

New Jersey Expands Emotional Distress Claims for Injury or Death to Loved Ones

The New Jersey Appellate Court recently held that it may not be necessary for a plaintiff to have viewed the injury being inflicted on the body of a marital, intimate or close family member to sustain a claim for severe emotional distress resulting from the negligence of another.

In *Litwin v. Whirlpool Corp.*, 436 N.J. Super. 80 (2014), the plaintiff, who had previously been trapped in his burning home, watched as firefighters rescued his stepson from the house. When rescue personnel brought the boy out of the building, the plaintiff's stepson was still burning, his skin on fire. The plaintiff filed a lawsuit against Whirlpool for its negligence in manufacturing dishwashers that were known to be potential fire hazards. In the subsequent lawsuit, the plaintiff filed a complaint asserting negligence against the defendant and a "Portee claim."

In order to assert a "Portee claim," a plaintiff must establish four elements: (1) Death or serious physical injury of another caused by the defendant's negligence; (2) A marital or intimate, familial relationship between the plaintiff and the injured person; (3) Observation of the death or injury at the scene of the accident; and (4) Suffering severe emotional distress. In seeking to dismiss the plaintiff's Portee claim on summary judgment, defendants argued that an essential element of a Portee claim required the party asserting the claim to have directly witnessed the injury-producing event. The plaintiff countered that a Portee claim did not require direct observation when the party asserting the claim had witnessed the injury-producing event through sensory perception.

The Appellate Court held that the viability of a Portee claim hung on whether the plaintiff had had a sensory, contemporaneous perception of an injury that was sustained by a spouse or close family member. Importantly, this was irrespective of the distance from which that perception arose. The Court reasoned that a Portee claim did not require a plaintiff to be within the zone of danger created by the defendant's negligent conduct, but only that the plaintiff observe the kind of result that is associated with the aftermath of an accident, such as bleeding, traumatic injury and cries of pain. The Court reasoned further that the observation prong could also be satisfied if the injury is one that is susceptible to immediate sensory perception and the plaintiff was an actual witness to the injury inflicted on a victim or immediately thereafter. In *Litwin*, the Court held that the fire was the injury-producing event observed by the plaintiff both while in the home and after he escaped. The fact that the plaintiff did not witness his stepson burn is irrelevant. What is important is that he had an immediate sensory perception of the fire and that he was a witness to the injury inflicted on his stepson after the fact.

The Court's ruling expands on the current understanding of *Portee v. Jaffee* to include claims not witnessed by the plaintiff, so long as an immediate sensory perception can be proved. If you have claims in New Jersey, involving alleged emotional injury to close family members who themselves were not physically injured, this case is a change in the current New Jersey Law and will affect and potentially expand further the scope of those individuals who can successfully pursue these claims.

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