DATE NAME OF CASE (DOCKET NUMBER)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

provide employees with reasonable avenues for voicing sexual harassment complaints.

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

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

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

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

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

We also found that conditional approval for advancement of the project was appropriate due to the nature of the project.

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

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

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

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

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

09-11-08 GRANT SPINKS, ROBERT KOVACS and MICHAEL EXLEY v. THE TOWNSHIP OF CLINTON, STEPHEN CLANCY, Individually and as Chief of Police of the Township of Clinton, DWIGHT

RUNYON, Individually and as an employee of the Township of Clinton, and WAYNE WEISS, Individually and as an employee of the Township of Clinton
A-5444-05T2

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

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

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

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

We conclude that a direct financial involvement under the Local Government Ethics Law (Ethics Law), N.J.S.A. 40A:9-

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

09-10-08 Mountain Hill, L.L.C. v. Zoning Board of Adjustment of the Township of Middletown
A-5496-04T3/A-5871-04T3
(consolidated)

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

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

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

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

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

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

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

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

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

Plaintiffs' appeal challenges various pre-trial and trial errors that warrant a new trial and defendants cross-appealed. Two challenges worthy of mention are aimed at the pre-trial

orders that dismissed plaintiffs' consumer fraud claims and limited the scope of damages.

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

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

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

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

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

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

double recovery supported the instruction requiring the jury to make the finding.

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

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

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

09-05-08 R.L. v. Kenneth Voytac
A-1001-06T5

This appeal presents a statute of limitations issue with respect to the Child Sexual Abuse Act (CSAA), N.J.S.A. 2A:61B-1, which provides in pertinent part:

> In any civil action for injury or illness based on sexual abuse, the cause of action shall accrue at the time of reasonable discovery of the injury and its causal relationship to the act of sexual abuse. Any such action shall be brought within two years after reasonable discovery.
>
> [N.J.S.A. 2A:61B-1b.]

Here, the abuse occurred between 1987 and 1990, when R.L. was ten to twelve years old. R.L. did not file this complaint until February 2004, nearly fourteen years after the last alleged incident of abuse. According to R.L., he was aware of the abuse since its occurrence. However, he discovered in late February 2002, that as a result of the abuse, he was suffering from depression, cross-dressing and gender confusion.

The judge dismissed the complaint as time-barred, finding that the cause of action accrued in 1999, during a sexual encounter between R.L. and his girlfriend, when R.L. had a flashback of the sexual abuse. The judge rejected R.L.'s allegation that it was not until late February 2002 that he made a connection between the abuse and his injuries.

We reverse, concluding that a cause of action pursuant to the CSAA, does not accrue until the occurrence of both: (1) the discovery of the injury; and (2) awareness that the injury was caused by the sexual abuse.

09-04-08 Henry Posso v. New Jersey Property-Liability Insurance Guaranty Association, et als.
A-1559-06T3

Plaintiff suffered catastrophic injuries in a work-related motor vehicle accident and obtained a net damages award of $4.7 million against the phantom vehicle. His employer's workers' compensation carrier asserted a lien of $1.3 million against any recovery. Plaintiff's uninsured-motorist coverage was limited to $500,000 but his carrier was declared insolvent and he filed a claim with the Property-Liability Insurance Guaranty Association (PLIGA). We rejected PLIGA's contention that plaintiff's claim was not a "covered claim" within the meaning of N.J.S.A. 17:30A-5(d) because he had received workers' compensation benefits in excess of $300,000--the statutory maximum payable by PLIGA under the New Jersey Property-Liability Insurance Guaranty Association Act (Guaranty Act)--even though the workers' compensation carrier could not seek reimbursement from PLIGA under the Guaranty Act. We held that where the statutory maximum and the workers' compensation benefits are less than the total amount of damages suffered, there can be no double recovery entitling PLIGA to a reduction of the amount payable by it.

08-29-08 Dmitriy Kotler v. National Railroad Passenger Corp.
A-5985-06T2

In a personal injury suit brought by a railroad employee under the Federal Employers' Liability Act (FELA), a plaintiff's receipt of collateral source benefits is inadmissible unless plaintiff "opens the door" on direct examination by referring to such benefits in a manner affecting his/her credibility. We conclude that plaintiff did not "open the door" to the admission of such evidence. Therefore, defense counsel's elicitation of collateral source benefits evidence on cross-examination of plaintiff and comments on that evidence in summation constitute grounds for reversal of the no-cause verdict.

08-29-08 State v. M.A.
A-4922-06T4

Defendant stole over $650,000 from his employer. A warrantless search of two workplace computers, conducted pursuant to the employer's consent, revealed evidence confirming the theft. Defendant appeals from the denial of his motion to suppress evidence seized from the computers, contending that he had a right to privacy in the personal information he stored in the computers. We concluded defendant had no reasonable expectation of privacy under the Fourth Amendment or the New Jersey Constitution in the contents of the computers, including the personal information.

08-27-08 NJ Dept. of Children and Families' Institutional Abuse Inv. Unit v. S.P.
A-2522-06T2; and
NJ Dept. of Children and Families' Institutional Abuse Inv. Unit v. G.W.
A-4807-06T2

1. In investigating allegations of abuse by school personnel, the Institutional Abuse Investigation Unit (IAIU) of the Department of Children and Families (DCF) must determine whether the allegations are "substantiated" or "unfounded." N.J.A.C. 10:129-1.3. In rendering an "unfounded" report, the IAIU may express its concerns about "inappropriate" or "unjustified" conduct by the staff member, but must do so based upon facts that have been tested for accuracy or are clearly corroborated. Such concerns cannot be based upon vague, conflicting or otherwise inaccurate reports.

2. The IAIU is prohibited from pursuing the school district to confirm or report its disciplinary or corrective action against a staff member on whom the IAIU has rendered an "unfounded" report. When a report is "unfounded," the school

district is not required to take any disciplinary or corrective action against the staff member.

08-27-08 Margaret Lee v. First Union National Bank, Wachovia Bank, N.A., First Union Brokerage Services, Inc., and Gregory Mack
A-1517-06T2

Plaintiff alleged she paid an employee of First Union National and First Union Brokerage Services $2,000 in cash for purchase of shares of a mutual fund and that he did not deposit the money into her brokerage account, which caused an overdraft which First Union covered by taking money from her checking account and selling some of the mutual fund units. Plaintiff's complaint alleged violation of the Consumer Fraud Act (CFA) and common law conversion.

The trial judge granted summary judgment to defendants, holding that the CFA was not applicable to a sale of securities and the count for misappropriation was barred by the two-year statute of limitations under the Blue Act, N.J.S.A. 49:3-71(g).

We reversed on the following grounds: (1) The transaction is not exempt from the CFA prohibition on deceptive sales practices because the claim relates to misrepresentation as to performance of services and not the nature or existence of the security; (2) N.J.S.A. 49:3-71(g) is not applicable because the gravaman of this count of the complaint concerns the unlawful "taking, detaining, or converting of personal property," which is subject to the six-year statute of limitations.

08-26-08 Michael A. Strahan v. Jean M. Strahan
A-3747-06T4

In calculating child support for high income families, the trial court must undertake a meaningful analysis of the custodial parent's statement of the children's needs and make a determination as to whether the expenses claimed by the custodial parent are reasonable. We reiterate the "three pony rule" in such cases; that is, "no child, no matter how wealthy the parents, needs to be provided [with] more than three ponies." Isaacson v. Isaacson, 348 N.J. Super. 560, 582 (App. Div.), certif. denied, 174 N.J. 364 (2002) (quoting In re Patterson, 920 P.2d 450, 455 (Kan. App. 1996)).

08-22-08 Fred Burnett v. County of Bergen and Bergen County Clerk's Office

A-2002-06T2

In this Open Public Records Act (OPRA) case, we address the question of whether the county clerk may redact social security numbers (SSNs) from masses of realty documents requested for the purpose of creating a commercial database to be accessed by subscribers. OPRA requires the government custodian of the requested records to redact that portion of the documents disclosing SSNs unless the SSNs are part of a record "required by law to be made, maintained or kept on file by a public agency." N.J.S.A. 47:1A-5a. SSNs are included in recorded realty documents as required by law.

There are competing interests, however, that must be balanced in determining whether the SNNs should be redacted from the documents plaintiff seeks to gather, compile and sell to other users. We hold that the right of privacy under the New Jersey Constitution, as articulated by our Supreme Court in Doe v. Poritz, 142 N.J. 189 (1995), establishes protection for New Jersey citizens from wholesale disclosure of SSNs through OPRA requests for masses of recorded realty documents, and that plaintiff's commercial interest in SSNs is outweighed by the government's interest in maintaining the confidentiality of SSNs.

08-20-08 State of New Jersey v. J.G.
A-2539-07T4

The cleric-penitent privilege may be invoked by either the cleric or the penitent. To be protected by the privilege, the communication must have been made (1) in confidence; (2) to a cleric; and (3) to the cleric in his or her role as a spiritual advisor.

The privilege does not apply where a cleric reaches out to an individual to intervene in unlawful conduct -- in this case sexual abuse of defendant's two daughters -- in an effort to stop the unlawful conduct and the cleric refuses to provide counsel or spiritual services -- in this case baptism -- to the individual.

08-19-08 Thomas Best v. C&M Door Controls
A-3801-06T2

Plaintiff filed suit against his employer alleging causes of action under the Prevailing Wage Act (PWA) and CEPA. Defendant made a pre-trial offer of judgment in the amount of

$25,000, which was not accepted, and trial commenced. The jury returned a verdict of $2,600 in plaintiff's favor on the PWA claim, and a verdict of no cause on the CEPA claim. After the verdict was returned, but prior to each side making its request for counsel fees and costs, the Supreme Court's amendments to the offer of judgment Rule (the Rule) became effective.

Plaintiff sought counsel fees as a prevailing party under the PWA's fee-shifting provision. Defendant sought counsel fees under CEPA's "frivolous litigation" provision, as well as the Rule.

We concluded that defendant was not entitled to fees under CEPA. We then concluded that the amended version of the Rule applied because it was in effect when defendant made application for its "allowances" under the Rule. As amended, the Rule permits the trial judge to deny an allowance to a non-claimant even if it obtained a "favorable" result if such an award "conflicts" with the underlying policy of the fee-shifting statute at issue.

We determined that an award to the defendant employer under the Rule did not conflict with policies supporting the PWA, but did conflict with the policies supporting CEPA. We remanded the matter to the trial court to further consider defendant's application under the Rule.

We also remanded the matter so that the trial judge could reconsider his award to plaintiff, and limit the award to that time reasonably spent in prosecuting plaintiff's PWA claim.

In concurring, Judge Stern did not necessarily agree that the amended version of the Rule should apply, but nonetheless reached the same result under the version of the Rule in existence when the offer was made and the trial occurred. Furthermore, while he agreed that the "policy embodied" in the PWA is different than that "embodied in other fee-shifting statutes," he believed the Rule "might well be inapplicable when plaintiff prevails in a case commenced under another fee-shifting statute."

08-19-08 Mary L. Ibrahim v. Reda M. Aziz
A-4447-05T2

When calculating child support, the trial court erred in imputing income based on New Jersey wages to a parent who was living and working in a foreign country where wages were

dramatically less than here. The family had been living in the foreign country and was visiting New Jersey when the parents separated. The father then returned to the foreign country and was unable to obtain a visa to come back to the United States. His child support payment should have been based on what he could earn in the foreign country.

08-18-08 State of New Jersey v. Tri-Way Kars, Inc.
A-1256-07T4

We held that a municipal court had no jurisdiction under N.J.S.A. 56:8-14 to assess a penalty for an alleged Consumer Fraud Act violation in connection with the sale of a used motor vehicle because N.J.S.A. 56:8-14 only grants jurisdiction over penalty enforcement actions.

We also held that the Central Municipal Court of Bergen County had no jurisdiction under N.J.S.A. 56:8-14.1 to assess such a penalty because that statute expressly limits jurisdiction over penalty assessment cases to municipalities "where the offense was committed or where the defendant may be found." Here, the offense was committed in South Hackensack where defendant conducted business and we concluded that this specific statute trumped the general power of the Assignment Judge to refer cases to the Central Municipal Court under N.J.S.A. 2B:12-1(e).

Finally, we provided guidance for future actions respecting the insufficiency of the municipal court "Complaint-Summons SF-1 and SF-2" to adequately provide notice of the essential facts of a penalty assessment action, as opposed to a penalty enforcement action where the use of these forms has been approved by the Administrative Office of the Courts.

08-13-08 State of New Jersey v. Walter Quezada
A-6472-05T2

A volunteer fireman who calls in false alarms and responds to the scene of the reported fire may be convicted of official misconduct, N.J.S.A. 2C:30-2. A conviction for setting false fire alarms, N.J.S.A. 2C:33-3, merges into official misconduct when the false alarm constitutes the official misconduct.

08-12-08 Sebastian Fernandez v. Nationwide Mutual Fire Insurance Company
A-4849-06T1

The issue presented on appeal is whether a PIP carrier's right to reimbursement for paid PIP benefits, pursuant to N.J.S.A. 39:6A-9.1, has priority over an insured's right to be made whole where the tortfeasor's insurance does not fully cover the insured's personal injury damages. We concluded that the decisions of Knox v. Lincoln Gen. Ins. Co., 304 N.J. Super. 431 (App. Div. 1997) and IFA Ins. Co. v. Waitt, 270 N.J. Super. 621 (App. Div.), certif. denied, 136 N.J. 295 (1994) are not in conflict, but rather address different issues under the PIP reimbursement statute. We determined that the issue presented is controlled by Knox and held: that where a PIP carrier has paid benefits to its insured, it is entitled to reimbursement of those benefits from the insurance proceeds of a third-party tortfeasor, pursuant to N.J.S.A. 39:6A-9.1, even if the limits of the tortfeasor's insurance policy are insufficient to make the insured whole.

08-08-08 George Harvey, et al. v. Township of Deptford
A-3187-06T1

Plaintiff, a towing operator, sought mandamus against the defendant municipality, compelling the public auction or removal of vehicles he had towed and stored at the municipality's request. He also sought monetary damages caused by the municipality's failure to conduct public auctions within the time limits contained in N.J.S.A. 39:10-A-1 to -7, and the storage of the towed vehicles on his property. The trial judge granted plaintiff partial summary judgment on liability, but limited his monetary damages to $400 per vehicle, finding N.J.S.A. 40:48-2.50 applicable to limit the municipality's exposure.

We affirmed. We conclude that N.J.S.A. 40:48-2.50 expressly limits the amount that a towing operator may recover against the municipality for the storage of vehicles towed at the municipality's request. We further conclude that plaintiff has no express or implied cause of action for monetary damages based upon the municipality's violation of the time limits set forth in N.J.S.A. 39:10A-1 to -7, and has no claim for monetary damages as a corollary to his mandamus action.

08-07-08 Frank Angrisani v. Financial Technology Ventures, L.P., et al.
A-5477-06T3

A party can be forced to arbitrate only those issues it has specifically agreed to arbitrate. Therefore, where plaintiff

contemporaneously entered into an employment agreement, which contained a provision for arbitration of disputes between plaintiff and the employer, and an agreement with investors for the purchase of stock in the employer, which did not contain any arbitration provision, plaintiff cannot be forced to arbitrate claims against the investors based on the stock purchase agreement.

08-06-08 In Re: Attorney General's "Directive on Exit Polling: Media & Non-Partisan Public Interest Groups," Issued July 18, 2007
A-0543-07T1

We uphold the validity of the Attorney General's Directive dated July 18, 2007, permitting non-partisan public interest groups to conduct exit polling within 100 feet of the outside entrance to a polling place but prohibiting the distribution by such non-partisan public interest groups within that same 100-foot area of any materials such as voters' rights cards.

08-06-08 State of New Jersey v. Michael A. Cooper
A-1066-06T4

On remand following the Appellate Division's decision ordering that sentences be served concurrently, and not consecutively as originally imposed, the aggregate sentence imposed on remand cannot be longer than the period of parole ineligibility flowing from the original sentence as well as the original aggregate specific term; hence, on remand when a consecutive sentence must be made to run concurrent with a sentence carrying a parole ineligibility term under the No Early Release Act, the new specific term sentence imposed cannot be greater than that which produces an 85 percent parole ineligibility term greater than the original period of parole ineligibility.

08-04-08 State v. Oscar Osorio
A-2067-05T4

Under the 2005 decision of the Supreme Court of the United States in Johnson v. California, a defendant may establish a prima facie case of the discriminatory use of peremptory challenges by producing evidence sufficient to support an inference that discrimination has occurred. Therefore, the part of our Supreme Court's decision in Gilmore that required a defendant to show a "substantial likelihood" of the

discriminatory use of peremptory challenges to establish a prima facie case has been superseded by Johnson.

08-01-08 State v. Robert K. Thompson, et al.
A-2279-07T4

Violation of the Conflicts of Interest Law and a corresponding Code of Ethics of a department of State government, standing alone, does not provide a basis for criminal prosecution for official misconduct. We affirmed the dismissal of counts containing such charges. But when such violations are combined with official acts benefiting or intending to benefit the party with whom the public official has a conflict, official misconduct may be charged. We reversed the dismissal counts containing such charges.

08-01-08 Dyana M. Espina v. Board of Review, New Jersey Department of Labor and Keybank National Association
A-3780-06T3

Pursuant to N.J.A.C. 12:17-9.11(b), an employee cannot be deemed to have abandoned her employment by failing to return to work, until the expiration of five consecutive days from the last day of an approved leave of absence. Thus, claimant is not disqualified for benefits as a "voluntary quit."

07-31-08 State of New Jersey v. Cecilia X. Chen
A-4251-06T5

The admissibility of the identification evidence presented at trial is the most significant issue raised on this appeal from a conviction for attempted murder. The victim initially identified the defendant under highly suggestive circumstances that posed a significant risk of compromising the initial and subsequent identifications. Law enforcement officers had no role in creating, encouraging or permitting the highly suggestive procedures utilized at the time of the initial identification.

We conclude that when there is evidence that the highly suggestive words or conduct of a private citizen pose a significant risk of misidentification, a preliminary hearing on admissibility of the identification is required. The holding is based on the court's responsibility to ensure that evidence of pre-trial identifications meet the standard for admission of such evidence, N.J.R.E. 803, and the Court's authority to exclude evidence of subsequent identifications that are of such

questionable reliability that the probative value is substantially outweighed by the risk of prejudice and misleading the jury, N.J.R.E. 403. See State v. Michaels, 136 N.J. 299, 316 (1994); State v. Williams, 39 N.J. 471, 489 (1963).

07-31-08 State OF New Jersey - In the Interest of X.B.
A-3053-06T4

X.B., a juvenile, was arrested for trespassing on public housing property, despite being notified that he was on a list prohibiting him from being on the housing complex property. Following his adjudication as a delinquent, he appealed, arguing his inclusion on the list was unconstitutional as applied to him.

We affirmed the trial court's finding of delinquency and found no constitutional infirmity as applied to him. We did, however, caution public entities who maintain such lists to consider adopting regulations regarding one's placement on and removal from the list and establishing a procedure whereby one can challenge placement on the list.

07-30-08 Felipe Hernandez v. Carmen Baugh
A-5752-06T2

Plaintiff sued defendant for legal malpractice in connection with his purchase, with his uncle, of a business. The uncle then removed plaintiff from the business; plaintiff sued his uncle and settled that litigation under a settlement agreement stating the settlement was "fair and reasonable . . . taking into account all relevant factors." The trial court dismissed plaintiff's malpractice action on the basis of Puder v. Buechel, 183 N.J. 428 (2005). We reversed, finding Puder distinguishable. Defendant's alleged malpractice was one of the relevant factors behind plaintiff's decision to settle the earlier litigation on the terms he did.

07-29-08 James Feigenbaum, et al. v. Frank Guaracini, Jr., et als.
A-0338-06T5

The question presented on appeal is whether a tenant's assignee can be held liable under the doctrine of equitable subrogation to the guarantor of the original tenant's obligation under the lease, for monies paid by the guarantor in settlement

of the landlord's claim for damages on default of the lease, where the assignee did not have knowledge of the guaranty contract. We answered the question in the negative. In the opinion, we examined the principles governing contracts of indemnification, guaranty, and suretyship.

07-25-08 Gary E. Meyer v. Howard S. Bixenholtz Construction, Construction Services, Inc., Builder Services Group, Stucco Services, Inc.
A-5152-06T2

A private cause of action may be brought in New Jersey state courts for violations of the unsolicited fax provisions of the federal Telephone Consumer Protection Act, 47 U.S.C.A. §227. We hold that violations may result in $500 per fax, but not for each regulatory violation within the same fax.

07-24-08 Nicola Daoud v. Adnan Mohammad
A-5446-06T2

The judge in this commercial landlord/tenancy matter did not follow the administrative directives covering the use of interpreters and thus defendant was deprived of his right to a Marini hearing. Whenever a matter is on the record, non English-speaking litigants are entitled to an interpreter provided by the court. The appeal of the judgment for possession of the store, however, is moot since the property has been re-rented. Defendant may seek relief in another forum.

07-24-08 Roy M. Victor v. State of New Jersey, New Jersey State Police, Sgt. Eric Estok, Dr. Donald Izzi, Capt. Salvatore Maggio, and Lt. Paul Wagner
A-6001-05T1

In plaintiff's complaint alleging discriminatory treatment based upon race and medical disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, he included an allegation of failure to accommodate plaintiff's physical disability. As to that claim, we concluded plaintiff has an affirmative obligation to prove he suffered an adverse employment action as a result of his employer's failure to accommodate his disability.

Failure to accommodate is not discrete from discrimination, but an act that may prove discrimination. More specifically, a plaintiff must first show the three prima facie elements required in any LAD disability discrimination claim: that

plaintiff was disabled yet qualified to perform the essential functions of the position of employment and suffered an adverse employment action because of the disability. The additional factors identified in Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 401-02 (App. Div. 2002), support the second element, that the employee could perform the essential functions of employment with reasonable accommodation. In other words, a plaintiff's proof of the lack of the employer's engagement in an interactive process to determine the need and availability of a reasonable accommodation, supplements the requisite presentation of a prima facie case of discrimination.

We reversed and ordered a new trial because the jury charge was legally insufficient and failed to require a finding that plaintiff suffered an adverse employment action.

07-23-08 State of New Jersey v. Joseph M. Bringhurst
A-4302-06T5

We conclude that post-conviction relief (PCR) petitions brought pursuant to State v. Laurick, 120 N.J. 1, cert. denied, 498 U.S. 967, 111 S. Ct. 429, 112 L. Ed.2d 413 (1990), must comply with Rule 7:10-2, and are subject to the five-year limit contained in Rule 7:10-2 (g)(2). However, those time limits may be relaxed to prevent an injustice. Because a Laurick PCR cannot be brought until there is a second or subsequent DWI conviction, the time bar should not mechanically be applied to deny the petition. However, to obtain the benefit of relaxation of the time limit, a defendant must put forth a prima facie case for relief in his petition itself.

In this case, where defendant's prior, uncounseled conviction was allegedly rendered ten years earlier, he failed to put forth a prima facie case for relief in his PCR petition. Therefore, its denial was appropriate.

07-23-08 State v. V.D.
A-2357-06T5

Defendant entered a negotiated plea of guilty to two counts of the fourth-degree crime of possession of a false document, N.J.S.A. 2C:21-2.1(d). The trial court placed defendant on probation with the special condition that she notify the Bureau of Immigration and Customs Enforcement (ICE). We struck that condition. It was not reasonably contemplated by defendant when she pled guilty and, in any event, exceeded the authority of the trial court.

07-22-08 Susan Olkusz and Richard Olkusz v. Hackensack Medical Center and Federal Insurance Company and Atlantic Mutual Insurance Company
A-2216-07T2

In this appeal, we are required to determine whether an amendment to N.J.S.A. 17:28-1.1, adopted by the Legislature on September 10, 2007, reversing the Supreme Court's holding in Pinto v. New Jersey Manufacturers Insurance Co., 183 N.J. 405 (2005), and prohibiting the use of step-down clauses in automobile insurance policies, should be applied retroactively.

The trial court held that the Legislature intended to apply this amendment retroactively. By leave granted, we now reverse. Absent a clear indication from the Legislature as to the effect of this statute, we hold that well-established principles of statutory interpretation require that we construe the statute's restriction on the common law right of freedom to contract prospectively. The statutory prohibition at issue cannot be viewed as "curative," because the holding in Pinto was not predicated on a misapprehension of established legislative policy.

07-22-08 In Re Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38-1 et seq.
A-0984-05T1

Although a challenge to the validity of an administrative regulation is ordinarily determined based solely on the record developed before the agency in considering adoption of the regulation, a court has the authority to remand for supplementation of the record, including the conduct of an evidentiary hearing, if it concludes that such proceedings are required for a proper determination of the challenge. The Farm Bureau has raised substantial questions regarding the validity of the septic density rule adopted by the DEP to govern development in the preservation area of the Highlands area that require such an evidentiary hearing. The water allocation rule also adopted by the DEP to govern development in the preservation area is valid.

07-22-08 State v. Rambo

A-5923-04T4

Defendant, who admitted shooting and killing his wife, was convicted of murder. The trial court correctly refused to charge passion/provocation manslaughter. Defendant argued he was entitled to a new trial because the Probate Part had refused, under the "Slayer Statutes" to allow him access to funds to retain private counsel of his choice. We did not procedurally have jurisdiction to review the orders of the Probate Part because defendant's appeal was only from the judgment of conviction.

07-21-08 Stephanie M. Hirl v. Bank of America
A-6459-06T1

In this appeal, we held that in order to invoke the remedial provision of the Electronic Fund Transfer Privacy Act (EFTPA), N.J.S.A. 17:16k-1 to -6, for unauthorized disclosure of financial records, a plaintiff must establish that the information was disclosed from an account with electronic fund transfer capability. Here, that foundational requirement was not established

07-21-08 Darren J. Schulman v. Scott B. Schulman, et al.
A-4674-06T1

In this case, we limit the Supreme Court's holding in Puder v. Buechel, 183 N.J. 428 (2005) by finding it inapplicable to the facts presented. Plaintiffs' shareholder derivative claims for legal malpractice and breach of fiduciary duty, as well as their individual and derivative claims for fraud and breach of contract, are not subject to dismissal under Puder's rationale. We therefore reverse the trial judge's orders of dismissal, entered prior to discovery, and based solely upon the holding in Puder, and remand for further proceedings.

07-21-08 William E. Meyer, Esq. v. MW Red Bank, LLC and Red Bank Zoning Board of Adjustment
A-1984-06T3

In this appeal, Michael DuPont, Esq., Chairman of the Red Bank Zoning Board of Adjustment, disqualified himself from participating in the variance application of developer MW Red Bank, LLC (MW) because his law firm had previously represented Christopher Cole, an owner of one of the entities that comprises MW. We found that DuPont's decision to disqualify himself did not automatically create a corresponding obligation on the part

of Lauren Nicosia, who replaced DuPont as the Acting Chair in the variance application, to do likewise because of her father's "of counsel" status in DuPont's law firm. We distinguished our decision in Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501 (App. Div. 2006), noting that DuPont's law firm had never represented MW and that the firm's last representation of Cole took place nearly two years before MW submitted its variance application to the zoning board.

07-15-08 G.H. v. Township of Galloway
A-3235-06T1
Township of Cherry Hill v. James Barclay, et al.
A-4036-06T1

Municipal ordinances prohibiting convicted sex offenders from living within specified distances of schools and other designated facilities are preempted by Megan's Law and are therefore invalid.

07-15-08 John Bustard, et al. v. Board of Review, et al.
A-5365-05T2

With the adoption of N.J.S.A. 43:21-5(d)(2) in L. 2005, c. 103 -- an exception to the labor dispute disqualification provision of subsection (d)(1) -- applicable by its terms from December 1, 2004, the Board of Review is obliged to evaluate the parties' proofs in a first-instance interpretation and application of the newly enacted provision before it can determine whether claimants are eligible for or disqualified from unemployment compensation benefits.

07-11-08 Carlos Serpa v. New Jersey Transit Rail Operations
A-4421-06T3

In this case a party sought to limit its duty to indemnify a public entity based on two statutes limiting recoveries against public entities.

The public entity settled a personal injury claim brought by a worker injured on the job and employed by the general contractor. When the public entity sought contractual indemnification from the general contractor, the general contractor contended that it was entitled to a deduction for the workers' compensation benefits it had paid to the injured worker. While N.J.S.A. 59:9-2(e) allows a public entity to deduct from a judgment the amount of workers' compensation

benefits the plaintiff received for the injuries, that statute does not apply to settlements. When negotiating the settlement sum, the parties would take into account the fact that if the case went to judgment the public entity would receive the deduction.

Since the contract provided that the public entity was entitled to indemnification for the general contractor's negligence and not for its own negligence, a jury trial was held to allocate responsibility for the accident between the public entity and the general contractor, and the general contractor was found to be eighty-five percent at fault. As a result, the general contractor must indemnify the public entity for eighty-five percent of the settlement sum. We reject the general contractor's argument that since a public entity is only responsible for the damages attributable to its percentage of negligence, under N.J.S.A. 59:9-3.1, the public entity's indemnification could not exceed fifteen percent of the settlement. Affirmed.

07-09-08 Gregory J. Forester, et al. v. Douglas H. Palmer, Joseph J. Santiago and City of Trenton
A-3690-07T3, A-3691-07T3

Although the 1987 amendment to Trenton's ordinance requiring all municipal officers and employees to be Trenton residents, which added a provision for waiver of the residency requirement, is invalid, this amendment is severable from the preexisting residency ordinance. Accordingly, Police Director Santiago, who is no longer a Trenton resident, must vacate the position. However, to assure an orderly transition of responsibilities to his successor, Director Santiago will be allowed to remain in the position for an additional seventy-five days.

07-09-08 Auto One Insurance Co. v. American Millennium Insurance Co., et al.
A-0496-07T1

This case concludes that the driver of a vehicle who would be entitled to liability coverage from the owner's insurance carrier pursuant to the "omnibus" provisions of N.J.S.A. 39:6B-1 is not also entitled to UM coverage pursuant to N.J.S.A. 17:28-1.1a, if that driver is not otherwise entitled to UM coverage under the terms of the owner's insurance policy.

07-08-08 Distributor Label Products, Inc. d/b/a Certified Data

Products v. Fleet National Bank, et al.
A-3260-06T5

This case concerns the liability of a drawee bank for checks with forged endorsements.

Plaintiff's employee had embezzled monies by writing checks to a legitimate vendor and then depositing the checks into his personal account with another bank. Some of the checks were fraudulently endorsed in the name of the payee and others were marked "for deposit only" with the account number. Since plaintiff failed to exercise ordinary care with respect to supervising the employee thereby substantially contributing to the loss and the drawee was not negligent, plaintiff was precluded from recovery under N.J.S.A. 12A:3-406. Plaintiff's recovery for those checks fraudulently endorsed in the name of the payee was also barred by N.J.S.A. 12A:3-405.

Since no material issues of facts were present, the trial court's granting of summary judgment for the drawee bank was affirmed.

07-07-08 Fernando Roa, et al. v. Lafe and Marino Roa
A-2588-06T3

Without reaching the merits of plaintiff's complaint, we reversed the trial judge's grant of summary judgment prior to discovery. We conclude that plaintiff may state a cause of action under the LAD's anti-retaliation provision, N.J.S.A. 10:5-12 (d), based upon post-termination conduct of his former employer that was not related to the workplace. We further conclude that plaintiff may survive defendant's statute of limitations defense by application of the continuing violation doctrine if he can prove the discriminatory retaliation occurred within two years of filing suit.

07-02-08 State of New Jersey v. Anthony Gioe, et al.
A-1214-06T5

The novel issue addressed in this appeal is whether a search warrant is invalid where an affiant failed to appear personally before a municipal court judge as required under Rule 3:5-3(a). We found the "insufficiencies or irregularities" in the proceedings to obtain the search warrant did not violate defendant's substantive rights, and they did not invalidate the search warrant that was issued. R. 3:5-7(g). Accordingly, we affirmed the order denying defendant's motion to suppress.

07-02-08 Harbor Commuter Service, Inc., Harbor Shuttle Inc., Walter Mihm and Stanis B. Mihm v. Frenkel & Co., Inc., McCue Captains Agency, Inc., and AON Risk Services, Inc. of Ohio
A-5530-05T2, A-5600-05T2, A-5628-05T2

Plaintiffs, who operated a surface vessel shuttle service in New York Harbor, purchased a ship and secured the purchase with a mortgage. The mortgage required plaintiffs to purchase hull insurance, which insures both the lender and the vessel owner, and breach of warranty insurance, which insures only the lender. The vessel was damaged, and because plaintiffs misrepresented the vessel's purchase price in their application for insurance coverage, neither the lender nor plaintiffs were able to recover insurance proceeds for damage. The lender sued plaintiffs, and the case settled with plaintiffs paying substantially the amount due under the mortgage and note.

In this case, plaintiffs sued their insurance brokers for failing to inform them that they would be unable to recover under the lender's breach of warranty policy if the hull insurance policy was ineffective. After the trial court denied defendants' motions for summary judgment, the jury entered a substantial verdict in favor of plaintiffs.

We vacated the final judgment, finding that the trial court erred in denying defendants' summary judgment motions. In our opinion, we discussed the difference between hull insurance and lender's breach of warranty insurance. We found that plaintiffs' misrepresentation in securing the hull insurance, which policy was subsequently voided by a federal district court judge, equitably estopped plaintiffs from recovering against the insurance brokers for their failure to inform plaintiffs that breach of warranty coverage inured only to the lender, not to the owners of the vessel.

07-01-08 In the Matter of the Petition of Adamar of New Jersey, Inc. for Renewal of its Casino and Casino Hotel Alcoholic Beverage Licenses and in the Matter of the Plenary Qualification of Tropicana Casino and Resorts, Inc., Tropicana Entertainment Holdings, LLC, Tropicana Entertainment Intermediate Holdings, LLC and Tropicana Entertainment, LLC as Holding Company of Adamar of New Jersey, Inc.
A-1727-07T1

We affirmed a decision by the Casino Control Commission that denied renewal of the casino licenses for the Tropicana Resort and Casino in Atlantic City. In doing so, we affirmed findings by the Commission that the licensee's regulatory compliance was "abysmal" and its performance demonstrated a lack of business ability to function in the Atlantic City regulatory environment. We also rejected the licensee's argument that the requirements for constitution and operation of an independent audit committee were not found in the statute or regulations governing the operation of casinos in this state.

06-30-08 In the Matter of the Appeal by Earle Asphalt
A-2776-07T2

The 2005 amendment to the Campaign Contributions and Expenditure Reporting Act, which prohibits any state agency from awarding a contract with a value over $17,500 to a business entity that has contributed more than $300 during the preceding eighteen months to the Governor, a candidate for Governor or any State or county political party committee, is constitutional. A contractor is only entitled to the exemption from the disqualification from bidding on State contracts that the amendment imposes for a violation of this prohibition if it not only requests, but also receives, reimbursement of the disqualifying contribution within thirty days.

06-30-08 State of New Jersey v. Murray Aikens, et al.
A-2281-07T4

Flight from one state to another constitutes a violation of the Federal Fugitive Act, and United States Marshals are authorized to make a warrantless arrest of a person who they have probable cause to believe has violated that Act.

06-30-08 Leona C. Taddei, et al. v. State Farm Indemnity Co.
A-3806-06T2

A UM policyholder who sues the UM carrier and receives a jury verdict for his injuries in excess of the policy's UM limits is not entitled to judgment against the UM carrier for the amount of the judgment. The trial judge did not err in molding the verdict to conform with the coverage limits.

Although a UM claimant can maintain an action against his or her carrier for extra-policy damages for breach of the coverage of good faith and fair dealing, plaintiff in this case never pled bad faith, and, even if pled and proven, the measure

of damages would be the foreseeable consequential damages caused by breach of the covenant, not the amount awarded by the jury on the underlying injury claim.

06-24-08 Jen Electric, Inc. v. County of Essex
A-3957-07T1

In this case we affirm the dismissal of plaintiff's complaint and conclude that plaintiff does not have standing to challenge bidding specifications issued by Essex County because plaintiff was not a bidder or prospective bidder on the contract and is not a taxpayer in the County. We also affirm the denial of a motion to amend the complaint to add one of the bidders as a plaintiff because the bidder failed to challenge the bid specifications within the time required by N.J.S.A. 40A:11-13(e).

06-24-08 Tyrone Barnes v. Lydell B. Sherrer, Administrator at Northern State Prison
A-5520-06T1

In this opinion, we describe the proper procedures for filing an inmate lost property claim, which should be processed administratively, rather than through an action in the Special Civil Part. Because the procedures were not followed in this case, we remand the matter with instructions that administrative regulations be followed, and we retain jurisdiction.

06-23-08 New Jersey Shore Builders Association v. Township of Jackson
A-5805-06T3
Builders League of South Jersey v. Egg Harbor Township, et al.
A-1563-07T2

This opinion addresses the authority of a municipality to require developers to set aside land for common open space or recreation, or make payments in lieu of those set-asides, as a condition of a development application. The Jackson Township trial court determined that the municipality's authority to make these exactions was limited to planned developments as defined in the Municipal Land Use Law. The Egg Harbor Township trial court concluded that the exactions were justified in other than planned developments. We concluded that the Municipal Land Use Law does not empower municipal governments to require developers to set aside land for common open space or recreational areas, except with regard to applications for planned developments as

defined in the Municipal Land Use Law. Consequently, we affirmed the order of the trial court in the Jackson Township case, and reversed the order of the trial court in the Egg Harbor Township case.

06-23-08 Jill Golden, et al. v. GMAC Insurance Company
A-4124-06T1

Where tortfeasor driver was insured at the time of the accident but became an uninsured motorist more than five years later when his automobile insurance carrier was deemed insolvent, we held that plaintiff's UIM claim against her insurer accrued as of the date of the insurance carrier's insolvency, rather than at the date of the accident. Accordingly, the six-year statute of limitations began to run upon the insurance carrier's liquidation and plaintiff's UIM claim was timely.

06-20-08 State of New Jersey v. Maribel Rolon, et al.
A-1049-06T4

In this appeal, we reverse defendant's conviction for first-degree robbery and remand for a new trial. Although the jury determined defendant was armed with a deadly weapon——a knife——the court committed reversible error when it instructed: "defendant's intent with respect to the [knife] is irrelevant."

06-19-08* Carl Johnson, et al. vs. Daniel Glassman, et al.
A-2074-06T2

In this opinion we discuss the requirement that a plaintiff in a shareholder derivative action plead "demand futility," i.e., that because of the corporate board's lack of independence and interest in the transactions at issue, it would have failed to act on the company's behalf if a demand on the board to do so had been made at the time that suit was filed. Although we rely on Delaware law in our decision, we note that New Jersey employs the same standards, albeit in a less well-developed manner.
[*Approved for Publication date]

06-19-08 State of New Jersey v. Jacob Burno-Taylor
A-0265-07T4

Because defendant's right to remain silent was not scrupulously honored, the trial court should have granted defendant's motion to suppress his statement.

06-19-08 McGovern v. Borough of Harvey Cedars, Board of Commissioners of the Borough of Harvey Cedars, and John Gerkens
A-0043-07T1

An ordinance banning construction close to the water's edge on Long Beach Island does not violate substantive due process and is not preempted by CAFRA.

06-19-08 Sanders v. Langemeier
A-4335-06T3

We held that an uninsured passenger who received emergency personal injury protection benefits under his driver's special automobile insurance policy was entitled to personal injury protection coverage from the UCJF for his non-emergency medical treatment.

06-17-08 Golden Door Charter School v. State-Operated School District of the City of Jersey City
A-0342-07T3

The State Board of Education concluded that N.J.S.A. 18A:36A-11b requires charter schools, not the school districts, to pay the cost of a regular course of home instruction offered to a handicapped student enrolled in a charter school. We affirm the Board's construction of the statute.

06-17-08 In the Matter of the Commitment of T.J.
A-3179-06T1

Examining the propriety of two orders requiring the conditional extension pending placement (CEPP) of appellant's involuntary civil commitment to the Trenton Psychiatric Hospital (TPH), pursuant to Rule 4:74-7(g), we conclude the State's burden to justify the continued involuntary commitment or the use of a less restrictive curtailment of individual liberty through CEPP is no different for appellant, whose mental illness contributed to past violent criminal behavior, including a sexual assault, than it is for any other patient who has not committed a violent crime or sexual offense. State v. Fields, 77 N.J. 282, 293-94 (1978); State v. Krol, 68 N.J. 236, 250 (1975).

06-16-08 Christine Saba Fawzy v. Samih Pawzy
A-5337-06T1

The primary issue in this appeal is whether parties in a matrimonial action can agree to binding, non-appealable arbitration of child custody and parenting time issues. We conclude that such an agreement violates the court's parens patriae obligation to protect the best interests of the children and is void as a matter of law.

06-16-08 Deborah K. Pool v. Morristown Memorial Hospital, et al.
A-6183-06T2

Plaintiff, an injured employee who obtained workers' compensation benefits, brought an action against, among others, a treating doctor. Prior to the rendering of a jury verdict, plaintiff and the doctor entered into a high/low agreement, which guaranteed plaintiff $100,000 regardless of a "no cause" or a verdict in a lesser amount. The jury rendered a "no cause" verdict and defendant paid $100,000 to plaintiff as agreed. In subsequent proceedings, the trial judge held that the employer's workers' compensation lien did not attach to this payment.

The court reversed, holding that the payment to an employee of the "low" defined by a high/low agreement, which agreement preceded a decision or verdict in favor of an alleged tortfeasor, is subject to the employer's statutory lien.

06-13-08 Kenia Alves v. Paul H. Rosenberg, M.D.
A-0015-07T1

In this medical malpractice action wherein no live witnesses testified, we held that the trial court erred in allowing the defense to read into the record extensive portions of the defendant's deposition testimony unrelated to the limited excerpts properly admitted by plaintiff in his case-in-chief under Rule 4:16-1. Neither Rule 4:16-1(b) ("And any other party may offer any other parts) nor the parallel doctrine of testimonial completeness, N.J.R.E. 106, allows the wholesale admission of inadmissible hearsay not necessary to supplement, explain or contextualize the admitted portion, or avoid misleading or confusing the trier of fact.

06-12-08 Block 268, LLC v. City of Hoboken Rent Leveling and Stabilization Board, et al.
A-2228-06T2

This opinion addresses whether plaintiff's multiple unit building, located in Hoboken, is entitled to the rent control

exemption articulated in N.J.S.A. 2A:42-84.5. At the time defendants originally leased their unit, the building consisted entirely of rental apartments. Title to the land passed to plaintiff in 2005, at which time, plaintiff converted several of the apartments into condominiums. Defendants contend that the transfer of title or the conversion of rental apartments into condominiums nullified plaintiff's statutory exemption from rent control ordinances.

We hold that the statutory exemption runs with the land, not with the owner. The conversion of the building's units to condominiums does not effect the building's status as a "multiple dwelling" and, in fact, enhances the property's marketability, in accordance with the legislative intent of N.J.S.A. 2A:42-84(b) and -84.6. Nor does the failure to provide mortgage information to the municipality when claiming the exemption affect the validity of the exemption. Rather, the mortgage affects only the duration of the exemption.

Finally, the original letter to the Hoboken municipal construction official, claiming the exemption, satisfies the filing requirements of N.J.S.A. 2A:42-84.4. Although the letter did not directly indicate the author's relationship with the building's owner, it was reasonably clear that the author of the letter was the owner of the property or was claiming the exemption on the owner's behalf.

06-09-08* North Jersey Neurosurgical Associates, P.A., et al. v. Clarendon National Insurance Company, et al.
A-3735-06T3

The issue in this case deals with the choice of law principles concerning the payment of PIP benefits with respect to a New Jersey resident injured as a passenger in a car registered and insured in New York but treated in New Jersey. (Under New York law PIP coverage is provided by the host vehicle, while in New Jersey the injured patient is covered by his resident brother's carrier). An actual conflict of law exists both with respect to primary coverage and apportionment if both policies are primary. New Jersey law controls and there shall be an equal contribution by the carriers up to the limits of the New York policy. The issue of PIP coverage of an insured who is a resident of New Jersey where the policy was issued and treatment was provided, because of its greater interest in protecting the injured resident and assuring his or her medical care and payment of the New Jersey provider. **[*Approved for Publication date]**

06-09-08 Roger Smith, et al. v. Alza Corp., et al.
A-4277-06T1

In this products liability action involving the diet drug Acutrim, we hold that an entity whose activities are limited exclusively to product packaging and labeling comes within the definition of "manufacture", N.J.S.A. 2A:58C-8, to whom strict liability for product defect may attach, and is not a "product seller", N.J.S.A. 2A:58C-8, who otherwise would qualify for statutory immunity under N.J.S.A. 2A:58C-9(d).

We also hold that under New Jersey's choice-of-law rules, the State's procedural and substantive law governs the claim of plaintiff, an Alabama resident, who purchased in Pennsylvania the over-the-counter drug that was labeled and packaged in bulk by the New Jersey-based defendant.

06-05-08 Division of Youth and Family Services v. J.L. and T.L., In the Matter of the Guardianship of O.L.
A-5490-06T4

In child abuse cases, the burden-shifting rule of In re D.T., 229 N.J. Super. 509 (App. Div. 1988), applies only where a limited number of people had access to the child at the time abuse definitively occurred. Otherwise, traditional res ipsa loquitur principles apply, and once DYFS establishes a prima facie case of abuse under N.J.S.A. 9:6-8.46a(2), the burden of going forward with evidence shifts to the defendants, but the burden of persuasion remains on DYFS.

06-04-08 State of New Jersey v. Steven R. Fortin
A-3579-07T4

Defendant convicted of capital murder committed in 1994 cannot be sentenced to life-without-parole because at the time of offense the maximum parole ineligibility term was thirty years and under the December 17, 2007 amendments to the murder statute the defendant can no longer present mitigating factors to reduce the sentence to such term if not outweighed by aggravating factors. The State did not advocate trying the matter as a capital case would have been tried to achieve a sentence of life-without-parole. Moreover, the holding is narrow as amendments such as the life-without-parole provisions of N.J.S.A. 2C:11-3 and No Early Release Act statutes would affect the sentences of capital murders after those statutes took effect.

6-03-08 B.H. v. State of New Jersey, et al.
A-2739-06T3

The Department of Human Services declared B.H. ineligible to receive Work First New Jersey/Temporary Assistance for Needy Families (WFNJ/TANF) benefits for her family because she also received benefits from the Subsidized Adoption Program (SAP) for her two adopted children. The decision was based on an instruction issued by the agency that SAP benefits were duplicative of the WFNJ/TANF benefits. We held the instruction cannot form the basis of the eligibility determination because it operates as a rule and was not adopted in accordance with the Administrative Procedure Act.

5-30-08 George Frappier v. Eastern Logistics, Inc., et als.
A-4399-06T1

Frappier, a New Jersey resident, was injured in an accident in New York while driving a truck that he leased to Eastern Express, Inc. The rental and services were governed by an agreement entitled "independent contractor lease." Frappier filed a petition with the Division of Workers' Compensation naming Eastern Express, Inc. and Eastern Logistics, Inc. as his employers. Acuity Insurance Company, Inc. insures Eastern Logistics, Inc. and was providing a defense subject to a reservation of its right to disclaim coverage.

By leave granted, Acuity appeals from an interlocutory order of the Division estopping Acuity "from denying coverage for truck drivers." Because Acuity was not a party to the proceeding in the Division and the judge of compensation had not determined whether Frappier was an employee or independent contractor at the time of the accident, we conclude that it was improper for the Division to exercise its ancillary authority to address insurance coverage.

5-30-08 Joseph Burke, et al. v. Sea Point Realtors, et al.
A-5652-06T1

Plaintiffs sought to purchase real property from the guardian of an incapacitated person that had been marketed for the guardian by defendant Sea Point Realty. Ultimately, the guardian sought approval to sell the property to defendants Thomas and Patricia Meyer without clearly disclosing to the Probate Part, in an action brought pursuant to R. 4:94-1 to -7, that the Meyers were the principals of Sea Point Realty. The

guardian also did not give notice of the action to plaintiffs or any of the other disappointed offerors. The probate judge approved the sale.

Plaintiffs subsequently brought this action in the Law Division, alleging fraud and other similar claims and seeking damages. Summary judgment was entered in favor of the Meyers, Sea Point and the guardian, based upon, among other things, a determination that the probate proceedings were conclusive on the legitimacy of the sale to the Meyers. The court reversed, concluding that the order approving the transaction was not entitled to preclusive effect because the guardian had not clearly indicated to the Probate Part that the purchasers were the principals of the real estate broker and because plaintiffs had not been given notice of the probate proceedings. As to the latter point, the court recommended consideration by the Civil Practice Rules Committee of the rules regarding the persons entitled to notice of a suit brought pursuant to R. 4:94-1 to -7.

5-30-08 Alexander Ivashenko, et al. v. Katelyn Court Company, Inc., et al.
A-6532-06T3

In 2001, plaintiffs brought a claim against their home builder under the New Home Warranty and Builders' Registration Act. One of plaintiffs' claims was related to a defective foundation wall. The Bureau of Homeowner Protection entered a decision, but gave plaintiffs the right to continue to monitor the wall for signs of movement or cracking. The wall continued to deteriorate and plaintiffs initiated a claim under the Act in 2004. Before that claim was adjudicated, they withdrew it and filed suit in Superior Court against the builder and the architects.

The trial judge dismissed plaintiffs' claim on the grounds that the lawsuit was barred because of the Act's election of remedies provision. We reversed, finding that the plaintiffs' election to proceed under the Act was not knowing and voluntary, and therefore the Act's election of remedies provisions did not preclude their Superior Court action.

5-29-08 John G. McElwee v. Borough of Fieldsboro
A-1230-06T3

We affirm the municipality's removal of appellant as a police officer, concluding that: 1) appellant's refusal to work

the later shift on certain days and his failure to comply with a directive that he devote a substantial amount of his time to patrol constitute serious misconduct; 2) the municipality's complaint was not barred by N.J.S.A. 40A:14-147 because the requirement that a complaint be filed within forty-five days after sufficient information is obtained to file the charges does not apply when a complaint is based on misconduct; 3) the municipality was not precluded from filing the charges because it had not adopted internal affairs guidelines in accordance with N.J.S.A. 40A:14-181; and 4) progressive discipline is not required in this matter due to the seriousness of the charges.

5-29-08 John McDarby, et al. v. Merck & Co., Inc.
A-0076-07T1
Thomas Cona, et al. v. Merck & Co., Inc.
A-0077-07T1

In these two appeals from trial verdicts in the Vioxx litigation, heard back-to-back, we affirm the compensatory damage award to plaintiff McDarby entered pursuant to the New Jersey product Liability Act. We reverse the punitive damage award to him under that Act, finding it preempted by the Federal Food, Drug and Cosmetic Act. We also reverse the awards of compensatory damages and attorneys' fees to McDarby and plaintiff Cona, entered pursuant to the New Jersey Consumer Fraud Act, finding those claims to have been subsumed within the Product Liability Act.

5-28-08 Spencer Savings Bank, SLA v. Walter Shaw, et al.
A-6338-06T2

We conclude that the Fair Foreclosure Act, N.J.S.A. 2A:50-53 to -68, does not permit a lender to recoup from the debtor attorneys fees and costs incurred between expiration of its notice of intention to foreclose and the filing of the foreclosure complaint.

5-27-08 Francisco Varo Varo, et al. v. Owens-Illinois, Inc., et al.
A-3332-06T3; A-4020-06T3; A-4021-06T3; A-4022-06T3; A-4023-06T3; A-4024-06T3; A-4025-06T3; A-4026-06T3; A-4027-06T3; A-4028-06T3; A-4029-06T3; A-4030-06T3; A-4031-06T3; A-4032-06T3; A-4033-06T3; A-4034-06T3 (consolidated)

Plaintiffs, 15 Spanish nationals, sued a New Jersey manufacturer in products liability, alleging injuries suffered

by exposure to asbestos while working aboard U.S. naval warships docked in Spanish territory. Defendant successfully moved for dismissal on forum non conveniens grounds. We reversed, finding that defendant did not establish that Spain was an adequate alternative forum to adjudicate the parties' dispute and that the motion judge erred both in (1) failing to consider the degree of deference properly accorded plaintiffs' choice of forum, and (2) in weighing the private- and public-interest factors implicated in the choice of forum. As to the adequacy of Spain as an alternative forum, we held that the question of availability should not be made to depend merely on the will or grace of a defendant who promises to accept service of process, but rather should be provided by law or made on express condition of the court's dismissal order.

5-21-08 State of New Jersey v. Sky Atwater, a/k/a Tyrone Johnson
A-3771-04T4

1. Where the jury's repeated questions indicated confusion about the requisite mental state for vehicular homicide, it was not sufficient for the trial court to re-charge the jury on recklessness. Rather, the trial court should have compared recklessness with negligence, in light of the jury's questions. Denial of defendant's request to charge negligence in response to the jury's questions was reversible error.

2. It was reversible error for the trial court to preclude a defendant from cross-examining the State's expert on the coefficient of friction, a factor the expert testified was critical in formulating his opinion on the speed of defendant's vehicle at the time of the accident.

3. The trial court committed plain error when it failed to strike and give a curative instruction for the prosecutor's repeated remarks that overstepped the bounds of propriety and deprived defendant of a fair trial.

4. The trial court's denial of defendant's application to argue negligence in summation under the circumstances of this case contributed to cumulative error.

5. In a vehicular homicide case where there is evidence that defendant may have been impaired by the use of alcohol, but no evidence that he was driving while intoxicated (DWI) under the statutory standard of N.J.S.A. 39:4-50, the trial court

should instruct the jury on the blood alcohol concentration (BAC) required for a per se DWI.

05-16-08 American Wrecking Corp. v. Burlington Insurance Co., et al. // DSM Nutritional Products, Inc. v. Burlington Insurance Co., et al. v. NIA Insurance Group, et al.
A-2214-07T3

In the context of a commercial general liability insurance policy issued by a surplus lines carrier for high-risk demolition projects, a cross-liability exclusion for an "employee of any insured," is unambiguous even when considered in light of a severability of insurance clause; and the exclusion violates neither the insureds' reasonable expectations nor public policy.

05-16-08 Clarence Thompson v. Robert James, et al.
A-6713-06T2

Employee who left work to gas up for job-related trip the next day was struck by an uninsured driver after leaving keys with gas station attendant, walking across four lanes of traffic, climbing over a guardrail and down into a grassy median of a Turnpike exit ramp where he was told expensive jewelry might be found. Employee then made claim under the uninsured motorist (UM) provision of his employer's commercial automobile insurance policy. We determined that employee was not "occupying" vehicle for purposes of UM coverage because there was no "substantial nexus" between facts of the accident and the use of the vehicle.

05-16-08 Frank DiMisa, et al. v. Ronald Acquaviva, R.E. Investors Ltd., Inc., et al.
A-0993-06T3

In this matter, the son of a member of a four-person partnership, having been secretly substituted by the father as a partner, purchased from the mortgagee a note secured by a mortgage given by the partners, caused the assignment of the instruments to a corporation the son had created to accept the assignment, and then caused the corporation to institute foreclose proceedings on the partnership property, obtaining a default judgment. In a separate proceeding, a General Equity judge properly found that the defalcating son was the alter ego of the corporation, and thus pierced the corporate veil when applying the doctrine of merger to extinguish the mortgage. Plaintiffs' action for compensatory and punitive damages against

the father, son and corporation was then transferred to the Law Division. There, plaintiffs claimed as their damages the attorneys' fees incurred in their action against the corporation to set aside the judgment in foreclosure. However, the Law Division judge granted summary judgment on that claim, declining to apply Restatement (Second) of Torts § 914(2), previously recognized in New Jersey, which permits attorney fee shifting, despite the absence of statute, rule or contract, if "[o]ne . . . through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person."

On appeal, we found this provision of the Restatement to be applicable, and we concluded that the Law Division judge had mistakenly applied equitable corporate piercing principles in a legal action when he refused to recognize the attorneys' fees incurred in plaintiff's action against the son's corporation as the basis for plaintiffs' claim for compensatory damages and dismissed their complaint.

05-15-08 Robin M. Dickson, et al. v. Township of Hamilton, et al.
A-0422-07T2

The Township police dispatcher's failure to repeatedly notify the DOT of an intermittent icy condition on a State highway traversing the municipality, following each and every automobile accident, will not eliminate the municipality's tort immunity for an injury caused solely by the weather condition. In its grant of immunity, N.J.S.A. 57:4-7 does not contain the "public property" limitation of N.J.S.A. 59:4-1(c). We conclude the scope of climatological immunity provided by N.J.S.A. 59:4-7 extends to public entities generally, not to the property owner specifically.

05-14-08 Kimberly A. Lancos, et al. v. Malcolm Silverman, et al. // Marc Lydon v. Myron Silverman, et al. // Myron Silverman, et al. v. York-Jersey Underwriters
A-4983-06T2

The instant appeal involved a fourth-party claim by homeowners against their insurance broker arising out of the homeowners' defense of numerous claims against them due to the collapse of the deck of their rental home, which resulted in injuries to a number of individuals. At the time of the deck collapse, the insurance policy covering the rental home did not include personal liability coverage and the homeowners contended

that the broker was negligent in failing to procure such coverage. We determined that summary judgment was properly denied, as a genuine factual dispute existed on the issue of the broker's alleged negligence. We also held that the trial judge did not abuse his discretion in precluding the parties from introducing evidence of the underlying claims against the homeowners.

The jury was presented with two interrogatories, the first asking if the broker was negligent, and the second asking if the broker's negligence was the proximate cause of the homeowners' loss. Despite being instructed to proceed to the second question if the first was answered in the affirmative and that at least five votes were required in order to reach a verdict, the jury returned a verdict with only four affirmative votes for the first question and six negative votes for the second. We held that the trial judge's acceptance of the jury's verdict and entry of a verdict of no cause for action was proper, as the jury's finding of no probable cause necessitated judgment for the broker regardless of how it would have answered the first question. Moreover, we determined that the jury's verdict, though incomplete, was valid as it did not suffer from confusion mistake, or irreconcilable inconsistency.

05-14-08 Township of Piscataway, et al. v. South Washington Avenue, LLC., et al.
A-3648-05T3; A-4094-05T3

Under the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 to -50, a condemnee's withdrawal of the deposit made with the declaration of taking is a waiver of all rights except for the right to litigate the amount of compensation.

When property increases in value between the date the complaint is filed and the date the declaration of taking is filed and the deposit made, and the increase is not due to governmental action but to market forces and inflation, the valuation date must be the date of the deposit.

When the condemnee challenges the authority to condemn, the automatic stay of further "steps in the action" provided for in N.J.S.A. 20:3-11, does not prevent the filing of the declaration of taking so long as the condemnee is permitted to remain in control of the property.

05-12-08 State of New Jersey v. Philip J. Castagna
A-4402-06T5

In trial of former police chief for arson and conspiracy to murder his wife, fact that the wife obtained a domestic violence temporary restraining order against defendant resulting in his suspension from office deemed admissible under Rule 404(b) on State's theory of motive. Similarly, charges later filed by wife of violation of the TRO and terroristic threats, resulting in conviction on disorderly persons charges and forfeiture of defendant's office, also held admissible as to motive. Jury to receive limiting instructions including an instruction that defendant's conviction on disorderly persons charges was reversed after defendant's indictment on arson and conspiracy charges.

05-09-08* Barbara Massarano vs. New Jersey Transit, et al.
A-5719-05T5

1. To establish a claim under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8, plaintiff must first demonstrate that she reasonably believed the employer's conduct was a violation of a law, regulation or public policy. Here, where plaintiff reported that New Jersey Transit (NJT) had improperly disposed of blueprints and schematics for bridges, tunnels, a new rail operations center, underground gas lines and building specifications for NJT facilities, and those same documents were readily available to contractors bidding on NJT projects, she could not demonstrate that disposal of the documents in a bin on a gated loading dock was a clear violation of a statute, regulation or public policy.

2. An employee whose job responsibilities include finding and reporting security breaches does not fall within the statutory definition of a "whistle-blower" under CEPA, N.J.S.A. 34:19-3(c)(1) and (2), when she reports what she believes to be a security breach.

3. In claims for retaliation under CEPA, the "burden shifting analysis under the [Law Against Discrimination (LAD)] should be applied." Zappasodi v. New Jersey, 335 N.J. Super. 83, 89 (App. Div. 2000). Here, when plaintiff established a prima facie claim for retaliation, defendant came forward with evidence demonstrating that plaintiff's demeanor was "obstructionist" and "insubordinate," justifying her termination. **[*Approved for Publication date]**

05-08-08 Anna I. Bolz v. Joseph A. Bolz, et al.
A-0916-06T5

In this appeal, we examine the combined effect of the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -12-3; the Joint Tortfeasors Contribution Law (JTCL), N.J.S.A. 2A:53A-1 to -5; and the Comparative Negligence Act (CNA), N.J.S.A. 2A:15-5.1 to -5.17, when there is a collision between a private automobile and an automobile that is owned by a public entity and driven by a public employee. We hold that, despite the fact that a public entity is not liable to pay damages unless plaintiff sustained a permanent injury as defined in the TCA, both drivers are deemed "tortfeasors" if they are found to have been negligent and their negligence was a proximate cause of the accident. Therefore, allocation or apportionment of each driver's negligence or fault must be assessed, even if there is a possibility that the public entity may not be liable for damages. Put a different way, although no damages can be awarded against a public entity or employee for pain and suffering if the injuries caused by an accident do not meet the threshold set by the TCA, the public employee is, nonetheless, a tortfeasor pursuant to JTCL and the CNA and this affects the judgment against the private tortfeasor.

05-06-08 In the Matter of the Expungement Petition of Robert Ross
A-0990-07T4

The expungement statute, N.J.S.A. 2C:52-2, permits expungement of an indictable conviction only if the petitioner "has not been convicted of any prior or subsequent crime." We construed the statute and held that if a petitioner commits two crimes at different times, he is precluded from seeking expungement even if he is sentenced and convicted for the two crimes on the same day.

05-05-08* State of New Jersey vs. William Schadewald
A-1191-06T5

1. A defendant convicted of a second or subsequent offense of driving while intoxicated (DWI), N.J.S.A. 39:4-50, who seeks a step-down in sentence on the ground that one or more of the prior convictions were uncounseled, pursuant to State v. Laurick, 120 N.J. 1, cert. denied, 498 U.S. 967, 111 S. Ct. 429, 112 L. Ed. 2d 413 (1990), must first petition for post-conviction relief (PCR) in the municipal court in which the prior uncounseled conviction occurred.

2. The PCR proceedings in municipal court are governed by Rule 7:10-2(f) and (g). [*Approved for Publication date]

05-01-08 Milford Mill 128, LLC v. Borough of Milford and the Borough of Milford Joint Planning Board and Zoning Board of Adjustment
A-5508-06T1

The Borough of Milford in March 2004 designated 70 acres of a defunct paper mill as an area in need of redevelopment under the Local Redevelopment and Housing Law ("LRHL"), N.J.S.A. 40A:12A-1 to -49. In January 2006 the Borough adopted a Redevelopment Plan for the site, calling for a mix of commercial and residential uses and substantial areas set aside for open space and wetlands. Among other things, the Plan requires that a party seeking to develop the site must first obtain from the Borough Council a determination of consistency with the Plan before submitting its proposal to the Joint Planning Board and Board of Adjustment ("the Joint Board").

Plaintiff, a contract purchaser, seeks to develop the site with markedly higher densities and more expansive uses than those called for under the Redevelopment Plan. Plaintiff sought use variances that would allow it to build units at more than sixteen times the area's permitted residential density, and which would nearly double the Borough's entire population. When the Joint Board declined to act on the variance application, plaintiff in February 2007 filed an action in lieu of prerogative writs, alleging various constitutional and statutory claims. The Law Division dismissed plaintiff's complaint.

We affirm the Law Division's dismissal because, pursuant to the Redevelopment Plan, plaintiff must obtain a consistency finding from the Borough Council as a precondition of having its development project considered by the Joint Board. The situation here is distinguishable from that in Weeden v. City Council of Trenton, 391 N.J. Super. 214 (App. Div.), certif. denied, 192 N.J. 73 (2007), because plaintiff's proposal is not a "minor exception" to the Redevelopment Plan, but rather an attempt to rezone, de facto, the entire redevelopment area.

We also sustain the trial court's finding that plaintiff's lawsuit challenging the merits of the Plan, more than two years after its adoption, is untimely under Rule 4:69-6(a). However, as the trial court's order contemplates, the dismissal of the present action is without prejudice to future proceedings. Such proceedings may include a potential inverse condemnation action

if the existing Plan ultimately deprives plaintiff, or the title owner, of all economically beneficial uses of the property.

04-30-08 New Jersey Division of Youth and Family Services v. I.Y.A. // In the Matter of the Guardianship of T.L. and K.L.
A-2994-06T4

In this appeal we conclude the testimony of two Division caseworkers, without expert medical testimony or reports, was insufficient to prove by a preponderance of the evidence that defendant's children were "parentified" or that defendant's involuntary hospitalization prevented her from adequately caring for her children. Accordingly, we reverse the order substantiating neglect or abuse and the order terminating protective services litigation.

04-29-08 Penn National Insurance Company v. Frank Costa, et al. v. Ernest D. Arians, et al.
A-5162-06T3

The injured party was severely hurt when he slipped on ice in his employer's driveway next to his employer's pickup truck and struck his head on the vertical post of the jack being used to replace one of the truck's tires. We determined that because the injuries were caused by the jack, they arose out of the maintenance of the automobile, thus falling under the exclusion in the homeowner's insurance policy. We reversed the Law Division's denial of the homeowner's insurer's motion for summary judgment and the grant of summary judgment in favor of the automobile insurer. We remanded for entry of judgment in favor of the homeowner's insurance carrier and against the automobile insurance carrier.

04-29-08 Hawthorne PBA Local 200 v. Borough of Hawthorne, et al.
A-4504-06T2

The issue in this appeal is whether, in a mayor-council form of government under the Faulkner Act, the appointment and promotion of police officers may be delegated by the Borough Council to the mayor, whom the council has designated as the "appropriate authority" pursuant to N.J.S.A. 40A:14-118, a general law that addresses the creation and internal structure of municipal police departments. The Law Division dismissed the plaintiff's challenge to the ordinance delegating that authority to the mayor, and we affirmed.

04-28-08 Janon Fisher v. Division of Law

A-2288-06T3; A-2448-06T3

The Division of Law properly calculated the "special service charge" for responding to a request under the Open Public Records Act for production of e-mails and computer files prepared by assistant and deputy attorneys general based on the time expended by those attorneys in retrieving and reviewing the requested government records to identify privileged materials. Where certifications that the Division of Law filed with the Government Records Council clearly indicate that the redacted material in documents produced in response to an OPRA request is privileged, there is no need for a remand for the purpose of requiring the Division to submit a more specific Vaughn index.

04-23-08 The Estate of Kathryn E. Spencer, et al. v. Daniel J. Gavin, Esq., et al.
A-0424-06T5

The professional liability issues in this case arise out of circumstances in which a lawyer, while acting in his capacity as an executor and administrator, stole $400,000 or more from his clients' three related estates. Within months after absconding with those funds and dissipating them, the lawyer-executor died of cancer.

The primary question before us is whether a fellow attorney who evidently did not participate in the thievery, but who had a close and interdependent business relationship with the lawyer-executor, and who concurrently performed legal work at the lawyer-executor's request for at least one of the same estates, had a duty to report the lawyer-executor's malfeasance upon allegedly learning of it.

We hold that a reporting duty in such circumstances is mandated by principles of legal ethics, tort law, and public policy, so long as the attorney is shown to have had actual knowledge of the other lawyer's wrongdoing. Because there are genuine issues of material fact as to the defendant attorney's actual knowledge of the thefts, we vacate summary judgment in his favor and remand for a trial.

04-22-08 Board of Education of the Lenape Regional High School District, Burlington County v. New Jersey State Department of Education, et al.
A-4860-06T3

A final investigation decision rendered by the Office of Special Education Programs, pursuant to the Individuals with Disabilities Education Act (IDEA), cannot be appealed to the Commissioner of Education.

04-21-08 EMC Mortgage Corporation v. Ishaque Chaudhri and Claudia Chaudhri, et al.
A-5261-06T2

We reverse the dismissal of plaintiff's foreclosure complaint. We conclude the motion judge erred in interpreting the notice requirements of the Fair Foreclosure Act (FFA), N.J.S.A. 2A:50-53 to -68, and incorrectly imposed an obligation on plaintiff to provide actual notice of the recorded assignment of mortgage to the mortgagors prior to initiating foreclosure. We also determine that sufficient factual disputes are present, making entry of summary judgment improper.

In our review, we conclude the notice provisions of N.J.S.A. 2A:50-56(a) are satisfied when the mortgagee sends the notice by first class and certified mail, return receipt requested, prior to filing the foreclosure complaint. The imposition of personal service by the motion judge exceeded the statutory requisites.

We also disagreed with the remedy utilized by the Chancery judge in GE Capital Mortgage Servs., Inc. v. Weisman, 339 N.J. Super. 590, 592 (Ch. Div. 2000), based upon the Legislature's statement that "[w]aivers by the debtor of rights provided pursuant to [the FFA] are against public policy, unlawful, and void[.]" N.J.S.A. 2A:50-61.

We also reversed the motion judge's dismissal of the action because the mortgagee failed to provide notice of its receipt of assignment from a prior mortgagee. The suggestion that New Jersey law places "a requirement of notice of the assignment to the obligor[,]" is incorrect as a matter of law. Current New Jersey law provides that the recordation of the mortgage assignment alone serves as notice to third parties of its existence. A trial was necessary to uncover the actual knowledge of third parties that claimed priority positions when the mortgagors wrongfully obtained an order discharging the mortgage and then sold the property to their daughter who obtained a purchase money mortgage.

04-21-08 Michael Bender v. Walgreen Eastern Co., Inc., et al.
A-4664-06T1

We conclude that a claim of professional negligence based on a pharmacist's filling a prescription with a drug not prescribed falls within the "common knowledge" exception to the affidavit of merit statute, which the Supreme Court recognized in Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387 (2001).

04-17-08 State of New Jersey v. Brandon Krause
A-3737-06T5

Based on defendant's failure to meet his burden of proving facts that would establish that the Hackettstown noise ordinance was preempted by the Noise Control Act of 1971, N.J.S.A. 13:1G-1 to -23, the ordinance was held valid and the conviction affirmed. However, the opinion noted that local noise ordinances may require DEP approval to be enforceable at least with respect to certain facilities, such as commercial and industrial sites.

04-15-08 State of New Jersey v. James Robinson
A-6381-05T4

In this appeal, we reverse the trial court's denial of defendant's motion to suppress evidence found in his dwelling. Our decision is grounded exclusively under the rights conferred in Article I, paragraph 7 of the Constitution of the State of New Jersey.

In executing a knock-and-announce warrant, the police must give the occupants of the dwelling a reasonable opportunity to respond before resorting to the use of force to gain entry to the residence. Here, the police broke down the entrance door of the dwelling, twenty to thirty seconds after announcing their presence, thus converting the knock-and-announce warrant into a de facto no-knock warrant. Furthermore, the use of a so-called flash bang explosive device by the police was factually unwarranted, and rendered a nullity the warrant's knock-and-announce condition imposed by the court.

04-14-08 Sumeru Naik v. Urvi Naik
A-6270-05T5

In this divorce appeal, we address the enforceability and amount of support that must be paid by the signer of an immigration Affidavit of Support (Form I-864EZ), pursuant to § 213A of the Immigration and Nationality Act (INA), 8 U.S.C.A. § 1183a. This form creates a binding contract that imposes an

obligation on the sponsor of a sponsored immigrant to insure that the immigrant has available support at or above 125 percent of the federal poverty line depending on the size of the family unit. This obligation, which is independent of spousal support, continues until the occurrence of one of several statutory termination events. We hold that Form I-864EZ support is enforceable in New Jersey courts. However, in setting such support the court may consider alimony, child support and equitable distribution awards in determining the sponsor's obligation.

04-14-08 State of New Jersey v. Forrest M. Baker, Sr.
A-6018-05T4

Defendant, a federal inmate at the Fort Dix Correctional Facility in Wrightstown, was produced for pre-trial appearances and for trial in the Law Division by way of the judge's "order to produce." We concluded that defendant's pre-trial motion to dismiss the indictment pursuant to the "anti-shuttling" provision of the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-4, was properly denied. Because a writ of habeas corpus ad prosequendum is not a detainer for IAD purposes, the statute was not triggered and the motion was properly denied.

04-10-08 N.E. v. New Jersey Division of Medical Assistance and Health Services, et al.
A-2276-06T2

The Division of Medical Assistance and Health Services correctly found that N.E. was not eligible for "Medicaid Only" benefits because, on the date as of which N.E.'s eligibility was determined, his resources exceeded the maximum amount permitted by N.J.A.C. 10:71-4.5(c), and pursuant to New Jersey's regulatory scheme, the income that N.E. was receiving and reasonably expected to receive had to be allocated to his spouse for her "Minimum Monthly Maintenance Needs Allowance" before more of his resources could be allocated to the spouse.

04-09-08 H.J. Bailey Company v. Neptune Township
A-0421-07T2

In this appeal, we are required to determine whether the failure of an owner of non-income-producing property to respond to a written request for information made by a municipal tax assessor pursuant to N.J.S.A. 54:4-34 (Chapter 91) triggers the sanction limiting the right of appeal, as modified by the

Supreme Court in Ocean Pines, Ltd. v. Borough of Point Pleasant, 112 N.J. 1 (1988).

The Tax Court concluded that the Ocean Pines sanction does not apply to non-income-producing properties. We affirm. In our view, the sanction for failing to respond applies only to income-producing properties. Despite this anomaly, we discern no legal authority to create, by judicial fiat, a sanction which the Legislature failed to provide. Thus, we recommend that the Legislature address the situation presented by this case, and provide a clear consequence for the owners of non-income-producing properties who fail to answer a Chapter 91 request.

04-09-08 Robert Nicastro, et al. v. McIntyre Machinery America, Ltd., et al.
A-1755-06T5

Although we were unable to conclude that application of traditional minimum contacts principles would support long-arm jurisdiction over the British manufacturer of a machine on which a New Jersey worker was injured, we found the manufacturer subject to jurisdiction in New Jersey under the stream-of-commerce theory based upon its establishment of an exclusive United States distributor arrangement, through which the worker's New Jersey employer purchased the machine.

04-09-08 D.G., Guardian Ad Litem for J.G. v. North Plainfield Board of Education, et al.
A-3988-05T5

We affirmed a jury verdict of no cause for action in this case wherein plaintiff alleged that her son, who suffered from cerebral palsy, was discriminated against by the Board of Education (Board) and certain individual employees of the Board in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, the Americans With Disabilities Act (ADA), 42 U.S.C.A. §§ 12101 to 12213, and the Federal Civil Rights Act, 42 U.S.C.A. §§ 1983 and 1985. We addressed the following issues, among others, in our opinion:

1. The Superior Court, Law Division, lacks jurisdiction to hear administrative appeals; rather, judicial review of administrative actions is vested in the Appellate Division. R. 2:2-3(a)(2); In re Senior Appeals Examiners, 60 N.J. 356, 363; In re Grievance of Trans. Emp., 120 N.J. Super. 540 (App. Div. 1972), certif. denied, 62 N.J. 193 (1973).

2. A party who requested a change in venue to another county cannot complain after an unfavorable verdict that the jurors in the new venue were less sympathetic to her cause than in the original county.

3. A party is not entitled to a pre-trial ruling that she is a "prevailing party" when there are substantial material facts in dispute. Moreover, a pre-trial claim for counsel fees under the "catalyst theory," i.e., that the plaintiff's legal action was the catalyst for change in defendant's procedures, is precluded by Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001) (holding that counsel fees can only be awarded under certain federal statutes, including the ADA, when there is an adjudication on the merits or a consent decree); Baer v. Klagholz, 346 N.J. Super. 79, 82-83 (App. Div. 2001), certif. denied, 174 N.J. 193 (2002) (holding that Buckhannon applies to federal claims litigated in New Jersey courts).

04-07-08 Waste Management of New Jersey, Inc. v. The Union County Utilities Authority, et al.
A-5018-06T2; A-5232-06T2 (consolidated)

In these appeals, the court considered whether the trial judge erred in permanently enjoining defendant Union County Utilities Authority from awarding a contract for the removal of solid waste within Union County to defendant Delaware and Hudson Railway Company, Inc., the lowest bidder, which proposed the transloading of waste materials onto rail cars at Newark for rail transportation to sites in Ohio.

The court first concluded that the existing procedural framework did not permit the entry of a permanent injunction because the plaintiff's application only sought an interlocutory injunction and defendants did not consent to the judge's finally resolving the issues posed.

The court then examined the record to determine whether the entry of an interlocutory injunction would have been appropriate. The court ultimately determined that plaintiff, an unsuccessful bidder, failed to demonstrate a likelihood of success on the merits of its claim that the decision to award the contract to the lowest bidder was arbitrary, capricious or unreasonable. In this regard, the court rejected the judge's first factual basis for the injunction -- that the Authority imperfectly investigated whether DHRC was a material subsidiary of its parent -- because, even if true, it had not been clearly

and convincingly established that the Authority ultimately reached the wrong conclusion. And the court rejected the judge's only other factual basis for the injunction -- that DHRC's lack of a state-issued permit rendered the bid non-conforming -- because it appeared far more likely that the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C.A. §§ 10101 to 11908, federally preempts the State's right to require that DHRC obtain a permit for the transloading of waste materials.

As a result, the court vacated the permanent injunction. However, even though the court found insufficient evidence to support a finding that plaintiff demonstrated a reasonable probability of success, the matter was remanded for a determination of whether an interlocutory injunction, limited to preserving the status quo, is appropriate in the circumstances.

04-07-08 Mountain Hill, L.L.C. v. Township of Middletown, et al.
A-1328-05T3

We considered the "typical partisan caucus meetings" exception, N.J.S.A. 10:4-7, to the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21, and held that, while the OPMA as a whole is to be liberally construed, N.J.S.A. 10:4-21, the exceptions to the OPMA are to be strictly construed. Because the attendees at private caucus meetings held by the Chairman of the Municipal Republican Party in Middletown, including a simple majority of the Township Committee, only discussed the political ramifications of matters affecting Middletown, including plaintiff's development project, they remained within the limited exception for "typical partisan caucus meetings" and did not contravene the OPMA.

04-02-08 Sopharie Leang, et al. v. Jersey City Board of Education, et al. v. Jersey City Medical Center Mobile Crisis Unit, et al.
A-5777-05T5

We hold that, on a motion for summary judgment where the opposing party does not comply with R. 4:46-2(b), the motion judge may only assume that the facts in the moving party's statement are true if those facts are sufficiently supported by the record. Where the record raises a dispute as to a material fact, the judge should order compliance with R. 4:46-2(b) and, if the record is voluminous, may impose a monetary sanction.

Public employees do not enjoy good-faith immunity from state and federal claims of false imprisonment, assault,

battery, defamation and intentional infliction of emotional distress, even though the public employer has no respondeat superior liability for the conduct of its employees. Although under DelaCruz v. Borough of Hillsdale, 183 N.J. 149, 164-65 (2005), the tort threshold of N.J.S.A. 59:9-2(d) generally applies to damages arising from false arrest and false imprisonment, it does not apply to damages arising from conduct that "was outside the scope of . . . employment or constituted a crime, actual fraud, actual malice or willful misconduct" under N.J.S.A. 59:3-14. We also hold that a Woolley-type claim against a public employer is governed by the Contractual Liability Act, N.J.S.A. 59:13-1 to -10.

We hold that the statutory immunity of N.J.S.A. 2A:62A-1 for caregivers treating persons injured in accidents or other emergencies does not immunize a medical transport person where there was no accident or emergency and the allegedly ill person refused medical treatment. Neither does N.J.S.A. 30:4-27.7(b) immunize a medical transport person where neither a law enforcement officer nor a screening service has directed such person to transport an individual for the purpose of mental health assessment or treatment.

03-31-08 State of New Jersey v. Brenda Hoffman
A-6473-06T4

In this appeal, we reverse an order admitting defendant into a Pretrial Intervention program over the prosecutor's objection. We conclude the victims' status as police officers does not eviscerate N.J.S.A. 2C:43-12(e)(4), which requires prosecutors to consider "[t]he desire of the complainant or victim to forego prosecution."

03-31-08 Agostinho Matos, et al. v. Farmers Mutual Fire Insurance Company of Salem County
A-4256-06T1

An insured is bound by the policy's one-year limitation period on filing suit to challenge denial of a claim if he knew or should have known of this term of the policy even though the endorsement reflecting this limitation was omitted from the copy sent to the insured.

03-28-08 New Jersey Division of Taxation v. Selective Insurance Company of America v. Abraham, S. Stahl, et al.
A-2402-06T3

Where the tax obligor's seller/user license was neither revoked nor canceled, the Division of Taxation was not bound by the two-year statute of limitations set forth in N.J.S.A. 54:39-20 for filing suit against the surety on a motor fuels tax bond. The trial court correctly applied the general ten-year statute of limitations on claims filed by the State, N.J.S.A. 2A:14-1.2a. Contrary to the State's contention that its cause of action would not arise until the surety denied its claim, we held that the cause of action arose when the obligor's taxes came due. Since the surety bond was not part of the obligor's bankruptcy estate, the obligor's bankruptcy did not toll the State's time to file suit against the surety. Therefore, the trial court properly dismissed the State's claims based on taxes that came due more than ten years prior to the filing of the complaint. Because some of the obligor's taxes may have come due within the ten-year limitations period, we remanded to the trial court for further proceedings.

03-28-08 Marie Romano v. Galaxy Toyota a/k/a Monmouth Toyota, M.T. Imports, Inc., et al. v. Daniel Caporellie, et al.
A-0251-06T3

In this "clocked" odometer case, we reject plaintiff's argument that because purchaser revoked acceptance of the vehicle, the "ascertainable loss" for CFA purposes was measured by the purchase price of the vehicle, as provided under the UCC, N.J.S.A. 12A:2-608 and N.J.S.A. 12A:2-711(1). We affirmed the trial court's determination to set aside the jury verdict, which awarded CFA damages equal to the vehicle purchase price.

The calculation of the amount of damages in altered odometer cases was discussed, but not expressly addressed in Cuesta v. Classic Wheels, 358 N.J. Super. 512, 519 (App. Div. 2003) and Sema v. Automall 46, Inc., 384 N.J. Super. 145, 149 (App. Div. 2006). Here, we specifically reviewed the determination of the measure of a plaintiff's ascertainable loss and concluded that for CFA purposes an award of damages to compensate her for the "unconscionable commercial practice" by defendant cannot be the purchase price she paid for the automobile, but was the difference between the price plaintiff paid for the vehicle less its actual value in the undisclosed altered condition.

03-28-08 State of New Jersey v. Hiram Rodriguez
A-4614-05T4

In this appeal, the court determined that the police complied with the "reasonable wait time" standard and therefore did not violate the "knock and announce" rule, which is incorporated in the Fourth Amendment and Article I, paragraph 7 of the state constitution, when they waited fifteen to twenty seconds after announcing their presence before entering the premises.

The State also argued in this appeal that Hudson v. Michigan, 547 U.S. 586, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006), which holds that the Fourth Amendment does not require application of the exclusionary rule upon a knock and announce violation, should be followed in determining the appropriate remedy for a similar violation of our state constitution. Since the court found no violation, it recognized that it was not necessary to decide this issue but expressed in dictum its doubt that Hudson would be followed in determining the remedy available upon a breach of the state constitutional knock and announce rule.

Judge Stern filed a concurring opinion.

03-27-08 Moper Transportation, Inc., et al. v. Norbet Trucking Corp., et al.
A-0992-06T2

Under New Jersey choice-of-law principles, New Jersey law controls the dispute between two insurance carriers as to coverage when the policies covering a New Jersey vehicle and its tractor are issued to New Jersey corporations in New Jersey, even though the accident occurred in New York and the drivers lived there. The settlement of the underlying personal injury action in New York distinguishes this case from others pointing to New York's governmental interest, and New Jersey law controls as to the allocation of loss between carriers.

03-27-08 Linda Lavin Gotlib v. Jonathan Gotlib
A-5679-05T1

In this matrimonial appeal, we hold that the non-custodial parent's obligation to reimburse the custodial parent for medical expenses not covered by insurance, should be deemed by a court reviewing a motion to enforce litigant's rights as an essential benefit to the parties' children. The right to receive these payments belongs to the children, and is therefore not subject to waiver by the inactions of the custodial parent. However, the non-custodial parent, from whom reimbursement is

sought, retains the right to question the reasonableness of any individual medical expense.

On the question of the children's college education, we remand for the trial court to make factual findings, after conducting a plenary hearing, guided by the factors outlined in Gac v. Gac, 186 N.J. 535 (2006) and Newburgh v. Arrigo, 88 N.J. 529 (1982).

We also hold that a mortgage on the former marital residence, held by one spouse as mortgagee to secure his equitable distribution interest, may be assigned to a third party. However, we decline to decide whether the assignee is a holder in due course, because he was not a named party in the proceedings before the Family Part.

03-27-08 Spring Creek Holding Company, Inc. v. Shinnihon U.S.A. Co., Ltd.
A-4606-05T2

Applying the Restatement (Second) of Contracts § 251, we held that a seller of real estate acted within its rights in terminating the agreement of sale because of a series of events that led the seller to reasonably believe that a protracted internal shareholder dispute over control of the buyer corporation would prevent the buyer from performing, primarily with respect to prosecuting zoning approvals. The seller demanded adequate assurance of performance. The documentary record supported the Chancery Division judge's finding in granting summary judgment in the seller's favor that no rational factfinder could find that the buyer provided adequate assurance of performance. We further held that the apparent resolution of the shareholder dispute through a federal lawsuit more than three years after the seller terminated the agreement did not affect the outcome of this litigation.

03-24-08 Nieschmidt Law Office v. Deborah Leamann, et al.
A-5272-06T3

We affirmed the dismissal of a law firm's complaint for unpaid legal fees for failure to give thirty-day Pre-Action Notice pursuant to Rule 1:20A-6, holding that a defendant's intention to defend against the complaint rather than participate in fee arbitration does not absolve a plaintiff's failure to give the required notice. We also noted that the imminent running of the six-year statute of limitations preventing plaintiff from filing the required thirty-day Pre-

Action Notice did not absolve plaintiff under the circumstances because plaintiff waited until the Notice could not be filed in a timely manner.

03-20-08 IMO Petition of S.D. of Removal for the Voluntary Self-Exclusion List
A-3427-06T2

The Casino Control Commission promulgated regulations for voluntary self-exclusion of problem gamblers from New Jersey gaming activities. S.D. signed up for the lifetime SEL. Though acknowledging he voluntarily requested, with full knowledge and intent, the direct statutory consequences of his placement on the SEL, namely a lifetime ban from New Jersey casinos, S.D. sought removal upon becoming aware that some out-of-state casinos affiliated with those in New Jersey would also exclude him from their gaming facilities.

The Commission denied the application, concluding the potential extra-territorial consequences of placement on New Jersey's SEL are collateral and do not negate the applicant's voluntary actions, the harm is minimal when balanced against the statutory aims of the SEL, and the agency's revision of its form to include reference to this potential consequence after being informed of it by S.D. do not demonstrate an acknowledgement of a duty to disclose this information or the insufficiency of the prior form signed by S.D.

We discern no basis to second-guess the agency's decision.

03-20-08 Kathleen v. Bauer, et al. v. Frederick nesbitt, III, et al.
A-2343-06T2

In this opinion we discuss the potential liability of a bar/restaurant under the New Jersey Licensed Alcoholic Beverage Server Fair Liability Act and the common law when a visibly intoxicated patron who has been served liquor by the bar is driven from the premises by an intoxicated underage patron who was not served liquor, and a fatal automobile accident results.

03-19-08 Adamar of New Jersey, Inc. v. David Mason
A-2021-06T3

The Legislature established a twenty-year term for New Jersey judgments, which can be extended for an additional twenty-year term under N.J.S.A. 2A:14-5, provided the creditor files a motion or other action to revive within twenty years

after the judgment was entered, and satisfies the elements of Kronstadt v. Kronstadt, 238 N.J. Super. 614, 616-18 (App. Div. l990) that: (1) the judgment is valid and subsisting; (2) it remains unpaid in full or in part; and (3) there is no outstanding impediment to its judicial enforcement, e.g., a stay, a pending bankruptcy proceeding, an outstanding injunctive order, or the like.

03-19-08 Glenn Sellers v. Board of Trustees of the Police and Firemen's Retirement System
A-1170-06T1

Where a municipality hired a firefighter under the mistaken belief that deductions for his service as a police officer and his service in the military would enable him to meet the statutory age requirements for firefighters and where the firefighter, acting in good faith and reasonably, left other employment to accept the position, the Board of Trustees of the New Jersey Police and Firemen's Retirement System has the authority under certain circumstances to apply equitable principles and provide a remedy.

The denial of plaintiff's enrollment in the New Jersey Police and Firemen's Retirement System is reversed and remanded to the Board of Trustees for a determination of whether plaintiff may be enrolled under equitable principles.

03-18-08 New Jersey Citizens Underwriting Reciprocal Exchange v. Kieran Collins, D.C., LLC., et al.
A-3705-06T1

Exercising its limited supervisory jurisdiction to review a trial judge's review of an arbitration award rendered pursuant to the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1 to -30 (APDRA), the court concluded that the trial judge acted within his statutory jurisdiction in finding the arbitrator's failure to consolidate two related arbitrations, which resulted in inconsistent awards, constituted "prejudicial error" as defined by N.J.S.A. 2A:23A-13(c)(5), thus permitting the trial judge's intervention. And, since the trial judge acted within his jurisdiction, the Appellate Division was precluded by N.J.S.A. 2A:23A-18(b), which declares that "[t]here shall be no further appeal or review" of a trial court's review of an ADPRA award, from examining the correctness of the trial judge's determination.

03-18-08 Michael Boyle v. Ford Motor Company, et al.

A-0889-06T3

In this product liability appeal, we hold that Ford Motor Company is not legally liable for the injuries plaintiff suffered when his car collided and burrowed under the rear of a truck which had been substantially modified by its owner after leaving Ford's custody and control. This type of accident was caused by the failure of a rear bumper safety device that was installed on the chassis cab by the vehicle's final stage manufacturer.

The chassis cab sold by Ford here was a component product, intended as a generic platform, to be modified and retrofitted to meet the needs of the vehicle's end-user. As such, it is neither feasible nor practical to impose upon Ford the legal responsibility for installing or providing the safety device at issue here. Consistent with industry practices and federal regulatory safety standards, the legal responsibility for installing the rear bumper guard must lie with the truck's final-stage manufacturer, because this entity is in the best position to determine the type of safety device needed.

In reaching this conclusion, we adhere to the "feasibility and practicality" standard articulated by our Supreme Court in Zaza v. Marquess & Nell, Inc., 144 N.J. 34 (1996). Our analysis is also informed by Restatement (Third) of Torts: Products Liability § 5 (1998).

03-17-08 In the Matter of the Application of E.F.G. to Assume a New Name
A-5975-06T1

Plaintiff, a domestic violence victim, appealed from a trial court's order denying her application to assume a new name, her request to waive the requirement to publish notice, and her request that the matter be placed under seal and not be entered in any data base accessible by the public. We found that adhering to the rule requiring publication of an application to change a name would result in an injustice, and, because we find that good cause exists to seal the court record, we reversed the trial court pursuant to Rule 1:1-2 and 1:2-1.

03-17-08 SWH Funding Corp. v. Walden Printing Co., Inc., et al.
A-0207-06T5

Under R. 4:21A-4(f), a party seeking to vacate a civil arbitration award entered by default must establish both "good

cause" and a "meritorious defense." Although defense counsel's neglect in failing to appear at the arbitration, and in failing to be diligent in ascertaining the outcome of the proceeding, constituted "good cause" under R. 4:21A-4(f), defendants failed, to demonstrate a "meritorious defense." Rule 4:50-1(a) relief is not available because inadvertence of counsel alone is insufficient, as a matter of law, to establish "excusable neglect."

In the context of adjudicating plaintiff's motion to confirm the arbitration award, the trial court erroneously increased the damage award entered by the arbitrator by considering evidence not presented by plaintiff in the original arbitration hearing. Under R. 4:21A-6(b)(3), the court's authority in adjudicating a motion to confirm an arbitration award is limited to reducing to judgment the amount of damages found by the arbitrator, supplemented only by prejudgment interest provided in R. 4:42-11(b).

03-14-08 Rosalie Bacon, et al. v. New Jersey State Department of Education
A-2460-05T1

Eight rural and poor school districts appeal from a decision of the New Jersey State Board of Education (Board) which, although finding their circumstances mirrored those of the Abbott urban school districts presently receiving remedial relief in accordance with a series of Supreme Court decisions, nevertheless declined to require the same relief for appellants. holding the Board lacked jurisdiction to do so. The Board instead directed the Commissioner, Department of Education, to design and conduct a needs assessment of each appellant district, which the Commissioner failed to do, opting to await the fate of pending legislative proposals, since enacted into law.

Recognizing the judiciary's stated preference for legislative and executive solutions to remedy constitutional violations, especially where, as here, legislation promising comprehensive and systemic relief has just been enacted, we found no warrant to interfere at this time with the approach ordered by the Board. We also found no inconsistency in ordering the Commissioner to promptly proceed with a particularized needs assessment of appellant districts as a integral step in the Board's ultimate determination, on remand, whether the needs so identified by the Department, in light of proven educational deficits already found by the Board, will be

met by the Act's new funding formula, so as to afford students in the Bacon districts the thorough and efficient education to which they are constitutionally entitled.

03-13-08 State of New Jersey v. Douglas Noble
A-3394-05T4

The State may, consistent with a defendant's right to remain silent, cross-examine him on the late filing of his alibi notice when such cross-examination is designed to highlight inconsistencies between the alibi notice and defendant's testimony a mere two days later. We conclude that here, where the cross-examination on the timing of the alibi notice served to demonstrate the unlikelihood that defendant's recollection of the facts supporting his alibi defense would change so significantly in a two-day period, the State's cross-examination did not constitute a prohibited evisceration of defendant's right to remain silent. Instead, such cross-examination constituted a permitted "litigational" use of the late furnishing of an alibi notice.

03-12-08 State of New Jersey v. Hipolito Ruiz
A-5529-06T4

When a jury acquits a defendant of the sole charge in the indictment, retrial for a lesser-included offense on which the jury was deadlocked is not constitutionally barred.

03-12-08 High Point Insurance Company v. J.M. (a minor), K.M. (a minor) by their G/A/L G.M. and C.M., G.M. and C.M. individually, and George Van Dyke and Sheryl Van Dyke
A-0829-06T5

In a coverage action, we develop the public policy issues considered in J.C. v. N.B., 335 N.J. Super. 503 (App. Div. 2000), certif. denied, 168 N.J. 294 (2001), and conclude that the public policy providing for vigilance of spouse to protect child sexual abuse victims precludes coverage under homeowner's policy for spouse as well as the abuser.

03-10-08 State of New Jersey v. Cadree B. Matthews
A-6040-05T4

An anonymous caller stated that a person in a burgundy Durango with temporary license plates was flashing a gun at a certain location late at night. Police proceeded to the scene, located the vehicle and performed a pat-down search of its three

occupants. The search revealed no weapons. The police then secured the occupants away from the vehicle and searched the passenger compartment, finding a handgun beneath the front passenger seat. While conducting the search, a fourth person, later identified as the defendant, attempted to get to the vehicle. When asked to leave the scene, he refused. Defendant was then arrested for disorderly conduct and resisting arrest. When he was secured in the back of a patrol car, defendant confessed that the handgun police found in the vehicle belonged to him. After the denial of a motion to suppress the handgun on the basis of an illegal search, defendant pled guilty to unlawful possession of a weapon, resisting arrest, and unlawful possession of a handgun by certain persons not to have weapons.

We reversed the convictions as to the unlawful possession of a weapon and certain persons, based upon the illegality of the search. The search was not justified under Terry v. Ohio because the anonymous tip, standing alone, did not provide an independent basis for the stop, frisk of the occupants, or search of the vehicle.

03-07-08 Nicole Hager, et al. v. Tammy M. Gonsalves, et al. // High Point Insurance Company v. Rutgers Casualty Insurance Company, et al.
A-4293-06T1

The failure of both the operator and the owner of a motor vehicle to cooperate with the vehicle's insurer, thus preventing the insurer from ascertaining whether the operator was a permissive user at the time of the subject accident, may provide sufficient grounds for the insurer to disclaim coverage.

03-06-07 State of New Jersey v. J.A.
A-2554-05T4

In this appeal from the denial of a post-conviction relief petition, we hold that the Supreme Court's decision in State v. P.H., 178 N.J. 378 (2004), that a jury may consider the timing of a victim's disclosure of sexual abuse in assessing credibility, and therefore disapproving the contrary holding in State v. Bethune, 121 N.J. 137 (1990), is not to be given complete retroactivity to encompass defendant's case on collateral review, but is limited to pipeline retroactivity only.

03-05-08 Helen Gazzillo v. Robert Grieb v. South Hunterdon Regional Board of Education

A-4346-06T2

Plaintiff sued defendant based upon his having sexually assaulted her. Both parties were employees of a regional board of education, and defendant contended he was not subject to suit because plaintiff had not filed a notice of claim. We disagreed because there was no nexus between his public employment and the alleged tort.

03-05-08 Montee Saunders, et al. v. Capital Health System at Mercer, et al.
A-3087-06T3

We reversed the Law Division's dismissal of plaintiffs' complaint against a certified nurse midwife and held that an Affidavit of Merit is not required in a personal injury suit for alleged professional malpractice against a licensed midwife. We also reversed the Law Division's dismissal of plaintiffs' complaint against a health care facility because the court failed to hold an accelerated case management conference, which is required in professional malpractice cases.

03-04-08 State of New Jersey v. Yusef Allen
A-4685-05T4

On appeal from the denial of defendant's petition for post-conviction relief, the Appellate Division remands for an evidentiary hearing to determine why defendant declined an offer for mistrial made by the judge during trial (counsel's statement during trial that he wasn't doing it for "economic" reasons did not suffice) and for an evaluation of the credibility of an individual who gave a post-judgment affidavit exculpating defendant.

03-03-08 Ric Malik, et al. v. A. Fred Ruttenberg, Esq., et al.
A-6615-06T3

During a recess in a multi-day arbitration to resolve claims under a residential construction contract, one of the attorneys for the homeowner and the builder were involved in a physical altercation during a recess. We held that N.J.S.A. 2A:23B-14a confers immunity on arbitrators and arbitral organizations from civil liability to the same extent as a judge acting in a judicial capacity, and this immunity bars plaintiff's claim of negligence founded on the failure of the arbitrator to admonish or remove one of the homeowners' attorneys from the proceedings.

03-03-08 Daniel Fackelman, et al. v. Lac d'Amiante du Quebec, et al.
A-4636-05T1

We hold that a workers' compensation insurer, which performed industrial hygiene studies for plaintiff's employer at plaintiff's place of employment, had no duty to warn the employees of workplace risks or educate them about the nature of the risks or means to minimize risk, when there was no evidence that the insurer negligently performed the studies or that the insurer had assumed any duty to oversee workplace safety.

02-29-08 Dugan Construction Company, Inc. v. New Jersey Turnpike Authority, et al.
A-3576-06T1

In a case involving a public contract for remediating polluted groundwater, we examined the doctrines of patent ambiguity and reformation. The contractor claimed $9.5 million for disposing of approximately 200,000 gallons of non-hazardous wastewater, although its bid of fifty dollars per gallon was based on the New Jersey Turnpike Authority's estimate that the project would produce only fifty-five gallons of wastewater. The trial judge dismissed the contractor's complaint based on the doctrine of patent ambiguity. We concluded that the contract estimate was a mistake, rather than an ambiguity, and that reformation was the appropriate remedy. Based on undisputed evidence concerning the reasonable per-gallon price of the work, we concluded that the contract should be reformed to provide the contractor compensation of about $50,000.

02-28-08 Richard Leidy v. County of Ocean, et al.
A-4127-06T2

In dismissing plaintiff's personal injury action against a public entity (County of Monmouth), we held that where the actual tortfeasor's identity has not been actively obscured and plaintiff has not been thwarted in his or her own diligent efforts to determine the responsible party, then plaintiff's misidentification does not constitute an "extraordinary circumstance" warranting relaxation of the Tort Claims Act 90-day time constraint, N.J.S.A. 59:8-8.

Prompt inspection of the area within a reasonable time following plaintiff's motorcycle accident would have led to identification of the County of Monmouth as the party responsible for maintaining the portion of the roadway,

bordering Ocean County, where the incident occurred. Moreover, the delay in notice, occasioned by the lack of any reasonable efforts by plaintiff in the interim 90 days to ascertain ownership of the roadway, likely prejudiced defendant in its efforts to investigate the accident scene which, due to time and weather, may have changed.

02-27-08 Dale Scott v. Foodarama Supermarkets
A-3936-06T3

We held that the exception to the going-and-coming rule in the Workers' Compensation Act, N.J.S.A. 34:15-36, which provides that an employee be paid for travel time in order to bring such time within the course of employment for compensation purposes, does not extend to cover a salaried worker required to work a minimum of forty-eight hours per week where travel time to and from work is not included in the minimum workweek.

02-27-08 Circus Liquors, Inc. v. Governing Body of AMiddletown Township
A-2294-06T3

In this appeal, the court considered whether the Director of the Division of Alcoholic Beverage Control was authorized to allow the holders of a third liquor license -- possessed in violation of the two-license limitation contained in N.J.S.A. 33:1-12.31 -- to retain the third license long enough to transfer it. The court concluded that because, among other things, the three licenses were held for six years in violation of the statute, the Director should not have granted the equitable remedy of permitting the holder to continue to hold the license in order to sell it.

02-26-08 Century Indemnity Company, et al. v. Mine Safety Appliances Company, et al.
A-1664-06T5

In this decision, we applied the comity principles set forth by the Supreme Court in its recent decision in Sensient Colors, Inc. v. Allstate Ins. Co. as a framework to analyze whether a preemptive coverage action instituted in New Jersey by Century Indemnity Company against Mine Safety Appliances Company (MSA), a manufacturer of allegedly defective respiratory protective devices, and its carriers should be dismissed in favor of a more limited second-filed Pennsylvania action, when that State was the state of residence of both Century and MSA and Pennsylvania law applying joint and several liability

principles to the allocation of coverage among triggered carriers was likely applicable to the dispute. As the result of our analysis, we affirmed the dismissal of the New Jersey action, without prejudice.

02-26-08 New Jersey Division of Youth and Family Services v. M.W. // In the Matter of the Guardianship of R.W., F.W. and T.H. New Jersey Division of Youth and Family Services v. T.H. // In the Matter of the Guardianship of T.H.
A-5756-05T4; A-6485-05T4

DYFS filed an action to terminate parental rights of two children against mother who abused and abandoned them. A third child also abused and neglected by the mother died as the result of abuse by the person to whom mother abandoned her children. Mother sued DYFS for wrongful death of third child and received $1 million settlement from the State. Trial court permitted amendment of guardianship action to include third child and terminated mother's parental rights to all three children. Held in these unusual circumstances that parental rights to child could be terminated posthumously on principle that equity will not permit wrongdoer to profit by wrongdoing.

02-26-08 State of New Jersey v. Terrence Echols
A-2377-05T4

In this appeal, the court reversed the denial of defendant's petition for post-conviction relief, finding defendant was denied the effective assistance counsel because: (1) trial counsel failed to fully elicit testimony regarding defendant's alleged alibi; (2) appellate counsel failed to pursue on direct appeal the trial judge's refusal to give the jury an alibi instruction; (3) trial counsel failed to object and appellate counsel failed to argue on appeal that the prosecutor's argument in his opening statement -- that the jurors were safe from defendant and others in the courtroom only because of the presence of sheriff's officers -- was prejudicial to his right to a fair trial; and (4) the confluence of these omissions, in the context of other circumstances, such as the testimony of witnesses in handcuffs and prison garb, generated a reasonable doubt about the reliability of the outcome.

02-25-08 Harrison Redevelopment Agency v. Anthony J. DeRose v. Town of Harrison and Planning Board of the Town of Harrison // Harrison Redevelopment Agency v. Anthony J. DeRose, et al.
A-0958-06T2; A-0382-07T2

These consolidated appeals address legal issues that have been the subject of several conflicting unpublished opinions in the Appellate Division and the Law Division. Appellant, a property owner in Harrison who was sued in condemnation by the Town's redevelopment agency, wishes to contest the blight designation of his property under the Local Redevelopment and Housing Law ("LRHL"), N.J.S.A. 40A:12A-1 to -49, and the criteria of Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007).

The trial judge ruled that the condemnee's defense was time-barred, because he had not filed a timely action in lieu of prerogative writs under R. 4:69-6 after the Town's governing body had designated his property for redevelopment. Although appellant had received notice by mail of the local planning board's "preliminary investigation" of the proposed blight designation under N.J.S.A. 40A:12A-6, he and others in the proposed redevelopment zone were not individually notified when the Town's Mayor and Council later adopted a resolution approving that designation. Appellant contends that the notice provisions of the LRHL unconstitutionally violate Federal and State norms of due process, as well as the State Judiciary's paramount authority over matters of practice and procedure.

We reverse, and hold that, unless a municipality provides contemporaneous written notice that fairly alerts an owner that (1) his or her property has been designated by its governing body for redevelopment, (2) the designation operates as a finding of public purpose and authorizes the taking of the property against the owner's will, and (3) informs the owner of the time limits within which the owner may take legal action to challenge that designation, an owner constitutionally preserves the right to contest the designation, by way of affirmative defense to an ensuing condemnation action. Absent such adequate notice, the owner's right to raise such defenses is preserved, even beyond forty-five days after the designation is adopted.

In reaching this result, we save the LRHL from a finding of unconstitutionality. We also harmonize the LRHL's notice provisions with the terms of Eminent Domain Act, which in N.J.S.A. 20:3-5 confers jurisdiction in condemnation actions over "all matters" incidental to the condemnation, specifically including the condemnor's "authority to exercise the power of eminent domain."

We also apply this holding today in two companion unpublished decisions, Harrison Redevelopment Agency v. Harrison

Eagle, LLP, et al., A-4474-06T2, and Harrison Redevelopment Agency v. Amaral Auto Center, Inc., et al., A-3862-06T2.

02-22-08 Estate of F.W., et al. v. State of New Jersey, et al.
A-0376-06T1

In this appeal, we reviewed the standard to be applied by the trial court when determining a reasonable attorney fee on a personal injury recovery in excess of $2,000,000 pursuant to Rule 1:21-7(c)(5). We held that on an application for a reasonable fee on that part of a personal injury recovery, no burden of proof is placed on the moving attorney to show the inadequacy of the fee recovered on the first $2,000,000. We concluded that although the rule directs an attorney to make an application for a reasonable fee pursuant to Rule 1:21-7(f), the rule's intent is only to require that the application complies with the procedural requirements of notice and of a hearing as stated in subsection (f).

02-21-08 Division of Youth and Family Services v. D.H. and J.V. // IMO the Guardianship of A.H.
A-4889-06T4

Kinship Legal Guardianship pursuant to the Kinship Legal Guardianship Act, N.J.S.A. 3B:12A-1 to -7, is deemed to be a permanent placement option in the appropriate circumstances specified in the statute.

02-20-08 Paul Dolan, et al. v. Sea Transfer Corp., et al.
A-1279-06T1

We reviewed in detail the choice-of-law principles applicable to vehicular accidents that have connections to both New Jersey and New York. The primary act of negligence occurred in New York, when a New York truck driver failed to properly secure a Hapag-Lloyd (H-L) container to a chassis attached to his tractor-trailer, before setting out from a Staten Island terminal to deliver H-L's container to the Bronx. The driver traveled through New Jersey to avoid New York traffic, and the accident occurred when the container fell off the truck in North Jersey, a few miles from the New York-New Jersey border. The accident severely injured a New York employee heading toward his New Jersey home after leaving work in upper Manhattan.

We concluded that New York's interest in fully compensating accident victims and promoting traffic safety predominated over New Jersey's interest in limiting the liability of non-negligent vehicle owners, and mandated application of New York's law

imposing vicarious liability on a vehicle owner (including, as here, the owner of a component of a tractor-trailer) for the negligence of the vehicle's driver.

02-20-08 Thomas Malick v. Seaview Lincoln Mercury
A-4631-06T3

In the middle of a personal injury trial, prior to which plaintiff had made an offer of judgment, the parties entered into a $1 million/$175,000 high-low agreement in which plaintiff waived "prejudgment interest," but did not waive "attorneys fees and costs" under the offer of judgment rule. When the jury returned a $5 million verdict, thus entitling plaintiff to a $1 million judgment under the high-low agreement, plaintiff sought counsel fees, costs and prejudgment interest under the offer of judgment rule, Rule 4:58-2, contending that the term "costs" included prejudgment interest under that Rule. Because Rule 4:42-11 and Rule 4:58-2 now both refer to awards of "prejudgment interest," we concluded that the agreement was ambiguous. The trial judge should not have summarily awarded plaintiff interest but should have held a plenary hearing to resolve the ambiguity; we remanded the case for that purpose. We also held that under R. 4:58-2, if prejudgment interest was to be awarded, it should be calculated on the $1 million judgment rather than the $5 million verdict.

02-19-08 Capital Finance Company of Delaware Valley, Inc. v. Maureen Bell Asterbadi, et al.
A-0243-06T1

The opinion of the Chancery Division was published prior to the appeal being argued and decided. Although our opinion does not state any new principles of law, we publish because we affirmed in part and reversed in part.

At a judicial sale, plaintiff purchased a debtor husband's interest in a single-family dwelling previously owned by the husband and his wife as tenants by the entirety, thereby, converting the interests of plaintiff and wife to that of tenants in common, as measured by the lives of the husband and wife. After plaintiff acquired its interest in the property, the wife remained in exclusive possession of the property and the Chancery Division denied partition. We reviewed the principles governing the obligation of an ousted cotenant to account to the cotenant in possession for payments made against a pre-existing purchase money mortgage.

02-14-08 Emily Marshall, et al. v. Raritan Valley Disposal, et al. v. Illinois National Insurance Company
A-1611-06T5

An insured that has had all costs of defense and settlement of a claim paid by an insurer lacks standing to pursue a coverage action against another insurer for those same costs. Such a coverage action may be maintained by the insurer that has paid the insured's costs in order to obtain contribution from the other insurer.

02-06-08 Czar, Inc. v. Jo Anne Heath and Thomas J. Heath, Sr.
A-4360-06T2

We hold that where the owner of a newly constructed home dealt directly with a custom cabinetmaker and contracted directly for the installation and construction of cabinets, doors, and certain woodwork, and where the custom cabinetmaker did not construct the new home, the cabinetmaker's services fall within the definition of "home improvement" contained within N.J.A.C. 13:45A-16.1A.

02-04-08 State of New Jersey in the Interest of D.Y.
A-0490-07T4

The prosecutor filed a complaint in the Family Part charging a juvenile with aggravated assault that led to the victim's death. More than 30 days later, after further investigation indicated that the juvenile had far greater responsibility for the death, the prosecutor dismissed the first complaint and filed a second complaint charging murder. Within 30 days of the second filing, the prosecutor moved for waiver of the murder complaint to the Law Division, where the juvenile would be tried as an adult. We reversed the denial of the prosecutor's motion, holding: (1) the motion was timely because the 30 time limit of N.J.S.A. 2A:4A-26(d) and Rule 5:22-2(a) did not begin to run on the murder complaint until it was filed; (2) the development of the additional incriminatory evidence after the filing of the first complaint provided good cause for an extension of the 30-day time limit even if that time began to run from the filing of the first complaint.

01-31-08 DEG, LLC v. Township of Fairfield, et al.
A-5181-06T2

A governmental body has authority to enter into a settlement of a case challenging the constitutionality of a

statute under which it agrees to an injunction against enforcement of the statute if it reasonably concludes there is a substantial question concerning the statute's constitutionality and the costs of the statute's defense are not justifiable. The governmental body may seek to vacate or modify the judgment memorializing such a settlement if it can show that enforcement of the judgment would no longer be equitable due to changes in the law or facts.

01-31-08 Mark Champion, et al. v. David W. Dunfee, Jr., et al. v. Kristi Kakoda
A-3167-06T2

We hold that a guest passenger who neither owns nor controls the motor vehicle, who enjoys no special relationship to, and has not substantially encouraged the wrongful behavior of, the actual tortfeasor, owes no affirmative duty to a fellow passenger to prevent a visibly intoxicated driver from driving his own automobile.

01-29-08 State of New Jersey v. Quinn Marshall
A-3397-05T4

A judge issued a search warrant for an apartment in a multiple unit structure but required that the police further investigate which of two apartments was allegedly involved in criminality; he did not require that the police return with this additional, necessary information, but instead issued the warrant on the condition that it not be executed until that additional information was obtained. The court concluded that this process violated the constitutional requirement that a search warrant be issued by a "neutral and detached magistrate" because the judge ceded his authority to the discretion of the police.

The State also argued that the warrant was sufficient insofar as it had authorized the police to search whichever apartment was "controlled" or "possessed" by a particular person. The court held that this loose description did not conform to the constitutional requirement that the place to be searched be "particularly describe[d]" in the warrant.

01-28-08 Appaloosa Investment, L.P.I., et al. v. J.P. Morgan Securities, Inc., et al.
A-5037-06T1

General jurisdiction, as distinguished from specific jurisdiction, may not be exercised by a New Jersey court over a foreign corporation when the corporation's only continuous contact with New Jersey is the use of agents in New Jersey to carry out the ministerial duties required for maintenance of the corporation's New York Stock Exchange listing of its publicly traded securities.

01-28-08 Bonnie A. Clark v. Anthony Pomponio
A-3013-04T2

In this divorce action, after the defendant had filed for bankruptcy and while the automatic bankruptcy stay was still in effect, the trial court suppressed defendant's answer for failure to provide discovery. This action violated the bankruptcy stay and was void with respect to the equitable distribution issues in the case.

After the bankruptcy stay was lifted, the court entered a default judgment of divorce. Since the suppression of defendant's answer with respect to equitable distribution issues was void, the provisions of the default judgment of divorce providing for equitable distribution must be set aside. Due to the interdependence of the financial issues in a divorce case recognized under New Jersey law, the trial court also should not have proceeded to suppress defendant's alimony claim nor award counsel fees.

01-28-08* State of New Jersey v. Morgan C. Scott
A-5813-03T4

The primary issue in this case was whether defendant actually or constructively possessed cocaine that was found in the vehicle in which he was a passenger. With one judge dissenting, we affirmed the trial court's decision to deny defendant's motion for acquittal and his motion for a new trial. But we remanded for a determination regarding the voluntariness of statements attributed to defendant and for resentencing. [*Approved for Publication date]

01-24-08 Shore Orthopaedic Group, LLC v. The Equitable Life Assurance Society of the United States, et al.
A-2191-05T2

A claim by medical group for disability coverage under a policy it owns as beneficiary which insures one of its members, as insured, is a first party claim for purposes of R. 4:42-

9(a)(6). The denial of counsel fees under the Rule and N.J.S.A. 2A:15-59.1 is upheld. However, the award of a $50,000 sanction for a discovery violation is also upheld.

01-24-08 State of New Jersey v. Ernest J. Read, III
A-1751-03T4

In determining whether to waive a charge of a Chart 1 offense against a juvenile over the age of sixteen, the Family Part is not required to consider the juvenile's alleged psychological impairments. N.J.S.A. 2A:4A-26, which authorizes the Family Part to waive jurisdiction to adult court based on judicial fact-finding by a preponderance of the evidence, does not violate a juvenile-defendant's jury trial rights under the principles set forth in Apprendi and Blakely.

01-23-08* Linda C. Edwards, et al. vs. Kevin B. Walsh, et al.
A-0401-06T3

1. Where expert witnesses agreed that plaintiff had a herniated disc and that the injury was permanent but disagreed as to whether the herniation was caused by the accident or resulted from degenerative disc disease, the evidence was sufficient to submit to a jury, and the trial court properly denied defendant's motion for a directed verdict.

2. Where plaintiff did not raise the issue of a pre-existing condition and, in fact, denied a pre-existing condition, but defendant raised the issue in cross-examining plaintiff's expert, the trial court properly charged the jury on pre-existing condition over defendant's objection. [*Approved for Publication date]

01-23-08 Yakup Acikgoz v. New Jersey Turnpike Authority, et al.
A-1758-06T3

In this appeal from the Division of Workers' Compensation, we interpret the "premises rule," N.J.S.A. 34:15-36, and affirm the compensation judge's determination that a motor vehicle accident occurring on an access overpass of the New Jersey Turnpike, between two co-employees of the Turnpike Authority, was not compensable. As a result, defendant's claim that plaintiff's tort lawsuit was barred by N.J.S.A. 34:15-8 was properly denied.

01-23-08 Division of Youth and Family Services v. G.M. and M.M. // In the Matter of the Guardianship of K.M. and C.M.
A-2173-06T4

In this opinion we review what considerations should inform the trial court's decision whether to permit the Division of Youth and Family Services (D.Y.F.S.) to terminate Title Nine proceedings after the filing of an abuse and neglect complaint has resulted in the modification of the residential custody of the children at issue.

We hold that modification of the residential custody of a child, from one natural parent to the other, is not a placement under N.J.S.A. 9:6-8.54. However, notions of fundamental fairness and the best interests of the child require that the judge conduct a full custody hearing prior to the termination of the Title Nine litigation to determine whether custody should remain as modified, or whether custody should be returned to the initial custodial parent, subject to conditions and D.Y.F.S.'s continued supervision.

Although such a hearing is not required by the specific language of Title Nine, it is implicit in the provision governing termination of the proceedings, N.J.S.A. 9:6-8.50(e), and it is required by the overarching statutory concern for the child's best interests.

Absent such a hearing prior to terminating the Title Nine litigation, custody could be effectively modified contrary to the parties' initial expressed intent and without due process. The original custodial parent would then unfairly bear the burden of demonstrating that the new custodial arrangement was not in the child's best interests, yet at the same time be deprived of the representation available to her in the Title Nine litigation and the D.Y.F.S. services available to her if custody was restored with conditions.

Since such a hearing was not held in this case prior to the termination of the litigation, we reversed and remanded.

01-23-08 In the Matter of the Estate of Robert O. Quarg, deceased
A-2459-06T3

Decedent's wife, from whom he had been estranged for over forty years, appealed the Chancery Division's order imposing a constructive trust on her surviving spouse's share of decedent's intestate estate in favor of decedent's companion, with whom he had lived since shortly after the estrangement. We held that, decedent's conduct and actions, together with the lengthy time

decedent and his companion lived together, and their mutual consideration as husband and wife, was sufficient to establish a question of fact whether there was an implied promise by decedent to ensure that his companion received adequate provisions during the remainder of her life. We determined that the Chancery Division mistakenly relied upon an equitable principle of a constructive trust and we remanded the matter for a determination whether such an implied contractual promise could be established.

01-22-08 State of New Jersey v. J.R.S. // In the Matter of Expungement Petition of J.R.S.
A-3453-06T5

Petitioner appeals from the order of the Law Division vacating a previously entered judgment of expungement. Before filing the expungement application, petitioner sent a TCA tort claims notice to the State regarding the subject matter of the expungement. After the expungement was granted, petitioner commenced a civil suit against the State.

We rejected the State's argument that petitioner's filing of a TCA tort claims notice constituted the commencement of "civil litigation" against a public entity, triggering the statutory bar against the granting of an expungement petition contained in N.J.S.A. 2C:52-14(d). We also found no statutory support for the State's argument that enforcement of the expungement judgment deprives the State of information needed to defend itself against plaintiff's allegations of wrongdoings.

01-22-08 In the Matter of: Consider Distribution of the Casino Simulcasting Special Fund (Accumulated in 2005) in the Amount of $1,820,699.42 pursuant to N.J.S.A. 5:12-205d
A-0082-06T3

The New Jersey Thoroughbred Horsemen's Association (THA) appeals from a final order of the New Jersey Racing Commission (NJRC) distributing, pursuant to N.J.S.A. 5:12-205d, $1,820,669.42 that was deposited in the Casino Simulcasting Special Fund during the year 2005. THA challenges the procedures the NJRC employed in distributing the fund among the competing applicants. We conclude that the NJRC's action was inconsistent with the OPMA, the APA and the principles of administrative due process.

01-18-08 New Jersey Division of Youth and Family Services v. T.P. // In the Matter of the Guardianship of C.S. and A.C.
A-3791-06T4

We held that the provisions of N.J.S.A. 9:2-2 governing the removal of children from this state over the objection of a parent apply to a caregiver granted Kinship Legal Guardianship (KLG) pursuant to N.J.S.A. 30:4C-84 to -92 and N.J.S.A. 3B:12A-1 to -7.

Defendant consented to the appointment of his son's maternal aunt as a kinship legal guardian but objected to the removal of his son from this state without the court first determining whether removal was in the child's best interest. Defendant also objected to the court granting KLG without including an order directing the Division of Youth and Family Services (Division) to facilitate visitation or, alternatively, assume the costs of visitation.

We rejected the Division's argument that the provisions of N.J.S.A. 9:2-2 do not apply to unmarried parents. We also questioned the Division's reliance upon its regulation implementing the legal guardianship subsidy program, N.J.A.C. 10:132A-1.1 to -3.5, as support for its position that visitation is a "placement-related activity" for which there is no available funding. We remanded to the Family Part to conduct further proceedings to determine whether the removal of the minor child from New Jersey to North Carolina was in his best interest and, if so, whether the circumstances of this KLG should include an order directing the Division to facilitate visitation and to what extent, if any, visitation costs should and can be funded by the Division.

01-17-08 Christine Gillespie v. Department of Education, State Board of Education
A-1120-06T3

The Department of Education properly denied a petition for an amendment to an administrative rule which recognizes that, in certain circumstances, a State district superintendent may make probable cause determinations in tenure proceedings for school employees. The regulation is consistent with the statutes that: permit the State to intervene in the operation of local school districts; grant broad power to the State district superintendent to make personnel decisions; and limit the powers of the board of education for the district. The rule was

adopted in accordance with the notice requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15; and tenured employees are not denied procedural due process when probable cause determinations are made by the State district superintendent rather than by the district board of education.

01-15-08 Jefferson Loan Company, Inc. v. Rubena A. Session, et al.
A-0270-06T1

In this appeal, we held that an assignee of a retail installment sales contract (RISC) can be held liable under the Consumer Fraud Act for the assignee's own unconscionable commercial practices and activities related to the assignee's repossession and collection practices, in connection with the subsequent performance of the RISC.

01-15-08 Eichen, Levinson & Crutchlow, LLP v. A. Kenneth Weiner, et al.
A-2794-06T5

We hold that an attorney-trustee who has been appointed pursuant to Rule 1:20-19 to oversee the practice of a suspended or disbarred lawyer is entitled to take possession of referral fees otherwise due to the suspended or disbarred lawyer from a certified civil trial attorney for matters that were referred to the certified civil trial attorney before the suspension but were completed thereafter. Such a result does not run afoul of the prohibition in Rule 1:20-20(b)(13) on a suspended lawyer sharing in legal fees earned by another lawyer after the disciplined lawyer has been suspended.

01-15-08 Alice Michael v. Robert Wood Johnson University Hospital, et al.
A-0414-06T2

A defendant who prevails in an action under the New Jersey Law Against Discrimination may be awarded counsel fees if the plaintiff brought the charge of discrimination in bad faith. N.J.S.A. 10:5-27.1. Proceeding with a reckless disregard or purposeful obliviousness to known facts may constitute bad faith under the statute. Any award of counsel fees under N.J.S.A. 10:5-27.1 has to take into account the economic circumstances of the unsuccessful plaintiff.

01-11-08 State of New Jersey v. B.M.
A-4075-06T5

We hold that a defendant's decision to introduce certain evidence may trigger the right of the State to rebut any unfair implication of that evidence. In this matter where sexual abuse is alleged by a ten-year-old child, we affirm the trial court's exercise of discretion to permit the defendant to elicit on cross-examination that the child had also alleged separate incidents of sexual abuse by three other persons. We remand, however, for further consideration, in light of the doctrine of "opening the door," as to whether the State may introduce evidence of juvenile delinquency adjudications pursuant to guilty pleas by the other three alleged abusers.

01-10-08 Noel Gowran v. Wawa, Inc., et al. // Robert Wood Johnson University Hospital v. Noel Gowran
A-6112-06T1

In this appeal, the court held that an intervenor was not required to personally serve upon plaintiff a third-party complaint, which sought relief from plaintiff, but was only required to serve the pleading on plaintiff's attorney of record.

01-10-08 W.H. Industries, Inc. v. Fundicao Balancins, Ltda
A-3694-06T1

In this breach of contract action between companies located in New Jersey and Brazil, procedural errors committed by plaintiff in the trial court and in this court preclude a determination that plaintiff established sufficient minimum contacts to satisfy its burden of proof on the issue of specific jurisdiction over the foreign company.

Assuming sufficient contacts for specific jurisdiction, international comity nonetheless justified dismissal of plaintiff's complaint even though its New Jersey action was filed shortly before the defendant filed its action in Brazil because (1) the claims and counterclaims in both jurisdictions arose from the same facts and concerned the same legal issues; (2) plaintiff proceeded on its counterclaim in Brazil without asking for deference as a matter of comity to its New Jersey action; (3) substantial discovery proceedings have occurred in Brazil; and (4) plaintiff has not suggested that Brazil will provide anything other than a fair resolution of the disputes.

01-10-08 Pond Run Watershed Association, et al. v. Township of Hamilton Zoning Board of Adjustment and Crestwood Construction, LLC
A-1022-06T1

A published and mailed notice of use variance applications sought for a proposed development that included a 5,000 square foot, 168-seat restaurant with a potential liquor license was inadequate under N.J.S.A. 40:55D-11 and Perlmart of Lacey v. Lacey Twp. Planning Bd., 295 N.J. Super. 234, 241 (App. Div. 1996) because the notice referred only to age-restricted housing and "retail/office units" and made no mention of the anticipated restaurant. Consequently, the application must be reheard by the local Zoning Board of Adjustment after a proper notice including the proposed restaurant is circulated.

The variances issued by the Zoning Board in this case also must be presented again for public hearing because the variance conditions had included a $476,000 negotiated payment by the developer towards the costs of a proposed off-site municipal amphitheatre. Although the trial court correctly declared the developer's payment an illegal exaction, the court should have remanded the matter to the Board rather than only excising that major feature from the overall project.

01-09-08* Piermont Iron Works Incorporated v. Evanston Insurance Company
A-5788/5803/5810/6079-05T3

We construed language in an umbrella insurance policy requiring the carrier, a surplus lines insurer, to send the insured notice of "nonrenewal" at least 30 days prior to the expiration date of the policy. Although surplus lines carriers are not subject to Banking and Insurance Department regulations that require such advance notice of nonrenewal, we concluded that the policy language should be construed in a manner consistent with those regulations and consistent with record evidence of the standard practice in the surplus lines industry. Therefore, consistent with Barbara Corp. v. Bob Maneely Ins. Agency, 197 N.J. Super. 339 (App. Div. 1984), app. dism., 102 N.J. 339 (1985), we concluded that the nonrenewal clause required the insurer to give notice of a conditional as well as an absolute intent not to renew the policy. Since the insurer did not give the required notice, the policy did not expire and there was coverage on the date the insured's employee was involved in an on-the-job accident. [*Approved for Publication date]

01-09-08 Erica D. Vitanza v. Sam H. James, Jr., a/k/a Samuel James
A-4728-06T1

Appeal from interlocutory order granting partial summary judgment dismissed in the absence of leave to appeal granted by the Appellate Division. While the court has considered fully briefed cases in the absence of a motion to dismiss, the Rules must be adhered to, and such appeals will be dismissed.

01-09-08 State of New Jersey v. Thomas Conroy, Jr.
A-2384-06T5

The question presented is whether a defendant, who has had three prior convictions for DWI, is entitled to the benefit of the ten-year step-down provision of N.J.S.A. 39:4-50(a)(3) on a fourth conviction, where the first conviction was entered by way of an uncounseled plea. We answer the question in the affirmative, determining that when defendant appeared before the Law Division he stood as a third offender, not a fourth offender, for the limited purpose of the trial court imposing a jail sentence under the enhanced sentencing provision of the DWI statute.

01-09-08 People for Open Government, et al. v. David Roberts, et al.
A-4926-05T1

We held that the plaintiffs, four individuals and the organization of which they are members, have standing to pursue this lawsuit in which they seek to compel the City of Hoboken, its Mayor and members of the City Council, to enforce an anti-"pay-to-play" ordinance enacted as a result of an initiative effort in which all of the plaintiffs were heavily involved. Garrou v. Teaneck Tryon, Co., 11 N.J. 294 (1953), does not require that plaintiffs demonstrate any additional "special damages" in these circumstances. We reverse the Law division order dismissing plaintiffs' suit for lack of standing and remand for consideration of other issues.

01-08-08 Aaliyah N. Alvarado, et al. v. J&J Snack Foods Corp.
A-2915-06T3

When there are competing dependency claims for Workers' Compensation benefits, the employer is required to determine the merits of the competing claims to allocate and pay benefits

equitably in order to secure the reduction in petitioner counsel fee awards provided by N.J.S.A. 34:15-64(c). In the event that the equitable allocation is contested, the attorney for the prevailing petitioner is entitled under N.J.S.A. 34:5-64(c) to a fee not to exceed twenty percent of the difference between the benefits initially paid to his client by the employer and the amount of the final award. The $50 limit contained in N.J.S.A. 34:15-64(c) applies only to petitioners who do not secure an increase in benefits following a voluntary tender or payment.

01-08-08 Rosemary Connell v. Edward Diehl
A-2331-05T5

We held in this palimony action that the supporting person's sole ownership of assets accumulated during their uninterrupted thirty-year cohabitation was not inconsistent with a promise of support for life. We also held that the dependent person was not required to prove that she expected any remuneration for her efforts to contribute to their marital-type lifestyle over the years. Finally, we held that a trial judge in calculating a lump-sum palimony award is not required to place the dependent person in the lifestyle she and the supporting person enjoyed, but rather to provide reasonable support sufficient to meet her minimal needs and prevent the necessity of public welfare, and in doing so must consider inflation in calculating the lump-sum award.

01-08-08 New Jersey Division of Youth and Family Services v. R.G.
A-2316-06T4

The trial court must appoint counsel to represent indigent litigants during all proceedings in an abuse and neglect case.

A permanency hearing is not required when a child is placed in the physical custody of a non-abusive parent.

01-07-08 State of New Jersey v. Larry R. Henderson
A-2921-04T4

In this appeal, the court reversed the denial of defendant's motion to suppress an out-of-court identification because the Attorney General's "Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures" were materially breached by the investigating officers' intrusion into an eyewitness's examination of a photographic array. The court concluded that this breach of the guidelines gave rise to a presumption of impermissible suggestiveness and required that

a new Wade hearing regarding the reliability of the identification be conducted.

01-02-08 Tyrell Hardy, etc. v. Hamza Abdul-Matin, et al.
A-2153-06T3

We hold that PIP and UM benefits can be denied to an insured, injured while a passenger in a stolen vehicle, only upon proof that the insured knew or should have known that the car was being driven without the owner's permission.

12-31-07 Garvin McKnight v. Office of the Public Defender and Kevin Walshe, Esq.
A-5527-05T2

In this appeal, the court considered when a plaintiff's malpractice action against his criminal defense attorney accrues and whether -- as held by other jurisdictions -- the accrual date is impacted by whether a plaintiff is actually innocent of or has been exonerated from the underlying criminal charges. Because these additional elements tend to produce unpredictable and undesirable results, the court rejected their inclusion into an accrual standard. However, because the results of post-conviction proceedings may be fatal to or otherwise impact upon the presentation of a criminal malpractice action, the court held that hereafter plaintiffs must commence at the same time, if they have not already done so, post-conviction proceedings in the criminal matter, and that trial courts freely stay criminal malpractice actions until the underlying criminal proceedings reach a logical conclusion.

Judge Stern filed a dissenting opinion.

12-27-07 Elena Weber v. Mayan Palace Hotel & Resorts, et al.
A-3250-06T2

When a complaint has been dismissed for lack of prosecution due to plaintiff's failure to serve the defendant, plaintiff may serve defendant with the dismissed complaint before filing a motion to restore the complaint. However, when serving the complaint plaintiff must notify defendant that the complaint was dismissed, and thereafter must promptly file a reinstatement motion. Defendant's time to answer will run from the date the complaint is reinstated.

12-24-07* Scott Rumana, et al. vs. County of Passaic, et al.
A-1135-07T2

The prohibition of the New Jersey Local Budget Law, N.J.S.A. 40A:4-1 to -88, on deficit financing, N.J.S.A. 40A:4-3, and the New Jersey Local Bond Law, N.J.S.A. 40A:2-1 to -64, on using bond proceeds to finance current expenses, N.J.S.A. 40A:2-3(b), override the provisions of the Local Budget Law, N.J.S.A. 40A:4-1 to -88, permitting counties to recognize proceeds from the sale of county property as miscellaneous revenue, N.J.S.A. 40A:4-27, and the New Jersey County Improvement Authorities Law, N.J.S.A. 40:37A-44 to -135, permitting counties to guarantee bonds issued by county improvement authorities, N.J.S.A. 40:37A-80. Thus, a county may not recognize the proceeds of the sale of county property to a county improvement authority as miscellaneous revenue to finance current expenses when the county undertakes to guarantee bonds issued by the county improvement authority to finance the purchase of county property. [*Approved for Publication date]

12-24-07 Township of West Orange v. 769 Associates, LLC, et al.
A-5677-05T5

In the context of an abandonment of condemnation action, the right to recover costs and counsel fees is not contingent upon the success of the property owner's defense strategy. Furthermore, to qualify for reimbursement under N.J.S.A. 20:3-26(b), the costs incurred by the property owner must have occurred within the "four corners" of the condemnation action.

12-21-07 Felix M. Garruto, et al. v. Lorraine Cannici
A-2447-06T1

We hold that an action for tortious interference with a bequest, premised upon undue influence by means of fraud, is barred when plaintiffs, with knowledge of probate proceedings, have failed to file a timely challenge to the will in probate court.

12-20-07 State of New Jersey v. Kelvis Calcano, et al.
A-3579-06T1

In this bail forfeiture case, the trial court did not abuse its discretion when it continued defendant's bail although defendant had lost contact with the surety for a period of time and thereafter faced a mandatory prison sentence after pleading guilty. As a result, bail was properly forfeited when defendant failed to appear at sentencing.

12-20-07 John Bardis, et al. v. First Trenton Insurance Co.
A-1470-06T1

In this action, plaintiff filed a UIM claim against his insurance carrier. At issue was whether his injuries were proximately caused by the motor vehicle accident. An issue at trial was whether evidence of the insurance carrier's prior payment of PIP benefits on behalf of plaintiff was admissible in the UIM trial on the issue of proximate cause. We concluded that it was not admissible for two primary reasons. First, although a UIM claim is a first-party claim by an insured against his insurance carrier based on breach of contract, the proofs necessary to sustain that claim are the same proofs that an insured must establish against the tortfeasor. Thus, whether the carrier paid PIP benefits on behalf of the insured is not relevant. Second, we concluded that to permit evidence that an insurance carrier previously paid PIP benefits would complicate the insurance carrier's decision to pay those benefits, thereby interfering with the public policy encouraging prompt payment of an injured party's medical expenses.

12-19-07 NL Industries, Inc. v. New Jersey Department of Environmental Protection, et al.
A-5877-05T1; A-5900-05T1

The trial court had jurisdiction to entertain plaintiff's declaratory judgment action under N.J.S.A. 58:10B-3.1. The trial court correctly held that the statute did not authorize the DEP to remove NL as the remediating party for that portion of a site for which no oversight document had been executed.

12-18-07 John C. Berkery, Sr. v. Monica Yant Kinney, et al.
A-1575-06T1

In this defamation case, plaintiff, who acknowledged six criminal convictions as a younger man, which were publicized at the time, remains a limited-purpose public figure with respect to his earlier criminal involvement. As a limited-purpose public figure, plaintiff must prove actual malice to prevail on a defamation claim against a newspaper columnist and the newspaper that published the allegedly defamatory articles. Sisler v. Gannett Co., 104 N.J. 256, 279 (1986).

We affirm the trial court's decision that plaintiff failed to submit sufficient evidence from which a jury could clearly and convincingly conclude that any of the defendants acted with actual malice.

12-17-07 State of New Jersey v. Brandon Krause
A-3737-06T5

Based on defendant's failure to meet his burden of proving facts that would establish that the Hackettstown noise ordinance was preempted by the Noise Control Act of 1971, N.J.S.A. 13:1G-1 to -23, the ordinance was held valid and the conviction affirmed. However, the opinion noted that local noise ordinances may require DEP approval to be enforceable at least with respect to certain facilities, such as commercial and industrial sites.

12-14-07 State of New Jersey v. Lateef J. Colley
A-3347-06T5

A prior conviction in another state for conduct equivalent to that proscribed by N.J.S.A. 39:4-50 subjects the defendant to the enhanced penalty provision set by N.J.S.A. 39:3-40f(2) upon a subsequent conviction in this state.

12-13-07 Carole Maguire v. Robin Mohrmann
A-1495-06T3

We affirmed the Special Civil Part judgment awarding plaintiff damages after the puppy she purchased from defendant pet dealer died five days after the sale. The Pet Purchase Protection Act, N.J.S.A. 56:8-92 to -97 (PPPA) governs consumers' rights when a cat or dog is purchased from a pet shop. Pet dealers are subject to the Consumer Fraud Act, N.J.S.A. 56:8-1 to -166, and the regulations promulgated there under by the Director of the Division of Consumer Affairs. N.J.A.C. 13:45A-12.1 to -12.3.

12-12-07 Mohammed Khan, et al. v. Sunil K. Singh, M.D., et al.
A-1027-06T1

In this medical malpractice case, we held that: 1) a res ipsa loquitur charge was not required because, even though plaintiff's experts testified that the medical community recognizes that an injury of the sort sustained by plaintiff would not have occurred in the absence of negligence, the experts' opinions were not supported by reference to any medical text or the experts' own experience; and 2) a mistrial was not required because the judge took appropriate curative measures to address trial testimony by defendant that differed from testimony that defendant had given in his deposition.

Judge Winkelstein has filed a dissenting opinion in which he concludes that the judge erred by failing to instruct the jury on res ispa loquitur.

12-11-07 Education Law Center, et al. v. New Jersey Department of Education
A-5089-06T2

The Department of Education is not entitled to withhold, either under the deliberative material exemption of OPRA or the common law, a document entitled "Alternative Funding Formula Simulations". The trial court's order directing release of the document to plaintiff Education Law Center is affirmed.

12-11-07 Carbis Sales, Inc., d/b/a Carbis Ladders, et al. v. Israel N. Eisenberg, Esq., et al.
A-4976-05T5

In this action alleging legal malpractice in the defense of the client's cause, plaintiffs were awarded damages substantially less than the amount of the adverse judgment against them in the underlying products liability case. Consequently, plaintiffs moved for a new trial on damages only, or additur, which was denied. On appeal, we agreed with plaintiffs there was no reasonable basis in the evidence for the jury's damage award, which was disproportionate to the adverse judgment against them. However, because a general verdict was returned, the remedy is a remand for a new trial as to all issues and all parties.

Instead of using special interrogatories that would have elicited jury findings as to whether malpractice was committed in defending the liability phase of the product liability action – in which case there would have been no recovery but for defendant's negligence (there being no claim of comparative fault to warrant any apportionment of liability); or in the damages phase – in which event recovery may have been less than awarded but for defendant's negligence – the jury was given no instruction as to damages other than it was in their discretion what, if anything, to award plaintiffs, and the verdict sheet did not require the jury to specify which conclusion they had reached. Because of this uncertainty, plaintiffs are not entitled, in effect, to a directed verdict on liability as would result if a remand were limited, as urged by plaintiffs, to a damages-only new trial.

We also held that plaintiffs may not recover for legal fees and costs expended for the services of a predecessor attorney in defendant's law firm who was not negligent.

We further denied defendant's own appeal because the factual and expert proofs were ample to demonstrate the trial attorney's deviations from the standards of care of a reasonably prudent defense lawyer.

12-11-07 State of New Jersey v. J.J.
A-2777-05T5

When, as part of a guilty plea, defendant is subject to community supervision under Megan's Law, the court must ensure that defendant understands the particular consequences of such supervision. In this case, defendant was not informed that Megan's Law would prevent him from living with his new wife and her child. Therefore, defendant should have been allowed to withdraw his guilty plea and proceed to trial on all the charges contained in the indictments.

12-10-07 B.D. v. Division of Medical Assistance and Health Services, et al.
A-1868-06T1

In this appeal, the court considered whether B.D., a seventy-seven-year-old, wheelchair-bound woman already in need of services, received fair market value when she transferred her home, which had been appraised at $259,917, together with the right to receive the rental income on an apartment within the home that was then generating $1,180 per month, to her grandson in exchange for his satisfaction of a $67,374.98 mortgage, $10,191.70 in cash, and a lease of the other apartment within the home to B.D. "for life." Concluding that the phrase "for life," which was accompanied by unexplained references in the lease to B.D.'s life expectancy, together with uncertainty as to B.D.'s rights to the leasehold if she ceased occupying them, rendered questionable B.D.'s claim that she received fair market value and warranted a hearing into the meaning of the lease terms.

12-07-07 Oceanport Holding, L.L.C. v. Borough of Oceanport and Planning Board of the Borough of Oceanport, et al.
A-6127-05T3

A developer is not required to show that it attempted to obtain relief from the zoning applicable to its property without

litigation in order to have standing to maintain a Mount Laurel action.

12-07-07 State of New Jersey v. Roger Emmons
A-5689-05T1

N.J.S.A. 2C:29-7, which proscribes a defendant's failure to appear either in court or for service of a sentence, is constitutional. Although a jury instruction in the language of the second sentence of N.J.S.A. 2C:29-7 would impose an unconstitutional burden upon a defendant to disprove the "knowing" mental culpability element of the offense, this constitutional defect can be avoided by a jury instruction that omits any reference to a defendant having the burden to prove that his failure to appear was "not knowingly."

12-06-07 In the Matter of Anthony Crimaldi
A-3310-06T3

In determining whether a claimant may seek an accidental disability retirement in the event of a "delayed manifestation of the disability" more than five years after the traumatic event, the Board of Trustees must consider the totality of factors including when the delayed manifestation actually occurred, why the filing was delayed, and prejudice to the Public Employees Retirement System.

12-06-07 Dr. Jason Cohen v. Board of Adjustment of the Borough of Rumson
A-2293-06T2

Plaintiff constructed a 6306 square foot home that exceeded the zoning limitations for building coverage by 293 square feet. The Board of Adjustment denied his variance request; the Law Division reversed the Board.

We reversed the Law Division but did not reinstate the Board's decision. Instead, we remanded for the Board to consider the testimony of plaintiff's experts, which the Board substantially ignored in arriving at its decision. We also instructed the Board to analyze plaintiff's application pursuant to subsection c of N.J.S.A. 40:55D-70c(1), which applies to exceptional situations "uniquely affecting a specific piece of property or the structures lawfully existing thereon."

11-30-07 Talib Turner v. Associated Humane Societies, Inc., et al.

A-2604-06T2

Plaintiff employee of defendant non-profit animal shelter expressed reservations to his supervisor, and through him, to the owner, about adopting out a Doberman that had attacked its previous owner, who then paid the shelter to euthanize it. Instead of putting the animal to sleep, and despite plaintiff's reservations, defendant approved the adoption, only to have the Doberman maul its new owner to death eleven days later. Plaintiff cooperated with defendant's internal investigation by outside counsel and shortly thereafter, he was terminated. His CEPA lawsuit was dismissed on directed verdict after plaintiff's case-in-chief, the trial judge finding that plaintiff did not have a reasonable belief that defendant's conduct violated any public policy (N.J.S.A. 34:19-3(c)(3)), or any law (N.J.S.A. 34:19-3(c)(1) and (a)(1)) inasmuch as defendant, as a non-profit entity, was exempt from the provisions of the Consumer Fraud Act (CFA).

We reversed and remanded for trial, finding that for purposes of section (c)(3), our Legislature, in a number of enactments, has recognized the serious and widespread threat that unprovoked dog attacks pose to the safety and welfare of our citizens, and that there was proof that plaintiff had an objectively reasonable belief that defendant's decision to adopt out this dog was inherently incompatible with New Jersey's public policy.

As to plaintiff's claim under section 3(c)(1) and (a)(1), the fact that defendant may not be subject to the CFA is not dispositive. A CEPA plaintiff need not show his or her employer actually violated a specific law, rule or regulation, only that plaintiff reasonably believes this to be the case. It suffices that from the proofs here there appears an arguably reasonable basis for believing that defendant engaged in activity violative "of a law . . . involving deception of, or misrepresentation to, any . . . customer . . . of the employer . . . ." N.J.S.A. 34:19-3(a)(1).

11-30-07 Ted M. Rosenberg, et al. v. State of New Jersey, Department of Law and Public Safety, etc.
A-0578-06T3

We remanded for a more detailed articulation of reasons where Law Division denied plaintiff's request, under the common law "right to know" doctrine, to release approximately 2000 pages of documents. We held that the Law Division judge should

have made specific factual findings, focusing either on individual documents or groups of documents. Without such findings, we are unable to determine if the Law Division judge abused his discretion. If necessary, those factual findings should be made in a separate, sealed decision, pending appellate review. Plaintiff has a personal interest in the release of these public records, as the documents relate to an investigation focused on an alleged attempt to impact plaintiff's appointment to a public position.

11-29-07 Nicholas Impink, et al. v. David Reynes, et al.
A-3448-06T5

We decided in this case that a trial court may not modify a settlement agreement using its parens patriae powers without the consent of the parties in approving an infant settlement pursuant to Rule 4:44-3. Instead, it may reject the settlement if it finds it not to be "fair and reasonable as to its amount and terms."

11-28-07 Thomas and Karen Janicky v. Point Bay Fuel, Inc., et al.
A-1165-06T3

The sole purpose of a certification of finality under Rule 4:42-2 is to permit execution on a partial summary judgment fully adjudicating a separable claim for affirmative relief. The appealability of an interlocutory order certified as final is solely an ancillary consequence of such a certification. Therefore, a litigant may not secure a certification of finality from a trial court to circumvent this court's exclusive authority to determine whether leave should be granted to appeal an interlocutory order.

11-27-07 Angela Hoag v. Commissioner Devon Brown, et al.
A-5537-05T2

Plaintiff is a licensed clinical social worker employed by Correctional Medical Services, an independent contractor, who assigned her to Southern State Correctional Facility to provide mental health services for prison inmates. Plaintiff alleged that a corrections officer threatened and physically and verbally abused her. She appeals from a summary judgment dismissing her hostile work environment claim under the New Jersey Law Against Discrimination. The court dismissed her claim because she was not an employee of the State. The judge also dismissed her negligent retention and supervision claim

against the State because she failed to meet the verbal threshold of the Tort Claims Act based on her psychological injuries. We reinstated both claims and discussed in the opinion why she could be considered an employee of the State for purposes of the Law Against Discrimination. We also discussed the elements necessary to vault the Tort Claims Act verbal threshold when a plaintiff only suffers psychological injuries.

11-27-07 State of New Jersey v. A.O.
A-5388-04T4

Defendant was convicted of aggravated sexual assault based on the uncorroborated testimony of a child witness who had recanted her accusation and then withdrawn the recantation. Prior to his arrest, defendant entered into a polygraph stipulation without advice of counsel. He failed the test, and the test result was admitted at his trial. We reversed his conviction, holding that inducing an uncounseled defendant to sign a stipulation agreeing that polygraph results will be admissible at trial, violates the defendant's Sixth Amendment right to trial counsel. We also held that the trial court should have held a State v. Guenther hearing before barring defendant from introducing evidence that a few months after accusing defendant, the victim-witness accused another man of molesting her and then recanted her accusation. We concluded Guenther applies to later, as well as prior, recanted accusations. Judge Weissbard filed a concurring opinion.

11-21-07 Christopher P. Calbi v. Linda J. Calbi
A-5053-05T1

Former husband sought termination of alimony obligation to former wife for causing the death of their fifteen-year-old son and her subsequent conviction for second-degree assault. Held that the facts of the case did not constitute "egregious fault" so as to terminate alimony. However, the former husband is entitled to show how the death of his son and its effect upon him led to adverse economic consequences including accumulated arrears. Further held that both alimony and payment on arrears suspended while former wife is incarcerated, and upon her discharge she is required to make an a new application for alimony.

11-19-07 Housing and Redevelopment Authority of the Township of Franklin v. Bertha Miller
A-2463-06T2

In federally subsidized public housing, the commission of a disorderly persons offense, or a petty disorderly persons offense, justifies eviction of the tenant when the tenant's conduct threatens the health or safety of other tenants, or their right to peaceful enjoyment of the public housing premises.

11-19-07 Michael Koruba v. American Honda Motor Co., Inc., et al.
A-5953-05T5

Despite manufacturer's warnings in the owner's manual and oral warnings by the retail seller at time of sale, plaintiff attempted an extreme jump on his sports all terrain vehicle (ATV), resulting in serious injury. We affirmed the summary judgment dismissal of his product liability failure-to-warn lawsuit, finding the expert's opinion on the need for on-product labeling a net opinion based on neither epidemiological data or empirical research linking such need to the magnitude of the risk associated with jumping.

We also found no basis for the expert's other opinion that Honda's promotional marketing of its ATV sent a "mixed message" to consumers, resulting in their failure to heed the warnings actually given. Although in some circumstances counteracting representations may nullify an otherwise suitable warning, here there was no evidence that Honda promoted its product in such a manner, and furthermore Honda was not responsible for general depictions appearing elsewhere in the media. Nor was Honda under a duty, as suggested by plaintiff's expert, to instruct on how to "safely" jump its ATV, that is to instruct on how to use a product in a manner the manufacturer has expressly warned against.

Lastly, we upheld the dismissal of plaintiff's negligence action against the seller, finding that the Product Liability Act is the exclusive remedy for personal injury claims arising out of product use.

11-16-07 Bienvenido Morel v. State Farm Insurance Company
A-1464-06T5

There is generally no right to appeal from a trial judge's decision in a case arising under The New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1 to -30. But the losing party may appeal when, as here, the judge completely failed to apply the standards of review required of

trial judges by that statute. Our review of a failure to apply the statute at all comes within our supervisory function over the trial courts.

11-16-07 State of New Jersey v. Gary Gaither, a/k/a Gary W. Gaither
A-3063-05T4

Defendant appealed an order denying his petition for post-conviction relief (PCR) alleging ineffective assistance of appellate counsel. Defendant argued that his appellate counsel's failure to communicate with him regarding his appeal constituted ineffective assistance of counsel per se. Secondly, defendant sought to extend the holding in State v. Rue, 175 N.J. 1 (2002), to appellate counsel. In Rue, the Supreme Court held that an attorney representing a defendant in a PCR petition is required to communicate with his client, investigate the client's claim, and advance all arguments requested by the client.

We held that the two-prong Strickland analysis is to be used in such cases and, therefore, that the failure to communicate is not per se ineffective assistance of counsel. We also declined to apply Rue to appellate counsel, finding it was inappropriate and unnecessary.

11-15-07 Shana Faith Massachi, et al. v. AHL Services Inc., et al.
A-1113-06T1

The Tort Claims Act immunity afforded by N.J.S.A. 59:5-4 for failure to provide police protection or sufficient police protection does not immunize a public entity from liability for a 9-1-1 operator's negligent performance of his or her ministerial responsibilities in the handling of an emergency call. We do not address the public entity's alternate immunity claim under N.J.S.A. 52:17C-10(d).

11-13-07 Ocean Medical Imaging Associates d/b/a Ocean Medical Imaging Center, et al.
(A-0362-06T1)

The appellants-ambulatory care facilities (ACF) challenge the validity of the Department of Health and Senior Services regulations adopted to implement N.J.S.A. 26:2H-18.57 imposing an assessment charged to certain ACFs. The revenues collected from the assessment finance hospital charity care.

The assessment calculation is bottomed on an ACF's gross receipts. Appellants sought to exclude from annual gross receipts "pass through" payments made to independent contractors and revenue for services other than those listed in the statute.

We conclude the Legislature purposely chose to use gross receipts to calculate an ACF's assessment, rather than some other calculation, such as adjusted gross income or net income. The statute failed to provide for exclusions as proposed by appellants. Thus, the agency's rulemaking falls within the bounds of its statutory authority.

Finally, we reject appellants' constitutional challenge to the regulation that uses a prior year's gross receipts to compute the future year's assessment.

11-08-07 Vincent F. Baldassano v. High Point Insurance Company
A-2183-06T1

Plaintiff was a passenger in a car involved in a one vehicle accident. He settled with the driver for the driver's policy limit of $100,000 but claimed his damages exceeded that amount and sought underinsured motorist (UIM) coverage from his auto insurance carrier, High Point Insurance Company (High Point). The UIM claim was denied because plaintiff's UIM limit of $100,000 had been met by the driver's insurance policy.

Plaintiff claimed that in 1998 when he first purchased the policy, the agent failed to explain the coverage options, the agent checked the boxes on the coverage selection form, and the agent failed to provide a buyer's guide. Plaintiff renewed the policy twelve times before the accident without inquiring about or changing the policy limits and transferred the policy twice to new vehicles.

We affirmed and held that under N.J.S.A. 17:28-1.9 the insurer is immune from liability under the circumstances presented where (1) the insured executed a coverage selection form on which the coverage selections had been checked by the agent; (2) the insured renewed the policy twelve times before the accident; and (3) the insured could not refute the carrier's claim that the agent provided "a written notice identifying [all coverage information] and containing a buyer's guide and coverage selection form" as required by N.J.S.A. 39:6A-23(a) and (c).

11-08-07 Citizens Voices Association v. Collings Lakes Civic Association, et al.
A-1025-06T3

We affirmed the Chancery judge's holding that certain deed restrictions in a lake community were still enforceable. In the decision, we reviewed the standards for modifying or terminating servitudes. In addition, we reviewed the standards for an abandonment of restrictive covenants. Lastly, we examined the res judicata consequences of a judgment that deals with continuing relief.

11-01-07 The Port Authority of New York and New Jersey v. Airport Auto Services, Inc.
A-1458-06T5

In an action brought by the Port Authority of New York and New Jersey, a counterclaim may not be pursued unless the counterclaimant has filed the required notice of claim and waited the required sixty days before filing the counterclaim.

Invoices submitted to the Port Authority in the ordinary course do not constitute substantial compliance with the notice of claim statutes.

10-26-07 Andrew McKenzie, et al. v. Jon Corzine, et al.
A-0703-07T3

Plaintiffs filed this action seeking a determination that the interpretive statement the New Jersey Stem Cell Research Bond Act of 2007 unfairly describes the question the voters are being asked to decide at the upcoming general election because it fails to discuss the impact on human cloning and fails to adequately discuss the Act's fiscal impact on the State. The court affirmed the trial judge's denial of injunctive relief and dismissal of the complaint, concluding that the Legislature's interpretive statement was entitled to great deference and that it represented a fair description of the contents of the Act.

10-26-07 State of New Jersey v. Marcus Cassady
A-6057-05T4

A jury found defendant guilty of robbery. Rejecting defense counsel's claim that the jury could conclude that defendant did not have the requisite purpose to put the bank teller in fear of immediate bodily injury, the trial court denied defendant's request for a jury instruction on theft.

Although the evidence was adequate to support defendant's conviction for robbery, it also provided a rational basis for an acquittal on that charge and conviction of theft. Accordingly, we reverse.

Judge Fuentes is filing a dissent.

10-25-07 Rock Work, Inc. v. Pulaski Construction Co., Inc., et al.
A-0381-06T2

Under the Arbitration Act of 2003, N.J.S.A. 2A:23B-1 to -32, when an arbitration agreement was made before January 1, 2003, and the parties did not agree thereafter on the record that the Act would govern their arbitration, the Act only applies if the arbitration was commenced after January 1, 2005, and "commencement" refers, not to the date the hearings began, but to the date on which the request for arbitration was made.

The arbitrators' rulings on procedural matters, such as the order and extent of closing arguments, are not reviewable in court.

Under the Act, the "American Rule" applies to fee shifting unless fee shifting is authorized by law in a civil action involving the same claim or by the express agreement of the parties. An implied agreement is insufficient.

10-24-07 Camie Livsey v. Mercury Insurance Group
A-1238-06T5

Uninsured motorist benefits are available to a plaintiff in a random, drive-by shooting.

10-24-07 State of New Jersey v. Michele Dixon
A-2419-04T4

For purposes of the bias intimidation statute, N.J.S.A. 2C:16-1, the term "handicap" should be defined with reference to the Law Against Discrimination, N.J.S.A. 10:5-5q, rather than by using a dictionary definition of the term.

10-23-07 In the Matter of Jennifer Rogiers
A-0651-06T1

In this probate case, we held that a father of a deceased child need not have supported that child during her lifetime to

qualify as a parent to take from the child's estate under New Jersey intestacy laws. We also concluded that while the Family Court has the equitable authority to grant retroactive child support even where no claim for child support had been made during a child's lifetime, the circumstances in this case were not sufficient to warrant retroactive child support after the child's death.

10-22-07* New Jersey Animal Rights Alliance and the Bear Education and Resource Group v. New Jersey Dept. of Environmental Protection, et al.
A-1463-05T3; A-1382-06T3

The 2005 Comprehensive Black Bear Management Plan should have been, but was not, adopted pursuant to the rulemaking provisions of the Administrative Procedure Act. Having not been so adopted, there was no black bear management policy in effect in 2006 or 2007, and the decision of the Commissioner of the Department of Environmental Protection not to implement the policy is therefore affirmed. [*Approved for Publication date]

10-22-07 Mercer Mutual Insurance Company v. Joseph N. Proudman, Sr., et al.
A-1287-06T5

Third-party plaintiffs (plaintiffs) brought a products liability action against cigarette manufacturer after a cigarette that was left burning caused a fire. We held that plaintiffs failed to state a claim upon which relief can be granted because burning is an inherent characteristic of cigarettes that is apparent to the ordinary user, which cannot be eliminated without impairing the usefulness of the product. Plaintiffs conceded at oral argument on appeal that a self-extinguishing cigarette could only reduce, not eliminate the danger.

10-22-07 Michael Sternesky v. Ana Cecilia Salcie-Sternesky
A-5932-05T3

We consider equitable distribution of an accidental disability retirement allowance awarded by the Board of Trustees of the Police and Fire Retirement System (PFRS). The Board has not provided guidance on segregation of the marital and individual components of a disability pension, as we encouraged in Larrison v. Larrison, 392 N.J. Super. 1, 18 (App. Div. 2007). The parties in this case did not provide the trial court with evidence that would permit such segregation, which we found

necessary in Larrison and Avallone v. Avallone, 275 N.J. Super. 575 (App. Div. 1994). We provide a formula for identification of the marital component of a PFRS accidental disability retirement allowance, which is inferable from the statutory scheme and decisions of our courts addressing equitable distribution of retirement assets, and we hold that a trial court should apply that formula in the absence of relevant evidence or guidance from the Legislature or Board.

10-19-07* Walter Sroczynski v. John Milek, et al.
A-3103-06T1

In order for an insurer's cancellation of a workers' compensation policy to be effective, the insurer must file a "certified statement" of cancellation with the Commissioner of Banking and Insurance as required by N.J.S.A. 34:15-81(b). The failure to do so renders the cancellation ineffective, even if the insurer has complied with all other applicable statutory requirements for cancellation. We also reject the insurer's substantial compliance argument under Bernstein v. Bd. of Trs., 151 N.J. Super. 71, 76-77 (App. Div. 1977). (*Approved for Publication Date)

10-19-07 New Jersey Department of Environmental Protection v. Town & Country Developers, Inc.
A-5940-05T1

In this environmental enforcement action under the Water Pollution Control Act (Act), N.J.S.A. 58:10A-1 to -35, we upheld a civil administrative penalty of $604,110 against a developer for not securing a DEP permit for sewer hookup prior to construction of a major residential development, even though there was no discharge of pollutants. We rejected defendant's contention that its violation was "minor" and therefore exempted as falling within the Grace Period Law, N.J.S.A. 13:1D-125 to -133, finding instead that the violation was purposeful, irremediable, and undermines the very purpose of the dry-sewer law prohibitions under the Act. As to the latter, we conclude that defendant's failure to obtain pre-approval deprived the DEP of its authority to decide, in the first instance, whether the project may adversely affect sewer infrastructure and statewide water quality.

10-18-07 Rachel G. Shuster v. Board of Review, et al.
A-1880-06T2

Defendant employer notified plaintiff that she was not a candidate for partner at his veterinary office, and that she would need to find new employment as soon as possible. After leaving her employer on the basis of tension in the workplace, giving sixty days notice pursuant to her contract of employment, plaintiff's claim for unemployment was contested by defendant employer and subsequently denied. Plaintiff first appealed to the Appeal Tribunal, which affirmed the denial of her claim, and next to the Board of Review of the Department of Labor, which also affirmed the denial of her claim. Both the Appeal Tribunal and the Board of Review relied upon N.J.S.A. 12:17-9.5 in determining that plaintiff was ineligible for benefits, stating that plaintiff's separation from her employer was not imminent.

We held that the Appeal Tribunal and Board of Review mistakenly relied upon N.J.S.A. 12:17-9.5 in finding that plaintiff's separation from her employer was not imminent. The parties were obligated to each other under the employment contract to provide sixty days notice before terminating the employment relationship. Thus, the "within" sixty days provision of N.J.S.A. 12:17-9.5 did not apply to plaintiff. Further, the regulation does not mandate disqualification from unemployment benefits. Because plaintiff had good cause for voluntarily leaving her employer attributable to defendant employer's statements regarding her seemingly imminent layoff, we reversed the decision of the Board of Review.

10-18-07 Rhonda Bosland v. Warnock Dodge, Inc., d/b/a Warnock Dodge/Chrysler/Jeep
A-1369-06T5

In this Consumer Fraud Act case, we hold that as long as a consumer is able to demonstrate a loss that is quantifiable and measurable, the consumer need not demand a refund of any overcharge prior to filing suit in order to satisfy the Act's "ascertainable loss" requirement. In so holding, we part company with the decision in Feinberg v. Red Bank Volvo, 331 N.J. Super. 506 (App. Div. 2000), which held otherwise.

We further hold that in order to satisfy the requirements of the Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 to -18 (TCCWNA), a consumer need not allege that the contract language was confusing. Such provision is a part of the Plain Language Act, N.J.S.A. 56:12-2 to -13, which is separate and distinct from the TCCWNA.

10-18-07 Kofi Ries v. Department of Corrections

A-6484-05T2

Pursuant to N.J.S.A. 30:1B-3 and N.J.S.A. 30:4-91.3, the Commissioner of Corrections maintains authority over adult offenders committed to state correctional institutions, even at times when they are physically outside prison walls. Consequently, the Department of Corrections was authorized to discipline appellant, who tested positive for cocaine and opiates upon his return to state prison after escaping from a halfway house, for violating the Department's regulation *.204 prohibiting the use of controlled dangerous substances. See N.J.A.C. 10A:4-4.1.

10-17-07 In the Matter of the Trust Under Agreement of Blanche P. Billings Vander Poel
A-0983-04T5

The settlor established a trust in 1950 under New Jersey law with her son as income beneficiary for life and a gift of the remainder to his "issue." Two years later the son married a woman with a ten-year-old daughter, the appellant, and three natural children resulted from that marriage. The son inquired into adopting the appellant as a minor, but was unable to do so because the family was then living abroad. Later he adopted the appellant as an adult, some thirteen years after the settlor's death.

Held that while an adopted child will equally participate in a remainder class gift to "issue," an adult adoptee may not so inherit from a "stranger to the adoption." The concept of equitable adoption, while providing a judicial remedy in the case of a child, is inapplicable to an adult adoptee. The record indicated that the settlor's probable intention was not to include an adopted child in the remainder gift to her son's issue.

10-16-07* Long Branch Housing Authority vs. Toni Villano
A-4617-05T1

A tenant in public housing that is under the control of a public housing agency may be removed from the leased premises pursuant to N.J.S.A. 2A:18-61.1e(2) when the tenant substantially violates a covenant or agreement pertaining to illegal uses of controlled dangerous substances, provided the covenant or agreement conforms to applicable federal guidelines. Moreover, federal law permits a tenant to be evicted from public housing when a member of the household or guest engages in drug-

related criminal activity in the leased premises, regardless of whether the tenant knew or should have known of the illegal activity. (*Approved for Publication date)

10-15-07 Housing Authority of the city of Bayonne v. Deborah Mims, et al.
A-5158-05T3

In this eviction action, the trial court found that plaintiff had established grounds for eviction but also found that the action was retaliatory, in violation of the Tenant Reprisal Act (TRA), N.J.S.A. 2A:42-10.10 to -10.14. However, the judge then determined that the TRA was preempted by federal law governing public housing authorities. We reversed, concluding that the TRA was not preempted by the federal statutes and regulations.

10-15-07 Elizabeth Trimarco, et al. v. Anne Trimarco, et al.
A-4093-05T5

The issue is whether an allegedly oppressed minority shareholder, whose derivative lawsuit on behalf of a corporation under N.J.S.A. 14A:12-7 ultimately settled, is otherwise entitled to counsel fees under Rule 4:42-9(a)(2)'s "fund in court" provision where there is no actual or specific "fund" out of which such fees could be awarded.

We upheld the trial court's discretionary award of counsel fees in this case, finding that the Rule is satisfied where shareholder litigation confers some benefit on the corporation, whether pecuniary or intangible, justifying shifting of the financial burden of producing the benefit to all those who would enjoy it.

10-15-07* State of New Jersey v. Jessie D. Chambers
A-6180-04T4

Under N.J.S.A. 2C:35-7.1, the crime of possession of a CDS with the intent to distribute is elevated from a third-degree crime to a second-degree crime if the offense is committed within 500 feet of a public building. In this opinion, we conclude that a museum qualifies as a public building even if it does not maintain regular hours and is only open to the public upon request.(*Approved for Publication date)

10-11-07* State of New Jersey v. Jeffrey Bendix

A-6508-05T3

We concluded that the trial court took too restrictive a view of the court's discretion, under N.J.S.A. 2C:35-16a, to grant defendant a hardship exception from the requirement that his driver's license be suspended due to his conviction for drug offenses. In remanding for a new hearing on the exception issue, we provided guidance as to the proper procedures for conducting the hearing. Defense counsel should present his client's application through formal witness testimony, and the State's opposition should likewise be presented through testimony rather than representations of counsel. (*Approved for Publication date)

10-11-07 State of New Jersey v. Eric Rowland
A-4383-06T5

The Contractors' Registration Act, N.J.S.A. 56:8-136 to -152, includes provisions under which knowingly engaging in the business of making or selling home improvements without having registered with the Division of Consumer Affairs is a fourth degree crime. Although the Act states that "a person who knowingly violates any of the provisions of this act is guilty of a crime of the fourth degree," the underlined phrase does not mean that the State must prove defendant knew about the Act and its provisions. In short, when used in a statute, the underlined phrase does not make knowledge of the law an element of the crime.

10-11-07 State of New Jersey v. Kevin Johnson
A-4544-05T4

In this appeal we examine the consequences of a sentencing court's failure to notify a defendant of his right to appeal within forty-five days, when the sentence was imposed prior to the New Jersey Supreme Court's opinion in State v. Molina, 187 N.J. 531 (2006). In Molina, the Court made prospective its holding that such a defendant had five years from the date of sentencing to move for leave to appeal as within time.

10-10-07 Philip Menichetti v. Palermo Supply Company
A-2290-06T1

We construed N.J.S.A. 34:15-64c of the Workers' Compensation Act, which permits an employer to pay a reduced amount of the employee's counsel fees if the employer makes a good faith offer of compensation prior to the hearing. We held

that the employer is entitled to the statutory reduction in fees where the employer makes an offer of compensation before having the employee examined by its doctor, even if the offer is higher than the percentage of disability the doctor eventually determines. We noted that the statutory scheme may deprive a petitioner's attorney of fees for work performed before the employer makes an offer, but arguments for amendment of the statute must be directed to the Legislature.

10-09-07 State of New Jersey v. David L. Moon, a/k/a David L. Hyde

This case requires us to consider the elements of endangering an injured victim, N.J.S.A. 2C:12-1.2b(2). We conclude that the crime does not apply to a person who abandons a corpse.

09-28-07 State of New Jersey v. Altariq Laboo, et al.
A-3746-06T5

Three individuals committed a string of armed robberies over the course of a one-hour period, taking items that included two cell phones. Approximately thirty hours after the last robbery, police used a tracking device to track one of the stolen cell phones to a three-family home located in a high-crime area. Three officers entered the building and used a handheld tracking device to determine the exact apartment. An officer knocked on the apartment door and announced that he was a police officer. The officer then heard a young female yelling and a man's voice saying "shut up, shut up, 5-0," and scurrying inside the apartment. Without obtaining a warrant, the officers forcibly entered the apartment, wherein they found evidence from the robberies.

We reversed the law division's order suppressing the evidence. The search was justified because the exigent circumstances, although police-created, arose as a result of reasonable investigative conduct. We held that the police were not required to procure a warrant because a delay presented a real potential danger to the officers and public, under the circumstances.

09-27-07 Diane Brierley, ete al. v. David S. Rode, et al.
A-0637-06T3

A business that permits another business, which is on the other side of a public road, to use its lot for customer

parking, has no duty to the other business's customers to make passage over the road reasonably safe.

09-24-07 Carolyn Amm Ausley v. County of Middlesex, et al.
A-2765-06T5

We addressed the circumstances under which a decedent's relative may obtain tissue samples taken during an autopsy, for purposes of further testing by a privately-retained medical expert. We also discussed the proper procedure to be followed in such cases.

09-13-07 State of New Jersey v. Wayne DeAngelo
A-4229-05T3

The focus of this appeal is the enforceability of a municipal ordinance that prevents the display of a large balloon in the shape of a rat during a labor dispute. We hold that the ordinance, which does not affect the parties' rights in the labor dispute, is not preempted by the National Labor Relations Act (NLRA), 29 U.S.C.A. § 151-69, nor does it abridge any party's freedom of expression. The ordinance is not void for vagueness. It is content-neutral and the record does not support a claim that it was selectively inferred.

Judge Sabatino dissents in part. He perceives a lack of content neutrality in the ordinance because it allows balloon grand opening signs.

09-06-07 State of New Jersey v. John L. Nyhammer
A-5672-04T4

We reverse a conviction for aggravated sexual assault on a girl, then nine years old, concluding that each of two rulings constituted reversible error. First, the judge should not have admitted defendant's confession. An investigator called defendant and explained that he was conducting an investigation against another man in connection with the abuse of another child as well as the victim in this case. The investigator did not indicate to defendant that the victim in this case had made allegations of abuse by defendants. Defendant went to the police station. The investigator gave defendant the Miranda warnings. After defendant gave a formal statement regarding the incident of abuse by the other man, the investigator told him that the victim had made accusations against defendant as well. Defendant became distraught. Miranda warnings were not given a second time. Defendant confessed. We conclude that defendant

did not make a knowing and voluntary waiver of his right to remain silent. Therefore, his confession was inadmissible.

Second, we conclude that the victim's hearsay videotape, which was the sole substantive evidence proving defendant's conduct, should have been excluded from evidence, pursuant to the Confrontation Clause. The videotaped statement was "testimonial," there was no prior opportunity for defendant to cross-examine the victim, and there was no opportunity for an adequate and meaningful cross-examination at trial because the victim was unresponsive to many questions. At trial, she did not recollect questions going to the heart of the charges. Therefore, the videotape was the sole substantive evidence at trial.

09-05-07 Exit A Plus Realty v. Edison Zuniga, et al.
A-5406-05T2

Where a real estate broker violates N.J.S.A. 45:15-17f, the listing agreement is voidable, but is not automatically null and void. To that extent, we expressly disapprove of the Law Division ruling in Winding Brook Realty v. Platzer, 166 N.J. Super. 575 (Law Div. 1979), aff'd on other grounds, 173 N.J. Super. 472 (App. Div.), certif. denied, 85 N.J. 119 (1980).