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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When Chrysler Corporation (Chrysler) attempted to establish a new automobile dealership in Asbury Park, New Jersey, it drew strong opposition from Monmouth Chrysler-Plymouth, Inc. (Monmouth), an existing Chrysler dealership, located approximately 4.25 miles away. Acting pursuant to the New Jersey Motor Vehicle Franchise Act, N.J. STAT. ANN. §§ 56:10-16 to -25 (Act), Monmouth filed a protest with the Motor Vehicle Franchise Committee (Committee) alleging "that the new dealership would be 'injurious' to it and to the public interest." 102 N.J. at 488-89, 509 A.2d at 163. Affirming the findings and conclusions of an administrative law judge, the Committee upheld Monmouth's protest and enjoined Chrysler from establishing a new dealership in Asbury Park. *Id.* at 489, 509 A.2d at 163. The Committee's decision was based on its belief that Monmouth " 'would be substantially injured by the establishment of a [new] dealership within 4.25 miles' " of its operation and that, consequently, the public interest would be adversely affected. *Id.* at 502, 509 A.2d at 170.

The appellate division reversed the Committee's decision and held "that the evidence did not support the Committee's conclusion that the establishment of the new dealership would be injurious." *Id.* at 489, 509 A.2d at 163. The New Jersey Supreme Court granted certification and affirmed the appellate division's holding that Monmouth failed to proffer sufficient evidence to support its cause of action. *Id.* at 502, 509 A.2d at 170.

Writing for a unanimous court, Justice Stein initially discussed the Act's purpose of affording existing automobile dealers protection "against the arbitrary insertion [by its franchisor] of a new dealer into its market area." *Id.* at 491-92, 509 A.2d at 164. Under the Act, a franchisor must give advanced written notice of its intention to establish, relocate, or otherwise insert a new dealership of the same line as the existing franchisee within the relevant market area. *Id.* at 491, 509 A.2d at 164 (citing N.J. STAT. ANN. § 56:10-16(f)). The Act defines relevant market area as " 'the geographic area 8 miles in radius from a proposed franchise. . . .' " *Id.* Once notice has been given, an interested

franchisee may file a protest with the Committee for a determination whether the insertion of the new dealership will be injurious to it or to the public interest.

In developing standards to be applied in determining whether a proposed franchise would be injurious, the court articulated three ways in which an aggrieved franchisee could demonstrate injury. The first standard introduced by the court was a showing "that the new distributorship . . . inflict[ed] such economic damage to an existing franchisee as to result in its eventual demise." *Id.* at 493, 509 A.2d at 165. In articulating this standard, the court reasoned that the Act achieved the aims of New Jersey's Franchise Practices Act, N.J. STAT. ANN. §§ 56:10-1 to -15, which prohibits wrongful terminations of franchises achieved either directly or indirectly. *Monmouth Chrysler-Plymouth*, 102 N.J. at 492, 509 A.2d at 165.

The second standard articulated by the court for determining injury was whether the effect of inserting another dealer into the relevant market area would "reduce the profitability of the protesting dealer to an extent sufficient to cause a substantial deterioration of that dealer's ability to provide adequate customer services." *Id.* at 499, 509 A.2d at 168. The court noted that although the Act was intended to protect existing franchisees from the arbitrary insertion of a new dealer into its market area, it also sought to provide consumers with adequate and reliable sales and service. *Id.* at 498, 509 A.2d at 168. Moreover, since the Act, in effect, places restrictions on intrabrand competition, that is, competition for the same product of a manufacturer in a given market area, the court felt it necessary "to harmonize its application . . . with our own State antitrust law." *Id.* at 494, 509 A.2d at 166. In this respect, Justice Stein observed that "[t]he central focus of modern antitrust analysis is the recognition that business efficiency and interbrand competition enhance consumer welfare." *Id.* at 497, 509 A.2d at 167. Justice Stein further noted that restraints on intrabrand competition in a given market area, however, are generally upheld by courts based on the premise that such restraints benefit the consuming public. *Id.* Based on these observations, the court concluded that the antitrust policy of both the state and the Act "recognize the common goal of protecting dealer services through restrictions on intrabrand competition." *Id.* at 499, 509 A.2d at 168.

The third factor which the court considered in determining injury is whether a franchisor's insertion of a new dealer "is moti-

vated primarily by non-economic considerations" such as coercion, intimidation, or retaliation. *Id.* at 502, 509 A.2d at 170. Together with a showing of bad faith, a protesting franchisee must demonstrate that it will incur some economic injury. *Id.* The court arrived at this third standard by analyzing the legislative intent of the Act and concluding that the Act's focus of prohibiting "arbitrary" or "unfair" conduct is consistent with the overall purpose of redressing the unequal bargaining position between manufacturer and dealer. *Id.* at 500, 509 A.2d at 169. To buttress its conclusion, the court noted that the purpose and application of the Automobile Dealer's Franchise Act, 15 U.S.C. §§ 1221-1225 (West 1982), "intended to achieve similar objectives." *Monmouth Chrysler-Plymouth*, 102 N.J. at 501, 509 A.2d at 170.

The *Monmouth Chrysler-Plymouth* decision is an example of the court having to balance the conflicting rights and equities of distinct parties to a single economic transaction. While the aggrieved dealer is clearly afforded a significant degree of protection under the Act against the more powerful manufacturer, as interpreted by this court, it is nonetheless faced with the difficult evidentiary burden of proving either the manufacturer's bad faith or that the dealership will not survive if another franchisee is located nearby. As a result, the manufacturer is afforded an opportunity to exist in a free market so long as it operates in good faith and does not indirectly terminate an existing franchise. The consuming public, however, is perhaps benefitted most by the *Monmouth Chrysler-Plymouth* decision since both the dealer and manufacturer are restricted in their economic freedom to the extent that their activities infringe upon the well being of the marketplace.

Anthony J. Serra

CRIMINAL LAW—ROBBERY—VICTIM'S SUBJECTIVE BELIEF OF THREAT WITH DEADLY WEAPON NOT SUFFICIENT TO WARRANT ARMED ROBBERY CONVICTION WHEN THREAT IS UNACCOMPANIED BY EXISTENCE OF TANGIBLE DEADLY WEAPON—*State v. Hutson*, 211 N.J. Super. 49, 510 A.2d 706 (App. Div. 1986).

While a passenger in a taxi, Donald Hutson and an unidenti-

fied companion demanded money from the driver and threatened to use a gun to obtain it. The driver did not see a weapon; instead, he saw one of the occupants holding a newspaper which he believed concealed a gun. 211 N.J. Super. at 51, 510 A.2d at 707. Following a trial, Hutson was convicted by the jury of armed robbery under N.J. STAT. ANN. § 2C:15-1 (West 1982). *Hutson*, 211 N.J. Super. at 51, 510 A.2d at 707. The trial judge ruled that it was not necessary for the taxi driver to have actually seen the gun. *Id.* at 52, 510 A.2d at 707. The court reasoned that an actual viewing of the weapon was not required since an object can be fashioned in a manner that would cause the victim to believe that it was capable of producing serious bodily injury or death. *Id.* at 51, 510 A.2d at 707.

On appeal, the appellate division reversed and held that the defendant must actually possess a deadly weapon. The threat of a concealed gun, according to the court, is insufficient for conviction. *Id.* at 52, 510 A.2d at 708. The court noted that although the subjective belief of a victim is incorporated in N.J. STAT. ANN. § 2C:11-1(c), the statute explicitly states that there must be "some tangible object which the victim believes to be a deadly weapon." *Hutson*, 211 N.J. Super. at 53, 510 A.2d at 708. In applying the statute to the instant case, the court reasoned that there was no evidence of the use of a deadly weapon and that the taxi driver's subjective belief that a gun could be concealed under the newspaper "neither converted the paper into a weapon nor eliminated the need for the existence of some weapon." *Id.* The court also opined that it was obligated to interpret the statute narrowly. *Id.* The court determined that if the legislature had intended the use of a purely subjective standard, it would have so provided. *Id.*

The *Hutson* decision establishes a stricter standard of proof by weakening the value of a victim's subjective account of a criminal assault. Although a more objective standard was imposed by the court, that standard remains based on a victim's subjective testimony. This interplay between subjective and objective standards may raise some interesting and complex issues of fact as the prosecution and the defense attempt to establish the existence or non-existence of a tangible object capable of producing death or serious bodily harm.

This area of law is highly fact sensitive. It is therefore doubtful that the *Hutson* ruling provides a clear and appropriate application of statutory language to an area of law in which issues of

proof ultimately depend on the interpretation of subjective testimony of victims and their assailants.

Alberto Romero

CIVIL PROCEDURE—TORT CLAIMS ACT'S NOTICE PROVISION NOT APPLICABLE TO CLAIMS MADE UNDER NEW JERSEY LAW AGAINST DISCRIMINATION OR FEDERAL CIVIL RIGHTS ACT—*Fuchilla v. Layman*, 210 N.J. Super. 574, 510 A.2d 281 (App. Div. 1986).

In August of 1983, Anne Fuchilla filed charges of sexual harassment against her employer, the University of Medicine and Dentistry of New Jersey (UMDNJ), in the Law Division of the Superior Court of New Jersey. 210 N.J. Super. at 584, 510 A.2d at 286. Fuchilla sought damages alleging violations of the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-1 (West 1976), and the Federal Civil Rights Act, 42 U.S.C. § 1983 (1982). *Fuchilla*, 210 N.J. Super. at 577, 510 A.2d at 283. She also sought equitable relief in the form of an injunction against the alleged discrimination, as well as damages for lost wages and benefits. *Id.* at 584, 510 A.2d at 286.

The trial court granted UMDNJ's motion for summary judgment, holding that Fuchilla's claims were barred since she failed to comply with the ninety day notice provision of the Tort Claims Act, N.J. STAT. ANN. § 59:8-8 (West 1982). *Fuchilla*, 210 N.J. Super. at 578, 510 A.2d at 283. The appellate division reversed and held that the Tort Claims Act's filing and notice provisions did not apply to claims made under either the New Jersey Law Against Discrimination or the Federal Civil Rights Act. *Id.* at 584, 510 A.2d at 286. The case was remanded for a trial on the merits. *Id.*

Writing for the court, Judge Dreier initially stated that the legislature had not intended that discrimination claims fall within the purview of the Tort Claims Act. *Id.* at 578-79, 510 A.2d at 283-84. This conclusion, according to the court, was warranted since the New Jersey Law Against Discrimination contains its own limitations, notice, and remedial provisions. *Id.* at 579, 510 A.2d at 284. The court reasoned that those provisions would "govern [discrimination] . . . claims to the exclusion of any other time or

notice provisions, including those of the Tort Claims Act." *Id.*, 510 A.2d at 283. Furthermore, in the court's view, the type of conduct redressable under the New Jersey Law Against Discrimination is more analogous to "malicious or willful" conduct specifically exempted from the Tort Claims Act. *Id.*, 510 A.2d at 284.

In analyzing the plaintiff's federal claim, Judge Dreier addressed UMDNJ's contention that it did not qualify as a "person" within the meaning of the Civil Rights Act and, hence, could not be held liable under any of its provisions. *Id.* at 581, 510 A.2d at 284. The court conceded that under prior law, a state and its agencies are immune from liability under § 1983 claims. *Id.* Judge Dreier reasoned, however, that the UMDNJ is an "autonomous governmental agency rather than an alter ego of the State." *Id.*, 510 A.2d at 285 (relying on N.J. STAT. ANN. § 18A:646-1). Therefore, he concluded that UMDNJ is answerable to claims of discrimination in violation of the Federal Civil Rights Act. *Id.*

The court next considered the applicability of the Tort Claims Act's notice provisions to the Federal Civil Rights Act. Judge Dreier noted that a very small minority of jurisdictions permit state tort claim notice provisions to govern claims made under 42 U.S.C. § 1983. *Fuchilla*, 210 N.J. Super. at 582-83, 510 A.2d at 285. New Jersey, along with the majority of state and federal courts that have considered the issue, however, has not applied its own notice provisions to federal discrimination claims. *Id.* Thus, the court reaffirmed that § 1983 claims are " 'unaffected by plaintiff's failure to give the notice required by the Tort Claims Act.' " *Id.* at 583, 510 A.2d at 285 (quoting Lloyd v. Borough of Stone Harbor, 179 N.J. Super. 496, 512, 432 A.2d 572, 580 (Ch. Div. 1981)).

Lastly, the court addressed the plaintiff's claims for injunctive relief and damages. Judge Dreier concluded that the Tort Claims Act, by its own terms, does not apply to claims for equitable relief. *Id.* at 584, 510 A.2d at 286. Hence, given its determination that all three of Fuchilla's claims were justiciable, the court declined to consider the timeliness of the plaintiff's claims under the Tort Claims Act. *Id.*

The legislative goal of eliminating discrimination in the public sector, which underlies both New Jersey's Law Against Discrimination and the Federal Civil Rights Act, is furthered by the *Fuchilla* opinion. Moreover, the decision is reasonable and practical. When a statute contains its own notice and filing provi-

sions, judicial economy dictates that those provisions govern claims brought under its auspices. The Tort Claims Act's notice and filing provisions are unambiguous; thus, circumventing their mandates would violate the clear legislative intent of the Act. In addition, the court aptly recognized that federal rights, created in order to rectify the inefficacy of state remedies, should not be vitiated by the application of a state procedural requirement. *Fuchilla* indicates the court's unwillingness to tolerate a defendant's procedural evasion of its responsibility under state and federal legislation.

Nancy McDonald

WILLS AND ESTATES—EXECUTION—FAILURE OF WITNESSES TO SIGN OTHERWISE VALID WILL AT TIME OF EXECUTION BARS ADMISSION TO PROBATE—*In re Estate of Peters*, 210 N.J. Super. 295, 509 A.2d 797 (App. Div. 1986).

On June 8, 1946, Conrad Peters married Marie Skrok. At that time, Marie was a widow with one child, Joseph Skrok, whom Conrad never adopted. Conrad and Marie had no children of their own during the course of their marriage. On December 30, 1983, Conrad suffered a stroke. While Conrad was in the hospital, Marie requested that her sister, Sophia Gall, prepare a will on Conrad's behalf. 210 N.J. Super. at 297-98, 509 A.2d at 798. Sophia, a notary public, drafted a document by which Conrad's entire estate would pass to his wife. *Id.* at 298, 509 A.2d at 798. The will also provided that if Marie predeceased Conrad, the estate would pass to Joseph. *Id.*

Sophia brought the will to Conrad in the hospital and read its contents to him. He allegedly signed the document in the presence of Sophia and two others, after which Sophia signed the will as notary public. *Id.* Sophia had also arranged for two of her employees to come to the hospital to endorse Conrad's will. *Id.* Purportedly due to the "emotional" circumstances of the day, however, Sophia failed to obtain the signatures from the two designated witnesses. *Id.*, 509 A.2d at 798-99.

Fifteen months later Conrad Peters died. His wife Marie died intestate five days earlier. *Id.* at 297, 509 A.2d at 798. Since Marie had predeceased her husband, Joseph Skrok stood to in-

herit Conrad's entire estate under the will. The Middlesex County Surrogate, however, refused to admit Conrad's will to probate because it lacked the signatures of two subscribing witnesses required by the New Jersey Wills Act. *Id.* at 299, 509 A.2d at 799 (citing N.J. STAT. ANN. § 3B:3-2 (West 1978)). As a result, Conrad's estate would escheat to the state since he died without heirs. *Id.*

Joseph Skrok then filed a complaint in the law division, probate part, as Conrad's contingent beneficiary. At an oral hearing, the probate part found that failure to follow the letter of the Wills Act was a mere "quirk" of circumstances and should not obviate the testator's intent. *Id.* at 300, 509 A.2d at 799. To remedy the situation, the judge ruled that Sophia's notarial signature would suffice as that of one witness. The judge also permitted one of the other witnesses to sign the will upon submission of an affidavit attesting to her presence at the time Conrad Peters signed his will. *Id.* Accordingly, the judge held that the will could be admitted to probate. *Id.*, 509 A.2d at 800. The state appealed this ruling to the appellate division.

In a two to one decision, the appellate division held that, despite the legislature's relaxation of executionary formalities in 1978, failure to comply with the remaining "minimum statutory requirements [had the] substantive impact" of invalidating a will which lacked the signatures of two subscribing witnesses. *Id.* at 304, 509 A.2d at 802. The majority noted that the revised Probate Code does not require subscribing witnesses to be present when a will is executed and sets no specific time within which a witness must subscribe a will. *Id.* at 301, 509 A.2d at 800. The court declared, however, that the statutory witness requirement would be "seriously undermined if not emasculated entirely if the witnesses were permitted here to substitute oral testimony for their written signatures." *Id.* at 306, 509 A.2d at 803. Thus, the majority found that the probate part had overstepped its equitable powers and reversed its decision. *Id.* at 297, 509 A.2d at 798.

The majority cited as persuasive authority a recent decision in which the appellate division "disapproved of the trial court's resort to equitable considerations where to do so would contravene the language and intent" of the revised 1978 Probate Code. *Id.* at 303, 509 A.2d at 801 (citing *In re* Estate of Cosman, 193 N.J. Super. 664, 669-71, 475 A.2d 659, 661-63 (App. Div. 1984)). The majority also noted numerous pre-reform decisions in which

failure to comply with the formalities of the Wills Act was deemed an error of substance, not formality. *Id.*, 509 A.2d at 802. Finally, the court relied on decisions from Nebraska, Michigan, and Oregon which, in similar situations, adhered strictly to those states' statutory signature requirements. *Id.* at 304-05, 509 A.2d at 802-03.

The majority emphasized the fact that fifteen months had passed between the execution of the will and the testator's death. The court commented on the "patent lack of evidence" as to why the defective will had not been cured during the testator's lifetime. *Id.* at 308, 509 A.2d at 804-05. The majority further noted that there was inconsistent testimony at trial as to the precise sequence of events at the time of the will's execution. *Id.* Consequently, the majority opined that to allow a witness to append his or her signature in this instance risked subversion of the legislative intent to prevent fraud. *Id.*, 509 A.2d at 804.

In dissent, Judge Simpson asserted that the doctrine of substantial compliance offered a means of avoiding the harsh result in this action while respecting both the testator's intent and the legislative aim of preventing fraud. *Id.* at 311-12, 509 A.2d at 806-07 (Simpson, J., dissenting). Under this doctrine, the failure of two witnesses to sign a will would not lead to per se invalidity. Rather, it would precipitate further inquiry by the court into the possibility of fraud and whether the will fairly reflected the testator's intent. Applying this doctrine to the facts of the instant action, Judge Simpson contended that Conrad's will could be admitted to probate. *Id.* at 312, 509 A.2d at 807 (Simpson, J., dissenting).

While Judge Simpson argued forcefully that the majority had retreated to legal formalism, there is little question that the court reached the correct result in this case. The majority did not absolutely refuse to consider substantial compliance in connection with the Wills Act's witness requirement. *Id.* at 305, 509 A.2d at 803. Rather, the instant appeal presented inappropriate circumstances in which to apply the doctrine. *Id.* Significantly, the court expressly left open the question of whether it might allow a witness to subscribe a will after the death of a testator who passed away shortly after the will's execution. *Id.* at 305-06, 509 A.2d at 803. Thus, a future case may present facts which would move a court to introduce the notion of substantial compliance in

this area. Given the factual inconsistencies present in the *Peters* case, however, the result is harsh, but the precedent is sound.

James F. Baxley

INSURANCE—INJURY—OCCURRENCE FOR PURPOSES OF LIABILITY COVERAGE LIMITATION IS DETERMINED BY THE CAUSE OF INJURY RATHER THAN THE NUMBER OF INJURIES OR CLAIMS—*Doria v. Insurance Co. of North America*, 210 N.J. Super. 67, 509 A.2d 220 (App. Div. 1986).

Michael and Andrew Doria were playing with their friend Jeffrey Brill near an abandoned pool on property belonging to Richard Orlina and Antonio Macina. The pool was uncovered for several years and, as a result, collected water and leaves. 210 N.J. Super. at 69, 509 A.2d at 221. Four-year-old Michael subsequently fell into the pool. In attempting to rescue his brother, five-year-old Andrew also fell into the water. *Id.* Jeffrey Brill ran home for help and returned to the scene with his mother. The boys were successfully rescued from the pool by Mrs. Brill. They sustained serious injuries, however, as a result of being unconscious for several moments. *Id.* at 69-70, 509 A.2d at 221. Roger Doria, Michael and Andrew's father, filed suit individually and on behalf of his sons seeking damages and medical costs. *Id.* at 70, 509 A.2d at 222.

The Insurance Company of North America (INA) provided the poolowners, Orlina and Macina, with personal liability coverage under a homeowner's policy. The policy, however, limited INA's liability to $100,000 on personal injury claims "caused by an occurrence." *Id.*, 509 A.2d at 221. The policy defined an "occurrence" as "an accident, including injurious exposure to conditions, which results. . .in bodily injury or property damage." *Id.*

The parties negotiated an aggregate settlement for $105,000. *Id.*, 509 A.2d at 222. The settlement agreement stipulated that Orlina and Macina would personally contribute $15,000 and INA would pay the remaining $90,000. *Id.* Roger Doria also reserved the right under the agreement to file a declaratory judgment action against INA in order to obtain a judicial interpretation of the word "occurrence." *Id.* Moreover, if Doria exercised this option and the court decided that *two* occur-

rences caused the injuries, INA would pay an additional $33,500 and reimburse Orlina and Macina the $15,000 they expended. *Id.* at 70-71, 509 A.2d at 222. The Dorias subsequently commenced a declaratory judgment action, and the trial court held that the boys' injuries were the result of a single occurrence. *Id.*

On appeal, the Appellate Division of the Superior Court of New Jersey affirmed. *Id.* at 76, 509 A.2d at 225. Specifically, the court held that the number of occurrences must be determined by examining the cause of injury, rather than by reference to the number of injuries or claims. *Id.* at 72-73, 509 A.2d at 223. The court reasoned that when two or more persons are injured as a result of a simultaneous sequence of events, there is only one occurrence. *Id.* at 76, 509 A.2d at 225.

The court also rejected the plaintiff's contention that the policy's definition of "occurrence" was ambiguous and therefore should be interpreted in favor of the insured. *Id.* at 71-72, 509 A.2d at 222-23. In reviewing the policy's terms, the court noted that INA defined an "occurrence" as an "accident . . . which results . . . in bodily injury. . . ." *Id.* at 72, 509 A.2d at 223. The court reasoned that an accident is a "sudden and fortuitous event, unexpected by the person to whom it happens." *Id.* As a result, the court concluded that the use of the term occurrence required that the policy be construed in terms of the accident's underlying cause instead of its effect. *Id.* at 72-73, 509 A.2d at 223. Consequently, the court held that the cause of an injury, and not the number of resulting claims, determined the coverage of a liability policy. *Id.* at 73-75, 509 A.2d at 223-24. Applying this analysis, the court concluded that INA was obligated to indemnify the insureds for only one "occurrence," because the owners' failure to securely cover their pool was the single cause of the victims' injuries. *Id.* at 75-76, 509 A.2d at 224-25.

The court further opined, however, that the effect of an accident would merit consideration when there was a temporal or spatial gap between the accident and the resulting injuries or damages. *Id.* at 74, 509 A.2d at 224. According to the court, this view would permit proof of intervening causes and would serve to undermine an allegation of proximate causation. *Id.* at 74-75, 509 A.2d at 224. Nevertheless, the court concluded that Michael's fall and Andrew's subsequent unsuccessful rescue attempt "occurred during a single, brief sequence of events" sufficient to constitute only *one* "occurrence" within the meaning of INA's policy. *Id.* at 76, 509 A.2d at 225.

The appellate division's definition of "occurrence" offers clear, workable guidelines to future litigants. In addition, the court's construction of the term "occurrence" serves to limit an insurer's liability. Arguably, the *Doria* decision was motivated by an awareness of a growing concern over excessive insurance awards. In any event, the court has indicated a desire to provide *realistic* coverage for injuries or damages under "occurrence" liability policies by limiting the insurance company's indemnity to a strict interpretation of the contract terms.

Kathleen H. Dooley

CRIMINAL LAW—FELONY MURDER—PROPER JURY INSTRUCTION CONCERNING CAUSATION NECESSARY TO SUPPORT FELONY MURDER CONVICTION—*State v. Smith*, 210 N.J. Super. 43, 509 A.2d 206 (App. Div. 1986).

On October 25, 1982, Herbert Lee Smith robbed a supermarket at gunpoint. While fleeing in his car from the scene of the robbery, Smith crashed into a car driven by Kelton Barnes and left the scene of the accident. Although Barnes manifested only superficial wounds, he suffered a heart attack and died within an hour of the accident. 210 N.J. Super. at 48, 509 A.2d at 209. Continuing his flight, Smith hit another vehicle driven by Colleen Reilly. At this point, Smith produced a gun and ordered Reilly to drive off with him. Reilly refused and escaped into a nearby police station. Two officers observed the incident and apprehended Smith. *Id.*

Smith was convicted under the New Jersey felony murder statute which imposes liability for a death caused by "the actor [while] engaged in . . . flight after committing or attempting to commit robbery. . . ." *Id.* at 50, 509 A.2d at 210 (quoting N.J. STAT. ANN. § 2C:11-3a(3) (West 1982)). He was also convicted on six other counts, including kidnapping and armed robbery. In reversing Smith's murder conviction, the appellate division determined that the trial judge failed to properly instruct the jury as to the statutory elements of causation as defined in N.J. STAT. ANN. § 2C:2-3. *Smith*, 210 N.J. Super. at 57, 509 A.2d at 214. The convictions on the other counts were affirmed and the matter was remanded for retrial. *Id.* at 62, 509 A.2d at 217.

The appellate division dismissed Smith's alternative claim that the state failed to produce the necessary evidence to establish a causal link between his conduct and the heart attack suffered by Barnes. Causation, according to the court, is statutorily defined as the "antecedent but for which the result in question would not have occurred." *Id.* at 50, 509 A.2d at 210 (quoting N.J. STAT. ANN. § 2C:2-3a(1)). The court further noted that under the statute liability "is not established unless the actual result is a probable consequence of the actor's conduct." *Id.* (quoting N.J. STAT. ANN. § 2C:2-3e). Although there was conflicting expert testimony as to whether or not the heart attack was precipitated by the car accident, the court ruled that Smith could not be heard to complain that the verdict was based on insufficient evidence merely because the jury failed to agree with Smith's expert. *Id.* at 51, 509 A.2d at 210. Based on the expert testimony and the facts on record, the court held that there was sufficient evidence for the jury to convict Smith of felony-murder. *Id.* at 52, 509 A.2d at 211.

The court, however, reversed the murder conviction on the grounds that the jury did not receive adequate instruction on the statutory elements of causation as defined under N.J. STAT ANN. § 2C:2-3. *Smith*, 210 N.J. Super. at 54, 509 A.2d at 212-13. The appellate division reasoned that a charge to the jury must set forth all elements of the offense. Although the trial judge in *Smith* charged the jury that causation was a requisite element of felony-murder and that the state had the burden of proving beyond a reasonable doubt that the defendant caused Barnes's death, he never defined causation. *Id.* at 55-57, 509 A.2d at 213-14. In New Jersey, causation for felony-murder is established by a "two-pronged" test: It involves the " 'antecedent but for' of 2C:2-3a as well as a finding that the result was a 'probable consequence of the actor's conduct' [under] 2C:2-3e." *Id.* at 55-56, 509 A.2d at 213. Thus, the appellate division concluded that the absence of the definition of causation was reversible error. *Id.*, 509 A.2d at 214.

Smith also challenged his attempted kidnapping conviction on the grounds that the indictment did not specifically allege that he intended to confine Reilly for a substantial amount of time. Smith alleged that the trial judge failed to adequately define the term "substantial period of time" in the jury charge. *Id.* at 58, 509 A.2d at 215. In dismissing both claims, the court noted that the appearance of the word "confine" and the statutory reference

to attempted kidnapping in the indictment gave Smith adequate notice to prepare a defense. *Id.* at 59-60, 509 A.2d at 216. Lastly, the court held that the failure to define the term "substantial period" in the jury charge was not reversible error. *Id.* at 61, 509 A.2d at 217.

The *Smith* decision reinforces the notion that the doctrine of strict liability is inapplicable to felony-murder situations. Before the Code was enacted, New Jersey case law held a felon liable for murder whenever a death resulted from the commission of a felony under the theory of transferred intent. *Id.* at 50, 509 A.2d at 210. Thus, whether the actor had the requisite intent to commit murder was irrelevant. The New Jersey Code incorporated the transferred intent concept by requiring the state to prove a causal link between the felony and the resulting death as defined under § 2C:2-3a(1), the "antecedent but for" test, coupled with § 2C:2-3e, the "probable consequence of the actor's conduct" test. *Id.* Both are essential to establishing causation.

Accordingly, by requiring a trial judge to instruct the jury on the two-pronged nature of the causation test, the burden of proof is properly placed on the prosecution to demonstrate not only that "but for" the defendant's conduct the victim would be alive, but also that the death must have been the natural consequence of the defendant's conduct. This ruling brings judicial decisions in line with the just intention of the Code.

C. Maria Flynn