STATE OF ILLINOIS COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

Pre-suit notice requirements vary depending on the identity of the defendant.

A) **County engineers and supervisors of highways.** For actions against any county engineer or superintendent of highways, the plaintiff must file written notice of the intent to commence any civil action with the office of that county engineer or superintendent of highways and with the State's Attorney of the county where the cause of action arose prior to suit and within six (6) months of receiving the injury. 745 ILL. COMP. STAT. 15/3 (2014).

B) **School districts.** For actions against any school district, the plaintiff must file written notice of the intent to commence action with the school board attorney, if there is one, and also with the clerk or secretary of the school board prior to suit and within six (6) months from the date that the injury was received. Notice of an action against a non-profit private school must be filed with the superintendent or principal. 745 ILL. COMP. STAT. 25/3 (2014).

C) **Metropolitan transit authorities.** No civil action against the authority can be commenced by any person for any injury unless it is commenced within one year from the date the cause of action accrued. 70 ILL. COMP. STAT. 3605/41 (2014).

Relationship to the Federal Rules of Civil Procedure

Illinois has its own Code of Civil Procedure. Some of the provisions in the Illinois Code of Civil Procedure are similar to provisions in the Federal Rules of Civil Procedure. *See* 735 ILL. COMP. STAT. 5/1-101 to 5/22-105 (2014).

Description of the Organization of the State Court System

A) **Judicial appointments.** Illinois full circuit judges are elected by the voters in partisan elections after being nominated in primary elections or by petition. *See* ILL. CONST. art. VI, § 12(a). Associate judges at the circuit court level are appointed to the court by the circuit court judges within each circuit. *Id.* § 8.

Judicial retention. Incumbent judges must receive sixty percent retention approval to retain office. *Id.* § 12(d).

B) **Structure.** The Illinois court system consists of three courts: the Supreme Court, the Appellate Court, and the Circuit Court. *See* ILL. CONST. art. VI, § 1.

The Appellate Court is divided into five judicial districts. Cook County comprises the First District while the remaining districts are made up of more than one county each. *See* ILL. CONST. art. VI, § 2.

The Circuit Court is currently divided into twenty two judicial circuits, each of which is comprised of one or more counties. 705 ILL. COMP. STAT. 35/1 (2014). Circuit courts hear both civil and criminal cases.

C) **Alternative dispute resolution.** Illinois does not have a comprehensive statewide statute for all methods of alternative dispute resolution ("ADR"). In general, state statutes and Supreme Court Rules make ADR programs optional for counties or judicial circuits. ILL. SUP. CT. R. 86 (2014). Local rules govern the programs, which are then approved by the Illinois Supreme Court.

1) **Arbitration.** Each circuit has the option to use a mandatory arbitration system and thereafter adopt rules for the conduct of the arbitration proceedings and determine which cases, within the general class of eligible actions, will go to arbitration. Only actions for money damages within a jurisdictional range under $50,000.00 are eligible for mandatory arbitration. Each local circuit court elects a jurisdictional range. ILL. SUP. CT. R. 86-98; 735 ILL. COMP. STAT. 5/2-1001A to -1009A (2014).

Procedural rules. The Illinois rules for discovery, civil procedure and evidence apply to arbitration. ILL. SUP. CT. R. 222(a) (2014). Cases, however, proceed to arbitration with certain relaxed rules of evidence.

Applicability of awards. Mandatory arbitration awards are non-binding and parties that were present at the arbitration hearing can file a notice of rejection within thirty days of the arbitration hearing with the clerk of the court, pay a fee to the circuit court clerk, and request to proceed to trial. 735 ILL. COMP. STAT. 5/2-1004A (2014). If no rejection of the award is filed, a judge of the circuit court may enter the award as the judgment of the court. 735 ILL. COMP. STAT. 5/2-1005A (2014).

2) **Mediation.** Circuits adopt local rules for mediation programs that are consistent with the Supreme Court Rules. Parties may, but are not required to, seek binding mediation. ILL. SUP. CT. R. 99 (2014).

However, circuits are required to develop mediation programs for child custody and divorce. ILL. SUP. CT. R. 905 (2014).

Service of Summons

A) **Person.** Under 735 ILL. COMP. STAT. 5/2-203(a) (2014), service upon a defendant is made if: (1) the defendant is personally served or (2) substituted service is made. A copy of the summons must be left at the defendant's residence with a family member or a person residing there who is thirteen years or older. The person who accepts service should be informed of the contents of the summons. A copy of the summons should also be mailed to the defendant at that address.

B) **Public corporation.** Personal jurisdiction over Illinois public corporations is acquired by leaving a copy with the appropriate agent, depending on whether it is a county, city, or village, and with the corporate officer of the public corporation corresponding thereto in the case. 735 ILL. COMP. STAT. 5/2-211 (2014).

C) **Private corporation.** Under 735 ILL. COMP. STAT. 5/2-204 (2014), a private corporation may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the Illinois or (2) in any other manner permitted by law, such as notification by publication and mail.

D) **Waiver of service.** A plaintiff may notify a defendant of an action and request that the defendant waive service of summons. 735 ILL. COMP. STAT. 5/2-213(a) (2014). The notice and request shall be in writing in a form prescribed by the Supreme Court Rule. *See* ILL. SUP. CT. R. 101 (2014). The defendant's waiver of service does not waive personal jurisdiction or venue issues. 735 ILL. COMP. STAT. 5/2-213(b) (2014).

E) **Personal jurisdiction.** Under 735 ILL. COMP. STAT. 5/2-209 (2014), there are three general bases for personal jurisdiction over persons who are not currently residents of Illinois. More specifically, the Code of Civil Procedure identifies:

1) fourteen specific acts that will subject a person to jurisdiction in Illinois with respect to causes of action arising from the doing of those acts;

2) presence, domicile, a corporation's organization under Illinois' laws or doing business in Illinois; or under a foreign defamation judgment against Illinois person or entity; or

3) any other constitutional bases for jurisdiction under the "catch-all" provision.

F) **Service for motor vehicles accidents.** Service of process in an action against a non-resident of Illinois stemming from his operation of a vehicle on Illinois highways may be proper. Notice of the filing of a copy of the service must be registered in the office of the Illinois Secretary of State and a copy of the process must be sent by registered mail by the plaintiff to the defendant's last known address, and the plaintiff's affidavit of compliance with the statute must be appended to the summons. The Secretary of State shall keep a record of all such processes, indicating the day and hour of such service. 625 ILL. COMP. STAT. 5/10-301 (2014).

Statutes of Limitations

A) **Personal injury.** Actions for damages for an injury to the person must be commenced within two (2) years after the cause of action accrued. 735 ILL. COMP. STAT. 5/13-202 (2014).

B) **Property damage.** Actions for damages for an injury to property must be commenced within five (5) years after the cause of action accrued. 735 ILL. COMP. STAT. 5/13-205 (2014).

C) **Wrongful death.** A plaintiff's claims for wrongful death against a defendant will survive only if a decedent's death occurred before the expiration of the statute of limitations period for the tort. Therefore, a wrongful death action will lie only where the deceased had a claim that was not time-barred on or before his death. 740 ILL. COMP. STAT. 180/1 (2014).

D) **Representative for deceased party.** If a person entitled to bring an action dies before the expiration of the statute of limitations for that action, an action may be commenced by the representative before the expiration of that time or within one year from the decedent's death, whichever date is later. The court may appoint a special representative, if no petition for letters of office for the decedent's estate has been filed, for prosecuting the action. 735 ILL. COMP. STAT. 5/13-209(a) (2014).

E) **Oral contracts.** Except in regard to vendor payments provided in 305 ILL. COMP. STAT. 5/11-13 (2014) and sales contracts as provided in 810 ILL. COMP. STAT. 5/2-725 (2014), actions on express or implied oral contracts must be commenced within five (5) years after the cause of action accrued. 735 ILL. COMP. STAT. 5/13-205 (2014).

F) **Written contracts.** Except as provided in sales contracts as provided in 810 ILL. COMP. STAT. 5/2-725 (2014), actions on written leases or written contracts must be commenced within ten (10) years after the cause of action accrued. However, if a payment or new promise to pay, in writing, was after the statute of limitations elapsed, a new ten-year statute of limitations begins. 735 ILL. COMP. STAT. 5/13-206 (2014).

G) **Metropolitan transit authorities.** Actions against the metropolitan transit authorities must be commenced within one (1) year from the date that the injury was received or the cause of action accrued and as more fully described within this Compendium. 70 ILL. COMP. STAT. 3605/41 (2014).

H) **Minors and people under a legal disability.** The statutes set forth in 735 ILL. COMP. STAT. 5/13-201 to 210 (2014) for, among other things, personal injury, contribution, indemnity, and contract actions do not apply to individuals under eighteen years old or under a legal disability. In those cases, the person must bring such actions within two (2) years after the person attains the age of eighteen years, or the disability is removed. 735 ILL. COMP. STAT. 5/13-211 (2014).

I) **Construction and improvements.** Actions based upon tort, contract, or otherwise against any person for an act or omission in the design, planning, supervision, observation or management of construction, or improvement to real property, must be commenced within four (4) years from the time the person bringing the action knew or reasonably should have known of such act or omission. 735 ILL. COMP. STAT. 5/13-214(a) (2014). No action based on the same claims as above can be brought after ten (10) years have elapsed from the time of such act or omission, but any person who discovers such act prior to the ten (10) year

expiration shall have no less than four years since to bring an action. 735 ILL. COMP. STAT. 5/13-214(b) (2014).

1) If a person otherwise entitled to bring a construction action could not have done so within the limitations period solely because such person was under the age of eighteen years or had a legal disability, the statute of limitations period does not begin to run until the person attains the age of eighteen years, or the disability is removed. 735 ILL. COMP. STAT. 5/13-214(c) (2014).

J) **Employment claims.** An employment claim brought under Illinois law must be commenced within five (5) years after the cause of action accrued. 735 ILL. COMP. STAT. 5/13-205 (2014). Separate statutes of limitations exist for claims brought under or in accord with federal law.

K) **Fraudulent Concealment.** If a person liable for a cause of action fraudulently conceals the existence of the cause of action from someone entitled to that knowledge, a plaintiff must commence the suit within five (5) years of discovering the fraud. 735 ILL. COMP. STAT. 5/13-215 (2014).

L) **Contribution.** 735 ILL. COMP. STAT. 5/13-204 (2014) governs the following circumstances related to contribution claims:

1) If an underlying action seeking recovery for injury has not been filed by a claimant, actions for contributions must be commenced within two (2) years after the time the party seeking contribution has made a payment.

2) If an underlying action has been filed by a claimant, actions for contribution must be commenced within two (2) years after the party seeking contribution has been served with process in the underlying action, or within two (2) years after the time the party seeking contribution knew or should reasonably have known of an act or omission giving rise to the action for contribution or indemnity, whichever period expires later.

3) The contribution statute of limitations does not apply to any action for damages in which contribution is sought from a party who is alleged to have been negligent and whose negligence has been alleged to have resulted in injuries or death by reason of medical or other healing art malpractice. Instead, the statute of limitations applicable to medical malpractice actions applies, which follows. *See* 735 ILL. COMP. STAT. 5/13-212 (2014).

M) **Medical malpractice.** Except for cases where fraudulent concealment applies as provided in 735 ILL. COMP. STAT. 5/13-215 (2014), plaintiffs in medical malpractice actions must bring their claims within two (2) years after the date on which they knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury, whichever occurred first, but in no event can plaintiffs file more

than four (4) years after the date of the events giving rise to the cause of action. 735 ILL. COMP. STAT. 5/13-212(a) (2014).

1) **Minors.** Except for cases of fraudulent concealment, plaintiffs must bring actions for injury or death resulting from medical malpractice within eight (8) years after the date on which the alleged act or omission occurred if the plaintiff was, at the time the cause of action accrued, under the age of eighteen years. Such plaintiffs may not bring actions after they turn twenty two years old. 735 ILL. COMP. STAT. 5/13-212(b) (2014).

2) If a plaintiff was under a legal disability other than being younger than 18 at the time the cause of action accrued, the period of limitations does not begin to run until the disability has been removed. 735 ILL. COMP. STAT. 5/13-212(c) (2014).

N) **Legal malpractice.** An action for damages against an attorney in the performance of professional services must be commenced within two (2) years from the time the plaintiff knew or reasonably should have known of the injury for which damages are being sought. 735 ILL. COMP. STAT. 5/13-214.3 (2014).

1) If the plaintiff is a minor or under a legal disability at the time the cause of action accrues, the period of limitations does not begin to run until majority is attained or the disability is removed. 735 ILL. COMP. STAT. 5/13-214.3(e) (2014).

Statutes of Repose

"A statute of repose limits the time within which an action may be brought and is not related to the accrual of any cause of action." *Goodman v. Harbor Mkt., Ltd.*, 278 Ill. App. 3d 684, 691, 663 N.E.2d 13, 18 (1st Dist. 1995) (citation omitted).

A) **Construction.** A plaintiff must bring a construction lawsuit within ten (10) years of the time of the act or omission leading to the cause of action. However, if the plaintiff discovers the act or omission within ten (10) years from the time of the act or omission, he will have at least four (4) years to bring the action. 735 ILL. COMP. STAT. 5/13-214(b) (2014).

B) **Medical malpractice.** Plaintiffs must bring medical malpractice actions for injury within four (4) years of the date the act that caused the injury or death occurred. 735 ILL. COMP. STAT. 5/13-212(a) (2014). If there has been a fraudulent concealment of the cause of action, 735 ILL. COMP. STAT. 5/13-215 (2014) allows the claimant to commence the action within five (5) years of the discovery of the cause of action and no later.

C) **Public accountant malpractice.** Plaintiffs must bring actions against public accountants within five (5) years after the date on the act or omission alleged to have caused the injury occurred. However, in the event that an income tax assessment is made or criminal prosecution is brought against a person, that person may bring an action against the public

accountant who prepared the tax return within two (2) years from the date of the assessment or conclusion of the prosecution. 735 ILL. COMP. STAT. 5/13-214.2(b) (2014).

D) **Legal malpractice.** Plaintiffs must bring actions for legal malpractice within six (6) years after the date on which the act or omission occurred. 735 ILL. COMP. STAT. 5/13-214.3(c) (2014). If there has been a fraudulent concealment of the cause of action, 735 ILL. COMP. STAT. 5/13-215 (2014) allows the claimant to commence the action within five (5) years of the discovery of the cause of action and no later.

E) **Local governments.** Plaintiffs must bring actions against public entities or public employees within two (2) years of the date on which the claimant knew or should have known of the injury, but in no event can the claim be brought after four (4) years after the date on which the act or omission alleged to be the cause of the injury or death occurred. 745 ILL. COMP. STAT. 10/8-101(b) (2014).

F) **Product liability.** 735 ILL. COMP. STAT. 5/13-213(b) (2014) states:

> Subject to the provisions of subsections (c) and (d) no product liability action based on any theory or doctrine shall be commenced except within the applicable limitations period, and, in any event, within 12 years from the date of first sale, lease or delivery or possession by a seller or 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier, of any product unit that is claimed to have injured or damaged the plaintiff, unless the defendant expressly has warranted or promise the product for a longer period and the action is brought within that period.

Venue Rules

A) Venue is proper in the county of residence where at least one defendant resides or where some part of the transaction out of which the cause of action arose. "Residence" means residence at the time the complaint was filed rather than when service of process was made or when the incident arose. 735 ILL. COMP. STAT. 5/2-101 (2014).

B) ***Forum non conveniens.*** The doctrine of *forum non conveniens* allows a court to decline jurisdiction when another forum for trial would be more convenient and better serve the interests of justice even though it would otherwise have jurisdiction. A motion to dismiss or transfer the action under this doctrine must be filed by a party no later than ninety (90) days after the last day allowed for the filing of that party's answer. ILL. SUP. CT. R. 187 (2014).

1) **Factors.** Courts balance private and public interest factors in determining whether to grant a motion to transfer pursuant to *forum non conveniens*:

a) **Private interest factors.** Private interest factors include: (1) the convenience of all the parties; (2) the relative ease of access to sources of

testimonial, documentary and real evidence; (3) the availability of compulsory process to secure attendance of unwilling witnesses; (4) the cost to obtain attendance of willing witnesses; (5) the possibility of viewing the premises, if appropriate; and (6) all other practical problems that make the trial of a case easy, expeditious and inexpensive. *Dawdy v. Union Pac. R.R. Co.*, 207 Ill. 2d 167, 172, 797 N.E.2d 687, 693 (2003) (citing *Cook v. Gen. Electric Co.*, 146 Ill. 2d 548, 557, 588 N.E.2d 1087, 1091 (1992)).

b) **Public interest factors.** Public interest factors include: (1) the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; (2) the unfairness of imposing jury duty upon residents of a county with no connection to the litigation; and (3) the interest in having local controversies decided locally. *Dawdy*, 207 Ill. 2d at 173, 797 N.E.2d at 693 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)).

NEGLIGENCE

Comparative Fault / Contributory Negligence

A) **Contributory negligence.** Under a contributory negligence standard, a plaintiff is barred from recovery if his negligence contributed to the accident that led to the claim. Illinois no longer recognizes contributory negligence. *Alvis v. Ribar*, 85 Ill. 2d 1, 5, 421 N.E.2d 886 (1981).

B) **Comparative fault.** Under a pure comparative fault standard, a plaintiff that was negligent in causing his own injury may recover, but only proportional to other parties' fault. Illinois does not recognize pure comparative fault. *Id.* at 16, 421 N.E.2d at 892.

C) **Modified comparative fault.** Illinois follows a modified comparative fault system, which combines elements of contributory negligence and comparative fault. Plaintiffs who are more than 50% at fault cannot recover; plaintiffs who are 50% or less at fault can recover, but their recovery is reduced by their proportion of the fault. A plaintiff's comparative fault is assessed with respect to the conduct of all who contributed to the injury, whether or not they are parties to the suit. 735 ILL. COMP. STAT. 5/2-1116 (2014).

D) **Burdens.** The plaintiff's comparative negligence must be pleaded as an affirmative defense and the defendant has the burden of proving comparative negligence. *D.C. v. S.A.*, 178 Ill. 2d 551, 564, 687 N.E.2d 1032, 1039 (1997). Plaintiff's negligence was codified as an affirmative defense with the requirement that the defendant plead the facts constituting the defense in 735 ILL. COMP. STAT. 5/2-613(d) (2014).

E) **Standard of review.** Illinois courts review a jury's assignment of percentages of comparative negligence by asking whether the verdict was against the "manifest weight of the evidence". *Junker v Ziegler*, 113 Ill. 2d 332, 339, 498 N.E.2d 1135, 1137 (1986). The standard of review is different for claims arising under the Federal Tort Claims Act, where

an appellate court must reverse if it has a "firm conviction" that the jury's determination is wrong.

F) **Assumption of the risk.** Despite the adoption of modified comparative fault, the Illinois Supreme Court has upheld the existence of the "open and obvious danger doctrine" as well as the "assumption of risk" defense, stating that the obviousness of a danger and the plaintiff's own negligence affect whether and to what extent the plaintiff is comparatively negligent. *Deibert v. Bauer Bros. Constr. Co.*, 141 Ill. 2d 430, 436-37, 566 N.E.2d 239, 243 (1990).

Exclusive Remedy – Workers' Compensation Protections

A) The Illinois Workers' Compensation Act, 820 ILL. COMP. STAT. 305/1 *et seq*. (2014), provides a uniform, speedy, and cost-efficient method of recovery without proof of fault for accidental injuries sustained by any employee arising out of and in the course of employment. *Fregeau v. Gillespie*, 96 Ill. 2d 479, 486, 451 N.E.2d 870, 873 (1983).

1) **"Arising out of" or "in the course of."** An injury "arises out of" and "in the course of" employment when it occurs within the period of employment, at a place where the employee is reasonably expected to fulfill his or her duties, and while he or she is performing those duties. *Kropp Forge Co. v. Indus. Comm'n*, 225 Ill. App. 3d 244, 250, 587 N.E.2d 1095, 1099 (1st Dist. 1992). Employment is not limited to the exact moment when an employee begins or ceases his duties, but includes a reasonable time before commencing and after concluding actual employment. *Chmelik v. Vana*, 31 Ill. 2d 272, 278, 201 N.E.2d 434, 438 (1964).

2) **Causal connection.** There must be a causal connection between the employment and the accidental injury, such that the injury originates in some risk connected with or incidental to the employment. *Id.* at 276, 201 N.E.2d at 437. This does not mean that the injury must have been foreseen or expected. *Id.* at 277, 201 N.E.2d at 438.

3) **Peculiar risk.** "Ordinarily, an injury does not arise out of the employment unless the danger causing the injury is peculiar to the work and the risk is not one to which the public generally is subjected." *Id.* at 277-78, 201 N.E.2d at 438. "However, if an employee is exposed to a risk common to the general public [but] to a greater degree than other persons by reason of his employment, the accidental injury is said to arise out of his employment." *Id.* at 278, 201 N.E.2d at 438.

B) **Exclusivity.** Because every employee receives a definite recovery, employees are not permitted to seek and recover both compensation under the Act and common-law damages from their employers. 820 ILL. COMP. STAT. 305/5(a) (2014). However, an employee, "out of caution or uncertainty", may file a common-law action against an employer, though he has already filed a workers' compensation claim. *Fregeau v. Gillespie*, 96 Ill. 2d 479, 485, 451 N.E.2d 870, 873 (1983). This enables the employee who is uncertain of the proper basis for recovery to toll the statute of limitations on a civil action. *Id.*

1) The Act prohibits employees, their dependents, estate representatives, and others entitled to recovery under the Act from bringing tort suits against employers for accidental injury. 820 ILL. COMP. STAT. 305/5 (2014).

2) The Act protects employers, employers' insurers, brokers, and service organizations retained by employers in providing safety service, advice, or recommendations. 820 ILL. COMP. STAT. 305/5 (2014). Co-workers are also protected from common-law and statutory suits for *unintentional* injury. *Id.*

C) **Burdens.** The exclusive remedy provision is an affirmative defense and the burden falls on the employer to establish an employment relationship and a nexus between the employment and the injury. *Victor v. Dehmlow*, 405 Ill. 249, 253, 90 N.E.2d 724, 727 (1950). An employer who does not assert the exclusive remedy defense at trial waives the defense and may be liable for negligence. *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 72, 783 N.E.2d 1024, 1030 (2002).

D) **Intentionality.** If an employee claims that injury was intentional, he will have the burden of proving a specific intent to injure. Even where an employee alleges an intentional tort on the part of the employer, his suit may be barred by the exclusive remedy provision if he actively pursued a remedy under the Illinois Workers' Compensation Act. *Zurowska v. Berlin Indus., Inc.*, 282 Ill. App. 3d 540, 544-45, 667 N.E.2d 588, 591-92 (1st Dist. 1996). On the other hand, acceptance of unsolicited benefits does not bar an employee's civil suit. *Wren v. Reddick Cmty. Fire Prot. Dist.*, 337 Ill. App. 3d 262, 268, 785 N.E.2d 1052, 1057-58 (3d Dist. 2002).

E) **Nonapplicability.** Workers' compensation does not apply in several important cases.

1) **Situations.** An employee may bring a common law cause of action against the employer if the employee proves that:

a) the injury was not accidental (intentional tort);

b) the injury did not arise from his or her employment;

c) the injury was not received during the course of employment; or

d) the injury was not compensable under the Illinois Workers' Compensation Act. *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 463, 564 N.E.2d 1222, 1226 (1990) (citation omitted).

2) **Illegally-employed minors.** The Act contains an exception for illegally-employed minors who may reject their right to workers' compensation benefits within six (6) months after the injury or death or six (6) months after the appointment of a legal representative, giving them the right to seek common law or statutory remedies. 820 ILL. COMP. STAT. 305/5(b) (2014).

3) **Respondeat superior.** The Act may also bar suit if an injured employee sues his employer on a theory of respondent superior for the acts of co-workers where the injury is deemed accidental from the employer's point of view. *Rodi v. Target Corp.*, 2004 U.S. Dist. LEXIS 5015, *5 (N.D. Ill. 2004). An injured employee may still be able to recover if he can show one of the following:

a) That the co-worker was an alter ego of the employer such that it is reasonable to infer that the co-worker was for all intents and purposes interchangeable with the employer. *Id.* at *7. The injured employee would also have to allege that the employer's alter ego intentionally inflicted, commanded, or expressly authorized an act that caused the injury. *Id* at *6.

b) That the employer commanded or expressly authorized the co-worker to engage in the alleged conduct. *Id.*

F) **Co-worker liability for intentional torts.** While the exclusive remedy provision bars an employee's action for injury caused by the negligence of a co-worker, it does not immunize the co-worker from suit for an intentional tort. *Valentino v. Hilquist*, 337 Ill. App. 3d 461, 473, 785 N.E.2d 891, 902 (1st Dist. 2003).

G) **Dual capacity.** Under the "dual capacity doctrine" an employer may be liable in tort if it operates in a second capacity that creates obligations independent of those of an employer. To invoke this doctrine, an employee must show that the employer has a second distinct legal persona generating obligations unrelated to those flowing from the first and that the injury resulted from the employer's conduct in the second non-employing capacity. *Murcia v. Textron, Inc.*, 342 Ill. App. 3d 433, 437-38, 795 N.E.2d 773, 777-78 (1st Dist. 2003) (citation omitted).

Indemnification

A) Indemnity shifts the entire responsibility for damages from the party who has been ordered to pay damages to another party who should have been liable for the damages. *Kerschner v. Weiss & Co.*, 282 Ill. App. 3d 497, 502, 667 N.E.2d 1351, 1355 (1st Dist. 1996). Contractual and implied indemnity are governed by the Joint Tortfeasor Contribution Act in 740 ILL. COMP. STAT. 100/0.01 *et seq*. (2014).

B) **Distinct from contribution.** Contribution is the right of a tortfeasor who has been ordered to pay all damages for a tort to recover some of the damages it paid from other tortfeasors according to each tortfeasor's proportionate liability. Indemnity and contribution are mutually exclusive remedies for allocating a plaintiff's damages among joint tortfeasors. *Kerschner*, 282 Ill. App. 3d at 502, 667 N.E.2d at 1355.

C) **Commencing an indemnity action.** An action for indemnity may be commenced under these circumstances:

1) a defendant may bring a third-party action in the original action against a potential indemnitor, or

2) a defendant may file a cross-claim for indemnity against a co-defendant in the original action.

Express and implied indemnity. An indemnity cause of action may be express or implied by law. The right to indemnity set forth in a contractual provision is considered express indemnity, while implied indemnity arises when a promise to indemnify can be implied from the relationship between the parties. *Dixon v. Nw. Transp. Co.*, 151 Ill. 2d 108, 118, 601 N.E.2d 704, 709 (1992).

D) Based on principles of restitution, implied indemnity arises in situations in which a promise to indemnify is implied from the relationship between the tortfeasors. *Kerschner*, 282 Ill. App. 3d at 502, 667 N.E.2d at 1356. Implied indemnity is only available where the party seeking it was not at fault in causing the loss. *Dixon v. Nw. Publ'g Co.*, 166 Ill. App. 3d 745, 751, 520 N.E.2d 932, 936 (4th Dist. 1988).

1) While enactment of the Joint Tortfeasor Contribution Act abolished implied indemnity relating to tort causes of action, implied indemnity arising from quasi-contractual causes of action remains viable where the indemnitee's liability is solely derivative. 740 ILL. COMP. STAT. 100/2(a) (2014).

2) Classic pre-tort relationships which have given rise to a duty to indemnify include the lessor-lessee (*Mierzjewski v. Stronczek*, 100 Ill. App. 2d 68, 241 N.E.2d 573 (1st Dist. 1968), owner-lessee (*Blaszak v. Union Tank Car*, 37 Ill. App. 2d 12, 184 N.E.2d 808 (1st Dist. 1962) and employer-employee relationships. *Heinrich v. Peabody Int'l Corp.*, 117 Ill. 2d 162, 165-66, 510 N.E.2d 889 (1987).

3) To state a cause of action for implied indemnity based upon quasi-contractual principles, a third-party complaint must allege:

   a) a pre-tort relationship between the third-party plaintiff and the third-party defendant and

   b) a qualitative distinction between the conduct of the third-party plaintiff and the third-party defendant. *See Muhlbauer v. Kruzel*, 39 Ill. 2d 226, 232 N.E.2d 790 (1968), *overruled on other grounds by Allison v. Shell Oil Co.*, 113 Ill. 2d 26, 495 N.E.2d 496 (1986).

4) A third party complaint must allege sufficient facts so that "it would be possible to discern potential relationships that would support a duty on the part of" a third-party defendant to indemnify the third-party plaintiff. *Id.*

5) The Joint Tortfeasor Contribution Act does not affect express indemnity. However, an indemnity contract will not be construed as indemnifying a tortfeasor against his

own negligence, unless clear and explicit language of the contract requires this form of construction. *Barger v. Scandroli Constr. Co.*, 38 Ill. App. 3d 348, 349, 347 N.E.2d 207, 208 (2d Dist. 1976). Furthermore, agreements to indemnify against willful misconduct and some forms of contracts such as construction contracts are unenforceable because they are contrary to public policy. *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494, 500-01, 336 N.E.2d 881, 885 (1975).

E) **Interpretation.** Where a contractual provision is apparently one for indemnification but may be reasonably read as one for contribution, the latter interpretation should be applied. *Cooper v Wal-Mart Stores*, 959 F. Supp. 964, 968 (C.D. Ill. 1997).

Joint and Several Liability

A) Joint liability is applicable where two or more defendants both contributed to a single, indivisible injury by their negligence and are thereby each fully liable for that injury. Several liability is applicable where defendants are only liable for their respective obligations. When a court applies joint and several liability, a plaintiff may seek full recovery from any of the defendants who are jointly liable for the harm.

B) In Illinois, joint and several liability is modified by 735 ILL. COMP. STAT. 5/2-1117 (2014). All defendants found liable are jointly and severally liable for a plaintiff's past and future medical expenses. *Id.* If a defendant's portion of the fault is less than twenty-five percent of the total fault, he or she will be severally liable, or responsible only for that portion of fault. *Id.* However, if a defendant's fault is twenty-five percent or greater, he will be jointly *and* severally liable for all other damages and the plaintiff will be able to collect the entire sum. *Id.*

C) **Applicability.** Severability does not apply if the liability of the tortfeasors is incapable of being legally apportioned. Accordingly, severability does not apply to tortfeasors who act in concert since the act of one is the act of all. A joint venturer in a common enterprise will be liable for any injuries resulting from the enterprise regardless of whether or not he was the one who was negligent.

Exceptions. 735 ILL. COMP. STAT. 5/2-1118 (2014) provides an exception that makes defendants jointly and severally liable for damages despite being less than 25% at fault. Environmental polluters and negligent parties in medical malpractice actions are always jointly and severally liable for damages. *Id.*

D) **Contribution.** Contribution distributes a loss among jointly and severally liable tortfeasors by requiring each to pay his or her proportionate share of the common liability. In Illinois, contribution claims are governed by the Illinois Joint Tortfeasor Contribution Act. 740 ILL. COMP. STAT. 100/1 *et seq*. (2014).

When two or more parties are subject to liability in tort arising out of the same injury or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them. 740 ILL. COMP. STAT. 100/2(a)

(2014). The proper focus for a right of contribution is the injury itself rather than a common theory of liability.

A defendant has a right of contribution only if he has paid more than his percentage share of the common liability, and his recovery is limited to the amount paid in excess of his share. 740 ILL. COMP. STAT. 100/2(b) (2014). No defendant is liable to make contribution beyond his own share of the common liability. *Id.* Common liability is (1) the amount the parties agree on in a post-judgment settlement that includes all tortfeasors or (2) a court-determined damage amount.

When a tortfeasors' obligation is uncollectible, the remaining tortfeasors must share the obligation in accordance with their percentage fault. 740 ILL. COMP. STAT. 100/3 (2014).

E) **Timing.** A contribution claim does not have to be asserted during litigation. It may be asserted by a separate action before or after payment of a settlement or judgment in favor of the claimant, by counterclaim, or by third-party complaint in a pending action. 740 ILL. COMP. STAT. 100/5 (2014).

1) **Contribution barred.** A defendant may be barred from seeking contribution:

a) If a statute of repose, which is substantive in nature, indicates that the other tortfeasor(s) cannot be held liable in tort, *Ziarko v. Soo Line R.R.*, 161 Ill. 2d 267, 641 N.E.2d 402 (1994);

b) If the damage amount is for punitive damages, *id.* at 277, 641 N.E.2d at 407;

c) If the action is for contractual liability or a breach of fiduciary duty, *id.*;

d) If he is guilty of an intentional tort, including when the defendant's willful and wanton actions rise to the level of intentional behavior, *id.* at 280, 641 N.E.2d at 408; or

e) If the other tortfeasor is immune from suit and the court balances policy considerations in favor of not allowing contribution. *Lietsch v. Allen*, 173 Ill. App. 3d 516, 521, 527 N.E.2d 978, 981 (1988).

F) **Effects of settlement.** When a release or covenant not to sue is reached with one joint defendant, it does not discharge any of the others from liability for the injury or wrongful death unless its terms so provide. 740 ILL. COMP. STAT. 100/2(c) (2014). However, recovery against the remaining tortfeasors is reduced to the greater of the amount stated in the release or in the amount of the consideration actually paid for it.

A defendant who settles with a claimant is not entitled to contribution from any other defendant whose liability is not extinguished by the settlement. 740 ILL. COMP. STAT. 100/2(d), (e) (2014). A good faith settlement of a workers compensation claim discharges a third party defendant's contribution liability to a non-settling defendant. *Higginbottom*

v. Pillsbury, 232 Ill. App. 3d 240, 247, 596 N.E.2d 843, 848 (5th Dist. 1992). In that case, the employer will not necessarily be absolved from further liability or contribution in tort. In addition, a settling defendant may still be subject to a claim for indemnity.

G) **Good faith requirement.** Settlement agreements must be entered into in good faith. After a preliminary showing of good faith, the burden shifts to the party opposing the settlement to demonstrate with clear and convincing evidence that the agreement was not made in good faith. In determining good faith a court asks whether the agreement provides the non-settling defendants with a fair and reasonable set-off in light of the parties estimated fault and potential financial exposure.

Secret loan-settling agreements, in which a settling defendant is repaid from the plaintiff's recovery from non-settling co-defendants, violate the good faith requirement. *Reese v. Chi., Burlington & Quincy R.R. Co.*, 55 Ill. 2d 356, 363, 303 N.E.2d 382, 386 (1973). Likewise, "Mary Carter" agreements, in which plaintiff and a defendant agree to a minimum and maximum damage award without informing other co-defendants, must be disclosed to the jury and can be used for purposes of cross examination. *Banovz v. Rantanen*, 271 Ill. App. 3d 910, 915-16, 649 N.E.2d 977, 982 (5th Dist. 1995).

H) **Verdict forms.** Settling tortfeasors who would have appeared on a jury verdict form had they not settled should not appear on the verdict form. *Ready v. United/Goedecke Servs.*, 2008 Ill. LEXIS 1439, 20-21 (2008). Thus, all liability is apportioned among non-settling defendants and the plaintiff. *See id.*

I) **Relationship with workers' compensation.** An employer's settlement of workers' compensation liability is considered to be from a collateral source and may not be set off against a third party's liability. However, an employer's waiver of its workers' compensation lien against any tort recovery by an employee is not regarded as a collateral source and the joint tortfeasor is thus entitled to set off the value of the waiver. *Pierce v. Commonwealth Edison Co.*, 101 Ill. App. 3d 272, 428 N.E.2d 174 (3d Dist. 1981).

The Illinois Workers' Compensation Act states that an employer's damages are limited to the amount it is obligated to pay out in workers' compensation. An employer, by virtue of the Act, has a lien on that payment and can recover up to 75% of its lien under Illinois law. 820 ILL. COMP. STAT. 305/1 *et seq.* (2014).

An employer can choose not to seek reimbursement of its workers' compensation obligation by waiving the lien it holds on the worker's recovery in his or her personal injury action. If the employer does so, it may avoid liability for contribution to the other tortfeasors allegedly responsible for the worker's injury. If an employer does not waive its lien it may be held liable for contribution up to the full extent of the lien amount. 820 ILL. COMP. STAT. 305/2 (2014).

Strict Liability

A) Strict liability holds a person responsible for the damage caused by his or her actions regardless of fault. The Restatement (Second) of Torts § 519(1) states that strict liability "arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity." Accordingly, liability may accrue regardless of the level of care taken by a defendant.

For strict liability to apply, (1) a plaintiff must have suffered injury to an interest protected by law, (2) the defendant must have had a duty to prevent the injury and (3) the defendant must have breached that duty, causing the injury. *Gonzalez v. Rock Wool Eng'g & Equip. Co.*, 117 Ill. App. 3d 435, 437, 453 N.E.2d 792, 793 (1st Dist. 1983).

B) **Applicability.** Illinois courts apply a strict liability standard to accidents involving unreasonably dangerous products as well as ultra-hazardous activities or abnormally dangerous activities. *Cont'l Bldg. Corp. v. Union Oil Co.*, 152 Ill. App. 3d 513, 516, 504 N.E.2d 787, 789 (1st Dist. 1987). To determine if an activity is ultra-hazardous or abnormally dangerous, courts consider the appropriateness of the activity to the place where it is maintained, in light of the character of the place and its surroundings. *Miller v. Civil Constructors*, 272 Ill. App. 3d 263, 269-70, 651 N.E.2d 239, 244 (2d Dist. 1995).

Under the ultra-hazardous activity doctrine, the court only considers whether the defendant was engaging in an abnormally dangerous activity and whether the plaintiff's injury resulted from that activity, not who was at fault. Even where an activity is ultra-hazardous or inherently dangerous, a court may choose not to apply strict liability if the activity has great social value. *Nelson v Commonwealth Edison Co.*, 124 Ill. App. 3d 655, 465 N.E.2d 513 (2d Dist. 1984).

In determining whether or not a particular activity is subject to strict liability, Illinois courts apply the factors enumerated in the Restatement (Second) of Torts § 520: (1) the existence of a high degree of risk of some harm to the person, land or chattels of others; (2) likelihood that the harm that results from it will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) extent to which its value to the community is outweighed by its dangerous attributes.

Ordinarily the presence of more than one factor, but not necessarily all of them, will be necessary to declare the activity ultra-hazardous as a matter of law so as to hold the actor strictly liable.

A party who has done nothing to create a risk of injury cannot usually be burdened with the duty of preventing that injury so as to be held strictly liable in tort. *Gonzalez*, 117 Ill. App. 3d at 437, 453 N.E.2d at 795.

C) **Exceptions.** Illinois draws a distinction between requiring a defendant to exercise a high degree of care when involved in a potentially dangerous activity, and requiring a defendant

to absolutely ensure the safety of others when engaging in an ultra-hazardous activity. Illinois law also bars recovery for injuries arising from voluntary participation in inherently dangerous activities, such as playing hockey or standing beside a race track.

D) **Learned Intermediary Doctrine.** In Illinois, the Learned Intermediary Doctrine provides that pharmaceutical companies have no duty to directly warn consumers about the harmful effects of prescription drugs because the companies provide warnings to doctors who are learned intermediaries between the manufacturers and the drug consumers. *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill. 2d 507, 517, 513 N.E.2d 387, 392 (1987). Manufacturers have a duty to sufficiently warn doctors of the harmful effects of a drug where the risk is not already known to the medical community. *Proctor v. Davis*, 291 Ill. App. 3d 265, 277, 682 N.E.2d 1203, 1211 (1st Dist. 1997).

The learned intermediary rule may be applied to immunize pharmacists from liability. The scope of protection, however, is limited, particularly in situations where a pharmacy has knowledge that a prescribed medication is contraindicated for a specific customer. *Happel v. Wal-Mart Stores*, 199 Ill. 2d 179, 181, 766 N.E.2d 1118, 1120 (2002).

Willful and Wanton Conduct

A) Willful and wanton conduct is "a course of action that shows an actual or deliberate intention to cause harm or, if not intentional, shows an utter indifference to or conscious disregard for the safety of others." *Doe v. Calumet City*, 161 Ill. 2d 374, 390, 641 N.E.2d 498, 506 (1994).

B) There is no independent tort of willful and wanton conduct—it is a hybrid of negligence and intentionally tortious behavior. *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 323, 659 N.E.2d 1322, 1327 (1995); *Ziarko*, 161 Ill. 2d at 275, 641 N.E.2d at 406. It is similar to ordinary negligence, but indicates a higher degree of negligence. *State Farm Mut. Auto. Ins. Co. v. Mendenhall*, 164 Ill. App. 3d 58, 61, 517 N.E.2d 341, 343 (4th Dist. 1987).

Willful and wanton conduct includes recklessness. Recklessness differs from negligence in that negligence can consist of mere inadvertence, incompetence, or a failure to take precautions, while reckless conduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others or with knowledge of facts that would disclose the danger to any reasonable person. The distinction between willful and wanton conduct that is intentional in nature and that which is reckless is important in determining whether or not a plaintiff's negligence will reduce her recovery under comparative negligence.

DISCOVERY

Electronic Discovery Rules

Electronic discovery relates to the discovery of electronically stored information. Illinois Supreme Court Rules 203, 201(b)(1) and 214 (2014) govern electronic discovery. Under these rules, the term "documents" "includes, but is not limited to, papers, photographs, films, recordings,

memoranda, books, records, accounts, communications and *all retrievable information in computer storage*." ILL. SUP. CT. R. 201(b)(1) (emphasis added). Rule 214 requires a party served with a request for discovery to provide a printed form of all requested electronic information. ILL. SUP. CT. R. 214 (2014).

Expert Witnesses

A) Expert witnesses are governed by Rule 213(f). Trial witnesses are divided into three categories: lay witnesses, independent expert witnesses, and controlled expert witnesses. ILL. SUP. CT. R. 213(f) (2014).

Lay witnesses can only give fact or lay opinion testimony. The party calling them must disclose the subject matter of their testimony. ILL. SUP. CT. R. 213(f)(1) (2014).

Independent expert witnesses give expert testimony but are *not* retained or employed by the presenting party. The presenting party must disclose (1) the subjects on which the witness will testify and (2) the opinions the party expects to elicit. ILL. SUP. CT. R. 213(f)(2) (2014).

Controlled expert witnesses give expert testimony and are retained or employed by the presenting party. The party must disclose (1) the subject matter on which the witness will testify, (2) the conclusions and opinions of the witness and the bases for them, (3) the qualifications of the witness, and (4) any reports prepared by the witness about the case. ILL. SUP. CT. R. 213(f)(3) (2014).

B) **Limit of scope.** A witness can only testify on direct to what she disclosed in the answer to a Rule 213(f) interrogatory or in a discovery deposition, but this limitation does not apply to cross examinations. ILL. SUP. CT. R. 213(g) (2014). Disclosure under Rule 213 is mandatory and is not only limited to witnesses who may cause unfair surprise. *Am. Serv. Ins. Co. v. Olszewski*, 324 Ill. App. 3d 743, 748, 756 N.E.2d 250, 254 (1st Dist. 2001).

C) Parties have the duty to seasonably update all witnesses' opinions, and bases for such opinions, that are expected to be presented at trial. ILL. SUP. CT. R. 213(i) (2014).

Non-Party Discovery

A) Subpoenas are governed by 735 ILL. COMP. STAT. 5/2-1101 (2014), as well as Illinois Supreme Court Rules 204 and 237-. Subpoenas are issued by the clerk of the court upon request. The issuance of a subpoena commands the nonparty to appear and, if ordered, to produce documents or other tangible items within the scope of the matter at a specified time and place. A deponent, or witness, who is subpoenaed, is ordered by law to obey it.

B) However, nonparties cannot be compelled to appear for depositions outside the county of their residence or business. *See* ILL. SUP. CT. R. 203 (2014); *Boston v. Rockford Mem. Hosp.*, 140 Ill. App. 3d 969, 975, 489 N.E.2d 429, 434 (1st Dist. 1986).

C) **Service.** Service of a subpoena to a nonparty witness is governed by Illinois Supreme Court Rules 204(a)(2) and 237(a). A deponent, or witness, must respond to a subpoena of which he or she has knowledge. ILL. SUP. CT. R. 237(a) (2014). Service of a subpoena may be proved by a return receipt showing delivery to the person. *Id.* Furthermore, service must be affected at least seven days before the date on which appearance is required. *Id.*

D) **Mileage fees.** Standard fees of $20.00 per day and $0.20 per mile must be paid to the person appearing at trial or at a deposition. 705 ILL. COMP. STAT. 35/4.3 (2014).

E) **Respondents.** Respondents in discovery are governed by 735 ILL. COMP. STAT. 5/2-402. A plaintiff may designate respondents, in addition to the named defendants, that are believed to have information essential to the determination of who should be properly named as additional defendants in the action. 735 ILL. COMP. STATS. 5/2-402 (2014). Named respondents in discovery must respond to discovery requests by the plaintiff in the same manner as the named defendants. *Id.* Respondents in discovery may be added as defendants in the action upon their own request or upon plaintiff's request, if evidence shows probable cause for such action and within six months of being named as a respondent in discovery, subject to certain exceptions. *Id.*

Respondents in discovery under this provision must be paid expenses and fees in the same manner as witness fees are paid under 705 ILL. COMP. STAT. 35/4.3.

Privileges

A lawyer's duty to protect client communications and information imposes three major ethical obligations on lawyers: confidentiality, the attorney-client privilege and the work product doctrine.

A) **Confidentiality of information.** Illinois Rule of Professional Conduct 1.6 governs an attorney's duty of confidence and is the widest prohibition against revealing client confidences because it extends beyond the courtroom. Lawyers are prohibited from revealing client confidences, even after termination of the lawyer-client relationship. ILL. R. P. C. 1.6(a) (2014). However, lawyers must reveal client information to the extent it appears necessary in preventing the client from committing an act that would result in death or serious bodily harm and may reveal confidences when a client intends to commit a crime or when necessary to collect fees or defend against wrongful conduct. ILL. R. P. C. 1.6(b), (c) (2014).

B) **Attorney-client privilege.** The attorney-client privilege is an evidentiary privilege that provides protection to communications between a client and his or her attorney. The privilege exists to allow a client to consult openly, freely, and candidly with his or her attorney without fear of being compelled to disclose the communicated information. *In re Marriage of Decker*, 153 Ill. 2d 298, 312, 606 N.E.2d 1094, 1101 (1992).

To be entitled to the privilege, a showing must be made that (1) a statement originated in confidence with the intention that it would not be disclosed, (2) the statement was made to an attorney acting in her legal capacity for the purpose of securing legal advice or services,

and (3) it remained confidential. *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 228, 851 N.E.2d 954, 957 (2d Dist. 2006). A vast array of statements are privileged. *People v. Ryan*, 30 Ill. 2d 456, 461, 197 N.E.2d 15, 17 (1964) (statements by an insured to her insurance company that had a duty to defend under the policy); *People v. Knippenberg*, 66 Ill. 2d 276, 283, 362 N.E.2d 681, 684 (1977) (statements made by defendant to defense counsel's hired investigator); *Rapps v. Keldermans*, 257 Ill. App. 3d 205, 209-10, 628 N.E.2d 818, 821 (1993) (statements made by defendant's decedent, including a drawing, to the insurer's investigator).

C) **Work product.** Illinois Supreme Court Rule 201(b)(2) governs work product. The work product doctrine, conceived in *Hickman v. Taylor*, 329 U.S. 495, 502 (1947), and codified in Federal Rule of Civil Procedure 26(b)(3) and subsequent state rules, bars discovery of materials prepared by opposing counsel in anticipation of trial. A key difference in the federal and Illinois rules is the scope of Illinois' protection. While the federal rule generally bars discovery of *all* work product prepared in anticipation of trial, Illinois, in the interest of judicial efficiency, takes a narrow approach to the rule, barring only materials that contain the theories, mental impressions, or litigation plans of the party's attorney from discovery. *See Monier v. Chamberlain*, 35 Ill. 2d 351, 359-60, 221 N.E.2d 410, 416 (1966); *Waste Mgmt., Inc. v. Int'l. Surplus Lines Ins. Co*., 144 Ill. 2d 178, 196, 579 N.E.2d 322, 329 (1991); ILL. SUP. CT. R. 201(b)(2) (2014).

D) **Self-critical analysis privilege.** Common law and statutory law concerning this privilege are developing among a number of state and federal jurisdictions, including Illinois. The privilege generally applies to documents containing information obtained through an internal evaluation of an incident. It is based on the premise that disclosure of documents that contain candid and potentially-damaging self-criticism will deter companies from conducting socially-useful investigations and making corrective measures in the future. *Morgan v. Union Pac. R.R.*, 182 F.R.D. 261, 264 (N.D. Ill. 1998). The privilege involves balancing the public interest in protecting such information against the private interest of the litigant in obtaining relevant information through discovery on a case by case basis. *Id.* The privilege only attaches if the invoking party shows that:

1) the information sought resulted from a critical self-analysis undertaken by the party seeking protection,

2) the public's interest in preserving the free flow of the type of information sought,

3) the information sought is the type whose flow would be curtailed if discovery was allowed, and

4) the document was prepared with the expectation of being confidential, and has, in fact, remained confidential. *Id*. at 266.

It is important to note that Illinois courts have been reluctant to fully adopt the self-critical analysis privilege. *In re K.S.*, 264 Ill. App. 3d 963, 637 N.E.2d 1163 (1st Dist. 1994).

Therefore, parties should not rely on asserting this privilege to protect communications in Illinois.

E) Illinois law protects communications made in the following contexts: physician and patient, rape crisis counseling, counseling victims of violent crimes, informant's privilege, statements made to clergy, and between union agent and member. 735 ILL. COMP. STAT. 5/8-801 *et seq.* (2014).

Requests to Admit

A) Illinois Supreme Court Rule 216 governs requests to admit. Under Rule 216(a), a party may serve another party a written request for an admission to a specified fact contained in the request. Rule 216(b) allows a party to serve on another party a written request for an admission of the genuineness of a document described in, and attached to, the request. Requests to admit may not include legal conclusions because the rule limits such requests to questions of fact. However, such fact requests can include "ultimate facts," or information essential to establishing one's case or defense. *P.R.S. Int'l v. Shred Pax Corp.*, 184 Ill. 2d 224, 239, 703 N.E.2d 71, 78 (1998).

B) A party served with a request to admit has twenty eight days to respond or the information contained in the request is deemed admitted. ILL. SUP. CT. R. 216(c) (2014). Within the twenty eight day period, the party served may (1) admit in part, or in whole; (2) deny in part, or in whole; (3) give reasons why the party cannot truthfully admit or deny; (4) object, in part or in whole, on the ground that the admission requests are improper, privileged, or irrelevant. *Id*.

Unique State Issues

Illinois uses a two-tiered approach to depositions, which involves the use of either an evidence deposition or a discovery deposition.

A) **Discovery depositions.** Discovery depositions may be used for impeachment, as admissions, as substitutes for affidavits, or, if otherwise admissible, as exceptions to hearsay rules. ILL. SUP. CT. R. 212(a) (2014).

B) **Evidence depositions.** In addition to serving the same purposes as discovery depositions, evidence depositions can be used for any purpose at trial if the deponent is unavailable. Evidence depositions may be used substantively at trial and are therefore taken as if the deponent was actually testifying at trial. ILL. SUP. CT. R. 206(c) (2014).

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

A) Expert witnesses who testify to the details of an incident, usually an automobile or airplane accident, can perform accident reconstructions. If there are no eyewitnesses capable of

recalling the details of the incident, an expert witness should be allowed to perform an accident reconstruction. In this situation, the court will utilize the "knowledge and application of principles of physics, engineering and other sciences beyond the ken of the average juror." *Miller v. Pillsbury Co.*, 33 Ill. 2d 514, 516, 211 N.E.2d 733, 735 (1965).

B) **Admissibility.** The test to determine whether reconstruction evidence is proper is the same as the admissibility test for any other evidence—whether the testimony of the expert witness would assist the trier of fact in understanding the evidence or in determining a fact of consequence. *Zavala v. Powermatic, Inc.*, 167 Ill. 2d 542, 546, 658 N.E.2d 371, 374 (1995). The court will consider four areas to qualify the witness as an expert:

1) the witness's qualifications,

2) the reliability of the scientific and technical basis of the expert's testimony considered in light of the evidence of physical facts introduced in the case,

3) the helpfulness of the expert testimony to the trier of fact, and

4) the sufficiency of the physical data upon which the expert bases her opinion.

Exception. One exception to the *Zavala* rule is that, as experts, police officers may only testify to their personal knowledge. They may not use their length of time in the field or experience with accidents to testify to the speed of an automobile when an accident occurred. *Watkins v. Schmitt*, 172 Ill. 2d 193, 207, 665 N.E.2d 1379, 1386 (1996). This is not considered knowledge beyond the ken of the average juror.

Appeal

An appeal is considered to be a continuation of a legal proceeding. The scope of appellate court jurisdiction is confined in civil cases to appeals from (a) final orders or judgments of the circuit court and (b) certain interlocutory orders.

A) **Final judgments.** Generally, only final judgments of a circuit court, in a civil case, are appealable as a matter of right. ILL. SUP. CT. R. 301 (2014). A final order is one which fixes, determines, and disposes of the parties' rights regarding the litigation on some definite, separate part of the litigation.

B) **Direct appeals.** Cases directly appealable to the Illinois Supreme Court include judgments of circuit courts (1) in cases in which a statute of the United States or of Illinois has been held invalid, and (2) in proceedings to compel compliance with orders entered by a Chief Circuit Judge, or (3) if public interest requires prompt adjudication. ILL. SUP. CT. R. 302(a) and (b) (2014). The appellate court only has jurisdiction over issues raised in the notice of appeal or those raised by proper amendments to the notice.

C) **Interlocutory appeals.** Interlocutory orders are appealable within thirty days of entry either as a matter of right or by permission of the circuit court if the order affects an

injunction, receivers or sequestrators, mortgagees rights, or parental rights. ILL. SUP. CT. R. 307(a) (2014).

D) **Notice of appeal.** The notice of appeal must be filed with the clerk of the circuit court within thirty days after the entry of the final judgment appealed from, or, if a timely post-trial motion directed against the judgment is filed, whether in a jury or a nonjury case, within thirty days after the entry of the order disposing of the last pending post judgment motion directed against that judgment or order. ILL. SUP. CT. R. 303(a)(1) (2014).

Biomechanical Testimony

A) Before testimony from a biomechanical engineer may be admitted at trial, the proponent of the evidence must prove that the methods of study utilized by the engineer are both generally accepted and reliable, as is the case with all expert opinion testimony.

B) If the trial court determines that the scientific evidence is novel, it must then meet the admissibility standard. To be admissible, evidence must be (1) reliable and (2) the test's reliability must be generally accepted in the appropriate scientific field. *People v. Simons*, 213 Ill. 2d 523, 530, 821 N.E.2d 1184 (2004).

Collateral Source Rule

The collateral source rule prohibits the admission of evidence that an injured party's damages will be compensated by a source other than the entity which caused the injury. *See* RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979). Collateral benefits do not reduce the defendant's tort liability, even though they reduce the plaintiff's loss.

A) Courts frequently apply the collateral source rule where the defendant seeks a reduction of damages because the plaintiff has received insurance benefits that partly or wholly indemnify the plaintiff for the loss.

B) Defendants cannot introduce evidence that plaintiff's losses have been compensated for, in whole or in part, by insurance. *Wills v. Foster*, 229 Ill. 2d 393, 400, 892 N.E.2d 1018, 1022-23 (2008). However, they are allowed to cross-examine plaintiff's witnesses, or provide their own, to disprove the reasonableness of a plaintiff's medical bills. *Id*. at 419, 892 N.E.2d at 1033-34.

Convictions

Evidence of prior convictions is only admissible to impeach the credibility of a witness. To be convicted, a person must have been sentenced to a crime, not just found guilty. The party who opposes the admission of the evidence bears the burden of proving it is prejudicial.

A) **Criminal convictions.** Evidence of prior convictions punishable by death or more than one year incarceration and crimes of dishonesty or false statements (lying, cheating, deceiving, or stealing) are admissible for impeachment, as long as no more than ten years

have passed since the date of the conviction or since the witness was released from jail, whichever is later. *See People v. Montgomery*, 47 Ill. 2d 510, 516, 268 N.E.2d 695, 698 (1971). When admitting previous crimes as evidence, the judge balances any prejudicial effect the evidence may have against the nature of the prior crime, the length of the defendant's criminal record and the importance of divulging the criminal record.

B) **Traffic tickets.** A traffic ticket conviction is a misdemeanor and evidence of prior misdemeanor convictions is inadmissible for impeachment.

Day in the Life Videos

A "Day in the Life" video is demonstrative evidence prepared by the lawyer who seeks to use it. Thus, it is subject to the same tests and admissibility requirements as photographs, charts, drawings, and models. *Cisarik v. Palos Cmty. Hosp.*, 144 Ill. 2d 339, 342, 579 N.E.2d 873, 874 (1991).

A) The videos will have no probative value. They are only used to help the jury better understand the verbal testimony of a witness. *Id.* at 341, 579 N.E.2d at 874.

B) During discovery, opposing counsel usually has the right to request a protective order that entitles him to be present at filming and a copy of all finished film. In some instances, opposing counsel may have the opportunity to use the excluded footage as evidence to support his case.

Dead Man's Statute

Illinois' Dead-Man's Act prohibits a witness from testifying regarding a conversation with a dead person or a person under legal disability when that witnesses' interests are adverse to the deceased's. 735 ILL. COMP. STAT. 5/8-201 (2014). Essentially, the Act protects the decedent from biased testimony.

A) **Exceptions.** There are four exceptions to the general rule. Otherwise-barred witnesses may testify: (1) if another competent witness has already testified to the conversation, (2) regarding matters from the deceased's deposition that have been entered into evidence, (3) regarding accounting books and (4) regarding heirship of the deceased's. 735 ILL. COMP. STAT. 5/8-201(a)-(d) (2014).

Medical Bills

Generally, a plaintiff's medical bills are admissible as damages evidence, regardless if the bills were paid by an insurance company. *Wills v. Foster*, 229 Ill. 2d 393, 892 N.E.2d 1018 (2008).

A) **Plaintiff's burden.** A plaintiff must prove that (1) he has paid or become liable to pay a medical bill, (2) he necessarily incurred the medical expenses because of injuries resulting from the defendant's negligence, and (3) the charges were reasonable for services of that nature. *Arthur v. Cantour*, 216 Ill. 2d 72, 81-82, 833 N.E.2d 847, 853 (2005).

B) **Reasonableness of bills.** If a bill has been paid, it is presumed to be reasonable. While the defense may call its own witnesses to prove the billed amounts do not reflect the reasonable value of the services, it may not introduce evidence that the plaintiff's bills were settled for a lesser amount because to do so would undermine the collateral source rule. *Id.*

Offers of Judgment

An offer of judgment is a tool some courts use to encourage settlement. If a party rejects a settlement offer that is more favorable to it than the final verdict in the case turns out to be, that party can be subject to penalties if the offer was presented as an offer of judgment.

Illinois does not recognize offers of judgment. Federal courts in Illinois, however, follow the federal rule permitting offers of judgment. FED. R. CIV. P. 68 (2014).

Offers of Proof

When introducing evidence, the introducing party can make an offer of proof to inform the court what type of evidence it is and how it is relevant and preserve the record for appeal. *People v. Thompkins*, 181 Ill. 2d 1, 6, 690 N.E.2d 984 (1998).

A) Offers of proof must be specific and detailed; they usually explain what a witness's response to a question would have been, what the basis was, and what purpose would have been served by the evidence. They must be made outside the presence of the jury to maintain a lack of bias in the trial procedure. *Id.* at 10, 690 N.E.2d at 988-89.

B) A proper offer of proof preserves the question for review on appeal. Thus, if the introducing party appeals the court's ruling that the evidence was inadmissible, there will be a record of what it would have proved. *Id.*

Prior Accidents

Evidence of prior accidents is usually relevant to show the existence of a particular danger or hazard, or that the defendant had notice of the hazardous nature of the accident site. To show the existence of a danger or hazard, the proponent of the evidence must lay a foundation showing a substantial similarity between the prior and present accidents. The trial court then has the discretion to decide whether there is a substantial similarity between the prior and present accidents.

Relationship to the Federal Rules of Evidence

Illinois has yet to codify its own rules of evidence. The Illinois Supreme Court has selectively adopted portions of the Federal Rules of Evidence. For admissibility requirements and standards, attorneys look to the Federal Rules for guidance.

Seat Belt and Helmet Use Admissibility

The Illinois Vehicle Code provides that failure to wear a seatbelt is not considered evidence of negligence. 625 ILL. COMP. STAT 5/12-603.1(c) (2014). The failure to wear a seatbelt will not limit the liability of an insurer or diminish the amount of damages a person may receive due to ownership, maintenance, or operation of a motor vehicle. *Id.* Further, the failure to wear a seatbelt is not admissible to "diminish any recovery for" damages. *Id.*

Spoliation

Spoliation is the withholding, hiding, or destruction of evidence relevant to a legal proceeding. *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 191-92, 652 N.E.2d 267, 269 (1995).

A) In Illinois, the general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute, or another special circumstance. *Id*. at 195, 652 N.E.2d at 270-71.

B) A defendant may voluntarily assume a duty by affirmative conduct. In any of the foregoing instances, a party owes a duty of due care to preserve evidence if a reasonable person in the party's position should have foreseen that the evidence was material to a potential civil action. *Id*.

Subsequent Remedial Measures

A subsequent remedial measure is a change, repair or precaution the defendant makes after an event or injury has occurred to prevent it from happening in the future. Issues involving such evidence are not admissible to prove prior negligence or willful and wanton conduct. *Herzog v. Lexington Twp.*, 167 Ill. 2d 288, 300, 657 N.E.2d 926, 932 (1995). Evidence of subsequent remedial measures is generally inadmissible to show negligence because admitting it would discourage people from fixing dangerous situations.

A) **Admissibility.** Subsequent remedial measures evidence may be admitted to show ownership or control of property, the feasibility of preventative measures, or used to impeach a witness. *Id.* at 300-01, 657 N.E.2d at 932.

Even when a subsequent remedial measure is offered for an otherwise-admissible reason, the court could still deem it inadmissible if its admission would cause unfair prejudice, confuse the issues, mislead the jury, waste the court's time, or be repetitive. *Id.* at 302, 657 N.E.2d at 933.

Use of Photographs

A) Photographs are demonstrative evidence. That is, they can only serve as a visual aid to the fact finder to supplement a witness's verbal testimony. As long as the verbal testimony the photograph seeks to make a fact in evidence more or less probable, it should be admissible. *Cisarik,* 144 Ill. 2d at 341-42, 579 N.E.2d at 874.

B) Before entering it into evidence, a photograph must pass the standard two-prong test all items of evidence must pass. First, someone who has personal knowledge of the photograph must lay a proper foundation by testifying that it accurately portrays what it is meant to show. Second, it is subject to a judicial balancing test to ensure that it is not substantially more prejudicial than probative of any relevant issue. *People v. Smith*, 152 Ill. 2d 229, 263, 604 N.E.2d 858 (1992).

DAMAGES

Caps on Damages

A) Statutory caps on damages limit the amount of recovery available in a cause of action. In Illinois, across-the-board caps for non-economic damages are unconstitutional. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 470, 689 N.E.2d 1057, 1105 (1997) (invalidating the Civil Justice Reform Amendments of 1995, or Public Act 89-7, which essentially capped non-economic damages for all torts).

B) Medical malpractice. The Illinois Supreme Court recently invalidated Public Act 94-677, which would have capped damages for medical malpractice at $1,000,000.00 per hospital and $500,000.00 per physician per incident on the ground that it was unconstitutional because it is the judiciary's, rather than the legislature's, task to determine damages. *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 250, 930 N.E.2d 895 (2010).

Calculation of Damages

A) In Illinois, a plaintiff bringing a cause of action for personal injuries may recover for various damages including:

1) past and future pain and suffering;

2) past and future loss of normal life or disability;

3) past and future disfigurement;

4) the reasonable expense of past or future medical care;

5) lost past or future earnings or profits; and

6) aggravation of a pre-existing condition.

B) Compensatory damages in the area of personal injury consist of two categories: economic damages and non-economic damages. Economic damages, such as lost earnings, are tangible losses; non-economic damages, such as pain and suffering, are intangible losses. Calculating economic damages requires determination of the value of each tangible loss, which can usually be obtained through bills, statements, receipts, *etc*. Non-economic

damages are more difficult to calculate because determining their value requires a subjective analysis for each loss, which varies case by case. *See Best*, 179 Ill. 2d at 384, 689 N.E.2d at 1067; *Exch. Nat'l Bank v. Air Ill., Inc.*, 167 Ill. App. 3d 1081, 1091, 522 N.E.2d 146, 152 (1st Dist. 1988).

Available Items of Personal Injury Damages

A) **Past medical bills.** All plaintiffs are entitled to seek to recover the full reasonable value of their medical expenses. The fact that a person has medical insurance, whether Medicare, Medicaid, or private, which reduced the amount of payment, will not reduce the amount an individual may recover. *Wills v. Foster*, 229 Ill. 2d 393, 399, 892 N.E.2d 1018 (2008).

B) **Future medical bills.** A plaintiff may recover damages for future medical bills. A plaintiff is entitled to recover the reasonable expense of necessary medical care resulting from the defendant's negligence if it proves the expense is necessary. These damages will be converted to their present cash value (the sum of money needed now), which, when added to what that sum may reasonably be expected to earn in the future, will equal the amount needed to pay any future medical bills. *See also Wills*, 229 Ill. 2d at 419, 892 N.E.2d at 1033 (citing *Arthur v. Catour*, 216 Ill. 2d 72, 78, 833 N.E.2d 847, 851 (2005)).

C) **Hedonic damages.** Hedonic damages, or damages for the loss of enjoyment of life, are available in Illinois. *Gomez v. Finishing Co.*, 369 Ill. App. 3d 711, 723, 861 N.E.2d 189, 201 (1st Dist. 2006).

D) **Increased risk of future harm.** Illinois allows recovery for increased risk of future harm if the plaintiff can show to a reasonable degree of medical certainty that the defendant's actions proximately caused harm to the plaintiff, regardless of the likelihood of future injury. *Holton v. Mem'l Hosp.*, 176 Ill. 2d 95, 115, 679 N.E.2d 1202 (1997).

E) **Disfigurement.** Disfigurement refers to making one less complete, perfect, or beautiful in appearance or character. Illinois allows damages for disfigurement as non-economic damages. *Bowman v. Am. River Transp. Co.*, 217 Ill. 2d 75, 80, 838 N.E.2d 949 (2005).

F) **Loss of normal life.** Illinois courts regard loss of normal life as a separate area of compensable damages, different from disability. *Snelson v. Kamm*, 204 Ill. 2d 1, 32, 787 N.E.2d 796, 813 (2003). Loss of normal life refers to an individual's inability to enjoy life that the individual has experienced. Such an award should include the plaintiff's temporary or permanent inability to pursue the pleasurable aspects of life, such as recreation or hobbies. *Turner v. Williams*, 326 Ill. App. 3d 541, 551, 762 N.E.2d 70, 79 (2001).

G) **Disability.** A disability is the absence of competent physical, intellectual, or moral powers; an impairment of earning capacity; the loss of physical function that reduces efficiency; or an inability to work. It is recognized as a type of non-economic damage, but is distinguishable from a loss of normal life. *Bowman*, 217 Ill. 2d 75, 838 N.E.2d 949.

H) **Past pain and suffering.** If there is evidence of a physical injury, courts can award damages for pain and suffering. To recover, a plaintiff must prove that she was conscious of her injury. *Decker v. Libell*, 193 Ill. 2d 250, 737 N.E.2d 623 (2000).

I) **Future pain and suffering.** A court may award damages for future pain and suffering if the evidence shows it is reasonably certain to occur in the future. When evidence of future pain and suffering is obvious, expert testimony is not needed. *Maddox v. Rozek*, 265 Ill. App. 3d 1007, 1011-12, 639 N.E.2d 164, 167 (1st Dist. 1994).

J) **Loss of society.** Loss of society is a type of pecuniary damage which refers to the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance and protection. The parents' pecuniary injury for loss of society is presumed for the death of a minor child. *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 120, 499 N.E.2d 1373, 1379 (1986). Under the Wrongful Death Act, there is a rebuttable presumption of loss of society of an unborn fetus. *Seef v. Sutkus*, 145 Ill. 2d 336, 339, 583 N.E.2d 510, 512 (1991). Although future economic damages are usually reduced to present cash value, future damages for loss of society awarded in a wrongful death action are not reduced to present cash value.

K) **Lost income, wages, earnings.** An injured party may recover for time lost even though he was paid his regular wage during incapacitation. Damages for a plaintiff's lost capacity rely on the plaintiff's ability to earn money, not the plaintiff's actual record of earning money. *Robinson v. Greeley & Hansen*, 114 Ill. App. 3d 720, 726, 449 N.E.2d 250, 254 (2d Dist. 1983). Whether the injured party was employed on the date of the accident does not matter. Lost earnings for the death of a child are not presumed but recovery is permitted in those cases where the child's earnings contributed to the support of the family. *Bullard v. Barnes*, 102 Ill. 2d 505, 516, 468 N.E.2d 1228 (1984).

L) **Diminished life expectancy.** Courts in Illinois have recognized damages for diminished life expectancy. "Damages for a decreased life expectancy are proper where a plaintiff can prove that his life expectancy is decreased as a result of the defendant's negligence." *Bauer v. Mem'l Hosp.*, 377 Ill. App. 3d 895, 921, 879 N.E.2d 478, 501 (5th Dist. 2007).

Lost Opportunity Doctrine

The Lost Opportunity Doctrine refers to the increased risk of harm a plaintiff experiences as a result of the defendant's conduct. As with damages for the increased risk of harm, damages for lost opportunity compensate plaintiffs for losing their chance at something, often survival or good health. Plaintiffs may seek damages even if it was not likely they would have seized the lost opportunity. *Holton v. Mem'l Hosp.*, 176 Ill. 2d 95, 115, 679 N.E.2d 1202, 1211 (1997).

Mitigation

The requirement to mitigate damage imposes a duty on the injured party "to exercise reasonable diligence and ordinary care in attempting to minimize his damages after injury has been inflicted." *Grothen v. Marshall Field & Co.*, 253 Ill. App. 3d 122, 128, 625 N.E.2d 343, 347 (1st Dist. 1993) (quoting BLACK'S LAW DICTIONARY 712 (5th ed. 1979)).

A) **Ordinary care to mitigate.** This duty exists both in the area of medical malpractice as well as in the area of injuries caused in a non-medical malpractice setting. *Hall v. Dumitru*, 250 Ill. App. 3d 759, 765, 620 N.E.2d 668, 673 (5th Dist. 1993). For instance, the doctrine of mitigation would require a plaintiff to exercise ordinary care and obtain reasonable medical treatment in an effort to be cured of his injuries. *Id.* A plaintiff will not be allowed to recover damages for injuries that are proximately caused by his failure to obtain medical care. *Grothen*, 253 Ill. App. 3d at 128, 625 N.E.2d at 347.

A plaintiff is also required to exercise ordinary care to mitigate damages to his property. The Illinois Pattern Jury Instructions state that in calculating compensation, the jury is to consider the plaintiff's duty of ordinary care to minimize existing dangers and to prevent further damages. Damages proximately caused by a failure to exercise such care cannot be recovered.

B) **Exception.** Surgical procedures as well as nonsurgical procedures which present a risk of enhanced or additional injury are not required to mitigate damages. *McDonnell v. McPartlin*, 303 Ill. App. 3d 391, 402, 708 N.E.2d 412, 420 (1st Dist. 1999). This exception does not encompass situations in which the risk from a medical procedure is remote. *Hall*, 250 Ill. App. 3d at 765, 620 N.E.2d at 673.

C) **Burdens.** A plaintiff's failure to mitigate his damages is an affirmative defense to be pleaded by the defendant as part of his answer, and the burden of proof on this issue rests with the defendant. *Brady v. McNamara*, 311 Ill. App. 3d 542, 547, 724 N.E.2d 949, 952 (1st Dist. 1999).

D) **Contributory negligence.** Failure to mitigate damages and contributory negligence are distinct legal concepts. While contributory negligence addresses whether the plaintiff was negligent in causing the accident to occur, failure to mitigate addresses what remedial steps the plaintiff took to lessen the impact of the accident. *Brady*, Ill. App. 3d at 549-50, 724 N.E.2d at 954-55.

Punitive Damages

A) Illinois has long held that punitive damages may be brought when "torts are committed with fraud, actual malice, deliberate violence, or oppression, or when the defendant acts willfully, or with gross negligence as to indicate wanton disregard of the rights of others." *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 415, 563 N.E.2d 397, 402 (1990) (quoting *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186, 384 N.E.2d 353, 359 (1978)).

Punitive damages are penal in nature and are not favored. Courts must take caution to see that punitive damages are not improperly or unwisely awarded. *Young v. Hummel*, 216 Ill. App. 3d 303, 308, 576 N.E.2d 1072, 1075 (1st Dist. 1991). To receive punitive damages, the plaintiff must do more than just allege willful and wanton conduct.

B) **Procedure.** The plaintiff must specifically plead punitive damages so the defendant has notice. *Young*, 216 Ill. App. 3d at 307, 576 N.E.2d at 1074. A plaintiff may not file a complaint seeking punitive damages initially. 735 ILL. COMP. STAT. 5/2-604.1 (2014). Pursuant to a pretrial motion, and after a hearing on the likelihood of proving punitive damages at trial, a plaintiff may amend a complaint to include punitive damages. *Id.* In addition to this requirement, a motion to amend a complaint to include punitive damages must be made no later than thirty days after the close of discovery. *Id.*

C) **Insurance coverage.** Illinois courts view punitive damages in the nature of a criminal penalty and accordingly prohibit insurance coverage for punitive damages arising out of one's own misconduct. *Beaver v. Country Mut. Ins. Co*., 95 Ill. App. 3d 1122, 1124, 420 N.E.2d 1058, 1060 (5th Dist. 1981) (quoting *Nw. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 440-41 (5th Cir. 1962)).

D) **Factors.** The governing authority in Illinois on when punitive damages are excessive comes from the United States Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996), and, more recently, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). Three guideposts should be considered in determining whether punitive damages are excessive:

1) the degree of reprehensibility of the defendant's misconduct,
2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and
3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.*

The U.S. Supreme Court has consistently rejected the idea of imposing or creating a mathematical formula or bright-line ratio to determine if punitive damages are excessive. *Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 484 870 N.E.2d 303, 321 (2006) (citing *BMW*, 517 U.S. 559 and *State Farm*, 538 U.S. 408). However, the Court does caution that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process, and has also suggested that punitive awards more than four times the amount of compensatory damages may be close to the line. *Id.*

In addition to the factors in *BMW* and *State Farm*, Illinois courts consider other factors. Illinois courts have also considered: (1) the nature and enormity of the wrong; (2) the financial status of the defendant; and (3) the potential liability of the defendant. *Gehrett v. Chrysler Corp*., 379 Ill. App. 3d 162, 180, 882 N.E.2d 1102, 1119 (2d Dist. 2008).

Recovery of Pre- and Post-Judgment Interest

A) **Prejudgment interest.** Prejudgment interest is not recoverable in actions for bodily injury, personal injury, or property damage. 815 ILL. COMP. STAT. 205/2 (2014). However, creditors can receive 5% annual interest, or the rate obligated by contract, on any money after it becomes due on bond, bill, promissory note, or other instrument of writing

(including insurance policies); on loaned money; on money due on the settlement of an account; and on money withheld by an "unreasonable and vexatious" delay of payment. *Id.*

B) **Post-judgment interest.** The recovery of post-judgment interest is governed by 735 ILL. COMP. STAT. 5/2-1303, except for judgments arising from child custody orders, which are governed by 5/12-209. Judgments recovered in any court accrue an interest of 9% annually, or 6% if the debtor is a government entity. 735 ILL. COMP. STAT. 5/2-1303 (2014). After a judgment is entered, interest accrues from the time the judgment was entered to the time it was satisfied and includes only the unsatisfied portion of the judgment. *Id*.

Recovery of Attorneys' Fees

A) In general, each party is responsible for paying its own attorneys' fees. *Losurdo Bros. v. Arkin Distrib. Co.*, 125 Ill. App. 3d 267, 274, 465 N.E.2d 139, 144 (2d Dist. 1984).

B) **Exceptions.** Parties can be liable for their opponents' legal fees if they contractually agree to be liable. *Id*.

C) **Reasonableness.** Parties cannot be liable for paying an opponent's legal fees if the fees are not reasonable. *Leader v. Cullerton*, 62 Ill. 2d 483, 487-88, 343 N.E.2d 897, 900 (1976). In determining fees' reasonableness, the burden is on the party seeking the fees to present sufficient evidence from which the trial court can render a decision as to their reasonableness. *First Nat'l Bank v. Barclay*, 111 Ill. App. 3d 162, 163, 443 N.E.2d 780, 782 (4th Dist. 1982).

To determine if fees are reasonable, courts consider a variety of additional factors such as the skill and standing of the attorneys, the nature of the case, the novelty and/or difficulty of the issues and work involved, the importance of the matter, the degree of responsibility required, the usual and customary charges for comparable services, the benefit to the client, and whether there is a reasonable connection between the fees and the amount involved in the litigation. *Estate of Healy v. Tierney*, 137 Ill. App. 3d 406, 409-10, 484 N.E.2d 890, 894 (2d Dist. 1985).

Settlements Involving Minors

A) A parent, simply by virtue of the parental relationship, has no legal right to settle a minor's cause of action. Courts must enter an order appointing the minor's parent or a representative standing *in loco parentis* as guardian on behalf of the minor. Local court rules have further requirements involving the appointment of a guardian *ad litem* to review and make recommendations concerning the *ad litem* approval or rejection of the proposed settlement. The court considers the guardian *ad litem's* recommendations but ultimately determines whether to approve, modify, or reject the settlement, all the while keeping the interests of the minor in mind. *Wreglesworth v. Artco, Inc.*, 316 Ill. App. 3d 1023, 1026-27, 738 N.E.2d 964, 968 (1st Dist. 2000). A minor who is a party to litigation is a ward of

the court and the court has a duty to protect the minor's rights. *Ott v. Little Co. of Mary Hosp.*, 273 Ill. App. 3d 563, 570-71, 652 N.E.2d 1051, 1056 (1st Dist. 1995).

B) The terms and conditions of any proposed settlement involving a minor must be submitted to and approved by the court. 755 ILL. COMP. STAT. 5/19-8 (2014); *Ott*, 273 Ill. App. 3d at 571, 652 N.E.2d at 1056. However, there is an exception to this rule allowing for the settlement of a minor's claim without court intervention when both the amount owed to the minor and the minor's personal estate do not exceed $10,000.00. 755 ILL. COMP. STAT. 5/25-2 (2014). In addition, local rules of the judicial circuit where the settlement is approved are applicable.

Taxation of Costs

A) In some circumstances, the winning party in a case or motion may recover costs from the losing party. Only those costs specifically designated by statute may be taxed as costs. *Vicencio v. Lincoln-Way Builders, Inc.*, 204 Ill. 2d 295, 300, 789 N.E.2d 290, 293-94 (2003). A prevailing party in any action for personal damages must recover costs, which are to be taxed, from the losing party. 735 ILL. COMP. STAT. 5/5-108, 5-109 (2014). Similarly, 5/5-110 mandates the award of costs to the prevailing party when judgment is granted upon motion, respectively. Pursuant to 5/5-108, taxable costs have been held to be "court costs," such as "filing fees, subpoena fees and statutory witness fees." *Vicencio*, 204 Ill. 2d 295 at 302, 789 N.E.2d at 295. Attorneys' fees are not costs. *Sanelli v. Glenview*, 126 Ill. App. 3d 411, 416, 466 N.E.2d 1119, 1122 (1st Dist. 1984).

B) **Other authority.** In addition, the Illinois Supreme Court has the power to make rules under which costs may be taxed when explicitly delegated the authority to do so by the legislature. *Vicencio*, 204 Ill. 2d at 300, 789 N.E.2d at 293-94. For example, Supreme Court Rule 137 awards a party costs and attorney's fees when its opponent has filed a frivolous pleading. Rule 208 generally requires parties to pay their own deposition costs. Rule 374 provides that the appellant pays costs if an appeal is dismissed or affirms the lower court's decision and the appellee pays costs if the appeal reverses the lower court's decision.

Unique Damages Issues

A) Economic testimony projecting plaintiff's wage loss in actual dollar figures over his lifetime is permitted. *See Baird v. Chi. Burlington & Q.R. Co.*, 63 Ill. 2d 463, 467, 349 N.E.2d 413, 415 (1976).

B) **Per diem requests.** For damages for pain and suffering, a plaintiff's attorney may not suggest that the jury calculate damages by placing a dollar value on each minute, hour, or day of suffering since such argument presents an illusion of certainty. On the other hand, placing a monetary value on suffering per year of life expectancy, where accompanied with advice that such calculation is only a suggestion is permitted. *Caley v. Manicke*, 24 Ill. 2d 390, 393, 182 N.E.2d 206, 208 (1962).

C) **Remote causation.** Expert medical testimony may not be necessary to prove a causal connection between an injury and a condition of ill-being where the connection is clearly apparent from the illness and the circumstances attending it. *Abrams v. Mattoon*, 148 Ill. App. 3d 657, 665, 499 N.E.2d 147, 152 (4th Dist. 1986) (quoting *Jackson v. Navick*, 37 Ill. App. 3d 88, 95-96, 346 N.E.2d 116, 123 (2d Dist. 1976)). However, where an injury complained of is remote in time from an accident, or the condition is one that is shrouded in controversy as to origin, such as the intervention of either a prior or subsequent injury or disease, lay testimony may be insufficient to establish a *prima facie* showing of causal relationship. *Id.*

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be 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.