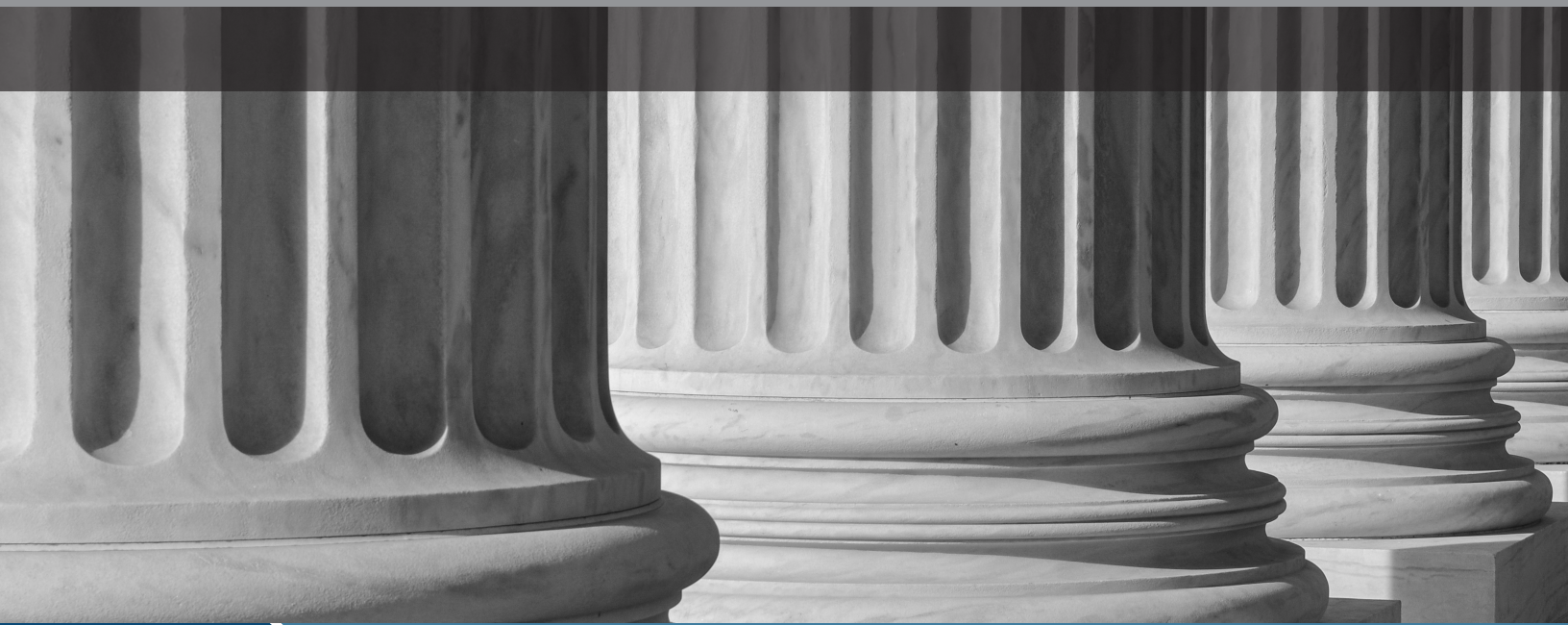


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WEST VIRGINIA Tort Profile

The West Virginia Tort Law Profile is not intended to provide specific legal advice or opinions, but rather to provide general information. If you need additional information regarding West Virginia law, or in relation to a specific claim, please do not hesitate to call upon us. (January 2019)

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I. OVERVIEW OF THE WEST VIRGINIA COURTS SYSTEM

Information about the West Virginia Judicial System may be found at the official web site which can be accessed at www.courtswv.gov. There are various links there that will lead to information about each of the courts in West Virginia, as well as general information about the judicial system as a whole.

A. Trial Courts

Throughout West Virginia, each County and City has its own courts, with a few exceptions. Each jurisdiction has several layers of courts, as established by the West Virginia Code. While there are central Rules of Procedure for all state courts, each local jurisdiction may have its own “local rules of procedure” which can dramatically vary practice in that Court. Accordingly, familiarity with the local rules in a given jurisdiction can be as important as familiarity with the central Rules of Procedure. The local rules are usually available through the court clerk’s office or the judges’ chambers.

1. Magistrate Court

The Magistrate Court has jurisdiction over civil cases in which the financial amount in dispute is less than \$10,000. The Magistrate Court also hears misdemeanor cases and conducts preliminary examinations in felony cases. In criminal cases the Magistrate Court issues and records affidavits, complaints, arrest warrants and search warrants, sets bail, makes decisions concerning proposed plea agreements, and the collection of court costs, cash bonds and fines. The Magistrate Court issues emergency protective orders in cases involving domestic violence. In some counties, where there are no mental hygiene commissioners, the Chief Judge of the Magistrate Court can designate a magistrate to handle all or part of probable cause involuntary hospitalization cases. A party to a civil action in Magistrate Court has the right to elect that the matter be tried by a jury when the amount in controversy exceeds twenty dollars or involves the possession to real estate. Moreover, discovery is limited in the Magistrate Court to production of documents and entry upon land, physical examination, and subpoenas for production of documentary evidence. Finally, any party to a final judgment may as a matter of right appeal to the Circuit Court.

2. Family Court

The Family Court has jurisdiction over civil cases involving divorce; annulment; separate maintenance; paternity; grandparent visitation; issues involving allocation of parental responsibility; and family

support proceedings, except those incidental to child abuse and neglect proceedings. The Family Court also holds final hearings in domestic violence proceedings. Discovery in the Family Court is permitted, as the interest of justice requires, pursuant to Rules 26 through 37 of the West Virginia Rules of Civil Procedure as may be ordered by the Court at any time, or as may be allowed by the Court upon motion demonstrating a particular need. Finally, a party aggrieved by a final order of the Family Court may file a petition for appeal to the Circuit Court, or in certain instances, the parties may waive the appeal to Circuit Court and may file an appeal with the Supreme Court of Appeals of West Virginia.

3. Circuit Court

The Circuit Court is West Virginia's only general jurisdictional trial court of record. Circuit Courts have jurisdiction over all civil cases at law over \$2,500.00; all civil cases in equity; proceedings in habeas corpus, mandamus, quo warranto, prohibition, and certiorari; all felonies and misdemeanors. The Circuit Courts receive appeals from Magistrate Court, municipal court, and administrative agencies, excluding workers' compensation appeals. The Circuit Courts also hear appeals from Family Courts, unless both parties agree to appeal to directly to the Supreme Court of Appeals of West Virginia. The Circuit Courts receive recommended orders from judicial officers who hear mental hygiene and juvenile matters.

Jury trials are available in the Circuit Court, and unless the court directs that a jury shall consist of a greater number, a jury shall consist of six persons. Moreover, the court may direct that not more than six jurors in addition to the regular jury may be called and impaneled as alternate jurors.

Full discovery is allowed in Circuit Court, including forty (40) interrogatories and unlimited requests for production of documents and unlimited requests for admissions. The depositions of both parties and non-parties are allowed. In addition, the Courts allow the use of expert witnesses and independent medical examinations.

4. Reputation of Jurisdictions in West Virginia

In general, West Virginia juries and judges have a reputation for plaintiff verdicts and damage awards. There are some exceptions, including the Circuit Courts for Berkley County, Jefferson County, and Upshur County, where relatively conservative juries can be expected. The court system of West Virginia has been described as a "judicial hellhole" by the American Tort Reform Association, and

as such, it leads to a generally modest prospect for a fair and reasonable result from most jury trials.

5. Arbitration / Mediation

Historically, West Virginia courts have not required any formal alternative dispute resolution (“ADR”). However, in recent years, West Virginia Circuit Courts have applied specific trial court rules to order the referral of specific cases to mediation. With the overarching goal of reaching a settlement of any and all disputes and issues before them, more Circuit Courts are making mediation mandatory; however, many circuits still rely on the agreement or stipulation of the parties as it relates to mediation in most cases.

B. Appellate Courts

1. The Supreme Court of Appeals of West Virginia

The Supreme Court of Appeals of West Virginia is the highest Court in the state, and is the court of last resort. The Supreme Court of Appeals, which is comprised of five justices, hears appeals of decisions over all matters decided in the Circuit Courts, including criminal convictions affirmed on appeal from Magistrate Court, and appeals for administrative agencies. Workers’ compensation appeals are unique and are appealed directly to the Supreme Court of Appeals from the administrative agency. The Supreme Court of Appeals also hears appeals of decisions in Family Court if both parties agree that they will not appeal directly to the Circuit Court.

The Supreme Court of Appeals also has extraordinary writ powers and original jurisdiction in proceedings involving habeas corpus, mandamus, prohibition, and certiorari. The Supreme Court of Appeals also interprets the laws and Constitutions of the State of West Virginia and the United States.

The Supreme Court of Appeals’ appellate jurisdiction is entirely discretionary. A party must petition the Supreme Court of Appeals to hear its appeal. Moreover, pursuant to the recently revised rules of appellate procedure, the Supreme Court of Appeals has the discretion to determine whether a case presents an issue proper for consideration by oral argument, and whether the merits of a case may be disposed by memorandum opinion or by published opinion.

II. COMMENCEMENT OF ACTION

A. Venue

Any civil action or other proceeding shall be brought in the county where the defendant resides; wherever a corporate defendant maintains its principal office, wherein its chief officer resides, or wherever it conducts business; wherever the defendant regularly conducts business activity; or where the cause of action arose. If there is more than one defendant, and there is no single venue applicable to all defendants, all may be sued in a county in which any one of them could be sued, or in the county where the cause of action arose. *See*, W. Va. Code § 56-1-1(a) (*Circuit Courts generally*), W. Va. Code § 50-2-2(a) (*Magistrate Courts generally*).

Venue in the courts of West Virginia is jurisdictional. In 2007, the West Virginia Legislature adopted the doctrine of *forum non conveniens* by statute. *See*, W. Va. Code § 56-1-1(b) (*Circuit Courts*), W. Va. Code § 50-2-2(b) (*Magistrate Courts*).

B. Complaints and Time for Filing an Answer

1. Magistrate Court

A civil action is commenced in Magistrate Court by filing a Complaint with the magistrate clerk. The Complaint shall contain a short and plain statement of the claim showing that the Plaintiff is entitled to relief, and a demand for judgment for the relief the Plaintiff seeks. Upon timely service of process of the Complaint upon a Defendant, the Defendant must file an Answer with the magistrate clerk within twenty (20) days, or if service was made upon an agent or attorney in fact, the Defendant shall have thirty (30) days. Under the West Virginia Rules of Civil Procedure for Magistrate Courts, defendants may also plead counterclaims and cross-claims, and may file third party complaints. Discovery in the Magistrate Court is limited to production of documents and entry upon land, physical examination, and subpoenas for production of documentary evidence and witnesses.

Generally, proceedings in Magistrate Court are less formal than those in Circuit Court. The same rules of evidence are applicable. Opening and closing statements are permitted. Medical records may be submitted, and are admissible without live testimony of the physician if the records are properly authenticated. Likewise, estimates for damage to automobiles may be introduced if accompanied by a sworn statement of the estimator regarding the authenticity of the estimate. Appeals to Circuit Court may be brought by any party to a final judgment

with the filing of a Notice of Appeal within 20 days after judgment is entered. The magistrate clerk shall also collect a bond from the appellant at the time the Notice of Appeal is filed, unless the appeal is permitted to proceed without prepayment.

2. Circuit Court

A civil action is commenced in Circuit Court by filing a Complaint with the circuit clerk. An Answer or other responsive pleading must be filed within 20 days of receipt of service of process; however, thirty days is permitted in the instance when the defendant files with the court a notice of bona fide defense, and when the defendant was served by or through an agent or attorney in fact authorized by appointment or by statute to receive or accept service of behalf of such defendant.

A motion to dismiss is a type of pleading filed by the defendant alleging that the Complaint fails to comply with several basic requirements. Specifically, a defendant can raise the defense of the lack of jurisdiction over the subject matter; the lack of jurisdiction over the person; improper venue; insufficiency of process; insufficiency of service of process; the failure to join a party; and the failure to state a claim upon which relief can be granted; i.e. that even if the facts are true as alleged, the Complaint does not set out a legal claim recognized under West Virginia law. Affirmative defenses such as the statute of limitations, contributory negligence and assumption of the risk must be raised specifically in the responsive pleading.

C. Service of Process

Particularly noteworthy for our interstate trucking companies, service of process can be effected against a driver defendant through the West Virginia Secretary of State. The mere operation of a motor vehicle upon the street, roads, and highways of the State of West Virginia by a non-resident is consent that service of process may be made on the West Virginia Secretary of State as the driver's agent or attorney-in-fact in any action or proceeding against the driver in any court of record in the state arising out of any accident or collision occurring in the State of West Virginia in which the non-resident was involved. In the event that process against a non-resident defendant cannot be effected through the West Virginia Secretary of State, the non-resident defendant shall be considered to have appointed as his or her agent or attorney-in-fact any insurance company which has a contract of automobile insurance or liability insurance with the non-resident defendant. (*See*, W. Va. Code § 56-3-31.)

III. 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 this breach of ordinary care is found to be the proximate cause of damage to the plaintiff, the plaintiff may recover. In order to establish 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. Plaintiff often argues 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. (*See*, W. Va. Code § 55-7-9.) Thus, plaintiff argues 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.

West Virginia recognizes the rule of modified comparative negligence. A plaintiff may not recover if his or her negligence exceeds or equals the combined negligence of the other parties. *See, Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S. E.2d 879 (1979). In 2015, the West Virginia Legislature adopted West Virginia Code § 55-7-13a, which defines comparative fault as “the degree to which the fault of a person was a proximate cause of an alleged personal injury or death or damage to property, expressed as a percentage.” The Code Section also provides that “[i]n any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person’s percentage of fault.” Finally, “[t]he total of the percentages of comparative fault allocated by the trier of fact with respect to a particular incident or injury must equal either zero percent or one hundred percent.” W. Va. Code Ann. § 55-7-13a.

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 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 that the injury to his person or property results proximately from tortious conduct of an employee acting within the scope of his employment, and that the act of the employee was done in accordance with the expressed or implied authority of the employer. The scope of the employment is defined as “an act specifically or impliedly directed by the master, or any conduct which is an ordinary and natural incident or result of that act.” An employee who deviates far from his duties can take himself out of the scope of the employment. However, an employee’s willful or malicious act may still be within the scope of employment. *See Griffith v. George Transfer & Rigging, Inc.*, 157 W. Va. 316, 201 S.E.2d 281 (1973) and *Barath v. Performance Trucking, Inc.*, 188 W. Va. 367, 424 S.E.2d 602 (1992).

b. Negligent Hiring

In order to establish a claim for negligent hiring, 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. *See Thomson v. McGinnis*, 195 W. Va. 465, 465 S.E.2d 922 (1995).

c. Negligent Entrustment

An employer who allows an employee to use a vehicle when the employer knows, or from the circumstances is charged with knowing, that the employee is incompetent or unfit to drive may be liable for an injury inflicted by the employee if the injury was proximately caused by the disqualification, incompetency, inexperience, intoxication or recklessness of the employee. *See Payne v. Kinder*, 147 W. Va. 352, 127 S.E.2d 726 (1962).

d. Subcontractors

Employers, generally, are not liable for the acts of an independent contractor. However, there are limits on this immunity. For instance, where one engages an independent

contractor to do work that is abnormally dangerous and likely to cause injury to a person or property, the employer may be subject to liability if the contractor fails to use due care. *See, Peneschi v. Koppers Co, Inc.*, 170 W. Va. 511, 295 S.E.2d 1 (1982). Likewise, if the work to be performed constitutes the creation of a public or private nuisance, the employer cannot avoid liability simply because it engaged an independent contractor to perform the work. *See, West v. National Mines Corp, et al.*, 168 W. Va. 578, 285 S.E.2d 670 (1981).

2. Passengers

There is no unauthorized passenger defense in West Virginia. 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 or invitee has a right to maintain an action for damages against an owner or operator of an automobile in which he is riding. *See, West Virginia Code § 33-6-29.*

3. Parental Liability for Torts of Children

Generally, a parent is not liable for the malicious, intentional acts of his/her minor, unemancipated child based upon their own independent negligence in failing to control their children. However, there is a statutory exception that establishes parental liability for the willful, malicious or criminal acts of children that proximately damage public or private property up to a limit of \$5,000.00. *See, W. Va. Code § 55-7A-2.*

4. Family Purpose Doctrine

The family purpose doctrine is followed in West Virginia. The doctrine provides that the owner of a motor vehicle, purchased or maintained for the use or enjoyment of his family, is liable for injuries caused by the negligent driving of that vehicle by any member of his family. *See Freeland v. Freeland*, 152 W. Va. 332, 162 S.E.2d 922 (1968). However, where a family member is driving another family member's vehicle, the family purpose doctrine cannot be used by a defendant to impute the negligence of the family member driving the vehicle to the family member who owns the vehicle. *See Bartz v. Wheat*, 169 W. Va. 86, 285 S.E.2d 894 (1982).

5. Dram Shop

A vendor of alcoholic beverages may be liable for injuries sustained by a third party that result from the intoxication of the vendor's

patron. The basis of dram shop actions in West Virginia is not based on dram shop legislation, but rather, a common law negligence approach that relies upon the violation of a specific alcohol related statute. Namely, West Virginia Code § 55-7-9 provides that any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation. In turn, West Virginia Code § 60-7-12 provides that alcoholic beverages shall not be sold to a person who is less than twenty-one years of age; an habitual drunkard; intoxicated; addicted to the use of a controlled substance; or mentally incompetent. *See Bailey v. Black*, 183 W. Va. 74, 394 S.E.2d 58 (1990). In regard to a gratuitous social host, the West Virginia Supreme Court of Appeals has held that absent a basis in either common law principles of negligence or statutory enactment, there is generally no liability on the part of a social host who gratuitously furnishes alcohol to a guest when an injury to an innocent third party occurs as a result of the guest's intoxication. *See Overbaugh v. McCutcheon*, 183 W. Va. 386, 396 S.E.2d 153 (1990).

C. Infliction of Emotional Distress Claims

1. Negligent Infliction of Emotional Distress

West Virginia recognizes the tort of negligent infliction of emotional distress. To recover under this theory, a plaintiff must prove that the serious emotional injury suffered by the plaintiff was reasonably foreseeable to the defendant based on the following factors: (1) the plaintiff was closely related to the injury victim; (2) the plaintiff was located at the scene of the accident and was aware that it was causing injury to the victim; (3) the victim is critically injured or killed; and (4) the plaintiff suffers serious emotional distress. *See Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992). Moreover, the West Virginia Supreme Court has held in the context of a negligent infliction of emotional distress claim absent physical injury, that a party may assert a claim for expenses related to future medical monitoring necessitated solely by fear of contracting a disease from exposure to toxic chemicals. *See Bower v. Westinghouse Electric Corporation*, 206 W. Va. 133, 522 S.E.2d 424 (1999).

2. Intentional Infliction of Emotional Distress

West Virginia recognizes the tort of intentional infliction of emotional distress. To recover under this theory, a plaintiff must prove that: (1) the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) the actions of

the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. *See Travis v. Alcon Laboratories*, 202 W. Va. 369, 504 S.E.2d 419 (1998).

D. Wrongful Death

In West Virginia, a wrongful death action is brought by the decedent's personal representative and seeks to recover, on behalf of the statutory beneficiaries, the loss as a result of the death of the decedent. The focus of this type of action is not on the damages incurred by the decedent, but rather the loss incurred by the beneficiaries.

1. Personal Representative and Beneficiaries

The Wrongful Death Statute specifies that any action brought under it shall be brought by and in the name of the personal representative of the decedent. *See*, W. Va. Code § 55-7-6(a). The Act sets forth two distinct classes of beneficiaries who may be entitled to recover damages for a wrongful death. The jury may apportion the damages to the beneficiaries, and if it does not, then the Court must do so when it enters Judgment on the verdict. *See*, W. Va. Code § 55-7-6 (b).

The first class of beneficiaries include the surviving spouse and children of the deceased, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in a distribution. If there are no such survivors, then the damages shall be distributed in accordance with the decedent's will or, if there is no will, in accordance with the laws of decent and distribution as set forth in chapter forty-two of the code. *See*, W. Va. Code § 55-7-6 (b).

2. Defenses

Any defense which would have barred suit or recovery by the deceased also bars recovery by a wrongful death plaintiff, e.g., assumption of the risk or contributory negligence by the decedent.

3. Statute of Limitations

A wrongful death action must be filed within two years from the date of death. *See*, W. Va. Code § 55-7-6 (d).

4. Damages

Damages may include both pecuniary damages which are designed to compensate for the loss of economic benefits and non-economic (solatium damages). The West Virginia's Wrongful Death Act specifically outlines four categories/descriptions of allowable

damages. *See*, W. Va. Code § 55-7-6 (c). The categories are as follows:

- a. Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent;
- b. Compensation for reasonably expected loss of income of the decedent and services, protection, care and assistance provided by the decedent;
- c. Expenses for the care, treatment, hospitalization of the decedent incident to the injury resulting in death; and
- d. Reasonable funeral expenses.

5. Compromise

a. Prior to the Commencement of the Wrongful Death Action

No wrongful death action may be maintained by the personal representative where the decedent, after injury, entered into a compromise of claims and accepted satisfaction therefor previous to his or her death. *See*, W. Va. Code § 55-7-5.

b. Compromises of Wrongful Death Action Must Be Court Approved

Any settlement of a wrongful death claim must be approved by a Circuit Court in West Virginia. If the claim is settled without pending litigation, the personal representative may petition the Court for approval of the settlement. *See*, W. Va. Code § 55-7-7.

E. Survival Actions

Any claim recognized by West Virginia law can survive the death of either the person entitled to assert such claim, or the person against whom such claim would be asserted. In the event that a person asserts a personal injury claim and then dies while such claim is pending, the claim should be amended to be a wrongful death claim. *See*, W. Va. Code § 55-7-8. Any defense which would have barred suit or recovery by the deceased also bars recovery by survival action.

F. Loss of Consortium

Loss of consortium means loss of society, affection, assistance, conjugal

fellowship and loss or impairment of sexual relations. West Virginia recognizes claims for loss of consortium, and plaintiffs may seek recovery for the same.

G. 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.

1. Duty Owed by Owner to Other Persons

The duty owed to injured individuals, by the owner or possessor, differs depending on which of the following three (3) categories is applicable.

a. Trespasser

A trespasser is a person who intentionally and without consent or privilege enters another’s property. Generally, the owner or possessor of property owes no duty of ordinary care to protect or safeguard an unknown trespasser from injury upon the premises. With regard to a trespasser, a possessor of property needs only to refrain from willful or wanton injury. Moreover, there is no general duty on the part of an owner to prevent a trespass. *See, Huffman v. Appalachian Power Company*, 187 W. Va. 1, 415 S.E.2d 145 (1992).

However, once the owner is aware of the trespasser’s presence, some degree of duty arises on the part of the owner. Essentially, railway employees must exercise reasonable care not to injure a known trespasser after the trespasser is discovered upon railroad tracks. *See Craighead v. Norfolk and Western Railway Company*, 197 W. Va. 271, 475 S.E.2d 363 (1996).

The legal standard varies when the trespasser is a child, but generally West Virginia does not 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.), 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 West Virginia which carve out an exception to this general rule in cases where an owner has created or maintains a dangerous instrumentality or condition at a place

frequented by children who thereby suffer injury, and the owner may be held liable for such injury if they knew, or should have known, of the dangerous condition and that children frequented the dangerous premises either for pleasure or out of curiosity. *See Love v. Virginian Power Co.*, 86 W. Va. 393, 103 S.E.2d 352 (1920). In regard to the same type of dangerous condition or instrumentality relative to an adult trespasser, a plaintiff must prove the following conditions: 1) the possessor must know, or from facts within his knowledge should know, that trespassers constantly intrude in the area where the dangerous condition is located; 2) the possessor must be aware that the condition is likely to cause serious bodily injury or death to such trespassers; 3) the condition must be such that the possessor has reason to believe trespassers will not discover it; and 4) in that event, the possessor must have failed to exercise reasonable care to adequately warn the trespassers of the condition. *See, Huffman v. Appalachian Power Company*, 187 W. Va. 1, 415 S.E.2d 145 (1992).

b. Licensees/Invitees

A licensee is described as a person who enters the land of another, with express or implied 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.

Generally an owner has no duty to keep the premises safe and suitable for the use of a licensee and is only liable for willful and wanton injury that may be done to a licensee. Specifically, the West Virginia Supreme Court of Appeals has held that the owner of property has no obligation to provide against dangers which arise out of the existing condition of the premises inasmuch as the licensee goes upon the premises subject to all the dangers attending such conditions. *See Burdette v. Burdette*, 147 W. Va. 313, 127 S.E.2d 249 (1962).

The distinction between an invitee and a licensee has been abolished in West Virginia. *See Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999). Despite this pronouncement, landowners or possessors now owe any non-trespassing entrant a duty of reasonable care under the circumstances. *See Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999).

Moreover, the West Virginia Legislature codified “open and

obvious” doctrine in West Virginia in West Virginia Code § 55-7-28, thus establishing that a possessor of real property owes not duty of care to protects other from dangers that are open, obvious, reasonably apparent, or as well know to the person injured as they are to the possessor. This statute creates a bar for civil damages arising of injuries for open and obvious dangers.

2. Snow and Ice

An owner or occupant of property must remove snow and ice from his or her property upon the end of a snowstorm. *See, Phillips v. Super America Group, Inc.*, 852 F.Supp. 504 (N.D.W.Va.) (1994).

3. Intervening Criminal Acts

Generally, an owner or landlord has no duty to prevent the criminal acts of third persons. In fact, under the common law of torts, a landlord does not have a duty to protect a tenant from the criminal activities of a third party. Moreover, a landlord’s general knowledge of prior unrelated incidents of criminal activity occurring in the area is not alone sufficient to impose a duty on the landlord. *See Miller v. Whitworth*, 193 W. Va. 262, 455 S.E.2d 821 (1995). However, the West Virginia Supreme Court of Appeals has expanded the duty of a landlord and found that a landlord may be liable to a tenant if a landlord’s affirmative actions or omissions have unreasonably created or increased the risk of injury to the tenant from the criminal activity of a third party. *See Miller v. Whitworth*, 193 W. Va. 262, 455 S.E.2d 821 (1995).

Moreover, in regard to the social guests of tenants, a landlord owes only the minimal duty of refraining from willfully or wantonly injuring the social guest, who is no more than a licensee. *See Jack v. Fritts*, 193 W. Va. 494, 457 S.E.2d 431 (1995). Finally, in regard to the common use tenant areas, the West Virginia Supreme Court of Appeals has held that in the absence of a special contract, the law imposes on a landlord the duty to exercise ordinary care to maintain in reasonably safe condition, premises owned by him and used in common by different tenants. *See Lowe v. Community Inv. Co.*, 119 W. Va. 663, 196 S.E. 490 (1938).

H. Products Liability

Products liability actions are of two basic types: defective products and inherently dangerous products. Inherently dangerous products are those which were manufactured without defect, yet pose a danger to person or property due to the design of the product. Products liability claims essentially argue that the defendant was negligent or breached applicable warranties.

Generally, a manufacturer must exercise ordinary care to produce products which are reasonably safe for their intended use. If an available alternative design, which would make the product safer with minimal increase in the cost of design or production, is available the manufacturer may be held liable for failing to implement such design. *See, Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974). As with other causes of action, the plaintiff must also show that his or her damages were proximately caused by the conduct of the defendant. *See, Morningstar v. Black and Decker Manufacturing Company*, 162 W. Va. 857, 253 S.E.2d 666 (1979).

The general test for establishing a basis for a products liability claim in West Virginia is whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonableness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made. *See, Morningstar v. Black and Decker Manufacturing Company*, 162 W. Va. 857, 253 S.E.2d 666 (1979). This use defectiveness covers situations where a product may be safe as designed and manufactured, but which becomes defective because of the failure to warn of dangers which may be present when the product is used in a particular manner. *See, Morningstar v. Black and Decker Manufacturing Company*, 162 W. Va. 857, 253 S.E.2d 666 (1979). For the duty to warn to exist, the use of the product must be foreseeable to the manufacturer or seller, and the determination of whether a defendant's efforts to warn of a product's dangers are adequate is a jury question. *See Ilosky v. Michelin Tire Corp.*, 172 W.Va. 435, 307 S.E.2d 603 (1983). Lack of contractual privity is not a defense if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to be affected by the goods. *See, W. Va. Code* § 46-2-318.

I. Strict Liability

Strict liability is not generally recognized in West Virginia, except for "abnormally dangerous and ultra hazardous activities" (such as blasting, aviation, and aerial broadcast spraying). *See, Bailey v. S. J. Groves & Sons Co.*, 159 W. Va. 864, 230 S.E.2d 267 (1951); *Parcell v. United States*, 104 F. Supp. 110 (S.D. W. Va. 1951); *Kell v. Appalachian Power Co.*, 170 W. Va. 14, 289 S.E.2d 450 (1982).

J. Medical Malpractice

In West Virginia, actions for medical negligence are governed by the Medical Professional Liability Act. *See West Virginia Code* § 55-7B-1 *et seq.* The Act requires that a plaintiff comply with the requirements of West Virginia Code § 55-7B-6 prior to the filing of a medical professional liability action against a health care provider. The foregoing section requires that at least thirty (30) days prior to filing suit, the plaintiff shall serve a notice

of claim upon each health care provider to be named in litigation, which shall include: 1) a statement of the theory of liability, and 2) a list of all health care providers and health care facilities to whom the notice of claim is being sent; together with a screening certificate of merit, which shall be executed under oath by a health care professional qualified as an expert witness in West Virginia, which shall include: 1) the expert's familiarity with the standard of care at issue, 2) the expert's qualifications, 3) the expert's opinion as to how the standard of care was breached, and 4) the expert's opinion as to how the breach of the standard of care resulted in injury or death. A plaintiff can bypass the screening certificate of merit if they believe that the cause of action is based upon a well-established legal theory of liability which does not require expert testimony; however, a statement setting forth such basis of alleged liability shall be served to the health care provider in lieu of a screening certificate of merit.

The Act further provides that a plaintiff who has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable statute of limitations shall furnish the health care provider with a statement of intent to provide a screening certificate of merit within sixty days of the date the health care provider receives the notice of claim. Upon receipt of the notice of claim or the screening certificate of merit, the health care provider may state that he or she has a bona fide defense and provide the name of his or her counsel to the plaintiff, or the health care provider may demand pre-litigation mediation provided for in subsection (g) of the Act. Mediation, if selected, shall be concluded within forty-five days of the written demand. Mediation shall be conducted in accordance with Rule 25 of the West Virginia Court Rules, and the plaintiff may depose the health care provider prior to or during the mediation. The Act further provides for tolling of the statute of limitations while the plaintiff and health care provider are engaged in the pre-suit requirements. If the mediation is unsuccessful, or not demanded, the plaintiff may move forward with his or her action. Finally, a notice of claim, a health care provider's response, a screening certificate of merit, and the results of any mediation are confidential any are not admissible as evidence, unless the court, upon hearing, determines that failure to disclose the contents would cause a miscarriage of justice.

Medical malpractice recoveries are subject to a cap for noneconomic loss in the amount of \$250,000.00 per occurrence; however, in cases where the plaintiff's damages were for: 1) wrongful death; 2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or 3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities, the cap for noneconomic loss is raised to the amount of \$500,000.00 per occurrence. See West Virginia Code § 55-7B-8. In addition, the Act further provides for the cap amounts to increase on an annual basis by an amount equal to the consumer price index, up to fifty percent of the stated cap amounts.

IV. DEFENSES TO CLAIMS

A. Limitations

1. Generally

For causes of action alleging personal injury, the statute of limitations is two years. *See* W. Va. Code § 55-2-12(b). On property damage claims, the statute of limitations is two years. *See*, W. Va. Code § 55-2-12(a). On oral or unwritten contracts the statute of limitations is five years, and on written contracts the statute of limitations is ten years. *See*, W. Va. Code § 55-2-6. As the statute of limitations is an “affirmative defense,” 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 under the West Virginia Medical Professional Liability Act is two years from the date of such injury, or within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs; provided, that in no event shall any such action be commenced more than ten years after date of injury. *See*, W. Va. Code § 55-7B-4(a). Moreover, a cause of action for injury to a minor, brought by or on behalf of a minor who was under the age of ten years at the time of such injury, shall be commenced within two years of the date of such injury, or prior to the minor’s twelfth birthday, whichever provides the longer period. *See*, W. Va. Code § 55-7B-4(b). The Act further provides that the foregoing periods of limitation shall be tolled for any period during which the health care provider or its representative has committed fraud or collusion by concealing or misrepresenting material facts about the injury. *See*, W. Va. Code § 55-7B-4(c).

3. Wrongful Death

The statute of limitations for a wrongful death action is two years from the date of death of such deceased person. *See*, W. Va. Code § 55-7-6(d).

4. Fraud

The statute of limitations for an action for fraud in West Virginia is two years from the date of the fraud or misrepresentation. *See*, W. Va. Code § 55-2-12. However, the West Virginia Supreme Court of Appeals has held that the discovery rule applies such that the statute of limitations for a claim for an action for fraud does not begin to

run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact and should be answered by the jury. *See, Stemple v. Dobson* 184 W. Va. 317, 400 S.E.2d 561 (1990).

5. Limitations on Enforcing Judgments

Any efforts to enforce or execute a civil judgment rendered in West Virginia must be initiated within ten years from the date the judgment was entered. However, this period of time may be renewed for an additional ten year period by appropriate filing with the Circuit Court. *See*, W. Va. Code § 38-3-18. Actions to enforce foreign judgments must be initiated according to the time limits of the original jurisdiction where the judgment was first entered, and must then be domesticated in West Virginia in a timely manner. *See* W. Va. Code § 55-14-1 *et. seq.* and W. Va Code § 33-3-18. Moreover, foreign judgments can be barred in West Virginia either if the action or suit was barred in the foreign state or otherwise incapable of being enforced there, or even if it was not barred in the foreign state, it would be barred as to any person residing in West Virginia for more than ten years after the foreign judgment was rendered. *See*, W. Va. Code § 55-2-13.

6. Claims Against the State of West Virginia and Political Subdivisions (West Virginia Governmental Tort Claims and Insurance Reform Act)

West Virginia has enacted a statutory scheme to control actions brought against the State and its political subdivisions. *See* W. Va. Code § 29-12A-1 *et seq.* The statute of limitation for bringing an action against the State and/or a political subdivision is two years after the cause of action arose. *See* W. Va. Code § 29-12A-6(a). Moreover, a cause of action for an injury to a minor, brought by or on behalf of a minor who was under the age of ten years at the time of injury, shall be commenced within two years after the cause of action arose or after the injury, death or loss was discovered or reasonably should have been discovered, whichever last occurs, or prior to the minor's twelfth birthday, whichever provides the longer period. *See*, W. Va. Code § 29-12A-6(b). The Act further provides that the foregoing periods of limitations shall be tolled for any period during which the political subdivision or its representative has committed fraud or collusion by concealing or misrepresenting material facts about the injury. *See*, W. Va. Code § 29-12A-6(c).

7. Tolling the Statute of Limitations

The running of the statute of limitations period for any given action may be tolled, or suspended, in certain special circumstances.

These include actions where: the claimant is an infant; the claimant is incapacitated; the claimant is incarcerated; or the claimant dies before the end of the statute of limitations period. *See*, W. Va. Code § 55-2-15.

B. Contributory Negligence

West Virginia is a “modified comparative negligence” jurisdiction. Therefore, a plaintiff can recover as long as the plaintiff’s own negligence does not equal or exceed the combined negligence of the other parties involved in the accident. Conversely, a plaintiff may not recover if his or her negligence exceeds or equals the combined negligence of the other parties involved in the accident. *See, Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S. E.2d 879 (1979). In order to prove the plaintiff’s comparative contributory negligence, 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 comparative contributory negligence by a preponderance of the evidence standard.

In 2015, the West Virginia Legislature adopted West Virginia Code § 55-7-13a, which defines comparative fault as “the degree to which the fault of a person was a proximate cause of an alleged personal injury or death or damage to property, expressed as a percentage.” The Code Section also provides that “[i]n any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person’s percentage of fault.” Finally, “[t]he total of the percentages of comparative fault allocated by the trier of fact with respect to a particular incident or injury must equal either zero percent or one hundred percent.” W. Va. Code § 55-7-13a

A child under the age of 7 is conclusively presumed to be incapable of comparative contributory negligence. 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 comparable contributory negligence (burden falls to plaintiff).

C. Assumption of the Risk

As a “modified comparative negligence” jurisdiction, West Virginia has adopted the rule of comparative assumption of risk. Specifically, a plaintiff is not barred from recovery by the doctrine of comparative assumption of risk unless his or her degree of fault arising therefrom equals or exceeds the combined fault of the other parties to the accident. *See, King v. Kayak Mfg Corp.*, 182 W. Va. 276, 387 S.E.2d 511 (1989). Moreover, comparative

assumption of risk still follows the tradition formulation of the rule which requires the existence of a factual situation in which the act of the defendant alone creates the danger and causes the injury and the plaintiff voluntarily exposes himself to the danger with full knowledge and appreciation of its existence. *See, Hollen v. Linger*, 151 W. Va. 255, 151 S.E.2d 330 (1966).

Comparative assumption of risk is a corollary doctrine to the comparative contributory negligence defense, and the distinctions between the two generally depend upon the conduct and intent of the plaintiff. The West Virginia Supreme Court of Appeals has delineated the two by stating that contributory negligence and assumption of risk are not identical. The essence of contributory negligence is carelessness; of assumption of risk, venturousness. Knowledge and appreciation of the danger are necessary elements of assumption of risk. Failure to use due care under the circumstances constitutes the element of contributory negligence. *See, Spurlin v. Nardo*, 145 W. Va. 408, 114 S.E.2d 913 (1960).

D. Immunity

1. Interspousal

The common-law defense of interspousal immunity in tort was abolished by the West Virginia Supreme Court of Appeals in *Coffindaffer v. Coffindaffer*, 161 W. Va. 557, 244 S.E.2d 338 (1978).

2. Parent-Child Immunity

The common-law defense of parent-child immunity in tort was abolished by the West Virginia Supreme Court of Appeals in *Erie Indemnity Co. v. Kerns*, 179 W. Va. 305, 367 S.E.2d 774 (1988); however, it is not applicable in automobile accident litigation, nor does it apply to intentional, willful, or malicious torts.

3. Shopkeeper Immunity

By statute, any owner of merchandise or its agents or employees may detain a suspected shoplifter for the purpose of investigating whether or not such person has committed or attempted to commit shoplifting; provided, the owner of merchandise or its agents or employees (1) have reasonable grounds to believe that the suspected shoplifter has committed the crime of shoplifting; and (2) the detention of the suspected shoplifter is done in a reasonable manner and does not last longer than thirty minutes. *See*, W. Va. Code § 61-3A-4.

4. Charitable Immunity / Good Samaritan Doctrine

There are several statutes in West Virginia that afford immunity

from civil liability to individuals relative to aid and services rendered. Specifically, no person, including a person licensed to practice medicine or dentistry who, in good faith, renders emergency care at the scene of an accident or to a victim at the scene of a crime, without remuneration, shall be liable for any civil damages as the result of any act or omission in rendering such emergency care. *See*, W. Va. Code § 55-7-15. Likewise, any person licensed to practice medicine and surgery who acting in the capacity of a volunteer team physician at an athletic event sponsored by a public or private elementary or secondary school who gratuitously and in good faith prior to the athletic event agrees to render emergency care or treatment to any participant during such event in connection with an emergency arising during or as the result of such event, without objection of such participant, shall not be held liable for any civil damages as a result of such care or treatment, or as a result of any act or failure to act in providing or arranging further medical treatment, to an extent greater than the applicable limits or his or her professional liability policy when such care or treatment was rendered in accordance with the acceptable standard or care; provided, this limitation of liability shall not apply to acts or omissions constituting gross negligence. *See*, W. Va. Code § 55-7-19.

Charitable immunity for hospitals rendering gratuitous aid and services to patients has been abolished in West Virginia. *See, Adkins v. St. Francis Hospital*, 149 W. Va. 705, 143 S.E.2d 154 (1965). Nonprofit organizations arranging passage on excursion trains shall not be liable for personal injury, wrongful death or property damage arising from the acts or omissions of the regulated carrier or governmental entity so long as the role of the not for profit is limited to arranging for persons or groups of persons to participate in the excursion and providing tour information regarding the scenic, historic or educational qualities of the excursion area. *See*, W. Va. Code § 55-7-20.

5. Pre-injury Exculpatory Agreements and Anticipatory Releases

Although not favored and strictly construed, pre-injury exculpatory agreements and anticipatory releases have been upheld and enforced in West Virginia; however, the West Virginia Supreme Court of Appeals has held that pre-injury agreements and anticipatory releases purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant's intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff's intention. *See, Murphy v. North American River Runners, Inc.*, 186 W. Va. 310, 412 S.E.2d 504 (1991). Moreover, the West Virginia Supreme Court of Appeals has held when a statute imposes a standard of

conduct, a clause in an agreement purporting to exempt a party from tort liability to a member of the protected class for the failure to conform to that statutory standard is unenforceable. *See, Murphy v. North American River Runners, Inc.*, 186 W. Va. 310, 412 S.E.2d 504 (1991).

E. Last Clear Chance

The last clear chance doctrine is effectively a plaintiff's defense to a defendant's claim of contributory negligence. Typically, if the opportunity to avoid the accident is available to a plaintiff as to a defendant, then the plaintiff's negligence is a proximate cause rather than a remote cause, and bars recovery. However, with the adoption of comparative negligence in West Virginia, the last clear chance doctrine has been abolished in West Virginia. The West Virginia Supreme Court of Appeals has held that since the adoption of comparative negligence, the historical reason for the doctrine of last clear chance no longer exists. Furthermore, because of the doctrine's interrelationship with the issue of proximate cause and because of the confusion surrounding the application of the doctrine, we believe the better course would be to abolish the use of the doctrine of last clear chance for the plaintiff. *See, Ratliff v. Yokum*, 167 W. Va. 779, 280 S.E.2d 584 (1981).

F. Misuse of Product

In a products liability case, the defendant can use the abnormal use of the product defense against the plaintiff. *See, Star Furniture Co. v. Palaski Furniture Co.*, 171 W. Va. 79, 297 S.E.2d 854 (1982); *Morningstar v. Black and Decker Mfg Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979).

G. Exclusivity of Workers' Compensation Claim

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, unless the employer or person against whom liability is asserted acted with deliberate intention. *See*, W. Va. Code § 23-2-6; § 23-2-6a; and § 23-4-2.

H. Non-permissive Use

In West Virginia, the omnibus clause in a motor vehicle policy provides coverage for any person who has the consent or the permission, either express or implied, of the owner of the motor vehicle. *See* W. Va. Code § 17D -4-12 (b)(2). As a corollary, West Virginia courts have held that absent the required consent or permission, an impermissible driver is not an insured under the motor vehicle policy. *See, Allstate Ins. Co. v. Smith*, 202 W. Va. 384, 504 S.E.2d 434 (1998).

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

Generally, a plaintiff has a duty to mitigate his or her damages. In West Virginia, the failure of a plaintiff to wear his or her safety belt, which is a violation of a statute, is inadmissible relative to the plaintiff's negligence or in mitigation of damages. *See*, W. Va. Code § 17C15-49(d).

V. DISCOVERY

A. Generally

A party may obtain discovery regarding any matter, not privileged, including the existence, description, nature, custody, condition, and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence. In West Virginia, discovery is governed generally by Rule 26 through 37 of the West Virginia Rules of Civil Procedure.

A party may also obtain discovery of the existence and contents of any insurance agreement under which any person may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired; except for the identity and location of persons having knowledge of discoverable matters, and the identity of each person to be called as an expert witness at trial.

B. Interrogatories

1. Generally

Interrogatories are written questions formally propounded by any party to an action upon any other party to an action. The responding party must answer each interrogatory separately and fully in writing under oath, unless it is objected to, in which case, the ground for objection must be stated and signed by the attorney making it. Interrogatories, including discrete subparts, cannot exceed 40 without leave of court or written stipulation. The party to whom the interrogatories are directed shall serve a response within

thirty (30) days after service of the interrogatories or, if the interrogatories are served with the initial service of process and initial pleading of the defendant, responses must be served within 45 days of service of the initial pleading. See WVRCP 33.

C. Request for Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

1. Generally

Any party may serve to any party, as to items that are in the possession, custody, or control of the party upon whom the request is served, to produce and permit the party making the request, or someone acting of the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of discovery; or to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of discovery. The party to whom the request is served shall serve a response within thirty (30) days after service of the request or, if the request is served with the initial service of process and initial pleading on the defendant, a response must be served within 45 days of service of the initial pleading stating that the inspection and related activities will be permitted, unless objected to, in which case the grounds for objection shall be stated and signed by the attorney making it. A request shall set forth the items to be inspected, either by individual item or by category, and shall describe each item and category with reasonable particularity. *See*, WVRCP 34.

D. Request for Admission

1. Generally

A party may serve at any time one or more written requests to any other party for the admission, for purposes of the pending action only, of the genuineness of any relevant documents described in or exhibited with the request, or the truth of any relevant matters of fact set forth in the request. Copies of the documents must be served with the request unless they have been or are otherwise furnished or made available for inspection or copying. Each matter of which an admission is requested must be separately set forth.

The matter will be deemed admitted, unless, within 30 days after service of the request, the party to whom the request is directed serves a written answer, admitting, denying or objecting to each request.

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admissions and the party who sought the admission fails to establish that it will suffer prejudice if the court permits a withdrawal or amendment. If a party fails to admit the genuineness of any document or the truth of any matter as requested under this rule and if the party requesting the admissions later proves the genuineness of the document or the truth of the matter, the party may move for an order requiring the other party to pay the reasonable expenses incurred in making the proof, which may include the attorney's fees. *See*, WVRCP 36.

E. Depositions

1. Generally

Any party to an action may cause the testimony of any person, including a party, to be taken by deposition for the purpose of discovery or for use as evidence in the action or for both purposes. Leave of court must be obtained to take a deposition only if the plaintiff seeks to take the deposition of any defendant within 30 days after service of process and the initial pleading unless the defendant has served a notice of taking deposition or otherwise sought discovery. Leave of court is also required to take the deposition of any person confined in prison.

A party seeking to take a deposition shall give reasonable notice in writing to every other party in the action, and a subpoena duces tecum may be served on the person to be deposed, designating the materials to be produced. Any party may record the deposition by videotape without leave of court or stipulation of the parties, provided that the party's intent to do so is included in the deposition notice. On motion, the court may order that deposition testimony be taken by telephone. WVRCP 30.

F. Physical and Mental Examination of Persons

1. Generally

When the physical or mental condition of a party or of a person in the custody or under the legal control of a party is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner. At any hearing necessitated by the request, the party requesting the

physical or mental examination has the burden of establishing good cause for the examination.

2. Reports

Upon request, the party requesting the examination shall deliver a detailed report of the examiner which should set out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like report of all earlier examinations of the same condition. After delivery of the detailed report, the party who requested the examination, upon request, is entitled to receive any other similar report of any examination of the condition previously or thereafter made.

G. Claims of Privilege or Work Product

1. Generally

Discovery is generally constrained only by questions of relevance. However, some materials, such as confidential communications with counsel (subject to attorney-client privilege) and material prepared in anticipation of litigation (work product privilege), are protected from discovery.

2. Attorney / Client Privilege

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the content of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client. In West Virginia, in order to assert an attorney-client privilege, three main elements must exist: 1) both parties must contemplate that the attorney-client relationship does or will exist, 2) the advice must be sought by the client from that attorney in his capacity as a legal adviser, and 3) the communication between the attorney and client must be identified to be confidential. *See, State of West Virginia, ex rel. Allstate Ins. Co. v. Madden*, 215 W. Va. 705, 601 S.E.2d 25 (2004).

3. Work Product Privilege

Generally, the work product privilege applies to materials prepared in anticipation of litigation. In West Virginia, work product doctrine provides a qualified immunity to two categories of work products: 1) fact work product which includes any documents or tangible things prepared by a party, or a party's representative, in anticipation of litigation, and 2) opinion work product which encompasses those documents or tangible materials which contain

the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative concerning the litigation. See *State ex rel. Erie Ins. Property & Cas. Co. v. Mazzone*, 220 W. Va. 525, 648 S.E.2d 31 (2007).

4. Method of Asserting Privilege

When a party withholds otherwise discoverable information on a claim of privilege or work product, the party claiming the privilege must expressly assert the privilege and must describe the nature of the documents, communication, or things not produced or disclosed in a manner (without disclosing the privileged information) that will enable the other parties to access the applicability of the privilege.

5. Discovery of Policy Limits and Contents

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. See, WVRCP 26 (b)(2). Information concerning the insurance agreement is not, by reason of disclosure, admissible as evidence at trial.

6. Collateral Sources of Indemnity

Generally, in a tort action, there is no set-off for monies obtained through collateral sources. The Supreme Court of Appeals of West Virginia evaluated collateral source payments in a situation where a medical provider agrees to reduce, write-off or discount the plaintiff's medical bills and whether a defendant could benefit from the reduction. The Court held that the collateral source rule prohibits the introduction of evidence regarding the reduction because the tortfeasor should not be allowed to benefit from such reduction, thus allowing plaintiffs to seek the reasonable value of the medical services, regardless of a reduction or write-off. *Kenney v. Liston*, 233 W. Va. 620, 760 S.E.2d 434, 437 (2014).

VI. Motions Practice

A. Generally

Applications to the court for an order are to be made by motion, are required to be in writing, unless made during a hearing or trial, and shall state with particularity the grounds for the relief being sought. See, WVRCP 7. Unless a different period is set by rule or by court, a written motion, notice of the hearing on the motion, and any supporting brief or affidavits shall be served at least nine days before the time set for the hearing, if served by mail (seven days if by hand delivery or fax),

and any response shall be served at least four days before the time set for the hearing, if served by mail (two days if by hand delivery or fax). The filing of the written motion, notice of the hearing on the motion, and any supporting brief or affidavits shall be at least seven days before the hearing, and any response shall be filed at least two days before the hearing. *See*, WVRCP 6(d).

B. Motion to Dismiss (Pre-Answer Motion)

A defendant may raise the following defenses in the party's responsive pleading or by motion prior to filing a responsive pleading: 1) lack of jurisdiction over the subject matter; 2) lack of jurisdiction over the person; 2) improper venue; 4) insufficiency of process; 5) insufficiency of service of process; 6) failure to state a claim upon which relief can be granted; and 7) failure to join indispensable parties. *See*, WVRCP 12 (b). Although the rules do not refer to any particular type of motion, the usual method of raising the defense of failure to state a cause of action or a jurisdictional defense is made by motion to dismiss; the defense of insufficiency of process is made by motion to quash; the defense of improper venue is made by motion to transfer; and, failure to join indispensable parties is made by motion to dismiss.

In addition to being raised by optional pre-answer motion or as a defense in the responsive pleading, the defenses of failure to state a cause of action and to join an indispensable party may also be made by motion for judgment on the pleadings or at trial. A motion for lack of jurisdiction can be raised at any time. If a party fails to raise the other defenses contained in Rule 12 (b), they are deemed waived.

C. Motion for Judgment on the Pleadings

After the pleadings are closed, a party may file a motion for judgment on the pleadings. This is appropriate when all facts properly pleaded in the complaint have been pled and have been admitted by the responding party, leaving only a question of law for the court to determine. *See*, WVRCP 12 (c).

D. Motion for a More Definite Statement

If a pleading to which an answer is permitted is so vague or ambiguous that a party cannot reasonably frame an answer, the party may move for a more definite statement before answering. *See*, WVRCP 12 (e). The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. *See*, WVRCP 12 (e).

E. Motion to Dismiss

In addition to motion to dismiss filed at the option of the pleader before the answer, any party may move for dismissal of an action for failure of an adverse party to comply with the Rule of Civil Procedure or of any order of the court. In addition, after the close of the plaintiff's evidence in a bench trial, the defendant may move for dismissal on the grounds that the facts and the law show that the plaintiff have no right to relief. *See*, WVRCP 50.

F. Summary Judgment

West Virginia Rule of Civil Procedure 56 provides for a motion for summary judgment. This rule provides that summary judgment may be granted when there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. The movant must identify any affidavits, answers to interrogatories, admissions, depositions and other materials, upon which the movant relies in support of the motion.

Motions for summary judgment must be served at least 10 days prior to the day set for the hearing on the motion.

VII. DAMAGES

A. Compensatory Damages

1. Generally

Compensatory damages are allowed for injuries actually received. Damages must be established with reasonable certainty. Damages in a personal injury action can include:

- a. any bodily injuries he sustained and their effect on his health according to their degree and probable duration;
- b. any physical pain [and mental anguish] he suffered in the past [and any that he may be reasonably expected to suffer in the future];
- c. any disfigurement or deformity and any associated humiliation or embarrassment;
- d. any inconvenience caused in the past [and any that probably will be caused in the future];
- e. any medical expenses incurred in the past [and any that may be reasonably expected to occur in the future];

- f. any earnings he lost because he was unable to work at his calling;
- g. any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future;
- h. any property damage he sustained.

2. Future Losses

Damages for future losses may be recovered, but those losses must be proven by the plaintiff with particularity. These can include future lost wages or income, lost business opportunities, future medical treatment (including future medical monitoring), and future pain and suffering. If such losses, or the amount of damage to be suffered therefrom, require any speculation, no recovery will be allowed. Future economic damages are well-suited for expert testimony, as they must be determined with certainty and then discounted to present-day value for purposes of calculating the award to be fixed.

3. Property Damage

Generally, the measure of recovery for damage to property is the actual cash value of the property. Where that property was damaged, but not destroyed, the proper measure of damages is the difference in fair market value of the property immediately before and immediately after the incident. This is known as the diminution of value, and is often awarded in addition to the cost of repairing the damage.

When residential real property is damaged, the owner may recover the reasonable cost of repairing it even if the costs exceed its fair market value before the damage. The owner may also recover the related expenses stemming from the injury, annoyance, inconvenience, and aggravation, and loss of use during the repair period. If the damage cannot be repaired, then the owner may recover the fair market value of the property before it was damaged, plus the related expenses stemming from the injury, annoyance, inconvenience, and aggravation, and loss of use during the time he has been deprived of his property. *Brooks v. City of Huntington*, 234 W. Va. 607, 768 S.E.2d 97 (2014). Moreover, To the extent that damages for cost of repair to residential real property exceed the fair market value of the property before it was damaged, damages awarded for cost of repair must be reasonable in relation to its fair market value before it was damaged. The measure of reasonable cost of repair damages is an issue for the trier of fact, but may be found to be unreasonable as a matter of law if unreasonably disproportionate

to the fair market value of the property prior to the damage. *Id.* Where the owner of residential real property which is damaged can establish that the pre-damage fair market value of the residential real property cannot be fully restored by repairs and that a permanent, appreciable residual diminution in value will exist even after such repairs are made, then the owner may recover both the cost of repair and for such remaining diminution in value. *Id.*

4. Mitigation of Damages

A plaintiff has a duty to mitigate his damages.

5. Consequential Damages

Consequential damages are most commonly involved in contract actions, where the claimant alleges some damages which are not directly caused by the actions complained of, but result from some of the consequences or results of such actions. Such damages are only recoverable when a party can prove that at the time of the contract the parties could reasonably have anticipated that these damages would be a probable result of the breach. *See, Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 158 W. Va. 708, 214 S.E.2d 823 (1975).

6. Punitive Damages

In 2015, the West Virginia legislature, in an effort to clarify punitive damages in West Virginia, adopted West Virginia Code § 55-7-29, which lays out the framework for punitive damages in West Virginia. First, the statute sets a “clear and convincing” standard for plaintiff to prove that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others. Next, the statute allows the defendant to decide whether to bifurcate the trial on punitive damages from the underlying liability for compensatory damages. Once compensatory damages are found, the trial court then determines whether sufficient evidence was established to proceed with a consideration of punitive damages. If the trial court finds that such evidence exists, then the same jury that determined liability shall determine punitive damages, if any. The maximum amount allowable under the statute is four times the amount of compensatory damages or \$500,000, whichever is greater. If the jury does award punitive damages, the trial court instructs the jury on the factors that are to be considered when deciding on an amount; said factors are contained in Syllabus Point 3 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 658, 413 S.E.2d 897, 899 (1991), holding modified by *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va.

482, 694 S.E.2d 815 (2010). Said factors include: reasonable relationship to the harm that is likely to occur from the defendant's conduct; the reprehensibility of the defendant's conduct; how long the defendant continued in his actions; whether he was aware his actions were causing or were likely to cause harm; whether he attempted to conceal or cover up his actions or the harm caused by them; whether/how often the defendant engaged in similar conduct in the past; whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him; if the defendant profited from his wrongful conduct; and the financial position of the defendant is relevant. *Id.*

Punitive damages are also known as exemplary damages. The purposes of punitive damages still remain the same, which are to punish the wrongdoer and deter others from similar conduct. Accordingly, punitive damages are generally not awarded against a defendant who is merely vicariously liable for the acts of another, unless they authorized or ratified the conduct of the wrongdoer, or the wrongdoer was acting within the scope of his employment. *See, Jarvis v. Modern Woodmen of America*, 185 W. Va. 305, 406 S.E.2d 736 (1991).

Evidence of a defendant's financial position is admissible because it is material to this purpose and is relevant to a determination of the size of the award and whether it is so large as to be excessive.

The West Virginia Supreme Court of Appeals has held that the public policy of West Virginia does not preclude insurance coverage for punitive damages arising from gross, reckless or wanton conduct. *See, Hensley v. Erie Insurance Co.*, 168 W. Va. 172, 283 S.E.2d 227 (1981). This excludes, however, coverage for punitive damages awarded as a result of intentional acts.

For cases involving a drunk driver, the driver's conduct will be deemed to show a reckless disregard for the rights of others when the evidence proves that the person drove a vehicle in the state while under the influence of alcohol; or under the influence of any controlled substance; or under the influence of any other drug; or under the combined influence of alcohol and any controlled substance or any other drug; or has the alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight; and when so driving does any act forbidden by law or fails to perform any duty imposed by law in the driving of the vehicle, which act or failure proximately causes the death of any person within one year next following the act or failure. *See, W. Va. Code* § 17C-5-2 (a).

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 costs, including attorney's fees, arising from the declaratory judgment litigation; provided that the court finds that the insurer did in fact have a duty to defend its insured under its policy. *See, Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986).

3. Various Statutory Provisions for Attorney's Fees.

Certain causes of action provided for by statute also specifically allow for the recovery of attorney's fees by the prevailing party. The most common of these is the West Virginia Consumer Credit Protection Act. *See, W. Va. Code* § 46A-1-101. Other causes of action include trade secret suits, the West Virginia Human Rights Act, and the West Virginia Workers Compensation Act (Limited to a portion of award).

4. Procedural Issues

Rule 37 of the West Virginia Rules of Civil Procedure provides that in matters of discovery disputes, if a Motion to Compel discovery is granted, the Court *shall* award the prevailing party its costs, including reasonable attorney's fees, unless the court finds that the motion was filed without the movant first making a good faith effort to obtain the discovery without court action.

C. Interest

The West Virginia Code provides that a judgment or decree entered by any court of the state shall bear interest from the date thereof, whether it be stated in the judgment or decree or not. The rate of interest shall be the rate of interest in effect for that calendar year (Calendar year 2012 is 7%),

and as adjusted in the future based upon the federal reserve discount rate formula. *See*, W. Va. Code § 55-6-31. If an obligation is based upon a written agreement, the obligation shall bear a prejudgment interest at the rate set forth in the written agreement until the judgment or decree is entered, and thereafter, the judgment interest rate shall be the same provided by statute. *See*, W. Va. Code § 55-6-31.

D. Costs

The prevailing party may recover their court costs. The party must present a motion for costs following entry of judgment. This may include costs of filing fees, subpoena costs, and copies.

1. Offer of Judgment

If a defendant makes an offer to allow judgment to be taken for an amount of money more than 10 days from the date of trial, and the same is refused by the plaintiff, and the subsequent judgment is less than or equal to the offer, then the plaintiff must pay the offering defendant's costs incurred after the making of the offer. *See*, WVRCP 68.

E. Limitation on Damages

West Virginia does not have a statutory cap on economic damages. Generally, there is no statutory cap on non-economic damages in most actions; however, Medical Malpractice judgments are subject to a non-economic statutory cap (*See*, Section III-J), and the State of West Virginia and its political subdivisions are subject to a non-economic statutory cap of \$500,000. *See*, West Virginia Governmental Tort Claims and Insurance Reform Act (West Virginia Code 29-12A-1). Finally, there are no statutory caps on punitive damages.

VIII. INSURANCE COVERAGE IN WEST VIRGINIA

A. Automobile Liability Limits

Liability insurance is "required" in West Virginia. Proof of insurance coverage is required before one can register a motor vehicle. An owner of a motor vehicle who fails to maintain proper liability insurance shall have his driver license suspended for a period of thirty days and shall have the motor vehicle registration suspended until proof of insurance is presented to the West Virginia Department of Motor Vehicles. *See*, West Virginia Code § 17D- 2A-5. In addition to this administrative penalty, an owner of an uninsured motor vehicle is guilty of a misdemeanor and upon conviction, shall be fined not less than two hundred dollars nor more than five thousand dollars, or confined in the county or regional jail not less than fifteen days nor more than one year, or both. *See*, West Virginia Code § 17D- 2A-9. By statute, any

insurance policy, issued to a resident of West Virginia or issued in West Virginia, providing insurance coverage for liability arising from the use of an automobile shall provide coverage for at least \$25,000 to any single plaintiff for personal injury, \$50,000 total coverage for any single incident, and coverage for property damage in the amount of \$25,000. *See*, West Virginia Code § 17D-4-2.

B. No Personal Injury Protection Coverage in West Virginia

In West Virginia, there is no PIP (personal injury protection) coverage as there is in other jurisdictions. However, West Virginia permits, but does not require, another similar type of coverage for the payment of medical expenses incurred by the occupants of a vehicle, commonly referred to as MEDPAY. This is elective coverage that pays regardless of fault. It is not uncommon for an injured party to have his or her health insurance pay the medical bills when they are incurred, and then obtain payment from both their own Medical Payments policy and the liability policy of the tortfeasor, effectively netting a triple-recovery. Generally, none of these policies are entitled to recover from the other or from the injured person for the multiple payments.

C. Uninsured / Underinsured Motorist Coverage

Any policy for automobile coverage must include coverage for damages caused to the insured by uninsured motorists in at least statutory minimum liability limits (25K/50K/25K). *See*, W. Va. Code § 33-6-31 (b). A vehicle is underinsured if its liability coverage is less than limits the insured carried for underinsured motorists' coverage or has been reduced by payments to others injured in the accident to limits less than limits the insured carried for underinsured motorists' coverage. *See*, W. Va. Code § 33-6-31 (b). In some circumstances, the underinsured motorist coverage of several policies can be stacked together to afford greater relief to qualified injured persons.

Any action filed by an injured plaintiff who intends to seek recovery of any Uninsured or Underinsured motorist coverage he or she may have must serve the lawsuit on his or her insurance carrier in addition to any other defendants. *See*, W. Va. Code § 33-6-31 (d).

D. Bad Faith

West Virginia Code § 55-13-1 allows an insured to recover costs and reasonable attorneys' fees in a declaratory judgment action brought by the insured against the insurer, if the trial court determines that the insurer was not acting in good faith when it denied coverage or refused payment under the policy. There can also be a bad faith claim when the carrier unjustifiably refuses to settle a claim within policy limits.

Neither common law nor statutory third-party bad faith claims exist in

West Virginia. The Supreme Court of Appeals of West Virginia abolished common law bad faith in *Elmore v. State Farm Mutual Insurance Company*, 202 W. Va. 430, 504 S.E.2d 893 (1998). The West Virginia Legislature abolished statutory third-party bad faith claims with the passage of West Virginia Code § 33-11-4a (2005). However, West Virginia Code § 33-11-4a allows for third-parties to file an administrative complaint with the West Virginia Insurance Commissioner for alleged unfair settlement practices. Third-party claimants have a one year statute of limitations to file an administrative complaint with the West Virginia Insurance Commissioner under West Virginia Code § 33-11-4a.

E. Reservation of Rights

West Virginia has no statutory requirements for a liability insurer to provide notice to the claimant or claimant’s counsel when a breach of the terms or conditions of the policy may give rise to a contractual defense on the part of the insurer.

F. Punitive Damages

The West Virginia Supreme Court of Appeals has held that the public policy of West Virginia does not preclude insurance coverage for punitive damages arising from gross, reckless or wanton conduct. *See, Hensley v. Erie Insurance Co.*, 168 W. Va. 172, 283 S.E.2d 227 (1981). This excludes, however, coverage for punitive damages awarded as a result of intentional acts.

G. Cancellation or Refusal to Renew Insurance

The West Virginia Code provides several strictly-enforced guidelines for the cancellation or the refusal to renew (hereafter collectively “cancellation”) a policy of insurance that has been properly issued and which has become effective. While an exhaustive treatment of the requirements and procedure for cancellation of insurance is beyond the scope of this document, below are some common pitfalls to be avoided in order to effectively mount the defense of cancellation of insurance

1. Advance Notice of Nonrenewal

No insurer shall fail to renew an outstanding automobile liability policy or physical damage insurance policy unless the nonrenewal is preceded by at least forty-five days advance notice to the named insured of the insurer’s election not to renew the policy. An insurer can only fail to renew an outstanding liability or physical damage insurance policy which has been in existence for two consecutive years or longer for the following reasons: 1) the named insured fails to make timely premium payments; 2) the policy is obtained through material misrepresentation; 3) the insured violates any of the

material terms and conditions of the policy; 4) the named insured or any other operator has had their operator's license revoked or suspended during the policy period, or has a physical or mental condition that prevents them from operating a motor vehicle; 5) the named insured or any other operator is convicted of or forfeits bail during the policy period for any felony or assault involving the use of a motor vehicle, negligent homicide arising out of the operation of a motor vehicle, operating a motor vehicle while under the influence of intoxicating liquor or of any narcotic drug, leaving the scene of a motor vehicle accident in which the insured is involved without reporting it as required by law, theft of a motor or the unlawful taking of a motor vehicle, or making false statements in an application for a motor vehicle operator's license; 6) the named insured or any other operator is convicted of or forfeits bail during the policy period for two or more moving traffic violations committed within a period of twelve months, each of which results in three or more points being assessed on the driver's record by the division of motor vehicles, whether or not the insurer renewed the policy without knowledge of all of the violations; 7) the named insured or any other operator has had a second at-fault motor vehicle accident within a period of twelve months, whether or not the insurer renewed the policy without knowledge of all of the accidents; or 8) the insurer ceases writing automobile liability or physical damage insurance policies throughout the state after submission to and approval by the commissioner of a withdrawal plan or discontinues operations within the state pursuant to a withdrawal plan approved by the commissioner. *See*, W. Va. Code § 33-66A-4(a).

2. Grounds for Cancellation

No insurer may cancel a policy providing automobile insurance after the policy has been in effect for sixty days, except for the specified reasons enumerated in West Virginia Code § 33-6A-1.

- a. the named insured fails to make payments of premium for the policy or any installment of the premium when due;
- b. the policy is obtained through material misrepresentation;
- c. the insured violates any of the material terms and conditions of the policy;
- d. the named insured or any other operator has had his or her operator's license suspended or revoked during the policy period including suspension or revocation for failure to comply with the consent provision of this code for a chemical test for intoxication; or is or becomes subject to epilepsy or heart attacks and the individual cannot produce a certificate

from a physician testifying to his or her ability to operate a motor vehicle;

- e. the named insured or any other operator is convicted of or forfeits bail during the policy period for any of the following reasons: any felony or assault involving the use of a motor vehicle; negligent homicide arising out of the operation of a motor vehicle; operating a motor vehicle while under the influence of alcohol or of any controlled substance or while having a blood alcohol concentration in his or her blood of eight hundredths or one percent or more, by weight; leaving the scene of a motor vehicle accident in which the insured is involved without reporting it as required by law; theft of a motor or the unlawful taking of a motor vehicle; making false statements in an application for a motor vehicle operator's license; or three or more moving violations committed within a period of twelve months, each of which results in three or more points being assessed on the driver's record by the division of motor vehicles, whether or not the insurer renewed the policy without knowledge of all of the violations.

3. Notices of Cancellation

In order to be valid, a notice of cancellation must be in writing, delivered or mailed to the named insured at the address shown in the policy, and shall state the reason or reasons relied upon by the insurer for the cancellation. *See*, W. Va. Code § 33-6A-3. Furthermore, the statute provides that there shall be no liability on the part of, and no cause of action shall arise against, any insurer or its agents or its authorized investigative sources for any statements made with probable cause by the insurer, agent or investigative source in a written notice required by this section.

H. Subrogation

Generally, an insurer is subrogated to claims of its insured once the insurer has indemnified the loss of the insured. The insurer has the right to file suit for its subrogated interest in its own name or in the name of its insured.

IX. MISCELLANEOUS ISSUES

A. Collateral Source Rule

The Collateral Source Rule is recognized in West Virginia. In a tort action, the Collateral Source Rule normally operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed

by the injured party. Moreover, the Collateral Source Rule also ordinarily prohibits inquiry as to whether the plaintiff has received payments from collateral sources. This is based upon the theory that the jury may well reduce the damages based on the amounts that the plaintiff has been shown to have received from collateral sources. See *Ratlief v. Yokum*, 167 W. Va. 779, 280 S.E.2d 584(1981). The Supreme Court of Appeals of West Virginia evaluated collateral source payments in a situation where a medical provider agrees to reduce, write-off or discount the plaintiff's medical bills and whether a defendant could benefit from the reduction. The Court held that the collateral source rule prohibits the introduction of evidence regarding the reduction because the tortfeasor should not be allowed to benefit from such reduction, thus allowing plaintiffs to seek the reasonable value of the medical services, regardless of a reduction or write-off. *Kenney v. Liston*, 233 W. Va. 620, 760 S.E.2d 434, 437 (2014).

B. Joint and Several Liability

Joint and Several Liability was abolished in West Virginia with the passage of West Virginia Code §§ 55-7-13a-d, which adopted the standard of "comparative fault." Specifically, the new statute addressing liability in a negligence claim and provides that liability for all compensatory damages shall be only several, and not joint.

However, a plaintiff can establish joint and several liability is when a conscious conspiracy exists between two or more defendants. Furthermore, joint and several liability will apply to a defendant when his or her actions involve alcohol or drug influenced driving, criminal conduct or alleged disposal of hazardous waste, which are proximate causes of the damages alleged by the plaintiff.

If a plaintiff through good faith efforts is unable to collect from a liable defendant, the plaintiff may, not one year after judgment becomes final, move the court for the reallocation of any uncollectible amount among the other parties found to be liable. The court may not reallocate to any defendant an uncollectible amount greater than that defendant's percentage of fault multiplied by the uncollectible amount, and there shall be no reallocation against a defendant whose percentage of fault is equal to or less than the plaintiff's percentage of fault.

C. Offer of Judgment

Offers of Judgment are recognized in West Virginia. (See Section VII – D).

D. Res Judicata and Collateral Estoppel

The doctrine of *res judicata* provides that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action or legal issue, 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.

E. Seat Belt Statute

In West Virginia, the failure of a plaintiff to wear his or her safety belt, which is a violation of a statute, is inadmissible relative to the plaintiff's negligence or in mitigation of damages. *See*, W. Va. Code § 17C-15-49(d).

However, the court may hold an in camera hearing to determine whether a plaintiff's failure to wear a seat belt was a proximate cause of the injuries complained of. If the court makes such a finding, then the jury may reduce the plaintiff's medical damages up to 5%. In lieu of the in camera hearing, the plaintiff can stipulate to the failure to wear a seat belt and the 5% reduction. *See* W. Va. § 17C-15-49(d).

F. Releases

Unless the document specifically provides for the release of all tortfeasors, a release discharges the obligations of only the party to the release. Moreover, the release to, or an accord and satisfaction with, one or more tortfeasors shall not inure to the benefit of another tortfeasor, and shall be no bar to an action or suit against such other tortfeasor for the same cause of action to which the release or accord and satisfaction relates. *See*, W. Va. Code § 55-7-12.

G. Internet Resources

In addition to the website for the West Virginia Judicial System, provided on page 1 of this profile, there are several other web pages that provide useful information.

1. The West Virginia Code

The Code of West Virginia can be found on-line at <http://www.sos.wv.gov>. This website offers searches for particular text, as well as a linked table of contents.

2. The West Virginia Administrative Code

A companion to the Code of West Virginia, the Code of State Rules contains all of the agency regulations promulgated by state agencies, including the Insurance regulations (Title 114). The Code of State Rules can also be found on-line at <http://www.sos.wv.gov>.

3. The West Virginia Insurance Commissioner

The homepage for the Insurance Commissioner can be accessed at <http://www.wvinsurance.gov/>

4. West Virginia Circuit Court Clerks

A useful collection of information about contact information, hours, judges, and general information about procedures in the various circuit courts in West Virginia, with links to each jurisdiction's own website (where applicable) can be found on the West Virginia's Judicial System Webpage. www.courtswv.gov.

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