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NEW JERSEY

WRONGFUL DEATH

I. STATUTE:

Statutory cause of action in derogation of common law. N.J. Stat. Ann. (N.J.S.A.) §§ 2A:31-1 to -6; Goodman v. Mead Johnson & Company, 534 F.2d 566 (3d Cir. 1976), cert. denied, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977); LaFage v. Jani, 166 N.J. 412, 766 A.2d 1066 (2001); Smith v. Whitaker, 160 N.J. 221, 734 A.2d 243 (1999).

II. EMPOWERED PLAINTIFFS:

- A. Persons Entitled To Sue or Make Claim – If decedent dies intestate, action shall be brought in the name of an administrator ad prosequendum named in Letters of Administration ad Prosequendum issued by the Surrogate's Court; if decedent dies testate, action shall be brought by the executor named in the will, if qualified, or by the administrator of the estate with the will attached, as the case may be. N.J.S.A. 2A:31-2; Ross v. Johns-Manville Corporation, 766 F.2d 823 (3d Cir. 1985); Satzinger v. Satzinger, 156 N.J.Super. 215, 383 A.2d 753 (Ch. Div. 1978); Glucksman v. Strelecki, 102 N.J.Super. 53, 245 A.2d 228 (Law Div. 1968); Kern v. Kogan, 93 N.J.Super. 459, 226 A.2d 186 (Law Div. 1967).
- B. Persons Entitled to Amount Recovered – Recovery is for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same; however, if any of the persons so entitled were dependent upon the decedent at his or her death, they shall take the same as though they were the sole persons so entitled, in such proportions, as shall be determined by the court without a jury. N.J.S.A. 2A:31-4.
- C. To Whom Amount Recovered Paid – In action commenced by administrator ad prosequendum, payment in settlement or satisfaction of judgment shall be made only to general administrator of decedent's estate, who has filed a bond or supplemental bond adequate to protect the persons entitled to recover. N.J.S.A. 2A:31-6; Lange v. Semanske, 108 N.J.Eq. 538, 155 A. 783 (Ch. 1931).

III. DAMAGES:

- A. Nature – Pecuniary injuries resulting from death, together with hospital, medical, and funeral expenses incurred for the deceased. N.J.S.A. 2A:31-5; McGrath v. Erie Lackawanna Railroad Company, 460 F.2d 1312 (3d Cir. 1972); LaFage v. Jani, 166 N.J. 412, 766 A.2d 1066 (2001); DeHanes v. Rothman, 158 N.J. 90, 727 A.2d 8 (1999); Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980); Hudgins v. Serrano, 186 N.J.Super. 465, 453 A.2d 218 (App. Div. 1982); Correia v. Sherry, 335 N.J.Super. 60, 760 A.2d 1156 (Law Div. 2000).
- B. Recoverable Losses –
- (1) Recovery based on contributions, reduced to monetary terms, which decedent might reasonably have been expected to make to his or her survivors. McGrath v. Erie Lackawanna Railroad Company, 460 F.2d 1312 (3d Cir. 1972); LaFage v. Jani, 166 N.J. 412, 766 A.2d 1066 (2001); Smith v. Whitaker, 160 N.J. 221, 734 A.2d 243 (1999); Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980); Hudgins v. Serrano, 186 N.J.Super. 465, 453 A.2d 218 (App. Div. 1982).
 - (2) Loss of companionship, guidance, advice, and counsel to the extent it is confined to its pecuniary element. Clawans v. United States, 75 F.Supp.2d 368 (D.N.J. 1999); Green v. Bittner, 85 N.J.1, 424 A.2d 210 (1980).
 - (3) Loss of prospective services arising from death of a child, whether infant or adult; parent-child relationship suffices as proof of nature of loss. Green v. Bittner, 85 N.J.1, 424 A.2d 210 (1980).
 - (4) Hospital, medical, and funeral expenses incurred on behalf of deceased. N.J.S.A. 2A:31-5.
- C. Losses Not Recoverable – Compensation for emotional loss of survivors is not allowed. Green v. Bittner, 85 N.J.1, 424 A.2d 210 (1980); Hudgins v. Serrano, 186 N.J.Super. 465, 453 A.2d 218 (App. Div. 1982).

SURVIVAL OF CAUSE OF ACTION

I. TORTS TO DECEDENT:

- A. Trespass Done to the Person or Property, Real or Personal, of Decedent – “Survival claim” is a decedent’s own for damages accrued during the lifetime of the decedent, which is prosecuted by the testator’s executor or the intestate’s administrator. N.J.S.A. 2A:15-3; Smith v. Whitaker, 160 N.J. 221, 734 A.2d 243 (1999); DeLane v. City of Newark, 343 N.J.Super. 225, 778 A.2d 511 (App. Div. 2001).

- B. Where Death Resulted From Injuries for Which Deceased Would Have Had Cause of Action Had He or She Lived – Executor or administrator may recover all reasonable funeral and burial expenses in addition to damages accrued during the lifetime of the deceased. N.J.S.A. 2A:15-3.

II. TORTS COMMITTED BY DECEDENT:

If a decedent within his or her lifetime had committed any trespass against the person or property, real or personal, of any person, such person or such person's executors or administrators shall have and may maintain the same action against the decedent's executors or administrators as such person may have had or maintained against the decedent. N.J.S.A. 2A:15-4; Weller v. Home News Publishing Company, 112 N.J.Super. 502, 271 A.2d 738 (Law Div. 1970).

STATUTES OF LIMITATIONS

- A. Personal Injury – In general, two years. N.J.S.A. 2A:14-2; Mullen v. Port Authority of New York and New Jersey, 100 F.Supp.2d 249 (D.N.J. 1999), aff'd., 225 F.3d 649 (3d Cir. 2000); McGrogan v. Till, 167 N.J. 414, 771 A.2d 1187 (2001).
- (1) Suits against Port Authority of New York and New Jersey – One year. (Notice of claim must be served at least 60 days prior to commencement of action.) N.J.S.A. 32:1-163, – 164; Doll v. Port Authority Trans-Hudson Corporation, 92 F.Supp2d 416 (D.N.J. 2000), aff'd., 261 F.3d 491 (3d Cir. 2001); Brown v. Port Authority Police Superior Officers Association, 283 N.J.Super. 122, 661 A.2d 312 (App. Div. 1995).
 - (2) “Tortious injury to the rights of another”, e.g., personal injury confined to economic harm – Six years. N.J.S.A. 2A:14-1; McGrogan v. Till, 167 N.J. 414, 771 A.2d 1187 (2001).
- B. Wrongful Death – Two years from date of death of decedent. No limitation if death resulted from murder, aggravated manslaughter, or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity, or adjudicated delinquent. N.J.S.A. 2A:31-3; Miller v. Estate of Sperling, 166 N.J. 370, 766 A.2d 738 (2001); Bernoskie v. Zarinsky, 344 N.J.Super. 160, 781 A.2d 52 (App. Div. 2001).
- C. Property Damage – Six years. N.J.S.A. 2A:14-1; Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968).

D. Contract –

- (1) In general, six years. N.J.S.A. 2A:14-1; Fraser v. Bovino, 317 N.J.Super. 23, 721 A.2d 20 (App. Div. 1998), certif. denied, 160 N.J. 476, 734 A.2d 791 (1999).
- (2) Action against immediate seller and remote supplier by commercial buyer for economic loss from purchase of defective goods. Four years. N.J.S.A. 12A:2-725 (U.C.C. § 2-725); Spring Motors Distributors, Inc. v. Ford Motor Company, 98 N.J. 555, 489 A.2d 660 (1985).
 - (a) Cause of action accrues when breach occurs. N.J.S.A. 12A:2-725(2).
 - (b) Breach occurs when tender of delivery is made. N.J.S.A. 12A:2-725(2).

E. Breach of Warranty –

- (1) In general, four years from accrual of cause of action (tender of delivery). N.J.S.A. 12A:2-725; Deluxe Sales and Service, Inc. v. Hyundai Engineering & Construction Co., Ltd., 254 N.J.Super. 370, 603 A.2d 552 (App. Div. 1992).
- (2) Parties may agree to reduce limitation period to not less than one year. N.J.S.A. 12A:2-316, - 725(1).

F. Products Liability –

- (1) Personal injury. Two years. N.J.S.A. 2A:14-2; Wade v. Armstrong World Industries, Inc., 746 F.Supp. 493 (D.N.J. 1990); Staub v. Eastman Kodak Company, 320 N.J.Super. 34, 726 A.2d 955 (App. Div. 1999), certif. denied, 161 N.J. 334, 736 A.2d 527 (1999).
- (2) Property damage. Six years. N.J.S.A. 2A:14-1; Cinnaminson Township Board of Education v. U.S. Gypsum Co., 552 F.Supp. 855 (D.N.J. 1982); Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973).
- (3) Absent personal injury or damage to property other than purchased goods, remedies available to commercial buyer for economic loss from purchase of defective goods are limited to those available under the Uniform Commercial Code. Spring Motors Distributors, Inc. v. Ford Motor Company, 98 N.J. 555, 489 A.2d 660 (1985).

G. Damages for Injury From Unsafe Condition of Improvement to Real Property – Ten years after the performance or furnishing of design, planning, surveying,

supervision of construction, or construction of improvement to real property. N.J.S.A. 2A:14-1.1; Woessner v. Air Liquide Inc., 242 F.3d 469 (3d Cir. 2001); Russo Farms, Inc. v. Vineland Board of Education, 144 N.J. 84, 675 A.2d 1077 (1996). Statute is statute of repose, not true “statute of limitations”; therefore, it is not subject to tolling. Hein v. GM Construction Co., Inc., 330 N.J.Super. 282, 749 A.2d 442 (App. Div. 2000).

- H. Minors, Insane – Statutes of limitation tolled until such time as minor reaches age of majority or insane person regains sane mind. N.J.S.A. 2A:14-21; Rolax v. Whitman, 175 F.Supp.2d 720 (D.N.J. 2001); LaFage v. Jani, 166 N.J. 412, 766 A.2d 1066 (2001). (See N.J.S.A. 2A:14-2 when cause of action is by or on behalf of minor for medical malpractice as the result of injuries sustained at birth.)
- I. Nonresidency of Person Liable – Persons entitled to cause of action may commence action within time set forth in applicable statute of limitation, exclusive of time or times of nonresidence or nonrepresentation within state of person liable. N.J.S.A. 2A:14-22.
- J. “Discovery Rule” – Equitable principle by which accrual of cause of action is delayed until injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, that he or she may have basis for actionable claim. Vispiano v. Ashland Chemical Co., 107 N.J. 416, 527 A.2d 66 (1987); Troum v. Newark Beth Israel Medical Center, 338 N.J.Super. 1, 768 A.2d 177 (App. Div. 2001), certif. denied, 168 N.J. 295, 773 A.2d 1158 (2001).
- K. Death of Person Liable – If any person against whom one of above listed causes of action lies dies before the running of the applicable statute of limitation, the space of six months following his or her death shall not be computed as part of the limitation period. N.J.S.A. 2A:14-23.
- L. Cause of Action Belonging to Decedent – No action which had not been barred as of the date of death shall be barred by the applicable statute of limitation sooner than six months after death. A cause of action which, but for the death would have been barred less than six months after death, is barred six months after death, unless otherwise tolled. N.J.S.A. 2A:14-23.1.

CONFLICTS RULE (TORTS)

Flexible “governmental-interest” analysis, on an issue-by-issue basis, with each issue receiving separate analysis. Clawans v. United States, 75 F.Supp.2d 368 (D.N.J. 1999); Erny v. Estate of Merola, 171 N.J. 86, 792 A.2d 1208 (2002); Fu v. Fu, 160 N.J. 108, 733 A.2d 1133 (1999); Restatement (Second) of Conflict of Laws § 145.

CONTRIBUTORY/COMPARATIVE NEGLIGENCE

- A. Comparative Negligence (Modified) – Contributory negligence shall not bar recovery if such negligence is not greater than the fault of the party against whom recovery is sought or not greater than the combined fault of all parties against whom recovery is sought (i.e., negligence of claimant must be no more than 50 percent of all fault contributing to injury in order for there to be a recovery). Damages shall be diminished by percentage of negligence attributable to person recovering. N.J.S.A. 2A:15-5.1 to – 5.2 (Comparative Negligence Act); Waterson v. General Motors Corporation, 111 N.J. 238, 544 A.2d 357 (1988); Burt v. West Jersey Health Systems, 339 N.J.Super. 296, 771 A.2d 683 (App. Div. 2001).
- B. Wrongful Death – Comparative negligence can be asserted as a defense in a wrongful death action. Del Tufo v. Township of Old Bridge, 147 N.J. 90, 685 A.2d 1267 (1996).
- C. Assumption of Risk – No longer valid defense under New Jersey law. Cordy v. Sherwin Williams Company, 975 F.Supp. 639 (D.N.J. 1997); McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238 (1963).

CONTRIBUTION AND INDEMNITY

- A. Contribution – Yes. N.J.S.A. 2A:53A-1 to –5 (Joint Tortfeasors Contribution Law). Pro rata apportionment of liability set forth in N.J.S.A. 2A:53A-3 modified by Comparative Negligence Act to provide apportionment of liability based on proportion of fault as determined by trier of fact. Dunn v. Praiss, 139 N.J. 564, 656 A.2d 413 (1995).
 - (1) Employer’s liability – In cases involving tortfeasors sued by employee covered by Workers’ Compensation Act, employer is not a “joint tortfeasor” within meaning of Joint Tortfeasors Contribution Law; therefore, tortfeasors may not obtain contribution by way of third-party action against employer. Bertone v. Turco Products, Inc., 252 F.2d 726 (3d Cir. 1958); Ramos v. Browning Ferris Industries of South Jersey, Inc., 103 N.J. 177, 510 A.2d 1152 (1986).
 - (2) Settling tortfeasors -
 - (a) Right of contribution does not exist when all tortfeasors settle claims because there can no longer be an adversary verdict. Tefft v. Tefft, 192 N.J.Super. 561, 471 A.2d 790 (App. Div. 1983).
 - (b) Percentage of liability attributable to settling co-defendant will be deducted from verdict against other co-defendants found liable. Sullivan v. Combustion Engineering, 248 N.J.Super. 134, 590

A.2d 681 (App. Div. 1991), certif. denied, 126 N.J. 341, 598 A.2d 897 (1991).

- (3) Collateral sources – In civil actions brought for personal injury or death, tort judgment or settlement is reduced by duplicative benefits from any other source except workers' compensation benefits or proceeds from life insurance policy, less applicable premium paid by plaintiff or member of plaintiff's family. N.J.S.A. 2A:15-97; Perreira v. Rediger, 169 N.J. 399, 778 A.2d 429 (2001).

B. Indemnity –

- (1) Contractual – Yes, but contract will not be construed to indemnify indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms. Ramos v. Browning Ferris Industries of South Jersey, Inc., 103 N.J. 177, 510 A.2d 1152 (1986).
- (2) Implied – Yes, but to be entitled to indemnification as one who is secondarily or vicariously liable, party must be without fault. Ramos v. Browning Ferris Industries of South Jersey, Inc., 103 N.J. 177, 510 A.2d 1152 (1986).

C. Joint and Several Liability – Except with regard to environmental tort actions, the party recovering may recover as follows:

- (1) The full amount of damages from any party determined by the trier of fact to be 60 percent or more responsible for the total damages. N.J.S.A. 2A:15-5.3a.
- (2) Only that percentage of the damages attributable to that party's fault from any party determined by the trier of fact to be less than 60 percent responsible for the total damages. N.J.S.A. 2A:15-5.3b.

PUNITIVE DAMAGES

A. Wrongful Death – No. Smith v. Whitaker, 313 N.J.Super. 165, 713 A.2d 20 (App. Div. 1998), aff'd., 160 N.J. 221, 734 A.2d 243 (1999).

B. Personal Injury – Yes. N.J.S.A. 2A:15-5.9 to – 5.17 (Punitive Damages Act).

- (1) Pleadings – Punitive damages must be specifically requested in complaint. N.J.S.A. 2A:15-5.11.
- (2) Standard of proof – Plaintiff must prove by clear and convincing evidence that harm suffered was the result of defendant's acts or omissions and that such acts or omissions were actuated by actual malice or by wanton and

willful disregard of persons who foreseeably might be harmed by those acts or omissions. N.J.S.A. 2A:15-5.12.

(3) Bifurcated trials –

- (a) Trial to be bifurcated if requested by any defendant. N.J.S.A. 2A:15-5.13a.
- (b) In first stage of bifurcated trial, trier of fact determines liability for and amount of compensatory or nominal damages; evidence relevant only to punitive damages is not admissible at this stage. N.J.S.A. 2A:15-5.13b; Baglini v. Lauletta, 338 N.J.Super. 282, 768 A.2d 825 (App. Div. 2001), certif. denied, 169 N.J. 607, 782 A.2d 425 (2001).
- (c) Punitive damages may be awarded only if compensatory damages are awarded in first stage of trial; award of nominal damages (not designed to compensate plaintiff and less than \$500) will not support a punitive damages award. N.J.S.A. 2A:15-5.13c.
- (d) Trier of fact decides liability for punitive damages in second stage of trial. N.J.S.A. 2A:15-5.13d.
- (e) Award of punitive damages must be specific as to a particular defendant. N.J.S.A. 2A:15-5.13e.

(4) Cap on award –

- (a) Except for causes of action based on bias crimes, the Law Against Discrimination, violation of confidentiality of AIDS or HIV information, or sexual abuse of children or in cases where a defendant has been convicted of refusing to submit to a chemical test under the Motor Vehicle Law, punitive damage awards are limited to five times the liability of a particular defendant for compensatory damages or \$350,000, whichever is greater. N.J.S.A. 2A:5-5.14.
- (b) Reasonableness of award – Jury’s punitive damage award should be overturned only in clear cases. N.J.S.A. 2A:15-5.14a; St. James v. Future Finance, 342 N.J.Super. 310, 776 A.2d 849 (App. Div. 2001), certif. denied, 170 N.J. 388, 788 A.2d 773 (2001).
- (c) Jury not to be informed of cap. N.J.S.A. 2A:15-5.16.

C. Covered by Insurance – No. Insurance coverage for punitive damages is offensive to public policy and frustrates purposes of punitive damage awards.

Johnson & Johnson v. Aetna Casualty and Surety Company, 285 N.J.Super. 575, 667 A.2d 1087 (App. Div. 1995).

PRODUCTS LIABILITY LAW

Statutory Cause of Action – All products liability actions filed on or after July 22, 1987 are governed by the New Jersey Product Liability Act (NJPLA), N.J.S.A. 2A:58C-1 to – 11; Tirrell v. Navistar International, Inc., 248 N.J.Super. 390, 591 A.2d 643 (App. Div. 1991), certif. denied, 126 N.J. 390, 599 A.2d 166 (1991). Common law actions for negligence and breach of implied warranty are subsumed by the NJPLA when asserted claims fall within Act’s purview; therefore, only claims sounding in strict liability in tort apply when NJPLA governs plaintiff’s cause of action. Universal Underwriters Insurance Group v. Public Service Electric & Gas Company, 103 F.Supp.2d 744 (D.N.J. 2000); Ramos v. Silent Hoist and Crane Co., 256 N.J.Super. 467, 607 A.2d 667 (App. Div. 1992).

AVIATION STATUTES

- A. General – N.J.S.A. 6:1-1 to –99; N.J.S.A. 6:2-1 to –12 (Uniform Aeronautics Law); N.J.S.A. 6:3-1 (Federal Aid for Airports); N.J.S.A. 6:5-1 to –9 (Service of Process Upon Nonresident).
- B. Liability –
 - (1) Forced Landing – Owner of aircraft is absolutely liable for injuries to persons or property on land or water; if aircraft is leased at the time of injury, both owner and lessee shall be liable; a pilot or aircrew member who is not the owner or lessee shall be liable only for the consequences of his or her own negligence. N.J.S.A. 6:2-6 to –7; Torchia v. Fisher, 95 N.J. 43, 468 A.2d 1061 (1983)(owners of stolen aircraft absolutely liable for damage caused by their planes to persons and property on the ground); Adler’s Quality Bakery, Inc. v. Gasteria, Inc., 32 N.J. 55, 159 A.2d 97 (1960)(absolutely liable owner entitled to seek contribution from others whose fault contributed to injuries of victims in accordance with ordinary tort law principles).
 - (2) Injury or Death of Passengers – Governed by applicable New Jersey tort law. N.J.S.A. 6:2-9.
 - (3) Collison – Governed by law applicable to torts on land. N.J.S.A. 6:2-8.