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

8-25-20 NICOLE PICKET, ETC. VS, MOORE'S LOUNGE, ET AL. (L-5298-15, HUDSON COUNTY AND STATEWIDE) (A-2330-17T2)

In this insurance coverage case, the court interprets a policy provision that excludes damage claims "arising out of any act of 'assault' or 'battery' committed by any person," including claims "arising out of . . . any act or omission in connection with the prevention or suppression of such 'assault' or 'battery.'" The court concludes that the exclusion barred an insured tavern's demand for a defense and indemnification arising out of one patron's fatal shooting of another. Specifically, the exclusion encompassed claims by the estate of the deceased patron that the tavern negligently hired, trained, and retained staff, and negligently failed to maintain a place free of reasonably foreseeable criminal activity. Those claims related to acts or omissions in connection with preventing the assault or battery of the victim. In reaching its conclusion, the court distinguished L.C.S., Inc. v. Lexington Insurance Co., 371 N.J. Super. 482 (App. Div. 2004).

8-18-20 STATE OF NEW JERSEY IN THE INTEREST OF Z.S., A JUVENILE (FJ-17-0013-20, SALEM COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3516-19T1)

This interlocutory appeal concerns the appropriate procedures under the current statute, N.J.S.A. 2A:4A-26.1, for evaluating whether a juvenile charged with a very serious offense should be waived to the Criminal Part and prosecuted as an adult.

On leave granted, the juvenile in this case, defendant Z.S., appeals the Family Part judge's order sustaining a prosecutor's decision to waive him to the Criminal Part to face a jury trial for committing first-degree aggravated sexual assault upon a minor.

The court vacates the trial judge's order because of several critical deficiencies in the processes that resulted in Z.S.'s waiver. Among other things, the prosecutor's written statement of reasons in support of waiver was incomplete, conclusory, and utilized obsolete 2000 guidelines that do not track the controlling factors under the revised 2016 waiver statute.

In addition, the prosecutor failed to explain in writing in advance of the waiver hearing why the extensive mitigating psychological evidence marshalled by the defense, documenting Z.S.'s intellectual disabilities and mental health issues, was inconsequential.

The trial judge also misapplied his discretion by declining to adjourn the waiver hearing at defense counsel's request, with the State's acquiescence, after she had been released from the hospital for pneumonia only two days earlier and was still feeling ill and having difficulty breathing.

Because of these grave procedural shortcomings, the court remands this matter for a renewed waiver hearing. The opinion also offers guidance on how best to proceed in such waiver matters under the revised 2016 statute.

8-14-20 STATE OF NEW JERSEY, by the COMMISSIONER OF TRANSPORTATION VS. ST. MARY'S CHURCH, ET AL. (L-3076-10, CAMDEN COUNTY AND STATEWIDE) (A-4452-18T3)

The court considers whether interest on a jury award of compensation for the condemnation of property by the Commissioner, Department of Transportation (Commissioner), is subject to the fixed six percent per annum interest rate established in N.J.S.A. 27:7-22. The court held that N.J.S.A. 27:7-22, which applies only when property is condemned by the Commissioner, was impliedly repealed by the subsequently enacted N.J.S.A. 20:3-50. That provision of the Eminent Domain Act of 1971 established uniform standards for the condemnation of property by all State entities. Because of the implied repeal of N.J.S.A. 27:7-22, interest on an award of compensation for the condemnation of property by the Commissioner must be determined in accordance with N.J.S.A. 20:3-32. That statute vests in the trial court broad discretion to establish an interest rate based on evidentiary submissions. This discretion includes the authority to determine when the rate of interest should be simple or compound.

8-13-20 CAROLYN REPKO VS. OUR LADY OF LOURDES MEDICAL CENTER, INC. (L-3559-18, CAMDEN COUNTY AND STATEWIDE) (A-2181-19T1)

The court considers, on leave granted, the denial of defendant Our Lady of Lourdes Medical Center, Inc.'s motion to dismiss the complaint filed in the name of plaintiff Carolyn Repko ten months after her death and granting the motion of her estate to amend the complaint to substitute itself as plaintiff after the running of the statute of limitations. Because a complaint by a dead person is a nullity, leaving nothing for an amended complaint to "relate back" to under Rule 4:9-3, the court reverses the denial of Lourdes' motion and remands for entry of an order dismissing the complaint with prejudice

8-7-20 IN THE MATTER OF THE GUARDIANSHIP OF SALLY DINOIA (A-5276-17T3)

In this appeal, the court affirmed the trial court's granting of counsel fees to a former court-appointed attorney in this guardianship action involving Sally DiNoia. The counsel fee application was opposed by Sussex County counsel. The amount awarded was $43,397.20. The County of Sussex, Division of Social Services, Adult Protective Services (APS) appealed the order.

Appellant filed a verified complaint seeking to declare Sally DiNoia incapacitated and for the appointment of a guardian over her person and property under the Adult Protective Services Act (the Act), N.J.S.A. 52:27D-406 to -425. The matter was highly contentious and Sally's son, John DiNoia, was enjoined from interfering with her care and treatment. An order was entered adjudging Sally an incapacitated person and appointing her daughter as guardian.

The court agreed with the trial court that John failed to cooperate with orders of the court and filed numerous applications, which were essentially frivolous, requiring responses from counsel. Additionally, the court determined that APS neglected to perform its statutory duties and failed to conduct a financial investigation and analysis of Sally's assets and debts as required by Rule 4:86-2(b).

Applying a deferential standard of review, the court held that the trial court was authorized to compel APS payment of fees for a court-appointed attorney. The court held, as a matter of law, that the trial court was authorized under Rule 4:86-4(e) and the Act to require APS to pay the fees of the court-appointed attorney for Sally. Further, the court found that whether the trial court erred in requiring APS to pay fees was subject to review under an abuse of discretion standard. Therefore, the court affirmed the decision of the trial court.

8-7-20 CARLTON HOCUTT III VS. MINDA SUPPLY COMPANY (L-6537-17, BERGEN COUNTY AND STATEWIDE) (A-4711-18T1)

The New Jersey Workers Compensation Act (WCA), N.J.S.A. 34:15-1 to -146, generally prohibits employees from suing their employers for injuries sustained in workplace accidents. This case probes the boundaries of the]"intentional wrong" exception to that general rule.

Plaintiff suffered serious injury while riding as a passenger on a forklift in defendant's warehouse. It was a common practice at the warehouse for workers to ride on the forklift while another worker drove the forklift. This practice violates workplace safety regulations promulgated by the U.S. Department of Labor Occupational Safety and Health Administration (OSHA).

The court first addressed plaintiff's contention that the WCA does not bar his lawsuit because he was not employed by defendant but rather by an employee leasing agency. The court applied the five-part test announced in Kelly v. Geriatric & Medical Services, Inc., 287 N.J. Super. 567, 571–72 (App. Div. 1996), and determined that plaintiff was a "special employee" of defendant and thus subject to the exclusive remedy of workers compensation.

The court turned next to plaintiff's contention that he is not barred from suing defendant because the company's practice of allowing, if not encouraging, workers to stand on moving forklifts was an intentional wrong, thereby exempting this case from the exclusive remedy of workers' compensation. Plaintiff argued defendant's misconduct constitutes intentional wrong because it occurred repeatedly. The court rejected the argument that violative conduct is an intentional wrong merely because it is an ongoing practice. The court interpreted Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161 (1985) as narrowing the circumstances when the intentional wrong exemption applies in recognition that reckless or negligent conduct often reflects a "deliberate" business decision by employers to promote speed and efficiency at the expense of workplace safety. The court concluded the intentional wrong exception would significantly erode the legislative preference for the workers' compensation remedy if all a plaintiff must show is that the negligent or reckless conduct was committed repeatedly.

The court surveyed a series of Supreme Court cases that applied the Millison analytical framework and concluded that defendant's violative conduct was not sufficiently egregious to rise to the level of an intentional wrong. The court noted the cases following Millison that found intentional wrong involved

violative conduct that was not just committed on multiple occasions but was repeated in the face of efforts by government regulators or others to put a stop to the practice. An employer's wrongful conduct is especially egregious when deception is used to conceal the repetition.

In this case, there were no prior forklift-related accidents or injuries, no prior OSHA citations pertaining to forklift operations, and no prior complaints from workers about unsafe forklift practices. Nor did defendant attempt to conceal its violative practice or otherwise deceive safety investigators. The court thus concluded that plaintiff failed to show his injury was substantially certain to occur and that the circumstances of its infliction were more than a fact of life of industrial employment.

8-5-20 BRANDI CARL, ET AL. VS. JOHNSON & JOHNSON JOHNSON CONSUMER COMPANIES, INC., ET AL (L-6546-14 AND L-6540-14, ATLANTIC COUNTY AND STATEWIDE) (CONSOLIDATED) (A-0387-16T1/A-0978-16T1)

Post Accutane, the court reversed summary judgment granted to defendants regarding plaintiffs' claims that their use of Johnson & Johnson baby powder had a causal connection to their development of ovarian cancer. In re: Accutane, 234 N.J. 340 (2018). The cases were the first two selected to be tried in the talc-based baby powder multi-county litigation.

Applying the analytical structure found in the Federal Judicial Center's Reference Manual on Scientific Evidence (Third Ed. 2011), the court concluded, after detailed consideration of the experts' lengthy N.J.R.E. 104 hearing testimony and reports, that their methodology was generally recognized in the field and the data upon which they relied was generally accepted for that use in the field. See Accutane, 234 N.J. at 352-53, 390. The experts hypothesized a connection between the migration of talc and inflammation to explain the development of ovarian cancers like plaintiffs'. The trial judge's suppression of their opinions was an abuse of discretion, as he failed to limit his decision to whether their methodology and data were generally accepted and relied upon in the relevant scientific field and instead rejected the merits of the opinions themselves, finding them less credible than those of defendants' experts

8-3-20 STATE OF NEW JERSEY VS. TYWAUN S. HEDGESPETH (16-07-2215 AND 16-07-2216, ESSEX COUNTY AND STATEWIDE) (A-0850-18T3)

In this direct appeal from a judgment of conviction, the court addressed several issues raised by defendant in a longer unpublished opinion affirming defendant's convictions. The two issues of first impression in New Jersey addressed in its published opinion are: (1) whether discharge from probation constitutes "release from confinement" for the purpose of triggering the ten-year time limit under N.J.R.E. 609(b)(1)'s more stringent standard for the admissibility of prior convictions for impeachment purposes; and (2) whether a "no-permit" affidavit prepared by a non-testifying police witness is testimonial and thereby subject to the Confrontation Clause. As to the former, the court held that the plain language of N.J.R.E. 609, coupled with the construction of identical language by the federal courts and sister states, as well as prior interpretation of confinement by New Jersey State courts in related and unrelated contexts, compel the conclusion that probation does not qualify as confinement as required under N.J.R.E. 609(b)(1). As to the latter, the court determined that the "no-permit" affidavit was not testimonial under the primary purpose test, and its admission without the testimony of the affiant who conducted the permit search did not violate the Confrontation Clause. The court reasoned that the affidavit established the absence of an objective fact, rather than detailing the criminal wrongdoing of defendant.

7-31-20 EILEEN McNELLIS-WALLACE, ET AL. VS. JOSEPH HOFFMAN, JR., ESQUIRE, ET AL. (L-1429-18, GLOUCESTER COUNTY AND STATEWIDE) (A-1488-19T1)

Applying the three-step sequential analysis of Beauchamp v. Amedio, 164 N.J. 111, 118 (2000), in this legal malpractice action to ascertain the last possible date a motion to permit a late tort claim notice could have been filed to preserve plaintiff's medical malpractice claim, we reverse, on leave granted, the denial of third-party defendant attorney's motion to dismiss his predecessor's contribution claim. Because the Beauchamp analysis makes clear that plaintiff's claim was irretrievably lost by the first lawyer who represented her, a year before the second lawyer entered his appearance, the first lawyer could have no claim for contribution against his successor. Accordingly, the second lawyer's motion to dismiss the third-party complaint for contribution and indemnification should have been granted as a matter of law.

7-29-20 NINA SEIGELSTEIN VS. SHREWSBURY MOTORS, INC., ET AL. (L-4072-15, MONMOUTH COUNTY AND STATEWIDE) (A-3801-18T2)

In this appeal of an award of counsel fees in a class action consumer fraud lawsuit that resulted in a settlement, the court held that the trial court mistakenly exercised its discretion when it relied on personal experience in private practice as well as unpublished decisions to reduce the hourly rates for the participating attorneys. In support of the fee application, class counsel submitted certifications by the lead attorneys, both highly experienced in class action consumer protection litigation, attesting that the hourly rates were consistent with their standard hourly rates and had been previously approved in several New Jersey state and federal cases. The claimed rates were further bolstered by supporting certifications from three experienced unaffiliated practitioners, certifying that the hourly rates billed were reasonable and consistent with rates charged in the community by lawyers of comparable experience. The court concluded that class counsel's submissions, which were not contested by defense counsel but were rejected by the trial court, mirrored the methodology deemed acceptable in Rendine v. Pantzer, 141 N.J. 292 (1995), governing the award of attorney's fees under a fee-shifting statute.

7-28-20 D.C. AND M.L. VS. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, ET AL. (DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES) (A-5749-17T1)

Appellants' Medicaid benefits under the New Jersey FamilyCare Aged, Blind, and Disabled (ABD) Program were terminated by the Department of Human Services, Division of Medical Assistance and Health Services (the Division). Prior to termination, appellants applied for benefits under another Medicaid Program, the Specified Low-Income Medicare Beneficiaries (SLMB) Program, but the Division rejected their application. Although appellants qualified for the SLMB Program, they were advised their application could not be processed until the ABD Program benefits were terminated. Because State Medicaid agencies are required under federal regulations to assess beneficiaries' eligibility for other Medicaid programs before terminating benefits, the court held that the Division was required to conduct an ex parte pre-termination review, and, based on appellants' undisputed eligibility, transition them from the ABD Program to the SLMB Program with no gap in coverage. As a result, the court reversed the Division's final agency decision and remanded for further proceedings.

7-24-20 STATE OF NEW JERSEY VS. AMIR A. ABUROUMI (14-12-1059, PASSAIC COUNTY AND STATEWIDE) (A-1334-18T2)

In this appeal, the court considers whether the performances of defendant's plea attorneys were deficient by: (1) negotiating an agreement that required defendant to plead guilty as a condition of admission to pretrial intervention (PTI), when the Guideline to the Rule in effect at the time of defendant's plea prohibited such a requirement by the State; and (2) failing to advise defendant, a non-citizen of the United States, that his acknowledgment of guilt subjected him to removal proceedings – even though the charges would be dismissed upon defendant's successful completion of PTI. Because the record does not reveal the substance of the plea negotiations between the State and defense counsel, nor the advice counsel rendered to defendant about the immigration consequences of his guilty plea, the court vacates the post-conviction relief court's order and remands for an evidentiary hearing.

7-22-20 EDISON BOARD OF EDUCATION VS. ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF EDISON, ET AL. (L-3666-19, MIDDLESEX COUNTY AND STATEWIDE) (A-0320-19T1)

A municipal board of education (BOE) challenged the grant of a use and bulk variances by a local zoning board of adjustment (ZBA) to permit construction of multi-family residential structures. The BOE alleged it had standing to bring the suit because the additional families would further tax an already overcrowded school district. In addition, the BOE argued that the ZBA violated the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21, because it failed to include on its meeting agenda any item reflecting its intention to adopt a memorializing resolution. The trial court rejected these arguments, and this court affirmed.

The court concluded that the BOE lacked standing, because it was not an "interested party," N.J.S.A. 40:55D-4, based on a generalized claim that more families might overburden the school district. The court also concluded that the ZBA did not violate the OPMA, because it included the particular meeting as a "special meeting" on its annual published notice of meetings. See Witt v. Gloucester Cty. Bd. of Chosen Freeholders, 94 N.J. 422, 433 (1983) (holding that "[p]ublication of an agenda . . . is required only in those instances where no annual notice has been provided in accordance with N.J.S.A. 10:4-18

7-22-20 MICHAEL BANDLER VS. LANDRY'S INC., GOLDEN NUGGET ATLANTIC CITY, ET AL. (L-0026-16, ATLANTIC COUNTY AND STATEWIDE) (A-5064-17T3)

The sole issue presented in plaintiff's appeal from the grant of summary judgment to defendants is whether the Casino Control Act, which grants the Division of Gaming Enforcement authority to regulate gaming-related advertising, N.J.S.A. 5:12-70(a)(16), preempts plaintiff's Consumer Fraud Act (CFA) and common law claims alleging a casino hotel falsely advertised a poker tournament. Based on its review of the two statutes, and relevant case law, including the Supreme Court's test for determining preemption of the CFA in Lemelledo v. Beneficial Management Corp.,

7-8-20 STATE OF NEW JERSEY VS. JUAN C. MOLCHOR STATE OF NEW JERSEY VS. JOSE A. RIOS (W-2020-000045-0806 AND W-2020-000047-0806, GLOUCESTER COUNTY AND STATEWIDE) (CONSOLIDATED) (RECORD IMPOUNDED) (A-2009-19T6/A-2010-19T6)

In these consolidated pretrial detention appeals, the court concludes that the Criminal Justice Reform Act (CJRA or Act), N.J.S.A. 2A:162-15 to -26, does not authorize a court to detain arrestees who are undocumented immigrants in order to thwart their potential removal from the country by federal immigration officials. Construing the Act in light of its legislative history and persuasive federal authority, the court concludes the risk of a defendant's failure to appear justifying detention must arise from the defendant's own misconduct, not the independent acts of a separate arm of government that may prevent a defendant from appearing. Inasmuch as the trial court detained defendants in part out of concern that their possible removal from the country would prevent their appearance at trial, the detention orders are reversed and the matters remanded for reconsideration.

7-7-20 STATE OF NEW JERSEY VS. ANTOINE WILLIAMS AND DANIQUE SIMPSON (18-02-0353, 18-02-0354, 18-06-0923, 18-02-0346, 18-02-0352, 19-04-0700, MIDDLESEX COUNTY AND STATEWIDE) (A-2850-19T6)

The Criminal Justice Reform Act (CJRA), N.J.S.A. 2A:162-15 to -26, strikes a balance: it authorizes the pretrial detention of persons charged with serious crimes who pose a risk of flight, danger, or obstruction that cannot be offset by conditions, but guarantees such detained persons the right to a speedy trial. A defendant cannot be detained for more than 180 days after indictment and the start of trial, unless the court finds (1) defendant's release would pose a "substantial and unjustifiable risk" to the safety of a person or the community;and (2) the failure to commence trial was not due to unreasonable delays by the prosecutor. N.J.S.A. 2A:162-22(a)(2)(a).

In this appeal the court holds that the trial court properly exercised its discretion in balancing the risk to the community and defendants' right to a speedy trial when it ordered the release of two defendants three years after they had been detained and found that the failure to commence the trial was due to unreasonable delays caused by the State.

7-2-20 IN RE CERTIFICATE OF NEED APPLICATION FOR THE MEMORIAL HOSPITAL OF SALEM COUNTY (NEW JERSEY DEPARTMENT OF HEALTH) (A-2571-18T1)

After the Salem County Hospital Corporation (SCHC) filed an application for a certificate of need (CN) to transfer ownership of the Memorial Hospital of Salem County, intervenors Carneys Point Rehabilitation and Nursing Center and Golden Rehabilitation and Nursing Center objected to SCHC's requests within that application to convert thirty existing medical/surgical beds to long-term care (LTC) beds and implement a previously approved CN for twenty-six psychiatric beds. Intervenors argued that with regard to the LTC beds: 1) SCHC's application was not filed in accordance with N.J.A.C. 8:33-4.1(a), which requires a finding by the Commissioner that a need exists for such beds in the area and the issuance of a call notice inviting competing applications from other providers in the area, and 2) the administrative record failed to establish a need for LTC beds. They also contended that with respect to the psychiatric beds, N.J.A.C. 8:33-3.3(j) prohibited the transfer of a previously unimplemented CN subject to exceptions which were inapplicable in this case.

The Commissioner granted SCHC's application for transfer of ownership as well as its requests for the LTC and psychiatric beds. It concluded that with regard to the LTC beds, "the addition of [thirty] LTC beds will have a minimal impact on the health care system as a whole and will contribute to the financial viability of Salem Hospital." With respect to the psychiatric beds, the Commissioner noted that the November 17, 2017 CN approval letter "addressed the requirements of N.J.S.A. 26:2H-8(a) [to] (f)" and incorporated that analysis by reference.

The court concludes that, despite the general deference owed to administrative agencies on appeal, the Commissioner failed to apply the relevant statutory factors to determine that there was a need for LTC beds in Salem County and he improperly awarded those beds without issuing a call notice in the New Jersey Register inviting competing applications for the provision of LTC beds. Further, even if the Commissioner's final decision can be interpreted as having determined a need for LTC beds in the area, the record contained insufficient support for such a finding. The court also concludes that the Commissioner was required to conduct an independent analysis of the actual need for a proposed service regardless of whether the transaction has an otherwise meritorious purpose, such as to support a hospital's financial viability. The court agrees, however, with the Commissioner's approval of the open adult acute care psychiatric beds to SCHC consistent with an unimplemented CN.

7-1-20 MARVIN ESCOBAR-BARRERA VS. PAUL KISSIN (L-0783-17. UNION COUNTY AND STATEWIDE) (A-5132-18T3)

In this appeal, the court considered the trial judge's handling of a plaintiff's mid-trial request for a twenty-four-hour adjournment or a mistrial when plaintiff's medical witness unexpectedly failed to appear to testify. The judge denied plaintiff's request for any form of relief and granted defendant's motion for involuntary dismissal pursuant to Rule 4:37-2(b), resulting in the dismissal of plaintiff's personal injury complaint with prejudice

The court holds that the judge's denial of an adjournment or a mistrial under the circumstances constituted a mistaken exercise of discretion. Because plaintiff's claim was completely dependent upon the non-appearing witness's testimony and plaintiff's inability to produce the witness was not the result of inexcusable neglect or willful failure, the court determines that the judge should have afforded some measure of relief to prevent the irretrievable loss of the claim and infringement of plaintiff's substantial rights. Accordingly, the court reverses the dismissal order and remands for a new trial.

6-22-20 STATE OF NEW JERSEY VS. STEVEN R. FORTIN (95-09-1197, MIDDLESEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-5929-17T2)

Defendant Steven R. Fortin, whom juries twice convicted of a brutal 1994 sexual assault and murder, appeals from the denial of his motion for a new trial based on newly discovered scientific evidence that casts doubt on the reliability and scientific validity of bitemark identification. After a review of the change in this forensic area since defendant's most recent murder conviction in 2007, and in light of defendant's conviction for a subsequent brutal sexual attack involving similar bitemarks and the 2007 trial testimony questioning expert bitemark testimony, the court affirms.

6-17-20 THE ESTATE OF FRANK A. CAMPAGNA, ET AL. VS. PLEASANT POINT PROPERTIES, LLC, ET AL. VS. BROUWER HANSEN & ISDEBSKI ASSOCIATES, ET AL. (L-2889-16, OCEAN COUNTY AND STATEWIDE) (A-2989-18T1)

A resident of a rooming house was stabbed to death by another resident. The assailant had recently been released from prison for a violent crime, although the rooming house owner and operator were not aware of that criminal history.

The decedent's estate brought a wrongful death and survival action against the rooming house owner and operator, arguing they had a duty to conduct a criminal background check before allowing the assailant to reside on the premises. The Law Division judge rejected that argument, and granted summary judgment to the defendants.

The court affirms, agreeing with the motion judge that the owner and operator of a New Jersey rooming house have no statutory or common-law duty to conduct criminal background checks of prospective new residents.

No statute or regulation in the State or opinion from another state has recognized such a duty. The imposition of such a duty also could have significant pubic ramifications.

6-16-20 STATE OF NEW JERSEY VS. MICHELLE PADEN- BATTLE (15-03-0584, ESSEX COUNTY AND STATEWIDE) (A-1320-17T2)

Defendant was convicted of first-degree kidnapping, conspiracy to kidnap,and felony murder, and sentenced to a sixty-year prison term. In her appeal, defendant raised numerous issues regarding her convictions as well as the sentence imposed.

The court first agreed that the jury's verdict could only be understood as supporting a conviction of second-degree kidnapping, not first-degree kidnapping for which she was sentenced, because the jury was not asked to determine whether defendant "release[d] the victim unharmed and in a safe place prior to apprehension."N.J.S.A. 2C:13-1(c)(1). The court, however, rejected defendant's argument that a new trial was required, holding instead, in accord with State v. Casilla, 362 N.J. Super. 554 (App. Div. 2003), that the verdict simply had to be molded to reflect a conviction of second-degree kidnapping.

Second, while the molding of the kidnapping conviction required resentencing, the court also mandated resentencing – and before a different judge – because the judge based the sentence on his declaration, based on his own understanding of the evidence, that defendant "ordered [the victim's] execution" even though the jury acquitted defendant of both first-degree murder and conspiracy to commit murder. The court held that, while federal constitutional principles may permit an enhancement of a sentence based on conduct for which the defendant was acquitted, see United States v. Watts, 519 U.S. 148 (1997), New Jersey constitutional principles do not. Because an acquittal means the State failed to overcome the accused's presumption of innocence – leaving the accused's innocence "established," State v. Hill, 199 N.J. 545, 559 (2009) – the sentencing judge here violated defendant's due process rights and her right to trial by jury by disregarding the jury's acquittal verdict and enhancing the sentence because of his personal own view of the evidence.

6-15-20 LVNV FUNDING, LLC, ETC. VS. JOSEPH DEANGELO (L-1242-09, GLOUCESTER COUNTY AND STATEWIDE) (A-0220-19T1)

Plaintiff commenced this collection action in July 2009, and in 2010 obtained a default judgment that defendant did not seek to vacate, under Rule 4:50, until 2018. The trial judge conducted an evidentiary hearing and found plaintiff's claim accrued no later than March 2004 – more than four years before the complaint was filed – meaning the action was time-barred when filed, N.J.S.A. 12A:2-725(1), and plaintiff's filing of the action violated the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 – 1692p. The judge, however, also determined that defendant's failure to respond to the complaint or plaintiff's post-judgment collection efforts was inexcusable. Balancing these circumstances, the trial judge concluded defendant was entitled to relief from the judgment and dismissal of the complaint.

In affirming, the court held that the judge's decision to vindicate the federal policy in favor of curbing "abusive debt collection practice" rather than the state interest in the finality of judgments was not an abuse of discretion.

6-15-20 STATE OF NEW JERSEY VS. ALEXANDER A. ANDREWS (17-09-1005, MIDDLESEX COUNTY AND STATEWIDE) (A-1348-19T1)

This appeal requires the court to determine whether the assignment judge correctly granted defendant's motion to overrule the State's rejection of his petition for a Graves Act waiver pursuant to N.J.S.A. 2C:43-6.2, "which embodies the so called 'escape valve' to the mandatory sentence requirements otherwise embodied in the Graves Act," N.J.S.A. 2C:43-6(c). State v. Alvarez, 246 N.J. Super. 137, 139 (App. Div. 1991). In granting defendant's application, the assignment judge concluded that based on the disparity in the prosecutor's treatment of similarly situated defendants and the discrepancy in the State's assessment of defendant's criminal record, defendant demonstrated "'arbitrariness constituting an unconstitutional discrimination or denial of equal protection' in the prosecutor's decision," State v. Benjamin, 228 N.J. 358, 372 (2017) (quoting Alvarez, 246 N.J. Super. at 148), that fell within the Alvarez proscription. The judge explained that while Benjamin precluded defendants challenging the denial of a Graves Act waiver from obtaining discovery of prosecutorial decisions in cases other than their own, as the judge responsible for reviewing all waiver cases, he was in the best position to determine whether the Alvarez standard had been violated. The court affirms the judge's decision and rejects the State's challenge. The court is satisfied that the judge's robust review and analysis were sound, and fulfilled the role contemplated in Benjamin, to "ensure[] that prosecutorial discretion is not unchecked." 228 N.J. at 373.

6-12-20 STATE OF NEW JERSEY VS. ANDREW F. STOVEKEN STATE OF NEW JERSEY VS. GEORGE BEECHER (16-08-0130, 16-08-0129, MIDDLESEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-1753-18T1/A-1985-18T1)

In these appeals, the court holds, as a matter of first impression, that a valid grand jury subpoena is sufficient to obtain prescription drug information maintained in New Jersey's Prescription Monitoring Program (PMP) when law enforcement personnel are investigating a prescriber.

6-11-20 BAFFI SIMMONS, ET AL. VS. WENDY MERCADO, ET AL. (L-0712-18, CUMBERLAND COUNTY AND STATEWIDE) (A-3460-18T1)

Plaintiff filed a complaint against defendants Millville and its police department under OPRA, N.J.S.A. 47:1A-1 to -13, seeking copies of DWI/DUI, drug possession, and drug paraphernalia summonses and complaints issued by Millville police officers. The trial judge granted relief but the court reversed. The court observed that the creation of a complaint-summons starts with a police officer – at the direction of the Attorney General – inputting information into an electronic system created and maintained by the Administrative Office of the Court. Once completed, the complaint-summons is retained by the municipal court, whose authority falls under the aegis of the judiciary. The court therefore held that the municipality and its police department are not the custodians of these records and they could not be compelled to search for and turnover these records in response to an OPRA request.

6-10-20 CARRINGTON MORTGAGE SERVICES, LLC VS. DAVID MOORE, ET AL. (F-007711-18, MONMOUTH COUNTY AND STATEWIDE) (A-4084-18T3)

Defendants appeal the Chancery Division's denial of their motion to vacate a default judgment of mortgage foreclosure. Defendants' house was severely damaged by Superstorm Sandy, and they ceased paying their mortgage loan.

Defendants filed a federal lawsuit against their flood insurance company and homeowners' insurer policies, seeking payment for the storm damage. They named the mortgage holder as a co-defendant, claiming the storm extinguished their obligation to pay the mortgage. The federal court dismissed the complaint against all three defendants.

The mortgage holder's successor then filed the present state-court foreclosure action. Defendants defaulted and final judgment was entered against them. Defendants argue the foreclosure action was barred under the Entire Controversy Doctrine, because the mortgagee had the opportunity to file a counterclaim for foreclosure in the previous federal action.

This court affirms the Chancery judge's ruling that the foreclosure action was not barred by the Entire Controversy Doctrine.

The federal case seeking insurance payments lacked a sufficient nexus to the mortgage to preclude the foreclosure case. In addition, the mortgage holder's contractual right to direct the use of any insurance proceeds does not eliminate the mortgage debt or the right to foreclose on the defaulted loan.

6-8-20 SOLOMON RUBIN VS. MARK TRESS, ET AL. (DC-000876-19, OCEAN COUNTY AND STATEWIDE) (A-3338-18T1)

The court affirms the dismissal without prejudice of a Special Civil Part suit to recover unpaid legal fees based on plaintiff's failure to provide defendants' attorney with a copy of the pre-action notice required by Rule 1:20A-6 referenced in the complaint in response to his written demand in accordance with Rule 4:18-2.

6-5-20 DCPP VS. R.D.B. AND M.N.M., IN THE MATTER OF THE GUARDIANSHIP OF R.D.B., II, AND D.L.J.M. (FG-07-0074-19, ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4795-18T1)

The biological mother of two children appeals from the Judgment of Guardianship entered by the Family Part terminating her parental rights to her two sons. The judge assigned to manage this case made the decision to terminate appellant's parental rights after conducting a one-day trial in which she was not present nor represented by counsel. At the first case management conference, appellant complained to the judge about her inability to communicate with the attorney assigned by the Public Defender – Office of Parental Representation (OPR). Without a formal motion or prior notice to appellant, the judge granted OPR counsel's oral application to be relieved as counsel of record for appellant. The judge thereafter told appellant she had only two options: (1) retain private counsel or (2) proceed without a lawyer

This court holds the Family Part violated appellant's constitutional and statutory right to be represented by competent counsel. The trial judge's response to appellant's dissatisfaction with her assigned OPR counsel is irreconcilable with the approach the Supreme Court established in N.J. Div. of Child Prot. & Perm. v. R.L.M. (In re R.A.J.), 236 N.J. 123, 149-51 (2018). This court vacates the Judgment of Guardianship against appellant, and remands for the matter to be tried before a different judge.

This court holds the Family Part violated appellant's constitutional and statutory right to be represented by competent counsel. The trial judge's response to appellant's dissatisfaction with her assigned OPR counsel is irreconcilable with the approach the Supreme Court established in N.J. Div. of Child Prot. & Perm. v. R.L.M. (In re R.A.J.), 236 N.J. 123, 149-51 (2018). This court vacates the Judgment of Guardianship against appellant, and remands for the matter to be tried before a different judge.

6-4-20 STATE OF NEW JERSEY VS. SANDRO VARGAS (15-08-1756, ESSEX COUNTY AND STATEWIDE) (A-2152-17T1)

In affirming defendant's conviction for murdering his former girlfriend, the court clarifies that evidence that satisfies a hearsay exception, such as defendant's prior threat to the victim, admissible as a statement of a party opponent, N.J.R.E. 803(b)(1), must also overcome the exclusion of other crimes, wrongs, and acts evidence under N.J.R.E. 404(b), as well as satisfy N.J.R.E. 403. The trial court mistakenly concluded that meeting the hearsay exception provided an independent basis for admitting the prior statement.Notwithstanding that mistake, the appellate court affirms the conviction, because the hearsay statement satisfied the Rule 404(b) test set forth in State v. Cofield, 127 N.J. 328, 338 (1992). In particular, its probative value as evidence of motive was not outweighed by its apparent prejudice.

6-4-20 STATE OF NEW JERSEY VS. ANDRES I. CHAVARRIA (18-10-0303 AND 18-10-0304, SUSSEX COUNTY AND STATEWIDE) (A-4473-18T3)

Defendant pleaded guilty to two counts of violating N.J.S.A. 2C:40-26(b) by driving during a period of license suspension or revocation for a second or subsequent violation of N.J.S.A. 39:4-50, driving while under the influence, or N.J.S.A. 39:4-50a, refusal to provide a breath sample. The court sentenced defendant on each count to a 180-day term of imprisonment with a 180-day period of parole ineligibility as a condition of serving a two-year probationary term. The court ordered the custodial terms to be served consecutively and the probationary terms to be served concurrently.

Defendant argued his sentences are illegal because the Criminal Code does not authorize a spilt sentence with a term of imprisonment that includes a mandatory period of parole ineligibility. The court disagreed, finding the plain language of N.J.S.A. 2C:43-2(b)(2) authorizes sentences including terms of incarceration as a condition of probation, with the only limitation being the term of incarceration may not exceed 364 days. The court finds that because defendant's individual and aggregate custodial sentences require less than 364 days of imprisonment as a condition of probation, they are authorized by N.J.S.A. 2C:43-2(b)(2) even though the terms of imprisonment include mandatory periods of parole ineligibility.

The court also determined the sentencing court erred by failing to make findings supporting its imposition of consecutive sentences, see State v. Yarbough, 100 N.J. 627 (1985), and by imposing sentences that were both consecutive and concurrent, see State v. Rogers, 124 N.J. 113 (1991). The court remanded for resentencing.

6-2-20 STATE OF NEW JERSEY VS. MARQUIS ARMSTRONG (15-05-0932, ESSEX COUNTY AND STATEWIDE) (A-2102-17T2)

Defendant pled guilty during trial to aggravated manslaughter. The victim was the boyfriend of his former girlfriend and mother of his daughter. The State introduced text messages defendant sent to her shortly before the homicide, alleging they were threatening and demonstrated defendant's jealous nature. Defendant moved pretrial to suppress the messages seized from her cellphone. Although the State asserted that police obtained consent before searching the phone, it objected to any evidentiary hearing on the issue, arguing that defendant lacked a reasonable expectation of privacy in those text messages and the requisite standing to challenge the search. Without holding an evidentiary hearing, the judge agreed with the State and denied the motion.

The court affirms, concluding that defendant had no reasonable expectation of privacy in the text messages once they were sent and received on another's phone, and that defendant lacked standing to challenge the search because he had no "proprietary, possessory or participatory interest in either the place searched or the property seized." State v. Randolph, 228 N.J. 566, 571 (2017) (quoting State v. Alston, 88 N.J. 211, 228 (1981)).

5-27-20 AMERICARE EMERGENCY MEDICAL SERVICE, INC. VS. THE CITY OF ORANGE TOWNSHIP, ET AL. (L-2397-19, ESSEX COUNTY AND STATEWIDE) (A-0117-19T4)

On leave granted, the New Jersey Department of Health Office of Emergency Medical Services appealed from a July 16, 2019 Law Division order lifting the summary suspension of plaintiff AmeriCare Emergency Medical Service, Inc.'s license to operate as an emergency medical service provider and permitting an action to proceed under the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2 (CRA). Although there is no jurisdictional requirement that administrative remedies be exhausted in order to bring suit under the CRA, the party alleging a claim must show a violation of a substantive right or that someone "acting under color of law" interfered with or attempted to interfere with a substantive right. State v. Quaker Valley Farms, LLC, 235 N.J. 37, 64 (2018). Since AmeriCare could not make that showing without agency adjudication of its administrative claims, the panel reversed the Law Division order.

5-21-20 RICHARD UNDERHILL, ET AL. VS. BOROUGH OF CALDWELL, ET AL. (L-1631-17, ESSEX COUNTY AND STATEWIDE) (A-1800-18T4)

This personal injury case arises from a pedestrian's fall on black ice in a parking lot leased by private owners to the Borough of Caldwell. The injured pedestrian and his wife sued both the Borough and the private owners, alleging negligent failure to maintain the parking lot and the internal driveway connected to it in a safe condition. The written lease between the owners and the Borough expressly delegates to the Borough the responsibility to clear the premises of ice and snow.

The trial court granted the Borough and the property owners summary judgment. Plaintiffs now appeal the ruling solely as to the property owners, arguing they had a non-delegable duty under tort law to keep the premises safe from accumulated ice and snow, or alternatively, that the language of the lease does not delegate that duty with sufficient clarity

We affirm, albeit for a legal reason not articulated by the trial court. Based on the Supreme Court's very recent opinion in Shields v. Ramslee Motors, 240 N.J. 479 (2020), the property owners are entitled to summary judgment as a matter of law. That is because the lease explicitly delegates to the Borough the exclusive responsibility to remove snow and ice from the premises. The fact that the tenant in this case is a public entity and that it uses the premises for a municipal parking lot does not warrant a different result than in Shields.

5-19-20 CARMELLA C. MINELLI, ET AL. VS. HARRAH'S RESORT ATLANTIC CITY, ET AL. (L-1509-15, MERCER COUNTY AND STATEWIDE) (A-4431-18T1)

Plaintiffs Carmella C. Minelli and her husband Anthony Minelli appeal from the dismissal of their personal injury action against defendants Harrah's Resort Atlantic City, Harrah's Operating Company, Inc., Caesars Entertainment and Caesars Entertainment Operating Company, Inc. based on the two-year statute of limitations, N.J.S.A. 2A:2-14. Because the court concludes that operation of Section 108(c)(2) of the Bankruptcy Code made plaintiffs' claims timely filed, at least as to the debtor, defendant Caesars Entertainment Operating Company, the judgment is reversed.

5-19-20 STATE OF NEW JERSEY VS. IAN W. MARIAS (18-12-3840, ESSEX COUNTY AND STATEWIDE) (A-2145-19T1)

This court granted the State leave to appeal in this pending criminal case to address the grading aspects of the money laundering statute, N.J.S.A. 2C:21-23 to -29. The core and unresolved legal question is the meaning of the term "amount involved" in N.J.S.A. 2C:21-27, which calibrates the severity of the offense.

Specifically, N.J.S.A. 2C:21-27(a) prescribes that a defendant commits a first-degree money laundering offense if the "amount involved" is $500,000 or more. The crime is a second-degree offense if the "amount involved" is under $500,000 but equal to or more than $75,000. Lastly, it is a third-degree offense if the "amount involved" is under $75,000

As this opinion explains, this court holds that where, as here, a defendant is charged with engaging in a money laundering transaction prohibited by N.J.S.A. 2C:21-25(b), the "amount involved" is the fair market value of the property transferred in that transaction and any other transactions conducted as part of that common scheme. That fair market value is to be determined by the trier of fact. The value is not necessarily equal to or limited by the sum that the money launderer received in the illicit transaction(s). However, the court rejects the prosecutor’s argument that the “amount involved” in a case charged under the “transactional” provision of the money laundering statute includes the value of unsold stolen goods that were not part of a laundering transaction.

5-14-20 STATE OF NEW JERSEY VS. DERRICK LAWRENCE (17-07-0930 AND 17-07-0931, BERGEN COUNTY AND STATEWIDE) (A-2919-18T2)

Defendant was confined to the Bergen County Jail work release program for failure to pay child support. He was released to search for work and twice failed to return to jail on a timely basis resulting in his indictment, subsequent plea, and sentence on two counts of third-degree escape, N.J.S.A. 2C:29-5(a).

On this appeal, from a denial of defendant's PCR petition, the court reverses and holds that because a child support contempt proceeding is "essentially a civil proceeding," see Pasqua v. Council, 186 N.J. 127, 140 (2006), defendant could not be charged with the criminal offense of escape, and the PCR court erred as a matter of law.

5-13-20 GURBIR S. GREWAL, ET AL. VS. WILLIAM AND OTHILIA GREDA, ET AL. (L-3414-16, UNION COUNTY AND STATEWIDE) (A-0604-18T2)

In this action, the Attorney General and Director of the New Jersey Division on Civil Rights alleged defendants violated the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49, by asking a prospective tenant of an apartment if she was a Muslim, refusing to lease the apartment based on the prospective tenant's religion, and making statements concerning the gender of a Division on Civil Rights investigator posing as a prospective tenant. A jury returned a no-cause verdict on plaintiffs' claims. The court reverses and remands for a new trial.

The court determines the trial court erred by allowing cross-examination of the prospective tenant about her religious beliefs and the teachings of the Quran in violation of N.J.R.E. 610 and in derogation of the privilege embodied in N.J.R.E. 512. The court rejects defendants' argument the cross-examination was permissible because the prospective tenant "opened the door" to questions about her religious beliefs and the teachings of the Quran during her direct testimony.

The court also concludes the trial court abused its discretion by allowing cross-examination of the prospective tenant about the alleged use of the term "infidels" by Muslims to refer to individuals that do not practice Islam. The court finds the cross-examination testimony, which defendants relied on to attack the prospective tenant's credibility, inadmissible under N.J.R.E. 608.

The court also finds the trial court did not conduct a proper analysis of the admissibility of the available portions of one of the defendant's recorded interview with a news organization, during which the defendant spoke about his interactions with prospective tenant and his beliefs concerning Muslims. The trial court incorrectly determined the available recorded portions of the interview were inadmissible under the "rule of completeness" without conducting the required analysis for the admissibility of the available portions of the recorded interview under the standard established by the Court in State v. Nantambu, 221 N.J. 390 (2015).

5-8-20 JAMES P. MCGORY VS. SLS LANDSCAPING (DIVISION OF WORKERS' COMPENSATION) (A-4837-18T2)

In this workers' compensation case, the court reverses an order dismissing with prejudice a claim petition and a motion for medical and temporary disability benefits. The court concludes the judge of compensation denied petitioner's due process rights by determining at the outset of case, and based solely on petitioner's affidavit supporting his motion for medical and temporary disability benefits, that petitioner was a "multiple liar" who lacked credibility. During the numerous subsequent proceedings in the matter, and without hearing any testimony from petitioner, the judge repeatedly found petitioner was a liar and, at one point, found petitioner's lack of credibility rendered it unnecessary to hear to any evidence on the merits of petitioner's claim. The court reverses the dismissal of the claim petition and denial of the motion for medical and temporary disability benefits, and remands for further proceedings before a different judge.

5-5-20 JOSEPH J. GORMLEY, III VS. SUSAN CANNAVO GORMLEY (A-1428-18T4)

In this appeal from a final judgment of divorce and an order denying reconsideration, the court rejected a trial judge's reliance on Gilligan v. Gilligan, 428 N.J. Super. 69 (Ch. Div. 2012), to the extent it held an award of social security disability to a spouse during the marriage was not sufficient to establish a party's inability to work for purposes of income imputation in the calculation of spousal and child support. The court held here that despite Gilligan's holding, the court continued to hew to its holding in Golian v. Golian, 344 N.J. Super. 337, 338-43 (App. Div. 2001), that when the Social Security Administration has determined a party is disabled, a presumption of disability is established and the burden shifts to the opposing party to refute that presumption

The court also rejected the trial judge's reliance on income averaging in her determination of whether a party was earning income commensurate with his or her earning capacity because the judge ignored current earnings and relied upon six years of income that were earned prior to the parties separating, which was more than five years before the trial date. The court held that the judge on remand should use the years prior to the trial when determining earning capacity.Finally, the court concluded that the trial judge also improperly deviated from the Child Support Guidelines by relying on the elimination of parenting time in the final judgment of divorce. The court concluded that because the amount of parenting time is an element of the Child Support Guidelines, a reduction based on elimination of parenting time did not support a finding of an injustice warranting a downward deviation in support.

5-4-20 C.C. VS. J.A.H. (FV-04-2424-19, CAMDEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4425-18T3)

In this case of first impression, the court examines the meaning of a "dating relationship" under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, where the parties never experienced a traditional, in-person "date." Instead, their relationship was demonstrated by the intensity and content of their communications, including the exchange of nearly 1300 highly personal text messages.

Acknowledging the prevalence of virtual communications in today's society, especially in view of the COVID-19 pandemic, the court recognized text messaging and other forms of electronic communication enable rapid yet deep interactions at all hours. Those communications can form bonds that may be no less intimate than traditional dating activities.

The court concluded the proliferate and exceedingly intimate communications between the parties in the present matter constituted a dating relationship within the meaning of the Act and supported entry of the final restraining order.

4-28-20 IN THE MATTER OF THE ADOPTION OF A CHILD BY C.J. (FA-08-0012-17, GLOUCESTER COUNTY AND STATEWIDE)(RECORD IMPOUNDED) (A-2593-17T2)

An attorney has an obligation to inform the court if he or she is not able to handle an assigned matter professionally due to a lack of expertise and inability to obtain sufficient knowledge to appropriately represent the client, and also is unable to retain a substitute attorney knowledgeable in the area. We sua sponte determine that appellate counsel was so ineffective in this contested adoption appeal that the mother was deprived of her right to appellate counsel. In counsel's five-page brief he relied on an inapplicable statute, cited to no cases and failed to mention the lack of a transcript of the judge's decision. We therefore adjourn this appeal to appoint substitute appellate counsel and obtain the transcript.

4-27-20 STATE OF NEW JERSEY VS. R.K. (99-08-0439 AND 12-05-0377, SOMERSET COUNTY AND STATEWIDE) (CONSOLIDATED) (RECORD IMPOUNDED) (A-2022-18T2/A-2024-18T2)

In these consolidated appeals, the court is asked to determine whether two sentences imposed on convicted sexual offender R.K. for violating a New Jersey Parole Board regulation imposing a Community Supervision for Life (CSL) condition banning the use of the Internet to access social media are unconstitutional on its face and as applied to him. The trial judge denied R.K.'s motions to correct his illegal sentences finding the ban did not violate his constitutional rights of free speech. Because the court concludes the blanket social media prohibition is both unconstitutional on its face based on Packingham v. North Carolina, 582 U.S. ___, 137 S. Ct. 1730 (2017), and as applied to R.K. based on J.I. v. N.J. State Parole Bd., 228 N.J. 204 (2017) and K.G. v. N.J. State Parole Bd., 458 N.J. Super. 1 (App. Div. 2019), the trial court's rulings are reversed, and the court remands for: (1) resentencing to remove the 2007 CSL condition prohibiting R.K. from accessing social networking on the Internet without the express authorization of the District Parole Supervisor; and (2) allowing R.K. to withdraw his September 2012 guilty plea for violating the terms of his CSL condition prohibiting him from accessing social networking.

4-20-20 STATE OF NEW JERSEY VS. DAVID GHIGLIOTTY (17-02-0154, UNION COUNTY AND STATEWIDE) (A-0938-19T3)

In this opinion, the court addresses the novel issue of whether a firearms toolmark identification expert's use of untested three-dimensional (3D) computer imaging technology known as BULLETTRAX, in conjunction with the traditional technique of comparing evidence and test bullets using a comparison microscope, requires that a Frye1 hearing be held to establish the scientific reliability of the BULLETTRAX machine and related software.

Following an evidentiary hearing, the trial court concluded that the State's expert relied upon the BULLETTRAX technology and the images it produced in concluding that a bullet fragment taken from the murder victim likely came from a handgun later seized from defendant. In so ruling, the trial court made extensive factual and credibility findings pertaining to the expert's testimony about his use of the images, and its findings are entitled to deference on appeal.

Under these circumstances, the court holds that a Frye hearing was necessary to demonstrate the reliability of the computer images of the bullets produced by BULLETTRAX before the expert would be permitted to testify at trial.

4-16-20 STATE OF NEW JERSEY, BY THE DEP VS. 10.041 ACRES STATE OF NEW JERSEY, BY THE DEP VS. 0.808 ACRES STATE OF NEW JERSEY, BY THE DEP VS. 3.814 ACRES (L-2982-17, L-2985-17, 3079-17, OCEAN COUNTY AND STATEWIDE) (CONSOLIDATED) (A-2278-17T4/A-2279-17T4/A-2507-17T4)

In State v. North Beach 1003, LLC, 451 N.J. Super. 214, 223 (App. Div. 2017), this court held that the Department of Environmental Protection (DEP) had the authority to "condemn private property to take perpetual easements for shore protection purposes" as part of the Manasquan Inlet to Barnegat Inlet Hurricane and Storm Damage Reduction Project to reduce flooding in the aftermath of Superstorm Sandy. This court also held that "easements that allow for publicly funded beach protection projects can include public access and use." However, this court expressly did not extend its holding to properties that were protected from flooding by an existing revetment.

In these sixty-seven consolidated condemnation appeals, this court affirmed the trial judge's final judgments upholding DEP's taking of permanent easements where the properties were protected by the revetment. This court agreed with the trial judge's conclusions that DEP properly determined that the revetment provided insufficient protection, and that the taking was not the product of fraud, bad faith, or manifest abuse of power.

4-16-20 STATE OF NEW JERSEY, BY THE DEP VS. 1 HOWE STREET BAY HEAD, LLC STATE OF NEW JERSEY, BY THE DEP VS. 623 EAST AVENUE, LLC STATE OF NEW JERSEY, BY THE DEP VS. MICHAEL CORTESE AND SAUNDRA CORTESE STATE OF NEW JERSEY, BY THE DEP VS. PAOLO COSTA STATE OF NEW J (A-1418-17T4/A-1419-17T4/A-1420-17T4/A-1421-17T4/A-1422-17T4/A-1423-17T4/A-1424-17T4/A-1425-17T4/A-1426-17T4/A-1427-17T4/A-1428-17T4/A-1429-17T4/A-1430-17T4/A-1432-17T4/A-1433-17T4/A-1434-17T4 A-1435-17T4/A-1436-17T4/A-1437-17T4/A-1438-17T4/A-1440-17T4/A-1)

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4-16-20 STATE OF NEW JERSEY, BY THE DEP VS. MIDWAY BEACH CONDOMINIUM (L-2653-17, OCEAN COUNTY AND STATEWIDE) (A-2071-17T4)

In State v. North Beach 1003, LLC, 451 N.J. Super. 214, 223 (App. Div. 2017), this court held that the Department of Environmental Protection (DEP) had the authority to "condemn private property to take perpetual easements for shore protection purposes" as part of the Manasquan Inlet to Barnegat Inlet Hurricane and Storm Damage Reduction Project to reduce flooding in the aftermath of Superstorm Sandy. This court also held that "easements that allow for publicly funded beach protection projects can include public access and use." However, this court expressly did not extend its holding to properties that were protected from flooding by an existing revetment.

In these sixty-seven consolidated condemnation appeals, this court affirmed the trial judge's final judgments upholding DEP's taking of permanent easements where the properties were protected by the revetment. This court agreed with the trial judge's conclusions that DEP properly determined that the revetment provided insufficient protection, and that the taking was not the product of fraud, bad faith, or manifest abuse of power.

4-14-20 EMILIANO RIOS VS. MEADOWLAND HOSPITAL MEDICAL CENTER (L-0142-17, HUDSON COUNTY AND STATEWIDE) (A-3846-18T1)

Plaintiff alleged defendant violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, by terminating his employment in retaliation for his opposition to defendant's requests that he make false statements concerning, and seek a baseless restraining order against, a co-employee in retaliation for the co-employee's filing of a complaint alleging defendant violated the LAD. The motion court granted defendant summary judgment, finding plaintiff did not present evidence establishing the prerequisite for a LAD retaliation claim under the Supreme Court's decision in Carmona v. Resorts International Hotel, Inc., 189 N.J. 354 (2007). More particularly, the motion court found plaintiff failed to demonstrate there was a good faith and reasonable basis for his co-employee's LAD complaint.

The court reverses the summary judgment order, finding Carmona's good faith and reasonable basis prerequisite for a LAD-retaliation claim applies to the protected activity under N.J.S.A. 10:5-12(d) triggering the alleged retaliatory actions. Unlike the plaintiff in Carmona, plaintiff did not allege he was retaliated by engaging in the protected activity of filing a LAD complaint. See N.J.S.A. 10:5-12(d). Instead, plaintiff alleged he was retaliated against for engaging in protected activity under N.J.S.A. 10:5-12(d) by opposing "acts forbidden under" the LAD—defendant's requests he make false statements and obtain a baseless restraining order against the co-employee in retaliation for her filing of a LAD complaint. The court holds that to satisfy the Carmona prerequisite for his LAD retaliation claim, plaintiff was required to demonstrate he had a good faith and reasonable basis to oppose defendant's requests because he alleged that protected activity triggered the alleged retaliation against him.

4-13-20 IN THE MATTER OF REGISTRANT J.G. IN THE MATTER OF REGISTRANT C.C. (ML-17-13-0023 AND ML-18-04-0057, MONMOUTH AND CAMDEN COUNTIES AND STATEWIDE) (RECORD IMPOUNDED) (CONSOLIDATED) (A-4807-17T1/A-5512-18T1)

These two appeals raise challenges to the use of the Registrant Risk Assessment Scale (RRAS) to determine the risk of re-offense by persons who have been convicted of possessing or distributing child pornography. Defendants both pled guilty to second-degree endangering the welfare of a child by distributing child pornography in violation of N.J.S.A. 2C:24-4(b)(5)(a)(iii). Following the completion of their custodial sentences, they were both found to pose a moderate risk of re-offense and were designated as Tier Two registrants under the Registration and Community Notification Laws, N.J.S.A. 2C:7-1 to -23, commonly known as Megan's Law.

Defendants appeal from the orders imposing that level of classification, contending that, as applied to them, the use of the RRAS was improper. They also argue that the use of the RRAS in tiering sex offenders who have been convicted of one offense related to possessing or distributing child pornography gives a skewed tiering result. Thus, defendants argue that the RRAS should be modified, replaced, or not used in tiering one-time child pornography offenders.

The court concludes that neither defendant created the record to support his arguments. Accordingly, the court affirms and issue this consolidated opinion to address the common arguments presented by defendants

4-9-20 ANGEL ALBERTO PAREJA VS. PRINCETON INTERNATIONAL PROPERTIES, ET AL. (L-2283-16, MERCER COUNTY AND STATEWIDE) (A-2111-18T3)

The court rejected the applicability of the ongoing-storm rule, which arbitrarily relieves commercial landowners from any obligation to try to render their property safe while sleet or snow is falling. The court held a commercial landowner has a duty to take reasonable steps to render a public walkway abutting its property—covered by snow or ice—reasonably safe. The court imposed a duty of ordinary care and identified factors to consider when determining whether the landowner breached that duty, emphasizing that reasonableness is the polestar.

4-7-20 STATE OF NEW JERSEY VS. BRIAN HORNE (18-04-0303, GLOUCESTER COUNTY AND STATEWIDE (A-0906-19T1)

The spousal privilege prevents a spouse or partner in a civil union of the accused from testifying against the accused. N.J.S.A. 2A:84A-17(2) and N.J.R.E. 501(2). One exception to the privilege is when "the accused is charged with an offense against the spouse or partner, a child of the accused or of the spouse or partner, or a child to whom the accused or the spouse or partner stands in the place of a parent." N.J.S.A. 2A:84A-17(2)(b) and N.J.R.E. 501(2)(b). The court in this opinion determines that the term "child" in the spousal privilege exception refers to an unemancipated child.

4-6-20 STATE OF NEW JERSEY VS. JAKE PASCUCCI (18-04-0261, MIDDLESEX COUNTY AND STATEWIDE) (A-4905-17T2)

Defendant pled guilty to an accusation charging him with the third degree offense of strict liability vehicular homicide pursuant to N.J.S.A. 2C:11-5.3a.The State agreed to recommend probation conditioned on defendant serving 364 days in the county jail. Mitigating factor five, N.J.S.A. 2C:44-1b(5), allows a judge to consider whether the victim's conduct induced or facilitated the commission of the crime. The trial judge held mitigating factor five was inapplicable in this case as a matter of law because N.J.S.A. 2C:11-5.3d provides: "It shall not be a defense to a prosecution under this section that the decedent contributed to his [or her] own death by reckless or negligent conduct." This court reverses and holds N.J.S.A. 2C:11-5.3d does not preclude a judge from finding and applying mitigating factor five. This court remands the matter for resentencing because the record shows a basis to find mitigating factor five.

4-2-20 MARK AMZLER VS. AMY AMZLER (FM-12-2131-09, MIDDLESEX COUNTY AND STATEWIDE) (A-3384-18T3)

Defendant Amy Amzler filed a motion to enforce plaintiff Mark Amzler's alimony obligation, as required under the parties' 2009 matrimonial settlement agreement (MSA). The MSA included an anti- Lepis1 provision, which stated that a "voluntary reduction in income of either party" would not constitute a substantial change in circumstances for the purpose of reviewing the alimony obligation. Plaintiff opposed the motion and filed a cross-motion seeking to modify or terminate his alimony obligation, as he had recently retired, before reaching full retirement age, due to medical issues. The trial court terminated plaintiff's alimony obligation, applying N.J.S.A. 2A:34-23(j)(2), which governs the review of alimony awards where the obligor retires before reaching full retirement age.

As a matter of first impression, the court held that N.J.S.A. 2A:34-23(j)(2) applies only to alimony orders entered after the effective date of the 2014 amendments to the alimony statute. The court relied on Landers v. Landers, 444 N.J. Super. 315, 324 (App. Div. 2016), where it held that N.J.S.A. 2A:34-23(j)(1) applies only to alimony orders established after the effective date of the 2014 amendments. In construing the statute, the Landers court held that although subsection (j)(1) does not explicitly state that it applies only to orders or agreements established after the 2014 amendments, "the particular language used in subsection (j)(3) clarifies the Legislature's intent to apply (j)(1) only to orders entered after the amendments' effective date."2 Id. at 324. In the current matter, the court found that there was no sound basis to depart from its reasoning in Landers and that construing subsection (j)(2) consistent with its construction of subsection (j)(1) conforms to the Legislature's intent in enacting subsection (j). Thus, the court held that N.J.S.A. 2A:34-23(j)(3), which governs the review of final alimony orders or agreements established before the effective date of the 2014 amendments to the alimony statute, is applicable to this case. Accordingly, the court vacated the orders under review and remanded the matter to the trial court to reconsider the parties' applications, applying the correct

1 Lepis v. Lepis, 83 N.J. 139 (1980).2 Subsection (j)(3) provides that it applies when "there is an existing final alimony order or enforceable written agreement established prior to the effective date of this act." N.J.S.A. 2A:34-23(j)(3).

provision of the statute and considering whether the anti-Lepis provision in the MSA prohibits a reduction of plaintiff's alimony obligation.

3-30-20 STATE OF NEW JERSEY VS. BENNIE ANDERSON (L-0600-19, MERCER COUNTY AND STATEWIDE) (A-4289-18T3)

Following defendant's guilty plea for accepting a $300 bribe while employed with the Jersey City Tax Assessor's Office, the State filed a complaint and order to show cause seeking the complete forfeiture of defendant's pension benefits pursuant to N.J.S.A. 43:1-3.1. Defendant principally argued that forfeiture of his entire pension (which he was already receiving) was an excessive fine in violation of the Eighth Amendment of the United States Constitution and Article I, Paragraph 12 of the New Jersey Constitution.

The trial court concluded that defendant's federal conviction mandated a complete pension forfeiture and did not violate the Excessive Fines Clause as receipt of pension benefits was a contractual arrangement between a public employee and employer conditioned on rendering honorable service, as opposed to a property right, and thus did not constitute a fine. The court concludes, contrary to the trial court, that defendant's right to receive pension benefits was a property right and the total forfeiture of his pension was a fine within the meaning of the Eighth Amendment. Although the trial court did not address whether the forfeiture was unconstitutionally excessive, the court concludes defendant's conduct was sufficiently egregious to warrant a complete pension forfeiture and did not violate the Eighth Amendment.

3-19-20 IN THE MATTER OF M.M., DEPARTMENT OF HUMAN SERVICES (NEW JERSEY CIVIL SERVICE COMMISSION) (CONSOLIDATED) (A-4038-17T4/A-2490-18T3)

The court holds that a career service employee who is disciplined by an appointing authority for violating the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy), N.J.A.C. 4A:7-3.1, may not appeal directly to the Civil Service Commission (Commission), but instead must first appeal either in a departmental hearing or, if applicable, in accordance with the procedure in a collective negotiations agreement. The court interprets the plain language of N.J.A.C. 4A:7-3.2(n) and N.J.A.C. 4A:7-3.2(n)(3) to permit a direct appeal to the Commission from a finding an employee violated the State Policy only where no discipline is imposed.

3-19-20 DCPP VS. T.S. AND L.H. IN THE MATTER OF THE GUARDIANSHIP OF A.H. (FG-11-0051-18, MERCER COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3227-18T3)

For the first time in this appeal, the biological mother of a five-year-old child argues the judgment of guardianship, which terminated her parental rights, must be vacated and the case remanded for a new trial because the resource parent, with whom the Division of Child Protection and Permanency (DCPP) placed the child, worked as a domestic violence liaison in the district office that was responsible to investigate and manage this case from its inception. At oral argument, this court requested supplemental briefs from the parties exclusively on this issue.

This court holds the DCPP violated the Conflict of Interest Law, N.J.S.A. 52:13D-12 to -27, and the ethical standards and protocols promulgated by the Department of Children and Families in its Policy Manual when it failed to transfer this case to another regional office based on the resource parent's assignment as a domestic violence liaison. The Division's failure to take timely and effective action to address this material conflict of interest tainted the management of this case from its incepti.

Independent of this ethical transgression, the Family Part judge who presided over this trial did not: (1) make credibility findings regarding the biological mother's testimony, (2) identify which of the two psychologists who testified as expert witnesses he found more persuasive, or (3) incorporate the opinions offered by the experts in his analysis of the four statutory prongs in N.J.S.A. 30:4C-15.1(a). This court remands this matter for the judge to conduct a plenary hearing to determine whether reunification with her biological mother is in the child's best interest at this stage of her emotional, psychological, and cognitive development. The judge must assess what psychological and/or emotional harm the child may suffer if she were to be removed from the custody of the resource parent and returned to the physical custody of her biological mother.

Finally, pursuant to N.J.S.A. 52:13D-21(h), this court directs the Appellate Division Clerk's Office to forward a copy of this opinion to the State Ethics Commission Office.

3-18-20 DELAWARE RIVERKEEPER NETWORK, ET AL. VS. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION STONY BROOK-MILLSTONE WATERSHED ASSOCIATION, ET AL. VS. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION (DEPARTMENT OF ENVIRONMENTAL PROTECTION) (CONSOLIDATED) (A-1821-17T3/A-1889-17T3)

In this consolidated appeal, Delaware Riverkeeper Network, Maya Van Rossum and Delaware Riverkeeper in one appeal, and Stony Brook-Millstone Watershed Association, Save Barnegat Bay, Raritan Headwaters Association, NY/NJ Baykeeper, Hackensack Riverkeeper and Association of New Jersey Environmental Commissions in the other, challenge the issuance of the Tier A municipal separate storm sewer system permit, claiming that it does not comply with federal and state law. They maintain that the permit does not include effluent limits and monitoring as required by federal law, and that the New Jersey Department of Environmental Protection's (DEP) inclusion of best management practices rather than effluent limits was a further violation of applicable law. Appellants also argue that the permit requirements are neither "clear, specific, and measurable," nor provide for meaningful review and that the DEP violated federal law by issuing permits without the public's involvement. Acknowledging its deferential standard of review, the court affirms the final agency decision.

3-18-20 G.C. VS. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND OCEAN COUNTY BOARD OF SOCIAL SERVICES E.M. VS. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND ESSEX COUNTY BOARD OF SOCIAL SERVICES (DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES (A-0772-18T3/A-1935-18T3)

Appellants filed for benefits under New Jersey's Medicaid — Aged, Blind and Disabled (ABD) program. Both were disabled and lived with other family members; each applicant's total "countable income" was below the federal poverty level (FPL) for a family of their size, but each applicant's individual Social Security Disability benefits exceeded the FPL for a family of one. The Department of Human Services, Division of Medical Assistance and Health Services (the Division) applied N.J.A.C. 10:72-4.4(d)(1), which stated that an applicant was ineligible if his or her "countable income . . . exceed[ed] the poverty income guideline for one person[.]" The Division denied the applications.

The court held that the regulation did not violate the federal Medicaid statute, Title XIX of the Social Security Act, but did violate New Jersey's Medicaid statute, N.J.S.A. 30:4D-1 to -19.5, which defines a "qualified applicant" as, among other things, a disabled individual "whose income does not exceed 100% of the [FPL], adjusted for family size," N.J.S.A. 30:4D-3(i)(11), and defines FPL as "the official poverty level based on family size[.]" N.J.S.A. 30:4D-3(p).

3-16-20 STATE OF NEW JERSEY VS. TREY I. LENTZ (18-07-0971, MONMOUTH COUNTY AND STATEWIDE) (A-4554-18T4)

The court addressed two issues of first impression in New Jersey: (1) whether the swabbing of a defendant's hands for gunshot residue (GSR) constitutes a search under applicable constitutional doctrines, and if so, (2) whether such a search is valid under the search incident to arrest exception to the warrant requirement. The court held that the swabbing of a defendant's hands for GSR is a search under the Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution because it intruded upon a reasonable expectation of privacy. Balancing the intrusion of GSR testing on an individual's privacy against promoting vital governmental interests, the court further concluded that if an individual is lawfully arrested and in police custody, a delayed search of the arrestee's person for GSR evidence after the arrestee is transported to police headquarters is constitutionally permissible under the search incident to arrest exception as long as the delay itself and the scope of the search are objectively reasonable. In this case, given the existence of probable cause, the timeline, location, and limited intrusion involved in the testing, as well as the ready destructibility of GSR evidence, the court was satisfied that the search was objectively reasonable in time and scope to pass constitutional muster. Accordingly, the court reversed the Law Division's order suppressing the GSR evidence and remanded for further proceedings.

3-10-20 STATE OF NEW JERSEY VS. KYLE P. BROWN (16-10-1680, MIDDLESEX COUNTY AND STATEWIDE) (A-3588-17T4)

A jury found defendant Kyle P. Brown guilty of third-degree arson, N.J.S.A. 2C:17-1(b), and second-degree causing or risking widespread injury or damage, N.J.S.A. 2C:17-2(a)(1), as a result of setting fire to, and causing an explosion of, his parked car in a sparsely-filled parking lot adjacent to his apartment building in the early morning hours.

The court holds the trial judge did not err in denying defendant's motion for acquittal of third-degree arson and second-degree causing or risking widespread injury or damage because there was sufficient evidence to establish that he caused a fire and explosion as set forth in N.J.S.A. 2C:17-1(b), and an explosion as set forth in N.J.S.A. 2C:17-2(a)(1).

In the unpublished portion of this opinion, the court affirms the trial judge's ruling on all other issues.

3-10-20 K.K-M., ET AL. VS. BOARD OF EDUCATION OF THE CITY OF GLOUCESTER CITY, CAMDEN COUNTY (COMMISSIONER OF EDUCATION) (A-1158-18T1)

Because the Kinship Legal Guardianship Act, N.J.S.A. 3B:12A-1 to -7, provides a permanent home for children, we affirm the decision of the Commissioner of Education that the children must now go to school where their kinship legal guardian lives. Neither the educational stability law, N.J.S.A. 30:4C-26; N.J.S.A. 18A:7B-12(a)(2), nor the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 to 1482, allows the children to remain enrolled in the school district where their biological mother is located.

3-5-20 STATE OF NEW JERSEY VS. PAULINO NJANGO (06-11-3542 AND 07-09-3244, ESSEX COUNTY AND STATEWIDE) (A-0397-18T3)

Defendant argued that unused prior service credits could be applied to reduce the period of mandatory parole supervision imposed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The court held that prior service credits could not be applied to reduce the period of parole supervision required under NERA.

3-5-20 K.D. VS. A.S. (FD-15-0550-19, OCEAN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3543-18T4)

In this appeal, the court examined whether a child's biological mother, who voluntarily surrendered her parental rights to allow her own mother, the child's maternal grandmother, to adopt the child, had standing as the child's legal sibling, per N.J.S.A. 9:2-7.1, to seek visitation rights against a non-relative adoptive mother. The court found the biological mother did not have standing under N.J.S.A. 9:2-7.1.

The child was placed with his non-relative adoptive mother following the death of his maternal grandmother. Several years later, a Family Part judge granted the biological mother's request to visit with the child pending his adoption. The visits continued for approximately one year until the child's non-relative adoptive mother adopted the child and stopped the visits. The biological mother filed a complaint to reinstate her visits post-adoption and her complaint was dismissed by another Family Part judge without an evidentiary hearing.

In adhering to the legal precepts expressed in Major v. Maguire, 224 N.J. 1 (2016) and In re D.C., 203 N.J. 545 (2010), the court determined the biological mother lacked standing as a legal sibling and was not entitled to visits under any other legal framework. Accordingly, the court affirmed the Family Part judge's dismissal of her complaint without an evidentiary hearing.

3-2-20 ELLEN BASKIN, ET AL. VS. P.C. RICHARD & SON, LLC, ET AL. (L-0911-18, OCEAN COUNTY AND STATEWIDE) (A-2662-18T1)

In this appeal, the court affirmed the trial court's denial of class certification to three plaintiffs who asserted claims under the Fair and Accurate Credit Transactions Act (FACTA) of 2003, 15 U.S.C. §§ 1681 to 1681x, which prohibits retailers who accept credit or debit cards from printing more than the last five digits of the card number or expiration date upon any receipt. The complaint was dismissed as to all three plaintiffs for lack of personal jurisdiction over defendants.

Plaintiff Ellen Baskin is a New Jersey resident who made a purchase at one of defendants' New Jersey stores and plaintiffs Kathleen O'Shea and Sandeep Trisal are New York residents who made purchases at defendants' New York stores.

The court agreed with the trial court that plaintiffs failed to establish that class action was warranted under Rule 4:32-1(b)(3). Specifically, plaintiffs only alleged technical violations of FACTA, and they did not assert they were victims of identity theft, fraud, or other harm. The court determined that individual actions in the small claims section would be a superior means to adjudicate claims of technical violations of FACTA. Thus, the superiority and predominance requirements of Rule 4:32-1(b)(2) were not met.

The court held that the New Jersey courts do not have general jurisdiction over defendants or specific jurisdiction to entertain the claims of the New York plaintiffs. However, the court determined that the trial court erred in dismissing Baskin's complaint because she is a New Jersey resident with an alleged FACTA claim emanating from a transaction at one of defendants' New Jersey stores. Therefore, the court reversed dismissal of Baskin's claims and reinstated the complaint as to her individual claims only.

2-27-20 ESTATE OF RENEE M. BARBUTO VS. BOYD & BOYD, ET AL. (L-0171-16, MERCER COUNTY AND STATEWIDE) (A-4014-17T4)

Barbara J. Boyd (defendant) and her husband William L. Boyd practiced law under the firm name, Boyd & Boyd. They did not have a partnership agreement and were never actually partners in the firm. After defendant left the firm and retired from the practice of law, William L. Boyd continued to practice under the firm name. The firm provided legal services to decedent, Renee M. Barbuto, and her estate later obtained a legal malpractice default judgment against the firm.

The estate claimed defendant was liable for the default judgment under N.J.S.A. 42:1A-20(a) and (b), which define the liability of purported partners under the Uniform Partnership Act (1996), N.J.S.A. 42:1A-1 to -56. At trial on the claim, plaintiff conceded defendant was not an actual partner in the law firm but argued defendant was liable because inclusion of her last name in the law firm's name constituted a representation she was a partner. Following presentation of plaintiff's evidence at trial, the court granted defendant's motion for dismissal. The trial court determined defendant is not liable for the firm's malpractice as a purported partner because plaintiff did not present any evidence decedent relied on a representation that defendant was a partner when decedent employed the firm to provide legal services.

The court affirms the dismissal. The plain language of N.J.S.A. 42:1A-20(a) and (b) imposes liability only where a plaintiff demonstrates reasonable reliance on a representation that the purported partner is a partner. The court rejects plaintiff's contention partnership liability may be imposed based on violations of RPC 7.5(c) and (d), which establish standards for inclusion of deceased and retired partner's names in law firm names, because RPC violations do not give rise to civil causes of action

2-25-20 STATE OF NEW JERSEY VS. TEVIN M. FIGARO STATE OF NEW JERSEY VS. ANTHONY J. GREEN STATE OF NEW JERSEY VS. ABE HAROLD (17-05-0465, 17-10-0945, 17-10-0961, 19-03-0275, 19-04-0318, AND 16-09-0824, CUMBERLAND COUNTY AND STATEWIDE) (CONSOLIDATED) (A-5654-18T4/A-0854-19T4/A-1287-19T4)

The court granted defendants leave to appeal from orders that denied their request to declare they were not statutorily ineligible for Drug Court and to process their applications. The judge accepted that recent revisions to the Drug Court Manual (the 2019 Manual) preserved two "tracks" for entry into the program: one, pursuant to special probation, N.J.S.A. 2C:35-14; and a second, as a general condition of probation, N.J.S.A. 2C:45-1. See, e.g., State v. Meyer, 192 N.J. 421 (2007).

Defendants were not eligible for special probation, because they faced current charges that were not "subject to a presumption of incarceration or a mandatory minimum period of parole ineligibility[.]" N.J.S.A. 2C:35-14(a). Additionally, defendants were previously convicted of crimes that made them ineligible pursuant to N.J.S.A. 2C:35-14(a)(6), (7). The judge accepted the State's argument that although there were two tracks for entry into Drug Court, the 2019 Manual created one uniform standard for eligibility under both tracks, specifically, that an applicant was legally ineligible if he failed to meet the criteria in N.J.S.A. 2C:35-14.

The Court reversed, concluding that the full text of the 2019 Manual did not support the State's interpretation, which was contrary to the clear intention, both legislatively and administratively, to broaden eligibility for Drug Court.

2-24-20 STATE OF NEW JERSEY VS. EDWIN ANDUJAR (15-05-1096, ESSEX COUNTY AND STATEWIDE) (A-0930-17T1)

Defendant appealed from a judgment of conviction after a jury convicted him of murder, arguing he was denied the right to a jury of his peers

During the voir dire, after an African American male juror was found acceptable to the court and seated in the jury box, the prosecutor performed acriminal background check on the juror and discovered someone with the same name had an outstanding municipal warrant. Without explanation to or from the juror, the trial judge granted the State's motion to remove the juror for cause so he could be arrested outside the presence of other jurors. Defendant argued the exclusion of the juror was racially motivated

The court reverses because the judge did not question the juror himself to ascertain the accuracy of the State's representation and the judge should have addressed defendant's objection under a Batson/Gilmore analysis.

2-24-20 S.W. VS. G.M. (FM-20-2163-11, UNION COUNTY AND STATEWIDE) (A-1278-18T3)

In a prior appeal, this court reversed and remanded the trial judge's open duration alimony determination directing him to find the marital lifestyle numerically and, if necessary, adjust the life insurance securing the alimony. The trial judge failed to enumerate the marital lifestyle and instead supplemented the supported spouse's current expenses with some expenses incurred during the marriage. The trial judge also decreased the life insurance obligation and calculated the death benefit using the supporting spouse's full social security age as the presumed end date for alimony.

The court reverses and remands the matter again to the trial judge and holds that N.J.S.A. 2A:34-23(b)(4) requires the judge to numerically calculate the marital lifestyle. The court's decision explains the purpose for and the means by which to calculate the marital lifestyle. The court also reverses and remands the life insurance computation and provides a method for calculating the present-day value of the alimony obligation to determine the life insurance death benefit.

2-24-20 STATE OF NEW JERSEY VS. FRANK CAMPIONE AND HOWARD KATZ (18-05-0685, MONMOUTH COUNTY AND STATEWIDE) (CONSOLIDATED) (A-1709-18T2/A-1710-18T2)

Defendant Frank Campione, a licensed physician assistant, who was federally registered to prescribe opioid medications, was indicted on charges of the unlawful practice of medicine, distribution of a controlled dangerous substance to patients, and possession of prohibited weapons. The State alleged that Campione misrepresented himself as a physician to patients, improperly wrote prescriptions in non-traditional settings, such as vehicles and restaurants, and wrote prescriptions for opioid medications that were not medically necessary. Defendant Howard Katz, a licensed physician who agreed to serve as Campione's supervising physician, was charged with unlawful practice of medicine.

Defendants' motion to dismiss the entire indictment was granted by the motion court. The motion court also granted defendants' motion for discovery of the identity, opinions, and reports of the experts consulted by the State post-dismissal of the indictment.

The court affirmed the dismissal of all charges against Katz. The State presented no evidence to the grand jury that Katz participated in Campione's alleged acts of improperly holding himself out as a physician to patients.

The court also affirmed the dismissal of the counts alleging the unlawful practice of medicine based on Campione's alleged failure to practice under the direct supervision of a physician and failure to provide notice of his employment to the State Board of Medical Examiners. Such conduct involves professional misconduct punishable by civil penalties, not criminal acts.

Similarly, the court affirmed the dismissal of the count charging defendants with conspiring to commit the unlawful practice of medicine. Because Campione was a licensed physician assistant who was registered to prescribe opioid medications and Katz was a licensed physician, violating the Physician Assistant Licensing Act (PALA), N.J.S.A. 45:9-27.10 to .28, is professional misconduct punishable by civil penalties, not criminal conduct under our Criminal Code. Thus, conspiring to violate PALA is not a crime

The court reversed the dismissal of the weapons counts because the State was not precluded from introducing evidence of the possession of the prohibited weapons in a subsequent grand jury proceeding that was not introduced during the first presentment.

The court also reversed the order compelling the State to provide postdismissal discovery of the State's experts. Because the indictment was dismissed in its entirety, the criminal action was no longer pending.Accordingly, the discovery afforded under

class='underline'> Rule 3:13-3(b)(1) does not apply even though defendant Campione still faced a civil forfeiture action and administrative disciplinary proceedings brought by the Board of Medical Examiners.

2-21-20 ERNEST BOZZI VS. BOROUGH OF ROSELLE PARK, ET AL. ERNEST BOZZI VS. CITY OF SUMMIT, ET AL. (L-1046-18 AND L-0543-18, UNION COUNTY AND STATEWIDE) (CONSOLIDATED) (A-4742-17T4/A-4743-17T4)

In these two consolidated appeals, calendared back-to-back for the purposes of a single opinion, plaintiff appeals the trial court's denial under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of his access, to the names and addresses on dog license records issued by defendant municipalities. The Law Division determined plaintiff was not entitled to the information because his sole purpose was to solicit dog licensees to install invisible fences at their homes. The court reverses.

The court concludes there is no outright prohibition under OPRA for the access of public records for commercial purposes, Burnett v. Cty. of Bergen, 198 N.J. 408, 435 (2009), and the licensees' names and addresses are public records in which they have no, or an insufficient, expectation of privacy in the information, Brennan v. Bergen Cty. Prosecutor's Office, 233 N.J. 330, 338, 342 (2018). Accordingly, the court need not reach plaintiff's common law argument.

2-20-20 SUMMIT PLAZA ASSOCIATES VS. RAGEE KOLTA, ET AL. (LT-007691-18, HUDSON COUNTY AND STATEWIDE) (A-1305-18T3)

The court addressed whether the unconscionability standard embodied in N.J.S.A. 2A:18-61.1(f) of New Jersey's Anti-Eviction Act is preempted by federal regulations promulgated by the United States Department of Housing and Urban Development (HUD). N.J.S.A. 2A:18-61.1(f) provides that the unconscionability of a rent increase is a defense in a summary dispossess action to removal for cause based on a tenant's failure to pay rent. Relying on the language in the governing HUD regulations, explicitly preempting the entire field of rent regulation, the court held that N.J.S.A. 2A:18-61.1(f) is preempted by the regulations. As a result, HUD-approved rent increases are not reviewable in summary dispossess proceedings, and the trial judge properly precluded evidence challenging the increase as unconscionable. The court also concluded that if the unit in which the tenant resides is subject to a HUD Section 8 housing assistance payments contract, then the operation, management, and maintenance of that unit, including the approval of rent increases, is governed by HUD's regulatory control irrespective of whether the tenant receives a Section 8 housing subsidy.

2-20-20 STATE OF NEW JERSEY V. BILAL BELLAMY (A-2959-17T4)

Defendant, while incarcerated for a parole violation, was arrested for a homicide he committed while on parole. After defendant completed his parole violation sentence, he remained in jail awaiting resolution of the homicide charges. He thereafter entered a guilty plea to the homicide charges. At sentencing, the trial court, following the holding in State v. Black, 153 N.J. 438 (1998), awarded defendant eighty-six days of jail credits for the period from the day he completed his parole violation sentence to the day of sentencing.

Defendant acknowledged that if Black applies, the trial court awarded the correct number of jail credits. He argued, however, that the holding in Black was effectively overruled by the Court in State v. Hernandez, 208 N.J. 24 (2011), and as a result, he is entitled to 1149 days of jail credits for the period from the day he was arrested on the homicide charge to the day of sentencing.

The court rejected defendant's argument, noting that Hernandez concerns circumstances unlike those in Black and that in Hernandez, the Court discussed its holding in Black at length without stating it was departing from that holding. In addition, the court reviewed a number of precedents cited by defendant applying the holding in Hernandez but found all inapposite to the circumstances addressed in Black. In the absence of a Supreme Court decision overruling its prior decision, the court declined to stray from the unequivocal holding in Black and affirmed the award of jail credits.

2-19-20 DIGITAL FIRST MEDIA, ETC. VS. EWING TOWNSHIP, ET AL. (L-0495-18, MERCER COUNTY AND STATEWIDE) (A-5779-17T2)

The court held that when police file a use of force report (UFR) regarding an officer's interaction with a minor charged as a delinquent, it is available under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, if redacted to remove the minor's name, as are UFRs filed regarding interactions with adults. Deletion of the minor's name preserves the confidentiality of a juvenile's records of delinquency or family in crisis as guaranteed pursuant to Rule 5:19-2 and N.J.S.A. 2A:4A-60. Redacted UFRs filed regarding police encounters with minors charged as a delinquent are not records "pertaining to juveniles"—they are government records capturing details of police conduct available to the public.

2-19-20 STATE OF NEW JERSEY VS. JOHN G. HAGER (14-07-0678, GLOUCESTER COUNTY AND STATEWIDE) (A-2568-17T4)

The court considered whether the omission of one of the Miranda warnings during custodial interrogation adequately conveys the substance of the warnings and concluded it did not, notwithstanding the fact that defendant continuously interrupted the administration of the warnings. Acknowledging out-of-state authority holding that a suspect may waive Miranda warnings by interrupting their delivery, the court concluded that the suspect's interruption of the warnings does not discharge law enforcement of their duty to deliver them. Finding that the erroneous introduction of the partially unwarned statements was not harmless error, the court reversed defendant's conviction, which followed a bifurcated jury trial, and vacated his guilty plea on the weapons offense. Relying on United States v. Patane, 542 U.S. 630 (2004), however, the court rejected defendant's contention that suppression of the weapon was mandated as a remedy for the Miranda violation despite the fact that the weapon was seized as a result of a search warrant based on the statements.

2-10-20 STATE OF NEW JERSEY VS. L.G.-M. (14-12-2073, MONMOUTH COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0790-18T1)

This appeal presents an issue of first impression, requiring the court to determine whether Padilla v. Kentucky, 559 U.S. 356 (2010), and State v. Gaitan, 209 N.J. 339 (2012), require defense counsel to advise their clients whether – and under what circumstances – the successful completion of the pretrial intervention program would permit a defendant to avoid immigration consequences. The Law Division judge denied defendant's petition for postconviction relief, finding Padilla and Gaitan did not apply here, where defendant did not enter a guilty plea.

Because neither Padilla nor Gaitan expressly limits its holding to cases in which a defendant enters a guilty plea, the court declines to narrowly construe their application only to those dispositions. Instead, the court interprets those decisions to impose an obligation upon defense attorneys to advise their clients of the potential immigration consequences of any criminal disposition, whether that disposition will result from a guilty plea, trial, or diversionary program. Accordingly, the court reverses and remands for an evidentiary hearing.

2-10-20 STATE OF NEW JERSEY VS. JOHN THOMPSON (6184, PASSAIC COUNTY AND STATEWIDE) (A-2011-18T4)

In this appeal, the court held that an intoxicated defendant asleep and behind the wheel of a parked motor vehicle with its engine running is "operating" the vehicle within the meaning of N.J.S.A. 39:4-50(a).

2-7-20 THOMAS MCKEOWN VS. AMERICAN GOLF CORP., ET AL. (L-0996-17, MORRIS COUNTY AND STATEWIDE) (A-3408-18T1)

Plaintiff appealed a grant of summary judgment in favor of defendant, a fellow golfer, with whom plaintiff was playing in a foursome. Defendant rented a golf cart, and plaintiff alleged that defendant – contrary to the rental agreement – allowed the cart to be driven by another golfer, who was allegedly unfamiliar with its operation and who, while operating the cart, struck plaintiff, causing his injuries. The trial judge granted summary judgment because, among other things, he viewed the rental agreement as a contract of adhesion that benefitted only the golf course, not other golfers like plaintiff.

In reversing, the court held, among other things, that the rental agreement was irrelevant because defendant owed plaintiff a common law duty to refrain from negligently entrusting the golf cart to an allegedly incompetent operator. The court also rejected the argument that the rental agreement was a contract of adhesion, as well as defendant's argument that plaintiff was not a beneficiary of the promises contained in that agreement.

2-6-20 STATE OF NEW JERSEY VS. WALEK P. DUNLAP (12-05-0858, MIDDLESEX COUNTY AND STATEWIDE) (A-4526-17T1)

This case probes the boundaries of the United States Supreme Court's landmark decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that under the Sixth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. In this case, defendant's original sentence to special probation was revoked for a series of violations. He was resentenced on his second-degree robbery conviction to the statutory maximum ten-year sentence after already serving roughly four years of special probation. He was given credit towards his prison sentence for the time spent in county jail and in residential treatment but not for the time he participated in outpatient treatment.

Defendant claims his prison sentence violates Apprendi because the combination of the ten-year prison term and time previously spent on special probation exceeds the ten-year maximum sentence for a second-degree conviction. In State v. Hawkins, __ N.J. Super. __ (App. Div.), certif. denied, __ N.J. __ (2019), the court rejected the argument that under Apprendi, a year on special probation undergoing outpatient treatment counts as a year in prison. However, the court in Hawkins affirmed the defendant's eight-year prison sentence on his second-degree conviction "without ruling directly on . . . whether imposition of the maximum custodial sentence plus special probation would be constitutionally defective." __ N.J. Super. at __ (slip op. at 12).

The court in the present case addresses that issue and holds that such a sentence, which was actually imposed in this instance, does not violate the Sixth Amendment. The court embraces the reasoning in Hawkins and concludes that time on special probation outside a residential treatment facility cannot be combined with a prison term when determining whether a sentence exceeds the "prescribed statutory maximum." The court finds further support for that conclusion in the Supreme Court's most recent pronouncement in the line of Apprendi cases, United States v. Haymond, 588 U.S. __, 139 S. Ct. 2369 (2019). Based on an analysis of Haymond and other precedents, the court holds that the Sixth Amendment issues raised in Apprendi and its progeny apply only to minimum and maximum terms of imprisonment; Apprendi principles simply do not apply to non-custodial forms of punishment such as special probation.

2-6-20 MASTEC RENEWABLES CONSTRUCTION COMPANY, INC. VS. SUNLIGHT GENERAL MERCER SOLAR, LLC, ET AL. (L-0336-14, MERCER COUNTY AND STATEWIDE) (A-1833-15T4)

A general contractor hired a subcontractor to design and construct a renewable solar generating facility on the campus of the Mercer County Community College. The Mercer County Improvement Authority issued bonds in excess of $29,000,000 to fund the project. The subcontractor filed a mechanics' lien notice against the Authority when it was unable to resolve a payment dispute with the general contractor. The subcontractor settled its claim against the general contractor and filed a complaint against the Authority to foreclose on its mechanic's lien.

The Law Division granted the Authority's motion to dismiss the foreclosure complaint under Rule 4:6-2(e). The trial court held that pursuant to N.J.S.A. 40:37A-127, all of the Authority's property was exempt from judicial process.

In this appeal, the subcontractor argues it's municipal mechanic's lien is enforceable against the Authority's project fund pursuant to the Municipal Mechanics' Lien Law, N.J.S.A. 2A:44-125 to -142. Amicus curiae Utility and Transportation Contractors Association of New Jersey, Inc. supports the subcontractor's legal position. The Authority argues the subcontractor's mechanic's lien is not valid under the County Improvement Authorities Law, N.J.S.A. 40:37A-44 to -135.

This court affirms the Law Division's order dismissing the foreclosure complaint as a matter of law under Rule 4:6-2(e), but for reasons other than those expressed by the trial court. Hayes v. Delamotte, 231 N.J. 373, 387 (2018). As a matter of first impression in a published opinion, this court holds that the Municipal Mechanics' Lien Law does not apply to county improvement authorities.

1-31-20 JOSEPH DIBUONAVENTURA VS. WASHINGTON TOWNSHIP, ET AL. (L-1435-13, GLOUCESTER COUNTY AND STATEWIDE) (A-0473-18T3)

The court holds that New Jersey's Constitution should be construed consistent with the federal Constitution in that a "class-of-one" equal protection claim cannot be asserted by a public employee. See Engquist v. Oregon Dep't of Agric., 553 U.S. 591, 594 (2008). Accordingly, the court affirms the dismissal of plaintiff's constitutional equal protection claim. The court also affirms the dismissal of plaintiff's claims under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, because those claims were precluded when he asserted retaliation as a defense in the administrative proceedings upholding his termination as a municipal police officer. Therefore, plaintiff cannot relitigate the retaliation issue in a CEPA action. See Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67 (2012).

1-27-20 STATE OF NEW JERSEY VS. LUCIAN FAULCON (19-03-0150, UNION COUNTY AND STATEWIDE) (A-5235-18T1)

Criminal defense counsel who represented a State witness who was questioned in the investigation of a murder may not then represent the defendant in the same case. On leave granted, the State argues that because defense counsel was present for the witness's interview with detectives, she will be hampered in her ability to effectively cross-examine the witness at trial, materially limiting her ability to represent defendant Lucian Faulcon. The anticipated testimony of the witness involves his identification of a phone number that the police connected to defendant and used to trace defendant's whereabouts at the time of the murder. Defense counsel's former representation of the witness materially limit's counsel's ability to represent defendant. To allow this conflicted representation is contrary to the fair administration of justice.

1-27-20 STATE OF NEW JERSEY VS. ARTHUR R. BURNS STATE OF NEW JERSEY VS. VAUGHN WILLIAMS (16-05-0528, BURLINGTON COUNTY AND STATEWIDE) (CONSOLIDATED) (A-2393-17T3/A-2478-17T4)

These consolidated appeals present an issue of first impression, requiring the court to decide whether the State's utilization of federally-contracted civilian monitors, who were sworn as "Special County Investigators," violated the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -37. Unlike Title III of the federal Omnibus Crime and Safe Streets Act, 18 U.S.C. §§ 2510-2523, New Jersey's Wiretap Act does not expressly permit delegation of wire interception to civilian personnel.

Because the Prosecutor exercised his inherent power to appoint personnel as part of his responsibility to carry out the duties of his office here, the court concludes the monitors were cloaked with the investigative responsibility of law enforcement officers when they intercepted the communications at issue. Accordingly, the court discerns no violation of the Wiretap Act, and affirms the Law Division order that denied defendants' motion to suppress the intercepted communications and the evidence seized as a result of those communications.

1-24-20 CLARENCE HALEY VS. BOARD OF REVIEW, ET AL. (BOARD OF REVIEW, DEPARTMENT OF LABOR) (A-4973-17T2)

The court affirms a decision by the Department of Labor and Workforce Development's Board of Review (Board) that disqualified petitioner from unemployment benefits. Petitioner was arrested on multiple charges and incarcerated for fifty-five days. While he was in jail, his employer filled his position. The grand jury did not indict petitioner. He was released from jail and the charges were dismissed. He unsuccessfully filed for unemployment compensation benefits after his release. The court agrees petitioner is disqualified from benefits under the Unemployment Compensation Law, N.J.S.A. 43:21-1 to -24.30. It is consistent with the Act's amendment in 1961 to review petitioner's incarceration as a voluntary separation that is "without good cause attributable to such work . . . ." N.J.S.A. 43:21-5(a). Because his loss of employment was not related to his work, petitioner was disqualified from benefits.

1-23-20 STATE OF NEW JERSEY VS. MIGUEL A. ROMAN-ROSADO (16-12-0968, GLOUCESTER COUNTY AND STATEWIDE) (A-3703-17T4)

Following the stop of defendant's car for allegedly violating N.J.S.A. 39:3-33 because the license plate frame on the car's rear license plate "conceal[ed] or otherwise obscure[d]" the words "Garden State" at the bottom of the license plate, a warrantless search of the car uncovered an unloaded handgun. The trial court denied defendant's motion to suppress the search and seizure of the handgun, and defendant subsequently pled guilty to second-degree certain persons not to possess a weapon, N.J.S.A. 2C:39-7(b)(1).

In defendant's appeal, the court was asked to decide: (1) whether there was reasonable suspicion to stop defendant's car for violating N.J.S.A. 39:3-33; and (2) whether the subsequent search and seizure of the handgun was legally permissible.

Based upon the common understanding of the words "conceal" and "obscure," this court concludes there was no reasonable suspicion to stop defendant's car for violating N.J.S.A. 39:3-33 where the minimal covering of "Garden State" did not make the words indecipherable. Hence, the seized gun was inadmissible to prove a second-degree certain persons offense.

For the sake of completeness, the court further decides that even if there was reasonable suspicion to stop defendant's car for a N.J.S.A. 39:3-33 violation, the subsequent search was not legally permissible because it did not satisfy the State's proffered exceptions to conduct a warrantless search of an automobile, i.e., a search incident to arrest, or a protective sweep.

Accordingly, the court reverses and vacates the conviction for second-degree certain persons not to possess weapons, and remands so defendant can move to vacate his guilty plea and have the judgment of conviction vacated pursuant to Rule 3:9-3(f).

1-23-20 PHANINDER PATHRI VS. SRIVANI KAKARLAMATH (FM-09-2150-18, HUDSON COUNTY AND STATEWIDE) (A-4657-18T1)

The court granted leave to appeal to review an order entered in this matrimonial action that denied plaintiff the opportunity to appear at the trial and testify by contemporaneous video transmission from his home in India. Recognizing that the court rules neither authorize nor prohibit such relief, the court identified and described the factors a judge should consider in ruling on the propriety of allowing a witness to testify remotely, and remanded so that plaintiff may provide the trial judge with a more fulsome application for the relief he requested.

1-15-20 ROBERT J. TRIFFIN VS. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, ET AL. (DC-004942-18, CAMDEN COUNTY AND STATEWIDE) (A-1473-18T1)

In this special civil part action, defendant Southeastern Pennsylvania Transportation Authority filed an answer but did not plead any affirmative defenses and never moved to dismiss for lack of personal jurisdiction prior to trial. Despite SEPTA's waiver of the defense, the trial judge raised it on his own at the trial's outset, and, after hearing brief argument, dismissed the claim against SEPTA for lack of personal jurisdiction.

In reversing the dismissal of the claim against SEPTA and remanding for a trial on the merits, the court concluded that once the defense of lack of personal jurisdiction is waived, a judge is not empowered to resurrect it.

1-13-20 VINCENT HAGER VS. M&K CONSTRUCTION (DIVISION OF WORKERS' COMPENSATION) (A-0102-18T3)

In this case of first impression, the court considers whether a workers' compensation judge can order an employer to reimburse its employee for the employee's use of medical marijuana prescribed for chronic pain following a work-related accident.

Because the court concludes the order does not require M&K to possess, manufacture or distribute marijuana, but only to reimburse petitioner for his purchase of medical marijuana, the court discerns no conflict between the federal Controlled Substance Act, (CSA), 21 U.S.C. § 841, which makes it a crime to manufacture, possess or distribute marijuana, and the New Jersey Compassionate Use Medical Marijuana Act (MMA), N.J.S.A. 24:6I-1 to -29.

Furthermore, M&K's compliance with the order does not establish the specific intent element of an aiding and abetting offense under federal law. The court also concludes M&K is not a private health insurer. Therefore, it is not excluded under the MMA from reimbursing the costs of medical marijuana.

Here, where petitioner has demonstrated the severity and chronic nature of his pain, his attempts to unsuccessfully alleviate the pain with multiple surgeries and medical modalities, and the validated efficacy of the prescribed medical marijuana, the court finds the use of medical marijuana is reasonable and necessary. Finding no legislative or legal barrier to an employer's reimbursement of its employee's expense for medical marijuana in a workers' compensation setting, the court affirms the order.

1-10-20 DCPP VS. A.L. AND S.B., IN THE MATTER OF AU.L. (FN-12-0172-17, MIDDLESEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1399-18T3)

After the court's affirmance of an abuse/neglect determination, defendant – with new appellate counsel – moved for reconsideration, claiming: (1) the court did not adequately review the record as evidenced by its short, three-paragraph opinion, and (2) the court ought to reopen the record so defendant may now assert arguments that prior appellate counsel was ineffective.

In finding no merit in the first contention, the court rejected defendant's theory that suggested the size of an appellate opinion reflects the time and effort expended by the court in considering the record and the issues. The court found that the second argument presented a novel question as to how a defendant in an abuse/neglect matter should pursue a claim of ineffectiveness of appellate counsel. The court determined that a reconsideration motion in the appellate court is not an inappropriate method but – because Rule 2:6-11(a) provides only a ten-day window for seeking such relief – the appellate ineffectiveness argument could also be pursued by way of a Rule 4:50 application in the trial court. Because the ineffectiveness arguments posed here warranted further factual development, the court remanded the matter to the trial court.

1-9-20 STATE OF NEW JERSEY VS. THOMAS HAWKINS (12-02-0380, MIDDLESEX COUNTY, AND 11-08-1383, HUDSON COUNTY, AND STATEWIDE) (A-5777-17T3)

The court rejects defendant's argument that the imposition of an eight-year custodial sentence after serving almost five years of special probation was an unconstitutional judicial extension of the statutory ten-year maximum custodial sentence, contrary to Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Blakely v. Washington, 542 U.S. 296, 303 (2004). Years served on special Drug Court probation are not equivalent to incarceration. Special Drug Court probation is an extraordinary rehabilitative opportunity, provided to defendants who choose to accept it with the clear explanation that a violation could result in the imposition of the maximum term of incarceration.

1-7-20 STATE OF NEW JERSEY VS. TAJMIR D. WYLES (16-06-1621, CAMDEN COUNTY AND STATEWIDE) (A-0702-19T4)

The court considered whether it was proper pre-trial for the trial court to review in camera a statement taken by defendant's investigator of a State's witness and redact inculpatory portions. Defendant requested this procedure as he only wanted to use the portions of the statement that were favorable to him. The State was only provided with the redacted statement.

The court concluded the process employed by the trial court was contrary to the intent established under Rule 3:13-3 and State v. Williams, 80 N.J. 472 (1979). The panel stated if a defendant wishes to use a statement or information taken from a State's witness, he or she must decide prior to trial, advise the State, and produce the statement.

Redaction of the statement prior to disclosure is only appropriate for any asserted work product privileged information. If defendant refuses to declare his or her intentions prior to trial regarding a statement, a trial court must consider the appropriate remedy under Rule 3:13-3(f). The procedure employed here deprived the State and its witness of the opportunity to assess the veracity of the statement.

1-3-20 KATHLEEN J. DELANOY VS. TOWNSHIP OF OCEAN, ET AL. (L-4441-14, MONMOUTH COUNTY AND STATEWIDE) (A-2899-17T4)

This appeal stems from a pregnancy discrimination suit brought by a female police officer against her employer. Plaintiff contends the employer violated the New Jersey Pregnant Workers Fairness Act ("PWFA"), a statute that has yet to be construed in a published opinion.

The PWFA amended the New Jersey Law Against Discrimination, effective January 2014, to explicitly prohibit pregnancy-based discrimination in employment and in other contexts. Among other things, the PWFA obligates employers, subject to an "undue hardship" exception, to provide "reasonable accommodations" in the workplace to pregnant women upon their request, and to not "penalize" such women because of their pregnant status. N.J.S.A. 10:5-12(s).

When plaintiff found out she was pregnant, she told her supervisors her doctor recommended she be taken off patrol. She asked to be transferred to a light-duty or less strenuous position within the Police Department. Plaintiff was consequently assigned to non-patrol duty, pursuant to the Department's maternity assignment policy. That policy allows pregnant officers to work a maternity assignment, but on the condition that the officer use up all of her accumulated paid leave time (e.g., vacation, personal, and holiday time) before going on the changed assignment. The maternity assignment policy differs from the Department's policy providing light-duty assignments for nonpregnant injured officers, because only the latter policy gives the Police Chief the authority to waive the loss-of-leave-time condition.

This court vacates the trial court's entry of summary judgment in favor of defendants. The Department's maternity assignment policy, as written, unlawfully discriminates against pregnant employees as compared to nonpregnant employees who can seek and obtain a waiver of the loss-of-leave-time condition. Such nonequal treatment violates the PWFA. The court upholds plaintiff's facial challenge to the policy and directs the trial court to grant her requests for declaratory and injunctive relief, leaving other remedial issues to be decided below.

The court vacates summary judgment in the employer's favor with respect to reasonable accommodation issues. There are genuine issues of material fact for a jury to resolve as to the reasonableness of the loss-of-leave-time condition and whether that condition is so harsh as to comprise an impermissible "penalty." The jury also must evaluate the employer's assertions of undue hardship and plaintiff's claims for monetary damages.

12-27-19 SUNDIATA ACOLI VS. NEW JERSEY STATE PAROLE BOARD (NEW JERSEY STATE PAROLE BOARD) (A-5645-16T2)

This court affirmed the denial of parole to a convicted murderer of a State Trooper. On remand, the full Board questioned Acoli about his rehabilitative efforts and his previous assertion that he was unconscious during the 1973 shooting. The Board found his responses were insincere, rehearsed, shallow, emotionless, contradictory, and implausible. After finding he lacked insight into his criminal behavior, the Board determined there was a substantial likelihood that Acoli would commit another crime if released at this time.

Judge Rothstadt dissented.

12-13-19 STATE OF NEW JERSEY VS. RAQUEL RAMIREZ STATE OF NEW JERSEY VS. JORGE OROZCO (14-07-0599, UNION COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (CONSOLIDATED) (A-4250-16T4/A-5060-16T4)

A jury convicted defendants, the mother and father of a two-year-old daughter, of reckless manslaughter and aggravated manslaughter respectively, and endangering the welfare of a child. The child died of blunt force head trauma and suffered numerous other internal and external injuries. Both defendants provided statements to law enforcement, but neither admitted causing the child's death, and the State had no eyewitnesses to any assault.

The State contended both defendants could be found guilty as principals or accomplices, and it urged the judge to provide instructions pursuant to N.J.S.A. 2C:2-6(c)(1)(c) (subsection 1(c)). That provides one may be an accomplice of another if "[w]ith the purpose of promoting or facilitating the commission of an offense . . . [and] [h]aving a legal duty to prevent the commission of the offense, fails to make a proper effort so to do[.]"

Relying on this court's decision in State v. Bass, 221 N.J. Super. 466 (App. Div. 1987), the only reported decision dealing with accomplice liability under subsection 1(c), and at the prosecutor's urging, the judge's jury charge carved out a separate basis for accomplice liability under Bass. The charge failed to tell jurors that in order to find a defendant guilty under subsection 1(c), they must find that defendant's failure to act was accompanied by a purpose to promote or facilitate the other's commission of a crime. The court specifically disapproved of Bass to the extent it implied otherwise, and reversed defendants' convictions.

12-13-19 SAMUEL MARTIN, III VS. NEWARK PUBLIC SCHOOLS (A-0338-18T4)

Petitioner applied to the Workers' Compensation Court for reimbursement of continued prescription opioid medication as part of his need for palliative care to treat a lower back injury suffered while he was working for respondent employer.

The compensation judge declined to compel the employer to pay for petitioner's prescription opioid medication in accordance with N.J.S.A. 34:15-15 of the Workers' Compensation Act. The statute requires employers to provide treatment to injured employees when the treatment is "necessary to cure and relieve the worker of the effects of the injury and to restore the functions of the injured member or organ where such restoration is possible . . . ." After six years of treating with the same physician who prescribed his pain medication, petitioner's pain had not been alleviated with either therapy or medication.

The court affirmed the compensation judge, holding petitioner failed to prove continued opioid treatment would cure or relieve his injury and return him to better function. The court found N.J.S.A. 34:15-15 requires proof that opioid medication provides curative relief and that continued use of opioids improves the function of the injured worker.

12-9-19 HENRY PULLEN, ET AL. VS. DR. AUBREY C. GALLOWAY, ET AL. (L-1768-18, MIDDLESEX COUNTY AND STATEWIDE) (A-1373-18T2)

The court held that a New York doctor who provided medical treatment to a New Jersey resident at a New York hospital was not subject to personal jurisdiction in New Jersey in a lawsuit alleging wrongful death and survivor claims resulting from the medical treatment. Moreover, web-based videos and internet postings describing the doctor's practice are insufficient contacts by themselves to support personal jurisdiction.

12-6-19 IN THE MATTER OF THE EXPUNGEMENT OF C.P.M. (XP-18-0686, ATLANTIC COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4210-18T3)

In this matter, we address whether it was error to grant C.P.M.'s petition for expungement under the "crime spree" doctrine set forth in the 2018 amendment to N.J.S.A. 2C:52-2(a). C.P.M. filed a petition seeking to expunge several offenses from his criminal record, including: (1) an April 10, 2005 conviction for third-degree possession of CDS, in violation of N.J.S.A. 2C:35-10(a)(1); and (2) two June 22, 2005 convictions for fourth-degree burglary, in violation of N.J.S.A. 2C:18-2, and fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3(a)(1).

Despite the requirement under N.J.S.A. 2C:52-2(a) that a court could only grant an expungement to an applicant who had not been "convicted of any prior or subsequent crime," petitions were periodically granted under a "single spree" or "crime spree" doctrine. In 2015, the Supreme Court definitively rejected the crime spree doctrine, holding that the Legislature clearly intended to "permit expungement of a single conviction arising from multiple offenses only if those offenses occurred as part of a single, uninterrupted criminal event." In re Expungement Petition of J.S., 223 N.J. 54, 73 (2015).

On October 1, 2018, N.J.S.A. 2C:52-2(a) was amended to permit the expungement of multiple crimes or offenses that "were interdependent or closely related in circumstances and were committed as part of a sequence of events that took place within a comparatively short period. . . ." The Legislature explained that the addition of the "interdependent or closely related in circumstances" and "within a comparatively short period of time" language was intended to allow expungement of "a so-called 'crime spree.'" S. Judiciary Comm. Statement to S. 3307 1 (L. 2017, c. 244) (emphasis added).

During the hearing on his petition, C.P.M. contended he was eligible for expungement under the crime spree exception in the newly amended statute. He argued that because he was under the influence of drugs during the several-month period in which the offenses occurred, his April and June 2005 convictions were sufficiently related. C.P.M. asserted that the trial court's analysis should include the motivations behind why a defendant committed the crimes.

The court granted the expungement petition under the crime spree exception in N.J.S.A. 2C:52-2(a). In relying on C.P.M.'s certifications, the judge concluded that C.P.M.'s drug use during the time period of the offenses was the "nexus" permitting a determination that the two incidents were closely related in circumstances.

This court reverses, finding the plain language of N.J.S.A.

2C:52-2(a) bars the expungement of C.P.M.'s convictions as the offenses were not interdependent or closely related in circumstances. The offenses at issue – drug possession, burglary, and criminal mischief – do not share common elements. The crimes also are not similar in nature. These offenses were not committed as part of some larger criminal scheme; each offense was a distinct crime perpetrated under entirely different and unrelated circumstances.

A defendant's self-serving declaration of his or her motivation behind crimes fifteen years after their occurrence is not a cognizable consideration within the meaning of the statute. We are satisfied the Legislature did not intend the result compelled by the trial court – that any person addicted to drugs could be eligible for an expungement of any crime the person alleged was committed while he or she was under the influence of an illegal substance.

12-3-19 STATE OF NEW JERSEY VS. N.T. (07-12-2892, MONMOUTH COUNTY AND STATEWIDE) (A-1012-18T2)

Defendant filed a petition for the expungement of all records relating to her arrest and conviction for third-degree endangering the welfare of a child for causing the child harm that would make the child an abused or neglected child, N.J.S.A. 2C:24-4(a)(2). She contended that the 2016 amendments to the expungement statute, N.J.S.A. 2C:52-2(b), permitted the expungement of non-sexual Title 9 crimes.

Although the intent behind the amended N.J.S.A. 2C:52-2(b) strongly favors expungement for rehabilitated offenders, the statute includes a list of numerous crimes that are barred from expungement. The crime to which defendant pleaded guilty is included on that list. Therefore, the court found the plain language of the statute prohibited the expungement of any conviction under N.J.S.A. 2C:24-4(a).

12-2-19 STATE OF NEW JERSEY VS. ANTOINE WILLIAMS (18-02-0353 AND 18-02-0354, MIDDLESEX COUNTY AND STATEWIDE) (A-5648-18T4)

The court granted leave to consider a trial court ruling about excludable time under the Criminal Justice Reform Act. In this case, excludable time was generated by two separate pretrial motions, which, for a while, were pending at the same time. The trial judge ordered that the excludable time permitted for one motion would not commence until the excludable time for the other motion ended. The court reversed, holding that the applicable statute and rule mandate that excludable time for an eligible pretrial motions commences when the motion is filed, and may expire in whole or in part simultaneously. Courts have no authority to "stack" excludable time periods.

12-2-19 STATE OF NEW JERSEY VS. ANTHONY G. PINSON, ET AL. STATE OF NEW JERSEY VS. DARNELL R. KONTEH, ET AL. (18-02-0346, 18-02-0348, 18-02-0349, 18-02-0351, 18-02-0352, 18-02-0353, 19-04-0700, MIDDLESEX, AND 18-02-0425, CAMDEN COUNTIES AND STATEWIDE) (CONSOLIDATE (A-4529-18T1/A-5680-18T1)

In these related interlocutory appeals, the motion judges suppressed weapons – allegedly involved in crimes in both counties – seized after a motor vehicle stop. The court determined the first motion judge improperly invalidated the arrest warrant that precipitated the seizure by: viewing a video that was not seen by the issuing judge; excising the statement that related to the video; and concluding the affidavit no longer supported probable cause, without conducting an evidentiary hearing.

While that suppression motion was pending, the parties in the other county urged the judge to adjourn defendants' identical suppression motion, pending the first motion judge's decision. Thereafter, the second motion judge properly granted defendants' motion based on the collateral estoppel doctrine. Because the court determined the first judge improperly invalidated the arrest warrant – and the second judge correctly concluded the collateral estoppel doctrine applied to the suppression motion before him – the court was compelled to vacate the second judge's suppression order.

The court remanded both matters for further proceedings.

11-27-19 IN THE MATTER OF CLIFTON GAUTHIER, ETC. (NEW JERSEY CIVIL SERVICE COMMISSION) (A-4015-17T4)

After criminal charges were lodged against him, Rockaway Township suspended Clifton Gauthier, a police officer, without pay. Gauthier successfully completed the pretrial intervention program (PTI), N.J.S.A. 2C:43-12 to -22, and the charges were dismissed. The Township reinstated him, and paid him withheld wages from the date of the PTI dismissal to the date of reinstatement. The Township refused to pay him wages from the time the charges were filed to the date of dismissal. The Civil Service Commission affirmed.

The court affirmed the Commission, as Gauthier's successful PTI completion was not one of the favorable dispositions of criminal charges which mandate payment of back wages enumerated in N.J.S.A. 40A:14-149.2. The statute predated the PTI scheme by years. The Court further held that the adoption of N.J.A.C. 4A:2-2.10(c), which exempts municipal police from its scope, was not thereby intended to require back wages to be paid.

11-27-19 STATE OF NEW JERSEY VS. SAAD A. SAAD (17-10-1485, MONMOUTH COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4124-18T4)

The court granted leave to appeal an order amending an indictment to reduce five counts alleging endangering the welfare of a child through sexual conduct from second-degree to third-degree charges. At issue is whether defendant, a pediatric surgeon who the State alleges molested four teenage patients during and after medical examinations, had a "legal duty for the care of" his victims or had "assumed responsibility for the care of" his victims within the meaning of second-degree endangering under N.J.S.A. 2C:24-4(a)(1).

The court held that although defendant had a professional duty to refrain from sexual contact with his patients, under the Supreme Court's narrow interpretation of N.J.S.A. 2C:24-4(a)(1) in State v. Galloway, 133 N.J. 631 (1993), the State must prove defendant had a "continuing or regular supervisory or caretaker relationship" with his victims to establish second-degree endangering. The evidence presented to the grand jury, even when viewed in the light most favorable to the State, instead suggests defendant, who treated the victims as a specialist for acute medical conditions, had limited and infrequent contact with his victims more akin to the "temporary, brief, or occasional caretaking functions" the Court determined in Galloway to fall under what now constitutes third-degree endangering.

The court also held that the legal duty for the care element of second-degree endangering cannot be established by proving defendant violated N.J.A.C. 13:35-6.3(c), a regulation of the Board of Medical Examiners prohibiting sexual contact between a physician and his or her patient. The regulation subjects physicians who violate its provisions to disciplinary measures relating to their licenses to practice medicine, but not criminal sanctions.

11-25-19 STATE OF NEW JERSEY VS. GREGORY J. PARKHILL (13-07-2155, CAMDEN COUNTY AND STATEWIDE) (A-4802-17T4)

In this vehicular homicide case, the State contended that defendant recklessly caused a pedestrian's death by speeding excessively. Defendant denied excessive speed and disputed that he caused the death of a pedestrian, alleging the pedestrian unexpectedly crossed the roadway outside the crosswalk and against the light. The court reverses defendant's conviction because the trial court should have delivered the model jury charge on causation, consistent with N.J.S.A. 2C:2-3(c), and it also should have instructed the jury, as defendant requested, that the motor vehicle code, N.J.S.A. 39:4-36(a)(4), requires pedestrians outside a crosswalk to yield to vehicles in the roadway.

11-22-19 STATE OF NEW JERSEY VS. ENOC PIMENTEL (15-06-0517, PASSAIC COUNTY AND STATEWIDE) (A-2814-17T2)

Defendant was charged under N.J.S.A. 2C:40-26 with the fourth-degree criminal offense of driving with a license that had been suspended because of multiple previous drunk driving convictions.

The court rejects defendant's claims that the 180-day mandatory minimum jail sentence prescribed by N.J.S.A. 2C:40-26 is cruel and unusual punishment, and that it also violates federal and state constitutional principles of equal protection and due process.

The stringent penalty chosen by the Legislature is constitutionally permissible to advance legitimate policy objectives of deterrence and public safety.

The court also reaffirms that the clear terms of statute do not allow judges the discretion to impose a lesser sentence.

11-18-19 RAYMOND NESBY, ET AL. VS. SHERYL FLEURMOND, ET AL. (L-1923-16, MIDDLESEX COUNTY AND STATEWIDE) (A-0958-16T4)

In this automobile insurance coverage action, plaintiff sought recovery of his unpaid medical expenses from the defendant carriers that issued policies to the tortfeasor's mother and sister, with whom the tortfeasor resided. Plaintiff had exhausted his personal injury protection (PIP) benefits. And, he settled his claims with the tortfeasor and owner of the vehicle by accepting the policy limit under the owner's policy. Because plaintiff was not a named insured under the tortfeasor's relatives' policies, did not reside with the named insureds nor occupy a vehicle insured under those policies – and released the tortfeasor from any and all claims arising from the accident – the court held his claims against the defendant insurers fail.

11-18-19 NEW JERSEY TRANSIT CORPORATION VS. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL. (L-6977-14, ESSEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-1026-17T1/A-1027-17T1)

For the period from July 2012 to July 2013, New Jersey Transit (NJT) had insurance policies that provided up to $400 million in coverage for property damage, but included a $100 million sublimit for losses generally "caused by flood." The damage to NJT property sustained during Superstorm Sandy came within the specific definitions in the policies of damage caused by "wind driven water" or a "storm surge" associated with a "named windstorm." Therefore, NJT's Sandy-related property damages do not fall within the general definition of losses "caused by flood," and are not subject to the $100 million flood sublimit.

11-15-19 IN THE MATTER OF REGISTRANT A.A. (ML-09-07-0111) (ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0678-18T1)

This court addressed what general procedure and related due process protections are afforded to individuals who committed crimes outside New Jersey when law enforcement allege that those crimes are "similar to" Megan's Law offenses under N.J.S.A. 2C:7-1 to -23, and therefore require registration in this State. This court held that an assistant prosecutor first makes the "similar to" determination. If required to register, the offender can challenge that obligation in the Law Division. At a summary hearing, in accordance with R.B.,1 the judge should (1) undertake an element-by-element legal comparison of the criminal codes of New Jersey and the other state; and (2) compare the elements of the crimes with the purposes of the underlying criminal statutes. Consistent with R.B., the judge may also examine trustworthy relevant evidence as to the underlying factual predicate for the out-of-state conviction.

11-14-19 JOSEPH JARDIM VS. MICHAEL EDWARD OVERLEY (L-2341-18, UNION COUNTY AND STATEWIDE) (A-1073-18T3)

This appeal calls for the court to revisit the application of traditional constitutional principles of personal jurisdiction and due process in the context of a retail sale contract made over the Internet.

After viewing an Internet posting that advertised a vintage car for sale, a New Jersey customer sent an email to the California owner offering to buy it. The seller responded with a counteroffer, and the parties swiftly agreed on a price. The buyer arranged to have the purchased car shipped from California to New Jersey. When the vehicle arrived here, the buyer discovered it was in poor condition. He sued the seller in the Law Division. The seller moved to dismiss the complaint for lack of in personam jurisdiction. The judge granted the motion, and the buyer now appeals.

The court affirms the dismissal of the complaint for lack of personal jurisdiction over the California seller. The seller in this one-time-sale scenario did not "purposely avail" himself of this State's retail market to a degree that rises to the level of "minimum contacts" needed to support personal jurisdiction under the Due Process Clause.

The parties' follow-up communications that occurred after they agreed on the car's price were insufficient to create a jurisdictional nexus to New Jersey. In addition, their simple contractual documents lacked a forum selection clause, which could have specified New Jersey as an agreed-upon forum.

The court does not foreclose a finding of specific jurisdiction in future Internet retail sale contexts in which more extensive transactional activities connected to this State occur.

11-13-19 C.R. VS. M.T. (FV-08-0021-19, GLOUCESTER COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0139-18T4)

The trial judge found, in this action under the Sexual Assault Survivor Protection Act (SASPA), N.J.S.A. 2C:14-13 to -21, that plaintiff's claim that she did not consent to a sexual encounter, or that she submitted out of fear, was in equipoise with defendant's contention that the sexual encounter was consensual. But, in entering a restraining order in plaintiff's favor, the judge determined that plaintiff was extremely intoxicated and incapable of consenting. Applying the definition of "mentally incapacitated" in N.J.S.A. 2C:14-1(i), the court determined that the intoxication required to render the alleged victim incapable of consenting could have been voluntarily consumed. And the court held that the intoxication level required to render an alleged victim incapable of consenting must have caused a prostration of faculties. Because the judge did not apply the prostration standard, the court remanded for further proceedings.

11-13-19 STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION VS. ALSOL CORPORATION (29-2017, MIDDLESEX COUNTY AND STATEWIDE) (A-3546-17T1)

In this appeal, this court must determine whether the Law Division correctly decided that municipal courts have jurisdiction to impose civil penalties in an enforcement action filed by the New Jersey Department of Environmental Protection (DEP) pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.24 (the Spill Act). After reviewing the record developed by the parties, this court holds municipal courts have jurisdiction pursuant to N.J.S.A. 58:10-23.11u(d) to impose civil penalties under the Spill Act in a summary proceeding conducted pursuant to the Penalty Enforcement Law of 1999, N.J.S.A 2A:58-10 to -12.

11-6-19 STATE OF NEW JERSEY VS. VINCENT A. PALEY (18-11-1495, MIDDLESEX COUNTY AND STATEWIDE) (A-0308-19T6)

In this interlocutory appeal, the court is asked to determine whether the trial court's August 28, 2019 order violated N.J.S.A. 2A:162-22(a)(2)(a), the speedy trial requirements of the Criminal Justice Reform Act (CJRA), N.J.S.A. 2A:162-15 to -26, and Rule 3:25-4(c)(1). The order excluded 137 days – August 19, 2019 to January 2, 2020 – from the October 15, 2019 speedy trial deadline for defendant Vincent A. Paley. Defendant is consequently confined in jail until his scheduled January 2, 2020 trial date.

11-6-19 STATE OF NEW JERSEY VS. MICHAEL CLARITY (13-10-0621, SOMERSET COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4596-17T3)

When originally sentenced, defendant was found to be a persistent offender eligible for an extended term under N.J.S.A. 2C:44-3(a), even though his last prior conviction occurred more than ten years earlier; the sentencing judge determined that the probationary term imposed on that earlier conviction constituted "confinement" and therefore reasoned that defendant's "last release from confinement" occurred within ten years. We rejected the holding that probation may be equated with confinement and remanded for resentencing. State v. Clarity, 454 N.J. Super. 603 (App. Div. 2018). At the subsequent sentencing proceedings, the State came forward with new information purporting to show defendant violated the terms of the earlier probationary sentence and was imprisoned for thirty months as a result, so that his last release from confinement occurred within ten years. When confronted with this information at resentencing, defense counsel conceded defendant was eligible to be sentenced to an extended term as a persistent offender.

11-4-19 BRENDA MILLER V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK (A-0078-16T3)

Petitioner, a former employee of the Newark school district, appealed from a Commissioner of Education decision finding that time she was employed in various classified Civil Service secretarial positions could not be used to calculate her entitlement to tenure under N.J.S.A. 18A:17-2. The statute provides that board of education employees holding secretarial or clerical positions obtain tenure after employment for three consecutive years and the beginning of the next succeeding school year. Although petitioner was employed in secretarial positions for more than three consecutive years, the Commissioner determined petitioner did not obtain tenure because under N.J.S.A. 18A:28-2 petitioner's employment in classified Civil Service secretarial titles did not satisfy the requirements of N.J.S.A. 18A:17-2.

10-31-19 IN THE MATTER OF REGISTRANT, B.B. IN THE MATTER OF REGISTRANT, A.V. (ML-99-07-0009 AND ML-99-07-0140, ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (CONSOLIDATED) (A-0060-18T1/A-0572-18T1)

This case concerns superfluous language contained in orders relieving sex offenders from Community Supervision for Life, N.J.S.A. 2C:43-6.4, ordering that the court rendered no decision as to any obligations the registrants may have in any other jurisdiction or state as a result of their status as a convicted sex offender, and shall remain in full force and effect until relief is granted in other jurisdictions. The subject language was unnecessary and improper because the language was ambiguous, future, contingent, and uncertain. Therefore, this court reverses and remands for the entry of orders without the superfluous language.

10-29-19 KEVIN BLANCHARD VS. NEW JERSEY DEPARMENT OF CORRECTIONS (NEW JERSEY DEPARTMENT OF CORRECTIONS) (A-3834-17T4)

In this Department of Corrections disciplinary appeal, the court holds that the Department acted arbitrarily, capriciously or unreasonably in denying a confirmatory laboratory test of a powder, seized from the inmate, which a field test indicated contained cocaine. The court reaches this conclusion in light of the field test's inherent limitations; the lack of other direct or circumstantial evidence that the inmate possessed drugs; the department's regulation compelling routine confirmatory tests of drug specimens; and the absence of any reasoned explanation for the Department's refusal to subject the seized powder to a confirmatory laboratory test.

10-29-19 STATE OF NEW JERSEY VS. GREGORY A. MARTINEZ (17-05-0586, MIDDLESEX COUNTY AND STATEWIDE) (A-3479-18T4)

This novel case concerns a prosecutor's office's use of body wires on a paid informant, an anticipated trial witness for the State in a narcotics case, to secretly monitor and record a criminal defense attorney's pre-trial interview of that informant.

10-28-19 STATE OF NEW JERSEY VS. JOE D. NICOLAS (15-09-1200, BERGEN COUNTY AND STATEWIDE) (A-4852-17T1)

Defendant appealed from a judgment of conviction, arguing the trial court should have granted his motion to dismiss the indictment because the substance he possessed alpha-PVP, also known as "flakka", was not listed as a Schedule I drug under New Jersey law. When the federal government schedules a substance, N.J.S.A. 24:21-3(c) gives the Director of Consumer Affairs in the Department of Law and Public Safety thirty days to do one of two things: (1) control the substance consistent with the federal government's scheduling, or (2) file an objection in the New Jersey Register. Absent is a requirement that the Director give notice when he or she intends to control the substance as directed by federal law. Thus, if the Director fails to file an objection to the federal government's scheduling within thirty days, as was the case with alpha-PVP, the Director must control the substance consonant with federal law. Thus alpha-PVP was automatically included in Schedule I because the Director did not object to the federal government's designation.

10-23-19 STATE OF NEW JERSEY VS. SHANGZHEN HUANG (A-2852-17T3)

The court determined the evidence presented by the State and the rational inferences from that evidence, viewed in the State's favor, established the element of defendant's reckless operation of a vehicle so as to render the motion judge's dismissal of an indictment charging defendant with second-degree vehicular homicide of a child, N.J.S.A. 2C:11-5, and fourth-degree assault by auto of the child's mother, N.J.S.A. 2C:12-1(c)(1), arising from a tragic pedestrian-motor vehicle incident, a clear abuse of his discretionary authority.

10-16-19 CRAIG SASHIHARA, ETC. VS. NOBEL LEARNING COMMUNITIES, INC., ETC. (L-2227-16, BURLINGTON COUNTY AND STATEWIDE) (A-0603-18T1)

In this case the court held the Director of the Division of Civil Rights does not have the general authority to sue in Superior Court, the Superior Court may not grant permanent injunctive relief on the director's complaint, and the New Jersey Law Against Discrimination does not recognize a claim for failure to contract with parents of a disabled child.

10-8-19 STATE OF NEW JERSEY VS. HERBY V. DESIR (15-09-0626, UNION COUNTY AND STATEWIDE) (A-2882-17T4)

After the trial judge denied his motion to compel the State to provide him with discovery, defendant Herby V. Desir pled guilty to second-degree possession of "Methylenedioxy-N-ethylcathinone (MDEC/Ethylone)," a Schedule I narcotic drug, with the intent to distribute it in violation of N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(4).1 Defendant reserved the right to appeal from the denial of his motion to compel discovery and his motion to suppress evidence seized during the execution of the search warrant. In accordance with the negotiated plea, the judge sentenced defendant to seven years in prison with three-and-one-half years of parole ineligibility.

10-7-19 A.J. v. R.J. (FM-20-0954-13, UNION COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1168-18T4)

Plaintiff A.J. appeals from a September 28, 2018 order sanctioning her by transferring custody of the parties' children to defendant R.J., for failure to comply with a prior order related to her unilateral intra-state relocation. We hold in cases where a court exercises its authority pursuant to Rules 1:10-3 and 5:3-7(a)(6), it must make findings under N.J.S.A. 9:2-4 that the sanction imposed is in the best interests of the children. We further hold the factors in Baures v. Lewis, 167 N.J. 91 (2001) no longer apply when a court is addressing an intra-state relocation, and instead, pursuant to Bisbing v. Bisbing, 230 N.J. 309 (2017), the court must apply N.J.S.A. 9:2-4. Because the trial judge applied the wrong law related to the intra-state relocation and did not apply N.J.S.A. 9:2-4 when he sanctioned plaintiff, we reverse and remand for further proceedings consistent with this opinion.

9-30-19 MARISOL RAJI VS. ALFONSO SAUCEDO, ET AL. (DC-008329-18, MIDDLESEX COUNTY AND STATEWIDE) (A-1629-18T1)

In considering the nature of a "pay-and-go" consent judgment, which resolved a summary dispossess action, and the judgment's impact on later-asserted claims for damages, we hold that by entering into such a consent judgment the parties entered into an accord and satisfaction and thereby finally resolved all the known claims arising out of the tenancy. Consequently, we affirm the trial court's rejection of the tenants' counterclaim in the landlord's subsequent action for enforcement of the pay-and-go judgment because the counterclaim was based on a claim then known to the tenants that they should have raised during the negotiations that led to the pay-and-go judgment.

9-25-19 JOHNSON & JOHNSON VS. DIRECTOR, DIVISION OF TAXATION, ET AL. (TAX COURT OF NEW JERSEY) (A-5423-17T3)

In this appeal, we address the issue of whether, following the Legislature's 2011 amendment of N.J.S.A. 17:22-6.64, plaintiff Johnson & Johnson (J&J) was required to pay an insurance premium tax (IPT) based upon all the risks it insured throughout the United States or based upon only those risks localized in New Jersey. Because both before and after the 2011 amendment, N.J.S.A. 17:22-6.64 provided that IPT was to be calculated at the rate of "5% of the gross amount of such premium" paid for insurance procured "upon a subject of insurance resident, located or to be performed within [New Jersey]," we conclude that J&J's IPT obligation should have continued to be based solely upon the risks it insured that were located within New Jersey, rather than upon the total United States premium for the applicable coverage policies. Accordingly, we reverse the Tax Court's contrary interpretation of the statute which is at odds with the plain language of N.J.S.A. 17:22-6.64, and remand for further proceedings.

9-12-19 DAVID SCOTT LANDAU VS. STACY LANDAU (FM-14-1196-12, MORRIS COUNTY AND STATEWIDE) (A-1240-18T4)

The question presented by this appeal, here on leave granted, is whether the changed circumstances standard of Lepis v. Lepis, 83 N.J. 139, 157 (1980), continues to apply to a motion to suspend or terminate alimony based on cohabitation following the 2014 amendments to the alimony statute, N.J.S.A. 2A:34-23(n). We determine the party seeking modification still has the burden of showing the changed circumstance of cohabitation so as to warrant relief from an alimony obligation, see Martindell v. Martindell, 21 N.J. 341, 353 (1956), and hold the 2014 amendments to the alimony statute did not alter the requirement that "[a] prima facie showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status." Lepis, 83 N.J. at 157. Because the trial court ordered discovery in this case without a prima facie showing of changed circumstances, we reverse.