DATE NAME OF CASE (DOCKET NUMBER)

09/05/14 ALLIED BUILDING PRODUCTS CORP. VS. J. STROBER & SONS,LLC, ET AL.
A-1113-12T4

This is a suit on a surety bond. Dobco, Inc. (Dobco) appeals from a final judgment denying its motion for partial summary judgment against Colonial Surety Company (Colonial), surety for J. Strober & Sons, LLC (Strober), Dobco's subcontractor, and granting Colonial's motion for summary judgment dismissing Dobco's claims against Colonial. The Law Division dismissed Dobco's claims against Colonial under the bond on the ground that the bond did not name Dobco as the obligee and because Dobco had rejected the bond as not in the form required by its subcontract with Strober. We deem neither of those facts material because we conclude that in entering into its surety contract with Strober, Colonial obligated itself to issue a performance bond to Dobco in the form annexed to the Dobco/Strober subcontract. Accordingly, we reverse.

09/05/14 STATE OF NEW JERSEY VS. SALADIN THOMPSON
A-1375-11T4/A-2154-11T4 (CONSOLIDATED)

In this appeal, we set aside defendant's convictions for murder and weapons offenses, after our earlier remand to the trial court to conduct a hearing pursuant to State v. Gilmore, 103 N.J. 508 (1986). Based upon our review of the remand record, we determined that we were unable to determine whether the State's exercise of seven of its nine peremptory challenges to excuse African-Americans was the product of impermissible discrimination as opposed to situation-specific bias, because the court failed to engage in the requisite "third-step" analysis established in Gilmore.

09/03/14* STATE OF NEW JERSEY VS. MARK C. SHEPPARD
A-1423-11T4/ A-0195-12T4(CONSOLIDATED)

In this appeal, we consider State v. Rose, 206 N.J. 141 (2011) in the context of when other bad acts evidence do not occur contemporaneously with the crime charged and therefore requires "intrinsic"/"non-intrinsic" analysis. A jury found defendant guilty of second-degree aggravated assault and four other offenses, arising out of the stabbing of a Hispanic man. Defendant asserts the trial judge erred by failing to

suppress, appropriately sanitize, or properly instruct the jury on the evidence concerning an encounter with the police that occurred three months after the stabbing, in which defendant revealed himself as a loud, aggressive, and foul-mouthed drunk, who made a single anti-Hispanic comment referencing the victim. We reverse and remand for a new trial, concluding the trial court mistakenly exercised its discretion when it admitted the bulk of the evidence concerning the prior encounter, without appropriate "sanitization" or jury instructions. In a companion case, we affirm the trial court's denial of a suppression motion and resulting conviction of weapons offenses. [*Approved for Publication date]

09/02/14* NEW CENTURY FINANCIAL SERVICES, INC., VS. AHLAM OUGHLA/ MSW CAPITAL, LLC, VS. AZEEM H. ZAIDI
A-6078-11T4/A-6370-11T1(CONSOLIDATED)

In these two appeals we consider the proofs necessary for plaintiffs to prevail on summary judgment in an action to collect an assigned debt on a closed and charged-off credit card account.

In considering whether plaintiffs established prima facie proof of their claims of ownership of the defendant's charged-off debt and the amount due the card issuer when it charged off the account, we hold that lack of notice to the debtor of the sale of the debt does not affect the validity of the assignment; the assignment need not specifically reference defendant's name or account number and instead may refer to an electronic data file containing that information; a plaintiff need not procure an affidavit from each transferor in its chain of assignments and may instead establish prima facie proof of ownership on the basis of business records documenting its ownership; and that an electronic copy of the periodic billing statement for the last billing cycle is prima facie proof of the amount due on the account at charge off. Applying those standards to the facts presented on the motions, we affirm one judgment and reverse the other. [*Approved for Publication date]

09/02/14 KATHLEEN KRUPINSKI N/K/A KATHLEEN GOCKLIN VS. MICHAEL KRUPINSKI
A-2300-12T2

Defendant appeals from the order of the Family Part denying his motion to terminate his obligation to pay

permanent alimony. Although the motion judge found defendant's retirement created "changed circumstances" under Lepis, the judge did not consider whether plaintiff can maintain her former marital lifestyle after she began receiving her equitable distribution share of defendant's pension. Although under N.J.S.A. 2A:34-23(b), the share of retirement benefits that has been equitably distributed is not "income" to plaintiff for purposes of determining alimony, defendant must be given the opportunity to prove that the value of plaintiff's share of his retirement benefit was enhanced by his "post-divorce efforts." If defendant is able to quantify the value of his post-divorce efforts, the court must then consider that "enhanced value" as "income" to plaintiff and outside the bar in N.J.S.A. 2A:34-23(b). If this "income" to plaintiff allows her to maintain a lifestyle equal to or better than her marital lifestyle, defendant is entitled to terminate his permanent alimony obligation. We reverse and remand for limited discovery and an evidentiary hearing.

08/27/14 KHASHAYAR VOSOUGH, M.D., ET AL. VS. ROGER KIERCE, M.D., ET AL.
A-3017-11T1

In this common law contract and tortious interference case, plaintiff doctors claimed damages on the ground that defendant hospital's bylaws were violated and not enforced by the hospital. The jury's verdict of about $1.27 million for plaintiffs is reversed because they did not have viable theories of recovery and because they did not prove compensable damages.

The same conduct of the individual defendants (the hospital's CEO and a department chairman) that allegedly constituted their tortious interference with plaintiffs' independent contractor agreements could not also constitute their conduct on behalf of the hospital that constituted the hospital's breach of the contract.

Furthermore, the at-will independent contractor agreements limited the doctors' claim for future lost income to 60 days, which was the time for notice by either party that the contract would be terminated.

08/25/14 STATE OF NEW JERSEY V. JAMES W. FRENCH
A-4963-13T1

A sentence of 90 days in jail followed by 90 days in an inpatient drug rehabilitation program does not satisfy the "fixed minimum sentence of not less than 180 days during which the defendant shall not be eligible for parole" mandated for the fourth-degree crime of operating a motor vehicle during a period of license suspension for multiple convictions of driving while intoxicated. N.J.S.A. 2C:40-26(b).

08/20/14* DYFS vs. S.I. I/M/O S.I., a minor.
A-2878-12T1

We reversed an order of abuse and neglect resulting from a custodial grandparent's refusal to comply with the Division's recommendation for the twelve-year-old child to undergo a psychiatric assessment. The grandmother insisted the child was rebelling and acting out, and was not suicidal. The Division removed the child, obtained what was an unremarkable mental health assessment, and filed Title 9 complaint alleging medical neglect.

We concluded there was no competent evidence the conduct complained of rose to the level of abuse and neglect because there was no proof the disagreement with the Division's recommendation recklessly created a substantial risk to the child's mental or physical safety, as required by N.J. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1 (2013). The trial judge's view that an immediate mental status evaluation was necessary was based on a generalized concern for teenage suicide and untethered to the facts of the case, which was void of factual or expert evidence demonstrating the child was in imminent danger. [*Approved for Publication date]

08/18/14 JAMES F. WALTERS V. YMCA
A-1062-12T3

Plaintiff sued the YMCA after he slipped and fell on steps that led to the indoor pool. The trial court granted defendant's motion for summary judgment and dismissed plaintiff's complaint based on an exculpatory clause included in the membership agreement plaintiff signed to access YMCA's facilities and physical fitness equipment. The motion judge found plaintiff's cause of action was barred under the Court's holding in Stelluti v. Casapenn Enters., Inc., 203 N.J. 286 (2010).

We reverse because the type of expansive exculpatory clause involved here was specifically not addressed by the

Court in Stelluti. Applying the standard for enforceability in Gershon v. Regency Diving Ctr., Inc., 368 N.J. Super. 237, 248 (App. Div. 2004), endorsed by the Court in Stelluti, we hold the YMCA's exculpatory clause is unenforceable because it would eviscerate the common law duty of care owed by the YMCA to its invitees, regardless of the nature of the business activity involved.

08/15/14 STATE OF NEW JERSEY V. WILLIAM SMULLEN
A-0722-12T4

Defendant pled guilty in 2003 to two counts of second degree sexual assault, N.J.S.A. 2C:14-2c(4), based on having consensual sexual intercourse on two separate occasions with a fifteen-year-old girl. In this appeal from the denial of a PCR petition, we hold defendant established a prima facie case of ineffective assistance of counsel based on his attorney's failure to inform him, before he pled guilty, of the nature and scope of the community supervision for life restrictions he would face in his home state of New York, pursuant to N.J.S.A. 2C:43-6.4. We remand the PCR judge to conduct an evidentiary hearing, pursuant to Rule 3:22-10(b), to determine whether there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial. State v. Nunez-Valdez, 200 N.J. 129, 138 (2009).

08/12/14 THE RIDGE AT BACK BROOK, LLC VS. W. THOMAS KLENERT
A-2345-12T1

Defendant represented himself from the commencement of the action, through the summary judgment stage and when final judgment was entered. Following the entry of final judgment, defendant retained counsel and unsuccessfully sought Rule 4:50 relief, arguing he could not previously afford counsel and did not understand what was required of him in responding to Rule 4:22 requests or in opposing summary judgment. In this appeal, the court vacated the order denying Rule 4:50 relief, concluding the trial judge should have more liberally indulged defendant's argument and remanding for that purpose. The court held the Rule 4:50 motion should have been treated in the same manner as such motions are treated when the moving party has been represented by a negligent attorney, as in cases such as Parker v. Marcus, 281 N.J. Super. 589, 593 (App. Div. 1995), certif. denied, 143 N.J. 324 (1996).

08/11/14 STATE OF NEW JERSEY VS. ARMANDO CARREON
A-5501-12T1

This appeal requires us to consider whether a never-licensed driver may be fined and sentenced to a custodial term under the penalty provisions of N.J.S.A. 39:3-10. Because we agree that the statute allows a fine or imprisonment but not both, even for drivers, who, like defendant, have never been licensed, we reverse defendant's sentence and remand to the Law Division for resentencing.

08/07/14 GLOBE MOTOR COMPANY AND THE MARGOLIS LAW FIRM, LLC VS. ILYA IGDALEV AND JULIA IGDALEV
A-0897-12T1

Plaintiffs' action sought enforcement of the terms of settlement, when a portion of the funds transferred by defendants in satisfaction of their obligations was reclaimed by a Chapter 7 Bankruptcy Trustee as a fraudulent transfer of the corporate debtor's funds. Defendant Ilya Igdalev certified the bank and certified checks he gave plaintiffs were sent by his friend, who was holding Ilya's money, which he was owed. In support of summary judgment, plaintiffs attached the Trustee's adversary proceeding, emails from bankruptcy counsel suggesting, after his review, settlement was appropriate, and the final settlement of the adversary proceeding.

We concluded, as did the motion judge, the documents sufficiently showed the money came from the debtor corporation and Ilya's claim his friend was to send his money did not defeat the fact his friend actually used the debtor corporation's funds. Also, Ilya never asserted the debtor owed him money.

We concluded even if Ilya was unaware of his friend's conduct, he directed the transaction and is responsible for the consequences. In accordance with the terms of settlement, defendants were liable to pay plaintiff the sum accepted by the Chapter 7 Trustee, along with attorney's fees and costs.

Judge Sapp-Peterson dissents, reasoning summary judgment should have been granted in favor of defendants on the breach of contract claim as a matter of law. As for plaintiffs' remaining claims of breach of the covenant of good faith and fair dealing, fraud, unjust enrichment and indemnification, she finds there are genuinely disputed issues of fact

surrounding the source of the funds utilized to satisfy defendants' obligations under the settlement agreement, which are sufficient to defeat summary judgment. She would reverse and remand for trial on those remaining claims.

08/06/14 K.A.F. VS. D.L.M.
D.L.M. VS. K.A.F. AND F.D.
A-0878-12T2

We hold that the consent of both fit and active legal parents to the creation of a psychological relationship between their child and a third party is not necessary for standing on the part of the third party to bring an action asserting psychological parenthood. It is sufficient if only one of the legal custodial parents has consented, and such consent need not be explicit, but may be gleaned from the circumstances. The status of the non-consenting parent, rather, is one factor among many a court should consider in determining whether the third party has established that he or she is a psychological parent, and, if so, whether the best interests of the child warrant some form of custody or visitation.

07/29/14 STATE OF NEW JERSEY VS. DONNA JONES
A-0793-13T1

We granted the State leave to appeal from an order that suppressed the results of a blood sample taken without a warrant prior to Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), and now reverse. Defendant caused a multiple vehicle accident, resulting in personal injuries that required hospitalization. Emergency personnel took approximately thirty minutes to extricate the unconscious defendant from her vehicle and the police investigation took several hours.

It is undisputed that the blood sample was obtained consistent with New Jersey law that existed at the time. We need not decide whether McNeely should be applied retroactively because the facts support a warrantless blood sample even if McNeely applies. Although McNeely rejected a per se exigency rule, it adhered to the totality of the circumstances analysis set forth in Schmerber v. California, 384 U.S. 757, 771-72, 86 S. Ct. 1826, 1836, 16 L. Ed. 2d 908, 920 (1966), stating the metabolization of alcohol was an "essential" factor in the analysis. Further, the Court noted

that the facts in Schmerber which, like here, included an accident, injuries requiring hospitalization, and an hours-long police investigation, were sufficient to justify a warrantless blood sample.

07/29/14 I/M/O GOVERNOR CHRIS CHRISTIE'S APPOINTMENT OF MARTIN PEREZ AS PUBLIC MEMBER 7 OF THE RUTGERS UNIVERSITY BOARD OF GOVERNORS
A-6047-12T3

In this case, Senate President Stephen M. Sweeney challenges Governor Chris Christie's appointment of Martin Perez to the Rutgers Board of Governors. We hold that the Appellate Division has jurisdiction to hear the appeal, the appeal should not be dismissed as untimely, and the Senate President has standing to challenge the Governor's action. We also hold that Governor's appointment of Perez without the advice and consent of the State Senate is a valid exercise of authority conferred on the Governor by the New Jersey Medical and Health Services Education Restructuring Act, L. 2012, c. 45.

07/29/14 STATE OF NEW JERSEY VS. ALFRED J. SMITH
A-0173-12T3

In this pre-State v. Henderson, 208 N.J. 208 (2011) matter, we reversed the denial of defendant's motion to suppress an out-of-court eyewitness identification following a show-up and vacated defendant's conviction. We determined police failed to properly comply with the recording requirements of State v. Delgado, 188 N.J. 48, 63 (2006). Specifically, they did not detail the out-of-court identification procedures or preserve the language exchanged between police and the witness prior to the show-up. More important, the motion judge made flawed factual findings following the Wade hearing and we found no support in the record for the conclusion the victim's identification of defendant was reliable. The victim's description of the man who mugged her was he was "tall and black." Scrutinizing the totality of the facts and circumstances, we rejected as unfounded the motion judge's finding that the victim had the ability to perceive and accurately identify defendant as her attacker.

07/28/14 R.K. VS. F.K.
A-4165-11T4

Under the two-step process outlined in Lepis v. Lepis, 83 N.J. 139 (1980), a movant seeking a change of custody must show a change of circumstances warranting relief to be entitled to an evidentiary hearing, but the judge must decide the evidentiary hearing based on the best interests of the child. After a seven-day divorce trial focused on child custody, the trial court mistakenly found no substantial change in circumstances rather than determining the best interests of the children.

The trial court also erred by relying on the Domestic Violence Act's provision that the court "shall presume that the best interests of the child are served by an award of [temporary] custody to the non-abusive parent." N.J.S.A. 2C:25-29(b)(11). That presumption, important in the initial FRO proceeding, has no application in a subsequent custody determination in a divorce trial, particularly once a change of circumstances has been shown. Rather, that trial is governed by N.J.S.A. 9:2-4, under which "the history of domestic violence" is one factor among several that the court must consider in determining the best interests of the children.

07/25/14 DARCY J. KOLODZIEJ VS. BOARD OF EDUCATION OF SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY
A-4826-12T1

We hold that maternity leave constitutes continued employment under N.J.S.A. 18A:28-5(a), entitling petitioner in this matter to tenure protection and status under the school district's Reduction In Force (RIF) plan.

07/21/14 MICHAEL C. KAIN VS. GLOUCESTER CITY, ET AL.
A-4854-12T2

The plan or design immunity provision of the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to :12-3, applies to injuries caused by "the plan or design of public property" approved "by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval . . . ." N.J.S.A. 59:4-6(a) (emphasis added). This case requires us to decide whether this provision exempts municipal defendants from liability for an allegedly dangerous condition in a pier designed by the Coast Guard and, specifically, whether the

Coast Guard falls within the scope of the term, "some other body," under the statute. We decide that it does. We also conclude that the Charitable Immunity Act applies to the non-municipal defendants.

07/17/14 IN THE MATTER OF THE EXPUNGEMENT APPLICATION OF P.H.
A-1345-13T4

We consider the application of the expungement statute, N.J.S.A. 2C:52-1 to -32, where petitioner was charged with a fourth degree offense but ultimately agreed to a violation of a statute for which he paid a civil penalty. Petitioner requested expungement of all criminal records, which was granted by the trial judge; records of the civil violation and the file of the NJSPCA were not subject to expungement.

The State appealed, advancing numerous reasons for reversal, primarily arguing the final disposition controls whether expungement relief is available. Maintaining the initial criminal charges were part of the same file that was disposed of through a plea agreement allowing defendant to pay a civil penalty, the State asserts expungement cannot be permitted. We disagreed and concluded petitioner was not convicted and the final disposition was not a plea agreement. Rather, the criminal charges were dismissed. Accordingly, expungement was permitted under N.J.S.A. 2C:52-6(a).

07/17/14 STATE OF NEW JERSEY VS. CALVIN PRESLEY, ET AL.
A-4816-12T2

In State v. McCann, 391 N.J. Super. 542 (App. Div. 2007), we announced a prospective "bright-line rule" that called for invalidating search warrants issued by a judge who was bound to recuse himself or herself based on a prior relationship. Upon being advised he had prosecuted one of the defendants when he was an assistant prosecutor, the trial judge recused himself. So, the question here is not one of recusal but of remedy. Defendants here ask us to apply McCann to the following facts: the judge prosecuted only one of the defendants; no defendant alleges the judge was biased or aware of the disqualifying facts when he issued the warrants or that there was insufficient probable cause for their issuance; and finally, the defendant prosecuted by the judge withheld the disqualifying facts while appearing before the judge on unrelated matters for "strategic" reasons for over a year. We conclude that McCann is distinguishable; the

remedy sought by defendants will not serve the interests of the Code of Judicial Conduct; and the appropriate remedy should be determined by what is "required to restore public confidence in the integrity and impartiality of the proceedings, to resolve the dispute in particular, and to promote generally the administration of justice." DeNike v. Cupo, 196 N.J. 502, 519 (2008).

07/17/14* STATE OF NEW JERSEY VS. TWO THOUSAND TWO HUNDRED NINETY-THREE DOLLARS ($2,293) IN UNITED STATES CURRENCY
A-4929-11T3

The State sought forfeiture of monies seized during the execution of a search warrant; defendant filed an answer denying that the monies were subject to forfeiture. The defendant was subsequently indicted, and the State obtained a stay of the civil forfeiture proceedings pending resolution of the criminal case. Defendant was found guilty by a jury and sentenced. While still incarcerated, he moved in the Special Civil Part for the return of the monies seized. He requested oral argument on the motion.

The notice of the motion hearing was sent to a post office box at Northern State Prison, the address provided by defendant in his motion papers. However, before the hearing date, the notice was returned to court marked "return to sender, insufficient address, unable to forward." Nevertheless, the matter proceeded on the hearing date with only the prosecutor present.

Without testimony, the judge entered an order denying defendant's motion and ostensibly granting the State a judgment of forfeiture.

We reversed, finding defendant was deprived due process by the Court's failure to provide notice of the hearing. In providing guidance for future proceedings, we commented on the prove of predicate facts necessary before the State may invoke the presumption contained in N.J.S.A. 2C:64-3(j). [*Approved for Publication date]

07/10/14 STATE OF NEW JERSEY VS. QUAHEEM JOHNSON
A-3363-13T3

In this case of first impression we held that a trial court improperly terminates a defendant's prosecution, within

the meaning of N.J.S.A. 2C:1-9, by accepting a partial verdict where the jury is deadlocked as to greater, charged offenses, but is unanimous in its finding of guilt as to uncharged, lesser-included offenses.

An indictment charged defendant with various offenses, including murder, felony murder and armed robbery, relating to his committing two separate robberies and killing one of the victims. A jury could not reach a unanimous verdict as to those charges but, as to murder and armed robbery, convicted defendant of uncharged, lesser-included offenses. Despite the jury being deadlocked as to the greater, charged offenses, the trial court accepted the jury's verdict and had it recorded. The State sought thereafter to retry defendant on felony murder, and defendant moved to bar a retrial arguing that double jeopardy principles and the improper termination of his prosecution barred a new trial as to those charges. The trial court agreed with defendant's arguments and granted his motion. We stayed further proceedings and granted the State leave to appeal the trial court's order.

After considering the State's argument in the context of the unusual circumstances of this case, we agreed with the trial court that a retrial on felony murder was barred by the improper termination of defendant's prosecution arising from the taint to the jury's verdict caused by the trial court's (1) acceptance of a partial verdict, (2) its failure to insist on there being a unanimous not guilty verdict before taking the verdict on the uncharged, lesser-included offenses, (3) its failure to review the verdict sheet with the jurors, combined with (4) the apparent confusion caused by the court's initially telling the jury to not inform the court if it was deadlocked. We also again restated our concern about the problems that can be created by accepting partial verdicts before a trial court has conducted the appropriate investigation as to whether a jury's deadlock is intractable.

07/08/14 STATE OF NEW JERSEY VS. DANIEL A. BORJAS
A-6292-11T2

Defendant was found guilty by a jury of three counts of knowingly making false government documents, second-degree offenses proscribed by N.J.S.A. 2C:21-2.1(b), and four counts of knowingly possessing false government documents, fourth-degree offenses proscribed by N.J.S.A. 2C:21-2.1(d). The incriminating items were created or stored in hard drives on computers at defendant's residence. The items were

discovered by law enforcement officers pursuant to a search warrant, although the officers found no printouts of the false items.

We reject defendant's argument that subsections (b) and (d) of N.J.S.A. 2C:21-2.1 are unconstitutionally overbroad because they allegedly infringe too much upon protected forms of expression. In doing so, we do not foreclose a future "as-applied" challenge to the statute by an artist, student, or other person who, unlike the present defendant, makes or stores false images for benign reasons involving constitutionally-protected speech.

Additionally, we reject defendant's argument that the statute is void for vagueness because it lacks an express element requiring the State to prove a defendant's specific intent to use the false items for illicit purposes. We also reject defendant's criticisms of the trial judge's jury instruction defining the term "document" under the statute to encompass items or images stored on a computer. The instruction is consistent with the broader meaning associated with the term "document" in common modern usage.

In an unpublished portion of the opinion, we uphold defendant's seventy-eight-month flat custodial sentence.

07/03/14 IN RE CHALLENGE OF CONTRACT AWARD SOLICITATION 13-X-22694 LOTTERY GROWTH MANAGEMENT SERVICES
A-4629-12T4

The award of a long-term contract to a private entity for sales and marketing and other management functions of the New Jersey State Lottery did not violate the 1969 constitutional amendment that authorized the lottery or the State Lottery Law's provision "establishing a lottery to be operated by the State." N.J.S.A. 5:9-2.

07/02/14 JORGE CASAL VS. HYUNDAI MOTOR AMERICA
A-4487-12T3

In a matter of first impression the issue is whether a manufacturer that violated the Lemon Law is required under N.J.S.A. 56:12-32a to pay counsel fees, for the work done by the consumer's attorney to cancel optional third party contracts arranged by the dealer at the time of the sale. We find this relief is required under the statute.

07/02/14 CLAIR W. FLINN, ET AL. VS. AMBOY NATIONAL BANK AND AB MONMOUTH, LLC
A-4216-12T1

Plaintiffs, the owners of eighteen of the forty-eight constructed units in a partially-built, ninety-six-unit condominium complex, sought an order from the trial court granting them control of the condominium association's governing board. Plaintiffs relied on a provision within the New Jersey Condominium Act, N.J.S.A. 46:8B-12.1(a), which provides that "when some of the units of a condominium have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business," then such unit owners "shall be entitled to elect all of the members of the [association's] governing board."

The trial court denied plaintiffs' request, relying upon N.J.A.C. 5:26-8.4(d), a regulation cited by defendants. The regulation states that "[a] developer may surrender control of the executive board of the [condominium] association prior to the time as specified [under the statute's percentage-based, lock-step procedures that are otherwise to be followed], provided the owners agree by a majority vote to assume control." The trial court ruled that plaintiffs were not entitled to an order transferring control because they had not agreed to assume such control by a majority vote of unit owners.

We reverse the trial court's decision because the cited regulation pertains to a developer's voluntary request to surrender control and does not pertain to the present situation of a request for involuntary surrender. In addition, the terms of the regulation cannot trump or negate the mandatory language of the statute.

The case is remanded for an evidentiary hearing to resolve the parties' factual dispute over whether or not the current developer is constructing or offering units for sale in the "ordinary course of business." In addition, in an unpublished portion of the opinion, we reversed the trial court's dismissal with prejudice of other counts of the complaint.

06/27/14 STATE OF NEW JERSEY VS. SCOTT CAMPBELL
A-5535-12T4

Defendant appeals his conviction of drunk driving ("DWI") and the trial court's denial of declaratory relief on his claim of unconstitutionality.

Defendant's prosecution was based upon an Alcotest reading of his blood alcohol content ("BAC") above the per se level of .08 prohibited by N.J.S.A. 39:4-50(a). He argues that case law authorizing the admission of Alcotest BAC results when the prerequisites for such admissibility are shown by "clear-and-convincing" proof, coupled with the statute's conclusively incriminating treatment of a BAC at or above .08, improperly combine to relieve the State of its constitutional burden of proving a driver's guilt by the more rigorous standard of proof "beyond a reasonable doubt."

We reject defendant's claim of unconstitutionality. The argument fails to distinguish the State's threshold burden of establishing the Alcotest's evidential admissibility from the State's ultimate burden at trail of establishing defendant's guilt of a per se offense beyond a reasonable doubt. Even if a pretrial motion to suppress the BAC results has been denied, a defendant can still present competing evidence or arguments at trial to persuade the court that the testing procedures were flawed and that his guilt has not been proven by the more stringent reasonable doubt standard.

06/26/14 RICHARD W. BERG, ET AL. VS. HON. CHRISTOPHER J. CHRISTIE,ET AL./MICHAEL DELUCIA, ET AL. VS. STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY, DIVISION OF PENSIONS AND BENEFITS
A-5973-11T4/A-6002-11T4/ A-0632-12T1(CONSOLIDATED)

Our opinion decides two appeals, Berg and DeLucia. In Berg, construing 1997 pension legislation, we conclude that the Legislature intended to create a contractual right to receive pension benefits, including cost of living adjustments. We find that plaintiffs' claims for payment of benefits from the pension funds is not barred by the Debt Limitation and Appropriations Clauses of the State Constitution. We reverse the trial court's grant of summary judgment to the State, and remand to allow the parties to create an evidentiary record on whether the State can satisfy the constitutional standard it must meet to justify impairing the obligation of a contract.

In DeLucia, plaintiffs raised separate arguments that we find without merit, and we affirm the trial court's decision granting summary judgment.

06/24/14* ELIZABETH A. COMANDO V. MARY F. NUGIEL
A-2403-13T3

We conclude RPC 1.7, addressing concurrent conflicts of interests, equally prohibits the representation of opposing parties in transactional matters. Accordingly, a concurrent conflict of interest arises when "the representation of one client will be directly adverse to another client," RPC 1.7(a)(1), such as the instant matter where counsel provided legal representation to both a corporate landlord, and its principals, as well as the corporate tenant and its principal. [*Approved for Publication date]

06/20/14 MARIA C. MANATA VS. FRANCISCO A. PEREIRA, ET AL.
A-0506-12T4

We reverse the liability finding in this verbal threshold case, because plaintiff's counsel improperly cross-examined defendant. Defendant-driver and plaintiff-pedestrian disputed whether plaintiff was walking in the cross-walk, or the middle of the block, when she was struck. Police did not investigate, but prepared a report after-the-fact. It included only plaintiff's version, although defendant said he spoke to the police, too. Without offering the report into evidence, plaintiff's counsel repeatedly used it in cross-examination and closing, to impeach defendant with his alleged omission of the version of events that he later asserted at trial. It was unclear whether the report would have been admissible under N.J.R.E. 803(c)(6), (7), (8) or (10), as it did not reflect any statement from defendant, and it apparently was prepared contrary to N.J. Motor Vehicle Commission report preparation guidelines. Cross-examination was improper since plaintiff's counsel conveyed through his questioning the substance of the unadmitted report, as evidence of defendant's alleged omission.

06/19/14 SERGIO RODRIGUEZ VS. RAYMOURS FURNITURE COMPANY, INC.
A-4329-12T3

Plaintiff's application for employment with defendant contained a provision requiring him to file any claim or

lawsuit relating to the employment within six months of the act underlying the action, and waiving any statute of limitations to the contrary. Plaintiff filed suit nine months after his alleged wrongful termination. We rejected plaintiff's unconscionability argument and enforced the provision. We therefore affirmed summary judgment in favor of defendant dismissing the complaint as time-barred.

06/17/14 HERBERT WREDEN AND KAREN WREDEN VS. TOWNSHIP OF LAFAYETTE, ET AL.
A-5422-12T3

In this appeal, we address the issue of whether a property owner's claim against a municipality for flooding allegedly caused by the municipality's construction of a retaining wall adjacent to the property was barred by N.J.S.A. 59:8-8b. Plaintiffs filed their notice of tort claim on January 28, 2008, but did not file their complaint against the municipality until June 28, 2011. Without making any findings as to whether plaintiffs' claim constituted a continuing tort or establishing the date of the accrual of plaintiffs' claim, the trial court granted the municipality's motion to dismiss because the complaint had not been filed within two years of the date of the notice of claim.

Consistent with the Supreme Court's decision in Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84 (1996), we reversed the trial court's determination and remanded for additional fact finding on the applicability of the continuing tort doctrine. We also reversed the trial court's ruling that plaintiffs were required to file a new notice of claim to seek damages against the municipality when the wall eventually collapsed and fell onto their property. We found that plaintiffs' notice of claim was sufficiently detailed to cover the wall's collapse. Finally, we reversed the trial court's decision to apply the entire controversy doctrine to deny plaintiffs' attempt to amend their complaint to add an inverse condemnation claim against the municipality.

06/17/14 STATE OF NEW JERSEY vs. SUZANNE SYLVESTER
A-5192-12T4

N.J.S.A. 2C:40-26b makes it a fourth degree offense to drive while one's license is suspended or revoked for a second or subsequent conviction for driving a car while under the influence of alcohol (DWI). In a bench trial before the Law Division on this charge, defendant argued that her second DWI

conviction had been voided ab initio by the municipal court when it granted her PCR petition two months after she was indicted for one count of violating N.J.S.A. 2C:40-26b. Thus, defendant argues the State cannot rely on this vacated second DWI conviction to meet its burden of proof under N.J.S.A. 2C:40-26b. The trial court rejected this argument. We affirmed.

It is undisputed that at the time defendant committed this offense, she was aware her driver's license had been revoked by a presumptively valid second conviction for DWI. We rely on State v. Gandhi, 201 N.J. 161, 190 (2010) to hold that a second DWI conviction vacated through PCR granted by a court after a defendant engages in conduct prohibited in N.J.S.A. 2C:40-26b, cannot be applied retroactively to bar a conviction under this statute.

06/17/14 STATE OF NEW JERSEY VS. CHRISTOPH F. ADAMS
A-1640-12T4

Defendant was arrested for a new crime while participating in the Intensive Supervision Program (ISP) following modification of a custodial sentence on a prior conviction to permit that participation. R. 3:21-10(b)(6). The precise question presented is whether defendant is entitled to jail credits pursuant to Rule 3:21-8 against the sentence for the new crime from the date of his arrest for that crime until the date he was either sentenced by the judge for the new crime or resentenced by the three-judge ISP panel for "fail[ure] to perform satisfactorily following entry into" ISP, R. 3:21-10(e). We conclude that a defendant in this circumstance is entitled to jail credits for days in confinement from the date of arrest to the date the first sentence is imposed.

Our decision is informed by State v. Hernandez, 208 N.J. 24 (2011), which deals with jail credits involving multiple charges, R. 3:21-8; N.J.S.A. 2C:44-5(b). And it is informed by State v. DiAngelo, 434 N.J. Super. 443 (App. Div. 2014), which applies Hernandez in a case involving resentencing for a violation of probation.

06/11/14 RICHARD LITWIN, ETC. VS. WHIRLPOOL CORPORATION, ET AL.
A-0186-13T1

We reverse the trial court order granting summary judgment to defendants in connection with plaintiff's bystander liability claim under Portee v. Jaffee, 84 N.J. 88 (1980). We concluded it was not necessary for plaintiff to have been in the house witnessing his son being engulfed in the fire in order to maintain his Portee claim. We concluded the fire was the injury-producing event, which plaintiff contemporaneously witnessed, having first been trapped in the home himself and, once rescued, aware that his son remained in the burning home.

We also concluded the motion judge failed to view the evidence in the light most favorable to plaintiff by finding plaintiff's claimed severe emotional distress, evidenced by the diagnosis of Post Traumatic Distress Disorder, failed to raise a genuinely disputed issue of fact.

06/10/14 STATE OF NEW JERSEY v. MICHAEL NUNEZ
A-3197-11T2

We reverse defendant's murder conviction because the trial judge permitted the State to bolster its case by calling defendant's investigator to testify to a prior consistent statement of the State's only eyewitness in violation of defendant's right to counsel.

06/09/14 NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES V. R.R.
A-2605-12T4

Appellant was a school bus driver. At the end of her route she did not visually inspect the bus to make sure there were no children left on board, as required by N.J.S.A. 18A:39-28. Instead, she had relied upon a school bus aide's representation there were not any children on the bus, even though in the past the driver had found the aide to be unreliable. In fact, a five-year old was left on board after the bus driver left for the day. The child was not discovered for fifty-five minutes.

We affirmed the finding of the Assistant Commissioner of the Office of Performance Management and Accountability of the Department of Children and Families that the bus driver had engaged in wilful and wanton conduct in violation of N.J.S.A. 9:6-8.21(c)(4)(b), for relying upon an undependable aide's representation and not personally inspecting the bus herself to determine if any children remained on board.

06/09/14 IN THE MATTER OF THE EXPUNGEMENT OF THE CRIMINAL RECORDS OF G.P.B.
A-1359-13T1

The court held that expungement is not permitted by N.J.S.A. 2C:52-2(a), which allows expungement for a person convicted of "a crime," where the petitioner had pleaded guilty to multiple briberies over the course of two days even though those crimes had a single purpose and even though they were memorialized in a single judgment of a conviction.

06/09/14 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. J.A.
A-2435-12T2

In this appeal, the court concluded that a parent fails to exercise the minimum degree of care required by N.J.S.A. 9:6-8.21(c)(4) when permitting children to be passengers in a vehicle driven by a person who appears to be inebriated.

06/05/14 STATE OF NEW JERSEY IN THE INTEREST OF Y.C.
A-1030-13T2

We held that the Juvenile Justice Commission's "interim policy" on transferring juveniles to adult prisons was invalid, because it was not adopted in compliance with the Administrative Procedures Act. We also found that the agency's action in transferring Y.C. was contrary to State ex rel. J.J., 427 N.J. Super. 541 (App. Div. 2012), which invalidated the JJC's transfer regulations and indicated that the agency must adopt new regulations before transferring a juvenile to an adult prison. We ordered that Y.C. be given a new transfer hearing, to be conducted by the Office of Administrative Law, and ordered the JJC to adopt new regulations within 180 days.

06/05/14 JUNE G. VALENT VS. BOARD OF REVIEW, DEPARTMENT OF LABOR AND HACKETTSTOWN COMMUNITY HOSPITAL
A-4980-11T2

The Board of Review denied appellant's application for unemployment compensation benefits finding she engaged in simple "misconduct connected to work" under N.J.S.A. 43:21-5(b). We reverse because the employer did not prove appellant committed misconduct by refusing to submit to a flu vaccination directive that exempted employees who objected

based on documented medical or religious reasons. Appellant declined to be vaccinated for secular reasons of personal choice.

The Board's decision to rely on appellant's termination as a legal basis for denying her application for unemployment benefits under N.J.S.A. 43:21-5(b) unconstitutionally violated appellant's freedom of expression by improperly endorsing the employer's religion-based exemption to the flu vaccination policy and rejecting the secular choice proffered by appellant.

06/03/14 PINELANDS PRESERVATION ALLIANCE AND MICHAEL PERLMUTTER VS. STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ET AL.
A-4880-11T2/ A-4883-11T2 (CONSOLIDATED)

This is a challenge by environmental groups to a CAFRA permit issued by the DEP to the developer of a Walmart in the coastal zone of the Pinelands National Reserve, on property inhabited by the northern pine snake, constituting an endangered or threatened species habitat. We held that in issuing the permit, the DEP did not waive compliance with its coastal regulations by allowing the developer to mitigate any adverse development impacts by using habitat enhancements on off-site, non-contiguous parcels. In so ruling, we found N.J.A.C. 7:7E-1.6 allows generally for mitigation and that under N.J.A.C. 7:7E-3.38, the DEP may use a "net" habitat value calculation in considering an "overall adverse impact," (i.e., whether the direct loss of pine snake habitat on the construction site may be offset by the proposed preservation and enhancement activities both on, immediately adjacent to, and off the development site).

We remanded the matter to the agency, however, to reconsider under N.J.A.C. 7:7E-5B.6(g), the maximum impervious coverage limits (80% vs. 30%) applicable to the developer's revised 2010 application, which in turn is reliant on the community planning boundaries on the DEP's CAFRA planning map. N.J.A.C. 7:7E-5B.6(g) designates certain areas in which development would be limited to the impervious coverage limits of the underlying coastal planning area, here the 30% Coastal Suburban Planning Area, N.J.A.C. 7:7E-5B.6(e). In so ruling, we found the Permit Extension Act, N.J.S.A. 40:55D-136.1 to -136.6 extended center designations created pursuant to CAFRA, including the Toms River Coastal

Regional Center designation at issue here, preventing them from expiring on March 15, 2007.

05/30/14 JOANNE TRAETTO VS. JAMES PALAZZO AND SANDRA PALAZZO
A-6107-12T1

In this appeal, we address the issue of whether the trial court should have decided plaintiff's nuisance suit on summary judgment. Plaintiff sued her neighbors seeking to enjoin their son from playing drums in their detached garage. Although plaintiff alleged that the drum playing occurred "at various lengthy periods at intermittent hours, both day and night" and prevented her from "obtain[ing] a routine of nighttime sleep," defendants alleged that they did not permit their son to play the drums past 7:00 p.m. Because of this material factual dispute, we held that summary judgment was inappropriate.

We also held that the fact that defendants were found to have not violated the municipal noise ordinance did not obviate the need for the court to consider whether "the character, volume, frequency, duration, time, and locality of" the noise caused by the drum-playing "unreasonably interfered" with plaintiff's "health or comfort." Finally, we held that the court should have granted plaintiff's request to inspect the garage where the drums were kept to determine their size and configuration, whether any sound amplification equipment was being used, and whether reasonable steps could be taken to muffle the drums or soundproof the garage.

05/30/14 BERGEN COUNTY PBA LOCAL 134 AND BERGEN COUNTY SHERIFF MICHAEL SAUDINO VS. KATHLEEN A. DONOVAN, BERGEN COUNTY EXECUTIVE
A-1810-12T1

We review the interplay between the Optional County Charter Law, N.J.S.A. 40:41A-1 to -149, and N.J.S.A. 40A:9-117, which deals with the compensation of sheriff's employees. Specifically, this appeal presents the questions (1) whether the Bergen County Sheriff (Sheriff) has the exclusive statutory authority to negotiate salary payments, increases, and other economic benefits with the employees of the Sheriff's Department, subject to the requirements of N.J.S.A. 40A:9-117; and (2) whether the court, rather than the New Jersey Public Employment Relations Commission (PERC), was the appropriate forum to adjudicate this dispute. We

answer both questions in the affirmative, and affirm the trial court's judgment.

05/30/14 KATHLEEN A. DONOVAN AND EDWARD TRAWINSKI VS. BERGEN COUNTY BOARD OF CHOSEN FREEHOLDERS AND JOHN D. MITCHELL
A-1117-12T1/ A-1362-12T1(CONSOLIDATED)

These consolidated appeals involve the statutory roles of the County Executive and the County Board of Chosen Freeholders under the county executive form of government. Construing the Optional County Charter Law, N.J.S.A. 40:41A-1 to -149, and the Local Fiscal Affairs Law, N.J.S.A. 40A:5-1 to -42, we adopt the trial court's ruling that the County Executive, rather than the Board of Freeholders, has the authority to appoint the auditor. We also affirm o.b. the trial court's determination that the Charter Law's provision allowing a county executive to be present and participate in discussions at all Freeholder meetings, N.J.S.A. 40:41A-40, does not allow a county executive to appoint a designee for such purpose.

05/22/14 GINA PARASCANDOLO VS. DEPARTMENT OF LABOR, BOARD OF REVIEW, BRICK TOWNSHIP BOARD OF EDUCATION AND VINNY'S KING PIZZA
A-3209-11T1

The appellant held two part-time jobs when she was temporarily disabled as a result of an injury at her employment by the Board of Education. She received temporary disability benefits (TDB) through her employment at her second employer, where both she and her employer contributed to the Temporary Disability Fund. Because the Board of Education was not a "covered" employer under the Temporary Disability Benefits Law (TDBL), N.J.S.A. 43:21-25 to -66, her TDB was calculated solely on the wages earned from the second employer. Nonetheless, because she received temporary workers compensation benefits from the Board of Education, the Board of Review asserted a lien against her TDB based upon the subrogation provision in N.J.A.C. 12:18-1.5, a regulation designed to implement our decision in In re Scott, 321 N.J. Super. 60 (App. Div. 1999), aff'd, 162 N.J. 571 (2000). After examining the interplay of the TDBL and the Workers Compensation Act when only one of two employers is a "covered employer" under the TDBL, we conclude that the Board relied upon an erroneous interpretation of its regulation;

that the amount of TDB appellant received was a "full recovery" and not a "double recovery" of benefits and therefore, subrogation was inappropriate.

05/21/14 STATE OF NEW JERSEY V. WILLIAM L. WITT
A-0866-13T2

The court granted leave to appeal an order granting defendant's motion to suppress evidence seized during a warrantless search of his vehicle. The court affirmed not only because it is bound by State v. Pena-Flores, 198 N.J. 6 (2009), and its many antecedents, and not only because no exigencies for the search were revealed during the suppression hearing, but also because there was no legitimate basis for the motor vehicle stop that preceded the search. In this last regard, the record demonstrated that the police officer stopped defendant's vehicle because defendant did not dim his high beams as he drove by the officer's parked patrol vehicle. Because the patrol vehicle was not an "oncoming vehicle," and because there were no other "oncoming vehicles" on the road at the time, the police officer did not have objectively reasonable grounds to believe defendant had violated the high-beam statute, N.J.S.A. 39:3-60, in making the vehicle stop.

05/21/14 EDUARDO CORTEZ VS. JOSEPH G. GINDHART, ESQUIRE D/B/A JOSEPH G. GINDHART & ASSOCIATES AND JOSEPH G. GINDHART& ASSOCIATES
A-0430-12T1

Plaintiff filed this legal malpractice action against his former attorney after pleading guilty to federal tax evasion charges and serving his sentence. He alleged that, due to his attorney's negligence in failing to negotiate a plea agreement early in the prosecution, he accepted a less favorable plea offer and received a harsher sentence. His complaint was dismissed on the ground that his exoneration on the criminal charge was a pre-requisite to maintaining a legal malpractice action. Because plaintiff did not allege that he suffered a wrongful conviction, proof of exoneration was not required. However, he was required to prove that he suffered actual injury as a result of the alleged attorney negligence. His complaint was properly dismissed because he failed to present competent evidence that he suffered an actual injury that was proximately caused by his attorney's alleged negligence.

05/15/14 COMMITTEE OF PETITIONERS FOR THE REPEAL OF ORDINANCE NUMBER 522 (2013) OF THE BORO OF WEST WILDWOOD VS. DONNA L. FREDERICK,ET AL.
A-0870-13T3

We review the interplay of the referenda procedures outlined in the Home Rule Act, N.J.S.A. 40:49-27, and the Walsh Act, N.J.S.A. 40:74-5. Defendants urge reversal of the Law Division's order, which considered the plaintiff's complaint in lieu of prerogative writs seeking a referendum to repeal the adoption of a municipal bond ordinance. Defendants argued the trial judge erred because the protest was untimely. Alternatively, defendants challenge the judge's legal finding that the procedural requirements for referenda set forth in the Walsh Act are not required to be followed when citizens protest an ordinance incurring indebtedness, which is guided by the procedures outlined in the Home Rule Act. We affirm concluding a voter protest of a bond ordinance is governed by the procedures set forth in the Home Rule Act, which purposefully do not mirror the referenda provisions governing other types of ordinance challenges in a municipality formed under the Walsh Act.

05/15/14 IN THE MATTER OF ADOPTION OF AMENDMENTS TO THE NORTHEAST UPPER RARITAN ET AL.
A-3236-10TI/A-5271-07T3/A-5990-07T3/A-5993-07T3(CONSOLIDATED CASE)

In 2008, the Department of Environmental Protection (DEP) adopted amendments to its Northeast, Upper Raritan, Sussex County, and Upper Delaware Water Quality Management Plans (WQMPs). Those amendments established total maximum daily loads limiting the amount of phosphorus, a nutrient that contributes to the growth of algae, discharged into the Passaic River. Appellants Pequannock, Lincoln Park and Fairfield Sewerage Authority, Hanover Sewerage Authority, Madison-Chatham Joint Meeting, and Warren Township Sewerage Authority collect municipal wastewater for treatment, after which they discharge the treated water into the Passaic River. Respondent North Jersey District Water Supply Commission (North Jersey), which operates the Wanaque Reservoir downstream from appellants, sometimes pumps water from the Passaic River into the reservoir.

Appellants challenged the WQMPs in an earlier appeal. We affirmed as to most issues, but remanded for a determination as to whether it was institutionally

practicable for the WQMPs to require strict compliance by respondents and other upstream treatment facilities from May through October only, with treatment at other times on an as-needed basis when North Jersey plans to divert water from the Passaic River to the Wanaque Reservoir. We retained jurisdiction.

Following an evidentiary hearing, an administrative law judge concluded that an off-season, as-needed treatment plan was institutionally practicable. The DEP Commissioner disagreed and determined to the contrary. Following further briefing and oral argument, we affirmed the Commissioner. After giving the required deference to the Commissioner's expertise, we found that his decision was not arbitrary, capricious, or unreasonable, and it that it was supported by substantial credible evidence in the record as a whole.

05/13/14 AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY VS. NEW JERSEY DIVISION OF CRIMINAL JUSTICE AND BRUCE SOLOMON
A-3381-12T1

In response to a request for government records under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to 47:1A-13, a government agency does not have the authority to redact an admittedly responsive document to withhold information the agency deems to be outside the scope of the request. Absent a legally recognized exception to disclosure, a citizen's right of access to public information is unfettered.

We also reverse the trial court's decision to place the "onus" on the requestor to clarify or engage in negotiations with the custodian as a jurisdictional prerequisite to instituting legal action to enforce his or her rights to access public information. This extra bureaucratic hurdle the requestor must clear before getting to the courthouse doors is untethered to any provision in OPRA and contravenes our State's strong public policy favoring "the prompt disclosure of government records." Mason v. City of Hoboken, 196 N.J. 51, 65 (2008); N.J.S.A. 47:1A-1.

05/13/14 STATE OF NEW JERSEY VS. CHAD BIVINS
A-1577-12T2

In this appeal, we consider whether the scope of the permissible area and persons to be searched, pursuant to a search warrant, extends to the location where defendant was

found, seated in a vehicle, parked on the street, five or six houses away from the premises where a search warrant was being executed. The motion judge found there was probable cause to search defendant based upon the search warrant. We reverse holding pursuant to Bailey v. United States, __ U.S. __, 133 S. Ct. 1031, 185 L. Ed. 2d 19 (2013), the search and seizure was beyond the spatial limits of the search warrant.

05/09/14 STATE OF NEW JERSEY VS. KASHIF K. PATTERSON
A-2055-10T1

We hold that the drug-trafficking recidivist provision in N.J.S.A. 2C:43-6(f) cannot be the basis to impose a mandatory extended term for the offense of drug trafficking within 500 feet of a public housing facility under N.J.S.A. 2C:35-7.1. N.J.S.A. 2C:43-6(f) has never been amended to add the subsequently-enacted N.J.S.A. 2C:35-7.1 to its list of drug trafficking offenses for which an extended term is required. The prosecution may move to apply N.J.S.A. 2C:43-6(f) to the N.J.S.A. 2C:35-5 count, and the resulting minimum term of parole ineligibility will survive the merger of that count with the N.J.S.A. 2C:35-7.1 count.

Because defendant attempted to explain away the cash in his pocket by using his post-arrest statement that "he was unemployed and that he won the money in Atlantic City gambling," the prosecutor's reference to his statement and his unemployment was not reversible error.

05/08/14 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. N.D., J.P. AND A.J. IN THE MATTER OF E.D.
A-2093-12T2

A few days after ingesting cocaine, N.D. gave birth to a child who tested positive for the drug but displayed no signs of withdrawal. At a fact-finding hearing, the Division introduced evidence that the infant was born premature and underweight, but presented no medical evidence to connect these conditions to the mother's drug use. The Family Part found the mother put the child at risk by her use of cocaine.

The fact-finding took place before the decision in Department of Children & Families v. A.L., 213 N.J. 1 (2013), and the Family Part judge did not have the benefit of the Court's holding that drug use by a parent during pregnancy, standing alone, may not substantiate a finding of abuse or neglect.

We reversed the finding of abuse or neglect and took the unusual step of remanding with a direction to re-open the fact-finding hearing to permit the parties to present medical or expert testimony as to whether the mother's consumption of cocaine caused harm to the child.

05/07/14 BENNETT A. BARLYN VS. PAULA T. DOW, ET AL.
A-0779-13T4

Plaintiff filed suit against various members of the Office of the Attorney General, individually and in their official capacities. He alleged that he was terminated from his position as an assistant county prosecutor after complaining that defendants dismissed indictments against the county Sheriff and members of her department for political purposes. Plaintiff claimed his termination was in violation of "clear mandates of public policy." See Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72 (1980). The Law Division judge granted his motion and compelled defendants to produce a copy of all materials generated by the grand jury in connection with its investigation of the Sheriff's Office, including but not limited to transcripts, exhibits, subpoenaed documents and other evidence.

We granted defendants' motion for leave to appeal and reversed, finding that plaintiff failed to make "a strong showing of particularized need that outweigh[ed] the interest in grand jury secrecy." State v. Doliner, 96 N.J. 236, 246 (1984).

We also addressed whether a motion seeking to compel production of grand jury materials must be brought before the vicinage assignment judge where the grand jury was empanelled, or whether the trial judge in another vicinage could decide the motion.

05/06/14 NEW JERSEY TRANSIT CORPORATION VS. EUGENE E. MORI, ET AL.
A-0122-12T4

This appeal concerns property acquired by New Jersey Transit through condemnation. The property contains navigable waters of the United States under the exclusive jurisdiction of the United States Army Corps of Engineers (ACOE). We held that because the ACOE has exclusive jurisdiction to determine whether the taking area falls under

the category of wetlands, it was error to submit this issue to the jury.

We also held that the trial judge should have conducted a pre-trial N.J.R.E. 104 hearing and rendered a determination that there existed the reasonable probability the ACOE would have granted a Section 404 permit as of the taking date for the proposed private development.

05/05/14 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. M.C.IN THE MATTER OF M.C., M.C., JR. AND A.C.
A-2398-12T2

On a father's appeal of a judgment entered against him following a fact-finding hearing in an abuse or neglect action commenced pursuant to N.J.S.A. 9:6-8.21 to -8.73 and N.J.S.A. 30:4C-12, we reverse. Construing N.J.S.A. 9:6-8.21(c)(4)(b), we conclude that in a case, such as this, where there is no finding of actual harm, N.J.S.A. 9:6-8.21(c)(4) requires a court to consider competent evidence establishing that the conditions that posed a risk of harm have been successfully remediated between the time that the Division of Child Protection and Permanency intervened and the time of the fact-finding hearing. We further conclude that if evidence of successful remediation by the time of the fact-finding hearing is undisputed and if there is no evidence establishing, or permitting a reasonable inference of, likely repetition of the conduct or circumstances that warranted intervention, the evidence is insufficient to support a determination that the child "is in imminent danger of becoming impaired."

05/05/14 STATE OF NEW JERSEY VS. JAMES BUCKNER
A-0630-12T1

We uphold the constitutionality of N.J.S.A. 43:6A-13(b), which authorizes the New Jersey Supreme Court to recall retired judges for temporary service, including those who have reached age seventy, an issue of first impression in this State.

Judge Harris, in dissent, concludes otherwise.

05/02/14 DEPARTMENT OF CHILDREN AND FAMILIES, DIVISION OF CHILD PROTECTION AND PERMANENCY VS. G.R.
A-4594-12T4

The Division of Child Protection and Permanency (the "Division") informed G.R. that she neglected her two-year-old son by leaving him unattended in her minivan while shopping in a Target store. G.R. immediately requested an Office of Administrative Law hearing to resolve numerous issues of disputed material facts. Five years later, the Division placed her name on the child abuse registry and issued its final agency decision, summarily concluding that G.R. neglected her son by failing to exercise a minimum degree of care as required by N.J.S.A. 9:6-8.21c(4)(b). This substantial delay was caused by agency inaction and by the misplacement of G.R.'s file by a deputy attorney general. Although G.R. timely disputed the Division's initial substantiation of neglect, she lived with the uncertainty of the outcome of her administrative challenge during the entire five years. We reversed without prejudice, remanded, and directed the OAL to conduct a hearing to resolve the disputed issues of fact, and we gave G.R. the opportunity to argue on remand that the case should be dismissed as a matter of fundamental fairness.

05/02/14 STATE OF NEW JERSEY VS. WEDPENS DORSAINVIL
A-0879-10T2

After a jury trial, defendant was convicted of first degree conspiracy to commit murder, second degree aggravated assault, and related second and third degree offenses. On the second day of deliberations, the jury reported it was "hopelessly deadlocked." Immediately following the jury's report of an inability to reach a unanimous verdict, sheriff's officers intervened at the jury's request to dissolve a physical altercation between two jurors. The trial court denied defendant's motion for a mistrial.

We reverse. A physical altercation between two or more deliberating jurors constitutes an irreparable breakdown in the civility and decorum expected to dominate the deliberative process envisioned by the Court in State v. Czachor, 82 N.J. 392 (1980). A jury verdict so tainted cannot stand as a matter of law. The trial judge's supplemental instructions to restore order exacerbated the problem by imposing a judicially crafted civility code of conduct that placed the judge at the center of jury deliberations in violation of State v. Figueroa, 190 N.J. 219 (2007).

04/29/14 BASIM HOBSON VS. NEW JERSEY STATE PAROLE BOARD

A-0681-12T3

Basim Hobson appeals from a final decision of the Parole Board (Board) revoking his release status on a mandatory five-year term of parole supervision imposed pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, and setting a nine-month future eligibility term. Hobson's release was revoked for violating two conditions imposed by the Board. We hold that the evidence was inadequate to support a finding of one violation and that the evidence of the second violation and Hobson's record on parole was inadequate to establish that he "seriously or persistently violated the conditions" of his release status as required by N.J.S.A. 30:4-123.60(b) and N.J.S.A. 30:4-123.63(d).

04/24/14 STATE OF NEW JERSEY VS. ALICE O'DONNELL
A-1889-12T2

Defendant pleaded guilty to the murder of her six-year-old son. She received a thirty-year sentence with a thirty-year MPI. She alleges her attorney was ineffective by failing to diligently pursue a diminished capacity defense and failing to adequately consult with her before urging her to plead guilty. We reverse the trial court's denial of PCR and remand for an evidentiary hearing.

We direct the court to separately apply the four-factor test governing plea withdrawal motions under State v. Slater, 198 N.J. 145 (2009), and the two-prong test governing PCR petitions under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We compare and contrast the two standards. Both apply to defendant's application for relief. Although the standards sometimes overlap, they do not always lead to the same results. We instruct the trial court not to conflate the two. We also conclude that the court mistakenly set too high a threshold for satisfying the "colorable claim of innocence" factor under Slater.

04/23/14 ARIEL SCHOCHET VS. SHARONA SCHOCHET
A-3601-13T2

We granted plaintiff's application to seek emergent relief from an order that denied his request for the appointment of experts at public expense to testify at an ability to pay hearing conducted pursuant to Rule 1:10-3. Relying upon Pasqua v. Council, 186 N.J. 127 (2006), he argues that such appointment is constitutionally required because he

faces possible incarceration if the trial court finds he willfully failed to pay his support obligations. Mindful that the appointment of counsel at public expense is required only when an obligor is indigent, we note that the occasion in which an indigent obligor's financial circumstances are so complex as to require expert testimony will be extraordinary. We conclude that plaintiff has failed to show the appointment of experts at public expense is constitutionally required in this case.

04/23/14 JO ANN SESSNER VS. MERCK SHARP & DOHME CORP.
A-4977-11T3

We were on the eve of filing a comprehensive opinion on the many issues raised in a voluminous record on appeal when counsel advised the matter had settled. Upon further inquiry, we learned the parties reached a settlement months ago. Despite our discretion to file an opinion when notified at such a late hour, we have withdrawn our opinion on the merits. We dismiss the appeal with the emphatic reminder that counsel must advise this court in a far more timely manner of a settlement or serious settlement discussions so that scarce judicial resources are not needlessly wasted.

04/23/14 ELBERT HUGHES V. A.W. CHESTERTON CO., ET AL./ MICHAEL GREEVER VS. A.W. CHESTERTON CO., ET AL./ GREGORY FAYER VS. A.W. CHESTERTON CO., ET AL./ ANGELO MYSTRENA, ET AL. VS. A.W. CHESTERTON CO., ET AL.
A-0778/779/4912/4913-11T2 (CONSOLIDATED)

Plaintiffs in these consolidated cases alleged they contracted asbestos-related diseases as a result of their exposure to asbestos contained in component parts of pumps manufactured by defendant. We consider whether a manufacturer has a duty to warn that component parts, which will be regularly replaced as part of routine maintenance, contain asbestos. Under the facts of this case, we find it would be reasonable, practical and feasible to impose such a duty here. However, we also reject plaintiffs' argument that causation may be proved by proximity to defendant's product in the absence of proof they were exposed to an asbestos-containing product manufactured or sold by defendant and, therefore, conclude plaintiffs failed to make a prima facie showing of causation.

04/09/14 IN THE MATTER OF THE GRANT OF A CHARTER TO THE MERIT PREPARATORY CHARTER SCHOOL OF NEWARK AND IN THE MATTER OF THE GRANT OF A CHARTER TO THE NEWARK PREPARATORY CHARTER SCHOOL
A-0019-12T2

The Commissioner of Education did not exceed his authority pursuant to The Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 to -18, when he granted charters to two schools that use a "blended" teaching methodology that combines in-person, face-to-face teaching and online instruction by means of internet materials.

04/08/14 SALVATORE LOPRESTI AND MARGARET LOPRESTI VS. WELLS FARGO BANK,N.A.
A-1356-12T3

We hold that the proscription against a prepayment penalty in the New Jersey Prepayment Law, N.J.S.A. 46:10B-1 to -11.1, does not apply to commercial loans even when personally guaranteed by the individual owners of the business to which the loan was made, and secured by a mortgage on their primary residence.

04/07/14 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. L.W. AND R.W. IN THE MATTER OF I.W. AND K.W.
A-3001-12T3

We reverse a finding of neglect after a mother came to the Division of Child Protection and Permanency office seeking housing for her two young children. We determine that the judge's finding of "unbelievably poor planning" was not sufficient for a finding of neglect. Parents of young children who become desperate for housing should be encouraged to seek a temporary safe placement for the children from the Division.

04/07/14 PETER INNES, ET AL. VS. MADELINE MARZANO-LESNEVICH, ESQ., ET AL. VS. MITCHELL A. LIEBOWITZ, ESQ., ET AL.
A-0387-11T1

Plaintiff, individually and on behalf of his daughter, sued defendants, a law firm and one of its principals, alleging emotional distress damages as a result of defendants' breach of their professional responsibility. The

complaint centered on a pre-divorce agreement, executed by the parties and their attorneys, that required plaintiff's ex-wife's then attorney to hold the daughter's passport in trust. Defendants, as successor counsel, with full knowledge of the agreement and without notice to anyone, gave the passport to the child's mother, who used it to remove the child to Spain, where she remains in the custody of her maternal grandparents. Plaintiff's ex-wife was criminally prosecuted and at the time of trial was incarcerated in New Jersey. Plaintiff has essentially been denied any contact with the child in the ensuing years. See Innes v. Carrascosa, 391 N.J. Super. 453 (App. Div.), certif. denied, 192 N.J. 73 (2007).

The jury found that, even though they were not clients, defendants breached the professional duty they owed to plaintiffs. It awarded damages to both father and daughter, and the judge included an award of counsel fees to both as part of the final judgment.

We affirmed the judgment as to plaintiff-father, but vacated the judgment as to his daughter. We discuss the duty owed by an attorney to a third-party in certain circumstances, the availability of emotional distress damages in an action sounding in legal malpractice, the necessary elements of proof in such an action and the propriety of an award of counsel fees to non-clients in such circumstances.

04/02/14 JOSEPH CHERILUS, ET AL. VS. FEDERAL EXPRESS, ET AL.
A-1285-12T2

Claims against the designer/manufacturer of a torklift (air cargo lift), specially designed for a Federal Express facility and affixed to the loading dock, were correctly dismissed as barred by the ten-year statute of repose, N.J.S.A. 2A:14-1.1(a). Also, plaintiffs could not effectively assign their tort claims against the designer/manufacturer to the settling defendant. And the settling defendant did not preserve its right to seek contribution under the Joint Tortfeasors Contribution Act, N.J.S.A. 2A:53A-3, when it settled with plaintiffs and filed a stipulation of dismissal rather than allow a "money judgment" to be entered in favor of plaintiffs.

03/27/14 H.S.P. VS. J.K.
A-1121-12T1

A petitioner asking the Family Part to make the findings in 8 U.S.C.A. § 1101(a)(27)(J) to enable a juvenile to apply for special immigrant juvenile status must show that reunification is viable with neither of the juvenile's parents due to abuse, neglect, or abandonment. It is insufficient to show only that one parent abused, neglected, or abandoned the juvenile.

The mother, who raised the juvenile, did not willfully neglect him merely because she was financially unable to provide better care. The mother did not abandon the juvenile, given that she arranged for him to enter the United States to live with a relative, and remains in contact with him. By contrast, the father, whose whereabouts are unknown, willfully abandoned the juvenile, because he left the family before the juvenile was born, never met the teenaged juvenile, and provided no support.

Because one parent had not abused, neglected, or abandoned the juvenile, the Family Part did not err in declining to find whether it was in the juvenile's best interest to be returned to his home country.

03/27/14 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. C.W. I/M/O I.N.W.
A-0542-12T4

We address the requisite procedures Family Part judges must follow to protect a defendant's due process rights when a child's testimony is sought in a protective services action. We hold that in any proceeding filed pursuant to N.J.S.A. 9:6-8.21(c), when a defendant objects to utilizing an alternative to the child's in-court testimony, the judge must adhere to the statutory procedures outlined in N.J.S.A. 2A:84A-32.4, prior to allowing in camera testimony of a child-witness.

03/26/14 HESS CORPORATION V. ENI PETROLEUM US, LLC
A-3464-12T4

In this appeal, we address the issue of whether defendant could raise a force majeure defense to plaintiff's breach of contract claim in a case where defendant's production of natural gas was disrupted by a leak in an underwater pipeline used to bring the gas to shore from defendant's offshore production point. The parties' contract provided that

defendant was required to provide a specific quantity of natural gas to plaintiff at a specific location for a specific price. However, the contract did not specify where defendant would obtain the gas to fulfill its obligation. Although defendant's own production of gas was disrupted by the leak in the pipeline, gas was still available from other sources to enable defendant to meet the requirements of the contract. Under those circumstances, we affirmed the decision of the trial court that the leak in the pipeline defendant used for the gas it produced did not constitute a force majeure event under the contract and was not grounds for excusing defendant's failure to perform the clear terms of its agreement with plaintiff.

03/24/14 N.B. VS. S.K.
A-0898-12T4/A-0899-12T4(CONSOLIDATED)

In 2002, plaintiff obtained a domestic violence final restraining order (FRO) against her husband, but agreed in 2003 to its vacation when the parties settled their matrimonial disputes; they then agreed to replace their respective FROs with mutual restraints in the divorce action. In 2012, after years during which the matrimonial restraints proved ineffectual in preventing defendant from attempting to communicate with plaintiff, plaintiff filed a domestic violence action alleging harassment when defendant repeatedly called a telephone that the matrimonial restraints barred him from calling. The trial judge excluded plaintiff's evidence of defendant's prior failures to comply with the matrimonial restraints and granted an involuntary dismissal on the ground that a violation of a matrimonial order cannot constitute an act of domestic violence. The court reversed, holding that defendant's past violations of the matrimonial restraints were relevant in that they provided an understanding of why plaintiff would be alarmed or seriously annoyed by what otherwise seemed to be innocuous communications.

In the separate but related appeal, the court affirmed the denial of plaintiff's subsequent motion to vacate the 2003 order, which vacated the original FRO, solely because plaintiff failed to seek relief within a reasonable period of time.

03/20/14 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. K.N. AND K.E. I/M/O T.E., A MINOR
A-4847-12T1

By our leave, the Division of Child Placement and Permanency (the Division) appeals from an order that required the return of a child to the home of his "maternal grandmother as a paid resource parent." We reversed that part of the order that required the Division to recognize the grandmother as a "paid resource parent," concluding that the Legislature has reserved issues as to licensure of a resource parent to the Division, in the reasonable, non-arbitrary exercise of its discretion.

However, we also concluded that the Division failed to provide notice to the judge of its removal of the child, something it was required to do beforehand by its own regulations. We further concluded that the judge, not the Division, had the authority to place the child based upon a determination of the child's best interests, even if the placement was with a relative who either did not qualify for a license or did not seek one.

We nevertheless reversed the order and remanded the matter for further proceedings because the judge failed to appreciate all the statutory criteria that should guide his consideration of the Division's opposition to a particular placement. We also clarified that under N.J.S.A. 30:4C-26.8(d)(9), the disqualification of a license to a resource home based upon a "conviction" for "domestic violence" means the entry of a final restraining order under the PDVA, even though those proceedings are civil in nature.

03/20/14 STATE OF NEW JERSEY VS. KEENAN OGLETREE, JR.
A-2081-12T2

In this appeal, defendant argued he was wrongfully denied 246 days of gap-time credit, which represented the time from his incarceration for a violation of probation until his sentence in later matters. The court agreed and reversed, holding that even though, in the earlier matter, defendant was incarcerated as a condition of probation for 120 days in the county jail, that jail condition did not constitute "imprisonment" within the meaning of the gap-time credit statute, N.J.S.A. 2C:44-5(b)(2). The court observed that application of a broader meaning of the word "imprisonment" in this setting would lead to the incongruous result that a probationary term conditioned on even a single day in the county jail would disqualify an award of gap-time credit when imprisonment was later imposed following a violation of

probation, whereas a probationary term without such a condition would not.

03/19/14 NEW JERSEY REALTY CONCEPTS, LLC, ET AL. VS. JOHN MAVROUDIS, ET AL.
A-2013-12T1

The Chancery Division's appointment of a special fiscal agent as the managing agent for a corporation does not place the property of the corporation in custodia legis. Appointment of a receiver would have placed the property in custodia legis, but the appointment of a special fiscal agent occurs with fewer procedural safeguards, endows the agent with more circumscribed powers, and provides less protection. Accordingly, rents due to the corporation could be reached by execution of a creditor's Law Division judgment against the corporation, and could be levied upon by the Sheriff.

A corporation's interest in rents from a property it owns with another corporation as tenants in common may be levied upon by a creditor of the corporation.

03/19/14 NATALIE BELLINO VS. VERIZON WIRELESS
A-1132-12T4

In this case we consider the essential elements required by the Workers' Compensation Act's anti-fraud provision, N.J.S.A. 34:15-57.4, to negate a claimant's eligibility for benefits under the Act. In particular, we address the state of mind that a respondent must prove to disqualify a claimant who has made misstatements about his or her medical history when applying for benefits. We uphold the workers' compensation judge's decision finding respondent did not prove the necessary elements under the anti-fraud provision as it did not prove that claimant had the intent to make false statements for the purpose of obtaining benefits.

03/18/14 STATE OF NEW JERSEY VS. MARTELL J. LAND/ STATE OF NEW JERSEY VS. SAMAD A. LAND
A-1906-11T2/A-2774-11T2(CONSOLIDATED)

The court reversed defendants' aggravated manslaughter convictions and remanded for a new trial, concluding that defendants' right to a fair trial was irretrievably prejudiced by the prosecutor's opening statement, which was replete with descriptions of facts the State did not prove.

03/14/14 IN THE MATTER OF FREDDIE B. FRAZIER, DEPARTMENT OF CORRECTIONS
A-3099-11T3

After extensive litigation resulting in one prior published and one unpublished appellate opinion, we determine that a Senior Correction Officer was properly removed from his position, which requires the ability to use a gun, because he was convicted in 2000 of a disorderly persons offense involving domestic violence. A 2004 amendment to N.J.S.A. 2C:39-7(b)(2) makes it a third-degree crime for a person convicted of an offense involving domestic violence to possess or carry a gun. We hold that this statute applies to Frazier and reject his arguments that his removal is barred by res judicata, collateral estoppel, the entire controversy doctrine or ex post facto prohibitions.

03/13/14 RON MILLS, ET AL. VS. STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY
A-3234-12T3

The panel determined that a wrongfully convicted criminal defendant is barred as a matter of law from recovering damages under the Mistaken Imprisonment Act (Act), N.J.S.A. 52:4C-1 to -6, if the conviction at issue was based on the defendant's guilty plea. The decision applies to defendants who were released from prison or pardoned prior to December 27, 2013, the effective date of amendments to the statute that specifically excluded such recovery. A majority of the panel also concluded that, under limited circumstances, a plaintiff's failure to file a verified complaint need not deprive the court of subject matter jurisdiction.

03/03/14 JANICE J. PRIOLEAU VS. KENTUCKY FRIED CHICKEN, INC.,
A-2884-12T4

We examine the scope of mode-of-operation liability, concluding the trial judge erred its application. While on her way to the restroom, plaintiff slipped on the tile floor of defendants' fast-food restaurant on a substance she described as "water" or "grease." The trial judge applied the doctrine finding defendants' operated a fast-food operation and had not followed certain safety policies. We reversed finding no link between the manner in which the

business was conducted and the alleged hazard plaintiff slipped on or its source. We concluded mode-of-operation liability results when a plaintiff suffers injury because the mode or manner of the business operation creates the dangerous condition on the premises. This concept does not lead to broad application. Although mode-of-operation liability is a type of dangerous condition, not all dangerous conditions arising in the operation of a business satisfy the mode-of-operation theory of liability.

In his dissent, Judge Hoffman views the facts as sufficient to impose mode-of-operation liability and would affirm the verdict.

02/26/24 STATE OF NEW JERSEY VS. RAMIER A. DUNBAR
A-5722-12T2

In response to a report of a shooting, officers arrived within moments at a location where approximately thirty persons had congregated. The officers' attention was drawn immediately to defendant, who appeared nervous and briefly ducked into an alley as others dispersed. Defendant walked away, keeping the marked patrol car in view, while the officers attempted to speak to him about the report. In response, defendant merely continued to walk away, looking back over his shoulder. One officer stepped out of the patrol car and asked defendant to stop. Defendant began to run, then discarded a handgun. We find the facts, when combined, established reasonable suspicion making the stop lawful. We therefore reverse the trial court's order suppressing the evidence.

02/24/14 STATE OF NEW JERSEY VS. J.B.W.
A-0527-13T4

The question presented is whether the term "youth serving organization," as defined in N.J.S.A. 2C:7-22, excludes organizations that work in cooperation with a public school and its staff to promote a school program. We conclude that such organizations are not excluded.

02/21/14 KATHERINE FELICIANO VS. JEFFREY N. FALDETTA, ET AL.
A-1301-12T3

This appeal raised the issue of whether, in the context of a contingent fee case, an award of fees under Rule 4:58-2(a) should be reduced by the amount of the contingent fee to

avoid a double recovery. The panel held that it should not because the fee belongs to the client and the attorney is not entitled to the entire contingent fee from the client under that circumstance. The attorney is entitled to the fee awarded pursuant to Rule 4:58-2 for the work done after the offer of judgment was rejected and fair compensation from the client for the period prior to that.

02/19/14 S.B. VS. G.M.B. N/K/A G.M.P.
A-2083-12T1

In this appeal, the court considered whether the trial judge erred in applying New Jersey's version of the Uniform Child Custody Jurisdiction and Enforcement Act in declining jurisdiction and finding Canada the more appropriate jurisdiction for the parties' parenting-time dispute. Because it was not shown plaintiff will likely be able to enter Canada due to his criminal conviction for an assault on defendant, and because the parties' property settlement agreement, which was executed only a few months earlier, clearly and unambiguously stipulated that New Jersey would continue to be the exclusive jurisdiction for parenting-time disputes, the court concluded that the judge misapplied N.J.S.A. 2A:34-71 and reversed.

02/19/14 WILLIAM E. NEWMAN, JR. VS. BOARD OF REVIEW, ET AL.
A-2253-09T3

We reverse the Board's determination to disqualify claimant from benefits for six weeks and remand for a new hearing for two reasons. First, a hearing as to the timeliness of the employer's appeal was held in claimant's absence when he was serving in the United States Air Force, contrary to the federal Servicemembers Civil Relief Act, 50 U.S.C.A. app. §§ 501 to 597. Second, the Board improperly found the employer's appeal was timely filed based on the date the employer received the determination from its representative, UC Express, rather than the date that UC Express received it.

02/13/14 STATE OF NEW JERSEY VS. DANIELLE N. DIANGELO
A-2230-11T1

We consider whether the scope of the Supreme Court's holding announced in State v. Hernandez, 208 N.J. 24 (2011), addressing jail credit calculations, extends to a defendant sentenced to a custodial term for a violation of probation

(VOP). We conclude the public policy expressed by the Court in Hernandez equally applies to VOP sentences. Following this policy, we determine the issuance of the VOP statement of charges to a defendant held in custody triggers the right to receive jail credits against the VOP sentence for a defendant's period of pre-adjudication custody, as well as against the new offense, irrespective of whether a VOP summons or warrant was issued. Accordingly, the trial court's order denying defendant's application for jail credits against her VOP sentence is reversed.

02/13/14 STATE OF NEW JERSEY VS. RAYMOND E. TROXELL
A-3730-10T2

Defendant was convicted of murder as an accomplice to his co-defendant, Marsh. The jury answered a specific interrogatory finding that defendant "as an accomplice [to Marsh] procured the commission of the offense by payment or promise of payment . . . ." N.J.S.A. 2C:11-3(b)(4). The finding of this "triggering event" made defendant eligible for a mandatory sentence of life without parole. The jury subsequently found aggravating factor (e), resulting in imposition of the mandatory sentence.

On appeal, defendant argued for the first time that the judge was required to provide the jury with instructions that permitted it to return a "non-unanimous" verdict on the triggering event, analogizing the situation to prior death penalty jurisprudence which required such a charge.

We concluded that, pursuant to the 2007 amendments that repealed New Jersey's death penalty and made significant changes to N.J.S.A. 2C:11-3, such an non-unanimity instruction is not required or appropriate, nor was there any independent constitutional basis requiring the instruction. We affirmed defendant's conviction and sentence.

02/06/14 L.R. VS. DIVISION OF DISABILITY SERVICES
A-5701-11T2

L.R. participates in the Personal Assistance Service Program under the Personal Assistance Services Act, N.J.S.A. 30:4G-13 to -22. She receives a monthly cash budget to assist her perform routine, nonmedical tasks and promote the greatest possible degree of self-control and self-direction. She appeals from the decision of the Commissioner of Human Services denying her request to use

unspent funds to pay for the landline connection to her residence phone, cell phone service, and internet access.

We reverse. The Commissioner's decision was arbitrary, capricious, and inconsistent with the Legislature's policy of promoting the greatest possible degree of self-control and self-direction on the part of consumers of Personal Assistance Service Program services.

01/31/14 PORT LIBERTE II CONDOMINIUM ASSOC. V. NEW LIBERTY RESIDENTIAL URBAN RENEWAL CO.
A-2574-11T1;A-3129-11T1(CONSOLIDATED)

Several years into the litigation, the trial court dismissed a massive construction lawsuit filed by a condominium association, on the grounds that the association had filed the lawsuit without first obtaining the unit owners' approval as required by the by-laws. Although the unit owners had voted to ratify the filing of the suit, the trial court reasoned that post-filing ratification was not permitted. We concluded that was contrary to well-established case law concerning ratification. We also reasoned that construing the by-laws to preclude ratification produced an absurd result, contrary to the unit owners' interests and to the purpose of the Condominium Act. We held that defendants – the developers and builders — had no standing to represent the interests of the unit owners in enforcement of the by-laws. Any interest defendants had in avoiding possible duplicative litigation by unit owners was satisfied when the unit owners' ratified the association's filing of the complaint.

01/31/14 TEAMSTERS LOCAL 97, ET AL. VS. STATE OF NEW JERSEY, ET AL. NEW JERSEY STATE FIREFIGHTERS' MUTUAL BENEVOLENT ASSOCIATION ET AL. VS. STATE OF NEW JERSEY ET AL.
A-3274-10T3; A-3868-10T3;A-3916-10T3;A-4086-10T3(CONSOLIDATED)

In these consolidated appeals, plaintiffs, who represent state and local public employees in collective negotiations with public employers, challenge the constitutionality of three laws: L. 2010, c. 1, which made changes to State-administered retirement systems; L. 2010, c. 2, which made changes to eligibility requirements for and benefits provided through the State Health Benefits Program (SHBP) and School Employees' Health Benefits Program (SEHBP); and L. 2010, c.

3, which made changes to other public employee benefits. We reject plaintiffs' constitutional challenges and affirm the trial court's dismissal of plaintiffs' complaints for failure to state a claim upon which relief can be granted.

01/29/14 STEPHANIE PLATIA VS. BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY
A-1730-12T3

In this appeal, we consider the application of the "temporary" employee exception to the Tenure Act, N.J.S.A. 18A:16-1.1. Plaintiff was employed as a special education teacher by the Board of Education of Hamilton Township (Board) for more than three academic years in a four-year period. However, the Board denied that she obtained tenure under the Tenure Act, N.J.S.A. 18A:28-1 to -18, because her employment for one of those academic years was as a "Long Term Substitute" pursuant to a contract that stated the position was "non-tenurial." We conclude the exception does not apply and that Platia obtained tenure as of right.

01/29/14 W.B. VS. NEW JERSEY DEPARTMENT OF CORRECTIONS
A-5490-11T3

In Williams v. N.J. Dep't of Corr., 423 N.J. Super. 176 (App. Div. 2011), we considered whether the Commissioner's broad authority to select the appropriate institution to house inmates, N.J.S.A. 30:4-91.2, is limited by the Sex Offender Act (SOA), N.J.S.A. 2C:47-1 to -10. In deciding the appeal of an inmate who challenged his transfer from the general prison population to the Adult Diagnostic Treatment Center (ADTC), we concluded that the Commissioner of the Department of Corrections (DOC) lacked the discretion to transfer inmates to the ADTC who did not meet the sentencing parameters of the SOA. Williams, supra, 423 N.J. Super. at 186. W.B.'s appeal entails a different challenge to the authority of the Commissioner regarding assignment to the ADTC. Convicted as a sex offender in New Hampshire, his custody was transferred to New Jersey pursuant to the Interstate Corrections Compact (the Compact), N.J.S.A. 30:7C-1 to -12;[1] N.H. Rev. Stat. Ann. §§ 622-B:1 to -B:3 (2013), where he was assigned to the ADTC. Following Williams, however, he was reassigned to a wing for inmates who were not sentenced under the SOA and appealed that decision, arguing that the Compact required that he be treated as an ADTC-eligible offender. For the reasons that follow, we affirm.

[[1]As codified, the Compact "empowers New Jersey to enter into contracts with other states 'for the confinement of inmates on behalf of a sending state in institutions situated within receiving states.'" Van Wickle v. N.J. Dep't of Corr., 370 N.J. Super. 40, 45 (App. Div. 2004) (quoting N.J.S.A. 30:7C-4(a)).]

01/27/14 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. W.F. AND R.F. I/M/O J.F., J.F., J.F., J.F. AND J.F.
A-0190-12T3

The Division of Youth and Family Services obtained care and supervision over six children in their parents' joint legal and physical custody. The father appeals the dismissal of the FN litigation, arguing that it changed his custody of the children without a dispositional hearing under N.J. Div. of Youth & Family Servs. v. G.M., 198 N.J. 382 (2009).

We rule that the father's arguments seeking custody of the three older children became moot when they turned eighteen during the FN litigation. The father's arguments regarding the custody of the three younger children cannot be raised in this FN appeal because he and the mother agreed, in a parallel FD case, to joint legal and split physical custody. That agreement mooted any challenges to earlier FN orders affecting their custody. Moreover, the preconditions for a dispositional hearing under G.M. never arose because there was no fact-finding hearing or finding of abuse or neglect.

01/24/14 WATERSIDE VILLAS HOLDINGS, LLC VS. MONROE TOWNSHIP
A-2466-12T1

We address whether a municipality is precluded from seeking dismissal of a property owner's tax appeal pursuant to N.J.S.A. 54:4-34, in circumstances where the assessor's Chapter 91 information request has omitted a word from the statute. We hold that where, as here, the omission is minor, does not alter the substance of the statute, and does not prejudice the property owner, the municipality is still entitled to seek dismissal under the statute.

01/23/14 R.S. VS. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND UNION COUNTY BOARD OF SOCIAL SERVICES
A-5798-11T1

In this appeal, we address an institutionalized Medicaid recipient's ability to shelter income for his non-institutionalized spouse. Here, the institutionalized

petitioner appeals from a final agency decision of the Division of Medical Assistance and Health Services (Division) finding that the community spouse monthly income allowance (CSMIA) for his wife, D.S., should be calculated in accordance with 42 U.S.C.A. § 1396r-5(e)(2)(B) and N.J.A.C. 10:71-5.7(e), rather than pursuant to a Family Part separate maintenance order, which gave petitioner's spouse substantially more money per month than the amount calculated according to the CSMIA. Following our review, we conclude the Division, when determining the institutionalized spouse's obligation for his nursing home care, is not bound to abide by the terms of the separate maintenance order, entered in a non-contested proceeding, without notice to the Division, because the Order was designed to circumvent the regulations governing the CSMIA. We affirm the Division's decision.

01/22/14 THOMAS DEMARCO, ET AL. VS. SEAN ROBERT STODDARD, D.P.M., ET AL.
A-3924-12T1

In this insurance coverage dispute, choice-of-law analysis requires that New Jersey law apply to a medical malpractice policy issued in Rhode Island to a doctor who falsely claimed in his application for insurance that a majority of his practice was conducted in Rhode Island. The alleged malpractice occurred in New Jersey upon a New Jersey resident, and the policy covered the out-of-state practice of the doctor.

The same analysis and reasoning previously applied in cases pertaining to compulsory auto insurance leads to the conclusion that the carrier's remedy of rescission in this case is limited so that the minimum compulsory amount of malpractice insurance remains available for an innocent patient claiming he was injured by the doctor's malpractice.

01/22/14 JUDITH A. DINAPOLI VS. BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY
A-5649-11T2

Respondent Board of Education of the Township of Verona sought review of the final decision of the Commissioner of Education finding Petitioner retained her secretarial tenure rights and could "bump back" to her secretarial position after she had voluntarily transferred to a non-secretarial position. The parties stipulated the issue as whether Petitioner was entitled to bumping rights to a secretarial or

clerical position following the elimination of her then non-secretarial position. Respondent argued that a secretary forfeits her tenure upon promotion to a non-secretarial position, as there is no legislative authority which permits the retention of secretarial tenure rights. Petitioner urged the court to find that the tenure rights she acquired through her employment as a secretary prior to promotion were not relinquished and remain a continuing entitlement. The court reversed. The court explained that the express terms of N.J.S.A. 18A:17-2 do not support the Commissioner's conclusion that secretarial staff maintain tenure upon transfer to non-secretarial positions, thus Petitioner relinquished her secretarial and tenure rights when she voluntarily assumed the non-secretarial position.

01/14/14 DEPARTMENT OF CHILDREN AND FAMILIES, DIVISION OF CHILD PROTECTION AND PERMANENCY VS. E.D.-O.
A-3825-12T4

The court held that a mother failed to exercise the minimum degree of care required by N.J.S.A. 9:6-8.21(c)(4)(b) by leaving her nineteen-month-old child unattended in a motor vehicle, with its engine running but the doors locked, while the mother entered a nearby store.

01/13/14 R.K. AND A.K. VS. D.L., JR.
A-2338-12T1

Plaintiffs, the maternal grandparents of a twelve-year-old girl, filed a verified complaint in the Family Part seeking visitation rights pursuant to our State's grandparent visitation statute, N.J.S.A. 9:2-7.1. After joinder of issue, but before any discovery, defendant/father moved to dismiss the complaint under Rule 4:6-2(e). Because the court relied on the parties' supplemental certifications, the motion judge decided the matter as a summary judgment motion under Rule 4:46-2(c).

We reverse. The facts alleged by plaintiffs established a prima facie case for relief under N.J.S.A. 9:2-7.1. The court also erred in granting defendant's motion to dismiss under Rule 4:46-2(c) because there were material issues of fact in dispute. The complexity and magnitude of the allegations also obligated the court to afford plaintiffs the opportunity to conduct discovery in order to gather sufficient evidence to overcome defendant's presumptively

valid objection to grandparent visitation as the child's father.

Although under Rule 5:4-4 and AOC Directive 08-11 grandparent visitation complaints are considered summary actions, the burden of proof imposed on plaintiffs in grandparent visitation cases under Moriarty v. Bradt, 177 N.J. 84, 117 (2003), cert. denied, 540 U.S. 1177, 124 S. Ct. 1408, 158 L. Ed. 2d 78 (2004) makes these matters ill-suited for traditional summary action designation. We thus hold that a complaint seeking grandparent visitation as the principal form of relief should not be automatically treated by the Family Part as a summary action. After joinder of issue, the vicinage Family Part Division Manager shall designate the matter as a contested case and refer the case for individualized case management by a Family Part judge selected by the vicinage Presiding Judge of Family. The judge shall review the pleadings and determine whether active case management is needed.

We also hold that an attorney-prepared pleading should not have been rejected by the Family Part Division Manager merely because it did not use the standardized form approved by the AOC for pro se litigants. This approach displays a disrespect for the work-product of professionally trained and highly experienced family law attorneys.

01/13/14 RICHARD CAPORUSSO, ET AL. VS. NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES, ET AL.
A-2266-12T3

Plaintiffs' action, submitted directly pursuant to Rule 2:2-3(a)(2), seeks "injunctive and/or declaratory relief" to compel the Department of Health to comply with the Legislature's directives set forth in the New Jersey Compassionate Use Medical Marijuana Act (the Act), N.J.S.A. 24:6I-1 to -16. Further, we consider whether plaintiffs have set forth an actionable constitutional challenge.

Following our review, we conclude DOH must complete its reporting requirements, set forth in N.J.S.A. 24:6I-12(a)(1), (2) and (c), within forty-five days of the date of this opinion. All other requests for relief were denied.

01/09/14 L.J.ZUCCA, INC. VS. ALLEN BROS. WHOLESALE DISTRIBUTORS INC., ET AL.
A-2723-11T1

Pursuant to the Unfair Cigarette Sales Act of 1952, N.J.S.A. 56:7-18 to -38, the Director of the Division of Taxation issues price lists for all brands of cigarettes, which minimum base prices wholesalers are presumptively required to charge retailers. Proof of underpricing, or rebates or concessions granted to retailers, constitutes prima facie evidence of anticompetitive intent, which is a required element of a statutory violation. Anticompetitive intent under the Act does not have the same meaning as "predatory intent," as that phrase is understood in federal antitrust law. Plaintiff was not required to prove that a defendant had the ability to recoup its underpricing losses.

However, a wholesaler may defend against a prima facie case of violation by presenting evidence of its actual costs of doing business that are less than the presumed costs the Director uses to set the price schedule. It may also defend by showing that it did not have the requisite anticompetitive intent in underpricing its cigarettes or in granting rebates or concessions.

01/07/14 ERNEST BOZZI VS. CITY OF ATLANTIC CITY, ET AL.
A-0532-12T4

We reviewed a Law Division order concluding plaintiff Ernest Bozzi suffered a violation of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, for which he was entitled to damages and attorney's fees. The trial court rejected defendants' arguments that plaintiff could not request relief under OPRA because he failed to file a written request and that the document sought by plaintiff — a bid package for a city project — was exempt from OPRA's reach and governed by the Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-1 to -51.

We affirmed the trial judge's conclusion that the requested bid specifications were government records, not otherwise excepted from OPRA's fee limits by the LPCL. However, in light of the clear statutory provisions, plaintiff's request, although seeking a government record, failed to comply with OPRA's writing requirement, which was fatal to recovery under the statute.

01/07/14 NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT VS. CREST ULTRASONICS, ET AL.
A-0417-12T4

We uphold the constitutionality of N.J.S.A. 34:8B-1, a measure the Legislature enacted in 2011 after the Governor's conditional veto of a more sweeping version of the proposed law. Subject to certain exceptions, the statute bars employers seeking to fill job vacancies in this State from purposefully or knowingly publishing advertisements stating that job applicants must be currently employed in order for their applications to be accepted, considered, or reviewed.

Appellants, a New Jersey company and its chief executive officer, posted a newspaper ad containing such prohibited language shortly after the law became effective, and were fined $1,000 by the Department of Labor and Workforce Development. They contend that N.J.S.A. 34:8B-1 improperly infringes upon their rights of free speech, in violation of the First Amendment of the United States Constitution and Article I, Paragraph 6 of the New Jersey Constitution.

Applying the well-established "intermediate scrutiny" test for evaluating content-based restrictions on commercial speech set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 561, 100 S. Ct. 2343, 2349, 65 L. Ed. 2d 341, 348 (1980), we conclude that the statute is narrowly tailored to advance a limited, but nevertheless substantial, governmental objective in maximizing the opportunities for unemployed workers to have their qualifications presented to prospective employers. The modest restrictions that the State has placed upon job advertising are constitutionally valid, even though employers might not consider, or ultimately hire, most of the unemployed applicants who respond to such job postings.

We therefore affirm the finding of a violation, but remand for the Department for reconsideration of the fine under the circumstances presented.

01/03/14 EDWARD MCGLYNN, JR., ET AL. VS. STATE OF NEW JERSEY, ET AL.
A-1743-12T3

A utility company does not owe a duty of care to passing motorists to remove a dead tree located within its right-of-way over privately owned lands where the New Jersey Department of Transportation also has a right-of-way. The tree fell on an adjoining highway, striking a vehicle, killing one occupant, and causing severe injuries to another.

12/30/13 ADAM M. FINKEL, ET AL. VS. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HOPEWELL, ET AL.
A-0908-13T2

A proposed question on a non-binding local referendum may not be placed on a ballot when the municipality has failed to submit the proposal to the county clerk within 81 days before an election as required by N.J.S.A. 19:37-1, even where the municipality has submitted the proposal within the 65-day deadline separately set forth in N.J.S.A. 19:37-2. Among other things, a governing body's non-compliance with the 81-day deadline in N.J.S.A. 19:37-1 conflicts with the local citizens' interests, as protected by N.J.S.A. 19:37-1.1, in having sufficient time to react to a referendum that has been proposed to be placed on the ballot.

Because the 81-day deadline of N.J.S.A. 19:37-1 was not met here, we declare the referendum at issue untimely and thus invalid. Consequently, we reverse the trial court's order holding to the contrary. Because the election has occurred and the governing body has already acted on the policy question posed by the referendum, we issue no other relief beyond our declaratory ruling.

We also explain why we declined to dismiss the appeal as moot, because the appeal raises a significant issue of interpretation of the election laws and because the tight time frames involved under the statues make the issue one that is "capable of repetition, yet evading review."

12/30/13 CARIBBEAN HOUSE, INC. VS. NORTH HUDSON YACHT CLUB AND THE RIVER PALM TERRACE
A-3857-11T1
A-4784-11T1 (CONSOLIDATED)

We review two orders restricting the use of a deeded access easement granted to defendant owner of the dominant estate when plaintiff's servient estate was subdivided, and plaintiff sold the land-locked dominant estate to defendant. Because we conclude that the use of the easement to which the owner of the servient estate objected benefitted only the dominant estate to which the easement is appurtenant, notwithstanding the ancillary value the arrangement provided to a third-party, we reverse.

12/30/13 IN THE MATTER OF APPLICATION OF JONATHAN R.

WHEELER FOR A RETIRED OFFICER PERMIT TO CARRY A FIREARM OPENLY AND/OR CONCEALED

IN THE MATTER OF APPLICATION OF GEORGE A. DAUDELIN FOR A RETIRED OFFICER PERMIT TO CARRY A FIREARM OPENLY AND/OR CONCEALED
A-3704-11T4

The questions presented are: 1) whether the "justifiable need" requirement of N.J.S.A. 2C:58-4d violates the Second Amendment; 2) whether subsection *l* of N.J.S.A. 2C:39-6 arbitrarily distinguishes between eligible retired officers and others; 3) whether distinctions between retired officers domiciled in New Jersey and elsewhere violate the Privileges and Immunities Clause of Article IV, Section 2 — an issue not raised in the trial court; and 4) whether LEOSA would preempt these applicants' prosecution for possessing a handgun without a permit in violation of N.J.S.A. 2C:39-5b — an issue not properly raised in the Law Division. We conclude that the appellants are not entitled to relief on any ground asserted.

12/26/13 S.M. VS. K.M.
A-6096-12T3

We granted leave to appeal from an order preventing a father in a pending divorce case from having any contact with his two children until the criminal charges against him, involving an allegation that he pointed a BB gun at his son, are resolved. We now reverse and remand for a hearing before the Family Part judge at which the prosecutor, criminal defense attorney and two family lawyers may be heard. We rely on Rule 5:12-6 and AOC Directive 03-09, which control visitation decision-making when an abuse and neglect case is being heard in the Family Part while a parent has criminal charges pending.

12/26/13 ESTATE OF MYROSLAVA KOTSOVSKA, BY OLENA KOTSOVSKA ADMINISTRATOR VS. SAUL LIEBMAN
A-5512-11T4

In this appeal from a $565,806.37 final judgment in a wrongful death action, we consider whether the question of the decedent's status as an employee or independent contractor, which the jury determined adversely to defendant, should have been decided in the Division of Workers' Compensation.

We conclude that the Division was the proper forum for resolution of that issue pursuant to Kristiansen v. Morgan, 153 N.J. 298 (1998), modified on other grounds, 158 N.J. 681 (1999). Notwithstanding the superior court's concurrent jurisdiction to decide the question of decedent's employment status, we reverse the liability verdict because we also conclude that the jury instructions on the issue were seriously flawed. Rejecting defendant's remaining points of error, however, we affirm the jury's damages verdict and preserve it pending remand to the Division to determine decedent's employment status.

12/24/13 STATE OF NEW JERSEY VS. IVONNE SAAVEDRA
A-1449-12T4

Defendant was employed by the North Bergen Board of Education as a clerk to the child study team. She was indicted with one count of second-degree official misconduct and one count of third-degree theft for allegedly taking confidential student records to assist her attorney in the prosecution of her civil employment discrimination claims against her employer. Relying on Quinlan v. Curtiss-Wright Corp., 204 N.J. 239 (2010), defendant unsuccessfully moved to dismiss the indictment before the trial court.

We granted leave to appeal and now affirm. We reject defendant's argument that she had an absolute right to take confidential student records to support her wrongful termination suit against the Board. Quinlan does not establish a bright-line rule decriminalizing conduct that is otherwise sufficient to support an indictment under State v. Hogan, 144 N.J. 216 (1996). The trial judge was not required to apply the multi-factor test in Quinlan to determine whether the State presented a prima facie case to support the indictment against defendant. Defendant is free, however, to raise Quinlan at trial to negate the state of mind requirements of official misconduct under N.J.S.A. 2C:30-2a and theft under N.J.S.A. 2C:20-2b(2)(g), as an affirmative defense.

Judge Simonelli dissents. She would have dismissed the indictment with prejudice on fundamental fairness grounds.

12/23/13 MIDLAND FUNDING LLC VS. CARL ALBERN, JR.
A-0562-12T4

In this appeal, the court considered a procedural question: is a defendant, who, in response to a complaint, moved for dismissal but did not file an answer after the motion was denied, entitled to notice of a plaintiff's request for default? Because Rule 4:43-1 does not expressly authorize an ex parte request for default in this unusual circumstance, and because the rules are based on a policy favoring the disposition of cases on their merits, the court reversed the denial of defendant's Rule 4:50 motion to vacate both the default and the default judgment later entered.

12/20/13 STATE OF NEW JERSEY V. TIMOTHY ADKINS
A-5748-12T4/A-5749-12T4(CONSOLIDATED)

Addressing the impact of Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), on pending cases involving warrantless blood tests, we reversed a trial court order suppressing blood evidence in a DWI and assault-by-auto case. Consistent with long-standing rulings of the New Jersey Supreme Court, the police obtained the blood sample from defendant without a search warrant. Thereafter, the United States Supreme Court unexpectedly changed the legal landscape by issuing a ruling that construed the Fourth Amendment more broadly than our Court.

On these facts, under Davis v. United States, ___ U.S. ___, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011), suppression would not be the appropriate remedy under federal constitutional law, because the New Jersey police were acting lawfully under established New Jersey precedent at the time of the search. Further, had our own Supreme Court issued the McNeely ruling as a construction of the New Jersey Constitution, the ruling would not have been applied retroactively. Under these unusual and very limited circumstances, we held that suppression of the evidence in this case was not required.

12/19/13 BAANYAN SOFTWARE SERVICES, INC. VS. HIMA BINDHU KUNCHA
A-2058-12T3

Plaintiff is an international information technology and software consulting company with headquarters in New Jersey. Plaintiff hired defendant to perform consulting services in Illinois. Defendant never lived in, worked in, or visited New Jersey. We hold that defendant lacks sufficient minimum contacts with New Jersey, and that to subject defendant to

jurisdiction in New Jersey would offend traditional notions of fair play and substantial justice.

12/18/13 SUSAN MARIE HARTE VS. DAVID RICHARD HAND/ T.B. VS. DAVID RICHARD HAND
A-5430-11T4/ A-5431-11T4 (CONSOLIDATED)

We affirm counsel fees and the refusal to consider an expert opinion on imputed income because it is a net opinion. We reverse the aspect of the motion judge's decision involving the calculation of child support for multiple families because the judge ignored the obligor's multiple obligations. We suggest one way to fairly calculate child support that is consistent with the purposes of the Child Support Guidelines not to penalize later-born children of a different mother. We suggest averaging the worksheet calculations, first with one family representing the "prior order," and then with the other family representing the "prior order." Using this method the obligor and all of the children are treated equitably.

12/16/13 WASTE MANAGEMENT OF N.J., INC. v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY, ET AL.
A-2806-12T1/A-2808-12T1 (CONSOLIDATED)

In this public bidding matter, the court granted leave to appeal the denial of an interlocutory injunction based solely on the trial judge's determination that plaintiffs were not likely to succeed on the merits. Because the judge mistakenly overlooked his authority to impose interlocutory injunctive relief to preserve the parties' positions and subject matter of the suit – even when there are legitimate doubts about plaintiffs' likelihood of success – the court reversed.

12/11/13 I/M/O AUTHORIZATION FOR FRESHWATER WETLANDS STATEWIDE GENERAL PERMIT 6;I/M/O CARE ONE, INC.
A-3236-10TI/A-3837-09T2/A-3400-10T2(CONSOLIDATED)

This opinion was not reported when filed, but is being reported now at the request of one of the parties pursuant to Rule 1:36-2(c).

The panel held that DEP's use of its Nonstructural Strategies Points System to assess a stormwater management plan was improper because implementation of the NSPS constituted improper administrative rulemaking, inasmuch as

it was not adopted using the rulemaking procedures of the APA.

12/11/13 IRVIN B. BEAVER VS. MAGELLAN HEALTH SERVICES, INC., ET AL.
A-1311-12T3

Under what circumstances may a litigant pursue common law and statutory causes of action in the Law Division, rather than appeal from State final agency determination, where the merits of the agency determination are at issue? This is the question we address in deciding this appeal.

11/27/13 PATERSON POLICE PBA LOCAL 1, ET AL. VS. CITY OF PATERSON, ETC.
A-1263-11T1

The parties engaged in compulsory interest arbitration after N.J.S.A. 40A:10-21(b) required public employees to pay a contribution of 1.5 percent of base salary toward their health benefits and the resulting award made specific reference to this requirement. However neither the statute nor the award defined "base salary." Defendant City of Paterson interpreted the term as base pensionable salary and made deductions accordingly. Plaintiffs initiated this action, contending that "base salary" meant base contractual salary and excluded additional items of compensation such as longevity, educational incentives, and night and detective differentials. Because "base salary" was defined in a subsequent statute applicable to the award here, N.J.S.A. 34:13A-16.7, we assume that, absent any statement to the contrary, the arbitrator used the term "base salary" as directed by the Legislature. Therefore, we reverse the judgment entered in plaintiffs' favor.

11-26-13 J.B., ET AL. VS. NEW JERSEY STATE PAROLE BOARD
A-5435-10T2/ A-1459-11T2/ A-2138-11T3/ A-2448-11T2/A-3256-11T2(CONSOLIDATED)

Appellants are individuals who have been convicted of sexual offenses, have completed their respective prison terms, and are now being monitored by respondent New Jersey State Parole Board as offenders who are subject to either parole supervision for life ("PSL") or its statutory predecessor, community supervision for life ("CSL"). N.J.S.A. 2C:43-6.4. They challenge the constitutionality of certain terms of supervision the Parole Board has imposed

upon them and other released sex offenders subject to CSL or PSL, mainly (1) restrictions on access to social media or other comparable web sites on the Internet; and (2) mandated submission to periodic polygraph examinations.

In the published portion of our opinion, we reject appellants' facial challenges to the Internet access restrictions, subject to their right to bring future "as-applied" challenges if they avail themselves of the Parole Board's procedures for requesting specific permission for more expanded Internet access and are then denied such permission.

As indicated in the unpublished portion of our opinion, we do not decide at this time the merits of appellants' constitutional attack upon the polygraph requirements. Instead, we refer that subject matter to the trial court for supplemental proceedings, pursuant to Rule 2:5-5(b), for the development of an appropriate record, including scientific or other expert proofs, and for fact-finding. Such proofs and fact-finding shall focus upon the alleged therapeutic, rehabilitative, and risk management benefits of polygraph testing when it is conducted within the specific context of post-release oversight of sex offenders.

11-21-13 JAMES J. PROCOPIO, JR. VS. GOVERNMENT EMPLOYEES INSURANCE COMPANY, a/k/a and d/b/a GEICO
A-2313-12T2

On leave granted, we reverse the trial court's interlocutory order compelling production of an insurer's claim file without first awaiting the outcome of the insured's bifurcated claim to underinsured (UIM) benefits, as premature, inefficient and potentially prejudicial to the insurer. We hold that where the underlying UIM or UM claim has been severed from the insured's bad faith claim for trial purposes, discovery as to the latter should await completion of the former in the insured's favor.

11-15-13 IN THE MATTER OF THE ESTATE OF AURELIA DEFRANK, DECEASED
A-4622-11T2

In this estate litigation, we reverse the grant of summary judgment in favor of one of decedent's two daughters as against the other, holding that in rebutting the presumption of survivorship when a party to a joint bank

account dies under the Multiple Party Deposit Account Act, N.J.S.A. 17:16I-1 to -17, evidence of events occurring after the creation of the joint bank accounts may relate back to, and be indicative of, the decedent's intent at the time the accounts were established. Moreover, where a party's state of mind, intent, knowledge or credibility is in issue, as here, summary judgment is ordinarily inappropriate.

11-07-13 STATE OF NEW JERSEY VS. ANGELIQUE STUBBS ET AL. AND STATE VS. JULES L. STUBBS ET AL.
A-1199-10T2/A-2942-10T2(CONSOLIDATED)

Husband and wife, Jules and Angelique Stubbs, were convicted of various CDS-related offenses. As to the wife, we remand for a hearing as to the admissibility of the form United States Currency Seizure Report, which she signed, pertaining to $4831 in cash seized from defendants' home along with a substantial quantity of drugs. The State argued that the wife, by signing the form, claimed ownership of the cash, which demonstrated she joined in her husband's drug-related activities. We conclude the form must be viewed as an adoptive admission under N.J.R.E. 803(b)(2); and, since the form was a statement of a criminal defendant, N.J.R.E. 803(b), the State as proponent was required to show, in a preliminary hearing pursuant to N.J.R.E. 104(c), that the statement was admissible. To do so, the State must show the wife was aware of and understood the contents of the allegedly adopted statement, and she unambiguously assented to it. We order a new trial for the wife only if the trial court determines on remand that the form was not properly admitted as an adoptive admission.

11-04-13 WILLIAM SUSER VS. WACHOVIA MORTGAGE, FSB, ET AL.
A-1330-12T2

In this appeal, the court considered whether plaintiff, who had foreclosed on a mortgage and obtained ownership of the property in question at a sheriff's sale, could maintain a quiet-title action against the holders of two previously-recorded mortgages. The court held that even though there was no dispute about the validity and priority of the other mortgages, the quiet title action could be maintained to resolve the limited question of whether one of the defendants had the right to foreclose in light of the factual disputes concerning the validity of its assignment and, for that reason, the court reversed the summary judgment entered in favor of that defendant. Summary judgment as to the other

defendant, which came into ownership of its mortgage through a merger with the original mortgagee, was affirmed.

11-01-13 ADVANCE AT BRANCHBURG II, LLC VS. TOWNSHIP OF BRANCHBURG BOARD OF ADJUSTMENT
A-1840-12T2

This appeal presented the issue of whether a residential development consisting primarily of market-rate housing, but also including affordable housing units, constitutes an inherently beneficial use for the purposes of obtaining a use variance pursuant to N.J.S.A. 40:55D-70(d)(1). Plaintiff sought to build the development in an industrial zone. In the reported portion of the opinion, the panel concluded that such a development is not an inherently beneficial use. In the unreported portion of the opinion, the panel concluded that the Board's decision denying the variance was not arbitrary, capricious or unreasonable.

10-31-13 J.O. VS. TOWNSHIP OF BEDMINSTER, ET AL.
A-1838-11T3/A-3182-11T3(CONSOLIDATED)

Although it was enacted in 1979, there are no published opinions that interpret or apply the Subpoena First Act, N.J.S.A. 2A:84A-21.9 to -21.13 (the Act), which has been described as "narrowly circumscrib[ing] the situations in which the State can properly search and seize materials acquired in the course of newsgathering." In this case, we consider the application of the Act to a suspect in a criminal investigation who asserted a claim to its protection based upon his status as an "internet publisher" after a search warrant was executed and his suppression motion was denied. We hold that plaintiff waived any claim to protection; that the officers here were not required to conduct an investigation to determine whether plaintiff was protected by the Act prior to seeking a warrant; and that, even if plaintiff had timely asserted his claim, he was not entitled to the Act's protection because the materials sought were not obtained in the course of newsgathering activities. The order granting summary judgment is affirmed.

10-29-13 HONORABLE DANA L. REDD, ET AL. VS. VANCE BOWMAN, ET AL.
A-5731-11T4

After Camden's city clerk certified an initiative petition pursuant to the Faulkner Act, N.J.S.A. 40:69A-1 to 210, the mayor and city council president sought relief declaring the proposed ordinance invalid and restraining its further submission to the city council or the voters.

The proposed initiative sought to maintain the city's police department and prohibit the city from joining an anticipated, newly-formed county-wide police department. The Law Division judge granted plaintiffs' requested relief, concluding that the proposed ordinance created an undue restraint on the future exercise of municipal legislative power and was invalid on its face. We reversed, noting that prior decisions adopting this judicially-imposed restriction on the Faulkner Act's initiative provisions preceded the Legislature's 1982 amendment. That amendment vested an ordinance passed by initiative with a special characteristic: "No such ordinance shall be amended or repealed within 3 years immediately following the date of its adoption by the voters, except by a vote of the people." N.J.S.A. 40:69A-196(a). Additionally, in a series of recent opinions regarding the Faulkner Act's referendum provisions, the Court has signaled that, absent express legislative restrictions, the power of the voters to exercise their rights to initiative and referendum cannot be abridged.

The judge specifically refrained from considering whether the ordinance was pre-empted by the Municipal Rehabilitation and Economic Recovery Act, N.J.S.A. 52:27BBB-1 to -75 (MRERA), and the Special Municipal Aid Act, N.J.S.A. 52:27D-118.24 to -118.31 (SMAA), statutory regimes that impose State oversight on Camden's finances. Because the record was inadequate, we remanded that issue for further consideration.

10-28-13 DR. & MRS. JOHN PETROZZI, ET AL. VS. CITY OF OCEAN CITY, ET AL.
A-1633-11T4/A-1677-11T4 (CONSOLIDATED)

In this action by Ocean City beachfront property owners for breach of easement agreements obligating the township to maintain a dunes height restriction, we hold that the municipality's failure to perform its part of the bargain is due to reasonably unforeseen circumstances beyond its control (passage of CAFRA amendments regulating dune maintenance) so as to relieve Ocean City of its contractual duty.

Even though Ocean City may not be liable for breach of contract under the doctrine of impracticability of performance, we nevertheless hold that the homeowners are not left without a remedy in the interest of fairness, since plaintiffs surrendered their right to compensation (through eminent domain condemnation) in reliance on Ocean City's promise to protect their ocean views. We go on to explain the proper measure of restitutionary damages, necessarily limited to the harm that flows naturally only from the increased height and to include the principles recently espoused in Borough of Harvey Cedars v. Karan, 124 N.J. 384 (2013).

10-24-13 GLENN HEDDEN VS. KEAN UNIVERSITY, ET AL.
A-4999-12T2

We hold that an e-mail from the head women's basketball coach at Kean University to the University's general counsel was protected by the attorney-client privilege even though she later disclosed it to the NCAA during its investigation into certain practices of the University's athletic program. In the organizational context, the University is considered the client and holder of the privilege, which cannot be waived by an employee who is neither an officer nor director of the entity, and who was not acting under the direction or with the express approval of the University in releasing the document.

Judge Guadagno dissents, finding, based on his review, that the e-mail was not seeking legal advice from counsel; was not made in confidence because another University employee was copied on the document; and that, in any event, any privilege that may have attached was waived when the University failed to object to the employee's disclosure to the NCAA.

10-23-13 JACQUELIN ARROYO VS. DURLING REALTY, LLC.
A-0967-12T2

In this negligence case, plaintiff was injured after she slipped on a telephone calling card that had been discarded on the sidewalk outside of defendant's convenience store. The trial court granted defendant summary judgment, which we affirm.

We reject plaintiff's argument that defendant is liable under the "mode of operation" theory of liability recognized

in Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003), and in other customer self-service cases. The present case is dissimilar to the successful mode-of-operation cases in several respects. In particular, the phone card had to be presented to a cashier after it was taken from a self-service rack, making the nexus between the rack and the eventual presence of the card on the sidewalk extremely attenuated. Also, the card stored minutes or value and thus was not debris that would invariably be discarded when its purchaser left the store.

It cannot be reasonably asserted that the store's "method of doing business," see Nisivoccia, 175 N.J. at 564, created the sidewalk hazard. What the purchaser chose to do with the card upon leaving the store was not an integral feature of the store's retail operation. Hence, ordinary principles of premises liability, including plaintiff's obligation to show defendant's actual or constructive notice of a dangerous sidewalk condition, apply.

The trial court properly rejected plaintiff's proffered report from a construction consultant, which included criticisms of defendant's maintenance and trash removal practices. The expert's criticisms comprised inadmissible "net opinions" that were not based on objective standards. Instead, the opinions were based upon the expert's personal experiences, without sufficient substantiation or competent proof that they were prevailing or common in the field.

10-17-13 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. J.S. IN THE MATTER OF THE GUARDIANSHIP OF A.G., A MINOR
A-0512-12T1

Defendant, a biological father, appeals the Family Part's judgment terminating his parental rights as to his minor child following a multi-day trial. Among other things, defendant argues that the trial court erred in upholding a decision of the Division of Youth and Family Services to "rule out" two cousins who had expressed interest in serving as alternative caregivers for the child.

Affirming the final judgment, we reject defendant's argument that the Division lacks the authority to rule out relatives under N.J.S.A. 30:4C-12.1 based upon considerations of a child's best interests. Instead, we hold that the applicable statutory provisions and a related regulation,

N.J.A.C. 10:120A-3.1, allow the Division to rule out a relative on such best-interests grounds, regardless of the relative's willingness or ability to care for a child. However, the Division's rule-out authority is always subject to the Family Part's ultimate assessment of that child's best interests.

We also uphold the validity of the language in N.J.A.C. 10:120A-3.1(b) prohibiting a relative who the Division rules out on best-interests grounds from pursuing an administrative appeal of that agency determination. However, we urge the Division to act with reasonable diligence in notifying a potential caretaker that he or she has been ruled out, once the investigation of that person has been completed.

10-17-13 STATE OF NEW JERSEY VS. LARRY R. HENDERSON
A-5482-11T3

In its landmark decision in this case, State v. Henderson, 208 N.J. 208 (2011), the Supreme Court remanded to the trial court for a new Wade hearing. Applying the Court's new state constitutional framework for such matters, the trial court denied suppression of the out-of-court eyewitness identification evidence used to convict defendant. On appeal, defendant argued, among other things, that the new framework implicitly imposed on the prosecution the burden of proving reliability by "clear and convincing evidence." In light of the language of the Supreme Court's opinion that, once a defendant provides evidence of suggestiveness the prosecution must "offer proof to show that the proffered eyewitness identification is reliable," id. at 289, the court rejected this argument, viewing the prosecution's burden as little different and no more onerous than the "burden of producing evidence" described in N.J.R.E. 101(b)(2).

Affirmed.

10-17-13 PATRICIA SOLIMAN ET AL. VS. THE KUSHNER COMPANIES, INC, ET AL.
A-5397-10T2

This appeal involves four consolidated law suits brought by employees of tenants and members of their families, including minors, against the landlord and managers of this commercial office building, as well as a number of other companies responsible for installing and maintaining video monitoring and recording equipment intentionally concealed

inside smoke detectors in four public bathrooms, two male and two female. Plaintiffs allege intentional and negligent infliction of emotional distress, common law invasion of privacy, and invasion of privacy under N.J.S.A. 2C:58D-1(b). They seek common law compensatory damages, punitive damages under the Punitive Damages Act, and statutory damages under N.J.S.A. 2C:58D-1(c).

The Law Division granted defendants' motions for summary judgment and dismissed plaintiffs' cause of action as a matter of law. We reverse the Law Division's order dismissing the counts in their complaints grounded on invasion of privacy. As a threshold issue, plaintiffs must show defendants' actions to clandestinely monitor their activities in a gender-restricted bathroom is subject to liability because it is the type of intrusion that a reasonable person would find to be highly offensive.

Consistent with the approach endorsed by the Supreme Court in Rumbauskas v. Cantor, 138 N.J. 173 (1995), we also hold that a plaintiff in a cause of action predicated on the tort of invasion of privacy, grounded in the subcategory of "invasion of intrusion on the plaintiff's physical solitude or seclusion," which includes the characteristics of unconsented prying, may recover compensatory damages for "personal hardships," similar in kind and scope to those codified in N.J.S.A. 10:5-3, if plaintiffs can show a causal link between defendants' intrusion and these "personal hardships."

10-16-13 KELLY GREENE VS. AIG CASUALTY COMPANY
A-2990-12T3

The question presented by this appeal is whether respondent AIG Casualty Company, which paid workers' compensation benefits to petitioner, Kelly Greene, is entitled to a lien against her settlement with a third-party tortfeasor pursuant to Section 40 of the Workers' Compensation Act, N.J.S.A. 34:15-40, even though her injury was ultimately noncompensable.

Nothing in either Section 15 or Section 40 conditions reimbursement of the claim from a third-party settlement on whether the benefits the employer paid were owed in the first place. Read in conjunction, Section 40 and our collateral source statute, N.J.S.A. 2A:15-97, plainly require that a third-party tortfeasor be held to the full extent of its

liability for a workplace injury, that the employer be repaid for benefits paid to the injured worker pursuant to the Act without regard to the compensability of the claim, and that the employee not obtain a double recovery. AIG is entitled to its lien.

10-16-13 STATE OF NEW JERSEY VS. DAVID GRANSKIE, JR.
A-6278-11T4

We held that defendant had the right to present expert testimony concerning his heroin addiction and withdrawal symptoms and the potential impact of his physical and psychological condition on the reliability of his confession. The expert may explain how heroin withdrawal could have affected the defendant during the police interrogation, but may not opine that the defendant's confession was unreliable or was false, because such testimony would usurp the jury's role. While the expert may rely in part on hearsay to explain his opinions, N.J.R.E. 703, there must be some legally competent evidence that defendant was in fact suffering from withdrawal at the time he made the confession.

10-09-13 ALLSTATE NEW JERSEY INSURANCE COMPANY, ET AL. VS. GREGORIO LAJARA, ET AL.
A-5684-11T4

In this interlocutory appeal, we affirm the trial court's order striking a jury demand in a private civil action under the Insurance Fraud Prevention Act (Act), N.J.S.A. 17:33A-1 to -30. We previously held that a right to trial by jury does not apply to a civil action under the Act by the Commissioner of Banking and Insurance. State v. Sailor, 355 N.J. Super. 315, 323-24 (App. Div. 2001).

We analyze the statute in view of established principles of statutory construction, and reject defendants' argument that the Act impliedly establishes a right to a jury trial. We distinguish Zorba Contractors, Inc. v. Housing Authority of Newark, 362 N.J. Super. 124 (App. Div. 2003), which found an implied jury trial right under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -109. We also conclude that there is no constitutional right to trial by jury under the fraud prevention law because the equitable nature of the statutory right to relief was unknown at common law before adoption of the State Constitutions.

10-08-13 STATE OF NEW JERSEY VS. L.A.

A-6175-10T4

In this PCR case, presented after an evidentiary hearing on remand, we explicate the familiar Strickland prejudice standard, requiring a defendant to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). We note the test is not outcome determinative; "reasonable probability" does not mean more likely than not; it means "probability sufficient to undermine confidence in the outcome." Ibid. We address the prejudice prong's application to a claim that counsel failed to call an exculpatory witness. We conclude a court must assess the absent or uncalled witness's credibility in light of the totality of the circumstances. The issue is not whether the absent witness is more credible than the State's witness; it is whether the absent witness's testimony sufficiently undermined confidence in the result. The court's ultimate goal is to assess the challenged trial's fairness and reliability.

Here, the trial judge found the absent witness credible, but denied relief because he perceived the victim-witness more credible. We reverse the court's denial of PCR because the court failed to consider the totality of circumstances, and misapplied the test for determining prejudice under Strickland.

09-26-13 I/M/O NEW JERSEY D.E.P. CONDITIONAL HIGHLANDS APPLICABILITY DETERMINATION,PROGRAM INTEREST NO. 435434
A-3236-10T1

This appeal arises from the second challenge to JCP&L's construction of a 230 kV/12.5 kV electrical substation in Tewksbury Township by the Friends of Fairmount Historic District (FFHD). In its last appeal, FFHD appealed from a final determination of the Board of Public Utilities that the substation was necessary to address repeated power outages in Tewksbury caused by an increased demand and we affirmed. In this case, FFHD appeals from a final agency decision of the Department of Environmental Protection (DEP), which determined that the construction of the substation was exempt from the Highlands Water Protection and Planning Act (the Highlands Act), N.J.S.A. 13:20-1 to -35, pursuant to N.J.S.A. 13:20-28(a)(11). That exemption applies to "the routine

maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines . . . by a public utility . . . ." We affirm.

09-25-13 BARBARA MINKOWITZ VS. RON S. ISRAELI
A-2335-11T2

This matter considers whether the arbitrator, having once mediated issues in dispute, can thereafter resume the role of arbitrator. On appeal, plaintiff challenges five separate orders confirming arbitration awards. She maintains each must be set aside under N.J.S.A. 2A:23B-23 or, alternatively, requests the final judgment of divorce be vacated pursuant to Rule 4:50-1, based on alleged procedural violations, the arbitrator's bias and substantive errors causing an unconscionable result.

We affirmed orders confirming arbitration awards incorporating the parties written mediated settlement agreements. Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., ___ N.J. ___, ___ (2013) (slip op. at 10, 31). However, after concluding an arbitrator may not conduct arbitration hearings once he or she functioned as a mediator, we vacated orders confirming arbitration orders entered after the arbitrator exceeded his powers. N.J.S.A. 2A:23B-23a(4).

09-19-13 NUWAVE INVESTMENT CORPORATION, ET AL. VS. HYMAN BECK & COMPANY, ET AL.
A-5275-10T1/ A-5451-10T1(CONSOLIDATED)

In this libel case, the jury awarded presumed damages to plaintiff NuWave Investment Corp., and two of its principals, Buckner and Ryan, in excess of $1 million in total. The jury also awarded NuWave $1.4 million in "actual" damages, rejected any award of actual damages to the two principals, and awarded NuWave $250,000 in punitive damages.

We affirmed the jury verdict on liability, but remanded the matter for a new trial on damages. We concluded that in light of the Supreme Court's recent opinion, W.J.A. v. D.A., 210 N.J. 229 (2012), a jury may award nominal presumed damages in a libel case, but it may not make an award of both "actual" damages and presumed damages. An award in excess of $1 million dollars in presumed damages cannot stand.

We also concluded that the matter should be remanded for a new trial on damages in light of the Model

Jury Charge which is, in some respects, inconsistent with the Court's holding in W.J.A. and its discussion of damages in defamation actions. As a result, we also vacated the punitive damages award.

Lastly, we affirmed the dismissal of plaintiffs' complaint against other defendants based upon the one-year statute of limitations applicable to defamation suits, finding that the "discovery rule" has been held to be inapplicable to defamation actions.

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.