

NJ LAWS EMAIL NEWSLETTER E390

Recent Cases:

1, Non-Profit Facility not Liable for Criminal Acts of Employee. Davis v. Devereux Foundation ___ NJ ___ (A-54/55-10)

The Court reaffirms the duty of due care imposed upon caregivers with in loco parentis responsibilities to persons with developmental disabilities. However, applying the analysis set forth and developed by prior Court opinions, the parties' relationship, the nature of the risk, the opportunity and ability to exercise care, and public policy, do not justify imposing on such caregivers a "non-delegable duty" to protect residents from harm caused by employees' intentional acts. Also, no rational fact finder could find that McClain's criminal assault on Davis was conducted within the scope of her employment.

2. No Vacating of 2005 Guilty Plea where Defendant did not prove he was misadvised by Trial Attorney. State v. Gaitan ___ NJ ___ (2012) (A-109-10).

The Padilla Case represents a new constitutional rule of law that, for Sixth Amendment purposes, is not entitled to retroactive application on collateral review.

Although the Nunez-Valdez governs the standard of attorney performance in these cases, defendants are not entitled to relief under that decision because neither defendant was affirmatively misadvised by counsel or established prejudice.

3. No 2nd Interrogation on New Charges. State v. John Wessells ___ NJ ___ (A-27-09) 2-29-12

Because the defendant has not yet been tried for the crimes with which he has been charged, he is entitled to the benefit of the United States Supreme Court's decision in Maryland v. Shatzer, ___ U.S. ___, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010), and the statements he made during his second interrogation must therefore be suppressed.

4. Join the NJ State Bar Association NJSBA and Receive for Free the Daily Briefing as a Member Benefit.

More benefits can be found at www.njsba.com. To join the NJSBA as an attorney member, or Associate member contact NJSBA Member Services at 732-249-5000 ext. 2300.

We also subscribe to the New Jersey Law Journal to receive more detailed case squibs. The unreported case squibs below are examples of NJSBA Law Journal member benefits. To join the NJSBA call 973-642-0075.

5. Will Contester did not Prove Confidential Relationship. In the Matter of the Estate of John C. Dobish, Chancery Division: Bergen County; Probate Part; Docket No.: P-004-11 Unreported

Defendant Darin Dobish, the decedent's son, filed a caveat against admitting to probate any paper writing purporting to be the decedent's will, claiming breach of fiduciary relationship, undue influence, and suspicious circumstances surrounding the preparation and execution of the will and trust instrument. He also seeks to set aside an intervivos transfer pursuant to the trust. Plaintiff, the decedent's daughter, filed a complaint seeking to set

aside the caveat and admit to probate a will dated May 14, 2009. Defendant filed an answer and counterclaim asserting non-compliance with statutory formalities and undue influence. The court found that the 2009 will satisfied the statutory requirements as to form and execution and that defendant failed to satisfy his burden of establishing a confidential relationship in the legal sense between plaintiff and the decedent or suspicious circumstances and even if he had, plaintiff has rebutted any presumption of undue influence and it discharges the caveat, admits the will to probate, and appoints plaintiff as executrix. It also finds that certain expenditures by plaintiff were not made for the benefit of the decedent and it orders her to pay back into the estate those expenses as well as improper real estate tax payments. It also awards counsel fees to plaintiff and defendant.

Source: NJLJ Daily Briefing February 24, 2012

6. Judge is Reprimanded for Helping Prosecutor in DWI Trial. In the Matter of Gregory R. McCloskey, Judge DOCKET NO: ACJC 2010-283 Unreported

A municipal judge who fed questions to the prosecutor during an ex parte chat in a drunken-driving case was publicly reprimanded on Feb. 24. The state Supreme Court agreed with the Advisory Committee on Judicial Conduct that Gregory McCloskey undermined confidence in the bench's independence and impartiality by showing a preference for the prosecution and should have disqualified himself. According to the ACJC presentment, McCloskey "directed" the prosecutor - outside the presence of defense counsel - to ask two questions of a witness that were "specifically central to the State's case and specifically critical to the defense theory. Unreported

Source: Daily Briefing-February 28, 2012

**7. Domestic Violence Reversed where No Intent to Harass.
D.L.J.-O v. J.J.O. Docket No. A-3256-10T4 Unreported**

Defendant appeals from a final restraining order entered in favor of plaintiff, his wife, under the Prevention of Domestic Violence Act. The panel finds that plaintiff's evidence of defendant's two phone calls to her and his kicking her in the ankle, without leaving a mark or bruise, and throwing a bag containing a comforter when she arrived to pick up their children was not sufficient to permit a finding that he had committed the predicate act of harassment and it reverses.

Source- Daily Briefing - March 1, 2012

8. DWI Guilty Plea Reversed where No Reasonable Suspicion Under the Influence. State v. Maclay, App. Div. Docket No. A-4542-10T4) Unreported.

Defendant appealed from the order of the Law Division, denying de novo his motion to suppress a motor vehicle stop that led to his arrest and conditional plea to driving under the influence. The Law Division sustained defendant's objection to consideration of the 911 recording, finding the state violated its continuing duty to provide it; defense counsel did not have an opportunity to cross-examine witnesses regarding it; and he did not have the opportunity to argue its significance before the municipal court.

The appellate panel found the state failed to present sufficient facts on which one could draw a reasonable and articulable suspicion of driving under the influence. There was no observation of inebriation or alcohol consumption before defendant entered his vehicle; nor was there any record evidence - after suppression of the 911 recording - that defendant was observed driving erratically,

or unusually, or in violation of other motor vehicle laws. The panel reversed and remanded to the municipal court to allow defendant to withdraw his conditional guilty plea.

Source- Daily Briefing - March 1, 2012

9. Will Challenger Failed to Prove Undue Influence. In re Estate Of Vivian Fassett, App. Div. DOCKET NO. A-3310-10T3

The Surrogate of Ocean County admitted to probate the last will and testament of Vivian Fassett and issued letters testamentary to Cheryl Capers and Marie Hardy as co-executrixes of the estate. Thomas Bolling, Fassett's brother, filed a complaint seeking an order setting aside the will, an order barring disposition of Fassett's remains as directed in her will, an accounting, and money damages. Bolling appeals from the order dismissing the complaint. On appeal, Bolling argues the will executed by Fassett is the product of undue influence and she was not competent to execute the will. The appellate panel affirms, finding Bolling failed to carry his burden of showing Fassett was not competent to execute the will or that the will was the product of undue influence. The panel notes that the judge's findings on the issues of testamentary capacity and undue influence are entitled to great weight because he had the opportunity to see and hear the witnesses and form an opinion about the credibility of their testimony in the course of two hearings.

Source: Daily Briefing - March 5, 2012

10. New statewide ban on the manufacture, distribution, sale, and possession of any of the hundreds of dangerous, manmade chemicals designed to mimic the effects of marijuana.

Attorney General Jeffrey S. Chiesa announced a statewide ban on the manufacture, distribution, sale, and possession of any of the hundreds of dangerous, manmade chemicals designed to mimic the effects of marijuana, commonly known as "synthetic marijuana," "K2," or "Spice."

Attorney General Chiesa noted that the ban, issued by the Division of Consumer Affairs, is much more comprehensive than previous efforts to eliminate synthetic marijuana. It includes both broad and specific language that includes all possible variants of the drug.

"This expansive action is necessary due to the unique nature of synthetic marijuana and other so-called designer drugs. When one product is banned, the manufacturers and dealers find it all too easy to evade the law by creating new toxic products that have similar effects on the brain, but are not specifically identified as illegal," Attorney General Chiesa said. "We are ending this dangerous game played by drug dealers. We are making it unambiguously clear that if a synthetic chemical is being sold because it mimics the effects of marijuana, the dealer is committing a crime."

The Order announced today bans ten entire classes of synthetic compounds that imitate the effects of marijuana, and all known or unknown variants of the drug that would fall within each class. The Order also expressly includes "any other synthetic chemical compound that is a cannabinoid receptor agonist and mimics the pharmacological effect of naturally occurring cannabinoids" - in other words, any synthetic chemical that mimics the effects on the brain of marijuana's active ingredient.

Effective immediately upon being signed yesterday by

Thomas R. Calcagni, Director of the Division of Consumer Affairs, the Order adds these chemicals to the list of Schedule I Controlled Dangerous Substances in New Jersey. As Schedule I CDS, the drugs are now subject to the highest level of State control, like cocaine and heroin. Manufacture, distribution, sale, or possession of the chemicals is now a third-degree crime. Violators may be subject to a fine of up to \$25,000 and imprisonment for a three- to five-year term.

"In addition to equipping law enforcement with the means to stop disreputable retailers from selling this poison in New Jersey, the Order sets the record straight about the toxic nature of these chemical concoctions," said Director Calcagni. "To the extent people once believed these substances were safe because they were legal - we've now made it perfectly plain that the sale and possession of these drugs is criminal, and their use is extremely dangerous and potentially deadly."

The toxic ingredients of synthetic marijuana can have devastating effects on the user:

Packets of synthetic marijuana and other suspected designer drugs have been sold at gas stations, boardwalk novelty shops, and other locations across New Jersey. The packages often bear labels claiming the contents are not covered by any existing federal or state ban, creating the impression that they can be sold legally. Data from the New Jersey State Police Office of Forensic Science illustrates how the sellers of these drugs have changed tactics to evade previous statewide and federal bans.

Source:<http://www.state.nj.us/lps/ca/press/02292012.htm>

11. Reminder: VIP invitation to Kenneth Vercammen's St. Patrick Happy Hour.

Kenneth Vercammen's St. Patrick Happy Hour

Friday, March 16, 2012; 5:00PM - 7:00PM

Bar Anticipation "Where Summer Never Ends"

703 16th Avenue

Lake Como/ Belmar, NJ 07719

Free for you and two friends.

Sorry if this email is a Dup. I did not want to miss anyone.

5-8PM Hot & Cold Buffet with carving station on 1st floor

The reduced price Happy Hour is 6-7PM with \$1 House Drink,
Bud/BudLt draft & House Wine Special

We are located in the back room past the stage, called the
Mahogany Room, near the outdoor bar.

Email Ken's Law Office so we can put your name on the VIP list
for wristbands. VercammenLaw@Njlaws.com

Bring a canned food donation for the St. James Food Bank Hands of
Hope