DATE NAME OF CASE (DOCKET NUMBER)

09/13/17 STATE OF NEW JERSEY VS. EDWARD FORCHION A/K/A NJ WEEDMAN
A-0161-17T6

Following a defendant's detention under the Criminal Justice Reform Act (CJRA), N.J.S.A. 2A:162-15 to -26, the State generally has ninety days to indict defendant, N.J.S.A. 2A:162-22(a)(1)(a), and 180 days after the indictment to try defendant, N.J.S.A. 2A:162-22(a)(2)(a). Both periods allow for "excludable time" and for the State to move to continue detaining defendant provided the State can make certain showings. N.J.S.A. 2A:162-22(a)(1), (2).

In accordance with the CJRA, defendant has been detained in jail since early March 2017. He contends that the time for his trial under the speedy trial provisions of the CJRA is about to be reached. On leave granted, he appeals three orders that found a total of sixty-seven days of "excludable time," N.J.S.A. 2A:162-22(a), under the CJRA. We hold that our standard of review of the period to "be excluded in computing the time in which a case shall be indicted or tried" under N.J.S.A. 2A:162-22(b) is de novo. We also hold that we apply the traditional deferential standard of review to the trial court's factual findings concerning the amount of time excluded. Applying these standards, we affirm the orders that found sixty-seven days of excludable time.

09/13/17 JEFFREY SAUTER VS. COLTS NECK VOLUNTEER FIRE COMPANY NO. 2
A-0354-15T1

The court affirms the dismissal on summary judgment of a volunteer firefighter's whistleblower claim against Colts Neck Volunteer Fire Company No. 2, and several individual officers and members of the fire company, finding volunteer firefighters are not entitled to the protections of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. Because plaintiff is not an employee of the fire company, its vote to strip him of his membership in the organization in alleged retaliation for his letters to the fire company's fidelity carrier and Colts Neck's Executive Fire Council, even if true, is not a violation of CEPA.

09/11/17 STATE OF NEW JERSEY VS. CARLIA M. BRADY

A-0483-16T4/A-0484-14T4(CONSOLIDATED)

The grand jury indicted defendant, a sitting Superior Court judge, for official misconduct, N.J.S.A. 2C:30-2b, and two counts of hindering the apprehension of her boyfriend, the subject of an active arrest warrant for robbery. N.J.S.A. 2C:29-3a(1) and (2). The indictment alleged that with a purpose to benefit herself and her boyfriend, defendant refrained from performing a duty inherent in the nature of her office, i.e., to "enforce an arrest warrant . . . by failing to adequately notify the . . . Police Department of . . . [her boyfriend's] intended appearance or presence at her residence." The hindering counts alleged defendant "harbored or concealed" her boyfriend and offered or provided aid to avoid discovery or apprehension or to effect escape. The Law Division judge granted defendant's motion to dismiss the official misconduct charge but denied her motion as to the two hindering counts. The court granted each party's motion for leave to appeal.

The court affirmed, holding that under the circumstances presented, the judge did not have a duty, inherent in her office, to notify police of her boyfriend's location or that he was shortly appearing at her home. The court also concluded the State had produced some evidence before the grand jury to support the indictment on the hindering counts.

09/07/17 NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION VS. JOSEPH DIVINCENZO AND JORGE MARTINEZ
A-4131-15T3

The New Jersey Election Law Enforcement Commission (ELEC) appeals from an initial decision by an Administrative Law Judge (ALJ) that it lacked jurisdiction to issue a complaint. The initial decision was deemed adopted pursuant to N.J.S.A. 52:14B-10(c) at a time when the Commission lacked a sufficient number of members to act due to longstanding vacancies. The resulting question of first impression implicates the primacy of an administrative agency's decisional authority, the exclusive jurisdiction of this court to review agency action, and the interpretation of the deemed-adopted provision as applied to the circumstances here. An ALJ lacks any independent decisional authority and may not encroach upon the ultimate decisional authority of the agency. Interpreting the deemed-adopted provision under the circumstances here and in light of the constitutional mandate for appellate review of administrative agency action, we will not infer a legislative intent to foreclose review. Finally, we conclude that the common law

quorum requirement applies to the Commission's issuance of a complaint and reverse the ALJ's decision.

08/31/17 STATE OF NEW JERSEY VS. JOSHUA NICHOLSON
A-0299-15T4

Defendant used his cell phone to film up the unsuspecting victim's skirt. The trial court denied defendant's motion to dismiss the indictment and ruled this "upskirting" incident was a third-degree invasion of privacy under N.J.S.A. 2C:14-9(b) (2004), now renumbered N.J.S.A. 2C:14-9(b)(1). Defendant claims the victim's intimate parts were not "exposed" as required by N.J.S.A. 2C:14-9(b) (2004) because the victim was wearing pantyhose. The Appellate Division holds that "exposed" means "open to view" and "visible" and that defendant violated N.J.S.A. 2C:14-9(b) (2004) because the victim's inner thighs and buttocks were open to view and visible through her sheer pantyhose. The Appellate Division also holds the meaning of "exposed" in N.J.S.A. 2C:14-9(b) (2004) was not altered by the Legislature's later enactment of a broader fourth-degree offense of filming "undergarment-clad intimate parts," N.J.S.A. 2C:14-9(b)(2), which need not be open to view or visible.

08/29/17 PATRICIA J. MCCLAIN VS. BOARD OF REVIEW, ET AL.
A-4319-15T3

Appellant left one job upon another's promise of employment. The new employer, however, rescinded the offer the day after appellant voluntarily quit the first job. The Board of Review affirmed the denial of appellant's application for unemployment benefits based on its interpretation of a 2015 amendment to N.J.S.A. 43:21-5(a), which exempts from disqualification "an individual who voluntarily leaves work with one employer to accept from another employer employment which commences not more than seven days after the individual leaves . . . the first employer." The Board determined that because appellant did not commence employment with the new employer, she was not entitled to the statutory exemption from disqualification. The court rejects the Board's interpretation of N.J.S.A. 43:21-5(a) and finds the exemption from disqualification does not require that the claimant actually commence employment with the new employer.

08/23/17 MONTCLAIR STATE UNIVERSITY VS. COUNTY OF PASSAIC, ET AL.
A-3318-15T3

In Rutgers v. Piluso, 60 N.J. 142 (1972), the Supreme Court addressed the limits of a local government's authority to regulate on-site construction on a state university's property that was confined to its campus. In this dispute, the court was asked to determine whether those limits apply to a state university's construction of a roadway that intersects with an off-site local road. The court held that the state university was not required to obtain local land use approval for the project because the limits imposed by Rutgers applied equally to the proposed development in this case.

08/16/17 <u>PAUL KAMIENSKI VS. STATE OF NEW JERSEY, DEPARTMENT OF TREASURY</u>
A-4816-14T2

This case presents us with questions of first impression regarding the interpretation of provisions of the Mistaken Imprisonment Act (Act), N.J.S.A. 52:4C-1 to -7, relating to eligibility, the burden of proof, damages and "reasonable attorney fees."

Plaintiff was convicted of two counts of purposeful murder and felony murder and drug conspiracy charges. His murder convictions were vacated after the Court of Appeals for the Third Circuit directed that a writ of habeas corpus be issued. His drug conspiracy conviction remained undisturbed. Released after serving more than twenty years in prison, he brought this action under the Act, seeking more than $6,000,000 in damages and $1 million in attorney's fees. After granting summary judgment to plaintiff, the trial court awarded him a judgment of $433,230. We reverse the grant of summary judgment, concluding the federal decision granting plaintiff's habeas corpus petition did not satisfy his burden to establish by clear and convincing evidence "he did not commit the crime for which he was convicted," N.J.S.A. 52:4C-3(b), as a matter of law. We also conclude plaintiff's drug conspiracy conviction does not render him ineligible under N.J.S.A. 52:4C-6. Because a remand is necessary, we also provide guidance to the trial court regarding how damages should be calculated under the Act prior to its 2013 amendment and by concluding the "reasonable attorneys fee" recoverable under N.J.S.A. 52:4C-5(b) is limited to fees incurred in the civil litigation under the Act.

08/16/17 <u>STATE OF NEW JERSEY VS. ELEX HYMAN</u>
A-3741-13T3

The principal issue in this appeal from drug-related convictions was whether it was error to admit as lay opinion testimony under N.J.R.E. 701 the lead investigative detective's interpretation of drug-related slang and code words that defendant and others used in wiretapped conversations. The court concludes that the detective, who did not converse with the speakers, offered an expert opinion based on his training and experience. However, the court rejects defendant's argument that even as an expert, the detective was not permitted to opine about the meaning of words as defendant used them. The court also rejects the suggestion that investigative detectives are categorically barred from testifying as experts. Inasmuch as the State established the detective's qualifications as an expert, and in light of the other evidence of defendant's guilt, the court concludes that the mistaken admission of the detective's testimony as lay opinion was harmless.

08/15/17 E.S. VS. H.A.
A-3230-14T2/A-3256-14T2(CONSOLIDATED)

The parties' final judgment of divorce left undecided issues of custody and parenting time regarding their four-year old son. DYFS subsequently substantiated defendant-father for child abuse. The Family Part judge concluded that finding was not conclusive for purposes of determining whether parenting time with defendant was in the child's best interest, and, so, he held a plenary trial to determine whether defendant had sexually abused his son and whether and under what circumstances defendant could exercise parenting time.

Following months of testimony, the judge concluded by clear and convincing evidence defendant had abused the child, awarded custody to plaintiff-mother and denied defendant any parenting time. Accepting the testimony of the court's expert psychologist, the judge conditioned any future application for parenting time upon defendant's admission of "wrongdoing," a psycho-sexual evaluation and completion of individual therapy.

The court concluded conditioning any future application for parenting time upon an admission of wrongdoing violated defendant's right against self-incrimination. Additionally, reiterating the holding in Parish v. Parish, 412 N.J. Super. 39 (App. Div. 2010), the court concluded it was error to restrict defendant's access to the court unless he met these conditions beforehand.

08/09/17 STATE IN THE INTEREST OF D.M.

A-0216-15T2

In this juvenile delinquency case where a fourteen year old was charged with aggravated sexual assault of an eleven-year-old child, neither penetration nor coercion was found by the trial judge, who nonetheless convicted the juvenile of endangering the welfare of a child, N.J.S.A. 2C:24-4(a). The Legislature expressly stated its intent not to criminalize sexual contact between children less than four years apart in age absent either penetration or coercion. To the extent that the child endangerment statute might nonetheless be thought to include behavior of the nature found by the judge in this case, ambiguity in the construction of the statute must be resolved in favor of the juvenile both because the specific statute trumps the general statute and because ambiguous criminal statutes must be interpreted favorably to the accused.

08/08/17 NANCY G. SLUTSKY VS. KENNETH J. SLUTSKY
A-5829-13T1/A-2813-14T1(CONSOLIDATED)

Among the issues discussed in these appeals from a final judgment of divorce, are two of note. First, the court reversed the trial judge's conclusion fixing the value of defendant's interest in his law firm as including goodwill, because the trial judge's limited findings were unsupported and failed to properly analyze the methodology set forth in Dugan v. Dugan, 92 N.J. 423 (1983), and Stern v. Stern, 66 N.J. 340 (1975). The court highlighted the starting point of the analysis must be review of a shareholder's agreement fixing the interest of an equity partner to discern whether it properly captured goodwill. Second, the court reversed a fee award to the payee because it failed to account for the ordered financial obligations imposed upon the payor by the final judgment, and because following fee arbitration, the stipulated fees now due to counsel were less than the sum the payee was ordered to contribute.

08/03/17 NORTH JERSEY MEDIA GROUP INC., D/B/A THE RECORD VS. STATE OF NEW JERSEY OFFICE OF THE GOVERNOR, ET AL.
A-3947-14T3/A-3948-14T3(CONSOLIDATED)

In this OPRA action, plaintiff appealed the trial court's denial of an order in aid of litigant's rights and the denial of the imposition of a civil penalty, finding N.J.S.A. 47:1A-11 authorizes only the Government Records Council to impose a penalty. The court reversed, holding that N.J.S.A. 47:1A-11 authorizes the Superior Court, and not just the Government Records Council, to impose a civil penalty where it is

determined there is a knowing and willful violation of OPRA and access to government records has been unreasonably denied under the circumstance. The court also reversed the denial of plaintiff's request for relief under Rule 1:10-3 because the affidavit describing the search for records in response to the second set of requests violated the case management order, was not based on personal knowledge and could not properly support the court's determination that defendant's search was reasonable.

08/01/17 IN THE MATTER OF THE EXPUNGEMENT OF THE ARREST/CHARGE RECORDS OF T.B./J.N.-T./ R.C.
A-1516-16T1/A-1517-16T1/A-1518-16T1(CONSOLIDATED)

The court considers whether Drug Court graduates seeking to expunge their criminal records pursuant to N.J.S.A. 2C:35-14(m) — the "Drug Court expungement statute," L. 2015, c. 261, §1 — must make a "public interest" showing as N.J.S.A. 2C:52-2(c)(3) requires for the expungement of certain third- and fourth-degree drug offenses. Based on the statute's plain language and legislative history, the court concludes that N.J.S.A. 2C:35-14(m)(2) imports the public interest requirement under N.J.S.A. 2C:52-2(c)(3). The court therefore vacates orders expunging the three applicants' criminal records and remands for application of the public interest test in light of In re Kollman, 210 N.J. 557 (2012), which applied the test to an expungement petition under Chapter 52.

07/28/17 IN RE: ACCUTANE LITIGATION
A-4698-14T1/A-0910-16T1(CONSOLIDATED)

In these multicounty litigation (MCL) products liability cases, the Appellate Division holds that the trial court erred in barring plaintiffs' experts from testifying as to certain epidemiological issues, and that Accutane can cause Crohn's disease. Accordingly, the orders dismissing the lawsuits are reversed and the cases are remanded to the trial court for further proceedings. The opinion reviews the legal principles applicable in a Kemp hearing, and provides some guidance for handling MCL cases in which the scientific evidence concerning the product develops over the protracted course of the litigation.

07/24/17 NORMA S. EHRLICH VS. JEFFREY J. SOROKIN, M.D.
A-2781-15T3

After suffering complications from a colonoscopy and polypectomy procedure, plaintiff filed a medical malpractice complaint against defendant, alleging negligent treatment. Prior to testimony at trial, plaintiff moved in limine to exclude evidence of her informed consent, arguing such evidence was irrelevant because she did not raise a claim for lack of informed consent. The judge denied plaintiff's motion, and the parties discussed the evidence at trial.

In a case of first impression in New Jersey, we follow the principle, adopted by various out-of-state courts, that informed consent evidence is irrelevant and prejudicial when the issue is negligent treatment. Because the error here was not harmless, we reverse the no-cause jury verdict and remand the matter for a new trial.

07/24/17 MAIN STREET AT WOOLWICH, LLC, ET AL. VS. AMMONS SUPERMARKET, INC., ET AL.
A-0713-15T3

After plaintiffs successfully defended against litigation brought by defendants challenging approvals for plaintiffs' shopping complex, plaintiffs filed a complaint against defendants, their attorney, and his firm alleging the litigation was a sham intended only to gain advantage over a competing business.

In a case of first impression, the court adopts the holding in Hanover 3201 Realty, LLC v. Village Supermarkets, Inc., 806 F.3d 162, 180 (3d Cir. 2015), cert. denied, ___ U.S. ___, 136 S. Ct. 2451, 195 L. Ed. 2d 264 (2016), and concludes that, when determining whether a litigant is entitled to immunity under the Noerr-Pennington doctrine, the motion judge was required to consider the allegations in plaintiffs' complaint that the litigation was part of a pattern of sham litigation brought by defendants for the purpose of injuring market rivals rather than to redress actual grievances.

07/19/17 IN THE MATTER OF WILLIAM R. HENDRICKSON, JR., DEPARTMENT OF COMMUNITY AFFAIRS
A-3675-15T1

If an agency fails to timely act on an administrative law judge's initial decision, by statute it is "deemed adopted," and becomes final. See N.J.S.A. 52:14B-10(c). The court holds that when the lack of a quorum attributable to vacancies caused the agency inaction, the deferential agency standard of review will

not be employed. Instead, the court will review the decision using the standard for decisions rendered in bench trials.

07/19/17 STATE OF NEW JERSEY, EX REL. LEONARD M. CAMPAGNA VS. POST INTEGRATIONS, INC., EBOCOM, INC., AND MARY GERDTS
A-1463-15T1

In this qui tam action, the court was asked to determine whether a claim against a corporation arising from its alleged failure to pay certain statutory obligations owed to the State relates to taxes that are expressly excluded from the purview of the New Jersey False Claims Act (NJFCA), N.J.S.A. 2A:32C-1 to -18. The statutory obligations included the alternative minimum tax required by the Corporation Business Tax Act, N.J.S.A. 54:10A-1 to -40, and assessments and fees imposed upon foreign corporations by the New Jersey Business Corporation Act, N.J.S.A. 14A:13-1 to -23. The court held that such obligations are taxes as contemplated by the NJFCA and, therefore, the Law Division properly dismissed plaintiff's complaint, which alleged that defendants violated the NJFCA by making false statements in order to avoid paying New Jersey "assessments, fees, license costs and other charges."

07/12/17 JOHN SMITH VS. ARVIND R. DATLA, M.D., ET AL.
A-1339-16T3

This interlocutory appeal presents novel statute of limitations issues. Plaintiff sued defendants for monetary damages and attorney's fees for (1) invasion of privacy for harmful public disclosure of private facts, (2) violation of the AIDS Assistance Act, N.J.S.A. 26:5C-1 to -14, and (3) medical malpractice arising out the defendant-doctor's alleged disclosure that plaintiff was HIV-positive in the presence of a third party without plaintiff's consent. Defendants moved to dismiss plaintiff's complaint because it was filed more than one year after the disclosure event.

The trial court denied defendants' motion, holding that a two-year statute of limitations applied to all three causes of action. The appellate panel affirmed, agreeing that each of plaintiff's causes of action were subject to the two-year statute of limitations imposed by N.J.S.A. 2A:14-2, not the one-year statute of limitations for defamation imposed by N.J.S.A. 2A:14-3.

07/10/17 FRANCINE REIBMAN, ETC. VS. JAY H. MYERS, ETC., ET AL.
A-0332-15T2

In this appeal, the Appellate Division was asked to consider whether plaintiff's property rights in the marital home under the New Jersey Joint Possession Statute N.J.S.A. 3B:28-3 were released, extinguished, or merged by virtue of a subsequent deed granting title by the entirety with defendant husband. This court holds, when plaintiff obtained a fee interest she lost protection under N.J.S.A. 3B:28-3 because her possessory interest merged into the greater fee estate.

As such, plaintiff's interest was subject to liens and an equitable mortgage, particularly, as here, where plaintiff was aware of and enjoyed the benefit of those loans and the parties intended the property to secure repayment.

07/10/17 OCWEN LOAN SERVICES, LLC VS. MARLA WUEBBENS QUINN
A-2668-14T3(NEWLY PUBLISHED OPINION FOR JULY 10, 2017)

In 2004, defendants David and Louisa Wuebbens conveyed their home to their daughter, Marla Wuebbens Quinn, while retaining life estates in the property. In 2005, Quinn and defendants executed a $260,000 mortgage on the property in favor of plaintiff's assignor, IndyMac Bank, F.S.B. (the 2005 mortgage). In 2007, Quinn refinanced the mortgage loan for $380,000 with IndyMac (the 2007 mortgage) and used the proceeds, in part, to satisfy the 2005 mortgage. IndyMac's title commitment failed to disclose defendants' recorded life estate interests in the property. As a result, defendants did not execute the 2007 mortgage.

In 2009, IndyMac filed an action to foreclose the 2007 mortgage after Quinn defaulted. The issue presented is whether plaintiff's 2007 mortgage lien takes priority over defendants' earlier recorded life estate interests in the property. Applying principles of replacement and modification recognized in the Restatement (Third) of Property - Mortgages (1997), the court extends its holding in Sovereign Bank v. Gillis, 432 N.J. Super. 36 (App. Div. 2013), so as to grant plaintiff's mortgage limited priority over defendants' life estates. Consequently, the court "capped" plaintiff's mortgage priority at $260,000, and preserved the priority of defendants' life estates over the portion of the 2007 mortgage loan that exceeded that amount.

07/10/17 STATE OF NEW JERSEY VS. KONSTADIN BITZAS
A-1653-14T1

In this criminal jury trial, the judge sua sponte dismissed with prejudice three counts in the indictment as a sanction against the State's fact witness's obstreperous behavior. The judge overruled the State's objection challenging her authority to take this action and denied the State's motion to declare a mistrial. Defense counsel acquiesced to the trial judge's decisions without comment. The jury found defendant guilty of the remaining counts in the indictment.

This court holds the trial judge abused her discretion when she denied the State's motion to declare a mistrial after it became apparent that the witness's misconduct had irreparably tainted defendant's right to a fair trial. The judge also erred when she sua sponte dismissed the first three counts of the indictment. A judge presiding over a criminal jury trial cannot enter a judgment of acquittal before the State has completed presenting its case and without applying the standards the Supreme Court established in State v. Reyes, 50 N.J. 454, 458-59 (1967); see also R. 3:18-1.

07/07/17 <u>FISHER, KRYSTAL AND DAVID VS. CITY OF MILLVILLE</u>
A-3351-15T3

The court reviewed the statutory requirements for a personal residence real estate tax exemption, granted to certain disabled veterans, honorably discharged, who served in "active service in time of war." Construing the Legislative intent the court concluded the military conflict applicable to plaintiff's period of service, Operation "Enduring Freedom," occurring on or after September 11, 2001, requires the disabling injury occur during service "in a theater of operation and in direct support of that operation." This geographic component was not satisfied by plaintiff who was injured during stateside basic training and never sent with her unit to Afghanistan. Accordingly, plaintiff's disabling injuries were not suffered in a theater of operation or in direct support of a theater of operation, and thus, were not the result of "active service in time of war," as defined in N.J.S.A. 54:4-8.10(a).

07/05/17 <u>DUTCH RUN-MAYS DRAFT, LLC VS. WOLF BLOCK, LLP</u>
A-0922-15T4

Reviewing a general jurisdiction challenge, the Appellate Division rejected plaintiff's argument asserting a foreign corporation's registration and acceptance of service of process in New Jersey constituted consent to submit to the general jurisdiction of the courts. Rather, the court adopted the

circumscribed view stated in Daimler AG v. Bauman, 571 U.S. __, 134 S. Ct. 746 187 L. Ed. 2d 624 (2014), which requires a court focus on an entity's affiliation with the state, such as the place of incorporation or a continuous, systematic course of business, making the entity "at home" in the forum. Id. at __, 134 S. Ct. at 761, 187 L. Ed. 2d at 641. In light of Daimler, the court rejects the holding in Allied-Signal, Inc. v. Purex Inds., Inc., 242 N.J. Super. 362, 366 (App. Div. 1990), basing general jurisdiction solely on the fiction of implied consent by a foreign corporation's compliance with New Jersey's business registration statute.

06/29/17 ATLANTIC AMBULANCE CORPORATION VS. JOHN G. CULLUM, ET AL.
A-1622-16T2

The court addressed an appeal from an order denying class certification on behalf of consumers who alleged that they were overcharged for ambulance services. The court held that consumers were not required to pay the bill for allegedly overpriced services to establish an ascertainable loss under the Consumer Fraud Act (CFA). However, the court held that under the "learned professional" exception, ambulance service providers were not subject to CFA claims, because ambulance services are comprehensively regulated by a State agency. The court also held that plaintiffs could not maintain a breach of contract claim challenging the reasonableness of the rates charged, because the ambulance service's rate-setting was a policy issue to be addressed by the Legislature and agencies within the Executive branch of government. However, plaintiffs could pursue a claim for a refund of a $14 mileage fee for patients who admittedly were not transported to a hospital, because that did not implicate any rate-setting policy issues.

06/28/17 STATE OF NEW JERSEY V. RORY EDWARD TRINGALI
DOCKET NO. A-1262-15T1

The State alleged that, acting in Florida, defendant paid an accomplice to launch spam attacks on a website that was integral to a New Jersey internet-based business, for the purpose of harming the business owner. The Appellate Division reversed an order dismissing the indictment charging defendant with the offenses of disrupting or impairing computer services, N.J.S.A. 2C:20-25(b), and impersonating another for the purpose of obtaining a benefit or depriving another of a benefit, N.J.S.A. 2C:21-17(a)(1). As to both offenses, the harmful result to the victim is an "element" of the offense, within the meaning

of the territorial jurisdiction statute, N.J.S.A. 2C:1-3(a)(1) and -3(g). Because the prosecutor produced some evidence that the New Jersey victims suffered harm in this State which was an element of each computer crime statute, New Jersey has territorial jurisdiction to prosecute defendant for those offenses. Therefore, the trial court erred in dismissing those counts of the indictment for lack of territorial jurisdiction.

06/26/17 I/M/O STATE OF NJ AND FOP POLICE LODGE 91
A-0413-15T4

The interest arbitration and salary cap provisions of the Police and Fire Public Interest Arbitration Reform Act, N.J.S.A. 34:13A-14 to -16.9, are not limited to situations where an existing collective negotiations agreement (CNA) is expiring. The Act also permits interest arbitration of a newly certified unit's first CNA, but subjects that interest arbitration to the two percent salary cap set forth in N.J.S.A. 34:13A-16.7.

06/23/17 STATE OF NEW JERSEY VS. GREGORY P. COBBS
A-4479-14T2

This appeal presented the question: when does the five-year statute of limitations begin to run against a prosecution for intentional failure to pay New Jersey taxes under N.J.S.A. 54:52-9(a). The offense has two elements: (1) the failure "to pay or turn over when due any tax, fee, penalty or interest or any part thereof required to be paid"; and (2) doing so with "the intent to evade, avoid or otherwise not make timely payment or deposit of any tax, fee, penalty or interest or any part thereof."

Defendant acknowledged he owed almost $200,000 in 2007 gross income taxes, according to his late tax return, which he filed on July 8, 2008. He was indicted for intentional failure to pay on July 10, 2013. The State argued the crime is a continuing one under N.J.S.A. 2C:1-6(c), and the limitations period does not begin running until a defendant's last affirmative act of evasion or avoidance — in this case, when defendant last falsely promised to pay in 2010. The court disagreed, holding the time period begins once a defendant fails to pay taxes when due and owing, and does so with the requisite intent. This can occur on the day taxes are first due, or at a later date only if the necessary state of mind first emerges then. The indictment alleged these two elements were satisfied when defendant filed his return. Therefore, the court reversed

the conviction because the indictment was returned more than five years after the crime was committed.

06/22/17 STATE OF NEW JERSEY, DEP VS. NORTH BEACH 1003, LLC, ET AL.
A-3393-15T4/A-3396-15T4/A-3397-15T4/A-3398-15T4/A-3399-15T4/A-3727-15T4/A-3770-15T4/A-3771-15T4/A-3781-15T4/A-3782-15T4/A-3783-15T4/A-3786-15T4/A-3787-15T4/A-3789-15T4/A-3790-15T4/A-3791-15T4/A-3792-15T4/A-3958-15T4/A-3960-15T4/A-3965-15T4/A-3966-15T4/A-3967-15T4/A-3969-15T4/A-3970-15T4 (CONSOLIDATED)

These consolidated appeals present the questions whether the New Jersey Department of Environmental Protection (DEP) has the authority to condemn private property to take perpetual easements for shore protection purposes and whether the easements can allow public access to, and use of, the areas covered by the easements. We hold that the DEP has such authority and the easements that allow for publicly funded beach protection projects can include public access and use. Thus, we affirm the trial court's final judgments finding that the DEP properly exercised its power of eminent domain and appointing commissioners to determine the value of the takings.

06/21/17 MICHAEL ABBOUD VS. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA
A-3434-14T1

The court affirms the trial court's summary judgment dismissal of plaintiff's claim for coverage under a directors and officers (D&O) liability policy. The insurer properly denied coverage under the policy's "insured vs. insured" exclusion, which generally bars D&O coverage for claims by one insured director or officer against another. The court discerns no ambiguity in the exclusion, and finds no merit in plaintiff's arguments that (1) a showing of collusion between the insureds is required to invoke the exclusion, and (2) the exclusion should not be enforced because it would violate his reasonable expectations.

06/20/17 STATE OF NEW JERSEY VS. DOMINIQUE T. MOORE
A-3669-16T7

In this appeal, we addressed whether the Monmouth County Prosecutor's Office must produce a completed Preliminary Law Enforcement Incident Report (PLEIR) when seeking pretrial

detention of a defendant under the Bail Reform Act (Act), N.J.S.A. 2A:162-15 to -26. Consonant with our Supreme Court's decision in State v. Robinson, ___ N.J. ___ (2017), and for the reasons set forth herein, we conclude the production of a PLEIR is not mandatory under the Act, Rule 3:4-2(c)(1), or the Office of the Attorney General, Directive Establishing Interim Policies, Practices, and Procedures to Implement Criminal Justice Reform Pursuant to P.L. 2014, c. 31 (Oct. 11, 2016).

06/19/17 STATE OF NEW JERSEY IN THE INTEREST OF M.P.
A-0303-16T2

In this juvenile delinquency prosecution, the Family Part sua sponte transferred venue to another vicinage without notice to the juvenile defendant or the State. When the State objected, the judge held a hearing and stated the transfer was occasioned by receipt of a confidential report filed by an judiciary employee pursuant to Judiciary Employee Policy #5-15, "Reporting Involvement in Litigation," (effective June 1, 2016) (the Policy). In a subsequently filed brief statement of reasons, without identifying the employee or his or her relationship to the litigation, the judge concluded that given the employee's access to the Family Automated Case Tracking System (FACTS), location in the courthouse and interaction with the public, the Policy required the transfer of venue.

The court granted the juvenile's motion for leave to appeal, which the State supported, and reversed. Our Court Rules presume venue is laid in the county of the juvenile's domicile, a presumption further supported by provisions of the Code of Juvenile Justice. Additionally, the Crime Victim's Bill of Rights require the court to consider the inconvenience to the victim occasioned by the transfer of venue.

While the Family Part Presiding Judge may order the transfer of venue for good cause over the objections of the juvenile and the State, the court must provide notice of its intention and an opportunity to object beforehand. Additionally, the court's power must be exercised in service to the goals of the Policy, i.e., "to maintain [the Judiciary's] high degree of integrity and to avoid any actual, potential or appearance of partiality or conflict of interest in the adjudication or handling of all cases," and the court must consider whether a less drastic measure, such as "insulating the [court employee] from the matter," would accomplish these goals.

06/19/17 KEYKO GIL, ET AL. VS. CLARA MAASS MEDICAL CENTER, ET AL.
A-4034-14T4

In this appeal, the court examined clauses contained in insurance policies covering a hospital to determine, among other things, whether the trial judge erred in rejecting plaintiffs' arguments that an allegedly negligent physician was also covered because he was the hospital's "employee" or a "leased worker," or because his limited liability company was "affiliated or associated" with the hospital. The court held that the policy language could not be plausibly interpreted to provide coverage to the physician or his limited liability company, and affirmed the summary judgment entered in favor of the insurers.

Judge Ostrer filed a concurring opinion.

06/15/17 MARC LARKINS, ETC. VS. GEORGE J. SOLTER, JR., ET AL.
A-2573-15T2

The legal issue on appeal is whether the State Comptroller is obligated to disclose his reasons for selecting the North Bergen Board of Education for a performance audit before commencing the audit. We held that N.J.S.A. 52:15C-1 to -24 (the Act) does not impose any such requirement. To hold otherwise would undermine the purpose of the Act; render meaningless an auditee's unambiguous statutory obligation to provide full assistance and cooperation with any audit; and unduly delay the conduct of audits.

06/14/17 THE STOP & SHOP SUPERMARKET COMPANY, LLC, v. THE COUNTY OF BERGEN; THE BERGEN COUNTY PLANNING BOARD; AND THE COUNTY OF BERGEN DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT
A-2134-14T1/A-4630-14T1(CONSOLIDATED)
(NEWLY PUBLISHED OPINION FOR JUNE 14, 2017)

The published portion of this opinion addresses the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. The Appellate Division holds OPRA litigation is authorized to allow a party who has been denied access to records to obtain access to those records, and counsel fees are authorized under OPRA if the litigation causes the production of those records. Because plaintiff had already obtained the responsive records before it filed its declaratory judgment action, its action was moot when filed, and plaintiff was not entitled to counsel fees. Plaintiff cannot avoid the proscription against litigating moot issues by bringing a declaratory judgment action.

06/13/17 STATE OF NEW JERSEY VS. DAMMEN D. MCDUFFIE/
STATE OF NEW JERSEY VS. HAKEEM A. CHANCE
A-1344-14T2/A-3634-14T3(CONSOLIDATED)

We examine defendants' attack on the State's exercised privilege, refraining from disclosing information regarding details related to a global positioning system (GPS) tracking device used to prove their involvement in two burglaries. We rejected defendants' constitutional attacks and upheld the privilege granted by N.J.R.E. 516 and N.J.S.A. 2A:84A-28, defining the guidelines reviewed when weighing disclosure in light of the asserted privilege. These include: (1) whether defendant demonstrates a particularized need for disclosure related to advance a stated defense; (2) whether the opportunity to cross-examine the officer, asserting non-disclosure based on privilege, satisfies a defendant's need to challenge the credibility of the testifying witness; (3) whether law enforcement provided required corroborating evidence extrinsic to the GPS, to protect a defendant's rights of confrontation and fair trial; and (4) whether a defendant has the opportunity to provide expert testimony to attack the evidence without disclosure of the requested information.

06/12/17 STATE OF NEW JERSEY VS. VICTORIA MAJEWSKI
A-2032-15T2

The grand jury indicted defendant in a single count charging her with aggravated assault by throwing a bodily fluid, N.J.S.A. 2C:12-13, which provides,

> A person who throws a bodily fluid at a . . . law enforcement officer while in the performance of his duties or otherwise purposely subjects such employee to contact with a bodily fluid commits an aggravated assault. If the victim suffers bodily injury, this shall be a crime of the third degree. Otherwise, this shall be a crime of the fourth degree.

The State alleged defendant spat at another inmate, and it landed on a corrections officer.

Defendant moved to dismiss the indictment, arguing the prosecutor failed to charge the grand jury regarding the statute's requisite mental state and failed to present clearly exculpatory evidence that negated her guilt. State v. Hogan,

144 N.J. 216, 237 (1996). This evidence included statements of inmates and the disciplinary report of the investigative corrections officer, which confirmed that defendant intended to spit at a fellow inmate, not the officer.

The judge denied the motion to dismiss, concluding the evidence did not meet the standard enunciated in Hogan, but he did not resolve what mental state was required under the statute or whether the prosecutor's instructions were appropriate. Defendant thereafter pled guilty.
The court concluded the State must prove that defendant acted purposely, and that the doctrine of transferred intent, N.J.S.A. 2C:2-3(d), cannot elevate the act of spitting, even if an offense under the Criminal Code, into an aggravated assault, unless the officer was the intended target. See, e.g., State ex rel S.B., 333 N.J. Super. 236, 244-45 (App. Div. 2000). Defendant's motion to dismiss should have been granted because the prosecutor failed to inform the grand jurors of the requisite culpable mental state.

06/09/17 STATE OF NEW JERSEY VS. BARTHOLOMEW P. MCINERNEY
A-0545-16T4

A defendant who elects not to testify at a retrial cannot, by virtue of the exercise of his Fifth Amendment privilege, make himself an unavailable witness. See N.J.R.E. 804(a)(1). Therefore, the testimony from the prior proceeding is not admissible under N.J.R.E. 804(b)(1). He cannot render himself unavailable at a second proceeding while seeking to benefit from the admission of his testimony from the first.

06/09/17 STATE OF NEW JERSEY VS. MARJORIE ANNA STUBBLEFIELD
A-2112-15T1

The court reverses defendant's two convictions for first-degree aggravated sexual assault of a physically incapacitated young man because defendant was unfairly hampered in her attempt to present evidence that she did not know nor should have known that he was mentally incapacitated. Defendant argued to the jury that the victim could communicate and consent to sexual activity. The court erred in excluding a defense expert's exhaustive videotaped evaluation of the victim. Other defense evidence was excluded based on an incorrect hearsay analysis and in a misguided effort to limit evidence of the controversial method of "facilitated communication." These cumulative errors mandate a new trial.

06/07/17 SATEC, INC., ET AL. VS. THE HANOVER INSURANCE GROUP, INC, ET AL. VS. PATRICK SPINA
A-5103-14T4

In this appeal, we held that plaintiff failed to demonstrate that its insurance agent was negligent by breaching a duty to procure, rather than just notify and recommend, flood insurance coverage. We further held that plaintiff's expert did not provide objective support for the existence of a standard, but relied upon a standard that was personal, thus rendering a "net opinion."

06/06/17 WOODLANDS COMMUNITY ASSOCIATION, INC. VS. ADAM T. MITCHELL, ET AL.
A-4176-15T2

The court considers whether a lender's assignee that takes possession of a condominium unit when the owner/mortgagor has defaulted on the loan, and thereafter winterizes the unit and changes the locks, is considered a "mortgagee in possession" of that unit, and responsible for the payment of condominium fees and assessments. Because we conclude that those discrete actions are not sufficient to render the lender's assignee a mortgagee in possession of the unit, we reverse the entry of summary judgment.

Whether a mortgagee or its assignee is in possession of property is determined on a case-by-case basis. We must consider whether the mortgagee is exercising control and management over the property. Indicia of control and management include elements of possession, operation, maintenance, use, repair, and control of the property such as paying bills or collecting rents. The minimal efforts taken here by defendant of changing the locks and winterizing the unit are not sufficient to convert itself into a mortgagee in possession. Defendant has not taken over the control and management of the unit nor exercised the requisite dominion over the property short of securing the unit.

06/05/17 T.M.S. VS. W.C.P.
A-4900-15T2

In the court's review of a reinstated final restraining order entered pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 - 35, we conclude the court may not sua sponte reinstate a final restraining order absent a Rule 4:50-1

application by plaintiff. Due process requires the party seeking to reinstate a final restraining order file a motion so defendant may have an opportunity to adequately defend the re-imposition of a final restraining order.

In this case, defendant was deprived of due process because the trial court, after vacating the final restraining order pursuant to N.J.S.A. 2C:25-29(d) and Carfagno v. Carfagno, 288 N.J. Super. 424 (Ch. Div. 1995), sua sponte reinstated the final restraining order based on plaintiff's claim she was not adequately served with defendant's Carfagno application. When the dispute arose regarding whether plaintiff had been served with defendant's Carfagno application, plaintiff should have asserted her claims via a Rule 4:50-1 motion in the domestic violence proceeding rather than have the final restraining order sua sponte and summarily reinstated in a separate weapons forfeiture hearing.

06/02/17 STATE OF NEW JERSEY VS. JOHN C. VAN NESS
A-2728-14T1

Defendant was convicted of third degree theft by deception, N.J.S.A. 2C:20-4, and fourth degree bad checks, N.J.S.A. 2C:21-5. The Criminal Division Manger twice rejected his application for representation by the Public Defender. The trial judge accepted this rejection as final. Under In re Custodian of Records, Criminal Div. Manager, 214 N.J. 147, 152 (2013), no rejection is final until the Assignment Judge or the Assignment Judge's designee reviews it. This court holds that when the Criminal Division Manager denies a defendant's application for representation by the Public Defender, the trial judge should assign temporary counsel, as Rule 3:4-2(b) now provides, and inform defendant of the right to have the application reviewed by the Assignment Judgment or designee. N.J.S.A. 2A:158A-15.1.

The trial judge also misapplied State v. King, 210 N.J. 2 (2012), when he relied on the following as evidence of defendant's knowing and voluntary waiver of his Constitutional right to counsel: (1) the Criminal Division Manager's denial of defendant's application for representation by the Public Defender; and (2) defendant's failure to obtain private counsel.

06/01/17 JOSHUA HAINES VS. JACOB W. TAFT, ET AL/ TUWONA LITTLE VS. JAYNE NISHIMURA
A-5503-14T4/ A-0727-15T2(CONSOLIDATED)

In these automobile negligence actions, plaintiffs were injured in a car accident and incurred more than $15,000 in medical expenses. The PIP coverage in each plaintiff's policy (both plaintiffs had standard automobile policies) was limited to $15,000 per person, per accident. Plaintiffs sought to recover those expenses exceeding $15,000 from the alleged negligent defendants.

Defendants and amici (interest groups which represented the insurance industry) argued various PIP statutes precluded insureds from recovering medical expenses above the PIP limit. Among other things, they contended permitting the recovery of medical expenses above an injured insured's PIP limit will bring back the days when court calendars were clogged with law suits that required a determination of who was at fault for the accident causing a plaintiff's injuries, a result the No-Fault Act intended to eliminate.

Whether an injured insured may recover medical expenses above his or her PIP limits has never been determined by an appellate court, and trial courts have been providing conflicting rulings. After examining the subject statutes, including the legislative history for each, and Supreme Court precedent, we concluded the Legislature intended an insured covered with a standard policy may recover from the tortfeasor medical expenses above the PIP limit in his or her policy, up to $250,000. While certain minor medical expenses, such as copayments and deductibles cannot be recovered, the Legislature did not intend to preclude the recovery of the medical expenses at issue here, which exceeded the $15,000 PIP limit by approximately $10,000 in one and $28,000 in the other matter.

05/30/17 RUCKSAPOL JIWUNGKUL, ETC. VS. DIRECTOR, DIVISION OF TAXATION
A-4089-15T2

The surviving partner of a domestic partnership, N.J.S.A. 26:8A-2(d) (DPA), filed New Jersey tax returns on behalf of his partner's estate that were consistent with their status as domestic partners. He claimed the spousal exemption allowed for domestic partners under the New Jersey Inheritance Tax, N.J.S.A. 54:34-2(a)(1), and, because no spousal deduction was permitted for domestic partners under the New Jersey Estate Tax, N.J.S.A. 54:38-1 to -16, he did not claim such a deduction. He later filed an amended estate tax return in which he claimed a marital deduction under the Estate Tax. This deduction was authorized to members of a civil union, N.J.S.A. 37:1-32(n); N.J.A.C.

18:26-3A.8(e), a formal relationship plaintiff and his partner had declined to enter, but was not authorized under the DPA.

In his appeal from the Tax Court's decision affirming the denial of the marital deduction, plaintiff argues the DPA violates the equal protection guarantee of the New Jersey Constitution, Art. I, Para. 1, and there is no rational basis for the marital deduction to be different under the New Jersey Inheritance Tax Law and the New Jersey Estate Law. We affirm, substantially for the reasons set forth in the cogent and comprehensive written opinion of Judge Patrick DeAlmeida, P.J.T.C., Jiwungkul, as Executor of the Estate of Michael R. Connolly, Jr. v. Director, Division of Taxation, Docket No. 009346-2015 (May 11, 2016).

05/30/17 KATHLEEN LEGGETTE VS. GOVERNMENT EMPLOYEES INSURANCE COMPANY ("GEICO"), ET AL.
A-1911-15T3

The issue of first impression presented in this matter is whether an out-of-state automobile insurance policy is deemed to provide PIP benefits when the named insured, while a pedestrian, is injured by a New Jersey driver. We conclude medical expenses for injuries suffered while a pedestrian, are not covered by N.J.S.A. 17:28-1.4, commonly known as the "Deemer Statute," which is triggered only when there is a nexus between the out-of-state automobile and the accident.

05/22/17 DCPP VS. J.E.C. I/M/O THE GUARDIANSHIP OF C.I.B.
A-2565-15T2

As a matter of first impression, the court concludes that the special evidentiary provision codified at N.J.S.A. 9:6-8.46(a)(4), allowing the admission of corroborated hearsay statements by children, applies only in abuse or neglect cases litigated under Title 9, and does not extend to guardianship cases litigated under Title 30 that seek the termination of a parent's rights.

Despite indicia of contrary customs, the court concludes that the plain meaning of N.J.S.A. 9:6-8.46(a)(4) confines its application to "hearings under this act," i.e. Title 9 proceedings. In addition, the court's statutory construction is supported by the legislative history and the significant differences between Title 9 cases and Title 30 termination cases

with respect to, among other things, the comparative stakes involved for a defendant and the higher burden of proof required to justify the permanent termination of a parent's rights.

The Legislature remains free to amend Title 30 to extend this special hearsay exception to termination cases, upon considering the competing policy interest implicated by such a revision.

05/17/17 DIVISION OF CHILD PROTECTION AND PERMANENCY VS. J.L.G.
A-1746-13T2(NEWLY PUBLISHED OPINION FOR MAY 17, 2017)

In this Title 9 matter, Y.A., the mother of a seven-year old child, viciously beat the child with her hand, fist, and a metal spatula, inflicting significant physical injuries that were evident and painful to the child several days later and required medical intervention. Defendant J.L.G. admitted he was present when Y.A. beat the child with her hand. He did not intercede to stop the beating; rather, he walked away into the next room to keep the child he had with Y.A. from seeing the beating continue and told Y.A. to stop hitting the child because she could get in trouble. Defendant did not report the abuse.

The trial court found that Y.A. abused or neglected the child within the meaning of N.J.S.A. 9:6-8.21(c)(4)(b) by unreasonably inflicting excessive corporal punishment. Y.A. did not appeal. The trial court also found that defendant abused or neglected the child within the meaning of N.J.S.A. 9:6-8.21(c)(4)(b) by failing to provide the child with proper supervision by unreasonably allowing the infliction of excessive corporal punishment by the child's mother. We affirmed.

05/11/17 B.C. VS. NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY
A-4805-15T4

In the context of a grandparent visitation appeal, the court discusses the interplay between the FN abuse and neglect docket and the FD non-dissolution docket. The court reverses the dismissal of the FD grandparent visitation complaint and directs that it be heard in conjunction with the ongoing FN neglect matter by the same judge. The court also directs reconsideration of the judge's FN order banning contact between the grandfather and the children in light of the preference expressed by the mother, who has legal custody of three of the four children.

05/09/17 BRIAN HEJDA VS. BELL CONTAINER CORPORATION
A-3502-14T1

In Puglia v. Elk Pipeline, Inc., 226 N.J. 258 (2016), our Supreme Court applied principles the United States Supreme Court clarified in Hawaiian Airlines v. Norris, 512 U.S. 246 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994), to conclude that an employee's state whistleblower claim was not pre-empted by § 301 of the Labor Management and Relations Act (LMRA), 29 U.S.C.A. 185(a). This appeal presents the question whether an employee-union member's disability discrimination claim under the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and retaliatory discharge claim under the Workers' Compensation Law (WCL), N.J.S.A. 34:15-1 to -128.5, are pre-empted by § 301. We conclude the claims as asserted are not pre-empted because they do not require interpretation of any provision of the collective bargaining agreement between the union and employer.

05/01/17 IN RE N.J.A.C. 12:17-2.1
A-4636-14T3

This appeal involves a challenge to the validity of a regulation, N.J.A.C. 12:17-2.1, adopted in 2015 by the Department of Labor and Workforce Development. In that regulation, the Department defines, for the first time in codified form, the concept of "simple misconduct" by an employee that can limit his or her eligibility for unemployment benefits under the Unemployment Compensation Act ("the Act"), N.J.S.A. 43:21-1 to -56. The Department's adoption of the regulation attempted to respond to concerns this court expressed in Silver v. Board of Review, 430 N.J. Super. 44 (App. Div. 2013), regarding the need for a codified rule that distinguishes "simple misconduct" from the more stringent intermediate concept of "severe misconduct" as defined by the Legislature in a 2010 amendment to N.J.S.A. 43:21-5(b), or the most extreme category of "gross misconduct" defined in the statute.

The court invalidates the portion of the challenged regulation defining simple misconduct. It does so because the definition illogically and confusingly mixes in concepts of "negligence" with intent-based concepts such as "willful disregard," "evil design," "wrongful intent," and similar states of mind. The regulation is also flawed because it defines "simple misconduct" in certain respects as encompassing employee conduct that is at least as extreme or venal – or perhaps more so – than "severe misconduct."

Consequently, the Department's final agency action adopting a definition of simple misconduct within N.J.A.C. 12:17-2.1 is reversed as arbitrary and capricious, without prejudice to the Department pursuing the adoption of a substitute regulation that cures these defects and conforms with the overall statutory scheme.

04/28/17 DCPP VS. R.L.M. AND J.J. IN THE MATTER OF THE GUARDIANSHIP OF R.A.J.
A-2849-15T2/A-3277-15T2

In this termination of parental rights (TPR) case, the father contends he was entitled to a new trial because he was denied his constitutional right of self-representation, which he argued is a corollary to the right to counsel under N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 306 (2007). While the constitutional right to procedural due process gives rise to the right to counsel in TPR cases, there is no corollary right of self-representation, unlike in criminal cases under the Sixth Amendment. Furthermore, any non-constitutional right to proceed pro se — under Rule 1:21-1(a) or arguably implied by N.J.S.A. 30:4C-15.4(a) — may be relaxed if the court concludes that the parent's pro se efforts would significantly undermine the interests of the child, the State and the court in an accurate result without undue delay. Also, any denial of such non-constitutional right is not a structural error requiring a new trial. Finally, the father did not assert his alleged right of self-representation unequivocally or timely.

04/27/17 SHAKEEM MALIK HOLMES VS. JERSEY CITY POLICE DEPARTMENT
A-1634-15T3

Where police officers insulted and threatened an arrestee, the conduct was sufficiently severe that a reasonable transgender person in plaintiff's position would find the environment within the police station to be hostile, threatening and demeaning. Therefore, the trial court erred in granting summary judgment, dismissing plaintiff's Law Against Discrimination complaint alleging "hostile-environment" discrimination in a place of public accommodation.

04/27/17 ALEXANDRA RODRIGUEZ VS. WAL-MART STORES, INC., ET AL.
A-4137-14T3

Plaintiff in this personal injury case appeals on several grounds from a no-cause jury verdict. Among other things,

plaintiff argues that she was unduly prejudiced by the admission, over her objection, of extensive testimony from a defense medical expert opining that she had magnified her symptoms and her alleged injuries from the accident. The testifying doctor, a neurologist, was not a psychiatrist, psychologist, or other mental health specialist. Plaintiff contends that the admission of this expert testimony unfairly impugned her overall credibility and thereby deprived her of a fair trial on both liability and damages.

The appellate panel concludes that the expert's opinions on symptom magnification were improperly admitted, and that plaintiff was sufficiently prejudiced by that ruling to be entitled to a new jury trial on all issues. In doing so, the panel adopts the reasoning of other jurisdictions that have disallowed such expert opinions about symptom magnification, malingering, or other equivalent concepts in civil jury cases, including the Eighth Circuit's seminal opinion in Nichols v. American National Insurance Company, 154 F.3d 875 (8th Cir. 1998).

A qualified expert is not precluded, however, from providing factual testimony recounting observations the expert made about plaintiff's physical movements or responses to testing during an examination, subject to exclusionary arguments under N.J.R.E. 403 that may be asserted on a case-specific basis. Nor is a qualified expert categorically precluded from testifying that a plaintiff's subjective complaints appear to be inconsistent with objective medical test results or findings. In addition, the court does not foreclose the admission of opinion testimony concerning symptom magnification or similar concepts from a qualified expert in a non-jury case, also subject to Rule 403.

04/27/17 <u>FAIRFAX FINANCIAL HOLDINGS LIMITED, ET AL. VS. S.A.C. CAPITAL MANAGEMENT, L.L.C., ET AL.</u>
A-0963-12T1

Plaintiff Fairfax Financial Holdings, a Canadian corporation, and plaintiff Crum & Forster Holdings Corp., a New Jersey corporation, commenced this action claiming that defendants – New York-based hedge funds, analysts, and others involved in the New York financial market – conspired in violation of racketeering laws to disparage plaintiffs so as to drive down their stock values. Some defendants profited from the alleged enterprise's actions by "shorting" plaintiffs' stock and some defendants profited in other indirect ways. After

considerable discovery, including the production of millions of pages of documents and the conducting of approximately 150 depositions, all plaintiffs' RICO and common law claims were dismissed by way of summary judgment.

In affirming in part and reversing in part, the court held, among other things: (1) the RICO claims were properly dismissed because New Jersey choice-of-law rules mandated the application of New York law, which, unlike New Jersey law, does not recognize a private civil RICO cause of action; (2) New Jersey's six-year statute of limitations applied to plaintiffs' disparagement claim rather than a shorter New York limitations period; (3) New York substantive law applied to plaintiffs' disparagement and tortious interference with prospective economic advantage claims and required that plaintiffs demonstrate special damages, which required their identification of lost customers; (4) plaintiffs' identification of 180 lost customers was sufficient to meet New York's special-damages requirement but their expert's attempt to quantify the portion of the market lost to plaintiffs as a result of the alleged disparagement did not meet New York's special-damages standard; and (5) two groups of New York defendants were properly dismissed on personal jurisdiction grounds because, among other things, plaintiffs presented insufficient evidence to support its theory – on the assumption such a theory is cognizable – of conspiracy-based jurisdiction.

04/24/17 BRYCE PATRICK, ET AL. VS. CITY OF ELIZABETH, ET AL.
A-2792-15T1

We address whether a municipality and board of education can be held to a higher standard of care under the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, in these circumstances where the minor plaintiff was struck by a motor vehicle as the child crossed the street in a school zone area. Plaintiff alleged that the area was a dangerous condition, and there was inadequate signage to warn motorists of the presence of children. Plaintiff asserts that the school zone imposes a special burden on defendants.

There was no record of complaints to the municipality regarding this area, and the court is satisfied that the entities were entitled to immunity under N.J.S.A. 59:4-2 as there were insufficient proofs provided as to the existence of a dangerous condition. The decision of what type of signage and where to place it is within the discretion accorded to a municipality and is immunized under N.J.S.A. 59:2-3(a).

Defendants are also accorded immunity under N.J.S.A. 59:4-5, which provides that a public entity is not liable for "an injury caused by the failure to provide ordinary traffic signals, signs, markings or similar devices." (emphasis added). Plaintiff argues that a sign in a school zone is not an "ordinary" sign subject to immunity under the statute because school zones require a higher standard of care.

Although N.J.S.A. 59:4-5 does not expressly define the term "ordinary," the court uses the dictionary definition of "regular, usual, normal, common, often reoccurring and not characterized by peculiar or unusual circumstances." Black's Law Dictionary 1249 (4th ed. 1957). Nothing was presented that the roadway in question would not fit within this definition of "ordinary."

In addressing plaintiff's argument that a school zone imposes a special burden on defendants, the court notes that when the Legislature has chosen to impose a higher standard of care in a school zone, it has done so explicitly. The court references examples of increased penalties for driving while intoxicated, see N.J.S.A. 39:4-50, and enhanced charges for distributing or possessing controlled dangerous substances within a school zone, see N.J.S.A. 2C:35-7. There is no such differentiation provided in the TCA, and therefore, no evidence of such a legislative intention. Without such intention, the court declines to carve out an exception for liability under the TCA for signage in a school zone or to denote signs in a school zone as anything but "ordinary."

4/19/17 <u>STATE OF NEW JERSEY VS. DONNELL W. ANCRUM</u>
A-0932-16T2

The court granted the State's leave to appeal from an illegal sentence. Defendant was charged with second-degree robbery, second-degree burglary, second-degree aggravated assault (serious bodily injury) and third-degree aggravated assault (significant bodily injury). After indicating the assault charges would merge into the robbery under the facts of the case and the effect of the mergers would be defendant's eligibility for special probation, <u>N.J.S.A.</u> 2C:35-14 (the Statute), the judge accepted defendant's guilty pleas to all four counts of the indictment. At sentencing, over the State's continued objection, the judge sentenced defendant to special probation, conditioned on his entry into, and completion of, Drug Court.

The court reversed, concluding that although the 2012 amendment to the Statute made defendants convicted of second-degree robbery and burglary eligible for special probation, the Legislature intended to continue to bar a defendant convicted of aggravated assault from receiving such a sentence. Similar to those cases in which the Legislature clearly intended certain mandatory sentences survive merger, a conviction for one of the Statute's disqualifying offenses survives merger and bars defendant's sentence to special probation.

4/19/17 KEITH WILLIAMS VS. RAYMOURS FURNITURE CO., INC.
A-3450-15T4

The Division of Workers' Compensation dismissed the petition of Keith Williams for lack of jurisdiction. The judge of compensation determined that because Williams worked in New York and the accident happened there, there was no reason for New Jersey to assume jurisdiction of Williams' claim. We reverse.

As the facts are undisputed that Williams accepted employment from respondent by telephone from his home in Paterson, thereby establishing New Jersey as the place the contract was created, the law is clear that New Jersey is an appropriate forum for resolution of petitioner's claim petition, certainly in conjunction with his residency here.

04/11/17 JACLYN THOMPSON VS. BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND
A-5028-14T1

Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 34 (2008), held that to obtain accidental disability benefits for a purely mental disability, "[t]he disability must result from direct personal experience of a terrifying or horror-inducing event that involves actual or threatened death or serious injury, or a similarly serious threat to the physical integrity of the member or another person." Following the example of Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14 (2011), the Appellate Division holds the Patterson requirement applies to mental disability arising from incidents involving mental and physical stressors if any physical injury was temporary or minor, despite Caminiti v. Bd. of Trs., Police & Firemen's Ret. Sys., 431 N.J. Super. 1 (App. Div. 2013).

The majority rules that the incidents triggering petitioner's mental disability did not meet the Patterson requirement and that her diagnosis of PTSD was not dispositive. Judge Ostrer dissents from that ruling.

The court rules the incidents were undesigned and unexpected given petitioner's lack of training.

04/10/17 NEW YORK-CONNECTICUT DEVELOPMENT CORP. VS. BLINDS-TO-GO (U.S.) INC. VS. ANTHONY NARDOZZI, ET AL.
UNIQUE MECHANICAL SERVICES, LLC. VS. NEW YORK-CONNECTICUT DEVELOPMENT CORP.
COUNTY GLASS & METAL INSTALLERS, INC. VS. NEW YORK-CONNECTICUT DEVELOPMENT CORP., ET AL.
A-5660-14T4

In this matter arising out of the construction of a building, we address whether a verdict can be sustained where the jury found that plaintiff, New York-Connecticut Development Corp. (NYCT), breached the pertinent contract, but nevertheless, awarded it damages under a quantum meruit theory.

Quantum meruit is a form of quasi-contractual recovery and is "wholly unlike an express or implied-in-fact contract in that it is 'imposed by the law for the purpose of bringing about justice without reference to the intention of the parties.'" St. Barnabas Med. Ctr. v. Cnty. of Essex, 111 N.J. 67, 79 (1988) (citations omitted). It has long been recognized, however, "that the existence of an express contract excludes the awarding of relief regarding the same subject matter based on quantum meruit." Kas Oriental Rugs v. Ellman, 394 N.J. Super. 278, 286 (App. Div. 2007).

Although a party may plead and pursue alternative, and even inconsistent theories, Kas, supra, 394 N.J. Super. at 287, a party is not entitled to recover on inconsistent theories. Ibid. (emphasis added). Once the jury determined that an express contract existed between the parties, it was erroneous for it to be directed to a consideration of quantum meruit. The jury instructions and verdict sheet both misstated the applicable legal principles of contract law. Consequently, we are constrained to reverse and remand for a new trial.

04/05/17 STATE OF NEW JERSEY VS. EDWARD HOLLAND
A-0315-15T4

The court examines defendant's challenge to denial of post-conviction relief because the trial judge had been his attorney in more than one matter seventeen years earlier. Although the trial record contained no mention of the judge's prior representation and does not definitively show the trial judge actually remembered defendant was his former client, testimony before the PCR court confirms the State and defense counsel were informed the judge had served as defendant's private counsel. The court rejects the PCR judge's conclusion to deny PCR suggesting counsel's decision not to seek recusal represents a "valid trial strategy," which cannot be second-guessed.

Reviewing the newly revised Code of Judicial Conduct, specifically Canon 3.17, which mandates disqualification for a period of seven years following the conclusion of that representation and recognizes "disqualification for a period of time in excess of seven years from the conclusion of the representation may be required in certain circumstances." The court reasoned the necessity of preserving the integrity of impartiality and avoiding all appearances of impropriety must be paramount. The court concluded prejudice envelops the entire process by casting doubt and leaving the lingering question of whether a trial judge's familiarity favored a defendant, or conversely, caused a trial judge to overcompensate so as not to reflect an appearance of bias. The court held when an instance arises where a judge previously represented a criminal defendant, the prior representation and relationship shall be clearly stated on the record, and the judge then be disqualified from proceeding in the matter.

04/04/17 STATE OF NEW JERSEY VS. MICHAEL D. MILLER
A-0459-15T4

Following a bench trial, defendant was convicted of second-degree child endangerment for distributing child pornography, N.J.S.A. 2C:24-4b(5)(a), and fourth-degree child endangerment by possessing child pornography, N.J.S.A. 2C:24-4b(5)(b). In affirming defendant's conviction, we hold that the trial court did not err in allowing a detective, who was not presented as an expert witness, to testify as a fact witness regarding his forensic examination of defendant's computer and defendant's use of peer-to-peer file sharing programs. In any event, any error in the admission of the challenged testimony was harmless as the detective possessed sufficient education, training, and experience to qualify as an expert in the field of computer forensics, and defendant was not surprised or prejudiced by the detective's testimony.

We further hold that, in applying aggravating factor one, N.J.S.A. 2C:44-1(a)(1), the trial court engaged in impermissible double-counting. We also conclude that, under the specific facts presented, defendant's convictions for fourth-degree possession of child pornography and second-degree distribution of child pornography merge. Accordingly, we remand for the court to resentence defendant without consideration of aggravating factor one, and for merger of the two offenses.

04/04/17 N.E., AS LEGAL GUARDIAN FOR INFANT J.V. VS. STATE OF NEW JERSEY, ET AL.
A-3717-13T2

Plaintiff is the legal guardian of a child who was severely and permanently injured by the criminal acts of his biological father. Plaintiff filed a civil action against the Division and a caseworker, and his supervisor claiming it was vicariously liable for the negligent manner these employees investigated plaintiff's allegations of child abuse and parental unfitness. The trial court rejected the Division's argument that its employees are entitled to immunity from civil liability under the Tort Claims Act. A jury found the Division 100 percent liable and awarded plaintiff a total of $165,972,503.

In this appeal, this court is required to determine whether the State of New Jersey can be held vicariously liable based on a Division caseworker's good faith execution of this State's child protection laws. This court holds the Division caseworkers were entitled to the qualified immunity afforded to public employees who act in good faith in the enforcement or execution of any law under N.J.S.A. 59:3-3 of the Tort Claims Act. An ordinary negligence standard is an insufficient basis to impose civil liability on a public employee involved in the execution of the law. For these reasons, this court reverses the jury's verdict and vacates the final judgment entered against defendants.

03/30/17 STATE OF NEW JERSEY VS. MARCUS PERKINS
A-4065-14T3

The Post-Conviction Relief (PCR) Judge determined that defendant's requested appeal was not filed, but declined to accord relief. Following State v. Jones, 446 N.J. Super. 28, 34-35 (App. Div.), certif. denied, ___ N.J. ___ (2016), the court reversed, holding that a PCR judge has the authority to provide a forty-five-day period to file an appeal where

ineffective assistance of counsel caused the failure to file a requested appeal.

03/28/17 RICHMOND LAPOLLA VS. COUNTY OF UNION, ET AL.
A-2411-14T3

Plaintiff claimed to be the victim of political patronage, suffering adverse employment actions in part because his politically active brother sparred with the chairwoman of the Union County Democratic Party. Plaintiff's appeal from the dismissal of his complaint presents the question whether his familial and social affiliations qualify as constitutionally protected conduct that satisfies an essential element of his claims for violation of the New Jersey Civil Rights Act (NJCRA), N.J.S.A. 10:6-1 to -2, and retaliation. We hold that they do not.

03/27/17 STATE OF NEW JERSEY VS. JAMES DENMAN
A-5329-14T1

In this case, we conclude the prosecutor and trial judge erroneously applied the presumption of PTI ineligibility to defendant's pending charge of third-degree attempted misapplication of funds from the Scotch Plains Police Athletic League (PAL), N.J.S.A. 2C:21-15 and 2C:5-1. Defendant, a Scotch Plains police officer, also served as the PAL treasurer. Faced with a financial crisis, he improperly borrowed $18,000 from PAL, but repaid the loan with interest four months later. The following month, the prosecutor learned of the loan and charged defendant. The prosecutor rejected defendant's PTI application, concluding defendant's unauthorized use of PAL's funds constituted a "breach of the public trust," contrary to PTI Guideline 3(i), because "defendant, a police officer, was Treasurer" of PAL, "an organization with a goal of uniting the local police and the local community through youth sports programs." Defendant appealed his PTI denial to the Law Division, which also concluded defendant committed a breach of the public trust. We reverse, concluding the record does not show a breach of public trust, and remand for the prosecutor to consider defendant's PTI application ab initio.

03/27/17 IN THE MATTER OF JOHN RESTREPO, DEPARTMENT OF CORRECTIONS
A-2951-14T4

After an ALJ reduced a corrections officer's disciplinary sanction, the Civil Service Commission (Commission) issued a

preliminary decision within forty-five days and obtained two fifteen-day extensions before issuing its final determination reinstating his termination. His appeal raises the issue of whether the timeliness of Commission decisions in disciplinary cases involving law enforcement officers and firefighters is governed by the recent legislation addressing such cases, N.J.S.A. 40A:14-200 to -212 (2009 Act), or by the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15.

The Appellate Division holds the specific 2009 Act governs the conflicting provisions of the general APA. Under N.J.S.A. 40A:14-204, the Commission's extensions were proper. Its lack of a quorum was an adequate grounds for an extension. Thus, its decision was timely even though its preliminary decision was inadequate. The court upheld the Commission's decision that progressive discipline was not required.

03/24/17 STEVEN CALTABIANO V. GILDA T. GILL
A-2805-16T4

After the voters of Salem County approved a referendum at the November 2016 General Election, pursuant to N.J.S.A. 40:20-20, to reduce the size of the Freeholder Board from seven to five members, the County Clerk determined that the transition procedure would be to place five new freeholders positions on the 2017 ballot, with those elected to take office on the Monday following that election, at which time the terms of all existing freeholders would terminate.

A challenge was brought, and the trial court approved the Clerk's determination. We reversed, holding that the transition should be accomplished by placing on the 2017 ballot only one freeholder position. Because the terms of three existing freeholders expire at the end of 2017, the reduction to five members would thus be accomplished without prematurely terminating the terms of any existing freeholders.

03/23/17 STATE OF NEW JERSEY VS. MELVIN HESTER/MARK WARNER/ ANTHONY MCKINNEY, AND LINWOOD ROUNDTREE
A-0068-16T1/ A-0069-16T1/ A-0070-16T1 AND A-0071-16T1 (CONSOLIDATED)

These four cases involve application of the Ex Post Facto Clauses of the Constitution. The State appealed from orders dismissing indictments charging defendants with third-degree violations of their special sentences of community supervision for life (CSL), N.J.S.A. 2C:43-6.4(d). Before the alleged CSL

violations, the Legislature amended N.J.S.A. 2C:43-6.4. As applied, the amended law retroactively increased defendants' punishment for committing their predicate crimes by raising the degree of the CSL violation from a fourth degree to a third degree, mandating the imposition of Parole Supervision for Life, and subjecting them to extended prison terms.

In affirming the orders, we held that the commission of the predicate crime, for which defendants received the special sentence of CSL, rather than the alleged CSL violation, is the operative "crime" for determining whether the 2014 amended law violated the Ex Post Facto Clauses.

03/22/17 H. JAMES RIPPON VS. LEROY SMIGEL, ESQ., ET AL.
A-2722-15T2

In this case, a Pennsylvania lawyer and his law firm represented plaintiff's spouse in a highly contentious divorce action in Pennsylvania. During that proceeding, the lawyer sent a letter to a New Jersey bank that plaintiff had contacted about obtaining a mortgage on a house he hoped to purchase in New Jersey. Among other things, the lawyer's letter intimated that plaintiff was improperly using marital funds to purchase the home. After the bank denied plaintiff a mortgage, he filed an action in New Jersey against his spouse, the lawyer, and his firm for defamation and tortious interference with contractual relations.

The trial court dismissed the New Jersey action, finding that it did not have jurisdiction over the lawyer and the law firm and that the complaint was barred on the basis of forum non conveniens and the doctrine of res judicata. In this opinion, the court remands the matter to the trial court to permit plaintiff to engage in discovery on the questions of jurisdiction and forum non conveniens. The court also concludes that plaintiff's complaint was not barred on res judicata grounds.

3/21/17 STATE OF NEW JERSEY VS. TARIQ S. GATHERS
A-4772-15T2

The State sought and the trial court granted a motion to require defendant, who had been arrested months earlier on weapons charges and was awaiting trial in the county jail, to provide a buccal swab. The State sought to conduct this search and seizure to compare defendant's DNA with DNA that might be recovered from a weapon found near the crime scene, even though defendant had

provided DNA as a result of a previous conviction. Because of the timing of the request and, among other things, the fact that the State hadn't first determined the presence of useful DNA on the weapon, the court found the search unreasonable and reversed.

03/21/17 STATE OF NEW JERSEY VS. C.W.
A-2415-16T7

In this appeal by the State from a denial of its motion for defendant's pretrial detention, this court addresses several legal issues arising under the new Bail Reform Act, N.J.S.A. 2A:162-15 to -26.

First, the scope of appellate review of a detention decision generally should focus on whether the trial court abused its discretion, but de novo review applies with respect to alleged errors or misapplications of law within that court's analysis.

Second, a defendant's prior history of juvenile delinquency and probation violations is a permissible – and at times especially significant – consideration in the detention analysis.

Third, in appropriate cases, a detention analysis should afford considerable weight to the tier classification of a defendant who has previously committed a sexual offense subject to Megan's Law, N.J.S.A. 2C:7-1 to -23, and whose dangerousness and risk of re-offending have been evaluated on a Registrant Risk Assessment Scale.

Fourth, a Pretrial Services recommendation to detain a defendant does not create, under Rule 3:4A(b)(5), a rebuttable presumption against release that a defendant must overcome. However, as the Rule states, such a recommendation to detain may be, but is not required to be, relied upon by the court as "prima facie evidence" to support detention.

The panel also discusses the Impact of the Judiciary's March 2, 2017 clarification of the two-part recommendation formerly used by Pretrial Services for the highest-risk category of defendants.

The case is remanded to the trial court for reconsideration in light of this guidance, and also to develop the record further on important and unresolved factual questions.

03/15/17 BRIAN SULLIVAN VS. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, ET AL.
A-3506-14T1

Plaintiff filed a complaint against the Port Authority of New York and New Jersey and individual Port Authority employees, alleging retaliation and civil conspiracy in violation of the New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. We affirmed the trial court's grant of summary judgment based on a finding that the Port Authority is not subject to suit under CEPA.

The Port Authority is a bi-state agency created by a compact that prohibits unilateral action by one state without express authorization in the compact or the concurrence of the legislature of the other state. The corollary to this proposition is that the Port Authority may be subject to complementary or parallel state legislation. Under the complementary or parallel legislation principle, one compact state's law can be applied to the bi-state agency if it is substantially similar to the legislation of the other state. If there is no complementary legislation, then it must be determined whether the bi-state agency impliedly consented to unilateral state regulation.

We determined that the compact did not expressly provide for application of CEPA against the Port Authority. We then compared CEPA to the New York Whistleblower Law, N.Y. Lab. Law § 740, and held they were not substantially similar so as to alter the compact. We also held that the clear and unambiguous language in the state legislations creating the Port Authority and the lack of complementary and parallel whistleblower statutes confirmed that New York and New Jersey did not mutually intend to consent to suit against the Port Authority under CEPA.

03/14/17 R.G. VS. R.G.
A-0945-15T3

In the court's review of a final restraining order entered pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, we address the 2015 amendments expanding the jurisdictional scope of the Act, concluding jurisdiction was

established, despite the fact these brothers had not resided together in more than thirty years.

The court also examined the factual support for the final restraining order. We concluded plaintiff's testimony regarding an incident between defendant and his son, which resulted in a New York order of protection, was not automatically admissible pursuant N.J.S.A. 2C:25-29(a)(1), as that provision is limited to the history of domestic violence between the parties and the admission of "a verifiable order" from a foreign jurisdiction. The court held testimony regarding other alleged acts of domestic violence involving third parties are admissible only if permitted by the rules of evidence, including N.J.R.E. 404, which preclude prior bad acts unless admitted as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or the absence of mistake or accident."

03/10/17 175 EXECUTIVE HOUSE, LLC VS. ELESHA MILES
A-1604-15T2

Although tenant received a rent subsidy voucher under the State's Rental Assistance Program (S-RAP) and timely paid her portion of the monthly rent, the landlord obtained a judgment of possession because she failed to pay late fees, attorney's fees and court costs ("additional rent").

The court vacated the judgment of possession, holding that a tenant with an S-RAP voucher cannot be evicted based solely on the non-payment of additional rent because to do so contravenes applicable regulations.

03/08/17 GREG NOREN VS. HEARTLAND PAYMENT SYSTEMS, INC.
A-2651-13T3

In previously ruling on the merits, the court, among other things, dismissed defendant's cross-appeal from the denial of summary judgment because defendant failed to comply with Rule 2:6-1(a)(1), which requires inclusion in the appendix of all items, and a statement of all items, presented to the trial court on the motion for summary judgment. Noren v. Heartland Payment Sys., Inc., __ N.J. Super. __, __ (App. Div. 2017) (slip op. at 14-15). Defendant moved for reconsideration, arguing that the cited Rule refers only to appeals "from a summary judgment," which, in defendant's view, could only mean an appeal from a grant of summary judgment, not a denial. The court denied the motion and rejected defendant's argument, holding that the Rule's critical phrase – "from a summary judgment" –

incorporates appeals from any disposition of a motion for summary judgment.

03/06/17 DIANA ACEVEDO AND REX FORNARO VS. FLIGHTSAFETY INTERNATIONAL, INC., ET AL.
A-1295-14T2

A back pay award under the Law Against Discrimination (LAD) is not to be reduced by the amount of unemployment compensation which the plaintiff has received. The collateral source statute, N.J.S.A. 2A:15-97, does not apply to monetary awards under the Law Against Discrimination (LAD).

03/03/17 GREG AND RENEE MATEJEK VS. MARTHA AND GUY WATSON, ET AL.
A-4683-14T1

In this action, one condominium unit owner sued neighboring unit owners, seeking their participation in an investigation of the site for the purpose of removing the cloud on title imposed by the New Jersey Department of Environmental Protection's open file, which was initiated years earlier when oil was found in a nearby brook. At the conclusion of a bench trial, the judge granted the relief sought by plaintiffs, and one of the neighboring owners appealed, arguing the New Jersey Spill Compensation and Control Act limited plaintiffs' private cause of action to a claim for contribution that required proof of defendants' actual discharge of contamination. The court agreed with the trial judge that an equitable remedy was appropriate -- and not precluded by the Spill Act -- and affirmed the judgment that compelled all the impacted property owners to initially share the cost of an investigation, subject to adjustment by later litigation if necessary.

03/03/17 STATE OF NEW JERSEY VS. JULIAN B. HAMLETT
A-4399-14T2

Defendant challenges the seizure of drugs and a handgun from his Galloway Township motel room pursuant to a search warrant based on probable cause issued by an Atlantic City Municipal Court judge. We hold that although the search warrant application failed to comport with the procedures promulgated for the cross-assignment of municipal court judges pursuant to State v. Broom-Smith, 201 N.J. 229 (2010), defendant's constitutional rights were not violated by the procedural deficiency and therefore suppression of the contraband found in defendant's motel room is not warranted.

We further hold that, with respect to a separate warrantless search of the center console of a rental vehicle defendant was driving, the police were authorized to conduct a limited search for credentials after defendant was unable to produce his driver's license or the vehicle's registration, insurance card, and rental agreement.

03/03/17 STATE OF NEW JERSEY VS. BRANDON KANE
A-2739-13T2

Defendant was convicted of aggravated assault, kidnapping, and other offenses. His victims were his long-time girlfriend and the host of a party they attended. Defendant contends, as his principal point on appeal, that the trial judge mistakenly denied his pre-trial motions to compel production of his girlfriend's mental health and medical records. The court concludes that the requested records were privileged, and defendant failed to demonstrate grounds to pierce the privilege. Furthermore, even apart from issues of privilege, defendant failed to meet the heavy burden the Supreme Court has applied to requests for discovery outside Rule 3:13-3. The court also questions whether any relief would have been appropriate absent notice to the third-party victim whose records defendant sought.

03/01/17 STATE OF NEW JERSEY VS. AMED INGRAM
A-1787-16T6

Defendant appealed from an order detaining him pretrial pursuant to the Bail Reform Act (the Act), N.J.S.A. 2A:162-15 to -26. The State presented the complaint-warrant, the affidavit of probable cause, the Preliminary Law Enforcement Incident Report and the Public Safety Assessment to establish probable cause for defendant's arrest and grounds for detention. Collectively, the documents demonstrated that a firearm had been discharged, police officers personally observed defendant in possession of a gun and seized the weapon and spent shell casings. Pretrial Services recommended that defendant be detained, or released with the highest level monitoring, including electronic monitoring.

Defendant objected, arguing a live witness with knowledge of the incident sufficient to permit meaningful cross-examination was required. The judge overruled the objection,

considered the State's proffered evidence and entered the order of detention.

On appeal, defendant argued that permitting the State to establish probable cause by proffer and without calling a witness violated his due process rights and the Act. The Court disagreed and affirmed the detention order, finding that allowing the State to proceed by proffer did not violate due process or the Act. However, the court noted that at detention hearings under the Act, the judge retains discretion to reject the adequacy of the State's proffer and compel production of a "live" witness.

02/28/17 STATE OF NEW JERSEY VS. ROBERT L. EVANS
A-0489-14T1

In this appeal, we consider the application of the "plain feel" exception to the warrant requirement, Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); State v. Jackson, 276 N.J. Super. 626, 628 (App. Div. 1994), to a strip search that was conducted after defendant was arrested on a warrant for failing to pay a $6.50 traffic fine. In the absence of a warrant or consent, N.J.S.A. 2A:161A-1 prohibits a strip search of a person "detained or arrested for commission of an offense other than a crime" unless the search is based on probable cause and "a recognized exception to the warrant requirement." N.J.S.A. 2A:161A-1. Guidelines issued by the Attorney General's Office set forth even more exacting criteria to be satisfied before a strip search is conducted. We conclude the plain feel exception did not apply and, further, that the seizure of drugs from defendant's person was not objectively reasonable. We reverse defendant's convictions and remand for a hearing to determine whether the search of an automobile pursuant to a search warrant was sufficiently free of taint from the unlawful search and seizure.

02/27/17 STATE OF NEW JERSEY VS. KALIL GRIFFIN
A-3491-15T2

The State appeals, on leave granted, a post-trial order to interview alternate jurors following the jury's return of a guilty verdict against defendant Kalil Griffin on charges of felony murder, robbery, and weapons offenses. Defense counsel sought the interviews after one of the alternates telephoned him after the verdict, claiming several jurors routinely met to discuss the case during the trial. The alternate indicated to defense counsel the jurors participating in those discussions

decided to vote guilty before summations, and claimed she heard the juror who organized them say he was going to make sure defendant did not "get off" like his co-defendant.

Delineating the obligations of a trial judge confronted with allegations of juror misconduct made after verdict as opposed to at trial, the panel concludes the alternate's allegations, even if substantiated, would not support setting aside the conviction. Because the allegations did not warrant the extraordinary procedure of calling back discharged jurors for questioning, it reverses the order and remands for sentencing and the entry of a judgment of conviction.

02/23/17 <u>IN THE MATTER OF TANAYA TUKES, ET AL.</u>
A-3374-14T3

In early 2015, the Department of Human Services closed the Woodbridge Developmental Center and privatized the operation of some State-operated group homes. This decision resulted in the need to lay off, demote, or reassign a number of employees. In this appeal, we reviewed the Department's employee layoff plan, which was approved by the Civil Service Commission, and affirmed the Commission's determination that employees in two job titles had lateral title displacement rights relative to each other.

02/21/17 <u>KATHLEEN WOLENS VS. MORGAN STANLEY SMITH BARNEY, LLC, ET AL.</u>
A-1028-15T1

Plaintiff appeals an order granting summary judgment and dismissing her complaint against her deceased mother's former investment company and its account manager. Plaintiff claims that defendants acted negligently and improperly in carrying out a written request to have her mother's bank accounts changed from accounts solely in her name to joint accounts with one of plaintiff's sisters.

This court affirms the dismissal. It has not been shown that defendants owed or breached any legal duties to plaintiff, who was neither their customer nor a person known to them with whom they had any established contractual or special relationship.

02/16/17 <u>LUCIA SERICO, ET AL. VS. ROBERT M. ROTHBERG, M.D.</u>
A-1717-15T1

In this appeal, we address the viability of a plaintiff's claim for fees under the offer of judgment rule, R. 4:58-1 to -6, after the parties enter into a high-low settlement agreement and the jury returns a verdict in excess of the high. The Law Division denied plaintiff's motion for fees under the Rule because plaintiff and defendant entered into the agreement and plaintiff did not expressly reserve her right to recover fees under the Rule. Based on the court's experience, it found that the "custom and usage" in the practice of law dictated that without evidence of a reservation of rights, a claim under the Rule was waived by entering into a high-low agreement. On appeal, plaintiff contended that although she did not reserve her rights, she did not waive them by entering into the agreement. Defendant argued that plaintiff's failure to reserve her rights gave rise to a waiver or abandonment of any claim she had for attorney's fees and, in any event, as the trial court found, the "custom and usage" practiced in the area provides that such claims are deemed abandoned when a party enters into a high-low agreement.

We concluded that, while the trial court's reliance on its personal experience was misplaced, it correctly determined that the amount of plaintiff's total recovery from defendant was limited by the ceiling imposed by the high-low agreement because plaintiff did not indicate any intention to preserve her claim under the Rule when the parties placed the agreement on the record.

02/14/17 DUNBAR HOMES, INC. VS. THE ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF FRANKLIN, ET AL.
A-3637-14T1

We consider what is required for a submission to a municipal agency to constitute an "application for development" that triggers the protection of the "time of application" statute, N.J.S.A. 40:55D-10.5, a matter of first impression. We reject arguments from the Township that the application must be "complete" and from the applicant that a "substantial bona-fide application which does not constitute a sham" is sufficient. We hold that the definition of "application for development" contained in the Municipal Land Use Law, N.J.S.A. 40:55D-3, is a mandatory term and that, pursuant to that definition, a submission must include "the application form and all accompanying documents required by ordinance for approval" for the "time of application" statute to apply.

02/09/17 MAURA RICCI N/K/A MAURA MCGARVEY VS. MICHAEL RICCI AND CAITLYN RICCI
A-1832-14T1/A-2409-14T1 (CONSOLIDATED)

We reversed Family Part orders requiring divorced parents to pay college tuition costs to their estranged daughter. The child left her mother's home and the parents agreed she was emancipated. Thereafter, the child sought to intervene in the matrimonial action, and the judge concluded the child was "unemancipated" for purpose of college costs, without review of the divergent facts in support of and in opposition to emancipation. He ordered payment of "de minimus" community college costs; a different judge extended this obligation, after a summary proceeding.

Whether a child is unemancipated is a threshold legal determination to a parent's obligation to pay college costs. The required parent-child relationship is one of interdependence: the child's right to support and the parents' obligation to provide payment are inextricably linked to the child's acceptance and the parents' measured exercise of guidance and influence. A finding of emancipation recognizes a child's independence from a parental influence and eliminates the obligation for support.

02/08/17 STATE OF NEW JERSEY VS. HABEEB ROBINSON
A-1891-16T2

The opinion addresses the scope of the discovery which the State must produce prior to a pretrial detention hearing held under the Bail Reform Act, N.J.S.A. 2A:162-15 to -26. Specifically, the court construes Rule 3:4-2(c)(1)(B), which requires the prosecutor to produce "all statements or reports in its possession relating to the pretrial detention application." The court rejects the State's argument that its discovery obligation is limited to producing the probable cause affidavit and the preliminary law enforcement information report (PLEIR). The rule obligates the prosecutor to provide a defendant with those materials in the State's possession that relate to the facts on which the State bases its pretrial detention application. In this case, the probable cause affidavit relied on eyewitness identification of defendant, and the opinion affirms the trial court's order requiring the prosecutor to provide defendant with the two eyewitness statements, photo arrays, a surveillance video, and the initial police reports.

02/08/17 KEAN FEDERATION OF TEACHERS, ET AL. VS. ADA MORELL, ET AL.
A-5481-14T3

In this action in lieu of prerogative writs, plaintiffs alleged the Board of Trustees of Kean University violated the Open Public Meetings Act (OPMA) by delaying ninety-four days and fifty-eight days before releasing the minutes of two Board meetings. On cross-motions for summary judgment, the trial court found the Board violated the "promptly available" standard under N.J.S.A. 10:4-14 of the OPMA. This court affirms. The trial court issued a permanent injunction directing the University to release the Board minutes within forty-five days of each future meeting. This court vacates the injunction, but orders the Board to adopt a meeting schedule for academic year 2017-2018 that will enable it to make its meeting minutes available to the public within thirty to forty-five days, absent extraordinary circumstances.

In Rice v. Union Cty. Reg'l High Sch. Bd. of Educ., 155 N.J. Super. 64, 73 (App. Div. 1977), this court held public bodies were required to send affected employees reasonable advance notice to enable them to (1) make a decision on whether they desire a public discussion; and (2) prepare and present an appropriate request in writing. Here, the trial court ruled that absent any discussion of the employees' status during closed session, or any stated intention to engage in such discussion, the Board is not required to send a Rice notice to the affected employees.

This court now reverses and holds a public body is required to send a Rice notice to all affected employees any time it places on its agenda its intention to take action affecting these employees' employment status. The notice requirement in Rice is predicated on the presumption that members of public bodies will discuss personnel matters and deliberate before reaching an ultimate decision. Not sending a Rice notice stifles the Board's deliberative process, inhibits the robust discussion by individual Board members that the Supreme Court endorsed in S. Jersey Pub. Co. v. N.J. Expressway, 124 N.J. 478, 493 (1991), and creates the impression the Board has colluded to violate the OPMA. As authorized under N.J.S.A. 10:4-16, this court declares the actions concerning personnel matters taken by the Board of Trustees of Kean University at its December 6, 2014 meeting null and void.

02/06/17 JANELLE BRUGALETTA VS. CALIXTO GARCIA, D.O., ET AL.
A-4342-15T1

In this interlocutory appeal, the court reverses the trial court's order piercing the self-critical analysis privilege under the Patient Safety Act, N.J.S.A. 26:2H-12.25(g). The trial court pierced the privilege because defendant hospital failed to report to plaintiff or the Department of Health that plaintiff suffered a "serious preventable adverse event" (SPAE), see N.J.S.A. 26:2H-12.25(a) as the Act required. See N.J.S.A. 26:2H-12.25(c), -12.25(d). In reversing, the appellate panel holds that the self-critical analysis privilege is conditioned solely on compliance with statutory and regulatory mandates governing formation of a patient safety plan and related procedural requirements. N.J.S.A. 26:2H-12.25(g). Furthermore, there was insufficient evidence of causation to support the trial court's finding of a SPAE. Specifically missing was expert evidence that any serious adverse event occurred "because of an error or other system failure." N.J.S.A. 26:2H-12.25(a).

02/06/17 GREG NOREN VS. HEARTLAND PAYMENT SYSTEMS, INC.
A-2651-13T3

In this appeal, plaintiff conceded a jury-waiver provision in his employment contract applied to his breach of contract claim against his employer but argued it did not apply to his claim that defendant violated the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19 to -14. The provision in the employment contract stated the parties "irrevocably waive any right to trial by jury in any suit, action or proceeding under, in connection with or to enforce this Agreement." There was no reference to statutorily conferred rights or to causes of action arising from plaintiff's employment. We conclude the jury-waiver provision failed to clearly and unambiguously explain the right to a jury trial was waived as to a CEPA claim and remand for a jury trial on that issue. We further vacate the counsel fee award to defendant of over $2 million and remand to the trial court to determine what portion of the award is warranted for the defense against the breach of contract claims.

02/02/17 IN THE MATTER OF THE APPLICATION OF THE STATE OF NEW JERSEY FOR COMMUNICATIONS DATA WARRANTS TO OBTAIN THE CONTENTS OF STORED COMMUNICATIONS FROM TWITTER, INC., FROM USERS @ AND @ , ESS-147-CDW-16 AND ESS-148-CDW-16.
A-3651-15T4

The State of New Jersey applied for two communications data warrants (CDWs) seeking the contents of two specific Twitter accounts. The Law Division judge issued both CDWs, however, he edited both to prohibit the State's access to any "oral or aural" components of any videos or video messages contained in the accounts. Relying in large part on our holding in State v. Diaz, 308 N.J. Super. 504, 512 (App. Div. 1998), and manuals issued by the AOC regarding judicial review of requests for CDWs, the judge concluded the such components were "oral communications" under the Wiretap Act, N.J.S.A. 2A:156A-1 to -37, and could not be accessed by a CDW but, rather, only if the State could satisfy the more stringent requirements necessary for the issuance of a wiretap order.

We reversed, concluding the Twitter postings are "electronic communications" in "electronic storage" and accessible with a CDW. The fact that the postings may contain videos that in turn contain the recorded human voice does not alter the inherent nature of the Tweet as an "electronic communication."

02/01/17 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. V.E. IN THE MATTER OF R.S.
A-0586-15T4

Effective April 1, 2013, administrative findings of child abuse or neglect have been expanded, allowing the Department of Children and Families to render one of four findings at the conclusion of an investigation, determining abuse or neglect is: "substantiated," "established," "not established," or "unfounded." N.J.A.C. 3A:10-7.3(c). An "established" finding of abuse or neglect appears to apply to less egregious conduct; however, regulations make clear "[a] finding of either established or substantiated shall constitute a determination by the Department that a child is an abused or neglected child pursuant to N.J.S.A. 9:6-8.21." N.J.A.C. 3A:10-7.3(d) (emphasis added).

The Division administratively "established" a finding of abuse or neglect against appellant, but denied appellant's request for an adjudicatory hearing. Concluding the result of an established finding is accompanied by adverse consequences, which, in part, matches effects of a substantiated finding, we hold a party challenging an "established" finding of abuse or neglect shall be entitled to an administrative hearing.

01/30/17 STATE OF NEW JERSEY VS. AMIE MARROCCELLI

A-5386-13T3

In this appeal from her conviction for vehicular homicide, defendant argued that the trial judge erred in excluding a letter she alleged her husband wrote in which he accepted responsibility, six months after the fact, for driving the car at the time of the accident that caused the victim's death. We concluded that defendant presented a prima facie showing of authenticity based upon her testimony at a Rule 104 hearing that she observed her husband as he wrote and signed the note. Therefore, we held that the judge should have admitted the note into evidence and given the jury the opportunity to subject it and defendant's testimony to more intense review. We also concluded that the trial judge erred in barring defendant from introducing evidence of her driving habits in support of her contention that she was not driving on the night of the accident.

01/27/17 HARRY SCHEELER VS. OFFICE OF THE GOVERNOR, ANDREW J. MCNALLY, ET AL./ HEATHER GREICO VS. NEW JERSEY DEPARTMENT OF EDUCATION, ET AL./ JOHN PAFF VS. NEW JERSEY MOTOR VEHICLE COMMISSION, ET AL.
A-1236-14T3/A-3170-14T4/A-3335-14T3(CONSOLIDATED)

The Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, does not permit government agencies to deny a citizen access to all requests for public records by third-parties, and Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), does not provide authority for the blanket denial of access to all third-party OPRA requests.

01/26/17 IN THE MATTER OF THE ESTATE OF ARTHUR E. BROWN
A-1086-14T4

In this appeal, the decedent was institutionalized in a nursing home, suffering from Alzheimer's disease. His wife, who predeceased him, had disinherited him, and he did not claim his one-third elective share of her augmented estate pursuant to N.J.S.A. 3B:8-1. We affirmed the trial court's denial of entry of judgment discharging a priority lien the Division of Medical Assistance and Health Services filed against the decedent's estate pursuant to N.J.S.A. 30:4D-7.8 for reimbursement of Medicaid benefits the decedent received during his lifetime. We also affirmed the court's calculation of the decedent's elective share.

We determined that the decedent was entitled to an elective share of his deceased wife's augmented estate that included the proceeds from the sale of the couple's former marital home, which had been transferred to the wife as sole owner prior to the decedent's admission into the nursing home. We rejected appellant's argument that N.J.S.A. 3B:8-1 did not apply to the decedent because he and his wife had been living separate and apart at the time of her death, and the couple ceased to cohabit as man and wife under circumstances that gave the wife a cause of action for divorce under N.J.S.A. 2A:34-2(d) or (f). We also rejected appellant's argument that the decedent's estate had no right to an elective share because that right was personal to him and could only be exercised during his lifetime as per N.J.S.A. 3B:8-11.

We rejected appellant's alternative argument that the decedent's elective share was zero because the proceeds from the sale of the former marital home were excluded from the wife's augmented estate under N.J.S.A. 3B:8-5. Lastly, we rejected appellant's argument that the value of some of the decedent's assets should be deducted from his elective share.

01/26/17 STATE OF NEW JERSEY VS. JAMES J. MAUTI
A-3551-12T3

A jury found defendant guilty of third degree aggravated criminal sexual contact and fourth degree criminal sexual contact and not guilty of first degree aggravated sexual assault and second degree sexual assault. Defendant is a physician. The complaining witness is his sister-in-law. We reverse and remand for a new trial.

We hold the trial judge should have excluded a towel containing defendant's semen based on the absence of competent evidence linking it to the alleged sexual assault. The towel also constituted inadmissible hearsay by conduct under N.J.R.E. 801(a)(2).

The judge also abused his discretion by permitting the State to call five fresh-complaint witnesses and thereafter deciding not to instruct the jury on fresh-complaint testimony. Defense counsel’s acquiescence to the trial judge’s decision not to charge the jury on fresh-complaint did not constitute invited error.

Finally, we conclude that the trial court properly admitted a redacted version of a letter sent by defense counsel to the

prosecutor as an adopted admission under N.J.R.E. 803(b)(3). Under these circumstances, we reject defendant's argument that defense counsel's letter falls within the ambit of "plea negotiations," as that term is used in N.J.R.E. 410. Our analysis is guided by the federal courts' review of Fed. R. Evid. 410, the source rule of N.J.R.E. 410.

As a matter of first impression in this State, we adopt the analytical approach used by the Fifth Circuit Court of Appeals in United States v. Robertson, 582 F.2d 1356, 1366 (5th Cir. 1978) to determine when interactions between the State's representative and defense counsel constitute protected "plea negotiations" under N.J.R.E. 410. This approach requires a trial judge to determine: (1) whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion; and (2) whether the accused's expectation was reasonable given the totality of the objective circumstances. The State bears the burden of proof. Because this two-tiered approach requires a fact-sensitive analysis, the trial judge should conduct an N.J.R.E. 104 hearing to resolve any disputed facts.

01/18/17 LINDA TISBY VS. CAMDEN COUNTY CORRECTIONAL FACILITY/ LINDA TISBY VS. CAMDEN COUNTY, ET AL.
A-0326-15T3/A-0344-15T3(CONSOLIDATED)

In this case, we affirm the dismissal of two complaints filed by a Camden County Corrections Officer who was removed from her position because she wore a khimar with her work uniform, consistent with the practice of her faith. Based on the reasoning of the trial judges, we find an accommodation would impose an undue hardship on defendants based upon safety and security concerns, and the second dismissal was appropriate based upon the entire controversy doctrine.

Plaintiff filed her complaint alleging violations under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49, asserting defendant's failure to accommodate sincere religious beliefs, and a complaint in lieu of prerogative writ seeking reinstatement and back pay. After considering arguments, the trial judge recognized plaintiff's sincerely held religious belief, but dismissed the complaint, determining an accommodation would impose an undue hardship on defendants because of overriding safety and security concerns of the prison and the importance of uniform consistency and neutrality.

A different judge dismissed the second prerogative writ complaint, citing the entire controversy doctrine because plaintiff's complaints were only slightly distinguishable and should have been heard as one action.

Reviewing federal authority touching on this issue, we conclude summary judgment dismissal was correctly entered. Any "inference of discrimination" based on the rejection of the accommodation request grounded on plaintiff's sincerely held religious beliefs was soundly rebutted by the employer's evidence of risks to safety, security and maintaining orderly objective operations in the prison. Further, plaintiff offered no proof of pretext. See Zive v. Stanley Roberts, Inc.; 182 N.J. 436, 447 (2005) (adopting burden shifting test set forth in McDonnell Douglass Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)).

01/10/17 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. S.W. AND R.W.
IN THE MATTER OF AL.W, AN.W., M.W. AND N.W.
A-4020-14T4

In this Title Nine matter, the date of defendant's fact-finding hearing was advanced from September 12 to September 11, 2013. There is no indication that defendant was advised of the date change and he did not appear for the hearing. Defendant's counsel agreed to proceed with a fact-finding hearing "on the papers." Based solely on documents submitted by the Division, the judge found defendant abused or neglected his four children when he relapsed and used cocaine after his arrest for failure to pay child support for the four children who were in his custody.

After defendant's arrest, the children were cared for by their older siblings and then taken to their mother's house. The children were not harmed and there was no proof that defendant's use of cocaine exposed any of the children to imminent danger or a substantial risk of harm.

There was also no evidence that defendant knowingly waived his right to a fact-finding hearing and agreed to have the judge decide whether he abused or neglected his children solely based on her review of reports prepared by Division caseworkers. Because statutory and constitutional rights are impacted when a defendant waives the right to testify on his own behalf, to call witnesses, to cross-examine witnesses who testify against him, and to have a judge make credibility determinations, there is no

reason why the protections afforded to defendants entering stipulations of abuse or neglect announced in Div. of Youth & Family Servs. v. M.D., 417 N.J. Super. 583, 617-18 (App. Div. 2011), should not be required when a defendant waives the right to a fact-finding hearing.

Even where a defendant makes a knowing waiver and agrees to a determination on the papers, the judge must reject the abbreviated procedure and proceed with a testimonial hearing if the record contains conflicting facts critical to the determination.

01/10/17 DOMINIC ANDALORA, ET AL. VS. R.D. MECHANICAL CORP., ET AL. VS. SWIFT CONSTRUCTION, LLC
A-3724-14T4

This case addresses a series of procedural errors in the handling of insurance coverage issues relating to a construction accident lawsuit. Once the injury lawsuit was settled, the general contractor's (gc's) insurer, which had contributed to the settlement under protest, was the real party in interest with respect to an action seeking reimbursement of its contribution from the subcontractor's insurer. The trial court erred in dismissing, with prejudice, the gc's contractual indemnification lawsuit against the subcontractor. Thereafter, the gc's insurer sued the subcontractor in its own name. On this appeal, the appropriate remedy was to amend the order on appeal to a without-prejudice dismissal, and permit the insurer to pursue its own complaint as subrogee.

01/09/17 SAMUEL KIRKPATRICK, JR., ET AL. VS. HIDDEN VIEW FARM AND DOROTHY NESTI
A-1585-15T3

This appeal concerns whether the personal injury liability immunity the Legislature created under the Equestrian Activities Liability Act (the "Equine Act"), N.J.S.A. 5:15-1 to 12, applies to a minor who accompanied family members to a horse farm but who did not personally take part in any horse-related activity there. The minor was bitten by another boarder's horse as he walked by its stall. His mother was nearby in the stable at the time, cleaning out the adjacent stall of her own horse.

The trial court held that the Equine Act's statutory immunity applied to this situation, and granted summary judgment to the defendant horse farm and its owner. We agree with the

court that although the minor did not ride or take care of any horses the day he was bitten, his role in accompanying his mother and sister, who were engaged themselves in such equine activities, placed him within the immunity statute's broad definition of a covered "participant," N.J.S.A. 5:15-2. Consequently, we affirm.

01/09/17 STATE OF NEW JERSEY VS. ISAAC A. YOUNG
A-1857-14T4

In this case of first impression, a jury convicted defendant of permitting or encouraging the release of a confidential child abuse record, a fourth-degree offense, N.J.S.A. 9:6-8.10b, hindering his own apprehension or prosecution by giving a false statement to law enforcement, a disorderly persons offense, N.J.S.A. 2C:29-3(b)(4), and fourth-degree false swearing by inconsistent statements, N.J.S.A. 2C:28-2(a). Defendant, a municipal official, had obtained a DYFS child abuse investigation report that had been in the police department's files through an anonymous source and shared the document with others for political purposes. There was no evidence that defendant had received the document from DYFS or had encouraged its release to him. We construed N.J.S.A. 9:6-8.10a and N.J.S.A. 9:6-8.10b and determined that defendant's conduct was not subject to the statutes' prohibitions or penalties. We therefore reversed defendant's conviction for that offense. We did not, however, vacate either of defendant's other two convictions, finding that the reversal of the one did not require the other convictions be vacated.

12/29/16 FDASMART, INC. VS. DISHMAN PHARMACEUTICALS, ET AL.
A-2800-15T3

In this breach of contract action, we reverse the trial judge's finding that suit against defendant Dishman Pharmaceuticals can be maintained in New Jersey. Dishman Pharma is an Indian corporation; Dishman USA is a subsidiary incorporated in New Jersey. Plaintiff is a Delaware corporation.

The transaction between plaintiff and Dishman Pharma involved the potential purchase of Dishman Pharma's manufacturing facility in China. All negotiations and meetings between the parties occurred in India; the memorandum of

understanding provided for the submission and payment of fees in India.

We disagree that Dishman USA was an alter ego of its parent company so as to require Dishman Pharma to be subject to suit in New Jersey. To determine if it is appropriate to pierce the corporate veil and find Dishman USA to be the alter ego of its parent, we apply the test set forth in State, Dept. of Envtl. Prot. v. Ventron, 94 N.J. 473 (1983) and the factors of Pfundstein v. Omnicom Grp. Inc., 285 N.J. Super. 245 (App. Div. 1995). Plaintiff has failed to meet its burden that Dishman Pharma dominated the subsidiary so that it had no separate existence. We also find plaintiff failed to present proofs of fraud concerning the creation of the subsidiary. Therefore, we conclude that the trial judge erred in finding jurisdiction over Dishman Pharma as an alter ego of its subsidiary.

We also reverse the trial judge's determination that in personam jurisdiction exists as a result of personal service of process executed upon an employee of Dishman Pharma when he came to New Jersey for the purpose of attending his deposition for this litigation. Despite that service, plaintiff must still satisfy the minimum contacts requirements with New Jersey for jurisdiction to attach.

12/29/16 STATE OF NEW JERSEY VS. LEE E. MOORER
A-2922-14T1

The Appellate Division holds that failure to deliver a controlled dangerous substance to a law enforcement officer, N.J.S.A. 2C:35-10(c), is not a lesser-included offense of possession of a controlled dangerous substance offense, N.J.S.A. 2C:35-10(a).

The Appellate Division also rules that under N.J.R.E. 803(a)(2)'s hearsay exception for consistent statements to rebut "recent fabrication," fabrication is "recent" if the fabrication or motive to fabricate post-dates the prior consistent statement. The Appellate Division also reiterates that New Jersey has never adopted a strict temporal requirement for the admission of consistent statements.

12/20/16 STATE OF NEW JERSEY VS. TERRI HANNAH
A-5741-14T3

Defendant was charged with hitting the victim in the face with her shoe. At trial, the State introduced a screenshot

taken by the victim of a "tweet" allegedly posted by defendant after the incident saying "shoe to ya face." Defendant argues that this Twitter posting was improperly admitted into evidence, citing a Maryland case requiring that such social media postings must be subjected to a greater level of authentication. The Appellate Division rejects that contention, holding that New Jersey's current standards for authentication are adequate to evaluate social media postings. Under those standards, it was not an abuse of discretion to admit the tweet based on the presence of defendant's photo and Twitter handle, its content containing information specific to the parties involved, and its nature as a reply to the victim's communications.

12/20/16 ANDRE DE GARMEAUX, ET AL. VS. DNV CONCEPTS, INC. T/A THE BRIGHT ACRE, ET AL.
A-1400-14T1

In this case of first impression, we were called upon to determine, among other arguments, whether prevailing plaintiffs in a Consumer Fraud Act (CFA) action are entitled to attorney's fees incurred in defense of a counterclaim. The trial court's decision included consideration of those fees in arriving at the quantum of the award. As we conclude that the defense of the counterclaim was inextricably intertwined with the defense of the CFA claim, consideration by the trial court of the attorney's fees incurred by plaintiffs for that purpose was proper.

12/15/16 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. S.G.IN THE MATTER OF A.G. AND G.W.G.
A-2533-14T3

Defendant S.G. appeals the trial court's finding that she abused or neglected her two-year-old daughter, in violation of N.J.S.A. 9:6-8.21(c). The trial court found that because defendant permitted drug use and drug dealing in the home where she and her daughter resided, and took no discernable steps to mitigate her daughter's exposure, her conduct was reckless and put her child at substantial risk of harm.

No witnesses testified at the fact-finding hearing. The parties agreed to forego the presentation of witnesses and to have the trial court decide material facts in dispute based solely on redacted copies of a police report detailing the events leading up to and occurring on the date of the drug raid and investigation summaries prepared by the Division of Child Protection and Permanency.

Since a determination of abuse and neglect requires a fact-sensitive analysis of particularized evidence, we hold that witness testimony was necessary to provide the court with the necessary facts to determine whether defendant exercised the requisite minimum degree of care under the circumstances. Merely reciting information found in redacted documentary evidence does not constitute fact-finding. This is especially so when there are unresolved and disputed details regarding facts of consequence to the determination of an abuse or neglect finding. Thus, although the parties acquiesced to a trial "on the papers," the court would have been better equipped to perform its role as fact-finder had these matters been developed more fully with evidence at a testimonial hearing.

12/14/16 STATE OF NEW JERSEY VS. MICHAEL RICHARD POWERS
A-3764-14T2

Defendant was convicted after a trial in municipal court, and again on appeal to the Law Division, of obstruction based on both physical interference and an "independently unlawful act." N.J.S.A. 2C:29-1(a). The court remanded for findings that might illuminate the judge's conclusory determination that defendant physically interfered with a state trooper in the issuance of a parking ticket at a highway rest stop. The court, however, also held that defendant, in these circumstances, could not be convicted of obstruction by means of "an independently unlawful act" that was based solely on N.J.S.A. 39:4-57, which provides that "[d]rivers of vehicles . . . shall at all times comply with any direction . . . of a member of a police department" when the officer is in the course of "enforcing a provision of this chapter." Defendant was outside his vehicle and, therefore not a driver, and the trooper was not enforcing Chapter 39 because he was only issuing a parking ticket.

12/07/16 DEBRA WARREN, ET AL. VS. CHRISTOPHER P. MUENZEN M.D., ET AL.
A-1949-15T4

In 2009, the Legislature amended the Survivor Act, N.J.S.A. 2A:15-3, for the first time including a statute of limitations requiring "[e]very action" under the Act "be commenced within two years after the death of the decedent . . . ." The 2009 Amendment also provided that if the death was a homicide, an action against "a defendant [who had] been convicted, found not guilty by reason of insanity or adjudicated delinquent . . . may be brought at any time." In this regard, the 2009 Amendment

mirrored an earlier amendment to the Wrongful Death Act (the WDA).

We granted leave to appeal in this case, in which plaintiff, executrix of her husband's estate, filed a medical malpractice complaint alleging causes of action under the Survivor Act and the WDA. The complaint was not filed within the two-year statute of limitation applicable to bodily injury, N.J.S.A. 2A:14-2, but was filed within two years of the decedent's death. In reversing the motion judge's denial of partial summary judgment to defendant on the Survivor Act claims, we concluded that construing the 2009 Amendment literally would lead to absurd results, contrary to the Legislature's stated intention when adopting the 2009 Amendment and contrary to a number of statutes of limitation found elsewhere in Title 2A.

12/06/16 DONNA SLAWINSKI VS. MARY E. NICHOLAS
A-0710-15T1

Defendant challenges the Family Part's exercise of continuing exclusive jurisdiction, implicating provisions of the Uniform Interstate Family Support Act (the Act), now codified at N.J.S.A. 2A:4-30.124 to - 30.201. Defendant maintains orders modifying child support must be vacated because she relocated to North Carolina, depriving New Jersey of jurisdiction.

The Act as recently amended, includes provisions regarding a New Jersey tribunal's authority to modify a controlling child support order when parents and child no longer reside in the state. See L. 2016, c. 1, eff. April 1, 2016. In this matter, we conclude the facts support the Family Part's authority to exercise continuing exclusive jurisdiction as the prior version of the Act, now repealed, was in effect and permitted the modification of the previously issued child support order. Were the current Act applied, under these facts New Jersey would also have jurisdiction. However, we are compelled to observe the amendments altered the foundations when individuals and the child leave New Jersey, possibly leaving a jurisdictional gap if there is no agreement among the parties as was shown here.

12/06/16 ANIL K. LALL VS. MONISHA SHIVANI

This appeal involves a parent's effort terminate a grandparent's visitation, which had been allowed pursuant to a consent order. We hold that a parent's rights, which the Court recognized in Moriarty v. Bradt, 177 N.J. 84, 114-15 (2003), do

not empower a parent to terminate or modify a consent order unilaterally. Rather, a request to modify or terminate visitation by consent order must be considered in accordance with the Lepis framework. That is, a parent must make a prima facie showing of changed circumstances as would warrant relief. If the parent vaults that threshold, the parent bears the burden to show the modification or termination would not cause harm to the child.

12/05/16 J.S. VS. D.S.
A-5742-14T2

Defendant appealed a domestic violence final restraining order (FRO), claiming it was void upon entry – despite the parties' settlement of matrimonial issues that included defendant's consent to the FRO – because the judge did not find an act of domestic violence had occurred. A few days before the scheduled date for oral argument in this court, the parties stipulated to a dismissal of the appeal that would allow for the perpetuation of the FRO. Notwithstanding their agreement, the court exercised its discretion, pursuant to Rule 2:8-2, and determined that the interests of justice required a disposition of the appeal's merits; the court vacated the FRO due to the lack of a finding of domestic violence, reinstated the TRO, and remanded for a final hearing.

12/05/16 MARK R. KRZYKALSKI, ET AL. VS. DAVID T. TINDALL
A-2539-14T3/A-2774-14T3(CONSOLIDATED)

Plaintiff commenced this personal injury suit against defendant, whose vehicle rear-ended plaintiff's, as well as a fictitious defendant, an unknown driver, who had cut across the lane in which plaintiff was driving to make a left turn. The trial judge permitted the jury to determine whether both defendant and the unknown driver were negligent and, if so, to ascertain their respective responsibility for plaintiff's injuries; both were found negligent, and the unknown driver was found 97% responsible. The court held that the trial judge properly allowed the jury to apportion responsibility between the known and unknown defendants, extending Cockerline v. Menendez, 411 N.J. Super. 596 (App. Div.), certif. denied, 201 N.J. 499 (2010), which differed only because, in Cockerline, the plaintiff had already settled with the UM insurer and thereby fixed the unknown driver's contribution, and here no such settlement was reached and no proceedings had occurred with respect to the UM carrier.

Judge Leone filed a concurring opinion.

12/01/16 COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO VS. NEW JERSEY CIVIL SERVICE COMMISSION
I/M/O JOB BANDING FOR SOFTWARE DEVELOPMENT SPECIALIST 1 AND 2, AND NETWORK ADMINISTRATOR 1 AND 2, OFFICE OF INFORMATION TECHNOLOGY
I/M/O CHANGES IN THE STATE CLASSIFICATION PLAN AND JOB BANDING REQUEST, DEPARTMENT OF TRANSPORTATION
A-4912-13T3/A-3041-14T3/A-0230-15T3/A-0232-15T3/ A-0274-15T3/ A-0275-15T3 (CONSOLIDATED)

The New Jersey State Legislature and other parties challenged several administrative agency decisions rendered by the Civil Service Commission (CSC) pertaining to a Job Banding Rule (the Rule), N.J.A.C. 4A:3-3.2A. The CSC adopted and implemented the Rule after the Legislature invoked its veto power, pursuant to N.J. Const. art. V, § 4, ¶ 6 (the Legislative Review Clause), finding in numerous concurrent resolutions that the Rule conflicted with the Civil Service Act (CSA), N.J.S.A. 11A:1-1 to 12-6, which incorporated the text of N.J. Const. art. VII, § 1, ¶ 2.

We concluded that the Legislature is entitled to substantial deference when it exercises its constitutional power to invalidate an administrative rule or regulation pursuant to the Legislative Review Clause. We held, however, that we may reverse the Legislature's invalidation of an administrative executive rule or regulation if (1) the Legislature has not complied with the procedural requirements of the Legislative Review Clause; (2) its action violates the protections afforded by the Federal or New Jersey Constitution; or (3) the Legislature's concurrent resolution amounts to a patently erroneous interpretation of "the language of the statute which the rule or regulation is intended to implement."

We reversed the decisions and concluded that the Legislature validly exercised its authority under the Legislative Review Clause. We therefore set aside the Rule, in all of its amended forms.

11/22/16 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. G.S. AND K.S. IN THE MATTER OF A.S. AND B.S.
A-5222-15T2/A-5223-15T2 (CONSOLIDATED)

We review the Family Part's series of orders that concern the potential need to disqualify one or both staff attorneys from the Office of Parental Representation ("OPR") who respectively represent the father and the mother in defending this child welfare case. The conflict-of-interest questions were prompted by defendants' advocacy of competing parenting plans for the future care of their twin children.

With some modification, we affirm the trial judge's determination to conduct a hearing to explore the conflict and waiver issues that arose in this particular case.

We agree with the OPR, the Office of Law Guardian, and the amicus New Jersey State Bar Association that, with appropriate screening measures, the law does not categorically prohibit or even presumptively disfavor two staff attorneys working out of the same OPR regional office from separately defending each of the parents in child welfare cases. In addition, when a significant divergence arises between the parents during the course of such litigation, the actual or potential conflict often may be mutually waivable by those clients, with appropriate consultation and substantiation of that waiver.

We further conclude that the trial court has an appropriate institutional role in assuring that the zealous independence of the staff attorneys will not be compromised, and that the confidentiality of client communications and attorney work product will be scrupulously maintained. The court retains the authority and discretion to conduct a hearing to explore such matters on a case-by-case basis to address specific instances where particularized concerns have arisen about the propriety of ongoing representation by the staff attorneys or the sufficiency of any client waivers.

11/21/16 STATE OF NEW JERSEY VS. CHARLES WHEATLEY
A-5026-14T1

Distinguishing State v. Reiner, 180 N.J. 307 (2004), we hold that a defendant who was previously convicted of driving while intoxicated (DWI) in a school zone in violation of N.J.S.A. 39:4-50(g) is subject to the increased penalties applicable to second offenders under N.J.S.A. 39:4-50(a)(2) when he was subsequently convicted of a conventional DWI in violation of N.J.S.A. 39:4-50(a).

11/14/16 STATE OF NEW JERSEY VS. RICHARD RIVASTINEO
A-3720-15T2

Based on the plain language of the statute as well as the rule of lenity, the State is precluded from aggregating the weight of cocaine and heroin to achieve a higher degree of crime pursuant to N.J.S.A. 2C:35-5(c).

11/09/16 STATE OF NEW JERSEY IN THE INTEREST OF A.R.
A-2238-14T3

Appellant, a fourteen-year-old juvenile, was found guilty of sexually touching a seven-year old boy on a bus returning from summer camp. The alleged victim was developmentally comparable to a three-year-old. After getting off the bus, he blurted out to his mother's cousin that appellant had touched him during the ride. Eighteen days later, a detective interviewed the younger child on videotape at the county prosecutor's office. The child repeated the accusation, demonstrating it with anatomical dolls. No eyewitnesses on the bus, including the driver and aide, corroborated the incident.

At a pretrial Rule 104 hearing, the court ruled that both of the child's hearsay statements were sufficiently trustworthy to admit under the "tender years" hearsay exception, N.J.R.E. 803(c)(27). The court then queried the younger child at the start of the trial about his ability to discern and tell the truth. The court twice concluded from the child's troublesome responses that he was not competent to testify under the criteria of N.J.R.E. 601. Nevertheless, the court accepted the child's hearsay statements and trial testimony repeating the accusations, based on the so-called "incompetency proviso" in Rule 803(c)(27), which treats children of tender years as available witnesses even if they are not competent to testify.

We conclude that the younger child's statements during his recorded interview with the detective were "testimonial" under the Confrontation Clause, as construed by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004), and its progeny. The objective "primary purpose" of the interview was to elicit and preserve statements from an identified child victim of sexual abuse about wrongful acts for potential use as evidence in a future prosecution. The child's testimonial statements to the detective here are distinguishable from the non-testimonial statements that a young child victim made to her teachers at school in Ohio v. Clark, 135 S. Ct. 173 (2015).

Although appellant's counsel attempted to cross-examine the child, that exercise was inadequate to safeguard his confrontation rights, given the child's undisputed incompetency. Hence, we reverse the admission of the detective's interview and the child's in-court testimony because it violated appellant's constitutional rights. However, as appellant concedes, the child's spontaneous assertion after getting off the bus was not testimonial under the Confrontation Clause and was properly admitted. We remand for the trial court to reconsider the proofs in light of our determinations.

11/07/16 IN THE MATTER OF THE PETITION OF SOUTH JERSEY GAS COMPANY FOR A DETERMINATION PURSUANT TO THE PROVISIONS OF N.J.S.A. 40:55D-19./ IN THE MATTER OF THE PETITION OF SOUTH JERSEY GAS COMPANY FOR A CONSISTENCY DETERMINATION FOR A PROPOSED NATURAL GAS PIPELINE
A-1685-15T1/A-2705-15T1/A-2706-15T1

There is sufficient credible evidence in the record to support the decision of the Board of Public Utilities that the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163, and any local regulations adopted pursuant to the MLUL shall not apply to a pipeline that South Jersey Gas proposes to construct in the Pinelands, but the Board mistakenly relied upon a decision by the Executive Director of the Pinelands Commission (Commission), who found that construction of the pipeline was consistent with the requirements of the Pinelands Comprehensive Management Plan, N.J.A.C. 7:50-1.1 to -10.35, because the Executive Director did not have authority to render a final decision for the Commission on that issue. Therefore, the matter is remanded to the Commission for review of the Executive Director's decision, and the Board is directed to issue an amended order, stating that its approval of the pipeline is conditioned upon issuance by the Commission of a final decision finding that the pipeline satisfies the requirements of the CMP.

11/04/16 THE ESTATE OF FRANCIS P. KENNEDY, ET AL. VS. STUART A. ROSENBLATT, C.P.A., ET AL.
A-5397-15T4

This interlocutory appeal involves a conflict-of-interest issue that arose after plaintiffs' attorney, who had filed and dismissed a professional negligence action while at his former firm, recommenced the action after joining his new firm, which had represented a defendant in the original action. That defendant, now represented by the same individual attorneys (who had since joined another firm) moved to disqualify plaintiffs'

new firm under RPC 1.10(b), on the basis that attorneys there had information protected by RPC 1.6 and RPC 1.9 material to the action, namely, electronically stored confidential documents.

Construing RPC 1.10(b) in light of recent amendments to RPC 1.6 (confidentiality of information) and its commentary, we concluded the senior member of plaintiff's new firm/defendant's former firm, who reviewed the electronically stored file to determine if a conflict existed, could review the metadata (defined in RPC 1.0 (p)) and document titles without violating RPC 1.10(b); but could not review the substantive content of the documents without violating RPC 1.10(b). We remanded the matter for a determination of that issue.

We also suggested the Advisory Committee on Professional Ethics review what obligation the defendant's attorneys had upon leaving their former firm to assure the client's information was secure and would not be improperly accessed.

11/02/16 <u>CUMBERLAND FARMS, INC. VS. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.</u>
A-4335-14T2

In this opinion, we conclude that plaintiff, the owner of convenience stores and gas stations throughout the State, failed to establish that it had an enforceable settlement agreement with the New Jersey Department of Environmental Protection ("the DEP") that purportedly resolved natural resource damage claims the DEP had asserted under the New Jersey Spill and Compensation Act, N.J.S.A. 58:10-23.11 to -23.50. Although the DEP sent plaintiff a draft settlement agreement for review, plaintiff never formally responded to the DEP's overtures and never sought to participate in the negotiations necessary to complete the process.

We also address the applicability of N.J.S.A. 58:10-23.11e2 to the settlement process. That provision, which went into effect in April 2006, requires the DEP to publish public notice concerning the terms of a proposed settlement at least thirty days prior to its agreement to any settlement. Here, we hold that the parties never agreed upon the terms of the settlement and, therefore, the DEP was not required to publish notice of the proposed settlement pursuant to the statute. However, we make clear that had the parties agreed upon the settlement terms and published those terms for public comment, the DEP would have had the authority to thereafter consummate, withdraw from, or

modify the agreement based upon the responses received during the public comment period.

10/21/16 A.M.C. VS. P.B.
A-4730-14T3

The Family Part found defendant physically assaulted his wife twice over a three-week period. Applying the two-prong analysis in Silver v. Silver, 387 N.J. Super. 112, 125–27 (2006), the judge found an FRO was not necessary to protect plaintiff from future acts or threats of violence. We hold the Family Part failed to adequately consider the inherently violent nature of the predicate acts. Under these circumstances, the need to issue an FRO was "self-evident." Silver, supra, 387 N.J. Super. at 127.

Defendant, a Newark Police Officer, was not served with the TRO. Notwithstanding defendant's failure to object, N.J.S.A. 2C:25-28l, N.J.S.A. 2C:25-28n, and the Domestic Violence Procedures Manual makes the Judiciary responsible to serve defendant with the TRO. We hold the trial court had an obligation to determine what caused this systemic failure. We further hold the trial court erred as a matter of public policy when it considered the Judiciary's failure to carry out this legal responsibility as a factor in favor of denying plaintiff's application for an FRO.

10/19/16 NEW JERSEY TRANSIT CORPORATION VS. MARY FRANCO, ET AL.
A-3802-12T4

Plaintiff condemned a property comprised of parcels in three municipalities. The trial court's just compensation award was based on the "highest and best use" of placing apartment buildings on the parcels in two municipalities and placing a driveway on the lots in the third municipality, whose zoning did not allow apartment buildings. The Appellate Division held that use of those lots for a private driveway servicing adjacent lots was itself a "use" and would require a use variance from the third municipality. Offering to dedicate the driveway as a public street would similarly require acceptance by the third municipality. Thus, the condemnee was required to show a reasonable probability the third municipality would have granted acceptance or a use variance, even if the driveway's design complied with the Residential Site Improvement Standards.

The escrow for environmental cleanup of a condemned property should be based on the remediation needed to achieve the highest and best use of the property used to calculate the condemnation award, rather than the condemnor's intended or actual use, with any unspent funds returned to the condemnee.

10/19/16 PETRO-LUBRICANT TESTING LABORATORIES, INC., and JOHN WINTERMUTE VS. ASHER ADELMAN, d/b/a eBossWatch.com
A-5214-14T4

In August 2010, defendant published an article on his website reporting on a complaint filed against plaintiffs by an employee containing allegations of gender discrimination and a hostile workplace environment. Over a year later, counsel for plaintiffs threatened defendant with a defamation lawsuit if the article was not removed. In response, defendant made minor changes to the article and re-posted it in December 2011. Although there was slightly different wording in the two articles and the title was changed, the allegedly defamatory content and substance was the same, and to some extent lessened.

The legislative purpose of favoring a short statute of limitations would be defeated if immaterial changes to an Internet post, that is viewed on a far wider scale and for an indefinite period of time than is traditional mass media, were to result in a retriggering of the statute of limitations on each occasion. Therefore, the statute of limitations will only be triggered if a modification to an Internet post materially and substantially alters the content and substance of the article.

The modifications made by defendant in the second article were intended to diminish the defamatory sting of the previously reported allegations. If a minor modification diminishes the defamatory sting of an article, it should not trigger a new statute of limitations.

The single publication rule is applicable, and the complaint filed in June 2012 is barred as untimely, as the statute of limitations commenced with the posting of the original article in August 2010. The grant of summary judgment to defendant is affirmed.
The dismissal of defendant's counterclaim for retaliation is also affirmed. Defendant did not have standing under the NJLAD to assert a claim of retaliation as he had no relationship with the aggrieved employee nor had he aided or encouraged her in

asserting her rights; he was a publisher who claimed to have objectively reported on an employment litigation.

10/04/16 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. J.D., JR. AND J.G. IN THE MATTER OF J.D., III
A-3716-14T4

Defendant J.D., Jr. appeals the trial court's finding that he abused or neglected his ten-year-old son, in violation of N.J.S.A. 9:6-8.21(c). No witnesses testified at the fact-finding hearing. The parties agreed to forego the presentation of witnesses and to have the trial court decide the disputed matter based solely on redacted copies of police reports of the incident and investigation summaries prepared by the Division of Child Protection and Permanency.

In this appeal, the court rejects defendant's belated challenge to the admission of the documents as barred by the invited error doctrine. The court also applies the principle that hearsay is generally evidential if no objection is made. Here, the trial judge gave the appropriate weight to the objectionable hearsay, and the record supports the judge's finding that defendant abused or neglected his son by leaving him unattended in a vehicle in the late evening while defendant entered a bar, became intoxicated, and attempted to flee the police.

The court nonetheless expresses concern over the dangers inherent in adjudicating contested trials based solely on documentary evidence. The procedure employed here, that is, submitting redacted documents in lieu of testimonial evidence, does not lend itself to the resolution of disputed factual issues or credibility determinations. Thus, even when the parties acquiesce to a trial "on the papers," the court cautions that fact-finding hearings that bear upon the welfare of children must still adhere to fundamental rules of evidence and be conducted with the formality and decorum attendant to any other adjudicative proceeding.

09/29/16 MIDLAND FUNDING LLC A/P/O WEBBANK VS. ROBERTA BORDEAUX
A-0850-14T3

Plaintiff filed a civil action in small claims court to collect the full amount of a consumer debt's alleged outstanding balance. The issue in this appeal concerns the enforceability of an arbitration clause that plaintiff claims was part of the original creditor's consumer credit application form.

Plaintiff's sole evidence of the arbitration agreement's existence consists of two single-spaced, photocopied pages that do not bear defendant's signature or any other indicia of her assent. The trial court enforced the arbitration clause, relying only on a certification in which a "Legal Specialist" employed by plaintiff attested that the two pages were in the records of plaintiff's predecessor in interest.

We reverse. Relying on Atalese v. U.S. Legal Serv. Grp., L.P., 219 N.J. 430, 442 (2014), cert. denied, ___ U.S. ___, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015), we hold that plaintiff failed to prove that defendant knowingly waived her constitutional right to adjudicate this dispute in a court of law.

09/21/16 STATE OF NEW JERSEY VS. BRIAN A. GREEN
A-2656-12T3

In this appeal from a conviction for possession of marijuana with intent to distribute, we address the question of whether the holding in State v. Cain, 224 N.J. 410 (2016), should be applied retroactively to cases still pending on appeal.

Based upon our review of the language used by the Supreme Court in Cain and in State v Simms, 224 N.J. 393 (2016), as well as other post-Odom decisions by the Court, we conclude Cain's holding must be given pipeline retroactivity, and applied to all cases pending on direct appeal.

09/20/16 STATE OF NEW JERSEY VS. STEVEN RIZZITELLO
A-0536-15T2

Defendant was indicted on a single count of fourth-degree operating a motor vehicle during the period of license suspension for a second or subsequent conviction for driving while intoxicated, in violation of N.J.S.A. 2C:40-26(b). The State appeals from the order of the trial court which admitted defendant into PTI over the prosecutor's veto. We reverse. The prosecutor's decision to reject defendant's application for admission into PTI did not constitute "a patent and gross abuse of discretion" as defined by the Supreme Court in State v. Roseman, 221 N.J. 611, 625 (2015).

However, we reject the prosecutor's characterization of the fourth degree offense under N.J.S.A. 2C:40-26(b) as falling

within the crimes that by their very nature carry a presumption against admission into PTI.

09/20/16 MYRNA B. TAGAYUN AND ROBERT S. MANDELL v. AMERICHOICE OF NEW JERSEY, INC., ET AL.
A-1628-13T1 (NEWLY PUBLISHED)

In this matter the trial court awarded counsel fees against two pro se plaintiffs for the filing of two complaints, pursuant to N.J.S.A. 2A:15-59.1(a)(1) and Rule 1:4-8(a), which allow an award of counsel fees when a pleading filed by a non-prevailing party is frivolous. When the original complaint was dismissed by the court as lacking merit, the plaintiffs filed both a second complaint and an appeal. We concluded the award of counsel fees was appropriate for the filing of the second complaint, but not for the first complaint.

We explain the history of the frivolous pleading sanctions and the need to strictly construe the term "frivolous" to avoid litigants becoming afraid to access the courts because of a fear they may be sanctioned if they pursue a good faith, but misguided claim.

09/19/16 STATE OF NEW JERSEY IN THE INTEREST OF JUVENILE, I.C.
A-5119-13T1

In this appeal and cross-appeal, we address the issue of whether a juvenile was entitled to credit on his suspended sentence for the time he spent in a residential community home program as part of his probationary sentence to the Juvenile Intensive Supervision Program ("JISP"). We also consider whether the juvenile should have been granted credit on his sentence for the period during which he participated in the JISP following his completion of the community home program.

Based upon our review of the record and applicable law, we hold that the juvenile was not entitled to credits for either of these periods. Therefore, we affirm the trial judge's decision denying the juvenile's request for credits for his time in the community home program, and reverse the judge's decision granting the juvenile credits for the period he participated in the JISP.

09/14/16 LEONIDES VELAZQUEZ VS. CITY OF CAMDEN AND OFFICER ALEXIS RAMOS
A-4627-13T4

We reverse the no-cause verdict in this New Jersey Civil Rights Act action brought by the victim of a police shooting against a Camden police officer and the involuntary dismissal of the case against the officer's employer, City of Camden, on the basis of two critical evidentiary errors.

First, the trial court, over plaintiff's objection, permitted an assistant prosecutor who headed the homicide unit to testify that after reviewing the investigation of the shooting, he determined not to criminally prosecute the officer. The obvious import of that testimony was that the prosecutor believed the officer's shooting of plaintiff was a justifiable use of force. We conclude the assistant prosecutor's opinion was clearly inadmissible under the lay opinion rule, N.J.R.E. 701, and because the jury could very well "have ascribed almost determinative significance to that opinion," Neno v. Clinton, 167 N.J. 573, 587 (2001), the error could not be considered harmless.

Second, the trial court barred plaintiff from making any reference to the officer's mental health records, reasoning that because excessive force claims are analyzed under the Fourth Amendment's "objective reasonableness" standard, the officer's subjective state of mind was irrelevant to whether his use of force was objectively reasonable under the circumstances. Plaintiff, however, never sought to use the records to challenge the officer's subjective motivation in firing on him. Instead, plaintiff sought to use the records to challenge the officer's perceptions and his ability to make observations, a classic use of extrinsic evidence to impugn a witness's credibility under N.J.R.E. 607.

We conclude that interpreting the "objective reasonableness" standard for evaluating excessive force claims so expansively as to preclude a cross-examiner from probing whether the officer's psychiatric symptoms affected his ability to accurately perceive the events giving rise to the claim, was error. Because the ruling severely prejudiced plaintiff in his ability to prove his excessive force claim against the officer and gutted his Monell claim against the City, we reverse the verdicts in defendants' favor and remand for a new trial.

09/12/16 LISA LOMBARDI VS. ANTHONY A. LOMBARDI
A-3624-13T1

This appeal required us to address the calculation of alimony where the parties relied on only a fraction of their

household income to pay their monthly expenses and regularly saved the balance during the course of their marriage. It is well-established that the accumulation of reasonable savings should be included in alimony to protect the supported spouse against the loss of alimony. See Jacobitti v. Jacobitti, 135 N.J. 571, 582 (1994); Martindell v. Martindell, 21 N.J. 341, 354 (1956); Davis v. Davis, 184 N.J. Super. 430, 437 (App. Div. 1982). In this case, we considered whether the parties' history of regular savings as part of their marital lifestyle requires the inclusion of savings as a component of alimony even when the need to protect the supported spouse does not exist.

The Family Part found that the monthly savings were part of the marital lifestyle, but excluded the amount from its calculation of alimony because savings were not necessary to ensure future payment of alimony. We disagreed with the court's decision and held that regular savings must be considered in a determination of alimony, even when there is no need to create savings to protect the future payment of alimony.