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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CONFLICTS OF LAW—INSURANCE—PLACE OF RESIDENCE DETERMINES LAW TO BE APPLIED IN CLAIM OF INTERSPOUSAL IMMUNITY ARISING OUT OF AUTOMOBILE ACCIDENT—*Nationwide Mutual Insurance Co. v. Perlman*, 187 N.J. Super. 499, 455 A.2d 527 (App. Div. 1983).

Mrs. Sherry K. Perlman was injured when a car in which she was a passenger struck a telephone pole. Mrs. Perlman's husband was driving the car at the time of the accident. The vehicle which Mr. Perlman was driving was owned by Sherry Perlman's father, Eddie Leon. The Perlmans, who lived in New Jersey, were using the car with the permission of Mr. Leon. Mr. Leon's vehicle was insured by Nationwide Mutual Insurance Company. The accident took place in New Jersey, while the insurance policy had been issued in New York. 187 N.J. Super. at 500-01, 455 A.2d at 528.

Mrs. Perlman brought suit in New Jersey against both her husband and her father for the injuries she sustained in the accident. Subsequently, Nationwide brought a separate action seeking declaratory judgment on two counts: first, that it had no duty to provide coverage or a defense to Mr. Perlman; and second, that New York law would apply to all issues of coverage under the policy issued to Eddie Leon. The trial court granted summary judgment to Nationwide, directing, *inter alia*, that New York law would apply to "all issues of interpretation of the automobile policy in the pending litigation." Sherry Perlman appealed. *Id.* at 501, 455 A.2d at 528.

In reversing the order that New York law apply, the appellate division recognized that the choice of law question was crucial to the pending litigation. New Jersey had abandoned the doctrine of interspousal immunity in motor vehicle cases in 1970. New York's insurance statute, however, adhered to the doctrine unless expressly stated otherwise in a policy. The appellate division recognized that New Jersey had previously applied the common-law rule that the law of the place of contracting governed liability under an insurance policy. The court then noted that the current trend in a conflict of laws situation was to weigh each state's respective interests in the controversy before deciding which law would apply. The result was that the *lex loci contractus* rule would ordinarily apply unless important state policies dictated otherwise. *Id.* at 502, 455 A.2d at 528-29. In holding that New Jersey law should apply, the court relied upon two earlier cases expressing the idea that the law of the state where the spouses resided had a significant interest in determining whether interspousal immunity would apply. *Id.* at 503, 455 A.2d at 529. New Jersey, the court observed, had a significant interest in preserving harmony among its

residents. Since the doctrine of interspousal immunity was likely to threaten the domestic harmony of the Perlmans, New Jersey law would apply. While noting that earlier cases had expressed concern that applying the law of another jurisdiction would expose an insurer to greater risk than anticipated, the court held that it was reasonable for an insurer to expect that a vehicle would be driven to another state with different laws regarding interspousal immunity. If an insurer wished to avoid such a situation, it should have expressly excluded coverage of interspousal claims. *Id.* at 504, 455 A.2d at 529-30.

Judge Fritz felt constrained to concur in the result but expressed reservation about making a different contract for the parties than that which they had struck between themselves. He did not believe that an insurer could reasonably anticipate the application of anything but New York law in such a situation. *Id.* at 505, 455 A.2d at 530 (Fritz, J. concurring).

The balancing of interests approach employed by the appellate division is the best solution to a difficult choice of law problem. The common-law rule of *lex loci contractus* should not be mechanically applied to every situation. The use of an "interest analysis" is desirable since it gives due regard to each state's relationship to the parties and the claim. Since an interspousal immunity claim between New Jersey residents is likely to have a significant impact upon the public policy considerations in New Jersey, it is desirable to apply New Jersey law. This is also in accord with the weight of current scholarly opinion on choice of laws. Furthermore, no insurmountable burden has been placed upon insurance companies by this decision. As the appellate division pointed out, the parties are free to make their own contract. Thus, an insurer wishing to prohibit interspousal claims need only make such an exclusion in its policy.

T.D.

CRIMINAL PROCEDURE—INCOMPETENTS—DISMISSAL OF CRIMINAL CHARGES AGAINST MENTALLY IMCOMPETENT DEFENDANT UNDER N.J. STAT. ANN. § 2C:4-6 MAY BE WITH OR WITHOUT PREJUDICE AT COURT'S DISCRETION—*State v. Gaffey*, 92 N.J. 374, 456 A.2d 511 (1983).

On April 20, 1977, Daniel Gaffey, who was then serving in the military, allegedly set fire to a building in which several persons died. 92 N.J. at 379, 456 A.2d at 513. Two days after the incident, Gaffey was hospitalized, diagnosed as an acute paranoid schizophrenic, *id.*, and discharged as unfit for military service. He was indicted for arson,

murder, and related crimes one year later, by which time he had been in several military hospitals for mental illness.

Pursuant to N.J. STAT. ANN. § 2C:4-6 (West 1982) which provides for evaluation of a defendant's fitness to stand trial, the trial court, on March 19, 1979, ordered Gaffey to undergo psychiatric observation. *Id.* at 380, 456 A.2d at 513. Eight months later, the defense moved to have the indictment dismissed. On the basis of expert testimony, the court declared Gaffey incompetent but declined to dismiss the indictment. Instead, it ordered a rehearing in six months under subsection (c) of the statute which provides for dismissal of an indictment when a defendant has remained incompetent for an "adequate" period of time. *Id.*, 456 A.2d at 513. On the defendant's renewed motion to dismiss, further expert opinion convinced that court that there was no substantial probability that Gaffey would regain his competence in the foreseeable future. Subsection (e) of the statute provides that "if it is determined that it is not substantially probable that the defendant will regain his competence in the forseeable future, the court may dismiss the charge." N.J. STAT. ANN. § 2C:4-6 (e). Therefore, applying the standard of subsection (e), the court dismissed the indictment and civilly committed Gaffey to Trenton Psychiatric Hospital. 92 N.J. at 380, 456 A.2d at 513.

The state appealed the dismissal, but upon learning that Gaffey's condition had deteriorated, sought permission to withdraw its appeal. The appellate division refused the request, and instead affirmed the trial court's order of dismissal on the merits. *Id.* at 381, 456 A.2d at 513. It did not address whether the dismissal was with or without prejudice, which had been raised during oral argument, finding the issue unripe for adjudication. The defendant petitioned for certification on the issue of whether dismissal pursuant to N.J. STAT. ANN. § 2C:4-6 is with prejudice.

The supreme court, in an opinion by Justice Handler, first dealt with what it deemed a "threshold issue," namely, whether leave to withdraw the appeal had been properly denied. Finding that withdrawal of the appeal would prejudice the defendant by leaving his rights unsettled, the court affirmed the appellate division's denial of the state's request. 92 N.J. at 382, 456 A.2d at 514. The court did not agree with the lower court's ripeness holding, however, and ruled that a definitive resolution of the case was warranted to safeguard the rights of both the defendant and the state. Likewise, the court found that the question of whether the dismissal was with or without prejudice should no longer be postponed.

Distinguishing between the relevant provisions of the statute authorizing dismissal of an indictment, the court held that dismissal under subsection (c) should always be with prejudice but dismissal can

be with or without prejudice under subsection (e). *Id.* at 389, 456 A.2d at 518. The difference reflects the respective rationales of the two provisions. The determinative factor in subsection (c) is the length of time which the defendant has remained institutionalized and unfit for trial. When, in the judge's opinion, "adequate" time has passed and further delay in proceeding with prosecution of the criminal charges would be unjust, he should dismiss the indictment with prejudice, so that the defendant need not fear its reimposition at a later date. The court, reviewing the history of N.J. STAT. ANN. § 2C:4-6(c), found a strong legislative intent to authorize such judicial discretion. 92 N.J. at 385, 456 A.2d at 516.

Subsection (e), on the other hand, observed the court, has no time requirement; it calls for the judge to evaluate whether the defendant is likely to regain his competency in the foreseeable future. Such predictions, however, can be wrong. Therefore, the court ruled, each case which falls under this provision must be evaluated individually, in the light of such factors as public safety and effective law enforcement, and the state should be allowed to reserve the right to continue or renew the prosecution when appropriate. *Id.* at 387, 956 A.2d at 517. The court justified this decision by noting that a defendant's rights under this system would not be compromised. Even when dismissal is without prejudice, reinstatement of the criminal charges is not automatic; the constitutional protections of due process to prevent undue delay and ensure fairness are still available to a defendant. *Id.* at 388, 956 A.2d at 517. The court thus remanded the matter to the trial court for a determination of whether, in light of all pertinent factors, the dismissal of the charges against the defendant Gaffey was with or without prejudice.

Through this decision, the Supreme Court of New Jersey has reinforced the role of the judiciary in supervising the enforcement of criminal law. By determining that not all dismissals on the grounds of incompetence must be final as a matter of course, the court achieved two objectives. It gave due recognition to public apprehension that some criminals might escape prosecution for serious offenses without justification, and, at the same time, maintained an equitable balance between those concerns and the rights of the individual which must be protected.

S.M.O.

DIVORCE—ATTORNEYS—GOODWILL OF ATTORNEY'S INDIVIDUAL LAW PRACTICE CONSIDERED PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION—*Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983).

Plaintiff James P. Dugan and defendant Rosaleen M. Dugan were married in 1958. Plaintiff is a member of the New Jersey Bar and carries on an individual law practice as a professional corporation. Plaintiff and defendant separated in 1978. Pursuant to a no-fault divorce judgment, the marital estate was distributed and provision was made for alimony and other relief. A major asset of the estate was plaintiff's law practice which amounted to some forty percent of the entire marital assets. Of this figure, seventy percent was attributed to "goodwill." 92 N.J. at 427, 457 A.2d at 3. The joint estate was ultimately valued at $606,966, with $230,864 and $376,102 being awarded to defendant and plaintiff respectively. *Id.*

Plaintiff appealed, claiming error in the trial court's distribution plan, *id.* at 426, 457 A.2d at 2, and the appellate division affirmed. *Id.* Although the supreme court dismissed the subsequent appeal, it granted plaintiff's petition for certification but limited it to the issues involved in the valuation of the law practice. *Id.* at 426-27, 457 A.2d at 2. In particular, the court considered whether goodwill is an asset subject to equitable distribution and if so, how it should be calculated. *Id.* at 432-33, 457 A.2d at 6.

In an opinion by Justice Schreiber, the court held that goodwill does indeed constitute property subject to equitable distribution despite its intangible nature. *Id.* at 434, 457 A.2d at 6. In the court's view the concept is a measure of one's ability to capitalize on one's reputation to generate future business. *Id.* at 429, 457 A.2d at 3. When goodwill has been established, it may represent a firm's most significant source of business. With regard to the value of goodwill in generating business for a licensed professional, particularly an attorney, the court distinguished its prior holding that a professional license and degree are not property subject to equitable distribution. While a license and degree provide only a "remote" possibility of increased future earnings, goodwill ensures probable future business because it is based on accomplishment through the exercise of the licensed profession. As a type of guarantee of future earnings, the court noted, the goodwill established by an attorney during the marriage will continue to benefit the firm after divorce. Thus, because the court found it would be inequitable to ignore the contribution of an attorney's spouse to this source of income, it adopted the rule that an attorney's goodwill is, like any other asset acquired during marriage, subject to equitable distribution. *Id.* at 433-34, 457 A.2d at 6.

On the issue of valuation, the court observed that the difficult task of valuing goodwill should be undertaken with great care as the practitioner will be forced to give up "tangible dollars for an intangible asset." *Id.* at 435, 457 A.2d at 7. In addition, one factor compli-

cating the valuation of an attorney's goodwill is that an attorney is prohibited from selling his practice along with goodwill by the *Code of Professional Responsibility*. *Id.* at 437, 457 A.2d at 8. Despite this limitation, the court maintained that the inherent economic value could not be denied. *Id.* at 439, 457 A.2d at 9.

In considering the trial court's valuation of plaintiff's law practice, the court found numerous errors. It took exception not only to the averaging period and comparative group selected, but also to the multiplier chosen for capitalization and the use of the dollar amount of the practice's assets on a particular date for comparison purposes. *Id.* at 441, 457 A.2d at 10-11. The court thus suggested two appropriate methods for calculating goodwill in an independent law practice. One method involved equating goodwill with the amount by which a practitioner's earnings would exceed the earnings of an attorney of similar experience, expertise, education, and age working as an employee in the same general location. *Id.* at 439, 457 A.2d at 9. Another method involved examining partnership agreements covering comparable attorneys which show value exceeding capital accounts. *Id.* at 440-41, 457 A.2d at 10. The court emphasized, however, that it did not mean to preclude the use of other methods for calculating goodwill which might also be acceptable. *Id.* at 441, 457 A.2d 10. Thus the matter was remanded to the trial court for reevaluation of the plaintiff's law practice with respect to goodwill including any appropriate modification of the equitable distribution plan. *Id.* at 444, 457 A.2d at 12.

DOMESTIC RELATIONS—ALIMONY AND MAINTENANCE—SHOWING OF COHABITATION ON PART OF DEPENDENT FORMER SPOUSE MAY RESULT IN ALIMONY MODIFICATION IF RELATIONSHIP REDUCES FINANCIAL NEED OF DEPENDENT FORMER SPOUSE—*Gayet v. Gayet*, 92 N.J. 149, 456 A.2d 102 (1983).

George and Mary Ann Gayet were divorced on July 18, 1978. The divorce judgment stipulated that Mary Ann would be awarded custody of the children, with George receiving off-premises visitation rights. Mary Ann was also permitted to live in the couple's home until such time as she remarried or until the youngest child reached the age of majority. George was ordered to make weekly alimony payments of $110 and child support payments of $50. In March of 1980, George moved to terminate alimony payments and sell the family residence alleging that Mary Ann was cohabiting with another man as "husband and wife." 92 N.J. at 150, 456 A.2d at 102. Both parties stipu-

lated that Mary Ann had cohabited with the other man four nights a week between December 1, 1979 and March 15, 1980.

The trial court found that Mary Ann continued to cohabit after March 15, 1980 approximately one night out of four and that as of the date of the hearing that Mary Ann and the other man "were living together." The trial court retroactively reduced Mary Ann's alimony award proportionate to the amount of time each week that she cohabited by four-sevenths for the December to March period and by one-fourth for the period from April to the date of the hearing. All alimony was terminated after the trial. The appellate division reversed, holding that an alimony award will not be modified because of a dependent former spouse's cohabitation with another unless the financial needs of the former spouse are diminished as a result of the cohabitation. *Id.* at 149-50, 456 A.2d at 102.

The supreme court, in an opinion by Justice O'Hern, affirmed the appellate division and held that a showing of a dependent former spouse's cohabitation constitutes "changed circumstances" justifying discovery and a modification of alimony hearing, but the test for any actual modification remains whether the relationship has reduced the financial needs of the dependent former spouse. *Id.* at 154-55, 456 A.2d at 105. In reaching its conclusion, the court balanced two competing legal policies: first, the legislative directive that alimony terminate upon remarriage of the dependent former spouse, N.J. STAT. ANN. § 2A: 34-25 (West 1952), and second, the right of an individual to carry on his or her personal life free from governmental sanctions. 92 N.J. at 151, 456 A.2d at 103.

The court briefly traced the development of New Jersey alimony law and then focused on the effect of postdivorce cohabitation on alimony law in other jurisdictions. While Illinois terminates alimony upon proof of cohabitation and New York and California terminate it when the former spouse lives with another and holds herself out as his wife, the court noted that the majority of jurisdictions employ an "economic needs" test in alimony modification applications. The test was outlined in *Garlinger v. Garlinger*, 137 N.J. Super. 56, 347 A.2d 799 (App. Div. 1975), and permits alimony modification when the cohabitant contributes to the dependent former spouse's support or resides in the alimony recipient's home without contributing toward expenses. 92 N.J. at 153, 456 A.2d at 104. The supreme court determined that this test correctly accommodated the actual financial needs of the dependent former spouse without penalizing her for her choice of lifestyle. The court held, however, that a showing of cohabitation, by itself, is sufficient to establish the necessary "changed circumstances" to merit discovery and a judicial hearing on the possibility of alimony modification. *Id.* at 154-55, 456 A.2d at 105.

In a dissenting opinion Justice Schreiber argued that under the circumstances of the case the cohabiting dependent former spouse should bear the burden of coming forward with evidence of her continuing need for alimony. He suggested that cohabitation should thus create a "rebuttable presumption" that alimony is no longer justifiable. Placing the burden of coming forward on the cohabiting party, Justice Schreiber held, was "harmonious with the legislative intent" that alimony terminate upon remarriage. *Id.* at 156, 456 A.2d. at 106 (Schreiber, J., dissenting).

By adhering to the "economic needs" test, the court is balancing the financial rights and obligations of both parties without punishing the dependent party's subsequent sexual conduct. While cohabitation constitutes a "changed circumstance" justifying discovery and a modification hearing, it is treated and examined by the court in the same way as any other "changed circumstance." The supporting former spouse who seeks modification, carries the burden of proof that the dependent former spouse truly has a lesser financial need than before the "changed circumstance." The criterion for awarding alimony is still the actual financial need of the dependent former spouse and not his or her living arrangement.

V.J.B.

EMINENT DOMAIN—JUST COMPENSATION—COMMON OWNERSHIP AND POSSIBILITY OF COMBINING USE OF PROPERTY REMAINING AFTER PARTIAL TAKING SHOULD BE CONSIDERED IN ASSESSING AMOUNT OF SEVERENCE DAMAGES DUE WHEN TWO PARCELS OF COMMONLY OWNED CONTIGUOUS LAND ARE TAKEN BY EMINENT DOMAIN—*New Jersey v. Silver*, 92 N.J. 507, 457 A.2d 463 (1983).

The Silvers own two parcels of contiguous land along Route 9 in Howell Township, New Jersey. New Jersey instituted a condemnation proceeding to take a portion of each of the two parcels in order to widen Route 9. Prior to the taking, the parcels had been put to separate uses. On one parcel was located a clothing store, and on the other a gas station. 92 N.J. at 511, 457 A.2d at 465. As a result of the taking, the use of one parcel as a clothing store was frustrated by the elimination of almost the entire parking lot, and the use of the other parcel as a gas station was made impossible due to the removal of the gasoline pumps, storage tanks, and structures. *Id.* Pursuant to the Eminent Domain Act of 1971, N.J. STAT. ANN. §§ 20:3-1 to -50 (West Cum. Supp. 1982-1983), the owner of property taken by the state via condemnation proceedings is entitled to just compensation for the property. In the case of a partial taking, the owner is entitled to the

value of the portion of the taken land plus "severence damages," representing the value by which the remaining land has been reduced. 92 N.J. at 514, 457 A.2d at 467.

At a hearing before condemnation commissioners, a separate award was set for each parcel. Both parties appealed and separate trials were ordered to determine the damages due on each parcel. *Id.* at 511, 457 A.2d at 465. At trials before different juries in the law division of the superior court, the court did not allow the state to introduce evidence that the damages due to the Silvers could be reduced by utilizing the remainder of the gas station parcel as a parking facility for the clothing store. Defendants were awarded $26,200 for damages to the gas station and $80,000 for damages to the clothing store. The state appealed on two grounds: The damages due on both parcels should have been determined at one trial by one jury; and the combined use of the properties should have been considered in determining the amount of damages due. The appellate division affirmed the condemnation awards, holding that the defendants were entitled to a separate award for the partial taking of each parcel. *Id.* at 512-13, 457 A.2d at 466.

On certification, the supreme court reversed and remanded the appellate division's decision. The court held that the common ownership of condemned parcels and the possibility of combining the use of the property should be entered as evidence in a single trial before one jury to accurately assess the value of damages resulting from the taking. The court began its analysis with the settled principle that an owner is entitled to just compensation when his property is taken by condemnation, and when, as here, there are two partial takings, the owner is entitled to severence damages for each parcel. *Id.* at 520, 457 A.2d 470. The amount of compensation is ordinarily based on the fair market value of the property taken, *id.* at 513, 457 A.2d at 466, which is that price which would be agreeable to a willing buyer and willing seller of the property. In the case of a partial taking, damages must reflect, in addition, the diminution in the value of the remaining property. All past and future facts and circumstances which would influence the parties to a sale of the property in arriving at a price must be considered. *Id.* at 515, 457 A.2d at 467. Due to the fluctuation in market conditions, noted the court, New Jersey courts liberally admit any evidence which would aid in the determination of fair market value. *Id.* The court will determine fair market value by an evaluation of the property put to its optimal use. *Id.* at 520, 457 A.2d at 467.

Noting that courts employ an even broader standard in the case of a partial taking because of the requirement that a value be assigned

to the remaining property, the court suggested that the potential combined use of condemned parcels is especially relevant in this case when the incorporation of the parcels is actually possible due to the common ownership of the property. The proposed use of the parcel on which the gas station had been located as a parking facility for the clothing store is a factor which would influence parties to the sale of the property in arriving at a fair price, and should be considered in the assessment of damages. *Id.* at 521, 457 A.2d at 471. The court held that in the interest of judicial economy, fairness, accuracy, and consistency, a single trial with a single jury is imperative to a decision such as this one wherein there is a strong connection between the two parcels of land and an overlap of evidence. *Id.* Justice O'Hern, in his dissenting opinion, agreed with the rationale of the supreme court, but declared that the proceedings should not be prolonged so long as there were no serious defects in the trial. *Id.* at 523, 457 A.2d at 472 (O'Hern, J., dissenting). In his view, the award should be upheld because the jury understood the economic circumstances pertinent to the property when it determined the amount of compensation due the Silvers. *Id.* at 522, 457 A.2d at 471 (O'Hern, J., dissenting).

The decision of the supreme court in no way effects when or to whom compensation is due under the Eminent Domain Act of 1971. Instead, it merely sets forth a possible method of assessing the fair market value of property remaining after a partial taking by the state in a condemnation proceeding. The fact that the combined use of the parcels in this case was employed to determine the amount of compensation due defendants does not imply that defendants in the future may not attempt to have similarly situated parcels evaluated separately.

D.R.

LANDLORD AND TENANT—DISTRAINT—NEW JERSEY DISTRESS ACT HELD UNCONSTITUTIONAL FOR FAILURE TO MEET DUE PROCESS NOTICE AND HEARING REQUIREMENTS—*Callen v. Sherman's, Inc.*, 92 N.J. 114, 455 A.2d 1102 (1983).

The principals of Sherman's, Inc., an interior decorating concern, guaranteed a two year lease on a store in a building owned by plaintiff. The lease provided that, in the event of default, the tenant would remain liable for the monthly rent. Approximately one year into the lease, tenant failed to pay the rent due and indicated that it

was going out of business. Although the lease had no acceleration clause, the landlord filed a complaint seeking the remaining rent due. Three weeks later, the landlord requested a municipal constable to padlock the premises and thereby distrain tenant's goods in the store pursuant to N.J. STAT. ANN. §§ 2A:33-1 to -23 (West 1952 & Cum. Supp. 1982-1983). 92 N.J. at 119, 455 A.2d at 1104. The tenant took no action with regard to the distraint other than to notify the Small Business Administration (SBA) with whom the tenant had no outstanding loan. The SBA auctioned the tenant's property and subsequently surrendered possession of the premises to the landlord, who was unable to rent the premises until approximately one year later. The principals filed for bankruptcy in 1980 and were discharged from all judgments in bankruptcy in 1981. *Id.* at 119-20, 455 A.2d at 1104-05.

The landlord sued for damages for breach of the lease and the tenant counterclaimed, challenging the constitutionality of the distraint. The trial court entered judgment against the tenant for a portion of the unpaid rent, *id.* at 118, 455 A.2d 1104, and dismissed the counterclaim as a matter of law, finding that the actions of the landlord and constable did not constitute state action as required to invoke fourteenth amendment protections. *Id.* Although the appellate division affirmed the damages award, it found that the tenant had been deprived of due process because the distraint did, in fact, constitute state action. Therefore, the case was remanded for a new trial on the tenant's counterclaim. *Id.*

On the landlord's petition for certification, the Supreme Court of New Jersey held the statute unconstitutional, *id.*, but reversed that part of the appellate division's judgment remanding the counterclaim for trial since defendant had suffered no damage as a result of the distraint. *Id.* In arriving at its decision, the court considered, whether distraint by a municipal constable at a landlord's request constituted state action, thereby invoking due process protection and, if so, whether the due process requirement of sufficient notice and opportunity to be heard was satisfied by the provisions of the statute. *Id.* at 117, 455 A.2d at 1103. Noting that distraint at common law was a purely private action, the court observed that the New Jersey statute required the aid of a sheriff or constable should the landlord so request. This active participation of a state official thus brought this procedure within the definition of "state action." *Id.* at 124, 455 A.2d at 1107. The court acknowledged that not all state action effects a deprivation giving rise to due process protections, but stated that the distraint, although temporary, did indeed deprive the tenant of its

goods in violation of fourteenth amendment due process guarantees. *Id.* at 127, 455 A.2d at 1108. The holding was limited to distraint by a sheriff or constable but the court noted that a tenant may be just as adversely affected by distraint on the part of a landlord and that there was no assumed difference between the actions based upon the presence or absence of a constable. *Id.* at 133, 455 A.2d at 1112.

With regard to what process was due the tenant, the court declared that the statute failed to meet the minimum notice and hearing requirements formulated by the United States Supreme Court. *Id.* at 132, 455 A.2d at 1111. In its current form, the statute does not require that the lessee be given notice and hearing prior to distraint, nor does it require the lessor to prove his right to distrain before taking possession of goods in which he has no ownership interest. *Id.* at 132-33, 455 A.2d at 1111. Moreover, unless a tenant sues for replevin, which the statute in effect discourages by making the tenant liable to the landlord for double costs in the event it is unsuccessful in such an action, the entire distraint procedure is conducted without review by an impartial third party. *Id.* Hence the statute was found to be unconstitutional. *Id.* at 133, 455 A.2d at 1112.

Even though the statute was held unconstitutional in this case, the court indicated that it was the legislature's probable intent that the statute survive. *Id.* at 135, 455 A.2d at 1113. In its opinion, the constitutional deficiencies could be cured by reading the statute in conjunction with N.J. Ct. R. 4:52 which deals with interlocutory relief. 92 N.J. at 135, 455 A.2d at 1113. Proceeding under this rule would provide for judicial supervision of the distraint. While in most cases due process would be satisfied by requiring notice and a predeprivation hearing, self-help and a postdeprivation hearing were not eliminated as an alternative available to the landlord in extraordinary circumstances. Such a scheme would cure the constitutional defect and allow the statute to survive. *Id.* at 137, 455 A.2d at 1114. By this decision, the New Jersey Supreme Court had indicated a willingness to modernize a statutory remedy so that it affords greater protection to the tenant in the form of due process but does not diminish the landlord's right to relief.

C.J.K.

NEGLIGENCE—Personal Injuries—Person Injured on Poorly Maintained Public Sidewalk Can Collect Damages from Present Owner of Adjacent Land and Predecessor in Title—*Cogliati v. Ecco High Frequency Corp.*, 92 N.J. 404, 456 A.2d 524 (1983).

Charlotte Cogliati fell and broke her hip on a broken sidewalk in North Bergen in November 1977. 92 N.J. at 405, 456 A.2d at 526. The commercial building adjoining the public sidewalk was owned by the Ecco High Frequency Corporation (Ecco), which had purchased the building from Bernard Oster in July 1977. *Id.*, 456 A.2d at 527.

The plaintiff brought an action for personal injuries, alleging that the sidewalk was in dangerous condition due to structural deterioration caused by either improper construction or inadequate maintenance. *Id.* at 404, 456 A.2d at 526. The defendants were Ecco, the present owner; Emil Capita, Ecco's principal stockholder; and Bernard Oster, Ecco's predecessor in title. *Id.* Ecco crossclaimed against Oster for contribution as joint tortfeasor. *Id.* at 405, 456 A.2d at 526. Oster joined his insurer as a third party defendant. *Id.* The trial court granted Oster's motion for summary judgment, as well as a subsequent motion for summary judgment by Ecco and Capita. *Id.* The court ruled that an abutting owner may be liable for his own negligent construction or repair of the sidewalk, or that of his predecessor in title, but not for sidewalk defects caused by incidental public traffic or the elements. *Id.* at 406, 456 A.2d at 527.

While plaintiff's appeal was pending, the Supreme Court of New Jersey decided *Stewart v. 104 Wallace Street, Inc.*, 87 N.J. 146, 432 A.2d 881 (1981), holding that commercial landowners are liable to pedestrians injured on public sidewalks abutting their property, when the landowners have failed to keep the sidewalk in reasonably good condition. 87 N.J. at 157, 432 A.2d at 882. The appellate division held that *Stewart* should be applied retrospectively to Ecco and Capita, that Oster was liable for a reasonable period of time following the sale, and that Oster's insurer may have had a continuing obligation to him. 92 N.J. at 407, 456 A.2d at 527.

On defendants' petition for certification, the supreme court affirmed the ruling in the appellate division that the case be remanded for trial. *Id.* at 418, 456 A.2d at 533. Writing for the majority, Justice Schreiber asserted that a predecessor in title who has created or maintained a sidewalk in dangerous condition should remain liable to a pedestrian injured therefrom, regardless of whether said predecessor had already passed title. *Id.* at 412, 456 A.2d at 530. In analyzing the obligation of a predecessor in title of realty following conveyance of title, the court examined the three rules that have developed in this area of the law. *Id.* at 407, 456 A.2d at 527. The first rule is that the seller of realty is not liable for injuries after the purchaser has taken possession of the premises regardless of whether the seller created the dangerous condition. *Id.* This rule is based on the notion that once he has surrendered possession and control, the seller's duty terminates.

Id. at 408, 456 A.2d at 528. Under the second rule the court considered, exposure to liability will continue until the dangerous condition has been corrected, reflecting the view that one should not be absolved from liability simply because possession has been transferred. *Id.* at 410, 456 A.2d at 529. The final rule covers an intermediate view and holds a seller liable for a reasonable time after the transfer. *Id.* at 411, 456 A.2d at 529. The supreme court adopted as the rule in New Jersey the doctrine that the predecessor in title should remain liable for injuries to pedestrians caused by defects which he could have corrected, regardless of a subsequent conveyance. *Id.* at 412, 456 A.2d at 530. The court reasoned that the predecessor in title is in fact responsible by his failure to repair, and should not be immune from legal responsibility because of an intervening conveyance. *Id.* This continuance of liability coincides with similar developments in other areas of tort law, particularly product liability law. *Id.* at 413, 456 A.2d at 530. Naturally, the plaintiff will have the burden of establishing that defendant's failure to repair was a substantial factor in causing the subsequent injury. *Id.* at 415, 456 A.2d at 532. The contribution of respective wrongdoers will depend upon the relationship and conduct of the parties. *Id.*

The court then examined whether the *Stewart* doctrine should be applied retrospectively to a predecessor in title in view of the fact that a new rule of law was being formulated. *Id.* at 416, 456 A.2d at 532. The court placed special emphasis on the reliance which landowners place on the belief that their liability is extinguished once they have transferred title to their property, thereby cancelling liability insurance policies. *Id.* at 415, 456 A.2d at 532. The insurance entanglements likely to arise were given serious consideration by the court. *Id.* at 417, 456 A.2d at 532. The court held that because of factors emanating from reliance by the predecessor in title, the rule enunciated would not generally be applied retroactively. *Id.* The court, however, allowed the *Stewart* doctrine to be applied in this case, so that "the plaintiff [would] be rewarded for her efforts in challenging the rule concerning predecessors in title." *Id.*, 456 A.2d at 533.

Justice Clifford filed a concurring opinion in which he agreed with the majority opinion insofar as it applied the *Stewart* doctrine to the present owner. *Id.* at 419, 456 A.2d at 534. He took exception, however, to the majority's reasoning concerning the predecessor in title, particularly in regard to the vague standards set up to determine the duration of the predecessor's liability. *Id.*

This decision has revamped the law in New Jersey regarding the liability of a commercial landowner who neglects to maintain the public sidewalk abutting his property. Hereafter, predecessors in title

will remain liable to pedestrians injured because of the predecessors' failure to maintain the sidewalk in proper condition. This decision should encourage all commercial landowners to keep their sidewalks in good repair, particularly since a transfer will not absolve them from liability for injuries resulting from their failure to act.

R.R.

TAXATION—PROPERTY TAXES—EXEMPTION DENIED TO THEATER WHOSE PROPERTY WAS NOT EXCLUSIVELY USED FOR STATUTORY PURPOSE—*Paper Mill Playhouse v. Millburn Township*, 118 N.J. Super. 18, 455 A.2d 1128 (App. Div. 1982).

The plaintiff, the Paper Mill Playhouse, claimed a property tax exemption in 1978 for its land and buildings located in Millburn, pursuant to N.J. STAT. ANN. § 54:4-3.6 (West Cum. Supp. 1982-1983) which provides an exemption for the property of corporations which are organized "exclusively for the moral and mental improvement of men, women and children," provided that they "are not for profit." 118 N.J. at 20, 455 A.2d at 1129. The theater, a nonprofit New Jersey corporation, is well known for its polished performances of major musicals, plays, and other popular productions, often featuring national and international talent in its leading roles. In order to produce these programs, the plaintiff corporation employs union actors and actresses, stagehands, managers, and other essential support staff. Advertising is handled by a press agent; financing is accomplished chiefly through its substantially priced tickets, *id.* at 22, 455 A.2d at 1130, although the theater also receives some private donations as well. *Id.* at 23, 455 A.2d at 1131. Mostly as a result of this activity, for forty-four to forty-six weeks a year, the plaintiff had net income of $275,000 for the fiscal year at issue. *Id.* at 22, 455 A.2d at 1130. The Essex County Board of Taxation denied the exemption claim, viewing the corporation as largely an "entertainment enterprise." The plaintiff contended that it is an important cultural center of the state. *Id.* at 20, 455 A.2d at 1129.

The Tax Court of New Jersey reversed the Board's determination and granted the exemption. *Id.* The court found that the plaintiff corporation had met all the exemption requirements of the statute, namely the corporation was organized and operated for the actual and exclusive purpose of promoting "the moral and mental improvement of men, women, and children," and it was not run for profit. *Id.* at 24, 455 A.2d at 1131.

The Superior Court of New Jersey, Appellate Division, reversed the decision of the tax court. *Id.* at 29, 455 A.2d at 1134. There was no dispute that N.J. STAT. ANN. § 54:4-3.6 was the applicable law, 118 N.J. Super. at 20, 455 A.2d at 1129; the court disagreed, however, with its application to the theater. *Id.* Looking beyond the cultural setting of the playhouse, the court noted the plaintiff's many commercial attributes. Only union help is employed for productions, *id.* at 21-22, 455 A.2d at 1130, while public involvement is limited to spectating. *Id.* at 29, 455 A.2d at 1134. Its manner of casting, producing and financing its operations is substantially like its taxable counterparts. Furthermore, its major works are chosen more for their popular appeal, and, therefore, their financial promise, than for their cultural value. *Id.*, 455 A.2d at 1133. In analyzing the line of New Jersey cases dealing with property tax exemptions, the court noted that it had not been sufficient in earlier cases to grant an exemption if there was only an indirect and not an exclusive use of property for "the moral and mental improvement" of society. *Id.* at 24-25, 455 A.2d at 1131. In addition, the theater's commercial nature was distinguishable from other tax exempt cultural centers which, through local participation in the planning and production of their programs, provided for the cultural enrichment of the community. The few ancillary activities of the plaintiff, namely its children's shows and art exhibitions, did not outweigh the theater's predominantly enterpreneurial character. Accordingly, the property was denied a tax exemption. *Id.* at 29, 455 A.2d at 1134.

As a result of this decision, the Paper Mill Playhouse will have to reconsider its current programming. Beyond the property tax exemption, the theater has also enjoyed the income tax exemption afforded under section 501(c)(3) of the Internal Revenue Code, the charitable exemption from the New Jersey state sales tax, and a special charitable organization mail rate. *Id.* at 23, 455 A.2d at 1131. Although these other tax exemptions are not necessarily lost, nor the corporate donations they attract, the taxing entities granting them their beneficial status may very well review those determinations. In an effort to avoid being caught in this dilemma, the plaintiff may be forced to forsake all its charitable activities, such as its discounted or free tickets distributed to senior citizens, students, and charitable organizations, *id.*, or its unprofitable art exhibits and other cultural events. Alternatively, the corporation may be compelled to curtail, if not eliminate, its "commercial" activities at the risk of diluting the quality of its performances.

G.T.