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

8-25-22 AMADA SANJUAN VS. SCHOOL DISTRICT OF WEST NEW YORK, HUDSON COUNTY (C-000030-21, HUDSON COUNTY AND STATEWIDE) (A-3273-20)

Appellant challenges a Law Division order confirming an arbitration award which sustained tenure charges filed by respondent West New York Board of Education ("Board") against her; demoted her from assistant principal to a fourth-grade teacher; and determined she was not entitled to back pay withheld from her under N.J.S.A. 18A:6-14 for a one-hundred-and-twenty-day suspension-without-pay period that was imposed upon the Board's certification of the charges. This appeal requires us to consider issues of first impression: (1) whether the arbitrator had the authority to demote appellant under N.J.S.A. 18A:6-16; and (2) whether the arbitrator had the right to deny appellant back pay arising from her suspension-without-pay period after determining her employment should not be terminated.

The court affirms the arbitrator's determination that appellant was not entitled to back pay withheld from her during her suspension-without-pay period based upon his determination that her conduct was unbecoming of a teaching staff member. The court reverses and remands because upon determining appellant's conduct was unbecoming but that she should not be terminated, the arbitrator lacked the statutory authority to demote her from her assistant principal position and he could only reduce her compensation. Appellant should be reinstated to her assistant principal position. On remand, the arbitrator must determine to what extent, if any, appellant's compensation should be further reduced through suspending her without pay or withholding salary increments, or a combination thereof.

8-23-22 ASHISH KUMAR, ET AL. VS. PISCATAWAY TOWNSHIP COUNCIL, ET AL. (L-5017-21, MIDDLESEX COUNTY AND STATEWIDE) (A-0227-21)

In this matter, the court considered whether a municipality may approve a resolution to place non-binding public opinion questions before the electorate when initiative petitions concerning the identical issues are on the same ballot. The majority concluded the municipality was not authorized under N.J.S.A. 19:37-1 to pass the resolutions regarding the public opinion questions because the electorate was considering the same issues on the ballot in their vote on the initiative questions.

The court also considered the trial court's order that denied plaintiffs' application for an award of attorney's fees under the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -2. Because defendants' actions of passing the unauthorized resolutions deprived plaintiffs of their substantive right to initiative, the majority reversed the court's order denying plaintiffs a counsel fee award.

Judge Smith dissented.

8-17-22 STATE OF NEW JERSEY VS. SCOTT M. HAHN (16-09-1174, HUDSON COUNTY AND STATEWIDE) (A-4755-18)

A jury convicted defendant of two counts of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a), two counts of second-degree vehicular homicide, N.J.S.A. 2C:11-5(a), one count of third-degree possession of gamma hydroxybutyrate (GHB), N.J.S.A. 2C:35-10.2(a), and one count of third-degree possession of gamma-butyrolactone (GBL), N.J.S.A. 2C:35-10(a)(1) and (3). The State contended defendant was the under the influence of GHB and had not slept for more than twenty-four hours when his car slammed into the back of another car stopped at a toll booth at Exit 14C of the New Jersey Turnpike at more than fifty miles per hour. The driver of the other car and his five-year-old daughter died as a result. The judge imposed an aggregate thirty-seven-year term of imprisonment, with a twenty-seven-year, two-month, and eleven-day period of parole ineligibility.

The court rejected defendant's challenge to the admissibility of the statement he gave to State Troopers while hospitalized the morning after the accident and after he was given his Miranda rights. Defendant contended, in part, that detectives failed to inform him that two people died in the crash, telling him only that they were investigating the accident, before he waived his rights. The court distinguished the facts from those presented in State v. Diaz, 470 N.J. Super. 495 (App. Div. 2022), which was filed before the Court issued its opinion in State v. Sims, 250 N.J. 189 (2022), reversing our earlier decision in that case.

The court reversed defendant's convictions for aggravated manslaughter, however, finding it was plain error for the judge to not provide ins tructions on second-degree reckless manslaughter as a lesser-included offense of aggravated manslaughter. The court rejected the State's argument that any error was harmless, given the jury's guilty verdict on the two vehicular homicide counts, noting the judge never explained the heightened degree of recklessness required to convict defendant of aggravated or reckless manslaughter committed by driving a vehicle, versus the element of recklessness required to sustain a conviction for vehicular homicide.

8-15-22 BRIAN AND KRISTINA PUGLIA VS. ROSEMARIA PHILLIPS, ET AL. (L-0945-16, BURLINGTON COUNTY AND STATEWIDE) (A-5367-18)

Plaintiffs' complaint alleged wrongful eviction under the Anti-Eviction Act, N.J.S.A. 2A:18-61.1 to -61.12, fraud, negligent misrepresentation, and other claims. Defendants filed an answer and counterclaim, asserting plaintiffs' negligence caused damage to the property and rendered portions of it "unusable." The parties cross-moved for summary judgment on the wrongful eviction cause of action, and the judge granted defendants summary judgment and denied plaintiffs' motion.

Defendants then made an offer of judgment, which plaintiffs accepted the next day. Plaintiffs' proposed order for judgment was limited to "the remaining counts" of the complaint and sought to preserve appeal of the interlocutory summary judgment orders. Defendants objected, citing Rule 4:58-4(c), which provides: "If a claimant asserts multiple claims for relief or if a counterclaim has been asserted against the claimant, the claimant's offer shall include all claims made by or against that claimant. If a party not originally a claimant asserts a counterclaim, that party's offer shall also include all claims by and against that party." (emphasis added). The judge entered defendants' proposed order of judgment that was not limited to "the remaining counts" of the complaint.

Plaintiffs appealed, in part arguing the interlocutory orders were appealable despite their acceptance of defendants' offer of judgment, citing, as they did in the Law Division, our decision in City of Cape May v. Coldren, 329 N.J. Super. 1, 10 (App. Div. 2000). The court affirmed the order of judgment without considering the merits of plaintiffs' arguments regarding the interlocutory orders by distinguishing Coldren on its facts and noting that decision was issued prior to adoption of Rule 4:58-4(c). Plaintiffs' acceptance of the offer of judgment settled all claims "by and against" defendants, including any claims dismissed on summary judgment.

8-11-22 FULTON BANK OF NEW JERSEY VS. CASA ELEGANZA, LLC, ET AL. (F-000615-18, ATLANTIC COUNTY AND STATEWIDE) (A-2859-20)

Fulton Bank (the Bank) foreclosed on a mortgage recorded prior to the filing of Iron Gate at Galloway's Homeowners' Association's (HOA) Declaration of Covenants. The HOA was created and the Declaration filed pursuant to Galloway Township's major subdivision approval of the relevant lots. The Bank sold the remaining lots after foreclosure, but at closing refused to pay the HOA fees accrued during its period of ownership. The Bank filed a motion under the foreclosure docket number, contending it owed no fees because foreclosure on the earlier-filed mortgage effectively nullified the Declaration of Covenants. The court concluded that the Bank was liable for the fees in arrears because the Declaration constituted an equitable servitude running with the land, as outlined in Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99 (2006).

8-3-22 STATE OF NEW JERSEY VS. TERRELL TUCKER (21-01-0129, HUDSON COUNTY AND STATEWIDE) (A-0937-21)

In this matter of first impression, the court considered whether the holding in State v. Cain, 224 N.J. 410 (2016), prohibiting expert witnesses from opining on a defendant's state of mind in drug cases, should also apply to grand jury proceedings. The court concluded that Cain's holding does apply to grand jury proceedings because concerns about the prejudicial effect of such testimony on petit jury deliberations are equally present during one-sided grand jury presentations, if not more so. Consequently, the court reversed in part the trial court order denying defendant's motion to dismiss the indictment charging defendant with numerous drug-distribution related offenses and remanded for further proceedings because a police officer testified before the grand jury, based on his training and experience, that defendant had possessed controlled dangerous substances with the intent to distribute them.

8-2-22 EUGENE BERTA VS.NEW JERSEY STATE PAROLE BOARD (NEW JERSEY STATE PAROLE BOARD) (A-1889-20)

The court reverses and remands the decision by the State Parole Board to deny state prison inmate Eugene Berta parole and to set a future eligibility term (FET) of seventy-two months. The court applies principles recently reaffirmed by the New Jersey Supreme Court in State v. Acoli, 250 N.J. 431 (2022). The court, however, does not grant parole as in Acoli, but rather remands for the Board to reconsider its decision and, if it chooses again to deny parole, to more fully explain its reasons for doing so and for imposing such a lengthy FET.

In 1984, Berta was convicted of murdering his girlfriend and was sentenced to a life term with a thirty-year period of parole ineligibility. The Board denied his first application for parole in 2015. The latest denial of parole was based on three supposedly negative circumstances: (1) Berta was committed to incarceration for multiple offenses; (2) he has a "serious" and "persistent" history of institutional disciplinary infractions; and (3) his continued denial of guilt constitutes "insufficient problem resolution."

The court concludes the Board improperly relied on the first two purportedly negative circumstances. Berta's jury trial convictions for murder and possession of a firearm for an unlawful purpose were merged at the sentencing hearing and thus he was not committed to state prison based on multiple offenses. As to Berta's record of institutional infractions, the court concludes that the Board was unreasonable in characterizing Berta's infraction history as persistent given that he has been infraction-free for nearly twenty years.

As to Berta's denial of guilt, the court concludes that the Board has yet to satisfactorily explain why that circumstance, viewed in context with his overall rehabilitative efforts, establishes by a preponderance of the evidence that he is substantially likely to re-offend. While Berta's ongoing refusal to accept responsibility for the murder he committed is a relevant circumstance, the court holds that admitting guilt is not a categorical prerequisite to parole. Accordingly, the Board shoulders the burden to explain why Berta's refusal to acknowledge his guilt foreshadows that he will commit a future crime. Although the court recognizes the Board's expertise in assessing inherently subjective circumstances such as "negative attitudes" and "insufficient problem resolution," it is not enough for the Board to state a conclusion, especially in view of in-depth psychological evaluations that show that Berta presents a low risk of re-offense.

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court also addresses the Board's decision to impose an FET almost three time as long as the presumptive twenty-seven-month FET that applies to inmates convicted of murder. The Board is authorized to set a higher FET only "if the future parole eligibility date which would be established pursuant to [N.J.A.C. 10A:71-3.21(a)] is clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future behavior." (emphasis added). The court views the "clearly inappropriate" standard to be a high threshold to vault. To impose a higher FET, the Board must overcome the presumption by explaining why a twenty-seven-month FET is clearly inappropriate. Furthermore, the court holds that the Board cannot simply pick a number out of thin air. The court stresses that: (1) an FET must not be imposed as a form of punishment; and (2) the decision to impose an FET beyond the presumptive FET, like the underlying decision to deny parole, must be tied directly to the goal of reducing the likelihood of future criminal behavior. The court also emphasizes that it will not permit the Board to use Berta's ongoing refusal to admit guilt as an artifice to convert his life sentence into a sentence of life without parole.

Judge Geiger joins in the result and issues a concurring opinion.

7-29-22 IN THE MATTER OF NJ TRANSIT AWARD OF CONTRACTS NO. 21-048A AND NO. 21-048B, ETC. (NEW JERSEY TRANSIT) (A-2598-21)

We granted Academy Express LLC's application to file an emergent motion to stay New Jersey Transit's award or execution of a contract for regular route local bus services in Hudson County pending Academy Express's appeal of NJ Transit's decision to award the contract to Orange, Newark, Elizabeth Bus Inc. (ONE Bus) and permitted ONE Bus to intervene as an interested party, entering a temporary stay pursuant to Rule 2:9-8 pending our disposition of the motion. Having considered the briefs and oral argument — and without prejudice to the merits panel's ultimate disposition of the matter — we deny the motion and dissolve our temporary stay, concluding Academy Express has not demonstrated a reasonable probability of success on the merits.

The powers of NJ Transit are "vested in the voting members of the board." N.J.S.A. 27:25-4(e). The corporation has been statutorily exempted from the need to bid the contracting-out of bus routes, N.J.S.A. 27:25-6(b), N.J.S.A. 27:25-11(g)(3)(d), and may choose the proposal the Board determines to be "the most advantageous to the corporation, price and other factors considered," N.J.S.A. 27:25-11(c)(1),(2). The Board also has broad discretionary authority to reject any proposal when it determines "it is in the public interest to do so," N.J.S.A. 27:25-11(c), and "shall" consider the "adequacy of performance by a carrier or its affiliates under other contracts . . . with NJ Transit" under its "contracting out" regulations, N.J.A.C. 16:85-2.3(a)(4).

Given that broad authority, NJ Transit could certainly consider the recently settled qui tam action against Academy Express and its affiliated companies and determine it was in the public interest to reject a proposal from a carrier that had only weeks before entered into a multi -million-dollar settlement with the State in a massive fraud case involving the same routes covered by these contracts. See Keyes Martin & Co. v. Dir., Div. of Purchase & Prop., 99 N.J. 244, 262 (1985) (upholding Director's rejection of a bid "in the public interest" based on an appearance of wrongdoing attributable to a possible conflict of interest).

7-20-22 DORETTA CERCIELLO, ETC. VS. SALERNO DUANE, INC., ET AL. (L-1690-17, UNION COUNTY AND STATEWIDE) (A-3090-20)

In this class action matter arising out of the purchase of a vehicle, the court considers whether defendants' material breach of an arbitration agreement—the failure to pay the administration fees—precludes them from asserting the waiver of the right to pursue a class action in the subsequent Superior Court litigation.

The arbitration agreement clearly informed consumer purchasers they were waiving their right to pursue a class action in court and in arbitration. Although defendants cannot compel arbitration because of their failure to pay the requisite fees, their breach of the agreement does not eradicate the other provisions to which plaintiff agreed—namely the waiver of the right to pursue a class action in court. This court affirmed the orders denying class certification.

7-15-22 IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, ETC. (L-6119-15, BERGEN COUNTY AND STATEWIDE) (A-3119-20)

Following years of litigation and a trial, the Borough of Englewood Cliffs (the Borough) was found to have failed for decades to comply with its constitutional obligations to provide its fair share of affordable housing. Thereafter, the Borough entered into settlement agreements to allow affordable housing to be built. Following a change in the membership of the Borough's council, however, the Borough moved to vacate the settlement agreements, contending that two council members who had voted for the agreements had conflicts of interest. That argument was in direct contradiction to the position the Borough had taken before the trial court and in a related litigation where the Borough had argued that there were no conflicts of interest.

The court affirms the trial court's rejection of the Borough's arguments for several reasons, including that the Borough was judicially estopped from claiming any conflict. The record establishes that for years the Borough has stalled various efforts to allow affordable housing to be built. The court emphasizes that the time for delaying constitutional compliance is over.

7-15-22 STATE OF NEW JERSEY VS. ALBERTO LOPEZ (15-01-0014, MERCER COUNTY AND STATEWIDE) (A-2694-18)

In this appeal, the court held that a statement elicited in violation of defendant's Sixth Amendment rights could be used for impeachment purposes, and the defendant's status as a juvenile waived to adult court had no impact on this conclusion. In doing so, the court relied upon the United States Supreme Court ruling in Kansas v. Ventris, 556 U.S. 586, 592 (2009), which held that voluntary statements obtained in violation of a defendant's Sixth Amendment right to counsel are admissible to impeach a defendant's inconsistent testimony at trial. Although the New Jersey Constitution provides a more robust right to counsel than the Federal Constitution, see State v. Sanchez, 129 N.J. 261, 275 (1992), the court reasoned that excluding the statement for all purposes "would add little appreciable deterrence" to police conduct. Ventris, 556 U.S. at 593.

In addition, acknowledging New Jersey's "special protections" accorded to juveniles in criminal proceedings, the court held that any inherent impulsivity or vulnerability due to defendant's age was remedied by the preclusion of his statement in the prosecution's case-in-chief. The court declined to expand New Jersey's juvenile protections so far such that a juvenile waived to adult court would be permitted to lie under oath, without permitting the State the opportunity to confront the defendant with his or her prior inconsistent statement.

7-15-22 HOLLYWOOD CAFÉ DINER, INC. VS. GERI JAFFEE, ET AL. (L-2786-19, CAMDEN COUNTY AND STATEWIDE) (A-2272-20)

In the midst of the COVID-19 pandemic, the parties in this legal malpractice action exchanged minimal discovery before the court issued its notice pursuant to Rule 4:36-2, advising that discovery would end in sixty days and any application for an extension must be made before the discovery end date (DED). Thirty days later, the court issued a trial date.

The parties secured a consensual sixty-day discovery extension, see Rule 4:24-1(c), but when defendants moved before expiration of the DED for a further extension, the judge denied the motion, concluding the exceptional circumstances standard applied because a trial date was set, and defendants failed to meet that standard. Plaintiff's motion for reconsideration was similarly denied, but not before defendants sought summary judgment, essentially arguing the lack of expert opinion doomed plaintiff's complaint. The judge granted defendants summary judgment.

The court reversed. The court construed Rule 4:24-1(c), which states a judge shall grant an extension motion upon good cause if made before the DED, but also states a court may grant a discovery extension only in exceptional circumstances once an arbitration or trial date is set. The court concluded that while court administrators may send notices setting future arbitration and trial dates before discovery ends, the plain language of the Rule, read in pari materia with other rules, requires judges to apply the good cause standard if the motion for a discovery extension is made before the DED. Plaintiff met the good cause standard.

7-14-22 SHENISE MONK, ET AL. VS. KENNEDY UNIVERSITY HOSPITAL, ET AL. (L-3527-20, CAMDEN COUNTY AND STATEWIDE) (CONSOLIDATED) (A-3361-20/A-3362-20/A-3363-20)

Defendants' motions for summary judgment to dismiss the complaint as untimely because it was filed four and a half years after decedent's death were denied by the trial court, which allowed the action to proceed by applying the minority tolling provision found in N.J.S.A. 2A:14-2(a), concluding the Legislature did not make clear whether the Act intended to distinguish between minors who died and minors who survived.

The court reversed, finding minority tolling applies only to actions brought on behalf of minors, and not to actions brought on behalf of decedents or their estates. The word "minor" requires a living human being and the plain legal meaning of "minor's 13th birthday" demonstrates the Legislature's intent that only living minors have birthdays. Plaintiffs were limited to wrongful death and survival claims causes of action, each of which applies a two-year statute of limitations. The court vacated the orders denying summary judgment but remanded to the trial court for findings as to whether defendants had substantially complied with those statutes.

7-7-22 STATE OF NEW JERSEY VS. SUPREME LIFE (18-04-0537, BURLINGTON COUNTY AND STATEWIDE) (A-5005-18)

Defendant was convicted of the lesser-included offense of passionprovocation manslaughter and attempted murder. His son was acquitted of all charges. The judge sentenced defendant to an aggregate sentence of twenty-years' imprisonment subject to NERA.

Defendant testified in his own behalf at trial, asserting self-defense and defense of his son. Defendant admitted during cross-examination that the statement he provided to police on the night of the incident failed to include critical details, for example, that his son was present or that defendant stabbed the two victims. Defendant admitted that he lied to police.

During the course of his summation, the prosecutor expressed his personal opinion that defendant was guilty, repeatedly called defendant a "liar," told the jury "we know he's a liar," and said defendant's testimony was "a story created by a liar." The court concluded the prosecutor's repeated derogatory comments amounted to plain error requiring reversal.

The court also held the judge's charge was fatally deficient because the judge never told the jury that self-defense and defense of others also applied to passion-provocation manslaughter, and the judge failed to instruct the jury on the lawful use of a weapon for a protective purpose with respect to the two weapons convictions.

6-30-22 STATE OF NEW JERSEY VS. KYLE A. SMART (21-10-1417, OCEAN COUNTY AND STATEWIDE) (A-2334-21)

In this criminal prosecution, the court granted the State's motion for leave to appeal from an order suppressing evidence seized from a motor vehicle without a warrant. Police conducted an investigatory stop after surveilling the car for more than an hour and developing information that the front seat passenger, defendant Kyle A. Smart, was engaged in drug activity. At the roadside stop, no evidence of drug activity was observed in plain view; the occupants of the car neither made incriminating statements nor furtive movements; and the driver denied consent to search. Police then requested a K-9 unit. The dog alerted to the presence of narcotics, leading to a warrantless search of the car and seizure of a loaded handgun and drugs from the cabin.

Finding police had reasonable and articulable suspicion to pull over the vehicle, the motion judge upheld the stop and further determined probable cause arose when the canine sniff revealed the presence of narcotics in the car. However, the judge found the circumstances giving rise to probable cause were not "unforeseeable and spontaneous," justifying a warrantless search under the automobile exception to the warrant requirement pursuant to State v. Witt, 223 N.J. 409, 450 (2015). Accordingly, the judge suppressed the evidence seized.

Although the court agrees with the State that police could not have secured a warrant before the car was stopped and, in that sense, they did not "sit" on probable cause, under the circumstances proscribed by Witt, the court disagrees with the State's contention that probable cause was unforeseeable and spontaneous within the meaning of Witt. Because probable cause did not arise until the canine alerted for the presence of narcotics, the court concludes those circumstances were not unforeseeable and spontaneous and, as such, the automobile exception to the warrant requirement did not apply to this warrantless search. The court thus affirms the motion judge's order for slightly different reasons.

6-24-22 STATE OF NEW JERSEY VS. JAIME CAMBRELEN (20-01-0031 AND 20-08-0539, ATLANTIC COUNTY AND STATEWIDE) (A-1008-20)

In this appeal, the court considered the propriety of a negotiated plea agreement provision, permitting the State to revoke its sentencing recommendation if the defendant is arrested on new charges that are not adjudicated prior to sentencing. Because the court concluded a no-new-arrest or no-new-charges provision violates a defendant's right to due process and is fundamentally unfair, the court vacated defendant's conviction and remanded the matter to allow the parties to negotiate a new plea agreement or permit defendant to withdraw his guilty plea. The court's decision does not affect those plea agreement provisions that limit the State's right to revoke its sentencing recommendation or recommend a harsher sentence if a defendant fails to appear at sentencing, provided the defendant is afforded a fair hearing pursuant to established case law.

6-20-22 MAC PROPERTY GROUP ET AL. VS. SELECTIVE FIRE AND CASUALTY INSURANCE CO. PRECIOUS TREASURES LLC VS. MARKEL INS. ET AL. (L-2629-20, L 2630-20, L-2631-20, CAMDEN COUNTY and L-0820-20 and L-0892-20, MERCER COUNTY AND STATEWIDE) (CONSOLIDATED) (A-0714-20/A-0962-20/A-1034-20/A-1110-20/A-1111-20/A-1148-20)

These six back-to-back appeals arising from Law Division orders in two vicinages have been consolidated for the issuance of a single opinion. They require the court to consider an issue of first impression — whether in the context of Rule 4:6-2(e) motions to dismiss with prejudice, insurance policies issued by defendants did not cover business losses incurred by plaintiffs that were forced to close or limit their operations as a result of Executive Orders issued by Governor Philip Murphy to curb the COVID-19 global health crisis.

We affirm because we conclude the motion judges were correct in granting Rule 4:6-2(e) dismissals of plaintiffs' complaints with prejudice for failure to state a claim on the basis that plaintiffs' business losses were not related to any "direct physical loss of or damage to" as required by the terms of their insurance policies. We conclude plaintiffs' business losses were also not covered under their insurance policies' civil authority clauses, which provided coverage for losses sustained from governmental actions forcing closure or limiting business operations under certain circumstances. We further conclude defendants' denial of coverage was not barred by regulatory estoppel. In the alternative, we conclude that even if plaintiffs' business losses otherwise satisfied the requirements of the relevant clauses, coverage was barred by their insurance policies' virus exclusions and endorsements because the Executive Orders were a direct result of COVID-19.

6-20-22 FAYE HOELZ VS. ANDREA LEGATH BOWERS, M.D., ET AL. VS. LUTHERAN CROSSINGS ENHANCED LIVING, ET AL. (L-0620-16, BURLINGTON COUNTY AND STATEWIDE) (A-1534-21)

After settling her medical malpractice suit with plaintiff's estate, defendant-doctor Bowers was prepared to try her third-party contribution claim against third-party defendant Comiskey, who also treated plaintiff but was never named as a direct defendant. Comiskey moved to dismiss, arguing the Joint Tortfeasor Contribution Law, (the JTCL), N.J.S.A. 2A:53A-1 to -5, predicated a contribution-only claim upon plaintiff's recovery of a "money judgment" against Bowers. The settlement and release executed by the parties did not satisfy the JTCL. The motion judge denied Comiskey's motion, finding it was untimely, and because the settlement was placed on the public website of the Division of Consumer Affairs, as required by regulation, the settlement was the equivalent of a money judgment.

On leave granted, the court reversed. The court reviewed a line of cases from the Supreme Court and the Appellate Division that have consistently construed the right to contribution under the JTCL as requiring entry of a money judgment against the contribution claimant.

The court also raised concern about continued application of the Court's holding in Young v. Steinberg, 53 N.J. 252 (1969). In Young, the Court held that "[a] suit for contribution based on a settlement which has been elevated to the status of a judgment by formal court proceeding, and which discharges the injured party's claim against a non-settling joint tortfeasor, comports with the intent of our statutory scheme." Id. at 255 (emphasis added). At trial, the contribution claimant must still "establish a common liability . . . and the quantum of the damages ensuing from the joint offense." Ibid.

The court noted Young was decided prior to enactment of the Comparative Negligence Act (the CNA), N.J.S.A. 2A:15-5.1 to -5.8. As a result, pro rata apportionment of damages under the JTCL was supplanted by apportionment of liability and damages based on comparative fault.

6-16-22 SHEILA BRYANT, ET AL. VS. COUNTY OF CUMBERLAND (L-0084-20, CUMBERLAND COUNTY AND STATEWIDE) (A-0726-20)

The trial court dismissed plaintiffs' personal injury complaint against Cumberland County because plaintiffs served their notice of claim on the county clerk rather than the clerk of the board of county commissioners. Recognizing that N.J.S.A. 59:8-7 and -10 do not specifically identify the county office or officer to be served with a notice of claim, the court held as a matter of first impression that service on the county clerk suffices.

6-16-22 VADIM CHEPOVETSKY, ET AL. VS. LOUIS CIVELLO, JR. (C-000008-19, MIDDLESEX COUNTY AND STATEWIDE) (A-0476-21)

In January 2007, defendant sold a business to a relative of the plaintiffs. All but $12,500 of the $196,5000 purchase price was financed by defendant. The loan was secured by a mortgage on plaintiffs' residence and the personal guaranty of plaintiff Vadim Chepovetsky. Shortly thereafter, the buyer defaulted. The maturity date of the mortgage was February 22, 2012. Litigation in 2008 did not result in a judgment. In 2011, plaintiffs filed a joint Chapter Seven bankruptcy. The debt schedules list defendant as an unsecured creditor. The bankruptcy trustee abandoned his interest in the plaintiffs' residence. A discharge was granted to plaintiffs and a final decree was entered closing the case a no-asset bankruptcy. Defendant received timely notice of the bankruptcy filing and the discharge.

Thereafter, plaintiffs filed this action to quiet title. Defendant filed a counterclaim, seeking to enter judgment for personal liability against plaintiffs on the guaranty and to fix the amount due on the mortgage. Plaintiffs did not raise the affirmative defense of discharge in bankruptcy. Plaintiffs' complaint was dismissed for failing to provide discovery. The court conducted a bench trial on the counterclaim. Plaintiffs did not attend the trial and their attorney did not raise the defense of discharge in bankruptcy. The court entered judgment for $410,800 against Chepovetsky but not Svetlana Nashtatik.

Thereafter, plaintiffs moved to vacate the judgment, alleging it was void due to their bankruptcy discharge, and to vacate the dismissal of their complaint, because they were not required to respond to defendant's discovery demands related to a debt discharged in bankruptcy. They also argued that foreclosure was barred by the six-year statute of limitations imposed by N.J.S.A. 2A:50-56.1. Defendant opposed the motion, relying on equitable principles, including unclean hands, and asserted that plaintiffs did not prove that Chepovetsky's liability on the guaranty was discharged.

The trial court vacated the judgment and the order dismissing the quiet title action. The court found the judgment was void ab initio because Chepovetsky's "personal debt" to defendant was discharged in bankruptcy. The court stated it was unaware of the discharge in bankruptcy when it entered judgment against Chepovetsky. The court found the order dismissing the complaint was "improvidently entered" and reinstated the complaint, noting that pursuant to 11 U.S.C. § 524, plaintiffs were "not obligated to do anything" and were "entitled to disregard" discovery that was part of an attempt to collect a discharged debt. The court also

found that the mortgage matured on February 22, 2012, and defendant failed to institute a timely foreclosure action within six years. Therefore, an action to quiet title was appropriate.

We granted defendant leave to appeal. Applying the Supremacy Clause, the court held that the nature, extent, and enforceability of a discharge in bankruptcy is controlled by the Bankruptcy Code and interpretative federal case law. Pursuant to 11 U.S.C. § 524, debtors are not required to defend a postdischarge collection action. Consequently, they were not required to provide discovery, and the failure to plead discharge in bankruptcy as an affirmative defense did not waive that defense or estop plaintiffs from asserting it. Enforcing the waiver of the affirmative defense of discharge in bankruptcy under Rule 4:5-4 would violate the Supremacy Clause and be inconsistent with substantial justice. The court rejected defendant's reliance on the Rooker-Feldman doctrine.

The court held that Chepovetsky's personal liability on the guaranty was discharged in bankruptcy and that Nashtatik was not a guarantor of the loan. Accordingly, the judgment imposing personal liability on Chepovetsky was void ab initio and properly vacated.

As to the mortgage lien, the court held that defendant was entitled to a judgment fixing the amount due on the mortgage, explaining that a discharge in bankruptcy only discharges the personal liability of the debtors, and the mortgage lien remains enforceable against their real property if the foreclosure action is timely filed. The court expressed no opinion on whether a future action to foreclose the mortgage would be time-barred by the applicable statute of limitations. The ruling that foreclosure was time-barred was vacated, with that issue to be reconsidered on remand.

6-15-22 IN THE MATTER OF THE REGISTRATION OF B.B. (ML-19-01-0027, ATLANTIC COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (RESUBMITTED) (A-1496-20)

The court affirmed the provisions of the trial court order designating registrant B.B. as a Tier II offender under the Registration and Community Notification Laws, N.J.S.A. 2C:7-1 to -23, commonly known as Megan's Law, and ordering notification of schools and community organizations pursuant to N.J.S.A. 2C:7-8(c)(2). However, the court: (1) concluded it was an abuse of the trial court's discretion to give a score of nine on factor six of the Risk Assessment Scale, "duration of offensive behavior," because the State did not prove by clear and convincing evidence that B.B.'s sexual offenses took place over two years and held that a score of three, applicable to sexual offenses that took place over one or two years was appropriate; and (2) vacated a provision of the trial court order excluding B.B.'s personal identifiers from the Sex Offender Internet Registry, N.J.S.A. 2C:7-12 to -18. The court found that the evidence on which the trial court relied for that determination was not expert testimony or other evidence specific to the unique aspects of B.B.'s offenses or character relevant to his risk of re-offense. The court noted, but did not decide, the question of whether Article IV, Section 7, Paragraph 12 of the State Constitution and its implementing statute, N.J.S.A. 2C:7-13(c), preclude a court from excluding the personal identifiers of a Tier II offender subject to community notification pursuant to N.J.S.A. 2C:7-8(c)(2) from the State Offender Internet Registry.

6-13-22 C.V., ET AL. VS. WATERFORD TOWNSHIP BOARD OF EDUCATION, ET AL. (L-1981-14, CAMDEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-0626-20)

The court considered a matter of first impression relating to the application of the New Jersey Law Against Discrimination (LAD). Specifically, the court considered whether the LAD applies to claims arising from a sexual predator's criminal assaults against a young schoolgirl where those crimes were committed on a school bus. Under the circumstances of this case, the court concluded the LAD did not apply, especially where, as here, there was no evidence that the predator's compulsive and repetitive behavior was the result of any proven intention to discriminate specifically against young women. The court found the LAD was simply not intended to provide a civil remedy for child sex abuse committed by compulsive pedophiles. Even if it was, it concluded a victim must demonstrate the discriminatory conduct would not have occurred 'but for' the student's protected characteristic. The court concluded the plaintiffs did not meet that burden. The court's opinion construing the LAD did not address or preclude relief under other laws that were not invoked by plaintiffs on appeal.

6-13-22 JUAN J. BARRON VS. SHELLEY GERSTEN, ET AL. (L-2081-20, UNION COUNTY AND STATEWIDE) (A-0912-20)

Plaintiff's complaint about a June 21, 2018 automobile accident was filed on June 29, 2020. Defendants moved to dismiss the complaint for failure to commence the action timely, citing the two-year statute of limitations set forth in N.J.S.A. 2A:14-2(a). In opposition, plaintiff contended the complaint was timely filed, asserting the Supreme Court had tolled the statute of limitations in its June 11, 2020 Fourth Omnibus Order related to the COVID-19 pandemic and effectively had added fifty-five days to the statute-of-limitations period. The trial court granted defendants' motion, finding the Supreme Court in its Omnibus Orders related to the COVID-19 pandemic had not added time to the statute of limitations but had deemed the period of time from March 16, 2020, to May 10, 2020, a legal holiday for purposes of computing time.

The court agreed with the trial court, finding the Supreme Court had issued an order on March 17, 2020, in which the Court cited its constitutional rule-making authority under Article VI, section 2, paragraph 3 of the New Jersey Constitution to deem the relevant time period a legal holiday. Noting the express language in the Fourth Omnibus Order "affirm[ing] the provisions of [its] prior orders" and that the Supreme Court had not cited any new or different authority for its directive regarding the computation of time, the court concluded the Supreme Court in the Fourth Omnibus Order was exercising its constitutional rule-making authority to deem March 16, 2020, through May 10, 2020, a legal holiday and was not adding time to the statute of limitations.

6-10-22 ANTHONY PETRO, ET AL. VS. MATTHEW J. PLATKIN, ETC. (C-000053-19, MERCER COUNTY AND STATEWIDE) (A-3837-19)

In this appeal, the court affirmed the dismissal of plaintiffs' complaint challenging the Medical Aid in Dying for the Terminally Ill Act, N.J.S.A. 26:16-1 to -20, which allows qualified terminally ill patients to request and obtain from his or her physician a prescription for medication that the patient can choose to self-administer to end his or her life in a "humane and dignified manner." The court held that plaintiffs, a terminally ill patient, a doctor, and a pharmacist, lacked standing to challenge the Act because the legislation provides that participation under its provisions is voluntary for patients and health care professionals. It also concluded that plaintiffs' constitutional challenges to the legislation, premised on the New Jersey Constitution's single object rule and right to enjoy and defend life and the United States Constitution's Free Exercise Clause, lacked merit.

6-9-22 STATE OF NEW JERSEY VS. RICHARD GOMES STATE OF NEW JERSEY VS. MOATAZ M. SHEIRA STATE OF NEW JERSEY VS. JASON CHIRIBOGA STATE OF NEW JERSEY VS. MAJU D. BARRY (S-2020-1306-1225, S-2021-0016-1421, 21-08-0745, and 21-06-0575, MIDDLESEX AND MORRIS COUNTIES AND (A-3477-20/A-0198-21/A-0581-21/A-0697-21)

In these appeals, trial courts in two vicinages reached opposite conclusions regarding whether, pursuant to the enactment of the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), N.J.S.A. 24:6I-31 to -56, N.J.S.A. 54:47F-1, N.J.S.A. 40:48I-1, N.J.S.A. 18A:61F-1, N.J.S.A. 2C:35-23.1, and N.J.S.A. 2C:52-6.1,[1] a defendant may be admitted into pretrial intervention (PTI) where they have a prior conditional discharge for marijuana charges. One court concluded the defendant could not be admitted into PTI, finding the Legislature did not end the PTI eligibility bar where a defendant received a conditional discharge. The other court held that while the Legislature did not amend the PTI statute, the legislative intent of CREAMMA included removing the statutory bar to PTI eligibility where a defendant obtained a conditional discharge.

After reviewing CREAMMA, the PTI statute, the expungement statute, and considering extrinsic evidence, including the legislative histories of each enactment, the court found no evidence the Legislature intended to repeal, amend, or supersede the bar to PTI eligibility following the completion of a supervisory program and granting of a condition discharge. If, in fact, the Legislature intended such a modification, the remedy should be left to it rather than the court, which declines to insert language that is unsupported by the extant legislative evidence and intent. As a result, the court reversed the trial court decisions granting three defendants' admission into PTI and upheld the trial court's ruling barring the fourth defendant PTI admission.

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[1] L. 2021, c. 16.

6-6-22 CATHERINE PARSELLS VS. BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, ETC. (NEW JERSEY COMMISSIONER OF EDUCATION) (A-3084-19)

A tenured teacher asked the board of education about switching from a full-time role to a part-time position with benefits. The board approved her transfer but failed to inform her of the impact it would have on her tenured status. When the teacher re-applied for a full-time role, she did not get the job. The teacher appealed and an administrative law judge found for the board. However, the Commissioner of Education reversed the initial decision, finding instead that the teacher did not knowingly waive her right to a full-time position because the board had a duty to inform the teacher of the consequences of going part-time under Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan Sch. Dist., 221 N.J. 349 (2015).

The court affirmed the Commissioner's decision and interpretation of Bridgewater-Raritan, which established a school's duty, under N.J.S.A. 18A:16-1.1, to provide notice to replacement teachers concerning the limitations on service time towards tenure. The court held that Bridgewater-Raritan compels school boards to notify in advance a full-time tenured teacher who voluntarily takes a part-time teaching position that she is at risk of not getting her full-time job back.

6-6-22 STATE OF NEW JERSEY VS. QUINTIN D. WATSON (18-02-0234, MIDDLESEX COUNTY AND STATEWIDE) (A-0235-19)

The court affirms defendant's jury trial conviction for second-degree robbery of a bank. The court first addresses defendant's contention that the trial judge erred by permitting the jury to hear testimony that the investigating police officer had been contacted by and "consulted" with another police department immediately before filing criminal charges. Defendant contends that such testimony violated the Confrontation Clause. After reviewing New Jersey's Confrontation Clause case law, the court concludes that the police officer's brief answer to the prosecutor's leading question concerning the consultation with the other police department violated defendant's Sixth Amendment rights because it created an inescapable inference that the other department possessed and shared incriminating evidence about the current offense that was not presented to the jury. The court nonetheless concludes that the constitutional error was harmless beyond a reasonable doubt.

The court next addresses defendant's contention that the trial judge abused his discretion by allowing a police witness to narrate surveillance video as it was being played to the jury. The court surveys the law in New Jersey explaining when a police witness may offer a lay opinion. The court also surveys cases in other jurisdictions that specifically address the admissibility of video narration testimony. The court declines to adopt a rule that would categorically prohibit such testimony, holding instead that a trial court has discretion to permit a witness to offer descriptive comments while a video is being played if the court finds that those specific comments would be helpful to the jury. To assist trial judges in making that determination, the court compiles a list of six factors to consider. In this instance, the court declines to second-guess the trial judge's rulings that sustained some objections to the video narration testimony and overruled others.

The court notes that the use of surveillance video evidence at trial is becoming more common because of the proliferation of government, commercial, and residential surveillance cameras. To improve the process by which the admissibility of police narration testimony is determined, the court recommends a new practice and procedure whereby the trial judge would conduct an in limine hearing when the prosecutor intends to present narration testimony in conjunction with playing a video to the jury. At that hearing, the court should rule upon the specific narration comments that will be permitted and those that will be foreclosed, providing clear instructions for the witness to follow. That in limine

procedure would obviate the need for a series of spontaneous objections in the presence of the jury.

The court also notes that there presently is no model jury instruction pertaining to lay opinion testimony. The court recommends that the Model Jury Charge Committee consider whether it would be appropriate to draft a model instruction specifically tailored to address video narration testimony.

The court next considers defendant's contention, raised for the first time on appeal, that the trial court erred by allowing the bank teller to make an in-court identification after having selected the photograph of another person from a photo array. After reviewing the foundational principles that undergird New Jersey's eyewitness identification jurisprudence, the court rejects defendant's request to categorically ban "first-time" in-court identifications. The court declines to impose new bright-line preconditions on when an eyewitness may identify the perpetrator at trial. Rather, the court retains the rule that the decision to allow an in-court identification is made on a case-by-case basis, mindful that suppression of identification testimony is rarely warranted and that the reliability of an identification and the weight to give to it is generally for the jury to decide with the benefit of cross-examination and appropriate jury instructions.

The court also addresses defendant's contention that the trial court should have revised the model jury charge sua sponte to explain the inherent suggestiveness of the in-court identification procedure. The court concludes that the trial judge did not commit plain error by relying on the current model jury charge. The court acknowledges, however, that the time has come to reexamine that instruction. After reviewing the case law and scientific literature, the court accepts that the inherent suggestiveness of in-court identifications is comparable to the suggestiveness of one-on-one show-up identifications. And yet, the court notes, the model jury instructions pertaining to in-court identifications are less detailed and precise than the model instruction that explains the risk of misidentification in a show-up procedure. The court recommends that the Model Jury Charge Committee consider revising the model instruction pertaining to in-court identifications, for example, by incorporating language currently used to explain the suggestiveness of one-on-one show-up identifications.

6-3-22 LOUIS RIPP VS. COUNTY OF HUDSON (DIVISION OF WORKERS' COMPENSATION) (A-2972-20)

N.J.S.A. 34:15-28.2(a) permits a workers' compensation judge to enforce a court order, statute or regulation by imposing "an additional assessment not to exceed 25% of moneys due for unreasonable payment delay." In this case, the parties settled petitioner's total disability claim, and, the judge imposed the maximum assessment when the county was sixteen days late in making payment required under the order.

The court reversed, concluding the judge erred as a matter of law because she considered litigation delays occurring prior to the settlement and entry of the order for payment in fashioning the award. The court also concluded the judge mistakenly exercised her discretion regarding the amount of the award, because she imposed the maximum additional assessment for a relatively short delay.

6-3-22 CHERYL ROOTH VS. BOARD OF TRUSTEES, ET AL. (PUBLIC EMPLOYEES' RETIREMENT SYSTEM) (A-2378-20)

A former public school bus driver appealed from a PERS final agency decision declaring her ineligible to file an accidental disability retirement application when separation from service was based upon an irrevocable resignation, not related to a disability, in accordance with N.J.A.C. 17:1-6.4.

On appeal, the court was required to determine whether a school employee, who irrevocably resigned while an employment grievance was pending, could file an application for ordinary or accidental disability retirement benefits, when the charges underlying the grievance did not relate to a disability. For the reasons stated in the court's opinion, it concluded that , in the first instance, a public school employee's irrevocable resignation from employment rendered the school employee ineligible for ordinary or accidental retirement benefits because the school employee's separation from service was based upon a resolution of the pending grievance, and not an alleged disability.

6-2-22 JESSE WOLOSKY VS. FREDON TOWNSHIP, ET AL. (TAX COURT OF NEW JERSEY) (A-2382-19)

The court vacates an order of the Tax Court awarding Green Township, pursuant to the frivolous litigation statute, N.J.S.A. 2A:15-59.1, "$45,589.35 in counsel fees and costs for its defense of [defendant Penny] Holenstein"[1] in her official capacity as Municipal Tax Assessor. Wolosky v. Fredon Twp., 31 N.J. Tax 373, 405 (Tax 2019). Because the motion for sanctions was filed 679 days after the entry of a final judgment, and after this court affirmed the dismissal of plaintiff's 2016 complaint challenging a property tax assessment, Wolosky v. Fredon Twp., No. A 1980-16 (App. Div. July 24, 2018), we conclude the Tax Court mistakenly exercised its discretion when it reopened the case and considered the motions as timely filed. We therefore vacate the award of sanctions in favor of Green Township.

Plaintiff also appeals from an order denying his motion for counsel fees against defendant Fredon Township. Because the record does not support a finding that Fredon Township acted frivolously, we affirm the denial of plaintiff's motion for sanctions.

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[1] We refer to Penny Holenstein individually as Holenstein, and refer to Michael and Penny Holenstein, collectively, as the Holensteins.

6-2-22 KEVIN MORRIS, ET AL. VS. RUTGERS-NEWARK UNIVERSITY, ET AL. (L-3280-17, ESSEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-0582-21/A-0583-21)

The plaintiffs whose claims are implicated in these interlocutory cross-appeals were members of defendant Rutgers-Newark's 2014-15 women's basketball team. Four plaintiffs describe themselves as African-American and gay, one as African-American and bisexual, and the sixth as Hispanic and heterosexual. They claim they were retaliated against and subjected to a hostile environment in violation of the Law Against Discrimination by defendants because, among other things, their interim coach, defendant William Zasowski, referred to them as "dykes," and "nappy-headed sisters," and asked the team captain for the names of the team members who were gay and, when they complained and sought a school investigation, defendants retaliated. The trial judge granted in part and denied in part defendants' summary judgment motion.

The court concluded that the judge did not err in denying summary judgment on plaintiffs' hostile environment claims and did not err in denying summary judgment on the retaliation claims of two plaintiffs; the court held, however, that the judge erred in granting summary judgment on the retaliation claims of the other four plaintiffs. The court held that both the hostile environment and retaliation claims should be considered, not individually as argued by defendants, but in light of the fact that plaintiffs were members of small, tightly-knit group and that each plaintiff could rely on the experiences of the others even if they did not directly experience or witness defendants' alleged discriminatory comments and epithets, thereby distinguishing Godfrey v. Princeton Theological Seminary, 196 N.J. 178 (2008) in this setting.

5-31-22 CHRISTINE SAVAGE VS. TOWNSHIP OF NEPTUNE, NEPTUNE TOWNSHIP POLICE, ET AL. (L-1528-16, MONMOUTH COUNTY AND STATEWIDE) (A-1415-20)

Plaintiff Christine Savage, a former sergeant with defendant Township of Neptune Police Department, appealed from an order enforcing a "non-disparagement provision" in a settlement agreement. In the underlying employment discrimination case, plaintiff alleged defendants engaged in continuing sexual discrimination, harassment, and unlawful retaliation, in violation of New Jersey's Law Against Discrimination (LAD) N.J.S.A. 10:5-1 to -50, the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, and Article I, Paragraph 6 of the New Jersey Constitution. On July 23, 2020, the parties settled the employment discrimination action and entered into an agreement, which included a non-disparagement provision, but not a non-disclosure provision.

Defendants Michael J. Bascom, the former Police Director for Neptune Township, and James M. Hunt, the Chief of the Neptune Police Department, filed a motion in September 2020, to enforce the settlement, arguing that plaintiff violated the non-disparagement provision during an interview with a television news reporter that aired on Channel 4, NBC news on August 11, 2020. The trial judge granted defendants' motion, finding that N.J.S.A. 10:5-12.8(a) only barred confidentiality or non-disclosure agreements (also referred to as NDAs), and that plaintiff violated the non-disparagement provision in the agreement when she commented during the televised interview that the Neptune Police Department had not changed, and it was still a "good old boys club." The judge subsequently awarded defendants $4,917.50 in counsel fees and costs for breach of the non-disparagement clause.

On appeal, plaintiff argues that the judge erred in granting the motion because the non-disparagement provision was against public policy and unenforceable under N.J.S.A. 10:5-12.8(a), and thus the judge also erred in denying her cross-motion for counsel fees under N.J.S.A. 10:5-12.9. In the alternative, plaintiff argues that even if the non-disparagement provision were enforceable, by adjudicating this dispute as a motion to enforce, rather than as a separate breach of contract action, the judge deprived her of her right to have a jury decide the disputed facts.

The court reversed the order granting defendants' motion to enforce the settlement agreement and held that although the terms of the non-disparagement provision are enforceable and the judge properly adjudicated this matter by motion, the judge nonetheless erred in finding that plaintiff violated the terms of the non-disparagement provision during the televised interview. Because defendants' enforcement motion was not successful, the court

vacated the judge's award of $4,917.50 in counsel fees to defendants. However, the court affirmed the judge's order denying plaintiff's cross-motion for counsel fees and costs under N.J.S.A. 10:5-12.9.

5-20-22 HEATHER J. MCVEY VS. ATLANTICARE MEDICAL SYSTEM INCORPORATED, ET AL. (L-3186-20, ATLANTIC COUNTY AND STATEWIDE) (A-0737-20)

The issue raised in this appeal is whether the First Amendment or Article I, Paragraph 6 of the New Jersey Constitution prevents a private employer from terminating one of its at-will employees for posting racially insensitive comments about the Black Lives Matter movement on her personal Facebook account. Defendants AtlantiCare Medical System Incorporated and Geisinger Health System Incorporated (AtlantiCare) employed plaintiff Heather J. McVey as a Corporate Director of Customer Service. During the height of the nationwide protests concerning the murder of George Floyd by police in Minnesota, McVey posted that she found the phrase "Black Lives Matter" to be "racist," believed the Black Lives Matter movement "causes segregation," and asserted that Black citizens were "killing themselves." McVey's Facebook profile prominently stated that she was an AtlantiCare Corporate Director. After it discovered the comments, AtlantiCare fired McVey and she filed a complaint alleging wrongful discharge. The court concluded that the First Amendment and Article I, Paragraph 6 of the New Jersey Constitution did not bar a private employer from terminating an at-will employee under the circumstances presented in this case, and held that the trial court properly dismissed McVey's complaint.

5-18-22 STATE OF NEW JERSEY VS. YVES M. MARCELLUS (16-11-0791, UNION COUNTY AND STATEWIDE) (A-4102-19)

Defendant appealed the denial of his motion to suppress evidence taken by police from an opaque bag and closed shoebox located in his mother's room in a home owned by his aunt; his aunt had previously barred defendant from the home. Police did not seek a warrant but instead sought and obtained the consent of defendant's aunt to search her home. No effort was made to obtain defendant's mother's consent to search her room, even though the trial judge found she was a tenant, because she spoke only Creole. Notwithstanding questions about the validity of the consent to search defendant's mother's room, the court concluded in reversing that there was no evidence to support a finding that police had a reasonably objective belief that either defendant's aunt or his mother had the authority to consent to a search of the opaque bag and closed shoebox because the record revealed this property belonged only to defendant, who did not consent. That defendant had no possessory interest or reasonable expectation of privacy in the premises where the closed containers were found was irrelevant to the analysis about the validity of the search of the containers.

5-18-22 C.E., ET AL. VS. ELIZABETH PUBLIC SCHOOL DISTRICT, ET AL. (L-2231-15, UNION COUNTY AND STATEWIDE) (A-0173-20)

Plaintiffs, the parents of a special needs child, sued defendants to enforce an Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, request. The OPRA request sought all settlements entered into by the school board before the New Jersey Office of Administrative Law (OAL) in petitions filed by or on behalf of students subject to an individualized education program or an accommodation plan.

The court affirmed the trial court's decision to enforce the OPRA request and award plaintiffs' attorney's fees. The court concludes that pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400(d)(1)(A), and state regulations implementing the IDEA, settlements entered before the OAL are public records and defendants were required to disclose them after redacting personally identifiable information.

5-16-22 JACOB MATULLO VS. SKYZONE TRAMPOLINE PARK, ET AL. (L-3117-20, OCEAN COUNTY AND STATEWIDE) (A-2813-20)

In this appeal, the court addresses the enforceability of an arbitration provision in an agreement signed by a fifteen-year-old minor to gain access to a commercial trampoline park. The court holds that the arbitration provision is not enforceable because the minor had the right to disaffirm the agreement and the limited exceptions to that right did not apply. Accordingly, the court reverses and vacates the order granting defendants' motion to compel arbitration of plaintiff's claims and dismissing his complaint with prejudice. The matter is remanded with instruction that plaintiff's complaint be reinstated so that his claims can be litigated in the Law Division.

5-16-22 LOUIE PEREZ VS. SKY ZONE, LLC, ET AL. (L-3464-20, UNION COUNTY AND STATEWIDE) (A-1861-20)

The court holds that an adult can waive his or her right to bring claims in a court and can be compelled to arbitrate personal injury claims when the adult had reviewed a clearly worded arbitration provision before entering a commercial recreational park.

The court also remands for entry of a new order because the trial court erred in dismissing the Law Division action. Instead of dismissing the action, the trial court should have stayed the Law Division action, including the claims against defendants who are not parties to the arbitration provision.

5-16-22 NICOLE HOOVER VS. MERRICK WETZLER, M.D., ET AL. (L-2395-20, CAMDEN COUNTY AND STATEWIDE) (A-2688-20)

In this nursing malpractice case, plaintiff Nicole Hoover appeals from an April 1, 2021 order denying reconsideration of a February 19, 2021 order that dismissed her claims with prejudice for failure to provide an appropriate Affidavit of Merit (AOM) against nurse/defendant Nicole Baughman.

After a total-knee replacement surgery, plaintiff sued Wexler, her orthopedic surgeon; defendant, a Registered Nurse First Assistant who was assisting Wexler in the surgery; and others, alleging negligence in the performance of the surgery. Shortly after filing suit, plaintiff filed and served a single AOM applicable to all defendants. The AOM was executed by Dr. Robert Tonks, M.D., a board-certified orthopedic surgeon who has experience performing total knee replacement surgery. The court granted defendant's motion to dismiss, determining that the AOM statute required plaintiff to submit an AOM from either a registered nurse or a physician who is familiar with the nursing standard of care and protocols of nurses.

The court finds that the like-credentialed requirements of the Patients First Act, N.J.S.A. 2A:53-41, applies only to physicians and not to other licensed professionals under the AOM statute, N.J.S.A. 2A:53A-26 to -29. See Meehan v. Antonellis, 226 N.J. 216 (2016) (holding section 41 applies only to physicians and "[t]here is simply no textual support for the application of the like-qualified requirements of section 41" to actions against other licensed professionals under section 27). Because there is no heightened "like-for-like" requirement that prohibited Tonks from authoring an AOM against defendant, he need only have satisfied N.J.S.A. 2A:53A-27's requirement that he "have particular expertise in the general area or specialty involved in the action."

The court concludes that Tonks is a qualified affiant under the statute. Defendant does not dispute Tonks' expertise in knee-replacement surgery. She concedes she was a member of the operative team and that she actively assisted in the surgery as a perioperative registered nurse. Notably, the central allegation against defendant and Wexler is identical: one or both negligently severed plaintiff's popliteal artery and vein. Under these circumstances, the court finds that Tonks is an expert who satisfies section 27 of the AOM statute and that plaintiff need not have filed an AOM from a registered nurse. Whether and to what extent Tonks may serve as an expert against defendant at trial must be fleshed out in discovery, and the court expresses no opinion on that subject.

Accordingly, the court

reverses and remands for further proceedings consistent with the court's opinion.

5-16-22 KNIGHTBROOK INSURANCE COMPANY VS. CAROLINA TANDAZO-CALOPINA, ET AL. (L-1056-20, ESSEX COUNTY AND STATEWIDE) (A-1115-20)

The court clarified when an insurance company may be relieved of providing insurance coverage to an insured who refuses to cooperate in defending a personal injury victim's claim pursuant to the terms of the insurance policy. An insurance company's satisfaction of either of the two variables identified in Hager v. Gonsalves, 398 N.J. Super. 529 (App. Div. 2008), constitutes appreciable prejudice sufficient to forfeit any obligation on the part of an insurance company to provide coverage to an insured.

Under the first variable, a trial court must determine whether an insurer's substantial rights have been irretrievably lost as a result of the insured's breach of the insurance policy. Under the second variable, a trial court must examine an insurer's likelihood of success in defending against an accident victim's claim had the insured not failed to cooperate.

In analyzing the appreciable prejudice variables, the court held the first variable applied to an irretrievable loss of substantial rights related to coverage determinations by an insurer. To conclude otherwise would render the second appreciable prejudice variable redundant. The two variables are intended to address different aspects of appreciable prejudice.

5-12-22 METRO MARKETING, LLC, ET AL. VS. NATIONWIDE VEHICLE ASSURANCE, INC., ET AL. (L-2090-16, OCEAN COUNTY AND STATEWIDE) (A-3907-18)

Plaintiffs in this case are affiliated companies engaged in selling extended service contracts 31 to motor vehicle owners over the telephone. They claim that defendants hired away key managers and more than forty members of their sales force, siphoned customers, and misappropriated alleged trade secrets.

Relying upon several legal theories, plaintiffs filed suit to recover damages and obtain injunctive relief. In a series of orders, the motion judge granted summary judgment to defendants, dismissing all of plaintiffs' claims now at issue on appeal. In ruling on summary judgment, the motion judge disregarded two certifications submitted by plaintiffs from a codefendant who "switched sides" and became employed by plaintiffs after his deposition.

This court holds that the "sham affidavit" doctrine adopted by the Supreme Court in Shelcusky v. Garjulio, 172 N.J. 185, 199-202 (2002), can extend to a "side switching" situation. In particular, the doctrine can apply where, as here: (1) a codefendant is deposed, (2) that deponent thereafter obtains a job with the plaintiff, (3) the deponent then aids his new employer by signing certifications recanting his deposition testimony, and (4) the plaintiff offers those certifications in opposing summary judgment motions by the other defendants.

Applying the sham affidavit doctrine to this record, the court rules the motion judge appropriately disregarded the side-switching employee's certifications because the employee failed, as Shelcusky requires, to "reasonably explain[]" why he "patently and sharply" contradicted his earlier deposition testimony. Id. at 201.

However, the court rules the judge erred in rejecting as evidence a recorded telephone conversation of a different codefendant who was also rehired by one of plaintiffs' companies after his deposition.

Because the recording should have been considered as evidence weighing against defendants' summary judgment motion, the court remands this matter to allow the Law Division in the first instance to reconsider its dismissal of the lawsuit in its entirety.

5-9-22 STATE OF NEW JERSEY VS. ANDREW N. LAVRIK (19-05-0566, BERGEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1540-20)

In this case of first impression, the court considered whether a victim in a criminal matter has standing to appeal from a trial court order granting defendant's motion for a civil reservation, where the victim neither moved to intervene before the trial court nor this court, and the parties to the underlying action did not appeal. Because the victim was aggrieved by the trial court's order, and the civil reservation was neither raised during plea negotiations nor made a condition of defendant's guilty plea, the court held the victim has standing to appeal.

However, the court's decision was subject to certain caveats. The court held the victim should have moved to intervene for leave to appeal and file a brief before this court. Because the court would have granted the victim's motion and considered her brief on the merits, the court concluded the victim's procedural missteps were not fatal in this case.

As for the merits of the victim's claims, the court concluded the trial court's decision was procedurally and substantively flawed. Because it is unclear from the record evidence whether defendant faces a "precarious financial situation" absent a civil reservation, the court disagreed with the trial court's decision that defendant satisfied the requisite "good cause" standard for entry of the civil reservation order.

Moreover, defendant's admission to the pretrial intervention (PTI)program was conditioned on his guilty plea. Until defendant completes – or is terminated from – the PTI program, his guilty plea is considered "inactive" under the PTI statute and the applicable Attorney General guidelines. Thus, the order under review was premature.

The court therefore vacated the order under review and remanded for further proceedings.

5-6-22 SHARYN PRIMMER VS. MICHAEL HARRISON (FM-18-0709-19, SOMERSET COUNTY AND STATEWIDE) (A-1590-20)

Defendant appealed from the trial court's finding that the parties' written palimony agreement was valid because, among other reasons, the court found both parties were represented by counsel. While this appeal was pending, the Supreme Court decided Moynihan v. Lynch, 250 N.J. 60 (2022) and struck down as unconstitutional a provision of the Statute of Frauds, N.J.S.A. 25:1-5(h), requiring parties to a palimony agreement receive the advice of counsel for such agreements to be valid. The court granted defendant's request for supplemental briefing as to whether Moynihan applied retroactively. The court affirms the trial court's findings upholding the parties' agreement and concludes Moynihan applies retroactively because of the constitutional dimensions of the Supreme Court's holding, which also furthers our State's jurisprudence encouraging the settlement of disputes in family matters.

5-3-22 T.B., AN INFANT BY HIS GUARDIAN AD LITEM, E.B., ET AL. VS. ALEXIS NOVIA, ET AL. (L-8651-19, MIDDLESEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-1405-21/A-1406-21)

This case involved a high school student injured when struck by another defendant's car while walking home from school. Because the student lived less than two and a half miles from his high school, he was not eligible for mandatory busing under N.J.S.A. 18A:39-1 and, therefore, was required to walk to and from school.

The Board adopted various policies and procedures related to student busing transportation. The Board also adopted procedures for parents seeking to contest the designation of a route as hazardous. The procedure required the parent to contact the Board's transportation supervisor to discuss the route designation and any transportation issues.

Following these policies and applying its adopted criteria, the Board determined the route taken by this student to and from school on the day of the accident was non-hazardous for high school students.

Sometime between 2010 and 2016, the Township assigned a traffic safety officer to work with the Board in evaluating the safety of various student walking routes. Due to cuts to the Board's school budget, the Board asked the Township's traffic safety officer to determine whether busing costs could be reduced. The Township's traffic safety officer determined the route travelled by this student on the day of the accident to be dangerous for students of any age, including high school students, and so advised the Board. The Board denied receiving such a recommendation.

The student and his parents filed suit alleging negligence against the Board, the Township, and the driver. The Board and the Township moved for summary judgment.

The court affirmed the denial of summary judgment to the Board. The court concluded a jury would have to resolve certain factual disputes regarding the Board's duty to plaintiffs, if any, and whether the Board breached such duties. The court identified the following factual issues regarding the Board's conduct: whether the Board breached a duty to plaintiffs by not adhering to its policies and procedures regarding the designation of hazardous routes; whether the Board violated its procedure governing situations where a parent seeks to contest the designation of a hazardous route or other busing issues; and whether the Board should have reevaluated the specific road travelled as a matter of general practice or based on information provided by the Township's traffic safety officer.

Additionally, the court determined a jury must assess whether the Board's failure to undertake these actions constituted a ministerial act, which is not entitled to immunity, or a

discretionary act, which is entitled to immunity. The court agreed the motion judge properly denied summary judgment to the Board because there were factual disputes regarding whether the Board's actions or inactions related to the student's transportation were reasonable under the circumstances after considering the Board's obligations under its own transportation policies.

The court reversed the denial of summary judgment to the Township. Under N.J.S.A. 18A:39-1.5(b), the Township had no duty beyond working in conjunction with the Board to determine criteria for the designation of a hazardous route and the Board admitted the Township satisfied its legal duty under the statute. The Board also conceded it made the decisions related to student transportation and designation of hazardous routes without input or participation by the Township.

5-3-22 KATHLEEN DIFIORE VS. TOMO PEZIC, ET AL. DORA DELEON VS. THE ACHILLES FOOT AND ANKLE GROUP, ET AL. JORGE REMACHE-ROBALINO VS. NADER BOULOS, M.D., ET AL. (L-0123-19, L-2412-20, and L-1929-19, ESSEX AND HUDSON COUNTIES AND STATEWIDE) (CONSOLIDATED) (A-2826-20/A-0367-21/A-1331-21)

These three consolidated appeals in personal injury cases pose related but distinct questions involving the application of Rule 4:19. The appeals concern when, if ever, a plaintiff with alleged cognitive limitations, psychological impairments or language barriers can be accompanied by a third party to a defense medical examination ("DME"), or require that the examination be video or audio recorded in order to preserve objective evidence of what occurred during the examination.

With the input of the parties' counsel and amici, the court revisits and updates the opinion from twenty-four years ago in B.D. v. Carley, 307 N.J. Super. 259 (App. Div. 1998) (authorizing the "unobtrusive" audio recording of a neuropsychological DME of a plaintiff who claimed in her civil action that she was suffering emotional distress). The court also considers 2016 Policy Statement of the American Board of Professional Neuropsychology disfavoring the third-party observation and recording of DMEs and urging practitioners to refuse such conditions except where required by law.

In the absence of more specific guidance within the present text of Rule 4:19, the court adopts adopt the following holdings.

First, a disagreement over whether to permit third-party observation or recording of a DME shall be evaluated by trial judges on a case-by-case basis,with no absolute prohibitions or entitlements.

Second, despite contrary language in Carley, it shall be the plaintiff's burden to justify to the court that third-party presence or recording, or both, is appropriate in a particular case.

Third, given advances in technology since 1998, the range of options should include video recording, using a fixed camera that captures the actions and words of both the examiner and the plaintiff.

Fourth, to the extent that examiners hired by the defense are concerned that a third-party observer or a recording might reveal alleged proprietary information about the content of the exam, the parties shall cooperate to enter into a protective order, so that such information is solely used for the purposes of the case and not otherwise divulged.

Fifth, if the court permits a third party to attend the DME, it shall impose reasonable conditions to prevent the observer from interacting with the plaintiff or otherwise interfering with the exam.

Sixth, if a foreign or sign language interpreter is needed for the exam (as is the case in two

of the appeals before us) the examiner shall utilize a neutral interpreter agreed upon by the parties or, if such agreement is not attained, an interpreter selected by the court.

The three cases are accordingly remanded to the respective trial courts to reconsider the conditions of each DME, consistent with the guidance expressed in this opinion.

5-2-22 STATE OF NEW JERSEY VS. A.M. (11-02-0201, MORRIS COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-3010-20)

A.M. suffers from end-stage multiple sclerosis, a progressive condition that renders her physically incapable of conducting any activities of daily life and requires twenty-four-hour daily medical care. After serving eight years of her forty-year sentence for the murder of her husband, she petitioned for release on parole to a medical facility pursuant to the Compassionate Release Act (CRA), N.J.S.A. 30:4-123.51e.

Subsection (f)(1) of the CRA authorizes a court to grant a petition for release on parole where there is clear and convincing evidence the inmate suffers from a "permanent physical incapacity" rendering the inmate "permanently physically incapable of committing a crime if released" and the conditions "under which the inmate would be released would not pose a threat to public safety." N.J.S.A. 30:4-123.51e(f)(1). Here, the motion court conducted hearings, determined A.M. satisfied the permanent physical incapacity and public safety requirements, but denied her petition based on its conclusion N.J.S.A. 30:4-123.51e(f)(1) vested it with discretion to do so.

The court reverses the denial of A.M.'s petition for compassionate release parole, concluding the plain language of the CRA does not vest a court with discretion to deny a petition where it otherwise determines there is clear and convincing evidence satisfying the permanent physical capacity and public safety criteria for release set forth in N.J.S.A. 30:4-123.51e(f)(1).

4-29-22 STATE OF NEW JERSEY VS. ANTHONY D. KILLE (18-11-0871, GLOUCESTER COUNTY AND STATEWIDE) (A-1049-19)

Although the court affirmed defendant's aggravated manslaughter conviction and sentence, it reversed defendant's convictions for second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1), and second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1), based on errors in the judge's final charge.

Despite charging self-defense, because he concluded defendant's return to the scene with a gun was "unreasonable," the judge refused to provide instructions on the unlawful purpose count that explains the use of a firearm for a "protective purpose." However, the model charge clearly explains the difference between self-defense, which requires both an honest and reasonable belief in the need to use force, and the use of a weapon for a protective purpose, which only requires an honest belief, not a reasonable one. See State v. Williams, 168 N.J. 323, 334–35 (2001) (explaining the difference between the two concepts).

Regarding the unlawful possession count, the judge failed to orally provide instructions regarding the permissible inference a jury may draw from the lack of any permit in defendant's name in the State Police database. Although the written instructions the judge provided included that portion of the model charge, the court held State v. Lindsey, 245 N.J. Super. 466, 475 (App. Div. 1991), and the current iteration of Rule 1:8-8(b)(2), do not relieve the judge of the obligation to orally provide instructions and not rely on copies of the written charge given to the jury.

4-28-22 STATE OF NEW JERSEY VS. S.J.C. (21-06-1120, ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1162-21)

By leave granted, defendant appeals from a trial court order, denying his motion to dismiss an indictment that charges him with two counts of first-degree aggravated sexual assault by penile-vaginal penetration, and two counts of second-degree endangering the welfare of a child. The indictment was returned four months after the East Orange Police Department issued complaint-warrants; seven years after the alleged victim reported the crimes to the police; and fourteen years after the last incident allegedly occurred. The alleged victim, who was five and six years old at the time of the alleged incidents, is defendant's biological daughter.

On appeal, as he did before the motion judge, defendant contends his right to due process was violated in three respects. Initially, defendant maintains the State's delay in presenting the case to the grand jury violated his right to due process under the Fourteenth Amendment and, as such, the motion judge misinterpreted the standard enunciated by the Supreme Court in State v. Townsend, 186 N.J. 473 (2006). Secondly, defendant claims the indictment, and the State's ensuing response to his bill of particulars, failed to provide sufficient notice of the dates and locations of the sexual assaults under the criteria established in State in the Interest of K.A.W., 104 N.J. 112 (1986). Finally, defendant asserts the cumulative effect of the State's delayed prosecution and its vague indictment warrant dismissal under the fundamental fairness doctrine.

Because the court concludes defendant failed to demonstrate "actual prejudice" under the second Townsend prong, the court declines to address defendant's assertion under the first Townsend prong that the judge erred in requiring him to establish the State acted in bad faith. The court concludes defendant's due process rights were not violated by the State's delay in seeking the indictment and affirms the motion judge's decision in that regard. However, the court clarifies the burden of proof required under the first Townsend prong.

Turning to the sufficiency of the indictment under the K.A.W. factors, the court cannot discern from the record on appeal whether the State discharged its obligation to narrow the dates of the alleged incidents. Notably, the record is devoid of any evidence that the State attempted to question the victim about life events occurring around the time of the two alleged incidents. Accordingly, the court

remanded the matter for the State to furnish the motion judge with documentary evidence of its efforts, if any, to narrow the time frame alleged in its responses to defendant's bill of particulars.

In view of its remand order, the court declined to address defendant's fundamental fairness argument.

4-27-22 APPLIED UNDERWRITERS, ET AL. VS. NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, ET AL. (L-0047-20, MERCER COUNTY AND STATEWIDE) (A-0653-20)

The court resolves the jurisdictional question of whether the Commissioner of the Department of Banking and Insurance ("DOBI") may pursue an administrative action against two out-of-state companies and their two licensed New Jersey affiliates for engaging in alleged improper insurancerelated practices in this State—or whether the Commissioner must instead rely on the Attorney General to bring a lawsuit against those companies in the Superior Court.

Specifically, the court interprets N.J.S.A. 17:32-20 ("Section 20"), which the Legislature enacted in 1968 as part of the Non-Admitted Insurers Act, N.J.S.A. 17:32-16 to -22. In pertinent part, Section 20 reads:

> Whenever it shall appear to the commissioner that any insurer, or any employee, agent, promotional medium, or other representative thereof, has violated, is violating, or is about to violate the provisions of this act, the Attorney General, upon the request of the commissioner, shall institute a civil action in the Superior Court for injunctive relief and for such other relief as may be appropriate under the circumstances.
>
> [N.J.S.A. 17:32-20 (emphasis added).]

The court holds that Section 20 does not restrict the Commissioner to the path of a Superior Court action in this circumstance. Based on the text, legislative history, and public policies of the statute as a whole, as well as principles of primary jurisdiction, the Commissioner has the authority to choose to pursue an administrative complaint against the companies instead of a lawsuit brought by the Attorney General.

Consequently, the court remands this matter to DOBI and directs that a previously stayed hearing in the Office of Administrative Law be reactivated.

4-26-22 STATE OF NEW JERSEY VS. STEPHEN A. ZADROGA (18-07-0550, HUDSON COUNTY AND STATEWIDE) (A-4432-19)

This criminal prosecution arises out of a head-on collision that killed a passenger in defendant's car. Defendant had driven the car into the lane of oncoming traffic, and an accident reconstruction expert estimated he had been speeding at over 80 mph in a 25 mph zone at the moment of impact. His blood sample was extracted at a hospital later that day, yielding apparent test results from the State Police laboratory of a blood alcohol content (BAC) well over the legal limit.

A grand jury charged defendant with vehicular homicide, drunk driving, and other offenses. After seven witnesses for the State had testified, a testifying nurse revealed that the State had inadvertently misattributed to defendant the blood sample of a deceased hospital patient, which the hospital had mistakenly released, and which the State then failed to authenticate. In addition, it came to light that defendant's own blood sample had been irretrievably lost.

The trial judge declared a mistrial and found the State had acted in bad faith in its misattribution of the blood samples. The judge denied defendant's motion to dismiss all charges with prejudice, but did dismiss with prejudice the three counts of the indictment that hinged on the BAC level. Defendant appealed; the State did not cross-appeal the judge's finding of bad faith.

The court holds the proper remedy in this unusual situation is to re-present the matter to a new grand jury, solely based on the reckless driving allegations, without proof or contentions by the State of defendant's intoxication or impairment. The court rejects defendant's claim of a double jeopardy violation, as the mistrial was justified on the grounds of manifest necessity. The court also rejects defendant's argument that it is fundamentally unfair to maintain any charges against him.

4-25-22 A.A.R. VS. J.R.C. (FV-06-0937-21, CUMBERLAND COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-2804-20)

Defendant appeals from a final restraining order (FRO) entered under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, based on a predicate act of assault, N.J.S.A. 2C:12-1. The court agrees with defendant's argument that procedural due process requires trial judges, before trial, inform defendants in domestic violence proceedings, both of the serious consequences resulting from the entry of an FRO and of their right to retain legal counsel. Because the judge in this case did not advise defendant of his legal exposure or of his due process right to counsel, the court vacates the order and remands for a new trial.

4-25-22 STATE OF NEW JERSEY VS. THOMAS ZINGIS (20-04, OCEAN COUNTY AND STATEWIDE) (A-0905-20)

Defendant appeals his conviction after a trial de novo in the Law Division of driving while intoxicated (DWI), contrary to N.J.S.A. 39:4-50. He also appeals his sentence, arguing the court erred when it considered his conviction to be a second DWI offense for sentencing purposes.

The court affirms defendant's conviction. However, because the State did not prove beyond a reasonable doubt that his prior DWI conviction was not based on an Alcotest breath sample test result rendered inadmissible by the holding in State v. Cassidy, 235 N.J. 482 (2018), the court vacates his sentence, and remands for resentencing as a first offense.

Cassidy arose from the misconduct of State Trooper Marc Dennis who falsified Alcotest calibration records over a number of years. The Cassidy Court held that breath sample test results obtained on Alcotest instruments calibrated by Dennis are inadmissible, calling into question the validity of tens of thousands of DWI convictions based on such results. The Cassidy Court directed the State to provide notice to all defendants whose prior convictions were subject to challenge because they were based on test results from Alcotest instruments calibrated by Dennis. The State subsequently compiled a list of defendants who received notice as directed by Cassidy.

In the present appeal, defendant was convicted of DWI during the time Dennis was falsely certifying Alcotest calibration records. At sentencin g for the present offense, defendant argued the State was required to produce the calibration records from his prior conviction to prove that Dennis was not involved in his conviction. The trial court agreed with the State's argument that the absence of defendant's name on the list of defendants who were sent a Cassidy notice was sufficient proof that defendant's prior conviction was not tainted by Dennis.

The court held that in the absence of evidence of how the Cassidy list was compiled and that it definitively includes all prior DWI convictions that relied on test results from Alcotest instruments calibrated by Dennis, the absence of a defendant's name on the list was insufficient proof that the defendant's prior conviction was not invalidated by Cassidy. The court made a similar holding with respect to the State's assertion, without supporting evidence, that Dennis was not involved in any DWI convictions that

arose out of Camden County. The court noted that the burden of Dennis's malfeasance as a law enforcement officer falls on the State, which cannot escape on the grounds of convenience and expediency its obligation to prove that a prior conviction on which it relies for an enhanced sentence in a subsequent prosecution was not tainted by his misconduct.

4-19-22 STATE OF NEW JERSEY VS. KARL SMITH (18-01-0178, CAMDEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-5557-17)

Defendant was charged with sexual crimes committed against two child victims, one of whom was his daughter and the other the daughter of defendant's girlfriend. The judge denied defendant's motion for severance, accepting the State's proffer that joinder was permitted under Rule 3:7-6, because evidence regarding both victims would be admissible pursuant to Rule 404(b) if the two sets of crimes were tried separately. See State v. Chenique-Puey, 145 N.J. 334, 341 (1996) ("If the evidence would be admissible at both trials, then the trial court may consolidate the charges because 'a defendant will not suffer any more prejudice in a joint trial than he would in separate trials.'" (quoting State v. Coruzzi, 189 N.J. Super. 273, 299 (App. Div. 1983)). The court reversed, concluding the judge misapplied Rule 404(b) in denying the severance motion.

The court also questioned the continued vitality of the Chenique-Puey analytic paradigm, noting that unlike situations where the State seeks to introduce evidence of uncharged crimes at trial, and must meet Cofield's rigorous four-prong test at a N.J.R.E. 104 hearing, a defendant's severance motion in these circumstances is most often decided solely on the State's proffer. In this case, the State's proffer in opposition to defendant's motion misstated some evidence and included evidence never adduced, or even admissible, at trial.

The court also traced some historical background regarding Rule 3:7-6, proposed revisions to the Rule never adopted by our Supreme Court, and case law interpreting the Rule in the context of severance motions.

4-18-22 STATE OF NEW JERSEY VS. C.J.L. (19-07-1053, MONMOUTH COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1052-21)

Defendant's bedroom was searched pursuant to a warrant after law enforcement received cyber tips about emails and Instagram messages containing images of child endangerment which were linked to an email address which incorporated defendant's last name and first initial. Among other devices, officers retrieved a cell phone from defendant's bedroom, but were unable to access the cell phone because it was passcode protected. The State filed a motion to compel production of the passcode by defendant. The Law Division denied the motion, finding the State failed to establish defendant's ownership of the phone. The State appealed.

The court held that the motion court erred by misapplying the foregone conclusion standard set forth in State v. Andrews, 243 N.J. 447 (2020), which established a testimonial exception to a defendant's right against self - incrimination under the United States Constitution as well as in New Jersey statutory and common-law. The court also held that the motion court erred by overlooking facts in the record which were probative on the issue of defendant's ownership or possession of the cell phone.

4-18-22 STATE OF NEW JERSEY VS. STEVE COTTO (16-12-3213, ESSEX COUNTY AND STATEWIDE) (A-4063-18)

The court in this case interprets and applies the New Jersey Supreme Court's recent decision in State v. Sims, __ N.J. __ (2022). Defendant appeals from his jury trial conviction for aggravated arson. During police investigation of a nightclub fire, detectives determined that defendant was a suspect. After discovering that he had open traffic warrants, the detectives arrested him on authority of those warrants even though their true purpose was to question him about the nightclub fire. After defendant waived his Miranda[1] rights and before posing any substantive questions, the detectives informed him they wanted to talk about the nightclub, not the traffic warrants. Defendant contends that his incriminating statements should have been suppressed because the interrogating detectives did not inform him during the Miranda waiver colloquy that he would be charged with aggravated arson.

In Sims, the majority re-affirmed that, when administering Miranda warnings, police are not required to advise an interrogee that he or she is suspected of committing a particular crime not yet charged by an arrest or complaint-warrant. The court highlights that while the majority in Sims rejected any such per se suspect-notification rule, it expressly retained the principle that the failure by police interrogators to disclose a defendant's suspect status can be a relevant factor as part of the totality of the circumstances. The court stresses, moreover, that the totality-of-the-circumstances analytical paradigm is rigorous because under New Jersey law, the State bears the burden of proving that a defendant knowingly, intelligently, and voluntarily waived his or her Fifth Amendment rights beyond a reasonable doubt. The court explains that it is the formidable proof-beyond-a-reasonable doubt standard, rather than a bright-line suspect notification requirement, that safeguards the Fifth Amendment rights of interrogees who have not been formally charged with the crime that is the subject-matter of the custodial interrogation.

The court also reaffirms that in applying the totality-of-the-circumstances test, it has little tolerance for police interrogation tactics that affirmatively mislead an interrogee as to the seriousness of the crime that is the subject-matter of the interrogation. In this case, the court agrees with the trial court's finding that defendant was "[b]y no means . . . misled or unaware of the nature of the questions." The

court thus concludes that the State proved beyond a reasonable doubt that defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment rights.

The court addresses concerns raised by the dissenting justices in Sims that individuals should not be taken from their homes or off the street without being told the reason for their arrest and should not be detained for hours without explanation. Sims, __ N.J. __ (slip op. at 1) (Albin, J., dissenting). The court notes that, in this case, defendant was immediately told the reason for his arrest —the open traffic warrants—and thereafter was quickly informed as to the true reason why the detectives wanted to question him.

The court rejects defendant's contention that the trial court abused its discretion by allowing the lead investigating detective to testify as both a fact witness and as an arson expert. The court concludes that the trial court took reasonable precautions to clearly delineate for the jury the detective's role as a fact witness and his role as an arson expert.

The court also concludes that the trial judge did not commit plain error by allowing the jury to watch a recording of the stationhouse interrogation in which the detectives repeatedly accused defendant of being the arsonist shown in a surveillance video. The court declines to apply the "invited error" doctrine, rejecting the State's argument that defendant is precluded from raising this issue on appeal because he did not object to the jury viewing this portion of the interrogation recording even as he sought to redact of other portions of the recording. Instead, the court applies the plain error standard of review. The court determines that the trial judge should have issued a limiting instruction explaining to the jury that the accusatory statements made by the detectives during the interrogation is not testimony and could only be considered in the context of understanding how the interrogation was conducted and how defendant responded to those accusations. Ultimately, however, the court concludes that any error in failing to instruct the jury does not rise to the level of plain error considering the strong evidence of guilt. The court also reasons that defendant did not suffer unfair prejudice by the jury hearing the detectives' accusatory remarks because it appears that defense counsel had made a strategic decision not to object as shown by counsel's argument in summation that the detectives were "overzealous" and were so convinced of defendant's guilt that they stopped looking for the true

culprit.

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[1]Miranda v. Arizona, 384 U.S. 436 (1966).

4-11-22 CHRISTINE ANN DEVERS VS. JEFFREY ERIC DEVERS (FM-07-1537-09, ESSEX COUNTY AND STATEWIDE) (A-4481-19)

After many years of litigation, the parties reached a settlement agreement, reserving for the matrimonial court's consideration a single issue about a bank account; the wife claimed the account was a marital asset and the husband claimed it consisted of investor funds. After a plenary hearing, the judge found the Investment Advisers Act deprived the court of subject matter jurisdiction, 15 U.S.C. § 80b-14a. An order was entered denying the wife's claim "without prejudice." Her reconsideration motion filed three months later was denied as untimely.

Soon after the wife appealed, the court entered an order that limited the appeal to a review of the order denying reconsideration. Later, however, the court allowed the parties to brief all issues, including the merits of the order denying the claim on jurisdictional grounds and whether the merits panel was barred from reconsidering the earlier motion order by the law of the case doctrine.

The court held that the order denying the wife's claim to the account "without prejudice" caused sufficient uncertainty about its finality that the interests of justice permitted the court's consideration of the jurisdictional ruling. The court also held that 15 U.S.C. § 80b-14a grants state courts concurrent jurisdiction, so the case was remanded for a disposition of the wife's claim to the account on its merits.

4-8-22 STATE OF NEW JERSEY VS. NESTOR FRANCISCO (18-05-1376, ESSEX COUNTY AND STATEWIDE) (A-3840-18)

As part of a homicide investigation, defendant gave a statement to a detective following the administration and waiver of Miranda[1] rights before the filing of a complaint-warrant or the issuance of an arrest warrant. Shortly after the statement began, defendant asked whether it would cause problems with his record because he was an undocumented noncitizen. The detective responded, "No. No," and told defendant his "status has nothing to do with this. I am not going to ask you any questions on your status, or how you got here to this country. Absolutely nothing." Defendant did not invoke any of his Miranda rights during the statement, initially denied involvement, asserted an alibi, and later in the statement made incriminating admissions.

Defendant opposed the State's motion to admit the statement, arguing he did not knowingly and voluntarily waive his Miranda rights because the detective falsely responded to his immigration status concerns. Following an evidentiary hearing, the trial court granted the motion.

The trial court also granted the State's motion to admit evidence of defendant's impecuniosity and prior thefts of personal property from the homicide victim's family, finding the four-part Cofield[2] test was satisfied.Defendant was convicted by a jury of murder, related weapons offenses, and tampering with evidence but acquitted of robbery and theft. He was sentenced to a fifty-year term for the murder, subject to a forty-two and onehalf-year period of parole ineligibility under the No Early Release Act, N.J.S.A.2C:43-7.2, and concurrent terms on the other offenses. Defendant appealed his conviction and sentence.In State v. Sims, the Court determined that "officers need not speculate about additional charges that may later be brought" and declined to adopt a bright-line rule that requires police officers to inform a suspect, "based on information learned to date in a developing investigation, of what charges may be filed" against him in the future. ___ N.J. ___ (2022) (slip op. 28, 30).Applied here, the clear import of Sims is that police officers need not speculate about or disclose possible immigration consequences of charges that may be brought in the future. Requiring police officers to do so is unwarranted, impractical, and contrary to the holding in Sims .The court declined to adopt: (1) a bright-line rule

requiring officers to engage in such speculation and to inform an interrogee that their statements could result in deportation or other immigration consequences; or (2) a brightline rule requiring suppression of a statement following inaccurate advice regarding its potential immigration consequences, even where the officer knowingly provides affirmative misadvice (e.g., making false assurances to a suspect that that they will not be deported even if they admit to committing the offense). Instead, as was done in this case, the trial court should consider any bad-faith conduct as part of the totality-of-the-circumstances test when determining whether defendant knowingly and voluntarily waived his Miranda rights. The court affirmed the admission of defendant's statement.The court also declined to expand Miranda warnings to include advising interrogees of the right to consult with an immigration attorney about the impact of the statement on their immigration status.

Due to the complexity of federal immigration law, the court recommended that law enforcement officers not engage in speculation and risk misadvising an interrogee. If an interrogee asks about the immigration impact of giving a statement, the officer can merely state that they cannot give any legal advice, and reiterate that the interrogee has the right to consult with an attorney and to have an attorney present during questioning.

The court rejected the argument that the State improperly shifted the burden of proof to defendant to produce a witness to corroborate a central facet of his defense, and the claim of prosecutorial misconduct during summation.

The court affirmed the admission of evidence of defendant's impecuniosity as he had placed his financial status in issue by asserting an alibi, claiming he was working in New York on the day of the homicide, and thus had no motive to rob the victim. The court also affirmed that the evidence of defendant's thefts and impecuniosity satisfied the four-part Cofield test, concluding the record showed the thefts were close in time to the homicide and led to defendant's firing, the evidence was clear and convincing, and its probative value outweighed the risk of unfair prejudice to the defendant.

The court affirmed defendant's sentence, finding the trial court properly applied and weighed the aggravating and mitigating factors, which were in equipoise. Accordingly, a midpoint sentence was appropriate. Because the length of the term and period of parole ineligibility were lower than midpoint, the sentence was

not manifestly excessive or unduly punitive.

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[1] Miranda v. Arizona, 384 U.S. 436 (1996).

[2] State v. Cofield 127 N.J. 328, 338 (1992).

4-6-22 STATE OF NEW JERSEY VS. M.B. (19-07-1182, OCEAN COUNTY AND STATEWIDE) (A-1363-19)

Defendant appealed his conviction for certain persons not to possess a weapon after the court denied his motion to suppress evidence seized with a warrant issued from an ex parte domestic violence restraining order. The court reversed and vacated defendant's conviction.

Police officers were called to defendant's home, where the victim alleged that defendant kicked her. Police arrested defendant for simple assault and asked the victim if she wanted to seek a temporary restraining order (TRO), which she did. The victim told police that knives and a pistol were in the home.

One officer called a Municipal Court judge and summarized the incident without being under oath and without the judge taking notes. The judge spoke to the victim, but the officer only overheard the victim's portion of the conversation. The call was recorded but subsequently destroyed pursuant to the police department's thirty-one-day record retention policy.

Based on that call, the judge issued a TRO and a telephonic warrant for police to search defendant's home for weapons. Police recovered knives and defendant moved to suppress. The trial court upheld the validity of the warrant and denied suppression notwithstanding the recording of the call was destroyed. Defendant appealed. Cognizant of the principles enunciated in State v. Hemenway, 239 N.J. 111 (2019), and State v. Cassidy, 179 N.J. 150 (2004), the court determined that the search warrant was invalid because the procedural failures did not provide a reliable record to assure the Municipal Court judge properly authorized the warrant.

The court did not conclude the thirty-one-day retention policies was bad faith per se, but that the policy fell below the obligation to retain evidence in criminal matters and that defendant was manifestly prejudiced by the destruction. Moreover, while a properly reconstructed record can remedy certain procedural failures, the reconstruction here was wholly inadequate. The motion judge only heard from the officer who overheard one side of the call—not the Municipal Court judge who issued the warrant.

Reversed and conviction vacated.

4-4-22 FACEBOOK, INC. VS. STATE OF NEW JERSEY IN RE THE APPLICATION OF THE STATE OF NEW JERSEY, ETC. (1527-CDW-21 AND 1311-CDW-21, ATLANTIC AND MERCER COUNTY AND STATEWIDE) (CONSOLIDATED) (RECORD IMPOUNDED) (A-3350-20/A-0119-21)

In these two appeals, the court granted the State leave to appeal from two orders, in unrelated matters, partially quashing two communication data warrants (CDWs) requiring Facebook, Inc. n/k/a Meta Platforms, Inc. (Facebook) to turn over, among other things, two of its users' prospective electronically stored communications for a period of thirty days as part of separate ongoing criminal investigations.

On appeal, the court was required to determine as a matter of first impression whether CDWs or wiretap orders had to be served on Facebook, to secure the prospective electronically stored communications. For the reasons stated in the court's opinion, it concluded that only CDWs were required, where, as here, the communications sought were from information that would be stored by Facebook as compared to simultaneous transmission of information through interception. However, it also concluded the CDWs relied upon in these two matters were too lengthy in duration under our State's warrant procedures, and therefore required modification from thirty days to ten days in duration, as prescribed by Rule 3:5-5(a).

4-4-22 STATE OF NEW JERSEY VS. JASON M. O'DONNELL (21-02-0011, HUDSON COUNTY AND STATEWIDE) (A-3118-20)

Defendant was indicted and charged with violating N.J.S.A. 2C:27-2 based on evidence that, during his 2018 campaign for office of mayor, he agreed to accept from an attorney $10,000 to become the city's tax attorney once defendant was elected; defendant was defeated at the polls. Defendant moved for a dismissal of the indictment. The trial judge granted the motion by relying on United States v. Manzo, 851 F. Supp. 2d 797 (D.N.J. 2012), which interpreted the statute to exclude from criminal liability unsuccessful candidates who accept bribes. The court rejected that interpretation and reversed.

3-31-22 STATE OF NEW JERSEY VS. RAMI A. AMER (18-06-0460, GLOUCESTER COUNTY AND STATEWIDE) (A-3047-18)

Defendant Rami A. Amer appeals from his convictions for a series of "smash and grab" burglaries, arguing, in part, that his charges should have been dismissed because he was not brought to trial within the timeframe permitted under the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-1 to -15. The court concludes defendant was timely brought to trial under the IAD after he agreed, through counsel, to a trial date beyond the initial 180-day deadline. The court also determines that even absent defendant's waiver, the filing of certain motions by defense counsel tolled the time limit under the IAD during the pendency of the motions. Accordingly, the court affirms defendant's convictions, but remands for resentencing to allow the sentencing judge to address the overall fairness of the consecutive sentences imposed, consistent with the Court's guidance in State v. Torres, 246 N.J. 246, 272 (2021).

3-31-22 STATE OF NEW JERSEY VS. ROBERSON BURNEY (16-04-1376, ESSEX COUNTY AND STATEWIDE) (A-1342-18)

Defendant appeals from his jury trial convictions for first -degree robbery and related crimes. He contends the trial court erred in ruling the State could use defendant's hospital-bed statements for impeachment purposes after ruling that the interrogating detectives had failed to properly administer Miranda warnings. Miranda v. Arizona, 384 U.S. 436 (1966). Defendant also contends the trial court erred in permitting a victim to make an in-court identification notwithstanding that her recollection was tainted when a detective told her that photographs of her stolen watch, that were taken by the perpetrator during the robbery, had been extracted from defendant's cell phone.

At the time of the interrogation, defendant was in a hospital intensive care unit awaiting overdue dialysis. Defendant was hooked up to an intravenous line (IV) and an electrocardiogram (EKG). A notation in his medical chart shows that he was suffering from "toxic/metabolic derangement." The Miranda waiver colloquy and ensuing interrogation was not audio- or videorecorded, even though the detectives had traveled to the hospital for the purpose of interviewing defendant.

The court concludes the detectives were not qualified to make a medical judgment as to defendant's cognitive capacity. Because the hospital -bed interrogation was not electronically recorded, the trial judge could not independently assess defendant's outward condition. Importantly, the trial judge candidly acknowledged that he did not have the benefit of an expert medical witness and thus did not fully understand the meaning of some of the terms used in defendant's hospital chart to describe defendant's medical condition at the time of the police interrogation.

The court recognizes that judicial review of the circumstances of a custodial interrogation must be "searching and critical" to ensure protection of a defendant's constitutional rights. Furthermore, the State bears the burden to prove the voluntariness of defendant's hospital-bed admissions beyond a reasonable doubt. The court therefore deems it necessary to remand the case for the State to present expert testimony concerning defendant's medical condition and for the trial court to make specific findings of fact and law as to the impact of that condition on the voluntariness of defendant's statements to police, considering the totality of all relevant circumstances.

The court rejects the State's alternative argument on appeal that even if the trial court erred in permitting the statements

to be used for impeachment purposes, that error was harmless. The record in this case clearly shows that the trial court's ruling to allow defendant's statements to be admitted for impeachment purposes significantly impacted defendant's decision to waive his right to testify on his own behalf. The court follows New Jersey and United States Supreme Court precedent that almost any error in allowing otherwise inadmissible evidence to be admitted for impeachment purposes results in reversal because an appellate court cannot not logically term "harmless" an error that presumptively kept the defendant from testifying.

The court also addresses—and rejects—defendant's contention that the trial court erred by permitting a victim to make an in-court identification of defendant, and by declining to instruct the jury that a detective had tainted her memory by mentioning defendant's name when discussing a photograph defendant had taken of the victim's stolen watch. The court notes this is an unusual situation in that the suggestive information was not conveyed during a traditional pretrial identification procedure such as a photo-array session. Rather, the information was conveyed when the victim confirmed that the photograph, she was shown depicted her watch that was stolen during the robbery.

The court concludes the information as to defendant's name, which was conveyed to the victim before trial, was suggestive in that it had the capacity to influence the victim's in-court identification. However, that circumstance was fully presented to the jury through skillful cross-examination. Indeed, the victim candidly acknowledged that her positive in-court identification was influenced by a deduction she drew from the information provided by the detective, not from her independent recollection of the physical appearance of the robber. The court concludes that in these circumstances, there was little danger that the jury might overstate its inherent ability to evaluate evidence offered by an eyewitness who honestly believed her identification of the perpetrator is accurate. The court thus concludes that the trial judge did not abuse his discretion in ruling that any inherent unreliability in the victim's in-court identification would be better addressed to the jury by way of cross-examination and appropriate instructions.

3-24-22 DEBORAH MARINO, ET AL. VS. ABEX CORPORATION, ET AL. (L-0836-10, MIDDLESEX COUNTY AND STATEWIDE) (A-1523-19)

The court considered defendant Ford Motor Company's (Ford) appeal from a final judgment awarding plaintiff Deborah Marino, Executrix for the Estate of Anita Creutzberger, (decedent) damages for decedent's death from peritoneal mesothelioma. Ford contended that the trial court erred in ruling that Ford violated a consent order and in implementing sanctions.

Decedent's husband and son worked at several Ford car dealerships where brake dust would spread and cover them. They brought dust home on their clothing where it was laundered by decedent. Decedent's estate sued Ford alleging decedent was exposed to asbestos from Ford brakes and that this exposure caused her mesothelioma. Among other allegations, the estate asserted that Ford negligently violated its duty to protect dealership workers and their families by failing to provide them with the same warnings and guidance for handling its asbestos products that it provided to its own employees.

The parties resolved a discovery dispute with a consent order. Ford agreed to search for Ford training materials that referred to asbestos or handling asbestos products and to produce any responsive documents and a corporate witness having knowledge of facts relating to Ford's training.

During the deposition of this designated witness, the employee denied any knowledge of relevant training manuals and any recent testimony regarding the same. Plaintiff's counsel confronted the employee with a 1974 Ford training manual, which the employee admitted he had seen and then confirmed he had been questioned about in another case a few months earlier.

The trial court, upon plaintiff's motion, sanctioned Ford by: (1) directing verdict to plaintiff on the issues of duty and breach; and (2) ordering that the jury be advised that Ford violated a court order and withheld evidence, so duty and breach of duty had been resolved against them. The court subsequently concluded that the sanctions order necessarily included a directed verdict on general, but not specific, causation. Ford appealed.

This court's review found little support for Ford's claims that it acted in good faith in responding to plaintiff's discovery requests and did not violate the consent order. The trial court's sanctions directly corresponded to the violation. The trial court's subsequent inclusion of a directed verdict on general causation flowed from the fact that a duty to warn only exists when the product is dangerous. Ford presented experts to opine against specific causation of decedent's mesothelioma, but these experts also discussed general causation, mooting

Ford's argument that it was prejudiced by the order's directed verdict for general causation.

The court discerned no abuse of the trial court's discretion to impose sanctions for violating the consent order and affirmed.

3-24-22 M.A.P. VS. E.B.A. (FD-09-0282-21, HUDSON COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1057-21)

In this appeal, the court considered whether two of the seven subsections of New Jersey's Uniform Interstate Family Support Act's long arm statute permitted exertion of personal jurisdiction over a nonresident alleged to have fathered a child through a sexual relationship with a New Jersey resident that occurred in New York. The court held that the out-of-state act that allegedly caused conception, even though coupled with the nonresident's knowledge that plaintiff was a New Jersey resident, could not be the nonresident's "act" under N.J.S.A. 2A:4-30.129(a)(5), which authorizes personal jurisdiction when "the child resides in this State as a result of the [nonresident's] acts or directives." The court also found unavailing N.J.S.A. 2A:4-30.129(a)(7), which allows for the exertion of personal jurisdiction whenever commensurate with due process, because the nonresident defendant lacked sufficient contacts with this State. As a matter of first impression, the court also held that the policies underlying N.J.R.E. 408 precluded consideration in the jurisdictional analysis of a letter sent to plaintiff by defendant's New Jersey lawyer proposing an amicable resolution.

3-14-22 STATE OF NEW JERSEY VS. E.R. (18-08-1800, 18-08-1838 AND 18-12-2955, CAMDEN COUNTY AND STATEWIDE) (A-1294-19)

Defendant E.R. appealed from her judgments of conviction, arguing the trial court erred when it entered an order affirming the prosecutor's denial of her application for admission to the pretrial intervention program (PTI), N.J.S.A. 2C:43-12. The court concludes the State: (1) failed to detail the level of mental health supervision defendant required, considering her lack of a criminal history and her recent, significant efforts to rehabilitate herself; (2) neglected to explain how the level of supervision defendant would receive on PTI differed significantly from the level she would receive on probation and why the necessary level of supervision through PTI would be inadequate; and (3) failed to address why defendant's lack of criminal history and compliance with mental health treatment were not weighed in favor of her entry into PTI. Accordingly, the court vacates the underlying order denying defendant entry into the PTI program, and remands for further proceedings.

3-14-22 IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF BORDENTOWN, ETC. (L-1579-15, BURLINGTON COUNTY AND STATEWIDE) (A-0357-20)

This court addressed whether an amended agreement between the Township of Bordentown and the Fair Share Housing Center satisfied the Township's Third Round obligations under Mount Laurel. This court held the trial court correctly found the amended agreement sets forth a plan that provides a realistic opportunity for the Township to meet its Mount Laurel obligations. We also reiterated that performing work for developers in other Mount Laurel cases does not in-and-of-itself create a conflict of interest for the special master appointed by the trial judge.

3-10-22 IN THE MATTER OF MICKEY YOUNG, ETC. (NEW JERSEY CIVIL SERVICE COMMISSION) (A-0400-20)

The sole issue raised in this administrative appeal is whether an appointing authority may unilaterally reduce a sanction from major to minor discipline after the employee is served with a Final Notice of Disciplinary Action (FNDA). Because the Civil Service Act and accompanying regulations generally permit an employee to appeal only major disciplinary actions, the reduction in sanction divests the Civil Service Commission of jurisdiction to hear the employee's appeal from an adverse administrative decision.

The court reviewed the statutory and regulatory schemes and rejected the employee's argument that the governing provisions prohibit the appointing authority from reducing the penalty after an FNDA has been issued. The court also found unavailing the employee's contention that the reduction in penalty and resulting divestiture of the Commission's jurisdiction violated his right to due process. In doing so, the court distinguished the present matter – involving a reduction in penalty – from its prior decision in Hammond v. Monmouth County. Sheriff's Department, 317 N.J. Super. 199 (App. Div. 1999), which held an appointing authority may not add charges to the FNDA.

Because the court determined no provision of the Act or accompanying regulations proscribed the appointing authority's inherent discretion to reduce a penalty after an FNDA has been issued to a Civil Service employee, the court concluded the Commission properly upheld the Administrative Law Judge's initial decision, dismissing the employee's complaint on summary decision for lack of subject matter jurisdiction.

3-10-22 DENTAL HEALTH ASSOCIATES SOUTH JERSEY, PA, ET AL. VS. RRI GIBBSBORO, LLC, ET AL. (L-3993-20, CAMDEN COUNTY AND STATEWIDE) (A-0320-21)

The court holds an attorney cannot be disqualified for a conflict of interest pursuant to RPC 1.9 and RPC 1.10(b) based solely on the content of the initial pleadings where the factual basis for the alleged conflict of interest is contested. The two-pronged analysis required by City of Atlantic City v. Trupos, 201 N.J. 447, 467 (2010) mandates a factfinding before a court can conclude disqualification is required because an attorney represented a former client in a substantially related matter.

3-9-22 STATE OF NEW JERSEY VS. MICHELANGELO TROISI (2019-22, MERCER COUNTY AND STATEWIDE) (A-1324-20)

Defendant, Michelangelo Troisi, appeals the Law Division order denying his de novo appeal of a guilty finding against him in Princeton Municipal Court for violating N.J.S.A. 39:4-97.3, use of hands-free and hand-held wireless communication devices while driving. At the municipal court trial, defendant argued that the manner in which he was using his cell phone while driving was not a violation of the plain meaning of the statute. Defendant testified and admitted that his conduct in the car required him to divert his attention from steering his vehicle on a public road for enough time to enter his six-digit passcode, open the Google Maps app, and place the cursor in the search window. The municipal court judge found defendant guilty of violating N.J.S.A. 39:4-97.3 and imposed a fine.

Defendant appealed de novo to the Law Division, which found defendant guilty of the traffic violation for substantially the same reasons as the municipal court: defendant's actions in his car exceeded the bounds of the statute.

Applying well-established principles of statutory construction, the court held that making multiple keystrokes on a cellphone to locate and use an app such as Google Maps while driving would constitute an offense under N.J.S.A. 39:4-97.3 and that the Law Division and municipal court did not abuse their discretion in finding that defendant's conduct was a violation. The court also held that the statute was not unconstitutionally vague because it fairly puts motorists on notice of what category of activity is impermissible.

3-7-22 GRANDVUE MANOR, LLC VS. CORNERSTONE CONTRACTING CORP., ET AL. (L-1602-20, BERGEN COUNTY AND STATEWIDE) (A-3702-20)

The court affirmed an order dismissing plaintiff's complaint and compelling arbitration under a construction Agreement to build a home in New York.

Plaintiff entered into the Agreement with defendant, a construction company headquartered in Connecticut. The Agreement contained a choice of law provision to govern by the law of the place where the project was located, excluding that jurisdiction's choice of law rules, and a provision providing that, if the parties selected arbitration as the method of binding dispute resolution, then the Federal Arbitration Act (FAA) would govern. Thus, the parties selected the law of New York, the place of the project, and the FAA to govern the Agreement.

Plaintiff sued defendants in New Jersey alleging defendants had not achieved substantial completion of the project, breached the contract and the implied covenant of good faith and fair dealing, committed fraud and negligent misrepresentation, breached New York lien law, breached their fiduciary duties, committed conversion, unjustly enriched themselves, and violated the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -224, and the New Jersey Racketeer Influenced Corrupt Organization Act (RICO), N.J.S.A. 2C:41-1 to -6.2.

The trial court delivered an oral opinion dismissing the complaint for the matter to be submitted to arbitration. The court concluded that, under New Jersey law, the arbitration provision is clear and unambiguous as to the requirement that the parties submit to arbitration and as to the parties' waiver of their right to a jury trial. The court noted that the litigants are sophisticated parties that freely entered into the Agreement to build a house for over $10 million.

The court considered whether the law of New Jersey or New York applied to the enforceability and construction of the arbitration provision. Here, the parties clearly and unambiguously chose New York law, where the project was located. Thus, the law of New York applied.

The court then concluded a New York court would likely enforce the arbitration provision as it was less broad than those the New York Court of Appeals upheld in Singer v. Jefferies & Co., 575 N.E.2d 98, 99-101 (1991), Atlas Drywall Corp. v. Dist. Council of New York City & Vicinity of United Bhd. of Carpenters & Joiners, 177 A.D.2d 612, 612-14 (2d Dept. 1991), and Nationwide Gen. Ins. Co. v. Invs. Ins. Co. of Am., 332 N.E.2d 333, 335 (1975). Moreover, Congress and the New Jersey Legislature have declared policies favoring arbitration. Martindale v. Sandvik, Inc., 173 N.J. 76, 84-85 (2002). Here, the court discerned no error in the order compelling arbitration because the arbitration provision is clear and unambiguous in waiving the right to a jury trial and covers the alleged disputes.

3-7-22 STATE OF NEW JERSEY VS. BARRY BERRY STATE OF NEW JERSEY VS. KENNETH DANIELS STATE OF NEW JERSEY VS. LEVELL BURNETT (17-06-1583, ESSEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-1068-18/A-1594-18/A-1884-18)

The court consolidates the appeals brought by three codefendants who were tried together for drug and firearms offenses. All three were charged and convicted for the "kingpin" offense, leader of a narcotics trafficking network, N.J.S.A. 2C:35-3. The State at trial relied principally on recorded jailhouse telephone conversations to establish defendants' roles in the drug trafficking conspiracy. The case hinges on what it means to be a "high-level" member of the conspiracy.

All three defendants moved for judgment of acquittal at the close of the State's case. The trial judge addressed defendants' motions collectively and did not analyze the facts pertaining to each defendant's individual role. The court concludes that the trial judge erred in denying the acquittal motion of the lowest-ranking defendant, Berry. While there can be multiple "leaders" within a given drug trafficking organization, not every participant in a drug trafficking conspiracy meets the definition of being a leader. Even giving the State the benefit of all favorable inferences from the evidence, the court concludes the State failed to prove that Berry exercised substantial authority and control over others. Berry essentially forwarded messages and instructions from codefendant Daniels, who was incarcerated in county jail. While that was an important function, the court notes that a participant may perform an essential function in the operations of an illicit drug operation without necessarily being a high-ranking member of that network for purposes of the leader offense.

3-7-22 MATHEW T. SULLIVAN VS. BOARD OF REVIEW, ET AL. (BOARD OF REVIEW, DEPARTMENT OF LABOR) (A-1664-20)

The court affirms the Board of Review (Board) decision, which denied a re-hearing after the Appeals Tribunal and agreed with the Division of Unemployment and Temporary Disability Insurance (Division) decision to seek repayment of unemployment benefits improperly awarded to petitioner.

Petitioner voluntarily left employment in October 2019, before the onset of the COVID-19 pandemic. Petitioner filed for and was awarded unemployment benefits for eight weeks, beginning in April 2020. In July 2020, the Division notified petitioner that he was not eligible for unemployment benefits under N.J.S.A. 43:21-5 because he did not leave for good cause attributable to work and his circumstances did not meet the criteria the under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C. §§ 9001 to 9141. Thus, he was ineligible for Pandemic Unemployment Assistance (PUA) benefits. The Division imposed the refund for petitioner to repay the improper unemployment benefits.

Petitioner appealed, and the Appeal Tribunal affirmed that petitioner was disqualified for such unemployment benefits. The Board agreed. Petitioner brought this appeal, arguing that because the Division erroneously gave petitioner the funds, it is estopped from seeking a refund.

The court agreed after considering the CARES Act's expansion of benefits under the PUA, petitioner was not eligible for benefits during the relevant time period. The Division is required to seek repayment from individuals who are ineligible for unemployment benefits, and petitioner did not show that he was in fact eligible, and the Board's decision was not administered arbitrarily, capriciously, or unreasonably. Further, the State is not estopped from seeking repayment because petitioner did not show a manifest injustice by the Division's decision to seek the required repayments it erroneously awarded.

3-4-22 STATE OF NEW JERSEY VS. STEPHEN P. MAROLDA (06-08-1382, BERGEN COUNTY AND STATEWIDE) (A-4556-19)

As part of an illegal gambling investigation, which included wiretap evidence, defendant was charged with third-degree promoting gambling, third-degree conspiracy to promote gambling, and second-degree financial facilitation of criminal activity. The Bergen County Prosecutor's Office also filed a civil forfeiture complaint against numerous bank accounts and other assets held by defendant and his company. Pursuant to a negotiated plea agreement, defendant waived his right to indictment, pled guilty to third-degree promoting gambling, and consented to the civil forfeiture of $3 million, in exchange for a recommended sentence of probation conditioned upon 180 days in jail and the dismissal of the charges filed against his wife.

At the plea hearing, defendant acknowledged he accepted bets for some of his employees, naming two of them, and admitted to participating in "a pay-and-collect situation with both of those individuals" and the bookmaker. Defendant further admitted he maintained written records of the bets that indicated the amount he needed to collect from the employees. On November 3, 2006, defendant was sentenced in accordance with the plea agreement. That same day he signed a consent order to enter judgment forfeiting $3 million in the civil forfeiture action. Defendant did not appeal his conviction or sentence or file a motion for relief from the forfeiture judgment.

On September 30, 2019, almost thirteen years after he was sentenced, defendant filed a first petition for post-conviction relief (PCR). Defendant sought an evidentiary hearing, withdrawal of his guilty plea, and the return of the forfeited funds. He argued that the time limitation imposed by Rule 3:22-12(a)(1) should be relaxed. Defendant raised claims of actual innocence, newly discovered evidence, ineffective assistance of counsel, and that the BCPO withheld exculpatory evidence. Defendant recanted his admissions during the plea hearing and contended that he never acted as a bookmaker.

The PCR court denied the petition without an evidentiary hearing, rejecting defendant's claims that trial counsel was ineffective and noting defendant received the benefit of a favorable plea deal. The PCR court also rejected defendant's claims of newly discovered evidence, actual innocence, that his plea was coerced, and that the prosecutor withheld exculpatory evidence. The PCR court further concluded that defendant did not demonstrate excusable neglect, his claims were speculative and had no basis in fact, and were time barred.

The court affirmed, noting that defendant pled guilty, was

sentenced, and signed the consent order for judgment of forfeiture in 2006, his term of probation ended in 2007, and the county prosecutor he accused of misconduct resigned in January 2016, yet he waited until September 2019 to file his petition. The court found no exceptions applied to the five-year time limitation imposed by Rule 3:22-12 and that enforcing the time-bar did not result in a fundamental injustice.

The court rejected defendant's argument that the time limit for filing his petition should be relaxed due to his actual innocence and declined to apply a federal equitable doctrine to override the clear mandate of Rule 3:22-12.

The court also rejected defendant's claim that the forfeited funds must be returned as a matter of law. The court noted defendant did not contest the civil forfeiture action, consented to the forfeiture of $3 million, had not filed for relief pursuant N.J.S.A. 2C:64-8, and did not file a motion for relief from the forfeiture judgment under Rule 4:50-1. The court held that defendant was bound by the forfeiture judgment and any attempt to set it aside must be filed in the Civil Part and was now time barred by Rule 4:50-2.

3-3-22 STATE OF NEW JERSEY VS. RAKIM P. WILLIAMS (17-12-0602 AND 18-08-0471, MERCER COUNTY AND STATEWIDE) (A-4156-19)

At issue in this appeal is the propriety of the prosecutor's closing remarks on a seven-minute segment of surveillance footage, included as part of the one-hour video recording admitted in evidence but not played for the jury by either side during trial. Although the trial judge denied the prosecutor's request to play the previously unseen segment on summation, the judge afforded the jurors the option of viewing this footage during their deliberations.

Upon the jury's ensuing request, the seven-minute segment was played for the first time in open court. Because defendant was not afforded an opportunity to address the footage, the court concludes the prosecutor's remarks exceeded the bounds of proper conduct and the trial judge's evidentiary decision compounded the error, thereby denying defendant a fair trial. Accordingly, the court vacates defendant's conviction for possession of a weapon by a convicted felon and remands for a new trial.

2-22-22 D.M.C. VS. K.H.G. (FM-15-1271-16, OCEAN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1326-20)

During the parties' divorce proceedings defendant was declared incapacitated due to a breakdown and multiple psychiatric hospitalizations. Following an investigation and filing of a complaint in the Probate Part by the guardian ad litem, the parties' adult children were appointed as co-guardians for defendant. The guardians, assisted by the guardian ad litem and an experienced divorce attorney, settled the case, and entered a comprehensive PSA.

Nearly two years after the divorce, the Probate Part deemed defendant competent and dissolved the guardianship. Approximately one year after dissolution of the guardianship defendant filed a Rule 4:50-1(f) motion to declare the PSA invalid. She argued her children should not have been appointed co-guardians because they were financially dependent on plaintiff and controlled by him and engaged in misconduct. The Family Part judge denied the motion.

On appeal, the court held the appointment of a party's adult child to serve as their guardian in a divorce proceeding pursuant to Rule 4:26-2(a) does not in itself render the subsequent settlement of the case unconscionable. The party seeking to undo the settlement must demonstrate misconduct by the guardian and that the settlement is unconscionable.

2-17-22 MARC RUSSI VS. CITY OF NEWARK, ET AL. (L-5182-19, ESSEX COUNTY AND STATEWIDE) (A-1064-20)

While plaintiff was driving his car on a road owned by Passaic County, a falling tree limb struck his car, causing him to suffer significant injuries. The tree with the broken limb was located in a 35,000 acre conservation easement owned by the City of Newark. The trial judge granted summary judgment to the City relying, in part, on the Landowner's Liability Act (LLA), N.J.S.A. 2A:42A-1 to -10. The judge also granted summary judgment to Passaic County, which had been sued under the Tort Claims Act.

The court held N.J.S.A. 2A:42A-8.1 of the LLA, entitled "[l]iability to persons injured on premises with conservation restriction," precluded the imposition of liability against the City. The statute provides immunity to an owner of premises on which "a conservation restriction is held by the State, [or] a local unit . . . and upon which premises subject to the conservation restriction public access is allowed, or of premises upon which public access is allowed pursuant to a public pathway or trail easement held by the State, [or] a local unit . . . ."

Because plaintiff's car travelled on a road providing public access and serving as a public pathway and the tree with the fallen limb stood within a conservation easement, the City was entitled to immunity under the LLA. The County likewise was properly granted summary judgment because the alleged dangerous condition was not on its property. N.J.S.A. 59:4-2.

2-16-22 IN THE MATTER OF THE APPLICATION OF T.I.C.-C. TO ASSUME THE NAME OF A.B.C.-C. (L-1330-20, MERCER COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-1706-20)

Appellant A.B.C.-C. is a transgender man who sought to change his name to conform his identification documents with his gender identity. As part of his application, appellant submitted evidence showing transgender people are subject to a particularized threat to their safety based upon their identity and asked that the record of his name change be sealed to protect him from such discrimination and violence. The trial court denied appellant's request. Because appellant demonstrated good cause to seal the record, the court reversed the trial court's denial of appellant's motion, ordered that the record be sealed, and remanded for any necessary further proceedings.

2-15-22 OLIVIA CHECCHIO, ET AL. VS. EVERMORE FITNESS, LLC, ET AL. (L-7065-20, MIDDLESEX COUNTY AND STATEWIDE) (A-3461-20)

In August 2018, fourteen-year-old Olivia Checchio went to Sky Zone South Plainfield—an indoor trampoline park—with four friends and Gina Valenti—the mother of one of the children. Upon arrival at the park, Valenti signed an agreement that included an arbitration provision, under which the signing adult on behalf of the minor child waived a jury trial and agreed to arbitrate any dispute or claim arising out of the child's use of the Sky Zone premises.

The trial court, relying on this court's recent decision in Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 21-22 (App. Div. 2021), denied defendants' motion to dismiss the complaint and compel arbitration.

Defendants moved for reconsideration, producing for the first time five agreements signed by Olivia's mother, Lisa, when she took Olivia to the park in 2016. Defendants asserted Gayles was distinguishable from the circumstances here because the 2016 agreements demonstrated a pattern of prior conduct, and, therefore, establish apparent authority.

The court noted the 2016 agreements contained different language than the 2018 agreement. The 2016 agreements did not vest Valenti with the authority to enter into the 2018 agreement or any future agreement on Olivia's behalf. Nor did the 2016 agreements manifest any understanding on Lisa's part that Valenti or any other adult could sign a future waiver agreement in the place of Lisa or on Olivia's behalf.

The court found there was no evidence demonstrating that Lisa would have signed the 2018 agreement. And, Lisa's prior execution of the 2016 agreements did not establish a pattern that she would authorize another person to sign an agreement on behalf of her daughter. Therefore, the court held the 2016 agreements did not establish Valenti had apparent authority to waive Olivia's trial rights under the 2018 agreement.

2-15-22 GILBERT ANTONUCCI VS. CURVATURE NEWCO, INC., ET AL. (L-1034-20, GLOUCESTER COUNTY AND STATEWIDE) (A-1983-20)

Plaintiff appeals from an order compelling arbitration and dismissing with prejudice his discrimination complaint against his former employer and two of its employees. This appeal presents an issue of first impression in this court: whether the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, pre-empts a 2019 amendment, adding N.J.S.A. 10:5-12.7 (Section 12.7), to New Jersey's Law Against Discrimination (LAD). Section 12.7 prohibits the waiver of procedural and substantive rights under LAD. The court holds that the arbitration agreement is enforceable, and that the FAA pre-empts Section 12.7 of LAD when applied to an arbitration agreement governed by the FAA. The court affirms the portion of the order compelling arbitration, but remands for entry of a new order that stays the litigation pending the arbitration.

2-14-22 STATE OF NEW JERSEY VS. M.K.P. (18-12-1242, BERGEN COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-2555-19)

N.J.S.A. 2C:24-8(a) imposes criminal liability on those who have "assumed continuing responsibility for the care of a person 60 years of age or older" and who "abandon[] the elderly person . . . or unreasonably neglect[] to do or fail[] to permit to be done any act necessary for the physical or mental health of the elderly person." In reversing, the court held that a conviction under this statute cannot be sustained when the defendant's conduct was alleged to be a physical assault. The Legislature intended instead to criminalize neglect, abandonment, and failures to act, not an assault, which is criminalized elsewhere in the criminal code.

2-11-22 NEW JERSEY STATE POLICEMEN'S BENEVOLENT ASSOCIATION VS. PHILIP D. MURPHY, ETC. NEW JERSEY SUPERIOR OFFICERS LAW ENFORCEMENT ASSOCIATION VS. PHILIP D. MURPHY, ETC. (EXECUTIVE ORDER NO. 283) (CONSOLIDATED) (A-1525-21/A-1548-21)

Appellants challenge the Governor's Executive Order 283, which imposes a COVID-19 vaccination mandate for, among others, the State's corrections officers. The court held that the Civilian Defense and Disaster Control Act, N.J.S.A. App. A:9-33 to -63, empowered the Governor to issue the order and that the order's vaccination mandate was rationally and adequately tailored to the problem posed.

2-7-22 WOODMONT PROPERTIES, LLC VS. TOWNSHIP OF WESTAMPTON, ET AL. (L-2494-18, BURLINGTON COUNTY AND STATEWIDE) (A-4453-19)

Plaintiff, which contracted to purchase a large tract of vacant land from Hovbros Burlington, alleged in this action that defendant TD Bank tortiously interfered with that contract by foreclosing its mortgage on the property. The trial judge dismissed for failure to state a claim.

In affirming in part, the court held that the foreclosure sale cut off plaintiff's unrecorded contract interest and thereby eviscerated plaintiff's continuing claim of a legal or equitable interest in the property despite an assumption of TD Bank's knowledge of plaintiff's contract rights when TD Bank foreclosed. In this regard, the court rejected the holding of a published trial court decision, PNC Bank v. Axelsson, 373 N.J. Super. 186 (Ch. Div. 2004), which found relevance in the application of N.J.S.A. 2A:50-30 when a foreclosing party has knowledge of an unrecorded interest.

In reversing in part, the court held that plaintiff could continue to seek damages on its tortious interference claim against TD Bank based on its theory, which the court was obligated to assume as true, that TD Bank manipulated its rights as to Hovbros and its related companies so as to interfere with plaintiff's contract rights.

2-7-22 STATE OF NEW JERSEY VS. MATTHEW DIAZ (19-07-1124, OCEAN COUNTY AND STATEWIDE) (A-3764-20)

This interlocutory appeal arises from an ongoing prosecution for strict liability for drug-induced death, N.J.S.A. 2C:35-9, following a fatal heroin overdose. The State appeals from a trial court order suppressing incriminating statements defendant made during a stationhouse interrogation because the officers did not advise him that a death had occurred and that he was facing prosecution for a first-degree homicide offense. The trial court had initially held the statements were admissible but granted defendant's motion for reconsideration that cited to the majority opinion in State v. Sims, 466 N.J. Super. 346 (App. Div.), certif. granted, 246 N.J. 146 (2021). While the parties and the trial court knew that the Supreme Court had granted certification, they appeared to be unaware that the Supreme Court had stayed the Sims opinion.

In Sims, the majority announced a new per se rule that when police make an arrest following an investigation, they must at the outset of a custodial interrogation advise the interrogee of the offense(s) for which he or she was arrested regardless of whether a complaint-warrant or arrest-warrant has been issued. 466 N.J. Super. at 367. The question to be addressed by the Supreme Court is: "[w]ere the officers required to advise defendant, who was not charged with any offenses at the time, why he was arrested before proceeding with the custodial interrogation."

In the present case, the court follows an alternate analytical route that does not depend on the outcome in Sims. The court leaves to the Supreme Court to decide whether police may remain silent during a Miranda colloquy with respect to the essence of unfiled charges for which the interrogee was taken into custody. Rather, the court focuses on the impact of the police decision in this instance to advise defendant of the reason for his arrest in a manner that was misleading. Under this analytical approach, the failure to advise defendant of the overdose death was a relevant factor to be considered in determining whether defendant's waiver of Miranda rights was made knowingly.

The court concludes, considering the totality of the circumstances, the State failed to prove beyond a reasonable doubt that defendant's waiver of his right against self-incrimination was made knowingly because the detectives affirmatively misled defendant by providing a deliberately vague and incomplete answer to his question

of why he was taken into custody. The court reasons that it is one thing for police to withhold information; it is another thing entirely for them to provide an explanation that creates or reinforces a false impression.

The court recognizes that police are permitted, within limits, to use trickery or deception in the course of a custodial interrogation. The court draws a fundamental distinction, however, between police trickery with respect to the strength of the evidence against an interrogee on the one hand, and trickery with respect to the seriousness of the offense(s) for which he or she was arrested on the other hand. While police are allowed to use certain forms of trickery following a knowing and voluntary Miranda waiver, the court finds no New Jersey precedent that authorizes trickery as part of the waiver process. Indeed, the court notes that Miranda v. Arizona expressly held that "any evidence that the accused was . . . tricked . . . into a waiver will, of course, show that the defendant did not voluntarily waive his [or her] privilege." 384 U.S. 436, 476 (1966).

The court adds that affirmatively misleading an interrogee about the seriousness of the offense for which he or she was taken into custody strikes at the heart of the waiver decision. The court does not, however, propose a categorical, per se rule that any deception or trickery of this type automatically warrants suppression. Rather, the court holds that the use of such a stratagem is an important factor to be considered as part of the totality of the circumstances in determining whether the State has met its burden of proving, beyond a reasonable doubt, that defendant made a knowing waiver of his right against self-incrimination.

Finally, the court rejects the State's argument that the detectives did not have probable cause to charge defendant with the strict liability for drug-induced death offense pending the completion of autopsy and toxicology reports. Applying de novo review, the court concludes that the detectives were aware of facts constituting probable cause that defendant committed the strict liability homicide offense, viewed from the standpoint of an objectively reasonable police officer.

2-3-22 JOHN P. BROWN, ET AL. VS. PATRICIA BROWN (L-2367-20, MONMOUTH COUNTY AND STATEWIDE) (A-0384-21)

Following the dismissal of a chancery action against them that sought a constructive trust on the proceeds of a sale of real property, plaintiffs filed a complaint against the prior suitor, alleging, among other things, the tortious interference with their contract to sell the real property. The prior suitor sought dismissal, arguing her earlier claim was cloaked by the litigation privilege. The trial judge held that the complaint and other pleadings were insulated by the litigation privilege but not the notice of lis pendens, which had been recorded but discharged in the earlier action.

In permitting review of that interlocutory disposition, the court affirmed in part and reversed in part, holding that the notice of lis pendens – a mere statement of the complaint's claims – was insulated by the litigation privilege, but the litigation privilege did not absolve the prior suitor of the consequences of having filed that earlier suit; in other words, the litigation privilege protected the prior suitor's statements and communications in the earlier judicial proceeding but did not protect her from a later action based on the allegation that the earlier suit was frivolous, vexatious or tortious.

2-1-22 SHAWN LABEGA VS. HETAL C. JOSHI, M.D., ET AL. (L-3088-18, MIDDLESEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-3399-20/A-3400-20/A-3401-20/A-3402-20)

The court permitted defendants in this medical malpractice action leave to appeal the trial court's denial of their motions for partial summary judgment on plaintiff's claims for breach of contract and hospital policy based on a third-party beneficiary theory as well as his claims for negligence per se for defendants' alleged violation of the hospital policies incorporated into those contracts. Because well-established precedent makes clear neither cause of action is available to plaintiff in this case as a matter of law, the court reversed the orders and remanded for entry of partial summary judgment for defendants dismissing those claims.

1-28-22 STATE OF NEW JERSEY VS. DANIEL ROCHAT (13-07-1002, BERGEN COUNTY AND STATEWIDE) (A-0103-17)

This appeal presents an issue of first impression—whether DNA evidence obtained from extremely small amounts of DNA through a technique known as low copy number (LCN) DNA testing, and in one instance, by using a proprietary Forensic Statistical Tool (FST) software program, which defendant contends are not generally accepted in the relevant scientific community, was improperly admitted at trial.

Defendant was indicted for the murder of a woman he had recently visited, that worked at his father's business. Her partially burned body was found in her residence. She died from blunt force head injuries. As part of their investigation, detectives obtained DNA samples from defendant, his apartment, a condominium that he had access to, his car, and the victim's fingernails. Samples from the kitchen of the apartment tested positive for blood. The DNA samples were sent to a laboratory DNA analysis.

The trial court denied defendant's motion for a Frye[1] hearing to determine the admissibility of the LCN DNA test results. At trial, the State's experts testified that DNA samples from the kitchen was consistent with the victim's DNA. Analysis of a second set of DNA samples showed a mixture of DNA from two people, one of whom was the victim. DNA samples from the victim's home did not test positive for defendant's DNA, but samples taken from the victim's fingernails did. Samples from defendant's apartment and car did not test positive for the victim's DNA. Defense experts opined that the LCN DNA testing and FST were neither reliable nor generally accepted in the relevant scientific community. Defendant was found guilty of the murder.

On appeal, the court remanded the case for a Frye hearing to determine the admissibility of the disputed DNA evidence under the standards adopted in State v. Harvey, 151 N.J. 117 (1997), and retained jurisdiction.

Following a multi-day Frye hearing, at which numerous expert witnesses testified, the trial court determined the State clearly established that the LCN DNA testing technique and FST were generally accepted in the relevant scientific community and ruled the DNA analysis was admissible.

The court rejected the trial courts determinations, concluding that the State did not clearly establish that the LCN DNA testing technique and FST were generally accepted in the relevant scientific community. Therefore, the DNA evidence derived by using that technique and software was inadmissible. Noting that the

remaining evidence was not overwhelming and recognizing that DNA evidence is powerful and compelling, the court determined that admission of the disputed DNA evidence raised a reasonable doubt that the jury was led to a verdict it otherwise might not have reached. Because the error was not harmless, the court reversed defendant's conviction and remanded for retrial.

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[1] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

1-24-22 UNDERWOOD PROPERTIES, LLC VS. CITY OF HACKENSACK, ET AL. (L-7980-19, BERGEN COUNTY AND STATEWIDE) (A-0044-20)

The parties were involved in litigation relating to the Hackensack Planning Board's zoning determinations and ordinances adopted in the City's redevelopment plan. Separately, plaintiff's attorney submitted requests for records from defendants pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, designated as OPRA requests from the attorney.

Defendants argued plaintiff lacked standing to bring suit under OPRA because the requests were submitted from plaintiff's attorney. The trial judge rejected the standing argument because counsel had implied authority to submit the requests. The trial judge also noted the Denial of Access complaint form adopted by the Government Records Council requires parties represented by counsel who make a request to state the name of the client on whose behalf the complaint is being filed.

Among other arguments raised by the parties in their respective appeals, defendants repeated their standing argument and urged the court to "establish the standard that if an attorney is filing an OPRA request on behalf of a client, it must clearly disclose that fact to the custodian of records, or if the response proceeds to litigation the attorney must be deemed the 'requestor.'"

The court affirmed, rejecting defendants' argument for the same reasons expressed by the trial judge. Although N.J.S.A. 47:1A-6 states the right to institute a suit under OPRA belongs "solely" to the requestor, OPRA and the rules of standing are broadly construed. Therefore, the literal reading of the statute urged by defendants should be eschewed.

1-24-22 TRENTON RENEWABLE POWER, LLC VS. DENALI WATER SOLUTIONS, LLC (C-000049-20, MERCER COUNTY AND STATEWIDE) (A-3060-20)

In this breach of contract action, the owner/operator of an aerobic biodigester facility sued defendant, Denali, which was contractually obligated to deliver quantities of organic waste to the facility for processing. Shortly after entry of the initial case management order, Denali served subpoenas on plaintiff and several nonparties, including Symbiont Science, Engineering and Construction, Inc. (Symbiont), which had designed and retrofitted the facility for plaintiff. Symbiont's subpoena required it to identify a corporate designee with familiarity in seventeen topic areas and demanded documents and electronically stored information in thirteen categories.

Much of the requested information centered on communications between plaintiff and Symbiont, such as the terms of Symbiont's agreement with plaintiff, "including the drafting, revision, and execution of the agreement"; "[t]he calculation of Symbiont's guaranteed maximum price to complete the construction to retrofit the Trenton Facility"; and "[a]ll communications with [plaintiff c]oncerning the construction and design" of the facility, "including but not limited to, the construction cost, construction schedule, and design modifications." Denali served similar requests on plaintiff.

When negotiations regarding the scope of production broke down between Denali and plaintiff, and between defendant and Symbiont, Denali moved to compel, and plaintiff and Symbiont moved to quash. The judge granted Denali's motion as to both plaintiff and Symbiont, relying on the broad scope of discovery permitted by Court Rules and case law.

The court granted Symbiont's motion for leave to appeal and reversed. Despite the broad scope of discovery permitted between parties, a court facing a discovery dispute involving a nonparty to the litigation must consider additional factors. The court also noted the special recognition the Federal Rules of Civil Procedure provide to discovery demanded from nonparties.

1-20-22 ESTATE OF MICAH SAMUEL TENNANT DUNMORE VS. PLEASANTVILLE BOARD OF EDUCATION ANGELA TENNANT VS. PLEASANTVILLE BOARD OF EDUCATION, ET AL. (L-0889-20 and L-0901-20, ATLANTIC COUNTY AND STATEWIDE) (CONSOLIDATED) (A-4314-19/A-4451-19)

In these matters arising out of the tragic shooting of a minor during a football game and his subsequent death several days later, the court considered whether the time for a minor's parent to file a notice of tort claim for her Portee[1] claim is tolled under the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 59:12-3. In reading in pari materia N.J.S.A. 59:8-8, which extends the statute of limitations for an injured minor to institute a cause of action until two years after their eighteenth birthday, and N.J.S.A. 2A:14-2, which tolls a parent's claim for the duration of the child's tolling period, and because the parent's Portee claim essentially includes the elements of the minor's claim, the court concludes it is only logical to toll the notice requirements under the TCA for the parent's Portee claim to coincide with the tolling period of the minor's claim. The court's ruling is consistent with the purposes underlying the entire controversy doctrine and in promoting judicial economy.

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[1] Portee v. Jaffee, 84 N.J. 88 (1980).

1-19-22 STATE OF NEW JERSEY VS. WILLIAM J. THOMAS (80-12-1541, ATLANTIC COUNTY AND STATEWIDE) (A-4368-19)

After being waived to adult court, defendant pled non vult to two murders that he committed when he was seventeen years old. He was sentenced to two concurrent life terms with no specified period of parole ineligibility, rendering him eligible for parole in May 1995, after serving thirteen years.

Defendant had no prior juvenile charges or adjudications of delinquency. Defendant has been a model prisoner during his decades of imprisonment. He has incurred no disciplinary infractions, committed no new crimes, obtained his GED, engaged in multiple programs to address his behavior and substance abuse, taken vocational courses, achieved and maintained gang minimum custody status, and serves as the electrician for the correctional facility. Defendant has now served over forty years in prison after being denied parole seven times and receiving lengthy future eligibility terms, despite multiple psychological evaluations that concluded he was a low risk for committing a new offense if released.

Defendant filed a motion for an adversarial hearing under Miller v. Alabama, 567 U.S. 460 (2012), to correct an unconstitutional sentence. Defendant contended that being eligible for parole was not the same as having a "meaningful opportunity for release." In support of his motion, defendant submitted parole data statistics regarding inmates who received life terms with no specified period of parole ineligibility. Defendant argued that although his sentence was life with no specified period of parole ineligibility, he was serving the practical equivalent of life without parole, which was not the intent of the sentencing judge. Defendant also emphasized that he has "a perfect institutional record" and "is a trusted inmate."

The State opposed the motion, arguing that the parole data was not relevant to whether defendant's sentence was illegal, and that defendant was not entitled to a Miller/Zuber[1] hearing because his original sentence was neither life without parole nor "the practical equivalent of life without parole."

Although recognizing that defendant had a blemish-free institutional record, the trial court denied the motion, finding it did not have the authority to review Parole Board or Appellate Division decisions. While crediting the parole data submitted by defendant and acknowledging that the "continued incarceration of defendant at the hands of the Parole Board did not seem to be the intention of [the sentencing judge]," the trial court nonetheless concluded that defendant's

sentence was not within the purview of Miller, Zuber, or Graham v. Florida, 560 U.S. 48 (2010). Noting the absence of any "mandated system of review for all lengthy juvenile sentences," the trial court held "there [were] no grounds for relief to defendant under the holdings in Miller, Graham or Zuber."

Applying Article I, Paragraph 12 of the New Jersey Constitution and the fundamental fairness doctrine, the court extended the procedure recently adopted by our Supreme Court in State v. Comer, ___ N.J. ___ (2022), for a juvenile convicted of homicide to petition the trial court for a review of their sentence after having served twenty years in prison, to defendant, who was sentenced to life without a specified period of parole ineligibility, and has now been imprisoned more than forty years as a result of seven parole denials.

The court reversed and remanded for an adversarial hearing to afford defendant the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" envisioned by Graham v. Florida, 560 U.S. 48 (2010) and Zuber, and adopted by Comer. At the evidentiary hearing, defendant shall have the right to be represented by legal counsel, present witnesses and expert testimony, cross-examine the State's witnesses, and introduce his nonconfidential parole records and other relevant, admissible exhibits. The court left the admissibility of such records and exhibits and any request for discovery to the sound discretion of the trial court. The court directed the trial court to consider the Miller factors and determine whether defendant has demonstrated maturity and rehabilitation.

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[1] State v. Zuber, 227 N.J. 422 (2017).

1-18-22 STATE OF NEW JERSEY VS. DIEGO ARROYO-NUNEZ (19-04-0265, UNION COUNTY AND STATEWIDE) (A-3746-20)

Defendant and the State of New Jersey jointly appeal the denial of their joint motion to modify defendant's sentence pursuant to Rule 3:21-10(b)(3). In 2019, defendant pled guilty to first-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(b)(1); the judge imposed a sentence of eleven years' imprisonment with twenty-four months of parole ineligibility, in accordance with the negotiated plea under N.J.S.A. 2C:35-12 (Section 12).

In April 2021, the Attorney General issued Law Enforcement Directive No. 2021-4, "Directive Revising Statewide Guidelines Concerning the Waiver of Mandatory Minimum Sentences in Non-Violent Drug Cases Pursuant to N.J.S.A. 2C:35-12," (the Directive). Pursuant to its terms, prosecutors were to file joint motions when requested by defendants, like defendant, who were serving mandatory minimum sentences for certain Chapter 35 offenses. The motions sought sentence modification eliminating, or reducing, the mandatory minimum feature of the sentence.

In all, more than 600 motions were filed. Defendant's motion was the first heard by a judge specially designated by the Supreme Court to hear these motions. The judge denied the motion, essentially concluding that a modification of defendant's sentence to eliminate the mandatory minimum term was contrary to the Legislature's intent when it enacted the Comprehensive Drug Reform Act of 1987 (the CDRA), N.J.S.A. 2C:35-1 to -36A-1, and the Directive thereby invaded the province of the Legislature contrary to the separation of powers doctrine. See N.J. Const. art. III, para. 1.

The court reversed, concluding the judge misconstrued Section 12 of the CDRA, and overlooked case law developed and statutory amendments enacted since its passage more than three decades ago. However, the court reiterated that the necessary finding of "good cause" for a modification under Rule 3:21-10(b)(3) is solely for the court to decide on an individual basis, and the mere filing of a joint motion did not establish "good cause" to modify the sentence.

1-13-22 JAMES T. KOPEC VS. ANNA M. MOERS JOSEPH LOPRESTI VS. JENNIFER LOPRESTI RICK G. ZORN VS. CHRISTINA ZORN SAMUEL MCGEE VS. LILLIAN MCGEE SANDRA WEED VS. LEROY WEED II MARY DETER VS. ROY L. DETER KAREN PREVETE VS. THOMAS MENDIBURU CHRIS DEFONTES VS. NICOLE DE (A-2551-18/A-2552-18/A-2553-18/A-2554-18/A-2726-18/A-2731-18/A-2758-18/A-3579-18/A-4190-18/A-4191-18)

In these ten back-to-back appeals, consolidated for the purpose of issuing one opinion, Weinberger Divorce & Family Law Group, LLC filed post-judgment motions in the Chancery Division, Family Part, to enforce its retainer agreements against its former clients. The law firm sought judgments for unpaid fees, or alternatively, orders compelling the parties to attend binding arbitration pursuant to an arbitration provision in its retainer agreements. The court affirms the denial of the law firm's enforcement motions, concluding: its applications should have been filed as complaints in the Law Division pursuant to the Rules of Court; the law firm was not entitled to entry of judgment for fees in any of the matters because it failed to provide the courts with the necessary information to assess the reasonableness of the fees requested by the firm; and the binding arbitration provision in the firm's retainer agreement is unenforceable because its vague, confusing and contradictory language fails to support the conclusion that the clients and the law firm mutually assented to its terms.

1-12-22 STEINER VS. STEINER (FM-07-2818-18, ESSEX COUNTY AND STATEWIDE) (A-2440-20)

After sixty-three years of marriage, plaintiff Sylvia Steiner commenced this divorce action. At the conclusion of a bifurcated trial for the sole purpose of resolving the parties' dispute about whether there were grounds for divorce, the trial judge found irreconcilable differences and entered a judgment of divorce. In appealing, defendant David Steiner argued, among other things, that bifurcation should not have been permitted and that the trial judge erred in finding irreconcilable differences. The court affirmed, holding that what constitutes irreconcilable differences varies from couple to couple and that the judge's determination that this couple's differences were irreconcilable and had endured for six months, as required by N.J.S.A. 2A:34-2(i), was entitled to deference. The court also held that the presiding judge did not abuse his discretion in bifurcating the cause of action from the parties' equitable distribution issues because of both the parties' ages and judicial economy, considering that a potential ruling on the cause of action in defendant's favor would negate the need for a time-consuming and costly trial on the parties' extensive equitable distribution issues.

1-10-22 STATE OF NEW JERSEY VS. TIMOTHY J. CANFIELD (16-12-3619, CAMDEN COUNTY AND STATEWIDE) (A-5586-18)

This case arises from a violent confrontation during which defendant shot and killed his sister-in-law's former boyfriend with a bow and arrow. The case examines when a trial court in a murder prosecution must instruct the jury on the lesser-included offense of passion/provocation manslaughter when the court decides to instruct the jury on self-defense. The court rejects the notion that passion/provocation manslaughter must always be charged when self-defense is raised, noting that that the two doctrines are triggered by different material elements, serve different purposes, and produce markedly different results. The court nonetheless recognizes that both doctrines address when and how a victim's conduct may affect a defendant's culpability for causing the victim's death; the same circumstances that prompt a responsive use of deadly force may provoke an impassioned reaction, requiring that the jury in a murder trial be given the option to convict for the lesser-included offense of passion/provocation manslaughter. Accordingly, the court recommends a new rule of procedure that when a trial court at a Rule 1:8-7(b) charge conference decides to instruct the jury on self-defense, the court should make findings on the record whether to charge on passion/provocation manslaughter, regardless of whether the defendant requests that instruction. This will help ensure that the decision is made in the first instance by the trial court, informed by the arguments of the parties, and not by an appellate court reviewing a cold record after a verdict has already been reached. The court also highlights the significant differences between the "rational-basis" test that applies when a defendant requests a jury instruction at trial and the more demanding "clearly-indicated" test that applies when a defendant contends for the first time on appeal that the court should have delivered the instruction sua sponte.

The court also addresses the geographic scope of the self-defense principle that a person need not retreat within his or her own dwelling before using deadly force, N.J.S.A. 2C:3-4(c). The court rejects defendant's argument that the term dwelling includes the "curtilage" of a home. The court also explains that a trial court need not instruct the jury on the principles of legal causation unless causation is at issue at trial.

1-3-22 STATE OF NEW JERSEY VS. JESUS M. HERRERA (18-08-0668, PASSAIC COUNTY AND STATEWIDE) (A-2021-20)

This case examines whether and in what circumstances a jury trial conviction for leaving the scene of a fatal motor vehicle accident, N.J.S.A. 2C:11-5.1, merges with a conviction for endangering an injured victim, N.J.S.A. 2C:12-1.2. The State appealed from the trial court's decision to impose concurrent state prison terms, arguing that N.J.S.A. 2C:11-5.1 and N.J.S.A. 2C:12-1.2 both expressly require that the sentences be served consecutively. Defendant cross-appealed, arguing that the trial judge should have merged the two convictions. Because the decision whether to impose consecutive or concurrent prison terms necessarily presupposes that a defendant has been convicted of at least two separate crimes, the threshold question is whether defendant's two convictions merge.

The court applies the "flexible" multi-faceted test for merger that focuses on the elements of the crimes and the Legislature's intent in creating them, and on the specific facts of each case. See State v. Miller, 237 N.J. 15 (2019). The court compared the elements of the leaving-the-scene and endangering crimes and also construes the express non-merger provisions codified in both N.J.S.A. 11-5.1 and N.J.S.A. 12-1.2. Both crimes are designed to protect injured individuals by creating incentives for persons to remain at the scene of an injury, to report the incident, and to render or summon aid. The two offenses thus offer alternative bases for punishing the same criminal conduct.

With respect to the critical fact-sensitive portion of the multi-part merger test, the court concludes that there was no continuous transaction to split into stages; rather, the criminal conduct was initiated and completed in a brief instant. In this instance, the leaving-the-scene and endangering crimes involved a single voluntary act—defendant's split-second decision to abscond from the accident scene—and were committed in the same place at exactly the same time.

Considering all of the relevant circumstances, the court concludes that the convictions must be merged, rendering academic the State's contention that consecutive sentences should have been imposed.

12-29-21 SEAVIEW HARBOR REALIGNMENT COMMITTEE, LLC, ET AL. VS. TOWNSHIP COMMITTEE OF EGG HARBOR TOWNSHIP, ET AL. (L-0079-17, ATLANTIC COUNTY AND STATEWIDE) (A-3048-19)

In this appeal, plaintiffs, Seaview Harbor Alignment Committee and certain residents of Seaview Harbor, challenge Egg Harbor Township's denial of their deannexation petition, which would have permitted Seaview Harbor to secede from the Township and annex with neighboring Borough of Longport. The trial court correctly affirmed the Township's decision. In doing so, the court considered and applied the three-part test enumerated in N.J.S.A. 40A:7-12.1, and concluded that although plaintiffs established that the Township's refusal to consent to deannexation was detrimental to a majority of Seaview Harbor residents, the Township's decision was neither arbitrary nor unreasonable, and plaintiffs failed to establish that deannexation would not cause significant harm to the well-being of the Township.

The court holds that a petition under N.J.S.A. 40:7-12.1 may be appropriately denied where a municipality establishes that deannexation would be detrimental to the majority of residents despite the undisputed fact that deannexation would produce considerable property tax savings for the petitioning homeowners, who seek to become part of a lower tax municipality. That detriment can include the loss of significant services to the community at large, removal of a diverse citizenship, and likely erosion of valuable civic participation caused by the absence of those homeowners who seek to deannex from the community

Here, the harm to the residents of Egg Harbor included not only the potential loss of revenue and attendant services, but the removal of a critical municipal resource – the diverse Seaview residents. That unique loss was not limited to its current and future economic impact, but also encompassed the transfer of a portion of Egg Harbor's population that historically participated in all phases of local government, and brought significant and substantive value to the deliberative decision-making process necessary for a healthy and robust community and government.

12-21-21 W.S. VS. DEREK HILDRETH, ET AL. (L-0043-20, GLOUCESTER COUNTY AND STATEWIDE) (A-2066-20)

Plaintiff alleged he was sexually molested by his sixth-grade teacher during the 1996–97 school year, but he reasonably did not realize he suffered injury as a result until 2016. His 2017 motion to file a late notice of claim was denied without prejudice; the judge concluding the certifications in support of the motion were not based on personal knowledge and otherwise inadequate.

In 2019, the Legislature made sweeping changes to the Tort Claims Act, the Child Sexual Abuse Act, and the Charitable Immunity Act, and it also enacted entirely new statutes of limitations for tort claims arising from sexual abuse and exploitation of minors, and sexual crimes committed against adults. See L. 2019, c. 120, and L. 2019, c. 239.

In particular, effective December 1, 2019, plaintiffs alleging sexual abuse as a minor that occurred prior to, on or after the effective date, may file suit at any time until reaching the age of fifty-five. The date the claim accrued no longer mattered. Effective the same date, a suit alleging sexual abuse by a public employee or employer no longer needed to comply with the predicate procedural requirements of the TCA, including, the notice of claim provision in N.J.S.A. 59:8-8. Plaintiff filed this suit in January 2020, and defendants — elementary school and school district — moved to dismiss, contending plaintiff failed to file a notice of claim within ninety days of the accrual of his claim. Ibid.

The court affirmed the motion judge's denial of defendants' motion, albeit for different reasons than he expressed. The court concluded that a retroactivity analysis was not required under the facts of this case, because plaintiff filed suit after the effective date of the new legislation and within the new statute of limitations; and, when filed, the complaint was no longer subject to the TCA's procedural requirements.

12-16-21 E.C., ET AL. VS. LEO INGLIMA-DONALDSON, ET AL. (L-1419-18, ESSEX COUNTY AND STATEWIDE) (RECORD IMPOUNDED) (A-2752-20)

In 2019, the Legislature expanded public-entity civil liability for claims based on sexual assaults and other sexual misconduct by enacting N.J.S.A. 59:2-1.3(a), which disables in those instances the immunities provided by the Tort Claims Act. In this action, plaintiff alleges he was the victim of the sexual misconduct of a teacher employed by the defendant board of education. In appealing the partial denial of its summary judgment motion, the board argued that this new statute does not apply unless the public entity – and not just the public employee – has engaged, in the words of the statute, in "willful, wanton or grossly negligent" conduct. The board also argued that even if triggered, N.J.S.A. 59:2-1.3(a) deprives the public entity only of its Tort Claims Act immunities, and not two defenses under the Act: the verbal threshold, N.J.S.A. 59:9-2(d), and the declaration that a public entity "is not liable for the acts or omissions of a public employee constituting a crime . . .," N.J.S.A. 59:2-10.

In affirming the denial of the board's summary judgment motion, the court enforced N.J.S.A. 59:2-1.3(a)(1) as written, concluding that a public employee's sexual offense was sufficient to provide the "willful, wanton or grossly negligent" conduct required of "the public entity or public employee" (emphasis added). The court also held that N.J.S.A. 59:2-10 is an immunity disabled by N.J.S.A. 59:2-1.3(a)(1) but that the verbal threshold in N.J.S.A. 59:9-2(d) is a limitation of liability, not an immunity, and remained applicable.

12-13-21 COLUMBIA FRUIT FARMS, INC., ET AL. VS. DEPARTMENT OF COMMUNITY AFFAIRS, ET AL. (DEPARTMENT OF COMMUNITY AFFAIRS) (A-3155-19)

Appellants are a group of twenty-nine New Jersey farms that maintained barns and other storage facilities on their properties. During the growing season, appellants housed farm workers in these structures. Despite this obvious change of use from structures intended to store agricultural products and equipment to residences for human beings, appellants refused to implement the additional fire safety measures required for residences by the New Jersey Uniform Construction Code (UCC), N.J.S.A. 52:27D-119 to -141.

In May 2018, the Director of the Division of Codes and Standards in the Department of Community Affairs (DCA) sent a letter to local construction officials reminding them of their responsibility to issue notices of violation when a farm failed to add fire suppression systems to the buildings in which their workers lived as required by the UCC. In March 2019, the Director sent a similar letter to the construction officials. As a result, the officials cited eighteen of the twenty-nine appellants for violating DCA's fire safety regulations between 2018 and 2019. None of these farms challenged the notices of violation.

On February 4, 2020, the Director sent a third letter to the construction officials again instructing them to enforce the change-of-use regulation when a farm converted a commercial farm building to residential living quarters for workers. The Director forwarded a similar letter to the New Jersey Secretary of Agriculture outlining the UCC requirements for residential structures used to house farm workers and the Secretary distributed that letter to a number of farms. Appellants thereafter filed a notice of appeal alleging that the Director's February 4, 2020 inter-agency letter to the Secretary constituted a "new agency rule" that DCA did not adopt in accordance with the rulemaking procedures required by the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -31.

The court rejected this argument and concluded the Director's February 4 letter bore few of the qualities that characterize a rulemaking activity subject to the procedural requirements of the APA as set forth in Metromedia, Inc. v. Dir., Div. of Tax'n, 97 N.J. 313, 331-32 (1984). Because the letter was not a new agency rule, the court dismissed appellants' appeal.

12-13-21 STATE IN THE INTEREST OF E.S. (FJ-20-0380-21, UNION COUNTY AND STATEWIDE) (A-3559-20)

This interlocutory appeal presents an unsettled question concerning the fair and appropriate sequence of proceedings in the prosecution of a juvenile offender who the State wishes to waive to adult court pursuant to N.J.S.A. 2A:4A-26.1. The question arises in a context where the juvenile moves to suppress evidence that the State will rely upon at the waiver hearing and also possibly seek to admit at an eventual trial.

The juvenile, joined by amici, argues the suppression hearing should take place first in the Family Part. Conversely, the State argues the waiver hearing should occur first, and, if the juvenile is waived, the Criminal Part then should hear the suppression motion.

Responding to the motion judge's observation of the need for guidance in the absence of a Court Rule or precedent on point, the court holds the Family Part has the discretion to determine the optimal sequence of proceedings, depending upon the circumstances presented in a particular case. In exercising that discretion, the trial court should apply a general preference to have the suppression hearing conducted first in the Family Part. As explained in this opinion, however, that preference may be outweighed by other considerations, such as whether (as is the case here) an adult alleged co-perpetrator or an already-waived juvenile co-perpetrator has filed a cognate suppression motion in the Criminal Part. Thus, unless a future Court Rule prescribes a different approach, the sequencing decision is best handled in the trial court in a case-by-case discretionary manner with that preference in mind.

Additionally, the court adopts the State's concession that if the juvenile offender is waived first but a Criminal Part judge thereafter grants the suppression motion, the offender can move to have the case remanded back to the Family Part if the remaining non-suppressed evidence can no longer support the continued prosecution of the juvenile as an adult.

Because the Family Part judge in this case did not misapply his discretion in choosing to proceed with the waiver hearing first, the court affirms that determination.

12-9-21 STATE OF NEW JERSEY VS. CALVIN FAIR (15-08-1454, MONMOUTH COUNTY AND STATEWIDE) (A-0913-19)

Defendant was charged in a one-count indictment with violating N.J.S.A. 2C:12-3(a) "and/or" (b). At trial, the jury was instructed that it could convict if it found defendant made a threat with "the purpose to terrorize" or with a "reckless disregard" of the risk of causing terror, under N.J.S.A. 2C:12-3(a), or if it found defendant threatened to kill "with the purpose" to put the victim in imminent fear of death, under N.J.S.A. 2C:12-3(b). During deliberations, the jury asked whether it was required to find a violation of both subsections (a) and (b); the judge responded one was enough but did not instruct the jurors that they had to unanimously agree on one of the theories to convict. In appealing his conviction, defendant argues N.J.S.A. 2C:12-3(a) violates the First Amendment in part and that the jury unanimity instructions were erroneous.

The court reversed, determining that N.J.S.A. 2C:12-3(a)'s "reckless disregard" standard is unconstitutionally overbroad and that the jury instructions did not adequately ensure against a patchwork verdict.

11-30-21 TOWNSHIP OF MONTCLAIR COMMITTEE OF PETITIONERS, ET AL. VS. TOWNSHIP OF MONTCLAIR ET AL. (L-2724-20, ESSEX COUNTY AND STATEWIDE) (A-2315-20)

Defendant's municipal clerk determined that plaintiffs' petition for a referendum on a rent-regulation ordinance lacked sufficient signatures; the clerk's decision resulted from her discerning of differences between some of the petition's e-signatures and the corresponding voters' pen-and-ink signatures on the voter rolls. The court affirmed the trial judge's determination that the clerk acted arbitrarily and capriciously because, among other things, the court found it was unreasonable, in light of the limiting circumstance of the COVID-19 pandemic, and the Governor's emergency order precluding door-to-door solicitations, for the clerk not to reach out and provide voters with an opportunity to cure any alleged uncertain signatures before attempting to disenfranchise them from the referendum process.

11-18-21 IN THE MATTER OF THE VERIFIED PETITION OF THE RETAIL ENERGY SUPPLY ASSOCIATION, ETC. (NEW JERSEY BOARD OF PUBLIC UTILITIES) (A-1229-20)

On January 22, 2019, the staff of the Board of Public Utilities issued a "Cease and Desist and Refund Instructions" Letter (2019 Letter) stopping third-party suppliers of electricity generation and transmission from passing through a price increase to their fixed- or firm-rate customers when those increases were allegedly due to a new provision of the Clean Energy Act, L. 2018, c. 17 (eff. May 23, 2018). Appellant, an organization representing these suppliers, filed a petition with the Board seeking the withdrawal of the 2019 Letter. Two other providers, together with the Division of Rate Counsel, asked to participate in the matter.

Although the Board's Secretary later offered other providers the opportunity to "reach resolution and close out the matter" and "thereafter be released" from the terms of the 2019 Letter, the Board never addressed appellant's petition asking that the directive be withdrawn in its entirety. After waiting over twenty months for the Board to act, appellant filed a notice of appeal from the Board's inaction.

Under these circumstances, the court remanded the matter and directed the Board to consider and resolve appellant's petition within sixty days of the date of the remand.

11-4-21 STATE OF NEW JERSEY VS. COUNTY OF OCEAN (L-0527-20, OCEAN COUNTY AND STATEWIDE) (A-3665-19)

An Ocean County Prosecutor's Office (OCPO) detective was operating a county vehicle while performing official duties when she struck another vehicle injuring a passenger. After the passenger sued the OCPO and the detective for personal injuries, the State agreed to defend and indemnify both defendants. However, the State asserted that pursuant to N.J.S.A. 59:10A-5 it could avail itself of the County's self-insurance and excess insurance policies mandated by N.J.S.A. 40A:10-3 as the primary sources to satisfy any judgment or settlement in the tort case. The State sued the County seeking a declaratory judgment to this effect. The trial court dismissed the complaint.

On appeal, the court affirmed and held that N.J.S.A. 59:10A-5 grants the Attorney General the ability to direct who shall take up the defense on behalf of the State. However, pursuant to Wright v. State, 169 N.J. 422 (2001), where an employee is entitled to a defense by the State, the State shall also bear the costs of indemnification. N.J.S.A. 59:10A-5 does not alter the State's obligation to defend and indemnify utilizing its resources.

11-3-21 STATE OF NEW JERSEY VS. JOELLE D. CARONNA STATE OF NEW JERSEY VS. FREDDY COLLADO (20-02-0221, MIDDLESEX COUNTY AND STATEWIDE) (CONSOLIDATED) (A-0580-20/A-0581-20)

This court held that the exclusionary rule applies where police violate Article I, Paragraph 7 of the New Jersey Constitution by unreasonably and unjustifiably ignoring a search warrant requirement that they knock and announce their presence before entering a dwelling. Doing so deters police from flagrantly violating knock-and-announce search warrant requirements; safeguards against unconstitutional, unreasonable, and illegal search and seizures under New Jersey law; and, importantly, upholds the rule of law and integrity of our administration of justice.

11-1-21 STATE OF NEW JERSEY VS. ANTHONY SCUDIERI (20-004, MONMOUTH COUNTY AND STATEWIDE) (A-0352-20)

In this appeal, the court held that the Legislature intended prospective application of the amended refusal statute, N.J.S.A. 39:4-50.4a. That intent was manifested by the Legislature's express statement that the amended legislation—which imposed on all defendants convicted of refusal the less onerous penalty of installing an interlock device rather than forfeiting his or her license as mandated by the former statute—would become effective on December 1, 2019, over four months after it was signed into law, and apply only to those defendants who committed an offense on or after that date. That unequivocal legislation pronouncement militates against retroactive application even for defendants who were sentenced after December 1, 2019.

In such circumstances, courts need not consider the common law exceptions to the presumption of prospective application as discussed in Gibbons v. Gibbons, 86 N.J. 515 (1981) and James v. New Jersey Manufacturers Ins. Co., 216 N.J. 552 (2014), nor the timing of the penalty incurred under the general savings statute, N.J.S.A. 1:1–15. The Legislature's determination that interlock devices serve as a greater deterrent than license forfeiture supports the conclusion that the amended legislation was neither ameliorative nor curative, in any event.

10-27-21 CHARLES J. PARKINSON VS. DIAMOND CHEMICAL COMPANY, INC., ET AL. (L-1341-18, UNION COUNTY AND STATEWIDE) (A-2639-20)

On leave granted, the court holds that the tax filings of corporations and other businesses receive the same presumption of confidentiality as individual tax records. Hence, the heightened requirements for disclosure specified in Ullmann v. Hartford Fire Ins. Co., 87 N.J. Super. 409 (App. Div. 1965), apply to such business tax filings as well.

As Ullmann instructs, a civil litigant can only obtain an opposing party's tax filings through discovery by demonstrating to the court: (1) the filings are relevant to the case; (2) there is a "compelling need for the documents because the information likely to be contained within them is "not otherwise readily obtainable" from other sources; and (3) disclosure would serve a "substantial purpose." Id. at 415-16.

10-22-21 WILMINGTON SAVINGS FUND SOCIETY, FSB VS. PATRICIA E. DAW, ET AL. (F-007259-16, OCEAN COUNTY AND STATEWIDE) (A-0829-19)

After appellants' home was severely damaged by Superstorm Sandy, they defaulted on their mortgage loan. Their flood insurer paid out $150,000 in benefits for the damage.

Pursuant to the contract terms, the lender's assignee held the insurance funds in escrow, while it decided whether repairs to the house would be "economically infeasible" or would lessen its security.

Over three years passed before the lender ultimately applied the insurance proceeds to the homeowners' outstanding debt. During that lengthy interval, over $40,000 in mortgage interest accrued.

The homeowners unsuccessfully argued to the Chancery judge they were entitled to a credit on the foreclosure judgment for that portion of the interest, due to the lender's allegedly unfair conduct.

Consistent with principles of fairness and reasonableness set forth in the Restatement (Third) of Property (Mortgages) (1997), this court holds the lender in such situations owes the borrower an implied covenant of good faith and fair dealing in determining how to dispose of the property or flood insurance funds.

If the lender unreasonably delays making a decision about the proposed use of the insurance funds for repairs, the Chancery judge has the equitable power to abate the mortgage interest that accumulated in the meantime. Additionally, the lender must place the insurance funds in an interest-bearing, segregated account until the proper use of those funds is resolved.

Having announced these governing principles, the court remands this matter to Chancery Division to develop the record more fully and evaluate whether the mortgage company breached the implied covenant.

10-18-21 JWC FITNESS, LLC VS. PHILIP D. MURPHY, ETC. (L-0388-20, SUSSEX COUNTY AND STATEWIDE) (A-0639-20)

In this latest appeal arising from executive orders (EOs) issued by the Governor of New Jersey in response to health-related emergencies caused by the spread of the COVID-19 coronavirus, plaintiff JWC Fitness, LLC, which until October 2020 operated a kickboxing business, claimed entitlement to compensation under the New Jersey Civil Defense and Disaster Control Act (Disaster Control Act), N.J.S.A. App. A:9-30 to -63, for the closure and limitations placed on its business under some EOs.

According to plaintiff, the EOs that temporarily limited and shut down the operations of health clubs, including gyms and fitness centers, effectively "commandeered and utilized" its property under N.J.S.A. App. A:9-34, such that the State must establish an "emergency compensation board" under N.J.S.A. App. A:9-51(c), in order to provide "payment of the reasonable value of such . . . privately owned property." N.J.S.A. App. A:9-34. Plaintiff also sought a declaratory judgment that the EOs effectuated a taking of its property without just compensation, in violation of the New Jersey Constitution, art. I, ¶ 20, and the United States Constitution, amends. V and XIV.

The court concluded that plaintiff's arguments were without merit as the statutory standard for compensation had not been implicated, and the EOs did not effectuate a taking of plaintiff's property within the meaning of the state and federal constitutions.

10-18-21 GREEN KNIGHT CAPITAL, LLC VS. GABRIEL CALDERON, ET AL. (F-005626-20, HUDSON COUNTY AND STATEWIDE) (A-1265-20)

In this action to foreclose a tax sale certificate, plaintiff appeals from three Chancery Division orders. The first denied plaintiff's motion to bar redemption and impose a constructive trust. The second granted the respondent investor's motion to intervene and permit redemption. The third denied plaintiff's motion to set the time, place, and amount of redemption as moot.

The court held that when an investor has an interest in the property in foreclosure, is prepared to redeem the tax sale certificate, and files a motion to intervene in the foreclosure action before the entry of an order setting the last date for redemption, the investor is permitted to intervene and redeem the tax certificate. Accordingly, the court affirmed the three orders entered by the trial court.

9-27-21 MORGAN DENNEHY VS. EAST WINDSOR REGIONAL BOARD OF EDUCATION, ET AL. (L-1333-17, MERCER COUNTY AND STATEWIDE) (A-2497-19)

Plaintiff Morgan Dennehy appeals from a February 18, 2020 order denying her motion for reconsideration of a previous order granting summary judgment to defendants East Windsor Regional Board of Education, Hightstown High School, James W. Peto, Todd M. Peto, and Dezarae Fillmyer. Plaintiff was a student at Hightstown High School and a member of the field hockey team. On September 9, 2015, the field hockey team was waiting for its scheduled practice on Hightstown High School's turf field to begin and was conducting drills in the "D-zone," an area between the recently renovated turf field and the track. Some members of the team were participating in the drills while others watched. A twenty-foot-tall ball-stopper is located at each end of the turf field and separates the "D-zone" from the turf field. While the field hockey team was practicing drills in the "D-zone," the boys soccer team was practicing on the turf field and plaintiff observed several soccer balls vault the ball stopper. After the team concluded its drills, plaintiff asked defendant Coach Fillmyer if she could take a shot on goal. Defendant agreed because plaintiff rarely had the opportunity to shoot on goal. Plaintiff left the area directly behind the ball stopper and, after she finished shooting, she was struck in the back of the neck by an errant soccer ball that went over the ball stopper. Plaintiff was later taken to the hospital and was diagnosed with a concussion. Plaintiff filed suit alleging that defendants were negligent and negligent in hiring, retaining, training, and supervision of employees.

On appeal, plaintiff argues that the motion judge erroneously applied the heightened recklessness standard set forth in Crawn v. Campo, 136 N.J. 494 (1994). After reviewing the applicable case law, the court concluded that the motion judge erred in applying the heightened recklessness standard from Crawn. In this case, defendant Fillmyer was not a co-participant who directly injured plaintiff and, therefore, Crawn does not apply.

The court also determined that Rosania v. Carmona, 308 N.J. Super. 365 (App. Div. 1998) does not apply to this case. In Rosania, a martial arts instructor participated in a sparring match with a student and kicked the student in the head causing his retina to detach. The martial arts dojo had a written rule that prohibited targeting of the head. The Rosania panel determined that if the jury found the risks inherent in the karate match

were materially increased by an instructor beyond those reasonably anticipated by the dojo rules, it should have been charged on the ordinary duty owed to business invitees rather than the heightened recklessness standard for competitive contact sports. The court declined to apply Rosania in this case for two reasons: first, defendant Fillmyer was not a co-participant; and second, the Rosania panel's decision was informed by cases decided by the New York Court of Appeals which contemplated a different heightened standard. The court concluded that because defendant in this case is a public employee, her duties, responsibilities, and immunities are clearly established in the New Jersey Tort Claims Act N.J.S.A. 59:1-1 to 12-3, and thus defendant is liable to the same extent as a private person for her negligence and the ordinary negligence standard should govern this case.

9-27-21 CITY OF NEWARK VS. NEWARK POLICE SUPERIOR OFFICER'S ASSOCIATION, ET AL. (PUBLIC EMPLOYMENT RELATIONS COMMISSION) (CONSOLIDATED) (A-0146-21/A-0159-21)

The court holds that the Mayor of the City of Newark has the authority, as a managerial prerogative, to mandate that all City employees be fully vaccinated against COVID-19. Nine unions representing City employees filed unfair labor practice charges against the City with the Public Employment Relations Commission (PERC) and requested an injunction to prevent the implementation of the mandate before the City negotiated with the unions. A Director of PERC issued an order granting in part and denying in part the unions' request for preliminary injunctive relief.

On leave granted, the court affirms the portion of the PERC order that held that the Mayor has a managerial prerogative to issue the mandate but vacates the portion of PERC's order that imposed restraints on the City or required any negotiations concerning the implementation, timing, or enforcement of the City's vaccination mandate.

9-17-21 JHC INDUSTRIAL SERVICES, LLC VS. CENTURION COMPANIES, INC., ET AL. (L-7635-17, BERGEN COUNTY AND STATEWIDE) (A-1980-19)

Defendant Centurion Companies, Inc. subcontracted demolition work it agreed to perform for Alfred Sanzari Construction to plaintiff JHC Industrial Services, Inc. JHC did the work and Sanzari paid Centurion for it. Centurion, however, did not pay JHC in full, prompting this action under the Prompt Payment Act. Although JHC completely prevailed after two years of litigation and trial, the judge refused its application for $104,670.51 in fees pursuant to N.J.S.A. 2A:30A-2(f), awarding it only $16,375.73. The judge reasoned it could not "[u]nder Rendine . . . grant over $100,000 in fees on a judgment that could not have exceeded $30,500."

The court reverses and remands for reconsideration of the fee award. The Prompt Payment Act is a fee-shifting statute that makes an award of "reasonable costs and attorney fees" mandatory to a prevailing party; the judge erred in reading in a proportionality requirement not included in the statute.

9-17-21 STATE OF NEW JERSEY VS. JOSUE A. CARRILLO (17-02-0316, ESSEX COUNTY AND STATEWIDE) (A-4889-18)

The main issue in this appeal from the trial court's denial of defendant's suppression motion without a testimonial hearing is whether the officer violated defendant's rights when he patted him down a second time, just minutes after the officer patted him down the first time and uncovered no weapons. The court concludes that an officer may conduct a second pat-down when, giving weight to the unproductive first one, the circumstances preceding the second one still give the officer reason to believe the suspect is armed and dangerous. Because there exist issues of fact material to that question, the court reverses the trial court's order and remands for a testimonial hearing.

9-16-21 STATE OF NEW JERSEY VS. DWAYNE D. BOSTON (15-09-2753, CAMDEN COUNTY AND STATEWIDE) (A-4752-17)

Defendant Dwayne D. Boston was convicted of third-degree possession of cocaine following a routine traffic stop on his way home from the movies with his wife and children. He contends the police unlawfully asked him, a front-seat passenger in his wife's car, to hand over his State identification card after he told them he did not have a driver's license. The court agrees, and concludes defendant's subsequent arrest on an open traffic warrant was unlawful, and the drugs seized in the ensuing search incident to his arrest should have been excluded at trial.

The court holds in a routine traffic stop where the driver has to be arrested on an open traffic warrant, the officer's asking whether a passenger is a licensed driver is reasonable; but when the passenger claims he does not possess a license, the officer's further demand for identification from the unlicensed passenger in the absence of particularized suspicion is not.

9-10-21 27-35 JACKSON AVENUE, LLC VS. SAMSUNG FIRE & MARINE INSURANCE CO., LTD. (L-6049-17, BERGEN COUNTY AND STATEWIDE) (A-2925-19)

A sprinkler head discharged for no apparent reason at plaintiff's property and flooded two floors. A major tenant immediately cancelled its lease, and plaintiff made claims under an insurance policy issued by defendant. Defendant hired an expert to examine the sprinkler head; he concluded that defendant had no subrogation claim because it could not prove the cause of the discharge.

Plaintiff requested that defendant preserve the sprinkler head for its expert's examination. However, defendant's expert had already disposed of it. Plaintiff retained its own expert, who concluded the cause of the discharge was either a product defect, faulty installation, or faulty maintenance/inspection, but he could not conclude which of those possibilities was more likely. Plaintiff filed suit, alleging intentional and negligent spoliation of evidence. After discovery, the judge granted defendant summary judgment.

The court concluded that plaintiff was not entitled to an "adverse" or "spoliation" inference against defendant, which was not the third-party target defendant. The court also concluded that although other states have adopted modified proximate cause standards to permit a plaintiff to demonstrate a prima facie spoliation case despite the loss of critical evidence, our Court has not addressed the issue. Instead, relying on traditional negligence principles, the court concluded that, given its expert's indefinite conclusions, plaintiff failed to establish a prima facie case of proximately caused injury and damages. The court affirmed the grant of summary judgment.