

An employer retained a doctor to conduct physical examinations of prospective employees. After reviewing one applicant's test results, the doctor informed the employer and the applicant that the applicant suffered from AIDS. The applicant was shocked by this news and suffered a heart attack as a result. One month later, the applicant learned that she in fact did not have AIDS and that the doctor had negligently confused her file with that of another prospective employee.

If the applicant sues the doctor to recover damages, under which cause(s) of action is she most likely to prevail?

- A. Invasion of privacy.
- B. Invasion of privacy and negligent misrepresentation.
- C. Negligent infliction of emotional distress.
- D. Negligent infliction of emotional distress and negligent misrepresentation.

Explanation:

Negligent infliction of emotional distress

Theories of recovery	Required elements
Zone of danger	Defendant's negligence put plaintiff in danger of immediate bodily harm Danger caused plaintiff serious emotional distress
Bystander	Defendant negligently injured plaintiff's close relative Plaintiff contemporaneously perceived that event Event caused plaintiff serious emotional distress
Special situations	Defendant negligently: delivered erroneous announcement of death or illness mishandled corpse or bodily remains contaminated food with repulsive foreign object Caused plaintiff serious emotional distress

A plaintiff can recover for **negligent infliction of emotional distress** (NIED) in three situations: (1) zone of danger, (2) bystander, or (3) special situations. Liability under the **special-situations theory** arises when the plaintiff suffers **serious emotional distress** because the defendant **negligently**:

delivered an **erroneous announcement of death or illness**
mishandled a **corpse or bodily remains** *or*
contaminated food with a **repulsive foreign object**.

Here, the doctor negligently misdiagnosed the applicant with AIDS because he confused her file with that of another prospective employee. The erroneous announcement of this illness caused the applicant serious emotional distress—she went into shock and suffered a heart attack upon being informed of this diagnosis. As a result, she will most likely prevail on her cause of action against the doctor for NIED.

(Choices A & B) There are four theories of recovery for **invasion of privacy**—none of which apply here. That is because the doctor did not (1) conduct the physical examination of the applicant without her authorization (ie, no intrusion upon seclusion), (2) publicize her private information, (3) publicize the misdiagnosis to cast her in a false light, or (4) use her name or likeness for personal benefit.

(Choices B & D) **Negligent misrepresentation** occurs in a commercial setting when (1) the defendant negligently provides the plaintiff with false information and (2) the plaintiff reasonably relies on that information and suffers pecuniary loss. Here, the doctor provided

the applicant with false information, but she never relied on his misdiagnosis. Therefore, negligent misrepresentation does not apply.

Educational objective:

Negligent infliction of emotional distress occurs under the special-situations theory when the plaintiff suffers serious emotional distress because the defendant negligently (1) delivered an erroneous announcement of death or illness, (2) mishandled a corpse or bodily remains, or (3) contaminated food with a repulsive foreign object.

References

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 47(b) cmt. f (Am. Law Inst. 2012) (special-situations theory of negligent infliction of emotional distress).

Restatement (Second) of Torts §§ 652A–652E (Am. Law Inst. 1977) (invasion of privacy).

Restatement (Second) of Torts § 552 (Am. Law Inst. 1977) (negligent misrepresentation).

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