CLE SEMINAR MATERIAL

CIVIL COURT RULES UPDATE (INCLUDING FAMILY LAW):

A Review of Rule Changes, Recent Court Decisions & Practice Guides

Presented By Former Justice Peter G. Verniero,
Judge Karen M. Cassidy A.J.S.C.,
Judge Robert Fall (on recall) and Gerald H. Baker, Esq.

CONTAINS MATERIAL FROM:

RULES GOVERNING THE COURTS (2018 ed.)

OF THE

STATE OF NEW JERSEY

AMENDMENTS TO SEPTEMBER 1, 2017
COMMENTS AND ANNOTATIONS INCLUDE CASES
REPORTED THROUGH 228 N.J. 632 AND 449 N.J. SUPER. 541

WITH COMMENTS AND ANNOTATIONS
BY
SYLVIA B. PRESSLER (1969-2010)
&
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Presented:
September 23, 2017
The Crystal Ballroom - Located at the Ramada Plaza • 160 Frontage Road, Newark, New Jersey 07114

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GLEF CLE Outline
September 23, 2017

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Session I (9:00am to 10:15am)

1.1. Organization of Court Rules

1.2. Court Rules Process Generally

- 1.2.1. Purpose of Rules
- 1.2.2. Committee Work/Rule Adoptions

1.3 General and Other Provisions

- 1.3.1. Metadata in Filed Documents, R. 1:32-2A
- 1.3.2. Mediator's Fee, R. 1:40-4
- 1.3.3. Other Mediator Provisions, R. 1:40-12
- 1.3.4. Witnesses, R. 1:9-1
- 1.3.5. Substitution, R. 1:11-2
- 1.3.6 Special Ethics Masters, R. 1:20-6
- 1.3.7 E-filing

Q&A

(Ten Minute Break, 10:15am to 10:25am)

Session II (10:25am to 11:25am)

2.1. Family Part Rules

- 2.1.1. Attorney's Fees & Withdrawal of Counsel, R. 5:3-5
- 2.1.2. Complaint, R. 5:4-2
- 2.1.3. Summons, R. 5:4-5
- 2.1.4. Termination of Child Support, R. 5:6-9
- 2.1.5 Venue, R. 5:7-1
- 2.1.6. Restraining & Other Orders; Pre-Trial Incarceration, R. 5:7A to C

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2.1.7. Appendix V/Other

Q/A

(Ten Minute Break, 11:25am to 11:35am)

Session III (11:35 am to 12:40pm)

3.1 Practice Guidelines for Court Rules

3.1.1. Mandatory Personal Injury Arbitration, R. 4:21A-2
3.1.2 . Service of Process Through Social Media,
K.A.v. J.L, 450 N.J. Super. 247 (Ch. 2016)
3.1.3. Transmittal of Notices by Fax or Email,
Conley v. Guerro, 228 N.J. 339 (2017)
3.1.4. Cyber Security: Communication of Protected Client Information Over the Internet,
ABA Formal Opinion 477
3.1.5. Right to Trial by Jury: Sanctions for Failure to Comply With Procedural Rules,
Williams v. American Auto Logistics, 226 N.J. 117 (2016)

Q/A

N.J. Court Rules - Annotated

Pressler & Verniero - 2018 Ed.

Part I

RULES OF GENERAL APPLICATION

[CHAPTER I. PROCEDURE]

- RULE 1:4. FORM AND EXECUTION OF PAPERS
  - 1:4-8. Frivolous Litigation
    - COMMENT
      - 2. Award of Sanctions.

The nature of litigation conduct warranting sanction under this rule has been strictly construed. See Tagayun v. AmeriChoice of N.J., 446 N.J. Super. 570, 578-581 (App. Div. 2016) (refusing to award sanctions for frivolous litigation despite Appellate Division cases rejecting plaintiff's position in light of Supreme Court decision decided after plaintiff filed complaint that supported her interpretation of the law).

As to other cases finding sanctions warranted under this rule, see Tagayun v. AmeriChoice of N.J., 446 N.J. Super. 570, 581-582 (App. Div. 2016) (affirming sanctions for filing amended complaint reasserting claims that had just been dismissed).

When a trial court allows a case to survive summary judgment and proceed to trial, a pleading cannot be deemed frivolous and an attorney cannot be deemed to have continued litigation in bad faith. United Hearts v. Zahabian, 407 N.J. Super. 379, 394 (App. Div.), certif. den. 200 N.J. 367 (2009). Cf. Noren v. Heartland Payment Sys., 448 N.J. Super. 486, 498 (App. Div. 2017), finding the CEPA standard for fee awards to be analogous to the frivolous standard of this rule and discussing the United Hearts standard.

- RULE 1:5. SERVICE AND FILING OF PAPERS
  - 1:5-6. Filing

1:5-6. Filing

(a) Time for Filing. . . no change.

(b) What Constitutes Filing with the Court. . . no change.

(c) Nonconforming Papers. The clerk shall file all papers presented for filing and may notify the person filing if such papers do not conform to these rules, except that

(1) the paper shall be returned stamped "Received but not Filed (date)" if it is presented for filing unaccompanied by any of the following:

(A-B) . . . no change.

(C) in Family Part actions, the affidavit of insurance coverage required by R. 5:4-2(f), the Parents Education Program registration fee required by N.J.S.A. 2A:34-12.2, the Affidavit of Verification and Non-Collusion as required by R. 5:4-2(c),

the Confidential Litigant Information Sheet as required by R. 5:4-2(g)~~in the form prescribed by the Administrative Director of the Courts~~, the Affidavit or Certification of Notification of Complementary Dispute Resolution Alternatives as required by R. 5:4-2(h) in the form prescribed in Appendix XXVII-A or XXVII-B of these rules, or the kinship caregiver assessment required in the kinship legal guardianship petition pursuant to N.J.S.A. 3B:12A-5(b); in non-dissolution actions, either a verified complaint/counterclaim form or a non-conforming complaint and completed supplemental form as required by R. 5:4-2(i); or

(D-E) . . . no change.

(2-4) . . . no change.

(d) Misfiled Papers. . . no change.

(e) Attorneys Answerable for Clerk's Fees. . . no change.

Note: * * *;subparagraph (c)(1)(C) amended July 28, 2017 to be effective September 1, 2017.

•COMMENT

•2. Paragraph (b); What Constitutes Filing with the Court.

This paragraph was amended, effective September 2016, by the addition of paragraph (8) making clear that filing in the Municipal Courts is provided for in Part VII of these rules. The rule was relaxed by Order, effective December 15, 2016, to require efiling using eCourts Criminal in all criminal matters except: (1) cases not tracked in PROMIS/Gavel, e.g., expungements, gun permit filings, municipal appeals; (2) filings that are not part of the court's official case file, e.g., prosecutor discovery pursuant to Rule 3:13-3(b)(1); (3) filings for which a fee is specifically required, e.g., municipal appeals, expungements; and (4) Megan's Law filings. See Notice to the Bar December 5, 2016. The Order also provides that failure to efile will result in the Superior Court clerk returning those pleadings to the filing party as "received but not filed." Returned documents must be electronically filed within 10 days of being returned in order to preserve the original received date as the filed date. The rules were also relaxed November 29, 2016, providing for efiling in the Tax Court.

Note, however, that, pursuant to Court Order of May 30, 2017 as amended by Court Order of July 5, 2017, as of the mandatory electronic filing date for each vicinage, any document submitted in paper form for filing in a civil matter (the L docket) will be rejected. The attorney thereupon will be directed to file the matter electronically through eCourts and the date of filing electronically will be the filed date. Note that the July Order similarly amended the Order of September 23, 2016 providing for efiling in Special Civil Part matters (DC docket) and Foreclosure matters (F docket). The May 2017 order provided as well that provisions of this paragraph providing for direct filing with a judge or chambers staff will not be applicable once there is mandatory electronic filing in that vicinage. The comments to this paragraph should be read with that Court Order in mind. Presumably, this rule will be amended to reflect the efiling requirement at some point in the future.. [SEE APPENDIX A HERETO FOR RELEVANT DOCUMENTS RE EFILING]

•3. Paragraph (c); Nonconforming Papers.

Subparagraph (1)(C) was amended effective September 2017, to include within its ambit in non-dissolution actions, verified complaints or counterclaims, either conforming or non-conforming, not filed on or with the appropriate form promulgated by the Administrative Office of the Courts pursuant to R. 5:4-2(i).

•RULE 1:6. MOTIONS AND BRIEFS IN THE TRIAL COURTS

•1:6-6. Evidence on Motions; Affidavits

•COMMENT

Affidavits by attorneys of facts not based on their personal knowledge but related to them by and within the primary knowledge of their clients constitute objectionable hearsay. See Estate of Kennedy v. Rosenblatt, 447 N.J. Super. 444, 456 (App. Div. 2016). The requirements of the rule also are not met by affidavits containing argument, other forms of hearsay and general factual or legal conclusions.

Because a party's opening statement is not evidence, it may not be regarded as "opening the door" so as to permit the adversary to adduce otherwise inadmissible evidence. Velazquez v. City of Camden, 447 N.J. Super. 224, 237 (App. Div.), certif. den. 228 N.J. 451 (2016) ("[o]pening statements are not evidential and should not be responded to by 'rebuttal' evidence. If improper remarks are made by counsel, the remedy lies in a curative instruction to the jury or, if absolutely necessary, a mistrial." citing State v. Anastasia, 356 N.J. Super. 534, 543 (App. Div. 2003). "[A]n improper or erroneous statement made on opening is not properly corrected by allowing the introduction of prejudicial evidence that would otherwise be inadmissible." Ibid.).

As to the general nature of the trial court's obligation to make findings of fact and conclusions of law and the critical importance of that function in terms of both the trial and appellate process, see DCPP v. J.D., 447 N.J. Super. 337, 352-353 (App. Div. 2016); Ricci v. Ricci, 448 N.J. Super. 546, 574-575 (App. Div. 2017)

As is also the case in criminal trials, use by the court of the appropriate model charge, while no guarantee of correctness, ordinarily protects against plain error. When a model charge is used in a context other than that for which it was adopted, the charge loses its presumption of propriety. When necessary, model charges, like all jury instructions, must be tailored to conform to the particular facts of a case. Torres v. Pabon, 225 N.J. 167, 188 (2016), holding that the court's failure to adjust the model charge to the facts resulted in a "contradictory and confusing" charge constituting error

Where the jury has heard a statement from counsel or a witness that is irrelevant, inadmissible or otherwise improper and also has the capacity for prejudice, the court's curative instruction must be prompt and sufficient to overcome the potential prejudice. On the other hand, no curative instruction was necessary in an underinsured motorist case for defense counsel's reference to the tortfeasor as defendant. Sackman v. New Jersey Mfrs. Ins., 445 N.J. Super. 278, 293-294 (App. Div. 2016)

As to the consequences of erroneously charging the substance of a statute, see also Torres v. Pabon, 225 N.J. 167, 187-188 (2016), holding it to be reversible error not to substitute "plaintiff" for "defendant" in the model jury charge on duty of a driver to maintain a safe distance when that charge is given for the purpose of showing plaintiff's contributory fault

•9.4.4. Missing-witness inference.

As to Clawans charges for missing witnesses, see also Torres v. Pabon, 225 N.J. 167, 181-187 (2016) (Clawans charge improperly issued as to defendant/witness and expert witness)

•9.5. Charging as to damages.

As to charges in motor vehicle negligence cases that do not include claims for medical expenses, see Torres v. Pabon, 225 N.J. 167, 187-188 (2016) (if medical treatment is referred to during trial, jury must be instructed not to speculate about plaintiff's medical expenses when determining amount of damages)

•RULE 1:9. SUBPOENAS

•1:9-1. For Attendance of Witnesses; Forms; Issuance; Notice in Lieu of Subpoena

A subpoena may be issued by the clerk of the court or by an attorney or party in the name of the clerk or as provided by R. 7:7-8 (subpoenas in certain cases in the municipal court). It shall state the name of the court and the title of the action and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. If the witness is to testify in a criminal action for the State or an indigent defendant, or has been subpoenaed by a Law Guardian in an action brought by the Division of Child Protection and Permanency pursuant to Title 9 or Title 30 of the New Jersey Statutes, the subpoena shall so note, and shall contain an order to appear without the prepayment of any witness fee. The testimony of a party who could be subpoenaed may be compelled by a notice in lieu of subpoena served upon the party's attorney demanding that the attorney produce the client at trial. If the party is a corporation or other organization, the testimony of any person deposable on its behalf, under R. 4:14-2, may be compelled by like notice. The notice shall be served in accordance with R. 1:5-2 at least 5 days before trial. The sanctions of R. 1:2-4 shall apply to a failure to respond to a notice in lieu of a subpoena.

Note: * * *; amended July 28, 2017 to be effective September 1, 2017.

•COMMENT

•1. Generally.

The rule requires service of a subpoena upon a non-party by personal service pursuant to R. 4:4-4. The rule was amended effective September 2017 to allow for waiver of the prepayment of witness fees upon the issuance of a subpoena by a Law Guardian on behalf of a child who is the subject of child welfare proceedings brought in the Family Part pursuant to Title 9 or 30 of New Jersey Statutes

•RULE 1:11. WITHDRAWAL, SUBSTITUTION, TERMINATION OF RESPONSIBILITY OF ATTORNEY

•1:11-2. Withdrawal or Substitution

(a) Generally. Except as otherwise provided by R. ~~5:3-5(d)~~ 5:3-5(e) (withdrawal in a civil family action),

(1) prior to the entry of a plea in a criminal action or prior to the fixing of a trial date in a civil action, an attorney may withdraw upon the client's consent provided a substitution of attorney is filed naming the substituted attorney or indicating that the client will appear pro se. If the client will appear pro se, the withdrawing attorney shall file a substitution. ~~An attorney retained by a client who had appeared pro se shall file a substitution.~~ If a mediator has been appointed, the attorney shall serve a copy of the substitution of attorney on that mediator simultaneously with the filing of the substitution with the court, and

(2-3) ... no change

(b) Professional Associations.... no change

(c) Appearance by Attorney for Client Who Previously Had Appeared Pro Se.Where an attorney is seeking to appear representing a client who previously appeared pro se, the attorney must file a notice of appearance, not a substitution of attorney, and pay the appropriate notice of appearance fee.

Note: * * *; paragraph (a) amended and new paragraph (c) added July 28, 2017 to be effective September 1, 2017.

•COMMENT

Paragraph (a) of the rule was amended effective September 2017 to conform the cross reference to the civil family action rule to changes then made in that rule

Subparagraph (a)(1) requires that attorneys seeking withdrawal must file a substitution not only with the court but also simultaneously with an already appointed mediator. Note, however, that this rule was "supplemented and relaxed" by order dated February 20, 2015, to provide that an attorney substituting for a pro se party must file an appearance rather than a substitution. Consequently, subparagraph (a)(1) was amended and new paragraph (c) adopted, effective September 2017, to provide that an attorney substituting for a formerly pro se client must file an appearance and pay the associated fee

•RULE 1:12. DISQUALIFICATION AND DISABILITY OF JUDGES

•1:12-1. Cause for Disqualification; On the Court's Motion

•COMMENT

•5. Paragraph (e); Interest in the Matter.

Disqualifying a judge who has an interest in the matter is a self-evident proscription. See also Rippo v. Baker, ___ U.S. ___, 197 L. Ed. 2D 167 (2017) (due process requirements may demand recusal when a judge "'ha[s] no actual bias'" but the probability of bias "is too high to be constitutionally tolerable")

Part I. RULES OF GENERAL APPLICATION [CHAPTER II. CONDUCT OF LAWYERS, JUDGES AND COURT PERSONNEL]

•RULE 1:14. CODES OF ETHICS

•COMMENT

•1. Professional Conduct.

•1.1. Generally.

An attorney has a general obligation of candor to other lawyers and the courts. Limited disclosure of client information between lawyers in different firms may be permitted under RPC 1.6(d) to address potential conflicts when a lawyer changes employment. See Estate of Kennedy v. Rosenblatt, 447 N.J. Super. 444, 455-456 (App. Div. 2016), discussing amendment to RPC 1.6(d)

Attorney Advertising Guideline 3 reflects the U.S. Court of Appeals for the Third Circuit decision in Dwyer v. Cappell, 762 F.3d 275 (3d Cir. 2014), and allows an attorney to advertise favorable judicial comments about the attorney's work so long as the advertisement is accompanied by a disclaimer that the judge's comments are not an endorsement of the attorney's legal skill or ability

•RULE 1:15. LIMITATION ON PRACTICE OF ATTORNEYS

•1:15-3. Limitations on Practice of Other Attorneys

•COMMENT

•4. Representational Conflicts Involving Private Clients.

•4.1. Post-2004 decisions.

Estate of Kennedy v. Rosenblatt, 447 N.J. Super. 444, 451-458 (App. Div. 2016) (remanding to resolve a potential conflict implicated by RPC 1.10(b) after defendant's attorneys left the firm that subsequently hired plaintiff's attorney; defendant's file, which had remained on the firm's electronic system, allegedly had been accessed by the firm to determine through "metadata" whether any remaining attorneys had viewed a strategic defense memorandum)

•RULE 1:20. DISCIPLINE OF MEMBERS OF THE BAR

•1:20-6. Hearings

(a) . . . no change

(b) Special Ethics Masters.

(1) . . . no change

(2) Appointment; Compensation. Special ethics masters shall be appointed by, and shall serve at the pleasure of, the Supreme Court under the administration of the Director of the Office of Attorney Ethics. Attorneys shall be paid the per diem rate in effect for single arbitrators under R. 4:21A-2(d)(1). The full per diem rate shall be paid for each day of a prehearing conference or hearing, or part thereof, ~~but shall not be paid for separate days~~ and for each day or part thereof for opinion preparation. The number of days or part thereof that are paid for opinion preparation in a particular matter may not exceed the total number of days that are paid in that matter for prehearing conference and hearing. A reasonable additional amount may be paid for actual typing expenses. Retired judges may serve pro bono or with compensation or, if they are on recall, shall be paid at the rate in effect for judges on recall service.

(3-4) ...no change

(c-e) ... no change

Note: * * *; subparagraph (b)(2) amended July 28, 2017 to be effective September 1, 2017.

•1:20-9. Confidentiality; Access to and Dissemination of Disciplinary Information

1:20-9. Confidentiality; Access to and Dissemination of Disciplinary Information

(a - e) ... no change

(f) Disclosure of Evidence of Criminal Conduct; All Other Disclosure Including Subpoenas.

(1) . . . no change

(2) Upon the request of a law enforcement agency seeking information in the possession of the Office of Attorney Ethics to assist the law enforcement agency with an ongoing criminal investigation, the Director of the Office of Attorney Ethics shall not release such information without the prior authorization of the Supreme Court. If requested by the law enforcement agency, the Supreme Court may, in its discretion, authorize the release of the information without notice to respondent or any other person.

(3) ~~(2)~~ In all other cases, including cases where civil or criminal subpoenas have been issued to disciplinary personnel, the Board may authorize the referral of any confidential documentary information to the appropriate authority only for good cause shown. When a requesting authority shall seek such information, it shall issue its subpoena, which shall be transmitted to the Board or shall file a motion seeking disclosure with the Board, on ten days' notice to the respondent and any known counsel, and the Director, both of whom shall be given an opportunity to be heard.
(g-p)... no change

Note: * * *; subparagraphs (d)(4) and (d)(5) amended July 28 2017 to be effective September 1, 2017; new subparagraph (f)(2) adopted and former subparagraph (f)(2) renumbered as (f)(3) August 2, 2017 to be effective September 1, 2017.

By order dated January 3, 2017 the Court ordered that "Rules Governing the Courts of the State of New Jersey, and in particular Rules 1:20 and 1:21, are supplemented and relaxed so as to require licensed New Jersey attorneys (a) to provide the Court as part of the annual electronic registration process with a valid email address, (b) to maintain a valid email address at all times, informing the Court of any changes to that email address throughout the course of the year using a form or process determined by the Administrative Director of the Courts."

R. 1:20-6; Hearings. Paragraph (b)(2) of this rule was amended effective September 2017 to make clear that the full per diem rate shall be paid for each day or part thereof for opinion preparation and that the number of days so paid for shall not exceed the total number of days for prehearing conferences and hearings

R. 1:20-9; confidentiality; access to and dissemination of disciplinary information. Paragraph (a) makes clear that a disciplinary stipulation waiving the filing of a formal complaint is a confidential paper subject to the rule

Subparagraph (d)(1) of this rule was amended effective September 2017 to provide that the charge for copies of records be in accordance with R. 1:38-9. Paragraph (d)(5) was also then technically amended

Subparagraph (f)(2), providing for release to law enforcement agencies of information in the possession of the Office of Attorney Ethics subject to prior authorization by the Supreme Court, was adopted effective September 2017. This required the renumbering of former subparagraph (f)(2) as subparagraph (f)(3)

The court in Mortgage Grader v. Ward & Olivo, 438 N.J. Super. 202, 211-213 (App. Div. 2014), aff'd 225 N.J. 423 (2016), continued the protections of limited liability partnership for a named partner notwithstanding the firm's failure to maintain required insurance, leaving the plaintiff in the malpractice action with no recourse against that partner personally (against whom there were no specific allegations of malpractice) or against the firm that had ceased to exist. The appellate division rejected the reasoning of the trial court that those protections had ended under the rule requiring insurance, reasoning that the rule's breach provided only for disciplinary sanctions and not the elimination of liability protections. The Supreme Court affirmed, holding that "[b]ecause only this Court may use Rule 1:21-1C to discipline a law firm organized as an LLP, and the Court Rules do not list conversion of business organizational form as a type of sanction, we conclude that conversion of [the firm] from an LLP to a GP was improper under the Rule." Mortgage Grader v. Ward & Olivo, 225 N.J. at 439-440, 441-442. The Court also held the Rule did not require firms to maintain professional liability insurance after dissolution during the windup period, and refused to impose such a requirement going forward

(a) . . . no change

(b) Appearance by Law Students and Graduates. A third year law student at, or graduate of, a law school approved by the American Bar Association may appear before the Appellate Division, a trial court or an agency in conjunction with a legal services or public interest organization or law school clinical or pro bono program certified under R. 1:21-11(b)(1) or (b)(3), or an agency of municipal, county or state government certified under R. 1:21-11(b)(3). Permission to appear pursuant to this paragraph by a law graduate who has not passed the New Jersey bar examination shall terminate upon the graduate's failure to pass the bar examination for the third time, or after two years of employment following graduation, whichever is sooner.

(c) . . . no change

Note: * * *; paragraph (b) amended March 6, 2017 to be effective immediately.

•COMMENT

Paragraph (b) was amended effective March 2017, to permit the appearance of law school students before the Appellate Division

•1:21-7. Contingent Fees

•COMMENT

•11. Lawyer Sharing of Contingent Fees.

In LaMantia v. Durst, 234 N.J. Super. 534 (App. Div.), certif. den. 118 N.J. 181 (1989), the court addressed the problem of contingent fee sharing where several firms have been successively involved in a representation and particularly where the attorney handling the matter has changed firms during the representation. The court concluded that sharing is to be done on a quantum meruit allocation basis which takes into account such factors as the length of time each firm spent on the case, the quality, nature and extent of the services rendered by each, pre-existing partnership agreements, the so-called rainmaking factor, and the viability of the claim at its various stages. See also, citing La Mantia, Granata v. Broderick, 446 N.J. Super. 449, 471-472 (App. Div. 2016), certif. granted 228 N.J. 516 (2017); Glick v. Barclays de Zoete Wedd, 300 N.J. Super. 299, 311 (App. Div. 1997)

•RULE 1:22. COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

•COMMENT

•2. Real Estate Brokers.

•2.2. Three-day review.

Attorney disapproval of a contract may be conveyed by fax, email, personal delivery or overnight mail with proof of delivery. Conley v. Guerrero, 228 N.J. 339, 356 (2017), modifying N.J. State Bar Ass'n v. N.J. Ass'n of Realtor Bds., 93 N.J. 470 (1983)

Part I. RULES OF GENERAL APPLICATION [CHAPTER IV. ADMINISTRATION]

•RULE 1:32. REPORTS BY COURTS AND PERSONNEL; RECORDS; FORMS AND PROCESS PRESCRIBED BY ADMINISTRATIVE DIRECTOR

•1:32-2A. Electronic Court Systems, Electronic Records, Electronic Signatures, Metadata

(a) Authorization of Electronic Court Systems .... no change

(b) Force and Effect of Data and Documents Submitted or Maintained Electronically .... no change

(c) Electronic Signatures .... no change

(d) Metadata. Filers are on notice that any document being submitted to the Judiciary for electronic filing may contain metadata, which is embedded information in electronic documents, including possibly personal identifiers, that is generally hidden from view. Filers are required by Rule 1:38-7 to remove all confidential personal identifiers from documents prior to submitting such documents for electronic filing. It is the responsibility of filers to remove any metadata in documents that they do not want to become part of the public record before submitting such documents for electronic filing. To remove metadata from a document after it has been filed, the filer must file a motion to remove the metadata or to replace the document with a version that does not contain the metadata. Metadata in a submitted document not removed by the filer is subject to public disclosure.

Note: * * *; caption amended and new paragraph (d) adopted July 28, 2017 to be effective September 1, 2017.

•COMMENT

R. 1:32-2A. The caption of this rule was amended and the text of paragraph (d) was added effective September 2017 warning filers of the existence of metadata. The new paragraph makes it clear that it is the responsibility of filers to remove any metadata they do not want to be part of the public record before filing. If, however, a filer wants to remove metadata after filing, the rule permits the removal of the metadata or replacement of the document by motion only. The rule also notes that R. 1:38-7 requires the removal of confidential personal identifiers including those in metadata. Presumably the motion practice of that rule applies to the removal of such identifiers from metadata post filing

•RULE 1:36. OPINIONS; FILING; PUBLICATION

•COMMENT

•2. Unpublished Opinions.

Note that a published opinion may be withdrawn and no longer serve as precedent. See State v. Jones, 449 N.J. Super. 12, 13 (App. Div. 2017), withdrawing published opinion after underlying criminal conviction was vacated and indictment dismissed with prejudice. [Query: Does this procedure apply in civil cases as well?]

•3. Construction and Application; Published Opinions.

•3.1. Generally.

The precedential reach of a published opinion depends on the place in the judicial hierarchy of the court issuing the opinion. In general, opinions of higher courts bind all lower courts but opinions of co-equal courts do not bind each other. Thus, the decisions of the Supreme Court bind the Appellate Division and all trial courts. See, e.g., Am. Civil Liberties v. Hendricks, 445 N.J. Super. 452, 477 (App. Div.), certif. granted 228 N.J. 440 (2016); Scannavino v. Walsh, 445 N.J. Super. 162, 172 (App. Div. 2016)

Note, especially, that "considered dicta" by the Supreme Court itself is nearly always binding on lower courts. State v. Rose, 206 N.J. at 183. Although, a mere "passing comment" in a Supreme Court opinion that appears inconsistent with a statement in an earlier opinion is arguably not precedential given its context, In re A.D., 441 N.J. Super. 403, 422-423 (App. Div. 2015), aff'd o.b. 227 N.J. 626 (2017), care must be taken to distinguish between such non-binding references and authoritative dicta. See also Scheeler v. Office of Governor, 448 N.J. Super. 333, 346 (App. Div. 2017) (summarizing Supreme Court teaching found on this subject under Rose)

Decisions of the Appellate Division bind all trial courts, but an Appellate Division decision does not bind other Appellate Division panels. Nor is a trial court opinion binding on other trial courts. See, e.g., Brundage v. Estate of Carambio, 195 N.J. 575, 593 (2008); Centorino v. Tewksbury Tp., 347 N.J. Super. 256, 262-263 (App. Div. 2001), certif. den. 172 N.J. 175 (2002).

Note that a published opinion may be withdrawn and no longer serve as precedent. See State v. Jones, 449 N.J. Super. 12, 13 (App. Div. 2017), withdrawing published opinion after underlying criminal conviction was vacated and indictment dismissed with prejudice. [Query: Does this procedure apply in civil cases as well?]

•RULE 1:38. PUBLIC ACCESS TO COURT RECORDS AND ADMINISTRATIVE RECORDS

•1:38-1. Policy.

Court records and administrative records as defined by R. 1:38-2 and R. 1:38-4 respectively and within the custody and control of the judiciary are open for public inspection and copying except as otherwise provided in this rule. Exceptions enumerated in this rule shall be narrowly construed in order to implement the policy of open access to records of the judiciary. Restrictions on access pursuant to R. 1:38, unless otherwise provided by law, shall not be applicable to named parties, defendants, or their legal counsel in the specific case or judicial proceeding.

Note: * * *; amended May 30, 2017 to be effective immediately.

•1:38-2. Definition of Court Records.

(a) "Court record" includes:

(1) any information maintained by a court in any form in connection with a case or judicial proceeding, including but not limited to pleadings, motions, briefs and their respective attachments, evidentiary exhibits, indices, calendars, ~~and~~ dockets, and aggregate data maintained or created by the judiciary for the purpose of statistics;

(2-5) no change

(b) no change

Note: * * *; amended May 30, 2017 to be effective immediately.

•1:38-3. Court Records Excluded from Public Access

The following court records are excluded from public access:

(a) General. Records required to be kept confidential by statute, rule, or prior case law consistent with this rule, unless otherwise ordered by a court upon a finding of good cause. These records remain confidential even when attached to a non-confidential document.

(b) Internal Records.

(1) Notes, memoranda, draft opinions, or other working papers maintained in any form by or for the use of a justice, judge, or judiciary staff member in the course of performing official duties, except those notes, not otherwise excluded from public access under this rule, that are required by rule or law, e.g., R. 7:2-1(e), to be taken as part of the record of the proceeding;

(2) Records of consultative, advisory, or deliberative discussions pertaining to the rendering of decisions or the management of cases; and support data maintained or created by the judiciary for use in reporting aggregate data for the purpose of statistics.

(c) . . . no change.

(d) Records of Family Part Proceedings.

(1) Family Case Information Statements required by R. 5:5-2, notices required by R. 5:5-10 including requisite financial, custody and parenting plans, ~~and~~ Financial Statements in Summary Support Actions required by R. 5:5-3 including all attachments, and settlement agreements incorporated into judgments or orders in dissolution and non-dissolution actions;

(2-12) . . . no change

(13) Child custody evaluations, parenting time and visitation plans, reports, and records pursuant to R. 5:8-4, R. 5:8-5, R. 5:8B, N.J.S.A. 9:2-1, or N.J.S.A. 9:2-3;

(14-17) . . . no change.

(e) Records of Guardianship Proceedings . . . no change.

(f) Records of Other Proceedings . . . no change.

Note: * * *; subparagraph [(a) and] (b)(1)[sic (b)(2)?] amended May 30, 2017 to be effective immediately; paragraph (a) and subparagraphs (d)(1) and (d)(13) amended July 28, 2017 to be effective September 1, 2017.

•1:38-5. Administrative Records Excluded from Public Access

The following administrative records are excluded from public access:

(a) ... no change

(b) Notes, memoranda, or other working papers maintained in any form by or for the use of a justice, judge or judiciary staff member in the course of his or her official duties, including administrative duties; and support data maintained or created by the Judiciary for use in reporting aggregate data for the purpose of statistics;

(c-r) ... no change

Note: * * *; paragraph (b) amended May 30, 2017 to be effective immediately.

•COMMENT

1. R. 1:38-1; Policy. This rule sets the basic policy of the judicial system with respect both to court and judiciary administrative records, declaring these records to be open to public access unless expressly excepted by R. 1:38-3 (court records) or R. 1:38-5 (administrative records). The rule further requires its narrow construction in implementation of the open-access policy. This rule was amended effective May 2017 to make it clear that the Rule is not intended to restrict access for named parties, defendants or their legal counsel in the ongoing case or judicial proceeding unless otherwise provided by law

2. R. 1:38-2; Definition of Court Records. This rule lists those materials included as court records for purposes of this rule and those excluded. Paragraph (a)(1) of this rule was amended effective May 2017 to make clear that court records include aggregate data maintained or created by the judiciary for statistical purposes

3. R. 1:38-3; Court Records Excluded from Public Access. This rule lists those records excluded from public access. Paragraph (a) of this rule was amended effective September 2017 to require a good cause finding before a court makes an otherwise confidential record public. With the exception of internal court records defined by paragraph (b) of the rule, subparagraph (2) of which was amended effective May 2017 to include support data maintained or created by the judiciary for use in reporting aggregate data for statistical purposes, the exclusion is generally based on statute or rule. This rule is intended to be all-inclusive. If confidentiality has been provided for in a statute, regulation, rule, or case law not here included, paragraph (a) makes clear that its omission should be deemed inadvertent and its confidentiality unaffected. If a statute, regulation or rule provides for specific new confidentiality in the future, that provision should be deemed encompassed by this rule. Thus, for example, a Family Case Information statement continues to be confidential after it has been appended to a non-confidential document. Paragraph (d)(1) was amended effective September 2017 to add notices required by R. 5:5-10 and settlement agreements incorporated in judgments or orders and paragraph (d()13) was also then amended to include parenting time and visitation plans in the list of confidential records

5. R. 1:38-5; Administrative Records Excluded from Public Access. This rule intends to constitute a complete list of administrative records not subject to public access. If confidentiality has been provided for in a statute, regulation, rule, or case law not here included, paragraph (a) makes clear that its omission should be deemed inadvertent and its confidentiality unaffected. If a statute, regulation or rule provides for specific new confidentiality in the future, that provision should be deemed encompassed by this rule. Paragraph (b) of this rule was amended effective May 2017 to include support data maintained or created by the judiciary for use in reporting aggregate data for statistical purposes in those administrative records excluded from public access

•RULE 1:40. COMPLEMENTARY DISPUTE RESOLUTION PROGRAMS

•1:40-4. Mediation - General Rules

(a) Referral to Mediation . . . no change.

(b) Compensation and Payment of Mediators Serving in the Civil and Family Economic Mediation Programs. The real parties in interest in Superior Court, except in the Special Civil Part, assigned to mediation pursuant to this rule shall equally share the fees and expenses of the mediator on an ongoing basis, subject to court review and allocation to create equity. Any fee or expense of the mediator shall be waived in cases, as to those parties exempt, pursuant to R. 1:13-2(a). Subject to the

provisions of Guidelines 2 and 15 in Appendix XXVI, Guidelines for the Compensation of Mediators, if the parties select a mediator from the courts rosters of civil and family mediators, the parties may opt out of the mediation process after the mediator has expended two hours of service, which shall be allocated equally between preparation and the first mediation session, and which shall be at no cost to the parties. As provided in Guideline 7 in Appendix XXVI, fees for roster mediators after the first two free hours shall be at the mediators market rate as set forth on the courts mediation roster. As provided in Guideline 4 in Appendix XXVI, if the parties select a non-roster mediator, that mediator may negotiate a fee and need not provide the first two hours of service free. When a mediator's fee has not been paid, collection shall be in accordance with Guideline 16 of Appendix XXVI. Specifically, the remedy for a family mediator to compel payment is either by an application, motion or order to show cause in the Family Part or by a separate collection action in the Special Civil Part (or in the Civil Part if the amount exceeds the jurisdictional limit of the Special Civil Part). The remedy for a civil mediator to compel payment is a separate collection action in the Special Civil Part (or in the Civil Part if the amount exceeds the jurisdictional limit of the Special Civil Part). Any action to compel payment may be brought in the county in which the mediation order originated. The remedy for a party and/or counsel to seek compensation for costs and expenses related to a court-ordered mediation shall be in accordance with Guideline 17 of Appendix XXVI.

(c) Evidentiary Privilege ... no change.

(d) Confidentiality ... no change.

(e) Limitations on Service as a Mediator ... no change.

(f) Mediator Disclosure of Conflict of Interest ... no change.

(g) Conduct of Mediation Proceedings ... no change.

(h) Termination of Mediation ... no change.

(i) Final Disposition ... no change.

Note: * * *; paragraph (b) amended July 28, 2017 to be effective September 1, 2017.

•1:40-12. Mediators and Arbitrators in Court-Annexed Programs

(a) ...no change.

(1-2) ...no change.

(3) Civil, General Equity, and Probate Action Roster Mediators. Mediator applicants to be on the roster for civil, general equity, and probate actions shall have ~~at least~~: (A) at least a bachelor's degree; (B) at least five years of professional experience in the field of their expertise in which they will mediate; (C) completed the required mediation training as defined in subparagraph (b)(5) within the last five years; and (D) except for retired or former New Jersey Supreme Court justices, Superior Court judges, and Administrative Law judges, evidence of completed mediation or co-mediation of a minimum of two civil, general equity or probate cases within the last year. Applicants who had the required training over five years prior to their application to the roster must complete the six-hour family or civil supplemental mediation course as defined in subparagraph (b)(8) of this rule.

(4) ...no change.

(5) Municipal Court Volunteer Mediators. Individuals may serve as volunteer mediators in municipal court mediation programs. To serve as municipal court mediators and volunteer their time, effort and skill to mediate minor disputes in municipal court actions, such individuals (A) must be approved by the Assignment Judge or designee in the vicinage in which they intend to serve, (B) must meet the basic dispute resolution training required by R. 1:40-12(b)(1), and (C) must have satisfied any continuing training requirements under R. 1:40-12(b)(2). ~~Municipal Court mediators shall be approved for that position by the Assignment Judge for the vicinage in which they intend to serve on recommendation of the Municipal Court judge, stating the applicant's qualifications. In considering the recommendation, the Assignment Judge shall review the applicant's general background, suitability for service as a mediator, and any mediation training the applicant may have completed.~~

(6) ...no change.

(i-iii) ...no change.

(b) ...no change.

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(1) General Provisions. All persons serving as mediators shall have completed the basic dispute resolution training course as prescribed by these rules and approved by the Administrative Office of the Courts. Volunteer mediators in the Special Civil Part and Municipal Court mediators shall have completed 18 classroom hours of basic mediation skills complying with the requirements of subparagraph (b)(3) of this rule. Mediators on the civil, general equity, and probate roster of the Superior Court shall have completed 40 classroom hours of basic mediation skills complying with the requirements of subparagraph (b)(5) of this rule and shall be mentored in at least two cases in the Law Division - Civil Part of Chancery Division - General Equity or Probate Part of the Superior Court for a minimum of five hours by a civil roster mentor mediator who has been approved in accordance with the "Guidelines for the Civil Mediation Mentoring Program" promulgated by the Administrative Office of the Courts. Family Part mediators shall have completed a 40-hour training program complying with the requirements of subparagraph (b)(4) of this rule and, unless otherwise exempted in this rule, at least five hours being mentored by a family roster mentor mediator in at least two cases in the Family Part. In all cases it is the obligation of the mentor mediator to inform the litigants prior to mediation that a second mediator will be in attendance and why. If either party objects to the presence of the second mediator, the second mediator may not attend the mediation. In all cases, the mentor mediator conducts the mediation, while the second mediator observes. Mentored mediators are provided with the same protections as the primary mediator under the Uniform Mediation Act. Retired or former New Jersey Supreme Court justices and Superior Court judges, retired or former Administrative Law judges, ~~Child~~ child welfare mediators, and staff/law clerk mediators are exempted from the mentoring requirements except as required to do so for remedial reasons. Mediators already serving on the Civil mediator roster prior to September 1, 2015 are exempted from the updated training requirements. Family Roster mediators who wish to serve on the Civil Roster, must complete the six-hour supplemental Civil Mediation training and must comply with the Civil roster mentoring requirement of five hours and two cases in the Civil Part. Judicial law clerks shall have successfully completed 12 classroom hours of basic mediation skills complying with the requirements of subparagraph (b)(6) of this rule.

(2-8) ...no change.

(c) Arbitrator Qualification and Training. Arbitrators serving in judicial arbitration programs shall have the minimum qualifications prescribed by Rule 4:21A-2 and must be annually recommended for inclusion on the approved roster by the local arbitrator selection committee and approved by the Assignment Judge or designee. All arbitrators shall attend initial training of at least three classroom hours and continuing training ~~every two years~~ of at least two hours in courses approved by the Administrative Office of the Courts.

(1) New Arbitrators. After attending the initial training, a new arbitrator shall attend continuing training after two years. Thereafter, an arbitrator shall attend continuing training every four years.

(2) Roster Arbitrators. Arbitrators who have already attended the initial training and at least one continuing training shall attend continuing training every four years.

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(3) ~~(1)~~ Arbitration Course Content - Initial Training. The three-hour classroom course shall teach the skills necessary for arbitration, including applicable statutes, court rules and administrative directives and policies, the standards of conduct, applicable uniform procedures as reflected in the approved procedures manual and other relevant information.

(4) ~~(2)~~ Arbitration Course Content - Continuing Training. The two-hour ~~biannual~~ continuingtraining course should cover at least one of the following: (a) reinforcing and enhancing relevant arbitration skills and procedures, (b) ethical issues associated with arbitration, or (c) other matters related to court-annexed arbitration as recommended by the Arbitration Advisory Committee.

(d) ...no change.

Note: * * *; subparagraphs (a)(3) text, (a)(5) caption and text, and (b)(1) text and paragraph (c) amended July 28, 2017 to be effective September 1, 2017.

•COMMENT

Note the adoption of the New Jersey International Arbitration, Mediation, and Conciliation Act, N.J.S. 2A:23E-1 et seq., by L. 2017, c. 1

R. 1:40-4. Paragraph (b) of the rule was amended effective September 2017 to provide remedies for compelling payments for family and civil mediators as well as for collection of a party's or counsel's compensation for costs and expenses related to mediation, pursuant to Guideline 16 and 17 of Appendix XXVI respectively, also then amended

R. 1:40-12. This rule provides for the qualifications and training required of roster mediators. The rule, permits trained law clerks, court staff and volunteers to mediate small claims disputes. It also permits them to mediate landlord-tenant disputes, provided they have received the training mandated by the rule. Subparagraph (a)(6) provides for the required qualifications of mediators in economic aspects of family matters. Subparagraph (b)(5) provides for mediation course requirements for economic mediators.

By order dated July 18, 2016, the Supreme Court had provided that retired New Jersey Superior Court judges: (1) applying to the civil mediation roster are now exempt from the requirement set forth in Rule 1:40-12(a)(3) of having completed mediation of two civil, general equity or probate cases within the previous year; and (2) applying to the civil or family mediation rosters are now exempt from the mentoring requirements set forth in Rule 1:40-12(b)(1). This order, with the addition of retired or former New Jersey Supreme Court Justices and Administrative Law Judges was implemented by rule amendment effective September 2017. Paragraph (a)(5) was also then amended to provide specific training requirements for volunteer Municipal Court mediators. That amendment also made clear that these mediators serve in a volunteer capacity. Paragraph (c) was then amended to provide as new subparagraph (1) and (2) for training of new and roster arbitrators respectively. This required the redesignation of former paragraphs (1) and (2) as (3) and (4). Newly redesignated paragraph (4) was amended to eliminate the biennial training requirement and replacing it with a continuing education requirement

Alternative Dispute Resolution Act; other statutes. Pursuant to administrative regulation adopted in accordance with N.J.S. 39:6A-5.1, the ADR mechanism for resolving PIP disputes is APDRA rather than the Arbitration Act, the insurance policy itself can demand APDRA proceedings, and a judicial remedy is available only if neither party has sought recourse to APDRA. Once a trial court reviews a PIP arbitration award, there is no further right to appeal under the ADPRA. Only rare circumstances grounded in public policy may warrant further appellate review in APDRA matters. See, e.g., CURE v. Orthopedic Specialists, [445 N.J. Super. 371]445 N.J. Super. 371, 375-376 (App. Div. 2016), permitting such limited review of trial court's dismissal of a summary action on timeliness grounds when there were unsettled questions of statutory construction

•RULE 1:43. FILING AND OTHER FEES ESTABLISHED PURSUANT TO N.J.S.A. 2B:1-7

•COMMENT

The rule was amended effective March 2017 to eliminate the Tax Court fee for counterclaims by taxing districts as inconsistent with N.J.S. 22A:5-1 and 54:51A-10). The Court further determined that all such fees collected since November 17, 2014, from taxing districts for filing counterclaims (in both small claims matters and non-small claims matters), shall be refunded to the taxing districts. Those refunds will be provided to the taxing districts once the process for doing so has been finalized

Part II
RULES GOVERNING APPELLATE PRACTICE IN THE SUPREME COURT AND THE APPELLATE DIVISION OF THE SUPERIOR COURT

- RULE 2:2. APPEALABLE JUDGMENTS AND DETERMINATIONS
  - 2:2-3. Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court
    - COMMENT
      - 2. Paragraph (a)(1); Appeals from Judicial Action.
        - 2.2. Appealable judgments.
          - 2.2.1. Appeals from final identified judgments, not opinions.

Appeals may be taken only from formally entered judgments and not from opinions, oral decisions, informal written decisions, or oral or written statements of reasons. See, e.g., Bandler v. Melillo, 443 N.J. Super. 203, 205, 209-210 (App. Div. 2015); North Jersey Media v. Bergen Cty. Pros., 447 N.J. Super. 182, 194 (App. Div. 2016)

Nor is the appellate court's jurisdiction properly invoked to render an advisory opinion or to decide cases in the abstract and without a developed factual basis. Nor may the parties invest the Appellate Division with jurisdiction it does not otherwise have. See also Ricci v. Ricci, 448 N.J. Super. 546, 566 (App. Div. 2017)

- 2.2.2. Finality as to all issues and all parties.

It is also well settled that a judgment, in order to be eligible for appeal as a final judgment, must be final as to all parties and all issues. See, e.g., Silviera-Francisco v. Bd. of Educ., 224 N.J. 126, 136 (2016); Ricci v. Ricci, 448 N.J. Super. 546, 565-567 (App. Div. 2017)

- 2.2.3. Consent and default judgments.

A judgment or order entered with the consent of the parties is ordinarily not appealable for the purpose of challenging its substantive provisions. One court, in an unusual case, Kranz v. Schuss, 447 N.J. Super. 168, 174 (App. Div.), certif. den. 228 N.J. 424 (2016), has permitted a consent agreement entered in a New Jersey matter to be subject to appellate review as it related to a contribution claim arising from a settlement in an earlier New York action. In so doing, the Kranz court relied on Janicky for the proposition that an "economic stake" in the appellate outcome was sufficient to overcome the traditional rule against such review. The Kranz court indicated that it had read but it did not describe the terms of the consent agreement or whether that agreement had reserved any issues for appeal. Ibid. Without knowing the terms of the agreement it is difficult to determine whether the Kranz court was misconstruing Janicky, attempting to harmonize the two cases, or intending to create an exception to the traditional rule given the unique procedural circumstances of dealing with in-state and out-of-state settlements.

- 2.2.4. Final judgment by dismissal without prejudice.

As to the appealability of a dismissal without prejudice, see Kranz v. Schuss, 447 N.J. Super. 168, 174 (App. Div.), certif. den. 228 N.J. 424 (2016) in which the court allowed an appeal as of right of an interlocutory order adverse to plaintiff based on a dismissal purportedly by consent. In that case plaintiff sought the voluntary dismissal after discovery was complete and immediately before trial was scheduled. See Comment to R. 4:37-1.

When parties appeal from final judgments, they also then may appeal from all interlocutory orders that have not been rendered moot or definitively ruled upon by the appellate court in a prior or separate appeal. See Ricci v. Ricci, 448 N.J. Super. 546, 567 (App. Div. 2017).

•2.3. Appealability of particular judgments.

•2.3.3. Finality of particular orders.

Intervention. There is judicial dispute as to whether an order denying intervention as of right is final. Compare Grober v. Kahn, 88 N.J. Super. 343, 360 (App. Div. 1965), modified 47 N.J. 135 (1966), with Government Security Co. v. Waire, 94 N.J. Super. 586, 589 (App. Div. 1967), certif. den. 50 N.J. 84 (1967). See also, Huny & BH Assoc. v. Silberberg, 447 N.J. Super. 606, 609-611 (App. Div. 2016), disagreeing with Grober and holding that orders denying intervention as of right, like those denying permissive intervention, are interlocutory and not final and appealable as of right. Note, however, that the dissent, while agreeing that there is no as-of-right appeal, argued that, given the unresolved state of the law, this motion should be seen as one seeking leave to appeal and that leave to appeal in such cases should be liberally granted.

•2.4. Waiver of the right to appeal.

As to waiver of the right to appeal to the Appellate Division from a trial court's final judgment, see also CURE v. Orthopedic Specialists, 445 N.J. Super. 371, 375-376 (App. Div. 2016) (allowing review of trial court's dismissal of summary action on timeliness grounds when there were unsettled questions of statutory construction);

•RULE 2:6. APPENDICES; BRIEFS; TRANSCRIPT

•2:6-1. Preparation of Appellant's Appendix; Joint Appendix; Contents

•COMMENT

•1. Paragraph (a); Contents of Appendix.

Moreover, the appendix may be required to include transcripts of related proceedings if considered by the trial court in its disposition. See also Noren v. Heartland Payment Sys., 448 N.J. Super. 486, 500 (App. Div. 2017), dismissing cross-appeal when defendant failed to submit to the appellate court the items, or even a list of the items, submitted to the trial court on the summary judgment motion and instead included only select exhibits it considered relevant. On reconsideration the Appellate Division rejected cross-appellant's argument that the rule applied to appeals from grants of summary judgment and not to denials. Noren v. Heartland Payment Sys., 449 N.J. Super. 193 (App. Div. 2017)

•2:6-2. Contents of Appellant's Brief

•COMMENT

•2. Point Headings.

The requirement that legal issues be argued under point headings obviously forecloses the raising of issues merely by footnote. See Sullivan v. Port Auth. of NY and NJ, 449 N.J. Super. 276, 281 (App. Div. 2017)

•3. Issues Not Raised Below.

An issue properly preserved below and presented by appellant imposes upon the court and the respondent the responsibility to address it. Issues not raised below, even constitutional issues, will ordinarily not be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest. See, e.g., Sullivan v. Port Auth. of NY and NJ, 449 N.J. Super. 276, 282 (App. Div. 2017)

Conversely, if an issue does not implicate the jurisdictional or public-interest standard, the appellate court should not itself recognize an unpleaded cause of action. Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 396-397 (2016)

An issue not raised below also may be considered by the court if it meets the plain error standard or is otherwise of special significance to the litigant, to the public or to the achieving of substantial justice and the record is sufficiently complete to permit its adjudication. See, e.g., Ricci v. Ricci, 448 N.J. Super. 546, 567 (App. Div. 2017)

When a trial court issues a verdict based on a theory of law not addressed by the parties, that verdict of course, is subject to review. See Scannavino v. Walsh, 445 N.J. Super. 162, 169 (App. Div. 2016). To the extent that the trial court's application of the law is dependent on facts not elicited at trial because the parties were unaware of the court's interpretation, the matter should be remanded to give the parties an opportunity to address both the facts and the law.

•4. Concise Statement of Facts.

The requirement that the statement of facts must be supported by references to the record and transcript is obviously not met by generally referencing a lengthy appendix item. See also State v. Mauti, 448 N.J. Super. 275, 315 n. 17 (App. Div. 2017) (reminding counsel of their duty to reference specific parts of the record)

•5. Waiver; Precluded Issues.

It is, of course, clear that an issue not briefed is deemed waived. See State v. Amboy Nat. Bank, 447 N.J. Super. 142, 148 n. 1 (App. Div.), certif. den. 228 N.J. 249 (2016) (claims not addressed in merits brief deemed abandoned)

Nor may a party conceding a material fact at trial argue the contrary on appeal. See Sullivan v. Port Auth. of NY and NJ, 449 N.J. Super. 276, 281 (App. Div. 2017)

•RULE 2:8. MOTIONS; DISMISSALS; SUMMARY DISPOSITIONS

•2:8-2. Dismissal of Appeals: Order; Stipulation

•COMMENT

•1. Dismissal on the Court's or a Party's Motion.

•1.2. Procedural and jurisdictional grounds for dismissal.

•1.2.1. Mootness.

Mootness is ordinarily defined as the inability of a court because of attendant circumstances to grant judicial relief. And see Jai Sai Ram, LLC v. Planning Bd., 446 N.J. Super. 338, 345 (App. Div. 2016) (appeal became moot by virtue of ordinance amendment permitting the use granted by variance)

•2. Dismissal by Agreement or Unilaterally.

The rule permits dismissal upon the filing of a stipulation at any stage of the appellate proceedings. Although private parties' desire to cease litigating disputes should not be lightly disregarded, dismissal is discretionary with the court. J.S. v. D.S., 448 N.J. Super. 17, 21, 23 (App. Div. 2016), underscoring that Rule 2:8-2 provides that the court "may," but not must, dismiss the appeal. Furthermore, following the trial court practice of R. 4:32-2(e), the rule requires leave of court to dismiss class actions. Cf. City of Paterson v. Paterson Gen. Hospital, 104 N.J. Super. 472 (App. Div. 1969), aff'd 53 N.J. 421 (1969). Such leave is also required in appeals involving the status of minors

•RULE 2:9. MISCELLANEOUS PROCEEDINGS PENDING APPEAL

•2:9-1. Control by Appellate Court of Proceedings Pending Appeal or Certification

(a) Control Prior to Appellate Disposition. Except as otherwise provided by R. 2:9-3, 2:9-4 (bail), 2:9-5 (stay pending appeal), 2:9-7, 2:9-13(f) and 3:21-10(d), the supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification filed. The trial court, however, shall have continuing jurisdiction to enforce judgments and orders pursuant to R. 1:10 and as otherwise provided. In addition, when an appeal is taken from an order compelling or denying arbitration, the trial court shall retain jurisdiction to address issues relating to claims and parties that remain in that court. When an appeal is taken from an order involving a child who has been placed in care by the Division of Child Protection and Permanency, the trial court shall retain jurisdiction to conduct summary hearings in due course to address issues not the subject of the appeal relating to the child or the child's family. Unless the appeal concerns the permanency plan of the child, the trial court also shall retain jurisdiction to conduct hearings to address the permanency plan of the child. The appellate court may at any time entertain a motion for directions to the court or courts or agencies below or to modify or vacate any order made by such courts or agencies or by any judge below.

(b) Proceedings on Remand to Tribunal of First Instance. . . . no change.

(c) Ineffective Assistance of Counsel Claim in Appeals from Judgment Terminating Parental Rights. . . . no change.

Note: * * *: paragraph (a) amended October 19, 2016 to be effective January 1, 2017.

Except to the extent of enforcement or correction and except as otherwise expressly provided for by rule, the ordinary effect of the filing of the notice of appeal is to deprive the court below of jurisdiction to act further in the matter under appeal unless directed to do so by the appellate court. See Petition of South Jersey Gas Co., 447 N.J. Super. 459, 474 (App. Div. 2016)

Paragraph (a) of the rule was amended effective January 2017 to add the cross reference to the then adopted R. 2:9-13(f) to provide for the continuing jurisdiction in the trial court of cases ordering pretrial detention pursuant to R. 3:4A, also then adopted. See further Comments to R. 2:9-13 and R. 3:4A

The standards for grant by an appellate court of a stay of judgment other than a money judgment are the same as those applicable to the trial court, requiring a balancing of the equities including the factors of irreparable harm, existence of a meritorious issue and the likelihood of success. The court also should consider the public interest when a case presents an issue of public importance. N.J. Election Law v. DiVincenzo, 445 N.J. Super. 187, 196, 202-206 (App. Div. 2016) (denying stay after giving due consideration to all factors including public interest).

As to the imposition of monetary sanctions, see Sackman v. New Jersey Mfrs. Ins., 445 N.J. Super. 278, 295-299 (App. Div. 2016) (monetary sanction imposed for submission of "shoddy, professionally unacceptable brief" that revealed counsel's lack of effort to cite and discuss any relevant legal authority).

The pre-1969 formulation of the standard of appellate review of the trial judge's disposition of a new trial motion was jury "mistake, partiality, prejudice or passion." That standard was reformulated by the 1969 revision as "manifest denial of justice under the law," and again rephrased in 1971, as a matter of form rather than substance, to comport with the language suggested by Dolson v. Anastasia, 55 N.J. 2, 6-8 (1969), namely, "a miscarriage of justice under the law." Moreover the same standard of review applies to both civil and criminal appeals. See, e.g., Delvecchio v. Tp. of Bridgewater, 224 N.J. 559, 572 (2016); Krzykalski v. Tindall, 448 N.J. Super. 1, 9 (App. Div. 2016)

Harmful error may result from cumulative errors when no one error is itself of sufficient magnitude to warrant reversal. See Torres v. Pabon, 225 N.J. 167, 190-192 (2016)

•3. Questions of Law; Standard of Review and Error.

•3.1. General principles.

On the scale of required deference that defines the standard of review, an appellate court owes no deference to the trial court's "interpretation of the law and the legal consequences that flow from established facts..." and, hence, an appellate panel's review of legal issues is de novo. Manalapan Realty v. Township Committee, 140 N.J. 366, 378 (1995). Thus the appellate court is not bound by the trial court's application of law to the facts or its evaluation of the legal implications of facts where credibility is not in issue. See Allstate Ins. v. Northfield Med., 228 N.J. 596, 619 (2017); State v. Robinson, 228 N.J. 529, 543 (2017); McCarrell v. Hoffmann-La Roche, 227 N.J. 569, 583-584 (2017); State v. Wilson, 227 N.J. 534, 544 (2017); Royster v. NJ State Police, 227 N.J. 482, 493 (2017); Sullivan v. Port Auth. of NY and NJ, 449 N.J. Super. 276, 283 (App. Div. 2017); Rippon v. Smigel, 449 N.J. Super. 344, 358 (App. Div. 2017)

Illustratively, issues involving interpretation of statutes or ordinances are questions of law reviewed de novo and hence no deference to the trial court is owed. Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017); In re Reglan Litigation, 226 N.J. 315, 327 (2016); Meehan v. Antonellis, 226 N.J. 216, 230 (2016); Smith v. Millville Rescue Squad, 225 N.J. 373, 387 (2016); Matter of Estate of Brown, 448 N.J. Super. 252, 268 (App. Div. 2017); Scheeler v. Office of Governor, 448 N.J. Super. 333, 342 (App. Div. 2017); Brugaletta v. Garcia, 448 N.J. Super. 404, 411-412 (App. Div. 2017); Matter of Commun. Data Warrants, 448 N.J. Super. 471, 479 (App. Div. 2017); Kean Feder. of Teachers v. Morell, 448 N.J. Super. 520, 526 (App. Div. 2017); Dunbar Homes v. Zoning Bd., 448 N.J. Super. 583, 595 (App. Div. 2017); Acevedo v. Flightsafety Intern., 449 N.J. Super. 185, 188 (App. Div. 2017); Caltabiano v. Gill, 449 N.J. Super. 331, 336 (App. Div. 2017)

Whether to apply a statute retroactively is similarly reviewed de novo. Johnson v. Roselle EZ Quick LLC, 226 N.J. 370 (2016)

Similarly, an interpretation of a contract is ordinarily a legal question for the trial court to decide and subject to de novo appellate review. See e.g. Cypress Point v. Adria Towers, 226 N.J. 403, 415 (2016) (interpretation of insurance policy); Manahawkin Convalesc. v. O'Neill, 217 N.J. 99, 115 (2014) (trial court's construction of nursing home admission agreement); Cumberland Farms v. Envir. Prot., 447 N.J. Super. 423, 438 (App. Div. 2016) and In re Estate of Balk, 445 N.J. Super. 395, 399-400 (App. Div. 2016) (settlement agreement); Rivera v. McCray, 445 N.J. Super. 315, 318 (App. Div. 2016) (interpretation of insurance contract)

Thus, an interpretation of an arbitration clause in a contract is also subject to de novo review. Roach v. BM Motoring, LLC, 228 N.J. 163, 177 (2017); Morgan v. Sanford Brown Inst., 225 N.J. 289, 302 (2016)

As to the applicability of de novo review to other matters, see Estate of Kennedy v. Rosenblatt, 447 N.J. Super. 444, 451 (App. Div. 2016) ("a determination of whether counsel should be disqualified is, as an issue of law, subject to de novo plenary appellate review"); North Jersey Media v. Bergen Cty. Pros., 447 N.J. Super. 182, 194 (App. Div. 2016) (whether OPRA requires disclosure of records is reviewed de novo)

•3.2. Review of dispositive motions.

•3.2.1. Summary judgment motions.

In reviewing summary judgment orders, the propriety of the trial court's order is a legal, not a factual, question. See Fernandez v. Nationwide Mut. Ins., 402 N.J. Super. 166, 170 (App. Div. 2008), aff'd o.b., 199 N.J. 591 (2009); Davidovich v. Israel Ice Skating, 446 N.J. Super. 127, 158 (App. Div. 2016)

Thus the appellate court applies the same standard as the trial court in respect of the same motion record. See Conley v. Guerrero, 228 N.J. 339, 346 (2017); Cypress Point v. Adria Towers, 226 N.J. 403, 414 (2016); Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 386 (2016); Steinberg v. Sahara Sam's Oasis, 226 N.J. 344, 349 (2016); Globe Motor Co. v. Igdalev, 225 N.J. 469, 469 (2016); ; Warren v. Muenzen, 448 N.J. Super. 52, 62 (App. Div. 2016); FDASmart v. Dishman Pharm., 448 N.J. Super. 195, 201 (App. Div. 2016); Sullivan v. Port Auth. of NY and NJ, 449 N.J. Super. 276, 282 (App. Div. 2017)

That is, the movant is entitled to judgment if, on the full motion record, the adverse party, who is required to have the facts and inferences viewed most favorably to it, has not demonstrated a prima facie case. It is, in effect, a sufficiency of evidence test. See Worthy v. Kennedy Health System, 446 N.J. Super. 71, 85-86, 94-95 (App. Div. 2016), certif. den. 228 N.J. 24 (2017) (reversing summary judgment order dismissing medical malpractice claim when judge overlooked evidence of causation)

•3.2.3. Involuntary dismissal.

The appellate court reviews motions for involuntary dismissal pursuant to R. 4:37-2(b) by the same prima facie case standard as governs the trial court. See Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016); Prager v. Joyce Honda, Inc., 447 N.J. Super. 124, 134 (App. Div. 2016)

•3.2.4. Motion for judgment.

The summary-judgment standard of review applies to appellate review of trial court determination of motions for judgment made pursuant to R. 4:40-1. See Sackman v. New Jersey Mfrs. Ins., 445 N.J. Super. 278, 290-291 (App. Div. 2016)

•3.4. Agency legal decisions.

•3.4.1. Interpretation of enabling statutes and regulations.

Regardless of whether an administrative agency is acting in an adjudicative or a legislative capacity, the agency's interpretation of its own enabling statute and of its own regulations, while not binding on the appellate court, is entitled to great weight and should ordinarily be deferred to unless contrary to statutory authorization or plainly unreasonable, particularly where agency expertise is relevant to the interpretation. See, e.g., In re Eastwick College, 225 N.J. 533, 541-542 (2016); Ardan v. Board of Review, 444 N.J. Super. 576, 584 (App. Div. 2016); Capital Health v. Banking and Ins., 445 N.J. Super. 522, 535 (App. Div.), certif. den. 227 N.J. 381 (2016)

a. Deference to agency interpretation of enabling legislation and regulations. See, according such weight to an agency's interpretation of the statute it is responsible to implement and enforce and to the agency's own promulgated regulations thereunder, Capital Health v. Banking and Ins., 445 N.J. Super. 522, 535-536, 544-545 (App. Div.), certif. den. 227 N.J. 381 (2016)

b. Withholding deference to agency interpretation of enabling statute. Although the appellate court accords substantial weight to agency interpretation of its enabling statute, it is not, as noted, bound by the agency's interpretation thereof, or by its interpretation of its own regulation or determination. See In re Eastwick College, 225 N.J. 533, 545 (2016); In re County of Atlantic, 445 N.J. Super. 1, 20-22 (App. Div.), certif. granted 227 N.J. 148 (2016); DCPP v. V.E., 448 N.J. Super. 374, 390-391 (App. Div. 2017)

•3.4.2. Other legal issues.

An agency's determination of a strictly legal issue, not involving either interpretation of its enabling legislation or the exercise of agency expertise, is not entitled to deference, and the appellate court will consider those issues de novo. See, e.g., Capital Health v. Banking and Ins., 445 N.J. Super. 522, 536 (App. Div.), certif. den. 227 N.J. 381 (2016); DCPP v. V.E., [448 N.J. Super. 374]448 N.J. Super. 374, 391 (App. Div. 2017); Thompson v. Board of Trustees, 449 N.J. Super. 478, 484 (App. Div. 2017)

•4. Discretionary Rulings.

•4.2. Attorneys' fee awards; fraud on the court; prejudgment interest.

The abuse-of-discretion standard governs review of a trial court's award of attorneys' fees. The abuse of discretion standard is met if the judge's reasoning is unsupported by the facts of record. And see Noren v. Heartland Payment Sys., 448 N.J. Super. 486, 497 (App. Div. 2017). The same abuse of discretion standard governs an award of attorney's fees as a sanction for fraud on the court. That standard also governs imposition of frivolous litigation fees. Tagayun v. AmeriChoice of N.J., 446 N.J. Super. 570, 577 (App. Div. 2016). And it governs an award of taxed costs. It also governs an award of prejudgment interest. See Comments 2 (tort cases) and 3 (contract cases) on R. 4:42-11 (interest on judgments).

•4.6. Discovery rulings.

An appellate court will generally defer to a trial court's decisions regarding discovery, with review under the discretion standard. See Capital Health System v. Horizon, 446 N.J. Super. 96, 114 (App. Div. 2016), leave to appeal granted 228 N.J. 516 (2017); Brugaletta v. Garcia, 448 N.J. Super. 404, 411 (App. Div. 2017)

That discretion is abused, however, when the court allows a party to rummage through irrelevant evidence. And see, finding an abuse of discretion in civil cases, Castello v. Wohler, 446 N.J. Super. 1, 25-26 (App. Div. 2016), finding abuse of discretion in court's refusal to extend discovery for exceptional circumstances when the fact disqualifying plaintiff's expert from testifying was not obvious from his resume

•4.7. Evidence rulings; comments on evidence; reopening the proofs.

The mistaken exercise of discretion standard applies to a judge's discretionary evidentiary rulings, provided they are not inconsistent with applicable law. See Griffin v. City of East Orange, 225 N.J. 400, 413 (2016)

Prejudicial error as to the admission of evidence in a civil trial may be reversible error. See, e.g., Griffin v. City of East Orange, 225 N.J. 400, 413, 422-423 (2016) (mistaken exercise of discretion to exclude, on relevancy grounds, testimony from a witness that her superiors had instructed her to lie to an investigator examining plaintiff's sexual harassment claims); Velazquez v. City of Camden, 447 N.J. Super. 224, 232, 234, 240 (App. Div.), certif. den. 228 N.J. 451 (2016) (reversible error to admit prejudicial testimony by assistant prosecutor in civil rights action)

As to the considerable constraints on the giving of a so-called Clawans charge, that is, permitting the jury to draw an adverse inference against a party failing to produce a particular witness, see Torres v. Pabon, 225 N.J. 167, 181-187 (2016).

The trial judge also has broad discretion in the allowing of rebuttal testimony, and a ruling in that regard will ordinarily be sustained absent gross abuse. The judge also has broad discretion in deciding whether to reopen the proofs. But see DCPP v. K.S., 445 N.J. Super. 384, 390 (App. Div. 2016) (abuse of discretion to refuse parent's request to reopen record to allow her to testify in termination hearing when request was made shortly after 1-day trial and before judge issued decision)

•4.8. Examination of witnesses.

b. Expert witnesses. The abuse of discretion standard governs appellate review of trial court decisions regarding expert witnesses, including the admission or exclusion of expert or opinion testimony, and the scope of direct and cross examination of an expert. See NJ Transit Corp. v. Franco, 447 N.J. Super. 361, 369 (App. Div. 2016)

•4.13. Reconsideration motions.

The abuse-of-discretion standard governs a trial judge's determination under R. 4:49-2 respecting reconsideration of a judgment or order. See Matter of Estate of Brown, 448 N.J. Super. 252, 268-269 (App. Div. 2017); Granata v. Broderick, 446 N.J. Super. 449, 468 (App. Div. 2016), certif. granted 228 N.J. 516 (2017); J.P. v. Smith, 444 N.J. Super. 507, 521 (App. Div.), certif. den. 226 N.J. 212 (2016)

•6. Review of Judicial Fact-Finding.

•6.1. Generally.

The standard of review of a trial court's fact-finding is one of deference, requiring only that the facts as found are supported by adequate competent evidence in the record. See Allstate Ins. v. Northfield Med., 228 N.J. 596, 619 (2017); Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017); Forfeiture of Personal Weapons, 225 N.J. 487 (2016); Matter of Estate of Brown, 448 N.J. Super. 252, 268 (App. Div. 2017)

•6.2. Family Part.

The findings of the Family Part are entitled to particular deference in view of its special expertise in the field of domestic relations. See also Thieme v. Aucoin-Thieme, 227 N.J. 269, 282-283 (2016); DCPP v. S.W., 448 N.J. Super. 180, 189 (App. Div. 2017); DCPP v. V.E., 448 N.J. Super. 374, 384 (App. Div. 2017). That deference may be tempered, however, when the court did not hear testimony or make credibility determinations based on the demeanor of witnesses. DCPP v. J.D., 447 N.J. Super. 337, 350 (App. Div. 2016). And that deference will not be accorded when the trial court went so wide of the mark that a mistake must have been made. K.F., 444 N.J. Super. 191, 200 (App. Div. 2016); Slawinski v. Nicholas, 448 N.J. Super. 25, 32 (App. Div. 2016)

With respect to dissolution matters, the Family Part has discretion in allocating marital assets to the parties in equitable distribution, and an equitable distribution award will be affirmed as long as the trial court could reasonably have reached its

result from the evidence presented and the award is not distorted by legal or factual mistake. And see also, as to the limited review of a child support award, Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 587 (App. Div. 2016)

Nevertheless Family Part findings will be rejected if not based on adequate competent evidence in the record and adequate findings based thereon and consistent therewith. See Ricci v. Ricci, 448 N.J. Super. 546, 564 (App. Div. 2017). See also Lombardi v. Lombardi, 447 N.J. Super. 26, 33, 41 (App. Div.), certif. den. 228 N.J. 445 (2016) (alimony award vacated when court failed to consider parties' routine and substantial savings as part of their standard of living); DCPP v. S.G., 448 N.J. Super. 135, 142-143 (App. Div. 2016) (vacating order finding abuse and neglect based only on Division's redacted documents, without witness testimony, and remanding for a testimonial fact-finding hearing); DCPP v. S.W., 448 N.J. Super. 180, 189-191 (App. Div. 2017) (vacating order finding neglect when trial judge conducted a hearing on the papers despite disputed facts and absent defendant); R.G. v. R.G., 449 N.J. Super. 208, 223 (App. Div. 2017) (reversing grant of final restraining order when findings were based on inadmissible testimony suggesting pattern of abuse)

•7. Standard of Review, State Administrative Agencies: Adjudicative Action.

•7.2. Substantial evidence rule generally.

The fundamental principle governing review of agency adjudicative actions is that the agency decision will be sustained unless it is arbitrary, capricious, or unreasonable, unsupported by substantial credible evidence in the record as a whole, offensive to the federal or state constitution or inconsistent with its statutory mission. See, e.g. Petition of South Jersey Gas Co., 447 N.J. Super. 459, 480 (App. Div. 2016); Matter of Tukes, 449 N.J. Super. 143, 156-157 (App. Div. 2017); Matter of Restrepo, 449 N.J. Super 409, 417 (App. Div. 2017); Thompson v. Board of Trustees, 449 N.J. Super. 478, 483 (App. Div. 2017)

•7.3. Agency fact-finding.

As to the considerable weight required to be given to agency expertise where expertise is relevant, see Petition of South Jersey Gas Co., 447 N.J. Super. 459, 480 (App. Div. 2016)

Nevertheless, appellate review "calls for careful and principled consideration of the agency record and findings" and is not a rubber stamping exercise. J.B. v. New Jersey State Parole, 444 N.J. Super. 115, 154-155 (App. Div.), certif. granted 226 N.J. 213 (2016); Mejia v. Dept. of Corrections, 446 N.J. Super. 369, 376-377 (App. Div. 2016)

•7.6. Hearings; opportunity to be heard.

•7.6.2. Contested case hearing.

b. Right to contested hearing; particular matters. The particular matters in which a contested-case hearing has been held to be required include:

Division of Child Protection and Permanency. Cf. DCPP v. V.E., 448 N.J. Super. 374, 396-402 (App. Div. 2017) (parties seeking to challenge Division's finding that abuse or neglect is "established" are entitled to an administrative hearing).

Department of Banking and Insurance. Capital Health v. Banking and Ins., 445 N.J. Super. 522, 544 (App. Div.), certif. den. 227 N.J. 381 (2016) (health provider entities affected by insurance carrier's new network plan not entitled to notice, participation in administrative process, or contested hearing).

•7.6.4. General due process requirements; all adjudications.

See also DCPP v. V.E., 448 N.J. Super. 374, 396-402 (App. Div. 2017) (due process requires a party be entitled to an administrative hearing to contest the Division's conclusion that abuse or neglect is established)

•7.7. Administrative remedies.

•7.7.5. Imposition of a penalty.

The imposition of a penalty by an administrative agency as authorized by statute will ordinarily be affirmed so long as it is jurisdictionally permissible, supported by the record to the extent factfinding is involved, is reasonably proportional to the offense, and neither arbitrary nor unreasonable. A penalty meeting those criteria, including revocation of a professional license, is required to be deferred to on appellate review. This rule applies to the final agency determination even if not in

accord with the lower administrative determination. See also, generally, In re Pontoriero, 439 N.J. Super. 24, 44 (App. Div. 2015); Matter of Restrepo, 449 N.J. Super. 409, 424-426 (App. Div. 2017)

The appellate court will reverse a penalty found to be arbitrary and unreasonable or "shocking to one's sense of fairness" under all the circumstances. See Matter of Restrepo, 449 N.J. Super. 409, 425 (App. Div. 2017) (progressive discipline not necessary when misconduct is egregious)

•7.8. Review of procedural rulings.

•7.8.2. Reopening and reconsideration.

Ordinarily an agency has the inherent power to reopen or reconsider its decisions. See generally N.J. Election Law v. DiVincenzo, 445 N.J. Super. 187, 203 (App. Div. 2016)

•7.9. Final disposition; delay and "deemed-adopted."

The 2014 amendments to N.J.S. 52:14B-10(c) curtailed the extensions an agency may seek to adopt, modify or reject an ALJ's initial decision before it is automatically approved or "deemed adopted." An agency may now only seek a single extension of 45 days for good cause shown, and there is no safe harbor for an agency unable to act within the prescribed period through no fault of its own. N.J. Election Law v. DiVincenzo, 445 N.J. Super. 187, 198-199 (App. Div. 2016). Pre-amendment case law strictly construed the deemed-adopted provision of N.J.S. 52:14B-10(c) and generally applied it only when there was gross indifference, inexcusable neglect or bad faith.

As to the deemed adopted provision applicable to discipline of firefighters and law enforcement officers pursuant to N.J.S. 40A:14-200 et seq., see Matter of Restrepo, 449 N.J. Super. 409, 422-423 (App. Div. 2017) (deemed-adopted provision did not apply when extensions were proper under N.J.S. 40A:14-204)

•8. Standard of Review, State Administrative Agencies: Regulatory Action.

•8.1. Generally; presumption of validity; arbitrary action.

The due process requirements applicable to agency adjudicative actions do not obtain in the same manner with respect to regulatory action even though the public at large may have a right to be heard on proposed action since the agency in fulfilling this function is not ordinarily dealing with individual cases. As a general proposition all legislative and legislative type actions, including rule promulgation, while subject to judicial review, are nevertheless presumed reasonable and required to be sustained if not arbitrary or unreasonable to effectuate the Legislature's purpose in granting the agency authority. See, e.g., Capital Health v. Banking and Ins., 445 N.J. Super. 522, 535 (App. Div.), certif. den. 227 N.J. 381 (2016)

The judicial role in reviewing regulatory action is limited to consideration of: (1) whether the action violated the express or implied legislative policies, (2) whether there is substantial evidence in the record to support the agency's findings, and (3) whether the agency clearly erred in reaching a conclusion unsupported by relevant factors. At least implicit in the scope of judicial review authority is a fourth factor, whether the agency's decision offends the State or Federal Constitution. See also generally Capital Health v. Banking and Ins., 445 N.J. Super. 522, 535-536 (App. Div.), certif. den. 227 N.J. 381 (2016)

Note, however, that the arbitrary or unreasonable standard does not apply to the review of the discretionary actions of a Governor. In re Veto by Gov. Chris Christie, 429 N.J. Super. 277, 291-293 (App. Div. 2012), certif. den. 214 N.J. 116 (2013), applying only the first and fourth factors for review of regulatory action with respect to the review of the discretionary actions of a Governor. Nor does it apply to the Legislature's invalidation of an agency rule or regulation under the Legislative Review Clause. Comm. Wkrs v. Civil Service Comm'n, 447 N.J. Super. 584, 600-601 (App. Div. 2016), holding that courts may reverse the Legislature's invalidation of an administrative rule or regulation only when (1) the Legislature has not complied with the Legislative Review Clause's procedural requirements; (2) the Legislature's action is unconstitutional; or (3) its concurrent resolution amounts to a patently erroneous interpretation of "'the language of the statute which the rule or regulation is intended to implement.'"

- RULE 2:12A. CERTIFICATION OF QUESTIONS OF LAW BY THE SUPREME COURT
  - COMMENT

And see Schwartz v. Accuratus Corp., 225 N.J. 517, 518-519 (2016) (addressing a question of law, which involved the scope of a premises liability rule previously recognized by the Court, that was certified and submitted to the Court by the Third Circuit under Rule 2:12A-1)

- RULE 2:13. ADMINISTRATION
  - 2:13-2. Quorum; Temporary Assignment
    - COMMENT

If the appeal has already been argued before the third judge is called in, the appeal is required to be reargued unless the parties consent to the third judge's participation. See Scannavino v. Walsh, 445 N.J. Super. 162, 165 n. 1 (App. Div. 2016) (judge who did not participate in oral argument joined opinion with consent of counsel)

Part IV
RULES GOVERNING CIVIL PRACTICE IN THE SUPERIOR COURT, TAX COURT AND SURROGATE'S COURTS

[CHAPTER I. SCOPE OF RULES: COMMENCEMENT AND FORM OF ACTION; SERVICE OF PROCESS]

•RULE 4:3. DIVISIONS; VENUE; TRANSFER OF ACTIONS

•4:3-2. Venue in the Superior Court

•COMMENT

•1. Paragraph (a); Where Laid.

The venue rules apply only in respect of the original parties. If venue is then properly laid in the main action, it may not thereafter be transferred on the ground that a third-party defendant is entitled to a different venue. Venue may, however, be changed in accordance with R. 4:3-3(a)(2) or (3). See Crepy v. Reckitt Benckiser, LLC, 448 N.J. Super. 419, 426-427 (Law Div. 2016)

•2. Paragraph (b); Business Entity.

As to the meaning of "actually doing business" under this subsection, see Crepy v. Reckitt Benckiser, LLC, 448 N. J. Super. 419, 430-440 (Law Div. 2016) (also extending applicability of this subsection to LLCs prior to Rule amendment).

•4:3-3. Change of Venue in the Superior Court

•COMMENT

A motion for a change of venue on the ground that venue was not laid in accordance with R. 4:3-2 should be routinely granted unless the party resisting the change makes a showing that a fair and impartial trial could not be had in the proper county or that “the convenience of parties and witnesses in the interest of justice” justifies trial in a county other than one where venue should have been laid. Thus, if the motion is made pursuant to R. 4:3-3(a)(2) or (3), the movant has the burden of demonstrating good cause for the change. If the motion is made pursuant to R. 4:3-3(a)(1), the respondent has the burden of demonstrating good cause for not making a change. And Crepy v. Reckitt Benckiser, LLC, 448 N.J. Super. 419, 427 (Law Div. 2016).

•RULE 4:4. PROCESS

•4:4-4. Summons; Personal Service; In Personam Jurisdiction

•COMMENT

•1. Overview.

Paragraph (a) makes clear that personal service, as therein required to be made on the various classes of defendants, must first be attempted before constructive or substituted service in accordance with paragraph (b) may be resorted to. Paragraph (a) prescribes the manner in which personal service on different categories of defendants may be accomplished. Paragraph (b) collects the modes of substituted and constructive service. Paragraph (c) provides for optional service by mail on defendants present within the State. The point is that service properly made under any appropriate provision of this rule, whether defined as personal, constructive, substituted or optional service, will result in in personam jurisdiction. In sum then, the various modes of service specified by paragraph (a) only state the mechanisms available for securing jurisdiction over persons and entities amenable, by reason of their presence in New Jersey, to an exercise of personal jurisdiction by this State. They cannot be read as mechanisms for obtaining long-arm jurisdiction unless the underlying predicate of long-arm jurisdiction, adequate contact with the State, exists. Accord, FDASmart v. Dishman Pharm., 448 N.J. Super. 195, 205-206 (App. Div. 2016).

•3. Constructive and Substituted Service.

•3.1. Paragraph (b)(1); mechanics of constructive service.

•3.1.1. Long-arm jurisdiction; general principles.

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The test of due process remains the reasonableness of the forum state's exercise of jurisdiction, and reasonableness is measured by such minimal contacts with the forum state that maintenance there of the suit does not offend traditional notions of fair play and substantial justice. See generally Nicastro v. McIntyre Machinery America, 201 N.J. 48 (2010), rev'd on other grds. 564 U.S. 873 (2011); Rippon v. Smigel, 449 N.J. Super. 344, 360-361 (App. Div. 2017).

Analysis of the adequacy of minimal contacts depends on whether the jurisdiction sought is specific or general. The standard for determining adequacy is lower when jurisdiction is "specific"—i.e., the cause of action arises out of the contacts, than when it is "general", i.e., the defendant is allegedly answerable in New Jersey for any cause of action based on its continuous and systematic activities here. As to establishing either general or specific jurisdiction over a parent corporation of a New Jersey subsidiary, see FDASmart v. Dishman Pharm., 448 N.J. Super. 195, 201-205 (App. Div. 2016); Pfundstein v. Omnicom Group Inc., 285 N.J. Super. 245 (App. Div. 1995)

Clearly, it is the plaintiff who has the burden of proving that defendant's contacts are sufficient to sustain the exercise of long arm jurisdiction. Moreover, if the facts underlying the claim of adequate contacts are in dispute, discovery and evidential hearing are required. See also Rippon v. Smigel, 449 N.J. At 361, reversing summary judgment when record was not sufficiently developed on issue of jurisdiction

•5. Forum Non Conveniens.

•5.1. Generally.

Objections by defendant to the exercise of long-arm jurisdiction are customarily coupled with a forum non conveniens argument which seeks the court's declination, on that basis, of jurisdiction which it finds it has. The forum non conveniens argument is predicated on the availability of an alternate forum. Once the court has determined it has jurisdiction, it should decline to exercise it on the forum non conveniens ground only upon a strong showing of great hardship and manifest inappropriateness of the forum and only if the plaintiff will not be seriously inconvenienced by being denied access to the courts of his choice in this State. See Rippon v. Smigel, 449 N.J. Super. 344, 364-366 (App. Div. 2017). As to both the public and private interest factors to be considered by the court, see Rippon v. Smigel, 449 N.J. Super. At 365.

The factual issues respecting the issue of the demonstrable inappropriateness of the plaintiff's forum selection ordinarily require discovery, and hence a pre-discovery determination is generally premature. And see Rippon v. Smigel, 449 N.J. Super. 344, 366 (App. Div. 2017)

[CHAPTER II. PLEADINGS AND MOTIONS]

•RULE 4:5. GENERAL RULES OF PLEADING

•4:5-4. Affirmative Defenses; Misdesignation of Defense and Counterclaim

•COMMENT

•2. Accord and Satisfaction.

•2.1. Generally; what constitutes a settlement agreement.

There is, of course, a strong public policy favoring the settlement of litigation. See, e.g., Globe Motor Co. v. Igdalev, 436 N.J. Super 594, 600-601 (App. Div. 2014), rev'd on oth grnds 225 N.J. 469 (2016); Cumberland Farms v. Envir. Prot., 447 N.J. Super. 423, 438-439 (App. Div. 2016); J.S. v. D.S., 448 N.J. Super. 17, 21 (App. Div. 2016). Ordinarily, the terms of a settlement agreement are given their plain and ordinary meaning. Nevertheless, a settlement agreement cannot be interpreted by the court more broadly than intended by the parties nor may its material terms be varied. The parties' "agreement to the essential terms," however, is required. Cumberland Farms v. Envir. Prot., 447 N.J. Super. 423, 438-439 (App. Div. 2016).

•2.2. Enforcement.

•2.2.1. Generally; unexecuted and oral settlement agreements.

As to the enforcement of unexecuted and oral settlement agreements, see [citations omitted]. As to cases settled in mediation, [citations omitted]. Enforcement must, however, be denied, where there is doubt as to the mutuality of the parties' intentions. See, e.g., Cumberland Farms v. Envir. Prot., 447 N.J. Super. 423, 439-442 (App. Div. 2016) (refusing to enforce unexecuted, marked-up version of settlement agreement when mutuality of intentions was in doubt)

•3. Arbitration and Award Under New Jersey Law.

•3.1. Scope; arbitrability.

•3.1.1. General principles; arbitration agreement; enforcement.

Because of the strong public policy favoring arbitration, the scope of arbitrability should ordinarily be liberally construed and all doubts resolved in favor of arbitration requiring dismissal of the arbitrable cause of action or issue and its reference to arbitration. Nevertheless, arbitration agreements are still construed under normal contract principles. Roach v. BM Motoring, LLC., 228 N.J. 163, 174 (2017). See also Kleine v. Emeritus at Emerson, 445 N.J. Super. 545, 552 (App. Div. 2016) (arbitration clause unenforceable when there was no "meeting of the minds" on the arbitral forum); Bernetich v. Med. Records Online, 445 N.J. Super. 173, 183-185 (App. Div.), certif. den. 227 N.J. 245 (2016) (arbitration provision in invoice unenforceable when there was no consideration)

The scope of arbitration is liberally construed to include both contract and tort actions. The scope also extends to defenses directly related to the subject matter of the clause. The question of whether the parties entered into a valid agreement to arbitrate their dispute is ordinarily for the court to decide, not the arbitrator. And an appellate court's review of an arbitration clause is de novo. That said, parties to an arbitration agreement can include a "delegation clause" providing that the arbitrator, rather than the judge, will decide threshold issues, such as whether they agreed to arbitrate. Morgan v. Sanford Brown Inst., 225 N.J. 289, 303-307 (2016) (finding that the agreement to arbitrate did not have a clearly identifiable delegation clause and defendants failed to assert the existence of one)

An arbitration agreement must be sufficiently clear as to what rights are being waived. See, all emphasizing the need for a "consensual understanding" about the waiver of a party's access to the courts, Morgan v. Sanford Brown Inst., 225 N.J. 289, 307-310 (2016); Kleine v. Emeritus at Emerson, 445 N.J. Super. 545, 550 (App. Div. 2016); Midland Funding LLC v. Bordeaux, 447 N.J. Super. 330, 335-336 (App. Div. 2016)

As to the enforceability, under New Jersey principles, of an arbitration clause included in a contract of adhesion, a case has held that an agreement to arbitrate is enforceable even if included in a contract of adhesion, and that an accepted application for employment constitutes such an agreement. Nevertheless, if the contract is one of adhesion, then a "sharpened inquiry" into whether an arbitration provision is unconscionable may be necessary. See Kleine v. Emeritus at Emerson, 445 N.J. Super. 545, 551-552 (App. Div. 2016) (claims of unconscionability required evidentiary hearing when viewed in light most favorable to plaintiff)

An agreement to arbitrate may also be enforceable even if not reciprocal. Compare Kleine v. Emeritus at Emerson, 445 N.J. Super. at 551, suggesting that the lack of reciprocity in a contract of adhesion may be unconscionable.

•3.1.2. Statutory causes of action.

An agreement to waive a statutory cause of action for workplace discrimination in favor of arbitration requires an explicit waiver that expressly includes reference to those claims. For cases in which the arbitration clause failed to provide adequate notice of the right being waived, see Noren v. Heartland Payment Sys., 448 N.J. Super. 486, 497 (App. Div. 2017). No specific language is required to accomplish a waiver; references to specific statutes by name or a general reference to statutory claims have been found to be sufficient. Although a court in the 1990s found that a broad agreement to arbitrate in an employment contract could be enforced, its language is likely too ambiguous under current standards. There, the language, "any dispute or difference arising out of or relating to this contract or the breach thereof," was held to encompass contract and tort claims, including plaintiff's CEPA claim.

•3.2. Procedural issues.

•3.2.3. Waiver, breach.

Arbitration rights may be waiverd by failure to request or demand them or by actions calculated to frustrate the adversary's arbitration rights. Breach of a valid arbitration agreement also may preclude enforcement. See Roach v. BM Motoring, LLC, 228 N.J. 163, 179-180 (2017) (failure to advance costs for arbitration constitutes material breach that bars breaching party from compelling arbitration)

•3.3. Arbitration award; enforcement.

•3.3.3. Proceedings to confirm arbitration award.

a. General principles; confirmation. Because arbitration is so highly favored by the law, the presumed validity of the arbitration award is entitled to every indulgence, and the party opposing confirmation has the burden of establishing statutory grounds for vacation. Cf. CURE v. Orthopedic Specialists, 445 N.J. Super. 371, 375-376 (App. Div. 2016) (allowing review of trial court's dismissal of summary action on timeliness grounds when there were unsettled questions of statutory construction)

•3.5. Specific causes.

•3.5.2. Automobile and other personal injury arbitration.

The rules governing private rather than public arbitration apply to judicial review of PIP, UM and UIM arbitrations. PIP disputes are, however, subject to resolution pursuant to the Alternative Procedure for Dispute Resolution Act (APDRA), N.J.S. 2A:23A-1 to 2A:23A-19 rather than the Arbitration Act pursuant to N.J.S. 39:6A-5.1. The significant difference is that under APDRA, the umpire's decision may be challenged in the trial court on the ground of erroneous application of the law, but no appeal from the trial court lies except in "rare circumstances" where the appellate court exercises its general supervisory power for public policy reasons or for issues that come within its exclusive supervisory power, such as attorney's fees. See also CURE v. Orthopedic Specialists, 445 N.J. Super. 371, 375-376 (App. Div. 2016) (allowing review of trial court's dismissal of summary action on timeliness grounds when there were unsettled questions of statutory construction)

•3.6. Related proceedings.

•3.6.1. Alternative Procedure for Dispute Resolution Act, et seq.

A voluntary submission to binding dispute resolution under the Alternative Procedure for Dispute Resolution Act (APDRA) N.J.S. 2A:23A-1 to 2A:23A-19, is, generally, closely akin to arbitration under N.J.S. 2A:24-1, et seq., now applicable only to collective bargaining agreements, and N.J.S. 2A:23B-1 et seq. applicable generally to private arbitrations. See Johnson v. Johnson, 204 N.J. 529, 546 (2010), highlighting differences between N.J.S. 2A:23B-1 et seq. and the APDRA. It differs significantly, however, in that the Chancery Division's judgment in a summary action to vacate, correct or modify the award is not appealable. But see CURE v. Orthopedic Specialists, 445 N.J. Super. 371, 375-376 (App. Div. 2016), permitting limited review of trial court's dismissal of a summary action on timeliness grounds when there were unsettled questions of statutory construction

•3.7. Public sector arbitration.

•3.7.1. General principles.

While arbitrations are generally governed by the 2003 Arbitration Act, N.J.S. 2A:23B-1 to 2A:23B-32, arbitration between an employer and a duly elected representative of employees under a collective bargaining agreement or collectively negotiated agreement is still governed by N.J.S. 2A:24-1 et seq. Thus, the older statute governs most public sector arbitration. Arbitration is a particularly favored remedy to settle public-sector labor disputes. And see N.J.S. 34:13A-5.3 according a presumption in favor of arbitration to public employees. Nevertheless, in contradistinction to the narrow scope of review in private sector arbitration awards, the standard of review of public-sector awards requires inquiry into their consistency with the law and with the public interest and public policy, including the fiscal impact of the award. See also Bound Brook Bd of Ed v. Ciripompa, 228 N.J. 4, 11-13, 18 (2017) (invalidating arbitrator's award under N.J.S. 2A:41-8(d) when arbitrator exceeded his authority by resolving a matter based on a legal question that the parties did not intend to submit to arbitration)

•3.7.6. Other public employee issues.

See Bd. of Educ. v. Educ. Ass'n, 227 N.J. 192, 194-195, 204-205 (2016) (school board may not unilaterally impose furlough days on teachers due to economic crisis in contravention of parties' collective negotiation agreement)

•6. Choice-of-Law.

•6.1. General principles.

As a procedural matter, it is clear that an issue of the applicability of foreign law should not only be raised before trial but requires decision before trial. The court may consider the choice-of-law issue when it is raised even if it has not been pleaded. And see In re Estate of Byung-Tae Oh, N445 N.J. Super. 402, 408 (App. Div. 2016), refusing to address choice-of-law issue raised on appeal for the first time

The first step in a conflict of law analysis is to determine whether there is in fact a conflict of law between the states having a nexus to the matter. The question of whose law governs should not be addressed at all until the proponent for application of the law of another jurisdiction demonstrates that the law of the two jurisdictions differs. See Ginsberg v. Quest Diagnostics, 227 N.J. 7, 12 (2016); In re Estate of Byung-Tae Oh, 445 N.J. Super. 402, 408 (App. Div. 2016)

New Jersey now applies the "significant interest test" of the Restatement (Second) Conflict of Laws, rather than the "governmental interest test" for tort cases. The tests are similar in application. See Restatement (Second) Conflict of Laws §§145, 146 (noting similarities between the two tests). Accordingly, the choice of law analysis for tort claims begins with the presumption that the law of the state where the injury occurred applies. Still, that presumption can be overcome when another state has a more significant relationship to the event causing the injury and the parties, in which case the law of that other state would apply. See also McCarrell v. Hoffmann-La Roche, 227 N.J. 569, 589-590 (2017); Ginsberg v. Quest Diagnostics, 227 N.J. 7, 12-13 (2016)

Both the significant relationship and governmental interest tests require that the law be applied on an issue by issue basis, and hence the law of a single jurisdiction may not apply to all issues. As to applying a defendant-by-defendant choice-of-law analysis when feasible under the significant relationship test, see Ginsberg v. Quest Diagnostics, 227 N.J. 7, 17-20 (2016)

•6.2. Choice of limitations law.

New Jersey applies a different choice-of-law test for statutes of limitations than it applies for substantive law. McCarrell v. Hoffmann-La Roche, 227 N.J. 569, 591-596 (2017). The McCarrell Court adopted Restatement (Second) §142, which has a presumption in favor of a forum state with a substantial interest in the litigation. In that circumstance, the forum state's statute of limitations applies unless exceptional circumstances would render that result unreasonable. Accordingly, "when New Jersey has a substantial interest in the litigation and is the forum state, it will generally apply its statute of limitations." McCarrell v. Hoffmann-La Roche, 227 N.J. at 593. If, however, New Jersey has no substantial interest in maintaining the claim, the court considers whether the claim would be barred under the statute of limitations of a state with more significant relationships to the parties and the occurrence

•6.3. Tort actions.

•6.3.1. General principles.

Professional malpractice. As to a medical malpractice case involving wrongful birth and wrongful life claims, see Ginsberg v. Quest Diagnostics, 441 N.J. Super. 198, 246 (App. Div.. 2015), aff'd 227 N.J. 7, 17-20 (2016), finding that under a defendant-specific approach to the choice-of-law analysis, New Jersey law should apply to the New Jersey health care defendants and New York law should apply to the New York health care defendants. In affirming, the Supreme Court in Ginsberg stated that the defendant-specific approach, which was properly articulated by the Appellate Division, should apply in the majority of cases. Ginsberg v. Quest Diagnostics, 227 N.J. 7, 17-20 (2016)

•7. Collateral Estoppel.

•7.1. General requirements.

Application of the doctrine of collateral estoppel requires identity of the issues litigated and to be litigated, notice and a full and fair opportunity to be heard afforded the party sought to be precluded, and equality of forum. Lisowski v. Borough of Avalon, 442 N.J. Super. 304, 324 (App. Div. 2015), certif. den. 227 N.J. 374 (2016). And see Delacruz v. Alfieri, 447 N.J. Super. 1, 24-25 (Law Div. 2015)

•8. Collateral Source Rule.

Note that N.J.S. 2A:15-97 only applies only to actions for personal injury or death. It does not apply to actions brought under the Law Against Discrimination. See Acevedo v. Flightsafety Intern., 449 N.J. Super. 185, 189-193 (App. Div. 2017) (unemployment compensation benefits received by plaintiff not deductible from back pay award)

•10. Comparative Negligence.

•10.2. Allocation of fault.

•10.2.1. Parties against whom allocation may be made.

Plainly, allocation may not be made as against a defendant dismissed on substantive grounds. It has been held that allocation of fault may be made only to those defendants who could be considered joint tortfeasors, and/or parties, under the Comparative Negligence Act and the Joint Tortfeasors Contribution Law. However, as is made clear by the concurrence in Krzykalski v. Tindall, 448 N.J. Super. 1, 11-17 (App. Div. 2016), the doctrine of precluding allocation to non-parties, specifically there to unnamed or fictitious defendants, has been observed far more in its breach than in its observance. The court in Krzykalski has held that apportionment of responsibility is required when a UM carrier settles with the plaintiff before trial and stands in the shoes of fictitious drivers, as well as when UM proceedings have not been litigated or resolved. Krzykalski v. Tindall, 448 N.J. Super. at 8. This follows Cockerline v. Menendez, 411 N.J. Super. 596, 617 (App. Div.), certif. den. 201 N.J. 499 (2010) in which it was held that when a plaintiff in a wrongful death action settles an uninsured motorist (UM) claim based on phantom vehicles, the known defendants are entitled to have the jury apportion any fault to those vehicles. See also Kranz v. Schuss, 447 N.J. Super. 168, 175-176 (App. Div.), certif. den. 228 N.J. 424 (2016), finding that allocation of settling New York doctors' fault as joint tortfeasors should result in a pro rata credit based on their fault in subsequent New Jersey litigation against a New Jersey doctor despite not being parties to that litigation. And see as to allocation of fault of settling defendants, Comment 10.2.3, infra, and *Mahoney,Current N.J. Personal Injury Recovery (GANN)* at Chapter 14, generally and more particularly 14:3. These follow a line of cases in which potentially liable defendants are unavailable on grounds other than a determination of non-liability. Such an approach preserves the remaining defendants' contribution rights against the dismissed defendant, which are not subject to the affidavit of merit requirement. See Comment 2.3. on R. 4:7-5 and Comment 5. on R. 4:5-8 (affidavit of merit). Allocation must be made among joint tortfeasors even if they are governed by different standards for the award of damages as, for example, if one tortfeasor is a private person liable for causing permanent injury and the other is a government employee liable only for causing substantial permanent injury. The point is that the immunity of the government employee from an award of damages if the permanent injury is not substantial does not affect his status as a joint tortfeasor if he was negligent, thereby reducing the percentage of the award the private tortfeasor must pay. Similarly, allocation should be made among co-defendants, some of whom are negligent and some of whom are strictly liable or who have committed intentional torts.

Liability, however, will not be apportioned when the duty of one tortfeasor encompasses the obligation to prevent the specific misconduct of the other tortfeasor. Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 246-247 (App. Div. 2014), aff'd as mod. on other grds. 224 N.J. 584 (2016) (no apportionment of liability to mother when defendants had assumed the duty to safeguard the passport of divorcing parents' daughter and then released the passport to the mother without notice to the father, thereby failing to prevent the specific misconduct that enabled the daughter to be removed from country)

•10.2.3. Allocation as among multiple defendants; effect of settlements on allocation.

Allocation may be made as among settling and non-settling defendants even if there are no cross-claims made by non-settling defendants against settling defendants provided the liability of the settling defendant is fairly tried on adequate notice to plaintiff. Conversely, adjudicated tortfeasors are not entitled to a reduction based on the plaintiff's settlement with a party whose liability has not been tried at trial. See also, with respect to out-of-state settling joint tortfeasor defendants, Kranz v. Schuss, 447 N.J. Super. 168, 175-176 (App. Div.), certif. den. 228 N.J. 424 (2016) (reversing trial court's holding that defendants were entitled to pro tanto credit for amount of New York settlement and holding that defendants were entitled to have any judgment reduced by amount of fault jury attributes to New York defendants)

•13. Election of Remedies.

•13.2. Statutory election requirements.

•13.2.1. Conscientious Employee Protection Act (CEPA).

Pursuit of the statutory cause of action waives only congruent common law claims for retaliatory discharge and not other claims arising out of the employment relationship. Young v. Schering Corp., 275 N.J. Super. 221 (App. Div. 1994), aff'd 141 N.J. 16 (1995). See also Royster v. NJ State Police, 227 N.J. 482, 498-500 (2017), holding that CEPA's waiver provision, which applies only to retaliatory conduct, was not a bar to defendant's LAD claim based on failure to accommodate

•15. Equitable Estoppel.

•15.2. Estoppel resulting from litigation conduct.

•15.2.1. Judicial estoppel.

Judicial estoppel is the preclusion of a party from taking a litigation position inconsistent with that purposefully taken in the same or previous litigation on which that party prevailed. See generally In re Declaratory Judgment, 446 N.J. Super. 259, 291-293 (App. Div. 2016), aff'd as mod. 227 N.J. 508 (2017)

•15.3. Estoppel against government entities.

The courts are customarily extremely reluctant to apply estoppel to governmental agencies and subdivisions. See generally Royster v. NJ State Police, 227 N.J. 482, 496 (2017); Welsh v. Bd. of Trustees, Police, 443 N.J. Super. 367, 376 (App. Div. 2016)

•19. Governmental Immunity

•19.3. Tort Claims Act, N.J.S. 59:1-1, et seq..

•19.3.1. General principles.

The New Jersey Tort Claims Act, N.J.S. 59:1-1, et seq., effective July 1, 1972, is dispositive, with respect to causes of action in tort accruing on and after its date, of the nature, extent and scope of state and local tort liability and the procedural requisites for prosecuting tort claims against governmental agencies. The Act has been described as reestablishing sovereign immunity except to the extent that liability is statutorily declared. Its intent is therefore characterized as reestablishing a system in which immunity is the rule and liability the exception. See Caicedo v. Caicedo, 439 N.J. Super. 615, 623 (App. Div. 2015); N.E. v. Dept. of Family Services, 449 N.J. Super. 379, 402 (App. Div. 2017)

•19.3.2. Scope of the Tort Claims Act.

Civil rights claims. Claims of civil rights violations under 42 U.S.C. 1983; the New Jersey Civil Rights Act of 2004, N.J.S. 10:6-2; and the Law Against Discrimination, N.J.S. 10:5-1, do not come within the ambit of the Tort Claims Act. Cf. Royster v. NJ State Police, 227 N.J. 482, 495 (2017) (State has immunity from suit under Americans with Disabilities Act (ADA))

•19.3.3. Respondeat superior; covered employees.

Specifically defined immunities, such as N.J.S. 59:5-4, may protect the public entity from liability for discretionary acts of its employees in the allocation of resources. These immunities, however, have been held not to extend to certain ministerial acts that are negligently performed. Compare Parsons v. Mullica Bd. of Educ., 226 N.J. 297, 310-312 (2016), holding that N.J.S. 59:6-4 provided a specific grant of immunity for failure to notify parents of results of student's eye examination which resulted in injuries related to delayed treatment

•19.3.4. Notice and time requirements.

And see Alberts v. Gaeckler, 446 N.J. Super. 551, 562-563 (Law Div. 2014) (tort claim notice filed on behalf of injured claimant that does not include assertion of bystander liability claim on behalf of claimant's husband does not substantially comply with the notice requirements of the Tort Claims Act for the purpose of averring the bystander liability claim)

Note that the Tort Claim Act's notice of claim requirements do not apply to actions brought under the Spill Compensation and Control Act, N.J.S. 58:10-23.11 to 23.24. NL Industries, Inc. v. State, 228 N.J. 280, 303 (2017)

g. Notice to public employees; employee immunity. The qualified immunities accorded governmental employees by N.J.S. 59:3-3 (good faith law enforcement) and N.J.S. 59:3-8 (institution and prosecution of legal proceedings) are forfeited by the employee's actual malice as defined by New York Times v. Sullivan, 376 U.S. 254 (1964). Nor does the good faith defense apply to causes of action based on such willful misconduct as false arrest and false imprisonment. See also N.E. v. Dept. of Family Services, 449 N.J. Super. 379, 404-405 (App. Div. 2017) (qualified immunity under N.J.S. 59:3-3 applies when employee actions are either objectively reasonable or rendered in good faith)

•19.4. Sovereign Immunity.

•19.4.2. State government.

Under the Eleventh Amendment the State is immune from suit for monetary damages in federal court, unless it consents or Congress has abrogated the its immunity under the Fourteenth Amendment. See also Royster v. NJ State Police, 227 N.J. 482, 493-495 (2017). The State is also immune from suit in State court when it has not provided consent. See also See also Royster v. NJ State Police, 227 N.J. at 494-495 (State's sovereign immunity extends to Americans with Disabilities Act (ADA) claims). And see NL Industries, Inc. v. State, 228 N.J. 280, 295-299 (2017), holding that the Legislature did not "clearly and unambiguously" intend to abrogate retroactively the State's immunity for activities occurring before the Spill Act's enactment

•20.3.7. Official immunity for claims under 42 U.S.C. 1983 and N.J.S. 10:6-1 to 10:6-2.

Federal law "provides a cause of action against any person who deprives an individual of federally guaranteed rights 'under color' of state law." Filarsky v. Delia, 566 U.S. 377 (2012). A person whose conduct is "fairly attributable" to a state may be sued as a state actor under 42 U.S.C. section 1983. Id. To free government actors from undue apprehension of potential civil liability for their public actions, the law has extended to them "qualified immunity," id., which protects them "'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). See also Reichle v. Howards, ___ U.S. ___, 182 L. Ed. 2d 985 (2012); Lapolla v. County of Union, 449 N.J. Super. 288, 304 (App. Div. 2017)

Courts apply a two-prong test to determine whether a police officer is entitled to qualified immunity: (1) do the facts, taken in the light most favorable to the injured party, show that the officer's conduct violated a statutory or constitutional right, and (2) was the right clearly established. Morillo v. Torres, 222 N.J. 104, 117-118 (2015); Brown v. State, 442 N.J. Super. 406, 427 (App. Div. 2015), certif. granted 225 N.J. 339 (2016). Under that test, an officer's qualified immunity from civil rights liability based on arrest or search and seizure requires probable cause or an objectively reasonable belief in probable cause. Subjective good faith is not a defense. As to the requirement that the "clearly established law" be "particularized" to the facts of the case, see White v. Pauly, ___ U.S. ___, 196 L. Ed. 2d 463 (2017) (police officer entitled to qualified immunity because he did not violate clearly established law by assuming proper procedures had been followed upon arriving late at the scene and employing deadly force)

•20. Immunities.

•20.11. Sports, recreation and entertainment immunities.

As to the limited liability and scope of immunity in respect of equine activities, see Hubner v. Spring Valley Equestrian, 203 N.J. 184, 203-204, 206-207 (2010) (broadly construing the immunity in the Equine Activities Liability Act); Stoffels v. Harmony Hill Farm, 389 N.J. Super. 207, 216-218 (App. Div. 2006). See also Kirkpatrick v. Hidden View Farm, 448 N.J. Super. 165, 167, 177-179 (App. Div. 2017) (holding that minor who did not ride or care for horses but who accompanied mother and sister on their equine activities was within immunity statute's broad definition of covered "participant")

•22. Insurance Claims.

•22.1. General principles.

The general rules for construction of insurance policies are thus based on the guiding principle that the interpretation favor the insured in order to meet his reasonable expectations. Moreover, interpretation of insurance-contract language is a question of law for the court, and review of trial court determinations is de novo in the appellate court. Andalora v. R.D. Mechanical Corp., 448 N.J. Super. 229, 235-236 (App. Div. 2017); Phibro Animal v. Nat. Union Fire, 446 N.J. Super. 419, 428 (App. Div. 2016). Accordingly, ambiguous provisions are construed liberally in favor of the insured, and exclusions and exceptions to coverage are strictly construed against the insurer. See, e.g., Rivera v. McCray, 445 N.J. Super. 315, 318-319 (App. Div. 2016)

When, however, the policy is clear as to its coverage, the insured is entitled to that coverage even if it is beyond his expectations. Stated differently, clear and unambiguous provisions will be construed according to their plain meaning whether or not coverage is thereby defeated. See Cypress Point v. Adria Towers, 226 N.J. 403, 415 (2016); Templo Fuente v. Nat. Union Fire, 224 N.J. 189, 200 (2016); Rivera v. McCray, 445 N.J. Super. 315, 319 (App. Div. 2016)

•22.2. Duty to defend and indemnify.

As to the separate principles governing the duty to defend and the duty to indemnify, see Givaudan Fragrances v. Aetna, 227 N.J. 322, 350-351 (2017)

•22.8. Specific insurance issues.

•22.8.7. Comprehensive general liability (CGL) insurance.

Comprehensive general liability (CGL) policies expose insurers to "such a wide variety of risks [that] carriers have sought to narrow the scope of their liability by confining it to 'well-defined accidents.'... Consequently, other risks, such as breach of contract, and liability for business torts, are not covered by CGL insurance." Ohio Cas. v. Island Pool & Spa, 418 N.J. Super. 162, 175 (App. Div.), certif. den. 206 N.J. 329 (2011) (upholding exclusion for "ongoing operations"). And see Cypress Point v. Adria Towers, 226 N.J. 403, 424-431 (2016) (post-construction consequential water damage caused by subcontractors' defective workmanship constituted an "occurrence" under the developer's CGL policy and was covered by the initial grant of coverage and by the subcontractor exception to the "your work" exclusion); Phibro Animal v. Nat. Union Fire, 446 N.J. Super. 419, 423, 434-436 (App. Div. 2016) (chickens' stunted growth caused by plaintiff's chicken feed additive is both "property damage" and a covered "occurrence" under CGL policy)

Non-assignment clauses are not barriers to post-loss assignments of claims. Givaudan Fragrances v. Aetna, 227 N.J. 322, 345-350 (2017). See also discussion of public policy considerations of assignment of rights at Comment 31.2.1, infra

•23. Laches.

Laches is an equitable defense available to a party who can prove both that the opposing party's delay in making the claim was unexplained, unexcused and unreasonable under the circumstances and that the party asserting laches was prejudiced thereby. See generally Harrington v. Harrington, 446 N.J. Super. 399, 411 (Ch. Div. 2016)

•26. Modification or Abandonment of Contract; Breach.

A missed payment does not constitute a total breach of an installment contract unless accompanied by an "anticipatory repudiation" indicating that future obligations would not be fulfilled. See In re Estate of Balk, 445 N.J. Super. 395, 401 (App. Div. 2016)

•27. No Fault.

•27.2. Inadmissibility of damages evidence.

If the automobile negligence action goes to trial, evidence of personal injury protection benefits paid or collectible is inadmissible. Torres v. Pabon, 225 N.J. 167, 189 (2016)

•27.3. Verbal threshold; procedure.

•27.4.1. Generally.

The original threshold for bringing a tort action was expressed in monetary terms, that is, the dollar amount of the cost of medical treatment. That standard was then replaced by a verbal threshold enumerating nine classes of qualifying injury. See N.J.S. 39:6A-8, amended effective January 1, 1989, affording insureds the option of purchasing insurance subject to that erbal threshold or no threshold at all. That statute survived constitutional challenge. The verbal threshold was reformulated by the 1998 amendment of N.J.S. 39:6A-8 by the Automobile Insurance Cost Reduction Act (AICRA). AICRA introduced the requirement of the physician's certificate and defined six categories of bodily injury, namely, those resulting in death, dismemberment, significant disfigurement or scarring, displaced fracture, loss of a fetus, or "permanent injury within a reasonable degree of medical certainty." The qualifying categories are similar to the pre-AICRA categories, but soft-tissue injuries eligible for suit have been limited to permanent injuries that have "not healed to function normally and will not heal to function normally with further medical treatment." The recurring issue following the adoption of the AICRA verbal threshold was whether or not the plaintiff was required to show not only that the injury fell into one of the six categories but also that the injury had a substantial life impact, a mandatory pre-AICRA requirement created by Oswin v. Shaw, 129 N.J. 290 (1992). The Supreme Court settled the issue in DiProspero v. Penn, 183 N.J. 477 (2005), and the companion case of Serrano v. Serrano, 183 N.J. 508 (2005), holding that substantial life impact is not an AICRA requirement. With respect,

therefore, to the former soft-tissue categories, plaintiff need only show by objective medical evidence as set forth in the physician's certificate that the injury is permanent. When the question of permanency is contested it is a fact question for the jury. Sackman v. New Jersey Mfrs. Ins., 445 N.J. Super. 278, 292 (App. Div. 2016) (shoulder injury requiring orthopedic hardware)

•27.6. Relationships and priorities between PIP and other benefit sources; subrogation, reimbursement and contribution.

•27.6.5. Actions by PIP carrier for reimbursement or contribution; subrogation.

a. Limitation period on reimbursement. As to the two-year limitation period for the claim by the PIP payer for reimbursement pursuant to N.J.S. 39:6A-9.1 from a non-PIP-covered tortfeasor, see Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 394-396 (2016). The period begins to run when the insured submits a claim form requested by the insurer. Johnson v. Roselle EZ Quick LLC, 226 N.J. at 395

b. Reimbursement rights. The amendment of N.J.S. 39:6A-9.1b by L. 2011, c. 11, provides that payment to the victim has priority of reimbursement to any other entity up to the limits of the insured tortfeasor's motor vehicle or other liability insurance policy. See Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 375, 385 (2016) (holding that the amendment applied prospectively while nevertheless noting that it was intended to reverse the outcome of Fernandez, infra)

•28. Preemption; Federal and State.

•28.1. General principles of federal preemption.

Because the laws of the United States, its treaties, and the Constitution itself are the "supreme Law of the Land", see U.S. Const. Art. VI, cl. 2, Congress may expressly or implicitly preempt, i.e., invalidate through federal legislation, a State law, rule or other State action. Field preemption recognizes Congress's intent "to foreclose any state regulation in the area," regardless of whether State law is consistent with "federal standards," whereas conflict preemption exists when "compliance with both state and federal law is impossible" or when "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Oneok, Inc. v. Learjet, Inc., ___ U.S. ___, 191 L. Ed. 2D 511, 517 (2015) (holding that state antitrust laws not preempted by the Natural Gas Act, 52 Stat. 821). And see In re Reglan Litigation, 226 N.J. 315, 328-329 (2016); Puglia v. Elk Pipeline, Inc., 226 N.J. 258, 274 (2016)

When Congress has superseded State legislation by statute, the judicial function is to "'identify the domain expressly pre-empted.'" Dan's City Used Cars, Inc. v. Pelkey, ___ U.S. ___, 185 L. Ed. 2d 909, 918 (2013), quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) and finding that a statute that supersedes state laws relating to price, route or service of motor carriers regarding transportation of property does not also pre-empt state laws regarding storage and disposal of towed vehicles. See also Puglia v. Elk Pipeline, Inc., 226 N.J. 258, 285-296 (2016) (union employee's state statutory right to bring CEPA claim based on wage-and-hour requirements not preempted by LMRA or NLRA when resolution of claim did not require interpretation of collective bargaining agreement or overlapping proofs)

•28.2. Specific federal legislative preemption.

Food, drugs and cosmetics; medical devices; hazardous substances. As to federal warning requirements, see also In re Reglan Litigation, 226 N.J. 315, 335-337 (2016), holding that because defendants failed to provide the required FDA-approved warnings for brand name drugs on their generic drug labels, plaintiffs' state law claims based on the out-of-date warnings were not preempted and state tort law could impose liability for inadequate warnings

Labor relations. As to preemption under the National Labor Relations Act and related legislation, see generally Puglia v. Elk Pipeline, Inc., 226 N.J. 258, 280-296 (2016)

•30. Promissory Estoppel.

Promissory estoppel is a viable affirmative defense. See also Cumberland Farms v. Envir. Prot., 447 N.J. Super. 423, 442 (App. Div. 2016) (rejecting promissory estoppel argument when there was no "clear and definite promise")

•31. Public Policy; Illegality.

•31.2. Particular contracts and contractual provisions.

•31.2.2. Exculpatory, limited liability and stipulated damages clauses.

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Exculpatory clauses are ordinarily voidable when they are contrary to public policy. This is particularly true when the exculpated party has a contractual, statutory or common-law duty. See also Steinberg v. Sahara Sam's Oasis, 226 N.J. 344, 359-360 (2016) (amusement park's liability waiver could not be enforced against claims of gross negligence or breach of statutory duty). And see Vitale v. Schering-Plough Corp., 447 N.J. Super. 98, 111-115 (App. Div.), certif. granted 228 N.J. 421 (2016) finding that when the common law has made clear that a special employee relationship does not exist between contractor's employer and the contractor's employee for workers' compensation purposes, employment contract waivers that preclude contractor's employees from suing employer for whom they provide services are void as against public policy

•31.2.9. Licensing requirements.

Where a statute requires licensing or registration of a business or profession as a condition of bringing suit, plaintiff's failure to have complied with the statutory requirement constitutes a defense to the action. See, e.g., Data Informatics v. Amerisource, 338 N.J. Super. 61, 80 (App. Div. 2001); Insight Global, LLC v. Collabera, 446 N.J. Super. 525, 534-536 (Law Div. 2015). And see AIT Global Inc. v. Yadav, 445 N.J. Super. 513, 519-521 (App. Div. 2016), holding that plaintiff, a properly registered temporary health service firm (THSF), could bring an action to enforce an employment agreement that imposed restrictive covenants and liquidated damages provisions on its employees. Those impositions subjected plaintiff to the provisions of the Private Employment Agency Act applicable to THSFs, but not to the Act's licensure requirements for employment agencies

•33. Res Judicata.

•33.1. General principles; applicability.

Res judicata is the preclusionary principle that bars cause or claim re-litigation. The prerequisite condition for the applicability of the doctrine is that the second litigation involves the same parties and the same claims, provided there was a fair opportunity to raise them, see Rippon v. Smigel, 449 N.J. Super. 344, 367-368 (App. Div. 2017); Delacruz v. Alfieri, 447 N.J. Super. 1, 21-24 (Law Div. 2015)

•36. Statute of Limitations.

•36.2. Discovery rule.

•36.2.1. Conditions for deferral.

The discovery rule is a rule of equity that defers a cause of action's date of accrual to the date when the plaintiff knew or was chargeable with knowing both that an injury has occurred and that the injury is the fault of another. And see, illustratively, Catena v. Raytheon Co., 447 N.J. Super. 43, 53-61 (App. Div.), certif. granted 228 N.J. 404 (2016) (claim against sellers of real property accrued when purchaser learned that sellers failed to disclose a past attempt to remediate contamination on the property, not when purchaser discovered the contamination); J.P. v. Smith, 444 N.J. Super. 507, 525-527 (App. Div.), certif. den. 226 N.J. 212 (2016) (claim accrued when plaintiff became aware that defendant's conduct was actionable as sexual abuse of a minor, not when she was emotionally capable of bringing an action)

Where the only cause-of-action information plaintiff lacks is the name of the tortfeasor, it has been held that the discovery rule does not apply to defer accrual until that information is obtained, but rather that the plaintiff must resort to the fictitious defendant practice of R. 4:26-4. As to proper compliance with the fictitious pleading rule, see Worthy v. Kennedy Health System, 446 N.J. Super. 71, 86-91 (App. Div. 2016), certif. den. 228 N.J. 24 (2017)

•36.2.3. Applicability.

As for its application in Consumer Fraud Act cases, see also Catena v. Raytheon Co., 447 N.J. Super. 43, 57-61 (App. Div.), certif. granted 228 N.J. 404 (2016) (claim accrued upon discovery that seller of real property knew of contamination on property, not when purchaser discovered the contamination)

•36.3. Statutory tolling.

•36.3.4. Minority.

As to medical malpractice actions, N.J.S. 2A:14-21 was amended in 2004, applicable to births after its effective date, to require an action for medical malpractice based on injuries sustained at birth to be brought prior to the minor's thirteenth birthday. Although other medical malpractice actions are subject to the tolling period of two years after reaching majority, they are subject to the affidavit of merit requirements of N.J.S. 2A:53A-26 to 2A:53A-29. It has been held by way of a strict construction of the affidavit of merit statute that if a minor's medical malpractice action is brought and dismissed with prejudice during minority, it is not therefore subject to revival or reinstatement. Accord, A.T. ex rel. T.T. v. Cohen, 445 N.J. Super. 300, 307-309 (App. Div. 2016)

•36.6. Contractual waiver of limitations period.

As to limitations periods that cannot be contractually shortened consistent with the public interest, see Rodriguez v. Raymours Furniture, 225 N.J. 343, 360-364 (2016) (provision in employment application reducing the LAD's 2-year limitations period to 6 months was unenforceable as against public policy)

•36.7. Specific State law claims.

Consumer Fraud Act (N.J.S. 56:8-1 to 56:8-20). Claims under the Act are governed by a six year statute of limitations. Catena v. Raytheon Co., 447 N.J. Super. 43, 52 (App. Div.), certif. granted 228 N.J. 404 (2016)

Defamation (N.J.S. 2A:14-3). With respect to the date of accrual of a defamation cause subject to the one-year limitations period, New Jersey's single publication rule applicable to mass publications and dating accrual from the first publication has been held to apply to internet postings. Churchill v. State, 378 N.J. Super. 471, 483 (App. Div. 2005). See also Petro-Lubricant Test. v. Adelman, 447 N.J. Super. 391, 398-400 (App. Div. 2016) (original and revised website posting deemed a single publication and subject to one-year limitations period commencing with the first publication)

Discrimination cases. All claims made in discrimination actions brought under the New Jersey Law Against Discrimination, N.J.S. 10:5-1 et seq., are subject to the two year statute of limitations applicable to personal injury actions even if the claims are economic in nature. Moreover, the LAD's two-year limitations period for private actions cannot be contractually shortened. Rodriguez v. Raymours Furniture, 225 N.J. 343, 360-364 (2016) (provision in employment application reducing the LAD's 2-year limitations period to 6 months was unenforceable as against public policy)

Negotiable instruments. A demand note executed and issued prior to the 1995 amendment of N.J.S. 12A:3-118(b) is subject to the six-year limitation period of N.J.S. 2A:14-1, the time running from the date of execution of the note. Under the amended statute, applicable to notes issued after June 1, 1995, the date of demand triggers the running of the limitation period. The limitation period remains six years unless there has been no demand for payment, in which case the period is ten years from the date of the last payment of principal or interest. N.J.S. 12A:3-118(b). The statute of limitations on a note payable at a definite time is six years from the due date. N.J.S. 12A:3-118(a). When the note contains several due dates, the court may apply the installment contract approach that starts a new six-year period for each due date. See In re Estate of Balk, 445 N.J. Super. 395, 400-401 (App. Div. 2016)

Product liability; sale of goods. The four-year limitation period of N.J.S. 12A:2-725 rather than the usual six-year period of N.J.S. 2A:14-1 is applicable to the sale of goods. And see Midland Funding LLC v. Thiel, 446 N.J. Super. 537, 543, 547-548 (App. Div. 2016) (four-year limitations period applies to claims arising from a retail customer's use of a store-issued credit card when the use is restricted to making purchases from the issuing retailer)

Wrongful death and survivorship. The statute of limitations for a wrongful-death action is two years from the decedent's date of death. N.J.S. 2A:31-3. The triggering act is the death, not any injury that may have preceded the death. By amendment of N.J.S. 2A:31-3, the statute of limitations also does not apply if the death resulted from murder, aggravated manslaughter or manslaughter for which the defendant was convicted, found not guilty by reason of insanity or adjudicated delinquent. To be concordant with N.J.S. 2A:31-3, the 2009 amendments to the Survivor Act, N.J.S. 2A:15-3, eliminated the statute of limitations provision for murder, manslaughter and aggravated manslaughter and provided that all other actions "brought under this chapter shall be commenced within two years after the death of the decedent." See L. 2009 C. 266 §1. Note that the amendment has not been interpreted to create a new two-year statute of limitations that begins upon death for

all Survivor Act claims. Warren v. Muenzen, 448 N.J. Super. 52, 64-69 (App. Div. 2016), holding that claims brought under the Survivor Act, not themselves dependent upon death, are not extended by virtue of the amendment just because the decedent died within the limitations period

•39. Unconscionable Contract.

Contract clauses invalidated because of their unconscionability are generally also voidable as a matter of public policy; that is, they generally result from contracts of adhesion where the imposed-upon party has little or no bargaining power. All contracts of adhesion are not, however, unconscionable. Although not automatically voidable, contracts of adhesion are subject to a sharpened scrutiny. Thus, the court, in determining unreasonable burden, overreaching, and patent unfairness, the hallmarks of unconscionability, must consider the subject matter of the contract, the relative bargaining position of the parties, the degree of economic compulsion motivating the compelled party, and the public interests affected. Rodriguez v. Raymours Furniture, 225 N.J. 343, 366-367 (2016). And see Rodriguez v. Raymours Furniture, 225 N.J. 343, 366-367 (2016), distinguishing between procedural unconscionability, that is, unfairness in formation of the contract, and substantive unconscionability, that is, excessively disproportionate terms.

See also Rodriguez v. Raymours Furniture, 225 N.J. 343, 366-367 (2016), noting that had the Court found an unconscionability analysis appropriate for the contractually-shortened LAD limitations period in the employment contract, it would have similarly found the provision unenforceable based on anti-discrimination concerns

•41. Waiver.

Waiver is the intentional relinquishment of a known right. Waivers of rights accorded by remedial social legislation are disfavored as violating public policy. Nevertheless, an agreement to arbitrate a discrimination claim, waiving the right to a civil action may be enforceable if the waiver of the right to maintain the civil action is explicit and unambiguous. As to the waiver of the right to appeal and of the right to jury trial in the election of arbitration as a dispute resolution mechanism, see Mt. Hope Dev. Assoc. v. Mt. Hope Waterpower, 154 N.J. 141, 148-149 (1998), construing the Alternative Procedure for Dispute Resolution Act, N.J.S. 2A:23A-1 et seq., and holding that because parties are clearly informed by the Act that invocation of its procedures involves these waivers, and because the election to proceed under the Act is voluntary, the waivers do not violate the rights of the parties. But see CURE v. Orthopedic Specialists, 445 N.J. Super. 371, 375-376 (App. Div. 2016), permitting limited review of trial court's dismissal of a summary action on timeliness grounds when there were unsettled questions of statutory construction

•42. Workers' Compensation Exclusivity.

•42.2. Definition of employee.

When the common law has made clear that a special employee relationship does not exist between contractor's employer and the contractor's employee for workers' compensation purposes, employment contract waivers that preclude contractor's employees from suing employer for whom they provide services are void as against public policy. Vitale v. Schering-Plough Corp., 447 N.J. Super. 98, 111-115 (App. Div.), certif. granted 228 N.J. 421 (2016) (employee of security service may sue the security service's employer despite contract clause)

•42.7. Relationship of workers' compensation to other benefit programs.

•42.7.2. Personal injury protection benefits (PIP).

As to the relationship between PIP and workers' compensation benefits, see Olivero by Lambert v. Travelers Indem. Co., 447 N.J. Super. 61, 73-77 (App. Div. 2016)

•42.8. Workers' compensation lien against tort recovery.

And see Talmadge v. Burn, 446 N.J. Super. 413, 417- 419 (App. Div. 2016), holding that workers' compensation lien, including medical benefits, must be satisfied by recovery from third-party tortfeasor. As to recovery of medical expenses when a worker is injured in an automobile accident, see Lambert v. Travelers Indem. Co., 447 N.J. Super. 61, 75-77 (App. Div. 2016) (injured worker may recover medical expenses from third-party tortfeasor; workers' compensation insurer entitled to reimbursement from worker for medical expenses already paid). See also Talmadge v. Burn, 446 N.J. Super. 413, 417-419 (App. Div. 2016)

The basic elements of legal fraud are a knowing falsehood or misrepresentation made with the intention that the other person relies thereon and that person's reliance and consequent damage. See generally Catena v. Raytheon Co., 447 N.J. Super. 43, 55 (App. Div.), certif. granted 228 N.J. 404 (2016)

An arms-length transfer for fair market value is not a fraudulent transfer under the Uniform Fraudulent Transfer Act (UFTA), N.J.S. 25:2-25. A transfer may be considered fraudulent under the UFTA if the debtor fails to receive "reasonably equivalent value." See Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 326-327, 329-333 (2017) (receipt of equivalent value by other corporations owned by sole shareholder of debtor not sufficient)

As to violations of the Insurance Fraud Prevention Act (IFPA), N.J.S. 17:33A-1 et seq., see generally Allstate Ins. v. Northfield Med., 228 N.J. 596, 624-627 (2017)

Liability under the IFPA requires proof that the defendant (1) presented a written or oral statement; (2) knew that the statement contained false or misleading information that was material to a claim for payment or other benefit; and (3) plaintiff was damaged as the result of a violation. Allstate Ins. v. Northfield Med., 228 N.J. 596, 614 (2017)

As to the "knowing" standard required for a violation of the IFPA, see Allstate Ins. v. Northfield Med., 228 N.J. at 619-620, holding that the trial court correctly applied a plain-language understanding of "knowing," rather than importing aspects of a "knowing" mens rea from the Criminal Code

The standard of proof under the statute is a preponderance, rather than the clear and convincing standard ordinarily applicable to fraud causes. Allstate Ins. v. Northfield Med., 228 N.J. 596, 615 (2017)

While not strictly an issue of special-matter pleading, note must be taken of the Affidavit of Merit Act, N.J.S. 2A:53A-26 to 2A:53A-29, one of the package of so-called tort reform bills adopted in 1995, which imposes on a plaintiff in a professional malpractice case the obligation of serving on the defendant, within 60 days after the answer is filed, an affidavit of an expert attesting that the defendant's performance was below the standards of the profession. The evident purpose of the affidavit of merit statute is the weeding out of frivolous professional malpractice claims. Meehan v. Antonellis, 226 N.J. 216, 228 (2016); ; McCormick v. State, 446 N.J. Super. 603, 610 (App. Div. 2016); Castello v. Wohler, 446 N.J. Super. 1 (App. Div. 2016); A.T. Ex rel. T.T. v. Cohen, 445 N.J. Super. 300, 308 (App. Div. 2016)

The construction and applicability of the Act were initially addressed by Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218 (1998), which held that failure to comply with the Act requires dismissal of the action with prejudice and stated in dictum that the statute was not constitutionally defective as an invalid intrusion into exclusively judicial power. See also A.T. ex rel. T.T. v. Cohen, 445 N.J. Super. 300, 305-306 (App. Div. 2016)

•5.2. Applicability.

As to the applicability of the affidavit of merit statute to causes of action other than or joined with professional malpractice, it is made clear by Couri v. Gardner, 173 N.J. 328, 340 (2002), abrogating Darwin v. Gooberman, 339 N.J. Super. 467 (App. Div.), certif. den. 169 N.J. 609 (2001), that the determinant is not the style in which the cause has been pleaded but whether the underlying facts supporting the cause of action allege deviation from professional standards. See also, so holding, Mortgage Grader v. Ward & Olivo, 225 N.J. 423, 443 (2016). Accordingly, simply pleading the cause as a breach of contract will not avoid the affidavit requirement if the breach is based on asserted deviation. The same rationale applies when a suit does not name professionals as defendants but alleges vicarious liability based on the underlying conduct of professionals. See McCormick v. State, 446 N.J. Super. 603, 613 (App. Div. 2016) (affidavit of merit required in suit against public entity alleging agency liability for negligent medical treatment by prison staff). And see Perez v. Zagami, LLC, 443 N.J. Super. 359, 364-366 (App. Div. 2016) (affidavit of merit not required in malicious use of process claim alleging an intentional tort)

•5.3.Timing.

Since the initial 60-day period runs from the date of the defendant's answer, it runs separately for each defendant. See Kubiak v. Robert Wood Johnson Hosp., 332 N.J. Super. 230 (App. Div. 2000), also holding that the statutory time period is not tolled in the case of a minor plaintiff. Accord, A.T. ex rel. T.T. v. Cohen, 445 N.J. Super. 300, 308-309 (App. Div. 2016)

•5.5. Dismissal with prejudice.

•5.5.1. Generally.

Ordinarily the dismissal of the action for failure of timely compliance with the affidavit of merit requirement is required by the statute to be with prejudice. See, e.g., A.T. ex rel. T.T. v. Cohen, 445 N.J. Super. 300, 306 (App. Div. 2016); Mortgage Grader v. Ward & Olivo, 438 N.J. Super. 202, 215 (App. Div. 2014), aff'd on other grds. 225 N.J. 423 (2016)

•5.5.2. Statutory exceptions.

a. Extraordinary circumstances. The statute permits a dismissal without prejudice if there are extraordinary circumstances making timely compliance impossible or impractical. One court avoided dismissing a case with prejudice when faced with a defective affidavit of merit by relying on the rules governing discovery under R. 4:24-1. In Castello v. Wohler, 446 N.J. Super. 1, 24-27 (App. Div. 2016), the court extended discovery to allow the plaintiff to retain a new expert and refile the AOM after concluding that plaintiffs' failure to detect inaccuracies in their expert's credentials satisfied the "exceptional circumstances" standard of R. 4:24-1 while also concluding that the plaintiff did not satisfy the "extraordinary circumstances" standard of the AOM Act. Compare A.T. ex rel. T.T. v. Cohen, 445 N.J. Super. 300, 307 (App. Div. 2016), rejecting the plaintiff's attempt to avoid the "finality of the AOM statute" by seeking a voluntary dismissal without prejudice under R. 4:37-1(b)

b. Waiver of specialty requirement. By 2004 amendment, N.J.S. 2A:53A-41c excuses the affidavit of merit requirement that the expert possess specialist qualifications so long as certain conditions are met. For a discussion and application of those conditions, see Ryan v. Renny, 203 N.J. 37, 50-61 (2010). See also Castello v. Wohler, 446 N.J. Super. 1, 18-19 (App. Div. 2016)

•5.5.3. Equitable exceptions.

When the law is unsettled as to the need to file an affidavit of merit, equitable considerations may warrant denial of a motion to dismiss. And see McCormick v. State, 446 N.J. Super. 603, 617-618 (App. Div. 2016), remanding for consideration of whether the attorney strategically failed to file an affidavit of merit and to determine the appropriate sanction given the unsettled law

•5.5.4. Special case management conference.

To remind parties of their obligations under the affidavit of merit statute, the Supreme Court has mandated a special case management conference in professional malpractice cases to be held within 90 days after filing of the answer. See also Castello v. Wohler, 446 N.J. Super. 1, 21 (App. Div. 2016). As to the importance of an effective Ferreira conference, see Meehan v. Antonellis, 226 N.J. 216, 240-241 (2016). And see McCormick v. State, 446 N.J. Super. 603, 616-619 (App. Div. 2016), remanding to determine whether the case should be dismissed with prejudice when the record was inadequate to determine whether the lack of a Ferreira conference was inconsequential

•5.6. Technical requirements.

With respect to the statutory requirement of N.J.S. 2A:53A-27 that the affiant must have expertise "in the general area or specialty involved in the action," see Meehan v. Antonellis, 226 N.J. 216, 238-239 (2016) (licensed dentist with expertise in sleep apnea, the subject of the action, satisfied requirements in action against orthodontist). Note that an affidavit of merit in a dental malpractice action need not comply with the enhanced credential standards of section 41. Meehan v. Antonellis, 226 N.J. 216, 232-238 (2016).

Although the plain language of N.J.S. 2A:53A-41(a) requires the testifying expert to have been practicing (or teaching at an accredited institution) at the time of the alleged malpractice, the same language is not used for physicians deemed to be specialists. Nevertheless, courts have interpreted the statute to require the same. See Castello v. Wohler, 446 N.J. Super. 1, 16-17 (App. Div. 2016) (affirming exclusion of retired expert physician); Medina v. Pitta, 442 N.J. Super. 1, 15-18 (App. Div.), certif. den. 223 N.J. 555 (2015) (expert physician who was retired as of time of alleged malpractice not qualified under Patients First Act to testify against specialists or board certified physicians)

•RULE 4:6. DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON PLEADINGS

•4:6-2. How Presented

•COMMENT

•2. Lack of Subject Matter Jurisdiction; 4:6-2(a).

•2.1. A non-waivable defense.

Since lack of subject matter jurisdiction is a non-waivable defense, see R. 4:6-7, it may be raised at any time, even on appeal. See also Lall v. Shivani, 448 N.J. Super. 38, 48 (App. Div. 2016). Jurisdiction cannot be conferred on the court by agreement of the parties. Nor can it be conferred by the parties' waiver. See also Royster v. New Jersey State Pol., 439 N.J. Super. 554, 568 (App. Div. 2015), aff'd as mod. 227 N.J. 482 (2017)

•2.2. Exclusivity of federal jurisdiction; interstate compacts.

•2.2.4. Interstate compacts.

The state court cannot unilaterally exercise jurisdiction over a bi-state agency against which discrimination is claimed. But the bi-state agency properly may consent to jurisdiction under the terms of the compact. In addition to consent, jurisdiction may be established if both states have passed complementary or parallel legislation.

As to cases involving the Port Authority of New York and New Jersey, see Sullivan v. Port Auth. of NY and NJ, 449 N.J. Super. 276, 284-288 (App. Div. 2017) (CEPA not similar enough to NY whistleblower law to constitute complementary legislation required for jurisdiction)

•4. Failure to State a Claim; 4:6-2(e).

•4.1. General principles.

•4.1.2. Summary judgment distinguished.

The primary distinction between a motion under R. 4:6-2(e) and R. 4:46 is that the former is based on the pleadings themselves. The rule expressly provides that if any material outside the pleadings is relied on on a 4:6-2(e) motion, it is automatically converted into a summary judgment motion. See, e.g., Tisby v. Camden County Corr. Fac., 448 N.J. Super. 241, 247 (App. Div. 2017)

•4.2. Specific causes of action.

•4.2.2. CEPA; other employment actions.

a. CEPA. As to the element of adverse employment action, clearly reduction in salary and loss of other employment benefits constitute adverse action. Likewise, failure to promote may constitute an adverse employment action. Royster v. New Jersey State Pol., 439 N.J. Super. 554, 575 (App. Div. 2015), aff'd as mod. 227 N.J. 482 (2017)

A CEPA action does not lie against the Delaware River Port Authority, a bi-state agency. Nor does it lie against the Port Authority of New York and New Jersey. Sullivan v. Port Auth. of NY and NJ, 449 N.J. Super. 276, 288 (App. Div. 2017)

As to federal preemption of CEPA claims, see Puglia v. Elk Pipeline, Inc., 226 N.J. 258, 280-296 (2016) (federal labor laws did not preempt CEPA claim when proofs did not overlap and interpretation of collective bargaining agreement was not required)

d. Private Employment Agency Act. As to the pleading requirements imposed by the Private Employment Agency Act, N.J.S. 34:8-43 et seq., with respect to actions to collect fees for activities regulated by the statute, see AIT Global Inc. v. Yadav, 445 N.J. Super. 513, 519-521 (App. Div. 2016), holding that temporary health service firms (THSFs) that include restrictive covenants and liquidated damages provisions in their employment agreements are subject to the Act's provisions applicable to THSFs, but not to its licensure requirements for employment agencies

•4.2.3. Discrimination claims.

a. Employment discrimination. The general provisions of New Jersey's Law Against Discrimination, N.J.S. 10:5-1 to 10:5-42 (LAD), are liberally construed and applied, whereas its exceptions are strictly construed, with doubts resolved in favor of application of the general provision. Nini v. Mercer County Community College, 202 N.J. 98, 109 (2010). See also , noting the LAD's broad remedial purpose and application, Smith v. Millville Rescue Squad, 225 N.J. 373, 390 (2016)

Ordinarily, in employment discrimination claims under the LAD, the New Jersey courts follow the four-prong test of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), namely, whether plaintiff is a member of the protected class, is qualified for the position, has suffered an adverse employment consequence, and the circumstances give rise to an inference of discrimination. This test applies when the plaintiff relies on circumstantial evidence of discrimination. Smith v. Millville Rescue Squad, 225 N.J. 373, 395 (2016)

If the plaintiff has proved a prima facie case, the burden of production shifts to the defendant to come forward with proof that the adverse employment action was motivated by legitimate reasons. The burden then shifts back to the plaintiff to show that the alleged legitimate reasons are pretextual. See, e.g., Tisby v. Camden County Corr. Fac., 448 N.J. Super. 241, 248-250 (App. Div. 2017)

As to employment discrimination claims under the LAD in which there is direct evidence of discrimination, New Jersey courts apply the burden shifting framework found under Price Waterhouse v. Hopkins 490 U.S. 228 (1989). A.D.P. v. ExxonMobil Research, 428 N.J. Super. 518, 533 (App. Div. 2012). Unlike the McDonnell Douglas test, which only shifts the burden of production, the Price Waterhouse test shifts the burden of persuasion to the defendant to prove that even if the illegal bias were not a factor, the employment decision would have occurred. See also Smith v. Millville Rescue Squad, 225 N.J. 373, 394-395 (2016)

As to disability discrimination in the workplace, the proscription against disability discrimination in the workplace imports the reasonable accommodation requirement of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101, et seq. See Royster v. NJ State Police, 227 N.J. 482, 499 (2017)

As to discrimination based on marital status, see Smith v. Millville Rescue Squad, 225 N.J. 373, 392 (2016) (marital status protection under LAD extends to claims that persons are being discriminated against for getting a divorce)

As to discrimination based on religion, see Tisby v. Camden County Corr. Fac., 448 N.J. Super. 241, 248-250 (App. Div. 2017), finding the defendant correctional facility had legitimate, non-discriminatory reasons to deny plaintiff an accommodation allowing her to wear a religious head covering when the accommodation would cause undue hardship because of the safety risks, the ability to hide contraband, and the necessity of uniform neutrality

d. Retaliation. As to retaliation claims under N.J.S. 10:5-12d of the LAD, see Carmona v. Resorts Intern. Hotel, 189 N.J. 354, 373-375 (2007), following federal law and holding that the plaintiff's complaint of discrimination which allegedly provoked the retaliation must have been made reasonably and in good faith and must be neither frivolous nor unfounded. For retaliation claims under the LAD, employee plaintiffs must show that they engaged in a protected activity known to their employer, they were subjected to an adverse employment decision, and there was a causal link between the protected activity and the adverse employment action. A plaintiff does not need to be a member of the protected class or to establish that there was actual discrimination against someone in the protected class. Battaglia v. United Parcel Serv., 214 N.J. 518, 547-551 (2013), finding that a male employee's complaint made in good faith about

language and actions believed to be discriminatory against women constitutes protected activity. See also Prager v. Joyce Honda, Inc., 447 N.J. Super. 124, 139-140 (App. Div. 2016)

g. Damages. As to compensatory damages generally, the case law distinguishes between allowed back pay and disallowed front pay. As to emotional distress damages, see Comment 4.2.9 infra. Moreover, unlike tort claims against public entities, LAD awards of compensatory damages against such entities are entitled to prejudgment interest pursuant to R. 4:42-11(b). Recoveries under the LAD are also not subject to collateral source rules. Acevedo v. Flightsafety Intern., 449 N.J. Super. 185, 189-190 (App. Div. 2017)

•4.2.4. Federal and State Civil Rights Acts.

As to claims brought under the New Jersey Civil Rights Act, see Lapolla v. County of Union, 449 N.J. Super. 288, 300-303, 307 (App. Div. 2017) (rejecting claims for political affiliation discrimination and retaliation for filing suit)

•4.2.5Contract claims - miscellaneous.

See Berg v. Christie, 225 N.J. 245, 272, 280 (2016) (no contractual right under non-forfeitable-right statute to continued cost-of-living adjustment of public pension benefits); EnviroFinance v. Env. Barrier, 440 N.J. Super. 325, 345 (App. Div. 2015) (elements of breach of contract claim)

As to claims based on the implied covenant of good faith and fair dealing, see Cumberland Farms v. Envir. Prot., 447 N.J. Super. 423, 443 (App. Div. 2016)

•4.2.7. Intentional torts.

The required publication of slander to a third person is not made by uttering the slander to an agent of the slandered principal. 30 River Court v. Capograsso, 383 N.J. Super. at 477-479. See also Senisch v. Carlino, 423 N.J. Super. 269, 277 (App. Div. 2011), certif. den. 211 N.J. 608 (2012)

See also Petro-Lubricant Test. v. Adelman, 447 N.J. Super. 391, 398-400 (App. Div. 2016) (original and revised website posting deemed a single publication and subject to one-year limitations period commencing with the first publication)

•4.2.8. Negligence.

The four elements of proof for a negligence cause of action are duty of care, breach of that duty, causation, and damages. As to gross negligence, and the failure to exercise "slight" care, see Steinberg v. Sahara Sam's Oasis, 226 N.J. 344, 363-365 (2016), holding that the tort of gross negligence requires a higher degree of negligence but not willful conduct

a. General principles. *Duty of care.* The issue of whether a defendant owes a duty of care to the plaintiff is a question of law to be decided by the court, which must determine, as a matter of fairness and policy, whether there exists, in the particular circumstances, a duty to exercise reasonable care to avoid the foreseeable risk of injury to another. See Schwartz v. Accuratus Corp., 225 N.J. 517, 528-529 (2016)

Business entity. Wolens v. Morgan Stanley, 449 N.J. Super. 1, 11 (App. Div. 2017) (investment company managing assets of mother did not owe duty of care to daughter)

Environmental contamination. Schwartz v. Accuratus Corp., 225 N.J. 517, 529-530 (2016) (acknowledging that under certain circumstances the reach of Olivo's [Olivo v. Owens-Illinois, Inc., 186 N.J. 394 (2006)], infra, duty of care may extend to persons other than the spouse of a worker exposed to a toxic substance)

b. Statutory or regulatory standard of conduct. As to statutes and regulations held not to create a private cause of action, see Steinberg v. Sahara Sam's Oasis, 226 N.J. 344, 360-361 (2016) (Carnival-Amusement Rides Safety Act, N.J.S. 5:3-31 to 5:3-59 does not, standing alone, give rise to a private cause of action)

Even if a statute, regulation or ordinance does not support a civil cause of action, its prescribed standard of conduct may be regarded as evidence of breach of duty if plaintiff was a member of the class for whose benefit the standard was established. See Steinberg v. Sahara Sam's Oasis, 226 N.J. 344, 361-363 (2016)

Violation of a traffic statute may be evidential of negligence. But see Torres v. Pabon, 225 N.J. 167, 187 (2016) (following too closely in violation of statute is negligence per se)

d. Premises liability. Premises liability principles dependent on the classification of the plaintiff as a business invitee, licensee or trespasser applies only to owners of non-commercial property, the conduct of other owners, occupiers, and possessors to be determined by ordinary negligence principles. See also, so holding, Schwartz v. Accuratus Corp., 225 N.J. 517, 527-530 (2016) and Olivo v. Owens-Illinois, Inc., 186 N.J. 394, 404 (2006)(applying ordinary negligence principles to determine duty of care with respect to off-premises contact with contamination)

•4.2.9. Emotional distress.

Emotional distress damages flowing from proscribed discrimination need not be severe or permanent. Emotional distress damages may be awarded in discrimination cases for humiliation, embarrassment and indignity. See also Cuevas v. Wentworth Group, 226 N.J. 480, 511 (2016)

As to negligently inflicted emotional distress, that tort requires a showing of defendant's breach of a duty owed plaintiff. See, e.g., Zelnick v. Morristown-Beard, 445 N.J. Super. 250, 266-267 (Law Div. 2015), stating that a private high school owed a student, but not her parents, the duty of care to prevent or stop the student's abuse by a teacher

•4.2.13. Corporate and private association governance.

As to the right of members of a private association to fair expulsion procedures and compliance with the organization's rules, see Cipriani Builders, Inc. v. Madden, 389 N.J. Super. 154, 164-171 (App. Div. 2006). And see Davidovich v. Israel Ice Skating, 446 N.J. Super. 127, 153-156 (App. Div. 2016), stating that private associations do not have unfettered discretion with respect to membership decisions and that judicial intervention, after exhaustion of remedies, may be warranted

•4:6-3. Required Motions; Preliminary Hearings

•COMMENT

•1. Personal Jurisdiction Defenses.

Clearly, the personal jurisdiction defenses must be resolved before trial except in the rare case in which the jurisdictional facts and the meritorious facts are so intertwined as to justify the court's order of deferral of the jurisdictional dispute until trial. Moreover, if necessary to a fair disposition of the pretrial motion, discovery must be permitted and a pretrial evidentiary hearing held if necessary. See also In re Estate of Byung-Tae Oh, 445 N.J. Super. 402, 406-407 (App. Div. 2016) (noting that had lack of jurisdiction been properly raised below, resolution of that question would have required a determination on the merits)

•RULE 4:7. COUNTERCLAIM AND CROSS-CLAIM

•4:7-1. Mandatory or Permissive Counterclaims

•COMMENT

•2. Mandatory Counterclaim.

•2.1. Entire controversy doctrine.

The entire controversy doctrine applies to germane counterclaims in mortgage foreclosure actions even where the counterclaim asserts a cause of action otherwise triable at law. Delacruz v. Alfieri, 447 N.J. Super. 1, 12-21 (Law Div. 2015)

•4:7-5. Cross-Claim Against Co-Party; Claim for Contribution or Claim for Indemnity

•COMMENT

•2. Pleading Requirements; Time.

•2.2. Cross-claims by non-settling defendants.

Although ordinarily a defendant wishing to preserve a cross-claim for contribution against other defendants must file and serve the appropriate pleading, the 1992 amendment of paragraph (c) of this rule, codifying the holding of Young v. Latta, 123 N.J. 584 (1991), created an exception to the general rule. If the proofs so justify, the jury may be asked to allocate fault

between the settling and the non-settling defendant, and the non-settling defendant will be responsible for only his allocated percentage of the verdict even if he did not assert a cross-claim for contribution and even if the total of the amount of the settlement and the non-settling defendant's percentage of the verdict is less than the full verdict. See also Kranz v. Schuss, 447 N.J. Super. 168, 178, 181-182 (App. Div.), certif. den. 228 N.J. 424 (2016) (in a subsequent New Jersey action, allowing pro rata apportionment of fault and liability under Young of settling New York joint tortfeasor defendants notwithstanding that they "were never parties to this suit, nor could they have been, because it is undisputed that New Jersey lacked personal jurisdiction over them")

- RULE 4:9. AMENDED AND SUPPLEMENTAL PLEADINGS
  - 4:9-3. When Amendments Relate Back
    - COMMENT
      - 2. Amendment Raising New Claims.

As to specific claims not permitted to relate back, see Alberts v. Gaeckler, 446 N.J. Super. 551, 569 (Law Div. 2014) (husband's bystander liability claim for negligent infliction of emotional distress is not derivative of his wife's personal injury claim and thus does not relate back to the filing of his wife's original complaint)

[CHAPTER III. PRETRIAL DISCOVERY; PRETRIAL CONFERENCE PROCEDURE]

- RULE 4:10. PRETRIAL DISCOVERY
  - 4:10-2. Scope of Discovery; Treating Physician
    - COMMENT
      - 1. Paragraph (a); Purpose and Relevance; Generally.

The general standard of discoverability as prescribed by paragraph (a) is relevance. The relevance standard of paragraph (a) does not, of course, refer only to matters which would necessarily be admissible in evidence but includes information reasonably calculated to lead to admissible evidence respecting the cause of action or its defense. See e.g. Capital Health System v. Horizon, 446 N.J. Super. 96, 114 (App. Div. 2016), leave to appeal granted 228 N.J. 516 (2017)

      - 2. Paragraph (a); Privilege.
        - 2.2. Particular privileges.
          - 2.2.11. Self-critical analysis.

The Patient Safety Act, N.J.S. 26:2H-12.23-12.25 (PSA), provides a safe harbor for self-critical analysis, establishing an absolute privilege for documents submitted pursuant to the PSA's mandatory and voluntary disclosure provisions. See Conn v. Rebustillo, 445 N.J. Super. 349, 355-357 (App. Div. 2016) (absolute privilege applies to all documents submitted to the Dept. of Health pursuant to PSA). If the self-critical analysis is conducted according to proper safety plan procedures, it is protected, regardless of compliance with reporting obligations. Brugaletta v. Garcia, 448 N.J. Super. 404, 413-414, 417 (App. Div. 2017)

      - 9. Special Discoverability Problems.
        - 9.3. Discovery from public bodies; right to know.
          - 9.3.1. Access to government records.

Generally. Discovery of the records of public entities may be obtained either under the common-law right to know or the current statute, the Open Public Records Act (OPRA), N.J.S. 47:1A-1 et seq, which replaced the former Right to Know Law. OPRA has been described as reflecting the State's "commitment to openness and transparency in governmental actions and activities." See also Paff v. Prosecutor's Office, 446 N.J. Super. 163, 177, 181 (App. Div.), certif. den. 228 N.J. 403 (2016)

OPRA. OPRA provides a statutory framework for public access to government records as well as exemptions from disclosure. Under OPRA, records may be exempt from disclosure by statute or other legislative action, regulation, executive order, court rule or federal law, regulation or order. See North Jersey Media v. Bergen Cty. Pros., 447 N.J. Super. 182, 201-203 (App. Div. 2016)

A request under OPRA is required to be in writing. The statute accords the custodian of records the option of determining the method or methods by which the written request is to be delivered or transmitted, but the option chosen must be reasonable. Failure to use the official request form prescribed by the custodian will not defeat the request if the requester has submitted a writing containing all the information required by the official form. The statute also requires the request to be specific. It may not simply demand all records requested by another party, particularly when that party is another public agency entitled to confidentiality; the documents requested must be identified or identifiable since it is not the custodian's obligation to research, analyze and collate data generally requested. Nor need a public agency honor a blanket demand for documents or, obviously, a demand for documents that do not exist or are not in its possession. A request that is not sufficiently specific will excuse the public body from compliance with the seven-day statutory period. A request for settlement agreements and releases without specifying the particular matters, however, is sufficiently specific. See also Scheeler v. Office of Governor, 448 N.J. Super. 333, 343-349 (App. Div. 2017) (request for all third-party OPRA requests received by an entity within specific time frame is sufficiently specific)

Certain documents are exempt from disclosure under OPRA. For example, an exemption exists for information received or maintained by law enforcement agencies regarding a person who has not been arrested or charged with an offense. North Jersey Media v. Bergen Cty. Pros., 447 N.J. Super. 182, 203 (App. Div. 2016). Other law enforcement documents exempt from disclosure include a "criminal investigatory record," defined as a document that "pertains to" a criminal investigation or civil enforcement proceeding that is not "required by law" to be made, maintained or kept on file. See Paff v. Prosecutor's Office, 446 N.J. Super. 163, 179-180 (App. Div.), certif. den. 228 N.J. 403 (2016); North Jersey Media v. Lyndhurst, 441 N.J. Super. 70, 90-91 (App. Div.), leave to appeal granted 223 N.J. 553 (2015). The Appellate Division is split with respect to the specific documents falling under the "required by law" standard. Compare North Jersey Media v. Lyndhurst, 441 N.J. Super. at 102-103, finding that an Attorney General directive that Use of Force Reports be kept by local police departments and transmitted to the Attorney General does not satisfy the "required by law" standard, with Paff v. Prosecutor's Office, 446 N.J. Super. at 184-188, holding that such Use of Force Reports are "required by law" under the directive, thus subjecting them to disclosure under OPRA.

See also, Paff v. Prosecutor's Office, 446 N.J. Super. at 187-188, in which the prosecutor's office failed to carry its burden of proof with respect to whether the mobile video recorder (MVR) recordings pertained to a criminal investigation. Because the activation of MVRs was automatic when the patrol vehicle switched on its overheard lights, the Paff court could not conclude that the officers were investigating anything at the time the lights were activated

As to access to 911 tapes, see North Jersey Media v. Lyndhurst, 441 N.J. Super. 70, 104, 107 (App. Div.), leave to appeal granted 223 N.J. 553 (2015) (911 recordings created before a criminal investigation begins are not exempt; they do not "pertain to" an investigation and are "required by law" to be maintained). Cf. Paff v. Prosecutor's Office, 446 N.J. Super. at 189 (MVRs preceded investigation and are therefore not exempt under "investigation in progress" exception)

As to the exemption of materials which, if disclosed, would jeopardize security or create a safety risk under N.J.S. 47:1A-1.1, see Gilleran v. Tp. of Bloomfield, 227 N.J. 159, 173-176 (2016), holding that, although the statutory exclusions do not provide a blanket OPRA exemption for security-camera recordings, they permit a categorical exception if access to the videotaped product of the surveillance medium itself would reveal security-compromising information. In the instant case, the Court found that wholesale release of surveillance videotape would reveal security-compromising information, explaining that "[r]equests for videotape product from surveillance cameras protecting public facilities are better analyzed under the common law right of access where the asserted need for access can be weighed against the needs of governmental confidentiality." Id. At 176-177

The balancing test between considerations of public access and considerations of privacy mandated by OPRA requires redaction of social security numbers from an inordinately large batch of requested recorded property documents. The privacy clause does not, however, shield relief payment records. Nor does it require shielding mobile video recordings in police vehicles. Paff v. Prosecutor's Office, 446 N.J. Super. 163, 192-193 (App. Div.), certif. den. 228 N.J. 403 (2016)

Access to records, however, is conditioned on a balancing between the claimant's legitimate interest and government's need for confidentiality. And see Gilleran v. Tp. of Bloomfield, 227 N.J. 159, 176-177 (2016); North Jersey Media v. Bergen Cty. Pros., 447 N.J. Super. 182, 209-212 (App. Div. 2016)

- 4:10-3. Protective Orders
  - COMMENT
    - 3. Grounds for Seeking Protective Order.
      - 3.4. Trade secrets.

As to the required in camera hearing respecting a claim of trade secret made in support of an application by a non-party to quash a discovery subpoena duces tecum, see Trump's Castle Assoc. v. Tallone, 275 N.J. Super. 159 (App. Div. 1994)

As to trade secrets generally, see Capital Health System v. Horizon, 446 N.J. Super. 96, 117-118 (App. Div. 2016), leave to appeal granted 228 N.J. 516 (2017)

- RULE 4:19. PHYSICAL AND MENTAL EXAMINATION OF PERSONS
  - COMMENT
    - 1. General Principles.

Noncompliance by the party to be examined is subject to the two-step dismissal procedure of R. 4:23-5(a), and the burden of seeking relief from the court is placed on the noncomplying party. Nevertheless, this rule, like R. 4:18-1 and R. 4:23-5, specifically permits the aggrieved party, in lieu of moving for immediate dismissal sanction under R. 4:23-5(a), to seek an order to compel the defaulting party to comply with the discovery request. The defaulting party's noncompliance with such an order does not, however, warrant immediate dismissal with prejudice. Rather, he must be given the opportunity, on his request, to have the examination rescheduled. And see McInroy v. Village Supermarket, 448 N.J. Super. 616, 621-623 (Law Div. 2016), when the defaulting party incurred a $375 missed appointment fee, it was within the court's discretion to impose a sanction against her in that amount

- RULE 4:21A. ARBITRATION OF CERTAIN CIVIL ACTIONS
  - 4:21A-2. Qualification, Selection, Assignment and Compensation of Arbitrators

(a) By Stipulation. ... no change

(b) Appointment From Roster. If the parties fail to stipulate to the arbitrators pursuant to paragraph (a) of this rule, the arbitrator shall be designated by the civil division manager from the roster of arbitrators maintained by the Assignment Judge on recommendation of the arbitrator selection committee of the county bar association. Inclusion on the roster shall be limited to retired judges of any court of this State who are not on recall and attorneys admitted to practice in this State having at least ~~seven~~ ten years of consistent and extensive experience in New Jersey in any of the substantive areas of law subject to arbitration under these rules, and who have completed the training and continuing education required by R. 1:40-12(c). A Certified Civil Trial Attorney with the requisite experience will be entitled to automatic inclusion on the roster. The arbitrator selection committee, which shall meet at least once annually, shall be appointed by the county bar association and shall consist of one attorney regularly representing plaintiffs in each of the substantive areas of law subject to arbitration under these rules, one attorney regularly representing defendants in each of the substantive areas of law subject to arbitration under these rules, and one member of the bar who does not regularly represent either plaintiff or defendant in each of the substantive areas of law subject to arbitration under these rules. The arbitrator selection committee shall review the roster of arbitrators annually and, when appropriate, shall make recommendations to the Assignment Judge to remove arbitrators from the roster. The members of the arbitrator selection committee shall be eligible for inclusion in the roster of arbitrators. The Assignment Judge shall file the roster with the Administrative Director of the Courts. A motion to disqualify a designated arbitrator shall be made to the Assignment Judge on the date of the hearing.

(c) Number of Arbitrators. ... no change

(d) Compensation of Arbitrators. ... no change

Note: * * *: paragraph (b) amended July 28, 2017 to be effective September 1, 2017.

•4:21A-6. Entry of Judgment; Trial De Novo

(a-b) ... no change

(c) Trial De Novo. An action in which a timely trial de novo has been demanded by any party shall be returned, as to all parties, to the trial calendar for disposition. A trial de novo shall be scheduled to occur within 90 days after the filing and service of the request therefor. A party demanding a trial de novo must ~~tender~~ submit with the trial de novo request ~~a check payable to the "Treasurer, State of New Jersey"~~ a fee in the amount of $200 towards the arbitrator's fee and may be liable to pay the reasonable costs, including attorney's fees, incurred after rejection of the award by those parties not demanding a trial de novo. Reasonable costs shall be awarded on motion supported by detailed certifications subject to the following limitations:

(1-5) ... no change

(d) ... no change

Note: * * *; paragraph (c) amended May 30, 2017 to be effective immediately.

•COMMENT

•1. R. 4:21A; Generally.

The expansion of arbitration may have ramifications in cases governed by the Comparative Negligence Act, N.J.S. 2A:15-5.1, et seq., where the statutory structure envisions the presence of all potentially culpable parties to permit a proper allocation of liability. See, generally, *Mahoney, Current N.J. Personal Injury Recovery (GANN)* at 15:4-2(c) and 15:6-2

•3. R. 4:21A-2; Qualification, Selection and Assignment of Arbitrators.

Paragraph (b) of this rule was amended effective September 2017 to change the seven years of experience criterion for inclusion of attorneys on the roster to ten years of "consistent and extensive" experience. It also provided that Certified Trial Attorneys with the requisite experience are entitled to automatic inclusion. The amendment also provided for annual review of the roster and recommendation by the selection committee to the Assignment Judge

•7. R. 4:21A-6; Entry of Judgment, Trial de Novo.

•7.4. Costs and fees.

Paragraph (c) was amended effective May 2017 to eliminate language requiring that the filing fee for a trial de novo be paid by a check payable to the Treasurer, State of New Jersey. By eliminating a specific method of payment the Court meant to provide for payment of this fee in eCourts Civil by attorney collateral account (Judiciary Account Charge System (JACS)). Presumably payment may still be made by check payable to the Treasurer at least until such time as the eCourts system has been fully implemented

•RULE 4:22. REQUESTS FOR ADMISSIONS

•4:22-1. Request for Admission

•COMMENT

•1. Procedure.

But see Torres v. Pabon, 225 N.J. 167, 184-185 (2016), finding plaintiff's requests for admissions were untimely, and therefore defendant had no obligation to answer, when served long after the close of discovery and so close to the trial date that the 30 day period to respond did not expire until the trial was well underway, and no application was made to the court for leave to serve the requests. The Court also found that the trial court abused its discretion in allowing plaintiff to read requests for admission to the jury when plaintiff's requests were both untimely and substantively improper. Id.

•2. Relevancy.

Note that requests for admission must seek facts within defendant's knowledge, or attempt to authenticate documents. Torres v. Pabon, 225 N.J. 167, 184-185 (2016) (plaintiff's requests that sought defendant's admissions to portions of an expert's report were substantively improper)

•RULE 4:23. FAILURE TO MAKE DISCOVERY; SANCTIONS

•4:23-2. Failure to Comply with Order

•COMMENT

•1. General Principles.

While a trial judge has broad discretion in formulating sanctions under R. 4:23, any sanctions imposed must be just and reasonable. Cf. Williams v. Am. Auto Logistics, 226 N.J. 117, 124-125 (2016), noting, generally, that courts have many available remedies to enforce compliance with a court rule that do not include removing a party's constitutionally-protected right to a jury trial

•RULE 4:24. TIME FOR COMPLETION OF DISCOVERY AND OTHER PRETRIAL PROCEEDINGS

•4:24-1. Time for Completion of Discovery

•COMMENT

•3. Paragraph (c); Extension of Time.

As to what constitutes extraordinary circumstances justifying extension of the discovery period, see Castello v. Wohler, 446 N.J. Super. 1, 25-26 (App. Div. 2016) (excusing plaintiff's counsel's failure to realize his expert was not qualified to testify when disqualifying fact was not obvious from resume)

•RULE 4:25. PRETRIAL CONFERENCES

•4:25-7. Attorney Conferences; Exchange of Information

•COMMENT

•2. Paragraph (b); Exchange of Information.

Note that this rule does not apply to proceedings in the Special Civil Part. Williams v. Am. Auto Logistics, 226 N.J. 117, 125-127 (2016)

[CHAPTER IV. PARTIES]

•RULE 4:26. PARTIES PLAINTIFF AND DEFENDANT

•4:26-1. Real Party in Interest

•COMMENT

•2. Real Party in Interest.

•2.1. General principles.

The real party in interest rule is ordinarily determinative of standing to prosecute an action. Standing has been held to be an element of justiciability, neither subject to waiver nor conferrable by consent. Moreover, the party asserting standing must be a proper legal entity. Note, however, that despite the real party in interest rule, in a UM/UIM action prosecuted by an insured to recover benefits under the policy from the insurer, the tortfeasor, rather than the insurer, may be identified at trial as the defendant. This rejects a rule compelling the insurer in a UIM trial to be identified as the defendant when ordinarily the underlying accident is the focus of such trials and the insurer's identity is irrelevant. Accord, Sackman v. New Jersey Mfrs. Ins., 445 N.J. Super. 278, 294-295 (App. Div. 2016)

Standing is, of course, not automatic. Generally, a litigant has no standing to assert the rights of a third party. See Zelnick v. Morristown-Beard, 445 N.J. Super. 250 (Law Div. 2015) (parents who brought gross negligence claim against private school that failed to prevent their daughter's abuse by a teacher had no standing to bring suit because they were not real parties in interest now that their daughter, to whom the school owed the duty of care, was an adult)

•3. Standing; Specific Applications.

Employment Law. See also Petro-Lubricant Test. v. Adelman, 447 N.J. Super. 391, 401 (App. Div. 2016) (journalist defendant reporting on "worst bosses" had no standing to assert retaliation counterclaim in defamation action when there were no proofs showing that he had any relationship with the aggrieved employee or that he had aided or encouraged the employee to assert an NJLAD claim)

Insurance. See Andalora v. R.D. Mechanical Corp., 448 N.J. Super. 229, 235-239 (App. Div. 2017) (in subrogation action insurer, not its insured who suffered no loss, was real party in interest in action; substitution, not dismissal with prejudice, proper remedy when insured filed action)

•4:26-4. Fictitious Names; In Personam Actions

•COMMENT

•1. General Principles.

This rule addresses the situation in which a plaintiff is aware of a cause of action against a defendant, but does not know that defendant's identity. It does not apply if the plaintiff has properly designated some defendants by fictitious names and then later discovers a cause of action against undescribed defendants whom he then seeks to join. Nor is the rule applicable where a plaintiff is unaware that an injury was caused by an identifiable defendant. As to the required specificity of the John Doe identification, plaintiffs' opportunity prior to the running of the statute of limitations to ascertain defendants' identity and plaintiff's diligence in ascertaining the identity of the responsible party, see generally Worthy v. Kennedy Health System, 446 N.J. Super. 71, 88-91 (App. Div. 2016), certif. den. 228 N.J. 24 (2017)

Where a defendant is sued in a fictitious name because of the plaintiff's inability to ascertain his identity despite diligent efforts, the complaint may be amended after the statute of limitations has run to substitute the defendant's true name and effect service on him, particularly where the defendant can show neither prejudice resulting from nor reliance upon the lapse of time. Worthy v. Kennedy Health System, 446 N.J. Super. 71, 88 (App. Div. 2016), certif. den. 228 N.J. 24 (2017)

•3. Plaintiff's Diligence.

Plaintiffs must be diligent in seeking to ascertain the identities of defendants to avoid prejudice that may result to defendants who are identified late. See also as to due diligence, Worthy v. Kennedy Health System, 446 N.J. Super. 71, 89-90 (App. Div. 2016), certif. den. 228 N.J. 24 (2017)

•5. Comparative Negligence.

Although it has been held that for comparative negligence purposes, no allocation of a percentage of negligence may be made against a fictitious defendant. , Bencivenga v. J.J.A.M.M., Inc., 258 N.J. Super. 399 (App. Div.), certif. den. 130 N.J. 598 (1992), subsequent case law has placed the continued vitality of this holding in doubt. See concurring opinion in Krzykalski v. Tindall, 448 N.J. Super. 1, 11-17 (App. Div. 2016). When a plaintiff in a wrongful death action settles an uninsured motorist (UM) claim based on phantom vehicles, the known defendants are entitled to have the jury apportion any fault to those vehicles. See Cockerline v. Menendez, 411 N.J. Super. 596, 617 (App. Div. 2010), certif. den. 201 N.J. 499 (2010). Apportionment of responsibility is required when the UM carrier settles with the plaintiff before trial and the carrier stands in the shoes of the fictitious drivers, as well as when UM proceedings have not been litigated or resolved. Krzykalski v. Tindall, 448 N.J. Super. 1, 8 (App. Div. 2016)

•RULE 4:28. JOINDER OF PARTIES

•4:28-3. Claims By or Against Spouse

•COMMENT

•4. Specific Actions.

Emotional distress. A claim for bystander emotional distress made under the principle of Portee v. Jaffee, 84 N.J. 88 (1980), is an independent, not a derivative, claim. See also Alberts v. Gaeckler, 446 N.J. Super. 551, 567 (Law Div. 2014).

Tort claims. A spouse's per quod claim need not be separately noticed under the Tort Claims Act if it is otherwise inferable from the other spouse's notice of claim. A husband's bystander liability claim for negligent infliction of emotional distress,

however, is an independent claim for damages separate from his wife's personal injury claim and must be separately noticed under the Tort Claims Act. Alberts v. Gaeckler, 446 N.J. Super. 551, 567-568 (Law Div. 2014)

- 4:28-4. Notice to Attorney General and Attorneys for Other Governmental Bodies
  - COMMENT
    - 1. Paragraph (a); Actions Involving Validity of Statute, Ordinance, etc., Unknown Owners.

Notice must be given to the Attorney General when the constitutionality of a statute is challenged, but notice need not be given when the statute's applicability, rather than its validity or constitutionality, is questioned. See also In re D.F.S., 446 N.J. Super. 203, 219 (App. Div.), certif. den. 227 N.J. 356 (2016) (declining to hear constitutional challenge based on claim that the Internet registry requirement violates due process when defendant did not raise claim below or notice the Attorney General)

- RULE 4:30A. ENTIRE CONTROVERSY DOCTRINE
  - COMMENT
    - 1. General Principles.

The rule as to claim joinder generally requires that all aspects of the controversy between those who are parties to the litigation be included in a single action. See, e.g., Tisby v. Camden County Corr. Fac., 448 N.J. Super. 241, 250-251 (App. Div. 2017)

    - 5. Specific Causes of Action.
      - 5.6. Foreclosure.

Of course, germane claims are barred by the doctrine. Delacruz v. Alfieri, 447 N.J. Super. 1, 21 (Law Div. 2015). And cf. Borden v. Cadles of Grassy Meadows, 412 N.J. Super. 567, 590-591 (App. Div. 2010) (discussing procedure for fair market value hearing after conclusion of foreclosure)

- RULE 4:33. INTERVENTION
  - 4:33-1. Intervention as of Right
    - COMMENT
      - 1. General Principles.

In general terms, intervention as of right requires the movant to show an interest in the subject matter of the litigation, an inability to protect that interest without intervention, lack of adequate representation of that interest, and timeliness of the application. Ricci v. Ricci, 448 N.J. Super. 546, 574 (App. Div. 2017)

      - 2. Pre-Judgment Intervention.
        - 2.1. De facto intervention.

If a non-party does not move to intervene but nevertheless fully participates in the action to protect and advance her interest, she may be deemed to be a de facto intervenor subject to all burdens and benefits of formal intervention. Ross v. Ross, 308 N.J. Super. 132, 147 (App. Div. 1998). See also Granata v. Broderick, 446 N.J. Super. 449, 472-473 (App. Div. 2016), certif. granted 228 N.J. 516 (2017) (creditors' opposition letters deemed to be motions to intervene as of right)

      - 4. Appeal.

There is judicial dispute as to whether an order denying intervention as of right is final. Compare Grober v. Kahn, 88 N.J. Super. 343, 360 (App. Div. 1965), mod 47 N.J. 135 (1966), with Huny & BH Assoc. v. Silberberg, 447 N.J. Super. 606, 609-610 (App. Div. 2016) (holding contra Grober)

[CHAPTER V. TRIALS]

•RULE 4:35. TRIAL BY JURY OR BY THE COURT

•4:35-1. Demand for Jury Trial

•COMMENT

•2. Right to Trial by Jury.

•2.1. General principles.

As to the right to trial by jury generally, see also Williams v. Am. Auto Logistics, 226 N.J. 117, 123-125 (2016), holding that trial courts may not deprive litigants of their constitutional right to a jury trial as a sanction for the failure to comply with procedural rules

•3. Specific Causes of Action.

Conscientious Employee Protection Act (CEPA). The 1990 amendment of N.J.S. 10:5-13 and 34:19-5 provides for a jury trial of CEPA actions, thus overruling prior contrary authority. Noren v. Heartland Payment Sys., 448 N.J. Super. 486, 493 (App. Div. 2017), noting that the amendment overruled Abbamont v. Bd. of Educ., 238 N.J. Super. 603 (App. Div. 1990), which held that there was no jury trial right under CEPA

•RULE 4:37. DISMISSAL OF ACTIONS

•4:37-1. Voluntary Dismissal; Effect Thereof

•COMMENT

•2. Paragraph (b); By Order of Court.

•2.1. General principles.

As to the standards governing the determination of whether the dismissal should be with prejudice and if not, the conditions of dismissal, if any, see also A.T. ex rel. T.T. v. Cohen, 445 N.J. Super. 300, 307-309 (App. Div. 2016), holding that a voluntary dismissal without prejudice would defeat the time frames in the Affidavit of Merit statute and the purpose behind it

But see Kranz v. Schuss, 447 N.J. Super. 168, 174 (App. Div.), certif. den. 228 N.J. 424 (2016), permitting appellate review as of right of an interlocutory order in a case dismissed pursuant to a consent agreement. Discovery in the case was complete and it was scheduled for trial at the time of dismissal. The Kranz court indicated that it had read but it did not describe the terms of the consent agreement or whether that agreement had reserved any issues for appeal. Ibid. Without knowing the terms of the agreement it is difficult to determine why the dismissal was deemed appropriate and why the appellate court was willing to accept the apparent stratagem of dismissal creating an as-of-right appeal of the interlocutory matter rather than an appeal by leave. Regardless of whether it is with or without prejudice, a dismissal under this paragraph, as with paragraph (a), adjudicates nothing. Thus, when DCPP seeks and is granted a dismissal of a Title 9 action so that it may institute a Title 30 action, there is no appeal of the Title 9 dismissal, particularly insofar as all issues present in the Title 9 action are present in the Title 30 action. DYFS v. A.P., 408 N.J. Super. 252 (App. Div. 2009), certif. den. 201 N.J. 153 (2010). However, when DCPP seeks and is granted a dismissal of a Title 9 action because the danger to the child has passed and the child is reunited with its family, there still may be adverse consequences of administrative rulings underlying the Title 9 action. In this instance, proper recourse is to administrative review of those rulings, not appeal of the dismissal. DCPP v. V.E., 448 N.J. Super. 374, 402-404 (App. Div. 2017)

•4:37-2. Involuntary Dismissal; Effect Thereof

•COMMENT

•2. Paragraph (b); At Trial_Generally.

•2.1. General principles.

Paragraph (b) of this rule requires denial of the defendant's motion for involuntary dismissal at the close of plaintiff's case, whether the trial is by judge or jury, if the plaintiff has shown a prima facie case, i.e., any evidence including all favorable inferences to be drawn therefrom which could sustain a judgment in plaintiff's favor. Stated differently, dismissal is appropriate when no rational jury could conclude from the evidence that an essential element of the plaintiff's case is present. As stated by the Supreme Court in Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969), the judicial function on a motion for

an involuntary dismissal under this rule "is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." See generally Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016); Prager v. Joyce Honda, Inc., 447 N.J. Super. 124, 134 (App. Div. 2016)

- RULE 4:38. CONSOLIDATION; SEPARATE TRIALS
  - 4:38-2. Separate Trials
    - COMMENT
      - 1. General Principles.

Ordinarily, the severance determination rests in the trial judge's discretion. Society Hill v. Piscataway Tp., 445 N.J. Super. 435, 451 (Law Div. 2016)

- RULE 4:40. MOTION FOR JUDGMENT
  - COMMENT
    - 1. General Principles.

The standard for determining both a motion for judgment under R. 4:40-1 and a motion for judgment notwithstanding the verdict under R. 4:40-2 is the same as that governing the determination of a motion for involuntary dismissal under R. 4:37-2(b), namely, the court must accept as true all the evidence which supports the position of the party defending against the motion and must accord that party the benefit of all legitimate inferences which can be deduced therefrom. Thus, if reasonable minds could differ, the motion must be denied. See Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969), distinguishing this rather mechanical standard from that which the court must apply on a new trial motion. See also Delvecchio v. Tp. of Bridgewater, 224 N.J. 559, 582 n. 7 (2016); Sackman v. New Jersey Mfrs. Ins., 445 N.J. Super. 278, 290-291 (App. Div. 2016); Vitale v. Schering-Plough Corp., 447 N.J. Super. 98, 119-120 (App. Div.), certif. granted 228 N.J. 421 (2016); Garmeaux v. DNV Concepts, Inc., 448 N.J. Super. 148, 163 (App. Div. 2016)

[CHAPTER VI. JUDGMENT]

- RULE 4:42. JUDGMENT; ORDERS; DAMAGES; COSTS
  - 4:42-9. Attorney's Fees
    - COMMENT
      - 1. General Principles.

Despite recurrent and considerable judicial attention given to the history of this rule (see History and Analysis of Rule Amendments Comment 1) and but for the enumerated exceptions of the rule allowing the award of an attorney's fee, the New Jersey Supreme Court has remained committed to the so-called American rule, that is, that the parties bear their own attorney's fees. See, e.g., Innes v. Marzano-Lesnevich, 224 N.J. 584, 592-593 (2016); In re Estate of Folcher, 224 N.J. 496, 506-507 (2016); Garmeaux v. DNV Concepts, Inc., 448 N.J. Super. 148, 159 (App. Div. 2016). The Supreme Court's rejection of any essential change in this rule may be construed as a further expression of its concern that expansion of the court's power to allow attorney's fees might well result in impositions upon judicial administration and upon litigants which would outweigh any advantages that might be anticipated

The allowance of an attorney's fee, where permissible, is a discretionary action required, however, to be based on factual findings, and is reviewable under the standard of a clear abuse of discretion. And see Noren v. Heartland Payment Sys., 448 N.J. Super. 486, 497 (App. Div. 2017), finding that although fee awards are generally entitled to deference, remand was required

      - 2. Paragraph (a); Actions in Which Fee is Allowable.
        - 2.8. Statutory authorization.
          - 2.8.1. General principles.

As to the method of calculating fees under a fee-shifting statute, see Rendine v. Pantzer, 141 N.J. 292 (1995), affirming the Appellate Division, 276 N.J. Super. at 398, and prescribing initial determination of a lodestar fee (a reasonable hourly rate

multiplied by the number of hours reasonably expended). And see, generally elucidating the methodology of the lodestar fee adjusted upward or downward, Garmeaux v. DNV Concepts, Inc., 448 N.J. Super. 148, 159-162 (App. Div. 2016)

Where several fee-shifting causes of action are alleged and the plaintiff obtains judgment on only one, the full fee is allowable if that judgment accords the plaintiff complete relief. As to shifting fees on CFA claims and claims involving the common-core of CFA-related facts, see Garmeaux v. DNV Concepts, Inc., 448 N.J. Super. 148, 156-159 (App. Div. 2016)

•2.8.2. Particular state statutes.

Civil Rights (N.J.S. 10:6-2). The 2004 New Jersey Civil Rights Act permits both an Attorney General's action or a private action against persons acting under color of law who violate either the federal or State constitutions. The attorney fee authorization in respect of private actions is drawn in favor of the prevailing party. See N.J.S. 10:6-2f. When a party's action serves as the "catalyst" for a change in a municipal ordinance, paragraph (f) permits that party to recover attorney's fees as a "prevailing party." In view of the remedial purpose of the statute it may be anticipated that it will be construed consistently with cognate federal legislation which authorizes an award in favor of a prevailing defendant only where the plaintiff's action was frivolous, unreasonable or without foundation. As to cases in which attorney's fee awards are not authorized under the Act, see Cranford Development v. Cranford, 445 N.J. Super. 220, 237-239 (App. Div.), certif. den. 227 N.J. 237 (2016) (developers not entitled to fee award in builder's remedy suits because substantive constitutional right at issue does not belong to them but to persons seeking to live in affordable housing)

Conscientious Employee Protection Act (CEPA) (N.J.S. 34:19-5 and 34:19-6): See also Noren v. Heartland Payment Sys., 448 N.J. Super. 486, 497 (App. Div. 2017)

Open Public Records Act (N.J.S. 47:1A-6): A requestor is not a prevailing party simply because the agency provided the documents after an OPRA suit was filed. If the trial court finds the government entity in violation of OPRA, the requesting party has prevailed within the meaning of the statute. When, however, the government entity voluntarily provides the documents after suit is filed the determination is more difficult, and a requestor is a prevailing party only if she achieves the desired result because the complaint brought about a change in the custodian's conduct; the suit was the "catalyst" for the disclosure. The statute contemplates cooperation between requestor and the public body with respect to incomplete or problematic requests or provision of documents. Thus, filing of suit before seeking an explanation or cooperation with respect to an incomplete provision of documents cannot support a prevailing party attorney fee award when the public body promptly supplies the documents after the filing of suit. Grieco v. Bor. of Haddon Heights, 449 N.J. Super. 513, 518-525 (Law Div. 2015)

•2.8.3. Federal statutes.

Clearly, only prevailing parties may be awarded attorney's fees. Once a party has been determined to have prevailed, the court's discretion to withhold attorneys fees is limited and is permissive only in special circumstances in which the grant of fees would be unjust. Attorney's fees may be awarded to a prevailing defendant only when the plaintiff's action was frivolous, unreasonable or without foundation. A favorable ruling on the merits, however, is not a necessary predicate to find that a defendant has prevailed for the purposes of attorney's fees under the Act. CRST Van Expedited, Inc. v. EEOC, ___ U.S. ___, 194 L. Ed. 2d 707 (2016).

•2.10. Agreements to pay attorney's fees; consequences of retainer agreements.

Attorney’s fees may be allowed where the parties have agreed thereto in advance by stipulation in a promissory note, power of attorney or other agreement or contract or where there is a statutory or contractual indemnity so providing. See also Noren v. Heartland Payment Sys., 448 N.J. Super. 486, 498 (App. Div. 2017), distinguishing the stricter CEPA fee-shifting standard from one in which there may be an award when the claim is not viable

•6. Attorney liens, Quantum Meruit Recovery.

•6.1. Charging lien.

As to the procedure for assertion of an attorney’s statutory charging lien under N.J.S. 2A:13-5, the attorney’s petition is to be filed in the main cause, that the judge must then set a pleading, discovery and trial schedule, and that the attorney is entitled to a plenary hearing even though a fee-shifting award has been made in the attorney’s favor, since findings with respect to fee-shifting are not dispositive of the client’s obligation to the attorney. And see Granata v. Broderick, 446 N.J. Super. 449, 465-467 (App. Div. 2016), certif. granted 228 N.J. 516 (2017) (failure to file petition for an attorney’s lien did not preclude judge from granting an attorney’s fee award)

See also, generally, applying the Brill standard, Steinberg v. Sahara Sam's Oasis, 226 N.J. 344, 366-368 (2016); IE Test, LLC v. Carroll, 226 N.J. 166, 184-187 (2016); Globe Motor Co. v. Igdalev, 225 N.J. 469, 479-481 (2016); Kirkpatrick v. Hidden View Farm, 448 N.J. Super. 165, 167 (App. Div. 2017); Kean Feder. of Teachers v. Morell, 448 N.J. Super. 520, 526 (App. Div. 2017); Wolens v. Morgan Stanley, 449 N.J. Super. 1, 3 (App. Div. 2017); Lapolla v. County of Union, 449 N.J. Super. 288, 299 (App. Div. 2017)

Clearly, bare conclusions in the pleadings without factual support in affidavits will not defeat a motion for summary judgment. Sullivan v. Port Auth. of NY and NJ, 449 N.J. Super. 276, 279-280 (App. Div. 2017)

Nor will a question of fact be created by the private intent of a party to a contract regarding the interpretation of that contract. The requirement that the court draw all legitimate inferences in favor of the non-moving party, however, may be sufficient to create a genuine issue of fact as to whether a party breached a contract. See Globe Motor Co. v. Igdalev, 225 N.J. 469, 480-481, 484-485 (2016) (defendant's certification, with benefit of all legitimate inferences, raised a genuine issue of fact as to whether he breached the settlement agreement)

A claim of incomplete discovery will not defeat a summary judgment motion when the party opposing the motion has not ought discovery within the time prescribed by R. 4:24-1 or has itself made a motion for summary judgment on the ground that no material fact is disputed. Nor need discovery be completed if further discovery will patently not change the outcome. See Tisby v. Camden County Corr. Fac., 448 N.J. Super. 241, 247 (App. Div. 2017)

Contract interpretation. An issue regarding interpretation of a contract clause presents a purely legal question that is particularly suitable for decision on a motion for summary judgment. Nevertheless, the interpretation of an agreement may present a factual issue if the meaning is uncertain or ambiguous enough to warrant consideration of parol evidence. See also Globe Motor Co. v. Igdalev, 225 N.J. 469, 482-485 (2016)

Paragraph (a) of this rule conforms to the formulation by the Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1969), applying the standard of "miscarriage of justice." And see Krzykalski v. Tindall, 448 N.J. Super. 1, 9 (App. Div. 2016)

The general standard for determining whether the quantum of compensatory damages awarded by the jury is remediable remains, as expressed by Baxter v. Fairmont Food Co., 74 N.J. 588 (1977), whether the quantum is plainly wrong or shocking to the conscience of the court. See Cuevas v. Wentworth Group, 226 N.J. 480, 499-500, 510 (2016); Berkowitz v.

Soper, 443 N.J. Super. 391, 413 (App. Div. 2016) That standard has been held not to have been substantially altered by the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J.S. 2A:53A-37 to 2A:53A-42, more specifically, N.J.S. 2A:53A-42. Cuevas v. Wentworth Group, 226 N.J. at 505-509, abrogating the expressions found in Ming Yu He v. Miller, 207 N.J. at 258-259

•2. Scope of New Trial.

•2.1. Limited retrial.

A new trial may also be limited to liability only, preserving the damages verdict. See Vitale v. Schering-Plough Corp., 447 N.J. Super. 98, 121-122 (App. Div.), certif. granted 228 N.J. 421 (2016) (failure to submit issue of comparative fault to jury required new trial on liability only)

•3. Additur/Remittitur.

If the issue on the new trial motion is only as to the damages assessed, either by plaintiff claiming inadequacy or the defendant claiming excessiveness, and where the claimant's right to relief is clear and it appears that the verdict was not the result of compromise or otherwise tainted, the techniques of additur and remittitur should be attempted to be employed in order to avoid the unnecessary expense and delay of a new trial. Cuevas v. Wentworth Group, 226 N.J. 480, 499 (2016)

•3.2. Remittitur.

As to the standard to be applied by the trial court when considering remittitur as well as the standard of review on appeal, see generally Cuevas v. Wentworth Group, 226 N.J. 480, 499-510 (2016) (affirming trial court's denial of defendants' remittitur motion)

Remittitur, albeit potentially useful, is nevertheless an extraordinary remedy. See also generally Cuevas v. Wentworth Group, 226 N.J. 480 at 499-500; Mickens v. Misdom, 438 N.J. Super. 531, 537 (App. Div.), certif. den. 221 N.J. 287 (2015). Accordingly, a trial court should not order a new trial or remit a jury's damages award unless it is so clearly disproportionate to the injury and its sequels that it may be said to shock the conscience of the court. See also Cuevas v. Wentworth Group, 226 N.J. at 503-505, holding that the shock-the-conscience standard refers objectively to the judicial conscience and is not dependent on examination of supposedly similar verdicts or a trial judge's personal experiences

•RULE 4:52. INJUNCTIONS

•4:52-1. Temporary Restraint and Interlocutory Injunction_Application on Filing of Complaint

•COMMENT

•3. Standards for Issuance.

•3.1. General standards.

See, generally, restating the standards for grant of a preliminary injunction, B & S Ltd. v. Elephant & Castle, 388 N.J. Super. 160, 167-168 (Ch. Div. 2006) (plaintiff must show by clear and convincing evidence that an injunction is necessary to prevent irreparable harm, that plaintiff asserts a settled legal right, that the material facts are uncontroverted, and that plaintiff's harm weighs more heavily). See also Davidovich v. Israel Ice Skating, 446 N.J. Super. 127, 160 (App. Div. 2016) (mandatory preliminary injunction did not meet stringent requirements when nonjudicial remedy existed before private trade association)

[CHAPTER VII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS]

•RULE 4:58. OFFER OF JUDGMENT

•COMMENT

•1. General Principles; 2004/2006 Amendments.

Inducement to settlement has remained the fundamental purpose of the rule as it has evolved. See, e.g., Serico v. Rothberg, 448 N.J. Super. 604, 614 (App. Div. 2017)

•2. Operation of the Rules.

The consequences of non-acceptance are spelled out in R. 4:58-2 (consequences of non-claimant's rejection) and R. 4:58-3 (consequences of claimant's rejection). Both rules provide that if the judgment is within a 20 percent margin of error, the party whose offer was rejected is entitled to attorney's fees and actual litigation expenses incurred after the date of non-

acceptance unless a stated exception of the rule applies. R. 4:58-2 further provides that if a money judgment is entered in favor of a claimant in an amount at least equal to 120 percent of his rejected offer, the claimant is also entitled to eight percent interest on the judgment calculated from the date of the offer or the date of the completion of discovery, whichever is later, but only to the extent it exceeds prejudgment interest allowable by R. 4:42-11(b). The purpose of the stipulation of the later of these dates, i.e., the date of the order or the date of completion of discovery, is obviously designed to afford the defending party a reasonable opportunity to make his own evaluation of the reasonableness of the offer in terms of the probable financial worth of the claim. As to the impact of the parties reaching a high-low agreement after an offer has been made, see Serico v. Rothberg, 448 N.J. Super. 604, 613-616 (App. Div. 2017) (high-low agreement precludes award in excess of agreement based on this rule absent specific preservation of right)

- RULE 4:59. PROCESS TO ENFORCE JUDGMENTS
  - 4:59-1. Execution
    - COMMENT
      - 5. Paragraph (e); Wage Executions.

The Clerk of the Special Civil Part may affix the designated judge's electronic signature on wage execution orders for uncontested wage applications. See Notice to the Bar dated September 12, 2016

- RULE 4:64. FORECLOSURE OF MORTGAGES, CONDOMINIUM ASSOCIATION LIENS AND TAX SALE CERTIFICATES
  - 4:64-1. Foreclosure Complaint, Uncontested Judgment Other Than In Rem Tax Foreclosures
    - COMMENT
      - 5. Paragraph (e); Priorities; Subsequent Encumbrancers.
        - 5.4. Priority of other liens.

Construction lien. Cf. Rosenthal & Rosenthal, Inc. v. Benun, 226 N.J. 41 (2016), holding that actual notice of an intervening lien subordinates a mortgage securing optional future advances and noting that constructive notice is sufficient in the construction loan context

Optional future advances. Rosenthal & Rosenthal, Inc. v. Benun, 226 N.J. 41, 61-66 (2016) (when future advances secured by a mortgage are optional, any such advances made after the mortgagee receives actual notice of a subsequent mortgage on the same property are subordinate to the subsequent mortgage)

  - 4:64-5. Joinder of Claims in Foreclosure
    - COMMENT

The purpose of this rule is twofold: first to define germane and non-germane claims, permitting joinder only of germane claims, and second, to make clear that the entire controversy doctrine does not apply to non-germane claims since they may not be joined in the foreclosure action. See, detailing the nature of germane claims, Delacruz v. Alfieri, 447 N.J. Super. 1, 12-21 (Law Div. 2015)

- RULE 4:69. ACTIONS IN LIEU OF PREROGATIVE WRITS
  - COMMENT
    - 5. R. 4:69-4; Filing and Management of Actions in Lieu of Prerogative Writs.
      - 5.2. Trial on the record; standard of review.

In prerogative writ matters tried on a record made by a local agency, the state of the record ordinarily controls, the substantial evidence rule applies to fact finding, the agency's action is presumed valid and reversible only if arbitrary, capricious or unreasonable, and the court is not bound by determination of legal issues. See e.g. Jacoby v. Englewood Cliffs Zon. Bd. of Adjustment, 442 N.J. Super. 450, 462 (App. Div. 2015)

The goal of the valuation process is to determine the fair market value of the property for its highest and best use on the date of taking, that is, what a willing seller would then pay a willing buyer. See generally NJ Transit Corp. v. Franco, 447 N.J. Super. 361, 369-370 (App. Div. 2016)

As to the relevance and weight of proof of expected or potential zoning or planning change, only when a trial court first determines that the proof reflects a reasonable probability of a zoning change, including a grant of a variance application, may a jury consider it. See also NJ Transit Corp. v. Franco, 447 N.J. Super. 361, 377 (App. Div. 2016) (reversing for failure to determine whether there was a reasonable probability the municipality would grant a use variance or accept a cul-de-sac dedication for land-locked property)

As to the surviving spouse's or domestic partner's election to take against the will, see also Matter of Estate of Brown, 448 N.J. Super. 252, 269-271 (App. Div. 2017), finding husband eligible for elective share of wife's augmented estate when the only reason for the couple's physical separation for three years was the husband's medical condition

Pursuant to N.J.S. 2A:17-56.23b, a docketed child support order constitutes a lien against the net proceeds of settlements, judgments, arbitration awards, workers compensation awards and inheritances. And see Smiley v. Thomas, 448 N.J. Super. 624, 632-633 (Law Div. 2016) (court refused to facilitate a settlement by approving an arrangement to increase recovery to plaintiff by reducing the fee he owed his counsel, and labeling that recovery as something other than "net proceeds of a settlement," when the net proceeds would be less than plaintiff's child support arrearages)

Part V
RULES GOVERNING PRACTICE IN THE CHANCERY DIVISION, FAMILY PART

[CHAPTER I. ACTIONS COGNIZABLE; SCOPE AND APPLICABILITY OF RULES; GENERAL PROVISIONS; PROCESS; VENUE; PLEADINGS; PROCESS; APPEARANCES]

•RULE 5:2. VENUE

•5:2-1. Venue, Where Laid

Venue in family actions shall be laid in accordance with the applicable provisions of R. 3:14-1 and R. 4:3-2 except as follows:

(a)(1) In actions primarily involving the support or parentage of a child (except actions in which the issue of support of a child is joined with claims for divorce, dissolution of civil union, termination of domestic partnership, or nullity) venue shall be laid, pursuant to the Uniform Interstate Family Support Act (UIFSA), in the county of New Jersey in which the child is domiciled, if New Jersey is determined to be the child's home state, as defined under N.J.S.A. ~~2A:4-30.65~~ 2A:4-30.125.

(2) In a proceeding to establish~~,~~ or enforce ~~, or modify~~ a support order or to determine parentage, personal jurisdiction over nonresident individuals shall be governed by N.J.S.A. ~~2A:4-30.68 and 2A:4-30.69~~2A:4-30.129.

(3) The jurisdictional basis for the establishment of a support order shall be governed by N.J.S.A. ~~2A:4-30.71~~ 2A:4-30.132.

(4) The continuing exclusive jurisdiction of New Jersey or another issuing state, exceptions thereto and modification of a support order issued by a court of this or another state, shall be governed by N.J.S.A. ~~2A:4-30.72~~ 2A:4-30.133.

(5) Recognition of an order entered by this State, or by a tribunal of another state, and the method to determine which order is controlling, when multiple orders exist, including responses to multiple registrations or petitions for enforcement, shall be governed by N.J.S.A. ~~2A:4-30.74~~2A:4-30.134 and ~~2A:4-30.75~~ 2A:4-30.135.

(b-g) . . . no change.

Note: * * * ; subparagraphs (a)(1), (a)(2), (a)(3), (a)(4), and (a)(5) amended July 28, 2017 to be effective September 1, 2017.

•COMMENT

Subparagraphs (a)(1), (a)(2), (a)(3), (a)(4), and (a)(5) were amended effective September 2017 to update the statutory cross references.

RULE 5:3. GENERAL PROVISIONS FOR FAMILY ACTIONS

•5:3-4. Counsel: Appearance; Prosecutor

•COMMENT

•2. Paragraph (a); Right to Counsel, Public Defender, Assignment of Counsel.

•2.1. Civil family actions.

The area in which indigent parties are entitled to counsel clearly encompasses litigation involving the Division of Child Protection and Permanency. See N.J.S. 9:6-8.43(a) and N.J.S. 30:4C-15.4. See further *Fall & Romanowski, Current N.J. Family Law, ~~Relationships Involving Children~~ Child Custody, Protection & Support (GANN)* at 13:1-8. And see DCPP v. G.S., 447 N.J. Super. 539, 555-557 (App. Div. 2016). * * * Indigent parents also have a right to counsel when a private agency seeks an adoption over their objection. See Comment 2.2 at R. 5:10-8.

•5:3-5. Attorney Fees and Retainer Agreements in Civil Family Actions; Withdrawal

(a-b) Retainer Agreements . . . no change.

(c) Award of Attorney Fees. Subject to the provisions of R. 4:42-9(b), (c), and (d), the court in its discretion may make an allowance, both pendente lite and on final determination, to be paid by any party to the action, including, if deemed to be just, any party successful in the action, on any claim for divorce, dissolution of civil union, termination of domestic partnership, nullity, support, alimony, custody, parenting time, equitable distribution, separate maintenance, enforcement of agreements between spouses, domestic partners, or civil union partners and claims relating to family type matters. All applications or motions seeking an award of attorney fees shall include an affidavit of services at the time of initial filing, as required by paragraph (d) of this rule. A pendente lite allowance may include a fee based on an evaluation of prospective services likely to be performed and the respective financial circumstances of the parties. The court may also, on good cause shown, direct the parties to sell, mortgage, or otherwise encumber or pledge assets to the extent the court deems necessary to permit both parties to fund the litigation. In determining the amount of the fee award, the court should consider, in addition to the information required to be submitted pursuant to R. 4:42-9, the following factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

(d) Affidavit of Services Provided. All applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated in RPC 1.5(a). The affidavit shall also include a recitation of other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought. If the court is requested to consider paraprofessional services in making a fee allowance, the affidavit shall include a detailed statement of the time spent and services rendered by paraprofessionals, a summary of the paraprofessionals' qualifications, and the attorney's billing rate for paraprofessional services to clients generally. No portion of any fee allowance claimed for attorneys' services shall duplicate in any way the fees claimed by the attorney for paraprofessional services rendered to the client. For purposes of this rule, "paraprofessional services" shall mean those services rendered by individuals who are qualified through education, work experience or training who perform specifically delegated tasks that are legal in nature under the direction and supervision of attorneys and which tasks an attorney would otherwise be obliged to perform.

(e) ~~(d)~~ Withdrawal from Representation.

(1-2) . . . no change.

(3) Upon the filing of a motion or cross-motion to be relieved as counsel, the court, absent good cause, shall sever all other relief sought by the motion or cross-motion from the motion to be relieved as counsel. The court shall first decide the motion to be relieved and, in the order either granting or denying the motion to be relieved, shall include a scheduling order for the filing of responsive pleadings and the return date for all other relief sought in the motion or cross-motion.

Note: * * *; paragraph (c) amended, new paragraph (d) adopted, former paragraph (d) redesignated as paragraph (e), and new subparagraph (e)(3) adopted July 28, 2017 to be effective September 1, 2017.

•COMMENT

•4. Paragraphs (c), Award of Attorney Fees and (d) Affidavit of Services Provided..

•4.1. Generally.

While an allowance for attorney's fees and costs remains discretionary, the court must nevertheless consider the factors listed in paragraph (c) of the rule in making the award. Note that the factor of reasonableness and good faith should be evaluated in the light of both trial and pretrial conduct. See *Fall & Romanowski, Current N.J. Family Law, Child Custody, Protection & Support (GANN)*, Chapter 40. The court should also take into account its authority to order sale or mortgaging

of marital assets to pay the pendente lite and final attorney fees of both parties. Because this paragraph of the rule incorporates R. 4:42-9(b), (c), and (d)(1), the history, interpretation and construction of that rule remains relevant to family action fee allowance. Thus the affidavit requirements of R. 4:42-9(b) are fully applicable. This was made explicit by rule amendment of this paragraph and the adoption of a new paragraph (d) incorporating most of the language of 4:42-9(b), effective September 2017

•5. Paragraph (e); Withdrawal From Representation.

This paragraph of the rule, formerly paragraph (d) was redesignated as paragraph (e) due to the concurrent adoption of the new paragraph (d) by rule amendment effective September 2017. This paragraph was also then amended by the addition of a new paragraph (3) to provide for the severance of the motion or cross-motion to be relieved from all other relief sought.

•RULE 5:3. GENERAL PROVISIONS FOR FAMILY ACTIONS

•5:3-7. Additional Remedies on Violation of Orders Relating to Parenting Time, Alimony, Financial Maintenance, Support, or Domestic Violence Restraining Orders

(a) Custody or Parenting Time Orders . . . no change.

(b) Alimony, Financial Maintenance, or Child Support Orders. On finding that a party has violated an alimony, financial maintenance, or child support order the court may, in addition to remedies provided by R. 1:10-3, grant any of the following remedies, either singly or in combination: (1) fixing the amount of arrearages and entering a judgment upon which interest accrues; (2) requiring payment of arrearages on a periodic basis; (3) suspension of an occupational license or driver's license consistent with law; (4) economic sanctions; (5) participation by the party in violation of the order in an approved community service program; (6) incarceration, with or without work release; (7) issuance of a warrant to be executed upon the further violation of the judgment or order; and (8) any other appropriate equitable remedy.

(c) Enforcement of Relief under Provisions of Domestic Violence Restraining Orders Not Subject to Criminal Contempt Complaints . . . no change.

Note: * * *; caption amended, and paragraph (b) caption and text amended July 28, 2017 to be effective September 1, 2017.

•COMMENT

The evident purpose of this rule is to illustrate the enforcement provisions available to the trial court in addition to those prescribed by R. 1:10-3. Paragraph (a) of the rule addresses violations of custody and parenting time orders, and paragraph (b) addresses violations of alimony, financial maintenance and support orders. "Financial maintenance" was added to the caption of the rule and to paragraph (b) and its caption by amendment effective September 2017, in recognition of the adoption of L. 2015 C. 223 §1 adopting N.J.S. 2A:17-56.67e which uses that term in providing for support of children over 23 years of age

•RULE 5:4. PROCESS, PLEADINGS, APPEARANCES

•5:4-2. Complaint

(a) Complaint Generally.

(1) . . . no change.

(2) Contents. Every complaint in a family part action, in addition to the special requirements prescribed by these rules for specific family actions shall also include a statement of the essential facts constituting the basis of the relief sought, the statute or statutes, if any, relied on by the plaintiff, the street address or, if none, the post office address of each party, or a statement that such address is not known; a statement of any previous family actions between the parties; and, if not otherwise stated, the facts upon which venue is based. If a civil union or domestic partnership exists between the parties, it shall be stated in the complaint. When dissolution or termination of that relationship is sought, the complaint shall contain a

separate cause of action seeking such relief.

In any action involving the welfare or status of a child, the complaint shall include the child's name, address, the date of birth, and a statement of where and with whom the child resides.

(b) Corespondent . . . no change.

(c) Affidavit of Verification and Non-Collusion . . . no change.

(d) Counterclaim . . . no change.

(e) Amended or Supplemental Complaint or Counterclaim for Dissolution Matters . . . no change.

(f) Affidavit or Certification of Insurance Coverage. The first pleading of each party shall have annexed thereto an affidavit listing all known insurance coverage of the parties and their minor children, including but not limited to life, health, automobile, ~~and~~ homeowner's and renter's insurance and any umbrella policy related thereto, long-term care, and disability insurance. The affidavit shall specify the name of the insurance company, the policy number, the named insured and, if applicable, other persons covered by the policy; a description of the coverage including the policy term, if applicable; and in the case of life insurance, an identification of the named beneficiaries. The affidavit shall also specify whether any insurance coverage was canceled or modified within the ninety days preceding its date and, if so, a description of the canceled insurance coverage. Insurance coverage identified in the affidavit shall be maintained pending further order of the court. If, however, the only relief sought is dissolution of the marriage or civil union, or a termination of a domestic partnership, or if a settlement agreement addressing insurance coverage has already been reached, the parties shall annex to their pleadings, in lieu of the required insurance affidavit, an affidavit so stating. Nevertheless, if a responding party seeks financial relief, the responding party shall annex an insurance-coverage affidavit to the responsive pleading and the adverse party shall serve and file an insurance-coverage affidavit within 20 days after service of the responsive pleading. A certification in lieu of affidavit may be filed.

(g) Confidential Litigant Information Sheet . . . no change.

(h) Affidavit or Certification of Notification of Complementary Dispute Resolution Alternatives . . . no change.

(i) Complaint in Non-Dissolution Matters . . . no change.

(j) Designation of Complex Non-Dissolution Matters . . . no change.

Note: * * *; subparagraph (a)(2) and paragraph (f) amended July 28, 2017 to be effective September 1, 2017.

- COMMENT
  - 1. Paragraph (a); Complaint.
    - 1.3. Divorce, dissolution of civil unions and termination of domestic partnerships causes of action.

These causes of action, and particularly the additional grounds for divorce specified by N.J.S. 2A:34-2, must be affirmatively pled. Accordingly, subparagraph (a)(2) was amended effective September 2017 to require specific reference to civil unions and domestic partnerships in the complaint and to require a separate cause of action be stated when seeking dissolution or termination of such relationships

•6. Paragraph (f); Affidavit of Insurance Coverage.

Paragraph (f) of this rule requires disclosure in each party's first pleading of all information regarding *all types of insurance coverage available to the family* as well as disclosure of coverage canceled or allowed to lapse within the previous 90-day period. Because the "including but not limited to" clause was too often overlooked this paragraph of the rule was amended effective September 2017 to expressly enumerate additional types of insurance, namely long-term care, disability and renter's insurance and umbrella policies. Of course, as heretofore, any other forms of insurance held for the benefit of the family not otherwise mentioned in the rule must still be included in the affidavit. The rule also requires maintaining policies identified in the affidavit pending court order

•5:4-5. Issuance of Summons for Dissolution Complaints

Plaintiff shall cause a summons to issue within sixty (60) days after the filing of a dissolution complaint. Should plaintiff fail to issue a summons within sixty (60) days from the date of the filing of a dissolution complaint, defendant may seek dismissal of the complaint or such other relief as is just and equitable. Such dismissal shall be without prejudice unless otherwise specified in the order.

Note: Adopted July 28, 2017 to be effective September 1, 2017.

•COMMENT

This rule was adopted effective September 2017 to require that a summons be issued within sixty (60) days after filing a dissolution complaint to avoid plaintiff strategically and deliberately failing to serve a dissolution complaint. Failure to issue a summons within this deadline entitles defendant to seek dismissal and other relief. Presumably R. 4:4-1 continues to apply to non-dissolution matters

[CHAPTER II. SPECIFIC CIVIL ACTIONS]

•RULE 5:6. SUMMARY ACTION FOR SUPPORT

•5:6-1. When and By Whom Filed

Except for UIFSA proceedings pursuant to N.J.S.A. ~~2A:4-30.65 to -30.123~~2A:4-30.124 to 2A:4-30.201, a summary action for support may be brought by either the party entitled thereto, an assistance agency or a party seeking to establish that party's support obligation provided no other family action is pending in which the issue of support has been or could be raised.

Note: * * *; amended July 28, 2017 to be effective September 1, 2017.

•5:6-4. Interstate Support

Matters originating under N.J.S.A. ~~2A:4-30.65 to 2A:4-30.123~~ 2A:4.30.124 to 2A:4-30.201 inclusive (Uniform Interstate Family Support Act), shall be scheduled in the same manner as other Family cases and shall be heard expeditiously.

Note: * * *; amended July 28, 2017 to be effective September 1, 2017.

•5:6-9. Termination of Child Support Obligations

(a) Duration of Support. In accordance with N.J.S.A. 2A:17-56.67 et seq., unless otherwise provided in a court order, judgment, or preexisting agreement, the obligation to pay current child support, including health care coverage, shall terminate by operation of law when the child being supported:

(1) dies;

(2) marries;

(3) enters the military service; or

(4) reaches 19 years of age, except as otherwise provided within this rule.

In no case shall a child support obligation extend beyond the date the child reaches the age of 23.

(b) Termination of Obligation in Cases Administered by the Probation Division.

(1) Notices of Proposed Termination. Where no other emancipation date or termination has been ordered by the court, the Probation Division shall send the obligor and obligee notice of proposed termination of child support prior to the child reaching 19 years of age in accordance with N.J.S.A. 2A:17-56.67 et seq. Notices shall contain the proposed termination date and information for the obligee to submit a written request for continuation of support beyond the date the child reaches 19 years of age.

(2) Written Request for Continuation. In response to the notice prescribed in section (1), the obligee may submit to the court a written request for continuation, on a form and within timeframes promulgated by the Administrative Office of the Courts, with supporting documentation and a future termination date, seeking the continuation of support beyond the child's nineteenth birthday if the child being supported:

(A) is still enrolled in high school or other secondary educational program;

(B) is enrolled full-time in a post-secondary educational program; or

(C) has a physical or mental disability as determined by a federal or state agency that existed prior to the child reaching the age of 19 and requires continued support.

(3) Review of Written Request for Continuation. The Probation Division shall review the obligee's written request and documentation and shall make recommendation to the court as to whether the support obligation will continue beyond the child's nineteenth birthday. If sufficient proof has been provided, the court shall issue an order to both parties establishing the future termination date. If sufficient proof has not been provided, the court shall issue an order to both parties terminating the current support obligation as of the date of the child's nineteenth birthday. No additional notice need be provided to the parties.

(4) No Response to Notice of Proposed Termination. If the Probation Division receives no response to the notices of proposed termination of child support, the court shall issue an order to both parties establishing the termination of obligation as of the child's nineteenth birthday. No additional notice need be provided to the parties.

(5) Motion or Application. If a party disagrees with the termination or continuation order entered, the party may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter requesting either termination or continuation of the child support obligation, as applicable.

(6) Arrears Remain Due and Enforceable. Any arrearages accrued prior to the date of termination shall remain due and enforceable by the Probation Division as appropriate until either they are paid in full or the court terminates the Probation Division's supervision of the support order. Upon termination of an obligation to pay current support, the amount to be paid to satisfy the arrearage shall be the sum of the obligation amount in effect immediately prior to the termination plus any arrears repayment amount if there are no other children remaining on the support order.

(7) Notice of Termination. Where an emancipation date or termination date has been ordered by the court, the Probation Division shall send the obligor and obligee notice of termination of child support prior to the child reaching the court ordered emancipation date or future termination date in accordance with N.J.S.A. 2A:17-56.67 et seq. Such notice shall contain the date on which child support shall terminate and information regarding the adjustments that will be made to the obligation, as applicable.

(8) Unallocated Orders. Whenever there is an unallocated child support order for two or more children and the obligation to

pay support for one or more of the children is terminated pursuant to N.J.S.A. 2A:17-56.67 et seq., the amount to be paid prior to the termination shall remain in effect for the other children. Either party may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter to adjust the support amount.

(9) Allocated Orders. Whenever there is an allocated child support order for two or more children and the obligation to pay support for one or more of the children is terminated pursuant to N.J.S.A. 2A:17-56.67 et seq., the amount to be paid shall be adjusted to reflect the reduction of the terminated obligation(s) for the other children. Either party may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter to adjust the support amount.

(c) Termination or Continuation of Child Support Obligations Not Administered by the Probation Division. Where an obligor has been ordered to pay child support directly to the obligee, the child support obligation shall terminate by operation of law in accordance with N.J.S.A. 2A:17-56.67 et seq., unless otherwise provided in a court order or judgment. Notwithstanding any other provision of law, a party may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter requesting termination or continuation of a child support obligation at any time, for good cause. The Probation Division shall not be required to provide any noticing, monitoring or enforcement services in any case where the obligor has been ordered to pay child support directly to the obligee.

(d) Other Reasons for Termination of Child Support Obligations. A party to a child support order, at any time, may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter requesting termination of a child support obligation based on good cause. Any arrearages accrued prior to the date of termination shall remain due and enforceable by the obligee or the Probation Division, as appropriate.

(e) Emancipation. Except as otherwise provided by these rules, and in accordance with N.J.S.A. 2A:34-23, N.J.S.A. 2A:17-56.67 et seq., and related case law, a party to a child support order at any time may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter requesting emancipation of a child. Court-ordered emancipation shall terminate the obligation of an obligor to pay current child support, as of the effective date set forth in the order of emancipation. Any arrearages accrued prior to the date of emancipation shall remain due and enforceable by the obligee or the Probation Division, as appropriate.

(f) Support for Children in Out-of-Home Placement through the Division of Child Protection and Permanency. A child support obligation payable to the Division of Child Protection and Permanency (DCP&P) for children in an out-of-home placement shall not be terminated by operation of law upon the child turning 19 years of age. A child support obligation payable to DCP&P shall terminate upon notification that the child is no longer in placement or upon the child turning 23 years of age, whichever occurs first.

(g) Financial Maintenance for a Child Beyond 23 Years of Age. Pursuant to N.J.S.A. 2A:34-23, N.J.S.A. 2A:17-56.67 et seq., and related case law:

(1) a child beyond 23 years of age may apply to the court for an order requiring the payment of financial maintenance or reimbursement from a parent;

(2) a parent, or a child over the age of 23, may apply to the court for an order converting a child support obligation to another form of financial maintenance in exceptional circumstances, including but not limited to the child's physical or mental disability that existed prior to the date that the child reached the age of 23;

(3) Any arrearages accrued prior to the date of termination or conversion shall remain due and enforceable by the obligee or Probation Division, as appropriate; and

(4) Court-ordered financial maintenance or reimbursement from a parent shall not be payable or enforceable as child support. The Probation Division shall not be required to provide any establishment, monitoring or enforcement of such maintenance or reimbursement order.

(h) Foreign Orders or Judgments. The provisions of N.J.S.A. 2A:17-56.67 et seq. shall not apply to child support provisions contained in orders or judgments entered by a foreign jurisdiction and registered in New Jersey for modification or enforcement pursuant to the Uniform Interstate Family Support Act, N.J.S.A. 2A:4-30.124 et seq.

Note: Adopted July 28, 2017 to be effective September 1, 2017.

- COMMENT
  - 1. R. 5:6-1 to 5:6-5; Summary Actions Generally.
    - 1.1. General provisions and principles.

These rules, together with R. 5:6A (child support guidelines), provide for summary actions for support. R. 5:6-1 permits the bringing of a summary support action only if no other family action is pending between the parties in which the issue of support has been or could be raised. This rule excepts proceedings pursuant to the Uniform Interstate Family Support Act (UIFSA), N.J.S. 2A:4-30.124 to 2A:4-30.201. Both R. 5:6-1 and R. 5:6-4 were amended effective September 2017 to specifically reference the current UIFSA statute rather than the predecessor uniform statute

If the parties no longer reside in the state that entered the original support order, but have not filed consents transferring jurisdiction to the courts of another state, the state that entered the original support order may exercise its continuing jurisdiction only if the parties formally consent. N.J.S. 2A:4-30.133a(2). And see Lall v. Shivani, 448 N.J. Super. 38, 47 (App. Div. 2016) (noting the jurisdictional gap that may arise if one party in such a situation withholds consent to the original state's exercise of jurisdiction). Before the 2016 revision of UIFSA, the state that had issued the controlling support order retained continuing jurisdiction, even when all parties and the child had left the state, until all parties had filed affirmative consents to another state's exercise of jurisdiction. See N.J.S. 2A:4-30.72(a)(2) (repealed by L. 2016, c. 1). And see Johnson v. Bradshaw, 435 N.J. Super. 100, 112-113 (Ch. Div. 2014) (when a temporary support order is issued by a court with proper jurisdiction, continuing exclusive jurisdiction to modify that order is lost once the parties no longer live in this State). For full discussion of the jurisdictional issues, see Fall & Romanowski, Current N.J. Family Law, Child Custody, Protection & Support (GANN) at 33:3

    - 5. R. 5:6-9; Termination of Child Support Obligations.

This rule was adopted effective September 2017 to incorporate the terms of N.J.S. 2A:17-56.67 et seq., which became effective February 1, 2017. To the extent that prior law remains viable under the new statute we include our former commentary on termination of child support below: [see online edition]

As to particular circumstances on which claims of emancipation have been based, see Llewelyn v. Shewchuk, 440 N.J. Super. 207, 218 (App. Div. 2015) (adult child considered emancipated given that she only sporadically attended college, voluntarily left home, received no support from parents once she left, relied on support of others, and worked part-time)

As to the relationship between emancipation and college attendance, see Tretola v. Tretola, 389 N.J. Super. 15, 21 (App. Div. 2006), finding a fact question precluding summary judgment where the property settlement agreement provided that full-time employment of a child over 18 would result in emancipation but college attendance would not and the child was both attending college and working full-time. See also Ricci v. Ricci, 448 N.J. Super. 546, 573-576 (App. Div. 2017), noting that the threshold determination of whether a child over 18 is emancipated must precede any analysis of parental obligation for higher education costs

And see Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 591 (App. Div. 2016) (court should enforce as written parents' agreement on college expenses). Compare Llewelyn v. Shewchuk, 440 N.J. Super. 207, 218-219 (App. Div. 2015) (adult child considered emancipated despite sporadic college attendance given that she voluntarily left home, relied on support of others, and worked part-time). And see Ricci v. Ricci, 448 N.J. Super. 546, 574-580 (App. Div. 2017), remanding for determination as to whether college-age child was emancipated when she left parents' homes before it can be resolved whether parents must provide college contributions. The Child Support Guidelines give the court discretion to apply them to support for students over 18 years of age who commute to college

See also Ricci v. Ricci, 448 N.J. Super. 546, 547 (App. Div. 2017), concluding an adult child may intervene when she has interest in advancing the position that she is unemancipated and in need of parents' support

Clearly, all Guideline applications must be based on the evidence and supported by a statement of reasons. Trial courts are well advised to articulate on the record why a particular guideline calculation is fitting under the established facts. Moreover, a completed child support guideline worksheet attached to the order is not an acceptable substitute for the judicial findings on which the order must be based. Courts must also provide findings in support of departures from the Guidelines. And see Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 594-596 (App. Div. 2016) (remanding when court failed to apply Guidelines for one child and to properly determine support for another based on statutory factors).

Countable income under the guidelines includes properly imputed income. In order to determine child support obligations, income may be imputed or assigned to parents found to be voluntarily unemployed or underemployed without cause. Income also may be imputed when a party fails to provide adequate financial information. See also Lall v. Shivani, 448 N.J. Super. 38, 50-51 (App. Div. 2016) (affirming imputation of income to parent who had previously worked as financial analyst for "major banking organization," but then accepted job as retail clerk without providing evidence of search for employment similar to past position)

Spousal income. In the absence of injustice, the guidelines preclude determination of a parent's income by combining it with the income of that parent's new spouse. And see Lall v. Shivani, 448 N.J. Super. 38, 49 (App. Div. 2016)

2.2.1. College payment obligation; private secondary schools. With respect to college payment obligations in light of the adoption of R. 5:6-9 in response to the enactment of N.J.S. 2A:17-56.67 et seq., see Comment 5 to that rule.

As to whether a fact-finding hearing is necessary to determine whether the statute bars retroactive modification of unallocated child support based upon prior emancipation of one or more children, see Harrington v. Harrington, 446 N.J. Super. 399, 407-409 (Ch. Div. 2016).

Modification may be based on the obligor spouse's assertion of substantially reduced income. Cf. Mills v. Mills, 447 N.J. Super. 78, 91 (Ch. Div. 2016) (court re-ran child support guideline worksheet and reduced child support obligation after modifying alimony obligation due to reasonable new employment with lower pay).

A hearing on child support modification is not required unless the court finds there is a genuine dispute of material facts. See also Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 592 (App. Div. 2016) (affirming trial court's decision to proceed without a hearing)

In light of the adoption of R. 5:6-9 in response to the enactment of N.J.S. 2A:17-56.67 et seq., see Comment 5 to that rule.

The changed circumstances standard applies even when support has been fixed by an agreement incorporated into the

divorce judgment. See also Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 590 (App. Div. 2016).

•4. Enforcement.

•4.3. Child Support Lien Act.

And see Smiley v. Thomas, 448 N.J. Super. 624, 632-633 (Law Div. 2016) (court refused to facilitate a settlement by approving an arrangement to increase recovery to plaintiff by reducing the fee he owed his counsel, and labeling that recovery as something other than "net proceeds of a settlement," when the net proceeds would be less than plaintiff's child support arrearages).

•RULE 5:7. DIVORCE, DISSOLUTION OF CIVIL UNION, TERMINATION OF DOMESTIC PARTNERSHIP, NULLITY, SEPARATE MAINTENANCE

•5:7-1. Venue

Except as otherwise provided by law, venue in actions for divorce, dissolution of civil union or termination of domestic partnership, nullity and separate maintenance shall be laid in the county in which plaintiff was domiciled when the cause of action arose, or if plaintiff was not then domiciled in this State, then in the county in which defendant was domiciled when the cause of action arose; or if neither party was domiciled in this State when the cause of action arose, then in the county in which the plaintiff is domiciled when the action is commenced, or if plaintiff is not domiciled in this State, then in the county where defendant is domiciled when service of process is made. For purposes of this rule, in actions brought under N.J.S.A. 2A:34-2(c), the cause of action shall be deemed to have arisen three months after the last act of cruelty complained of in the Complaint. For purposes of this rule, in actions brought under N.J.S.A. 26:8A-10 for termination of a domestic partnership in which both parties are non-residents and without a forum available to dissolve the domestic partnership, venue shall be laid in the county in which the Certificate of Domestic Partnership is filed. For purposes of this rule, for the dissolution of a civil union created in New Jersey in which both parties are now non-residents and without a forum available to dissolve the civil union, venue shall be laid in the county in which the civil union was solemnized.

Note: * * *; amended July 28, 2017 to be effective September 1, 2017.

•COMMENT

This rule was amended effective September 2017 to permit non-residents to seek termination or dissolution from New Jersey's courts for civil unions and domestic partnerships established in New Jersey when the state in which they currently reside does not provide a forum for such dissolution. In such cases, the county of venue shall be that in which the union was solemnized or the domestic partnership was filed

•5:7-4. Orders Establishing Alimony and Child Support Obligations

•COMMENT

•2. Alimony and Maintenance.

•2.1. General principles.

See also as to the basic purpose and underlying tenets of the alimony award, Quinn v. Quinn, 225 N.J. 34, 48 (2016); Lombardi v. Lombardi, 447 N.J. Super. 26, 36-37 (App. Div.), certif. den. 228 N.J. 445 (2016)

•2.3. Factors in the award of alimony.

As to the factors to be considered in awarding alimony, see N.J.S. 2A:34-23 (b) enumerating the factors to be considered by the court in determining whether to award alimony and, if so, in what amount. See, e.g., Lombardi v. Lombardi, 447 N.J. Super. 26, 41 (App. Div.), certif. den. 228 N.J. 445 (2016) (assessment of marital lifestyle includes evidence of regular saving)

•2.4. Right to alimony.

•2.4.4. Cohabitation by obligee.

It is improper for the alimony order to predetermine that alimony will terminate on the obligee spouse's cohabitation with another or on the obligor's retirement, since the effect of those events on the alimony obligation is dependent on the financial circumstances then surrounding them. Nevertheless, parties can voluntarily agree to such stipulations. See also

Quinn v. Quinn, 225 N.J. 34, 51-55 (2016) (judge's finding that obligee spouse has cohabitated entitles obligor spouse to full enforcement of marital settlement agreement that cohabitation is an alimony-termination event, regardless of permanancy of cohabitation or economic dependence or reliance).

•2.4.5. Palimony.

As to the creation of a constructive trust and an allocation of a percentage of the portion of a closing bonus earned during a long cohabitation before a short marriage, see Thieme v. Aucoin-Thieme, 227 N.J. 269, 287-293 (2016).

•4. Equitable Distribution.

•4.3. Distributability of specific property.

•4.3.1. Pre-marital assets; enhanced value of non-distributable assets.

Ordinarily, assets acquired before marriage are not distributable. But a marital residence purchased in contemplation of marriage is distributable. The rule of nondistributability generally applies to assets acquired during a period of pre-marital cohabitation. Nevertheless, assets then acquired may be distributable if the parties intended to create a marital partnership in contemplation of marriage. Moreover, although monetary compensation earned before marriage may not be subject to equitable distribution as a marital asset, it may be deemed to be held in constructive trust. Thieme v. Aucoin-Thieme, 227 N.J. 269, 287-293 (2016) (percentage of portion of closing bonus earned during long cohabitation before short marriage considered by court to be held in constructive trust).

•5. Enforceability of Property Settlement Agreements.

•5.1. General principles.

Because of the public policy favoring settlement, particularly matrimonial settlement, there is a judicial predisposition in favor of the validity and enforceability of property settlement agreements whether or not incorporated into the judgment of divorce. See Quinn v. Quinn, 225 N.J. 34, 44 (2016). An oral settlement agreement placed on the record or agreed to in chambers is fully enforceable. If, of course, there is a factual dispute as to whether an agreement has actually been entered into, it requires resolution by evidential hearing. Settlement agreements are ordinarily subject to general contract law. Quinn v. Quinn, 225 N.J. At 45

•5:7-4A. Income Withholding for Child Support; Notices

(a) Immediate Income Withholding . . . no change.

(1) Application . . . no change.

(2) Procedure . . . no change.

(3) Advance Notice. Every complaint, notice or pleading for the entry or modification of a child support order shall include the following written notice: In accordance with N.J.S.A. 2A:17-56.7a ~~2A:17-56.7~~ et seq., the child support provisions of a court order are subject to income withholding on the effective date of the order unless the parties agree, in writing, to an alternative arrangement or either party shows and the court finds good cause to establish an alternative arrangement. The income withholding is effective upon all types of income including wages from current and future employment.

(b) Initiated Income Withholding . . . no change.

(c) Rules Applicable to All Withholdings . . . no change.

(d) All Notices Applicable to All Orders and Judgments That Include Child Support Provisions . . . no change.

Note: * * *; subparagraph (a)(3) amended July 28, 2017 to be effective September 1, 2017.

•5:7-4A. Income Withholding for Child Support; Notices

•COMMENT

Subparagraph (a)(3) of this rule was amended effective September 2017 to correct a typographical error in the citation to N.J.S. 2A:17-56.7a.

•5:7-6. Consolidated Enforcement and Modification Proceedings

•COMMENT

•2. Enforcement and Modification of Alimony.

•2.2 Change of circumstances.

•2.2.2. Cohabitation.

N.J.S. 2A:34-23(n) adopted in 2014 specifically provides for suspension or termination of alimony if the factors it enumerates for determining cohabitation are met. As to modification of an alimony award based on cohabitation, see Spangenberg v. Kolakowski, 442 N.J. Super. 529, 538-539 (App. Div. 2015)

When the divorce agreement does address future cohabitation, see also Quinn v. Quinn, 225 N.J. 34, 51-55 (2016), enforcing an anti-cohabitation clause in a marital settlement agreement. The Quinn Court held that a judge's finding that the obligee spouse had cohabitated entitled the obligor spouse to full enforcement of their agreement that cohabitation is an alimony termination event, regardless of any economic dependence on the part of the obligee spouse who had since ended her cohabitation

•2.2.4. Retirement; underemployment.

Note that N.J.S. 2A:34-23 was amended by the addition of subsections j., k., and l. providing for requests for modification of alimony upon prospective or actual retirement of the obligor. As to modification or termination of alimony based on "prospective retirement," see Mueller v. Mueller, 446 N.J. Super. 582, 591 (Ch. Div. 2016) (rejecting as premature plaintiff's request for order prospectively terminating alimony upon expected retirement in five years)

As to the effect on modification of an obligor spouse's underemployment, it is clear that income of former employment cannot be imputed to spouse who was involuntarily terminated from that employment. Compare Mills v. Mills, 447 N.J. Super. 78, 88-91 (Ch. Div. 2016), questioning the applicability of prior case law in light of subsection (k), and utilizing a reasonableness and fairness standard as a basis for modifying alimony after a salary reduction due to an involuntary job change that was reasonable under subsection (k).

[Domestic violence restraining order and related restraining order materials omitted.]

•RULE 5:8. CUSTODY OF CHILDREN

•5:8-5. Custody and Parenting Time/Visitation Plans, Recital in Judgment or Order

(a) In any family action in which the parties cannot agree to a custody or parenting time/visitation arrangement, the parties must each ~~submit~~ file a Custody and Parenting Time/Visitation Plan ~~to the court no later than seventy-five (75) days after the last responsive pleading~~, which the court shall consider in awarding custody and fixing a parenting time or visitation schedule. The Custody and Parenting Time/Visitation Plan shall be filed no later than seventy-five (75) days after the last responsive pleading is filed. If, however, mediation as permitted by R. 1:40-5(a) is conducted, the Custody and Parenting Time/Visitation Plan shall be filed no later than 14 days following an unsuccessful mediation.

Contents of Plan. The Custody and Parenting Time/Visitation Plan shall include but shall not be limited to the following factors:

(1) Address of the parties.

(2) Employment of the parties.

(3) Type of custody requested with the reasons for selecting the type of custody.

(a) Joint legal custody with one parent having primary residential care.

(b) Joint physical custody.

(c) Sole custody to one parent, parenting time/visitation to the other.

(d) Other custodial arrangement.

(4) Specific schedule as to parenting time/visitation including, but not limited to, weeknights, weekends, vacations, legal holidays, religious holidays, school vacations, birthdays and special occasions (family outings, extracurricular activities and religious services).

(5) Access to medical school records.

(6) Impact if there is to be a contemplated change of residence by a parent.

(7) Participation in making decisions regarding the child(ren).

(8) Any other pertinent information.

(b) . . . no change.

(c) . . . no change.

Note: * * *; paragraph (a) amended July 28, 2017 to be effective September 1, 2017.

•COMMENT

•1. General Principles; Rule Structure.

•1.3. Custody/parenting time plan.

R. 5:8-5 requires submission by the parties of a custody and visitation plan in contested actions and requires the judgment specifically to state all custody and visitation terms ordered. Paragraph (a) of this rule was amended effective September 2017 to reflect the adoption of R. 1:40-5(a)(2), requiring mediation for custody disputes absent domestic violence. Parties who cannot agree to custody or parenting time/visitation arrangements must file custody and parenting time/visitation plans within 75 days after the last responsive pleading or, by the September 2017 amendment, within 14 days of unsuccessful mediation conducted under R. 1:40-5(a). Paragraph (c) provides for sanctions, including dismissal of pleadings, for failure of compliance

•3. Specific Custody Issues.

•3.1. Removal of child from jurisdiction.

•3.1.2. Single custodial parent.

The general rule is that the parent having residential custody may remove the child from the jurisdiction over the objection of the non-custodial parent if the removal application is made in good faith, the removal will not be inimical to the child's best interests, and some reasonable visitation can be made available to the non-custodial parent. See Bisbing v. Bisbing, 445 N.J. Super. 207, 214-217 (App. Div.), certif. granted 227 N.J. 262 (2016)

•3.1.4. Procedure.

A plenary hearing on removal is not required if the moving papers demonstrate no prima facie dispute of material fact. Cf. Bisbing v. Bisbing, 445 N.J. Super. 207, 216-217 (App. Div.), certif. granted 227 N.J. 262 (2016), remanding for a plenary hearing when the mother sought relocation shortly after entering into the marital settlement agreement and the father raised the question of whether she negotiated the custody provisions in bad faith to gain the benefit of favorable removal procedures.

•4. Visitation/Parenting Time; Specific Issues.

•4.1. Persons entitled to visitation.

•4.1.3. Grandparents.

And see Slawinski v. Nicholas, 448 N.J. Super. 25, 32, 37 (App. Div. 2016), reversing modification of consent order granting grandparent visitation when court failed to require moving parent to prove change of circumstances and absence of harm to child

•RULE 5:9. ACTIONS BY APPROVED AGENCY FOR TERMINATION OF PARENTAL RIGHTS

•COMMENT

•5. Trial.

•5.1. Termination standards.

•5.1.1. Burden of proof.

As a matter of federal constitutional imperative, the standard of proof required to be met by the plaintiff in an action to terminate parental rights is clear and convincing evidence. And see, generally, as to the constitutional nature of the parental right, DCPP v. K.S., 445 N.J. Super. 384, 390-394 (App. Div. 2016)

•RULE 5:10. ACTION FOR ADOPTION OF A CHILD

•5:10-4. Surrogate Action

(a) Review of Complaint Prior to Docketing. .... no change

(b) Jurisdiction.

(1) Upon the filing of a complaint for the adoption of a child, if it appears therefrom that there is jurisdiction and that each plaintiff is qualified, as required by statute, and that the complaint is substantially complete in all respects, the complaint shall be docketed. At the time of docketing, the Surrogate's staff shall conduct a party look-up in the Judiciary case management system to determine if any of the parties exist in the court's system. If a party exists in the system, the party's demographic information shall be copied into the adoption case using the process in the Judiciary's case management system.

(2) The court shall fix a day for preliminary or final hearing as provided by statute. The Surrogate shall provide the entire adoption file to the court for review no later than five business days before the first adoption proceeding.

(3) Upon the court fixing a day for preliminary or final hearing in private placement adoptions, the Surrogate shall append to the court's order a form promulgated by the Administrative Director of the Courts informing the child's parents of the procedure to object to the adoption, the right to legal counsel, and how to apply for a court-appointed attorney. The signed order and form shall be returned to the plaintiff for service of the form and notice of the hearing on the child's parents pursuant to N.J.S.A. 9:3-45.

~~(3)~~(4) If there is a lack of jurisdiction or lack of qualification on the part of a plaintiff the court shall dismiss the complaint forthwith. If a complaint is not substantially complete in all respects, the court shall order the plaintiff to file an amended complaint or shall dismiss the complaint without prejudice, as the situation requires.

Note: * * *; former subparagraph (b)(3) redesignated as subparagraph (b)(4) and new subparagraph (b)(3) adopted May 30, 2017 to be effective immediately.

•COMMENT

In furtherance of providing notice and an opportunity to be heard paragraph (b) of the rule was amended by the addition of a new subparagraph (3), effective May 2017, requiring that the surrogate append newly adopted forms to the court's order fixing a day for preliminary or final hearing in private placement adoptions. Those forms are available at:

http://www.njcourts.gov/forms/12144_notice_rights_agency_adopt.pdf and

http://www.njcourts.gov/forms/12145_notice_rights_non_agency_adopt.pdf

The signed order and forms are to be returned to the plaintiff for service on the child's parents pursuant to N.J.S. 9:3-45. The adoption of this new subparagraph required the redesignation of former subparagraph (b)(3) as (b)(4)

•5:10-5. Post-Complaint Submissions

(a) At least ten business days before a preliminary hearing the following shall be filed with the court:

(1) For private stepparent adoptions and direct private placement adoptions, fingerprint and Division of Child Protection and Permanency name checks.

(2) Proposed form ~~Form~~ of order for execution upon completion of preliminary hearing.

(3) Proof of service on the biological or legal parent or parents or any of the following if not previously submitted:

(A) Termination of parental rights judgment;

(B) Parent's death certificate;

(C) Affidavit of diligent inquiry to locate the parent or parents;

(D) Surrender of parental rights to agency;

(E) Judicial surrender order;

(F) Denial of paternity form;

(G) Evidence that the biological father does not appear on the child's birth certificate, and he has not taken action pursuant to N.J.S.A. 9:3-45(b)(6);

(H) ~~Proof of service of a~~ The notice of intent to place the child for adoption pursuant to N.J.S.A. 9:3-45(b)(3) with no objection having been filed;

(I) Affidavit executed by the placing parent that the parent cannot identify or refuses to identify the other biological or legal parent.

(4) For private stepparent adoptions and direct private placement adoptions, the Notice of Rights in an Adoption Proceeding (Private/Non-Agency Placement) form as promulgated by the Administrative Director of the Courts. If the Private/Non-Agency Placement form is served on, but not filed by, the parent, proof of service on the parent must be filed.

(5) For private agency adoptions, the Notice of Rights in an Adoption Proceeding (Agency Placement) form as promulgated by the Administrative Director of the Courts. If the Agency Placement form is served on, but not filed by, the parent, proof of service on the parent must be filed.

(b) . . . no change

(c) . . . no change

(d) . . . no change

Note: * * *; subparagraphs (a)(2) and (a)(3)(H) amended, and new subparagraphs (a)(4) and (a)(5) adopted May 30, 2017 to be effective immediately.

•COMMENT

In furtherance of the required notice and opportunity to be heard, paragraph (b) of the rule was amended by the adoption of a new subparagraph (3), effective May 2017, requiring that, on the fixing of a day for preliminary or final hearing in private adoptions, the Surrogate shall append to the court's order the form informing the child's parents of the hearing and the

parents' right to object. This order is to be returned to the plaintiff for service on the child's parents pursuant to N.J.S. 9:3-45. These forms are available at:

http://www.njcourts.gov/forms/12144_notice_rights_agency_adopt.pdf and

http://www.njcourts.gov/forms/12145_notice_rights_non_agency_adopt.pdf

As a consequence of this adoption, former subparagraph (3) was redenominated as subparagraph (4)

- RULE 5:10. ACTION FOR ADOPTION OF A CHILD
  - 5:10-8. Preliminary Hearing
    - COMMENT
      - 2. Standards for Adoption.
        - 2.2. Adoption over parental objection.

Parents have a constitutional and statutory right to counsel when a private agency decides to seek adoption over the parents' objection. In re Adoption of J.E.V., 226 N.J. 90, 108 (2016) (indigent mother had right to appointed counsel when private adoption agency began adoption proceedings). This right derives from the constitutional right to counsel when the State moves to terminate parental rights. See also In re Adoption of J.E.V., 442 N.J. Super. 472, 478 (App. Div. 2015), aff'd 226 N.J. 90 (2016). As for waiver of that right, see In re Adoption of J.E.V., 226 N.J. at 114 (court should conduct colloquy to ensure knowing waiver). As to the parents' right to notice of private adoption hearings so that they might exercise their right to object see, R. 5:10-4(b)(3) and 5:10-5(a)(4) and (5) adopted May 2017 and Comments thereto providing for service of newly adopted forms on parents to inform them of their rights.

- RULE 5:12. PROCEEDINGS BY DIVISION OF CHILD PROTECTION AND PERMANENCY
  - COMMENT
    - 1. Applicability; Rule Structure.
      - 1.8. R. 5:12-7; claims of ineffective assistance of counsel.

The right to counsel implies the right to effective representation by counsel, as determined by the two-pronged standard of Strickland v. Washington, 466 U.S. 668 (1984). See also DCPP v. G.S., 447 N.J. Super. 539, 555 (App. Div. 2016)

    - 2. Construction and Application.
      - 2.1. Right to counsel.

Indigent parents are entitled to representation by the Public Defender. N.J.S. 9:6-8.43(a); N.J.S. 30:4C-15.4. See also DCPP v. G.S., 447 N.J. Super. 539, 555-563 (App. Div. 2016), explaining how the responsibility for providing counsel for parents ultimately landed with the Office of Parental Representation

      - 2.2. Discovery.

When DCPP, in a Title 9 proceeding, has unsuccessfully attempted to obtain the prosecutor's investigatory material in a pending parallel criminal investigation of child abuse, it will not be deemed to have violated its discovery obligations under R. 5:12-3, and that material, if released by the prosecutor prior to the Title 9 trial, must be admitted as evidence provided a reasonable opportunity to meet it has been afforded. See also DYFS v. M.S., 340 N.J. Super. 126, 130 (App. Div. 2001), stating that the Chancery Division is the appropriate forum in which to seek disclosure of DYFS records only after an application to the Division has been made and denied

      - 2.3. Trial.

A fact finding hearing to determine abuse and neglect is a critical stage in a Title 9 hearing. See also DCPP v. S.W., 448 N.J. Super. 180, 191 (App. Div. 2017). See also DCPP v. J.D., 447 N.J. Super. 337, 352-354 (App. Div. 2016), cautioning trial judges about the dangers inherent in adjudicating contested trials "on the papers" and the need to make specific factual findings of abuse or neglect. Accord, DCPP v. S.G., 448 N.J. Super. 135, 145-146 (App. Div. 2016). See also DCPP v. S.W.,

448 N.J. Super. 180, 191-193 (App. Div. 2017), further cautioning judges to ensure that a defendant's waiver of the rights afforded by a fact-finding hearing is clear and unequivocal before proceeding "on the papers."

Generally, admissibility under R. 5:12-4(d) requires satisfaction of the prerequisites for admission as a business record under N.J.R.E 803(c)(6). NDCPP v.T., 445 N.J. Super. 478, 495 (App. Div. 2016). See also DCPP v. S.G., 448 N.J. Super. 135, 145-146 (App. Div. 2016); DCPP v. J. D., 447 N.J. Super. 337, 347 (App. Div. 2016). Even if the records meet the business records exception, hearsay embedded in those records must satisfy a separate hearsay exception. DCPP v. J.D., 447 N.J. Super. at 347-348.

•2.4. Conduct constituting abuse and neglect.

Abuse and neglect under N.J.S. 9:6-8.21(c) is determined under a gross negligence standard and requires a finding of willful or wanton misconduct. See also DCPP v. S.G., 448 N.J. Super. 135, 143-144 (App. Div. 2016)

Div. Of Child Protection v. K.G., 445 N.J. Super. 324, 343-347 (App. Div. 2016) (mother was "grossly negligent" in routinely leaving infant alone with cognitively impaired caregiver); DCPP v. J.D., 447 N.J. Super. 337, 352 (App. Div. 2016) (intoxicated father was grossly negligent when he left his ten-year-old son unattended in a car on a school night, went into a bar, and attempted to flee the police and leave the child behind); DCPP v. S.W., 448 N.J. Super. 180, 189-191 (App. Div. 2017) (no proof defendant's cocaine use exposed children to imminent danger or substantial risk of harm)

•2.5. Abuse and neglect finding; entry of judgment; central registry.

The findings must be found, at minimum, by a preponderance of the evidence. See DCPP v. S.G., 448 N.J. Super. 135, 143 (App. Div. 2016); DCPP v. S.W., 448 N.J. Super. 180, 188 (App. Div. 2017)

•RULE 5:13. PROCEEDINGS UNDER THE CHILD PLACEMENT REVIEW ACT

•5:13-5. Reviews of Children in Placement; Court Orders; Submission of Placement Plan

(a) Enhanced ~~45-Day~~ Initial Reviews. In all cases involving a child placed by the Division of Child Protection and Permanency ("Division"), the child placement review board shall act on the court's behalf by conducting an enhanced ~~45-day~~ review initiated 60 days after placement, which includes the collection of information to be entered on a form prescribed by the Administrative Director of the Courts. Upon completion of the enhanced ~~45-day~~ 60-day review, the board shall make its recommendations to the court on a form prescribed by the Administrative Director of the Courts.

(b) Court Orders; Placement Plans. All orders entered by the court prior to the enhanced ~~45-day~~ 60-day review by the child placement review board placing a child in the custody of the Division pursuant to N.J.S. 9:6-8.54, N.J.S. 30:4C-12, N.J.S. 2A:4A-43 or N.J.S. 2A:4A-46 shall be provided by the court to the board. The Division shall submit a placement plan to the court within 30 days of the date of placement. In any case in which the placement is the result of a court order, the notice of the enhanced ~~45-day~~ 60-day child placement review shall be made available to all counsel or parties appearing pro se who have related matters pending before the Family Part of Superior Court. In addition, counsel or parties appearing pro se shall receive timely notice of all subsequent proceedings and orders under the Child Placement Review Act relating to that litigation.

Note: * * *; paragraph (a) caption and text amended and paragraph (b) amended July 28, 2017 to be effective September 1, 2017.

•COMMENT

•1. General Principles.

•1.2. Rule structure.

R. 5:13-5(a) provides for review of DCPP placements by a child placement review board acting on the court's behalf, referencing the "enhanced 45-day review" provided for in Administrative Directives #4-10 and #4-13. Note, however, that those two directives were replaced with revised directives #16-17 and #19-17, reflecting statutory amendment enacted by L.

2016, c. 90 providing for a 60 day review period rather than the previously mandated 45-day period. The caption and paragraph were amended effective September 2017 to effect this change. Paragraph (b) provides that all orders entered before this review must be provided to the review board. The placement plan which the Division is required to provide is to be submitted to the court, not the board, within 30 days of the date of placement. Paragraph (b) was also amended effective September 2017 to effect the change to a 60-day period.

[OMMITTED: Part V. RULES GOVERNING PRACTICE IN THE CHANCERY DIVISION, FAMILY PART [CHAPTER IV. JUVENILE DELINQUENCY ACTIONS]]

Part VI
RULES GOVERNING CIVIL PRACTICE IN THE LAW DIVISION SPECIAL CIVIL PART

- RULE 6:1. SCOPE, COGNIZABILITY AND VENUE
  - 6:1-1. Scope and Applicability of Rules

The rules in Part VI govern the practice and procedure in the Special Civil Part, heretofore established within and by this rule continued in the Law Division of the Superior Court.

(a-e) ... no change.

(f) Judgments. R. 4:101 shall not apply to judgments of the Special Civil Part unless a statement for docketing is filed with the Clerk of the Superior Court. A statement for docketing shall issue on request to the Clerk of the Superior Court~~Clerk of the Special Civil Part~~, on ex parte application of the party requesting docketing and payment of the statutory fees

(g) Forms. The forms contained in Appendix XI to these rules are approved and, except as otherwise provided in R. 6:2-1 (form of summons), R. 6:7-1(a) (execution against goods and chattels and wage execution) and R. 6:7-2(b) through (g) (information subpoena), suggested for use in the Special Civil Part. Samples of each form shall be made available to litigants by the Clerk of the Superior Court ~~Clerk of the Special Civil Part~~.

Note: * * *; paragraphs (f) and (g) amended March 7, 2017 to be effective immediately.

- RULE 6:1. SCOPE, COGNIZABILITY AND VENUE
  - 6:1-3. Venue

(a) ... no change

(b) Improperly Venued Complaints. If a Special Civil Part complaint is presented for filing in a county where venue does not lie, and the error is apparent prior to acceptance of the complaint for filing and processing, the complaint shall be date stamped and returned to the plaintiff with instructions to file it in the county in which venue is properly laid. The original stamped date shall be considered the filing date only if the complaint is filed within 15 days thereof with the Clerk of the Superior Court ~~Clerk of the Special Civil Part~~] or the Deputy Clerk of the Superior Court in the appropriate county. The stamp bearing the filing date shall so inform the plaintiff.

If, however, the complaint has been filed and it becomes apparent before service is effectuated that venue is improper, the court ~~clerk~~ shall forward the complaint and all other documents filed in the matter to the proper county and advise the litigants of the correct county of venue as well as the address of that county ~~the Special Civil Part Clerk of the county~~.

Note: * * *; paragraph (b) amended March 7, 2017 to be effective immediately.

- COMMENT
  - 1. Scope.

R. 6:1-1(f) and (g) and R. 6:1-3(b) were technically amended effective March 2017 to correct the reference to the Clerk of the Superior Court and to provide for filing with the Deputy Clerk of that court

•RULE 6:2. PROCESS

•6:2-2. Process; Filing and Issuance

(a) ... no change

(b) Non-resident Defendants; Filing. If no defendant can be served with process within this State, the plaintiff may file the complaint with the Clerk of the Superior Court ~~clerk of the Special Civil Part of~~ or the Deputy Clerk of the Superior Court in the county in which the subject transaction or occurrence took place.

Note: * * *; paragraph (b) amended March 7, 2017 to be effective immediately.

•COMMENT

•2. Paragraph (b); Non-Resident Defendants, Filing.

This paragraph of the rule was technically amended effective March 2017 to correct the reference to the Clerk of the Superior Court and to provide for filing with the Deputy Clerk of that court

•RULE 6:3. PLEADINGS, MOTIONS AND PARTIES

•6:3-4. Summary Actions For Possession of Premises

•COMMENT

•2. Dispossess; Non-Payment of Rent.

•2.2. Defenses.

•2.2.4. Illegality of rent demanded; section 8 subsidies.

N.J.S. 2A:18-55, permitting the charging of late fees and attorneys' fees as additional rent, is contrary, in the public housing context, to 42 U.S.C. §1437a(a)(1), and is thereby preempted in respect of federally funded housing. The same applies to residents of private housing receiving State rental assistance equivalent to Section 8. See 175 Executive House v. Miles, 449 N.J. Super. 197, 207 (App. Div. 2017) (failure to pay additional rent not grounds for eviction of State Rental Assistance Program (S-RAP) recipient)

•RULE 6:4. PROCEEDINGS BEFORE TRIAL

•6:4-1. Transfer of Actions

(a-c) ... no change.

(d) Transmission of Record; Costs. Upon presentation of an order transferring an action to the Law Division, the Clerk of the Superior Court ~~clerk of the Special Civil Part~~ shall transmit the papers on file in the court, together with copies thereof, to the Deputy Clerk ~~deputy clerk~~ of the Superior Court in the county of venue.

(e-f) ... no change.

(g) Transfer of Landlord/Tenant Actions. A motion to transfer a summary action for the recovery of premises to the Law Division pursuant to N.J.S.A. 2A:18-60, shall be made by serving and filing the original of that ~~said~~ motion with the Clerk of the Superior Court ~~Clerk of the Special Civil Part~~ no later than the last court day prior to the date set for trial. The motion shall be returnable in the Special Civil Part on the trial date, or such date thereafter as the court may determine in its discretion or upon application by the respondent for more time to prepare a response to the motion. Upon the filing of the motion, the Special Civil Part shall take no further action pending disposition of the motion. If the motion is not resolved on the original trial date, the court may require security for payment of rent pending disposition of the motion. If the motion is granted, the Clerk of the Superior Court shall transmit the record in accordance with R. 6:4-1(d). If the motion is denied, the court shall set the action expeditiously for summary hearing.

Note: * * *; paragraphs (d) and (g) amended March 7, 2017 to be effective immediately.

•COMMENT

•1. General Principles.

Because of both the monetary limits on recovery available in the Special Civil Part and its expedited procedures, including summary dispossess actions, an action commenced in that court may actually involve either a greater sum in controversy or complex issues whose resolution requires plenary treatment and full discovery. This rule accordingly prescribes procedures for transfer of an action in the Special Civil Part to the Law Division in three distinct situations: where recovery on the claim is likely to exceed the monetary limits (paragraph (b)), where the recovery on a counterclaim is likely to exceed the monetary limits (paragraph (c)), and where the issues involved in a landlord-tenant action are complex (paragraph (g)). The remaining paragraphs of the rule address procedures on transfer. Paragraphs 6:4-1(d) and (g) were technically amended effective March 2017 to correct the reference to the Clerk of the Superior Court

- RULE 6:4. PROCEEDINGS BEFORE TRIAL
  - 6:4-3. Interrogatories; Admissions; Production
    - COMMENT
      - 1. General Principles.

In accordance with the expedited procedures of the Special Civil Part, both depositions pursuant to R. 6:4-4 and pretrial conferences pursuant to R. 6:4-2 require leave of court. The routine modes of discovery available in the Special Civil Part include interrogatories (paragraphs (a) and (b)), requests for admission (paragraph (c)), and production and inspection (paragraph (d)). Even more limited discovery in small claims cases is provided for by paragraph (d). See Williams v. Am. Auto Logistics, 226 N.J. 117, 127 (2016), in which the Court, in holding that R. 4:25-7 does not apply to proceedings in the Special Civil Part noted comments made by the Supreme Court Committee on Special Civil Part Practice in 2006, to the effect of "'the typical Special Civil Part case simply does not warrant the extensive exchange of information [required by Rule 4:25-7]...'"

- RULE 6:5. TRIALS
  - 6:5-3. Trial by Jury
    - COMMENT
      - 1. Right to Jury Trial.

The right to a jury trial in the Special Civil Part is not governed by R. 4:25-7 and its requirements. Williams v. Am. Auto Logistics, 226 N.J. 117, 126-127 (2016). Litigants with a constitutionally-protected right to a jury trial may not be deprived of that right as a sanction for failure to comply with procedural rules. Williams v. Am. Auto Logistics, 226 N.J. at 123-124

- RULE 6:7. PROCESS TO ENFORCE JUDGMENTS
  - 6:7-3. Wage Executions; Notice, Order, Hearing; Accrual of Interest

(a) Notice, Order, Hearing. The provisions of R. 4:59-1(e) (wage executions) are applicable to the Special Civil Part, except as otherwise provided by R. 6:7-1(a) and except that the judgment-debtor shall notify the Clerk of the Superior Court by filing in the county in which the execution originated ~~clerk of the Special Civil Part named in the notice of execution~~ and the judgment-creditor in writing within 10 days after service of the notice of any reasons why the order should not be entered and the judgment-creditor may waive in writing the right to appear at the hearing on the objection and rely on the papers.

(b) ... no change

Note: * * *; paragraph (a) amended March 7, 2017 to be effective immediately.

- COMMENT

Paragraph (a) of the rule, consistent with R. 6:3-3, accords a party the right affirmatively to waive oral argument and rely on the papers. See Comment on R. 6:3-3. This paragraph of the rule underscores the special information required when a request for a wage execution is made. This paragraph was technically amended effective March 2017 to make clear that the notice is required to be filed with the Clerk of the Superior Court in the county in which the execution originated

APPENDIX A
RELEVANT DOCUMENTS RE E-FILING

1. Supreme Court Order of 5/30/17, Notice to Bar: 6/6/17
2. Notice to Bar: 6/28/17 (Paper Courtesy Copy Motion Papers)
3. Supreme Court Order of 7/5/17, Notice to Bar: 7/6/17
4. Notice to Bar: 9/5/17 (Camden)

NOTICE TO THE BAR

eCOURTS CIVIL – MANDATORY ELECTRONIC FILING IN THE CIVIL PART OF THE LAW DIVISION OF SUPERIOR COURT

The Judiciary's eCourts Civil application is being implemented in the Civil Part of the Law Division on a vicinage by vicinage basis. The Supreme Court has approved a plan that will require all attorneys to file all pleadings and other documents electronically using eCourts Civil in actions commenced in the Civil Part of the Law Division, including applicable statewide judgment lien documents submitted to the Clerk of the Superior Court. Exceptions to the mandatory electronic filing requirement are confidential documents, documents excluded from public access, documents to be filed under seal, and enforcement motions filed under a docketed judgment lien ("J" docket), which will continue to be required to be filed on paper.

As set forth in the attached May 30, 2017 order, all attorneys will be required to file through eCourts Civil sixty (60) days following implementation of eCourts Civil in each vicinage. The 60-day mandatory filing date may be shortened or increased by the vicinage Assignment Judge after consultation with the Administrative Director, though it may not be shorter than 30 days nor longer than 90 days. Attached to this Notice is the planned schedule for vicinage implementation, indicating the dates upon which attorneys will be required to file electronically in the Mercer, Middlesex and Morris/Sussex Vicinages (the three vicinages in which eCourts Civil has been implemented as of the date of this notice. The mandatory electronic filing dates for the remaining vicinages will be available on the Judiciary's website at http://www.njcourts.gov/attorneys/ecourts.html as eCourts Civil is implemented in those vicinages.

Attorneys filing in vicinages where eCourts Civil has been implemented are encouraged to begin filing electronically prior to the mandatory dates. Information sessions on eCourts for the Civil Part are being offered through the county bar associations throughout the state. Live demonstrations are being offered by the Administrative Office of the Courts for attorneys and their staff, and tutorials on eCourts Civil will be available on the Judiciary's website at https://www.njcourts.gov/attorneys/ecourts.html.

Any paper in a Civil Part matter required to be filed electronically but received other than electronically from an attorney or law firm on or after the mandatory filing date for that vicinage will be returned to the filing attorney with a notice that it must be filed electronically. In such instances, the attorney will have ten (10) days to file that same document along with the return notice electronically in order to preserve the original submission date as the filing date.

An attorney seeking to file any fee-related document in the Civil Part through eCourts Civil at present must have a JACS account. Information on establishing a JACS account can be found at http://www.njcourts.gov/attorneys/jacs.html.

Questions regarding eCourts Civil and the mandatory electronic filing requirement may be directed to Taironda E. Phoenix, Chief, Civil Court Programs, by phone at 609-292-8471 or by email to taironda.phoenix@njcourts.gov.

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: June 6, 2017

SUPREME COURT OF NEW JERSEY

WHEREAS, the Judiciary has implemented eCourts in Superior Court of New Jersey in Criminal, Tax Court, Foreclosure and Special Civil Part ("DC" docket); and

WHEREAS, eCourts is being expanded to the Civil Part of the Law Division ("L" docket) on a vicinage by vicinage basis with the final vicinage scheduled to be added in December 2017;

IT IS ORDERED that pursuant to N.J. Const. Art. VI, sec. 2, par. 3, the Rules of Court are supplemented and relaxed such that upon implementation of **eCourts-Civil** in each of the vicinages, all New Jersey attorneys filing pleadings and other documents in the Civil Part in that vicinage shall be required to submit those documents electronically as of 60 days following implementation in eCourts-Civil in that vicinage. This 60-day date is subject to revision to no less than 30 days nor more than 90 days by the vicinage Assignment Judge after consultation with the Administrative Director of the Courts. Exceptions to this requirement of mandatory electronic filing are confidential documents, documents excluded from public access, and documents to be filed under seal, which shall continue to be filed in paper form; and

It IS FURTHER ORDERED that the Rules of Court are supplemented and relaxed such that all New Jersey attorneys filing documents related to statewide judgment liens in Civil Part matters shall be required to submit those documents electronically, except for enforcement motions filed in the vicinage under the judgment number ("J" docket), which shall continue to be filed in paper form; and .

It IS FURTHER ORDERED that the provisions of Rule 1:5-6 are supplemented and relaxed so as to permit documents submitted in paper form that are required to be filed electronically to be returned to the filing party marked as "received but not filed," with those returned documents needing to be electronically filed within 10 days in order to preserve the original received date.

For the Court,

Chief Justice

Dated: May 30, 2017

eCourts Civil

IMPLEMENTATION AND MANDATORY EFILING DATES FOR THE LAW DIVISION, CIVIL PART (as of June 6, 2017)

VICINAGE	IMPLEMENTATION DATE	MANDATORY EFILING DATE *
Mercer	Friday, April 28, 2017	Thursday, July 6, 2017
Middlesex	Thursday, May 11, 2017	Thursday, July 6, 2017
Morris/Sussex	Thursday, May 26, 2017	Thursday, July 6, 2017
Union	Thursday, July 6, 2017	(to be determined)
Hudson	Thursday, July 20, 2017	(to be determined)
Ocean	Thursday, August 3, 2017	(to be determined)
Burlington	Thursday, August 17, 2017	(to be determined)
Camden	Thursday, August 31, 2017	(to be determined)
Bergen	Thursday, September 14, 2017	(to be determined)
Passaic	Thursday, September 28, 2017	(to be determined)
Atlantic/Cape May	Thursday, October 12, 2017	(to be determined)
Monmouth	Thursday, October 26, 2017	(to be determined)
Essex	Thursday, November 9, 2017	(to be determined)
Cumberland/Gloucester/Salem	Thursday, November 30, 2017	(to be determined)
Somerset/Hunterdon/Warren	Thursday, December 14, 2017	(to be determined)

The mandatory electronic filing dates for the remaining vicinages will be available on the Judiciary's website at http://www.njcourts.gov/attorneys/ecourts.html.

* The mandatory filing dates have been approved by the Acting Administrative Director of the Courts consistent with the Supreme Court's May 30, 2017 order.

NOTICE TO THE BAR

eCourts CIVIL – COURTESY COPIES OF ELECTRONICALLY FILED MOTIONS

A previous Notice to the Bar (dated June 6, 2017) advised of the implementation schedule for the Judiciary's eCourts Civil application in the Civil Part of the Law Division on a vicinage by vicinage basis. That notice further advised that attorneys will be required to electronically file in the Civil Part in the Mercer, Middlesex and Morris/Sussex Vicinages as of July 6, 2017, and that the mandatory dates for remaining vicinages will be available on the Judiciary's website (http://www.njcourts.gov/attorneys/ecourts.html) as each vicinage implements eCourts Civil.

This Notice is to advise that, effective immediately and until further notice, for all motions electronically filed in eCourts Civil, attorneys must upon filing also provide one paper courtesy copy of all motion-related papers to the Civil judge assigned to handle the motion. Motion-related papers include, but are not limited to, notices of motion, briefs in support of or in opposition to the motion, certifications, exhibits, proposed orders and cross-motions.

Attorneys must clearly indicate "**COURTESY COPY**" on the first page of each motion-related paper provided to the assigned judge.

Questions regarding eCourts Civil, including this courtesy copy requirement, may be directed to Taironda E. Phoenix, Chief, Civil Court Programs, by phone at 609-815-2900 ext. 54900 or by email to taironda.phoenix@njcourts.gov.

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: June 28, 2017

NOTICE TO THE BAR

MANDATORY eCOURTS AND NON-ACCEPTANCE OF PAPER FILINGS – eCOURTS CIVIL, DC (SPECIAL CIVIL), AND FORECLOSURE

The Supreme Court in its mandatory eCourts orders for Foreclosure and DC (Special Civil) cases (September 23, 2016 order) and for Civil cases (May 30, 2017 order) included language relaxing the provisions of Rule 1:5-6 such that documents that are required under the Court's orders to be filed electronically but are instead submitted in paper form are to be marked as "received but not filed," and returned to the filing party with the instruction to file the document electronically within ten days in order to preserve the original received date as the filed date. This Notice is to advise that the Court, in its July 5, 2017 order published with this notice, has amended both prior orders so as to specifically eliminate that provision.

Accordingly, effective immediately for eCourts Foreclosure and eCourts DC and effective as of the mandatory electronic filing date for each vicinage for eCourts Civil, any document submitted in paper form for filing by a New Jersey licensed attorney shall be rejected for filing. The notice of such rejection will advise the attorney to file the matter electronically. Once the attorney does so, that date will be the filed date (not the earlier date that the document was erroneously submitted in paper form). Additionally, the Court's order provides that the language in Rule 1:5-6(b) permitting direct filing of matters with a judge or with chambers staff will no longer be applicable as of the mandatory electronic filing date for each vicinage.

Questions regarding (a) eCourts DC Special Civil Part may be directed to Lloyd Garner, Chief, Special Civil Part Services, by email to lloyd.garner@njcourts.gov or by phone at 609-815-2900 ext. 54900; (b) eCourts Foreclosure, to Michelle M. Smith, Superior Court Clerk, by email to michelle.smith@njcourts.gov or by phone at 609-421-6100 or; and (c) eCourts Civil, to Taironda E. Phoenix, Chief, Civil Court Programs, by phone at 609-815-2900 ext. 54900 or by email to taironda.phoenix@njcourts.gov.

Glenn A. Grant for SDB

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: July 6, 2017

SUPREME COURT OF NEW JERSEY

It is ORDERED that, effective immediately and until further order, the Court's May 30, 2017 Order regarding mandatory eCourts Civil is amended so as to provide that as of the mandatory electronic filing date for each vicinage, any document submitted in paper form by an attorney for filing in a Civil matter (Law Division, Civil Part (the L docket)) shall be rejected for filing, with the direction to the attorney to file the matter electronically; in such instances the date the document is received electronically through eCourts will be the filed date.

It is FURTHER ORDERED that the provisions of Rule 1:5-6(b) regarding direct filing of matters in a vicinage with a judge or with chambers staff shall not be applicable as of the mandatory electronic filing date for that vicinage.

It is FURTHER ORDERED that, effective immediately and until further order, the Court's September 23, 2016 Order regarding mandatory eCourts DC (Special Civil) and mandatory eCourts Foreclosure is similarly amended so as to provide that any paper submitted by an attorney for filing in a Special Civil Part matter (DC docket) or in a Foreclosure matter (F docket) shall be rejected for filing, with the direction to file the matter electronically; in such instances the date the document is received electronically through eCourts will be the filed date.

It is FURTHER ORDERED that all other provisions of the Court's May 30, 2017 and September 23, 2016 Orders shall remain in full force and effect until further order.

For the Court,

Chief Justice

Dated: July 5, 2017

NOTICE TO THE BAR

Camden Vicinage – Mandatory eCourts and Non-Acceptance of Paper Filings – eCourts Civil, DC (Special Civil), and Foreclosure

Please be advised that pursuant to the New Jersey Supreme Court's orders dated May 30, 2017 and July 5, 2017, and the notice to the Bar dated July 6, 2017, the mandatory electronic filing date for eCourts Civil and non-acceptance of paper filings by attorneys in the Camden Vicinage shall be **Monday, October 2, 2017**. Exceptions to this requirement are confidential documents, documents excluded under public access, documents to be filed under seal, and enforcement motions filed under a docketed judgment lien ("J" docket), all of which will continue to be filed on paper. Additionally, as of the electronic filing date, in accordance with the Court's order, the direct filing of matters with a judge or with chambers staff will no longer be applicable.

Accordingly, pursuant to the New Jersey Supreme Court Order dated July 5, 2017, as of Monday, October 2, 2017, any document submitted for filing in paper form in Camden Vicinage by an attorney in a Civil matter (Law Division, Civil Part) shall be rejected for filing, with the direction to the attorney to file the matter electronically. In such instances, the filed date will be the date the document is received electronically through eCourts.

Additionally, a paper courtesy copy of all motion-related papers should be provided directly to the Civil Judge assigned to handle the motion. This requirements includes, but is not limited to, notices of motion, briefs in support of or in opposition to the motion, certifications, exhibits, proposed orders, and cross motions. This includes Orders to Show Cause applications and requests to withdraw or reschedule motions. Attorneys must clearly indicate "COURTESY COPY" on the first page of each motion-related paper.

This supersedes the notice dated August 1, 2017.

Honorable Deborah Silverman Katz
Assignment Judge
Camden Vicinage

Dated: September 5, 2017