2023 Civil Case Law Update

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2023 CIVIL CASE LAW UPDATE

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CIVIL CASE LAW UPDATE

2021-2022

Updated December, 2022

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SUPREME COURT

Miriam Rivera vs. The Valley Hospital, Inc. (085992/085993/085994) (Bergen County and Statewide) Aug. 25, 2022 (A-25/26/27-21)

Summary: As a matter of law, the evidence presented, even affording plaintiffs all favorable inferences, does not establish that defendants' acts or omissions were motivated by actual malice or accompanied by wanton and willful disregard for Ruscitto's health and safety. A reasonable jury could not find by clear and convincing evidence that punitive damages are warranted based on the facts of this case, and partial summary judgment should have been granted.

Larry Schwartz vs. Nicholas Menas, Esq. (085184) (Monmouth County and Statewide) Aug. 17, 2022 (A-54/55-20)

Summary: The Court joins the majority of jurisdictions that reject a per se ban on claims by new businesses for lost profits damages, and it declines to follow Weiss to the extent that it bars any claim by a new business for such damages. Claims for lost profits damages are governed by the standard of reasonable certainty and require a fact-sensitive analysis. Because it is substantially more difficult for a new business to establish lost profits damages with reasonable certainty, a trial court should carefully scrutinize a new business's claim that a defendant's tortious conduct or breach of contract prevented it from profiting from an enterprise in which it has no experience and should bar that claim unless it can be proven with reasonable certainty. The Court remands these matters so that the trial court may decide defendants' motions in accordance with the proper standard.

Norman International, Inc. vs. Admiral Insurance Company (086155) (Morris County and Statewide) Aug. 10, 2022 (A-24-21)

Summary: The policy's broad and unambiguous language makes clear that a causal relationship is not required in order for the exclusionary clause to apply; rather, any claim "in any way connected with" the insured's operations or activities in a county identified in the exclusionary clause is not covered under the policy. Richfield's operations in an excluded county are alleged to be connected with the injuries for which recovery is sought, so the exclusion applies. Admiral has no duty to defend a claim that it is not contractually obligated to indemnify.

East Bay Drywall, LLC vs. Department of Labor and Workforce Development (085770) (Statewide) Aug. 02, 2022 (A-7-21)

Summary: The Commissioner's finding that East Bay did not supply sufficient information to prove the workers' independence under the ABC test's prong C was not arbitrary, capricious, or unreasonable, but rather was supported by the absence of record evidence as to that part of the test.

The Court is satisfied that all sixteen workers in question are properly classified as employees, and it remands to the Department for calculation of the appropriate back-owed contributions.

Crystal Point Condominium Association, Inc. vs. Kinsale Insurance Company (085606) (Hudson County & Statewide) July 18, 2022 (A-76-20)

Summary: Crystal Point may assert direct claims against Kinsale pursuant to the Direct Action Statute in the setting of this case. Based on the plain language of N.J.S.A. 17:28-2, however, Crystal Point's claims against Kinsale are derivative claims, and are thus subject to the terms of the insurance policies at issue, including the provision in each policy mandating binding arbitration of disputes between Kinsale and its insureds. Crystal Point's claims against Kinsale are therefore subject to arbitration.

Linden Democratic Committee vs. City of Linden (086255) (Union County & Statewide) July 06, 2022 (A-30-21)

Summary: In amending in 1990 Sections 11 and 13 of the Municipal Vacancy Law, N.J.S.A. 40A:16-11 and -13, the Legislature removed the governing body's discretion to keep vacant a seat previously occupied by a nominee of a political party. Instead, the Legislature empowered the municipal committee of the political party whose nominee previously occupied the vacant seat to submit three names to the governing body. N.J.S.A. 40A:16 11. Section 11 mandates that the governing body choose one of the municipal committee's three nominees.

Thomasenia L. Fowler vs. Akzo Nobel Chemicals, Inc. (085939) (Middlesex County & Statewide) June 30, 2022 (A-5-21)

Summary: As to the duty to warn, an asbestos manufacturer or supplier that places inadequate warnings on asbestos bags used in the workplace has breached its duty to the worker, regardless of whether it provides the employer with the correct information, which is reasonably intended to reach its employees. As to medical causation, the trial court's modified Model Jury Charge on proximate cause sufficiently guided the jury.

Robert Sipko vs. Koger, Inc. (085022) (Bergen County & Statewide) June 23, 2022 (A-74-20)

Summary: In light of all the defendants' conduct regarding KDS and KPS to strip Robert of his rightful interests, equity cannot abide imposing a marketability discount to the benefit of defendants. The trial court's acceptance of Robert's expert's valuation of the company fell within its broad discretion and was fully supported by the record. Defendants were given the opportunity to present an expert valuation of the companies on remand but made the strategic decision not to do so. The Court declines to provide defendants with another bite of this thoroughly chewed apple and reinstates the judgment of the trial court.

Ann Samolyk vs. Dorothy Berthe, III (085225) (Ocean County & Statewide) June 13, 2022 (A-16-21)

Summary: After reviewing the noble principles that infuse the public policy underpinning this cause of action, the Court declines to consider property, in whatever form, to be equally entitled to the unique value and protection bestowed on a human life. The Court nevertheless expands the rescue doctrine to include acts that appear to be intended to protect property but are in fact reasonable measures ultimately intended to protect a human life.

John C. Sullivan vs. Max Spann Real Estate & Auction Co. (085225) (Somerset County & Statewide) June 09, 2022 (A-57-20)

Summary: A residential real estate sale by absolute auction is distinct from a traditional real estate transaction in which a buyer and seller negotiate the contract price and other terms and memorialize their agreement in a contract. In an absolute auction or an auction without reserve, as is the issue here, the owner unconditionally offers the property for sale and the highest bid creates a final and enforceable contract at the auction's conclusion, subject to applicable contract defenses. Imposing the three-day attorney review prescribed in State Bar Ass'n on residential real estate sales conducted by absolute auction would fundamentally interfere with the method by which buyers and sellers choose to conduct such sales.

In the Matter of Dionne Larrel Wade (085931) June 07, 2022 (D-132-20)

Summary: In the four decades since Wilson, the Court has consistently disbarred attorneys who knowingly misappropriated client funds regardless of their motives or other mitigating factors. The rule has remained inviolate because of the critical aims it seeks to serve: to protect the public and maintain confidence in the legal profession and the Judiciary. 81 N.J. at 461. If a lawyer knowingly misappropriates client funds, both the attorney and the public should know that the person will be disbarred.

Mack-Cali Realty Corp. vs. State of New (085465) (Hudson County & Statewide) May 31, 2022 (A-8/9/10/11-21)

Summary: The Court affirms the judgment of the Appellate Division substantially for the reasons expressed in Judge Messano's published opinion.

Dobco, Inc. vs. Bergen County Improvement Authority (086079) (Passaic County & Statewide) April 28, 2022 (A-18/19-21)

Summary: The Court affirms the judgment of the Appellate Division substantially for the reasons expressed in Judge Messano's published opinion. The Court requires that, going forward, a plaintiff claiming taxpayer standing in an action challenging the process used to award a public contract for goods or services must file a certification with the complaint. As to the merits of this appeal, the Court departs from the Appellate Division's decision in only one respect: the Court does not rely on the leasing and financing arrangements contemplated by the BCIA and defendant County of Bergen.

Troy Haviland vs. Lourdes Medical Center of Burlington County, Inc. (085419) (Burlington County & Statewide) April 12, 2022 (A-70-20)

Summary: The AOM statute does not require submission of an AOM to support a vicarious liability claim against a licensed health care facility based only on the conduct of its non-licensed employee.

In the Matter of Proposed Construction of Compressor Station (086428) (Statewide) April 11, 2022 (A-44-21)

Summary: Appellants should have included Tennessee as an "interested party" pursuant to Rule 2:5-1(d) when they filed their initial Notice of Appeal and Case Information Statement in the Appellate Division. Accordingly, the Court declines to reach the arguments advanced under Rules 4:33-1 and -2. The matter is remanded to the Appellate Division to permit appellants to file an amended Notice of Appeal and Case Information Statement that names Tennessee as an interested party pursuant to Rule 2:5-1(d).

Hamid Harris vs. City of Newark (085028) (Essex County & Statewide) March 30, 2022 (A-59-20)

Summary: The trial court's order in this case was a decision premised on factual findings as well as legal conclusions, not an exclusively legal determination. A trial court's order rejecting as a matter of law a claim of qualified immunity should not be designated as a final order appealable as of right under Rule 2:2-3(a), and federal law does not require the contrary result. In an NJCRA action, a defendant seeking to challenge a trial court's order denying qualified immunity prior to final judgment must proceed by motion for leave to file an interlocutory appeal in accordance with Rules 2:2-4 and 2:5-6.

Aleice Jeter vs. Sam's Club (085880) (Union County & Statewide) March 17, 2022 (A-2-21)

Summary: The mode of operation rule does not apply to the sale of grapes in closed clamshell containers. Selling grapes in this manner does not create a reasonably foreseeable risk that grapes will fall to the ground in the process of ordinary customer handling. The Court stresses that dispositive motions should not be made or decided on the eve of trial, without providing the parties with a reasonable opportunity to present their cases through testimony and argument.

Richard Rivera vs. Union County Prosecutor's Office (084867) (Union County & Statewide) March 14, 2022 (A-58-20)

Summary: *OPRA does not permit access to internal affairs reports, but those records can and should be disclosed under the common law right of access -- subject to appropriate redactions -- when interests that favor disclosure outweigh concerns for confidentiality. The Court provides guidance on how to conduct that balancing test.

Kathleen M. Moynihan vs. Edward J. Lynch (085157) (Burlington County & Statewide) March 08, 2022 (A-64-20)

Summary: The palimony agreement, as written and signed, without the attorney review requirement, is enforceable. That portion of N.J.S.A. 25:1-5(h), which imposes an attorney-review requirement to enforce a palimony agreement, contravenes Article I, Paragraph 1 of the New Jersey Constitution. The parties did not enter an oral palimony agreement.

Libertarians for Transparent Government vs. Cumberland County (084956) (Cumberland County & Statewide) March 07, 2022 (A-34-20)

Summary: Most personnel records are confidential under OPRA. But under the law's plain language, certain items qualify as a government record including a person's name, title, "date of separation and the reason therefor." N.J.S.A. 47:1A-10. To the extent that information appears in a settlement agreement, the record should be available to the public after appropriate redactions are made.

Graphnet, Inc. vs. Retarus, Inc. (085529) (Hudson County & Statewide) Feb. 11, 2022 (A-71-20)

Summary: As the Appellate Division found, remittitur was improper without Graphnet's consent. But this matter requires a new trial on all damages in which the jury is properly instructed on actual and nominal damages. The Court also refers Model Civil Jury Charge 8.46D to the Committee on Model Civil Jury Charges to be amended.

Thomas J. Stewart vs. New Jersey Turnpike Authority/Garden State Parkway (085416) (Monmouth County & Statewide) Feb. 09, 2022 (A-61/62-20)

Summary: The Court agrees with the trial court that plaintiffs' new theory should not have been considered given its late presentation. The Court nonetheless holds, for completeness, that plaintiffs' new theory did not raise an issue of material fact. The Court reinstates summary judgment in favor of defendants and dismisses the complaint with prejudice. The Court also finds that Earle is entitled to derivative immunity.

In the Matter of Establishment of Congressional Districts by the New Jersey Redistricting Commission (086587) Feb. 03, 2022 (R-3-21)

Summary: none available

Diane S. Lapsley vs. Township of Sparta (085422)(Statewide) Jan. 18, 2022 (A-68/69-20)

Summary: Lapsley's injuries arose out of and in the course of her employment because the parking lot where she was injured was owned and maintained by the Township, adjacent to her place of work, and used by Township employees to park. Lapsley was therefore entitled to benefits under the Workers' Compensation Act.

Michele Meade vs. Township of Livingston (085176)(Essex County and Statewide) Dec. 30, 2021 (A-52-20)

Summary: Here, sufficient evidence was present for a reasonable jury to find that what Livingston Township Councilmembers perceived to be Police Chief Handschuch's discriminatory attitude toward Township Manager Meade influenced the Council's decision to terminate her, in violation of the LAD. Accordingly, the Court reverses the grant of summary judgment and remands this matter for trial.

Todd B. Glassman vs. Steven P. Friedel, M.D. (085273) (Monmouth County and Statewide) Dec. 23, 2021 (A-48/49/50/51-20)

Summary: The Court agrees with the Appellate Division that the Ciluffo pro tanto credit does not further the legislative intent expressed in the Comparative Negligence Act and does not reflect developments in case law over the past four decades. In its stead, the Court sets forth a procedure to apportion any damages assessed in the trial of this case and future successive-tortfeasor cases in which the plaintiff settles with the initial tortfeasors prior to trial.

Cooper Hospital University Medical Center vs. Selective Insurance Company of America (085211) (Camden County and Statewide) Dec. 22, 2021 (A-46-20)

Summary: Because Mecouch was a Medicare enrollee in 2016, Cooper -- a Medicare provider -- was required to bill and accept payment from Medicare, which promptly covered Mecouch's medical expenses in accordance with its fee schedule. Cooper could not seek payment from Selective other than for reimbursement of the Medicare co-payments and deductibles.

G.C. vs. Division of Medical Assistance and Health Services (084417) (Statewide) Nov. 18, 2021 (A-35/36/37-20)

Summary: The Court affirms the Appellate Division's invalidation of N.J.A.C. 10:72-4.4(d)(1) as inconsistent with its state enabling legislation and contrary to legislative intent. But the Court has grave concerns that the regulation's method of operation is also inconsistent with the federal Medicaid law. The Court accordingly vacates that portion of the Appellate Division's analysis that rejected the federal-law argument by cross-petitioners.

In the Matter of John Robertelli (084373) Sept. 21, 2021 (D-126-19)

Summary: *After conducting a de novo review of the record and affording deference to the credibility findings of the Special Master, the Court concludes that the OAE has failed to establish by clear and convincing evidence that Robertelli violated the RPCs. The disciplinary charges must therefore be dismissed.

Ernest Bozzi vs. City of Jersey City (084392) (Hudson County & Statewide) Sept. 20, 2021 (A-12-20)

Summary: Owning a dog is a substantially public endeavor in which people do not have a reasonable expectation of privacy that exempts their personal information from disclosure under the privacy clause of OPRA.

APPELLATE DIVISION

L.R. on Behalf of J.R. vs. Cherry Hill Board of Education, Sept., 29, 2022 (A-1819-20)

Plaintiff L.R. is the mother of a disabled student attending the Camden City Public Schools. She served defendant Cherry Hill Board of Education and its record custodian with an Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -17, request for all settlement agreements from all lawsuits in which defendant was sued by a student and/or their parent. The request asked defendant to redact the parent and student names leaving only their initials. Defendant produced the documents sought but redacted all personally identifiable information (Pll), including initials.

Plaintiff appealed. Following the decision in L.R. vs. Camden City Public School District (L.R.l), 452 N.J. Super. 56 (App. Div. 2017), and L.R. v, Camden City Public School District (L.R.ll), 238 N.J. 547 (2019), the trial judge dismissed the complaint finding plaintiff was not entitled to the initials because she: (1) Was not authorized to obtain the information by means of a court order; and (2) lacked a common law right of access to student records because defendant had a legitimate claim of confidentiality under the Family Educational Records and Privacy Act, 20 U.S.C. 1232g, and the New Jersey Pupil Records Act, N.J.S.A. 18A:36-19.

Following this appeal, the Department of Education promulgated new regulations governing public access to student records under OPRA in response to L.R.II. The regulations define PII and student records that may be releases pursuant to a court order provided the records do not contain any PII. N.J.A.C. 6A:32-21. They also state student "records removed of all [PII]" may be released without consent. N.J.A.C. 6A:32-7.5(g)(1).

On appeal, the court affirmed, holding the new regulations were not retroactive, and even if they were defendant's redaction of the initials was consistent with the regulations and the trial judge's ruling that plaintiff was not entitled to unredacted records. The court held plaintiff's reliance on Keddie vs. Rutgers, 148 N.J. 36, 40 (1997), establishing the public's common law right to records, and C.E. vs. Elizabeth Public School District, 472 N.J. Super. 253 (App. Div. 2022), establishing the right to settlements entered before the Office of Administrative Law under OPRA, were inapposite because those cases involved the failure to produce documents not whether a defendant should have reacted the PII altogether.

Malzberg vs. Josey, Sept 27, 2022 (A-2883-20)

This case presents a question of first impression regarding the scope of the Transportation Network Company Safety and Regulatory Act (TNCSRA or Act), N.J.S.A. 39:5H-1 to -27. The TNCSRA, which was enacted in 2017, comprehensively regulated companies and drivers that use a digital network such as a mobile phone application (app) to connect a "rider" to a "prearranged ride." Plaintiff was injured in a motor vehicle accident while he was operating his motorcycle as an Uber

Eats delivery drive. The novel legal issue raised in this appeal is whether the Act - which requires "transportation network companies" to provide at least $1.5 million in underinsured motorist coverage - protects drivers while they are delivering food and not just when they are in the process of transporting passengers. The court concludes that the Act by its literal terms applies only to the prearranged transport of riders and not to the prearranged delivery of food.

In determining the scope of the statute's intended reach, that is, its "overall meaning," the court pays special attention to the definition section, noting that the very existence - or non-existence - of specific definitions reveals the basic concepts and principles the Legislature deemed to be especially important, warranting precise and explicit formulations. The Legislature's decision to define certain terms but not others, the court reasons, can provide insight into the overall meaning of the statutory scheme and the scope of its reach. In this instance, nothing in the definition section - or any other section of the Act for that matter – refers to the delivery of food The absence of any reference to food delivery in the definition section stands in stark contrast to the interrelated definitions that refer explicitly and repeatedly to "rides" and "riders," which clearly denote the transport of human passengers.

Because the primary question posed in this case is easily resolved under a plain-text analysis, the court acknowledges that it need not consider extrinsic sources to determine legislative intent. The court nonetheless adds in the interest of completeness that nothing in the legislative history supports plaintiff's contention that the Act applies to food delivery services. The court further notes that regulations promulgated by the Motor Vehicle Commission support the court's interpretation as to the scope of the Act.

The court acknowledges that by enacting the TNCSRA, the Legislature recognized the commercial and societal value of new technologies that use mobile digital networks to connect customers with service providers. But while the use of an app is necessary to trigger the Act's provisions, that alone is not sufficient. The court concludes that to fall within the Act's jurisdiction – and thus to invoke the protections of its minimum insurance coverage provisions – the app-based connection must be used to arrange a ride for a human passenger.

The court further acknowledges that while the TNCSRA is of comparatively recent vintage, it was enacted before the COVID-19 pandemic, during which the imperative for social distancing simultaneously increased the demand for home delivery of food and reduced the demand for ridesharing. The court emphasizes that the evolution of the supply and demand marketplace since the TNCSRA was enacted does not change its plain text. While there may be circumstances, not present here, where it is necessary and appropriate to teach an old law to do new tricks, a statute's text does not evolve sua sponte. Reviewing courts, moreover, must afford due deference to the legislative process. Accordingly, the court stresses, it is for the political branches, not the Judiciary, to amend a statute to account for new developments and to fill any "holes" in the statute's scope and reach.

Sept. 09, 2022 --- No Published Appellate opinions reported for today

Amada Sanjuan vs. School District of West New York, Hudson County (C-000030-21, Hudson County And Statewide) Aug. 25, 2022 (A-3273-20)

Summary: Appellant challenges a Law Division order confirming an arbitration award which sustained tenure charges filed by respondent West New York Board of Education ("Board") against her; demoted her from assistant principal to a fourth-grade teacher; and determined she was not entitled to back pay withheld from her under N.J.S.A. 18A:6-14 for a one-hundred-and-twenty-day suspension-without-pay period that was imposed upon the Board's certification of the charges. This appeal requires us to consider issues of first impression: (1) whether the arbitrator had the authority to demote appellant under N.J.S.A. 18A:6-16; and (2) whether the arbitrator had the right to deny appellant back pay arising from her suspension-without-pay period after determining her employment should not be terminated.

The court affirms the arbitrator's determination that appellant was not entitled to back pay withheld from her during her suspension-without-pay period based upon his determination that her conduct was unbecoming of a teaching staff member. The court reverses and remands because upon determining appellant's conduct was unbecoming but that she should not be terminated, the arbitrator lacked the statutory authority to demote her from her assistant principal position and he could only reduce her compensation. Appellant should be reinstated to her assistant principal position. On remand, the arbitrator must determine to what extent, if any, appellant's compensation should be further reduced through suspending her without pay or withholding salary increments, or a combination thereof.

Ashish Kumar, et al. vs. Piscataway Township Council, et al. (L-5017-21, Middlesex County And Statewide) Aug. 23, 2022 (A-0227-21)

Summary: In this matter, the court considered whether a municipality may approve a resolution to place non-binding public opinion questions before the electorate when initiative petitions concerning the identical issues are on the same ballot. The majority concluded the municipality was not authorized under N.J.S.A. 19:37-1 to pass the resolutions regarding the public opinion questions because the electorate was considering the same issues on the ballot in their vote on the initiative questions.

The court also considered the trial court's order that denied plaintiffs' application for an award of attorney's fees under the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -2. Because defendants' actions of passing the unauthorized resolutions deprived plaintiffs of their substantive right to initiative, the majority reversed the court's order denying plaintiffs a counsel fee award.

Judge Smith dissented.

Brian and Kristina Puglia vs. Rosemaria Phillips, et al. (L-0945-16, Burlington County And Statewide) Aug. 15, 2022 (A-5367-18)

Summary: Plaintiffs' complaint alleged wrongful eviction under the Anti-Eviction Act, N.J.S.A. 2A:18-61.1 to -61.12, fraud, negligent misrepresentation, and other claims. Defendants filed an answer and counterclaim, asserting plaintiffs' negligence caused damage to the property and rendered portions of it "unusable." The parties cross-moved for summary judgment on the wrongful eviction cause of action, and the judge granted defendants summary judgment and denied plaintiffs' motion.

Defendants then made an offer of judgment, which plaintiffs accepted the next day. Plaintiffs' proposed order for judgment was limited to "the remaining counts" of the complaint and sought to preserve appeal of the interlocutory summary judgment orders. Defendants objected, citing Rule 4:58-4(c), which provides: "If a claimant asserts multiple claims for relief or if a counterclaim has been asserted against the claimant, the claimant's offer shall include all claims made by or against that claimant. If a party not originally a claimant asserts a counterclaim, that party's offer shall also include all claims by and against that party." (emphasis added). The judge entered defendants' proposed order of judgment that was not limited to "the remaining counts" of the complaint.

Plaintiffs appealed, in part arguing the interlocutory orders were appealable despite their acceptance of defendants' offer of judgment, citing, as they did in the Law Division, our decision in *City of Cape May vs. Coldren*, 329 N.J. Super. 1, 10 (App. Div. 2000). The court affirmed the order of judgment without considering the merits of plaintiffs' arguments regarding the interlocutory orders by distinguishing Coldren on its facts and noting that decision was issued prior to adoption of Rule 4:58-4(c). Plaintiffs' acceptance of the offer of judgment settled all claims "by and against" defendants, including any claims dismissed on summary judgment.

Doretta Cerciello, etc. vs. Salerno Duane, Inc., et al. (L-1690-17, Union County And Statewide) July 20, 2022 (A-3090-20)

Summary: In this class action matter arising out of the purchase of a vehicle, the court considers whether defendants' material breach of an arbitration agreement—the failure to pay the administration fees—precludes them from asserting the waiver of the right to pursue a class action in the subsequent Superior Court litigation.

The arbitration agreement clearly informed consumer purchasers they were waiving their right to pursue a class action in court and in arbitration. Although defendants cannot compel arbitration because of their failure to pay the requisite fees, their breach of the agreement does not eradicate the other provisions to which plaintiff agreed—namely the waiver of the right to pursue a class action in court. This court affirmed the orders denying class certification.

Hollywood Café Diner, Inc. vs. Geri Jaffee, et al. (L-2786-19, Camden County And Statewide) July 15, 2022 (A-2272-20)

Summary: In the midst of the COVID-19 pandemic, the parties in this legal malpractice action exchanged minimal discovery before the court issued its notice pursuant to Rule 4:36-2, advising that discovery would end in sixty days and any application for an extension must be made before the discovery end date (DED). Thirty days later, the court issued a trial date.

The parties secured a consensual sixty-day discovery extension, see Rule 4:24-1(c), but when defendants moved before expiration of the DED for a further extension, the judge denied the motion, concluding the exceptional circumstances standard applied because a trial date was set, and defendants failed to meet that standard. Plaintiff's motion for reconsideration was similarly denied, but not before defendants sought summary judgment, essentially arguing the lack of expert opinion doomed plaintiff's complaint. The judge granted defendants summary judgment.

The court reversed. The court construed Rule 4:24-1(c), which states a judge shall grant an extension motion upon good cause if made before the DED, but also states a court may grant a discovery extension only in exceptional circumstances once an arbitration or trial date is set. The court concluded that while court administrators may send notices setting future arbitration and trial dates before discovery ends, the plain language of the Rule, read in pari materia with other rules, requires judges to apply the good cause standard if the motion for a discovery extension is made before the DED. Plaintiff met the good cause standard.

In The Matter Of The Application Of The Borough Of Englewood Cliffs, etc. (L-6119-15, Bergen County And Statewide) July 15, 2022 (A-3119-20)

Summary: Following years of litigation and a trial, the Borough of Englewood Cliffs (the Borough) was found to have failed for decades to comply with its constitutional obligations to provide its fair share of affordable housing. Thereafter, the Borough entered into settlement agreements to allow affordable housing to be built. Following a change in the membership of the Borough's council, however, the Borough moved to vacate the settlement agreements, contending that two council members who had voted for the agreements had conflicts of interest. That argument was in direct contradiction to the position the Borough had taken before the trial court and in a related litigation where the Borough had argued that there were no conflicts of interest.

The court affirms the trial court's rejection of the Borough's arguments for several reasons, including that the Borough was judicially estopped from claiming any conflict. The record establishes that for years the Borough has stalled various efforts to allow affordable housing to be built. The court emphasizes that the time for delaying constitutional compliance is over.

Shenise Monk, et al. vs. Kennedy University Hospital, et al. (L-3527-20, Camden County And Statewide) (Consolidated) July 14, 2022 (A-3361-20/A-3362-20/A-3363-20)

Summary: Defendants' motions for summary judgment to dismiss the complaint as untimely because it was filed four and a half years after decedent's death were denied by the trial court, which allowed the action to proceed by applying the minority tolling provision found in N.J.S.A. 2A:14-2(a), concluding the Legislature did not make clear whether the Act intended to distinguish between minors who died and minors who survived.

The court reversed, finding minority tolling applies only to actions brought on behalf of minors, and not to actions brought on behalf of decedents or their estates. The word "minor" requires a living human being and the plain legal meaning of "minor's 13th birthday" demonstrates the Legislature's intent that only living minors have birthdays. Plaintiffs were limited to wrongful death and survival claims causes of action, each of which applies a two-year statute of limitations. The court vacated the orders denying summary judgment but remanded to the trial court for findings as to whether defendants had substantially complied with those statutes.

Mac Property Group et al. vs. Selective Fire And Casualty Insurance Co. Precious Treasures LLC vs. Markel Ins. et al. (L-2629-20, L 2630-20, L-2631-20, Camden County and L-0820-20 And L-0892-20, Mercer County and Statewide) (Consolidated) June 20, 2022 (A-0714-20/A-0962-20/A-1034-20/A-1110-20/A-1111-20/A-1148-20)

Summary: These six back-to-back appeals arising from Law Division orders in two vicinages have been consolidated for the issuance of a single opinion. They require the court to consider an issue of first impression — whether in the context of Rule 4:6-2(e) motions to dismiss with prejudice, insurance policies issued by defendants did not cover business losses incurred by plaintiffs that were forced to close or limit their operations as a result of Executive Orders issued by Governor Philip Murphy to curb the COVID-19 global health crisis.

We affirm because we conclude the motion judges were correct in granting Rule 4:6-2(e) dismissals of plaintiffs' complaints with prejudice for failure to state a claim on the basis that plaintiffs' business losses were not related to any "direct physical loss of or damage to" as required by the terms of their insurance policies. We conclude plaintiffs' business losses were also not covered under their insurance policies' civil authority clauses, which provided coverage for losses sustained from governmental actions forcing closure or limiting business operations under certain circumstances. We further conclude defendants' denial of coverage was not barred by regulatory estoppel. In the alternative, we conclude that even if plaintiffs' business losses otherwise satisfied the requirements of the relevant clauses, coverage was barred by their insurance policies' virus exclusions and endorsements because the Executive Orders were a direct result of COVID-19.

Faye Hoelz vs. Andrea Legath Bowers, M.D., et al. vs. Lutheran Crossings Enhanced Living, et al. (L-0620-16, Burlington County and Statewide) June 20, 2022 (A-1534-21)

Summary: After settling her medical malpractice suit with plaintiff's estate, defendant-doctor Bowers was prepared to try her third-party contribution claim against third-party defendant Comiskey, who also treated plaintiff but was never named as a direct defendant. Comiskey moved to dismiss, arguing the Joint Tortfeasor Contribution Law, (the JTCL), N.J.S.A. 2A:53A-1 to -5, predicated a contribution-only claim upon plaintiff's recovery of a "money judgment" against Bowers. The settlement and release executed by the parties did not satisfy the JTCL. The motion judge denied Comiskey's motion, finding it was untimely, and because the settlement was placed on the public website of the Division of Consumer Affairs, as required by regulation, the settlement was the equivalent of a money judgment.

On leave granted, the court reversed. The court reviewed a line of cases from the Supreme Court and the Appellate Division that have consistently construed the right to contribution under the JTCL as requiring entry of a money judgment against the contribution claimant.

The court also raised concern about continued application of the Court's holding in *Young vs. Steinberg*, 53 N.J. 252 (1969). In Young, the Court held that "[a] suit for contribution based on a settlement which has been elevated to the status of a judgment by formal court proceeding, and which discharges the injured party's claim against a non-settling joint tortfeasor, comports with the intent of our statutory scheme." Id. at 255 (emphasis added). At trial, the contribution claimant

must still "establish a common liability . . . and the quantum of the damages ensuing from the joint offense." Ibid.

The court noted Young was decided prior to enactment of the Comparative Negligence Act (the CNA), N.J.S.A. 2A:15-5.1 to -5.8. As a result, pro rata apportionment of damages under the JTCL was supplanted by apportionment of liability and damages based on comparative fault.

Sheila Bryant, et al. vs. County of Cumberland (L-0084-20, Cumberland County and Statewide) June 16, 2022 (A-0726-20)

Summary: The trial court dismissed plaintiffs' personal injury complaint against Cumberland County because plaintiffs served their notice of claim on the county clerk rather than the clerk of the board of county commissioners. Recognizing that N.J.S.A. 59:8-7 and -10 do not specifically identify the county office or officer to be served with a notice of claim, the court held as a matter of first impression that service on the county clerk suffices.

C.V., et al. vs. Waterford Township Board of Education, et al. (L-1981-14, Camden County and Statewide) (Record Impounded) June 13, 2022 (A-0626-20)

Summary: The court considered a matter of first impression relating to the application of the New Jersey Law Against Discrimination (LAD). Specifically, the court considered whether the LAD applies to claims arising from a sexual predator's criminal assaults against a young schoolgirl where those crimes were committed on a school bus. Under the circumstances of this case, the court concluded the LAD did not apply, especially where, as here, there was no evidence that the predator's compulsive and repetitive behavior was the result of any proven intention to discriminate specifically against young women. The court found the LAD was simply not intended to provide a civil remedy for child sex abuse committed by compulsive pedophiles. Even if it was, it concluded a victim must demonstrate the discriminatory conduct would not have occurred 'but for' the student's protected characteristic. The court concluded the plaintiffs did not meet that burden. The court's opinion construing the LAD did not address or preclude relief under other laws that were not invoked by plaintiffs on appeal.

Juan J. Barron vs. Shelley Gersten, et al. (L-2081-20, Union County and Statewide) June 13, 2022 (A-0912-20)

Summary: Plaintiff's complaint about a June 21, 2018 automobile accident was filed on June 29, 2020. Defendants moved to dismiss the complaint for failure to commence the action timely, citing the two-year statute of limitations set forth in N.J.S.A. 2A:14-2(a). In opposition, plaintiff contended the complaint was timely filed, asserting the Supreme Court had tolled the statute of limitations in its June 11, 2020 Fourth Omnibus Order related to the COVID-19 pandemic and effectively had added fifty-five days to the statute-of-limitations period. The trial court granted defendants' motion, finding the Supreme Court in its Omnibus Orders related to the COVID-19 pandemic had not added time to the statute of limitations but had deemed the period of time from March 16, 2020, to May 10, 2020, a legal holiday for purposes of computing time.

The court agreed with the trial court, finding the Supreme Court had issued an order on March 17, 2020, in which the Court cited its constitutional rule-making authority under Article VI, section 2, paragraph 3 of the New Jersey Constitution to deem the relevant time period a legal holiday. Noting the express language in the Fourth Omnibus Order "affirm[ing] the provisions of [its] prior orders" and that the Supreme Court had not cited any new or different authority for its directive regarding the computation of time, the court concluded the Supreme Court in the Fourth Omnibus Order was exercising its constitutional rule-making authority to deem March 16, 2020, through May 10, 2020, a legal holiday and was not adding time to the statute of limitations.

Cheryl Rooth vs. Board of Trustees, et al. (Public Employees' Retirement System) June 03, 2022 (A-2378-20)

Summary: A former public school bus driver appealed from a PERS final agency decision declaring her ineligible to file an accidental disability retirement application when separation from service was based upon an irrevocable resignation, not related to a disability, in accordance with N.J.A.C. 17:1-6.4.

On appeal, the court was required to determine whether a school employee, who irrevocably resigned while an employment grievance was pending, could file an application for ordinary or accidental disability retirement benefits, when the charges underlying the grievance did not relate to a disability. For the reasons stated in the court's opinion, it concluded that, in the first instance, a public school employee's irrevocable resignation from employment rendered the school employee ineligible for ordinary or accidental retirement benefits because the school employee's separation from service was based upon a resolution of the pending grievance, and not an alleged disability.

Louis Ripp vs. County of Hudson (Division of Workers' Compensation) June 03, 2022 (A-2972-20)

Summary: N.J.S.A. 34:15-28.2(a) permits a workers' compensation judge to enforce a court order, statute or regulation by imposing "an additional assessment not to exceed 25% of moneys due for unreasonable payment delay." In this case, the parties settled petitioner's total disability claim, and the judge imposed the maximum assessment when the county was sixteen days late in making payment required under the order.

The court reversed, concluding the judge erred as a matter of law because she considered litigation delays occurring prior to the settlement and entry of the order for payment in fashioning the award. The court also concluded the judge mistakenly exercised her discretion regarding the amount of the award, because she imposed the maximum additional assessment for a relatively short delay.

Kevin Morris, et al. vs. Rutgers-Newark University, et al. (L-3280-17, Essex County and Statewide) (Consolidated) June 02, 2022 (A-0582-21/A-0583-21)

Summary: The plaintiffs whose claims are implicated in these interlocutory cross-appeals were members of defendant Rutgers-Newark's 2014-15 women's basketball team. Four plaintiffs describe themselves as African-American and gay, one as African-American and bisexual, and the

sixth as Hispanic and heterosexual. They claim they were retaliated against and subjected to a hostile environment in violation of the Law Against Discrimination by defendants because, among other things, their interim coach, defendant William Zasowski, referred to them as "dykes," and "nappy-headed sisters," and asked the team captain for the names of the team members who were gay and, when they complained and sought a school investigation, defendants retaliated. The trial judge granted in part and denied in part defendants' summary judgment motion.

The court concluded that the judge did not err in denying summary judgment on plaintiffs' hostile environment claims and did not err in denying summary judgment on the retaliation claims of two plaintiffs; the court held, however, that the judge erred in granting summary judgment on the retaliation claims of the other four plaintiffs. The court held that both the hostile environment and retaliation claims should be considered, not individually as argued by defendants, but in light of the fact that plaintiffs were members of small, tightly-knit group and that each plaintiff could rely on the experiences of the others even if they did not directly experience or witness defendants' alleged discriminatory comments and epithets, thereby distinguishing *Godfrey vs. Princeton Theological Seminary*, 196 N.J. 178 (2008) in this setting.

Christine Savage vs. Township of Neptune, Neptune Township Police, et al. (L-1528-16, Monmouth County and Statewide) May 31, 2022 (A-1415-20)

Summary: Plaintiff Christine Savage, a former sergeant with defendant Township of Neptune Police Department, appealed from an order enforcing a "non-disparagement provision" in a settlement agreement. In the underlying employment discrimination case, plaintiff alleged defendants engaged in continuing sexual discrimination, harassment, and unlawful retaliation, in violation of New Jersey's Law Against Discrimination (LAD) N.J.S.A. 10:5-1 to -50, the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, and Article I, Paragraph 6 of the New Jersey Constitution. On July 23, 2020, the parties settled the employment discrimination action and entered into an agreement, which included a non-disparagement provision, but not a non-disclosure provision.

Defendants Michael J. Bascom, the former Police Director for Neptune Township, and James M. Hunt, the Chief of the Neptune Police Department, filed a motion in September 2020, to enforce the settlement, arguing that plaintiff violated the non-disparagement provision during an interview with a television news reporter that aired on Channel 4, NBC news on August 11, 2020. The trial judge granted defendants' motion, finding that N.J.S.A. 10:5-12.8(a) only barred confidentiality or non-disclosure agreements (also referred to as NDAs), and that plaintiff violated the non-disparagement provision in the agreement when she commented during the televised interview that the Neptune Police Department had not changed, and it was still a "good old boys club." The judge subsequently awarded defendants $4,917.50 in counsel fees and costs for breach of the non-disparagement clause.

On appeal, plaintiff argues that the judge erred in granting the motion because the non-disparagement provision was against public policy and unenforceable under N.J.S.A. 10:5-12.8(a), and thus the judge also erred in denying her cross-motion for counsel fees under N.J.S.A. 10:5-12.9. In the alternative, plaintiff argues that even if the non-disparagement provision were

enforceable, by adjudicating this dispute as a motion to enforce, rather than as a separate breach of contract action, the judge deprived her of her right to have a jury decide the disputed facts.

The court reversed the order granting defendants' motion to enforce the settlement agreement and held that although the terms of the non-disparagement provision are enforceable and the judge properly adjudicated this matter by motion, the judge nonetheless erred in finding that plaintiff violated the terms of the non-disparagement provision during the televised interview. Because defendants' enforcement motion was not successful, the court vacated the judge's award of $4,917.50 in counsel fees to defendants. However, the court affirmed the judge's order denying plaintiff's cross-motion for counsel fees and costs under N.J.S.A. 10:5-12.9.

Heather J. McVey vs. AtlantiCare Medical System Incorporated, et al. (L-3186-20, Atlantic County and Statewide) May 20, 2022 (A-0737-20)

Summary: The issue raised in this appeal is whether the First Amendment or Article I, Paragraph 6 of the New Jersey Constitution prevents a private employer from terminating one of its at-will employees for posting racially insensitive comments about the Black Lives Matter movement on her personal Facebook account. Defendants AtlantiCare Medical System Incorporated and Geisinger Health System Incorporated (AtlantiCare) employed plaintiff Heather J. McVey as a Corporate Director of Customer Service. During the height of the nationwide protests concerning the murder of George Floyd by police in Minnesota, McVey posted that she found the phrase "Black Lives Matter" to be "racist," believed the Black Lives Matter movement "causes segregation," and asserted that Black citizens were "killing themselves." McVey's Facebook profile prominently stated that she was an AtlantiCare Corporate Director. After it discovered the comments, AtlantiCare fired McVey and she filed a complaint alleging wrongful discharge. The court concluded that the First Amendment and Article I, Paragraph 6 of the New Jersey Constitution did not bar a private employer from terminating an at-will employee under the circumstances presented in this case, and held that the trial court properly dismissed McVey's complaint.

C.E., et al. vs. Elizabeth Public School District, et al. (L-2231-15, Union County and Statewide) May 18, 2022 (A-0173-20)

Summary: Plaintiffs, the parents of a special needs child, sued defendants to enforce an Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, request. The OPRA request sought all settlements entered into by the school board before the New Jersey Office of Administrative Law (OAL) in petitions filed by or on behalf of students subject to an individualized education program or an accommodation plan.

The court affirmed the trial court's decision to enforce the OPRA request and award plaintiffs' attorney's fees. The court concludes that pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400(d)(1)(A), and state regulations implementing the IDEA, settlements entered before the OAL are public records and defendants were required to disclose them after redacting personally identifiable information.

KnightBrook Insurance Company vs. Carolina Tandazo-Calopina, et al. (L-1056-20, Essex County and Statewide) May 16, 2022 (A-1115-20)

Summary: The court clarified when an insurance company may be relieved of providing insurance coverage to an insured who refuses to cooperate in defending a personal injury victim's claim pursuant to the terms of the insurance policy. An insurance company's satisfaction of either of the two variables identified in *Hager vs. Gonsalves*, 398 N.J. Super. 529 (App. Div. 2008), constitutes appreciable prejudice sufficient to forfeit any obligation on the part of an insurance company to provide coverage to an insured.

Under the first variable, a trial court must determine whether an insurer's substantial rights have been irretrievably lost as a result of the insured's breach of the insurance policy. Under the second variable, a trial court must examine an insurer's likelihood of success in defending against an accident victim's claim had the insured not failed to cooperate.

In analyzing the appreciable prejudice variables, the court held the first variable applied to an irretrievable loss of substantial rights related to coverage determinations by an insurer. To conclude otherwise would render the second appreciable prejudice variable redundant. The two variables are intended to address different aspects of appreciable prejudice.

Louie Perez vs. Sky Zone, LLC, et al. (L-3464-20, Union County and Statewide) May 16, 2022 (A-1861-20)

Summary: The court holds that an adult can waive his or her right to bring claims in a court and can be compelled to arbitrate personal injury claims when the adult had reviewed a clearly worded arbitration provision before entering a commercial recreational park.

The court also remands for entry of a new order because the trial court erred in dismissing the Law Division action. Instead of dismissing the action, the trial court should have stayed the Law Division action, including the claims against defendants who are not parties to the arbitration provision.

Nicole Hoover vs. Merrick Wetzler, M.D., et al. (L-2395-20, Camden County and Statewide) May 16, 2022 (A-2688-20)

Summary: In this nursing malpractice case, plaintiff Nicole Hoover appeals from an April 1, 2021 order denying reconsideration of a February 19, 2021 order that dismissed her claims with prejudice for failure to provide an appropriate Affidavit of Merit (AOM) against nurse/defendant Nicole Baughman.

After a total-knee replacement surgery, plaintiff sued Wexler, her orthopedic surgeon; defendant, a Registered Nurse First Assistant who was assisting Wexler in the surgery; and others, alleging negligence in the performance of the surgery. Shortly after filing suit, plaintiff filed and served a single AOM applicable to all defendants. The AOM was executed by Dr. Robert Tonks, M.D., a board-certified orthopedic surgeon who has experience performing total knee replacement surgery. The court granted defendant's motion to dismiss, determining that the AOM statute required

plaintiff to submit an AOM from either a registered nurse or a physician who is familiar with the nursing standard of care and protocols of nurses.

The court finds that the like-credentialed requirements of the Patients First Act, N.J.S.A. 2A:53-41, applies only to physicians and not to other licensed professionals under the AOM statute, N.J.S.A. 2A:53A-26 to -29. See *Meehan vs. Antonellis*, 226 N.J. 216 (2016) (holding section 41 applies only to physicians and "[t]here is simply no textual support for the application of the like-qualified requirements of section 41" to actions against other licensed professionals under section 27). Because there is no heightened "like-for-like" requirement that prohibited Tonks from authoring an AOM against defendant, he need only have satisfied N.J.S.A. 2A:53A-27's requirement that he "have particular expertise in the general area or specialty involved in the action."

The court concludes that Tonks is a qualified affiant under the statute. Defendant does not dispute Tonks' expertise in knee-replacement surgery. She concedes she was a member of the operative team and that she actively assisted in the surgery as a perioperative registered nurse. Notably, the central allegation against defendant and Wexler is identical: one or both negligently severed plaintiff's popliteal artery and vein. Under these circumstances, the court finds that Tonks is an expert who satisfies section 27 of the AOM statute and that plaintiff need not have filed an AOM from a registered nurse. Whether and to what extent Tonks may serve as an expert against defendant at trial must be fleshed out in discovery, and the court expresses no opinion on that subject.

Accordingly, the court reverses and remands for further proceedings consistent with the court's opinion.

Jacob Matullo vs. SkyZone Trampoline Park, et al. (L-3117-20, Ocean County and Statewide) May 16, 2022 (A-2813-20)

Summary: In this appeal, the court addresses the enforceability of an arbitration provision in an agreement signed by a fifteen-year-old minor to gain access to a commercial trampoline park. The court holds that the arbitration provision is not enforceable because the minor had the right to disaffirm the agreement and the limited exceptions to that right did not apply. Accordingly, the court reverses and vacates the order granting defendants' motion to compel arbitration of plaintiff's claims and dismissing his complaint with prejudice. The matter is remanded with instruction that plaintiff's complaint be reinstated so that his claims can be litigated in the Law Division.

Metro Marketing, LLC, et al. vs. Nationwide Vehicle Assurance, Inc., et al. (L-2090-16, Ocean County and Statewide) May 12, 2022 (A-3907-18)

Summary: Plaintiffs in this case are affiliated companies engaged in selling extended service contracts 31 to motor vehicle owners over the telephone. They claim that defendants hired away key managers and more than forty members of their sales force, siphoned customers, and misappropriated alleged trade secrets.

Relying upon several legal theories, plaintiffs filed suit to recover damages and obtain injunctive relief. In a series of orders, the motion judge granted summary judgment to defendants, dismissing all of plaintiffs' claims now at issue on appeal. In ruling on summary judgment, the motion judge disregarded two certifications submitted by plaintiffs from a codefendant who "switched sides" and became employed by plaintiffs after his deposition.

This court holds that the "sham affidavit" doctrine adopted by the Supreme Court in *Shelcusky vs. Garjulio*, 172 N.J. 185, 199-202 (2002), can extend to a "side switching" situation. In particular, the doctrine can apply where, as here: (1) a codefendant is deposed, (2) that deponent thereafter obtains a job with the plaintiff, (3) the deponent then aids his new employer by signing certifications recanting his deposition testimony, and (4) the plaintiff offers those certifications in opposing summary judgment motions by the other defendants.

Applying the sham affidavit doctrine to this record, the court rules the motion judge appropriately disregarded the side-switching employee's certifications because the employee failed, as Shelcusky requires, to "reasonably explain[]" why he "patently and sharply" contradicted his earlier deposition testimony. Id. at 201.

However, the court rules the judge erred in rejecting as evidence a recorded telephone conversation of a different codefendant who was also rehired by one of plaintiffs' companies after his deposition. Because the recording should have been considered as evidence weighing against defendants' summary judgment motion, the court remands this matter to allow the Law Division in the first instance to reconsider its dismissal of the lawsuit in its entirety.

Kathleen DiFiore vs. Tomo Pezic, et al. Dora Deleon vs. The Achilles Foot and Ankle Group, et al. Jorge Remache-Robalino vs. Nader Boulos, M.D., et al. (L-0123-19, L-2412-20, and L-1929-19, Essex and Hudson Counties and Statewide) (Consolidated) May 03, 2022 (A-2826-20/A-0367-21/A-1331-21)

Summary: These three consolidated appeals in personal injury cases pose related but distinct questions involving the application of Rule 4:19. The appeals concern when, if ever, a plaintiff with alleged cognitive limitations, psychological impairments or language barriers can be accompanied by a third party to a defense medical examination ("DME"), or require that the examination be video or audio recorded in order to preserve objective evidence of what occurred during the examination.

With the input of the parties' counsel and amici, the court revisits and updates the opinion from twenty-four years ago in *B.D. vs. Carley*, 307 N.J. Super. 259 (App. Div. 1998) (authorizing the "unobtrusive" audio recording of a neuropsychological DME of a plaintiff who claimed in her civil action that she was suffering emotional distress). The court also considers 2016 Policy Statement of the American Board of Professional Neuropsychology disfavoring the third-party observation and recording of DMEs and urging practitioners to refuse such conditions except where required by law.

In the absence of more specific guidance within the present text of Rule 4:19, the court adopts adopt the following holdings.

First, a disagreement over whether to permit third-party observation or recording of a DME shall be evaluated by trial judges on a case-by-case basis, with no absolute prohibitions or entitlements. Second, despite contrary language in Carley, it shall be the plaintiff's burden to justify to the court that third-party presence or recording, or both, is appropriate in a particular case.

Third, given advances in technology since 1998, the range of options should include video recording, using a fixed camera that captures the actions and words of both the examiner and the plaintiff.

Fourth, to the extent that examiners hired by the defense are concerned that a third-party observer or a recording might reveal alleged proprietary information about the content of the exam, the parties shall cooperate to enter into a protective order, so that such information is solely used for the purposes of the case and not otherwise divulged.

Fifth, if the court permits a third party to attend the DME, it shall impose reasonable conditions to prevent the observer from interacting with the plaintiff or otherwise interfering with the exam. Sixth, if a foreign or sign language interpreter is needed for the exam (as is the case in two of the appeals before us) the examiner shall utilize a neutral interpreter agreed upon by the parties or, if such agreement is not attained, an interpreter selected by the court.

The three cases are accordingly remanded to the respective trial courts to reconsider the conditions of each DME, consistent with the guidance expressed in this opinion.

T.B., An Infant By His Guardian Ad Litem, E.B., et al. vs. Alexis Novia, et al. (L-8651-19, Middlesex County and Statewide) (Consolidated) May 03, 2022 (A-1405-21/A-1406-21)

Summary: This case involved a high school student injured when struck by another defendant's car while walking home from school. Because the student lived less than two and a half miles from his high school, he was not eligible for mandatory busing under N.J.S.A. 18A:39-1 and, therefore, was required to walk to and from school.

The Board adopted various policies and procedures related to student busing transportation. The Board also adopted procedures for parents seeking to contest the designation of a route as hazardous. The procedure required the parent to contact the Board's transportation supervisor to discuss the route designation and any transportation issues.

Following these policies and applying its adopted criteria, the Board determined the route taken by this student to and from school on the day of the accident was non-hazardous for high school students.

Sometime between 2010 and 2016, the Township assigned a traffic safety officer to work with the Board in evaluating the safety of various student walking routes. Due to cuts to the Board's school budget, the Board asked the Township's traffic safety officer to determine whether busing costs could be reduced. The Township's traffic safety officer determined the route travelled by this student on the day of the accident to be dangerous for students of any age, including high school students, and so advised the Board. The Board denied receiving such a recommendation.

The student and his parents filed suit alleging negligence against the Board, the Township, and the driver. The Board and the Township moved for summary judgment.

The court affirmed the denial of summary judgment to the Board. The court concluded a jury would have to resolve certain factual disputes regarding the Board's duty to plaintiffs, if any, and whether the Board breached such duties. The court identified the following factual issues regarding the Board's conduct: whether the Board breached a duty to plaintiffs by not adhering to its policies and procedures regarding the designation of hazardous routes; whether the Board violated its procedure governing situations where a parent seeks to contest the designation of a hazardous route or other busing issues; and whether the Board should have reevaluated the specific road travelled as a matter of general practice or based on information provided by the Township's traffic safety officer.

Additionally, the court determined a jury must assess whether the Board's failure to undertake these actions constituted a ministerial act, which is not entitled to immunity, or a discretionary act, which is entitled to immunity. The court agreed the motion judge properly denied summary judgment to the Board because there were factual disputes regarding whether the Board's actions or inactions related to the student's transportation were reasonable under the circumstances after considering the Board's obligations under its own transportation policies.

The court reversed the denial of summary judgment to the Township. Under N.J.S.A. 18A:39-1.5(b), the Township had no duty beyond working in conjunction with the Board to determine criteria for the designation of a hazardous route and the Board admitted the Township satisfied its legal duty under the statute. The Board also conceded it made the decisions related to student transportation and designation of hazardous routes without input or participation by the Township.

Applied Underwriters, et al. vs. New Jersey Department of Banking and Insurance, et al. (L-0047-20, Mercer County and Statewide) April 27, 2022 (A-0653-20)

Summary: The court resolves the jurisdictional question of whether the Commissioner of the Department of Banking and Insurance ("DOBI") may pursue an administrative action against two out-of-state companies and their two licensed New Jersey affiliates for engaging in alleged improper insurance related practices in this State—or whether the Commissioner must instead rely on the Attorney General to bring a lawsuit against those companies in the Superior Court.

Specifically, the court interprets N.J.S.A. 17:32-20 ("Section 20"), which the Legislature enacted in 1968 as part of the Non-Admitted Insurers Act, N.J.S.A. 17:32-16 to -22. In pertinent part, Section 20 reads:

> Whenever it shall appear to the commissioner that any insurer, or any employee, agent, promotional medium, or other representative thereof, has violated, is violating, or is about to violate the provisions of this act, the Attorney General, upon the request of the commissioner, shall institute a civil action in the Superior Court for injunctive relief and for such other relief as may be appropriate under the circumstances. [N.J.S.A. 17:32-20 (emphasis added).]

The court holds that Section 20 does not restrict the Commissioner to the path of a Superior Court action in this circumstance. Based on the text, legislative history, and public policies of the statute as a whole, as well as principles of primary jurisdiction, the Commissioner has the authority to choose to pursue an administrative complaint against the companies instead of a lawsuit brought by the Attorney General.

Consequently, the court remands this matter to DOBI and directs that a previously stayed hearing in the Office of Administrative Law be reactivated.

Deborah Marino, et al. vs. Abex Corporation, et al. (L-0836-10, Middlesex County and Statewide) March 24, 2022 (A-1523-19)

Summary: The court considered defendant Ford Motor Company's (Ford) appeal from a final judgment awarding plaintiff Deborah Marino, Executrix for the Estate of Anita Creutzberger, (decedent) damages for decedent's death from peritoneal mesothelioma. Ford contended that the trial court erred in ruling that Ford violated a consent order and in implementing sanctions.

Decedent's husband and son worked at several Ford car dealerships where brake dust would spread and cover them. They brought dust home on their clothing where it was laundered by decedent. Decedent's estate sued Ford alleging decedent was exposed to asbestos from Ford brakes and that this exposure caused her mesothelioma. Among other allegations, the estate asserted that Ford negligently violated its duty to protect dealership workers and their families by failing to provide them with the same warnings and guidance for handling its asbestos products that it provided to its own employees.

The parties resolved a discovery dispute with a consent order. Ford agreed to search for Ford training materials that referred to asbestos or handling asbestos products and to produce any responsive documents and a corporate witness having knowledge of facts relating to Ford's training.

During the deposition of this designated witness, the employee denied any knowledge of relevant training manuals and any recent testimony regarding the same. Plaintiff's counsel confronted the employee with a 1974 Ford training manual, which the employee admitted he had seen and then confirmed he had been questioned about in another case a few months earlier.

The trial court, upon plaintiff's motion, sanctioned Ford by: (1) directing verdict to plaintiff on the issues of duty and breach; and (2) ordering that the jury be advised that Ford violated a court order and withheld evidence, so duty and breach of duty had been resolved against them. The court subsequently concluded that the sanctions order necessarily included a directed verdict on general, but not specific, causation. Ford appealed.

This court's review found little support for Ford's claims that it acted in good faith in responding to plaintiff's discovery requests and did not violate the consent order. The trial court's sanctions directly corresponded to the violation. The trial court's subsequent inclusion of a directed verdict on general causation flowed from the fact that a duty to warn only exists when the product is dangerous. Ford presented experts to opine against specific causation of decedent's mesothelioma,

but these experts also discussed general causation, mooting Ford's argument that it was prejudiced by the order's directed verdict for general causation.

The court discerned no abuse of the trial court's discretion to impose sanctions for violating the consent order and affirmed.

In The Matter Of The Application Of The Township Of Bordentown, etc. (L-1579-15, Burlington County and Statewide) March 14, 2022 (A-0357-20)

Summary: The sole issue raised in this administrative appeal is whether an appointing authority may unilaterally reduce a sanction from major to minor discipline after the employee is served with a Final Notice of Disciplinary Action (FNDA). Because the Civil Service Act and accompanying regulations generally permit an employee to appeal only major disciplinary actions, the reduction in sanction divests the Civil Service Commission of jurisdiction to hear the employee's appeal from an adverse administrative decision.

The court reviewed the statutory and regulatory schemes and rejected the employee's argument that the governing provisions prohibit the appointing authority from reducing the penalty after an FNDA has been issued. The court also found unavailing the employee's contention that the reduction in penalty and resulting divestiture of the Commission's jurisdiction violated his right to due process. In doing so, the court distinguished the present matter – involving a reduction in penalty – from its prior decision in *Hammond vs. Monmouth County Sheriff's Department*, 317 N.J. Super. 199 (App. Div. 1999), which held an appointing authority may not add charges to the FNDA.

Because the court determined no provision of the Act or accompanying regulations proscribed the appointing authority's inherent discretion to reduce a penalty after an FNDA has been issued to a Civil Service employee, the court concluded the Commission properly upheld the Administrative Law Judge's initial decision, dismissing the employee's complaint on summary decision for lack of subject matter jurisdiction.

Dental Health Associates South Jersey, PA, et al. vs. RRI Gibbsboro, LLC, et al. (L-3993-20, Camden County and Statewide) March 10, 2022 (A-0320-21)

Summary: The court holds an attorney cannot be disqualified for a conflict of interest pursuant to RPC 1.9 and RPC 1.10(b) based solely on the content of the initial pleadings where the factual basis for the alleged conflict of interest is contested. The two-pronged analysis required by City of *Atlantic City vs. Trupos*, 201 N.J. 447, 467 (2010) mandates a factfinding before a court can conclude disqualification is required because an attorney represented a former client in a substantially related matter.

Grandvue Manor, LLC vs. Cornerstone Contracting Corp., et al. (L-1602-20, Bergen County and Statewide) March 07, 2022 (A-3702-20)

Summary: The court affirmed an order dismissing plaintiff's complaint and compelling arbitration under a construction Agreement to build a home in New York.

Plaintiff entered into the Agreement with defendant, a construction company headquartered in Connecticut. The Agreement contained a choice of law provision to govern by the law of the place where the project was located, excluding that jurisdiction's choice of law rules, and a provision providing that, if the parties selected arbitration as the method of binding dispute resolution, then the Federal Arbitration Act (FAA) would govern. Thus, the parties selected the law of New York, the place of the project, and the FAA to govern the Agreement.

Plaintiff sued defendants in New Jersey alleging defendants had not achieved substantial completion of the project, breached the contract and the implied covenant of good faith and fair dealing, committed fraud and negligent misrepresentation, breached New York lien law, breached their fiduciary duties, committed conversion, unjustly enriched themselves, and violated the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -224, and the New Jersey Racketeer Influenced Corrupt Organization Act (RICO), N.J.S.A. 2C:41-1 to -6.2.

The trial court delivered an oral opinion dismissing the complaint for the matter to be submitted to arbitration. The court concluded that, under New Jersey law, the arbitration provision is clear and unambiguous as to the requirement that the parties submit to arbitration and as to the parties' waiver of their right to a jury trial. The court noted that the litigants are sophisticated parties that freely entered into the Agreement to build a house for over $10 million.

The court considered whether the law of New Jersey or New York applied to the enforceability and construction of the arbitration provision. Here, the parties clearly and unambiguously chose New York law, where the project was located. Thus, the law of New York applied.

The court then concluded a New York court would likely enforce the arbitration provision as it was less broad than those the New York Court of Appeals upheld in *Singer vs. Jefferies & Co.*, 575 N.E.2d 98, 99-101 (1991), *Atlas Drywall Corp. vs. Dist. Council of New York City & Vicinity of United Bhd. of Carpenters & Joiners*, 177 A.D.2d 612, 612-14 (2d Dept. 1991), and *Nationwide Gen. Ins. Co. vs. Invs. Ins. Co. of Am.*, 332 N.E.2d 333, 335 (1975). Moreover, Congress and the New Jersey Legislature have declared policies favoring arbitration. *Martindale vs. Sandvik, Inc.*, 173 N.J. 76, 84-85 (2002). Here, the court discerned no error in the order compelling arbitration because the arbitration provision is clear and unambiguous in waiving the right to a jury trial and covers the alleged disputes.

Marc Russi vs. City of Newark, et al. (L-5182-19, Essex County and Statewide) Feb. 17, 2022 (A-1064-20)

Summary: While plaintiff was driving his car on a road owned by Passaic County, a falling tree limb struck his car, causing him to suffer significant injuries. The tree with the broken limb was located in a 35,000 acre conservation easement owned by the City of Newark. The trial judge granted summary judgment to the City relying, in part, on the Landowner's Liability Act (LLA), N.J.S.A. 2A:42A-1 to -10. The judge also granted summary judgment to Passaic County, which had been sued under the Tort Claims Act.

The court held N.J.S.A. 2A:42A-8.1 of the LLA, entitled "[l]iability to persons injured on premises with conservation restriction," precluded the imposition of liability against the City. The statute

provides immunity to an owner of premises on which "a conservation restriction is held by the State, [or] a local unit . . . and upon which premises subject to the conservation restriction public access is allowed, or of premises upon which public access is allowed pursuant to a public pathway or trail easement held by the State, [or] a local unit . . . ."

Because plaintiff's car travelled on a road providing public access and serving as a public pathway and the tree with the fallen limb stood within a conservation easement, the City was entitled to immunity under the LLA. The County likewise was properly granted summary judgment because the alleged dangerous condition was not on its property. N.J.S.A. 59:4-2.

In The Matter Of The Application Of T.I.C.-C. To Assume The Name Of A.B.C.-C. (L-1330-20, Mercer County and Statewide) (Record Impounded) Feb. 16, 2022 (A-1706-20)

Summary: Appellant A.B.C.-C. is a transgender man who sought to change his name to conform his identification documents with his gender identity. As part of his application, appellant submitted evidence showing transgender people are subject to a particularized threat to their safety based upon their identity and asked that the record of his name change be sealed to protect him from such discrimination and violence. The trial court denied appellant's request. Because appellant demonstrated good cause to seal the record, the court reversed the trial court's denial of appellant's motion, ordered that the record be sealed, and remanded for any necessary further proceedings.

Gilbert Antonucci vs. Curvature Newco, Inc., et al. (L-1034-20, Gloucester County and Statewide) Feb. 15, 2022 (A-1983-20)

Summary: Plaintiff appeals from an order compelling arbitration and dismissing with prejudice his discrimination complaint against his former employer and two of its employees. This appeal presents an issue of first impression in this court: whether the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, pre-empts a 2019 amendment, adding N.J.S.A. 10:5-12.7 (Section 12.7), to New Jersey's Law Against Discrimination (LAD). Section 12.7 prohibits the waiver of procedural and substantive rights under LAD. The court holds that the arbitration agreement is enforceable, and that the FAA pre-empts Section 12.7 of LAD when applied to an arbitration agreement governed by the FAA. The court affirms the portion of the order compelling arbitration, but remands for entry of a new order that stays the litigation pending the arbitration.

Olivia Checchio, et al. vs. Evermore Fitness, LLC, et al. (L-7065-20, Middlesex County and Statewide) Feb. 15, 2022 (A-3461-20)

Summary: In August 2018, fourteen-year-old Olivia Checchio went to Sky Zone South Plainfield—an indoor trampoline park—with four friends and Gina Valenti—the mother of one of the children. Upon arrival at the park, Valenti signed an agreement that included an arbitration provision, under which the signing adult on behalf of the minor child waived a jury trial and agreed to arbitrate any dispute or claim arising out of the child's use of the Sky Zone premises.

The trial court, relying on this court's recent decision in *Gayles vs. Sky Zone Trampoline Park*, 468 N.J. Super. 17, 21-22 (App. Div. 2021), denied defendants' motion to dismiss the complaint and compel arbitration.

Defendants moved for reconsideration, producing for the first time five agreements signed by Olivia's mother, Lisa, when she took Olivia to the park in 2016. Defendants asserted Gayles was distinguishable from the circumstances here because the 2016 agreements demonstrated a pattern of prior conduct, and, therefore, establish apparent authority.

The court noted the 2016 agreements contained different language than the 2018 agreement. The 2016 agreements did not vest Valenti with the authority to enter into the 2018 agreement or any future agreement on Olivia's behalf. Nor did the 2016 agreements manifest any understanding on Lisa's part that Valenti or any other adult could sign a future waiver agreement in the place of Lisa or on Olivia's behalf.

The court found there was no evidence demonstrating that Lisa would have signed the 2018 agreement. And, Lisa's prior execution of the 2016 agreements did not establish a pattern that she would authorize another person to sign an agreement on behalf of her daughter. Therefore, the court held the 2016 agreements did not establish Valenti had apparent authority to waive Olivia's trial rights under the 2018 agreement.

Woodmont Properties, LLC vs. Township of Westampton, et al. (L-2494-18, Burlington County and Statewide) Feb. 07, 2022 (A-4453-19)

Summary: Plaintiff, which contracted to purchase a large tract of vacant land from Hovbros Burlington, alleged in this action that defendant TD Bank tortiously interfered with that contract by foreclosing its mortgage on the property. The trial judge dismissed for failure to state a claim. In affirming in part, the court held that the foreclosure sale cut off plaintiff's unrecorded contract interest and thereby eviscerated plaintiff's continuing claim of a legal or equitable interest in the property despite an assumption of TD Bank's knowledge of plaintiff's contract rights when TD Bank foreclosed. In this regard, the court rejected the holding of a published trial court decision, *PNC Bank vs. Axelsson*, 373 N.J. Super. 186 (Ch. Div. 2004), which found relevance in the application of N.J.S.A. 2A:50-30 when a foreclosing party has knowledge of an unrecorded interest.

In reversing in part, the court held that plaintiff could continue to seek damages on its tortious interference claim against TD Bank based on its theory, which the court was obligated to assume as true, that TD Bank manipulated its rights as to Hovbros and its related companies so as to interfere with plaintiff's contract rights.

John P. Brown, et al. vs. Patricia Brown (L-2367-20, Monmouth County and Statewide) Feb. 03, 2022 (A-0384-21)

Summary: Following the dismissal of a chancery action against them that sought a constructive trust on the proceeds of a sale of real property, plaintiffs filed a complaint against the prior suitor, alleging, among other things, the tortious interference with their contract to sell the real property.

The prior suitor sought dismissal, arguing her earlier claim was cloaked by the litigation privilege. The trial judge held that the complaint and other pleadings were insulated by the litigation privilege but not the notice of lis pendens, which had been recorded but discharged in the earlier action.

In permitting review of that interlocutory disposition, the court affirmed in part and reversed in part, holding that the notice of lis pendens – a mere statement of the complaint's claims – was insulated by the litigation privilege, but the litigation privilege did not absolve the prior suitor of the consequences of having filed that earlier suit; in other words, the litigation privilege protected the prior suitor's statements and communications in the earlier judicial proceeding but did not protect her from a later action based on the allegation that the earlier suit was frivolous, vexatious or tortious.

Shawn Labega vs. Hetal C. Joshi, M.D., et al. (L-3088-18, Middlesex County and Statewide) (Consolidated) Feb. 01, 2022 (A-3399-20/A-3400-20/A-3401-20/A-3402-20)

Summary: The court permitted defendants in this medical malpractice action leave to appeal the trial court's denial of their motions for partial summary judgment on plaintiff's claims for breach of contract and hospital policy based on a third-party beneficiary theory as well as his claims for negligence per se for defendants' alleged violation of the hospital policies incorporated into those contracts. Because well-established precedent makes clear neither cause of action is available to plaintiff in this case as a matter of law, the court reversed the orders and remanded for entry of partial summary judgment for defendants dismissing those claims.

Underwood Properties, LLC vs. City of Hackensack, et al. (L-7980-19, Bergen County and Statewide) Jan. 24, 2022 (A-0044-20)

Summary: The parties were involved in litigation relating to the Hackensack Planning Board's zoning determinations and ordinances adopted in the City's redevelopment plan. Separately, plaintiff's attorney submitted requests for records from defendants pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, designated as OPRA requests from the attorney.

Defendants argued plaintiff lacked standing to bring suit under OPRA because the requests were submitted from plaintiff's attorney. The trial judge rejected the standing argument because counsel had implied authority to submit the requests. The trial judge also noted the Denial of Access complaint form adopted by the Government Records Council requires parties represented by counsel who make a request to state the name of the client on whose behalf the complaint is being filed.

Among other arguments raised by the parties in their respective appeals, defendants repeated their standing argument and urged the court to "establish the standard that if an attorney is filing an OPRA request on behalf of a client, it must clearly disclose that fact to the custodian of records, or if the response proceeds to litigation the attorney must be deemed the 'requestor.'"

The court affirmed, rejecting defendants' argument for the same reasons expressed by the trial judge. Although N.J.S.A. 47:1A-6 states the right to institute a suit under OPRA belongs "solely"

to the requestor, OPRA and the rules of standing are broadly construed. Therefore, the literal reading of the statute urged by defendants should be eschewed.

Trenton Renewable Power, LLC vs. Denali Water Solutions, LLC (C-000049-20, Mercer County and Statewide) Jan. 24, 2022 (A-3060-20)

Summary: In this breach of contract action, the owner/operator of an aerobic biodigester facility sued defendant, Denali, which was contractually obligated to deliver quantities of organic waste to the facility for processing. Shortly after entry of the initial case management order, Denali served subpoenas on plaintiff and several nonparties, including Symbiont Science, Engineering and Construction, Inc. (Symbiont), which had designed and retrofitted the facility for plaintiff. Symbiont's subpoena required it to identify a corporate designee with familiarity in seventeen topic areas and demanded documents and electronically stored information in thirteen categories.

Much of the requested information centered on communications between plaintiff and Symbiont, such as the terms of Symbiont's agreement with plaintiff, "including the drafting, revision, and execution of the agreement"; "[t]he calculation of Symbiont's guaranteed maximum price to complete the construction to retrofit the Trenton Facility"; and "[a]ll communications with [plaintiff c]oncerning the construction and design" of the facility, "including but not limited to, the construction cost, construction schedule, and design modifications." Denali served similar requests on plaintiff.

When negotiations regarding the scope of production broke down between Denali and plaintiff, and between defendant and Symbiont, Denali moved to compel, and plaintiff and Symbiont moved to quash. The judge granted Denali's motion as to both plaintiff and Symbiont, relying on the broad scope of discovery permitted by Court Rules and case law.

The court granted Symbiont's motion for leave to appeal and reversed. Despite the broad scope of discovery permitted between parties, a court facing a discovery dispute involving a nonparty to the litigation must consider additional factors. The court also noted the special recognition the Federal Rules of Civil Procedure provide to discovery demanded from nonparties.

Estate of Micah Samuel Tennant Dunmore vs. Pleasantville Board of Education Angela Tennant vs. Pleasantville Board of Education, et al. (L-0889-20 and L-0901-20, Atlantic County and Statewide) (Consolidated) Jan. 20, 2022 (A-4314-19/A-4451-19)

Summary: In these matters arising out of the tragic shooting of a minor during a football game and his subsequent death several days later, the court considered whether the time for a minor's parent to file a notice of tort claim for her Portee1 claim is tolled under the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 59:12-3. In reading in pari materia N.J.S.A. 59:8-8, which extends the statute of limitations for an injured minor to institute a cause of action until two years after their eighteenth birthday, and N.J.S.A. 2A:14-2, which tolls a parent's claim for the duration of the child's tolling period, and because the parent's Portee claim essentially includes the elements of the minor's claim, the court concludes it is only logical to toll the notice requirements under the TCA for the parent's Portee claim to coincide with the tolling period of the minor's claim. The

court's ruling is consistent with the purposes underlying the entire controversy doctrine and in promoting judicial economy.

Seaview Harbor Realignment Committee, LLC, et al. vs. Township Committee of Egg Harbor Township, et al. (L-0079-17, Atlantic County and Statewide) Dec. 29, 2021 (A-3048-19)

Summary: In this appeal, plaintiffs, Seaview Harbor Alignment Committee and certain residents of Seaview Harbor, challenge Egg Harbor Township's denial of their deannexation petition, which would have permitted Seaview Harbor to secede from the Township and annex with neighboring Borough of Longport. The trial court correctly affirmed the Township's decision. In doing so, the court considered and applied the three-part test enumerated in N.J.S.A. 40A:7-12.1, and concluded that although plaintiffs established that the Township's refusal to consent to deannexation was detrimental to a majority of Seaview Harbor residents, the Township's decision was neither arbitrary nor unreasonable, and plaintiffs failed to establish that deannexation would not cause significant harm to the well-being of the Township.

The court holds that a petition under N.J.S.A. 40:7-12.1 may be appropriately denied where a municipality establishes that deannexation would be detrimental to the majority of residents despite the undisputed fact that deannexation would produce considerable property tax savings for the petitioning homeowners, who seek to become part of a lower tax municipality. That detriment can include the loss of significant services to the community at large, removal of a diverse citizenship, and likely erosion of valuable civic participation caused by the absence of those homeowners who seek to deannex from the community.

Here, the harm to the residents of Egg Harbor included not only the potential loss of revenue and attendant services, but the removal of a critical municipal resource – the diverse Seaview residents. That unique loss was not limited to its current and future economic impact, but also encompassed the transfer of a portion of Egg Harbor's population that historically participated in all phases of local government, and brought significant and substantive value to the deliberative decision-making process necessary for a healthy and robust community and government.

W.S. vs. Derek Hildreth, et al. (L-0043-20, Gloucester County and Statewide) Dec. 21, 2021 (A-2066-20)

Summary: Plaintiff alleged he was sexually molested by his sixth-grade teacher during the 1996–97 school year, but he reasonably did not realize he suffered injury as a result until 2016. His 2017 motion to file a late notice of claim was denied without prejudice; the judge concluding the certifications in support of the motion were not based on personal knowledge and otherwise inadequate.

In 2019, the Legislature made sweeping changes to the Tort Claims Act, the Child Sexual Abuse Act, and the Charitable Immunity Act, and it also enacted entirely new statutes of limitations for tort claims arising from sexual abuse and exploitation of minors, and sexual crimes committed against adults. See L. 2019, c. 120, and L. 2019, c. 239.

In particular, effective December 1, 2019, plaintiffs alleging sexual abuse as a minor that occurred prior to, on or after the effective date, may file suit at any time until reaching the age of fifty-five. The date the claim accrued no longer mattered. Effective the same date, a suit alleging sexual abuse by a public employee or employer no longer needed to comply with the predicate procedural requirements of the TCA, including, the notice of claim provision in N.J.S.A. 59:8-8. Plaintiff filed this suit in January 2020, and defendants — elementary school and school district — moved to dismiss, contending plaintiff failed to file a notice of claim within ninety days of the accrual of his claim. Ibid.

The court affirmed the motion judge's denial of defendants' motion, albeit for different reasons than he expressed. The court concluded that a retroactivity analysis was not required under the facts of this case, because plaintiff filed suit after the effective date of the new legislation and within the new statute of limitations; and, when filed, the complaint was no longer subject to the TCA's procedural requirements.

E.C., et al. vs. Leo Inglima-Donaldson, et al. (L-1419-18, Essex County and Statewide) (Record Impounded) Dec. 16, 2021 (A-2752-20)

SUMMARY: In 2019, the Legislature expanded public-entity civil liability for claims based on sexual assaults and other sexual misconduct by enacting N.J.S.A. 59:2-1.3(a), which disables in those instances the immunities provided by the Tort Claims Act. In this action, plaintiff alleges he was the victim of the sexual misconduct of a teacher employed by the defendant board of education. In appealing the partial denial of its summary judgment motion, the board argued that this new statute does not apply unless the public entity – and not just the public employee – has engaged, in the words of the statute, in "willful, wanton or grossly negligent" conduct. The board also argued that even if triggered, N.J.S.A. 59:2-1.3(a) deprives the public entity only of its Tort Claims Act immunities, and not two defenses under the Act: the verbal threshold, N.J.S.A. 59:9-2(d), and the declaration that a public entity "is not liable for the acts or omissions of a public employee constituting a crime . . .," N.J.S.A. 59:2-10.

In affirming the denial of the board's summary judgment motion, the court enforced N.J.S.A. 59:2-1.3(a)(1) as written, concluding that a public employee's sexual offense was sufficient to provide the "willful, wanton or grossly negligent" conduct required of "the public entity or public employee" (emphasis added). The court also held that N.J.S.A. 59:2-10 is an immunity disabled by N.J.S.A. 59:2-1.3(a)(1) but that the verbal threshold in N.J.S.A. 59:9-2(d) is a limitation of liability, not an immunity, and remained applicable.

Township of Montclair Committee of Petitioners, et al. vs. Township of Montclair et al. (L-2724-20, Essex County and Statewide) Nov. 30, 2021 (A-2315-20)

Summary: Defendant's municipal clerk determined that plaintiffs' petition for a referendum on a rent-regulation ordinance lacked sufficient signatures; the clerk's decision resulted from her discerning of differences between some of the petition's e-signatures and the corresponding voters' pen-and-ink signatures on the voter rolls. The court affirmed the trial judge's determination that the clerk acted arbitrarily and capriciously because, among other things, the court found it was unreasonable, in light of the limiting circumstance of the COVID-19 pandemic, and the Governor's

emergency order precluding door-to-door solicitations, for the clerk not to reach out and provide voters with an opportunity to cure any alleged uncertain signatures before attempting to disenfranchise them from the referendum process.

State of New Jersey vs. County of Ocean (L-0527-20, Ocean County and Statewide) Nov. 04, 2021 (A-3665-19)

Summary: An Ocean County Prosecutor's Office (OCPO) detective was operating a county vehicle while performing official duties when she struck another vehicle injuring a passenger. After the passenger sued the OCPO and the detective for personal injuries, the State agreed to defend and indemnify both defendants. However, the State asserted that pursuant to N.J.S.A. 59:10A-5 it could avail itself of the County's self-insurance and excess insurance policies mandated by N.J.S.A. 40A:10-3 as the primary sources to satisfy any judgment or settlement in the tort case. The State sued the County seeking a declaratory judgment to this effect. The trial court dismissed the complaint.

On appeal, the court affirmed and held that N.J.S.A. 59:10A-5 grants the Attorney General the ability to direct who shall take up the defense on behalf of the State. However, pursuant to *Wright vs. State*, 169 N.J. 422 (2001), where an employee is entitled to a defense by the State, the State shall also bear the costs of indemnification. N.J.S.A. 59:10A-5 does not alter the State's obligation to defend and indemnify utilizing its resources.

Charles J. Parkinson vs. Diamond Chemical Company, Inc., et al. (L-1341-18, Union County and Statewide) Oct. 27, 2021 (A-2639-20)

Summary: On leave granted, the court holds that the tax filings of corporations and other businesses receive the same presumption of confidentiality as individual tax records. Hence, the heightened requirements for disclosure specified in *Ullmann vs. Hartford Fire Ins. Co.*, 87 N.J. Super. 409 (App. Div. 1965), apply to such business tax filings as well.

As Ullmann instructs, a civil litigant can only obtain an opposing party's tax filings through discovery by demonstrating to the court: (1) the filings are relevant to the case; (2) there is a "compelling need for the documents because the information likely to be contained within them is "not otherwise readily obtainable" from other sources; and (3) disclosure would serve a "substantial purpose." Id. at 415-16.

JWC Fitness, LLC vs. Philip D. Murphy, etc. (L-0388-20, Sussex County and Statewide) Oct. 18, 2021 (A-0639-20)

Summary: In this latest appeal arising from executive orders (EOs) issued by the Governor of New Jersey in response to health-related emergencies caused by the spread of the COVID-19 coronavirus, plaintiff JWC Fitness, LLC, which until October 2020 operated a kickboxing business, claimed entitlement to compensation under the New Jersey Civil Defense and Disaster Control Act (Disaster Control Act), N.J.S.A. App. A:9-30 to -63, for the closure and limitations placed on its business under some EOs.

According to plaintiff, the EOs that temporarily limited and shut down the operations of health clubs, including gyms and fitness centers, effectively "commandeered and utilized" its property under N.J.S.A. App. A:9-34, such that the State must establish an "emergency compensation board" under N.J.S.A. App. A:9-51(c), in order to provide "payment of the reasonable value of such . . . privately owned property." N.J.S.A. App. A:9-34. Plaintiff also sought a declaratory judgment that the EOs effectuated a taking of its property without just compensation, in violation of the New Jersey Constitution, art. I, ¶ 20, and the United States Constitution, amends. V and XIV.

The court concluded that plaintiff's arguments were without merit as the statutory standard for compensation had not been implicated, and the EOs did not effectuate a taking of plaintiff's property within the meaning of the state and federal constitutions.

Morgan Dennehy vs. East Windsor Regional Board of Education, et al. (L-1333-17, Mercer County and Statewide) Sept. 27, 2021 (A-2497-19)

Summary: Plaintiff Morgan Dennehy appeals from a February 18, 2020 order denying her motion for reconsideration of a previous order granting summary judgment to defendants East Windsor Regional Board of Education, Hightstown High School, James W. Peto, Todd M. Peto, and Dezarae Fillmyer. Plaintiff was a student at Hightstown High School and a member of the field hockey team. On September 9, 2015, the field hockey team was waiting for its scheduled practice on Hightstown High School's turf field to begin and was conducting drills in the "D-zone," an area between the recently renovated turf field and the track. Some members of the team were participating in the drills while others watched. A twenty-foot-tall ball-stopper is located at each end of the turf field and separates the "D-zone" from the turf field. While the field hockey team was practicing drills in the "D-zone," the boys soccer team was practicing on the turf field and plaintiff observed several soccer balls vault the ball stopper. After the team concluded its drills, plaintiff asked defendant Coach Fillmyer if she could take a shot on goal. Defendant agreed because plaintiff rarely had the opportunity to shoot on goal. Plaintiff left the area directly behind the ball stopper and, after she finished shooting, she was struck in the back of the neck by an errant soccer ball that went over the ball stopper. Plaintiff was later taken to the hospital and was diagnosed with a concussion. Plaintiff filed suit alleging that defendants were negligent and negligent in hiring, retaining, training, and supervision of employees.

On appeal, plaintiff argues that the motion judge erroneously applied the heightened recklessness standard set forth in *Crawn vs. Campo*, 136 N.J. 494 (1994). After reviewing the applicable case law, the court concluded that the motion judge erred in applying the heightened recklessness standard from Crawn. In this case, defendant Fillmyer was not a co-participant who directly injured plaintiff and, therefore, Crawn does not apply.

The court also determined that *Rosania vs. Carmona*, 308 N.J. Super. 365 (App. Div. 1998) does not apply to this case. In Rosania, a martial arts instructor participated in a sparring match with a student and kicked the student in the head causing his retina to detach. The martial arts dojo had a written rule that prohibited targeting of the head. The Rosania panel determined that if the jury found the risks inherent in the karate match were materially increased by an instructor beyond those reasonably anticipated by the dojo rules, it should have been charged on the ordinary duty

owed to business invitees rather than the heightened recklessness standard for competitive contact sports. The court declined to apply Rosania in this case for two reasons: first, defendant Fillmyer was not a co-participant; and second, the Rosania panel's decision was informed by cases decided by the New York Court of Appeals which contemplated a different heightened standard. The court concluded that because defendant in this case is a public employee, her duties, responsibilities, and immunities are clearly established in the New Jersey Tort Claims Act N.J.S.A. 59:1-1 to 12-3, and thus defendant is liable to the same extent as a private person for her negligence and the ordinary negligence standard should govern this case.

JHC Industrial Services, LLC vs. Centurion Companies, Inc., et al. (L-7635-17, Bergen County and Statewide) Sept. 17, 2021 (A-1980-19)

Summary: Defendant Centurion Companies, Inc. subcontracted demolition work it agreed to perform for Alfred Sanzari Construction to plaintiff JHC Industrial Services, Inc. JHC did the work and Sanzari paid Centurion for it. Centurion, however, did not pay JHC in full, prompting this action under the Prompt Payment Act. Although JHC completely prevailed after two years of litigation and trial, the judge refused its application for $104,670.51 in fees pursuant to N.J.S.A. 2A:30A-2(f), awarding it only $16,375.73. The judge reasoned it could not "[u]nder Rendine . . . grant over $100,000 in fees on a judgment that could not have exceeded $30,500."

The court reverses and remands for reconsideration of the fee award. The Prompt Payment Act is a fee-shifting statute that makes an award of "reasonable costs and attorney fees" mandatory to a prevailing party; the judge erred in reading in a proportionality requirement not included in the statute.

Table of Cases