DATE NAME OF CASE (DOCKET NUMBER)

09-13-13 CITIZENS UNITED RECIPROCAL EXCHANGE VS. SABRINA A. PEREZ, ET AL.
A-3100-11T1

An insurance exchange appealed the trial court's holding that when an automobile insurance policy is declared void from its inception due to a fraudulent application, an innocent injured third party is entitled to the statutory mandatory minimum liability coverage of up to $15,000/$30,000. The majority reaffirmed our holding in New Jersey Manufacturers Insurance Co. v. Varjabedian, 391 N.J. Super. 253 (App. Div.), certif. denied, 192 N.J. 295 (2007), that an insurer cannot rely on the alternative basic policy to avoid providing the statutory mandatory minimum coverage. The dissent concluded that where, as here, the policy holder purchased only the basic policy, the $10,000 optional liability coverage is the upper limit of coverage available innocent third parties.

09-04-13 JOEL S. LIPPMAN, M.D. VS. ETHICON, INC. AND JOHNSON & JOHNSON, INC.
A-4318-10T2

In this CEPA action, plaintiff appeals from the order of the Law Division granting defendants' motion for summary judgment. Relying in part on this court's decision in Massarano v. New Jersey Transit, 400 N.J. Super. 474 (App. Div. 2008), the motion judge concluded that plaintiff admitted "it was his job to bring forth issues regarding the safety of drugs and products," thus, he "failed to show that he performed a whistle-blowing activity."

Applying the legal principles established by the Court in Dzwonar v. McDevitt, 177 N.J. 451, 461-62 (2003), we disagree that an employee's job title or employment responsibilities should be considered outcome determinative in deciding whether the employee has engaged in whistle-blowing activities protected under CEPA. Furthermore, to the extent that the approach adopted by the trial court was approvingly expressed or implicitly adopted by the panel in Massarano, supra, 400 N.J. Super. 474, we explicitly decline to endorse it here.

After conducting our own de novo review of the record, viewing the factual record presented in the light most favorable to plaintiff, and applying the standards established by the Court in Dzwonar, we reverse the trial court's decision to grant

defendants' motion for summary judgment. We conclude that there are sufficient material issues of fact in dispute that can only be resolved by a trier of fact.

08-28-13 STATE OF NEW JERSEY VS. EDIXON VASQUEZ
A-4933-10T3

We consider the recurring dilemma confronting trial courts when a defendant expresses dissatisfaction with representation by current counsel at sentencing after the court has denied an adjournment request to obtain new counsel. The court placed on the record strong and sustainable reasons justifying denial of the adjournment request. However, because the court failed to address defense counsel's perceived conflict in his continued representation of defendant, we are constrained to vacate the sentence and remand.

08-28-13 GENERO ALICEA VS. BOARD OF REVIEW, ET AL.
A-4163-10T1

Because appellant was not afforded the due process set forth in Rivera v. Board of Review, 127 N.J. 578 (1992), we reverse the Board of Review's dismissal of his appeal because it was filed too late. Appellant was sent determinations assessing more than $17,000 in purportedly illegally collected unemployment benefits and penalties. These determinations were written in English, with only the appeal procedure translated into Spanish. We determine that Rivera protects Puerto Rican roofers as well as Puerto Rican farmworkers. To comply with the Rivera due process requirement of a notice written in Spanish to be sent to Puerto Rican seasonal workers, a translation of the substantive determination as well as a translation of the appeal timeline must be provided. An exhortation in Spanish to find someone to translate the determination is not sufficient. We reverse and remand for a hearing on the merits of the appeal.

08-27-13 LINDA KUBERT, ET AL. VS. KYLE BEST, ET AL.
A-1128-12T4

The sender of a text message has a duty under the common law of negligence to refrain from sending a text to a person who the sender knows, or has special reason to know, is then driving and is likely to read the text while driving. Plaintiffs in this case, who were grievously injured by a driver who was texting, did not produce sufficient evidence to withstand summary judgment on the remote texter's breach of such a duty. (The concurring opinion disagrees with the imposition of such a

duty on a remote texter, concluding that traditional tort principles are adequate to determine whether liability can be imposed.)

08-26-13 STATE OF NEW JERSEY VS. DANIEL BLAZAS
A-0705-10T3

The "meaningful opportunity to present a complete defense" guaranteed by the Federal and New Jersey Constitutions is denied when the prosecution substantially interferes with a defendant's ability to secure witness testimony. In this case, the government conduct alleged did not result in the denial of witness testimony but, rather, in the denial of access to the witness for interview by the defense. Because such allegations, if true, would be proof of substantial interference with defendant's constitutionally guaranteed right of access to witnesses, we hold that the trial judge erred in failing to conduct an evidentiary hearing. In addition, we conclude that a reversal of defendant's convictions is required because the trial judge granted his motion to proceed pro se without adequately advising him of the consequences of his decision.

08-23-13 GENE FEDOR VS. NISSAN OF NORTH AMERICA, INC./
JINGESH GHANDI VS. NISSAN OF NORTH AMERICA, INC.
A-6034-11T3/ A-0116-12T1(CONSOLIDATED)

We determine whether plaintiff-consumers, who were granted a repurchase of their respective vehicles through defendant-manufacturer's informal dispute settlement mechanism, Auto Line, specifically established pursuant to the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act (MMA), 15 U.S.C.A. §§ 2301 to 2312, retain the right to file a separate action solely to recover attorney's fees under the MMA or the New Jersey Motor Vehicle Warranty Act (Lemon Law), N.J.S.A. 56:12-29 to -49, notwithstanding that Auto Line's procedures expressly excluded attorney fee awards.

We conclude a warrantor's informal dispute resolution mechanism adopted under the MMA is not required to include a fee-shifting component for successful consumers, and may properly exclude an award of attorney's fees. Further, we discern no support for the suggestion a consumer who successfully elects relief through a manufacturer's informal dispute resolution mechanism created pursuant to the MMA has a right to attorney's fees under the Lemon Law.

08-23-13 MORRISTOWN ASSOCIATES VS. GRANT OIL COMPANY, ET AL.
A-0313-11T3

The general six-year statute of limitations for damage to property, N.J.S.A. 2A:14-1, as mitigated by the discovery rule of Lopez v. Swyer, 62 N.J. 267 (1973), applies to a private claim for contribution pursuant to N.J.S.A. 58:10-23.11f(a)(2), which is part of the New Jersey Spill Compensation and Control Act.

08-22-13 TOWNSHIP PHARMACY VS. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
A-3849-10T1

Plaintiff appeals from the decision of the Director of the New Jersey Division of Medical Assistance and Health Services denying its application to participate in the State's Medicaid program as a pharmaceutical service provider. The Director's decision was based on plaintiff's failure to disclose the criminal record of one of its employees. We affirm.

We hold that the Director correctly construed the disclosure requirements to enroll in the State's Medicaid program as a provider of health care, in this case pharmaceutical services. Here, plaintiff failed to perform basic due diligence before answering a question intended to disclose information material to a proper determination of an applicant's eligibility to participate in the Medicaid provider program. Although plaintiff did not intend to deceive or conceal this information, public policy supports the Director's determination that, under these circumstances, failure to provide accurate, truthful, and complete information constitutes good cause to deny the application.

08-19-13 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY v. C.S. and J.C
A-3353-12T3

In this interlocutory appeal of an order transferring temporary custody of a child from foster parents to grandparents prior to trial of a Title 30 action, the court reversed the trial court's refusal to permit the admission of evidence regarding any bond that may have formed between the child and the foster parents, and the impact of its severance, and remanded. Although the court observed that in such a circumstance there is a statutory preference for temporary placement with the grandparents, the child's best interests

warranted a consideration of any bonding evidence opponents of the transfer might wish to present.

08-16-13 BRUCE KAYE, ET AL. VS. ALAN P. ROSEFIELDE, ET AL. VS. DEBORAH KAYE, ET AL.
A-1120-07T1

This civil dispute originated in the Chancery Division where plaintiff filed a complaint against defendant alleging, inter alia, unfaithful servant, civil fraud, and legal malpractice. Although monetary damages were potentially available, plaintiff sought primarily equitable relief. Defendant answered and filed a counterclaim alleging, in part, violations of the protections afforded whistleblowers under the Conscientious Employee Protection Act (CEPA) and common law breach of contract.

We hold that the trial court did not misuse its discretionary authority when it invoked the doctrine of ancillary jurisdiction to adjudicate the entire controversy, including trying, without a jury, the claims raised by defendant in his counterclaim. We also hold that attorneys hired to serve as in-house counsel are bound by the conflict of interests proscription in RPC 1.8(a), including specifically providing the client/employer with written notice of potential conflicts.

On the question of damages, we hold that the Chancery Division has the authority to award punitive damages, provided such damages are warranted under the Punitive Damages Act. In a legal malpractice action, if punitive damages are based on defendant's "actual malice" as defined in N.J.S.A. 2A:15-5.10, counsel fees awarded to the plaintiff constitute "compensatory damages" as defined in N.J.S.A. 2A:15-5.10.
Finally, under the facts of this case, we hold that defendant, who was hired to be the chief operating officer and general counsel of plaintiff's varied businesses, was not an "employee" entitled to the protections afforded under CEPA, pursuant to standards established by the Court in D'Annunzio v. Prudential Insurance Co. of America, 192 N.J. 110 (2007), and Stomel v. City of Camden, 192 N.J. 137 (2007).

08-13-13 MANUEL GUAMAN, ET AL. VS. JENNIFER VELEZ, COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES, ET AL.
A-1870-10T2

The majority opinion held that the State did not violate the Federal or State Constitutions when it eliminated state-

funded Medicare benefits for a group of permanent resident aliens who did not meet the five-year residency requirement set forth in the Federal Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). The dissent concluded that the State's action violated State and Federal equal protection guarantees.

08-13-13 STATE OF NEW JERSEY VS. JOSE L. NEGRETE
A-3301-09T2

During deliberations in this murder trial, a juror disclosed information not in evidence to the other jurors while they were discussing candy found on the chest of the victim, whose body was found in a pool of blood on her basement floor. Contrary to the judge's instruction to him during jury selection, the juror told his fellow jurors that he knew the witness who was the father of the homicide victim's children. He also told the other jurors that his girlfriend, who knew the children's aunt, told him that the aunt said one of the children told her she put the candy on her mother.

In this circumstance, the court erred in relying on the jurors' individual expressions of ability to decide the case only on the evidence adduced at trial and the law. The offending juror had demonstrated that he could or would not do that. And the other jurors' professions of ability to serve as required were immaterial because the errant juror's disclosures had the capacity to influence their deliberations.

08-12-13 BOROUGH OF SEASIDE PARK, ET AL. VS. COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF EDUCATION, ET AL.
A-0743-10T4

Plaintiffs Seaside Park, its BOE and thirteen taxpayers, and defendants Seaside Heights BOE, and Island Heights and its BOE, appeal from the Law Division's dismissal of their claims seeking dissolution of the Central Regional School District, permission to withdraw from the District, or alteration of the District's funding formula. The Legislature has established a comprehensive scheme for this relief, including a voter referendum. The referendum on dissolution failed and plaintiffs did not pursue the statutory processes for withdrawal and modification of the tax allocation method for Central Regional. Plaintiffs have not asserted a cognizable constitutional or other claim that would provide legal or equitable basis for judicial intervention and relief. Even if we held plaintiffs exhausted their administrative remedies and are subject to a

substantially inequitable tax allocation, they would not be entitled to the extraordinary equitable relief afforded in Petition for Authorization to Conduct a Referendum on Withdrawal of North Haledon School District from the Passaic County Manchester Regional High School District, 181 N.J. 161 (2004). Accordingly, we affirm.

08-08-13 ELIZABETH GNALL VS. JAMES GNALL
A-3582-10T1

Reviewing plaintiff's challenge to a limited duration alimony award, we reversed, declaring a fifteen-year marriage does not qualify as short-term, precluding an award of limited duration alimony.

08-05-13 BERNARD AND JEANNE ADLER VS. SAVE, N/K/A SAVE, A FRIEND TO HOMELESS ANIMALS
A-0643-10T3

This appeal requires us to address the enforceability of a conditional inter vivos gift. Guided by the facts presented here, we hold that a charity that solicits and accepts a gift from a donor, knowing that the donor's expressed purpose for making the gift was to fund a particular aspect of the charity's eleemosynary mission, is bound to return the gift when the charity unilaterally decides not to honor the donor's originally expressed purpose.

Absent the donor's consent, the recipient of the gift is not at liberty to ignore or materially modify the expressed purpose underlying the donor's decision to give, even if the conditions that existed at the time of the gift may have materially changed, making the fulfillment of the donor's condition either impossible or highly impractical. When, as here, the donor is alive and able to prove the conditional nature of the gift through his or her testimony and other corroborative evidence, a reviewing court's duty is to enforce the donor's original intent, by directing the charity to either fulfill the condition or return the gift.

07-30-13 IN THE MATTER OF REGISTRANT T.H.: APPLICATION FOR JUDICIAL REVIEW OF NOTIFICATION AND TIER CLASSIFICATION
A-3642-12T1

This Megan's Law appeal arises from a trial court order denying registrant's motion to be classified as a Tier One registrant, representing a low risk to reoffend, as opposed to a

Tier Two classification, representing a moderate risk to reoffend. The focus of the application before the trial court was on criterion seven of the Registrant Risk Assessment Scale, length of time since last offense.

After review of registrant's arguments, those of the prosecutor, and the written decision of the trial court, we are persuaded that criterion seven was reviewable because there was evidence of change in circumstances. We disagree with the underlying premise of In re N.N., 407 N.J. Super. 30 (Law Div. 2009), that the time from the last offense does not constitute a significant change of circumstances. Criterion seven has a built-in change of circumstances to reflect the likelihood of re-offense.

We reverse and remand to the trial court for further proceedings.

07-30-13 CUMBERLAND COUNTY BOARD OF CHOSEN FREEHOLDERS VS. VITETTA GROUP, P.C., ET AL.
A-1377-12T3

In this matter, we review the interplay between the statute of repose requiring suit to be filed within ten years for damages resulting from any deficiency in the supervision or construction of an improvement to real property, N.J.S.A. 2A:14-1.1 and the ten-year statute of limitations governing civil actions commenced by the State or its political subdivisions, N.J.S.A. 2A:14-1.2.

Plaintiff argued its suit against the supervisor of a county building project fell under the exceptions set forth in the statute of repose, as the complaint alleged damages resulted from willful misconduct, gross negligence, or fraudulent concealment in connection with the property improvement, N.J.S.A. 2A:14-1.1(b)(2). Plaintiff reasoned since the statute of repose was implicated; the statute of limitations did not apply.

We rejected this argument holding if an action is barred by the statute of limitations; it cannot be saved by the statute of repose.

07-25-13 STATE OF NEW JERSEY VS. RICKY WRIGHT
A-4813-10T1

This appeal concerns the "third-party intervention" (or "private search") doctrine, which courts have applied in

authorizing the police to inspect or search a defendant's property in certain instances without a warrant, so long as the police do not exceed the scope of the private actor's intrusion that led to the police's involvement.

The trial court relied upon this doctrine in denying defendant's motion to suppress drugs and other incriminating evidence seized by the police from his girlfriend's apartment. The landlord had entered the apartment at the girlfriend's request to repair a leak. While he was there, the landlord observed drugs on a night stand and, in fear, he called the police. The police responded to the scene, were let into the apartment by the landlord, and confirmed his observation of the drugs and other contraband in open view. The girlfriend then arrived and the police secured her consent to a search of the apartment, through which they found a gun and other evidence of criminal conduct.

Given the heightened constitutional protection that the Fourth Amendment of the United States Constitution and Article 1, paragraph 7 of the New Jersey Constitution accord to the privacy of residential premises, we join with several other courts in limiting the extent to which the third-party intervention doctrine may authorize warrantless police searches of private residences. In particular, we hold that, at the very least, the doctrine does not apply in situations where the third party who provides the police with access to a dwelling has entered it unlawfully or otherwise in violation of the resident's property rights or her reasonable privacy expectations. Apart from that limitation, the doctrine also should not apply if the totality of the intrusion by the private party and law enforcement officials is objectively unreasonable. Because these residency-related limitations were not violated here, we affirm the denial of the suppression motion and defendant's ensuing conviction.

07-18-13 AMERICAN INTERNATIONAL INSURANCE COMPANY OF DELAWARE VS. 4M INTERPRISE, INC., ET AL.
A-3490-11T2

The Federal Liability Risk Retention Act of 1986 (LRRA), 15 U.S.C.S. §§ 3901 to 3906, exempts risk retention groups from many, but not all, state laws regulating insurers. The primary issues on this appeal are whether New Jersey violates LRRA by requiring risk retention groups to provide pedestrian personal injury protection (pedestrian-PIP) benefits in conformity with N.J.S.A. 17:28-1.3 or by precluding them from participating in

the New Jersey Property-Liability Insurance Guaranty Association (PLIGA), N.J.S.A. 17:47A-9, which pays pedestrian-PIP benefits for commercial liability insurers who are members. Because LRRA does not exempt risk retention groups from the coverage requirements of a state motor vehicle no-fault insurance law, 15 U.S.C.S. § 3905(a), and precludes a state from requiring or permitting a risk retention group to participate in PLIGA, an insurance solvency guaranty association, 15 U.S.C.S. § 3902(a)(2), we reject these claims.

07-17-13 STATE OF NEW JERSEY VS. SILAS QUIXAL
A-4692-11T2

We reverse, determining that defendant had a New Jersey constitutional right to counsel on his claim of ineffective assistance of trial counsel, raised for the first time in a post-conviction relief (PCR) petition. Defendant wrote the judge from prison stating that he wanted to represent himself for his PCR hearing. He also waived his appearance. On his second PCR petition he claimed that he did not previously knowingly and intelligently waive counsel. The State did not argue that the written request to represent himself constituted a knowing and intelligent waiver, but argued that defendant was not constitutionally entitled to counsel on collateral review. We hold that defendant has a constitutional right to counsel on an initial PCR petition where he raises ineffective assistance of trial counsel for the first time.

07-15-13 GEORGE OYOLA AND AUDREY OYOLA VS. XING LAN LIU, ET AL.
A-1107-12T3

In this case, we decide that the 2004 legislative amendments to the Property-Liability Insurance Guaranty Association Act, N.J.S.A. 17:30A-1 to -20, do not change the Supreme Court's holding in Thomsen v. Mercer-Charles, 187 N.J. 197 (2006). The Property-Liability Insurance Guaranty Association (Association) contended that because an insured had received workers' compensation and other benefits that exceeded its maximum liability for a claim against an insolvent insurer, its obligation to pay was extinguished. We affirm the judgment of the trial court ordering the Association to pay plaintiffs $85,000 to satisfy the claim, and hold that, consistent with Thomsen, the other payments should be offset only against the insured's total damages in calculating the Association's obligation.

07-10-13 HARVEY S. ROSEFF, ET AL. VS. BYRAM TOWNSHIP, ET AL.

A-5479-11T3

The question presented in this case is whether an ordinance authorized by N.J.S.A. 40A:4-45.14 is subject to a referendum authorized by N.J.S.A. 40:69A-185, a provision of the Optional Municipal Charter Law commonly known as the Faulkner Act, N.J.S.A. 40:69A-1 to -210. Because the Legislature "has made clear its intention to carve out of the democratic processes provided in the Faulkner Act," In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 362 (2010), ordinances adopted pursuant to N.J.S.A. 40A:4-45.14 by providing that they "shall take effect immediately upon adoption," we conclude that a protest referendum is barred. N.J.S.A. 40A:4-45.14(c).

07-09-13 BELMONT CONDOMINIUM ASSOCIATION, INC. VS. DEAN GEIBEL, ET AL.
A-2584-10T3

In this action by a condominium association for negligent construction and violations of the Consumer Fraud Act (CFA), we reject the builder/developer's claim that damages relating to defects in common elements and to misrepresentations in initial offering materials should be allocated so that the association can only collect on behalf of a certain percentage of the unit owners and not those who purchase after the defects become known. In other words, the association has standing to aggregate ascertainable losses of members who did not purchase their units from the developer and, accordingly, may recover all the damages necessary to repair or correct the defects to the common elements and to which it may be statutorily entitled under the CFA. We decline to reduce or apportion the recoverable damages (including the CFA award) for subsequent unit purchasers.

We also hold, based on our reading of the condominium's master deed in conjunction with the New Jersey Condominium Act, that the windows for which the association claims damages are not part of the "common elements" of the condominium but rather part of the individual units, and therefore the cost of their replacement is not recoverable in this action.

Finally, we hold that the trial court improperly trebled the prejudgment interest on the "punitive" portion of the CFA damages award. In awarding prejudgment interest on the entire CFA damages award, the trial court incorrectly focused on the

purpose and intent of the CFA, which is punitive, rather than the purpose and intent of Rule 4:42-11, which is compensatory.

07-05-13 MAYOR DAWN ZIMMER, ET AL. VS. COUNCILWOMAN THERESA CASTELLANO
A-2559-12T4

In this appeal, the court considered whether the remaining members of the Hoboken Council validly replaced a resigned member. As the court held in the companion case, Booker v. Rice, __ N.J. Super. __ (App. Div. 2013), in this context abstentions may not be counted as "no" votes. The court, however, reached that conclusion based on its interpretation of Robert's Rules of Order because, unlike the Newark Council, which has a specific rule of procedure that governs the meaning of abstentions, Hoboken's rules of procedure require resort to Robert's Rules. The court also reversed because the trial judge mistakenly directed the remaining councilmembers to vote on the question more than thirty days after the vacancy occurred, when the remaining councilmembers no longer possessed the statutory authority to fill the vacancy.

07-05-13 CORY BOOKER, ET AL. VS. RONALD C. RICE, ET AL.
A-2413-12T4

In this appeal, the court considered whether a vacancy on the Newark Municipal Council was validly filled in a manner consistent with the Municipal Vacancy Law, N.J.S.A. 40A:16-1 to -23, when, of the eight remaining councilmembers, four voted "yes," two voted "no," and two abstained. The affirmative voters took the position that this created a four-four deadlock, which, in their view, authorized the mayor to vote, pursuant to N.J.S.A. 40A:16-8; the mayor voted in favor of the nominee. The court held that the Council's rules of procedure required that the abstentions not be counted as either "yes" or "no" votes, that the voting did not result in a tie, and that the mayor was not authorized to vote. As a result, the Council failed to fill the vacancy within the thirty days permitted by N.J.S.A. 40A:16-12, leaving the matter to the ultimate disposition of Newark's voters.

07-05-13 KIMBA MEDICAL SUPPLY, A/S/O CARLOS GALEANO VS. ALLSTATE INSURANCE COMPANY OF NJ, ET AL./ ROY J. PICKELL VS. TRAVELERS AUTO INSURANCE COMPANY OF NEW JERSEY A/K/A TRAVELERS OF NEW JERSEY INSURANCE COMPANY
A-1443-11T2/ A-1902-11T2(CONSOLIDATED)

These appeals arise out of two separate cases involving contested automobile personal injury protection ("PIP") benefits. They concern whether the trial court, under the New Jersey Alternative Procedure for Dispute Resolution Act ("APDRA"), N.J.S.A. 2A:23A-1 to -19, and associated PIP regulations cross-referencing that statute, has the authority to remand unresolved questions to a dispute resolution professional ("DRP") after the court has vacated or modified a DRP's decision. Forthright, the organization that contractually provides the Department of Banking and Insurance with the DRPs who hear PIP matters, insists that the trial court has no such power to remand PIP cases.

Exercising our supervisory appellate function, we reject Forthright's interpretation of the law. We conclude that Sections 13 and 14 of the APDRA, N.J.S.A. 2A:23A-13 and -14, must be sensibly construed to authorize such remands to a DRP, in certain limited situations where a PIP arbitration award has been judicially vacated or modified. We therefore affirm the trial judges' respective decisions to remand these two PIP cases to Forthright in the circumstances presented, so that the open issues can be decided in that arbitral forum on an appropriate record.

In addition, we affirm the trial court's ruling that the "Basic" $15,000 PIP coverage limits apply to the insured in Kimba Medical, based upon her choice when she originally procured the auto policy. We reject the provider's argument that the higher $250,000 "Standard" PIP limits apply to the insured because she did not sign new coverage selection forms each time her policy was periodically renewed. We do not reach, however, the question of whether that Basic policy limit should apply to the insured's injured passenger, an open issue that was not addressed by either the DRP or the trial court.

07-03-13 SOVEREIGN BANK VS. JOSEPH M. GILLIS, ET AL.
A-5132-11T2

This appeal concerns whether a refinancing lender that discharges its own previous mortgage and issues another mortgage loan for a higher amount, and which simultaneously pays off the

balance owed on a junior lienor's line of credit without having it closed, can rely upon equitable principles to maintain its priority over that junior lienor. This question of priority arises here in a context in which the borrowers, after obtaining the refinancing, drew additional funds on the line of credit and then defaulted on both the refinanced mortgage loan and the line of credit.

Applying principles of "replacement and modification" and "material prejudice" recognized in the Restatement (Third) of Property – Mortgages (1997), we reverse the trial court's decision allowing the junior lienor that had extended the line of credit to vault over the priority of the refinancing mortgage lender. We consequently direct the trial court, on remand, to determine the proper extent of the refinancing lender's priority, in an amount that avoids material prejudice to the junior lienor.

07-02-13 ST. PETER'S UNIVERSITY HOSPITAL VS. NEW JERSEY BUILDING LABORERS STATEWIDE WELFARE FUND, ET AL. VS. UNION LABOR LIFE INSURANCE COMPANY ET AL.
A-1463-11T3/A-1464-11T3/A-1465-11T3 (CONSOLIDATED)

In these consolidated appeals, we decide whether the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. § 1001 to -1461, preempts a medical provider's claims against the ERISA benefit plan for payment of the provider's customary fees for the services it rendered to patients rather than the discounted fees the plan would have been legally entitled to pay had it not breached its contractual obligation for timely payment. We are satisfied the provider's claims are expressly preempted by Section 514(a) of ERISA, 29 U.S.C.A. § 1144(a), and thus affirm summary judgment dismissal of the complaints.

06-28-13 STATE OF NEW JERSEY VS. THOMAS J. WOLFE
A-0416-12T3

We affirm a drunk driving conviction where defendant unsuccessfully sought to block admission of his Alcohol Influence Report (AIR), a report generated by an Alcotest breathalyzer device, because the State did not provide complete discovery after it was requested. During trial, the municipal court required defense counsel to specify the grounds for his objection to the admissibility of the AIR, and the State was then allowed to cure the deficiencies in the foundational evidence pointed out by defense counsel. We interpret Rule 7:7-7(h) to allow this mid-trial discovery where defendant alleges

no prejudice and the State did not intend to mislead the defense.

06-25-13 STATE OF NEW JERSEY, BY THE COMMISSIONER OF TRANSPORTATION VS. SHALOM MONEY STREET, LLC, ET AL.
A-4205-11T2

In this condemnation case, both the State and the property owner filed appeals from the commissioners' award fixing just compensation for a temporary taking. The issue before us is whether the trial court may reinstate the commissioners' award over the parties' objection after dismissing their appeals sua sponte. We conclude the trial court may not do so.

06-25-13 BRIAN HEYERT, ET AL. VS. MENASSIE TADDESE, ET AL. YAYINE MELAKU, ET AL. VS. HOBOKEN RENT LEVELING & STABILIZATION BOARD, ET AL.
A-4801-10T2

We hold in this instance that a landlord's raising a tenant's rent in excess of the municipality's rent control ordinance is a violation of the Consumer Fraud Act (CFA) by the occurrence of an affirmative act of misrepresentation. As such, plaintiff need not show actual deceit or fraud nor prove an intent to commit an unconscionable commercial practice and, therefore, a landlord's mistaken reliance on counsel's advice is not cognizable under the CFA's strict liability standard.

We also reject a series of challenges attacking Hoboken's rent control ordinance as unconstitutionally vague as it applies to condominiums, violative of the landlords' civil rights under 42 U.S.C.A. Section 1983, and amounting to an impairment of contract and a regulatory taking.

Lastly, we conclude that the landlords' appeal of the Rent Leveling Board's 2005 legal base rent determination was untimely, and further uphold the lower court's remand to the Board for reconsideration of the grant of the landlords' hardship application to consider the effect of the second mortgage on the landlords' expected return on investment.

06-21-13 IN THE MATTER OF J.S.
A-4132-11T1

We affirm the final determination of the New Jersey Department of Human Services (DDD), declining to place J.S., a developmentally disabled adult who was in a private residential

placement in Massachusetts and assigned to the non-urgent waiting list, on the priority waiting list retroactive to April 15, 1996, the date of the DDD's new regulations which rendered J.S. eligible for priority placement. Based on the language of the regulations and our deference to the agency's interpretation of its regulations, we are not convinced the DDD was legally obligated to affirmatively notify appellants, J.S.' parents, of the change in regulations or that it acted arbitrarily or capriciously warranting judicial intervention.

06-21-13 ROZELLE E. VILLANUEVA AND JOSE L. VILLANUEVA VS. MATTHEW J. ZIMMER AND CARMEN DEROSA
A-1587-11T3

We hold that in a personal injury action plaintiff cannot introduce into evidence or offer testimony respecting a Social Security Administration determination that she is disabled and unable to work to support her injury and damage claims. Such a determination is clearly hearsay and does not fall with the exceptions of N.J.R.E. 803(c)(8) or N.J.R.E. 803(c)(6). We distinguish Golian v. Golian, 344 N.J. Super. 337 (App. Div. 2006), and hold that that decision does not warrant a contrary result.

06-21-13 STATE OF NEW JERSEY VS. JAMES RIPPY
A-5129-10T3

The primary issues presented on this appeal and cross-appeal involve the award of jail credits on four indictments that were pending for several years. We hold: that the State may appeal an award of jail credits on the ground that they are not authorized by Rule 3:21-8; that a defendant subject to multiple charges who has been sentenced on only one indictment is entitled to jail credits for a period of confinement that follows reversal of the convictions underlying the first sentence and precedes the first sentencing following the reversal; and that jail credits for such confinement are due on all indictments pending at the time.

06-18-13 CHARLES F. WASKEVICH, JR. VS. HEROLD LAW, P.A., ET AL.
A-2927-11T3

In this case involving an employment dispute between attorneys, we enforce federal law requiring bifurcation when some claims between parties must be arbitrated and one statutory LAD claim between the same parties must be tried.

06-13-13 JB POOL MANAGEMENT, LLC VS. FOUR SEASONS AT SMITHVILLE HOMEOWNERS ASSOCIATION, INC.
A-5169-11T3

This case arises out of a one-year contract in which appellant, a pool management company, agreed to supply a condominium association with lifeguards and maintenance services for the association's indoor pool. During the term of that contract, a mold infestation was discovered in the pool facilities, prompting government officials to order the pool closed for over seven months while the mold was remediated. The pool company sued the association for breach of contract, seeking to recover four months of service fees that the association had not paid while the pool was closed.

Over the pool company's objection, the trial court charged the jury that the association's obligation to pay the monthly fees during the period when the pool was closed could be excused under the doctrine of frustration of purpose, see Restatement (Second) of Contracts § 265 (1981), a theory that the association had not raised in its affirmative defenses. Having received that instruction, the jury found the association was not liable for the four months of disputed fees.

In this case of first impression, we hold that the doctrine of frustration of purpose generally should be pleaded as an affirmative defense by litigants seeking to invoke it. Because the frustration doctrine was not raised here by the association before trial, and instead was identified, sua sponte, by the trial judge during the charge conference as a more suitable alternative to a proposed charge of impossibility of performance, we reverse the final judgment dismissing the breach of contract claim. To rectify apparent prejudice to the pool company arising from the late notice, we remand for additional discovery focused on that defense, followed by a new trial.

Given the inapplicability of the frustration doctrine where the parties have allocated the risk of supervening event, we further direct the trial court to reexamine its finding that the "underlying purpose of [the] contract was conditioned upon the pool being open for use." The court must consider explicitly if its finding about the parties' intentions can be reconciled with the contract's provision that "[t]here will be no reduction in charges of the contract amount for any closing."

06-13-13 JAMES FLOOD VS. BHANU ALURI-VALLABHANENI, M.D., ET AL.
A-4248-11T2

In this lost-chance, medical malpractice action, plaintiff, administrator of his daughter's estate, settled with several defendants, and the claims against others were dismissed. Defendant, a radiologist, continued to assert cross-claims against the settling defendants.

Over plaintiff's objection, the judge adapted form interrogatories supplied by defendant and rejected plaintiff's request to use the form interrogatories appended to Model Jury Charge (Civil) 5.50E, "Pre-existing Condition — Increased Risk/Loss of Chance — Proximate Cause" (Approved 12/02, Charge Originally Published 2/03, Rev'd 2/04). The interrogatories submitted to the jury essentially followed the form interrogatories previously used and appended to Model Jury Charge (Civil) 5.36E, "Pre-existing Condition — Increased Risk/Loss Chance — Proximate Cause" (4/96).

The jury concluded defendant deviated from the standard of care, and that the deviation increased the risk of harm from decedent's pre-existing medical condition; however, the jury unanimously found the increased risk was not a substantial factor in causing her death. Plaintiff's appeal is limited to claims that it was reversible error not to use the current interrogatories.

We affirmed the no cause verdict, finding the interrogatories did not mislead the jury or misstate the law. We also concluded that the current form interrogatories are inconsistent with established precedent and have the potential, in a Scafidi-type medical malpractice suit, of relieving a plaintiff of proving an essential element of the lessened proximate cause standard, i.e., that a defendant's deviation not only increased the risk of harm, but was also a substantial factor in bringing about the ultimate harm.

We requested the Model Jury Charge Committee to re-examine the issue, and, in the interim, we disapproved of the continued use of the model interrogatories as currently written.

06-13-13 <u>JOHN PAFF VS. NEW JERSEY STATE FIREMEN'S ASSOCIATION</u>
A-4111-11T3

We determine in this appeal that the New Jersey State Firemen's Association (Association), created pursuant to state law, N.J.S.A. 43:17-41, and the direct recipient of taxes on certain fire insurance premiums, N.J.S.A. 54:18-1 and -2, and N.J.S.A. 17:22-6.59, is an "independent State . . .

instrumentality" and therefore a "public agency," N.J.S.A. 47:1A-1.1, under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. Consequently, the Association is subject to OPRA, and the trial court erred in concluding otherwise. We reverse and remand to the trial court to consider plaintiff's claim for relief under OPRA.

06-13-13 STATE VS. NEIL COHEN
A-3682-08T4

This appeal requires us to balance the competing interests of a criminal defendant who seeks discovery of materials that go to the essence of the underlying charged offenses, with the public interest in prohibiting the dissemination of the same materials — contraband child pornography. The trial judge fashioned a protective order that, by its terms, provided for defendant's discovery of the relevant materials but established strict guidelines that limited access and use of the materials. We conclude that while the State of New Jersey's concerns focus on the possibility of misuse of the materials, the judge's order recognizes these concerns and establishes procedures to minimize such eventuality. Accordingly, we conclude that defendant is entitled to discovery under the terms of the protective order and affirm. [*Approved for Publication date]

06-10-13 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. H.R. AND N.B. IN THE MATTER OF THE GUARDIANSHIP OF E.B.
A-2002-11T2/A-2003-11T2 (CONSOLIDATED)

In this termination of parental rights appeal, where the biological parents are drug addicts and the prospective adoptive mother is the six-year-old child's maternal aunt, the Family Part must correct inaccurate information DYFS gave to the aunt that kinship legal guardianship is not available for a child less than twelve years old. The Family Part must then determine whether the caretaker parents still wish to adopt rather than agree to kinship legal guardianship, and it must re-evaluate whether an alternative to termination of parental rights is available.

06-05-13 E.B. VS. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES & E.S. VS. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
A-6110-10T3/A-6111-10T3/A-0637-11T3 (CONSOLIDATED)

These consolidated appeals challenge the issuance of Medicaid Communication No. 11-03, dated February 22, 2011, by the Division of Medical Assistance and Health Services of the State of New Jersey Department of Human Services that requires a Medicaid applicant or recipient to complete the Division's standardized Medicaid Designation of Authorized Representative (MDAR) form if the applicant wishes to appoint an authorized representative to act on the applicant's behalf. Plaintiffs (Medicaid recipients and the nursing home facilities where they reside) argue that the MDAR form requirement and the denial of their requests for fair hearings, due to their refusal to complete and submit the form, violates federal and State laws, and the New Jersey Administrative Procedure Act (APA).

We concluded that given the Division's broad authority to administer the State Medicaid program and plans, the use of a standardized authorization form did not violate any federal or state laws or regulations. Regarding the claim that the use of the form violated the APA, we recognized that during the pendency of the appeal the Division began the rulemaking process in accordance with the APA to promulgate the adoption of the MDAR form.

On remand, we direct the Division to complete the rulemaking process. While doing so, the Division's present system, namely requiring the completion of the MDAR form pursuant to Medicaid Communication No. 11-03, shall remain in full force and effect until the promulgation of the proposed rule or until December 31, 2013, whichever occurs first. If new rules are not promulgated by December 31, 2013, then Medicaid Communication No. 11-03 shall be deemed null and void as of that date.

The Division is also ordered to proceed expeditiously with fair hearings to address the unresolved Medicaid penalty issues as to E.B. and E.S., provided that plaintiffs or someone on their behalf provisionally completes the Division's currently existing MDAR form, subject to the outcome of the rulemaking process and potential appellate review of the dispositions in the fair hearings.

06-04-13 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. Y.N. AND P.C. IN THE MATTER OF P.A.C.
A-5880-11T2

We affirm the finding of abuse or neglect where a newborn suffered severe withdrawal as a result of his mother's ingestion of methadone during pregnancy. The withdrawal, which lasted

thirty-nine days and required numerous doses of morphine and treatment in the neonatal intensive care unit, was compelling evidence of the "actual impairment" required by the Court in New Jersey Department of Children & Families v. A.L., 213 N.J. 1, 22 (2013), to satisfy N.J.S.A. 9:6-8.21(c).

06-04-13 OZLEM KOSEOGLU Et Al. VS. ANN WRY, M.D.
A-1008-11T4

Upon request, we are publishing a previously released opinion. In this medical negligence matter, we affirmed the jury verdict, which apportioned damages, notwithstanding defendant's principal trial strategy was to argue she was not negligent, and if she were, the ultimate outcome would have been unchanged. We determined the evidence before the jury allowed it to determine some portion of plaintiff's ultimate injury would have occurred even if defendant's conduct was proper. Relying on this evidence, we rejected plaintiff's argument seeking vacation of the verdict, and concluded defendant was not required to produce proofs "amounting to scientific or mathematical precision as to how much each [causal factor] contributed in percentage points to [the] ultimate death." Poliseno v. Gen. Motors Corp., 328 N.J. Super. 41, 60 (App. Div.), certif. denied, 165 N.J. 138 (2000).

06-03-13 JORGE GRIJALBA VS. MARIA FLORO AND JOSE MARTINS
A-4563-11T4

In this slip and fall case, plaintiff alleged that defendant experienced financial difficulties, converted her owner-occupied two-family-zoned house into a basement-owner-occupied three-family house, and changed the nature of the ownership of the premises to be more like a business. The question is whether the property is considered "commercial" or "residential" for purposes of establishing sidewalk liability pursuant to Stewart v. 104 Wallace Street, Inc., 87 N.J. 146, 157 (1981). The judge granted summary judgment without analyzing the residential-commercial distinction.

We acknowledged that if the property is deemed to be a typical owner-occupied two-family house, then our decisions since Stewart have generally held that the property is considered to be residential, as that term is commonly applied, and did not disturb that precedent. We rejected defendant's assertion that all two- and three-family owner-occupied homes are considered residential. We remanded and directed the judge to analyze the residential-commercial distinction because there were unresolved and disputed factual issues regarding the nature of the ownership and the use of the property.

05-30-13 FRANK CAMINITI VS. BOARD OF TRUSTEES, POLICE AND FIREMEN'S RETIREMENT SYSTEM
A-1994-10T2

For the second time, appellant seeks reversal of the decision of the Board of Trustees of the Police and Firemen's Retirement System (Board) denying his application for accidental disability benefits. We affirmed the Board's decision the first time in Caminiti v. Board of Trustees, Police & Firemen's Retirement System, 394 N.J. Super. 478 (App. Div. 2007), which was released before the Supreme Court decided Patterson v. Board of Trustees, State Police Retirement System, 194 N.J. 29 (2008), and Richardson v. Board of Trustees, Police & Firemen's Retirement System, 192 N.J. 189 (2007). As a result, the Court remanded appellant's case and directed the Board to reconsider his application in light of the standards established by Patterson and Richardson.

On remand, the Board again denied appellant's application. This time, we reverse. The Board's decision was arbitrary and capricious, mischaracterized appellant's injuries, and misapplied the standards established by the Court in Patterson and Richardson.

05-29-13 DANIEL TUMPSON, ET AL. VS. JAMES FARINA, ET AL.
A-5454-10T4

In this appeal, we consider whether a municipal clerk, upon receipt of a referendum petition which contained less signatures than the requisite fifteen percent required by the Faulkner Act, is permitted to not file it, but to reject it, and not undertake any further review. We hold that, if timely filed, a municipal clerk must file a referendum petition, review the petition, set forth the particulars in which the petition is defective, certify the defective particulars to the council, and notify two members of the petition committee of his findings.

Additionally, under the facts in this case, plaintiffs are not entitled to relief under the New Jersey Civil Rights Act as a result of the actions of the municipal clerk.

05-28-13 ANTHONY VELLUCCI, ETC. VS. ALLSTATE INSURANCE COMPANY ET AL.
A-2905-10T1

This is a wrongful death and survivorship action. Decedent's place of employment was located in a commercial office building owned and managed by defendant Mack-Cali, a large and sophisticated real estate investment trust. Plaintiff claims decedent contracted Legionnaires' disease in December 2004 when he was exposed to a water-borne pathogen in the building's water supply system.

We affirm the trial court's grant of Mack-Cali's motion for summary judgment. The prevailing industry and regulatory standards do not impose a duty on commercial landlords to take proactive measures to ensure that a commercial office building's water supply is not contaminated by the Legionella bacteria. Absent evidence that Mack-Cali actually knew or should have known, through the exercise of reasonable maintenance measures, that the building's water supply had been contaminated with the Legionella bacteria prior to decedent's case, Mack-Cali is not liable for decedent's demise.

05-22-13 IN THE MATTER OF THE ESTATE OF JACK D. THOMAS
A-5171-11T2

In this appeal, the court reversed an order that summarily dismissed a complaint, which sought a declaratory judgment that plaintiff is decedent's child and sole heir and which also sought vacation of the grant of letters of administration to decedent's brother. The Chancery judge determined that the complaint was untimely because it was filed four months beyond the six-month time-bar contained in Rule 4:85-1. The court held that the part of the complaint that sought a determination regarding parentage and intestate succession was governed by the doctrine of laches, which would not be offended by the continuation of the action. And, although the court held that Rule 4:85-1 applied to that part of the complaint seeking relief from the issuance of letters of administration, its six-month time-bar was expandable by application of Rule 4:50-1(f), which permitted the continued maintenance of the action.

The court also reversed the order denying plaintiff's motion to disinter decedent's remains. Recognizing that the law disfavors disturbance of a decedent's final resting place for the purpose of resolving civil disputes, the court held that whether disinterment should be ordered should await a fuller exposition of the merits and exploration of alternate means for resolving the parentage dispute.

05-20-13 STATE OF NEW JERSEY VS. DUSTIN S. REININGER

A-1833-11T1

In this appeal, the central issue is whether a police officer's limited seizure of two nylon firearm cases from the backseat of defendant's vehicle was valid under the Fourth Amendment. After reviewing the record in light of the arguments on appeal, we hold the seizure was valid under the plain view doctrine: the officer was lawfully in the viewing area; he discovered the firearms inadvertently; and he had probable cause to believe that defendant possessed firearms in violation of the law. Additionally, we note that because the seizure was proper under the plain view doctrine, it was not necessary for the State to establish exigent circumstances under the automobile exception.

05-15-13 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES v. L.M. and P.T., IN THE MATTER OF THE GUARDIANSHIP OF M.M., N.M., and S.M.
A-1933-11T3/A-1934-11T3(CONSOLIDATED)

We affirm the judgment of guardianship as to two children, but reverse as to the third, due to the Division's failure to establish the third and fourth prongs of the best interest test by clear and convincing evidence.

When litigation began, defendant/father was incarcerated and several court proceedings were held in his absence without any effort to produce him. We reaffirm a parent's right to be present at all critical proceedings.

The father was not provided with meaningful services by the Division, as the focus was almost exclusively on reunification of the child with defendant/mother. While the Division may focus its reunification efforts on the custodial parent, these efforts must not ignore the non-custodial parent.

Finally, this eleven-year old, special-needs child has experienced several failed foster placements since she was first removed at age five. Her significant behavioral problems and the Division's inability to find a permanent placement, six years after her initial removal, do not support the finding that termination of parental rights will not do more harm than good.

05-14-13 STATE OF NEW JERSEY v. YOLANDA TERRY and TERON SAVOY
A-0218-12T4

The State intercepted cellphone calls and texts in which a husband and wife allegedly conspired to commit crimes. The trial judge denied defendants' motion to exclude their communications, and the court granted leave to appeal. The court held that N.J.S.A. 2A:156A-11, which requires a special need before intercepting communications in "a place used primarily for habitation for a husband and wife," does not require a special need to wiretap a cellphone used by a married person. The court further held that interception does not vitiate the marital communications privilege, because N.J.S.A. 2A:156A-11 provides that "[n]o otherwise privileged . . . communication intercepted [under the Wiretap Act] shall lose its privileged character."

The trial judge adopted a crime-fraud exception to the marital communications privilege, N.J.R.E. 509, citing federal decisions, other states' cases, and the crime-fraud exception to the attorney-client privilege, N.J.R.E. 504(2)(a). Although there may well be compelling reasons to add such an exception, the court held that, under State v. Byrd, 198 N.J. 319 (2009), and State v. Mauti, 208 N.J. 519 (2012), such an exception to a privilege enacted by the Legislature can be added only by rule or statute pursuant to the Evidence Act, N.J.S.A. 2A:84A-1 to -49.

05-10-13 STATE OF NEW JERSEY VS. JOHN J. PERRY
A-0465-11T4

No violation of the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-1 to -15, occurs when a sending state refuses to release a defendant, who is a parole violator in the sending state, to New Jersey before the disposition of his parole violation. The statutory scheme does not require dismissal; no public policy would be advanced by punishing New Jersey for lawful action taken by the sending state that may incidentally delay the disposition of charges in our jurisdiction.

05-07-13 RONALD C. REESE V. REBECCA WEIS, F/K/A REBECCA REESE
A-5557-10T2

At issue in this matter is whether defendant received a substantial economic benefit as a result of her cohabitation, such that alimony should be terminated. We conclude the inquiry regarding whether an economic benefit arises in the context of cohabitation must consider not only the actual financial assistance resulting from the new relationship, but also may

weigh other enhancements to the dependent spouse's standard of living that directly result from cohabitation. We also find a trial judge's exercise of discretion when determining whether to modify or terminate alimony may properly evaluate the duration of the new relationship and assess its similarities to the fidelity associated with marriage.

05-06-13 JENNIFER WINSTOCK AND RICHARD WINSTOCK VS.
AMATO GALASSO, ESQ.
A-2715-10T2

In this legal malpractice case, plaintiff sued defendant claiming that his incorrect legal advice resulted in him having to plead guilty to third degree promotion of gambling, N.J.S.A. 2C:37-2a(2). Plaintiff's wife was indicted for the same offense based on her role as the owner and registered agent of the LLC that operated and promoted the gambling enterprise. Despite the State consenting to her admission into PTI, co-plaintiff sued defendant based on the same theory of liability. Relying on Alampi v Russo, 345 N.J. Super. 360, 367 (App. Div. 2001), the trial judge dismissed the malpractice action as a matter of law, holding that plaintiffs were precluded from suing defendant by the doctrine of judicial estoppel, and dismissed plaintiffs' claim for emotional distress damages.

We reverse the dismissal of the malpractice action, because a rational jury could find that defendant's incorrect legal advice was a substantial factor in causing plaintiffs to engage in criminal conduct. The trial court misapplied Alampi by treating plaintiff's guilty plea as an impenetrable wall, shielding defendant from civil liability based on professional malpractice. In cases involving tort or contract claims, the doctrine of issue preclusion does not automatically prevent a plaintiff in a civil trial from contesting the admitted facts that formed the basis of his or her guilty plea. State, Dep't of Law and Pub. Safety v. Gonzalez, 142 N.J. 618, 629 (1995).

Co-plaintiff's admission into PTI renders the concerns of issue preclusion irrelevant. Admission into PTI is not predicated upon an accused acknowledging his or her culpability to a particular criminal charge. Guideline IV, R. 3:28. Furthermore, once admitted into supervisory treatment, any "statement or disclosure" made by a participant in a PTI program is not admissible evidence against her "in any civil or criminal proceeding." N.J.S.A. 2C:43-13f.

Applying our holding in Gautam v. De Luca, 215 N.J. Super. 388, 399 (App. Div.), certif. denied, 109 N.J. 39 (1987), we affirm the trial court's denial of emotional distress damages. Absent egregious circumstances, such claims are not cognizable in a legal malpractice action.

05-01-13 MATTHEW J. BARRICK, JR. VS. STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF PROPERTY MANAGEMENT AND CONSTRUCTION
A-4442-11T2

We reverse the determination of the Director, Division of Property Management and Construction recommending the award of a contract to RMD, the lowest bidder, to lease office space for a State agency, and remand the case to decide whether to award the lease to plaintiff-appellant, the second lowest bidder, or to rebid it. We hold that the DPMC erred in failing to perform an accessibility analysis when the bids initially reflected that neither bidder complied with the distance requirement to accessible public transportation, and in failing to perform a materiality and waiver analysis of the distance requirement on reconsideration when it ascertained that only RMD's bid was noncompliant. RMD's bid materially deviated from the scope of work, was non-conforming and non-waivable, so the DPMC was without discretion to recommend the award of the lease to RMD.

05-01-13 FABIO COLOGNA VS. BOARD OF TRUSTEES, POLICE AND FIREMEN'S RETIREMENT SYSTEM
A-4222-11T4

N.J.S.A. 43:16A-3(5), as amended in 1980, extends to five years the usual two-year period within which a former member of the Police and Firemen's Retirement System ("PFRS") may resume employment and reinstitute his membership in the retirement system. The provision applies to instances when the member "has been discontinued from service through no fault of his own or through leave of absence . . . and he has not withdrawn his accumulated deductions[.]" Ibid.

Consistent with the Governor's conditional veto message that led to the provision's amendment, we construe the five-year extended time frame as being confined to only members who lose their public employment as the result of an employer's layoff or reduction in force, or through leave of absence in accordance with the statute.

Because appellant in the present case voluntarily resigned from his former employment as a police officer and was not fired, laid off, or granted a leave of absence, we affirm the final agency decision of the PFRS Board of Trustees precluding reinstatement of his membership more than two years later.

04-29-13 SCHEPISI & MCLAUGHLIN, PA VS. CARMINE LOFARO, ET AL.
A-5426-10T2

This appeal arose from a dispute between a creditor and the debtor's former attorney over entitlement to funds held in a trust account and recovered in a separate action in Florida. The debtor hired counsel to represent it after the creditor obtained judgment against the debtor in New Jersey. When the creditor sought to collect on the judgment by bringing suit in Florida against a Florida corporation that owed money to the debtor, the debtor entered into a "contingency agreement" with its counsel for representation respecting the "unlawful retention" of money owed by the Florida corporation. The agreement provided for a fee based on a percentage of "money recovered for" the debtor. Debtor's counsel never filed any pleadings in the Florida Action. The Florida corporation later made payment to the trust account of counsel, in return for releases from the creditor and debtor.

We reversed the orders of the Law Division releasing the disputed funds to debtor's former counsel in satisfaction of the contingency agreement and remanded the matter to the Law Division to ascertain the propriety of counsel's "charging lien" and to determine what, if anything, counsel did to recover money in the Florida action.

04-26-13 GEOVANNI R. REGALADO VS. AMADA CURLING, MUNICIPAL CLERK OF THE CITY OF PASSAIC, AND KRISTEN CORRADO, PASSAIC COUNTY CLERK
A-3821-12T2

In this appeal, we consider the dismissal of plaintiff, Geovanni R. Regalado's verified complaint seeking an order restraining defendant, Amada Curling, in her capacity as Municipal Clerk, City of Passaic (City), from printing his name on the election ballot as a mayoral candidate for the City's May 14, 2013 municipal election. The Law Division judge found plaintiff's withdrawal request was untimely, having been submitted less than the sixty-day requirement for such withdrawal, as set forth in N.J.S.A. 19:13-16. We reversed.

We reasoned that printing ballots bearing plaintiff's name may potentially result in a voter casting a vote for a candidate no longer pursuing the office, thereby depriving that voter of the opportunity to cast a meaningful vote for another viable candidate. We concluded such a result would be "inimical to the public interest" and inconsistent with the overriding public policy that "election laws are to be liberally construed" in order to effectuate their purpose.

04-26-13 DEPOLINK COURT REPORTING & LITIGATION SUPPORT SERVICES VS. DAVID S. ROCHMAN, ESQ., ET AL.
A-4117-11T4

Plaintiff court reporting service commenced this collection action against defendant attorney for the cost of a deposition transcript which defendant ordered but then refused to pay for. Defendant then filed a third-party complaint against the collection agency which plaintiff retained to collect the debt, alleging violations of the Fair Debt Collection Practices Act (FDCPA), the New Jersey Consumer Fraud Act (CFA), and common law fraud.

The threshold issue under the FDCPA is whether the bill for the court reporter's services was incurred for personal, family, or household expenses and thus constitutes a "consumer" debt under the act. We held that it does not, nor is defendant's status as a sole proprietor determinative of the issue. Accordingly defendant's FDCPA claim against the collection agency did not fall within the scope of the Act, and was properly dismissed on summary judgment.

We also held that (1) defendant's common law fraud claim against the collection agency was properly dismissed due to defendant's inability to demonstrate reliance on the collection agency's statements; (2) defendant's CFA claim against the collection agency was properly dismissed because any misrepresentations by the collection agency, even if made, were not in connection with the sale of merchandise to defendant, and defendant suffered no "ascertainable loss"; and (3) summary judgment was properly granted as a matter of law even though discovery was incomplete.

04-23-13 ERICA TURNER, ET AL. VS. TOWNSHIP OF IRVINGTON, ET AL.
A-5478-11T2

We hold that N.J.S.A. 52:17C-10(d), which immunizes 9-1-1 operators for conduct that is not wanton and willful, and N.J.S.A. 59:2-10, a general Tort Claims Act provision which immunizes public entities for the wanton and willful conduct of their employees, together prevent a public entity employer from being held liable for its operators' conduct regardless of their level of culpability.

04-23-13 STATE OF NEW JERSEY VS. MARKEES PRUITT
A-1343-11T2

In this appeal, we address the issue of whether the prosecutor's use of a peremptory challenge to excuse the only qualified African-American person in the jury panel was sufficient to require the prosecutor to provide a non-discriminatory explanation for the exercise of the challenge. After reviewing the record in light of the contentions advanced on appeal, we hold that because there was only one qualified member of the cognizable group in the jury panel; the defendant was also a member of that same group; the prosecutor failed to ask the juror any follow-up questions; and, other than her race, the juror was as heterogeneous as the community as a whole, the trial judge should have required the prosecutor to explain his non-discriminatory reason for the challenge.

04-17-13 KEVIN ROBINSON VS. MICHAEL ZORN, NEW JERSEY TRANSIT CORPORATION, AND ANGELO LIONELLI
A-3152-11T4

In this personal injury lawsuit, plaintiff, a bus passenger, appealed from an order denying his motion to amend his complaint to assert an uninsured motorist (UM) claim against defendant New Jersey Transit (NJT). Plaintiff, an out-of-state uninsured individual, sought a ruling from us that would require NJT to provide UM coverage.

The judge denied the motion, relying on Ross v. Transport of New Jersey, 114 N.J. 132, 147 (1989) (applying N.J.S.A. 39:6-54 and concluding that a public entity, which has not chosen to insure or self-insure, is freed from the obligation to provide UM coverage). In 1987, the Legislature amended N.J.S.A. 39:6-54a. [The parties in Ross were not affected by the 1987 amendment because the amendment occurred "after the events at issue."] And, in 2003, the Legislature enacted an insurance reform package and established, as part of that effort, a special automobile insurance policy (SAIP), N.J.S.A. 39:6A-3.3.

We determined that the Legislature did not alter the holding in Ross, by passing the 1987 amendment or creating the SAIP, and concluded, therefore, that the Legislature did not modify the holding in Ross to require that public entities provide UM insurance coverage to out-of-state uninsured residents like plaintiff. Although plaintiff sought a ruling from us that would require NJT to provide UM insurance coverage, we held that the wisdom of any such requirement, which would change the policy of limiting government liability exposure as expressed in the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 12-3, should be left to the Legislature.

04-16-13 IN THE MATTER OF A.N., A MINOR
A-5657-10T3

A Chancery Division order approving certain expenditures and authorizing similar future expenditures by a special needs trust, which also adjudicated that the expenditures "shall not" act to deprive the beneficiary of any Medicaid benefits should a Medicaid application be made, exceeded the court's subject matter jurisdiction. The Division of Medical Assistance and Health Services, as the single state agency responsible for administering New Jersey's Medicaid program, is vested with the sole authority for determining Medicaid eligibility, and it retains the right to review the subject expenditures and the totality of the beneficiary's financial circumstances during a five-year look-back period.

04-15-13 MAHWAH REALTY ASSOCIATES, INC. v. TOWNSHIP OF MAHWAH
A-4360-11T4

In this appeal, the court examined whether an ordinance that authorizes "health and wellness centers" and "fitness and health clubs" in two industrial zones changes the "classification" of those zones, thereby requiring compliance with the MLUL notice provisions contained in N.J.S.A. 40:55D-62.1, and, if so, whether that statute requires notice that includes identification not only of the affected zoning districts, but also identification of all the properties within the zoning districts by "street names, common names or other identifiable landmarks, and by reference to lot and block numbers[.]" The court concluded that the ordinance proposed a change in classification because these additional uses fundamentally altered the industrial zones, but the court reversed the judgment invalidating the ordinance because N.J.S.A. 40:55D-62.1 requires, in this instance, only identification of the affected zoning districts. The additional

requirement for identification of the specific impacted properties only applies when a change in boundaries is proposed.

04-05-13 STATE OF NEW JERSEY VS. ROSKILDE GOMEZ
A-5103-11T2

In protecting a defendant's due process rights, courts have inherent authority to order discovery in a criminal case seeking to compel the victim of an aggravated assault to undergo a physical examination by a defense doctor, but such an order should rarely be issued and should be directed to the State rather than the victim. Defendant must show a compelling or substantial need for the examination that clearly outweighs the victim's rights, including constitutional and statutory protections afforded to victims of crime.

04-05-13 WARREN HOSPITAL, ET AL. VS. JOHN DOES (1-10) (BEING FICTITIOUS NAMES FOR PERSONS NOT YET IDENTIFIED) AND JANE DOES (1-10)(BEING FICTITIOUS NAMES FOR PERSONS NOT YET IDENTIFIED)
A-4119-11T4

In this interlocutory appeal, the court reversed a trial court order that quashed a subpoena, which was served by plaintiffs on an Internet Service Provider, that sought information about the identity of one or more individuals who hacked into plaintiff Warren Hospital's intranet and circulated defamatory messages to the hospital's employees. The court concluded that the trial judge erred in protecting the anonymity of the alleged hackers by strictly applying the procedures outlined in Dendrite Int'l, Inc. v. Doe No. 3, 342 N.J. Super. 134 (App. Div. 2001).

04-05-13 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. P.H. AND J.C.
IN THE MATTER OF B.H., K.C. AND L.C.
A-0939-11T3

The statutory scheme found in Title 9 and Title 30 does not allow the Department of Children and Families to notify a church that an individual the church intends to employ as a "youth pastor" was substantiated for child sexual abuse.

04-04-13 SOMA MANDAL, M.D. VS. PORT AUTHORITY OF NEW YORK AND NEW JERSEY, ET AL.
A-0100-10T3; A-0132-10T3(CONSOLIDATED)

Plaintiff, a physician, slipped and fell in a corridor of Pavonia Station in Jersey City while on her way through the station to board a train for New York City. She sued the Port Authority of New York and New Jersey, and Modern Facilities Services, Inc., which was retained by the Port Authority to maintain the station, for her personal injury damages, and was awarded more than $7,000,000 for the loss of past and future earnings, pain and suffering, and other losses. A judgment was entered that also included more than $500,000 in prejudgment interest.

The court reversed and remanded for a new trial because, among other things, the jury was erroneously instructed to apply the heightened common-carrier standard of care to the Port Authority's acts or omissions even though plaintiff was not injured while on board or while embarking or debarking from a train. The court held that, in this instance, the Port Authority was to be held to the same standard of care of any other commercial land occupier, and the erroneous instruction required a new trial on all issues.

In addition, as a matter of first impression, the court held that the Port Authority could be held liable for an award of prejudgment interest.

04-01-13 JANET HENEBEMA VS. SOUTH JERSEY TRANSPORTATION AUTHORITY, ET AL.
A-3723-10T4

In this personal injury case arising out of one of several accidents on the Atlantic City Expressway, the parties contested the predicate facts relevant to determining whether defendants either exercised discretionary decision-making or performed ministerial acts in connection with dispatch procedures. That distinction is central to applying the correct standard of liability under N.J.S.A. 59:2-3(d) (requiring proof that a public entity's discretionary decisions were "palpably unreasonable"). The question is whether a judge or jury should resolve that threshold dispute.

We held that when the evidence establishes a genuine issue of material fact regarding whether a public entity's alleged failures were the result of discretionary decision-making as to how to use its resources, or instead involved ministerial acts mandated by law or practice, then that fact issue must be submitted to the jury. The judge himself improperly settled that fact-laden dispute and charged a potentially erroneous

standard of care. Thus, we reversed judgment on liability and remanded for a new trial.

We also (1) upheld the damages award because the issues pertaining to pain and suffering are sufficiently separate and distinct from the liability issues that turned on whether defendants performed discretionary or ministerial acts; (2) rejected defendants' net opinion argument to bar plaintiff's liability expert on police practices; and (3) agreed that defendants, as public entities, were not subject to pre-judgment interest pursuant to the Offer of Judgment rule, R. 4:58-2(a)(2).

03-28-13 STEPHANIE WASHINGTON VS. CARLOS A. PEREZ, ET AL.
A-4284-11T4

Without determining whether a missing-witness inference may be drawn from a party's failure to call an expert to testify -- a matter about which other appellate panels had disagreed -- the court held that a missing-witness charge was inappropriate where defendants chose not to call their medical experts because it was not shown that those witnesses were "peculiarly within [defendants'] control" or that their testimony would have been superior to the other medical testimony elicited at trial. In addition, the court held the missing-witness instruction was prejudicial because plaintiff's counsel inappropriately argued in summation that defense counsel's failure to call the expert witnesses demonstrated the defense lacked "candor." For those reasons, the court determined that defendants were prejudiced and a new trial required.

03-28-13 LISA MCLEAN VS. LIBERTY HEALTH SYSTEM, ET AL.
A-1793-11T4

At the trial of this medical malpractice case, the jury found that defendant emergency room doctor was not negligent in failing to detect a virulent infection that paralyzed the sixteen-year-old decedent and eventually led to his death. We order a new trial because of error in barring plaintiff from presenting testimony from a second liability expert with respect to the alleged deviation from the standard of medical care on the ground that the testimony would have been "duplicative" of another expert that plaintiff presented. For purposes of the retrial, we also address defendant's burden of proof, in accordance with Scafidi v. Seiler, 119 N.J. 93 (1990), to apportion proximate causation between the pre-existing infection and the doctor's alleged negligence.

03-22-13 JAMES HITESMAN VS. BRIDGEWAY INC., D/B/A BRIDGEWAY CARE CENTER
A-0140-11T3

A licensed or certified health care professional may assert a claim against his or her employer pursuant to the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8, based upon a reasonable belief that the employer's conduct "constitutes improper quality of patient care[.]" N.J.S.A. 34:19-3a(1) and c(1). The statutory definition of "improper quality of patient care" includes the violation of "any professional code of ethics." N.J.S.A. 34:19-2(f). In this appeal, we consider whether plaintiff's proof, and specifically his reliance upon a professional code of ethics not applicable to his employer, was sufficient to support a liability verdict in his favor. We conclude that, as a matter of law, plaintiff failed to prove the first element of his CEPA claim.

03-22-13 STATE OF NEW JERSEY VS. RYAN R. DEHART
A-4251-10T2

In this appeal, we address the issue of whether it was plain error for a police officer to provide hearsay testimony explaining why he included defendant's photograph in a photo array and for the prosecutor to highlight that testimony in summation. We also consider whether the trial court was required to instruct the jury on the elements of attempted robbery even though such an instruction was not requested by defendant. After reviewing the record in light of the contentions advanced on appeal, we determine the police officer's testimony should not have been admitted and that the prosecutor's summation improperly bolstered the officer's testimony in violation of defendant's constitutional right of confrontation. We further conclude it was plain error to fail to instruct the jury on the elements of attempted robbery. We therefore reverse defendant's convictions and remand for a new trial.

03-21-13 IN RE N.J.A.C. 7:1B-1.1 ET SEQ.
A-3514-11T2/ A-4098-11T2 (CONSOLIDATED)

We uphold the Department of Environmental Protection's Waiver Rules, N.J.A.C. 7:1B-1.1 to -2.4, as against claims they are ultra vires, vague and ill-defined.

We find the promulgation constitutes a valid exercise of the DEP's implied authority incidental to the extensive powers vested in the agency by the Legislature. We also find the waiver rules establish appropriate and clear standards for the exercise of agency discretion.

We invalidate, however, the documents on DEP's website, to the extent they go beyond the terms of the regulations, as de facto rulemaking in violation of the notice and comment requirements of the Administrative Procedure Act.

03-21-13 JOAN I. SILVER VS. BOARD OF REVIEW, ET AL
A-1750-11T3

We reversed the Board of Review's finding of "severe misconduct," a new intermediate level of misconduct added to N.J.S.A. 43:21-5(b) by a 2010 amendment. Although some of the examples of severe misconduct specified in the amendatory provision, by their literal terms, could be satisfied by repeated violations of the employer's rules occasioned by negligence or inadvertence, we held that deliberate conduct is required. The Board did not find deliberate conduct in this case, and the record would not support such a finding.

03-14-13 STATE OF NEW JERSEY VS. TYRONE STEELE
A-1232-12T3

On leave granted, we modify the $200,000 bail, of which $150,000 must be cash, set by the trial court on two indictments charging only fourth-degree offenses. We construe N.J.S.A. 2C:6-1, which generally imposes a limit of $2500 on bail for fourth-degree offenses. We conclude the court may exercise its statutory power to exceed $2500 for "good cause" by applying the bail factors set forth in State v. Johnson, 61 N.J. 351 (1972) and incorporated in Rule 3:26-1(a). However, we conclude the trial court here inappropriately considered safety of the community when setting the amount of money bail. We discuss the role of non-monetary conditions of bail to protect the community.

03-13-13 MARLENY VEGA VS. 21ST CENTURY INSURANCE COMPANY
A-2904-11T4

The court held that an insurer's timely letter rejecting an arbitration award was sufficient to trigger its right to nullify an uninsured motorist arbitration award even though the insurer did not expressly state it was "demanding a trial." The

insurer's letter "rejected the arbitration award" and invited settlement discussions, and could not be plausibly interpreted as meaning anything other than that the insurer had invoked its right to demand a trial. In so holding, the court overruled LoBianco v. Harleysville Ins. Co., 368 N.J. Super. 515 (Law Div. 2003), which held to the contrary.

03-07-13 UNITED PARCEL SERVICE GENERAL SERVICES CO., ET AL. VS. DIRECTOR, DIVISION OF TAXATION
A-0940-10T3

The Director of the New Jersey Division of Taxation (the Director) appeals from a Tax Court determination abating late payment penalties and determining tax amnesty penalties were inapplicable. The penalties had been imposed by the Director regarding taxes found due resulting from imputation of interest income on inter-company transfers between plaintiffs-affiliated subsidiaries and their parent corporation. The Director argued once the tax liability assessments were upheld, the imposition of penalties was mandatory. Judge Kuskin disagreed and we affirmed.

Plaintiffs' reporting position asserted the inter-company transfers did not generate income. No reported case in this State provided guidance on that issue. Further, other courts addressing a similar issue had concluded the transfers were not loans, thus reinforcing the reporting position taken by plaintiffs. The Director, following an extended audit, characterized the transfers as loans, which required imputation of income. Judge Kuskin determined the Director's position was not unreasonable. Plaintiffs did not challenge the amount of imputed income or resultant tax liability.

Judge Kuskin also found the totality of the facts and circumstances nevertheless warranted waiver of the late payment penalties as permitted by N.J.S.A. 54:49-11a. He concluded the Director's failure to do so represented an abuse of discretion. Deferring to the Tax Court's factual findings, we concurred with Judge Kuskin's application of the late payment waiver statute because the tax liability issue in question was one of first impression and plaintiffs had provided evidence satisfying the "reasonable cause" standard for abatement of the penalty. N.J.S.A. 54:49-4a; N.J.A.C. 18:2-2.7(b).

Regarding the amnesty penalties, we agreed plaintiffs were not subject to the statutory penalties because whether plaintiffs had a legal obligation to pay certain taxes was

unsettled and the liability was only discovered in the audit after the Director's determination on an issue of first impression. Consequently, there were no "tax liabilities eligible to be satisfied," as required by N.J.S.A. 54:53-17b and -18b, to trigger the amnesty provisions because the audit determination was rendered following the close of the amnesty period.

03-06-13 HOLLY HALVORSEN, ET AL. VS. GREGORY J. VILLAMIL, ET AL./RUSSELL HARRIOTT, ET AL. VS. GREGORY J. VILLAMIL, ET AL.
A-1306-11T4/ A-1435-11T4 (CONSOLIDATED)

We reversed the summary judgment dismissal of a dram shop action against the corporate owner of the T.G.I. Friday's in Brick where the motion judge failed to consider the opinions of plaintiffs' expert in conjunction with the direct and circumstantial evidence of record. Despite the lack of an eyewitness, we determined that the record contains sufficient evidence to create a genuine issue of material fact as to whether T.G.I. Friday's served the drunk driver who caused the accident while he was visibly intoxicated.

03-04-13 DANIEL MOTLEY VS. BOROUGH OF SEASIDE PARK ZONING BOARD OF ADJUSTMENT
A-3214-11T4

Plaintiff dismantled his house, which had fallen into disrepair and had not been occupied for several years, down to its foundation and footings. The building, which was one of two houses situated on the same small lot, indisputably was a pre-existing nonconforming use and structure under the local zoning ordinance.

We held that the extent of the house's demolition exceeded "partial destruction" within the meaning of N.J.S.A. 40:55D-68. Plaintiff therefore required a variance from the local zoning board in order to restore the non-conforming structure to its prior dimensions.

02-28-13 STATE OF NEW JERSEY VS. LEON C. GLASPIE
A-4920-10T3

The IAD is violated when a defendant who is simultaneously serving a sentence and awaiting disposition on new charges in a sending state is "shuttled" to New Jersey. See N.J.S.A. 2A:159A-4(e). The open charges do not prevent strict

application of the IAD's dismissal provisions under Alabama v. Bozeman, 533 U.S. 146, 121 S. Ct. 2079, 150 L. Ed. 2d 188 (2001).

02-28-13 APOGEE TRUCKING, L.L.C. VS. BOARD OF REVIEW, DEPARTMENT OF LABOR AND LESTER V. BECKLES
A-0977-10T4

We affirm the granting of unemployment benefits to the employee-truck driver, who became uninsurable because of his poor driving record. Although the employer's argument is fairly debatable in analogizing this case to Yardville Supply Co. v. Board of Review, 114 N.J. 371 (1989), where the truck driver lost his license because he was convicted of DWI, the facts are sufficiently different not to require reversal of the Department's final decision. The employer here knew of the driver's poor record when it hired him, and additional incidents during the period of employment were not the cause of his becoming uninsurable.

02-27-13 ALISON TATHAM VS. SCOTT JOHN TATHAM
A-4592-11T1

The parties to this matrimonial action are Australian citizens, who, because of the husband's work in international financial investment, lived in many places shortly after their 1992 marriage, mostly in the Far East. The family, which includes two teenaged daughters, moved to New York City briefly and then to Rumson, New Jersey, either sometime in 2006 or in the Summer of 2007 (the parties disputed the date). In the Fall of 2008, the husband returned to Singapore, where he has since resided; the wife and their daughters, however, remained in New Jersey. In July 2011, the wife commenced this divorce action, which the judge dismissed on motion, finding: the court lacked subject matter and personal jurisdiction; New Jersey, as compared to Australia, where the husband subsequently filed a divorce action, constituted an inconvenient forum; and the wife's technical failure in effecting service of process on the husband in Singapore could not be corrected.

The court reversed, concluding that the trial court possessed subject matter jurisdiction because the wife was a bona fide New Jersey resident, and personal jurisdiction over the husband could be exerted because he had lived here with his family for at least thirteen months only a few years before the commencement of the action. The court also determined that the doctrine of forum non conveniens did not permit dismissal

because of the strong presumption in favor of the wife's choice of her home state as a forum and because an Australia forum appeared to be inconvenient for both parties. And, although the wife erred in failing to seek prior approval -- in accordance with Rule 4:4-4(b)(1)(B) -- of her process server when serving the summons and complaint on the husband in Singapore, the court held that this ministerial mistake could be cured nunc pro tunc and exercised original jurisdiction to do so.

02-27-13 STATE OF NEW JERSEY VS. DARRYL BISHOP/ STATE OF NEW JERSEY VS. WILBERTO TORRES
A-0048-11T4/ A-1399-11T4(CONSOLIDATED)

Unlike with resentencing after revocation of "regular" probation under N.J.S.A. 2C:45-3b, upon resentencing after revocation of Drug Court special probation under N.J.S.A. 2C:35-14f(4), mandatory periods of parole ineligibility and mandatory extended term provisions that existed at the time of original sentencing survive during the term of special probation and remain applicable at the time of resentencing. We therefore affirmed the VOP sentences these defendants received, which were for extended terms and contained minimum periods of parole ineligibility.

02-26-13 EWA FIK-RYMARKIEWICZ VS. UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, ET AL.
A-0086-11T3

We affirmed a dismissal of plaintiff's complaint with prejudice because she demonstrated contumacious behavior, ignored court orders, and obstructed discovery of information directly relevant to her emotional distress claim.

02-25-13 DEBORAH F. TOWNSEND, ET AL. VS. NOAH PIERRE, ET AL.
A-4039-11T4

We reversed summary judgment and set aside a ruling that plaintiff's expert rendered an inadmissible net opinion. We held that where there is a reasonable basis for a jury to reject a credibility-based recollection of a fact witness, the expert may properly comment, in a hypothetical manner pursuant to N.J.R.E. 705, about alternative factual possibilities that have support in the record.

02-25-13 MICHAEL ROSEN VS. CONTINENTAL AIRLINES, INC.
A-0705-11T1

We hold that plaintiff's complaint against defendant airline arising from his inability to use a headset purchased from the airline on an earlier flight, and the refusal of the airline to sell him a new headset and alcoholic beverages on a subsequent flight without a credit card, is preempted by 49 U.S.C.A. § 41713(b)(1).

Plaintiff's complaint alleged that defendant violated the New Jersey Consumer Fraud Act (CFA); that defendant's refusal to accept cash during a flight constituted unlawful "discrimination against low income individuals;" and that defendant, by refusing to accept cash during the flight, prevented plaintiff from enjoying in-flight amenities, and caused plaintiff to suffer "severe mental anguish and emotional distress." We affirm the Law Division's dismissal of plaintiff's complaint, and find that plaintiff's claims under the CFA, and other state tort claims, are preempted by the federal Airline Deregulation Act, 49 U.S.C.A. § 41713(b)(1), and that plaintiff's claim for class certification was baseless.

02-22-13 IN THE MATTER OF THE APPLICATION FOR A NEW JERSEY PERMIT TO CARRY A HANDGUN BY RICHARD PANTANO
A-1682-11T1

We affirm the trial court's order denying appellant's application for a permit to carry a firearm. We found sufficient credible evidence in the record to support the trial court's conclusion that the appellant had failed to demonstrate "justifiable need" for the permit. N.J.S.A. 2C:58-4(d). We also reject appellant's argument that the "justifiable need" requirement infringes appellant's constitutional right to bear arms. U.S. Const. amend II. We rely on the presumption of constitutionality, the lack of clarity that the Supreme Court in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) intended to extend the Second Amendment right to a state regulation of the right to carry outside the home, and the Second Circuit's explicit affirmation of the New York right-to-carry law, which is similar to New Jersey's, in Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 89 (2d Cir. 2012).

02-22-13 STATE OF NEW JERSEY V. BRUCE E. LIGE
A-6211-09T2

In a prosecution for receiving stolen property, N.J.S.A. 2C:20-7(b) permits the jury to infer that defendant knew the

property was stolen if he was "found in possession or control of two or more items of property stolen on two or more separate occasions; or . . . [h]as received stolen property in another transaction within the year preceding the transaction charged." The trial court misapplied this statute in admitting extensive evidence of four prior theft offenses that defendant had committed more than a year earlier and one after the date of the current charges. That "other crimes" evidence was not admissible under the statute and required analysis under N.J.R.E. 404(b).

02-14-13 FRANK ALFANO, JR. VS. PATROLMAN PIERCE SCHAUD, ET AL.
A-1379-11T2

For purposes of ruling on a motion for summary judgment, we hold that when opposing parties tell two different stories, one of which is blatantly contradicted and discredited by conclusive physical evidence — here a time-stamped police dispatch audiotape that is neither doctored nor altered — so that no reasonable jury could believe it, a court should not adopt that version of the facts.

02-13-13 STATE OF NEW JERSEY VS. MYLON KELSEY
A-4850-10T1

By leave granted, the State appeals from the order of the trial court denying its application to compel defendant, a police officer of the City of Trenton, to produce a flashlight that may or may not be in defendant's possession. The State claims it has probable cause to believe the flashlight may have been used by defendant illegally as a weapon, when defendant took part in a street brawl, during which at least one person sustained serious bodily injury from allegedly being hit with the flashlight.

The trial court held that compelling defendant to turn over the flashlight under these circumstances would violate defendant's right against self-incrimination. Relying on In re Addonizio, 53 N.J. 107, 129 (1968), we agree with the trial court and affirm.

02-07-13 STATE OF NEW JERSEY VS. BRUNO GIBSON
A-5163-10T2

We hold that in a driving-under-the-influence prosecution, N.J.S.A. 39:4-50, due process and fundamental fairness preclude a trial court, absent a defendant's consent, from relying upon

the evidence heard in a pre-trial suppression hearing as proof of guilt in the trial on the merits. In this case, defense counsel objected to reliance on the suppression hearing record and moved to dismiss in the absence of other proofs. The court nonetheless found defendant guilty of DUI solely on the basis of evidence elicited at the pre-trial hearing to suppress the fruits of a motor vehicle stop and subsequent arrest. We reverse the conviction and order entry of a judgment of acquittal.

02-07-13 STATE OF NEW JERSEY VS. MOSES A. BREWSTER
A-3394-10T4

This PCR appeal addresses Padilla v. Kentucky, 559 U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); State v. Nunez-Valdez, 200 N.J. 129, 138 (2009); and Rule 3:22-12, the limitations period for filing a PCR petition as amended in 2010. We hold that defendant did not establish factually a prima facie case of ineffective assistance of counsel by alleging that his attorney at the time he pleaded guilty in 1998 to marijuana charges failed to predict correctly that a federal deportation complaint would be filed against him in 2010. The warning contained in Question 17 of the plea form that defendant "may" be deported was correct and sufficient advice. Also, the PCR was untimely filed under R. 3:22-12, in particular, because an attorney told defendant no later than in 2007 that his conviction would cause immigration problems.

02-06-13 MEGAN BURNS AND JOSEPH NIEVES VS. HOBOKEN RENT LEVELING & STABILIZATION BOARD AND BLOOMFIELD 206 CORPORATION
A-2621-11T4

We review defendant Bloomfield's challenge to an order denying its motion to vacate plaintiff's voluntary dismissal because it was not made a party to the stipulation. We agree the trial judge's denial of Bloomfield's motion to vacate the stipulation of voluntary dismissal was error because the stipulation failed to conform to requirements set forth in Rule 4:37-1(a). However, the error was harmless as the judge considered and granted plaintiffs' cross-motion to dismiss the action with prejudice, pursuant to Rule 4:37-1(b).

02-05-13 BOROUGH OF MERCHANTVILLE VS. MALIK & SON, LLC, ET AL.
A-3745-11T4

We affirm the Law Division's order for final judgment in favor of the Borough of Merchantville, permitting it to exercise its power of eminent domain and appointing commissioners, and denying the motion of appellant, L.B., a lien holder, to dismiss the condemnation complaint. We hold that a condemning authority is not obligated under N.J.S.A. 20:3-6 to negotiate with the assignee of a mortgagee which has obtained a final judgment of foreclosure on the subject property. Moreover, the property owner's express "formal notification of [its] rejection" of the condemnor's offer to purchase its property and vague invitation to discuss "more reasonable compensation in an amount which would satisfy all liens and encumbrances on the property" is inadequate evidence that the property is worth more than the amount offered, and constitutes a sufficient rejection of the condemnor's bona fide one-price offer to permit the condemnor to proceed with litigation.

02-04-13 BEVERLY MAEKER VS. WILLIAM S. ROSS
A-3034-11T4

In this appeal, we reverse the trial court ruling that the 2010 amendment to the Statute of Frauds, N.J.S.A. 25:1-5(b), requiring a writing memorializing palimony agreements and the independent advice of counsel for each party in advance of executing the agreement, applies only to palimony agreements entered after the January 18, 2010 effective date of the amendment. We held the amendment is enforcement legislation, which addresses under what circumstances enforcement of palimony agreements may be enforced irrespective of when the purported agreement may have been entered.

01-31-13 DAN STEPHENSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF JACK M. MURRAY VS. WILLIAM E. SPIEGLE, III, ESQUIRE
A-4193-11T2

Two months after executing a Will that conveyed his estate to family members or trusts benefiting family members, the decedent opened a bank account, which named defendant-attorney, the drafter of the Will, as the "pay-on-death" beneficiary. After decedent died a year later, defendant expressed his surprise but also took the position that the account devolved to him personally. The estate commenced this action, seeking recovery of the funds and, after a bench trial, the Chancery judge ordered rescission, finding decedent made a unilateral

mistake in that he likely intended to fund a trust or the trusts referenced in the Will.

The court affirmed, finding a unilateral mistake created no impediment to rescission where: the mistake was material; decedent exercised reasonable care; enforcement of the mistake would produce an unconscionable result; and defendant was not prejudiced by the loss of the windfall. The court also held the judge could have imposed a resulting trust or reformed this "poor man's will" by application of the doctrine of probable intention.

01-30-13 MARTIN MAYER VS. ONCE UPON A ROSE, INC., ET AL.
A-2922-11T3

This negligence case arises from the personal injuries that a caterer sustained when a glass vase shattered. The vase contained a floral arrangement, which a florist working at the same catered event had been carrying across the room. Invoking the doctrine of res ipsa loquitur, the injured caterer sued the florist and the floral company, contending that either the florist had been gripping the vase in a dangerous manner or that the vase had not been adequately inspected for cracks before it was brought to the site.

The trial court granted defendants a directed verdict at the close of the caterer's proofs before the jury, mainly because the caterer had not retained a liability expert to explain why the vase had shattered. We reverse, concluding that it was not essential for this plaintiff to have retained a liability expert in these circumstances, and that the jury should have been allowed to evaluate plaintiff's claims based upon res ipsa loquitur principles.

01-30-13 STATE OF NEW JERSEY VS. DAVID T. POMIANEK, JR.
A-2694-10T4

We construed one section of the bias intimidation statute, which defendant challenged as unconstitutional. We held that a conviction under N.J.S.A. 2C:16-1a(3) requires proof of the defendant's biased intent in committing the predicate crime; proof of the victim's perception of the crime is insufficient for a conviction. That construction is consistent with the legislative history and necessary to avoid holding the statute unconstitutional.

We also construed the official misconduct statute, N.J.S.A. 2C:30-2a, holding that under the facts of this case defendant could be re-tried for official misconduct based on harassment by conduct but not harassment by communication.

01-29-13 IN THE MATTER OF THE CITY OF CAMDEN AND THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 788
A-1244-11T2

When the collective bargaining agreement between the City of Camden and its firefighters expired in December 2008, the parties engaged in compulsory interest arbitration under N.J.S.A. 34:13A-14 to -21. The arbitration was subject to both the New Jersey Arbitration Act, N.J.S.A. 2A:24-1 to -11, and the Compulsory Interest Arbitration Act procedure, which requires the arbitrator to give due weight to factors enumerated in N.J.S.A. 34:13A-16(g). Further, an amendment to N.J.S.A. 34:13A-16, effective January 1, 2011, mandated that "a written report explaining how each of the statutory criteria played into the arbitrator's determination of the final award" accompany each arbitrator's decision. N.J.S.A. 34:13A-16(f)(5).

It was undisputed that the City's financial distress had resulted in substantial layoffs of its employees, including one-third of its firefighters and that State-controlled aid was declining. Although the arbitrator acknowledged that the City was unable to fund the award from its own tax base, he awarded the firefighters an 8.5% increase in base wages over four years. Calling the State a "fourth party" to the arbitration, the arbitrator concluded the State must provide funding for the City's Fire Department budget, including salary increases. In addition, the arbitrator delayed and attempted to limit the firefighters' contributions to health insurance costs, contrary to N.J.S.A. 40A:10-21.1 and N.J.S.A. 40A:10-21(b).

We reverse PERC's decision to affirm the award; vacate the award; and remand for proceedings before a different arbitrator for the following reasons: The arbitrator exceeded his authority by denominating the State a "fourth party" that he essentially required to fund the award. The award was the product of "undue means," N.J.S.A. 2A:24-8(a), because it was contrary to statutory mandates governing employees' contributions toward their health benefits, N.J.S.A. 40A:10-21.1 and N.J.S.A. 40A:10-21(b). The arbitrator failed to give due consideration to the factors set forth in N.J.S.A. 34:13A-16(g) or adequately explain how each of the statutory criteria played into the determination of the final award, as required by

N.J.S.A. 34:13A-16(f)(g). The nature of these errors suggests a commitment to the arbitrator's stated intention to award an increase to the firefighters, requiring that this matter proceed before a different arbitrator.

01-28-13 IN THE MATTER OF THE EXPUNGEMENT OF THE CRIMINAL RECORDS OF R.Z.
A-4253-11T4

We reverse and remand an order expunging an adult conviction for two second-degree crimes — theft by deception and financial facilitation of criminal activity — because petitioner failed to prove the crimes were contemporaneous. N.J.S.A. 2C:52-2(a) precludes expungement if a petitioner has been "convicted of any prior or subsequent crime." Crimes are prior or subsequent if committed on "separate occasions." In re Ross, 400 N.J. Super. 117, 122 (App. Div. 2008). We hold the petitioner bears the burden to show one crime was not prior or subsequent to the other. Also, we hold a crime involving a course of conduct is deemed to occur, for expungement purposes, when the course of conduct begins as well as when it ends, and we reject the suggestion that the date of commission is determined solely by N.J.S.A. 2C:1-6c, which states, for statute of limitations purposes, a crime involving a course of conduct is committed when the conduct terminates. We remand to allow petitioner to submit proofs that his two crimes were in fact contemporaneous.

01-24-13 D.N. VS. K.M.
K.M. VS. D.N.
A-3021-11T3; A-3022-11T3

In these back-to-back appeals of Family Part orders in two domestic violence matters, we review whether there is a right to assigned counsel, and particularly, whether counsel should be appointed for indigent litigants presenting or defending domestic violence complaints. We concluded the relief a court may grant and the remedies available under the Prevention of Domestic Violence Act (the Act), N.J.S.A. 2C:25-17 to -35, are curative. Therefore, the protections of due process do not require the appointment of counsel for indigents presenting or defending a private party's civil domestic violence action. Also, the Legislature did not intend to invoke the power of the State to prosecute civil requests for restraining orders. Rather, the Act provides a plaintiff with a cause of action for

civil relief for which there is no entitlement to assigned counsel.

01-16-13 JODY A. SAYLES, ETC. VS. G&G HOTELS, INC., ET AL. VS. DONNA AND DENNIS O'NEILL
DONNA AND DENNIS O'NEILL VS. G7G HOTELS, INC., ET AL. VS. JODY A SAYLES, ETC.
A-2926-11T1

In this appeal, the court reviewed a dispute between defendant G&G Hotels, Inc. and defendant Howard Johnson International, Inc., triggered when two individuals fell through a third-floor window of G&G's Atlantic City hotel. G&G and HJI had previously entered into a license agreement, which allowed the former's use of the latter's brand name and, also, obligated the former to broadly indemnify the latter. In affirming the summary judgment that obligated G&G to indemnify HJI, the court held that even though a better provision could have been crafted, the provision in question required indemnification for claims "when the active or passive negligence" of HJI is "alleged or proven," thus distinguishing this case from Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177 (1986) and its progeny.

01-11-13 WILLIAM NIELSEN, ET AL. VS. WAL-MART STORE #2171, ET AL.
A-2790-11T1

The court held that a commercial condominium unit owner owed the employee of an independent contractor a duty of care regarding a hazardous condition outside the boundaries of its unit, notwithstanding that the condominium developer continued to own and had contractually assumed the duty to maintain and repair the area in question.

01-11-13 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. T.S. IN THE MATTER OF C.R.E. A/K/A C.B.
A-1773-11T1

Following a guardianship trial at which DYFS failed to prove a cause of action for terminating defendant's parental rights, the court ordered that the matter revert to the FN docket and scheduled a permanency hearing before another judge. The FN judge, sua sponte, scheduled and conducted a fact-finding hearing at which he determined by clear and convincing evidence that defendant had abused or neglected his child, even though DYFS had not established defendant's paternity until nearly a

year after the child's birth, had assumed responsibility for the child's care and supervision shortly after the child's birth, and had never relinquished its care and supervision of the child.

We reversed, holding that the FN judge improperly applied a clear and convincing standard without first providing proper notice to defendant; and that the evidence presented by DYFS of defendant's non-compliance with services was not sufficient to establish that defendant abused or neglected the child, who had never been in defendant's custody.

01-08-13 STATE OF NEW JERSEY VS. JOHN C. BLANN
A-0097-11T2

We reverse defendant's conviction because the absence of a signed jury waiver required by Rule 1:8-1(a), coupled with the judge's failure to question defendant on the record regarding his request to waive a jury and the judge's failure to state his reasons for granting defendant's request, make it impossible for a reviewing court to assess whether defendant's waiver was knowing and voluntary.

Judge Lisa dissents and would affirm the conviction without prejudice to defendant's right to seek review by way of a petition for post conviction relief.

12-20-12 FRANCIS CHIARELLO VS. BOARD OF TRUSTEES, PUBLIC EMPLOYEES RETIREMENT SYSTEM
A-1199-11T1

Appellant sought an ordinary disability retirement from one PERS position with the intention to retain an elected office, another PERS position, in reliance on N.J.S.A. 43:15A-47.2, which authorized a multiple PERS member's retention of an elected office upon retirement from another PERS position. The court held, among other things, that appellant was not required to terminate his mayoral position even though N.J.S.A. 43:15A-47.2 was repealed before his retirement application was ruled upon. The court reasoned that simple fairness and the principle that favors prospective application of statutes required that appellant's eligibility to retain his position as mayor should be governed by the laws existing at the time of the application, particularly when appellant applied for a disability retirement four months before the repeal. The court, however, remanded for a determination of whether appellant could be totally and

permanently disabled from one position without being similarly disabled from the other.

12-19-12 L & W SUPPLY CORPORATION D/B/A BUILDING SPECIALTIES VS JOE DESILVA T/D/B/A DESILVA CONTRACTORS, ET AL.
A-2960-10T2

The Construction Lien Law, N.J.S.A. 2A:44A-1 to -38, and Craft v. Stevenson Lumber Yard, Inc., 179 N.J. 56, 63 (2004), impose an obligation upon a materials supplier that files a construction lien to show that it applied payments correctly against several open accounts of a contractor that purchased materials for different building jobs. This opinion elaborates upon that obligation and holds that, when the contractor has not provided specific, reliable instructions as to the allocation of its payment based on the source of the payment funds, or when a reasonable supplier should suspect that the contractor has not used an owner's funds to pay for materials supplied for that owner, then the supplier must make further inquiry and attempt to verify the source of the payment funds so that it can allocate them to the correct accounts.

12-07-12 STEPHEN E. BURKE VS. RAYMOND BRANDES, ET AL.
A-3051-11T3

Reversing the Law Division, we held that a request of the Governor's Office for records concerning EZ Pass benefits afforded to retirees of the Port Authority, including correspondence between the Office of the Governor and the Port Authority, was not "overbroad" under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13.

12-07-12 IN THE MATTER OF THE VETO BY GOVERNOR CHRIS CHRISTIE OF THE MINUTES OF THE NEW JERSEY RACING COMMISSION FROM THE JUNE 29, 2011 MEETING AND THE ALLOCATION ACTION TAKEN AT THAT MEETING BY THE NEW JERSEY RACING COMMISSION
A-6028-10T3

The Thoroughbred Breeders' Association of New Jersey (the TBA) appealed from Governor Chris Christie's veto of the minutes of a meeting of the New Jersey Racing Commission. The Commission decided to distribute $15 million collected by the Casino Redevelopment Authority (CRDA) for the purpose of augmenting "purse monies" at New Jersey racing venues. The TBA challenged the constitutionality of the legislative scheme, adopted as part of the creation of the Atlantic City Tourism

District, that expressly permitted the Commission to request the monies for this purpose and the CRDA to distribute them, but, at the same time, preserved the Governor's power to veto the Commission's minutes, thereby rendering any action taken null and void.

We examined the various constitutional arguments made by the TBA and rejected them.

The TBA also argued that, even if the legislative scheme was constitutional and the Governor's veto permissible, his action was arbitrary, capricious and unreasonable. We concluded that our usual standard of review applicable to executive agency action did not apply to the discretionary actions of the Governor pursuant to an express legislative grant.

12-05-12 ENID SANTIAGO VS. NEW YORK & NEW JERSEY PORT AUTHORITY, ET AL.
A-5773-10T1

Plaintiff, a provisional police officer with the Port Authority Police Department, was terminated after what, she alleged, was a sham internal affairs investigation. She alleged violations of the LAD, CEPA and the Civil Rights Act (CRA). The judge dismissed the complaint, finding lack of subject matter jurisdiction based upon plaintiff's failure to provide notice prior to filing suit as required by N.J.S.A. 32:1-163 (requiring sixty days notice prior to filing suit).

Plaintiff argued that because New Jersey and New York adopted "complimentary" legislation addressing workplace discrimination and whistleblowing, and because no notice was required under New Jersey's Tort Claims Act prior to filing suit under the LAD, CEPA or the CRA, she need not have provided pre-suit notice to the Port Authority.

We affirmed. Without reaching a conclusion as to plaintiff's "complimentary" legislation argument, we decided that the Port Authority's waiver of sovereign immunity and limited consent to suit was expressly conditioned on pre-litigation notice. Given the failure to provide such notice, the court lacked subject matter litigation, regardless of the nature of plaintiff's claims.

12-04-12 FRANK R. CIESLA O/B/O THE VALLEY HOSPITAL VS. NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES, ET AL.
A-5309-10T1

We affirm the Government Records Council's ("GRC's") ruling that a draft report prepared by staff within the Department of Health concerning a hospital's then-pending, but ultimately withdrawn, application for a Certificate of Need comprises "deliberative material." Such material is excluded from the statutory definition of an obtainable "government record" under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1.1. We hold that the OPRA exemption for deliberative material is absolute, despite prior opinions that have suggested or presumed that the OPRA exemption is qualified.

We further hold that the GRC's jurisdiction is confined to OPRA matters and that it lacks authority to adjudicate common-law claims for access to public records. Under the common law, the deliberative process privilege is not absolute but qualified. Exercising our original jurisdiction, we reject appellant's common-law claim for access to the Department's draft report because the asserted need for disclosure does not outweigh the strong public policy in promoting robust and confidential internal advice to a governmental decision-maker.

11-28-12 AUGUSTINE W. BADIALI VS. NEW JERSEY MANUFACTURERS INSURANCE GROUP
A-2795-11T3

In a prior appeal, the court considered whether defendant New Jersey Manufacturers Insurance Group (NJM), an uninsured motorist (UM) insurer -- barred by its policy from rejecting an arbitration award under $15,000 -- was entitled to reject a $29,148.62 award when only liable to pay half. In adhering to D'Antonio v. State Farm Mut. Auto. Ins. Co., 262 N.J. Super. 247 (App. Div. 1993), which considered the same situation in an underinsured motorist (UIM) setting, the court concluded that the insurer was bound to the award and, therefore, affirmed a judgment that precluded NJM's demand for a trial de novo. Badiali v. N.J. Manufacturers Ins. Grp., No. A-4870-09 (App. Div. Feb. 28, 2011). In this subsequent action, plaintiff sought damages from NJM, arguing that NJM litigated in bad faith in advocating that its policy did not preclude a rejection of the arbitration award.

The court affirmed the summary judgment entered in favor of NJM, holding that NJM's position was fairly debatable because it found support in an earlier unpublished decision of this court.

11-16-12 RAYMOND TARABOKIA, JR., ET AL. VS. STRUCTURE TONE

A-3822-11T2

We affirmed the summary judgment dismissal of a negligence action by an employee of a subcontractor against the general contractor for a work-site injury, finding, under the circumstances presented, that the scope of the duty owed by the general or prime contractor does not encompass the manner and means of using equipment selected, supplied and controlled by the subcontractor.

11-16-12 L.A. VS. NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES, ET AL.
A-2726-11T1

This case required us to define the standard of care applicable to a physician treating a child in the context of the physician's duty to report child abuse to the Division of Child Protection and Permanency, formerly known as the Division of Youth and Family Services. The parties agreed that the standard of care is embodied in N.J.S.A. 9:6-8.10, which requires reporting by "[a]ny person having reasonable cause to believe that a child has been subjected to child abuse."

For reasons explained in the opinion, we concluded that "a physician has 'reasonable cause to believe' that there has been abuse if a 'probable inference' from the medical and factual information available to the physician is that the child's condition is the result of child abuse, including 'reckless' or 'grossly or wantonly negligent' conduct or inaction by a parent or caregiver. The inference need not be the 'most probable,' but it must be more than speculation or suspicion."

11-15-12 STATE OF NEW JERSEY VS. CHRISTOPHER CARRIGAN
A-3751-11T1

N.J.S.A. 2C:40-26(b), which became effective on August 1, 2011, makes it a fourth-degree crime for a motorist to operate a vehicle at a time when his or her driver's license is suspended or revoked for a second or subsequent conviction for driving while intoxicated ("DWI") or refusal to submit to an alcohol breath test. Defendant was charged with that crime, upon being found driving a car in September 2011 while his license was suspended due to multiple prior DWI offenses. The trial court dismissed the complaint, concluding that the application of N.J.S.A. 2C:40-26(b) to defendant violated ex post facto principles, essentially because his ongoing license suspensions had been imposed before the statute's effective date.

We reverse and conclude that a violation of N.J.S.A. 2C:40-26(b) comprises a new offense based upon new conduct, and that the statute does not impose retrospective punishment for a prior offense. Hence, the law may be constitutionally applied to drivers with suspended licenses, such as defendant, who are caught driving after August 1, 2011, regardless of whether their DWI-based suspensions were imposed before that date.

11-14-12 DEUTSCHE BANK NATIONAL TRUST COMPANY VS. CONRAD D. RUSSO AND IRENE RUSSO
A-2437-11T1

We affirmed the trial court's order denying the foreclosure defendants' 2011 motion to vacate a default judgment that was entered in 2009. Defendants contended that plaintiff lacked standing because it filed the foreclosure complaint before obtaining an assignment of the mortgage, although it obtained an assignment before the judgment was entered. Defendants further argued that because plaintiff lacked standing, the trial court lacked subject matter jurisdiction over the case. We concluded that, due to defendants' unexcused, years-long delay in asserting the standing defense, dismissal of the foreclosure complaint would not be an appropriate remedy. Therefore, in this context, lack of standing would not constitute a meritorious defense for purposes of the motion to vacate the foreclosure judgment. We also held that, in our State court system, standing is not a jurisdictional issue. Therefore, a foreclosure judgment obtained by a party that lacked standing is not "void," and defendants' reliance on Rule 4:50-1(d)(judgments void for lack of jurisdiction) was misplaced.

11-13-12 CRYSTAL ICE-BRIDGETON, LLC VS. CITY OF BRIDGETON, ET AL.
A-1687-11T1

In affirming summary judgment to various municipal defendants and a private contractor, we analyzed whether a property owner was entitled to notice before the contractor demolished the remainder of the owner's fire-damaged building. We concluded that the notice requirements contained in N.J.A.C. 5:23-2.32(b)(2) and the summary hearing safeguards provided in N.J.S.A. 40:48-2.5(f)(2) were inapplicable because the municipal fire chief, acting pursuant to N.J.S.A. 40A:14-54.1, had "sole authority" to direct the ongoing fire operations, including the demolition of the building, in order to protect the lives and property endangered by the fire, and he had not yet declared the

fire to be out. We also ruled that the municipal defendants, and the private contractor who acted at their direction, were immune from liability in these circumstances pursuant to the Tort Claims Act, N.J.S.A. 59:1-1 to 12-3.

11-08-12 STATE OF NEW JERSEY VS. NICQUAN D. SCOTT
A-4633-10T1

We focused on the mens rea needed to convict defendant of second-degree possessing, receiving, or transferring a community gun, N.J.S.A. 2C:39-4a(2), and analyzed whether the State must prove that defendant knew the firearm was a community gun. We held that defendant's knowledge of the communal character of a firearm is not an element of the statute.

11-05-12 ARLENE KANDRAC, ET AL. VS. MARRAZZO'S MARKET AT ROBBINSVILLE, ET AL.

In this appeal from an order granting summary judgment, we consider whether a commercial tenant in a multi-tenant shopping center owes a duty to its patrons to maintain an area of the parking lot that the landlord is contractually obligated to maintain. We hold that, although the determination of a duty remains a fact-sensitive issue, as a general rule, the commercial tenant does not have such a duty.

10-29-12 DAVID L. HAWK VS. NEW JERSEY INSTITUTE OF TECHNOLOGY, ET AL.
A-2059-11T3

A tenured professor at New Jersey Institute of Technology (NJIT) brought an action in the General Equity Part seeking to enjoin pending "detenure" proceedings against him, claiming deprivation of procedural due process in the university's internal investigation of his conduct. The action was dismissed for failure to exhaust administrative remedies, and we affirmed.

The assertion of a constitutional claim is but one factor to be considered in determining whether judicial intervention is justified, and in order to be relieved of the exhaustion requirement, that claim must be a colorable one and not dependent on facts to be developed at the administrative proceeding, or capable of being vindicated therein.

Here, plaintiff's constitutional claim does not rise to the level to warrant interlocutory judicial interference. The full panoply of procedural due process rights does not attend the

administrative investigative stage and the process actually afforded plaintiff pre-hearing was more than adequate.

10-29-12 NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY VS. JOSEPH MARCANTUONE, ET AL.
A-1868-10T3

Plaintiff New Jersey Schools Development Authority provided the funding for the City of East Orange to acquire by condemnation environmentally contaminated real property owned by defendants Joseph Marcantuone and Robert Gieson. Pursuant to Housing Authority of New Brunswick v. Suydam Investors, 177 N.J. 2 (2003), funds representing the estimated cost of remediation of the land were held in escrow pending a final determination on liability under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.24.

Relying on our decision in White Oak Funding, Inc. v. Winning, 341 N.J. Super. 294 (App. Div.), certif. denied, 170 N.J. 209 (2001), the trial court held defendants were not liable as a matter of law for the cost of remediation because they were not "in any way responsible" for the contamination. The court also held that defendants were not the current owners of the property at the time the contamination was discovered because plaintiff had previously been vested with title as condemnor under N.J.S.A. 20:3-19.

We reverse the trial court and hold that our decision in White Oak was in part implicitly superseded by the 2001 amendments to the Spill Act creating the "innocent purchaser" defense codified at N.J.S.A. 58:10-23.11g(d)(5). We remand for the court to determine whether defendants can establish, by a preponderance of the evidence, the four elements of the "innocent purchaser" defense. We also hold that in a post-condemnation proceeding to determine Spill Act liability under Suydam, defendants are deemed the "current owners" of the property, notwithstanding N.J.S.A. 20:3-19.

10-26-12 A.D.P. VS. EXXONMOBIL RESEARCH AND ENGINEERING COMPANY
A-4806-10T4

Plaintiff, a long-term employee, voluntarily disclosed to her employer that she was an alcoholic and was going to an in-patient rehabilitation program. At the time of her disclosure, plaintiff's job performance was satisfactory and she was not the subject of any pending or threatened employment or disciplinary action. Upon her return, the employer required her to agree to

conditions, including total abstinence and random alcohol testing for a minimum of two years, as a condition of employment. These conditions were not imposed pursuant to a "last chance agreement" but, rather, were required by ExxonMobil's Alcohol and Drug Use Policy. Her employment was terminated nearly one year later when a breathalyzer test revealed alcohol use. She filed suit, alleging discrimination based upon her disability and wrongful termination.

In this appeal, we consider whether summary judgment was properly granted to the employer. Viewing the record with favorable inferences drawn in favor of the plaintiff, the imposition of these conditions and the termination of plaintiff's employment pursuant to the employer's policy constituted direct evidence of discrimination. As a result, the burden of persuasion shifted to the employer, requiring it to show that the employment actions taken would have occurred even if it had not considered plaintiff's disability, see McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 525 (2003), a burden it failed to satisfy as a matter of law. We therefore conclude that summary judgment dismissing plaintiff's disability discrimination claim was inappropriate.

10-25-12 NEW JERSEY ASSOCIATION OF SCHOOL ADMINISTRATORS,ET AL. VS. CHRISTOPHER D. CERF, ET AL.
ROBERT H. HOLSTER VS. CHRISTOPHER D. CERF, ET AL.
A-4647-10T4/ A-4997-10T1(CONSOLIDATED)

The questions presented are whether: the salary cap exceeds the authority delegated to the Commissioner by the Legislature in N.J.S.A. 18A:7-1 to -16 (L. 2007, c. 63, §§ 42-58) or violates the Separation of Powers Clause, N.J. Const. art. III, ¶ 1; the cap on salary conflicts with the authority of a local school board to fix its superintendent's salary, N.J.S.A. 18A:17-19; application of the salary cap to superintendents whose contracts expired on June 30, 2011 is precluded by N.J.S.A. 18A:17-20.1 or -20.2; and the Commissioner violated the rulemaking provisions of the Administrative Procedure Act (the Act), N.J.S.A. 52:14B-1 to -24, by directing the ECSs to suspend review of renegotiated contracts pending adoption of the salary caps. Concluding that the answer to each of the foregoing questions is "No," we uphold the agency's actions.

10-23-12 STATE OF NEW JERSEY VS. MICHAEL CARRERO
STATE OF NEW JERSEY VS. ANDRES F. BALUSKI
A-3232-11T3/ A-4319-11T3 (CONSOLIDATED)

We review discovery orders separately issued in these two DWI cases authorizing defense counsel and/or defense experts to inspect and photograph rooms within the police stations where their respective clients provided breath samples on the Alcotest device in order to verify that the tests were properly administered. In Carrero, such access was granted to help ascertain whether devices emitting radio frequency interference (RFI) had been located in the station within 100 feet of the testing area. In Baluski, such access was granted to help ascertain whether the interior layout of the station physically prevented defendant from being observed for the required twenty minutes before testing.

We reverse the discovery orders because neither defendant has shown a reasonable justification to conduct the requested inspection.

We conclude that Carrero's request is insufficient in light of the Supreme Court's binding legal and evidentiary determination in State v. Chun, 194 N.J. 54, 89, cert. denied, 555 U.S. 825, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008), that the Alcotest is designed in a manner that is "well shielded from the impact of any potential RFI," and also in light of the State's countervailing security interests disfavoring routine civilian access to the interior of a police station.

We conclude that Baluski's request is likewise insufficient because he has presented no affirmative basis to believe that an officer failed to observe him for the twenty pre-testing minutes required by Chun, supra, 194 N.J. at 79, and also in light of the State's countervailing security interests.

10-19-12 J.D. VS. M.A.D.
A-2229-11T4

We review a wife's appeal of that portion of a domestic violence final restraining order entered against her husband, granting him exclusive possession of their marital home and temporary custody of their two children. Because that order denied the victim of domestic violence temporary custody of her children, contrary to the statutory presumption contained in N.J.S.A. 2C:25-29b(11), and restrained her from her home without statutory authorization, we reverse.

10-19-12 FRANCIS NATHANIEL CLARK VS. DENISE LOCKWOOD CLARK
A-1147-11T1

We reversed the trial court's award of alimony, holding defendant's long-term scheme to embezzle more than $345,000 from the joint marital business while serving as the business's bookkeeper, led to plaintiff's fault-based claim for divorce, caused more than a mere economic impact upon the marital assets, and demonstrated the rare case of egregious fault justifying consideration of whether defendant's marital misconduct obviated an award of alimony.

10-17-12 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. L.J.D.IN THE MATTER OF THE GUARDIANSHIP OF A.T.D., A MINOR
A-5896-10T3

We examine a young mother's challenges to a judgment of guardianship terminating her parental rights. Appellant was fourteen when her son was born and she was a child in the custody of the Division of Youth and Family Services, now known as the Division of Child Protection and Permanency. Appellant's placement required her child to be placed in the Division's custody.

Significant is Appellant's challenge that the Division failed to extend reasonable efforts to provide services to aid correction of circumstances necessitating her child's placement. Claiming her age caused the child's removal, appellant suggests the Division must continue services that previously were unsuccessful because of her youth.

In making the required fact-sensitive review of whether the services extended were reasonable, we believe the Division's burden, in this exceptional instance, is a heightened one, dictated by the special circumstance posed by a child-parent's young age. We conclude the Division's efforts must include satisfactory services to aid the development of the child-parent's maturation and necessary skills to adequately parent his or her child. The balancing test considers, on the one hand, the child-parent's abilities, motivations, capabilities and other familial resources to reach this goal, and, on the other hand, the infant's need for achieving stability and permanency within a reasonable time period.

10-16-12 LEE HOAGLAND AND DENISE HOAGLAND v. CITY OF LONG BRANCH
A-0538-11T2/A-1583-11T2(CONSOLIDATED)

In this case, we consider whether plaintiffs, who had been the subject of eminent domain actions the municipality later abandoned, could recover compensation over and above the litigation expenses they were paid under N.J.S.A. 20:3-35. We hold that, because the municipality followed all the statutory requirements in bringing and later abandoning the actions, there was no "temporary taking" of plaintiffs' properties under the Eminent Domain Act, N.J.S.A. 20:3-1 to -50. We also reject plaintiffs' contention that a temporary taking occurred when the trial judge found the municipality had the authority to take possession of their properties. Finally, we hold that a taking did not occur under general constitutional principles. We therefore affirm the trial court's grant of summary judgment to the municipality.

10-11-12 DEUTSCHE BANK TRUST COMPANY AMERICAS, F/K/A BANKER'S TRUST COMPANY, AS TRUSTEE VS. YONY R. ANGELES
A-2522-11T1

Defendant in this foreclosure case cited our decision in Deutsche Bank National Trust Co. v. Mitchell, 422 N.J. Super. 214 (App. Div. 2011), in support of his challenge to the Chancery judge's refusal to allow him to raise the issue of standing based on a late assignment of mortgage. We affirmed, holding that defendant, who did not contest the foreclosure, waited too long to raise the issue of standing. He raised the issue for the first time more than three years after default on the mortgage, and after entry of final judgment, mediation, sheriff's sale, and hardship stay of eviction.

10-10-12 STATE OF NEW JERSEY VS. BARTHOLOMEW P. MCINERNEY
A-5292-09T1

We reversed defendant's conviction for second-degree child endangerment, N.J.S.A. 2C:24-4a, because the trial court's jury instruction, patterned after the Model Jury Charge, allowed for a conviction based on a relationship between defendant, a high school athletic coach, and student-victims, not statutorily prescribed.

10-09-12 WILLIAM C. BUCHANAN VS. JEFFREY LEONARD, ESQ. AND MORGAN, MELHUISH, MONAGHAN, ARVIDSON, ABRUTYN & LISOWSKI, ESQS., A PARTNERSHIP
A-2243-11T4

The litigation privilege does not preclude a client from asserting a legal malpractice claim against the attorney who

represented him in a prior malpractice action where the attorney provided the client's insurance carrier a memo seeking settlement authorization, in which the attorney stated the client had committed a criminal act, thereby allegedly causing the carrier to withdraw coverage.

10-04-12 NATURAL MEDICAL, INC., ET AL. VS. NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES, ET AL.
A-3406-10T1

We hold that the Department of Health did not act arbitrarily, unreasonably or in contravention of the New Jersey Compassionate Use Medical Marijuana Act, N.J.S.A. 24:6I-1 to -16 (Act), in limiting the initial permitting to the statutorily-mandated minimum of six alternate treatment centers (ATCs) to cultivate and distribute marijuana. The Act further requires that the first six ATCs are to be operated by non-profit entities. Appellants, a for-profit corporation and its principal, did not have an unqualified right to apply for permits to operate ATCs and to have their applications processed and evaluated irrespective of need.

10-02-12 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. S.N.W.
IN THE MATTER OF A.W. AND E.W.
A-0504-11T4

The mere fact that a parent appeared inebriated is not necessarily determinative of whether that parent was providing a minimum degree of care. As a result, the court vacated an order based solely on a determination that the parent had abused or neglected her twenty-month old and five-month old children by appearing inebriated. The court concluded that the trial judge failed to determine the parent's degree of culpability, particularly in light of uncertainty about whether the parent had exceeded the prescribed amount of Xanax she was then taking and whether that circumstance prevented her from being able to provide a minimum degree of care.

09-28-12 GASKILL VS. CITI MORTGAGE
A-5832-10T2

Plaintiffs sought to cancel a judgment obtained prior to filing a petition in bankruptcy pursuant to N.J.S.A. 2A:16-49.1. Although the judgment creditor had not levied on the real property owned by plaintiffs prior to the bankruptcy filing and the judgment was eligible for cancellation, plaintiffs had

failed to list the judgment creditor or the judgment in their petition. Therefore, the judgment creditor had no knowledge of the bankruptcy filing or the discharge in bankruptcy and no opportunity to enforce its judgment post-discharge and before plaintiffs filed their complaint to cancel the judgment. We held that the motion judge properly tolled the period in which the judgment creditor could seek to enforce its judgment until one year following conclusion of this litigation. We reasoned that the statutory remedy provided by N.J.S.A. 2A:16-49.1 assumes knowledge by the judgment creditor of the bankruptcy proceedings and the discharge in bankruptcy. Here, it was undisputed that the judgment creditor had no knowledge of the bankruptcy proceeding before plaintiffs filed to cancel the judgment.

09-27-12 S.P. VS. NEWARK POLICE DEPARTMENT, ET AL.
A-5591-10T3

We granted leave to the City to appeal denial of a motion for summary judgment seeking to dismiss the complaint of a sexual assault victim for damages based on its police officers' earlier failure to arrest and remove the assailant pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-21. We address the interplay of the Tort Claims Act and the PDVA. We affirm the trial court's conclusion that the victim and attacker, boarders in a rooming house, can be considered "household members" under the PDVA. However, we reverse the denial of summary judgment, holding the PDVA does not expressly create an exception to the immunity provisions of the TCA such that the failure of police to arrest the attacker subjects the public entity to liability for subsequent damages to the victim, where the officers determined she was not a victim of domestic violence and exhibited no visible injuries.

09-21-12 KELLY RAMOS VS. HERBERT FLOWERS, ET AL.
A-4910-10T3

Plaintiff, who asserts that he was in the process of filming a documentary about gang activity in a public area, filed suit against the police officer whom he alleges ordered him to stop filming, claiming that the officer violated his free-speech rights under Article I, paragraphs 6 and 18 of the New Jersey Constitution, as well as the First Amendment to the United States Constitution. He brought the suit under the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2. The Law Division granted defendant's motion for summary judgment and

dismissed the complaint, finding that qualified immunity barred the free-speech claims. We reversed.

We determined that the affirmative defense of qualified immunity is available in actions brought under the Civil Rights Act, just as it is in actions brought under 42 U.S.C.A. § 1983. However, as is the case with § 1983, it is only applicable to claims for money damages and does not apply to injunctive relief.

We further determined that the motion judge erred in applying the defense on summary judgment because the alleged actions of defendant, taken in the light most favorable to plaintiff, violated plaintiff's free-speech rights, which we held were well-established at the time of the incidents that gave rise to plaintiff's claims. Under those circumstances, qualified immunity is not applicable.

We remanded claims involving allegations of an unlawful arrest for further consideration and the articulation of reasons for the dismissal of those claims.

09-18-12 STATE OF NEW JERSEY VS. RODNEY CULLEN
A-5474-10T1

After defendant waived his right to testify and rested, but before summations and before the occurrence of any other substantive event during this criminal trial, defendant changed his mind and sought a reopening of the record so he might testify. The trial judge denied the application and defendant was convicted. The court reversed and remanded for a new trial, finding any delay caused by defendant's change of course was outweighed by his constitutional right to testify.

09-12-12 KATHERINE MILNE VS. ROBERT GOLDENBERG
A-4062-10T4/A-4319-10T4/A-4594-10T4 (CONSOLIDATED)

In this matrimonial matter the parties raised several challenges to four Family Part orders. Two significant issues warrant publication of our opinion. First, we examined the scope of the hearing regarding a report by a guardian ad litem (GAL) as required by Rule 5:8B. The trial judge limited the evidentiary hearing to examination, including cross-examination, of the GAL, after rejecting plaintiff's request to testify and allow an adjournment to obtain an expert opinion. We determined the trial judge employed too restrictive an interpretation of

Rule 5:8B, and clarified the parties' ability to contest the facts presented by a GAL.

Second, we reversed as error the trial court's appointment of a parenting coordinator (PC) without conforming to the Supreme Court Guidelines implementing the PC Pilot Program as he believed the Guidelines applied only to pilot counties, which did not include Essex County. We held that although parties to a matrimonial dispute may agree to accept defined obligations regarding use of a PC, which do not violate the public policy of this State, any Family Part judge ordering the appointment of a PC must comply with the Supreme Court's established Guidelines.

09-10-12 BARBARA GONZALEZ, ET AL. VS. STATE OF NEW JERSEY APPORTIONMENT COMMISSION, ET AL.
A-0747-11T4; A-0869-11T4(CONSOLIDATED)

In this appeal, we affirm the order dismissing a complaint filed by numerous individuals and groups challenging the legislative reapportionment map approved by the State of New Jersey Apportionment Commission.

09-10-12 JOHN MULLEN AND HOWARD LEVINE VS. THE IPPOLITO CORPORATION, ET AL.
A-5823-10T3

Plaintiffs, the owners of a single-family house adjacent to a preexisting nonconforming motel, filed an action in lieu of prerogative writs seeking mandamus relief against the Borough of Point Pleasant Beach and its zoning, construction, and dune protection officials. Plaintiffs claimed that, over a period of years, the municipal defendants ignored their numerous complaints that the motel was expanding its physical footprint and intensifying its business operations, all in violation of municipal zoning and dune protection ordinances.

The trial court granted the municipal defendants' motion for summary judgment finding that plaintiffs' complaint was untimely under Rule 4:69-6a, and for failure to exhaust administrative remedies under Rule 4:69-5. Relying on Garrou v. Teaneck Tryon Co., 11 N.J. 294 (1953), we now reverse and hold the trial court should not have dismissed plaintiffs' complaint against the municipal defendants.