SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

In this section, the Seton Hall Law Review *presents synopses of recent New Jersey cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of some of the more interesting changes in significant areas of practice.*

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ARBITRATION AND AWARD—ARBITRATORS SHOULD MAKE KNOWN SUBSTANTIAL BUSINESS RELATIONSHIP WITH ANY PARTY AND DISCLOSE ALL FACTS WHICH MIGHT INDICATE INTEREST OR CREATE PRESUMPTION OF BIAS—*Barcon Associates v. Tri-County Asphalt Corp.*, 172 N.J. Super. 186, 411 A.2d 709 (App. Div. 1980).

Barcon Associates, Incorporated (Barcon) entered into a written subcontract with Tri-County Asphalt Corporation (Tri-County) for construction work on a Chester, New Jersey shopping center. 160 N.J. Super. 559, 563, 390 A.2d 684, 686 (Law Div. 1978). The contract contained an arbitration clause whereby the parties agreed to submit all disputes to a panel of three arbitrators. Each party was authorized to designate one arbitrator, and the two arbitrators chosen by the parties would select the third. *Id.*

A dispute arose between Barcon and Tri-County, and arbitrators were selected in accordance with the procedures outlined above. Barcon designated Vincent A. Spatz, the president and principal stockholder of V.A. Spatz Excavating and Paving Company (Spatz Co.), as an arbitrator. *Id.* Prior to and throughout the arbitration hearings, Barcon and Spatz engaged in substantial ongoing business transactions. *Id.* at 563-65, 390 A.2d at 686-87. These transactions remained undisclosed to Tri-County and the other two arbitrators until after the award was rendered in favor of Barcon. *Id.* at 563, 390 A.2d at 686.

Pursuant to N.J. STAT. ANN. § 2A:24-7 (West 1952), Barcon commenced a summary action in the law division to confirm the arbitration award against Tri-County. After a full hearing, in which testimony from the three arbitrators as well as employees of both parties was elicited, the judge vacated the arbitration award finding that there was "evident partiality" on the part of one of the arbitrators within the meaning of N.J. STAT. ANN. § 2A:24-8(b) (West 1952). 160 N.J. Super. at 563, 390 A.2d at 686. Barcon appealed this decision to the appellate division which affirmed the judgment of the lower court. 172 N.J. Super. at 186, 411 A.2d at 709.

There were no proofs adduced showing that the arbitrator in question had actually acted in a biased or partisan manner during the proceedings. 160 N.J. Super. at 571, 390 A.2d at 689. Nevertheless, it was Tri-County's position that the mere existence of business relationships was suggestive of favoritism and dependence. *Id.* at 567, 390 A.2d at 687. The appellate division agreed with the trial court in its finding that the appearance of bias or partisanship, regardless of whether it was actually present, was diametrically opposed to the quasi-judicial function of arbitration which requires minimally accept-

able standards of impartiality and independence. 172 N.J. Super. at 190, 411 A.2d at 711.

The court registered its approval of the rule expressed in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150, *rehearing denied*, 393 U.S. 1112 (1969). As long as all the parties involved in an arbitration proceeding are fully informed, in advance, of a substantial business relationship that exists between an arbitrator and a party to the dispute, such arbitrator would not automatically be disqualified from his position. 172 N.J. Super. at 190, 411 A.2d at 711. The burden of disclosing the existence of the relationship is placed upon the arbitrator or the party who nominated him. *Id.*

In a situation where such a relationship is not revealed, the court found the rule adopted in *Richco Structures v. Parkside Village, Inc.*, 82 Wis.2d 547, 263 N.W.2d 204 (1978) to be applicable. 172 N.J. Super. at 191, 411 A.2d at 711. The test to determine if an arbitration award should be vacated for "evident partiality" is whether a reasonable party to an arbitration proceeding, upon learning of the relationship, would suspect the arbitrator's impartiality to the extent where such party "'would demand that the arbitration be conducted on terms which would provide checks on the arbitrator's exercise of discretion, or would take other protective measures to assure an impartial arbitration and award. [263 N.W.2d at 213].'" *Id.*

Although it has not been held that arbitrators must shape their conduct to conform with the standards prescribed for article III judges, they must maintain an unbiased attitude in performing their duties. The affirmative duty to disclose the existence of a business relationship between an arbitrator and a party to the proceeding will allow the arbitration procedure to remain a viable method for resolving disputes, thereby alleviating, to some extent, the ever increasing workload of our overcrowded courts.

CHARITIES—TORTS—LOSS OF TORT IMMUNITY THROUGH COMMERCIAL ACTIVITY—*Kasten v. Y.M.C.A.*, 173 N.J. Super. 1, 412 A.2d 1346 (App. Div. 1980).

Plaintiff Mimi Kasten was injured in a fall on December 26, 1976, at the Arrowhead Ski Resort in Marlboro, New Jersey. A negligence action was filed claiming that the defendant Y.M.C.A., operator of the ski resort, had rented to the plaintiff skiing equipment which was in bad repair and poorly fitted. Not being a member of the Y.M.C.A., plaintiff was required to pay a higher tow fee. 173 N.J. Super. at 3-5, 412 A.2d at 1347-48.

In a motion for summary judgment, defendant invoked charitable immunity under N.J. STAT. ANN. § 2A:53A-7 (West Cum. Supp. 1979-80), which bars tort recovery where the plaintiff was "'a beneficiary, to whatever degree, of the works'" of the defendant charity. 173 N.J. Super. at 6, 412 A.2d at 1349. Defendant argued that the ski resort was a part of the general charitable scheme of the nonprofit corporation.

The superior court, law division, found that Ms. Kasten had been a "'recipient of the benefactions'" of the defendant, Y.M.C.A., and therefore her suit was barred by N.J. STAT. ANN. § 2A:53A-7. *Id.* at 5, 412 A.2d at 1349. The superior court, appellate division, reversed and remanded. In writing for the court, Judge King relied upon *Mayer v. Fairlawn Jewish Center*, 38 N.J. 549, 186 A.2d 274 (1962), in which the Supreme Court of New Jersey construed N.J. STAT. ANN. § 2A:53A-7. In that case, the supreme court ruled that the particular relationship of the plaintiff to the defendant charity is the controlling factor. Judge King inferred from *Mayer* that charitable immunity under the statute does not arise automatically with "[p]laintiff's mere presence on the defendant's property or use of defendant's facilities," and that as a nonmember/user, plaintiff is not necessarily barred from suit where a member/user would be. 173 N.J. Super. at 8, 412 A.2d at 1350.

The appellate division also held that although any profits from the commercial ski operation were used to defray the costs of the Y.M.C.A.'s charitable works, the organization was not immune from liability for negligence arising out of the operation of the facility. In support of this holding, the court cited several out-of-state decisions, as well as the common law rule that charitable tort immunity is lost for commercial activities even though the profits from those activities are ultimately used for the organization's charitable purposes. *Id.* at 9, 412 A.2d at 1350.

The *Kasten* court thus has defined the limits of New Jersey's charitable immunity statute by holding that nonmember patrons of commercial establishments operated by charitable organizations are not barred from civil recovery by N.J. STAT. ANN. § 2A:53A-7.

CRIMINAL PROCEDURE—INSTRUCTIONS TO JURIES—ABA STANDARDS REPLACE CONVENTIONAL *Allen* CHARGE IN CRIMINAL TRIALS IN NEW JERSEY—*State v. Czachor*, 82 N.J. 392, 413 A.2d 593 (1980).

John Stanley Czachor was charged with twice threatening the life of Mrs. Mary Catrone with a pistol. His trial was completed in one

day, whereupon the case was sent to the jury. Three times the jury reported an impasse in its deliberations. Each time the trial judge delivered a modified *Allen* charge, and each time the defendant failed to object. On the third day, one hour after the last *Allen* charge had been given, the jury returned with "unanimous guilty verdicts on four of the six counts." 82 N.J. at 394-95, 413 A.2d at 594. On appeal the defendant argued that giving supplemental instructions to a deadlocked jury for the third time was plain error. The appellate division rejected the argument and affirmed the convictions in an unpublished opinion. *Id.* at 395, 413 A.2d at 594.

The Supreme Court of New Jersey, however, agreed with the defendant's contention that the cumulative effect of the three charges was so inherently coercive and potentially prejudicial as to amount to reversible error. *Id.* at 394, 413 A.2d at 594. Remanding the case for a new trial, the court recommended the use of the ABA model charge instead of the modified *Allen* instructions employed by New Jersey courts in the recent past. *Id.* at 405, 413 A.2d at 599. Furthermore, the court declared that it could no longer countenance conventional *Allen* charges in criminal trials and held that this prohibition would have a limited retroactive effect. *Id.* at 408, 413 A.2d at 601. Three justices, apparently favoring complete retroactivity, would have preferred to reserve the retroactive effect issue for a later case. *Id.* at 411, 413 A.2d at 602 (Pashman, J., concurring).

Reevaluating the arguments concerning the *Allen* charge, the New Jersey supreme court in *Czachor* followed the example of courts in three federal circuits and twenty-two states which have condemned it because of "the substantial risk that the right to a fair trial at the hands of an impartial jury is jeopardized by its use." *Id.* at 398, 413 A.2d at 596. A charge containing coercive features, with or without balancing language, was held to violate basic requirements of a fair trial. Without reaching the question of constitutionality, the court prohibited the use of the *Allen* charge by exercising its supervisory power.

Turning to the specific circumstances in *Czachor*, the court first scrutinized the three *Allen* charges individually and found each to be deficient. While the only coercive feature of the first two instructions was their exclusive focus upon the dissenting jurors, an additional fault of the third charge was its emphasis on "the inconvenience and costs of a mistrial and retrial." *Id.* at 403, 413 A.2d at 598. The court then examined the repeated use of the charge and held such repetition to be "'[an] error possess[ing] a clear capacity for producing an unjust result,'" mandating reversal. *Id.* at 402, 404, 413 A.2d at 598, 599.

Having condemned the use of a conventional modified *Allen* charge, the court also rejected the corresponding New Jersey Model Criminal Charge because of similar deficiencies. N.J. Model Jury Charges, Crim. No. 4, 190 (1978). While awaiting review by its Committee on Criminal Practice, the court approved the ABA model charge and adopted the concomitant recommendations for its use. Accordingly, such a charge should be included in the initial general instructions to the jury and any repetition is subject to the trial court's sound discretion. 82 N.J. at 404-07, 413 A.2d at 599-600.

CRIMINAL PROCEDURE—JUVENILE DELINQUENCY—RECORDS OF ADJUDICATION OF JUVENILE DELINQUENCY CANNOT BE EXPUNGED—*State v. W.J.A.*, 173 N.J. Super. 19, 412 A.2d 1355 (Law Div. 1980).

Petitioner, a thirty-five year old male applying for an Atlantic City casino employee license, sought expungement of records adjudicating him to be a juvenile delinquent. 173 N.J. Super. at 19-20, 412 A.2d at 1356. Those records revealed a series of convictions and arrests for assault and battery, carnal abuse, and disorderly persons offenses which occurred between 1961 and 1966. *Id.* at 21, 412 A.2d at 1356.

Superior Court Judge Porreca noted that pursuant to N.J. STAT. ANN. § 5:12-89(b)(2) (West Cum. Supp. 1979-1980), and N.J. Admin. Code § 19:41-714 (Supp. 1979) an applicant is required to reveal on a personal history disclosure any criminal and arrest records. 173 N.J. Super. at 20, 412 A.2d at 1356. Contained within the disclosure were inquiries as to whether the applicant had "ever been arrested or charged with any juvenile offense . . . in this state or any other jurisdiction," and whether the applicant or any member of his/her immediate family "ha[d] ever been arrested, indicted and/or charged with or convicted of a criminal or disorderly persons offense." *Id.* This last question, however, provided that any expunged record would not have to be disclosed. *Id.*

Under N.J. STAT. ANN. § 2C:52-1 to -32, as amended by L. 1979, c. 178, §§ 108-39 (West 1979), expungement of records is available for certain convictions where there have been no prior or subsequent convictions (except for a disorderly persons offense) and for almost all arrests. The court pointed out that except for the expungement of a conviction for possession or use of a controlled dangerous substance by anyone who was twenty-one years old or younger at the time of the offense, the expungement statute does not address any juvenile

delinquent convictions. 173 N.J. Super. at 21, 412 A.2d at 1357; N.J. STAT. ANN. § 2C:52-5, as amended by L. 1979, c. 178, § 112 (West 1979). Furthermore, the court noted that juvenile delinquency offenses are not considered to be crimes. *Id.* at 25, 412 A.2d at 1358; N.J. STAT. ANN. § 2A:4-64 (West Cum. Supp. 1979-1980).

Judge Porreca found that the only remedy available for the nondisclosure of juvenile records was to file a petition to "seal" those types of records. 173 N.J. Super. at 21, 412 A.2d at 1357; N.J. STAT. ANN. § 2A:4-67 (West Cum. Supp. 1979-1980). Even though the petitioner's records were sealed, they would not qualify for nondisclosure on the casino license application under the expungement exception. 173 N.J. Super. at 22, 412 A.2d at 1357. The petitioner urged that since the "sealing remedy [was] inadequate . . . expungement should be authorized." *Id.*

Citing *In re R.C.C.*, 151 N.J. Super. 174, 376 A.2d 614 (J. & D.R. Ct., Cape May County 1977) as distinguishable in that it held that dismissed charges of juvenile delinquency could be expunged, the court reasoned that such a remedy did not immediately attach to juvenile delinquency convictions. 173 N.J. Super. at 22, 412 A.2d at 1357. *R.C.C.* was useful in the instant case, however, because it pointed out that the expungement statute was intended to come into play "where a defendant's contacts with the criminal justice system are some indication of innocence—arrests, dismissals, acquittals." 151 N.J. Super. at 177-78, 376 A.2d at 616. Judge Porreca observed, as did the court in *R.C.C.*, that the expungement laws provide a "far more effective" remedy than the sealing statute when attempting to mask a defendant's prior connections with the criminal justice system. 173 N.J. Super. at 23, 412 A.2d at 1357. Expunged records may only be inspected when good cause is shown that those records are needed for judicial proceedings or litigation. *Id.*; N.J. STAT. ANN. § 2C:52-19, as amended by L. 1979, c. 178, § 126 (West 1979). Sealed records, however, may be inspected by any individual pursuant to a court order and are reactivated upon subsequent criminal conviction. 173 N.J. Super. at 23, 412 A.2d at 1358; N.J. STAT. ANN. §§ 2A:4-67(d) & (e) (West Cum. Supp. 1979-1980). The *W.J.A.* court found a conflict between the limited protection afforded by the sealing statute and the overall "rehabilitative purposes of our juvenile delinquency law." 173 N.J. Super. at 23-24, 412 A.2d at 1358.

The Casino Control Commission statutes and regulations and the New Jersey statutes covering expungement and sealing laws create a disparity in the treatment of individuals who, as adults, were able to have their criminal convictions expunged, and those persons who, as

adjudicated juvenile delinquents, were only allowed to have their prior records sealed. As the court in *W.J.A.* recognized, such a result is seemingly incongruous when the alleged purpose behind juvenile delinquency statutes is to afford youths a fresh start. This protective approach which the State of New Jersey has evidenced toward its youthful offenders is severely undercut when conflicting statutes and administrative regulations are recognized and yet allowed to continue.

INSURANCE—CIVIL PROCEDURE—INJURED PARTY NOT ESTOPPED FROM LITIGATING ISSUE OF INTENT IN CIVIL ACTION ON INSURANCE POLICY AFTER DEFENDANT'S CRIMINAL CONVICTION—*Garden State Fire & Cas. Co. v. Keefe*, 172 N.J. Super. 53, 410 A.2d 718 (App. Div. 1980).

Ronald Keefe was insured under a homeowner's comprehensive policy issued by Garden State Fire & Casualty Co. (Garden State) which "excluded from personal liability coverage 'bodily injury or property damage which is either expected or intended from the standpoint of the Insured.'" 172 N.J. Super. at 56, 410 A.2d at 719. Keefe was the defendant in a negligence action brought by John Kelley for personal injuries suffered when Keefe fired a shotgun over the heads of three youths, including Kelley, who were throwing snowballs at Keefe's car. As a result of that incident, Keefe was indicted for atrocious assault and battery to which charge he eventually pleaded guilty. *Id.*

Garden State, in a declaratory judgment action against Keefe and Kelley, sought to determine the applicability of the exclusion provision of the insurance policy. The trial court granted Garden State's motion for summary judgment, holding "that the criminal conviction on its face established the fact of Keefe's intent." *Id.* The superior court, appellate division, reversed the trial court, ruling that in these circumstances the doctrine of collateral estoppel did not automatically apply. Instead, "the innocent victim here did have a right to litigate the intent question in his pending civil action against the insured . . . ." *Id.* at 55, 410 A.2d at 719.

The appellate court noted the New Jersey supreme court's disposition of a similar question in *Burd v. Sussex Mutual Ins. Co.*, 56 N.J. 383, 267 A.2d 7 (1970). There, a criminal conviction for atrocious assault and battery did not preclude the litigation of the question of

intent by either the victim or the insured in a subsequent civil trial. In deciding the issue, the court relied on public policy considerations and the lack of mutuality necessary for estoppel. *Id.* at 398-99, 267 A.2d at 15-16. Recently, the supreme court reaffirmed its commitment to public policy considerations in *Ambassador Ins. Co. v. Montes*, 76 N.J. 477, 388 A.2d 603 (1978).

The *Keefe* court found further support of its holding in *Lyons v. Hartford Ins. Group*, 125 N.J. Super. 239, 310 A.2d 485 (App. Div. 1973), *certif. den.*, 64 N.J. 322, 315 A.2d 411 (1974). That case involved an exclusionary clause identical to the one in the instant case, and the court ruled that insurance coverage would attach where an intentional act resulted in an unintended injury. Whether or not the acts would support a criminal conviction was not taken to be dispositive of the intent issue.

In an attempt to preclude the parties from litigating the issue of intent, Garden State relied on *New Jersey Mfrs. Ins. Co. v. Brower*, 161 N.J. Super. 293, 391 A.2d 923 (App. Div. 1978). Garden State claimed that the *Brower* case eliminated the mutuality requirement of estoppel. As the *Keefe* court pointed out, however, there can be no automatic application of collateral estoppel because the goal of the court system is to have factual cases "fully, fairly, and definitively litigated." 172 N.J. Super. at 59, 410 A.2d at 721. The requirement of mutuality in a particular case depends on the facts involved and the public policy considerations implicated.

Another factor weighed by the court in reaching its decision was Keefe's plea of guilty to the charge. The result of this guilty plea, the court felt, was less than a full litigation of the issue of intent. The court stated that "it would be unfair for the victim of defendant's conduct to be precluded from seeking a civil recovery, by defendant's entirely unilateral and self-interested decision to waive trial of the criminal charge." *Id.* at 61, 410 A.2d at 721. Accordingly, the court held that while the criminal conviction may be introduced as evidence by the insurance company declining coverage, such evidence is not conclusive and the claimant may relitigate questions of coverage under the policy.

In *Keefe*, the court declined to automatically invoke collateral estoppel in a non-mutuality situation. Public policy considerations were properly balanced to ensure that an innocent victim has the opportunity to litigate all questions which may not have been fully determined in a criminal action against the insured. Such a holding provides that a claimant will be adequately protected in his right to a fair hearing on all factual issues involved.

LIMITATION OF ACTIONS—STATUTE OF LIMITATION FOR PERSONAL INJURY ACTION TOLLED WHERE PLAINTIFF'S FORMER COUNSEL MISTAKENLY FILED IN WRONG COURT AND DEFENDANTS WOULD NOT BE PREJUDICED—*Galligan v. Westfield Centre Service, Inc.*, 82 N.J. 188, 412 A.2d 122 (1980).

Plaintiff's decedent, Mary F. Galligan, was involved in an automobile accident on April 17, 1975. She died one month later, allegedly from injuries suffered in that accident. Plaintiff, claiming diversity of citizenship, filed a complaint on April 14, 1977, in the United States District Court for the District of New Jersey against Westfield Centre Service, Inc. and Chrysler Corporation. This action was dismissed by the district court for lack of jurisdiction upon a finding that plaintiff and defendant Westfield Centre Service, Inc. were citizens of New Jersey. 82 N.J. at 190, 412 A.2d at 123.

Two days before the federal claim was dismissed, plaintiff filed a nearly identical complaint in the Superior Court of New Jersey, Law Division. The trial court, applying N.J. STAT. ANN. § 2A:14-2 (West 1952), granted defendants' motion to dismiss the superior court action since the suit was commenced two years and twenty-two days after the cause of action arose. N.J. STAT. ANN. § 2A:14-2 provides for a two year limitation period in which all suits for personal injury must be initiated. No existing exception to the statute of limitation was found to be applicable. The appellate division upheld this position and denied plaintiff's leave to appeal without considering the merits.

The Supreme Court of New Jersey reversed the trial court, recognizing that because of the harsh results statutes of limitations sometimes yield, courts have developed "a common law of limitation." 82 N.J. at 191, 412 A.2d at 124. This doctrine has been used to avoid injustices which would occur with a literal application of statutes of limitations, while fully implementing the legislative purposes behind the enactment or such statutes.

The court found that statutes of limitations create security and stability for individuals in our society by compelling suit within a reasonable time after the alleged wrong is committed. *Id.* at 191-92, 412 A.2d at 124. This allows for the eventual repose of the action, as well as ensuring that information crucial to a defending party will not be lost through time. It was also recognized, however, "that a mistake in the selection of a court having questionable or defective juris-

diction should not defeat tolling of the statute when all other purposes of the statute of limitations have been satisfied." *Id.* at 193, 412 A.2d at 124.

Pertinent to the court's reasoning was that the state court complaint was substantially similar to the one filed in federal court, and defendants' concession that their case would not be prejudiced by the lapse of twenty-two days. "Since the passage of an additional 22 days has impaired neither the defendants' ability to litigate nor the court's capacity to adjudicate, plaintiff's cause of action has not become 'stale.'" *Id.* at 194, 412 A.2d at 125.

The *Galligan* court found support for the decision in its inherent equitable powers. Using a standard of "minimal substantial compliance," the court was satisfied that test was met by plaintiff's diligence in filing a suit within a two year period after the accident. *Id.* at 194-95, 412 A.2d at 125. It would be inequitable, the court stated, to deny plaintiff the opportunity to present his case, especially where the choice of court error was not made by him, but by his attorney. *Id.* at 194, 412 A.2d at 125.

Justice Pollock, in dissent, contended that a statute of limitations is not tolled by the filing of a complaint in a court that does not have subject matter jurisdiction. *Id.* at 197, 412 A.2d at 126 (Pollock, J., dissenting). The dissenting opinion pointed out that New Jersey has not enacted a "saving statute" of the kind adapted in other states. *Id.* Such a statute provides that a party may pursue an action which would otherwise be prohibited if the claim has been dismissed on grounds other than its merits. Justice Pollock distinguished all the cases relied upon by the majority, noting that each involved an action brought in a court which was competent to hear or transfer the case to the proper court. No such power was in the district court in this case. There is no statutory authority allowing a federal court to transfer an action to a competent state court. *Id.* at 198, 412 A.2d at 127. The trial court, then, should have been affirmed and the suit dismissed, according to the dissent.

In *Galligan*, the New Jersey supreme court invoked the "common law of limitations" where a strict application of the statute would have yielded an inequitable result. The court did not, however, create a strict rule of law to be applied in all such cases. Instead, the facts of the case were closely analyzed in order to balance the equities. Since the purposes of N.J. STAT. ANN. § 2A:14-2 would not be frustrated by holding the limitations period tolled, the court declined to rigidly enforce the statute, opting for a more flexible approach.

MOTOR VEHICLES—OWNER OF CAR WHO NEGLIGENTLY LEAVES KEYS IN UNATTENDED VEHICLE NOT LIABLE FOR INTENTIONAL INJURIES INFLICTED WITH STOLEN CAR ON ARRESTING POLICE OFFICER—*Berko v. Freda*, 172 N.J. Super 436, 412 A.2d 821 (Law Div. 1980).

Ralph Freda left the keys in his car and it was stolen. After receiving a report of the theft over the radio, Police Officer Berko saw the vehicle and gave chase. In an unsuccessful attempt to escape, the thief rammed the police car three times. When both automobiles were finally stopped, the police officer approached the stolen car. While the officer had his arm in the open door, the youthful driver intentionally stepped on the accelerator, dragging and injuring Berko. 172 N.J. Super. at 436, 412 A.2d at 821. The police officer brought a negligence action against the owner of the car, but defendant Freda's motion for summary judgment was granted. *Id.* at 442, 412 A.2d at 824.

To support his motion, defendant advanced theories novel to New Jersey law. Initially, defendant argued that the owner of a stolen automobile should not be held liable for its use as an instrument of intentionally tortious acts by the thief, even where the owner's negligence facilitated the theft. *Id.* at 437-40, 412 A.2d at 822-23. Defendant also invoked the fireman's rule claiming that, by analogy, a police officer should also be barred from recovery for injuries sustained in the ordinary course of his duties. The trial court agreed with both contentions.

Addressing defendant's first argument, Judge Griffin conceded that liability had been found in two related situations. The owner of a car who left the keys in the ignition was held liable for the negligent acts of the car thief. *Hill v. Yaskin*, 75 N.J. 139, 380 A.2d 1107 (1977); *Zinck v. Whelan*, 120 N.J. Super. 432, 294 A.2d 727 (App. Div. 1972). In another instance, the owner of an apartment building who neglected to repair a door lock was held liable for the criminal acts of a burglar. *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368, 346 A.2d 76 (1975). The court, however, saw a closer connection between the instant case and the situation in *Dwyer v. Erie Inv. Co.*, 138 N.J. Super. 93, 350 A.2d 268 (App. Div. 1975).

In *Dwyer*, the owner of a building failed to close a hole which provided access for intruders, but was not held liable for gun shot wounds inflicted on plaintiff by a suspected burglar emerging from the hole. Affirming judgment for defendant, the appellate division reasoned that both *Zinck* and *Braitman* were distinguishable. Without referring explicitly to *Zinck*, the *Dwyer* court termed it "a policy de-

cision applied to particular fact situations" and described *Braitman* as a case "arising out of a landlord-tenant relationship." *Id.* at 100, 350 A.2d at 272. Moreover, the events leading to Dwyer's injury were found to be "beyond the scope of *reasonable* foreseeability" and thus not legally caused by defendant's conduct. *Id.* at 101, 350 A.2d at 273 (emphasis in original). Quoting this passage from *Dwyer*, Judge Griffin held that as a matter of law it was similarly unforeseeable that a thief would use a stolen car as a weapon to assault a police officer. Defendant was, therefore, entitled to summary judgment. 172 N.J. Super. at 442, 412 A.2d at 824.

The court then considered defendant's second argument that the fireman's rule should be applied to policemen. As stated in *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129 (1960), the rule forecloses fire fighters from receiving any compensation for injuries suffered in the line of duty other than their pay and workmen's compensation benefits. Public policy demands such a rule, particularly in the absence of "wanton" conduct or violation of a statute by the owner whose property is on fire. *Id.* at 274-77, 157 A.2d at 131-32. Persuaded by the reasoning of other state courts, Judge Griffin subscribed to the analysis that a policeman is "'a person who, fully aware of the hazard created by the defendant's negligence, voluntarily confronts the risk for compensation.'" 172 N.J. Super. at 441, 412 A.2d at 824 (quoting *Walters v. Sloan*, 20 Cal. 3d 202, 204, 571 P.2d 609, 612 (1977)).

Summary judgment could have been based on this ground alone. Instead, it was premised on the controversial theories surrounding tort liability for the acts of third persons. The New Jersey supreme court has provided firm guidance in this area through its decisions in *Braitman* and *Hill*, both of which fully adhered to the *Zinck* doctrine. Unfortunately, by relying on the appellate division's decision in *Dwyer*, the trial court in the present case chose a precedent of lesser weight and questionable validity.

RIGHT TO TRIAL BY JURY—ILLEGITIMACY—CONSTRUING COURT RULE TO LIMIT STATUTORY RIGHT TO JURY TRIAL TO EITHER PARTY IN BASTARDY PROCEEDING WOULD VIOLATE CONSTITUTION—*G. v. C.*, 172 N.J. Super. 123, 410 A.2d 1199 (Law Div. 1978), *aff'd per curiam*, 172 N.J. Super. 360, 412 A.2d 128 (App. Div. 1979).

Plaintiff, who was the recipient of welfare assistance from Union County, filed a notice of appeal with the New Jersey superior court after her bastardy and support action was dismissed by the juvenile

and domestic relations court on March 7, 1978. 172 N.J. Super. at 125, 410 A.2d at 1200. A demand for trial by jury was contained in that notice of appeal. Defendant, the alleged father, asserted that the plaintiff was not entitled to that right. *Id.*

The plaintiff found support for her contention in statutory language which states that any party "aggrieved" in a bastardy proceeding could appeal to the county court and "[u]pon request of *either* party the appeal shall be tried before a jury." N.J. STAT. ANN. § 9-17:20 (West 1976) (emphasis added). The defendant, on the other hand, relied upon a court rule promulgated by the New Jersey supreme court, N.J. Ct. R. 4:74-6, which provides that such a proceeding "shall be heard . . . without a jury unless *defendant* demands trial by jury in his notice of appeal." N.J. Ct. R. 4:74-6 (emphasis added).

At the outset, Judge Callahan of the New Jersey superior court, law division, acknowledged that a conflict existed between the statute and the rule. 172 N.J. Super. at 126, 410 A.2d at 1200. *See Sarte v. Pidoto*, 129 N.J. Super, 405, 409, 324 A.2d 48, 50-51 (App. Div. 1974). The *G. v. C.* court, after examining the tentative draft comment of the rule, reasoned that the supreme court did not intend that the right to trial by jury be limited. 172 N.J. Super. at 126, 410 A.2d at 1200. The court pointed out that a discrepancy existed even between the tentative draft comment and the rule; the rule refers to the " 'defendant's' right, while the comment uses the term 'appellant.' " *Id.* The court concluded that the drafters used the terms interchangeably and, therefore, this mere change, as contained in the rule, was intended to implement whatever statutory right existed. *Id.*

Judge Callahan explained that the apparent confusion created by the term "defendant" as contained in the rule, arose out of the "anomalous nature of a bastardy proceeding." *Id.* at 127, 410 A.2d at 1201. The term "defendant" would suffice in the context of an appeal of a criminal matter but bastardy cases are essentially civil actions. *Id.* In light of the "misapprehension of the nature of the proceeding" the rule was interpreted to afford the right to trial by jury to either party. 172 N.J. Super. at 127, 410 A.2d at 1201.

Furthermore, Judge Callahan concluded that the right to trial by jury was protected by the New Jersey Constitution. *Id.* at 131, 410 A.2d at 1202. The applicable section provides that "[t]he right of trial by jury shall remain inviolate." N.J. CONST., art. 1, para. 9. This clause protected the right to trial by jury that existed in all matters at common law when the Constitution of 1776 was adopted. 172 N.J. Super. at 128, 410 A.2d at 1201. After tracing the history of the right to trial by jury in bastardy proceedings, the court concluded that such a right did exist at common law in 1776. *Id.* at 128-31, 410 A.2d at 1201-03.

Judge Callahan's decision was affirmed by the appellate division of the New Jersey superior court in a *per curiam* opinion. 172 N.J. Super. 360, 412 A.2d 128 (App. Div. 1979).

The matter of whether both parties in an appeal of a bastardy proceeding are entitled to a trial by jury has long been recognized as an area of dispute. The court in *G. v. C.* resolved that issue, thereby achieving two goals—allowing both parties to enjoy this basic right, and simultaneously removing the criminal taint from this civil action.