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Lesson Plan

1.) Invasion of privacy

Friedman . Martinez, 2020 WL 3240960 (Secret recording in women's room)

"Intrusion upon seclusion" is a tort that allows individuals whose privacy has been invaded to seek recovery for their injuries. In New Jersey, the tort provides a cause of action against the intentional intrusion, "physical[ ] or otherwise, upon the solitude or seclusion of another ... if the intrusion would be highly offensive to a reasonable person." In this appeal, we consider the history and nature of right to privacy claims as well as the showing needed to withstand a motion for summary judgment.

The eleven-count complaint alleged invasion of privacy contrary to N.J.S.A. 2A:58D-1, tortious invasion of privacy, and intentional and negligent infliction of emotional distress by Martinez; employer liability pursuant to section 317 of the Restatement (Second) of Torts, negligent hiring and retention, and negligent supervision against CRS; negligence/ premises liability against the owner-managers; negligence/inadequate security by companies allegedly employed by the owner-managers; negligence in the form of a breach of the "duty to exercise reasonable care for the safety, security and privacy of plaintiffs by allowing and failing to detect installation of devices in the women's restroom" against the owner-managers; and respondeat superior against the owner-managers for CRS's negligence. Later in the year, the trial court consolidated the matter with cases brought by three individual plaintiffs. The trial court also appointed a special master to oversee discovery.

We find that an intrusion on privacy occurs when someone uses a private space where a spying device has been concealed and "the intrusion would be highly offensive to a reasonable person." To bring a claim, the victim does not have to present direct evidence that she was secretly recorded. She can instead establish a case of intrusion on seclusion based on reasonable inferences drawn from the evidence.
Here, however, there was not enough evidence in the summary judgment record to demonstrate, either directly or inferentially, that the plaintiffs who were dismissed used bathrooms with cameras in them during the relevant time period. We therefore find that summary judgment was properly granted, and we reverse the judgment of the Appellate Division.

2.) Common knowledge exception to affidavit of merit

Cowley v. Virtua Health, 2020 WL 2109370

The Affidavit of Merit Statute requires plaintiffs alleging malpractice against a licensed professional to include an affidavit from a medical expert in their filing. The affidavit must provide that there exists a reasonable probability the standard of care exercised in the alleged malpractice fell outside the acceptable professional or occupational standards. This Court has fashioned an exception to that requirement for cases in which the alleged conduct or failure to act, if accepted as true, would be readily recognizable, by a person of average intelligence, as a failure to exercise the appropriate standard of care. The issue here, is whether the failure to act when a patient dislodges her tube and refuses its reinsertion would fall within the jury's common knowledge as a departure from the acceptable standards.

The common knowledge exception to the Affidavit of Merit Statute applies only when expert testimony is not required to prove a professional defendant's negligence. Thus, in the limited cases where a person of reasonable intelligence can use common knowledge to determine that there was a deviation from a standard of care, an expert is no more qualified to attest to the merit of a plaintiff's malpractice practice claim than a non-expert. This is not one of those cases. Here, where a patient removed the tube herself and refused replacement, important questions about the procedures, protocols, and duties of a licensed nurse in these circumstances must be explained in order to establish a deviation in the standard of care. In addition, important considerations about patient autonomy complicate the standard-of-care analysis. A jury could not reach a determination as to a nurse's responsibility under these circumstances without the benefit of expert opinion as to the appropriate balance between patient autonomy and prescribed treatment. An affidavit of merit was therefore required, and we accordingly reverse the judgment of the Appellate Division.

3.) Cumulative errors - Secondary gain – Molded verdict)

Morales-Hurtado v. Reinoso, 457 N.J.Super. 170 (App. Div. 2018)

1 reference by rear-ending driver's counsel to one's expectations in litigious society was improper during opening statement;
2 fact that motorist's attorney elicited that motorist was born in another country did not open the door to questions by driver's counsel about motorist's citizenship;
3 evidence about airbags in motorist's car not deploying upon impact with driver's minibus was inadmissible, absent expert testimony;
4 driver's counsel's establishing that doctor knew motorist was involved in lawsuit when doctor wrote expert report for motorist's counsel was not improper;
5 driver's counsel's cross-examination of motorist's treating physician about his draft report should have been excluded;
6 assertions driver's counsel made while cross-examining motorist's treating physician, namely that physician should answer questions objectively, should have been disallowed;
7 driver's counsel should not have been permitted to cross-examine motorist's treating physician about the concept of secondary gain;
8 motorist's life care expert had the right to apprise the jury she relied on, among other things, interviews with motorist and his wife;
9 even if some of the underlying information was somehow improperly considered by motorist's life care expert, such was not a basis for wholesale exclusion of her entire opinion; and
10 cumulative effect of multiple errors and improprieties deprived motorist of fair trial.
Reversed and remanded.

4.) TCA & Verbal Threshold under TCA

Nieves v. OPD, 2020 WL 1870253

This case arises out of the representation of plaintiff Antonio Chaparro Nieves by a state public defender, Peter Adolf, Esq., for criminal charges related to sexual assault. After his conviction, Nieves was granted post-conviction relief based on the ineffective assistance of counsel at trial. DNA evidence later confirmed that Nieves was not the perpetrator, and the underlying indictment against him was dismissed. Nieves subsequently recovered $608,333.33 in damages from the State under N.J.S.A. 52:4C-2, a section of the Mistaken Imprisonment Act, N.J.S.A. 52:4C-1 to -7, for the time he spent wrongfully imprisoned. He then filed the present legal malpractice action seeking damages against the Office of the Public Defender and Adolf.

In this appeal Nieves argues that the Tort Claims Act (TCA or the Act), N.J.S.A. 59:1-1 to 12-3, which governs tort actions filed against public entities and public employees in this state, should not apply to a criminal defendant's legal malpractice claim filed against his public defender. If the Act applies, Nieves then contends that the Act's limitations concerning pain and suffering awards should not apply to the loss of liberty damages he seeks in this malpractice action.

The appellate judgment under review held that the TCA applied to Nieves's legal malpractice action and that his claim for loss of liberty damages had to satisfy the Act's requirements for a pain and suffering award. We affirm the Appellate Division's judgment on both issues.

5.) Deemer statute: Basic policy & special policy

Felix v. Richards, 241 N.J. 169 (2020)

Insurers authorized to do business in New Jersey and writing policies for such vehicles must comply with compulsory insurance coverage limits. See N.J.S.A. 39:6A-3, -4. The Legislature established a standard policy setting the minimal compulsory coverages that an insurer must offer and provide to insureds in New Jersey. Under the standard policy, the insurer must provide the insured with, in pertinent part, at least $15,000 per person/ $30,000 per accident in bodily injury liability insurance coverage (BI).
No insurer is forced to write in New Jersey, but for the privilege of doing so, an insurer is bound by the laws in this state. One demand placed on insurers that choose to do insurance business in New Jersey concerns the policies written by such insurers for insureds in other states. That demand is effectuated through New Jersey's so-called "deemer" statute, N.J.S.A. 17:28-1.4, which lies at the heart of this appeal. The deemer statute's purpose, generally stated, is to ensure that New Jersey residents injured as a result of an accident with an out-of-state vehicle will have recourse to policies of insurance that are at least as broad as the presumptive minimal limits of a New Jersey insurance policy. See generally Craig & Pomeroy, N.J. Auto Insurance Law § 3.3 (2019). In other words, regardless of the actual terms of out-of-state policies, those policies have been deemed to guarantee the same $15,000 per person/$30,000 per accident BI that New Jersey policies have had to offer.

Since the enactment of the deemer statute, the Legislature has created two alternate forms of lesser insurance coverage -- coverage that does not automatically include BI. One is the basic policy, created in 1998 as part of the Automobile Insurance Cost Reduction Act (AICRA), L. 1998, cc. 21 and 22, which carries no BI unless an optional $10,000 amount is selected. See N.J.S.A. 39:6A-3.1. The other is the special policy, created in 2003, which has an *174 income eligibility requirement for participation and no optional BI. See N.J.S.A. 39:6A-3.3. Eligible insureds may satisfy New Jersey's insurance law requirements by purchasing basic or special policies.

In this case, an insurer argues that the later enactment of the basic policy has fundamentally altered the requirements of the deemer statute. Because the basic policy carries no BI requirement, the argument goes, the amount deemed to be covered by out-of-state policies has been reduced from previously required amounts -- namely $15,000/$30,000 in compulsory minimum BI liability -- to the level of the basic policy. If correct in its argument, the insurer would have no obligation to provide any BI because the basic policy does not contain any minimally required BI. The trial court rejected that argument and the Appellate Division affirmed. We agree with those determinations and affirm the Appellate Division judgment in all respects.

6.) In *personam* Jurisdiction & dismissal with prejudice)

Pullen v. Galloway, 461 N.J.Super. 587 (Appp. Div. 2019)

Applying these well-established standards, Dr. Galloway is not subject to personal jurisdiction in New Jersey. Dr. Galloway does not have the continuous and substantial contacts that would subject him to general jurisdiction in New Jersey.

Dr. Galloway lives and practices medicine in New York. He certified he held a New Jersey medical license only between 2004 and 2009, and never actually practiced medicine in New Jersey.

Plaintiff contends that Dr. Galloway advertised on local television stations and published information on the internet. Those general contentions, however, are insufficient to establish general jurisdiction. Plaintiff did not identify any actual advertising on local television stations. Instead, plaintiff merely asserted that Dr. Galloway had engaged in such advertisement. That contention is not supported by any specific facts such as the nature of the advertising, when and where the advertising was actually aired, and whether the advertisement was directed at New Jersey residents.
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Plaintiff's certification also included a screen shot of a YouTube video entitled, “Meet Cardiothoracic Surgeon Dr. Aubrey Galloway.” The video was uploaded by NYU Medical Center in August 2017, more than a year after decedent's surgery. Plaintiff also references Dr. Galloway's listing on NYU Medical Center's website. We have adopted the federal courts' view that “the mere accessibility of a foreign business' website through which customers may obtain information ... is insufficient contact by itself to support general jurisdiction.

In short, plaintiff's general allegations do not satisfy the rigorous standard for establishing general jurisdiction through substantial and sustained contacts.
Dr. Galloway is also not subject to specific jurisdiction based on his treatment of decedent. It is undisputed that Dr. Galloway treated and operated on decedent in New York. He had no contact with decedent in New Jersey. We have previously held that a doctor's out-of-state treatment of a New Jersey resident does not, in and of itself, establish personal jurisdiction. Bovino v. Brumbaugh, 221 N.J. Super. 432, 437, 534 A.2d 1032 (App. Div. 1987). In Bovino, we explained that when a patient seeks personal services from an out-of-state physician, those services are not directed towards a particular place; rather, they are directed at the needs of the patient. In that regard, we noted that it is fundamentally unfair to subject an out-of-state physician to jurisdiction in New Jersey when treatment is provided exclusively in another state.

Plaintiff contends that the decedent's New Jersey doctor was a friend of Dr. Galloway. In that regard, plaintiff suggests that the decedent's New Jersey doctor referred decedent to Dr. Galloway for treatment. Such a referral does not establish specific personal jurisdiction.

Dr. Galloway did not initiate or seek the referral. Instead, a New Jersey doctor, who apparently knew Dr. Galloway, referred decedent to Dr. Galloway. Such a referral is not purposeful conduct by Dr. Galloway with New Jersey.
1
While we affirm the order dismissing defendants for lack of personal jurisdiction, the dismissal should not have been with prejudice. The dismissal of the complaint was not an adjudication on the merits. R. 4:37-2(d) (“any dismissal not specifically provided for by R. 4:37, other than a dismissal for lack of jurisdiction, operates as an adjudication on the merits.”); Exxon Research and Eng'g Co. v. Indus. Risk Ins'rs, 341 N.J. Super. 489, 519, 775 A.2d 601 (App. Div. 2001) (finding that a dismissal for lack of jurisdiction should be without prejudice because such a dismissal is not an adjudication on the merits). Accordingly, we remand for the limited purpose of entering an amended order dismissing the complaint without prejudice.

7.) ICE - The ongoing storm rule

Pareja v. Princeton International, 2020 WL 1764922 (App. Div. 2020)

In this slip and fall case, we must address whether the ongoing-storm rule applies in New Jersey. The ongoing-storm rule arbitrarily relieves commercial landowners from any obligation to try to render their property safe while sleet or snow is falling. The rule is premised on the ground that to do so would always be "inexpedient and impractical." Such a bright-line rule, however, ignores situations when it is reasonable for a commercial landowner to remove or reduce foreseeable and known snow or ice hazards. Thus, adherence to the rule frustrates a main function of tort law—deterring tortious behavior and preventing accidents.

We hold that a commercial landowner has a duty to take reasonable steps to render a public walkway abutting its property—covered by snow or ice—reasonably safe. Such a duty—to remove or reduce a foreseeable hazard—cannot be fulfilled by always waiting to act until after a storm ends, regardless of the risk imposed to invitees and pedestrians. The commercial landowner's liability may arise only if, after actual or constructive notice, it fails to act in a reasonably prudent manner under the circumstances to remove or reduce the foreseeable hazard. Whether it would be inexpedient or impractical to act is one of many factors for the jury's consideration. Thus, reasonableness is the polestar.

1 a commercial landowner has a duty to take reasonable steps to render a public walkway abutting its property, covered by snow or ice, reasonably safe, even when precipitation is falling;
2 to assess reasonableness of commercial landowner's conduct, or lack thereof, to render public walkway abutting its property, covered by snow or ice, reasonably safe, even when precipitation is falling, jury may consider multiple factors;
3 genuine issue of material fact remained as to whether commercial landowner had actual or constructive notice of the dangerous condition of ice on sidewalk, thus precluding summary judgment; and
4 genuine issue of material fact remained as to whether commercial landowner acted reasonably under all the circumstances by not acting in any way to prevent, remove, or reduce hazards associated with the precipitation on sidewalk, thus precluding summary judgment.

8.) ICE – leased parking lot on commercial property

Underhill v. Borough of Caldwell, 2020 WL 2562925 (App. Div. 2020)

This personal injury case arises from a pedestrian's fall on black ice in a parking lot leased by private owners to the Borough of Caldwell. The injured pedestrian and his wife sued both the Borough and the private owners, alleging negligent failure to maintain the parking lot and the internal driveway connected to it in a safe condition.
The written lease between the owners and the Borough expressly delegates to the Borough the responsibility to clear the premises of ice and snow.
The Borough and the property owners moved for summary judgment. The trial court granted the Borough's motion, finding no basis for its liability. It found plaintiffs had failed to establish actual or constructive notice of a dangerous condition. Plaintiffs have not appealed that ruling as to the Borough.

The court also granted summary judgment to the property owners in a separate ruling apparently predicated on the absence of notice. Plaintiffs now appeal that ruling, arguing the property owners had a non-delegable duty under tort law to keep the premises safe from accumulated ice and snow, or alternatively, that the language of the lease does not delegate that duty with sufficient clarity.

We affirm, albeit for a legal reason not articulated by the trial court. Based on the Supreme Court's very recent opinion in Shields v. Ramslee Motors, 240 N.J. 479, 223 A. 3d 172 (2020), the property owners are entitled to summary judgment as a matter of law. That is because the lease explicitly delegates to the Borough the exclusive responsibility to remove snow and ice from the premises.

9.) ICE – Commercial landlord and tenant responsibilities

Shields v. Ramslee Motors, 240 N.J. 479 (2020)

1 whether based on the lease or common law, tenant had duty to remove snow and ice from the premises;
2 lease delegated the duty of snow and ice removal from private driveway to tenant;
3 fact that landlord had reserved the right to enter the leased premises to perform repairs did not mean that landlord was responsible for driver's injuries;
4 the non-delegable duty of commercial landlords to remove snow and ice from public sidewalks abutting their property was not applicable to private driveway; and
5 landlord did not owe duty of reasonable care to mail delivery driver.

This case calls on the Court to determine whether the owner of a commercial property owes its tenant's invitee a duty to clear snow and ice from the property's driveway while the property is in the sole possession and control of the tenant. Plaintiff Baldwin Shields was delivering a letter at 608 Tonnelle Avenue, Jersey City, when he slipped on ice and fell on the driveway. At the time, 608 Tonnelle Avenue was occupied by a commercial tenant, Ramslee Motors, a used car dealership.

The lease agreement between the landlord and Ramslee Motors stated that Ramslee Motors was responsible for maintaining the property as if it were the “de facto owner.” The trial court found that the landlord was not responsible for removing snow and ice from the property and granted the landlord's motion for summary judgment. The Appellate Division disagreed. It found that the lease was silent as to who was responsible for snow and ice removal from the driveway and determined that, in any case, the landlord owed the same non-delegable duty to maintain the driveway that it owed with respect to the sidewalks abutting the leased property.

We disagree with those determinations. The lease agreement between Ramslee Motors and the landlord directly addressed the issue of responsibility for maintenance of the property, which includes removal of snow and ice. That duty rested solely with Ramslee Motors, whether based on the lease or common law. Ramslee Motors retained complete control over the premises where plaintiff fell and was exclusively responsible for plaintiff's injuries. Therefore, we reverse the judgment of the Appellate Division and reinstate the trial court's grant of summary judgment.

10.) Remedies - When a promised expert does not appear at trial

Escobar-Barrera v. Kissin, 2020 WL 3564847 (App. Div. 2020)

Plaintiff Marvin Escobar-Barrera appeals from the July 17, 2019 Law Division order granting defendant Paul Kissin's mid-trial motion for involuntary dismissal of plaintiff's personal injury complaint, pursuant to Rule 4:37-2(b). We reverse.

Under the circumstances, the judge's denial of an adjournment or a mistrial constituted a mistaken exercise of discretion. Plaintiff's need for an adjournment or a mistrial did not result from careless conduct by plaintiff or his attorney, and Dr. He's testimony was essential to "permit[ ] the case to go to the jury." Thus, Dr. He's non-appearance meant that plaintiff "was unable fully to present [his] case." Even assuming, as defendant suggests, that Dr. He's failure to appear was the fault of counsel for not scheduling her testimony in a timely manner,[7] "at most" counsel's conduct "was excusable neglect."

11.) SUPERJURY – Clarificaation of *additur* & *remittitur*

Orientale v. Jennings, 239 N.J. 569 (2019).

Under our common law jurisprudence, when a jury's damages award is so grossly excessive that it shocks the judicial conscience, the trial judge may, with the consent of the plaintiff, grant a remittitur -- the highest award that, in the judge's view, could be sustained by the evidence. If the plaintiff accepts the remitted amount, the defendant is bound by that judicial finding, subject to the right to appeal. Likewise, when a jury's damages award is so grossly inadequate that it shocks the judicial conscience, the trial judge may, with the consent of the defendant, grant an additur -- an increased award that, in the judge's view, could be sustained by the evidence. If the defendant accepts the additional amount, the plaintiff is bound by that judicial finding, subject to the right to appeal.

Plaintiff and a number of amici curiae argue that the current practices of remittitur and additur are in tension with the constitutional right to trial by jury. We need not address the constitutional issue before us, however. Instead, we choose to exercise our superintendence over the common law and our constitutional authority over the practices and procedures of our courts to bring the use of remittitur and additur in line with basic notions of fair play and equity. We hold that when a damages award is deemed a miscarriage of justice requiring the grant of a new trial, then the acceptance of a damages award fixed by the judge must be based on the mutual consent of the parties.
Going forward, in those rare instances when a trial judge determines that a damages award is either so grossly excessive or grossly inadequate that the grant of a new damages trial is justified, the judge has the option of setting a remittitur or an additur at an amount that a reasonable jury would award given the evidence in the case. Setting the figure at an amount a reasonable jury would award -- an amount that favors neither side -- is intended to give the competing parties the greatest incentive to reach agreement. If both parties accept the remittitur or additur, then the case is settled; if not, a new trial on damages must proceed before a jury.

Holdings: The Supreme Court, Albin, J., held that:
1 remittitur or additur must be an amount that both parties would deem reasonable -- not the highest or lowest sustainable amount permitted by evidence;
2 in setting proper amount of additur or remittitur, trial court must attempt to determine amount that reasonable jury, properly instructed, would have awarded;
3 acceptance of remittitur or additur is optional to both parties, and absence of mutual consent means that case proceeds to second jury for new damages trial; and
4 insured was entitled to new trial on issue of damages.