and wage loss; he suffered no uncompensated economic loss. The motion judge held NJ Transit's claim must be dismissed because AICRA bars claims for compensated economic damages.

The court reverses the summary judgment dismissal, holding the workers’ compensation carrier is permitted to pursue its Section 40 claim for reimbursement of the worker's compensation benefits paid to the injured employee against the third-party tortfeasors. If successful, the workers' compensation carrier would be reimbursed by the tortfeasors, subject to their right to indemnification from their own automotive insurers. Therefore, allowing such recovery does not conflict with AICRA's collateral source rule, N.J.S.A. 39:6A-6.

Regarding the interplay of the WCA and AICRA, where only workers' compensation benefits and PIP benefits are available, the primary burden is placed on workers' compensation pursuant to N.J.S.A. 39:6A-6. Where only PIP benefits and tortfeasor liability are involved, the primary burden is placed on the PIP carrier by N.J.S.A. 39:6A-12. However, where both workers' compensation benefits and the proceeds of a tort action have been recovered, the tort recovery is primary pursuant to N.J.S.A. 34:15-40(f). In turn, where workers' compensation benefits have been paid, but the injured employee has not sought or obtained recovery from the tortfeasor, the primary burden is placed on the tortfeasor.

12-4-18 R.L.U. VS. J.P. (FV-02-1615-17, BERGEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4823-16T1)

The court reverses the Family Part order entered under the Sexual Assault Survivor Protection Act (SASPA), N.J.S.A. 2C:14-13 to -21. SASPA cannot be used to impose a restraining order on defendant based on conduct that occurred before SASPA's effective date. SASPA does not permit such retroactive application. The Family Part judge heard credible testimony from plaintiff that defendant had intercourse with her in 2005 when she was eleven. The Family Part judge correctly concluded the 2005 incident of intercourse was a sexual assault, however the 2005 assault was not a predicate act triggering the right to SASPA protection because SASPA was not signed into law until 2015.

11-29-18 RICHARD W. TULLY, JR. VS. PETER MIRZ (L-5951-16, BERGEN COUNTY AND STATEWIDE) (A-0241-17T1)

Plaintiff, a shareholder in a closely-held corporation, brought an action against the only other shareholder, asserting both direct claims for breach of contract and breach of the covenant of good faith and fair dealing, and derivative shareholder claims alleging breach of fiduciary trust, mismanagement, conversion, and fraud. Following the conclusion of a bench trial, the trial judge dismissed the action in its entirety without prejudice for lack of standing.

The court reverses the dismissal of plaintiff's direct claims of breach of contract and breach of the covenant of good faith and fair dealing, and remands those claims to the trial court to render a decision on the merits, finding plaintiff had standing to pursue those direct claims.

The court rejects plaintiff's argument that the prior denial of defendant's motions to dismiss for failure to state a claim upon which relief may be granted constituted the law of the case. The court affirms the dismissal without prejudice of the remaining derivative claims because it is unable to determine from the record if allowing the derivative claims to proceed would prejudice the corporation's creditors.

11-28-18 ANTHONY MALACOW VS. NEW JERSEY DEPARTMENT OF CORRECTIONS (NEW JERSEY DEPARTMENT OF CORRECTIONS) (A-1587-17T3)

The court remands to the Department of Corrections (DOC) for reconsideration and the articulation of appropriate reasons for the sanctions imposed on the inmate consistent with N.J.A.C. 10A:4-9.17(a) and Mejia v. New Jersey Department of Corrections, 446 N.J. Super. 369, 378-79 (App. Div. 2016). The court suggests the DOC amend its regulations so that particularized reasons for sanctions are provided in all future disciplinary matters.

11-21-18 ANNA BERMEO VS. MARIO BERMEO (FM-13-1076-14, MONMOUTH COUNTY AND STATEWIDE) (A-1312-17T1)

In this appeal, plaintiff argues that she was entitled to have the post-judgment motion judge establish the marital lifestyle pursuant to Crews v. Crews, 164 N.J. 11 (2000) notwithstanding a waiver of that determination at the time the judgment of divorce was entered; and that she was entitled to an increase in her alimony payment. Affirming denial of her motion, the court rejected plaintiff's argument that the court was obligated to conduct a Crews analysis post-judgment because: their Property Settlement Agreement was recently entered; did not reserve such a determination; and was not the product of coercion or duress. Consequently, the court found no basis to impute a higher income to defendant and increase plaintiff's alimony payments.

11-19-18 METRO COMMERCIAL MANAGEMENT SERVICES, INC., ET AL. VS. NANCY VAN ISTENDAL (C-000036-16, BURLINGTON COUNTY AND STATEWIDE) (A-0275-17T4)

In this appeal, defendant argued that she was an oppressed minority shareholder under N.J.S.A. 14A:12-7(1)(c) even though she contracted to be an employee at-will. After serving as plaintiff's Chief Financial Officer for thirteen years, she claimed that she had a reasonable expectation of continued employment and that her at-will designation was irrelevant and erroneous. A Consent Order entered by the parties in prior litigation between them validated their Shareholder Agreement and confirmed defendant's at-will status.

The court rejected defendant's reliance upon unpublished out-of-state cases as factually distinguishable and unpersuasive that defendant urged us to adopt for the proposition that an oppressed shareholder may have an expectation of continued employment. The court declined to do so, and affirmed the summary judgment dismissal of defendant's counterclaim on the basis that her at-will status was paramount.

11-16-18 INVESTORS BANK VS. JAVIER TORRES, ET AL. (F-001463-15, BERGEN COUNTY AND STATEWIDE) (A-3029-16T4)

Defendant challenged plaintiff's right to foreclose, arguing N.J.S.A. 12A:3-309 precluded the enforcement of a note, lost prior to the assignment of a concomitant mortgage, because plaintiff never owned or controlled the underlying debt. The court interpreted the statute as allowing the enforcement of a lost note where the assignor – which provided a lost-note affidavit to plaintiff – possessed the note and was entitled to enforce it when the loss occurred, and plaintiff proved the terms of the note and its right to enforce it.

11-15-18 STATE OF NEW JERSEY VS. ROBERT ANDREWS (16-06-1781, ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0291-17T4)

The trial court's order compelling defendant to disclose the passcodes to his cell phones does not violate his right against self-incrimination under the Fifth Amendment to the United States Constitution because, although the defendant's act of producing the passcodes conveyed implicit facts as to the ownership, control, and ability to access the phones, the conveyance of these facts was a foregone conclusion because defendant did not give the State any information it did not already possess. The order also does not violate defendant's right against self-incrimination under New Jersey's common law, N.J.S.A. 2A:84A-19, or N.J.R.E. 503.

11-15-18 STATE OF NEW JERSEY VS. JAMES M. HARRIS (13-10-2986, CAMDEN COUNTY AND STATEWIDE) (A-3694-15T4)

The court reverses two murder convictions. The motion to suppress a photograph of a gun and ammunition similar to that used in the double murder should have been granted because the photograph was mistakenly provided by Sprint in response to a communications data warrant (CDW) that did not seek photographs. The State argued that the photograph was in plain view, but as the file containing the photograph was clearly identified as a photograph, and labeled as outside the time frame of the CDW, the court rejects the plain view argument. Admission of that photograph was not harmless error, given the State's repeated emphasis on the photograph in summation as well as the fact that the jury declared itself deadlocked three times.

11-14-18 STATE OF NEW JERSEY VS. CALVIN BASS (83-06-2420, ESSEX COUNTY AND STATEWIDE) (A-0407-17T4)

Defendant challenges the denial of his fourth petition for post-conviction relief (PCR), arising from a 1984 murder conviction. He contends that the revised waiver statute, N.J.S.A. 2A:4A-26.1(c)(1), effective March 1, 2016, should have been retroactively applied by the PCR judge pursuant to our holding in State in Interest of J.F., 446 N.J. Super. 39 (App. Div. 2016). Although defendant was fourteen years and one month of age at the time he committed the crime, we hold N.J.S.A. 2A:4A-26.1(c)(1), which does not authorize waiver to adult court of a juvenile under the age of fifteen, has no retroactive application where a defendant's conviction and sentence have been adjudicated with finality.

11-13-18 P.H. VS. L.W. (FD-02-0659-16, BERGEN COUNTY AND STATEWIDE) (A-5345-16T4)

In this appeal involving an interstate custody dispute, the court reverses the Family Part's order denying the South Dakota mother's motion to dismiss. Applying the Uniform Child Custody Jurisdiction and Enforcement Act, the court concludes the Family Part initially exercised jurisdiction in 2016 based on a mistaken finding that New Jersey was the children's "home state," as the parties' twin daughters did not reside here for six consecutive months immediately before the father filed suit. Furthermore, the trial court should have determined, by the time it decided defendant's motion to dismiss over a year later, that New Jersey lacked "exclusive, continuing jurisdiction," because both parties and their daughters had long been absent from New Jersey, they lacked a significant connection here, and substantial relevant evidence was no longer available here. In any event, New Jersey had become an inconvenient forum. The court remands the case for a stay of further proceedings in anticipation of dismissal.

11-13-18 MARILYN FLANZMAN VS. JENNY CRAIG, INC., ET AL. (L-6238-17, BERGEN COUNTY AND STATEWIDE) (A-2580-17T1)

This court invalidated an arbitration agreement because the parties did not understand the rights that ostensibly foreclosed plaintiff's right to a jury trial. They could have designated an arbitral institution (like AAA or JAMS) or they could have communicated a general method for selecting a different arbitration setting. Identifying the arbitration process is important because it provides a "meeting of the minds" about what replaced a judicial adjudication. Here, the agreement ignored the subject altogether. This court therefore reversed the order compelling arbitration for lack of mutual assent and remanded to the trial court for further proceedings.

11-9-18 DCPP VS. M.C. AND J.R., IN THE MATTER OF J.C.-R. (FN-15-0211-16, OCEAN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-5252-16T3)

This appeal involves the standards and procedures for in camera review and judicial disclosure of a parent's presumptively-confidential juvenile records in child welfare litigation brought by the Division of Child Protection and Permanency ("the Division"), a context not addressed in existing case law.

The Law Guardian objected to the father having unsupervised parenting time with his eighteen-month-old daughter, having learned that he had been adjudicated delinquent as a juvenile several years earlier after for committing sexual offenses upon two minors. The father opposed the court reviewing or disclosing the juvenile records, asserting they are confidential under N.J.S.A. 2A:4A-60.

After hearing oral argument, the Family Part judge reviewed the father's records in camera. The judge then released the records in their entirety to counsel, pursuant to a protective order confining their use to the present Title 30 litigation. The father has appealed the judge's rulings.

The panel affirms the Family Part judge's decision to conduct an in camera review of the records. The panel also upholds the judge's denial of the father's request for the court to conduct an additional hearing after the in camera review was completed. However, because the court's decision to release the records without further hearing was not accompanied by a statement of reasons, as required by case law and Rule 1:7-4, the panel remands this matter for the court to reconsider the matter, make any appropriate modifications, and generate the requisite statement of reasons.

11-8-18 DEUTSCHE BANK TRUST COMPANY AMERICAS, ETC. VS. DEBBIE A. WEINER, ET AL. (F-026288-16, SOMERSET COUNTY AND STATEWIDE) (A-2110-17T4)

A statute of limitations enacted in 2009 bars residential foreclosure actions commenced after the earliest of three points in time: six years from "the date fixed for the making of the last payment or the maturity date set forth in the mortgage or the note," N.J.S.A. 2A:50-56.1(a), thirty-six years from the recording of the mortgage, N.J.S.A. 2A:50-56.1(b), and twenty years from an uncured default, N.J.S.A. 2A:50-56.1(c). In this appeal, the court rejected a mortgagor's argument that a foreclosure action was time-barred because it was filed seven years after a default and the acceleration of the loan. The court determined that the triggering event in subsection (a)'s six-year provision is the date "set forth in the mortgage or the note," and not the date upon which the mortgagee accelerated the loan, because of subsection (a)'s clear and unambiguous language and because subsection (c) provides a time-frame – twenty years – that begins to run upon an uncured default.

11-8-18 STATE OF NEW JERSEY VS. QUIASIA N. CARROLL (W-2018-005075-0408, CAMDEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0152-18T6)

The court reverses and remands for reconsideration the trial court's order of pre-trial detention. The State charged defendant with cyber-harassment, N.J.S.A. 2C:33-4.1(a)(2); and retaliation against a witness, N.J.S.A. 2C:28-5(b), based on Facebook posts in which defendant, in coarse language, identified and castigated a witness at a murder trial, and expressed her hope that someone would "blow [his] glasses . . . off his face." The court reverses the trial court's findings of probable cause with respect to cyber-harassment, as the posts did not involve lewd, indecent, or obscene statements. Applying First Amendment principles governing "true threats," and "advocacy intended, and likely, to incite imminent lawless action," United States v. Alvarez, 567 U.S. 709, 718 (2012), the court affirms the trial court's finding of probable cause to charge retaliation, but concludes that the "weight of the evidence against the . . . defendant," N.J.S.A. 2A:162-20(b), was nonetheless weak, requiring reconsideration of the detention decision.

11-7-18 IN THE MATTER OF THE ESTATE OF DOUGLAS CASTELLANO, ETC. (CP-0212-2016, ESSEX COUNTY AND STATEWIDE) (A-0165-17T3)

N.J.S.A. 9:17-43(a)(1) establishes a presumption that "[a] man is presumed to be the biological father of a child if . . . [h]e and the child's biological mother [were] married to each other and the child [was] born during the marriage." The decedent here died intestate, leaving siblings and a child, who was born when his mother was married to another man. Decedent's siblings claim this presumption, as well as other circumstances, required the court to assume that the mother's husband had "equitably adopted" the child and thereby severed the child's relationship to the decedent. The court affirmed the trial court's grant of summary judgment, holding that N.J.S.A. 9:17-43(a)(1)'s presumption had been rebutted by DNA evidence that conclusively established that the decedent fathered the child, and that the other circumstances were of insufficient weight to cause a break in that natural relationship.

11-2-18 RADIATION DATA, INC. VS. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL. (L-1260-16, SOMERSET COUNTY AND STATEWIDE) (A-0707-17T2)

Plaintiff is a certified radon measurement and mitigation business regulated by the Department of Environmental Protection ("DEP") and the largest radon measurement business in the State. While the DEP was pursuing a regulatory enforcement action against the company, the company filed suit against the DEP and several DEP officials in the Law Division, alleging improper conduct and violations of its constitutional, statutory, and common-law rights.

Defendant moved to dismiss the company's constitutional and civil rights claims, asserting their alleged conduct was shielded under principles of qualified immunity. The trial court partially denied the immunity motion and ordered the parties to proceed with discovery.

The panel concludes the trial court misapplied principles of qualified immunity and should have dismissed the corresponding counts of the complaint. The DEP did not violate "clearly established" equal protection and due process rights by pursuing a regulatory enforcement action against the company, and by directing that communications between the company and the agency be channeled through their respective attorneys while the contentious administrative litigation was ongoing. Among other things, the panel notes that a regulatory agency must retain the discretion to interact with private parties in a manner it deems most efficient and effective, so long as it responds to outside inquires within a reasonable time and in a reasonable manner. Discovery on these claims was unnecessary, as defendants have qualified immunity from suit, not just a final judgment. The matter is remanded to adjudicate other open counts of the complaint.

In a separate unpublished opinion issued today, the panel affirmed in part the findings of the DEP Commissioner and the two administrative law judges that the company committed various regulatory violations, and reversed and remanded those findings in part.

11-1-18 DEXTER RAMPERSAUD, ET AL. VS. RONALD A. HOLLINGSWORTH, ET AL. (LT-015717-16, HUDSON COUNTY AND STATEWIDE) (A-2897-16T1)

In this appeal, a now-evicted tenant of a residential apartment, which he sublet to another, argued that only the subtenant, whose conduct generated the tenancy action, could be evicted. In affirming a judgment of possession, the court rejected the tenant's strained interpretation of the Anti-Eviction Act, N.J.S.A. 2A:18-61.1(c), and conclude that a wrongful act of one permits the eviction of all occupants.

10-30-18 STATE OF NEW JERSEY VS. RAINLIN VASCO (15-09-0641, UNION COUNTY AND STATEWIDE) (A-4435-15T2)

We affirm defendant's judgment of conviction for fourth degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d). Defendant claimed his guilty plea lacked an adequate factual basis and he demonstrated a colorable claim of innocence. We hold the trial court properly reviewed defendant's claims using the factors set forth in State v. Slater, 198 N.J. 145 (2009), and not a de novo standard of review. We conclude the trial court did not abuse its discretion in making these findings and that there was an adequate factual basis for the guilty plea.

Dissent and opinion filed.

10-30-18 DCPP VS. P.O. AND M.C.D., IN THE MATTER OF THE GUARDIANSHIP OF M.D.C.-O. AND J.E.C.-O. (FG-15-0017-13, OCEAN COUNTY AND STATEWIDE) (RECORD IMPOUNDED)(CONSOLIDATED) (A-1871-16T2/A-1872-16T2)

Although the court affirmed the termination of parental rights of these parents, who executed an identified surrender and were removed to Peru, their country of origin, the court emphasized the need to put on the record all matters in child protective services litigation resulting in an order, even when the parties present consent to the order. Notice should also be provided to biological parents when the Division of Child Protection and Permanency seeks to vacate an identified surrender and seek termination of parental rights.

10-19-18 STACI PIECH VS. GLENN LAYENDECKER, ET AL. (L-3473-14, MIDDLESEX COUNTY AND STATEWIDE) (A-1417-16T4)

Plaintiff suffered injuries while a forty-year-old man struck a piñata at a birthday party. The judge charged both Model Jury Charges (Civil), 5.20F(4), "Social Guest – Defined and General Duty Owed" (rev. Dec. 2014) (the Model Charge), and Exception (2) to the Model Charge. That exception states that "[i]n cases where the host is conducting some 'activity' on the premises at the time of [the] guest's presence, [the host] is under an obligation to exercise reasonable care for the protection of [the] guest." This court held that when a plaintiff sustains an injury resulting solely from an "activity" on the host's property – as opposed to an injury caused by a combination of that activity and a physical dangerous condition on the property – then the judge should only charge Exception (2).

10-17-18 STATE OF NEW JERSEY VS. RICKY BROWN (17-06-1207, ATLANTIC COUNTY AND STATEWIDE) (A-3619-17T1)

The panel addresses the strip search statute, N.J.S.A. 2A:161A-1 to -10, which affords certain protections to persons who are arrested or detained for non-indictable offenses, and whether the Attorney General Guidelines for strip searches extend those protections to persons arrested or detained for crimes.

The panel concludes that neither the legislative history nor the plain terms of the statute authorized the Attorney General to promulgate Guidelines to extend the statute's protections to persons detained or arrested for crimes. The panel further concludes that the strip search was justified here by probable cause and reasonable exigent circumstances, thereby satisfying the Fourth Amendment of the United States Constitution, and Article I, Paragraph 7 of the New Jersey Constitution.

The panel affirms the trial court's order denying defendant's motion to suppress five bricks of heroin seized from defendant's groin area pursuant to a strip search following defendant's arrest for indictable drug offenses.

10-5-18 L.E. AND P.T. VS. THE PLAINFIELD PUBLIC SCHOOL DISTRICT, ET AL. VS. A.D. AND R.B. (L-2513-15, UNION COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3638-16T1)

The panel reverses the trial court's summary judgment dismissal of plaintiff L.E.'s complaint that she was sexually assaulted in a high school bathroom during class hours as a result of the negligent supervision of defendant school board and its employees. The court holds that negligent supervision is distinct from a claimed failure to provide police protection services, or to enforce laws, for which the Tort Claims Act provides immunity, under N.J.S.A. 59:5-4, N.J.S.A. 59:3-5, and N.J.S.A. 59:2-4. Therefore, the trial court erred in relying on the Act in dismissing the complaint. Noting that the duty to supervise students during school hours on school property is well-established, the panel concludes that a jury could reasonably find that defendants violated the duty under the facts presented; and, despite the students' independent acts, the negligent supervision was a proximate cause of L.E.'s injuries.

10-4-18 CHARLES WRIGHT VS. BANK OF AMERICA, N.A., ET AL. (L-0433-15, GLOUCESTER COUNTY AND STATEWIDE) (A-2358-15T3)

Plaintiff filed a complaint that alleged five notices of intention to foreclose served on him by defendant BAC Home Loans Servicing, LP. (BAC) violated the Fair Foreclosure Act. He asserted that BAC – the alleged servicer of loans made in 2007 when plaintiff purchased his residence – neglected to include the name and address of the lender. Although no foreclosure action followed on the heels of these notices, plaintiff claims these FFA violations – not actionable on their own – may form the basis of a claim under the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA). Consequently, he argues that the trial judge erred in dismissing the complaint by applying the litigation privilege and by holding that the alleged FFA violation cannot support a TCCWNA claim. The court rejected the application of the litigation privilege but because the legal grounds upon which the latter determination was based have shifted since the trial judge's decision and the perfection of this appeal, see Spade v. Select Comfort Corp., 232 N.J. 504 (2018), the court vacated the order of dismissal and remanded to allow for an amended pleading expressing the true nature of his damage claim.

10-3-18 ESTATE OF MARY VAN RIPER VS. DIRECTOR, DIVISION OF TAXATION (TAX COURT OF NEW JERSEY) (A-3024-16T4)

Where, as occurred here, decedent and her spouse transferred property to a trust, retained life interests in the property, and directed the trustee to transfer the property to a relative upon the death of decedent or her spouse, whichever is the last to occur, the Division of Taxation did not err by imposing an inheritance transfer tax on the full value of the property because decedent and her spouse held the property as tenants by the entirety, and the transfer was intended to take effect "at or after" decedent's death. N.J.S.A. 54:34-1(c).

9-24-18 STATE OF NEW JERSEY VS. J.S.G. (13-12-1208, GLOUCESTER COUNTY AND STATEWIDE) (A-4665-14T4)

This appeal involves the warrantless, nonconsensual search of children's school records for the name of their father, defendant J.S.G., who was the owner of a vehicle linked to two burglaries. Defendant filed a motion to suppress his name, arguing the police obtained it in violation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C.A. § 1232g, and its corresponding regulation, 34 C.F.R. § 99, and the New Jersey Pupil Records Act (NJPRA), N.J.S.A. 18A:36-19, and its corresponding regulations, N.J.A.C. 6A:32-7.1 to -7.8, governing the disclosure of student educational records.

We affirmed the denial of defendant's motion, finding FERPA did not create an enforceable right or provide for suppression as set forth in Gonzalez Univ. v. Doe, 536 U.S. 273 (2002). By analogy, we relied on State v. Evers, 175 N.J. 355 (2003), involving the Federal Electronic Communications Privacy Act (ECPA), to conclude that FERPA, like the ECPA, does not confer a reasonable expectation of privacy under the Fourth Amendment in student records.

We considered the NJPRA and its corresponding regulations, which permit school officials to provide directory information, including a student's name, to law enforcement, and which require school official to provide such information at the request of law enforcement. We also determined that like FERPA, the NJPRA merely provides administrative remedies for violations and does not permit a private right of action or suppression. We also ruled that the NJPRA does not create a reasonable expectation of privacy in student records under Article I, paragraph 7 of the New Jersey Constitution.

Finally, we followed federal law, which holds that a defendant's identity resulting from an unlawful search is not subject to the exclusionary rule.

9-24-18 SANDRA NICHOLAS, ET AL. VS. HACKENSACK UNIVERSITY MEDICAL CENTER, ET AL. (L-4839-12, MIDDLESEX COUNTY AND STATEWIDE) (A-5165-15T2)

In this medical malpractice action, plaintiffs claimed the board certified defendant doctors deviated from the standard of care in their specialties of pediatrics and pediatric critical care. The trial court barred the testimony of plaintiffs' expert, finding he did not satisfy the requirements of the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J.S.A. 2A:53A-37 to -42. More particularly, the trial court found that although the expert was board certified in pediatrics and pediatric critical care, he was not qualified to testify under the Act because, at the time of the alleged malpractice, he did not spend a majority of his professional time in either active clinical practice in the specialties, as required by N.J.S.A. 2A:53A-41(a)(2)(a), or instructing students in the specialties as required by N.J.S.A. 2A:53A-41(a)(2)(b).

The court reverses and holds the expert satisfied the Act's qualification requirements. The court determined the evidence established the expert practiced in the same specialties as the defendant doctors, and thereby met the requirements of N.J.S.A. 2A:53A-41(a). The court further concluded that where the alleged malpractice occurred during the practice in a specialty recognized by the American Board of Medical Specialties and a defendant doctor is board certified in the specialty, the plaintiffs' expert must also satisfy either the requirements of N.J.S.A. 2A:53A-41(a)(1) or N.J.S.A. 2A:53A-41(a)(2). The court found the trial court erred by finding the expert was required to satisfy the requirements of either N.J.S.A. 2A:53A-41(a)(2)(a) or (b) where the evidence otherwise established the expert was credentialed at a hospital to treat patients for the condition at the time of the alleged malpractice, and thereby satisfied the requirements of N.J.S.A. 2A:53A-41(a)(1).

9-24-18 MILAGROS ROMAN VS. BERGEN LOGISTICS, LLC, ET AL. (L-2652-17, BERGEN COUNTY AND STATEWIDE) (A-5388-16T3)

In this employment case, plaintiff asserted claims for violations of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and intentional infliction of emotional distress. The trial court granted defendants' motion to dismiss the complaint, finding plaintiff was obligated to litigate her claims in arbitration pursuant to an agreement she executed when she was hired. The agreement also included a punitive damages waiver, which the trial court determined was enforceable.

The court affirmed the order dismissing the complaint, finding the agreement satisfied the requirements established in Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014), and therefore plaintiff was obligated to prosecute her claims in arbitration. The court, however, modified the order, holding the punitive damages waiver is unenforceable because it violates the public policy underlying the LAD. The court further concluded the waiver should be severed from the agreement, and directed that the matter proceed to arbitration with plaintiff able to pursue her punitive damages claim.

9-20-18 JASON DEVER VS. DEBRA HOWELL (FD-05-0386-11, CAPE MAY COUNTY AND STATEWIDE) (A-0468-17T3)

This case involves the father's attempt to relocate the children to another State over the mother's objection. He relocated anyway without obtaining an order permitting the move. This court held that N.J.S.A. 9:2-2 required him to obtain an order permitting the removal before the actual relocation. On the mother's later motion, the judge ordered the father to return the children. In upholding the judge's refusal to do a best interests analysis on the mother's motion, this court concluded that the time for the judge to determine whether plaintiff had established "cause" for the removal of the children would have been before the relocation occurred, and that the father had the ultimate burden of proof.

9-14-18 PALISADIUM MANAGEMENT CORP. VS. BOROUGH OF CLIFFSIDE PARK CARLTON CORP. VS. BOROUGH OF CLIFFSIDE PARK (TAX COURT OF NEW JERSEY) (A-4370-15T4)

The panel considered the appeals of owners of two adjacent tax lots on the site of the former Palisades Amusement Park in Cliffside Park from Tax Court judgments affirming the 2011-2013 tax assessments on the properties. The Tax Court found plaintiffs had overcome the presumption of the validity of the assessments; rejected the Borough's cost approach for valuing the property; rejected the reliability of improvement costs generated by computer software; accepted plaintiffs' expert's hybrid approach to valuation but found the appraiser lacked adequate objective evidence to support his adjustments; and determined there was not sufficient competent evidence in the record to permit the court to make an independent finding of true value, resulting in the assessments being affirmed. The panel affirms, substantially for the reasons expressed by Judge Fiamingo in her written opinion, which is reported at 29 N.J. Tax 245 (Tax 2016).

9-6-18 LINDA COWLEY, ET AL. VS. VIRTUA HEALTH SYSTEM, ET AL. (L-3616-16, CAMDEN COUNTY AND STATEWIDE) (A-4004-16T4)

In this appeal, plaintiffs challenge the dismissal of their medical malpractice complaint for failure to serve an affidavit of merit. The motion judge rejected plaintiffs' argument that the "common knowledge" exception relieved them of that obligation because the nurses who cared for one of the plaintiffs failed to take any action when a nasogastric (NG) tube that was properly inserted into her, in accordance with a physician's order, became dislodged and allegedly caused her to suffer serious injuries. The motion judge found the fact that the tube was initially inserted in accordance with a physician's order, to be "critical in making this determination" and changed "this matter from a case where a jury with ordinary knowledge and experience could make a determination . . . to a standard of care case that requires expert testimony" because "a jury [could not] make a determination . . . without knowing what . . . a nurse [should] do" when a [NG] tube is inserted pursuant to an order but subsequently comes out.

The panel disagreed and concluded that the nurses' failure to take any action – not even contacting the physician who ordered that the tube be inserted – demonstrated that a health care provider failed to adhere to a doctor's order and therefore satisfied the purposes of the Affidavit of Merit Statute by establishing that plaintiffs' claim had sufficient merit under the common knowledge exception to proceed.