
Civil Practice Update

All the Law That's Fit to Print

by Michael J. Epstein

Vol. XI, No. 1
January 2013

HAPPY NEW YEAR AND THE SECOND DECADE. We wish all of you a healthy and happy new year. As we enter our second decade of reporting on civil law, we will continue to try to provide you with summaries of interesting and notable cases. Where the law goes, nobody knows

Does a Commercial Condominium Owner Owe a Duty of Care to an Independent Contractor When the Contractor Is Injured Outside the Owner's Unit? If you said no, you would be wrong. See Nielsen v. Wal-Mart Store #2171, 2013 N.J. Super. LEXIS 3 (App. Div. 2013). In Nielsen, defendant Wal-Mart retained Nielsen, an exterminator, to perform services, and Nielsen sustained injuries when he slipped and fell in an area maintained by the Condominium Association, not Wal-Mart. Initially, Nielsen sued only Wal-Mart, and added the Condominium Association after the statute of limitations expired. Thus, the Association was dismissed on summary judgment. With respect to Wal-Mart, the panel held that whether a duty of reasonable care exists

depends on whether imposing such a duty satisfies basic fairness. To make such a determination, courts must consider factors like the nature of the risk, the opportunity and ability to exercise care, and the public interest in the proposed solution. The panel stated that the contractual agreement between Wal-Mart and the Association was insignificant because the question is whether Wal-Mart's patrons and invitees used the dangerous area. In other words, imposing a duty of care against Wal-Mart or a unit owner fosters the public interest of constant vigilance by the unit owner. Finally, Wal-Mart told Nielsen to enter the unit from the area where he fell. At first blush, this case seems to contradict traditional "sidewalk" law because the accident happened outside Wal-Mart's property, i.e., on adjacent property. However, a closer look at this opinion shows that it is based on sound reasoning and logic. The fact is that a commercial landowner has a duty to business invitees to provide a safe egress for the invitation. Accordingly, if an injury occurs within the scope of the invitation or in an area where a plaintiff is told to walk to engage in

The opinions and comments expressed herein are attributable solely to the author and are not representative of the Bergen County Bar Association.

Civil Practice Update

All the Law That's Fit to Print

by Michael J. Epstein

Vol. XI, No. 1
January 2013

the invitation, the unit owner must be held liable for any dangerous condition in the area within the scope of the invitation. Any other ruling would be unfair and against public policy.

Must a Defendant Produce Surveillance Video of an Accident Before a Plaintiff's Deposition? For those of you who said no based on Jenkins v. Rainer, 69 N.J. 50 (1976), you would be wrong! See Herrick v. Wilson, 2011 N.J. Super. LEXIS 239 (Law Div. 2011). In Herrick, plaintiffs were injured while crossing a valet service at the Taj Mahal Casino in Atlantic City when an employee of the casino struck them with a vehicle. The accident was captured on the casino's video surveillance, but defendants argued that producing the surveillance video before the deposition would preclude it from obtaining plaintiff's independent recollection. The trial court rejected defendants' reliance on Jenkins, which provides that a defendant has the right to take plaintiff's deposition before producing post-accident surveillance video of the plaintiff. The trial court reasoned that a

Jenkins video is done for impeachment purposes whereas pre-accident surveillance videos are taken outside of the litigation context and in the normal course of business. Thus, the trial court ruled that R. 4:10-2, 4:17, and 4:18 made the video discoverable, and that said rules were designed to avoid concealment and surprise. Notably, the trial court rejected defendant's argument regarding the video refreshing plaintiff's memory because the same argument could be made about other frequently produced discovery, e.g., police reports, photographs, and witness statements. We agree 100% with the trial court's ruling because it rejected pre-trial gamesmanship. Discovery is intended to allow parties to investigate their cases and not to be prejudiced because the other party has a document that has not been produced.

Contributions. If you have an interesting case, rule interpretation, ethics issue, or civil-related story, please contact me at (201) 845-5962, (f) (201) 845-5973, or e-mail mjepstein@theepsteinlawfirm.com.

The opinions and comments expressed herein are attributable solely to the author and are not representative of the Bergen County Bar Association.
