DATE NAME OF CASE (DOCKET NUMBER)

09/09/16 STATE OF NEW JERSEY VS. DHARUN RAVI
A-4667-11T1/A-4787-11T1(CONSOLIDATED)

Defendant was convicted of multiple counts of invasion of privacy, bias intimidation, hindering prosecution, and tampering with evidence. The jury found defendant guilty on four counts directly predicated on N.J.S.A. 2C:16-1(a)(3), a now constitutionally defunct law pursuant to the Supreme Court's holding in State v. Pomianek, 221 N.J. 66, 69 (2015). The State conceded that the convictions under these four counts are void as a matter of law.

09/07/16 STATE OF NEW JERSEY VS. JAMES BOYKINS
A-0751-14T1

Defendant raises an issue not addressed in State v. Hudson, 209 N.J. 513, 517 (2012). We consider whether defendant, who received a second extended-term sentence for a crime he committed while on bail awaiting trial on the offense for which he received his first extended-term sentence, was "in custody" within the meaning of N.J.S.A. 2C:44-5b when he committed the second offense. Because we conclude defendant was "in custody" within the meaning of N.J.S.A. 2C:44-5b when he committed the second offense, we reject his claim that his second extended term constituted an illegal sentence.

08/31/16 RACHEL KRANZ, ET AL. VS. STEVEN SCHUSS, M.D., ET AL.
A-4918-13T1

Represented by her mother as guardian ad litem, infant-plaintiff settled a malpractice action brought in New York that alleged her attending New York medical providers failed to timely diagnose her hip dysplasia, resulting in subsequent surgeries and the increased risk of arthritis in her hip. The New York court approved a structured settlement of $2 million.

Plaintiff commenced suit in New Jersey, against the pediatrician and his practice group who began treating plaintiff after the family moved to New Jersey, when plaintiff was one-year old. Defendants successfully moved in limine for a pro tanto $2 million credit against any judgment entered in favor of plaintiff in the New Jersey action.

We reversed. Examining the Joint Tortfeasors Contribution Law, and the Comparative Negligence Act, we concluded that even

though the settling New York defendants were not, and, because of lack of personal jurisdiction, could not be "parties" to the New Jersey suit, defendants were not entitled to a pro tanto credit. Rather, defendants were only entitled to contribution, i.e., a reduction of any award against them by the amount of fault allocated by the jury to the settling New York defendants.

08/31/16 NORTH JERSEY MEDIA GROUP INC., D/B/A COMMUNITY NEWS VS. BERGEN COUNTY PROSECUTOR'S OFFICE, ET AL.
A-2393-13T3

A news organization requested records from a prosecutor's office regarding a person who was not charged with any crime pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of access. In this matter of first impression, we must determine whether the prosecutor's refusal to confirm or deny the existence of responsive records was permissible under OPRA and the common law or a violation thereof. We hold that an agency may "neither confirm nor deny" the existence of records in response to an OPRA request when the agency (1) relies upon an exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) presents a sufficient basis for the court to determine that the claimed exemption applies. Because records relating to a person who has not been arrested or charged with an offense are entitled to confidentiality based upon long-established judicial precedent, an exemption exists under N.J.S.A. 47:1A-9(b) that precludes a custodian of records from disclosing whether such records exist in response to an OPRA request. We further conclude that the prosecutor's office made a sufficient showing to avail itself of this exemption and that access is also properly denied under the common law right of access.

08/29/16 MIDLAND FUNDING LLC VS. BRUCE THIEL/
MIDLAND FUNDING LLC VS. LUISA ACEVEDO/
MIDLAND FUNDING LLC VS. ALISA JOHNSON
A-5797-13T2/A-0151-14T1/A-0152-14T1(CONSOLIDATED)

In these three consumer debt collection actions, we hold that the statute of limitations applicable to an action filed to collect debts arising from a customer's use of a retail store's credit card, which use is restricted to the specific store, is the four-year statute of limitations that governs contracts relating to the sale of goods, N.J.S.A. 12A:2-725, rather than the six-year statute of limitations that governs most contractual claims, N.J.S.A. 2A:14-1. We also hold that if an

action is filed after the expiration of the four-year period, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.A. §§ 1692 to 1692p, requires an award of statutory damages and costs, absent a showing that the action was filed due to a "bona fide error" under the act.

08/26/16 STATE OF NEW JERSEY VS. AMBOY NATIONAL BANK ACCOUNT NUMBER XXX-XXXX-2 VALUED AT FOUR HUNDRED THIRTY-SIX THOUSAND EIGHT HUNDRED FORTY-FIVE DOLLARS AND EIGHTY-SIX CENTS IN UNITED STATES CURRENCY, ET AL.
A-0703-14T2

This civil forfeiture action concerns the seizure of $846,000, $722,000 of which represented "entry fees" to participate in sports pools. The claimant admitted operating sports pools for approximately twenty years but denied the pools were illegal. The New Jersey Constitution prohibits the Legislature from authorizing gambling except through referendum and several exceptions established by the Constitution. The pools operated by claimant did not fall within any of these exceptions. We further conclude the State met its burden to show by a preponderance of the evidence that (1) there was a direct causal connection between the money seized and the promotion of gambling and (2) the promotion of gambling involved constituted an indictable offense under N.J.S.A. 2C:37-2. We further reject claimant's argument that the court erred in failing to allocate the funds seized between illegal and legal purposes, noting claimant failed to present sufficient credible evidence in response to the State's motion for summary judgment to permit such an allocation. Finally, we reject claimant's argument that the State violated the notice provision of N.J.S.A. 2C:64-3 by failing to give notice to the players whose entry fees had been deposited into the joint accounts held by claimant and were part of the funds seized.

08/25/16 ANTHONY MCCORMICK VS. STATE OF NEW JERSEY
A-3493-14T2

An injured plaintiff who alleges that he received inadequate medical care while housed in a government facility cannot avoid his obligation to serve an Affidavit of Merit (AOM) under N.J.S.A. 2A:53A-27 by naming only the public entity as a defendant in his complaint and not suing the individual licensed professionals who provided the allegedly inadequate care. We extend the holding of Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 416 N.J. Super. 1 (App. Div. 2010) (requiring an AOM where a legal malpractice

complaint named only law firms as defendants and not their associate, the licensed attorney who acted negligently) to cases involving public entity defendants and involving other forms of malpractice.

08/24/16 JENNIFER LAMBERT AND GARY LAMBERT VS. TRAVELERS INDEMNITY COMPANY OF AMERICA/PAUL REED VS. QUAL-LYNX AND TOWNSHIP OF MARLBORO AND MONMOUTH MUNICIPAL JOINT INSURANCE FUND/WILLIAM AGAR VS. QUAL-LYNX AND TOWNSHIP OF HAZLET AND MONMOUTH MUNICIPAL JOINT INSURANCE FUND
A-1073-14T3/A-3040-14T1/A-3107-14T1(CONSOLIDATED)

In these consolidated appeals, we hold that when a worker is injured in the course of his or her employment in a motor vehicle accident and workers' compensation coverage is available, the right of the injured worker to pursue claims against a third-party tortfeasor and the right of the workers' compensation insurer to be reimbursed are governed by the Workers' Compensation Act, N.J.S.A. 34:15-1 to -142. Accordingly, the injured worker may recover medical expenses from a third-party tortfeasor, and N.J.S.A. 39:6A-12, which is part of the Automobile Insurance Cost Reduction Act, does not apply. The workers' compensation insurer, in turn, has the right to be reimbursed for the appropriate portion of the medical expenses it has already paid under Section 40 of the Workers' Compensation Act, N.J.S.A. 34:15-40.

08/22/16 NICOLE PRAGER VS. JOYCE HONDA, INC.
A-3691-14T3

We consider whether the trial court correctly dismissed plaintiff Nicole Prager's claims of retaliation and constructive discharge at the close of her proofs pursuant to Rule 4:37-2(b).

Although we reject the trial court's conclusion that plaintiff's report to the police of a workplace incident, in which a customer of her employer tugged down the sleeve of her shirt revealing her bra, was not protected activity under the LAD, we affirm the dismissal because the proofs were otherwise insufficient to sustain a judgment in plaintiff's favor.

We conclude plaintiff's constructive discharge claim was properly dismissed because no reasonable juror could find her receipt of two written warnings, which she contended were issued in retaliation for her pressing charges against the customer, and the coldness of her co-workers following her decision to go to the police "so intolerable that a reasonable person would be

forced to resign rather than continue to endure it." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002) (quotation omitted).

08/22/16 PHILIP VITALE VS. SCHERING-PLOUGH CORPORATION
A-1156-14T4

In the context of a worker for a security guard service, this opinion resolves a novel question of law in New Jersey: Whether a provision in an employment contract limiting a worker's right to sue a third party for negligence is enforceable. The court determines such a provision, eliminating an employee's remedies from a non-employer, and allowing only those remedies provided from his or her employer pursuant to the Workers' Compensation Act, N.J.S.A. 34:15-1 to -142, is against New Jersey public policy and therefore unenforceable.

Because plaintiff could have contributed to the fall by not turning on the light prior to stumbling, the court also remands for a new trial as to comparative negligence only, where plaintiff, in the course of his work duties, was injured after tripping over an object negligently left on a dark staircase.

08/18/16 RICHARD CATENA VS. RAYTHEON COMPANY, ET AL.
A-4636-13T4

In this appeal, we apply the discovery rule to fraud claims under common law and the Consumer Fraud Act arising from the sale of commercial real property. The seller and his lender, both defendants, knew about environmental contamination on the property, which they partly remediated before the closing. Rather than disclose that information, the seller provided plaintiff an affidavit stating that he was unaware of any contamination on the site. In reversing the summary judgment dismissal on statute of limitations grounds, we hold that discovery did not occur until plaintiff was aware of facts indicating defendant knew his statements were false, and intended plaintiff to rely upon their falsity. We base this on the rule that a plaintiff cannot discover the basis for a fraud claim until he is aware of facts establishing the essential elements of the claim, one of which is mens rea.

08/16/16 STATE OF NEW JERSEY VS. MARIANO ANTUNA
A-0849-14T2

Defendant's counsel's failure to read to him and have him answer question seventeen on the plea form, which would have

conveyed to defendant the risk of deportation, resulted in ineffective assistance of counsel and requires his plea be vacated. Although counsel provided no affirmative misadvice as discussed in Nuñez-Valdéz, counsel's failure to review the question on the plea form with defendant, who could not speak or read English, requires reversal.

08/11/16 RIGOBERTO MEJIA VS. NEW JERSEY DEPARTMENT OF CORRECTIONS
A-0710-13T4

Rigoberto Mejia, who is serving a mandatory-minimum state prison term of forty years, appeals from a cumulative sanction of three-and-one-half-years in administrative segregation for throwing bodily fluids on two corrections officers and related offenses. Although he has been released from restrictive custody, the court reverses the sanctions imposed, determining that the regulation allowing a hearing officer unfettered discretion in deciding whether or not to consider the enumerated sanctioning factors is not permissible. The court also expresses concern over the mental health treatment provided to Mejia, whose first language is not English, as well as the fact that Mejia's administrative appeal, written in Spanish, was initially affirmed without translation.

08/09/16 JOHN GIOVANNI GRANATA VS. EDWARD F. BRODERICK, JR., ESQ., ET AL.
A-2928-14T2/A-3036-14T2(CONSOLIDATED)

In a case of first impression, we hold that an attorney's pledge of anticipated counsel fees can be considered a receivable under UCC Article 9 and a creditor may perfect a security interest in those fees that were pledged as collateral for a loan made to the attorney. Because the creditor filed a UCC-1 financing statement and fully complied with Article 9, it had a perfected security interest which attached, even though the counsel fees had not been awarded, and enjoyed priority over subsequent lien creditors claiming against the same collateral.

08/09/16 STATE OF NEW JERSEY VS. JAMES GLEATON
A-3458-13T1

After three days of deliberations, a jury found defendant guilty of first degree distribution of cocaine and related offenses. The central and dispositive issue in this appeal concerns the trial judge’s response to criticism of the foreperson’s leadership style by a group of nine jurors. We

hold the judge erred when he allowed the nine jurors to select a spokesperson to convey their grievances, instead of interviewing each juror separately. This error influenced the judge's characterization of the foreperson as an "obstructionist."

The judge misapplied our decision in State v. Rodriguez, 254 N.J. Super. 339 (App. Div. 1992), to replace juror number 1 as foreperson. Although well-intended, the judge's decision had the capacity of being perceived by the foreperson as a retaliatory act intended to coerce her to change her stance in the deliberations. The judge's bias in favor of unanimity influenced the impermissibly coercive steps he took against juror number one. State v. Figueroa, 190 N.J. 219, 237-38 (2007).

07/29/16 STATE OF NEW JERSEY VS. RYAN RINKER
A-1238-14T3

Defendant was tried for the theft and possession of his father's revolver. The State contended that defendant sold the gun to his co-defendant, who was tried separately and convicted at an earlier trial. Defendant's father reluctantly appeared and testified at the co-defendant's trial, indicating to representatives of the prosecutor's office at the time: "I know I have to come in, but I will not trial prep, and I will not bury my son. I will come in and testify but I will not bury my son."

When the father refused to appear at his son's trial held several months later, the State sought to introduce his testimony at the co-defendant's trial pursuant to the forfeiture-by-wrongdoing exception to the hearsay rule, N.J.R.E. 804(b)(9). After conducting a hearing pursuant to N.J.R.E. 104(a), the trial judge concluded that defendant had "indirectly engaged in wrongdoing . . . that was intended to procure the unavailability of his father as a witness in this case." The State then played a recording of defendant's father's testimony at the co-defendant's trial.

We reversed. We examined the factual predicates necessary for admission of hearsay pursuant to N.J.R.E. 804(b)(9) and its federal counterpart and concluded the State failed to meet its burden of proof for admission. We also concluded that the error was not harmless.

07/27/16 JAI SAI RAM, LLC AND SUNIL DHIR VS. THE PLANNING/ ZONING BOARD OF THE BOROUGYH OF SOUTH TOMS RIVER AND WAWA, INC.
A-2075-14T2

The time of application rule, set forth in N.J.S.A. 40:55D-10.5, does not apply to a situation where, after a property owner or developer submits an application for a use variance, the municipality amends the zoning ordinance to specifically permit that use in the zone. In that situation, applying the time of application rule would produce an absurd result, contrary to the Legislature's purpose in adopting the statute. Here, the local board granted the use variance; the Law Division upheld the board's decision; and the objectors filed an appeal to the Appellate Division. While the appeal was pending, the local zoning was amended to permit that specific use in the zone. The respondent developer is entitled to the benefit of the amendment, and the appeal concerning the use variance is moot.

07/26/16 TINA L. TALMADGE VS. CONNIE S. BURN
A-3160-14T1
(NEWLY PUBLISHED FOR JULY 26, 2016)

Plaintiff appeals from the denial of her motion to declare the medical benefits portion of a workers' compensation lien unenforceable. She argues since medical benefits that could have been paid through plaintiff's personal injury protection policy are not recoverable from a tortfeasor, they also are not subject to repayment to the workers' compensation insurance carrier (the carrier) pursuant to N.J.S.A. 34:15-40 (section 40) of the Workers' Compensation Act (the Act), which permits reimbursement of benefits when a third-party caused the employee's injury.

Examining the purpose of the Automobile Insurance Cost Reduction Act's no-fault provisions and section 40, we conclude an employee who receives medical expenses as workers' compensation benefits is permitted to seek recovery of those sums from the third-party. Nevertheless, the Act entitles the carrier to repayment from a third-party recovery of all medical benefits paid, even when the resultant net recovery does not fully compensate the employee.

07/20/16 STATE OF NEW JERSEY VS. CESAR MUNGIA AND U.S. SPECIALITY INSURANCE COMPANY/ STATE OF NEW JERSEY VS. CHRISTIAN RODRIGUEZ AND AMERICAN RELIABLE INSURANCE

COMPANY/ STATE OF NEW JERSEY VS. ALEXIS MELENDEZ AND AMERICAN RELIABLE INSURANCE COMPANY
A-0974-14T1/A-0975-14T1/A-0976-14T1

Defendants were released on bail and fled from the United States. The sureties located the defendants in foreign countries, but the State apparently did not seek extradition. We hold that if a defendant becomes a fugitive and flees to a foreign country, there is a presumption against remission. The surety must make every effort to assist in the re-apprehension of the defendant, including by locating the defendant in the foreign country. The failure to extradite a located defendant does not excuse the sureties from their contract with the State, and generally does not justify remission if the State has no ability to obtain extradition of the defendant. However, if the surety locates the defendant in a foreign country, and extradition is possible, but the State elects not to request that the federal government seek extradition, there is no absolute bar against remission. In that situation, the trial court should consider the general factors governing remission.

07/19/16 STATE OF NEW JERSEY VS. RODNEY ARMOUR
A-2006-14T1

In this case of first impression we addressed the standard governing a post-conviction request to retest fingerprint evidence based on advances in fingerprint science, or expansions of the New Jersey State Police Automated Fingerprint Identification System and Integrated Automated Fingerprint Identification System databases.

We concluded that the statutory standard governing retesting of DNA provides a suitable framework for assessing a request for retesting fingerprints. Applying that framework, the critical factor in this case is whether there would be a "reasonable probability" that defendant would be entitled to a new trial if the fingerprint retesting were favorable, pursuant to N.J.S.A. 2A:84A-32a(d)(5)d. After reviewing the record evidence, we concluded that even if the latent fingerprint was tested anew and a third party identified, defendant would not be entitled to a new trial in light of the substantial evidence of guilt and the lack of a proffered alibi. Consequently, we affirm the motion judge's denial of defendant's motion.

07/14/16 PHIBRO ANIMAL HEALTH CORPORATION VS. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA
A-5589-13T3

Plaintiff in this coverage dispute, a maker of animal health products, sold an additive for chicken feed designed to control a common intestinal disease. The additive stunted the growth of broiler chickens commercially raised by several of plaintiff's customers, and the customers sued. Plaintiff sought coverage for those customers under Comprehensive General Liability (CGL) and umbrella policies it purchased from its insurer.

The insurer disclaimed coverage, and plaintiff sued the insurer in a declaratory judgment action. The trial court granted the insurer summary judgment, finding the stunted-growth claims were not within the scope of the policies' insuring clauses and also were disallowed under the policy exclusion for "impaired property" that can be restored to use.

We reverse the trial court's ruling that the liability claims against plaintiff relating to the undersized chickens did not arise out of a covered "occurrence" and did not involve covered "property damage." We also reject the insurer's argument that coverage must be disallowed here under the "economic loss" doctrine. However, we agree with the trial court that the "impaired property" exclusion might nullify coverage, and remand for further proceedings and fact-finding to determine whether the affected chickens could feasibly be "restored to use" after they ceased ingesting the additive.

We address other issues in the unpublished portion of this opinion, which (1) affirms the trial court's ruling that the "contractual liability" and "professional liability" policy exclusions do not apply and (2) remands for fact-finding concerning the reasonableness of the settlement that plaintiff reached with its affected customers.

07/11/16 IN RE DECLARATORY JUDGMENT ACTIONS FILED BY VARIOUS MUNICIPALITIES, COUNTY OF OCEAN, PURSUANT TO THE SUPREME COURT'S DECISION IN In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015)
A-3323-15T1

We granted leave to appeal from an order entered by a designated Ocean County Mount Laurel judge requiring the court's Special Regional Master to include, as a new, "separate and discrete" component, an additional calculation for establishing a municipality's affordable housing need from 1999 to 2015 (the gap period). In entering the order, the judge concluded that a

municipality's fair share affordable housing obligation for the third-round cycle is comprised of (1) its newly-created, court-imposed, "separate and discrete" gap-period obligation; (2) unmet prior round obligations from 1987 to 1999; (3) present need; and (4) prospective need.

The narrow legal issue on appeal is whether such a retrospective obligation is authorized by (1) the core principles of the Mount Laurel doctrine, as codified in the Fair Housing Act of 1985 (FHA), N.J.S.A. 52:27D-301 to -329; and (2) In re Adoption of N.J.A.C. 5:96 & 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015). Resolution of this legal question specifically addresses whether a municipality's prospective need involves a retroactive housing obligation starting in 1999. We focused on the propriety of the court's conclusion that such a "separate and discrete" obligation was "constitutionally mandated."

Applying the Mount Laurel doctrine and the plain language of the FHA, including its unambiguous definition of "prospective need" — a forward "projection of housing needs based on development and growth which is reasonably likely to occur in a region or a municipality" — and following the Supreme Court's admonition not to become an alternative administrative decision maker for unresolved policy issues surrounding the Third Round Rules, we held that the FHA does not require a municipality to retroactively calculate a new "separate and discrete" affordable housing obligation arising during the gap period. We acknowledged that identifiable housing need that arose during the gap period would be captured by a town's present need obligation.

We emphasized that under our tripartite system of government, the imposition of a new retrospective calculation, designed to establish affordable housing need during the gap period — a new methodology that essentially addresses "unresolved policy details of replacement Third Round Rules" — is best left for consideration by the Legislative and Executive branches of government, where public policy issues associated with such an additional obligation can be fairly and fully debated in the public forum. The Legislature may craft new legislation addressing such a retrospective need that may have arisen during any gap period between housing cycles if that is the course it wishes to take. Enforcement of subsequent legislation promoting affordable housing needs — and its effect on a municipality's Mount Laurel obligation — would still be a matter that may be brought to the courts.

07/06/16 STATE OF NEW JERSEY VS. EDWARD PEOPLES
A-4965-13T1

In this appeal, we affirmed the denial of defendant's petition for post-conviction relief grounded on the ineffective assistance of counsel (IAC), Paul W. Bergrin, who has been suspended from the practice of law in New Jersey and is presently serving a life sentence on a federal conviction. Defendant admitted that he was involved with attempting to tamper with the State's witnesses, but claimed he did so based on Bergrin's illegal and unethical advice to tamper with witnesses. Even if this was true, we held that a defendant who participates in illegal conduct with his attorney or acquiesces in his attorney's illegal conduct is not entitled to IAC relief.

07/01/16 IN THE MATTER OF REGISTRANT D.F.S.
A-0816-15T1

The opinion construes the Internet registration section of Megan's Law, which requires that the individual registration information of certain sex offenders be listed on a publicly-available Internet registry. In 2013, the Legislature eliminated certain previously-existing exceptions for low and moderate risk offenders, including incest offenders, "if the offender's conduct was characterized by a pattern of repetitive, compulsive behavior." N.J.S.A. 2C:7-13(e). Like the Megan's Law judge, we concluded that under N.J.S.A. 2C:7-13(e), the decision whether an offender's individual registration record "shall be made available to the public on the Internet registry" depends whether his sex offenses were repetitive and compulsive at the time he committed them, and not on his mental condition at the time of the Megan's Law tier hearing. Therefore, we affirmed the order requiring that D.F.S.'s information be placed on the Internet registry.

07/01/16 RUTGERS UNIVERSITY STUDENT ASSEMBLY (RUSA), ET AL. VS. MIDDLESEX COUNTY BOARD OF ELECTIONS, ET AL.
A-4318-14T2

In this case, we address the constitutionality of N.J.S.A. 19:31-6.3(b), which requires all eligible persons to register to vote no later than twenty-one days prior to an election. Plaintiffs assert they should be permitted to register to vote on election day, and that the twenty-one-day advance registration requirement improperly infringes on their right to vote under N.J. Const. art. II, § 1, ¶ 3(a). Based upon our review of the record and applicable law, we conclude that the

statute furthers the fundamental State interest in preserving the integrity of New Jersey's electoral process, while imposing no unreasonable burden upon plaintiffs' right to vote. Therefore, we conclude that N.J.S.A. 19:31-6.3(b) is constitutional.

In a concurring opinion, Judge Ostrer notes that it is the job of the Legislature to determine the mode and manner of voting, and our role is limited to reviewing the constitutionality of legislative policy judgments enacted into law. Therefore, he would find twenty-one-day advance registration constitutional without adopting the policy judgments discussed in the majority opinion that support it.

06/30/16 JOHN PAFF VS. OCEAN COUNTY PROSECUTOR'S OFFICE
A-4226-14T3

Dash cam films made by motor vehicle recorders (MVRs) in police vehicles - which, in accordance with the police chief's written policy order, are generated automatically whenever the vehicle's overhead lights are activated - are "government records" subject to disclosure under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. Appellant Ocean County Prosecutor's Office failed to carry its statutory burden to show that the films fall within an exception under OPRA.

Judge Gilson dissents.

06/23/16 CAPITAL HEALTH SYSTEM, INC., ET AL. VS. HORIZON HEALTHCARE SERVICES, INC./ SAINT PETER'S UNIVERSITY HOSPITAL VS. HORIZON HEALTHCARE SERVICES, INC.
A-2913-15T2/A-2929-15T2(CONSOLIDATED)

These two back-to-back appeals are related to our June 7 opinion in Capital Health Sys., Inc. v. N.J. Dep't of Banking & Ins., ___ N.J. Super. ___ (App. Div. 2016), where we affirmed the Department of Banking and Insurance's decision approving Horizon Blue Cross Blue Shield of New Jersey's (Horizon's) application to establish the OMNIA Health Alliance (OMNIA) network. Several of the hospitals in that case brought actions in the Chancery Division against Horizon alleging that the insurer breached its contracts with them by, among other things, not including them as Tier 1 hospitals in the new OMNIA network. The trial courts granted the hospitals' requests for discovery of a consultant's report Horizon used to select and tier the hospitals for the network, contracts between Horizon and the

OMNIA hospitals, and other proprietary business information concerning the formation of the network.

In our decision, we considered the relevancy of this material to the hospitals' claims, and then balanced it against Horizon's need to maintain the confidentiality of material which, if disclosed, could give plaintiffs a competitive advantage over other hospitals in each of their service areas and over the insurer in future negotiations concerning rates. As a result of this balancing, we ordered specific redactions to be made in the materials sought by the hospitals.

06/23/16 ANDREA DAVIDOVICH VS. ISRAEL ICE SKATING FEDERATION, ET AL.
A-0283-15T1

Plaintiff is a teenage ice skater of dual United States-Israeli citizenship. She filed a complaint in the Law Division seeking to break free from the Israeli ice skating federation she represented in the pairs event at the 2014 Winter Olympics. Plaintiff, whose Israeli skating partner severed their relationship shortly after the Olympics, now wishes to compete internationally for the United States.

Under the rules of the International Skating Union ("ISU"), plaintiff cannot skate for the United States without obtaining a release from the Israeli federation. The federation has declined to grant her such an unconditional release, contending that doing so will detrimentally encourage other skaters in whom it has invested substantial resources to switch their affiliations to other countries.

The trial court granted partial summary judgment to plaintiff and ordered the federation to issue a release over its objection. We granted leave to appeal to defendants.

We reverse the trial court's summary judgment ruling and vacate the court-ordered release because of (1) the strong general policies disfavoring judicial interference into the internal affairs of sporting organizations, (2) the need for possible non-judicial remedies to be exhausted with the ISU, and (3) the presence of genuine disputed issues of material fact and business justification. However, we affirm the trial court's denial of summary judgment to both sides on a separate count of the complaint alleging defendants' tortious interference with plaintiff's prospective economic opportunities.

06/22/16 LISA R. WORTHY VS. KENNEDY HEALTH SYSTEM, ET AL.
A-2698-14T1

In this medical negligence matter, we examine whether plaintiff met the requirements of Rule 4:26-4, the fictitious party pleading rule, to save her claims from being dismissed as untimely. Plaintiff consulted counsel less than two months prior to the expiration of the statute of limitations. A complaint was filed in time, in which the illegible signatures and professional designations of unidentified defendants, as taken from hospital treatment records, were used in lieu of typed names. The signatures were placed in the caption and included in the complaint's specific allegations of negligence. Counsel's post-complaint efforts to identify all defendants included correspondence, telephone calls, motions for enforcement, special interrogatories, and depositions. The hospital did not identify those professionals for approximately fifteen months after the complaint was filed. The judge dismissed the complaint, finding identification efforts prior to its filing were insufficient. We reversed. Not only must the court consider all facts and circumstances, but also must determine whether defendant suffered prejudice from any delay, which resulted from the hospital's lapses, not plaintiff's.

We also reviewed facts supporting causation regarding another defendant, who argued despite his alleged failure to diagnose and treat plaintiff's condition, she would not have experienced a better outcome. Concluding the judge failed to apply the proper legal standard, we reverse.

06/21/16 BRICK TOWNSHIP PBA LOCAL 230 AND MICHAEL SPALLINA VS. TOWNSHIP OF BRICK
A-1979-14T3

The judge concluded that Michael Spallina, who retired as a police officer on accidental disability, was required by N.J.S.A. 40A:10-21.1, L. 2011, c. 78, § 42, effective June 28, 2011 (Chapter 78) to contribute to the cost of his health insurance provided as a benefit along with disability retirement payments.

We held that Chapter 78 does not require ordinary or accidental disability retirees to make premium payments for health insurance benefits.

06/20/16 STATE OF NEW JERSEY VS. DONNELL JONES
A-3396-14T3

Defendant's post-conviction relief petition, asserting his attorney's failure to file a direct appeal, was denied. There being no dispute defendant requested an appeal after judgment was entered, prejudice should have been presumed and the PCR judge should not have assessed the merit of the arguments defendant would have pursued had his appeal not been negligently forfeited. The court allowed defendant forty-five days to appeal the three-year-old judgment of conviction.

06/20/16 RACHELE LOUISE CASTELLO VS. ALEXANDER M. WOHLER, M.D.
A-0337-14T3

We held, in medical negligence cases, where a plaintiff's counsel timely serves an affidavit of merit (AOM) and reasonably relies on the AOM and expert's curriculum vitae, which erroneously reflects that the witness is actively practicing medicine, and, through no fault of the plaintiff's counsel, the error is first discovered after the expiration of the 120-day deadline imposed under the AOM statute, N.J.S.A. 2A:53A-26 to -29, exceptional circumstances exist requiring the judge to allow a plaintiff sufficient time to retain a different expert witness who is qualified under the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J.S.A. 2A:53A-37 to -42, issue a new AOM, and serve a corresponding expert report. If warranted, the judge may include other procedures or requests for relief related to the extension of discovery and service of a new AOM and expert report.

06/17/16 STATE OF NEW JERSEY VS. MATTHEW J. WALTERS
A-0203-14T1

Defendant Matthew J. Walters appeals from the Law Division order that removed gap-time credit from a previously-entered judgment of conviction (JOC). The Law Division found that gap-time credit cannot be awarded for a sentence imposed on a Title 39 violation - driving while intoxicated (DWI), N.J.S.A. 39:4-50. We concluded that nothing in the language or statutory scheme of N.J.S.A. 2C:44-5(b) supports the conclusion that a defendant must be convicted for a Criminal Code offense to receive gap-time credits. Given that defendant has satisfied the requirements of N.J.S.A. 2C:44-5(b)(2), he is entitled to gap-time credits even though the sentence was for a Title 39 violation. Reversed and remanded to the Law Division for amendment of the judgment of conviction to reflect the proper award of gap-time credits.

06/16/16 STATE IN THE INTEREST OF J.F.
A-0392-15T3

In this appeal, the majority affirms the trial court's denial of the State's juvenile waiver application, both for the reasons stated by the trial judge and on the alternate basis that the new higher statutory age requirement of N.J.S.A. 2A:4A-26.1(c)(1), as appropriately applied retroactively, precludes waiver of J.F., who was fourteen years old at the time of the shooting that gave rise to the charges.

Judge Gilson concurs with the majority based on the decision by the trial judge, but opines that this court should not have considered the retroactivity of the age provision in the revised waiver statute because no party raised that issue.

06/16/16 CHRISTINE AVELINO-CATABRAN VS. JOSEPH A. CATABRAN
A-4973-13T4

In this post-judgment dissolution matter, we hold that, absent changed circumstances, where parents' matrimonial settlement agreement clearly provides that they will share their children's college costs equally, a court need not apply the factors set forth in Newburgh v Arrigo, 88 N.J. 529, 545 (1982), to determine whether a parent should contribute to a child's college costs and the extent of the contribution. In addition, where a child is required to seek financial aid to help reduce the costs associated with college, that obligation does not include re-paying a Federal Direct PLUS Loan (PLUS Loan) secured by a parent to satisfy the parent's obligation under the agreement.

06/15/16 STATE OF NEW JERSEY VS. JAMES E. JONES AND LIKISHA JONES AND GODFREY J. GIBSON
A-3600-13T2/A-4230-13T1

Co-defendants were indicted for the offenses resulting from their conduct in 2002, when they drove their sister to woods near the New Jersey Turnpike so she could hide her dead child's body. The Law Division judge applied the DNA exception to the five-year statute of limitations in denying defendants' motion to dismiss the indictment. See N.J.S.A. 2C:1-6(c).

The conspiracy count of the indictment, which alleged obstruction in that the co-defendants intimidated the victim's

sister into silence, survived because it was a "continuing offense." See State v. Diorio, 216 N.J. 598 (2014). We found, however, that the DNA exception did not apply to any charge as the DNA match only identified the victim, and not the "actor" as required by the statute. See State v. Twiggs, ___ N.J. Super. ___, (App. Div. 2016) (slip op. at 9). The denial of the motion to dismiss the indictment was reversed, except for the conspiracy count.

06/09/16 MARY T. KLEINE VS. EMERITUS AT EMERSON ET AL.
A-4453-14T3

In reviewing an order compelling the arbitration of a dispute between a patient and a nursing home facility, the court recognized that the Federal Arbitration Act and its liberal policy favoring arbitration precluded application of the New Jersey Nursing Home Act's prohibition on compelled arbitration of such disputes. Notwithstanding, the arbitration clause in question called for arbitration administered by the American Arbitration Association, which had a policy of declining to administer the arbitration of health care disputes. Because the forum ostensibly agreed upon was not available, the court held that the patient could not be compelled to arbitrate and reversed.

06/07/16 CAPITAL HEALTH SYSTEM, INC., ET AL. VS. NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE
A-1211-15T3

In this case, ten New Jersey hospitals challenged the Department of Banking and Insurance's decision to approve Horizon Blue Cross Blue Shield of New Jersey's (Horizon's) application to establish the OMNIA Health Alliance (OMNIA) network. OMNIA is a health benefits plan that contains a two-tiered network of hospitals and physicians under which a member's costs are lower if the member elects to use a Tier 1 provider. Horizon designated appellants as Tier 2 hospitals under the OMNIA tiered plan.

We conclude that the OMNIA plan met the Department's network adequacy requirements by ensuring that there was at least one hospital in each county or service area that was within twenty miles or thirty minutes, whichever is less, from 90% of the covered subscribers in the plan. Although OMNIA did not initially provide sufficient coverage in Burlington County for obstetrical services, it made arrangements with a Tier 2 hospital in that county to provide these services at Tier 1

rates. We held that this arrangement satisfied the Department's network adequacy requirements.

We also rejected appellants' contention that the Department's approval of the OMNIA plan was contrary to the public interest. After reviewing the governing statutes, we concluded that the Legislature did not specifically require the Department to make a specific finding that the approval of any tiered network plan "was in the public interest." In any event, we ruled that the Department's approval of an application that met all of existing regulatory requirements plainly served the public interest. We also noted that there is no statutory or regulatory procedure for the Department to determine the financial impact of the tier designation on a hospital.

Finally, we determined there is no provision in the existing statutes or regulations requiring that an insurance carrier publicly disclose the criteria it used to evaluate the hospitals for inclusion in, or exclusion from, a particular tier. We also found that appellants did not have a right to a hearing contesting Horizon's application for approval of the OMNIA network.

06/06/16 AIT GLOBAL INC. VS. PANKAJ YADAV
A-2847-14T4

Plaintiff, a temporary help service firm (THSF) appealed a judgment in favor of its former employee after it attempted to enforce early termination and restrictive covenant provisions pursuant to an employment agreement. The sole question on appeal is whether plaintiff is required to be licensed as an employment agency pursuant to the Private Employment Agency Act (the Act), N.J.S.A. 34:8-43 to -66, in order to enforce an employment agreement with defendant. We conclude that registration, rather than licensing, is required for a THSF to enforce an employment agreement pursuant to the Act. We reverse and remand.

06/06/16 STATE OF NEW JERSEY VS. ALFRED W. COURSEY, III
A-1415-14T1

Pre-trial Intervention Guideline 3(i), which creates a presumption against admission to Pre-Trial Intervention for defendants charged with certain offenses, does not apply to third-degree or fourth-degree possession of marijuana with intent to distribute, N.J.S.A. 2C:35-5(b)(11), -5(b)(12). The prosecutor's rejection of defendant's PTI application based on a

misapplication of Guideline 3(i) was a gross and patent abuse of discretion, requiring a remand to the prosecutor for reconsideration ab initio of defendant's PTI application.

05/31/16 NEW JERSEY DIVISION OF CHILD P IN THE MATTER OF N.A.T. AND J.V.ROTECTION AND PERMANENCY VS. N.T. AND A.K. AND J.A.V.
A-1008-14T4

The Division of Child Protection and Permanency obtained a finding of abuse or neglect based primarily on hearsay evidence in a Division report and a Division consultant's psychological evaluation. The Appellate Division holds that, to be admissible as a business record of the Division, a Division report must meet the requirements of N.J.R.E. 803(c)(6), whether the report is offered under N.J.S.A. 9:6-8.46(a)(3), Rule 5:12-4(d), or In re Guardianship of Cope, 106 N.J. Super. 336 (App. Div. 1969). If a Division report is admissible under N.J.R.E. 803(c)(6) and meets the requirements of N.J.S.A. 9:6-8.46(a)(3), Rule 5:12-4(d), or Cope, the court may consider the statements in the report that were made to the author by Division staff personnel, or affiliated medical, psychiatric, or psychological consultants, if those statements were made based on their own first-hand factual observations, at a time reasonably contemporaneous to the facts they relate, and in the usual course of their duties with the Division. However, whether the Division report is offered under N.J.R.E. 803(c)(6), N.J.S.A. 9:6-8.46(a)(3), Rule 5:12-4(d), or Cope, statements in the report made by any other person are inadmissible hearsay, unless they qualify under another hearsay exception as required by N.J.R.E. 805. Expert diagnoses and opinions in a Division report are inadmissible hearsay, unless the trial court specifically finds they are trustworthy under the criteria in N.J.R.E. 808, including that they are not too complex for admission without the expert testifying subject to cross-examination.

In judging the sufficiency of the evidence, a reviewing court must consider all the evidence admitted by the trial court.

05/26/16 AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, ET AL V. ROCHELLE HENDRICKS ET AL.
A-4399-13T2

Appellants challenge the Department of Higher Education's awards of capital improvement grants to two sectarian

institutions of higher education, consisting of over $10 million to Beth Medrash Govoha, and $645,323 to Princeton Theological Seminary. Appellants contend these grants violate Article I, Paragraph 3 of the New Jersey Constitution because the recipients will use the funds substantially to support religious instruction and the preparation of future candidates for ministry in the Jewish and Christian faiths.

In Resnick v. East Brunswick Township Board of Education, 77 N.J. 88 (1978), the Supreme Court construed Article I, Paragraph 3 to bar public schools from allowing religious organizations to use school facilities in the evenings and on weekends for religious instruction unless the users fully reimbursed the public for the costs of providing that access. Applying that binding precedent disallowing such a taxpayer-funded subsidy, we conclude that Resnick compels the invalidation of the Department's grants to these two sectarian institutions.

We acknowledge that the legislative history reflects that the intended meaning of Article I, Paragraph 3 – a provision included in our State's first Constitution in 1776 and readopted in the 1844 and 1947 Constitutions – is not entirely clear. As an intermediate appellate court, however, we defer to the Supreme Court to assess if it so chooses whether the reasonably debatable lineage of the constitutional provision warrants any reexamination or modification of Resnick.

05/17/16 STATE OF NEW JERSEY VS. JONATHAN ZEMBRESKI
A-0632-14T3

Defendant appealed from his convictions for committing robbery, burglary, and impersonating a law enforcement officer. Defendant's victim was a guest at a hotel and a gambling patron at its casino. The evidence presented was that defendant followed his victim to his room and gained access by claiming to be an FBI agent. Once inside, defendant threatened to prosecute the victim, demanded that he give defendant money, and slammed the door to the room on the victim's hand when he tried to escape, injuring him in the process.

In this case of first impression, we affirm defendant's convictions, holding that defendant committed an act of burglary, N.J.S.A. 2C:18-2, by gaining access to his victim's residence by deception for the purpose of committing a crime.

05/13/16 IN THE MATTER OF THE ESTATE OF BYUNG-TAE OH, DECEASED
A-4562-13T1

In this probate matter, the court affirmed a summary judgment that determined a $900,000 transfer from a now-deceased intestate Korean citizen to his son's New Jersey limited liability company was an investment and not a gift. The court rejected the son's claim to a presumption that the money was a gift because it was transferred to the company, not decedent's son; without the presumption, the son could not sustain his burden of proving a gift by clear, cogent and persuasive evidence. The court also rejected the argument — raised for the first time on appeal — that the court lacked subject matter jurisdiction; N.J.S.A. 3B:10-7 authorizes ancillary jurisdiction over New Jersey property possessed by a nonresident intestate at the time of death, and it was no impediment that the exercise of that jurisdiction was dependent on the dispute's resolution. Lastly, the court rejected the argument that Korean law should have been applied; that argument was not raised in the trial court and, even on appeal, the son never cited a Korean authority, let alone one in conflict with New Jersey law.

05/12/16 IN THE MATTER OF THE ESTATE OF SOLOMON Z. BALK, DECEASED
A-1197-14T2

The terms of a promissory note entered into on June 4, 2007 as a settlement between the parties required an initial payment and four installment payments to be made at specific times thereafter. Although the promisor remitted $37,000 towards the $800,000 note over eighteen months, he failed to pay the initial sum or make the installment payments in full.

On June 2, 2014, the promisee moved to enforce the settlement agreement and enter judgment. The trial court concluded that New Jersey's six-year statute of limitations was applicable (contrary to Pennsylvania's four-year statute based on a choice-of-law analysis not a subject of this appeal) and applied the installment contract approach to determine the accrual date of the claim.

As there was no repudiation or total breach of the promissory note, the judge correctly applied the installment method. Under this approach, a new statute of limitations begins to run against each installment when it becomes due. The promisee is entitled to all payments which became due on and after June 3, 2008.

05/06/16 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. K.S. AND A.L., SR. I/M/O THE GUARDIANSHIP OF A.L., JR., AND A.K.L.
A-4905-14T2

A biological mother succeeds in her appeal of the trial court's denial of her request to testify after the close of evidence. She did not appear for her termination of parental rights trial, but came to court seeking to testify on the day the judge was prepared to render his decision. A parent facing the termination of parental rights is entitled to every reasonable opportunity to produce evidence. If a parent seeks to reopen the record to testify after the close of evidence, the trial court is constitutionally obligated to grant that request as long as it does not interfere with the children's essential and overriding interest in stability and permanency.

05/06/16 CITIZENS UNITED RECIPROCAL EXCHANGE VS. NORTHERN NJ ORTHOPEDIC SPECIALISTS
A-0945-14T2

PIP arbitration procedures permit a summary "action filed pursuant to N.J.S.A. 2A:23A-13 for review of the award." N.J.A.C. 11:3-5.6(g). Under N.J.S.A. 2A:23A-13(a), "[a] party to an alternative [dispute] resolution proceeding shall commence a summary application in the Superior Court for its vacation, modification or correction within 45 days after the award is delivered to the applicant, or within 30 days after receipt of an award modified pursuant to [N.J.S.A. 2A:23A-12(d)]." The Appellate Division holds that if a party files an application to modify under N.J.S.A. 2A:23A-12(d), or an application to modify or clarify under the rules of the PIP dispute resolution organization, a party must file any summary action within 30 days after receipt of the order resolving the application, regardless of whether the order grants or denies modification or clarification.

05/05/16 STATE OF NEW JERSEY VS. RYAN SUTHERLAND
A-5432-14T3

A police officer stopped defendant's car because one of the four tail lights was not illuminated. The Law Division granted defendant's motion to suppress finding that N.J.S.A. 39:3-61(a) and -66 only required one functioning tail light on each side and the officer's mistake rendered the stop unreasonable.

We reversed, noting the confusing state of Title 39 and concluding that the officer had reasonable and articulable suspicion of a motor vehicle violation.

05/04/16 PATRICIA T. CONN, ETC. VS. BABYLIN REBUSTILLO, ET AL.
A-1421-15T3

The Patient Safety Act (PSA), N.J.S.A. 26:2H-12.23 to -12.25, establishes an absolute privilege for two categories of documents. N.J.S.A. 26:2H-12.25(f) (subsection (f) privilege) applies to the first category, which consists of documents received by the Department of Health (the Department) pursuant to the mandatory reporting requirement, N.J.S.A. 26:2H-12.25(c) (subsection (c)) or the voluntary disclosure provision, N.J.S.A. 26:2H-12.25(e) (subsection (e)). N.J.S.A. 26:2H-12.25(g) provides a similar privilege (subsection (g) privilege) to a second category of documents, developed as part of a "self-critical analysis" that might never be provided to the Department. In this interlocutory appeal, we review the statutory criteria and scope of the subsection (f) privilege and clarify the distinction between the thresholds for the application of the subsection (f) and subsection (g) privileges. We conclude: the subsection (f) privilege is not subject to review to determine whether the health care facility complied with the "process requirements" set forth in the PSA; the privilege covers all "documents, materials, or information received by the department" pursuant to N.J.S.A. 26:28-12.25(c) or (e); and attaches to those items upon receipt by the Department.

05/02/16 VANESSA RIVERA VS. ELMER F. MCCRAY, III, AND NEW JERSEY RE-INSURANCE COMPANY
A-2337-14T1

This appeal requires us to interpret an underinsured motorist (UIM) coverage step-down provision in a personal automobile insurance policy, issued by defendant New Jersey Re-Insurance Company (NJM). The issue presented is whether a "special policy," see N.J.S.A. 39:6A-3.3, which provides no UIM coverage at all, provides "similar coverage" so as to trigger the step-down provision and reduce UIM coverage to zero. Based on the plain language of the NJM policy and well-established principles of insurance contract interpretation, we conclude it does not. We therefore reverse the trial court's order dismissing plaintiff's claim to UIM coverage under the NJM policy.

05/02/16 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. K.G. AND V.M., SR. IN THE MATTER OF V.M., JR.
A-5370-13T3

In this Title 9 case, defendant neglected her baby when she left him in the care of her older teenage son who had a serious cognitive disability. Applying the totality of the circumstances test, we agreed with the trial judge that defendant's conduct constituted gross negligence.

04/27/16 STATE OF NEW JERSEY VS. ROBERT LUZHAK
A-2445-14T3

In this case of first impression, we interpret N.J.S.A. 2C:40-26(b), which provides that it is a crime of the fourth degree to operate a motor vehicle during a period of license suspension if the license was suspended for a second violation of N.J.S.A. 39:4-50 or N.J.S.A. 39:4-50.4(a), as including out-of-state convictions for DWI.

We reached our determination after consideration of analogous statutes relating to interstate recognition of motor vehicle violations and the use of equivalent out-of-state convictions as prior offenses for enhanced DWI sentencing. We also considered the legislative policy behind the statute's enactment.

04/27/16 A.T., AN INFANT BY HER MOTHER AND NATURAL GUARDIAN, T.T., AND T.T., INDIVIDUALLY VS. M. COHEN, M.D., ET AL.
A-0589-14T1

The issue in this medical malpractice case is whether a minor plaintiff can take a voluntary dismissal without prejudice under Rule 4:37-1(b) to avoid a dismissal with prejudice of her complaint for the failure to provide an affidavit of merit (AOM) within the required timeframe. The court concludes that Rule 4:37-1(b) cannot be used to circumvent the time strictures in the AOM statute even if the statute of limitations has not expired.

Plaintiff's counsel failed to file an AOM within 120 days of the filing of the answer. No extraordinary circumstances were presented; just an "oversight" of counsel. After defendants moved for summary judgment, counsel requested leave to take a voluntary dismissal under Rule 4:37-1(b), reasoning that there

remained many years until the expiration of the statute of limitations due to plaintiff's status as a minor and there was no prejudice to defendants.

The court finds that permitting a voluntary dismissal in these circumstances would render the AOM statute and its underlying purpose meaningless. The minor's claim was pursued by her guardian ad litem and she was represented by counsel. The Legislature did not choose to carve out an exception for minors under the AOM statute as it has done with the statute of limitations in tort cases.

Judge Fisher dissents, concluding that a trial judge should have the authority to exercise discretion and grant a voluntary dismissal, if appropriate, to preserve the future of a minor's malpractice action. He notes the protections afforded minors, including the equitable tolling of a minor's suit under the Wrongful Death Act and the process requiring judicial approval of settlement reached on behalf of minors, R. 4:44. He finds the minimal prejudice incurred by defendants can be addressed by the trial judge with the imposition of any terms necessary to alleviate that harm upon the re-filing of the complaint.

04/26/16 STUART SACKMAN, ET AL. VS. NEW JERSEY MANUFACTURERS INSURANCE COMPANY
A-3230-13T4

In this UIM case, the policy issued by NJM to plaintiff contained a verbal threshold provision pursuant to the AICRA. At trial, the tortfeasor's liability was stipulated. In this appeal, plaintiff argued the trial judge erred (1) denying his motion for a directed verdict as to permanency; (2) the brevity of the jury's deliberations is per se indicative of bias and constituted a clear miscarriage of justice; (3) NJM's counsel's reference to the tortfeasor as "defendant" in her opening statement to the jury was improper and misleading; and (4) the judge's curative instructions were insufficient and constituted reversible error. We rejected all of these arguments and affirmed.

In Part III of this opinion we imposed a monetary sanction against plaintiff's counsel under Rule 2:9-9 because the brief he submitted in this appeal displayed an utter indifference to the standards of professional competence a tribunal is entitled to expect from an attorney admitted to practice law in this State.

Judge Gilson concurs except for Part III of this opinion.

04/26/16 CRANFORD DEVELOPMENT ASSOCIATES, LLC, ET AL. VS. TOWNSHIP OF CRANFORD, ET AL.
A-5822-12T2

In this Mount Laurel case, we addressed a series of issues in affirming the trial court's decision granting plaintiff developer a builder's remedy. Under the circumstances presented, plaintiff satisfied the requirement to negotiate in good faith before filing the lawsuit. Plaintiff did not have to establish that its lawsuit was a "catalyst for change" as a separate element of its claim for a builder's remedy. Rejecting defendant's proposed "all or nothing approach" to the builder's remedy, we held that the trial court had authority to modify the builder's remedy plaintiff sought by decreasing the number of approved units. Under the facts presented, the trial court had discretion to appoint a special hearing examiner to review and approve plaintiff's final site plan application, in a proceeding that allowed participation by the local planning board. We rejected plaintiff's cross-appeal, holding that the New Jersey Civil Rights Act does not authorize a counsel fee award to a developer in a builder's remedy lawsuit.

04/25/16 MARGO S. ARDAN VS. BOARD OF REVIEW, LOURDES MEDICAL CENTER OF BURLINGRON COUNTY, INC. AND ALLIANCE HEALTHCARE
A-5826-13T2

Appellant was employed as a registered nurse at Lourdes Medical Center of Burlington County for approximately two years. She obtained a "desk job" with another employer prior to resigning from Lourdes, and told Lourdes she was resigning "to seek other opportunity." She was laid off from the second job after seven weeks and applied for unemployment benefits.

The Deputy Director found appellant was disqualified for benefits because she left work at Lourdes voluntarily without good cause attributable to the work. For the first time on appeal to the Appeal Tribunal, appellant relied on N.J.A.C. 12:17-9.3(b) and claimed that she left Lourdes because of a medical condition that was aggravated by her working conditions and there was no other suitable work available.

The Board ultimately determined that appellant was disqualified for benefits because she left work at Lourdes

voluntarily without good cause attributable to the work. The Board accepted the Appeal Tribunal's findings that appellant left Lourdes to accept other employment; never advised Lourdes she was leaving for medical reasons; and never requested or afforded Lourdes an opportunity to provide an accommodation. We held that the Board reasonably interpreted N.J.A.C. 12:17-9.3(b) to require an employee to notify an employer of a medical condition that was aggravated by the working conditions, request an accommodation, and afford the employer an opportunity to address the matter to determine whether there was other suitable work available.

Nearly one and one-half years after the Board's decision, the Legislature amended N.J.S.A. 43:21-5(a) to provide an exception to individuals who voluntarily leave work with one employer to accept work from another employer. We held that the amendment should not be retroactively applied.

04/25/16 NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION VS. JOSEPH DIVINCENZO AND JORGE MARTINEZ
A-1596-15T3

The New Jersey Election Law Enforcement Commission (ELEC) has not had a full complement of commissioners since November 2011, when one of the commissioners died. In January 2013, ELEC authorized a complaint against respondents. At that time, one of the three commissioners recused himself and so, there were two commissioners who voted to authorize the complaint. An administrative law judge (ALJ) dismissed the complaint on the ground that ELEC did not have a quorum of members required to issue a complaint and therefore lacked jurisdiction to act. Pursuant to N.J.S.A. 52:14B-10(c), ELEC had forty-five days in which to adopt, reject or modify the ALJ's decision and was permitted to extend that time for one forty-five day period before the ALJ's decision was deemed adopted as the agency's final decision. However, ELEC could not obtain another extension of time without the consent of the respondents. Its ability to take action regarding the ALJ's decision was thwarted by the fact that a second commissioner had died, leaving only one commissioner who had not recused himself.

As the forty-five day extension period was drawing to a close, ELEC sought emergent relief, asking this court to toll the remainder of that period until such time as the vacancies are filled. We granted ELEC leave to file an emergent motion, tolled the forty-five day period pending this decision and have held oral argument on the motion. After reviewing the arguments

in light of applicable legal principles, we conclude that, notwithstanding the public interest involved and the debatable merits of the ALJ's decision, ELEC has failed to make the necessary showing, Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982), to warrant the relief sought. We therefore deny ELEC's motion for emergent relief and vacate our prior order tolling the forty-five day period.

04/22/16 BERNETICH, HATZELL & PASCU, LLC, ETC. VS. MEDICAL RECORDS ONLINE, INC. (D/B/A "MRO")
A-0657-15T3

We conclude in this appeal that a hospital's medical records processor may not enforce a mandatory arbitration clause that it included in its invoice to a patient's attorney in response to a request for records. The hospital, and the processor acting as its agent, had a pre-existing legal duty under State law to provide the patient's records upon the payment of a cost-based fee and nothing more. Performance of an undisputed legal duty is not consideration. Restatement (Second) of Contracts, § 73 (1981). Consequently, the records requester's alleged bargain to arbitrate any dispute related to the invoice was unsupported by consideration, and therefore unenforceable. We therefore affirm the trial court's order denying the records processor's motion to compel arbitration of a dispute over its invoice.

04/22/16 STATE OF NEW JERSEY VS. GAIL LAWRENCE
A-2905-12T4
(NEWLY PUBLISHED FOR APRIL 22, 2016)

We reverse an order dismissing defendant's request for review of municipal court convictions. When defendant's brief was not filed, the Law Division dismissed the municipal appeal without prejudice. Defendant moved for reconsideration and reinstatement. She provided evidence scheduling notices were sent to her municipal attorney, even though she filed for de novo review. Former counsel attempted to correct the misunderstanding, but did not notify defendant; the clerk did not resend the notices. Current counsel requested a new date to file a brief and schedule trial. Reinstatement was denied.

Although a municipal appeal may be dismissed for failure to submit a brief, R. 3:23-7, we conclude here denial of the motion for reinstatement represented an abuse of discretion. Current counsel correctly assessed the resulting difficulties posed were

he to file a new notice of appeal, which would be untimely. R. 3:23-2. Thus, the ordered dismissal, even though without prejudice, effectively denied defendant her right to challenge the merits of her conviction in a trial de novo before the Law Division. R. 3:23-8(a).

04/19/16 STATE OF NEW JERSEY VS. RICHARD BARD
A-1016-14T3
(NEWLY PUBLISHED FOR APRIL 19, 2016)

In this police citizen encounter, we examine whether the totality of presented facts and circumstances, including defendant's refusal to comply with a police directive to show his hands, support an objectively reasonable suspicion defendant was armed, justifying detention and a limited protective frisk for weapons. We distinguish the factual circumstances described from those set forth in United States v. Davis, 94 F. 3d 1465 (10th Cir. 1996), wherein the court concluded investigatory detention was not justified under facts that included the defendant's pocketed hands. Noting any analysis turns on individualized facts, in this matter the decision to stop and frisk was constitutionally supported because defendant appeared nervous and moved his hand to his back pocket as he walked toward police at 1:30 a.m., in the high crime area, then continued to conceal his hand, despite requests for him to expose it to the officer's view. Suppression was properly denied.

04/18/16 JOHN PAFF VS. GALLOWAY TOWNSHIP, ET AL.
A-0125-14T4

We reverse the Law Division order requiring Galloway Township and its Clerk to provide plaintiff with two email logs he had requested under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. Because OPRA does not require public agencies to create records that do not already exist, we conclude that plaintiff was not entitled to the logs requested in this case.

04/14/16 GINAMARIE GOMES VS. THE COUNTY OF MONMOUTH AND CORRECT CARE SOLUTIONS, LLC
A-1679-14T4

We hold that the Tort Claims Act, N.J.S.A. 59:1-1 to :14-4, does not require a plaintiff, who was treated by a medical provider under contract to provide care to inmates at a county jail, to serve that private contractor with a tort claims notice

before she can sue that company for negligence. We accordingly reverse the trial court's dismissal of plaintiff's claims against the contractor for failure to serve it with such a notice.

04/14/16 EDWARD J. SCANNAVINO VS. MARIE WALSH AND EVERETT WALSH
A-0033-14T1

Plaintiff sued his neighbors, alleging that the wall between their properties had been damaged by the roots of trees growing in defendants' yard. The Supreme Court has stated that nuisance claims are governed by the Restatement (Second) of Torts. Under the Restatement (Second) of Torts, a possessor of land is not liable for physical harm caused outside of the land by a natural condition. Here, the trees were a natural condition, because they had not been planted or preserved by defendants. Defendants' cutting back the trees did not create liability, because there was no evidence that it was an affirmative action taken to preserve the trees, or that it improved the health or growth of the trees or their roots. As an intermediate appellate court, the Appellate Division declined plaintiff's invitation to adopt the Restatement (Third) of Torts.

04/06/16 JAIME TAORMINA BISBING VS. GLENN R. BISBING, III
A-5047-14T1

In this appeal, the court examines the effect of a non-relocation agreement on a subsequent request by the primary custodial parent to relocate to a distant state. The court reverses and remands for a relocation hearing to determine first whether the primary custodial parent negotiated the non-relocation clause of the matrimonial settlement agreement (MSA) in bad faith. If so, a "best interests of the child" analysis must be conducted. Second, if bad faith is not demonstrated, the trial court must then consider whether the parent proved a substantial unanticipated change in circumstances warranting avoidance of the agreed-upon non-relocation provision and simultaneously necessitating a Baures analysis. If the MSA was negotiated in good faith, yet the parent fails to satisfy her burden of proving a substantial unanticipated change in circumstances, the court must apply the same "best interests" analysis as required in the first step. Only if the noncustodial parent is unable to demonstrate that the custodial parent negotiated the MSA in bad faith, and the custodial parent is able to prove a substantial unanticipated change in

circumstances occurred, should the custodial parent be accorded the benefit of the Baures analysis.

04/06/16 STATE OF NEW JERSEY VS. EBONEE R. WILLIAMS
A-0591-13T2

During plea negotiations, defendant gave a formal statement with the advice of counsel, after acknowledging that the statement could be used against her in the event of a trial. When plea negotiations failed, the trial court ruled defendant's statement could be used to impeach her if she testified at trial. The Appellate Division holds that N.J.R.E. 410 generally prohibits the use of any statement made during plea negotiations to impeach the person making the statement. However, consonant with the interpretation of Fed. R. Evid. 410 in United States v. Mezzanatto, 513 U.S. 196, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995), the Appellate Division holds that a defendant can waive N.J.R.E. 410's protection against use of such statements for impeachment, and that such a waiver is valid and enforceable absent an affirmative indication that the waiver was entered into unknowingly or involuntarily. The Appellate Division remands to allow the trial court and the parties to address whether waiver occurred here.

04/05/16 STERLING LAUREL REALTY, LLC, ET AL. VS. LAUREL GARDENS CO-OP, INC., ET AL.
A-0696-14T4

The central issue in this case is whether defendant Co-Op's Board of Directors could amend the bylaw definition of a quorum (for purposes of shareholder meetings) from a majority of the shareholders to twenty percent of the shareholders. We hold the New Jersey Business Corporation Act (the Act), N.J.S.A. 14A:1-1 to 17-18, precludes the Board from unilaterally reducing the Co-Op's shareholder-quorum requirement. We conclude N.J.S.A. 14A:5-9 makes clear that an amendment to a corporation's bylaws is insufficient to supplant the default majority quorum requirement set forth in the Act; only an amendment to the certificate of incorporation — which can only be approved by a vote of the shareholders, see N.J.S.A. 14A:9-2(4) — could legally alter the Co-Op's shareholder-quorum requirement.

04/01/16 RICHARD WALKER, ET AL. VS. COSTCO WHOLESALE WAREHOUSE
A-2493-14T2

In this slip-and-fall case, we hold that the trial court erred in rejecting plaintiff's request to charge the jury with

mode-of-operation liability principles under Model Civil Jury Charge 5.20F(11). Plaintiff presented a reasonable factual basis for a jury to find that what he perceived to be a "white, yogurt-based substance" on the floor of defendant's warehouse store came from a self-service display stand offering cups of free cheesecake. On retrial, the court should specifically include in its charge an instruction that the defendant is not liable under mode-of-operation principles unless the jury finds that the food offered at the self-service display was the source of the substance on which plaintiff slipped.

03/29/16 STATE OF NEW JERSEY VS. LOUISE FRANK
A-0832-13T1

Defendant was convicted of leaving the scene of a motor vehicle accident involving serious bodily injury, N.J.S.A. 2C:12-1.1, and leaving the scene of a motor vehicle accident resulting in injury, N.J.S.A. 39:4-129(a). The trial court ordered that the motor vehicle violation merge into the criminal offense, and that the penalties survive merger. The judge sentenced defendant to a four-year term of probation for the criminal offense and a custodial sentence of 180 days on the Title 39 violation, believing the custodial sentence was mandatory. We agreed that the criminal offense and motor vehicle violation merged as a matter of law, and that the Title 39 penalties survived merger, but we reversed the imposition of a custodial sentence, concluding it was not mandatory under N.J.S.A. 39:4-129(a), and remanded for resentencing.

03/28/16 IN THE MATTER OF THE APPLICATION FOR A RETAIL FIREARMS DEALER'S LICENSE RENEWAL BY CAYUSE CORP. LLC, T/A WILD WEST CITY
A-4229-11T2

In this appeal from the denial of a retail firearms dealer license under N.J.S.A. 2C:58-2, we hold that a trial court must conduct a hearing on a contested license application, providing the applicant notice and an opportunity to be heard. A court may not, as was done here, deny an application based on the State's ex parte submission, without notice to the applicant. Nor was that procedural deficiency cured by offering the applicant a de novo "appeal" before the same judge. We hold an applicant bears the burden to prove its entitlement to the license; but, the State generally bears the burden to produce evidence as to its reasons for opposing licensure. When the State's opposition is based on criminal charges, the State must present competent evidence of underlying facts.

We vacated the orders denying the applicant's license application, but declined to order issuance of the license, as the applicant sought. Instead, the applicant must file a new application, which shall be considered in accord with the principles we described.

03/24/16 DEBRA DUGAN, ET AL. VS. TGI FRIDAYS, INC., ET AL.
A-3485-14T3

In this action, in which plaintiffs assert that defendants violated the Consumer Fraud Act, N.J.S.A. 56:8-1 to -184, and the Truth in Consumer Contract Warranty and Notice Act, N.J.S.A. 56:12-14 to -18, by failing to disclose prices for beer, soda and mixed drinks on their menus, the trial court erred by certifying the matter as a class action because plaintiffs failed to establish that common questions of fact predominate over questions affecting only individual class members, as required by Rule 4:32-1(b)(3).

03/22/16 STATE OF NEW JERSEY VS. S.B.
DOCKET NO. A-5063-14T3

We examine the definition of "youth serving organization" found in Megan's Law and conclude N.J.S.A. 2C:7-22 does not encompass a youth ministry, which is a part of and supervised by the pastor and elders of a church.

03/22/16 STATE OF NEW JERSEY VS. GARY TWIGGS
DOCKET NO. A-4417-14T1

The court affirms the trial court's dismissal of an indictment prosecuted beyond the statute of limitations, pursuant to N.J.S.A. 2C:1-6. Contrary to the State's argument, we hold that the statutory tolling provision in N.J.S.A. 2C:1-6, for situations in which "the actor" is identified by means of DNA evidence, refers to the individual whose DNA is analyzed. The court concludes that the statute of limitations is not tolled for a defendant identified by another actor whose prosecution is supported by DNA evidence. Instead, it applies only to those who perpetrated criminal activity.

A dissenting opinion was filed by Judge Leone.

03/18/16 IN THE MATTER OF THE ENFORCEMENT OF NEW JERSEY FALSE CLAIMS ACT SUBPOENAS

DOCKET NO. A-0749-15T2/A-0756-15T2

By way of this chancery action commenced pursuant to the New Jersey False Claims Act (NJFCA), N.J.S.A. 2A:32C-1 to -15, -17 to -18, the Attorney General obtained an order enforcing the administrative subpoenas, which were designed to investigate the advisability of his intervention in a federal qui tam action, that were served on appellants. The court reversed, holding that, although the NJFCA imbues the Attorney General with broad investigatory powers for determining whether to intervene as of right, once, as here, the Attorney General declines to intervene as of right and the qui tam complaint is unsealed, the Attorney General no longer possesses the right to issue and obtain enforcement of administrative subpoenas even though the Attorney General retains the opportunity to later seek intervention in the qui tam action upon good cause shown.

03/18/16 STATE OF NEW JERSEY VS. WILLIAM BURKERT
A-5103-13T3

We reverse defendant's conviction for harassment concluding the State's evidence showed defendant engaged in protected speech and did not prove he engaged in harassing conduct, which is a required element of the offense N.J.S.A. 2C:33-4(c).

03/17/16 STATE OF NEW JERSEY VS. DIANE MONACO
A-0473-14T2

In affirming defendant's conviction of driving under the influence and refusal to submit to a chemical breath test, we address two points related to the refusal conviction. First, applying State v. O'Driscoll, 215 N.J. 461 (2013), we hold that defendant failed to present evidence that her refusal was materially affected by the failure to inform her that she would be required to install an ignition interlock if convicted. Second, we hold that a defendant bears the burden to prove that he or she lacked the physical capacity to perform the chemical breath test. In this case, defendant maintained her asthma rendered her incapable of providing the minimum air volume. Although defendant's treating physician testified about her pulmonary function, the Law Division judge found the proofs were insufficient to establish defendant was incapable of providing the requisite air volume.

03/17/16 STATE OF NEW JERSEY VS. SANDRA ABRIL

A-3362-13T3

The central question in defendant's appeal of her conviction for aggravated assault and related charges is whether the court was correct in ruling defendant's character witnesses could be cross-examined about whether they knew she had been convicted of murdering her husband in 1982, for which she received a thirty-year prison term.

Although the adoption of former Evidence Rule 47 ended the ability of a prosecutor to impeach the credibility of a defendant's character witness by inquiring into the witness's knowledge of alleged criminal misconduct not evidenced by a criminal conviction, neither its successor, N.J.R.E. 405, nor N.J.R.E. 607, prohibits such impeachment when the inquiry is limited to the witness's knowledge of a defendant's criminal convictions.

The panel thus rejects defendant's argument that her proposed character witnesses could not have been impeached by the prosecutor inquiring into their knowledge of defendant's prior conviction for murder, but holds sanitization would have been appropriate. The panel, however, declines to find the trial court's failure to sua sponte suggest sanitization of the conviction in the context of impeachment of a character witness automatically constitutes reversible error.

The panel remands defendant's sentence for merger of her conviction for unlawful possession of a weapon with her conviction for aggravated assault and correction of the judgment to reflect the court's oral pronouncement of sentence. See State v. Rivers, 252 N.J. Super. 142, 147 n.1 (App. Div. 1991) (noting in the event of a discrepancy between the court's oral pronouncement of sentence and the sentence described in the judgment of conviction, the sentencing transcript controls and a corrective judgment is to be entered).

03/11/16 WOLVERINE FLAGSHIP FUND TRADING LIMITED, ET AL. VS. AMERICAN ORIENTAL BIOENGINEERING, INC., ET AL.
A-0654-14T1

Plaintiffs argue that the Chancery Division incorrectly interpreted Uniform Commercial Code 8-112, as adopted by this state at N.J.S.A. 12A:8-112, to require actual seizure of certificated shares owned by a debtor before a creditor can reach the debtor's interest in those shares. Having reviewed

the arguments in light of the applicable law, we affirm the order of the Chancery Division.

03/09/16 IN THE MATTER OF COUNTY OF ATLANTIC AND PBA LOCAL 243 AND FOP LODGE 34 AND PBA LOCAL 77/ IN THE MATTER OF TOWNSHIP OF BRIDGEWATER AND PBA LOCAL 174
A-2477-13T4/A-0107-14T1

The Public Employment Relations Commission (PERC) abandoned its long-standing dynamic status quo doctrine in an appeal by FOP Lodge 34 and PBA Local 77 alleging unfair practice charges against Atlantic County, thus reversing a hearing examiner's award in favor of the public employees. In reliance on that decision, PERC dismissed Local 174's grievance against Bridgewater Township. PERC held that Atlantic County's failure to pay salary increments during the period of an expired collective bargaining agreement (CNA) was not an unfair labor practice. In the Bridgewater appeal, PERC held that the issue of automatic salary increments after the expiration of a CNA was neither mandatorily negotiable nor legally arbitrable and dismissed the grievance. We reversed, concluding that PERC's abrupt change in adjudicative doctrine was action in conflict with its legislative mandate, which is the implementation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -39.

03/07/16 J.P. VS. GREGORY J. SMITH, ET AL.
A-0055-15T1

This case involves claims of sexual abuse brought by plaintiff J.P. against defendants Southern Regional High School and Southern Regional School Board (collectively, "the School"). In her complaint, filed in September 2014, plaintiff alleged that, in 2004, she was subjected to repeated sexual abuse by the School's assistant band director, defendant Gregory Smith. The acts of abuse allegedly occurred (1) at the School, where plaintiff was a student; (2) during two School-organized overnight trips; and (3) in plaintiff's home. Plaintiff sought damages pursuant to the Child Sexual Abuse Act (CSAA), N.J.S.A. 2A:61B-1, and under various common law theories of tort liability.

The CSAA's definition of passive sexual abuse limits the class of persons who are potentially liable to those who are "within the household." Distinguishing Hardwicke v. American Boychoir School, 188 N.J. 69 (2006), we conclude that the School, a public day school, is not liable as a passive abuser

under the CSAA because it does not fit within that statutory definition. Accordingly, we affirm the dismissal of plaintiff's CSAA claim against the School.

We further conclude that plaintiff's common law claims accrued no later than July 2013, when plaintiff's expert opined that she fully understood she had been abused and the consequences of that abuse. Hence, no Lopez hearing is necessary to determine the date the common law claims accrued. Those claims are in turn barred due to plaintiff's failure to comply with the notice provisions of the Tort Claims Act. We therefore reverse that portion of the order under review that reinstated the common law claims and ordered a Lopez hearing.

03/02/16 STATE OF NEW JERSEY VS. DANIEL MORDENTE
A-5838-13T1

The court affirms the denial of a motion to suppress the evidence of marijuana plants found in the basement of a home searched as part of the police protocol for locating missing persons. The sixty-five year old missing woman in this case suffered from dementia, and was reported by her son as having left the home at some point during the night prior to the search.

In his dissent, Judge Fuentes opines that the police emergency aid doctrine does not justify this search under the guidelines set forth in State v. Vargas, 213 N.J. 301 (2013), and prior case law.

03/01/16 STATE OF NEW JERSEY VS. ROBERT J. KOSCH, JR.
A-2099-14T3

Defendant was convicted of, among other things, theft of immovable property for having leased vacant residences by creating an appearance of ownership through the use of forged or fraudulent documents. The court rejected defendant's argument that N.J.S.A. 2C:20-3(b) only criminalizes theft of title to immovable property; an unlawful taking of a lesser interest may also support a prosecution based on this statute. The court reversed, however, because the jury was not clearly instructed about the nature of the interest allegedly taken. In addition, the court rejected the argument that N.J.S.A. 2C:21-17.3, which criminalizes trafficking in personal identifying information, is constitutionally overly broad or vague.

02/29/16 STATE OF NEW JERSEY VS. STEPHON G. WRIGHT

A-4309-13T2

Following the denial of defendant Stephon G. Wright's motions to exclude the testimony of the victim identifying Wright as the man who robbed him at gunpoint and to suppress statements Wright made to the police, he entered a conditional guilty plea pursuant to a negotiated agreement to first-degree armed robbery, N.J.S.A. 2C:15-1; and was sentenced to eight years in state prison subject to the periods of parole ineligibility and supervision required by the No Early Release Act, N.J.S.A. 2C:43-7.2. He appeals pursuant to Rule 3:9-3(f), contending the court erred in denying his motions and, in the alternative, that his sentence is excessive.

We find no error in the court's decision to admit the identification evidence under the test established in State v. Henderson, 208 N.J. 208 (2011), and thus reject defendant's arguments on that point. We also reject Wright's arguments regarding his sentence. We agree, however, that his statements to the police were the product of the equivalent of custodial interrogation without required Miranda warnings and should have been suppressed. Accordingly, we reverse the court's decision to admit the statements and remand for further proceedings.

02/26/16 STATE OF NEW JERSEY VS. A.S.-M.
A-4682-14T2

We held that a defendant terminated from the pre-trial intervention (PTI) program may be reinstated upon reconsideration. Such a reconsideration, which is not expressly precluded by N.J.S.A. 2C:43-12(g)(1) and Guideline 3(g) of Rule 3:28, is especially permissible when circumstances show the initial order terminating a defendant from PTI failed to adhere to the requirements of N.J.S.A. 2C:43-13(e), including the obligation to undertake a "conscientious judgment" to (1) adequately consider whether the participant willfully violated the PTI conditions; and (2) determine whether the defendant remains a viable candidate for PTI under the original or modified PTI terms.

02/26/16 STATE OF NEW JERSEY VS. HORACE BLAKE
A-5695-13T4

In this PCR appeal, defendant contends his plea counsel failed to provide effective assistance of counsel as outlined in Padilla and Gaitan. Although counsel and the court discussed immigration consequences at the plea hearing, defendant argues

counsel failed to convey the likelihood of removal with sufficient precision. Defendant claims counsel misled him to think he might resist deportation, because counsel did not say defendant faced "presumptively mandatory deportation" or "mandatory deportation."

We hold that an attorney need not use "magic words" found in Padilla or Gaitan to convey immigration consequences. Also, the judge's statements, including the "may result in your removal" language of the plea form, may not be imputed to counsel in the ineffectiveness determination. A PCR court must review the totality of the advice counsel has given to decide if an attorney has effectively informed his client of immigration consequences. Under these circumstances, we conclude counsel provided effective assistance, and affirm the denial of PCR.

02/25/16 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. K.M. I/M/O G.G.
A-3662-13T3

The biological mother of an infant born showing signs of withdrawal from opioid addiction appeals from the Family Part's finding that she neglected her child under N.J.S.A. 9:6-8.21(c)(4)(a). We affirm. Defendant was addicted to opioid-based pain medication and illicitly obtained the opioid analog Suboxone to treat her withdrawal symptoms during her pregnancy. She waited three days after she gave birth to disclose this to the neonatal staff monitoring the infant. This delayed the treatment that could have alleviated the child's suffering.

We hold defendant's conduct was grossly negligent under G.S. v. Dep't of Human Servs., 157 N.J. 161 (1999). Defendant neglected her infant son when she failed to disclose key medical information in a timely manner to the neonatal staff after the child was born. These facts are distinguishable from the approach endorsed by the Court in New Jersey Division of Child Protection & Permanency v. Y.N., 220 N.J. 165 (2014).

02/24/16 STATE OF NEW JERSEY VS. KEITH DRAKE
A-1514-14T4

The No Early Release Act (NERA) applies to a list of crimes including "subsection b. of N.J.S. 2C:14-2 and paragraph (1) of subsection c. of N.J.S. 2C:14-2, sexual assault." N.J.S.A. 2C:43-7.2(d)(8). Defendant argues that the Legislature's use of the word "and" means that NERA only applies to second-degree sexual assault by penetration using physical force and coercion

under N.J.S.A. 2C:14-2(c)(1) if a defendant is simultaneously sentenced for violating N.J.S.A. 2C:14-2(b), which covers sexual contact with a victim who is less than 13 years old and the actor is at least four years older than the victim. The Appellate Division rejects that argument, and finds that NERA applies to a conviction for either N.J.S.A. 2C:14-2(b) or N.J.S.A. 2C:14-2(c)(1).

02/23/16 IN THE MATTER OF REGISTRANT J.S.
A-3541-14T1

On the State's appeal, we interpret N.J.S.A. 2C:7-2(f), which allows termination from the registration requirements of the Registration and Community Notification Law, N.J.S.A. 2C:7-1 to -11, also known as Megan's Law, and the related requirements for Community Supervision for Life "upon proof that the person has not committed an offense within 15 years following conviction." The judge adopted petitioner's position he was "convicted" on January 14, 2000, the date he entered his guilty plea. The State disagreed and asserted petitioner was "convicted" on November 13, 2000, the date the judgment of conviction was imposed.

Following our review, we reverse and conclude the import of the statutory language requires, as a prerequisite for requesting termination from the registration requirements, an offender demonstrate a fifteen-year period of being offense-free and Megan's Law compliant, following the date the judgment of conviction is issued.

02/23/16 STATE OF NEW JERSEY VS. L.S.
A-2523-13T2

In this case, we construe the elements of N.J.S.A. 2C:28-4(b)(1), which at the time of trial, provided that a person commits a disorderly persons offense if he "[r]eports or causes to be reported to law enforcement authorities an offense of other incident within their concern knowing that it did not occur[.]" The legislature has since made the offense a fourth-degree crime. See L. 2015, c. 175 (eff. Jan. 11, 2016).

Defendant reported that she was the victim of a sexual assault committed by an unknown assailant on her college campus. During the investigation, she admitted supplying false details of the events, such as the location of the crime and the identity of the assailant. Neither the municipal court judge nor the Law Division judge, however, concluded that the sexual

assault had not occurred. Instead, based upon case law developed prior to enactment of our Criminal Code, the judge at the trial de novo concluded that the supplying of false details was sufficient to prove defendant's guilt beyond a reasonable doubt.

We reversed.

02/22/16 STATE OF NEW JERSEY VS. JOHN N. MAHONEY
A-5320-14T4

We granted leave to appeal from an order denying the State's motion to preclude two deliberating jurors from addressing the court at defendant's sentencing hearing. We reversed and remanded for sentencing without input from the jurors.

We held that a judge may not consider for sentencing purposes any comments from a deliberating juror to identify applicable aggravating or mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b). Consequently, deliberating jurors are precluded from participating at a defendant's sentencing proceeding. To allow juror participation would unnecessarily create a substantial risk of distracting the jurors from their primary purpose – serving as judges of the facts – and would indubitably undermine the sanctity of the jury's deliberative process in our system of jurisprudence.

02/22/16 NANCY E. LANDERS VS. PATRICK J. LANDERS
A-3931-14T3

In this matter, we clarify the application of the 2014 amendments to the alimony statute addressing the modification of alimony when an obligor retires. When an obligor files an application to terminate or modify alimony upon his or her retirement, the circumstances of the parties are examined under N.J.S.A. 2A:34-23(j). More specifically, subsection (j)(1), which places the burden of proof on the obligee to rebut the presumption to terminate alimony when an obligor reaches full retirement age as defined under the statute, is used for alimony awards entered after the effective date of the amended statute. On the other hand, subsection (j)(3), which requires an obligor to demonstrate by a preponderance of the evidence modification or termination of alimony is appropriate, governs review of final alimony awards established prior to the effective date of the statutory amendments.

02/19/16 ALEXANDER BARDIS, ET AL. VS. KITTY STINSON, ET AL.
A-3454-12T3
(NEWLY PUBLISHED OPINION FOR FEBRUARY 19, 2016)

Plaintiffs Alexander Bardis and Monica Bardis appeal from the January 25, 2013 Law Division order granting summary judgment in favor of defendants Kitty Stinson, Stinson Claims Services (collectively Stinson), and Cumberland Insurance Group (Cumberland) (collectively Defendants). The trial court found there was no coverage under plaintiffs' homeowner's insurance policy for the collapsed basement wall and other damages to their home allegedly caused by "hidden decay." The court also rejected plaintiffs' argument that "hidden defects" allegedly resulting from the faulty construction meant the same as "hidden decay," and were thereby covered losses under the policy. We find a question of fact regarding causation, and ultimately coverage, and therefore, reverse and remand.

Judge Sapp-Peterson respectfully dissents, reasoning there is no ambiguity in the terms of the commercial dwelling policy issued to plaintiffs.

02/09/16 NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY VS. K.F. AND R.G. AND D.M.I/M/O A.M. AND N.G.
A-0558-14T1

We reverse application of the burden-shifting paradigm found in In re D.T., 229 N.J. Super. 509 (App. Div. 1988), in an abuse and neglect case involving a twenty-five-day-old infant. The parents brought the child to the emergency room with a bruised lip and small bump on the side of the head which they claimed resulted from the baby falling off a bed. Throughout the investigation, neither parent wavered from the narrative that the mother took the infant into the bedroom and left him there sleeping. While in the living room, they heard the baby suddenly start to cry, the mother returned to the bedroom and found him on the floor. They immediately took the child for treatment. Since an infant that age cannot roll, that night medical personnel referred the matter to the Division of Child Protection and Permanency.

During the fact-finding hearing, the trial judge shifted the burden of persuasion to the father because the mother's explanation that she placed the child near the edge of the bed was unconvincing, and the father was in the home when the incident occurred. We conclude that merely finding one parent's

explanation insufficient should not result in shifting the burden to the other.

02/08/16 STATE OF NEW JERSEY IN THE INTEREST OF C.F.
A-2718-12T2

In 2012, C.F. was charged and tried as a juvenile for a felony murder committed in 1976. He was found guilty and given a ten-year sentence, the maximum permitted by a law enacted in 1983 and still in effect. The State appealed, arguing the judge should have applied the law in effect when the offense was committed — that repealed law permitted the imposition of an indeterminate life sentence.

The court affirmed, holding that the trial judge did not violate the savings statute, N.J.S.A. 1:1-15, which generally bars retroactive application of new laws, because the triggering date for application of the savings statute was the date the juvenile "incurred" a "penalty," not the date he "committed" the "offense." The juvenile here did not incur a penalty until found guilty in 2012; the trial judge properly applied the sentencing law on the books at that time and not the law discarded by the Legislature decades earlier.

02/01/16 U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, 2006-EQ1 VS. JOANN L. CURCIO, ET AL.
A-2649-13T4

After unsuccessful attempts at personal service, plaintiff served the complaint in foreclosure on defendant at the encumbered property by regular and certified mail. We rule that defendant's failure to challenge service earlier, in her opposition to the entry of a final judgment in default, bars a belated attempt to raise the issue in a motion to vacate default judgment. In any event, such service by mail was proper under Rule 4:4-3(a) because plaintiff adequately attempted personal service, and its certificate showed plaintiff first made diligent inquiry to determine if defendant still resided at the encumbered property. Plaintiff was not required to obtain a court order or file an affidavit before making service by mail. Rather, the certificate showing diligent inquiry and service must be filed within the time to answer the complaint. Because plaintiff served defendant within the State under Rule 4:4-3(a), plaintiff did not need to follow the rules governing mail service out of State, Rule 4:4-4(b)(1)(C), or mail service to

obtain in rem jurisdiction, Rule 4:4-5(a)(2), or meet Rule 4:4-5(c)'s requirements for affidavits under those rules.

01/29/16 IN THE MATTER OF THE ADOPTION OF A CHILD BY M.E.B. AND K.N.
A-3486-14T4

Here, an ex parte hearing was held to review defendant-parents' order to show cause that contested a plaintiff-grandparents' complaint seeking termination of parental rights and adoption, as well as the accompanying temporary order of custody. Defendants' asserted the complaint was flawed, specifically contending plaintiffs failed to demonstrate the child was "available for adoption" after having been "placed for adoption," as required by Rule 5:10-3. After considering the parents' testimony, the judge vacated the previously filed order for preliminary hearing, and sua sponte dismissed plaintiffs' complaint stating only her conclusion plaintiffs lacked standing.

We hold a plaintiff's complaint may not be dismissed in an ex parte proceeding initiated by a defendant; due process demands notice and an opportunity to be heard to defend the sufficiency of the complaint. Further, we reject as erroneous defendant's assertion that a filed adoption complaint may be dismissed by the court ex parte under Rule 5:10-4(b)(3).

01/28/16 STATE OF NEW JERSEY VS. L.D.
A-4008-14T1

On our leave granted, the State appeals from a January 22, 2015 order dismissing count two of a Grand Jury indictment, charging defendant L.D. with second-degree speculating or wagering on official action or information, N.J.S.A. 2C:30-3. The narrow question for consideration is whether the State presented evidence to establish defendant obtained and acted upon "information to which he has or has had access in an official capacity and which has not been made public," as proscribed by N.J.S.A. 2C:30-3. Although no New Jersey court has squarely addressed the meaning of "information . . . which has not been made public," N.J.S.A. 2C:30-3, the language used is not unique or ambiguous. We concluded if no evidence shows the identified information was relayed to the public official in confidence or the information was not publicly disclosed, an essential element of the statute is not satisfied. In this matter, the State's evidence failed to satisfy the elements of the charged offense.

01/27/16 STATE OF NEW JERSEY VS. KASON D. HOCKETT
A-2820-13T2

The trial judge excluded defendant's offer and use of evidence that would have challenged the credibility of the State's chief eyewitness to the alleged murder because the judge believed the evidence was obtained through questionable or unscrupulous means. The court reversed and remanded for a new trial, holding that how defendant acquired the evidence had no bearing on its admissibility and that its exclusion — and the limitation the ruling placed on cross-examination of the eyewitness — was clearly capable of producing an unjust result.

01/27/16 STATE OF NEW JERSEY VS. IRIS QUINTERO
A-2186-13T4

We affirm defendant's de novo conviction for refusal to submit to a breath test, N.J.S.A. 39:4-50.4a. Defendant argues that the Attorney General's current standard statement under N.J.S.A. 39:4-50.2(e) is fundamentally deficient for not specifying the mandatory minimum penalties for refusal. In State v. O'Driscoll, 215 N.J. 461, 479-480 (2013), the Supreme Court noted, but declined to address, the sufficiency of the standard statement.

We hold that the current standard statement satisfies the statutory mandate — that is, informing motorists and impelling compliance — by adequately informing drivers of the maximum potential license revocation and fine, and the possibility of ignition interlock, that they face for refusal. In so ruling, we note that adding other details, including the differing mandatory minimum and maximum penalties for first offenders, second offenders, and certain third offenders, may run the risk of submerging the most significant penalties in those details.

01/26/16 ANNETTE TROUPE VS. BURLINGTON COAT FACTORY WAREHOUSE CORPORATION
A-1687-14T4

Plaintiff, a customer of a retail clothing store, slipped and fell on a berry on the floor. Applying principles recently clarified in Prioleau v. Kentucky Fried Chicken, 223 N.J. 245 (2015), we affirm the trial court's grant of summary judgment dismissing plaintiff's personal injury action. We hold that the mode-of-operation rule does not apply because there was no clear nexus between the berry and the clothing store's self-service

component. Nor did plaintiff show any breach of duty by the store to its customer.

01/25/16 IN THE MATTER OF PAUL WILLIAMS, TOWNSHIP OF LAKEWOOD
A-0341-15T2

In this case of first impression in New Jersey, we considered the issue of whether an employer's order that an employee undergo a psychological examination to determine his continued fitness for duty was reasonably justified under the Americans with Disabilities Act (ADA), 42 U.S.C.A. §§ 12101-12213. The employer ordered the examination after receiving a letter from an anonymous source complaining of the employee's disruptive behavior. The employer failed to take any action to investigate the allegation and waited over eight months to require the evaluation. When the employee refused to undergo the examination, citing the protections provided under the ADA, the employer terminated him from employment. The Civil Service Commission upheld the termination.

After reviewing the applicable provisions of the ADA, together with the EEOC's regulations and interpretative Enforcement Guidance, we concluded that the termination was improper and provided guidance to employers on how these provisions should be applied in future cases.

01/25/16 STATE OF NEW JERSEY VS. VICTOR GONZALEZ
A-0768-13T2

The court reversed defendant's conviction for robbery and aggravated assault, concluding the jury instructions, which repeatedly used the ambiguous phrase "and/or" in guiding the jury as to the findings required, were clearly capable of producing an unjust result.

01/21/16 J.B. VS. NEW JERSEY STATE PAROLE BOARD/ L.A. VS. NEW JERSEY STATE PAROLE BOARD/ B.M. VS. NEW JERSEY STATE PAROLE BOARD/ W.M. VS. NEW JERSEY STATE PAROLE BOARD/ R.L. VS. NEW JERSEY STATE PAROLE BOARD
A-5435-10T2/A-1459-11T2/A-2138-11T3/A-3256-11T2/
A-1385-15T2

Appellants and intervenor Public Defender challenge the practices of the New Jersey State Parole Board in administering polygraph examinations periodically to released sex offenders who are subject to either parole supervision for life ("PSL") or its statutory predecessor, community supervision for life

("CSL"), N.J.S.A. 2C:43-6.4. The challengers argue that such polygraphs violate their rights under various provisions of the United States and New Jersey Constitutions. They also contend that the agency's use of polygraphs, which have been declared unreliable evidence in our courts of law, is unreasonable, arbitrary, and capricious.

Based upon the extensive record of factual and expert testimony in hearings conducted before the trial court pursuant to our referral under Rule 2:5-5(b), we reject appellants' categorical attempt to invalidate all polygraph testing conducted by the Parole Board. We find ample support in the record for the trial court's finding that such testing reasonably can assist parole officers and treatment professionals in making better-informed decisions as to supervision and treatment.

Our validation of polygraph testing in this discrete PSL/CSL context is subject to certain important provisos. Given persisting concerns about polygraph accuracy, we conclude that the Parole Board may not use machine-generated "technical" polygraph results in any evidential manner to support imposing sanctions or increased restrictions on the monitored individuals. That does not, however, preclude the evidential use of the substance of any admissions or other statements made by the offenders at a polygraph session.

We also hold that the Parole Board must enhance its regulations and practices to safeguard an offender's right to invoke his constitutional privilege against self-incrimination in responding to any questions posed before or during a polygraph examination session.

01/20/16 JOSEPH A. BERKOWITZ VS. SUSAN J. SOPER
A-5273-13T3

Defendant rear-ended plaintiff’s car while stopped at a traffic light. Plaintiff's damages were based on his account of the severity of his back pain and diagnostic tests that showed disc compression and bulges in the lumbar region of his spine. The jury awarded plaintiff $2,000,000 for pain and suffering. The trial court denied defendant's motions for a new trial and for remittitur.

We reverse. The trial judge committed reversible error when he denied defense counsel’s request to adjourn the trial without applying the standards codified in Rule 4:36-3(b).

Reversal is also warranted because plaintiff's counsel made material misrepresentations in his opening statements, in violation of an attorney's duty of candor established by our Supreme Court in Passaic Valley Sewerage Comm'rs v. Geo. M. Brewster & Son, Inc., 32 N.J. 595, 605 (1960). Finally, the judge also erred in denying defendant's motion for a new trial under Rule 4:49-1(a). The jury's award of compensatory damages shocked our collective judicial conscience, was not supported by the evidence, and constitutes a clear miscarriage of justice.

01/20/16 STATE OF NEW JERSEY VS. CECILIO DAVILA
A-6302-11T3

Defendant entered into a negotiated guilty plea, reserving the right to appeal a pre-trial motion relating only to a dismissed count of the indictment. The majority holds that a defendant's appeal of a pre-trial motion relating only to a dismissed count is moot. To afford this defendant every benefit of his plea agreement, the merits of his claim that insufficient evidence was presented to the grand jury are nevertheless addressed and his conviction affirmed.

Judge Gilson concurs with the majority, but disagrees with the mootness holding, reasoning that defendant properly reserved his right to appeal pursuant to Rule 3:9-3(f).

01/19/16 STATE OF NEW JERSEY VS. ERNEST JONES
A-5383-13T1

Defendant Ernest Jones was sentenced to community supervision for life (CSL) in 2000 following his conviction for second-degree sexual assault. After his release from prison in 2002, defendant was convicted eight times of violating the conditions of his CSL. Consequently, in 2012, the Parole Board subjected defendant to GPS monitoring as a condition of his CSL, pursuant to the Sex Offender Monitoring Act (SOMA), N.J.S.A. 30:4-123.89 to -123.95. SOMA was enacted effective August 6, 2007, and governs the continued monitoring of serious and violent sexual offenders.

Shortly thereafter, defendant purposely removed his tracking device. Following a jury trial, defendant was convicted of fourth-degree violation of CSL, N.J.S.A. 2C:43-6.4d. Defendant was not charged with third-degree offenses under statutes criminalizing violations of SOMA.

For the first time on appeal, defendant argues that the GPS monitoring program retroactively enhances the penal consequences of his existing CSL sentence and thereby violates the Ex Post Facto clauses of the Federal and New Jersey Constitutions. Distinguishing Riley v. New Jersey State Parole Board, 219 N.J. 270 (2014), we conclude that the GPS monitoring did not materially increase defendant's punishment, and that the Parole Board had the authority to impose it as a condition of his CSL sentence. We also find that defendant was afforded adequate notice and the opportunity to be heard before GPS monitoring was imposed. We therefore reject defendant's ex post facto and due process arguments and affirm his conviction.

01/19/16 STATE OF NEW JERSEY VS. REGINALD ANTHONY
A-2658-12T3

Rule 3:17(a) provides that, "[u]nless one of the exceptions set forth in paragraph (b) are present, all custodial interrogations conducted in a place of detention must be electronically recorded when the person being interrogated is charged with" certain listed crimes, including murder. However, subsection (b)(vi) excepts from the recordation requirement "a statement . . . given at a time when the accused is not a suspect for the crime to which that statement relates while the accused is being interrogated for a different crime that does not require recordation[.]"

In this case, defendant was arrested on an open motor vehicle warrant and interrogated regarding a homicide. The preliminary interrogation was not recorded, but, at some point, after concluding based on defendant's statements that he was a suspect in the homicide, investigators recorded his statement on video. The trial judge denied defendant's motion to suppress the statement and concluded there was no obligation to record the initial portion of the interrogation.

We construe the somewhat ambiguous provisions of the Rule and conclude that an interrogation must be recorded if, taking into account the totality of the circumstances then known to the interrogator, a reasonable police officer would have a reasonable basis to believe defendant was a "suspect" in the crime about which he was being questioned. In this case, we conclude that the trial judge properly determined that the investigators reasonably concluded that defendant was not a suspect when the interrogation began.

01/15/16 JOHN WELSH VS. BOARD OF TRUSTEES, POLICE AND FIREMEN'S

RETIREMENT SYSTEM
A-0191-14T4

We affirm the determination of the Board of Trustees of the New Jersey Police and Firemen's Retirement System denying petitioner's request to reactivate and merge his former PFRS pension account with his current PFRS account.

We distinguish our decisions in Sellers v. Board of Trustees of the Police & Firemen's Retirement System, 399 N.J. Super. 51 (App. Div. 2008), and Francois v. Board of Trustees, Public Employees' Retirement System, 415 N.J. Super. 335 (App. Div. 2010), where an equitable remedy was appropriate. Unlike those cases, the petitioner was unable to demonstrate detrimental reliance on the actions of either his employer or the Board.

01/15/16 IN ENFORCEMENT SUPERVISORS ASSOCIATIONTHE MATTER OF STATE OF NEW JERSEY AND NEW JERSEY LAW
A-3111-13T2

In this appeal, appellant challenged an interest arbitration salary award rendered pursuant to N.J.S.A. 34:13A-16.7(b), the "2% salary cap." We held that PERC did not err in affirming the arbitrator's acceptance of the State's scattergram and methodology to calculate the costs of the salary award to establish that it would not violate the 2% salary cap, and PERC's decision fully comported with Borough of New Milford and PBA Local 83, P.E.R.C. No. 2012-53, 38 N.J.P.E.R. ¶340, 2012 N.J. PERC LEXIS 18 at 13 (2012) and its progeny.

01/14/16 DIAL, INC., A NEW JERSEY NONPROFIT CORPORATION VS. CITY OF PASSAIC AND STATE OF NEW JERSEY
A-2106-13T2

Invoking various federal and state anti-discrimination laws, plaintiff, a disability rights organization, challenges the validity of a portion of a state statute, N.J.S.A. 39:4 197.7. The provision authorizes municipalities to charge a permit fee to disabled persons who request a personally assigned, exclusive parking space on the street in front of their residences.

On the same legal grounds, plaintiff challenges an ordinance adopted pursuant to N.J.S.A. 39:4-197.7 by the City of Passaic. The ordinance imposes an annual fee of $50 for a disabled person to obtain, upon request, a personally-assigned

handicapped parking spot in front of his or her residence. The City conceded, however, that a separate provision within the ordinance that had imposed a fee for obtaining "generic" (i.e., not personally-assigned) handicapped parking spaces on residential streets was invalid.

Plaintiff contends that fees imposed for personally assigned parking spaces represent an illegal surcharge that discriminates against the disabled. The trial court rejected this argument, finding that no federal or state anti-discrimination laws or regulations require public entities to provide such personally-assigned handicapped parking spaces on public streets.

We affirm the trial court's rejection of plaintiff's facial challenge to the fee provisions within the statute and ordinance. The City is not precluded from charging a reasonable fee for a parking benefit that is not required under the anti-discrimination laws and which is not otherwise made available to non-disabled persons.

01/14/16 STATE OF NEW JERSEY VS. F.W.
A-1635-13T3

We affirmed defendant's conviction for fourth-degree violating Community Supervision for Life (CSL), a provision that existed at the time defendant committed the sex offenses for which he was sentenced to CSL. Because defendant committed the sex offenses before the Sex Offender Monitoring Act (SOMA) was enacted, the Ex Post Facto Clause barred defendant's prosecution for third-degree SOMA crimes. We did not decide defendant's alternate argument that imposing GPS monitoring for life was so punitive as to violate the Ex Post Facto Clause in his case.

We noted that the CSL statute appears to authorize GPS monitoring as a means of enforcing CSL under appropriate circumstances, including where an offender violates the terms of his CSL. The Parole Board has adopted regulations which provide for GPS monitoring of CSL offenders under defined circumstances and limited time frames, and give offenders a due process right to challenge the monitoring requirement. Nothing in our opinion would preclude the Board from applying those regulations to defendant now that he has been released from prison.

01/13/16 YVIETTA MATISON VS. MARK LISNYANSKY
A-5656-13T2

The father's appeal of a default judgment awarding the mother palimony and custody of the couple's two children is dismissed based on the legal doctrine of fugitive disentitlement. A bench warrant for non-payment of child support remains outstanding against the father. He is not entitled to the protection of the court while he flaunts the court's authority from overseas.

01/12/16 LUIS PEREZ VS. ZAGAMI, LLC, ETC., AND NASH LAW FIRM, LLC, ET AL.
A-3268-14T2

This case of first impression presents the question of whether an affidavit of merit is required to support a malicious use of process claim when an advice of counsel affirmative defense is asserted in a SLAPP-back suit. The court concludes it is not.

After a defamation case (SLAPP suit) brought by defendants was dismissed, plaintiff filed a complaint for malicious use of process (SLAPP-back suit). Defendants asserted an advice of counsel affirmative defense in their responsive pleading. Plaintiff moved to amend his complaint to add the law firm and individual attorneys as defendants. The law firm then moved to dismiss the action contending that plaintiff was required to file an affidavit of merit to support his claims.

The court upholds the trial judge's denial of the motion to dismiss. The court finds that a malicious use of process action is an intentional tort requiring proof of malice and not a deviation from a standard of care and therefore no affidavit of merit is needed to support the claim.

01/12/16 VICTOR ROSARIO, ET AL. VS. MARCO CONSTRUCTION AND MANAGEMENT INC. A/K/A MARCO CONSTRUCTION, ET AL.
A-1562-14T3

Plaintiffs urged us to conclude that in tort cases, the commencement of the statute of limitations (SOL) under the Uniform Fraudulent Transfer Act, N.J.S.A. 25:2-20 to -34, runs from a different date than in commercial contract transaction cases. Plaintiffs admitted that in commercial contract transaction cases, the SOL runs from the date of the transfer. They maintained, however, that in tort cases, the SOL is triggered once they obtain a judgment. We declined to make that distinction, concluded that the SOL under N.J.S.A. 25:2-31(a)

expired, and affirmed an order denying their motion to file a fourth amended complaint.

01/07/16 GRANT W. MORGAN VS. RAYMOURS FURNITURE COMPANY, INC., ET AL.
A-2830-14T2

Defendants appealed the denial of their motion to compel arbitration of claims contained in plaintiff's complaint, which included age discrimination and wrongful termination claims, arguing that within its employee handbook could be found plaintiff's agreement to both arbitrate and waive his right to sue. Although those provisions were located within, the employer had prefaced the handbook with a disclaimer against any assumption that its provisions were "contractual in nature." The court affirmed the denial of arbitration, concluding the employer could not equitably have it both ways and that the presence of the employer's disclaimer precluded a determination that the employee had contracted away his right to sue.

12/30/15 SEOUNG OUK CHO, ET AL. VS. TRINITAS REGIONAL MEDICAL CENTER, ET AL.
A-5923-13T2

On the day before jury selection in this medical malpractice case, defendant filed a motion that was purportedly a "motion in limine," but which sought the dismissal of the complaint against him in its entirety, an admitted violation of the rule governing summary judgment motions.

The fact that this misuse of the motion in limine occurs sufficiently often to win our notice, despite our repeated cautions against such practice, leads us to conclude it necessary to state clearly what a motion in limine is not. It is not a summary judgment motion that happens to be filed on the eve of trial. When granting a motion will result in the dismissal of a plaintiff's case or the suppression of a defendant's defenses, the motion is subject to Rule 4:46, the rule that governs summary judgment motions. We hold the trial court's consideration of these motions and dismissal of the complaint against defendant deprived plaintiffs of their right to due process of law, reverse that dismissal and remand for restoration of the complaint to the trial calendar.

12/30/15 J-M MANUFACTURING COMPANY, INC. VS. PHILLIPS & COHEN, LLP, AND JOHN HENDRIX
A-5867-13T2

We affirm the Rule 4:6-2(e) dismissal of J-M's complaint based on application of the entire controversy doctrine. In 2006, defendant John Hendrix, plaintiff J-M's former employee, filed a federal qui tam action in California under the False Claims Act (FCA), 31 U.S.C.A. §§ 3729-3732, alleging J-M defrauded various governmental entities in the sale of PVC pipe. Hendrix gathered the information which formed the basis of the FCA action while represented by his attorneys, defendant Phillips & Cohen. The FCA protects legitimate whistleblowers from counterclaims meant to harass or indemnify a liable defendant by holding the counterclaims in abeyance until a defendant's liability is decided. If a defendant is found liable, the counterclaim is dismissed as the FCA prohibits a defendant from obtaining indemnification or offset for its wrongdoing. No counterclaim was filed by J-M.

While the qui tam action was pending final resolution, J-M sued in New Jersey seeking damages against Hendrix and his attorneys for Hendrix's investigatory activities, including the removal or duplication of confidential documents, customer information, and other claimed breaches of Hendrix's contractual commitments to J-M. We conclude that the entire controversy doctrine mandates dismissal of the New Jersey complaint because it was based on the same transaction or transactional circumstances as the California proceedings. We further conclude that in light of the purpose of the entire controversy doctrine and the policy aims of the FCA, the fact that the cases were being pursued simultaneously did not prevent application of the doctrine.

12/29/15 IN THE MATTER OF THE NEW JERSEY MARITIME PILOT & DOCKING PILOT COMMISSION'S DETERMINATION REGARDING EXAMINATION REQUIREMENT FOR LICENSURE OF NEW JERSEY DOCKING PILOTS
A-5176-13T1

In this appeal, appellants challenged the validity of a regulation adopted by the New Jersey Maritime Pilot & Docking Pilot Commission, which required docking pilot apprentices to pass an examination before licensure as a docking pilot. We rejected appellants' contentions that the regulation was inconsistent with the New Jersey Maritime Pilot and Docking Act, which had no such requirement, was contrary to legislative

intent, transgressed the Commissions enabling legislation, and lacked regulatory standards. We held that the regulation fell within the substantive authority vested in the Commission under the Act and was consistent with and achieved the express legislative policies and overall objectives underlying the Act. We also held that the docking pilot regulations as a whole provided sufficient regulatory standards to inform the public and docking pilot apprentices of the content of the examination.

12/28/15 STATE OF NEW JERSEY VS. MWANZA FITZPATRICK/
STATE OF NEW JERSEY VS. KEEYAN BRISTER
A-2477-14T3/ A-2478-14T3 (CONSOLIDATED)

These consolidated appeals present a question of first impression of what is the time within which the State can appeal the denial of a drug offender restraining order sought in connection with a sentence. At sentencing, the State requested drug offender restraining orders in accordance with N.J.S.A. 2C:35-5.7(h). The sentencing court denied those applications and the State appealed. We hold that the governing statute, N.J.S.A. 2C:35-5.7(k), requires such appeals to be filed within ten days of the date of sentencing. Because the State failed to file its notices of appeal in these matters within the ten-day period, we dismiss both appeals for lack of jurisdiction.

12/22/15 HACKENSACK RIVERKEEPER, INC. AND NY/NJ BAYKEEPER VS.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
A-1752-12T3

Two non-profit organizations challenged DEP's promulgation of its "public trust rights rule," N.J.A.C. 7:7-9.48, and "public access rule," N.J.A.C. 7:7-16.9, first adopted in 2012, re-codified in 2014, and re-adopted as re-codified in 2015. In Borough of Avalon v. New Jersey Department of Environmental Protection, 403 N.J. Super. 590 (App. Div. 2008), certif. denied, 199 N.J. 133 (2009), we concluded earlier versions of the rules were "not statutorily authorized and therefore invalid." Id. at 597. In this opinion, we conclude that the current regulations are not authorized by case law developed under the "public trust doctrine," or by CAFRA, and invalidate the regulations.

12/21/15 STATE OF NEW JERSEY VS. DAVID HUDSON
A-2943-14T4

In this interlocutory matter, we review an order disqualifying counsel and his firm from representing defendant,

a former Newark police officer. The State moves for disqualification alleging an actual conflict of interest resulted because one of the ten Newark police officers identified by the State as possible witnesses was counsel's former client. Additionally, the State alleges counsel had a current conflict based on an appearance of impropriety as he was an attorney for the Newark Fraternal Order of Police lodge, in which the Newark police officers are members.

We reverse the order and remand for further proceedings, concluding the record did not support the finding or existence of an actual conflict of interest. Further, the trial judge erred in grounding his determination of a potential conflict on the appearance of impropriety. We hold the appearance of impropriety standard may not be used as a basis to find a conflict of interest under RPC 1.7 or 1.9. In re Supreme Court Advisory Comm. on Prof'l Ethics Op. No. 697, 188 N.J. 549, 563 n.5, 568 (2006).

12/18/15 IN THE MATTER OF THE NEW JERSEY FIREMEN'S ASSOCIATION OBLIGATION TO PROVIDE RELIEF APPLICATIONS UNDER THE OPEN PUBLIC RECORDS ACT
JEFF CARTER VS. JOHN DOE
A-2810-13T2

In this OPRA and common law right of access case, the New Jersey State Firemen's Association secured a declaratory judgment that it correctly denied access to records of a relief award to an Association member. The records requestor appealed.

We conclude a records custodian may not bring a declaratory judgment action against a record requestor to enforce its right to withhold records, because OPRA does not provide the records custodian an independent right of action. As to both OPRA and the common law, declaratory relief was inappropriate in this case because the declaratory judgment action was essentially an effort to preempt an imminent claim by the records requestor; and allowing a declaratory judgment action solely with respect to the common law would unnecessarily fragment claims. As a substantive matter, we conclude that under the circumstances presented, both OPRA and the common law required disclosure of documents containing the applicant's name and the award amount.

Judge Messano concurs in the judgment, but declines to join in the section of the opinion that expresses the general principle that if there is no private right of action under a

particular statute, a party may not secure a declaration of its statutory rights under the Declaratory Judgment Act.

12/17/15 MARK LAGERKVIST VS. OFFICE OF THE GOVERNOR OF THE STATE OF NEW JERSEY AND JAVIER DIAZ, LEGAL SPECIALIST/RECORDS CUSTODIAN
A-0250-14T3

A journalist appeals a Law Division order denying him access to records of the Governor and unspecified members of his senior staff's third-party funded travel. He contends that the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, required the custodian of the records to have attempted to reach an agreement with him before denying the request, and that in any event, his inquiry, which covered a two-year period and did not specify dates, events, or participants other than the Governor himself, was not unclear or overbroad.

Having decided the inquiry exceeded OPRA's scope, we also declined to expand the effect of N.J.S.A. 47:1A 5(g), which requires the custodian to "attempt[] to reach a reasonable solution with the requestor" when a records request would "substantially disrupt agency operations." We found it does not include this scenario, when research and information, not records, are sought.

12/15/15 MICHAEL BANDLER VS. ROCCO MELILLO
A-1315-14T2

In this opinion, we address a situation where plaintiff's only argument on appeal is that the trial judge included dictum in his written opinion dismissing plaintiff's complaint. He asked that we redact the dictum from the judge's decision.

We concluded that a party may not parse through the opinion of a trial judge and take an appeal from words, sentences, or sections of the opinion that he or she finds objectionable when the party is not asserting the order or judgment was made in error. Because appeals are taken from actions of a trial court, and not from the trial court's rationale, much less dicta, we dismissed plaintiff's appeal for want of jurisdiction.

12/15/15 STATE OF NEW JERSEY VS. RODNEY J. MILES
A-2692-12T1

The defendant was arrested during an undercover drug operation. Defendant was charged on a warrant with possession

of a CDS with intent to distribute on or near school property. Defendant was also charged on a summons with a disorderly persons offense of possession of marijuana.

After defendant was indicted, he appeared pro se in municipal court via video conference after being incarcerated for a family matter. The disorderly persons drug offense, which was not joined with the indictable offense, was pending. Without the presence or participation of the State, but in accord with the existing "practice," the judge amended the offense to loitering and then took a plea from defendant. Predicated upon his plea, defendant sought to bar the prosecution of the indictable charge.

The court held that the subsequent prosecution and conviction on the indictable charge was barred under the "same evidence" test which is still recognized under state constitutional principles. The court reasoned that the "fundamental fairness" doctrine did not apply, notwithstanding the State's failure to join the disorderly offense with the indictable charges and defendant's reasonable expectation that his plea to the disorderly offense charge resolved all charges which arose out of his arrest.

12/11/15 IN THE MATTER OF THE ESTATE OF MICHAEL D. FISHER, II
A-0878-14T2

In this case of first impression, we interpret N.J.S.A. 3B:5-14.1(b)(1), which provides that a parent who is deemed to have "abandoned" his or her child "by willfully forsaking" the child is barred from sharing in the child's estate if the child dies intestate. Among other things, we conclude that the party seeking to apply the statute to bar recovery must demonstrate by a preponderance of the evidence that the parent, through his or her intentional conduct, manifested a settled purpose to permanently forego all parental duties and relinquish all parental claims to the child.

In our case, we determined that while the parent did not take the steps needed to resume parenting time with his child after a final restraining order prohibiting parenting time was issued near the time of the parties' divorce, he did not intend to permanently forego all parental duties and claims. Most notably, the parent continued to pay child support, and was in contact with the child over social media several months prior to the child's death.

12/08/15 IN THE MATTER OF BOARD OF FIRE COMMISSIONERS, FIRE DISTRICT NO. 1, MONROE TOWNSHIP AND MONROE TOWNSHIP PROFESSIONAL FIREFIGHTERS ASSOCIATION, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 3170
A-0765-14T2

Applying the dual motivation test in In re Township of Bridgewater, 95 N.J. 235 (1984), PERC determined that anti-union animus was a substantial or motivating factor for the Board's termination of firefighters. It also rejected as pretextual the Board's assertion that it fired the firefighters as a cost saving measure.

We affirmed PERC's determinations and held that after it reinstates an aggrieved employee, a public employer retains its rights under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -43, "to discharge a worker for a legitimate business reason, unrelated to the employee's union activities." Twp. of Bridgewater, supra, 95 N.J. at 237. The reinstatement of the employee, therefore, does not forever preclude the public employer from making legitimate and non-retaliatory employment decisions.

12/03/15 STATE OF NEW JERSEY VS. WALTER A. TORMASI
A-3830-13T4

Defendant, convicted of his mother's 1996 murder, filed in 2011 a post-conviction relief petition based on an incomplete affidavit purporting to contain his father's acknowledgement that he, not defendant, was responsible for the murder; this thirty-eight-page document was discovered by defendant's brother shortly after the father's death in 2010. The PCR judge conducted a testimonial hearing limited solely to the admissibility of the document; defendant's siblings testified they had seen the complete document, with a signed and notarized thirty-ninth page years earlier. The PCR judge concluded — without opining on the siblings' credibility — that the document was inadmissible because it was neither handwritten, signed, nor capable of being authenticated. The court reversed, holding that, even though incomplete, the document was admissible pursuant to N.J.R.E. 803(c)(25) and capable of being authenticated pursuant to N.J.R.E. 901. The court remanded for consideration of the witnesses' credibility and the other factors relevant to claims of newly-discovered evidence.

11/25/15 IN THE MATTER OF THE ADOPTION OF THE MONROE TOWNSHIP HOUSING ELEMENT AND FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES
A-0688-15T1

In the wake of In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (2015), and In re Failure of the Council on Affordable Housing To Adopt Trust Fund Commitment Regulations, 440 N.J. Super. 220 (App. Div. 2015), the trial court denied the motion of the Department of Community Affairs to intervene in this action, which was commenced by the Township of Monroe for a judgment declaring its housing plan presumptively valid. The DCA sought to file a counterclaim seeking an accounting and turnover of Monroe's affordable housing trust funds based on an allegation that Monroe failed "to spend or commit to spend" the funds with the period prescribed by law. The court granted leave to appeal and affirmed substantially for the reasons set forth in Judge Douglas K. Wolfson's published written opinion.

11/25/15 STATE OF NEW JERSEY V. JEAN A. SENE
A-2256-13T1

The question of first impression presented on this appeal is whether contact between defendant's vehicle and a victim is a necessary element of leaving the scene of an accident in violation of N.J.S.A. 2C:11-5.1. Defendant was driving a taxi when a pedestrian stepped into his lane of traffic. The pedestrian fell into the adjoining lane of traffic and was killed when she was run over by another vehicle. Defendant did not stop his taxi at the scene and left without speaking to anyone. A jury convicted him of leaving the scene of a fatal motor vehicle accident under N.J.S.A. 2C:11-5.1. On appeal, defendant contends that a necessary element to the crime is contact between his vehicle and the victim. We disagree and hold that such contact is not an element of this crime. We also hold that N.J.S.A. 2C:11-5.1 is not unconstitutionally vague. We, therefore, affirm defendant's second-degree criminal conviction.

Because the sentencing judge did not correctly identify the aggravating and mitigating factors, we remand for resentencing.

We also vacate a $5000 restitution award and remand for a hearing in accordance with N.J.S.A. 2C:44-2(b), (c).

11/24/15 LISA B. FREEDMAN AND JEFFREY C. ENDA VS. MURRAY N. SUFRIN AND ELLEN L. SUFRIN, ET AL.
A-4942-13T1

Plaintiffs commenced this quiet-title action in response to defendants' assertion that a restrictive covenant, which they imposed years earlier on a former owner of plaintiffs' property, required that "as many trees . . . as possible" be retained on plaintiffs' property. In applying the long-standing rule of strict construction of restrictive covenants of this nature, the court found numerous ambiguities in the language employed by the covenant's drafter that suggested, among other things, that the tree-removal restriction was likely intended to apply only during the construction of a residence on plaintiffs' property that occurred many years earlier. Because the strict-construction rule barred enforcement of the covenant in light of these ambiguities, the court affirmed the summary judgment entered in favor of plaintiffs.

11/19/15 ESTATE OF SANDRA BRUST AND PHILIP BRUST, ETC. VS. ACF INDUSTRIES, LLC, ET AL.
A-3431-13T4

Sandra Brust's father, John Noga, was employed by the Port Authority Transit Corporation (PATCO) from 1970 to 1977. His job duties included adjustment and repair of locomotive brakes, which allegedly released friable asbestos particles into the air. He also worked on approximately one car a year for resale after hours at home, removing and replacing automotive brake shoes in the process. That also allegedly released asbestos particles into the air. The family moved from New Jersey in 1977. Brust, who was born in 1963, came into contact with Noga's asbestos-laden clothes when he came home from work and when she helped her mother wash his laundry. She developed mesothelioma in 2010. Plaintiffs sued the locomotive and automotive defendants for personal injuries based on Brust's secondary exposure to asbestos.

We conclude that Brust's state law claims against the locomotive defendants regarding her secondary exposure to asbestos in the years Noga was a PATCO employee were preempted

by federal law, specifically, the Locomotive Inspection Act (LIA), 49 U.S.C.A. §§ 20701-20703. We further conclude that Brust's secondary exposure to asbestos resulting from her father's work on cars was not sufficiently frequent, regular, and proximate to withstand the automotive defendants' motions for summary judgment.

11/18/15 STATE OF NEW JERSEY IN THE INTEREST OF C.L.H.'S WEAPONS
A-0072-14T2

The State appeals from a final order of the Family Part denying its motion to have C.L.H. forfeit five illegal assault rifles, among other weapons, and his firearms purchaser identification card seized pursuant to the Prevention of Domestic Violence Act of 1991.

Following the entry of a temporary restraining order against C.L.H.'s wife arising out of a domestic violence complaint brought by her eighty-one-year-old father, the police seized the weapons from the couple's home pursuant to N.J.S.A. 2C:25-28j. While the forfeiture action was pending, C.L.H. advised the prosecutor he was transferring the confiscated weapons to a licensed firearms dealer pursuant to the 2013 gun amnesty law. The Family Part determined that because C.L.H. was not a defendant in the domestic violence case, and the guns were seized solely because of a restraining order against C.L.H.'s wife, not allowing him to take advantage of the gun amnesty law was "not equitable."

The panel reversed, concluding the court erred in determining the gun amnesty law applied because the weapons were in the possession of the prosecutor on the law's effective date. Instead it held that because the five assault firearms were seized pursuant to the Prevention of Domestic Violence Act and cannot be returned to C.L.H. under the Domestic Violence Forfeiture Statute as they are contraband under N.J.S.A. 2C:64-1a(1), C.L.H. is expressly disqualified from obtaining a handgun purchase permit or firearms purchaser identification card under the Gun Control Law, N.J.S.A. 2C:58-3c(8), and thus from regaining possession of his remaining firearms and his firearms purchaser identification card held by the prosecutor.

11/18/15 CASEY PIATT VS. POLICE AND FIREMEN'S RETIREMENT SYSTEM, NEW JERSEY DEPT. OF CORRECTIONS, AND STATE OF NEW JERSEY
A-5504-12T1

Under N.J.S.A. 43:16A-3 and N.J.A.C. 17:4-2.5(a), a person must be no more than thirty-five years old when becoming a member of the Police and Firemen's Retirement System (PFRS). Plaintiffs are State corrections officers who claim that age requirement cannot be applied to them. However, the long history of PFRS makes clear that the Legislature intends to restrict PFRS membership to persons meeting that age requirement at the time they become a "policeman" or "fireman." N.J.S.A. 43:16A-3. Although N.J.S.A. 43:16A-3 applies by its terms to political subdivisions, it also applies to State corrections officers because the Legislature has included them in the definition of "policeman." The age requirement serves the Legislature's goals of using PFRS's heightened benefits to encourage persons to become officers while young and fit, and to retire at a relatively early age. Moreover, the PFRS Board by regulation has properly applied this construction of the PFRS Act for more than forty years. N.J.A.C. 17:4-2.5(a).

11/13/15 SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION 22 VS. RAYMOND KAVANAGH VS. DAVID CASTNER, ET AL.
A-3646-13T1

In this appeal of a summary judgment that affirmed a union's imposition of fines against defendant, the court affirmed the judge's upholding of the union's finding of violations and also rejected defendant's contention that he was wrongfully denied counsel at the union disciplinary proceedings. The court, however, reversed the trial judge's determination that the fines were reasonable because the judge did not consider factors relevant and necessary to that determination. The case is remanded for the trial judge to employ relevant factors as set forth in this opinion in assessing the reasonableness of the fine.

11/12/15 IN THE MATTER OF THE IMPLEMENTATION OF L. 2012, C. 24, N.J.S.A. 48:3-87(t), ETC.
A-4565-13T3

Construing the Solar Act, N.J.S.A. 48:3-87, we affirmed a decision of the Board of Public Utilities that appellant's application could not be considered under N.J.S.A. 48:3-87(t), because it concerned a solar project to be sited on property which had been valued, assessed and taxed as farmland. Such applications are governed by N.J.S.A. 48:3-87(s). In addition, subsection (t) did not apply to the application because the

property was not a contaminated industrial or commercial site within the definition of a brownfield, as set forth in N.J.S.A. 48:3-51.

11/09/15 LISA IPPOLITO VS. TOBIA IPPOLITO
A-4840-13T1

In this matrimonial action, the family judge instituted a contempt proceeding, pursuant to Rule 1:10-2, against defendant upon the judge's receipt of a letter from plaintiff's counsel claiming that defendant violated an order which prohibited defendant from "threatening or intimidating any expert in this matter." Because the judge presided over the very contempt proceeding he initiated, failed to appoint counsel to prosecute the matter, and shifted the burden of persuasion to defendant, the court vacated the order under review and remanded the contempt proceeding to the assignment judge to designate another judge to preside over the contempt proceeding.

11/06/15 ROSALIE BACON VS. NEW JERSEY STATE DEPARTMENT OF EDUCATION
A-2452-14T1

Plaintiffs, a group of fifteen school districts, and parents and children from those districts, appeal from the Law Division's order dismissing their complaint for failure to state a claim upon which relief can be granted. Plaintiffs brought the complaint as a summary action "to enforce agency orders" under Rule 4:67-6(a)(2). Plaintiffs sought to compel defendant New Jersey State Department of Education to provide the funding provided by the School Funding Reform Act of 2008 (SFRA), along with facilities improvements and other measures.

In this opinion, we hold that plaintiffs could not bring their complaint as a summary action under Rule 4:67-6(a)(2) because the district-specific needs assessments which plaintiffs sought to enforce did not require the Department to fully fund the districts under the SFRA or otherwise provide for specific relief and, therefore, there were no orders capable of being enforced under the rule.

11/05/15 MICHAEL CONLEY, JR. AND KATIE M. MAURER VS. MONA GUERRERO, BRIAN KRAMINITZ, AND MICHELE TANZI
A-3796-13T2

We affirm the trial court's determination that a residential seller effectively terminated her sale agreement with plaintiffs during the agreement's three-day attorney review period, mandated by New Jersey State Bar Association v. New Jersey Association of Realtor Boards, 93 N.J. 470 (1983), mod., 94 N.J. 449 (1983). The agreement requires notice of disapproval by certified mail, telegram or personal delivery to the realtors; no delivery method is prescribed for notice to parties. The seller's attorney sent the disapproval letter by facsimile and email to the buyer's attorney and by email to the realtor, a dual agent. It was undisputed that the realtor, the buyer's attorney, and the buyers received actual notice of the disapproval. The realtor did not complain about the method of delivery. We conclude that, even assuming the buyers could enforce the realtor's right to notice by the prescribed delivery methods, substantial compliance sufficed, since the buyer did not dispute actual notice and enforcement of the method-of-delivery requirement would result in a disproportionate forfeiture of the seller's right to disapprove the contract.

11/02/15 O.Y.P.C. VS. J.C.P.
A-0334-14T1

We remanded this case to the trial court, based on the Supreme Court's recent decision in H.S.P. v. J.K., __ N.J. __ (2015), and we provided guidance for the trial court to follow on remand. The trial court had dismissed the application for lack of jurisdiction, because it concerned an immigrant who was over the age of eighteen. Following H.S.P., we held that in addressing an application filed as a predicate step in seeking special immigrant juvenile (SIJ) status for a person under age twenty-one, Family Part judges must make the required SIJ findings regardless of whether other relief can be granted. We also noted that the Family Court has some sources of jurisdiction over persons between the ages of eighteen and twenty-one, and the trial court's reliance on the definition of "juvenile" set forth in the Code of Juvenile Justice was misplaced.

10/30/15 STATE OF NEW JERSEY VS. RICKY ZUBER
A-4169-11T2

The United States Supreme Court has held that the Eighth Amendment forbids the sentence of life without parole for a juvenile offender who did not commit homicide. Graham v. Florida, 560 U.S. 48, 74, 130 S. Ct. 2011, 2030, 176 L. Ed. 2d 825, 845 (2010). We hold that Graham applies retroactively.

Assuming Graham can be extended to aggregate term-of-years sentences imposed consecutively for separate criminal episodes, defendant's aggregate sentence of fifty-five years before parole eligibility is not the "functional equivalent" of life without parole. His sentence gives him a meaningful and realistic opportunity for parole well within the predicted lifespan for a person of defendant's age.

This predicted lifespan should be determined using the CDC's National Vital Statistics Reports, "United States Life Tables," as used in Appendix I of our Court Rules. When a Graham claim is raised at a sentencing or PCR hearing, the court should use the most recent table available for a person of the defendant's age at the time of the hearing, without injecting disparities regarding race, sex, and ethnicity.

10/29/15 BOUND BROOK BOARD OF EDUCATION VS. CIRIPOMPA
A-2198-14T1

This appeal involves a teacher-tenure arbitration conducted pursuant to the Tenure Employees Hearing Law (TEHL), N.J.S.A. 18A:6-10 to -18.1. The Bound Brook Board of Education charged a high school teacher with two counts of unbecoming conduct and sought his dismissal. The arbitrator found that the Board proved the first charge, but not the second charge, and modified the penalty from dismissal to a 120-day suspension without pay. The Board then filed an action in the Chancery Division challenging the arbitrator's award. The Chancery Division judge vacated the award as procured by undue means pursuant to N.J.S.A. 2A:24-8(a) and remanded for a new arbitration hearing before a different arbitrator.

We reversed the vacatur of the arbitration award and reinstated the award. We also rejected the teacher's argument that the court lacked authority to order a rehearing before a different arbitrator beyond forty-five days of the first arbitration hearing date.

10/26/15 STEPHEN BARR VS. BISHOP ROSEN & CO., INC.
A-2502-14T2

Plaintiff was employed for seventeen years with defendant, a securities broker-dealer. In defining their relationship by written agreements in 1997 and 2009, plaintiff consented to arbitrate any dispute, but he did not expressly waive his right to sue in a judicial forum. In 2000, defendant advised

plaintiff by memorandum of a federal regulation that required broker-dealers to advise employees that, when agreeing to arbitrate, the employee surrenders the right to sue. The court held, in affirming the trial judge's denial of a motion to compel arbitration of plaintiff's complaint regarding compensation, that the 2000 memorandum could not inform or pour content into the arbitration agreements executed in 1997 and 2009, because the disclosure was not simultaneously made.

10/23/15 IN THE MATTER OF THE ADOPTION OF A CHILD BY J.E.V. AND D.G.V.
A-3238-13T3

The order terminating parental rights is reversed because the indigent mother, who placed her special-needs two-year-old daughter in foster care with a State-licensed private adoption agency, had a constitutional and statutory right to court-appointed counsel, beginning when the agency first determined to proceed with an adoption over the mother's objection. The agency decided on its own that the mother was an unfit parent and had abandoned her child. In the future, in similar circumstances, a private adoption agency must notify the court when advising an indigent parent of its intention to proceed with an adoption. The court must devise a procedure for assigning pro bono counsel to represent an indigent parent in this situation, prior to the filing of the adoption complaint.

10/22/15 JOHN M. GATELY AND PATTY SUE GATELY VS. HAMILTON MEMORIAL HOME, INC., D/B/A BRENNA-CELLINI FUNERAL HOME, AND MARIA E. BRENNA
A-4458-13T2

This appeal arises out of a no-cause jury verdict rejecting a father's claims that a funeral home wrongfully released the remains of his adult son for cremation without the father's authorization. The father contends that he told an individual employed by the home (known in the trade as an "intern") that he did not want his son to be cremated. He claims that the intern and funeral home ignored his protestations and instead improperly acceded to the contrary direction of the decedent's mother.

The main and novel legal issue presented to us is whether the qualified immunity from civil liability granted to funeral directors under N.J.S.A. 45:7-95 and N.J.S.A. 45:27-22(d) extends to interns who are employed by funeral homes pursuant to regulations issued by the State Board of Mortuary Science. The

immunity precludes liability unless the defendant had "reasonable notice" of untrue representations or a lack of authorization by the decedent's surviving next of kin.

We conclude that the statutory immunity does extend to such interns. The trial judge consequently did not err in charging the elements of the immunity to the jury.

10/21/15 CAROL JACOBY VS. ZONING BOARD OF ADJUSTMENT OF THE BOROUGH OF ENGLEWOOD CLIFFS, ET AL./ MARCIA DAVIS, ET AL. VS. BOARD OF ADJUSTMENT OF THE BOROUGH OF ENGLEWOOD CLIFFS, ET AL.
A-0007-13T1/A-0259-13T1/A-0404-13T1(CONSOLIDATED)

In this prerogative writs case involving the proposed construction of a building in close proximity to the historic Palisades Cliffs, we reversed an order upholding a height variance and remanded to the Zoning Board to conduct further proceedings consistent with the enhanced standards of N.J.S.A. 40:55D-70(d)(6), as articulated in Grasso v Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004). We held that in determining whether the height of the building is "consistent with the surrounding neighborhood," the Board was obligated to consider the impact that the structure would have on all reasonable visual vantage points. We otherwise affirmed the order upholding a bulk variance pursuant to N.J.S.A. 40:55D-70(c)(2).

10/20/15 DEPARTMENT OF CHILDREN AND FAMILY, INSTITUTIONAL ABUSE INVESTIGATION UNIT VS. D.B./ DEPARTMENT OF CHILDREN AND FAMILIES, INSTITUTIONAL ABUSE INVESTIGATION UNIT VS. A.G.
A-5434-12T3/A-0276-13T3 (CONSOLIDATED)
(NEWLY PUBLISHED OPINION FOR OCTOBER 20, 2015)

Applying established case law to N.J.A.C. 10:129-7.3, effective April 1, 2013, the Institutional Abuse Investigation Unit of the Department of Children and Families appropriately entered findings of "not established" after investigating allegations against two defendants — a teacher's aide for a special needs child and an elementary school art teacher. The reports, however, must be rewritten to clarify that no determination as to the validity of the witness's statements was made.

10/16/15 STANLEY E. WILLIAMS VS. BOROUGH OF CLAYTON
A-3191-14T2

We affirm the trial court's issuance of a declaratory order confirming that N.J.S.A. 40A:14-129 and -130 restrict the appointment of Police Chiefs in smaller cities (i.e., those not of the "first class" or "second class" in population and which are not civil service jurisdictions) to police officers who have served in those police departments for at least three years.

The issuance of declaratory relief in this case was appropriate because there was an actual controversy presented by the Borough's plan to include external candidates who lack such statutory eligibility in the testing and selection process for Police Chief.

We also note that the trial court's order does not require the Borough to appoint plaintiff, the sole statutorily-qualified officer who had applied for the position, as Chief. The Borough may choose to re-advertise the position or pursue other options not contrary to these statutes.

10/14/15 DEBORAH SPANGENBERG VS. DAVID KOLAKOWSKI
A-2655-14T1

Among the issues reviewed in this post-judgment matrimonial matter is defendant's argument that plaintiff's cohabitation requires termination of his alimony obligation, as required by newly enacted subsection (n), amending N.J.S.A. 2A:34-23. We rejected defendant's suggestion applying N.J.S.A. 2A:34-23(n), concluding the provisions are inapplicable to post-judgment orders finalized before the statute's effective date.

10/14/15 STATE OF NEW JERSEY VS. VANCLEVE ASHLEY
A-0403-12T2

When there has been a plea agreement and a defendant seeks to withdraw his guilty plea to multiple counts after providing an inadequate factual basis to support the plea, the remedy is to vacate the plea in its entirety, reinstate the dismissed charges and restore both the State and the defendant to their positions prior to the guilty plea. State v. Campfield, 213 N.J. 218, 232 (2013) (citing State v. Barboza, 115 N.J. 415, 420 (1989)). In this case, we consider whether the same remedy applies when the guilty plea, lacking an adequate factual basis for two of three charges, is entered without a plea offer from the prosecutor, but after the defendant has been advised by the trial court regarding the maximum sentence the judge was "inclined" to impose. Because it was intended that the maximum

ten-year sentence the judge was inclined to impose would globally address all charges and defendant provided an inadequate factual basis for the most serious offenses, it was error to deny his motion to vacate his plea and sentence him to the ten year term.

09/17/15 A.A. VS. CHRISTOPHER J. GRAMICCIONI, ESQ., CAREY J. HUFF, ESQ., AND OFFICE OF THE COUNTY PROSECUTOR OF MONMOUTH COUNTY, NEW JERSEY
A-0946-13T3

This appeal involves an anonymous requestor of records pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and alternatively under the common law right of access, who seeks to remain anonymous when litigating in the Superior Court. We conclude there is no statutory authorization, rule authorization or compelling reason permitting A.A. to prosecute this matter anonymously. We also conclude that the trial judge properly dismissed the complaint for failure to comply with Rule 4:67.

09/17/15 JACQUELINE SCHIAVO, ET AL. VS. MARINA DISTRICT DEVELOPMENT COMPANY, LLC, D/B/A BORGATA CASINO HOTEL & SPA
A-5983-12T4

Plaintiffs, twenty-one women who are present or former employees of defendant Marina District Development Company, LLC, operating as the Borgata Casino Hotel & Spa, appeal from the summary judgment dismissal of their complaint alleging violations of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, as informed by Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.A. §§ 2000e to 2000e-17. Plaintiffs allege defendant's adoption and application of personal appearance standards (the PAS) subjected them to illegal gender stereotyping, sexual harassment, disparate treatment, disparate impact, and as to some plaintiffs, resulted in adverse employment actions.

We examine the types of decimation claims and generally hold the PAS requirements were permitted by N.J.S.A. 10:5-12(p), a provision allowing an employer to establish reasonable employee appearance standards and the LAD does not encompass allegations of discrimination based on weight, appearance, or sex appeal.

The evidence does not support plaintiffs' claims of gender stereotyping, disparate treatment, and disparate impact. However, the record does present a material dispute of facts regarding defendant's application of the PAS weight standard to harass certain plaintiffs whose lack of compliance resulted from documented medical conditions and post-pregnancy, thus targeting them because of their gender. As to those claims, summary judgment is reversed and the matter remanded.