DATE NAME OF CASE (DOCKET NUMBER)

09-04-09 COUNTY OF WARREN, ET AL. V. STATE OF NEW JERSEY, ET AL.
A-4591-07T1

This opinion upholds the validity of the master plan adopted by the Highlands Water Protection and Planning Council against an argument that the Council lost its authority to adopt the plan by failing to do so within the time set forth in N.J.S.A. 13:20-8. It also rejects constitutional challenges to the Highlands Act based upon equal protection arguments, some of which were premised on a purported constitutional right to farm. The Act had already been upheld on due process grounds in OFP, L.L.C. v. State, 395 N.J. Super. 571 (App. Div. 2007), aff'd o.b., 197 N.J. 418 (2008).

09-02-09 NEW JERSEY ASSOCIATION OF SCHOOL BUSINESS OFFICIALS V. LUCILLE E. DAVY, COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION
A-6074-07T2

The Commissioner of the Department of Education has adopted regulations entitled "Fiscal Accountability, Efficiency and Budgeting Procedures," N.J.A.C. Title 6A, Chapter 23A, to implement laws enacted to revise the school funding formula and reduce property taxes, in part, through oversight and limitation of government spending by school districts. See L. 2007, c. 53, 63, 92 and 260. We reject a challenge to the Commissioner's authority to adopt regulations that set standards for payments in lieu of unused sick and vacation leave to school district business administrators, N.J.A.C. 6A:23A-3.1(e)(6)-(8), and condition a school district's receipt of state aid on its adoption of a nepotism policy, N.J.A.C. 6A:23A-6.2.

09-02-09 BOARD OF EDUCATION OF THE CITY OF CLIFTON V. ZONING BOARD OF ADJUSTMENT OF THE CITY OF CLIFTON
A-0717-07T3

Due to overcrowding at Clifton High School, the Board of Education of the City of Clifton acquired property, which housed a vacant warehouse that the Board would convert into a 500-student ninth-grade annex. Because the property was located in an industrial zone, where schools are not permitted, a use variance was required. The Department of Education (DOE) approved the project but the Zoning Board denied the variance based on, among other things, on- and off-site safety issues.

We affirmed Judge Passero's reversal of the denial and grant of the variance, concluding, in part, that the Zoning Board could not consider on and off-site safety issues because the Educational Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 to -48, gave the DOE exclusive jurisdiction over such issues.

08-26-09 TOWNSHIP OF WYCKOFF v. PBA LOCAL 261, ET AL.
A-2268-07T2/A-2527-07T2 (consolidated)

In these consolidated appeals from a trial court determination that an arbitrator had exceeded his powers in affording relief to the union and its member, Brenda Groslinger, we conclude, following federal law, that the standard of review of an arbitrator's interpretation of the issue submitted to him is a deferential one. Utilizing that standard, we reverse.

08-25-09 STATE OF NEW JERSEY V. LOUIS E. VENEY, JR.
A-2852-06T4

The question presented on direct appeal is whether a defendant was denied effective assistance of counsel because his attorney failed to seek dismissal of the charge of third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b, the State having previously tried defendant to conclusion on another charge, arising from the same core set of facts giving rise to the charge of unlawful possession of a weapon. We concluded that the State was barred from prosecuting the charge of unlawful possession of a weapon pursuant to the mandatory joinder rule, N.J.S.A. 2C:1-8b and Rule 3:15-1(b). In the opinion we discussed the various rules of procedure and principles of law governing not only mandatory joinder, but also double jeopardy, severance and dismissals.

We also concluded that defendant was denied the effective assistance of counsel; and reversed the conviction and dismissed the indictment.

08-24-09 HOMES OF HOPE, INC. V. EASTAMPTON TOWNSHIP LAND USE PLANNING BOARD
A-5551-07T2

The issue presented is whether affordable housing continues to constitute an inherently beneficial use for purposes of obtaining a use variance, N.J.S.A. 40:55D-70d(2), after the municipality in which the property is located has met its fair

share obligation under the Fair Housing Act (FHA), N.J.S.A. 52:27D-301 to -329.19, and its concomitant regulations. We conclude that a municipality's compliance with the FHA by meeting its fair share obligation does not impact affordable housing's inherently beneficial use status for purposes of obtaining a use variance. Affordable housing continues to foster the general welfare and constitutes a special reason to support a use variance.

08-20-09 DAVID B. BURNETT V. GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS, ET AL.
A-6131-07T2

In this Open Public Meeting Act, N.J.S.A. 10:4-6 to -21 challenge, plaintiff successfully proved one violation of the Act occurring within forty-five days of the action being filed. We concluded the remaining allegations of violations occurred more than forty-five days prior to the filing of plaintiff's complaint, making them untimely for relief pursuant to N.J.S.A. 10:4-15. Nevertheless, they were evidential of an alleged past pattern of defendant's noncompliance with the Act presented to support plaintiff's request for prospective injunctive relief pursuant to N.J.S.A. 10:4-16.

We reversed the Law Division's summary judgment dismissal because the alleged violative actions were too remote. When examining the timeliness of plaintiff's request, we concluded the limitations period in Rule 4:69-6 does not preclude consideration of the defendant's past conduct when determining the appropriateness of an injunctive remedy.

08-19-09 TOWNSHIP OF READINGTON, ET AL. V. SOLBERG AVIATION CO., ET AL.
A-3083-07T3/A-1537-08T3 (consolidated)

This appeal challenging a condemnation judgment granting, among other things, title and possession of a portion of defendant Solberg Aviation Co.'s ("defendant" or "Solberg") property to plaintiff Township of Readington ("plaintiff" or "the Township"), raises two critical issues of law. The first is the preemptive effect of state aviation statutes, specifically the Air Safety and Zoning Act (ASZA), N.J.S.A. 6:1-80 to 84, -88, and the State Aviation Act, N.J.S.A. 6:1-20 to -44, and regulations on land use authority. The second is the application of the principles enunciated in Mount Laurel Twp. v. MiPro Homes, L.L.C., 379 N.J. Super. 358 (App. Div. 2005), aff'd, 188 N.J. 531 (2006), cert. denied, ___ U.S. ___, 128 S. Ct. 46, 169 L. Ed. 2d 242 (2007). Defendant claims that the

taking was pretextual in an attempt to limit the use of airport property. As to this claim, we conclude that defendant presented a sufficient factual basis to overcome a motion for summary judgment; we further conclude that state statutes preempt certain aspects of local land use, constraining a municipality's exercise of its condemnation authority, Garden State Farms, Inc. v. Bay, 77 N.J. 439, 449 (1978). In a consolidated appeal, we further conclude that under the Eminent Domain Act of 1971 (EDA), N.J.S.A. 20:3-1 to -50, title passed to the Township upon the filing of the Declaration of Taking, and the Township improperly assessed taxes against defendant.

08-13-09 STATE OF NEW JERSEY IN THE INTEREST OF Z.W.
A-4759-07T4

Pursuant to N.J.S.A. 9:6-8.10a(b)(6), DYFS disclosed a confidential report to the prosecutor in a pending juvenile matter. Defense counsel sought discovery of the report; the prosecutor requested the judge to conduct a preliminary in camera review. The judge denied the request and ordered the prosecutor to review the report to determine whether it should be disclosed, in whole or in part, to defense counsel and, if so, to disclose it; the judge also ordered the prosecutor to obtain an additional DYFS report, and to review it and disclose to defense counsel any part of the report the prosecutor deemed to be discoverable.

We reversed and remanded for in camera review of both reports prior to disclosure to defense counsel. We held that N.J.S.A. 9:6-8.10a does not authorize the release of confidential DYFS reports to third parties not identified as authorized recipients of such reports in N.J.S.A. 9:6-8.10a(b) without an in camera review to determine if such disclosure is essential to the resolution of any issue before the court. (Approved for Publication Date).

08-12-09 JOSEPH QUIGLEY, ETC. V. ESQUIRE DEPOSITION SERVICES, LLC
A-1254-08T3

After a plaintiff has been given multiple opportunities to amend a complaint dismissed for failure to file a claim, a court is not required to review a motion to dismiss an amended complaint for failure to state a claim with the same liberality as the original complaint. An allegation that the price of a product was "excessive," without any consideration of the manner in which it was marketed, does not state a claim under the Consumer Fraud Act.

08-12-09 STATE OF NEW JERSEY IN THE INTEREST OF A.S.
A-5747-07T4

We suppress the confession of the fourteen-year-old adoptive daughter of F.D., who committed an act of fellatio upon F.D.'s four-year-old grandson, because in incorrectly explaining the daughter's Miranda rights and in participating in her interrogation, F.D. placed the interests of her grandson ahead of the interests of her daughter. We suggest that in circumstances in which a parent has a conflict of interest arising from a familial relationship to both the alleged juvenile perpetrator and victim, an attorney represent the juvenile during any custodial interrogation.

08-12-09 LESLIE LAUREN SEVERINO, ET AL. V. JERMAINE MELACHI, ET AL.
NAYDA REBOLLO, ET AL. V. JERMAINE MELACHI, ET AL.
A-0248-07T3 AND A-0299-07T3, consolidated.

Julio Severino and Yavalier Rodriguez were struck by an automobile and killed after they exited a vehicle owned by Severino's fiancé, Viviana Muniz. We held that Severino and Rodriguez were not entitled to underinsured motorist coverage or personal injury protection benefits because there was not a substantial nexus between the accident and the use or occupancy of the Muniz vehicle. We also held that Severino was not entitled to coverage as a named insured under the policy covering the Muniz vehicle.

08-11-09 CSFB 2001-CP-4 PRINCETON PARK CORPORATE CENTER, LLC, ETC. V. SB RENTAL I, LLC, ET AL.
A-6307-07T2

We hold that a non-recourse carve-out clause in a mortgage note is enforceable. It is not a liquidated damages provision inasmuch as it works to define the terms and conditions of personal liability, and not to affix probable damages. Moreover, the fact that in this case the breach that triggered personal liability (imposition of a subordinate lien on securitized realty without lender's consent) was eventually cured, resulting in no harm to the lender, does not render enforcement of the carve-out unfair or unjust. By further encumbering the property, even if only temporarily, the borrower's action had the potential to affect the viability and value of the collateral that secured the original loan and

therefore cannot be said to be totally unrelated to the borrower's ultimate default on its mortgage payment.

08-11-09 JOYCE QUINLAN V. CURTISS-WRIGHT CORPORATION
A-5728-06T1

Plaintiff sued her former employer, alleging gender discrimination and retaliatory discharge. The trial court erred when it instructed the jury that plaintiff's attorney's use at deposition of confidential documents plaintiff had copied from her employer's files was protected activity. Further, the record did not support presenting the issue of punitive damages to the jury.

08-10-09 ISMAEL CRUZ-DIAZ v. PETER J. HENDRICKS, ET ALS and LIBERTY MUTUAL INSURANCE COMPANY
A-4608-07T2

The judge dismissed plaintiff's PIP claim as time barred, pursuant to the PIP statute of limitations. N.J.S.A. 39:6A-13.1. We affirm, rejecting plaintiff's argument that payment of transportation costs to an independent medical examination (IME), which were paid by the PIP insurer, constitute a "benefit" that extends the time when the PIP statute of limitations begins to run.

08-10-09 IN RE ADOPTION OF N.J.A.C. 11:3-29 BY THE STATE OF NEW JERSEY, DEPARTMENT OF BANKING AND INSURANCE
A-0344-07T3

In this appeal, we uphold the validity of the physician's fee schedule adopted by the Commissioner of Banking and Insurance pursuant to N.J.S.A. 39:6A-4.6 and N.J.A.C. 11:3-29, as well as the personal injury protection (PIP) physician's fee schedule. However, we enjoin the use of the specific Ingenix UCR database permitted pursuant to N.J.A.C. 11:3-29.4(e)(1), pending further action by the Department of Banking and Insurance.

08-10-09 THE PRESBYTERIAN HOME AT PENNINGTON V. BOROUGH OF PENNINGTON, ET AL.
A-6061-06T1

In this appeal we consider the interpretation of a 1993 amendment to N.J.S.A. 54:4-3.6, which declares that the real property of various health care providers is exempt from local property taxes. The Tax Court held that an assisted living

facility must provide charity care in order to qualify for the exemption. We held that the language of the legislative history and plain language of the amendment contained no such qualification and reversed the order denying a real estate tax exemption for the 2003 and 2004 tax years.

08-06-09 PROFESSIONAL STONE, STUCCO & SIDING APPLICATORS, INC. v. JIM CARTER
A-0015-08T1

In reversing the denial of relief from a default judgment, the court found no equitable bar to a second Rule 4:50-1 motion and held that a trial court should consider on its merits a second more thorough motion when -- due to haste caused by pending collection proceedings -- an earlier Rule 4:50-1 motion was found inadequate and denied.

08-06-09 A.M.S., on behalf of minor child, A.D.S. v. BOARD OF EDUCATION OF THE CITY OF MARGATE, OCEAN COUNTY and BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY
A-4193-07T2

In this appeal, we uphold the Department of Education Commissioner's decision determining that Margate is responsible for providing petitioner's son with a free public school education. We found there was substantial, credible evidence in the record establishing that petitioner, a full-time, active duty member of the United States Army, is domiciled in Margate.

In turn, we also found that the Commissioner's determination that petitioner's son is also domiciled in Margate did not create a new rule without notice and comment rule-making. Rather, we found the Commissioner's decision on this point was consistent with the common law principle that a child's domicile is normally that of his or her parents.

08-06-09 FRANK BORROMEO VS. DOMINIC DIFLORIO AND CAROL MIGLIACCIO
A-3979-07T2

In this appeal, we reviewed the statutory requisites for writs of execution and concluded a misdirection in the command of a writ, that is, commanding the wrong sheriff to execute on a debtor's property and misstating the county in which the realty is located, makes the writ void, not merely voidable. The error

cannot be cured by a corrected writ; a new writ must issue. Moreover, an execution using a void writ is also void.

Regarding delivery of the writ, strict statutory compliance is necessary and delivery occurs only when the sheriff stamps the sealed writ. The date of receipt of a facsimile, which was not stamped, cannot be considered "delivered" under the statute.

Finally, the debtor's discharge in bankruptcy of a claim may not discharge the lien if the lien had attached to a legal interest of the debtor prior to the bankruptcy. However, the debtor must have held a legal interest subject to attachment, pursuant to N.J.S.A. 2A:16-1. The matter is remanded for the trial court to determine whether the debtor's recorded equitable interest in realty was such an attachable interest.

08-05-09 LARRY S. LOIGMAN, ESQ., ET AL V. THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, ET AL
A-3340-07T2

The position of municipal attorney must be provided for by ordinance, N.J.S.A. 40A:9-139, and the salaries, wages and compensation of municipal officers and employees must generally be set by ordinance, N.J.S.A. 40A:9-165. However, we held that an individual appointed as a municipal attorney may perform those duties defined in the ordinance establishing the position for the salary set by ordinance, and may also be compensated for additional nonrecurring services at an hourly rate authorized by a professional services resolution and contract pursuant to the Local Public Contracts Law, N.J.S.A. 40A:11-5(1)(a)(i).

08-05-09 LARRY LOIGMAN V. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, ET AL
A-2180-07T2

An ordinance creating a police department pursuant to N.J.S.A. 40A:14-118 satisfies the "organizational chart" requirement of Reuter v. Borough Council of Fort Lee, 328 N.J. Super. 547 (App. Div. 2000), aff'd in part, rev'd in part, 167 N.J. 38 (2001), by listing the maximum number of officers authorized within each rank.

08-05-09 STATE v. WENDIS ADAMES
A-1493-07T2

Defendant Wendis Adames appealed his conviction for the first-degree murder of his father. The issue at trial was not

whether Adames killed his father, but whether he was legally responsible for doing so based upon his alleged mental illness. See N.J.S.A. 2C:4-1. For that reason, the outcome of the trial turned largely on the jury's evaluation of expert testimony concerning his mental health at the time of the homicide. We concluded that the prosecutor improperly commented on Adames's demeanor in the courtroom during the cross-examination of one of his mental-health expert witnesses and again during summation. See State v. Rivera, 253 N.J. Super. 598, 604-05 (App. Div.), certif. denied, 130 N.J. 12 (1992). Some of her comments involved an incident that took place outside of the presence of the jury and, therefore, constituted improper factual assertions by the prosecutor. See State v. Farrell, 61 N.J. 99, 102-03 (1972). We reversed and remanded for a new trial.

08-04-09 HUBNER V. SPRING VALLEY EQUESTRIAN CENTER
A-4723-07T1

The question raised is whether the Legislature's policy inferable from the equine animal activities act, N.J.S.A. 5:15-1 to -11, precludes enforcement of an exculpatory agreement to defeat a claim of liability based on acts, omissions and circumstances expressly identified in N.J.S.A. 5:15-9. Because enforcement of a release in those circumstances is so likely to alter the balance struck by the Legislature in allocating the risks and costs of equine animal activities, N.J.S.A. 5:15-1, we conclude that absent contrary direction from the Legislature an exculpatory agreement cannot be enforced to defeat a claim of liability authorized by N.J.S.A. 5:15-9.

08-04-09 NEW JERSEY LAWYERS' FUND FOR CLIENT PROTECTION V. STEWART TITLE GUARANTY CO.
A-2622-07T1

Consistent with the Court's holding in Sears Mortgage Corp. v. Rose, 134 N.J. 326 (1993), we hold a title insurance company liable to its insureds for the defalcation of the closing attorney, because the carrier's written notice disclaiming any agency relationship between the attorney and the carrier was sent only to the wayward attorney, and not to the insureds.

We further hold the carrier vicariously liable for the attorney's defalcation, even though the theft of clients' funds occurred before the creation of an agency relationship. The harm caused by the attorney to his clients cannot be isolated to any discrete act. Here, the chain of defalcation continued long after the agency relationship was created.

08-04-09 MARIA STOECKER v. MARIO F. ECHEVARRIA
A-1452-07T2, A-1975-07T2 (consolidated)

The trial court correctly dismissed plaintiff's legal malpractice claim with prejudice because plaintiff failed to serve an affidavit of merit within the time required by N.J.S.A. 2A:53A-27. Plaintiff did not establish that: her failure to comply with the statute was due to exceptional circumstances, she substantially complied with the statute, or defendant should be estopped from seeking dismissal of the claim. Plaintiff's failure to comply with the affidavit of merit statute did not, however, bar plaintiff from asserting a claim against her attorney for fraud because that claim did not require proof that the attorney deviated from the standard of care applicable to the legal profession.

08-03-09 Abby Ryan and Kirk Ryan v. Andrew Renny, M.D.
A-0176-08T3

In this appeal, we construe N.J.S.A. 2A:53A-41c, which permits, under appropriate circumstances, a waiver of the specialty criteria required of a person either testifying as an expert witness or executing an Affidavit of Merit in a medical malpractice action. The statute provides that such person must be a specialist in the same area or subspecialty of the medical malpractice defendant. N.J.S.A. 2A:53A-41a. However, the court may waive the specialty requirement if: (1) the plaintiff can show "to the satisfaction of the court that a good faith [but unsuccessful] effort has been made to identify an expert in the same specialty or subspecialty;" and (2) another physician, who is not a specialist in the area of practice, "possesses sufficient training, experience and knowledge to provide the testimony." N.J.S.A. 2A:53A-41c. Here, three experts in the specialty were identified, but all declined to author an Affidavit of Merit in favor of plaintiff. We hold a waiver should not have been granted.

08-03-09 STATE OF NEW JERSEY v. TOY-LING WASHINGTON
A-2533-07T4

In this case, defendant was charged with the unlawful taking of the monies of an elderly person who resided in defendant's home. We held that the trial court correctly instructed the jury as to the manner in which it could aggregate the alleged thefts for purposes of determining the grade of the offense pursuant to N.J.S.A. 2C:20-2b(4). We also held that the

trial court correctly instructed the jury on three different types of theft even though the indictment only charged theft by unlawful taking because, under N.J.S.A. 2C:20-2a, a defendant may be found guilty if his or her conduct constitutes "theft" under any provision of Chapter 20 of the Criminal Code.

08-03-09 STATE V. PHILIP BERTRAND
A-2378-07T4

Defendant's conviction for refusing to provide breath samples, N.J.S.A. 39:4-50.2, is affirmed. The parking garage of a high-rise condominium that held 354 cars, and the use of which was restricted to residents of that building, constituted a "quasi=public area" for purposes of the statute.

07-31-09 D. LOBI ENTERPRISES INC. V. PLANNING/ZONING BOARD OF THE BOROUGH OF SEA BRIGHT
A-5718-07T2

We conclude that only seven of the nine members of a planning board, acting as a board of adjustment pursuant to N.J.S.A. 40:55D-25(c), may vote on an application for a "d" variance application under N.J.S.A. 40:55D-70(d). Further, under the facts of this case, the Board's decision to deny the "d" variance application was not arbitrary, capricious or unreasonable.

The trial court's decision on the voting requirement is affirmed, but its decision to overturn the Board's decision is reversed. The Board's denial of the variance is reinstated.

07-31-09 FREDDI JACKOWITZ V. STEPHANIE LANG
A-4699-07T1

In a civil damage compensatory damage trial, admonishing a jury to "send a message" to "defendant and other drivers" who abuse their driving privileges is inappropriate. We conclude that the trial judge did not commit error in setting aside the verdict and ordering a new trial.

07-31-09 STATE V. BRIAN T. BARROW
A-4334-07T4

A police officer stopping a motor vehicle for violating N.J.S.A. 39:3-74 must provide articulable facts showing that he

or she reasonably believed that an object hanging from a rearview mirror obstructed the driver's view.

07-31-09* Dione DeSours Costa v. Copeland Construction and Salvatore Gaccione
A-6022-07T1

The Law Division judge erred in dismissing plaintiff's claim against the general contractor and owner of a home-building site, as a matter of law on summary judgment. We concluded there was sufficient evidence to submit to a jury the issue of whether the owner of the property also operated as the de facto general contractor who was responsible for worksite safety under common law and OSHA. We distinguished Slack v. Whalen, 327 N.J. Super. 186 (App. Div. 2000), where the residential landowner did not act as a general contractor and had no duty for worksite safety. The situation in this case is factually distinguishable from Slack. [*Approved for Publication date]

07-30-09 STATE V. MARTIN F. SMITH
A-5217-07T4

Defendant's conviction on trial de novo for violating N.J.S.A. 39:4-125 is affirmed because he turned his vehicle "around so as to proceed in the opposite direction on a highway" on which a "no U turn" sign was conspicuously posted. Defendant does not have to perform a "u turn." The West Annotated version of the statute contains an error. The "no U turn" sign need not be on a "state" highway, and therefore whether or not the road was a "state" highway was irrelevant, as there is a rebuttable presumption the statute was properly posted. As defendant was not entitled to assigned counsel, the fact he was improperly assigned counsel in the Law Division does not require vacation of the municipal conviction because he was not assigned counsel there.

07-30-09 MAINTAINCO, INC. V. MITSUBISHI CATERPILLAR FORKLIFT AMERICA, INC.
A-1485-07T2

We held that constructive termination constitutes a violation of the Franchise Practices Act, N.J.S.A. 56:10-1 to -15.

We also held that expert fees are not allowable under N.J.S.A. 56:10-10, which allows a successful claimant under the

Act to recover "the costs of the action including but not limited to reasonable attorney's fees."

07-30-09 APPLICATION FOR PROJECT AUTHORIZATION UNDER THE NEW JERSEY REGISTER OF HISTORIC PLACES ACT, SEARS, ROEBUCK AND CO. RETAIL DEPARTMENT STORE, GATEWAY OFFICE PARK PROJECT, CAMDEN, NEW JERSEY
A-6494-06T1

The Camden Redevelopment Agency (CRA) submitted to the Historic Preservation Office of the Department of Environmental Protection (DEP) an Application for Project Authorization Under the New Jersey Register of Historic Places Act, N.J.S.A. 13:1B-15.128 to -15.132, to acquire and demolish the Sears, Roebuck and Company Retail Department Store, a building that had been placed on the National and New Jersey Register of Historic Places. We held that the CRA had standing to apply for and receive the authorization pursuant to N.J.S.A. 13:1B-15.131. We also held that the DEP did not act arbitrarily, capriciously or unreasonably in granting the application.

07-29-09 GINA STELLUTI VS. CASAPENN ENTERPRISES
A-3780-07T2

Plaintiff was injured when the handlebars of a stationary bicycle, which she was riding in a "spinning" class at a private fitness club, abruptly became detached. She sued the club for negligence. The club asserted that it was absolved from liability because of a non-negotiable exculpatory agreement that plaintiff had signed when she joined the club.

We found the exculpatory agreement enforceable in insulating the club from liability for ordinary negligence concerning the safety of its exercise equipment. The agreement did not and could not, as a matter of public policy, shield the club from more extreme conduct such as reckless, willful, wanton, or palpably unreasonable acts or omissions diminishing the safe condition of its equipment. Because the present scenario did not involve such extreme conduct, we affirm summary judgment in favor of the club.

07-29-09 THIGPEN v. CITY OF EAST ORANGE
A-0456-07T2

We held that the trial court was mistaken when it determined as a matter of law that defendants were liable in damages to plaintiff, Francis DeHerde, on his claim for service

as the de facto Supervisor of the East Orange Police's Traffic Unit, because the proofs conflicted as to whether he held that office on a de facto basis. We thus remanded the matter for retrial utilizing the standards expressed in Jersey City v. Dept. of Civil Service, 57 N.J. Super. 13, 27 (App. Div. 1959). We rejected the defendants' argument that DeHerde's damages should be limited to back pay, determining that if past and future pension benefits were found to be owing on retrial, the defendants, not the Division of Pensions, would be responsible for payment.

Plaintiff, Sanford Thigpen, another East Orange Police Officer, sought economic and non-economic damages for malicious prosecution pursuant to N.J.S.A. 2A:47A-1 and non-economic damages for invasion of privacy. We affirmed the trial court's determination that the claims were subject to the Tort Claims Act's injury threshold. Since that threshold was not met, Thigpen was entitled only to economic damages for malicious prosecution. We affirmed the dismissal of his non-economic damage claims based on malicious prosecution and invasion of privacy.

07-28-09 STATE OF NEW JERSEY V. LAURA MORAN
A-3810-07T4

We reject the constitutional and repeal by implication (though the subsequent creation of the motor vehicle point system) challenges to N.J.S.A. 39:5-31, which authorizes, without standards or limits, driver's license suspensions for willful motor vehicle violations.

07-27-09 ARNOLD P. FEROLITO V. PARK HILL ASSOCIATION and PAGANO COMPANY
A-4985-07T1

The appeal is from an award of fees and costs for frivolous litigation entered against a party pursuant to N.J.S.A. 2A:15-59.1. We address the scope of a prevailing party's obligations to give notice pursuant to Rule l:4-8 and to prove that the litigant, who was represented by counsel, acted in bad faith.

07-27-09 STATE OF NEW JERSEY V. JOHN LAKE
A-3988-07T4

As with official misconduct, N.J.S.A. 2C:30-2a, where a non-pecuniary benefit is involved, bribery, N.J.S.A. 2C:27-2a,

is a second-degree crime, and the State has no burden to prove that the benefit has a value of more than $200.

Personal characteristics of a defendant may be considered as applicable to a downgraded sentence pursuant to the interest of justice prong of N.J.S.A. 2C:44-1f(2) only if they relate to the offense itself and give fuller context to the offense circumstances.

We affirmed defendant's second-degree convictions for misconduct in office and bribery, but reversed his sentence in the third-degree range.

07-22-09 CLIFF K. GOLDSMITH V. CAMDEN COUNTY SURROGATE'S OFFICE
A-0628-08T3

Plaintiff filed this putative class action complaint alleging violations of OPRA and the common law right of access to public records. He contended that the copying fees charged by defendants were excessive. Plaintiff's complaint also alleged a cause of action for "unjust enrichment."

Plaintiff filed his complaint four months after paying the allegedly excessive fees. He thereafter voluntarily dismissed his substantive claims under OPRA and the common law, but alleged his equitable claim was not time-barred. The trial judge dismissed the complaint, finding plaintiff's equitable claims were subsumed by his OPRA and common law claims. As a result, his complaint was time-barred under Rule 4:69-6(a), and the holding in Mason v. City of Hoboken, 196 N.J. 51 (2008).

We agreed and affirmed. We concluded that plaintiff's equitable claim that sought disgorgement of excess fees was totally dependant upon his OPRA or common law access causes of action. Therefore, having failed to file in a timely fashion, the trial judge properly dismissed plaintiff's complaint.

07-22-09 STATE OF NEW JERSEY V. MICHAEL P. HANNIGAN
A-0323-06T4

We hold that the decision to impose consecutive indeterminate sentences is governed by the criteria relevant to rehabilitation identified in State v. Carroll, 66 N.J. 558, 561-62 (1975), not the criteria relevant to deserved punishment developed in State v. Yarbough, 100 N.J. 627 (1985).

07-21-09 CHICAGO TITLE INSURANCE CO. V. DANIEL ELLIS, ET AL.

A-5133-07T1

The issue considered is whether defendants who received fraudulently obtained money from their daughter must repay it to the rightful owner even if they had no knowledge of the fraud and even if they did not retain the money. We hold that exercise of dominion or control over the money makes defendants liable for conversion of the rightful owner's personal property, unless defendants were unaware of the fraud and received the money in exchange for fair value.

07-20-09 STATE OF NEW JERSEY IN THE INTEREST OF R.M.
A-0105-07T4

A juvenile who is found on the streets in violation of a municipal curfew ordinance and is unable to produce any identification may be arrested and detained until identification can be produced and the juvenile released to the custody of his or her parents. A juvenile who is arrested for a curfew violation may be searched incident to that arrest before being transported to police headquarters.

07-17-09 NEW JERSEY DIVISION OF YOUTH & FAMILY SERVICES V. A.P. and F.H., IN THE MATTER OF S.H.
A-3564-07T4

A parent's appeal of an order that dismisses a Title 9 action brought by DYFS before there has been an adjudication of abuse and neglect and entry of a final order of disposition is mooted by DYFS' filing of a Title 30 action for termination of parental rights.

07-16-09 MCKESSON WATER PRODUCTS CO. V. DIRECTOR, DIVISION OF TAXATION
A-5423-06T3

In this appeal, we are required to decide whether the Tax Court correctly construed the term "nonoperational income," as used in N.J.S.A. 54:10A-6.1(a), to determine whether plaintiff's gain from a deemed asset sale under Internal Revenue Code §338(h)(10) is subject to the New Jersey Corporation Business Tax (CBT). As a corollary to this issue, the Director of Taxation also sought a remand for the Tax Court to consider the applicability of the "unitary business" principle, in light of the United States Supreme Court's decision in Meadwestvaco Corp. v. Illinois Department of Revenue, 553 U.S., ___, 128 S. Ct. 1498, 170 L. Ed. 2d 404 (2008).

We affirm substantially for the reasons expressed by the Tax Court in McKesson Water Products Co., v. Director, Division of Taxation, 23 N.J. Tax 449 (Tax 2007). We also deny the Director's application for remand. Because the central issue in this appeal is resolved based on purely statutory grounds, we discern no legal basis to reach the constitutional issues implicated in the unitary business principle.

07-16-09 DYFS V. V.M. & B.G. - I/M/O GUARDIANSHIP OF J.M.G.
A-4627-06T4

In this Title 9 appeal, the majority concludes that DYFS established abuse and neglect. The majority declined to address the issue of whether in finding abuse and neglect, the trial judge erred in considering defendant mother's refusal to consent to a cesarean-section (c-section) as an element of abuse and neglect. The majority was of the view that there was sufficient evidence in the record to sustain the finding of abuse and neglect making it unnecessary to address the c-section issue. The panel agreed that the appeal was not moot as it reversed the finding of abuse and neglect as to defendant father notwithstanding that the parental rights of the parents were terminated in a subsequent Title 30 proceeding presently under review by this court.

The concurring opinion concludes that consideration of the mother's refusal to consent to a c-section was error and should be addressed. DYFS initially took the position that such refusal was relevant to the issue of abuse and neglect but later urged that the refusal was relevant to the issue of credibility as the mother later indicated that she did not refuse the procedure.

07-14-09 MELISSA TYNES, ET AL. V. ST. PETER'S UNIVERSITY MEDICAL CENTER, ET AL.
A-5267-07T2

The trial court erred by requiring plaintiff to show "exceptional circumstances" for a discovery extension because the court had not scheduled the matter for arbitration or trial; however, the court's order denying the discovery extension and dismissing plaintiffs' complaint with prejudice is affirmed because plaintiffs failed to show "good cause" to extend the time for discovery, as required by Rule 4:24-1(c).

07-13-09 STATE V. FINESMITH
A-4543-07T4

The State sought a communications data warrant for a one-year period to establish a pattern of use in anticipation of the defense that another member of the household was responsible for downloading child pornography. The trial judge granted the CDW but restricted it to the two-week period prior to the date of the last download of the prohibited matter.

Held: No reasons were given by the court for the two-week restriction other than the conclusion that the one-year period sought by the State was "excessive." We reversed, finding that the court's decision was arbitrary and unnecessarily restrictive of the State's right of investigation.

07-10-09 INTERNATIONAL SCHOOL SERVICES, INC. V. NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
A-5722-07T3

Plaintiff International School Services, Inc. (ISS) is a New Jersey corporation that employs teachers who work in schools located in Asia and South America. None of the teachers work in New Jersey. Plaintiff sought a declaratory judgment to determine whether it was obligated to provide workers' compensation insurance to its overseas employees pursuant to the New Jersey Workers' Compensation Act, N.J.S.A. 34:15-1 to -142.

In determining whether an employer must provide workers' compensation coverage, the trial court must analyze the connection between plaintiff's overseas employees and New Jersey in accordance with the standards set forth in Connolly v. Port Auth. of New York and New Jersey, 317 N.J. Super. 315, 319-20 (App. Div. 1998) (citing Larson's Workers' Compensation Law).

We reversed the trial court's order declaring that plaintiff was obligated to provide workers' compensation coverage for its overseas employees and remanded the matter for further discovery respecting the overseas employees' contacts with New Jersey and reconsideration in light of Connolly and Larson's treatise.

07-10-09 ALLSTATE INSURANCE CO. V. OTTO FISHER
A-4445-06T3

The failure of the motion judge to comply with Rule 1:7-4 requires that the uncontested summary judgment entered in

plaintiffs' favor be reversed and remanded; however, defendant's dilatory conduct warrants that the vacating of the judgment be conditioned on the payment of reasonable attorney's fees and costs.

07-09-09 STATE OF NEW JERSEY V. JOHN WESSELLS
A-1545-08T4

In this appeal we hold that, pursuant to both the federal and New Jersey Constitutions, a person who has asserted the right to counsel during a police custodial interrogation and is subsequently released may be interrogated again if the break in custody afforded a reasonable opportunity to consult an attorney.

07-06-09 ARCANGELO & DENISE CASILLI V. GEORGE SOUSSOU, ET ALS.
A-5205-07T2

We hold that the unambiguous terms of an insurance policy's exclusion clause denies coverage when use of a family member-owned vehicle other than the "named insured's" "covered auto" was involved, except when it was the "named insured's" themselves who were using the family member-owned vehicle. We found that excluding coverage for a separately-insured family member's use of a non-covered auto is not uncommon, is legally sound, and supported by policy.

07-02-09 STATE V. ALICE O'DONNELL
A-0858-06T4

Evidence observed in plain view during a police entry into a residence to provide emergency aid may be seized without a warrant even though there is a short delay between the emergency aid entry and the seizure of evidence by other police officers responsible for processing the crime scene.

07-01-09 TAC ASSOCIATES V. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY
A-1044-08T1

In this appeal, we invalidate N.J.A.C. 19:31-8.2, a regulation promulgated by the New Jersey Economic Development Authority (EDA) to implement certain sections of the Hazardous Discharge Site Remediation Fund. We determine that the regulatory definition for eligibility to a special revolving fund, established by the Legislature for the purpose of

financing remediation activities, is inconsistent with the statutory criteria in N.J.S.A. 58:10B-6(b)(4).

07-01-09 STATE OF NEW JERSEY V. GERMAN MARQUEZ
A-5044-07T4

The police have no constitutional obligation to translate into Spanish the standard statement under the breath-test refusal statute, N.J.S.A. 39:4-50.2(e), to a licensed New Jersey driver arrested for drunk driving who does not understand English. We reaffirm the Law Division's holding in State v. Nunez, 139 N.J. Super. 28, 32-33 (Law Div. 1976), that no such translation is required. However, we recommend that, as an administrative matter, the Motor Vehicle Commission prospectively consider having the standard statement translated into Spanish and perhaps other prevalent foreign languages.

07-01-09 DONNA HAND V. PHILADELPHIA INSURANCE COMPANY
A-1957-07T1

Contrary to the result reached by our colleagues in Olkusz v. Brown, 401 N.J. Super. 496 (App. Div. 2008), we conclude that the Legislature implicitly intended the so-called "Scutari Amendment," N.J.S.A. 17:28-1.1(f), to be applied retroactively. However, under the facts of this case, we also conclude that to do so would result in a manifest injustice to defendant insurer.

06-26-09 MARINA STENGART v. LOVING CARE AGENCY, INC.
A-3506-08T1

In this appeal, the court addressed whether workplace regulations converted an employee's emails with her attorney -- sent through the employee's personal, password-protected, web-based email account, but via her employer's computer -- into the employer's property. Finding that the policies undergirding the attorney-client privilege substantially outweigh the employer's interest in enforcement of its unilaterally imposed workplace regulation, the court rejected the employer's claimed right to rummage through and retain the employee's emails to her attorney.

06-26-09 MARILYN PISCITELLI V. CLASSIC RESIDENCE BY HYATT
A-5027-07T2

Plaintiff, Marilyn Piscitelli, sued defendant, Classic Residence by Hyatt, for compensatory and punitive damages arising out of its hiring of an illegal alien, Rosa Marchena,

who obtained employment with defendant as a maid using plaintiff's social security number and name.

On appeal, plaintiff asserted she, a victim of identity theft, may recover compensatory and punitive damages from the employer of the identity thief, based on (1) the employer's alleged negligence in complying with the federal employment verification requirements set forth in the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a(b); (2) the employer's alleged negligence in not utilizing the federal voluntary pilot program established by Pub.L. No. 104-208, 110 Stat. 3009-655 to 3009-665, to obtain confirmation of the identity of the thief; (3) the employer's alleged negligence enabling the identity thief to obtain employment with it; (4) the alleged fraud by the employer against plaintiff; and (5) the alleged breach by the employer of its "contract with the Federal and State tax authorities" to correctly report plaintiff's earnings.

We held there is no private right of action pursuant to IRCA, 8 U.S.C. § 1324a; no negligence cause of action based on IRCA and the voluntary pilot program for employee eligibility confirmation; plaintiff's common law negligence claim is preempted by IRCA, and; we decline to recognize the tort of negligent enablement of imposter fraud in the context of this case. We also found no basis for a fraud or third-party beneficiary claim.

06-19-09 VAN NOTE-HARVEY ASSOCS., P.C. V. NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY
A-3115-07T1

Defendant New Jersey Schools Development Authority did not comply with N.J.A.C. 19:38C-5.6 when it selected seven firms to serve as site consultants with respect to school construction in special needs districts. The regulation calls for preparation of a consolidated ranking, including technical scores and interview scores. The Authority did not prepare a consolidated ranking but based its decision on interview scores alone.

06-19-09 IN THE MATTER OF THE CIVIL COMMITMENT OF W.X.C., SVP-458-07
A-0347-07T2

In this case, we held that a sexually violent predator who did not receive sexual offender treatment while incarcerated does not have an ex post facto claim when he is committed

pursuant to the Sexually Violent Predator Act, N.J.S.A. 30:4-27.24 to -27.38.

06-18-09 VIVIAN CRESPO v. ANIBAL CRESPO
A-0202-08T2/A-0203-08T2 (consolidated)

The trial court in this matter found unconstitutional the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, because, in the trial judge's view: (a) the Legislature's enactment of practices and procedures for the adjudication of cases brought pursuant to the Act violated the separation of powers doctrine; and (b) the Legislature's requirement that such cases be adjudicated through application of the preponderance standard, instead of the clear-and-convincing standard, violated due process principles. The court disagreed on both points and reversed. In addition, the court rejected defendant's other constitutional arguments, which the trial judge had also rejected, regarding the Act's impact on the rights to: bear arms, trial by jury, the appointment of counsel, and discovery.

06-17-09 WARREN HOSPITAL v. NEW JERSEY DEPARTMENT OF HUMAN SERVICES, DIVISION OF MENTAL HEALTH SERVICES
A-1261-07T2

We conclude that the involuntary psychiatric commitment law, N.J.S.A. 30:4-27.1 to -27.23, does not require the designated screening center that conducts psychiatric screening services to be located in a hospital, so long as the statutorily required psychiatric assessment is accomplished in a setting where screening center staff can explore whether involuntary psychiatric commitment is actually necessary. Despite the absence of a statutory requirement, DHS promulgated a regulation requiring screening services to be "physically located in a hospital," and be "either directly operated by or formally affiliated by written agreement with said hospital." N.J.A.C. 10:31-6.1(b). DHS also adopted a regulation, N.J.A.C. 10:31-1.4, allowing waiver of this location requirement.

The location waiver issued to the screening service in question was the result of a comprehensive and thoughtful analysis of the relevant clinical and programmatic regulatory criteria, and is not violative of the involuntary commitment statutes. Because the statutes governing screening services do not obligate a designated screening center to be physically located in a hospital, issuance of the location waiver constituted valid agency action, and was neither arbitrary nor capricious.

06-16-09 RONALD HADFIELD, ET AL. V. THE PRUDENTIAL INSURANCE CO. AND ROSE ANN LILLO
A-5140-07T1

Defendant married decedent in 2002, and in 2003 he named her the beneficiary of his group life insurance policy. They divorced in 2004, and decedent died March 15, 2006, not having changed that designation. Amended N.J.S.A. 3B:3-14, effective February 27, 2005, controls; the policy proceeds pass as if the former spouse disclaimed her interest.

06-15-09 DAVANNE REALTY V. EDISON TOWNSHIP
A-0333-08T3

In conformity with Chapter 91 of the Laws of 1979, N.J.S.A. 54:4-34, the Tax Court dismissed plaintiff Davanne Realty's challenge to the assessed value of its commercial property. Davanne appeals from that order and contends that its tax bill is a fine, forfeiture or penalty imposed in violation of the Excessive Fines Clause of the Eighth Amendment and Article I, paragraph 12 of the New Jersey Constitution. We conclude that the Tax Court properly rejected this claim.

06-12-09 STATE OF NEW JERSEY V. JEREMIAH HUPKA
A-4882-07T4

Defendant, a sheriff's officer and part-time municipal police officer, pled guilty to fourth-degree criminal sexual contact. As part of his plea bargain with the State, he consented to the forfeiture of his current positions, and further agreed not to seek any employment in law enforcement in the future. However, the plea bargain reserved the issue of whether an order of permanent future forfeiture of all public employment, N.J.S.A. 2C:51-2(d), should be entered, pending further briefing and argument by the parties. The judge subsequently entered an order barring defendant from all future public employment, finding defendant's offense "involv[ed] or touch[ed] on" his official positions.

We reversed, concluding that under the circumstances presented, defendant's offense was not "related directly to [his] performance in, or circumstances flowing from, [his] specific public office[s][.]" Ibid. Therefore, forfeiture of all future public employment was not appropriately ordered.

In her dissent, Judge Lihotz concludes that under the circumstances presented, the offense required forfeiture of all future public employment under the statute.

06-10-09 FRIENDS OF PEAPACK-GLADSTONE V. BOROUGH OF PEAPACK-GLADSTONE LAND USE BOARD; THE MAYOR AND COUNCIL OF THE BOROUGH OF PEAPACK-GLADSTONE; HF COTTAGES, L.L.C.; AND HF DEVELOPMENT, L.L.C.
A-4668-07T3

Appellants, a coalition of local residents, appealed the Law Division's approval of settlement that a local land use board entered into with a developer. The settlement permitted the developer to build age-restricted, single-family homes on property adjacent to a golf course, in lieu of corporate-accommodation "golf cottages" that had originally been planned for the site. The settlement resolved a pending prerogative writs action that the developer had brought against the board and the municipality. The settlement terms were approved at a public hearing before the board patterned after Whispering Woods at Bamm Hollow v. Middletown Planning Bd., 220 N.J. Super. 161 (Law. Div. 1987).

Appellants contend that the settlement did not comply with the notice precepts and other requirements of Whispering Woods, and also violated the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 to -163. They mainly argue that the settlement improperly allowed the developer to circumvent, without obtaining a density variance, stricter density requirements that were extended to the property when it was rezoned after the developer had obtained preliminary and final approvals for the golf cottages.

We affirm the Law Division's approval of the settlement, and its finding that no density variance was required because the developer was still within the time frame protecting it from adverse rezoning.

In particular, we hold that: (1) the filing of litigation by objectors seeking to prevent the project's construction; and (2) a zoning official's decision to withhold issuance of a construction permit to the developer because of perceived deviations from the prior approvals, are both "legal action[s] . . . to protect the public health and welfare," sufficient to invoke the tolling of the developer's approval period provided for by N.J.S.A. 40:55D-21.

Second, we hold that although a land use board has the discretion at the preliminary approval phase to extend protection to a developer beyond the minimum three years prescribed by the MLUL, see N.J.S.A. 40:55D-49, any such extended period of protection flowing out of the preliminary approval is extinguished once the respective board grants final approval. N.J.S.A. 40:55D-52. Upon the adoption of final approval, a developer is instead protected from changes in the applicable zoning laws for a minimum of two years, subject to the board's ability to grant, in its discretion, three one-year extensions of protection. N.J.S.A. 40:55D-52. Those subsequent extensions may be issued either prospectively or retroactively, as permitted by N.J.S.A. 40:55D-52(c), and are further subject to tolling under N.J.S.A. 40:55D-21 because of certain intervening actions that interfere with construction.

06-09-09 ANTHONY GONZALEZ, JR. V. SETH SILVER, M.D., ET ALS.
A-2264-07T1

In this medical malpractice action, it was reversible error to have charged the stricter "but for all-or-nothing" causation test rather than the more relaxed "substantial factor" standard where plaintiff was not claiming negligence in causing his elbow to dislocate during surgery for a fractured wrist, but rather that defendant physician did not timely diagnose the dislocation because he failed to perform the recognized tests either through post-surgery x-rays or at follow-up visits.

We also addressed two other issues capable of repetition at retrial. One was evidential concerning the admission of testimony of plaintiff's car surfing (standing on the roof of a car) just before the accident, for credibility purposes given plaintiff's contradictory accounts at time of deposition and earlier to his physician. We held that since "car surfing" was related to neither diagnosis nor treatment of the injury plaintiff sustained, contradiction on such a marginal, collateral matter was especially likely to have injected prejudice into the proceeding and therefore under identical circumstances on retrial, reference to car surfing should be disallowed.

The other issue concerned the trial judge's conduct of voir dire, which did not fully conform to AOC's Directives #21-06 and #04-07 (Standards for Jury Selection), in that the court failed to ask three open-ended questions of each prospective juror. In this particular case, we found that plaintiff's counsel was complicit in the procedure ultimately employed, but noted that,

as a general proposition, we consider it error not to have asked the requisite open-ended questions until a juror answered the initial voir dire question in the affirmative. Although in civil matters a certain residual discretion resides in the trial judge to accommodate the individual circumstances of each case and the consensus views of counsel, we emphasized both the importance of following the proper voir dire protocol as provided in the Directives, which are intended as uniform practices binding on all trial courts, and the need, on retrial, to conform to those dictates.

06-08-09 KAS ORIENTAL RUGS, INC. v. ELLMAN
A-2567-07T2

In this appeal, the court addressed another variation of the problems recently considered in Romagnola v. Gillespie, Inc., 194 N.J. 596 (2008), and Best v. C & M Door Controls, Inc., 402 N.J. Super. 229 (App. Div.), certif. granted, 197 N.J. 13 (2008), regarding the impact of rule amendments on a rejected offer of judgment. In its earlier decision in this matter, Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278 (App. Div.), certif. denied, 192 N.J. 74 (2007), the court found without merit one aspect of the sales representative's damage award and, for the first time, made relevant his rejection of his adversary's offer of judgment; however, by the time the court decided the earlier appeal, Rule 4:58 had been amended and, in its amended form, made available defenses to a fee allowance that were not expressed in the Rule as it existed when the offer was made and rejected.

The court held that, absent an injustice or interference with vested rights, the new amendments should apply to cases pending at the time of amendment. The court held that even if this were not so, it would apply the new rule amendments in this case due to its idiosyncratic nature and, as a result, reversed the allowance of offer-of-judgment fees.

The court also interpreted the fee-shifting provisions of the Sales Representatives' Rights Act, N.J.S.A. 2A:61A-1 to -7, as permitting awards to both the sales representative and his principal where the former had filed claims that should be viewed independently and where one claim was meritorious and the other potentially frivolous. As a result, the court remanded for a determination as to whether the second claim was frivolous.

Judge Miniman concurred in the holding regarding the offer of judgment rule and dissented from the majority's interpretation of the Sales Representatives' Rights Act.

06-05-09 MYRON CORPORATION V. ATLANTIC MUTUAL INSURANCE CORPORATION
A-5528-07T2

Plaintiff Myron Corporation, based in New Jersey and insured under a CGL policy written in New Jersey, was sued in several states by businesses claiming that Myron sent them "junk faxes" in violation of federal law. Plaintiff's insurer, Atlantic Mutual, refused to defend or indemnify Myron in the "junk fax" litigation. After successfully fending off a federal declaratory judgment action on coverage, which Atlantic filed in Illinois but which the federal court dismissed on abstention grounds, Myron prevailed on its New Jersey coverage lawsuit against Atlantic. We held that because Myron prevailed on the merits of its New Jersey coverage lawsuit and was entitled to fees for that litigation under Rule 4:42-9(a)(6), Myron was also entitled to counsel fees for the Illinois federal litigation, which was part of the same controversy over the coverage issue.

06-04-09 BOUIE V. NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, SUSAN BASS LEVIN AND DEBORAH HEINZ,
A-0842-07T3

The hearing that the Department of Community Affairs must afford a recipient of federal Section 8 rental assistance benefits before terminating those benefits is a "contested case" within the intent of the APA, which must be heard by an ALJ.

06-03-09 ST. GEORGE'S DRAGONS, L.P V. NEWPORT REAL ESTATE GROUP, L.L.C.
A-5779-06T1/A-6115-06T1 (consolidated)

The case concerns a lease giving the tenant of a commercial building the right of first refusal to purchase the property. We reviewed the legal principles applicable to rights of first refusal, concluding that both the first-refusal clause and the third-party offer were to be construed using traditional principles of contract interpretation. A first-refusal clause may specify that the right-holder must pay brokers' commissions and may guarantee the seller a net recovery on the sale. However, where neither the right of first refusal nor the third-party contract contained such provisions, the right-holder was only required to match the third party's purchase offer, and the

seller was obligated to pay the brokers' commissions, although this resulted in the seller obtaining a smaller net recovery on the sale to the right-holder.

06-02-09 DIANE REDVANLY V. AUTOMATED DATA PROCESSING, INC., and RICHARD FEENEY
A-4082-06T2

The United States Supreme Court held in McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995), that an employee, who was wrongfully terminated but was found to have committed misconduct that would have resulted in termination or non-hire, is not barred from all remedy at law, but the jury may consider evidence of misconduct in determining the damages award. In this appeal, we hold that in a case where this "after-acquired defense" is appropriate, the trial must be bifurcated into a liability and damages phase and evidence of the defense is admissible only in the latter phase.

06-01-09 DEB ASSOCIATES V. GREATER NEW YORK MUTUAL INSURANCE COMPANY
A-5308-07T3

We addressed insurance coverage for costs associated with bringing undamaged portions of a damaged structure up to current construction code standards. In this case, but for wind damage to the seventh floor of plaintiff's building (a covered claim), plaintiff would not have been required to bring the wall-to-floor connections in the rest of the building up to current code standards. Therefore, those additional repairs were covered under the policy.

05-29-09 UNITED HEARTS, L.L.C. v. MOZAFAR ZAHABIAN, a/k/a MIKE ZAHABIAN and ZAN ASSOCIATES, L.L.C.
A-6234-07T3

For purposes of imposing sanctions pursuant to Rule 1:4-8(b), a pleading cannot be considered frivolous, nor can an attorney be deemed to have litigated the matter in bad faith, when the trial court denies summary judgment on at least one claim and allows the matter to proceed to trial.

05-29-09 ELIZABETH SCHMIDHAUSLER, JOSEPH SHARPLES and SHIRLEY SHARPLES, LISA ANN WADE, JOHN CIECURA and MARION CIECURA and HILARY AYERS-KAVTARADZE v. PLANNING BOARD OF THE BOROUGH OF LAKE COMO and RONALD GLYNN

A-5932-07T3

In this case, a Planning Board member who was ineligible to vote on an application because he had missed one meeting at which the application was heard voted although he neither read the transcript nor listened to the tape of the meeting before voting, as required by N.J.S.A. 40:55D-10.2. We held that the remedy for such violation may be a remand to the Board to have all the current members revote with those who had not attended one or all of the hearings in the matter first review the transcript or listen to the tape of any meeting or meetings they may have missed, certify they have done so, and then deliberate and vote.

05-27-09 STATE OF NEW JERSEY V. GJELOSH DOCAJ, a/k/a JERRY DOCAJ, a/k/a JERRY DOCOJ
A-4592-06T4

An isolated error in the model jury charge on passion/provocation manslaughter was harmless when examined within both the context of the charge itself and the evidence and arguments presented at trial.

05-27-09 STEVEN TANENBAUM, ET AL. V. TOWNSHIP OF WALL BOARD OF ADJUSTMENT, ET AL.
A-1740-06T1

Plaintiffs, Steven and Deborah Tanenbaum, were homeowners in a Mount Laurel development constructed pursuant to the settlement of a builders' remedy suit. When the Tanenbaums sought to subdivide their property, they were informed by the Township's Board of Adjustment that they could not take advantage of the small-lot zoning that had been permitted as the result of the Mount Laurel litigation. Instead, their proposed subdivision was governed by the large-lot zoning otherwise applicable to the property. The Tanenbaums unsuccessfully challenged the Board's conclusion in a prerogative writs action. This appeal followed.

In our per curiam opinion, we affirm on the basis of the opinion of Judge Alexander Lehrer, which will be published simultaneously with ours.

05-21-09 DINESHA LEBRON VS. CAMDEN CITY BOARD OF EDUCATION AND SHARPE ELEMENTARY SCHOOL
A-5125-07T1

Plaintiff was hit by a car as she walked home from elementary school. We concluded her tort claims notice, filed within ninety days of the accident, adequately informed the defendant Board of Education of her injury in compliance with N.J.S.A. 59:8-4 of the Tort Claims Act, even though the stated basis of liability, i.e., no crossing guard, did not relate to a duty imposed on the Board. We determined the factual basis expressed in plaintiff's tort claims notice sufficiently advised the Board of possible liability for breach of its duty to supervise its student after dismissal. Further, the Act does not require a plaintiff to recite in the mandated notice the legal theories to be pursued in a civil action. We also concluded the Act imposed no obligation on plaintiff to refile or amend a notice to detail the alleged legal bases for the Board's liability, despite the passage of time between the first served notice when plaintiff was a minor and the filing of plaintiff's Law Division action after reaching the age of majority. Accordingly, we reverse the entry of summary judgment and reinstate plaintiff's complaint against the Board.

05-21-09 PAFF V. CITY OF EAST ORANGE
A-4280-07T2

The authority that N.J.S.A. 47:1A-5(f)(1) confers upon a custodian of government records to adopt a form for requesting access to a government record, which includes "specific directions and procedures for requesting a record," authorizes a custodian to direct that a request for a government record must be transmitted only by methods specified in the form, which need not include every method of transmission mentioned in N.J.S.A. 47:1A-5(g).

05-21-09 TINA RENNA V. COUNTY OF UNION
A-0821-07T2

We hold that all requests for OPRA records must be in writing; that such requests shall utilize the forms provided by the custodian of the records; however, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5(f). Where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5(g).

05-20-09 JUAN SERRANO and EDILBERTO VIVAR, et al v. UNDERGROUND UTILITIES CORP., et als.
A-0676-08T1

Plaintiffs, laborers employed by defendants on various construction projects in New Jersey, filed this putative class action on behalf of themselves and others similarly situated employees, alleging violations of the Fair Labor Standards Act, 29 U.S.C. §§ 207 and 216(b), and the New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.25 to -56.47.

Plaintiffs contend that they were not paid for all of the time that they actually worked, were paid regular wages for overtime hours, and were paid at hourly rates below the mandatory prevailing wage levels for public works projects. They seek compensation allegedly due under the statutes for work already performed, but no prospective relief.

The two named plaintiffs are immigrants from Ecuador, and most or all of the other alleged class members are from Central or South America. During initial depositions, defense counsel attempted to probe into plaintiffs' immigration status and other related matters, contending that such inquiries are germane to plaintiffs' credibility. Plaintiffs contend that the inquiries are improper and designed to intimidate them and the potential class members.

On leave granted, we affirm, with certain modifications and conditions, the trial court's protective order restricting the discovery of information relating to plaintiffs' immigration and residency status.

Judge Carchman has filed a concurring opinion, stating that the proper methodology for balancing the appropriate factors is to start with a presumption that any inquiry into matters of immigrant status is not appropriate. The concurrence would place the burden on the proponent to demonstrate, beyond the issue of credibility, why such inquiry is germane to the issues in dispute. Judge Simonelli joins in the concurring opinion.

05-20-09 W9/PHC REAL ESTATE LP, ET AL. V. FARM FAMILY CASUALTY COMPANY
A-1618-07T3

In the instance of conflicting pro-rata and excess other-insurance clauses in commercial general liability policies, the policy containing the pro-rata provision must be exhausted

first, up to the policy limits, before the excess-only policy becomes available. We follow the majority rule and find the pro-rata Zurich policy primary and the Farm Family excess only.

05-18-09 STATE V. GEORGE L. ROBBINS
A-0365-08T4

In order to successfully challenge the defendant's enrollment in the Pretrial Intervention ("PTI") Program, the State's appeal must be filed within fifteen days of the order of enrollment to obtain a stay of the order. The Rules provide that an order of enrollment into PTI over the Prosecutor's objection is final for purposes of appeal, but must be filed within fifteen days to stay defendant's participation in the program.

05-15-09 A.B. v. DIVISION OF MEDICAL ASSISTANCE & HEALTH SERVICES and CAMDEN COUNTY BOARD OF SOCIAL SERVICES
A-1855-06T1

We rejected the petitioner's contention that he was not subject to the five-year bar on receipt of New Jersey Care benefits pursuant to N.J.A.C. 10:72-3.2. That regulation is applicable to lawful permanent residents (LPRs) entering the United States on or after August 22, 1996, which imposes a five-year bar on benefits. He contended that his travel to the United States three times before that date when he stayed for six months in 1992 and two months each in 1994 and 1996 exempted him from the five-year bar even though he only entered the United States as a lawful permanent resident on December 1, 2005.

The New Jersey Medical Assistance and Health Benefits Act, N.J.S.A. 30:4D-1 to -19.5, defines "eligible alien," N.J.S.A. 30:42-3q, and that definition clearly creates two classes of lawful permanent residents——those who entered the United States before August 22, 1996, and those who entered on or after that date. Ibid. The regulations governing New Jersey Care Benefits cannot be construed to avoid this statutory definition and create a third class——those who visited the United States before August 22, 1996, who then became lawful permanent residents on or after that date, thus avoiding the five-year bar that the Legislature imposed on receipt of benefits under the Act.

05-14-09 PANSINI CUSTOM DESIGN ASSOCIATES, LLC. V. CITY OF OCEAN CITY

A-2003-07T1

In this appeal we addressed the issue of whether the use of averaging of comparable sales by the trial judge in fixing the fair market value of the real property represents an appropriate evaluation methodology and whether it fulfills a judge's fact-finding responsibility. The trial judge, after excluding the high and low comparable sales presented by the expert witnesses in competing appraisals, averaged the values of the remaining comparables to arrive at a fair market value. We disapproved of the practice of averaging and concluded that it does not represent a reasoned and considered valuation technique.

05-13-09 State of New Jersey v. Geoffrey Pollock
A-5958-07T4

Defendant appealed his conviction for a per se violation of N.J.S.A. 39:4-50, driving with a blood alcohol concentration of 0.08 percent or more. We are called upon to determine whether the semiannual-recalibration requirement for Alcotest machines, established by the Supreme Court in State v. Chun, 194 N.J. 54, cert. denied, ___ U.S. ___, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008), is applicable to cases in which the test was administered prior to Chun and in compliance with the then existing annual-recalibration protocol. Because we determined that the change mandated by Chun was not intended to be applied to such, we affirmed the conviction.

05-12-09 State of New Jersey v. Robert Dwayne Green
A-1892-07T4

It was error for the Criminal Division Manager to refuse defendant the opportunity to submit an application for pre-trial intervention. Pursuant to Rule 3:28 and the accompanying PTI Guidelines, a defendant must be allowed to apply for PTI, even if the application is unlikely to be granted due to the prosecutor's opposition. Accordingly, we reversed the Law Division order denying defendant's PTI appeal motion, and remanded with direction that the Criminal Division Manager allow defendant to submit an application and render a decision on the merits of the application.

05-11-09 NJ CURE v. THE ESTATE OF ROBERT HAMILTON and ALBERT DENEVE, M.D.
A-0964-08T3

Albert DeNeve, M.D., appealed an order, entered pursuant to Rule 1:10-3, sanctioning him for failure to supply the medical records of a patient in connection with a Personal Injury Protection (PIP) arbitration to which DeNeve was not a party. We vacated the sanction order because DeNeve was not properly served with the order to show cause and verified complaint that gave rise to the sanctioning order. In addition, he was never properly served with the underlying document subpoena. We reiterate that a document subpoena to a non-party must be served as required by Rule 1:9-3, unless the non-party voluntarily accepts and complies with mail service.

05-08-09 JAN SCHADRACK AND NGOC NGUYEN, husband and wife v. K.P. BURKE BUILDER, LLC AND JAN SCHADRACK AND NGOC NGUYEN, husband and wife v. L.E.D. ELECTRICAL AND MECHANICAL CONTRACTORS, LLC
A-5035-07T3/A-5063-07T3 (consolidated)

A de novo standard of judicial review applies to contentions that the arbitration of a construction lien claim violated the statutory requirements of the Construction Lien Law ("CLL"), N.J.S.A. 2A:44A-1 to -38. However, utilizing that review standard, we are satisfied that the CLL arbitrations in these two related cases did not sufficiently, if at all, transgress the statute so as to require forfeiture of the respective contractors' liens.

Specifically, in Schadrack v. LED, we conclude that the arbitrator's acceptance and consideration of supplemental documents from the lienor, over the homeowners' objection, did not violate the terms of the CLL and instead was a matter within the arbitrator's discretion under the Rules of the American Arbitration Association. We also find that the lienor's misidentification on the lien form of the corporate name of the project's general contractor was a de minimus error that did not require forfeiture.

In Schadrack v. Burke, we conclude that the lienor's untimely service of a request for arbitration was inconsequential because the homeowners failed to demonstrate the material prejudice required under the CLL's service provision, N.J.S.A. 2A:44A-7, to warrant forfeiture. Section 7's requirement of proof of material prejudice is not nullified by Section 5(c) of the CLL, N.J.S.A. 2A:44-5(c), that generally calls for strict compliance with statutory requirements in residential lien cases.

05-07-09 Dordaneh Maleki, M.D. v. Atlantic Gastroenterology Associates, P.A., et al.
A-1585-08T3

In this appeal, the court rejected the trial judge's determination that a typographical error in the jury verdict sheet, which mistakenly referred to a single defendant as "defendants," was capable of causing jury confusion when the thrust of the case as presented, as well as the entirety of the jury charge, demonstrated that the claim the jury was asked to consider was asserted against only a single defendant. As a result, the court reversed the order that granted a new trial for that reason and directed entry of a judgment in favor of plaintiff based on the jury's verdict.

05-07-09 Robert Swan v. Boardwalk Regency Corp., et al.
A-6229-07T1

We upheld the trial court's summary judgment dismissal of the complaint of plaintiff, an at-will employee in Caesars' surveillance department, alleging a Pierce claim for wrongful discharge in violation of public policy. Plaintiff was terminated following charges by the Division of Gaming Enforcement alleging improper surveillance of female patrons by plaintiff and co-employees; the Casino Control Commission subsequently found no violation by plaintiff. We agreed plaintiff was not fired in violation of a "clearly enunciated public policy" and the employer had the right to independently assess plaintiff's conduct and the bad publicity surrounding the charges and terminate plaintiff with or without cause.

The trial court also correctly dismissed plaintiff's false light invasion of privacy claim, grounded in allegations defamatory in nature, as time-barred by the one-year statute of limitations applicable to defamation, N.J.S.A. 2A:14-3. This holding is consistent with the dicta in Rumbauskas v. Cantor, 138 N.J. 173 (1994) and decisions throughout the country.

05-07-09 Lopez v. Patel
A-5262-07T3

Defendants are equitably estopped from raising on the morning of trial a defense of collateral estoppel based on Habick v. Liberty Mutual Fire Ins. Co., 320 N.J. Super. 244 (App. Div.), certif. denied, 161 N.J. 149 (1999), when that defense was available during fourteen months of discovery and pretrial preparation. Habick held that plaintiff in an auto

negligence case is collaterally estopped from relitigating an adverse determination reached in PIP arbitration.

05-06-09 Karen Petersen and Freedom Farms v. Jane Meggitt, Denise Blauth, Horse News, Hunterdon County Democrat, Penn Jersey Advance, Tri Town News, the Examiner, and Greater Media Newspapers
A-4816-07T1

Media defendants published presumably defamatory statements about plaintiffs' conduct in their horse-farm business. The media defendants investigated the information, carefully checking the accuracy of the statements with multiple sources, including plaintiffs, who declined to comment. We held that the qualified fair-comment privilege applied to the statements because they discussed the starvation of several horses rough-boarded at plaintiffs' farm and the death of one horse, which was left to rot for ten days in a paddock at plaintiffs' farm. Both issues were a matter of public health and safety and the article reported on municipal court proceedings, a matter of public interest and concern. As a result, no content/form/context analysis under Senna v. Florimont, 196 N.J. 469 (2008), was required. Summary judgment was correctly granted because plaintiffs failed to adduce any evidence of actual malice on the part of the media defendants or any reckless disregard of falsity.

05-05-09 State v. J.K.
A-1314-07T4

The pipeline retroactivity holding of State v. Bellamy, 178 N.J. 127 (2003), remains viable notwithstanding additional data now available on the number of sex offenders civilly committed under the SVPA who pled guilty to a predicate offense before adoption of the SVPA, without advice of potential SVPA consequences, and whose case was not pending trial or on direct appeal when Bellamy was decided.

05-04-09 State v. David Mosner
A-1650-07T4

Admission into the Pre-Trial Intervention program can be conditioned on the defendant's guilty plea to a motor vehicle offense carrying a mandatory 180-day term of imprisonment where the defendant's attitude would render pretrial intervention ineffective.

05-01-09 Steven Klug and Bruce Licausi v. Bridgewater Township Planning Board, et al.
A-5176-06T1

Plaintiffs filed a complaint in lieu of prerogative writs challenging the Bridgewater Township planning board's grant of major subdivision approval to the applicants. During the proceedings, the Township appointed the applicants' professional planner as Township planner. The planner then recused herself from further participation, except she wrote a memo outlining certain planning issues and recommending certain conditions for approval of the application.

The trial judge found that the Board had to approve the application because it complied with all applicable zoning ordinances and did not require a variance or waiver. However, he also found that the planner had a conflict of interest. Instead of requiring the application to begin anew, the judge remanded for the Board's de novo reconsideration of the record without reference to the memo or to an environmental impact statement the planner had prepared prior to her appointment as Township planner. Based upon the remand proceedings, we found this remedy appropriate.

04-27-09 Linda A. Boritz v. New Jersey Manufacturers Insurance Company
A-4929-07T3

After the plaintiff was injured in a traffic accident, she forwarded the UIM carrier a Longworth letter, requesting permission to settle for the tortfeasor's $15,000 policy limits. When the plaintiff sent the letter, she was aware that the UIM policy limits were $100,000. In providing the plaintiff with a consent to settle, the UIM carrier failed to inform her that the UIM coverage limits would be reduced by a step-down clause, capping the plaintiff's entitlement to UIM benefits at the UIM coverage limits ($25,000) in her own automobile policy. We concluded that the UIM carrier was estopped from enforcing the step-down provision by failing to inform the plaintiff of the UIM limits at the time it responded to her Longworth letter.

04-27-09 Paragon Contractors, Inc. v. Peachtree Condominium Association, et al. v. Raymond Holmes, et al.
A-0408-08T3

In this appeal, the court rejected the argument that the trial court's failure to schedule the case management conference

required by Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003) tolled the time to file or otherwise excused the malpractice claimant's failure to timely file an affidavit of merit. In so holding, the court expressed its disagreement with that part of the decision of another panel, Saunders v. Capital Health System, 398 N.J. Super. 500, 510 (App. Div. 2008), which held to the contrary.

04-24-09 Raymond Marcinczyk, et al. v. State of New Jersey Police Training Commission, et al.
A-4340-07T3

The court held that the exculpatory agreement executed by plaintiff, a police trainee, is valid and enforceable, and barred his negligence claim, because the agreement served a valid public concern, did not negate a statutory duty, and was not unconscionable.

04-24-09 In the Matter of the Reallocation of PBI Regional Medical Center's SFY 2007 Charity Care Subsidy
In the Matter of the Reallocation of PBI Regional Medical Center's SFY 2008 Charity Care Subsidy
A-0245 / 1793-07T2 (consolidated)

If a hospital charity care subsidy must be reallocated due to the hospital's unanticipated closure, the Commissioner of Health and Senior Services may employ the alternative distribution methodology authorized in N.J.A.C. 10:52-13.7(f) in order to maintain beneficiary access to health care services in the affected community.

04-23-09 GERALDINE SINGLETARY V. WAWA
A-5723-07T2

This opinion affirms the decision of the judge of compensation that the subsequent work duties of the petitioner were the cause of her most recent disability and need for surgery, not the natural progression of an earlier work-related slip and fall accident. It distinguishes Peterson v. Hermann Forwarding Co., 267 N.J. Super. 493 (App. Div. 1993), which held that a subsequent employer is not liable for disability or medical treatment arising from an injury that occurred during earlier employment.

04-23-09 Nini v. Mercer County Community College
A-2802-07T3

We held that N.J.S.A. 10:5-12, which allows an employer to refuse to accept for employment or to promote any person over the age of seventy, does not apply to nonrenewal of contracts of long-term employees over the age of seventy. Here, we reversed and remanded for trial a complaint filed by a seventy-three year old woman who established a prima facie case that her contract of employment was not renewed due to her age.

04-23-09 Vic Chandok v. Rekha Chandok
A-5871-06T3

The trial judge should have recused himself in light of the fact that he had acrimonious litigation with defense counsel with whom he had practiced law, even though the litigation ended eight years earlier. Defendant had an objectively reasonable belief that she could not receive a fair and unbiased hearing. A new trial is required, but the new trial judge may assess counsel fees based on defense counsel's failure to advise the judge, upon late entry of the case, that he might move for recusal and upon consideration of other relevant factors.

04-22-09 Wakefern Food Corporation v. Liberty Mutual Fire Insurance Company
A-2010-07T3

We construed an insurance policy covering a group of supermarkets against food spoilage and other damages due to loss of electrical power. We concluded that a 2003 electrical blackout, which left portions of the United States and Canada without power for several days, was a covered occurrence. The policy applied to loss of power due to "physical damage" to electric generating facilities away from the supermarkets' premises. We concluded that the undefined term "physical damage" was ambiguous and should be construed, consistent with the insureds' reasonable expectations, to include loss of function, e.g., a situation in which the power grid was physically unable to produce electricity.

04-22-09* ROBERT J. TRIFFIN V. WACHOVIA BANK, N. A. AND BANK OF AMERICA
A-6107-06T2 and A-6685-06T3

In these back-to-back appeals consolidated for purposes of a single opinion, we concluded that plaintiff, as assignee, lacked standing to pursue claims under the Check Clearing for the 21st Century Act, 12 U.S.C. 5001-5018, because those claims

were statutory in nature, and, thus, not assignable pursuant to N.J.S.A. 2A:25-1. (Approved for Publication Date).

04-21-09 State v. Ross Finesmith
A-1056-08T4

Under the "reasonable continuation" doctrine, a single search warrant may provide authorization for the executing officers to make more than one entry into the premises identified in the warrant if they are unable to locate an item of evidence specified in the warrant during their initial entry. In order for a re-entry into premises to be considered a reasonable continuation of the search authorized by the warrant, two conditions must be satisfied: first, the subsequent entry must be a continuation of the original search, rather than a new and separate search; and second, the decision to conduct a second entry to continue the search must be reasonable under the totality of the circumstances.

04-17-09 Franklin Mutual Insurance Company v. Metropolitan Property & Casualty Insurance Company
A-5265-07T2

The continuous trigger theory was adopted in Owens-Illinois, Inc. v. United Insurance Co., 138 N.J. 437 (1994) to allocate insurance coverage in long-term environmental contamination cases. We address how the allocation is applied when the property has more than one owner during the period of contamination.

04-17-09 C.L. v. W.S.
A-5782-06T2

Defendant's engagement to and sexual relationship with plaintiff in New Jersey, which allegedly resulted in the conception of a child, constituted a sufficient contact with New Jersey to support the New Jersey courts' exercise of long-arm jurisdiction over defendant with respect to plaintiff's claims under the Parentage Act for a declaration of paternity and child support, even though defendant left New Jersey more than twenty years ago and has not returned.

04-15-09 Robert R. Dean, et al. v. Barrett Homes, Inc., et al.
A-1479-07T1

Plaintiffs purchased a seven-year old home that was clad in a stucco-like product known as Exterior Insulation Finishing System. Plaintiffs secured a home inspection that warned of potential problems with the siding including the possibility of structural damage and mold. Plaintiffs took no action and completed the purchase. One year after occupying the premises, they observed problems with the siding that ultimately resulted in water infiltration and structural damage to sheathing, framing and substrate of the home.

Plaintiffs filed an action against the siding manufacturer, the builder, home inspector, and various contractors and subcontractors. Plaintiffs sought relief under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -184, and the Products Liability Act (PLA), N.J.S.A. 2A:58C-1 to -11. Plaintiffs settled with all parties except the manufacturer.

We affirmed the trial judge's dismissal of the action as to both theories and concluded that plaintiffs had no cause of action under the CFA. As to the PLA, we affirmed the judgment of the Law Division concluding that the "economic loss rule" precludes relief. We relied, in part, on our recent decision in Marrone v. Greer & Polman Constr. Inc., 405 N.J. Super. 288 (App. Div. 2009).

Judges Sabatino and Simonelli concur in the judgment. They agree that these plaintiffs, who were alerted by their home inspector to the sheathing's risks prior to closing, have no cause of action against the sheathing manufacturer under either the CFA or the PLA. However, as a matter of law, they would not extend the "economic loss" doctrine to bar an innocent home purchaser from recovering under the PLA from a manufacturer of a defective component of the home, where that component causes physical damage to other portions of the home. In that respect, they disagree with Marrone v. Greer & Polman Construction Co., 405 N.J. Super. 288 (App. Div. 2009), and instead would adopt the majority approach cited in the Restatement (Third) of Torts, Sect. 19, comment e (holding that a defective product incorporated into an improvement to realty does not lose its identity as a product, and can trigger strict liability for physical damages caused to other portions of the realty).

04-09-09 John A. Bart, Esq. v. Passaic County Public Housing Agency
A-5049-07T3

The Government Records Council correctly found that the custodian did not unreasonably deny access to government records sought pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, because the document request lacked specificity and required the custodian to engage in legal research and analysis in order to identify the records being sought.

04-08-09 3519-3513 REALTY, LLC V. MARY C. LAW
A-5326-07T3

Plaintiff limited liability company, the owner of a three-unit building, was not entitled to invoke N.J.S.A. 2A:18-16.1(1)(3) to evict the tenants in one of the units because a limited liability company cannot "personally occupy" the unit.

04-08-09 In the Matter of Fair Lawn Borough, Bergen County, Motion of Landmark at Radburn Seeking Amendment of Dismissal of Fair Lawn's Third Found Fair Share Plan Petition
A-1611-07T3

Construing the Fair Housing Act, N.J.S.A. 52:27D-301 to -329, and regulations of the Counsel on Affordable Housing (COAH), we confirmed COAH's authority to dismiss a municipality's third round petition for substantive certification of its affordable housing plan, based on the municipality's persistent failure to comply with the terms of its second round certification. Where a municipality has not actually satisfied its previously-unmet need for affordable housing, COAH need not allow the municipality to remove from its plan a viable site that has been included for over a decade as part of its vacant land adjustment.

04-08-09 Rocky Hill Citizens for Responsible Growth v. Planning Bd. of the Borough of Rocky Hill
A-1595-07T1

A citizens group challenged an ordinance that created standards for residential construction within a historic preservation district. A developer complying with the standards was "deemed to comply" with the district's development ordinance.

On appeal, we held that the motion judge did not abuse her discretion in denying an enlargement of time under Rule 4:69-6(c), to challenge the ordinance.

We further held that a "deemer" provision of the municipal ordinance did not usurp the Planning Board's authority under the Municipal Land Use Law. N.J.S.A. 40:55D-1 to -163. We concluded that the Planning Board's action was appropriate.

We did observe that, as a practical matter, plaintiffs' challenge of the Planning Board's approval of the development application, provided a forum for a review of the merits of the challenged ordinance.

04-07-09 State of New Jersey v. Isaac Lenin
A-6499-03T4

Sixth Amendment right to counsel did not apply to defendant where, some four years after murder charges against him were dismissed following two hung juries, State used confidential informant to surreptiously record incriminating statements from defendant pertaining to the murder incident, which statements led to the filing of identical charges against defendant arising from the same incident; there were no adversarial judicial criminal proceedings pending against defendant when he made the statements, and there was no evidence that the State obtained dismissal of the murder charges in a deliberate attempt to circumvent his constitutional rights.

04-06-09 New Jersey Manufacturers v. Prestige Health Group
A-1616-07T1

Notwithstanding the procedural missteps relating to the filing of an answer to the original complaint, plaintiffs may not obtain default and default judgment as a result of defendants' failure to file an answer to an amended complaint because plaintiffs failed to serve that pleading on defendants' attorney of record, contrary to Rule 1:5-1(a).

04-06-09 State v. Duane Kelly
A-3199-05T4

A jury convicted defendant of two counts of murder and two counts of felony murder. The two victims were shot with a .38 caliber gun, which had not been recovered by the time of defendant's trial. The jury also convicted defendant of first-degree robbery and unlawful possession of a .40 caliber handgun; it acquitted him of unlawful possession of a .38 caliber handgun and possessing both the .38 caliber and the .40 caliber handguns for an unlawful purpose.

The trial court sua sponte set aside those convictions and ordered a new trial when a defense witness said she had committed perjury at defendant's trial. Before the new trial commenced, the .38 caliber gun was discovered. Defendant was again convicted of two counts of murder, two counts of felony murder, and first degree robbery.

We rejected defendant's argument that he could not be convicted of these murders because the first jury found him not guilty of possessing the murder weapon and of possessing it for an unlawful purpose.

04-03-09 State of New Jersey v. Jason Broom-Smith
A-3526-07T4

The trial court properly denied defendant's motion for discovery concerning the issuance of a warrant authorizing police to search defendant's house for possible CDS. We concluded that the warrant was not invalid by virtue of the fact that it was issued by a municipal judge sitting in a different municipality than the one in which defendant's house was located. The assignment judge had issued an order authorizing municipal judges within the county to substitute for each other pursuant to Rule 1:12-3(a) and N.J.S.A. 2B:12-6. Further, for purposes of a possible Franks hearing, the trial judge did not abuse his discretion in denying defendant's application for discovery, which the judge concluded was either a "fishing expedition" or an attempt to learn the identity of a confidential informant.

04-03-09 John Constantine v. Township of Bass River, et al.
A-5506-06T3

Plaintiff appealed from the trial court's dismissal of his class action complaint in which he sought a declaration of permissible fees that a municipality may charge for discovery provided relative to matters in the municipal court. Plaintiff also challenged the denial of his motions for bilateral class certification and permission to file a second amended complaint.

While affirming dismissal of plaintiff's complaint because it failed to present a cognizable claim for relief, we also addressed an interlocutory order entered by the trial judge that declared OPRA's "default" fee schedule, N.J.S.A. 47:1A-5(b), to be the appropriate fees that a municipality may charge for discovery in the municipal court. We also referred proper consideration of the issue to the Attorney General, the

Legislature, and the Supreme Court's Committee on Municipal Court Practice.

As a result of the dismissal of plaintiff's complaint, we did not reach the issue of class certification or the denial of leave to file an amended complaint.

04-02-09 In the Matter of Jasper Seating Company, Inc.'s Request for Reconsideration Regarding Request for Proposal No. 07-X-37965
A-4636-07T2

Appellant appeals from the Final Agency Determination of the Division of Purchase and Property to reject appellant's bid as non-conforming for the State's purchase awards under its publicly-bid contract for furniture because the bid included a sticker reflecting a price increase. We affirm the Division's determination. Under the public bidding standard adopted in Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994), once a deviation from the RFP has been identified, the issue is whether the bid non-compliance constitutes a material and hence non-waivable irregularity.

04-02-09 Laurie & Gregory Riley v. John Keenan, et als.
A-6054-06T3

The issue in this automobile negligence action is whether an employer may be held liable for injuries to a third party caused by an intoxicated driver acting outside the workplace and outside the scope of his employment. Even assuming the employee's work-related sleep deprivation, as claimed by plaintiff, we see no reason to extend the notion of duty to, or create a new theory of recovery against, an employer in circumstances where the employer neither knew nor had control over its employee's "incapacity", nor engaged in any affirmative act to worsen the situation, and where the independent intervening act of the employee's intoxication broke any causal connection between work fatigue and the ensuing automobile accident.

04-01-09 In Re: Petition for Authorization to Conduct a Referendum on the Withdrawal of the Borough of Oradell from the River Dell Regional School District
A-1318-07T1

The Borough of Oradell has filed a petition for authorization to conduct a referendum to withdraw from the River

Dell Regional School District. The Board of Review denied the petition. On appeal, we affirmed. In addressing an issue of first impression, we concluded that a board of review may consider factors in addition to a school district's borrowing margin in deciding whether the dissolution of a school district will impose an excessive debt burden upon the constituent school districts.

03-27-09 Highland Lakes Country Club and Community Association v. Frank W. Nicastro, Sr., and Lisa Ann Nicastro
A-4260-07T1

Third-party defendants, licensed land surveyors, appeal from the denial of a motion to dismiss a third-party complaint for failure to comply with the Affidavit of Merit Statute (Statute), N.J.S.A. 2A:53A-26 to 29. The third-party plaintiffs are defending against an action for trespass and a boundary dispute by relying on the accuracy of a survey they obtained from the third-party defendants. They have asserted no claim against the surveyors that is not contingent upon their liability to plaintiff, and plaintiff has not yet complied with a discovery order to produce a survey calling the line shown on defendants' survey into question. We conclude that application of the Statute would be inconsistent with its overall purposes under the present circumstances of this case.

03-26-09 539 Absecon Boulevard, LLC v. Shan Enterprises, et al.
A-2250-06T1

Plaintiffs purchased from defendants an operating 204-room motel business, along with the land on which the seven-story motel building was situated and an adjacent parcel. Plaintiffs contended that the sellers violated the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -106, by misrepresenting to them the sources and amounts of the past operating revenues for the motel. After a bench trial, the Law Division granted plaintiffs relief under the CFA, but dismissed their separate common-law claims.

We reverse the judgment because we hold that the CFA does not apply to this transaction, which was predominantly for the sale of an ongoing business, and where the alleged fraud concerned the business's revenues rather than misrepresentations about the real estate.

03-25-09 John Ivan Sutter, M.D., P.A., et al. v. Horizon Blue Cross Blue Shield of New Jersey, et al.

A-3708-06T3

1. In determining whether a proposed settlement of a class action is fair and reasonable, the trial court must conduct a fairness hearing pursuant to Rule 4:32-2(e). Where the facts underlying the proposed settlement are in dispute by objectors to the settlement, the trial court must conduct a testimonial hearing during which the parties and objectors have the opportunity to present and cross-examine witnesses before the court determines whether the proposal is fair and reasonable.

2. In determining whether a class attorney's fee award is reasonable, the trial court must consider the lodestar method (based upon a reasonable hourly rate) or the percentage recovery (or common fund) method (based upon a reasonable percentage of the proposed settlement). In applying the percentage recovery method, however, the trial court must review the reasonableness of the fees awarded in light of the hourly rate, the complexity of the legal issues involved and whether the case is tried or settled.

3. The court cannot base a percentage recovery fee award on a disputed valuation of the settlement.

03-24-09 Kelly Reilly, et al. v. Marc Weiss
A-5065-07T1

In this case, we determined that a landlord may not collect as a security deposit an amount exceeding that permitted by N.J.S.A. 46:8-21.2 (one and one-half months' rent). The landlord cannot justify a greater amount by permitting the tenant to maintain a pet on the premises, even though pets were prohibited under the terms of the lease. We conclude that although the Security Deposit Act, N.J.S.A. 46:8-19 to -26, does not contain an express penalty for violations of N.J.S.A. 46:8-21.2, any monies in excess of the statutory limit that are held by the landlord and not returned at the termination of the lease are monies "wrongfully withheld," and subject to the doubling provisions of N.J.S.A. 46:8-21.1. Under the unusual facts of this case, we permitted the landlord, who sought no affirmative relief by counterclaim, but did prove damages in excess of the lawful security deposit amount, to receive a credit against the statutorily "doubled" amount.

03-24-09 Continental Insurance Company, et al. v. Honeywell International, Inc., et al., and Honeywell

International, Inc. v. Travelers Casualty and Surety Company, et al.
A-1973-08T1, A-1976-08T1, A-1978-08T1, A-1979-08T1, A-1981-08T1, A-1982-08T1, A-1983-08T1, A-1984-08T1 and A-1986-08T1 (consolidated)

The court considered the trial court's application of comity principles in these two companion cases.

In the first, Continental filed an action in New Jersey seeking a declaration as to whether certain entities, including the Resco defendants, were entitled to the benefits of coverage from policies, extending over a four-year period, that were issued to other entities. As the case bogged down in personal jurisdiction disputes for more than three years, Resco commenced suits in Indiana, Texas and Ohio seeking coverage from Continental and many other insurers under policies issued over far greater time periods (ranging from forty-two to fifty years) than the four years in question in the New Jersey action. When Continental moved for injunctive relief to bar Resco's prosecution of the out-of-state cases, the trial judge permitted Continental's joinder of all the parties and claims asserted in the out-of-state cases; the trial judge then concluded that because of the considerable conflict between the New Jersey action, as amended, and the out-of-state suits and, because the New Jersey action was "first-filed," an injunction was required to prevent Resco from prosecuting the out-of-state suits. In reversing the injunction, the court found that Continental's claim that the New Jersey suit was "first-filed" in these unusual circumstances was, at best, ambiguous, and that other special equities, including the slow progress of the New Jersey action, inured against the issuance of the anti-suit injunction.

In the second case, the trial judge refused to dismiss or stay Honeywell's action against Travelers that was filed eight days after a substantially similar New York action was filed by Travelers against Honeywell. The court held that the New York action was "first-filed" and that there was insufficient support for the argument that New Jersey was the "natural" forum for the dispute or that Travelers had unfairly out-raced Honeywell to court when the parties had been attempting to negotiate a settlement for nearly four years and either party could have filed suit at any time during that lengthy period.

03-23-09 William H. Balentine and Luke Gianetta v. New Jersey Insurance Underwriters Association
A-4186-07T3

The record owner of real property, who is serving as the nominee of another person, has an insurable interest in that realty sufficient to recover the proceeds of a vandalism insurance policy on which he is listed as a named insured.

03-20-09 Edwin Ortiz v. New Jersey Department of Corrections
A-2394-07T1

Edwin Ortiz is an inmate currently incarcerated at Northern State Prison who has been identified as a member of a Security Threat Group, the Latin Kings. See N.J.A.C. 10A:5-1.3; N.J.A.C. 10A:5-6.5. Denying membership, Ortiz invoked the Department of Corrections' inmate-remedy system, N.J.A.C. 10A:1-4.1 to -4.9. We discuss the Department's regulations governing STGs and the inmate-remedy system. Because the Department did not respond in accordance with its regulations, and Ortiz did not file an administrative appeal, we dismiss the appeal for failure to exhaust administrative remedies and direct the Department to consider an administrative appeal.

03-20-09 Phyllis Rabinowitz v. Judith Wahrenberger
A-1626-07T1

Questions posed by an attorney representing a defendant in a medical malpractice action to a plaintiff prosecuting the action are protected by the litigation privilege. The trial court correctly dismissed plaintiffs' complaint which sought damages for the tort of outrage and infliction of emotional distress.

03-19-09 State of New Jersey Department of Environmental Protection, Bureau of County Environmental and Waste Compliance Enforcement v. Mazza and Sons, Inc., Borough Property, L.L.C., Dominick J. Mazza, Individually, and James Mazza, Individually
A-4097-07T1

A party who has not filed a timely appeal from a final administrative agency order may not collaterally attack that order in an enforcement action by the agency under Rule 4:67-6. However, an agency is not automatically entitled to a judicial enforcement of an administrative order simply by filing a complaint in the Chancery Division; to obtain such enforcement, the agency must show that the party to whom the order was directed failed to comply and that the court's assistance is necessary to secure compliance.

03-19-09 Joyce Barber and Michael James Barber, Her Husband v. Shoprite of Englewood & Associates, Inc.
A-6311-05T2

1. The cumulative effect of numerous errors that are not individually reversible may result in an unfair trial warranting reversal and a new trial under the cumulative error doctrine.

2. Where an attorney-juror undertakes to explain legal terms from the jury charge to the other jurors, those explanations may have a "tendency" to influence the verdict and warrant a new trial. Panko v. Flintkote Co., 7 N.J. 55, 61 (1951).

03-17-09 Asbury Park Press v. County of Monmouth
Paff v. Monmouth County
A-3567-07T2/A-3626-07T2 (consolidated)

The Open Public Records Act does not permit a government agency to withhold disclosure of the confidential agreement it reached with an employee to settle her sexual harassment lawsuit. Although the definition of "government record" in OPRA excludes "information generated . . . in connection with any sexual harassment complaint filed with a public employer," that exclusion does not apply to a sexual harassment lawsuit filed with the court. The prevailing requestor is entitled to reimbursement of some attorney's fees although the initial OPRA request may have been properly denied.

03-13-09 Iron Mountain Information Management, Inc. v. City of Newark, et al.
A-6561-06T2

We hold that with one limited exception, a commercial tenant is not entitled in the redevelopment context to individual advance notice of a municipality's intention to declare blighted the building in which the tenant's business is located. A commercial tenant is not entitled to the enhanced notice provisions we required in Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361 (App. Div. 2008), for fee simple owners.

03-12-09 Sweeney v. Sweeney
A-1182-07T2

A property settlement agreement incorporated into a divorce decree does not preclude a subsequent arbitration claim by a claimant against the ex-spouse's employer-brokerage firm where the claimant-spouse had a contractual relationship with the brokerage firm and the issue of investment misconduct by the broker-spouse was not litigated in the divorce action.

03-11-09 Open MRI of Morris & Essex, L.P. V. John R. Frieri
A-4689-07T2

Plaintiffs opened and operated an MRI facility without first obtaining a license from the Department of Health and Senior Services. They obtained a license after the Commissioner of the Department announced an amnesty period during which a license could be obtained without administrative penalties being assessed. That amnesty provision did not shield plaintiffs from penalties imposed for committing insurance fraud.

03-11-09 John K. Chance and Irene P. Chance, As Co-Executors of the Estate of Keron D. Chance v. Kevin P. McCann
A-1155-07T3

This appeal concerns allegations of breach of a partnership agreement between two attorneys, one of whom was about to retire when the agreement was signed. The agreement called for the continuing partner to pay the retiring partner $630,000 over time. After the retiring partner's death, his estate sought to recover the unpaid balance, plus interest. The remaining partner defended the action, arguing that he only signed the agreement because the retiring partner agreed that he was not really owed that amount and would not seek to collect it. In a counterclaim, the remaining partner alleged that the retiring partner himself breached the agreement. The remaining partner lost in the trial court through summary judgment and after trial as to one count of the counterclaim. We reversed as to the estate's claim and one count of the counterclaim, but affirmed as to the other count.

We agreed with the trial court that (1) the remaining partner was precluded by the parol evidence rule from seeking to vary the terms of the agreement through oral testimony and (2) equitable fraud was not applicable. We held that the remaining partner should have been permitted to litigate certain affirmative defenses, including laches and waiver. We concluded that, because of the unique facts presented, this was the rare case in which laches might bar recovery even though the suit was filed within the six-year statute of limitations for contract

claims. The retiring partner had not brought suit himself during the almost four years after the remaining partner stopped making payments. We also held that the remaining partner should have been permitted to argue that the retiring partner's own breach excused his further performance.

We reversed the jury verdict with respect to the remaining partner's allegation that the retiring partner breached the agreement's requirement that he use good faith efforts to persuade his clients to remain with the firm. We held, in part, that the trial judge should have applied the "clear and convincing" standard of N.J.S.A. 2A:81-2 for the entire cause of action only if oral testimony about the decedent's statements were required to make out a prima facie case, disagreeing with Moran v. Estate of Pellegrino, 90 N.J. Super. 122, 124-25 (App. Div. 1966), and adopting the reasoning of Denville Amusement Co. v. Fogelson, 84 N.J. Super. 164, 168-69 (App. Div. 1964).

03-10-09 Doreen Houseman v. Eric Dare
A-2415-07T2

This appeal is from a judgment dividing real and personal property jointly owned by cohabitants when they ended their engagement to be married. The trial court concluded that the law does not permit specific performance of an agreement about possession of a pet. We reverse.

03-09-09 Township of Cinnaminson and Edward M. Schaeffer, Construction Official for the Township of Cinnaminson v. Robert and Deana Bertino and FHG, INC. t/a Fantasy Gifts and Rheta F. Cheskin and Bruce S. Cheskin
A-2074-07T1

The central issue in this appeal concerns the constitutionality of a zoning ordinance adopted by the Township of Cinnaminson that restricts the location where commercial establishments that sell adult videos and novelty items can operate. The trial court rejected defendants' constitutional challenge, finding that the ordinance constituted a reasonable time, place, and manner restriction, was content neutral, and served a substantial governmental interest while allowing reasonable alternative avenues of communication.

We reverse. We hold that the trial court misapplied the holding in Hamilton Amusement Center v. Verniero, 156 N.J. 254 (1998), when it relied on a generalized notion of "common sense" to find that the ordinance served a substantial governmental

interest. Although evidence of a substantial governmental interest need not be based on empirical studies, such evidence must nevertheless provide a rational, objective basis from which to ascertain the existence of a substantial governmental interest underpinning the legislation.

We also hold that under Township of Saddle Brook v. A.B. Family Center, 156 N.J. 587 (1999), the Township of Cinnaminson has the burden of showing the availability of alternative suitable sites where the restricted business may operate. The Township must make this determination in the context of the restrictions imposed by N.J.S.A. 2C:34-7(a).

03-06-09 Albert Dragon, et al. v. New Jersey Department of Environmental Protection, et al.
A-5743-06T2

At issue is whether an administrative agency, through its dispute resolution process, can effectively override statutory, as well as its own regulatory requirements.

Here, after initially denying a CAFRA coastal general permit for the tear down and reconstruction of an oceanfront home nine feet closer to the ocean, the DEP, finding a "litigation risk", settled the homeowner's challenge to the agency's denial by issuing a letter of authorization "in lieu of permit", approving the development subject to conditions designed to meet several of the environmental concerns underlying the regulation's development ban.

On a third-party challenge to DEP's authorization, we held that, given the express language of the exception to the regulatory development ban, which the homeowner clearly did not meet, the DEP did not correctly assess its "litigation risk", and that, in any event, the agency could not use its settlement process to circumvent CAFRA's substantive permitting requirements to allow regulated development in a coastal region governed exclusively by CAFRA and its implementing regulations.

03-05-09 Jagjit Kaur and Abhilasha Singh v. Assured Lending Corp., Moin Ali, and Alex Senderov
A-6287-07T2/A-6288-07T2 (consolidated)

Settling parties who agree on a remedy of rescission and leave to restore a settled matter to the trial list upon default must include specific language preserving that remedy within the terms of the settlement agreement. Ultimately, the

determination of whether the matter will be so restored rests within the discretion of the motion judge, but the right to seek leave for such relief should be explicitly preserved in the agreement.

03-05-09 Ted Dempsey, Sr., and Patricia Dempsey, individually and as guardians ad litem for their minor son, O.D. v. Clarence Alston, Interim Superintendent of Pleasantville Public School District, Felicia M. Hyman, Assistant Principal of Pleasantville High School, and Pleasantville Board of Education
A-4975-06T3

In this appeal, we affirmed the decision of the Chancery Division judge, William C. Todd, III, rejecting plaintiffs' challenge to the constitutionality of N.J.S.A. 18A:11-8, which authorizes boards of education to adopt school dress code policies. We found the statute constitutional on its face and as applied to plaintiffs' son, a student in Pleasantville's public school district, which adopted a school dress code policy in 2001.

03-04-09 DYFS v. A.R. - I/M/O Guardianship of C.S., Jr.
A-5079-07T4

A comparative bonding evaluation of the child with his or her natural parents and foster parents is almost always necessary even when DYFS satisfies the second prong of the "best interests" test for termination of parental rights, and was necessary in this case. We affirm the denial of termination on DYFS' appeal as to the youngest child only where the Family Part denied termination as to the mother of all four children. (The fathers had been terminated and do not appeal). If reunification is unduly delayed, the Family Part can appoint a professional to oversee the reunification process.

03-04-09 State v. Sergei Chepilko
A-5473-06T4/A-0084-07T4

The taking of photographs of persons walking on the Atlantic City Boardwalk and then attempting to sell the photographs to the subjects does not constitute expressive conduct entitled to First Amendment protection that insulates a person engaged in this activity from prosecution for a violation of municipal ordinances prohibiting the sale of merchandise on the Boardwalk.

03-03-09 North Jersey Media Group, Inc., d/b/a The Record v. Bergen County Prosecutor's Office and Jeffrey Ziegelheim
A-2209-07T2

A prosecutor's office employee has a "special privacy" interest in maintaining the confidentiality of records relating to a request for approval of outside employment such that those records are exempt from disclosure to a newspaper, which has made a request for the documents pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13.

03-03-09 State of New Jersey v. Sidney Atkins
A-4734-05T4

Following the established rule in State v. Mingo, 77 N.J. 576, 586-87 (1978), we find reversible error in allowing the prosecution to invade the privilege with regard to the defense-retained consultant. Accordingly "the report and testimony of a defense-retained expert consultant who will not testify as a defense witness and whose report will not be utilized as evidence are not available to the State." Ibid. The justification that defendant waived the privilege by operation of N.J.R.E. 607 in introducing the victim's recantation fails because other evidence was available to the prosecution to rebut the charge of recent fabrication, improper influence, or motive which would not have been unduly prejudicial to defendant.

03-02-09 In the Matter of Raymour and Flanigan Furniture, and Neil Goldberg, President and Individually
A-4622-07T1

Appellant, Raymour and Flanigan, appeals from a decision of the Commissioner of the Department of Labor and Workforce Development. The Commissioner held that Raymour and Flanigan did not qualify as a "trucking industry employer," and, therefore, was not entitled to an exemption under the New Jersey Wage and Hour Law allowing such employers to pay certain employees an overtime rate of not less than 1½ times the minimum wage, rather than the statutorily required overtime rate of 1½ times the employee's regular wage. Raymour and Flanigan argued that although it is in the retail industry, for purposes of its facilities from which it conducts its delivery operations, it qualified as a "trucking industry employer," as that term is defined by the Wage and Hour Law as any "business or establishment" primarily operating for the purpose of conveying property from one place to another. N.J.S.A. 34:11-56a4.

In affirming the Commissioner, we concluded that the facilities in which Raymour and Flanigan conducts its trucking operations are not separate establishments so as to qualify for the trucking industry employer exemption. Thus, Raymour and Flanigan is required to pay all employees 1½ times the employee's regular hourly wage for each hour the employee works in excess of 40 in any week.

02-27-09 Catherine G. Alexander v. Board of Review
A-1592-07T2

We invalidate N.J.A.C. 12:23-5.1, a regulation governing the showing that an applicant must make in order to obtain extended unemployment benefits during training, finding the regulation to be inconsistent with the statute it purports to interpret, N.J.S.A. 43:21-60a. Applying the statute to Alexander, we find her eligible to receive extended unemployment benefits.

02-26-09 N.M. v. Division of Medical Assistance and Health Services and Monmouth County Board of Social Services
A-0828-07T1

Under an amendment to the statutes governing the federal Medicaid program enacted as part of the Deficit Reduction Act of 2005, the value of an annuity purchased for the sole benefit of the "community spouse" may be considered in determining whether the resources of the "institutionalized spouse" exceed the "resource limit" for Medicaid eligibility.

02-25-09 In The Matter Of The Disciplinary Action Against Detective Ariel Gonzalez
A-1392-07T3

We held that the Waterfront Commission's media relations policy, which prohibited employees from contacting the media without prior approval of the Executive Director to be overbroad and thus an unconstitutional prior restraint upon speech. We also held the policy to have been unconstitutionally applied to Detective Gonzalez, who was disciplined for contacting the media to report a potentially toxic pile of dirt that had remained on the Commission's property for three years and the presence of dead rats in and around the dirt pile.

02-24-09 David Horsnall v. Washington Township (Mercer County) Division of Fire; David Fried, et als.

A-0655-07T3

The creation of a Division of Fire to replace a previously existing Fire District does not eliminate a Fire District Fireman's statutory tenure protections, N.J.S.A. 40A:14-19 and N.J.S.A. 40A:14-25.

02-20-09 Janice A. Egeland v. Zoning Board of Adjustment of the Township of Colts Neck
A-3739-07T3

This appeal raised the novel issue of whether a division of real property by testamentary devise is a "self-created hardship" for the purposes of an application for an undue hardship variance pursuant to N.J.S.A. 40:55D-70(c). We concluded that, although the division of a conforming lot by testamentary devisee is permitted, a resulting non-conforming lot constitutes a "self-created hardship," as that term is used in Jock v. Zoning Board of Adjustment of Township of Wall, 184 N.J. 562, 591 (2005), for the purposes of the cited statute.

02-17-09 State v. Timothy Popovich
A-2862-07T4

Defendant's conviction is reversed; the trial court erred when it ruled that defendant's expert was subject to a sequestration order. State v. Lanzel, 253 N.J. Super. 168 (Law Div. 1991) is distinguished.

02-11-09 State v. Lawrence S. Coven
A-5846-07T4

Misapplication of entrusted property, N.J.S.A. 2C:21-15, is not a continuing course of conduct offense. The offense is complete the moment the recipient clearly and objectively misapplies the entrusted property, thus putting it at substantial risk of loss or detriment of the owner or person for whose benefit it was entrusted. The indictment, which was returned more than five years after that date, was properly dismissed for failure to comply with the statute of limitations.

02-11-09 Lucent Technologies, Inc. v. Township of Berkeley Heights
A-4439-07T1

The Tax Court judge interpreted Rule 8:7(e) (Rule) as not being "open-ended" as to when a municipality may file a motion

to dismiss a tax appeal based upon a false or fraudulent response to a request pursuant to N.J.S.A. 54:4-34, commonly known as Chapter 91. We held that the Rule expressly excepts from the time constraints for filing tax appeal dismissal motions, those based upon a false or fraudulent response to a Chapter 91 request. We found the Tax Court judge's interpretation of the Rule contrary to its express language and also contrary to the clear language of Chapter 91 prohibiting tax appeals where there has been a false or fraudulent response to a Chapter 91 request.

02-10-09 City of Englewood v. Exxon Mobile Corporation, et al.
A-2490-07T2

At issue is at what point does the mortgagee receive the lower interest rate earned on condemnation proceeds deposited in court rather than the more favorable contractual mortgage interest rate. Relying on Empire Mortgage, 341 N.J. Super. 216 (App. Div. 2001), we identified that point as when the funds are "available" for withdrawal by the mortgagee, id. at 225, but that "availability" does not equate with the actual withdrawal of the funds from court. In other words, we rejected the mortgagee's claim that the contract rate of interest runs until payment is actually made. Instead, we held that funds are "available" once the deposit is made and no impediment (i.e. lack of notice) exists for the mortgagee to apply for withdrawal of the funds on deposit.

Here, although the mortgagee's withdrawal motion was initially denied due to the City's unresolved environmental remediation concerns, such delay was not attributable to any fault of the mortgagor and impacted both mortgagee and mortgagor. Thus, we found no sound reason to doubly burden the mortgagor, who remained obligated to continue paying interest, by requiring that interest be paid at the higher contract rate to the singular benefit of the mortgagee.

02-10-09 Tracey D. Parks v. Board of Review, Department of Labor and Cooper Health Systems
A-4053-07T2

An employee who is absent from work due to a need to care for a sick child or other family emergency, which results in the employee's discharge, is not disqualified from receiving unemployment compensation benefits under N.J.S.A. 43:21-5(b), which provides a six-week disqualification for a discharge based on "misconduct connected with the work."

02-09-09 Hackensack City v. Bergen County
County of Bergen v. Hackensack City
A-0507:0511:0512:0929-07T2(consolidated)

In these consolidated appeals from determinations of the Tax Court, we conclude the County's limited use of property and its preparation of the property for possible office use were sufficient public purposes to qualify the property for exempt status pursuant to N.J.S.A. 54:4-3.3.

We also examine the application of the Freeze Act, N.J.S.A. 54:51A-8, to the two years following the Tax Court's final judgment, as affirmed. The judgment rejected the City's challenge to the sufficiency of the property's public purposes and concluded the County owned property, denoted as tax exempt from 1975 to 1993, continued to be exempt in 1994.

02-06-09 State of New Jersey v. Alshamoon Thompson
A-2748-06T4

When we remand a matter to a judge to reconstruct the record pursuant to Rule 2:5-3(f) in connection with a post-conviction relief application based on ineffective assistance of trial and appellate counsel, the judge may not proceed until he has received a "statement of the evidence and proceedings" from the appellant and "any objections or proposed amendments thereto." Ibid. Where objections have been made, the judge is to settle the statement on the record within fourteen days on notice to and in the presence of the prosecutor, defense counsel, and defendant and, then, is file it with the clerk of court. The reconstructed record must "provide[] reasonable assurances of accuracy and completeness." State v. Izaguirre, 272 N.J. Super. 51, 57 (App. Div.), certif. denied, 137 N.J. 167 (1994). Here, the judge erred when he merely secured copies of the attorneys' notes and, in an ex parte proceeding on the record, briefly described the facts relating to defendant's conviction, referred to one of several issues raised respecting trial counsel, and very briefly summarized his ruling on that one issue. Additionally, a delay of four-and-a-half months in complying with our mandate is unacceptable.

02-06-09 In The Matter of Review and Revision of the
Decision to Deny Freshwater General Permit No.7
A-4593-06T1

This appeal concerns the issuance of Freshwater General Permit No. 7, N.J.A.C. 7:7A-5.7, by the Department of Environmental Protection for respondent's work in a man-made ditch located in an easement respondent had on appellant's property. The DEP concluded that compliance with the Storm Management Rules, N.J.A.C. 7:8-1 to -6.3, was not required because the work was not a "major development."

02-06-09 William Randolph v. City of Brigantine Planning Board, et al.
A-3031-07T2

In this appeal, we concluded that conflict of interest principles embodied in the common law, the Municipal Land Use Law, and the Local Government Ethics Law, required a member of the planning board to disqualify herself from applications in which the board's engineer reviews the application and provides recommendations to the board, where the board member had a personal relationship with, and owned a home jointly with, the principal of the engineering firm that employed the board engineer. As a result, we set aside the board's approval of a preliminary site plan application and reversed the trial court judge who affirmed the planning board's decision.

02-04-09 State of New Jersey v. William Norman
A-5662-06T4

We reverse the trial court's denial of defendant's petition for post-conviction relief (PCR), and remand for a plenary hearing. In 1998, defendant pled guilty pursuant to a negotiated agreement to first-degree robbery, subject to the No Early Release Act (NERA). The version of NERA in effect at the time required that defendant commit a "violent crime," as defined in the statute. Defendant thus stipulated that he inflicted "serious bodily injury," as defined in N.J.S.A. 2C:11-1(b), on the victim of the robbery.

We hold that in order for this stipulation to have a preclusive effect on the question of whether defendant inflicted serious bodily injury, the stipulation must be supported by competent medical evidence. Defendant's mere lay opinion is insufficient as a matter of law. Defendant also presented sufficient grounds to relax the five-year limitation period in Rule 3:22-12. Under these circumstances, defendant established a prima facie case of ineffective assistance of counsel, thus entitling him to a plenary hearing.

02-04-09 Joseph Marrone, et al. v. Greer & Polman Construction, Inc., et al.
Greer & Polman Construction, Inc. v. Selective Insurance Group, Inc., et al.
A-3651-07T2

Plaintiffs sued the manufacturer and the distributor of a home siding product known as Exterior Insulation Finish System (EIFIS cladding), alleging that the cladding was defective and allowed water damage to the house. They did not claim that the cladding caused personal injury or damage to personal property. Plaintiffs, who purchased the house from the original owners eight years after construction, had no contact with the defendants and received no information about the cladding before buying the house. We affirmed the summary judgment dismissal of their claims under the Consumer Fraud Act (CFA) and the Products Liability Act (PLA).

The CFA claim was properly dismissed because there was no proof of a causal connection between defendants' alleged misrepresentations about their product to third parties and plaintiffs' decision to buy the house.

The PLA claims were barred by the economic loss doctrine. Construing N.J.S.A. 2A:58C-1b(2), which defines "harm" to property as excluding harm "to the product itself," we concluded that the product purchased was the house and that plaintiffs could not sue under the PLA where a component of the purchased product caused damage to the product.

02-03-09 East Orange Board of Education v. New Jersey Schools Construction Corporation and the New Jersey Economic Development Authority
A-6597-05T1

The East Orange Board of Education brought an action in lieu of prerogative writs against the New Jersey Schools Construction Corporation and the New Jersey Economic Development Authority seeking an order requiring them to proceed with certain school facilities projects that were deferred when the initial funding from the Educational Facilities Construction and Financing Act ran low. The action was filed in the Law Division in Essex County. It was subsequently transferred to Mercer County and then to the Appellate Division.

We held that the East Orange Board of Education did not demonstrate that the deferral was arbitrary or capriciously and

that it was not entitled to the application of equitable or promissory estoppel either legally or factually. We affirmed the transfer to the Appellate Division and dismissed the action in lieu of prerogative writs with prejudice.

02-02-09 State of New Jersey v. Robbie Thomson
A-2980-06T4

Even if the State elicits improper expert testimony by use of a hypothetical question that tracks the language of the statute a defendant has been charged with violating or seeks an expert opinion that an offense was committed, a reversal of the defendant's conviction is required only if that testimony was sufficiently prejudicial to have the capacity to bring about an unjust result.

02—02-09 Elizabeth Donnelly v. Gregory R. Donnelly
A-2389-07T3

In December 2003, the parties entered into a property settlement agreement that fixed, among other things, defendant's support obligations by utilizing an income figure derived from an average of defendant's income from his law practice over the five previous years. In April 2005, defendant moved for a downward modification, claiming a decline in his income. After a plenary hearing, the trial judge found unconvincing defendant's claim that his income had declined as asserted. Approximately one year later, defendant moved again for a downward modification, citing an additional decline in his income; the trial judge denied that application without a hearing.

In this appeal, the court affirmed the denial of the second modification motion, concluding among other things that the trial judge was fully authorized to rely upon his earlier findings as well as defendant's failure in the interim to modify the relatively exorbitant lifestyle he adopted after the divorce -- a fact that played a large role in the denial of the first motion. The court also held that the trial judge correctly found that the alleged decline in income had not been shown to be anything but temporary in light of the brief period of time that had elapsed since he decided the first modification motion.

01-30-09 Harold M. Hoffman v. Hampshire Labs, Inc., et al.
A-3401-07T1

The trial court correctly determined that plaintiff failed to state a claim under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -60, because plaintiff did not allege sufficient facts to establish that, in the sale of their product, defendants had engaged in an act or practice declared unlawful by the CFA or that plaintiff had sustained an "ascertainable loss" due to any such unlawful act. The trial court also correctly found that plaintiff failed to state a claim of fraud because plaintiff had not alleged sufficient facts to show that defendants made false statements about their product, knowing that the statements were false, or that plaintiff had purchased the product in reliance upon any such false statement.

01-29-09 Hyacinth Thorpe, etc. v. Jasford Wiggan, et al.
A-1995-07T2

A father who left his four-year-old child in a smoke-filled car strapped in a car seat, with no means of escape, is not entitled to parental immunity for the child's death. The father's actions do not implicate customary child-care issues or a legitimate exercise of parental authority or supervision.

01-28-09 Hildegard Kay v. George Kay
Bernard Kanefsky, Executor of the Estate of George Kay
A-1594-07T3

George Kay died during the pendency of an action for divorce, and the trial court denied his estate leave to substitute for defendant and file amended pleadings. On appeal the estate contends that the trial court erred by relying on Krudzlo v. Krudzlo, 251 N.J. Super. 70, 73 (Ch. Div. 1990), in which the court held that, unlike a surviving spouse, the estate of a decedent spouse "is not entitled to assert equitable claims against the marital estate sounding in constructive trust, resulting trust, quasi-contract or unjust enrichment" in accordance with Carr v. Carr, 120 N.J. 336 (1990).

We conclude that the trial court should have accepted the pleadings and considered whether the equities stemming from the facts alleged call for relief from the strict legal effects of defendant's death during the pendency of the divorce action. To the extent that Krudzlo provides a contrary rule, we disapprove it.

01-22-09 Thomas Wilson v. Brick Township Zoning Board of Adjustment
A-3622-07T3

We hold that the Legislature's use of the term "or" in N.J.S.A. 40:55D-70(c)(1)(c), which states that a variance may be granted when strict application of any regulation "would result in peculiar and exceptional practical difficulties to, **or** exceptional and undue hardships upon, the developer of such property. . . ." is significant. (Emphasis added). Because the term "or" between the phrases "peculiar and exceptional practical difficulties" and "exceptional and undue hardships" is disjunctive, a developer may seek a variance under either phrase, provided the other relevant criteria for a (c)(1) variance are met. To hold otherwise would render the phrase "peculiar and exceptional practical difficulties" superfluous.

01-21-09 612 Associates, L.L.C. v. North Bergen Municipal Utilities Authority, et al.

We interpret portions of the Sewerage Authorities Law (SAL), N.J.S.A. 40:14A:1 through -45, and the Municipal and Counties Utilities Authorities Law (MCUAL), N.J.S.A. 40:14B:1 through -78. The trial court erred when it concluded that only the sewerage or utilities authority to which a housing development is directly connected is entitled to a sewerage connection fee, even though such entity does not ultimately treat the effluent. We conclude the entity that actually treats the effluent is entitled to collect from a new user a non-duplicative connection fee representing a fair contribution for the past capital costs of its treatment facility even though the actual connection is only indirect.

01-20-09 Orthopaedic Associates a/s/o Samuel Mdigos-Mulli v. The Department of Banking and Insurance, et als. A-5591-06T2

In affirming the dismissal of an action collaterally challenging a PIP-benefits determination and attacking the overall fairness of the medical review organization (MRO) process under AICRA's dispute resolution process, we held that, because the impartiality of an MRO physician can be challenged as part of an action brought in the Law Division pursuant to N.J.S.A. 2A:23A-13 for review of the dispute resolution professional's decision, the process itself was not inherently unfair.

01-16-09 Celanese Ltd. v. Essex County Improvement Authority A-0241-07T2

We discuss the principles governing the construction of ambiguous clauses within a contract and conclude the trial court incorrectly resolved the matter by way of summary judgment.

01-15-09 Skulskie v. Ceponis
A-2397-07T1

In this subrogation matter, we reviewed the enforceability of a waiver of subrogation provision in a homeowner's policy in the residential condominium context. The by-laws of the condominium association required the association to obtain property and casualty insurance and further provided that the coverage must contain a waiver of subrogation. The by-laws also provided that unit owners could, but were not obliged to, obtain coverage to insure their interests, but any insurance must contain a waiver of subrogation. We enforced the waiver of subrogation in an action commenced by the insurer of an insured condominium unit owner against an uninsured unit owner and affirmed the summary judgment entered in favor of the uninsured unit owner.

01-15-09 Fernando Toto v. Princeton Township
A-0216-07T3

We affirm the dismissal of plaintiff's hostile work environment claim brought under the New Jersey Law Against Discrimination, (LAD), N.J.S.A. 10:5-1 to 10:5-49, because it is barred by the statute of limitations. Plaintiff maintained that he left the workplace due to its hostile work environment and that he refused to return to work because the employer had not remediated the problem. Due to his failure to return to work, plaintiff was terminated from his position. Under these circumstances, the statute of limitations ran from the date plaintiff left the workplace and not the later date when he was terminated from the position. His last day in the workplace was the last time that he could have experienced the hostile work environment, and that is the day the statute of limitations began to run on that claim.

At the trial on plaintiff's failure to accommodate claim under the LAD, the trial court properly declined to admit into evidence a letter that contained both admissible material on the issue of notice and inadmissible material prejudicial to the defense, where the trial court allowed plaintiff to question the witness about the admissible portions of the letter. We affirm.

01-14-09 Deborah Heart & Lung v. Heather Howard, J.D., et als.
A-4131-07T3

We hold that a regulatory agency's (Dep't of Health and Senior Services) change in the manner of reporting to the public risk-adjusted mortality data on open heart surgery does not constitute administrative rulemaking, and amounts to no more than informal agency action not subject to the statutory rulemaking procedures of the Administrative Procedure Act (APA) or the Health Care Facilities Planning Act. Nonetheless, such agency action in this case was preceded by adequate notice to the regulated class and an opportunity to be heard, sufficient to satisfy administrative due process.

01-14-09 State v. Anthony McNeil a/k/a Minister Mahdian Ali
A-2255-06T1

A defendant competent to stand trial under N.J.S.A. 2C:4-4 may not be competent to waive his or her right to counsel and to represent himself pro se.

01-12-09 Wilson v. Brown
A-5854-07T1/A-5883-07T1 (consolidated)

We hold that the e-mail communications between the Governor and Carla Katz requested by plaintiff are government records pursuant to the Open Public Records Act. We also hold that the communications are protected from disclosure by executive privilege. Plaintiff failed to demonstrate the requisite need to overcome the privilege.

01-12-09 Michael R. LaPlace v. Pierre Briere, individually and trading as Pierre Briere Quarter Horses, and Pierre Briere Quarter Horses, LLC, Charlene Bridgwood, Douglas Gultz and Sherry Gultz, husband and wife
A-1625-07T3

This case concerns the application of bailment law and the tort of conversion to circumstances where a horse died at the defendant stables while being exercised by an unauthorized person. The record contains no evidence establishing the cause of the horse's death or proving that the exercising of the horse was done negligently.

We hold that the conduct of the unauthorized person, an experienced horsewoman, in exercising the horse without permission did not constitute the degree of dominion and control

over the animal that would give rise to a claim of conversion against her. Although damage to a chattel is a factor to be considered in determining whether a conversion has occurred, here that factor was given no weight since no causal connection was shown between the exercising of the horse and its death.

Under bailment law, the death of the horse gave rise to a prima facie case of conversion and negligence against the stable as bailee. Here the stable rebutted that presumption by coming forward with proofs of the circumstances in which the horse died. Even if the stable were negligent in allowing an unauthorized person to exercise the horse, we cannot presume that its negligence was a proximate cause of the horse's death, because determining the cause of death was uniquely within the control of plaintiff, the only person who had the authority to order a necropsy of the horse.

Summary judgment for defendants is affirmed.

01-12-09 R.R. v New Jersey Department of Corrections
A-0508-07T2

We hold that a sexually violent predator who has been civilly committed to a Special Treatment Unit has no constitutional right to marital privacy and conjugal visitation, and that regulations that do not establish such a right were properly promulgated and in accord with legislative intent.

01-09-09 Doris Sexton v. County of Cumberland/Cumberland Manor
A-6414-06T1

The alleged aggravation of an employee's pre-existing COPD caused by inhaling perfume sprayed into the air by a co-employee satisfies the "arising out of" employment criterion of N.J.S.A. 34:15-7 and is compensable. We rejected the judge of compensation's conclusion that the COPD fell into the category of a proclivity of the employee, the aggravation of which while in the course of employment did not arise out of the employment.

01-08-09 Hermes Reyes, et al. v. Harry C. Egner, et al. v. Colombia Reyes v. Prudential Fox & Roach Realtors
A-5977-06T3

In this premises liability case, we consider whether the lessors of a beach house had a duty to correct or warn about what are claimed to be dangerous conditions of their property, presenting hazards that allegedly were not reasonably apparent

to a short-term tenant and her guests. The tenant's elderly father, who had been vacationing at the house, was injured when he lost his balance while stepping onto an outside wooden platform. The platform was adjacent to the sliding glass door leading from the master bedroom to a rear deck. There was no handrail available to help plaintiff regain his balance, despite building code provisions that appear to mandate one. He and his wife thereafter filed a personal injury action against the lessors and the real estate broker that had facilitated the two-week lease.

Because the trial court erroneously required plaintiffs to prove that the lessors had actively or fraudulently concealed the allegedly dangerous conditions, we vacate summary judgment entered in the lessors' favor. In doing so, we endorse and apply the principles expressed in Section 358 of the Restatement (Second) of Torts (1965), which does not require proof of such concealment by a lessor in order for liability to attach. We distinguish Patton v. The Texas Co., 13 N.J. Super. 42, 47 (App. Div.), certif. denied, 7 N.J. 348 (1951) (holding that a lessor is not liable for latent defects, absent "fraudulent concealment"), decided before the adoption of the Second Restatement and which is inconsistent with Section 358. We do so because this case, unlike Patton, involves a short-term rental, a context in which a lessee often has only a limited opportunity to discover hazardous conditions on the premises.

We affirm the grant of summary judgment to the real estate broker, declining to extend liability to the broker in this short-term rental context beyond the limits expressed in Hopkins v. Fox Lazo Realtors, 132 N.J. 426 (1993).

01-07-09 Pan Chemical Corp. v. Hawthorne Borough
A-4779-06T1

The Borough reasonably relied on the legislative definitions set forth in ISRA and applied them to determine whether an environmentally contaminated property was "in use" or "shut down" for taxation valuation purposes. ISRA provides a rational, objective standard in an environmental context by which one can determine whether property "in use" or "closed down" for purposes of triggering the obligation to remediate. Nothing in the Supreme Court's opinion in Inmar, which preceded ISRA and its "ten percent standard," precludes a taxing municipality from utilizing that standard to determine whether a property is "in use" for the purpose of valuation.

01-07-09 State v. James Jackson
A-1775-06T4

If a criminal defendant waives his right to a jury trial and is found guilty in a bench trial, he may challenge his jury trial waiver on appeal solely on the ground that it was not voluntary and knowing. The other factors that the Supreme Court in Dunne directed a trial court to consider in determining whether to grant a defendant's motion to waive a jury trial are not designed to protect the rights of the defendant, but rather to assure that a trial before a judge rather than a jury does not undermine the public's confidence in the criminal justice system. Therefore, a defendant may not rely upon the trial court's misapplication of those other factors to obtain a new trial before a jury.

01-05-09 Harold Hoffman v. Asseenontv.com
A-1840-07T1

On motion for summary judgment, Judge Martinotti in the Law Division dismissed plaintiff's fraud claims, concluding that plaintiff did not establish an ascertainable loss. The judge also dismissed the counterclaim because defendant had not established plaintiff's malicious use or perversion of legal process. Both sides appeal, and we affirm.

12-31-08 Division of Youth & Family Services v. M.C., III, I/M/O Guardianship of M.C., IV AND N.C.
A-1845-07T4

In this appeal from a DYFS abuse and neglect proceeding, we hold that neither N.J.S.A. 9:6-8.46(a)(3) nor Rule 5:12-4(d) permits DYFS to introduce into evidence (1) medical reports prepared on DYFS-provided documents by non-"affiliated consultants[,]" In re Guardianship of Cope, 106 N.J. Super. 336, 343-44 (App. Div. 1969), without producing the author(s) of such reports at trial; or (2) DYFS reports that were not prepared from the testifying DYFS worker's first-hand knowledge of the case.

12-24-08 William M. Campbell v. Borough of North Plainfield, et al.
A-0526-07T3

We held that the MLUL notice and protest provisions in N.J.S.A. 40:55D-63 are independent of each other, and that the exemption in that section from the requirement of personal

notice to affected property owners a proposed zoning amendment that results from a master plan update recommendation does not affect the right of affected property owners to protest and to require that the amendatory ordinance be adopted by a two-thirds supermajority.

We also held that a "judicially declared" vacancy must be counted in calculating the required two-thirds vote.

Finally, we held that a subsequent enactment, by more than a two-thirds vote, of a similar ordinance with some changes, was, on the totality of the record, an amendatory ordinance, and its validity was therefore dependent on the validity of the original ordinance, which was not valid because it was protested and received less than the required two-thirds votes.

12-24-08 Paradise Park Homeowners Association, Inc. et al. v. Riverdale Management Associates, et al.
A-5593-06T1

The Mobile Home Protection Act, N.J.S.A. 46:8C-2 to -21, grants mobile home park residents a right of first refusal triggered by the sale of the property. N.J.S.A. 46:8C-11 and N.J.S.A. 46:8C-12. Plaintiffs are an association of mobile home owners formed under the Act. Defendants are the former and present owners of this mobile home park.

Under N.J.S.A. 46:8C-13(a), any sale "not made in contemplation" of changing the property's use as a private mobile home community is exempt from the right of first refusal. Defendants invoked this exemption when the park was sold. Plaintiffs sued to enforce their right of first refusal. On cross-motions for summary judgment, the trial court dismissed the complaint finding the sale exempt under N.J.S.A. 46:8C-13(a).

We now reverse and hold that the term "in contemplation" in N.J.S.A. 46:8C-13(a) denotes a state of mind involving less commitment to action than an "intent." A seller invoking such an exemption must have a rational, good faith basis to believe, under all of the attendant circumstances, that the sale was not made "in contemplation" of changing the use of the property. Here, plaintiffs presented sufficient evidence to survive summary judgment.

12-17-08 Riverside Chiropractic Group, a/s/o Megan Machado v. Mercury Insurance Company

A-3034-07T2

In this personal injury protection (PIP) action, the assignee of an insurance contract challenged the Alternative Procedure for Dispute Resolution Act's (APDRA), bar to appellate review, arguing that the statute was unconstitutional as applied. N.J.S.A. 2A:23A-18(b). We dismissed, holding that the statutory bar to appellate review was not unconstitutional as applied because the applicable insurance contract did not require the insured to file any claims he/she had in arbitration. The fact that the assignee in this case opted to arbitrate instead of sue amounted to a voluntarily waiver of the right to appellate review.

We further held that the facts before us did not give rise to our exercising our "supervisory function" to review the Law Division's actions.

12-17-08 Polarome International, Inc., formerly known as Polarome Manufacturing Co., Inc. v. Greenwich Insurance Company and Zurich Insurance Company
A-0566-07T1

Where complaints in two toxic-tort actions alleging personal injuries are ambiguous as to the dates of exposure and injury triggering coverage, the carriers may examine evidence extrinsic to the complaints to determine when the last pull of the "continuous trigger" of Owens-Illinois, Inc. v. United Insurance Co., 138 N.J. 437 (1994), occurred in order to establish that they had no duty to indemnify, and thus, no duty to defend. Because the time of initial manifestation of the toxic-tort personal injuries at issue here predated the applicable coverage periods, neither insurer had a duty to defend or indemnify, even though further progression of the disease may have occurred while the relevant policies were in effect.

12-16-08 Larry Price v. Strategic Capital Partners
A-2494-07T2

Larry Price is a pro se litigant who frequently challenges the actions of the Union City Zoning Board. In this case, he challenged the Board's issuance of a density variance that permitted the trebling of the density of a high-rise building in a zone in which the zoning ordinance sought to prohibit the granting of any density variance. We affirmed the trial court's determination that a zoning ordinance cannot lawfully prohibit

the granting of density variances, because such a prohibition conflicts with the specific statutory grant of authority to do so found in N.J.S.A. 40:55D-70(d)(5). We remanded the matter back to the Board for further consideration of whether the density problem, i.e., that it is not economic to build tall, low density buildings, was unique to this project or common to the zone and whether it is appropriate to treble the density in that particular zone. We also required that the Board provide a fuller explanation of the reasons for its actions.

12-15-08 Leonard Felicioni v. Administrative Office of the Courts, et als.
A-2716-07T1

Appellant, who is one of several victims of a fraudulent scheme perpetrated by a criminal defendant ordered to pay restitution to all of them, challenges the State's current system of paying restitution on a first-in-time rather than automatic pro-rata basis. We rejected his multi-faceted challenge, finding the method of distribution violates neither his substantive due process nor equal protection rights under the federal and State constitutions; nor his State constitutional rights under the Victims Rights Amendment (VRA), N.J. Const., art. I, ¶ 22; nor his statutory rights under New Jersey's Crime Victim's Bill of Rights, N.J.S.A. 52:4B-34 to -70, and Civil Rights Act, N.J.S.A. 10:6-1 to -2.

12-15-08 Praxair Technology, Inc. v. Director, Division of Taxation
A-6262-06T3

In administering N.J.S.A. 54:10A-2, a section of the Corporation Business Tax Act, the Director may not give retroactive application to the clarifying example in N.J.A.C. 18:7-1.9(b), i.e., to tax years antedating the promulgation in 1996 of the clarifying example dealing with the tax liability of foreign corporations that earn licensing fees from parent corporations in New Jersey.

12-12-08* Save Hamilton Open Save vs. Hamilton Township Planning Board, et al.
A-1795-07T2

The Phase II stormwater management regulations adopted by the DEP do not include any provision for DEP review to determine compliance. Therefore, unless a developer is required to obtain a permit under another DEP regulatory program, such as the

Freshwater Wetlands Protection Act, the determination of compliance with the Phase II regulations must be made by the planning board as part of its review of a land use application under the Municipal Land Use Law and the statewide rules that govern streets, water supply, sanitary sewer systems, and stormwater management, adopted pursuant to the Residential Site Improvement Standards Act. (Approved for Publication Date)

12-12-08* Sealed Air Corporation vs. Royal Indemnity Company, et al.
A-5951-06T3

In this case, we examined whether a directors and officers (D&O) insurance policy affords coverage for defense costs and damages arising from a suit alleging misrepresentations regarding contingent liabilities for pollution claims made in connection with a multi-step transaction to reorganize and merge businesses. We held that, based on the "substantial nexus" standard set forth in Am. Motorists Ins. Co. v. L-C-A Sales Co., 155, N.J. 29, 35 (1998), the complaint clearly arose from alleged violations of the Securities Exchange Act of 1934 and the rules promulgated there under, and not from intentional pollution. We found that the language of the pollution exclusion in the applicable insurance policy, as well as the reasonable expectations of the insured, prevented the insurer from disclaiming coverage. (Approved for Publication Date)

12-12-08 Fernando Piniero, et al. v. New Jersey Division of State Police, et al.
Martin Temple, et al. v. Peter C. Harvey, et al.
David Kushnir, et al. v. New Jersey Department of Law and Public Safety, et al.
A-2507-07T3

In this appeal, we were required to determine whether the contents of a four-way investigation report of the background check of Joseph Santiago, who was nominated by Governor James McGreevey for the position of Superintendent of the New Jersey State Police, was subject to discovery by plaintiffs, New Jersey State troopers, who alleged that they were retaliated against because of their involvement in preparing and compiling the information for the report. Three separate groups of State troopers sought discovery of the four-way investigation. We determined that two of the groups of State troopers did not have the requisite interest in the four-way investigation report to

warrant disclosure of the report, and the third group, while having such an interest, was not entitled to the report as its interest did not outweigh the public's interest in keeping the report confidential. Consequently, we reversed the general equity judge who permitted discovery of a redacted version of the four-way investigation report.

12-12-08 Ricki R. Rogers v. Felipe Noguera
A-1531-07T2

The parties entered into a prenuptial agreement (agreement) prior to their 1981 marriage. In 1998, the Legislature adopted the Uniform Pre-Marital Agreement Act (the Act), N.J.S.A. 37:2-31 to -41. The agreement was governed by pre-Act case law articulated in D'Onofrio v. D'Onofrio, 200 N.J. Super. 361, 366 (App. Div. 1985), and Marschall v. Marschall, 195 N.J. Super. 16 (Ch. Div. 1984). Those pre-Act cases held that prenuptial agreements are valid and enforceable under certain conditions, but subject to modification at the time of enforcement if the spouse sought to be bound by the agreement will suffer a substantial diminution in his standard of living after the divorce.

Here, after lengthy evidentiary hearings, the trial court declared the entire agreement unenforceable and determined that defendant was entitled to seek equitable distribution and alimony. We modified the trial court's conclusion to allow defendant to seek alimony if and when he demonstrates substantially changed circumstances under the standard articulated in Lepis v. Lepis, 83 N.J. 139 (1980). The remainder of the agreement remains in full force and effect.

12-12-08 State of New Jersey v. Kevin C. Williams
A-4616-04T4

We hold that there was no violation of an order of sequestration or defendant's constitutional rights when the victim remained in the courtroom after testifying, overheard defendant speak, and was recalled to make vocal identification.

12-11-08 J.A v. A.T.
A-3003-07T4

We held that application of the first filed doctrine to register and enforce a custody order issued by a Greek court would contravene public policy, despite the fact that there was evidence that plaintiff participated in the Greek proceeding through a representative and filed a counterclaim for custody in that action. We found that apart from the fact that the order granting custody to defendant was temporary, the record was devoid of evidence that the court considered any of the statutory factors outlined in N.J.S.A. 9:2-4(c) before reaching its decision. Thus, we concluded that "special equities" militated against according deference to the temporary custody determination by the Greek court.

12-11-08 Bertha Bueno v. Board of Trustees, Teacher's Pension and Annuity Fund, Division of Pensions and Benefits
A-0916-07T2

Where an applicant for public-employee ordinary disability retirement benefits is only disabled from performing the duties of her assigned public-employee position but the employer has no other work available for her in the general area of her ordinary employment, then the applicant must prove that she is disabled from performing duties in the general area of her ordinary employment for other employers and may even be required to prove that she is disabled from performing substantially different duties for other employers or is generally unemployable in order to qualify for ordinary disability retirement benefits.

12-11-08 Sophie Bubis v. Jack Kassin, et al.
A-5783-06T2

Owners of private property adjoining oceanfront property below the mean high water mark held by the State under the public trust doctrine may not limit the public's use of that property to enhance the enjoyment of their own property.

However, such property owners have no obligation to allow public access to their own property above the mean high water mark that they maintain exclusively for their own recreational use.

12-10-08 Scott Evans v. Atlantic City Board of Education, et al.
A-1939-07T3

In this appeal, the court held that a sending-district representative on a receiving district's board of education was not entitled to vote on the appointment of the receiving board's solicitor. The court observed that N.J.S.A. 18A:38-8.1 enumerates those matters on which a sending-district representative is eligible to vote and held that the statute should be literally interpreted because its unambiguous language, as illuminated by its legislative history, reveals an intent to permit voting only on the matters expressly enumerated.

12-10-08 The Biber Partnership, P.C. v. Diamond Hill Joint Venture, LLC and McManus Design Group, Inc.
A-1766-07T1

The section of the New Jersey version of the Uniform Arbitration Act that authorizes consolidation of separate arbitration proceedings recognizes that, even in the absence of an express prohibition against consolidation in a contract providing for arbitration, the legitimate expectations of the contracting parties may limit a court's authority to order consolidation of arbitration proceedings.

12-09-08 B&H Securities, Inc. v. Duane D. Pinkney, Marc J. Palladino, Michael Poisler and Advanced Integration Security, LLC
A-3642-07T3

An employee's claim under the Wage Act that is removed from the Department of Labor to the Superior Court for a jury trial is a Superior Court action, which is subject to the same rules of practice and procedure, including the court's authority to consolidate with other pending actions, as any other Superior Court action.

12-09-08 David A. Ames v. Dama Gopal
A-2522-07T1

Plaintiff was not entitled at trial to an instruction that a herniated disc constitutes a permanent injury, entitling him to non-economic damages. We distinguish Pardo v. Dominguez 382 N.J. Super. 489 (App. Div. 2006).

12-04-08 In Re Election Law Enforcement Commission Advisory Opinion No. 01-2008
A-2816-07T1

We affirmed an advisory opinion issued by the Election Law Enforcement Commission, concluding that an elected official being criminally prosecuted by the United States Attorney for alleged corruption in office may not use campaign funds to pay for legal defense costs.

12-03-08 Antonia Verni, et al. v. Daniel R. Lanzaro, et al.
A-1816-07T3

We reverse a June 7, 2007 order sealing the settlement proceedings, the settlement documents, and all further proceedings in this personal injury action as contrary to the Rule 1:1-2 and the guidelines identified by the Supreme Court that guide judicial discretion in any decision to seal a court record.

12-01-08 State of New Jersey in the Interest of P.M.P.
A-5156-07T4

We conclude a juvenile delinquency complaint, filed at the direction of a county prosecutor's office, is not the substantial equivalent of an indictment such that it initiates a formal adversarial proceeding and triggers a juvenile's right to counsel. We reverse the trial court's extension of the protections of State v. Sanchez, 129 N.J. 261, 277 (1992) to juvenile proceedings.

11-28-08 Senator Nia H. Gill v. N.J. Department of Banking and Insurance
A-0886-07T1

The issue presented in this appeal is the right of GEICO, which filed documents with the New Jersey Department of Banking and Insurance, to intervene in a Government Records Council proceeding held pursuant to the Open Public Records Act, in which a third party seeks public disclosure of GEICO's documents. GEICO moved to intervene, claiming that its documents did not constitute public records, as they contained confidential, proprietary information.

The GRC denied the motion to intervene and we reversed, concluding that GEICO was entitled to participate in the GRC proceeding to protect what it considers to be its confidential and proprietary information.

11-21-08 John A. Bart v. City of Paterson Housing Authority
A-5826-06T1

We reversed the Final Decision of the Government Records Council that there had been a knowing and willful violation of the Open Public Records Act (OPRA) and imposing a $1,000 sanction. Because claimant already had one document in his possession when he demanded a copy under OPRA, he had not been wrongfully denied access to the document.

Further, we declined to equate a written response that had been prepared with the assistance of counsel to an OPRA request to be so vague as to constitute a knowing and willful violation of the statute.

11-20-08 Gobe Media Group, LLC v. Cisneros
A-3524-07T2

The question presented on appeal is whether a monetary judgment entered in the Special Civil Part, when the business entity was not represented by an attorney as required by Rule 1:21-1(c), renders the judgment void ab initio or voidable at the election of the adverse party. We held that the judgment is voidable at the election of the adverse party without establishing a material irregularity in the trial proceeding or that the judgment was otherwise erroneously entered. We also held that our decision is applicable to the present case and prospective cases, but not cases previously decided that are beyond the time for reconsideration or direct appeal.

11-20-08 Steven Spaeth v. Vathsala Srinivasan
A-2834-07T1

At issue is whether a defendant, who answered a plaintiff's complaint and counterclaimed without asserting the affirmative defense of the promise to arbitrate, waived her contractual right to arbitration. We held that under the circumstances, where defendant did not initiate the litigation and actively attempted to extricate herself therefrom, where minimal discovery was exchanged, and where the six-month delay in invoking the contractual right neither benefited defendant nor caused demonstrable prejudice to plaintiff, defendant should not be deprived of the arbitration remedy she bargained for.

11-19-08 Borough of Avalon v. New Jersey Department of Environmental Protection
A-3410-07T3

The DEP rules that require a municipality to allow public access to tidal waterways and their shores "at all times" unless it obtains the DEP's permission to close the area and that require a municipality that seeks an appropriation from the Shore Protection Fund to enter into a State Aid Agreement that obligates the municipality to provide such additional parking spaces and restroom facilities in proximity to the oceanfront as the DEP may mandate are declared invalid.

11-18-08 State of New Jersey v. Steven Stull
A-5097-06T4

Defendant was convicted of simple assault. He contends that the evidence did not permit the trial court to find that he caused "physical pain." N.J.S.A. 2C:11-1a; N.J.S.A. 2c:12-2a. Defendant placed and held the victim in a headlock for twenty to thirty seconds, squeezed his neck and yanked and swung him around. There was no testimony about the victim's pain and he did not sustain bruises or seek or receive treatment. We conclude that the State met its obligation to prove guilt beyond a reasonable doubt through proof of defendant's conduct and inferences reasonable on the evidence as a whole.

11-17-08 ZRB, LLC v. New Jersey Department of Environmental Protection, Land Use Regulation
A-6046-06T3

The New Jersey Department of Environmental Protection rejected appellant's application for a Statewide General Permit No. 6 to fill wetlands and build a single-family subdivision on its property. The application was rejected because the Department found that the wetlands on the property constituted a habitat for the barred owl, a species the State had designated as threatened.

On appeal, we determined that pursuant to the Freshwater Wetlands Protection Act and the New Jersey Endangered and Nongame Species Conservation Act, the State has the authority to protect threatened, as well as endangered, species. We also concluded that the decision to deny appellant's application for the permit was not arbitrary, capricious or unreasonable.

11-17-08 Mainland Manor Nursing & Rehabilitation Center v. New Jersey Department of Health & Senior Services
A-4438-06T2

If a health care facility's application for a certificate of need is denied, and the facility fails to appeal from the grant of a certificate of need to another medical facility for the same medical service, an appeal from the denial of the certificate may become moot if the successful applicant has instituted the new medical service. If an Administrative Law Judge makes findings of fact and conclusions of law which indicate that the agency head's preliminary decision was erroneous, the agency head must consider that decision de novo in light of the Administrative Law Judge's findings and conclusions.

11-14-08 James Williamson v. New Jersey Department of Corrections
A-3465-07T2

We reverse the finding that inmate committed prohibited act *.101, escape from a halfway house. Inmate was allowed to go to a job interview, but the bus driver dropped him off at the wrong industrial park. Inmate got lost. He called the halfway house and was told to try to make the interview anyway. Inmate eventually made the interview. However, he returned to the halfway house at 3:45 p.m., instead of 2:00 p.m. At 2:50 p.m., he was reported to the local police as an escapee. It is undisputed that inmate had made several telephone calls to the halfway house to report his whereabouts.

We conclude that although inmate's conduct constituted a technical "escape," under these circumstances it was arbitrary to find him guilty and impose a sanction. The governing statutes and regulations give the DOC flexibility and discretion in adjudicating a charge of escape.

11-14-08 In the Matter of Hartz/Damascus Bakery, Inc.
A-5566-06T3

In this challenge by a municipality to the New Jersey Meadowlands Commission's issuance of a zoning certificate for site improvements and change in permitted uses from a warehouse/office to light industrial facility, we held:

1. the municipality has standing to object;

2. the agency has exclusive jurisdiction over the type and location of development in the Meadowlands district

and has exclusive approval authority for all development applications;

3. that notice to, and "consultation" with, the municipality met statutory and regulatory requirements;

4. that the application under review did not require a variance because it merely sought a change in permitted uses;

5. that, unlike a variance, the application did not require a plenary hearing under the enabling Act and implementing regulations;

6. that, unlike a variance where discretion is involved, when an applicant for a zoning certificate meets the engineering, performance and zoning standards, the agency is obliged to issue the approval; and

7. that the function being more investigatory, administrative and ministerial, rather than adjudicatory, adversarial and quasi-judicial in nature, the agency properly delegated its decision-making authority to staff.

11-13-08 Jeffrey Shectman v. Robert Bransfield, M.D.
A-3035-07T2

In this medical malpractice action, defendant was entitled to have the jury instructed on medical judgment because the expert testimony established that there were two generally accepted courses of treatment that could have been employed and the choice between the two was a matter of the physician's judgment.

11-13-08 St. James AME Development Corporation v. City of Jersey City
A-1029-07T3

A motion to dismiss a complaint with prejudice for failure to answer interrogatories must be denied when the earlier order to dismiss without prejudice is not served on the plaintiff.

Moreover, such a motion to dismiss with prejudice must also be denied if fully responsive answers had been provided and a motion to restore is pending. If there is a dispute regarding the responsiveness of the answer, the judge must decide that issue before addressing the motions to restore or to dismiss.

11-12-08 Thomas John Salzano v. North Jersey Media Group, Inc., et al.
A-6715-06T1

Plaintiff is the son of a former officer of NorVergence, Inc., which is the subject of bankruptcy proceedings. The media defendants reported on a complaint filed in federal court against plaintiff by the trustee of NorVergence's assets. The trustee claimed that NorVergence funds were fraudulently transferred to plaintiff, and alleged that plaintiff "unlawfully diverted, converted and misappropriated" NorVergence funds "for his own personal benefit." The media defendants asserted in their articles about the trustee's suit, among other things, that plaintiff "stole" NorVergence funds. The trial judge granted defendants' motion to dismiss the complaint, which pled numerous causes of action, including defamation, for failure to state a claim upon which relief may be granted.

In this appeal, the court reversed the dismissal of the complaint, holding that defendants could not rely upon the fair report privilege because the proceeding they reported on consisted only of an initial pleading that had not been the subject of judicial review. Absent the shield of the fair report privilege, defendants could not demonstrate the statements were true or nondefamatory. The court also held that, although a private person, plaintiff was embroiled in a public matter and must be held to the actual malice standard, but the court also held that plaintiff should be permitted to amend his complaint.

11-12-08 Grow Company, Inc. v. Dilip Chokshi and Pharmachem Laboratories, Inc.
A-4282-06T2

In this appeal, the court reviewed a partial summary judgment that found the terms of an earlier settlement agreement required a dismissal of plaintiff's claims against defendant

Dilip Chokshi, who was plaintiff's former employee, and defendant Pharmachem Laboratories, Inc., with whom Chokshi presently has a business relationship. The trial judge also found that the settlement agreement entitled Chokshi to an award of counsel fees, but did not quantify the amount due, choosing instead to dismiss that claim without prejudice to be renewed in a later suit. The court concluded that the disposition of the fee issue was not a final determination and left interlocutory the order under review. Although the court again condemned the foisting of jurisdiction upon it in the absence of a final order, as it had in Vitanza v. James, 397 N.J. Super. 516 (App. Div. 2008), in these particular circumstances the court found it equitable to grant leave to appeal out of time.

In reaching the merits, the court reversed the partial summary judgment, holding that the settlement agreement was capable of more than one plausible interpretation. The court also declined to determine whether a former employer was limited to a single suit against an allegedly disloyal former employee, leaving that novel issue to further factual development in the trial court.

Lastly, the court concluded that the trial judge had no authority to compel plaintiff to post a supersedeas bond because plaintiff had not sought a stay and because no money judgment had been entered against plaintiff.

11-10-08 State of New Jersey v. Thomas E. Best
A-0891-07T4

A school principal may search a student's car parked on school grounds whenever, under the totality of the circumstances, the principal reasonably suspects that evidence of criminal activity will be found in the vehicle. In light of the strong State interest in maintaining order, safety and discipline in the school environment, neither probable cause nor a warrant is required.

11-07-08 Rutgers-The State University v. Alter Fogel
A-1493-07T2

The venue section of the Federal Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692i, requires that debt collection actions be filed either in the county where the debtor lives or in the county where the debtor signed the contract underlying the debt.

11-03-08 New Jersey Manufacturers Ins. Co. v. Horizon Blue Cross Blue Shield of New Jersey
A-0712-07T3

The issue in this appeal is whether a health insurer whose insured has designated the health insurance as primary under N.J.S.A. 39:6A-4.3d, is required to participate in PIP arbitration pursuant to N.J.S.A. 39:6A-5.1. We conclude that this statutory arbitration provision does not apply to health insurers.

10-31-08 New Jersey Division of Youth and Family Services v. S.S., In the Matter of K.S.H.
A-5209-07T4/A-5210-07T4 (consolidated)

Following a colloquy among the trial court, counsel for DYFS, the Law Guardian, and the natural mother pro se, the trial court entered an order directing a change of custody of a child from DYFS to his natural mother, when no exigent circumstances existed. We reversed and remanded directing that the court conduct a proper evidentiary hearing on the issue of change of custody.

10-31-08 Michael O'Rourke v. City of Lambertville, et al.
A-0481-07T3

When a municipality adopts rules governing disciplinary actions for the members of its police force pursuant to N.J.S.A. 40A:14-181 to implement guidelines promulgated by the Attorney General, the municipality is required to comply with those rules, and the City's failure to do so in this case requires reversal of its decision to remove the appellant police officer.

10-30-08 State v. Jeffrey Nemes
A-6320-07T4

An interlocutory order denying a motion to dismiss on double jeopardy grounds is not appealable as a final judgment.

10-29-08 Estate of Ramona Cordero, et al. v. Christ Hospital, et al.
A-1289-07T1

On appeal from a grant of summary judgment in favor of the defendant hospital, plaintiffs contend the evidence was adequate to permit a jury to find the hospital liable for an anesthesiologist's negligence under a theory of "apparent

authority." There is apparent authority when "a hospital by its actions, has held out" a doctor as its agent and "a patient has accepted treatment from that physician in the reasonable belief that it is being rendered in behalf of the hospital." Basil v. Wolf, 193 N.J. 38, 67 (2007) (quoting and approving Arthur v. St. Peters Hosp., 169 N.J. Super. 575, 581 (Law. Div. 1979)). Based on the absence of evidence that the hospital "actively held out" or "misled" the patient "into believing" that the anesthesiologist was its agent, or that patient was misled, the trial court dismissed plaintiffs' claim.

We hold that when a hospital provides a doctor for a patient and the totality of the circumstances created by the hospital's action and inaction would lead a patient to reasonably believe the doctor's care is rendered in behalf of the hospital, the hospital has held out that doctor as its agent. We also hold that when a hospital patient accepts a doctor's care under such circumstances, the patient's acceptance in the reasonable belief the doctor is rendering treatment in behalf of the hospital may be presumed unless rebutted.

10-29-08 Philip D'Ambrosio v. Department of Health and Senior Services
A-0914-07T3

The Department of Health and Senior Services has the authority under the 1984 Emergency Medical Services Act, N.J.S.A. 26:2K-7 to -53 (the "EMS Act"), to regulate emergency medical technicians, commonly known as "EMT-Bs", who provide basic life support services, despite the fact that the classifications in the EMS Act do not specifically list EMT-Bs as a discrete subcategory of EMTs. The corresponding Departmental regulations pertaining to EMT-Bs, N.J.A.C. 8:40A-1.1 to -10.4, are therefore valid and applicable to appellant's effort to obtain recertification to serve in this State as an EMT-B.

Additionally, the authority of the Department of Health and Senior Services to certify EMTs such as appellant who happen to serve on local rescue squads is not affected by municipal certification requirements for rescue squad members set forth in the Highway Traffic Safety Act of 1987, N.J.S.A. 27:5F-13.1 to -43 (the "Traffic Safety Act"). The Traffic Safety Act supplements, but does not supplant, the regulation of EMTs that is conducted by the Department of Health and Senior Services.

10-28-08 In the Matter of Thomas J. Kim, M.D. to Practice

Medicine and Surgery in the State of New Jersey
A-1488-07T1

The authority of the New Jersey Board of Medical Examiners includes the ability to grant licensure conditioned by a reprimand. Because the Board is vested not only with the greater power to deny, revoke, or suspend a physician's medical license, N.J.S.A. 45:1-21, but also with the power to invoke the lesser sanctions of warnings, reprimands, or censure, N.J.S.A. 45:1-22(a), we concluded that to limit the exercise of the power to grant or deny licensure, separate from the imposition of a lesser and perhaps more appropriate action, was irrational and may thwart the effectiveness of the Board's fundamental dual purpose -- to permit qualified physicians licensure while protecting the State citizenry.

10-27-08 Fiona Bayne v. Earl Johnson
A-0974-06T1

We denied palimony to the claimant who lived with her paramour and his wife for a substantial period of time based upon absence of proof of a promise of lifetime support and also because claimant left the relationship voluntarily.

10-24-08 Donald J. Trump v. Timothy L. O'Brien, et al.
A-3905-06T2

Following the publication of the biography, TrumpNation, its subject, Donald Trump, sued its author, Timothy O'Brien, and his publisher, claiming that O'Brien's report that Trump's net worth was only $150 million to $250 million, not the billions that Trump asserted, was defamatory. During discovery, Trump sought the identification of the three sources of O'Brien's information, along with notes of interviews with those sources. O'Brien refused to produce the requested discovery, citing the newsperson's privilege. The trial court, applying New York's Shield Law, found the information unprotected and ordered production of this and other information and documentation.

On appeal, we reversed, determining that the identity and statements of the sources were protected by New York's Shield Law. In doing so, we found that non-fiction books were protected by that Law, the information contained in TrumpNation was of public interest and thus "news," and that O'Brien's sources were confidential. We also found that Trump had failed to meet the burden required to defeat the qualified privilege applicable to allegedly non-confidential materials. Although we

recognized that both the confidential and allegedly non-confidential materials that O'Brien refused to disclose would be protected by New Jersey's Shield Law, we did not resolve the conflict of law issue thus raised, finding it not to have ripened.

10-14-08 Hina K. Patel v. New Jersey Motor Vehicle Commission
A-2911-07T1

New Jersey's unsafe driving statute, N.J.S.A. 39:4-97.2, provides that the Motor Vehicle Commission shall assess the driver points for a third or subsequent offense. The statute also affords relief from the assessment of points when an offense is committed more than five years after a prior offense. In this appeal, we have construed that language to apply only to offenses that occur after the third offense.

10-14-08 In Re Carry Permit of James L. Andros
State of New Jersey v. James L. Andros
A-4077-06T4

The federal Law Enforcement Officers' Safety Act of 2004, 18 U.S.C.A. Section 926C, does not preempt the State from revoking the permit of a retired police officer under N.J.S.A. 2C:39-6L(6).

10-10-08 Phoenix Funding, Inc. v. Shartane and Robert Krute
A-1706-07T3

This case involves the Tax Sale Law, N.J.S.A. 54:5-1 to -137. We consider whether a person who acquires an interest in property that is the subject of an action to foreclose a tax sale certificate may redeem without intervening in the proceeding if the person has a "close personal relationship" with the property owner. We conclude that N.J.S.A. 54:5-98, N.J.S.A. 54:5-89.1 and Rule 4:64-6(b) require intervention.

10-10-08 State of New Jersey v. Anthony Alexander
A-6333-06T4

In this appeal, the court reversed the denial of post-conviction relief because trial counsel's representation of both defendant and another individual, who allegedly participated in crimes with defendant, placed counsel in a per se conflict of interest. The court held that because the conflict arose between the entry of a guilty plea but before sentencing, there was no cause to disturb the plea, but that defendant was

entitled to be resentenced following a determination of what might have occurred had defendant sought to cooperate with law enforcement regarding his alleged cohort.

10-10-08 City of Ocean City v. Joseph Somerville
A-1982-06T1

We hold that an ordinance that imposes a "cost of living" cap on budgeted municipal expenditures in a Faulkner Act community may not be adopted by the "initiative" process.

10-08-08 Francis and Aniela Sullivan v. Coverings & Installation, Inc., Frank F. Setola, and Cheryl A. Setola
A-6025-06T1

We held that plaintiffs were not required to establish "good cause" for reinstatement of their complaint, which was dismissed without prejudice for failure to permit defendants to inspect their residence. Rule 4:23-5(a)(1) expressly permits a party whose complaint has been dismissed without prejudice to move, on notice, to vacate the dismissal at any time before the entry of an order dismissing the complaint with prejudice. Because defendants never moved to dismiss the complaint with prejudice under Rule 4:23-5(a)(2), plaintiffs' complaint remained dismissed without prejudice. Consequently, when plaintiffs moved to reinstate their complaint nearly one year later, the court's inquiry was limited to determining whether (1) the discovery violation resulting in the dismissal had been cured, (2) the restoration fee had been paid, and (3) what, if any, sanctions, counsel fees and costs, or both, should be imposed as a condition of restoration.

10-06-08 Maragliano v. Land Use Board of the Township of Wantage and B. Robert McEwan
A-6526-06T1

Under the time of decision rule, a land use agency should not approve a land use application under a zoning ordinance that has been amended to change the land use regulations in the zone on the ground that the amendment's effective date has not yet arrived.

10-06-08 State of New Jersey v. John TaimanglO
A-2569-06T2

Part III of the Rules govern municipal appeals in the Law Division. Defendant must be afforded right to be present and allocution unless waived on the record. He must also be advised of right to appeal and State v. Molina, 187 N.J. 531 (2006) applies in the absence of adherence to R. 3:21-4(h). The conviction in this case is affirmed because the remand conducted pending the appeal permitted defendant to raise all issues in the Law Division and the de novo review cured defects in the municipal court proceedings.

10-03-08 Zagami, LLC, d/b/a The Landmark Americana Tap and Grill, d/b/a Landmark Liquors v. Mary Ann Cottrell, et al.
A-3948-07T3/A-4227-07T3 (consolidated)

We held that the defendants in this defamation action brought by the owner of a bar are accorded absolute immunity, under the litigation privilege, for oral and written statements they made objecting to, and in connection with, the plaintiff's municipal liquor license renewal proceeding. In extending the privilege to these allegedly defaming defendants, we found the administrative proceeding with its attendant safeguards of notice, hearing, neutrality, availability of review on appeal, and presence of retarding influences, sufficiently similar to strictly judicial proceedings so as to protect the allegedly defamed party from false or malicious charges and therefore accord participants therein the same mantle of protection.

09-30-08 State of New Jersey v. Jayson Williams
A-2524-07T4

There can be no dispute that a criminal investigation infected by racial animus would violate a defendant's due process rights. Clearly there is no room for racial bias in any law enforcement investigation.

On leave granted, the State argues that the trial court erred in ordering the State to disclose to defendant records relating to racial remarks made by a "senior officer" in the prosecutor's office during a briefing on the case.

In the majority's view, where blatantly racist remarks have been made by a "senior officer" during a briefing on the case, due process requires that we allow discovery of relevant information to determine whether the investigation and/or prosecution was tainted by racism such that the outcome may have been different.

A dissent was filed by Wefing, J.A.D.

09-30-08 In the Matter of Kenneth R. Martinez
A-0090-07T2

A civil service appointing authority violates the Rule of Three, N.J.S.A. 11A:4-8, in guaranteeing a promotional candidate that he or she will receive the appointment if he or she attains the highest score on the examination, particularly where, as in this case, the individual guarantee was not contemporaneously disclosed to the other applicants who sat for the examination.

09-29-08 Association of New Jersey Rifle & Pistol Clubs, Inc., et al. v. Jersey City, et al.
A-4443-06T2/A-4708-06T2 (consolidated)

A municipal ordinance prohibiting the purchase of more than one handgun within a thirty-day period is invalid as preempted by State law.

09-18-08 Robin Cerdeira v. Martindale-Hubbell, a Division of Reed Elsevier, Inc., and Melvin Bowers
A-5855-06T1

In this appeal we hold that constructive knowledge of co-worker sexual harassment premised upon a negligence-based theory of direct liability, or through agency, may be imputed to an employer where the employer has failed to have in place effective and well-publicized sexual harassment policies that provide employees with reasonable avenues for voicing sexual harassment complaints.

09-18-08 State of New Jersey v. Quadir Whitaker
A-4340-05T4

Defendant was convicted under the principle of accomplice liability, N.J.S.A. 2C:2-6b(3), of having committed the crimes of first-degree robbery and felony murder. The question presented on appeal is whether a defendant charged as an accomplice may be found guilty of robbery by uttering an instruction to the principal, during the immediate flight from an attempted theft, to hide the weapon used during the attempted theft, after all necessary elements of the crime of robbery have concluded.

We answered the question in the negative. We held that the phrase contained in the robbery statute, "[a]n act shall be deemed to be included in the phrase 'in the course of committing a theft'" N.J.S.A. 2C:15-1a, refers only to those acts set forth in sections a(1), (2), and (3) of the statute which elevate simple theft, or attempted theft, to the crime of robbery. We determined that the phrase does not encompass other acts committed by an alleged accomplice after all elements necessary to constitute the crime of robbery had concluded. Lastly, to the extent that State v. Williams, 232 N.J. Super. 432 (App. Div.), certif. denied, 118 N.J. 208 (1989) and State v. Baker, 303 N.J. Super. 411 (App. Div.), certif. denied, 151 N.J. 470 (1997) hold to the contrary, we disagreed.

09-17-08 In Re Proposed Xanadu Redevelopment Project
A-0674-04T1/A-0688-04T1 (consolidated)

We hold that the New Jersey Meadowlands Commission (NJMC) and the New Jersey Department of Environmental Protection (NJDEP) fulfilled their statutory mandate to "consult" with the New Jersey Sports and Exposition Authority (NJSEA) concerning the Xanadu Redevelopment project. We distinguished between the agency's consulting function as opposed to its approval function. The NJDEP and NJMC were only required to hold a quasi-legislative hearing on the Redevelopment project and the NJDEP and NJMC recommendation that the Xanadu project advance, subject to conditions, was not arbitrary and capricious but was supported by substantial evidence in the record.

We also found that conditional approval for advancement of the project was appropriate due to the nature of the project. Also, there is no applicable statute or precedent to suggest that such conditions are improper. Furthermore, we found petitioners were given ample time to comment on the NJDEP's report. The NJDEP was only required to allow enough time for comment so that fairness and overall administrative balance were reasonably secured. Lastly, the NJMC and NJDEP did not violate the public trust doctrine by permitting the Xanadu project to move forward because the surrounding wetlands will remain preserved.

09-17-08 In Re Stream Encroachment Permit For Proposed Xanadu Redevelopment Project
A-1435-04T1/A-1438-04T1 (consolidated)

We hold that the New Jersey Department of Environmental Protection (NJDEP) had a sufficient factual basis to grant

permits to fill approximately 7.69 acres of wetlands in connection with the Xanadu Redevelopment project. Also, the NJDEP's determination that mitigation of traffic and air quality problems must be addressed in stages due to the nature of the project was not an arbitrary and capricious resolution, and, therefore, must be upheld. Furthermore, development of the surrounding wetlands does not violate N.J.A.C. 7:7E-3.27(c)(1) because there is little, if any, possible water dependant use for the property and no prudent or feasible alternative to developing the project on a non-wetlands site. However, the NJDEP process of reviewing future submissions for compliance with conditions contained in the approval fails to provide an adequate opportunity for public comment. Therefore, the NJDEP is required to develop a system that ensures the opportunity for such comment.

09-16-08 Eastern Concrete Materials, Inc. v. Daibes Brothers, Inc., et als.
A-0067-07T3

The definition of "supplier" in the Construction Lien Law, N.J.S.A. 2A:44A-2, establishes a three-tier structure for eligibility to file a lien. A supplier to a sub-subcontractor is not eligible where neither the supplier nor the company supplied had the required "direct privity of contract with an owner, contractor, or subcontractor in direct privity of contract with a contractor."

09-11-08 GRANT SPINKS, ROBERT KOVACS and MICHAEL EXLEY v. THE TOWNSHIP OF CLINTON, STEPHEN CLANCY, Individually and as Chief of Police of the Township of Clinton, DWIGHT RUNYON, Individually and as an employee of the Township of Clinton, and WAYNE WEISS, Individually and as an employee of the Township of Clinton
A-5444-05T2

Defendant The Township of Clinton sought to bar the release of certain documents, primarily the records of an internal investigation of the Township police department, submitted to the trial court in connection with a summary judgment motion, arguing that disclosure is forbidden by law, and that, under common-law principles, the Township's interest in confidentiality outweighs the public's interest in accessing the records. We found that the trial court properly applied Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356 (1995) to the facts of the case, but did not effectuate the redaction of all the personal information ordered to be withheld. Therefore, we

affirmed the trial court's release of the documents at issue and remand the matter for further redaction of the record in accordance with the trial judge's prior order.

09-11-08 GRANT SPINKS, ROBERT KOVACS and MICHAEL EXLEY v. THE TOWNSHIP OF CLINTON, STEPHEN CLANCY, Individually and As Chief of Police of the Township of Clinton, DWIGHT RUNYON and WAYNE WEISS
A-4522-05T1

Three former Township of Clinton police officers appealed from two orders granting summary judgment to defendants, The Township of Clinton and Stephen Clancy, the Police Chief of Clinton. Plaintiffs had pled guilty to falsifying documents concerning their police activities, were admitted into a pre-trial intervention program, resigned their positions as police officers, and stipulated they would not work again in law enforcement in New Jersey. Following this, they sued defendants, alleging retaliation in violation of plaintiffs' civil rights pursuant to 42 U.S.C.A. § 1983, and unlawful termination based upon age in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12. After reviewing plaintiffs' contentions and the applicable employment law, we affirmed the orders.

09-10-08 Mountain Hill, L.L.C. v. Township Committee of the Township of Middletown, et al.
A-2404-06T2

We conclude that a direct financial involvement under the Local Government Ethics Law (Ethics Law), N.J.S.A. 40A:9-22.1 to -22.25, with a developer and its members requires disqualification of a municipal official from introducing, considering and voting on ordinances and a master plan adversely affecting the development even where the municipal official terminated the direct financial involvement after the developer filed an Application for Development Permit. We also conclude that such a termination of involvement in 2000 is not so remote in time that the official may participate in such municipal action in 2001 and 2004 free of any conflict of interest whether or not the official voted in favor of the ordinances or master plan. We also conclude that additional financial involvement with a member of the developer in 2003 required disqualification from participating in the 2004 ordinances and master plan.

09-10-08 Mountain Hill, L.L.C. v. Zoning Board of Adjustment of the Township of Middletown

A-5496-04T3/A-5871-04T3
(consolidated)

We determine that a use variance is not required for cross-zone driveways in a planned development where the parking in each zone is sufficient to accommodate all of the uses in that zone and the driveways are not necessary to access either zone from a public street. The cross-zone driveways merely serve the beneficent purpose of reducing traffic impact on public streets from movement within the planned development.

09-09-08 Dowell Associates v. Harmony Township Land Use Board, et. al.
A-5564/5650-06T3

Where preliminary major subdivision approval relating to a parcel which satisfied the township's fair share obligation as a result of a Mt. Laurel settlement and substantive certification by the Council on Affordable Housing was denied by the municipal land use board, the Law Division properly ordered conditional subdivision approval subject to the issuance of necessary stormwater and sewer disposal treatment permits and approval by the Department of Environmental Protection (DEP). DEP had jurisdiction over the issues in dispute and would protect the public interest in the circumstances.

09-09-08 Howard D. Brunson v. Affinity Federal Credit Union and Jim Wilcox
A-4439-06T1

1. A claim of malicious prosecution may be based on allegations that the person who initiated a criminal prosecution did so recklessly without a reasonable basis.

2. In a claim of malicious prosecution, a grand jury indictment is prima facie evidence of probable cause but may be rebutted with evidence that the facts presented to the grand jury are in dispute.

3. A financial institution and its certified fraud investigator have a duty of care to a non-customer in whose name and upon whose identification the institution opened an account. That duty included the duty to conduct a reasonable investigation before initiating criminal proceedings against the person whose stolen identity was used to open the account. It is for a jury to determine whether the financial institution and

the fraud investigator breached their duty of care and that the breach proximately caused plaintiff's injury.

09-09-08 Finderne Management Company, Inc., Rocque Dameo and Daniel Dameo v. James W. Barrett, Gerald T. Papetti and U.S. Financial Services, and Cigna Financial Advisors, Inc., Lincoln National Life Insurance Company, Ronn Redfearn, Steven G. Shapiro, Tri-Core, Inc., Monumental Life Insurance Company, and Inter-American Insurance Company of Illinois, and Beaven Companies, Inc., CJA Associates, Inc. and Raymond J. Ankner
A-1057-05T5

Plaintiffs sought recovery for losses alleged to result from false and misleading representations by defendants who induced plaintiffs to establish what defendants represented as a "tax qualified," multiple employer welfare benefit plan and trust that provided employers with a tax-deductible vehicle to fund pre-retirement death benefits for owner-employees through the purchase of specific life insurance products, and allowed the individual insured to convert the insurance policy to obtain post-retirement benefits. Following an audit, the IRS disallowed claimed deductions for two of the six tax years of plaintiffs' participation. Plaintiffs paid the additional taxes and interest, terminated participation in EPIC, and lost their investment.

Plaintiffs' appeal challenges various pre-trial and trial errors that warrant a new trial and defendants cross-appealed. Two challenges worthy of mention are aimed at the pre-trial orders that dismissed plaintiffs' consumer fraud claims and limited the scope of damages.

Plaintiffs proposed that providers of personal financial planning services are subject to the Consumer Fraud Act (CFA) N.J.S.A. 56:8-1 to -166. Defendants sought exemption as "learned professionals." Neveroski v. Blair, 141 N.J. Super. 365, 379 (App. Div. 1976).

We concluded that self-proclaimed "professionals" offering financial planning services were not the "learned professionals" as contemplated by Neveroski and its progeny. No governmental board or agency regulates or sets uniform minimum education or training criteria for a member of this occupation. The lack of uniform regulation of an occupational group defeats its

recognition as "learned professionals," as contemplated in Neveroski.

Nevertheless, the transaction at issue was not a consumer transaction, but a complex tax avoidance plan. Therefore, the CFA claims were properly dismissed.

Next, we reviewed plaintiffs' claim of error in the order excluding their claims for damages based on their expectation of benefit from the tax avoidance scheme. We agreed with Judge Derman that the high stakes tax avoidance plan and the speculative rewards contemplated by a taxpayer joining the plan defeated a claim for "benefit-of-the-bargain" damages.

Moreover, recovery of benefit-of-the-bargain damages would require the court to enforce the plan provisions, which were disallowed by the IRS, contrary to longstanding public policy.

Also, when addressing the issue of damages, plaintiffs presumably dissatisfied with the amount of the award, argued the trial judge erred in allowing the jury to assess whether plaintiffs realized a benefit from the tax savings in the four years unaffected by the IRS audit. We rejected plaintiffs' interpretation of Randall v. Loftsgaarden, 478 U.S. 647, 106 S. Ct. 3143, 92 L. Ed. 2d 525 (1986), which suggested "as a matter of law" plaintiffs' "tax deductions should not be taken into account in determining damages in business transactions." Randall did not address this issue but determined the scope of statutory recissory damages under federal securities laws. Despite the lack of published authority on this narrow issue, we concluded New Jersey's strong public policy against permitting double recovery supported the instruction requiring the jury to make the finding.

The final issue of note regards the offer of judgment rule. We concluded Rule 4:58-2(a) did not apply and defendants' counsel fee application was properly denied. The Rule is difficult to apply when an offer of judgment is presented by multiple defendants. Here, some of those defendants presented a subsequent individual offer. Thus, we conclude the initial offer was deemed withdrawn.

09-08-08 Berk Cohen Associates at Rustic Village, LLC
v. Borough of Clayton
A-4988-05T2

In this appeal we address whether N.J.S.A. 40:66-1.3 requires a municipality that provides its residents with curbside pickup of solid waste to provide onsite dumpster pickup at an apartment complex or otherwise reimburse the cost of the service. Following a hearing, the trial court directed reimbursement, concluding the curbside collection on the public street adjacent to the apartment complex was a "lesser service" and "not the functional equivalent of the safe and secure trash removal enjoyed by other residents of the community." We hold that the municipality's offer to the apartment complex of curbside pickup satisfied its statutory obligation to provide the solid waste service "in the same manner as provided to the residents of the municipality who live along public roads and streets" and reverse.