

STATE LAW SUMMARY

Overview of the State of New Jersey

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Overview of the State of New Jersey

Court System

A. Trial Courts

The structure of New Jersey's court system is among the simplest in the nation. There are only a few basic types of courts in the state: Municipal courts, Tax court, state Superior Court, which includes the trial courts, an Appellate Division and the New Jersey Supreme Court. The Chief Justice of the Supreme Court of New Jersey is Stuart Rabner.

Civil cases in which the amounts in controversy exceeds \$15,000 are heard in the Civil Division of the Superior Court. Cases in which the amounts in controversy are between \$3,000 and \$15,000 are heard in the Special Civil Part of the Civil Division. Those in

which the amounts in controversy are less than \$3,000 are also heard in the Special Civil Part and are known as small claims cases. In all, about 560,000 cases are heard in the Civil Division and Special Civil Part.

Civil cases in which monetary damages are not being sought are heard in the General Equity Division of Superior Court. General Equity judges handle non-jury cases such as those involving trade secrets, labor matters, foreclosures and other disputes in which court relief, often in the form of restraining orders, is sought on an emergency basis.

In New Jersey, all personal injury and auto cases are placed into mandatory, non-binding arbitration. (N.J. Court R. 4:21A-1(a)(1) and (2)). This takes place 45 days after the close of discovery and is usually held before a panel of 1 to 3 arbitrators who are attorneys within the county. These arbitrations are non-binding and, therefore, any party may file a demand for trial de novo within 30 days of the award. However, under the de novo rule, if a party is not at least 20% more successful on the ultimate judgment, they could be held for costs and reasonable attorney's fees, up to \$750. (N.J. Court R. 4:21A-6(3) and (4)).

The number of jurors on civil trials is usually 6, although some judges may impanel two additional jurors.

The more conservative counties are rural communities such as Cumberland, Salem and Hunterdon. Other conservative counties are those with older, more homogenous residents such as Somerset, Warren, Morris, Burlington, Cape May, Gloucester, Monmouth, Ocean and Sussex.

The more liberal counties include those with diverse cultural backgrounds in larger cities such as Trenton, Elizabeth, Jersey City, Newark, New Brunswick, Atlantic City, Hackensack, Paterson and Camden. These counties are Mercer, Union, Hudson, Essex, Middlesex, Atlantic, Bergen, Passaic, and Camden.

[Civil Division](#) – Link to New Jersey Superior Court – civil division.

In order to avoid the varying counties, removal of an action to federal court should be considered. Removal to federal court offers several advantages. First, plaintiff's counsel is generally less familiar with federal court. Second, the case is assigned to a federal judge and a magistrate judge who will move the case at a faster pace. Third, the jury pool is drawn from a number of counties so it is more diverse.

In order for the case to be removable to federal court, the case must meet the requirements for "diversity jurisdiction", meaning that none of the plaintiffs is from the same state as any of the defendants and the amount in controversy must exceed \$75,000. A notice of removal must be filed within 30 days after the receipt of the initial pleading by the defendant or within 30 days after the matter becomes removable, if the action was not originally one that could be removed to federal court.

B. Appellate Courts

The Appellate Division of the Superior Court is New Jersey's intermediate Appellate Court. It is comprised of 33 judges who sit in two and three judge panels chosen from parts consisting of four or five judges. Appellate Division judges hear appeals from decisions of the trial courts, the Tax Court and State administrative agencies. The Appellate Division decides 6,500 to 7,000 appeals and approximately 7,500 motions each year.

Each part is administered by a Presiding Judge. The Honorable Ariel A. Rodríguez serves as the Court's Acting Presiding Judge for Administration. The chambers of the Appellate Division judges are located in Atlantic City, Jersey City, Morristown, New Brunswick, Newark, Trenton, West Long Branch, and Westmont. Arguments are heard in courtrooms located in Atlantic City, Morristown, New Brunswick, Newark, and Trenton, as well as other locations from time to time.

The Appellate Division considers appeals timely taken as of right from the final judgments of the Law Division and the Chancery Division of the Superior Court, final judgments of the Tax Court and final decisions of State administrative agencies. Litigants requiring Appellate Division review of interlocutory or interim orders of a trial court or agency may do so only with leave of the Court. This requires the filing of a motion for leave to appeal, which may be granted and ruled upon immediately, granted and permitted to be processed for a later determination, or denied. If leave is denied, the party seeking review may do so as of right following the final judgment of the trial court or final decision of the administrative agency.

Some appeals are, however, disposed of through other programs established by the Appellate Division for the processing of certain types of appeals as described below:

Civil Appeals Settlement Program (CASP) is designed to identify, at the initial phase of processing, those appeals which could possibly be settled. Alternatively, appeals with very complex issues may be selected for a pre-argument conference in order to delineate and clarify those issues prior to briefing.

Bond requirements are addressed on a case-by-case basis generally, with the assigned judge addressing whether a bond is required.

Procedural

A. Venue

Venue is governed by New Jersey Rule of Court 4:3. Venue in the Superior Court shall be laid by Plaintiff in the initial filing of the complaint. If the matter involved real property, venue is proper in the county where the property lies. In all other matters, venue shall be laid in the county in which the action arose, or in any county in which a party resides at the time of commencement of the action, or in the county where the summons was served on a nonresident defendant. Venue may be challenged under these rules pursuant to a motion filed within 10 days after the date for the filing of any

responsive pleading prescribed by R. 4:6-1, or, if the action is brought pursuant to R. 4:67 (Summary actions), on or before the return date. If not so made, objections to venue shall be deemed waived except that if the moving party relies on R. 4:3-3(a)(2), substantial doubt that a fair and impartial trial can be had in the county where venue is laid, the motion may be made at any time before trial. (N.J.Court R. 4:3-3(B)).

B. Statute of Limitations

The statute of limitations in New Jersey for bodily injury claims based on negligence is two years from the date of injury. (N.J.S.A. 2A:14-2; *Raskulinecz v. Raskulinecz*, 141 N.J. Super. 148, 357 A.2d 330 (Law Div. 1976)).

A cause of action for property damage must be filed within six years from the time of injury. (N.J.S.A. 2A:14-1).

A wrongful death action must be filed within two years from the date of death. (N.J.S.A. 2A:31-3).

A breach of contract action must be filed within six years from the time the cause of action accrued. (N.J.S.A. 2A:14-1). The cause of action accrues when the breach is or should have been discovered. (*Spring Motors Distribution, Inc. v. Ford Motor Co.*, 191 N.J. Super. 22, 465 A.2d 530 (App. Div. 1983)).

Contract actions are governed by the Uniform Commercial Code and is four years. (N.J.S.A. 12A:2-725). By agreement, the parties may reduce the period of limitation to not less than 1 year, but they may not extend it beyond 4 years. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. (N.J.S.A. 12A:2-725).

A formal demand for arbitration seeking reimbursement for PIP benefits must be filed within two years of the date the PIP application was received by the insurer. (N.J.S.A. 39:6A-9.1)

C. Time for Filing An Answer

An answer to a complaint must be filed within 35 days of service of the complaint.

D. Dismissal Re-Filing of Suit

Matters can be dismissed without prejudice and re-filed either within the statute of limitations or, if all parties agree to waive statute of limitations defenses, then by consent.

The court will administratively dismiss actions that are not prosecuted for more than 120 days, or will dismiss same on motion by a party for failure to prosecute.

Liability

A. Negligence

New Jersey follows the traditional rule for establishing a cause of action in negligence. Plaintiff must prove that defendant had a duty to protect plaintiff from injury, defendant failed to perform that duty, and plaintiff's injuries were proximately caused by defendant's failure to perform that duty. (*McKinley v. Slenderella Systems of Camden, N.J., Inc.*, 63 N.J. Super. 571 (App. Div. 1960)).

The degree of care required of defendant must be in proportion to the apparent risk. As the danger becomes greater, defendant is required to exercise greater care commensurate with the danger. (*Harpell v. Public Service Coordinated Transport*, 20 N.J. 309 (1956); *Kinsey v. Hudson and Mahattan R. Co.*, 130 N.J.L. 285 (Sup. Ct. 1943), *aff'd*, 131 N.J.L. 16` (E&A 1944)).

The modified comparative negligence statute will not bar recovery if plaintiff's negligence was not greater than the negligence of the defendants. Therefore, plaintiff may recover damages only if plaintiff is found to be less than 51 percent at fault. Any damage award received by plaintiff will be reduced by plaintiff's percentage of negligence, if any. (N.J.S.A. 2A:5-5.1).

Generally, proof of a violation of a statutory duty is not the same as proof of negligence, although it is evidence to be considered by the jury. Where, however, a statute specifically incorporates a common-law standard of care, a jury finding of a statutory violation constitutes a finding of negligence.

Similarly, where a following automobile fails to maintain a reasonably safe distance behind the automobile ahead in violation N.J.S.A. 39:4-89 and the failure to do so results in a collision, the violation of the statute is negligence per se. (*Dolson v. Anastasia*, 55 N.J. 2, 258 A.2d 706 (1969); N.J.S.A. 39:4-89).

B. Negligence Defenses

Standard Defenses that should be raise in NJ: The answer to the complaint must set forth defenses of accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppels, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and jurisdictional defenses.

In addition, in motor vehicle cases, it is appropriate to plead failure to wear a seat belt, failure to exceed the no-fault verbal threshold (if applicable), failure to mitigate dmages, and the collateral source rule.

Affirmative Defenses: Rule 4:5-4 provides in part that "a responsive pleading shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defense...." An affirmative defense is waived if not pled or otherwise timely raised. (*Brown v. Brown*, 208 N.J. Super. 372, 506 A.2d 29 (App. Div. 1986)).

New Jersey recognizes the affirmative defenses of contributory negligence, assumption of risk (*Oldring v. Metropolitan Life Ins. Co.*, 492 F.Supp. 994 (D.N.J. 1980); last clear chance (*Latta vv. Carlfield*, 158 N.J. Super. 151, 385 A.2d 910 (App. Div. 1978); *aff'd*, 79 N.J. 128, 398 A.2d 91(1979); and the entire controversy doctrine (*Cogdell v. Hospital*

Center of Orange, 116 N.J. 7 (1989)'560 A.2d 1169 and Cafferata v. Peyser, 251 N.J. Super. 256, 597 A.2d 1101 (App. Div. 1991).

Sudden Emergency – To invoke the sudden emergency doctrine and to be entitled to that charge to the jury, a party must have been confronted by a sudden emergency over which he had no control, without fault on his part. The doctrine negates negligence if the jury finds that the party chose one of alternative reasonably prudent courses of action, even though, by hindsight, another course of action would have been safer. If applicable, a jury charge incorporating the sudden emergency doctrine is available both on the issue of negligence of a defendant and on the issue of contributory negligence of a plaintiff. *Roberts v. Hooper*, 181 N.J. Super. 474 (1981).

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross negligence is the want or absence of, or failure to exercise slight care or diligence. (*Draney v. Bachman*, 138 N.J. Super. 503, 509-510 (Law Div. 1976) quoting *Oliver v. Kantor*, 122 N.J.L. 528, 532 (Sup. Ct. 1939), *aff'd* 124, N.J.L. (E. & A. 1941)).

Gross negligence occurs on the continuum between ordinary negligence and intentional misconduct. The continuum runs from (1) ordinary negligence, through (2) gross negligence, (3) willful and wanton misconduct, (4) reckless misconduct to (5) intentional misconduct. The difference between negligence and gross negligence is a matter of degree. (*Monaghan v. Holy Trinity Church*, 275 N.J. Super. 594, 599 (App. Div. 1994); *Stuyvesant Assoc. v. Doe*, 221 N.J. Super. 340, 344 (Law Div. 1987)). Gross negligence does not imply willful or wanton misconduct or recklessness. *Stuyvesant Associates*, *supra*. “Essentially, the concept of willful and wanton misconduct implies that a person has acted with reckless disregard for the safety of others. Where an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences, the law holds him responsible for the injuries he causes.” (*G.S. v. Dept. Human Serv. DYFS*, 157 N.J. 161, 179 (1999)).

D. Negligent Hiring and Retention

New Jersey recognizes a cause of action for negligent hiring, supervision, and training. (*Scarfi v. Aetna Casualty & Surety Co.*, 233 N.J. Super. 509, 559 A.2d 459 (App. Div. 1989)). An action for negligent hiring or retention of an employee requires proof that the employer knew or had reason know of the particular unfitness, incompetence, or dangerous attributes of the employee and the employer could reasonably have foreseen that those qualities created a risk of harm to other persons. Additionally, the employee’s unfitness or dangerous characteristics must have proximately caused the injury. (*DiCosala v. Kay*, 91 N.J. 159, 450 A.2d 508 (1982)).

There is one unreported case interpreting New Jersey law which holds that where an employer has admitted that the employee acted within the course and scope of his

employment, evidence of negligent, hiring, training, supervision or retention becomes unnecessary, irrelevant, redundant and prejudicial. (Fallon v. Marxen, 95-cv-1546 (U.S.D.C. N.J. 1997)).

E. Negligent Entrustment

New Jersey recognizes a cause of action for negligent entrustment based on the ownership and use of a vehicle. (Salem Group v. Oliver, 128 N.J. 1, 607 A.2d 138 (1992)). An owner of a vehicle who loans or rents a vehicle to another is not vicariously liable for the borrowee's negligence unless that individual is an agent or employee of the owner. Other than noted above, the owner of a motor vehicle may be liable to a third party only if there is an agency relationship between the owner and the driver. (Haggerty v. Cedeno, 267 N.J. Super. 114, 630 A.2d 848 (Law Div. 1993), aff'd, 279 N.J. Super. 607, 653 A.2d 1166 (App. Div. 1995), cert. denied, 141 N.J. 98, 660 A.2d 1197 (1995)). Moreover, neither an accommodation signer nor co-lessee of a vehicle has any duty to determine the competence or fitness of a lessee to operate the vehicle, and neither may be held liable for injuries caused by a lessee's incompetence as a driver. (Baran v. Clouse Trucking, Inc., 225 N.J. Super. 230, 542 A.2d 34 (Ap. Div.), cert. denied 113 N.J. 353, 550 A.2d 463 (1988)).

F. Dram Shop

The Dram Shop statute is formally titled, NJ Licensed Alcoholic Beverage Server Fair Liability Act, N.J.S.A. 2A:1 to 7). Under this statute, the Legislature provided a civil remedy to "[a] person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server may recover damages from a licensed alcoholic beverage server only if 'the server was negligent (i.e. served a visibly intoxicated person,...), the injury was proximately caused by the negligent service of alcoholic beverages, the injury was proximately caused by the negligent service of alcoholic beverages, and the injury was a foreseeable consequence of the negligent service.'" (N.J.S.A. 2A: 22A-5(a)).

G. Joint and Several Liability

A recovering party may recover the full amount of its damages against any party determined to be responsible for 60% or more of the total damages. If a party is found to be less than 60% responsible for total damages, it can be held responsible only for payment of that percentage of damages directly attributable to its negligence. (N.J.S.A. 2A:15-5.3).

H. Wrongful Death and/or Survival Actions

New Jersey permits a wrongful death action to be brought in the name of the administrator of the estate of the decedent for injuries which were caused by a wrongful act, neglect, or default and for which, if death had not ensued, the person would have been entitled to recover damages. ((N.J.S.A. 2A:31-1).

The New Jersey's Survivor's Act was intended to supplement the Wrongful Death Act and therefore, affords complete and adequate redress to the estates of those who were injured in person or property by injuries causing the death. (N.J.S.A. 2A:15-3). To that

end, the Act allows the decedent's estate to recover any loss to the decedent that accrued between injury and death. The Survivor's Act, in contrast to the Wrongful Death Act, does not contain an express limitation on the types of damages recoverable under the Act. (N.J.S.A. 2A:15-3). Under New Jersey law, punitive damages are permitted under the Survivor's Act. (N.J.S.A. 2A:15-3).

I. Vicarious Liability

Respondeat Superior – The doctrine has traditionally been used to hold an employer liable for the torts of its employees when the employee was acting within the scope of employment. (*Gilborges v. Wallace*, 78 N.J. 342, 396 A.2d 338 (1978); *Wright v. Globe Porcelain Co.*, 72 N.J. Super. 414, 179 A.2d 11 (App. Div. 1962); W. Prosser, *Law of Torts*, 460-61 (4th Ed. 1971). The employee's action will generally be deemed to be within the scope of employment if it is the kind of action that the employee is employed to perform, it occurs within the authorized time and space limits, and it is activated, at least in part, by a purpose to serve the employer. (*DiCosala v. Kay*, 91 N.J. 159, 450 A.2d 508 (1982).

New Jersey has adopted the "dual purpose" rule which states that when a trip serves the employee/driver's private affairs and is also in furtherance of the master's business, the master is subject to liability for the employee's actions. (*Gilborges v. Wallace*, 78 N.J. 342, 296 A.2d 338 (1978).

The determination of whether a deviation from the required route is a detour (which allows for recovery against an employer) or a frolic (which relieves the employer of liability) is a fact-based determination to be made by a jury. (*Deleson Steel Co., Inc. v. Hartford Ins. Group*, 148 N.J. Super. 336, 372 A.2d 663 (Law Div. 1977).

In addition, where a transportation company leases a vehicle from its owner by written agreement, a rebuttable presumption arises that the driver of the vehicle was operating the vehicle as an agent of the lessee. (*Bartell v. Razzano*, 291 A.2d 22, 119 N.J. Super. 243 (App. Div. 1972).

Placard Liability – A lessee which is a DOT authorized carrier assumes full responsibility for leased equipment and the entire combination. Under case law, the lessee has liability for the negligence of the lessor or its driver at all times while the lessee's placards are displayed on the leased equipment. Under some federal cases, that liability has continued after the lessee's business has been completed, so long as the placard remains on the equipment. Although recent case law indicates that the existence of a lease is not dispositive of whether a bobtail or trucking insurer is primary, the presence of the lessee's decals on a leased vehicle gives rise to a "strong presumption" that the vehicle is under the lessee's possession and control. (*Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (1969) cert. denied, 395 U.S. 935 (1969).

Liability for Unauthorized Passengers – If an employee has express or implied permission to carry passengers, the passenger is considered an invited guest and the employer may be held liable for an injury to the passenger. (*Yanowitz v. Pinkham*, 111 N.J. Law. 448, 168 A. 770 (err. & App. 1933). However, if there is no consent by the

employer, the carriage of a passenger is outside of the employee's scope of employment and there is no liability on the part of the employer. (Id.)

J. Exclusivity of Workers' Compensation

Under New Jersey law, an employee is barred from suing his/her employer directly for job related injuries. Employees can only recover against their employers for job related injuries through the workers' compensation system. (N.J.S.A. 34:15-1).

In situations where an employee is injured on the job by someone other than his employer, the employee can sue the responsible party for damages and can also file a workers compensation claim. However, in such circumstances the workers compensation carrier will have a statutory lien against any money that the injured party recovers from the responsible party, equal to 2/3 of the workers compensation benefits that have been paid on the injured party's behalf.

Under the New Jersey Workers Compensation Act injured employees are barred from suing not only their employer, but co-employees. (N.J.S.A. 34:15-8).

Employers lose the protection of the workers' compensation bar and may be sued directly for job related injuries where they have committed an intentional wrong. (Tomeo v. Thomas Whitesell Construction, 176 N.J.366 (2003)). In order for an employer's act to be considered "intentional", two conditions must be satisfied: (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize.

Damages

A. Statutory Caps on Damages

See section on Punitive Damages below.

B. Compensatory Damages for Bodily Injury

Damages recoverable in personal injury action – Plaintiff is generally entitled to recover compensatory damages if he/she has met the burden of proving some loss or injury and if the jury has been provided some evidence from which to estimate the amount of damages, even if plaintiff is unable to prove the exact measure of damages. (Nappe v. Anschelwitz, Barr, Ansell & Bonello, 97 N.J. 37, 477 A.2d 1224 (1984)). Damages are generally awarded to compensate plaintiff for past and future medical expenses and lost wages directly attributable to defendant's negligence, as well as pain and suffering. A spouse may recover damages for loss of consortium which includes fair and reasonable compensation for the loss of the spouse attending to household duties, loss of companionship, loss of comfort, and loss of marital relations. (Tichenor v. Santillo, 218 N.J. Super. 165, 527 A.2d 78 (App. Div. 1987); N.J. Sourt R. 4:28-3(b)).

C. Collateral Source

The Collateral Source Rule prevents plaintiff from obtaining a double recovery in excess of the party's actual loss. (N.J.S.A. 2A:15-97) the rule is also intended, to some extent, to shift the burden from liability insurance carriers to health and disability carriers. (Fayer v. Keene Corp., 311 N.J. Super. 200 (App. Div. 1998); 709 A.2d 808 (1998)). Thus a plaintiff injured as a result of a third party's negligence who received medical treatment paid by his health insurer cannot recover his medical expenses from the defendant. The exception to this rule is contained in the no fault provisions of the motor vehicle and traffic regulations which provide that the benefits allowed for personal injury protection shall be payable as loss accrues without regard to collateral sources, except that benefits collectible under workers compensation insurance, employees temporary disability benefit statutes, Medical provided under federal law and benefits in fact collected, that are provided under federal law to active and retired military personnel shall be deducted from the benefits collectible. (N.J.S.A. 39:6A-6). The New Jersey Supreme Court has ruled that the collateral source rule prohibits a health insurer from asserting its rights of reimbursement from the plaintiff or subrogation against a tortfeasor which may arise by express agreement between the insurance company and the insured, statute or an equitable right of subrogation. (Perreira v. Rediger, 169 N.J. 399).

Effect of Settlement with a joint tortfeasor, even if for less than the joint tortfeasor's share of the pro rata claim, reduced plaintiff's claim by the pro rata amount and bars an action for contribution against the settling defendant. If the settling party is found not to be a joint tortfeasor, plaintiff's claim is reduced by the amount received from the settling defendant. (Theobald v. Angelos, 44 N.J. 228, 208 A.2d 129 (1965)).

D. Pre-Judgment/Post judgment Interest

Except where provided by statute with respect to a public entity or employee, and except as otherwise provided by law, the court shall, in tort actions, including products liability actions, include in the judgment simple interest, calculated as hereafter provided, from the date of the institution of the action or from a date 6 months after the date the cause of action arises, whichever is later, provided that in exceptional cases the court may suspend the running of such prejudgment interest. Prejudgment interest shall not, however, be allowed on any recovery for future economic losses. Prejudgment interest shall be calculated in the same amount and manner provided for by paragraph (a) of this rule except that for all periods prior to January 1, 1988 interest shall be calculated at 12% per annum. The contingent fee of an attorney shall not be computed on the interest so included in the judgment. (N.J. Court R. 4:42-11). Post Judgment interest is governed by the same rule.

E. Damages for Emotional Distress

Negligent Infliction of Emotional Distress – New Jersey recognizes a cause of action for negligent infliction of emotional harm to a bystander provided that four elements are established: (1) the death or serious physical injury of another was caused by defendant's negligence; (2) a marital or intimate family relationship existed between

plaintiff (bystander) and the injured person; (3) there was an observation of death or serious physical injury by the bystander who witnessed the death or physical injury at the scene of the accident; and (4) the observation resulted in severe emotional distress. Moreover, the “intimate family relationship” standard has been liberalized to include relationships outside those of blood or marriage, such as an engaged couple living together who are considering marriage. (*Dunphy v. Gregor*, 136 N.J. 99, 642 A.2d 372 (1994)).

F. Wrongful Death and/or Survival Action Damages

Damages in Wrongful Death Action – Plaintiffs can recover only for pecuniary damages resulting from death as well as hospital, medical and funeral expenses. (N.J.S.A. 2A:31-5). Pecuniary losses include the value of the decedent’s services, companionship (but not solace), guidance and nurture of children, and future lost earnings, reduced by income taxes and the cost of necessities, had the decedent lived. (N.J.S.A. 2A:31-5; *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980)).

Survival Action – The Survival Act is designed to compensate for damages sustained by the decedent prior to death. (N.J.S.A. 2A:15-3). These losses include pain and suffering and loss of earnings between the time of injury and death. The pain and suffering of decedent must be conscious pain and suffering. (*Eyoma v. Falco*, 247 N.J. Super. 435, 589 A.2d 653 (App. Div. 1991)).

While no New Jersey state court has yet addressed the validity of a claim for fear of impending death, the issue has been addressed in an unpublished opinion issued by the District Court of New Jersey. (*In Re Jacoby Airplane Crash litigation*, D.N.J. 2006, 2006 WL 3511162 (D.N.J.)) The court held that the New Jersey Supreme Court would likely permit evidence of fear of impending death, given the evolution of New Jersey law generally with respect to emotional distress claims. However, expert testimony was necessary to support the claim.

G. Punitive Damages

Punitive damages may be awarded in a personal injury action based on negligence. To warrant an award of punitive damages, defendant’s conduct must amount to intentional wrongdoing in the sense of an “evil-minded act”, or an act accompanied by a wanton and willful disregard of the rights of another. (*Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 477 A.2d 1224 (1984); *Wolfe v. Protcor & Gamble Co.*, 555 F.Supp. 613 (D. N.J. 1982)). The key to the recovery of punitive damages is the intentional aspect of the wrongful act.

The Punitive Damages Act became law in 1995 as part of New Jersey’s Tort Reform. The Punitive Damages Act provides: (1) punitive damages cap of \$350,000 or five times the liability of the defendant for compensatory damages, whichever is greater; (2) changes the standard of proof from “preponderance of the evidence” to “clear and convincing evidence” (3) requires an award of compensatory damages of at least \$500; and (4) is effective for causes of action filed on or after October 27, 1995. (N.J.S.A. 2A:15-5.9 et. Seq.)

New Jersey, like many other states, has decided that there should not be an exception for those torts in which liability is vicariously imposed on the employer for the wrong of his servant. (*Johnson & Johnson v. Aetna Cas.*, 285 N.J. Super. 575 (1995).

Defendants are not permitted to insure for punitive damages because the public policy for punitive damages, that is punishment and deterrence, would be defeated. (*Johnson & Johnson v. Aetna Cas.*, 285 N.J. Super. 575 (1995).

H. Diminution in Value of Damaged Vehicle

Diminished value is a viable theory of recovery for property damages in New Jersey. (*Newman v. Pasternack*, 103 N.J.L. 434 (E.&A. 1927). Expert testimony is required in order to establish diminished value and evidence of cost or repair is generally admissible as a proper element to be considered in ascertaining diminished value. (*Romano v. Galaxy*, 399 N.J. Super. 470 (2008) and *Manda v. City of Orange*, 77 N.J.L. 285 (Sup. Ct. 1909).

I. Loss of Use of Motor Vehicle

Under New Jersey Law, recovery is permitted for all damages naturally and proximately caused by wrongful conduct, including loss of use. (*Ward v. Huff*, 94 N.J.L. 81 (Sup. Ct. 1920), as modified by *Winkler v. Hartford Acc. And Ind. Co.*, 66 N.J. Super. 22 (App. Div. 1961). Loss of use has been defined as those damages occasioned to the plaintiff by reasons of the detention, including personal loss, inconvenience and capital outlay. (*Taylor v. Brewer*, 94 N.J.L. 392, 393 (Sup. Ct. 1920), as modified by *Winkler v. Hartford Acc. And Ind. Co.*, 66 N.J. Super. 22 (App. Div. 1961).

Evidentiary Issues

A. Preventability Determination

New Jersey presently does not have case law on the issue of admissibility of preventability determinations.

B. Traffic Citation from Accident

Evidence of a defendant's guilty plea to a traffic offense is admissible in a civil suit to establish liability arising from the same occurrence unless the plea is made with a civil reservation. (*Eaton v. Eaton*, 119 N.J. 628, 575 A.2d 858 (1990). A civil reservation is a specific reservation made on behalf of defendant against the use of a guilty plea in a civil suit. In particular, pursuant to R. 7:6-2(a)(1), a court may, upon the request of a defendant at the time a plea is entered, order that the guilty plea shall not be evidential in any civil proceeding. (N.J.Court Ru. 7:6-2(a)(1)). The issuance of a traffic citation alone is not admissible evidence. (*Nesta v. Meyer*, 100 N.J. Super. 434, 242 A.2d 386 (App. Div. 1968). If a civil reservation is obtained, issuance of the ticket and guilty plea are discoverable, but neither will be admissible at trial.

The Careless Driving Statute is the best example of this principle because it provides that a person is guilty of careless driving if a person drives a vehicle "carelessly or

without due caution and circumspection, in a manner so as to endanger or be likely to endanger, a person or property.” (Eaton v. Eaton, 119 N.J. 628, 575 A.2d 858 (1990); Dolson v. Anastasia, 55 N.J. 2, 258 A.2d 706 (1969); N.J.S.A. 39:4-97).

C. Failure to Wear a Seat Belt

The Seat Belt Defense – Although not the basis of a defense, New Jersey has a mandatory seat belt law. (N.J.S.A. 39:3-76.2e-h, j-k) First, the failure to wear a seat belt is not negligence per se. (Waterson v. General Motors Corp., 111 N.J. 238 (N.J.) 544 A.2d 357) Second, the defendant has the burden of producing evidence that nonuse of a seat belt enhanced plaintiff’s injuries. (Id.) third, assuming the defense has been properly raised, any percentage of fault attributed to a plaintiff will not reduce the full amount of damages. (Id.) rather, only those injuries and damages determined to have been caused by the failure to use a seat belt will be diminished and, as a result of the unique formula prescribed by the court, the damages will never be reduced in total. (Id.) recently, a New Jersey court held that a defendant may also present evidence of a rear seat passenger’s failure to wear a seatbelt to prove that party’s comparative negligence in order to reduce her damages. (Marken-Lambert v. Detsagovrakis, PAS-L-1374-04). This is significant as back seat passengers over the age of 18 are not required by law to wear a seat belt. The court held that the seat belt defense is one based on common sense and its applicability should not depend on where one is seated in the automobile.

D. Failure of Motorcyclist to Wear a Helmet

New Jersey Helmet Law – N.J.S.A. 39:3-76.7- No person shall operate or ride upon a motorcycle unless he wears a securely fitted protective helmet of a size proper for that person and of a type approved by the federal DOT. Such a helmet must be equipped with either a neck or chin strap and be reflectorized on both sides. New Jersey also has a Bicycle Helmet law requiring everyone under 17 years of age to wear a helmet when riding a bicycle. The Statute also requires bicycle riders to follow the rules of the road. (N.J.S.A. 39:4-10.1). The rule requires anyone who is either riding or a passenger on a bicycle to wear a helmet approved by the Consumer Safety Product Commission. Courts have likened the “bicycle helmet defense” to the seat belt defense. While adults are not required to wear helmets, evidence that the plaintiff was not wearing a helmet can be introduced as proof of their comparative negligence in order to reduce damages. (Nunez v. Schneider National Carriers, 217 F.Supp.2d 562 (N.J. 2002).

E. Evidence of Alcohol or Drug Intoxication

Evidence of intoxication is relevant to the issue of negligent driving, but in order to introduce evidence of prior drinking, supportive evidence must be presented “from which the trier of the fact may reasonably conclude that the drinking affected the safe operation of the vehicle.” (Black v. Seabrook Assoc., LTD., 298 N.J. Super. 630,637 (App. Div.), certif. denied., 149 N.J. 409 (1997).

Any person who is convicted of, or pleads guilty to, operating a motor vehicle while intoxicated, in connection with an accident, shall have no cause of action for recovering

economic or non-economic loss sustained as a result of the accident. N.J.S.A. 39:6A-4.5. However, this statute does not preclude an intoxicated motorist from recovering PIP benefits from their insurer.

F. Testimony of Investigating Police Officer

New Jersey permits investigating police officers to testify on a case by case basis, dependent on whether the testimony is permitted under the Rules of Evidence, such as to the location of evidence at the scene. However, an unpublished opinion has held that an investigating police officer cannot testify as to his opinion as to the cause of a motor vehicle accident as it exceeded the boundaries for lay opinion testimony. (*Patel v. Decortes*, 2006 WL 3391423 (App. Div. 2006 – unpublished))

G. Expert Testimony

New Jersey's Rules of Evidence are similar to the Federal Rules of Evidence.

H. Collateral Source

New Jersey's Rules of Evidence are similar to the Federal Rules of Evidence.

I. Recorded Statements

A statement taken from an insured's driver by an attorney which was retained by a defendant transportation company in anticipation of litigation is protected by work product privilege and does not have to be produced in discovery. (*Miller v. J.B. Hunt*, 339 N.J. Super. 144, 770 A.2d 1288 (App. Div. 2001); *Stephan v. LaCorte*, 77 N.J. USper. 443, 186 A.2d 713 (Law Div. 1962)). However, courts have held that the defendant's statement was taken by defendant's insurance adjuster to investigate the automobile accident which led to the lawsuit was not material prepared in anticipation of litigation. (*Pfender v. Torres*, 336 N.J. Super. 379, 765 A.2d 208 (App. Div. 2001)).

J. Prior Convictions

New Jersey's Rules of Evidence are similar to the Federal Rules of Evidence.

K. Driving History

Such records may be admissible under the Rules of Evidence as to whether the records' probative value outweighs any prejudice.

L. Fatigue

Such records may be admissible under the Rules of Evidence as to whether the HOS violations probative value outweighs any prejudice.

M. Spoliation

New Jersey does not recognize a separate cause of action for spoliation, as spoliation is remediable under the tort of fraudulent concealment of evidence. Spoliation typically refers to the destruction of evidence by one party to impede the ability of another party to litigate the case. In civil litigation, depending on the circumstances, spoliation of evidence can result in a separate cause of action for fraudulent concealment, discovery

sanctions, or an adverse trial inference against the party that caused the loss of evidence. (*Jerista v. Murray*, 185 N.J. 175 (2005)).

The elements that must be established by a plaintiff in a tort action for fraudulent concealment of evidence are: (1) that defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation; (2) that the evidence was material to the litigation; (3) that plaintiff could not reasonably have obtained access to the evidence from another source; (4) that defendant intentionally withheld, altered or destroyed the evidence with the purpose to disrupt the litigation; and (5) that plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed. (*Rosenblit v. Zimmerman*, 166 N.J. 391 (2001)).



Settlement

A. Offer of Judgment

Any party may make an offer of judgment at any time more than 20 days before the first scheduled trial date or daily or weekly trial call. (Whichever is earliest.) (N.J. Court. R. 4:58. It is important to note that in New Jersey Superior Court a Plaintiff can also make an offer to take judgment, which is different from the Federal Offer of Judgment Rule that permits only a defendant to make an offer of judgment.

The party to whom the offer is made has until the tenth day prior to the first trial date or first listing to accept the offer. If the offer is not accepted, it is deemed withdrawn and is inadmissible for any purpose except the fixing of allowances after trial. An offer cannot be unilaterally withdrawn by the offering party. It is only withdrawn by the passage of time and thus, once made, must remain open for a period of 90 days or until ten days prior to trial, whichever period expires first. (N.J. Ct. R. 4:58).

If the offer of a claimant is not accepted and the claimant obtains a verdict or determination at least as favorable as the rejected offer or, if a money judgment in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit, reasonable litigation expenses incurred following non-acceptance, prejudgment interest in the amount of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later and a reasonable attorney's fee, which shall belong to the client, for such subsequent services as are compelled by the non-acceptance. (N.J. Ct. R. 4:58-2)

If an offer made by a party other than the claimant is not accepted and the determination is favorable to the offeror, the offeror shall be allowed, in addition to costs of suit, a reasonable attorney's fee, for such subsequent services as are required by the non-acceptance, and this amount will belong to the client and constitute a prior charge upon the judgment. A favorable determination qualifying for allowances under this rule is a verdict or determination at least as favorable to the offeror as the offer or, if a money judgment, is in an amount excluding allowable prejudgment interest and counsel

fees, that is 80% of the offer or less. No allowances shall be granted, however, if the claimant's claim is dismissed, a no-cause verdict is returned, or only nominal damages are awarded.

B. Liens

In situations where an employee is injured on the job by someone other than his employer, the employee can sue the responsible party for damages and can also file a workers compensation claim. However, in such circumstances the workers compensation carrier will have a statutory lien against any money that the injured party recovers from the responsible party, equal to 2/3 of the workers compensation benefits that have been paid on the injured party's behalf.

C. Minor Settlement

New Jersey conducts "friendly" hearings when a settlement involves a minor. When approving a settlement on behalf of a minor, the court enters an appropriate judgment in accordance with R. 4:48A. Although the majority of settlements on behalf of minors are paid into the custody of the court, i.e., into the Surrogate's Intermingled Trust Fund (SITF), the court under R. 4:48A, has the discretion for good cause to allow a guardian, rather than the Surrogate, to control the investment and use of the settlement funds. The revised model friendly judgment promulgated here includes language covering both deposits of net settlement funds into SITF and the alternative of guardians holding and independently investing such funds, including both the guardianship process and the bond requirement.

D. Negotiating Directly With Attorneys

New Jersey does not have case law on this issue. Claims professionals can negotiate settlements directly with attorneys.

E. Confidentiality Agreements

The parties can enter into a confidentiality agreement regarding the terms of a release but same must be agreed to by all parties and is then filed with the Court.

F. Releases

Releases are agreements to settle a lawsuit as a contract and is governed by contract law. It is prepared by the parties' attorneys and the terms are agreed upon by all prior to the signing. (*Pascarella v. Bruck*, 190 N.J. Super. 118, 125, 462 A.2d 186 (App. Div. 1983), certif.. denied 94 N.J. 600, 468 A.2d 233 (1983). Signatures must be notarized.

G. Voidable Releases

Releases can be voided only if the party lacked the capacity to make an agreement. (*Hillside National Bank v. Sansone*, 11 N.J. Super. 390, 399, 78 A.2d 441 (App. Div. 1951).

Transportation Law

A. State DOT Regulatory Requirements

Under provisions of N.J.S.A. 39:5B-32 and N.J.A.C. 13:60 the New Jersey State Police have adopted the Federal Motor Carrier Safety Regulations, title 49 CFR 390-397. These regulations apply to both interstate and intrastate operators.

New Jersey's DOT is governed by N.J.A.C. Title 16, Transportation. A link to the website is: www.state.nj.us/transportation/about/rules/current/shtm.

B. State Speed Limits

Speed limits on state roads in New Jersey are set by the New Jersey DOT. The speed limits can vary between 25 mph up to 65 mph. However, the speed limits on certain 65 mph roads is reduced in certain traffic areas. A link to the speed limits on all New Jersey state roads can be found at:

www.state.nj.us/transportation/refdata/traffic_orders/speed.

C. Overview of State CDL Requirements

New Jersey CDL requirements: 18 years of age; have a valid New Jersey Class D license; 20/40 vision in each eye (with or without glasses); be able to recognize red, green and amber colors; be physically fit as certified by a licensed physician.

Insurance Issues

A. State Minimum Limits of Financial Responsibility

Except as provided by section 4 of P.L.1998, c. 21 (C.39:6A-3.1), every owner or registered owner of an automobile registered or principally garaged in this State shall maintain automobile liability insurance coverage, under provisions approved by the Commissioner of Banking and Insurance, insuring against loss resulting from liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the ownership, maintenance, operation or use of an automobile wherein such coverage shall be at least in:

- a. an amount or limit of \$15,000.00, exclusive of interest and costs, on account of injury to, or death of, one person, in any one accident; and
- b. an amount or limit, subject to such limit for any one person so injured or killed, of \$30,000.00, exclusive of interest and costs, on account of injury to or death of, more than one person, in any one accident; and
- c. an amount or limit of \$5,000.00, exclusive of interest and costs, for damage to property in any one accident.

No licensed insurance carrier shall refuse to renew the required coverage stipulated by this act of an eligible person as defined in section 25 of P.L.1990, c. 8 (C.17:33B-13) except in accordance with the provisions of section 26 of P.L.1988, c. 119 (C.17:29C-7.1) or with the consent of the Commissioner of Banking and Insurance. (N.J.S.A. 39:6A-3).

Loss of right to Sue for Failure to Insure - An owner of a motor vehicle who does not have liability insurance cannot file a lawsuit for damages sustained as a result of an accident. In addition, he/she will be subject to a mandatory fine and a one year license suspension. (N.J.S.A. 39:6A-4.5).

Loading/Unloading Doctrine – Demand for Defense and Indemnification under Omnibus insurance Clause - In New Jersey, all motor vehicle insurance policies must include

coverage (omnibus coverage) for individual, other than the named insured, who use the vehicle with the consent of the insured. (N.J.S.17:28-1.5 and N.J.S. 17:28-1.6). The omnibus clause extends coverage to any person using, operating or riding in the insured vehicle if done with permission. (Id.) the term “use” has been given a broad interpretation, including, but not limited to, encompassing the “loading and unloading” of the insured vehicle. (Bellafonte v. General Motors, et al., 151 N.J. Super. 377 (App. Div. 1977)).

Under the “loading and unloading doctrine”, a trucking company may be held to defend and indemnify other parties involved in the loading and unloading of its truck. (Pisaneschi v. Turner Construction, 785 A.2d 50 (2001)). However, the Courts have begun to create exceptions to this doctrine such as where the accident occurs after the completion off the loading and unloading of the freight or where the cause of the accident is not necessary to the loading and unloading of the freight. (Pisaneschi v. Turner Construction, 785 A.2d 50 (2001)).

B. Uninsured Motorist Coverage

Every owner or registrant of an automobile registered or principally garaged in new Jersey must maintain uninsured/underinsured motorist coverage in the amounts of \$15,000 per person for bodily injury, \$30,000 per accident for bodily injury and \$5,000 per accident for property damage with a \$500 deductible for each insured. (N.J.S.A. 17:28-1.1 N.J.S.A. 39:6A-14). This statute differentiates between uninsured motorists and underinsured motorists. (N.J.S.A. 17:28-1.1(e)). However, the term “automobile” as defined by the statute is limited to private passenger automobiles and does not include commercial vehicles or buses. (N.J.S.A. 39:6A-2).

C. No Fault Insurance

New Jersey’s No Fault statute is N.J.S.A. 39:6A-1. This places limitations on the right to sue for non-economic loss unless they have sustained a bodily injury which resulted in death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or a permanent injury within a reasonable degree of medical probability other than disfigurement or scarring.

Under N.J.S.A. 39:6A-8, a person may elect the no limitation on lawsuit option, which does not limit their right to sue for noneconomic loss. This incurs a higher premium.

Insurers paying PIP benefits for medical expenses have the right to recover the amount paid from any tortfeasor which was not, at the time of the accident, required to maintain personal injury protection or medical expenses benefits coverage, other than for pedestrians, under the laws of New Jersey, including personal injury protection coverage required to be provided in accordance with Section 18 of P.I. 1985, c. 520 (C.17:28-1.4), or although required, did not maintain personal injury protection or medical expense benefits coverage at the time of the accident. (N.J.S.A. 39:6A-9.1). This does not represent a lien against plaintiff’s recovery from a third party, but instead a direct claim which may be asserted by the PIP insurer.

However, the insurer's right to recover must be asserted within two years of the date of their receipt of the PIP application. N.J.S.A. 39:6A-9.1 mandates that a claim for the reimbursement of PIP benefits made against a tortfeasor's insurer must be submitted to arbitration. (N.J.S.A. 39:6A-9.1) However, whether the claim for the reimbursement of PIP benefits made against a tortfeasor with a self-insured retention must be submitted to arbitration remains an open issue in New Jersey.

A new law amended N.J.S.A. 39:6A-9.1 to clarify that any recovery by the insurer, health maintenance organization, or governmental agency from the tortfeasor's insurer shall be subject to any claim by the injured party and shall be paid only after satisfaction of that claim, up to the limits of the insured tortfeasor's motor vehicle policy or other liability insurance policy. (Effectively overruling *Fernandez v. Nationwide Mutual Fire Ins. Co.*, 402 N.J. Super. 166 (App. Div. 2008).

No Fault Verbal Threshold – The verbal threshold exempts a person from tort liability for non-economic loss unless a person can demonstrate a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a bodily organ, member, function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute that person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment. (N.J.S.A. 39:6A-8).

Owners and operators of buses are exempted from tort liability for non-economic losses as a result of bodily injury unless the plaintiff has sustained a personal injury which resulted in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement. (N.J.S.A. 17:28-1.7). an injury is considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment.

In order to comply with the above, a plaintiff must satisfy certain requirements. Within 60 days following the date of the answer to the complaint by the defendant, plaintiff must provide the defendant with a certification from the licensed treating physician or a board-certified licensed physician to whom the plaintiff was referred by the treating physician. The certification must state that the plaintiff sustained an injury described above.

D. Disclosure of Limits and Layers of Coverage

A party may obtain discovery of the "existence and contents" of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of the judgment or who may be required to indemnify or reimburse payments made to satisfy the judgment. N.J. Court R. 4:10-2(b).

E. Unfair Claims Practices

N.J.A.C. 11:2-17.12 governs unfair claims settlement practices and requires an investigation to begin within 10 days and for PIP benefits to be paid within 60 days. If the claim cannot be settled within that time period, the insurer must send written notice of same within 45 days and every 45 days thereafter until the matter is settled. (N.J.A.C. 11-2-17.12).

F. Bad Faith Claims

New Jersey permits both first-party bad faith claims (*Pickett v. Lloyd's and Peerless Ins. Agency*, 131 N.J. 457, 621 A.2d 445 (1993)) and third-party bad faith claims. (*Miglicio v. HCM Claim Mgmt. Corp.*, 288 N.J. Super. 331, 672 A.2d 266 (1995)). In order to establish bad faith, plaintiff must "show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard or the lack of a reasonable basis for denying the claim." (*Pickett v. Lloyd's*, supra.)

G. Coverage – Duty of Insured

Most insurance companies put a "cooperation clause" into the policies requiring the insured to cooperate with the investigation, settlement or defense of any suit and New Jersey Courts have recognized this duty of the insured. (*DiFrancisco v. Chubb Ins. Co.*, 283 N.J. Super. 601 (App. Div. 1995)).

H. Fellow Employee Exclusions

Under the New Jersey Workers Compensation Act, injured employees are barred from suing not only their employer, but also co-employees. (N.J.S.A. 34:15-8).