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DISTRICT OF COLUMBIA
Tort Profile

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I. OVERVIEW OF THE DISTRICT OF COLUMBIA COURT SYSTEM

Information about the Superior Court for the District of Columbia can be found on the D.C. Court's web site, which can be accessed at http://www.dccourts.gov. This address contains links to information about the Court and its various divisions and offices, litigation forms, e-filing, and general information about the judicial system as a whole.

A. Trial Courts

The Superior Court is the primary trial court in the District of Columbia. Superior Court has several different divisions, including Civil, Small Claims & Conciliation, Criminal, Family, Traffic, Landlord & Tenant, Probate, and Tax. Each division maintains its own dockets, clerks, and rules of procedure. The court consists of a chief judge and 61 associate judges. The court is assisted by the service of 24 magistrate judges as well as retired judges who have been approved as senior judges. The judges of the Superior Court generally rotate through each of the divisions, and only hear cases from one division at a time according to their rotation schedule. The Superior Court was only created in 1970, and prior to that all actions in the District of Columbia were tried in the Federal Courts. To that end, cases from the District of Columbia Federal Courts prior to February 1971 are binding unless overturned by D.C. Court of Appeals sitting *en banc*. M.A.P. v. Ryan, 285 A.2d 310 (D.Ct. 1971). Accordingly, with regard to most issues, the Superior Court Rules of Civil Procedure track the Federal Rules of Civil Procedure rather closely.

1. Civil Division

The Civil Division is the primary trial court for civil and equity actions, including but not limited to tort actions, in the District of Columbia. The Civil Division has four branches: Civil Actions Branch, Quality Review Branch, Landlord and Tenant Branch and Small Claims and Conciliation Branch. Because of the nature and purpose of this publication, most of the discussion herein is applicable to proceedings in the Civil Division unless otherwise specified.

a. Small Claims and Conciliation Branch

The Small Claims and Conciliation Branch has jurisdiction over cases where the amount at issue does not exceed Ten Thousand Dollars ($10,000). A jury trial can be requested and the case will transfer to the Superior Court. There are no jury trials in the Small Claims Branch. Most actions in the Small Claims Branch are heard by Commissioners or Magistrate Judges. If suit is filed against you, you will receive a statement of claim providing the hearing date and time. There is no requirement to file an Answer or any formal discovery procedure. Following proper service, parties present at the

initial hearing and are generally ordered to attend mediation. If an agreement in reached in mediation, the terms of the settlement are memorialized in a praecipe to be filed with the clerk.

2. Reputation of the Superior Court in the District of Columbia

In general, juries and judges in the District of Columbia Superior Court are very liberal, and are known for being relatively plaintiff-friendly, particularly in cases with corporate defendants. Jurors are often willing to overlook indiscretions such as criminal records, poor employment histories, surveillance videos and otherwise negative personal characteristics. Further, cases often are delayed in this Court, sometimes for years.

3. Arbitration/Mediation

The Superior Court adopted a *mandatory* ADR program ("The Multi-Door Dispute Resolution Division") many years ago. All civil cases are assigned to non-binding mediation, a case evaluation, or an arbitration. The specific form of ADR is agreed-upon by the parties at the Scheduling Hearing held at the commencement of the case, and is scheduled for approximately 90 days after the close of discovery. If mediation is selected by the judge, each party is required to file a confidential statement which is provided to the mediator. The mediator will assist the parties with the dispute. The mediator will assist with possible solutions or settlements. If case evaluation is selected, a trained evaluator will listen to informal presentations by the parties and will discuss the strengths and weaknesses of each party's case. If arbitration is selected, all parties submit confidential settlement statements to the ADR office, who then assign the matter to someone trained by the court (a lawyer) to facilitate the arbitration for the parties. The parties then report to the ADR office to try to clarify the issues, and perhaps settle the case.

If parties do not resolve the matter through ADR, a pre-trial conference is scheduled approximately within the next 60 days.

B. The District of Columbia Court of Appeals

The Court of Appeals is the highest court in the District of Columbia, and is the Court with jurisdiction to review rulings and judgments from the Superior Court. See D.C. Code § 11-721. The Court consists of a chief judge and 8 associate judges. The Court is also assisted by a number of retired judges. Cases before the court are randomly selected, three judge divisions unless an *en banc* hearing is requested. Rulings from the District of Columbia Court of Appeals are reviewable by the United States Supreme Court.

II. COMMENCEMENT OF ACTION

A. Jurisdiction / Venue

As the only Court for the District of Columbia, the Superior Court has jurisdiction over its residents, and causes of action arising in the District of Columbia. See D.C. Code § 11-921 (a).

B. Proceedings

1. Civil Division

Actions in the Superior Court begin with the filing of a Complaint. At the time of filing, each case is assigned to a Calendar, and each Calendar is assigned to a particular judge. Several of the Calendars rotate to a new judge on January 1 of each new year, so often the judge who presides over the case at the beginning will not be involved with the case at the trial stage.

Service of the summons, complaint, and initial order shall be made within 60 days after the filing of the complaint or the court will dismiss the action without prejudice as to that defendant. D.C. Super. Ct. R. Civ. P. 4(m).

When service is effected upon the Defendant(s), the Complaint is accompanied by a Summons and an Initial Order. The Initial Order will include the time limit for filing an Answer, time period for filing proof of service, the judge's name, the calendar number, the initial scheduling conference time and date, and the courtroom.

A scheduling conference is held in every case, and it serves two primary purposes. First, any issues regarding service of process, or other preliminary legal matters, including, if applicable, preliminary motions, are reviewed, clarified and decided. Second, if all service issues are resolved, the Court will enter a Scheduling Order. In setting a Scheduling Order, the case will be assigned to a "track", depending upon how much time the parties estimate they will need to prepare the case through discovery. Generally, the more parties and counsel that are involved, and the more complicated the nature of the case, the higher the track. Track 4 is the highest and longest track. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge. See D.C. Super. Ct. R. Civ. P. 16(b). Attorneys need not appear in person for the scheduling conference if a praecipe signed by all attorneys is filed no later than seven (7) calendar days prior to the conference. If the attorneys elect to file a praecipe in lieu of appearance, they must consent to the entry of a track one or track two scheduling order and provide available dates for mediation and a pretrial conference. D.C.

Super. Ct. R. Civ. P. 16(b)(2).

An Answer is required by each defendant within *20 days* after service of process upon him/her, unless granted additional time by the Court. The clerks of the Civil Division are diligent in reviewing files to verify whether a served defendant has filed an Answer. If no Answer is timely filed, the clerks will place the defendant in technical default status. When a party is in default, they cannot proceed to file an Answer, as the clerk's office will not accept filings from that party until the default is vacated. That default can be vacated in one of several ways, according to the Superior Court Rules of Civil Procedure. See D.C. Super. Ct. R. Civ. P. 55 and 55-III.

2. Small Claims and Conciliation Branch

Pleadings, and indeed the rules of procedure, are simplified in the Small Claims and Conciliation Branch. Accordingly, most pleadings that are filed in this division are hand-written on pre-printed carbonless-copy forms available at the clerk's office. Most pleadings filed by Attorneys are typed or generated on a word processing computer program, unless it is one page or less, in which case most are hand-written. No responsive pleading is required in cases in the Small Claims and Conciliation Branch. Instead, the Complaint is served with a special form titled "Statement of Claim", where the Plaintiff provides a brief description of the nature and facts of his/her claim. This form also notifies the Defendant(s) of the hearing date to be held on the claim. Hearings are generally scheduled 5 to 30 days from filing of the Complaint. At that hearing, the Defendant (or Defense Counsel) must appear and contest the claim. Cases in the Small Claims and Conciliation Branch are assigned to the docket for a return day. The first order of business on the return day, assuming all parties have been served with process and notice of the return day, is to conduct mediation with a court-trained mediator. If the parties are unable to settle their case, they return to the courtroom and request a trial. Sometimes a trial can be held that same day, but more often the parties have to return another day to conduct their trial. For this reason, cases often settle before the return day. See D.C. Super. Ct. R. Sm. Cl. 1 – 18.

III. DISCOVERY

A. Scope of Discovery

In general, parties may obtain discovery of any matter, not privileged, that relates to any party's claim or defense in the action, regardless of whether or not the discovery sought will be admissible as evidence at trial. See D.C. Super. Ct. R. Civ. P. 26(b)(1).

1. Insurance Agreements

A party may obtain discovery of the existence and contents of any insurance agreement. See D.C. Super. Ct. R. Civ. P. 26(b)(6). An application for insurance, however, is expressly *not* considered part of an insurance agreement. The Rule also specifies that discoverability of insurance agreements does not mean that any such material will be admissible in evidence at trial.

2. Trial Preparation Materials

A party may obtain discovery of any statements that party has made relevant to the litigation, i.e. any recorded or written statements. See D.C. Super. Ct. R. Civ. P. 26(b)(3). Likewise, a person not a party to the action may also obtain discovery of any such statements they have made.

A party may, in certain circumstances, obtain discovery of certain materials prepared by an adverse party in anticipation of trial. In order to obtain such discovery, the party seeking such discovery must show the Court that they would be unable to obtain such material through any other means without undue hardship, and that they have a substantial need for such material in the preparation of their case. Id. Under no circumstances, however, may a party obtain discovery of the mental impressions, conclusions, opinions, or legal theories of an attorney or representative of the party from whom discovery is so ordered.

3. Expert Witness Discovery

Discovery of information pertaining to a party's expert witness(es) is limited to certain subject matters expressly allowed by Rule, unless a party seeking additional discovery can show good cause for additional discovery. See D.C. Super. Ct. R. Civ. P. 26(b)(4). Information generally discoverable include the identity of the witness, the subject matter upon which the witness is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for such opinions. Additional information may be discovered upon Court

Order. Additionally, a party can depose another party's testifying expert witness(es), at which point practice tends to allow fairly wide inquiry into the background, qualifications, experience, and opinions of the expert.

B. Discovery Procedures

1. Protective Orders

A party may move the Court for a Protective Order when the discovery sought imposes an annoyance, embarrassment, oppression, or undue burden or expense. See D.C. Super. Ct. R. Civ. P. 26(c). The Court may, at its discretion, afford the following types of relief: that the discovery not be had; that the discovery only be had on specified terms and conditions; that the discovery only be had using a method of discovery different than that originally sought (*i.e.* interrogatories instead of a deposition); that the scope of discovery be limited so as to not allow inquiry into certain matters; that the discovery only be allowed with certain specified persons present; that discovery be sealed, and thereafter only opened by Order of the Court; that certain trade secret information not be disclosed, or only disclosed in a certain manner; or that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened only as directed by the Court.

2. Supplementation of Responses

When a party answers discovery requests from another party, and the answers were complete when made, the party is under no duty to supplement its responses except for requests which seek the identity of persons with knowledge of discoverable matters and expert witnesses who are expected to testify. Further, parties are obligated to amend prior responses when they subsequently learn that the prior responses were incorrect when made, or when a prior response is no longer true and the circumstances are such that a failure to amend the prior response is in substance a knowing concealment of the truth. See D.C. Super. Ct. R. Civ. P. 26(e).

3. Resolving Discovery Disputes

Prior to filing any motion relating to discovery, the parties or their counsel must meet for a reasonable time to try to resolve the dispute. Any motion must include a certification that such a meeting took place, including the date, time and place of the meeting. Exceptions to this rule include where

a party has failed to provide any responses whatsoever to a discovery request and the moving party has written a letter to the offending party at least 10 days prior to filing the motion, where a party failed to adhere to a Court Order regarding discovery, and where a meeting as required by the Rule could not be scheduled since the offending party failed to respond to a letter 10 days prior to the filing of the motion *and* at least two phone calls. See D.C. Super. Ct. R. Civ. P. 26(h). Note: Superior Court Judges often assess sanctions against the losing party in a discovery dispute.

4. Time for Responding to Discovery Requests

Written discovery requests, namely Interrogatories, Requests for Production, and Requests for Admission, must be answered no later than 30 days from the date of service. See D.C. Super. Ct. R. Civ. P. 33, 34, and 36. However, when such discovery requests are served with the Summons and Complaint, they must be answered within 45 days. Id. If discovery requests are served by mail, the responding party may add 3 additional days to its deadline for responding to the requests. See D.C. Super. Ct. R. Civ. P. 6. Any grounds for an objection to an interrogatory must be stated with specificity and timely or is waived unless the party's failure to object is excused by the Court for good cause shown. See D.C. Super. Ct. R. Civ. P. 33(b)(4).

C. Specific Discovery Methods

The Superior Court Rules of Civil Procedure provide for the following types of discovery in civil actions:

1. Depositions

A party may take the deposition of any person. See D.C. Super. Ct. R. Civ. P. 30(a). The Notice of Deposition shall afford reasonable notice of the time and place of the deposition. A party may also note the deposition of a corporate party, partnership, association, or governmental entity. The Notice of Deposition must identify the method of recording the testimony of the witness. See D.C. Super. Ct. R. Civ. P. 30(b).

A party is required to obtain leave of court if a deposition is noted for a date less than 30 days from the date of service of process on defendant(s), if a requested deposition will result in more than 10 depositions being taken by the plaintiffs, defendants, or third-party defendants, or if the proposed

witness has already been deposed in the case. See D.C. Super. Ct. R. Civ. P. 30(a)(2).

In order to take a deposition of a witness outside the District of Columbia, a party must file a Motion seeking appointment of an examiner. The Motion must identify the witness, the case, and the reasons why the testimony of the witness is important. See D.C. Super. Ct. R. Civ. P. 28-I(a). To take the deposition of a witness located in the District of Columbia, for a case pending in another jurisdiction, a certified copy of a commission or notice to take the Deposition must be filed with the Superior Court clerk's office. Once approved, the Superior Court will issue the appropriate subpoena for the witness to appear and give testimony. See D.C. Super. Ct. R. Civ. P. 28-I(b).

2. Interrogatories

Any party may serve Interrogatories on any other party. See D.C. Super. Ct. R. Civ. P. 33. Interrogatories must be answered under oath by the party serving the answers. Where the answer to an Interrogatory is contained in the business records of the responding party, that party may choose to make such records available in lieu of formally answering such Interrogatory. See Rule 33(d). The responding party must sufficiently identify the record(s) from which the answer may be ascertained. No more than 40 Interrogatories, including sub-parts, may be served without leave of Court. See Rule 33(a).

3. Requests for Production and Things and Entry on Land for Inspection

Any party may serve Requests for Production or for Entry Upon Land for Inspection on any other party without leave of Court. See D.C. Super. Ct. R. Civ. P. 34. The requesting party is allowed to make copies of any documents properly requested. The party producing documents has the option of producing them as they are kept in the normal course of business or organizing them to correspond to the requests for production.

With respect to non-party witnesses, a party may issue a Subpoena *Duces Tecum* seeking the production of certain specified documents. See D.C. Super. Ct. R. Civ. P. 34(c) & 45.

4. Independent Medical Examinations

When the mental or physical condition of a party is at issue in a case, the Court may Order that party to submit to an examination arranged by, and at the expense of, the party requesting such examination. See D.C. Super. Ct. R. Civ. P. 35. The examining physician shall issue a detailed written report

that shall be given to all parties, which shall set forth the findings of the examiner, the results of all tests made, and all diagnoses and conclusions.

5. Requests for Admissions

A party may serve on any other party a written request for the admission of certain facts or the application of law to fact, including the genuineness of documents described in the request. See D.C. Super. Ct. R. Civ. P. 36. Such admissions are limited to the pending case only and may not be used in other actions. Each request shall be separately set forth and shall be deemed admitted unless denied within 30 days. The responding party cannot object or refuse to answer a request for admission solely because the requested admission presents a genuine issue for trial. If a party does not have sufficient information to respond, they must affirm in their response that they have made a reasonable inquiry and are unable to answer the request. However, subject to these qualifications, it is acceptable to answer that a party has insufficient information to answer the Request.

If a party fails to admit certain facts, or the genuineness of certain documents, and does not make an objection which is sustained by the Court, they face certain sanctions if the requesting party is later otherwise able to establish the truth of the facts or the genuineness of the documents involved. In this circumstance, the Court *shall* award the requesting party the reasonable expenses it incurred in making that proof, unless the Court finds that the refusal to admit was based on a good faith belief that the non-admitting party would prevail, that the admission sought was of no substantial importance, or the existence of other circumstances that would make an award of expenses unjust. See D.C. Super. Ct. R. Civ. P. 37(c).

IV. MOTIONS PRACTICE

A. Generally

All Motions filed in the Civil Division require a filing fee. Failure to pay the filing fee results in rejection of the proposed Motion by the clerk. Prior to filing any Motion (except for sanctions against an attorney or party pursuant to Rule 11), including Motions for Summary Judgment, a party must contact the other parties to the action to determine whether they will consent to the relief sought. All Motions must include a certification by the filing party that they sought consent from all other parties prior to filing the Motion. See D.C. Super. Ct. R. Civ. P. 12-I(a).

All Motions and Oppositions must also include a Statement of Points and Authorities in support of the proposed Motion, as well as a proposed Order. See D.C. Super. Ct. R. Civ. P. 12-I(e). An opposing Statement of Points and Authorities shall be filed within *15 days* of service of the original Motion, not counting weekends and legal holidays. If the motion is received by mail, you are allowed an additional 3 days to file and serve an opposition. Failure to file an opposing Statement of Points and Authorities may result in the Court treating the Motion as conceded. Id. In the caption, all motions are to indicate the next event to be held pursuant to the scheduling order. See D.C. Super. Ct. R. Civ. P. 12-I(h).

B. Motions Hearings

Each Judge on the Superior Court has his/her own preferences regarding whether to conduct a hearing on a Motion. However, most Motions seem to be ruled upon by the Judge, in chambers, on the papers submitted by the parties. While a party may request oral argument on a particular motion, it is within the Court's discretion whether to entertain oral argument. See D.C. Super. Ct. R. Civ. P. 12-I(f). Accordingly, it is important to raise all relevant arguments and issues in the papers submitted, and to ensure that your position is clearly and convincingly set forth therein.

C. Rule 12 Motions

The Superior Court Rules of Civil Procedure track the Federal Rules of Civil Procedure with regard to the manner in which a defendant can raise certain defenses. Rule 12(b) in each set of rules sets forth several specific defenses which may be raised either in the responsive pleading, or by motion. Those defenses are: lack of subject matter jurisdiction; lack of personal jurisdiction; insufficiency of process; insufficiency of service of process; failure to state a claim upon which relief may be granted; and failure to join a party. If these defenses are raised by Motion, the Motion must be filed prior to the responsive pleading. See D.C. Super. Ct. R. Civ. P. 12(b).

Rule 12 also provides several other types of Motions, including a Motion for judgment on the pleadings (Rule 12(c)), Motion for more definite statement (Rule 12(e)), and a Motion to Strike (Rule 12(f)).

D. Summary Judgment

In addition to a Memorandum of Points and Authorities, Motions for Summary Judgment also require a Statement of Uncontested Material Facts. See D.C. Super. Ct. R. Civ. P. 12-I(k). Opposing parties may file, within 10 days after service of the Motion (again, not counting weekends and legal holidays) a Statement of Material Facts which are in dispute. Both the moving party and the opposing party shall refer to the parts of the record relied upon to support each statement of fact

set forth in their respective papers.

A Motion for Summary Judgment may be supported by discovery responses in the case or by Affidavit. If a Motion for Summary Judgment is supported, the opposition may not rest upon the mere allegations or denials of that party's pleading, but instead must set forth specific points which are supported by the record. See D.C. Super. Ct. R. Civ. P. 56(e).

V. Common Causes of Action

A. Negligence

Negligence is defined as a failure to use ordinary care. Ordinary care is that which a "reasonable person" would use under the given circumstances. If a breach of ordinary care is found to be the proximate cause of damage to a plaintiff, the plaintiff may recover. In order to make out a case, a plaintiff must first show what the appropriate standard of care is; i.e., what the reasonable person should have done under the circumstances. In some complicated actions, such as medical malpractice cases, this showing requires testimony from expert witnesses to explain to the jury and the court the appropriate standard of care required under the circumstances. Plaintiff must then show that the conduct of the defendant failed, without excuse, to meet the applicable standard.

The theory of negligence *per se* suggests that the conduct of the defendant is negligent as a matter of course without the need for further inquiry. Plaintiffs often argue negligence *per se* in conjunction with a statutory provision that allows persons injured by another's violation of any statute to recover for the same. Thus, plaintiffs argue that if the defendant's conduct violated any statutory obligation, the defendant is guilty of negligence *per se* and plaintiff should automatically recover. While the defendant may be found to be negligent *per se*, the court will still require plaintiff to prove that such negligence is the proximate cause of plaintiff's injury.

The District of Columbia recognizes the rule of contributory negligence. If a plaintiff is found to have contributed in any way to the plaintiff's injuries, the plaintiff may not recover. In theory, if the defendant's negligence is 99% of the total negligence comprising the incident, and the plaintiff's negligence is 1%, the plaintiff is not entitled to recovery. Juries are loathe to apply this rule of law except in the clearest of cases**.** Defendants can also argue that a plaintiff's contributory negligence is negligence *per se*, subject to the same requirements of showing proximate causation.

B. Imputed Liability

1. Employer

An employer may be held responsible for the torts of his/her employee under three distinct theories: respondeat superior, negligent hiring and retention, and negligent entrustment.

a. Respondeat Superior

Under this doctrine, an employer may be held vicariously liable for tortious acts proximately caused by an employee, as long as those acts are within the scope of employment. In order to prevail under this theory of recovery, a plaintiff must prove (1) a master and servant relationship between employer and employee; (2) that the employee was in the process of his employer's business at the time of the tort; and (3) that the employee was in the scope of his employment at the time of the tort. The scope of the employment is defined as "incidental" to an employer's business and done "in furtherance of" the employer's business. An employee who deviates far from his duties has taken himself out of the scope of the employment. However, an employee's willful or malicious act may still be within the scope of employment.

b. Negligent Hiring and Retention

In order to establish a claim for negligent hiring or retention, a plaintiff must prove that the employer of the individual who committed the allegedly tortious act negligently placed an unfit person in an employment situation involving unreasonable risks of harm to others. The District of Columbia has also recognized negligent retention of an independent contractor.

c. Negligent Entrustment

An employer who allows an employee to use a vehicle or other property when the employer knows or has reason to know that because of the employee's youth, inexperience, physical or mental disability, or otherwise, the employee may use the vehicle or property in a manner involving unreasonable risk of physical harm to himself and others, is subject to liability.

d. Subcontractors

Employers, generally, are not liable for the acts of independent contractors, as opposed to employees. However, there are limits to this immunity from liability. Wilson v. Good Humor Corp., 757 F.2d 1293 (D.C. Cir. 1985).

2. Automobile Cases

a. Passengers

There is no unauthorized passenger defense in the District of Columbia. The negligence of the driver of an automobile will not be imputed to a mere passenger unless the passenger has or exercises control over the driver. A guest has a right to maintain an action for damages against an owner or operator of an automobile in which he/she is riding.

b. Owners

The former statutory provision deeming an individual operating a motor vehicle to be the agent of the owner was repealed. See Johnson v. Agnant, 480 F.Supp.2d 1 (D.D.C. 2006).

3. Parental Liability for Torts of Children

Cases dealing with the liability of parents for acts of minor children impose such liability where the parent has permitted a minor to use a dangerous instrumentality, or where they have knowingly permitted, encouraged, or failed to discourage, conduct inherently dangerous to others or prohibited by law intended to promote public safety. See Bateman v. Crim, 34 A.2d 257 (D.C. Mun. App. 1943).

4. Dram Shop *(see p. 30 for more on D.C. Dram Shop Liability)*

A vendor of alcoholic beverages can be held liable for injuries sustained by a third party that result from the intoxication of the vendor's patron. See Rong Yao Zhou v. Jennifer Mall Restaurant, Inc., 534 A.2d 1268 (D.C. 1987).

a. Social Host Liability

Social hosts have no duty and are not liable to parties who are injured when alcohol is served to guests. See Wadley v. Aspillaga, 163 F.Supp. 2d 1 (D.D.C. 2001).

C. Infliction of Emotional Distress Claims

The District of Columbia has done away with the requirement that Plaintiff suffer from a physical injury to support a claim for mental or emotional harm, and has instead adopted a "Zone of Danger" rule. To recover for emotional distress in the District of Columbia, a plaintiff must show that they were in "the zone of physical danger and as a result feared for his or her own safety because of defendant's negligence." However, to recover, the emotional distress must be serious and verifiable. See Brown v. Argenbright Security, Inc., 782 A.2d 752 (D.C. 2001). Damages for mental distress and related "injuries" may also be awarded as compensation for an intentional tort. See Neisner Bros., Inc. v. Ramos, 326 A.2d 239 (D.C. 1974).

D. Wrongful Death

A wrongful death action is brought by certain relatives or beneficiaries of a decedent and seeks recovery for their loss as a result of the death of the decedent. The focus on this type of action is not on the damages incurred by the decedent, but on the loss incurred by the plaintiffs.

1. Plaintiffs and Beneficiaries

The Wrongful Death Statute specifies that any action brought under it should be presented by the personal representative of the decedent. See D.C. Code § 16-2702. The personal representative is either an executor or administrator of the decedent's estate. See Strother v. District of Columbia, 372 A.2d 1291 (D.C. 1977). Any damages recovered on a wrongful death case go solely to the benefit of the spouse and next of kin. See D.C. Code §§ 16-2701 – 16-2703.

2. Statute of Limitations

A wrongful death action must be filed within two years from the date of death of the deceased person. See D.C. Code § 16-2702.

3. Damages

There are certain elements of damages which may, generally, be recoverable in an action brought under the Wrongful Death Act. See D.C. Code § 16-2701; Doe v. Binker, 492 A.2d 857 (D.C. 1985). Those elements are:

a. Compensation for reasonably expected loss of income of the decedent and services, protection, care and assistance provided by the decedent;

b. Expenses for the care, treatment, hospitalization of the decedent incident to the injury resulting in death; and

c. Reasonable funeral expenses.

d. It is noteworthy that a plaintiff in a wrongful death action in the District of Columbia may not recover for non-economic loss, such as grief or solace, to family members. See Hughes v. Pender, 391 A.2d 259 (D.C. 1978).

E. Survival Actions

Any claim recognized by the law of the District of Columbia can survive the death of either the person entitled to assert such claim, or the person against whom such claim would be asserted. A survival action is brought by the legal representative of the Decedent, as opposed to the personal representative in the case of a wrongful death action. A legal representative is a person who is authorized to take the place of, and act on behalf of, the decedent, whether through operation of law or through a testamentary act by the decedent.

The proper measure of damages in a Survival Action is the compensation to the estate itself for the loss of prospective economic benefit in the form of the decedent's prospective net lifetime earnings discounted to present worth. As with wrongful death actions, a plaintiff in a survival action in the District of Columbia may not recover for non-economic loss, such as grief or solace, to family members. See Hughes v. Pender, 391 A.2d 259 (D.C. 1978).

F. Loss of Consortium

Loss of consortium means loss of society, affection, assistance, conjugal fellowship and loss or impairment of sexual relations, as a result of another tort or injury. The District of Columbia does recognize claims for loss of consortium. Generally, the party complaining of loss of consortium must have been married to the primary victim-spouse at the time their cause of action accrued. See Stager v. Schneider, 494 A.2d 1307 (D.C. 1985).

G. Strict Liability

Strict liability is not generally recognized in the District of Columbia, except for products liability actions. *See* sub-heading J, Products Liability, herein below.

H. Medical Malpractice

Actions for medical negligence are subject to the standard rules applicable to negligence cases generally. See D.C. Code §§ 16-2801, et seq. There are some statutory provisions which apply to specific issues, such as the confidentiality attached to peer review documents. See D.C. Code § 44-805. The Plaintiff bears the burden of proving the standard of care, which in medical malpractice cases usually requires an expert witness. See Washington v. Washington Hosp. Center, 579 A.2d 177 (D.C. 1990). The expert witness must establish the basis for his/her knowledge of the applicable national standard of care and link his/her opinion testimony to the applicable national standard. See Hill v. Medlantic Health Care Group, 933 A.2d 314 (D.C. 2007).

I. Premises Liability

Premises liability actions are a version of negligence involving the liability of the owner or occupant (herein collectively "owner") of real property for damage sustained by another person on the premises. Unlike many other jurisdictions, in the District of Columbia, the traditional status (either trespasser, licensee, or invitee) of the plaintiff, or victim, has for all practical purposes been abolished, particularly with respect to licensees and invitees. However, there is case law applying a stricter standard for trespassers.

1. Duty Owed by Owner to Other Persons

a. Trespassers

A trespasser is a person who intentionally and without consent or privilege enters another's property. Generally speaking, a trespasser may recover for injuries sustained on the property of another person only when he/she can prove that his/her injury is the result of willful, wanton, or intentional actions by the landowner. See Holland v. Baltimore & Ohio Railroad Co., 431 A.2d 597 (D.C. 1981).

Some of the legal standards are different when the trespasser is a child, but generally the District of Columbia does adhere to the "attractive nuisance" doctrine. That doctrine provides that children are unable to control their impulses, and when a piece of property has some feature that children find interesting (pond, tower, etc.), that the owner should anticipate that children may be drawn to that feature, and should take appropriate measures to protect such child trespassers. However, there are some cases in the District of Columbia, where the danger is said to be so obvious that children of a certain age are presumed to recognize the danger and appreciate the

risk of drawing near, i.e., the danger of a moving train. E.g., Foshee v. Consolidated Rail Corp., 849 F.2d 657 (D.C. Cir. 1988).

b. Licensees and Invitees

A licensee is described as a person who enters the land of another, with permission, and for his or her own purposes and benefits. Licensees include the following classes of persons: social guests, hunters, persons who are invited into one portion of the premises and proceed to enter other portions, trespassers whose presence is known and acquiesced-to by the owner. An invitee is described as a person who enters the land of another, with permission, pursuant to the invitation.

While a landowner traditionally owed each of these classes of persons a different standard of care, the distinction has been abolished by case law in the District of Columbia. In Hopkins v. Baker, 553 F.2d 1339 (D.C. Cir. 1977), the court noted the revised standard in the District of Columbia, which is applicable to both traditional licensees and traditional invitees. A landowner owes these persons a duty of exercising reasonable care to maintain his or her property in a reasonably safe condition. Factors to be considered include the likelihood of injury to others as a result of a particular condition or hazard, the seriousness of such injury if it were to occur, and the burden on the landowner of avoiding the risk.

2. Snow and Ice

An owner, occupant, or person or entity in control of residential or commercial property, including undeveloped lots of land, is required to remove snow or sleet from any paved sidewalk in front of or abutting such real property within 8 hours of daylight after the snow or sleet stops. See D.C. Code § 9-601. However, this statute does not create a private cause of action on the part of an injured person. See Albertie v. Louis and Alexander Corp., 646 A.2d 1001 (D.C. 1994); Murphy v. Schwankhaus, 924 A.2d 988 (D.C. 2007).

3. Intervening Criminal Acts

Generally, an owner owes no duty to prevent the criminal acts of third persons on the owner's property. However, exceptions to this general rule include: in landlord-tenant relationships, where the criminal acts are foreseeable, and would have been prevented if the landlord had acted in a reasonable manner under the circumstances. See Morton v. Kirkland, 558 A.2d 693 (D.C. 1989).

J. Products Liability

The District of Columbia has adopted strict liability in products liability cases. In order to recover, a plaintiff must prove: (1) the seller was engaged in the business of selling the product that caused the harm; (2) the product was sold in a defective condition unreasonably dangerous to the consumer or user; (3) the product was one which the seller expected to and did reach the plaintiff consumer or user without any substantial change from the condition in which it was sold; and (4) the defect was a direct and proximate cause of the plaintiff's injuries. A product may be found defective if it has one of three shortcomings: (1) a manufacturing defect; (2) an absence of sufficient warnings or instructions; or (3) an unsafe design. Where a vendor or merchant sells a product, which is unreasonably dangerous, that vendor or merchant is liable for the injuries sustained by the consumer regardless of fault of the vendor or merchant, and regardless of whether there is privity of contract. Contributory negligence is not a defense in a strict liability action, but misuse of the product and assumption of the risk are valid defenses. See Young v. Up-Right Scaffolds, Inc., 637 F.2d 810 (D.C. Cir. 1980).

VI. DEFENSES TO CLAIMS

A. Limitations

1. Generally

For negligence causes of action alleging personal injury or property damage, the statute of limitations is 3 years. See D.C. Code § 12-301(3). For contract actions, the statute of limitations is 3 years. See D.C. Code § 12-301(7). The statute of limitations is an "affirmative defense," and as such, it must be raised in the first responsive pleading or it is considered waived.

2. Medical Malpractice

The statute of limitations for filing actions for medical malpractice is 3 years from the date the cause of action accrues. If a medical malpractice claim arises from a foreign object left in the body of the plaintiff, the statute extends to one year from the date the object is discovered or reasonably should have been discovered. See Burke v. Washington Hosp. Center, 293 F.Supp. 1328 (D.D.C. 1968); Burns v. Bell, 409 A.2d 614 (D.C. 1979).

3. Wrongful Death

The statute of limitations for a wrongful death action is 2 years from the date of death. See D.C. Code § 16-2702. If the wrongful death occurred in

another state, that state's wrongful death act may govern. If a specific statute of limitations is included in the foreign state's act, that limitation period may apply in the District of Columbia proceeding.

4. Survival Action

The statute of limitations for a survival action is 3 years from the date of death. See D.C. Code § 12-301(8); Strother v. District of Columbia, 372 A.2d 1291 (D.C. 1977).

5. Fraud

The limitations period for an action for fraud is 3 years from the date of the fraud or misrepresentation. See King v. Kitchen Magic, Inc., 391 A.2d 1184 (D.C. 1978). However, if the fraud or misrepresentation at issue prevents the discovery of the cause of action, the period may be extended until it is discovered, provided the plaintiff exercised due care to investigate and identify the cause of action.

6. Intentional Torts

The limitations period for an action for an intentional tort, such as libel, slander, assault, battery, malicious prosecution, false arrest, and false imprisonment, is 1 year. See D.C. Code § 12-301(4).

7. Tolling the Statute of Limitations

The running of the limitations period for any given action may be tolled or suspended, in certain special circumstances. The most common situations where a claimant may be given additional time in which to bring a claim include: the claimant is a minor; the claimant is incapacitated during the limitations period; the claimant is incarcerated; or the death of either the claimant or the defendant. See D.C. Code § 12-301 et. seq.

B. Contributory Negligence

As stated previously, the District of Columbia is a "contributory negligence" jurisdiction. Therefore, a lack of reasonable care on the part of the plaintiff, however slight, even one percent, is a *complete bar* to recovery if such negligence contributes to the plaintiff's injury. See Aetna Casualty & Surety Co. v. Carter, 549 A.2d 1117 (D.C. 1988). The evidence must show that the plaintiff's conduct did not conform to the standard of what a reasonable person of like age, intelligence, and experience would do under the circumstances for his own safety and protection. The burden is on the defendant to prove plaintiff's contributory negligence by a preponderance of evidence standard. However, in reality, a jury will not likely find

contributory negligence unless the plaintiff's negligence is substantial. A child under the age of 7 is conclusively presumed to be incapable of contributory negligence. However, the age of the child in a contributory negligence case is an issue of fact for the jury. Nat'l City Devel. Co. v. McFerran, 55 A.2d 342 (D.C. 1947). The presumption may be rebutted for children between the ages of 7 and 14 (burden falls to defendant), and children over the age of 14 are rebuttably presumed to be capable of contributory negligence (burden falls to plaintiff).

If the Plaintiff is a pedestrian, bicyclist, or "other non-motorized user of a public highway," involved in an accident with a motor vehicle, the standard is more akin to a comparative negligence standard. The Plaintiff's recovery is not barred unless the Plaintiff's negligence is (1) a proximate cause of the Plaintiff's injury *and* (2) greater than the aggregated total amount of negligence of all of the defendants that proximately caused the plaintiff's injury. D.C. Code § 50–2204.52.

C. Assumption of the Risk

A plaintiff is *completely barred* from recovery if he or she assumes the risk of injury when, with full knowledge and understanding of an obvious danger, he or she voluntarily exposes himself or herself to that risk of injury. See Janifer v. Jandebeur, 551 A.2d 1351 (D.C. 1989). See also Morrison v. MacNamara, 407 A.2d 555 (D.C. 1979). The doctrine of assumption of risk requires showing: (1) that the nature and extent of the risk are fully appreciated; and (2) that the risk is voluntarily incurred. There are certain risks which anyone of adult age must be able to appreciate, including the danger of slipping on ice, falling through unguarded openings, and lifting heavy objects.

Assumption of the risk is a corollary doctrine to the contributory negligence defense, and the distinctions between the two generally depend upon the conduct and intent of the plaintiff. If the plaintiff acts with an understanding of the risks that he or she faces, and the likelihood of injury is known, then he or she may be found to have assumed the risk. Alternatively, if the plaintiff acts without careful contemplation of his or her proposed actions and the consequences of the same, then plaintiff may be found to have been contributorily negligent.

D. Immunity

1. Spousal

Spousal Immunity has been abolished by statute in the District of Columbia. See D.C. Code § 46-601.

2. Parent-Child Immunity

An unemancipated minor may bring an action against a parent in tort,

regardless of whether the parent has liability insurance. See Rousey v. Rousey, 528 A.2d 416 (D.C. 1987).

3. Charitable Immunity

The doctrine of Charitable Immunity is not recognized in the District of Columbia, and a charitable corporation is responsible for its negligent acts just as other entities and individuals are. See Carl v. Children's Hosp., 702 A.2d 159 (D.C. 1997).

E. Last Clear Chance

While technically not considered a defense to a claim, last clear chance is a defense to contributory negligence. When a plaintiff is contributorily negligent, that plaintiff may claim that the defendant committed a fresh act of negligence at a time when the defendant could have avoided the accident and the plaintiff could not. This issue arises when the plaintiff alleges that the defendant was negligent, and the defendant defends on the basis that the plaintiff was contributorily negligent. Plaintiff may then assert that the defendant had the last clear chance to avoid the accident, after the plaintiff's negligent act, and that the defendant should be liable to the plaintiff notwithstanding the plaintiff's own contributory negligence. See WMATA v. Jones, 443 A.2d 45 (D.C. 1982).

F. Misuse of Product

There cannot be a recovery against a manufacturer in a products liability case when there has been an unforeseen misuse of the article. See Payne v. Soft Sheen Prods., Inc., 486 A.2d 712 (D.C. 1985). While a manufacturer may not be held liable for every misuse of its product, it may be held liable for a *foreseeable* misuse of an unreasonably dangerous product

G. Exclusivity

Workers' compensation is the sole remedy for an injured worker as against his or her employer or co-employee for injuries sustained in the workplace. See D.C. Code § 32-1504. The workers' compensation bar is a special plea, which must be raised either before the Answer is filed or concurrently with the Answer.

H. Non-permissive Use

Statutory presumption that vehicle was driven with owner's consent continues only until there is credible evidence to the contrary and ceases when there is uncontradicted proof that the automobile was not being used with the owner's permission. See Jones v. Halun, 296 F.2d 597 (D.C. 1961).

I. Plaintiff's Failure to Mitigate His or Her Damages

A defendant bears the burden to prove that the plaintiff failed to mitigate his or her damages to prevent recovery for those damages that could have been avoided if the plaintiff had taken reasonable measures. See Foster v. George Washington Univ. Med. Ctr., 738 A.2d 791 (D.C. 1999).

VII. DAMAGES

A. Compensatory Damages

1. Generally

"Special damages" are all those injuries that flow as a natural consequence of the tortious act. Beyond the immediate damage to the body is the possibility of manifold additional "out of pocket" expenses, also known as "special damages." These damages may include, but are not limited to, medical, dental, or psychiatric treatment bills, bills for physical or vocational therapy, lost earnings, loss of earnings capacity, medication, prosthetic devices, transportation expenses to and from health care providers, property damage or losses, mental anguish or emotional distress, future medical expenses, permanent physical impairment, disfigurement, future lost earnings based upon life expectancy, and other probable future consequences. All special compensatory damages must be proven to a reasonable certainty and may not be premised upon mere speculation or conjecture.

2. Bodily Injury

Economic and non-economic damages are recoverable. Economic damages are based upon the actual expense incurred or loss of value of those items or services. There is no cap on pain and suffering damages in the District of Columbia. All damages are determined by the trier of fact.

3. Property Damage

Fair market value of property is recoverable. To determine fair market value, the property's price, age, condition and any depreciation may be considered. See Maalouf v. Butt, 817 A.2d 189 (D.C. 2003).

4. Total Loss of Motor Vehicle or Other Property

Fair market value is determined at the time of the loss. See Sawyer v. Monarch Cab Co., 164 A.2d 340 (D.C. App. 1960). When an automobile is practically destroyed or so extensively damaged as to be beyond repair, the measure of liability is the difference between the fair market value immediately before the loss less its salvage value immediately afterwards.

See id.

5. Loss of Use or Rental Value of Motor Vehicle

Plaintiff's recovery for loss of use would be the reasonable time the owner is deprived of the use as the proximate and natural result of the damage to the vehicle. See Brandon v. Capital Transit Co., 71 A.2d 621 (D.C. App. 1950).

6. Pre-Judgment Interest

An award of pre-judgment interest is mandatory if the debt is liquidated and such interest is "payable by contract or by law or usage." See Nolen v. District of Columbia, 726 A.2d 182 (D.C. 1999); D.C. Code § 15-108.

7. Post-Judgment Interest

Post-judgment interest is recoverable from the date of the judgment only. See D.C. Code § 15-109. The rate of interest in the District of Columbia is 6% per annum. See D.C. Code § 28-3302(a). Interest is otherwise allowable on money judgments in civil cases in the manner and at the rates specified in 28 USC § 1961. Therefore, the interest rate varies according to the formula set forth in this section. Information regarding the current Treasury Bill interest rate may be obtained by calling (202) 452-3244 or going to <http://www.federalreserve.gov/releases/h15/current>.

8. Limitations on Damages

There is no cap for economic damages, non-economic damages or punitive damages in the District of Columbia.

9. Emotional Distress

Emotional distress may be proven as an element of damages in a negligence action.

10. Impairment of Future Wage Earning Capacity

In personal injury cases, District of Columbia courts consider lost wages and earnings suffered by the injured person from the time of injury to the time of trial as well as those lost wages and earnings reasonably certain to occur in the future.

B. Attorney's Fees

1. Generally

Generally, attorney's fees are not recoverable against another party unless they are permitted by contract or statute. In tort litigation, each party is required to pay their own attorney's fees regardless of the result of the litigation. Caution should be taken, however, with certain actions maintained under federal and state laws pertaining to discrimination as those particular statutes may have provisions, which permit plaintiffs to seek attorney's fees.

2. Actions Against Insurers

When the insured must resort to litigation to enforce a liability carrier's contractual duty to provide coverage for his/her potential liability to third persons, the insured is entitled to recovery of attorney's fees and expenses incurred in that litigation. See Nolt v. U.S. Fidelity and Guaranty Co., 329 Md. 52, 617 A.2d 578 (1993); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842 (1975); Cohen v. American Home Assur. Co., 255 Md. 334, 258 A.2d 225 (1969); American Continental Ins. Co. v. Pooya, 666 A.2d 1193 (D.C. 1995). However, the court has also held, in the context of a director's and officer's policy, that there is no recovery of attorney's fees where the insurer denied coverage in good faith. See Collier v. MD-Individual Practice Ass'n, Inc., 327 Md. 1, 607 A.2d 537 (1992).

3. Frivolous Actions or Pleadings

District of Columbia Superior Court Civil Procedure Rule 11 provides that sanctions may be awarded against a party and/or its attorneys if the court finds that any pleading, motion or other paper is presented to the court for any improper purpose, any frivolous reason or without reasonable information or belief as to the truth of the contents of the particular pleading or paper.

C. Punitive Damages

1. Generally

Generally, the law of the District of Columbia disfavors punitive damages. In a negligence action, punitive damages may be awarded only when there is also a verdict assessing compensatory or other actual damages. See Franklin Inv. Co., Inc. v. Smith, 383 A.2d 355 (D.C. 1978). Punitive damages generally are not awarded in contract actions. They are available, however, where the alleged breach of contract merges with and assumes the character of a willful tort. See Bragdon v. Twenty-Five Twelve Assocs. Ltd. P'ship, 856 A.2d 1165 (D.C. 2004).

2. Standard of Proof - Actual Malice

To sustain an award of punitive damages, the plaintiff must prove, by clear and convincing evidence, that the tortfeasor acted with evil motive or actual malice. See Daka, Inc. v. Breiner, 711 A.2d 86 (D.C. 1998).

3. Insurability of Punitive Damages

Public policy does not preclude insurance coverage for punitive damages.

VIII. INSURANCE COVERAGE IN DISTRICT OF COLUMBIA

A. Mandatory Liability Coverage

All persons owning or operating motor vehicles within the District of Columbia are required to maintain personal liability insurance policies with coverages equal to or greater than $25,000 for any one person and up to $50,000 for any accident. Additionally, all motor vehicles are required to have insurance coverage for the payment of claims for property of others damaged or destroyed in an accident up to $10,000 per accident. See D.C. Code §§ 31-2403 & 31-2406.

B. Uninsured & Underinsured Motorist Coverage

1. Generally

An uninsured motor vehicle is defined to include a vehicle that is not insured by an applicable motor vehicle liability policy; or a vehicle wherein the insurer denies coverage for the loss; or the owner or operator of the vehicle causing the damages cannot be identified.

All policies of insurance in the District of Columbia must contain uninsured motorist protection equal to or greater than the minimum amounts of $25,000 per person and $50,000 per accident for bodily injury or death and $5,000 per accident for property damage. See D.C. Code § 31-2406(f).

Underinsured motor vehicle coverage, which provides coverage up to the limits of uninsured motorist coverage where the wrongdoer's liability coverage is less than the uninsured motorist's limits, is optional. See D.C. Code § 31-2406(c-1).

2. Uninsured Motorist Fund

A victim who sustains an injury from a motor vehicle accident who would not otherwise be compensated for his or her loss may make a claim against the Uninsured Motorist Fund subject to the following conditions:

a. The accident must be reported to the Mayor within 45 days after the accident, except that this requirement may be waived for good cause. The District does not have to provide uninsured motorist coverage for vehicles it owns. See D.C. Code § 31-2408.01;

b. The claim must be filed on a form supplied by the Mayor and submitted within 180 days after the accident (requirement may be extended if the victim is still undergoing medical treatment for injuries relating to the accident or for a good cause). See D.C. Code § 31-2408.01(b)(2);

c. The victim suffered a loss of more than $100 as a result of the accident. See D.C. Code § 31-2408.01(b)(3); and

d. All other identifiable insurers are financially unable to fulfill their obligations to compensate the victim. See D.C. Code § 31-2408.01(b)(4).

Attorney's fees for claims brought against the Fund are limited to 10% of the award or $1,000.00, whichever is less. See D.C. Code § 31-2408.01(f).

C. Personal Injury Protection Coverage ("PIP")

1. Generally

The purchase of no fault coverage in the form of Personal Injury Protection (PIP) is optional in the District of Columbia. Persons insured with PIP coverage may opt either to accept PIP benefits, with concomitant lawsuit restrictions, or to reject PIP benefits and proceed against the wrongdoer without regard to any lawsuit restriction. See D.C. Code § 31-2404.

2. Optional PIP Coverage

a. Insurers are required to offer optional PIP coverage as follows:

(1) Medical and rehabilitation expenses: Range of coverage: $50,000 to $100,000 for each victim. See D.C. Code § 31-2404(c)(5);

(2) Work Loss: Range of coverage: $12,000 to $24,000 per victim (In addition to lost time from regular employment, work loss includes expenses incurred as a result of the victims' inability to perform services for personal or family benefit during the first 3 years after the date of the accident) See D.C. Code § 31-2404(d); and

(3) Funeral benefits: Actual costs up to $4,000. See D.C. Code § 31-2404(e).

3. Election of PIP Benefits

Accident victims who are eligible for PIP coverage and wish to collect such benefits must notify the insurer providing such coverage within 60 days of the accident. Insurers who have coverage available are required to notify any identifiable victim in writing of the 60 day election. The 60 day election written word period may be extended upon the mutual written agreement of the victim and the insurer. See D.C. Code § 31-2405.

4. Rejection of PIP Benefits

A victim who fails to elect to receive PIP benefits by filing the requisite notice automatically is entitled to seek compensation for all injuries and damages sustained by the proceeding against the wrongdoer pursuant to common law tort remedies. See D.C. Code § 31-2405.

5. Time for Filing and Payment of Claims

In order of priority, the insurer liable to pay benefits is:

(1) The victim's own PIP insurance carrier; or

(2) The insurance carrier providing coverage for the motor vehicle occupied by the victim at the time of the accident.

Where two or more insurance carriers are obligated to pay PIP on an equal basis, the carrier against whom the claim is first made shall process the claim and pay benefits as if wholly responsible with the right to seek contribution from other carriers at a later time. See D.C. Code § 31-2407.

6. Penalty for Late Payment of PIP

PIP benefits are payable as loss accrues and must be paid within 30 days after receipt of reasonable proof of the fact and amount of the loss. See D.C. Code § 31-2410(c).

Attorney's fees and interest are awardable in lawsuits seeking payment of overdue PIP benefits. See D.C. Code § 31-2410(e).

7. Lawsuit Restriction

Victims who elect to receive PIP benefits are precluded from maintaining a civil action based upon liability of their wrongdoer unless the victim is able to satisfy one of the following criteria listed in D.C. Code Section 31-2405(b). The criteria are as follows:

a. The injury directly results in substantial permanent scarring or disfigurement;

b. The injury directly results in substantial and medically demonstrable permanent impairment that has significantly affected the ability of the victim to perform professional activities or usual and customary daily activities;

c. The injury directly results in a medically demonstrable impairment that prevents the victim from performing all or substantially all of the material acts and duties that constitute his or her usual and customary daily activities for more than 180 continuous days; or

d. The medical and rehabilitation expenses of a victim or work loss of a victim exceeds the amount of PIP benefits available.

If PIP is not elected, there are no lawsuit restrictions. The District of Columbia's interpretation of the No-Fault Act (PIP) is set out in the case of Musa v. Continental Insurance Co., 644 A.2d 999 (D.C. 1994). Note: The D.C. PIP statute has not significantly reduced third-party claims.

e. Subrogation

An insurer who pays PIP benefits has a right of subrogation against another insurer, based on a determination of fault involving 2 or more vehicles, one of which is not a passenger motor vehicle. See D.C. Code § 31-2411(d).

IX. IMPORTANT ISSUES/INFORMATION FOR INSURERS

A. Duty to Defend

The duty to defend is separate from and broader than the duty to indemnify. The duty to defend is triggered if the allegations in the complaint raise the potentiality that the claim may be covered by the policy. Any doubt as to whether there is a potentiality of coverage under an insurance policy will be resolved in favor of the insured. Once there is a potentiality of coverage, the insurer is obligated to defend

the entire suit until such time, if ever, that the claims have been limited to ones outside the policy coverage. If an insurer refuses to defend a claim within the policy coverage on behalf of the insured, the refusal to defend constitutes a breach of contract and the insurer would be liable for damages incurred by the insured as a result of the insurer's breach of its obligation to defend. See Siegel v. William E. Bookhultz & Sons, Inc., 419 F.2d 720, 136 U.S. App. D.C. 138 (1969). Indemnification under the policy is not due unless the insured actually loses or is made liable for claims that are covered by the policy. See Sherman v. Ambassador Ins. Co., 670 F.2d 251, 216 U.S. App. D.C. 93 (1981).

B. Releases

Unless the document specifically provides for release of all tortfeasors, a release discharges the obligations of only the party to the release. See Noonan v. Williams, 686 A.2d 237 (D.C. 1996); McKenna v. Austin, 134 F.2d 659, 77 U.S. App. D.C. 228 (1943). The effect of a release of a joint tortfeasor is ordinarily a question of fact dependent on two inquiries: 1) did the plaintiff intend to release all wrongdoers or only the particular party named in the release; and (2) did the amount settled for fully compensate the plaintiff, or was it taken merely as the best obtainable compromise for the settler's liability. See McKenna, supra.

X. MISCELLANEOUS RULES

A. Minors

The guardian or fiduciary of a minor is eligible to bring suit and settle an action on behalf of the minor, however, the settlement is not valid unless it is approved by a judge of the court in which the action is pending. See D.C. Code § 21-120. If the net value of the money and property due to the minor exceeds $3,000, no person may receive the money or property on behalf of the minor until he is appointed guardian of the estate of the minor to receive the money or property by a court of competent jurisdiction. See id.

B. Offer of Judgment

The District of Columbia follows the Federal Rules of Civil Procedure regarding offers of judgment. District of Columbia Superior Court Civil Procedure Rule 68 provides that if an offer of judgment is made and rejected by the offeree, and the judgment finally obtained is not more favorable than the offer, the offeree must pay the costs incurred by the offeror after the offer was made. F.R.C.P. 68.

C. Res Judicata and Collateral Estoppel

The doctrine of res judicata is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but

as to all matters which with propriety could have been litigated in the first suit. Collateral estoppel involves preclusion of a claim when the material issue has been litigated and decided in a prior suit, though that prior suit may have involved a completely different cause of action.

XI DRAM SHOP LIABILITY - DISTRICT OF COLUMBIA

A. Dram Shop Laws

In the District of Columbia, liability for the sale, delivery, or permitted consumption of alcoholic beverages to an obviously intoxicated person is governed in part, by D.C.'s Omnibus Alcoholic Beverage Regulation Act, D.C. Code § 25-781 (2015) ("OABR Act" or "the Act"), and D.C. case law. D.C. Code § 28-781(a) prohibits the sale or delivery of alcohol to a person under the age of 21, an intoxicated person, a person who appears to be intoxicated, or a person of notoriously intemperate habits. D.C. Code § 28-781(b) further prohibits retail licensees from permitting the consumption of alcohol at the licensed establishment by the same classifications of people listed in §28-781(a). Licensees who violate the OABR Act are subjected to penalties, which include fines and suspension of the licensee for a specified period of time. See D.C. Code § 28-781(f). The Act, however, does not affirmatively create a separate cause of action against the licensee whose violations of the Act result in injuries to a third-person. See id.

The District of Columbia Court of Appeals has adopted the concept of "dram shop" liability, which provides a separate cause of action against the licensee by injured third-parties, through the doctrine of negligence *per se*. See Rong Yao Zhou v. Jennifer Mall Rest., Inc., 534 A.2d 1268 (D.C. 1987) (reviewing D.C. Code § 25-121(b) (1981), which is now codified in D.C. CODE § 28-781 (2015)); Jarrett v. Woodward Bros., Inc., 751 A.2d 972 (D.C. 2000) (reviewing D.C. Code § 25-121(b) (1981), which is now codified in D.C. Code § 28-781 (2015)). To establish a cause of action under D.C. law, a plaintiff is required to prove that the defendant (licensee) violated § 28-781 and that such statutory violation was the proximate cause of the plaintiff's injuries. Rong Yao Zhou, 534 A.2d at 1272. Although claims arising under D.C.'s "dram shop laws" typically involve motor vehicle accidents, licensees have also been held liable for damages caused by intentional torts of intoxicated patrons. Norwood v. Marrocco, 586 F. Supp. 101 (D.D.C. 1984) aff'd, 780 F.2d 110 (D.C. Cir. 1986).

B. Negligent *Per Se* – Violation of § 28-781

In the District of Columbia, a defendant's unexcused violation of the OABR Act, by serving "persons already intoxicated or apparently intoxicated", renders the defendant negligent *per se*. Rong Yao Zhou, 534 A.2d at 1276. However, once a defendant is found to have violated the statute, the defendant may "present evidence as to whether the violation was excusable under the circumstances or whether other acts of due care negate the negligence implied by the statutory violation." Id. at 1277.

C. Proximate Cause

As stated above, a plaintiff is required to show that the defendant violated § 25-781, and that such violation was the proximate cause of his or her injuries. In the context of dram shop liability, proximate cause has been defined as proof of an injury and "its proximity in time, place and circumstances… to the alleged statutory violation." Rong Yao Zhou, 534 A.2d at 1277 (internal quotations and citations omitted). The District of Columbia Court of Appeals has specifically noted that when considering proximate cause "the jury is *not* free to find that the customer's consumption of the alcohol was an intervening cause of the harm to plaintiff, thereby negating proximate cause as it relates to the tavern keeper's furnishing of the drinks." Id.

D. Sale or Permitted Consumption to Underage Person

The OABR Act prohibits the sale, delivery, or permitted consumption of alcoholic beverages to persons under the age of 21. While the traditional application of dram shop liability, as stated above, applies only to injuries of innocent third-persons, the District of Columbia Court of Appeals has extended a licensee's liability to include injuries to a voluntarily-intoxicated underage person who became intoxicated as a result of the licensee violating the Act. Jarrett, 751 A.2d at 980-81. As such, the intoxicated underage person's own unlawful actions will not constitute contributory negligence or assumption of the risk. Id. at 986-87.

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