STATE OF PENNSYLVANIA COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-suit Notice Requirements/Prerequisites to Suit

A) **Professional Liability**: The pre-suit notice requirement for professional liability actions is governed by PA. R. CIV. P. 1042.3. A plaintiff alleging a cause of action based upon professional liability must file a certificate of merit with the complaint or within sixty (60) days after filing the complaint. The certificate of merit must state one of the following: (a) that an appropriate licensed professional has supplied a written statement that there is a reasonable probability that the care received did not meet the acceptable professional standard of care, or (b) that the claim against the defendant is based solely on allegations that other licensed professionals working under, or for whom the defendant is responsible, deviated from the acceptable standard of care, or finally (c) that expert testimony is not required to prosecute the claim.

B) **Actions against Government Agencies**: The pre-suit notice requirement for claims against the government is governed by 42 PA. CONS. STAT. § 5522. Any person who is about to commence an action against a government unit for injury to person or property must within six (6) months from the date that any injury was sustained or any cause of action occurred file a notice with the office of the government unit, or, if the claim is against the Commonwealth, then with the Attorney General.

Relationship to the FED R. CIV. P.

A) Pennsylvania governs its civil courts with the Pennsylvania Rules of Civil Procedure. The Pennsylvania rules are structured very differently from the Federal Rules of Civil Procedure.

B) While the FED R. CIV. P. requires only notice pleading, Pennsylvania is a fact-pleading jurisdiction. *See* PA. R. CIV. P. 1019. The complaint must not only give notice to the defendant of the allegations against him, but also must formulate the issues by summarizing the facts essential to the claim. *Zitney v. Appalacian Timber Prod.*, 72 A.3d 281 (Pa. Super. 2013); *Alpha Tau Omega Fraternity v. Univ. of Pa.*, 464 A.2d 1349, 1352 (Pa. Super. 1983). An opposing party may not generally deny allegations, but must set forth facts to support the denial. *See* PA. R. CIV. P. 1019(c).

Description of the Organization of the State Court System

A) Pennsylvania's unified judicial system features four-levels of courts. These four levels, from highest authority to lowest, consist of: the Supreme Court, the Superior and the Commonwealth Courts, the courts of Common Pleas, and the Special Courts (comprised of Magisterial District Judges, Traffic Courts and Municipal Courts). *See* 204 PA. CODE § 201.2.

B) **The Supreme Court** is the highest court in the Commonwealth. The Court has original, but not exclusive jurisdiction over cases of habeas corpus, Mandamus and Quo Warranto. In limited cases, the Supreme Court has direct appellate jurisdiction over final orders of the courts of Common Pleas. Otherwise, appeals are discretionary and must be sought by petition. The most significant portion of the Supreme Court's jurisdiction, however, is dedicated to appeals from final orders of the Superior and Commonwealth Courts. Additionally, the Supreme Court may assume plenary jurisdiction over any matter involving an issue of public importance pending before any Pennsylvania court at any stage of the litigation.

C) Pennsylvania has two mid-level appellate courts, the Commonwealth Court and the Superior Court. The two courts have jurisdiction over different types of appellate and original matters:

1) **The Superior Court** is primarily the appellate court of first and last resort for nearly all private civil and criminal cases. The Superior Court's appellate jurisdiction includes all appellate matters not within the exclusive jurisdiction of the Commonwealth Court or the Supreme Court. It has original jurisdiction only over matters of mandamus and prohibition to courts of lower jurisdiction that are ancillary to matters within its appellate jurisdiction.

2) **The Commonwealth Court** serves as both a trial court and an appellate court for most civil matters involving the Commonwealth of Pennsylvania. The Commonwealth Court has original jurisdiction over all claims brought against the Commonwealth, except: applications for a writ of habeas corpus or post-conviction relief not ancillary to proceedings within the appellate jurisdiction of the court; eminent domain proceedings; actions or proceedings relating to matters affecting government units; actions or proceedings conducted pursuant to the Board of Claims Act regarding contracts with the Commonwealth; actions or proceedings in the nature of trespass as to which the Commonwealth government formerly enjoyed sovereign or other immunity and actions or proceedings in the nature of assumpsit relating to such actions or proceedings in the nature of trespass. 42 PA. CONS. STAT. § 761(a)(1). Additionally, the Commonwealth Court has exclusive original jurisdiction over all claims brought *by* the Commonwealth, except eminent domain proceedings. 42 PA. CONS. STAT. § 761(a)(2). Except with respect to actions brought by the Commonwealth or its officers, and actions over which the Supreme Court has original Jurisdiction, the Commonwealth Court's original jurisdiction is exclusive. The Commonwealth Court has appellate jurisdiction over certain appeals by or against the Commonwealth and appeals from matters where original jurisdiction was vested in another tribunal pursuant to the exclusions, set forth above, to the Commonwealth Court's original jurisdiction.

D) **The Courts of Common Pleas** are courts of general trial jurisdiction. They enjoy unlimited original jurisdiction unless exclusive jurisdiction is granted to another

Pennsylvania Court. In addition, the Courts of Common Pleas have appellate jurisdiction over the orders of certain government agencies and the lower courts in their district, including traffic courts, municipal courts and magisterial district judges. Most courts of Common Pleas have their own local rules which can be accessed online at: http://www.pacourts.us/courts/supreme-court/committees/rules-committees/local-rules-for-common-pleas-and-magisterial-district-courts/.

E) Pennsylvania's Magisterial District Judges have jurisdiction over all traffic cases, minor criminal cases and civil cases with amounts in controversy of less than $12,000. *See* 42 PA. CONS. STAT. § 1515(a)(3).

F) **The Philadelphia Municipal Court** is a court of limited jurisdiction. The Court has original jurisdiction over the processing of all adults arrested in Philadelphia and is responsible for all criminal trials with a maximum prison sentence of five years. With regard to civil cases, the Philadelphia Municipal Court has jurisdiction over small claims cases in which the amount in controversy is less than $12,000, landlord-tenant cases of unlimited amounts, and real estate and school tax disputes in which the amount in controversy is less than $15,000. Since there is no right to trial by jury in the Philadelphia Municipal court, the Court of Common Pleas has jurisdiction over appeals for a trial de novo. *See* 42 PA. CONS. STAT. § 1123.

G) **The Philadelphia Traffic Court** is a court of limited jurisdiction that adjudicates moving citations issued by the Philadelphia Police Department and other law enforcement agencies.

H) **The Pittsburgh Municipal Court** is comprised of the Housing Division, the Traffic Division and the Criminal Division. Within the court's jurisdiction are non-traffic related summary offenses occurring in Pittsburgh, traffic violations (excluding parking tickets and other citations issued by the Pittsburgh Parking Authority) occurring in Pittsburgh, violations of Pittsburgh ordinances that were not adopted or enacted by 53 PA. CONS. STAT. § 5504 *et seq.* (dealing with the Parking Authority), preliminary hearings on all felony and misdemeanor cases occurring in Pittsburgh and preliminary hearings on homicide cases within Allegheny County. *See* 42 PA. CONS. STAT. § 1143.

I) Supreme Court justices, Superior Court judges, Commonwealth Court Judges and Common Pleas Court judges are initially elected by way of partisan election for a ten (10) year term. After serving for ten (10) years, the judges seek re-election by a retention vote; a "yes/no" vote with no ballot reference to the candidate's political affiliation. Judges and justices may serve an unlimited amount of terms, and retention is subject to the retirement mandates of the Pennsylvania Constitution, which requires retirement on the last day of the calendar year in which they attain the age of 70 years. *See* CONST. ART. 5, §§ 13, 15, 16.

J) District Magistrates, Traffic Court judges and Municipal judges are elected to six (6) year terms by a partisan election. Special Court judges are re-elected by way of partisan election after their initial term. *See* CONST. ART. 5, §§ 13, 15.

K) Compulsory Arbitration in Pennsylvania is governed by 42 PA. CONS. STAT. Ann. § 7361. This statute sets the framework for mandatory arbitration in the court system, but the local courts of Common Pleas adopt their own specific rules. Mandatory arbitration limits vary by county and usually run from $25,000 to $50,000. A party can challenge an arbitration award by filing for a trial de novo to the Court of Common Pleas. A party that failed to appear at an arbitration hearing cannot be denied a trial de novo appeal of the arbitration award. *Pantoja v. Sprott*, 721 A.2d 382, 385 (Pa. Super. 1998).

L) Disputes or impasses between public employers and public employees must be submitted to mediation if no agreement is reached within 21 days after negotiations have commenced, and the parties have not previously utilized mediation. 43 P.S. § 1101.801.

Service of Summons

A) **Service of Process upon an individual located within the Commonwealth** is governed by PA. R. CIV. P. 402. Process may be served on an individual by handing a copy to the individual, or at the individual's residence to an adult member of the family of the individual or to an adult in charge of the residence. A sheriff must serve process in all counties but Philadelphia County. *See* PA. R. CIV. P. 400.1. If the individual is residing in a hotel, inn or apartment, process may be served by handing a copy to a clerk or manager at the place of residency. Process may also be served by handing a copy to an agent of the individual at any office or usual place of business of the individual. When authorized by a rule of civil procedure, process may be served by mail requiring a signed return receipt by the individual or his agent. PA. R. CIV. P. 403.

B) **Service of process outside of Pennsylvania** is governed by PA. R. CIV. P. 404. Process may be served by a competent adult handing a copy to the defendant, handing a copy to an adult member of the defendant's family at the place where he resides, or if the defendant is residing in a hotel or inn, by handing a copy to the clerk or manager. Service may also be made by certified mail, return receipt requested. Rule 404 additionally allows service to be made in any way that complies with the rules of the jurisdiction in which service is being made, or in a manner provided by treaty, or as directed by the foreign authority in a response to a letter rogatory or request.

C) **Service of process upon partnerships and unincorporated associations** may be made upon any partner, officer or registered agent of the entity. If the entity has authorized an agent in writing to receive process, process may be served upon that agent. Process may also be served upon the manager, clerk or other person in charge of any regular place of business of the entity. *See* PA. R. CIV. P. 423.

D) **Service of process upon corporations** may be made upon an executive officer, partner or trustee of the entity. Service may also be made upon an authorized agent or the manager, clerk or person in charge of any place of business of the entity. *See* PA. R. CIV. P. 423.

E) An action may be commenced by filing either a complaint or a writ of summons. PA. R. CIV. P. 1007. The filing of a writ of summons is sufficient to toll the applicable statute of limitations, but the writ must be served within thirty (30) days of its filing. A writ of summons may be reissued any number of times after it is filed within a time period equal to the applicable statute of limitations, running from the date of filing. *See* PA. R. CIV. P. 401.

Statutes of Limitations

A) The statute of limitations for contracts, whether oral or written, is governed by 42 PA. CONS. STAT. § 5525. Actions and proceedings arising from written, oral and implied-in-law contracts must be filed within four (4) years.

B) The statute of limitations for a survival claim and wrongful death is two (2) years from the time that the cause of action accrued. 42 PA. CONS. STAT. § 5524(2). The cause of action for a survival claim accrues on the date of the injury or on the date of the discovery of the injury. *Moyer v. Rubright*, 651 A.2d 1139, 1142 (Pa. Super. 1994). In a survival action, the statute of limitations can never begin to run after the decedent's death. *Id.* Therefore, the latest possible date of accrual is the date of death.

C) The statute of limitations for a wrongful death claim is two (2) years. 42 PA. CONS. STAT. § 5524(2). The cause of action accrues on the date of death. *Moyer*, 651 A.2d at 1142. There is generally no application of the "discovery of the injury" rule in a wrongful death action. *Id.* A wrongful death action for the death of a person caused by exposure to asbestos must be filed within two years from the time that the person is informed by a licensed physician that he or she has been injured by exposure to asbestos or within two (2) years of the date that the person knew or should have known that he or she has been injured due to exposure to asbestos, whichever is earlier. 42 PA. CONS. STAT. § 5524.1. In such a case, the statute of limitations for a wrongful death claim may begin to run prior to the decedent's death.

D) An action against any officer of the government for anything done in the execution of his office must be commenced within six (6) months of the time that the cause of action accrued. 42 PA. CONS. STAT. § 5522(b).

E) Actions founded on fraud or deceit must be commenced within two (2) years. 42 PA. CONS. STAT. § 5524(7).

F) Medical malpractice actions must be commenced within two (2) years of the injury or death. The "discovery rule" governs when this two (2) year limitation period begins to run, which is when the Plaintiff discovers the wrongdoing. 42 PA. CONS. STAT. § 5524(2).

G) Legal malpractice actions must be commenced within two (2) years of the wrongdoing. 42 PA. CONS. STAT. § 5542(7). Pennsylvania uses the "occurrence rule" to govern statute of limitation issues in a legal malpractice action. Under this rule, the statutory period begins upon the happening of the alleged breach of

duty. *Bailey v. Tucker*, 621 A.2d 108, 115 (1993). There is an exception to the occurrence rule, which is referred to as the "equitable discovery rule." This will be applied when the injured party is unable, despite the exercise of due diligence, to know of the injury or its cause. *Pocono Raceway v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (1983). As such, the statute of limitations in a legal malpractice claim begins to run when the attorney breaches his or her duty, and is tolled only when the client, despite the exercise of due diligence, cannot discover the injury or its cause. *Robbins & Seventhko Orthopedic Surgeons, Inc. v. Geisenberger*, 674 A.2d 244 (Pa. Super. 1996).

H) The statute of limitations for personal injury claims is governed by 42 PA. CONS. STAT. § 5524. A personal injury action must be commenced within two (2) years.

I) Actions brought for dismissal or failure to hire based upon race or color must be filed first with the Pennsylvania Human Rights Commission within 180 days of the alleged discrimination. Any subsequent court action is governed by 42 PA. CONS. STAT. § 5524 and must be filed within two (2) years of the Commission's final determination on the claim.

J) An original defendant who wishes to join an additional defendant on the basis of sole liability must do so within the statute of limitations applicable to the plaintiff's underlying claim. A defendant seeking contribution or indemnity generally must join the additional defendant within sixty (60) days of the plaintiff's original pleading or any amendment thereof. PA. R. CIV. P. 2253.

K) If a cause of action arises when the plaintiff is a minor, the applicable statute of limitations does not begin to run until the plaintiff reaches the age of eighteen. In the case of sexual abuse against a minor, the plaintiff must commence an action within twelve (12) years of attaining the age of majority (18). 42 PA. CONS. STAT. § 5533.

Statute of Repose

A) Civil actions brought against any person lawfully performing, designing, planning or supervising a construction project must be commenced within twelve (12) years after the completion of the project. 42 PA. CONS. STAT. § 5536. When the action arises from an injury or wrongful death that occurred more than ten (10) years but within twelve (12) years after the completion of the project, the action must be commenced within fourteen (14) years of the completion of the project.

    1) Claims for contribution or indemnification for damages resulting from injury to property, persons or wrongful death in a construction action must be commenced within twelve (12) years after the completion of the project, or fourteen (14) years if the injury occurred between ten (10) and twelve (12) years after completion of the project.

B) Actions against landscape architects are governed by 42 PA. CONS. STAT. § 5538. Actions must be commenced within twelve (12) years of substantial completion of the project. However, the 12-year limitation may not be asserted as defense in

an action against a person in possession or control of a landscape improvement for a claim arising from an injury or wrongful death.

C) The repose period for Worker's Compensation is governed by 77 P.S. § 602. Claims for Worker's Compensation will be barred after two (2) years from the date of the injury unless the parties have agreed upon the amount of compensation payable or one of the parties has filed a petition.

Venue Rules

A) Generally, an action must be brought in the county where the defendant may be served or where the cause of action arose. When the action involves multiple defendants, it may be brought in any county where venue is appropriate against one of the defendants. PA. R. CIV. P. 1006. Special rules exist with respect to the following types of actions:

1) In an action involving property or part of property, the action must be brought in the county where the property is situated. *See* PA. R. CIV. P. 1006(a)(2).

2) In the case of a medical professional liability action against a health care provider the action can only be brought in the county where the cause of action arose. *See* PA. R. CIV. P. 1006(a.1).

3) An action brought by the Commonwealth in a court of common pleas may be brought in any county permitted by rule of the Supreme Court. PA. R. CIV. P. 2103.

4) An action brought against a political subdivision must be brought in county in which the subdivision is located. PA. R. CIV. P. 2103.

5) An action against a partnership or association may be brought in the county where the partnership or association regularly conducts business, or where the cause of action or transaction or occurrence giving rise to the cause of actions occurred, or in the county where the property at issue in the case is situated. PA. R. CIV. P. 2130, 2156.

6) An action against a corporation must be brought in the county where the corporation is registered, where it regularly conducts business, where the cause of action or transaction or occurrence giving rise to the cause of action arose, or where property at issue in the case is situated. PA. R. CIV. P. 2179.

B) Improper venue must be raised by preliminary objection or it is deemed to be waived. Upon a finding of improper venue, the court will transfer the case to the appropriate county. The costs of the transfer are paid by the plaintiff. *See* PA. R. CIV. P. 1006(e), 1028(a)(1).

C) The *forum non conveniens* doctrine allows a court to refuse to exercise jurisdiction when it would be inappropriate to do so in that forum and there is another forum available for the plaintiff. Two overriding considerations in determining whether transfer to another forum is appropriate fall in favor of the plaintiff; they are:

1) Strong deference to the plaintiff's initial choice of forum; and

2) the availability of an alternative forum for the plaintiff to pursue his claim.

Other factors considered are the interests of the parties involved in the matter and the interests of the public (including administrative difficulties, access to evidence, costs of obtaining attendance of witnesses, etc.). *See Plum v. Tampax*, 160 A.2d 549 (Pa. 1960).

NEGLIGENCE

Comparative Fault/Contributory Negligence

A) Contributory negligence is conduct on the part of a plaintiff that falls below the standard of care to which he should conform for his own protection and that is a legally contributing cause in bringing about the plaintiff's harm. *See Angelo v. Diamontoni*, 871 A.2d 1276, 1280 (Pa. Super. 2005) (internal citations omitted).

B) The Pennsylvania Comparative Negligence Act permits a plaintiff to recover when the plaintiff's own negligence is not greater than the causal negligence of the defendant. When the percentage of negligence attributable to the plaintiff is 50% or less, the amount recovered is calculated by reducing the total damages, as determined by the finder of fact, in proportion to the negligence of the plaintiff. *See* 42 PA. CONS. STAT. ANN. § 7102(a) (West 2011); *see also Rekun v. Pelaez*, 976 A.2d 578, 580 (Pa. Super. 2009).

C) Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution. *See* 42 PA. CONS. STAT. ANN. § 7102(a.1)(1), (4) (West 2011).

D) Under Pennsylvania law, contribution may only take place among parties that are properly in the case. *See Morris v. Lenihan*, 192 F.R.D. 484, 490 (E.D. Pa. 2000).

E) Passage of the Pennsylvania Comparative Negligence Act subsumed the doctrine of contributory negligence within the doctrine of comparative negligence, but it did not abolish the doctrine of assumption of the risk or the doctrine of reckless, wanton, and willful misconduct. *See* 42 PA. CONS. STAT. ANN. § 7102(a) (West

2011); *see also Vargus v. Pitman Mfg. Co.*, 510 F. Supp. 116, 118-19 (E.D. Pa. 1981), *aff'd*, 673 F.2d 1304 (3d. Cir. 1981), *rehearing denied*, 675 F.2d 73 (3d. Cir. 1982).

F) The Pennsylvania Comparative Negligence Act should not be applied to compare the relative fault between a defendant sued in strict liability and a third-party defendant sued in negligence. *See* 42 PA. CONS. STAT. ANN. §§ 7102(a), 8322 (West 2011); *see also Bike v. Am. Motors Corp.*, 101 F.R.D. 77, 83 (E.D. Pa. 1984).

G) When willful or wanton misconduct is involved, comparative negligence should not be applied. *See Krivijanski v. Union R.R. Co.*, 515 A.2d 933, 936 (Pa. Super. 1986).

H) Under the Comparative Negligence Act, claims for loss of consortium fail if the negligence of the injured spouse exceeds the negligence of the defendant or all of the defendants. But if the injured spouse's negligence does not exceed that of the defendant or defendants, then the claim for loss of consortium should be reduced by the percentage of negligence attributable to the injured spouse. *See Scattaregia v. Shin Shen Wu*, 495 A.2d 552, 554 (Pa. Super. 1985).

I) The "last clear chance doctrine" has never been adopted in Pennsylvania, as it serves no useful purpose in view of the enactment of the Comparative Negligence Act. *See Spearing v. Starcher*, 532 A.2d 36, 37-38 (Pa. Super. 1987).

Exclusive Remedy - Worker's Compensation Protections

A) Workers' compensation in Pennsylvania is legislated under the Pennsylvania Workers' Compensation Act and the Occupational Disease Act. 77 P.S. § 1, *et seq.*, 77 P.S. § 1201, *et. seq.*; *See McMullen v. WCAB (C & D Techs., Inc.)*, 858 A.2d 147, 150 (Pa. Commw. Ct. 2004).

B) The Workers' Compensation Act is remedial and, as such, is to be liberally construed. *See Hannaberry HVAC v. WCAB (Snyder, Jr.)*, 834 A.2d 524, 528 (Pa. 2003) (internal citations omitted).

C) In order to establish a right to compensation, the following elements must be present:

1) an employment relationship, during which
2) an injury arises
3) in the course of employment,
4) and is related to the employment.

See 77 P.S. § 411(1).

D) Section 481 expressly provides that the liability of the employer to employees is exclusive under the Act. *See* 77 P.S. § 481; *see also English v. Lehigh Cnty. Auth.*, 428 A.2d 1343, 1347 (Pa. Super. 1981).

E) Where compensability is found by a workers' compensation judge, a tort suit against the employer will be dismissed based on the exclusive remedy provisions of the Act. *See Dunn v. United Ins. Co. of Am.*, 482 A.2d 1055, 1057 (Pa. Super. 1984). This immunity extends to a "statutory employer." *See Ventura v. Skylark Motel, Inc.*, 246 A.2d 353, 354 (Pa. 1968).

F) Immunity from tort liability under the Act is not an affirmative defense. The Act deprives the court of subject matter jurisdiction, and this issue may be raised at any time or by the courts sua sponte. *See LeFlar v. Gulf Creek Indus. Park #2*, 515 A.2d 875, 879 (Pa. 1986).

G) There is also immunity from common law liability for actions of co-employees, except for intentional acts. *See* 77 P.S. § 72.

H) An exception to the general rule of immunity exists when the employer fails to maintain workers' compensation insurance coverage. The employee is then given the option to sue in tort law or pursue a workers' compensation claim. *See* 77 P.S. § 501.

I) Unless an intentional act is committed by a third person or a co-employee, there is no other basis for a theory of intentional wrong to overcome the immunity of the Act. Even a claim of a willful violation of the Occupational and Safety Health Administration (OSHA) regulations by the employer will not overcome the immunity. *See Poyser v. Newman & Co.*, 522 A.2d 548, 551 (Pa. 1987). However, injuries caused by an act of a third person or a co-employee intended to injure the employee because of reasons personal to the third person or co-employee are specifically excluded from the Act. *Id.*

J) The dual capacity doctrine allows for common law liability when the employee is not in the course of employment at the time of injury, but upon the employer's premises. *See Tatrai v. Presbyterian Univ. Hosp.*, 439 A.2d 1162, 1165-66 (Pa. 1982). An employee's presence at the time of the injury must be due to the nature of the employer's business, even if the employee was engaged in a personal mission. *Id.*

K) The workers' compensation carrier is immune from civil liability based upon the employer's immunity unless expressly provided for in a written contract. *See* 77 P.S. §§ 501, 481.

L) The right of action against a third-party tortfeasor under §319 of the Pennsylvania Workers' Compensation Act " . . . remains in the injured employee, and the

employer/insurer's right of subrogation under §319 must be achieved through a single action brought in the name of the injured employee or joined by the injured employee." *Liberty Mut. Ins. Co. v. Domtar Paper Co.*, 113 A.3d 1230, 1240 (Pa. 2015).

Indemnification

A) Indemnity is a common law remedy that shifts the entire loss from one who is compelled by legal obligation to pay a judgment occasioned by the initial negligence of another, despite no active fault on their part, and for which they are only secondarily liable. *See Willet v. Pa. Med. Catastrophe Loss Fund*, 702 A.2d 850, 854 (Pa. 1997); *see also Oblon v. Ludlow-Fourth Corp.*, 595 A.2d 62, 69-70 (Pa. Super. 1991). It is a fault-shifting mechanism, operable only when a defendant who has been liable to a plaintiff solely by operation of law, seeks to recover their loss from a defendant who actually is responsible for the accident that occasioned the loss. *See Sirianni v. Nugent Bros., Inc.*, 506 A.2d 868, 871 (Pa. 1986).

B) The right of indemnification may be based upon an express contract to indemnify. *See Richardson v. John F. Kennedy Mem'l Hosp.*, 838 F. Supp. 979, 989 (E.D. Pa. 1993). In a case in which the language of an indemnity contract is not explicit, the court will look to the circumstances surrounding it and the object of the parties in making it. *See Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc.*, 171 A.2d 185, 189 (Pa. 1961). Such a contract will be construed most strongly against the party who drew it. *Id*.

C) Pennsylvania law permits indemnification, even for the indemnitee's own negligence, as long as the agreement to indemnify is "clear and unequivocal." *See Kiewit E. Co., Inc. v. L & R Constr. Co., Inc.*, 44 F.3d 1194, 1199 (3rd Cir. 1995). There is no presumption that the indemnitor intended to assume responsibility for the indemnitee's own negligence, unless the contract puts it beyond doubt. *See Bush v. Chi. & Nw. Transp. Corp.*, 522 F. Supp. 585, 587 (E.D. Pa. 1981) (quoting *Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc.*, 171 A.2d 185, 188 (Pa. 1961)). Furthermore, the burden of clear expression is even greater when the indemnitee drafts the contract. *Id*.

D) An employer may be joined as an additional defendant in a suit by the injured employee against a third-party in order to enforce the contractual right of indemnification. *See Gallagher v. Transp. Pool, Inc.*, 421 A.2d 1212, 1214 (Pa. Super. 1980).

Joint and Several Liability/Contribution

A) To be subject to joint tortfeasor liability under the Pennsylvania Uniform Contribution Among Joint Tortfeasors Act, parties must act together in committing wrongdoings, or their acts, if independent of each other, must unite in causing a single injury. *See* 42 PA. CONS. STAT. ANN. § 8322 (West 1976) *et seq*.; *see also Allen Organ Co. v. Galanti Organ Builders, Inc.*, 798 F. Supp. 1162, 1171 (E.D. Pa. 1992).

B) The Uniform Contribution Among Tortfeasors Act defines "joint tortfeasors" as two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them. *See* 42 PA. CONS. STAT. ANN. § 8322 (West 1976).

C) Under the Fair Share Act, a joint tortfeasor whose percentage of liability is found to be less than 60% is liable to pay only the portion of damages for which he is found liable. On the opposite token, where a defendant is held liable for 60% or more, that defendant remains liable to pay the full amount of the judgment. *See* 42 PA. CONS. STAT. ANN. § 7102. (West 2011). However there are five major exceptions to this rule, where joint tortfeasors may be held jointly and severally liable to an injured party: (1) when the defendant commits an intentional misrepresentation; (2) when the defendant commits an intentional tort; (3) where the defendant's liability exceeds the sixty percent threshold; (4) when the defendant violates the Hazardous Sites Cleanup Act; and (5) when a defendant has violated the Liquor Code. *See Id.*

D) A governmental entity may be jointly and severally liable with another governmental entity or with other non-governmental defendants. *See DiMino by DiMino v. Borough of Pottstown*, 598 A.2d 357, 361-62 (Pa. Commw. Ct. 1991); *see also U.S. Fid. & Guar. Co. v. Royer Garden Ctr. & Greenhouse, Inc.*, 598 A.2d 583, 588 (Pa. Commw. Ct. 1991), *rev'd on other grounds; Allen v. Mellinger*, 784 A.2d 762, 766 (Pa. 2001).

E) The Uniform Contribution Among Tortfeasors Act is applied to determine the rights to contribution between the strict liability defendants and the negligence defendants as a group, while the Comparative Negligence Act controls the rights of the negligent defendants. *See Capuano v. Echo Bicycle Co.*, 27 Pa. D. & C.3d 524, 532-33 (1982). A negligent tortfeasor and a strictly liable tortfeasor are "joint tortfeasors," subject to contribution, where each had the opportunity to prevent the plaintiff's injuries and each of the tortfeasor's acts combined to produce a single, indivisible harm. *See Rabatin v. Columbus Lines, Inc.*, 790 F.2d 22, 25 (3rd Cir. 1986).

F) Two conditions must exist before the right of contribution arises: (1) the conditions are that one joint tortfeasor has discharged the common liability or paid more than his pro-rata share and (2) the liability of the other joint tortfeasor

to the injured persons has been extinguished by the settlement. *See Nationwide Mut. Ins. Co. v. Phila. Elec. Co.*, 443 F. Supp. 1140, 1143 (E.D. Pa. 1977) (quoting *Swartz v. Sunderlund*, 169 A.2d 289, 291 (1961)). A contribution claim is viable even where the underlying tort claim would be barred by the statute of limitations. *See United States v. Sunoco, Inc.*, 501 F. Supp. 2d 656, 666 (E.D. Pa. 2007). The right to contribution creates a cause of action based upon principles of equity and quasi-contract. *See W. D. Rubright Co. v. Int'l Harvester Co.*, 358 F. Supp. 1388, 1392 (W.D. Pa. 1973).

G) A party can pursue a claim for contribution only if it has established that it was itself liable to the injured party for that party's injury. *Nat'l Specialty Ins. Co. v. Tunkhannock Auto Mart, Inc.*, 2017 U.S. Dist. LEXIS 23160, at * 9 (M.D. Pa. 2017).

H) In a claim for contribution, the original defendant must plead sufficient and material facts to sustain a cause of action against the co-defendant. *See Childers v. Power Line Equip. Rentals, Inc.*, 681 A.2d 201, 213 (Pa. Super 1996) (internal citations omitted). The original defendant cannot rely upon bald assertions when pleading a claim for contribution. *Id.* At trial, a requested jury instruction may be denied if a contribution claim is not properly plead. *Id.*

I) A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but reduces the claim against the other tortfeasors in the amount of consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid. *See* 42 PA. CONS. STAT. ANN. § 8326.

J) Where a plaintiff and settling defendant sign a pro tanto release, the plaintiff's ultimate recovery against the nonsettling joint tortfeasor is the total award of damages reduced by the amount of consideration paid for the release. *Baker v. AC&S, Inc.*, 755 A.2d 664, fn. 1 (Pa. 2000).

K) With a pro rata release, the plaintiff's ultimate recovery against the nonsettling tortfeasors is the total award of damages reduced by the settling party's allocated share of the liability. *Id.*

L) A release by the injured person of one joint tortfeasor does not relieve them from liability to make contribution to another joint tortfeasor, unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued and provides for a reduction to the extent of the pro rata share of the released tortfeasor of the injured person's damages recoverable against all the other tortfeasors. *See* 42 PA. CONS. STAT. ANN. § 8327.

Strict Liability

A) Pennsylvania recognizes strict liability under two theories:

1) abnormally dangerous activities
2) products liability

B) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from that activity, although he or she has exercised the utmost care to prevent the harm. *See Herman v. Welland Chem., Ltd.*, 580 F. Supp. 823, 826 (M.D. Pa. 1984); *see also Albig v. Mun. Auth. of Westmoreland Cnty.*, 502 A.2d 658, 661-63 (Pa. Super. 1985).

C) In determining whether an activity is abnormally dangerous, a flexible standard exists. Factors to be considered include the existence of a high degree of risk of some harm to the person, land or chattels of others, the likelihood that the harm that results from the activity will be great, an inability to eliminate the risk by the exercise of reasonable care, the extent to which the activity is not a matter of common usage, the inappropriateness of the activity to the place where it is carried on, and the extent to which the activity's value to the community is outweighed by its dangerous attributes. *See Albig*, 502 A.2d at 663 (citing RESTATEMENT (SECOND) OF TORTS § 520).

D) In contrast, a plaintiff in a products liability case must prove that the injury-causing product was defective, that the defect existed at the time the product left the control of the defendant in the action, and that such defect was the proximate cause of the plaintiff's injury. *See Carrecter v. Colson Equip. Co.*, 499 A.2d 326, 329 (Pa. Super. 1985). A defect in a product may consist of a mistake in manufacturing, improper design, or the inadequacy or absence of warnings regarding the use of the product. *See* RESTATEMENT (THIRD) OF TORTS: Product Liability § 2 (2010).

E) The manufacturer's duty to warn of dangers involved in the use of prescription drugs is generally satisfied by warning physicians, rather than the ultimate user, because a purchaser's doctor acts as a learned intermediary between the purchaser and the manufacturer. *See Coyle by Coyle v. Richardson-Merrell, Inc.*, 584 A.2d 1383, 1386 (Pa. 1991). Under the "learned intermediary doctrine", a manufacturer will be held liable only where it fails to exercise reasonable care to inform one for whose use the product is supplied of facts which make the product likely to be dangerous, where the intended user in a case involving a prescription drug or device is the prescribing physician. *See Rosci* v. *AcroMed, Inc.*, 669 A.2d 959, 969 (Pa. Super. 1995).

F) Pennsylvania follows the Restatement (Second) of Torts with respect to the standard for strict liability, declining to adopt the Restatement (Third) of Torts. In

Tincher v. Omega Flex, 104 A.3d 328 (Pa. 2014), the Pennsylvania Supreme Court departed from precedence set in *Azzarello v. Black Brothers Company*, 391 A.2d 1020 (Pa. 1978), which precluded any jury determination regarding whether a product was unreasonably dangerous. The *Tincher* court set forth a new "composite standard" under which a plaintiff can satisfy his or her burden of proof for a strict product liability claim in the design defect context through either the "risk-utility test" or the "consumer expectations test." The court held as follows:

> [W]e conclude that a plaintiff pursuing a cause upon a theory of strict liability in tort must prove that the product is in a "defective condition." The plaintiff may prove defective condition by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. The burden of production and persuasion is by a preponderance of the evidence.
>
> Whether a product is in a defective condition is a question of fact ordinarily submitted for determination to the finder of fact; the question is removed from the jury's consideration only where it is clear that reasonable minds could not differ on the issue. Thus, the trial court is relegated to its traditional role of determining issues of law, *e.g.*, on dispositive motions, and articulating the law for the jury, premised upon the governing legal theory, the facts adduced at trial and relevant advocacy by the parties.
>
> To the extent relevant here, we decline to adopt the Restatement (Third) of Torts: Products Liability §§ 1 *et seq.*, albeit appreciation of certain principles contained in that Restatement has certainly informed our consideration of the proper approach to strict liability in Pennsylvania in the post-Azzarello paradigm.

Tincher, 104 A.3d at 335. While the *Tincher* opinion concerned a design defect, it may not be limited to design defect in its application. The case raises many new questions, which the Pennsylvania Supreme Court itself stated would need to be presented to future courts. The lower courts in Pennsylvania are in the process of digesting *Tincher* and trying to correctly apply it to the cases before them. It will be some time before the full scope of *Tincher* will be addressed by the courts.

Willful and Wanton Conduct

A) Willful and wanton conduct can give rise to a tort action. It involves a conscious indifference to a risk of serious danger such that the tortfeasor's conduct is characterized by a willingness to inflict injury. See *Kasanovich v. George*, 34

A.2d 523, 525 (Pa. 1943). Wanton misconduct is not merely a high degree of negligence. *Id.* Accordingly, the Comparative Negligence Act does not apply to wanton misconduct and a plaintiff should not be barred from recovery regardless of their negligence if the defendant's actions constitute wanton misconduct. *Id.*

DISCOVERY

Expert Witnesses

A) In Pennsylvania, a party may obtain an expert witness's identity and the subject matter of his report either by response to interrogatories pursuant to PA. R. CIV. P. 4003.5 or by pre-trial statement and report pursuant to PA. R. CIV. P. 212.2.

B) Information acquired or developed by an expert in preparation for trial is discoverable under PA. R. CIV. P. 4003.5 for experts expected to testify at trial, if the information is otherwise discoverable under Pennsylvania's general discovery rule, PA. R. CIV. P. 4003.1. Rule 4003.1 requires only that the matter for which discovery is sought be relevant to the subject of the litigation.

C) Facts known or opinions held by an expert who is not expected to be called as a witness at trial is not discoverable except in the case of a medical expert as provided in PA. R. CIV. P. 4010(b) or by order of court upon the showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. PA. R. CIV. P. 4003.5 (a)(3).

D) Communications in any form between a party's attorney and an expert is not discoverable except for those circumstances that would allow disclosure of privileged communications under Pennsylvania law. As a result, the discovery of draft expert reports and any communications between the attorneys and experts relating to such draft reports is prohibited. PA. R. CIV. P. 4003.5(a)(4). *See also Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 32 A.3d 800 (Pa. Super. 2011), appeal denied in part by 52 A.3d 221 (Pa. 2012), affirmed by an equally divided court at 91 A.3d 680 (Pa. 2014).

E) In the absence of cause shown, the deposition of expert witnesses is not permitted. However, a deposition of a medical witness, other than a party, may be used at trial for any purpose whether or not the witness is available to testify. PA. R. CIV. P. 4020(a)(5).

F) The expert's trial testimony may not be inconsistent with or go beyond the fair scope of his or her report. *See* PA. R. CIV. P. 4003.5(c).

Non-party Discovery

A) A subpoena can command a person to attend and testify at a particular time and place; it may also require the person to produce documents or things which are under the possession, custody or control of that person. PA. R. CIV. P. 234.1. A subpoena may not be used to command a person to attend an *ex parte* meeting with an attorney. PA. R. CIV. P. 234.1(c). The party seeking production of documents from a non-party by subpoena must give notice of intent to serve the subpoena, including a copy of the subpoena, to all involved parties at least twenty days prior to service. PA. R. CIV. P. 4009.21. The party wishing to serve the subpoena must also file a copy of the subpoena attached to a certificate that states that notice of intent to serve was given to all parties to the action, no objection to the subpoena has been received and that the subpoena that will be served is identical to the one attached to the certificate. PA. R. CIV. P. 4009.22. The twenty-day notice and certification requirement does not apply to a subpoena commanding a person to attend and testify at a deposition or produce documents at a deposition. PA. R. CIV. P. 234.1(a), Official Note; PA. R. CIV. P. 4009.21(a), Official Note.

B) Pennsylvania has adopted the Uniform Interstate Depositions and Discovery Act. 42 PA. CONS. STAT. § 5331 *et seq.* Under this Act, a subpoena issued by a court of a state other than Pennsylvania may be presented to the prothonotary in the Pennsylvania jurisdiction "in which the person who is the subject of the [subpoena] resides, is employed or regularly transacts business in person," and the prothonotary must issue a subpoena for service on the person in that jurisdiction. 42 PA. CONS. STAT. § 5335. A request for the issuance of a subpoena under this Act does not constitute a court appearance by counsel in Pennsylvania. 42 PA. CONS. STAT. § 5335(a).

Privileges

A) Pennsylvania courts generally disfavor evidentiary privileges. *Commonwealth v. Simmons*, 719 A.2d 336, 340 (Pa. Super. 1998).

B) **Pennsylvania's attorney-client privilege** appears in 42 PA. CONS. STAT. ANN. § 5928 for civil cases and 42 PA. CONS. STAT. ANN. § 5916 for criminal cases. These two nearly identical rules state that counsel may not testify to the content of confidential communications made to him by his client. In order for the privilege to apply, the communications must be made for the purpose of obtaining or providing legal services. Only the client may assert the attorney-client privilege. *See Commonwealth v. McKenna*, 213 A.2d 223, 226 (Pa. Super. 1965); *see also Heister v. Davis*, 3 Yeates 4 (Pa. 1800).

    1) The Pennsylvania attorney-client privilege operates as a two-way street and protects confidential communications from client-to-attorney as well as communications from attorney-to-client for the purpose of obtaining or

providing professional legal advice. *Gillard v. AIG Ins. Co.*, 15 A.3d 44 (Pa. 2011).

2) Communications that are otherwise protected by the privilege are not excepted merely because the communication was made through an agent of the client. *See e.g.*, *Gould v. City of Aliquippa*, 750 A.2d 934, 937 (Pa. Commw. 2000).

3) Communications between agents or employees who are authorized to act on behalf of the corporation and corporate counsel are privileged. *Gould*, 750 A.2d at 937. However, communications between employees and in-house counsel are privileged as to the corporation, but *not* the employee. *See e.g.*, *Amtrak v. Fowler*, 788 A.2d 1053, 1064-65 (Pa. Commw. 2001).

4) The attorney-client privilege can be waived not only by express waiver, but also by failure to assert the privilege or by partial disclosure of the confidential communication.

5) Notes taken by client at the direction of counsel and given to counsel for purposes of representation in a suit are protected by attorney-client privilege and are not waived even where client does not know or understand the purpose of the notes. *Farrell v. Regola*, 150 A.3d 87, 102 (Pa. Super. 2016).

6) If two parties share representation by counsel for one matter, neither party can claim that the communications made to the attorney are privileged in a subsequent dispute between them. PA. R. PROF. C. 1.7, Explanatory Comment 30.

7) The issue of whether an inadvertent disclosure to a third party amounts to a waiver of the attorney-client privilege is not entirely clear in Pennsylvania. *Contra Carbis Walker, LLP v. Hill, Barth & King, LLC*, 930 A.2d 573 (Pa. Super. 2007) (privileged waived); *see Board of Supervisors of Milford Twp. v. McGogney*, 13 A.3d 569 (Pa. Commw. 2011) app. denied, 24 A.3d 364 (Pa. 2011) (privileged not waived). The following five-factor balancing test has been applied to determine whether an inadvertent disclosure amounts to waiver of the privilege: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its errors. *See e.g.*, *Carbis Walker, LLP*, 930 A.2d at ; *Bd. of Supervisors of Milford Twp*., 13 A.3d at 572-73.

8) The attorney-client privilege offers no protection where the client is seeking legal advice from counsel in order to commit a crime or fraud. *See e.g.*, *In re Investigating Grand Jury*, 593 A.2d 402, 406-407 (Pa. 1991).

9) When an attorney is accused of incompetency in a criminal trial, the former client may not assert his attorney-client privilege to prevent the lawyer from disclosing to the court the content of communications that are relevant to this conduct in the underlying case. *See e.g., Commonwealth v. Chimel*, 738 A.2d 406, 414 (Pa. 1999).

10) Similarly, an attorney may present otherwise privileged information to the court that is relevant to a fee dispute. *See e.g.*, Pa. R. PROF. C. 1.6(c).

C) **The work product doctrine** is stated in PA. R. CIV. P. 4003.3. Pennsylvania's version of the privilege differs significantly from the Federal Rules of Civil Procedure. Under the Pennsylvania rule, any matter otherwise discoverable may be discovered regardless of whether it was prepared in anticipation of trial. *See also Sedat, Inc. v. Dep't of Envtl. Resources*, 641 A.2d 1243, 1245 (Pa. Commw. 1994). However, the attorney's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research or legal theories are not discoverable.

1) Mental impressions, opinions, conclusions, strategies and theories formed with respect to the value or merit of a claim or defense or with respect to strategy or tactics by the party's representative other than his or her attorney—most often an insurance investigator—are similarly not discoverable. Memoranda or notes made by a representative, however, are not protected.

2) Where the legal opinion of the attorney is at issue in the case, it may become discoverable. For example, when a party claims the affirmative defense of reliance upon advice of counsel, that party may not assert the work product doctrine to protect the opinion of his or her counsel.

D) **The self-critical analysis privilege** is largely undefined in Pennsylvania and has generally not been recognized. Those courts which have recognized a self-critical analysis privilege have generally required that the party asserting the privilege demonstrate that the material to be protected satisfies at least three criteria: the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; and, the information must be of the type whose flow would be curtailed if discovery were allowed. *Joe v. Prison Health Servs.*, 782 A.2d 24, 34 (Pa. Commw. 2001).

Requests to Admit

A) Requests for admission are governed by PA. R. CIV. P. 4014. A party may serve a request for admission upon any other party without leave of the court after service of original process has been made upon the party at whom the request is directed. Each request for admission must be asked separately. The receiving party has

thirty (30) days to respond to the requests, but never less than forty-five (45) days after the service of original process upon him or her. Upon expiration of this time period, the matters are deemed to be admitted unless they have been denied. Denials must be detailed and responsive to the requests, setting forth the reasons for denial. The party requesting admission may ask the court to determine the sufficiency of the responses. In the case that the court finds the responses to be insufficient, it will either deem the matters to be admitted or order that the responding party submit an amended answer.

Unique State Issues

A) Pre-complaint discovery is governed by PA. R. CIV. P. 4003.8. A plaintiff can obtain some discovery before filing a complaint where the information sought is material and necessary to the complaint and will not impose unreasonable annoyance, embarrassment, oppression, burden or expense to any person.

   1) However, in a professional liability action requiring a certificate of merit, the plaintiff may only seek production of documents and things, or the entry of property before the filing of a certificate of merit. PA. R. CIV. P. 1042.5. Otherwise, pre-certificate of merit discovery is not allowed without leave of court.

E-Discovery

A) In contrast to federal courts and the majority of state courts, the Pennsylvania Supreme Court has declined to adopt extensive rules regarding the discoverability and production of electronically stored information ("ESI"). Although ESI is recognized as a distinct category of "documents" for production purposes, see Rule 4009.1(b), the Pennsylvania Rules of Civil Procedure do not treat ESI any differently than other categories of discoverable information. Accordingly, "traditional principles of proportionality" and reasonableness, rather than specific rules, govern the production of ESI in Pennsylvania. See Explanatory Comment (2012), subsection B, preceding Rule 4009.1 (setting forth consideration relevant to "proportionality standard" governing production of ESI); see also Rule 4009.11, Note ("A request seeking electronically stored information should be as specific as possible. Limitations as to time and scope are favored, as are agreements between the parties on production formats and other issues.").

B) Because the Pennsylvania Supreme Court has declined to adopt federal e-discovery jurisprudence, see Explanatory Comment (2012), subsection A, preceding Rule 4009.1, e-discovery issues remain relatively undeveloped in Pennsylvania. See *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, No. 08 CV 6048, 2013 Pa. Dist. & Cnty. Dec. LEXIS 467 at *8 (Pa. C.P. Lackawanna Cty. July 5, 2013) ("With the exception of the above-quoted discussion of the 'proportionality standard' in PTSI, Inc. [*PTSI, Inc. v. Haley*, 71 A.3d 304, 316 (Pa. Super. 2013)] in connection with the denial of a motion for spoliation

sanctions following a party's deletion of ESI, there is an absence of appellate precedent addressing electronic discovery in civil litigation.").

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

A) Rules 701 through 706 of the Pennsylvania Rules of Evidence govern the admissibility of opinion and expert testimony. Generally, a qualified accident reconstruction expert will be permitted "to testify as to an estimate of the speed of [a] vehicle based on the weight of the car, the length of the skid marks, the grade of the street, the characteristics of the road surface and other considerations[.]" *Haeberle v. Peterson*, 396 A.2d 738 (Pa. Super. 1978).

B) Additionally, a lay witness's opinion as to the speed of a vehicle may be admissible, if the witness had an adequate opportunity to observe the travel path of the vehicle in question, and is an experienced driver. *See Fisher v. Cent. Cab Co.*, 945 A.2d 215 (Pa. Super. 2008). But a lay witness would be permitted to express an estimate of vehicle speed in numerical terms only, because terms such as "fast", "slow", or "excessive" are conclusory in nature and lack any evidentiary value. *See Kearns by Kearns v. DeHaas*, 546 A.2d 1226 (Pa. Super. 1988).

C) Demonstrative evidence of actual accident recreations, and computer animations of such recreations, will be admitted within the discretion of the trial judge. *See Commonwealth v. Serge*, 896 A.2d 1170 (Pa. 2006); *Leonard v. Nichols Homeshield, Inc.*, 557 A.2d 743 (Pa. Super. 1989), *appeal denied*, 575 A.2d 115 (Pa. 1990). Where the demonstration of evidence is a physical representation of the incident or event, the conditions must be sufficiently close to those involved in the accident at issue to make the probative value of the demonstration outweigh the prejudicial effects.

Biomechanical Testimony

Biomechanical testimony can be used to prove the force of an impact in an accident, and how that force may have affected the person claiming injury. As with other experts in Pennsylvania, a biomechanical expert needs to be qualified as an expert prior to offering an opinion. Biomechanical experts are generally not permitted to testify as to a person's injuries. In addition, biomechanical experts generally cannot testify as to causation for injuries, unless the biomechanical expert also is a medical doctor. Whether testimony on this issue will be permitted may depend on the particular county in Pennsylvania where the case is venued. *See Hollock v. Erie Ins. Exch.*, 54 Pa. D. & C.4th 449 (Luzerne Cty, January 7, 2002).

Appeal - When Permitted and Timing

Generally, a party cannot appeal from an order unless it is a final order. *See* PA. R. APP. P. 341. There are exceptions to the general rule, however, including, appeals from collateral orders and interlocutory orders, that are appealable by permission or right. *See* PA. R. APP. P. 311, 312, and 313. Most orders or judgments must be appealed from within thirty days from the date same was docketed and served. *See, e.g.*, PA. R. APP. P. 903. The appeal period is generally absolute, and the failure to timely appeal deprives the appellate court of jurisdiction. *See* 42 PA. CONS. STAT. § 5504. Because of the potential waiver issues and the detailed rules as to what orders can be appealed from, counsel extremely familiar with appellate procedures should be consulted for appellate issues.

Collateral Source Rule

The collateral-source rule is a principle that prevails in personal-injury actions and serves to prohibit a defendant from introducing evidence that the plaintiff received benefits for the subject injuries from some collateral source, such as insurance. The rule thus permits a plaintiff to recover for all of their damages, notwithstanding receipt of payment from the collateral source. The rule is designed to protect tort victims and avoid precluding them from obtaining redress for their injuries from collateral sources. *See Pusl v. Means*, 982 A.2d 550 (Pa. Super. Ct. 2009), *over'd on other grounds; Smith v. Rohrbaugh*, 54 A.3d 892 (Pa. Super. 2012); s*ee also Beechwoods Flying Serv., Inc. v. Al Hamilton Contracting Corp.*, 476 A.2d 350, 352 (Pa. 1984).

Criminal/Traffic Convictions

Convictions for summary offenses by themselves, where an accused is not entitled to a jury trial, are not admissible in a civil action. *See Stumpf v. Nye*, 950 A.2d 1032 (Pa. Super. 2008). Also, guilty pleas in summary traffic offenses are inadmissible in a civil action. *See* 42 PA. CONS. STAT. § 6142. But operative facts necessary for misdemeanor and felony criminal convictions can be admitted as conclusive facts in civil suits arising from the same event. *See Folino v. Young*, 568 A.2d 171 (Pa. 1990). PA. R. EVID. 404(b) permits evidence of past crimes for purposes of demonstrating motive, intent,

preparation, knowledge, or absence of mistake or accident. PA. R. EVID. 609 permits, for impeachment purposes, evidence of prior convictions of crimes involving dishonesty.

Day In The Life Videos

Videotaped evidence is "demonstrative evidence" and its admission is within the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. Like photographs, day in the life videos must be sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact. *Commonwealth v. Serge*, 586 Pa. 671, 896 A.2d. 1170 (2006). To be admissible, the video must be authenticated by a person who prepared the video or another person with sufficient knowledge to testify that the video "fairly and accurately represents" the events captured on the recording at the time of the recording. *See Nyce v. Muffley*, 384 Pa. 107, 119 A.2d. 530 (1956). Day in the life videos need to meet the relevancy and admissibility requirements under Pennsylvania Rules of Evidence 401, 402, 403, and 901. Because a video has the potential to have a greater impact on a jury than photographic or oral testimony, the trial judge may need to view it in camera before ruling on its admissibility in whole or in part and determine if there is any distortion of the day's events. *See Commonwealth v. Hindi*, 429 Pa. Super. 169, 631 A.2d. 1341 (1993).

The Dead Man's Act/Statute

The Dead Man's Act provides that a party to a controversy cannot testify as to conversations between himself and the opposing party, if the opposing party is deceased. *See* 42 PA. CONS. STAT. § 5930. The purpose of the Dead Man's Act is to "prevent the injustice that might flow from permitting a surviving adverse party to give testimony that is favorable to himself and unfavorable to the decedent's interest, but which the decedent's representative is in no position to rebut." *Schroeder v. Kamerer*, 861 A.2d 885, 889 (Pa. 2004). The protection of the Dead Man's Act is easily waived by the party claiming it, including by participating in discovery, and therefore, case law interpreting same should be closely reviewed before engaging in discovery. Case law also provides more instruction as to what evidence and/or testimony does not fall within the purview of this Act.

Medical Bills

A) In a tort action for personal injuries, generally, the Plaintiff may recover the amount of medical expenses reasonably incurred or reasonably necessary to be incurred. But where the expenses have been paid by insurance or other benefits, "the amount paid and accepted by [the provider] as payment in full for the medical services is the amount [the Plaintiff] is entitled recover as compensatory damages." *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786 (Pa. 2001); *overruled on other grounds not affecting the holding cited above, Northbrook Life Ins. Co. v. Commonwealth of Pa*., 949 Pa. 333 (Pa. 2008).

B) Special rules apply regarding the admissibility of medical bills in auto cases, under the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 PA. CONS. STAT. § 1701 *et seq*., commonly known as "Act 6."

C) Also in an auto case, when the medical bills *are* admissible, the Plaintiff may put into evidence and recover (and the lienholder may demand) only the "Act 6" amount payable for the particular medical treatment, accommodations, products or services at issue. This generally translates into about what Medicare would pay, which often is a lot less than the face of amount of the charges. *See* 75 PA. CONS. STAT. § 1797(a); *Pittsburgh Neurosurgery Assoc., Inc. v. Danner*, 733 A.2d 1279 (Pa. Super. 1999), *appeal denied*, 751 A.2d 192 (Pa. 2000) (This reduction of the medical bills is accomplished by referral of the matter to third parties who provide health insurance claim adjustment services.).

D) If a … fee schedule … has not been calculated under the Medicare program for a particular product . . . the amount of the payment may not exceed 80% of the provider's usual and customary charge. 75 Pa. Const. Stat. § 1797(a). The MVFRL does not define the term "usual and customary charge". However, the Department of Insurance has promulgated a regulation that defines that term as "the charge most often made by providers of similar training, experience and licensure for a specific … product or service in the geographic area where the … product or service is provided. *Freedom Med. Supply, Inc. v. State Farm Fire & Cas. Co.* , 131 A.3d 977, 983 (Pa. 2016)(citing 31 Pa. Code § 69.3). Reimbursements by insures of a provider's charge for medical products or services, absent a Medicare fee for the product or service, may be calculated predicated on the provider's bill for services or data collected by the carrier. *Freedom Med. Supply*, 131 A.3d at 984.

Offers Of Judgment

Pennsylvania has no rule similar to Federal Rule of Civil Procedure 68 as to offers of judgment. But Pennsylvania does have PA. R. CIV. P. 238, dealing with delay damages on a verdict. Pursuant to PA. R. CIV. P. 238, damages for delay are awarded for a period of time from the date one year after the date of original process up to the date of the award, verdict, or decision, unless Defendant makes a written offer and Plaintiff's recovery is not more than 125% of the award amount. Such an offer tolls the period of time for the calculation of delay damages. Delay damages are calculated at a rate equal to the prime rate listed in the first edition of the Wall Street Journal published for each calendar year during which delay damages are awarded, plus one percent, not compounded.

Offer Of Proof

PA. R. EVID. 103(a)(2) addresses offers of proof under Pennsylvania evidence. An offer of proof is designed to alert the Court to the content and purpose of proposed testimony.

An offer of proof is adequate if it states the purpose of the testimony sought to be introduced in such a manner that the Court may perceive its relevancy. *Germantown Dairy Co. v. McCallum*, 72 A. 885 (Pa. 1909), *quoted in, Cockcroft v. Metropolitan Life Insurance Co.*, 3 A.2d 184, 186 (Pa. Super. 1938). A party making an offer of proof is deemed to waive any grounds for admitting evidence other than those stated in the offer of proof. *See Commonwealth v. Newman*, 555 A.2d 151 (Pa. Super. 1989). Additionally, a failure to make an offer of proof will be treated as a waiver of that ground for any appellate relief unless the substance of the evidence was apparent from the context, or had been brought to the Court's attention in a Motion in Limine.

Prior Accidents

Evidence of prior accidents is only admissible if the prior accident is "sufficiently similar" to the subject accident and occurred under sufficiently similar circumstances. Such evidence is generally relevant to show the existence of a defect or dangerous condition or the defendant's knowledge of same. A trial court has wide latitude in determining whether to admit such evidence and the burden of showing that the two accidents are sufficiently similar rests with the party seeking to introduce the evidence. *See Blumer v. Ford Motor Co.*, 20 A.3d 1222 (Pa. Super. Ct. 2011); s*ee also Valentine v. Acme Mkts.*, 687 A.2d 1157, 1163 (Pa. Super. 1997).

Relationship To The Federal Rules Of Evidence

The Pennsylvania Rules of Evidence are similar to the Federal Rules of Evidence, and were basically adopted from the federal rules; however, it is important to keep in mind that there are differences between the two sets of rules. For example, with regard to expert testimony, the Pennsylvania Rules of Evidence require an expert to testify as to the facts or data that support the expert's opinion prior to offering his or her opinion. *See* PA. R. EVID. 705. On the other hand, the Federal Rules of Evidence do not require disclosure of the underlying facts or data prior to the expert offering his or her opinion. *See* FED. R. EVID. 705. In addition, the Federal Rules of Evidence contain thirty-three exceptions to the hearsay rule while the Pennsylvania Rules of Evidence contain only twenty-four exceptions to the hearsay rule. *See* FED. R. EVID. 801 *et. seq.* and PA. R. EVID. 801 *et. seq.*, respectively. In light of the differences between the two sets of rules, a careful review of the applicable Pennsylvania Rule of Evidence will need to be done when considering an evidentiary issue.

Seat Belt and Helmet Use Admissibility

A) Under Pennsylvania statutory law, a person's failure to wear a seat belt or to use a child passenger restraint system is inadmissible in a civil action. *See* 75 PA. CONS. STAT. § 4581(e). That is, the Defendant in an auto case may not argue that a Plaintiff's failure to wear a seat belt was comparative negligence nor that the failure to wear a seat belt caused the Plaintiff to suffer worse injuries than he or

she should have suffered. *See Gaudio v. Ford Motor Co.*, 976 A.2d 524 (Pa. Super. 2009)

B) Similarly, 75 PA. CONS. STAT. § 3510(c) prohibits use of evidence that a person was riding a bicycle without a helmet. (The entire statutory section is directed toward children under twelve, and subjects the parent or guardian of such a child to a fine. Subsection (c), however, speaks in general terms regarding inadmissibility, and does not limit the prohibition to persons of any particular age.)

C) There is no statutory prohibition against introducing evidence of a motorcyclist's failure to wear a helmet. Under 75 PA. CONS. STAT. § 3525, motorcyclists meeting certain licensing and experience requirements are not required to wear a helmet. Others are required to wear a helmet. The statute, however, does not contain a non-admissibility section, like those contained in the seat belt and bicycle helmet statutes. Thus, in the absence of any appellate case law prohibiting it, it appears that Rule 401 of the Pennsylvania Rules of Evidence, relating to relevant evidence, governs the admissibility of evidence that a motorcyclist was not wearing a helmet. For example, one could argue that a Plaintiff-motorcyclist was comparatively negligent for not wearing a helmet and that their own negligence wholly or partially caused some or all of their injuries.

Spoliation

When a party to litigation either intentionally destroys, or fails to preserve, evidence, the court may impose sanctions for spoliation against the offending party. *See Parkinson v. Guidant Corp.*, 315 F. Supp. 2d 760 (W.D. Pa. 2004). These sanctions may include, but are not limited to: (1) an outright dismissal of claims; (2) the exclusion of countervailing evidence; or (3) a jury instruction on the "spoliation inference." The "spoliation inference" permits the jury to assume that the destroyed evidence would have been unfavorable to the offending party. Pennsylvania has also rejected an independent cause of action of negligent spoliation. *See Pyeritz v. Commonwealth*, 32 A.3d 687 (Pa. 2011).

Subsequent Remedial Measures

When a party takes action to remedy a condition following an injury or event, that party's action may be deemed a subsequent remedial measure. Such action is generally not admissible to prove negligence on behalf of the party who remedied the condition. But evidence of a subsequent remedial measure may be used for impeachment purposes. Evidence of a subsequent remedial measure may also be used to establish ownership or control with respect to the condition at issue. The rule pertaining to subsequent remedial measures applies to both negligence cases and strict liability cases. *See* PA. R. EVID. 407, *Duchess v. Langston Corp.*, 564 Pa. 529, 769 A.2d 1131 (2001).

Use Of Photographs

Photographic evidence is "demonstrative evidence" and its admission is within the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. In order to introduce a photograph, it must be "sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact." *Commonwealth v. Serge*, 586 Pa. 671, 896 A.2d. 1170 (2006). To be admissible, the photograph must be authenticated by a person who took the photograph or another person with sufficient knowledge to testify that the photograph "fairly and accurately represents" the object, thing, scene or injury in question. *See Nyce v. Muffley*, 384 Pa. 107, 119 A.2d. 530 (1956). Photographs need to meet the relevancy and admissibility requirements under Pennsylvania Rules of Evidence 401, 402, 403, and 901.

DAMAGES

Caps on Damages

Statutory caps on damages limit the amount of recovery available in a cause of action. In Pennsylvania, there are no statutory caps for economic and non-economic damages. But where a cause of action is brought against the Commonwealth of Pennsylvania, damages are limited to $250,000 per occurrence or $1,000,000 in the aggregate. *See* 42 PA. CONS. STAT. ANN. § 8528 ("Sovereign Immunity Act"). There is a similar cap on damages for actions against local governmental agencies of $500,000 in the aggregate. 42. Pa. Cons. Stat. Ann. § 8553(b). However, a bill currently is pending in the Pennsylvania General Assembly to raise the damage cap for local agencies to $2,000,000 in the aggregate for any occurrence or series of transactions. In addition, there is separate bill pending that would eliminate the damage cap in actions alleging sexual abuse and also would affect the statutes of limitations and other aspects of such actions.

Although Pennsylvania does not impose a cap on compensatory damages for medical malpractice cases, it does have a program of state-sponsored excess insurance. *See* 40 P.S. § 1303.712**.** Medical Care Availability and Reduction of Error Fund ("MCARE" Fund). Punitive damages against a physician cannot exceed 200% of compensatory damages absent intentional misconduct. *See* 40 P.S. § 1303.505. There is a bill pending to amend this section of the law to limit the award of punitive damages against personal cafe/assisted living facilities or certain long term care facilities to 250% of the compensatory damages, subject to certain exceptions. Also, the Pennsylvania Supreme Court held that a former statute purporting to limit contingency fees recoverable in a medical malpractice action was unconstitutional. *See Heller v. Frankston*, 475 A.2d 1291, 1295 (Pa. 1984).

Calculation of Damages

In Pennsylvania, a plaintiff bringing a cause of action for personal injury may recover for various damages including, but not limited to:

1) Past and future loss of earnings and earning capacity
2) Past and future pain and suffering
3) Reasonable value for past and future medical and/or dental expenses
4) Post and future disfigurement
5) Loss of consortium
6) Property losses (with limited exceptions)

Damages in the area of personal injury are generally divided up into two categories: economic and non-economic. Economic damages, such as lost earnings, are tangible losses; non-economic damages, such as pain and suffering, are considered to be intangible losses. Calculating economic damages requires determination of the value of each tangible loss, which can usually be obtained through bills, statements, receipts, etc. Non-economic damages are more difficult to calculate because determining value requires a subjective analysis for each loss, which varies case by case. The PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS is also an effective resource that contains model jury instructions on damages, including value determinations.

Available Items of Personal Injury Damages

A) **Past Medical Bills**. A plaintiff may recover damages from past medical bills. In most circumstances, damages recovered by the plaintiff from the defendant are not decreased by the amount the plaintiff received from insurance proceeds. One exception to the "collateral source" rule is where an action is brought against the Local Government. *See* 42 PA. CONS. STAT. ANN. § 8553. In that instance, the amount a claimant receives under a policy of insurance is deducted from the amount of damages that would otherwise be recoverable. *See* 42 PA. CONS. STAT. ANN. § 8553(d).

However, Plaintiff only may recover the amount of medical expenses that Plaintiff actually paid or which he or she has incurred actual liability. A Plaintiff is not entitled to recover amounts billed for medical treatment, but which Plaintiff has not paid and for which Plaintiff will never incur an obligation to pay, such as charges written off by an insurance plan. *Moorhead v. Crozer Chester Medical Center*, 564 Pa. 156, 163-165, 765 A.2d 786, 790-791 (2001)(*overruled on other grounds*).

B) **Future Medical Bill**s. Future medical bills are admissible provided the movant proves, through expert testimony, not only that future medical expenses will be incurred, but also the reasonable estimated cost of such services. *See Mendralla v. Weaver Corp.*, 703 A.2d 480, 485 (Pa. Super. Ct. 1997); *see also Cohen v. Albert Einstein Med. Ctr.*, 592 A.2d 720, 729 (Pa. Super. Ct. 1991).

C) **Hedonic Damages**. Hedonic Damages have been defined as loss of enjoyment of life, or for the value of life itself, as measured separately from the economic productive value that an injured or deceased person would have. *See* BLACK'S LAW DICTIONARY 391 (6th ed. 1990). Most states, including Pennsylvania,

appear to have requirements that consciousness is a requirement for the recovery of hedonic damages. Therefore, under Pennsylvania case law, Hedonic Damages are only available to living plaintiffs. *See Willinger v. Mercy Cath. Med. Ctr., Etc.*, 393 A.2d 1188, 1191 (Pa. 1978). It should also be noted that, in Pennsylvania, Hedonic Damages are a component of pain and suffering. *Id*. "Loss of Normal Life" is analyzed under the rubric of Hedonic damages.

D) **Increased Risk of Harm/Actual Injury Requirement**. Pennsylvania Courts have traditionally been reluctant to permit remedies in tort actions, absent actual injury, particularly where the plaintiff seeks damages for increased risk of harm. *See Redland Soccer Club, Inc. v. Dept. of the Army*, 696 A.2d 137, 143 (Pa. 1997). But the Pennsylvania Supreme Court distinguished medical monitoring and specifically held that a cause of action could be held for medical monitoring. *Id*. In addition to medical monitoring cases, in a class action, class members may assert a single common complaint even if they have not all suffered actual injury, and demonstrating that all class members are subject to the same harm will suffice. *Braun v. Wal-Mart Stores, Inc.*, 630 Pa. 292, 304, 106 A.3d 656, 663, fn 8 (2014).

E) **Disfigurement**. Disfigurement is defined as that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner. *See* BLACK'S LAW DICTIONARY 468 (6th ed. 1990). Pennsylvania recognizes disfigurement as a type of compensatory damage.

F) **Disability**. A physical disability or incapacity caused by physical defect or infirmity, or bodily imperfection; the absence of competent physical, intellectual, or moral powers; impairment of earning capacity; loss of physical function that reduces efficiency; inability to work. It is recognized as a type of compensatory damage, distinguishable from hedonic damages or disfigurement.

G) **Past Pain and Suffering**. If there is evidence of a physical injury, damages for pain and suffering are considered proper. Pennsylvania courts require a plaintiff to prove that they were conscious of the injury.

H) **Future Pain and Suffering**. Damages for future pain and suffering may be awarded if the evidence shows it is reasonably certain to occur.

I) **Loss of Consortium**. Loss of a conjugal fellowship of husband and wife, and the right of each to the company, society, co-operation, affection, and aid of the other in every conjugal relation. *See* BLACK'S LAW DICTIONARY 309 (6th ed. 1990). In an action against the Commonwealth for wrongful death, damages for loss of consortium are available only to spouses, and do not include a parent's loss of society and companionship of her child. *See Dept. of Pub. Welfare v. Schultz*, 855 A.2d 753, 755 (Pa. 2004); *Ebersole v. SEPTA*, 111 A.3d 286 (Pa. Comnwlth. 2015). However, in an action against a non-Commonwealth party under the

Wrongful Death Statute, the enumerated statutory beneficiaries may recover the value of the "services" of the deceased, including "society and comfort", such as emotional and psychological loss. *Rettger v. UPMC Shadyside*, 991 A.2d 915, 932-933 (Pa. Super. 2010) (recovery by parents).

J) **Loss of Society**. Loss of society is a type of pecuniary damage that refers to the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protections. *See* BLACK'S LAW DICTIONARY 1391 (6th ed. 1990). Under Pennsylvania law, a child can recover in a wrongful death action for "loss of guidance, tutelage, and moral upbringing." *See Machado v. Kunkel*, 804 A.2d 1238, 1245 (Pa. Super. Ct. 2002). A parent also can recover for the loss of services of a child, including non-pecuniary damages. *Rettger, supra.* at 932-933. This is to be distinguished from "loss of parental consortium" or "loss of society," which is unavailable in Pennsylvania.

K) **Lost Income, Wages, and Earnings**. Any claim for damages must be supported by a reasonable basis for calculation; mere guess or speculation is not enough. *See Mecca v. Lukasik*, 530 A.2d 1334, 1339 (Pa. Super. Ct. 1988). Pennsylvania law requires sufficient data from which damages can be assessed with reasonable certainty. *See Macan v. Scandinavia Belting Co.*, 107 A. 750, 753 (Pa. 1919); *see also Pratt v. Stein*, 444 A.2d 674, 696 (Pa. Super. Ct. 1982). Although courts do not require mathematical exactness, damages cannot be awarded by guess or speculation. *See Cronan v. Castle Gas Co.*, 512 A.2d. 1, 5 (Pa. Super. Ct. 1986). Notwithstanding the preceding, there is some authority for the proposition that the question of whether damages are speculative, and thus, not recoverable, has nothing to do with the difficulty in calculating the amount of damages, but deals with the more basic question of whether there are identifiable damages. *Newman Development Group of Pottstown, LLC v. Genuardi's Family Market, Inc.*, 98 A.3d 645, 661-662 (Pa. Super. 2014)(contract damages). In addition, "Although the fact[-]finder may not render a verdict based on sheer conjecture or guesswork, it may use a measure of speculation in estimating damages." *Boehm v. Riversource Life Insurance Co.*, 117 A.3d 308, 328 (Pa. Super. 2015).

Mitigation

A) Mitigation of damages imposes a duty on the injured party "to exercise reasonable diligence and ordinary care in attempting to minimize his damages, or avoid aggravating the injury . . ." after injury has been inflicted. *See* BLACK'S LAW DICTIONARY 1002 (6th ed. 1990). Mitigation is an affirmative defense, so the burden of proving failure to mitigate is on the defendant. *See Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1448 (3d Cir. 1996). However, the duty to mitigate is not onerous and only requires that the Plaintiff make an "honest, good faith effort" and it does not require success. *Vladimirsky v. School District of Philadelphia*, 144 A.3d 986 (Pa. Comnwlth. 2016).

B) For instance, the doctrine of mitigation would require a plaintiff to exercise ordinary care and obtain medical treatment in an effort to be cured of their injuries. A plaintiff will not be allowed to recover damages for injuries that are proximately caused by their failure to obtain medical care.

Punitive Damages

A) Pennsylvania has long held that punitive damages are proper whenever a party's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct resulting from either an evil motive or because of a reckless indifference to the rights of others. *See Lesoon v. Metro. Life Ins. Co.*, 898 A.2d 620, 634 (Pa. Super. Ct. 2006) (citing *Ruffing v. 84 Lumber Co.*, 600 A.2d 545, 551 (Pa. Super. Ct. 1991)).

B) The governing authority in Pennsylvania on when punitive damages are excessive comes from the United States Supreme Court. Three guide posts should be considered in determining whether punitive damages are excessive: (1) degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *See Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 420 (Pa. Super. 2004) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)). Under Pennsylvania law, the "size of a punitive damages award must be reasonably related to the State's interest in punishing and deterring the particular behavior of the defendant and not the product of arbitrariness or unfettered discretion *Hollock*, 842 A.2d at 419" (quoting *Shiner v. Moriarty*, 706 A.2d 1228, 1241 (Pa. Super. 1998)).

The United States Supreme Court has consistently rejected the idea of imposing or creating a mathematical formula or ratio to determine if punitive damages are excessive. *Id*. at 421. The Court, however, does caution that few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process and has also suggested that punitive awards more than four times the amount of compensatory damages may be close to the line. *Id*. Notwithstanding the preceding, the Pennsylvania Superior Court (intermediate appellate court) has upheld punitive damage awards with ratios of 10-1 (*Hollock*, *supra*), and 5.6-1 (*Empire Trucking Company, Inc. v. Reading Anthracite Coal Company*, 71 A.3d 923 (Pa. Super. 2013)).

Recovery of Pre- and Post-Judgment Interest

A) The recovery of pre-judgment interest is governed by 42 PA. CONS. STAT. ANN. § 8101. Pre-judgment interest is only recoverable where authorized by agreement of the parties or by statute. *See Pittsburgh Const. Co. v. Griffith*, 834 A.2d 572,

590 (Pa. Super. 2003). In contract cases, statutory pre-judgment interest is awardable as of right. *Id*. "In claims that arise out of a contractual right, interest has been allowed at the legal rate from the date that payment was wrongfully withheld, where the damages are liquidated and certain, and the interest is readily ascertainable through computation." *Id*. (citing *Metropolitan Edison Co. v. Old Home Manor, Inc.* 334 Pa. Super. 25, 482 A.2d 1062, 1064 (1984)).

B) The recovery of post-judgment interest is governed by 42 PA. CONS. STAT. ANN. § 8101. The general rule is that a plaintiff is entitled to interest on a judgment from the date of the verdict. *See Johnson v. Singleton*, 658 A.2d 1372, 1374 (Pa. Super. 1995) (citation omitted). For purposes of computing interest, judgment and verdict are synonymous, and the date from which interest accrues is the date of verdict, not the date judgment is finally entered." *Id*.

Recovery of Attorney's Fees

A) The right of participants to receive counsel fees, as a taxable cost of litigation, is governed by 42 PA. CONS. STAT. ANN. § 2503. Only attorneys' fees that are reasonable will be allowed. 42 PA. CONS. STAT. ANN. § 2503.

B) The burden will be on the parties seeking the fees, whether for them or on behalf of a client to present sufficient evidence from which the trial court can render a decision as to their reasonableness.

C) The reasonableness of the fee is left to the discretion of the trial court. A trial court's determination will not be reversed absent an abuse of discretion. But "where counsel fees are statutorily authorized in order to promote the purposes of a particular legislative scheme, the trial court should not determine the appropriateness of counsel fees under the general standards applicable in all litigation. Rather, it should consider whether an award of fees would, in the circumstances of the particular case under consideration, promote the purposes of the specific statute involved. . . ." *See Krebs v. United Ref. Co. of Pa.*, 893 A.2d 776, 787-88 (Pa. Super. 2006).

D) In addition, Pennsylvania has its version of Federal Rule of Civil Procedure 11. *See* Pa. R. Civ. P. 1023.1 through 1023.4. Under the latter rule, reasonable attorney's fees may be awarded for violation of Rule 1023.1(c).

Settlements Involving Minors

A) To effectuate a settlement involving minors, court approval is required, regardless of whether the claim is in litigation or settled outside of court. *See* PA. R. CIV. P. 2039. In considering whether to approve a settlement, the court is charged with protecting the best interest of the minor. *See Johnson v. Clearfield Area Sch. Dist.*, 319 F. Supp. 2d 583, 586 (W.D. Pa. 2004); s*ee also Power by Power v. Tomarchio*, 701 A.2d 1371, 1374 (Pa. Super. 1997) (citations omitted).

B) A petition for approval must provide to the Court sufficient information upon which the Court may base its determination. *See Johnson*, 319 F. Supp. 2d at 587. In order to "assure that the minor's best interests are protected, the petition should include all relevant facts and reasons why the minor's guardian believes the settlement is desirable and why it is in the minor's best interest to settle the action." *Id*. (citation omitted). Such relevant facts include a description of the minor's physical and/or psychological condition, a statement and/or discussion regarding the minor's current physical and/or mental health needs, evidence of the extent of the minor's condition, and the need for future medical and/or psychological care, as well as future expenses. *Id*.

Taxation of Costs

A) Taxation of costs is governed by 42 PA. CONS. STAT. ANN. § 1726. The general rule in an action at law "is that the costs inherent in a lawsuit are awarded to and should be recoverable by the prevailing party." *See Busy Bee, Inc. v. Wachovia Bank*, No. 97-CV-5078, 2006 WL 723487, at *72 (Pa. Com. Pl. 2006) (quoting *Gregory v. Harleysville Mut. Ins. Co.*, 542 A.2d 133, 135 (Pa. Super. Ct. 1988)).

B) The recoverable costs are limited to those associated with a proceeding in Court, and not to those of preparation, consultation and fees generally. *Id.* For example, absent statutory authority, when local rules are in agreement between the parties, the prevailing party may not recover its taxable costs or any charges for deposition transcripts. *Id*.

Unique Damages Issues

A) Expert medical testimony may not be necessary to prove a causal connection between an injury and a condition of ill being, where the connection is clearly apparent or obvious. *See Kovalev v. Sowell*, 839 A.2d 359, 368 (Pa. Super. Ct. 2003). Where the injury complained of is not obvious or apparent, however, expert medical testimony is necessary to establish the causal nexus of the injury to the tortious conduct. *Id*.