3.14 INVASION OF PRIVACY (01/2016)

NOTE TO JUDGE

Invasion of privacy involves not one single tort, but is four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name. Otherwise they have almost nothing in common except that each represents an interference with the right of the plaintiff to be left alone. The four categories of invasion of privacy are: (a) unreasonable intrusion upon the seclusion of another, (b) appropriation of another's name or likeness, (c) unreasonable publicity given to one's private life and (d) publicity that normally places another in a false light before the public. *Brisbee v. John C. Conover Agency, Inc.*, 186 *N.J. Super*. 335, 339 (App. Div. 1982); *Restatement, Torts* 2d, § 562A at 376 (1977).

1. **False Light Invasion of Privacy**[1]

NOTE TO JUDGE

There are differing interests protected by the law of defamation and the law of privacy, which account for the substantive gradations between these torts. The interest protected by the duty not to place another in a false light is that of the individual's peace of mind, *i.e.*, his or her interest "in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is." *Restatement (Second) of Torts* § 652E, comment b. "The action for defamation," on the other hand, "is to protect a person's interest in a good reputation. . . ." As with the requirement in defamation actions that the matter publicized be untrue, a fundamental requirement of the false light tort is that the disputed publicity be in fact false, or else "at least have the capacity to give rise to a false public impression as to the plaintiff." Annotation, "False Light Invasion of Privacy-Cognizability and Elements," 57 *A.L.R.* 4th 22, 104 (1987); *see Tellado v. Time-Life Books, Inc.*, 643 *F.Supp.* 904, 907 (D.N.J. 1986); *Cibenko v. Worth Publishers, Inc.*, 510 *F.Supp.* 761, 766 (D.N.J. 1981); *Bisbee v. John C. Conover Agency*, *supra*, 186 *N.J. Super.* at 342; *Restatement (Second) of Torts*, § 652E, comment b. However, unlike a defamation claim, it is not necessary in false-light actions that the material that casts plaintiff in a false light also injure her standing in the community. *See Cibenko v. Worth Publishers, Inc.*, *supra*, 510 *F.Supp.* at 766; *Restatement (Second) of Torts* § 652E, comment b.

[1] It is accepted in New Jersey that a cause of action exists for invasions of privacy involving "publicity that unreasonably places the other in a false light before the public." *See, e.g., Faber v. Condecor, Inc.*, 195 *N.J. Super.* 81, 86-87 (App. Div.), certif. denied, 99 *N.J.* 178 (1984); *Bisbee v. John C. Conover Agency*, 186 *N.J. Super.* 335, 339 (App. Div. 1982); *N.O.C., Inc. v. Schaefer*, 197 *N.J. Super.* 249, 253-54 (Law Div. 1984); *Devlin v. Greiner*, 147 *N.J. Super.* 446, 461-62 (Law Div. 1977); *Palmer v. Schonhorn Enterprises, Inc.*, 96 *N.J. Super.* 72, 75 (Ch. Div. 1967); *DeAngelis v. Hill*, 180 *N.J.* 1, 19 (2004); *Durando v. Nutley Sun*, 209 *N.J.* 235, 249 (2012); *Hornberger v. American Broad. Co.*, 351 *N.J. Super.* 577, 598 (2002).

The plaintiff alleges that the defendant has invaded (her/his) privacy by placing (her/him) in a false light before the public. By this (s/he) means that the defendant publicized material about (her/him) that is false and is such a major misrepresentation of (her/his) character, history, activities or beliefs that a reasonable person in the plaintiff's position would either be expected to take serious offense or be justified in feeling offended or aggrieved.

To recover on this claim, the plaintiff must prove, by a preponderance of the evidence[2]:

(1) That the defendant gave publicity to a matter concerning the plaintiff that was false;

(2) That the defendant either knew that that the publicized material was false and would place the plaintiff in a false light or acted with reckless disregard as to whether the publicized material was false and the false impression created by the publicized matter;

(3) That the material so misrepresented the plaintiff's character, history, activities, or beliefs that a reasonable person in the plaintiff's position would find the material highly offensive; and

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[2] If the plaintiff is a public official, public figure, or where the plaintiff is a private person but the publicity involves a matter of legitimate public concern, then the trial court should instruct the jury that the plaintiff's burden is "clear and convincing" evidence, not "preponderance of the evidence." *Durando v. Nutley Sun*, 209 *N.J.* 235, 253 (2009). *See generally* footnote 1 of the "Public Defamation" instructions (Model Civil Charge 3.11A).

(4) That the publicity was the cause of the plaintiff's injuries/damages/losses.

"Publication" or "Publicity" means that the matter is made public, by communicating it to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.[3]

[3] *Restatement, Torts* 2d, § 652 D and E, comment (a).

2. Intrusion on Seclusion

NOTE TO JUDGE

> Invasion of privacy by intrusion does not depend upon any publicity, or communication to the public generally, nor does it require a physical intrusion. *Restatement (Second) of Torts* § 652B, comment a. The gist of the tort is interference with the plaintiff's solitude, seclusion, or private affairs and concerns, and this can occur by an unauthorized entry to the plaintiff's premises, electronic eavesdropping, unauthorized opening of plaintiff's mail, examining a private bank account, or repeated hounding and harassment. *Id*. at comment b.

The plaintiff alleges that the defendant has invaded (her/his) privacy by unreasonably intruding upon the plaintiff's seclusion. By this (s/he) means that the defendant's interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable person. To recover for unreasonable intrusion on seclusion or solitude, the plaintiff must prove by a preponderance of the evidence all of the following:

(1) That the defendant intentionally intruded or pried into the plaintiff's seclusion without permission from the plaintiff;

(2) That the intrusion was highly offensive to a reasonable person;

(3) That the matter or activities on which the defendant intruded was private; and

(4) That the intrusion was the cause of the plaintiff's injuries/damages/losses.

The plaintiff cannot recover on a claim of intrusion on seclusion if you find that the defendant did not actually delve into the plaintiff's concerns, or where the plaintiff's activities are already public or known.

Cases:

Bisbee v. John C. Conover Agency, 186 *N.J. Super*. 335, 339-40 (App. Div. 1982); *Rumbauskas v. Cantor*, 138 *N.J.* 173 (1994); *Castro v. NYT Television*, 384 *N.J. Super*. 601, 609 (App. Div. 2006).

3. Appropriation of Name or Likeness

The plaintiff alleges that the defendant has appropriated or used the plaintiff's name or likeness for a commercial purpose. By this (s/he) means that the defendant was seeking to capitalize on the plaintiff's likeness for a predominantly commercial purpose and not for the dissemination of news or information. To recover for the appropriation of one's name or likeness, the plaintiff must prove by a preponderance of the evidence all of the following:

(1) That the defendant used the plaintiff's [name/voice/signature/photograph/likeness] to advertise the defendant's business or product, or for some other commercial purpose;

(2) That the use did not occur in connection with the dissemination of news or information, and was without a redeeming public interest or historical value[4];

(3) That the defendant did not have the plaintiff's consent for the use; and

(4) That the use was the cause of the plaintiff's injuries/damages/losses.

Cases:

Castro v. NYT Television, 370 *N.J. Super.* 282, 297 (App. Div. 2004); *Faber v. Condeco, Inc.*, 195 *N.J. Super.* 81 (App. Div.) certif. denied 99 *N.J.* 178 (1984); *N.O.C., Inc. v. Schaefer*, 197 *N.J. Super.* 249 (Law Div. 1984); *Restatement (Second) of Torts* § 652C.

[4] Element 2 may be omitted if there is no question of fact with regard to this issue.

4. Publicity Given to Private Life

NOTE TO JUDGE

This form of invasion of privacy differs from defamation and false light invasion of privacy in that false statements are not required. This tort imposes liability for publicity given to true statements of fact. One who gives publicity to a matter concerning the *private* life of another is subject to liability to the other for invasion of his [or her] privacy, if the matter publicized is of a kind that

(a) would be *highly* offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

It is not an invasion of the right of privacy to communicate a fact concerning the plaintiff's private life to a single person or *even to a small group of persons.* *Romaine v. Kallinger,* 109 *N.J.* 282, 297 (1988), *Dzwonar v. McDevitt,* 348 *N.J. Super.* 164 (App. Div. 2002). *Restatement (Second) of Torts* § 652D (1977) (emphasis added). Also, there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record. *Romaine v. Kallinger,* 109 *N.J.* 282, 297 (1988).

The plaintiff alleges that the defendant has given publicity to her/his private life. By this (s/he) means that the defendant publicized material about (her/him) of a private nature that a reasonable person in the plaintiff's position would be justified in feeling offended or aggrieved. Facts about the plaintiff's life that are matters of public record are not of a private nature. To recover for publicity given to her/his private life, the plaintiff must prove by a preponderance of the evidence all of the following:

(1) That the defendant publicized information concerning the private life of the plaintiff;

(2) That the defendant publicized the private information without the plaintiff's consent;

(3) That a reasonable person in the plaintiff's position would consider the publicity highly offensive;

(4) That the private information was not of legitimate public concern; and

(5) That the publication was the cause of the plaintiff's injuries/damages/losses.

"Publication" or "Publicity" means that the matter is made public, by communicating it to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.