STATE OF WASHINGTON COMPENDIUM OF LAW

Prepared by
Rodney L. Umberger
Williams Kastner
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600
www.williamskastner.com

Updated 2012

PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

1) **Health care.** In order to commence an action based upon a health care provider's professional negligence, the defendant must be given ninety (90) days' notice of the intention to commence the action. WASH. REV. CODE § 7.70.100 (2012). The notice shall be given by regular, registered, or certified mail with return receipt requested and deposited in the post office addressed to defendant. If the defendant is, or was at the time of the alleged professional negligence, acting as an actual agent or employee of a health care provider entity, the notice may be addressed to the "chief executive officer, administrator, office of risk management, if any, or registered agent for service of process, if any, of such health care provider entity." *Id.* Following the filing of the ninety (90) day pre-suit notice, all causes of action will be subject to mandatory mediation. *Id.*

2) **State agents.** In order to commence an action against the state, or against any "state officer, employee, or volunteer, acting in such capacity, for damages arising out of tortious conduct," the claim must first be presented to and filed with the state's office of risk management. (The "risk management division" was changed to the "office of risk management by 2011 1st sp.s. c 43 § 511). WASH. REV. CODE § 4.92.110 (2012). No action shall be commenced until sixty (60) days have elapsed after the presentment and filing of the claim.

3) **Torts against local governments.** Presentment and prerequisites for claims seeking damages arising out of tortious conduct against all local governmental entities and their officers is governed by WASH. REV. CODE § 4.96.020 (2012). All claims for damages presented after July 26, 2009 must be presented on the standard tort claim form. The form is maintained by the risk management division of the office of financial management and it requires the following information:

> (i) The claimant's name, date of birth, and contact information; (ii) A description of the conduct and the circumstances that brought about the injury or damage; (iii) A description of the injury or damage; (iv) A statement of the time and place that the injury or damage occurred; (v) A listing of the names of all persons involved and contact information, if known; (vi) A statement of the amount of damages claimed; and (vii) A statement of the actual residence of the claimant at the time of presenting the claim and at the time the claim arose.

WASH. REV. CODE § 4.96.020. No action shall be commenced until sixty (60) days have elapsed after the claim has first been presented to and filed with the governing body of the local governmental entity. *Id.*

Relationship to the Federal Rules of Civil Procedure

Civil procedure is governed by Title 4 of the Washington Revised Code. The Washington rules generally mirror the Federal Rules, though there are some differences. Washington has not yet adopted rules on electronic discovery. The U.S. District Court for the Western District of Washington has proposed a Model Protocol for the Discovery of Electronically Stored

Information in Civil Litigation. The court is soliciting comments on the model in 2012. Where the Federal Rules and the Washington Rules are identical, Washington courts consider federal decisions as persuasive authority for questions of construction.

Organization of the State Court System

A) **Structure.** The Washington State Court system is comprised of the Supreme Court, Court of Appeals, Superior Court and courts of limited jurisdiction (District and Municipal Courts).

1) **District and municipal courts.** District and municipal courts are courts of limited jurisdiction. District courts are county courts and serve defined territories, both incorporated and unincorporated, within the counties. Municipal courts are those created by cities and towns. District courts have jurisdiction over both criminal and civil cases. District courts have jurisdiction over civil cases seeking damages for injury to individuals or personal property and contract disputes in amounts of up to $75,000.00. Municipal courts hear cases for violations of municipal or city ordinances. Municipal courts do not accept civil claims cases. *See generally District Courts*, WASHINGTON COURTS, http://www.courts.wa.gov/appellate_trial_courts/index.cfm?fa=atc.crtPage&crtType=Dist (last visited July 16, 2012); *Municipal Courts*, WASHINGTON COURTS, http://www.courts.wa.gov/appellate_trial_courts/index.cfm?fa=atc.crtPage&crtType=Muni (last visited July 16, 2012).

2) **Superior Courts.** Superior Courts of Washington are courts of general jurisdiction. In addition, superior courts have the authority to hear cases appealed from courts of limited jurisdiction. Superior court cases may be appealed to the Court of Appeals or they may go directly to the Supreme Court. The superior courts are grouped into single or multi-county districts. There are thirty superior court districts in Washington. Judges are elected to serve four (4) year terms in superior court. When vacancies arise between elections, the seat is filled by appointment of the Governor until the next election. *See generally Superior Courts*, WASHINGTON COURTS, http://www.courts.wa.gov/appellate_trial_courts/index.cfm?fa=atc.crtPage&crtType=Super (last visited July 16, 2012).

3) **Washington Court of Appeals.** The Washington Court of Appeals is a non-discretionary appellate court. It hears cases appealed from superior court. The Court of Appeals is divided into three divisions, each of which serves a specific geographic area of the state. Twenty-two judges are divided between the three geographic districts. Judges are elected to six (6) year staggered terms on the Court of Appeals. *See generally Appellate Case Processing Model*, WASHINGTON COURTS, http://www.courts.wa.gov/appellate_trial_courts/div1/caseproc/ (last visited July 16, 2012).

4) **Supreme Court.** The Supreme Court is the state's highest court and is governed by WASH. REV. CODE § 2.04.010 *et seq*. (2012). The Supreme Court is comprised

of nine justices who are elected to six (6) year terms. The Court has appellate jurisdiction with few limitations.

B) Alternative dispute resolution.

1) **Arbitration.** Mandatory arbitration of civil actions is governed by WASH. REV. CODE § 7.06.010 *et seq*. (2012). In counties with a population that exceeds one hundred thousand people, arbitration is required for certain civil actions seeking only monetary judgment (not to exceed $15,000.00). WASH. REV. CODE § 7.06.010-.020 (2012). If the county population is less than one hundred thousand, the superior court of the county or county legislative authority may similarly authorize mandatory arbitration. WASH. REV. CODE § 7.06.010.

2) **Mediation.** Mandatory mediation of health care claims is governed by WASH. REV. CODE § 7.70.100. In any action based on a health care provider's professional negligence, the defendant must be given at least ninety (90) days' notice of the intention to commence the action. "After filing of the ninety (90) day presuit notice, and before a superior court trial, all causes of action, whether based on tort, contract or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial." *Id.* The mandatory mediation requirement does not apply, however, to an action subject to mandatory arbitration under WASH. REV. CODE § 7.06.010 or an action in which the parties have previously agreed to submit the claim to arbitration.

Service of Summons

A) **Person.** Service of summons on a person is governed by WASH. REV. CODE § 4.28.080 (2012). Service is accomplished by serving the person directly, or by leaving a copy of the summons at their usual place of abode with a person of suitable age and discretion who is a resident therein. In the alternative, if personal service cannot reasonably be accomplished, the summons may be served by mail by leaving a copy at defendant's usual mailing address with a person of suitable age and discretion who is a resident, proprietor or agent thereof, and then mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address. Service shall be deemed completed on the tenth day after the required mailing.

B) **Corporation.** Service of summons on a corporation is governed by WASH. REV. CODE § 4.28.080. Service is accomplished by delivering a copy of the summons to the "president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent."

If a corporation fails to appoint or maintain a registered agent in this state, or the registered agent cannot with reasonable diligence be found at the registered office, then

the secretary of the state may be served as the corporation's agent. WASH. REV. CODE § 23B.05.040 (2012).

C) **Other.** Service of summons on the State must be made on the attorney general or by leaving the summons and complaint in her office with an assistant attorney general. WASH. REV. CODE § 4.92.020 (2012). Service of Summons on political subdivisions of the state is governed by WASH. REV. CODE § 4.28.080 (2012). Actions against counties in Washington are brought by serving the county auditor or, during normal office hours, the deputy auditor. Towns and incorporated cities are sued by serving the mayor or city manager, or during normal office hours, the designated agent or city clerk. School districts are sued by serving the superintendent or, during normal office hours, an assistant superintendent, deputy commissioner, or business manager.

Service on non-resident motorists is governed by WASH. REV. CODE § 46.64.040 (2012). Service is accomplished by delivering two copies of the summons to the secretary of state and mailing by registered mail a copy to the defendant's last known address.

Statutes of Limitations

A) **Tolling.** Actions are deemed commenced (or not commenced) for the purpose of tolling any statute of limitations pursuant to WASH. REV. CODE § 4.16.170 (2012). An action shall be deemed commenced when the complaint is filed or summons is served, whichever occurs first (though the other must be accomplished within ninety days of the first). The Supreme Court of Washington has ruled that service of process on one defendant tolled the statute of limitation as to unserved defendants. *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wash. 2d 325, 815 P.2d 781 (1991).

Statute of limitations in Washington can be tolled by absence from the state, by personal disability, or by death. WASH. REV. CODE § 4.16.180-.200 (2012).

B) **General statute of limitations.** An action for relief not provided for under Washington statutes shall be commenced within two (2) years after the cause of action accrued. WASH. REV. CODE § 4.16.130 (2012).

C) **Contract.** Statute of limitations for an action upon a contract in writing or liability express or implied arising out of a written agreement is six (6) years. WASH. REV. CODE § 4.16.040 (2012). Actions for breach of oral contracts must be commenced within three (3) years. WASH. REV. CODE § 4.16.080 (2012). Under the Uniform Commercial Code, causes of action arising from a breach of contracts for sale of goods have a four (4) year statute of limitation. WASH. REV. CODE § 62A.2-725 (2012) (sale of goods).

D) **Contribution.** The statute of limitations for the enforcement of contribution is governed by WASH. REV. CODE § 4.22.050 (2012):

> If a judgment has been rendered, the action for contribution must be commenced within one year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (a) discharged by payment the common liability within the period of the state of limitations applicable to the claimant's

> right of action against him and commenced the action for contribution within one year of payment, or (b) agreed while the action was pending to discharge the common liability and, within one year after the agreement, have paid the liability and commenced an action for contribution.

E) **Fraud.** The statute of limitations for relief on the grounds of fraud is three (3) years. WASH. REV. CODE § 4.16.080 (2012). A fraud cause of action is not deemed to have been accrued until the discovery of the alleged fraud. *Id.*

F) **Actions by state, counties, municipalities.** Statute of limitations for actions brought in the name of or for the benefit of any county or other municipality or quasi-municipality of the state are governed by WASH. REV. CODE § 4.16.160 (2012). Actions for the benefit of any county or municipality shall be subject to the same time limitations as actions brought by private parties; provided that, except for construction cases, there shall be no limitations to actions brought in the name of or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state.

G) **Actions against state or local governments.** In causes of action against the state or local governments for personal injuries, plaintiff must present a notice of claims prior to suit and in accordance with governing statutes and also within the limitation period for the tort claimed. WASH. REV. CODE §§ 4.92.100, .110, 4.96.020 (2012).

H) **Medical malpractice.** The statute of limitations for any civil action for damages for injury occurring as a result of health care or related services is governed by WASH. REV. CODE § 4.16.350 (2012). An action based on professional negligence shall be commenced within three (3) years of the act or omission alleged to have caused the injury or condition, or within one (1) year of the time the patient (or his representative) discovered or reasonably should have discovered the injury, whichever occurs first. In no event shall an action be commenced more than eight (8) years after the said act or omission. The medical malpractice statute of limitations applies when the action is brought for alleged professional negligence against a person licensed by the state to provide health care or related services, an employee, or agent of such licensed person, or upon an entity, facility or institution employing one or more such licensed person.

I) **Personal injury and injury to personal property.** The statute of limitations for injury to personal property is governed by WASH. REV. CODE § 4.16.080 (2012). Action for "taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not otherwise enumerated," shall be commenced within three (3) years.

J) **Survival of actions.** "If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of the time and within one year from his death." WASH. REV. CODE § 4.16.200 (2012).

1) **Personal injury.** Washington has a special death by personal injury survival statute, WASH. REV. CODE § 4.20.060 (2012), that provides that a decedent's own action for personal injuries may be prosecuted by the personal representative of

the decedent's estate on behalf of certain statutorily designated beneficiaries if the personal injuries caused the death.

Statute of Repose

A) **Construction and improvements to realty.** The statute of repose for construction claims in Washington is six (6) years. WASH. REV. CODE § 4.16.310 (2012). If an action does not accrue within the six (6) year statute of repose or an actionable cause is not filed within the applicable state of limitations, the claim is barred. Further, in contract actions the applicable statute of limitations expires, regardless of discovery, six (6) years after substantial completion of construction, or during the period within six (6) years after the termination of the services enumerated in WASH. REV. CODE § 4.16.300 (2012), whichever is later. WASH. REV. CODE § 4.16.326. The statute of repose for construction claims bars claims that do not arise within six (6) years of substantial completeness of the project.

B) **Medical malpractice.** WASH. REV. CODE § 4.16.350 (2012), which governs the statute of limitations for medical malpractice, contains a statute of repose barring such claims that are brought more than eight (8) years after the alleged act or omission causing injury.

Venue Rules

A) **Real property.** For actions brought for the determination of questions affecting the title, or for any injuries to real property, or for questions involving the rights to the possession or title to any specific article of personal property, the suit shall be commenced in the county in which the subject property, or some part thereof, is situated. WASH. REV. CODE § 4.12.010 (2012).

B) **Personal injury or property damage.** Causes for the recovery of damages for injuries to the person or for injury to personal property, shall be brought either in the county in which the cause of action or some part thereof arose, or in the county in which the defendant (or one of the defendants if there is more than one) resides. WASH. REV. CODE § 4.12.020 (2012). Action for the recovery of a penalty or forfeiture imposed by statute shall be brought in the county where the cause arose. *Id.* Also, suit against a public officer, or person specially appointed to execute his or her duties, for an action done by him or her in virtue of his or her office shall be brought in the county where the cause arose. *Id.*

C) **Corporation.** The venue of any action brought against a corporation, at the option of the plaintiff, shall be (a) in the county where the tort was committed, (b) in the county where the work was performed for said corporation, (c) in the county where the agreement entered into with the corporation was made, or (d) in the county where the corporation has its residence. WASH. REV. CODE § 4.12.025 (2012).

1) **Residence of a corporation.** For the purpose of the venue statute, the residence of a corporation defendant shall be deemed to be in any county where the corporation "(a) transacts business; (b) has an office for the transaction of

business; (c) transacted business at the time the cause of action arose; or (d) where any person resides upon whom process may be served upon the corporation." *Id.*

D) **State.** For any claim brought by a person or corporation against the state of Washington, the venue for such action shall be (a) the county of residence of the plaintiff; (b) the county where the cause of action arose; (c) the county in which real property that is subject of the action is situated; (d) the county where the action may properly be commenced by reason of the joinder of additional defendants; and (e) in Thurston county. WASH. REV. CODE § 4.92.010 (2012).

E) **Change of venue.** Change of venue may be granted by the court, on proper motion, when it is shown by affidavit or other satisfactory proof that the county designation in the complaint is not the proper county, or that there is reason to believe an impartial trial cannot be had therein, or the convenience of witnesses or the ends of justice would be forwarded by the change, or that from any cause the judge is disqualified. WASH. REV. CODE § 4.12.030 (2012).

NEGLIGENCE

Comparative Fault/Contributory Negligence

A) In 1973, Washington abolished contributory negligence as a total bar in actions seeking recovery for death, personal injury, and injury to property. Laws of 1973, 1st ex. sess., ch 138, codified at WASH. REV. CODE §§ 4.22.005-.015 (2012).

B) **Pure comparative fault.** Pure comparative fault negligence became effective in Washington in 1974 and applies to actions for death, personal injury, or injury to property. WASH. REV. CODE §§ 4.22.005-.020 (2012). Plaintiff's recovery is reduced by plaintiff's proportion of fault. WASH. REV. CODE §§ 4.22.005-.015. Thus, a plaintiff who is 99% at fault can still recover one percent of his or her damages.

Exclusive Remedy – Workers' Compensation Protections

A) Washington State's Industrial Insurance Act bars an employee from bringing a civil action for non-intentional torts against his or her employer when employee's claims arise while the employee is acting in the course of his or her employment. WASH. REV. CODE § 51.04.010 *et seq.* Workers' compensation is an employee's exclusive remedy against his or her employer.

WASH. REV. CODE § 51.04.010 (2012) states in relevant part:

> The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all

> jurisdiction of the courts of the states over such causes are hereby abolished, except as in this title provided.

B) **Structure.** Workers' compensation is largely run by the State through the Department of Labor & Industries. *See generally* WASH. REV. CODE § 51.04.010 *et seq*. (2012); WASH. REV. CODE § 51.32.010 *et seq*. (2012). Employers either pay premiums to a state fund or can elect to be self-insured. *See generally* WASH. REV. CODE § 51.16.035 *et seq.* (2012). Under the Act, a self-insured employer assumes responsibility, assuming a third party does not share fault, regardless of fault of the employee. WASH. REV. CODE §§ 51.32.010, 51.04.010.

Indemnification

A) Indemnity shifts the entire loss of the plaintiff from one defendant to another by reason of some legal obligation to pay damages occasioned by the negligence of another.

B) **Active/passive indemnity.** In 1981, the Washington legislature abolished active/passive indemnity. WASH. REV. CODE § 4.22.040(3) (1982). The Washington Court of Appeals, Division I, has held, however, that the Tort Reform Act only abolishes common law indemnity rights between joint tortfeasors only between joint tortfeasors with a right of contribution. *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 590 (2000). Thus, tort-based indemnity actions between non-joint tortfeasors may have survived the Tort Reform Act.

C) **Implied indemnity.** In 1997, the Washington Supreme Court also recognized an equitable or implied indemnity theory arising from the UCC implied warranty and a defective product. *Cent. Wash. Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 516-18 (1997). In the construction context only express indemnity contracts are deemed enforceable. WASH. REV. CODE § 4.24.115 (2012); *see also Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 764, 912 P.2d 472 (1996) (upholding an indemnification addendum in the construction context where the parties had expressly agreed thus satisfying RCW 4.24.115.). Recent case law supports the position that implied indemnity does not arise from construction contracts, and quelled a spate of 2002 and early 2003 trial court decisions to the contrary. *Fortune View Condo. Ass'n v. Fortune Star Dev. Co*., 151 Wn.2d 534, 541-42, 90 P.3d 1062 (2004); *Urban Dev., Inc. v. Evergreen Bldg. Prods., LLC*, 114 Wn. App. 639, 645-47, 59 P.3d 112 (2002); *see also* WASH. REV. CODE § 4.24.115. Written contracts for indemnity are generally enforceable, as are actions for implied indemnity that are supported by express warranty. *Fortune Star*, 151 Wn.2d at 541-42.

Joint and Several Liability

A) The 1981 Tort Reform Act retained joint and several liability and established a right of contribution between or among two or more persons who are jointly and severally liable for the same harm. Laws of 1981, ch. 27. This was amended by the 1986 Tort Reform Act, which eliminated joint and several liability except in certain situations (which are listed below). Laws of 1986, ch. 305; s*ee* WASH. REV. CODE § 4.22.070 (2012).

Allocation. WASH. REV. CODE § 4.22.070 provides that in all actions involving the fault of more than one entity (including the plaintiff), the trier of fact is to determine the percentage of total fault attributable to every entity which causes plaintiff's damages, including the claimant, defendant, third-party defendants, entities released by claimant and immune entities. Judgment is entered against the parties at fault for their proportionate share of the total damages. In 1993, WASH. REV. CODE § 4.22.070 was amended to preclude an assignment of fault to the claimant's employer.

B) **Apportionable beings.** An entity to which fault is allocated under WASH. REV. CODE § 4.22.070 must be a juridical being capable of fault. *See Price v. Kitsap Transit*, 125 Wn.2d 456, 462, 886 P.2d 556 (1994). "Animals, inanimate objects, and forces of nature are not juridical beings capable of fault and cannot be attributed fault." *Id.*; *Humes v. Fritz Co.*, 125 Wn. App. 477, 491, 105 P.3d 1000 (2005) (citing *Price v. Kitsap Transit*, 125 Wn.2d 456, 886 P.2d 556 (1994)). A Native American tribe's sovereign immunity does not bar allocation of fault to it under WASH. REV. CODE § 4.22.070. *Id.*

C) **Several liability.** This liability is *several* and not joint, except in the following four circumstances: (1) where the plaintiff is not at fault, (2) the defendants were acting in concert, (3) a person acted as an agent or servant of a party, or (4) in certain other instances involving hazardous materials or substances. WASH. REV. CODE § 4.22.070(1)(a), (b).

D) **Defendants' liability.** Where the plaintiff is not at fault, a modified form of joint and several liability applies, whereby joint and several liability is imposed on defendants against whom judgment is rendered for the *sum* of those defendants' fault. The modified form of joint and several liability does not include the fault of immune entities or released entities. WASH. REV. CODE § 4.22.070.

E) **Effect of release.** A release by the plaintiff of one joint tortfeasor does not discharge the other tortfeasors unless the release so provides, but the release reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or by the percentage of fault assigned to the settling defendant(s), depending on whether there is joint or several liability. *See* WASH. REV. CODE § 4.22.070. Under WASH. REV. CODE § 4.22.070, the damages resulting from negligence must be "segregated from those resulting from intentional acts and the negligent defendants are jointly and severally liable only for the damages resulting from their negligence." *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 105, 75 P.3d 497 (2003).

Strict Liability

A) To succeed on a claim based on strict liability in Washington, the plaintiff needs to show: (a) his harm was proximately caused by the defendant's actions, and (b) the defendant acted within a category covered by strict liability. *See* 16 WASH. PRAC., TORT LAW AND PRACTICE § 2.1 (3d ed.).

B) Washington courts recognize three types of cases where strict liability applies: abnormally dangerous activities, injuries caused by animals, and invasion of real property interests caused by trespass or nuisance. *Id.*

1) **Abnormally dangerous conditions.** Washington courts apply the factors set forth in RESTATEMENT (SECOND) OF TORTS § 520 to determine whether an activity is abnormally dangerous. *See Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 6, 810 P.2d 917 (1991). "The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care." *Id.* at 7 (citing the RESTATEMENT (SECOND) OF TORTS § 520, comment f (1977)).

2) **Animals.** The general rule in Washington is strict liability governs injuries caused by animals known to be abnormally dangerous. *Arnold v. Laird*, 94 Wn.2d 867, 871, 621 P.2d 138 (1980). Otherwise, injuries caused by animals are governed by negligence. *Id.* Strict liability only applies to the owner of an abnormally dangerous animal; landlords where such animals are kept are not strictly liable. *Frobig v. Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994).

3) **Diverting water.** Strict liability is the applicable standard when a landowner causes damage to another landowner's land by diverting naturally occurring water onto that land, regardless of the diligence and care used in erecting the diversion. *See Peters v. Lewis*, 28 Wash. 366, 369, 68 P. 869 (1902); *Noyes v. Cosselman*, 29 Wash. 635, 642, 70 P. 61 (1902); *Pruitt v. Douglas Cnty.*, 116 Wn. App. 547, 556, 66 P.3d 1111 (2003).

4) **Express liability provision.** Strict liability may also be imposed by Washington statute that includes an express liability provision (*e.g.*, damages caused by the release of hazardous waste). *See* WASH. REV. CODE § 16.08.040 (2012); *Hansen v. Sipe*, 34 Wn. App. 888, 890, 664 P.2d 1295 (1983) (noting that WASH. REV. CODE § 16.08.040 expressly imposes a strict liability standard).

C) **Products liability.** Under WASH. REV. CODE § 7.72.030(2), Washington's product liability statute, strict liability is the standard that Washington courts apply in a design defect product liability claim. *Eriksen v. Mobay Corp.*, 110 Wn. App. 332, 343, 41 P.3d 488 (2002) (citation omitted).

> To make out a prima facie case in strict liability, a plaintiff must establish (1) that there was a defect in the product which existed when it left the manufacturer's hands, (2) that the defect was not known to the user, (3) that the defect rendered the product unreasonably dangerous, and (4) that the defect was the proximate cause of the injury.

Fabrique v. Choice Hotels Intern., Inc., 144 Wn. App. 675, 682-83, 183 P.3d 1118 (2008).

D) **Learned intermediary.** Washington follows the learned intermediary doctrine, whereby pharmaceutical companies fulfill their duty to warn consumers of dangers associated with

drug use if physicians have been warned of potential harm. *Estate of LaMontagne v. Bristol-Myers Squibb*, 127 Wn. App. 335, 111 P.3d 857 (2005). Whether a prescription drug company provided adequate warning to a physician is determined by the negligence standard. RESTATEMENT (SECOND) OF TORTS § 402A.

Willful and Wanton Conduct

A) Willful misconduct requires knowledge in acting, wanton misconduct requires knowledge that the action will result in harm. The Court of Appeals describes the difference as, "between casting a missile with intent to strike another and casting a missile with reason to believe that it will strike another, but with indifference as to whether it does or does not." *Kremer v. Audette*, 35 Wn. App. 643, 646, 668 P.2d 1315 (1983).

B) **Distinguished from recklessness.** Willful and wanton is a higher mental state than recklessness. *State v. Roggenkamp*, 153 Wn.2d 614, 631, 106 P.3d 196 (2005). "Willful or wanton misconduct falls between simple negligence and an intentional tort." *Conradt v. Four Star Promotions, Inc.*, 45 Wn. App. 847, 853, 728 P.2d 617 (1986).

C) **Distinguished from negligence.** Washington courts distinguish willful and wanton misconduct from negligence by the degree of risk the defendant takes. *Id.*

DISCOVERY

Electronic Discovery Rules

Washington case law has not yet developed law governing discovery of Electronically Stored Information. Washington has not adopted the Federal Rules on Electronic Storied Information or amended WASH. C. R. 34.

A rules committee submitted a proposed amendment to WASH. C. R. 34 to the Washington State Bar Association Board of Governors for consideration in the summer of 2012. The text of the amended rule acknowledges that Electronically Stored Information is discoverable. The suggested amendment adopts the organization and headings of the corresponding federal rule. The amended rule further addresses the format by permitting, but not requiring, the requesting party to designate the form or forms for the Electronically Stored Information.

Expert Witnesses

A) The rule of discovery relating to experts and trial preparation is governed by WASH. C. R. 26 (2012).

B) **Interrogatories.** Under WASH. C. R. 26, a party may, through interrogatories, require another party to identify any expert it expects to call at trial. The party must state the subject matter on which the expert is expected to testify, state the "substance of the facts and opinions" of the expected testimony, summarize the grounds for each opinion, and include any other information discoverable under WASH. C. R. 26. The identity and

opinions of an expert that is not expected to testify is generally not discoverable, except as provided in WASH. C. R. 35(b) or upon a showing of exceptional circumstances that make it "impracticable" for the party seeking discovery to obtain the information by other means.

C) **Mental or physical examination.** When the mental or physical condition of a party is at issue, the court may order an examination and an accompanying record of the examination. Under WASH. C. R. 35(b), the record of the examining physician is discoverable even if that physician is not expected to testify at trial.

D) **Work product doctrine.** Washington's WASH. C. R. 26 embraces the federal rule of discovery of expert work product established in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947). The work product doctrine and the rules concerning discovery of expert testimony must be read together. "The work product doctrine limits not only pretrial discovery but may also prevent a consulting expert who is hired in anticipation of litigation from testifying at deposition or trial." *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004).

Non-Party Discovery

A) **Discovery.** Documents or other tangible things can be requested from a non-party during discovery by the use of a subpoena duces tecum, without taking the person's deposition under WASH. C. R. 45; this practice was not permitted in Washington prior to 2007. 4 WASH. PRAC., RULES PRACTICE WASH. C. R. 45 (5th ed.).

B) **Depositions.** A non-party can also be directed to bring documents or other tangible things to a deposition. In this situation, the subpoena duces tecum can be joined with the subpoena for attendance at the deposition, or it may be issued separately. WASH. C. R. 45(a). In addition, WASH. C. R. 30(b)(1) requires that the designation of materials to be produced in accordance with the subpoena should be attached to, or included in, the notice of deposition. 4 WASH. PRAC, RULES PRACTICE WASH. C. R. 45 (5th ed.).

C) **Scope.** Where non-party is subpoenaed to produce information, request may not be overly broad or burdensome. *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004).

Privileges

A) **Attorney-client privilege.** The attorney-client privilege is codified in Washington at WASH. REV. CODE § 5.60.060(2) (2012). The privilege is intended to allow a client to "communicate freely with their attorneys without fear of later discovery." *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007).

B) **Work product.** Attorney work product is protected under WASH. C. R. 26(b)(4). The rule allows for a party to obtain discovery of documents prepared in "anticipation of litigation or for trial" only upon a showing that the other party has a substantial need for the documents and would be otherwise unable to obtain them without undue hardship. There is a near-absolute privilege against disclosure of the mental impressions,

conclusions, opinions, or legal theories of an attorney or other representative of a party in litigation. Disclosure of mental impressions will be permitted if the attorney's mental impressions are directly at issue. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 611, 963 P.2d 869 (1998). If work product is subject to a discovery order by the court, the court shall protect against any mental impression type disclosures by redaction. *Id.*

1) The work product doctrine was discussed extensively in *Soter v. Cowles Pub. Co.*, 162 Wash. 2d 716, 174 P.3d 60 (2007). The court noted: (1) The protections of the work product rule extend beyond documents prepared by counsel—the protections also apply to documents prepared by the client, or by others retained on behalf of the client, including investigators, so long as the documents were prepared in anticipation of litigation; (2) Documents prepared in the ordinary course of business, and not for litigation, are not protected by the work product rule. Disclosure of an attorney's notes about what a witness said is "particularly disfavored" because the notes tend to reveal the attorney's thought processes.

2) **Extent.** Given the language of "documents and tangible things," the rule "protects photographs, charts, diagrams, and the like, though photographs and diagrams made at or about the time of the event in question may be sufficiently unique to justify disclosure on the basis of substantial need." 3A WASH. PRAC., RULES PRACTICE C. R. 26 (5th ed.).

3) **Federal Rules.** The state rule conforms to the federal rule from *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947).

C) **Self-critical analysis.** Washington Courts have not adopted or rejected the self-critical analysis privilege.

Requests to Admit

A) According to WASH. C. R. 26(a), a party may obtain discovery through requests for admission.

B) **Scope.** "A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters" within the scope of rule 26(b)." WASH. C. R. 36. The request may relate to statements of fact, opinions of fact, and application of law to fact, including the genuineness of documents described in the request. *Id.*

C) **Purpose.** The purpose of requests for admission under WASH. C. R. 36 is to eliminate matters over which there is no dispute; the rule is not designed to force opposing parties to admit contested issues. *In re Proceeding Against Sanai*, 167 Wash. 2d 740, 753, 225 P.3d 203 (2009). The requests for admission should be used to "define the issues and expedite the trial by eliminating the need to produce witnesses and evidence in support of facts not in controversy." 14 WASH. PRAC., CIVIL PROCEDURE § 17:1. It is to circumscribe the contested factual issues in the case as that the disputed issues may be

clearly and succinctly presented to the trier of fact. *Coleman v. Altman*, 7 Wn. App. 80, 497 P.2d 1338 (1972).

D) **Answer.** A party must answer a request for admissions by the end of a thirty (30) day period after service, or the matter is deemed admitted. WASH. C. R. 36(a). However, a trial court may grant an extension at its discretion. *Santos v. Dean*, 96 Wash. App. 849, 982 P.2d 632 (1999). To determining whether to exercise its discretion to grant an extension of time in which to respond to a request for admission, the court applies the two-part test from WASH. C. R. 36(b)—(1) "whether permitting the extension subserves the presentation of the merits of the case," and (2) "whether the extension will prejudice the opposing party." *Santos*, 96 Wn. App. at 859-60.

E) **Legal conclusions.** A party is not required by WASH. C. R. 36 to admit "factual matters central to the lawsuit or legal conclusions." *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 472, 105 P.3d 378 (2005).

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

A) Washington courts allow expert testimony so long as the testimony is relevant, beyond common understanding, and assists the trier of fact in understanding facts or evidence. Historically, Washington trial court judges were skeptical of accident reconstruction experts and excluded their testimony based on a belief it was within the common knowledge or experience of the jury to comprehend. Today, however, expert accident reconstruction testimony is generally allowed so long as the expert is properly qualified, adequately supports his opinions with investigation, and testifies to a matter beyond common knowledge. *See, e.g., Gerard v. Peasley*, 66 Wn.2d 449, 403 P.2d 45 (1965) (allowing investigating officer's expert testimony as to point of impact).

B) ***Frye.*** When accident reconstruction is performed in a criminal case using a computer program, a Washington court will conduct a *Frye* hearing to ensure that (1) the computer is working properly, (2) the inputs are sufficiently accurate, and (3) the program being used is generally accepted by the community of scientists for the use in question. *State v. Sipin*, 130 Wn. App. 403, 415, 123 P.3d 862 (2005).

Appeal

A) **Final judgments.** Generally speaking, appeals are only permitted from the final judgments of a superior court. However, a variety of other kinds of decisions listed in the Washington Rules of Appellate Procedure 2.2, can be appealed. *See* WASH. R. APP. P. 2.2. A final judgment is a judgment or decree, which ends the litigation and leaves nothing for the court to do but execute the judgment. *Greenlaw v. Smith*, 67 Wn. App. 755, 759, 840 P.2d 223 (1992) (citing *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 633, 89 L. Ed. 911 (1945). A judgment is not final, and thus not appealable, until it is issued in writing. On appeal, a judgment is final when it concludes the action by

"resolving the plaintiff's entitlement to the requested relief." *Purse Seine Vessel Owners v. State*, 92 Wn. App. 381, 387, 966 P.2d 928 (1998).

B) **Discretionary review.** A party may seek direct review of a decision of a court of limited jurisdiction by the Washington Supreme Court where a number of conditions are met. WASH. R. APP. P. 4.3(a). First, the decision the party seeks to appeal must be a final decision of the type appealable under WASH. R. APP. P. 2.2. *Id.* Second, the trial court must enter a written statement establishing that the case involves "a fundamental and urgent issue of statewide importance," that delay in obtaining a judgment on appeal will be detrimental to a party or the public interests, and that the issue is presented by the record of the proceedings in the court of limited jurisdiction. *Id.* The Washington Supreme Court will only directly review a decision of a superior court where authorized to do so by statute, where a state law is found unconstitutional, where there is inconsistency between Washington courts on an issue, where a "fundamental and urgent issue of broad public import" is involved, in actions against a state officer, and in death penalty cases. WASH. R. APP. P. 4.2(a)(1)-(6).

Biomechanical Testimony

In Washington, a biomechanical engineer testifying as an expert will be held to the same general standard as any expert. This requires a preliminary demonstration that he or she qualifies as an expert and plans to offer testimony that will be helpful to the trier of fact. WASH. ER 702. Where proffered testimony is based on a new or unusual theory, the party seeking to offer the testimony must establish that the underlying science is generally accepted in the scientific community. *In re Marriage of Parker*, 91 Wn. App. 219, 226, 957 P.2d 256 (1998); *see also In re Detention of Strauss*, 106 Wn. App. 1, 8-9, 20 P.3d 1022 (2005).

Collateral Source Rule

A plaintiff's receipt of benefits from a source not party to a suit for damages generally will not reduce the amount of damages the plaintiff receives. *See Stone v. City of Seattle*, 64 Wn.2d 166, 391 P.2d 179 (1964). As a result, evidence of such receipt of benefits is not admissible at trial. *Id.* In an action against a health care provider, the defendant provider may introduce evidence of receipt of benefits from non-party sources other than the plaintiff's personal insurance. WASH. REV. CODE § 7.70.080 (2012).

Past Convictions

A) **Impeachment.** Evidence of a prior crime is admissible for impeachment of a witness under WASH. ER 609 (certain conditions must be met) and may also be admissible under WASH. ER 404(b) as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

B) **Purpose.** Under WASH. ER 404(b), the trial court must determine the purpose for which admission is sought, whether the evidence is relevant to proving an element of the charged crime, and whether the probative value outweighs any prejudicial effect. *State v.*

DeVries, 149 Wn.2d 842, 848, 72 P.3d 748 (2003). What "crimes, wrongs, or acts" refers to is not addressed in the statute; however, case law indicates that the rule restricts evidence of all manner of acts, regardless of whether a conviction results.

C) **Felonies.** Under WASH. ER 609, the crime must have been punishable by death or imprisonment in excess of one (1) year and the trial court must determine that the probative value of introducing the past conviction outweighs the prejudice to the party against which the evidence is offered.

D) **Crimes involving dishonesty.** Alternatively, evidence of a witness's past conviction can be introduced if the crime "involved dishonesty or false statement, regardless of the punishment." WASH. ER 609(a). Convictions more than ten (10) years old cannot be introduced "unless the court determines . . . that the probative value of the conviction . . . substantially outweighs its prejudicial effect." WASH. ER 609(b).

Day In The Life Videos

Washington courts generally allow admission into evidence of "day in the life" videos, which demonstrate the challenges a personal injury plaintiff faces as a result of his or her injuries. *See Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wash. App. 275, 298-99, 78 P.3d 177 (2003) (allowing admission of in-life video as showing of injuries and suffering). These videos, however, are subject to WASH. ER 403 allowing for the exclusion of evidence that is prejudicial. They are also subject to the general admissibility requirements for demonstrative videotapes, DVDs, and motion pictures.

Dead Man's Statute

The Dead Man's Statute prohibits interested parties from providing evidence of transactions or statements made by a deceased or incompetent person or a minor under the age of fourteen. WASH. REV. CODE § 5.60.030 (2012). The test to determine whether a party is an interested party for purposes of the statute is whether the witness would gain or lose by direct effect of the judgment or the record would be legal evidence against the witness in another action. *See, e.g.*, *Wildman v. Taylor*, 46 Wn. App. 546, 549, 731 P.2d 541 (1987). This statute has been held applicable in will contests. *In re Estate of Wind*, 27 Wn.2d 421, 178 P.2d 731 (1947).

Medical Bills

Medical bills are admissible to prove damages under WASH. ER 904. When medical bills are proposed as exhibits and proper notice is given, they will be admitted unless an objection to their admission is made. WASH. ER 904(a). During trial, however, a defendant will be allowed to challenge admitted medical bills on the ground that they are unrelated to the incident giving rise to the lawsuit. *Hawkins v. Marshall*, 92 Wn. App. 38, 44-45, 962 P.2d 834 (1998).

Offers of Judgment

Like settlement offers and negotiation, evidence of an offer of judgment is generally inadmissible. WASH. C. R. 68. An offer of judgment may be admissible in a proceeding to determine costs, however, because under WASH. C. R. 68, if the final judgment obtained by the offeree is not more favorable than the offer, the offeree must pay the offeror's costs incurred after the making of the offer. The costs allowed do not include attorney fees. For the most part, Washington's offer of judgment rule is weak in that the recoverable costs are typically minimal (*e.g.*, court reporter fees, witness fees).

Offers of Proof

When a party's evidence has been excluded by a trial court, Washington law allows that party to make an offer of proof to establish what the evidence would have demonstrated had it been found admissible. *See* WASH. ER 103. This not only allows a trial court to reach a considered ruling on admissibility but also provides an appellate court with a basis on which to review evidentiary issues. Washington has no prescribed manner for making an offer of proof and the established methods vary depending on the trial judge and the type of evidence in question. The trial judge should be consulted on this issue in the pre-trial motions phase. *See generally Brundridge v. Fluor Fed. Servs., Inc*., 164 Wn.2d 432 (2008). An offer of proof will not satisfy the rule that appellate courts will only consider challenges raised at trial when the party objects on different grounds on appeal. *See State v. Hudson*, 150 Wn. App. 646, 208 P.3d 1236 (2009).

Prior Accidents

Evidence of prior accidents may be admissible on a limited basis under Washington law in circumstances where sufficient similarity exists between the prior accident(s) and the accident at issue. *Turner v. Tacoma*, 72 Wn.2d 1029, 1035-36, 435 P.2d 927 (1967). More likely, however, evidence of injuries sustained in a prior accident and the circumstances surrounding those injuries may be admissible at a trial relating to a subsequent accident. *Id.* at 1036.

Relationship to the Federal Rules of Evidence

A) Washington Rules of Evidence are generally in accord with the Federal Rules of Evidence, with one large exception. Washington has not adopted the *Daubert* rule that applies in the federal courts; rather, Washington courts retain the *Frye* test for determining admissibility of novel scientific evidence. Although the rule has been criticized as overly conservative and difficult to administer, it continues to be applied in Washington cases. *State v. Copeland*, 130 Wn.2d 244, 251, 922 P.2d 1304 (1996); *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994) (affirming State's adherence to *Frye* standard despite existence of *Daubert*).

Rationale for *Frye* standard. The rationale of the *Frye* standard, which requires general acceptance in the relevant scientific community, is that expert testimony should be presented to the trier of fact only when the scientific community has accepted the reliability of the underlying principles. 293 F. 1013, 1014, 54 App. D.C. 46 (D.C. Cir. 1923). If the *Frye* test is satisfied, the trial court must then proceed with the two-part test of WASH. ER 702 to determine whether the

expert testimony should be an admitted, *i.e.*, whether the expert qualifies as an expert, and whether the expert's testimony would be helpful to the trier of fact. *Id.*

Seat Belt and Helmet Use Admissibility

A) **Seat belts.** Under Washington law, failure to comply with the seat belt law "does not constitute negligence, nor may failure to wear a safety belt assembly be admissible as evidence of negligence in any civil action." WASH. REV. CODE § 46.61.688(6) (2012). As a result, evidence of a failure to wear a seatbelt is not admissible under a number of circumstances, including where a defendant raises a contributory negligence defense alleging failure to mitigate damages. *Clark v. Payne*, 61 Wn. App. 189, 193, 810 P.2d 931 (1991).

B) **Helmets.** Under Washington law, it is unlawful for a person to ride a motorcycle "on a state highway, county road, or city street unless wearing upon his or her head a motorcycle helmet" unless that motorcycle is equipped with a steering wheel, seat belt and enclosed seating areas for the driver and passenger approved by the state patrol. WASH. REV. CODE § 46.37.530(1)(c) (2012). An earlier version of the statute required a "protective motorcycle helmet of a type conforming to rules adopted by the state patrol" and was held to be unconstitutionally vague. *See State v. Maxwell*, 74 Wn. App. 688, 692-93, 874 P.2d 1390 (1994); *but see City of Bremerton v. Spears*, 134 Wn.2d 141, 949 P.2d 347 (1998). Since being amended in 2003, the updated version of the statute has not been cited in any case law.

Spoliation

A) **Defined.** "Spoliation is the 'intentional destruction of evidence.'" *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999) (quoting BLACK'S LAW DICTIONARY 1401 (6th ed. 1990)). "Where relevant evidence that would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he [the party] fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that the evidence would be unfavorable" to that party. *Id.* (quoting *Pier 67, Inc. v. King Cnty.*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977)). "To remedy spoliation the court may apply a rebuttable presumption, which shifts the burden of proof to a party who destroys or alters important evidence." *Marshall*, 94 Wn. App. at 381.

B) **Factors.** Courts look at two factors when determining whether spoliation warrants a sanction: "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party." *Henderson v. Tyrell*, 80 Wn. App. 592, 607, 910 P.2d 522 (1996) (citing *Sweet v. Sisters of Providence in Wash.*, 895 P.2d 484, 491 (1995). After weighing these two general factors, the trial court uses its discretion to craft an appropriate sanction. *Id.* In weighing the importance of the evidence, the court considers whether the adverse party was afforded an adequate opportunity to examine it. *Id.* at 607-08. A party's actions are improper and constitute spoliation where the party has a duty to preserve the evidence in the first place. *Id.* at 610.

Subsequent Remedial Measures

Under WASH. ER 407 and relevant case law, evidence of subsequent remedial measures such as the posting of warning signs, disciplinary action, retraining, etc., is not admissible to prove negligence or culpability. *See, e.g., Wick v. Clark Cnty.*, 86 Wn. App. 376, 936 P.2d 1201 (1997) (regarding warning signs). Per the rule's language, it is, however, admissible for other purposes such as "proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." WASH. ER 407.

Use of Photographs

Generally, where a photograph is used to illustrate or support the testimony of a witness, the original photograph will not have to be produced but a witness will have to authenticate it by testifying as to what it shows. WASH. ER 1003. The admissibility of a duplicate, however, is called into question where a genuine question is raised as to the authenticity of the original or it would be unfair to admit the duplicate in lieu of the original. WASH. ER 1003. Where a photograph itself has independent probative value, the best evidence rule will apply and the original will have to be produced. WASH. ER 1002. This ordinarily will not create a problem because the term "original" is broadly defined in the context of photographs and a duplicate may nonetheless be admissible. *See* WASH. ER 1001.

DAMAGES

Caps on Damages

There is no statutory cap on personal injury or wrongful death plaintiff's noneconomic damages in Washington. The Washington Supreme Court deemed such caps on non-economic damages unconstitutional as a violation of the plaintiff's constitutional right to trial by jury. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636 (1989).

Calculation of Damages

Washington courts allow recovery for pain and suffering (both mental and physical) past and with reasonable probability to be experienced in the future (WPI 30.06); the reasonable value of necessary medical care, treatment, and services received to the present time (and that care, treatment, and services with reasonable probability to be required in the future) (WPI 30.07.01, .02); the reasonable value of earnings, earning capacity, employment, salaries, business opportunities, employment opportunities lost to the present time and with reasonable probability to be lost in the future (WPI 30.08.01, .02). *See generally* WPI 30.

Available Items of Personal Injury Damages

A) **Medical bills.** A plaintiff can recover for all medical expenses, past, present, and future. Medical expenses include the reasonable value of necessary medical care, treatment, and services received. To do so, the plaintiff must prove the reasonableness of the medical expenses claimed. The plaintiff is entitled to recover only the reasonable value of medical services received, not necessarily the total of all bills paid. *Cox v. Spangler*, 141

Wn.2d 431, 5 P.3d 1265 (2000); *Patterson v. Horton*, 84 Wn. App. 531, 929 P.2d 1125 (1997).

B) **Increased risk of harm.** Washington pattern jury instructions employ a "reasonable probability" standard of proof in providing for future damages. WPI 30.05, 30.06, 30.07.02, 30.09.02. The value of future damages in Washington is reduced to their present value and may be demonstrated by expert testimony. *Cornejo v. State*, 57 Wn. App. 314, 788 P.2d 554 (1990).

C) **Disability and disfigurement.** Damages for disability or disfigurement have been available as noneconomic damages under Washington law for many years. *See Gray v. Wash. Water Power Co.*, 30 Wash. 665, 71 P. 206 (1903). Such damages are meant to compensate a person for loss of the ability to lead a normal life and can be demonstrated by pointing to activities or interests an injured plaintiff will no longer be able to enjoy. *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 746 P.2d 285 (1987).

D) **Loss of enjoyment of life.** Loss of enjoyment of life is not available under Washington's survival statutes because the loss of enjoyment of life must be experienced prior to death. *Estate of Otani v. Broudy*, 151 Wn.2d 750, 92 P.3d 192 (2004).

E) **Pain, suffering and emotional distress.** Washington plaintiffs are entitled to damages for conscious pain and suffering, as well as emotional distress, with accompanying physical injury. These damages are considered together under Washington law. While physical symptoms must generally be demonstrated to recover for emotional distress, in the case of specific torts involving intentional or willful conduct by the defendant, such as outrage, emotional distress damages are recoverable even without physical manifestation. *Brower v. Ackerley*, 88 Wn. App. 87, 943 P.2d 1141 (1997).

F) **Loss of Consortium.** Loss of consortium damages are recoverable in Washington in cases of death or personal injury to a child, spouse, registered domestic partner or parent. *See* WASH. REV. CODE §§ 4.20.020, 4.24.010 (2012). In wrongful death cases, such damages are only recoverable when sought by a statutory beneficiary. *Roe v. Ludtke Trucking, Inc.*, 46 Wn. App. 816, 732 P.2d 1021 (1987). There are two tiers of statutorily prescribed beneficiaries. The first tier includes the child, children, spouse, or registered domestic partner, of the deceased. In addition, if there are no first tier beneficiaries, parents and siblings who were dependent on the deceased for support may recover damages. *Schumacher v. Williams*, 107 Wn. App. 793, 28 P.3d 792 (2001).

G) **Lost Income, Wages, Earnings.** A plaintiff may recover both lost wages, compensation for the regular wages a plaintiff would have collected but was unable to due to injury, and loss of earning capacity when a plaintiff suffers permanent disability or permanent diminution in the ability to earn money. In the first case, the plaintiff must establish that his injury caused him to lose the wages. A plaintiff need not be a wage earner to recover for loss of earning capacity. *See generally Dep't of Labor & Indus. v. Granger*, 159 Wn.2d 752, 154 P.3d 839 (2007).

Lost Opportunity Doctrine

Washington recognizes lost chance as a compensable interest, including lost chance of survival, even where a plaintiff would have had less than a 50% chance of survival had the chance not been lost. *Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 664 P.2d 474 (1983). This doctrine has been extended to recognize a lost chance at slowing an illness. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 3 P.3d 211 (2000).

Mitigation

It is generally the duty of an injured party to use reasonable means to mitigate damages, including via available legal remedies, and an injured party will usually not be allowed to recover for any failure to mitigate. There is no duty to mitigate in intentional tort cases or cases in which the wrong is ongoing. *Cobb v. Snohomish Cnty.*, 86 Wn. App. 223, 935 P.2d 1384 (1997); *Desimone v. Mut. Materials Co.*, 23 Wn.2d 876, 162 P.2d 808 (1945).

Punitive Damages

Punitive damages are not available under Washington law except where explicitly authorized by statute. Washington courts have consistently held that punitive damages are contrary to public policy. *See, e.g.*, *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 56 P. 1072 (1891) (punitive damages are "unsound in principle and unfair and dangerous in practice").

Recovery of Pre- and Post-Judgment Interest

A) **Post-judgment interest.** Post-judgment interest begins accruing, generally at a statutorily prescribed rate established when the judgment is entered, as of the date on which a valid judgment is entered. WASH. REV. CODE § 4.56.110(4) (2012); *In re Marriage of McLaughlin*, 46 Wn. App. 271, 729 P.2d 659 (1986).

B) **Prejudgment interest.** Prejudgment interest is awarded under Washington law under the premise that a party who retains money rightfully owed another party should be charged interest on the amount owed. Prejudgment interest, however, should not be awarded where the amount in question has not been determined with exactness. Prejudgment interest will only be awarded when the amount is liquidated or when an unliquidated claim is determinable without resorting to discretion but by reference to a fixed contractual standard. *Forbes v. Am. Bldg. Maint. Co. W.*, 170 Wn.2d 157, 240 P.3d 790 (2010); *Hansen v. Rothaus*, 107 Wn.2d 468, 730 P.2d 662 (1986).

Recovery of Attorney's Fees

Following the traditional rule in the United States (the "American rule"), civil actions in Washington generally require that each party pay its own attorney's fees and costs. There are exceptions, however, on the basis of statutory authority, contractual agreement, or in equity. *Cosmopolitan Eng'g Grp. Inc., v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006). The amount of any such award is generally left to the discretion of the trial court, and will only

be overturned if found manifestly unreasonable or based on untenable grounds. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 272 P.3d 827 (2012).

Settlement Involving Minors

When any claim in Washington is settled which involves the beneficial interest of an unemancipated minor, the court will determine the adequacy of the proposed settlement on behalf of such affected person and reject or approve it. WASH. SUP. CT. SPR 98.16W(a). After a petition for approval of the settlement is filed, a court may appoint a guardian ad litem to investigate to proposed settlement and advise the court on whether it should be approved on behalf of the minor. WASH. SUP. CT. SPR 98.16W(c)(1); *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992); *In re Settlement/Guardianship of A.G.M.*, 154 Wn. App. 58, 223 P.3d 1276 (2010).

Taxation of Costs

A) Generally speaking, a cost is taxed by the prevailing party to the party required to pay it. The prevailing party is the one that received an affirmative judgment in its favor. In the event neither party wholly prevails, Washington courts follow the "proportionality approach" whereby the determination of who is the prevailing party depends on the extent of the relief afforded the parties. When both parties prevail on major issues, however, each party bears its own costs. *Guillen v. Contreras*, 169 Wn.2d 769, 238 P.3d 1168 (2010); *Joint Ventures Fourplay v. Loistl*, No. 64038-1-I, 2011 Wn. App. LEXIS 1048 (Wash. Ct. App. 2011).

B) **Allowable costs.** Allowable costs include court costs such as fees for filing and service of process, reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records admitted as evidence, statutory attorney and witness fees, and the reasonable expense of transcription of depositions to the extent it was deemed necessary by the court or arbitrator to achieve the successful result. WASH. REV. CODE §§ 4.84.010, .090 (2012). Other reasonable attorney fees are not allowed to be awarded as cost, unless authorized by contract, statute, or equitable exception. *City of Seattle v. McCready*, 131 Wn.2d 266, 931 P.2d 156 (1997). The plaintiff of an action brought in superior court shall in no case be entitled to costs taxed as attorneys' fees. WASH. REV. CODE § 4.84.030 (2012).

indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.