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.*

TABLE OF CONTENTS

CIVIL PROCEDURE—STATUTE OF LIMITATIONS NOT A BAR TO PARTIES' REINSTATEMENT OF THEIR COMPLAINT—*Jansson v. Fairleigh Dickinson University*, 198 N.J. Super. 190, 486 A.2d 920 (App. Div. 1985).

On June 21, 1978, Victoria M. Jansson and Ellen E. McNamara, Fairleigh Dickinson University students, "were brutally attacked and repeatedly raped" in their campus dormitory room. The attackers were apprehended and convicted. On June 19, 1980, Ms. Jansson and Ms. McNamara filed a civil suit against Fairleigh Dickinson University. The suit sought compensatory and punitive damages and claimed that the University had been negligent by not providing adequate security on campus.

The University responded by filing an answer and forwarding a series of interrogatories to the plaintiffs' attorney. 198 N.J. Super. at 192, 486 A.2d at 921. The plaintiffs' attorney never answered these interrogatories despite numerous written requests by defense counsel, who, because of this failure to respond, successfully moved for dismissal on April 6, 1981. Although the dismissal order was sent to the plaintiffs' attorney, he never attempted to vacate this order. In fact, in response to repeated inquiries by the plaintiffs concerning the status of the case, their attorney constantly misrepresented that a trial was imminent. *Id.* at 192-93, 486 A.2d at 921. Eventually, the plaintiffs retained new counsel and, on March 22, 1984, moved to reinstate the complaint and amend the pleadings. In opposing the plaintiffs' motion, the University successfully argued that it had been denied the opportunity to conduct a timely investigation of the incident and that a reinstatement of the complaint would "severely prejudice" its defense. *Id.* at 193, 486 A.2d at 921.

While sympathetic to the plaintiffs' situation, the trial judge denied their motion to reinstate the complaint, stating that "to do so would render our discovery rules totally nugatory." *Id.* at 192, 486 A.2d at 921. The trial court further stated that the appropriate action for compensation would be a malpractice suit against the plaintiffs' former attorney. *Id.* The appellate division, however, reversed and held that "the sins or faults of an errant attorney should not be visited upon his client absent demonstrable prejudice to the other party." *Id.* at 194, 486 A.2d at 922. The appellate division further ordered that the case be remanded to determine whether the three year time delay has im-

paired the University's ability to defend itself. *Id.* at 197, 486 A.2d at 923.

Judge Baime, who wrote the appellate opinion, noted that courts are constantly called upon to reconcile "the finality of litigation and judicial economy with the equitable notion that justice should be done in every case." *Id.* at 193, 486 A.2d at 922. While the court acknowledged the importance of maintaining a degree of consistency and predictability in its discovery rules, Judge Baime nevertheless expressed a general disinclination to dismiss a case simply because the statute of limitations had run. *See id.* at 193-94, 486 A.2d at 922 (citing *Crews v. Garmoney*, 141 N.J. Super. 93, 96, 357 A.2d 300, 301-02 (App. Div. 1976)). The court also noted that the tension between these competing values intensifies when the parties are not at fault and have relied on the presumed ability and good faith efforts of their attorneys. *Id.* at 194, 486 A.2d at 922.

In attempting to resolve this dichotomy, the appellate division examined previous judicial treatment of the issue and found that the fairness of the rule's application has depended upon the factual situation of the individual case. The court noted that some cases required strict compliance with its discovery rules, while in others flexibility and relaxation of these rules were necessary to achieve essential fairness. *Id.* at 194-95, 486 A.2d at 922. After reviewing relevant decisions, Judge Baime presented four factors ordinarily considered by courts in determining whether discovery rules should be relaxed: "(1) the extent of the delay, (2) the underlying reason or cause, (3) the fault or blamelessness of the litigant, and (4) the prejudice that would accrue to the other party." *Id.* at 195, 486 A.2d at 922-23. In applying these criteria to the present case, the court found that the substantial delay in attempting to reinstate the case was outweighed by the fact that the plaintiffs were "entirely blameless" in causing the time lapse and the dismissal of their case. *Id.*, 486 A.2d at 923. The court reasoned that the plaintiffs students should not be forced to suffer because of their former attorney's gross dereliction of professional duties. *Id.* at 195-96, 486 A.2d at 923. Although Judge Baime was sensitive to the trial court's concerns regarding the possible impact of relaxed discovery rules, he "perceive[d] no justification, moral or legal, for punishment of an innocent litigant for the personal conduct of his counsel unless the other party would be prejudiced." *Id.* at 196, 486 A.2d at 923. The appellate division therefore reversed the trial court's ruling

and remanded the case to determine whether the defendant would be unduly prejudiced by the substantial passage of time. *Id.* at 196-97, 486 A.2d at 923.

In view of the severe hardship that may have been imposed on two innocent parties, the appellate court's decision reflected a reasonable and practical approach to a troublesome situation. To enforce strictly the relevant discovery rules and prohibit the plaintiffs' request for relief would have exalted form over substance. Although the court properly acknowledged that the efficacy of such rules will be destroyed by the creation of too many judicially-created exceptions, it correctly observed that " 'justice [should be] the polestar and our procedures must ever be moulded and applied with that in mind.' " *Id.* at 195, 486 A.2d at 922 (quoting *New Jersey Highway Authority v. Renner*, 18 N.J. 485, 495, 114 A.2d 555, 560 (1955)).

Howard Keith Uniman

FORFEITURE—CONSTITUTIONAL LAW—INNOCENT NON-CONSENTING OWNERS WHO DID NOT KNOW OF ILLEGAL USE AND WHO ACTED REASONABLY TO PREVENT SUCH USE ARE EXEMPT FROM FORFEITURE—*State v. 1979 Pontiac Trans Am, Color Grey, New Jersey Registration No. 223-PYX, Serial No. 2W87K9N191373*, 98 N.J. 474, 487 A.2d 722 (1985).

On July 25, 1982, Orlando Figueroa (Orlando) and a friend were driving home from the New Jersey shore in a 1979 Pontiac Trans Am that belonged to Orlando's father (Mr. Figueroa). In the City of Elizabeth at approximately 1:00 a.m., Orlando and his companion broke into a parked Corvette, removed its "T-roof," and placed it into the trunk of the Pontiac. 95 N.J. at 478, 487 A.2d at 724. A witness to the theft contacted the police, who ultimately apprehended Orlando at the Figueroa residence and discovered the Corvette's T-roof in the trunk of the Pontiac. Orlando, who had no criminal record, claimed that the theft was the result of a spontaneous impulse brought on by excessive drinking. Although he was indicted for the crime, he was subsequently accepted into the Pretrial Intervention Program. *Id.* at 478-79, 487 A.2d at 724.

Acting pursuant to N.J. STAT. ANN. § 2C: 64-3 (West 1982),

the Union County prosecutor brought a summary action seeking forfeiture of the Pontiac because it was utilized in furtherance of an unlawful activity. Without hearing any testimony, the law division ruled in favor of the state and ordered that title to the automobile be vested in Union County. The appellate division, in an unreported decision, affirmed the lower court without addressing the constitutionality of the forfeiture statute. 95 N.J. at 479, 487 A.2d at 725.

The New Jersey Supreme Court granted Mr. Figueroa's petition for certification and held that the New Jersey forfeiture statute, N.J. STAT. ANN. § 2C:64-1 to -9, should be construed as "exclud[ing] innocent owners who did not consent to or know of the illegal use of their property and who did all that reasonably could be expected to prevent that use." 95 N.J. at 485, 487 A.2d at 728. Justice Pollock, writing for a unanimous court, explained that contemporary forfeiture statutes serve to discourage owners from carelessly lending their property to others, and that forfeiture is often the only manner in which to ensure that a particular offense will not be committed. The court recognized, however, that the law disfavors forfeitures. Because forfeiture can "result in the taking of private property for public use without compensation," Justice Pollock noted that New Jersey law requires that forfeiture statutes be strictly construed in favor of the individual threatened with the loss of his property. *Id.* at 480-81, 487 A.2d at 725-26.

The court continued by explaining that under the statute there are two general types of property subject to forfeiture: prima facie contraband and property " 'utilized in furtherance of an unlawful activity.' " *Id.* at 481-82, 487 A.2d at 726 (quoting N.J. STAT. ANN. § 2C:62-1). Construing a 1981 amendment to N.J. STAT. ANN. § 2C:62-5, the court noted that a general exemption for innocent owners had been eliminated, and an express exemption presently existed only for lessors and lienholders. Moreover, the court opined that because the language of the statute could require forfeiture of property that was stolen from innocent persons and subsequently used illegally, a literal reading would render the statute unconstitutional. Justice Pollock emphasized, however, that statutory exemptions from forfeiture are to be construed liberally in order to provide the property owner with maximum relief. Accordingly, the court held that the statute also excepted innocent owners who could prove that they took

every reasonable step in order to prevent the unlawful use of their property. 95 N.J. at 82-83, 487 A.2d at 726-27.

The court continued by determining that the reasonableness of an owner's actions should be decided on a case-by-case basis. More specifically, Justice Pollock noted that if an owner has actual or constructive knowledge of the intended unlawful use, then affirmative steps must be taken to prevent such use; if the owner has no such knowledge, then such a duty would be diminished or perhaps eliminated. *Id.* at 486, 487 A.2d at 728. The court further reasoned that the degree of knowledge that an owner possesses, or should possess, depends on a number of factors, including the relationship between the owner and the user, the manner in which the property was transferred, and the nature of the property itself. *Id.*, 487 A.2d at 728-29.

Applying those principles to the case before it, the court noted that a parent-child relationship existed between the owner and the user of the forfeited property. It stated that a parent would not be immunized from forfeiture if he relinquished all control of an automobile to his child. In addition, Justice Pollock admonished that a parent should not allow his child to carry contraband in the parent's automobile. Ultimately, the court would have to evaluate the reasonableness of an owner's conduct in any given situation. Therefore, the court reversed and remanded, instructing the trial court to consider "all of the relevant circumstances." *Id.* at 487, 487 A.2d at 729.

The supreme court's decision ensures that innocent owners are not unduly penalized for an illegal, unforeseeable, use of their property. In addition, it reflects the court's strong desire to prevent unconstitutional takings. By liberally construing the statute's exemption provision, the court struck an equitable balance between the constitutional proscription of the taking of private property and the legitimate exercise of the police power. Because the reasonableness of an owner's conduct is determined on a case-by-case basis, however, it is imperative that sound judicial discretion be utilized. Moreover, any judicial assessment of whether an owner has acted "reasonably" should seek to benefit society by encouraging the responsible lending of property.

Michael F. Chiarella

TORTS—NEGLIGENCE—SOCIAL HOST LIABILITY NOT EXTENDED TO CONDUCT UNRELATED TO OPERATION OF MOTOR VEHICLE AND OTHERWISE UNFORESEEABLE, *Griesenbeck v. Walker*, 199 N.J. Super. 132, 488 A.2d 1038 (App. Div. 1985).

In the early morning hours of February 27, 1981, a fire swept through the Montclair home of James and Caryl Griesenbeck, claiming their lives as well as that of their eighteen month old son, James, and seriously injuring their five year old daughter, Dana. 199 N.J. Super. at 134, 488 A.2d at 1039. The autopsy report stated that Mr. and Mrs. Griesenbeck had died from smoke inhalation. In addition, toxological evidence revealed that Caryl Griesenbeck had a blood alcohol content of .172%, indicating that she had imbibed at least nine alcoholic drinks not long before her death. *Id.* at 135, 488 A.2d at 1040. Further investigation disclosed that Caryl Griesenbeck had gone to the home of her parents, John and Maryl Walker, at approximately 9:30 p.m. on the night of the tragic fire. According to Mr. Walker, he had served his daughter two alcoholic drinks prior to her returning to her own home between 11:30 and midnight. *Id.* at 134, 488 A.2d at 1039.

The guardian *ad litem* for the plaintiffs, Dana Griesenbeck and the estate of her brother James, brought suit against John and Maryl Walker. The suit claimed that the grandparents had served their daughter alcohol knowing that she was already intoxicated and had allowed her to leave in that condition. As a result of the Walkers' negligent conduct, the plaintiffs' attorneys argued, Caryl Griesenbeck either caused the fire in her home or was so physically impaired that she was unable to rescue her family. *Id.* at 135, 488 A.2d at 1040.

Relying on the appellate division's decision in *Kelly v. Gwinnell*, 190 N.J. Super. 320, 463 A.2d 387 (App. Div. 1983), *rev'd*, 96 N.J. 538, 476 A.2d 1219 (1984), which had held that a social host was not liable for injuries to a third party caused by a guest's drunken driving, the trial court granted the defendants' motion for summary judgment. On appeal, the Superior Court of New Jersey, Appellate Division, observed that the later reversal of *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984), had removed the basis for the trial court's ruling. However, the appellate division also noted that because the *Kelly* decision was limited to liability for harm resulting from drunken driving, the question of whether a cause of action existed in the present case remained

open. 199 N.J. Super. at 135, 488 A.2d at 1040. Accepting the plaintiffs' allegations as true, and asserting that the issues in the case were solely questions of law, the court then considered the plaintiffs' appeal on the basis of common law principles of negligence and proximate causation. *Id.* at 135-36, 488 A.2d at 1040.

Judge Gaynor, writing for the majority, thoroughly examined the basic principles of common law negligence in terms of (a) a duty imposed by law to act or refrain from acting, (b) a breach of that duty, (c) the necessity of proximate cause, and (d) the foreseeability of the harm, which defines the scope of the duty to be obeyed. *Id.* at 136-37, 488 A.2d at 1040-41. In scrutinizing the facts in the instant case, the court maintained that these key elements of actionable negligence were clearly absent. *Id.* at 141, 488 A.2d at 1044. The court specifically distinguished *Kelly*, in which the risk of harm to third parties from the operation of a motor vehicle was foreseeable and therefore unreasonable. In the present case, the court noted, Caryl Griesenbeck was not driving when the harm occurred. Moreover, the court observed, it was unforeseeable that she would later cause harm to her children, who were at home sleeping. Therefore, the court concluded that in the circumstances of this case the defendants did not owe a duty of care to the plaintiffs. *Id.* at 138, 488 A.2d at 1042. To hold otherwise would, in the court's opinion, "place an unreasonable burden upon a host in subjecting him to liability for unforeseeable and indeterminable risks." *Id.* at 139, 488 A.2d at 1042. In addition, the court observed that the policy interests which had led the supreme court in *Kelly* to impose a duty on social hosts were lacking in the present case. Elucidating the *Kelly* decision, the appellate division concluded that a social host is not liable to third parties for the negligent acts of an intoxicated guest when that conduct is unrelated to the operation of a motor vehicle and is otherwise unforeseeable. *Id.*

In considering the issue of proximate cause, the court held that the social host's act of serving liquor must be "so closely and significantly connected with the consequences as to justify imposition of liability." *Id.* at 140, 488 A.2d at 1043. In the instant case, the court concluded that even if Caryl Griesenbeck's condition was responsible for the tragedy, the consequences were so unforeseeable that the Walkers' conduct could not be considered the proximate cause of the harm suffered by the children. *Id.* The court also noted that the absence of a duty owed to the injured party by the provider of alcohol, or the lack of causal con-

nection between the provision of alcohol and the harm claimed, has compelled other jurisdictions to deny social host liability. *Id.* at 141, 488 A.2d at 1043.

While the court examined closely the fundamental underpinnings of common law negligence and proximate causation, the true basis for its decision lies in the area of social policy. This was evidenced by the considerable emphasis it placed on "justice, fairness, and common sense." *Id.* at 140, 488 A.2d at 1043. It was also evidenced by the way in which the court distinguished *Kelly*. The court noted that *Kelly* was grounded on the policy of protecting the general public from accidents caused by drunken drivers. The death and injury in the present case, however, were unrelated to drunken driving and did not directly affect the general public. Consequently, a ruling in favor of the plaintiffs would have served no useful social or legislative goal. *Id.* at 139, 488 A.2d at 1042. In addition, because the parties in this case were closely related, the tragedy struck at both plaintiffs and defendants in a personal manner. It is the duty of the court to consider the unique facts of every case, and the tragic circumstances of this family's misfortune could not support imposing further legal fault on the defendants. Thus, in light of the facts, the court could do no less than affirm the trial court's dismissal of the plaintiffs' cause of action.

Olivia P. Klein

PRIVILEGED COMMUNICATIONS—ATTORNEY-CLIENT PRIVILEGE EXPLAINED—*United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553, 483 A.2d 821 (App. Div. 1984).

Morty Wolosoff and a group of investors gave a mortgage note to United Jersey Bank sometime in 1971. A default on the debt followed, with the result that United Jersey Bank received a final judgment against Wolosoff on March 2, 1981, in the amount of $3,957,571. Subsequently, Wolosoff's attorney, Richard Salsburg, and Robert Mulligan, the bank's vice-president and in-house counsel, met to discuss satisfaction of the judgment. During those talks, Salsburg allegedly represented to Mulligan that Wolosoff only had assets sufficient to pay $680,000 on the judgment. Extended negotiations ultimately resulted in a stipulation

of settlement, filed on May 20, 1981, whereby Wolosoff agreed to extinguish the judgment by paying $875,000 in four installments. 196 N.J. Super at 558, 483 A.2d at 823.

Mulligan asserted that in June 1983 he discovered that Wolosoff had substantially more assets during the period of negotiations than Salsburg had represented. Wolosoff's 25% investment in Cable Systems, Inc. (CSI) was not worthless, as he had been told by Salsburg in 1981, but was in fact worth more than $5,000,000. *Id.*, 483 A.2d at 823-24. In addition, Mulligan claimed he discovered that during the time of negotiations Wolosoff had owned marketable securities worth $1,235,000, as well as valuable Florida real estate worth over $1,000,000. As a result of that new information, United Jersey brought an action against Wolosoff, seeking damages and a rescission of the stipulation of settlement. Furthermore, the bank sought injunctive relief that would have forced Wolosoff to pay the full judgment from the proceeds of the sale of his CSI stock. An additional suit subsequently was filed by United Jersey Bank against Wolosoff, Salsburg and Salsburg's law firm, alleging that Salsburg and his firm had intentionally and fraudulently misrepresented Wolosoff's financial position in order to force a reduction in settlement of the original judgment. Those two actions were later consolidated for trial. *Id.* at 559, 483 A.2d at 824.

During the long and protracted pretrial discovery period that followed, attorneys for United Jersey Bank informed opposing counsel of their intent to assert the attorney-client privilege in order to prevent their production of several requested documents. Wolosoff responded by requesting court sanctions and an order compelling discovery. The chancery division denied the application for sanctions but directed that all confidential communications be surrendered. The trial judge reasoned that full pretrial disclosure was necessary because the disputed communications might relate to the critical issue regarding the plaintiff's reasonable reliance upon the representations made by Salsburg and Wolosoff. *Id.* at 560, 483 A.2d at 824. The appellate division reversed the chancery division's order, and directed, instead, that the trial court make an *in camera* inspection of the appropriate documents and release only those that related to the issue of plaintiff's reasonable reliance upon the alleged representations made during the negotiation period. *Id.* at 568, 483 A.2d at 828-29.

In reaching its decision, the appellate division first acknowl-

edged the competing interests present in the case. On one hand, the court noted, it is of primary importance that a broad and extensive disclosure of the facts be allowed in order best to discover the truth. On the other hand, the court conceded, that objective must partially yield to the equally compelling need to preserve the secrecy of communications between a client and his legal counsel in order to promote open and uninhibited exchanges, including those between corporate employees and in-house counsel. It remained the duty of the court, the appellate division observed, to strike the appropriate balance.

The court continued by noting that, given the importance of full discovery, the privilege should be accorded to only those communications made to an attorney who is acting in his official capacity. Thus, the mere fact that Mulligan was an attorney was not enough, in the court's view, to cloak his discussions with United Jersey officials with the privilege. Instead, the court held that it is the responsibility of the trial court, in an *in camera* proceeding, to scrutinize the documents in question to determine whether, by their nature and content, they properly fall within the scope of the attorney-client privilege. *Id.* at 562-63, 483 A.2d at 825-26.

The appellate division continued its analysis with a discussion of waiver. In order to set aside the operation of the privilege, the court observed, a three-pronged test must be satisfied. *Id.* at 564, 483 A.2d at 826 (citing *In re Koslov*, 79 N.J. 232, 398 A.2d 882 (1979)). First, there must exist a " 'legitimate need . . . to reach the evidence sought to be shielded.' " *Id.* (quoting *In re Koslov*, 79 N.J. 232, 243, 398 A.2d 882, 888 (1979)). Moreover, the court noted, the relevance and materiality of the documentary evidence must be clearly demonstrated. Finally, the party seeking to prevent the operation of the privilege must show by a preponderance of the evidence that the evidence sought cannot be obtained from a less intrusive source.

The appellate division held that all three conditions had been met in the instant case. Nonetheless, it held that the chancery division's order to surrender all documents was unfairly broad; the privilege should be waived, in the court's opinion, only for that evidence which the trial court determined, *in camera*, was pertinent to the issue of reasonable reliance. *Id.* at 567-68, 483 A.2d at 828.

The appellate division provides a theoretically sound solution to the difficult problem of balancing the competing needs of

secrecy and disclosure. By requiring an *in camera* review of disputed evidence, the court best avoids the overly broad application of either full discovery principles or the attorney-client privilege. Nevertheless, this theoretical precision comes at a great cost of time—a scarce judicial resource. Of necessity, the careful sifting of documents by a trial court *in camera* first to determine whether the privilege should obtain, and then, using the highly subjective tripartite formula to ascertain whether the privilege should be waived, will further protract the already lengthy and interminable pretrial discovery period. It is doubtful that the small social policy gains derived from the court's *in camera* efforts will outweigh the detrimental effect that an extended discovery period will have on an individual's social right to litigate his claims.

Gordon W. Thomas

TORTS—NEGLIGENCE—DESIGN PROFESSIONAL LIABLE TO PROTECT CONTRACTOR FOR MONETARY DAMAGES DESPITE LACK OF CONTRACT PRIVITY—*Conforti & Eisele v. John C. Morris Associates*, 199 N.J. Super 498, 489 A.2d 1233 (App. Div. 1985).

Conforti & Eisele, Inc. (Conforti) was retained by the State of New Jersey (State) as general contractor in connection with construction performed at the New Jersey College of Medicine and Dentistry. 199 N.J. Super. at 500, 489 A.2d at 1234. The State had retained a project architect, who had, in turn, employed the services of other design professionals, including a subcontracting engineer, Kelly & Morris, Inc., subsequently John C. Morris Associates (Morris). *Id.* During the course of construction, Conforti experienced difficulties, which it attributed to faulty coordination of the project drawings by the design professionals, and as a result of which it suffered financial losses. *See id.* Conforti instituted suit against the architect, an engineer, and Morris, alleging professional negligence with respect to the project's design. *Id.* All defendants, with the exception of Morris, entered into settlement agreements, under which Conforti agreed to indemnify them against cross-claims by other parties to the action. *See id.* At trial, Morris moved to have Conforti's complaint dismissed for failure to state a cause of action. 175 N.J. Super. 341, 342, 418 A.2d 1290, 1291 (Law Div. 1980). Judge

Marzulli rejected the defendant's argument and held that lack of contractual privity between a general contractor and a subcontracting design professional did not bar a damage action for professional negligence. *Id.* at 344, 418 A.2d at 1292. On March 17, 1981, by an oral opinion in a non-jury trial to determine the parties' liabilities, Conforti, Morris, and the two settling defendants were found to be equally negligent. 199 N.J. Super. at 500, 489 A.2d at 1234. The appellate division granted Morris leave to appeal on the issue of the applicable negligence principles and on the extent of its negligence. Conforti was allowed to cross-appeal the finding of its negligence. *Id.* at 500-01, 489 A.2d at 1234. In an unreported decision, the court reversed Judge Marzulli's finding that Conforti had been negligent, but found no need to address the basis upon which the trial court had predicated its finding of negligence. *Id.* at 501, 489 A.2d at 1234. In the course of the action, Morris had asserted cross-claims against the architect and engineer for indemnification, which Conforti defended in accordance with the terms of the settlement agreements. *See id.* The appellate division affirmed all decisions below, noting that the previous reversal with respect to Conforti's negligence had increased Morris's liability for damages from 25% to 33 1/3%. *Id.*

In a *per curiam* opinion, the appellate division upheld both Judge Marzulli's finding that Morris had been negligent and his dismissal of the cross-claims for the reasons expressed in his oral opinions. The court also agreed with the trial court's expansion of design professionals' liability to encompass economic damage to third parties. *Id.* at 500, 489 A.2d at 1234. Judge Marzulli, noting that the case was one of first impression in New Jersey, began his analysis by noting that defenses to third party personal injury actions on the basis of lack of contractual privity are disfavored. Although initially concerned with injuries caused by defectively designed products, he pointed out that liability had been extended to design professionals, such as architects and engineers, *see Totten v. Gruzen*, 52 N.J. 202, 245 A.2d 1 (1968), when it was determined that the professional negligence resulted in personal injury. 175 N.J. Super. at 342, 418 A.2d 1291. Judge Marzulli found no logical basis for distinguishing between damages arising out of a personal injury and economic losses by third parties resulting from negligent performance by design professionals. Noting that other jurisdictions were in accord with that position, he enumerated certain factors that were to be consid-

ered in determining liability in similar cases. Those factors include the extent to which the third party was intended to be affected, the forseeability of harm, the certainty of injury, the degree to which the professional's conduct was connected to the injury, the ethics of that conduct, and the prevention of future harm. *Id.* at 344, 418 A.2d at 1292 (citing *United States v. Rogers and Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958)).

The public policy that all professionals be held to a higher standard of care with respect to the effects of their work is well settled. Allowing design professionals to inflict deficient work products upon third parties, so long as no personal injury results, places the entire economic risk for any deficiencies upon the party that is most likely to be affected monetarily. Such a distinction is illusory and could result in inflated construction costs if contractors "pad" their submitted bids to protect themselves from possible lost profits. Extending design professionals' liability for negligence to encompass resulting economic losses, as well as losses arising out of personal injuries, eliminates this specious distinction.

Janet Pruden Bright