SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

In this section, the Seton Hall Law Review *presents synposes 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

CONSTITUTIONAL LAW—DUE PROCESS—RECLASSIFICATION OF PRISONERS BY COMMISSIONER IS VALID EXERCISE OF STATUTORY POWERS AND NOT VIOLATIVE OF PRISONERS' DUE PROCESS RIGHTS—*Jenkins v. Fauver*, 108 N.J. 239, 528 A.2d 563 (1987) 506

CRIMINAL PROCEDURE—JUVENILES—COURTS MAY NOT CONSIDER AS AN AGGRAVATING FACTOR THE ELEMENTS THAT MAKE AN OFFENSE A FIRST-DEGREE CRIME—*State v. R.G.D.*, 108 N.J. 1, 527 A.2d 834 (1987) 508

TORTS—STATUTE OF LIMITATIONS—MERE SUSPICION REGARDING THE EXISTENCE AND CAUSE OF AN INJURY, WITHOUT REASONABLE MEDICAL SUPPORT OR DOCUMENTATION, DOES NOT TRIGGER THE RUNNING OF THE STATUTE OF LIMITATIONS IN A TOXIC-TORT CASE—*Vispisiano v. Ashland Chem. Co.*, 107 N.J. 4, 527 A.2d 66 (1987).. 511

PROPERTY—ZONING & PLANNING—A MUNICIPALITY'S AUTHORITY UNDER THE MUNICIPAL LAND USE LAW IS LIMITED TO REASONABLE AND NECESSARY IMPROVEMENTS DIRECTLY RESULTING FROM A PARTICULAR SUBDIVISION OR DEVELOPMENT—*New Jersey Builders Ass'n v. Mayor of Bernards Township*, 108 N.J. 223, 528 A.2d 555 (1987).. 514

CRIMINAL LAW—PRETRIAL INTERVENTION PROGRAMS—PROSECUTOR MAY CONDITION ADMISSION INTO A PRETRIAL INTERVENTION PROGRAM UPON AN APPLICANT'S RESIGNATION FROM EMPLOYMENT AS A POLICE OFFICER—*State v. DeMarco*, 107 N.J. 562, 527 A.2d 417 (1987).. 516

CONSTITUTIONAL LAW—DOUBLE JEOPARDY—ACQUITTAL FOR RECKLESS DRIVING BARS SUBSEQUENT PROSECUTION FOR DRIVING UNDER THE INFLUENCE WHERE

THE SAME PROOFS ARE USED FOR BOTH OFFENSES—
State v. DeLuca, 108 N.J. 98, 527 A.2d 1355 (1987) ... 519

CONSTITUTIONAL LAW—DUE PROCESS—RECLASSIFICATION OF PRISONERS BY COMMISSIONER IS VALID EXERCISE OF STATUTORY POWERS AND NOT VIOLATIVE OF PRISONERS' DUE PROCESS RIGHTS—*Jenkins v. Fauver*, 108 N.J. 239, 528 A.2d 563 (1987).

Two inmates escaped from the Rahway State Prison minimum security camp in August and September of 1984. 108 N.J. at 245, 528 A.2d at 566. In response to rising public concerns regarding prison security, an assistant commissioner of corrections directed the prison superintendent to relocate all prisoners with prior homicide convictions from the minimum security camp to the main institution. The status of the relocated inmates was then changed to either "full minimum—inside only," affecting the inmates' housing conditions, or "gang minimum," affecting both the inmates' housing conditions and work assignments. *Id.* at 246, 528 A.2d at 566.

At the time of the reclassification, Standard 853, currently codified at N.J. ADMIN. CODE tit. 10A §§ 9-4.1 to -4.8 (Supp. 1987), specified three levels of custody classification. *Jenkins*, 108 N.J. at 244 & n.4, 528 A.2d at 565 & n.4. "Maximum custody," the most restrictive status, requires confinement of inmates within the main institution under continuous supervision. *Id.* at 244, 528 A.2d at 565. "Gang minimum," an intermediate status, permits participation in activities requiring supervised movement outside of the main institution, on institutional grounds. "Full minimum," the least restrictive classification, allows inmates to be assigned to programs and/or satellite units outside of the main institution with minimal supervision. Additionally, Standard 853 grants certain officials the power to temporarily increase an inmate's custody level in emergency situations, subject to the approval of the Institution Classification Committee. *Id.* at 245, 528 A.2d at 566 (quoting N.J. ADMIN. CODE tit. 10A § 9-4.4 (Supp. 1987)).

Inmates who were reclassified to more restrictive custody levels filed suit against the Rahway State Prison and the Department of Corrections seeking monetary and injunctive relief for alleged violation of 42 U.S.C. § 1983. *Jenkins*, 108 N.J. at 243, 528 A.2d at 565. On a motion by the Department of Corrections, the case was removed to the appellate division as the action was in effect an appeal from the final determination of a state administrative agency. *Id.* The appellate division, considering only the

adequacy of process afforded the inmates as a result of their reclassification, held that reclassification to "full minimum—inside only" did not interfere with any protected liberty interest, but reclassification to "gang minimum" required just cause and fair hearing. *Id.* at 242-44, 528 A.2d at 564-65 (citing *Jenkins v. Fauver*, 219 N.J. Super. 420, 425-27, 530 A.2d 790, 792-94 (App. Div. 1986)). The Supreme Court of New Jersey affirmed in part and reversed in part the decision of the appellate division. *Id.* at 243, 528 A.2d at 565.

Justice Stein, writing for a unanimous court, acknowledged that prisoners retain certain due process rights in spite of their incarceration. *Id.* at 246-47, 528 A.2d at 566-67. The court noted, however, that there is no protected liberty interest where a prisoner's status is subject to change by prison officials without proof of misconduct. *Id.* at 248, 528 A.2d at 567 (citing *Meachum v. Fano*, 427 U.S. 215 (1976)). The justice further observed that the legislature had granted the Commissioner of the Department of Corrections broad discretionary power to administer facilities and take appropriate action in order to maintain satisfactory relationships with municipalities within a reasonable radius of the prisons. *Id.* at 252, 528 A.2d at 570 (quoting *Jenkins v. Fauver*, 219 N.J. Super. 420, 424-25, 530 A.2d 790, 792 (App. Div. 1986)). He also recognized that it was reasonable for inmates to have certain expectations about the conditions of their incarceration. *See id.* at 253, 528 A.2d at 570-71. The court, however, held that because of the circumstances surrounding the administration of the prison, reasonable expectations of prisoners will not always rise to the level of protected liberty interests. *Id.* As the Commissioner had statutory authority to reclassify inmates and had done so without considering their individual disciplinary records, the court concluded that no constitutional rights of the inmates had been implicated. *Id.* at 253-54, 528 A.2d at 571.

The court acknowledged that although the Commissioner's actions were valid when taken, it was inconsistent with departmental regulations to distinguish inmates with prior homicide convictions from other inmates when determining their status. *Id.* at 254-55, 528 A.2d at 571. Justice Stein stated that once the exigent circumstances which had given rise to the Commissioner's action had passed, his actions should be reconciled by promptly amending departmental regulations. *Id.* at 255-56, 528 A.2d at 571-72. Citing public policy concerns, the court indicated its belief that the interests of the inmate population and the

Department would best be served by harmony between regulation and action. *See id.* at 255, 528 A.2d at 572.

The *Jenkins* decision illustrates the tension between the legitimate concerns of municipalities which surround state penal institutions and the constitutional rights of prison inmates. The court recognized that prisoners must be afforded certain constitutional rights regardless of their confinement. The court properly held that individual rights are not infringed upon by a general reclassification. Moreover, the court was sensitive to municipalities, which support and accept the prison within their communities, must be afforded certain protections as well. So long as individual liberty interests are not involved, the Department of Corrections may properly reevaluate prison classifications when necessary to ensure the safety and security of the communities surrounding our prisons.

Tommie Ann Gibney

CRIMINAL PROCEDURE—JUVENILES—COURTS MAY NOT CONSIDER AS AN AGGRAVATING FACTOR THE ELEMENTS THAT MAKE AN OFFENSE A FIRST-DEGREE CRIME—*State v. R.G.D.*, 108 N.J. 1, 527 A.2d 834 (1987).

On April 26, 1984, two boys, sixteen year old R.G.D. and fifteen year old W.T.P., attacked a sixteen year old girl, A.A., in the auditorium of Vineland High School. 108 N.J. at 3, 527 A.2d at 834-35. The following day, juvenile delinquency charges were filed against the boys alleging that if they were adults their actions would have constituted the first-degree crime of aggravated sexual assault. *Id.* at 3-4, 527 A.2d at 835. On May 22, 1984, the state successfully petitioned the Superior Court, Chancery Division, Family Part, to waive jurisdiction of both cases to the Superior Court, Law Division. *Id.* at 4, 527 A.2d at 835. The appellate division reversed the orders for transfer and remanded the matter to juvenile court for disposition. *Id.* The appellate division held that the trial court had improperly rejected expert testimony as to whether R.G.D. could be rehabilitated before the age of nineteen. *Id.* The appellate division also concluded that the lower court denied W.T.P. due process by refusing to appoint an independent medical expert on his behalf. *Id.* The

Supreme Court of New Jersey granted the state's leave to appeal. *Id.*

The supreme court reversed the appellate division decision and remanded the case to the juvenile court for reconsideration of the waiver issue in light of the guidelines set out in its decision. *Id.* at 17-18, 527 A.2d at 842-43. Writing for an unanimous court, Justice O'Hern analyzed the recent history of waiver as well as the legislative intent behind the state's 1982 revision of the New Jersey Code of Juvenile Justice, N.J. STAT. ANN. § 2A:4A-26. *R.G.D.*, 108 N.J. at 4-10, 527 A.2d at 835-39. The justice observed that in the late 1970's, a presumption of nonwaiver existed as a result of the law's overriding concern for the juvenile's rehabilitation and the public's protection. *Id.* at 7, 527 A.2d at 837. He further noted that under the old standards, waivers were granted only if the court could find that there was no reasonable chance of rehabilitating the juvenile before the age of majority. *Id.*, 527 A.2d at 836 (citing Act of Dec. 14, 1973, ch. 306, 1973 N.J. Laws 831 (current version at N.J. STAT. ANN. § 2A:4A-26)). The justice posited that changing policies gave rise to the prevailing, nation-wide theory that rehabilitation is ineffective for both adult and juvenile offenders and that deterrence and punishment should be the primary goals of sentencing and treatment of juveniles. *Id.* at 7-8, 527 A.2d at 837. Accordingly, the justice asserted that the juvenile code was revised in 1982 because of this national trend and the belief that serious offenders were being treated too leniently. *Id.* at 8-9, 527 A.2d at 837-38.

The justice recognized that under the new revisions there is a strong presumption in favor of waiver. *Id.* at 12, 527 A.2d at 839. Such a presumption is created, noted Justice O'Hern, if the juvenile is fourteen years old and the state has probable cause to believe that the teen committed a serious crime such as criminal homicide, robbery, arson, and sexual assault; or the juvenile has been previously convicted, sentenced or jailed for a serious crime; or has committed a violent crime against a person. *Id.* at 9-10, 527 A.2d at 838 (citing The Senate Judiciary Statement to Assembly No. 641, N.J. CODE OF JUV. JUST. § 7 (1982)). Moreover, the justice emphasized that the new law provided that in order to rebut the presumption of waiver, the juvenile must show that he can be rehabilitated before reaching nineteen and that the probability of rehabilitation substantially outweighs the factors advanced by the state in support of a waiver. *Id.* at 11, 527 A.2d at 839.

In the case at bar, the justice held that the appellate division failed to give the legislative preference for waiver proper consideration. *Id.* at 16, 527 A.2d at 841. Justice O'Hern also determined that the trial court in addressing the issue of waiver did not give sufficient consideration to the rehabilitation factor. *Id.* The justice observed that the trial court refused to consider expert evidence pertaining to rehabilitation of the defendant. *Id.* at 17, 527 A.2d at 842. The justice emphasized that the trial court must reach a decision on potential rehabilitation based on "its own sense of the matter and experience, with the aid of any available expert testimony." *Id.*

The supreme court also determined that the trial court erred by considering as aggravating factors the very components of the crime which made it a first degree offense subject to the presumption of waiver. *Id.* Justice O'Hern observed that "the very fact that the actor is aided by another and that physical force or coercion is involved . . . makes the crime of the first-degree." *Id.* The justice concluded that these facts in themselves do not create an independent reason for finding that aggravating circumstances existed. *See id.*

Finally, the court held that a juvenile does not have the right to an independent psychiatrist at the waiver hearing. *Id.* at 18, 527 A.2d at 842. The justice maintained that the right to an expert only arises when guilt or innocence is at issue, or when loss of liberty or life is possible. *Id.* A juvenile does not have the right at a waiver hearing, where the forum is the issue, not guilt or punishment. *Id.*

The 1982 law expanded the class of juveniles potentially affected by a waiver and revised the standards for the hearing. *R.G.D.* indicates a desire by the courts to follow the legislative preference of waiver for serious offenses. The law and the courts reflect a public concern that juveniles who commit serious crimes are not adequately punished. This case, however, also demonstrates a strong interest in maintaining a careful balance between the protection of the public and the welfare of a juvenile. The decision instructs trial judges to adequately consider mitigating circumstances that should be weighed against the presumption for waiver. Yet, ironically, the court draws the line at providing the defendant with the help of an expert at a waiver hearing.

Karen Lee

TORTS—STATUTE OF LIMITATIONS—MERE SUSPICION REGARDING THE EXISTENCE AND CAUSE OF AN INJURY, WITHOUT REASONABLE MEDICAL SUPPORT OR DOCUMENTATION, DOES NOT TRIGGER THE RUNNING OF THE STATUTE OF LIMITATIONS IN A TOXIC-TORT CASE—*Vispisiano v. Ashland Chem. Co.*, 107 N.J. 416, 527 A.2d 66 (1987).

John Vispisiano was employed by the Chemical Control Corporation (Chemical Control) at a toxic-waste disposal site from October 1977 to April 1978. 107 N.J. at 420, 527 A.2d at 68. On March 12, 1982, approximately four years after he had left the company's employ, Vispisiano instituted a suit to recover damages for medical complications and injuries resulting from his exposure to toxic chemical wastes. A hearing, conducted pursuant to *Lopez v. Swyer*, 62 N.J. 267, 300 A.2d 563 (1973), was held to determine whether the plaintiff's claim had accrued more than two years before the filing of his complaint. The hearing revealed that Vispisiano suffered from recurring headaches which stopped after he left his job with Chemical Control and although a former co-worker was hospitalized with similar symptoms, Vispisiano's physicians originally attributed his condition to high stress and other unknown causes. *Id.* at 420-24, 527 A.2d at 68-70. The hearing also revealed that in August 1982, Vispisiano's condition was ultimately diagnosed as attributable to toxic chemical exposure. *Id.* at 424, 527 A.2d at 70.

Based on the evidence produced at the *Lopez* hearing, the trial court granted summary judgment in favor of the defendants, concluding that the plaintiff's complaint was time-barred by the two year statute of limitations for personal injuries. Relying on the facts that Vispisiano's recurring headaches had ended shortly after he terminated employment with Chemical Control, that he was aware that a former co-worker had been hospitalized with similar symptoms in 1980, and that in March 1980 Vispisiano expressed suspicions that his condition was caused by chemical contamination, the trial court concluded that Vispisiano clearly knew before March 1980 that his exposure to toxic chemicals may have given rise to an actionable claim. *See id.* at 424-25, 527 A.2d at 70. The appellate division affirmed the trial court's decision, and held that Vispisiano's claim was time-barred because he initially suspected chemical exposure as the cause of his symptoms in 1980, and "was not entitled to await medical confirmation of a causal connection" before filing suit. *Id.* at 431, 527

A.2d at 74. Vispisiano appealed and the Supreme Court of New Jersey granted certification. *Id.* at 420, 527 A.2d at 68.

In a per curiam opinion, the supreme court reversed the appellate court's decision, and held that a plaintiff must have reasonable medical information indicating the nature and cause of his injuries in order "to have the requisite knowledge for accrual of a toxic tort cause of action." *Id.* at 435, 527 A.2d at 76 (citing *Mancuso v. Mancuso*, 209 N.J. Super. 51, 58-59, 506 A.2d 1253, 1256-57 (App. Div. 1986)). In reaching its decision, the court first observed that the purpose of a statute of limitations was to insure the diligent and timely pursuit of claims. *Id.* at 426, 527 A.2d at 71 (citing *Farrell v. Votator Div. of Chemetron Corp.*, 62 N.J. 111, 115, 299 A.2d 394, 396 (1973)). The court noted, however, that the New Jersey Supreme Court had previously adopted the "discovery rule" to avoid the possibility of harsh and unjust results if statutes of limitations were inflexibly applied. *Id.* (citing *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961); *Mancuso v. Mancuso*, 209 N.J. Super. 51, 506 A.2d 1253 (1986)). The court stated that pursuant to the discovery rule, a cause of action accrues when the "injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, that he may have a basis for an actionable claim." *Id.* at 434, 527 A.2d at 75-76 (quoting *Lopez v. Swyer*, 62 N.J. 267, 272, 300 A.2d 563, 565 (1973)).

Noting the difficulty in determining the nature and cause of toxic-tort injuries, the court stated that refinement of the application of the discovery rule in toxic-tort cases was necessary. *Id.* at 429, 434, 527 A.2d at 73, 76. Therefore, the court concluded that a mere suspicion of the cause and existence of an injury was not sufficient to trigger the running of the statute of limitations. *Id.* at 434, 527 A.2d at 75. The court held that in order for the statute of limitations to toll, the plaintiff must have "reasonable medical information" which would indicate the existence of a cause of action. *Id.* The court emphasized, however, that its ruling did not require medical confirmation, but merely a physician's inclusion of chemical poisoning in the diagnosis or other reliable medical support. *Id.* at 437, 527 A.2d at 77. The court concluded that because Vispisiano's doctor had never diagnosed Vispisiano's symptoms as being related to chemical exposure prior to his filing suit, Vispisiano's action was not barred by the statute of limitations. *Id.* at 437-38, 527 A.2d at 77-78.

Justice Clifford, in a separate concurring opinion, empha-

sized that he had not abandoned his "long-held" position regarding the discovery rule. *Id.* at 438, 527 A.2d at 78 (Clifford, J., concurring). Justice Clifford opined that "the rule should not operate to start the running of the statute of limitations afresh with the discovery of a cause of action, but rather should function to give a plaintiff a reasonable time after discovery, up to what remains of the 'traditional' statutory period, within which to file the complaint." *Id.* The justice asserted that because in the case at bar the statute of limitations had not run by the time the plaintiff filed his complaint, he joined fully in the majority's decision. *Id.*

The supreme court's decision recognizes the unusual nature of toxic-tort cases and the inherent difficulties associated with application of the statute of limitations in such cases. Toxic-tort victims have been afforded the benefit of a refined application of the discovery rule because they cannot readily identify the nature and source of their injuries. Thus, without medical advice to support his suspicions, a plaintiff is presumed to remain uninformed and incapable of pursuing his claim. To avoid injustice to such victims, the New Jersey Supreme Court was correct to require reasonable medical information before triggering the statute of limitations in toxic-tort cases.

Clearly, the supreme court's requirement of reasonable medical support was practical, as well as equitable. The lower court's determination would have had the effect of requiring a plaintiff to diagnose his own condition. A plaintiff, without formal medical education, cannot be expected to form a reasonable opinion regarding his condition. Moreover, a plaintiff cannot possibly maintain a suit, based on suspicions, without substantial proof of his claim. A plaintiff's suit should not be time-barred before the plaintiff's injury manifests itself. A plaintiff, without medical documentation of his injury and its cause, cannot be said to be "sleeping on his rights" because he cannot know that he has a viable cause of action. Therefore, the modification of the discovery rule's application to the statute of limitations in toxic-tort cases was both rational and equitable.

Marlene Nisch

PROPERTY—ZONING & PLANNING—A MUNICIPALITY'S AUTHORITY UNDER THE MUNICIPAL LAND USE LAW IS LIMITED TO REASONABLE AND NECESSARY IMPROVEMENTS DIRECTLY RESULTING FROM A PARTICULAR SUBDIVISION OR DEVELOPMENT—*New Jersey Builders Ass'n v. Mayor of Bernards Township*, 198 N.J. 223, 528 A.2d 555 (1987).

New Jersey trade organizations representing builders and developers brought suit against Bernards Township challenging an ordinance which allocated the cost of the township's long-term road improvement plan between the township and future developers. 108 N.J. at 244, 247, 528 A.2d at 555, 557. The ordinance provided for a cost-allocation formula which established pro rata shares of contribution by the township and future developers based upon the number of existing structures and projected future construction. *See id.* at 225-26, 528 A.2d at 556-57 (quoting *New Jersey Builders Ass'n v. Mayor of Bernards Township*, 211 N.J. Super. 290, 292-93, 511 A.2d 740, 741-42 (Law Div. 1985)). The shares were calculated by determining a "trip generation" assessment value for residential and commercial establishments. This amount was then applied to the number of units to be constructed, and through the use of a simple mathematical computation, the cost per future development to be incurred by a developer could be easily determined. The developers challenged the ordinance on the basis that it constituted an invalid exercise of Bernards Township's authority under the Municipal Land Use Law (MLUL), N.J. STAT. ANN. § 40:55D-42 (West Supp. 1986). *Id.* at 224, 528 A.2d at 555. The developers alleged that the MLUL specifically limited a municipality's charges of cost to a developer for those improvements which are necessitated by the construction of the individual subdivision or development. *See id.* at 227 n.3, 528 A.2d at 557 n.3 (quoting N.J. STAT. ANN. § 40:55D-42 (West Supp. 1986)).

The trial court held that the provisions of the ordinance which distributed the cost of future road improvements to developers exceeded the authority granted to the municipalities by the MLUL. *Id.* at 227-28, 528 A.2d at 557. The appellate division affirmed and held that its decision was not restricted to prospective application. *Id.* at 228, 528 A.2d at 557. The Supreme Court of New Jersey granted certification and affirmed the lower courts' decisions. *Id.*

Writing for a unanimous court, Justice Stein initially deter-

mined that the plaintiffs had standing to challenge the ordinance. *Id.* at 227, 528 A.2d at 557. Addressing the substantive matter, the court noted that its prior decisions limited municipal exactions of developers for off-site improvements to needs attributable to the specific development. *Id.* at 228, 528 A.2d at 557-58 (citing *Divan Builders v. Planning Bd.*, 66 N.J. 582, 334 A.2d 30 (1975); *Longridge Builders Inc. v. Planning Bd.*, 52 N.J. 348, 245 A.2d 336 (1968); *Daniels v. Point Pleasant*, 23 N.J. 357, 129 A.2d 265 (1957)). Justice Stein then reviewed the diverse conclusions reached by other jurisdictions when faced with similar questions. *See id.* at 229-33, 528 A.2d at 558-60. He observed that most jurisdictions have resolved this issue within the context of state statutes defining the authority of individual municipalities. *Id.* at 233-34, 528 A.2d at 560.

In ascertaining whether the ordinance was a valid exercise of municipal authority under the MLUL, the court reviewed its prior decisions interpreting the predecessor to MLUL. *See id.* at 234-37, 528 A.2d at 560-62. Justice Stein asserted that the sparse case law in this area revealed that municipalities were allowed to require developers to make off-site improvements if such "*improvements [were] made necessary by reason of the subdivision's effect on lands other than the subdivision property.*" *Id.* at 236, 528 A.2d at 561-62 (quoting *Divan Builders Inc. v. Planning Bd.*, 66 N.J. 582, 596, 334 A.2d 30, 37 (1975)). The court reasoned that had the legislature intended to expand "municipal power to require contribution for off-site improvements" beyond prior case law, this intention would have been reflected in the MLUL's legislative history. *Id.*, 528 A.2d at 562.

Moreover, the court observed that the legislature is presumed to be aware of relevant judicial decisions in this area. *See id.* (citing *Barringer v. Miele*, 6 N.J. 139, 144, 77 A.2d 895, 897 (1951). The court inferred that if the legislature disagreed with case law, then the legislative history of MLUL would have reflected the legislature's disagreement. *See id.* Justice Stein concluded that both "the plain meaning and obvious legislative intent" of the MLUL limit municipal authority to those improvements which are necessarily a direct result of a specific subdivision or development. *Id.* at 237, 528 A.2d at 562. Accordingly, the court held that as the legislature had not yet authorized municipalities "to allocate the cost of substantial public projects among new developments on the basis of their anticipated im-

pact," the ordinance must be declared invalid. *Id.* at 237-38, 528 A.2d at 562.

The court's decision shifts the burden of road improvements necessitated by future developments from howeowners and owners of developments to the general public. Realistically, municipalities will be forced to distribute the cost of these improvements to the taxpayers. Thus, this decision seriously impairs municipalities' ability to adequately plan and prepare for future growth. Municipalities must now rely on unpopular taxes to raise much needed capital for such improvements. Reliance on such tax proposals is neither beneficial, nor conducive to future planning.

Appropriately the court's decision places upon the legislature the ultimate responsibility for determining how municipalities should allocate the cost of road repairs and other services necessitated by future developments and subdivisions. The political arena, not the judiciary, is the proper forum where such a policy question should be decided. Given the MLUL's legislative intent, however, it is uncertain whether the legislature will take affirmative action with regard to this issue.

Kathleen B. Harden

CRIMINAL LAW—PRETRIAL INTERVENTION PROGRAMS—PROSECUTOR MAY CONDITION ADMISSION INTO A PRETRIAL INTERVENTION PROGRAM UPON AN APPLICANT'S RESIGNATION FROM EMPLOYMENT AS A POLICE OFFICER—*State v. DeMarco*, 107 N.J. 562, 527 A.2d 417 (1987).

On June 17, 1984, Vincent DeMarco an off-duty police officer, heard noises outside his home and went to investigate. 107 N.J. at 563-64, 527 A.2d at 418. DeMarco pursued a car that he believed was responsible for the disturbance and for a recent rash of vandalism to neighborhood mailboxes. *Id.* at 564, 527 A.2d at 418. Shortly after losing sight of the car, DeMarco came upon a neighbor involved in an argument with two men that the neighbor believed had vandalized area mailboxes that evening. DeMarco asserted that after he identified himself as a police officer, one of the suspects fled. *Id.*, 527 A.2d at 419. DeMarco claimed that the other suspect, Timothy Moore, attacked him and

DeMarco was forced to strike back with a nightstick in self-defense. Moore alleged; however, that DeMarco threatened to shoot him and his friend, and therefore they both attempted to flee. *Id.* at 565, 527 A.2d at 419. Moore claimed that as he did, DeMarco attacked him with a nightstick.

DeMarco was indicted for aggravated assault with a deadly weapon. *Id.* (citing N.J. STAT. ANN. § 2C:12-1b(5)(a) (West 1982)). The Director of the Sussex County Pretrial Intervention Program (PTIP), a rehabilitation program to deter future criminal conduct, recommended DeMarco for enrollment in consideration of DeMarco's record as a police officer, his admitted involvement in the incident, and his belief that his actions were justified. The Sussex County Prosecutor, however, asserted that DeMarco should not be admitted to the program unless he resigned from the Newark Police Department. *Id.* at 566, 527 A.2d at 419. DeMarco motioned for review of the prosecutor's determination, maintaining that the prosecutor had abused his discretion. *See id.*, 527 A.2d at 419-20.

The law division ordered the enrollment of DeMarco in the PTIP, and held that the prosecutor's request for the defendant to terminate his employment was inappropriate and was inconsistent with the goals of the PTIP. *Id.* The appellate division reversed, concluding that the prosecutor's determination was not "a patent and gross abuse of his discretion." *Id.*, 527 A.2d at 420. The Supreme Court of New Jersey affirmed the appellate division's determination as modified. *Id.* at 573, 527 A.2d at 423. The court held that while the prosecutor's actions did not exceed his authority, he should have considered less severe alternatives. *See id.* at 570-71, 527 A.2d at 422.

Writing for the majority, Justice Pollock noted that in challenging a prosecutor's decision denying admission to a PTIP, the defendant must prove by clear and convincing evidence that the prosecutor's determination was a "patent and gross abuse of his discretion." *Id.* at 566, 527 A.2d at 420 (quoting *State v. Dalglish*, 86 N.J. 503, 506, 432 A.2d 74, 75 (1981); *State v. Leonardis*, 73 N.J. 360, 382, 375 A.2d 607, 618 (1977)). Thus, the court emphasized that judicial review of the prosecutor's decision should be limited to "only the most egregious examples of injustice and unfairness," regardless of whether such limited review results in a court upholding a decision with which it disagrees. *Id.* (quoting *State v. Leonardis*, 73 N.J. 360, 384, 375 A.2d at 607, 619 (1977)).

The court also reviewed the Penal Code's pretrial interven-

tion provisions and the applicable court rules and guidelines. *See id.* at 567, 527 A.2d at 420. Justice Pollock stated that the Penal Code stipulates that consideration is to be given to the type of offense to determine whether it "is of an assaultive or violent nature." *Id.* at 567-68, 527 A.2d at 420 (citing N.J. STAT. ANN. 2C:43-12(e) (West 1982)). The justice noted that the court rules and guidelines allow denial of admission to a PTIP where the offense at issue constitutes a breach of public trust and "would deprecate the seriousness of [the] defendant's crime." *Id.* (citing N.J. COURT RULES 3:28, Guideline 3(i)).

With regard to the case at bar, the court observed that a police officer was obligated to maintain public safety and uphold the law. *Id.* at 569, 527 A.2d at 421. The majority determined that DeMarco's attack upon a member of the community was a breach of public trust. *Id.* Therefore, the court concluded that the prosecutor's demand that DeMarco resign from the police force was not a gross abuse of discretion, because DeMarco's conduct arose under the auspices of his office and thus was a breach of public trust. *Id.* at 570, 527 A.2d at 422. Moreover, the court held that conditioning admission to the PTIP on the defendant's resignation could be justified as an attempt to prevent future incidents of this nature. *Id.* Finally, the majority emphasized that the court's holding did not suggest that the prosecutor was compelled to deny DeMarco's admission into a PTIP, but rather left that determination to the prosecutor's discretion. *Id.* at 570-71, 527 A.2d at 422.

In a dissenting opinion, Justice Handler argued that the prosecutor incorrectly applied the standards governing the PTIP. *Id.* at 573, 527 A.2d at 423 (Handler, J., dissenting). He noted that in evaluating eligibility for the PTIP, previous decisions by the court had considered employment a relevant factor only "if it constitute[d] a material circumstance in connection with the commission of [a] crime" or was rationally related to determining the defendant's amenability to rehabilitation. *Id.* at 575, 527 A.2d at 424 (Handler, J., dissenting). Justice Handler asserted that once the prosecutor had decided that a defendant was eligible for the PTIP, it was impermissible to condition admission on the defendant's resignation of employment as a form of punishment. *Id.* at 578, 527 A.2d at 426. Justice Handler stated that forcing DeMarco to make a choice between continued employment as a police officer or admission to a PTIP was a gross abuse of discretion because it hindered the goals of the rehabilitation program.

Id. at 578-79, 580, 527 A.2d at 426, 427. Moreover, the justice maintained that the majority's holding interfered with DeMarco's procedural due process rights. *Id.* at 582, 527 A.2d at 428 (citing N.J. STAT. ANN. § 40A:14-147 to -148 (West 1980). Specifically, he noted that there were specific statutory procedures and guidelines for disciplining or removing a police officer, and the prosecutorial decision to condition admission to the PTIP interfered with those procedures. *Id.* at 581, 527 A.2d at 427.

The *DeMarco* decision does a disservice to the criminal justice system, as well as the PTIP. In *DeMarco*, the court refused to disturb a prosecutorial decision, even though it suggested that the decision was improper. The court's sanctioning a legislative's grant of authority ultimately allows the prosecutor to act as both the finder of fact and judge. In effect, the prosecutor, based wholly on his personal perception of the events surrounding an alleged offense, can determine whether an individual will be criminally prosecuted or simply admitted to a rehabilitative program. Clearly, any time the court suspects an abuse of discretion the court should be obligated to review the decision. Basic constitutional freedoms are too valuable to allow only the most egregious prosecutorial errors to be rectified.

Moreover, the court's tolerance of the prosecutor's circumvention of the statutory law is alarming. As Justice Handler observed, termination of the defendant's employment should have been in accordance with the applicable New Jersey statute. The *DeMarco* majority inappropriately favored the state's interest when it failed to consider the due process interests of the defendant.

Cherie A. Hiller-Sanders

CONSTITUTIONAL LAW—DOUBLE JEOPARDY—ACQUITTAL FOR RECKLESS DRIVING BARS SUBSEQUENT PROSECUTION FOR DRIVING UNDER THE INFLUENCE WHERE THE SAME PROOFS ARE USED FOR BOTH OFFENSES—*State v. DeLuca*, 108 N.J. 98, 527 A.2d 1355 (1987).

Linda DeLuca struck and fatally injured a pedestrian on January 29, 1984. 108 N.J. at 100, 527 A.2d at 1356. A breathalyzer test subsequently revealed that DeLuca had a blood alcohol con-

tent of .21%. *Id.* at 101, 527 A.2d at 1356. DeLuca was charged with driving while under the influence (DWI) and reckless driving. Additionally, she was indicted for death-by-auto.

At trial, the state allegedly offered evidence to prove both that DeLuca was intoxicated and that the weather and road conditions were good. *Id.* After a full hearing, the jury acquitted DeLuca of the death-by-auto charge. *Id.* Following the acquittal, DeLuca moved to dismiss the reckless driving and DWI charges pending in municipal court. *Id.* While the state agreed to drop the reckless driving charge, the municipal court judge denied DeLuca's motion to dismiss the DWI charge. *Id.* The law division reversed based upon its decision on *State v. Dively*, 92 N.J. 573, 458 A.2d 502 (1983). *DeLuca*, 108 N.J. at 101, 527 A.2d at 1356. The court posited that double jeopardy barred the state from using the same proofs to establish recklessness in the DWI prosecution as were used in the death-by-auto case. *Id.* The appellate division affirmed, holding that even though the DWI charge required proof of elements not encompassed by the death-by-auto charge, the use of the same proofs precluded prosecution of the DWI offense. *Id.* On appeal, the Supreme Court of New Jersey reversed the decision of the lower courts, and remanded the case to the trial court with instructions to ascertain whether intoxication was the sole proof offered of recklessness at the death-by-auto trial. *Id.* at 109, 527 A.2d at 1360-61. The court held that if the trial court determined the prosecution's sole evidence of recklessness was intoxication at the death-by-auto trial, then the subsequent acquittal of the death-by-auto charge would bar a later prosecution for DWI. *Id.*

Justice Pollock, writing for a unanimous court, observed that the New Jersey Constitution provides the same double jeopardy protection guaranteed by the United States Constitution. *Id.* at 102, 527 A.2d at 1357. Justice Pollock noted that the United States Supreme Court has asserted that when "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied . . . is whether each provision requires proof of an additional fact which the other does not." *Id.* at 103, 527 A.2d at 1357. (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). The justice also emphasized that a recent Supreme Court decision regarding double jeopardy requires an examination of the relationship between the charges at issue. *Id.* at 104, 527 A.2d at 1358 (citing *Illinois v. Vitale*, 447 U.S. 410, 420 (1980)).

While recognizing the confusion created by the *Vitale* decision, Justice Pollock concluded that the New Jersey Supreme Court had interpreted *Vitale* as creating a two-prong test to ascertain when double jeopardy would bar a subsequent prosecution. *Id.* at 105-06 (citing *State v. Dively*, 92 N.J. 573, 458 A.2d 502 (1983)). Justice Pollock posited that under the first prong, if the court determines that "each offense requires proof of an additional fact not necessary for the other offense," then the two offenses are different, and double jeopardy does not bar a subsequent prosecution. *Id.* at 106, 527 A.2d at 1359. Under the second prong, the justice advanced that double jeopardy may bar a prosecution "if the same evidence used to prove the first offense is necessary to prove the second offense." *Id.* (citing *State v. DeLuca*, 208 N.J. Super. 422, 434, 506 A.2d 55, 62 (1986)). The justice noted that the *Dively* court had held that "it is only when both prongs are met that double jeopardy applies." *Id.* at 106, 527 A.2d at 1359 (quoting *State v. Dively*, 92 N.J. 573, 581, 458 A.2d 502, 506 (1983)). The court, however, agreed with the appellate division's determination that *Vitale* intended the second prong as an alternative test, and that the *Dively* court was incorrect in holding otherwise. *Id.* at 107, 527 A.2d at 1359. Therefore, the court concluded that the appropriate double jeopardy test in New Jersey is to compare the elements of the offenses, or in the alternative, to examine the evidence presented. *Id.*, 527 A.2d at 1360.

Accordingly, the court examined the facts presented in light of both double jeopardy standards. *Id.* at 108, 527 A.2d at 1360. The court held that under the elemental test, death-by-auto and DWI are not the same offenses. *Id.* Justice Pollock reasoned that the elements of the two charges are distinguishable because proof of death is necessary to establish death-by-auto, while proof of intoxication is required to prove drunk driving. *Id.* The court, however, was unable to ascertain whether the evidentiary prong had been satisfied from the record of the death-by-auto trial. *Id.* at 109, 527 A.2d at 1360-61. Unable to independently determine whether intoxication was the sole evidence offered to prove recklessness, the court remanded the case for a determination on the issue. *Id.*

Finally, the court noted the jurisdictional dilemma created by separate proceedings for DWI and death-by-auto prosecutions. *Id.* at 111, 527 A.2d at 1361-62. The court stated that DWI is normally prosecuted in municipal court because it is a traffic

offense. *Id.* Death-by-auto, on the other hand, the court stated is an indictable offense triable only in the superior court. *Id.* To avoid future double jeopardy problems, the court held that the two charges are to be tried simultaneously in the superior court with the judge sitting as both superior court judge and municipal court judge. *Id.*

The court's interpretation of the double jeopardy clause in *DeLuca* clearly extends its protections beyond what was originally intended. Although the supreme court properly recognized the important role which the double jeopardy clause plays in protecting citizens from multiple prosecutions arising out of the same incident, the court's interpretation of the clause may result in guilty offenders going unpunished due to procedural errors. For this reason, the court's holding should be limited to the unique facts of this case. The court's direction, however, to try DWI and death-by-auto cases simultaneously in superior court will avoid the problem of double jeopardy.

Keith A. McKenna