NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1479-13T1

WARD SAND AND MATERIALS COMPANY,

Plaintiff-Appellant,

v.

THE TRANSAMERICA INSURANCE COMPANY, AMERICAN CASUALTY COMPANY OF READING, PA, CONTINENTAL CASUALTY COMPANY, WESTCHESTER FIRE INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, PENN AMERICA INSURANCE COMPANY, AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY f/k/a GREAT AMERICAN SURPLUS LINES INSURANCE COMPANY, and FIREMAN'S FUND INSURANCE COMPANY,

Defendants-Respondents,

and

EMPLOYERS MUTUAL INSURANCE COMPANY, AMERICAN EXCESS INSURANCE COMPANY, PURITAN INSURANCE COMPANY, OLD REPUBLIC INSURANCE COMPANY, WESTERN EMPLOYERS INSURANCE COMPANY, and THE NEW JERSEY PROPERTY AND LIABILITY INSURANCE GUARANTY ASSOCIATION on behalf of THE HOME INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, and MISSION INSURANCE COMPANY,

Defendants.

Argued February 24, 2015 - Decided January 12, 2016

Before Judges Fisher, Nugent and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-4130-09.

Louis Giansante argued the cause for appellant (Giansante & Associates, LLC, attorneys; Mr. Giansante, of counsel and on the briefs).

Heather E. Simpson argued the cause for respondents Transamerica Insurance Company and United States Fire Insurance Company as assumptive reinsurer of Westchester Fire Insurance Company (Carroll, McNulty, & Kull, LLC, attorneys; Christopher R. Carroll and Ms. Simpson, of counsel and on the brief).

Nicole J. Rosenblum argued the cause for respondents American Casualty Company of Reading, PA, and Continental Casualty Company (Hangley Aronchick Segal Pudlin & Schiller, attorneys; Ms. Rosenblum, of counsel and on the brief).

Robert W. Mauriello, Jr. argued the cause for respondent First State Insurance Company (Graham Curtin, attorneys; Mr. Mauriello and Jennifer L. Schoenberg, on the brief).

Nicholas J. Lombardi argued the cause for respondent Penn America Insurance Company (Harrington and Lombardi, LLP, attorneys; Mr. Lombardi, on the brief).

Katherine Heid Harris (Locke Lord, LLP) of the Illinois bar, admitted pro hac vice, argued the cause for respondent American Empire Surplus Lines Insurance Company (Saul Ewing, LLP, and Ms. Heid Harris, attorneys; Joseph C. Monahan (Saul Ewing, LLP) of the Pennsylvania bar, admitted pro hac vice, of counsel; Amy L. Piccola, on the brief).

Brian R. Ade argued the cause for respondent Fireman's Fund Insurance Company (Rivkin Radler, LLP, attorneys; Mr. Ade, of counsel and on the brief, Andrew N. Firkins, on the brief).

The opinion of the court was delivered by

NUGENT, J.A.D.

In this declaratory judgment action, plaintiff Ward Sand and Materials Company (Ward) appeals from Law Division summary judgment orders allocating insurance coverage among primary and excess insurers for cleanup of environmental contamination at a landfill. Ward also appeals from the order denying its motion for reconsideration. The primary question we must decide is whether the trial court erred by concluding Ward is responsible for the sums allocated to insolvent insurers or whether, as Ward argues, the sums allocated to insolvent insurers should be reallocated among solvent primary and excess insurers. Having examined the matter in light of the record and controlling law, we reject Ward's arguments and affirm.

I.

Beginning in 1970, Ward accepted Pennsauken Township's municipal waste at Ward's sand mining property. In 1978, it sold the property to the Township. In 1991, the Township and the Pennsauken Solid Waste Management Authority, having entered into an administrative consent order with the New Jersey Department of Environmental Protection for cleanup of the site,

sued numerous parties, including Ward, for contribution under the Spill Act, N.J.S.A. 58:10-23.11 to -23.24. Ward notified its primary and excess insurers, and subject to a reservation of rights, the primary insurers agreed to defend Ward, sharing costs pro-rata.

Ward's primary and excess insurers and coverage from April 1970 through April 1986 were:[1]

Primary Policies

Insurer	**Policy Number**	**Policy Period**	**Per Occurrence Limits**
Transamerica	5126400	4/30/70 — 4/30/71	$250,000
American Casualty	CCP7423671	4/30/71 — 4/30/74	$250,000
Continental Casualty	CCP9856535	4/30/74 — 5/31/76	$250,000
Home	GA244412	5/31/76 — 5/31/77	$250,000
Home	GA9571856	5/31/77 — 5/31/78	$250,000
Home	GA9716523	5/31/78 — 5/31/79	$250,000
Home	GA9856535	5/31/79 — 5/31/80	$250,000
Reliance	GL2559796	5/31/80 — 5/31/81	$500,000
Reliance	GL3099371	5/31/81 — 5/31/82	$500,000
Reliance	GL3703668	5/31/82 — 5/31/83	$500,000

[1] Policies issued to Ward following expiration of the 1985 policies apparently contained absolute pollution exclusions and are therefore not at issue on this appeal. There are some discrepancies in the record concerning policy numbers and other policy information not material to the issues before us on this appeal.

PMA	GL308400-61-21 34-7	5/31/83 — 4/1/84	$500,000
PMA	GL308400-61-21 34-7	4/1/84 — 4/1/85	$500,000
PMA	GL308400-61-21 34-7	4/1/85 — 4/1/86	$500,000

Excess Policies

Insurer	**Policy Number**	**Policy Period**	**Policy Limits**
Westchester/US Fire	DCL 460374	4/30/69 — 4/30/72	$2M excess of primary
Westchester/US Fire	DCL 001490	4/30/72 — 4/30/75	$2M excess of primary
Continental	RDU 2134869	6/26/75 — 4/30/76	$2M excess of primary
First State	904500	10/1/76 — 10/1/77	$5M excess of primary
Westchester/US Fire	5203447677	10/1/77 — 10/1/78	$5M excess of primary
Westchester/US Fire	5230043793	10/1/78 — 10/1/79	$5M excess of primary
Penn America	UMX6010	10/1/79 — 10/1/80	$1M excess of primary
American Excess	EUL5006956	10/1/79 — 10/1/80	$4.5M (part of $9M) excess of $1M and primary
Employers Mutual	MMO70987	10/1/79 — 10/1/80	$4.5M (part of $9M) excess of $1M and primary
Reliance	LU7527715	5/31/80 — 5/31/81	$5M excess of primary
Great American	OCX00551	5/31/80 — 5/31/81	$5M excess of $5M and primary
Puritan	ML652450	5/31/80 — 5/31/81	$10M excess of $10M and primary
Reliance	LU2224687	5/31/81 — 5/31/82	$5M excess of primary
Fireman's Fund	XLX1481189	5/31/81 — 5/31/82	$5M excess of $5M and primary
Old Republic	OZX11830	5/31/81 — 5/31/82	$10M excess of $10M and primary
Reliance	LU448458	5/31/82 — 5/31/83	$10M excess of primary
Twin City	TXS 100524	5/31/82 — 5/31/83	$10M excess of $10M and primary

Mission	MN023848	5/31/83 — 4/1/84	$20M excess of primary
Mission	MN031279	4/1/84 — 4/1/85	$20M excess of primary
Western Employers	UL10048512801	4/1/85 — 4/1/86	$5M excess of primary
Integrity	XL210416	4/1/85 — 4/1/86	$5M excess of $5M and primary
Royal	ED103079	4/1/85 — 4/1/86	$10M excess of $10M and primary
Federal	7929-03-99	4/1/85 — 4/1/86	$30M excess of $20M and primary

During the Pennsauken landfill litigation, two of Ward's insurers became insolvent. In October 2001, Reliance Insurance Company (Reliance) was declared insolvent. In June 2003, Home Insurance Company (Home) was declared insolvent. Three of Ward's other carriers had become insolvent before the Pennsauken action commenced: Mission National Insurance Company (Mission) in February 1987; Integrity Insurance Company (Integrity) in March 1987; and Western Employers Insurance Company (Western) in April 1991. Thus, the insolvent carriers had all become insolvent before December 2004.

Beginning in October 2003, the Property Liability Insurance Guaranty Association (PLIGA) contributed to defense costs on behalf of the insolvent insurers.[2]

[2] "The PLIGA Act created [PLIGA] — a private, non-profit, unincorporated association whose members consist of insurance companies licensed to issue certain types of insurance policies in New Jersey, including property insurance. . . . [PLIGA] is empowered to assess members in amounts necessary to pay the (continued)

In January 2009 Ward settled the Pennsauken litigation for $5.5 million. Its insurers did not contribute to the settlement. In June 2009, one of its solvent carriers, PMA — Ward's primary insurer from May 31, 1983 through April 1, 1986 — contributed and settled with Ward and plaintiffs in the Pennsauken litigation by paying $1.5 million into escrow. In August 2009, Ward commenced an action against its primary and excess insurers and PLIGA seeking, among other relief, an order allocating insurance coverage for the settlement.

Following extensive motion practice, the court dismissed several of Ward's claims against several insurers, some with prejudice and some without prejudice. In June 2011, Ward settled its claims against PLIGA for $1,228,500, plus $200,000 in legal fees and costs. PLIGA paid on behalf of insolvent insurers Home, Reliance, Mission, and Western.[3] In August 2011, following argument on the parties' cross-motions for summary judgment, the court denied the cross-motions but determined, among other things:

(continued)
covered claims of an insolvent insurer. The assessments are recouped by insurance carriers, which pass them onto insureds as a policy premium surcharge." Farmers Mut. v. N.J. Prop.-Liab. Ins. Guar. Ass'n., 215 N.J. 522, 541 (2013).

[3] The settlement made no mention of Integrity, one of the five insolvent insurers.

> [T]his [c]ourt is bound to apply the New Jersey Supreme Court's rationale in Carter-Wallace, Inc. v. Admiral Ins. Co., 154 N.J. 312 (1998), Werner Indus., Inc. v. First State Ins. Co., 112 N.J. 30 [1988], Johnson v. Braddy, 186 N.J. 40 (2006), Benjamin Moore & Co. v. Aetna Cas. & Sur. Co. 179 N.J. 87 (2004) and [Spaulding Composites Co. v. Aetna Cas. & Sur. Co., 176 N.J. 25 (2003), cert. denied sub nom. Liberty Mut. Ins. Co. v. Caldwell Trucking PRP Grp., 540 U.S. 1142, 124 S. Ct. 1061, 157 L. Ed. 2d 953 (2004)] to the facts of this case, and having found no exceptional circumstances that would permit departure from the allocation scheme outlined in the foregoing decisions, the allocation of the Pennsauken Landfill Settlement shall include the full policy limits as contained in the written policies for all policies proven to have been issued to Ward Sand and in effect during the triggered policy coverage years (July 1, 1970 to April 1, 1986) (hereinafter, the "Coverage Block") and which do not contain an applicable pollution exclusion.

The court's decision required Ward to bear the sums allocated to its insolvent insurers to the extent such sums exceeded the PLIGA payments.

The court extended discovery and ordered that all previous dismissals without prejudice "are hereby now dismissals with prejudice, subject to the [c]ourt's remaining interlocutory jurisdiction[.]" The court thereafter denied Ward's motion for reconsideration.

Following additional motion practice and Ward's unsuccessful motion for leave to file an interlocutory appeal,

the trial court heard argument concerning the specific policies that were to be included within the coverage allocation and whether certain pollution exclusions applied. On May 28, 2013, the court filed two orders confirming specific policies to be included or excluded in the coverage allocation, set forth the dollar amounts of the respective insurers' obligations, and apportioned defense costs in related litigation. On November 13, 2013, the court denied Ward's motion for reconsideration and signed a confirming order. Ward appealed.

II.

Ward contends that because the 2004 amendments to the PLIGA Act are corrective or curative, principles of statutory construction require that they be applied retroactively. Ward further contends the trial court's decision concerning allocation contravenes existing law. Based on these arguments, Ward submits it is entitled to a judgment based on its proposed allocation, an allocation which should include coverage provided by two insurers not identified when the trial court entered its summary judgment orders.

When a party appeals from an order granting summary judgment, our review is de novo and we apply the same standard as the trial court under Rule 4:46-2. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162,

167 (App. Div.), certif. denied, 154 N.J. 608 (1998). First, we determine whether the moving party demonstrated there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006).

In doing so, we view the evidence in the light most favorable to the non-moving party, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), and review the legal conclusions of the trial court de novo, without any special deference. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Here, the material facts are undisputed. Ward's arguments present questions of law.

In resolving these questions of law, we begin by reviewing the principles applicable to allocation among insurers of liability for cleanup of environmental contamination. Our Supreme Court has

> adopted the 'continuous trigger' theory of liability, holding that
>
> > when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy. That is the continuous-trigger theory for activating the

> insurer's obligation to respond under the policies.
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> [Carter-Wallace, supra, 154 N.J. at 321 (quoting Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 478-79 (1994) superseded by statute, N.J.S.A. 17:30A-5).]

In Owens-Illinois, the Court concluded "any allocation should be in proportion to the degree of the risks transferred or retained during the years of exposure[,]" and the "better formula" is to "allocate[] the losses among the carriers on the basis of the extent of the risk assumed, i.e., proration on the basis of policy limits, multiplied by the years of coverage." Owens-Illinois, supra, 138 N.J. at 475. The Court provided this illustration:

> During a nine-year period, our model assumed that in years one through three coverage for the owners of an office building was provided in the amount of two million dollars per year; in years four through six the applicable coverage had a limit of three million dollars per year; and in years seven through nine, during which time no insurance was purchased, the self-insured risk was four million dollars per year. Thus, under an allocation methodology that is proportionate to the degree of the risks transferred or retained during the years of exposure, insurers in years one through three would bear 6/27ths of the responsibility, insurers in years four through six would shoulder 9/27ths, and the building owners in years seven through nine will be responsible for 12/27ths.
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> [Carter-Wallace, supra, 154 N.J. at 322-23 (citing Owens-Illinois, supra, 138 N.J. at 475-476 (internal citations omitted).]

In Carter-Wallace, the Court expanded the Owens-Illinois methodology to "vertical" layers of coverage and allocated primary and excess layers of coverage in effect for a given year, "beginning with the primary policy and proceeding upward through each succeeding excess layer." Carter-Wallace, supra, 154 N.J. at 326. The Court illustrated vertical allocation with this example:

> Assume that primary coverage for one year was $100,000, first-level excess insurance totaled $200,000, and second-level excess coverage was $450,000. If the loss allocated to that specific year was $325,000, the primary insurer would pay $100,000, the first level excess policy would be responsible for $200,000, and the second-level excess policy would pay $25,000.
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> [Id. at 326-327.]

As may be evident from the example,

> the primary policy in a particular year answers until its limits are exhausted, then the first-level excess policy answers until its limits are exhausted and the vertical exhaustion scheme continues until all of the damages assigned to the particular year are covered or all of the insurance policies' limits are exhausted, whichever occurs first.
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> [Spaulding, supra, 176 N.J. at 38.]

Additionally, in explaining its Owens-Illinois and Carter-Wallace decisions, the Spaulding Court noted that under its pro-ration formula, "the insured is required to pay its 'aliquot'

share of both defense and indemnification on account of years in which it was uninsured, self-insured, or its coverage was exhausted or bankrupt." Id. at 35-36.

The Court's Owens-Illinois and Carter-Wallace decisions did not address the issues created by insolvent insurers. We addressed one issue concerning insolvent carriers in Sayre v. Ins. Co. of N. Am., 305 N.J. Super. 209 (1997), superseded by statute, N.J.S.A. 17:30A-5. That case involved environmental contamination and the continuous-trigger doctrine applicable to insurance policies issued over an eleven-year period where one was insolvent. Id. at 211-12, 215. The New Jersey Surplus Lines Guaranty Fund (Guaranty Fund)[4] responded to claims concerning the insolvent insurer. Ibid. The Guaranty Fund argued "the allocation method used in Owens-Illinois should be employed first to exhaust all other insurance coverage provided by the solvent carriers on the risk." Id. at 213. We held "the Fund [was] required to pay the share which would have been

[4] "The [New Jersey Surplus Lines Insurance] Guaranty Fund Act [N.J.S.A. 17:22-6.70 to -6.83] and PLIGA Act both establish entities that take the place of certain insolvent insurers in responding to covered claims. . . . Under the Guaranty Fund Act, the Guaranty Fund membership is composed of surplus line insurers. N.J.S.A. 17:22-6.73. Under the PLIGA Act, the Guaranty Association explicitly excludes from membership surplus line insurers. N.J.S.A. 17:30A-5 (defining 'member insurer' and 'insolvent insurer')[.]" Farmers Mut., supra, 215 N.J. at 539 n.4.

allocated to the [insolvent insurer]'s policy, not exceeding the statutory $300,000 limit." Id. at 214.

In so holding, we noted that the Guaranty Fund requirement that "an insured must exhaust all other applicable coverage available to it" was inapplicable because "no other coverage is here available for the period insured by [the insolvent insurer]." Id. at 215. We further noted: "[t]he effect of the Fund's argument in this case is to create a separate statutorily unauthorized 'fund' consisting of insurers who were not on the risk during [the insolvent insurer]'s nine-month period of coverage. We do not conceive that this was the purpose of Owens-Illinois formula." Ibid.

The pro-rata allocation scheme developed in the foregoing cases was required based on both horizontal and vertical layers of insurance coverage. The insured was responsible for the pro-rata share of an insolvent insurer to the extent that pro-rata share was not paid by PLIGA.[5] That allocation scheme changed not because of common law developments, but by legislative action in 2004.

[5] Subject to other qualifications and conditions, PLIGA is "obligated to the extent of the covered claims against an insolvent insurer," but only as to "that amount of each covered claim which is less than $300,000 per claimant and subject to any applicable deductible and self-insured retention contained in the policy." N.J.S.A. 17:30A-8(a)(1).

The PLIGA Act requires "[a]ny person having a claim . . . under an insurance policy other than a policy of an insolvent insurer . . . to exhaust first his right under that other policy." N.J.S.A. 17:30A-12(b). In 2004, "the Legislature added an amendment to both the PLIGA Act and the Guaranty Fund Act defining the word 'exhaust' in continuous-trigger cases involving progressive injury and property damage." Farmers Mut., supra, 215 N.J. at 542. The Legislature amended N.J.S.A. 17:30A-5 by adding the following definition of exhaust:

> "Exhaust" means with respect to other insurance, the application of a credit for the maximum limit under the policy, except that in any case in which continuous indivisible injury or property damage occurs over a period of years as a result of exposure to injurious conditions, exhaustion shall be deemed to have occurred only after a credit for the maximum limits under all other coverages, primary and excess, if applicable, issued in all other years has been applied.
>
> [Ibid. (quoting L. 2004, c. 175, § 2 (effective Dec. 22, 2004)).]

Interpreting this amendment, the Supreme Court has explained:

> The most straightforward, plain reading of N.J.S.A. 17:30A-5 is that the term "if applicable" modifies "other coverages" and that "other coverages" is merely a shorthand reference to policies issued by solvent insurers. Thus, when one of several insurance carriers on the risk is insolvent in a continuous-trigger case, then the limits of the policies issued by solvent

> insurers "in all other years" must first be exhausted before [PLIGA] is obligated to pay statutory benefits.
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> [Farmers Mut., supra, 215 N.J. at 543.]

In addition, the Supreme Court explicitly rejected the argument "that, for the years in which [PLIGA] is standing in the place of an insolvent carrier in a long-tail environmental contamination case, the insured — not the solvent insurer — is compelled to make payments under the Owens-Illinois allocation scheme before accessing statutory benefits under the PLIGA Act." Id. at 544. Nonetheless, the statutory amendments are prospective only:

> On December 22, 2004, the Legislature made substantial revisions to the [PLIGA] Act. Those revisions only apply prospectively, however. The amendatory legislation states that "[t]his Act shall take effect immediately and shall apply to covered claims resulting from insolvencies occurring on or after that date." L. 2004, c. 175, § 8. Accordingly, we apply herein the version of the Act that pre-dates those amendments.
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> [Thomsen v. Mercer-Charles, 187 N.J. 197, 204 n.2 (2006).]

In view of the common law development of the continuous-trigger doctrine and the superseding legislation embodied in the 2004 amendments to the PLIGA Act, including the amendments' prospective application, Ward's arguments are without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following brief comments.

Ward asserts the 2004 amendments to the PLIGA Act should be applied retroactively. Acknowledging the Supreme Court's note in Thomsen, that the amendments apply prospectively, Ward appears to assert that because the issue before the Court in Thomsen involved the PLIGA Act's setoff provision, N.J.S.A. 17:30A-12(b), rather than the Act's definition of "exhaust," the Court's notation does not apply to the case now before us. Thomsen, supra, 187 N.J. at 206. Ward also argues that because the 2004 amendments are ameliorative or corrective, they apply retroactively; and that only Ward's interpretation of the PLIGA Act and its amendments is consistent with rules of statutory construction. Ward is simply incorrect.

The 2004 amendments were enacted on December 22, 2004, in "[a]n Act concerning the New Jersey Property-Liability Insurance Guaranty Association and amending P.L. 1974, c. 17." L. 2004, c. 175. In the final section of the Act, L. 2004, c. 175, § 9 states: "This Act shall take effect immediately and shall apply to covered claims resulting from insolvencies occurring on or after that date." This section, concerning the effective date of the amendments, applies to L. 2004, c. 175 in its entirety, not to any one section. Additionally, Ward's reference to policy considerations expressed in case law are unavailing. "The common law must bow when in conflict with the legislative scheme. A statute does not stand in an inferior status to the

common law. Rather, a statute must be honored unless constitutionally infirm." Farmers Mut., supra, 215 N.J. at 528.[6]

Ward next argues in several points of its brief that the trial court's allocation to Ward of its insolvent insurers' pro-rata shares contravenes settled law. Ward's arguments are constructed mostly from language in case law taken out of context. We have discussed the development of relevant case law above. There is no need to repeat it here. Suffice it to say that Ward's arguments, not the trial court's decision, are contrary to established case law.

We are not insensitive to the unfairness that results when a responsible business has purchased insurance to cover its business risks and the insurer becomes insolvent. Yet, solvent insurers might argue it is equally unfair to require them to pay claims on risks they have not insured. The myriad of policy considerations implicated by these considerations, particularly in the context of cleanup costs for environmental contamination, have been carefully considered and weighed by both the Supreme Court and the Legislature. The judicial and legislative solutions have been widely acclaimed. See Spaulding, supra, 176 N.J. at 39-40. The trial court comprehensively analyzed and

[6] We note that Ward's settlement with PLIGA is inconsistent with its arguments on appeal.

correctly applied the applicable judicial pronouncements and legislative enactments. We affirm its decision.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION