DATE NAME OF CASE (DOCKET NUMBER)

09-16-10 IN THE MATTER OF THE PROBATE OF THE ALLEGED WILL AND CODICIL OF LOUISE MACOOL, DECEASED
A-4697-08T2/A-4734-08T2 (consolidated)

In this probate action, we affirm the trial court's judgment declining to admit into probate a will that was not reviewed by decedent before her demise. We reject, however, that part of the court's ruling that construes N.J.S.A. 3B:3-3 as requiring that the writing offered as a will under the statute bears in some form the signature of the testator as a prerequisite to its admission to probate. On the question of counsel fees, we affirm the court's decision granting plaintiff's application for fees under Rule 4:42-9(3), but remand for the court to reconsider the amount of the award.

09-16-10 PAUL TRACTENBERG v. TOWNSHIP OF WEST ORANGE
A-2556-08T3

In this appeal, we are presented with an issue of first impression, whether property appraisals of a 120-acre property known as the Highlands performed by a private appraiser at the behest of the West Orange Council, fall within the deliberative process exemption of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. Five months before the Supreme Court decided Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009), the trial court determined that OPRA's deliberative process exemption applied to those portions of the appraisals that were not purely factual and ordered the release of a portion of the requested appraisals. The court also ruled that the appraisals were not protected from full disclosure under the attorney work product doctrine or on the basis of attorney-client privilege.

We hold that under Education Law Center, the appraisals are not subject to the deliberative process exemption because (1) they have not been used in the "decision making process" and (2) their disclosure will not "reveal deliberations that occurred during [the decision making process]." Id. at 280. We reversed those portions of the trial court orders granting the partial release of the appraisals, and ordered their complete release. We otherwise affirmed.

09-14-10 US BANK, N.A. V. NIKIA HOUGH, ET AL.
A-5623-08T3

This is a real property foreclosure action. The primary question presented is whether a commercial lender, which makes a loan secured by a mortgage on an affordable housing unit in excess of the amount permitted by N.J.A.C. 5:80-26.8(b), is prohibited from seeking to foreclose upon the mortgage. We answered the question in the affirmative, holding that the mortgage is void pursuant to N.J.A.C. 5:80-26.18(e).

A secondary question raised in the appeal is whether N.J.A.C. 5:80-26.18(e) also prohibits the lender from seeking to collect upon the underlying debt instrument. We answered that question in the negative, holding that the regulation does not bar the lender from seeking to collect upon the underlying obligation.

09-10-10 STATE OF NEW JERSEY V. PETER TRIESTMAN
A-6408-08T4

We dismissed an indictment charging defendant with fourth-degree sexual contact because the prosecutor failed to correctly read and reference statutory sexual offenses when the grand jury was convened on September 23, 2008. The mistakes in the charge left the grand jury with no idea of which portions of N.J.S.A. 2C:14-2 were incorporated by reference into N.J.S.A. 2C:14-3b, which defendant was ultimately charged with violating. This was compounded with the passage of eleven weeks before the prosecutor presented defendant's case, at which time she provided no further written or oral charge to the jury. We referred this matter to the Criminal Practice Committee.

Defendant also sought dismissal of the indictment on the ground that the statute requires physical force in addition to mere sexual contact. He urges there was no evidence of any physical force, negating an indictment under N.J.S.A. 2C:14-3b. We rejected this argument because the Supreme Court in State v. M.T.S., 129 N.J. 422, 444 (1992), unequivocally stated that it was "hardly possible" that the Legislature in enacting N.J.S.A. 2C:14-3 "wanted to decriminalize unauthorized sexual intrusions on the bodily integrity of a victim by requiring a showing of force in addition to that entailed in the sexual contact itself."

09-08-10 STATE V. JAMES J. MAUTI
A-3023-09T4

In this appeal, we determine that the spousal privilege in N.J.R.E. 501(2) cannot be pierced by applying the factors

outlined by the Court in In re Kozlov, 79 N.J. 232, 243-44 (1979).

09-07-10 MARY HINTON, ET AL. V. EILEEN D. MEYERS
ESTATE OF YAA AYANNAH BOSOMPEM, ET AL. V. EILEEN D. MEYERS, ET AL.
A-5700-08T1

In this appeal, we consider whether the third element of a claim for negligent infliction of emotional distress under Portee v. Jaffee, 82 N.J. 88 (1980), "observation of the death or injury at the scene of the accident," is satisfied with proof of knowledge or awareness of death or injury but without contemporaneous sensory perception. We determined that such proof does not satisfy the third element and affirmed the trial court order granting summary judgment dismissing plaintiff's Portee claim, as well as its order denying plaintiff's motion for reconsideration.

09-07-10 HAVEN SAVINGS BANK V. KATHLEEN M. ZANOLINI, ET AL.
NEW YORK COMMUNITY BANK V. DONIE RAY ANDERSON
A-3962-08T1/A-4069-08T1 (consolidated)

Attorney-in-fact Global Discoveries, Ltd., appealed a final order awarding it fees less than the thirty-five percent fees specified in contingent-fee agreements with defendants Kathleen M. Zanolini and Donie Ray Anderson in connection with Global's efforts to recover excess funds from Sheriff's sales of the defendants' properties. Because such agreements are governed by section 106 of the New Jersey Uniform Unclaimed Property Act, N.J.S.A. 46:30B-1 to -109, we applied N.J.S.A. 46:30B-106 to the contingent fee agreements. We determined that such agreements are specifically authorized by that section, which allows thirty-five percent contingent fees where the agreement is executed before property has been deemed abandoned and turned over by the holder to the State Treasurer. We affirmed the portion of the order respecting fees due from Zanolini's unclaimed property, because the agreement did not state the amount of the net recovery to Zanolini as N.J.S.A. 46:30B-106 requires. However, we reversed the order respecting Anderson because the contingent fee agreement conformed entirely with N.J.S.A. 46:30B-106 and we remanded the matter to the General Equity judge for entry of a judgment in favor of Global pursuant to its contingent fee agreement providing a thirty-five percent contingent fee.

08-31-10 HUNTERDON MEDICAL CENTER v. READINGTON TOWNSHIP
A-4262-08T3

We hold, pursuant to principles articulated by the Supreme Court in Hunterdon Medical Center v. Township of Readington, 195 N.J. 549 (2008), that Hunterdon Medical Center is entitled to an exemption, pursuant to N.J.S.A. 54:4-3.6, from local property taxes imposed on its physical therapy service, operated by the Medical Center at an off-site facility approximately nine and one-half miles from the hospital.

08-31-10 MARY L. WALKER V. ROUTE 22 NISSAN, INC. AND CARMELO GIUFFRE, ET AL
A-2942-08T2

This appeal involves a class action filed by plaintiff under the Consumer Fraud Act (CFA) and the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA). We affirm the court's decision to decertify the class, to grant summary judgment finding defendant liable under the CFA and TCCWNA under plaintiff's remaining personal claims, to award plaintiff compensatory damages under the CFA, and to impose a civil penalty on defendant under the TCCWNA.

We reverse the court's award of counsel fees under the CFA because the court determined the reasonable hourly rate plaintiff's counsel was entitled to receive based on the judge's personal experiences. We thus remand for the court to determine a reasonable hourly rate after making the findings required under Rendine v. Pantzer, 141 N.J. 292, 337 (1995). We also reverse the court's decision to enhance plaintiff's counsel's lodestar by forty-five percent and remand for the court to reconsider whether a fee enhancement is warranted after applying the factors identified by the United States Supreme Court in Perdue v. Kenny A., ____ U.S. ____, 130 S. Ct. 1662, 1669, 176 L. Ed. 2d 494, 501-02 (2010).

08-31-10 MARK TANNEN V. WENDY TANNEN, ET ALS.
A-4185T1/4211-07T1 (consolidated)

Defendant/wife was the beneficiary of a discretionary support trust settled by her parents. She and her parents were the trustees of the trust.

The judge handling the divorce action ordered plaintiff/husband to name the trust (and other family trusts) as

third-party defendants in the litigation. The trusts participated in the trial.

At the conclusion of the trial, limited to the financial issues of alimony, equitable distribution and child support, the judge imputed income from the trust to defendant, and ordered the trustees to make a monthly payment to her. He then further ordered the trust to continue making payments for shelter-related expenses that it historically had made. The judge then computed plaintiff's alimony obligation based upon this imputed income stream.

We concluded that defendant's beneficial interest in the discretionary support trust was not an asset held by her for purposes of the alimony statute, and therefore no income should have been imputed to her. However, we recognized that the current Restatement (Third) of Trusts, extensively relied upon by the trial judge, has changed the law, and that pursuant to its terms, defendant has an enforceable interest in the trust income. As a court of intermediate appellate jurisdiction, we refused to apply the terms of the current Restatement, which have not been adopted in any reported appellate or Supreme Court opinion in New Jersey.

We also reversed other provisions of the judgment of divorce regarding computation of the alimony award, the child support award, and equitable distribution.

08-30-10 KENNETH VAN DUNK, SR. and DEBORAH VAN DUNK v. RECKSON ASSOCIATES and JAMES CONSTRUCTION COMPANY, INC.
A-3548-08T2

A single act which an employer knew to be dangerous to an employee can satisfy the "intentional wrong" exception to the Workers' Compensation bar, precluding summary judgment, for a contractor where a supervisor sent an employee into a trench under construction knowing the risks of danger.

08-27-10 YELLEN V. KASSIN
A-5596-08T3

In this appeal, we held that the evidence did not support a finding of reciprocal prescriptive easements. In doing so, we emphasized that the hostility element still requires use of another's property under a claim of right to an interest in the property.

08-27-10 STATE v. JESSE J. LACEY
A-4920-08T4

A DYFS proceeding is not a "civil proceeding" for purposes of the evidentiary preclusion provision of Rule 3:9-2. Thus, the trial court properly denied the preclusion of evidential use of the plea.

08-27-10 CUPIDO V. PEREZ
A-4557-08T2

The question presented is whether an out-of-state resident whose automobile is insured by an insurance company, which, although not authorized to transact either private passenger automobile or commercial motor vehicle insurance business in this State, controls affiliate companies that are authorized to transact commercial motor vehicle business in the State, is subject to the limitation-on-lawsuit threshold pursuant to N.J.S.A. 17:28-1.4, commonly referred to as the deemer statute. We answered the question in the affirmative.

08-26-10 CAST ART INDUSTRIES, LLC, ET AL. V. KPMG, LLP
A-2479-08T2

The phrase "at the time of the engagement by the client" in N.J.S.A. 2A:53-25(b)(2)(a), which set forth one of the prerequisites under the Accountant Liability Act for imposition of a duty of care upon an auditor to a non-client, refers to the entire period from when an accountant is retained to when an audit report is issued. The evidence in this case satisfied all the prerequisites of the Act for imposition of a duty of care to a non-client. The determination of whether misstatements in an auditor's report are material involves both quantitative and qualitative considerations. Although an auditing firm's internal rules may be admissible as evidence of whether reasonable care was exercised, such internal rules may not be relied upon to establish a higher standard of care than the common law standard of reasonable care under all the circumstances. If the evidence supports a finding that accounting malpractice was a substantial factor in the destruction of the business of a party entitled to rely upon an auditor's report, the value of the destroyed business may be an appropriate measure of damages.

08-25-10 U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS

THROUGH CERTIFICATES, 2006-EQ1 v. MARK M. WILLIAMS and MRS. MARK M. WILLIAMS and STATE OF NEW JERSEY
A-6185-08T2

In our opinion, we examined the provisions of the Judiciary's newly enacted residential mortgage Foreclosure Mediation Program (FMP). We considered whether a mortgagor, who was unrepresented and unassisted by a housing counselor during the mediation session, was entitled to an extension of the period of redemption.

08-23-10 MICHAEL B. FRANCOIS v. BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM
A-0687-08T2

Petitioner who was on "mobility assignment" from the New Jersey Economic Development Authority (EDA) to the Port Authority of New York and New Jersey (PA) from May 2003 to December 2005 and who was paid by the EDA while the EDA was being reimbursed by the PA for petitioner's salary and benefits, and while petitioner was doing work beneficial to the State of New Jersey, was entitled to PERS pension service credits for the period of assignment notwithstanding his resignation at age fifty-five when he could take an early retirement without penalty and acceptance of the same job as a Port Authority employee at that time. His employer's failure to follow the technical requirements and prerequisites for the assignment cannot prejudice the petitioner who relied on the benefits. However, petitioner is not entitled to the salary credits received while at the PA to the extent they were greater than he would have earned with the EDA.

08-20-10 BONNIE ANDERSON, ET AL. VS. A.J. FRIEDMAN SUPPLY CO., INC., ET AL. VS. GOODYEAR TIRE AND RUBBER COMPANY, ET AL.
A-5892-07T1

In this asbestos litigation, plaintiffs Bonnie and John R. Anderson, husband and wife, alleged that Bonnie contracted mesothelioma from either one or both of two exposures to asbestos at the refinery owned by defendant Exxon Mobil Corporation. The first was bystander exposure from laundering John's asbestos-laden work clothes during his employment with Exxon from 1969 to 2003. The second was direct exposure during Bonnie's employment with Exxon from 1974 to 1986.

Exxon appeals from a judgment in favor of plaintiffs, awarding $7 million to Bonnie and $500,000 per quod to John. Exxon contends, among other arguments, that the action was barred by the exclusive remedy provisions of the Workers' Compensation Act (WCA), N.J.S.A. 34:15-1 to -69.3. We reject that argument as it pertains to the bystander exposure. We hold that Exxon owed a duty to Bonnie (as a member of John's household) to exercise reasonable care to provide a workplace free of asbestos, which could cause bystander exposure to the household members of its employees.

We also hold that pursuant to the dual persona doctrine, Bonnie could recover in tort if she could prove that (1) her mesothelioma was caused from exposures while she was not employed by Exxon, or (2) Bonnie's bystander exposure was the substantial cause of her mesothelioma.

08-18-10 KORAL MOORE V. WOMAN TO WOMAN OBSTETRICS & GYNECOLOGY
A-0953-09T1

Plaintiffs, an infant and the child's parents, filed a complaint alleging medical malpractice and seeking damages for wrongful birth and life. This is an appeal from orders compelling arbitration of all three plaintiffs' claims against a defendant doctor and his practice group, which rendered care to the mother during her pregnancy. We conclude that agreements to arbitrate pre-dispute medical malpractice claims are not unenforceable as a matter of law, and provide direction for the reconsideration of plaintiffs' claim that this contract of adhesion requiring arbitration is unenforceable under the circumstances present in this case.

08-17-10 MARY E. CAIN AND JAMES D. CAIN V. MERCK & CO., INC. f/k/a SCHERING-PLOUGH CORPORATION
A-2138-08T2

We construe N.J.S.A. 14A:5-28(4) of the New Jersey Business Corporate Act as allowing shareholders with a proper purpose to inspect the minutes of the board of directors and executive committee. However, this right of inspection is limited to those portions of the minutes that are pertinent to the shareholder's proper purpose and should not be confused with a discovery order. Further, unsubstantiated allegations of mismanagement do not constitute a proper purpose; rather, a shareholder who asserts investigation of mismanagement as a proper purpose must come forward with specific, supported and

credible allegations of mismanagement in order to be entitled to the inspection.

08-16-10 STATE OF NEW JERSEY V. ALNESHA MINITEE AND STATE OF NEW JERSEY V. DARNELL BLAND
A-5002-06T4/A-6213-06T4 (consolidated)

In these back-to-back appeals concerning the warrantless search of a motor vehicle, we harmonize the seemingly inconsistent holdings in State v. Martin, 87 N.J. 561 (1981) and State v. Pena-Flores, 198 N.J. 6 (2009), by finding that the exigent circumstances that existed at the scene only permitted the police to seize the vehicle. Under our State's Constitution, once impounded, the police were required to obtain a warrant before searching the vehicle.

We also construe the United States Supreme Court's opinion in Chambers v. Maroney, 399 U.S. 42, 51-52, 90 S. Ct. 1975, 1981, 26 L. Ed. 2d 419, 428 (1970), permitting warrantless searches of vehicles impounded by the police, to constitute binding authority only under the Fourth Amendment.

08-13-10 JACQUELINE BETANCOURT V. TRINITAS HOSPITAL
A-3849-08T2

Although this appeal raises a significant issue regarding the conflict between a patient and healthcare providers regarding the continuation of medical treatment where the patient is in a persistent vegetative state, we grant plaintiff's motion to dismiss the appeal as moot. We conclude that the following factors support such dismissal: 1) the patient is deceased and the results of this appeal will not affect his rights; 2) there is a dispute between the parties as to the decedent's condition at the time medical treatment was withdrawn; 3) the record is inadequate to address the issues in dispute; 4) the prospect of a malpractice action by plaintiff against the healthcare providers, as well as the substantial outstanding medical bills, create issues that are unlikely to reoccur.

08-10-10 ESTATE OF ANNA RUSZALA BY MARIE MIZERAK, (Executrix) V. BROOKDALE LIVING COMMUNITIES, ET AL.
IDA AZZARO, As Proposed Administrator Ad Prosequendum for the Estate of Pasquale Azzaro V. BROOKDALE LIVING COMMUNITIES, ET AL.
A-4403-08T1/A-4404-08T1 (consolidated)

In these consolidated appeals we must decide whether § 2 of the Federal Arbitration Act (FAA), 9 U.S.C.A. § 2, preempts the public policy expressed in N.J.S.A. 30:13-8.1. We reverse the court's finding that the FAA is inapplicable. We affirm, however, the trial court's determination that these residency agreements were contracts of adhesion. Under the doctrine of substantive unconscionability, we strike as unenforceable the provisions in the arbitration clause that restrict discovery, limit compensation for non-economic damages, and outright preclude punitive damages. Finally, we remand the Azzaro matter to the trial court to determine whether a valid contract was formed between the parties.

08-10-10 STATE v. MICHAEL J. RAMSEY
A-1024-08T1

Where victim was killed by one of four bullets shot from a passing car at close range, the defendant's conviction for murder was affirmed notwithstanding the judge's decision, agreed to by defendant, that aggravated manslaughter and manslaughter not be charged as lesser-included offenses.

08-09-10 WILLIAM HAMMER v. DOUGLAS W. THOMAS, ET AL.
PROFORMANCE INSURANCE CO. v. NEW JERSEY MANUFACTURERS INS. CO., ET AL.
A-0209-08T2/A-0742-08T2 (consolidated)

In this declaratory judgment action instituted by the injured motorist's UM carrier, we affirm the trial court's grant of summary judgment in favor of the tortfeasor's automobile insurance provider who declined coverage based on the policy exclusion for any insured "[w]ho intentionally causes bodily injury or property damage." We hold that the policy was not ambiguous and that the standard to be applied is that set forth in Voorhees v. Preferred Mutual Insurance Co., 128 N.J. 165 (1992) and its progeny relating to automobile, homeowners and related liability policies, and not that set forth in the workers' compensation case of Charles Beseler Co. v. O'Gorman & Young, Inc., 188 N.J. 542 (2006).

08-09-10 STATE OF NEW JERSEY v. QURAN GOODMAN
A-1329-07T4

This appeal required us to determine whether evidence concerning gang membership and rivalry is admissible to prove motive in a murder case. Basing our review on N.J.R.E. 404(b) and State v. Cofield, 127 N.J. 328 (1992), we concluded that

such evidence was properly admitted. We also upheld the admission of consciousness-of-guilt evidence, again analyzing the issue using N.J.R.E. 404(b) and Cofield.

08-06-10 I/M/O XANADU PROJECT AT THE MEADOWLANDS COMPLEX; APPLICATION OF BENIHANA MEADOWLANDS CORPORATION FOR A SPECIAL CONCESSIONAIRE PERMIT
A-2702-08T2

We conclude that the Director of the Division of Alcoholic Beverage Control properly concluded that: (1) the State or its political subdivision entered into a contract with the applicant Benihana Meadowlands Corp. authorizing the sale of alcoholic beverages on the property; (2) the property, Xanadu, on which the sale will take place is State property; and (3) Benihana is fit to serve alcoholic beverages. N.J.A.C. 13:2-5.2. We affirm the final decision of the Director and ABC.

08-06-10 STATE OF NEW JERSEY V. QUINN M. LATNEY
A-6208-06T4

We consider defendant's objection to a flight instruction, and conclude the instruction was unwarranted and that the evidence of flight should not have been admitted at trial. Defendant was on trial for robbery and related crimes. Two days before the robbery defendant had stolen a car from a dealership, and the day following the robbery, defendant was pursued by the police while driving the stolen car. He pled guilty to theft of the car prior to this trial.

The State did not introduce evidence that the car was stolen and neither did defendant. We conclude that under these circumstances, the evidence of flight should have been excluded.

08-06-10 STATE OF NEW JERSEY V. EDWARD C. KUHN
A-4561-06T4

In this case involving an Internet investigation by officers representing themselves as a thirteen-year-old child, we address the application of N.J.S.A. 2C:5-1a(1) and a(3).

08-05-10 DYFS v. I.H.C. and D.C.
A-2208-09T4

In this abuse or neglect case, we hold that N.J.R.E. 404(b) did not bar consideration of the father's acts of domestic violence against his ex-wife and the children of that marriage

about seven years earlier to prove risk of harm to the children of this marriage. We also hold that domestic violence that presents risk to children in an abuse or neglect case can be broader than the meaning of that term under the Prevention of Domestic Violence Act. As testified by the experts, the father's coercive control of the mother, together with both parents' denial of and failure to treat their psychological conditions, posed a risk of harm to the children. In reaching these holdings, we address and distinguish DYFS v. H.B., 375 N.J. Super. 148 (App. Div. 2005), and DYFS v. S.S., 372 N.J. Super. 13 (App. Div. 2004), certif. denied, 182 N.J. 426 (2005).

08-05-10 STATE OF NEW JERSEY V. AHMED BADR
A-1975-08T4

The New Jersey Smoke-Free Air Act, N.J.S.A. 26:3D-55 to -64, is neither unconstitutionally vague nor overbroad as applied to defendant's hookah bar. In the absence of constitutional infirmity, the question whether the Act should be amended to explicitly include or exclude defendant's conduct is left to the Legislature.

08-05-10 STATE V. JESSE BELLIARD
A-2658-07T4

Where causation was a critical factor in a felony-murder prosecution and trial, the omission of the language "or too dependant on another's volitional acts" was plain error warranting a reversal and a new trial. The issue of the probable consequences and involvement and actions of third-party participants in the crime required that the jury be informed that "another's volitional acts" would impact on the element of causation.

The failure to define "attempt" was not plain error.

08-04-10 JEFFREY LIPKOWITZ, M.D., ET AL. V. HAMILTON SURGERY CENTER, LLC, ET AL.
A-4489-08T1

In this appeal we construe the term "financial detriment" as found in the New Jersey Uniform Securities Law (USL), N.J.S.A. 49:3-47 to -76, which requires that claimants prove that they suffered a "financial detriment." N.J.S.A. 49:3-71 (b)(1). We hold that the USL indicates a legislative intent to place investors in the same position they were in before making

the investments, not a preference of giving them the benefit of their bargains.

08-04-10 PARIS WILSON, ET AL. V. CITY OF JERSEY CITY, ET AL.
A-4044-08T2

Plaintiffs are the victims of a brutal assault that occurred in their Jersey City home. They seek remedies from certain public employees and employers for several putative failures to rescue in a timely fashion. In particular, plaintiffs allege that negligence by 9-1-1 call takers, a dispatcher, and police officers resulted in death and serious injury that could have been avoided. The governmental agents and agencies claim immunity pursuant to the Tort Claims Act and N.J.S.A. 52:17C-10(e).

We affirm in part and reverse in part the Law Division, which had found immunity in favor of the public employees and entities. We reject the argument that N.J.S.A. 52:17C-10(e) provides blanket immunity for 9-1-1 call takers and others connected with public safety answering points.

08-04-10 MMU OF NEW YORK, INC., As Assignee of 200 OCEAN BOULEVARD ASSOCS., L.P. V. GRIESER
A-2484-08T3

A court has inherent equitable authority, even in the absence of express statutory authorization, to allow a credit to a judgment debtor for the fair market value of the debtor's property that is executed upon and then purchased by a judgment creditor at a sheriff's sale for a nominal amount.

08-04-10 SHANA FAITH MASSACHI, as Administratrix and Administratrix Ad Prosequendum of the Estate of Sohayla Massachi, deceased v. CITY OF NEWARK POLICE DEPARTMENT
A-5252-07T1

We decide a question left unresolved in our prior opinion in this case, Massachi v. AHL Services, Inc., 396 N.J. Super. 486, 508 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008), and now decide that N.J.S.A. 52:17C-10, commonly known as the 9-1-1 immunity statute, does not provide immunity to a public entity's emergency communications center for its employees' bungled response to a call for emergency police

assistance. Their negligent mishandling of the call, and failure to properly dispatch police, contributed to the murder of a young woman by her former boyfriend.

08-03-10 TOM JUZWIAK V. JOHN/JANE DOE

A-2302-09T2

Plaintiff sued for intentional infliction of emotional distress and harassment following the receipt of three e-mails and served a subpoena on Yahoo! to learn the true identity of the author. "John Doe" moved to quash the subpoena. We reversed the trial court's order denying "John Doe's" motion.

08-03-10 NEW JERSEY ASSOCIATION OF SCHOOL ADMINISTRATORS v. BRET SCHUNDLER, Commissioner of Education of the State of New Jersey
A-2101-08T2

Plaintiffs challenge regulations adopted by the Commissioner of Education in 2008 entitled "Fiscal Accountability, Efficiency and Budgeting Procedures," N.J.A.C. 6A:23A-1.2 to -22.15. We reject the argument that the regulations are an impermissible taking, unconstitutionally vague, a violation of equal protection and ultra vires. We agree, however, as opposed to N.J. Ass'n v. Davy, 409 N.J. Super. 467 (App. Div. 2009), that certain of the regulations violate the tenure statute, N.J.S.A. 18A:28-5, and are thus invalid.

Judge Grall concurs in part and dissents in part.

07-30-10 MELODY CURZI VS. RAYMOND L. RAUB, III, ET AL.
DENNIS LOSCO, ET AL. VS. RAYMOND L. RAUB, III, ET AL.
RAYMOND L. RAUB, III, ET AL. VS. MELODY CURZI, ET AL.
A-5380-06T1

Under the Right to Farm Act, N.J.S.A. 4:1C-1 to -10.4, the county agriculture development board, not the Superior Court, had jurisdiction over plaintiff's private nuisance claims against a farmer for placing box trailers end-to-end along their property lines because under all of the circumstances, it was reasonably debatable that the conduct constituted an acceptable agricultural practice.

07-29-10 DANIEL REICH, D.M.D. V. BOROUGH OF FORT LEE ZONING BOARD OF ADJUSTMENT, ET AL.

A-1677-08T1

In this action in lieu of prerogative writs, plaintiff periodontist appeals from an order of the Law Division affirming the Zoning Board's decision interpreting the simultaneous occupation of the dental office by him and the existing endodontist to be an expansion of the nonconforming use, and denying plaintiff's variance application. The court found the Board did not act arbitrarily, dismissed with prejudice plaintiff's complaint, and entered judgment in favor of the Board.

We reverse. The record does not support the Board's finding that there was an expansion of the nonconforming use or, even assuming otherwise, that plaintiff failed to meet the positive and negative criteria for variance relief.

07-29-10 JAMES GANNON, ET AL. V. AMERICAN HOME PRODUCTS, INC. ET ALS.
A-3936-07T2

Defendants were granted summary judgment in this products liability vaccine case involving Orimune, an oral polio vaccine administered to plaintiff in the 1970's. See Rivard v. Am. Home Prods., Inc., 391 N.J. Super. 129 (App. Div. 2007) (in which we detailed the history of the development of Orimune and affirmed the denial of summary judgment on the causation issue). Plaintiff had also filed suit against the United States in federal district court, alleging negligence by the government in the screening of Orimune and in insuring regulatory compliance. That suit resulted in judgment in favor of the United States, the judge determining that plaintiff had failed to prove Orimune caused cancer in humans.

Defendants sought summary judgment on two fronts: they alleged plaintiff had failed to adequately identify their particular vaccine as the one he received; and, they supplemented their initial motion with a copy of the district court's opinion and argued that plaintiff was precluded from proving causation in this case. The judge granted summary judgment for both reasons.

We reversed. On the product identification issue, we concluded the judge had misapplied the Brill standard, and that plaintiff had raised a genuine factual dispute that precluded summary judgment. On the collateral estoppel issue, we discussed several exceptions to the rigid application of the

doctrine, and, under the circumstances of this case and given the lack of any motion record on the issue, we concluded that it was inappropriate to grant summary judgment on this ground.

07-28-10 DEPARTMENT OF CHILDREN AND FAMILIES, DIVISION OF YOUTH AND FAMILY SERVICES v. C.H.
A-4786-08T1

An ALJ found that a parent's corporal punishment of a four-year-old who reported to a neighbor that there was no electricity in their home was insufficient to sustain an allegation of abuse under N.J.S.A. 9:6-8.21(c). The Director disagreed, finding that given the reason for inflicting the corporal punishment, the fact that the child was struck multiple times, and the parent's history of questionable corporal punishment, the abuse had been substantiated. We affirmed and agreed the Director properly considered the parent's past admitted history of corporal punishment inflicted upon the child.

07-28-10 WELLS REIT II - 80 PARK PLAZA, LLC v. DIRECTOR, DIVISION OF TAXATION // CHICAGO FIVE PORTFOLIO, LLC v. DIRECTOR, DIVISION OF TAXATION
A-5276-07T3; A-3381-08T3

In this opinion, we address conflicting Tax Court decisions regarding a 2006 legislative amendment (L. 2006, c. 33) to New Jersey's realty transfer fee on property purchases over $1,000,000, also known as the "Mansion Tax," N.J.S.A. 46:15-7.2. This amendment, codified as N.J.S.A. 46:15-7.4, provides a refund of the Mansion Tax to contracts for commercial properties that were "fully executed before July 1, 2006," provided that the deed was transferred on or before November 15, 2006. Two published Tax Court opinions, Wells Reit II-80 Park Plaza, LLC v. Director, Div. of Taxation, 24 N.J. Tax 98 (2008), and Chicago Five Portfolio, LLC v. Div. of Taxation, 24 N.J. Tax 342 (2008), came to different interpretations of the phrase "fully executed before July 1, 2006."

We hold that: (1) N.J.S.A. 46:15-7.4 is not an "exemption" from the Mansion Tax, but rather a refund provision; (2) as such, the section should be construed in favor of the taxpayer; and (3) the plain meaning and common usage of the phrase "fully executed before July 1, 2006," means a real estate contract that is signed and binding upon the parties before July 1, 2006, whether or not there are subsequent amendments to the terms. Thus, we affirm Chicago Five Portfolio, LLC v. Div. of Taxation

and reverse Wells Reit II-80 Park Plaza, LLC v. Director of Taxation.

07-27-10 IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MELISSA VAN PELT, GRAY CHARTER SCHOOL, NEWARK, ESSEX COUNTY
A-5889-08T2

We affirmed the Commissioner of Education's decision suspending appellant's teaching certificate for one year after appellant resigned her teaching position at a charter school immediately prior to commencement of the school term, in violation of the terms of her employment agreement. In so doing, we affirmed the Commissioner's determination that N.J.S.A. 18A:26-10, which governs the suspension of a teacher's certificate for wrongfully ceasing to perform his or her duties, and N.J.S.A. 18A:28-8, which requires tenured teachers to give sixty days written notice of their intention to resign from a teaching position, equally apply to teaching staff members of charter schools as to teaching staff members of public schools.

07-26-10 STATE OF NEW JERSEY V. DELORES RANDALL
A-2495-08T4

A prosecutor may not condition a defendant's participation in the pre-trial intervention (PTI) program upon an agreement by the defendant to plead guilty. Here the prosecutor erred in doing so. However, the denial of participation in PTI is upheld, nonetheless, because defendant had been violently and directly combative with a law enforcement officer and yet failed to acknowledge any responsibility for her conduct, claiming she had been passive despite a contradictory video. Since the program may not be effective for people who refuse to accept any responsibility for their conduct, it was not an abuse of discretion, under the circumstances here, for the prosecutor to deny defendant participation in PTI.

07-23-10 S.D. v. M.J.R.
A-6107-08T2

In this action pursuant to the Prevention of Domestic Violence Act (PDVA), we held that the Free Exercise Clause of the First Amendment does not require a Family Part judge to exempt defendant, a practicing Muslim, from a finding that he committed the predicate acts of sexual assault and criminal sexual contact and thus violated the PDVA. We also found that

the judge was mistaken in failing to enter a final restraining order in the matter.

07-23-10 CORNETT V. JOHNSON & JOHNSON, ET AL.
A-4694-08T1/A-5539-08T1 (consolidated)

At issue is whether state law claims against a manufacturer of a medical device that has been given premarket approval by the U.S. Food & Drug Administration (FDA) are federally preempted as well as time-barred.

We affirm in part and reverse in part the Law Division's Rule 4:6-2(e) dismissal of plaintiffs' master complaint alleging strict product liability, breach of express and implied warranty, and derivative claims for alleged defects in defendant's Cypher coronary stent as federally preempted by the Medical Device Amendments of 1976 (MDA or Act), 21 U.S.C.A. §§360c-360m, to the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C.A. §§301-399. Although the MDA contains an express preemption provision against state standards for devices that would be stricter than the requirements applicable to such devices under the Act, it preempts only state claims that apply substantive standards of liability different from the device-specific federal requirements. Therefore, a state cause of action is not preempted where it imposes only requirements that are "parallel," rather than additional, to the existing federal requirements under the MDA and FDCA. Additionally, a state claim can be impliedly preempted if it could not be articulated but for the existence of a federal requirement that was allegedly violated.

Here, claims under New Jersey's Product Liability Act, N.J.S.A. 2A:58C-1 to -11 (PLA), for design defect, punitive damages and failure to warn based solely on the product's labeling, are federally preempted as they impose different requirements than the FDA. However, the remainder of their failure to warn claims concerning both approved and off-label uses, as well as their claims for manufacturing defect and breach of express warranty, and derivative claims, as pled, are parallel to and are not expressly or impliedly preempted by the MDA.

Additionally, we affirm the Law Division's dismissal of one of plaintiffs' 48 cases, as it correctly applied Kentucky's statute of limitations, rather than New Jersey's, under applicable choice of law principles. In any event, Cornett's case was time-barred under either statute of repose since,

pursuant to this State's equitable discovery rule, a consensus of the medical community is not required and, under these facts, a lay person could have reasonably suspected a possible connection between the stent and decedent's sub acute stent thrombosis that developed five months after the Cypher's implantation and eventually lead to his death just weeks later.

07-23-10 VAN HORN V. VAN HORN
A-6553-06T3

We reversed an order disqualifying counsel over her client's objection for violating Rule 5:3-5(b) by taking a post-judgment mortgage on her client's real estate while her representation of her client continued during the time for appeal by virtue of Rule 1:11-3. We held that disqualification of counsel was not an available remedy for a violation of Rule 5:3-5(b). At most, the Family Part judge could have invalidated the transaction. We did not require same because the direct appeal has been decided and the evil sought to be prevented by Rule 5:3-5(b) no longer exists.

07-22-10 CBS OUTDOOR, INC. V. BOROUGH OF LEBANON PLANNING BOARD/BOARD OF ADJUSTMENT
A-3479-08T2

This action in lieu of prerogative writs involves outdoor advertising media. We provisionally remand the development application to the local land use agency for further proceedings. The opinion addresses several recurring land use issues, including conditional use variances, the time of decision rule, and the "turn square corners" doctrine.

07-22-10 IN THE MATTER OF THE AUGUST 16, 2007 DETERMINATION OF THE NJDEP OF AN EXEMPTION FROM THE NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING ACT ON BEHALF OF CHRIST CHURCH, BLOCK 22203, LOTS 2 AND 3, ROCKAWAY TOWNSHIP, MORRIS COUNTY, NEW JERSEY
A-1646-08T1

The Township of Rockaway challenges a decision by the New Jersey Department of Environmental Protection that exempts a proposed church campus construction project from the provisions and regulations of the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 to -35. Among the issues raised in this appeal, we are required to determine whether the agency misconstrued the meaning of the terms "footprint" and "reconstruction" contained in N.J.S.A. 13:20-28a(4).

Mindful of our standard of review, which requires us to give substantial deference to an administrative agency's interpretation of a statute that the agency is charged with enforcing, we conclude, under the facts presented, that the agency's interpretation of the terms "reconstruction" and "footprint" is consistent with the public policy underpinning the Highlands Water Protection and Planning Act and constitutes a sustainable exercise of the agency's enforcement authority.

07-21-10 STATE OF NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES V. T.G. - IMO THE GUARDIANSHIP OF R.V., MINOR
A-6187-08T4

Defendant appeals from the denial of her Rule 4:50-1 motion to set aside her voluntary surrender of parental rights to DYFS. We noted the statute governing this form of surrender, N.J.S.A. 30:4C-23, provides a vehicle to effectuate a permanent plan for a child, but does not create a framework to review post-judgment requests by a parent to vacate their decision.

Based on the similarities between surrenders to other approved agencies under Title 9 and those to the Division in lieu of proceeding to guardianship under Title 30, we discerned no impediment to applying the requisites delineated in N.J.S.A. 9:3-41(a) to a proceeding governed by N.J.S.A. 30:4C-23. The analysis of a motion to vacate must also be guided by the two-pronged examination articulated in In re Guardianship of J.N.H., 172 N.J. 440, 474 (2002): first, a parent must identify a change of circumstances fitting one of the basis set forth in Rule 4:50-1 and, second, show by clear and convincing evidence that vacating the judgment is in the child's best interest and will not impair the child's stability and permanency.

07-16-10 BIG M, INC. V. TEXAS ROADHOUSE HOLDING, LLC
A-3088-08T1

In this appeal, we address whether tips and gratuities are subject to wage garnishment. We explained that the issue turns on the control exercised by the employer of the tips and gratuities, but held that tips and gratuities paid in cash directly to the employee or charged to a credit card and paid contemporaneously to the employee are not subject to garnishment. We reversed a judgment in favor of the judgment holder against the employer of a judgment debtor and remanded for development of the factual record.

07-16-10 J.D., by his mother TRISHA SCIPIO-DERRICK v. LUCILLE DAVY, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF EDUCATION
A-1375-08T2

Charter school students in Newark are not deprived of equal protection under the New Jersey Constitution by the funding provisions of the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 to -18, and the Educational Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 to -48, under which charter schools receive only ninety percent of the per pupil funding provided to traditional public schools in Newark, and are excluded from receiving any state or local funding for facilities, as opposed to one hundred percent of eligible facilities costs provided to traditional public schools in Newark.

07-16-10 STATE OF NEW JERSEY V. PAUL A. FOGLIA
A-6332-07T4

We reversed defendant's murder conviction based upon the wholesale admission of "bad act" evidence, which was admitted without any limiting instructions from the judge. We rejected the various grounds for admissibility asserted by the State, concluding that much of the evidence was irrelevant under the first prong of the Cofield test.

In particular, we rejected the State's argument that the evidence was admissible to rebut defendant's asserted "passion/provocation manslaughter" defense.

07-15-10 ASHI-GTO ASSOCS. V. IRVINGTON PEDIATRICS, P.A.
A-5054-08T2/A-5265-08T2 (consolidated)

We discuss factors a trial court should consider when presented with a claim for counsel fees for a frivolous defense asserted at trial, when the time frame of Rule 1:4-8 cannot be met.

07-14-10 JACKSON HOLDINGS, LLC, ET AL. VS. JACKSON TOWNSHIP PLANNING BOARD
A-3435-08T1

If a trial court hearing an action challenging a planning board's decision on an application for a land use approval perceives a substantial question concerning the validity of the

part of the zoning ordinance under which the approval was sought, the court should order the governing body's joinder in the action and determine the validity of the disputed part of the zoning ordinance before reviewing the board's decision.

07-13-10 SELECTIVE INSURANCE COMPANY OF AMERICA v. ARTHUR C. ROTHMAN, M.D., Ph.D., P.A., ET ALS.
A-5288-08T3/A-5289-08T3/A-5290-08T3 (consolidated)

Physician assistants are not authorized by N.J.S.A. 45:9-5.2 to perform needle electromyography tests because physician assistants are not licensed to practice medicine and surgery in this State pursuant to chapter 9 of Title 45 of the Revised Statutes.

07-12-10 STATE v. JOSEPH FEDERICO
A-0678-08T4

Defendant, convicted at a bench trial in municipal court and on trial de novo in the Law Division, may not receive a custodial sentence of more than 180 days for all consolidated charges disposed of in a single proceeding.

07-12-10 RICHARD LUCHEJKO V. CITY OF HOBOKEN, CM3 MANAGEMENT COMPANY and SKYLINE CONDOMINIUM ASSOCIATION
A-5702-07T2

In this appeal we decide whether, a condominium association has a duty to maintain an abutting public sidewalk as if it were a commercial landowner. We hold that a condominium association does not bear such duty or responsibility. We also reject other theories of liability against the association and the municipality.

07-09-10 STATE OF NEW JERSEY V. TAMESHA CAMPBELL
A-1866-09T4

We reverse an interlocutory order denying a motion for a jury trial after a mistrial holding that the declaration of mistrial nullified defendant's prior waiver of her Sixth Amendment right to trial by jury.

07-08-10 IN THE MATTER OF ARTHUR C. SNELLBAKER
A-1443-09T2

The Chief of Police of Atlantic City was unlawfully denied salary increases granted to his subordinates contrary to

N.J.S.A. 40A:14-179. The City acknowledged that he was awarded retroactive salary increases as part of a settlement of all claims because the increases had been wrongfully withheld. The Division of Pensions and Benefits employed an erroneous interpretation of N.J.S.A. 43:16A-1(26) to conclude that the reasons for including this award in the settlement were irrelevant. The mere fact that those increases coincided with the police chief's retirement did not render them "individual salary adjustments . . . granted primarily in anticipation of" his retirement that are not creditable for retirement benefits. It is necessary to evaluate all the factors relevant to the award of the increase and the employee's retirement to determine whether the salary adjustment was granted primarily in anticipation of retirement. The facts, as adopted by the Division, clearly show that the retroactive salary increases here were not granted primarily for that purpose.

07-08-10 DALESSIO V. GALLAGHER, ET AL.
A-0949-09T2

In light of the Uniform Child Custody Jurisdiction and Enforcement Act's objective to prioritize home state jurisdiction over child custody disputes, the apparent inconsistency between the definition of "home state" in N.J.S.A. 2A:34-54 and the provisions of N.J.S.A. 2A:34-65(a)(1) dealing with initial jurisdiction must be resolved in a manner that gives full effect to both predicates for home state jurisdiction under N.J.S.A. 2A:34-65(a)(1).

07-08-10 NEW JERSEY HOSPICE AND PALLIATIVE CARE ORGANIZATION V. JOHN GUHL, DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, DEPARTMENT OF HUMAN SERVICES and JENNIFER VELEZ, COMMISSIONER OF HUMAN SERVICES,
A-5548-08T2

A regulation adopted by the Division of Medical Assistance and Health Services, which is reflected in the State Medicaid plan approved by the Center for Medicare and Medicaid Services in the Department of Health and Human Services, is entitled to Chevron deference. The regulation prescribing the method of calculation of the reimbursement rate paid to hospice providers for Medicaid recipients who reside in nursing facilities is valid because it reflects a permissible construction of the federal statute governing that reimbursement rate.

07-08-10 PALOMBI v. PALOMBI

A-2189-08T2

Appellant argued that the motion judge erred in deciding six post-judgment motions that concerned "substantive" issues without oral argument. Reviewing the circumstances of each motion, the court found no abuse of discretion. Motions that seek a modification of financial obligations without providing a current and a prior case information statement pursuant to Rule 5:5-4(a) and motions for reconsideration that fail to explicitly identify the matters or controlling decisions that demonstrate that the court acted in an arbitrary, capricious or unreasonable manner, see R. 4:49-2, are deficient on their face. Because these deficiencies are evidentiary in nature, they cannot be cured at oral argument. Therefore, although motions nominally raised issues of a substantive nature, the motions failed to present "substantive" issues to the court for determination; oral argument would have been unproductive and unnecessary; and the motion judge acted within his discretion to deny oral argument.

07-07-10 BAYER V. TOWNSHIP OF UNION
A-1482-07T2

In this case, where defendant was arrested based upon a mistaken identification, we affirm the trial court's dismissal of plaintiff's 42 U.S.C.A. § 1983 claim on summary judgment because a careful review of the undisputed facts reveals that a reasonable police officer would have believed there was probable cause to arrest plaintiff. That was a determination appropriately made by the trial court. We also affirm the trial court's dismissal of plaintiff's Tort Claims Act claim because plaintiff failed to provide timely notice pursuant to N.J.S.A. 59:8-8.

07-02-10 CHARLES HAYWOOD, ET AL. VS. RICKY HARRIS, ET AL.
A-1120-09T3

Plaintiff appeals from the judgment entered after trial in this uninsured motorist litigation brought against his carrier. Plaintiff was subject to the "limitation on lawsuit" option (LOL), N.J.S.A. 39:6A-8(a), and alleged a "permanent" injury, as well as past and future lost wages based upon his inability to return to his prior position as a union mason. Defendant stipulated to liability, and the case was tried as to whether plaintiff's injury was "permanent," and on causation and damages. The jury concluded plaintiff's injury was not permanent, but awarded plaintiff $75,000 in economic damages.

The jury interrogatory did not distinguish between an award for past versus future loss of earnings.

Plaintiff's past lost wages were approximately $28,000, and the judge granted defendant's request to mold the verdict and enter judgment in that amount. Plaintiff contended that the jury's award reflected past lost wages, as well as future lost wages for a reasonable period of time, and that the award was fully supported by the evidence.

We concluded that plaintiff's claim for future lost wages was not barred as a matter of law simply because the jury concluded the injury was not "permanent" within the meaning of N.J.S.A. 39:6A-8(a). However we affirmed, concluding that plaintiff had failed to adduce sufficient proof of a continuing future wage loss.

We also concluded that the current model jury charge on future loss of earnings should be modified in situations where the plaintiff alleges a permanent injury and the LOL applies. The jury should be specifically instructed that in the event it concludes that plaintiff's injury is not permanent, it may make an award for future loss of earnings, but the amount of any award must be limited to only those earnings "lost during a reasonable period of recuperation and recovery." Miskelly v. Lorence, 380 N.J. Super. 574, 578 (App. Div.), certif. denied, 185 N.J. 597 (2005).

07-02-10 STATE OF NEW JERSEY VS. ENDER F. POMPA
A-0139-08T4

Following his conviction of various drug offenses, defendant appealed the denial of his motion to suppress in excess of thirty pounds of marijuana seized by police without a warrant from a closet in the sleeper cabin of defendant's tractor trailer. The court held that the closely regulated business exception permitted a warrantless administrative inspection of certain areas of the tractor trailer, but concluded that the search turned unlawful when it progressed into unregulated areas without the exigent circumstances required by State v. Pena-Flores, 198 N.J. 6, 28 (2009).

07-01-10 STATE v. SCHMIDT
A-2237-08T4

In this opinion we hold that (1) the police are required to comply with N.J.S.A. 39:4-50.2(e) by reading the standard language concerning the consequences of a refusal to take an Alcotest (part two of the Standard Statement) when a defendant unequivocally agrees to submit to an Alcotest but then fails without reasonable excuse to produce a valid sample and (2) the police have the discretion to discontinue the Alcotest and charge the arrestee with refusal without affording the arrestee the maximum eleven attempts that the Alcotest machine permits.

06-28-10 FIGUEROA V. NEW JERSEY DEPARTMENT OF CORRECTIONS
A-3914-08T2

In this appeal, appellant challenges the Department of Corrections' decision finding him guilty of the prohibited act of attempting to possess marijuana. In reversing, we determine that the DOC's adjudication was not based on "substantial evidence" in the record. In so doing, we reviewed the proofs necessary to establish that the appellant committed the prohibited act under the substantial evidence standard. We construed the term "possession," not otherwise defined in the definitional sections of the Administrative Code governing inmate discipline, by applying the same construction as the term is defined for the purpose of imposing criminal liability under statutes charging individuals with possession of controlled dangerous substances. State v. Pena, 178 N.J. 297, 305 (2004).

06-25-10 BARBARA SZCZECINA AND MICHAEL SZCZECINA v. PV HOLDING CORP and JOSEPH J. MARTINO AND MELISSA BOOS
A-3437-08T3

We reverse a $1,000,000 jury verdict following a verbal threshold, damages-only trial due to clearly inappropriate statements about the defense made by plaintiff’s counsel in his opening statement and summation. Those statements included derisive comments about defendants, their counsel, and their expert witnesses, as well as counsel's request that the jury "send a message" through its verdict. Because we conclude that counsel's conduct infected the jury's verdict, we reverse and remand for a new trial.

06-25-10 VANDELLA DAVIS, V. DEVEREUX FOUNDATION, ET AL
A-0580-09T1

A charitable foundation that houses and treats people with emotional, developmental and educational disabilities does not

have a non-delegable duty to protect its residents from intentional torts committed on them by its employees. In other words, strict liability does not apply in this setting. Contra Hardwicke v. Am. Boychoir Sch., 368 N.J. Super. 71 (App. Div. 2004); J.B. v. Mercer County Youth Det. Ctr., 396 N.J. Super. 1 (App. Div. 2007). But if the employee commits the intentional tort, however outrageously, at least in part to further the employer's business, the employer is liable under the doctrine of respondeat superior.

06-23-10 WILLIAM W. ALLEN, ET AL. VS. V AND A BROTHERS, INC., d/b/a CALIPER FARMS NURSERY AND LANDSCAPING SERVICES, ET AL.
A-4427-08T1

We hold that an individual officer or employee of a corporation can be held liable for committing a regulatory violation of the Consumer Fraud Act as the result of the definition of "person" found in N.J.S.A. 56:8-1(d) and the inclusion of "person[s]" as potentially liable parties in N.J.S.A. 56:8-2.

06-23-10 JEFFREY M. BROWN ASSOCIATES, INC., ET AL. V. INTERSTATE FIRE & CASUALTY COMPANY, ET AL.
A-2325-08T2

An additional insured endorsement that provides coverage that is "excess over any other insurance" should be construed in accordance with its plain language to provide only excess coverage to an additional insured that had primary coverage under its own policy. A subcontract that requires the named insured-subcontractor to obtain primary coverage for the additional insured-general contractor cannot be construed to expand the scope of coverage provided under an additional insured endorsement if the issuer of the policy was not provided notice of the subcontract's terms.

06-21-10 NEW JERSEY LAW ENFORCEMENT SUPERVISORS ASSOCIATION, ET AL. v. STATE OF NEW JERSEY
A-2839-08T1

The police and firefighters paid convention leave statute, N.J.S.A. 11A:6-10, is not unconstitutional as special legislation and does not violate the equal protection rights of

members of employee organizations not affiliated with the unions designated in the statute.

06-17-10 ARCHBROOK LAGUNA, LLC v. CHARLES L. MARSH
A-5254-08T3

Plaintiff commenced this action, alleging fraud and the breach of defendant's fiduciary duties as a corporate officer. At the time this suit was filed, defendant's action against plaintiff in Georgia was still pending. And, once this action was filed, plaintiff voluntarily dismissed its counterclaim against defendant in Georgia. After a trial and the entry of final judgment in Georgia, defendant successfully moved to dismiss this action on the basis of the entire controversy doctrine.

In affirming, the court determined, among other things, that the entire controversy doctrine does not only apply when "successive suits" are filed but may be applied when the second suit is filed while the first is still pending. The court also held that application of the entire controversy doctrine in this circumstance required a dismissal with prejudice, not a dismissal without prejudice, as plaintiff argued. Lastly, the court held that defendant should have sought dismissal more expeditiously but did not find the delay so inequitable as to require denial of the motion to dismiss.

06-15-10 SIERFELD V. SIERFELD, ET AL.
A-4280-08T3

Plaintiff, defendants' adult daughter who was allegedly residing in their home temporarily, sought coverage under her parents' homeowners and umbrella insurance policies for injuries she sustained as a result of a bite by the family dog. Allstate denied coverage under both policies, claiming that plaintiff was a resident of defendants' household, and thus excluded from coverage as an "insured person." We agreed with Allstate, holding that the words "resident" and "household" as used in the policies were unambiguous, and that plaintiff and her parents had a "substantially integrated family relationship" sufficient to make her a "resident" of her parents' household at the time of the dog bite.

06-14-10 PERTH AMBOY BD. OF EDUC. V. CHRIS CHRISTIE, GOVERNOR OF THE STATE OF NEW JERSEY
A-3361-09T4

We hold that Executive Order 14, which freezes State aid to school districts for the remainder of FY 2010 in an amount equal to each district's anticipated surplus funds, but allows transfers from the surplus to meet a school district's current year's operating costs, is authorized both statutorily and constitutionally, despite N.J.S.A. 18A:7F-7's command that such excess surplus funds be used for the next year's school budget, and therefore does not violate the separation of powers doctrine.

06-14-10 SHAMROCK LACROSSE, INC. V. KLEHR, HARRISON, HARVEY, BRANZBURG & ELLERS, LLP; and OBERMEYER REBMANN MAXWELL & HIPPEL, LLP; and NATIONAL IP RIGHTS CENTER, LLC
A-5730-08T3

An affidavit of merit, pursuant to N.J.S.A. 2A:53A-26 to -29, was necessary in a legal malpractice action brought against two Pennsylvania-based law firms, each having bona fide offices in New Jersey, arising out of alleged negligence by a patent attorney employed successively by those law firms, in his representation of a New Jersey client before the United States Patent and Trademark Office.

06-11-10 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES V. D.M. IN THE MATTER OF THE GUARDIANSHIP OF S.M.
A-6020-08T4

The issue presented on appeal is whether a parent's parental rights may be terminated when the New Jersey Division of Youth and Family Services (DYFS or Division) fails to prove all prongs of the best interests of the child standard, but nevertheless, the child may suffer serious psychological or emotional harm by severing the bond between the child and his or her foster parents. We conclude that any harm the child may suffer from severing of that bond cannot, in and of itself, serve as a legally sufficient basis for termination of the parent's parental rights. We hold that in such a case, DYFS must still prove by clear and convincing evidence that the parent's actions or inactions substantially contributed to the forming of that bond to where any harm caused to the child by severing the bond rests at the feet of the parent. Because we found an absence of that proof, we reversed and remanded for further proceedings consistent with this opinion.

Judge Skillman filed a concurring opinion.

06-09-10 IN THE MATTER OF JOHNNY POPPER, INC. t/a J.D. BYRIDER t/a FISHER'S FINE AUTOMOBILES
A-4398-08T1

A used car dealer who kept the price list of cars on the lot only in the sales office violated the CFA provision, N.J.S.A. 56:8-2.5, requiring the price of retail merchandise to be affixed to the merchandise or "located at the point where the merchandise is offered for sale," which we construed to mean the place where the merchandise is found by the consumer, not where the sale transaction occurs.

06-08-10 Sheila Aronberg v. Wendell Tolbert and Fleetwood Taggart
A-4896-08T3

N.J.S.A. 39:6A-4.5(a) bars uninsured drivers from suing for personal injuries sustained in automobile accidents. The trial court granted summary judgment to defendants, dismissing a survival action brought by an uninsured decedent's estate and denied summary judgment as to the wrongful death action brought by his heirs. The panel concludes that, although that statutory bar may be applied to survival actions, which pursue the decedent's claims, the statutory bar does not apply to a wrongful death action, which seeks compensation for the losses suffered by the uninsured decedent's heirs as the result of the tortious conduct of others. The denial of summary judgment as to that claim is affirmed.

06-07-10 STATE OF NEW JERSEY V. ROBERT DWAYNE GREEN
A-1892-07T4

In an earlier opinion we held that under Rule 3:28, every defendant must be permitted to apply to the Pre-trial Intervention Program (PTI), even if the defendant's chances of acceptance are slim. We now clarify that our opinion did not require PTI directors to do a "full work-up" on such applications. Further, where a defendant is conditionally ineligible for PTI, due to the type or degree of crime charged or for other reasons, the PTI program may withhold evaluation of the application until the prosecutor decides whether to join in the application or to reject it. However, at some point, the PTI director must evaluate the merits of the PTI application and make a recommendation. We also note that the PTI forms and procedures currently in use may be confusing to defendants and suggest that the Criminal Practice Committee consider developing uniform PTI application forms and procedures.

06-04-10 CAMPUS ASSOCIATES L.L.C. V. ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF HILLSBOROUGH
A-0690-08T2

When a contract purchaser is denied a use variance for the property and declines to appeal that adverse decision, the landowner has standing to appeal the denial of the variance.

06-04-10 SLAUGHTER V. GOVERNMENT RECORDS COUNCIL, ET AL.,
A-0163-08T1

The executive order issued by former Governor McGreevey one day after the effective date of OPRA, which provided that any government record a state agency proposed to exempt from disclosure by administrative rule published after enactment of OPRA that had not yet been adopted in accordance with the APA would be exempt from disclosure, was intended to be temporary only and therefore is no longer in effect.

06-03-10 LIBERTY MUTUAL INS. CO. v. GARDEN STATE SURGICAL CENTER, LLC
A-4114-08T3

In this appeal, the court recognized that N.J.S.A. 2A:23A-18(b) precludes appellate review of orders that confirm, modify or correct arbitration awards issued pursuant to the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1 to -30, but held that this limitation does not bar appellate courts from reviewing other orders, for example, as here, an order denying leave to file an amended complaint and an order dismissing the action on timeliness grounds. In addition, the court also found its exercise of supervisory jurisdiction was appropriate because the trial judge's cursory opinion did not reveal whether his order confirming the arbitration awards conformed to N.J.S.A. 2A:23A-13.

06-02-10 DEPARTMENT OF CHILDREN AND FAMILIES, DIVISION OF YOUTH AND FAMILY SERVICES V. K.A.
A-2537-08T3

We reverse DYFS's substantiation of abuse against the mother of an emotionally disturbed eight year-old girl based on excessive corporal punishment. Appellant struck the child five times on the shoulder with a closed fist leaving a visible bruise.

Absent statutory, regulatory, or case law guidance, we define "excessive corporal punishment" by common usage to mean going beyond what is proper or reasonable under the circumstances. Thus, a single incident of violence may be severe enough to sustain a finding of excessive corporal punishment, provided that the parent or caregiver could have foreseen, under all of the attendant circumstances, that such harm could result from the punishment inflicted. Here, the force used by appellant was reasonable under the circumstances.

06-02-10 STATE OF NEW JERSEY IN THE INTEREST OF T.S., A Minor
A-1390-08T4

Appellant, a teenage girl, was adjudicated delinquent for an act that if committed by an adult would have constituted the disorderly persons offense of simple assault. By way of disposition, the Family Part placed T.S. on probation for a period of six months. As one of the conditions of probation, the court ordered her to serve ten days of confinement in a county youth detention facility. We reverse this aspect of the trial court's order of deposition.

The Juvenile Justice Code does not contain the equivalent of N.J.S.A. 2C:43-2(b)(2), permitting a criminal court to sentence a defendant to a jail term not to exceed 364 days as a condition of probation. N.J.S.A. 2A:4A-44b(1) of the Juvenile Justice Code provides for a presumption of non-incarceration for any fourth degree offense or lower. There is nothing in this record that supports overcoming the presumption of non-incarceration for this adjudication of delinquency based on a disorderly persons offense.

05-28-10 QUERESHI V. CINTAS CORP.
A-1848-08T3

N.J.S.A. 34:15-28.1 provides that workers' compensation benefits are to be paid promptly, and a penalty shall be assessed and reasonable attorneys' fees shall be paid when a respondent unreasonably or negligently delays or refuses to pay temporary disability compensation. A judge of compensation must award a reasonable attorneys' fee when the statutory penalty is awarded. The fee is not limited by N.J.S.A. 34:15-64, the statutory formula governing fee awards following an award of benefits.

05-27-10 STATE v. ROY FRIEDMAN

A-0793-08T1

Mandatory periods of parole supervision on consecutive sentences imposed under the No Early Release Act, N.J.S.A. 2C:43-7.2, run concurrently upon release from incarceration.

05-27-10 ANTHONY TONIC VS. AMERICAN CASUALTY CO., i/p/a CNA INS. CO.
A-3383-07T1

Plaintiff was injured in a hit-and-run accident. He was able to identify the van involved and its owner, who on the day of the accident was in Florida on vacation. He was unable to ascertain the identity of the driver of the van. Plaintiff commenced suit against the owner and "John Doe" drivers, and also named defendant UM/UIM insurer in the complaint. Discovery ensued with defendant/insurer's active participation.

Plaintiff settled his claim with the owner of the van's insurer for its policy limits and served a Longworth notice on defendant. Defendant moved for summary judgment, arguing that its subrogation rights had been impaired because plaintiff failed to amend his complaint and substitute several individuals - friends and family of the van's owner - as defendants in place of the fictitious John Does.

We reversed the grant of summary judgment, concluding that defendant had not established as a matter of law that plaintiff had failed to make reasonable efforts to identify the driver of the van, and that defendant had also failed to establish as a matter of law that its subrogation rights had been prejudiced.

05-26-10 FAIR SHARE HOUSING CENTER, INC. V. NEW JERSEY STATE LEAGUE OF MUNICIPALITIES
A-1200-08T3

The League of Municipalities is not a "public agency" subject to the Open Public Records Act because it does not provide any governmental services, but instead provides advice to, and acts as an advocate for, its member municipalities.

05-21-10 JANE COLCA f/k/a ANSON v. DAVID ANSON
A-1822-08T2

In this post-judgment matrimonial matter, we rejected plaintiff's argument that an order entered three years earlier denying defendant's request that she pay child support was

immutable, forever relieving her of the obligation to support the parties' unemancipated daughter until and unless defendant could prove changed circumstances warranting modification of the prior order's provisions. This position is unsupportable as a matter of law.

05-21-10 STATE v. RILEY JEFFERSON a/k/a SYNCERE RILEY JEFFERSON
A-1945-06T4

(1) In the absence of a warrant or a recognized exception from the Fourth Amendment's warrant requirement, the police could not lawfully enter defendant's home to conduct a Terry-type detention and investigation of defendant.

(2) A police officer's wedging herself in the doorway to prevent defendant from closing his front door was entry into the home.

(3) The police failed to show either "hot pursuit" exigent circumstances or a community caretaking exception from the warrant requirement.

(4) Although the police entry was unlawful, defendant had no right to resist physically, and the search of his person incident to arrest was lawful.

(5) Consent to search defendant's apartment, given by defendant's wife, was tainted by the unconstitutional police conduct and was not shown to be voluntary.

05-20-10 COURIER-POST NEWSPAPER, ET AL. v. COUNTY OF CAMDEN, ET AL.
A-2993-08T3

In this case, the Courier-Post challenged the decisions by Camden County and the sheriff of Camden County to place legal notices in The Philadelphia Inquirer at a negotiated rate. In resolving this dispute, we reached the following conclusions.

First, the Courier-Post, a newspaper qualified to publish such notices and which has done so in the past, has standing to bring this suit.

Second, The Philadelphia Inquirer does not meet the statutory requirement in N.J.S.A. 35:1-2.2, that a newspaper carrying legal notices must be "printed and published" in New Jersey. Even though The Philadelphia Inquirer is available

online to people in New Jersey, it is "printed and published" in Pennsylvania within the meaning of the statute. For similar reasons, The Philadelphia Inquirer is not "printed and published" in Camden County for the purpose of publishing the sheriff's notices under N.J.S.A. 2A:61-1.

Third, the negotiated rates for the cost of these legal notices in The Philadelphia Inquirer, although less than the fixed statutory rates set forth in N.J.S.A. 35:2-1, nonetheless violate the statute because they differ from the mandatory statutory rates.

Finally, these statutory provisions do not violate the Commerce Clause of the United States Constitution, U.S. Const. art. I, §8, cl. 3, because a state or its subdivisions, when acting as a consumer, may prefer in-state businesses.

The order of the trial court granting summary judgment in favor of defendants is reversed.

05-19-10 COAST AUTOMOTIVE GROUP, LTD. V. WITHUM SMITH & BROWN
A-0226-08T1

The question presented is the scope of an arbitration clause in a retainer agreement between an accounting firm and its client. We conclude that their agreement "to resolve any and all fee-related disputes" in binding arbitration includes claims of breach of the agreement related to payment owed for services rendered but not the client's affirmative claims for consequential damages attributable to breach.

05-17-10 STATE OF NEW JERSEY v. RICKY SESSOMS
A-1488-09T4

On the strength of an affidavit purportedly authored by a confidential informant, a defendant charged with drug and weapons possession offenses obtained a pretrial order compelling the State to "confirm or deny" the informant's identity. We reverse the order, as the privilege belongs to the State and not the informer, and the circumstances in this case did not satisfy the "disclosure" exception found in N.J.R.E. 516.

05-17-10 POWERHOUSE ARTS DISTRICT ASSOCIATION, ET AL. V.CITY COUNCIL OF THE CITY OF JERSEY CITY, ET AL.
A-4570-08T3

In this action in lieu of prerogative writs, we hold that, unlike a blight designation, a challenge to a redevelopment plan amendment adopted by a municipal planning board and city council (pursuant to the Local Redevelopment & Housing Law (LRHL), N.J.S.A. 40A:12A-1 to -73), which is a discretionary act of broader application, must be measured against an "abuse of discretion," rather than "substantial evidence" standard of review.

We also hold that industrial lots properly blighted years earlier pursuant to the LRHL's predecessor statute may be included under the plan without any further evaluation of whether they remained in need of redevelopment.

Here, although the plan amendment was somewhat inconsistent with the historic preservation element of the original plan adopted only four years earlier, and with the master plan, the proposal's other benefits outweighed its negative features and was in the "public interest," so as not to render municipal action either arbitrary, capricious or unreasonable, but rather adequately reasoned and grounded in the record.

05-14-10 CFG HEALTH SYSTEMS, LLC v. COUNTY OF HUDSON
A-2034-09T2

When a local contracting unit awards a contract following public bidding pursuant to the Local Public Contracts Law, N.J.S.A. 40A:11-1 to -51, it may not thereafter amend the contract if the amendment materially changes the terms and conditions upon which the contract was bid and awarded.

05-10-10 BURNETT v. COUNTY OF GLOUCESTER
A-4329-08T3

Plaintiff made a request to the County of Gloucester for production of documents pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, consisting of "[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present." Alleging noncompliance, plaintiff then filed suit, but summary judgment was granted against him on the ground that production was not required because the requested documents were not in the County's possession and its Clerk had no obligation to seek them from sources beyond the County's files.

On appeal, we determined that (1) settlements executed by third parts on behalf of a governmental entity constitute

government records as defined by OPRA; (2) a request for "settlement agreements" without specification of the matters to which they pertain does not constitute a request for information obtained through research, requiring no response pursuant to OPRA, but rather a request for a specific document triggering OPRA's disclosure requirements; and (3) the County was not excused from its OPRA obligations because the requested documents were not in its possession.

05-07-10 COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; NEW JERSEY PUBLIC EMPLOYEES COUNCIL 1 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; THE INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL EMPLOYEES, AFL-CIO, LOCAL 195; and AMERICAN FEDERATION OF TEACHERS, AFL-CIO NEW JERSEY V. CHRIS CHRISTIE, GOVERNOR OF THE STATE OF NEW JERSEY; NEW JERSEY EDUCATION ASSOCIATION V. CHRIS CHRISTIE, GOVERNOR OF THE STATE OF NEW JERSEY; NEW JERSEY STATE POLICEMEN'S BENEVOLENT ASSOCIATION V. CHRIS CHRISTIE, GOVERNOR OF THE STATE OF NEW JERSEY
A-2871-09T2/A-2996-09T2/A-2997-09T2 (consolidated)

Paragraph 1 of Executive Order No. 7, 42 N.J.R. 580(b) (January 20, 2010) ("EO 7"), which seeks to extend "pay-to-play" restrictions on political campaign contributions to labor organizations, violates principles of separation of powers under article III, paragraph 1 of the New Jersey Constitution.

In particular, EO 7's intended treatment of collective bargaining agreements as "contracts" and labor unions as "business entities" is fundamentally incompatible with existing laws and statutes, and thus impermissibly encroaches upon law-making powers delegated by the people to the Legislature under the 1947 Constitution.

The provision is invalidated, effective July 1, 2010, without prejudice to the future potential adoption of appropriate legislation enacting pay-to-play reforms covering labor organizations, in a manner consistent with or amending, as necessary, existing laws.

05-07-10 MARCELO BUSTAMANTE VS. BOROUGH OF PARAMUS, ET ALS.
A-1869-08T2

Plaintiff's complaint alleging violations of 42 U.S.C.A. § 1983, and common law assault and battery, was dismissed pursuant to Rule 4:6-2(e). Plaintiff had been indicted for resisting

arrest and aggravated assault upon two of defendant police officers. After pleading guilty to resisting, plaintiff entered PTI and all charges against him were dismissed.

Defendants argued that plaintiff's civil complaint was barred by the "unfavorable result" of his guilty plea and entry into PTI, relying upon the holding in Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), and Gilles v. Davis, 427 F.3d 197 (3d Cir. 2005). The trial judge agreed and dismissed the complaint with prejudice.

We concluded that plaintiff's civil claims are barred by the disposition of his criminal charges only if a potential verdict in the civil case was inconsistent with the underlying criminal charges. Because plaintiff alleged that the officers continued to assault him after he was in custody, his claims were not barred as a matter of law, and should not have been dismissed pursuant to Rule 4:6-2(e).

05-05-10 POTOMAC AVIATION, LLC V. PORT AUTHORITY OF NY AND NJ, ET ALS.
A-3128-08T2

Defendant fell asleep at the wheel of her car and crashed through a perimeter fence at Teterboro Airport, striking and significantly damaging, plaintiff's plane. The plane was parked in a portion of the airport leased by defendant First Aviation Services from the airport's owner, the Port Authority of New York and New Jersey. Plaintiff sued both, along with the driver and owners of the car.

After settling with the driver and owners, plaintiff's complaint against the remaining defendants was dismissed on summary judgment. Plaintiff, on appeal, argued that First Aviation Services was presumed to be negligent as bailee of the plane, and that both defendants were negligent for failing to secure the perimeter fence to resist any incursion by vehicles straying from the adjacent street.

We affirmed the grant of summary judgment on grounds different than those expressed by the motion judge. We concluded that plaintiff failed to adduce any proof of the bailee's negligence beyond the presumption which had been adequately rebutted. We further concluded that while the accident was foreseeable, the scope of the duty owed by defendants, either as landlord or lessee of the premises, did not include the obligation to place guide rail or other

protective devices along the roadway to safeguard against the negligence of those using the road.

05-03-10 MOSES SEGAL, Individually, E.S., A Minor By Her Guardian ad Litem, MOSES SEGAL, and W.S., A Minor By His Guardian ad Litem, MOSES SEGAL, V. CYNTHIA LYNCH, An Individual.
A-0805-08T2

Plaintiff, the father of two minor children, filed a complaint in the Law Division alleging on his own behalf and on behalf of his two children, that defendant, the children's mother, intentionally or recklessly engaged in extreme and outrageous conduct which alienated the natural bond and affection that should exist between them and caused both he and the children emotional distress.

We hold that this cause of action is not barred by the Heart Balm Act. We nevertheless affirm the trial court's dismissal of the complaint as a matter of public policy under our parens patriae responsibility. We also hold that plaintiff's factual allegations do not make out a case of intentional infliction of emotional distress under Buckley v. Trenton Saving Fund Soc., 111 N.J. 355 (1988). We do not foreclose the possibility that such a tort can be asserted as part of a pending case in the Family Part under Tevis v. Tevis, 79 N.J. 422 (1979).

04-30-10 STATE OF NEW JERSEY V. ORION T. BRABHAM
A-3571-07T4

Defendant primarily objects to the denial of his motion to suppress statements he made to New Jersey law enforcement officers after he was incarcerated for a parole violation in New York. Accepting the judge's factual findings, we conclude that the statements, which the judge found were made during a meeting defendant requested to negotiate a plea, should have been excluded pursuant to N.J.R.E. 410.

04-29-10 NEW JERSEY MANUFACTURERS INS. CO. V. NATIONAL CASUALTY CO.
A-0737-09T3

An insurer against which a Rova Farms claim is asserted may raise as an affirmative defense that the case could not have been settled by deposit of its policy limit plus whatever amount the insured -- or in this case the excess insurer -- would have

been willing and able to contribute. An insurer against which a Rova Farms claim is established is only liable for prejudgment interest above its policy limit for the period of time following the insurer's breach of its duty of good faith in settlement negotiations.

04-29-10 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES V. B.M. and T.B. - IN THE MATTER OF THE GUARDIANSHIP OF Z.T.T.B., a minor respondent
A-5542-08T4/A-5543-08T4 (consolidated)

A medical report containing a doctor's expert opinion may not be admitted into evidence under Rule 5:12-4(d) unless DYFS establishes all the prerequisites of N.J.R.E. 803(c)(6) for its admission as a business record.

04-28-10 FREDERICK VOSS VS. KRISTOFFE J. TRANQUILINO, ET AL.
A-5431-08T1

N.J.S.A. 39:6A-4.5(b), which provides that a person convicted of DWI in connection with an accident "shall have no cause of action for . . . loss sustained as a result of the accident," does not bar a dram shop claim by that person.

04-27-10 KITCHENS INTERNATIONAL, INC. VS. EVANS CABINET CORP., ET AL.
A-4289-08T1

The trial court correctly refused to strike plaintiff's Canadian judgments, which were filed here pursuant to the Uniform Enforcement of Foreign Judgments Act, N.J.S.A. 2A:49A-25 to -33, but should have stayed enforcement of the judgments, upon the posting by plaintiff of adequate security, pending a determination by the court in a previously-filed action as to whether the Canadian court properly exercised personal jurisdiction over defendant.

04-27-10 STATE OF NEW JERSEY VS. E.W.
A-0146-08T4

We held that defendant was entitled to post-conviction relief consisting of vacation of an illegal sentence when evidence demonstrated that defendant had committed a sexual assault on a juvenile in 1979 when the statute of limitations for the offense was five years, the statute of limitations on the offense had expired prior to the amendment of N.J.S.A. 2C:1-6 in 1986 to exempt sexual assault from the five-year bar, and

defendant was not indicted for the crime until 1991. Any application of the 1986 version of N.J.S.A. 2C:1-6 to preserve the claim against defendant violated the Constitution's Ex Post Facto Clause, and thus both his conviction and sentence were illegal.

04-26-10 TALL TIMBERS PROPERTY OWNERS ASSOCIATION, INC., et al. v. NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS
A-0336-08T1

The Department of Community Affairs' interpretive regulation, which determined that recreational park trailers are subject to the Uniform Construction Code, is valid. The Department's regulation of recreational park trailers under the Code is not preempted by the National Manufactured Housing Construction and Safety Standards Act because HUD has not yet adopted regulations establishing safety standards for such trailers.

04-23-10 HOMESITE INS. CO. V. SUSAN HINDMAN, ET AL
A-5103-08T1

In our interpretation of business and rental exclusions in a homeowner's policy we concluded that neither barred coverage. The business exclusion could not apply to rental activity, the more specific provisions of which should control. Although the rental exclusion prohibited rental or holding out for rental any part of the premises, the exclusion contained an exception for boarders, unless rented or "intended" to be rented to more than two boarders. We held that, notwithstanding the insured's rental to more than two boarders for several years prior to the policy period during which the accident occurred, she had only two boarders during the policy period, her present intent at the time of the accident is dispositive, and in the absence of objective evidence that she intended at that time to rent to more than two boarders, intent is not established.

04-22-10 TOO MUCH MEDIA, LLC, ET AL. v. SHELLE HALE
A-0964-09T3

On leave granted in this defamation cause of action, we hold that the protections of New Jersey's Shield Law, N.J.S.A. 2A:84A-21, do not extend to an operator of a website so as to bar from disclosure sources from which she obtained information in her investigation on the online adult entertainment industry and later posted on internet bulletin boards.

04-22-10 MENA SAADALA v. EAST BRUNSWICK ZONING BOARD OF ADJUSTMENT AND 7-ELEVEN, INC.
A-4999-08T1

An application for a use variance for establishment of a combined convenience store and retail gasoline station, commonly referred to as a mini-mart, to replace two separate nonconforming uses for a convenience store and gasoline station, seeks approval for a new use, which is subject to the restrictive standards set forth in Medici, rather than the more liberal standards set forth in Burbridge for a use variance for expansion of a nonconforming use.

04-22-10 STATE OF NEW JERSEY v. KARL LESTER MURPHY
A-3693-08T4

We held that the trial judge's rulings, authorizing the State to use a seventeen-year-old prior conviction to impeach defendant's credibility and permitting the prosecutor to argue that a testifying police officer had no incentive to lie, deprived defendant of his right to a fair trial. We agreed with defendant's contention that the prosecutor's summation exceeded the boundaries of legitimate advocacy when she vouched for the credibility of her witness. We likewise agreed with defendant's claim that because he had no intervening convictions, this seventeen-year-old conviction was so stale that its probative value was vastly outweighed by its prejudicial effect, and the judge therefore erred by permitting the State to use it to impeach his credibility. In this trial, where the State's proofs were far from overwhelming, we declined to consider these errors harmless.

04-22-10 DIVISION OF YOUTH AND FAMILY SERVICES v. R.D.; IN THE MATTER OF THE GUARDIANSHIP OF K.D. and R.D., Minors.
A-4478-07T4

Collateral estoppel may be invoked in a termination of parental rights case and applied to the first prong of the best interests of the child test where a finding of abuse and neglect was previously made by clear and convincing evidence.

04-21-10 LAURA HIGGINS et al. v. MARY F. THURBER et al.
A-0108-08T1

The court reviewed the dismissal of plaintiffs' legal malpractice action, which was brought against the attorneys for the estate of their late father, based in part on the trial court's application of the entire controversy doctrine.

In a prior action in the Probate Part, the executor of the estate sought approval of a formal accounting. Plaintiffs filed exceptions, which challenged the reasonableness of defendant's fees and the adequacy of advice given by defendants regarding those fees. Due to the scope of the exceptions, defendants sought to intervene in the probate proceeding in order to defend themselves. The probate judge granted that request, thereby expanding the reach of the accounting action to arguably include a legal malpractice claim suggested by plaintiffs' exceptions. Shortly before trial in the accounting action, plaintiffs voluntarily dismissed any claims they may have had against defendants that were included in their exceptions and commenced this legal malpractice action in the Law Division.

The Law Division judge dismissed the action. On appeal, the court reversed, finding that although the probate judge had expanded the accounting action to include what might appear to be a legal malpractice action against defendants, the probate judge -- by adhering to a trial date scheduled for approximately two months after defendants were permitted to intervene -- did not provide plaintiffs with a full and fair opportunity to litigate the malpractice action. The court held it was inequitable to apply the entire controversy doctrine in these circumstances and reversed.

04-20-10 INTERNATIONAL SCHOOLS SERVICES V. W. WINDSOR TOWNSHIP
A-4911-08T1

In this local property tax appeal, we consider whether a non-profit organization whose stated goals include "aiding, promoting and encouraging" educational associations "by all appropriate means" actually used the subject property for the "moral and mental improvement of men, women and children," thereby satisfying the second prong for an exemption under N.J.S.A. 54:4-3.6. We disagree with the Tax court's finding that it did not. However, as we agree that plaintiff has failed to satisfy the third statutory prong that the operation and use of the property must not be conducted for profit, we affirm denial of the exemption.

04-20-10 JANET FLETCHER V. CESSNA AIRCRAFT COMPANY
A-4596-08T2

The General Aviation Revitalization Act of 1994, 49 U.S.C.A. § 40101 note (GARA) is "a statute of repose that generally bars suits against airplane manufacturers brought more than eighteen years after the delivery date to an initial purchaser of the aircraft." Robinson v. Hartzell Propeller, Inc., 454 F.3d 163 (3d Cir. 2006). It does not apply unless the action against the manufacturer is one "in its capacity as a manufacturer." GARA Section 2(a).

The question raised on this appeal is whether an action for damages based on Cessna's failure to warn of a potential dangerous condition or to advise about measures available to avoid the condition or its catastrophic results is one against Cessna "in its capacity as a manufacturer." We conclude that it is and reverse the denial of Cessna's motion for summary judgment on these claims.

04-15-10 GUACIARO V. GONZALES
A-4988-08T1

Plaintiffs sought UM arbitration when their vehicle was struck by an uninsured motorist. Plaintiffs' insurance carrier rejected the arbitration award. We affirmed the trial court's order granting a new trial on all issues, as opposed to just damages, distinguishing Derfuss v. New Jersey Manufacturers, 285 N.J. Super. 125 (App. Div. 1995), and Salib v. Alston, 276 N.J. Super. 108 (Law Div. 1994).

04-15-10 ROBERT C. CURTIS v. CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS
A-1843-08T3

In this matter, we examined whether plaintiff's claims under the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -106, fell within the scope of the arbitration clause of the parties' consumer services agreement. In Gras v. Assoc. First Capital Corp., 346 N.J. Super. 42, 52-54, (App. Div. 2001), certif. denied, 171 N.J. 445 (2002), we upheld the court's dismissal of a CFA action as the parties' agreement required arbitration of "all statutory claims arising out of the relationship." Although this wireless telephone service agreement did not specifically include a waiver of the consumer's statutory claims, we held its language compelling arbitration and mandating waiver of a jury trial were succinctly stated, unambiguous, easily noticeable and sufficiently specific with regard to the actual terms and manner of arbitration,

explicitly informing the consumer that resolution of disputes would be in an arbitral forum. Rejecting plaintiff's second point, we held the contracts use of "∞" was not unconscionable.

04-14-10 IN THE MATTER OF THE PROTEST OF AWARD OF NEW JERSEY STATE CONTRACT A71188 FOR LIGHT DUTY AUTOMOTIVE PARTS
A-5626-07T1

In this appeal, we consider a challenge by former suppliers of auto parts to the State of New Jersey to a contract awarded by the Director of the Division of Purchase and Property pursuant to N.J.S.A. 52:34-6.2. This statute authorizes the Director to enter into cooperative purchasing agreements between multiple public entities in various states and a vendor. Here, the Director awarded a contract to AutoZone to supply auto parts to the State of New Jersey in accordance with a Master Agreement awarded by Charlotte, North Carolina, following a competitive bidding process.

We held that suppliers of auto parts to the State of New Jersey, whose contracts with the State had recently expired, and their business association have standing to challenge not only the specifications of the cooperative purchasing agreement but also the award of the contract. To effectuate this holding, the Director must provide notice to prospective bidders of the intention to consider utilization of the cooperative purchasing procurement method and notice of any award pursuant to this authority.

While acknowledging our limited scope of review, we also held that the record does not provide sufficient information to determine whether the AutoZone Contract meets the statutory standard as the "most cost-effective method of procurement" as found by the Director. Therefore, we remanded for further findings of fact.

04-14-10 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES V. N.S. AND R.B. - IMO THE GUARDIANSHIP OF K.A.N., J.B. AND K.B.
A-1076-06T4/A-1338-06T4 (consolidated)

In these consolidated Title Nine matters, two new issues are reviewed: (1) whether defendants may challenge the court's finding of abuse and neglect, even though they have not appealed from the final dispositional order terminating the litigation; and (2) whether N.S.'s right to counsel of her choice was

violated by the denial of her request to substitute criminal counsel as her attorney in the Title Nine proceeding.

Addressing the former, we confirmed the proper procedure to be followed by defendants is to include that reservation in the final order. As to the latter, it is the court which must review counsel's dual representation request, on notice to the Title Nine parties, and determine whether any conflict exists or the need to enter a protective order is warranted.

04-12-10 CITY OF PLAINFIELD, ET AL. V. NEW JERSEY DEPARTMENT OF HEALTH & SENIOR SERVICES/IN THE MATTER OF MUHLENBERG HOSPITAL
A-0107-08T3/A-0179-08T2 (consolidated)

The Commissioner of Health and Senior Services properly granted a Certificate of Need to allow for the closure of Muhlenberg Hospital. In so doing, the Commissioner properly imposed a series of conditions reflecting community needs and complied with the mandates imposed by the Supreme Court in In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413 (2008).

04-12-10 STATE OF NEW JERSEY v. GERMAINE A. HANDY
A-1838-07T4

This appeal required us to determine whether evidence found during the search incident to defendant's arrest should have been suppressed because the dispatcher who incorrectly informed the arresting officer that there was an outstanding arrest warrant acted unreasonably under the circumstances, even though the conduct of the arresting officer himself was reasonable. The warrant at issue, which was ten years old at the time, had the same birth month, but a different birth day and year. The first name on the warrant was a variant spelling of defendant’s first name. We concluded that suppression is required and, consequently, reversed the conviction.

04-05-10 NEAL BORDEN, ET AL. VS. CADLES OF GRASSY MEADOWS II, LLC, ET AL.
A-2386-08T1

Defendant was the assignee of a judgment in favor of the Howard Savings Bank (the Howard) and its initial assignee, the Federal Deposit Insurance Corporation (FDIC). Defendant appealed from a judgment extinguishing and discharging a judgment in a foreclosure action on a commercial mortgage note

and guaranties entered in favor of the Howard and the FDIC. Plaintiffs were two of the guarantors of the note against whom the summary judgment was entered. The judge vacated the summary judgment because no deficiency hearing was sought by the Howard or the FDIC after a final judgment of foreclosure was entered and the mortgaged property was sold at a sheriff's sale. Upon examination of how New Jersey courts have applied FMV credits to commercial notes and mortgages, we reverse and reinstate the summary judgment because the Howard and the FDIC had no duty to trigger a deficiency hearing after the sale of the property and the burden to seek a hearing rested on plaintiffs through a timely objection to the sheriff's sale.

03-31-10 CATHOLIC FAMILY AND COMMUNITY SERVICES VS. STATE-OPERATED SCHOOL DISTRICT OF PATERSON
A-0438-08T1

We reversed a final decision of the Commissioner of the Department of Education requiring recoupment of allegedly excessive administrative/indirect costs from an Abbott private preschool provider. The preschool provider's budget was prepared in accordance with Department of Education promulgated guidelines, and approved by the district and Department of Education. All expenses were incurred in accordance with the approved budget. The Commissioner's reliance on oral instructions and past practices cannot override specific agency prepared instructions and guidelines.

03-30-10 NJDYFS V. N.J., D.R. & S.W. (I/M/O THE GUARDIANSHIP OF D.J., N.D.R. & N.R.)
A-3598-08T4

In this parental termination case, the Law Guardian for three children appealed from the Family Part's denial of her request to compel the prospective adoptive parent of two of the children to continue visitation among the siblings. We held that the court acted properly in not exercising its parens patriae power to force sibling visitation post-adoption in contravention of express legislative policy, embodied in the New Jersey Adoption Act, N.J.S.A. 7:3-37 to -56, rejecting open adoptions.

We also declined to reach the issue of whether the children have a constitutional right to associate with their siblings post-adoption, finding the question not ripe for resolution since the adoptions in this case have not been finalized and the prospective adoptive parent of at least one set of siblings has

expressed a willingness to have the two children continue visits with their other sibling.

03-26-10 E.S. v. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
A-2564-08T2

Petitioner, an applicant for Medicaid benefits, appeals from the imposition of a transfer penalty — a delay in eligibility — triggered by the payment of $56,550 to her daughter in consideration of a personal care services contract. The Department of Human Services, Division of Medical Assistance and Health Services (Division) found the transfer to be for less than fair market value, and to have been made in order to deplete petitioner's estate for Medicaid eligibility purposes. The Division's decision is affirmed.

03-25-10 MIRIAM GONZALEZ V. NEW JERSEY PROPERTY LIABILITY INSURANCE GUARANTY ASSOCIATION, ET AL.
A-1298-07T2

In this appeal we affirm the validity of the National Arbitration Forum's Rule 4 (now known as Rule 9), of the New Jersey No-Fault Arbitration Rules, which requires an individual seeking emergent medical treatment disputed by a personal injury protection (PIP) insurer to demonstrate "immediate and irreparable loss or damage." The challenges included: (1) whether Rule 4 violates the Administrative Procedures Act; (2) was ultra vires; (3) imposed additional requirements on PIP claimants in violation of public policy; (4) contravened the authority to decide emergent cases by NAF dispute resolution professionals; and (5) violates equal protection under state and federal constitutions.

03-24-10 CATHERINE KENNEDY CARCHIDI, ET AL. V. MICHELLE A. IAVICOLI, M.D., ET AL.
A-4986-08T3

To avoid inherent and unjustified prejudice to the medical malpractice plaintiff and unwarranted interference with the physician-patient relationship, the defense may not use as causation experts physicians who have never treated plaintiff but are members of his treatment group.

03-24-10 POINT PLEASANT BOROUGH PBA LOCAL #158, ET AL. V. BOROUGH OF POINT PLEASANT, ET AL.
A-4416-08T2

N.J.S.A. 40A:10-23 permits, among other things, discretionary assumption of the cost of medical expense benefits by municipalities for employees "who have retired after 25 years or more of service credit in a State or locally administered retirement system and a period of service of up to 25 years with the employer at the time of retirement." In light of that statute, we hold the collective negotiations agreement (CNA) between Point Pleasant Borough PBA Local # 158 and the Borough of Point Pleasant, as well as local ordinance § 14-19, to be ultra vires and thus void because they make no reference to service credits and require a period of actual service with the employer that exceeds the statutorily required period.

03-19-10 PHILIP KOZMA V. STARBUCKS COFFEE COMPANY, ET AL.
A-3908-08T3

The opinion upholds a jury verdict of no compensatory damages where the jury assigned sixty percent fault to defendant and forty percent to plaintiff. We determine that the jury was properly instructed and there was no inconsistency in its determinations. Satisfied that no miscarriage of justice occurred, we affirm the denial of plaintiff's application for a new trial on damages only.

03-18-10 STATE OF NEW JERSEY V. HENRY KIM
A-3863-08T4

Defendant's conviction for refusal to submit breath samples, N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a, is affirmed because the State is not required to prove he understood the standard statement read to him in English, State v. Marquez, 408 N.J. Super. 273 (App. Div.), certif. granted, 200 N.J. 476 (2009), and on procedural grounds because defendant failed to move to exclude evidence of his refusal or present evidence that created a material issue as to his ability to understand English.

03-16-10 COMMITTEE TO RECALL ROBERT MENENDEZ FROM THE OFFICE OF U.S. SENATOR v. NINA MITCHELL WELLS, SECRETARY OF STATE, ET AL.
A-2254-09T1

In the absence of an express provision in the federal Constitution and the fact U.S. Term Limits v. Thornton, 514 U.S.

779, 115 S. Ct. 1042, 131 L. Ed. 2d 881 (1995) considered the qualification clause of Article I of the United States Constitution and involved no Seventeenth Amendment issue, we will not declare the express "recall" provision of the State Constitution regarding a United States Senator, N.J. Const. art. I, ¶ 2b, unconstitutional under the Supremacy Clause for purposes of proceeding with a recall petition. Accordingly, we order the filing of the notice of petition, with respect to the petition to recall Senator Robert Menendez. However, we do not definitively declare the recall provision of our State Constitution valid or invalid with respect to a United States Senator at this point in the process. In light of the substantial constitutional issue involved, we stay our order pending the filing of a notice of appeal or petition for certification to the New Jersey Supreme Court.

03-16-10 ESTATE OF FRANK J. EHRINGER v. DIRECTOR, DIVISION OF TAXATION
A-4982-08T3

The Director of the Division of Taxation did not err by denying the estate's claim for a refund of estate taxes because the estate failed to file the refund claim within three years of the payment of the taxes, as required by N.J.S.A. 54:38-3, and the circumstances did not justify a tolling of the statute of limitations.

03-11-10 COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1034 V. NEW JERSEY STATE POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 203 AND BURLINGTON COUNTY
A-1394-08T1

N.J.S.A. 34:13A-5.3 prohibits policemen from joining "an employee organization that admits employees other than policemen to membership." We conclude that the Public Employment Relations Commission (PERC) exceeded its statutory authority by adopting a per se rule that Burlington County weights and measures supervisors and apprentices are "policemen" within the intendment of this statute solely because of those employees' statutory authority to arrest "on the violation of any of the provisions" of the weights and measures law "within [their] view or presence." N.J.S.A. 51:1-106. We disapprove the per se rule adopted by PERC in In re County of Warren, 12 NJPER 357 (¶17134 1986), and remand to PERC for further consideration in light of County of Gloucester v. Public Employment Relations Commission, 107 N.J. Super. 150 (App. Div. 1969), aff'd, 55 N.J. 333 (1970), and our opinion.

03-08-10 STATE OF NEW JERSEY IN THE INTEREST OF T.M.
A-4897-08T4

This short opinion serves as a reminder to Family Part judges that a hearing to determine waiver of a juvenile for adult prosecution of a designated serious charge does not involve weighing the evidence to determine guilt or innocence but only whether the State has probable cause to charge the juvenile.

03-08-10 JOHN KRAYNIAK V. BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM
A-2578-08T3

In this appeal we decide whether a member of the Prosecutor's Part of the Public Employees' Retirement System (PERS) is eligible to retire pursuant to the Early Retirement Incentive Act (ERI), L. 2008, c. 21. We hold that such a member is not eligible to retire pursuant to ERI.

03-05-10 JOHN PAFF v. DIVISION OF LAW
A-3007-08T1

We analyze whether unpublished Administrative Agency Advice (AAA) letters issued by the Division of Law, which interpret the statutes and regulations the Division's administrative agency clients are required to apply and enforce, are "government records" for purposes of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and therefore available to the public. We answer that question in the negative because we are satisfied that the AAAs are a "record within the attorney-client privilege," N.J.S.A. 47:1A-1.1, and therefore not subject to public access under OPRA.

03-05-10 RONEN SHIMONI V. N.J. DEPARTMENT OF CORRECTIONS
A-1408-08T1

Denial by the Commissioner of Corrections of an inmate's application to serve the remainder of his sentence in the country of his citizenship is not subject to the usual standard of judicial review, i.e. whether it was arbitrary, capricious or unreasonable. Considering that inmates have no constitutionally protected liberty interest in an international transfer and given the broad powers statutorily invested in the Commissioner, denial of such an application will not be reversed absent proof

that it was made with malicious intent or on a constitutionally impermissible basis, such as race, religion, or national origin.

03-05-10 RAHGEAM JENKINS v. NJ DEPARTMENT OF CORRECTIONS
A-1220-08T3

Prison disciplinary regulation prohibiting the possession of "anything related to a security threat group" is not unconstitutionally vague and provides fair warning of prohibited conduct. The court's review of the record, which included a gang investigator's identification of gang-related terms in seized letters and reasons, supported a finding that possession of these letters was prohibited.

03-04-10 NJ EDUCATION ASSOCIATION, ET AL V. STATE OF NJ, ET AL
A-4460-07T1

We hold that members of the Teachers' Pension and Annuity Fund (TPAF), although entitled by law to the receipt of vested benefits upon retirement, possess no constitutionally-protected contract right to the particular level, manner or method of State funding provided by statute.

02-24-10 COUNTY OF BERGEN EMPLOYEE BENEFIT PLAN AND THE COUNTY OF BERGEN VS. HORIZON BLUE CROSS AND BLUE SHIELD OF NEW JERSEY, ET AL.
A-0616-09T1

Under the Collateral Source Rule, N.J.S.A. 2A:15-97, a county with a self-insured benefits plan for its employees is not entitled to pursue a subrogation action to recover medical expenses the Plan paid to its insured, a county employee who brought personal injury claims against third-party tortfeasors.

02-24-10 JOSEPH A. DONELSON AND JOHN SEDDON VS. DUPONT CHAMBERS WORKS AND PAUL KAISER
A-2028-08T1

We extend to a CEPA cause of action the same requirement that already applies to a plaintiff seeking economic damages under the LAD, namely a requirement that the plaintiff prove a constructive discharge or an actual termination of employment before being entitled to an award of back and front pay. Because the trial judge erroneously accepted plaintiff's argument that the jury need not be instructed on constructive discharge or required to so find, we vacated the $724,000

economic loss award and the $500,000 punitive damages award and remanded for the entry of judgment in favor of defendant.

02-22-10 CITY OF WILDWOOD V. GARY DEMARZO
A-5250-08T1

This appeal concerns the application of the common law doctrine of incompatibility. The City of Wildwood, a municipality organized under the Walsh Act, appeals from the order of the trial court permitting defendant to serve as one of three elected commissioners comprising the City's governing body, while on an unpaid leave of absence from his other municipal position as a Wildwood police officer.

We hold that the trial court erred in permitting defendant to continue to hold two incompatible public offices in the same municipality. The court's attempts at counteracting the myriad of conflicts arising from such incompatibility by restricting defendant's conduct as a city commissioner impermissibly limited the statutory authority conferred upon such office by the Legislature under the Walsh Act.

02-22-10 FORT LEE SURGERY CENTER, INC. v. PROFORMANCE INSURANCE COMPANY
A-1192-08T2

The Alternative Procedure for Dispute Resolution Act (APDRA), N.J.S.A. 2A:23A-1 to -30, declares that, following a trial court's judgment, confirming, modifying or correcting an award, "[t]here shall be no further appeal or review," N.J.S.A. 2A:23A-18(b). Notwithstanding, it has been recognized that appellate courts retain supervisory jurisdiction to ensure that trial courts limit their review of arbitration awards to the circumstances authorized by N.J.S.A. 2A:23A-13. Here, the court held that so long as a trial court rationally articulates that correction of an award is required by one of the grounds set forth in N.J.S.A. 2A:23A-13, appellate courts are not free to intervene even when believing the trial court was mistaken in correcting the award. Any broader view of appellate jurisdiction would eviscerate N.J.S.A. 2A:23A-18(b) and conflict with the Legislature's expressed desire, in enacting APDRA, to eliminate appellate review.

02-19-10 JOHN BERKERY, SR. V. ESTATE OF LYLE STUART, ET. AL.
A-5105-07T1

In Berkery v. Kinney, 397 N.J. Super. 222 (App. Div. 2007), certif. denied, 194 N.J. 445 (2008), we held that plaintiff failed to establish that statements made by a journalist and her publisher in newspaper articles about plaintiff's involvement with the K&A Gang and a book on the subject entitled Confessions of a Second Story Man: Junior Kripplebauer and the K&A Gang were made with actual malice.

On this appeal, we address the application of the same standards to the author and distributors of the same book and conclude that the actual malice standard applies to the author and distributors. We further conclude that plaintiff failed to meet his burden on defendants' motion for summary judgment, and the motion judge did not err in dismissing the complaint.

02-19-10 NJ SCHOOLS CONSTRUCTION CORP., ET AL. V. DAVID LOPEZ, ET ALS
A-4732-07T2

In this condemnation action instituted by the former New Jersey Schools Construction Corporation (now New Jersey Schools Development Authority), we hold that the value of improvements to the property, made after the defendant owner received a "Notice of Interest" (NOI) letter from the agency, are included in setting just compensation, where there was no proof that these improvements were constructed for the sole purpose of enhancing the condemnation award. Also, absent any indicia of imminent condemnation, the owner who failed to disclose his receipt of the NOI letter to the local zoning board, before which variance approvals were pending, did not engage in bad faith.

As a threshold issue, we held that a consent order of settlement that expressly reserves the right to appeal an interlocutory order and provide that the judgment would be vacated if the interlocutory order were reversed on appeal is appealable under Rule 2:2-3.

02-18-10 CATHY C. CARDILLO, ESQ. V. BLOOMFIELD 206 CORP., JAMES STATHIS AND STEVEN SILVERMAN
A-4020-08T3

We conclude that RPC 5.6(b) is violated when an attorney simultaneously negotiates with the same party a settlement of litigation on behalf of her clients and a related agreement on her own behalf to restrict her practice of law. Rule of Professional Conduct (RPC) 5.6(b) prohibits an attorney from

agreeing to restrict the attorney's practice as "part of the settlement of a controversy between private parties." Attorneys may not circumvent the import of RPC 5.6(b) by stating that the settlement of litigation is separate from the agreement to restrict the practice of law, where the agreements were negotiated contemporaneously and are interconnected.

02-11-10 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES V. J.C.
NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES V. T.S.L., IN THE MATTER OF THE GUARDIANSHIP OF J.D.L.C.
A-1683-09T4, A-1684-09T4

Following a trial, defendants' parental rights to a minor child were terminated. They timely indicated their desire to appeal, but the Office of Parental Representation failed to file timely appeals and did not move for leave to file notices of appeal out of time until nearly sixteen months after entry of the trial court's judgment and more than four months after the child's adoption. Although such motions are treated with great liberality, the court denied defendants' motions due to both the extraordinary delay in seeking relief and the intervening nonrelative adoption.

02-10-10 DEAN SMITH V. HUDSON COUNTY REGISTER, ET AL.
JAMES GENSCH V. HUNTERDON COUNTY CLERK'S OFFICE, ET AL., MARTIN O'SHEA V. SUSSEX COUNTY CLERK'S OFFICE, ET AL.
A-1762-08T2, A-2507-08T3, A-2518-08T3 (consolidated)

Plaintiffs asserted in these three lawsuits that defendants have overcharged them, and other members of the public, for the copying of government records maintained at County offices, in violation of N.J.S.A. 47:1A-5(b) within the Open Public Records Act ("OPRA"), and the common law. We reverse the trial courts' orders dismissing plaintiffs' complaints.

We construe N.J.S.A. 47:1A-5(b) to require that, unless and until the Legislature amends OPRA to specify otherwise, or some other statute or regulation applies, the Counties must charge no more than the reasonably-approximated "actual costs" of copying such records. The burden of proving or disproving compliance with that "actual cost" mandate will vary, depending upon whether the charges in question exceed certain fee levels identified in the second sentence of N.J.S.A. 47:1A-5(b).

Because of the likely budgetary and administrative impacts of our holding, we make this decision prospective, effective at the outset of the next fiscal year, and deny plaintiffs retroactive relief.

02-09-10 STATE OF NEW JERSEY V. DASHAWN MILLER
A-3094-08T4

Defendant's trial on charges of robbery of two victims, burglary and related weapons offenses was conducted in a courtroom in which the record is videotaped. During the course of deliberations, the jurors asked to hear the testimony of one of the victims again. The trial judge arranged for the jury to view the video in open court and in the presence of defendant, both counsel and the judge. The jury ultimately found defendant guilty of the crimes, and the judge sentenced defendant to an aggregate term of twenty-eight years, which is comprised of two fourteen-year terms for first-degree robbery and concurrent sentences for the remaining convictions.

In rejecting defendant's claim of prejudice from the replay of the videotaped testimony, we assess the potential for prejudice in light of the options available to the judge. And, in affirming his sentence, we apply the standard of review set forth in State v. Bieniek and State v. Cassady.

02-09-10 KENT MOTOR CARS, INC. AND ROBERT BURT V. REYNOLDS AND REYNOLDS CO., AND UNIVERSAL UNDERWRITERS GROUP
A-5246-07T3

The trial court erred in granting dismissal of a "successive action" under Rule 4:5-1(b)(1) because the party whose name was not disclosed in a prior action in accordance with this rule failed to show that it had been "substantially prejudiced" by this non-disclosure.

02-08-10 GRIFFIN V. BURLINGTON VOLKSWAGEN, INC., and AUGUSTINE STAINO,
A-2727-08T1

Under the broad form of arbitration clause in a motor vehicle retail order form, which required parties to arbitrate "any claim . . . that may arise out of or relat[e] to the purchase" of the car and "the financing thereof[,]" the purchaser is required to arbitrate his claims of false arrest, false imprisonment and malicious prosecution, based on the

seller reporting the car stolen when purchaser retained car despite seller's demand for its return after financing could not be obtained.

02-08-10 STATE V. JASON LEWIS and JEROME LEWIS
A-2066-08T4

Where police stopped vehicle at night in a neighborhood known for drug sales based on evidence providing probable cause to believe vehicle contained drugs, persons other than the occupants who also had reason to believe the vehicle contained drugs may have had access to the vehicle, and there was a substantial question whether other police officers would have been available to detain the occupants while an application was made for a warrant, the State established the exigent circumstances required to justify a search of the vehicle under the automobile exception to the warrant requirement. Moreover, the validity of the search was not affected by the fact that drugs were found in a closed leather case because, when the automobile exception applies, the police may search every part of the vehicle and its contents that may conceal the object of the search.

02-05-10 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES v. R.M.
A-2081-08T4

This appeal required determination of (1) the criteria for application of the "suspended judgment" provision of N.J.S.A. 9:6-8.51(a)(1); and (2) whether successful completion of a period of suspended judgment necessarily leads to the removal of the underlying finding of abuse or neglect from the central registry maintained by the Division pursuant to N.J.S.A. 9:6-8.11.

The opinion concludes that (1) the suspended judgment provision of N.J.S.A. 9:6-8.51(a)(1) is generally applicable when a Family Part judge has held a dispositional hearing and is not prepared to enter a final order returning the child to the parent or placing the child with the Division, but instead proposes to give the parent an opportunity to maintain the family unit based upon adherence to the particular remedial requirements established pursuant to N.J.S.A. 9:6-8.52(a); and (2) successful completion of a period of suspended judgment does not result in expungement of the underlying finding of abuse or neglect.

Because there is no basis to conclude that the Legislature intended the suspended judgment provision of N.J.S.A. 9:6-8.51(a)(1) to provide the equivalent of Pretrial Intervention in abuse and neglect cases, New Jersey Division of Youth & Family Services v. C.R., 387 N.J. Super. 363 (Ch. Div. 2006) is overruled.

02-04-10 VIRGINIA COCKERLINE, as General Administratrix and Administratrix of the ESTATE OF MARK COCKERLINE v. ERIKA MENEDEZ, et al
A-4635-07T1

Res ipsa loquitur permits a jury to infer a defendant was negligent; it does not permit inference of proximate cause. Amounts received as social security survivor and death benefits and as PIP death benefits must be deducted from a jury's verdict under the collateral source statute, N.J.S.A. 2A:15-97.

02-03-10 PARISH V. PARISH
A-1837-08T2

We reviewed a Family Part order dismissing "as moot" a post-judgment motion to enforce litigant's rights. The motion judge did not review the merits of plaintiff's application and directed the parties to present their disputes to the parenting coordinator designated in the Dual Final Judgment of Divorce. Additionally, the judge conditioned the filing of all future motions on the requirement that the parties and their attorneys first conduct a four-way settlement conference to resolve the disputes and certify that these efforts proved unsuccessful. Finally, the court imposed an award of counsel fees.

We reversed the order due to the motion judge's failure to substantively address plaintiff's ELR motion, as the issues presented were not moot and ripe for disposition. The parties had previously sought review by, and received the recommendations of, the parenting coordinator. More importantly, we reversed the mandated restriction on the parties' exercise of the right to file post-judgment ELR motions in the absence of a specific finding of the need to control frivolous litigation. Finally, because the counsel fee award was based on a determination we reversed, it too was reversed.

Judge Ashrafi concurred with that portion of the opinion reversing the dismissal of plaintiff's motion because the requested relief was not moot, and the award of counsel fees.

Judge Ashrafi dissented from that portion of the opinion reversing the pre-filing condition imposed on future motions.

02-01-10 GONZALEZ v. WILSHIRE CREDIT CORPORATION
A-2634-08T2

We hold that a series of standardized agreements to cure default between a non-debtor mortgagor and the mortgage servicer are covered by the Consumer Fraud Act, even when executed post-foreclosure.

02-01-10 LAKE VALLEY ASSOCIATES, LLC, T/A UNIVERSITY PARK APARTMENTS V. TOWNSHIP OF PEMBERTON
A-4040-07T2

Plaintiff, the owner of a large apartment complex in Pemberton Township, 2brought an action in lieu of prerogative writs facially challenging the constitutionality and statutory validity of Ordinance No. 5-2006, adopted by the Township in May 2006. The ordinance imposes certain registration obligations and other regulatory requirements on landlords within the Township. Among other things, plaintiff argued that the ordinance is not for a valid public purpose; violates due process and separation-of-powers principles of the United States Constitution and the New Jersey Constitution; and is preempted by the Hotel and Multiple Dwelling Law, N.J.S.A. 55:13A-1 to -28, and by other state statutes.

We affirm the Law Division's dismissal of plaintiff's claims, substantially for the cogent reasons expressed by Assignment Judge John A. Sweeney in his written opinion of February 13, 2008, from which we quote at length in this published opinion.

01-29-10 STATE V. RAHEEM VENABLE
STATE V. MALIK SIMMONS
A-5237-06T4/A-5527-06T4 (consolidated)

Defendants are not entitled to a reversal of their convictions based on the trial court's announcement that members of the victim's and defendants' families would not be allowed in the courtroom during jury selection in light of the fact that defendants did not object to such exclusion of family members and the absence of any indication that family members were in the courthouse and desired to attend jury selection.

01-28-10 STATE OF NEW JERSEY VS. DAVID RIVERA a/k/a

DAVID J. RIVERA
A-1724-08T4

Reviewing defendant's challenge to the admission of Alcotest results relied upon to support a per se violation of N.J.S.A. 39:4-50, we rejected a suggested methodology requiring the State to truncate the intermediate calculations of the relative and absolute upper tolerance limits when discerning whether the Alcotest readings obtained were valid. We concluded the Supreme Court in State v. Chun, 194 N.J. 54, cert. denied, __ U.S. __, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008) expressed no preference for truncating the various interim calculations on Worksheet A, which would have the resultant effect of lowering the range of tolerance below that approved by the Court with the concomitant result of falsely increasing the number of invalid Alcotest results, precluding justifiable prosecutions for per se violations of N.J.S.A. 39:4-50.

01-27-10 IN THE MATTER OF RIVERVIEW DEVELOPMENT, LLC, WATERFRONT DEVELOPMENT PERMIT NO. 0908-05-0004.3 WFD 060001
A-1843-08T3

Townhouse residents, whose views of the Hudson River and the New York City skyline will be fully or partially blocked by a proposed high-rise development, do not have the right to a trial-type hearing in the Office of Administrative Law to contest the high-rise developer's application to the Department of Environmental Protection ("DEP") for a waterfront development permit under the Coastal Zone Management Regulations, N.J.A.C. 7:7E-1.1 to -8A.5. We affirm the DEP Commissioner's determination that such residents lack "a particularized property interest sufficient to require a hearing on constitutional or statutory grounds," as is necessary under N.J.S.A. 52:14B-3.2c. However, such residents do have standing to challenge on appeal the merits of the issued permit.

01-27-10 PAUL ROSEN, ET AL V. PETER KEELER, ET AL
A-0555-08T2

An easement appurtenant cannot be transferred or assigned for the benefit of another tenement separate from the dominant estate unless the instrument creating it demonstrates a clear intent to grant such a right. A provision in the instrument stating that the easement runs with the land and inures to the benefit of the grantees and their "assigns and successors in

title" does not grant such a right but is limited to subsequent owners of the dominant estate. Therefore, the purported assignment of the easement right to a third party is unenforceable.

01-26-10 STATE OF NEW JERSEY V. SCOTT S. KUENY
A-2812-07T4

The trial judge did not abuse his discretion in denying a mistrial after defendant suffered a medical incident at the end of the court day and he returned the next day. The judge gave an adequate instruction at the beginning of the following day which suggested that defendant did suffer some "illness" and was "treated," as opposed to "faking" an event for sympathy.

Defendant police officer's conviction for misconduct in office was reversed because his use of someone else's bank card left in an ATM machine and taking cash from her account was not sufficiently related to his office to constitute official misconduct by the officer while on vacation and out of his jurisdiction.

01-25-10 CFG HEALTH SYSTEMS, LLC V. CORRECTIONAL HEALTH SERVICES
A-2577-07T3

It is appropriate under some circumstances to grant a party adversely affected by a judgment leave to intervene for the purpose of pursuing an appeal if a party with a similar interest who actively litigated the case at the trial level has elected not to appeal. Under the competitive contracting in lieu of public bidding sections of the Local Public Contracts Law, a local contracting agency may reject all contract proposals and repeat the competitive contracting process if it reasonably concludes that its consideration of the original proposals violated the provisions or purposes of the Law.

01-22-10 STATE OF NEW JERSEY V. MARK HICKS
A-4338-07T4

We are compelled to remand for a new PCR hearing because assigned counsel's perfunctory performance failed to meet the standards articulated by the Supreme Court in State v. Webster, 187 N.J. 254 (2006) and Rule 3:22-6(d).

01-19-10 KATHRYN POTE V. CITY OF ATLANTIC CITY, ET AL.
A-2544-08T3

We affirm summary judgment dismissal and denial of reconsideration of plaintiff's premises liability complaint against SMG, the manager of Boardwalk Hall, for injuries allegedly sustained when she slipped and fell on an icy patch of snow on the Atlantic City boardwalk about ten feet away from Boardwalk Hall's property as she was approaching the building to attend a show. We perceive no just public policy consideration or sound basis to create another exception to the general rules governing premises liability and expand the duty established by our current case law to hold SMG liable under the circumstances of this case.

01-19-10 STATE v. JOSEPH ALLEN LEE
A-4977-07T4

Attempted murder is not embodied in N.J.S.A. 2C:25-19a and therefore is not subject to the Domestic Violence Surcharge under N.J.S.A. 2C:25-29.4.

01-13-10 JESSE J. COOPER, SR. v. BARNICKEL ENTERPRISES, INC.
A-1813-08T3

Injuries resulting from accident which occurred while off-site employee was driving for a cup of coffee in employer's vehicle on his coffee break was compensable under the workers' compensation law because the accident occurred within a reasonable distance from the place at which the off-site employee was waiting to perform a work related meeting and the coffee break was equivalent to that of an on-site employee.

01-11-10 JOSEPH BERNSTEIN, ET AL. V. STATE OF NEW JERSEY, ET AL.
A-1601-08T3

In this prisoner-on-prisoner homicide, the decedent's estate sued a number of Department of Corrections (DOC) officials as well as administrators and employees of East Jersey State Prison, alleging common law tort and federal civil rights claims based on defendants' alleged delayed response to the attack, resulting in the inmate's death. Specifically, plaintiff claimed that the attack was delayed by: (1) a prison policy dictating supervision of the mess hall from protective cages above the floor rather than direct floor patrol and (2) a violation of a standing order by assembling two emergency response teams rather than one before interceding. Plaintiff also sought to hold defendants liable for failing to remove the

attacking inmate from the prison's general population, as he suffered from psychological problems.

We affirmed the summary judgment dismissal of plaintiff's complaint finding the individual State defendants immune from State tort claims under N.J.S.A. 59:5-2(b)(4) in the absence of any evidence of willful misconduct. As to the federal civil rights claims under 42 U.S.C.A. § 1983, we also found no proof of a constitutional violation, that is, no evidence defendants acted with a deliberate indifference to a substantial risk to decedent in violation of the Eighth Amendment's "cruel and unusual punishment" ban. Moreover, because we discerned no violation of a clearly established constitutional right, we held the individual State defendants have a qualified immunity from liability under 42 U.S.C.A. § 1983.

01-11-10 ROBERT J. TRIFFIN v. AUTOMATIC DATA PROCESSING, INC.
A-5533-07T3

In this case that arises from our remand in Triffin v. Automatic Data Processing, Inc., 394 N.J. Super. 237 (App. Div. 2007), we affirm the trial judge's decision and hold that the finding that plaintiff committed a fraud upon the court was supported by adequate, substantial, and credible evidence and that the sanctions imposed for such fraud were permissible and reasonable.

01-07-10 STATE v. CIANCAGLINI
A-2785-08T4

In this appeal from a DWI conviction, after prior separate DWI and refusal convictions, we disagree with the holding of State v. DiSomma, 262 N.J. Super. 375 (App. Div. 1993), and hold that the prior refusal conviction does count toward making this a third offense. Our holding is consistent with a line of cases both before and after DiSomma concluding that a prior DWI conviction counts toward enhancement of the sentence imposed for a refusal conviction. See, e.g., State v. Tekel, 281 N.J. Super. 502 (App. Div. 1995).

We also hold that double jeopardy does not bar re-instatement of the sentence originally imposed in the municipal court for a third DWI offense, which was reduced in the Law Division to a sentence for a first DWI offense.

01-06-10 J.T.'s TIRE SERVICE, INC. and EILEEN TOTORELLO V. UNITED RENTALS NORTH AMERICA, INC.

A-2989-08T2

A woman entrepreneur claimed that defendant stopped buying tires from her company because she refused to submit to sexual demands from defendant's branch manager. We held that her allegations of quid pro quo sexual harassment stated a cause of action under the Law Against Discrimination, N.J.S.A. 10:5-12(l).

12-31-09 YAAKOV ABDELHAK v. THE JEWISH PRESS INC., OLEG RIVKIN, RICHARD I. SCHARLAT and GABRIELLE TITO, et al.
A-2023-08T3

We reject plaintiff's contention that when a cause of action is secular in nature, and the defendants are not religious figures, there can be no excessive entanglement. Where, as here, a jury cannot evaluate plaintiff's cause of action without developing a keen understanding of religious doctrine, and without applying such religious doctrine to the facts presented, the excessive entanglement that the First Amendment seeks to avoid is squarely presented. Thus, we conclude that neither the secular nature of the cause of action nor the secular professions of the defendants serve as a per se bar to a finding of a lack of subject matter jurisdiction.

12-30-09 IN THE MATTER OF CENTEX HOMES, LLC PETITION FOR EXTENSION OF SERVICE AND/OR FOR EXEMPTION FROM MAIN EXTENSION RULES N.J.A.C. 14:3-8.1 ET. SEQ. PURSUANT TO N.J.S.A. 48:2-27 AND N.J.A.C. 14:3-8.8(a)(4) OR (a)(6).
A-2207-07T3

Where the intent to incorporate smart growth land use planning principles is not contained within the enabling of the Board of Public Utilities (BPU), and where the BPU is not specifically called upon by the State Planning Act, N.J.S.A. 52:18A-196 to -207, to incorporate the smart growth planning principles contained therein, the BPU exceeded its authority under N.J.S.A. 48:2-27 by promulgating a regulation that prohibited public utilities from subsidizing new service extensions in areas not designated for growth under the State Planning Act.

12-30-09 NAJDUCH V. TOWNSHIP OF INDEPENDENCE PLANNING BOARD, ET AL.
A-2900-08T1

A planning board only has jurisdiction to grant site plan approval for a development project that is a permitted use in the zoning district.

12-29-09 ANDREA ORZECH, ET AL. v. FAIRLEIGH DICKENSON UNIVERSITY
A-5919-07T1

A university's negligent failure to enforce its alcohol policy and a student's violation of that policy do not negate the student's status as a beneficiary of the university's educational works. We therefore found that the wrongful death claim resulting from the student's accidental fall to his death from his dormitory window, while intoxicated, was barred by charitable immunity, and we reversed the judgment against the university.

12-21-09 G.D. v. BERNARD KENNY and THE HUDSON COUNTY DEMOCRATIC ORGANIZATION, INC.
A-3005-08T3

Defendants, sued for defamation for preparing and circulating flyers referring to plaintiff's criminal record, may assert the defense of truth despite the fact that plaintiff's conviction has been expunged.

12-21-09 DAVID JOHNSON V. MOLLY V.G.B. JOHNSON
A-0704-08T1

In this appeal from an order confirming an arbitral award respecting custody and parenting time, we conclude that Fawzy v. Fawzy, 199 N.J. 456 (2009), should be given pipeline retroactive effect. As a result, we reverse and vacate the arbitral award because the arbitration agreement prohibited a transcript of the proceedings. Without an adequate record, the Family Part judge could not evaluate the threat of harm to the children.

12-17-09 IN RE PETITION FOR REFERENDUM ON CITY OF TRENTON ORDINANCE 09-02
A-5864-08T3

The sale of such portion of the water utility system is not subject to the Faulkner Act referendum provisions mandated by N.J.S.A. 40:69A-185. The portion serves less than five percent of the population of the municipality and is excepted from a public vote by N.J.S.A. 40:62-3.1.

The portion of a municipal water system that lies outside of the municipality and provides water services to adjoining municipalities does not "serve" the municipality.

12-17-09 ANDREW FAUCETT V. DARIANNA VASQUEZ
A-2945-08T1

A prior, post-judgment order entered in 2002 awarded primary residential custody of these divorced parties' eleven-year old son to the plaintiff/father. When he faced imminent deployment to Iraq as an Army reservist, defendant/mother, who shared legal custody of her son and exercised significant parenting time under the order, moved for modification. She sought immediate transfer of residential custody of her son and child support, arguing that between herself and the child's stepmother, she was presumed to have custody. Determining that the child should not be uprooted in the middle of the school year, the motion judge denied the mother's request without prejudice, but nevertheless ordered a custody evaluation. Defendant appealed.

We concluded that the "parental presumption" does not apply under such circumstances and the mother was not entitled to modification simply because the parent of primary residential custody was about to be deployed for one year.

However, we also determined that the mother had established a prima facie case of changed circumstances that affected the welfare of her son. The judge properly ordered a custody evaluation, and clearly anticipated further review. We concluded that the motion judge should not have denied defendant's motion, and reversed only as to that aspect of the order.

12-16-09 STATE OF NEW JERSEY V. R.T.
A-1131-06T4

The majority reversed defendant's conviction for multiple counts of first-degree aggravated sexual assault and one count of second-degree endangering the welfare of a child finding defendant's right to a fair trial was prejudiced by the court charging the jury with intoxication as possibly negating an element of the crime, over defense counsel's objection. The facts in evidence do not clearly indicate a rational basis for the conclusion that defendant suffered such a "prostration of faculties" as to render him incapable of forming the requisite

mental state to commit the crimes and the instruction interfered with defense counsel's stated trial strategy.

The dissent found the trial court's discretion to give a "road map" instruction on voluntary intoxication is not limited to cases in which the charge is "clearly indicated" by the evidence. Since the charge did not have the capacity to lead to an unjust result here, the trial court did not commit reversible error in giving the charge.

12-15-09 MING YU HE v. ENILMA MILLER
A-5685-07T3

In earlier proceedings, the court reversed an order granting a remittitur of the pain and suffering and per quod components of a jury verdict. The Supreme Court reversed in part and remanded to the trial judge for a complete and searching analysis including a factual analysis of how the award here was different or similar to others to which it was compared. The trial judge thereafter considered two verdicts produced by trials over which he presided, as well as verdicts emanating from other courts, and adhered to his earlier ruling that the award was excessive.

Pursuant to the Supreme Court's mandate, the court reconsidered its earlier decision and found the trial judge's analysis of the verdicts in other cases was inadequate and inconsistent with the applicable jurisprudence. The court concluded that -- although high and perhaps overly-generous -- a pain and suffering award of $1,000,000 for a permanent injury incurred by the forty-six year old plaintiff, who sustained four herniated discs as a result of the defendant's negligence, was not so wide of the mark as to constitute a manifest miscarriage of justice.

12-14-09 STATE OF NEW JERSEY V. STEVEN MUSTARO
A-2582-08T4

We consider defendant's appeal from the denial of a post-sentence motion to vacate his plea of guilty to driving while intoxicated. The motion was predicated on a claim that the State withheld exculpatory evidence, but by the time the motion was filed the evidence — a videotape recorded by the camera in the arresting officer's patrol car — had been destroyed through reuse in accordance with the police department's procedures. Applying State v. Parsons, 341 N.J. Super. 448 (App. Div. 2001) and State v. Marshall, 123 N.J. 1, 107-09 (1991), we conclude

that defendant failed to establish that he would not have admitted to driving if he had access to the videotape prior to the plea, and we further conclude that the denial of his motion was fully consistent with a proper application of the principles set forth in State v. Slater, 198 N.J. 145 (2009).

12-14-09 STATE OF NEW JERSEY VS. CHRISTOS E. TSETSEKAS
A-1832-08T4

We reversed the Law Division conviction and required dismissal of the DWI charge due to violation of defendant's right to a speedy trial. The extensive delay in adjudicating this matter, caused solely by the State's repeated lapses in preparation and the failure to secure its witnesses, infringed upon defendant's due process rights.

12-10-09 J.S. VS. J.F.
A-2552-08T2

In this appeal, the court examined the factors relevant to determining whether a dating relationship exists for purposes of the Prevention of Domestic Violence Act and concluded that a plaintiff is not automatically disqualified from claiming a dating relationship solely because defendant may have paid plaintiff for her company.

12-09-09 STATE V. DANA RONE
A-5850-07T4/A-6192-07T4 (consolidated)

A decision by the Prosecutor's Office to waive forfeiture of office under N.J.S.A. 2C:51-2 is not analogous to prosecutorial decisions with respect to pretrial intervention and is not entitled to enhanced deference or judicial review. Waiver of forfeiture is a judicial function, not a prosecutorial one.

12-07-09 PAULA ALEXANDER, JOAN COLL, and CHERYL THOMPSON-SARD v. SETON HALL UNIVERSITY, JOHN J. MYERS, ROBERT SHEERAN, PAULA BULEY, KAREN E. BOROFF and JOSEPH DEPIERRO
A-1251-08T3

There is no cause of action under the New Jersey Law Against Discrimination (LAD) for discrimination in pay and compensation benefits when the discrimination is based on decisions ("discrete acts") which occurred outside the LAD two-

year statute of limitations. The fact the impact of the discriminatory decision-making continued the pay disparity into the two-year period before the complaint was filed is not relevant. Using the guidance of the federal Title VII jurisprudence, we follow the United States Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 127 S. Ct. 2162, 167 L. Ed. 2d 982 (2007), despite Congress' subsequent adoption of the Lily Ledbetter Fair Pay Act of 2009. The Legislature, not this court, must amend LAD to achieve the result Congress adopted.

12-04-09 BOYLAN V. THE BOROUGH OF POINT PLEASANT BEACH
A-0234-08T2

Any ambiguity in the description of the boundaries of a lot created by a subdivision, which is contained in the deed conveying the lot, should be resolved by reference to the filed subdivision map that shows the precise boundaries of the lot.

12-02-09 STATE OF NEW JERSEY V. JOEL M. UGROVICS
A-4906-08T4

This appeal concerns the admissibility of the results of an Alcotest. By leave granted, the State appeals from the order of the Law Division suppressing the results of the Alcotest because the arresting officer, rather than the Alcotest operator, was the person who observed defendant during the twenty minutes prior to him taking the test. In reaching this conclusion, the trial court relied on what it characterized as the "procedures" mandated by the Supreme Court in State v. Chun, 194 N.J. 54, cert. denied, ____ U.S. ____, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008).

We reverse. We hold that the State is only required to establish that the test subject did not ingest, regurgitate or place anything in his or her mouth that may compromise the reliability of the test results for a period of at least twenty minutes prior to the administration of the Alcotest. The State can meet this burden by calling any competent witness who can so attest.

12-01-09 CARLSON, JR., V. CITY OF HACKENSACK
A-2898-08T3

The question presented is whether a municipality is permitted to reduce the salary of its tax assessor during his or her term of office if the municipality also reduces the

assessors' weekly work hours, commensurate with the salary reduction. We answered the question in the negative, determining that the issue is controlled by the unambiguous proscription contained in N.J.S.A. 40A:9-165, notwithstanding the provision contained in N.J.S.A. 40A:9-146, permitting a municipality to set the amount of weekly work hours of the tax assessor "commensurate with the compensation paid to the tax assessor." We concluded that the authority to reduce a tax assessor's salary during the term of his or her office because of budgetary constraints must come in the first instance from the Legislature.

11-25-09 I/M/O PROVISION OF BASIC GENERATION SERVICE FOR THE PERIOD BEGINNING JUNE 1, 2008
A-3200-07T3

On this appeal by the Division of Rate Counsel, we conclude that the Board of Public Utilities properly approved the pass-through to utility ratepayers of a portion of the costs of solar renewable energy certificates.

We rejected Rate Counsel's arguments that the Board's action should be reversed because: 1) it violates the contract clause of the Constitutions of the United States and New Jersey, U.S. Const. art. I, § 10, cl. 1; N.J. Const., art. IV, § 7, ¶ 3; 2) it violates statutorily granted rights to notice of a hearing; 3) it violates its procedural due process rights; and 4) it is arbitrary and capricious and not based on credible evidence in the record.

11-24-09 ALPERT, GOLDBERG, BUTLER, NORTON & WEISS, P.C., n/k/a Alpert Butler & Weiss, P.C., Plaintiff-Respondent, v. MICHAEL QUINN, MARITA QUINN and QUINN-WOODBINE REALTY & LEASING CO., L.L.C., Defendants-Appellants
A-5503-07T2

We hold in this attorney-fee collection action the following: (1) given the unique relationship between an attorney and a client, the fiduciary duty owed by an attorney to a client, and the need for a client to have complete information at the time of retention concerning the fees, charges, and obligations to be owed by a client to the attorney, R.P.C. 1.5(b) requires an attorney to present a client the attorney has not regularly represented, in writing, at the time of retention, all of the fees and costs for which the client will be charged, as well as the terms and conditions upon which the fees and

costs will be imposed; (2) we adopt Williston's principles that in order for a contract to properly incorporate by reference a separate document, the document to be incorporated must be described in such terms that its identity may be ascertained beyond doubt and the party to be bound by the terms must have had "knowledge of and assented to the incorporated terms"; (3) the failure to conduct a case management conference pursuant to Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003), in a malpractice action does not toll the timeframes set forth in the Affidavit of Merit statute; and (4) Rule 1:4-8(d)(2) compensates a party, represented by an attorney or appearing pro se, for the reasonable legal fees and expenses the party actually incurred as a result of an adversary's frivolous claim and, therefore, an attorney appearing pro se is not entitled to fees unless the fees are actually incurred as opposed to imputed.

11-23-09 STATE V. ROBERT WILLIAMS
A-4530-07T4

Flight from an unconstitutional investigatory stop that could justify an arrest for obstruction does not automatically justify admission of evidence revealed during that flight. For such evidence to be admissible, there must be a "significant attenuation" between the unconstitutional stop and seizure of evidence.

11-19-09 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES v. P.W.R., ET ALS.
A-1060-08T4

The trial judge in this Title 9 action defaulted a defendant because she did not attend the factfinding hearing even though her attorney appeared to represent her interests. The court concluded that, unless warranted by defendant's failure to comply with a prior order and the potential for default was adequately noticed, a judge is not authorized to enter a default in this circumstance. In considering the overall circumstances, however, the court determined that the default had no meaningful impact on the proceedings and affirmed.

11-17-09 EPIX HOLDINGS CORPORATION V. MARSH & MCLENNAN COMPANIES, INC., ET AL.
A-3059-08T3

We reverse the Law Division's denial of defendants' motion to compel arbitration of plaintiff's anti-trust and related common law claims in a pending lawsuit, holding:

1. under principles of equitable estoppel, a non-signatory may enforce an arbitration clause in a contract signed by a subsidiary where the issues to be litigated are intertwined with the agreement containing the arbitration clause;

2. a clause that provides for arbitration of any dispute "arising out of" is broad enough to encompass claims going to the formation of the underlying contract and hence extends to the price-fixing and related common law claims in this case;

3. unlike employment claims alleging violations of the Law Against Discrimination, the Legislature did not intend statutory anti-trust and restraint of trade claims to be non-arbitrable; and

4. the fact that arbitration will not conclude the entire litigation in this case (as claims will remain pending in the Law Division against other co-defendants) is not a bar to the enforcement of an arbitration clause since piecemeal resolution is allowed when necessary to give effect to an arbitration agreement.

11-16-09 GLORIA OSORIA v. WEST NEW YORK RENT CONTROL BOARD, ET AL.
A-1596-08T1

The rental building in this case was covered by a rent control ordinance but was converted to one that became exempt under the language of the ordinance. We hold that the ordinance provides tenant protections that are at least coextensive with the protections of the Anti-Eviction Act, but neither the ordinance nor the Anti-Eviction Act implicitly creates vested rights of a pre-conversion tenant beyond its explicit terms. As to the latter point, we agree with a similar holding in Dempsey v. Mastropasqua, 242 N.J. Super. 234 (App. Div. 1990), and disagree with the contrary holding of Surace v. Papachristou, 244 N.J. Super. 70 (App. Div. 1990). We also disapprove Judge Fast's contrary holding in Chambers v. Nunez, 217 N.J. Super. 202 (Law Div. 1986).

11-16-09 STATE OF NEW JERSEY v. JOSEPH ECKERT
A-0216-08T4

A conviction for refusal to submit to a breath examination cannot be merged with a DWI conviction. Such a plea agreement violated applicable merger principles as well as the Court's Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey.

11-12-09 STATE OF NEW JERSEY v. UCHE ADIM
A-4962-05T4

We consider deviations from the model jury instructions on further deliberations approved in State v. Czachor, 82 N.J. 392, 400 (1980) and adopted in Model Jury Charge (Criminal), Final Charge: Further Jury Deliberations at 24 (2004) and conclude that a judge may not outline the evidence in delivering that supplemental charge. We also address the State's privilege to withhold the identity of a citizen who provides information about the concealment of evidence of a crime and conclude that the State is not required to establish an ongoing arrangement with the informer in order to invoke the privilege provided in N.J.R.E. 516.

11-09-09 MARTIN O'SHEA v. TOWNSHIP OF WEST MILFORD
A-1185-08T3

The Attorney General's guidelines, policies and procedures requiring the completion of "Use of Force Reports" (UFRs) and their maintenance in the files of police departments have the force of law for police entities, rending such documents accessible under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. Therefore, UFRs do not qualify, generically, under the "criminal investigatory records" exception of OPRA.

11-09-09 CELINA GONZALEZ-POSSE v. JOSE RICCIARDULLI
A-6446-06T3

We hold that the Family Part order, modifying spousal support by extending the term of limited duration alimony from five years (at $500 weekly), which the parties agreed to in a property settlement agreement, to seventeen years (at $100 weekly), failed to meet the heightened statutory standard of "unusual circumstances", N.J.S.A. 2A:34-23(c); or to adhere to the presumption that the durational feature of the support

obligation be preserved; or to otherwise give effect to the need for, and purpose of the original agreed-upon arrangement.

10-27-09 BERKELEY SQUARE ASSOCIATION, INC. v. ZONING BOARD OF ADJUSTMENT OF THE CITY OF TRENTON, ET AL.
A-2389-08T1

After property owner satisfies its burden of proving the existence of a nonconforming use at the time a zoning ordinance was amended, the objector to issuance of permits for rehabilitation of building as a nonconforming use has the burden of going forward on issue of abandonment before property owner must meet its burden of persuasion as to continuation of the nonconforming use.

10-27-09 CARL AND DELLA DARST v. BLAIRSTOWN TOWNSHIP ZONING BOARD OF ADJUSTMENT
A-0308-08T3

Although a land use board ordinarily may not impose aesthetic conditions upon a site plan, we sustain their imposition in the context of this bifurcated application. We do so because the use variance the Board of Adjustment had granted earlier to the applicants was founded upon "special reasons" that included certain positive aesthetic factors relating to the placement of self-storage containers on the property. The Board relied upon the applicants' representations in the use variance phase that they would install rows of a certain kind of container near the front of the property, and the Board was justified in rejecting the applicants' later attempt in the site plan phase to substitute a different kind of container that comparatively had visual drawbacks.

We invalidate, however, the Board's attempt to shorten the two-year period assured to the applicants under N.J.S.A. 40:55D-52 for completing paving, landscaping and other "conditions subsequent" to the approved site plan.

10-22-09 UNITED CONSUMER FINANCIAL SERVICES CO. V. WILLIAM CARBO v. A&M MERCHANDISING, INC.
A-5501-06T2

The dispute that gave rise to this class action litigation is about the content and form of a contract and notice of cancellation, which was approved by a single creditor and used

by multiple door-to-door sellers in retail installment sales of vacuum cleaners. The appeal is from a judgment awarding injunctive relief and a civil penalty in the amount of $100 to each member of the class pursuant to the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18, based upon violations of consumer rights provided in the Retail Installment Sales Act (RISA), N.J.S.A. 17:16C-1 to -61, and the Door-to-Door Retail Installment Sales Act (DDRISA), N.J.S.A. 17:16C-61.1 to -61.9.

We reject the claim that class certification was improper because only one of the several sellers was involved in the purchase made by the class representative. We affirm the TCCWNA penalty because the contract violated a consumer right provided by RISA and the aggregate award was neither unconstitutionally excessive nor a basis for decertification of the class. We modify the injunctive relief because the Federal Trade Commission regulations, 16 C.F.R. §§ 429.1 to 429.3, preempt and preclude enforcement of several but not all of the provisions of DDRISA.

10-21-09 D.R. HORTON, INC., NEW JERSEY V. J.J. DELUCA CO., INC.
A-1041-08T2

We affirm, for reasons stated by the Chancery Division, a judgment holding that the New Jersey Arbitration Act, N.J.S.A. 2A:23B-10(c), does not vest exclusive jurisdiction in the courts to decide motions to consolidate two or more pending arbitration proceedings and therefore the matter may proceed before a neutral arbitrator in accordance with the American Arbitration Association's (AAA) procedural rules.

10-21-09 IN RE AGRICULTURAL, AQUACULTURAL, and HORTICULTURAL WATER USAGE CERTIFICATION RULES, N.J.A.C. 7:20A-1.1 ET SEQ.
A-3283-06T3

The New Jersey Farm Bureau challenged the administrative action of the New Jersey Department of Environmental Protection in readopting and amending N.J.A.C. 7:20A, regulations that implement and enforce the Water Supply Management Act (Water Act), N.J.S.A. 58:1A-1 to -17. For the reasons set forth in the opinion, we upheld the validity of most of the challenged regulations, but found three regulatory amendments, N.J.A.C. 7:20A-1.3, N.J.A.C. 7:20A-2.3(j), and N.J.A.C. 7:20A-2.5(a)(11)(v), invalid because they are ultra vires; and we

required the rewriting of N.J.A.C. 7:20A-1.7(c)(1), because it was ultra vires as written.

10-20-09 JANICKY V. POINT BAY FUEL, INC. and USF INSURANCE CO. and THE POWDERHORN AGENCY, INC.
A-0867-08T3

When the parties consent to entry of a final judgment memorializing a settlement disposing of all claims in an action, a party cannot appeal from an interlocutory order that no longer has any effect upon any party's pecuniary interests or property rights.

10-19-09 IN THE MATTER OF ANTHONY DUBOV
A-0832-08T4

The Supreme Court of the United States' decision in Heller, which held that the Second Amendment protects an individual right to keep and bear arms, has no effect upon the constitutionality of the New Jersey statute requiring a permit to purchase a firearm. A trial court's failure to conduct a hearing on an appeal from the denial of an application for a firearms purchaser permit within the thirty-day period allowed by N.J.S.A. 2C:58-3(d) does not require automatic approval of the application. The trial court erred in failing to conduct an evidentiary hearing on an appeal from the denial of an application for a firearms purchaser permit and instead deciding the appeal based on evidence submitted to the court ex parte in the form of telephone calls by the trial judge to the applicant's former employers and an unsolicited letter submitted after argument of the appeal that commented negatively upon the applicant's fitness to possess a firearm.

10-15-09 STATE V. RAAFIQ LEONARD
A-4330-07T4

The trial court properly precluded defense counsel from confronting the victim with a fifteen-year-old conviction for third-degree aggravated assault. Vasquez v. Jones, 496 F.3d 564 (6th Cir. 2007) is distinguishable.

10-08-09 STATE OF NEW JERSEY V. L.V.
A-3149-07T4

Defendant pled guilty to second-degree manslaughter and second-degree aggravated assault on her two newborn infants and was sentenced to two concurrent five-year terms of imprisonment,

subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. The matter came before the panel on the Sentence Oral Argument calendar with defendant arguing the judge erred in sentencing her as a second-degree offender. Because the judge erred in not finding all the mitigating factors supported by the record, we reversed. We considered defendant's long history of horrific sexual and psychological abuse by her father, who twice impregnated her; her significant mental retardation; the significant role her father played in the death of her first child and the assault of the second; the presence of a duress defense; the absence of any prior history of delinquency or criminal activity; the likelihood her conduct would not recur because her father had been sentenced to an aggregate thirty-five year term; her character and attitude making it unlikely she would commit another offense; and her cooperation with the prosecution of her father. Thus, we concluded that the mitigating factors substantially outweighed aggravating factors (1), (2), and (9) and resentenced defendant as a third-degree offender to two concurrent terms of four years, subject to NERA, with three years of parole supervision.

10-07-09 New Jersey Manufacturers Insurance Company v. Bergen Ambulatory Surgery Center
A-0307-08T2

In this case, plaintiff automobile insurer sought discovery in the Law Division pursuant to N.J.S.A. 39:6A-13 for use in personal injury protection (PIP) arbitration proceedings. The nature of the discovery was the annualized billing and payment history of the defendant ambulatory surgery center for certain services that were subject to a usual, customary, and reasonable (UCR) analysis in the PIP arbitration proceedings. We hold that this type of expansive discovery is not obtainable under N.J.S.A. 39:6A-13 as of right in the Law Division. We therefore affirm the trial court's dismissal of plaintiff's action.

10-01-09 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES v. J.L.
A-1103-08T2

In this decision, we reverse the final decision of the Director of the Division of Youth and Family Services (DYFS) finding that J.L. had committed an act of child neglect as defined by N.J.S.A. 9:5-8.21c(4)(b), determining that willful and wanton misconduct was not demonstrated. Additionally, we again query whether inclusion on the Central Registry prior to any trial-type hearing of the matter constitutes a deprivation

of due process rights under the federal or state constitution or is fundamentally unfair. However, we ultimately determine that the matter is not ripe for our consideration, since J.L. did not challenge her interim inclusion on the Registry either before DYFS or by order to show cause in Superior Court, and her appeal was only from the Director's final decision.

09-28-09 I/M/O OF J.W.
A-5458-08T1

Internet and area notification consistent with moderate risk of recidivism is warranted under Megan's Law for this registrant both by reason of his RRAS tiering score and because of uniquely serious factors which bring the matter further out of "heartland" contemplated by the RRAS.

09-25-09* State vs. David Cooper
A-2810-07T4

In a case in which defendant was sentenced to death and his sentence was upheld by the Supreme Court and thereafter converted to life without parole upon abolition of the death penalty, a post conviction relief petition addressed to the penalty phase, including claims of ineffective assistance of counsel, was not moot because, if defendant is entitled to a new penalty proceeding, he could be sentenced to a term less than life without parole. The scope of review embodying a claim of ineffective assistance of counsel in a PCR involving a case in which the death penalty was imposed will remain the same as it was at the time of trial. In the absence of prejudice, the Public Defender could substitute one of defendant's trial counsel before the jury was empanelled and sworn, and the decision was for the Public Defender, not the originally designated attorney, to decide. Given the mitigating factors presented to the jury, including his mother's addiction to alcohol during pregnancy and while defendant was a child, defendant did not demonstrate there was a reasonable probability that the penalty phase deliberations would have been affected by proofs that defendant could be diagnosed as the victim of fetal alcohol syndrome. **[*Approved for Publication date]**

09-10-09 STATE v. AURELIO RAY CAGNO
A-7021-03T4

A RICO conspiracy must continue to within five years of the indictment, but there is a presumption that the conspiracy continues when a member of an organized crime family is involved, and the State does not have to prove that an overt act occurred within the five year period. In any event, in this case a Family member's refusal to testify over a grant of immunity and signal of "thumbs up" to defendant as he left the courtroom at defendant's first trial can be considered overt acts in a superseding indictment.