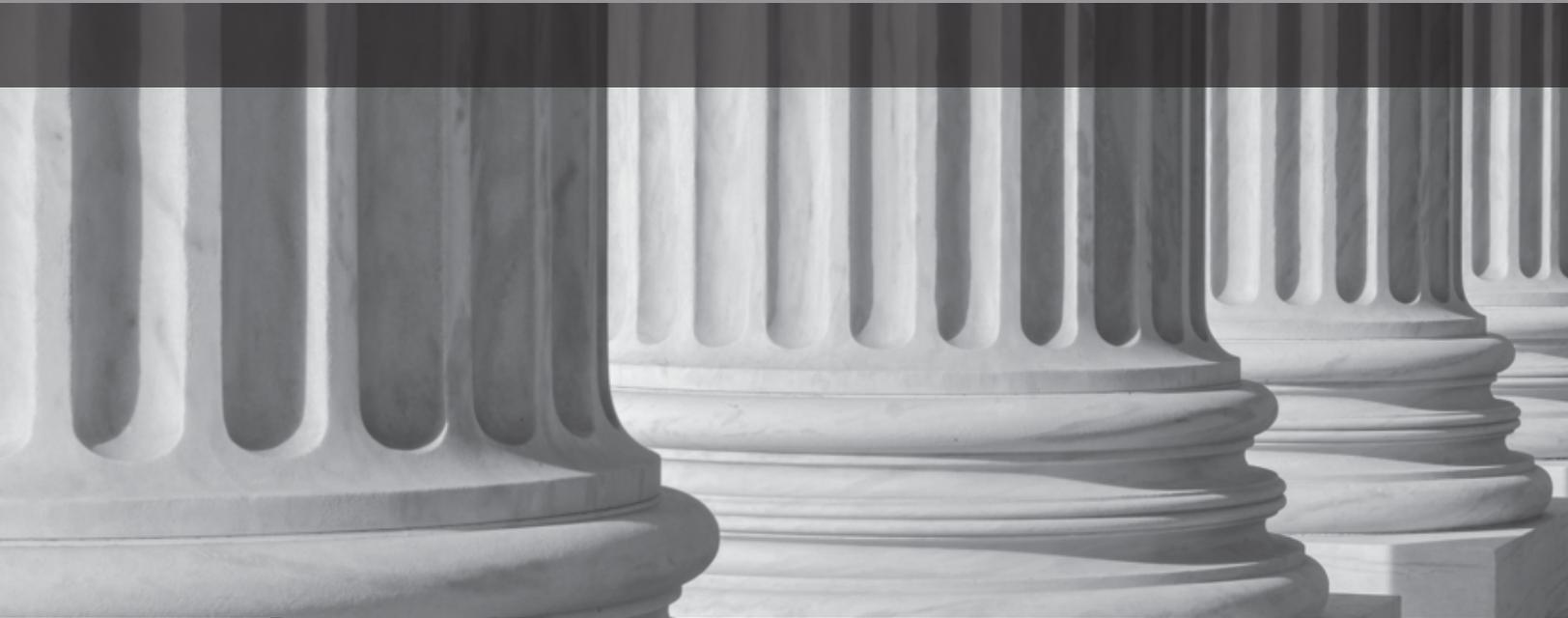


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DELAWARE

Tort Profile

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I. OVERVIEW OF THE DELAWARE COURT SYSTEM

A. Trial Courts

1. Justice of the Peace Court (“JP Court”)

JP Court is the entry level court with jurisdiction over certain traffic violations and misdemeanors in criminal cases. The court also sits as a committing magistrate. It has jurisdiction over civil matters where the amount in controversy is less than \$15,000.00. Civil matters in JP Court are limited to property or contract matters, including exclusive jurisdiction over landlord tenant disputes. There is no jurisdiction for personal injury matters. Appeals from JP Court are to the Court of Common Pleas.

2. The Court of Common Pleas (“CCP”)

CCP is a statewide court of limited jurisdiction. It has jurisdiction in civil matters if the amount in controversy is less than \$50,000.00. Filing a civil complaint in CCP constitutes a waiver of a jury trial. A defendant may file an answer and include a demand for a jury, which automatically transfers the case to Superior Court. Criminal jurisdiction is limited to misdemeanors and violations. The court has concurrent jurisdiction with the JP Court in this area. The court also hears preliminary hearings in criminal matters including felonies. The court has appellate jurisdiction over the JP Court and revocations of driver’s licenses from the DMV. Appeals from CCP are on the record to the Superior Court.

3. Superior Court

The Superior Court is the State’s primary trial court and court of general jurisdiction. The Superior Court has jurisdiction over all common law matters, but it is not a court of equity. It hears criminal matters, including all felony cases and most drug cases. There is no monetary maximum jurisdiction. The court also has specific authority to issue certain writs. *See* 10 *Del. C.* § 562. The Court sits as an appellate court for appeals from certain state agencies, such as the Department of Labor, as well as the Court of Common Pleas. Appeals from the Superior Court are taken to the Supreme Court of the State of Delaware.

4. Family Court

The Family Court is a court of limited, statutory jurisdiction. The Family Court hears domestic cases, including divorce proceedings, Protection From Abuse petitions, and criminal cases involving juveniles. In addition, the court may hear criminal matters, other than felonies, involving one family member against another, child abuse and neglect cases, and custody issues.

Appeals from the Family Court go directly to the Supreme Court, except in criminal matters where the accused has a right to a jury trial, in which case there is a trial *de novo* in the Superior Court

5. Chancery Court

The Chancery Court is a court of equity. The Chancery Court does not have jurisdiction over any case where an adequate remedy may be had at common law or by statute. 10 *Del. C.* § 341. Traditionally, it is the court of corporate litigation, including shareholder disputes, contract matters not involving a claim for monetary damages (i.e., a demand for specific performance), and Trust and Estate matters. Appeals from Chancery Court are to the Supreme Court.

B. Appellate Courts

1. The Supreme Court of the State of Delaware

The Supreme Court is the State's appellate court. The Court takes direct appeals from the Superior Court, Chancery Court, and Family Court. The Court is also the administrative arm of the court system in Delaware, also presiding over attorney disciplinary proceedings. The Court may also issue certain extraordinary writs, such as a Writ of Mandamus. The court may hear certified questions from the lower courts or issue advisory opinions when called upon by the General Assembly. A panel of the Court consists of three justices, while an en banc panel consists of all five justices.

II. COMMENCEMENT OF ACTION¹

A. Venue

An action may be commenced in any of the three counties in Delaware (New Castle, Kent, and Sussex). Generally, the action is filed where the defendant resides or where the incident occurred. However, should the plaintiff choose a different venue than where the defendant resides, he forfeits recovery of costs should he prevail. *Jardel Co. v. Hughes*, 523 A.2d 518, 533 (Del. 1987).

B. Reputation of Jurisdictions in Delaware

Generally, juries in Delaware are conservative compared to surrounding jurisdictions. Of the three counties, Sussex, the most rural, is the most conservative, followed by New Castle County. An exception to this assessment may be when there is a corporate defendant. In those cases, downstate juries may not be as favorable. The District Court juries tend to be more conservative than state court juries.

¹ The Delaware Rules generally track the Federal Rules of Civil Procedure.

C. Time for Filing an Answer

Superior Court Rules provide twenty (20) days to file a responsive pleading once the defendant has been served. Super. Ct. Civ. R. 12(a). In lieu of filing an Answer, the defendant may file a Motion to Dismiss (on the pleadings). The defendant also pleads affirmative defenses in the Answer. Certain defenses are waived if not made at the time the Answer is filed, including: lack of jurisdiction over the person; insufficiency of process; improper venue; or insufficiency of service of process. Super. Ct. Civ. R. 12(h).

Amendments to pleadings are freely given and may be had once as a matter of course. Super. Ct. Civ. R. 15(a). Delaware is a notice pleading state. A pleading need only contain a short statement showing that the party is entitled to the relief sought and a demand for judgment. An Answer must either admit, deny (partially or fully), or state the party has insufficient knowledge to answer (in effect a denial) an averment. Other pleadings allowed are Counterclaims, Cross-claims and Third Party Complaints.

The defendant may file a Third-Party Complaint any time after the Complaint has been served and up to ten (10) days after the Answer has been filed. After ten days the defendant must obtain leave of court to file a Third-Party Complaint. The defendant as a third-party plaintiff causes a summons and complaint to be served on the third-party defendant.

D. Pleadings in Personal Injury Matters

The Complaint and Answer must be filed with a standard set of interrogatories, commonly referred to as “Form 30 Interrogatories.” Super. Ct. Civ. R. 3(h). For the plaintiff, this is a set of seven (7) questions concerning the accident and medical treatment of they received. The plaintiff is also required to provide medical records pursuant to this rule. Commonly, the plaintiff’s attorney will only produce these records after the defense attorney has filed an Answer. In addition, the defendant may demand that a plaintiff attend an Independent Medical Exam.

E. Alternative Dispute Resolution (“ADR”)

Attending an ADR proceeding is compulsory in Delaware. ADR may be in the form of mediation, arbitration, or neutral assessment. If the parties cannot agree on the form, the court will order mediation. Super. Ct. Civ. R. 16(4). The parties stipulate to the ADR practitioner, and if they cannot agree, the Court appoints one. Arbitration consists of both evidence submitted on the records and testimony by the parties and other lay witnesses. Experts may provide opinions in written form. Exhibits must be submitted to the arbitrator ten (10) days prior to the hearing. The parties may stipulate to binding arbitration, at which point the case is removed from the docket.

III. COMMON CAUSES OF ACTION

A. Negligence

Negligence is defined as the act or failure to act that the actor as a reasonable person should recognize involves an unreasonable risk of harm to others where the actor has a duty to refrain from taking the action or has a duty to act if the omission may result in harm. RESTATEMENT 2ND TORTS § 284 (1965). Recovery in an action for negligence requires: one, proof of a duty; two, a breach of that duty; three, proximate causation; and four, damages. *Lenkewicz v. Wilmington City Ry. Co.*, 74 A. 11, 12-13 (Del. Super. 1908). Children are generally held to the standard of care that a child of similar age and maturity would be expected to understand. *Beggs v. Wilson*, 272 A.2d 713 (Del. 1970). However, children under the age of seven are afforded a rebuttable presumption that they are “incapable of negligence.” *Audet v. Convery*, 187 A.2d 412, 413 (Del. Super. 1963).

B. Negligence Per Se

Negligence per se is the violation of a statute enacted for the safety of others. In Delaware, evidence of a violation of a statute may, but does not always, constitute negligence per se. In a claim for negligence per se, a plaintiff must establish four elements: first, the statute in question was enacted for the safety of others; second, the statutory violation proximately caused the plaintiff's injury; third, the plaintiff was a member of the class “protect persons” that the statute was intended to protect; and fourth, the statute established a standard of conduct designed to avoid the harm suffered by plaintiff. *NVF Co. v. Garrett Snuff Mills, Inc.*, 2002 WL 130536, at *2 (Del. Super. Jan. 30, 2002).

C. Res Ipsa Loquitor

Pursuant to Delaware Rule of Evidence 304, the doctrine of Res Ipsa Loquitor allows the trier of fact to draw the inference that negligence occurred in an accident in certain circumstances. This applicability of this doctrine is determined at the *close* of the plaintiff's case. D.R.E. 304(c)(1).

D. Respondeat Superior

This doctrine allows for an employer to be held liable for the actions of their employees. The employee must be acting within the scope of their employment when the tortious conduct takes place. *Fisher v. Townsend's, Inc.*, 695 A.2d. 53, 58 (Del. Super. 1997). Essentially, the employer is vicariously liable for the actions of their employee or agent. *Id* at 58-59.

E. Negligent Hiring and Supervision

An employer is liable for negligent hiring by employing someone it should have known posed a risk of harm to others, or in the case of supervision failed to properly provide procedures, orders or otherwise supervise the actions of an employee who commits a tortious act. *Knerr v. Gilpin, Van Trump & Montgomery, Inc.*, 1988 WL 40009 (Del. Super. Apr. 8, 1988); RESTATEMENT SECOND OF AGENCY § 213 (1958).

F. Negligent Entrustment

A vehicle owner or employer is subject to liability when he or she provides a vehicle (or other dangerous instrument) to someone he or she knows or should have known that doing so would constitute an unreasonable risk of harm to others. Delaware courts have held that the standard to prove negligent entrustment in an automobile case is as follows: one, entrustment of the vehicle; two, to a reckless or incompetent driver whom; three, the entrustor had reason to know is reckless or incompetent; and four, this results in damages. *Fisher v. Novak* 1990 WL 82153 (Del. Super. June 6, 1990).

There is also a statute in Delaware providing that an owner of a motor vehicle who permits a minor to drive that vehicle can be imputed with the liability of the minor in case of an accident, and will be held jointly and severally liable with the minor for any damages caused by the minor. *21 Del. C. § 6105*.

G. Dram Shop Actions

Generally, Delaware does not recognize a cause of action against servers or sellers of alcoholic beverages for damages caused by a third party. *McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

H. Emotional Distress Claims

Delaware recognizes a cause of action for Negligent Infliction of Emotional Distress. The courts have held that for the plaintiff to recover, he or she must be in a zone of immediate danger to the negligent act. There is an exception for parents if there is a willful, wanton act(s) that causes harm to their child. *Mancino v. Webb*, 274 A.2d 711 (Del. Super. 1971). Damages for negligent infliction of emotional distress are not available in a breach of contract action absent physical injury or actual intent to inflict emotion distress. *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (Del. 1996).

To present a cause of action for Intentional Infliction of Emotion Distress, the plaintiff must show conduct by the defendant that was “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community...”

Mattern v. Hudson, 532 A.2d 85, 86 (Del. Super. 1987). Liability does not arise from insults, indignities, petty oppressions, as one must be free to express opinions. Only if the “distress is so severe that no reasonable man could be expected to endure it” does liability arise. *Id.*

I. Loss of Consortium

A claim for the loss of companionship, services, conjugal relations, impairment of sexual relationship due to injuries to a spouse. This claim is derivative of the injured plaintiff’s claim.

J. Premises Liability

Premises liability in Delaware is controlled in part by the Guest Premises Statute, which states that there shall be no cause of action against a landowner by licensees (guests without payment) or trespassers for injuries occurring on the property due to the landowner’s negligence. 25 *Del. C.* § 1501. A plaintiff may recover upon proof of willful or wanton conduct on the part of the landowner. *Id.* Child trespassers may still recover under the attractive nuisance doctrine. *Kalb v. Council*, 2013 WL 1934665, at *5 (Del. Super. May 8, 2013).

For a “business invitee” or “public invitee,” the landowner has a duty to inspect their property for danger and make it “reasonably safe by repair” or give the invitee “warning of any dangerous conditions.” *Lum v. Anderson*, 2004 WL 772074, at *1 (Del. Super. Mar. 10, 2004). A public invitee differs from a licensee in that the former’s “invitation involves more than the fact that the land is open to the public or that they are ‘merely tolerated,’ but rather that the public is expected and desired to come.” *Id.* at 4. The statute does not apply to commercial property or business invitees. Delaware courts have followed the Restatement of Torts with respect to the liability standard required. *Jardel Co., v. Hughes*, 523 A.2d 518 (Del. 1987).

1. Slip and Fall Standard of Care

The “storekeeper owes a duty to the public to see that those portions of its premises ordinarily used by its customers are kept in a reasonably safe condition for their use.” *Howard v. Food Fair Stores*, 201 A.2d 638, 640 (Del. 1964). This “duty includes taking reasonable steps to remove dangerous conditions.” *Walker v. Shoprite Supermarket, Inc.*, 2004 WL 3023089, at *2 (Del. Oct. 20, 2004). The storekeeper’s liability is limited to injuries caused by “defects or conditions of which the storekeeper had actual notice or which could have been discovered by such reasonable inspection.” *Howard*, 201 A.2d at 640. Customers entering a store have “the right to assume that the floor is suitable and safe to walk upon, and is free from obstacles and defects which might cause a fall.” *Id.* at 642.

Customers must, however, “exercise reasonable care while walking in the store.” *Walker*, 2004 WL 3023089 at *2. “It is negligent for a patron not to see what is plainly visible when there is nothing to obscure his or her view.” *Id.* “Although customers . . . do not need to keep a constant lookout, they must keep a reasonable lookout, and exercise reasonable care.” *Id.* A customer “is under the affirmative obligation to watch where he or she is walking, to exercise the sense of sight in a careful and intelligent manner to observe what a reasonable person would see.” *Winkler v. The Delaware State Fair, Inc.*, 1992 WL 53412, at *2 (Del. Feb. 20, 1992).

a) Examples of Negligent Customers

In *Walker*, the plaintiff slipped on jelly that had spilled onto the floor from a broken jar that had been dropped by a customer. *Walker*, 2004 WL 3023089 at *1. There was nothing between the plaintiff and the spill when she fell. *Id.* Although the spill was apparent, the plaintiff testified that she did not see it and that she never looked at the floor. *Id.* Moreover, the employees attended to the plaintiff and testified that they had “just been called to clean up the spill.” *Id.* The Court held that it was reasonable for a jury to conclude “that a store customer who fails to see the remains of a large grape jelly spill and walks right into it, is primarily responsible for her fall.” *Id.* at 2.

In *Winkler*, the plaintiff tripped over a rope on the fair grounds. *Winkler*, 1992 WL 53412 at *1. The plaintiff testified that she was not paying attention to where she was walking when she fell. *Id.* The trial court concluded that the plaintiff’s actions constituted negligence. *Id.* The Supreme Court of the State of Delaware affirmed the trial court and wrote that it “was correct in stating that it is negligent not to see what is plainly visible where there is nothing to obscure one’s vision.” *Id.* at 2.

2. Continuous Storm Doctrine

Landowners generally need not begin clearing their walkways and parking lots of snow until a reasonable period of time after the storm ends. *Sztybel v. Walgreen Co.*, 2011 WL 2623930, at *1 (Del. Super. June 29, 2011) (citing *Young v. Saroukos*, 185 A.2d 274, 282 (Del. Super. 1962), *aff’d*, 189 A.2d 437 (Del. 1963)). The “landowner has no legal duty to begin ice removal until precipitation has stopped, regardless of the severity of the storm.” *Cash v. East Coast Prop. Mgmt., Inc.*, 2010 WL 2336867, at *2 (Del. Super. June 8, 2010), *aff’d*, 2010 WL 4272925 (Del. Oct. 29, 2010). A store’s policy that ice and snow shall be removed during a storm, “without more, does not constitute the voluntary assumption of a legal duty.” *Cash*, 2010 WL 4272925 at *4. Thus, even if the landowner attempts to remove

the snow during the storm, “[t]he absence of a legal duty to remove the icy conditions renders moot the question of whether they exercised reasonable care.” *Id.*

3. Actions Brought by a Customer Against a Store

a) Standard of Care

Pursuant to 11 *Del. C.* § 840(c), adult store employees whom have probable cause to believe a person has committed shoplifting “may, for the purpose of summoning a law-enforcement officer, take the person into custody and detain the person in a reasonable manner on the premises for a reasonable time.” Such an employee who detains or provides information leading to the arrest of a shoplifter, “shall not be held civilly or criminally liable for such detention or arrested,” provided that they had probable cause to believe the person shoplifted. 11 *Del. C.* § 840(d).

b) Malicious Prosecution

A claim of malicious prosecution requires the plaintiff to prove six elements: first, the plaintiff was prosecuted at a prior judicial proceeding; second, the defendant initiated and/or prosecuted the plaintiff at the previous proceeding; third, the former proceeding terminated in favor of the plaintiff; fourth, the defendant acted with malice; fifth, there was a lack of probable cause for the commencement of the prior judicial proceeding; and sixth, the plaintiff suffered an injury. *Quartarone v. Kohl’s Dep’t Stores, Inc.*, 983 A.2d 949 (Del. Super. Feb. 2, 2009).

c) Defamation

A claim of defamation requires the plaintiff to demonstrate: first, a false, defamatory statement was made concerning the plaintiff; second, same was published to a third party; third, the third party understood the statement to be defamatory in nature; fourth, fault on the part of the defendant; and fifth, the plaintiff suffered injury. *Robert v. Murray*, 2009 WL 2620725, at *5 (Del. Super. July 24, 2009). “Truth is an absolute defense.” *Id.* Additionally, “[s]tatements to a law enforcement officer are privileged.” *Better v. Mitchell*, 2004 WL 3312524, at *2 (Del. Com. Pl. Oct. 5, 2004).

K. Products Liability

Delaware is among the minority of jurisdictions that have rejected strict liability for sales of defective products. The Delaware Supreme Court held that the adoption of

the Uniform Commercial Code (“UCC”) remedies preempted the doctrine of strict liability. The plaintiff must proceed under a negligence theory or under the UCC for breach of warranty. *Cline v. Prowler Industries*, 418 A.2d 968 (Del. 1980). Strict liability does apply to leases. *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976).

1. Breach of Warranty

Implied Warranty of Merchantability. General warranty guarantees that the product will be fit for its ordinary uses. 6 *Del. C.* § 2-314.

Implied Warranty of Fitness for a Particular Purpose. The buyer relies on the seller’s knowledge that the product is fit for the intended purpose. 6 *Del. C.* § 2-315.

Third party beneficiaries of warranties express or implied are restricted to “natural persons” injured by defective products. Consequently, a corporation suffering property damage would not be able to recover as a third party beneficiary.

Economic loss from a defective product is not recoverable in tort. A product that causes neither personal injury nor property damages (other than to itself) limits recovery to contract and warranty remedies. *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194 (Del. 1992)

L. Third Party Violent Crime

Delaware adopted the Restate Second of Torts standard with regard to a business owner’s liability for thirty party criminal activity, which occurs on the business’ premises. *Jardel Co., v. Hughes*, 523 A.2d 518, 525 (Del. 1987). Section 344(f) of the Restatement Second states that the possessor of land is generally under no duty to police their land until he or she “knows or has reason to know that the acts of the third person are occurring, or are about to occur.” RESTATEMENT (SECOND) OF TORTS § 344(f) (1965). Knowledge may be inferred from past experiences. *Id.*

In *Jardel*, the plaintiff was an employee of a store in the mall owned by the defendant. *Jardel Co.*, 523 A.2d at 522. After finishing work one night, she exited the mall and was abducted by two men who forced her to a remote location where they raped, assaulted, and tried to kill her. *Id.* The defendant had hired a security firm to provide guards for the mall. *Id.* at 523. The defendant decided to use only one guard at night, against the advice of the security firm. *Id.*

The Supreme Court of the State of Delaware held that “while a property owner is no more an insurer or guarantor of public safety than are police agencies, there is a residual obligation of reasonable care to protect business invitees from the acts of third persons.” *Id.* at 525. The Court explained that malls have distinguishing

characteristics because they are situated on large tracts of private property and “do not enjoy the benefit of routine police protection.” *Id.* The Court held that because the defendant had “undertaken [the] security responsibility,” the mall was charged “with anticipating the conduct of all persons who might frequent the mall and, in the language of the Restatement, ‘give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect against it.’” *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 344 (1965)). The “foreseeable standard” is not limited to anticipating only the crimes that had previously been reported. *Jardel Co.*, 523 A.2d at 524-25. The Court explained that although the most foreseeable crime for malls is shoplifting, the “repetition of criminal activity, regardless of its mix, may be sufficient to place the property owners on notice of the likelihood that personal injury, not merely property loss, will result.” *Id.* at 525. The Court adopted “the Restatement standard, which approves the concept that incidents of criminal activity provide a duty to foresee specific conduct.” *Id.*

This duty to warn and protect is limited to the “geographic zones” within the landowner’s control. *Rhudy v. Bottlecaps, Inc.*, 830 A.2d 402, 405 (Del. 2003). In *Rhudy*, the plaintiffs parked in a public lot adjacent to the defendant’s establishment. *Id.* at 403. After they exited their vehicle, they were robbed at gunpoint and shot at, which left one plaintiff dead. *Id.* The defendant did not own the parking lot or have an agreement for the exclusive use thereof. *Id.* at 403-04. However, they did reference in their advertisements the availability of nearby parking and would pick up litter there after large events. *Id.* at 404. “The trial court reasoned that because [the defendant] did not possess or control the [public lot], it did not owe a duty to warn or protect [the plaintiffs] from crime on the lot.” *Id.* The Supreme Court of the State of Delaware affirmed. *Id.* at 405. The Court reasoned that because the lot was not owned by the defendant, it could not be expected to protect its patrons from crimes that occurred there “to any greater extent than it could protect patrons who parked on any nearby public streets.” *Id.* at 406. The Court was not swayed that the defendant should be held liable “because it benefitted from the public parking made available to its patrons.” *Id.* at 407.

Furthermore, even if the storeowner is negligent, they must also be the proximate cause of the plaintiff’s injury. *Harvey v. Super Fresh Food Markets, Inc.*, 2000 WL 1611070 (Del. Super. Sept. 8, 2000), *aff’d*, 2001 WL 898602 (Del. July 30, 2001). In *Harvey*, the plaintiff was shot during an armed robbery. *Harvey*, 2000 WL 1911070 at *1. The defendant argued that although its panic button and surveillance cameras were not operational at the time of the robbery, said security devices would not have prevented the plaintiff’s injuries “under the circumstances of a violent takeover robbery.” *Harvey*, 2001 WL 898602 at *1. The jury found the plaintiff negligent “but that such negligence was not a proximate cause of [the plaintiff’s] injury and thus awarded no damages.” *Id.*

M. Wrongful Death

The Delaware wrongful death statute provides a recovery for mental anguish suffered by survivors of a decedent, which includes the surviving spouse, children, father, and mother or persons in standing *in loco parentis* at the time of the death. 10 *Del. C.* § 3724.

Delaware also has a survival statute. It provides that all causes of action, except for defamation and malicious prosecution, survive the decedent and pass on to the estate to continue to prosecute the cause of action. 10 *Del. C.* § 3701.

IV. DEFENSES TO CLAIMS

A. Statute of Limitations

There is a two (2) year statute of limitations for personal injuries. 10 *Del. C.* § 8119. Once a claim for damages is made, the defendant/insurance carrier must provide notice to the plaintiff of this two-year statute of limitations. Failure to do so tolls the statute. In medical malpractice cases, the same two-year statute applies for a known condition. If the condition was unknown or could not, in the exercise of reasonable diligence, have been discovered, the limitations period is extended until three years from the date of the injury.

There is a two-year statute of limitations for wrongful death and injury to personal property. 10 *Del. C.* § 8107.

1. Other Causes of Action

Causes of action unaccompanied by physical injury such as fraud, negligence, misrepresentation, or defamation are subject to a three-year statute of limitation similar to contract actions. 10 *Del. C.* § 8106.

2. Limited Discovery Rule

The statute of limitations begins to run when a plaintiff is chargeable with knowledge that his physical condition was attributed to the defendant's negligence. *Stagg v. Bendix Corp.*, 472 A.2d 40 (Del. Super. 1984), *aff'd*, 486 A.2d 1150 (Del. 1984). If the plaintiff knew of his injuries but was unable to make a causal inference from the defendant's negligence to that injury, the statute is not necessarily precluded from running. *Grecco v. Univ. of Delaware*, 619 A.2d 900 (Del. 1993).

B. Comparative Negligence

Delaware is a comparative negligence state. 10 *Del. C.* § 8132. The plaintiff's negligence will not bar recovery if their negligence is not greater than the negligence of the defendant. However, damages shall be diminished in proportion to the amount of negligence attributed to the plaintiff. Essentially, if the plaintiff is greater than 50% at fault there is no recovery. If there is 50% fault on the part of the plaintiff, the plaintiff can recover, but damages will be reduced by half. *Id.*

C. Assumption of the Risk

Assumption of the risk is divided into two categories. *Farrell v. Univ. of Delaware*, 2009 WL 3309288, at *2 (Del. Super. Oct. 8, 2009). Primary assumption of the risk is when the plaintiff relieves the defendant of legal duty by expressly agreeing to take his or her chance of injury from a known risk arising from the defendant's conduct or property. *Id.* This can be established through circumstantial "words or conduct" and "need not take the form of specific spoken or written words." *Id.* (internal quotation marks omitted). Secondary assumption of the risk has been absorbed "into the concept of comparative negligence." *Id.* The question is whether the plaintiff's conduct in encountering a known risk is in itself unreasonable. This is left to the finder of fact to determine if the plaintiff's conduct was reasonable, and whether it rose to the level of negligence greater than that of the defendant. *Koutoufaris v. Dick*, 604 A.2d 390 (Del. 1992).

D. Immunity

1. Parental Immunity

The doctrine of parental immunity still applies as to issues of control, authority and discretion over the child, and there can be no action and contribution that would be available against the parent whose negligence combines with the defendant to produce injury. However, the defendant could still prove that the parental negligence was the supervening cause of the injury cutting off the defendant's liability. *Sears, Roebuck & Co. v. Huang*, 652 A.2d 568 (Del. 1995).

2. Spousal Immunity

There is no longer any spousal immunity in the State of Delaware.

3. Governmental or Sovereign Immunity

The State of Delaware retains sovereign immunity for acts or omissions alleged in connection with official duties providing that the actions were without gross negligence. 10 *Del. C.* § 4001. There are certain exceptions pursuant to specific statutes where the State has waived sovereign

immunity. One of these is the Delaware Transit Authority, which, by statute, has waived sovereign immunity up to \$300,000.00 per occurrence for accidents involving transit vehicles.

Generally, counties and municipalities are shielded from liability. There are, however, three statutory exceptions to municipal and county immunity: one, liability for negligent acts in connection with the ownership maintenance or use of any motor vehicle; two, liability for the construction operation or maintenance of any public building; and three, liability for a discharge of toxic substances. 10 *Del. C.* § 4012. Determining liability of counties or municipalities turns on whether the municipality's or county's acts are discretionary or ministerial. *Sussex Cnty. v. Morris*, 610 A.2d 1354 (Del. 1992). Discretionary acts are subject to immunity; ministerial acts can be subject to liability under one of the exceptions. *Id.* The distinction between ministerial and discretionary acts is always one of degree. *Id.* at 1359.

V. DISCOVERY

A. Scope of Discovery (Rule 26)

Parties may obtain discovery of any matter that is not privileged and is relevant, whether it relates to the claim or defense of the parties seeking discovery. Information inadmissible at trial is still discoverable if it appears reasonably calculated to lead to discovery of admissible evidence. *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.*, 623 A.2d 1118 (Del. Super. 1992).

B. Discovery Methods

1. Depositions (Rule 30)

Depositions may be taken of any person including any party. Depositions may be taken without leave of the court unless the person is incarcerated. Notice must be provided of the deposition including how the deposition is to be taken, whether it is to be done by video. Costs are the responsibility of the party taking the deposition.

2. Use of Deposition in Court

Any part of a deposition, so far as at it is admissible under the rules of evidence, may be used against a party that was present or represented at the taking of the deposition. A deposition may be used by any party for contradicting or impeaching testimony of a deponent, or for other reasons permitted by the Delaware Rules of Evidence. The deposition of any non-party witness may be used if the court finds that the witness is out of the state of Delaware, deceased, or unable to testify due to some other

infirmity. Lastly, the party may use the deposition if the deponent has ignored a summons to attend trial. Depositions of expert witnesses may be taken and read into the record in lieu of live testimony.

3. Interrogatories (Rule 33)

Interrogatories may be served at any time after the commencement of the action on the other party, including with the service of the summons and complaint or with the filing of the answer. The party on whom the interrogatories are served has thirty (30) days to provide answers and any objections thereto. Each interrogatory is restated in reply and answered fully unless objected to, in which case the objection needs to be clearly stated and signed by both the attorney and the party under oath. If the answer to the interrogatory may be derived from business records, the answer is sufficient to state where the answer may be found within the record. As previously noted, there is a limited form of expedited discovery in personal injury cases. Super. Ct. Civ. R. 3(h).

4. Production of Documents and Things and Entry upon Land for Inspection and Other Purposes (Rule 34)

Any party may serve a request for production of documents without leave of court. If an entry upon land for inspection is required, the request must specify a reasonable time, place, and manner of inspecting the item, which must be described with reasonable particularity. This rule only applies to parties.

5. Physical or Independent Medical Examination (Rule 35)

A party may request and notice a physical exam or the court may order one. Following the examination, the requesting party must provide a copy of the written report of the exam to the other party.

6. Request for Admissions (Rule 36)

Any party may serve on any other party written admissions of the truth of any matters within the scope of Superior Court Civil Rule 26 (General Discovery). Each matter for which admission is sought must be separately set forth. Any matter for which admission is requested is deemed admitted unless within thirty (30) days after service of the request, the party files a written answer or objection to the request. A defendant shall not be required to serve answers or objections before forty-five (45) days after the service of the summons and complaint on the defendant. The party that has requested admissions can move the court to determine the sufficiency of the answers or objections. A request for admission may not ask for an admission on the central issue of the case. For example, it cannot ask the

defendant to admit to liability or to violation of a statute in a motor vehicle case where the defendant's liability is a bona fide legal issue in the case.

7. Motion to Compel Discovery

If a party fails to provide discovery responses within the prescribed time, the requesting party may file with the court a motion compelling discovery. If, following an order granting the motion to compel, the other party still has not provided the requested answers, the court may require the party who failed to make discovery pay the other side's attorneys' fees. The Court may also order the striking of certain pleadings or preclude the defendant from producing certain items of evidence in this case.

VI. MOTIONS PRACTICE

A. Generally

A written motion must set forth with particularity the relief sought and the grounds therefore, along with authorities in support of the request. Exhibits and affidavits may be attached in support of the motion. All unreported cases must be provided to the court. A motion must be served on the other party no later than ten (10) days prior to the noticed hearing time. When responding to a motion, a party must file its response no later than four (4) days prior to the scheduled hearing time. A motion is limited to six (6) pages unless waived by the court, or the judge orders additional briefing. Super. Ct. Civ. R. 10, 78.

B. Motion to Dismiss

A motion to dismiss is filed in lieu of an Answer. A motion to dismiss considers only the four corners of the Complaint. If the parties rely on evidence outside of the facts plead in the Complaint then the motion is converted to a motion for summary judgment. Super. Ct. Civ. R. 56. Defenses that must be pleaded in either an initial motion or in the Answer are: one, lack of jurisdiction over the person; two, improper venue; and three, insufficiency of process or service of process. If not plead, these defenses are waived. A motion to dismiss for failure to state a claim, jurisdiction over subject matter, or failure to join a party may be made at any time.

C. Motion for a More Definite Statement

Prior to filing a responsive pleading, a party may file a motion for clarification of pleadings that are vague and ambiguous. If the Court agrees, the other party must respond in ten (10) days. Failure to respond may result in the pleading being stricken. Super. Ct. Civ. R. 12(e).

D. Motion for Judgment on the Pleadings

After the pleadings are closed, any party may move for judgment on the pleadings. The standard for this motion is that no material facts are at issue and the defendant would be entitled to judgment as a matter of law. The courts do not favor this type of motion and will often allow discovery to proceed before dismissing a case on this basis.

E. Motion to Strike

Within twenty (20) days of the service of pleadings a party may motion for a particular pleading to be stricken. The court may order any insufficient defense or redundant matter stricken.

F. Motion for Summary Judgment

At any time, a party may file for summary judgment. The Delaware rule tracks Federal Rule of Civil Procedure 56. A party may supplement its motion with affidavits, deposition transcripts, or other sworn discovery answers. If the court deems there to be no material facts in dispute, the judge can decide the case as a matter of law. The burden is on the moving party to show there are no material facts in dispute. Further, all reasonable inferences must be drawn favorably to the nonmoving party, and the court reads the record in the light most favorable to the nonmoving party.

G. Motion in Limine

This motion is used prior to and during trial to exclude evidence from being offered at trial. Traditionally, motions are made prior to the impaneling of the jury. In Delaware, these are most often made at the pretrial conference or in chambers prior to voir dire. *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 500 (Del. 2001).

VII. DAMAGES

A. Compensatory Damages

The purpose of a damages award is just compensation for the loss or injury sustained. Compensatory damages impose satisfaction for an injury done such that an award is directly related to the harm caused. Compensatory damages include

general damages, special damages, and consequential damages. General compensatory damages are awarded when the injury caused by the wrongful conduct would not be adequately compensated by mere nominal damages. General compensatory damages are for those injurious consequences that might have been foreseen or foreseeable and are such as the law presumes to be the natural and probable consequence of the defendant's wrongful conduct. Special damages are those damages that are the natural but not necessary result of the wrongful acts. Special damages include compensation for out-of-pocket losses, which may include medical expenses, property damage, lost wages, future lost earnings, medical expenses, loss of earning power, and substitute services. Special damages must be proven to a reasonable probability and cannot rest on mere speculation.

B. Punitive Damages

Punitive damages serve three purposes: one, to punish the wrongdoer; two, to deter the wrongdoer from engaging in similar conduct in the future; and three, to deter others from similar conduct. The plaintiff must show behavior that rises to the level of willful, wanton, and malicious conduct in order to recover punitive damages. A plaintiff may prove this conduct by showing a pattern of behavior in addition to a single act. *Jardel Co. v. Hughes*, 523 A.2d 518, 529 (Del. 1987); *see also Crowhorn v. Nationwide*, 836 A.2d 558 (Del. Super. 2003).

In order to recover punitive damages in a bad faith claim against an insurance carrier, the insured must show that the conduct of the insurance company was a wanton and willful breach of the insurance contract. *Tackett v. State Farm*, 653 A.2d 254 (Del. 1996).

C. Interest

Delaware follows the general rule that the prevailing party is entitled to pre-judgment and post-judgment interest on a monetary judgment, with several limitations. Pre-judgment interest is generally only available where the damages were easily determined prior to litigation, or liquidated, such as a breach of contract action or property damage. In a tort action for compensatory damages where the plaintiff made an offer, extended for a minimum of thirty days, that is less than the judgment, then pre-judgment interest is available and is calculated from the date of the injury. 6 *Del. C.* § 2301(d). Interest is not self-executing and must be requested as an item of damages. *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 961 A.2d 521, 525 (Del. 2008). Post-judgment interest attaches upon entry of judgment. The rate of interest is 5% plus the Federal Reserve Discount Rate at the time the interest is due. 6 *Del. C.* § 2301(a).

D. Attorney Fees

Generally, each party pays their own attorneys' fees unless otherwise provided for by contract or by statute. An exception is when the court determines that the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Brice v. Dep't of Corr.*, 704 A.2d 1176, 1179 (Del. 1998).

E. Costs

The prevailing party may recover their court costs. Super. Ct. Civ. R. 54(d). The party must present a motion for costs following entry of judgment. This may include costs of deposition transcripts provided the transcript was entered into the record as evidence. Expert witness fees are subject to review by the court for reasonableness.

1. Offer of Judgment

If a defendant makes a settlement offer more than ten days from the date of trial, the offer is refused by the plaintiff, and the subsequent judgment is less than or equal to the offer, the plaintiff must pay the defendant's costs incurred subsequent to the offer. Additionally, the plaintiff is precluded from filing for his or her costs. Super. Ct. Civ. R. 68.

F. Contribution Among Joint Tortfeasors

1. Delaware law provides statutory contribution for defendants with a common liability to the plaintiff. 10 *Del. C.* § 6301.
2. The statute provides for apportionment among joint tortfeasors in accordance with their relative percentages of fault.
3. Defendants may be jointly or severally liable to the plaintiff. When it is determined that one defendant is the sole proximate cause of the injury, this acts as a supervening cause, shielding other defendants from liability. *Sears Roebuck & Co. v. Huang*, 652 A.2d 568 (Del. 1995).

VIII. INSURANCE COVERAGES

A. Personal Injury Protection in Delaware

The No Fault Statute – 21 *Del. C.* § 2118

The status enables persons injured in automobile accident to receive immediate payment of their medical expenses and lost wages without the delay of protracted litigation. *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557 (Del. 1988).

1. Who Is Covered

a. Occupants of Delaware registered Motor Vehicles

A person is an occupant if they are engaged in a task related to the operation of the motor vehicle (includes pumping gas, maintenance, but not necessarily a job related task such as offloading cargo), or within a reasonable geographic perimeter (entering, touching or within reach of the vehicle). *Selective Ins. Co. v. Lyons*, C.A. No. 00C-03-335 SCD (Del. Super. Oct. 25, 2001); *Nat'l Union Fire Ins. Co. v. Fisher*, 692 A.2d 892, 896 (Del. 1997).

Rental vehicles registered in another state and insured to that state's minimum coverage are not required to carry Delaware PIP coverage. *Green v. Budget Rent A Car Corp.*, C.A. No. 02C-06-029 RRC (Del. Super. June 18, 2004).

b. Other Registered Vehicles

Named insureds of a Delaware policy or members of their household:

- (1) while occupying a motor vehicle not covered by a Delaware insurance policy; and
- (2) while a pedestrian struck by a vehicle not covered by a Delaware insurance policy.

c. Pedestrians

All pedestrians struck in Delaware by a motor vehicle registered and insured in Delaware.

2. Coverage Provided

Reasonable and Necessary expenses incurred within two (2) years from the date of the accident (see below for an exception to the time limit). 21 *Del. C.* § 2118(a)(2).

a. Medical Expenses

- The plaintiff has the burden of demonstrating that their medical expenses are reasonable. *Lundberg v. State Farm Mut. Auto. Ins. Co.*, 1994 WL 1547774 (Del. Com. Pl. July 11, 1994) (citing *Wilmington Bd. of Educ. v. DiGiacomo*, C.A. No. 84AJA-13 (Del. Super. Feb. 28, 1985)).

- The reasonableness and necessity of the expenses must be established by a physician. *Watson v. Metro. Prop. & Cas. Ins. Co.*, 2003 WL 22290906 (Del. Super. Oct. 2, 2003).
- Nursing services must be provided by a professional. *Johnson v. Lumberman's Mut.*, C.A. No. 02C-05-274 FSS (Del. Super. Apr. 25, 2003).
- Medical expenses include dental, surgical, medicine, ambulance, prosthetics, and funeral services.
- An insured has two (2) years and ninety (90) days to submit medical expenses. *Carriere v. Peninsula Indem. Co.*, C.A. No. 99C-02-210 (Del. Super. June 12, 2000).
- \$5000.00 compensation for funeral services.
- No coverage for mileage reimbursement.
- NO FEE SCHEDULE

b. Medical Expenses Incurred After Two (2) Years

- The plaintiff must supply a statement from their doctor, written within the two-year time frame, stating that the procedure is necessary but was impractical to perform within two years. *Graham v. Nationwide Ins. Co.*, 444 A.2d 286 (Del. Super. 1982).
- The plaintiff may receive ninety (90) days of lost wages incurred as a result of the procedure.

c. Lost Wages (Net lost earnings)

- Actual out of pocket loss.
- Includes the cost of benefits. *Crum & Forster Ins. Grp. v. Miller*, 634 A.2d 373 (Del. Super. 1993).
- Net lost earnings are defined as gross wages less taxes. The customary figure accepted is 80% of gross income.
- Lost wages must be due to inability to work and cannot be claimed for time off to attend doctor visits or physical therapy. *Ramsey v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 2240164

(Del. Super. Sept. 28, 2004), *aff'd*, 2005 WL 528846 (Del. Mar. 10, 2005).

- The plaintiff may have a duty to mitigate his damages by seeking substitute work. *Casson v. Nationwide Ins. Co.*, 455 A.2d 361 (Del. Super. 1982). However, while the statute does not require mitigation, a policy provision might. *George v. Donegal Mut. Ins. Co.*, 2003 WL 2006873 (Del. Super. Apr. 28, 2003). Plaintiff does have a duty to undergo medical or rehabilitation treatment that may lessen the disability and speed their return to work.
- Payments for lost income can be reduced by substitute work.
- Lost wage payments only continue with medical disability.
- Self-employed lost earnings.
 - a. The insured must prove lost earnings by providing evidence offering a reasonable person (jury) a reasonable means to calculate the loss. The quality of this evidence is a question of credibility for the jury's consideration. *Moody v. Nationwide Mut. Ins. Co.*, 549 A.2d 291 (Del. 1988)
 - b. A self-employed person can also prove lost wages by providing proof of payments to a substitute employee.
 - c. A self-employed person may recover gross income to compensate for ongoing "overhead." The court may put him or her in the same position as a plaintiff who is an employee. *Kapsalis v. State Farm Mut. Ins. Co.*, 1997 WL 529590 (Del. Super. Apr. 30, 1997).

d. Substitute Services

The insured can recover for "personal services" that they would normally have performed had they not been injured (house cleaning, yard work, other maintenance). 21 *Del. C.* § 2118(a)(2)(a)(4).

e. Minimum Required Coverage (21 *Del. C.* § 2118)

- \$15,000.00 per person; \$30,000.00 per accident.
- \$5000.00 for funeral services.

- Deductibles are permitted but cannot be required.

3. Secondary or Excess Coverage

a. Stacking

A pedestrian can stack his own coverage with that on the striking vehicle. Policy provisions preventing double coverage when other PIP benefits are available are enforceable. *Gonzalez v. State Farm Mut. Auto. Ins. Co.*, 1996 WL 526014 (Del. Aug. 19, 1996).

- b. Household coverage may be used as excess coverage. Passengers in a Delaware registered vehicle can seek excess coverage from a policy in their household.

4. Exclusions

- a. Coverage exclusions customary to the field of liability insurance and not inconsistent with the requirements of the statute are generally valid. *Cubler v. State Farm Mut. Auto. Ins. Co.*, 679 A.2d 66 (Del. 1996).
- b. Non-Permissive Use exclusion valid. *Harris v. Nationwide*, Del. Supr., CA No. 95C-08-008, Terry, J. (Feb. 6, 1997). In certain cases, however, minimum coverage must still be afforded.
- c. Exclusions for DUI are invalid. *Bass v. Horizon Assurance Co.*, 562 A.2d 1194 (Del. 1989).

5. Subrogation

- a. 21 *Del. C.* § 2118(g) provides that the No Fault carrier has a right to subrogate its payments of benefits up to the limits of the tortfeasor's liability coverage.
- b. The No Fault carrier stands in line behind the injured party and cannot interfere with any settlement in the liability case. The tortfeasor's carrier may pay the subrogation claim ahead of any settlement. If there is insufficient coverage, then the No Fault carrier may have to reimburse some or all of the monies.
- c. If the tortfeasor is self-insured or uninsured, the subrogation may be taken directly against that party. For example, a claim against a governmental agency. *State Farm Mut. Auto. Ins. Co. v. United States*, CA No. 2-454, (D. Del. July 22, 2003).

- d. The No Fault carrier may also subrogate against a Worker's Compensation carrier for those benefits provided by that coverage.
- e. The usual forum for PIP subrogation is Intercompany Arbitration.

6. The Notice requirement (21 Del. C. § 2118B)

a. Notice of claim or request for benefits.

- Application for benefits must be sent within ten (10) days of notice of the claim.

b. Written request for payment of a claim.

- Upon receipt of the payment request, bill, and proper documentation, the insurer has thirty (30) days to either issue payment or to deny **in writing** the claim or bill.
- The carrier must provide in writing an explanation for the denial of the claim. For example: Due to the enclosed report from Dr. X further payment of medical expenses is being denied.

c. Penalties for failure to provide written notice of denial.

- Interest on the unpaid amount up to 2 1/2%.
- Costs of any action filed by the insured to recover payment
- Reasonable attorney fees.
- Attorney fees are payable upon proof by the insured that the payment was denied in bad faith.

7. Statute of Limitations

- a. An insured has three (3) years from the date of denial to file a complaint to toll the statute of limitations. *Harper v. State Farm Mut. Ins. Co.*, 703 A.2d 136 (Del. 1997).
- b. The carrier must provide notice to the insured of the statute of limitations. Failure to provide notice directly to the insured will toll the statute of limitations. 10 Del. C. § 4317. Usually notice is provided on the PIP applications. Also noted on EOPs sent to the insured for a denial of individual medical bills. All denial letters should include notice of the statute of limitations.

- c. Subrogation of PIP benefits also subject to three (3) year statute of limitations. The status accrues from the date of payment.

8. Coordination of Benefits

- a. General rule: Plaintiff allowed to maximize available benefits.

b. Worker's Compensation

- PIP benefits are primary.
- The insured can elect one coverage over the other.
- The plaintiff can collect the difference between workers' compensation benefits, paid at 66 2/3% and the 80% paid by PIP.
- Workers' compensation benefits are subject to a maximum rate, adjusted annually. High income workers may be able to recover additional PIP if they hit the maximum rate.

9. Collateral Source Rule

- a. Delaware recognizes the collateral source rule, which states that a tortfeasor cannot benefit by payment from a third party for injuries or medical expenses sustained by a plaintiff. Evidence of damages can still be presented to the jury. There is an exception to this regarding PIP benefits. Medical expenses and lost wages paid pursuant to 21 *Del. C.* § 2118 cannot be introduced as evidence in the liability case.
- b. The insured can collect both disability pay and PIP benefits as long as he or she paid consideration for those benefits. The courts treat this as the ability to contract for a double recovery. If the employer paid 100% of the premiums we can offset for any benefits received. *State Farm Mut. Ins. Co. v. Nalbone*, 569 A.2d 71 (Del. 1989).
- c. Health insurance. The PIP carrier would owe the lien and any balance billed by the provider to the insured.

10. Bad Faith

- a. Plaintiff must show that the denial or refusal to honor the claim was without reasonable justification. *Casson v. Nationwide Ins. Co.*, 455 A.2d 361 (Del. Super. 1982).

- An IME opinion that cuts off treatment or disability is reasonable justification. *Albanese v. Allstate Ins. Co.*, 1998 WL 437370 (Del. Super. July 7, 1998).
- Delay due to coverage and cancellation issues can be reasonable justification. *Lewis v. Am. Indep. Ins. Co.*, C.A. No. 03C-11-001 (Del. Super. June 22, 2004).

b. The *Crowhorn* case.

- Court certification of a class and final approval of settlement in a class action suit against Nationwide alleging breach of contract, bad faith, and fraud. Allegations of deceptive claims handling practices included delay or denial of payment without reasonable explanation, systematic denials of PIP claims, and fraudulent use of IMEs to terminate coverage. This matter was extensively litigated before settlement – Nationwide files were subject to discovery and adjusters were deposed. *Crowhorn v. Nationwide Mut. Ins. Co.*, 836 A.2d 558 (Del. Super. 2003).

B. Liability Coverage

1. The minimum mandatory amounts for motor vehicle liability coverage are \$25,000.00 per person and \$50,000.00 per occurrence for bodily injury, and \$10,000.00 in coverage for damage to property resulting from the use of the covered motor vehicle. 21 *Del. C.* § 2118 (a); 21 *Del. C.* § 2902(b) (2).
2. Motorcycles are subject to the same mandatory coverage as automobiles.

C. Uninsured and Underinsured Motorist Coverage

1. This coverage is offered for accidents caused by motorists who have failed to provide the mandated liability coverage on their vehicle and for accidents with hit and run vehicles.
 - Every insurer must offer Uninsured Motorist (“UM”) coverage at the minimum amounts required for liability coverage. This coverage may be waived or rejected by the insured. Such a waiver must be in writing. Property damage coverage for accidents caused by uninsured motorists is subject to a \$250.00 deductible unless a higher deductible is agreed upon. 18 *Del. C.* § 3902(a).
 - Higher limits may be contracted for, up to \$100,000.00 per person, \$300,000.00 per accident or a single limit of \$300,000.00; however, in no case may the limit for UM coverage be greater than the liability

limits on the policy. 18 *Del. C.* § 3902(b). An insurer must offer this option in writing to the insured. Such an offer must be made every time there is a material change in the policy (i.e.; adding a new vehicle).

- When higher limits are taken, then the UM coverage also includes Underinsured Motorist (“UIM”) coverage. An underinsured motor vehicle is one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all applicable insurance policies are less than the damage sustained by the insured. 18 *Del. C.* § 3902(b)(2). UIM coverage is available when all available liability coverage has been exhausted and the plaintiff has not been fully compensated. *Nationwide Mut. Auto. Ins. Co. v. Peebles*, 688 A.2d 1374, (Del. 1997).
- Statute of limitations. UM is considered a contract action and the three (3) year statute of limitations applies. *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286 (Del. 1982).
- In Delaware, a claimant can stack UIM coverage. For a plaintiff to stack UIM coverage, the tortfeasor must meet the statutory definition of an underinsured motorist under 18 *Del. C.* § 3902(b)(2). A claimant can look to any policy applicable at the time of the accident to show that the tortfeasor satisfies the threshold definition of an underinsured motorist. A claimant may not stack coverage in order to show that the tortfeasor satisfies the threshold definition of an underinsured motorist. Once a claimant shows that the tortfeasor is an underinsured motorist, he or she is statutorily required to exhaust the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident by payment of settlement or judgments, before he or she can access his or her personal UIM coverage. Delaware courts are very deferential to the legislative intent/public policy aim to protect innocent persons from unknown and impecunious tortfeasors.

D. Permissive Use

1. The Delaware Financial Responsibility Law only requires liability coverage for operators of motor vehicles with the express or implied permission of the owner. 21 *Del. C.* § 2902(b)(2).
2. The statute has been interpreted to mean that a policy exclusion for non-permissive use is valid and that it applies to both liability coverage and PIP coverage. *Harris v. Nationwide Mut. Ins. Co.*, 712 A.2d 470, (Del. Super. 1997), *aff’d*, 1997 WL 664686 (Del. Nov. 14, 1997).

3. Delaware follows the minor deviation rule to determine whether an operator's use of a vehicle exceeded the scope of permission. *O'Neal v. State Farm Mut. Auto Ins. Co.*, 977 A.2d 326 (Del. 2009).

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