DATE NAME OF CASE (DOCKET NUMBER)

09-04-07 In the Matter of R.A.
A-4106-06T1

Held that In the Matter of R.D., 384 N.J. Super. 61 ((App. Div. 2006) does not authorize a different trial judge to alter a previously adjudicated Megan's Law Tier Assessment and Community Notification Determination where there are no facts previously unknown or undisclosed to the judge who made the initial determination. It also clarifies the scope of the phrase "household/family member" as used in the Registrant Risk Assessment Scale.

08-31-07* State of New Jersey vs. Ahmet S. Kotsev
A-3256-05T5

1. N.J.S.A. 39:4-50 mandates a minimum of ninety consecutive days incarceration for a third or subsequent conviction for driving while intoxicated (DWI). Sheriff's Labor Assistance Programs (SLAP) and weekend service are not substitute sentencing options for third or subsequent offenders.

2. The 1993 statute mandated a third or subsequent offender to serve 180 days incarceration "except that the court may lower such term for each day, not exceeding ninety days, served performing community service." No other options are available.

3. The 2004 amendment to N.J.S.A. 39:4-50, commonly referred to as Michael's Law, similarly mandates 180 days incarceration but allows a reduction of one day for each day, not exceeding ninety days, in an inpatient rehabilitation program.

In other words, a third or subsequent DWI conviction requires a defendant to serve a minimum of ninety consecutive days of incarceration.(*Approved for Publication date)

08-29-07 J.H. v. Mercer County Youth Detention Center, et al.
A-3637-05T2

We hold that a county youth detention center is a "person standing in loco parentis within the household" of a detained juvenile within the meaning of the Child Sexual Abuse Act (CSAA), N.J.S.A. 2A:61B-1. We further hold that the New Jersey Tort Claims Act provisions, N.J.S.A. 59:2-10 and N.J.S.A. 59:9-2 (c) and (d), do not bar a juvenile detainee's compensatory and punitive damages cause of action under the passive abuser

liability provision of the CSAA against the county youth detention center and the county that operates the center, where a worker with supervisory authority sexually abuses a child under the age of eighteen years and those in supervisory authority knowingly permit or acquiesce in the child sexual abuse.

08-28-07 M.S. v. Millburn Police Department, et al.
A-5601-05T1

The prohibition set by N.J.S.A. 2C:58-3c(8) that a Firearms Purchase Identification card shall not be issued "[t]o any person whose firearm is seized pursuant to the 'Prevention of Domestic Violence Act of 1991' . . . and whose firearm has not been returned," survives even if, as in the case here, the domestic violence restraining order is vacated.

08-27-07 Borough of Glassboro v. Fraternal Order of Police Lodge No. 108, et al.
A-3145-05T2

When two police officers apply for the same promotion in a non-civil service municipality, residency may be considered by the appointing authority only where the resident and nonresident achieve the same score on a qualifying test. N.J.S.A. 40A:14-122.6.

08-24-07 Mortimer Hetsberger v. Department of Corrections, et al.
A-4813-05T1

We reverse and remand a summary judgment dismissal because the trial court did not apply the two-part standard of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C.A. § 2000cc-1, in determining whether genuine issues of material fact existed. The State prison inmate had pleaded RLUIPA and the trial court was obliged to determine whether DOC regulations regarding security threat groups and its actions in respect of this plaintiff are (1) "in furtherance of a compelling governmental interest; and (2) . . . the least restrictive means of furthering that compelling governmental interest." The trial court's application only of First Amendment standards did not satisfy the statutory requirements.

08-24-07 Carol Jones, et al. v. Department of Community Affairs, et al.
A-0701-05T3

Constitutional questions should not be considered in a vacuum in the absence of a well-developed record isolating the essential factual issues at their basis and including findings of fact. Constitutional questions necessary to the complete resolution of contested case issues may be considered, in the first instance, in an administrative proceeding.

08-23-07 Danilo Arias v. Freddy Figueroa, et al.
A-1866-05T5

The close questions involved in weighing the relative governmental interests of New Jersey and New York to determine which jurisdiction's rule of vicarious liability governs a car rental company's amenability to suit, in the circumstances, is resolved by a determination that the New York statutory rule was not intended to apply extra-territorially.

08-16-07* Sandra W. Seigel v. The New Jersey Department of Environmental Protection

In this opinion, we were called upon to interpret regulations promulgated by the Department of Environmental Protection (DEP) that define a "dune," N.J.A.C. 7:7E-3.16(a), and a "primary frontal dune," N.J.A.C. 7:7-7.8(d)1ii.

Petitioner's applied for a coastal general permit under the Coastal Area Facility Review Act (CAFRA) seeking permission to construct a single-family oceanfront home. The agency concluded that the entirety of petitioner's property was a "primary frontal dune," and denied the permit.

We reversed. We interpreted the regulatory definitions and concluded that petitioner's entire property was not a "primary frontal dune" and determined that the proposed construction area was not on a dune and, therefore, not subject to regulatory restrictions.

We also concluded that DEP's interpretation of the regulatory language resulted in a fundamental unfairness to petitioner whose surrounding neighbors had constructed similar homes on their adjacent properties. (*Approved for Publication date)

08-15-07 Department of Environmental Protection v. Johan Kafil, et al.
A-5364-05T2

We reverse the trial court's holding that, before DEP may file a civil action seeking injunctive relief remediating alleged Spill Act and USTA violations, it must first employ its own extensive regulatory power in administrative proceedings.

08-14-07 State of New Jersey v. Jay C. Fisher
A-3026-05T3

Pursuant to N.J.S.A. 2C:11-5.1, a driver involved in a motor vehicle accident that results in the death of another person is guilty of a crime if the driver fails to comply with the requirements of N.J.S.A. 39:4-129. The driver must either remain at the scene to provide his or her driving credentials to designated persons or report the accident and his or her identity to the nearest officer of the local police department, county police or the State Police. Compliance with those requirements would preclude prosecution under N.J.S.A. 2C:11-5.1.

Moreover, compliance with those requirements would not violate the driver's privilege against self-incrimination. As the United States Supreme Court recognized in California v. Byers, disclosure of name and address is essentially a neutral act and most accidents occur without creating criminal liability. Under the facts of this case, there was no reasonable basis for the driver to apprehend prosecution, inasmuch as the decedent had been crouching or lying near the middle of the road. If, under different facts, compliance with the statutory requirements did pose a legitimate risk of self-incrimination, it might be necessary to accord compliant drivers use or derivative-use immunity as outlined in State v. Patton.

08-10-07 OFP, L.L.C. v. State of New Jersey
A-3190-05T1

The Highlands Act's administrative hardship waiver remedy must be exhausted before a property owner can assert a claim that the Act's restrictions upon development in the preservation area of the Highlands Region have resulted in a regulatory taking. The retroactive application of the Highlands Act to major development projects that received all required regulatory approvals under other statutes during the period between the Act's introduction and enactment is valid.

08-10-07 Essie Wilson v. Paradise Village Beach Resort and Spa, et al.

A-3055-05T5

A Mexican resort's participation in advertisements placed by airlines and travel agencies in newspapers distributed in New Jersey and the resort's maintenance of websites that can be accessed by New Jersey residents do not constitute sufficient contacts with New Jersey for our courts to exercise jurisdiction over a claim that does not arise out of those contacts.

08-09-07 Roslyn Quarto, et al. v. Maureen Adams, et al.
A-3904-06T1

The transitional issue presented in this appeal is whether the Division of Taxation ("the Division") is compelled by Lewis v. Harris, 188 N.J. 415 (2006), and the subsequent enactment of New Jersey's civil union act, L. 2006, c. 103 ("the Civil Union Act"), to permit a same-sex couple, married in another jurisdiction before that statute's February 19, 2007 effective date, to file a joint New Jersey gross income tax return for income they earned in calendar year 2006.

Appellants, who are New Jersey residents, were united in a same-sex marriage in Canada in 2003. Guided by the Attorney General's Formal Opinion No. 3-2007 (regarding New Jersey's recognition of same-sex unions from other jurisdictions), the Acting Director of the Division denied appellants' request to file a joint New Jersey tax return for their 2006 earnings.

Although appellants are entitled to declaratory relief concerning future tax years, we hold that the Division is not required to treat appellants' 2006 income as joint income. We are satisfied that the Division may utilize a reasonable transition period to conform its forms and procedures to the constitutional and statutory principles espoused in Lewis v. Harris, supra, and in the Civil Union Act. We also note that the Acting Director's determination comports with established administrative practices of looking to the familial status of wage earners, for taxation purposes, during the calendar year that their income was earned.

Judge Stern has filed a concurring opinion. The concurrence expresses reservations about denying appellants, as partners in a legally-recognized civil union, the right to file a joint tax return after February 19, 2007, but defers to the Supreme Court's remedial prerogatives.

08-09-07 Dennis Pryor v. Department of Corrections

A-1707-04T5

N.J.A.C. 10:18A-9.6 which permits the Administrator of the Adult Diagnostic and Treatment Center to withhold from inmates "material that is not sexually oriented" when it will "impede the rehabilitation of the inmate(s)," is facially constitutional, and N.J.A.C. 10A:16-4.4, concerning "inmate-therapist confidentiality," does not violate the Eighth Amendment, but may require a warning as to use in light of the Sexual Violent Predator Act.

08-08-07 Fayette Fair Trade, Inc. t/a Club 41 v. Governing Body of the City of Perth Amboy
A-2429-06T5

Petitioner Fayette Fair Trade, Inc. appeals from a final determination of the Director of the Division of Alcoholic Beverage Control (ABC) suspending its license based on a finding of an undisclosed business interest in the license, and the licensee's failing to disclose that interest in the application, or providing false, misleading or inaccurate information about it. At issue in this appeal is whether a licensee's employee who runs the day-to-day operations of the licensed premises with little or no oversight from the owner of the corporation licensee and who shares in the licensee's profits, but is not a shareholder, holds an impermissible undisclosed beneficial interest in the liquor license in violation of N.J.S.A. 33:1-25. The ABC Director found unlawful conduct, and we affirm.

08-06-07 Citizens United to Protect the Maurice River and Its Tributaries, Inc., et al. v. City of Millville Planning Board, et al.
A-4204-05T2

The process by which a planning board determines whether a general development plan (GDP) "will not have an unreasonably adverse impact on the area in which it is proposed to be established," see N.J.S.A. 40:55D-45d, is intended to be general in nature and to provide the increased flexibility desirable to promote mutual agreement between a developer and planning board regarding the basic scheme of a planned development. Consideration should be from the standpoint of probable feasibility, with more detailed presentation deferred until subsequent applications for preliminary site plan and subdivision approvals.

Applying this standard, the planning board had before it sufficient evidence to support its determination that the proposed GDP will not have an unreasonably adverse impact, and we affirm the Law Division order upholding the board's approval.

08-03-07 In the Matter of Expungement Application of G.R.
A-0079-06T1

N.J.S.A. 2C:35-5a(1), criminalizes the knowing or purposeful possession of a CDS "with intent to manufacture, distribute or dispense" to another. The statute does not draw a distinction between distributing or dispensing to another in exchange for money and a gratuitous transfer of the narcotics. Either conduct constitutes the crime as defined by N.J.S.A. 2C:35-5a(1). However, for purpose of expungement, it does make a difference. A sale of CDS is a bar to expungement; but a transfer for no consideration is not. Therefore, we hold that the facts must be examined to determine if the underlying possession of the CDS was with intent to sell, as opposed to dispense or distribute without a sale.

A judgment of conviction for possession of a CDS "with intent to dispense or distribute" contrary to N.J.S.A. 2C:35-5a(1), by itself is not conclusive of intent to sell or intent to dispense for no consideration. The description of the offense in the judgment of conviction does not aid the judge in deciding whether the statutory bar applies in a given situation. To the extent that State v. P.L., 369 N.J. Super. 291 (App. Div. 2004) makes such a suggestion, we disagree with that opinion.

08-02-07 Danna Goldhaber, et al. v. Charles Kohlenberg
A-5114-05T2

New Jersey may exercise jurisdiction over defendant, a California resident with no contacts in New Jersey, who allegedly posted defamatory messages about plaintiffs, New Jersey residents, on an on-line news group.

08-01-07 In re Adoption of N.J.A.C. 12:17-9.6 by the State of New Jersey Department of Labor
A-4026-05T3

This appeal challenges the facial validity of N.J.A.C. 12:17-9.6, a regulation promulgated by the Department of Labor and Workforce Development, which provides that employees who leave their employment to participate in "a written voluntary layoff and/or early retirement incentive policy or program . . .

so that another employee may continue to work" are qualified to receive unemployment compensation benefits. We hold the regulation is invalid as a matter of law as it contravenes the legislative policies underlying the Unemployment Compensation Act, N.J.S.A. 43:21-1 to -71, and is inconsistent with the Supreme Court's interpretation of N.J.S.A. 43:21-5(a) in Brady v. Board of Review, 152 N.J. 197 (1997).

07-31-07 In re Vioxx Litigation
A-1731-06T1

We affirm the order of Judge Higbee dismissing the VIOXX-related claims of 98 plaintiffs residing in the U.K. on grounds of forum non conveniens.

07-31-07 Ocean Seniors, L.L.C., etc. v. Township of Ocean Sewerage Authority, etc.
A-6495-05T3

We affirm the decision by Judge Lehrer to reject a challenge by the developer of age-restricted condominium apartments to the method used to calculate the sewerage connection fees applicable to the condominium development. In our opinion, we rely on established precedent to hold that the Authority's determination to impose the same connection fee both upon single-family residences and upon age-restricted apartments does not violate equal protection. We also reject the developer's argument that the calculation of "service units" should have taken into account customer communities that had entered into contracts with the Authority for bulk treatment services, basing our rejection principally on Judge Lehrer's reasoning, as set forth in his opinion, which is published along with ours.

07-31-07 State of New Jersey v. Ernest Spell
A-4186-05T5

While the record supports the conviction for refusal to take a breathalyzer test, N.J.S.A. 39:4-50.2, and the conviction is affirmed, effective October 1, 2007 officers must read the additional paragraph of the statutorily promulgated statement of the Motor Vehicle Commission before any refusal conviction can be sustained.

07-31-07 Jeanne Klawitter and Dennis J. DeBonis v. City of Trenton
A-0208-05T5

This appeal by the City of Trenton presents two distinct issues regarding employment-related claims by two members of the Trenton Police Department.

Klawitter's claim of reverse discrimination based on race in the denial of a promotion resulted in a jury verdict in her favor. We affirmed. We rejected the City's argument that it was permissible to use race as a "plus" factor. The City maintained at trial that race was not a factor in any respect. It did not present evidence or argue that race was considered as a plus factor. Further, race can be used as a plus factor only pursuant to an established affirmative action plan. The City did not establish the existence of such a plan.

DeBonis, a sergeant, filed for retirement but, within thirty days of the effective date, sought to cancel his retirement as authorized by a pension regulation, N.J.A.C. 17:4-6.3, and requested to be rehired to a vacant sergeant position. The City refused, informing DeBonis that, pursuant to civil service regulations, his name could be placed on a reemployment list. The trial court granted partial summary judgment on liability in favor of DeBonis and a jury awarded him damages. We reversed, holding that DeBonis' right to cancel his retirement under pension regulations did not entitle him to immediate reemployment, which, instead, was controlled by priorities promulgated by civil service laws and regulations.

07-30-07 Taysir Sheika v. New Jersey Department of Corrections
A-4124-05T3

A "Service of Suit" clause in a commercial insurance policy is not a forum selection cause and does not preclude the insurer from filing first in the jurisdiction in which the insurer resides.

07-30-07 Christie L. Schorpp-Replogle v. New Jersey Manufacturers Insurance Company
A-0915-05T2

We consider whether tinnitus, often described as "ringing in the ears," may be compensable under our State's workers' compensation laws, N.J.S.A. 34:15-1 to -128, in the absence of a compensable hearing loss.

We hold that tinnitus qualifies as a compensable disability under N.J.S.A. 34:15-36, provided that (1) the condition is due

in a material degree to exposure to harmful noise at the employee's workplace, (2) materially impairs his or her working ability or is otherwise serious in extent, and (3) is corroborated by objective medical testing despite the mainly-subjective nature of the affliction. Tinnitus meeting those requirements is compensable, even if the employee does not also have a sensorineural loss of hearing below the decibel levels specified as disabling by the Occupational Hearing Loss Act ("OHLA"), N.J.S.A. 34:15-35.10 to -35.22.

07-27-07* Helen Crespo v. Jimmy Crespo
A-4359-05T1

The question presented is whether a supporting parent's payments against child support arrears should be suspended where the parent is disabled and his or her only income is SSI benefits. Following Burns v. Edwards, 367 N.J. Super. 29 (App. Div. 2004), we held that the parent's payments against arrears are to be suspended until such time as the parent has the ability to pay the arrears from income or assets, actual or imputed, other than SSI. (*Approved for Publication date)

07-27-07 Nationwide Mutual Fire Insurance Company v. Nicholas Fiouris, et al.
A-5458-05T2

N.J.S.A. 39:6A-5.1, which provides for arbitration of disputes regarding PIP benefits upon the demand of either the insured or the insurer, does not apply to a dispute regarding alleged fraud in the procurement of the policy.

07-27-07 Vineland Construction Company, Inc. v. Township of Pennsauken, et al.
A-3136-05T2

Pennsauken Township determined that approximately 600 acres of waterfront property, including 137 acres owned by plaintiff, was in need of redevelopment. The Township designated a master redeveloper for the entire area. Plaintiff does not challenge the Township's determination that the area is in need of redevelopment or the Township's redevelopment plan. It argues that it should be permitted to develop its own property as part of the redevelopment project and not be subject to eminent

domain proceedings to turn its property over to the master redeveloper.

We held that plaintiff does not have a constitutional right to redevelop its own property, and, once it is determined that the property is in need of redevelopment, thus establishing a public purpose, the municipality has the authority under the LRHL to condemn the property and designate a master redeveloper to execute the redevelopment plan if the municipality reasonably concludes that such action is necessary or convenient. The record established a reasonable basis here, and we owe judicial deference to the legislative decision.

Judge Holston filed a dissent.

07-26-07 State of New Jersey v. Richard Wilson, et al.
A-5618-05T1
-consolidated with-
State of New Jersey v. James Franklin, et al.
A-5622-05T1
-consolidated with-
State of New Jersey v. Regina Charles, et al.
A-5625-05T1

In these appeals by a corporate surety from bail forfeiture orders, we hold that the bright-line distinction, for purposes of exoneration or remittance of bail, between non-appearing defendants found to be in custody out-of-state and in-state has lost its significance. We thus find State v. Erickson, 154 N.J. Super. 201 (App. Div. 1977), no longer to be a proper expression of the law. We remand the matters for further consideration of whether bail can be exonerated or remitted at the time the defendant is located in out-of-state custody and a detainer is lodged, or whether such relief must await the defendant's return to New Jersey.

We also suggest that it is inequitable for the State, which has resources for locating defendants that are not available to recovery agents, to fail to notify the court and the surety when a defendant has been found in out-of-state custody, since the absence of such notification may affect the entry of orders of forfeiture and the costs of recovery expended by the surety.

07-26-07 Vincent L. Gamba v. Township of Brick
A-4384-05T1

We consider a municipality's statutory obligations to afford notice and a hearing prior to demolition of a privately owned building it deems unsafe, N.J.S.A. 40:48-2.5; N.J.S.A. 40:48-2.7, and conclude that the Township did not meet or substantially comply with its obligations in this case.

07-26-07 State of New Jersey v. Alex Banks
A-2983-05T4

Defendant was convicted by a jury and contends that the trial court erred in removing a deliberating juror and substituting an alternate after the initial panel declared its inability to reach a unanimous verdict and the court delivered a Czachor charge. We conclude that when a question about a juror's "inability" to proceed arises after the jury has informed the court that it cannot agree on a verdict, the trial court should rely on the presumption that the jurors have deliberated in accordance with the initial charge and any additional instructions that can be given consistent with Czachor. If the jurors cannot reach a verdict thereafter, then mistrial should be granted.

07-23-07 Dennis M. Sammarone v. James J. Bovino; Town & Country Developers, Inc., et al.
A-6287-05T1

Plaintiff sued to collect commissions promised to him for effectuating an introduction to Leona Helmsley and her key personnel, resulting in defendants' purchase of a valuable tract of land in Fort Lee owned by the Helmsley interests. The trial court granted defendants' motion to dismiss for failure to state a claim because plaintiff is not a licensed real estate broker. We reversed, finding that plaintiff should have the opportunity to attempt to develop a record to establish that denying him a commission would unfairly benefit defendants and not further the purpose of N.J.S.A. 45:15-3.

07-23-07 In re Christine V. Bator, Commissioner, Board of Public Utilities
A-5028-05T2

Appellant, a Commissioner of the Board of Public Utilities, appeals from a decision of the State Ethics Commission advising that she must recuse herself from any matters in which her sister's work product is involved. Appellant's sister is a BPU employee within the Division of Energy, holding the position of Chief of the Bureau of Rates and Tariffs.

We affirmed, holding that there is a disqualifying conflict of interest here because appellant's sister has a significant role in matters assigned to her Bureau. Thus, allowing appellant to participate in matters on which her sister worked, creates a reasonable public impression that appellant's judgment as a member of the Board Public Utilities may be tainted or at least influenced by personal considerations.

07-20-07 Commercial Insurance Company of Newark v. Mary Steiger, et al.
A-1314-05T1

Decedent perished in a one-car collision. His Estate sued the vehicle's manufacturer, alleging the products liability theory that the death occurred because the vehicle was not "crash worthy." After the products liability suit was settled, the Estate filed a UM claim, alleging that the accident was caused by a "phantom" vehicle. UM insurer filed a declaratory judgment action to preclude the UM claim on several grounds.

We hold that the Estate is not barred from pursuing a UM claim based on the doctrines of judicial estoppel, which applies when a party has convinced a court to accept its position. The doctrine does not apply here because a settlement does not imply endorsement of a party's position by the court.

We also hold that the settlement of the products liability claim without the consent of the UM insurer does not bar the UM claim because the products liability defendant is neither an uninsured motorist nor the owner of an uninsured vehicle.

Lastly, we hold that, in order to avoid a double recovery, the UM insurer is entitled to a credit for the amount of the products liability settlement.

07-20-07 State of New Jersey v. Raul D. Lopez
A-4469-04T4

The mandatory minimum sentence requirement in the last paragraph of N.J.S.A. 2C:13-1c(2), for certain categories of kidnapping, twenty-five years without parole, is not amenable to a sentence downgrade under N.J.S.A. 2C:44-1f(2).

07-20-07 In the Matter of Civil Commitment of J.M.B., SVP-358-04
A-6458-03T2

J.M.B. was civilly committed under the Sexually Violent Predator Act, N.J.S.A. 30:4-27.24 to -.38. He appealed his initial commitment, alleging he was wrongfully committed because none of his convictions were sexually violent offenses as defined by N.J.S.A. 30:4-27.26. Held that subsection (b) is a catchall provision permitting the psychiatric experts and the court to consider the factual circumstances of the offenses in making the determination of whether the committee committed sexually violent offenses and was a sexual predator under the Act.

07-19-07 New Jersey Property-Liability Insurance Guaranty Association v. Hill International, Inc.
A-6335-05T2

In this appeal, we determine whether the New Jersey Property-Liability Insurance Guaranty Association (PLIGA) is liable for a claim filed by the issuer of a surety bond, which acted as the guarantor of the performance of a subcontractor in a school construction project.

We hold that the direct negligence claim asserted by the surety against the company now insured by PLIGA is a covered claim under both the policy issued by the insolvent carrier, and the statute defining what is a compensable, covered claim against PLIGA. By so doing, we reject PLIGA's argument that the surety's claim here is analogous to the subrogation claim asserted by the workers' compensation carrier in Sussman v. Osterhoff, 232 N.J. Super. 306 (App. Div.), certif. denied, 117 N.J. 143 (1989).

07-19-07 Bogey's Trucking & Paving, Inc., et al. v. Indian Harbor Insurance Company, et al.
A-2529-05T3

We consider the automobile exclusion in a CGL policy and conclude that the business's auto insurer, not the CGL insurer, owed a duty to defend and indemnify. We also determine that a passenger in the insured dump truck, who left that truck to direct its driver and was hit by the driver of an insured car was "occupying" the dump truck and is entitled to UM coverage.

07-18-07 State of New Jersey v. Tammy Buczkowski
A-4671-05T1

We apply the Supreme Court's dictum in State v. Fisher, 180 N.J. 462, 474 (2004), that N.J.S.A. 39:5-3a requires service of process within thirty days from the date of the alleged offense in most instances of charged motor vehicle violations. We, therefore, affirm the Law Division's dismissal of a charge of reckless driving, N.J.S.A. 39:4-96, as untimely. We also apply the doctrine requiring "[t]he government [to] 'turn square corners' in its dealings with the public."

07-18-07 Builders League of South Jersey, Inc. v. The Township of Franklin, et al.
A-1247-05T5

The issue before us is whether a municipality may devise a transfer of development rights program other than as authorized by the State Transfer of Development Rights Act, N.J.S.A. 40:55D-137 to -163. We held that it may not; therefore, the de facto transfer of development rights program adopted by the municipality based on a provision of N.J.S.A. 40:55D-65c that allows a municipality to adopt standards for planned developments that include clustering of development between noncontiguous parcels is invalid.

07-18-07 M.F. v. Department of Human Services, Division of Family Development
A-6771-04T2

After the death of the minors' mother, the Camden County Board of Social Services reduced Temporary-Assistance-to-Needy-Families benefits which had been paid to appellant prior to the mother's death under the Work First New Jersey Act, N.J.S.A. 44:10-44 to -78, on the ground that one of the two minors was not the biological child of appellant, nor did appellant have a legal relationship with that child. Appellant contended that he was the psychological parent of that ten-year-old child because the child and his mother had lived with appellant for nine years before the mother's death. Relying on V.C. v. M.J.B., 163 N.J. 200, cert. denied, 531 U.S. 926, 121 S. Ct. 302, 148 L. Ed. 2d 243 (2000), appellant argued that psychological parenthood is a legal relationship within the policy objectives of the Work First New Jersey Act and that he was entitled to receive benefits for his psychological child.

We held that the Work First New Jersey Act and the regulations promulgated thereunder specifically require that a legal relationship must exist pursuant to a court order and that neither a county social services agency nor the Department of

Human Services could recognize a de facto psychological parental relationship. Such a psychological-parent relationship may be established through a Kinship Legal Guardianship proceeding, N.J.S.A. 3B:12A-1 to -7, after which the kinship legal guardian would be eligible for benefits under the Kinship Care Subsidy Program, N.J.A.C. 10:90-19.1(a), (c). We determined that the V.C. decision did not require agency recognition of psychological parenthood because the statutory and regulatory scheme of the Work First New Jersey Act expressly required a court order and one could readily be obtained by psychological parents under the Kinship Legal Guardianship Act.

07-17-07 Robert Flick v. PMA Insurance Company, et al.
A-0202-06T1

Although an order of a judge of compensation may be enforceable in the Law Division pursuant to R. 4:67-6, petitioner's civil action here arising out of a compensation judge's orders was properly dismissed because he failed to exhaust his administrative remedies in the Division of Workers' Compensation, including but not limited to N.J.S.A. 34:15-28.1 and N.J.S.A. 12:235-3.14.

07-17-07 Cramer Hill Residents Association, Inc., et al. v. Melvin R. Primas, et al.
A-5486-05T3

Plaintiffs are a homeowner's association and individual homeowners in the City of Camden. They filed a legal challenge seeking to invalidate an ordinance authorizing the City to acquire property by eminent domain, under the authority of N.J.S.A. 52:27D-325, of the Fair Housing Act.

We hold that under express language of N.J.S.A. 52:27D-325, the City has the authority to acquire private property by eminent domain without having to obtain a substantive certification from the Council on Affordable Housing (COAH) provided for in N.J.S.A. 52:27D-313. We nevertheless remand for the trial court to conduct a fact-finding hearing to determine whether the proposed land acquisition plan authorized by the ordinance actually increases the number of affordable housing units in the City.

07-17-07 New Century Financial Services, Inc. v. Lee B. Dennegar
A-5403-05T5

In this non-jury matter, the trial judge held defendant liable for a credit card debt despite his contention that he never applied for or used the credit card. On appeal, the court concluded that the credible evidence supported the trial judge's determination that defendant either expressly applied for the card, or authorized his roommate -- to whom he ceded authority over his finances -- to apply for and use the card. The court held that the consequence of any misuse or fraudulent use by the roommate was to be borne by defendant, and not the credit card issuer.

The court also rejected defendant's argument that plaintiff or its assignor had failed to comply with the Truth in Lending Act, 15 U.S.C.A. §§ 1601 to 1667, because that Act was designed to protect credit cardholders from unauthorized use, and because a cardholder's failure to examine credit card statements that would reveal fraudulent use of the card constitutes a negligent omission that creates apparent authority for charges that would otherwise be considered unauthorized.

07-13-07 Synnex Corporation, et al. v. ADT Security Services, Inc., et al.
A-3740-05T5

An exculpatory clause in a contract for the sale of a burglar alarm system is not contrary to public policy because such a clause simply allocates responsibility to the buyer to maintain the requisite insurance coverage for any property loss due to theft.

07-13-07 Gail Brown v. Fannie Y. Williams, et al.
A-3029-05T1

Considerations of underlying policy and statements in legislative committee reports cannot trump the plain language of a statute, L. 2003, c. 89, § 86 (dealing with motor vehicle insurance), regarding the effective dates of separate provisions of the enactment, specifically § 35, codified at N.J.S.A. 39:6-86.7 (concerning PIP payments by the UCJF to pedestrians).

07-13-07 New Jersey Eye Center, P.A. v. Princeton Insurance Company, et al.
A-0204-05T5

An insured's settlement of a number of pending malpractice actions by agreeing to submit the claims to arbitration, at which it would not contest liability or proximate cause,

violated the duty of cooperation because the carrier had not abandoned the insured.

07-13-07 State of New Jersey v. Daniel C. McAllister
A-4604-04T4

A conviction for the elevated first degree offense of endangering the welfare of a child by the production of pornography proscribed by N.J.S.A. 2C:24-4b(3), which requires the State to show that the defendant was a "parent, guardian or other person legally charged with the care or custody of the child," cannot be based solely on evidence that the defendant was a live-in boyfriend of the victim's mother who had a de facto parental relationship with the victim. Only a person who has been assigned responsibility for a child's care or custody by a court or public agency may be found to be "legally charged" with the child's care or custody.

07-12-07 Ronald Jamgochian v. New Jersey State Parole Board
A-3928-05T3

Four years after his release from prison, appellant, who is serving a term of community supervision for life, N.J.S.A. 2C:43-6.4(b), was ordered to abide by a curfew, which required confinement to his residence every day from 8:00 p.m. to 7:00 a.m., for an indefinite period of time. The court held that N.J.A.C. 10A:71-6.11(l), which governs the manner in which a curfew may be imposed by the Parole Board as a special condition, provides an inadequate procedural framework upon which to rest this limitation on appellant's liberty interests and deprived him of a meaningful opportunity to be heard. The matter was remanded for further proceedings consistent with due process.

Judge Wefing filed a dissenting opinion.

07-12-07 State of New Jersey v. Joseph R. Marolda, Sr., et al.
A-2400-05T1

We apply the open fields doctrine in a case involving an aerial observation of a corn field.

07-12-07 Lourdes Medical Center of Burlington County v. Board of Review, et al.
A-4255-04T2

In determining whether striking nurses employed by a not-for-profit hospital are qualified to receive unemployment benefits, the Division of Unemployment Insurance must apply its regulations governing a stoppage-of-work determination in a flexible manner where, as here, the employer is a regulated entity. Where a regulated entity is required to maintain operations and hire temporary replacement workers, as here, the Director must consider a variety of factors, including a comparison of net operating revenue before and during the strike, in determining whether the employer has suffered a stoppage of work under N.J.A.C. 12:17-12.2(a)(2).

07-11-07 State of New Jersey v. Charles Brown
A-4980-05T1

Neither the doctrine of collateral estoppel nor fundamental fairness preclude a criminal prosecution for the same events following denial of a Final Restraining Order and dismissal of a Domestic Violence complaint in the Family Part.

07-11-07 Arlene Dennis v. Board of Trustees, Public Employees' Retirement System
A-4957-05T3

The decision of the Board of Trustees, Public Employees' Retirement System, denying an accidental disability pension under the prevailing test for "traumatic event," is reversed because it lacked substantial support in the essentially uncontradicted facts and because, in applying legislative policies to the facts, the Board reached conclusions that could not reasonably have been drawn from the record. A re-evaluation of Kane is advocated.

07-11-07 Frank Caminiti v. Board of Trustees, Police and Firemen's Retirement System
A-4698-04T5

The decision of the Board of Trustees, Police and Firemen's Retirement System, denying an accidental disability pension under the prevailing tests for "traumatic event" is affirmed as supported by substantial evidence; not arbitrary, capricious or unreasonable; and reflecting a respectable application of statutory and case law standards. A re-evaluation of the "traumatic event" standard is advocated.

07-10-07 Elizabeth Bernoskie, etc. v. Robert Zarinsky
A-4905-05T1

This appeal is from a post-judgment order in a civil action denying defendant's motion for the return of funds plaintiff collected on a judgment that was reversed on appeal because the trial court erred in concluding that the statute of limitations was equitably tolled. See Bernoskie v. Zarinsky, 383 N.J. Super. 127, 141 (App. Div.), certif. denied, 186 N.J. 604 (2006). Acknowledging the continuing validity of the equitable principles applied in Bruns v. Mattocks, 6 N.J. Super. 174, 176-77 (App. Div.), certif. denied, 4 N.J. 456 (1950), we employ them, hold that defendant is entitled to restitution and remand for further proceedings.

07-06-07 Harry and Rita Schmoll, et al. v. J.S. Hovnanian & Sons, LLC
A-4815-05T1

Counsel fee award was properly made after a mid-trial settlement of a multi-count class action, in which plaintiffs' CFA claim was still viable and the injunctive relief provided in the settlement was substantially that sought in the CFA count.

07-06-07 Lawrence Denike, et al. v. Michael Cupo
A-3597-05T3; A-4135-05T3

Although critical of the trial judge's timing, we held that an appearance of impropriety was not created when the judge began negotiating for post-retirement employment with plaintiff's law firm before entry of the final judgment because the judge had finally decided the case and the judgment merely memorialized the decision.

We also held that the Limited Liability Company Act, N.J.S.A. 42:2B-1 to -70 requires that a member's fair share be valued as of the date a court disassociates the member from the limited liability company.

07-06-07 State of New Jersey v. Jayson L. Conklin
A-2439-06T5

After the trial judge dismissed an indictment charging defendant with terroristic threats contrary to N.J.S.A. 2C:12-3(a) in connection with threats to kill the victim, we reinstated the indictment, holding that threats to kill may be prosecuted under either N.J.S.A. 2C:12-3(a) or N.J.S.A. 2C:12-3(b) because the elements of subsection (a) differ from the

elements of subsection (b) and the prosecutor has the discretion to seek an indictment under either statutory provision.

07-05-07 Robert James Pacilli Homes, L.L.C. v. Township of Woolwich, et al.
A-3622-05T5
-consolidated with-
Woolwich Landowners Association v. The Township of Woolwich
A-3818-05T5

The breadth and impact of proposed amendments to the zoning ordinance effected a change of classification within three residential zones and required notice as prescribed by N.J.S.A. 40:55D-62.1.

07-05-07 Murphy Knight v. AAA Midatlantic Insurance Company
A-3621-05T1

This appeal requires us to consider whether an award of counsel fees and costs is available to a first-party insured who prevails in an action to compel the insurer to provide extended medical-expense benefits required by N.J.A.C. 11:3-7.3(b). We conclude that both counsel fees and costs are available.

07-03-07 Carole Brundage v. Estate of Carl Carambio
A-5017-05T2

In this appeal, we must decide whether a lawyer, in the context of opposing a motion for leave to appeal, has a duty to disclose the existence of a pending appeal in which the lawyer is counsel of record, when the pending appeal involves the identical legal issue the appellate tribunal is being asked to consider in the motion for leave to appeal.

We held that under the provisions of R.P.C. 3.3(a)(5), plaintiff's counsel had an affirmative duty to inform the appellate panel considering the motion for leave to appeal of a pending appeal involving a material issue that was substantially similar or related to a material issue raised in the motion for leave to appeal in which the attorney was involved. This lawyer violated this duty because, as attorney of record, he was actually aware of the existence of such an appeal and failed to inform the appellate panel of its existence.

Guided by the principles articulated by the Supreme Court in In re Seelig, 180 N.J. 234 (2004), we set aside a settlement

that was tainted by such sharp practices, as the only way to restore the essential elements of good faith and fair dealing which are implicit parts of all contracts in this State.

07-03-07 Riya Finnegan, LLC v. Township Council of South Brunswick, et al.
A-3513-05T1

Township Council of South Brunswick appeals the invalidation of a municipal ordinance which rezoned plaintiff's property from a commercial development district to an office development district. In a published opinion, Finnegan v. Twp. Council of S. Brunswick, 386 N.J. Super. 255 (Law Div. 2006), the trial court held that the municipal legislation was arbitrary and capricious, because the Township Council did not have the benefit of expert testimony to support the enactment of the ordinance. The court held that the ordinance constituted inverse spot zoning.

We reverse and held that the trial court applied an incorrect standard of review in determining the validity of the ordinance. The Township Council was entitled to rely on the views expressed by Township residents as a basis for enacting municipal legislation. We also held that the ordinance did not constitute spot zoning, because its principal purpose furthered a comprehensive zoning scheme, and was not designed merely to relieve the lot from the burden of a general regulation.

07-02-07 KAS ORIENTAL RUGS, INC. VS. MATT ELLMAN
A-3829-05T3

In this non-jury action, the trial judge awarded a salesman damages against his former principal based on a determination as to what their contract required; the judge awarded additional damages based upon quantum meruit. The court concluded, in light of the presence of an express contract as to the amount of commissions due, that the trial judge was precluded from awarding additional commissions based upon quantum meruit. The court also held that the Sales Representatives' Rights Act, N.J.S.A. 2A:61A-1 to -7, governs the amount of counsel fees to which the salesman might be entitled upon remand. The Act limits such an award to a determination of whether the fees sought were actually incurred and whether the fees actually incurred represented a reasonable expenditure of time and effort for what was accomplished in the lawsuit. (*Approved for Publication date)

06-29-07 State of New Jersey v. Robert Silva
A-2332-06T5

On interlocutory review, we reversed a trial judge's judicial notice, in a criminal trial, of another judge's factual finding in a related domestic violence proceeding.

06-29-07 Raymond Van Duren v. Leigh Rzasa-Ormes
A-2133-05T3

A non-appealability clause in an arbitration agreement, executed before New Jersey's Arbitration Act was amended effective January 1, 2003, and between parties of relatively equal bargaining position who are represented by counsel, that bars judicial review other than confirmation of the arbitration award is enforceable only to the extent it waives judicial review beyond the trial court level. In this case, despite the broad preclusionary language in the agreement's non-appealability clause, defendant obtained meaningful review of its claims of arbitrator bias and misconduct in the Chancery Division and therefore waived any further review by way of appeal here.

06-28-07 State of New Jersey v. David L. Franchetta, Jr.
A-1498-06T5

This case presents a novel issue as to whether a "rebound effect" or a "hangover effect" from a previous ingestion of cocaine constitutes being "under the influence" of a narcotic drug pursuant to N.J.S.A. 39:4-50. We held that it does. Although the cocaine ingested by defendant was not pharmacologically active at the time of the incident, we found that it was the proximate cause of his impaired behavior and that he was therefore "under the influence" of a narcotic drug for purposes of N.J.S.A. 39:4-50.

06-28-07 Robert J. Triffin v. Automatic Data Processing, Inc., et al.
A-6986-03T5

The court found that Mr. Triffin manufactured assignment agreements for checks upon which he filed suit against the drawer. However, the jury's verdict on the drawer's counterclaim for common law fraud against Mr. Triffin cannot stand due to lack of reliance on the drawer's part. We recognized, though, that sanctions for committing fraud on the

court may be appropriate and remanded the matter for a hearing on that issue.

06-27-07 Joseph and Pamela Hughes, et al. v. Monmouth University, et al.
A-2227-06T2

In this appeal Monmouth University obtained several variances from the Borough of Long Branch Board of Adjustment to construct a large student dormitory in a low density residential zone. We affirmed the trial court's decision, which we approved for publication, holding that Board of Adjustment members did not have disqualifying conflicts because they participated in various University events, were alumni, or had children who had gone to the school.

We also held that a Board member who disqualified herself from voting because she had missed several meetings, was not precluded from commenting on issues for which she was properly prepared.

06-27-07 Mohammad F. Ahammed v. Jeffrey P. Logandro, et al.
A-4993-05T1

This is an automobile accident personal injury negligence case. Plaintiff and defendant were both pizza delivery drivers engaged in the course of their employment when their vehicles collided. Defendant asserted the bar of the Workers Compensation Act (Act) as an affirmative defense in his answer to plaintiff's complaint. Plaintiff's counsels' actions during the course of the litigation lulled defense counsel into mistakenly believing that the fellow-servant rule was not a viable defense to plaintiff's cause of action. After belatedly becoming informed of the viability of the defense, defendant one week prior to the scheduled trial date, asserted the defense as a bar to plaintiff's complaint. We found that equitable principles and the strong public policy underpinnings of the fellow-servant provision supported the trial judge's finding that defendant did not waive his workers compensation defense by his late assertion of the defense.

06-27-07 Trinity Church v. Atkin Olshin Lawson-Bell, et al.
A-3022-05T1

A standard clause in architects' and builders' contracts abrogates the discovery rule by providing that the statute of limitations for claims between the parties runs from the date of

substantial completion of the project. The clause is subject to equitable defenses such as equitable estoppel. In this case, however, plaintiff was aware of the alleged construction defects before the six-year limitation period expired but waited another two years before filing suit. Plaintiff presented no evidence that defendants lulled plaintiff into missing the filing deadline or engaged in other inequitable conduct that would give rise to estoppel.

06-26-07 Sevasti Podias, et al. v. Michael J. Mairs, et al.
A-6312-05T4

In circumstances where the driver of an automobile may either be unwilling or unable to seek emergency aid for an individual struck by the car and lying helpless in the middle of a roadway, the passengers' inaction in failing to take simple precautions at little if any cost or inconvenience to them, is actionable based either on an independent legal duty to act or, vicariously, as aiders or abettors who substantially assisted the driver's misconduct by encouraging him to abandon the scene.

06-26-07 Robert M. Alpert v. Sharon Harrington
A-5686-05T3

An applicant for a driver's license cannot obtain an exemption from the requirement of submission of a social security number with the application by simply showing that he tendered an "Affidavit of Revocation and Rescission" of his social security registration to the Social Security Administration.

06-25-07 Rosalie Ann Griffith v. Mark Gerard Tressel
A-1213-05T3

This appeal requires us to consider the scope of New Jersey's "exclusive, continuing jurisdiction" over a custody order entered by a court of this state, N.J.S.A. 2A:34-66, and the standards for declining that jurisdiction in favor of a more appropriate forum, N.J.S.A. 2A:34-71.

06-22-07 Alan Beegal, et al. v. Park West Gallery, et al.
A-1428-06T2

Defendants operate art auctions on cruise ships. They appealed from the certification of a putative class of bidders. We reversed the order granting class certification because Admiralty Jurisdiction applies, and under an Admiralty Law

analysis, common questions of law do not predominate over individual questions of law.

06-21-07 Brian Scott Owens, Sr., et al. v. Gerald Feigin, M.D., et al.
A-1074-06T5

We held that the notice requirements of the Tort Claims Act do not apply to a claim based on the Civil Rights Act of 2004. N.J.S.A. 10:6-2.

06-20-07 Chubb Custom Insurance Company, et al. v. The Prudential Insurance Company of America, et al.
A-4125-05T1

A "Service of Suit" clause in a commercial insurance policy is not a forum selection cause and does not preclude the insurer from filing first in the jurisdiction in which the insurer resides.

06-20-07 IMO the Estate of Edward H. Shinn, IV, et al.
A-3819-05T5

In this appeal, the court determined that the trial judge mistakenly invoked the doctrine of equitable estoppel in enforcing plaintiff Stacey Shinn's premarital waiver of an elective share to the estate of her late husband, Edward Shinn, IV, which waiver, in the circumstances, was otherwise rendered unenforceable by N.J.S.A. 3B:8-10 and N.J.S.A. 37:2-38. The court held that because "equity follows the law," the doctrine of equitable estoppel should not have been utilized to override the Legislature's declaration that a premarital agreement, which did not fully disclose what was being waived or which did not contain an adequate waiver of such a disclosure, must not be enforced.

06-19-07 Leslie Conrad v. Michelle & John, Inc., d/b/a Nipper's Pub, et al.
A-1131-05T5

This appeal concerns the propriety of the trial court's order dismissing with prejudice a dram shop cause of action, as a sanction for plaintiff's failure to produce her expert at a court-ordered N.J.R.E. 104 hearing. The trial court also granted defendant's summary judgment motion, finding that there were no material facts in dispute, thus entitling defendant to a judgment in its favor as a matter of law.

We reversed. We held that, absent a bona fide and timely in limine application by defendant seeking to bar plaintiff's expert testimony, the trial court had no basis to order plaintiff's expert to respond to an N.J.R.E. 104 hearing to determine the scientific validity of his opinions. The trial court also erred in imposing the ultimate sanction of dismissal with prejudice, before first exhausting lesser sanctions. Finally, we concluded that there are sufficient material issues of fact in dispute, giving plaintiff the right to present her case to a jury. An eyewitness's recantation of a crucial part of his testimony presents a fundamental jury issue.

06-18-07 IMO Camden County Prosecutor and Camden County Assistant Prosecutors' Ass'n // IMO Union County Prosecutor and Union County Assistant Prosecutors' Ass'n
A-6631-05T5; A-0593-06T5

The Union County and Camden County Assistant Prosecutors' Associations appeal decisions of the Public Employment Relations Commission denying their petitions for initiation of compulsory interest arbitration under the Police and Fire Public Interest Arbitration Act, N.J.S.A. 34:13A-14a to -16.6 (the Act). The Act allows law enforcement officers engaged in performing police services to utilize the compulsory interest arbitration procedure of N.J.S.A. 34:13A-16 as a means of resolving collective bargaining impasses between law-enforcement employees and their public employers.

We held assistant prosecutors are not engaged in performing police services within the scope of the Act because assistant prosecutors: are employed by county prosecutors to perform legal services in furtherance of county prosecutors' law enforcement activities, are not vested with statutory police powers, and are not enumerated in the non-exclusive list of employee groups entitled to utilize compulsory interest arbitration.

06-18-07 State of New Jersey v. William Purnell
A-5641-04T4

A criminal defendant's refusal to cooperate in a competency to stand trial evaluation may be the product of mental incompetence and must be adequately explained and reconciled with an ultimate finding of competence. That was not done here. The examining psychiatrist was unable to conclude to a reasonable degree of medical certainty whether defendant was

competent to stand trial, but ventured an "educated guess" that he was. The finding of competence was not supported by the record. Defendant should not have been put on trial, and his conviction is reversed.

06-15-07 John L. Alfano v. BDO Seidman, LLP, et al.
A-1581-06T3

Order denying defendant Deutsche Bank's (DB) motion to compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C.A. § 1-16, was reversed. Plaintiff Alfano executed an agreement which contained a broad arbitration clause with DB's subsidiary. Although DB was a nonsignatory to the agreement, an agency relationship between DB and its subsidiary was established, allowing DB to seek enforcement of Alfano's agreement to arbitrate claims within the provisions of the agreement.

The agreement's arbitration clause which stated arbitration "shall be determined pursuant to the rules then in effect of the NASD" was found not to be dependent on the NASD accepting jurisdiction, adopting the reasoning of the Ninth Circuit expressed in Reddam v. KPMG LLP, 457 F. 3d 1054, 1061 (9th Cir. 2006), that the unavailability of the NASD to arbitrate this matter will not defeat the applicability of arbitration where the arbitration contract is otherwise enforceable and applicable to this dispute.

Alfano's argument that his complaint, which alleged various contract and tort actions, was beyond the scope of arbitrable issues in the arbitration contract was rejected because the tort allegations related directly to the contractual relationship between the parties, in light of the broad arbitration provision. Finally, the remainder of the Law Division action must be stayed pending the ordered arbitration.

06-15-07 Peter Stransky v. The Monmouth Council of Girl Scouts, Inc., et al.
A-4531-05T3

In this appeal, where the trial judge found the location of a long missing natural monument to resolve a boundary dispute, we found that call priorities, such as the general preference for natural monuments, are subordinate to the manifest intent of the grantor if this can be ascertained. Here, the manifest intent of the grantor required that we reverse the trial court's boundary determination.

06-15-07 Melvin Rosen, et al. v. Smith Barney, Inc., et al.
A-5252-04T2

Law Division judgment entered in favor of the class action designated plaintiffs and against defendants based on the conclusion that parties' agreement to divert earnings to an incentive compensation plan violates the public policy undergirding the New Jersey Wage and Hour Law (Wage law), N.J.S.A. 34:11-4.1 to -67, reversed based on our conclusion that the plan, including its forfeiture provisions, violates neither the Wage law nor the State's public policy.

Judge Weissbard dissents. He concludes that the wage diversion for purposes of purchasing stock under the terms of the plan was inextricably bound to the forfeiture component, which amounts to an unenforceable restrictive covenant and, therefore, the wage forfeiture violates the public policy as expressed in the Wage law.

06-14-07 Progressive Group v. Luz Mirian Hurtado, et al.
A-4362-05T1

Plaintiff instituted this declaratory action seeking to have its policy declared automatically terminated as of June 1, 2002, because the owner of the insured vehicle allegedly transferred legal title to another individual on that date. Although the motion judge likely erred by concluding that there was no valid transfer of legal title because the assignment of the certificate of title was not filed with the Division of Motor Vehicles, we affirm on different grounds. We held that the owner's failure to strictly comply with the Motor Vehicle Certificate of Ownership Law by not providing an odometer reading, as required by N.J.A.C. 13:21-5.9(a), rendered the purported assignment of the certificate of title incomplete and thus did not legally serve to transfer title. As a result, plaintiff's policy was not automatically terminated and coverage remained with plaintiff.

06-14-07 John Hogoboom v. Kelly Hogoboom (n/k/a/ Grimsley)
A-2794-05T5

The parties agreed to arbitrate their post-judgment disputes and signed an arbitration agreement stating "any decision of the Arbitrator can be appealed on the same basis as an Order on Judgment of the Superior Court." That appeal must

be to the Law Division, not to this court. The parties may not by contract create appellate jurisdiction in this court.

06-13-07 M.E.F. v. A.B.F.
A-2501-05T1

In this case interpreting the spousal impoverishment provisions of the Medicaid Catastrophic Care Act of 1988, we discuss the circumstances in which a community spouse may obtain a court order of support that supersedes the monthly income allowance, determined through the administrative process, that is deducted from the remaining assets of an institutionalized spouse receiving Medicaid assistance in payment for his nursing home care. We also discuss the level of proof required in the state court proceedings.

06-12-07 Abraham Hemsey v. Board of Trustees, et al.
A-1852-05T5
-consolidated with-
Dennis M. Keenan v. Board of Trustees, et al.
A-2117-05T3

We addressed two consolidated cases, each of which concerned the Police and Firemen's Retirement System (PFRS). We affirmed a decision of the PFRS Board that N.J.S.A. 43:16A-3.1 and N.J.S.A. 43:16A-15.3 required Keenan to re-enroll in PFRS, where he voluntarily retired as Trenton's Fire Chief and was re-hired the next day as Trenton's Public Safety Director. However, because he relied in good faith on advice from the Division of Pensions in accepting the new job, we concluded that the Board was estopped from requiring him to repay the pension benefits he had already received.

In Hemsey's case, we affirmed the PFRS Board's decision that his retirement must be rescinded pursuant to N.J.S.A. 43:16A-15.3, where Hemsey retired as a police officer and was re-hired three months later under a consulting contract pursuant to which he performed substantially the same duties as before he retired. We affirmed the Board's determination that Hemsey acted as an employee not an independent contractor. Because Hemsey did not produce sufficient evidence to support his claim of estoppel he was properly required to repay the pension benefits he had already received.

06-06-07* Geeta Chakravarti v. Pegasus Consulting Group
A-00651-05

In this LAD employment discrimination action, the trial court's reduction of the lodestar fee in making a counsel fee award, because plaintiff had voluntarily dismissed five of the six counts of her complaint, was an unwarranted and mistaken discretionary ruling. Plaintiff did not abandon an entitlement to a greater unliquidated damages award in respect of her retaliation, CEPA, or breach of contract claims than she received on account of her gender discrimination proofs. There was no basis for evaluating her counsel fee entitlement on the premise that she had achieved only partial success on the totality of her claims.

While remanding for reconsideration of the lodestar entitlement in calculating the counsel fee award, we affirmed all other aspects of the judgment, including the liability determination made in a proof hearing, following defendant's default and the trial court's determinations that defendant had persistently and inexcusably failed to discharge its litigation responsibilities. [*Approved for Publication date]

06-06-07 Joseph Cotler, et al. v. Township of Pilesgrove
A-0092-06T2

N.J.S.A. 40:49-2.1(a)'s requirement that the published notice of a proposed zoning ordinance contain "a brief summary of the main objectives or provisions of the ordinance" is not satisfied by a notice which states that the ordinance "include[s] revisions to the zoning maps, zoning districts [and] zoning district regulations," without any information concerning the specific nature or scope of those revisions.

06-06-07 New Jersey Department of Environmental Protection, et al. v. Exxon Mobil Corporation
A-6588-05T5

We hold that an entity may be strictly liable under the New Jersey Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 to -23.24, for damages for the loss of use of natural resources adversely affected by its discharge of hazardous substances, a question of first impression in this State.

06-06-07 State of New Jersey v. Robert C. Morgan, Jr.
A-5969-05T1

In this case we consider whether the uncontroverted testimony of a law enforcement officer as to the lawful speed

limit in an area is sufficient evidence upon which defendant may be found guilty of "speeding" in violation of N.J.S.A. 39:4-98. We conclude that such testimony, if admissible and believed by the judge, is sufficient proof of the lawful speed and, thus, reaffirm our holding in State v. Craig, 150 N.J. Super. 513 (App. Div. 1977). We conclude the State need not introduce an enacted ordinance or regulation in order to prove the lawful speed and, thus disapprove the holding in State v. Miller, 59 N.J. Super. 538 (Law Div. 1959).

06-04-07 Dolores Simmermon, et al. v. Dryvit Systems, Inc., et al.
A-4564-05T3

Plaintiff filed a consumer fraud action against defendant in connection with materials used in the construction of his home. At issue in this appeal is whether plaintiff is bound by the terms of a settlement in a class action filed in the State of Tennessee against defendant. The Law Division answered this question in the affirmative, and entered an order dismissing plaintiff's New Jersey case. The trial court found that: (1) plaintiff was within the class of litigants covered by the Tennessee case; (2) he was constructively on notice of his right to opt out of the settlement; (3) despite such notice, he failed to opt out of the settlement; and (4) he was bound by the terms of the settlement, and thus precluded from prosecuting his New Jersey case.

We reverse. We hold that Dryvit's failure to comply with the requirements of R. 4:5-1(b)(2) prevents it from invoking the preclusive effect of the settlement agreement in the Tennessee matter.

06-04-07 Theresa Seabridge v. Discount Auto, Inc., et al. // Mildred Sessa v. Discount Auto, Inc., et al.
A-3237/3902-05T1

We hold that an amendment to a personal automobile policy, without notice to the policyholder, that substituted a step down of coverage rather than the prior exclusion of coverage when the covered automobile was driven by a person in the automobile repair business is valid and enforceable.

06-04-07 Port Liberte Homeowners Association, Inc., et al. v. Sordoni Construction Company, et al.
A-2138-04T1

The question presented is whether plaintiffs, non-profit corporations charged with controlling and maintaining a condominium's common elements, formed after the misrepresentations or omissions complained of, have standing to assert common law and consumer fraud claims against the manufacturer of a product used by the developer in the construction of the common elements. We answered the question in the affirmative, determining that a condominium association is the intended beneficiary of a developer's actions; therefore, any subcontractor or materialman entering into a contract or supplying a product for use in the construction of the common elements after the developer registers the condominium with the Department of Community Affairs, N.J.S.A. 45:22A-26, is on constructive notice that representations made to, and omissions withheld from the developer, will be deemed as if they were made to, or withheld from the association, once the association assumes control of the condominium.

06-04-07 Estate of Patricia Albanese, et al. v. John R. Lolio, Jr., Esq., et al.
A-1861-05T2

Summary judgment was granted to a law firm retained to represent an estate which was sued for malpractice by the executrix and other beneficiaries individually. The critical issue related to whether the firm owed a duty of representation to the plaintiffs as individuals based on the failure to advise about personal tax liability relative to the sale of an asset of the estate for estate tax purposes. The retainer should have been clearer on the scope of representation, and summary judgment was reversed as to the issue of duty to the executrix as an individual, but not as to her sisters, the other beneficiaries.

06-04-07 New Jersey Manufacturers Insurance Company v. National Casualty Company
A-0852-05T2

This appeal requires us to determine whether the issuer of a primary insurance policy is obligated to pay prejudgment interest pursuant to R. 4:42-11(b), where such payment would exceed its coverage limit. We considered this question in the context of an agreement in which the primary carrier and the excess carrier agreed to settle a claim against their insured, leaving the question of prejudgment interest to be determined by the Law Division.

We remand for the trial court to apply the standards articulated by the Supreme Court in Kotzian v. Barr, 81 N.J. 360, 367 (1979). In order to hold a carrier liable for prejudgment interest, even when such interest exceeds the policy's coverage limit, the trial court must find that the carrier violated its fiduciary duty to engage in meaningful, timely, good faith efforts to settle the claims asserted by the party suing its insured within the policy's coverage limit.

05-31-07 State of New Jersey v. Eddie Daniels, Jr.
A-4915-05T4

Resolving an issue left open in State v. Dangerfield, 171 N.J. 446, 463-64 (2002), we hold that when police effectuate a lawful arrest, even for a minor Penal Code offense, and decide to transport the arrested person to headquarters for processing, a full search of the arrestee is permitted; the police are not limited to a Terry type pat down. Here, defendant was arrested for the petty disorderly persons offense of defiant trespass. As a result, the search of his person prior to being placed in the police car, revealing cocaine, was proper.

05-31-07 State of New Jersey v. Kenneth Nero
A-0297-05T4

In a prosecution for first-degree robbery based on simulated possession of a deadly weapon, it was error not to charge the jury that a mens rea of knowingly was required with respect to defendant's actions. N.J.S.A. 2C:15-1b contains a mental element as to the other two bases on which second-degree robbery is elevated to first-degree (attempting to kill and purposely inflicting serious bodily injury), but none as to the "armed with or threatens the immediate use of" language. Simulation falls under that last category and likewise requires a mental state of least knowingly pursuant to the gap-filler statute. N.J.S.A. 2C:2c(3).

We also note that the Model Charge on simulation adopted in the wake of State v. Harris, 357 N.J. Super. 532 (App. Div. 2003), omitted a critical reference to the intentional nature of defendant's words or gestures constituting simulation.

In this case, where defendant put forward a plausible, innocent explanation for his conduct, the error was harmful and clearly capable of producing an unjust result.

05-30-07 Joyce Barber, et al. v. Shop-Rite of Englewood & Associates, Inc. t/a Shop-Rite of Wharton, et al.
A-4058-06T1

We find that there is a presumptive right of access to a civil post-verdict jury voir dire. We also hold that in the instant case, there is no compelling, overriding interest which would rebut the presumption of access and that the well-founded concerns of the trial judge could be adequately addressed through less restrictive alternatives than requiring closure.

05-30-07 State of New Jersey v. Angela Baum, et al.
A-1576-06T5

In this appeal, we reversed the trial court's suppression of marijuana and cocaine seized in the course of a traffic stop for driving a vehicle with dark tinted windows and without an inspection sticker. We approved the twenty-six minute roadside investigation that was expanded beyond the initial reason for the stop when the nervous driver failed to produce a license or insurance card and did not know who owned the car. in addition, the driver and passenger told inconsistent stories regarding whether they had traveled to New York by bus or in the car in which they had been stopped.

05-30-07 J. Louis Binder v. Price Waterhouse & Co., L.L.P.
A-5115-05T3

The primary issue in this case is whether tolling principles apply to preserve a state court action that was originally timely filed in, and later dismissed by, the federal courts after the normally-applicable statute of limitations had already expired. We find the proper standard to apply in this case is "equitable principles" but that plaintiff did not act promptly to file his state court action after dismissal of the federal action.

05-25-07 Kimberly A. Jolley, et al. v. John J. Marquess, Esquire, et al.
A-4513-05T2

Under the facts presented here, we conclude the carrier that issued a malpractice insurance policy to a law firm is required to provide a defense and possible indemnification to one of the firm's former partners for acts of malpractice committed after he left the firm.

05-25-07 Carlos Alberto Aguerre, et al. v. Schering-Plough Corporation, et al.
A-1940-04T2

Plaintiffs, long-term employees of Schering-Plough's Argentinean subsidiary, allege that they were abruptly terminated after disclosing "widespread unethical and illegal marketing and sales practices." In their complaint, plaintiffs allege that defendants Schering-Plough and certain of its officers and executives, violated the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. Defendants moved to dismiss the complaint on the ground that settlement agreements entered into with each of the plaintiffs were reduced to judgment in accordance with Argentine law and the Foreign Country Money-Judgments Recognition Act (FCMJRA), N.J.S.A. 2A:49A-16 to -24, precludes plaintiffs from bringing an action in the United States based upon claims that were previously settled and reduced to judgment in Argentina.

We reverse the judgment of the trial court dismissing the complaint and hold that: (1) the FCMJRA may be pled as an affirmative defense; (2) the public policy expressed by the Legislature in CEPA substantially outweighs the policy favoring settlements; and (3) plaintiffs' CEPA allegations fall squarely within New Jersey's public policy exception to the FCMJRA.

We further hold that plaintiffs' defamation claims, which stemmed from conduct entirely within Argentina the consequences of which were confined to Argentina, were properly dismissed on the ground of forum non conveniens.

05-24-07 Elizabeth Baboghlian, et al. v. Swift Electrical Supply, et al.
A-6563-04T3

A property owner's duties, imposed by New Jersey's Uniform Fire Code, formerly N.J.A.C. 5:18-1.1 to -4.19 now recodified as N.J.A.C. 5:70-1.1 to -4.19, (the implementing regulations of the Uniform Fire Safety Act, N.J.S.A. 52:27D-192 to -213), which include the duty to obtain a permit prior to the voluntary installation of a fire safety system, and to arrange for inspection of the system by the municipal fire sub-code official after completion of installation and annually, thereafter, are nondelegable to a independent contractor/installer.

05-24-07 CSX Transportation, Inc. v. Director, Division of Taxation // Norfolk Southern Corporation v. Director, Division of Taxation
A-6102/6104-04T3

Plaintiffs are the operators of railroads in New Jersey and elsewhere. They appeal from a published Tax Court decision that affirmed the Railroad Franchise Tax (RFT) assessments of the Director of the New Jersey Division of Taxation. One of the plaintiffs also challenged the ten percent RFT tax rate, claiming it violates the Railroad Revitalization and Regulatory Reform Act (4-R Act), in that it discriminates against railroads because other corporations are taxed at the rate of nine percent under New Jersey's corporate business tax.

We affirmed the Tax Court's determination that the ten percent Railroad Franchise Tax rate does not violate the 4-R Act. We also concluded that the formula used by the Director to compute the percentage of each railroad's net income attributable to its operations in New Jersey is not unconstitutional on its face. We did decide, however, that the railroads had submitted sufficient evidence that their incomes attributable to their New Jersey operations were substantially lower than the incomes the Director attributed to their New Jersey operations, to make a prima facie showing that the RFT may be unconstitutional as applied to them. Consequently, we reversed the summary judgment and remanded to the Tax Court for further proceedings.

05-22-07 State of New Jersey v. Dionte Byrd
A-1833-04T5
-consolidated with-
State of New Jersey v. Freddie Dean, Jr.
A-3469-04T4

At trial, the inculpatory statement of a non-testifying State witness was admitted through the testimony of a police detective, the judge having determined that both defendants had forfeited their Sixth Amendment right of confrontation when they procured the witness's silence by threatening him with bodily harm. We reversed the convictions concluding that for the statement to have been admissible, the statement must also fall within one of the exceptions to the hearsay rule of preclusion, or be admissible by other law, N.J.R.E. 802. Our Rules of Evidence, contrary to the Federal Rules do not contain a forfeiture-by-wrongdoing hearsay exception permitting admission of the statement. N.J.R.E. 804(b). Although courts in a

number of jurisdictions without a codified hearsay exception have adopted the forfeiture-by-wrongdoing doctrine through judicial decision, we decline to do so determining that such change in the Rules of Evidence should be accomplished by the Supreme Court in accordance with the procedure prescribed in N.J.S.A. 2A:84A-38 and -39, rather than by judicial opinion.

05-21-07 In the Matter of Physical Abuse Concerning A.I.
A-0896-05T5

The Institutional Abuse Investigation Unit of the Division of Youth and Family Services acted within its authority in issuing findings that conduct of a teacher was "unjustified and inappropriate" despite the finding that and the allegation of child abuse was "unfounded." However, although it can have no adjudicatory impact, the IAIU letters to appellant and to the Chief Administrator of the Wayne School District must be amended to give the teacher more information about the findings and to make clear that the findings were not binding upon the school district. The court also held that any letter to a school district or district administrator related to the conduct of a teacher must be sent to that teacher.

05-21-07 State of New Jersey v. Ernie Lane
A-1907-04T4

Defendant was charged with participating in an armed robbery. The court considered, among other things, the legitimacy of warrantless searches of defendant's backyard and shed that followed both the police interview of defendant in his driveway and defendant's accompanying of all but one police officer to the station house for questioning. The police officer who remained behind at defendant's home, with the aid of a flashlight, looked into defendant's backyard through an open gate in a fence. The officer claimed to have seen a headband worn by one of the robbers. He then entered the yard, picked up the headband, claimed that it was "still warm" -- which to him suggested that it had recently been removed by its wearer -- and then conducted a protective sweep of the backyard, which led to the discovery of an automatic rifle in a shed. The trial judge denied the motion to suppress the headband, based on the plain view exception, and denied the motion to suppress the rifle on the protective sweep exception.

The court remanded for further proceedings because the trial judge's findings did not fully explain numerous factors applicable to the application of both the plain view exception

and the protective sweep exception. And, as a matter of first impression in this state, the court expansively interpreted Maryland v. Buie, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1981), and held that a protective sweep may be validly performed even when an arrest is not performed.

05-21-07 In the Matter of the Adoption of N.J.A.C. 19:3, 19:4, 19:5 and 19:6 by the New Jersey Meadowlands Commission // New Jersey Builders Association v. New Jersey Meadowlands, Commission, etc.
A-4174-03T3; A-3107-04T1

Under the New Jersey Constitution as interpreted by the Mount Laurel cases, the New Jersey Meadowlands Commission is responsible for affirmative zoning and planning for affordable housing in its 21,000 acre district. But the Commission should act in consultation with COAH, and the planning and zoning should be based on municipal responsibilities for affordable housing as established by COAH.

Although the Commission's present zoning regulation fails to adequately address the Commission's constitutional responsibilities, the regulation is a reasonable interim response to the recent court-ordered reworking of COAH's third round rules. The Commission is directed to adopt appropriate planning and zoning regulations promptly after COAH issues its amended third round rules, and in the meantime to also determine whether it should impose a scare resources restraint to preserve land for affordable housing.

The New Jersey Sports and Exposition Authority is not responsible under the Constitution for affordable housing within its portion of the Meadowlands District.

The case against the local entities is remanded to the Law Division.

05-18-07 State of New Jersey v. William J. Burden
A-1773-04T4

Evidence that defendant tried to bribe a witness, two years after the incident for which he was facing trial, is not part of the res gestae of the underlying offense, and its admissibility must be analyzed under N.J.R.E. 404(b). The evidence was properly admitted to show consciousness of guilt. The trial court erred in failing to give a tailored limiting instruction pursuant to State v. Cofield, 127 N.J. 328 (1992), and State v.

Williams, 190 N.J. 114 (2007). However, we concluded the error was harmless since this evidence was unlikely to lead a jury to conclude that the defendant was predisposed to commit the underlying offense, in this case an attempted home invasion, and the trial court gave a strong general 404(b) charge.

05-15-07 Board of Education of the City of Sea Isle, et al. v. William J. Kennedy
A-3011-05T3

The question presented is whether the School Ethics Act, N.J.S.A. 18A:12-21 to -34, specifically N.J.S.A. 18A:12-24j, creates an exemption to the prohibition on conflicts of interest in N.J.S.A. 18A:12-2. We answered the question in the negative, concluding that N.J.S.A. 18A:12-2 and N.J.S.A. 18A:12-24 govern different situations. N.J.S.A. 18A:12-2 outlines several of the requirements necessary for an individual to qualify as a local school board member, whereas N.J.S.A. 18A:12-24 governs the actions of a qualified board member during his or her term on the board.

05-15-07 State of New Jersey v. Brett Kearns
A-5034-04T4

The State appeals from a sentence imposed on defendant, Brett Kearns, asserting the sentence imposed following his violation of probation was illegal because a mandatory No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, term of parole ineligibility was not imposed. Defendant pled guilty to second-degree robbery, N.J.S.A. 2C:15-1, and was sentenced to a term of incarceration with a NERA parole disqualifier. However, pursuant to the plea agreement after defendant successfully participated in drug rehabilitation, his sentence was modified under R. 3:21-10 to a term of five years of probation. Defendant violated probation and was sentenced to a term of incarceration that did not include a NERA parole disqualifier.

We held that defendant's sentence was illegal because a NERA parole disqualifier should have been imposed. Modification of a sentence under R. 3:21-10 did not alter the nature of defendant's conviction for robbery, which is an offense that carries with it a mandatory period of parole ineligibility under NERA. It matters not whether the term of incarceration is imposed following a revocation of probation on a NERA mandated crime. Imposition of a NERA parole disqualifier is mandatory where a defendant is sentenced to a term of incarceration for an offense enumerated in NERA.

05-15-07 Sun Coast Merchandise Corporation, et al. v. Myron Corporation, et al.
A-6148-03T5; A-2965-04T5

Following a lengthy trial in this complex commercial dispute, the jury rendered a verdict in favor of the seller of goods. On appeal, the court reversed, concluding, among other things, that the trial judge mistakenly (1) defined for the jury when a contract for the sale of goods has been formed, (2) failed to adequately explain when a warranty against infringement has been breached, (3) permitted the jury to find that the buyer had converted goods that had already been delivered to the buyer but not paid for, instead of leaving the seller to his breach of contract remedies, and (4) charged the jury regarding equitable principles that the jury had no right to apply in this case. As to those legal principles that were adequately defined in the judge's charge, the judge nevertheless erred by failing to relate for the jury those principles to the factual contentions of the parties.

05-14-07 Luz M. Cruz v. Central Jersey Landscaping, Inc. // Valentyna Hohl v. Insulated Duct & Cable Co. // Audrey Bush v. Kauffman & Minteer, Inc. // Ruth A. Herzer v. Classical Cars Nissan, Inc.
A-3843/3844/4379/4878-04T1

We consolidate four appeals that raise a common question under the Workers' Compensation Act, N.J.S.A. 34:15-1 to -142 (the Act). On January 14, 2004, an amendment revising the formula for calculating death benefits payable to the dependents of an eligible, deceased worker was approved to "take effect immediately." L. 2003, c. 253, §§ 1, 4. We conclude that the revised formula should be applied in pending cases to calculate death benefits for dates on and after the effective date of the amendment, January 14, 2004.

Judge Holston is filing a dissent.

05-11-07 State of New Jersey v. James Dorman
A-2873-05T3

In this DWI appeal, we hold that notwithstanding the Supreme Court's holding in Crawford v. Washington, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004), a breathalyzer machine certificate of operability offered by the State to meet its burden of proof under State v. Garthe, 145

N.J. 1 (1996), remains admissible as a business record under N.J.R.E. 803(c)(6).

05-10-07 P.V., by her Guardians Ad Litem, T.V. and L.V. and T.V. and L.V. v. Camp Jaycee
A-4160-05T1

The Charitable Immunity Act does not provide immunity to a New Jersey charity for a claim arising out of its alleged negligence in the operation of a summer camp in Pennsylvania, which has abolished charitable immunity, because Pennsylvania's interest in applying its law subjecting charities to the same liability as profit-making entities outweighs New Jersey's interest in immunizing New Jersey charities from liability for alleged tortious conduct in another state.

05-09-07 State of New Jersey v. Hugh F. Breslin
A-6074-05T3

Defendant, Hugh F. Breslin, appeals from a judgment convicting him of refusal to submit a breath sample, N.J.S.A. 39:4-50.2, and the imposition of a two-year suspension of his driving privileges as a second offender, N.J.S.A. 39:4-50.4a. Defendant argued that there was not probable cause for the police to request he submit a breath sample, and that he should not be considered a second offender under N.J.S.A. 39:4-50.4a because his prior conviction for refusal to submit a breath sample was obtained when the burden of proof required for such a conviction was the preponderance of the evidence standard.

We preliminarily held that the Law Division judge correctly found that the police had probable cause to stop defendant and to believe defendant was driving while under the influence of intoxicating liquor sufficient to affirm his conviction for refusal to submit a breath sample, N.J.S.A. 39:4-50.2. As to defendant's contention that he should not be considered a second offender under N.J.S.A. 39:4-50.4a, we held that there is no just reason to nullify a prior refusal conviction based upon a lesser burden of proof from being considered in determining a defendant's second-offender status under N.J.S.A. 39:4-50.4a after a second conviction for the same refusal offense based upon the criminal standard of proof.

05-09-07 In the Matter of the Application of Robert L. Taylor, Cape May County Prosecutor, for an Order Directing the Cape May County Board of Chosen Freeholders to

Appropriate Necessary Funds for the Cape May County Prosecutor's Office
A-5522-05T1

In this Bigley matter, see In re Application of Bigley, 55 N.J. 53 (1969); N.J.S.A. 2A:158-7, we affirm based on the opinion of Judge William C. Todd, III, reported at ___ N.J. Super. ___ (Law Div. 2006).

05-09-07 In the Matter of the Civil Commitment of J.P.
A-2269-05T2

Committee, whose predicate criminal offenses were for endangering the welfare of a child, determined to be a SVP. The SVPA's open-ended definition of "sexually violent offense" found at N.J.S.A. 30:4-27.26(b), must be interpreted in the light of the associated specific definitions listed in N.J.S.A. 30:4-27.26(a). When read together, the rational construction of these two paragraphs shows that the Legislature considered it appropriate to expand "sexually violent offense" to also include conduct which demonstrates the elements of the enumerated sexually violent offenses delineated in subsection (a), even though the conviction may be for an offense other than those specifically listed. Conduct underlying offenses to which committee pled guilty demonstrated elements of sexual assault.

05-08-07 In re Determination by Director of the Division of Alcoholic Beverage Control that the Xanadu Redevelopment Project at the Continental Airlines Arena Site at the Meadowlands Sports Complex Meets All Jurisdictional Requirements for the Issuance of Any Necessary Special Concessionaire Permits Pursuant to N.J.A.C. 13:2-5.2, etc.
A-6348/6393-04T5

An "advisory opinion" of the Director of the Division of Alcoholic Beverage Control, issued without a hearing and asserting the availability of special concessionaire permits and his jurisdiction over them, is not tantamount to final agency action, i.e., embodying any action substantively adverse to appellants. It is, therefore, not reviewable at this time, and the appeal is dismissed. Appellants will be entitled, at an appropriate time, as objectors to any application for such a permit, to a hearing on the issues raised.

05-08-07 State of New Jersey v. Franklin Jack Burr, II
A-4603-04T1

In this sexual assault prosecution, we reversed defendant's conviction because he was precluded from offering expert evidence that he suffers from Asperger's Disorder, a form of autism, as an explanation for some of his arguably inappropriate behavior with the victim, one of his piano students. It is not necessary that this disorder constitute a "mental disease or defect" under the diminished capacity statute, N.J.S.A. 2C:4-2, for the evidence to be admissible; it is sufficient if it has probative value on an issue in the case.

Here, the prosecutor strongly argued that defendant's behavior constituted "grooming," as a prelude to a sexual assault. Hence, the error was not harmless.

We also held that N.J.R.E. 803(c)(27), the so-called "tender years" exception to the hearsay rule, does not run afoul of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and its progeny, insofar as it permits introduction of evidence of a "testimonial" out of court statement (here videotaped) of the victim, under circumstances where the victim testifies in court and is able to be fully cross-examined on her allegations. Id. at 59 n.9, 124 S. Ct. at 1369 n.9, 158 L. Ed. 2d at 197 n.9.

05-04-07 Ella Jackson, et al. v. HSBC Bank USA, et al.
A-0977-06T2

When a private entity that has purchased tax sale certificates in other than bulk sales from a municipality includes charges and other non-monetary burdens not expressly permitted by the Tax Sale Law, N.J.S.A. 54:5-1 to -137, in installment payment plan agreements respecting those certificates, the remedy is reformation and not assessment of the penalties called for by the Tax Sale Law for redemption in the ordinary course. In the particular circumstances of this case, the Consumer Fraud Act is not applicable.

05-04-07 Freddie B. Frazier v. Northern State Prison, et al.
A-3624-04T3

A simple assault under N.J.S.A. 2C:12-1a(3), which consists of an "attempt[] by physical menace to put another in fear of imminent serious bodily injury," cannot be a "misdemeanor crime of domestic violence" within the intent of the federal Lautenberg Amendment, under which a convicted person is prohibited from possessing a firearm, because this type of

simple assault does not "[have], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon[.]"

05-01-07 State of New Jersey v. Darren L. Bradshaw
A-4731-02T4

We held that application of the notice of alibi rule, R. 3:12-2, to bar a defendant's own testimony as to his whereabouts at the time of a crime, because of his failure to comply with the Rule, unconstitutionally infringes on defendant's state and federal right to testify, a right emanating from the due process and compulsory process guarantees. We disagree with contrary rulings in State v. Francis, 128 N.J. Super. 346 (App. Div. 1974) and State v. Gonzalez, 223 N.J. Super. 377 (App. Div.), certif. denied, 111 N.J. 589 (1988).

Combined with a highly objectionable summation by the prosecutor, the error was not harmless. A new trial is required.

04-30-07 Henry E.Raab, et al. v. Borough of Avalon, et al.
A-6028-04T5

This appeal requires us to determine the applicable limitation period within which a private party must commence an action to challenge the taking of private property by a public entity, as an exercise of its police power, where the public entity's actions fail to comply with any of the statutory provisions governing the use of eminent domain.

Applying the definition of inverse condemnation articulated by our Supreme Court in Greenway Development Co. v. Borough of Paramus, 163 N.J. 546, 553 (2000), we now hold that the physical taking of real property involved here constitutes an act of inverse condemnation.

We further hold that a cause of action against a governmental defendant to recover the value of the real property that was taken by inverse condemnation is governed by the provisions of N.J.S.A. 2A:14-1 -2, and must be filed within six years from the date of accrual, which is defined as the date the landowner becomes aware or, through the exercise of reasonable diligence, should have become aware, that he or she had been deprived of all reasonably beneficial use of the property.

04-27-07 Township of Dover v. Frank and Sharon Scuorzo // Director, Division of Taxation v. Lambertville City, et al.
A-2843-05T5; A-3036-05T2

The statutory deduction from real estate taxation granted to veterans who were in "active service in time of war" and the exemption from real estate taxation granted to veterans who suffered a total and permanent disability as a result of such service are not available to veterans whose only military service was for training in the National Guard or Reserves.

04-27-07 The Connecticut Indemnity Company v. Richard Podeszwa, et al.
A-5982-04T1

Public policy considerations do not prevent an insurer of a tractor-truck from excluding from liability coverage all losses sustained by third parties in an accident with the truck while it is being used for business purposes. We conclude that so long as the truck is covered by an additional policy providing coverage for business use, such exclusionary language in a "bobtail" policy violates neither the requirements of N.J.S.A. 39:6B-1, nor the public policy of the State.

04-26-07 Bruce Paparone,Inc., et al. v. The State of New Jersey, et al.
A-5127-05T5

In 1997, plaintiffs Sturgis signed a Farmland Preservation Agreement under the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 to -48, agreeing to retain their land in agricultural production for eight years and to notify the State if they signed a contract to sell the land. The Agreement gave the State a "first right and option to purchase the land upon substantially similar terms and conditions" in the event the Sturgises signed a contract of sale. In November 2003 the Sturgises signed a contract to sell the land to plaintiff Paparone for development but failed to notify the State until March 1, 2005.

In July 2005 Paparone was granted preliminary major subdivision approval for seventy-two building lots. The State offered to purchase the land for six hundred thousand dollars less than the Sturgises would receive under the contract with Paparone, but the Sturgises rejected the offer. We reversed the trial court's grant of summary judgment to plaintiffs,

concluding there was a material question of fact whether the State's offer was substantially equivalent in value, measured as of the date the contract was executed, not the later date when the preliminary major subdivision approval was received.

04-26-07 Denise M. Sciarrotta, et al. v. Global Spectrum, et al.
A-5103-05T1

To the extent warm-ups before a hockey game entail "heightened vulnerability" to spectators over risks normally associated with the hockey game experience, the limited duty rule of Maisonave may not govern.

04-26-07 Raymond G. Perelman v. Nicholas Casiello
A-2515-05T2

We conclude that defendant purchased his property with knowledge of restrictive covenants in his chain of title, that the original grantee and grantor intended to burden defendant's land and benefit plaintiff's, and that the right to enforce those covenants transferred to plaintiff with ownership of the property benefited.

04-25-07* New Jersey Division of Youth and Family Services v. S.F. // In the Matter of the Guardianship of S.L. and S.L., minors
A-0106-06T4

When a parent continually relapses after participating in drug treatment, and neglects her children as a result of her addiction, an award of kinship legal guardianship pursuant to N.J.S.A. 3B:12A-6(c) is proper. Guided by N.J. Div. of Youth and Family Services v. C.S., 367 N.J. Super. 76 (App. Div.), certif. denied, 180 N.J. 456 (2004), we hold that children should not languish indefinitely waiting for a parent to achieve stability. [*Approved for Publication date]

04-25-07 New Jersey Manufacturers Insurance Company v. Oscar Vizcaino
A-2018-06T3

If a complaint asserts both a claim for an intentional tort, which is not covered by defendant's liability insurance policy, and a claim for negligence, which is covered by the policy, defendant's insurer may refuse to defend the action, in which event the insurer is obligated to reimburse its insured

for defense costs and the judgment if it is later determined that the claim was covered by the policy.

04-25-07 Steven Portnoff v. New Jersey Manufacturers Insurance Company
A-1442-05T5

The collateral source rule in the No Fault Insurance Act (N.J.S.A. 39:6A-6) entitles an auto insurer to a setoff against income continuation benefits (N.J.S.A. 39:6A-4b) for workers' compensation permanent disability benefits (N.J.S.A. 34:15-12b).

04-25-07 State of New Jersey v. Miriam Miraballes
A-0404-05T4

We find error in the prosecutor's use of a hypothetical question addressed to the State's expert on non-traditional religious practices. In that question, in which the State's entire case was summed up (covering over ten transcript pages), a description of an individual was used which was a patently obvious reference to the defendant. To make matters worse, on redirect examination, the judge, erroneously ruling that the defense had "opened the door" on cross-examination, allowed the prosecutor to substitute defendant's actual name into the hypothetical. The question as asked went far beyond anything permitted by Odom or Summers and contravened the fundamental premise of any hypothetical that the defendant's name should not be used.

Further, the expert was permitted to testify that because of the secrecy associated with defendant's religion, a "priestess" of the religion, such as defendant, would never tell the truth if called to testify at trial.

We found the errors to be not harmless, requiring a new trial.

04-24-07 John T. Paff v. New Jersey Department of Labor
A-2413-05T5

1. Statements made by counsel in briefs are not an adequate substitute for sworn statements made by parties.

2. Responses by public entities to requests for documents pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to 13, shall be accompanied by sworn statements by agency personnel setting forth the following information:

(1) the search undertaken to satisfy the request;
(2) the documents found that are responsive to the request;
(3) the determination of whether the document or any part thereof is confidential and the source of the confidential information;
(4) a statement of the agency's document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed.

3. The sworn statement shall have appended to it an index of all documents deemed by the agency to be confidential in whole or in part, with an accurate description of the documents deemed confidential. The index is essentially a "privilege log" that must provide sufficient information "respecting the basis of the privilege-confidentiality-exception claim vis a vis each document." Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth., 369 N.J. Super. 175, 185 (App. Div.), certif. denied, 182 N.J. 147 (2004). An accurate index is necessary for substantive review by the requesting party as well as the reviewing court.

4. After its in camera review, the GRC shall then produce the following to the requesting party:
(1) the redacted or unredacted documents responsive to the request;
(2) sworn statement provided by the agency with the index or "privilege log" appended thereto; and
(3) the minutes of the meeting at which the documents were reviewed in camera reflecting its explanation for all redactions or withheld documents.

04-20-07 Kevin J. Azzara v. Township of Waterford
A-4023-05T5

A police officer hired after completing the required police training course under the "alternate route" authorized by a 1998 amendment to the Police Training Act, N.J.S.A. 52:17B-66 to -77.6, may be subject to a one-year probationary period prescribed by a municipal ordinance, during which the officer can be terminated without cause.

04-19-07 J.P. v. Division of Medical Assistance and Health Services, et al.
A-5339-05T1

In this case, we construed Federal and State Medicaid statutes and regulations concerning special needs trusts. We held that alimony does not constitute income received by a Medicaid recipient, where the alimony is paid to a special needs trust created under 42 U.S.C.A. § 1396p(d)(4)(A) pursuant to a Family Part order as part of divorce proceedings. Therefore, the State Medicaid program cannot reduce its contribution to the recipient's nursing home costs by the amount of alimony her ex-husband pays to the special needs trust.

04-19-07 Mark A. Nouhan, et al. v. Board of Adjustment of the City of Clifton, et al.
A-4925-05T5

A mercantile license issued by a municipal governing body cannot be relied upon as authorization for a use of property that is not permitted by the zoning ordinance. A special exception granted under the former Municipal Planning Act that authorizes use of the subject property as a restaurant does not provide authorization for its current use as a discotheque-nightclub.

04-19-07 Maria Todaro v. County of Union and Harold Gibson, et al.
A-2077-05T5

A jury found that plaintiff was denied promotion to Superintendent of Weights and Measures of Union County solely due to her political affiliation, contrary to 42 U.S.C. § 1983. The jury awarded compensatory damages and also found that plaintiff was entitled to an award of punitive damages. The parties reached a post-verdict settlement that resolved all issues except plaintiff's claim for equitable relief, which they agreed to submit to the trial judge. At the hearing, the judge ordered that plaintiff receive salary and benefits comparable to what the incumbent Superintendent was receiving at the time of the hearing. We concluded this remedy failed to make plaintiff whole. We reversed and remanded for further fact-finding and reconsideration of the equitable remedies of instatement or, alternatively, front pay.

04-19-07 State of New Jersey v. Eliezer Martinez
A-3152-04T5

We hold that the principles established in Apprendi, Blakely and Booker do not require that a jury determine the

amount of restitution to be paid by a defendant convicted of health claims and Medicaid fraud.

04-18-07 David Murphy, et al. v. Dante Implicito, M.D., et al.
A-1773-06T2

Plaintiff sued his orthopedic surgeons after they placed cadaver bone in his spine, contrary to his instructions, during back surgery. Plaintiff had subsequent back surgery which, among other things, removed the cadaver bone and inserted other materials. In this opinion, on leave granted, we primarily examine the scope of damages available to plaintiff if he is successful in his claims for battery and breach of contract. We also conclude that in addition to having a viable per quod claim derivative of her husband's battery claim, plaintiff's wife may proceed with her per quod claim arising out of her husband's breach of contract claim because defendants' breach of contract allegedly resulted in personal injuries to plaintiff.

04-18-07 Carol Bedford, et al. v. Anthony L. Riello, D.C., et al.
A-5125-04T1

Plaintiff sued the defendant chiropractors alleging their adjustments of her knee resulted in a torn meniscus and resultant disability. Prior to trial, plaintiff asked the court to rule, as a matter of law, that chiropractors are not permitted in New Jersey to adjust a patient's knee; that adjustments are limited to a patient's spine. The motion judge denied the motion and, in a subsequent trial, the jury returned a verdict for defendants.

We reversed and remanded for a new trial, concluding that the scope of chiropractic practice in New Jersey constrains a chiropractor to adjustments of a patient's spine, and does not permit knee adjustments. Accordingly, the jury should have been so instructed, and told that if it found that defendants adjusted plaintiff's knee, that conduct could be considered as evidence of defendants' deviation from the standard of care.

04-17-07 State of Maine v. Sekap, S.A.Green Cooperative Cigarette Manufacturing Company, S.A.
A-4284-05T2

In an issue of first impression, we concluded that the provisions of New Jersey's version of the Uniform Enforcement of Foreign Judgments Act, specifically N.J.S.A. 2A:49A- 29(a) and

(b), require the judgment debtor to post adequate security before a stay of enforcement of a properly domesticated foreign judgment can be entered. The judgment debtor must post the security even if it is raising a "due process defense," -- in this case, lack of personal jurisdiction in the rendering state -- to the domesticated judgment.

However, we also reaffirmed our holding in Sonntag Reporting Serv. Ltd. v. Ciccarelli, 374 N.J. Super. 533 (App. Div. 2005), permitting the judgment debtor to raise the "due process defense" here in New Jersey, without posting security. We remanded the matter to the trial court for further proceedings, including "jurisdictional discovery."

04-17-07 Sebastiano Genovese (a/k/a Sam Genovese) v. Mercedes Genovese
A-3930-05T1

In a New Jersey divorce action filed in 2005, the trial court properly valued plaintiff's pension assets using a marriage end-date other than the date plaintiff filed his New Jersey complaint, as suggested by Painter v. Painter, 65 N.J. 196, 217 (1974). In this case, plaintiff's remarriage after entry of a final judgment of divorce in a New York action, which was subsequently reversed on defendant's appeal, presented "incontrovertible evidence" pinpointing the time the marriage "irretrievably broke-down," such that the marital partnership terminated prior to the filing of the New Jersey complaint for divorce. Smith v. Smith, 72 N.J. 350, 361-62 (1977). We thus conclude that the facts of this case present another exception to the Painter rule.

04-17-07 State of New Jersey v. James Thomas
A-6422-04T4

In these cross-appeals, we are presented with two issues involving sentencing under the Brimage [*n. 1] Guidelines. The first Brimage issue raised by the State is whether the trial court erred by imposing a lower sentence than that negotiated between the State and defendant pursuant to the Brimage Guidelines and N.J.S.A. 2C:35-12, based on the court's belief that the agreement violated defendant's constitutional rights because it imposed a greater sentence for having invoked his right to a suppression hearing. We hold that the trial court erred in imposing the lesser sentence.

The second Brimage issue raised by defendant is whether the Brimage Guidelines, which were promulgated by the Attorney General to address negotiated-sentence agreements under N.J.S.A. 2C:35-12, violate the principles of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and State v. Natale, 184 N.J. 458 (2005). We hold that the Brimage Guidelines do not violate the recent cases affecting sentencing.

[*n. 1 - State v. Brimage, 153 N.J. 1 (1998)].

04-16-07 Prospect Rehabilitation Services, Inc. v. Generoso Squitieri, Esq.
A-2991-05T5

The trial court dismissed plaintiff's legal malpractice complaint on summary judgment, finding plaintiff had voluntarily settled the underlying case without exhausting its appeal and separate active lawsuits and thus was precluded, as a matter of law, from attempting to recoup the difference in a malpractice action against its former attorney. We reverse. Plaintiff never represented the settlement was a fair and satisfactory resolution of its underlying claims and settled the case after the trial court denied its motion to amend the complaint to assert omitted claims that it contends constitute the attorney's malpractice. There are factual issues as to whether plaintiff took reasonable steps to avoid the consequences of its former attorney's alleged negligence, some of which will require expert testimony.

04-13-07 Union County Improvement Authority v. Artaki, LLC, et al.
A-6237-05T5

Defendants sought consolidation of two total condemnation cases involving five contiguous parcels of realty, some of which were owned by a family controlled LLC and others were owned by individuals or a combination of family members. Defendants sought to treat the entirety of the realty as one parcel to determine its highest and best use. We remanded to the Law Division for reconsideration to determine whether evidence surrounding ownership and control of the LLC was held by the same individuals who individually owned the other parcels of realty resulting in identity of common beneficial interest over all parcels per Housing Auth. of City of Newark v. Norfolk Realty, 71 N.J. 314, 324 (1976). Although Norfolk involved a partial taking and the fixing of severance damages, its reasoning regarding the determination of unity of ownership,

when legal title is held in individual and corporate names, remains applicable in this matter.

Additionally, inextricably intertwined with the determination of unity of use, is defendants' theory on the method of valuation, suggesting use of an integrated value to determine "the highest and best use" of the combined assemblage of realty, which must be determined by the factfinder.

On remand, the motion judge must review whether one trial would provide the best means for a jury to determine whether unity of ownership and unity of use of these contiguous parcels exists, and that one trial could best accommodate the overlap of proofs on such considerations as market factors, the potential combined use, and the method of valuation of the realty necessary for a determination of just compensation for each separate parcel. R. 4:73-6; N.J.S.A. 20:3-7(b).

04-13-07 Cheryl Leitner, et al. v. Toms River Regional Schools, et al.
A-3460-05T1

We reverse the trial judge's order denying an extension of discovery in the absence of a fixed arbitration or trial date. We outline a number of factors which a trial judge should consider in determining whether "good cause" has been shown for an extension of discovery in the absence of a fixed arbitration or trial date under Best Practices.

04-13-07 Vincent J. Addesa v. Glenine Addesa
A-5515-04T3

The mediator in a private mediation should not have been deposed, nor his file subject to discovery, in connection with an attack on a privately mediated property settlement agreement (PSA) as "unconscionable." Nor should the agreement have been vacated on the basis of his testimony. However, the motion to set aside the PSA provided a basis for the plenary hearing which was ordered, and enough was demonstrated at the hearing to uphold the finding of unconscionability.

04-13-07 In re Adoption of Amendments and New Regulations at N.J.A.C. 7:27-27.1, et al. // In re Control and Prohibition of Mercury Emissions, et al.
A-2445-04T2; A-2476-04T2

We uphold the first-ever regulations of the DEP controlling mercury emissions from iron and steel melters – the largest single source of atmospheric mercury emissions in New Jersey – against a number of challenges, including that DEP exceeded its statutory authority; acted arbitrarily, unreasonably and without a legitimate technical basis by requiring use of emission control technologies that are neither commercially available nor of proven effectiveness for the forms of mercury generated by the mini-mills; and violated the rulemaking requirements of the Administrative Procedure Act (APA), N.J.S.A. 52:14B-23.

04-11-07 Mary K. Kibler, et al. v. Roxbury Board of Education, et al.
A-4358-05T2

A teacher who is knocked down and injured as the result of a student-on-student fight cannot pursue a common-law tort action against her school district and school officials to recover for her injuries. Such a tort action is barred by the exclusivity provision of the Workers' Compensation Act, N.J.S.A. 34:15-8. The lawsuit does not fall within the statute's intentional-wrong exception because it fails the "context" prong of Laidlow v. Hariton Machinery Co., 170 N.J. 602, 617 (2002).

04-10-07 State of New Jersey v. Robert T. Condon, a/k/a Bob T. Condon
A-1905-05T4

The question presented is whether a defendant charged with attempted sexual assault may be found guilty under N.J.S.A. 2C:5-1a(1), where the defendant is arrested before completing the act, which would have constituted the underlying crime. We hold that he may not be found guilty under that section of the criminal attempt statute. We also hold that under those facts, if the defendant has taken a substantial step toward commission of the underlying crime, the defendant may be found guilty under N.J.S.A. 2C:5-1a(3).

04-09-07 Endo Surgi Center, P.C. v. Liberty Mutual Insurance Company
A-1387-06T5

An insured who is denied PIP benefits may not maintain a common law action for breach of good faith against the insurer because such benefits are statutory in origin, and therefore, an insured who is wrongfully denied such benefits is entitled to

only the statutory remedy of interest on the benefits plus attorney's fees.

04-09-07 New Jersey Citizen Action, Inc., et al. v. County of Bergen, et al.
A-4901-05T1

We reverse dismissal of plaintiffs' complaint for failure to state a cause of action because it alleges, among other things, that when Bergen County leased operation of the Bergen Pines County Hospital to a private entity it also provided the private entity with $33 million in loans to be used by the private entity as it pleased and for purposes unconnected with the public end of operating the hospital.

04-09-07 In the Matter of the Civil C ommitment of R.Z.B. SVP-367-04
A-3060-04T2

With the acquiescence of federal prison officials, the Attorney General of New Jersey may have a federal inmate, who is confined in New Jersey and about to complete his federal sentence, examined by mental health professionals for purposes of determining if he should be civilly committed under the Sexually Violent Predator Act (SVPA), N.J.S.A. 30:4-27.24 to -27.38. We perceive no impediment to federal authorities choosing to work cooperatively with the State to assure the safety of the public.

04-05-07 Jennifer Larrison v. Richard Larrison
A-2097-05T3

In this appeal we are required to determine whether a police disability pension is subject to equitable distribution without any exemption for that portion of the pension benefit intended as compensation for the disability. We now reaffirm the principle we first articulated in Avallone v. Avallone, 275 N.J. Super. 575 (App. Div. 1994). In addressing an equitable distribution claim against a disability pension, a reviewing court must determine which portion of the pension represents a retirement component in which plaintiff would be entitled to share, and that portion which represents compensation for defendant's personal disability and personal economic loss.

A trial court should explore, with the assistance of expert analysis, other options, including limiting the amount subject to equitable distribution to defendant's contributions to his

pension, which is what he would have received had he left the police department at the time without a disability. We also encourage PFRS to consider expressly identifying which portion of a disability pension is intended to be exclusively compensatory.

04-05-07 Martin O'Shea v. West Milford Board of Education
A-2026-05T5

Handwritten notes of the Board Secretary, taken during an executive session of the Board of Education as a memory aid to assist in preparing the formal typed minutes, need not be disclosed pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1.1.

04-04-07 State of New Jersey v. Michael Lisa
A-5358-05T1

N.J.S.A. 2C:2-1b provides that "liability for commission of an offense may not be based on an omission unaccompanied by action unless . . . a duty to perform the omitted act is otherwise imposed by law. . . ." We held that the legislative history clearly establishes that the reference to "law" in the phrase "otherwise imposed by law" was intended to include duties arising from civil common law. A 1999 amendment to the statute that referenced several statutes dealing with public safety, introduced by the phrase, "including but not limited to," did not evince a legislative intent to limit "law" to statutory law.

In this case, the grand jury was charged that the applicable civil common law duties could be found in principles set out in the Restatement (Second) of Torts. We held that imposition of such duties, which in this case involved the duty to summon aid for an individual in distress from using drugs with defendant, did not provide a criminal defendant with constitutionally adequate notice that his conduct might be the basis of criminal liability. Our conclusion was buttressed by the fact that the duties in question had not even been clearly and definitively adopted in our civil jurisprudence. Because the instructions clearly had the capacity to affect the grand jury's consideration of the reckless manslaughter charge, we affirmed the Law Division order dismissing that count of defendant's indictment.

Judge Lihotz concurred in part and dissented in part. She expressed the view that the duty to summon aid for another under the circumstances presented was sufficiently established in our

common law so as to support the grand jury instructions. She would reverse the dismissal of the reckless manslaughter count.

04-04-07 Michael Hutnick v. ARI Mutual Insurance Company
A-2610-05T5

We reject the claim of an underinsured motorist (UIM) insurer that its insured's notification of a settlement offer from the tortfeasor without expressly relaying its intent to accept the offer violated its Longworth obligation and deprived the UIM insurer of its subrogation rights and thus excused the insurer from UIM liability.

Rather, we find a series of correspondence from the insured to its UIM carrier effectively gave notice of the acceptability of the settlement offer, substantially complied with Longworth and contract notification requirements, and results in no prejudice to the insurer.

04-03-07 Peter W. Innes v. Maria Jose Carrascosa
A-1821-06T2

In this international child custody dispute, the mother is currently incarcerated for violating litigant's rights under R. 1:10-3. We found that the courts of New Jersey initially possessed and maintained throughout the matter, personal and subject matter jurisdiction. We determined that there is no obligation under the Hague Convention to recognize the determinations made by the courts of Spain under principles of comity or res judicata. Further, we found no basis to afford comity to the Ecclesiastic Tribunal of the Archbishopric of Valencia. Lastly, we found no error in the refusal of the trial court to adjourn the custody trial pending the disposition of the mother's indictment for interference with child custody or the court-imposed sanctions.

04-03-07 Patricia McGowan v. Lewis O'Rourke
A-5001-05T3

This case discusses the award of counsel fees as compensatory damages under the Domestic Violence Act, N.J.S.A. 2C:25-29b(4). In particular, it distinguishes that award from one made in a matrimonial action under N.J.S.A. 2A:34-23 and Williams v. Williams, 59 N.J. 229 (1971). Rather than using the matrimonial factors, we held that if a domestic violence fee is reasonable and is incurred as a direct result of domestic

violence, then a court, in an exercise of its discretion, may award fees.

04-03-07 State of New Jersey v. Joseph Bianco
A-4582-04T4

In this appeal, defendant claimed the right to a new trial because a juror, upon realizing during deliberations that he knew defendant, failed to make that fact known to the trial judge and, as a result, participated in the rendering of the guilty verdict. Despite the juror's failure to immediately advise of his earlier incorrect answer during voir dire, the court held that defendant was not entitled to a new trial because defendant also realized during trial that he and the juror had been acquainted in the past, and, thus, waived his right to complain by remaining silent until after the verdict was rendered.

04-02-07 Helen Mary Devaney v. Francis A. L'Esperance, Jr.
A-1241-05T1

Cohabitation is an essential element to a cause of action for palimony.

04-02-07 State of New Jersey v. Darren L. Bradshaw
A-4731-02T4

We held that application of the notice of alibi rule, R. 3:12-2, to bar a defendant's own testimony as to his whereabouts at the time of a crime, because of his failure to comply with the Rule, unconstitutionally infringes on defendant's state and federal right to testify, a right emanating from the due process and compulsory process guarantees. We disagree with contrary rulings in State v. Francis, 128 N.J. Super. 346 (App. Div. 1974) and State v. Gonzalez, 223 N.J. Super. 377 (App. Div.), certif. denied, 111 N.J. 589 (1988).

Combined with a highly objectionable summation by the prosecutor, the error was not harmless. A new trial is required.

03-29-07 State of New Jersey v. Wilberto Rodriguez
A-4866-04T4

We address the application of self-defense to manslaughter, concluding that the trial court committed plain error in instructing the jury that it should consider self-defense in

deliberating on the murder charge but not as to the manslaughter charges against defendant. We also address the need to charge the jury as to the defendant's honest but mistaken belief in the need to use a weapon (here, a pocket knife) to defend himself, as it relates to charges of possession of a weapon for an unlawful purpose and unlawful possession of a weapon.

03-28-07 Hunterdon Medical Center v. Township of Readington
A-0287/0288/0289/0290/0291/0293-05T2

The Tax Court denied local property taxation exemptions to the hospital for portions of an offsite building it owned and operated as a Wellness Center, Physical Therapy Service and Pediatric Practice, finding they did not meet the statutory "use test" to qualify for hospital purposes, and the Pediatric Practice also failed to meet the statutory "not-for-profit" requirement. N.J.S.A. 54:4-3.6. These expanded services were part of HMC's new self-defined and open-ended "continuum of care" concept aimed at enhancing and improving the general health status of the local population. The court was unable to apply the "reasonably necessary" test previously applied to hospitals providing a core function of 24-hour continuous acute care because it would produce an inconclusive result so it articulated and applied a rational, flexible three-component analytical framework for these types of cases. We agree with the criteria developed by the Tax Court and their application to the facts of this case, and affirm. Our endorsement of this framework is not an abandonment of the reasonably necessary standard, which should be used in the first instance.

03-27-07 First Atlantic Federal Credit Union v. Charles S. Perez, et al.
A-4645-05T5

We hold that where a check casher cashes a check for an individual payee without authorization from, or outside the presence of the corporate co-payee, and the check casher promptly settles with the corporate co-payee after a Rule 1:4-8 demand, the drawee bank initially sued by the corporate co-payee is not entitled to attorney's fees as "expenses" incurred for breach of the UCC's presentment warranty, N.J.S.A. 12A:4-208(b). Given our forum's strict adherence to the American rule, we do not interpret the term "expenses", or the term "other damages" incurred due to bad faith conduct under N.J.S.A. 12A:4-103(e), as inclusive of attorney's fees. Moreover, attorney's fees are not available as a traditional element of damages where the tort of another forces an innocent third party, here the drawee bank, into litigation, because where, as here, a

check is improperly negotiated, the UCC provides a comprehensive remedy.

03-26-07 Shelby Casualty Insurance C ompany v. H.T., N.T., I.T. and J.T. // P.G. by her g/a/l/ N.I. and N.I. v. I.T. and J.T.
A-5424-05T3

The inferred intent rule, which precludes, as a matter of law, insurance coverage for a sexual assault committed by an adult against a young child does not apply to a perpetrator under fourteen years of age. A factual determination must be made on a case by case basis to determine the perpetrator's subjective intent.

03-23-07 State of New Jersey v. Alvin McCann
A-0354-06T1

A municipal court judge who issued a search warrant for defendant's residence had a prior attorney-client relationship with defendant and with other members of his family over a period of many years. The Law Division granted defendant's motion to suppress, finding that the judge was not the constitutionally required "neutral and detached magistrate."

We agreed that the judge should not have issued the warrant, concluding that the appearance of impropriety was objectively reasonable and required the judge's recusal. The judge knew or should have known that the person identified in the warrant application was his former client.

However, we accorded our holding prospective effect only, concluding that suppression was not warranted in this case where defendant made no assertion of possible bias on the part of the judge and our decision established a new rule of law, as follows:

> In the future, if a defendant makes a particularized and credible assertion of facts which objectively suggest an appearance of partiality on the part of the judge issuing a search warrant, based on a prior relationship or otherwise, a "bright-line" rule invalidating the search warrant will be applicable.

03-23-07 Estate of Calvert Ostlund, Sr. v. Calvert Ostlund,Jr., et al.

A-3739-05T1

This case concerns the disposition of a joint bank account on the death of one of the parties to the account and the right to certain checks payable to decedent that were deposited to the joint account after decedent's death. In particular, the case discusses the Multiple-Party Deposit Account Act, as well as the case law concerning the disposition of joint bank accounts set forth in Pascale v. Pascale and In re Estate of Penna.

The case also reviews those provisions of the Uniform Commercial Code that deal with endorsements and checks payable and endorsed by a decedent and negotiated after a decedent's death by the surviving joint tenant on the bank account.

03-22-07 New Jersey Division of Youth and Family Services v. B.H. // IMO O.F., A.F. and E.F.
A-5272-05T4

This case discusses and resolves the issue of whether ineffective assistance of counsel is a basis for an appeal in a child abuse or neglect case.

03-22-07 New Jersey Manufacturers Insurance Company v. Cheryl M. Varjabedian, et al.
A-3372-05T1

This insurance dispute required us to determine the default personal injury liability coverage responsibility of an automobile insurance carrier where the tortfeasor's policy is subject to retroactive revocation following an otherwise covered accident. We hold that when faced with liability for damages sustained by an innocent third-party claimant, a carrier's default liability on a standard automobile policy subject to retroactive revocation is equal to the $15,000/$30,000 limits mandated by AICRA. Thus, we overrule Mannion v. Bell, 380 N.J. Super. 259 (Law Div. 2005), which held that under AICRA the default coverage following retroactive revocation was limited to the PIP benefits and property damage liability coverage mandated in the alternative basic policy described in N.J.S.A. 39:6A-3.1.

We also noted that with the passage of AICRA, N.J.S.A. 17:28-l.le(2) was amended to provide that automobiles covered by a basic policy under N.J.S.A. 39:6A-3.1 are not considered uninsured motor vehicles. Thus, an apparent anomaly was created, which might leave innocent accident victims, who have only UM coverage, unprotected if the tortfeasor is insured with

the optional mandated basic policy (which has no personal injury liability coverage).

03-22-07 State of New Jersey v. Adam J. Kent
A-3137-05T1

Defendant was convicted of DWI following a single-car rollover accident, and the Law Division affirmed his conviction. At the municipal trial, the State placed into evidence, among other proofs, (1) a blood sample certificate pursuant to N.J.S.A. 2A:62A-11 from a private hospital employee who had extracted blood from defendant and (2) reports from a State Police laboratory that had tested the blood samples. The authors of those hearsay documents did not appear at trial.

We reaffirm our holdings in State v. Renshaw, 390 N.J. Super. 456 (App. Div. 2007) (regarding blood sample certificates) and in State v. Berezansky, 385 N.J. Super. 84 (App. Div. 2006) (regarding State Police laboratory reports) concluding that the hearsay documents are "testimonial" under Crawford v. Washington, 541 U.S. 36 (2004), and that defendant was thus deprived of his right of confrontation under the Sixth Amendment.

However, we also note that, unless our Supreme Court determines otherwise, the confrontation clause of article I, paragraph 10 of the New Jersey Constitution does not appear to independently require such cross-examination beyond current federal precedents interpreting the Sixth Amendment. Additionally, we recommend that legislative and/or rule-making initiatives be pursued to avoid placing undue testimonial burdens on health care workers and law enforcement personnel who may create documents relevant to drunk driving prosecutions.

Defendant's DWI conviction is affirmed on independent grounds, based upon the arresting officer's numerous observations indicative of defendant's intoxication, and defendant's admission of drinking.

Judge Stern concurs, addressing issues relating to the applicability of the right of confrontation to DWI and other non-indictable prosecutions in the municipal court.

03-21-07 Patricia Morella v. Grant Union/New Jersey Self-Insurers Guaranty Association
A-0056-05T3

The question presented is whether a petitioner, whose injury occurs before the employer's insolvency, is required to file a proof of claim in the employer's bankruptcy proceeding before qualifying for compensation benefits under N.J.S.A. 34:15-120.18a. We concluded that the statute creates two classes of claimants, those injured before and those injured after the employer's insolvency, and the requirement of filing a proof of claim only applies to the latter.

03-21-07 Gloucester County Improvement Authority v. New Jersey Department of Environmental Protection
A-4282-04T1

A notice of violation of the Solid Waste Management Act issued by the Department of Environmental Protection, which orders the immediate cessation of operation of a solid waste facility, is an order of abatement within the intent of N.J.S.A. 13:1E-9(c), which the recipient is entitled to an administrative hearing to challenge.

03-21-07 State of New Jersey v. Hector A. Velasquez
A-3982-01T3

We hold that before authorizing an adverse inference based upon failure to produce a witness against a defendant in a criminal trial, a court must evaluate the importance of the expected testimony in light of the State's burden of persuasion and any defense asserted. We also hold that unless a defendant in a criminal case has injected an issue such as an alibi or asserted a separate defense, the inference should not be authorized. Finally, we hold that when a court instructs the jury that it may draw the adverse inference, the court must explain its limited significance.

We also consider whether a defendant may be sentenced to an extended term for sexual assault or criminal sexual contact, pursuant to N.J.S.A. 2C:44-3g, if the indictment does not allege the facts essential to imposition of that term. We conclude that the indictment must allege the factual predicates.

03-19-07 Frank Weeden, et al. v. City Council of the City of Trenton, et al.
A-2200-05T5

An applicant seeking to construct a restaurant with a drive-thru window applied for a variance from a redevelopment plan, adopted as overlay zoning, that prohibited drive-in

restaurants. We held that where a municipality adopts a redevelopment plan as overlay zoning in a zoning district, the zoning board of adjustment has jurisdiction to grant a variance from the provisions of the plan. Our opinion specifically does not address applications from designated redevelopers that have covenanted with a municipality to carry out a redevelopment plan.

03-16-07 Jacqueline Johnson v. Republic Western Insurance Company
A-3968-05T5

The motor bus PIP statute mandating passenger medical expense benefits (MEB) coverage, N.J.S.A. 17:28-1.6, contains no stated period of limitations, nor references one. The trial judge applied the principle of legislative oversight and applied the two-year statute of limitations of the automobile PIP statute, N.J.S.A. 39:6A-13.1, granting summary judgment to the bus carrier and dismissing the injured bus passenger's complaint as untimely filed. We reverse.

We have only found "legislative oversight" and imported a provision of the automobile PIP statutes into the statutes governing motor bus MEB by implication in limited situations (deemer and reimbursement), which resulted in coverage to an injured passenger. This statute is a remedial one, which should be construed liberally to advance its purpose of providing MEB coverage to injured bus passengers. This purpose would be undermined by imposing on potential claimants an unstated two-year limitations period. This is not a "clear case" in which to invoke the extraordinary principle of amendment by implication to constrict the availability of this coverage.

03-16-07 Theodore Gregory, et al. v. Borough of Avalon Planning/Zoning Board, et al.
A-0748-05T3

The interest of justice warranted an enlargement of time to challenge resolutions of municipal governing body that authorized owner of motel, restaurant and bar to encroach upon public beach area and property dedicated to street right-of-way, because those resolutions involved significant public interests and were closely related to a resolution of the Board of Adjustment granting land use approvals required for expansion of facility.

03-16-07 21-23 Seidler Associates, L.L.C., et al. v. City of Jersey City
A-0460-05T1

We held that (1) assignees of tax sale certificates have sufficient interest in the property to be entitled to notice of municipal demolition proceedings, (2) the notice requirements for the establishment of demolition liens must be strictly complied with, and (3) despite the invalidation of this demolition lien for inadequate notice, the city is not permitted to redeem the tax sale certificates.

03-15-07 Craig A. Uherek v. Shabana Sathe f/k/a Shobhana Uherek
A-6293-05T2

In this appeal, the court held that R. 5:8-6 did not require that a parent be provided with a transcript of a judge's in camera interview of a child when the interview was conducted four years prior to the request and there was no longer a pending custody dispute.

03-15-07 Shirley Campbell v. Jules Campbell
A-3989-05T5

In this appeal, we hold that pursuant to the Uniform Interstate Family Support Act (UIFSA), codified at N.J.S.A. 2A:4-30.65 to -30.123, the nonregistering party is precluded from contesting the registration of a foreign child support agreement after it has been properly confirmed.

UIFSA requires the nonregistering party seeking to contest the validity of a registered order to do so at the registration hearing, which should be requested within twenty days after the date of mailing or personal service of notice of registration. N.J.S.A. 2A:4-109. If there has been proper notice to the nonregistering party, and the order is properly registered and confirmed, N.J.S.A. 2A:4-111 "precludes further contest of the order with respect to any matter that could have been asserted at the time of registration." Ibid.

03-09-07 Amanda Mastondrea v. Occidental Hotels Management S.A., et al.
A-6412-05T3

We hold that specific personal jurisdiction may be maintained by New Jersey's courts over a Mexican resort located in the State of Quintana Roo that conducts, through an agent,

targeted advertising directed to New Jersey residents and maintains contractual relationships with a travel entity headquartered in New Jersey of which Liberty Travel is a part. Although we also affirm the plaintiff's choice of New Jersey as the forum for her action arising from personal injuries sustained at the Mexican resort, we declare the law of Quintana Roo applicable to issues of apportionment of liability and damages, despite the fact that Quintana Roo applies principles of strict contributory negligence and limits both the amount of damages and the manner in which they will be measured.

03-08-07 David Rivard, et al. v. American Home Products, Inc., et al.
A-2478/4931-05T3

This appeal construes 42 U.S.C.A. § 300aa-33(5), an exception to the National Childhood Vaccine Injury Act, which permits certain actions involving vaccines to bypass the Federal Vaccine Court and proceed in State Court. We hold that defendant drug companies can not be considered to have intentionally added to Orimune, an oral polio vaccine, a monkey virus, SV40, that allegedly caused a brain tumor and subsequent death of plaintiffs' daughter. Therefore, the exception did not pertain and plaintiffs' State complaint, alleging a "vaccine – related injury or death," must be dismissed and filed in the Federal "Vaccine Court."

03-08-07 Cresencio Espinal, et al. v. Marino Arias, et al.
A-2445-05T1

In this verbal threshold case, we reversed a jury verdict in plaintiff's favor. We concluded that the judge unfairly limited defense counsel's opportunity to qualify his expert witness, in essence requiring defense counsel to accept plaintiff's counsel's stipulation as to the witness's qualifications. We further concluded that the court was required, but failed, to instruct the jury not to speculate about the plaintiff's medical expenses, which were paid by PIP, even though plaintiff was not seeking reimbursement for those expenses. Finally, we concluded that injuries that were caused by the accident that did not meet the verbal threshold could be considered by the jury in deciding plaintiff's noneconomic loss, as long as at least one of plaintiff's injuries met the threshold.

03-08-07 Michael Pizzullo, et al. v. New Jersey Manufacturers Insurance Company

A-1395-05T2

In this declaratory judgment action, plaintiffs sought a determination that each of them, as a named insured, was entitled to $500,000 in underinsured motorist (UIM) benefits, under a single family auto policy issued by NJM. Plaintiffs' claim was based upon on an alleged oral assurance made by an NJM customer service representative ten years before the accident. NJM argued that this action was barred by the immunity granted to insurance carriers in N.J.S.A. 17:28-1.9a. After a bench trial, the Law Division held that NJM was equitably estopped from denying the UIM coverage sought by plaintiffs.

We reversed, holding that equitable considerations cannot trump the public policy enunciated by the Legislature in N.J.S.A. 17:28-1.9.

03-07-07 Madeline Muise, etc. v. GPU, Inc., et al. // George J. Tzannetakis, et al. v. GPU, Inc., et al.
A-6580-05T3

Plaintiffs appeal the decertification of a putative class of electrical consumers who experienced electrical outages, allegedly as a result defendants' negligence in failing to replace two transformer banks at defendants' Red Bank electrical substation. In Muise v. GPU, Inc. (Muise II), 371 N.J. Super. 13, 19 (App. Div. 2004), we affirmed decertification of a broader putative class, but remanded for certification of a more limited Red Bank class of consumers. We intimated that on remand, proof of damages as to the Red Bank class, in individual cases, would likely be feasible through use of customer claim forms and surveys, statistical analysis, and judicious use of the tools of discovery. Id. at 64. On remand, the trial court was not presented with and did not consider such proof of damages.

We reverse decertification of the Red Bank class and find that plaintiffs should be afforded reasonable time to present proof of damages as we instructed in Muise II. Only then could the trial court properly address and decide a motion to decertify the class. Additionally, we determined that the decisions in Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234 (2005) and Dabush v. Mercedes-Benz USA, LLC, 378 N.J. Super. 105 (App. Div.), certif. denied, 185 N.J. 265 (2005), are confined to an interpretation of the term "ascertainable loss" as used in the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20, and as such are not applicable here.

03-07-07 Christina Hand v. John Hand, Jr.
A-4748-05T1

We affirm the post-judgment Family Part order denying plaintiff's motion to change custody without holding a plenary hearing because plaintiff failed to establish a prima facie case that there was a genuine and substantial factual dispute regarding the welfare of the children.

03-06-07 Paul F. Ratti v. Department of Corrections
A-2609-05T2

When the evidentiary phase of a hearing has begun but is adjourned before completion, and the original hearing officer is unavailable on the date the hearing resumes, the evidentiary phase of the hearing must begin anew before the replacement hearing officer. Especially when credibility determinations are to be made, principles of fundamental fairness require that the same finder of fact receive all the evidence and make determinations based on all the proofs.

03-06-07 Robert J. Triffin v. Bank of America, et al.
A-2422-05T2

The Check Cashers Regulatory Act of 1993, N.J.S.A. 17:15A-30 to -52, does not create a private cause of action nor does the act's public policy preclude a licensed check casher from assigning a dishonored check to plaintiff, who had a civil judgment for fraud entered against him.

03-05-07* Coryell, L.L.C., as Assignee of M.D. Sass Municipal Finance Partners II, L.P. v. Paul Curry and Wanda D. Price
A-3758/3759-04T5

In this appeal, we hold that pursuant to Rule 4:64-1(f), the constitutional requirements of due process in a foreclosure action do not require notice "most" reasonably calculated to apprise parties of the foreclosure action. Rather, due process is satisfied when notice is accomplished in a manner reasonably calculated, under all of the circumstances, to apprise interested parties of the foreclosure action and afford them an opportunity to present their objections. [*Approved for Publication date]

03-01-07 W.T. v. Division of Medical Assistance and Health Services, et al.
A-0089-05T5

Director of Division of Medical Assistance and Health Services upheld imposition of Medicaid transfer penalty based on unequal equitable distribution to spouse of Medicaid applicant in an action for divorce from bed and board. Reversed on grounds that no regulation authorized the decision, which was also contrary to New Jersey law of equitable distribution.

02-28-07 Glenn T. Cooper, et al. v. Consolidated Rail Corporation
A-0073-06T1

The trial court did not abuse its discretion by granting a motion to dismiss a complaint with prejudice pursuant to Rule 4:23-5(a)(2) when none of the outstanding discovery had been provided.

Although plaintiffs were pro se for a significant portion of the time following the initial dismissal without prejudice, that was not an "exceptional circumstance" necessary to avoid the ultimate sanction of Rule 4:23-5(a)(2), where the judge had painstakingly explained to plaintiffs their obligation to provide all outstanding discovery within the next ninety days, and the consequences of their failure to do so.

02-28-07 Township of Maplewood v. Township of South Orange Village, et al.
A-0466-05T5

N.J.S.A. 18A:22-5, which defines a necessary majority for action by the Board of School Estimate, requires both (i) a majority of the members of the full Board of School Estimate; and (ii) a majority of the members appointed by the participating municipalities.

02-27-07 State of New Jersey v. James R. Davis
A-2607-04T5

We hold that there is no absolute requirement in a sexual assault prosecution involving a child that defendant must arrive at a physical meeting with the targeted victim for preliminary "grooming" actions to ripen into an attempted sexual assault. Prior detailed conversations can constitute a sufficient

indication of defendant's criminal purpose to constitute an attempt.

We also suggest that when the prosecution involves other-crimes evidence and an entrapment defense is advanced the better practice is for the trial judge to try the defense sequentially with the same jury to ensure that the jury properly utilizes the other-crimes evidence.

02-27-07 State of New Jersey v. Benigno Rosario
A-1039-04T4

Defendant who entered a guilty plea to murder in New York in reliance on offer from prosecutor in New Jersey as to what offer would be in New Jersey if he enters guilty plea in New York could enforce New Jersey offer upon his return to New Jersey.

02-26-07 Woodview Condominium Association, Inc. v. Kevin Shanahan, et al.
A-1018-05T2

A mortgagee in possession is liable for delinquent condominium charges, which had accrued against the property's legal owner, for services and utilities furnished during the mortgagee's possession and control of the premises.

02-26-07 Carol Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.
A-6383-04T3

We hold that the Punitive Damages Act precludes enhancing a punitive damage award for general deterrence purposes. In awarding punitive damages, the jury must focus on an amount reasonably sufficient to "punish the defendant and deter that defendant from repeating such conduct." N.J.S.A. 2A:15-5.14(a).

Judge Sapp-Peterson dissents.

02-23-07 Virginia and David Block v. James Plosia, et al.
A-4919-05T1

In a dispute contractually referred to arbitration pursuant to the New Jersey Arbitration Act of 2003, N.J.S.A. 2A:23B-1 to -32, a party is entitled to fair and reasonable notice in advance of the arbitration session that the award may include extraordinary statutory remedies of treble damages and attorney's fees.

02-22-07* In the Matter of the Commitment of J.R.
A-4572-05T5

Appellant was involuntary recommitted to a mental health treatment facility after a recommitment hearing. Based on the treating psychiatrist's testimony that the appellant may stop taking his medication and have to be returned to the facility, the trial court determined that there was clear and convincing evidence that appellant suffered from a mental illness and was a danger to himself and to others. We reversed, holding that the psychiatrist's testimony was inadequate to satisfy the State's burden of proof by clear and convincing evidence that the appellant was dangerous to himself, others or property by reason of mental illness. We emphasized that to justify an involuntary commitment, it is necessary to show more than the potential for dangerous conduct and that there must be a substantial risk of dangerous conduct within the reasonably foreseeable future. [*Approved for Publication]

02-22-07 In the Matter of the Estate of Howard C. Hope, Sr., Deceased
A-3470-05T2

Pursuant to N.J.S.A. 3B:23-3, a provision of the New Jersey statutes that govern the administration of estates, distribution of a decedent's assets in kind is preferable to distribution in cash. Under the facts here, however, whether to distribute the assets in kind or sell the property and distribute cash was within the discretion of the administrator in the first instance, and ultimately in the discretion of the trial judge.

02-16-07 Glen Reilly v. AAA Mid-Atlantic Insurance Company of New Jersey
A-5692-04T3

The Commissioner of Banking and Insurance reasonably construed the term "at-fault accident" to include a one-car, weather-related accident in which the insured driver was not negligent. The agency's interpretation was not unreasonable in light of the purpose of the legislation, N.J.S.A. 17:33B-14, which authorized the regulation. However, the agency's past construction of that term has been inconsistent, and its implementing regulation, N.J.A.C. 11:3-34.3, does not give the insurance industry or consumers fair notice as to the types of accidents that would result in assessment of points for insurability purposes. Therefore the agency must amend the

regulation to define "at-fault" and its application to one-car accidents.

02-15-07 Barbara J. Rente, et al. v. Roseann V. Rente
A-2887-05T5

We reverse the Family Part's grant of unsupervised weekly visitation to the paternal grandparents under the grandparent visitation statute, N.J.S.A. 9:2-7.1, where the grandparents' sole proof was that they babysat the toddler on occasion, and the mother was amenable to supervised visitation, possibly once a month. The grandparents' proofs were clearly insufficient to satisfy the high burden of proof of harm required under Moriarty v. Bradt to rebut the presumption in favor of parental decision-making. The judge made no finding, and the record is devoid of evidence to support a finding, that visitation was necessary and the monthly supervised visitation schedule offered by the mother was inadequate to avoid harm to the child.

02-13-07 Halina Jablonowska, et al. v. David P. Suther, et al.
A-0462-05T5

Here, plaintiff was driving in an automobile with her mother as passenger. Plaintiff's car was struck by a vehicle driven by defendant and her mother died of injuries sustained in the collision. Plaintiff asserted various claims arising from the accident, including an emotional distress claim pursuant to Portee v. Jaffee, 84 N.J. 88 (1980).

We affirm the jury's award of damages to plaintiff for the loss of her mother's companionship, advice and counsel; and the damage award for the decedent's conscious pain and suffering. We also affirm the trial judge's dismissal of plaintiff's Portee claim, concluding that the claim is subject to the limitation on lawsuit threshold under the Automobile Insurance Cost Reduction Act (AICRA), and the claim failed as a matter of law because plaintiff did not present objective clinical evidence to show that she had sustained a "permanent injury" as that term is defined in N.J.S.A. 39:6A-8a.

02-09-07 State of new Jersey v. Jean Morales
A-2842-06T5

We held that recently promulgated AOC Directive 21-06, entitled, "Approved Jury Selection Standards, Including Model Voir Dire Questions," is binding on all trial courts and its

provisions must be strictly followed. We reversed a proposed voir dire method that does not comport with the Directive.

02-09-07 City of Passaic v. Charles Shennett, et al.
A-1311-05T5

1. In exercising their powers of eminent domain, government entities must strictly comply with the rules and statutes governing condemnation.

2. When a condemnor fails to comply with the precondemnation procedures set forth in N.J.S.A. 20:3-6, the Superior Court lacks jurisdiction and must dismiss the complaint in condemnation.

3. Due process renders a judgment void when a plaintiff fails to serve a defendant in accordance with Rules 4:4-3, -4 and/or 4:67-3. Failure of due process renders the Superior Court without jurisdiction over the defendant and without the authority to enter a judgment affecting the defendant's rights or property. R. 4:4-4(a); M&D Assocs. v. Mandara, 366 N.J. Super. 341, 353 (App. Div.), certif. denied, 180 N.J. 151 (2004).

4. When a condemnor fails to serve a property owner with notice of the commissioners' hearing in accordance with N.J.S.A. 20:3-12(c), the commissioners' appraisal is void.

5. When a condemnor fails to comply with the precondemnation requirements of N.J.S.A. 20:3-6; fails to serve the property owner with process in accordance with the Rules of Court; and fails to serve the property owner with notice of the commissioners' hearing, the judgment of condemnation is void – irrespective of the sale of the subject property to a third party.

02-09-07 State of New Jersey v. Robert C. Renshaw
A-0712-05T1

We hold that the admission in evidence of the Uniform Certification for Bodily Specimens Taken in a Medically Acceptable Manner, pursuant to N.J.S.A. 2A:62A-11, without the opportunity for cross-examination of the nurse who drew the blood, and over the objection of defendant, runs afoul of the right of confrontation protected both by the United States and the New Jersey Constitutions.

02-08-07 Jan Marshak v. Lawrence Weser
A-0586-05T1

Under the Uniform Interstate Family Support Act (UIFSA), N.J.S.A. 2A:4-30.65 to -30.123, the law of the issuing state controls the duration of a child support obligation entered in that state. Pennsylvania law does not require a parent to pay college expenses for a child who has reached age eighteen. Accordingly, even though both parents now live in New Jersey, UIFSA precluded a New Jersey court from modifying a support order, originally issued in Pennsylvania, to require defendant to pay for his eighteen-year old child's college education.

02-08-07 Campo Jersey, Inc. v. Director, Division of Taxation
Bubbles, Inc. etc. v. Director, Division of Taxation
A-5384-04T5; A-6078-04T5

In a case of first impression, we affirmed the Tax Court, 22 N.J. Tax 251 (2005), and upheld sales tax assessments on food items sold by certain vendors operating kiosks and free standing carts at the Meadowlands Sports Complex and Quakerbridge Mall, finding reasonable and not ultra vires the Director's definition of "premises" to include the total space of the facilities that customers had to enter to make their food purchases.

02-08-07 In re Application of Virtua-West Jersey Hospital Voorhees for a Certificate of Need
A-1455-04T5

The Commissioner of the Department of Health and Senior Services has the discretion to review and grant a certificate of need (CN) application from a hospital for a change of authorized service designation even though the change of designation was not included in the expressed scope of the CN call issued by Department, but was germane to it.

02-06-07 State of New Jersey vs. Michael King
A-5172-01T1

The fact that a defense witness testified in shackles, or at least in handcuffs, cannot be deemed "harmless error" in a case in which the identification testimony introduced against defendant was not overwhelming nor strong, and the charge should have been more fact sensitive on "suggestiveness." State v. Artwell, 177 N.J. 526 (2003), was prospective only with respect to testimony of a defense witness while dressed in "prison garb," but the prohibition to testifying while shackled (in the absence of a necessity) was not made prospective only.

02-05-07 Rutgers Casualty Insurance Company v. Robert LaCroix, et al.
A-4006-05T2

The public policy that requires an insurer to pay innocent third parties, injured in automobile accidents, the minimum personal injury protection coverage provided by N.J.S.A. 39:6A-4 likewise applies to an innocent child of an insured, residing in the insured's household who is unaware of the insured's material misrepresentations in his insurance application, and who is a licensed driver injured in an automobile accident while driving the insured's car with his permission.

02-05-07 State of New Jersey v. Charles A. Watkins
A-3853-05T4

In this appeal from a denial of defendant's appeal of his rejection from pre-trial intervention (PTI), we addressed the meaning of PTI Guideline 3(i)(2), which directs consideration of whether the crime was "part of a continuing criminal business or enterprise." Reviewing the prior cases that have addressed this Guideline, we conclude that the Prosecutor and the reviewing judge erroneously applied Guideline 3(i)(2) to the facts of this case which involved improper receipt of unemployment checks over a four-month period. Defendant's conduct did not possess the characteristics of a "business" or "enterprise" nor did it persist for a long enough period to be deemed "continuing," as that phrase has been applied in earlier cases.

As a result, we remanded to the Prosecutor for reconsideration of defendant's application without consideration of Guideline 3(i)(2).

02-05-07 Ellen J. Johnson v. David L. Johnson, et al.
A-1172-05T1

A Family Court judge appointed an accountant to evaluate and to verify the income derived by defendant-husband from his various business interests. In an action by the accountant against defendant for payment of defendant's share of the fee, we held that the attorney for the accountant is not entitled to attorneys' fees pursuant to Rule 4:42-9(a)(1) and Rule 5:3-5(c).

02-05-07 Taijuana M. Hale v. Jacqualine L. Farrakhan
A-1048-05T3

If a tenant is forced to vacate a residential unit based on the landlord's announced intent to personally occupy the unit, and the landlord fails to occupy the unit, the landlord has the burden of proving in a wrongful eviction action brought by the tenant that the landlord's failure to personally occupy the unit was not arbitrary.

02-05-07 State of New Jersey v. James Hemphill
A-6297-04T4

Pursuant to R. 3:21-8, a defendant is entitled to receive credit for time spent in custody, on this charge, in the United Kingdom, while pending extradition to New Jersey.

02-05-07 State of New Jersey v. David Amodio
A-0264-04T4

In this matter, defendant was convicted of passion/provocation manslaughter, felony murder, arson and other offenses arising from the death of his girlfriend and her son in a fire at defendant's home. We hold that: 1) evidence obtained by the police and other officials in the fire-damaged home was properly seized without a warrant because the evidence was found during an investigation into the cause and origin of the fire, which was conducted within a reasonable time after the fire had been extinguished; and 2) the warrantless seizure of defendant's clothes was permissible because those garments had been removed from defendant in order to provide emergency medical assistance.

02-02-07 State of New Jersey v. Adam Goodmann
A-1447-05T1

We hold that a customer who, following a billing dispute with Walgreens regarding the cost of photoprocessing, takes the finished photographs without paying for them, but gives his name and address to the store manager, cannot be found guilty of shoplifting. Photoprocessing constitutes a service, and therefore, Walgreens was not acting as a "merchant" when it contracted to develop the customer's film. Further, the photographs that Walgreens produced were not "merchandise," because they lacked value to anyone other the customer and were not salable.

We also hold that a customer, engaged in a billing dispute, who left contact information so that the dispute could be settled, cannot be found to have "purposely" taken possession of the "merchandise" with the intention of converting the same to

his own use without "paying to the merchant the full retail value thereof."

02-02-07 Yilmaz, Inc. v. Director, Division of Taxation
A-0080-05T5

In a reported opinion, the Tax Court judge applied the standard utilized in local property tax cases, Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985), i.e., cogent evidence that is "definite, positive and certain in quality and quantity to overcome the presumption" of correctness of the assessment, to a taxpayer who challenged a state tax assessment based on an audit of a cash business, involving only factual issues and the methods employed by the Director. Yilmaz, Inc. v. Dir., Div. of Taxation, 22 N.J. Tax (Tax 2005). We expressly endorse this standard.

02-02-07 Jason Cutler v. Theodore Dorn, et al.
A-5512-02T1

The evidence in support of plaintiff's hostile work environment LAD claim based on religion or ancestry was insufficient for submission to the jury, and judgment nov should have been granted. The remark that precipitated plaintiff's complaint, although very offensive, was not made by a supervisor or directed at plaintiff, and was not, by itself, sufficiently egregious to be actionable. Nor was an actionable claim established by evidence of additional comments and actions to which plaintiff was subjected over several years. The additional incidents were sporadic, plaintiff never objected or complained, and they were part of the give-and-take among co-workers, in which plaintiff willingly participated.

02-01-07 David Kwiatkowski v. Joseph Gruber, et al.
A-3845-05T5

An order dismissing a complaint without prejudice pursuant to R. 4:23-5(a)(1) is not a final order that can be appealed as of right. And when, as here, plaintiff's complaint is dismissed without prejudice for failure to comply with an ordered medical examination for an adversary, the rule implicitly requires that plaintiff's counsel ask defense counsel to schedule another medical examination and that defense counsel must cooperate in a reasonable manner. After the examination has been promptly conducted, plaintiff may then move for reinstatement of the complaint. Appeal dismissed.

02-01-07 Eric A. Kranz v. Arthur H. Tiger, M.D., et al.
A-2459-04T2

In a personal injury negligence case, negligent miscommunications between plaintiff's physician and plaintiff's attorney, which result in plaintiff accepting a settlement solely because his attorney wrongly informed him that his key medical witness was unavailable to testify in court, may provide grounds for professional malpractice actions against the physician and the attorney. Expert testimony is not required when the allegation is simply that the professionals communicated negligently.

When plaintiff chooses to try the malpractice case by the method known as a "suit-within-a-suit," evidence of settlement negotiations and evidence of the reasonableness of the settlement are inadmissible. Although the jury needs to know that the underlying action ended with a settlement, it should not be told anything about the amount or reasonableness of the settlement. If the verdict exceeds the settlement, the settlement amount will be deducted from the verdict before judgment is entered.

01-30-07* Dorothy Clark v. UMDNJ
A-0257-05T5

In this malpractice appeal, we held that the proper standard of care for an oral and maxillofacial surgeon in his second year of residency and a medical school graduate in her fourth year of residency is that of the average general practitioner. [*Approved for Publication date]

01-29-07 Leo Facto, et al. v. Snuffy Pantagis, et al.
A-1153-05T1

A power failure at the beginning of a wedding reception relieved banquet hall of its contractual obligation to provide reception because the lack of lighting and shutdown of the air conditioning system made continuation of performance impracticable. However, the banquet hall's inability to perform the contract for the wedding reception also relieved the bride and groom of their obligation to pay the contract price.

01-29-07 Sharon K. Smith vs. State of New Jersey, et al.
A-6002-04T2

In this appeal, the court rejected the novel contention that a public employee may be eligible for accidental disability pension benefits, pursuant to N.J.S.A. 43:15A-43, when the traumatic event that caused the disability occurred when the public employee was temporarily employed prior to becoming a member of the Public Employees' Retirement System.

01-29-07 In the Matter of the Civil Commitment of T.J.N. SVP-351-03
A-4857-03T2

Temporary commitment under Sexually Violent Predator Act (SVPA), N.J.S.A. 30:4-27.28, not vacated after subsequent initial commitment hearing where one of two certificates necessary for temporary commitment was inadequate but State sustained its burden at the subsequent adversarial commitment hearing. The State under the SVPA must present only one psychiatrist at the adversarial hearing, provided that he or she is a member of the "treatment team" who examined the committee within five days of the hearing, but even though the constitutional confrontation clauses do not apply, cross-examination of the expert(s) relied upon by the State at the hearing is required. Included hearsay in reports of the State's experts, and fact one State's expert did not interview appellant, do not require reversal of initial commitment.

01-26-07 Psak, Graziano, Piasecki & Whitelaw v. Fleet National Bank, et al.
A-6785-04T1

Plaintiff law firm filed a lawsuit nearly six years after the check drawn on its attorney trust account with Fleet was negotiated, to recover the $6000 overage paid by Fleet to GE Capital to pay off a mortgage in a real estate closing. We held that plaintiff's common law negligence action against both Fleet and GE Capital, ordinarily governed by the six-year statute of limitations of N.J.S.A. 2A:14-1, actually is one to enforce its rights in matters concerning negotiable instruments and arising under Article IV of the Uniform Commercial Code (UCC), particularly N.J.S.A. 12A:4-401, and as such is governed by the UCC's three-year statute of limitations in N.J.S.A. 12A:4-111.

Further, just as with actions against banks for conversion of negotiable instruments, see New Jersey Lawyers' Fund For Check Protection v. Pace, 186 N.J. 123 (2006), we declined to apply the "time of discovery" rule to the instant action, finding no reason in law or policy to extend any greater

protection in this instance to plaintiff, whose claim is grounded only in negligence.

But even if available to toll the statute of limitations, the discovery rule would not inure to plaintiff's benefit here because plaintiff was in possession of the canceled check and the bank statement showing the incorrect amount debited from its IOLTA account shortly after the instrument was negotiated, and because plaintiff was under a mandatory duty imposed by court rule to monitor its attorney trust account on a regular basis.

01-25-07 In re Adoption of Uniform Housing Affordability Controls by the New Jersey Housing and Mortgage Finance Agency
A-2678-04T3

In this appeal, we have concluded that the regulation enacted by the New Jersey Housing and Mortgage Finance Agency that establishes affordability ranges for the provision of housing pursuant to the Mount Laurel doctrine, which regulation has been incorporated by the New Jersey Council on Affordable Housing (COAH) into its third round regulations, is not inconsistent with the Agency's legislative mandate, nor is it arbitrary, capricious or unreasonable. This opinion is being issued in conjunction with a companion opinion, In re the Adoption of N.J.A.C. 5:94 and 5:95 by the N.J. Council on Affordable Hous., in which we address challenges to COAH's adoption of its third round regulations.

01-25-07 In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing, etc.
A-1960/2665/2674/2706-04T3

In this appeal, we address a multifaceted challenge to the validity of the substantive rules of the Council on Affordable Housing (COAH) for the third round that calculate affordable housing needs from 1999 to 2014 and establish criteria for satisfaction of the need between 2004 and 2014.

In the course of this opinion, we have affirmed COAH's methodology for calculating a municipality's rehabilitation share, N.J.A.C. 5:94-2.1(b); its decision to no longer reallocate present need, N.J.A.C. 5:94, Appendix A at 94-35; its continued use of regional contribution agreements, N.J.A.C. 5:94-5.1 to -5.5; and its regulations awarding credits, bonus credits and vacant land adjustments, N.J.A.C. 5:94-4.20(d),

-4.16(a), -4.22, -3.4(a)(1). We have also declared that the agency implementation of its decision to subtract tax credit developments from statewide and regional housing need, N.J.A.C. 5:94, Appendix A at 94-44, by a so-called policy change must be addressed through rule making.

We have also held that COAH's use of filtering in calculating statewide and regional housing need, N.J.A.C. 5:94, Appendix A at 94-42, is unsupported by the record, thus requiring a reconsideration of the need calculation. We have also invalidated the growth share rules to the extent that the methodology relies on unissued data from the State Planning Commission, permits voluntary compliance, and excludes job growth and housing growth resulting from rehabilitation and redevelopment. We have also invalidated the regulations that permit municipalities to provide affordable housing without offsetting benefits, and invalidated the regulation, N.J.A.C. 5:94-4.19, that permits municipalities to age restrict fifty percent of affordable housing to be built in a municipality.

We have directed COAH to promulgate regulations in conformance with the Mount Laurel doctrine and the Fair Housing Act within six months.

01-24-07 Housing and Redevelopment Authority of the Township of Franklin v. Mary Mayo
A-3630-05T3

This appeal involved a breach of a public housing lease term limiting residency to authorized tenants. In the decision, we disapprove of Jijon v. Custadio, 25 N.J. Super. 370 (Law Div. 1991) and hold that the tenant may not cure such a breach solely by having the unauthorized residents vacate the public housing two days before trial for possession and months after the Housing Authority had timely served the tenant with notices to cease and quit and demand for possession and termination of the lease. Instead, any cure must address and remediate the lengthy period of unauthorized lodging.

01-24-07 Jayesh Ghandi v. Julia Cespedes, et al.
A-1637-05T1

We held in this matter that a plaintiff's motion to restore to the trial calendar under Rule 1:13-7(a) should be viewed with great liberality, absent a finding of fault by the plaintiff and prejudice to the defendant.

01-24-07 Samuel L. Doyal v. New Jersey Department of Environmental Protection
A-4839-04T1

The Freshwater Wetlands Protection Act does not authorize issuance of a general permit for filling or other regulated activity in a freshwater wetland that is part of a surface water tributary system, regardless of whether the system is non-tidal or tidal.

01-24-07 New Jersey Builders Association v. New Jersey Council on Affordable Housing
A-4531-04T5

Plaintiff New Jersey Builders Association (NJBA) appeals from the denial of its application for attorney's fees pursuant to N.J.S.A. 47:1A-6, a provision of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. Relying upon N.J.S.A. 47:1A-5(i), NJBA claims that it was entitled to fees because New Jersey Council on Affordable Housing (COAH), Department of Community Affairs, did not produce the information it demanded within seven business days.

We hold that NJBA was not entitled to fees. Because NJBA's OPRA request did not specifically identify the documents it sought, as required by N.J.S.A. 47:1A-5(f), OPRA's seven-business-day deadline did not apply, N.J.S.A. 47:1A-5(i). Moreover, NJBA's request required COAH to identify records, survey COAH employees, gather responsive information and produce new documents. Because OPRA does not require an agency to perform such tasks and because NJBA needed more than ten business days to review the materials COAH produced, we hold that COAH established that its conduct was authorized by N.J.S.A. 47:1A-5(g), which permits an agency confronted with a request that will substantially disrupt its operations to offer a reasonable solution that accommodates the competing interests.

01-23-07 Monogram Credit Card Bank of Georgia v. Robert c. Tennesen, et al.
A-6267-04T1

In this action brought under the Consumer Fraud Act (CFA), we determine that the delivery of non-conforming household furniture, and the seller's subsequent failure to provide the consumer with the options set forth in N.J.A.C. 13:45A-5.1, is a per se violation of the statute.

We interpret this regulatory scheme which has been significantly amended over the years so as to limit our prior holding in DiNicola v. Watchung Furniture's Country Manor, 232 N.J. Super. 69 (App. Div.), certif. denied, 117 N.J. 126 (1989) to its facts and its place in time.

01-23-07 Finderne Heights Condominium Association, Inc. v. Paul Rabinowitz, et al.
A-6135-04T1

This opinion holds that the alternative dispute resolution requirements in the Condominium Act and the Planned Real Estate Development Full Disclosure Act do not prohibit a unit owner or a condominium association from initiating litigation without first submitting the dispute to alternative dispute resolution, if there are compelling circumstances.

01-23-07 The Jersey Division of Youth and Family Services v. F.H. and A.H. // IMO the Guardianship of H.H., K.H. and Y.H.
A-3477-04T4; A-3846-04T4 (consolidated)

These are two consolidated termination of parental rights cases involving defendants' three biological children. Both parents argue that DYFS did not prove each of the four statutory elements of N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence. The father individually argues that DYFS failed to consider: (1) placing the children with his brother, as an alternative to termination; and (2) that the termination of Muslim parents' parental rights, followed by a Christian adoption, undermines the children's cultural and religious heritage.

We hold that the Division met its burden of proof that the parents were unwilling or unable to provide a safe and secure environment for the middle child. With respect to the eldest child, there was insufficient evidence to support the trial court's holding that the parents caused or were otherwise responsible for causing significant physical or emotional injuries to her. Finally, with respect to the youngest child, there was no evidence showing that the parents caused or were otherwise responsible for causing any physical or emotional injuries to him.

In order to sustain a judgment terminating a defendant's parental rights with respect to children who have not been the direct recipient of abuse or neglect, the trial court must find,

by clear and convincing evidence, that DYFS has demonstrated that the parent's failure to adequately respond to and/or prevent the abuse endured by one child, exposes any similarly situated sibling to a high probability of being abused or neglected.

In this light, we (1) affirm the judgment terminating defendants' parental rights with respect to the middle child; and (2) reverse the judgment terminating defendants' parental rights with respect to the other two siblings. We remand the matter to the Family Part to explore, at a permanency hearing, DYFS' capability to provide defendants with the services and supervision necessary to insure the health, welfare, and safety of these two children.

We are satisfied that a precipitous reunification of these two children with their parents is not warranted. Rather, a carefully monitored, closely supervised, gradual increase in both the frequency and scope of the parents' contacts with these two children will provide the best means to achieve the goal of returning the children to their parents, without compromising their safety. If, after the passage of sufficient time to assess the efficacy of these services, the trial court is satisfied that reunification is no longer legally viable, DYFS may re-file its Guardianship Petition.

Finally, we reject defendants' arguments that DYFS' actions undermined the children's religious and cultural rights to be raised as Muslims. DYFS' mission, and its driving concern in these type of cases, is first and foremost the physical and emotional well-being of the children. Although the continuation of a child's cultural and religious traditions may be laudatory, it cannot guide a decision to remove or not to remove; to terminate or not to terminate; or to pass over an otherwise suitable foster placement.

01-22-07 State of New Jersey v. Shirley Reid
A-3424-05T5

We held that an internet subscriber has an expectation of privacy in information on file with the internet provider identifying her as the user associated with an anonymous "screen name." Since the police obtained that identifying information by means of an invalid subpoena, issued by a municipal court administrator and returnable on the date of issuance, the order suppressing the evidence obtained from the internet provider was affirmed.

01-17-07 In the Matter of Jacob Micheletti, et al
A-4418-05T2

Speech and occupational therapy for autistic child was excluded from coverage under the State Health Benefits Program by a final administrative decision of the State Health Benefits Commission. Held that the exclusion is contrary to the Mental Health Parity Act, the purpose and spirit of the State Health Benefits Program and the public policy of this State for the protection and nurturing of children.

This decision is a companion to the decision delivered by Judge Payne in Markiewicz v. State Health Benefits Program, ___ N.J. Super. ___ (App. Div. 2007) that has been released simultaneously.

01-17-07 Walter Markiewicz v. State Health Benefits Commission
A-0507-05T5

Occupational, physical and speech therapy constitute the primary, medically recognized treatments for persons suffering from autism and pervasive developmental disorder. Nonetheless, in a final administrative decision, the State Health Benefits Commission affirmed the exclusion of those treatments from coverage under the New Jersey State Health Benefits Plan. We reverse that determination and conclude that the contractual exclusion, as applied, violates New Jersey's Mental Health Parity Act.

A similar conclusion has been reached by another panel of this court, as expressed in a decision delivered by Judge Collester that has been released simultaneously with this one.

01-16-07 Phyllis Sinclair, et al. v. Merck & Co., Inc.
A-5661-04T5

We reversed as premature the trial court's dismissal on the pleadings of plaintiffs' proposed class action for medical monitoring for undiagnosed myocardial infarctions allegedly resulting from the use of Vioxx. We remanded the matter to afford plaintiffs the opportunity to demonstrate exposure to the drug by evidence of presently existing physical injury or other means, and required that a determination of the viability of their claims, as a matter of law, take into account all of the factors set forth by the Supreme Court in Ayers v. Twp. of Jackson, 106 N.J. 557, 606 (1987).

01-12-07 Kimberly Britten v. Liberty Mutual Insurance Company
A-2440-05T3

In this appeal, we determined that plaintiff, who was entitled to recover PIP benefits under her personal auto insurance policy, was precluded from also recovering PIP benefits under her mother's auto insurance policy, irrespective of plaintiff's status as a resident member of her mother's household. We found that the anti-stacking provisions of N.J.S.A. 39:6A-4.2 and the statutory exclusions contained in N.J.S.A. 39:6A-7 bar plaintiff from recovering PIP benefits under both policies.

01-11-07 State of New Jersey v. Malvern L. Lewis
A-1391-03T4

Defendant was found guilty of the murder of one person, aggravated assault and related weapons offenses with respect to another person, and contempt for violation of a domestic violence restraining order. The trial judge erred in failing to sever the contempt charge and in allowing the restraining order into evidence as to the other crimes. Because defendant's state of mind was at issue with respect to the aggravated assault and weapons offenses, the errors were prejudicial and required reversal of those convictions. But the errors were not capable of producing an unjust result with respect to the murder conviction because the homicide was admitted, self-defense and heat-of-passion manslaughter were not in the case, and no reasonable jury could have found that the homicide constituted aggravated manslaughter or manslaughter rather than murder. The errors were also not capable of affecting the contempt conviction, which rested on admitted facts unrelated to defendant's state of mind when he attacked the second victim.

01-10-07 State of New Jersey v. David Liviaz
A-5135-05T1
-consolidated with-
State of New Jersey v. Dennis J. Claros-Benitez
A-5136-05T1

Although PTI may not be denied solely because a defendant is an illegal alien, it can be a relevant factor, and in both of these cases defendant's illegal status plus other facts justified the prosecutor's rejection of defendant's application for admission to the PTI program. Judgments of the trial court therefore reversed.

01-10-07 In the Matter of the Ownership of Renewable Energy Certificates ("RECs") Under The Electric Discount and Energy Competition Act, As It Pertains to Non-Utility Generators and the Board's Renewable Energy Portfolio Standards
A-5183/5189/5191-04T5

The Board of Public Utilities decided that for existing long-term contracts involving purchase of electricity produced with renewable energy, the initial owner of the Board-created Renewable Energy Certificates, or "RECs," would be the purchasing utility rather that the selling renewable energy producer. Since the decision violates neither federal nor state law, is fair to the parties, and fairly benefits retail consumers, we affirmed.

01-09-07 Nancy Giordano v. John Giordano
A-3210-05T1

In this appeal, the court rejected an argument that federal law, once triggered, preempts state law or otherwise prohibits a state court from compelling a delinquent parent to pay child support arrearages at a rate greater than that imposed by a federal court in ordering restitution pursuant to the Child Support Recovery Act, 18 U.S.C.A. § 228.

01-08-07 William Grubbs, et al. v. Lenore Slothower, et al.
A-4196-05T2

We reverse the trial judge's reversal of the zoning board of adjustment's denial of plaintiff's major subdivision and variance application. We remand the matter to the zoning board of adjustment to apply the appropriate standard of review to plaintiffs' request for a density variance pursuant to N.J.S.A. 40:55-70d(5). We determine for the first time that the appropriate standard of review for a density variance involving a permitted use is the more relaxed standard enunciated by the Supreme Court in Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994) and echoed in our prior opinion in Randolph Town Ctr. Assocs., L.P. v. Twp. of Randolph, 324 N.J. Super. 412 (App. Div. 1999).

01-04-07 State of New Jersey v. Louis Toscano, et al.
A-6664-04T1

Safety National Casualty Corporation posted a bail bond in the amount of $40,000 for defendant Louis Toscano and appeals from an order that remits $8000 and forfeits $32,000 of that bond. The warrant that was issued upon Toscano's failure to appear was executed two days before Safety had notice of his non-appearance. We conclude that this forfeiture is excessive when considered under the remittitur guidelines issued by the Administrative Director of the Courts and remand for reconsideration. See Directive #13-04, Revision to Forms and Procedures Governing Bail and Bail Forfeitures, Attachment F (2004). When a surety cannot qualify for "partial remission" because it did not engage in "immediate substantial efforts to recapture," as we have construed that phrase in State v. Ruccatano, 388 N.J. Super. 620 (App. Div. 2006), the "policy concerns" and "factors" that inform decisions under the remittitur guidelines require consideration of a "starting point" between those for "minimal remission" and "partial remission."

12-29-06* I.L. v. New Jersey Department of Human Services, Division of Medical Assistance and Health Services
A-3476-04T1

I.L. owned three life insurance policies having a total surrender value of $5,913. In light of I.L.'s dementia, these policies were not "accessible" to her for purposes of N.J.A.C. 10:71-4.4(b)(6), and she was eligible to participate in the Medicaid Only program. [*Approved for Publication date]

12-27-06 New Jersey Citizens United Reciprocal Exchange v. American International Insurance Company of New Jersey
A-2099-05T5

Plaintiff filed a declaratory judgment action seeking a declaration that defendant was obligated to reimburse plaintiff for 50% of the underinsured motorist (UIM) benefits paid to its insured, asserting that the step-down provision in defendant's policy was unenforceable. We held that where a claimant, other than the named insured, seeks to void a step-down provision, asserting that the insurer failed to provide reasonable notice of a change in UIM coverage by including such a provision, the burden of persuasion to prove inadequate notice to the insured rests with the claimant, not the insurer.

12-27-06 All Modes Transport, Inc., et al. v. William G. Hecksteden, et al.
A-0361-05T5

A trial court has no obligation to interrupt a party's testimony to warn him that it may be self-incriminating. A trial court should not suggest to a party that the failure to settle a case may result in the court referring that party's testimony to the appropriate prosecuting authority.

12-27-06 JS Properties, L.L.C., et al. v. Brown and Filson, Inc., t/a Shelby's
A-5993-04T1

In this commercial tenancy matter, the tenant filed a counterclaim, asserting the novel claim that it was constructively evicted as a result of the landlord's allegedly malicious suit for possession. The court was not required to determine whether such a theory should be recognized in this State because the tenant remained in possession of the leased premises for six months following the commencement of the suit for possession, a fact which was fatal to the constructive eviction claim. The court, however, reversed and remanded for a new trial on the landlord's claim for damages because the trial judge erred in excluding the tenant's expert testimony regarding the fair market sale or rental value of the leased premises, which was offered to show that the landlord did not take reasonable steps in mitigating damages.

12-26-06 Robert C. McKenzie v. Board of Trustees of the Public Employees' Retirement System
A-1376-05T5

Under N.J.S.A. 43:15A-61, a government employee must remain actively engaged in his or her "office, position or employment" until he or she attains the age and service requirements to qualify for veterans' benefits upon retirement.

12-21-06 Nicholas Diehl v. Beverly Diehl
A-1976-05T5

On remand for a Lepis hearing, the judge determined that plaintiff was disabled, awarded him counsel fees and costs, reduced his support obligations retroactively and gave him a credit for all retroactive SSD benefits paid to the child. We conclude: (1) a credit for weeks during which plaintiff had no court-ordered support obligation is not equitable; (2) a credit for the period during which plaintiff was required to pay support at the level set in the final judgment is equitable, Sheren v. Moseley, 322 N.J. Super. 338 (App. Div. 1999); and (3)

a credit for benefits paid for weeks during which plaintiff was charged with support at a reduced level was neither equitable nor consistent with the child support guidelines, R. 5:6A; Child Support Guidelines, Pressler, Current N.J. Court Rules, Appendix IX-B to R. 5:6A at 2255 (2007).

12-20-06* State of New Jersey v. Breane Starr Blakney
A-6162-01T4

In this appeal of defendant's murder conviction arising out of the death of her six-month-old infant, we found that the jury charge on the limited purposes for which evidence of prior abuse of the infant could be considered pursuant to N.J.R.E. 404(b) was neither confusing nor vague. In addition, we concluded that the prosecutor's summation, though highly charged and delivered without objection from the defense, was not so egregious that defendant was deprived of a fair trial. We agree, however, that defendant's conviction for third-degree aggravated assault should have been charged as a lesser included offense of second-degree aggravated assault.

Judge Weissbard filed a dissenting opinion in which he disagreed with the majority's conclusion that the trial court properly instructed the jury on the 404(b) evidence. He also concluded that the prosecutor's misstatements during summation further emphasized the need for carefully tailored, complete and forceful limiting instructions. In his view, these errors resulted in extreme prejudice to defendant in a case where the evidence, if properly considered by the jury, could have supported a manslaughter verdict rather than the murder conviction. [*Approved for Publication date]

12-20-06 State of New Jersey v. Ryan Buda
A-4778-04T4

An excited utterance made by a child abuse victim to a DYFS worker at a hospital, although admissible under state evidence law, is inadmissible in this case as a result of evolving federal constitutional jurisprudence under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and Davis v. Washington,__ U.S. __, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). There is a concurring opinion.

12-19-06 State of New Jersey v. Manuel B. Ortiz
A-4941-05T2

The question presented is whether a defendant who is adjudicated not guilty by reason of insanity, N.J.S.A. 2C:4-1, and released, pursuant to N.J.S.A. 2C:4-8b(2), may be subjected to periodic Krol reviews as a condition of release. Although we answered the question in the negative, we concluded that the court possesses inherent authority to impose, as a condition of release under N.J.S.A. 2C:4-8b(2), the submission of periodic reports from the defendant's mental health provider concerning defendant's treatment, compliance with his medication regimen, and future prognosis.

12-18-06 Barbara Stoffels v. Harmony Hill Farm, et al.
A-2085-05T2

This appeal concerns the statute governing equine animal activities, N.J.S.A. 5:15-1 to -12, that grants to a stable operator a limitation on liability, subject to several exceptions. Two exceptions to the limitation on operator liability were at issue. We held that the operator of a stable properly relied on a comprehensive e-mail message from plaintiff that provided an extensive description of her horse riding experience. The judge properly granted summary judgment and dismissed this aspect of plaintiff's complaint. We held, however, that genuine issues of material fact existed whether the horse assigned to plaintiff by the operator was suitable, thereby precluding summary judgment on this portion of plaintiff's claim.

12-15-06 J.S. v. L.S.
A-2322-05T2

Defendant, who was statutorily presumed, by N.J.S.A. 9:17-43a(1), to be the father of a child born to his wife during their marriage, was properly relieved of all current and future obligations of financial support for the child when genetic testing established that he was not the biological father. Defendant was not entitled, however, to recover from his ex-wife sums he paid for the support of the child from birth to the time that the presumption of paternity was rebutted. In spite of the ex-wife's deceit, she was not liable for reimbursement of money paid by defendant for child support based on his presumed paternity. She was not unjustly enriched because responsibility for support runs from parent to child, not parent to parent. Requiring the mother to reimburse would be contrary to the best interests of the child since that would inevitably result in depletion of resources for the child.

To the extent anyone has been unjustly enriched, it was the true biological father, who was not a party to the action. Defendant's remedy is against him, not the mother.

12-14-06 Lorraine Ramsey, et al. v. Delaware River and Bay Authority, et al.
A-0773-05T3

We hold that the Delaware River and Bay Authority (DRBA) improperly instituted a one-year suit limitation period and a Delaware venue provision governing actions against the DRBA resulting, as in this case, from personal injuries sustained by passengers on the Cape May-Lewes Ferry. These significant actions should have been approved by the DRBA commissioners pursuant to the legislative compact governing the DRBA. N.J.S.A. 32:11E-1. As a result, summary judgment in favor of the DRBA dismissing the passenger's personal injury suit is reversed.

12-13-06 Debra S. Smerling, et al. v. Harrah's Entertainment, Inc., et al.
A-16889-05T1

Plaintiff's consumer fraud action against a licensed casino hotel alleging false and misleading promotional advertising is not preempted by the Casino Control Act's comprehensive regulation of New Jersey's casino industry. We discern no "direct and unavoidable conflict" between the dual regulatory schemes, which share a mutual view "assuring that such advertisements are in no way deceptive; nor do we perceive that judicial construction would affect the uniformity of the interpretation or application of the Casino Control Act's statutory or regulatory requirements.

12-12-06 In the Matter of a Grand Jury Subpoena Issued to Amato A. Galasso, Esq.
A-2199-05T2

Given the secrecy underlying a grand jury proceeding, the judge was entitled to rely on an ex parte certification submitted for in camera review by the State in opposition to a motion to quash a grand jury subpoena.

12-11-06 Cipriani Buildersm Inc., et al
A-1234-05T2

A trade association's failure to comply with its own by-laws in expelling a member may support a claim that the expulsion was wrongful. Statements by a trade association's executive director that certain members had engaged in "lowly maneuvers," "illegal rule-breaking" and "dissension-causing tactics" were only rhetorical hyperbole and therefore could not support a defamation claim.

12-08-06 State of New Jersey v. Walter Tuthill, et al.
A-6548-04T1

We hold that a surety's obligation on a bail bond is not necessarily released by a court's mistaken cancellation of the bond, and that absent a showing by the surety of detrimental reliance or a material increase in the risk originally undertaken, a court is not bound by its error, has the power to correct it, and acts within its discretion in ordering the bond reinstated without the surety's consent.

12-07-06 State of New Jersey v. Franklin Saving Account Number 2067, et al.
A-1895-05T1

On motion of the State's adversary in this civil forfeiture proceeding, the trial court quashed a subpoena for bank records that did not comply with Rule 4:14-7(c), precluded the State from issuing another, granted summary judgment against the State and required the State to pay counsel fees pursuant to Rule 1:4-8. Prior to commencing this forfeiture action, however, the State demonstrated probable cause and obtained a court order that authorized seizure of the account and compelled the bank to surrender related records.

We conclude that it was a mistaken exercise of discretion to impose a sanction tantamount to a dismissal of the State's case under these circumstances. The deviation did not prejudice the litigant or deprive him of the protection that Rule 4:14-7(c) was designed to afford.

We also conclude that the court erred in imposing sanctions under Rule 1:4-8. The moving party did not follow the procedural requirements of Rule 1:4-8(b). Moreover, there was no basis for a finding that the subpoena was issued for an improper purpose or without the evidential support required at this early stage of the proceeding. See R. 1:4-8(a)(1)-(4).

12-07-06 Allstate New Jersey Insurance Company, et al. v. Cherry Hill Pain and Rehab Institute, et al.
A-1064-05T5

Defendant's initial Camden County action against plaintiffs, seeking judgment that it was entitled to reimbursement for the medical treatment of patients, was dismissed pursuant to R. 4:6-2(e). Thereafter, plaintiffs filed this action against defendants in Burlington County which was dismissed by the trial court under the entire controversy doctrine.

We first held that R. 4:6-2(e) provides the option to raise its enumerated defenses either by motion or in an answer, and plaintiffs were not prohibited from raising their defense of lack of standing in an answer to defendants' Camden County complaint.

We also held that the entire controversy doctrine should not bar plaintiffs' subsequent Burlington County action against defendants where application of the doctrine would not further its objectives to promote conclusive determinations, public policy, party fairness, and judicial economy. Since defendants' initial action against plaintiffs was dismissed for lack of standing and failure to state a claim, and not on the merits, and because plaintiffs' complaint alleged claims which are separate and discrete from those asserted in the initial action, the trial court's application of the entire controversy doctrine to bar plaintiffs' action against defendants was inappropriate. Finally, defendants will not be prejudiced in their defense of plaintiffs' claims. We therefore reversed and remanded for further proceedings.

12-05-06 Michael Allen, et al. v. World Inspection Network International, Inc.
A-1624-05T1

We held that a provision in a franchise agreement, requiring that all disputes be arbitrated in the State of Washington, was an integral part of the arbitration clause and therefore fell within the ambit of the Federal Arbitration Act. Under Supremacy Clause principles, the New Jersey Franchise Practices Act could not preclude enforcement of this forum selection provision. We also concluded that the trial judge's findings were insufficient to justify voiding the forum selection provision under general principles of State contract

law, the only relevant exception to enforceability under the Federal Act.

12-01-06 Ismael Negron v. Melchiorre, Inc., et al.
A-5105-04T5

In this appeal we consider whether a party who files an offer of settlement for a specified amount pursuant to the Offer of Judgment Rule is entitled to recover from the party not accepting the offer, the sanctions available under Rule 4:58-2, when: (1) defendant did not accept plaintiff's offer within ninety days of its service; (2) the first trial in the underlying litigation was nullified as a mistrial; (3) the jury's verdict in a second trial was set aside by the trial court; (4) a final judgment in plaintiff's favor, awarding him damages greater than 120% of his offer of settlement was not entered until the completion of a third trial; and (5) the initial offer of settlement was not reaffirmed after the first mistrial, or at any time thereafter.

We now hold that the sanctions provided in Rule 4:58-2 are enforceable against the party who fails to accept an offer of judgment "prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires," Rule 4:58-1, even if the first trial results in a mistrial. The only requirement for the enforceability of these sanctions is the entry of a final judgment disposing of the case. Rule 4:58-5. It matters not whether the final judgment was entered after the completion of one trial, or, as here, after the completion of the third trial.

11-30-06 In the Matter of the Probate of the Will of Samuel Lee
A-0547-05T1

Federal law controls issues regarding payment of federal estate taxes and therefore controls the question of repayment to a surviving spouse's estate of the federal estate tax attributable to Qualified Terminable Interest Property created under the will of the spouse who was first to die. As a result, the trial judge was incorrect in holding that charitable beneficiaries of QTIP trusts were not exonerated from the payment of the federal estate taxes attributable to the QTIP trusts. However, as a matter of state law, the will could be construed to provide family members a greater share of the estate to pay federal estate taxes which must be paid exclusively from their shares.

11-28-06 Lydia Forrestall v. Michael S. Forrestall
A-2337-05T1

Neither employer contributions to a 401(k) plan nor the income generated by that plan would have been available to pay child support expenses in an intact family and are, therefore, not includable in determining a parent's income for child support purposes.

11-28-06 Donald M. Tretola v. Jane K. Tretola
A-1840-05T1

At issue in this appeal are the rights of the non-custodial parent to information and modification of his support and educational obligations for the parties' nineteen-year-old son, who is both employed and attending college full time. We reverse the trial court's order denying plaintiff's request to emancipate his son and requiring a contribution towards college expenses, and remand for discovery and a plenary hearing.

The Family Part judge was remiss in not requiring defendant to submit documentation of Daniel's credits and earnings and in dismissing the matter summarily. The judge also erred in failing to schedule a plenary hearing to determine the intent of the parties in entering into the PSA, which did not specifically address this situation, and to evaluate Daniel's college plans, expenses, income and savings, and his parents' financial status before concluding he was not economically self-sufficient to warrant emancipation, or that there was not a sufficient change of circumstances for the modification of child support.

11-28-06 Papergraphics International, Inc. v. Juan "J.J." Correa, Jr., et al.
A-0360-05T1

Trial court's summary judgment of liability under the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-01 to -109, reversed. We found CFA applicability hinges on the nature of a transaction, requiring a case by case analysis. In this case the plaintiff's purchase of 9,714 printer ink cartridges, bought for resale at a significant profit not for its individual use was not the type of "consumer transaction" covered by the statute. The commercial transaction was between parties who were experienced commercial entities of relatively equal bargaining power, which engaged in negotiated contracts. Further, plaintiff had knowledge of the potential risks of

purchase at the time of sale and was not an unsophisticated buyer.

11-21-06 In re Contest of the November 8, 2005 General Election for the Office of Mayor for the Township of Parsippany-Troy Hills
A-2353-05T2

In an election contest pursuant to N.J.S.A. 19:29-1 to -14, second-place petitioner alleged the receipt of illegal votes and the rejection of legal votes as a cause for the contest. N.J.S.A. 19:29-1e. The motion judge dismissed the petition for failure to state a claim pursuant to Rule 4:6-2(e). The petition contained the names, addresses and voting districts of alleged illegal voters, and rejected legal voters, in sufficient number to potentially change the outcome of the election in petitioner's favor. We reverse and hold that petitioner pled her case with the required specificity of N.J.S.A. 19:29-2 and that the burden placed on the petitioner by the motion judge at the pleading stage was too onerous. The matter is remanded for an expedited plenary hearing and other proceedings consistent with our holding.

11-21-06 David Foster v. Newark Housing Authority, et al.
A-1614-05T2

The New Jersey Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 to 59:12-3, rather than common law, governs negligence actions against a public entity landlord.

A police officer's right to sue under the statute abrogating the fireman's rule, N.J.S.A. 2A:62A-21 to -22, is subject to the TCA if the defendant is a public entity covered by the TCA.

A jury could find that maintenance of an unlocked door to a public entity's apartment building is palpably unreasonable.

11-21-06 Howard Wein, et al. v. Jack Morris, et al.
A-6129-04T1

In this appeal, the court held that the trial judge erred in sua sponte enforcing the parties' agreement to arbitrate at a time when the matter had been pending for five years, when the parties' cross-motions for summary judgment were pending and when a trial was imminent. The court rejected the contention that defendants were obligated to immediately appeal the order

compelling arbitration, holding that -- despite the order's dismissal of the complaint and all claims -- it was not a final order and that defendants were not then obligated to move for leave to appeal, instead concluding that no prejudice should result from defendants' failure to seek review of the order compelling arbitration until final judgment was rendered. The court also held that by participating thereafter in a sixteen-day arbitration hearing, defendants did not waive their right to later seek reversal of the erroneous order compelling arbitration once final judgment was entered.

Lastly, the court held that the arbitrator exceeded his authority when, after entering an award that resolved all claims, the arbitrator later revisited and modified his award, not just to correct "clerical, typographical or computational" errors but to grant plaintiffs additional affirmative relief that was denied in the original award.

11-17-06 State of New Jersey v. Mark Ruccatano
A-1695-05T1

The Remittitur Guidelines governing partial remission of forfeited bail were promulgated by the Administrative Office of the Courts in Administrative Directive #13-04 issued on November 17, 2004, and were endorsed by us in State v. Ramirez, 378 N.J. Super. 355 (App. Div. 2005). In part, the Guidelines call for "minimal remission" in situations where the surety "provided minimal or no supervision while the defendant was out on bail," but the amount of the remission varies depending on whether the surety did or did not "engage in immediate substantial efforts to recapture the defendant." In this case, we addressed the meaning of "immediate substantial efforts."

We held that the immediacy of the surety's efforts should ordinarily be measured from the time the surety is informed of the warrant/forfeiture, without reference to when it would or should have learned of that fact if there had been proper supervision.

We also held that "substantial efforts" is given meaning by the use of the phrase, "reasonable efforts under the circumstances," one of the listed factors to be weighed in deciding the amount of the remission. We also equate reasonable with effective. The word substantial does not relate solely to the quantum of effort expended by the surety, but to the quality of that effort.

Here, the surety, once made aware of the defendant's default, immediately ascertained that he was incarcerated in another county and notified the Prosecutor's office in the county where the bail was posted. Though not much effort was expended, the surety's efforts were effective in recapturing defendant and were reasonable under the circumstances. As a result, the surety's efforts were substantial for the purpose of applying the appropriate Guideline.

11-17-06 M.A. v. E.A.
A-6736-04T1

Under the narrow definition of a "victim" in the Prevention of Domestic Violence Act codified at N.J.S.A. 2C:25-19(d), an unemancipated minor who has been sexually assaulted by her co-habitating stepfather cannot obtain a restraining order against him under the Act if she does not become pregnant. Nor does the minor's mother have standing to obtain a TRO or an FRO under the Act on her daughter's behalf. Any remedy to the statute's limitations must come from the legislature.

11-17-06 State of New Jersey v. Darnell Bell
A-3850-04T4

Applying New York v. Harris, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990), we held that an illegal search of a third party's residence, during which defendant was found and arrested pursuant to a valid arrest warrant, does not justify suppression of defendant's confession, made three hours later at the police station. We rejected defendant's argument that we should reach a different result under Article I, paragraph seven of the New Jersey Constitution.

11-16-06 E&M Liquors, Inc., et al. v. Public Service Electric & Gas Company
A-6586-04T1

Utility company immunity for interruption of service does not extend to direct negligence.

11-16-06 S.T. Hudson Engineers, Inc., et al. v. Pennsylvania National Mutual Casualty Company, et al.
A-5629-04T5

Plaintiffs filed a declaratory judgment action against defendant, seeking insurance coverage and a defense, including

counsel fees and costs, under a Comprehensive General Liability policy and a Commercial Umbrella policy issued by defendant.

We affirmed the trial court's determination that defendant was obligated to defend plaintiffs. We held that the policies' professional services exclusion should be construed in favor of the insureds to provide coverage. Furthermore, the products-completed operations coverage, which applied to the giving of warnings and instructions, was not included in the professional services exclusion. As a result, defendant had a duty to defend plaintiffs under the products-completed operations coverage for plaintiffs' alleged negligent failure to provide warnings, and such a duty is not shielded by the professional services exclusion.

Finally, we affirmed the trial court's determination that plaintiffs are "successful claimants," pursuant to R. 4:42-9(a)(6), and therefore are entitled to counsel fees and costs incurred in prosecuting the initial litigation.

11-16-06 The Estate of Vaciliki Nicolas, et al. v. Ocean Plaza Condominium Association, Inc.
A-4945-04T3

We hold that Sections 5-4.1 and 5-12(g) of the New Jersey Law Against Discrimination provide a cause of action for disability discrimination based upon the failure of a condominium association to provide a disabled resident, of a multiple unit condominium building, a reasonable parking space accommodation sufficient to afford her an equal opportunity to the use and enjoyment of her condominium unit.

11-15-06 Theresa Palmieri v. Angelo Palmieri
A-6500-04T2

A motion judge should not resolve factual disputes on the basis of conflicting certifications purporting to demonstrate whether the ex-wife was "residing with an unrelated person," which pursuant to a clause in the property settlement agreement, would be grounds for termination of alimony payments. Moreover, the language of such a clause must be construed reasonably, so as not to reach an absurd result and so as not to ignore the qualification in Konzleman v. Konzelman, 158 N.J. 185, 202 (1999), that a mere romantic, casual or social relationship is not sufficient to justify the enforcement of a provision in a property settlement agreement terminating alimony.

11-13-06 Chicago Title insurance Company, et al. vs. Donald Bryan, etc. and other consolidated cases
A-1840-04T3; A-3108-04T3; A-2039-05T3; A-3110-04T3; A-3111-04T3; A-3112-04T3; A-3113-04T3; A-3114-04T3; A-3115-04T3; A-3116-04T3; A-3117-04T3; A-3118-04T3; A-3119-04T3; A-3120-04T3; A-3121-04T3; A-3122-04T3; A-3123-04T3; A-2034-05T3; A-2035-05T3; A-2036-05T3; A-2037-05T3; A-2038-05T3; A-2040-05T3; A-2041-05T3; A-2042-05T3; A-2043-05T3; A-2044-05T3; A-2045-05T3; A-2046-05T3

Title insurance companies are subject to assessments authorized by the Insurance Fraud Protection Act, N.J.S.A. 17:33A-1 to -30, which are used to fund the operation of Office of Insurance Fraud Prosecutor. They are not exempt from the assessments by the provisions of the Title Insurance Act of 1974, N.J.S.A. 17:46B-1 to -62.

11-09-06 Ronald J. Bruno, et al. v. Mark Magrann Associates, Inc., et al.
A-0411-05T5

Home buyer, with broad arbitration clause in purchase contract with developer, may be required to arbitrate dispute over home's heating system with subcontractors, even in the absence of direct contractual relationship with subcontractors.

11-09-06 Marie Brun v. John Cardoso, et al.
A-0306-05T5

We held that where the interpretation of an MRI is in dispute, the report of a radiologist interpreting the MRI is, on objection, inadmissible hearsay and not subject to admission as a business record, N.J.R.E. 803(c)(6), to be bootstrapped into evidence by another expert pursuant to N.J.R.E. 705. In such circumstances, due to the complexity of MRI interpretation, the expert who seeks to rely on the report must be qualified to interpret the film or the radiologist who in fact authored the report must be produced as a witness subject to cross-examination.

We further held that a "rule" prevalent in a particular county prohibiting chiropractors from testifying to the results of MRIs is unauthorized and should not be followed. There can be no such local rules on matters of substantive law. Each judge must decide a matter based on the law as they understand it, not on a consensus among judges in their county.

Finally, we held that the trial judge erred in dismissing plaintiff's complaint rather than declaring a mistrial, where plaintiff's substitute radiologist advised counsel shortly before trial that he did not agree in part with the MRI interpretation of his former employee and was prepared to offer an opinion more favorable to plaintiff. Under the circumstances, even though a mistrial would permit plaintiff to, in effect, make a late amendment to her interrogatory answers, a dismissal was too harsh a sanction, particularly when defendants already had an expert prepared to rebut the interpretation of plaintiff's substitute expert.

11-06-06 In the Matter of A.S. // Division if Youth and Family Services v. K.S., J.S., R.S. and T.S. // In the Matter of the Guardianship of A.S. A Loving Choice Adoption Associates
A-3170-05T4

We affirm the Family Part's denial of appellant's motion to intervene in this protective services litigation holding the natural parent's execution of a surrender of parental rights to an approved agency consenting to her child's placement for adoption was ineffective as custody of the child had previously been transferred to a third party, from whom DYFS effectuated an emergency removal, which was later confirmed by an order granting the Division custody, care and supervision of the child. To allow intervention would usurp the State's authority to protect the best interests of the child and the court's role in overseeing the Division's responsibility to supervise her care.

11-06-06 Ramon Robles v. New Jersey Department of Corrections
A-2654-05T3

We rejected a Department of Correction's blanket policy of keeping confidential all security camera videotapes in order "to preclude inmates from learning camera angles, locations, or blind spots." Instead, we directed the Department to develop a record, regarding the particular need for confidentiality of specific videotapes, that could be reviewed by this court.

11-06-06 Beverly Roman v. City of Plainfield, et al.
A-6337-04T2

When the roots of a municipally-owned tree have caused a sidewalk slab to be upraised and uneven, and when the

municipality forbids the commercial landowner from cutting the tree roots in order to repair the sidewalk, the municipality has exercised sufficient "control" over private property within the meaning of the Tort Claims Act, N.J.S.A. 59:4-1(c), to have made the granting of the municipality's motion for judgment at the conclusion of plaintiff's case, improper. In so ruling, we conclude that a municipality can be liable for a dangerous condition existing on private property when the municipality has so usurped a private landowner's control of his own property as to potentially warrant a finding that the municipality has treated the private property as though it owned it. Posey ex rel. v. Bordentown Sewerage Auth.

11-02-06 Tahiyyah Jones v. Naser City Transportation Corp., et al.
A-1419-05T1

Under the relevant statute, N.J.S.A. 17:28-1.1, a motor vehicle insurance policy issued to a taxicab owner may limit uninsured motorist's coverage to the insured and the cab drivers, while excluding such coverage for passengers.

11-01-06 Robert Lodato v. Evesham Township, et al.
A-4559-04T2

Plaintiff, Robert Lodato, appealed the grant of summary judgment in favor of defendants, Evesham Township, Shade Tree Advisory Commission of Evesham Township, and Tana and Stephen Baughn, dismissing plaintiff's personal injury action against defendants seeking damages for injuries plaintiff suffered when he fell over a sidewalk slab raised by a tree root. We affirmed the grant of summary judgment in favor of the Shade Tree Advisory Commission and Tana and Stephen Baughn. We reversed the grant of summary judgment in favor of Evesham Township because plaintiff's proofs, showing that the condition of the sidewalk was open and obvious, that the condition of the sidewalk existed for eighteen years, and that Township employees were called to the same area to repair similar conditions, were sufficient to create a question of fact whether the Township had constructive notice of a dangerous condition under N.J.S.A. 59:4-3b of the Tort Claims Act.

11-01-06 State of New Jersey v. Amy Eldridge
A-2656-03T4

Where the State and defendant offered contrasting theories of causation in a vehicular homicide prosecution, failure to

charge volitional conduct of another as an intervening cause, pursuant to N.J.S.A. 2C:2-3c, was reversible error. The State argues that if the jury had accepted defendant's version of the cause of the crash, she would have been found not guilty under the "but-for" causation test of N.J.S.A. 2C:2-3a(1); and therefore, the failure to give a jury instruction was harmless error.

We reject that argument.

10-30-06 Lisa Lozner (n/k/a Fitzgibbon) v. Steven W. Lozner
A-6493-04T5

We hold that substantial student loan debt can constitute a factor to be considered in determining whether alteration of a guideline-based support award is warranted, provided the parent reasonably and necessarily acquired the loan for educational purposes with the goal of improving his or her earning capacity.

10-25-06 Regency Savings Bank, F.S.B. v. Southgate Corporate Office Center, et al.
A-1757-05T1

When a sheriff's sale pursuant to a mortgage foreclosure judgment is cancelled by plaintiff because of a settlement with defendant, the sheriff's percentage fee under N.J.S.A. 22A:4-8 must be based, not on the amount of the judgment or the value of the property, but on the amount of the settlement. When the settlement calls for a cash payment for cancellation of the sale, for which defendant receives additional time to obtain refinancing, with the understanding that on a failure to meet the deadline for refinancing, plaintiff will receive a deed to the property from defendant, the amount of the settlement is the cash payment.

10-25-06 In re Referendum Petition to Repeal Ordinance 04-75
A-2009-04T1

The trial court erred in determining that petitions for a referendum to reject a municipal ordinance did not satisfy the standards of N.J.S.A. 40:69A-185. The ordinance involved a reorganization of the Trenton Police Department.

Where close questions are presented, the default rule in deciding where the ultimate decision-making authority on the municipal level lies is to be found in the Legislature's

declaration of policy that that power rests with the people through the referendum mechanism.

10-24-06 Bernadette Geringer v. Hartz Mountain Development Corporation
A-1864-04T1

In the particularized context of a "triple net" commercial lease in which the landlord exercised its contractual prerogative to review and approve the tenant's design and construction of an entire floor leased within the building, and where the landlord's premises manager performed a walk-through inspection of that floor before it was occupied, we hold that the landlord owed a coextensive duty of reasonable care to invitees to assure that the design and construction of an interior stairway on that floor was safe.

However, we affirm the motion judge's determination that the landlord owed no duty to invitees regarding the maintenance and repair of the stairway, given the terms of the lease delegating those particular responsibilities to the tenant and where the record reflects no actual participation by the landlord in such maintenance and repair functions.

10-24-06 In the Matter of the Civil Commitment of M.L.V.
A-2588-03T2

Pursuant to N.J.S.A. 30:4-27.28d, the Attorney General may initiate a court proceeding for the involuntary civil commitment of a person as a sexually violent predator even though the Parole Board has granted parole and authorized the individual's release from incarceration.

10-20-06 Sensient Colors Inc. v. Allstate Insurance Company, et al.
A-2052-05T5

In this environmental insurance coverage dispute arising from contamination at a Camden site, we hold that the trial judge erred in dismissing the insured's New Jersey action in favor of the insurer's first-filed New York lawsuit. The "first-filed doctrine" is not an absolute rule of comity-stay jurisprudence to be rigidly exercised but rests with the discretion of the court to be applied in light of underlying equitable principles. Here, special equities counsel against deference to the New York action including, most significantly, New Jersey's strong public policy interest in remediating waste

sites within its borders and in ensuring adequate financial resources for the job. The fact that remediation in this case may be near completion or already funded is immaterial since New Jersey's interest remains equally strong regardless of who conducts and incurs the costs of remediation and when, and includes assuring that indemnification agreements allocating financial responsibility are effectively enforced.

10-19-06 Alan O'Shea, et al. v. New Jersey Schools Construction Corporation, et al.
A-5459-04T1

The principal issue on appeal was whether the New Jersey Schools Construction Corporation, a public entity authorized by the Educational Facilities Construction and Financing Act to construct and finance school facilities projects, may permit a general contractor to substitute major trade subcontractors for those listed in the general's bid documents after the bid was awarded. We concluded that such a practice is contrary to public bidding laws and their underlying policies.

10-17-06 Daniel Prado v. State of New Jersey, et al.
A-6273-03T1

A State employee's oral presentation to other State employees at a staff meeting was within the scope of his employment and did not constitute willful misconduct, even though the employee used ethnically and sexually offensive language during the presentation. Therefore, the employee is entitled to indemnification from the State for the costs of defending LAD actions brought against him based on those offensive comments.

10-12-06 Infinity Outdoor, Inc. v. Delaware and Raritan Canal Commission
A-0111-04T3

Although the Delaware & Raritan Canal Commission (DRCC) has been established in the Department of Environmental Protection (DEP) and shares a unique partnership with the DEP in promulgating rules and regulations for the use and protection of the Delaware & Raritan Canal State Park, we hold that the DRCC is the agency head with authority to render final agency decisions approving, rejecting or modifying proposed projects within the regulatory review zone, from which appeals to us lie. Moreover, we find that the applicant in this matter was not entitled to automatic approval of its application by virtue of

the default provision of N.J.A.C. 7:45-2.6 because any agency delay in decision making was occasioned by the applicant's own requests for extension and subsequent revision and ultimate withdrawal of its amendment.

10-02-06 Borough of Bogota v. Kathleen A. Donovan, et al.
A-0601-06T1

Because a municipality may not enact an ordinance adopting English as its official language, the County Clerk properly refused to put on the ballot a non-binding referendum under N.J.S.A. 19:37-1, asking the voters whether the municipality should adopt such an ordinance.

09-29-06 Robert Oberhand v. Director, Division of Taxation, et al.
A-3886-04T2; A-4243-04T2

The retroactive estate tax law adopted on July 1, 2002, by L. 2002, c. 31, § 1, N.J.S.A. 54:38-1(a)(2)(a), applies without exception to all resident decedents dying after December 31, 2001, including those who, like the decedents in question, drafted their wills before the statute was adopted to avoid federal and state taxes in a manner then permitted by law and who died after December 31, 2001, and before adoption of the statute. The Tax Court opinion in Oberhand, 22 N. J. Tax 55 (Tax 2005), erred in granting the estates exemption from the tax due under the new law by application of the equitable doctrine of manifest injustice because that doctrine has no place in retroactive-taxation cases.

09-21-06 State of New Jersey v. Michael A. O'Neill
A-0147-04T4

We reject defendant's claim that the two tape-recorded statements he made to the police should have been suppressed because they were the product of a two-stage interrogation technique (question-first, warn-later) found to be improper by the United States Supreme Court in Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

09-21-06 State of New Jersey v. Anthony Walkings
A-2218-03T4

On appeal, defendant challenged the trial judge's denial of his motion for a new trial and the judge's refusal to conduct a hearing into a juror's concerns about jury deliberations in this

criminal matter. The juror first communicated his concerns to the prosecutor's office the day after the verdict was rendered; the prosecutor's office later referred the matter to the trial judge. On appeal, the court agreed that the trial judge should not have further explored the juror's concerns through his own ex parte, unrecorded discussions with that juror, holding that it is improper for a judge to have an ex parte communication with a juror even after deliberations are complete and after the jury has been discharged. Due to inadequacies in the record on appeal, the court held that further proceedings were required in order to amplify and illuminate the content of the juror's communications with the prosecutor's office and the trial judge.

09-21-06 State of New Jersey v. Marshall Rountree
A-2043-02T1;A-5014-02T1

In a consolidated opinion, we affirmed the denial of post-conviction relief petitions in two counties, addressing two issues. First, we held that State v. Franklin, applying Apprendi to second-offender Graves Act mandatory extended-term sentences, does not apply retroactively in the context of this collateral review. Any broadening of Franklin's pipeline retroactivity can come only from the Supreme Court.

Second, we addressed defendant's ineffective-assistance argument, namely, that he was prejudiced by the failure of counsel in both counties to move, pursuant to Rule 3:25A-1, for consolidation of the pending indictments for purposes of plea negotiations and sentencing. We concluded that counsel in such circumstances should move for consolidation, and the failure to do so established the first prong of defendant's ineffective-assistance claims.

We concluded, however, that defendant could not establish the second prong of an ineffective-assistance claim. Defendant was charged with Graves Act crimes in each county, and he contended that if he had been sentenced in a single proceeding, he would have avoided a second-offender extended term. For purposes of this appeal, we assumed, by analogy to State v. Owens (but without so deciding), that defendant's premise was correct. But because defendant rejected a plea offer that was as favorable as any he could have expected in a consolidated plea offer, he could not prove that counsels' failures likely made a difference.

09-18-06 Toll Bros., Inc., et al. v. Board of Chosen Freeholders of the County of Burlington, et al.

and Toll Bros., Inc., et al. v. Thomas R. Whitesell, et al. and Toll Bros., Inc., et al. v. Moorestown Township Planning Board, et al. (Consolidated)
A-4814-03T5; A-4816-03T5; A-6884-03T5

We hold that a developer may be held to its voluntary agreement to pay more than its pro-rata share of off-site road improvements despite the fact the scope of the development was substantially reduced after the agreement was executed. The agreement should be enforced unless it contravenes an express legislative policy or is inconsistent with the public interest.

09-12-06 State of New Jersey Division of Youth and Family Services v. R.L. // IMO the Guardianship of B.L. State of New Jersey Division of Youth and Family Services v. E.L. // IMO the Guardianship of B.L.
A-4978-04T4; A-5555-04T4

Held that natural father cannot be held responsible for failure to acknowledge abusive acts of mother to child.

09-11-06 Saddle Brook Realty, LLC v. Township of Saddle Brook Zoning Board of Adjustment, et al.
(A-0498-05T3)

Plaintiff failed to demonstrate as a special reason for use variance that strip mall was "particularly suitable" location for proposed fast food restaurant or that variance for this use could be granted without substantially impairing the purpose and intent of the municipality's zoning ordinance that prohibits fast food restaurants in every district.