

AM-153-05T5

FILED
APPELLATE DIVISION

ORDER ON MOTION

DEC 01 2005

Jeffrey E. Thomas
ACTING CLERK

STATE OF NEW JERSEY,
Plaintiff-Appellant

v.

JANE H. CHUN, et. als.,
Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. AM-153-05T5

MOTION NO. M-1253-05

BEFORE PART: H

JUDGE(S): FALL
GRALL

MOTION FILED: NOVEMBER 4, 2005 BY: STATE OF NEW JERSEY

ANSWER(S) FILED: NOVEMBER 29, 2005 BY: EVAN M. LEVOW, ESQ.,
on behalf of defendants

SUBMITTED TO COURT: NOVEMBER 18, 2005

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS
1st DAY OF DECEMBER, 2005 HEREBY ORDERED AS FOLLOWS:

GRANTED	DENIED	OTHER
(X)	(X)	(X)

MOTION BY APPELLANT
FOR LEAVE TO APPEAL,
ACCELERATION, STAY,
SUMMARY REVERSAL,
& JUDICIAL NOTICE

As this matter involves a matter of significant public
importance, leave to appeal is granted.

The application by the State for summary reversal and for
judicial notice of State v. Foley, 370 N.J. Super. 341 (Law Div.
2004) as a basis for the requested summary reversal is DENIED, as
this court finds no legal basis in the record submitted to
require judicial notice of the decision in Foley in these cases.
See State v. Dorigiuzzi, 334 N.J. Super. 530, 533, 539 (App. Div.

2000) (declining to give binding effect to Law Division's decision in State v. Maida, 332 N.J. Super. 564, 574 (Law Div. 2000) (which had found that HGN testing was admissible as generally accepted in the relevant scientific community), and holding that absent a determination by an appellate court, "trial courts in this State are not at liberty to admit evidence of newly-devised scientific technology unless the general acceptance thereof is demonstrated by expert testimony, authoritative scientific and legal writings or judicial opinions[.]" and noting that it is "unusual for an appellate court to rely exclusively on judicial notice"); State v. Deloatch, 354 N.J. Super. 76, 78 (Law Div. 2002) (noting that "[a]bsent Appellate Division or Supreme Court approval of a new technology, trial courts are obliged to conduct a hearing to determine if the proposed test is one considered generally accepted in the relevant scientific community"). For a meaningful review, the record in the trial court must be adequately developed.

Having granted leave to appeal, we remand the matter to the Law Division for a hearing on an accelerated basis consistent with that ordered by the Law Division in its October 14, 2005 order, at which hearing the trial court may consider the relevant portions of the record in Foley, *supra*, subject to the right of cross-examination as determined by the trial court, consistent with the approach set forth in Romano v. Kimmelman, 96 N.J. 66, 71-72 (1984) (directing expansion of the record to include relevant portions of the record of evidential hearings in the trial court concerning scientific reliability of breathalyzer machines).

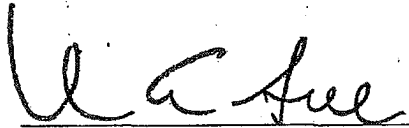
We also draw the trial court's attention to the inclusion of the Draeger Alcotest Models 6510, 7010, 7110, 7110 MKIII, 7100 MKIII-C, 7410, 7410 Plus on the National Highway Traffic Safety Administration's list of conforming products for evidential breath testing devices. See, e.g., 69 F.R. 42237 (July 14, 2004). See also Ala. Admin. Code r. Title 370-1-1-.02 (1998); Ill. Admin. Code § 510, Appendix B (2001); N.J.A.C. 13:51-3.5; N.Y. Comp. Codes R. & Regs., § 59.4(b)(6) (2000); 34 Pa.Bull. 4204 (Aug. 7, 2004).

We retain jurisdiction. Upon completion of the remand proceedings, an amended notice of appeal and cross-appeal may be filed, and the Clerk shall issue a scheduling order for consideration of this appeal on the plenary calendar on an accelerated basis.

We note that the State has not sought a stay of paragraph 12 of the order issued by the Law Division on October 14, 2005, which provides that "[a]ll litigation involving the 7110 now

pending in Middlesex County is hereby stayed pending the outcome of the consolidated hearing . . . as to the admissibility of breath tests using the 7110, except to the extent set forth" in that order. Accordingly, we do not address that matter.

FOR THE COURT:

A handwritten signature in cursive script, appearing to read "R. A. Fall", written over a horizontal line.

ROBERT A. FALL, J.A.D.

I hereby certify that the foregoing is a true copy of the original on file in my office.

A handwritten signature in cursive script, appearing to read "Jeffrey C. Thompson", written over a horizontal line.

ACTION CLERK OF THE APPELLATE DIVISION