STATE OF NEW JERSEY COMPENDIUM OF LAW

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Updated 2017

PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

A) **Public entities.** The pre-suit notice requirement for actions for death, injury or damage to person or to property against any public entity or public employee is governed by N.J. STAT. ANN. § 59:8-8 (2017). Prior to suit and within ninety (90) days after accrual of the claim, the plaintiff must file notice of the claim with the public entity or public employee. After six (6) months from the date notice of claim is received, the person may bring suit against the public entity or employer in the appropriate court of law.

1) **When claims barred.** A plaintiff's claim against the public entity or employee is barred if (1) the plaintiff fails to provide notice to the public entity within the ninety (90) day period, except as provided by N.J. STAT. ANN. § 59:8-9 (2017); (2) two (2) years have elapsed since the accrual of the claim; or (3) the plaintiff or representative entered into a settlement agreement with respect to the claim. N.J. STAT. ANN. § 59:8-8 (2017).

2) **Minors and mentally incapacitated.** For minors and mentally incapacitated persons, the time period in this section does not begin until the minor reaches majority or the mentally incapacitated person returns to mental capacity. *Id.*

B) Notice of the claim to the public entity must be by delivery or certified mail to (1) the office of the Attorney General, or (2) the office of the State agency allegedly involved in the action. Notice of a claim to a local public entity must be by delivery or certified mail to the local public entity. Proper service upon a public entity constitutes constructive service upon any employee of that public entity. N.J. STAT. ANN. § 59:8-10 (2017).

Relationship to the Federal Rules of Civil Procedure

New Jersey had adopted its own Rules of Court governing civil practice in State courts. Certain rules pertaining to discovery practices parallel the Federal analogues contained in the Federal Rules of Civil Procedure, compare *e.g.*, FED. R. CIV. P. 36 and N.J. CT. R. 4:22-1. In the absence of case law interpreting such rules, the courts have looked to decisional authority interpreting the parallel Federal Rule. *See Freeman v. Lincoln Beach Motel*, 182 N.J. Super. 483, 485 (Law Div. 1981) ([A]bsent New Jersey precedent construing discovery rules, resort to federal case law is proper "[s]ince our court rules are based on Federal Rules of Civil Procedure, it is appropriate to turn to federal case law for guidance.").

Description of the Organization of the State Court System

A) **Judicial selection.** Judges in New Jersey are appointed by the Governor, subject to approval by the legislature. After serving a period of seven (7) years Judges are eligible for reappointment with lifetime tenure. *See* N.J. CONST. art. VI, § 6.

B) **Structure.** The New Jersey court system consists of the following: the New Jersey Supreme Court and the New Jersey Superior Court. There are also three inferior courts

within the judiciary: the New Jersey Tax Court, Municipal Courts and the Surrogate's Court. The New Jersey Superior Court is comprised of three divisions: the Appellate Division, Law Division and Chancery Division. The Law and Chancery Divisions are divided into subdivisions or "Parts." The Law Division is divided into a General Part and a Special Civil Part (jurisdictional limit of $15,000). The Chancery Division has three Parts: General Equity, Family and Probate. *See generally* N.J. CONST. art. VI.

Proceedings pursuant to the New Jersey Workers Compensation Act are handled by a quasi-judicial agency, the Division of Workers Compensation in the Department of Labor. *See* STATE OF NEW JERSEY, DEP'T OF LABOR & WORKFORCE DEV., http://lwd.state.nj.us/labor/wc/workers/workers_index.html (last visited July 5, 2017).

C) **Alternative dispute resolution.** Alternative dispute resolution ("ADR") is governed by the New Jersey Court Rules. The New Jersey courts strongly encourage the use of alternative dispute resolution methods. N.J. CT. R. 1:40-1, -12 provides a comprehensive framework for compulsory mediation requirements as to civil, probate and general equity matters. Additionally through statutes and regulations, New Jersey allows disputes pertaining to personal injury protection insurance benefits to be resolved through arbitration on request of any party to the dispute. *See* N.J. STAT. ANN. § 39:6A-5.1, *et seq.* (2017).

Service of Summons

A) Service of a summons upon any defendant by personal service is governed by N.J. CT. R. 4:4-4(a). The form of personal service for different persons and entities are as follows:

1) **Person.** Service of summons upon a person can be by (1) personal service; (2) leaving a copy of the summons and complaint at the person's residence or usual place of abode with a competent person residing there who is fourteen (14) years of age or older, or (3) delivering a copy of the complaint and summons to a person authorized by appointment or law to receive service of process on the person's behalf. N.J. Ct. R. 4-4(a)(1).

2) **Corporation.** Service of summons upon a corporation may be made by personal service on any officer, director, trustee, managing or general agent, any person authorized by appointment or by law to receive service, or on the registered office of the corporation. If service cannot be made on any of these foregoing people, service may be made on the corporation's principal place of business in New Jersey, or any employee of the corporation if there is no principal place of business. Note that a foreign corporation may be served only as the rule prescribes subject to due process. N.J. Ct. R.4-4(a)(6).

3) **State of New Jersey.** Service of Summons upon the State of New Jersey may be made by personal service upon the Attorney General or his/her designee named in writing and filed with the Clerk of the Superior Court. Service may also be made my mail. Special rules apply for liens or encumbrances held by the State. N.J. Ct. R.at 4-4(a)(7).

a) **Personal jurisdiction.** The court rules regarding personal jurisdiction over a defendant does not apply to service of process by an administrative agency; the court rules expressly apply only to the Supreme Court, the Superior Court, the Tax Court, the surrogate's courts and the municipal courts. *See Shannon v. Acad. Lines, Inc.*, 346 N.J. Super. 191, 196 (App. Div. 2001).

4) **Public Bodies.** Service of Summons upon a public body may be made by personal service on the presiding officer, clerk or secretary of the entity. N.J. CT. R. 4:4-4(a)(8).

B) **Substituted service.** Service of summons of any defendant by substituted or constructive service is governed by N.J. CT. R. 4:4-4(b). Substituted service can be made:

1) By mail or personal service outside the state after affidavit stating despite diligent effort, personal service cannot be made. The rule specifies certain requirements for personal service outside of New Jersey and personal service outside of United States jurisdiction.

2) As provided by law.

3) By court order, if no other mode of service is possible.

C) **By mail.** Service of summons of any defendant by optional mailed service is governed by N.J. CT. R. 4:4-4(c). Service may be made by registered, certified or ordinary mail in lieu of personal service only if the defendant answers or otherwise appears to respond to the complaint within sixty (60) days of mailed service. If the defendant fails to answer or appear in that time period, service must be made by personal or substitute service.

D) **Waiver.** Waiver of service is governed by N.J. CT. R. 4:4-6. Service is deemed proper by the defendant's general appearance or by acceptance of the service of summons, signed by the defendant's attorney or signed and acknowledged by the defendant. Additionally, the failure to object to service of process by answer or timely motion can waive any defect in process. *Kugler v. Koscot Interplanetary, Inc.*, 120 N.J. Super. 216, 257-58 (Ch. Div. 1972).

E) **Actions against nonresidents.** N.J. STAT. ANN. § 39:7-8 (2017) provides that service of process in an action against a nonresident of New Jersey growing out of his operation of a vehicle on New Jersey highways, resulting in damage or loss to person or property may be made by personal service upon any chauffeur or operator of the vehicle or any other vehicle of the nonresident, while the vehicle is being operated in New Jersey. Further, service of process upon the nonresident may be had by personal service to any person in custody of the vehicle, if that person is fourteen (14) years of age or older and a copy of such process is posted in a conspicuous place on the vehicle.

Statutes of Limitations

A) **Personal injury.** The statute of limitations for a personal injury action is governed by N.J. STAT. ANN. § 2A:14-2 (2017). Actions for damages for an injury to the person must be commenced within two (2) years after the cause of action accrued.

B) **Wrongful death.** The statute of limitations for wrongful death is governed by N.J. STAT. ANN. § 2A:31-3 (2017). Actions for wrongful death must be commenced within two (2) years of the decedent's death. However, "if the death resulted from murder, aggravated manslaughter or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent, [the wrongful death action] may be brought at any time." *Id.*

C) **Cause of Action belonging to Decedent.** 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 six (6) months from the decedent's death, whichever date is later. N.J. STAT. ANN. § 2A:14-23.1 (2017).

D) **Property damage.** The statute of limitations for a property damage action is governed by N.J. STAT. ANN. § 2A:14-1 (2017). Actions to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, shall be commenced within six (6) years after the cause of action accrued.

E) **Sales contracts.** The statute of limitations for a contract action for a sale is governed by N.J. STAT. ANN. § 12A:2-725 (2017). Actions on contracts for sale, whether express or implied, shall be commenced within four (4) years after the cause of action accrued.

F) **Contracts.** The statute of limitations for a contract action, other than contracts for sale, is governed by N.J. STAT. ANN. § 2A:14-1 (2017). Actions on contracts shall be commenced within six (6) years after the cause of action accrued. However, if any payment or new promise to pay was made in writing within or after the period of six (6) years, then an action may be commenced at any time after the time of such payment or promise to pay. *Bassett v. Christensen*, 127 N.J.L. 259, 261 (Ct. Err. & App. 1941).

G) **Leases, specialties, recognizance or awards.** The statute of limitations for actions on a lease, specialty, recognizance, or award is governed by N.J. STAT. ANN. § 2A:14-4 (2017). Actions for a lease, specialty, recognizance or award must be commenced within sixteen (16) years after the cause of action has accrued.

1) **Payments after statute of limitations.** If any payment is made on a lease, specialty, recognizance or award within or after a period of sixteen (16) years, except for breach of contract for sales under N.J. STAT. § 12A:2-725 (2017), an action may be commenced within sixteen (16) years of such payment.

2) **Instruments under seal.** An action for instruments under seal brought by a merchant, bank, finance company or financial institution must be commenced within six (6) years after the cause of action has accrued.

H) **Actions by State.** The statute of limitations for actions commenced by the State is governed by N.J. STAT. ANN. § 2A:14-1.2 (2017). All civil actions by the State must be commenced within ten (10) years from the date that the cause of action accrued. Specifically excepted from this statute are actions where an express limitations provision exist, or actions concerning remediation of a contaminated site, closure of a sanitary land fill facility, or payment of compensation for damage to, or loss of, natural resources due to the discharge of hazardous substance.

1) **"State."** The term "State" means "the State, its political subdivision, any office, department, division, bureau, board, commission or agency of the State or one of its political subdivisions, and any public authority or public agency, including, but not limited to, the New Jersey Transit Corporation." N.J. STAT. ANN. § 2A:14-1.2(c).

I) **Tolling.** A number of statutes specifically enumerate tolling provisions applicable to minors and/or those under legal disability. N.J. STAT. ANN. § 2A:14-21 (2017) alters the statutes of limitations for action set forth in N.J. STAT. ANN. § 2A:14-1 to -8 (2017), and N.J. STAT. ANN. § 2A:14-16 to -20 (2017), (including personal injury, contribution, indemnity, and contract actions), for individuals who, at the time the cause of action accrues, are either under the age of eighteen (18) years or mentally disabled as to prevent proper understanding of legal rights or action. In such cases, the person may bring said action within the time as limited by aforementioned statutes, after the person reaches eighteen (18) years of age or becomes of proper mental capacity.

1) **Medical malpractice upon infants.** Notwithstanding the provisions of this section to the contrary, an action by or on behalf of a minor that has accrued for "medical malpractice for injuries sustained at birth shall be commenced prior to the minor's 13th birthday," as provided in N.J. STAT. ANN. § 2A:14-2 (2017).

J) **Real property.** The statutes of limitations for construction actions and for actions based on improvements to realty are governed by N.J. STAT. ANN. § 2A:14-1.1 (2017). Actions based upon tort, contract, or otherwise against any person for an act or omission in the design, planning, supervision or management of construction, or for any injury to real or personal property, or for an injury to the person, or for bodily injury or wrongful death arising out of the defective and unsafe condition of an improvement to real property, shall be commenced within ten (10) years after the performance or furnishing of such services or construction.

1) This shall not apply to actions "against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the

defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought." *Id.*

2) This section does not apply to government action that is (1) "on a written warranty, guaranty or other contract that expressly provides for a longer effective period;" (2) "based on willful misconduct, gross negligence or fraudulent concealment;" (3) "under any environmental remediation law" or government contract under any environmental remediation law; (4) "pursuant to any contract for application, enclosure, removal or encapsulation of asbestos." *Id.*

K) **Employment.** The statute of limitations for employment claims under the New Jersey Law Against Discrimination (N.J. STAT. ANN. § 10:5-13) is governed by N.J. STAT. ANN. §§ 2A:14-1, -2 (2017). An employment tort claim under the New Jersey Law Against Discrimination must be commenced within two (2) years after the cause of action accrued, while an employment contract claim must be commenced within six (6) years after the cause of action accrued.

1) **Tortious injury.** The New Jersey Supreme Court stated, "[c]ourts have viewed 'tortious injury to the rights of another' as applying primarily to actions for economic loss." *Montells v. Haynes*, 133 N.J. 282, 291 (1993) (internal citation omitted). Accordingly, when the action is for lost wages and benefits, it has been governed by the six year statute of limitations. *Brown v. Coll. of Med. & Dentistry*, 167 N.J. Super. 532, 535 (Law Div. 1979). When, on the other hand, damages for emotional or physical harm are sought, the action is for "injuries to the person," and will be governed by the two-year tort statute of limitations. *Montells*, 133 N.J. at 291-92.

L) **Contribution.** The statute of limitations for contribution actions is governed by N.J. STAT. ANN. § 2A:14-1 (2017). An action for indemnity or contribution must be commenced within six (6) years after the cause of action accrued.

1) **Accrual.** If the agreement indemnifies for loss, the cause of action accrues when liability is discharged by payment and the surety suffers an actual loss. *See First Indem. of Am. Ins. Co. v. Kemenash*, 328 N.J. Super. 64, 72 (App. Div. 2000) (citing *Bernstein v. Palmer Chev. & Olds., Inc.*, 86 N.J. Super. 117, 122 (App. Div. 1965)). If the agreement provides indemnification for liability, the cause of action arises with the liability, that is, when an obligation to pay is imposed on the surety. *Id*.

2) In *First Indemnity of America Insurance Co. v. Kemenash*, the agreement indemnified the surety as to both liability and loss. The surety did not to sue on the indemnity agreement until almost six years after the loss accrued. The defendant, a general contractor, contended that the surety's complaint should be dismissed on the ground that it was barred by the six (6) year statute of limitations because the surety's cause of action accrued at the point when liability was imposed upon it, which was more than six (6) years before the surety filed the

complaint. The court determined that the surety could maintain an action for recovery of actual loss, even though the time had expired on an action to recover on the agreement to indemnify based upon the imposition of liability, because the surety's first actual payment for the loss was less than six years before it filed suit. *Id.*

M) **Medical malpractice.** The statute of limitations for medical malpractice actions is governed by N.J. STAT. ANN. § 2A:14-2 (2017). Actions for injury or death against physician, dentist, registered nurse, or hospital, whether based upon tort, breach of contract, or otherwise, must be commenced within two (2) years after the cause of action has accrued.

1) **Minors injured at birth.** "[A]n action by or on behalf of a minor that has accrued for medical malpractice for injuries sustained at birth shall be commenced prior to the minor's [thirteenth] birthday." *Id.*

2) If such action by or on behalf of a minor for medical malpractice for injuries sustained at birth "is not commenced by the minor's parent or guardian prior to the minor's[twelfth] birthday, the minor or a person [eighteen] years of age or older designated by the minor to act on the minor's behalf may commence [the] action." *Id.* The minor or designated person may petition the court to appoint a guardian ad litem to act on the minor's behalf for such an action. *Id.*

N) **Legal malpractice.** A single statute of limitations controls the timeliness of all legal malpractice actions, regardless of the specific injuries asserted. The statute of limitations is for six years, under N.J. STAT. ANN. § 2A:14-1 (2017). *McGrogan v. Till*, 167 N.J. 414, 427 (1999).

O) **Penal statutes.** The statute of limitations for actions on penal statutes is governed by N.J. STAT. ANN. § 2A:14-10 (2017). Actions on penal statutes must be commenced:

1) Within two (2) years from when the offense is committed or cause of action accrues for (a) actions limited to the State of New Jersey, or (b) the action is limited to the aggrieved party.

2) Within one (1) year after from when the offense is committed or cause of action accrues (a) for actions limited to any person, or to the State of New Jersey, and any other person to prosecute on that behalf (except if the same action will be brought by the State within one (1) year after default of such a cause of action), and (b) for actions limited to any county or municipality, officer of the county or municipality, any person for use by the county or municipality, or for use of the poor of the municipality, either in whole or with another person with the right to sue under the same action.

Statutes of Repose

A) **Construction.** The statute of repose applicable to construction actions is governed by N.J. STAT. ANN. § 2A:14-1.1(a) (2017):

> No action, whether in contract, tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or person, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than [ten] 10 years after the performance or furnishing of such services and construction. This limitation shall serve as a bar to all such actions, both governmental and private, but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

Venue Rules

A) Venue is governed by N.J. CT. R. 4:3-2. Venue is proper in the county where the cause of action arose, where any party to the action resides, or where summons was served on a nonresident defendant. Residence means residence at the time the complaint was filed rather than when service of process was made or when the incident arose. A corporation is deemed to reside in any county where its registered office is located or where it is actually doing business. Further, venue is proper for actions regarding real property in the county where the affected property is located. Special venue rules may apply to structured settlements, receivership actions, attachments, family actions, probate actions, Special Civil Part actions, and motor vehicle surcharge debt actions.

B) ***Forum non conveniens.*** The doctrine of *forum non conveniens* is governed by common law, as embodied in *Kurzke v. Nissan Motor Corp. in U.S.A.*, 164 N.J. 159 (2000). The doctrine of *forum non conveniens* was firmly embedded in New Jersey law by the court in *Civic S. Factors Corp. v. Bonat*, 65 N.J. 329, 332 (1974). *Forum non conveniens* allows a court to decline jurisdiction even though it has jurisdiction over the parties and the subject matter involved when another forum for trial would be more convenient and better serve the interest of justice. Generally, deference is given to plaintiff's choice of forum. However, the plaintiff's choice of forum is not entitled to the same weight or consideration in all cases. For example, it is reasonable to assume the forum is convenient when the home forum or the site of the accident or injury have been chosen. However, when the plaintiff is foreign, this assumption is less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference. *See id.*

1) **Factors.** There are private and public interest factors that are balanced and affect the courts' decision when defendants bring a motion for a change of venue, governed by N.J. CT. R. 4:3-3 and pursuant to *forum non conveniens*:

a) **Private interest factors.** The private interest factors include:

> (1) the relative ease of access to sources of proof, (2) the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses, (3) whether a view of the premises is appropriate to the action and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive, including the enforceability of the ultimate judgment.

Kurzke, 164 N.J. at 166 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S. Ct. 839, 843 (1947)).

b) **Public interest factors.** The public interest factors include:

> (1) the administrative difficulties which follow from having litigation pile up in congested centers rather than being handled at its origin, (2) the imposition of jury duty on members of a community having no relation to the litigation, (3) the local interest in the subject matter such that affected members of the community may wish to view the trial and (4) the local interest in having localized controversies decided at home.

Kurzke, 164 N.J. at 165 (quoting *Gulf Oil Corp.*, 330 U.S. at 508-09, 67 S. Ct. at 843 (1947)).

NEGLIGENCE

Comparative Fault / Contributory Negligence

A) **Modified comparative fault**. The rule of comparative negligence is based on N.J. STAT. ANN. § 2A:15-5.1 *et seq*. (2017). Contributory negligence does not preclude recovery if it does not exceed the negligence of the person against whom recovery is sought. Damages are reduced in accordance with the percentage of fault assigned to the party recovering. N.J. STAT. ANN. § 2A:15-5.1 (2017).

B) **Causes of action.** Comparative negligence obtains in civil actions for damages based on negligence, product liability or professional malpractice, "whether couched in terms of contract or tort and like theories." N.J. STAT. ANN. § 2A:15-5.2(c)(1) (2017).

C) **Trier of fact.** The Comparative Negligence Act enables the trier of fact to determine "the extent, in the form of percentage, of each party's negligence or fault." N.J. STAT. ANN. § 2A:15-5.2(a)(2) (2017). The determination encompasses not only negligence, but also strict liability, intentional torts, and willful, wanton or reckless conduct. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 608-09 (1997).

Exclusive Remedy – Workers' Compensation Protections

A) Employees who suffer work-related injuries are barred by the exclusive remedy provision of the Workers' Compensation Act, N.J. STAT. ANN. §§ 34:15-1 to -146 (2017), from pursuing negligence actions in court against their employers. The exclusive remedy provision also bars injured employees from maintaining tort actions against their co-employees for negligent acts committed within the scope of employment which result in injury. N.J. STAT. ANN. § 34:15-8 (2017). Minors may elect to pursue compensation either under the Workers' Compensation Act, or by tort actions against their employers. *LaPollo v. Hosp. Serv. Plan of N.J.*, 113 N.J. 611, 613 (1989).

B) **"In the course of."** An accident arises "in the course of employment" when it occurs within the period of employment and at a place where the employee may reasonably be. N.J. STAT. ANN. § 34:15-36 (2017).

C) **Causal connection.** "[T]o trigger coverage under workers' compensation there must be a causal connection between the accident and the employment. Situs alone is not enough." *Mule v. N.J. Mfrs. Ins. Co.*, 356 N.J. Super. 389, 397 (App. Div. 2003).

D) **Control test.** Courts first look to the "control test" to determine whether a worker was an employee covered by the Act, or an independent contractor: whether the employer had the right to "direct the manner in which the business or work shall be done, as well as the results to be accomplished. The control test is satisfied so long as the employer has the right of control, even though the employer may not exercise actual control over the worker." *Sloan v. Luyando*, 305 N.J. Super. 140, 148 (App. Div. 1997). A second measure of employee status is the "relative nature of the work" test: an employer-employee relationship exists if there is substantial economic dependence upon the putative employer and a functional integration of their respective operations. *Id.*

E) **Intentional acts.** Suits resulting from the intentional acts of an employer or co-employee are not barred by the exclusivity provision. *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 185 (1985). The trial court must make two separate inquiries: first, whether, when viewed in a light most favorable to the employee, the evidence could lead a jury to conclude that the employer acted with knowledge that it was substantially certain that a worker would suffer injury. If that question is answered affirmatively, the trial court must then determine, solely as a judicial function, whether, if the employee's allegations are proved, they constitute a simple fact of industrial life or are outside the purview of the conditions the Legislature could have intended to immunize under the Workers' Compensation bar. *Laidlow v. Hariton Mach. Co.*, 170 N.J. 602, 623 (2002).

F) **Dual capacity.** The "dual capacity" doctrine stands for the proposition that an employer normally shielded from tort liability by the exclusive remedy principle may be liable in tort to its own employee if it occupies, in addition to its capacity as an employer, a second capacity that confers on its obligations independent of those imposed on him as an employer. In New Jersey it is disfavored, if not outright disapproved. While it may have viability in some circumstances, it is clearly inapplicable where the employee is injured during the course of his employment on the premises of the employer. *Kaczorowska v. Nat'l Envelope Corp.*, 342 N.J. Super. 580, 592-93 (App. Div. 2001).

Indemnification

A) **Contract.** "Indemnity arises from contract, express or implied." *George M. Brewster & Son v. Catalytic Constr. Co.*, 17 N.J. 20, 28 (1954).

B) **Accrual.** Indemnification obligations accrue on an event fixing liability, rather than on preliminary events that eventually may lead to liability but have not yet occurred. *Holloway v. State*, 125 N.J. 386, 399 (1991). A cause of action for indemnification generally accrues at time judgment is rendered against the indemnitee on the underlying claim. *McGlone v. Corbi*, 59 N.J. 86, 94-95 (1971).

C) **Common-law indemnity.** In the absence of an express agreement, allocation of the risk of loss between parties may be achieved through common-law indemnity, an equitable doctrine that allows a court to shift the cost from one tortfeasor to another. The right to common-law indemnity arises "without agreement, and by operation of law to prevent a result which is regarded as unjust or unsatisfactory." *Promaulayko v. Johns Manville Sales Corp.*, 116 N.J. 505, 511 (1989). Generally, common law indemnification shifts the cost of liability from one who is constructively or vicariously liable to the tortfeasor who is primarily liable. *Adler's Quality Bakery, Inc. v. Gaseteria, Inc.*, 32 N.J. 55, 80 (1960).

D) **Construction of indemnity contracts.** *Ramos v. Browning Ferris Indus., Inc.*, 103 N.J. 177, 190-92 (1986) states:

> Indemnity contracts are interpreted in accordance with the rules governing the construction of contracts generally. When the meaning of the clause is ambiguous, however, the clause should be strictly construed against the indemnitee. Thus, a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms.

E) **Special legal relationship.** A third party may recover on a theory of implied indemnity from an employer only when a special legal relationship exists between the employer and the third party, and the liability of the third party is vicarious. Ordinarily, a party who is at fault may not obtain indemnification for his or her own acts. As an exception to the general rule, one who in good faith and at the direction of another commits a tort is allowed indemnity against the person who caused him or her to act. *Id.*

F) **Construction negligence on premises.** In construction contracts as more particularly defined in N.J. STAT. ANN. § 2A:40A-1 (2017), that statute renders void and unenforceable provisions purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to people or damage to property caused by or resulting from the sole negligence of the promise or its agents or employees.

G) **Fees.** As to whether the indemnitee may recover counsel fees in addition to the judgment against him, New Jersey uses an "after-the-fact" approach which permits an indemnitee to recover counsel fees if the indemnitee is adjudicated to be free from active wrongdoing, and has tendered the defense to the indemnitor at the start of the litigation. *Mantilla v. C Mall Assocs.*, 167 N.J. 262, 272-73 (2001).

H) **Corporate agents.** New Jersey corporations are permitted to "indemnify [a] corporate agent against [his] expenses incurred in connection with any proceeding [initiated] by or in the right of the corporation to procure a judgment in its favor" that involves the corporate agent. N.J. STAT. ANN. § 14A:3-5(3) (2017). A corporate agent will be indemnified only if he or she acted in good faith and in a manner that he or she reasonably believed to be in or not opposed to the best interests of the corporation. *Id.*

I) **Insurance for punitive damages.** Indemnity for punitive damages by way of insurance coverage is not permitted as a matter of public policy. *Johnson & Johnson v. Aetna Cas. & Sur. Co.*, 285 N.J. Super. 575, 580-89 (App. Div. 1995).

Joint and Several Liability

A) The Comparative Negligence Act provides that the recovery party may obtain "[t]he full amount of the damages from any party determined by the trier of fact to be 60% or more responsible for the total damages" but "[o]nly that percentage of the damages directly attributable to that party's negligence or fault from any party determined by the trier of fact to be less than 60% responsible for the total damages." N.J. STAT. ANN. § 2A:15-5.3 (2017). In environmental tort actions, the recovering party may procure "the full amount of the compensatory damage award from any party determined to be liable, except in cases where the extent of negligence or fault can be apportioned," and if the recovering party is unable to recover the percentage of compensatory damages attributable to a non-settling insolvent party, that amount may be recovered from any non-settling party in proportion to the percentage of liability attributed to that party. N.J. Stat. Ann. § 2A:15-5.3(d)(1)-(2). Subject to these and other applicable limitations, any party who is compelled to pay more than his percentage share may seek contribution from the other joint tortfeasors. *Id.* at § 2A:15-5.3(d)(3).

B) The Joint Tortfeasors' Contribution Law, N.J. STAT. ANN. § 2A:53A–1 *et seq.* (2017), provides that

> [w]here injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more

> of the joint tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pay such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess so paid over his pro rata share; but no person shall be entitled to recover contribution under this act from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought.

N.J. STAT. ANN. § 2A:53A–3 (2017).

C) **Judgment triggers.** The express terms of the statute require a "judgment" in order to trigger the right to contribution; a stipulation of dismissal and release will not suffice. A settling party may not seek contribution without a final consent judgment. *Gangemi v. Nat'l Health Labs., Inc.*, 305 N.J. Super. 97, 103 (App. Div. 1997).

D) **Effect of settlement.** The effect of a settlement on remaining defendants' contribution claims is addressed in N.J. CT. R. 4:7-5(c):

> A non-settling defendant's failure to have asserted a cross-claim for contribution against a settling defendant, however, shall not preclude either an allocation of a percentage of negligence by the finder of fact against the settling defendant or a credit in favor of the non-settling defendant consistent with that allocation, provided plaintiff was fairly apprised prior to trial that the liability of the settling defendant remained an issue and was accorded a fair opportunity to meet that issue at trial.

E) **Collateral source rule.** The collateral source rule, N.J. STAT. ANN. § 2A:15–97 (2017), provides for a set-off or reduction of an award to plaintiffs in civil actions involving personal injury or death for benefits received, other than workers' compensation benefits or the proceeds from a life insurance policy, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable.

F) **Workers' compensation.** The Workers' Compensation Act, N.J. STAT. ANN. § 34:15–40 (2071), imposes a lien in the amount of medical and compensation payments already paid, upon an injured employee's recovery against a third party. Workers' compensation liens are not enforceable against public entities or their employees. *Travelers Ins. Co. v. Collella*, 169 N.J. Super. 412, 416 (App. Div. 1979).

Appeals

A) **Appeal as of right.** Appeal from the final judgment of the Superior Court trial divisions may be taken as of right to the Appellate Division of the Superior Court by filing the prescribed notice of appeal and transcript request within forty-five (45) days of the judgment's entry. N.J. CT. R. 2:4-1(a); *Id.* at 2:5-1.

B) **Finality.** In order to be considered a final judgment and so appealable, a judgment or order must be final both as to all issues and all parties. *Lawler v. Isaac*, 249 N.J. Super. 11, 17 (App. Div. 1991).

C) **Interlocutory appeals.** If the order is not final, respondent on the appeal has the responsibility to move for its dismissal, but in any case, it will be dismissed by the court unless in the interests of justice it grants leave to appeal *nunc pro tunc*. N.J. CT. R. 4:42-2 provides that finality certification is available only for interlocutory orders which, if final, "would be subject to process to enforce a judgment pursuant to R. 4:59." For all other non-final, interlocutory orders, the Appellate Division may grant leave to appeal in the "interest of justice." N.J. CT. R. 2:2-4. In extraordinary circumstances and in the public interest, leave may be granted *nunc pro tunc* where the appellant filed a notice of appeal rather than a required motion for leave. *Caggiano v. Fontoura*, 354 N.J. Super. 111, 123-24 (App. Div. 2002).

D) **Timing.** Applications for leave to appeal from an interlocutory order shall be made within twenty (20) days after the date of service of the order. If, however, a motion to the trial court for reconsideration of the order from which leave to appeal is sought is filed and served within twenty (20) days after the date of its service, the time to file and serve the motion for leave to appeal in the Appellate Division shall be extended for a period of twenty (20) days following the date of service of an order deciding the motion for reconsideration. N.J. CT. R. 2:5-6(a).

E) **Appeal *nunc pro tunc*.** The appellate court has the power to grant leave to appeal *nunc pro tunc* from an interlocutory order where there are extraordinary circumstances and the interest of justice so warrants. *Greco v. Zecchino*, 285 N.J. Super. 418, 421 (App. Div. 1995).

F) **Cross appeals.** Cross appeals from final judgments may be taken by serving and filing a notice of cross appeal "within 15 days after the service of the notice of appeal or the entry of an order granting leave to appeal." N.J. CT. R. 2:4-2(a).

1. **Applications.** N.J. CT. R. 2:5-6(b) states:

> Applications for leave to cross appeal from interlocutory orders . . . as to which leave to appeal has not already been granted shall be made by serving and filing with the appellate court a notice of motion within 20 days after the date of service of the court order or administrative decision appealed from or after notice of the agency or officer's action taken or, if no cross motion is filed, within 20 days following decision of a motion for reconsideration as provided by [N.J. CT.] R. 2:5-6(a). If an appeal from an interlocutory order, decision or action is allowed, an application for leave to cross appeal (if the application has not been previously denied) may be made by serving and filing with the appellate court a notice of motion within 10 days after the date of service of the order of the appellate court allowing the appeal.

G) **Against weight of the evidence.** N.J. CT. R. 2:10-1 states:

> In both civil and criminal actions, the issue of whether a jury verdict was against the weight of the evidence shall not be cognizable on appeal unless

> a motion for a new trial on that ground was made in the trial court. The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.

H) **Effect of errors.** N.J. CT. R. 2:10-2 provides:

> Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

I) **Appealable orders.** It has been held that only the judgment or orders designated in the notice of appeal are subject to the appeal process and review. *Sikes v. Twp. of Rockaway*, 269 N.J. Super. 463, 465-66 (App. Div.), *aff'd*, 138 N.J. 41 (1994). However, a notice of appeal from the "judgment" will "encompass all interlocutory orders upon which the judgment is based." *Synnex Corp. v. ADT Sec. Servs., Inc.*, 394 N.J. Super. 577, 588 (App. Div. 2007).

J) **Appeals as of right.** Appeals may be taken to the Supreme Court from final judgments of the Appellate Division as of right: (1) "in cases determined by the Appellate Division involving a substantial question arising under the United States or New Jersey Constitution;" (2) "in cases where, and with regard to those issues as to which, there is a dissent in the Appellate Division;" (3) "directly from the trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in such cases;" and (4) "in [such] cases as are [otherwise] provided by law." N.J. CT. R. 2:2-1(a).

K) Where the right to appeal from the Appellate Division is not clear beyond doubt, the proposed appellant should petition the Supreme Court "for certification, outlining fully his claim to an appeal as of right, as well as any other appropriate reasons indicating why this court should allow further review even if it believes that the case does not present a sufficient constitutional question." *Tidewater Oil Co. v. Mayor & Council of Carteret*, 44 N.J. 338, 341-42 (1965).

L) **Leave from interlocutory orders.** N.J. CT. R. 2:2-2:

> Appeals may be taken to the Supreme Court by its leave from interlocutory orders: (a) of trial courts in cases where the death penalty has been imposed; (b) of the Appellate Division when necessary to prevent irreparable injury; and (c) on certification by the Supreme Court to the Appellate Division pursuant to [N.J. CT.] R. 2:12-1.

M) **Appellate Division certification.** The Supreme Court may accept an appeal from interlocutory or final orders on certification to the Appellate Division under N.J. CT. R. 2:12-1.

1) **Notice.** N.J. CT. R. 2:12-3(a) provides:

> If certification is sought to review a final judgment of the Appellate Division, the petitioner shall, within 20 days after its entry, serve a copy of a notice of petition for certification upon all parties who may be affected by the proceeding and shall file the original notice with the clerk of the Supreme Court.

Cross-petitions may be filed "within 10 days after the service and filing of the notice of petition for certification." N.J. CT. R. 2:12-3(b).

2) **Grounds.** N.J. CT. R. 2:12-4 states the grounds for certification:

> Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

3) **Timing.** The petition for certification must be filed and served within ten (10) days after the filing of the notice of petition for certification, or thirty days (30) after the entry of the final judgment, whichever is later. N.J. CT. R. 2:12-7(b).

N) **Tolling.** The running of the time for taking an appeal and for the service and filing of a notice of petition for certification shall be tolled (a) "[b]y the death of an aggrieved party, or by the death, disbarment, resignation or suspension of the attorney of record for such party;" (b) by a timely application for reconsideration made to the Appellate Division; (c) in criminal by a timely motion to the trial court for judgment, for a new trial, in arrest of judgment, or for rehearing or to amend or make additional findings of fact; (d) "[i]n criminal actions by the insanity of the defendant"; or (e) in civil actions by a timely motion for rehearing or to amend or make additional findings of fact, for judgment notwithstanding the verdict, for a new trial, or for rehearing or reconsideration seeking to alter or amend the judgment. N.J. CT. R. 2:4-3.

O) **Extension of time.** The appellate court, upon a showing of good cause and the absence of prejudice, may extend the time for appeal from final judgments or for giving notice of a petition for certification for a period not exceeding thirty (30) days, but only if the notice of appeal or notice of petition for certification was in fact served and filed within the time as extended. N.J. CT. R. 2:4-4(a).

P) The appellate court, on a showing of good cause and the absence of prejudice, may extend the time for interlocutory appeals for a period not exceeding an additional fifteen (15) days, and may grant leave to appeal as within time from an interlocutory order, decision or action, provided that the appeal was in fact taken within the time for appeals from final judgments, decisions or actions. N.J. CT. R. 2:4-4(b).

Q) The appellate court may extend the time for cross-appeals and appeals by respondents as of right, cross appeals from interlocutory orders, motions for certification of appeal pending unheard in the Appellate Division, and cross-petitions for certification, "for such period as it deems reasonable." N.J. CT. R. 2:4-4(c).

Strict Liability

A) New Jersey recognizes theories of strict liability through statute and common law, specifically:

1) Products liability under the New Jersey Products Liability Act ("NJPLA"), codified at N.J. STAT. ANN. § 2A:58C-1, *et seq.* (2017); and

2) Abnormally dangerous activities under the RESTATEMENT (SECOND) OF TORTS §§ 519-20 (1977).

B) **Products liability.** New Jersey courts have held that actions for harm caused by a product fall exclusively under the NJPLA, and subsume any common law actions for negligence and breach of implied warranty. *Universal Underwriters Ins. Group v. Pub. Serv. Elec. & Gas Co.*, 103 F. Supp. 2d 744, 746-47 (D.N.J. 2000); N.J. STAT. ANN. § 2A:58C-1(b)(3). When the NJPLA applies, the action is essentially one of strict liability. *Universal Underwriters Ins. Group,* 103 F. Supp. 2d at 747.

1) **Plaintiff's burden.** The New Jersey Supreme Court held that in product liability actions, a plaintiff need not prove the defendant's negligence, because the focus is on the actual condition of the product. *Coffman v. Keene Corp.*, 133 N.J. 581, 598 (1993). In adhering to the policy of easing the plaintiff's burden of proof, courts have imputed knowledge of a product's defect to the manufacturer, thus eliminating an inquiry about a manufacturer's actual notice or knowledge of the defect. *Id.* at 599. To impute knowledge, the plaintiff does not need to prove the manufacturer knew of a defect, but rather must prove that knowledge of the defect existed within the relevant industry. *Id*.

2) **Facts to allege.** Under N.J. STAT. ANN. § 2A:58C-2 (2017), a product manufacturer or seller is liable if the claimant proves the harmful product was not reasonably fit, suitable or safe for its intended purpose, because:

a) the product deviated from design specifications, formulae, or performance standards of the manufacturer or identical units,

b) the product did not have adequate warning or instructions, or

c) the product had a design defect.

3) **Manufacturer identity.** Under N.J. STAT. ANN. § 2A:58C-9 (2017), a product seller is immune from liability if he provides an affidavit certifying the correct identity of the product manufacturer. This is subject to certain statutory limitations:

a) A product seller is liable if (1) the product seller gives the plaintiff the incorrect identity of the manufacturer, and fails to ever give the correct identity, (2) "the manufacturer has no known agents, facility, or other presence within the United States," or (3) the manufacturer is legally bankrupt, has no attachable assets, and a judgment for assets from the bankruptcy estate is not recoverable. N.J. Stat. Ann. § 2A:58C-9(c).

b) A product seller is liable if (1) "the product seller has exercised some significant control over the design, manufacture, packaging or labeling of the product relative to the alleged [product defect];" (2) the product seller knew or should have known of the defect in the product or the plaintiff can show that the product seller knew of facts from which a reasonable person would conclude that the product seller had or should have had knowledge of the alleged defect in the product; or (3) "the product seller created the defect in the product." N.J. Stat. Ann.§ 2A:58C-9(d).

4) **Labeling.** In *Smith v. Alza Corp.*, 400 N.J. Super. 529, 547 (App. Div. 2008), the New Jersey Appellate Division held a company could be strictly liable for packaging and/or labeling a defective product, because the company was a "manufacturer" and not a "seller" for the purposes of the NJPLA. Accordingly, the court refused to extend the immunity given to product sellers under N.J. STAT. ANN. § 2A:58C-9 (2017) to companies that package and label defective products. *Id*. at 542.

5) **Cause of liability.** Strict liability holds a person or entity responsible for the damage caused by that person or entity's actions regardless of fault. The RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1977) 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." According liability may accrue regardless of the level of care taken by the defendant.

C) **Abnormally dangerous activities.** Under the abnormally dangerous activity doctrine, where harm naturally and probably results despite the exercise of utmost care, the court does not care who was at fault or in what proportion, but rather considers whether the defendant was engaging in an abnormally dangerous activity and whether the plaintiff's injury resulted from that activity. If so, absolute strict liability may apply. 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. *See T & E Indus., Inc. v. Safety Light Corp*., 123 N.J. 371, 390-91 (1991).

1) **Factors.** In determining whether or not a particular activity is subject to strict liability, New Jersey courts apply the factors enumerated in the RESTATEMENT (SECOND) OF TORTS § 520:

> (a) the existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

2) 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. *T & E Indus.*, 123 N.J. at 390-91.

C) **Learned intermediary.** Under New Jersey common law, the learned intermediary doctrine provides that pharmaceutical companies and pharmacists 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. *Niemiera by Niemiera v. Schneider*, 114 N.J. 550, 559 (1989). The learned intermediary doctrine is not applicable, however, where direct warnings to consumers about products are mandatory. *Clark v. Hoffman-La Roche, Inc.*, 2006 WL 1374516, at *5 (N.J. Super. 2006). Instead, N.J. STAT. ANN. § 2A:58C-4 removes liability for a product manufacturer or seller if the product has adequate warning or instruction. *Id.* at *6. A warning or instruction in connection with a drug, device, food, or food additive approved or prescribed by the FDA creates a rebuttable presumption of the adequacy of the warning or instruction. *Id.*

1) **Standard.** An adequate product warning or instruction is one that a reasonably prudent person in similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used, or in the case of prescription drugs, taking into account the characteristics of, and the ordinary knowledge common to, the prescribing physician. N.J. STAT. ANN. § 2A:58C-4 (2017).

Willful and Wanton Conduct

A) Willful and wanton conduct is viewed in New Jersey as "an accepted intermediary position between simple negligence and the intentional infliction of harm." *Foldi v. Jeffries*, 93 N.J. 533, 549 (1983) (citations omitted) ("New Jersey has long recognized the distinction between willful or wanton conduct on the one hand and mere negligence on the other. And unlike an intentional tort, 'wanton or willful misconduct does not require the establishment of a positive intent to injure.'"); *see also G.S. v. Dep't of Human Servs., Div. of Youth & Family Servs.*, 157 N.J. 161, 179 (1999).

B) **Definition.** New Jersey law defines willful and wanton misconduct as occurring in those situations where "'the defendant with knowledge of the existing condition, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result.'" *Foldi*, 93 N.J. at 549 (quoting *McLaughlin v. Rova Farms, Inc.*, 56 N.J. 288, 305 (1970)); *G.S.*, 157 N.J. at 178.

C) **Degree.** New Jersey courts do not view willful and wanton conduct as being of a different kind than ordinary negligence but of a different degree. *G.S.*, 157 N.J. at 178-79 (citing *McLaughlin*, 56 N.J. at 305) ("Although it is clear that the phrase implies more than simple negligence, it can apply to situations ranging from 'slight inadvertence to malicious purpose to inflict injury.'"); *Krauth v. Israel Geller & Buckingham Homes, Inc.*, 31 N.J. 270, 277 (1960) (stating that wantonness "is an advanced degree of negligent misconduct").

1) Recklessness. Willful and wanton conduct includes recklessness. *G.S.*, 157 N.J. at 179 ("Essentially, the concept of willful and wanton misconduct implies that a person has acted with reckless disregard for the safety of others. . . . Thus, under a wanton and willful negligence standard, a person is liable for the foreseeable consequences of her actions, regardless of whether she actually intended to cause injury.").

DISCOVERY

Electronic Discovery Rules

New Jersey has amended its Rules of Court to incorporate electronically stored information within the ambit of discovery in civil actions. See N.J. CT. R. 4:10-2(a) (scope of discovery) and N.J. CT. R. 4:18-1 (production of documents and electronically stored information). New Jersey has also adopted a "safe harbor" provision where electronically stored information has been lost through the operation of a document retention program or electronic information system similar to that provided by FED. R. CIV. P. 37. N.J. CT. R. 4:23-6 provides "[a]bsent exceptional circumstances, the court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."

Expert Witnesses

A) The standards relative to the admission of expert and lay opinion testimony are set forth in the New Jersey Rules of Evidence 702 through 705 dictate the parameters for the scope of and admission of expert witness opinion testimony. New Jersey Rule of Evidence 701 addresses the admissibility of opinion testimony by lay witnesses.

B) **Frye standard.** With regard to the admissibility of expert opinion testimony, in most cases the New Jersey courts adhere to the *Frye* standard (*see Frye v. United States*, 293 F.

1013 (D.C. Cir. 1923) that requires "general acceptance" of the matter at issue by the relevant scientific community to be established as a predicate to the admission of such testimony. *See State v. Doriguzzi*, 334 N.J. Super. 530, 539 (App. Div. 2000). In tort cases in which personal injuries are alleged to have been caused by the use of a drug or exposure to a toxic substance, the courts have applied a "relaxed standard" with regard to the admissibility of expert opinion testimony required to prove causation. *See Kemp ex rel. Wright v. State*, 174 N.J. 412, 430-31 (2002); *Landrigan v. Celotex Corp.*, 127 N.J. 404, 413-14 (1992).

C) **Scope.** The scope of discovery regarding expert witnesses is governed by N.J. CT. R. 4:10-2. Notably, the New Jersey courts insulate from discovery all communications between attorneys and their experts that constitute the "collaborative process" involved in the preparation of the expert witness' report. In addition to communications between the attorney and the expert relating to the collaborative process, all draft reports prepared in connection with that process are also protected from discovery. N.J. CT. R. 4:10-2(d)(1).

Non-Party Discovery

A) Subpoenas are governed by N.J. CT. R. 1:9-1 and N.J. CT. R. 4:14-7. Subpoenas in connection with actions pending in the New Jersey courts that are to be served within New Jersey may be issued by lawyers duly admitted to the New Jersey Bar. A subpoena requires a non-party witness or appropriate designee of a non-party to appear at a designated time and place to provide testimony and produce documents or other tangible items within the scope as specified in the subpoena. Absent agreement by the party issuing the subpoena or the issuance of a protective order by the court, a witness duly subpoenaed is mandated by law to comply with its requirements. A subpoena may be issued in an action pending in the New Jersey courts by personal service upon the non-party.

B) **Geographical requirements.** New Jersey residents may be subpoenaed to attend depositions only (1) in the county in which the witness resides, is employed or transacts business in person; or (2) be at a location in the state within twenty (20) miles of the witness' residence or place of business; or (3) at a place that may be fixed by court order. N.J. CT. R. 4:14-7(b)(1).

C) **Expenses.** A party subpoenaing a witness must reimburse the witness for out of pocket expenses and loss of pay incurred by the witness in attending the deposition. N.J. CT. R. 4:14-7(b)(1).

D) **Timing.** Subpoenas must be simultaneously served on the witness and all parties no less than ten (10) days prior to the date scheduled in the subpoena for the witness' deposition. N.J. CT. R. 4:14-7(c). No information or documents may be released by the subpoenaed witness prior to the date set for the deposition. N.J. CT. R. 4:14-7(c). While it is permitted for the party issuing the subpoena to simply accept the production of documents requested by the subpoena and waive the requirement that the witness appear on the scheduled date for a deposition, the documents cannot be released by the witness prior to the return date of the subpoena. N.J. CT. R. 4:14-7(c).

Privileges

A lawyer's duty to protect client communications and information can be found in three bodies of law: the attorney-client privilege, the work product doctrine, and client confidentiality.

A) **Attorney-client privilege.** This privilege is governed by N.J. R. EVID. 504, which holds that communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. N.J. R. EVID. 504(1). The Rule goes on to further state that "a communication made in the course of a relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege." N.J. R. EVID. 504(3) (2017).

1) **Exception.** N.J. R. EVID. 504(2) holds that this privilege will not extend to three different scenarios:

a) "a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud," or

b) "a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction," or

c) "a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer."

2) **Parties to the communication.** Cases considering statements made to agents of the lawyer who also have confidential or privileged communications with the client include: *State v. Davis*, 116 N.J. 341, 361 (1989) (citations omitted) (the attorney-client privilege "has been held to include confidential communications to private investigators acting on behalf of counsel for the defendant"); *State v. Pavin*, 202 N.J. Super. 255, 262 (App. Div. 1985) (The privilege should be held to shield communications between an insured and an insurance adjuster "only where the communications were in fact made to the adjuster for the dominant purpose of the defense of the insured by the attorney and where confidentiality was the reasonable expectation of the insured."); *State v. Kociolek*, 23 N.J. 400, 412 (1957) (citations omitted) (holding that the attorney-client privilege will apply to a case where a psychiatrist was retained by defense counsel to inquire into the defendant's mental state because the "privilege is not based upon the relation of 'doctor and patient,' but rather that of attorney and client in that the 'doctor was the agent of the attorney and the sub-agent of the defendant'").

3) **Comparison with work product.** The attorney-client privilege has been held to be more important than the related work product privilege. *See Seacoast Builders Corp. v. Rutgers*, 358 N.J. Super. 524, 554 (App. Div. 2003) (holding that "protection of the attorney-client privilege is more important than protection of work product").

B) **Attorney work product protection.** Rule 26(b)(3) of the Federal Rules of Civil Procedure and N.J. CT. R. 4:10-2(c) govern the parameters of the attorney work product protection. The work product doctrine—conceived in *Hickman v. Taylor*, 329 U.S. 495 (1947) and codified in subsequent federal and state rules—bars discovery of materials prepared by opposing counsel in anticipation of trial.

1) The wording of the New Jersey Court Rule is substantially similar to the Federal Rule, providing that "a party may obtain discovery" of documents and other discoverable materials that are

> prepared in anticipation of litigation or for trial or for another party or by or for that other party's representative . . . *only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means*.

N.J. CT. R. 4:10-2(c) (emphasis added). Even if a party meets this burden, the court will still "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*; *see also Halbach v. Boyman*, 377 N.J. Super. 202, 207 (App. Div. 2005) (citation omitted) (The Rule "provides that even when the work product privilege may be pierced and documents ordered to be produced . . . 'the mental impressions, conclusions, opinions, or legal theories'" are "'discoverable only in the rarest situations.'").

2) **Exception.** FED. R. CIV. P. 26(b)(3)(C) and N.J. CT. R. 4:10-2(c) both provide that a party or non-party witness may obtain, without the normal required showing of need or hardship, a statement made by himself or herself concerning the action or its subject matter.

C) **Confidentiality.** Under R. P. C. 1.6(a), a lawyer is prohibited from revealing client confidences unless the client consents after consultation or disclosure is "impliedly authorized in order to carry out the representation." Under Rule 1.6(b)(1), a lawyer *must* reveal client information to the extent it appears necessary in preventing the client from committing an act that would result in death, substantial bodily harm, or substantial injury to the financial interest or property of another. R. P. C. 1.6(b)(2) provides that a lawyer *must* reveal client information in order to prevent the client from committing an illegal or fraudulent act that the lawyer reasonably believes would perpetrate a fraud upon

the tribunal. Instead of requiring disclosure like Rule 1.6(b), Rule 1.6(d) *permits* a lawyer to reveal client confidences in other situations, including: rectifying the consequences of a client's criminal, illegal or fraudulent acts, establishing a claim or defense for a lawyer in a controversy between the lawyer and client, or to comply with other law. "Reasonable belief" as it is used in both Rules 1.6(b) and (d), is defined as "the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence." R. P. C. 1.6(e).

D) **Self-critical analysis privilege.** This privilege generally applies to documents containing information obtained through an internal evaluation of an incident as a matter of public policy. *See Payton v. N.J. Tpk. Auth.*, 148 N.J. 524, 544 (1997). The reasoning behind the institution of such a privilege "'is the encouragement of candor and frankness toward the ends of discovering the reasons for past problems and preventing future problems.'" *Id.*

1) **Criteria.** In order to assert such a privilege, a party must prove three criteria: (i) "the information which is the subject of a production request must be the criticisms or evaluations or the product of an evaluation or critique conducted by the party opposing the production request;" (ii) "the 'public need for confidentiality' of such analysis must be such that the unfettered internal availability of such information should be encouraged as a matter of public policy;" and (iii) "the analysis or evaluation must be of the character which would result in the termination of such self-evaluative inquiries or critical input in future situations if this information is subject to disclosure." *CPC Int'l, Inc. v. Hartford Accident & Indem. Co.*, 262 N.J. Super. 191, 197 (Law Div. 1992) (internal quotation marks omitted).

2) **Not absolute.** The New Jersey Supreme Court, however, has expressly declined to adopt "near-absolute protection" for these self-critical analysis materials. *Payton*, 148 N.J. at 545. Instead, the court adopted a case by case weighing process for "the disclosure of evaluative and deliberative materials," whereby the court will balance a litigant's private need for disclosure against the public's need for confidentiality. *Id.* at 545-46. The court concluded that while "trial courts should accord significant weight to self-critical analysis . . . certain interests in disclosure are strong enough, in their reflection of important public policies, to outweigh such confidentiality concerns under most, if not all, circumstances." *Id.* at 548; *see also Christy v. Salem*, 366 N.J. Super. 535, 542-44 (App. Div. 2004) (applying the *Payton* balancing test to determine that some of the information in a medical peer review report should be disclosed because of the harm nondisclosure would pose to the plaintiff but also finding that certain portions of the peer review should remain confidential in order to facilitate candid assessment by hospital staff in the future).

E) N.J. R. EVID. 500, *et seq.* govern other forms of privileged communications between parties. These privileged communications include:

1) Rule 505: Psychologist-patient privilege
2) Rule 506: Patient and physician privilege
3) Rule 508: Newsperson's privilege
4) Rule 509: Marital privilege-confidential communications
5) Rule 510: Marriage counselor privilege
6) Rule 511: Priest-penitent privilege
7) Rule 516: Identity of informer
8) Rule 517: Victim [of violence] counselor privilege
9) Rule 518: Social worker privilege
10) Rule 519: Mediator privilege

Requests to Admit

A) New Jersey Court Rule 4:22 governs requests to admit. Under N.J. CT. R. 4:22-1 a party may serve upon another party a written request seeking the admission of any matter of fact within in the scope of discovery (*see* N.J. CT. R. 4:10-2), including the genuineness of any documents.

B) **Questions of fact**. Requests for admissions must be limited to questions of fact, and may not be directed to matters of pure opinion or conclusions of law. *Van Langen v. Clark*, 173 N.J. Super. 517, 521-23 (Law Div. 1980).

C) **Response requirements**. Absent an extension of time upon consent with the party serving the request or court order, a party has thirty (30) days from the date of its receipt of requests for admissions to either respond in writing to the requests or to seek relief from the court by way of a protective order under N.J. CT. R. 4:10-3. N.J. Ct. R. 4:22-1. A party has a duty to exercise good faith in responding to requests for admissions. To that end, a party must either specifically admit or deny each request or set forth in detail the reasons why it cannot truthfully admit or deny the request. N.J. CT. R. 4:22-1. *See Mass. Mut. Life Ins. Co. v. Manzo*, 234 N.J. Super. 266, 281-82 (App. Div. 1989), *rev'd on other grounds*, 122 N.J. 104 (1991). Requests for admissions shall be deemed to have been admitted by the party if it fails to respond to the requests within the thirty (30) days provided by the rule, or such other time as set by agreement of the parties or court order. N.J. CT. R. 4:22-1.

D) **Insufficient information**. A party responding to requests for admissions may not claim lack of information or knowledge as a reason for its failure to admit or deny the request unless it affirmatively states that a reasonable inquiry was made and that the information known or readily obtainable is insufficient to permit it to admit or deny the request. N.J. Ct. R. 4:22-1.

E) **Effect of admission**. Under N.J. Ct. R. 4:22-2, any matter of fact affirmatively admitted by a party in response to requests for admissions or, any matter deemed admitted by virtue of a party's failure to respond in a timely fashion to the requests for admissions, shall be considered to be conclusively established by the court unless permitted by the court to be withdrawn or admitted upon formal motion.

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

A) The admissibility of evidence concerning the reconstruction of an accident "is within the area of judicial discretion and turns on whether the reconstruction sufficiently duplicates the original event as described by witnesses or participants." *Persley v. N.J. Transit Bus Operations*, 357 N.J. Super. 1, 14 (App. Div. 2003) (citations omitted). For example, a video reconstruction, so long as it is "substantially similar to the subject accident, created by means of a process which was made known to the jury, provided to plaintiff in discovery, and shown in real time as well as in slow motion," should be admissible. *Id.* at 17. Moreover, the depiction would have to conform "with nearly all of the evidence surrounding the subject accident," and should also be authenticated. *Id.*

B) **Test.** The test to determine whether a reconstructionist is qualified to give expert opinion testimony is addressed under N.J. R. EVID. 702. The proposed expert must possess "specialized . . . knowledge, skill, experience, training or education," such that it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* A court will consider three requirements for the admission of the expert's testimony:

1) "the intended testimony must concern a subject matter that is beyond the ken of the average juror;"
2) "the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable;" and
3) "the witness must have sufficient expertise to offer the intended testimony."

State v. Jamerson, 153 N.J. 318, 337 (1998) (quoting *State v. Kelly*, 97 N.J. 178, 208 (1984)).

C) Notably, investigating police officers can testify as non-experts "based on [their] own observations regarding the point of impact of two vehicles in an automobile accident case." *State v. LaBrutto*, 114 N.J. 187, 199 (1989). In *LaBrutto*, the court specifically held that a police officer need not be qualified as an accident reconstruction expert in order to give his opinion of the point of impact. *Id.*

Biomechanical Testimony

A) A party can demonstrate scientific evidence, like that offered by a biomechanical engineer, as reliable in three ways: (i) "[w]hen an expert in a particular field testifies that the scientific community in that field accepts as reliable the foundational bases of the expert's opinion"; (ii) when scientific literature "reveals a consensus of acceptance regarding a technology," so "long as comparable experts in the field accept the soundness of the methodology, including the reasonableness of relying on the underlying data and information"; and (iii) by "pointing to existing judicial decisions that announce that

particular evidence or testimony is generally accepted in the scientific community." *Hisenaj v. Kuehner*, 194 N.J. 6, 17 (2008) (internal quotation marks omitted).

B) **Relevancy.** Biomechanical testimony is not always admissible. The court specifically noted in *Hisenaj* that

> we recognize that the relationship between the studies and literature on which Dr. Alexander relied and Dr. Alexander's opinions in this matter could be attacked as tenuous. The appellate panel highlighted several potential flaws in Dr. Alexander's reliance on the seventeen studies when extrapolating opinions concerning plaintiffs['] injuries. Those flaws, if developed in a trial record, might convince a trial court to exclude expert testimony from a biomechanical engineer concerning the likely injuries that a particular plaintiff would suffer as a result of a low-impact, vehicle-on-vehicle collision. . . .

Id. at 24-25 (citation omitted).

Collateral Source Rule

The common law collateral source rule prohibits the admission of evidence that an injured party's damages will be compensated by a source other than the person/entity which caused the injury. *See* RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979). Such collateral benefits do not reduce the defendant's tort liability, even though they reduce the plaintiff's loss. The premise of this rule was that "'an injured party may recover fully from a tortfeasor for personal injuries notwithstanding that much of his loss was covered by contractual arrangements, such as for example an accident or life insurance policy.'" *Kiss v. Jacob*, 138 N.J. 278, 281 (1994) (quoting *Theobald v. Angelos*, 44 N.J. 228, 239 (1965)).

A) New Jersey has rejected this common law rule through the passage of a statutory provision, which directs that in any personal injury or wrongful death action,

> if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff . . . or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable. . . .

N.J. STAT. ANN. § 2A:15-97.

1) **Purpose of statutory rejection of collateral source rule**. This statute was passed in order to preclude a plaintiff's opportunity for double recovery that would normally be available under the common law Collateral Source Rule. "'This bill is intended to

prohibit duplicate recovery by plaintiffs. Thus, if a plaintiff received disability benefits, health insurance benefits, unemployment compensation, or other benefits after having established an injury, the benefits would be required to be deducted from the award.'" *Kiss*, 138 N.J. at 282 (quoting Statement to Senate Bill No. 2708 (Nov 23, 1978)); *see also Perreira v. Rediger*, 169 N.J. 399, 403 (2001) ("The purpose underlying [the statute] is twofold: to eliminate the double recovery to plaintiffs that flowed from the common-law collateral source rule and to allocate the benefit of that change to liability carriers.").

2) **Types of benefits included under statute.** These "benefits" mentioned in the statute "'refer[] only to those benefits to be paid post-judgment to which plaintiff has an established, enforceable legal right when judgment is entered and which are not subject to modification based on future, unpredictable events or conditions.'" *Mandile v. Clark Material Handling Co.*, 303 F. Supp. 2d 531, 533 (D.N.J. 2004) (quoting *Parker v. Esposito*, 291 N.J. Super. 560, 566 (App. Div. 1996)) (*Mandile* held that a husband's recovery in a wrongful death action for his wife had to be reduced by the amount of social security benefits due to him under the New Jersey Statute). "[T]he Legislature's essential concern was with insurance-type benefits" and not with proceeds a plaintiff received from a "settlement with a defendant later found to bear no liability." *Kiss*, 138 N.J. at 282.

Convictions

A) Normally past convictions may be considered only for impeachment purposes, but unlike the Federal Rules of Evidence, the New Jersey Rules of Evidence permits the admission of prior convictions in other limited situations. *See* N.J. R. EVID. 404(b) ("[E]vidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith," but "*[s]uch evidence may be admitted* for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, [or] identity." (emphasis added)); N.J. R. EVID. 405(a) ("When evidence of character or trait of character of a person is admissible, it may be proved by evidence of . . . conviction of a crime which tends to prove the trait."). Unlike Rule 609, which governs admissibility of any past conviction to impeach a witness, Rule 405(a) limits admissibility to those criminal convictions tending to prove the specific character trait involved in the case. *See* Richard J. Biunno, CURRENT N.J. RULES OF EVIDENCE, N.J. R. EVID. 405, cmt. 4 (Gann 2014).

B) **Pre-requisites to use a prior conviction for impeachment purposes.** Under relevant New Jersey law there is a conflict regarding the issue of whether or not a prior conviction for which a person has not yet been sentenced may be used to impeach the person's credibility as a witness in a subsequent matter. *See* Richard J. Biunno, CURRENT N.J. RULES OF EVIDENCE, N.J. R. EVID. 609, cmt. 2 (Gann 2014); *compare State v. Eddy*, 189 N.J. Super. 22, 27 (Law Div. 1982) (holding that the term "conviction" is meant to apply only to "a sentenced defendant whose right to appeal following trial has expired"), *with State v. Rios*, 155 N.J. Super. 11, 16 (App. Div. 1977) ("[T]he State may use defendant's prior conviction to affect his credibility, if he elects to testify[,] although sentence has not yet been imposed thereon"). Regardless of whether or not a sentencing is required, in

New Jersey, convictions subject to appeal cannot be used to impeach a witness in a subsequent trial. *See State v. Biegenwald*, 96 N.J. 630, 638 (1984).

C) **Criminal.** Unlike the Federal Rule of Evidence, which specifies particular convictions that will be deemed admissible, the corresponding New Jersey Rule "makes no admissibility distinction in terms of the crime of which the witness has been convicted." N.J. R. EVID. 609, 1991 Supreme Ct. Comm. Cmt. The drafters found that "[e]vidence of any conviction of crime is subject to exclusion if its probative value is outweighed by its prejudicial effect, but it is the defendant who bears the burden of proving exclusion." *Id*.; *see also State v. Sands*, 76 N.J. 127, 147 (1978) (holding that the trial judge must engage in this balancing test to determine whether evidence of a prior conviction could be admitted to impeach a witness), *modified in part, State v. Brunson*, 132 N.J. 377, 391 (1993). Factors used in this balancing test to determine how relevant or remote a witness' prior conviction will be, include: (1) the passage of time between the prior conviction and the current testimony, (2) the nature of convictions where serious crimes, "including those involving lack of veracity, dishonesty or fraud, should be considered as having a weightier effect than, for example, a conviction of death by reckless driving," and (3) the extent of intervening convictions between the past conviction and the crime for which the defendant is being tried. *Sands*, 76 N.J. at 144-45. While the facts of the *Sands* decision concerned the possibility of a criminal defendant testifying at his own trial, subsequent decisions have indicated that this decision can be applied to any witness. *See State v. Balthrop*, 92 N.J. 542, 545 (1983) (agreeing with the Appellate Division's holding that *Sands* stood for the proposition that "evidence of prior convictions [that] affect the credibility of *any witness* can be excluded" (emphasis added)).

D) **Traffic.** While Rule 609 does not distinguish specific crimes that would be considered admissible under the Rule, "it is clear that it applies only to indictable offenses which are the subject of valid convictions. Neither evidence of arrests for or charges of crime[s] are admissible under this rule." N.J. R. EVID. 609, 1991 Supreme Ct. Comm. Cmt. Therefore, convictions regarding traffic violations will not be considered admissible under Rule 609. *Id.*; *see also State v. Rowe*, 57 N.J. 293, 302 (1970) (The New Jersey Supreme Court disapproved of the trial court permitting testimony regarding defense witness' convictions for nonindictable offenses, including evidence of a conviction for driving without a license.); *State v. Colombino*, No. 02-282-06, 2007 WL 2873130, at *2 (N.J. Super. App. Div. Oct. 4, 2007) (holding that Rule 609 "only authorizes the admission of criminal convictions," and therefore the Rule does not "authorize the introduction of traffic violations" for impeachment purposes). The New Jersey Supreme Court, while not dealing specifically with traffic violations in other cases, has held that only evidence proving a prior conviction can be admitted under Rule 609 and any evidence simply indicating an arrest or a stay in jail is not sufficient to meet the Rule's requirements. *See State v. Kociolek*, 23 N.J. 400, 420 (1967); *State v. Pacheco*, 38 N.J. 120, 128 (1962); *State v. Landeros*, 20 N.J. 69, 72 (1955).

1) **Admissibility of guilty pleas for prior traffic violations in civil actions arising out of traffic accidents.** The Third Circuit, applying New Jersey law, has

previously ruled that a guilty plea regarding a traffic conviction would be admissible in civil actions arising out of the traffic accident in question. *See Eschelbach v. William S. Scull Co.*, 293 F.2d 599, 603 (3d Cir. 1961) (holding that a guilty plea might "be a circumstance to be taken into consideration . . . in determining whether or not under all of the circumstances as developed by the entire evidence, the plaintiff or the defendant . . . exercised the reasonable care that they were required by the law to exercise"). However, the New Jersey Superior Court - Appellate Division, has rejected this position, finding that guilty pleas should not be admissible against a person in a subsequent civil trial due to the fact that the jury could not know the multiple factors that entered into a decision to plead guilty. *See Mead v. Wiley Methodist Episcopal Church*, 23 N.J. Super. 342, 352-55 (App. Div. 1953) ("Assuming that the guilty pleas were admitted, it can be readily seen that such evidence might well have a decisive effect upon the jury, without any knowledge of the reasons that impelled the witness to enter his guilty pleas.").

Day in the Life Videos

"Day in the Life" videos that are properly authenticated may be admitted into evidence to aid the jury in understanding the nature and extent of the plaintiff's injuries. The trial court will determine whether the probative value of the evidence is substantially outweighed by the risk of undue prejudice, confusion of issues or misleading the jury. *Ocasio v. Amtrak*, 299 N.J. Super. 139, 153-55 (App. Div. 1997); *Schiavo v. Owens-Corning Fiberglas Corp.*, 282 N.J. Super. 362, 368-69 (App. Div. 1995).

Dead Man's Statute

The New Jersey Dead Man's Statute protects deceased and lunatic persons by imposing a higher evidentiary threshold on any party asserting a claim or affirmative defense against them. *See* N.J. STAT. ANN. 2A:81-2 (2017). The statute provides:

> In a civil action that is commenced or defended by a guardian on behalf of a person who is mentally incapacitated or by a personal representative on behalf of a decedent, any other party who asserts a claim or an affirmative defense against the person who is mentally incapacitated or against the personal representative, that is supported by oral testimony of a promise, statement, or act of the person who is mentally incapacitated before the onset of mental incapacity, or of the decedent, shall be required to establish the same by clear and convincing proof.

Id. Courts have held that the purpose of this statute "is to diminish the likelihood of feigned claims or defenses based upon transactions with a decedent [or mentally incapacitated individual] where the decedent [or mentally incapacitated individual] can no longer contradict them." *Denville Amusement Co. v. Fogelson*, 84 N.J. Super. 164, 168-69 (App. Div. 1964).

A) **Actions regarding decedent**. This statute will not apply when claims are asserted seeking recovery of damages not related to the assets of a decedent's estate. *Germann v. Matriss*, 55 N.J. 193, 212 (1970) (holding that the Dead Man's Statute will not apply to actions where the administrator of a decedent's estate sued to recover damages from a dentist in a wrongful death action because "[t]he decedent's estate is not affected by the outcome [and] the damages recovered are for the benefit of the persons designated in the Death Act"). In contrast, when a civil suit is brought against the decedent's estate then the Dead Man's Statute will apply. *DeBlanco v. Dooley*, 164 N.J. Super. 155, 160 (App. Div. 1978) (holding that the plaintiff was entitled to recover $5,000.00 from the decedent's estate based on both his testimony that he gave the loan and proof of a promissory note).

B) **Actions regarding Mentally Incapacitated Individuals (formerly referred to as "lunatics").** The same principles and standards that the statute applies to decedents' estates also apply to the estates of mentally incapacitated individuals. *See In re Dodge*, 50 N.J. 192, 229-30 (1967) (holding that the defendants did not produce sufficient evidence to prove that the mentally incapacitated individual, a wealthy donor to a college, fully understood the consequences of signing a letter of intent bestowing artwork on the college, especially considering there was evidence that showed she was openly deceived by representatives of the college).

C) **Standard**. This heightened burden of proof is necessary in cases arising under this statute, due to the fact that these cases will often "involve circumstances or issues that are so unusual or difficult, that proof by a lower standard will not serve to generate confidence in the ultimate factual determination." *In re Polk*, 90 N.J. 550, 568 (1982). Courts in New Jersey have held that a lack of concrete evidence supporting a party's claim against a decedent's estate will not meet the heightened evidentiary threshold provided for in the statute. *See Czoch v. Freeman*, 317 N.J. Super 273, 284 (App. Div. 1999) (holding that a mother and daughter did not meet the statutory standards by simply testifying that they had received gifts from the decedent over the years, especially when the decedent's sons presented evidence that the decedent maintained control of the funds and directed the daughter to loan them money); *DeBlanco*, 164 N.J. Super. at 158-60 (The court held that the decedent's estate owed the plaintiff $5,000 for the personal loan he gave to the decedent because of the additional proof of a promissory note. However, the court also found the estate was not responsible to pay back the plaintiff's $1,000.00 loan he made through a corporate entity, due to the lack of any evidence to support his testimony that he had made the loan.).

D) **Interaction with New Jersey Rules of Evidence**. There are two Rules of Evidence that parties to an action involving the Dead Man's Statute must consider. The first is Rule 804(b)(1), which provides the circumstances under which a declarant's testimony could be admissible in a later action where the declarant is no longer available as a witness. *See* N.J. R. EVID. 804(b)(1)(A)-(B). The second, Rule 804(b)(6), provides that in civil proceedings, a statement "made by a person unavailable as a witness because of death" will be admissible "if the statement was made [1] in good faith [2] upon declarant's personal knowledge [3] in circumstances indicating that it is trustworthy." N.J. R. EVID.

804(b)(6). These Rules are important because, if such statements are admitted into evidence, they could greatly affect whether the party asserting a claim against a decedent or mentally incapacitated individual is able to meet its heightened burden of proof under the statute.

Medical Bills

Generally, a plaintiff's medical bills are only admissible if they are unpaid or have been paid out of pocket by the plaintiff. Medical bills that have been paid by a collateral source, such as health insurance or automobile insurance are not admissible at the time of trial.

A) **Paid by plaintiff.** For outstanding medical expenses and expenses paid directly by the plaintiff, a plaintiff who is awarded a verdict is entitled to payment for medical expenses which were reasonably required for the examination, treatment and care of injuries proximately caused by the defendant's negligence. *Ayers v. Jackson Tp.*, 106 N.J. 557, 603 (1987); *Schroeder v. Perkel*, 87 N.J. 53, 69 (1981). Medical expenses are the fair and reasonable value of the costs of doctors' services, hospital services, medicines, medical supplies, medical tests and any other charges for medical services.

B) **Automobile accidents.** Where the plaintiff alleges injuries from an accident involving an automobile, medical bills are generally paid for by the plaintiff's automobile insurance carrier and are not admissible at the time of trial. In determining the reasonable amount of damages due to the plaintiff, a jury may not speculate about the medical expenses the plaintiff may have had. *See Roig v. Kelsey*, 135 N.J. 500, 507 (1994).

C) **Personal injury and wrongful death.** For all personal injury or wrongful death actions arising after December 18, 1987, N.J. STAT. ANN. 2A:15-97 (2017) requires that medical expense benefits from sources other than joint tortfeasors, workers' compensation carriers or the proceeds from life insurance policies be disclosed to the trial judge and the court must reduce the verdict accordingly. *See Thomas v. Toys 'R' Us, Inc.*, 282 N.J. Super. 569, 586 (App. Div. 1995).

Calculation of Damages

A) In New Jersey, a plaintiff bringing a cause of action for personal injury may recover the following:

1) Pain and suffering
2) Disability/impairment
3) Loss of enjoyment of life
4) Disfigurement
4) Loss of spouse's services, society and consortium
6) Past medical expenses
7) Future medical expenses
8) Lost income, wages, earnings

The first five (5) are non-economic damages and under these principles a plaintiff is entitled to fair and reasonable compensation for any permanent or temporary injury resulting in pain and suffering, disability to or impairment of his/her faculties, health, or ability to participate in activities, as a proximate result of the defendant's negligence. This measure of damages is what a reasonable person would consider to be adequate and just under all the circumstances of the case to compensate the plaintiff. The last three (3) listed above are economic damages calculated by evidence of admissible past and future medical bills and evidence of past and future loss of earnings as a proximate result of the defendant's negligence.

Available Items of Personal Injury Damages

A) **Pain and suffering.** Where a plaintiff sustains physical injury, he/she may recover damages for pain and suffering. The duration of the plaintiff's pain and suffering is to be determined: any damages awarded must cover the damages suffered by the plaintiff since the accident, to the present time, and into the future if the injury and its consequence have continued to the present time or can reasonably be expected to continue into the future. *Coll v. Sherry*, 29 N.J. 166, 177 (1959); *Simmel v. N.J. Coop Co.*, 28 N.J. 1, 16 (1958)..

B) **Disability/impairment.** Disability or impairment means worsening, weakening or loss of faculties, health or ability to participate in activities. It includes the inability to pursue one's normal pleasure and enjoyment. A plaintiff may collect damages based upon how the injury has deprived the plaintiff of his/her customary activities as a whole person. *Greenberg v. Stanley*, 51 N.J. Super. 90, 106 (App. Div. 1958), *overruled in part on other grounds*, *Falzone v. Busch*, 45 N.J. 559 (1965).

C) **Disfigurement.** When the injury has left the plaintiff deformed or disfigured, scars or other insults on one's personal appearance, the plaintiff may be able to collect damages for his or her change in physical appearance and mental suffering caused by being conscious of the disfigurement. *Toto v. Ensuar*, 196 N.J. 134, 144 (2008).

D) **Loss of enjoyment of life.** In New Jersey, a person is entitled to fair and reasonable compensation for disability to or impairment of his/her ability to participate in activities, and to pursue his/her normal pleasures and enjoyment. *Eyoma v. Falco*, 247 N.J. Super. 435, 449-50 (App. Div. 1991).

E) **Loss of spouse's services, society and consortium.** In New Jersey, a husband/wife is entitled to recover for the loss of the spouse's services, society and consortium. A plaintiff's spouse may recover under a *per quod* claim for loss of impairment of the plaintiff's services, society, and consortium including attending to household duties, companionship and comfort, and marital relations. *Rex v. Hunter*, 26 N.J. 489, 492 (1958); *Schuttler v. Reinhardt*, 17 N.J. Super. 480, 486 (App. Div. 1952).

F) **Past medical bills.** A plaintiff may only recover for past medical bills when the plaintiff is personally responsible for payment, whether they have been paid or are unpaid. Medical bills paid for by a collateral source (with certain exceptions, such as life insurance, workers compensation lien, Medicare lien, Medicaid lien), are not recoverable

at the time of trial. A plaintiff entitled to recover for medical expenses may recover those reasonably required for the examination, treatment and care of injuries proximately caused by the defendant's negligence. Medical expenses are the costs of doctors' services, hospital services, medicines, medical supplies, medical tests and any other charges for medical services. The amount of payment is the fair and reasonable value of such medical expenses. *Ayers v. Jackson Tp.*, 106 N.J. 557, 608-09 (1987); *Schroeder v. Perkel*, 87 N.J. 53, 70 (1981).

G) **Future medical bills.** As described above, generally medical expenses are only recoverable if not covered by a collateral source. Recovery is permitted if the plaintiff proves that he or she will need continued medical care as a result of the defendant's wrongful act. The proof must be sufficient for the jury to make an approximate estimate of the cost. *Schroeder v. Perkel*, 87 N.J. 53, 69-70 (1981). The test to be applied is whether there is a reasonable probability of incurring future medical or hospital expenses to treat or cure the injury sustained in the accident. *Coll v. Sherry*, 29 N.J. 166, 176 (1959); *Work v. Phila. Supply Co.*, 95 N.J.L. 193, 196 (Ct. Err. & App. 1920).

H) **Lost income, wages, earnings.** A plaintiff has a right to be compensated for any earnings lost as a result of injuries caused by the defendant's wrongdoing. This is determined by considering the length of time during which the plaintiff was not able to work, what his/her income was before the injuries, how much he/she earned upon return to work, whether the injuries affected his/her ability to do any tasks required on the job and any lessening or decrease in his/her income after returning to work. The lost earnings are determined by net or take-home pay and not on gross income. *Ruff v. Weintraub*, 105 N.J. 233, 238 (1987). The plaintiff must make a reasonable effort to minimize the damages resulting from a loss of earnings, but extraordinary or impractical efforts are not necessary.

Mitigation

A) In New Jersey, there exists the doctrine of avoidable consequences, or mitigation of damages that implements the reduction in recoverable damages attributable to the plaintiff's post-accident behavior. A plaintiff who has suffered an injury as a result of a tort cannot recover for any portion of the harm that by the exercise of ordinary care he/she could have avoided. *Ostrowski v. Azzara*, 111 N.J. 429, 441 (1988).

B) **Medical treatment.** Generally, a plaintiff injured by another's negligence has a duty to exercise reasonable care to seek and submit to medical and surgical treatment in order to affect a cure and minimize damages. Failure or refusal to do so bars recovery for consequences which could have been avoided by the exercise of such care. A defendant is liable only for that portion of the injuries attributable to the defendant's negligence. *Ostrowski v. Azzara*, 111 N.J. 429, 439 (1988).

1) **Surgery.** A plaintiff has a duty to mitigate damages by undergoing surgical treatment, unless the procedure involves a peril to life, undue risk, or

unreasonable anguish. *Albert v. Monarch Fed. Sav*. 327 N.J. Super. 462, 465 (App. Div. 2000).

C) **Percentage fault.** Where a plaintiff did not act reasonably to avoid or to alleviate injury, a jury shall assess in terms of percentages the degree to which the injuries were the result of the plaintiff's own unreasonable failure to minimize or to avoid further injury. A plaintiff may still recover for damages attributable to the accident even when the plaintiff's post-tort conduct has caused more than 50% of the total damages. *Lynch v. Scheininger*, 162 N.J. 209, 230 (2000).

D) **Seat belts.** A plaintiff's failure to wear a seatbelt is not relevant in deciding who is at fault for causing the accident. However, failure to wear a seatbelt may affect the amount of money the plaintiff may recover for any injuries sustained. If a plaintiff is found negligent for failing to wear a seatbelt and the plaintiff's injuries were made greater or more severe because he/she was not using a seatbelt, damages are to be reduced. A jury is to determine total damages and subtract that number by the amount of damages the plaintiff would have sustained if he/she were wearing a seatbelt. The number would then be reduced in proportion to the plaintiff's jury determined fault in failing to use an available seat belt. *Waterson v. Gen. Motors Corp.*, 111 N.J. 238, 274 (1988); N.J. MODEL JURY CHARGE 8.21 (2017).

Unique Damages Issues

A) **Measure of pain and suffering.** New Jersey law does not provide a set table, schedule or formula by which a person's pain and suffering, disability, impairment, or loss of enjoyment of life may be measured in terms of money. The amount is left to the reasonable discretion of the jury. Any party may argue to a jury that unliquidated non-economic damages be calculated on a time-unit basis without reference to a specific sum. The judge will instruct the jury that these comments are argument only and not evidence. N.J. CT. R. 1:7-1(b). A jury is advised to determine a number based upon common experience, the nature of the pain and suffering, disability, impairment, loss of enjoyment of life and the nature and function of money.

B) **Pre-existing injuries.** A plaintiff may not recover for a preexisting injury. However, if the injuries sustained aggravated or made the plaintiff's preexisting injury more severe, then the plaintiff may recover for any damages sustained due to an aggravation or worsening of a preexisting condition but only to the extent of that aggravation. The plaintiff has the burden of proving what portion of his/her condition is due to his/her pre-existing injury. *Blanks v. Murphy*, 268 N.J. Super. 152, 162 (App. Div. 1993); *see also Thornton v. Gen. Motors Corp.*, 280 N.J. Super. 295, 303 (Law Div. 1994).

C) **Loss of profits.** A plaintiff, who is the owner of a business, may seek damages for the value of the plaintiff's services in carrying on that business which were lost as a proximate result of his/her injuries. The value of the plaintiff's services is determined by the nature of the business, the capital, assets and personnel employed, the average weekly (or monthly) profits earned before and after the accident and any expense to which the plaintiff was put to

hire others to perform services which the plaintiff had previously performed him/herself. *Woschenko v. Schmidt & Sons*, 2 N.J. 269, 277-78 (1949).

D) **Services of child.** Parents may bring a per quod claim for damages related to the loss of the services of their infant child, in the performance of household chores and to the child's earnings, until the child reaches the age of majority or is emancipated. Upon reaching the age of majority the right to loss of earnings belongs solely to the emancipated child; however, the law recognizes that a child, after the age of majority, may perform services for the parents, may provide valuable companionship and care as the parents get older, and may make monetary contributions to the parents. *Mathias v. Luke*, 37 N.J. Super. 241, 246-47 (App. Div. 1955); *Davis v. Eliz. Gen. Med. Ctr.*, 228 N.J. Super. 17, 23 (Law Div. 1988), *overruled in part on other grounds, Tynan v. Curzi*, 332 N.J. Super. 267 (App. Div. 2000).

Offers of Judgment

A) N.J. CT. R. 4:58-1 provides that any party to any action, other than a matrimonial action, in which exclusively monetary damages are sought, including both liquidated damages and unliquidated damages, may, at any time not later than twenty (20) days prior to the actual trial date serve upon the opposing party an offer to allow judgment in a specific amount or of a specific nature to be taken against him if he is defending against a claim or to be entered in his favor if he is asserting a claim.

B) **Timing.** The party to whom the offer is made has until the tenth day prior to the actual trial date or ninety (90) days after service of the offer, whichever period first expires, to accept the offer. If it is not so accepted, it is deemed withdrawn and is inadmissible for any purpose except the fixing of allowances after trial. N.J. CT. R. 4:58-1(b) (2017) explicitly states that "[i]f the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee[s]." Thus, the State of New Jersey does not recognize offers of judgment evidence except for the limited purpose of the fixing of allowances after trial. If the offer is accepted within the applicable time period, then none of the penalties of the rule set forth below will apply. *Estate of Okhotnitskaya v. Lezameta*, 400 N.J. Super. 340, 349 (Law Div. 2007).

C) **Counter-offers.** A counter-offer will not affect the viability of the original offer, which remains open until accepted or withdrawn. Additionally, the rejection of an offer does not preclude the offering party from subsequently submitting the same or a different offer within the prescribed time period.

D) **Effect.** In the absence of a subsequent offer, a rejecting offeree will be subject to the consequences provided by N.J. CT. R. 4:58-2 and N.J. CT. R. 4:58-3 on the basis of the rejected offer. *See Sovereign Bank v. United Nat'l Bank*, 359 N.J. Super. 534, 542 (App. Div.), *cert. denied*, 177 N.J. 489 (2003). Rules 4:58-2 and 4:58-3 provide that if the judgment is within a twenty percent margin of error, the party whose offer was rejected is entitled to attorneys' fees and actual litigation expenses incurred after the date on non-

acceptance unless a stated exception of the Rule applies. N.J. CT. R. 4:58-2 further provides that if a money judgment is entered in favor of a claimant in an amount at least equal to 120 percent of his/her rejected offer, the claimant is also entitled to eight percent interest on the judgment calculated from the date of the offer of the date of the completion of discovery, whichever is later, but only to the extent it exceeds prejudgment interest allowable under the Court Rules. *See* Pressler & Verniero, CURRENT N.J. COURT RULES, N.J. CT. R. 4:58, cmt. 2 (Gann 2015).

Offers of Proof

When an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what is expected to be proved by the answer of the witness. N.J. CT. R. 1:7-3.

A) On a bench trial the court *shall* "upon request permit the evidence and any cross-examination relating thereto . . . [be] preserved, unless it clearly appears to the court that the evidence is not admissible on any ground or that the witness is privileged or unless the interest of justice otherwise requires." *Id*.

B) In actions before a jury the court may allow, in its discretion, and in the absence of the jury, the taking and preservation of the excluded evidence. The court will consider factors such as trial delay, impairment of the coherence of the trial, resulting prejudice, and the significance of the proffered evidence. *Id*.

C) Counsel that fails to proffer the evidence to the court may be foreclosed on appeal from raising the question of the prejudicial effect of the exclusionary ruling. *Duffy v. Bill*, 32 N.J. 278, 294 (1960).

Prior Accidents

Evidence of prior accidents is admissible if they make a disputed fact more or less probable. The evidence 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. If attempting 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 has the discretion to decide whether substantial similarity has been shown. However, this evidence will be excluded if it does not pass the judicial balancing test. *See Wymbs ex rel. Wymbs v. Twp. of Wayne*, 163 N.J. 523, 537 (2000) (holding that trial courts should have discretionary authority to determine, on a case-by-case basis, the relevancy of prior accidents to the case at hand); *see also Schaefer v. Cedar Fair*, 348 N.J. Super. 223, 240 (App. Div. 2000) (holding that once evidence of prior accidents is admitted, it is within the discretion of the trial judge to allow evidence of no prior accidents to refute the allegations).

Relationship to the Federal Rules of Evidence

New Jersey codified its Rules of Evidence in 1992. *See* N.J. R. EVID. 101-1103. In many instances, the New Jersey Rules parallel the Federal Rules of Evidence. Significant differences

do exist, however, with regard to certain rules, *e.g.*, *compare* FED. R. EVID. 702 *and* N.J. R. EVID. 702 regarding admissibility of expert witness testimony. Accordingly, reference should first be made to New Jersey Rules of Evidence with reference to the Federal Rules of Evidence and their interpretive case law for additional support on a case-by-case basis.

Seat Belt and Helmet Use Admissibility

A) **Seat belts.** In *Waterson v. Gen. Motors Corp.*, 111 N.J. 238, 241 (1988), the Supreme Court established the principle that, "if a jury finds that a plaintiff's failure to wear a seat belt constitutes negligence that contributed to plaintiff's injuries and damages, that negligence shall be considered in determining plaintiff's award." The Court explained that the "relevant inquiry" is not whether the failure to wear a seat belt was a cause of the accident but whether the non-use of the device "contributed to plaintiff's injuries." *Id.* at 264. Applying comparative negligence principles, the Court stated that "all relevant factors" should be considered in arriving at "appropriate damages awards." *Id.* However, there must be evidence that "the failure to wear a seat belt" increased the "extent or severity" of plaintiff's injuries. *Id.* Thus, in New Jersey, a motorist's failure to use a seat belt is not negligence per se, even after the enactment of mandatory seat belt laws, but it is admissible as evidence for purposes of comparative negligence.

B) **Child passenger restraint systems.** Of further interest, the failure to utilize a child passenger restraint system is not admissible as evidence at any civil trial. N.J. STAT. ANN. 39:3-76.2a (2015) states:

> Every person operating a motor vehicle, other than a school bus, equipped with safety belts who is transporting a child under the age of eight years and weighing less than 80 pounds on roadways, streets or highways of this State, shall secure the child in a child passenger restraint system or booster seat, as described in Federal Motor Vehicle Safety Standard Number 213, in a rear seat. If there are no rear seats, the child shall be secured in a child passenger restraint system or booster seat, as described in Federal Motor Vehicle Safety Standard Number 213. In no event shall failure to wear a child passenger restraint system or to use a booster seat be considered as contributory negligence, nor shall the failure to wear the child passenger restraint system be admissible as evidence in the trial of any civil action.

C) **Helmets.** As to the failure to use a helmet, two New Jersey District Courts have addressed whether such evidence is admissible for purposes of comparative negligence in divergent ways. In *Cordy v. The Sherwin Williams Co.*, 975 F. Supp. 639 (D.N.J. 1997), the court declined to permit defendant to argue to the jury that plaintiff's failure to wear a bicycle helmet should affect any damages received by plaintiff. The court made the following observations:

> There is nothing in either federal or state law that would have alerted a reasonable person in plaintiff's position that his legal rights could be

> prejudiced by his decision not to wear a bicycle helmet. Nothing in the law provided notice to plaintiff that he was legally expected to wear a helmet or that failure to wear a helmet could be considered legally unreasonable. The court will therefore not contravene fundamental notions of fairness by announcing defendant's proposed new rule of law at the expense of this severely injured plaintiff who had no reason to predict the promulgation of such a new rule.

Id. at 647-48. The rationale in *Cordy* was later criticized by the same federal district court in *Nunez v. Schneider Nat'l Carriers, Inc.*, 217 F. Supp. 2d 562 (D.N.J. 2002). In *Nunez*, the plaintiff alleged that decedent was fatally injured when she was struck by defendant's tractor-trailer while riding her bicycle without a helmet. The defendant trucking company and driver moved to introduce evidence that decedent's failure to wear a helmet contributed to her injuries and, therefore, any damages awarded to plaintiff should be reduced by decedent's comparative fault. In granting the motion, the court allowed evidence of decedent's non-helmet use to prove decedent's comparative negligence in order to reduce damages. *Id.* at 570. In rejecting the rationale underlying the *Cordy* decision, the *Nunez* court stated:

> That the New Jersey legislature has not made it an offense for an adult to ride a bicycle without wearing a helmet does not necessarily mean that it intended that in the exercise of ordinary care an adult bicyclist never may have an obligation to wear a helmet to avoid foreseeable injuries. . . . [T]here is a difference between saying, 'It is up to you to decide whether or not to wear a safety helmet,' and saying, 'You will never, under any circumstances, have to suffer legal consequences for not wearing a helmet.'"
>
> Moreover, as set forth above, there is a demonstrable link between wearing a helmet and minimizing injuries. The New Jersey legislature has enacted legislation obviously recognizing this fact. Permitting evidence of helmet nonuse in order to reduce damages also serves to encourage the voluntary use of helmets, thereby furthering the statutory objectives in this area. Indeed, given the well documented efficacy of helmets in reducing injuries and preventing death, and the legislature's recognition of this fact, the absence of legislation requiring adults to wear helmets serves not as a basis for precluding but for admitting evidence of their nonuse at trial to reduce damages.

Id. at 568 (internal quotation marks omitted).

Spoliation

A) Spoliation is defined as "the hiding or destroying of litigation evidence, generally by an adverse party." *Rosenblit v. Zimmerman*, 166 N.J. 391, 400-01 (2001). New Jersey does not recognize a separate tort for spoliation because the courts conceive of spoliation as

remediable under existing tort principles, namely the tort of fraudulent concealment. *Id*. at 405-07

B) **Elements.** The elements of the tort of fraudulent concealment are:

> (1) That defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation; (2) That the evidence was material to the litigation; (3) That plaintiff could not reasonably have obtained access to the evidence from another source; (4) That defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation; (5) That plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.

Id. at 406-07.

C) **Inference**. However, a "spoliation inference" may be used where a litigant is found to have destroyed or concealed evidence during the underlying litigation. *Id*. at 401. "[The spoliation inference] essentially allows a jury . . . to presume that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her." *Id.* at 401-02.

1) Factors. In order for the spoliation inference to apply, four essential factors must be satisfied: (1) the evidence in question must be within the party's control; (2) it must appear that there has been actual suppression or withholding of evidence; (3) the evidence destroyed or withheld must be relevant; and (4) it must have been reasonably foreseeable that the evidence would later be discoverable. *MOSAID Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004); *R.L. v. Voytac*, 402 N.J. Super. 392, 406 (App. Div. 2008), *rev'd on other grounds*, 199 N.J. 285 (2009).

Subsequent Remedial Measures

N.J. R. EVID. 407 governs the admissibility of subsequent remedial measures, holding that such efforts are "not admissible to prove that the event was caused by negligence or culpable conduct." N.J. R. EVID. 407. The Rule, however, further states that "evidence of such subsequent remedial conduct may be admitted as to *other issues*." *Id.* (emphasis added).

A) **Event.** The term "event" is meant to refer "to the accident, not to the date on which the instrumentality which caused the event came into plaintiff's hands." *Lavin v. Fauci*, 170 N.J. Super. 403, 409 (App. Div. 1979). Therefore, "evidence of measures taken after a [plaintiff's] purchase but before any accident" occurred would be admissible to prove negligence or culpable conduct. *Id.*; *see also* Richard J. Biunno, CURRENT N.J. RULES OF EVIDENCE, N.J. R. EVID. 407, cmt. 1 (Gann 2017).

B) **Application.** This Rule has been previously held applicable to *exclude* evidence of repairs, *Gaskill v. Active Envtl. Techs., Inc.*, 360 N.J. Super. 530, 537 (App. Div. 2003);

improvements in operational procedures, *Hannsson v. Catalytic Constr. Co.*, 43 N.J. Super. 23, 27 (App. Div. 1956); discharges of employees, *Rynar v. Lincoln Transit Co., Inc.*, 129 N.J.L. 525, 530 (Ct. Err. & App. 1943); signs warning of dangerous conditions, *Smith v. State, Dept. of Transp.*, 247 N.J. Super. 62, 65 n.1 (App. Div. 1991); and installations of safety devices, if evidence of such remedial measures takes place *after* an event or injury and "is offered for the purpose of proving negligence or culpable conduct in connection with the event in question." Biunno, N.J. R. EVID. 407, cmt. 1.

C) **Policy.** Numerous New Jersey courts have ruled that the policy rationale justifying this Rule is the fact that individuals should be encouraged to take remedial measures to improve dangerous situations. *See Dixon v. Jacobsen Mfg. Co.*, 270 N.J. Super. 569, 587 (App. Div. 1994) ("[T]his rule is based upon social policy, as opposed to the relevance of such evidence on the issue of fault and, as such, is designed to encourage remedial measures to be taken in order to avoid the occurrence of similar accidents."); *Molino v. B.F. Goodrich Co.*, 261 N.J. Super. 85, 102 (App. Div. 1992) ("The obvious policy underlying this rule is that persons should not be discouraged from taking remedial steps to make a potentially dangerous situation more safe.").

D) **Issues other than negligence or culpable conduct.** The second sentence of Rule 407 indicates that evidence of subsequent remedial conduct that "has relevance to some fact in issue other than negligence or culpable conduct" is admissible. Biunno, N.J. R. EVID. 407. cmt. 2. The Appellate Division in *Lavin* indicated a number of scenarios where evidence of subsequent remedial conduct would be found admissible,

> to establish control over the instrumentality causing the injury, *Manieri v. Volkswagenwerk A.G.*, 151 N.J. Super. 422, 432 (App. Div. 1977); to show defendant's customary standard of care, *Ryan v. Port of New York Auth.*, 116 N.J. Super. 211, 219 (App. Div. 1971); to prove the condition existing at the time of the accident, *Millman v. U.S. Mortgage & Title Guar. Co.*, 121 N.J.L. 28, 34-35 (1938); to show that a feasible alternative for avoiding the danger existed at the time, *Apgar v. Hoffman Constr. Co.*, 124 N.J.L. 86, 90 (1940), and to attack the credibility of a witness, *Lombardi v. Yulinsky*, 98 N.J.L. 332, 334 (1923).

Lavin, 170 N.J. Super. at 407. More recent cases have also addressed this issue, like the Appellate Division decision affirming *Millman* through its holding that evidence of subsequent remedial conduct by a chemical facility could be used to prove that there was a defect in the gas emission system at the time of the accident. *See Harris v. Peridot Chem. (NJ), Inc.*, 313 N.J. Super. 257, 293-95 (App. Div. 1998) ("[E]vidence of subsequent remedial measures is admissible to rebut the defense that the accident did not happen in the manner claimed.").

E**)** **Relationship with Rule 403.** In order to admit these subsequent remedial measures to prove issues other than negligence or culpable conduct, the asserting party must prove that such evidence is relevant to an issue in the case. *See* N.J. R. EVID. 403 (excluding any relevant evidence "if its probative value is substantially outweighed by the risk of (a)

undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence."); *see also Spinelli v. Golda*, 6 N.J. 68, 78-79 (1951) (holding that evidence of "subsequent repairs" should only be admissible when there is an "actual controversy" surrounding the issue that has been presented to the court); *Kane v. Hartz Mountain Indus., Inc.*, 278 N.J. Super. 129, 148 (App. Div. 1994) ("Even where subsequent remedial conduct evidence has relevance to some fact in issue other than negligence, it may be excluded if the prejudicial effect outweighs the probative value.").

Use of Photographs

Real or demonstrative evidence, including photographs and maps, may be introduced at trial. Photographic evidence must be authenticated. Authentication is satisfied by evidence sufficient to support a finding that the photograph is what the proponent claims. The court generally has a relaxed process as to proof of authentication, serving as a screening process to ensure the photograph is prima facie genuine and will leave the jury to a more intense review. N.J. R. EVID. 901.

A) Photograph authentication requires testimony establishing (1) the photograph is an accurate reproduction of what it purports to represent and; (2) the reproduction is of the scene at the time of the incident in question or the scene has not changed between the time of the incident in question and the taking of the photograph. *Saldana v. Michael Weinig, Inc.*, 337 N.J. Super. 35, 46-47 (App. Div. 2001).

B) **Duplicates.** Generally, the original photograph is required. A duplicate may be used if the original is lost or destroyed, or otherwise not obtainable; the original is in the possession of an opponent; or the photograph relates to a collateral matter and it would not be expedient to require production. N.J. R. EVID. 1002, 1004.

DAMAGES

Caps on Damages

Statutory caps on damages limit the amount of recovery available in a cause of action. New Jersey imposes a $250,000.00 statutory cap on damages for negligence suits against "any nonprofit corporation, society or association organized exclusively for hospital purposes . . . as the result of any one accident." N.J. STAT. ANN. § 2A:53A-8 (2017). New Jersey also caps punitive damages to five (5) times compensatory damages or $350,000.00, whichever is greater. N.J. STAT. ANN. § 2A:15-5.14 (2017); *Johnson v. Mountainside Hosp.*, 239 N.J. Super. 312, 322 (App. Div. 1990) (holding that constitutionality "is now well settled"). The cap on punitive damages, however, does not apply to causes of action brought under, for instance, the Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to -49 (2017), or the Conscientious Employee Protection Act, N.J. STAT. ANN. §§ 34:19-1 to -14 (2017).

Punitive Damages

A) In New Jersey, punitive damages are governed by the Punitive Damages Act ("PDA"), N.J. STAT. ANN. §§ 2A:15-5.9 to -5.17 (2017). "The Legislature's purpose in enacting the Act was to establish more restrictive standards with regard to the awarding of punitive damages." *Pavlova v. Mint Mgmt. Corp*., 375 N.J. Super. 397, 403 (App. Div. 2005). To recover punitive damages under the PDA, a plaintiff must prove "by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." N.J. STAT. ANN. § 2A:15-5.12(a) (2017). "Actual malice" is "intentional wrongdoing in the sense of an evil-minded act." N.J. STAT. ANN. § 2A:15-5.10 (2017). "Wanton and willful disregard" is "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission." *Id.* Mere negligence, however gross, is insufficient. N.J. STAT. ANN. § 2A:15-5.12(a) (2017).

B) **Pleadings requirement.** Punitive damages must be expressly requested in a party's pleadings. N.J. STAT. ANN. § 2A:15-5.11 (2017). Further, they are only available after the trier of fact awards compensatory damages, as opposed to nominal damages. N.J. STAT. ANN. § 2A:15-5.13(c) (2017). A punitive damages award must be specific as to each defendant in a multi-defendant proceeding. N.J. STAT. ANN. § 2A:15-5.13(e) (2017).

C) **Standard.** An award of punitive damages under the PDA involves a two-step inquiry. First, the trier of fact must determine whether to award punitive damages. The PDA requires the trier of fact to consider all relevant evidence, including the likelihood of serious harm, defendant's awareness of that likelihood, defendant's conduct upon learning that its initial conduct is likely to cause harm, and any efforts towards concealment. N.J. STAT. ANN. § 2A:15-5.12(b) (2017). Second, upon determining that punitive damages are warranted, the trier of fact must determine the amount of such damages. The PDA requires the trier of fact to consider all relevant evidence, including the aforementioned factors, the profitability of the misconduct to defendant, the duration of the misconduct, and defendant's financial condition. N.J. STAT. ANN. § 2A:15-5.12(c) (2017); *see also Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.*, 390 N.J. Super. 557, 569-70 (App. Div. 2007) ("[W]hile general deterrence remains inherent in the nature of exemplary damages, the Act does not permit counsel to urge the jury to increase a punitive damage award in order to enhance the general deterrence of others.").

D) **Caps.** The PDA caps punitive damages awards to five times compensatory damages or $350,000.00, whichever is greater. N.J. STAT. ANN. § 2A:15-5.14(b) (2017); *Johnson v. Mountainside Hosp.*, 239 N.J. Super. 312, 322 (App. Div. 1990) (holding that constitutionality "is now well settled"). The cap on punitive damages, however, does not apply to causes of action brought by or on behalf of bias crime victims under N.J. STAT. ANN. §§ 2A:53A-21 to -24 (2017); Law Against Discrimination actions under N.J. STAT. ANN. §§ 10:5-1 to -49 (2017); AIDS actions under N.J. STAT. ANN. §§ 26:5C-5 to -14

(2017); actions brought by victims of sexual abuse under N.J. STAT. ANN. § 2A:61B-1 (2017); Conscientious Employee Protection Act actions under N.J. STAT. ANN. §§ 34:19-1 to -14 (2017); or in cases where a defendant has been convicted of murder, N.J. STAT. ANN. § 2C:11-3 (2017), manslaughter, N.J. STAT. ANN. § 2C:11-4 (2017), driving while intoxicated, N.J. STAT. ANN. § 39:4-50 (2017), refusal to commit to a chemical test, N.J. STAT. ANN. § 39:4-50.4a (2017), or the equivalent laws of another jurisdiction, *see* N.J. STAT. ANN. § 2A:15-5.14(c) (2017).

E) **Excessiveness.** Punitive damages are subject to the strictures of Due Process under the Fourteenth Amendment. In determining whether an award is so excessive that it violates this protection, the court must consider: (1) "the degree of reprehensibility" of defendant's conduct; (2) the disparity between the harm (actual or potential) suffered by plaintiff and the punitive damages award; and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). The Supreme Court has refused to adopt a bright-line, mathematical ratio to govern this inquiry, but has suggested that punitive damages awards more than four times compensatory damages may be excessive. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (disputing constitutionality of damage awards in excess of single-digit ratios); *Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

F) **Judge's discretion.** The PDA also requires the trial judge, prior to entering judgment on a punitive damages award, to determine that the award is "reasonable in its amount and justified in the circumstances of the case, in light of the purpose to punish the defendant and to deter that defendant from repeating such conduct." N.J. STAT. ANN. § 2A:15-5.14(a) (2017). The trial judge is empowered to reduce or expunge an award therewith. *Id.* In making this determination, the trial judge will consider the PDA's statutory factors and the *BMW* factors. *Baker v. Nat'l State Bank*, 161 N.J. 220, 231 (1999). Further, "the court's responsibility to review awards of punitive damages for reasonableness is heightened when such damages are awarded against a public entity." *Lockley v. N.J. Dep't of Corr.*, 177 N.J. 413, 433 (2003).

Recovery of Pre- and Post-Judgment Interest

A) **Post-judgment interest**. N.J. Ct. R. 4:42-11(a) permits recovery of post-judgment interest on a money judgment obtained in any cause of action except where otherwise provided by law or ordered by the court. *See Brown v. Davkee Inc.*, 324 N.J. Super. 145, 147-48 (App. Div. 1999). The Rule generally provides simple interest on unpaid money judgments according to the preceding fiscal year's average rate of return on the State Cash Management Fund. This rate is subject to a 2% point enhancement for judgments recovered in excess of a specified monetary limit. Interest for periods covered by different rates must be calculated separately to arrive at the required post-judgment interest. Post-judgment interest accrues from the entry of final judgment and does not require disposal of all appeals. *Baker v. Nat'l State Bank*, 353 N.J. Super. 145, 173-74 (App. Div. 2002); *see also Reliable Water Co. v. Monroe Twp. Mun. Util. Auth*., 146 N.J. Super. 291, 294 (App. Div. 2001) (holding that post-judgment interest on arbitration

award accrues from date of award). In exceptional circumstances, the court may permit post-judgment interest at a contract rate or excuse it altogether. *See, e.g.*, *R. Jennings Mfg. v. N. Elec.*, 286 N.J. Super. 413, 417-18 (App. Div. 1995); *Mehta v. Johns-Manville Products Corp.*, 163 N.J. Super. 1, 6 (App. Div. 1978) (denying plaintiff post-judgment interest where post-settlement delay was not attributable to defendant). Post-judgment interest is governed by alternate regimes in cases involving abatement of tax liability, N.J. STAT. ANN. § 54:3-27.2 (2017), and PIP awards, N.J. STAT. ANN. § 39:6A-5 (2017).

B) **Prejudgment interest.** Pre-judgment interest is mandatory in all tort actions. N.J. CT. R. 4:42-11(b); *see also Heim v. Wolpaw*, 271 N.J. Super. 538, 542 (App. Div. 1994) (explaining that the rule compensates plaintiffs for not having judgment money while their action is pending, recovers defendant's use of funds during that time, and encourages defendants to settle). Pre-judgment interest is calculated in the same manner as for post-judgment interest, except for periods prior to 1988. Pre-judgment interest will be denied "where provided by statute with respect to a public entity or employee," N.J. CT. R. 4:42-11(b) (2017), or in certain exceptional circumstances, *see, e.g.*, N.J. STAT. ANN. § 2A:48-1 (2017) (recovery against municipality under Riot Act); N.J. STAT. ANN. § 59:9-2(a) (2017) (recovery under N.J. Tort Claims Act); *Pasha v. Rosemount Mem'l Park*, 344 N.J. Super. 350, 361 (App. Div. 2001) (unwarranted delay by plaintiff); *Heim*, 271 N.J. Super. at 543-44 (judgment-proof debtor). Pre-judgment interest accrues from the date the cause of action arises and not the date of the tort. Where there are multiple parties, pre-judgment interest is calculated for each according to the date they were joined in the action. *Waldron v. Johnson*, 368 N.J. Super. 348, 355 (App. Div. 2004) (citing *Young v. Latta*, 233 N.J. Super. 520, 526 (App. Div. 1989), *aff'd*, 123 N.J. 584 (1991)). Pre-judgment interest is subject to the "offer of judgment" rule, N.J. CT. R. 4:58-1 to -5 (2017).

1) **Discretion.** Pre-judgment is awarded on a discretionary basis in contract actions according to equitable principles. *DialAmerica Mktg., Inc. v. KeySpan Energy Corp.*, 374 N.J. Super. 502, 508 (App. Div. 2005). An otherwise valid exercise of discretion will not be overturned absent a "manifest denial of justice." *P.F.I., Inc. v. Kulis*, 363 N.J. Super. 292, 301 (App. Div. 2003). Generally, the pre-judgment interest rate in contract actions will reflect the standard for post-judgment interest in N.J. CT. R. 4:42-11(a). *See Benevenga v. Digregorio*, 325 N.J. Super. 27, 34 (App. Div. 1999); *cf. Musto v. Vidas*, 333 N.J. Super. 52, 72-73 (App. Div. 2000) (applying compounded prime rate in minority stockholder case under N.J. STAT. ANN. § 14A:12-7(8)(d)). Equitable principles will not be applied, however, where parties contractually obligate themselves to pay pre-judgment interest. *See, e.g.*, *Van Note-Harvey v. East Hanover*, 175 N.J. 535, 541-42 (2003); *Kramer v. Ciba-Geigy*, 371 N.J. Super. 580, 608-09 (App. Div. 2004); *Utica Mut. Ins. Co. v. DiDonato*, 187 N.J. Super. 30, 43-44 (App. Div. 1982) (precluding pre-judgment interest where contract included liquidated damages provision).

Recovery of Attorneys' Fees

A) In New Jersey, each party is responsible for their own attorneys' fees unless the matter comes within one of eight specified fee-shifting exceptions. N.J. CT. R. 4:42-9(a); *see also NJDPM v. N.J. Dept. of Corrections*, 185 N.J. 137, 152 (2005). These exceptions permit recovery of attorneys' fees in family actions, where there is a "fund in court," probate actions, mortgage foreclosure and tax sale certificate foreclosure actions, and actions arising out of liability or indemnity policies. N.J. CT. R. 4:42-9(a)(1)-(6). Attorneys' fees are also recoverable where explicitly authorized by Court Rule. N.J. CT. R. 4:42-9(a)(7); *see, e.g.*, N.J. CT. R. 1:4-8 (2017) (frivolous actions); N.J. CT. R. 4:14-8 (failure to attend deposition or serve deposition subpoena); N.J. CT. R. 4:23-1 to -5 (discovery sanctions); N.J. CT. R. 4:37-1(b) (voluntary dismissal); N.J. CT. R. 4:86-4(e) (attorney for alleged incompetent); N.J. CT. R. 5:5-5 (early settlement program). Attorneys' fees are also recoverable where explicitly authorized by statute. N.J. CT. R. 4:42-9(a)(8); *see, e.g.*, N.J. STAT. ANN. § 2C:41-6(c) (2017) (RICO Act); N.J. STAT. ANN. § 10:5-27.1 (2017) (Law Against Discrimination); N.J. STAT. ANN. § 20:3-26 (2017) (eminent domain); N.J. STAT. ANN. § 34:11B-12 (2017) (Family Leave Act); N.J. STAT. ANN. § 2A:15-59.1 (2017) (frivolous claims); N.J. STAT. ANN. §§ 34:19-5 to -6 (2017) (Conscientious Employee Protection Act); N.J. STAT. ANN. § 56:8-19 (2017) (Consumer Fraud Act); *see also Garcia v. L&R Realty, Inc.*, 347 N.J. Super. 481, 492-93 (App. Div. 2002) (awarding attorneys' fees where plaintiff sued under fee-shifting statute of Massachusetts consumer fraud law).

B) **As a part of damages.** N.J. CT. R. 4:42-9(a) does not preclude recovery of attorneys' fees as an element of damages. *See, e.g.*, *Saffer v. Willoughby*, 143 N.J. 256, 269-72 (1996) (permitting recovery of attorneys' fees in former client's legal malpractice action as consequential damages proximately related to malpractice). The rule also does not preclude attorneys' fees recoverable by stipulation in a promissory note, power of attorney, or other agreement or contract. Such agreements, however, will be strictly construed in light of New Jersey's policy disfavoring recovery of attorneys' fees. *McGuire v. City of Jersey City*, 125 N.J. 310, 326 (1991).

C) **Procedural requirements.** In order to recover attorneys' fees, a party must submit an affidavit of service and a statement of fees received. N.J. CT. R. 4:42-9(b)-(c). The affidavit of service must address the eight reasonableness factors enumerated in N.J. R.P.C. 1.5(a), which includes considerations of the time and labor required to provide the legal services, the customary fee for similar services, the relevant time limitations, and the nature and reputation of the attorney(s) providing the services. Although the affidavit is a prerequisite to any award, a technically defective affidavit will not preclude recovery of attorneys' fees. *Elizabeth Bd. of Educ. v. NJT*, 342 N.J. Super. 262, 273 (App. Div. 2001). The Court may order a plenary hearing in the rare case that a genuine factual dispute exists as to the necessity of services provided or the reasonableness of fees. *See id.* at 271-72; *see also Scott v. Salerno*, 297 N.J. Super. 437, 452 (App. Div. 1997).

D) **Standard for appeals.** Attorneys' "fee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." *Rendine v. Pantzer*, 141 N.J. 292, 317 (1995). Remuneration for appellate services is within the jurisdiction of the appellate court pursuant to N.J. CT. R. 2:11-4(a).

Settlements Involving Minors

A) The court reviews settlements involving minors and mentally incapacitated persons for fairness and reasonableness as to its amount and terms pursuant to N.J. CT. R. 4:44-3. In the case of a structured settlement involving deferral of proceeds, the court will assess the certainty that all future payments will be made in accordance with the terms of the settlement. The court must either approve or disapprove the settlement; it cannot unilaterally vary the terms of the agreement, even if it is in the best interests of the child. *Impink ex rel. Bald iv. Reynes*, 396 N.J. Super. 553, 562-64 (App. Div. 2007).

B) **Not bound by parents' settlement.** Absent judicial approval pursuant to N.J. CT. R. 4:44-3, a minor is not bound by a parents' settlement. *Hojnowski v. Vans Skate Park*, 375 N.J. Super. 568, 583 (App. Div. 2005) ("[W]ithout statutory authority or judicial authorization, a parent has no ability to release a claim properly belonging to a child."); *Moscatello ex rel. Moscatello v. UMDNJ*, 342 N.J. Super. 351, 360-61 (App. Div. 2001).

C) **Judgment.** Upon approving a settlement, the court will enter a judgment pursuant to N.J. CT. R. 4:48A, which requires disposition of proceeds pursuant to N.J. STAT. ANN. §§ 3B:15-16, -17 unless the court orders otherwise or the judgment is in favor of a minor in an amount not exceeding $5,000.

Taxation of Costs

A) A prevailing party is entitled to taxed costs "as of course" in any civil action unless otherwise provided by statute, court rule, or court order. N.J. CT. R. 4:42-8(a). A party so entitled must file with the clerk of the court an affidavit reciting that such costs "have been necessarily incurred and are reasonable in amount, and if incurred for the attendance of witnesses, shall state the number of days of actual attendance and the distance traveled, if mileage is charged." N.J. CT. R. 4:42-8(c). Recovered costs are taxed according to law. N.J. STAT. ANN. § 2A:15-59 (2017); *see also* N.J. STAT. ANN. §§ 2A:15-64 to -66 (2017) (enumerating rules governing taxation by clerk of the court or other taxing officer).

B) **Denial of costs.** Under N.J. CT. R. 4:42-8(c), a prevailing party may be denied an award of costs only for "special reasons." *Schaefer v. Allstate N.J. Ins. Co.*, 376 N.J. Super. 475, 487 (App. Div. 2005) (citation omitted); *Accord TWC Realty P'ship v. Zoning Bd. of Adjustment of Edison*, 321 N.J. Super. 216, 217 n.1 (App. Div. 1999) (noting that denial of costs requires greater justification than for denial of interest); *see also* N.J. CT. R. 4:42-8(b) (restraining costs against defaulting defendant in replevin and quiet title actions).

C) **Against prevailing party.** Costs are generally not allowed against a prevailing party unless provided by statute. *See, e.g., Adoption of a Child by H.C.*, 284 N.J. Super. 202, 207 (Ch. Div. 1994) (assessing costs against prevailing plaintiff in adoption proceeding pursuant to N.J. STAT. ANN. § 9:3-53).

D) **Allowable costs.** Because of the restrictions imposed by N.J. CT. R. 4:42-8(c), "[i]n most proceedings, the costs which might be taxed will be relatively incidental." *Greenfeld v. Caesar's Atl. City Hotel/Casino*, 334 N.J. Super. 149, 157 (Law Div. 2000). Examples of allowable costs are enumerated in N.J. STAT. ANN. §§ 22A:2-8, -9 (2017), which includes legal fees of witnesses, filing and docketing fees paid to the clerk of the court, and in certain circumstances, deposition costs. *But see Buccinna v. Micheletti*, 311 N.J. Super. 557, 564-65 (App. Div. 1998) (experts' fees and deposition costs are generally not taxed costs).

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.