STATE OF WEST VIRGINIA COMPENDIUM OF LAW

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I. PRE-SUIT AND INITIAL CONSIDERATIONS

A. Pre-Suit Notice Requirements/Prerequisites to Suit

In general, West Virginia does not have pre-suit requirements. However, there are certain statutory exceptions.

1. **Health care.** To bring a lawsuit against a health care provider, the complaining party must provide a written notice of claim to each prospective defendant no less than thirty (30) days before filing the lawsuit. In addition, the notice of claim must include the theory of liability, a list of all health care providers to whom notices of claim are being sent, and a screening certificate of merit executed under oath by a health care provider qualified as an expert under West Virginia evidence law. W.VA. CODE § 55-7B-6 (2015).

2. **Government agencies.** To bring a lawsuit against a government agency, the complaining party must provide the chief officer of the government agency and the Attorney General with written notice at least thirty (30) days before filing the lawsuit. W.VA. CODE § 55-17-3(a) (2015).

B. Relationship to the Federal Rules of Civil Procedure

1. **West Virginia Rules of Civil Procedure.** West Virginia has its adopted its own Rules of Civil Procedure. W.VA. R.C.P.(2015). However, Rule 56, regarding summary judgment, is nearly identical to its Federal counterpart. *See Emp'rs' Liab. Assurance Corp. v. Hartford Accident & Indem. Co.*, 158 S.E.2d 212, 218 (W.Va. 1967).

2. **Weight to federal cases.** Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, substantial weight is given to federal cases in determining the meaning and scope of the State Rules. *See Painter v. Peavy*, 451 S.E.2d 755, fn. 6, 758 (W.Va. 1994).

C. Description of the Organization of the State Court System

1. **Judicial selection.** The rules regarding the election and appointment of judges and magistrates within West Virginia are as follows:

   i. Justices for the West Virginia Supreme Court of Appeals are elected by the voters in nonpartisan elections for twelve (12) year terms. Justices on the Supreme Court must have practiced law for at least ten (10) years. Annually, members of the court choose the position of chief justice. The governor appoints justices to fill vacancies on the five-member bench.

   ii. Circuit Court judges are chosen in nonpartisan elections by the voters of the circuit for a term of eight (8) years. The governor appoints judges to fill vacancies. Circuit Court judges must have practiced law for at least five (5) years.

iii. Magistrate Court judges are also elected in nonpartisan elections for four (4) year terms. Circuit Court judges appoint magistrates to fill vacancies. Magistrates do not have to be lawyers.

See generally WEST VIRGINIA JUDICIARY, http://www.courtswv.gov (last visited March 10, 2015).

2. **Structure.** The West Virginia state court system consists of three courts: the Supreme Court of Appeals, Circuit Courts, and Magistrate Courts. West Virginia is one of only eleven states with a single appellate court. Said another way, there is no intermediate appellate court.

   i. **Supreme Court of Appeals.** The Supreme Court of Appeals is the court of last resort in West Virginia and is located in the state capital, Charleston, West Virginia. It receives appeals from the Circuit Courts throughout the state. All civil appeals are discretionary, and there is no mandatory duty on the part of the Court to accept any petition for appeal. *See generally Supreme Court of Appeals*, WEST VIRGINIA JUDICIARY, http://www.courts.wv.gov (last visited March 10, 2015).

   ii. **Circuit courts.** West Virginia's 31 Circuit Courts are courts of general jurisdiction over all civil cases at law over $2,500; all civil cases in equity; proceedings in *habeas corpus*, *mandamus*, *quo warranto*, prohibition, and *certiorari*; and all felonies and misdemeanors. In addition, Circuit Courts receive appeals from magistrate courts, municipal courts, and administrative agencies (excluding workers' compensation appeals). *See generally Circuit Courts*, WEST VIRGINIA JUDICIARY, http://www.courts.wv.gov (last visited March 10, 2015).

   iii. **Magistrate Courts are courts of limited jurisdiction.** Magistrates hear misdemeanor cases, conduct preliminary examinations in felony cases, hear civil cases with $5,000.00 or less in dispute, and issue arrest warrants, search warrants, and emergency protective orders in cases involving domestic violence. *See generally Magistrate Courts*, WEST VIRGINIA JUDICIARY, http://www.courtswv.gov (last visited March 10, 2015).

3. **Alternative dispute resolution.** Parties wishing to end a dispute may voluntarily submit the controversy to arbitration in West Virginia. W.VA. CODE § 55-10-1 *et seq*. (2015). Once a dispute is submitted to arbitration, the submission is irrevocable absent leave of court. W.VA. CODE § 55-10-2 (2015). As of 2015, West Virginia has enacted the Revised Uniform Arbitration Act.

D. **Service of Summons**

1. **Person.** Service of Summons and Complaint upon a person is governed by W.VA.R.C.P.4(d)(1) (2015). Service on a person can effectuated by:

    i. Personal Service. Personally serving the person with the summons and complaint, or

    ii. Substituted service. Substituted service can be accomplished through any of the following::

        a. Delivering the summons and complaint at the individual's dwelling to a member of the individual's family who is above the age of sixteen years old,

        b. Delivering a copy of summons and complaint to an agent or attorney in fact authorized by appointment or statute,

        c. Requesting the clerk to send a copy of the summons and complaint to be served by certified mail with return receipt requested and delivery restricted to the addressee, or

        d. Requesting the clerk to send a copy of the summons and complaint by first class mail, postage prepaid, to the person to be served, together with two copies of a notice and acknowledgement conforming substantially to Form 14 and a return envelope, postage prepaid, addressed to the clerk.

2. **Public corporation.** Service of Summons upon a public corporation is governed by W.VA.R.C.P.4(d)(6) (2015).

    i. **City, town, or village.** To successfully serve a city, town, or village, a copy of the summons and complaint must be served in accordance with subsection I.D.1. upon the mayor, city manager, recorder, clerk, treasurer, or any member of the council or board of commissioners.

    ii. **County commission.** To successfully serve a county commission, a copy of the summons and complaint must be served in accordance with subsection I.D.1. upon any commissioner or the clerk thereof, or, if they be absent, to the prosecuting attorney of the county.

    iii. **Board of education.** To successfully serve a board of education, a copy of the summons and complaint must be served in accordance with subsection I.D.1. upon the president or any member thereof or, if they be absent, to the prosecuting attorney of the county.

iv. **Domestic public corporation.** To successfully serve any other domestic public corporation, (i) a copy of the summons and complaint must be delivered or mailed to any officer, director, or governor, or (ii) a copy of the summons and complaint must be delivered or mailed to an agent or attorney in fact authorized by appointment or by statute to receive or accept service in its behalf.

3. **Private corporation.** Service of summons upon a private corporation is governed by W.VA. R.C.P.4(d)(5) (2015). Service is obtained by delivering or mailing a copy of the complaint and summons to an officer, director, trustee, agent, or attorney in fact of the private corporation. W.VA. R.C.P.4(d)(5)(A-B) (2015).

4. **Long-arm statute.** West Virginia's long-arm statute extends to the full reach of due process. Specifically, W.VA. CODE § 56-3-33 (2015) provides that service of process in an action against a nonresident for a cause of action arising from any of the following seven acts shall be of the same legal force and validity as though such nonresident were personally served with a summons and complaint within the state:

> (1) Transacting any business in this state;
>
> (2) Contracting to supply services or things in this state;
>
> (3) Causing tortious injury by an act or omission in this state;
>
> (4) Causing tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
>
> (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected such person to use, consume or be affected by the goods in this State: Provided, That he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
>
> (6) Having an interest in, using or possessing real property in this state; or
>
> (7) Contracting to insure any person, property or risk located within this state at the time of contracting.

"In contrast to the legislative schema of W.VA. CODE § 56-3-33 (2015), Rule 4 of the West Virginia Rules of Civil Procedure does not provide that constructive service on a nonresident defendant has the same force of law as personal service effected in state. As a result, *in personam* jurisdiction does not arise by operation of law when a nonresident defendant is constructively served with process pursuant to the provisions

of Rule 4 of the West Virginia Rules of Civil Procedure." Syl. Pt. 4, *Leslie Equip. Co. v. Wood Res. Co., L.L.C.*, 687 S.E.2d 109 (W.Va. 2009).

5. **Non-resident operating a motor vehicle.** Service of process in an action against a non-resident that grows out of the operation of a vehicle on a West Virginia highway can be obtained by delivering a copy of the summons and complaint to the West Virginia Secretary of State office, which will then mail a copy to the non-resident motorist. In the event process cannot be effected through the Secretary of State, the summons and complaint may be served upon any insurance company that has a contract of automobile or liability insurance with the nonresident motorist. W.VA. CODE § 56-3-31 (2015).

6. **Infant or incompetent person.** Service of process upon an infant or incompetent person under the age of fourteen can be obtained by delivering a copy of the summons and complaint to the person's guardian or conservator resident in West Virginia. If no such guardian or conservator exists, then service shall be delivered to the person's father or mother, and in the alternative, to a guardian *ad litem*. Service shall not be directed upon any one of these persons if he or she is the plaintiff. W.VA. R.C.P.4(d)(2) (2015).

E. Statute of Limitations

1. Construction. Actions based on a claim to recover damages flowing from any deficiency in construction or improvement to realty may not be brought more than ten (10) years after the performance of such services or construction. W.VA. CODE § 55-2-6a (2015); *see also Stone v. United Eng'g*, 475 S.E.2d 439, 448 (W.Va. 1996). However, the ten (10) year statute of limitations does not include claims against the owner of real property for deficiencies if that owner planned, designed, surveyed, observed, or supervised the construction or actually constructed the improvement(s) to real property. *Stone*, 475 S.E.2d at 448.

2. Contracts. Actions based on oral contracts must be filed within five years, while actions based on written contracts have a ten (10) year statute of limitation. W.VA. CODE § 55-2-6 (2015).

3. Application to State. Unless otherwise expressly provided, every statute of limitation shall apply to the state. W.VA. CODE § 55-2-19 (2015).

4. Personal injury. Actions based on personal injury must be brought within two (2) years after the right to bring the action has accrued. W.VA. CODE. § 55-2-12(b) (2015). The statute, however, does not always run immediately.

Under the **discovery rule**, the statute of limitations will begin to run when the plaintiff knows or should have known (1) that he or she has been injured, (2) the identity of the entity that may have breached a duty to act with due care toward the plaintiff, and (3) that the conduct of that entity has a causal relation to the injury. *Gaither v. City Hosp.*

Inc., 487 S.E.2d 901, 909 (W.Va. 1997). "Whether a plaintiff 'knows of' or 'discovered' a cause of action is an objective test." Syl. Pt. 4, *Dunn v. Rockwell*, 689 S.E.2d 255 (W.Va. 2009).

> A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact. Syl. Pt. 5, *Dunn v. Rockwell*, 689 S.E.2d 255 (W.Va. 2009).

5. **Wrongful death.** Actions based on wrongful death must be brought within two (2) years after the death of such deceased person. W.VA. CODE. § 55-7-6(d) (2015). Under the discovery rule, the statute of limitations begins to run when the decedent's representative knows or should know (1) the decedent has died; (2) the death was the result of a wrongful act; (3) the identity of the person or entity who owed the decedent a duty to act with due care and who may have engaged in conduct that breached that duty; and (4) the wrongful act of that person has a causal relation to the decedent's death. Syl. Pt. 8, *Bradshaw v. Soulsby*, 210 W.Va. 682, 558 S.E.2d 681 (2001).

6. **West Virginia Medical Professional Liability Act.** West Virginia's Medical Professional Liability Act provides the statute of limitations for actions against health care providers. W.VA. CODE § 55-7B-4(a) (2015).

    i. **Tolling.** For adults, the statute provides a two (2) year statute of limitation for actions against a health care provider. The clock begins to run at the date of such injury or within two (2) years of the date when the person discovers or should have discovered the injury. This period does not extend past ten (10) years. W.VA. CODE § 55-7B-4(a) (2015).

    ii. **Minors.** If a minor under the age of ten is injured, the action must be commenced within two (2) years of the date of the injury, or prior to the minor's twelfth birthday, whichever provides the longer period. W.VA. CODE § 55-7B-4(b) (2015).

iii. **Fraud.** The statute of limitations is tolled for any period during which the health care provider has committed fraud or collusion by concealing or misrepresenting material facts about the injury. W.VA. CODE § 55-7B-4(c) (2015).

7. **Property damage.** Actions based on damage to property must be brought within two (2) years after the right to bring the claim has accrued. W.VA. CODE § 55-2-12 (2015).

8. **Fraud.** Causes of action for injuries to property and person and for deceit or fraud shall survive upon the death of the person entitled to recover or upon the death of the person liable. W.VA. CODE § 55-7-8a (2015). Additionally, the causes of action that survive at common law remain unaffected by the statute. *Id.*

9. **Bad faith.** Statutory and common law bad faith claims are subject to the one (1) year statute of limitations contained in W.VA. CODE § 55-2-12(c) (2015). *Noland v. Va. Ins. Reciprocal*, 686 S.E.2d 23 (W.Va. 2009).

10. **Tolling.** Generally, the statute of limitations begins to run when the right to assert a cause of action accrues. In certain circumstances, the showing of fraud will toll the running of the statute. *Sansom v. Sansom*, 137 S.E.2d 1 (W.Va. 1964). If the person with a right to bring an action is an infant or is insane, the action may be brought within the like number of years allowed to an unimpeded adult when the infant or insane person becomes of full age or sane, provided that it cannot be brought after twenty (20) years from the time the right accrues. W.VA. CODE § 55-2-15 (2015). In medical malpractice cases involving a minor under the age of ten, the statute is tolled and the suit must be brought prior to the minor's twelfth birthday or within two (2) years of the date of such injury, whichever provides the longer period. W.VA. CODE § 55-7B-4 (2015).

F. Statute of Repose

Construction. W.VA. CODE § 55-2-6a (2015) provides that no action, in contract or tort, for contribution or indemnity to recover damages for any deficiency in construction or improvement to real property, or to recover damages for injury to real property, personal property, bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property may be brought more than ten (10) years after the performance of such services or construction. The period of limitations is not tolled until the earlier of when the improvements are occupied or accepted.

1. **Time limit.** W.VA. CODE § 55-2-6a (2015) sets an

> arbitrary time period after which no actions, whether contract or tort, seeking damages for any deficiency in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property may be initiated against architects and builders. This arbitrary time limit begins to run when the builder or

> architect relinquishes access and control over the construction or improvement, and the construction or improvement is (1) occupied or (2) accepted by the owner of the real property, whichever occurs first. Pre-existing statutes of limitation for both contract and tort actions continue to operate within this outside limit.

Neal v. Marion, 664 S.E.2d 721, 728 (W.Va. 2008).

2. **Distinguishing from a statute of limitations.** "A statute of limitations ordinarily begins to run on the date of the injury; whereas, under a statute of repose, a cause of action is foreclosed after a stated time period regardless of when the injury occurred." *Gibson v. W.Va. Dep't of Hwys.*, 406 S.E.2d 440, 443 (W.Va. 1991).

G. Venue Rules

1. Venue is governed by W.VA. CODE § 56-1-1 (2015). Venue is proper in the circuit court of any county where the defendants may reside or where the cause of action arose.

    i. **Corporations.**
        a. If the defendant is a corporation, venue is proper where its principal office is or wherein its mayor, president or other chief officer resides;

        b. However, if the corporation's principal office is not located within West Virginia, and its mayor, president or other chief officer do not reside within West Virginia, then venue is proper where the corporation does business; or

        c. If the corporation is organized under the laws of West Virginia but has its principal office located outside of West Virginia and has no office or place of business located within West Virginia, venue is proper in the circuit court of the county in which the plaintiff resides or the circuit court of the county in which the seat of state government is located.

    ii. For actions of ejectment or unlawful detainer, the suit must be brought in the county where the land sought to be recovered, or some part thereof, is located.

2. ***Forum non conveniens.*** The doctrine of *forum non conveniens* is governed by W.VA. CODE § 56-1-1a (2015). This doctrine allows a court to decline jurisdiction based on convenience and the interests of justice, even though the court would have jurisdiction over the parties, because the action would be more properly heard in a forum outside the state. While the plaintiff has great deference in choice of forum, this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in the state.

In determining whether to dismiss any plaintiff under the doctrine of *forum non conveniens*, the court shall consider:

> (1) Whether an alternate forum exists in which the claim or action may be tried;
>
> (2) Whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
>
> (3) Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
>
> (4) The state in which the plaintiff(s) reside;
>
> (5) The state in which the cause of action accrued;
>
> (6) Whether the balance of the private interests of the parties and the public interest of the State predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this State. Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the State include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the State; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty;
>
> (7) Whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation; and
>
> (8) Whether the alternate forum provides a remedy.

W.VA. CODE § 56-1-1a(a) (2015).

II. NEGLIGENCE

A. Comparative Fault/Contributory Negligence

In 2015, West Virginia passed a new modified comparative fault system. W. Va. Code § 55-7-13 and § 55-7-24. Under the new comparative fault system, liability is now "several" and defendants are only responsible for their proportion of fault. Additionally, Plaintiff's fault is not a bar to recovery unless that fault is greater than the combined fault of all other persons or entities. If Plaintiff's fault is less than the combined fault of all other persons, recovery shall be reduced in proportion to Plaintiff's degree of fault.

Another significant change in the 2015 amendments to West Virginia's comparative fault system juries will be able to consider the fault of all responsible parties, whether a party to the litigation or not. Any fault assigned to non-parties will be reduced from Plaintiff's recovery in proportion to the percentage of fault charged to the nonparty. Additionally, where Plaintiff has settled with a party or nonparty before verdict, Plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty.

The new comparative fault system is applicable to all actions arising on or after May 25, 2015.

B. Exclusive Remedy – Workers' Compensation Protections

1. In West Virginia, any employer who pays into the workers' compensation fund "is not liable to respond in damages at common law or by statute for the injury or death of any employee." W.VA. CODE § 23-2-6 (2015). Instead, claims that arise out of the furtherance of the employer's business must be submitted to the workers' compensation board.

2. **Deliberate intention.** An employer, however, is subject to liability if it acted with "deliberate intention" to injure the worker. W.VA. CODE § 23-4-2(c) (2015). Under West Virginia Code section 23-4-2(c) (2015): "[a]n employee, widow, widower, child, or dependent has a deliberate intention cause of action against the employer for injury or death of an employee. In the event of an employee's death, the decedent's estate has a claim." Syl. Pt. 3, *Murphy v. E. Am. Energy Corp.*, 680 S.E.2d 110 (2009).

3. Section 23-4-2 was revised during the 2015 Legislative Session. For injuries to employees that occurred prior to July 1, 2015, the former Deliberate intention standard can be demonstrated in one of two ways:

    i. If "[i]t is proved that the employer . . . acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee . . ." or

ii. If all of the following facts are proven:

a. "That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;"

b. "That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;"

c. "That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation . . . or of a commonly accepted and well-known safety standard within the industry or business of the employer; . . ."

d. "That…the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition;" and

e. "That the employee exposed suffered serious compensable injury or compensable death . . . as a direct and proximate result of the specific unsafe working condition."

Id.

For those injuries occurring after July 1, 2015, the revised Deliberate Intention statute is applicable. Employees may still recover under part (i) above, but significant changes to the five-part test described in part (ii) were made as follows:

- Where "actual knowledge" (Part b) could be imputed to the employer through any management personnel, the revised statute defines that actual knowledge of the unsafe working condition must come from the employee's immediate supervisor.
- Under part (c) above, the statutes, rules or regulations relied upon must be specifically applicable to the work and working condition and must be intended to address specific hazards presented by the alleged unsafe working condition. Most notably, the revised statute removes the ability for the trier of fact to determine whether Part (c) has been proven. Instead, whether a statute, rule or regulation is applicable to the work is a matter of law for the judge to decide.
- Under the prior statute, Part (d) did not specify who could expose the employee to the specific unsafe working condition. The revised statute requires that the supervisor/manager alleged to have actual knowledge must also be the same person who exposes the employee to the unsafe working condition.
- Finally, Part (e), requiring "serious compensable injury" has been defined in the revised statute. The primary method for determining serious compensable

injury under the revised statute is that the injury (independent of any preexisting impairment) must result in a permanent impairment rating of 13% in workers' compensation claim, AND cause permanent loss or significant impairment of a bodily organ or system, or have objectively verifiable radiculopathy. A physical injury without objective medical evidence to support a diagnosis is not acceptable.

4. **West Virginia Human Rights Act.** Additionally, an employee is not prohibited from bringing suit and seeking recovery under the West Virginia Human Rights Act for discriminatory conduct that, although incidentally related to a work-related injury recoverable under the Workers' Compensation Act, gave rise to an entirely separate liability under the WVHRA. *Messer v. Huntington Anesthesia Group*, 620 S.E.2d 144, 160 (W.Va. 2005).

C. Indemnification

1. Indemnity is a shifting of complete responsibility to another party because of (1) an expressed or implied agreement, (2) the relation of the parties to one another and the consequent duty owed, or (3) a significant difference in the kind or quality of their conduct. PROSSER TORTS § 51 (Hornbook Series 5th ed. 1984).

2. There are two basic types of indemnity: express indemnity, based on a written agreement, and implied indemnity, arising out of the relationship between the parties. Syl. Pt. 1, *Valloric v. Dravo Corp.*, 357 S.E.2d 207 (W.Va. 1987).

   i. **Express indemnity.** An express indemnity agreement can provide the person having the benefit of the agreement, the indemnitee, indemnification even though the indemnitee is at fault. Such result is allowed because express indemnity agreements are based on contract principles. Courts have enforced indemnity contract rights so long as they are not unlawful. *Id.*

   ii. **Implied indemnity.** Implied indemnity is based on principles of equity and restitution. *Harvest Capital v. W.Va. Dept. of Energy*, 560 S.E.2d 509, 512 (W.Va. 2002). The right to seek implied indemnity belongs only to a person who is without fault. *See, e.g., Hager v. Marshall*, 505 S.E.2d 640, 648 (W.Va. 1998).

   The requisite elements of an implied indemnity claim in West Virginia are:

   a. an injury was sustained by a third party;
   b. for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and
   c. for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and indemnitee share.

Harvest Capital, 560 S.E.2d at 514.

D. Joint and Several Liability

1. In West Virginia, a defendant whose liability is 30% or less shall be several, meaning they are only liable for the damages attributed to him, unless an exception applies. W.VA. CODE § 55-7-24(a)(2) (2015). Tortfeasors who are more than 30% liable are joint and severally liable. Thus, a plaintiff may collect their damages from whomever is able to pay, regardless of the fault attributed to that specific party. *Id.*; *Sitzes v. Anchor Motor Freight, Inc.*, 289 S.E.2d 679, 705-06 (W.Va. 1982).

2. **Exception.** There is an exception to the 30% rule, stated above, which makes the rules of joint and several liability applicable to the following categories of tortfeasors despite the percentage of fault attributed to them:

    i. Any party who acted with the intention of inflicting injury or damage;
    ii. Any party who acted in concert with another person as part of a common plan or design resulting in harm;
    iii. Any party who negligently or willfully caused the unlawful emission, disposal or spillage of a toxic or hazardous substance; or
    iv. Any party strictly liable for the manufacture or sale of a defective product.

    W.VA. CODE § 55-7-24(b)(1)-(4) (2015).

    Further, in cases of medical negligence, liability is several, but not joint. W.VA. CODE § 55-7B-9.

3. **Inability to collect.** Also, if the plaintiff in good faith is unable to collect payment from a liable defendant, the plaintiff may move, within six months of the judgment becoming final, for reallocation of any uncollectible amount among the other parties in the litigation.

    i. The court will reallocate the uncollectible amount among the other parties in the litigation at the time the verdict is rendered, including a claimant at fault according to their percentages of fault.
    ii. A defendant whose percentage of fault is equal or less than the plaintiff's percentage of fault, *or* whose percentage of fault is less than ten percent, the court will not reallocate any portion of the uncollectible amount to him or her.
    iii. Thus, a party whose liability is between ten and 30% could potentially become liable for a portion of the damages assessed against a co-defendant, if such co-defendant becomes insolvent.

    W.VA. CODE § 55-7-24(c) (2015).

E. Strict Liability

1. Strict liability holds a person responsible for damages caused by their actions regardless of fault. RESTATEMENT (SECOND) OF TORTS § 519(1).

2. **Product liability.** "A defective product may fall into three broad, and not necessarily mutually exclusive, categories: design defectiveness; structural defectiveness; and use defectiveness arising out of the lack of, or the inadequacy of, warnings, instructions and labels." *Morningstar v. Black & Decker Mfg*. Co., 253 S.E.2d 666, 682 (W.Va. 1979).

    i. **Standard.** In West Virginia, the standard for establishing strict liability in tort is "whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made." *Id.* at 683. Further, negligence is inferred when it is shown that the accident would not have occurred but for the product being defective. *See Anderson v. Chrysler Corp.*, 403 S.E.2d 189, 193 (W.Va. 1991).

    ii. **Stream of commerce.** "Once it can be shown that a product was defective when it left the manufacturer and that the defect proximately caused the plaintiff's injury, a recovery is warranted under strict liability absent some conduct on the part of the plaintiff that may bar his recovery." *Morningstar*, 253 S.E.2d at 680.

3. **Learned intermediary doctrine.** Drug manufacturers cannot use the learned intermediary doctrine in West Virginia to avoid liability after failing to warn consumers about the risks of their products. Instead, drug manufacturers are under the "same duty to warn consumers about the risks of their products as other manufacturers." *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 914 (W.Va. 2007).

F. Willful and Wanton Conduct

Willful and wanton are words used in West Virginia to "signify a higher degree of neglect than gross negligence." *Groves v. Groves*, 158 S.E.2d 710, 713 (W.Va. 1968). Willful and wanton conduct "imports premeditation or knowledge and consciousness that injury is likely to result from the act done or from the omission to act." *Mandolidis v. Elkins Indus.*, 246 S.E.2d 907, 914 (W.Va. 1970) (quoting *Stone v. Rudolph*, 32 S.E.2d 742, 748 (W.Va. 1944)).

III. DISCOVERY

A. Electronic Discovery Rules

West Virginia has not yet amended its Rules of Civil Procedure to provide for a section relating to electronic discovery.

B. Depositions

W.Va. R.C.P.30, governs deposition upon oral examination. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. A party desiring to take the deposition of any person upon oral examination must notice the deposition in accordance with the parameters set forth in W.Va. R.C.P. 30. The deposition shall be taken under oath. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion to limit the scope and manner of the deposition if the court finds "the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent…." W.Va. R.C.P. 30(d)(1); (3).

C. Interrogatories

1. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 40 in number including all discrete subparts, to be answered by the party served. W.Va. R.C.P., Rule 33.

2. Answers and Objections

i. Each interrogatory shall be answered separately and fully in writing under oath, unless an objection is lodged within 30 days after the service of the same. Id.

ii. The Answers must be verified by the party making them, and the objections must be sgned by the attorney. *Id.*

iii. All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. *Id*.

iv. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. *Id*.

3. Scope; use at trial. The answers may be used to the extent permitted by the rules of evidence. *Id*.

D. Requests for Production of Documents

1. Any party may serve on any other party a request to produce or permit the party making the request, to inspect and copy, any designated documents that are in the possession, custody or control of the party upon whom the request is served, or to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served. W.Va. R.C.P., Rule 34.
2. The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. *Id*.
3. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. *Id*,
4. A party who produces documents for inspections shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. *Id*.

E. Requests to Admit

1. **Purpose.** W.Va.R.C.P.36 (2015) governs requests for admissions. "[T]he purpose of [the rule] is to expedite trial by establishing certain material facts as true and thus narrowing the range of issues at trial." *Checker Leasing, Inc. v. Sorbello*, 382 S.E.2d 36, 38 (W.Va. 1989).

2. **Serving request.** Under Rule 36, a party may serve upon any other party a written request for an admission. W.VA.R.C.P.36. The matter is admitted unless, within thirty (30) days after service of the request, the party to whom the request was directed serves upon the party requesting the admission a written answer or objection. When those requests are served with the summons and complaint, a defendant has forty-five (45) days to file a response. W.VA.R.C.P.36(a) (2015).

3. **Effect of admission.** Any matter admitted under Rule 36 is conclusively established, unless the court permits amendment or withdrawal of the admission. W.VA.R.C.P.36(b) (2015).

4. **Sufficiency of answers.** The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. W.VA.R.C.P.36(a) (2015).

F. Physical and Mental Examinations

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. W.Va. R.C.P., Rule 35.

G. Non-Party Discovery Subpoenas are governed by W.VA. R.C.P.45 (2015). Subpoenas are issued by the clerk of the court upon request, and may be served on any person who is not a party and who is not less than eighteen years old. Unless the court uses its power to quash or modify a subpoena, the deponent or witness who is subpoenaed is required by law to obey it. In addition, a subpoena may direct a person to produce and permit inspection and copying of designated books, documents, or tangible things in the possession or control of that person.

H. Privileges

1. **Attorney-client privilege.** To assert an attorney-client privilege, three elements must be present. *See State v. Burton*, 254 S.E.2d 129, 135 (W.Va. 1979); *State ex rel. Allstate Ins. Co. v. Madden*, 601 S.E.2d 25, 33-34 (W.Va. 2004).

> i. Both parties must contemplate that the attorney-client relationship does or will exist.
>
> ii. The advice must be sought by the client from the attorney in his or her capacity as a legal adviser; and
>
> iii. The communication between the attorney and client must be intended to be confidential.

Burton, 254 S.E.2d 129; *Madden*, 601 S.E.2d 25.

2. **Work product.** Attorney work product is protected if the motivating purpose behind the creation of the document is to assist in pending or probable future litigation. *State ex rel. United Hosp. Ctr. v. Bedell*, 484 S.E.2d 199, 213 (W.Va. 1997).

Bedell further states that:

> Both the attorney-client privilege and the work product doctrine are to be strictly construed. Exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth. Furthermore, the burden of establishing the attorney-client privilege or the work product exception, in all their elements, always rests upon the person asserting it.

Id. at 208.

3. **Self-critical analysis privilege.** West Virginia does not recognize a self-critical analysis privilege.

4. **Health care peer review privilege.** The West Virginia Health Care Peer Review Organization Protection Act has created a privilege for the proceedings and records of a review organization, and has made them unavailable in discovery and unable to be admitted into evidence in any civil action arising from the matters that are subject to the review. W.VA. CODE § 30-3C-3 (2015). This privilege, however, can be waived by formally indicating intent to waive. *See Young v. Saldanha*, 431 S.E.2d 669 (W.Va. 1993); *State ex rel. Brooks v. Zakaib*, 588 S.E.2d 418 (W.Va. 2003)

5. **Confidentiality of statements made to clergy.** W.VA. CODE § 57-3-9 (2015) limits the clergy privilege to (a) criminal matters, (b) grand jury testimony, and (c) domestic matters. *See* Syl. Pt. 3, *State v. Potter*, 478 S.E.2d 742 (W.Va. 1996).

6. **Husband-wife privilege.** In criminal cases, both spouses can prevent the other from testifying, and each can refuse to testify. W.VA. CODE § 57-3-3 (2015). Moreover, there is no negative inference or presumption created against the accused. *Id*. Additionally, neither spouse can testify as to confidential communications made during the marriage without the other spouse's consent. W.VA. CODE § 57-3-4 (2015).

   a. **Failure to cooperate in discovery.**
      i. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery. W.Va. R.C.P., Rule 37.
      ii. Evasive or incomplete answer or response is to be treated as a failure to answer or respond. *Id*,
      iii. If the motion is granted, the court shall require the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's answer, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust. *Id*.

IV EVIDENCE, PROOFS AND TRIAL ISSUES

A. Relationship to Federal Rules of Evidence

Many rules in the West Virginia Rules of Evidence are modeled after the Federal Rules of Evidence. *See State v. Sutphin*, 466 S.E.2d 402, 414 (W.Va. 1995) ("The West Virginia Rules of Evidence are patterned upon the Federal Rules of Evidence, and we have repeatedly recognized that when codified procedural rules or rules of evidence of West Virginia are patterned after the corresponding federal rules, federal decisions

interpreting those rules are persuasive guides in the interpretation of our rules.") (internal citations omitted).

B. Expert Witnesses.

1. **Standard.** In cases involving scientific experts, the circuit court must engage in two inquiries to fulfill its gatekeeper role: "First, the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, or whether the work product amounts to good science. Second, the circuit court must ensure that the scientific testimony is relevant to the task at hand." *Gentry v. Mangum*, 466 S.E.2d 171, 182 (W.Va. 1995).

2. **Qualification.** To qualify as an expert, the court must determine "whether the proposed expert meets the minimal educational or experiential qualifications in a field that is relevant to the subject under investigation which will assist the trier of fact," and whether the expert is testifying about a subject within his or her expertise. *Gentry v. Mangum*, 466 S.E.2d 171, 184 (W.Va. 1995).

    i. **Technical opinions.** Unless an engineer's opinion is derived from the methods and procedures of science, his or her testimony is generally considered technical in nature, and not scientific. Therefore, a court considering the admissibility of such evidence should not apply this analysis. *See Watson v. INCO Alloys Int'l, Inc.*, 545 S.E.2d 294, 301 (W.Va. 2001).

    ii. **Non-scientific experts.** If the case involves non-scientific experts, then W.VA. W.V.R.E. 702 (2010) applies, and the witness must (1) be an expert, (2) that testifies to technical or specialized knowledge, and (3) the expert testimony must assist the trier of fact. *Watson v. INCO Alloys Int'l, Inc.*, 545 S.E.2d 294, 302 (W.Va. 2001).

3. **Disclosures.** The expert may testify in terms of opinion or inference and give reasons without first having to testify to the underlying facts or data, unless required by the court. The expert, however, may be required to disclose the underlying facts or data on cross-examination. W.VA. W.V.R.E. 705 (2015).
4. **Work product.** Whether or not experts can assert a work product privilege has yet to be directly addressed in West Virginia. Rule 26 of the West Virginia Rules of Civil Procedure, however, provides that facts known and opinions held by experts are discoverable. W.VA. R.C.P.26(b)(4) (2015).

C. Rebuttal witnesses. West Virginia courts have discretion to allow or exclude witnesses from the courtroom to prevent "influenced" testimony.

1. **Factors.** A rebuttal witness's testimony can be excluded under the exclusion clause in W.V.R.E. 615 (2015). A trial court should consider several factors, including:

i. "How critical the testimony in question is;
ii. Whether the information ordinarily is subject to tailoring such that cross-examination or other evidence could bring to light any deficiencies;
iii. To what extent the testimony of a witness is likely to encompass the same issues as other witnesses;
iv. In what order the witness will testify; and
v. If any potential for bias exists which may motivate the witness to tailor his or her testimony."

State v. Omechinski, 468 S.E.2d 173, 181 (W.Va. 1996).

2. **Criminal.** Allowing the prosecution to present rebuttal evidence was proper where a criminal defendant's witness on direct examination raised a material matter, and on cross-examination testified adversely to the prosecution. *See State v. Dietz*, 390 S.E.2d 15, 22 (W.Va. 1990).

D. Accident Reconstruction

1. **Redesign.** A trial judge has discretion in admitting the evidence of a subsequent redesign and reconstruction of an accident. *See Gonzalez v. Conley*, 484 S.E.2d 171 (W.Va. 1997).

2. **Standard.** Experts qualified in accident reconstruction can testify as long as the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. *See State ex rel. Jones v. Recht*, 655 S.E.2d 126, 132 (W.Va. 2007); *see also* W.V.R.E. 702 (2015).

E. **Biomechanical Testimony**. Qualified experts can provide biomechanical testimony as long as the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. *See State ex rel. Jones v. Recht*, 655 S.E.2d 126, 132 (W.Va. 2007); *see also* W.VA. W.V.R.E. 702 (2015).

F. **Convictions.** In instances where evidence of prior convictions is admissible, the evidence is only admissible for the purpose of impeaching the credibility of a witness.

1. **Criminal.** Evidence of a prior conviction can be admitted to attack the credibility of a witness accused in a criminal case only if the crime involved perjury or false swearing. There is no Rule 403 analysis for weighing the probative value against the undue prejudice in this situation. W.VA. W.V.R.E. 609(a)(1) (2015).

2. **Other witnesses.** For all other witnesses other than criminal defendants, evidence of a prior conviction can be admitted to attack the credibility of the witness if the crime was punishable by imprisonment in excess of one year or if the crime involved dishonesty or false statement, regardless of the punishment. The admissibility of the

prior conviction is subject to a Rule 403 analysis by weighing the probative value and the undue prejudice. W.VA. W.V.R.E. 609(a)(2)(A-B) (2015).

3. **Traffic.** Evidence of prior misdemeanor convictions is inadmissible; therefore, misdemeanor traffic ticket convictions are not admissible.

G. Use of Photographs

1. Photographs are demonstrative evidence used to aid the jury or judge. W.VA. W.V.R.E. "Digital images are [also considered] 'photographs' under … the West Virginia Rules of Evidence." Syl. Pt. 2, *State v. William M.*, 692 S.E.2d 299 (W.Va. 2010). Photographs are admissible under the West Virginia Rules of Evidence; a witness normally testifies that they know the object involved and that the photograph correctly depicts that object. *Id.* at 261.

2. **Prejudicial effect based on gruesomeness.** When an objection is based on a photograph being gruesome, the admissibility of the photograph must be determined on a case-by-case basis, pursuant to West Virginia Evidence Rules 401-403. *State v. Derr*, 451 S.E.2d 731, 744 (W.Va. 1994).

H. Day in the Life Videos.

1. Day in the Life videos are subject to the same admissibility requirements as photographs.

   W.VA. W.V.R.E. 1001(c) addresses the admissibility of the videotape into evidenceThe general rule is that pictures and photographs relevant to any issue are admissible. The trial judge has wide discretion in determining admissibility. *Roberts v. Stevens Clinic Hosp.*, 345 S.E.2d 791, 796 (W.Va. 1986).

2. **Factors.** When deciding whether to admit a videotape, the trial court will consider the videotape's tone, editing, and the availability of similar evidence through in-court testimony. *Id*.

I. Medical Bills.

1. Generally, a plaintiff's medical bills are admissible as evidence of damages even if the bills were paid by another source. The evidence of payment by a collateral source will be inadmissible. (See "Collateral Source Rule," *infra*, Section V. subsection E,).

2. **Foundation expert testimony.** If a defendant objects to the introduction of medical bills on the basis that the defendant's evidence will raise a substantial contest as to the questions of causal relationship or medical necessity, the court may only admit the challenged medical bills with foundation expert testimony that tends to show medical necessity or a causal relationship. *See Collins v. Bennett*, 486 S.E.2d 793, 798 (W.Va. 1997).

J. Seat Belt and Helmet Use Admissibility

1. **Seat belts.** Failure to wear a seatbelt is not evidence of negligence and is not admissible to mitigate damages. W.VA. CODE § 17C-15-49(d) (2015). The trier of fact may, however, reduce medical damages by a maximum of five percent for a violation of the seatbelt laws if an in camera hearing reveals that failing to wear the seatbelt was a proximate cause of the injuries complained, and the jury, by special interrogatory finds that the injured party failed to wear a seatbelt, and that failure constituted a failure to mitigate damages. If the plaintiff stipulates to the reduction, then the judge calculates the reduction and no evidence of the failure to wear a seatbelt is permitted. In all cases, the actual computation of the dollar amount reduction shall be determined by the court. *Id.*

2. **Helmets.** In West Virginia, there is no common law or statutory defense based on a plaintiff's failure to take safety precautions such as wearing a helmet.

K. Prior Accidents.

Under West Virginia law, "similar occurrence evidence must relate to accidents or injuries or defects existing at substantially the same place and under substantially the same conditions. Evidence of injuries occurring under different circumstances or conditions is not admissible." Syl. Pt. 3, *Gable v. Kroger Co.*, 410 S.E.2d 701 (W.Va. 1991).

L. Subsequent Remedial Measures.

1. Generally, evidence of remedial measures or subsequent repairs post-accident is not admissible to prove negligence in connection with the accident. W.V.R.E. 407 (2015). This policy is rooted in the desire to encourage subsequent remedial actions and to prevent the jury from assuming negligence.

2. **Proper purposes.** This rule, however, does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership; control; feasibility of precautionary measures, if controverted; or impeachment. *Id.*

M. Offers of Proof.

1. If opposing counsel successfully objects to evidence, counsel offering the evidence may explain what the evidence would have shown had the judge allowed it to be presented. This opportunity, called an offer of proof, must be made outside of the presence of the jury.

2. **Purpose.** Offers of proof do two things: (1) they allow the trial judge to reevaluate the decision, and (2) they help the appeals court in deciding if the ruling was proper.

See State v. Blake, 478 S.E.2d 550, 558 (W.Va. 1996); *State v. Calloway*, 528 S.E.2d 490, 498 (W.Va. 1999).

3. **Record.** "The appellate review of a ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not a part of that record." Syl. Pt. 2, *State v. Bosley*, 218 S.E.2d 894 (W.Va. 1975).

   Therefore, once a party has made a particularized offer of proof under W.VA. W.V.R.E. 103(a)(2) (2015), it may not, on appeal, expand or modify the substance of the evidence put before the trial court. *Calloway*, 528 S.E.2d at 498.

3. Dead Man's Statute. West Virginia's Dead Man's Statute generally works to prevent a witness from testifying as to any personal transaction or communication between such witness and a person at the time of such examination that is deceased or insane. W.VA. CODE § 57-3-1 (2015). The protections afforded under the Dead Man's Statute are waived if the party who is protected calls the witness to testify, or gives evidence as to the transaction. *See Ogdin v. First Nat'l Bank*, 138 S.E. 376 (W.Va. 1927); *In re Estate of Thacker*, 164 S.E.2d 301 (W.Va. 1968).

N. Spoliation.

1. Parties who reasonably anticipate litigation have a "fundamental affirmative duty to preserve relevant evidence." *Tracy v. Cottrell*, 524 S.E.2d 879, 887 (W.Va. 1999).

2. A trial court has discretion to sanction a party for destroying evidence in certain situations, including the power to dismiss a claim, exclude evidence, or provide a jury instruction on spoliation. *Id*.

O. Offers of Judgment.

1. Offers of Judgment are offers made by a defendant to an adverse party more than ten (10) days before trial to allow judgment to be taken against the defendant for a specific amount of money or property. W.VA.R.C.P. 68(a) (2015).

2. **Jury.** If the offer is rejected, it "shall not be disclosed to the jury and . . . is not admissible except in a proceeding to determine costs." W.VA.R.C.P. 68(c) (2015).

3. **Payment of costs.** "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." W.VA.R.C.P. 68(c) (2015).

4. **Subsequent offers.** "The fact that an offer is made but not accepted, or accepted only as part payment, does not preclude a subsequent offer." W.VA.R.C.P. 68(c) (2015).

P. Appeal.

1. **Final judgment.** An appeal may be taken from the entry of a final judgment. *W.Va. Dep't of Energy v. Hobet Mining & Constr. Co.*, 358 S.E.2d 823, 825 (W.Va. 1987); *see also* W.VA.R.C.P.72 (2015).

2. **Other orders.** In addition, an appeal may be taken from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under W.VA.R.C.P. 50(b); granting or denying a motion under Rule 52(b) to amend or make additional findings of fact; granting or denying a motion under Rule 59 to alter or amend the judgment; or granting or denying a motion for a new trial under Rule 59. W.VA.R.C.P. 72 (2015).

3. **Timing.** A notice to appeal a judgment from a Circuit Court to the West Virginia Supreme Court of Appeals and the attachments required must be filed within thirty (30) days from the entry of the judgment or order being appealed. W.VA.R.A.P. 5(b) (2015). It must be perfected within four (4) months of the date the judgment was entered in the office of the Circuit Clerk; however, the Circuit Court from which the appeal was taken or the Supreme Court may, for good cause, extend such period not exceeding an additional two (2) months total. W.VA.R.A.P. 5(f) (2015).

V. DAMAGES

A. Caps on Damages

Generally, damages are not capped in West Virginia. But there are statutory exceptions.

1. **Medical malpractice.** Non-economic damages in medical malpractice cases have been capped by the West Virginia legislature at $250,000 per occurrence or $500,000 per occurrence in the case of (1) wrongful death, (2) permanent and substantial deformity, or (3) permanent physical or mental functional injury that prevents the injured person from independently caring for himself. W.VA. CODE § 55-7B-8(a)-(b) (2015). These caps are adjusted annually for inflation based on the Consumer Price Index. W.VA. CODE § 55-7B-8(c). The current cap was held constitutional by the West Virginia Supreme Court of Appeals. *MacDonald v. City Hospital Inc.*, 715 S.E.2d 405, 420 (W.Va. 2011).

2. **Punitive damages.** In 2015, the West Virginia legislature established a cap on punitive damages. Punitive damage awards may not exceed the greater of four times the amount of compensatory damages or $500,000.00, whichever is greater. W.VA. CODE § 55-7-27 (2015)

B. Calculation of Damages

1. Personal injury damages are normally divided between economic damages (tangible losses) and non-economic damages (intangible losses, such as pain and suffering). To determine economic damages, the jury can consider tangible items, such as bills, statements, receipts, etc. Calculating non-economic damages is more difficult because of the subjective analysis it requires for each case.

2. In West Virginia, a plaintiff bringing a cause of action for personal injuries may recover for various damages including, but not limited to:

   a. Current and future pain and suffering;
   b. Current and future loss of enjoyment of life or disability;
   c. Past and future medical care;
   d. Loss of society;
   e. Lost past or future earnings;
   f. Deformity or Disfigurement;
   g. Emotional distress and mental anguish;
   h. Embarrassment, humiliation or degradation; and
   i. Increased Risk of Harm.

C. Available Items of Personal Injury Damages.

1. **Past medical bills.** The full amount of a Plaintiff's medical bills may be recovered.

   In *Kenney v. Liston, 760 S.E. 2d 434 (W.Va. 2014)*, the Court held that medical bills are recoverable in total regardless of the amount actually paid by the plaintiff's health insurer. This resolves an argument that many defense counsel have advanced–that only the amount actually paid by the insurer should be recoverable as damages.

   "A person who has been injured by the tortious conduct of a culpable tortfeasor is entitled to recover from the tortfeasor the reasonable value of medical and nursing services necessarily required by the injury. This recovery is for the reasonable value of the services and not for the expenditures actually made or obligations incurred." Syllabus pt. 6, *Id.*

   Where an injured person's health care provider agrees to reduce, discount or write off a portion of the person's medical bill, the collateral source rule permits the person to recover the entire reasonable value of the medical services necessarily required by the injury. The tortfeasor is not entitled to receive the benefit of the reduced, discounted or written-off amount. Syllabus pt. 7, *Id.*

   The basis for the Court's opinion is that medical bills are recoverable if "reasonable and necessary." Justice Loughry dissents, stating "[t]he majority's conclusion that medical bills that include a "write-off" or discount–an amount no one pays–constitutes the 'reasonable value' of the medical services rendered defies both logic and common

sense." To the extent counsel have made the "net" argument, this opinion resolves the issue and makes clear the total amount of a bill is recoverable. *Id.* at 453 (Loughry, J. dissent).

The *Kenney v. Liston* opinion notes that it does not apply to cases of medical negligence. *Id* at fn. 54.

2. W.Va. **Future medical bills.** A plaintiff can recover for future reasonable and necessary medical services that are reasonably certain to be incurred. *See Shreve v. Faris*, 111 S.E.2d 169, 175 (W.Va. 1959). Additionally, in West Virginia, a present physical harm is not needed to sustain a claim for future medical expenses. *See Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W.Va. 1999). A claim for the recovery of medical monitoring costs can be successful when it is proven that such expenses are necessary and reasonably certain to be incurred as a result of the defendant's tortious conduct. *Id.* The plaintiff must also prove they have been significantly exposed to a proven hazardous substance by the tortious conduct of the defendant, and because of this exposure, the plaintiff has suffered an increased risk of contracting a serious disease. *Id.* Punitive damages, however, may not be awarded on a cause of action for medical monitoring. *Perrine v. E.I. DuPont de Nemours & Co.*, 694 S.E.2d 815, 881 (W.Va. 2010).

3. **Hedonic damages.** Although hedonic damages, also known as damages for the loss of enjoyment of life, are recognized in West Virginia, they are included as part of the general measure of damages,and are not subject to a separate economic calculation.. Syl. Pt. 4, *Wilt v. Buracker*, 443 S.E.2d 196 (W.Va. 1993).

4. **Increased risk of harm.** West Virginia courts recognize a claim for medical monitoring if the defendant's tortious conduct has exposed the plaintiff to an increased risk of contracting a serious disease. *See Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 434 (W.Va. 1999).

   However, there is no common law cause of action in West Virginia for property monitoring. *Carter v. Monsanto Co.*, 575 S.E.2d 342, 346 (W.Va. 2002).

5. **Disfigurement.** West Virginia recognizes disfigurement as a type of compensatory damage. *See Hardy v. Hardy*, 413 S.E.2d 151 (W.Va. 1991).

6. **Loss of normal life.** West Virginia recognizes damages for loss of enjoyment of life when a plaintiff has suffered a permanent injury. These damages compensate the plaintiff "for the permanent effect of the injury itself on 'the capability of an individual to function as a whole man.'" *Wilt*, 443 S.E.2d at 200.

7. **Disability.** West Virginia recognizes disability as a type of compensatory damage. *See Hardy v. Hardy*, 413 S.E.2d 151 (W.Va. 1991).

8. **Past pain and suffering.** An injured plaintiff may recover pain and suffering damages in West Virginia even if the underlying injuries are not of a permanent nature. Syl. Pt. 1, *Keiffer v. Queen*, 189 S.E.2d 842 (W.Va. 1972).

9. **Future pain and suffering.** Future pain and suffering damages can be awarded to a plaintiff when the evidence shows it is reasonably certain that future expenses proximately related to the negligence of the defendant will be incurred. *Delong v. Kermit Lumber & Pressure Treating Co.*, 332 S.E.2d 256, 257-58 (W.Va. 1985).

10. **Loss of society.** West Virginia courts recognize a claim for loss of society in wrongful death cases, and the evidence of a relationship with the decedent may be admitted for purposes of determining damages. *See* W.VA. CODE § 55-7-6; *see also Voelker v. Frederick Bus. Props. Co.*, 465 S.E.2d 246 (W.Va. 1995).
11. **Lost income, wages, earnings**. Lost earnings comes in two forms: (1) past and (2) future. *Gault v. Monongahela Power Co.*, 223 S.E.2d 421, 427 (W.Va. 1976). A plaintiff can be awarded lost income, wages, and earnings. *Id.* Evidence of a plaintiff's past earnings is pertinent and admissible when the jury is determining lost future earning capacity. *Id.*

D. Lost Opportunity Doctrine

West Virginia recognizes the lost opportunity doctrine, also known as the "loss of chance" theory.

1. **Standard of care.** To collect damages for loss of chance, a health care provider must have failed to follow an accepted standard of care, and this failure must have deprived the patient of a chance of recovery or increased the risk of harm.

2. **Improvement.** The plaintiff must also prove, to a reasonable degree of medical probability, that "following the accepted standard of care would have resulted in a greater than twenty-five percent chance that the patient would have had an improved recovery or would have survived." W.VA. CODE § 55-7B-3(b) (2015).

E. Collateral Source Rule. West Virginia recognizes the collateral source rule. The rule "normally operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party." *Ratlief v. Yokum*, 280 S.E.2d 584, 589-90 (W.Va. 1981). The purpose of the collateral source rule is to prevent the jury from being tempted to reduce the damages "based on the amounts that the plaintiff has been shown to have received from collateral sources." *Id.*

F. Mitigation.

Injured parties have a duty to use ordinary care to minimize damages.

1. In breach of contract cases, the aggrieved party has a duty to mitigate damages if they can do so without unreasonable effort or expense. *See Taylor v. Sturm Lumber Co.*, 111 S.E. 481 (W.Va. 1922).

2. **No duty to anticipate negligence.** However, absent a statutory provision stating otherwise, "a plaintiff owes no duty to anticipate a defendant's negligence…." *Wright v. Hanley*, 387 S.E.2d 801, 804 (W.Va. 1989).

G. **Specific economic damages.** "A plaintiff seeking damages for future losses in the form of specific income or capacity to earn a living, including lost opportunity, must show how his or her economical situation has been impeded." Such proof is necessary to keep with the doctrine of avoidable consequences, which states that "a party cannot recover damages flowing from consequences that the party could reasonably have avoided." *Cook v. Cook*, 607 S.E.2d 459, 466-67 (W.Va. 2004).

H. Punitive Damages.

1. Intentionality. Punitive damages may be awarded to punish a defendant for "willfulness" or an intentional infliction of damages. *See C.W. Dev. v. Structures, Inc.*, 408 S.E.2d 41, 45 (W.Va. 1991). Punitive damages must bear a reasonable relationship to actual damages. *See Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W.Va. 1991).

2. Breach of contract. Punitive damages are normally only recoverable in actions based in tort. "Absent an independent, intentional tort committed by the defendant, punitive damages are generally not available in an action for breach of contract." *Goodwin v. Thomas*, 403 S.E.2d 13, 16 (W.Va. 1991).

3. Standard of Proof. In 2015, the West Virginia legislature adopted the "clear-and-convincing-evidence" standard of proof for punitive damages. The statute states that punitive damages may only be awarded if the damages suffered "were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others." W.VA. CODE § 55-7-27(a) (2015).

4. Bifurcation. In a jury trial involving punitive damages, upon the request of any defendant, the court may conduct a bifurcated trial with respect to punitive damages. In the first stage of the bifurcated trial, the jury shall determine liability for compensatory damages. If the jury finds during the first stage of the bifurcated trial that a defendant is liable for compensatory damages, then the court shall determine if there is sufficient evidence to proceed with a consideration of punitive damages. If the court finds that sufficient evidence exists to proceed, then the same jury shall determine if a defendant is liable for punitive damages and may award such damages in the second stage. W.VA. CODE § 55-7-27(b)(1-3) (2015)

5. **Insurability.** Punitive damages are insurable under West Virginia law. *See Hensley v. Erie Ins. Co.*, 283 S.E.2d 227, 231 (W.Va. 1981) ("Where punitive damages are permitted to be recovered under the insurance policy, the insurance company is only liable to its policy limits as to both types of damages.").

   i. **Recklessness.** Even though gross, reckless, or wanton negligence are difficult words to define, "they are nonetheless species of negligence and therefore, from a public policy standpoint, should not be precluded from insurance coverage." *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227, 231-32 (W.Va. 1981).

   ii. **Exclusion.** Insurance companies, however, may exclude punitive damages from the policy. *See* W.VA.C.S.R. § 114-63-5.14 ("Underinsured motor vehicle coverage may include an exclusion for punitive damage liability").

6. **Caps.** Punitive damage awards may not exceed the greater of four times the amount of compensatory damages or $500,000, whichever is greater. W.VA. CODE § 55-7-27(c) (2015)

I. Recovery of Pre- and Post-Judgment Interest.

1. Pursuant to W.VA. CODE § 56-6-31 (2015),

> the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the Fifth Federal Reserve District secondary discount rate in effect on the second day of January of the year in which the judgment or decree is entered: Provided, that the rate of prejudgment and post-judgment interest shall not exceed eleven percent per annum or be less than seven percent per annum.

   The rate of interest for the year 2015 for judgments and decrees entered on or after January 1, 2015 is 7.0%. http://www.statejournal.com/story/27764364/supreme-court-sets-interest-rate-for-judgements-and-decrees-entered-in-2015 (last visited March 11, 2015).

2. **Prejudgment interest.** Prejudgment interest is a "form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned." Syl. Pt. 1, *Buckhannon-Upshur Cnty. Airport Auth. v. R & R Coal Contracting, Inc.*, 413 S.E.2d 404 (W.Va. 1991).

3. **Post-judgment interest.** Post-judgment interest compensates an individual for "the delay between the judgment and the receipt of actual payment." *Adams v. Nissan Motor Corp. in U.S.A.*, 387 S.E.2d 288, 295 (W.Va. 1989).

J. Recovery of Attorney's Fees.

1. Litigants are normally responsible for paying their own attorney's fees unless court rule, statute or express contract provision provides otherwise. Syl. Pt. 2, *Sally-Mike Props. v. Yokum*, 365 S.E.2d 246 (W.Va. 1986).

   i. "There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as costs when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Syl. Pt. 3, *Id.*

   ii. **Fraud.** "Where it can be shown by clear and convincing evidence that a defendant has engaged in fraudulent conduct which has injured a plaintiff, recovery of reasonable attorney's fees may be obtained in addition to the damages sustained as a result of the fraudulent conduct." Syl. Pt. 4, *Bowling v. Ansted Chrysler-Plymouth-Dodge*, 425 S.E.2d 144 (W.Va. 1992).

   iii. **Amount.** When applicable, a reasonable attorney's fee is "presumptively one-third of the face amount of an insurance policy, unless the amount disputed under the policy is either extremely small or enormously large." *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 80 (W.Va. 1986)

   iv. **Determining reasonable attorneys' fees.** When the relief sought in a human rights action is primarily equitable, "reasonable attorneys' fees" should be determined by "(1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate—the lodestar calculation—and (2) allowing, if appropriate, a contingency enhancement." Syl. Pt. 3, *Bishop Coal Co. v. Salyers*, 380 S.E.2d 238 (W.Va. 1989).

2. **Discretionary.** "The decision to award or not to award attorney's fees rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse." *Beto v. Stewart*, 582 S.E.2d 802, 806 (W.Va. 2003).

3. **Test.** "Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client." Syl. Pt. 4, *Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156 (W.Va. 1986).

   To determine the reasonableness of both time expended and hourly rate charged; and the allowance and amount of a contingency enhancement, a court should consider the following factors:

   > (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations

> imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Id.

4. **Burden.** Attorneys have the burden of proof to show the reasonableness and fairness of a contract for attorney's fee. Syl. Pt. 2, *Comm. on Legal Ethics of W.Va. State Bar v. Tatterson*, 352 S.E.2d 107 (W.Va. 1986).

K. **Settlements Involving Minors**.

1. **Court approval.** W.VA. CODE § 44-10-14 (2015) requires court approval prior to the entry of a proposed settlement, release and distribution of settlement proceeds involving a minor.

2. **Court considerations.** W.VA. CODE § 44-10-14(g)(1) (2015) states:

> In allowing the payment of settlement proceeds for attorney fees, legal expenses, court costs and other costs of securing the settlement in such reasonable amounts as the court finds in its discretion to be appropriate, the court shall consider the amount to be paid as damages, the age and necessities of the minor, the nature of the injury, the difficulties involved in effecting the settlement, legal expenses and fees paid to attorneys in similar cases and any other matters which the court determines should be considered in achieving a proper and equitable distribution of settlement proceeds.

L. Taxation of Costs.

1. W.VA.R.C.P. 54(d) (2015) provides that "[t]he clerk shall tax costs within ten (10) days after judgment is entered, and shall send a copy of the bill of costs to each party affected thereby."

2. **Party responsible.** The clerk of the court in which a party recovers costs is responsible for levying the tax on the costs. W.VA. CODE § 59-2-13 (2015).