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The Annual New Jersey Personal Injury Case Law Review - 2014

By: Robert W. Rubinstein, Certified Civil Trial Attorney
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Lesson Plan

About the presenter:

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Robert W. Rubinstein is certified by the New Jersey Supreme Court as a Civil Trial Attorney and has served for many years as a Senior Instructor for Garden State CLE. At his law practice in Hamilton Township, Mercer County, he focuses on business law and litigation, personal injury, and municipal court. Mr. Rubinstein fights hard for his clients, winning important appellate victories against major corporations such as Trump Casino and Disney. He was Municipal Prosecutor for Lawrence Township from 2001 to 2005. He is the author of the Thompson-West New Jersey Practice Series-Motor Vehicle Law and Practice Forms, lecturers on effective legal writing

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429 N.J.Super. 568, 574 (App. Div. 2013)

[Dram Shop Act – Proof of Intoxication]

Pursuant to the Dram Shop Act as codified under *N.J.S.A.* 2A:22A–2

a. A person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server may recover damages from a licensed alcoholic beverage server only if:

(1) The server is deemed negligent pursuant to subsection b. of this section; and

(2) The injury or damage was proximately caused by the negligent service of alcoholic beverages; and

(3) The injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages.

b. A licensed alcoholic beverage server shall be deemed to have been negligent *only when the server served a visibly intoxicated person,* or served a minor, under circumstances where the server knew, or reasonably should have known, that the person served was a minor.

The Act defines visibly intoxicated as "a state of intoxication accompanied by a perceptible act or series of acts which present clear signs of intoxication." However, the Act does not contain language mandating that a plaintiff produce an eyewitness to prove a person was served alcohol by the beverage server while he or she was visibly intoxicated.

Nielsen v. Wal-Mart Store, 429 N.J.Super. 251, 260-261 (App. Div. 2013)

[Duty of Care – Invitee]

That Wal-Mart had not contractually agreed to maintain or repair the area where plaintiff was injured is simply one factor to be considered in determining whether a duty of care should be imposed. In our view, this factor carries little weight. To be sure, as between Wal-Mart and the developer, the developer was saddled with the duty to maintain or repair. But plaintiff, as well as others invited to make foreseeable uses of the premises, should not be limited by these contractual arrangements. We find the private contractual arrangement of duties between unit owner and developer to have little weight because, otherwise, a commercial unit owner—or a commercial tenant—could blithely turn a blind eye to any defects or

hazards in common areas not owned by the unit owner or tenant but foreseeably used by their invitees and passersby. The imposition of liability on a commercial condominium unit owner or tenant in these circumstances advances important policy interests by fostering the land occupier's constant vigilance. [I]n speaking about the duty of a commercial tenant —a status we view as largely indistinguishable from commercial condominium unit owner—that the imposition of a duty will encourage [tenants] to keep a watchful eye over leased premises and give prompt notification to landlords when problems arise."

Nicholas v. Mynster, 213 N.J. 463, 467-468 (2013)

(Patients First Act NJSA 2A:53A-41)

In this medical-malpractice case, we must determine whether, under the New Jersey Medical Care Access and Responsibility and Patients First Act, plaintiffs' medical expert possesses the statutory credentials necessary to testify against defendant physicians. [Previously, we have] held that, generally, a plaintiff's medical expert testifying to the standard of care allegedly breached by a defendant physician must be equivalently credentialed in the same specialty or subspecialty as the defendant physician. Here, the two defendant physicians who treated [the plaintiff] for carbon monoxide poisoning were board certified in emergency medicine and family medicine. Plaintiffs' expert physician was board certified in internal and preventive medicine and specialized in hyperbaric medicine, including the use of hyperbaric oxygen in the treatment of carbon monoxide poisoning.

Defendants moved to bar the testimony of plaintiffs' expert and for summary judgment. Defendants claimed that plaintiffs' expert could not testify to the standard of care because he did not practice in the same medical specialty as defendants. The court denied the motion to bar plaintiffs' expert from testifying. The court ruled that expertise in

the treatment of the condition was sufficient even if the expert did not share the same medical specialty as the defendant physicians. The court implicitly denied the summary judgment motion as well. The Appellate Division denied defendants' motion for leave to appeal.

We now reverse. *N.J.S.A.* 2A:53A–41 of the Patients First Act requires that plaintiffs' medical expert must "have specialized at the time of the occurrence that is the basis for the [malpractice] action in the same specialty or subspecialty" as defendant physicians. The trial court failed to apply the equivalency requirements of the Patients First Act.

Estate of Desir ex rel. Estiverne v. Vertus 214 N.J. 303, 329-330 (2013)

In the context of this case, we find no basis on which to impose a duty in tort on [Defendant]. He knew only that his client stepped back as if she had seen something. He heard no calls for help or sounds of a struggle. He knew no more about the actual circumstances unfolding in his office than that which he disclosed to [Defendant's murdered neighbor,] Novaly. And he knew no more about the general dangers of the neighborhood than did the others living nearby, including his neighbor Novaly. He had installed a security system that was intended to prevent intruders from entering. At most, when he left by the side door, he thought something was wrong and, when deposed, suggested that he thought it might have been a "robbery or something." Whatever instinctive reaction caused [Defendant] to leave the building, the actual information that he had concerning the attendant risk is vague and diffuse, offering a poor basis on which to attempt to craft a generally applicable rule in tort.

So, too, was the request that [Defendant] made of his neighbor a limited one. When [Defendant] arrived at Novaly's residence, both of them were in a place of complete safety. [Defendant] only asked Novaly to telephone the business and see who answered. He did not ask Novaly to call 911 because he believed he had too little information to pass along to the police. He did not ask Novaly to rush down the street or

take matters into his own hands; in fact it is not clear that he actually knew that Novaly was doing anything other than stepping outside to peek down the road.

We recognize, as did the appellate panel, that the facts before us are tragic and that the victim and his survivors are rightly deserving of our sympathy. But the function of the law, and in particular the common law governing tort recoveries, cannot be driven by sympathy or overshadowed by the effects of tragedy. Rather, the function of tort law is deterrence and compensation, and absent circumstances in which the definition of the duty can be applied both generally and justly, this Court should stay its hand.

Grijalba v. Floro, 431 N.J.Super. 57, 66-67 (App. Div. 2013)

(Sidewalk Liability)

We have extrapolated the following themes from these cases regarding sidewalk liability law and the residential-commercial distinction: (1) the Court has acknowledged repeatedly that residential property owners are generally not liable for sidewalk injuries; (2) the Court has maintained the fundamental notion that commercial property owners are better prepared to spread the risk of loss to innocent third parties than residential homeowners; (3) the residential-commercial distinction requires a case-by-case, fact-sensitive analysis; (4) we continue to use commonly accepted definitions of "commercial" and "residential" to resolve the residential-commercial distinction; (5) in determining whether an owner-occupied two- or three-family home is deemed "residential" or "commercial," courts have considered the nature of the ownership of property and the predominant use of that property; and (6) the commercial-residential framework, even in the gray area of owner-occupied two- and three-family

structures, continues to provide guidance and predictability for property owners.

Angland v. Mountain Creek Resort, Inc. 213 N.J. 573, 585 (2013)

(The New Jersey Ski Act, NJSA 5:13-1 *et. seq*. – Recreational sporting activities & the standard of care)

Seen, then, in its historical context, the Ski Act was designed to serve a specific purpose. It operates to fix duties of skiers and ski resort operators in order to regulate their conduct in the context of creating certainty in the claims that arise between them. It does so in order to delineate the allocation of risk and thereby to ensure that the ski area operators are able to secure insurance that will respond to the claims that the statute permits. The Ski Act, as the legislative history demonstrates, therefore has as its particular purpose the allocation of responsibility between operators and skiers so as to ensure the continued viability of the ski resort industry; it was not designed to govern claims as between participants who engage in recreational activities at ski resorts.

That the Ski Act was not designed to address claims between skiers is apparent as well from its inclusion of a reference to "other skiers" in the list of inherent risks of skiing that each skier is deemed to have assumed. *N.J.S.A.* 5:13–5 (providing that "skier is deemed to have knowledge of and to assume the inherent risks of skiing ... created by ... other skiers"). That reference, placed in the section of the statute that addresses the inherent risks of skiing, aligns with the statute's provision that claims

against the operator for such risks are barred. *N.J.S.A.* 5:13–6. The implication is clear; had the Legislature intended to define the standard of care that would apply to claims as between skiers, it would have done so. Instead, the statute, consistent with the legislative purpose, simply insulates the operator from liability for claims arising from acts of other skiers.

Flood v. Aluri-Vallabhaneni
431 N.J.Super. 365, 379 (App. Div. 2013)

(Jury Charge Interrogatories)

Plaintiff concedes that the judge properly instructed the jury using the Model Charge. In other words, the judge told the jury it must first consider whether plaintiff proved [Defendant] deviated from accepted medical standards, and then consider whether that deviation "increased the risk of harm posed by the plaintiff's preexisting condition." The judge then provided verbatim the Model Charge on "substantial factor." Plaintiff's claim of error relates solely to the interrogatories on the verdict sheet, specifically, the insertion of question 3, requiring the jury to find plaintiff proved the increased risk from [Defendant's] deviation was a substantial factor in bringing about Keisha's death.

A "trial court's interrogatories to a jury are not grounds for a reversal unless they were misleading, confusing, or ambiguous.". In reviewing a jury interrogatory for reversible error, we "consider it in the context of the charge as a whole. An accurate and thorough jury charge often can cure the potential for confusion that may be present in an interrogatory.

The questions on the verdict sheet tracked the language of the current Model Charge and clearly explained those issues upon which plaintiff bore the burden of proof. We recognize that the questions posed in this case were not those appended to the Model Charge. However, the

interrogatories used, i.e., questions 1, 2 and the disputed question 3, properly reflected the sequential analysis required [by the well-established case law.] Because the charge was correct, and the questions posed on the jury verdict sheet correctly stated the law, any deviation was insignificant.

James v. New Jersey Manufacturers Ins. Co., ___ NJ ___ (2014)

(Step-down provisions)

In *Pinto v. New Jersey Manufacturers Insurance Co.*, 183 *N.J.* 405, 407, 874 *A.*2d 520 (2005), this Court enforced a commercial motor vehicle liability policy's "step-down" provision, which had the effect of capping uninsured or underinsured motorist coverage (UM/UIM coverage) provided through an employer's commercial policy to employees and other qualifying "insureds" at the limits available to such individuals through their personal automobile insurance coverage. The *Pinto* holding relied on prior recognition of the legitimacy of such contractual capping provisions

Two years later, a new statute was enacted that prohibits, in motor vehicle liability policies issued to corporate or business entities, the use of step-down provisions to provide less UM/UIM coverage for employees than that which is provided to the "named insureds" on the policy; and further, if the policy lists only the business entity as the "named insured" then employees are "deemed" eligible for maximum available coverage. *L.* 2007, *c.* 163, codified at *N.J.S.A.* 17:28–1.1(f). The new legislation, which was signed into law on September 10, 2007, specified that it was effective immediately. *L.* 2007, *c.* 163, § 2.

This appeal involves the application of the new legislation to a policy that was in effect at the time that the legislation became effective. The policy contained a step-down provision that but for the new legislation would govern the limits of UM/UIM coverage for the injured employee involved in this matter. Specifically, we are called on to address whether the step-down provision is enforceable for a UIM claim by the employee

concerning an accident that occurred prior to the adoption of *N.J.S.A.* 17:28–1.1(f). Thus, we must consider the retroactivity of the statute.

The law favors prospective application of a new statute. To conclude otherwise requires a finding that one of the recognized exceptions to that rule applies. We conclude that there is no evidence that the Legislature explicitly or implicitly directed retroactive application and no other exception pertains here. The legislation, by its very terms, reformed commercial motor vehicle liability policies as of the date it became effective. While that brought about the amendment of existing policies from that date forward for the life of that policy and for any new or renewal policies that were issued subsequent to the new law's effective date, the new law did not retroactively alter otherwise lawful policy terms applicable to claims that arose before the legislation took effect. A UM/UIM claim under an occurrence-based motor vehicle liability policy is governed by the policy terms in effect on the date of the occurrence, here the accident. The timing of the instant accident preceded the effective date when *N.J.S.A.* 17:28–1.1(f) reformed the employer's motor vehicle liability policy.

Applying established rules of statutory construction and the retroactivity of new legislation, we hold that *N.J.S.A.* 17:28–1.1(f) does not retroactively apply to an accident that preceded the new legislation's effective date.

Beim v. Hulfish, ___ NJ ___ (2014)

(Wrongful death – pecuniary benefits)

John Kellogg, ninety-seven years of age, died in 2008 following a motor vehicle accident allegedly caused by the negligence of two of the defendants. His death occurred on the eve of significant changes in federal tax law. Plaintiffs—Kellogg's daughters, (one of whom, Bob Ramsey took to the Junior Prom in 1967) the executors of his estate and the trustee of a marital trust—allege that had Kellogg survived until 2009, his estate would have paid substantially less in taxes than it did under the tax laws governing in 2008. They further assert that if Kellogg died in any of the three years that followed, his estate would have paid no federal tax at all. Plaintiffs contend that defendants should be held liable for the estate tax paid by Kellogg's estate under the federal tax laws that governed in 2008.

The trial court rejected this claim and granted defendants' motion to dismiss and motion for summary judgment. An Appellate Division panel reversed the trial court's determination and reinstated plaintiffs' claim, holding that the estate taxes constitute pecuniary injuries under the Act.

We reverse. We hold that the Act does not authorize plaintiffs' estate tax damages claim. The Legislature defined the statutory cause of action as one that "would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury." *N.J.S.A.* 2A:31–1. Although several categories of economic and non-economic losses sustained by a decedent's heirs may constitute "pecuniary injuries resulting from [the decedent's] death" under *N.J.S.A.* 2A:31–5, plaintiffs' proposed estate tax claim would expand the Act beyond its intended parameters. Damages premised upon the distinctions between the estate tax laws that governed in succeeding

years are unrelated to any contributions that decedent would have made to his heirs had he remained alive. Such damages do not advance the Legislature's objective to leave a decedent's heirs "in no worse position economically than if [their] relative had lived."

McGlynn v. State, 434 N.J.Super. 23 (App. Div. 2014)

(Vegetation – Duty of Care)

In determining whether a duty is owed, the first step in the analysis, notions of fairness and public policy must be taken into account. "No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists."

An injured party must demonstrate more than the mere foreseeability of harm. A claimant must also establish grounds for a "value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care."

Plaintiffs have not established such grounds in this case. The basis for plaintiffs' claim is that they are the third party beneficiaries of defendants' contractual undertakings to keep power lines free from encroaching vegetation, in furtherance of the uninterrupted provision of power to JCP & L customers, and that defendants' failure to remove a dead tree that was not affecting the flow of electricity nonetheless warrants the imposition of such a duty.

It is not disputed that JCP & L had a clear and defined commitment to keep vegetation controlled in order to prevent interruptions in service. To expand that commitment to include maintenance of vegetation for the benefit of passing motorists, where power lines are unaffected, would create an onerous burden without a corresponding benefit where the responsibility already exists, to a greater or lesser extent, on individual property owners and NJDOT.

This is not an instance where, for example, defendants were in the process of negligently removing a dead tree or a tree limb, and a passerby was injured. Nor is it an instance where a power line was damaged, fell onto the roadway, and, thus, created a hazard.

Estate of Kotsovska ex rel. Kotsovska v. Liebman, 433 N.J.Super. 537, 547-549 (App. Div. 2013)

(Employee/Independent Contractor)

Because the Law Division had concurrent jurisdiction to decide whether the decedent was an employee or independent contractor, the failure to recognize the Division's primary jurisdiction would not, standing alone, require the case to be reversed. We agree with [the Defendant], however, that the instructions to the jury were seriously flawed and clearly capable of producing an unjust result, thus requiring reversal. *R.* 2:10–2.

The court charged the jury generally regarding the distinctions between an employee and a general contractor with reference to a lengthy list of factors. Specifically, and by way of example, the judge instructed that hiring, payment of regularly weekly sum, provision of tools, supplies of a workplace and being terminable at will are factors that weigh in favor of the employer/employee relationship. [The] lack of payroll deductions, payment in cash are factors that weigh against the employer/employee relationship.

Determining whether an individual is an employee or an independent contractor is often difficult and a recitation of factors organized into "pro-employee and pro-independent contractor lists is not particularly helpful" in accomplishing the task. Moreover, because the Act is socially remedial legislation, "[t]he term 'employee' is to be defined liberally in order to bring as many cases as possible within the scope of the Workers' Compensation Act," even when the employee is attempting to have himself excluded from its coverage.

The trial court's instructions focused only on defining whether decedent was an employee based on the control test, which is grounded in traditional master-servant principles. In compensation cases, however, the Supreme Court has adopted an additional "economic and functional" test, of which the determinative criteria are " 'not the inconclusive details of the arrangement between the parties, but rather the extent of the economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business.'. The trial court did not instruct the jury on this relative nature of the work test, although highly relevant here as decedent would appear to have been entirely economically dependent on [the Defendant].

In addition, the trial court's instruction that the lack of payroll deductions and payment in cash are factors weighing against a finding of employment was incomplete and misleading. Although they are obvious factors suggesting independent contractor status, we acknowledged their reduced importance in this context more than fifty years ago. We have cautioned that these factors, included in the control test, must be viewed critically in light of Larson's acknowledgment of the desire on the part of some "employers to avoid both the financial cost and the bookkeeping and reporting inconvenience that goes with workmen's compensation, unemployment compensation, social security and the like."

Their inclusion by the trial judge without further explanation, part of a larger failure to tailor the specifics of the court's charge to the facts of the case, combined with the absence of an instruction on the relative nature of the work test, resulted in a charge that did not adequately convey the law and was clearly capable of producing an unjust result.

Arroyo v. Durling Realty, LLC
433 N.J.Super. 238, 243-245 (App. Div. 2013)

(Mode of Operation)

The record lacks competent proof that defendant failed to exercise due care in the manner in which it maintained the sidewalk outside of its store. We acknowledge that "[t]he proprietor of premises to which the public is invited for business purposes of the proprietor owes a duty of reasonable care to those who enter the premises upon that invitation to provide a reasonably safe place to do that which is within the scope of the invitation." This duty of care "requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe."

No witnesses or exhibits in the record contradict the store manager's sworn testimony describing the Quick Chek's routine maintenance and trash removal procedures. Those procedures have not been shown by competent evidence to be unreasonable. Moreover, the conclusory statements of plaintiff's expert criticizing those procedures are not grounded in identified objective standards, and thus must be disregarded as inadmissible net *244 opinion.

In both the expert's initial report and supplemental report, he presents opinions "from my [meaning, his] experience" without ever stating what that experience is, or explaining how it is reflective of objective standards about convenience store operations or maintenance. Here, plaintiff has failed to show that her expert's opinions were "more than the expert's personal views." . The expert alludes to the fact that "[m]any stores" require an hourly "check sheet" for maintenance procedures, but he provides no substantiation for this assertion and does not indicate whether this is the prevailing or common practice in the industry. A net opinion is insufficient to satisfy a plaintiff's burden on a motion for summary judgment.

We further agree with Judge Santiago that this is not an appropriate case for the imposition of mode-of-operation liability. In certain distinctive instances, our courts have eliminated a tort plaintiff's requirement of proof of actual or constructive notice where, as a matter of probability, a dangerous condition is likely to occur "as the result of the nature of the business, the property's condition, or a demonstrable pattern of conduct or incidents." . In such mode-of-operation cases, the courts "have accorded the plaintiff an inference of negligence, imposing on the defendant the obligation to come forward with rebutting proof that it had taken prudent and reasonable steps to avoid the potential hazard."

The Supreme Court's prior reported cases that have allowed mode-of-operation liability have typically involved hazards located inside of a defendant's retail building. For example, in, the plaintiff was injured after slipping on a slimy substance on the floor of a self-service cafeteria. There, the Court found that there was a "reasonable

probability that the dangerous condition would occur" due to the fact that the cafeteria was a "very busy" self-service operation that did not supply lids for its beverage containers, nor require its patrons to use food trays.

Soliman v. Kushner Companies, Inc.
433 N.J.Super. 153, 161-163 (App. Div. 2013)

(Invasion of Privacy)

We agree with plaintiffs' argument and reverse the trial court's order dismissing the counts in their complaints grounded on invasion of privacy. The trial court erred in dismissing plaintiffs' complaints as a matter of law. Under these circumstances, a rational jury could find defendants' actions violated plaintiffs' reasonable expectations of privacy. These material issues of fact cannot be resolved through summary judgment. We affirm, however, the court's dismissal

of plaintiffs' claims based on intentional and negligent infliction of emotional distress.

In our view, a rational jury could find that shielding the cameras from detection by placing them inside facially innocuous, yet ubiquitous safety devices, such as smoke detectors, is more suggestive of a sinister voyeuristic purpose than a good faith reasonable attempt at combating vandalism. This plausible conclusion by a jury is further supported by defendants' decision to disregard the suggestions made by the Fair Lawn Police Department to place a sign on the bathroom doors alerting all who entered that the bathroom's so-called "common areas" were monitored by video cameras.

However, even assuming a good faith motive, a rational jury could find that the approach adopted by defendants here is per se unreasonable because: (1) the clandestine nature of the surveillance operation negated the deterrent effect defendants allegedly sought to create; (2) acts of vandalism to bathrooms do not justify the installation of a covert video surveillance system to monitor inherently private areas like bathrooms; (3) although all areas of a bathroom are deemed private, bathrooms intended to be used exclusively by women and girls are inherently more susceptible to invasion of privacy claims. Plaintiffs can present evidence to a jury that women and girls utilize public bathrooms, including areas outside the toilet stalls, with the reasonable expectation that their private grooming activities will only be visible to fellow female users who may be present at the time; and (4) both men and women

may have used the so-called quasi-public areas of the bathrooms to perform personal grooming or other private activities when no one else was visibly present that they would have otherwise refrained from performing even in the presence of members of their own gender.

Based on these plausible findings, plaintiffs may be entitled to compensatory relief under both common law principles of privacy and pursuant to the specific cause of action for invasion of privacy authorized by the Legislature under *N.J.S.A.* 2A:58D–1. Depending on whether the jury awards compensatory damages, plaintiffs have also presented sufficient evidence to preserve the right to seek an award of punitive damages in a bifurcated proceeding as required under the PDA.

Citizens United Reciprocal Exchange v. Perez, 432 N.J.Super. 526, 535 (App. Div. 2013)

(Insurance Fraud – liability coverage)

Thus, to dispel any lingering ambiguity and provide clear guidance to trial judges confronted by situations like the one we confront here, we now reaffirm the principle of law we established in [New Jersey Mfrs. Ins. Co. v. Varjabedian, 391 N.J.Super. 253 (App. Div. 2007)]:

The alternative coverage provided by a basic policy under *N.J.S.A.* 39:6A–3.1 mandates no minimum amount of liability coverage. It only provides for optional liability coverage. The only mandated or compulsory minimum liability coverage limits in our statutes are the $ 15,000 per injury and $30,000 per accident, prescribed in both *N.J.S.A.* 39:6A–3 and *N.J.S.A.* 39:6B–1. *Accordingly, a carrier seeking to retroactively void coverage based upon the prior conduct of its insured*

tortfeasor cannot rely on the alternative basic policy's lack of mandated liability coverage to avoid providing the minimum compulsory non-cancelable $15,000/$30,000 liability limits.

We recognize that the automobile insurance law continues to provide for mandatory minimum liability coverage and also provide for optional liability coverage. *N.J.S.A.* 39:6B–1. To the extent that this creates an anomalous situation, it may be appropriate for the Legislature to address.

[Note – this case is entitled to an appeal to the Supreme Court as a matter of right based upon a dissent from Judge Ashrafi.]

Kubert v. Best, 432 N.J.Super. 495, 503 (App. Div. 2013)

(Text-messaging liability)

The issue before us is not directly addressed by these statutes or any case law that has been brought to our attention. We must determine as a matter of civil common law whether one who is texting from a location remote from the driver of a motor vehicle can be liable to persons injured because the driver was distracted by the text. We hold that the sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus be distracted.

In this appeal, we must also decide whether plaintiffs have shown sufficient evidence to defeat summary judgment in favor of the remote texter. We conclude they have not. We affirm the trial court's order dismissing plaintiffs' complaint against the sender of the text messages, but we do not adopt the trial court's reasoning that a remote texter does

not have a legal duty to avoid sending text messages to one who is driving.

*** * * * ***

Having considered the competing arguments of the parties, we also conclude that liability is not established by showing only that the sender directed the message to a specific identified recipient, even if the sender knew the recipient was then driving. We conclude that additional proofs are necessary to establish the sender's liability, namely, that the sender also knew or had special reason to know that the driver would read the message while driving and would thus be distracted from attending to the road and the operation of the vehicle. (at 514-515)

Villanueva v. Zimmer
431 N.J.Super. 301, 317-318 (App. Div. 2013)

(Public Records Exception under NJRE 803(c)(8))

Guided by these principles, we hold *N.J.R.E.* 803(c)(8) does not authorize the admission of an SSA determination of disability as a hearsay exception in the circumstances of this case. The plain terms of the rule simply do not authorize the admission of an SSA determination that plaintiff is disabled, to be utilized as substantive evidence in a personal injury action where plaintiff has the burden of proving she suffered an injury caused by an accident and that the injury impaired her ability to work.

The conclusion of a federal administrative law judge (ALJ) or the SSA itself that a person is disabled is neither an "act done by the official" nor is it "an act, condition or event observed by the official." The history of *N.J.R.E.* 803(c)(8) clearly distinguishes an "act done" or an "event observed," on

the one hand, and an administrative "conclusion," on the other. "Findings" by a public official are only admissible under the rule if they are statistical—a qualifier obviously inapplicable to an SSA disability determination. *See* *N.J.R.E.* 803(c)(8)(B).

An SSA disability determination is of dubious probative value in a personal injury action, in any event. The lack of a meaningful adversarial process with respect to the cause, existence and extent of a plaintiff's alleged disability renders the SSA's conclusions on that issue unreliable.