DATE NAME OF CASE (DOCKET NUMBER)

08-30-12 SADIA SAJJAD VS. SAJJAD AHMAD CHEEMA
A-4929-10T3

We review a jurisdictional dispute, involving parties to an international marriage, as it relates to custody of the parties' child. Our review considers the application of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), N.J.S.A. 2A:34-53 to -95, and the doctrine of comity. Plaintiff's New Jersey complaint for divorce followed defendant's previously initiated actions seeking divorce and custody in Pakistan. We reversed the trial judge's dismissal of plaintiff's complaint concluding he should defer to the foreign jurisdiction's on-going proceedings without undertaking a jurisdictional analysis required by the UCCJEA. When determining a child's home state for the purposes of entering an order of custody in a jurisdictional dispute, we reinforced the necessity of conducting an evidentiary hearing to discern conflicts in factual assertions set forth in the parties' respective pleadings.

Further, the dismissal of litigation citing comity is error if no analysis is performed regarding whether the tribunal considering the first-filed matter had subject matter jurisdiction and whether the foreign judgment will not offend New Jersey's public policy.

08-28-12 STATE OF NEW JERSEY IN THE INTEREST OF J.J.
A-2357-11T2

This case required us to determine whether procedural due process rights must be accorded to an adjudicated juvenile prior to transfer from a juvenile facility operated by the Juvenile Justice Commission (JJC) to an adult correctional facility operated by the Department of Corrections (DOC) pursuant to the provisions of N.J.S.A. 52:17B-175(e). That statute permits such transfers of a juvenile "who has reached the age of 16 during confinement and whose continued presence in the juvenile facility threatens the public safety, the safety of juvenile offenders, or the ability of the commission to operate the program in the manner intended." The State takes the position that no due process rights of any kind, including notice and an opportunity to be heard, are required. We disagreed and reversed.

We concluded that the rehabilitative purposes of the juvenile justice system combined with the importance of the decision in terms of the availability of rehabilitative services to juveniles at issue require due process at least as extensive as that required for prison discipline. See Avant v. Clifford, 67 N.J. 496, 525 (1975). At a minimum, before a juvenile can be transferred to custody of the DOC, there must be written notice of the proposed transfer and the supporting factual basis, an impartial decision maker, an opportunity to be heard and to present opposition, some form of representation, and written findings of fact supporting a decision to proceed with the transfer.

08-23-12 IN THE MATTER OF THE LIQUIDATION OF INTEGRITY INSURANCE COMPANY/SEPCO CORPORATION
IN THE MATTER OF THE LIQUIDATION OF INTEGRITY INSURANCE COMPANY/MINE SAFETY APPLIANCES COMPANY
A-3850-10T1/ A-5191-10T1 (CONSOLIDATED)

In these appeals from the denial of toxic tort claims asserted against Integrity Insurance Company in Liquidation by Sepco Corporation and Mine Safety Appliances Company, we applied choice of law principles to the insurance contracts at issue and concluded that the trial court properly held that the law of New Jersey applied to the question of the allocation of coverage among excess insurance policies potentially covering the claims for which recovery was sought. We further affirmed the court's determination that, under New Jersey's pro rata approach to allocation, which takes account of the insurer's time on the risk and the degree of risk that was assumed, Integrity's excess policies were not triggered by these claims. We rejected the insureds' argument that an "all sums" allocation, recognized by the courts of California and Pennsylvania, which permits the insured to recover in full under any triggered policy that it chooses, was applicable, thereby triggering Integrity's coverage.

08-23-12 SHATINA D. SUAREZ VS. EASTERN INTERNATIONAL COLLEGE F/K/A MICROTECH TRAINING CENTER, INC.
A-2705-10T2

Plaintiff Shanita D. Suarez enrolled in the diagnostic medical ultrasound technician (DMUT) program of Micro Tech, a for-profit school, after an admissions representative told her that upon graduation, she would be able to perform ultrasounds

on patients in hospitals and clinics and earn $65,000 per year. In this lawsuit, alleging violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -195, and common law fraud, she contends that these representations were false. She alleges that, to obtain employment in this field, it was necessary to obtain American Registry for Diagnostic Medical Sonography certification. Because Micro Tech lacked necessary accreditation, she was not eligible upon graduation to take the examination administered by ARDMS to obtain the certification required by potential employers. She contends that, as a practical matter, she cannot either attain the credentials necessary to be eligible to take the ARDMS examination or obtain employment as an entry level sonographer.

Plaintiff now appeals from an order that granted summary judgment to defendant, dismissing her complaint. We conclude that, because a jury could find that defendant's statements were so misleading as to a material fact as to effectively deprive her of the ability to make an intelligent decision as a consumer, the statements were actionable under the CFA and summary judgment was inappropriate. We affirm the dismissal of her common law fraud claim.

Defendant cross-appeals, arguing that plaintiff's CFA claim should have been dismissed as barred under a "learned professional" exemption. We reject defendant's argument that the "learned professional" exemption applies.

08-23-12 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. C.H. AND M.B. IN THE MATTER OF J.B.
A-5642-09T2

The trial judge sua sponte dismissed a DYFS abuse or neglect complaint in the interim between the close of its presentation of evidence and the scheduled return date for defense witness testimony, without notice to the parties or an opportunity to be heard. The case arose out of the ingestion of about thirty prescription pills by a toddler while he was solely supervised by his mother C.H., resulting in a severe medication overdose, hospitalization, and, fortunately, full recovery.

DYFS and Law Guardian argue the sua sponte dismissal deprived them of due process rights, was based on an improper legal analysis, and was erroneous, as DYFS had established a prima facie case. We agree that the court erred procedurally and substantively with respect to C.H., and reverse and remand for continuation of the fact-finding hearing. We affirm

dismissal of the complaint against the father as it was entered following an oral motion and argument by counsel.

We also hold the court did not properly consider the policy considerations of G.S. v. Dept of Human Services and its progeny and focus on the risks posed, the harm to the child, and whether the harm could have been prevented by a cautionary act on C.H.'s part. The court also failed to apply the correct standard for involuntary dismissal under Rule 4:37-2(b), and improperly concluded that DYFS failed to present a prima facie case of abuse and neglect as to C.H.

08-13-12 STATE OF NEW JERSEY VS. KIRBY LENIHAN
A-4667-10T1

In this case of first impression, we determine that a violation of N.J.S.A. 39:3-76.2f, the "seat belt law," can serve as a predicate offense to support a conviction under N.J.S.A. 2C:40-18(b), which proscribes knowingly violating a law or failing to perform a duty imposed by law intended to protect the public health and safety and recklessly causing serious bodily injury. We reject defendant's claims that N.J.S.A. 2C:40-18(b) is unconstitutionally vague and that the seat belt law is not a law intended to protect the public health and safety as contemplated by this statute.

08-10-12 STATE OF NEW JERSEY VS. ANTHONY MONTGOMERY
A-2192-10T4

After the State's presentation of overwhelming evidence of defendant's guilt, including several videotapes and testimony from ten eyewitnesses, in the jury's presence defendant assaulted his attorney, attempted to escape from the courtroom, and struggled with sheriff's officers. We held that a defendant cannot engage in courtroom misconduct and then expect to be rewarded with a mistrial or new trial for his egregious behavior where the trial judge took appropriate cautionary measures to ensure a fair trial.

08-09-12 C.A., ET AL. VS. ERIC BENTOLILA, M.D., ET AL.
A-1261-11T1

In this case of first impression, we construe the confidentiality provisions within the Patient Safety Act (the "PSA"), N.J.S.A. 26:2H-12.23 to -12.25, and their interplay with other laws and procedures, including the qualified common-law privilege for self-critical analysis of medical peer review

documents set forth in Christy v. Salem, 366 N.J. Super. 535 (App. Div. 2004).

We hold that post-event investigatory and analytic documents exclusively created by a medical facility in compliance with the PSA and its associated regulations, and not created for some other statutory or licensure purpose, are absolutely privileged from disclosure under the PSA. The PSA's confidentiality provisions insulate such documents from outside access. They do so regardless of a plaintiff's asserted need for disclosure and regardless of whether the documents contain factual information in addition to subjective opinions.

However, if the specified procedures of the PSA and the related regulations have not been observed, or if the documents have been generated for additional non-PSA purposes, then the PSA's absolute privilege does not apply. Instead, other legal principles govern, such as those expressed in Christy, depending upon the kind of document involved.

08-09-12 MAUREEN CASTRIOTTA VS. BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY
A-5222-10T3

Petitioner, an elected member of the Roxbury Board of Education, was censured by her fellow Board members for conduct that allegedly undermined the orderly administration of the school district. On petitioner's appeal, the Acting Commissioner of Education found the Board did not have the power to review and sanction a fellow member. Despite finding in petitioner's favor, the Commissioner denied her request for indemnification, under N.J.S.A. 18A:12-20, for legal fees and costs she incurred in connection with defending herself against the censure resolution adopted by the Board. In reaching this conclusion, the Commissioner found the disciplinary proceeding initiated by the Board against petitioner was not a "legal proceeding" under N.J.S.A. 18A:12-20.

We reversed. When the Board decided that petitioner had committed an ethical infraction warranting the sanction of censure, it was performing an adjudicatory act and functioning in a quasi-judicial capacity. This process constituted a "legal proceeding" under N.J.S.A. 18A:12-20.

08-08-12 A.Z. VS. HIGHER EDUCATION STUDENT ASSISTANCE AUTHORITY
A-4827-10T1

The Higher Education Student Assistance Authority denied a Tuition Assistance Grant (TAG) to a United States citizen who lived in New Jersey since 1997, because her parents were not "legal New Jersey residents," specifically, her mother was an undocumented immigrant. We reverse, concluding: the TAG belongs to the dependent student, not the parent, so the statute barring grants to ineligible non-citizens does not apply; the dependent student here has satisfied the statutory residence requirement, based on her evident intent to make New Jersey her permanent home; the agency's 2005 regulation, which provides that a dependent child's legal residence is conclusively determined to be the same as the parent's domicile, was ultra vires, and reversed longstanding prior interpretation, implicitly approved by the Legislature through intervening enactments, that a dependent child's residence was only rebuttably presumed to be that of the parents. Here, such presumption was rebutted.

08-07-12 F.H.U. VS. A.C.U.
A-4668-10T4

We affirm the April 29, 2011 Family Part order directing A.C.U., to turn over his nine-year-old daughter, M.U., to her mother, F.H.U. This will allow the return of M.U. to her former home in Turkey. We hold that when petitioning for the return of a child under the Hague Convention on the Civil Aspects of International Child Abduction, although the Convention requires an analysis of a wrongfully removed child's "well-settled" status in his or her new country when the petition is filed more than one year after the removal, this required analysis is not a jurisdictional limitation. Therefore, based on the merits and other criteria set by the Hague Convention, a court may order the return of such child to the home country despite a finding that he or she is well-settled here.

08-06-12 TOWNSHIP OF JEFFERSON VS. DIRECTOR, DIVISION OF TAXATION, ET AL.
TOWNSHIP OF JEFFERSON VS. MORRIS COUNTY BOARD OF TAXATION
A-3013-10T3 / A-0613-11T3 (CONSOLIDATED)

In these tax appeals, the Township of Jefferson challenges the Table of Equalized Valuations promulgated by defendant, the Director, Division of Taxation, for the year 2010 and adopted by the Morris County Board of Taxation, arguing that the use for equalization purposes in that table of average true value in excess of equalized true value violated New Jersey statutes and the New Jersey Constitution's Uniformity Clause. Tax Court

Judge Bianco rejected the Township's arguments in decisions reported at 26 N.J. Tax 1 (Tax 2011) and 26 N.J. Tax 129 (Tax 2011). On appeal, we have affirmed the orders resulting from Judge Bianco's decisions, substantially for the reasons stated in his reported opinions.

08-01-12 STATE OF NEW JERSEY VS. EDWARD DUPREY
A-5469-10T4

This case required us to determine whether testimony given by the plaintiff or defendant during the trial of a domestic violence matter can be used for the purposes of cross-examination in a related criminal trial. We determined that a broad application of the language of N.J.S.A. 2C:25-29(a), which provides that "testimony given by the plaintiff or defendant in the domestic violence matter shall not be used in the simultaneous or subsequent criminal proceeding against the defendant," would impair a criminal defendant's rights under the Confrontation Clause of the Sixth Amendment. We further determined that the Legislature did not intend to permit a criminal defendant who testifies at his criminal trial to be immune from cross-examination based on prior inconsistent statements made under oath at the DV trial. We held that testimony from a DV trial can be used for the limited purpose of cross-examination in a manner consistent with the opinion, but cannot be used as affirmative evidence except as permitted by the statute.

08-01-12 AVIS BUDGET GROUP, INC., AND THE HERTZ CORPORATION VS CITY OF NEWARK, ET AL.
A-3801-10T4

We determine that Ordinance 6PFS-I 050510 (the Ordinance), enacted by defendant City of Newark, levying a tax on all car rental transactions within the City's Second and Third Industrial Zones, the latter of which encompasses parts of Newark Liberty International Airport is valid and does not violate the Anti-Head Tax Act, 49 U.S.C.A. § 40116, 42 U.S.C.A. § 1983 or the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3.

We conclude that the Ordinance is a valid exercise of municipal authority and affirm the decision of the Law Division.

07-27-12 LAURIE NEWMARK-SHORTINO, ET AL. VS. ANDREI BUNA, M.D.
A-0332-10T3

In this medical negligence action where the jury entered a no cause verdict in favor of defendant, we hold the trial court committed reversible error when it failed to submit to the jury plaintiffs' lack of informed consent theory, in addition to their claim of deviation from the standard of care (medical malpractice). Although the facts supporting each theory of liability were intertwined, the evidence before the jury was sufficient to submit both theories of liability for their verdict. We reversed and remanded for a new trial based solely upon a claim of lack of informed consent.

07-26-12 IN THE MATTER OF REGISTRANT P.B.
A-3549-11T1

This Megan's Law tiering appeal arises from a conviction for third-degree endangering the welfare of a child based on possession of child pornography on a home computer.

Applying the clear-and-convincing evidence standard, we held that the "penetration" element of the "degree of contact" criterion on the Registrant Risk Assessment Scale could not be satisfied merely by a showing of possession of pornographic materials depicting penetration "without any concomitant indication that [the registrant] played a role in the penetrative activity either as a participant or a producer."

We also held that a showing of the quantity of material alone, without any "proofs via expert witnesses or otherwise, . . . proffered to establish the length of time the material may have been on registrant's computer, or how much time would have been required to compile the quantity discovered," did not satisfy the proof requirements needed for any finding on the "duration of offensive behavior" criterion.

In dictum, we emphasized the prohibitions of Rule 1:36-3 regarding the citation or use of unpublished opinions; criticized reliance by the trial court on an argument made in another matter in reaching its findings and conclusions, without fully articulating the argument made for the benefit of opposing counsel and the record; and commented upon the duty of county prosecutors to administer Megan's Law uniformly from county to county.

07-26-12 IN THE MATTER OF THE CHALLENGE OF THE NEW JERSEY STATE FUNERAL DIRECTORS ASSOCIATION TO AMENDMENTS N.J.A.C.13:36-4.9(c); 13:36-5.17(c) AND 13:36-5.18(a)
A-0177-11T2

The New Jersey State Funeral Directors Association, Inc. (Association) challenges amendments to N.J.A.C. 13:36-4.9(c), 13:36-5.17(c) and 13:36-5.18(a), adopted by the Department of Law and Public Safety, Division of Consumer Affairs, State Board of Mortuary Science (Board). 43 N.J.R. 2360 (Sept. 6, 2011). The amendments were proposed to "clarify a registered mortuary's responsibilities with respect to the participation of unlicensed persons in the removal and preparation of bodies for disposition." 42 N.J.R. 1674 (Aug. 2, 2010). The Association challenges the amendments as exceeding the Board's regulatory authority, unconstitutionally vague and arbitrary and unreasonable in that they require registered morticians to do the impossible. Because the amendments have none of those defects, they are affirmed.

07-24-12 FORD MOTOR CREDIT COMPANY, LLC, D/B/A JAGUAR CREDIT VS. PATRICIA MENDOLA VS. JAGUAR LAND ROVER NORTH AMERICA, LLC, ET AL.
A-4675-10T1

The precise and limited issue we decide is whether a claimant must present expert testimony to support her causes of action against several defendants in the automotive business for damages sustained when the engine of her leased automobile seized. We hold that an expert witness is necessary to support the claims of negligent repair and inspection of the repair work, and to prove that the vehicle was defective. However, a prima facie claim of breach of express warranty does not require proof of a defect and, therefore, does not in the first instance require that the claimant have an expert witness to explain the reasons that the vehicle did not perform as warranted. We also hold that there is no cause of action for damages to the product itself, and consequential losses arising from such damages, under New Jersey's Product Liability Act, N.J.S.A. 2A:58C-1 to -11.

07-24-12 G.D.M. AND T.A.M., ET AL. VS. BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY
A-0953-10T1

This appeal presents a facial challenge to the validity of a regulation, promulgated by the Board of Education of the Ramapo Indian Hills Regional High School District, that seeks to control student conduct not only at school or during school-related functions and activities, but at all other times and

places. The regulation asserts this control by conditioning student participation in extracurricular activities on compliance with a specifically enumerated code of student conduct, without requiring a nexus between the alleged violation of law and school order or safety.

The then Acting Commissioner of Education invalidated the regulation because it exceeded the authority conferred upon local school boards to regulate student conduct. We affirm.

07-23-12 FELIX MANGUAL VS. LAZAR BEREZINSKY, ET AL. JUDITH MANGUAL AND FELIX MANGUAL VS. LAZAR BEREZINSKY, ET AL.
A-0979-11T4

We affirm summary judgment to plaintiffs on liability in this res ipsa case because plaintiffs' proofs, although circumstantial, were sufficient to make out a prima facie case of negligence, which defendant could not rebut as he had no explanation for his car having spun out of control and left the roadway, striking and injuring plaintiffs as they stood on the shoulder outside their disabled car. We reverse the summary judgment to plaintiffs on agency. Although the parties made cross-motions on a largely undisputed record, the inferences that could be drawn from the undisputed facts vary greatly thus requiring the agency issue to be determined by the jury.

07-23-12 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. M.G. IN THE MATTER OF THE GUARDIANSHIP OF A.R.G., A MINOR
A-4608-10T1

The defendant in this termination of parental rights case was represented by counsel and regularly appeared at scheduled hearings in the Title 9 and Title 30 proceedings. We consider whether it was proper to enter default against him based upon his sporadic failures to comply with orders that required him to submit to evaluations and obtain services and conclude that it was not. This error was compounded by the trial court's error in repeatedly referring to the standard applicable to a motion to vacate default judgment as the standard to be applied in a motion to vacate default. We further find it was an abuse of discretion to allow DYFS, over counsel's objection, to rely upon the written reports of psychological and bonding experts without producing them as witnesses. The flaws in the procedures here resulted in a failure to provide M.G. with the "fundamentally fair procedures" required before his parental rights could be

terminated. We therefore reverse the termination order and remand for a new trial.

07-23-12 VLAD Y. MAKUTOFF VS. BOARD OF REVIEW, ET AL.
A-3444-10T3

Non-immigrant professionals granted limited work authorization by the Department of Homeland Security (DHS) under the North American Free Trade Act are not eligible for unemployment benefits because they are not "available for work" within the meaning of N.J.S.A. 43:21-4(c). The authorization permits the professional to work only for an identified employer, and additional approval must be obtained from DHS before he or she can work for another. See 19 U.S.C.A. §§ 3301-3473; 8 U.S.C.A. § 1184(e)(2); 8 U.S.C.A. § 1101(a)(15)(H).

07-19-12 WAYNE PROPERTY HOLDINGS, L.L.C. VS. TOWNSHIP OF WAYNE, ET AL.
A-3478-10T4; A-3607-10T4 (CONSOLIDATED)

Plaintiff builders must exhaust their administrative remedies before the Council on Affordable Housing in connection with the consideration the Township's petition for substantive certification in the third round of the Council's process prior to proceeding in the Law Division on their Mount Laurel challenges to the ordinances that received second-round substantive certification.

07-17-12 DAMIAN CALIENDO, ETC. VS. JENNIFER VELEZ, ET AL
A-3773-10T3

A regulation which provides that incident reports prepared by the Division of Developmental Disabilities are not public records and may be released only by court order does not violate N.J.S.A. 30:4-24.3, which authorizes a developmentally disabled resident of a state institution to consent to the release of a confidential document that mentions the resident. Therefore, a developmentally disabled resident of a state institution or the resident's guardian is not entitled to unfettered access to a report prepared by a member of the institution's staff regarding an investigation of alleged neglect or abuse of the resident.

07-16-12 BOROUGH OF PAULSBORO VS. ESSEX CHEMICAL CORPORATION
A-5248-10T4

The Suydam rule that contaminated property acquired by eminent domain must be valued as if the contamination had been

remediated does not apply in an eminent domain action for acquisition of property containing a landfill that has been closed with the approval of the DEP, because the condemnee in that circumstance is not subject to any additional liability for remediation of the site.

07-11-12 ESTATE OF STANLEY KOSAKOWSKI VS. DIRECTOR, DIVISION OF TAXATION
A-4499-10T2

We affirm the opinion of the Tax Court, published at 26 N.J. Tax 21 (Tax Ct. 2011), as consonant with the application of the doctrine of manifest injustice as expressed by a plurality of the New Jersey Supreme Court in its decision in Oberhand v. Director, Division of Taxation, 193 N.J. 558 (2008).

07-11-12 KATHLEEN A. JACOBY VS. FRANK C. JACOBY
A-4278-10T2

Reviewing whether child support should be reduced when a child resides on campus while attending college, we confirm that although a child's attendance at college is a change in circumstance warranting review of the child support amount, there is no presumption that a child's required financial support lessens because he or she attends college.

When faced with the question of setting child support for college students living away from home, we reinforce the principle that resort to the Child Support Guidelines (Guidelines), R. 5:6A, to make such support calculations is error as a trial court's review requires assessment of all applicable facts and circumstances and the weighing factors set forth in N.J.S.A. 2A:34-23a.

07-06-12 DES CHAMPS LABORATORIES, INC. VS. ROBERT MARTIN COMMISSIONER, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
A-3235-10T4

We hold that the Department of Environmental Protection lacks the statutory authority under the Industrial Site Recovery Act of 1993 ("ISRA"), N.J.S.A. 13:1K-6 to -14, or under the Site Remediation Reform Act of 2009 ("SRRA"), N.J.S.A. 58:10C-1 to -29, to require an owner or operator of an industrial establishment, which stored or handled only small quantities of hazardous substances below certain levels prescribed in N.J.S.A. 13:1K-9.7, to certify to the best of its knowledge that the site

is free from contamination as a condition of obtaining a "de minimis quantity exemption" ("DQE") from ISRA requirements when seeking to transfer title or to cease operations at the site.

The imposition of such an obligation as a condition of DQE approval is inconsistent with ISRA and SRRA, statutes which are designed, among other things, to streamline the regulatory process and, as ISRA proclaims, "minimize governmental involvement in certain business transactions." N.J.S.A. 13:1K-7. The Department remains free, however, to seek remedial measures against the owner or operator under other environmental statutes and regulations that are not tied to the DQE approval process.

We further declare invalid similar provisions within N.J.A.C. 7:26-5.9, recently adopted in May 2012, requiring a "contamination free" certification by the applicant.

06-29-12 IN THE MATTER OF THE ESTATE OF RICHARD D. EHRLICH
A-5439-10T2

We upheld the admission to probate of a Will lacking the formality requirements of N.J.S.A. 3B:3-2 because under N.J.S.A. 3B:3-3, there is clear and convincing evidence that the decedent intended the document, which he drafted, reviewed and gave his assent to, to constitute his Last Will and which reflects his final testamentary wishes.

Judge Skillman dissents, believing that N.J.S.A. 3B:3-3 cannot reasonably be construed to authorize the admission to probate of an unexecuted Will.

06-28-12 LORI E. RITZ VS. MOTOR VEHICLE COMMISSION
A-2700-10T4

A violation of a South Carolina statute that imposes a "civil fine" of not more than $500 upon a person who is found in possession of drug paraphernalia does not constitute a "conviction . . . for a drug offense in [another] state" under N.J.S.A. 39:5-30.13, which mandates a six-month suspension of the offender's motor vehicle license, because a violation of such a civil regulatory statute is not a "drug offense," which is defined as a violation of a law of another state that is "substantially similar in nature to the 'Comprehensive Drug Reform Act of 1987.'"

06-27-12 MERRILL LYNCH, ET AL. VS. CANTONE RESEARCH, INC., ET AL.
A-2680-10T1; A-2682-10T1; A-2699-10T1(CONSOLIDATED)

In these consolidated appeals, we affirm four orders entered in the Law Division, enjoining defendants from pursuing their third-party claims against plaintiffs in two investor-initiated FINRA arbitrations, as well as denying defendants' cross-motions to compel plaintiffs to arbitration. We hold that the Law Division has the authority to determine "gateway" issues such as whether an arbitration agreement exists between the parties, and whether FINRA's Customer Code and Industry Code compel plaintiffs to arbitrate defendants' third-party claims for contribution and indemnification.

06-26-12 RICHARD GREENBERG VS. NEW JERSEY STATE POLICE TROOPER NICHOLAS J. PRYSZLAK, ET AL.
A-5925-10T1

Following a dispute between plaintiff and defendant Oil Station, Inc. (OSI), which had performed an oil change on plaintiff's vehicle and allegedly damaged the vehicle's battery in the process, plaintiff closed the bank account on which he had made the original payment of $129.44 and provided OSI a check for $31.02, the amount which plaintiff felt was due. OSI contacted the State Police, which conducted an investigation and ultimately concluded there was probable cause to believe plaintiff violated the bad check statute, N.J.S.A. 2C:21-5. Plaintiff was arrested in his home and held at a state police barracks until he agreed to pay the full amount OSI claimed was due.

Plaintiff commenced this action, alleging false arrest, false imprisonment, various constitutional violations, and other common law torts. The trial judge granted summary judgment in favor of the State Police and the other State defendants, as well as OSI and its representative. The court reversed, concluding that an arrest within the home was unlawful absent an arrest warrant or exigent circumstances -- both of which were absent -- or consent, which turned on disputed questions of fact that could not be decided at the summary judgment stage. The court also held there were genuine questions of material fact regarding the State defendants' claim that probable cause to arrest existed and on the defense of qualified immunity, thereby precluding summary judgment.

In addition, the court reversed the summary judgment entered in favor of OSI and its representative because that judgment was based on the trial judge's dismissal of the claims against the State defendants. The court also found there was evidence to support plaintiff's theory that OSI and its representative conspired with the State defendants to falsely arrest and imprison plaintiff because, among other things, OSI had previously enlisted the aid of the State Police in the collection of OSI's unpaid bills.

06-26-12 STATE OF NEW JERSEY VS. DIANA M. PALMA
A-3473-10T3

On appeal from a trial de novo in the Law Division, we reverse and remand for resentencing consistent with the principles established in State v. Moran, 202 N.J. 311 (2010). We hold that the imposition of a custodial sentence for careless driving, N.J.S.A. 39:4-97, requires a finding of aggravating circumstances evincing as "a matter of degree" more than mere carelessness, and that the tragic death of the victim, resulting from a motor vehicle violation, is not dispositive of whether a custodial sentence is appropriate under the circumstances.

06-25-12 JEREMY S. PITCOCK VS. KASOWITZ, BENSON, TORRES, & FRIEDMAN, L.L.P.
A-5036-10T2

Under the "most significant relationship" test that now controls the resolution of choice-of-law questions in tort actions, plaintiff's malicious use of process claim based on a lawsuit filed against him in New York arising out of the termination of his partnership in a New York law firm is barred by New York's one-year limitations period applicable to such actions.

06-25-12 ASDAL BUILDERS, LLC, ET AL. VS. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.
A-2392-10T1

We published that portion of our lengthy opinion reviewing the final decision of the Commissioner of the Department of Environmental Protection (DEP), regarding the renovation and construction of structures located in a floodway, which addressed penalty assessments imposed pursuant to the DEP's authority designated in the Environmental Enforcement Enhancement Act (EEEA), L. 2007, c. 246. The enactment of the

EEEA eased the penalty assessment procedure by granting the DEP direct authority to impose assessments rather than pursue an injunction and penalties through an action filed in Superior Court. N.J.S.A. 58:16A-63(a) (2004), amended by L. 2007, c. 246 (Jan 4, 2008).

We reversed and vacated the EEEA assessments, finding they applied to alleged violations that pre-existed the statute's adoption, which were being challenged on appeal, and could not be considered "on-going."

06-22-12 IN THE MATTER OF THE BOARD'S MAIN EXTENSION RULES N.J.A.C. 14:3-8.1 ET SEQ.
A-1626-10T2; A-1640-10T2; A-2026-10T2; A-2227-10T2(CONSOLIDATED)

In this appeal, we addressed the question of whether, and to what extent, our 2009 opinion in In re Centex Homes, LLC, 411 N.J. Super. 244 (App. Div. 2009) should have retroactive effect. In Centex, we invalidated as ultra vires the 2005 Board of Public Utilities (BPU) regulations known as the Main Extension Rules, N.J.A.C. 14:3-8.1 to -8.13, deeming the Extension Rules an "extreme departure" from the procedures that had been extant for nearly a century.

Despite our sweeping invalidation of the Extension Rules, BPU chose to afford our Centex decision only pipeline retroactivity, confining the benefit of Centex to only eighteen developers, and denying the benefit of Centex to hundreds of others.

In the present appeals, which we consolidated for purposes of disposition, we conclude that because our opinion in Centex did not announce a new rule of law, but instead accomplished the reinstatement of a well-accepted and well-understood century-long procedure, the pipeline retroactivity ordered by BPU was error. We held that complete retroactivity of Centex was required.

06-21-12 IN THE MATTER OF THE EXPUNGEMENT PETITION OF J.B.
A-1564-11T2

In this appeal from the denial of a petition to expunge juvenile adjudications and an adult conviction, we construe the 1980 statute permitting expungement of juvenile adjudications. L. 1980, c. 163, codified at N.J.S.A. 2C:52-4.1. We conclude the trial court misinterpreted the unnumbered paragraph in

N.J.S.A. 2C:52-4.1(a), "For purposes of expungement, any act which resulted in a juvenile being adjudged a delinquent shall be classified as if that act had been committed by an adult." In view of the legislative history of the 1980 statute, and canons of statutory construction, we construe the quoted sentence to apply only to applications to expunge juvenile adjudications under N.J.S.A. 2C:52-4.1(a). The 1980 law was intended to allow expungement of juvenile adjudications, which was not otherwise permitted; there was no evidence the Legislature intended to make expungement of adult convictions more difficult by treating juvenile adjudications as if they were adult convictions.

Applying our reading of the statute, petitioner was entitled to expungement of his entire record of multiple juvenile adjudications under N.J.S.A. 2C:52-4.1(b). Also, although the court mistakenly applied the quoted sentence to render petitioner's juvenile adjudications equivalent to adult convictions, the court correctly denied the petitioner to expunge the adult conviction because it was filed less than ten years after completion of the sentence, N.J.S.A. 2C:52-2(a), and petitioner failed to establish that expungement after just five years was "in the public interest," N.J.S.A. 2C:52-2(a)(2).

06-21-12 IN THE MATTER OF THE CIVIL COMMITMENT OF D.Y.
SVP-491-08
A-4296-09T2

We hold there is no constitutional right to self-representation at a commitment hearing, held pursuant to the Sexually Violent Predator Act, N.J.S.A. 30:4-27.24 to -27.38, under either the Sixth Amendment or Due Process Clause of the Fourteenth Amendment.

06-21-12 J.E.V. VS. K.V.
A-2933-09T2

In this appeal, we reaffirm established principles governing the award of limited duration alimony, which consider the length of the marriage, the period of economic dependency during the marriage, and the skills and education necessary to return to the workforce rather than the marital lifestyle and the ability to replicate the marital lifestyle at the end of the chosen term. Once the trial judge found that the mental illness

affecting the supported spouse would not interfere with her ability to obtain and sustain employment, we affirmed a ten-year limited duration alimony award.

06-20-12 IN THE MATTER OF THE PETITION OF RICHARD G. MURPHY, II, FOR MANDATORY RELIEF FOR PUBLIC SERVICE ELECTRIC AND GAS COMPANY'S OVERCOLLECTION OF "STRANDED COST" SURCHARGES PURSUANT TO N.J.S.A. 48:3-61
A-4758-10T2

The Electric Discount and Energy Competition Act (EDECA), N.J.S.A. 48:3-49 to -98.4, allows an electric utility company to recover certain "stranded costs" by imposing market transition charges (MTC) and transition bond charges (TBC) upon its customers. While EDECA allows the Board of Public Utilities to periodically review the amount of the MTC the company has collected, it does not require the Board to reconsider its prior order fixing the amount of the company's "stranded costs." Furthermore, EDECA precludes the Board from re-evaluating the amount of the "stranded costs" the company may recover through the TBC.

06-18-12 N.G. VS. J.P.
A-3247-10T3

In this appeal from the issuance of a final restraining order (FRO) under the Prevention of Domestic Violence Act, we affirmed the exercise of jurisdiction even though the parties, who are adult siblings, have not resided together since 1960, when they both were children. We agreed with the judge's determination that the harassment of plaintiff by defendant over the intervening decades -- although sporadic -- conferred jurisdiction on the Family Part to issue the FRO, in light of the fact that the present incidents arose directly from the parties' acrimonious family relationship and their status as former household members.

06-18-12 JOHN FILGUEIRAS VS. NEWARK PUBLIC SCHOOLS, ET AL.
A-0241-10T1

Plaintiff was an non-tenured school teacher who was terminated pursuant to the employment contract that permitted the school district to terminate plaintiff upon thirty days' written notice. Plaintiff filed a complaint alleging, among other things, a violation of the Civil Rights Act (the CRA), N.J.S.A. 10:6-1 to -2, in particular his substantive due process rights. Defendants' motion for involuntary dismissal at the

conclusion of plaintiff's case was denied, and the jury ultimately found in his favor. Counsel fees were also awarded.

We concluded that plaintiff's CRA claim should have been dismissed at the end of his case because it was insufficient as a matter of law. As a non-tenured at-will teacher, plaintiff had no cognizable claim of a property right entitled to substantive due process protection. Plaintiff's belated attempt to characterize the claim as a liberty interest -- to be free from the "promulgation of falsehoods" harmful to his reputation -- was similarly not entitled to substantive due process protection.

06-18-12 STATE OF NEW JERSEY VS. THOMAS NEVIUS
A-5438-07T4

At issue is the admissibility under N.J.R.E. 803(c)(25) (declarations against interest) of an out-of-court statement by a defendant's non-testifying confederate that supposedly implicated the declarant in a felony murder and exculpated defendant by naming another as the co-perpetrator of the crime.

We upheld the trial court's exclusion of the statement, finding no abuse of discretion in the evidentiary ruling or due process violation. We concluded that the so-called inculpatory portion was actually self-serving and unreliable as it tended to dilute or excuse the declarant's criminal culpability by placing the blame on another. But even if considered self-incriminating, the so-called exculpatory portion of the statement neither strengthened nor bolstered the inculpatory effect of the declarant's exposure to criminal liability to allow it to be admissible.

06-13-12 S.J. VS. DIVISION OF MEDICAL ASSISTANCE, ET AL.
R.H. VS. JENNIFER VELEZ, ETC.
C.B. VS. JENNIFER VELEZ, ETC.
A-5714-10T1; A-5803-10T2; A-5804-10T1 (CONSOLIDATED)

In these consolidated administrative appeals that involve publicly-funded medical assistance programs, we affirm decisions of the Director of the Division of Medical Assistance and Health Services. Specifically, we uphold the Director's determinations to deny appellants' applications to continue to receive healthcare benefits after becoming ineligible due to increased incomes.

06-08-12 STATE OF NEW JERSEY, BY THE COMMISSIONER OF TRANSPORTAION VS. MARLTON PLAZA ASSOCIATES
A-2164-10T4

As to the scope of damages awardable to condemnees at a just compensation trial where a highway improvement project involves both a modification of highway access and a condemnation, we held that a claim for damages arising from the internal effects of the access modification, (i.e., diminution in value due to impacts caused by poor vehicle maneuverability), which the property owners consented to and left them with reasonable alternate access, may not be appropriately considered in the condemnation trial concerning the State's acquisition phase.

06-08-12 STATE OF NEW JERSEY VS. PATRICK DEFRANCO
A-2054-10T4

We held that a defendant school teacher, who had previously sexually assaulted a student, did not have a reasonable expectation of privacy in his cell phone number when, at an earlier time, he had given his prior number to the student, did not seek to hide the new number from him, and had disclosed the number to the school for inclusion in its Staff Directory and to multiple parents and students in connection with a school trip that defendant was chaperoning. We found further that the school's Resource Officer, a policeman functioning in that dual capacity, who was aware of the student's allegations of sexual assault, acted reasonably in requesting the number from the secretary to the school's principal, and that the school acted reasonably in disclosing the number to the officer. As a consequence, we affirmed the trial court's decision to deny defendant's motion to suppress the transcript of a telephone call between him and the student that was intercepted by the police as a means for corroborating the student's claim of sexual assault while a juvenile.

06-06-12 S.K. VS. J.H.
A-1358-11T2

Plaintiff brought this suit pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, as a result of being atrociously assaulted by defendant, who, along with plaintiff, was on a trip to Israel with approximately forty others. In seeking to prove the existence of a "dating relationship," plaintiff was able to show only that, on the evening of the assault, she and defendant sat together, danced

together, and were together for a few hours at the bar. The trial court found a "dating relationship" and entered a final restraining order.

In considering defendant's appeal, the court deferred to the trial judge's finding that the parties' interactions constituted a "date" but rejected the argument that this one date constituted the "dating relationship" required by the Act. Although the Legislature did not expressly define what it meant by a "dating relationship," the court found from the majority of those other states that have defined the term that a "dating relationship" is a romantic social relationship, which is further defined by its frequency and duration but which excludes casual or ordinary fraternization between two individuals in a business or social context. As a result of this generally accepted meaning of "dating relationship," the court held that a single date was insufficient and reversed.

06-04-12 STATE OF NEW JERSEY VS. RENARD JOSEPH
A-5651-09T1

In this appeal of a defendant's triple armed robbery convictions where identification was a principal issue, we held that despite the lack of expert testimony, a proper foundation was laid for the computer-based photo retrieval system used to obtain the three victims' out-of-court identifications and that such a procedure, akin to a mug shot book, was not invalidated by police failure to record and retain the photographs viewed by the witnesses.

06-01-12 HOUSE OF FIRE CHRISTIAN CHURCH VS. ZONING BOARD OF ADJUSTMENT OF THE CITY OF CLIFTON, ET AL.
A-6128-10T1

We dismiss the appeal because the order appealed from is interlocutory, the trial court improvidently certified the order as final, and the unresolved issues are best fully addressed in the Law Division before appellate review is undertaken. In balancing the needs of the individual litigants against the firm judicial policy of avoiding piecemeal litigation, we conclude that the public interest is best served by the matter returning to the Law Division for a complete and final disposition of all issues as to all parties.

06-01-12 IN RE PELVIC MESH/GYNECARE LITIGATION
A-5685-10T4

The trial court exceeded its discretion in this multi-plaintiff, jointly case-managed litigation by ordering that defendants were barred from retaining as an expert witness or consulting with any physician who has at any time treated one or more of the several hundred plaintiffs. The "litigation interests" of a current or past patient are not synonymous with the "medical interests" of patients, which physicians are ethically bound to pursue and support. Defendants' proposed protocol and protective order would address any potential issue of physician-patient privilege, which was essentially waived in this litigation.

Judge Sabatino's concurrence would reverse the trial court's order on the ground that the disqualification provisions are overbroad and unduly burdensome on the defense, particularly in light of the number of potential defense experts that were or will be disqualified.

05-31-12 CATHERINE ZEHL VS. CITY OF ELIZABETH BOARD OF EDUCATION, ET AL.
A-1296-11T3

This interlocutory appeal, where we review the propriety of the appointment of a discovery master based on extraordinary circumstances under Rule 4:41-1, requires us to reconcile and harmonize two significant policies: 1) the continuing need for and use of available tools and procedures to ensure that litigation is conducted in an orderly and efficient manner to achieve a just result; and 2) the recognition and safeguarding of unfettered judicial access for litigants prosecuting remedial actions brought pursuant to the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, and the New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8.

While these two policies generally partner well, where the posture of the litigation warrants the use of a discovery master, these policies may conflict. We conclude that in actions brought pursuant to the LAD and CEPA, in finding extraordinary circumstances as grounds for appointing a discovery master, the trial judge must consider the remedial nature of the LAD and CEPA litigation as well as the ability of litigants to absorb the costs of such relief. The judge must consider that the appointment of a discovery master in fee-shifting remedial cases, which by their very nature oftentimes involve litigants with limited resources, may impose a cost burden on litigants that creates a de facto bar to their access

to the justice system. The trial judge failed to consider these factors here. We reverse and remand.

05-31-12 MANAHAWKIN CONVALESCENT VS. FRANCES O'NEILL AND FRANCES O'NEILL, ETC., VS. BROADWAY HEALTH CARE MANAGEMENT, LLC, ET AL.
A-0841-11T4

The complaint captioned Manahawkin Convalescent v. Frances O'Neill was dismissed. This appeal pertains to the third-party action filed by Frances O'Neill, in her capacity as Executrix of the Estate of Elise Hopkins v. Broadway Health Care Management, LLC, et al.

The issue presented in this appeal is whether the Rehabilitation and Nursing Home Admission Agreement required to be signed prior to plaintiff's mother Elise Hopkins' admission to Manahawkin Convalescent Center violated the Nursing Home Act, N.J.S.A. 30:13-1 to -17, the Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 to -18, and the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. The narrower issue is whether the nursing home's lawsuit filed against the plaintiff as the responsible party, to collect the outstanding debt owed for services rendered for her mother's care, violates the Consumer Fraud Act.

We recognized the long-standing "learned professional" exception to the Consumer Fraud Act that proscribes consumer protection actions against certain types of professionals or industries that are regulated by separate state or federal agencies, where such regulation could conflict with regulation under the CFA. The Supreme Court held in certain instances separate agencies with concurrent regulatory jurisdiction and control may create conflicting determinations, rulings and regulations affecting the identical subject matter.

Hospital billing activities have been found to be within the learned professional exception due to state and federal regulations associated with the receipt of Medicaid and Medicare funding. Applying that rule of law here, we determine that defendant's nursing home is similarly regulated and as such, their billing services fall within the "learned professional" exception of the CFA.

05-31-12 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. T.S. IN THE MATTER OF I.S. AND V.S.
A-3012-10T3

In a case where the court finds no abuse or neglect and the children are living with a parent, a court may not continue the care and supervision by the Division of Youth and Family Services, over the parent's objection, without conducting a summary hearing, on adequate notice, to determine whether the Division's intervention, pursuant to N.J.S.A. 30:4C-12, is in the children's best interests and to identify necessary services.

05-29-12 ROBERT B. BEIM, ET AL. VS. TREVOR R. HULFISH, ET AL.
A-5947-10T4

As a matter of first impression, we hold that under New Jersey's Wrongful Death Act, N.J.S.A. 2A:31-1 to -6, pecuniary injuries may include a diminishment in a prospective inheritance caused by increased estate taxes incurred due to the premature death of a decedent.

05-29-12 SWARNLATA KHANDELWAL, ET AL. VS. ZURICH INSURANCE CO., ET AL. VS. LALITKUMAR KHANDELWAL
A-2620-10T2

In the context of automobile insurance provided for car rentals, we held that an intra-family exclusion is void as against public policy even though it is included in an optional, separate policy rather than the basic coverage policy that comes with the rental.

05-25-12 STATE OF NEW JERSEY VS. RAYMOND D. KATES
A-3907-10T1

We conclude the trial court mistakenly exercised its discretion in denying defendant a continuance to enable him to retain counsel of his choice, after he learned on the eve of trial that the assistant deputy public defender who had been representing him was about to deployed for active military service. Although the right to counsel of choice is not absolute and may be balanced against the court's interest in managing its calendar, the trial court failed to weigh the appropriate factors governing the discretionary decision whether to grant the requested continuance. The availability of competent counsel not of defendant's choice was an insufficient basis for denying the continuance. As deprivation of counsel of choice is a structural error not subject to harmless error analysis, reversal of defendant's conviction and a new trial is mandated.

05-25-12 IN THE MATTER OF MARTIN CARLUCCIO, SAFETY SPECIALIST TRAINEE, DMV (S0599J), MOTOR VEHICLE COMMISSION
A-5219-09T1

Appellant was disqualified from a list of eligible candidates for the position of Safety Specialist Trainee with the Motor Vehicle Commission (MVC) because of a 1999 conviction for attempted aggravated assault. Appellant appealed to the Civil Service Commission and argued, among other things, that the Rehabilitated Convicted Offender Act (the RCOA), N.J.S.A. 2A:168A-1 to -16, controlled, and a certificate issued by the State Parole Board pursuant to the RCOA presumptively demonstrated his rehabilitation and eligibility for employment.

The Civil Service Commission denied appellant's appeal, concluding that the RCOA did not apply because the position permitted "access to sensitive information that could threaten the public health, welfare, or safety," N.J.S.A. 2A:168A-7(c)(1), and therefore was not "public employment" subject to the provisions of the RCOA.

Appellant sought reconsideration and furnished, among other things, a certificate issued by the Parole Board pursuant to the RCOA that was specific to the position of Safety Specialist Trainee. The motion was denied.

We discussed the recent amendments to the RCOA, and specifically concluded that "[n]otwithstanding any law to the contrary," N.J.S.A. 2A:168A-7(a), a certificate issued pursuant to N.J.S.A. 2A:168A-8 is the legislatively-chosen mechanism to "reliev[e] disabilities, forfeitures or bars" to public employment arising from certain prior criminal convictions. Because the Commission failed to consider the effect of the Parole Board's determination and the preeminent role the Legislature delegated to the Parole Board under the RCOA, we remanded the matter for further proceedings.

05-22-12 CORRECTIONAL MEDICAL SERVICES, INC. VS. STATE OF NEW JERSEY, ET AL.
A-5334-10T4

We hold that documents generated by the State in connection with its investigation of compliance by Correctional Medical Services (CMS) with the terms of its contract with the State, its determination to assess liquidated damages against CMS, and its computation of such damages are not protected from discovery

in a breach of contract action instituted by CMS by either the deliberative process or the official information privileges.

05-21-12 MARTIN E. O'BOYLE VS. BOROUGH OF LONGPORT, ET AL.
A-2698-10T2

In this case we find that the common interest doctrine applies in the context of the work product privilege, protecting letters and CDs exchanged between counsel from disclosure under OPRA and the common law right of access.

05-18-12 JOSEPHINE GABRIELE, ET AL. VS. LYNDHURST RESIDENTIAL COMMUNITY, L.L.C., ET AL.
A-5257-10T3

A general employee exclusion from insurance coverage for personal injury to an employee of "any insured" arising out of or in the course of, or as a consequence of, employment by any insured, excludes coverage to an additional insured for personal injury or death of an employee of the named insured. When an endorsement to an insurance policy restricts the coverage provided by the basic policy, the endorsement is generally controlling.

05-18-12 DOCK STREET SEAFOOD, INC., ET AL. VS. CITY OF WILDWOOD, ET AL.
A-4411-10T4

In this inverse condemnation action involving a property in a redevelopment zone, plaintiff appeals from a judgment in favor of defendant following a bench trial. Judge Michael Winkelstein found plaintiff's failure to file a redevelopment application for its property precluded its inverse condemnation claims and purported comments by individual municipal officials that no building permits would be issued to the property owners did not excuse plaintiff's obligation to exhaust administrative remedies; plaintiff's continued use of the property for the same purpose as when purchased and its rejection of an offer to purchase by the redeveloper belied its claim of destruction of all beneficial use; and defendant's inability to redevelop the area despite diligent attempts did not significantly interfere with plaintiff's property rights. We affirm substantially for the reasons set forth by Judge Winkelstein in his comprehensive written opinion and supplemental letter opinion, which we now publish.

05-17-12 STATE OF NEW JERSEY VS. EDWARD RONALD ATES

A-2308-09T3

Defendant appealed his conviction for the murder of his ex-son-in-law, arguing the unconstitutionality of the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -34, because it permitted the interception of telephone calls between individuals located entirely outside New Jersey. The court rejected this argument, finding no infirmity so long as the listening post was located in New Jersey.

Defendant also argued that the State should have been barred from using all intercepted telephone calls because the State recorded a telephone call between defendant and his attorney. The trial judge precluded the use only of the calls intercepted after the recording of the attorney-client communication and the court concluded this was an appropriate remedy for the reasons expressed in the trial judge's written opinion, State v. Ates, __ N.J. Super. __ (Law Div. 2009).

05-16-12 NORTH HALEDON FIRE COMPANY NO. 1, JOHN BLEEKER AND DANIEL STEVENSON VS. BOROUGH OF NORTH HALEDON AND LINCOLN NATIONAL CORPORATION D/B/A LINCOLN FINANCIAL GROUP
A-2918-10T4

The Emergency Services Volunteer Length of Service Award Program Act, N.J.S.A. 40A:14-183 to -193, allows a county or municipality to make annual contributions to active volunteer members of emergency service organizations operating under their respective jurisdictions if the member earns points for participating in certain activities. The Act permits a county or municipality to require members of its volunteer fire department to earn a minimum number of points for fire department responses as a condition for the annual contribution; however, the municipality did not impose such a condition in its implementing ordinance.

05-15-12 IN THE MATTER OF THE APPEAL OF LANGAN ENGINEERING & ENVIRONMENTAL SERVICES, INC.
A-2145-11T3

A section of the Campaign Contributions and Expenditure Reporting Act, N.J.S.A. 19:44A-20.14, provides that a business entity is disqualified from the award of a state contract if the firm has made a political contribution within the eighteen-month period immediately preceding the "commencement of negotiations." In the context of publicly-bid contracts, we construe the term

"commencement of negotiations" to be the date the bid was submitted.

05-15-12 STATE OF NEW JERSEY VS. RYAN L. HODGE
A-5961-10T1

In this appeal, we granted leave to the State to consider the trial court's interlocutory order suppressing a statement taken from defendant, a juvenile at the time, shortly after his arrest for murder. Neither an attorney nor defendant's legal guardian were present at the time the statement was taken. Nor had defendant had the opportunity to consult with an attorney in advance of providing the statement. The motion judge accorded pipeline retroactivity to State in the Interest of P.M.P., 200 N.J. 166 (2009). We reverse and hold that P.M.P. is to be applied prospectively.

P.M.P. announced a new rule; its purpose is not furthered by retroactive application; law enforcement officials, in good faith, have relied upon the old rule in conducting custodial interrogations of juveniles; and retroactive application would have a significant impact upon the administration of justice.

05-14-12 STATE OF NEW JERSEY VS. JAMES CRAFT
A-5022-10T2

The primary issue in this case is whether the police violated defendant's constitutional rights when they entered a bedroom in his mother's apartment without a search warrant. We conclude that the police officers' actions were objectively reasonable because the officers had reason to believe defendant was in the bedroom, they knew he was potentially armed and dangerous, and it was impracticable to obtain a search warrant. We therefore reverse the order granting defendant's motion to suppress a handgun and cocaine that were in plain view when the police entered the bedroom.

05-14-12 EDIE BRITMAN SAURO VS. FRANK SAURO IN THE MATTER OF BUDD LARNER, P.C.
A-2735-09T3

The law firm of Budd Larner, P.C., one of three firms that represented plaintiff during this protracted matrimonial case, appeals the Family Part's equitable distribution award, arguing that the manner in which the court allocated the parties' marital assets negatively affected the firm's attorney charging lien pursuant to N.J.S.A. 2A:13-5.

Invoking its parens patriae responsibility, the Family Part established a college trust account by allocating money that would have otherwise been subject to equitable distribution, took action to ensure that defendant honored his support obligation, and set aside a modest amount to permit plaintiff to acquire skills to enter the labor force independent of defendant's support.

We affirm and hold that the Family Part's actions were within its discretionary authority and in keeping with its parens patriae responsibility. Dedicating these funds towards a specific future purpose before the entry of final judgment was not inconsistent with the protections afforded to attorneys in N.J.S.A. 2A:13-5. The lien attaches only to funds available to the parties at the time of the final disposition of the case.

05-11-12 GREGORY LASKY AND ADVOCATES FOR DISABLED AMERICANS (AFDA) VS. BOROUGH OF HIGHTSTOWN
A-5256-10T1

In a public accommodation disability discrimination claim against a municipality under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49, alleging an overall lack of access, we hold that an advance request for an accommodation from the disabled individual is not a precondition to filing suit.

We distinguish, as requiring such notice, those claims alleging a failure to reasonably accommodate and account for making specific adaptations required by the individual's disability, that is not equivalent to a facility's general unavailability on prohibited grounds.

05-11-12 GREGORY LASKY AND ADVOCATES FOR DISABLED AMERICANS (AFDA) VS. MOORESTOWN TOWNSHIP
A-2742-10T3

In upholding a jury verdict finding a public entity not liable under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C.A. §§ 12101-12213, and the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, for denying plaintiff, a paraplegic, access to its park, we held that the trial court properly charged the jury with governing legal principles. One such principle is that for facilities preexisting 1992, the effective date of Title II's implementing regulations, a public entity may satisfy the ADA by adopting a

variety of measures less costly than structural change, including assigning aides to assist disabled persons in accessing services. Nor does a facility not accessible without assistance necessarily violate the LAD, which requires a "reasonable accommodation." Thus, the question of whether the plaintiff was discriminated against by being denied "reasonable access" to the park was one for the jury to resolve.

05-11-12 CARMENA STONEY AND LINDA VANDEUSEN VS. MAPLE SHADE TOWNSHIP
A-1777-10T3

At issue is whether a trial court may deny injunctive relief upon a jury finding of access discrimination under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C.A. §§ 12101-12213, and the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.

We hold that although injunctive relief is authorized by both the ADA and LAD, it does not automatically follow from a breach of either statute. Instead, where a party has demonstrated actual success on the merits, a court must balance three factors to determine whether injunctive relief is appropriate: (1) the threat of irreparable harm to the movant; (2) the harm to be suffered by the non-moving party if the injunction is granted; and, most significantly, (3) the public interest at stake, which strongly favors mandating accessibility.

Moreover, irreparable harm to the disabled individual from a denial of access should be presumed in cases involving facilities built or "altered" after January 26, 1992, the effective date of Title II's implementing regulations, which mandate compliance with specific architectural standards.

05-09-12 DAVID SCHMIDT VS. CELGENE CORPORATION AND CVS/CAREMARK CORPORATION
A-2685-10T2

Plaintiff filed a complaint alleging violations of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, well beyond CEPA's one-year limitation period, N.J.S.A. 34:19-5, and while he had a breach of contract action based on the same facts pending in Texas. Primarily because plaintiff's delay is attributable to his initial selection of the Texas

forum and his subsequent decision to pursue a remedy for a CEPA violation in New Jersey after an unfavorable choice of law determination by a court in Texas, we conclude that the doctrines of substantial compliance and equitable tolling do not permit him to proceed in New Jersey.

05-08-12 STATE OF NEW JERSEY VS. KIWANIE SALTER
A-4410-10T2

Defendant was indicted for, among other crimes, two counts of aggravated sexual assault by oral penetration and two counts of criminal sexual contact. Each count alleged the conduct occurred between September 2nd and September 5th, 2006, and the language in each was identical.

The juvenile victim testified to the various incidents that allegedly occurred and formed the basis of the individual counts, although his testimony was somewhat inconsistent with that given before the Grand Jury. In her jury instructions, the judge did not differentiate what alleged conduct was charged in each count. After an extended sidebar discussion, and the prosecutor's ultimate assent, the judge submitted a jury verdict sheet that similarly did not differentiate what conduct was alleged in each of the four counts. The jury found defendant guilty of one count of aggravated sexual assault, but not guilty of the other. It also found defendant guilty of both counts of criminal sexual contact.

05-08-12 STATE OF NEW JERSEY VS. DAVID M. GIBSON
A-1513-10T4

In this appeal, defendant argued, among other things, that the trial judge erred in denying his motion to suppress evidence seized from him following his arrest for defiant trespass. The court rejected this argument, concluding that the arresting officer possessed probable cause that defendant had engaged in a defiant trespass even though the property owner posted a "no loitering" instead of a "no trespassing" sign.

05-07-12 ETHEL GRAY VS. CALDWELL WOOD PRODUCTS, ET AL.
A-0120-11T1

In this action, plaintiff was injured as a result of a slip and fall on ice on the sidewalk in front of defendant's vacant commercial building. In the appeal, the court considered whether the commercial property owner owed a duty to the plaintiff. The trial court entered summary judgment in favor of

defendant finding that sidewalk liability did not apply because, as a vacant building, the property was not being used at the time of the accident. In reversing, the court determined that the commercial property was subject to sidewalk liability because the property had the capacity to generate income and did, in fact, spread the risk of loss by maintaining commercial property insurance. The court also held that defendant had a duty to remove snow and ice from sidewalks abutting its property.

05-04-12 STATE OF NEW JERSEY VS. JENNIFER LEE LOCASCIO
A-5119-09T1

Defendant was convicted of vehicular manslaughter after a jury trial. The indictment stemmed from a one-car accident in which defendant's boyfriend was killed after the car veered off the road and struck a tree. The pivotal issue at trial was whether, as the State contended, defendant was the driver or whether, as the defense and its expert contended, the boyfriend was the driver.

The State presented expert testimony from the county medical examiner opining that defendant was the driver. During the course of his testimony, the medical examiner rendered opinions, over defendant's objection, about the probable movements of the occupants within the car as it decelerated and crashed, including an analysis of how the passenger's body allegedly "cushioned" the driver's body during the accident.

We reverse defendant's conviction and order a new trial because the testimony of the medical examiner, who the State concedes is not qualified as an expert in biomechanics or accident reconstruction, prejudicially went beyond the scope of his expertise on a crucial disputed issue. The examiner's testimony should have been confined to the aspects of his expertise as a pathologist concerning the nature and causes of bodily injury, and should not have delved into the biomechanical forces and movements within the automobile.

05-03-12 STATE OF NEW JERSEY VS. ANTHONY ROSE
A-0192-11T2

We hold that the newly enacted forfeiture-by-wrongdoing exception to the hearsay rule, N.J.R.E. 804(b)(9), applies retroactively to wrongdoing that occurred before the new Rule's effective date of July 1, 2011, and therefore to all trials conducted thereafter.

04-26-12 TOWNSHIP OF NEPTUNE VS. STATE OF NEW JERSEY
A-5573-09T3

In this case, the Township of Neptune sought a judgment declaring that the New Jersey Department of Environmental Protection (NJDEP) was required to dredge the State navigational channels in Shark River Bay by a date certain and identify a site for the temporary placement of the dredged materials. We conclude that: (1) the Appellate Division has exclusive jurisdiction to consider this claim of agency inaction and a remand is not required to compile a factual record; (2) mandamus will not lie to compel the NJDEP to exercise its discretion in the specific manner requested; and (3) relief is not warranted on the basis of implied contract, equitable estoppel, the public trust doctrine, or public nuisance.

04-25-12 ADELE KONOP, ET AL. VS. ELLEN J. ROSEN, M.D.
A-2908-10T1

In this medical malpractice action, the factual support for plaintiff's expert's opinion regarding defendant's deviation rested solely upon a notation that appeared in a hospital consultation report prepared, not by defendant, but by a resident doctor in the emergency room. Following a N.J.R.E. 104 hearing, the judge concluded that the notation should be redacted from the report because it was hearsay, not subject to any exception. He subsequently granted defendant summary judgment.

We reversed, concluding that there was sufficient circumstantial evidence to permit a reasonable jury to conclude by a preponderance of the evidence that the notation was a statement attributable to defendant, thus admissible under N.J.R.E. 803(b)(1) ("[a] statement offered against a party which is . . . the party's own statement").

We further concluded that although N.J.R.E. 104(a) reserves to the judge determinations as to whether preliminary "condition[s]" of "admissibility," as opposed to relevancy, have been fulfilled, when the only condition of admissibility is resolution of a single disputed fact, the exercise of the judge's discretion is limited. In such circumstances, the judge is not the ultimate factfinder, but, rather, must decide only whether the evidence is sufficient to allow a jury to decide the disputed fact in favor of the proponent of the evidence.

04-20-12 STATE OF NEW JERSEY VS. PAULO BARROS
A-1288-10T2

In this case, the court previously applied Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and affirmed the grant of post-conviction relief based on defendant's assertion that his attorney did not advise him that his guilty plea in 2008 to drug distribution charges subjected him to mandatory deportation. The Supreme Court granted the State's petition for certification and remanded for the court's reconsideration in light of State v. Gaitan, __ N.J. __ (2012), which held that Padilla announced a new rule applicable only to guilty pleas entered after Padilla was decided. In light of Gaitan, the court reversed the grant of post-conviction relief but also stayed its judgment to allow defendant to seek habeas corpus relief in federal court in light of the Third Circuit's determination in United States v. Orocio, 645 F.3d 630 (3d Cir. 2011), that Padilla does not constitute a new rule.

04-18-12 MYRON COWHER VS. CARSON & ROBERTS, ET AL.
A-4014-10T1

Reversing summary judgment in favor of plaintiff's employer and two co-workers, we hold that plaintiff, a non-Jew, presented a prima facie case of discrimination on the basis of perceived religious affiliation through videotapes and admissions establishing that the co-workers had regularly uttered anti-Semitic epithets and engaged in other anti-Semitic conduct directed at plaintiff. In reaching that conclusion, we found a presumption to exist that defendants' conduct was spurred by plaintiff's perceived status as a Jew.

We also found prima facie evidence that defendants' conduct was severe or pervasive enough to make a reasonable person believe that the conditions of plaintiff's employment were altered and that the working environment had been made hostile or abuse. We held in that regard that the conduct should be evaluated from the perspective of a reasonable Jew, and that the fact that plaintiff was not Jewish was relevant only to his damages.

04-17-12 STATE OF NEW JERSEY VS. RONALD L. JONES, JR.
A-5186-10T2

We reverse defendant's drug distribution conviction, concluding that: 1) the testimony provided by the State's drug

distribution expert, on whether defendant possessed the cocaine for personal use or instead for distribution, ran afoul of the proscriptions in State v. McLean, 205 N.J. 438 (2011), and State v. Odom, 116 N.J. 65 (1989); and 2) the admission of evidence that defendant possessed oxycodone denied him a fair trial, as he was not charged with that offense, and the State should not have been permitted to use such N.J.R.E. 404(b) evidence to bolster its contention that defendant possessed the cocaine with the intention of selling it.

04-17-12 JAMES BROOKS VS. BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM
A-3778-10T3

A school custodian who suffered a total and permanently disabling shoulder injury while carrying a 300-pound weight bench when the other persons who were assisting him suddenly dropped their side of the bench experienced a "traumatic event" that qualifies him for an accidental disability pension under the tests set forth in Richardson.

04-16-12 STATE OF NEW JERSEY VS. BRIAN RICE
A-3777-09T4

Defendant, an off-duty police officer, was convicted of second-degree official misconduct, conspiracy to commit official misconduct, and tampering with physical evidence. Pursuant to N.J.S.A. 2C:43-6.5(a), defendant faced a mandatory minimum term of five-years' imprisonment. The judge sentenced defendant as a third-degree offender, N.J.S.A. 2C:44-1(f)(2), reduced the mandatory minimum pursuant to N.J.S.A. 2C:43-6.5(c)(2), and imposed a sentence of three years with a three-year period of parole ineligibility.

The State appealed and defendant cross-appealed. We affirmed defendant's conviction of official misconduct and tampering but reversed and remanded for reconsideration of the sentence imposed.

N.J.S.A. 2C:43-6.5 was enacted in 2007 as part of a comprehensive legislative scheme affecting the pension rights of public employees, as well as the forfeiture and sentencing provisions of the Code. N.J.S.A. 2C:43-6.5(c)(2) permits the judge to "waive or reduce the mandatory minimum term of imprisonment required by" the statute if he "finds by clear and convincing evidence that extraordinary circumstances exist such that imposition of a mandatory minimum term would be a serious

injustice which overrides the need to deter such conduct in others." This portion of the statute has not been the subject of a reported case.

We conclude the statute requires application of a different standard than that which governs the exercise of the judge's discretion in downgrading the offense pursuant to N.J.S.A. 2C:44-1(f)(2) (permitting the judge to impose a sentence "one degree lower than that of the crime for which [the defendant] was convicted" if "clearly convinced that the mitigating factors substantially outweigh the aggravating factors and . . . the interest of justice demands").

04-13-12 POTOMAC INSURANCE COMPANY OF ILLINOIS VS. PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, ET AL.
A-3164-09T2

In this opinion, we determined that one co-insurer's settlement of coverage litigation with the insured does not necessarily bar another co-insurer's claim against the settling co-insurer for defense costs in the underlying action. However, we also hold that the attorneys who filed and defended the coverage suit had an obligation under the entire controversy doctrine to disclose the potential claim for defense costs by the non-party co-insurer.

In this case, the attorney who filed the coverage action on behalf of the insured was retained and controlled by the co-insurer which subsequently filed the action seeking contribution to defense costs. Consequently, we reversed that portion of the order on appeal that awarded counsel fees to that insurer in the subsequent action, based upon the failure to disclose the potential subsequent action.

04-12-12 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. D.S.H AND W.W. // IN THE MATTER OF THE GUARDIANSHIP OF R.S.H.
A-5723-10T1

We reverse the termination of the mother's parental rights to her eight-year-old daughter, Rachel. Although the mother's estranged husband was dismissed from the litigation when a paternity test ruled him out as Rachel's biological father, we determine that he remains Rachel's legal father. Thus it is not necessary to terminate the mother's parental rights to facilitate an adoption by her estranged husband. We view this

decision as mandated by precedent and beneficial to all concerned.

04-11-12 TALMAGE LORD VS. BOARD OF REVIEW, ET AL.
A-1054-10T4

An employee who accepted his employer's directive that he "had to resign" did not leave his employment "voluntarily" and therefore is not disqualified under N.J.S.A. 43:21-5(a) from receiving unemployment compensation benefits.

04-05-12 ANWAR WALID, ET AL. VS. YOLANDA FOR IRENE COUTURE, INC., ET AL.
A-3112-10T4

We reviewed the Law Division's findings and conclusions following a bench trial wherein it was held that plaintiffs proved by clear and convincing evidence that defendant sellers of a business knowingly misrepresented the business's income with the intent that plaintiffs rely thereon in buying the business, but failed to prove reasonable reliance upon such misrepresentations. We have clarified the principle of reasonable reliance and determined that plaintiffs' proofs at trial clearly and convincingly established reasonable reliance.

We also concluded that a general integration clause in the contract does not prevent the introduction of parol evidence in an action based upon fraud in the inducement to contract.

04-05-12 JOYCE QUINLAN VS. CURTISS-WRIGHT CORPORATION
A-5728-06T1

In this employment case brought pursuant to the Law Against Discrimination, we examine, at the Supreme Court's direction, various open issues that were not previously resolved on appeal. See Quinlan v. Curtiss-Wright Corp., 204 N.J. 239 (2010), reversing in part Quinlan v. Curtiss-Wright Corp., 409 N.J. Super. 193, 218 (App. Div. 2008).

Although we affirm the verdict in plaintiff's favor on liability, we conclude that the trial court erred in instructing the jury that the defendant employer bore the burden of proving that plaintiff would fail to mitigate her damages in the future. In addition, the jury charge should have made clear that plaintiff bore the specific burden of proving a reasonably likely period of time that her loss of earnings would continue into the future. Because the jury's $3.65 million award in

future economic losses could have been affected by the flawed instructions, we remand for a new trial on the issues of front pay and other related damages.

We also refer to the Model Civil Jury Charge Committee a request to develop a charge on front pay, including instructions addressing these particular issues of reasonable duration and mitigation.

04-04-12* BOROUGH OF HARVEY CEDARS V. HARVEY KARAN AND PHYLLIS KARAN
A-4555-10T3

Plaintiff condemned an easement across defendants' oceanfront property and constructed a huge dune that partially blocked the previously unobstructed ocean view from their house. Affirming the trial court, we held that construction of the dune conferred a general rather than a special benefit on defendants' property. The resulting protection from storm damage was the object of the dune project and was not different in kind from the benefit conferred on the island as a whole, even if the benefit to defendants' land might be somewhat greater than that conferred on houses located further inland. The trial judge correctly held a N.J.R.E. 104 hearing to determine whether plaintiff's proffered evidence could establish a special benefit or only a general benefit, and properly barred plaintiff from placing before the jury evidence of general benefit. We declined to disturb the verdict, which was based on defendants' claim that, by blocking their ocean view, the dune diminished the value of their house. (*Approved for Publication date)

04-03-12 ALPHA BEAUTY DISTRIBUTORS, INC. VS. WINN-DIXIE STORES, INC., ET AL.
A-3111-10T2

In this appeal, the court reviewed a dismissal of this action based on plaintiff's failure in its Rule 4:5-1(b)(2) certification to mention a pending federal action, which was commenced by plaintiff and its majority shareholder against other shareholders, as well as the entire controversy doctrine. In reversing, the court concluded that Rule 4:5-1(b)(2) was not violated but, even if it was, dismissal represented an inappropriate sanction. The court also found the entire controversy doctrine inapplicable because the core of the federal action was a dispute between plaintiff's shareholders

and the action here sought the collection of debts allegedly due from plaintiff's customers. The court also held the entire controversy doctrine was not equitably applied because the defendants were not prejudiced by plaintiff's failure to join them to the federal action and the interests of judicial economy were not disserved because there was no likelihood of duplication of effort or inconsistent determinations.

04-02-12 REGINA LITTLE, ETC. VS. KIA MOTORS AMERICA, INC.
A-0407-11T3

Almost three years after the trial judge's decision setting aside only one aspect of the jury's damages verdict in a class action and instituting a claims procedure for determining those damages on an individual basis, a second judge vacated another aspect of the jury's damages verdict and expanded the nature of claims procedure. We reverse because she did so without applying the well-established standards for departing from the "law of the case" and granting a new trial.

03-30-12 STATE OF NEW JERSEY VS. PERINI CORPORATION, ET AL.
A-3268:3269-10T4(CONSOLIDATED)

The ten-year statute of repose, N.J.S.A. 2A:14-1.1, did not bar the State from seeking damages under a multi-phase construction contract for alleged defects of a hot water system that was connected to the entire project. The hot water system was not identified in the construction documents as a separate phase or component of the project with its own distinguishable completion date, and so, was not a separate "improvement to real property" under the statute. The trial court erred in dismissing the State's claims against the general contractor and other contractors that continued to work on the project within the ten-year period on the ground that the State had begun to use the hot water system and occupied most parts of the project more than ten years before it filed its complaint.

03-30-12 MARQUIS A. WALKER, ETC. VS. ILMIA CHOUDHARY, M.D., ET AL.
A-1425-10T1

In this appeal, we conclude that a dismissal against an employee on the basis of the statute of limitations is not an adjudication on the merits so as to bar the claims against the principals.

We also determine that the matter shall be remanded to the trial court for a Lopez hearing to determine whether the

"relation-back" doctrine, Rule 4:9-3, is applicable and, if not, whether, in the interest of justice, the Rule should be relaxed.

03-29-12 BOROUGH OF PITMAN VS. MONROE SAVINGS BANK, SLA
A-3113-10T1

We reviewed the Law Division's denial of the Borough of Pitman's request to require payment of Fire Code penalties that had been assessed against the previous property owner, to Monroe Savings Bank, a foreclosing mortgagee, which acquired title to the property at Sheriff's sale. We concluded payment of assessed Fire Code violation penalties rests with the property owner or a subsequent owner who acquires the property from the owner. A purchaser of the property at Sheriff's Sale is neither a "person who purchases a property" as used in N.J.S.A. 53:27D-210f of the Uniform Fire Safety Act nor a "subsequent owner" as found in N.J.A.C. 5:70-2.2(e) of the Uniform Fire Safety Code. Enforcement of the assessed penalties may also be made against the property by securing a judgment lien under the Penalty Enforcement Law of 1999, N.J.S.A. 2A:58-11 to -12. That judgment is accorded priority based on the date it is recorded. Because Monroe's foreclosure judgment was filed before the Borough's civil judgment, any claim the Borough could have enforced has been foreclosed.

03-29-12 KAREN COLE VS. JERSEY CITY MEDICAL CENTER, ET AL.
A-4914-09T1

After she was terminated from her position as a nurse anesthetist, plaintiff sued the Jersey City Medical Center and her immediate employer, Liberty Anesthesia Associates, LLC., under the Conscientious Employee Protection Act and the Law Against Discrimination. Plaintiff's employment agreement with Liberty had an arbitration clause covering these claims. She did not have a similar arrangement with the Medical Center.

After plaintiff settled her claims against the Medical Center, the trial court granted Liberty's motion to enforce the arbitration clause. We hold that Liberty is precluded from enforcing the arbitration clause. Liberty could have moved to bifurcate plaintiff's claims against Liberty from her claims against the Medical Center. Instead, as a matter of litigation strategy, Liberty opted to participate in the suit brought in the Superior Court for a period of twenty months, completing all reciprocal discovery. Liberty did not raise the issue of arbitration until three days before the scheduled trial date.

03-27-12 300 BROADWAY HEALTHCARE CENTER, L.L.C., D/B/A NEW VISTA NURSING AND REHABILATION CENTER VS. WACHOVIA BANK, ET AL.
A-5023-10T3/A-5025-10T3

The Uniform Commercial Code provides that an "issuer" of a check may not bring a claim for conversion. N.J.S.A. 12A:3-420(a). The Code defines the term "issuer" to mean the "maker or drawer of an instrument." N.J.S.A. 12A:3-105(c). The term "drawer" is defined in the Code as "a person who signs or is identified in a draft as a person ordering payment." N.J.S.A. 12A:3-103(a)(3). We hold that, under the Code, the "issuer" of a check includes the person identified on the check ordering its payment, regardless of whether that person's signature was forged, and is barred from asserting a conversion claim regarding the check.

03-27-12 BURLINGTON COUNTY BOARD OF SOCIAL SERVICES VS. G.W.
A-5974-09T2

The issue raised in this appeal is whether a county board of social services may terminate a recipient's General Assistance (GA) and Emergency Assistance (EA), which is provided pursuant to the Work First New Jersey Program, N.J.S.A. 44:8-107 to -145.5, based on the recipient's eligibility for, rather than actual receipt of, Social Security Disability benefits (SSD). The Board of Social Services determined that the anticipated SSD benefits placed his monthly "countable income" above the maximum limit to be eligible for GA and EA benefits. Appellant did not receive his first SSD check until after termination of his GA and EA benefits. We hold that, upon receiving notification that a GA or EA recipient has been approved for SSD benefits, pursuant to the "prospective budgeting methodology" prescribed in N.J.A.C. 10:90-3.11, the Board of Social Services need not wait until the recipient is in actual receipt of SSD benefits before adding the amount of those benefits to the recipient's countable income, and determining whether GA or EA benefits should be terminated.

03-26-12 BOROUGH OF SADDLE RIVER VS. 66 EAST ALLENDALE, LLC
A-2886-10T3

In this condemnation case, we consider whether the trial judge correctly made his threshold determination that "the record contains sufficient evidence of a probability of a zoning change to warrant consideration by the jury" in its assessment of fair market value, as required by State, by Commissioner of

Transportation v. Caoili, 135 N.J. 252, 261-62 (1994). We also consider whether the judge erred by performing this gatekeeping role before summations, rather than before the trial commenced.

We conclude that the judge correctly determined there was sufficient evidence of a reasonable probability of a zoning variance. Further, although it is preferable for a judge to make the threshold determination prior to the commencement of the trial, we do not read Caoili to require that the judge must, in every case, conduct a pretrial plenary hearing. Likewise, we do not read the dicta in County of Monmouth v. Hilton, 334 N.J. Super. 582, 592 (App. Div. 2000), that evidence of probable change is considered by the jury "[i]f the judge is satisfied that a preliminary showing has been made," to require a pretrial hearing in every case.

Here, because the judge found that his probability determination would have required testimony from five proposed experts and a possible seven-day plenary hearing, the judge did not abuse his discretion by making his findings before summations.

03-23-12 ENZIO COLUMBRO, ET AL. VS. LEBANON TOWNSHIP ZONING BOARD OF ADJUSTMENT, ET AL.
A-4558-10T3

In this prerogative writs case, we consider whether a welding business operated from a large residential garage constituted a "home occupation." In affirming the trial judge's order dismissing the action, we conclude that the zoning board acted reasonably by granting a "conditional use" variance pursuant to N.J.S.A. 40:55D-70d(3). Substantially for the reasons articulated in Judge Peter A. Buchsbaum's written decision, we conclude that the garage use was properly classified as a "home occupation" because the use was both "accessory" and "incidental" to the owner's primary residential use. We distinguish Adams v. Delmonte, 309 N.J. Super. 572 (App. Div. 1998), which held that a septic tank cleaning business operated from the defendant's residence was not a qualifying "home occupation."

03-21-12 FATMA MOHAMED VS. IGLESIA EVANGELICA OASIS DE SALVACION
A-6019-10T4

In this case, plaintiff sued defendant church after she slipped and fell on the sidewalk abutting defendant's property.

The trial court granted defendant's motion for summary judgment, finding that defendant was not a commercial landowner that was required to maintain the sidewalk abutting its property under Stewart v. 104 Wallace Street, Inc., 87 N.J. 146 (1981) and its progeny. We hold that the trial court should have granted plaintiff the opportunity to complete discovery before considering defendant's summary judgment motion. We therefore reverse and remand for further proceedings in conformity with our opinion.

03-13-12 BUILDING MATERIALS CORPORATION OF AMERICA d/b/a GAF MATERIALS CORPORATION VS. ALLSTATE INSURANCE COMPANY, ET AL.
A-4444-09T3

In this insurance coverage dispute following the settlement of a class action lawsuit, plaintiff, the manufacturer of roof shingles, appealed from a judgment of no cause of action entered after a lengthy jury trial, and the defendant insurer cross-appealed from an order denying its motion for a new trial on its counterclaim.

Defendant's insurance policy contained an exclusion for damage to its own products. In affirming the trial court's rulings and jury verdict, we principally held that on its claim for indemnification under the policy, plaintiff cannot establish a prima facie case of covered loss simply by demonstrating that the class action claimants alleged potential third-party property damage; rather, plaintiff must show that the underlying settlement actually included payment for such claimed damages. The burden then shifts to the insurer to show that the policy excluded the loss.

03-12-12 INVESTORS SAVINGS BANK VS. KEYBANK NATIONAL ASSOCIATION, ET AL.
A-0404-10T2

Under the doctrine of equitable subrogation, a refinancing mortgagee is ordinarily entitled to the same priority as the original mortgagee even though it negligently failed to discover the lien of an intervening judgment creditor before closing.

03-08-12 IN RE A PLAN FOR THE ABOLITION OF THE COUNCIL ON AFFORDABLE HOUSING AND PROVIDING FOR THE TRANSFER OF THE FUNCTIONS, POWERS, AND DUTIES OF THE COUNCIL ON AFFORDABLE HOUSING TO THE DEPARTMENT OF COMMUNITY AFFAIRS, REORGANIZATION PLAN 1-2011

A-6301-10T4

The issue raised in this appeal is whether, pursuant to the Executive Reorganization Act of 1969, N.J.S.A. 52:14C-1 to -11 (Reorganization Act), a Governor may abolish an independent agency created by the Legislature that is "in but not of" a department of the Executive Branch. As applied here, the narrower issue is whether respondent Governor Chris Christie may, under the terms of the Reorganization Act, "abolish" the Council on Affordable Housing (COAH), an independent agency created by the Fair Housing Act, N.J.S.A. 52:27D-301 to -329 (FHA), and transfer the duties, responsibilities and obligations of that agency to the sole authority of the Commissioner of the Department of Community Affairs (DCA).

Strictly construing the Reorganization Act, we conclude that it does not grant the Governor the power to abolish a legislatively created, representative, independent authority that is "in but not of" the Executive Branch or any department in that branch of the government. Applying this rule here, we determine that the Governor exceeded his authority under the Reorganization Act in abolishing COAH. Accordingly, we reverse.

03-08-12 CHARLES CAMERON, ET AL. VS. ROY B. EWING
A-3628-10T2

In this appeal, we address the novel issue whether the stream of payments due a homeowner under a home equity conversion mortgage, also known as a reverse mortgage, is subject to execution and garnishment for the benefit of judgment creditors of the homeowner. We conclude the mortgagee's obligation to make monthly payments to defendant, the judgment debtor, is properly construed to be a "debt" against which plaintiffs, the judgment creditors, may obtain an order directing execution and garnishment under N.J.S.A. 2A:17-50 and -63 and Rule 4:59-1(c). We also find the reverse mortgage payments are "rights and credits" subject to an order for installment payments by the judgment debtor. N.J.S.A. 2A:17-64. We remand for the court to determine the percentage of the reverse mortgage payments properly subject to execution. N.J.S.A. 2A:17-56.

03-08-12 TOWNSHIP OF FRANKLIN VS. FRANKLIN TOWNSHIP PBA
TOWNSHIP OF FRANKLIN VS. FRANKLIN TOWNSHIP PBA LOCAL 154 SUPERVISORY OFFICERS ASSOCIATION
A-2313-10T1/A-2822-10T1

We review two decisions issued by the Public Employment Relations Commission (PERC) regarding whether proposed patrol shift schedule modifications were mandatorily negotiable as intimately affecting employees' working conditions or were non-negotiable as falling within the Township's managerial prerogative.

Although we agree the CNAs under review granted the Township managerial latitude to schedule police shifts "as needed[,]" we reject the expansive reading of this phrase to support the Township's position the shift modifications merely "implement[ed] a provision of the contract which had been extensively bargained for by the parties." Rather, the changes mandated officers work more hours without concomitant compensation, an alteration of the core of the CNAs' provisions.

We distinguished the holding of our opinion in In re Morris County Sheriff's Office v. Morris Cnty. Policemen's Benev. Ass'n, Local 298, 418 N.J. Super. 64, 75-76 (App. Div. 2011), noting a desire to achieve thrift cannot sustain the adoption of a policy abrogating the Township's binding contractual obligations to its law enforcement employees.

03-07-12 GROW COMPANY, INC. VS. DILIP CHOKSHI, ET AL.
A-0026-10T4

In this appeal, the court reviewed the sufficiency of the judge's findings in awarding attorney's fees. Ascertaining a reasonable fee was complicated because the judge had previously determined that the contractual provision upon which the award was based only authorized fee-shifting with regard to certain discrete aspects of this multi-faceted suit. To expeditiously resolve the issue, the judge appointed an expert, who developed a methodology in which, among other things, a percentage was assigned to each task and then applied in light of the length of each written document. Although the judge recognized the expert's approach was unusual, the judge adopted it while further discounting the award derived by the expert based upon the judge's feel of the case developed during the lengthy nonjury trial. The court -- recognizing that no precise formula is required -- affirmed the award because the expert's methodology was sufficiently illuminating and also subjected to the judge's own knowledge and understanding of the case and, in particular, the performance of prevailing counsel during the course of the litigation.

03-07-12 HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY VS. THE STATE OF NEW JERSEY, ET AL.
A-2232-09T3

In this appeal, we conclude that the Premium Tax Cap Statute, N.J.S.A. 54:18A-6, as amended by Assembly Bill A4401 (A4401), L. 2005, c. 128, is not unconstitutional as a denial of due process or equal protection, a bill of attainder, or special legislation. By its terms, A4401 eliminated the tax cap on premiums received by health service corporations (HSCs) when at all relevant times, plaintiff Horizon Blue Cross Blue Shield of New Jersey was the only HSC in New Jersey. Among its other claims, plaintiff charged that it was singled out for retaliation after it refused to convert to for-profit status.

We determine that A4401 was rationally related to the legislative goals of raising revenue to reduce a budget deficit as well as to eliminate a loophole in the tax law whereby HSCs had a lower effective tax rate than other health insurance carriers. We further conclude that plaintiff's claim of retaliation is likewise without merit.

The Tax Court opinion is reported at 25 N.J. Tax 290 (Tax Ct. 2009).

03-05-12 HEATHER HOLST-KNUDSEN f/k/a HEATHER MIKISCH VS. ERIK MIKISCH
A-3596-10T1

This appeal from post-divorce orders implicates the holdings of Gubernat v. Deremer, 140 N.J. 120 (1995), and Ronan v. Adely, 182 N.J. 103 (2004), that a strong presumption shall be applied in favor of the choice of the primary caretaker parent for a child's surname. We express our disagreement with another panel of this court in Emma v. Evans, ___ N.J. Super. ___, ___, ___ (App. Div. 2012) (slip op. at 2, 7), that the presumption does not apply to children born to married parents. We conclude that a distinction based on birth in or out of wedlock is not supported by the Supreme Court's analysis in Gubernat and Ronan. We suggest that the Supreme Court might choose to consider whether the presumption should apply where the parties have entered into a detailed parenting agreement that is nonetheless silent on the issue of the child's name.

Parts of our opinion that address other issues are redacted from the published version.

03-05-12 STATE OF NEW JERSEY, ET AL. VS. THOMAS CULLEN, T.C., ET AL.
A-3001-09T1

The Endangered Nongame Species Conservation Act (ENSCA), N.J.S.A. 23:2A-1 to -15, makes it unlawful to "harass" a "species or subspecies of wildlife" declared by the Department of Environmental Protection to be endangered. As used in ENSCA, the term "harass" means an intentional or negligent act which creates the likelihood of injury by annoying the species to such an extent as to significantly disrupt its normal behavioral patters.

03-05-12 STATE OF NEW JERSEY VS. SAEED T. ELLIS
A-0156-09T4

We vacate a drug "kingpin" conviction, finding that the State failed to prove the requisite elements of that first-degree offense beyond a reasonable doubt, namely defendant's elevated status and supervisory control within an organized drug trafficking network.

03-05-12 TRACEE EDMONDSON VS. BOARD OF EDUCATION OF THE BOROUGH OF ELMER, ET AL.
A-1719-10T2

This appeal involves a challenge to an expansion of a sending-receiving relationship between two adjoining local school districts to include all pupils from the sending district. The receiving district will accommodate all students residing in the adjoining municipalities by renting one of the schools it will operate from the sending district. We conclude that this sending-receiving arrangement does not exceed the statutory authority granted to the districts' Boards of Education, N.J.S.A. 18A:11-1; N.J.S.A. 18A:20-2 to -22; N.J.S.A. 18A:38-8 to -24, does not amount to a de facto regionalization that must be accomplished in accordance with N.J.S.A. 18A:13-34, and does not require the Commissioner to disapprove this sending-receiving arrangement on the ground that the sending district will become a non-operating district, N.J.S.A. 18A:8-43 to -49.

03-02-12 TELEBRIGHT CORPORATION, INC. VS. DIRECTOR, NEW JERSEY DIVISION OF TAXATION
A-5096-09T2

A foreign corporation that regularly and consistently permits one of its employees to telecommute full-time from her New Jersey residence is doing business in New Jersey, is subject to the New Jersey Corporation Business Tax Act, N.J.S.A. 54:10A-1 to -41, and must file New Jersey Corporation Business Tax returns.

03-01-12 STATE OF NEW JERSEY, IN THE INTEREST OF K.O.
A-0238-09T1

The panel interpreted N.J.S.A. 2A:4A-44(d)(3) to allow the imposition of an extended term for a juvenile on the second adjudication for a qualifying offense, as long as the juvenile had previously been sent to an adult or juvenile facility. We rejected the juvenile's argument that the statute required two prior qualifying offenses.

02-27-12 JIM SCHEIDT VS. DRS TECHNOLOGIES, INC., ET AL.
A-3459-09T4

We reject a challenge by a shareholder in a direct action to the merger of an American defense contractor, DRS Technologies, Inc. with an Italian defense contractor, Finmeccanica, SpA. In doing so, we discuss at length Delaware securities law as it applies to claims of breach of fiduciary duties of due care, loyalty, good faith, and candor.

02-22-12 STATE OF NEW JERSEY VS. EDWARD F. SYLVIA, JR.
A-3477-10T1

Defendant was found guilty of driving while under the influence, N.J.S.A. 39:4-50, and refusal to submit to a breath test, N.J.S.A. 39:4-50.4a. On appeal to the Law Division, defendant first challenged the territorial jurisdiction of the municipal court. We conclude that the claim should be assessed under the standards applicable in criminal prosecutions as set forth in State v. Denofa, 187 N.J. 24, 44, 46 (2006), and find the evidence of jurisdiction adequate.

02-17-12 KAREN BROWN, ESQ. VS. CITY OF PATERSON, ET AL.
A-0031-11T3

This appeal concerns N.J.S.A. 2B:12-5, which authorizes a municipality, with the Assignment Judge's approval, to appoint either an additional permanent municipal judge or a temporary municipal judge. A permanent judge has a three-year term of office, while a temporary judge's term is limited to one year.

We held that a municipality may not obtain the Assignment Judge's permission to appoint an additional permanent judge and then appoint a temporary judge instead, without obtaining the Assignment Judge's approval for that appointment. On the record presented, it was not an abuse of the trial judge's discretion to preliminarily enjoin the municipality from terminating the employment of plaintiff, a municipal judge, pending further proceedings in the case.

02-15-12 NEW JERSEY DENTAL ASSOCIATION VS. METROPOLITAN LIFE INSURANCE COMPANY, ET AL.
A-2916-10T2

The New Jersey Dental Association contends that by allowing the bundling of an otherwise lawful dental plan, based on a selective contracting arrangement, with an otherwise lawful ancillary program for services not covered by the dental plan, the Commissioner of the Department of Banking and Insurance has exceeded the authority delegated in the selective contracting law, N.J.S.A. 17B:27A-54. We reject that contention and uphold the validity of the Department's regulation, N.J.A.C. 11:22-5.10.

In addressing the Department's and the defendant insurers' objections to our reaching the merits of the issue presented, we also discuss the relationship between private causes of action, declaratory actions implicating an agency's primary authority, and jurisdiction to review agency action.

02-15-12 STATE OF NEW JERSEY IN THE INTEREST OF A.C.
A-5308-10T4

N.J.S.A. 2A:4A:40, the provision of the Code of Juvenile Justice that denies the right to a jury trial in adjudications under the Juvenile Code, is constitutional. The application of Megan's Law to juvenile sex offenders does not give rise to a jury trial right for juveniles accused of sex offenses. Whether to modify Megan's Law, in light of current information about its impact on juvenile offenders, is a policy decision for the Legislature.

02-14-12 IN THE MATTER OF THE APPLICATION XIANGJING ZAHN TO CHANGE THE NAME OF HONGHONG ZHAN, A MINOR, TO MICHELLE HONGHONG ZHAN
A-6113-10T1

A permanent resident alien may obtain a legal change of name pursuant to N.J.S.A. 2A:52-1 to -4. We reverse the trial court's order, which dismissed a name change application on the basis that relief under the statute was limited to United States citizens.

02-14-12 IN RE: PETITION FOR REFERENDUM TO REPEAL ORDINANCE 2010-17 OF THE CITY OF MARGATE CITY, ATLANTIC COUNTY, STATE OF NEW JERSEY
JOHN STEVEN WOERNER, ET AL. VS. THOMAS D. HILTNER, ET AL.
A-2475-10T1

The section of the Home Rule Act that establishes the right to a public referendum regarding any ordinance authorizing the incurring of an indebtedness applies to a municipality organized under the Walsh Act.

02-09-12 DOUGLAS D. DAVIS VS. JUSTIN B. BARKASZI, ET AL.
A-2345-10T1

In this dram shop case where the accident occurred only minutes after the driver left the defendant bar, we reverse and remand for a new trial because the trial court erred in three respects. The judge failed to charge the jury that if it found that alcohol was negligently served, that alcohol must have had time to enter the bloodstream of the driver prior to the accident to be a proximate cause. The judge also improperly charged the jury that the driver had an average tolerance to alcohol after precluding the defense from exploring this issue with lay witnesses. The judge erred as well in his spoliation charge because plaintiff failed to make the threshold showing that the bar improperly destroyed its video surveillance footage. This error was particularly harmful because the judge did not allow the jury to hear testimony concerning the reasons why the bar chose not to preserve the footage.

02-09-12 NORFOLK SOUTHERN RAILWAY COMPANY VS. INTERMODAL PROPERTIES, LLC
A-3353-09T2

In this case, where the railroad sought approval from the Department of Transportation to acquire private property by the exercise of the State's power of eminent domain, we hold that: 1) N.J.S.A. 48:12-35.1 permits the taking if the railroad establishes that the reasonable needs of its business demand acquisition of the property; 2) federal law does not preempt the

provision of N.J.S.A. 48:12-35.1 which requires the railroad to establish that "alternative property suitable for the specific proposed use" is not available "thorough on-site accommodation"; and 3) the property owner has the burden of proof on the issue under N.J.S.A. 48:3-17.7 as to whether the taking would cause it undue injury.

02-07-12 MARGARET NORDSTROM VS. WILLIAM "HANK" LYON
NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION
A-0291-11T1

In this appeal of an election contest, we hold that the New Jersey Election Law Enforcement Commission has exclusive jurisdiction over allegations of reporting violations, and primary jurisdiction over allegations of excess contributions, under the New Jersey Campaign Contributions and Expenditures Reporting Act. We reverse the Law Division's decision to nullify the results of the Morris County Republican primary election for Freeholder that was conducted in June 2011, which was based upon the court's mistaken exercise of jurisdiction. We also conclude that the court erroneously determined that certain voting irregularities had been sufficiently proven to warrant relief under the election contest statute.

02-02-12 MARGARET DUCEY VS. STEPHEN DUCEY
A-1066-09T3

Without addressing the parties' arguments on the merits of the substantive challenges to the amended final judgment of divorce (JOD) in this matrimonial matter, we are constrained to reverse, as we reject the procedure employed by the trial judge, who, after presiding over a fourteen-day trial, entered a final JOD advising the court's "underlying opinion will be sent shortly." Several months later, when the trial judge released the reasoning for her prior determinations, the substantive provisions diverged significantly from those in the JOD and counsel was ordered to prepare an amended JOD. Although the trial judge included factual findings for many of the conclusions set forth in the amended JOD, no explanation was given for the wholesale alteration of the initially ordered provisions in the JOD. We reject any suggestion that the trial judge's actions in this regard fall within her reasoned discretion, as discussed in Lombardi v. Masso, 207 N.J. 517 (2011). Accordingly we reverse and remand for a new trial before a different Family Part judge.

02-01-12 STATE OF NEW JERSEY VS. NICKOLAS AGATHIS

A-2211-09T4

Defendant pled guilty to the domestic violence offense of simple assault and was placed on probation conditioned upon forfeiting his firearms identification card. Relying on State v. Nunez-Valdez, 200 N.J. 129 (2009), defendant filed a post conviction relief petition, arguing he received ineffective assistance of counsel when his attorney incorrectly informed him that he could regain his firearms identification card after completing the term of probation.

Guided by Rule 3:22-5, the PCR court denied defendant's petition without conducting an evidentiary hearing, concluding that it was bound by our earlier opinion affirming defendant's conviction on direct appeal. Applying the standard articulated by the Court in Nunez-Valdez, we reversed and remanded for the PCR court to conduct an evidentiary hearing.
Because N.J.S.A. 2C:58-3(c) rendered defendant permanently ineligible to obtain a firearms identification card, defendant has shown that his trial counsel's performance fell below the standard expected of an attorney licensed to practice law in this State. Under these circumstances, the PCR court must determine whether there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial.

01-31-12 STATE VS. ELLEN HEIN
A-5858-09T2/A-1720-10T4

In these consolidated appeals we reverse the Law Division's finding that defendant was guilty of violating a municipal ordinance requiring an inspection of her property. We do so on the basis of evolved Fourth Amendment jurisprudence viewed under the lens of our State constitution and reach the conclusion that the ordinance, as applied to defendant, is unconstitutional. We affirm the Law Division's separate finding the defendant was guilty of violating three local provisions of a property maintenance code.

01-27-12 CTC DEMOLITION COMPANY, INC. VS. GMH AETC MANAGEMENT/DEVELOPMENT LLC, ET AL.
A-3703-10T4

In applying the first-filed rule of comity -- by which, absent special equities, the court that first acquires jurisdiction has precedence over another court later acquiring jurisdiction -- the court held that, in these circumstances, a

demand for mediation or arbitration, alleged to be the contractually required form of dispute resolution, constituted the first-filed action. As a result, the court held that the trial court was not required to defer to a later filed Pennsylvania suit, which sought a declaratory judgment regarding the applicability of mediation or arbitration.

01-20-12 PAUL EMMA VS. JESSICA EVANS
A-2303-10T3

In Ronan v. Adely, 182 N.J. 103 (2004) and Gubernat v. Deremer, 140 N.J. 120 (1995), the Court established a presumption in favor of the choice of a parent of primary residence (PPR) when seeking a change of the surname of a child born out of wedlock. In this appeal, the court rejected the argument that this presumption should be applied when, following a divorce, the PPR seeks to change the surname of children born during the course of a marriage.

01-20-12 IN THE MATTER OF THE CIVIL COMMITMENT OF U.C.
A-5012-09T2

The Legislature has delegated exclusive authority to the Division of Developmental Disabilities to determine the appropriate placement of a developmentally disabled person eligible for its services. Therefore, a trial court that has placed a developmentally disabled civil committee on "continued extension pending placement" (CEPP) status lacks the authority to order the Division to fund that person's placement in a particular facility the court determines to be most appropriate.

01-17-12 A&M FARM & GARDEN CENTER VS. AMERICAN SPRINKLER MECHANICAL, L.L.C.
A-2921-10T1

Rule 4:23-5(a)(3), which governs the dismissal or suppression of pleadings with prejudice for failure to provide discovery, requires a motion judge to take action to obtain compliance with the requirements of the rule. Despite obvious breaches of the rule's requirements, the motion judge here granted an unopposed motion to dismiss plaintiff's complaint with prejudice without taking any action to secure compliance. We hold that, when a court considers such a motion and there is nothing before the court showing that a litigant has received notice of its exposure to the ultimate sanction, the court must take some action to obtain compliance with the requirements of

the rule before entering an order of dismissal or suppression with prejudice.

01-17-12 STATE OF NEW JERSEY VS. S.K.
A-1488-10T1

Defendant's conviction for violating a domestic violence restraining order is vacated and the complaint dismissed because the provision of the order prohibiting defendant from "any other place where plaintiff is located" is overly broad and not authorized by the Prevention of Domestic Violence Act, and also because defendant did not provide a sufficient factual basis for his guilty plea and conviction.

01-12-12 BELL TOWER CONDOMINIUM ASSOCIATION VS. PAT HAFFERT
A-3218-10T2

Although a portion of the Condominium Act (Act) requires condominium associations to establish a "fair and efficient procedure for the resolution of housing-related disputes" between individual unit owners and the association, or between unit owners, "as an alternative to litigation," the Act does not define the term "housing-related disputes" contained in N.J.S.A. 46:8B-14(k). Because the long-established public policy of this State favors alternative dispute resolution, and because the Legislature chose broad and unconditional language when it required the arbitration of "housing-related disputes," we construe the term broadly. We hold that "housing-related disputes" refers to any dispute arising directly from the condominium relationship. Without limitation, our opinion provides examples of disputes that would not be "housing-related," such as automobile accidents in the condominium parking lot, crimes committed by one unit owner against another, or a commercial dispute arising from a failed business venture between two unit owners.

01-12-12 REPOSSESSION SPECIALISTS, ET AL. VS. GEICO INSURANCE COMPANY
ANNETTA JACKSON VS. REPOSSESSION SPECIALISTS INC., ET AL.
A-2712-10T1

Interpreting the omnibus clause of a personal automobile insurance policy, the court determines that an entity that repossessed the policy holder's automobile after the policy holder defaulted under a secured car loan, was not a user "with permission" under the policy and therefore was not entitled to

coverage. The court reasons that the repossessor's use was not permissive because the repossessor's use was as of right under both the installment credit agreement and the Uniform Commercial Code, and the policy holder lacked the power to revoke the repossessor's right to use. The court therefore affirmed the trial court's grant of summary judgment to the policy holder's insurer.

01-10-12 IN THE MATTER OF THE APPLICATION FOR EXPUNGEMENT OF THE CRIMINAL RECORDS OF MARINO LOBASSO
A-3577-10T4

We affirmed an order denying expungement of a third-degree eluding conviction after five years. Appellant relied on L. 2009, c. 188, § 1, codified at N.J.S.A. 2C:52-2a(2), which reduced the waiting period for expunging certain criminal convictions from ten to five years provided the court finds "in its discretion that expungement is in the public interest, giving due consideration to the nature of the offense, and the applicant's character and conduct since conviction." Construing the new law, we concluded that expungement before ten years is reserved for compelling but not necessarily rare or unusual cases. We held that a trial court should weigh case-specific facts regarding the nature of the offense, the offender's character and conduct, and other relevant factors. Related to an "offender's character and conduct," a trial court may consider facts of an arrest that did not result in conviction, if supported by cognizable evidence. Regarding the "nature of the offense," a trial court may consider the grade of the offense, and related circumstances. Additionally, a trial court may consider: whether the petitioner engaged in activities post-conviction to limit the risk of re-offending; the petitioner's character and conduct before conviction; and the conviction record's impact on the petitioner's "reentry" efforts.

01-05-12 JOHN CAMBRIA VS. TWO JFK BLVD, LLC, ET AL. VS. JFK FOOD & DELI, INC., ET AL.
A-0802-10T2

In this action, plaintiff was injured as a result of a slip and fall on ice in the parking lot of a strip mall. In the appeal, the court considered whether a tenant's insurer owed any duty to the landlord and the landlord's real estate manager where the record revealed that, despite agreement, the tenant had failed to have the landlord named as an additional insured. The trial court entered summary judgment in favor of the

landlord and real estate manager based on the tenant's insurer's policy term that it would provide coverage for "[a]ny person . . . acting as your real estate manager." The court reversed, finding there could only be coverage if it could be shown that the real estate manager was the tenant's real estate manager and concluding that the evidence did not support a finding that the tenant bore any responsibility for the parking lot area. As a result, the real estate manager did not act for the tenant, only the landlord, in maintaining the parking lot.

12-29-11 STATE OF NEW JERSEY VS. DAVID BAYLOR
A-0054-09T1

The life sentences without parole imposed in this matter do not violate the Ex Post Facto Clauses of the Federal and State Constitutions because defendant was convicted of murders that he committed in 2005, and the murder statute in effect at that time required the imposition of life sentences without parole where, as here, the jury found at least one statutory aggravating factor.

12-29-11 STATE OF NEW JERSEY VS. SHAFFONA MORGAN
A-4468-08T4

In this appeal, we hold that a series of ex parte communications between the trial judge and the jury did not compromise the integrity of the jury deliberations requiring the reversal of defendant's conviction. We also hold that, under the circumstances of this case, the court did not violate defendant's right to a fair trial or impugn the integrity of the jury's deliberative process by permitting the jurors to take copies of sections of the charge with them over a weekend. We nevertheless caution trial courts against engaging in such a practice without expressed authority and guidance from the Supreme Court. We refer this issue to the Civil and Criminal Practice Committees to develop recommendations to the Supreme Court to either explicitly forbid the practice, or permit it under specific guidelines.

12-22-11 STATE OF NEW JERSEY VS. THOMAS W. BERNOKEITS, JR.
A-3150-10T4

We hold that standard, roadside field sobriety testing does not require the police to have probable cause to arrest or to search, but rather may be undertaken on the basis of a reasonable articulable suspicion alone that defendant was driving while intoxicated.

12-22-11 DR. ENRICO BONDI, ETC. VS. CITIGROUP, INC., ET AL.
A-2654-08T2

We affirm the order granting summary judgment in favor of Citibank that dismissed all of plaintiff's claims, except the claim that Citibank employees aided and abetted looting of corporate funds by senior corporate officers at a multi-national corporation that failed in December 2003. In doing so, we held that the trial judge properly applied the in pari delicto affirmative defense asserted by Citibank to defeat most of plaintiff's claims. Following trial, the jury returned a verdict in favor of Citibank on the looting claim.

We also affirmed a series of other pre-trial, trial, and post-trial rulings and affirmed the $431,318,824.84 judgment in favor of defendant-counterclaimant Citibank.

12-21-11 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES. V.T., G.G. AND R.S.
A-2571-10T4

R.S. appeals the finding that he neglected his eleven-year-old daughter by testing positive for drugs at two supervised visits. The Division of Youth and Family Services acknowledges that he behaved properly at both visits. We hold that under these circumstances, the positive test results in themselves are not sufficient evidence of abuse or neglect.

12-20-11 IN THE MATTER OF DANIEL RODRIGUEZ // IN THE MATTER OF DOUGLAS TUBBY
A-2616-10T1/A-2706-10T1

Corrections officers, who are defendants in a civil action filed by an inmate, appeal from denials of legal representation pursuant to N.J.S.A. 59:10A-2. The Attorney General relied on disciplinary charges against the officers that had been withdrawn and did not consider discipline that the inmate received because his disruptive conduct gave the officers reason to believe he posed a threat of imminent assault.

Applying Prado v. State, 186 N.J. 413 (2006), we reverse because the denials are predicated upon findings of probable willful misconduct and actual malice that lack support in the record and are inconsistent with controlling legal principles.

12-20-11 STATE OF NEW JERSEY VS. NICOLE M. HOLLAND // STATE OF NEW JERSEY VS. KENNETH S. PIZZO, JR.
A-4384-09T3/A-4775-09T3

We hold that sufficient credible evidence supports the remand court's findings that the Control Company digital thermometer is comparable in all material respects to the Ertco-Hart digital thermometer previously used during the Alcotest calibration process, and that the Control Company certificate is facially valid and satisfies the requirements as a foundational document as required by State v. Chun, 194 N.J. 54, cert. denied, 555 U.S. 825, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008).

12-19-11 THE SALT & LIGHT COMPANY, INC., ET AL. VS. WILLINGBORO TOWNSHIP ZONING BOARD OF ADJUSTMENT
A-3393-10T1

Although the duplex for occupancy by two homeless families that plaintiff-charitable organization proposed to construct would be an inherently beneficial use, the board of adjustment did not abuse its discretion in determining that the public benefit to be derived from this use was outweighed by the detrimental effect upon the integrity of the zoning plan that would result from construction of a two-family residence in an area zoned exclusively for single-family residences.

12-12-11 K.L. VS. EVESHAM TOWNSHIP BOARD OF EDUCATION
A-1771-10T3

The Open Public Records Act and the common law right of access to public records did not require disclosure at this time of notes kept by school personnel regarding incidents involving plaintiff's children because the notes were privileged under the attorney work product doctrine. The recently-enacted Anti-Bullying Bill of Rights Act, L. 2010, c. 122, N.J.S.A. 18A:37-13.1 to -32, did not apply to plaintiff's request or the school district's record-keeping obligations.

Plaintiff's OPRA lawsuit was the catalyst for disclosure of one document, and so, plaintiff was entitled to partial reimbursement of his attorney's fees. The document was not disclosed only pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, which does not have a fee-shifting provision.

12-07-11 STATE OF NEW JERSEY VS. JOHN J. LAWLESS, JR.
A-2064-10T3

Defendant pled guilty to aggravated manslaughter and driving while intoxicated. After consuming a large amount of beer, defendant fell asleep at the wheel of his car, crossed the center line of the road and collided with an on-coming car, killing the driver and causing serious injuries to the passengers. Citing aggravating factors two (the gravity and seriousness of the harm inflicted), three (the risk that defendant will commit another offense), six (the extent of defendant's prior criminal record), and nine (the need for specific and general deterrence), the judge imposed a thirty-year term of imprisonment for the aggravated manslaughter charge.

We held that the record did not support reliance on aggravating factor two because defendant pled guilty to only one charge involving one victim; therefore, the judge could not rely on the injuries suffered by other victims of the collision. We also held that the judge could not rely on multiple prior driving while intoxicated convictions because these charges are not considered crimes. We remanded for reconsideration of the sentence in accordance with the aggravating factors supported by the record.

12-06-11 DANIEL SCHULMANN, ET AL. VS. DIRECTOR, NEW JERSEY DIVISION, NEW JERSEY DIVISION OF TAXATION
A-2089-10T3

The taxpayer used his personal funds to pay commissions owed by two S corporations. He and his wife then deducted the commission expenses from the S corporation income that they reported on their personal income tax returns. Affirming the reported opinion of the Tax Court, we held that the taxpayer could not disregard the corporate form by taking personal deductions for paying corporate obligations. The attempted deductions also violated the rule against "cross-netting" of losses, as set forth in N.J.S.A. 54A:5-2.

12-02-11 CHARLES WILLIAMS VS. NEW JERSEY DEPARTMENT OF CORRECTIONS
A-5962-08T3

An inmate at the Adult Diagnostic Treatment Center (ADTC) challenged the authority of the Commissioner of the Department of Corrections to transfer inmates to the ADTC who do not meet the qualifications for confinement at the ADTC set forth in the Sexual Offender Act (SOA), N.J.S.A. 2C:47-1 to -10, more

specifically the provisions of N.J.S.A. 2C:47-3. We concluded that the very specific provisions of the SOA, as explored at length by the Supreme Court in In re Civil Commitment of W.X.C., 204 N.J. 179, 196-99 (2010), cert. denied, ___ U.S. ___, 131 S. Ct. 1702, 179 L. Ed. 2d 635 (2011), significantly limit the Commissioner's otherwise broad discretion to assign inmates to available institutions under N.J.S.A. 30:4-91.2, and that only sex offenders who meet each of the three criteria set forth in the SOA can be confined at the ADTC. Those criteria are: (1) the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, (2) the offender is amenable to sex offender treatment, and (3) the offender is willing to participate in such treatment.

12-01-11 ANIMAL PROTECTION LEAGUE OF NEW JERSEY, THE BEAR EDUCATION AND RESOURCE GROUP, ET AL. VS. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION("NJDEP"), BOB MARTIN, ET AL.
A-1603-10T2

On this appeal challenging the validity of the Comprehensive Black Bear Management Policy (CBBMP) adopted by respondent New Jersey Department of Environmental Protection, we conclude that while there may be disagreements as to available data and its interpretation, under our standard of review we defer to agency findings that are based on sufficient evidence in the record. We further conclude that the agency findings here meet that standard. Most important, we determine that appellants have failed to demonstrate that respondents acted arbitrarily or capriciously or in bad faith. We further find that appellants have failed to demonstrate any procedural deficiencies supporting invalidation of the CBBMP. Accordingly, we affirm.

12-01-11 NEW PROVIDENCE APARTMENTS CO., L.L.C. VS. MAYOR AND COUNCIL OF BOROUGH OF NEW PROVIDENCE, ET AL.
A-2924-10T4

A municipal ordinance that imposes a $100 annual fee per apartment unit for sewer service upon owners of apartment houses, but does not impose this fee upon owners of single-family houses, complies with the statutory mandate that sewer fees shall be "uniform and equitable for the same types and classes of use and service" and the equal protection guarantees of the United States and New Jersey Constitutions, because the fee is reasonable designed to reduce the gross disparity in the contributions to the costs of sewer service derived from real

estate taxes paid by apartment owners and owners of single-family houses.

12-01-11 MICHAEL C. SENISCH VS. JAMES CARLINO, ET AL.
A-6218-09T3

Pursuant to the 2005 "Health Care Professional Responsibility and Reporting Enhancement Act" (colloquially called the "Cullen Act"), N.J.S.A. 26:2H-12.2c, and also pursuant to prior case law establishing a qualified immunity for truthful job references by a former employer, defendants could not be held liable in a civil lawsuit for responding to a reference request with negative information from the personnel file of plaintiff, a physician's assistant. Defendants were not required to include in the reference plaintiff's version of the circumstances of his termination since the settlement of a prior CEPA and LAD lawsuit he brought did not include an admission of wrongdoing by defendant former employer.

11-30-11 NEWARK MORNING LEDGER CO., PUBLISHER OF THE STAR-LEDGER VS. NEW JERSEY SPORTS & EXPOSITION AUTHORITY
A-1810-10T1

We are asked to examine the scope of certain exemptions from the disclosure requirements set forth in the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. We conclude disclosure of the terms of the licensing agreements for use of the IZOD Center, a state-owned facility, is mandated by OPRA. The redacted terms relating to the use of the arena do not fall within the scope of "trade secrets" or "proprietary commercial or financial information" as used in N.J.S.A. 47:1A-1.1. Further, disclosure of the details regarding the licensing fees and other remunerative arrangements would not afford an advantage to other venues competing for bookings because they are widely known among those involved in this branch of the entertainment industry, defeating defendant's claims of confidentiality.

11-28-11 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES V. T.I., IN THE MATTER OF THE GUARDIANSHIP OF S.L.M.
A-2850-10T3

In this appeal from an order terminating parental rights, we are asked to consider the definition of "feasible" under the Kinship Legal Guardianship (KLG) statute, N.J.S.A. 3B:12A-1 to -7. We conclude that, when a caregiver in a case brought by the Division of Youth and Family Services (DYFS) unequivocally

asserts a desire to adopt, the finding required for a KLG that "adoption of the child is neither feasible nor likely" cannot be met.

11-23-11 IN THE MATTER OF THE NOVEMBER 2, 2010, ELECTION FOR THE OFFICE OF MAYOR IN THE BOROUGH OF SOUTH AMBOY, MIDDLESEX COUNTY, NEW JERSEY
A-2499-10T1

This case considers an election contest pursuant to N.J.S.A. 19:29-1 and addresses, among other things, issues of domicile and late amendments to petitions under N.J.S.A. 19:29-5. Further, we address the requirements for voter registration when applying for driver's license renewal at the Division of Motor Vehicles under N.J.S.A. 19:31-6(b) and N.J.S.A. 39:2-3.2. We hold that citizens who are accorded a voter registration opportunity when obtaining or renewing a driver's license must complete the voter registration application in order to become a registered voter.

11-23-11 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. I.S.
IN THE MATTER OF N.S. AND S.S.
A-5793-09T3

We clarify our earlier decision in New Jersey Division of Youth and Family Services v. I.S., 422 N.J. Super. 52 (App. Div. 2011). We state that our reference to the trial judge's finding, based upon clear and convincing evidence, that I.S. was unable to care for her daughters, was illustrative of the quality of proof presented rather than our alteration of the preponderance of the evidence standard of proof governing abuse or neglect proceedings under Title 9.

We also clarify that proceedings under Title 30 are governed by the preponderance of the evidence standard of proof, except where the Division seeks an order terminating parental rights. In such cases, the Division is required to prove that termination is in the best interests of the child by clear and convincing evidence.

11-16-11 KANE PROPERTIES, L.L.C. VS. CITY OF HOBOKKEN, ET AL.
A-3903-10T4

Plaintiff, a developer, obtained variance relief from the Hoboken Board of Adjustment, but that relief was largely overturned on the objector's appeal to the Hoboken City Council.

Shortly after the Board issued its decision granting the variances, the objector's attorney became the Hoboken Corporation Counsel. Despite having recused himself, the attorney participated, albeit to a limited extent, in the appeal proceedings before the Council. On the facts presented, we held that even that limited degree of participation tainted the Council's decision, requiring a remand to the Council and reconsideration of the appeal ab initio.

11-14-11 ROCKAWAY SHOPRITE ASSOCIATES, INC. VS. CITY OF LINDEN AND COUNCIL OF THE CITY OF LINDEN, ET AL.
A-1345-10T4

A public notice of a rezoning ordinance purporting to effect a substantial alteration in the character of a district by creating entirely new zones with different uses, that merely advises the zoning is being amended as to properties identified by common name and lot and block number, is legally deficient under N.J.S.A. 40:49-2.1 because it fails to apprise the interested public of what exactly is being proposed.

11-09-11 STATE OF NEW JERSEY VS. JEFFREY S. ZEIKEL
A-1495-10T4

Defendant was correctly sentenced as a third-time DWI offender based on a prior conviction in New Jersey for DWI and two prior convictions in New York State for driving while ability impaired. The New York convictions were "of a substantially similar nature" as a DWI violation in New Jersey. See N.J.S.A. 39:4-50(a)(3). Defendant's constitutional, statutory, and factual challenges to the consideration of his 1980s New York convictions are rejected.

11-03-11 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. D.P. AND O.B. IN THE MATTER OF V.B.
A-4087-10T4

We reviewed resource parents' appeal of an order denying their motion to intervene in a best interests hearing, which considered whether to remove the twenty-month old child from the resource home, her primary home since birth, or to place her with a relative. On appeal, the resource parents assert the trial court erroneously denied intervention, disregarding their status as "indispensible parties" and their standing as the child's "psychological parents."

We affirmed, concluding the right to notice of proceedings and to inform the court granted to resource parents by the Legislature in N.J.S.A. 9:6-8.19a, does not impart a legal interest or an expectation to engage experts, demand discovery, appear in the action, or cross-examine witnesses. We are convinced the limited and temporary character of foster care remains the legislative policy of this State. The trial court fully abided all statutory provisions governing a resource parent's participation in litigation involving a child entrusted to their care by the Division, granting the resource parents all process they were due.

10-27-11 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. H.P AND V.P.
IN THE MATTER OF H.P., JR., A.P. AND A.P.
A-0642-10T1

Defendant appealed from an order that concluded he had abused or neglected his three children. The finding was rendered by the judge's consideration only of testimony taken at a hearing conducted the day the complaint was filed, at a time when defendant was present but not represented by counsel.

The court held that defendant's claim that the record considered when the finding of abuse/neglect was made was inadequate because he was not represented when the testimony was taken lacked merit because defendant was represented when he consented to the judge's reliance on that earlier testimony. The court reversed and remanded, however, because the judge made a finding of abuse/neglect by using the clear and convincing standard without providing defendant advance notice of that standard's use. In addition, the judge's findings consisted only of a summary of the testimony followed by a conclusion parroting the requirements of N.J.S.A. 9:6-8.21 without credibility determinations or an analysis of what the judge found had actually occurred. Absent greater clarity regarding this and other factual circumstances, the court was unable to conclude that the evidence was sufficient to meet the applicable preponderance standard even though the judge felt the higher clear and convincing burden had been met.

10-27-11 SUSAN D'ALESSANDRO VS. NORMAN & JUDITH HARTZEL, ET AL.
A-3736-09T3

We granted summary judgment dismissal of plaintiff's negligence suit against the owner of short-term vacation rental property where plaintiff failed to offer expert proof that the

condition of which she complained was dangerous or involved an unreasonable risk of physical harm to visitors, and where, in any event, the record indisputably demonstrated she knew or had reason to know of the claimed risk involved and, conversely, defendant had no reason to expect that plaintiff would not discover the obvious condition.

10-27-11 STATE OF NEW JERSEY VS. RAYMOND MALDON
A-1473-09T1

Defendant presented legally competent evidence that (a) his attorney misinformed him that his guilty plea to criminal sexual contact could not result in his later civil commitment under the Sexually Violent Predator Act, and (b) he would have insisted on going to trial if he had been correctly advised. Defendant filed the PCR petition immediately after he was civilly committed based, in part, on his guilty plea in this case. Mistakenly finding that defendant was uninformed rather than misinformed, and concluding that his claim was barred because it arose prior to State v. Bellamy, 178 N.J. 127 (2003), the trial judge denied the petition. Because the petition involved emerging legal issues, and defendant presented a prima facie case on both Strickland prongs, we concluded that the case should be decided based on a complete record and remanded the matter for an evidentiary hearing.

10-26-11 NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES VS. J.C. IN THE MATTER OF E.C.
A-1269-10T4

Although we determined the appeal by defendant mother was moot, we reviewed the procedural requirements attached to protective services litigation proceeding pursuant to N.J.S.A. 30:4C-12, following the Division's dismissal of an action under Title Nine alleging abuse and neglect.

10-26-11 STATE OF NEW JERSEY VS. GEORGE R. MELENDEZ
A-0640-08T4

Relying on the public safety exception in New York v. Quarles, 467 U.S. 649, 655-56, 104 S. Ct. 2626, 2631, 81 L. Ed. 2d 559, 557 (1984), and State v. O'Neal, 190 N.J. 601, 618 (2007), the trial court admitted inculpatory statements defendant gave in response to officers' questions about the

location of the handgun he used to kill his wife. Defendant was in custody and had invoked his right to counsel.

Assuming the claimed "public safety" meets the criteria in State v. Stephenson, 350 N.J. Super. 517, 525 (App. Div. 2002), we are persuaded by the reasoning in United States v. DeSantis, 870 F.2d 536, 541 (9th Cir. 1989), and hold that the same "exigent circumstances" that permit the pre-Miranda interrogation of a defendant, permit the police to question a defendant after he or she has invoked the right to counsel. Pursuant to Stephenson, we hold there was an insufficient basis to apply the public safety exception. We affirm, however, because the trial court correctly found defendant waived his right to counsel, independent of the initially tainted interrogation.

10-21-11 PRINCETON HEALTHCARE SYSTEM VS. NETSMART NEW YORK INC.
A-3533-10T4

A negotiated contract between corporations for the installation and implementation of a complex computer software system does not constitute a contract for the "sale of merchandise" that can provide the basis for a claim under the Consumer Fraud Act.

10-20-11 STATE OF NEW JERSEY VS. JOSEPH DIORIO
A-4981-07T4

We affirm defendant's convictions for his role in a planned bankruptcy, also known as a "bust-out" scheme. We find that the indictment was returned within the statute of limitations period because the theft by deception was not completed until the contractual period for repayment had ended, not when the goods were received. Additionally, we reject defendant's argument that an oral plea agreement existed.

10-18-11 MINDY JACOBSON, ET AL. VS. UNITED STATES OF AMERICA ET AL.
A-1605-10T1

We hold that the United States enjoys sovereign immunity from liability for damages arising from the Social Security Administration's failure to withhold disability benefits payments pursuant to a state child support garnishment order.

The Law Division granted summary judgment in favor of plaintiff, who sued individually and on behalf of her minor

daughter, for whom child support was awarded, ordering the federal government to pay them compensatory damages, pre-judgment interest, and counsel fees and costs. We reverse and hold that plaintiff's claim is barred by sovereign immunity under 42 U.S.C.A. § 659.

10-18-11 LORRAINE GORMLEY VS. LATANY WOOD-EL, ET AL.
A-3894-09T3

Defendants appeal the interlocutory order denying their summary judgment motion seeking, on the basis of qualified immunity, dismissal of plaintiff's civil rights complaint. Plaintiff, an attorney, claimed defendants violated her substantive due process right under the Fourteenth Amendment when they created and imposed serious risks of harm to her as she met with her client, a mental patient confined at Ancora. Plaintiff's client physically attacked her during the course of that meeting. The motion judge ruled whether defendants are entitled to qualified immunity is a question of fact for the trier of fact. We reversed, holding that the determination of whether defendants are entitled to qualified immunity is a question of law for the court.

We additionally held that the facts, as alleged, established a prima facie case of a state-created danger theory of liability under the Fourteenth Amendment, but nonetheless concluded defendants were entitled to qualified immunity because the right asserted was not clearly established at the time plaintiff was attacked.

10-17-11 REGINA BASKETT, ET AL. VS. KWOKLEUNG CHEUNG
A-0755-10T4

In this appeal we address the 2008 amendments to Rule 1:13-7. We hold that in single-defendant cases the standard for reinstatement of a complaint is good cause. In multi-defendant cases, reinstatement within ninety days of the prior dismissal is permitted on a showing of good cause, but thereafter a party must demonstrate exceptional circumstances to reinstate a complaint. Because this case involves only a single defendant, the standard is good cause, which we conclude was adequately demonstrated by the motion record in the Law Division.

10-11-11 STATE OF NEW JERSEY, ET AL. VS. CORRECTIONAL MEDICAL SERVICES, INC., ET AL.
A-5575-09T2

We conclude that the New Jersey False Claims Act, N.J.S.A. 1A:32C-1 to -15 and N.J.S.A. 2A32C-17 to -18, is not retroactively applicable to conduct prior to the Act's effective date, which was March 13, 2008.

10-6-11 ESTATE OF ALVINA TAYLOR VS. DIRECTOR, DIVISION OF TAXATION
A-3501-09T3

In this appeal, we affirm the decision of the Tax Court, published at 25 N.J. Tax 398 (Tax 2010), granting the Director, Division of Taxation, summary judgment dismissing the Estate's complaint with prejudice and denying an inheritance tax refund. In doing so, we agree with the Director's and Tax Court's decision that the three-year limitation on requesting inheritance tax overpayment refunds, set by N.J.S.A. 54:35-10, is enforceable; and the Square Corners Doctrine did not apply to the facts of this case so as to preclude application of N.J.S.A. 54:35-10.

10-4-11 ADVANCE HOUSING, INC., ET AL. VS. TOWNSHIP OF TEANECK, ET AL.
A-0728-09T3

We reversed the Tax Court's denial of real property tax exemptions to charitable organizations which provide housing and supportive services to individuals with psychiatric disabilities. In interpreting N.J.S.A. 54:4-3.6, we determine that the motion judge erred in denying the exemptions on the basis that supportive services were also provided to residents of other housing and that the absence of a requirement that residents receive supportive services was not determinative when there was no issue of fact that all residents in fact participated in the services offered, which were integral to their ability to live independently in the housing provided.

10-3-11 MIDLAND FUNDING, LLC VS. ROSA GIAMBANCO
A-1651-09T3

In this appeal, we review a consent judgment in which the judgment-creditor waived notice under Rule 4:59-1(d) in the event of default upon the conditions of settlement incorporated into the consent judgment. The Law Division judge found certain provisions of the consent judgment contrary to public policy and struck the contrary provisions before otherwise approving the consent judgment.

We held that such consent judgments are not contrary to public policy, provided the judgment-debtor's waiver of notice under Rule 4:59-1(d) is knowing and informed. Because the proposed consent judgment was deficient in that it failed to advise the judgment-debtor of the nature and consequences of the waiver, we concluded the Law Division judge properly rejected the order as proposed. We additionally held where a court rejects the terms of a consent judgment, it may not, absent concurrence by all parties, strike the offending provisions and then approve the consent judgment as modified by the court. Rather, we concluded the court must return the matter to its pre-settlement status.

09-30-11 JERALD D. ALBRECHT VS. CORRECTIONAL MEDICAL SERVICES, ET AL.
A-0605-10T4

We hold that the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29 only applies to health care facilities that have been duly "licensed as" such by the Department of Health and Senior Services. N.J.S.A. 2A:53A-26(j). Additionally, where a question is raised about the status of a defendant in a malpractice action as a licensed person or health care facility and demands production of a license, the person or entity seeking a dismissal for failure to provide an affidavit of merit pursuant to N.J.S.A. 2A:53A-29 must submit competent evidential proof of its licensure. Finally, we reject the claim of Correctional Medical Services that Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, 416 N.J. Super. 1, 26-27 (App. Div. 2010), and Nagim v. N.J. Dep't of Transit, 369 N.J. Super. 103, 109 (Law Div. 2003), should be extended to it because it has not established that it is a professional corporation whose shareholders are all licensed professionals.

09-30-11 SAMUEL TORTORICE, ET AL. VS. LYNNE VANARTSDALEN
A-4260-09T1

This visitation dispute arises between plaintiffs, the child's paternal grandparents, and defendant, the child's maternal grandmother. Because a fit parent has a fundamental right to autonomy in child-rearing decisions, a grandparent who seeks a visitation order must show that visitation is necessary to avoid harm to the child. Defendant argues that because she is the child's "psychological parent," she enjoys the same right to autonomy and consequently, plaintiffs must satisfy an avoidance of harm standard before a visitation order may be entered. We hold that the status of "psychological parent" does

not afford defendant such constitutionally mandated autonomy, that a best interest analysis applies to this dispute, and affirm the order granting visitation to plaintiffs.

09-30-11 ELIZABETH TYMCZYSZYN VS. COLUMBUS GARDENS, ET AL.
A-3544-09T4

Plaintiff slipped on ice and fell on the sidewalk abutting a multi-unit residential property owned and operated by the Hoboken Housing Authority. The trial court granted summary judgment to the Housing Authority. We reverse because plaintiff presented sufficient evidence to survive summary judgment under N.J.S.A. 59:4-2(a), establishing that the manner in which the Housing Authority removed snow and ice from the area in question could have created the dangerous condition that caused plaintiff's injury. In the alternative we find that, under N.J.S.A. 59:4-2(b), the Housing Authority was constructively on notice of the dangerous condition.

Applying Bligen v. Jersey City Housing Authority, 131 N.J. 129 (1993), we also hold the Housing Authority is not entitled to invoke the weather condition immunity in N.J.S.A. 59:4-7, or the common law immunity for snow-related activities under Miehl v. Darpino, 53 N.J. 49, 54 (1968).

09-29-11 BERTHA BUENO VS. BOARD OF TRUSTEES, ET AL.
A-1690-09T2

We determined that appellant was entitled to a service retirement allowance retroactive to the effective date she sought a disability retirement allowance because regulation in effect at the time of her initial application did not prohibit her from changing her application pursuant to N.J.A.C. 17:3-6.3(a) to one for a service retirement allowance while her petition for certification following our affirmance of the denial of a disability retirement allowance was still pending. The Board's practice of limiting such a conversion to the thirty-day period following its denial of a disability retirement allowance constituted a rule under Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 33, 331-32 (1984), that was not promulgated in accordance with the specific rulemaking procedures of the Administrative Procedures Act, N.J.S.A. 52:14B-1 to -15.

09-29-11 LORETTA DEBOARD VS. WYETH, INC., ET AL.
DORA BAILEY, ET AL. VS. WYETH, INC., ET AL.
A-6230-07T1;A-6251-07T1 (CONSOLIDATED)

We affirm the orders of summary judgment entered by Judge Jamie Happas dismissing plaintiff's product liability and other claims arising from utilization of hormone replacement therapy, relying in our decision on the comprehensive opinion of Judge Happas, which will be published simultaneously. In that opinion, Judge Happas properly declined to extend our reasoning in McDarby v. Merck & Co., Inc., 401 N.J. Super. 10 (App. Div. 2008), appeal dismissed, 200 N.J. 282 (2009), to permit plaintiffs to overcome the presumption of the adequacy of FDA-approved warnings by demonstrating that further testing, if voluntarily undertaken, would have disclosed an increased risk from taking the drugs at issue.