

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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FAMILY LAW—PARTIES CAN CONTRACT TO SUBMIT ALIMONY AND CHILD SUPPORT PAYMENTS TO BINDING ARBITRATION—*Faherty v. Faherty*, 97 N.J. 99, 477 A.2d 1257 (1984).

After seventeen years of marriage and with four dependent children, Susan and Roger Faherty were divorced. Prior to the divorce and with the aid of counsel, they negotiated a property settlement agreement that was incorporated into the final divorce decree. Not only did that agreement specify the manner in which the Fahertys' assets were to be distributed, but it also contained a clause that provided that the Fahertys would submit to arbitration any financial disputes that arose from the agreement's provisions. Under the agreement, the rules of the American Arbitration Association (AAA) would govern the arbitration process and the arbitrator's decision would be binding. 97 N.J. at 102, 477 A.2d at 1259. The parties recognized that Roger's ability to pay child and spousal support was influenced by his variable earnings as an investment banker, and, accordingly, the agreement provided that, under certain circumstances, the support could be adjusted. *Id.* at 103, 477 A.2d at 1259.

When Roger fell behind in his alimony and child support payments, Susan moved in the chancery division for an order fixing the arrearages and compelling discovery of Roger's business records. Roger cross-moved to have the arrearages submitted to arbitration and to have the amount of future payments reevaluated in view of changed circumstances. The chancery division ordered that the issues be arbitrated in accordance with the agreement. Susan alleged the arrearages to be \$25,400 for child support and \$25,000 for alimony. The arbitrator fixed the amounts owed for alimony at \$37,648 and for child support at \$12,284, and he denied any reduction in future alimony or child support. *Id.* at 104, 477 A.2d at 1260. The chancery division confirmed the arbitration award and denied Roger's motion to vacate the award. *Id.* at 105, 477 A.2d at 1260. Despite the fact that it was he who initially sought to compel arbitration, Roger appealed, challenging both the validity of the arbitration clause and the confirmation of the arbitration award. He claimed that the arbitration clause should not be enforced because, as a matter of public policy, disputes over alimony and child support should be settled by the courts; he also claimed that the arbitration award was erroneous. The appellate division found all of the issues raised by Roger to be without merit, and the New

Jersey Supreme Court granted certification. *See id.* at 105, 477 A.2d at 1260-61.

Justice Garibaldi, writing for a unanimous court, observed that while marital separation agreements are generally enforceable, *id.* at 105, 477 A.2d at 1261, and arbitration is a valid means for resolving contractual disagreements, *id.* at 107, 477 A.2d at 1261-62, it was the first time that the issue of the enforceability of an arbitration clause within a separation agreement had been before the supreme court. *Id.* at 105, 477 A.2d at 1261. After considering the sensitive nature of domestic disputes and the advantages of party autonomy in such matters, the court held that spouses may in their separation agreement bind themselves to submit alimony disputes to arbitration. *Id.* at 107-08, 477 A.2d at 1262. The court also noted that public policy in fact favors, rather than frowns upon, such agreements. *Id.* at 107, 477 A.2d at 1262.

With respect to arbitration of child support and custody disputes, however, Justice Garibaldi recognized that courts have a *parens patriae* duty to protect the best interests of children. Thus, although the court found that child support disputes can be made subject to the arbitration process, it held that the trial court should conduct a special review of an arbitrator's award when the child's best interests might be adversely affected. *Id.* at 109-10, 477 A.2d at 1263. Justice Garibaldi observed that such an adverse effect could occur only when the arbitrator's award is less than the amount of support that is requested and when the child's standard of living is thereby actually and materially affected. *Id.* at 110, 477 A.2d at 1263. The court remarked that, under such circumstances, a *de novo* review is essential. *Id.* at 109-10, 477 A.2d at 1263. In addition, while the court did not decide the issues of whether child custody and visitation rights could be made subject to binding arbitration, Justice Garibaldi indicated that the court's policy with respect to child support would probably be equally applicable in such cases. *Id.* at 110, 477 A.2d at 1263.

In an attempt to guide future arbitration in the area, Justice Garibaldi urged that all findings of fact made by the arbitrator be preserved in written form in order to facilitate modification of alimony or child support based on changed circumstances. *Id.* at 111, 477 A.2d at 1264. Finally, with regard to the specific facts before it, the court affirmed the arbitration award with minor modifications. *Id.* at 112-13, 477 A.2d at 1264-65.

The *Faherty* decision provides divorcing spouses with a viable alternative to litigating financial disputes. More importantly, where children are involved, the court has not foresaken its responsibility to protect their best interests. With respect to child support payments, a neutral arbitrator should be as competent as a court in assessing both the child's needs and the parent's relative ability to provide for them. In addition, protection of the child's needs is further insured by the court's authority to review disputed arbitration awards.

Carla J. Crusius

CONTRACTS—IMPLIED WARRANTY OF WORKMANLIKE PERFORMANCE—IN ABSENCE OF NONASSIGNABILITY CLAUSE IN CONTRACT, CONTRACTOR NOT IMMUNIZED FROM CONTRACTUAL OBLIGATION TO PERFORM WORK IN WORKMANLIKE, NON-NEGLECTIVE MANNER BECAUSE ORIGINAL OWNER OR BUYER TRANSFERRED PROPERTY TO SUCCESSOR—*Aronsohn v. Mandara*, 98 N.J. 92, 484 A.2d 675 (1984).

When Mr. and Mrs. Kawash decided to add a patio to their Wyckoff, New Jersey home, they employed the Mandara Masonry Corporation (Mandara) to do the construction work. The patio was completed in 1974 by William S. Mandara, the owner of the company; his father, Salvatore Mandara; and three employees. 98 N.J. at 95, 484 A. 2d at 676-77. In August 1975, the plaintiffs, Mr. and Mrs. Aronsohn, purchased the Kawash home. *Id.* at 96, 484 A. 2d at 677. Their purchase agreement afforded them both the right to make an engineering inspection and the corresponding right to cancel the contract upon an unsatisfactory report. *Id.* at 100, 484 A. 2d at 679. In 1978, the Aronsohns discovered a separation between the patio and the wall of the house. They also noticed that the slate slabs of the patio floor were beginning to rise, and that the patio's outside wall was starting to buckle. The Aronsohns then brought suit against Mandara and Salvatore Mandara, alleging breaches of express and implied warranties, as well as strict liability and negligence claims. *Id.* at 96, 484 A. 2d at 677.

Although the plaintiffs' expert witness testified at trial that the patio had been constructed improperly, the court granted the

defendants' motion to dismiss. *Id.* at 96-97, 484 A. 2d at 677. It found the express warranty claim to be without merit because the defendants' construction contract had been with the Kawashes, and thus there was no privity of contract between the defendant and the Aronsohns. The court also rejected the plaintiffs' negligence claim, finding that, because the plaintiffs were seeking recovery for an economic loss, rather than for injury to their persons or property, their action sounded in contract. Finally, the trial judge reasoned that because the suit involved a service contract, neither an implied warranty nor a strict liability claim was appropriate. *Id.* at 97, 484 A. 2d at 677. The appellate division affirmed the trial court's judgment.

The New Jersey Supreme Court granted the Aronsohns' petition for certification, *id.* at 97, 484 A. 2d at 678, and held that in the absence of a nonassignability clause in the contract, a contractor should not be "immunized from his contractual obligation to have performed his work in a workmanlike, non-negligent manner simply because the original owner or buyer transferred the property to a successor." *Id.* at 99, 484 A. 2d at 678. The court remanded the matter for a new trial to determine whether Mandara had built the patio in a workmanlike manner. *Id.* at 107-08, 484 A. 2d at 683.

Writing for a unanimous court, Justice Schreiber observed that when there exists no express contractual provision with respect to workmanship, the law implies a covenant of reasonably good and workmanlike performance. He thus reasoned that the contract between Mandara and the Kawashes included an implied promise by Mandara to construct the patio in a workmanlike manner. *Id.* at 98, 484 A. 2d at 678. In determining to whom such an implied warranty runs, the court opined that the requirement of contractual privity should be abandoned and that a builder's liability should extend to third persons, such as subsequent purchasers who sue for breach of the implied covenant of good workmanship. Justice Schreiber believed that to require privity under circumstances such as those before him would defeat the purpose of the implied warranty of good workmanship and, in effect, would bar the only remedy that a homeowner might have against the contractor's negligent workmanship. The court reasoned that the fortuity of a change of ownership should not relieve the contractor of liability for unworkmanlike construction, nor should the innocent purchaser be left without recourse for his financial losses. *Id.* at 102-03, 484 A. 2d at 680.

Justice Schreiber noted, however, that a contractor can limit his obligations to a subsequent purchaser by including such a restriction in his agreement with the original owner, provided that such a limitation comports with public policy. *Id.* at 103, 484 A. 2d at 680-81. The court, however, observed that there was nothing in the Kawashes' contract with Mandara that prohibited assignment of their contractual rights. *Id.* at 99, 484 A. 2d at 679. Justice Schreiber reasoned that the Kawashes' conveyance of their property indicated their intent to assign to the Aronsohns all of their contractual rights associated with the property, which included the right of action for breach of contract.

The supreme court also analogized the defendants' implied promise to construct the patio in a workmanlike manner to a real property covenant that runs with the land, and it found that the benefits of both "should flow with the ownership despite the absence of privity between the contractor and the present owner." *Id.* at 101, 484 A. 2d at 679-80. The court held, however, that the Aronsohns could not maintain a cause of action on the theory of implied warranty of habitability. *Id.* at 103, 484 A. 2d at 681. Justice Schreiber identified habitability as "synonymous with suitability for living purposes," *id.* at 104, 484 A. 2d at 681, and he concluded that the evidence did not establish that the patio "constituted a vital living element in the home." *Id.* at 105, 484 A. 2d at 682. The court also held that because no express provisions in the Kawashes' agreement had been violated, the Aronsohns could not maintain their action on the basis of express warranty theory. *Id.* at 103, 484 A. 2d at 681.

Finally, the court stated that it was not obliged to decide the validity of the Aronsohns' negligence claim, because no personal injuries or property damage had been alleged, and because such negligence, if established, would constitute a breach of the implied covenant of workmanlike performance, which is a contract action. Justice Schreiber noted, however, that New Jersey decisions have established that a contractor's liability can be grounded on a negligence theory, despite the absence of privity between the parties, if the plaintiff has suffered injuries to his person or to his property as a proximate result of a contractor's negligent workmanship. *Id.* at 106-07, 484 A. 2d at 682-83.

In closing, the court found that because there was conflicting evidence as to whether the defendant had built the patio in a workmanlike manner, and because the plaintiffs had established a prima facie case, a new trial was necessary. Justice Schreiber ad-

ded, however, that because the Aronsohns' purchase agreement had included the right to conduct an engineering inspection of the premises they could not recover damages for a defective condition that was readily apparent on or before the date on which title was transferred. *Id.* at 107-08, 484 A. 2d at 683. The court reasoned that the Aronsohns should be presumed to have taken such defects into account when they agreed to the sale price. *Id.* at 100, 484 A. 2d at 679.

Under the *Aronsohn* court's holding, an innocent homeowner is protected from latent defects caused by the negligent workmanship of a contractor who has made an "improvement" on the property while it was in the possession of a previous owner. The contractor, however, can prevent such suits by carefully drafting an agreement that includes a nonassignability clause and other reasonable restrictions on his obligations.

Unfortunately, the court has provided little guidance as to exemplary restrictions that would comport with public policy. The New Home Warranty and Builders' Registration Act, N.J. STAT. ANN. § 46:3B-1 to -12 (West Cum. Supp. 1984-1985), requires that builders of new homes provide the person for whom the home is built with warranties of one, two, or ten years, depending upon the part of the home that is warranted. *See* 98 N.J. at 99 n.3, 484 A. 2d at 678 n.3. The regulations, which delineate the subject matter of those warranties, require a one year warranty on attached patios. *Id.* The provisions of the Act, however, extend only to the initial occupants of a new house and to those who purchase directly from the initial occupants. *See Id.* at 99, 484 A. 2d at 678. In light of these legislative enactments, a carefully drafted agreement, which includes a nonassignability clause and a warranty of specific duration, may adequately protect the contractor while conforming to public policy.

John P. MacPhee

PRODUCTS LIABILITY—STRICT LIABILITY IN TORT—MANUFACTURER'S DUTY TO WARN NOT EXTINGUISHED BY USER'S ACTUAL KNOWLEDGE OF DANGER—*Campos v. Firestone Tire & Rubber Co.*, 98 N.J. 198, 485 A.2d 305 (1984).

On November 1, 1978, Armando Campos suffered severe injuries while inflating a tire on a rim assembly, which had been purchased by his employer, Theurer Atlantic, Inc. (Theurer), from the defendant, Firestone Tire & Rubber Company (Firestone). The accident occurred when Campos reached inside a safety cage, which enclosed the rim assembly, in an attempt to secure a locking element that was allowing pressurized air to escape from a tire. 98 N.J. at 202, 485 A.2d at 307. He was injured when the assembly exploded. *Id.* at 203, 485 A.2d at 307. Campos sued Firestone in strict liability in tort, alleging defects both in the design of the rim assembly and in the warnings that were provided to Theurer. *Id.*, 485 A.2d at 308.

Prior to the accident, Firestone had provided Campos's employer with manuals that described proper tire preparation and had also given Theurer a chart containing printed safety warnings. That chart had been posted on the wall in the plaintiff's workplace. However, Campos, a Portuguese immigrant, alleged that the warnings were ineffective because he was unable to read English. *Id.*, 485 A.2d at 307. Despite the fact that he was unable to read the written warnings, Campos did have actual knowledge of the danger of explosion that was associated with the use of the rim assembly because he had been involved in a similar workplace accident in 1972. On that occasion, Campos had been injured, although less severely, when he inserted his hand near the rim assembly as air was being forced into a tire. *Id.*, 485 A.2d at 308.

At trial, the jury rejected the plaintiff's design defect claim. It did, however, find that Firestone had failed to warn adequately of the danger associated with operation of the rim assembly and that this failure to warn was the proximate cause of Campos's injury. *Id.* at 203-04, 485 A.2d at 308. On appeal, a divided appellate division reversed. *See Campos v. Firestone Tire & Rubber Co.*, 192 N.J. Super. 251, 469 A.2d 943 (App. Div. 1983), *rev'd and remanded*, 98 N.J. 198, 485 A.2d 305 (1984). The majority opinion of the appellate division emphasized that no duty to warn should be imposed on a manufacturer where the danger was obvious and the user had knowledge of it. *Id.* at 261-62, 469 A.2d

at 949. The dissent, however, asserted that a plaintiff's subjective knowledge of danger is not relevant to the issue of duty to warn and should only be considered with respect to the question of proximate causation. *Id.* at 269-70, 469 A.2d at 953 (Dreier, J., dissenting).

In a unanimous opinion authored by Justice Schreiber, the New Jersey Supreme Court reversed the judgment of the appellate division and remanded the case for a new trial on the failure to warn issue. 98 N.J. at 211, 485 A.2d at 312. The supreme court noted that there was no question that the manufacturer possessed knowledge of the risk associated with the use of its product. Accordingly, Firestone had a duty to issue a warning to foreseeable users that would be sufficient to protect them from hidden dangers. *Id.* at 206, 485 A.2d at 309. Justice Schreiber also asserted that, in New Jersey, the obviousness of a danger is merely one factor to be considered in determining whether a duty to warn exists. Even where the danger is patent, the court noted, a manufacturer is not necessarily relieved of its duty to warn. *Id.* at 207, 485 A.2d at 310. The supreme court concluded that, under the circumstances of the instant case, Firestone had a duty to warn the plaintiff that placing his hand in the cage surrounding the rim assembly was potentially dangerous. In addition, the court found that, in view of Campos's inability to read English, the written warnings provided by Firestone were inadequate and that warnings in pictorial form should have been used. *Id.* at 208, 485 A.2d at 310.

The supreme court did not accept Firestone's argument that the issue of failure to warn was irrelevant because of the plaintiff's actual knowledge of the danger. Holding that a manufacturer's duty to warn cannot be extinguished by an injured user's perception of danger, the court agreed with the dissenting opinion of the appellate division that the plaintiff's awareness of the danger was relevant to the issue of proximate causation, rather than to the issue of duty to warn. Justice Schreiber noted that it was for a jury to decide whether Firestone's failure to warn was the proximate cause of the plaintiff's injuries. *Id.* at 209, 485 A.2d at 311. In the court's view, the trial judge had not properly instructed the jury that the plaintiff bore the burden of proving that the accident would not have occurred had there been a proper warning. The case, therefore, was remanded for a new trial. *Id.* at 210-11, 485 A.2d at 311-12.

In holding that Campos's awareness of the danger associated

with operation of the rim assembly was relevant to the question of proximate causation, rather than to the manufacturer's duty to warn, the supreme court has properly focused its strict liability inquiry. Applying this rationale to the plaintiff's strict liability claim, the court refused to modify the manufacturer's duty to place only defect-free products with adequate warnings in the marketplace. As a practical matter, the court's decision may be of limited value to injured plaintiffs, because their preexisting knowledge of danger may still be used by defendants to prove that the absence of a warning was not the proximate cause of their injuries. Of additional significance is the court's observation that warnings in graphic or symbolic form may be appropriate in view of the many unskilled and semiskilled employees in the workplace who cannot read English. This requirement was never fully developed by Justice Schreiber, who instead focused his discussion on the causation element, observing that there was evidence that the plaintiff's instinctive act would not have been prevented even with a proper pictorial warning. Accordingly, more extensive judicial consideration is warranted on the issue of the adequacy of written warnings in workplaces filled with illiterate and semiliterate workers.

Marianne M. DeMarco

ETHICS—BREACH OF ATTORNEY'S DUTY TO ADVERSARY RESULTS IN LIABILITY FOR MALPRACTICE SUIT BROUGHT AGAINST ADVERSARY—*Malewich v. Zacharias*, 196 N.J. Super. 372, 482 A.2d 951 (App. Div. 1984).

When Patricia Malewich decided to bring a matrimonial action against her husband, Robert Malewich, she retained Lazlo Zacharias, Jr., to represent her. 196 N.J. Super. at 374, 482 A.2d at 952. Although Mr. Zacharias received notification that a trial date had been set, he relied upon the representation of his adversary, Jon Auty, that, unless Auty notified him otherwise, the case would be adjourned. *Id.* at 374-76, 482 A.2d at 952-53. Auty never contacted Zacharias, but the case went to trial as scheduled. When Auty informed the court that Zacharias would not appear, a default judgment was entered against the plaintiff. Mr. Malewich, however, was allowed to proceed on his counterclaim. *Id.* at 376, 482 A.2d at 953. The ex parte proceeding resulted in

an order dissolving the marriage, an equitable distribution of the parties' assets, and an assessment of tort damages against the plaintiff. *Id.* at 375, 482 A.2d at 952.

Patricia Malewich subsequently discharged Zacharias and retained another attorney, Marc Allen Chase, who "attempted to vacate the judgment and negotiated a settlement." *Id.* at 374, 482 A.2d at 952. Mrs. Malewich, represented by Chase, then brought a legal malpractice action against Zacharias for failing either to appear for trial or to notify her of the original trial date. She asserted that if she had been advised of the trial date she would have been present at trial to refute claims against her and that she could have proven claims against her husband if Zacharias had properly represented her. Zacharias, in turn, filed a third-party action against Auty and Chase, which the trial court dismissed for failure to state a claim upon which relief could be granted. The appellate division granted Zacharias's motion for leave to appeal and affirmed the trial court's order with respect to Chase, finding that as a matter of law he had owed no duty to Zacharias. *Id.* at 375-76, 482 A.2d at 952-53. The appellate division also reversed the dismissal of the third-party complaint against Auty and remanded the matter to the trial court. *Id.* at 377, 482 A.2d at 954.

Writing for the court, Judge Dreier explained that if Auty had, in fact, misrepresented to the trial court what had transpired between him and Zacharias, Auty was in violation of Disciplinary Rules 7-102(A)(2), (5), and (7), which require that attorneys make only true statements to a court. *Id.* at 376, 482 A.2d at 953. In addition, Judge Dreier applied the standard of duty based on reasonableness that was set forth in *Wytupeck v. Camden*, 25 N.J. 450, 136 A.2d 887 (1957), and found that because a member of the bar may reasonably rely on assertions made by an opposing attorney, Auty owed Zacharias a duty to act in good faith, the breach of which could render Auty liable for all or part of the malpractice claim against Zacharias. 196 N.J. Super. at 375-77, 482 A.2d at 952-53. In dicta, the *Malewich* court reemphasized that there is a "covenant of good faith and fair dealing" implicit in every contract, and it observed that such a standard must be applied even more stringently among members of the bar, whose conduct is governed by a specific code of ethics. *Id.* at 377, 482 A.2d at 953.

The *Malewich* decision clearly serves to reinforce the importance of maintaining a high ethical standard among members of

the legal profession. More specifically, the court underscores the often forgotten fact that lawyers owe a duty not only to their clients and to the court, but also to each other. By creating a rule whereunder an attorney can be made to pay damages to a wronged colleague, the case hopefully will deter lawyers from exercising anything other than the utmost good faith when dealing with their adversaries.

Darlene Pereksta

CRIMINAL PROCEDURE—SENTENCING—GRAVES ACT MINIMUM PAROLE INELIGIBILITY APPLICABLE TO ACCOMPLICE TO ARMED ROBBERY—*State v. White*, 98 N.J. 122, 484 A.2d 691 (1984).

In June 1981, Oliver White and three other men participated in two armed robberies. In both instances, White knew that his companions were armed, although he himself did not carry a gun. He was subsequently convicted of two counts of armed robbery and was sentenced to two concurrent, fifteen year terms. In addition, pursuant to the Graves Act, N.J. STAT. ANN. § 2C:43-6(c) (West 1982), White was sentenced to five years of parole ineligibility. The Graves Act provides that a person who is convicted of, among other things, armed robbery and who either "used or was in possession of a firearm" during the commission of the crime, shall be sentenced to a minimum period of parole ineligibility. 98 N.J. at 127-28, 484 A.2d at 693 (quoting N.J. STAT. ANN. § 2C:43-6(c)).

White appealed his parole ineligibility sentence on the ground that he neither used nor possessed a weapon during the robberies and that, therefore, his conduct did not fall within the scope of the Graves Act. Despite White's contentions, the appellate division affirmed the sentence, reasoning that White was an equally culpable accomplice since he knew that his cohorts possessed firearms. *Id.* at 127, 484 A.2d at 693. The New Jersey Supreme Court granted White's petition for certification in order to clarify the circumstances under which the sentencing requirements of the Graves Act apply to an accomplice. *Id.* at 126, 484 A.2d at 693.

The supreme court affirmed the appellate division's holding.

Id. at 132, 484 A.2d at 696. Justice Schreiber, writing for the majority, determined that an accomplice is subject to the sanctions of the Graves Act if (1) he is convicted of an armed Graves Act offense, or (2) he is convicted of an unarmed offense and he either knew or had reason to know that his principal would use or possess a firearm while committing the crime. *Id.* at 126, 484 A. 2d at 693. In so holding, the court rejected White's argument that, because he was not armed during the robberies, his conduct did not fall within the clear language and purpose of the Act. *Id.* at 128, 484 A.2d at 694. Justice Schreiber observed that the legislative intent behind the Graves Act was to deter the possession and use of firearms, *id.* at 128, 484 A. 2d at 694, and that although the Act's language might be susceptible to varied constructions, it should be interpreted so as to further that purpose. *Id.* at 131-32, 484 A.2d at 696.

In reaching its conclusion, the court examined how an "accomplice" fits within the scheme of the Graves Act. *Id.* at 128-29, 484 A.2d at 694. Justice Schreiber defined an accomplice as a person "who acts with the *purpose* of promoting or facilitating the commission of *the* substantive offense for which he is charged as an accomplice." *Id.* at 129, 484 A.2d at 694 (emphasis in original). The court further noted that a person who acts as an accomplice is "legally accountable" for the conduct of a cohort and that both the accomplice and the cohort are guilty of the crime if they " 'shared in the intent which is the crime's basic element.' " *Id.* at 129, 484 A.2d at 694 (quoting *State v. Fair*, 45 N.J. 77, 95, 211 A.2d 359, 367 (1965)). Based upon those observations, Justice Schreiber reasoned that an accomplice, even if he did not possess a firearm, has committed the same crime as an individual who was armed, so long as the accomplice had the requisite intent to promote the crime. *Id.* at 130, 484 A.2d at 695. The court thus concluded that, unless the accomplice neither knew nor had reason to know that his partner possessed a firearm, the legislative intent to deter the use of firearms compelled application of the Graves Act sanctions to the accomplice. *Id.* at 130-32, 484 A.2d at 695-96.

In a dissenting opinion, Justice Handler asserted that the Graves Act should not apply to an accomplice who neither possessed nor used a firearm during an armed robbery. *Id.* at 132-33, 484 A.2d at 696 (Handler, J., dissenting). To hold otherwise, the dissent maintained, would require the court to disavow prior New Jersey decisions, which Justice Handler construed as requir-

ing "actual, immediate, and personal possession of a gun by the offender" in order to render the Graves Act applicable. *Id.* at 133, 484 A.2d at 697 (Handler, J., dissenting). He emphasized that the Act mandates an enhanced sentence for one who "used or was in possession of a firearm," and he criticized the majority for deviating from that express language. Justice Handler maintained that the Graves Act, as a penal statute, must be construed strictly and thus cannot be extended by implication to include sentencing of non-possessory offenders. *Id.* at 134, 484 A.2d at 697 (Handler, J., dissenting).

The dissent explained that the rule of strict statutory construction is designed to limit the scope of conduct covered by a penal statute and thus prevent fundamental unfairness and arbitrary enforcement. *Id.* at 134-35, 484 A.2d at 697 (Handler, J., dissenting (citing *State v. Maguire*, 84 N.J. 508, 423 A.2d 294 (1980))). The dissent further noted that those standards of construction, which govern the sentencing provisions of the New Jersey Criminal Code, "emphasize the objectives of discretionary, enlightened, fair and individualized sentencing." *Id.* at 135, 484 A.2d at 697 (Handler, J., dissenting). Accordingly, Justice Handler concluded that, although the guilt of an accomplice may be the same as that of his principal, sentencing must remain individualized, and that while the Graves Act may govern the determination of the principal's sentence, it would be both unsound and unfair to impose automatically the sanctions of the Act on his accomplice. *Id.* at 135-36, 484 A.2d at 697-98 (Handler, J., dissenting).

In *White*, the New Jersey Supreme Court extended application of the Graves Act in order to impose a five year term of parole ineligibility upon a non-possessory accomplice to an armed robbery. The majority based its decision upon the laudable goals of deterring possession and use of firearms, and of discouraging the substantial increase in violent crimes that has taken place in New Jersey. By so extending applicability of the Graves Act, the court has demonstrated that it will go beyond express statutory language in order to achieve those goals.

Deborah A. Reperowitz