NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-2248-21
A-2249-21

SILVANA LANSIGAN DELVALLE, Administrator ad Prosequendum for Estate of RANIEL HERNANDEZ, SILVANA LANSIGAN DELVALLE and RALPH HERNANDEZ, Individually,

Plaintiffs-Respondents,

v.

HENRY J. TRINO, CHARLENE TRINO, AIREL TRINO, and KEVIN GARCIA,

Defendants-Appellants,

and

WENDY KOO, and CHARLES TRAN,

Defendants-Respondents,

and

CHRISTIN KOO,

Defendant.

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APPROVED FOR PUBLICATION

December 6, 2022

APPELLATE DIVISION

Argued September 29, 2022 – Decided December 6, 2022

Before Judges Sumners, Geiger and Berdote Byrne.

On appeal from interlocutory orders of the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5663-19.

Peter E. Mueller argued the cause for appellant Kevin Garcia (Harwood Lloyd, LLC, attorneys; Peter E. Mueller, of counsel and on the briefs; Eileen P. Kuzma, on the briefs).

John Burke argued the cause for appellants Henry Trino, Charlene Trino, and Airel Trino (John Burke, of counsel and on the briefs).

Edward M. Colligan argued the cause for respondents Silvana Lansigan Delvalle and Ralph Hernandez (Colligan & Colligan, attorneys; Edward M Colligan, of counsel and on the brief).

The opinion of the court was delivered by

SUMNERS, JR., J.A.D.

In August 2017, intoxicated twenty-six-year-old Raniel Hernandez accidentally drowned in a swimming pool while attending a party hosted by defendant Airel Trino at the home of his parents, defendants Henry and Charlene Trino. Plaintiffs Silvana Lansigan Delvalle, Raniel's mother, as administrator of Raniel's estate and individually, and Ralph Hernandez, Raniel's father, filed suit alleging common law negligence, intentional infliction of emotional

distress, and a Portee[1] claim against the Trinos, as well as party attendees Kevin Garcia, Wendy Koo, Christin Koo, and Charles Tran.

At the close of discovery, all the defendants sought summary judgment dismissal of the complaint.[2] The motion court denied applications by Garcia and the Trinos (collectively defendants) on the ground that there were genuine issues of material facts in dispute with respect to their negligence. As to Garcia, the dispute involved his active role in Raniel's drowning. Concerning the Trinos, the dispute involved the common law duty owed to an intoxicated Raniel and the implementation of reasonable pool safety protections to prevent his drowning. The motion court did not address dismissal of plaintiffs' intentional infliction of emotional distress and Portee claims.

Our Supreme Court granted leave to appeal to defendants. Garcia argues he cannot be held liable for Raniel's death. He maintains there are no facts indicating he caused Raniel to enter the pool, and he is not liable for attempting to rescue Raniel upon noticing Raniel never resurfaced. Garcia contends, as a party guest, he owed no duty to Raniel to prevent his drowning. Garcia also

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[1] Portee v. Jaffee, 84 N.J. 88 (1980).

[2] Motions by Wendy Koo and Charles Tran were denied and are not the subject of this appeal. Christin Koo's motion was granted and is not the subject of this appeal.

contends his conduct did not constitute intentional infliction of emotional distress, and there is no viable Portee claim because plaintiffs did not witness their son drowning.

The Trinos contend they are not liable under the Social Host Liability Act (SHLA), N.J.S.A. 2A:15-5.5 to 5.8, because plaintiffs' claims are not based on a third party injured by a motor vehicle driven by a guest who was intoxicated due to the Trinos' service of alcohol. They also maintain they owed no common law duty to Raniel to protect him from drowning because of his voluntary intoxication.

These appeals have been calendared back-to-back and consolidated to issue a single opinion. Based upon the parties' arguments and applicable law, we reverse the denial of summary judgment to both Garcia and the Trinos. Garcia should have been granted summary judgment because the undisputed record indicates he had no role in the intoxicated Raniel's decision to jump into the pool, nor did he have a duty to rescue Raniel. Furthermore, there is no indication Garcia failed to exercise good faith when he tried to save Raniel. The Trinos should have been granted summary judgment because the SHLA does not govern plaintiff's drowning and, under our current state law, they owed Raniel no common law duty to prevent him from swimming while intoxicated. As for

the intentional infliction of emotional distress and Portee claims, they fail as a matter of law against defendants.

I.

In celebration of the end of summer and his friend Melanie's birthday, twenty-one-year-old Airel invited his friends to a party at his home where he lived with his parents. Airel told guests to bring swim attire if they wanted to go swimming. He purchased alcohol for his guests to drink, knowing that at least twenty-five percent of them were underage, but they would be allowed to drink. Yet, according to Charlene, who was the only parent at home during the party, alcohol was prohibited at the party. At least sixty people attended the party; Raniel attended with the Koos.

At one point, a visibly intoxicated Raniel entered the pool with Wendy after she agreed to his request to throw her in the pool—an activity he had planned weeks before. Wendy got out of the pool but Raniel, a former Marine trained to swim, did not. After Wendy tried unsuccessfully to pull Raniel out of the pool, Garcia and Tran went in to rescue Raniel. Sadly, efforts to resuscitate Raniel were unsuccessful. There was a twenty-five-minute delay between the time Raniel's body was pulled out of the pool and when 9-1-1 was called.

Garcia left the Trino residence to take his minor girlfriend away from the party so she would not be cited for underaged drinking. He returned within thirty minutes and spoke with the Bergenfield Police. The autopsy report concluded acute alcohol (ethanol) intoxication—Raniel's blood alcohol content (BAC) at the time of drowning was .119 percent—as the cause of the accidental drowning and cardiac arrest.

Plaintiffs claim there is circumstantial evidence that Raniel's death was caused by Garcia's and Tran's roughhousing in the pool with Raniel. Garcia denies he caused Raniel's death, claiming when he realized Raniel—his friend––was drowning, he entered the pool to rescue him. Tran also says he entered the pool to rescue Raniel. Wendy claimed they all jumped in at same time to rescue Raniel, but Garcia claimed he jumped in first and realized he needed help, so Tran jumped in to help him. There is no evidence of any roughhousing in the pool. Approximately ten seconds of cell phone video footage taken by Christin shows Raniel and Wendy entering the pool but does not show any roughhousing or horseplay, Garcia's rescue efforts, nor Raniel in distress. Ralph saw the video, but Delvalle never did. The subsequent investigation by the Bergenfield Police did not identify any party attendees who witnessed Raniel enter the pool or any prior altercation.

II.

Negligence Claims Against Garcia

The motion court's order denying summary judgment dismissal of the negligence claims against Garcia had a rider attached explaining its decision.[3] The court determined there were genuine issues of material fact in dispute surrounding Garcia's involvement, stating,

> there is conflicting testimony about [Raniel's and Wendy's] entry into the pool which creates ambiguity as to what happened in the moments surrounding [Raniel's] death which is material to this case. Testimony of [Wendy] explains that she, []Garcia and []Tran jumped in the pool at the same time in an effort to rescue [Raniel]. However, [] Garcia asserts that he jumped in the pool to potentially rescue [Raniel], was unable to do so, and then later called []Tran to assist in helping [Raniel]. These conflicting details directly impact the potential rescue of Raniel . . . which is material to the case before this [c]ourt. The conflicting details surrounding the moments prior to [Raniel's] death creates enough of a genuine dispute of material fact to defeat summary judgment motions brought by …Garcia, . . . Tran, and the Trino [d]efendants.

In our de novo review of the motion court's summary judgment order, we conclude that, even viewing the facts in a light most favorable to plaintiffs as

[3] The court issued separate orders denying the motions by Garcia, the Trinos, and Tran, but issued a single rider setting forth its reasoning. The order denying Tran summary judgment is not the subject of these appeals.

the non-moving party, summary judgment should have been granted to Garcia because the motion court misapplied the law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div. 2006). The motion court failed to address the key factor of whether Garcia owed Raniel a duty which he breached, causing his drowning. See Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013) (holding that, to prove a defendant's tort liability, a plaintiff must prove a duty of care, a breach of that duty, actual and proximate causation, and damages). We agree with Garcia's contention that he did not owe Raniel a statutory or common law duty.

Plaintiffs fail to articulate a duty Garcia breached which made him liable for Raniel's drowning and justified the denial of summary judgment. As a party guest, Garcia had no duty to restrict or police Raniel's conduct at the party. The SHLA does not apply for many reasons, but primarily because Garcia was not a party host. We have found no statute or case law in our state "impos[ing] a civil tort duty of care on social guests to monitor and control the alcoholic drinking of another guest absent a special relationship or circumstance." Franco v. Fairleigh Dickinson Univ., 467 N.J. Super. 8, 33 (App. Div. 2021) (citation omitted).

Unlike the motion court, we discern no relevance regarding what happened after Raniel's motionless body was seen in the pool and rescue attempts occurred. Garcia's post-drowning conduct is irrelevant to the issue of whether he owed a duty to Raniel. There are no facts or contentions suggesting Garcia's rescue efforts should not be afforded protection from civil liability under the Good Samaritan Act, N.J.S.A. 2A:62A-1 to -35. In pertinent part, the Act provides "any individual . . . who in good faith renders emergency care at the scene of an accident or emergency to the victim or victims thereof, . . . shall not be liable for any civil damages as a result of any acts or omissions . . . in rendering the emergency care." N.J.S.A. 2A:62A-1. There is no indication Garcia's conduct was not in good faith.

Plaintiffs cite no facts to support their claim that Garcia and others were engaged in "roughhousing, frolic[,] and horseplay when . . . Garcia . . . intentionally, recklessly[,] and negligently caused Raniel to drown." There is neither circumstantial evidence nor conflicting testimony, as plaintiffs argue, leading to any reasonable conclusion that Garcia's conduct contributed to the drowning.

Plaintiffs also argue flight, as defined by the criminal model jury charge, establishes that Garcia's leaving the Trinos' home before the police got there

constitutes circumstantial evidence of his consciousness of guilt or liability for the drowning. Under the flight charge, if the jury finds

> the defendant, fearing that an accusation or arrest would be made against him/her on the charge involved in the indictment, took refuge in flight for the purpose of evading the accusation or arrest on that charge, then [it] may consider such flight in connection with all the other evidence in the case, as an indication or proof of a consciousness of guilt.
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> [(Model Jury Charges (Criminal)), "Flight" (rev. May 10, 2010).]

In addition, plaintiffs rely on Jones v. Strelecki, 49 N.J. 513 (1967), to consider flight as evidence of Garcia's consciousness of guilt or liability for the drowning. There, our Supreme Court allowed evidence of a driver's hit-and-run conduct to support a finding of consciousness of liability. Id. at 519. Plaintiff's reliance on the flight charge and Jones is off the mark. Allowance of the flight evidence in Jones was because the "logical connection between post-crime hit-and-run conduct and the accident is underscored by the penalization of flight from the scene of an accident involving personal injuries." State v. Williams, 190 N.J. 114, 127 (2007) (citing N.J.S.A. 39:4-129).

Garcia had no reason to flee from being accused of a crime or being penalized in any manner. He sought to save a friend from drowning, which the facts, as supported by the medical examiner's conclusion, indicate was

accidental. Upon realizing his rescue effort was unsuccessful, Garcia left the premises to prevent his girlfriend from being cited for underaged drinking. The fact that he returned and spoke to the police refutes any contention he fled because he felt responsible for Raniel's drowning. There is nothing in the record suggesting Garcia temporarily left the scene because he believed he had any responsibility for the accidental drowning. Thus, a fact-finder should not consider flight as a basis for Garcia's temporary departure from the Trinos' home right after Raniel drowned.

Accordingly, Garcia is entitled to summary judgment dismissal of plaintiffs' negligence claims based upon Raniel's drowning.

III.

Negligence Claims Against the Trinos

The motion court, as it did in denying Garcia's summary judgment motion, determined there were genuine issue of material fact and denied dismissal of plaintiffs' negligence claims against the Trinos. The court stated:

> there are genuine issues of material fact in dispute as to what duty [the Trinos] may have owed to persons they invited to their home, and additionally, what protections would have been reasonable to implement to protect their guests. There is dispute as to what statute may govern the actions of the Trinos, specifically, what duty they had to [Raniel]. There is also a dispute as to the level of foreseeability regarding

> the potential risk of danger to guests who were provided alcohol and given unrestricted access to the pool.

We conclude there was no basis to deny the Trinos' summary judgment motion because of a genuine issue of material fact in dispute concerning the duty they owed to Raniel. Whether the Trinos owed a legal duty to Raniel was a question of law for the court to decide. See Carvalho v. Toll Bros. & Devs., 143 N.J. 565, 572 (1996). The court, not a fact finder, must determine if the Trinos owed a duty to Raniel. See Jersey Cent. Power & Light Co., 212 N.J. at 594.

Before addressing the duty issue, however, we consider the Trinos' contention that plaintiffs' claims are barred because the SHLA, the exclusive civil remedy for imposing liability against them for serving alcohol to Raniel that resulted in his death, does not apply in this matter. We agree—as do plaintiffs—the SHLA does not apply, but we reject the notion that plaintiffs' claims should therefore be barred.

The SHLA provides it "shall be the exclusive civil remedy for personal injury . . . resulting from the negligent provision of alcoholic beverages by a social host to a person who has attained the legal age to purchase and consume alcoholic beverages." N.J.S.A. 2A:15-5.6(a). However, the SHLA specifically addresses a person's bodily injury from a motor vehicle accident negligently caused by an intoxicated person who was willfully and knowingly served

alcohol while visibly intoxicated by a social host of an unlicensed premises. N.J.S.A. 2A:15-5.6(b)(1)-(3). This does not mean the SHLA is the exclusive civil remedy in all circumstances when a cause of action alleges a social host negligently served alcohol. There is no case law standing for the proposition that a social host's liability for the service of alcohol to an intoxicated person is limited to claims under the SHLA to the exclusion of other negligence theories. The SHLA is limited to injuries sustained in the negligent operation of a motor vehicle. Because injuries can arise from negligent conduct related to intoxication outside of motor vehicle accidents, those claims should be entitled to relief if there was a breached duty of care that actually and proximately caused damages. See Jersey Cent. Power & Light Co., 212 N.J. at 594.

As for the Trinos' duty, plaintiffs argue they "owed a [common law] duty of reasonable care to [Raniel] in the conduct and supervision of their pool party activities including their guests, their pool and their party." Generally, where the focus is not on a physical condition of the property but on activities conducted thereupon, the duty to use reasonable care falls upon "the person conducting the activity." Hanna v. Stone, 329 N.J. Super. 385, 389 (App. Div. 2000). Four factors are considered in determining whether a defendant owes a duty: "the relationship of the parties, the nature of the attendant risk, the

opportunity and ability to exercise care, and the public interest in the proposed solution." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993).

In Estate of Narleski v. Gomes, Justice Albin, writing for the Court, recognized that "[a]ny common law duty imposed by this Court must 'satisf[y] an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.'" 244 N.J. 199, 213 (2020) (quoting Hopkins, 132 N.J. at 439). To determine "whether a new duty meets the basic fairness test and advances an enlightened public policy, Justice Holmes's reminder that 'a page of history is worth a volume of logic,' N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921), directs us to look to the historical antecedents for such a duty in this case." Ibid. The Court acknowledged "intoxicated driving remains [as] one of the preeminent public safety threats in New Jersey" and thoroughly detailed the significant measures taken by our Legislature and courts to mitigate against its tragic consequences. Id. at 213-223. Thus, the Court concluded "an underage social host, who makes [a] residence available and facilitates underage drinking, has a duty not to knowingly provide or allow self-service of alcohol to a visibly intoxicated guest and, if a guest becomes visibly intoxicated, to take reasonable steps to prevent the guest from operating a motor vehicle." Id. at 227.

Unlike the public safety concerns expressed in Narleski, there is no similar significant public concern here involving a guest who drowns at a pool party due to his voluntary intoxication. Suffice to say, this court has recognized a homeowner's responsibility towards guests swimming in her or his pool under specific circumstances. Despite affirming summary judgment dismissal of the plaintiff's claims in Tighe v. Peterson because there was no duty to warn about the pool's shallowness given that he swam in the pool approximately twenty times before, we left undisturbed a viable claim based on the failure to warn had the plaintiff not been aware of the pool's condition. 175 N.J. 240, 241-242 (App. Div. 2002). Nevertheless, our case law has yet to suggest that a social host has the duty to prevent a voluntarily intoxicated adult guest from going swimming to safeguard the guest's own well-being. There is no indication the Trinos' pool had a dangerous condition that was unknown to Raniel which proximately caused his drowning. The Trinos therefore cannot be held "liable to [their] invitees for physical harm caused to them by any . . . condition on the land whose danger is known or obvious to them." La Russa v. Four Points at Sheraton Hotel,

360 N.J. Super. 156, 163 (App. Div. 2003) (citing Restatement (Second) of Torts § 343A(1) (Am. Law Inst. 1965)).[4]

Looking at other state courts, we find no ruling where a social host was held liable based upon common-law negligence or wanton and reckless misconduct for the injury or death of an intoxicated adult guest to whom alcoholic beverages were furnished. See Manning v. Nobile, 582 N.E.2d 942, 949 (Mass. 1991) (holding an intoxicated adult guest injuring himself when he crashed his car into a tree, is not "permitted to recover from a social host for the guest's own injuries"); Johnson v. Paige, 615 P.2d 1185, 1187 (Or. Ct. App. 1980) (holding there is no common law claim against hosts who served the plaintiff alcohol when he died from falling down the stairs in the hosts' home); Estate of Valesquez v. Cunningham, 738 N.E.2d 876, 880-81 (Ohio Ct. App.

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[4] The Restatement (Second) of Torts § 343A cmt. e (Am. Law Inst. 1965) provides:

> The possessor of the land may reasonably assume that [the invitee] will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

2000) (ruling a "social host does not have a duty to maintain constant supervision of an adult guest, and generally, in the absence of a special relationship, there is no duty to" supervise or protect a voluntarily intoxicated social guest in a swimming pool because "a . . . pool is an open and obvious danger of which a landowner has no duty to warn"); Alves v. Santos, 47 N.Y.S.3d 699, 703-04 (N.Y. Sup. Ct. 2017) (finding the intoxicated property owner had no responsibility to foresee that the intoxicated decedent would jump into the pool, and also noting the injury was suffered by a voluntarily intoxicated adult, not by a third party); Lizarzaburo v. Schmergel, 135 A.D.3d 833, 835 (N.Y. App. Div. 2016) (ruling a housekeeper who was entertaining a guest on her employer's property had no common law duty to protect the guest from the results of his own voluntary intoxication when he drowned in the pool).

The Trinos contend plaintiffs' negligence claims based on their failure to provide supervision of the pool activity and to rescue Raniel should have been dismissed. Plaintiffs argue, because the Trinos did not provide a lifeguard and the twenty-five-minute delay in calling 9-1-1 after Raniel's body was pulled out of the pool, defendants are liable because there was a lapse of time in saving Raniel. Plaintiffs cite to an American Red Cross publication advising a host to arrange appropriate supervision during a pool party and that alcoholic beverages

should be "strictly prohibited" by anyone participating in water activities. However, no statute, regulation, or case law required the Trinos to provide a lifeguard at the party or to prevent a guest from drinking and getting in the pool. The Red Cross's pronouncement is advisory and did not establish a common law duty. Furthermore, plaintiff's liability expert acknowledged no municipality in New Jersey prohibits serving alcohol at a pool party.

Plaintiffs cite Endre v. Arnold, 300 N.J. Super. 136, 143-44 (App. Div. 1997), for the proposition that "a host has a duty to come to the aid of a social guest who the host knows or has reason to know is in serious physical peril due to an accident that occurred on the host's premises." Their reliance is misplaced.

In Endre, a drunken guest suffered an injury falling down the stairs, and the host delayed in getting help. Id. at 141-42. We determined the host had "to take reasonable action to turn the injured [guest] over to those qualified to care for the guest." Id. at 143-44. However, we affirmed the grant of summary judgment because a reasonable fact finder could not find, based upon the plaintiff's proofs, that the host's failure to provide aid to the injured intoxicated guest was the proximate cause of his death. Id. at 147-48. Similarly, plaintiffs have failed to show that, prior to individuals at the party performing CPR on Raniel, a delay in seeking assistance was a proximate cause of his death. Thus,

plaintiffs' claims that the Trinos failed to provide a lifeguard or other properly trained pool supervision and failed to rescue are dismissed.

The Trinos argue plaintiffs' claim that Raniel was the "victim" of underage drinkers, namely Wendy, Tran, and Garcia, should be dismissed. We agree.

Plaintiffs contend defendants had a duty to protect decedent from other guests who drank excessively. In support, they cite Narleski, 244 N.J. at 217 (recognizing the Legislature did not "create a liability-free zone for underage social hosts who knowingly provide alcohol to visibly intoxicated minors and underage adults who negligently cause injury to third parties as a result of their intoxication"); Linn v. Rand, 140 N.J. Super. 212, 219-20 (App. Div. 1976) (no immunity for host who furnishes alcoholic beverage to minor guest who proximately injures innocent third party); and Kelly v. Gwinnell, 96 N.J. 538, 547-48 (1984) (host is liable to third party injured by intoxicated social guest when injury is caused by guest's negligent operation of motor vehicle).

Those cases, however, are distinguishable from the situation at Airel's party. Those cases all involved an injury proximately caused by an intoxicated third-party minor. There is no evidence Raniel's drowning was due to the conduct of intoxicated third-party minors. The evidence shows that Raniel voluntarily jumped into the pool with Wendy, and his drowning was not caused

by her or anyone else.

We also agree with the Trinos that plaintiffs' claim of gross negligence and willful and wanton disregard for Raniel's safety should be dismissed. Plaintiffs argue the Trinos were grossly negligent and acted with willful and wanton disregard for decedent's safety by failing to warn him about being drunk and swimming or roughhousing.

Plaintiffs rely upon Franco where this court reversed summary judgment because a reasonable jury could find the dormitory resident assistants "were grossly negligent or were willfully or wantonly indifferent when they failed to enforce the University's policies prohibiting underaged and excessive drinking" resulting in an underage drinker becoming intoxicated and injuring himself in a motor vehicle accident. 467 N.J. Super. 8, 33, 40 (App. Div. 2021). Such reliance is misplaced. Franco involved the protection and safety of an underaged drinker, unlike here, where the injured person was a twenty-six-year-old ex-Marine. There was no indication the Trinos knew or should have known Raniel would be unable to regulate his drinking to avoid putting himself in an unsafe situation. There is no showing their conduct displayed "indifference to consequences," Banks v. Korman Assocs., 218 N.J. Super. 370, 373 (App. Div. 1987) (citation omitted), or "reckless disregard of the safety of others," In re

Kerlin, 151 N.J. Super. 179, 185 (App. Div. 1977) (citation omitted), meaning "more than mere thoughtlessness or inadvertence, or simple inattention . . . ." Prosser & Keeton on the Law of Torts, § 34 at 212 (5th Ed.1984).

Moreover, even accepting the Trinos' conduct constituted gross negligence or willful and wanton disregard towards Raniel's safety, plaintiffs have not shown such conduct proximately caused the drowning. Plaintiffs have not established the Trinos' failure to warn Raniel about being drunk and swimming was the proximate cause of Raniel's death. He accidentally drowned with an elevated BAC after jumping into the pool—an activity he had planned before the party. There was no evidence that any game or behavior of an underage drinker caused him to drown.

Accordingly, the Trinos are entitled to summary judgment dismissal of plaintiffs' negligence claims based upon Raniel's drowning.

IV.

Intentional Infliction of Emotional Distress Claims

Plaintiffs argue defendants covered up what happened to Raniel, failed to call 9-1-1 until twenty-five minutes after decedent's body was drawn out of the pool, told guests to leave before police arrived, and permitted the Koos to hide from police inside the home. Moreover, when Ralph arrived at the Trinos' home,

nobody would tell him what happened to his son. Plaintiffs assert defendants' actions indicate they deliberately sought to cover up what happened to Raniel which amounted to intentional infliction of emotional distress. In support, they rely upon medical experts opining how the drowning and its "cover-up" affected their mental well-being.

Although the motion court did not address whether the emotional distress claims should be dismissed as required by Rule 1:7-4, to avoid unnecessary litigation delay, we choose not to remand because the record provided allows us to determine whether it was appropriate to grant summary judgment dismissal of the intentional infliction of emotional distress claims. Leeds v. Chase Manhattan Bank, N.A., 331 N.J. Super. 416, 420-21 (App. Div. 2000) (affirming the grant of summary judgment even though the order merely stated "denied").

Initially, we point out that, despite concluding plaintiffs' wrongful death negligence claims are dismissed, their intentional infliction of emotional distress claims may survive and stand on their own merits. Hume v. Bayer, 178 N.J. Super. 310, 317 (Law Div. 1981). A plaintiff establishes a prima facie claim of intentional infliction of emotional distress by showing:

> (1) defendant acted intentionally; (2) defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly

> intolerable in a civilized community;" (3) defendant's actions proximately caused him emotional distress; and (4) the emotional distress was "so severe that no reasonable [person] could be expected to endure it."
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> [Segal v. Lynch, 413 N.J. Super. 171, 191 (App. Div. 2010) (citation omitted).]

We detailed examples of conduct warranting jury consideration of liability for intentional infliction of emotional distress in Ingraham v. Ortho-McNeil Pharmaceutical stating it

> includes: (1) a county sheriff's using an atrocious racial slur to refer to an African-American employee, Taylor v. Metzger, 152 N.J. 490, 508-21 (1998); (2) a defendant teacher's false report that the plaintiff teacher, a practicing non-violent Buddhist, had threatened to kill her students, and arranging to have the plaintiff removed publicly from the school, allegedly in retaliation for rebuking the defendant's sexual advances, Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 568, 587-88 (2009); (3) a supervisor and two co-workers at a military facility surrounding the plaintiff and making comments and gestures to suggest that she was to perform a sexual act on the supervisor while the others watched, followed by a threatening telephone call implying that the Mafia would become involved if the plaintiff pursued the investigation, Wigginton v. Servidio, 324 N.J. Super. 114, 119-20, 123, 130-32 (App. Div. 1999); (4) a landlord's intentional shutting off heat, running water, and security in a rent-controlled building in an effort to induce the tenants to vacate, 49 Prospect St. Tenants Ass'n v. Sheva Gardens, Inc., 227 N.J. Super. 449, 455-57, 466, 471-75 (App. Div. 1988); and (5) a doctor's allegedly telling parents that their child was "suffering

> from a rare disease which may be cancerous knowing that the child has nothing more than a mildly infected appendix," Hume v. Bayer, 178 N.J. Super. 310, 319 (Law Div. 1981).
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> [422 N.J. Super. 12, 21 (App. Div. 2011).]

We also listed cases where our courts declined to find that the behavior was sufficiently extreme and outrageous, such as:

> (1) the decedent's children from an earlier marriage were not informed about and thus excluded from a viewing at the funeral home after the decedent was murdered, Cole v. Laughrey Funeral Home, 376 N.J. Super. 135, 147-48 (App. Div. 2005); (2) a supervisor expressed doubt that the plaintiff had been diagnosed with breast cancer, and then came near her "on the verge of physically bumping into [the plaintiff's] breast area as if to see" if she truly had a mastectomy, Harris v. Middlesex County College, 353 N.J. Super. 31, 36, 46-47 (App. Div. 2002); (3) managers at an appliance retailer brought theft charges against the plaintiff sales manager for selling a television to his brother-in-law below cost, [Griffin v. Tops Appliance City, Inc., 337 N.J. Super. 15, 20-25 (App. Div. 2001)]; and (4) the defendant in a divorce case had a long-term adulterous affair with her boss, Ruprecht v. Ruprecht, 252 N.J. Super. 230, 236-38 (Ch. Div. 1991).
>
> [422 N.J. Super. at 22.]

While we certainly appreciate plaintiffs' attempt to get clarity about how their son drowned was an emotional experience, there is no support for the contention defendants' behavior rose to such an outrageous level that it was

"beyond all possible bounds of decency," and "utterly intolerable in a civilized community." They were under no duty to answer plaintiffs' questions. Refusal to give the answers sought by plaintiffs or allowing the Koos to hide in the Trinos' house does not appear extreme or outrageous.

Lastly, we address the Portee claim. In Portee, the Court approved a cause of action for negligent infliction of emotional distress, which required proof of "(1) the death or serious physical injury of another caused by defendants' negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress." 84 N.J. at 101.

Ralph contends, in viewing the video of Raniel and Wendy jumping in the pool, he saw Raniel drowning, causing him severe emotional distress. (Pb48). This does not satisfy Portee because he must have been present when his son drowned to make a claim. See e.g., Johnson v. Mountainside Hosp., 239 N.J. Super. 312, 327 (App. Div. 1990) (holding a plaintiff cannot recover for emotional distress without being present and observing the actual injury inflicted on a family member). Moreover, while the video may be Ralph's last and unnerving "snapshot" of Raniel while he was alive, it does not depict him

drowning or in any type of distress. Thus, there are insufficient facts to sustain a Portee claim.

Accordingly, defendants are entitled to summary judgment dismissal of the intentional infliction of emotional distress claims.

Reversed.