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

8-31-21 FRANK GRILLO, ET AL. VS. STATE OF NEW JERSEY (L-0495-19, MERCER COUNTY AND STATEWIDE), (A-1038-19)

Plaintiffs, police officers employed by the City of Trenton who were on work-related temporary disability and their police union, appealed the dismissal with prejudice of their declaratory judgment complaint against the State of New Jersey and the denial of their cross-motion to amend the complaint.

Plaintiffs sought relief from the State Health Benefits Program (SHBP), N.J.S.A. 52:14-17.25 to -17.46a., which requires all public employees to contribute to the cost of their health benefits plan based on their "base salary." Plaintiffs argued that cost of their SHBP benefit contributions while disabled should be calculated based on the temporary disability benefits they receive, not their "base salary."

The State moved pursuant to Rule 4:6-2(e) to dismiss the complaint with prejudice based on the plain language of the statute. The plaintiffs' cross-motion to amend the declaratory judgment complaint sought alternate relief, declaring that recipients of temporary disability benefits should not make any contributions to the SHBP while disabled.

Applying well-established principles of statutory construction, the court held that temporary disability benefits are not "base salary" for purposes of the SHBP. The court also held that the denial of plaintiffs' cross-motion to amend the complaint was not an abuse of discretion where the unambiguous language of the statute rendered the proposed amendment futile.

8-27-21 E.S., ETC. VS. BRUNSWICK INVESTMENT LIMITED PARTNERSHIP, ET AL. (L-0727-17, MIDDLESEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3372-18)

Plaintiff appealed the grant of summary judgment to her landlord. Plaintiff alleged that defendant's maintenance man, a fellow tenant of plaintiff, sexually assaulted her minor children. Plaintiff's complaint stated several causes of action, but the only two preserved for appeal were that defendant was directly negligent pursuant to Restatement (Second) of Agency, section 219(2)(b), and vicariously liable for the sexual assaults, pursuant to section 219(2)(d), which both provide exceptions to the general rule that an employer is not liable for the acts of its employee outside the scope of his or her employment.

The court affirmed the grant of summary judgment, noting that our courts have applied both of those sections of the Restatement Second in limited circumstances to serve the purposes of remedial legislation, like the LAD, CEPA and the Child Sexual Abuse Act, but not in similar factual circumstances. Additionally, the court examined the significant revisions made to both these sections of the Restatement Second by the Restatement (Third) of Agency and examined decisions from other jurisdictions that discussed these sections of the Restatements.

8-25-21 STATE OF NEW JERSEY VS. YVONNE JEANNOTTE-RODRIGUEZ STATE OF NEW JERSEY VS. MARTA I. GALVAN STATE OF NEW JERSEY VS. LISA FERRARO (19-06-0446, PASSAIC COUNTY AND STATEWIDE) (CONSOLIDATED) (A-4361-19/A-4371-19/A-4374-19)

In these three appeals, the court affirms the trial court's order dismissing without prejudice a six-count indictment against a physician, and her medical assistant and office manager. The State alleged the medical assistant practiced medicine without a license; she and the physician fraudulently billed for the medical assistant's services under the physician's name; and all three individuals conspired to commit this fraud. The trial court did not abuse its discretion because, most significantly, the prosecutor failed to adequately and accurately instruct the grand jury about what a medical assistant may do without encroaching upon the licensed practice of medicine. And, because the law does not clearly draw a line around a medical assistant's scope of allowable activities, prosecuting someone for crossing the line may violate the right to fair warning. The prosecutor also improperly referred to additional evidence that he did not present to the grand jury, and presented a questionable analysis of the amount of money involved in the charged offenses. And the indictment lacked sufficient detail to give defendants a fair opportunity to mount a defense.

Although the trial court had dismissed a previous indictment against defendants, the trial court also appropriately declined to dismiss the second indictment with prejudice, as there was insufficient evidence of prosecutorial vindictiveness.

8-17-21 LINDEN DEMOCRATIC COMMITTEE, ET AL. VS. CITY OF LINDEN, ET AL. (C-000019-19, UNION COUNTY AND STATEWIDE) (A-1759-19)

The Municipal Vacancy Law, N.J.S.A. 40A:16-1 to -23 (the Vacancy Law), sets out the procedure for filling vacancies in the office of mayor and members of a municipal council. Here, when a vacancy was created in a ward council seat, the remaining members of the city council resolved pursuant to N.J.S.A. 40A:16-5(b) not to fill the vacancy on an interim basis. The local party committee, however, relying on N.J.S.A. 40A:16-11, forwarded three nominees to the council, which refused to appoint any of them and retained the vacancy.

Plaintiffs, the nominee of the party committee and the committee, filed a complaint seeking to seat the nominee as ward councilperson and also alleging the council's refusal to seat the nominee violated the New Jersey Civil Rights Act (NJCRA). The trial judge found in plaintiffs' favor, ordered the nominee seated as ward council person, found a violation of the NJCRA, and awarded counsel fees and costs to plaintiffs.

The court reversed, construing the Vacancy Law as initially enacted in 1979, along with later amendments in 1980 and 1990, as providing the governing body with discretion to fill the vacancy on an interim basis or leave the seat vacant until the next general election.

8-17-21 JENNIFER BUDDY VS. JONATHAN E. KNAPP ET AL. CORRINE BUDDY ET AL. VS. JONATHAN E. KNAPP ET AL. DAMIEN CONNEEN VS. STATE OF NEW JERSEY ET AL. (L-1037-16, L-1046-16, and L-1049-16, ATLANTIC COUNTY AND STATEWIDE) (CONSOLIDATED) (A-4339-18/A-4344-18/A-4492-18)

These appeals arise from two motor vehicle accidents that occurred about a year apart in approximately the same location under similar circumstances. In both instances, a driver traveling westbound on Route 322 in Folsom Borough made an illegal left turn in the direction of one of two driveway entrances to a WaWa convenience store and struck a motorcycle traveling eastbound on the highway. In the first accident, the motorcycle driver was killed and his wife, who was a passenger, seriously injured. In the second accident, the motorcycle driver was seriously injured. The injured parties and the estate of the decedent filed suits against the entity that owns the convenience store and the State, which owns the highway and the land on which the store's driveway entrances are situated, alleging a number of claims sounding in negligence.

The court held that the commercial landowner who operates the convenience store did not owe a duty of care to plaintiffs to prevent drivers on the adjoining State highway from making an illegal left turn into the store's parking lot entrances. In addition, the court declined plaintiffs' invitation to impose on commercial property owners the obligation to warn business patrons of the obvious danger posed by driving over two sets of solid yellow lines to cross two lanes of opposing traffic on a highway with a fifty-five-mile-per-hour speed limit to enter a store parking lot. The court noted a nearby jug handle provided westbound drivers a safe alternative to access the store's parking lot through an intersection controlled by a traffic light.

The court also concluded the State is entitled to immunity for all claims asserted against it under three provisions of the Tort Claims Act: (1) law enforcement immunity, N.J.S.A. 59:2-4, for its alleged failure to enforce its regulations with respect to the design of the parking lot driveway entrances; (2) licensing immunity, N.J.S.A. 59:2-5, for any permitting decision, or alleged absence thereof, related to the construction and maintenance of the driveway entrances; and (3) inspection immunity, N.J.S.A. 59:2-6, for any alleged failure to inspect the driveway entrances during two highway improvement projects after their construction. In addition, the court found the statutory exception to immunity for dangerous conditions of public property did not apply because the driveway entrances, which were in the State's right-of-way, were not dangerous conditions and use of the driveway entrances with due care did not create a reasonably foreseeable risk of the injuries suffered by plaintiffs, which were caused by the illegal activity of the drivers

who struck their motorcycles.

8-16-21 STATE OF NEW JERSEY VS. F.E.D. (79-01-1131, ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNED) (A-2554-20)

Effective February 1, 2021, the Legislature abolished "medical parole." Instead, the Legislature empowered the courts to grant certain inmates "compassionate release" based on the "medical parole" criteria. To petition for compassionate release, an inmate must present a valid "Certificate of Eligibility for Compassionate Release" from the Department of Corrections, attesting that the inmate suffers from a terminal disease (meaning that the inmate will die within six months) or a permanent physical incapacity (meaning that the inmate is "permanently unable to perform activities of basic daily living", needs "24-hour care," and has a condition that "did not exist at the time of sentencing").

Because F.E.D.'s Certificate of Eligibility was invalid, the court affirms the trial court's denial of his petition. The two requisite medical diagnoses on which the certificate relied did not conclude that F.E.D. was terminally ill or unable to perform activities of basic daily living.

8-11-21 STATE OF NEW JERSEY VS. JOHN JACOBUS (18-11-0836, CAPE MAY COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1069-19)

In State v. Hester, 233 N.J. 381 (2018), the Supreme Court held a 2014 amendment to N.J.S.A. 2C:43-6.4(d) that enhanced the penal consequences of a conviction for violating the conditions of community supervision for life (CSL), including by increasing the degree of the crime from a fourth-degree offense to a third-degree offense, constitutes an unconstitutional ex post facto law as applied to individuals who violate the conditions of CSL following the amendment's effective date. In this appeal, the court holds that under the savings statute, N.J.S.A. 1:1-15, an individual who violates the conditions of CSL following the 2014 amendment may be charged with, and convicted of, the fourth-degree offense extant under N.J.S.A. 2C:43-6.4(d) when he or she was sentenced to CSL.

8-5-21 STATE OF NEW JERSEY VS. ANDREW HOWARD-FRENCH (18-10-0872, HUDSON COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-2456-19)

A jury found defendant Andrew Howard-French guilty of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(2); and third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2(a). The offenses arose from the death of a twenty-three-month-old child who was under defendant's care.

The court holds the trial judge did not abuse his discretion in admitting: defendant's prior bad acts in accordance with N.J.R.E. 404(b)(2); the treating physician's testimony regarding the child's injuries; a non-sanitized statement by an investigating detective accusing defendant of lying during an interrogation of defendant; and the State's forensic pathology expert's testimony regarding the child's cause of death in accordance with N.J.R.E. 705. Defendant's arguments that trial counsel's failure to object to the testimony by the treating physician, the detective, and the expert, lack merit. The admission of the testimony was not plain error clearly capable of producing an unjust result.

The court holds that the trial judge did not err in using the word "flight" in the jury charges as was it taken verbatim from the Model Jury Charges (Criminal), "Endangering Injured Victim (N.J.S.A. 2C:12.12)" (rev. Mar. 14, 2016). The court also concludes the trial judge did not err in failing to sua sponte instruct the jury on the affirmative defense of summoning medical treatment under N.J.S.A. 2C:12-1.2(c) because there was no evidence supporting the charge and, to the contrary, there was sufficient evidence that defendant endangered the injured child by leaving him in defendant's apartment with no other adult present.

Finally, even though the court normally does not entertain ineffective assistance of counsel claims on direct appeal, we address and dismiss defendant's claims because they relate to counsel's failure to object to evidence, which as noted, was properly admitted.

8-2-21 DCPP VS. D.H., T.W., J.K., JR., AND K.M., IN THE MATTER OF THE GUARDIANSHIP OF D.H., T.G., AND J.W. (FG-16-0048-19, PASSAIC COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (CONSOLIDATED) (A-1774-19/A-1857-20)

The court holds that a parent's status as a recreational marijuana user cannot suffice as the sole or primary reason to terminate that parent's rights under Title 30, unless the Division of Child Protection and Permanency proves with competent, case-specific evidence that the marijuana usage endangers the child or children.

This approach aligns with existing Title 30 case law, the recently adopted constitutional amendment partially decriminalizing non-medicinal marijuana usage, N.J. Const. art. IV, § 7, ¶ 13, and related implementing statutes, as well as child welfare cases from other states.

In this case, the parents each admitted they had used marijuana on several occasions while caring for their preschool child, and the Division presented unrebutted expert testimony explaining the risks of harm associated with that conduct. Beyond that, the trial judge had substantial other evidence to further support his finding that all four prongs for termination under N.J.S.A. 30:4C-15.1(a) had been proven by clear and convincing evidence. Hence, the judgment is affirmed.

7-27-21 PALISADES INSURANCE COMPANY VS. HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY (L-6136-19, MIDDLESEX COUNTY AND STATEWIDE) (A-2830-19)

Plaintiff Palisades Insurance Company appeals from a February 28, 2020 order granting defendant Horizon Blue Cross Blue Shield of New Jersey's motion for summary judgment and dismissing its complaint with prejudice. Plaintiff is an automobile insurance company that provides mandatory personal injury protection (PIP) benefits for medical expenses arising out of injuries sustained during car accidents. Pursuant to N.J.S.A. 39:6A-4.3(d), plaintiff allows its customers to designate their health insurer as primary for payment of car-accident-injury-related expenses, which election results in a premium reduction. The insureds named in plaintiff's complaint each elected to have defendant act as the primary payor. Despite the designation, plaintiff received and paid the claims, before they were properly submitted to defendant. On appeal, plaintiff asserts that it has a right to be reimbursed for the medical expenses it voluntarily paid under a theory of subrogation.

After reviewing the provisions of the New Jersey Automobile Reparations Reform Act (No-Fault Act), N.J.S.A. 39:6A-1 to -35, the Coordination of Benefits scheme (COB), N.J.A.C. 11:3-37.1 to -37.14, and case law, the court concluded that no cause of action for subrogation exists to allow a PIP carrier to pursue reimbursement from a health insurer for claims mistakenly paid out of turn. Plaintiff's remedies are to deny the claim upon receipt, recover payments from the medical providers, request that the insureds submit their claims to defendant and pursue an appeal if coverage is denied, or obtain an assignment of rights and pursue the appeals on the insureds' behalf. In addition, when a health carrier is exempt from providing benefits, the COB regulations allow the PIP carrier to recoup the amount of the reduced premium from its insured. None of these remedies were pursued by plaintiff in this case.

The court also concluded that further discovery would be futile, as the sought-after information is not capable of overcoming the legal obstacle faced by defendants: the absence of a legal right of subrogation to recoup payments mistakenly made out of turn.

7-23-21 STATE OF NEW JERSEY VS. JOSEPH EHRMAN (18-19 AND 19-19, HUDSON COUNTY AND STATEWIDE) (CONSOLIDATED) (A-4144-19/A-4447-19)

In these back-to-back appeals, defendant challenged numerous complaint-summonses issued in municipal court by the Jersey City Department of Housing, Economic Development and Commerce for municipal violations involving rental properties owned by various limited liability companies (LLCs) of which defendant was a member. In one appeal, defendant challenged an interlocutory order denying his motion to dismiss twenty-five complaint-summonses issued to him individually and granting the State's cross-motion to amend the complaints to name the LLC that was the record owner instead of him. In the other appeal, defendant challenged the order finding the LLC that was the record owner of the property guilty of violating a municipal ordinance following a trial de novo in the Law Division notwithstanding the fact that the LLC made no appearance through counsel and neither the municipal court nor the trial court inquired on the record to ascertain whether there was a knowing and voluntary waiver before proceeding with the trial.

The court reversed and remanded for entry of an order of dismissal without prejudice of the twenty-five complaint-summonses because they were issued to the wrong defendant and therefore fatally defective and both the municipal court and trial court erroneously relied on a Part IV rule governing civil practice to grant the State's cross-motion to amend. The court also reversed the finding of guilt of the LLC and remanded for a new trial because the absence of an appearance through counsel or a clear waiver of such in a quasi-criminal municipal court prosecution constitutes a violation of constitutional dimension requiring reversal.

7-22-21 STATE OF NEW JERSEY VS. D.F.W. (20-01-0101, CAMDEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-2220-20)

The court addresses two Criminal Justice Reform Act provisions affecting a detained defendant's speedy trial rights.

First, the Act requires a defendant's release (subject to exceptions and conditions) if trial does not commence after detention of 180 days (not counting excludable time), but the Act directs a court to extend that period upon the return of a superseding indictment. N.J.S.A. 2A:162-22(a)(2)(b)(ii). Here, the trial judge mistakenly added another 180 days to defendant's detention, without considering the differences between the two indictments, and if the prosecutor could have obtained the superseding indictment sooner, as Rule 3:25-4(f) requires. Those two factors require a court to weigh the State's need for an extension against the unfairness to a defendant of granting one. Here, the prosecutor announced nineteen days after the superseding indictment's return that she was ready to proceed to trial. Therefore, an extension beyond nineteen days was unwarranted, because the State did not need more than that to prepare for trial.

Second, the Act requires a defendant's release (subject to conditions) after two years of detention (not counting excludable time attributable only to the defendant) if the prosecutor is not ready to proceed to trial. N.J.S.A. 2A:162-22(a)(2)(a); R. 3:25-4(d). Before the two years elapsed, the prosecutor announced she was ready to proceed to trial and a trial date was set. Then, the Supreme Court suspended criminal jury trials because of COVID-19. Defendant sought release after the two years elapsed during the shutdown, contending the prosecutor could not be ready if the court was not. The trial judge denied release and the court affirms. The two-year limit is measured by the prosecutor's readiness, not the trial court's. Defendant was not entitled to release under the "two-year clock" although, because of the pandemic, no court could conduct the trial the prosecutor was ready to try.

7-20-21 CHARLES KRAVITZ, ET AL. VS. PHILIP D. MURPHY, ET AL. (L-0774-20, CUMBERLAND COUNTY AND STATEWIDE) (A-1584-20)

In this appeal, we reject the claims of appellants who argued that Governor Murphy lacked the authority to issue Executive Order 128 (EO 128), which permitted New Jersey residential tenants to use their security deposits to pay rent. We conclude the Governor was authorized to enact EO 128 pursuant to emergency powers the Legislature delegated to the Governor under the New Jersey Civil Defense and Disaster Control Act, N.J.S.A. App. A:9-30 to -63. We further conclude that EO 128 does not violate appellants' rights under the New Jersey Constitution.

7-20-21 STATE OF NEW JERSEY VS. LAUREN M. DORFF (18-10-0804, CAPE MAY COUNTY AND STATEWIDE) (A-2485-19)

In this appeal the court held that defendant's Fifth Amendment right to counsel was violated during a stationhouse interrogation, reversing the trial court order denying defendant's suppression motion. Detectives at the outset of the interrogation advised defendant of her rights under Miranda v. Arizona, 384 U.S. 436 (1966). During the interrogation, defendant made several references to her need to speak with an attorney. The court held that defendant's statement, "[t]hat's why I feel I might need a lawyer," was sufficient to invoke her right to counsel. A detective then commented, "[w]ell, I mean that's a decision you need to make. . . . But if you didn't do anything [wrong], you certainly don't need to have [an attorney]." Defendant immediately responded that she felt she had not done anything wrong and elected to continue with the interrogation. She eventually made an inculpatory admission.

The court ruled the detective's brief, spontaneous comment undercut the Miranda warnings and impermissibly burdened the Fifth Amendment right to counsel. By suggesting in effect that innocent persons do not need an attorney, the detective implied that a request to terminate the interrogation to speak with counsel would evince a consciousness of guilt, thereby discouraging the assertion of the right to counsel. The court emphasized the State bears the burden to show scrupulous compliance with Miranda, adding that there is no "good faith" exception to the Miranda rule. Rather, the court held, a Miranda violation such as the one that occurred in this case triggers the exclusionary rule whether it was intentional or inadvertent.

7-19-21 CINDY JOHNSON, ETC. VS. FRANK MCCLELLAN, ESQ. VS. AARON J. FREIWALD, ESQ., ET AL. (L-2366-19, MIDDLESEX COUNTY AND STATEWIDE) (A-2683-19)

Plaintiff brought a civil action for damages, under N.J.S.A. 2C:21-22a, against defendant, a law school professor and Pennsylvania attorney, resulting from defendant's alleged unauthorized practice of law regarding his involvement in plaintiff's prior medical malpractice suit. Plaintiff also sought disgorgement of a $52,145.42 referral fee she claimed defendant received improperly.

The Law Division judge granted plaintiff's motion for summary judgment and then entered judgment against defendant for $308,181.68, with $52,145.42 representing the disgorged referral fee and $256,036.26 representing treble damages and attorney's fees, under N.J.S.A. 2C:21-22a. Because disgorgement is a remedy, not a cause of action, and because we find no evidence that defendant caused plaintiff to sustain an "ascertainable loss," a required element for a cause of action under N.J.S.A. 2C:21-22a, we reverse.

7-15-21 PAMI REALTY, LLC VS. LOCATIONS XIX INC (L-5845-18, MIDDLESEX COUNTY AND STATEWIDE) (A-0576-20)

During the arbitration of the parties' dispute, the arbitrator participated in settlement discussions. After he advised counsel he would be issuing an opinion in favor of defendant, plaintiff complained about the arbitrator's participation in the settlement discussions and the resumption of role of arbitrator. The motion judge denied defendant's motion to confirm the arbitration award and granted plaintiff's motion to vacate it on the basis the arbitrator had exceeded his powers. The motion judge apparently based those decisions on the lack of a written agreement regarding whether the arbitrator could participate in settlement discussions and resume arbitrating, citing Minkowitz v. Israeli, 433 N.J. Super. 111 (App. Div. 2013). Clarifying Minkowitz, the court held that although the parties had to agree to an arbitrator participating in settlement discussions and continuing to act as an arbitrator, that agreement did not have to be in writing. The court remanded for an evidentiary hearing.

7-14-21 IN THE MATTER OF D.L.B. (0119-XTR-2020-000001, ATLANTIC COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1035-20)

In this appeal, the State challenges the court's denial of a final extreme risk protective order under the Extreme Risk Protective Order Act of 2018, which empowers a court to remove firearms from a person who "poses a significant danger of bodily injury to . . . self or others" by possessing them. N.J.S.A. 2C:58-24(b). Because the trial court did not admit critical evidence, did not require or ensure the State presented information and evidence upon which it relied in support of its petition, and did not make essential findings of fact, the court reverses and remands for further proceedings.

7-9-21 NANCY WOLLEN VS. GULF STREAM RESTORATION AND CLEANING, LLC, ET AL. (L-0900-18, OCEAN COUNTY AND STATEWIDE) (A-1107-20)

In this appeal, the court considered an internet-based company's method of communicating its terms and conditions in the ever -evolving arena of online consumer contracts. At issue is the validity of an arbitration provision embedded in those terms and conditions that "could" be accessed via a hyperlink before plaintiff submitted her request for defendant's services. Because the defendant company did not demonstrate that the consumer plaintiff was on notice of the arbitration provision prior to submitting her service request through the website, the court held defendant failed to establish plaintiff was aware of the arbitration provision.

Applying a fact-intensive inquiry, the court held plaintiff did not knowingly and voluntarily agree to waive her right to resolve her disputes in court. Accordingly, the court reversed the order under review that enforced arbitration, and remanded for reinstatement of the complaint.

7-8-21 DOBCO, INC. VS. BERGEN COUNTY IMPROVEMENT AUTHORITY, ET AL. HOSSAM IBRAHIM VS. BERGEN COUNTY IMPROVEMENT AUTHORITY, ET AL. (L-0486-21 and L-0508-21, PASSAIC COUNTY AND STATEWIDE) (CONSOLIDATED) (A-2201-20/A-2202-20)

A construction company and its principal, a resident and taxpayer of Bergen County, filed separate complaints challenging the proposed selection process for a general contractor to rehabilitate the historic Bergen County Courthouse. The City of Hackensack designated the county improvement authority (BCIA) as a "redevelopment entity" pursuant to the Local Redevelopment and Housing Law (LRHL). In turn, the BCIA solicited responses to a request for qualifications (RFQ), which set out the scope of the project and BCIA's intention to enter into a contract with a "redeveloper," the general contractor chosen. The selection process did not require public bidding under the Local Public Contracts Law (LPCL).

The Law Division judge dismissed both complaints, essentially concluding that because the BCIA was acting as a "redevelopment entity," its selection of a "redeveloper" was not subject to the LPCL. He dismissed both complaints with prejudice.

The court affirmed dismissal of the construction company's complaint on procedural and equitable grounds. However, the court reversed dismissal of the individual taxpayer's complaint, concluding that the BCIA generally was subject to the LPCL, and the "goods and services" at issue would normally be subject to public bidding. Although the BCIA was acting as a redevelopment entity under the LRHL, it could not avoid the strictures of the LPCL by simply denominating the general contractor as a "redeveloper." The court remanded the matter to the Law Division to permanently restrain the BCIA from proceeding with the selection process anticipated under the RFQ.

7-7-21 JAIME TAORMINA BISBING VS. GLENN R. BISBING, III (FM-19-0324-14, SUSSEX COUNTY AND STATEWIDE) (A-0138-20)

In this post judgment matrimonial appeal, the court addressed whether a trial court may determine that plaintiff's obligation to pay defendant previously awarded counsel fees was non-dischargeable as a domestic support obligation in any future federal bankruptcy proceeding pursuant to 11 U.S.C. § 523(a)(5) (Section 5). Defendant had twice tried unsuccessfully to discharge obligations in the bankruptcy court, thus, despite the lack of a pending bankruptcy proceeding, there was clearly an ongoing dispute as to the payment of counsel fees, which presented an actual controversy over which the trial court had jurisdiction. The court held the lack of a filed bankruptcy action does not bar review of non-dischargeability when the record itself presupposes it, as it did here.

Pursuant to 11 U.S.C. § 1328(a)(2), domestic support obligations as defined in Section 5 are not dischargeable in bankruptcy cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code. However, obligations arising solely under Section 15 may be dischargeable in Chapter 13 filings. 11 U.S.C. § 1328(a)(2). The court held the trial judge properly determined the counsel fee award to be non-dischargeable as a domestic support obligation. The underlying matter involved defendant's attempt to preserve his ability to visit with his daughters regularly, despite plaintiff's attempt to relocate them across the country. Accordingly, the trial court further established that the funds in this matter could have been used for the children's support including tuition and child support payments, such that the counsel fee award was tantamount to an award of support for the benefit of the children.

7-2-21 BARBARA ZILBERBERG VS. BOARD OF TRUSTEES, ET AL. (TEACHERS' PENSION AND ANNUITY FUND) (A-3595-18)

Plaintiff appealed from an administrative determination of the Board of the Teachers' Pension and Annuity Fund (TPAF) rejecting her request that a portion of interest payments owed on her pension loan be waived. In 2004, plaintiff secured a $26,860 pension loan from TPAF and retired after having made two payments through payroll deduction. The Division of Pensions and Benefits (Division) did not deduct plaintiff's loan payments from her distributions once she had retired, and she did not inquire about her loan repayment status between 2004 and 2017.

In September 2017, the Division notified plaintiff that an audit of pension loans revealed she owed an outstanding balance of $25,973.83 plus additional accrued interest of $21,227, for a total of $47,200.83 and that it would begin deducting loan payments from her monthly retirement allowance to cover the repayment of principal and interest. Plaintiff offered to repay the remaining balance and five years of interest, at four percent, in a lump sum payment if the Board of Trustees for TPAF (Board) would waive the interest accrued after the original five-year term. The Board rejected her offer and denied her request to waive the accrued interest assessed on her outstanding loan obligation. Notably, the State had entered into a closing agreement with the Internal Revenue Service (IRS) under which outstanding pension loans, plus interest, would be repaid to State-administered retirement systems, including TPAF, to protect their tax-qualified status. Plaintiff appealed the Board's determination.

The trial court affirmed the Board. The Internal Revenue Code, § 72(p), N.J.S.A. 18A:66-35, N.J.S.A. 18A:66-35.1, and N.J.S.A. 18A:66-63 controlled the interest obligation, even though it was the Division's fault the payments were not deducted from plaintiff's pension checks.

When a pension loan is not repaid within five years of its distribution, the loan funds are essentially converted to taxable income as a "deemed distribution." I.R.C. § 72(p)(2)(B) sets forth an exception from a taxable deemed distribution for a loan from a qualified employer plan, provided the loan is repaid within five years. I.R.C. § 72(p)(1) ("If during any taxable year a participant or beneficiary receives, directly or indirectly, any amount as a loan from a qualified employer plan, such amount shall be treated as having been received by such individual as a distribution under such plan."). Repayment of interest to TPAF is crucial to maintain the pension plan's tax-qualified status.

The Board's decision was not arbitrary, capricious, or unreasonable. The Board's

decision comported with the IRS requirement that TPAF collect a sum sufficient to repay the amount borrowed with interest thereon.

7-1-21 TALMADGE VILLAGE LLC VS. KEITH WILSON (DC-008290-20, MIDDLESEX COUNTY AND STATEWIDE) (A-0590-20)

In this one-sided appeal, plaintiff-landlord Talmadge Village LLC challenges the trial court's stay of the October 8, 2020 order ejecting defendant Keith Wilson from the apartment he shared with Talmadge's former tenant and restoring possession to the landlord. The lease had expired, defendant was never on the lease, and he never notified the landlord he lived there.

Plaintiff initiated an ejectment action to have defendant removed from the apartment. Following a hearing during which both parties participated, the trial court issued an order for possession in plaintiff's favor and directed defendant to vacate the premises. The judge then stayed enforcement of his order "pursuant to Executive Order 106 and P.L. 2020, c. 1 for the duration of the moratorium imposed thereby." Because the court concludes the governor's moratorium on evictions, as set forth in Executive Order 106, does not extend to persons having the legal status of squatters, the court vacates the stay.

6-30-21 JEFFREY J. TEMPLE VS. CYNTHIA G. TEMPLE (FM-18-0710-03, SOMERSET COUNTY AND STATEWIDE) (A-0293-20)

Even though plaintiff marshaled considerable evidence demonstrating that his ex-wife has been in a fourteen-year relationship with another man, with whom she has traveled extensively and attended numerous family events, that she recently stayed in his home for a number of uninterrupted months, and that the other man has repeatedly described defendant as "my wife" in social media postings, the trial judge denied plaintiff's motion to modify or terminate alimony based on the contention that defendant had either remarried or was cohabiting. The court reversed, finding there was a genuine factual dispute about whether defendant had remarried and that plaintiff presented a prima facie case of cohabitation that warranted discovery and an evidentiary hearing. In so holding, the court rejected the notion that Landau v. Landau, 461 N.J. Super. 107, 118-19 (App. Div. 2019) created a template for what constitutes a prima facie case of cohabitation, and concluded that a prima facie case is determined by the central thesis of cohabitation without the need for an affirmative showing on all the items listed in N.J.S.A. 2A:34-23(n). The court therefore held that a prima facie case is made when, assuming the truth of the movant's allegations and providing the movant with all reasonable inferences, the opponent appears to be in "a mutually supportive, intimate personal relationship" in which the new couple "has undertaken duties and privileges that are commonly associated with marriage or civil union." N.J.S.A. 2A:34-23(n).

6-29-21 IN THE MATTER OF THE ELECTION FOR ATLANTIC COUNTY FREEHOLDER DISTRICT 3, ET AL. (L-3929-20, ATLANTIC COUNTY AND STATEWIDE) (A-1205-20)

Appellant won the November 2020 election for the Atlantic County Third District County Commissioner race defeating her opponent by 286 votes. The election was primarily a vote-by-mail election pursuant to Executive Order and subsequently enacted legislation.

Appellant's opponent contested the election results because the Atlantic County Clerk sent incorrect ballots that failed to list the Third District County Commissioner race to a segment of voters, which totaled more than the margin of victory. Among other grounds, the opponent contested the election pursuant to N.J.S.A. 19:29-1(e), which permits a challenge "[w]hen illegal votes have been received, or legal votes rejected at the polls sufficient to change the result . . . ." Appellant argued the court could not overturn the election because pursuant to N.J.S.A. 19:63-26, "[n]o election shall be held to be invalid due to any irregularity or failure in the preparation or forwarding of any mail-in ballots prepared or forwarded pursuant to the provisions of [the Vote By Mail Law]." The Law Division Judge granted the relief sought by the opponent, revoked appellant's certificate of election, declared a vacancy, and scheduled a special election for the position.

On appeal, the court affirmed the Law Division's decision, and in a case of first impression held, N.J.S.A. 19:63-26 establishes a rebuttable presumption that limits the ability to invalidate an election due to any irregularity or failure in the preparation or forwarding of any mail-in ballots. However, a contestant may rebut the presumption by asserting one or more of the grounds under N.J.S.A. 19:29-1 as a basis to invalidate the election. An election shall be set aside if the trial judge concludes the contestant has proved a basis to do so under N.J.S.A. 19:29-1 by a preponderance of the evidence and the judge finds that no person was duly elected, as per N.J.S.A. 19:29-9.

6-29-21 IN THE MATTER OF THE PETITION OF CELESTE FERNANDEZ, ETC. (L-3848-20, ATLANTIC COUNTY AND STATEWIDE) (A-1139-20)

Celeste Fernandez was one of four candidates in the November 3, 2020 election for two Commissioner at Large (CAL) positions in Atlantic County. Fernandez placed third, 381 votes behind John W. Risley, Jr. Fernandez filed a petition with the Law Division seeking a recount pursuant to N.J.S.A. 19:28-1.

The State had selected the Atlantic County CAL election as one that would be subject to an audit in which two percent of the ballots cast would be recounted. The audit reduced Risley's margin of victory over Fernandez by one vote. However, the State's audit indicated there were errors in the identification of overvotes (where the voter selects more than two candidates for the CAL position and no vote is counted) and undervotes (where the voter selects one or no candidate for the CAL position).

The trial court ordered an audit or recheck of two additional four percent of the votes, using the same procedures that the Board had used in the State-mandated audit. The combined results of the initial audit and court-ordered recheck indicated that 1,297 votes originally tallied as overvotes or undervotes had been recounted, and seventy-four votes were changed to recorded votes for candidates.

The court rejected Fernandez's contention that she was entitled to an automatic right to a recount pursuant to N.J.S.A. 19:28-1. We held that to obtain a recount pursuant to the statute, a candidate must present sufficient credible evidence to show there is reason to believe an error was made in the counting of the votes, and the court should order a recount if the claimed error could affect the outcome of the election.

Here, Fernandez presented sufficient evidence establishing that there is reason to believe an error was made in the counting of the votes for the CAL election, specifically the votes initially recorded as overvotes or undervotes. We therefore conclude the trial court mistakenly exercised its discretion by denying Fernandez's request for a machine re-scanning of all ballots cast in the CAL election, and a hand recount of all votes identified as overvotes or undervotes.

6-24-21 STATE OF NEW JERSEY VS. W.C. (FO-08-0264-20, GLOUCESTER COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0800-20)

Defendant's firearms were seized following entry of a temporary restraining order against him pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. The court entered a final restraining order (FRO) following a trial, but later granted defendant's motion for reconsideration, vacated the FRO, and, following a second trial, dismissed the domestic violence complaint because the plaintiff did not sustain her burden of proving an entitlement to an FRO.

Following entry of the FRO, the State moved for forfeiture of defendant's weapons under the PDVA. Notwithstanding the subsequent dismissal of the FRO, the State argued it was entitled to forfeiture under N.J.S.A. 2C:25-21(d)(3) because N.J.S.A. 2C:25-29(b), which requires that domestic violence FROs include a minimum two-year bar on a defendant's possession and ownership of a firearm, resulted in a disability under N.J.S.A. 2C:58-3(c)(6), which prohibits the issuance of a handgun purchase permit or firearms purchaser identification card to a person who is "subject to" a PDVA restraining order prohibiting possession of a firearm. The motion court denied the State's forfeiture application, and the State appealed.

The court affirms the motion court's denial of the forfeiture application. The court holds an FRO that is vacated as improvidently granted in the first instance does not support the otherwise mandatory bar under N.J.S.A. 2C:25-29(b), and therefore does not result in a disability under N.J.S.A. 2C:58-3(c)(6) permitting forfeiture under N.J.S.A. 2C:25-21(d)(3).

6-24-21 YOEL ROMERO VS. GOLD STAR DISTRIBUTION, ET AL. (L-7287-17, MIDDLESEX COUNTY AND STATEWIDE) (A-0379-20)

In this negligence and products liability action involving plaintiff's ingestion of one of defendant's products, SHED RX, a diuretic, which contained a substance banned by the World Anti-Doping Agency, this appeal required the court to reiterate well-settled principles set forth in Rule 4:50-1 relative to motions to vacate default judgments. The court also reviewed the standard for calculating damages under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -226 for plaintiff's claims of lost wages and income, reputational damages, and infliction of emotional distress, ascertainable loss, and trebling of damages.

6-21-21 GEORGE A. WILHELM VS. RYDER LOGISTICS & TRANSPORTATION SOLUTIONS, ET AL. (NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT) (CONSOLIDATED) (A-3770-18/A-3792-18/A-3797-18/A-3798-18)

In this case of first impression in New Jersey, the court considers whether N.J.S.A. 34:15-95.5 requires a triennial redetermination of petitioners' combined awards of state workers' compensation total disability benefits and social security disability benefits (SSD) as is done under 42 U.S.C. § 424a.

Under both N.J.S.A. 34:15-95.5 and 42 U.S.C. § 424a, a petitioner is limited to the amount they can simultaneously collect from SSD and state workers' compensation benefits. If the combined monthly total benefits of SSD and state workers' compensation benefits exceeds eighty percent of the petitioner's pre-disability average current earnings (ACE), SSD is reduced. Under 42 U.S.C. § 424a, Social Security receives the benefit of the offset.

In 1980, New Jersey enacted a law authorizing the reduction of the workers' compensation award instead of SSD when determining the simultaneous collectability of benefits. Therefore, New Jersey is a reverse offset state, meaning that the employer, insurance carrier, or Second Injury Fund gets the benefit of the offset, not Social Security.

42 U.S.C. § 424a(f) requires a triennial redetermination of benefits. N.J.S.A. 34:15-95.5 does not. Petitioners contend our Legislature intended to adopt the federal triennial redetermination provision. However, the plain language of N.J.S.A. 34:15-95.5 does not include a redetermination of benefits. And the legislative history is similarly silent. See Sponsor's & Lab. Comm. Statement to A. 1206 1-17 (L.1980, c. 83). Moreover, 42 U.S.C. § 424a(d) explicitly states that a triennial redetermination is not applicable in reverse offset states.

Because our Legislature did not include a cost-of-living increase in the statute, and the federal statute exempts reverse offset states from reviewing its benefits triennially, we affirm the order denying a redetermination of benefits and for the reimbursement of overpayment of benefits.

6-21-21 IN RE N.J.A.C. 17:2-6.5 (PUBLIC EMPLOYEES' RETIREMENT SYSTEM) (A-2059-18)

The New Jersey Education Association challenged a regulation of the Public Employee Retirement System Board that amended the definition of "willful negligence." The definition is important because a public employee seeking an accidental disability pension must prove that his or her disability did not result from his or her willful negligence. The court invalidates the regulation because it strays from the Legislature’s intent to include an element of recklessness in "willful negligence," and because the regulation’s plain language contradicts the Board’s own reasoning in defense of its proposal.

6-17-21 STATE OF NEW JERSEY VS. KEPHINE OGUTA (19-03-0292, HUDSON COUNTY AND STATEWIDE) (A-2598-19)

In this appeal, the court addresses the relatively rare set of facts requiring a self-defense jury instruction when a defendant is charged with unlawful possession of a weapon in violation of N.J.S.A. 2C:39-5(d). A jury convicted defendant of fourth-degree unlawful possession of a weapon, which was a knife. Defendant argues that the jury instruction on the charge was improper because it did not include his request for a self-defense instruction. The court agrees and reverses his conviction because the jury could have found self-defense was a justification for defendant's possession of a knife, which he testified he possessed for use at work and only took out spontaneously in self-defense. Defendant's other arguments are without merit or moot.

6-15-21 ESTATE OF JAMES BURNS, ETC. VS. CARE ONE AT STANWICK, LLC, ET AL. (L-2044-17, BURLINGTON COUNTY AND STATEWIDE) (A-1344-20)

In this interlocutory appeal, the court held that although the Legislature established a bill of rights for those living in assisted living residences, N.J.S.A. 26:2H-128(b), it did not recognize – as it had with residential health care facilities, rooming and boarding houses, dementia care homes, or nursing homes – their right to pursue a private cause of action for a breach of the bill of rights. The court also determined that the common law should not adopt such a cause of action.

6-15-21 INTERNATIONAL BOTHERHOOD OF ELECTRICAL WORKERS LOCAL 400, ET AL. VS. BOROUGH OF TINTON FALLS, ET AL. (L-3966-19, MONMOUTH COUNTY AND STATEWIDE) (A-3565-19)

This case arises out of the development of a solar energy power plant on land in Tinton Falls leased by private parties from the United States Department of the Navy at Naval Weapons Station Earle (NWS Earle).

Under Article I, Sec. 8, par. 17 of the United States Constitution, the land on which NWS Earle is located became a federal enclave in 1947 when the Governor of New Jersey ceded jurisdiction to the United States. As a result, any activities on NWS Earle, located on federal land, are free from regulation by any state or locality.

The majority of the electricians working on the project were members of plaintiff International Brotherhood of Electrical Workers Local 400 (IBEW). IBEW contended Tinton Falls was responsible for the issuance of permits and conducting inspections. The municipality and the New Jersey Department of Community Affairs (DCA) informed IBEW that state laws did not apply to federal territory. The federal government had the exclusive right to regulate its properties.

IBEW instituted suit against Tinton Falls and the DCA. IBEW did not sue the federal government. The trial court granted defendants' motions to dismiss because the federal government was a necessary party to the action and the state court lacked jurisdiction over the federal enclave.

The court affirmed. In addition to being the lessor of the property, the Navy was involved in every aspect of the construction project. The action could not be adjudicated without the joinder of the federal government required under Rule 4:28-1.

The court also found that any amendment to the complaint to join the federal government would be futile because the federal district courts have exclusive jurisdiction over the federal government and the Navy as a military branch. Therefore, the United States cannot be joined as a party in the state court suit. Because the trial court lacked jurisdiction over the federal government, the judge could not address or interpret the applicable contract. As there were no state claims left to adjudicate in the trial court , the complaint was properly dismissed under Rule 4:6-2 (a), (e), and (f).

6-9-21 JILL CADRE, ET AL. VS. PROASSURANCE CASUALTY COMPANY, ET AL. (L-10530-15, BERGEN COUNTY AND STATEWIDE) (A-4969-18)

Rule 1:21-1B governs the practice of law as an LLC. Among other things, it mandates that attorneys who do so must procure professional liability insurance that provides coverage to the LLC for damages "arising out of the performance of professional services by attorneys employed by the [LLC] in their capacities as attorneys." R. 1:21-1B(a)(4). Plaintiff, an attorney who conducted her practice as an LLC, purchased a professional liability insurance policy from defendant. Plaintiff's paralegal embezzled nearly $800,000 of clients' closing funds from the firm's trust account. Plaintiff made a claim for defense and indemnification under the policy, but defendant declined coverage, relying on the policy's definition of covered damages. That definition explicitly excluded damages for "the return or restitution of . . . misappropriated client funds . . . ."

Plaintiff sought declaratory judgment seeking reformation of the policy, arguing that the policy did not comply with the Rule, which had the force of statutory law, and which was intended to protect the public from uninsured risks. Alternatively, plaintiff argued the policy was ambiguous and failed to meet her reasonable expectations. The court rejected these arguments and affirmed the Law Division's grant of summary judgment to defendant.

6-8-21 IN THE MATTER OF THE CIVIL COMMITMENT OF M.F. (SOCC-000001-06, SOMERSET COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3572-19)

M.F.'s assigned counsel appeals from a February 19, 2020 order granting M.F.'s legal guardian's application to intervene in M.F.'s involuntary commitment proceedings. On appeal, M.F.'s counsel argues the guardian has not met the criteria for intervention under Rule 4:33-1 or Rule 4:33-2, and that the plain language of N.J.S.A. 30:4-27.12 precludes intervention as a matter of law. This case presents the issue of who is entitled to express a position on whether M.F., a gravely disabled patient involuntarily committed to a psychiatric hospital, continues to meet the statutory definition of dangerousness. The issue is complicated by the fact that M.F. is unable to express his preference due to his debilitating mental illness.

Based upon the record and in light of the applicable law, the court affirmed the judge's order allowing the legal guardian to intervene, not to usurp assigned counsel's role, but to fulfill his separate duties to safeguard the welfare of his ward. Because M.F.'s views are not easily or readily ascertainable, however, and considering the sharply divergent views of the legal guardian and assigned counsel, the court directed that on remand the judge appoint an attorney to serve as guardian ad litem for M.F., to conduct an investigation and report his or her findings to the court.

6-4-21 STATE OF NEW JERSEY VS. OSCAR RAMIREZ (20-01-0071, HUDSON COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1298-20)

A grand jury indicted defendant with first degree kidnapping, four counts of first degree aggravated sexual assault, and other related offenses. At the victim's request, the State sought a protective order pursuant to Rule 3:13-3(e)(1) to exclude her home address from the discovery made available to defendant. The trial court ordered the State to disclose the victim's home address to his counsel and investigators.

By leave granted, this court holds that the disclosure of the victim's home address in this case violates the public policy of this State, as reflected in The Victims' Rights Amendment to our State Constitution. N.J. Const., art. I, ¶ 22. This disclosure also violates the Sexual Assault Victim's Bill of Rights, N.J.S.A. 52:4B-60.1 to 60.3, which gives a victim of sexual violence the right "[t]o choose whether to participate in any investigation of the assault[.]" N.J.S.A. 52:4B-60.2(7).

6-2-21 IN THE MATTER OF THE GLORIA T. MANN REVOCABLE TRUST (P-000330-18, BERGEN COUNTY AND STATEWIDE) (A-2663-19)

Plaintiff and defendant—brother and sister, respectively—were named as co-trustees of a trust created by their mother. A few months after their mother's passing, plaintiff resigned as trustee. He later contested his resignation and his sister's actions as the remaining trustee, filing a verified complaint and subsequent amended verified complaint seeking: an order declaring him a trustee; a full accounting of the actions taken by defendant as trustee; a return of all trust and non-trust property taken by defendant or any agent of defendant; compensatory, consequential, incidental, nominal and expectation damages; and lawful interest, attorney's fees and other equitable relief.

The court determined the trial court's decision that plaintiff signed a Resignation of Trustee and did not, as he contended, delegate his authority to a co-trustee was supported by substantial, credible evidence. Neither prior notice of the resignation to the trust's beneficiaries and the co-trustee nor approval of the court was needed under N.J.S.A. 3B:31-50(a), because the trust provided if either trustee was "unable or unwilling to serve or to continue to serve, then the other shall serve as sole trustee[.]" It further provided "[n]o [t]rustee shall be required to obtain the order of any court to exercise any power or discretion" under the trust. Not only did the trust allow resignations, it provided for continuity of the trust's administration if a trustee did resign. Because plaintiff resigned, the court further rejected his argument that defendant violated N.J.S.A. 3B:31-48 by making unilateral decisions.

The court also upheld the trial court's determination that defendant did not violate the Prudent Investor Act (the Act), N.J.S.A. 3B:20-11.1 to -11.12, by holding trust assets in regular bank accounts. The prudent investor rule is a default rule—expressing "a standard of conduct, not outcome," N.J.S.A. 3B:2-11.9—and was expanded by the trust provisions granting defendant broad investment powers. The degree of caution exercised by defendant was befitting her fiduciary capacity

Although defendant breached her fiduciary duty by making a one-time distribution of trust funds to herself, she acted in accordance with the trust's broad grant of powers by delaying other interim distributions until inheritance taxes were paid. The court also determined, under N.J.S.A. 3B:31-72(a), the trial court properly found plaintiff was entitled only to five-percent interest on the amount of the co-trustee's self-serving distribution, dismissing plaintiff's request for "other appropriate relief" under N.J.S.A.

3B:31-71(b)(10), including lost investment opportunity and punitive damages, because the "opinion" of plaintiff's expert was "nothing more than speculation of what [p]laintiff might have earned if distributions were made to [him] from the [t]rust," and plaintiff did not pray for punitive damages in his complaint or prove defendant acted with actual malice or wanton and willful disregard for plaintiff.

In addition, the court determined, notwithstanding a fiduciary's duty to communicate with beneficiaries as required by N.J.S.A. 3B:31-67(a) and 3B:31-5(b)(7), there was no evidence that plaintiff suffered damages as a result of defendant's unresponsiveness to his inquiries for a brief period.

The court also summarily addressed plaintiff's counsel-fee arguments and his argument that the trial court abused its discretion by refusing to allow him to testify as a rebuttal witness.

6-2-21 JOSE CARBAJAL VS. NANCY V. PATEL, ET AL. (L-4317-17, MIDDLESEX COUNTY AND STATEWIDE) (A-1999-19)

In this third-party automobile negligence action, this court determined that plaintiff was entitled, under the Comparative Negligence Act (CNA), N.J.S.A. 2A:15-5.1 to -5.8, to fully recover his damages from defendant after the jury found her sixty percent responsible for causing the accident, even though defendant was unable to obtain contribution under the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 to -5, directly from plaintiff's uninsured motorist (UM) carrier. From a practical standpoint, defendant receives an offset up to plaintiff's uninsured motorist policy limit, thereby foreclosing the possibility of plaintiff receiving double recovery. But her inability to recover directly from the UM carrier for any amount defendant paid above her pro rata share does not present an obstacle to plaintiff's full recovery under the CNA.

6-1-21 VLADIMIR DIAZ VS. HERBERT J. REYNOSO, ET AL. (L-8244-19, BERGEN COUNTY AND STATEWIDE) (A-1285-20)

This interlocutory appeal from a Rule 4:6-2(e) dismissal order raises novel issues of legal duty and tort liability in a drunk driving context. The issues concern whether a volunteer who assures police officers at a roadside stop of an apparently inebriated driver that he will take the driver and his car safely to a residence—but thereafter relinquishes the car to the driver before reaching that destination—can be civilly liable as a joint tortfeasor if the driver then collides with and injures another motorist

In the present case, police officers stopped a driver who was traveling in the wrong direction on a one-way street. Perceiving the motorist was unfit to drive, the officers asked him if he could arrange for someone to pick him up. The motorist called a friend, who quickly arrived and assured the officers that he would drive the motorist and his car to another location. Relying on this assurance, the police issued a moving violation traffic ticket to the motorist and allowed the friend to drive him away. Minutes later, the friend returned the car to the motorist at a railroad crossing and separated from him. The motorist, who was intoxicated well over the legal limit, resumed driving and crashed his car into the plaintiff's vehicle. He later pled guilty to committing assault by auto while under the influence of alcohol. The severely injured plaintiff sued the driver, a bar where the driver had been drinking that night, the police officers and their city employer, and the volunteer. The volunteer moved to dismiss the claims against him, arguing he owed no legal duty that could make him civilly liable to any extent for this accident.

After reviewing a video of the motor vehicle stop and a prosecutor's investigative report, the motion judge concluded the volunteer breached no legal duty to the injured plaintiff. The judge accordingly dismissed plaintiff's claims, as well as the police defendants' related cross-claims for contribution, against the volunteer.

Applying statutory public policies, including John's Law, N.J.S.A. 39:4-50.22, and allied common law principles, the court reverses the motion judge's dismissal order.

The court holds that a volunteer who fails to discharge his commitment to the police in such a situation and who willingly allows a visibly intoxicated motorist to resume driving can bear a portion of the civil liability for an ensuing motor vehicle accident caused by that drunk driver. The presence of such a legal duty will hinge upon whether the volunteer is advised by the police, or objectively has reason to

know from the surrounding circumstances, that his or her promise is an important obligation and that failing to carry it out could result in civil financial consequences.

In recognizing these legal duties that may have been assumed by the volunteer, the court does not absolve any other parties whose negligence, if proven, contributed to the harm, including the drunk driver himself, the police officials who failed to field test or arrest him, and the tavern that served him alcohol. Their own respective shares of fault would need to be determined and allocated, based upon customary rules of proximate causation and joint tortfeasor liability.

5-27-21 ALFRED LAWSON VS. OFFICER JEFF DEWAR, ET AL. (L-8788-20, MIDDLESEX COUNTY AND STATEWIDE) (A-2443-20)

The court granted leave to appeal and summarily vacated an order that denied reconsideration of an earlier interlocutory order because the judge invoked the "palpably incorrect" standard, which applies only to Rule 4:49-2 motions to alter or amend a final judgment or final order, instead of the more liberal standard of Rule 4:42-2, which declares that interlocutory orders "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." The court also found the judge erred by giving undue deference to the prior judge's interlocutory order and by applying the law of the case doctrine, which has no bearing in this setting.

In remanding, the court provided guidance about the prior order that precluded a non-party, who failed to appear for a subpoenaed deposition, from testifying at trial. The court observed that the first judge had applied Rule 4:23-2, which applies only to parties, instead of Rule 1:9-5, which applies when a non-party fails to honor a subpoena. The court directed that the trial judge, in ruling on the reconsideration motion, consider how the latter rule's purpose is to secure the non-party's compliance with the subpoena, not to hamper the trial's search for the truth by eliminating the non-party's potentially relevant testimony.

5-26-21 PREMIER PHYSICIAN NETWORK, LLC VS. ROBERT MARO, JR., M.D., ET AL. (L-0166-18 AND L-0167-18, CAMDEN COUNTY AND STATEWIDE) (A-1152-20)

Plaintiff, a limited liability company (LLC), sued defendants, alleging they had been members of plaintiff, were bound by an operating agreement they had not signed, and, under the terms of the operating agreement, owed plaintiff shortfall amounts and penalties when they voluntarily left plaintiff. The trial court summarily determined defendants were bound by the operating agreement, relying primarily on N.J.SA. 42:2C-12(b), which states "[a] person that becomes a member of a limited liability company is deemed to assent to the operating agreement."

Considering the definition of operating agreement set forth in N.J.S.A. 42:2C-2 and the language of N.J.S.A. 42:2C-12(b), the court held a draft operating agreement does not become the operating agreement of an LLC unless it is "the agreement . . . of all the members of" the LLC, N.J.S.A. 42:2C-2, meaning "all the members" have to agree to it. If all existing members do not agree to the draft agreement when it is proposed, then the draft operating agreement remains a draft agreement and does not become the operating agreement of the LLC. If all members agree to a draft operating agreement, it then becomes the operating agreement of the LLC and any subsequent members are bound by the already-existing operating agreement. Because the trial court misinterpreted statutory law, the court reversed the partial summary judgment entered in plaintiff's favor.

5-26-21 STATE OF NEW JERSEY V. MICHELLE LODZINSKI (14-08-0871, MIDDLESEX COUNTY AND STATEWIDE) (A-2118-16)

A jury convicted defendant of the murder of her six-year-old son, who defendant reported went missing while both were at a Memorial Day carnival in 1991. Although defendant was immediately suspected of the crime in 1992 when her son's remains were found in a shallow grave, and the case received national media attention, the State did not indict defendant until 2014, after three women who babysat the child in the late 1980s and early 1990s identified a distinctive blanket found at the gravesite as the child's.

Defendant appealed, contending the evidence was insufficient to prove that she caused her son's death, and the delay in prosecution violated her due process rights. Defendant also argued that the judge erred by dismissing a deliberating juror who had conducted independent research and substituting an alternate juror to continue deliberations.

The court affirmed defendant's conviction, concluding that giving the State the benefit of all favorable testimony and inferences drawn from the circumstantial evidence presented to the jury, there was sufficient evidence to prove defendant purposefully or knowingly caused her son's death. The court also concluded the delay in prosecution did not deny defendant her due process rights, and the judge did not err in substituting an alternate for a deliberating juror who had violated the court's instructions and conducted independent research.

5-24-21 IN THE MATTER OF THE CIVIL COMMITMENT OF J.S. (SVP-24-99, ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0625-19)

J.S. challenged an order continuing his civil commitment to the Special Treatment Unit under the Sexually Violent Predators Act, N.J.S.A. 30:4-27.24 to -27.38 on grounds his trial counsel provided ineffective assistance. The court affirmed the order of commitment and held that a litigant subject to a civil commitment may raise claims of ineffective assistance of counsel. The court also held that such claims may be raised on appeal from the commitment order or an order continuing commitment. However, the record must be sufficient to address the claims. Otherwise, the claims of ineffective assistance of counsel must be raised to the trial court in the first instance.

5-20-21 BONNIE MARIE COTTRELL, ETC. VS. NATHAN HOLTZBERG, M.D, ET AL. (L-5557-16, MIDDLESEX COUNTY AND STATEWIDE) (A-3976-19)

Defendant Bey Lea Village Care Center owned and operated a nursing facility where Maryann Cottrell was a patient. She signed an arbitration agreement upon her admission in 2017, was there for twenty days and discharged. She was admitted to Bey Lea again in early 2018 where she resided for ten months until her death. Maryann Cottrell did not sign an arbitration agreement for the 2018 admission. While she was a resident in 2018, Bey Lea sold the nursing facility to defendant Complete Care at Bey Lea, LLC. Defendants claim the 2017 arbitration agreement applies to the 2018 admission.

The court affirms the order denying arbitration of issues arising from the 2018 admission. The court concludes there was no arbitration agreement for the 2018 admission and the 2017 agreement did not apply. Although the 2017 arbitration agreement included a clause delegating to an arbitrator the ability to decide "gateway disputes regarding the enforceability, validity, severability and/or interpretation" of the arbitration agreement, it was for a judge —not an arbitrator— to decide whether the 2017 arbitration agreement applied to the 2018 admission. The 2017 agreement did not apply because Maryann Cottrell did not assent to arbitrate disputes about the 2018 admission.

5-18-21 JONATHAN JEFFREY VS. STATE OF NEW JERSEY, ET AL. (L-1007-18, UNION COUNTY AND STATEWIDE) (A-1187-18)

Plaintiff was severely injured in a one-vehicle motorcycle accident and was diagnosed with quadriplegia. He claims the EMTs who responded to the accident scene caused or exacerbated his injuries by the way they picked him up from the ground and placed him in the ambulance. Plaintiff appeals from the order of Law Division that denied his motion for leave to file a late notice of claim under the Tort Claims Act.

N.J.S.A. 59:8-8 requires a claimant to file a notice of claim within ninety days of its accrual. This court holds the Law Division mistakenly exercised its discretion by not giving proper consideration to the traumatic ramifications of the catastrophic, life-altering injuries plaintiff suffered in this accident. Under the standard established by the Supreme Court in S.E.W. Friel Co. v. New Jersey Turnpike Auth., 73 N.J. 107, 122 (1977), these facts are sufficient to constitute "extraordinary circumstances" pursuant to N.J.S.A. 59:8-9.

5-17-21 STATE OF NEW JERSEY VS. LATONIA E. BELLAMY (11-03-0348, HUDSON COUNTY AND STATEWIDE) (A-0502-19)

The court remands the matter for resentencing of Latonia Elizabeth Bellamy, a/k/a Na-Na, Latonia E. Bellamy, Latonia Bellamy, whom a jury convicted of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2), among other offenses. The court reiterates that a resentence, absent some specific limiting directive to the contrary, allows a judge to engage in the statutory analysis anew. State v. Case, 220 N.J. 49 (2014). The judge must sentence the defendant as he or she stands before the court at that time.

The court also addressed the applicability of N.J.S.A. 2C:44-1(b)(14), a mitigating factor enacted after defendant's prior sentence. It applies when a defendant is less than twenty-six years of age when the crimes occurred. It may be considered on remand because this is essentially a new sentence proceeding. Application of the statute is therefore not "retroactive," and even if so, the statute's ameliorative purpose allows it. This does not automatically entitle youthful defendants sentenced before October 19, 2020, with cases in the pipeline, to reconsideration of their sentences based solely on a claim that the new law should be applied.

Furthermore, defendant should be granted access, pursuant to N.J.S.A. 9:6-8.10a(b)(6), to her Division of Child Protection and Permanency records in preparation for her sentence. Defendants charged with crimes are entitled to the records, redacted by the court, to aid in their defense where relevant as a matter of due process. State v. Cusick, 219 N.J. Super. 452, 459 (App. Div. 1987). The records should be made equally available to individuals who came under the Division's care and may benefit from access to the information. The application may be made in the Law Division, not in the Family Part.

5-13-21 STATE OF NEW JERSEY VS. JULIAN SANDERS (17-07-1979, ESSEX COUNTY AND STATEWIDE) (A-1965-18)

The novel issue presented in this appeal is whether a claim of self-defense applies to a charge of endangering an injured victim, N.J.S.A. 2C:12-1.2(a), when the injured victim has been injured by the defendant in the course of defending himself against said victim.

Following a jury trial, defendant was acquitted of murder and weapons offenses but convicted of endangering an injured victim, whom he admitted stabbing in self-defense after an altercation during which the victim forbade defendant from entering a store, threatened to beat defendant up, and threw a punch when defendant refused to heed the warnings. Defendant dodged the punch and stabbed the victim once in the chest with a knife defendant had produced from his pocket and brandished during the altercation. After the stabbing, the victim staggered around before collapsing on the ground and defendant left the scene without calling for medical assistance. The victim was later transported to the hospital where he died from the stab wound the following morning. Video surveillance footage of the entire five-minute encounter was played at the trial.

The trial judge instructed the jury on self-defense as applied to the homicide and weapons-related charges, but not the endangering charge. At trial, defense counsel neither requested the charge nor objected to its omission. However, on appeal, defendant argued the charge should have been given because self-defense applied to endangering.

After analyzing the general principles pertaining to justification defenses and considering the elements and legislative history of the endangering an injured victim statute, the court concluded that its omission in the unique facts presented in this case does not rise to the level of plain error. The court reasoned that when defendant left the scene, it was clear that his conduct had rendered the victim physically helpless such that he no longer posed a threat to defendant or anyone else. Because the victim was physically helpless, defendant could not have had a reasonable belief in the continued need to use force or the requirement to retreat without summoning medical assistance to justify self-defense. Rather than imposing an obligation on defendant to secure the safety of his attacker while endangering himself, the application of the endangering statute in this case sought to preserve a life after the threat or need for force had been neutralized.

Judge Sabatino joins in the result and issues a concurring opinion. The concurrence underscores the court's recognition that principles of self-defense, necessity or other justification may

appropriately apply in some factual situations to relieve a crime victim, who has repelled and injured an attacker, of criminal liability under N.J.S.A. 2C:12-1.2(a).

5-12-21 JUSTIN GAYLES, ET AL. VS. SKY ZONE TRAMPOLINE PARK, ET AL. (L-1530-18, MORRIS COUNTY AND STATEWIDE) (A-3519-19)

Defendant owned a trampoline park and required that adults who brought minors to the facility electronically execute a waiver of rights that also included an arbitration agreement at a computer station prior to entry. The adult would necessarily have to certify he/she was the parent or legal guardian of the minor or had been granted power-of-attorney to execute the waiver on behalf of the child's parent. Third-party defendant listed plaintiff's child as one of the minors seeking entry to the facility and executed the waiver. Plaintiff's child fractured his leg while using the trampolines.

Defendant sought summary judgment dismissing the complaint and compelling arbitration of plaintiff's negligence claims. Defendant argued that it reasonably believed in the third party's "apparent authority" to execute the waiver on plaintiff's behalf. The judge denied defendant's motion and defendant appealed as of rights.

The court affirmed, rejecting defendant's argument that it was entitled as a matter of law on the motion record to rely on the doctrine of apparent authority to enforce the waiver and compel arbitration. In particular, the court examined the provisions and commentary of the Restatement (Third) of Agency regarding the doctrine of apparent authority.

5-11-21 D.M.R. VS. M.K.G. (FV-01-1206-20, ATLANTIC COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4085-19)

Defendant appealed from a final restraining order (FRO) entered against her pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, based on a predicate act of harassment, N.J.S.A. 2C:33-4(a). This court reversed because the trial court did not conduct the required legal analysis necessary to enter the FRO under Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006) and the record did not demonstrate plaintiff needed future protection. Further, our review of the record also disclosed defendant was deprived of due process due to numerous trial irregularities in the remote proceeding, including that defendant had insufficient notice and opportunity to prepare a defense in her case, plaintiff's witness was not sequestered, plaintiff testified in the witness's presence with witness coaching plaintiff, and the trial court engaged in inappropriate questioning of defendant.

5-11-21 ESTATE OF LAURA CHRISTINE SEMPREVIVO, ET AL. VS. HASSAN LAHHAM, ET AL. (L-2343-18, ATLANTIC COUNTY AND STATEWIDE) (A-2505-19)

This appeal implicates the proper application and limitations of Rule 1:13-7, an administrative "docket-clearing rule." The court considered two issues: (1) whether the good cause or exceptional circumstances standard applies for reinstatement of the complaint in a multi-defendant case, where no defendants have appeared in the case and participated in discovery; and (2) whether the rule empowers the trial court to dismiss a complaint with prejudice in response to a motion filed by the nondelinquent party.

The court concluded the trial court misapplied the exceptional circumstances standard under Rule 1:13-7, thereby preventing adjudication of plaintiffs' claims on the merits. In that regard, the trial court mistakenly exercised its discretion by denying plaintiffs' motion to reinstate their complaint. The court also held that Rule 1:13-7 neither empowers a trial court to dismiss a cause of action with prejudice nor authorizes a party in a case to affirmatively seek such a drastic sanction as a form of relief.

Accordingly, the court reversed and remanded the order under review so the underlying medical malpractice action can be decided on the merits.

5-5-21 STATE OF NEW JERSEY IN THE INTEREST OF J.D. (FJ-13-0137-20, FJ-13-0491-20 AND FJ-13-0492-20, MONMOUTH COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0548-20)

In 2019, three women alleged that J.D. sexually assaulted them years earlier when they and J.D. were minors. The State filed juvenile delinquency complaints against J.D. and moved to waive certain charges to the Criminal Part to try J.D. as an adult on the alleged assaults that occurred when he was between the ages of fifteen and seventeen.

The issue on this appeal is whether the waiver proceedings should be governed by the current statute, N.J.S.A. 2A:4A-26.1, which became effective in March 2016, or by a hybrid of the current statute and one provision of the statute in effect at the time of the alleged offenses, N.J.S.A. 2A:4A-26(e). The court holds that the current statute governs.

5-4-21 DCPP VS. J.Y., IN THE KINSHIP MATTER OF J.T. (FL-09-0156-10, HUDSON COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1406-19)

The mother of an infant girl was unable to identify the father, so defendant was not a specified party to the KLG action the Division instituted shortly after his daughter's birth because the mother's disabilities rendered her unable to care for her daughter. Defendant remained incarcerated for the greater part of the first twelve years of her life but, after he learned of the child and established paternity, applied for visitation. By then, the child had been in the care and custody of the KLG guardian. Eventually, the trial court amended the KLG judgment and granted defendant limited contact with his daughter.

After a series of motions relating to that contact, defendant sought visitation and vacation of the KLG judgment. The trial court granted limited contact with the child—then twelve years old—and refused to address the motion to vacate the KLG judgment, concluding res judicata precluded such an application.

We reversed, determining the court erred because res judicata did not bar defendant's application to vacate the judgment rendered in an action to which he was not a party and involved proofs related solely to the mother, not defendant. We recognized the KLG judgment did not abrogate defendant's parental rights.

We reviewed the statutory grounds for vacating a KLG judgment under N.J.S.A. 3B:12A-6(f) and 3B:12-6(g), the procedures that should be followed and the criteria analyzed in determining the child's best interests when a non-party seeks to vacate a KLG judgment.

4-30-21 MICHAEL C. STEELE VS. JANE D. MCDONNELL STEELE (FM-18-0584-16, SOMERSET COUNTY AND STATEWIDE) (A-5172-18)

Defendant appealed from a declaratory judgment finding the marital agreement (MA) she and her former spouse signed eight months after they married was a valid, enforceable agreement. And, she appealed from the final judgment of divorce (JOD) that incorporated the MA. We conclude the trial court erred by deeming the agreement to be in the nature of an enforceable pre-marital agreement. The parties' mid-marriage agreement was negotiated and executed after they wed, and the inherently coercive circumstances accompanying the making of the agreement here warranted heightened judicial scrutiny to assure it was fair and equitable. Therefore, we reverse the declaratory judgment and that portion of the JOD which enforced the MA, vacate the denial of defendant's counsel fee request, and remand for further proceedings. We identify factors the trial court should consider on remand when assessing whether to enforce the agreement.

4-29-21 PHOENIX PINELANDS CORPORATION, ETC. VS. HARRY DAVIDOFF, ET AL. (C-000246-11, OCEAN COUNTY AND STATEWIDE) (A-2823-16)

The court reverses the final judgment in this quiatimet and ejectment action that divested defendant State of New Jersey of its title to seven parcels of land in the Preservation Area of the Pinelands National Reserve, consisting of over 250 acres, and granted title to those properties to an adjoining landowner, plaintiff Phoenix Pinelands Corporation, operator of a grandfathered sand and gravel mine. The court declares Phoenix's surreptitious, two-decade-long quest to undermine and cloud the State's title to the properties and establish its own competing chains of title — by plotting and resurveying the titles from the original grants from the Council of Proprietors of West Jersey, searching those titles forward, purchasing the fractional interests of the descendants of long-dead record title holders, convincing the tax assessor of Little Egg Harbor to make Phoenix's principal, David Denise, the assessed owner of the State's properties, consolidating the State's lands with Phoenix's sand mine, and having the State's parcels wiped off the tax map — the nefarious acts of a title raider, which should have barred it from any relief in a court of equity.

Having declared Phoenix's attempted annexation of the State's lands as violative of public policy, the court imposes a constructive trust on the "title" Phoenix acquired to one of the State's seven parcels, finding the State equitably entitled to the parcel upon payment to Phoenix of the sum it paid to acquire it, plus simple interest, and further finds Phoenix failed to establish title to any of the State's remaining six parcels under theories of quia timet or ejectment.

Accordingly, the court remands for entry of judgment in recordable form, following the State's tender of payment as described above, declaring Denise and Phoenix have no interest in these State lands and adjudging the State the owner of each parcel in fee simple.

4-28-21 STEPHAN LANZO, III, ET AL. VS. CYPRUS AMAX MINERALS COMPANY, ET AL. (L-7385-16, MIDDLESEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-5711-17/A-5717-17)

Plaintiff Stephen Lanzo III filed a complaint alleging he contracted mesothelioma due to his long-term use of talc products that contained asbestos. His spouse asserted a claim for the loss of her husband's services, society, and consortium. The case was tried before a jury, which returned a verdict against defendants Johnson & Johnson Consumer, Inc. (JJCI), and Imerys Talc America, Inc. (Imerys).

We reverse the judgment and remand the matter to the trial court for new, separate trials against JJCI and Imerys. We conclude the trial court erred by permitting plaintiffs' experts to testify that non-asbestiform mineral fragments can cause mesothelioma because the experts' theory was not generally accepted in the scientific community and lacked support in a publication reasonably relied upon by other experts in the field.

We also conclude the trial court did not mistakenly exercise its discretion by providing an adverse inference instruction to the jury based on Imerys' discovery violations and failure to retain relevant evidence. We decided, however, that the trial court erred by failing to sever the claims against JJCI because the adverse inference instruction was unduly prejudicial to JJCI, which had no role in the discovery violations or the spoliation of evidence.

4-22-21 BOARD OF EDUCATION OF EAST NEWARK, ETC. VS. KEVIN D. HARRIS, ET AL. (L-1134-21, HUDSON COUNTY AND STATEWIDE) (A-1982-20)

This matter arises out of an emergent application by the Borough Clerk of East Newark. The court granted him permission to file a motion on short notice to stay, pending appeal, the trial court's order directing the Borough to place a ballot question to reclassify East Newark from a Type I to a Type II school district on an April 20, 2021 special election ballot even though the Borough was not conducting an election on that day.

Following receipt of the motion briefs in which the parties addressed the merits and not the standard for stay pending appeal, the court exercised its authority under Rule 2:8-3(b) to decide the case summarily. Because N.J.S.A. 18A:9-5 permits a reclassification question in a Type I district to be presented to voters only "at the next municipal or general election," and the April 20 special school election is neither, the court reversed and remanded for dismissal of the School Board's complaint.

4-20-21 EAST BAY DRYWALL, LLC VS. DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT (DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT) (A-2467-19)

This administrative agency case concerns the application of the so-called "ABC Test," N.J.S.A. 43:21-19(i)(6) (A), (B), and (C), in classifying whether drywall installers utilized by appellant at various installation sites are either its employees or, conversely, independent contractors, for purposes of liability for contributions to the state unemployment and temporary disability compensation ("UCL") fund, N.J.S.A. 43:21-7.

Following a review of records, an auditor from the Department of Labor and Workforce Development concluded that about half of the drywall installers who provided services for appellant during the pertinent years had been improperly classified as independent contractors rather than as appellant's employees. As to those particular installers, the auditor assessed appellant for unpaid contributions to the fund. Appellant disputed those findings of misclassification, and an administrative hearing ensued.

After the hearing, an administrative law judge ("ALJ") applied the ABC factors and concluded three of the individual installers had been misclassified as independent contractors. However, the ALJ found that certain other installers who had formed and operated bona fide corporations or limited liability companies ("LLCs") during the audit period and should not be deemed appellant's employees in this regulatory context.

On further review, the Commissioner of the Department issued a final agency decision reinstating in full the auditor's findings. Applying the ABC Test, this court affirms the Commissioner's decision in part as to certain installers and reverses in part as to others. In particular, the evidence supports the ALJ's decision that part A (insufficient control of the work) and part B (work performed away from appellant's business office) of the ABC test were fulfilled. The evidence concerning part C (independent operation of a business) varies by installer and requires partial reversal of the Commissioner's decision.

In the course of its analysis, this court rejects the Commissioner's reliance on an income tax statute, N.J.S.A 42:2C-92, as grounds to "disregard" in this UCL contribution context the entity status of single-member LLCs, as opposed to the statute's applicability to income tax scenarios.

This court also rejects the Commissioner's mistaken reliance on a regulation, N.J.A.C. 12:16-11.2, that concerns the obligation of single-member LLCs as employers to make UCL contributions for their own workers, and which does not resolve whether the LLC's member is another company's employee.

4-15-21 STATE OF NEW JERSEY VS. AAKASH A. DALAL STATE OF NEW JERSEY VS. ANTHONY M. GRAZIANO (13-03-0374, BERGEN COUNTY AND STATEWIDE) (CONSOLIDATED) (A-5556-16/A-0686-17)

During a one-month period, between December 10, 2011, and January 11, 2012, five Jewish houses of worship were vandalized, fire-bombed, or attempted to be fire-bombed. Following separate trials, co-defendants Anthony Graziano and Aakash Dalal were convicted of multiple crimes related to those acts, including first-degree terrorism, N.J.S.A. 2C:38-2(a); first-degree aggravated arson, N.J.S.A. 2C:17-1(a)(2) and N.J.S.A. 2C:2-6; first-degree conspiracy to commit arson, N.J.S.A. 2C:17-1 and N.J.S.A. 2C:5-2; and first-degree bias intimidation, N.J.S.A. 2C:16-1(a)(1) and N.J.S.A. 2C:2-6.

Defendants separately appeal, challenging the constitutionality of the New Jersey Anti-Terrorism Act (Act), N.J.S.A. 2C:38-1 to -5. In this consolidated opinion the court addresses a question of first impression: whether the Act is unconstitutionally vague. The court holds it is not. Accordingly, we affirm defendants' convictions. The court also addresses an Eighth Amendment challenge to the sentence imposed under the Act and concludes that it is not cruel and unusual.

4-14-21 W.M. VS. D.G. (FD-16-0674-20, PASSAIC COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3097-19)

In this non-dissolution matter, W.M., a putative psychological parent, appeals from two orders directing her to return a teenage minor to the physical custody of his biological mother, D.G. We conclude the trial court did not fully examine plaintiff's claim she was a psychological parent, and applied the wrong factors for determining whether such parentage existed. Also, the court should have appointed counsel for the child, then seventeen years old, and converted the otherwise summary matter to the complex track. Therefore, we reverse.

In 2017, with his mother's consent, the minor started living with W.M. However, in late 2019, D.G. demanded that her son return home. Based on limited testimony elicited during summary proceedings, the trial court directed the teenager, then almost seventeen years old, to return home over his objection. He stayed at his mother's home one night but refused to remain there. W.M. filed an emergent application, seeking to be designated as the minor's psychological parent, asking that he be returned to her custody, and that the minor's volunteer attorney be permitted to participate in the proceedings. The trial court denied W.M.'s application without a plenary hearing, denied W.M.'s request for the teenager's attorney to participate in the proceedings, and did not reach the paramount issue of the minor's best interests.

After staying the trial court's orders pending appeal and granting the minor's attorney the right to appear on his behalf, the appellate court reversed. Although the teenager will be eighteen soon, the court also outlined appropriate factors for trial courts to consider when handling a complex FD custody matter. The court concludes the trial court did not fully examine plaintiff's claim she was a psychological parent, and applied the wrong factors for determining whether such parentage existed. Also, the court should have appointed counsel for the child, then seventeen years old, and converted the otherwise summary matter to the complex track.

4-14-21 LISA I. GREEBEL VS. MICHAEL A. LENSAK (FM-19-0178-15, SUSSEX COUNTY AND STATEWIDE) (A-1784-19)

In this appeal, the court addresses two post-judgment orders in this palimony case between plaintiff Lisa Greebel and defendant Michael Lensak. The parties never married, but shared a long-term, romantic relationship from approximately 2000 to 2013. During this time, the parties purchased a home, cohabitated, and raised their daughter, born in 2001.

In 2005, plaintiff obtained legal advice from attorney Vincent Celli about her right to financial support from defendant if the parties ever ended their relationship without marrying. Using a different attorney, plaintiff filed a palimony suit in 2014. The case settled in 2018. One year later, Mr. Celli filed a motion for defendant to vacate the final judgment pursuant to Rule 4:50-1, re-open discovery, and set aside the parties' settlement agreement. Plaintiff filed a cross-motion to disqualify Mr. Celli and his firm from representing defendant, alleging the 2005 consultation created a disqualifying conflict.

The court affirms the disqualification of the Celli firm and the dismissal without prejudice of defendant's motion to vacate the final judgment; however, we reverse the provision sealing and barring further use of the motion pleadings.

4-13-21 AHMED HASSAN, ET AL. VS. ROLAND WILLIAMS, ET AL. (L-0213-16, OCEAN COUNTY AND STATEWIDE) (A-3336-18)

In this motor vehicle negligence case, defendant Roland Williams, a driver for defendant ABF Freight System, Inc., rear-ended plaintiff Ahmed Hassan, a driver for FedEx. A defense expert opined that Hassan cut in front of Williams at a slow speed. The jury found both drivers negligent, but Hassan slightly more so, and the court entered a no cause judgment.

On appeal, the court holds that the trial judge erroneously excluded statements by ABF officials that Williams could have prevented the accident, he drove recklessly, and he violated ABF safety protocols. These were all statements of a party opponent. N.J.R.E. 803(b). The judge's reasoning that the statements should be excluded because they went to the "ultimate issue" was at odds with N.J.R.E. 704. The judge correctly excluded evidence that ABF discharged Williams, but he did so for the wrong reason; it was inadmissible because it was a subsequent remedial measure under N.J.R.E. 407. However, the investigatory finding that led to the discharge decision was not a subsequent remedial measure. Also, the probative value of the ABF officials' statements was not substantially outweighed by the risk of undue prejudice, confusion of the issues, or misleading the jury. Given the closeness of the jury's comparative negligence findings, the trial court's mistaken exclusion of the statements warrants a new trial.

4-8-21 GANNETT SATELLITE INFORMATION NETWORK, LLC, ETC. VS. TOWNSHIP OF NEPTUNE (L-2616-17, MONMOUTH COUNTY AND STATEWIDE) (A-4006-18)

Gannett Satellite Information Network, LLC, which publishes the Asbury Park Press, brought an action to compel the Township of Neptune to disclose the Internal Affairs (IA) file of Philip Seidle, who had been a Sergeant in the Township's Police Department. In June 2015, Seidle shot and killed his ex-wife using his service revolver, while off-duty.

The trial court determined that Gannett was not entitled to access to the records under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, but found, after consideration of the relevant factors under Loigman v. Kimmelman, 102 N.J. 98 (1986), that Gannett was entitled to access to the records under the common law. The trial court also awarded Gannett attorney's fees for the successful pursuit of its claim under the common law. The trial court stayed its judgment pending appeal.

The Township appealed, and Gannett cross appealed, from the trial court's judgment. While the appeal and cross appeal were pending, the Attorney General (AG) ordered public disclosure of Seidle's IA file pursuant to the AG's Internal Affairs Policy and Procedures (IAPP).

We held that the trial court correctly decided that Gannett was not entitled to access to the records under OPRA, and Gannett was entitled to access under the common law. We also held that although attorney's fees can be awarded to a plaintiff that prevails on a claim under the common law right of access, an award of attorney's fees to Gannett was not warranted under the circumstances.

3-31-21 BV001 REO Blocker, LLC VS. 53 WEST SOMERSET STREET PROPERTIES, LLC, ET AL. (F-000856-19, SOMERSET COUNTY AND STATEWIDE) (A-0419-19)

Defendant sought relief from a final default judgment of foreclosure of a tax sale certificate, so it could redeem its property. In denying relief, the trial court cited the tax sale certificate's validity, and defendant's failure to ensure its taxes were paid. But, under the Tax Sale Law, an owner need not challenge the tax sale certificate, nor excuse its own past non-payment, before redeeming its property. Defendant presented compelling reasons for its failure to answer the foreclosure complaint; defendant promptly moved to vacate the default judgment; and it was prepared to redeem the property. Based on those exceptional circumstances, the trial court should have exercised its broad equitable power under Rule 4:50-1(f) and granted defendant relief from the judgment. Therefore, the appellate court reversed the trial court's order.

3-29-21 SHARAD YAGNIK, ET AL. VS. PREMIUM OUTLET PARTNERS, LP, ET AL. (L-2601-18, MERCER COUNTY AND STATEWIDE) (A-0179-20)

In this construction site accident case, the court addresses an unresolved question of New Jersey law: When is an Affidavit of Merit ("AOM") under N.J.S.A. 2A:53A-27, supporting claims against a licensed professional, due in situations where a plaintiff's original complaint is later amended and additional answers or other pleadings are filed?

Plaintiffs served AOMs (one from an engineer and another from an architect) more than 120 days after the defendant engineering firm filed its answer to the original complaint, but before that firm answered an amended complaint naming another defendant.

Relying in part on several federal decisions interpreting New Jersey law, the motion judge ruled the deadline for an AOM "does not come into play until the pleadings are [all] settled." Based on that reasoning, the judge deemed timely the two AOMs tendered by plaintiffs more than a year after the engineering firm had filed its original answer and first amended answer.

Declining to adopt the federal approach, this court holds the AOM statute's text and legislative purposes require the affidavit to be served within 60 days (extendable for good cause to 120 days) from the date when the licensed professional files its answer, regardless of whether the pleadings are subsequently amended to name other defendants or assert additional claims. That deadline is subject, however, to the long established AOM exceptions for (1) substantial compliance or (2) extraordinary circumstances.

The court concludes extraordinary circumstances to justify the delayed AOMs exist here, based on events stemming from the initial negotiated voluntary dismissal of plaintiffs' claims against the engineering firm and the restoration of those claims the following year after discovery shed more light on the firm's role in the project.

3-25-21 KENNETH FRANCO, ET AL. VS. FAIRLEIGH DICKINSON UNIVERSITY, ET AL. (L-5362-16, BERGEN COUNTY AND STATEWIDE) (A-3055-18)

This appeal raises novel questions concerning the scope of the duty owed to an adult who is not old enough to drink legally but who nonetheless drinks alcohol to excess and injures himself in a motor-vehicle accident. Plaintiff, when he was a twenty-year-old college student, attended a social gathering in a suite in a university's residential hall. He had planned to spend the night in the suite and fell asleep after becoming visibly intoxicated. He later awoke, left the suite, and was injured when a car he was driving went off the road. No one saw plaintiff leave the suite

Plaintiff and his parents appeal from a series of orders that granted summary judgment to the University, four student residential assistants (RAs), four student suitemates (the Suitemates), and three other students who attended the gathering as guests. Plaintiff contends that the University and the students had a duty to take action that would have prevented him from driving while drunk. The court holds that certain defendants had no duty, while the duty of other defendants, and a related causation issue, present questions of fact for a jury to resolve.

The three student guests had no duty to monitor the actions of plaintiff. Any duty of the Suitemates ended when plaintiff fell asleep with the plan to spend the night in the suite. The University and its student RAs are protected by the Charitable Immunity Act (CI Act), N.J.S.A. 2A:53A-7 to -11, which shields them from claims based on simple negligence. There are disputed issues of material fact concerning whether the RAs were grossly negligent or acted with willful or wanton indifference in failing to enforce the University's policies prohibiting underage drinking. There is also a related disputed issue of material fact concerning whether any breach by the RAs caused plaintiff's injuries. Accordingly, the court affirmed in part, reversed in part, and remanded for further proceedings.

3-19-21 IN THE MATTER OF THE IMPLEMENTATION OF L. 2018, C. 16, ETC. (NEW JERSEY BOARD OF PUBLIC UTILITIES) (A-3939-18)

In 2018, after the New Jersey Legislature passed the Global Warming Response Act, N.J.S.A. 26:2C-37 to -68, having declared that it was in the State's interest to reduce greenhouse gas emissions, the Legislature enacted a Zero Emission Certificate (ZEC) program for eligible nuclear power plants, L. 2018, c. 16, codified at N.J.S.A. 48:3-87.3 to -87.7 (the ZEC Act). The purpose of the ZEC Act is to subsidize nuclear power plants at risk of closure, helping them to remain operational despite competition from other carbon-emitting power sources, to further New Jersey's clean energy goals.

The New Jersey Board of Public Utilities (the Board) considered ZEC applications from the Salem 1, Salem 2 and Hope Creek nuclear power plants located in Salem County. Following an extensive review of the applications, including voluminous confidential financial information about the nuclear power plants' costs and revenues, certifications that the plants would shut down in three years absent a material financial change, as well as consideration of thousands of public comments, the Board determined that all three applicants satisfied the five statutory eligibility criteria codified at N.J.S.A. 48:3-87.5(e) and should receive ZECs. The court reviewed challenges to the Board's decision by New Jersey Division of Rate Counsel as well as other interested parties. Because the Board's decision regarding the financial viability of the three plants in question is adequately supported by the record and consistent with both the ZEC Act's plain language and the legislative intent, the court affirmed.

3-18-21 STATE OF NEW JERSEY VS. VALERIE WILLIAMS (17-036, MORRIS COUNTY AND STATEWIDE) (A-5163-18)

After the municipality painted white lines on a paved area, defendant painted over the lines with black paint and then painted a new white line. She claimed the paved area was a "parking bay" on her property; the municipality claimed it was a public street.

In a trial de novo, the Law Division convicted defendant of violating a municipal ordinance that prohibited a person from unnecessarily obstructing "any . . . street, or public place in the [municipality] with any kind of vehicle, boxes, lumber, wood, or any other thing[.]"

Without addressing the property-ownership issue, the court perpended the plain-language meanings of "obstruct" and considered two Law Division decisions—one by then-Judge Virginia A. Long—interpreting that term as used in the statute prohibiting obstruction of highways and other public passages, N.J.S.A. 2C:33-7. Because defendant's actions did not block or otherwise impede passage, the court concluded she did not violate the ordinance and reversed her conviction.

3-11-21 160 WEST BROADWAY ASSOCIATES, LP VS. 1 MEMORIAL DRIVE, LLC, ET AL. (L-4142-15, PASSAIC COUNTY AND STATEWIDE) (A-2454-18)

Following a bench trial, the judge concluded defendant 1 Memorial Drive, LLC, was the successor of defendant Amma, Corp., and entered judgment in favor of plaintiff, Amma's landlord, for unpaid rent for the balance of the lease extension. The judge concluded exceptions to the general rule that a transferee is generally not liable for the debts of the transferor, see Woodrick v. Jack J. Burke Real Estate, Inc., 306 N.J. Super. 61, 72–73 (App. Div. 1997), applied, even though he found that the only asset Amma transferred was a trademarked name, Super Supermarket. The judge made no finding as to the actual value of the trademark, which 1 Memorial had been using for nearly one year and which several other supermarkets in New Jersey used. Nevertheless, using his personal knowledge of other businesses in the city, and their recognizable business names, the judge found successor liability.

Citing several cases from other jurisdictions and treatises, the court concluded that the transfer of all or substantially all of the predecessor entity's assets is a predicate to any finding of successor liability as to the successor entity. In this case, the substantial credible evidence supported a finding that the transfer of a generic trademark was of limited value, and plaintiff failed to prove that Amma transferred any, much less all or substantially all, of its assets to 1 Memorial. The court reversed and vacated the judgment.

3-11-21 A.M. VS. MONMOUTH COUNTY BOARD OF SOCIAL SERVICES (DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICE) (RECORD IMPOUNDED) (A-5105-18)

Petitioner challenged a final agency decision of the Acting Director, Division of Medical Assistance and Health Services finding her eligible for Medicaid benefits but: (1) imposing a penalty of $496,333.33 for the value of the one-third interest in her home she transferred to her son during the five-year look - back period " established in N.J.A.C. 10:71-4.10; and (2) directing that the penalty be increased by the value of a life estate in the home she relinquished to her son at time of the transfer. The court reversed the Acting Director's decision, finding the transfer of both interests in the property to be exempt from the penalty under the child caregiver exemption established in N.J.A.C. 10:71-4.10(d)(4). The regulation has not been previously construed in a published opinion.

The exemption applies to a Medicaid applicant's transfer of an interest in her home to a child who has lived in the home for a minimum of two years and provided assistance to the applicant beyond that normally expected of a child and which delayed the parent's institutionalization. The Acting Director found the exemption did not apply because petitioner's son: (1) worked full-time outside the home four days a week; (2) did not establish that the assistance he provided to his mother before work, after work, overnight, and during the day when he was not working delayed her institutionalization; (3) used petitioner's funds to pay for home healthcare aides when he was working; and (4) did not prove his claim to have reduced his work hours when his mother's dementia progressed.

The court found that the Acting Director misapplied the regulation, given the substantial evidence in the record that petitioner's son provided assistance beyond that normally expected of a child, including bathing, clothing, feeding, toileting, and medicating petitioner daily, as well as monitoring her overnight wandering and other needs. In addition, the court held that a child's full-time employment and use of home healthcare aides paid with petitioner's funds did not negate the exemption, as the regulation did not require that a child devote his full-time and own funds to caring for his parent to qualify for the exemption. The court held that it is the qualitative nature of the care provided by the child and the resulting delay in institutionalization that are relevant to applicability of the exemption.

3-9-21 ROBERT FUHRMAN, ET AL. VS. HEATHER MAILANDER, ET AL. (L-4906-20, BERGEN COUNTY AND STATEWIDE) (A-0080-20)

In this accelerated appeal arising from a municipal clerk's rejection of an initiative petition to move the school board and municipal elections to the date of the November general election, the court held that the municipal clerk violated the Faulkner Act, N.J.S.A. 40:69A-184 to -192, by repeatedly refusing to certify and file the initiative petition due to perceived minor technical noncompliance. The court also held that the municipal clerk's actions violated the right of initiative petition guaranteed by the Faulkner Act, thereby depriving the petitioners of a substantive right protected by N.J.S.A. 10:6-2(c) of the New Jersey Civil Rights Act, and entitling them to an award of reasonable attorney's fees and costs under N.J.S.A. 10:6-2(f).

3-8-21 BOROUGH OF FRANKLIN VS. JEFFREY R. SMITH (L-0566-19, SUSSEX COUNTY AND STATEWIDE) (A-2545-19)

This appeal requires us to determine if a police officer employed in a non-civil service municipality can be subpoenaed to testify in the municipality's case-in-chief at a departmental disciplinary hearing seeking his termination. The court concludes the subpoena violates neither fundamental fairness and due process nor statutory procedures governing discipline of a police officer in a non-civil service municipality. The court further concludes that absent an objection to a specific question, it is premature to determine whether there is a violation of the officer's Fifth Amendment constitutional right against self-incrimination. Accordingly, the court affirms the Law Division order granting the municipality's request to enforce the subpoena.

3-4-21 CRYSTAL POINT CONDOMINIUM ASSOCIATION, INC. VS. KINSALE INSURANCE COMPANY (L-1579-20, HUDSON COUNTY AND STATEWIDE) (A-4621-19)

Plaintiff, the managing association for a high-rise condominium building, obtained monetary judgments by default against two companies involved in construction and inspection of the condominium building. Alleging the companies were insured under insurance policies issued by defendant, plaintiff filed a declaratory judgment complaint seeking coverage. Plaintiff appeals the Law Division order that dismissed its declaratory judgment complaint and required it to arbitrate its claim for insurance coverage.

The court reversed the order. Under the direct action statute, N.J.S.A. 17:28-2, plaintiff can sue defendant directly for coverage under the insurance policies when there is evidence the insureds are bankrupt or insolvent. However, plaintiff did not assent to the arbitration clause in the policy and therefore, it is not required to arbitrate its claims. The court reinstated the declaratory judgment complaint and remanded for further proceedings.

3-3-21 ROBERT J. TRIFFIN VS. SHS GROUP, LLC, ET AL. (DC-013226-18, MIDDLESEX COUNTY AND STATEWIDE) (A-5497-18)

Plaintiff Robert Triffin appeals from an order denying his motion for reconsideration of an order, entered after a Special Civil Part trial, that dismissed his action against defendants SHS and John Sickles. Defendant SHS, a hair styling school, issued a check to one of students, codefendant Amanda Grzyb-Kelly, for living expenses. Grzyb-Kelly did not file an answer, and the judge entered default judgment against her at the conclusion of trial. Grzyb-Kelly cashed the check twice on the same day, first by electronically depositing it into her account at Wells-Fargo using photos of the front and back of the check through an application on her phone, then at United Check Cashing where it was indorsed, marked with a dated stamp, and exchanged for payment. The check was dishonored when United Check Cashing presented it for payment at defendant's bank, Bank of America. Plaintiff subsequently purchased the dishonored check, along with several others, through an assignment agreement.

Plaintiff filed a complaint pursuant to N.J.S.A. 12A:3-414(b), which entitles the holder of a dishonored check to enforce payment against the drawer. The trial judge found that N.J.S.A. 12A:3-308(b) provided a defense to plaintiff's right to payment based on the evidence that defendant had previously paid the check. Specifically, after reviewing both parties' copies of the check, the judge noted that the electronically deposited check into Wells-Fargo lacked an indorsement, whereas the check cashed at United Check Cashing was indorsed and physically relinquished. Accordingly, the court dismissed the complaint against SHS and Sickles.

In his motion to reconsider, plaintiff argued that because the check was not indorsed, negotiation and transfer, as required by N.J.S.A. 12A:3-201(b) and -203 (c), did not occur. Rather, plaintiff argued, defendant's bank made an illegitimate payment that did not satisfy defendant's obligation to pay. On reconsideration, the trial judge relied, in part, on N.J.S.A. 12A:3-414(c) and concluded the defendant's obligation to pay was discharged. N.J.S.A. 12A:3-414(c) states: "If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained." Similar to a certified check, "acceptance" in this context refers to a process by which a bank guarantees payment of a draft, N.J.S.A. 12A:3-409(a); the statute does not use the term in its colloquial sense.

The court found that N.J.S.A. 12A:4-205 eliminates the indorsement requirement for negotiation and transfer if the customer of a depository bank delivers an item for collection. Because Grzyb-Kelly was a

customer of Wells Fargo, the depository bank in this case, the unendorsed check was effectively negotiated and transferred when she made the electronic deposit. Indorsement was not required. The court affirmed the trial judge's finding that defendant had successfully proved his previously paid defense.

Affirmed.

2-26-21 GLENN CIRIPOMPA VS. BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY (NEW JERSEY COMMISSIONER OF EDUCATION) (A-5458-18)

The Commissioner of Education determined that a board of education could use unemployment benefits and payments from other employment that plaintiff, a tenured teacher, had received during a tenure-charge suspension period to offset outstanding back pay owed to him. Finding that N.J.S.A. 18A:6-14, by its express language, authorizes a board to deduct "sums" the suspended teacher had received "by way of pay or salary from any substituted employment," the court held that unemployment benefits are not "sums" received "by way of pay or salary from any substituted employment" and the Commissioner erred in finding the board could deduct unemployment benefits from the back-pay award. Thus, the court reversed the portion of the Commissioner's final administrative decision regarding unemployment benefits. The court affirmed the Commissioner's determination that plaintiff's other employment constituted "substituted employment" and that the board could use payments from that substituted employment to offset any back pay owed to plaintiff.

2-18-21 STATE OF NEW JERSEY VS. CHRISTOPHER HARRIS STATE OF NEW JERSEY VS. DONALD J. FALCONE STATE OF NEW JERSEY VS. JOELL A. FOGG STATE OF NEW JERSEY VS. GARY R. NELSON STATE OF NEW JERSEY VS. MANUEL SANTIAGO STATE OF NEW JERSEY VS. THOMAS EDGER STATE OF NEW JER (A-2256-19/A-2876-19 /A-3509-19/A-4629-19/A-0075-20/A-0234-20/A-0237-20 /A-0547-20/A-3509-19/A-0075-20)

In this appeal, which consolidates eight cases, the court addressed the criteria for admission to Drug Court, which is a nationally acclaimed program that combats the hopelessness of addiction with the hopefulness of treatment. Defendants are admitted via two separate and distinct "tracks." A Track One defendant can only be admitted if he or she meets all of the eligibility criteria for special probation set forth in N.J.S.A. 2C:35-14(a). For Track Two candidates, the criteria enumerated in N.J.S.A. 2C:35-14(a) are relevant considerations but are not prerequisites to admission. The court ruled that a defendant is a Track One candidate if, and only if, a present offense for which he or she is to be sentenced is subject to the presumption of imprisonment set forth in N.J.S.A. 2C:44-1(d) or to a mandatory term of parole ineligibility. The court rejected the State's contention that a defendant is a Track One candidate because he or she has previously been convicted of a crime subject to the presumption of imprisonment or has previously been sentenced to State prison. The court also held that once it is determined that a defendant is legally eligible for Drug Court, the decision to grant or deny admission rests in the discretion of the sentencing court and that decision is entitled to substantial deference in view of the specialized expertise, training, and experience of Drug Court judges

2-16-21 MACK-CALI REALTY CORP., ET AL. VS. STATE OF NEW JERSEY, ET AL. (L-4903-18, HUDSON COUNTY AND STATEWIDE) (A-3097-18)

Plaintiffs challenged Jersey City's adoption of a payroll tax ordinance that exempted from its calculation the "total remuneration" employers paid to Jersey City residents, and included in the calculation remuneration paid to employees who worked outside the city but were supervised by an employee in the city. Amendments to the Local Tax Authorization Act, N.J.S.A. 40:48C-1 to -42 (LTAA) in 2018 permitted the exemption of local residents and authorized the use of payroll tax revenue to augment Jersey City's loss of state educational aid resulting from 2018 amendments to the School Funding Reform Act of 2008 (SFRA), N.J.S.A. 18A:7F-43 to -63. Jersey City was the only municipality that satisfied the statutory requirements. The Law Division judge upheld the constitutionality of the ordinance and amendments to the LTAA and dismissed the complaint.

The court affirmed in most respects. However, the court concluded that plaintiffs' constitutional challenge to the supervisor provision pursuant to the Commerce Clause of the United States Constitution potentially had merit and vacated dismissal of that count of the complaint. The court remanded the matter for further proceedings.

2-12-21 NEW YORK MORTGAGE TRUST VS. ANTHONY E. DEELY ET AL. (F-043539-14, OCEAN COUNTY AND STATEWIDE) (A-1261-19)

In this residential mortgage foreclosure action, the court adopts the approach of the Third Restatement of Property: Mortgages that equitable subrogation is appropriate when loan proceeds from refinancing satisfies the first mortgage, the second mortgage is paid in full as part of the transaction, and the transaction is based on a discharge of the second mortgage, so long as the junior lienor, here defendant, is not materially prejudiced. The court concludes that under such circumstances, equitable subrogation should not be precluded by the new lender's actual knowledge of the intervening mortgage. By limiting the first lien priority of plaintiff's mortgage to the balance due on the prior first mortgage at closing, the superior lien balance owed by the borrowers was not increased. Under these circumstances, the junior lienholder is not materially prejudiced by subrogating plaintiff's mortgage.

In this appeal, the court determined as a matter of first impression that the Supreme Court's holdings in State v. A.G.D., 178 N.J. 56 (2003), and State v. Vincenty, 237 N.J. 122 (2019), requiring that police inform a defendant subject to custodial interrogation of specific charges filed against him before he can waive his Miranda rights, also applies to an interrogee who was arrested and questioned prior to any charges being filed, where the arrest was based upon information developed through an earlier police investigation

The court also concluded that the trial court erred by admitting the victim's statement to police through a police officer's hearsay testimony at trial because defendant was deprived of a meaningful opportunity to challenge the victim's statement through cross examination at a pretrial hearing or before the jury,where at the pretrial hearing the victim could not recall ever giving the statement to police and he later refused to appear at trial to testify before the jury

In a separate opinion concurring with the result but dissenting from the majority's extension of A.G.D. to custodial interrogations where neither a complaint-warrant nor arrest warrant have been issued, a member of the panel expressed concern that the new rule announced in the majority opinion has the potential to introduce subjectivity, ambiguity, and uncertainty to the administration of Miranda warnings.

The opinion that the court originally issued on January 4, 2021, is being withdrawn and replaced by the accompanying opinion based upon the court having granted the State's motion to correct the record relating to two trial transcripts, and its motion to reconsider in light of those corrections. Specifically, the transcripts were corrected to reflect that defendant, in response to his pre-interrogation inquiry, was not told of any charge that supported his arrest, rather than a lie about the charge as described in the earlier opinion.

The matters are remanded for new trials to be preceded by N.J.R.E. 104 hearings, at which the trial court may consider adopting measures such as explanatory jury instructions, reasonable time and witness limits, and prohibitions on misleading demonstrative aids about the 510(k) clearance process.

2-4-21 THE BANK OF NEW YORK MELLON V. MARIANNE CORRADETTI ET AL. (A-5334-16T1)

Following a trial in this residential foreclosure matter, the Chancery Division granted judgment in defendants' favor based on findings that the mortgage and related closing documents were forged, and plaintiff mortgagee failed to present evidence the court found credible and reliable otherwise supporting the legal and equitable claims asserted in the complaint. On appeal, the majority determined the Chancery Division's findings were supported by substantial credible evidence, and plaintiff otherwise failed to present evidence the court found credible supporting its claims. The majority deferred to the court's credibility determinations and findings of fact and affirmed but remanded for the court to allow plaintiff to seek reimbursement from defendants for monies paid on defendants' behalf for taxes and insurance.

The dissent concluded the Chancery Division's finding that the mortgage documents were forged was not supported by adequate, substantial, and credible evidence, and, for that reason, the judgment should be vacated and the case remanded for a new trial or dismissed without prejudice

2-3-21 STATE OF NEW JERSEY VS. COREY PICKETT (17-07-0470, HUDSON COUNTY AND STATEWIDE) (A-4207-19T4)

In this case of first impression addressing the proliferation of forensic evidentiary technology in criminal prosecutions, this appeal required the court to determine whether defendant is entitled to trade secrets of a private company for the sole purpose of challenging, at a Frye hearing, the reliability of science underlying novel DNA analysis software and expert testimony. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). At the hearing, the State produced an expert who relied on his company's complex probabilistic genotyping software program to testify that defendant's DNA was present, thereby connecting defendant to a murder and other crimes. So long as the State utilized the expert, this court held that defendant is entitled to the discovery of the software's proprietary source code and related documentation under a protective order.

2-2-21 IN RE PROTEST OF CONTRACT AWARD FOR PROJECT A1150-18, ETC. (DIVISION OF PROPERTY MANAGEMENT AND CONSTRUCTION) (A-1193-19T1)

This appeal from the Division of Property Management and Construction's (DPMC) rejection of a bid protest and award of the contract for the Comprehensive Renovation and Restoration of the New Jersey Executive State House project to the lowest bidder presents an issue of first impression—whether a prime contractor bidder is required to name its building control systems subcontractor in its bid. See N.J.S.A. 52:32-2.

The DPMC and the court denied the protestor's earlier applications for a stay of the decision and a request to accelerate the appeal. Significant expenses were incurred by the successful bidder, and substantial work on the project progressed, while the appeal was pending. This included the award of thirty-six subcontracts.

The court found setting aside the contract award would severely impact the Executive State House, jeopardize the work already completed, the project in general, and risk damage to the historic structure. Therefore, it would be contrary to the public interest to void the contract even for any remaining uncompleted portion of the construction. Accordingly, the court dismissed the appeal as moot.

Because the issues raised arguably involve a matter of public importance capable of repetition while evading review, the court addressed the merits. The court found no merit in appellant's arguments, holding that the DPMC properly interpreted the subcontractor naming provisions of N.J.S.A. 52:32-2. Bidders are only required to identify subcontractors who would install the actual HVACR system but not those who would engage in a separate trade by performing the more specialized work of installing building management control systems.

2-1-21 H.V.D.M. VS. R.W. (FD-0727-20, ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-2877-19T1)

In this appeal the court addressed the predicate state court findings necessary for a federal petition for Special Immigrant Juvenile Status (SIJS). Specifically, a state court must analyze the five prongs of the federal regulations set forth in 8 C.F.R. § 204.11(c) (2020) under state law before an applicant can file a petition to the United States Citizenship and Immigration Services (USCIS) for SIJS. The trial court erroneously concluded that a child was not dependent on New Jersey courts due to the existence of a Canadian custody order that awarded custody to plaintiff, her paternal grandmother a New Jersey resident who registered the Canadian custody order in New Jersey pursuant to the New Jersey Uniform Child Custody Jurisdiction and Enforcement Act (NJUCCJEA), N.J.S.A. 2A:34-79.

The court disagreed with the trial court's determination that "the juvenile is not dependent on this court and has not been placed in the custody of an agency or individual appointed by this court." The trial court here used the conjunction "and," but the federal regulations and federal statute use the disjunctive "or."

Specifically, prong two provides that the state court must determine whether the "juvenile is dependent on the court or has been placed under the custody of an agency or an individual appointed by the court." H.S.P., 223 N.J. at 210 (referring to 8 C.F.R. § 204.11(c)(3) (2020); 8 U.S.C. § 1101(a)(27)(J)).

The court reversed and remanded the matter to the Family Part for further proceedings

1-29-21 CITY OF NEWARK VS. TOWNSHIP OF JEFFERSON (TAX COURT OF NEW JERSEY) (A-1303-19T1)

The tax court entered an October 18, 2019 judgment affirming tax assessments on approximately 4036 acres of watershed land owned by plaintiff City of Newark situated in defendant Township of Jefferson for the tax years 2009 to 2019. City of Newark v. Twp. of Jefferson, 31 N.J. Tax 303, 311-18 (Tax 2019). Rejecting the expert testimony of both parties' appraisers, the tax court found while plaintiff may have overcome the presumption of the correctness of the assessments, it failed to maintain its burden of proof to modify the assessments.

This court reversed, holding the assessment was defective and not entitled to the presumption of validity because it was primarily based on a settlement discussion rather than the value of the property. The assessment was also problematic because the assessor relied on another sale he failed to verify. The tax court made no findings regarding the validity of the assessment methodology and the record does not support its validity. The court remanded the matter for reconsideration and further findings on this issue and directed the tax court to make an independent finding of the value of the property for tax purposes.

1-29-21 DIANE S. LAPSLEY VS. TOWNSHIP OF SPARTA, ET AL. (DIVISION OF WORKERS' COMPENSATION) (A-0958-19T3)

Petitioner Diane Lapsley appealed from an order of a judge of compensation concluding that injuries she sustained in a February 3, 2014 accident arose out of and in the course of her employment as a Sparta Township librarian pursuant to the Workers' Compensation Act (the Act), N.J.S.A. 34:15-1 to -146. After clocking out and exiting the library premises, petitioner was struck by a snowplow in an adjacent parking lot that happened to be owned by the township. The compensation judge concluded that petitioner's injuries were compensable pursuant to the premises rule, N.J.S.A. 34:15-36, which provides that "[e]mployment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer . . . ."

The court held that a mechanical application of the premises rule in the context of a public-entity employer deviates from well-settled principles applicable to private employers and invites an overbroad and unwarranted expansion of public-entity liability for workers' compensation claims. The court identified employer-directed control of an employee's use of a parking lot as a critical element in the application of the premises rule. See Novis v. Rosenbluth, 138 N.J. 92, 93 (1994). An injury will be compensable if it is sustained while the employee is using the lot where the manner of ingress or egress is dictated by the employer, or in an area where the employee parks at the employer's direction. Conversely, use of a shared parking lot that accommodates multiple tenants, without specific instruction from an employer, is not sufficient to satisfy to the premises rule.

The stipulated facts of this case established that petitioner's employer exercised no control of its employee's use of the common-use parking lot. Petitioner was off-the-clock at the time of the accident and had exited the library premises. Library employees were not given any instructions about where in the subject lot to park or indeed whether to park in that particular lot, on the street, or anywhere else in town where parking may be available. Nor were library staff instructed on the manner of ingress or egress. The lot was shared with other municipal employees and members of the public alike.

Under these facts, the court concluded that there was no reasoned basis to depart from the general rule that the library's "use" of the common-use parking lot for its employees' benefit was not sufficient to satisfy the premises rule.

Accordingly, the court reversed the compensation judge's order finding the accident was compensable.

1-28-21 TARTA LUNA PROPERTIES, LLC, ET AL. VS. HARVEST RESTAURANTS GROUP, LLC, ET AL. (C-000101-16, UNION COUNTY AND STATEWIDE) (A-4994-18T3)

This litigation arises out of the lease of a building in which defendants-tenants intended to open a restaurant. The lease agreement contemplated an extensive rebuilding and repair of the premises. During the renovations, plaintiffs-landlord raised numerous issues regarding the quality of the construction. They eventually instituted suit seeking the termination of the lease and imposition of a forfeiture as well as an increase in rent. After a bench trial, the Chancery court entered judgment in favor of defendants, finding plaintiffs' claims meritless.

Nevertheless, the Chancery court considered plaintiffs' application for counsel and expert fees. The Chancery court determined there was no contractual or statutory basis for an award of fees. The trial court also recognized that defendants relied on their professionals – architects and engineers – as well as the municipal officials who approved the construction, issued permits and a certificate of occupancy. However, because "the safety of the public" was compromised by the faulty construction, the Chancery court found that equitable principles demanded the remedy of counsel fees. Therefore, in determining an award of fees was warranted by principles of equity, the trial court awarded plaintiffs nearly $1,000,000 in counsel and expert fees.

This court concluded that the general concept of public safety has not been recognized as an exception to the American rule and the policy preventing fee-shifting. There was no statutory or contractual basis for the award nor did the litigation fit into any exception under Rule 4:42-9. In addition, the Chancery court found defendants had not acted willfully or engaged in any intentional misconduct. Therefore, the panel concluded the award was not supported by equitable principles. The order granting counsel and expert fees is reversed.

1-27-21 TROY HAVILAND VS. LOURDES MEDICAL CENTER OF BURLINGTON COUNTY, INC. (L-0782-19, BURLINGTON COUNTY AND STATEWIDE) (A-1349-19T3)

In this appeal, the court held that an in-house attorney employed under a multi-year contract, and who was subject to termination based only on cause as defined in the agreement, was not precluded by Rule of Professional Conduct 1.16 to pursue contractual damages if wrongfully discharged. In reaching this decision, the court followed similar holdings in Nordling v. Northern State Power Co., 478 N.W.2d 498 (Minn. 1991), and Karstetter v. King County Corrections Guild, 444 P.3d 1185, 1191 (Wash. 2019), and found factually distinguishable the decision in Cohen v. Radio-Electronics Officers Union, Dist. 3, 146 N.J. 140 (1996), which limited an attorney's award of damages for a breach of contract to quantum merit.

In addition, the court concluded the trial court's award of $260,026.88 in damages was supported by sufficient credible evidence and made in accordance with applicable law. The court, however, remanded for the trial court to apply prejudgment interest to the damages award.

1-26-21 KIRK C. NELSON VS. ELIZABETH BOARD OF EDUCATION (L-1377-17, UNION COUNTY AND STATEWIDE) (A-4580-18T3)

In this appeal, the court held that an in-house attorney employed under a multi-year contract, and who was subject to termination based only on cause as defined in the agreement, was not precluded by Rule of Professional Conduct 1.16 to pursue contractual damages if wrongfully discharged. In reaching this decision, the court followed similar holdings in Nordling v. Northern State Power Co., 478 N.W.2d 498 (Minn. 1991), and Karstetter v. King County Corrections Guild, 444 P.3d 1185, 1191 (Wash. 2019), and found factually distinguishable the decision in Cohen v. Radio-Electronics Officers Union, Dist. 3, 146 N.J. 140 (1996), which limited an attorney's award of damages for a breach of contract to quantum merit.

In addition, the court concluded the trial court's award of $260,026.88 in damages was supported by sufficient credible evidence and made in accordance with applicable law. The court, however, remanded for the trial court to apply prejudgment interest to the damages award.

1-25-21 STATE OF NEW JERSEY VS. ABNER RODRIGUEZ (19-06-0986, MIDDLESEX COUNTY AND STATEWIDE) (A-3586-19T4)

In this appeal, the court addressed the judicial review of a prosecutor's decision to deny a defendant's request for a waiver of the Graves Act mandatory minimum term of parole ineligibility pursuant to N.J.S.A. 2C:43-6.2. In State v. Andrews, 464 N.J. Super. 111 (App. Div. 2020), the court recently held that a prosecutor's disparate treatment of similarly situated defendants can be a relevant consideration as part of the robust judicial review of prosecutorial discretion. In Andrews, the prosecutor failed to address the trial judge's concerns regarding other cases where Graves Act waivers were granted. In the present appeal, in contrast, the prosecutor proffered specific reasons for distinguishing defendant Rodriguez from the other defendants identified by the trial judge who had previously been granted a Graves Act waiver. The court identified several basic principles to guide a trial judge in determining whether other defendants are similarly situated to the defendant challenging the prosecutor's decision to deny a waiver. Applying those principles, the court concluded that defendant failed to establish that the prosecutor acted in an arbitrary or discriminatory fashion. The court further concluded that defendant failed to establish that the prosecutor's decision in this case constituted a patent and gross abuse of discretion.

1-21-21 MARCELLA SIMADIRIS VS. PATERSON PUBLIC SCHOOL DISTRICT (L-1674-19, PASSAIC COUNTY AND STATEWIDE) (A-0197-19T3)

The trial court determined that a board of education's decision to certify tenure charges against plaintiff in private violated her alleged right to demand a public proceeding. The school district's appeal pitted that part of the Tenured Employees Hearing Law, N.J.S.A. 18A:6-10 to -25, which declares a charge against a tenured employee "shall no" be discussed by a board of education "at a public meeting," N.J.S.A. 18A:6-11, against that part of the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21, which permits a public body to exclude the public from personnel discussions "unless" the affected employee "request[s] in writing that the matter . . . be discussed at a public meeting," N.J.S.A. 10:4-12(b)(8). Because the Legislature's broad strokes in the Open Public Meetings Act were expressly subjected to exceptions existing in other legislation, N.J.S.A. 10:4-12(b)(1), and because tenured employees have other greater procedural rights than non-tenured employees, the court held that N.J.S.A. 18A:6-11's unambiguous declaration that such proceedings "shall not" take place in public – enacted nineteen days after enactment of the Open Public Meetings Act – demonstrates that the Legislature did not intend to allow tenured board-of-education employees the right – granted other public employees by N.J.S.A. 10:4-12(b)(8) – to demand a public hearing. For that reason, defendant was not required to serve this tenured employee with a Rice notice, see Rice v. Union Cnty. Reg'l H.S. Bd. of Educ., 155 N.J. Super. 64 (App. Div. 1977), which serves the purpose of advising public employees of their right to demand a public hearing via N.J.S.A. 10:4-12(b)(8).

1-19-21 STATE OF NEW JERSEY VS. E.J.H. (FO-20-0144-20, UNION COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-4228-19T1)

In this appeal, the court considers whether words and gestures directed to a domestic violence complainant, by way of a consensually-activated home security camera, violated the strictures of the restraining order issued under the Prevention of Domestic Violence Act (Act), N.J.S.A. 2C:25-17 to -35. During the plea hearing, the Family Part judge sua sponte rejected defendant's factual basis for the disorderly persons offense of contempt for violating the restraining order and dismissed the complaint. The judge found as a matter of law that defendant did not knowingly violate the restraining order. Instead, the judge concluded the electronic transmission of defendant's comments and lewd gesture to his estranged wife during his parenting time, were not expressly prohibited under the restraining order and, as such, defendant did not knowingly "contact" his estranged wife.

Although the restraining order did not expressly prohibit defendant from directing remarks to – or making gestures at – his estranged wife via the home security camera, the order expressly prohibited defendant from "having any oral" or "electronic, or other form of contact or communication with [her]." Because defendant directed his comments and gesture to his estranged wife, by way of a camera that was specifically activated so that she could observe his parenting time, defendant was aware of the high probability that she would hear his comments and observe his lewd gesture. Accordingly, this court vacated the trial judge's order and remanded for reinstatement of the complaint.

1-15-21 STATE OF NEW JERSEY VS. C.W.H. (16-07-0617, CUMBERLAND COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-5254-17T1)

Following a jury trial, defendant was convicted of sexual assault related offenses stemming from the sexual abuse of his daughter from the time she was five to the time she was twelve years old. The victim reported the molestation to police when she was thirty-one years old and, four years earlier, disclosed the abuse to her sister-in-law who testified at trial that the disclosure seemed credible to her because of defendant's "weird vibes" and her "intuition." During the investigation, detectives conducted a lengthy interrogation of defendant following the administration of Miranda warnings. In his recorded statement, despite repeated denials of the allegations, defendant made incriminating admissions relying on the fact that the victim had said "it happened." During the trial, after detailing his training and experience conducting interrogations, the interrogating detective assessed the veracity of defendant's denials during questioning after the recorded statement was played for the jury. Defendant produced eight character witnesses, each of whom testified at trial about his impeccable reputation in the community and was asked on cross-examination whether the witness' opinion of defendant would change if he or she knew that defendant had admitted to police inappropriately touching his daughter, the very allegations that were the subject of the trial.

The court reversed the convictions, reasoning that the evidentiary errors raised by defendant for the first time on appeal, either in isolation or in combination, were clearly capable of producing an unjust result pursuant to Rule 2:10-2 in the circumstances of the case. Specifically, the court found that the detective's testimony, which clearly conveyed the impression that defendant was being deceptive during questioning and, given the detective's expertise, impermissibly colored the jury's assessment of defendant's credibility, constituted impermissible lay opinion mandating reversal notwithstanding the trial judge's sua sponte curative instruction. Additionally, the testimony of the victim's sister-in-law did not satisfy the reasonable time requirement of the fresh complaint rule and injected inferential propensity evidence into the case in violation of N.J.R.E. 404. Finally, the prosecutor's inquiry into defendant's character witnesses' knowledge of defendant's alleged criminal conduct not evidenced by a criminal conviction was impermissible under N.J.R.E. 608 and 405.

1-13-21 STATE OF NEW JERSEY VS. WALTER A. TORMASI (97-04-0234, SOMERSET COUNTY AND STATEWIDE) (A-3534-17T4)

In 1996, when he was sixteen years old, defendant fatally shot his mother. Defendant was waived to the Law Division, tried as an adult, and convicted of first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2), and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a). Following merger, defendant was sentenced to life imprisonment subject to a thirty-year period of parole ineligibility. The court has previously affirmed the conviction and sentence on direct appeal and the denial of four petitions for post-conviction relief.

In May 2013, defendant moved to correct an illegal sentence under Rule 3:21-10(b)(5). He argued that the sentencing court did not consider his youth and associated mitigating factors and that his life term deprived him of an opportunity to earn his release through demonstrated maturity and rehabilitation. He further argued that it is likely that he will serve much longer than thirty years because the State Parole Board can repeatedly deny parole even if demonstrated maturity and rehabilitation.

Defendant further argued that mere eligibility for parole does not amount to a meaningful opportunity for release because the State Parole Board regularly contravenes the intentions and expectations of sentencing judges, thereby overruling sentencing decisions and usurping the power of sentencing judges. Defendant asserted that the State Parole Board's decision-making process is statutorily and constitutionally deficient because it is not required to consider the court-accepted brain science that children are constitutionally different and not deserving of the most severe punishments.

Defendant claimed he was entitled to resentencing under State v. Zuber, 227 N.J. 422 (2017), and Article I, Paragraph 12, of the New Jersey Constitution, which prohibits "cruel and unusual punishments" Defendant will be eligible for parole in 2026 at age forty-seven.

The court affirms the denial of defendant's Rule 3:21-10(b)(5) motion to correct an illegal sentence, holding that defendant's sentence is not illegal or the functional equivalent of life without parole. The court adheres to the holding in State v. Bass, 457 N.J. Super. 1 (App. Div. 2018), concluding that defendant is not entitled to resentencing under Zuber, even though the sentencing court had not considered the factors enumerated in Miller v. Alabama, 567 U.S. 460, 477-78 (2012), when it imposed the sentence. Any rehabilitative actions undertaken by defendant while incarcerated were matters for the State Parole Board to consider and did not render the sentence unconstitutional. The court thus rejected defendant's argument that he is entitled to resentencing under Zuber.

The court also holds that defendant's challenges to the parole process are not ripe since he is still serving the statutorily mandated thirty-year period of parole ineligibility and is not yet eligible for parole. The court notes that if defendant is eventually denied parole and receives a future eligibility term, he may appeal that decision and challenge the constitutionality of the statutory and regulatory framework governing parole at that time.

1-12-21 CHRIS DOE VS. RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, ET AL. (L-1651-18, MIDDLESEX COUNTY AND STATEWIDE) (A-5285-18T2)

Plaintiff appeals the trial court's denial under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, to his right of his access to various records, including his own Rutgers University graduate student records, and his request for attorney's fees and costs (collectively "attorney's fees").

The court concludes OPRA only allows plaintiff to obtain copies of his own academic transcripts, discipline records, and financial records subject to redaction to preclude the identity of other students. The court remands for the trial court to determine whether plaintiff is entitled to any attorney's fees related to his efforts to obtain these records.

The court also remands for the trial court to issue findings of facts and conclusions of law regarding plaintiff's entitlement to attorney's fees related to defendants' voluntary release of information pertaining to specific university professors' and administrators' disclosable records. No position is taken as to whether plaintiff is entitled to any attorney's fees that shall considered on remand. All other aspects of the trial court's order are affirmed.

1-11-21 JONATHAN CRUZ VS. THE CAMDEN COUNTY POLICE DEPARTMENT, ET AL. (L-3570-17, CAMDEN COUNTY AND STATEWIDE) (A-1276-19T3)

The court holds that a grand jury witness, including a law enforcement witness, has absolute immunity from a civil rights claim under New Jersey law for grand jury testimony that is alleged to have omitted relevant information. Accordingly, the court adopts and applies to the New Jersey Civil Rights Act (NJCRA), N.J.S.A. 10:6-1 to -2, the ruling by the United States Supreme Court in Rehberg v. Paulk, 566 U.S. 356, 367-69 (2012), which held that a witness testifying before a grand jury has absolute immunity from a civil rights claim under 42 U.S.C. § 1983. The court did not decide whether a witness who lies to a grand jury has absolute immunity because there was no evidence that the witness in this case lied.

Consequently, the court affirmed an order granting summary judgment to a detective who was alleged to have violated the NJCRA in a civil action by failing to tell a grand jury certain information that may have raised questions about an eye witness' identification of a criminal defendant who was later acquitted at trial.

1-5-21 STATE OF NEW JERSEY VS. WILLIAM A. GERENA (18-10-0853, HUDSON COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3655-18T2)

In this criminal appeal, defendant principally contends the trial judge should not have admitted opinion testimony from a police officer and a civilian eyewitness estimating the range of heights and ages of children they had observed near defendant in a public park. The witnesses saw the group of children, accompanied by several adults, playing on equipment in a playground. The State relied on their testimony to prove that one or more of the children was under the age of thirteen, a statutory grading element of the charged offenses of lewdness and sexual assault by contact.

The trial court rejected defendant's contention that the opinion testimony was too speculative to be considered by the jury. On appeal, defendant reiterates this argument, contending as a general proposition that witnesses commonly misjudge the ages and heights of other persons.

For the reasons that follow, we affirm the court's evidentiary ruling. In the circumstances presented, the two witnesses had an adequate opportunity to view the physical characteristics and activities of the group of children to enable them to provide lay opinions under N.J.R.E. 701 about the perceived ranges of the children's heights and ages.

Although we appreciate the inherent risks of imprecision and mistake when eyewitnesses estimate the heights or ages of other persons, such lay opinions nonetheless may be admissible under Rule 701 and helpful to the trier of fact, subject of course to cross-examination and other forms of impeachment.

In evaluating the admissibility of such evidence, a court should consider a variety of factors, such as (1) distance, (2) length of time of the observation, (3) any observed activity of the person, (4) physical comparisons with the height or size of nearby objects or other persons, (5) whether the eyewitness attests to a range rather than a specific height or age, (6) whether the observed individual has a comparatively similar age or height as the witness, (7) whether there is corroborating proof, and (8) the totality of circumstances. In appropriate cases, the court may exclude or limit the opinion testimony in its discretion under N.J.R.E. 403 and, if warranted, provide jurors with a limiting or cautionary instruction.

Because it is contrary to the Supreme Court's evidence rules and case law governing lay opinion, we decline to apply the 1916 categorical pronouncement of the Court of Errors and Appeals that age "is not within the category of things . . . which . . . can be proved by opinion testimony."State v. Koettgen, 89 N.J.L. 678, 683 (E. & A. 1916), discussed in Part II, infra. Rather, we apply a contextual, case-by-case analysis of admissibility of such proof consistent with our modern Rules of Evidence and prevailing case law principles.

12-31-20 STATE OF NEW JERSEY VS. ADRIENNE N. SMITH AND ORVILLE COUSINS (17-08-1176, BERGEN COUNTY AND STATEWIDE) (A-0838-20T4)

This appeal requires the court to determine whether the ongoing COVID-19 pandemic provided a sufficient legal reason and manifest necessity for the judge to terminate the trial, where the jury had been impaneled and sworn and the trial was well under way. The court concluded it positively and decidedly did. In reaching that conclusion, the court declined to dismiss the charges, and it applied age-old legal principles guiding the federal and state constitutional prohibition against double jeopardy.

12-29-20 STATE OF NEW JERSEY VS. LUIS A. LORA (14-07-0465, SOMERSET COUNTY AND STATEWIDE) (A-3472-17T2)

In this criminal appeal involving a high speed vehicular pursuit of a fleeing suspect, the court affirmed the trial court's decision to preclude defendant from using the Attorney General's Guidelines on Vehicular Pursuit of a Fleeing Suspect as substantive evidence on the issue of causation in the aggravated assault while eluding arrest charge under N.J.S.A. 2C:12-1(b)(c). The court agreed with the trial court that the jury might confuse deviation from the Guidelines with causation and its prejudicial value outweighed its probative value.

The Guidelines were properly permitted to be utilized by defendant during cross-examination for the limited purpose of impeachment.

12-29-20 FRANCIS ROSS CLARK VS. DAVID NENNA, M.D., ET AL. (L-0197-17, HUNTERDON COUNTY AND STATEWIDE) (A-5098-18T1)

This medical negligence case arises from a 2011 surgery that defendant Dr. David Nenna performed on plaintiff to remove surgical hardware from a prior surgery. Four years later plaintiff discovered defendant left three washers in his leg.Due to medical concerns, however, plaintiff who is a paraplegic, was unable to have a second surgery to remove the hardware.

Plaintiff did not claim any physical pain or limitation as a result of the retained washers. Rather, plaintiff sought to recover damages only for the emotional distress caused by knowing surgical washers were in his leg that could not be removed. In support of his claim for damages, he provided a certification briefly describing his mental anguish, as to which he would testify at trial. The trial judge granted defendant's motion for summary judgment finding plaintiff had failed to establish emotional distress damages because he did not provide supporting medical or expert proof.

The court held that emotional distress damages ordinarily must be supported by medical or expert proof. Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 235-36 (App. Div. 2014). There are two exceptions to this general rule. The first exception is for cases involving intentional torts such as racial or sexual discrimination. Where a tortfeasor's conduct is willful, the Court has explained "the victim may recover all natural consequences of that wrongful conduct, including emotional distress and mental anguish damages . . . ." Tarr v. Ciasulli, 181 N.J. 70, 82 (2003).

The second exception are cases in which "[t]he nature of [the] particular harm mitigates against the reason for an enhanced standard of proof in the first instance – the elimination of spurious claims." Innes, 435 N.J. Super. at 236. For example, medical or expert proof has not been required when plaintiffs have suffered from malicious use of process, Baglini v. Lauletta, 338 N.J. Super. 282, 307 (App. Div. 2001), wrongful birth arising from inadequate genetic counselling, Geler v. Akawie, 358 N.J. Super. 437, 457 (App. Div. 2003), and where a funeral home failed to ensure that orthodox ritual requirements were met. Menorah Chapels at Millburn v. Needle, 386 N.J. Super. 100, 116 (App. Div. 2006).

Accordingly, the court affirmed summary judgment in favor of defendant.

The court held that plaintiff's case did not satisfy either exception. Therefore, he was required to support his claim for emotional distress damages with medical or expert proof, which he did not do. Accordingly, the court affirmed summary judgment in favor of defendant.

12-10-20 GARDEN STATE INVESTMENT VS. TOWNSHIP OF BRICK, NEW JERSEY AND THE APPROVED REALTY GROUP VS. TOWNSHIP OF BRICK, ET AL. (C-0234-17 and C-0080-18, OCEAN COUNTY AND STATEWIDE) (CONSOLIDATED) (A-0082-19T2/A-0093-19T2)

After only physically inspected the properties and examining the assessment records and tax map, plaintiffs purchased tax sale certificates on vacant lots in Brick Township. They paid accruing taxes and bided their time until entitled to commence foreclosure actions. Once their foreclosure actions were underway, plaintiffs finally obtained title searches and learned the properties were encumbered by a conservation easement, which rendered the properties undevelopable. That discovery prompted plaintiffs to commence these actions, seeking rescission of their tax sale certificate purchases and reimbursement of taxes paid. The chancery judge granted summary judgment in favor of Brick Township, and in distinguishing Twp. of Middletown v. Simon, 193 N.J. 228 (2008), the court affirmed because, unlike Middletown's conduct there, Brick Township's tax assessor was as much in the dark about the conservation easement as plaintiffs and, unlike Middletown, the township took no active steps to deprive plaintiffs of the value of their investments.

12-9-20 LISA IPPOLITO VS. TOBIA IPPOLITO, ET AL. (FM-14-0147-13, MORRIS COUNTY AND STATEWIDE) (A-3619-19T1)

After disposition of a lengthy and hotly-contested matrimonial action, a dispute arose about the lien of one of defendant's former attorneys and whether it required payment of the attorney's fees from an escrow account holding the net proceeds of a sale of marital property. With one minor exception, the trial judge ruled against the attorney.

The court recognized that N.J.S.A. 2A:13-5 permits the attachment of an attorney's lien, as relevant here, only to an "award" or "judgment" entered in the client's favor. Because the trial judge awarded all marital assets to plaintiff, the lien could not attach to the escrow fund that was part of the award to plaintiff. And, even if it did, the court held that the lien only gave the attorney an opportunity to assert his claim; ultimately, the trial judge was required to ascertain which of the competitors to the fund had the more equitable interest. In this case, plaintiff – having been victimized by defendant's contumacious conduct and unwillingness to honor his support obligations – had the greater equitable right to the fund than defendant's former attorney.

12-3-20 TODD B. GLASSMAN, ETC. VS. STEVEN P. FRIEDEL, M.D., ET AL. (L-2383-18, MONMOUTH COUNTY AND STATEWIDE) (A-4042-19T3)

In Ciluffo v. Middlesex General Hospital, the court adopted a framework for trial courts to follow when a plaintiff settles a negligence claim with the original tortfeasor and proceeds to trial against medical professionals whose subsequent negligent treatment resulted in additional injuries and damages. 146 N.J. Super. 476 (App. Div. 1977). To avoid a windfall to the plaintiff, the court explained that after a plaintiff settled her claim with the first of successive independent tortfeasors, the medical defendants were entitled to a full pro tanto credit for the settlement amount if that amount exceeded the total "provable damages" suffered by the plaintiff as determined by a jury; the medical defendants would receive a partial credit against any verdict if the settlement amount exceeded the difference between the total provable damages minus the amount of damages the jury apportioned to the malpractice. Id. at 482–83.

In this case, plaintiff's decedent suffered a fractured ankle resulting from a fall at a restaurant. She came under the care of medical defendants, who performed surgery on the fracture five days later. Plaintiff's decedent allegedly suffered additional injuries, and subsequently died from a pulmonary embolism, allegedly the result of defendants' medical malpractice.

While discovery was ongoing, plaintiff settled her claim with the restaurant for $1.15 million. The medical defendants moved for a declaration entitling them to the Ciluffo pro tanto settlement credit, and the motion judge entered orders to that effect.

The court granted plaintiff leave to appeal and reversed. After examining caselaw developments in the years since Ciluffo was decided, including enactment of the Comparative Negligence Act, the court concluded that awarding pro tanto settlement credits is a vestige of the common law without support in our current jurisprudence.

12-2-20 MELISSA KNIGHT VS. VIVINT SOLAR DEVELOPER, LLC, ET AL. (L-2852-18, CAMDEN COUNTY AND STATEWIDE) (A-2258-19T3)

At issue on this appeal is the validity of an arbitration provision contained within a purported agreement between a consumer and a solar energy company. Plaintiff consumer acknowledges she memorialized her understanding of the overall agreement by affixing her signature to the signature line of an otherwise blank iPad screen, displayed to her by defendant salesperson. Plaintiff maintains, however, that she did not check any boxes on the iPad screen that would otherwise indicate her assent to arbitration.

Relying on our Supreme Court's then-recent decision in Goffe v. Foulke Management Corporation, 238 N.J. 191 (2019), the trial judge granted defendants' motion to compel arbitration and stay plaintiff's Law Division action. In doing so, the trial judge determined the arbitrator must decide threshold issues concerning the overall validity of the parties' purported written agreement, which contained the arbitration provision.

The court disagrees, concluding there exist questions of fact concerning the mutuality of assent to the arbitration provision, which is necessary to bind both parties to arbitration, thereby distinguishing this matter from Goffe. Because it is unclear from the record whether plaintiff agreed to arbitrate disputes under the agreement, the court vacates the trial court's order and remands for a plenary hearing for the judge to first make that threshold determination.

12-1-20 STATE OF NEW JERSEY VS. IAN P. STEINGRABER (14-08-0867, UNION COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3781-19T3)

This appeal requires the court to decide whether the terms of a negotiated plea agreement waived the prosecutor's requirement to move for imposition of parole supervision for life (PSL) under N.J.S.A. 2C:43-6.4. By leave granted, the State appealed from a Law Division order that granted defendant's amended petition for post-conviction relief (PCR), as further amended by the PCR court sua sponte to a motion for reduction of sentence.

The PCR court concluded the trial court's imposition of PSL – in the absence of a motion by the prosecutor as required under the PSL statute – constituted an illegal sentence. This court, however, determined the sentence was not illegal, but remanded for the trial court to consider whether PSL should have been imposed.

11-30-20 KATHLEEN PANNUCCI VS. EDGEWOOD PARK SENIOR HOUSING - PHASE 1, LLC, ET AL. (L-4098-15, MONMOUTH COUNTY AND STATEWIDE) (A-4735-17T3)

Injured while boarding an elevator, plaintiff relied on res ipsa loquitur to establish her prima facie case against the elevator's owner, manager and servicer. To apply the doctrine, plaintiff had to show: 1) the accident was one that "ordinarily bespeaks negligence"; 2) the defendant exclusively controlled the instrumentality that caused the accident; and 3) the injury did not result from the plaintiff's own voluntary act or neglect. Because plaintiff could not satisfy the third prong, her suit was dismissed on summary judgment. On appeal, she asks the court to follow out-of-state authority and discard the third prong as a matter of law, contending it defeats the purpose of the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to -5.8. The court declines to do so, and affirms summary judgment, because it is not free to undo settled Supreme Court precedent absent an indication the Court would endorse the change; and the rule regarding plaintiff contribution retains some vitality, notwithstanding adoption of comparative responsibility.

11-25-20 IN THE MATTER OF THE APPLICATION FOR MEDICINAL MARIJUANA ALTERNATIVE TREATMENT CENTER FOR PANGAEA HEALTH AND WELLNESS, LLC., ET AL. (NEW JERSEY DEPARTMENT OF HEALTH) (CONSOLIDATED) (A-2204-18T4/A-2219-18T4/A-2276-18T4/A-2278-18T4/A-2283-18T4/A-2288-18T4/A-2292-18T4/A-2305-18T4)

In these eight appeals, appellants argued that the Department of Health made numerous errors in its selection of entities to operate Alternative Treatment Centers to grow, process, and dispense marijuana as part of the State's Medicinal Marijuana Program. They complained about, among other things, the Department's selection process, including the criteria used, the manner in which applications were scored, and the overall sufficiency and explanation of the final agency decisions; they specifically contended that the Department should at least have engaged in an interim process by which disappointed applicants could question or challenge the scores received prior to the issuance of final agency decisions that left it to the court to act as a clearing house for all such challenges. In agreeing the scoring system produced arbitrary results that have gone unexplained, the court vacated the final agency decisions and remanded for further proceedings.

11-24-20 STATE OF NEW JERSEY VS. SAMUEL W. CHEN STATE OF NEW JERSEY VS. COLIN P. QUINN STATE OF NEW JERSEY VS. MICHAEL T. SANTITORO (17-04-0261, 17-04-0263, and 17-04-0262, MIDDLESEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-1121-18T4/A-1122-18T4/A-1123-18T4)

These consolidated appeals ask the court to determine whether the Middlesex County Prosecutor's Office (Prosecutor's Office) can condition defendants' admissions into the pretrial intervention program (PTI) applications, N.J.S.A. 2C:43-12, on service of jail time after they were released on their own recognizance.

In accordance with plea agreements, defendants pled guilty to amended charges of third-degree criminal mischief, N.J.S.A. 2C:17-3, and they were each sentenced to a four-year term of noncustodial probation. Pursuing rights preserved in their plea agreements, defendants sought to overturn the denials of their PTI applications with appeals to the trial judge, claiming the Prosecutor's Office abused its discretion by proposing that they serve jail time to gain admission. The trial judge rejected defendants' requests without addressing the impact of the jail time proposals.

We reverse. The Prosecutor's Office abused its discretion by tainting the PTI application process through unsuccessfully seeking to have defendants agree to serve jail time to gain admission. Although imposing the condition of jail time for PTI admission was not expressly permitted or prohibited by the governing statute, court rule, or guidelines in effect at the time, we conclude it was illegal to do so because vesting such authority to the Prosecutor's Office would afford it powers contrary to the Legislature's intent in creating PTI. The trial court shall therefore enter orders vacating defendants' guilty pleas and admit them into PTI.

11-24-20 STATE OF NEW JERSEY VS. PETER K. PAUL (W-2019-000346-1507, OCEAN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0599-20T6)

Rule 3:26-2(c)(2) governs a defendant's motion to relax conditions of his or her pre-trial release under the Criminal Justice Reform Act. The Rule empowers the trial court to recalibrate a releasee's conditions upon a showing of "a material change in circumstance." The court holds that pre-trial discovery that has reduced the "weight of the evidence" against the defendant may constitute such changed circumstances. So may a defendant's compliance with restrictive conditions over an extended period, if such compliance coincides with another material change demonstrating that the defendant's pre-trial behavior may be adequately managed by less restrictive means than initially imposed. Because the trial court here did not review defendant's motion to relax his release conditions under Rule 3:26-2(c)(2), the court granted defendant's motion for leave to appeal, reversed the trial court's order denying relief, and remanded for reconsideration.

11-23-20 B.B. VS. S. BRADLEY MELL, ET AL. (L-7200-19, ESSEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-3450-19T1/A-3452-19T1)

Defendant Mell, a wealthy businessman, engaged in sexual relations with B.B. over a period of months when she was fifteen years old. Upon discovery, Mell was arrested and soon convicted of federal and state crimes; he is presently incarcerated in a federal penitentiary. B.B. commenced this action for damages against Mell and others and obtained an order attaching some of Mell's assets. Soon after, Mell sought an order permitting the payment of his attorneys in this civil action from the attached funds; the judge granted that motion and later entered another order fixing the amount of fees to be paid from the fund. The court granted B.B.'s motions for leave to appeal those two orders and reversed, holding that B.B. had a greater priority to the fund even though she has yet to obtain a judgment and that the equities preclude such an invasion of the fund, noting it would be perverse to allow Mell's expenses to be paid from the fund established through valid court procedures for the benefit of his victim.

11-23-20 RONALD RAFANELLO VS. JORGE S. TAYLOR- ESQUIVEL, ET AL. (L-3488-15 AND L-1721-17, UNION COUNTY AND STATEWIDE) (A-4397-18T2)

In this multi-vehicle accident case involving a dump truck, the court concludes that New Jersey law requires a commercial motor carrier to provide a minimum insurance coverage amount of $750,000 when engaged in interstate or intrastate commerce, as prescribed by N.J.S.A. 39:5B-32 and N.J.A.C. 13:60-2.1. Here, the individual driving the dump truck was an employee of defendant trucking company and responsible for the accident but was not listed as a covered driver on the policy. However, he was a permissive user and therefore, the commercial insurance policy issued to the trucking company required a minimum coverage amount of $750,000 and the step-down provision in the insured's combined single limit policy is not triggered. The trial court's order granting summary judgment and capping the tortfeasor's exposure at $35,000 is reversed.

11-19-20 VICTORIA CRISITELLO VS. ST. THERESA SCHOOL (L-3642-14, UNION COUNTY AND STATEWIDE) (A-4713-18T3)

In this action brought under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, the court was asked to determine whether a parochial school's knowledge of the pregnancy of an unmarried lay teacher, who started as a teacher's aide for toddlers, later taught art, and had no responsibility for religious instruction, can serve as the nondiscriminatory basis for the teacher's termination for violating the school's morals code, where the school never made any effort to determine whether any of its other employees have violated the school's prohibition against "immoral conduct" that is allegedly incorporated into each employees' terms of employment. The court held that knowledge or mere observation of an employee's pregnancy alone is not a permissible basis to detect violations of the school's policy and terminate an employee.

11-13-20 JOHN C. SULLIVAN, ET AL. VS. MAX SPANN REAL ESTATE & AUCTION CO., ET AL. (L-1036-17, SOMERSET COUNTY AND STATEWIDE) (A-5327-18T1)

The court determined that real estate auction sales contracts prepared by attorneys, licensed real estate brokers, or salespersons need not contain the three-day attorney review clause mandated by N.J. State Bar Ass'n v. N.J. Ass'n of Realtor Boards, 93 N.J. 470 (1983), as codified in N.J.A.C. 11:5-6.2(g). Here, a blank, pre-printed contract was sent to the highest bidder, defendant, and recommended an attorney review the contract. The court rejected defendant's claim that she was entitled to a return of her $121,000 deposit monies after not being able to secure financing in this cash deal. The liquidated damages provision in the sales contract was validated, and the $121,000 deposit monies, plus interest, were equally divided between plaintiffs/sellers and co-defendant.

11-12-20 S.H., ET AL. VS. K&H TRANSPORT, INC., ET AL. (L-2169-16, ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0413-18T4)

The court reverses summary judgment to defendants Orange Board of Education, Sussex County Regional Transportation Cooperative and K&H Transport Inc., the bus company responsible for transporting a seventeen-year-old special needs student to and from an out-of-district, State-approved school for students with disabilities. The trial judge determined the bus company owed no duty to plaintiffs "to protect against the alleged injury" — sexual assault — and that no reasonable person could find the bus company's actions caused plaintiff's injury. The court finds that whether the minor-plaintiff's sexual assault, by young men she encountered after being dropped off unsupervised blocks from the designated bus stop outside her home, was a foreseeable risk of injury to her was impacted by the extent of the minor's disability, and that the trial court erred in resolving that question on disputed facts.

11-9-20 IN THE MATTER OF THE EXPUNGEMENT OF THE INVOLUNTARY CIVIL COMMITMENT RECORD OF M.D.V. (L-3447-19, CAMDEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0663-19T2)

The process for the expungement of a voluntary or involuntary commitment can be found in N.J.S.A. 30:4-80.8 to -80.11. The statutory scheme does not prohibit additional applications if a first petition is unsuccessful. The relevant language in the statute requires a petitioner seeking expungement to present his or her personal history since the hospitalization, as well as his or her present circumstances, and reputation in the community. N.J.S.A. 30:4-80.8; N.J.S.A. 30:4-80.9. Therefore, the court concludes the dismissal of a petition entered after an evidentiary hearing should be designated as "without prejudice."

11-5-20 STATE OF NEW JERSEY VS. PETER NYEMA (11-08-0833, MERCER COUNTY AND STATEWIDE) (A-0891-18T4)

Following the denial of his motion to suppress physical evidence, defendant pled guilty to first-degree robbery, N.J.S.A. 2C:15-1. Police officers seized the evidence following an investigatory stop of an automobile in which defendant was a passenger. The arresting officer testified he stopped the car because he was advised two black men had robbed a store. The officer used a spotlight mounted to his car to illuminate the interiors of passing vehicles as he traveled to the store. In one car, he observed three black men who did not react to the light. The officer stopped the car based on those observations. The court holds that knowledge of the race and gender of criminal suspects, without more, does not establish a reasonable articulable suspicion that the men in the car had robbed the store. Accordingly, the court reverses defendant's conviction, vacates his sentence, and remands for further proceedings.

10-28-20 IN THE MATTER OF THE ADOPTION OF A CHILD BY C.J. (FA-08-0012-17, GLOUCESTER COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-2593-17T4)

In this appeal from a contested private adoption matter, the court reversed the termination of the biological mother's parental rights and vacated the judgment of adoption in favor of the child's stepmother. The court held the evidence did not support the finding that the biological mother had failed to affirmatively assume the duties of a parent, and found error in the trial court's reliance upon the biological mother's child support arrears as proof of intentional abandonment of financial obligations. Further, the court held the trial court impermissibly shifted the burden of proof, relied on hearsay, and erroneously imported the "best interest" standard applicable to Title 30 guardianship proceedings.

10-22-20 KENNETH ZAHL VS. HIRAM EASTLAND, JR., ET AL. (L-0851-16, MORRIS COUNTY AND STATEWIDE) (A-3696-19T2)

On leave granted, defendant, a Mississippi attorney (and his associated law firms), appeal from the denial of his motion to dismiss plaintiff's complaint for lack of personal jurisdiction. R. 4:6-2(b). Defendant was admitted pro hac vice to represent plaintiff in a federal lawsuit filed in the federal district court for the district of New Jersey alleging, among other things, RICO claims against the New Jersey Attorney General and other state officials. The federal suit was ultimately dismissed; the Third Circuit affirmed the dismissal.

Plaintiff initiated this suit alleging malpractice and excessive billing in defendant's representation of him in the prior federal action. As he did before the Law Division, defendant, who never physically appeared in New Jersey in connection with the federal suit, argued that he never personally availed himself of the privileges of doing business in New Jersey, lacked requisite minimum contacts with the state, and that requiring him to defend himself in state court in New Jersey offended traditional notions of fair play and substantial justice

The court affirmed the Law Division's denial of the motion to dismiss, finding particular significance in defendant's pro hac vice admission, since it required defendant to abide by certain New Jersey Court Rules, including, a limit on contingent fees, financial contribution to the Client Security Fund, and an obligation to abide by the Rules of Professional Conduct as adopted by our Supreme Court.

10-20-20 STATE OF NEW JERSEY VS. CHRISTOPHER RADEL (16-08-0697, PASSAIC COUNTY AND STATEWIDE) (A-2503-18T3)

Charged with numerous weapons and drug offenses, defendant moved in the trial court for the suppression of evidence – guns, ammunition, drugs, and drug paraphernalia – seized pursuant to a search warrant based on information police obtained during a warrantless entry into defendant's home. The trial judge denied the suppression motion, finding the police conducted a permissible protective sweep of the home. The court disagreed with the trial judge's application of State v. Davila, 203 N.J. 97 (2010), concluding that the police lacked both a reasonable and articulable suspicion of danger and a legitimate purpose for remaining on the premises, since defendant was arrested outside the home and handcuffed before police conducted the sweep.10/

10-16-20 IN THE MATTER OF ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NOS. 2020-5 AND 2020-6 (DEPARTMENT OF LAW AND PUBLIC SAFETY) (CONSOLIDATED) (A-3950-19T4/A-3975-19T4/A-3985-19T4/A-3987-19T4/A-4002-19T4)

In these five consolidated appeals, petitioners and intervenors mount a facial challenge to Attorney General Grewal's Directives 2020-5 and 2020-6, which ended New Jersey's decades-long practice of shielding the identities of law enforcement officers receiving major discipline for misconduct

The court upholds the Directives, finding the Attorney General acted within his authority under the Law and Public Safety Act of 1948, the Criminal Justice Act of 1970, and N.J.S.A. 40A:14-181, and not in violation of Executive Order 11 (Byrne), OPRA, or any right of plaintiffs'. The court's conclusion that the Directives constitute a valid exercise of the Attorney General's authority does not preclude any officer from bringing an as-applied challenge to publication of his or her name pursuant to Directives 2020-5 or 2020-6 for discipline finalized before release of those Directives.

10-16-20 STATE OF NEW JERSEY VS. JEREMIE FABER (17-036, MONMOUTH COUNTY AND STATEWIDE) (A-5726-17T4)

Defendant was convicted in municipal court of driving while under the influence of alcohol (DWI), N.J.S.A. 39:4-50(a). In a de novo appeal pursuant to Rule 3:23-8, the Law Division found defendant guilty, but reduced the period of license suspension from nine months to seven months because the municipal court judge improperly relied on defendant's lack of credibility to support a lengthier period of license suspension. In this appeal, defendant argues the Law Division should have vacated his municipal court conviction and remanded the matter for a new trial.

This court also notes the Law Division's failure to follow the standard in State v. Robertson, 228 N.J. 138 (2017) when it stayed the execution of defendant's sentence pending the outcome of this appeal.

10-15-20 IN THE MATTER OF OFFICER GREGORY DIGUGLIELMO AND NEW JERSEY INSTITUTE OF TECHNOLOGY (PUBLIC EMPLOYMENT RELATIONS COMMISSION) (A-3772-19T2)

This case presents the unsettled legal question of whether a campus police officer who has been terminated by a State university or college because of alleged non-criminal misconduct may challenge his termination through what is known as "special disciplinary arbitration" administered by the Public Employment Relations Commission ("PERC" or "the Commission"), pursuant to N.J.S.A. 40A:14-209 and -210.

The legal issue arises in the context of an attempt by the New Jersey Institute of Technology ("NJIT") to terminate one of its campus police officers for alleged misconduct in using force to apprehend a potential juvenile offender who was bicycling through the university grounds. Over NJIT's objection, PERC referred the dispute to a special disciplinary arbitrator.

This court affirms PERC's determination that the NJIT police force is a "law enforcement agency" within the meaning of N.J.S.A. 40A:14-200. However, NJIT officers nonetheless are not eligible for special disciplinary arbitration because that option is restricted by N.J.S.A. 40A:14-150 to officers who work for municipal police departments in jurisdictions that are not part of the civil service system.

In addition, even if that statutory restriction under N.J.S.A. 40A:14-150 did not pertain, the officer in this case is ineligible because he has not been suspended without pay, as required by N.J.S.A. 40A:14-209 and -210.

10-2-20 RIALTO-CAPITOL CONDOMINIUM ASSOCIATION, INC. VS. BALDWIN ASSETS ASSOCIATES URBAN RENEWAL COMPANY, LLC, ET AL. (L-4994-13. HUDSON COUNTY AND STATEWIDE) (A-3502-18T3)

In this appeal, the court considered a condominium association's standing to sue defendants alleged to have been involved in the design, manufacture, and installation of the condominium's windows. The motion judge found the association lacked standing because the master deed declares without ambiguity that the windows are part of the units. The court agreed with that understanding of the master deed and the limits it places on the association's window claims, but the court also recognized that any claim against these defendants based on allegations that their actions altered the buildings' exterior appearance in a way that violated a historic preservation easement could be asserted because the association is bound by the easement and would have a sufficient stake in that claim's outcome. Additionally, the court rejected the motion judge's finding that the association was limited to suing only the unit owners for damages caused to the common elements; that determination is inconsistent with the nature of the association's relationship to the common elements and to the unit owners.

9-4-20 LIBERTARIANS FOR TRANSPARENT GOVERNMENT, ETC. VS. CUMBERLAND COUNTY, ET AL. (L-0609-18, CUMBERLAND COUNTY AND STATEWIDE) (A-1661-18T2)

The court determines a settlement agreement between defendant Cumberland County and a former County employee resolving a preliminary notice of disciplinary action (PNDA) against the employee is not a government record under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, but instead is a personnel record exempt from disclosure under section 10 of the statute, N.J.S.A. 47:1A-10. The court rejects the argument of plaintiff Libertarians for Transparent Government that the settlement agreement was properly released in redacted form as not supported by the language of section 10 or the history of excluding personnel and pension records from public access contained in Executive Orders 9 (Hughes), 11 (Byrne) and 21 (McGreevey).

The court reverses the trial court order that released the redacted settlement agreement and remands for the court to consider whether Libertarians is entitled to the agreement, either in whole or in part, under the common law right of access to public records, see Bergen Cty. Improvement Auth. v. N. Jersey Media Grp., Inc., 370 N.J. Super. 504, 520 (App. Div. 2004).

9-3-20 STATE OF NEW JERSEY VS. MICHAEL GUERINO (16-04-0672, OCEAN COUNTY AND STATEWIDE) (A-4644-17T1)

This case examines the scope of Rule 3:11, which requires law enforcement to make a detailed record of an out-of-court identification. The court focused on an unusual live identification event that took place almost two years after the robbery and two weeks before trial. The prosecutor asked the robbery victim to come to the courthouse and sit in a hallway while defendant and other jail inmates were led past her. This event was not electronically recorded and no verbatim account was made of the dialogue between the victim and prosecutor's office representatives who accompanied her. Defendant argued this event corrupted the victim's memory, rendering her subsequent in-court identification inadmissible.

The State did not seek to introduce evidence of the hallway event at trial and characterized it as "trial prep." The court nonetheless concluded it was an out-of-court "identification procedure conducted by a law enforcement officer" within the meaning of Rule 3:11(a) and therefore should have been recorded. The court remanded for the trial court to make detailed findings concerning whether the hallway procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.