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Overview of State of NEW JERSEY Court System

A. Trial Courts

Superior Courts – have original jurisdiction throughout the state in all cases. This is the trial level of courts. It is broken down into three parts. The civil side is divided into Law and Chancery and the third part handles Criminal actions.

The New Jersey Superior Court is divided into the following Vicinages:

Vicinage 1 – Atlantic & Cape May Counties

Vicinage 2 – Bergen County

Vicinage 3 – Burlington County

Vicinage 4 – Camden County

Vicinage 5 – Essex County

Vicinage 6 – Hudson County

Vicinage 7 – Mercer County

Vicinage 8 – Middlesex County

Vicinage 9 – Monmouth County

Vicinage 10 – Morris & Sussex Counties

Vicinage11 – Passaic County

Vicinage 12 – Union County

Vicinage 13 – Somerset, Hunterdon & Warren Counties

Vicinage 14 – Ocean County

Vicinage 15 – Gloucester, Cumberland & Salem County

Counties vary from conservative to liberal depending on the socio-economic demographics.

The liberal counties are those with diverse cultural backgrounds in cities such as Trenton, Elizabeth, Jersey City, Newark, New Brunswick, Atlantic City, Paterson and Camden.

These cities are found in the following counties: Mercer, Union, Hudson, Essex, Middlesex, Atlantic, Passaic and Camden counties.

The more conservative counties are more rural and/or suburban in nature and contain more homogenous populations. These counties include Bergen, Cumberland, Salem Hunterdon, Somerset, Warren, Morris, Burlington, Cape May, Gloucester, Monmouth, Ocean and Sussex.

Law Division – Civil cases in which the primary relief sought is money.

a. The Small Claims division has jurisdiction over cases where the monetary relief sought does not exceed $3,000.00. The Small Claims division requires mandatory mediation of all claims before the matters are tried. These mediations are usually done by court-appointed mediators, law clerks, volunteer certified mediators, or between the attorneys assigned to the case.

b. The Special Civil Part is within the law division and has jurisdiction over cases where the relief sought does not exceed $15,000.00.

c. The Law Part does not limit the monetary relief amount which can be sought.

Chancery – Handles cases that seek primarily equitable, non-monetary forms of relief (Family part is part of Chancery; in some counties such as Morris, the surrogates court is also part of Chancery).

Jury Trials – In civil actions, a jury will consist of 6 people unless the court for good cause shown orders a jury of twelve (12) persons or the parties agree to be bound by the verdict of another number of jurors. Rule 1:8-2(b).

Normally, the panel will consist of six (6) jurors and two (2) additional alternates picked to insure that there are six jurors remaining at the end of a civil proceeding, even if during the course of the trial a juror, for any reason, is no longer able to serve.

N.J. Const. art. I, § 9 authorizes the trial of civil causes by a jury of six persons, and a litigant also has the right to have the verdict "rendered by not less than five-sixths of the jury."

Mandatory Arbitration

R. 4:21A-1(a) requires mandatory arbitration for the following:

> (1) Automobile Negligence Actions. All tort actions arising out of the operation, ownership, maintenance or use of an automobile shall be submitted to arbitration in accordance with these rules.
>
> (2) Other Personal Injury Actions. Except for professional malpractice and products liability actions, all actions for personal injury not arising out of the operation, ownership, maintenance or use of an automobile…
>
> (3) Other Non-Personal Injury Actions. All actions on a book account or instrument of obligation, all personal injury protection claims against plaintiff's insurer, and all other contract and commercial actions that have been screened and identified as appropriate for arbitration shall be submitted to arbitration in accordance with these rules.

B. Appellate Courts

Appellate Division

Intermediate court. Appeals cannot be taken as a matter of right when it comes to interlocutory orders in civil cases. Rather, only final judgments – those that dispose of all claims of the Superior Court are appealable as of right to the Appellate Division. R. 2:2-3(a)(1). A litigant has 45 days from the date a judgment is entered to appeal. In certain cases a 30 day extension may be granted.

Supreme Court

The New Jersey Supreme Court is the highest level of Appeal in the State. It is composed of a chief justice and six associate justices.

Appeals to the Supreme Court can be as of right (R. 2:2-1(a)) or on certification (R. 2:2-1(b)).

Bond Requirement

In order to stay a judgment pending an appeal, the judgment-debtor must post a supersedeas bond with that court in the amount stated in the court order.

R. 2:9-6. "…the supersedeas bond shall be presented for approval to the court or agency from which the appeal is taken, or to the court to which certification is sought,

and shall have such surety or sureties as the court requires."

"The bond shall be conditioned for the satisfaction of the judgment in full, together with interest and trial costs, and to satisfy fully such modification of judgment, additional interest and costs and damages as the appellate court may adjudge". R. 2:9-6.

Post-Judgment Interest

Allowed at published rates in Rules of Court, which change annually. Pursuant to R. 4:42-11(a)(ii), the annual post-judgment interest rate is equal to the average rate of return for the State of New Jersey Cash Management Fund for the preceding fiscal year, rounded off to the nearest one-half percent.

Procedural

A. Venue

Venue refers to the particular county in which a court with jurisdiction may hear and determine a case because that county has some relationship to the particular dispute. Under R. 4:3-2 venue can be laid by the Plaintiff in Superior Court actions as follows:

(1) actions affecting title to real property or a possessory or other interest therein, or for damages thereto, or appeals from assessments for improvements, in the county in which any affected property is situated;

(2) actions not affecting real property which are brought by or against municipal corporations, counties, public agencies or officials, in the county in which the cause of action arose; and

(3) the venue in all other actions in the Superior Court shall be laid in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement, or in which the summons was served on a nonresident defendant.

B. Statute of Limitations

A statute of limitations is a type of law that restricts the period of time that a person may initiate legal proceedings. Time limits can vary depending on the type of case and the state where the particular cause of action occurred.

Fraud - Actions based on fraud must be filed within 6 years.

Libel-Slander-Defamation - These types of actions must be filed within 1 year from the date of the alleged conduct.

Medical Malpractice - All actions against medical professionals must be filed within 2 years of the date of the act resulting in the injury, or within 2 years of the date the injury

was, or should have been, discovered. If the injured party is a minor who suffered from an injury during birth, a claim must be filed before that minor's 13th birthday.

Personal Injury - Personal injury actions must be filed within 2 years from the date of the injury.

Product Liability - Product liability actions must be filed within 2 years from the date of the injury, or within 2 years from the date the injury was, or should reasonably have been, discovered.

Wrongful Death - Wrongful death actions must be filed within 2 years of the date of death.

Special Rules Tolling the Statute of Limitations - In New Jersey, when the injured party is a minor the limitations period begins to run on that minor's 18th birthday. This exception does not apply regarding medical malpractice injures suffered at the time of birth. If an injured party is deemed to be mentally incompetent or insane, the limitations period will begin to run after the termination of the disability.

C. Time for Filing an Answer

Time to file an Answer to the Complaint is **35 days** from the date of service. R. 4:6-1. If more time is needed, it is customary to grant it upon request. If plaintiff's counsel declines an extension, defendant may make an application to the court.

Extensions of time. R.4:6-1(c). The time for service of a responsive pleading may be enlarged for a period not exceeding 60 days by the written consent of the parties. The consent must be filed with the responsive pleading. Further enlargements are allowed only on notice by court order, on good cause shown therefor.

D. Dismissal Re-Filing of Suit

New Jersey allows plaintiffs to dismiss actions. A plaintiff may dismiss an action without prejudice at any time before the plaintiff is served with a responsive pleading or by filing a stipulation of dismissal signed by all the parties appearing in the action. R. 4:37-1.

Otherwise a plaintiff cannot unilaterally dismiss a case, without leave of Court. R. 4:37-1.

If a plaintiff files a new suit based on the same cause of action and against the same defendant, the defendant can move for costs of the previous suit. R. 4:37-4.

Liability

A. Negligence

Definition - New Jersey follows the traditional rule for establishing a cause of action in negligence. The Plaintiff must prove that defendant had a duty to act reasonably to prevent the happening of an accident, that the defendant failed to perform that duty, and that the plaintiff's injuries were proximately caused by the defendant's failure to perform that duty. McKinley v. Slenderella Systems of Camden, N.J., Inc., 63 N.J. Super. 571 (App. Div. 1960).

NJ Uses the Classification System to Determine the Duty of Care Owed

New Jersey adheres to the traditional common-law approach of landowner tort liability which is "predicated on the status of the person on the property at the time of the injury." The duty of care owed by the landowner depends on whether the injured party is a "*trespasser*", "*licensee*" or "*business invitee*," Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 625 A.2d 1110 (1993). However, it should be noted that there has been a trend in New Jersey of moving away from the specific categories within which an injured party was previously defined.

a. **Invitee** – the highest level of care - There are two types of invitees; a business visitor, and one who enters as a result of a public invitation. (See, e.g. Schwartz v. Jamieson, Moore, Peskin & Spicer, 2004 WL 4021754 (App. Div. 2004)).

   i. **The Business Visitor** - entrants that share some business purpose with the landowner. For example, an employee or a customer in a store, even if the customer does not intend to make a purchase, is a business invitee. All that is required is some prospective advantage to the landowner. The duty a landowner owes to a business visitor is to ensure the premises are free of defects and safe for the public as a whole. The landowner also has an absolute obligation to repair any dangerous conditions on the property and to warn any business visitors of hidden defects.

   ii. **The Public Invitation -** Most courts accept a broad definition of public invitation which includes, as an invitee, any person on land open to the public or to the class of the public of which the entrant is a member. For example, visitors in hospitals and users of public parks, though having no business purpose on the land are invitees and entitled to ordinary care.

b. **Licensee –** Intermediate Duty of care - one whose presence on the land is tolerated or permitted and thus not a trespasser, but who technically does not qualify as an invitee, e.g., social guests at a person's home.

i. Landowner owes no duty to inspect the premises or make them reasonably safe.
ii. Landowner is liable only if he knows or has reason to know of the dangerous condition on the land and should realize this condition is dangerous. Additionally, the landowner must have some reason to think that the licensee might encounter the dangerous condition.

c. **Trespasser** – Minimal Duty of Care – the entrant has no privilege to be on the land.
   i. Courts are less likely to find that landowners owe any duty to a trespasser, with one important exception. *The landowner owes a duty not to wantonly inflict injury upon a "mere" trespasser who does not intend to commit a crime on the property.*
   ii. Duties to Child Trespassers - landowners usually owe a higher duty of care to trespassing children. *A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if: (a) The place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass; (b) The condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children; (c) The children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it; (d) The utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved; and(e) The possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children.*

   iii. To prove a prima facie case under the infant-trespasser doctrine, plaintiff must establish each of those five elements. Vega by Muniz v. Piedilato, 154 N.J. 496, 713 A.2d 442 (1998).

Duty - The degree of care that the defendant must exhibit must be in proportion to the apparent risk involved in the activity. As the danger becomes greater, the defendant is required to exercise greater care proportionate to the danger. Harpell v. Public Service Coordinated Transport, 20 N.J. 309 (1956); See also, Kinsey v.Hudson and Manhattan R. Co., 130 N.J.L. 285, (Sup. Ct. 1943), aff'd, 131 N.J.L. 161 (E & A 1944).

Comparative Negligence - New Jersey follows a system using the modified comparative negligence – 51% rule.

New Jersey follows the 51% rule. This means an injured party can only recover if it is determined that his or her fault in causing the injury does not reach 51%.

B. Negligence Defenses

The Answer to the Complaint should list the following standard defenses:
- failure of consideration, fraud, accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and jurisdictional defenses. Please note there are judges who consider it to be inappropriate to plead "everything under the sun," however, it is still what is most often done by defense counsel.

In response to complaints involving motor vehicle accidents, it is appropriate to plead failure to wear a seat belt, failure to exceed the no-fault verbal threshold (if applicable), failure to mitigate damages, and the collateral source rule.

Sudden Emergency Doctrine – In order to assert the "sudden emergency doctrine" as a defense, a party must have been confronted by a sudden emergency over which he had no control, without fault on his part. The doctrine can successfully counter a claim of negligence if the jury finds that the defendant chose one of alternative reasonably prudent courses of action, even though, by hindsight, another course of action would have been safer. Roberts v. Hooper, 181 N.J. Super. 474 (1981).

If applicable, a jury charge incorporating the sudden emergency doctrine can be used both to prove the negligence of a defendant and/or the contributory negligence of a plaintiff. Roberts v. Hooper, 181 N.J. Super. 474 (1981).

Unavoidable accident - is not an affirmative defense. It merely amounts to a denial of negligence. Cohen v. Kaminetsky, 36 N.J. 276 (1961).

Affirmative Defenses
R. 4:5-4 states that "[a] responsive pleading shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defense . . . ."
- An affirmative defense is waived, if not pled or raised timely.
- New Jersey law acknowledges the following affirmative defenses:
1) *Contributory Negligence*
2) *Assumption of Risk* → Except in cases where there is a statutory foundation, the defense of assumption of the risk is not a valid defense in the normal negligence action. However, there are fact scenarios which recognize the concept of assumption of risk and have been acknowledged by statute. Such examples include:

Skiing: *N.J.S.A.* 5:13-1, *et seq.*

Roller Skating: *N.J.S.A.* 5:14-1, *et seq.*

Equestrian Activities: *N.J.S.A.* 5:15-1, *et seq.*

With regard to sports injuries in general, New Jersey has adopted a recklessness standard of care in determining the duty that a recreational player owes to another. Schick v. Ferolito, 167 *N.J.* 7 (2001) (golf); Crawn v. Campo, 136 *N.J.* 94 (1994) (softball).

3) *Last Clear Chance* → Latta v. Carlfield, 158 N.J. Super. 151, 385 A.2d 910 (App. Div. 1978), aff'd, 79 N.J. 128, 398A.2d 91 (1979) citing Restatement, Torts 2d, § 479 at 530 and § 480 at 535 (1965) to distinguish between the helpless plaintiff and the inattentive plaintiff:

> § 479 Last Clear Chance: The Helpless Plaintiff
>
> A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,
>
> (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and
>
> (b) the defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he
>
> (i) knows of the plaintiff's situation and realizes or has reason to realize the peril involved in it or
>
> (ii) would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to the plaintiff to exercise.
>
> § 480 Last Clear Chance: The Inattentive Plaintiff
>
> A plaintiff who, by the exercise of reasonable vigilance, could discover the danger created by the defendant's negligence in time to avoid the harm to him, can recover if, but only if, the defendant
>
> (a) knows of the plaintiff's situation, and
>
> (b) realizes or has reason to realize that the plaintiff is inattentive and therefore unlikely to discover his peril in time to avoid the harm, and
>
> (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm.
>
> The Plaintiff has a continuing obligation to exercise reasonable care even after

she has, through her original negligence, placed herself in a position of danger, if she hopes to be exculpated from the effect of her original negligence. "However, defendant also has a continuing duty to exercise reasonable care. Sections 479 and 480 provide the conditions of liability for a defendant's failure to utilize with reasonable care and competence an existing opportunity to avoid injury to a plaintiff. Section 479 applies to a plaintiff who is unable to avoid injury by reasonable vigilance and care immediately before the injury, in which case defendant would be liable if he actually discovered or should have discovered plaintiff's situation. On the other hand, §480 applies where a plaintiff by the exercise of reasonable vigilance could have discovered the peril in time to avoid injury. In such case a defendant is liable only if he actually discovered plaintiff's situation prior to the injury." Latta v. Carlfield, 158 N.J. Super. 151, 385 A.2d 910 (App. Div. 1978), aff'd, 79 N.J. 128, 398A.2d 91 (1979).

4) Entire Controversy Doctrine → This doctrine was designed to achieve weight in litigation by avoiding piecemeal or fragmented litigation and it requires parties to assert all claims against a defendant in one legal proceeding. Failure to do so may result in a bar of any subsequently filed claims, though this doctrine has been slowly chipped away over time and there are many instances now where the Entire Controversy Doctrine no longer applies

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross Negligence is defined as "the want or absence of, failure to exercise slight care or diligence". Draney v. Bachman, 138 N.J. Super. 503, 509 (Law Div. 1976) (quoting Oliver v. Kantor, 122 N.J.L. 528, 532 (1939), aff'd 124, N.J.L. (E. & A. 1941).

"Gross Negligence occurs on the continuum between ordinary negligence and intentional misconduct. The continuum runs from (1) ordinary negligence, through (2) gross negligence, (3) willful and wanton misconduct, (4) reckless misconduct to (5) intentional misconduct. The difference between negligence and gross negligence is a matter of degree. Monaghan v. Holy Trinity Church, 275 N.J. Super. 594, 599 (App. Div. 1994); Stuyvesant Assoc. v. Doe, 221 *N.J. Super.* 340, 344 (Law Div. 1987)."
To find gross negligence, the plaintiff must prove that "the consequences of the defendant's conduct could reasonably have been foreseen. It must appear that the injury was not the result of inattention, mistaken judgment or the failure to exercise ordinary or reasonable care. Rather it must appear that the injury was the natural and probable result of the failure to exercise slight care or diligence." N.J. Model Civil Jury Charge § 5.12.

Willful and Wanton Conduct

N.J.S.A. 2A:15-5.10 defines "wanton and willful disregard" as a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission."

"Essentially, the concept of willful and wanton misconduct implies that a person has acted with reckless disregard for the safety of others. G.S. v. Dept. Human Serv. DYFS, 157 N.J.161, 179 (1999) (citing Fielder v. Stonack, 141 N.J. 101, 123, (1995), McLaughlin, 56 N.J. 288, 306 (1970)). Where an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences, the law holds him responsible for the injuries he causes." Thus, under a wanton and willful negligence standard, a person is liable for the foreseeable consequences of her actions, regardless of whether she actually intended to cause injury. Id.

Punitive Damages - N.J.S.A. 2A:15-5.10 defines punitive damages as those "damages awarded against a party in a civil action because of aggravating circumstances in order to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future. Punitive damages do not include compensatory damages or nominal damages."

D. Negligent Hiring and Retention

"An employer may be held responsible for the torts of an employee under three theories: respondeat superior, negligent entrustment, and negligent hiring and supervision." Cosgrove v. Lawrence, 214 N.J. Super. 670, 679 (Law Div. 1986).

New Jersey recognizes a cause of action for negligent hiring and retention. DiCosala v. Kay, 91 N.J. 159 (1982).

"Generally, an employer is not liable for an employee's criminal or tortious act, whether negligent or intentional, unless the act was committed during the course of, and within the scope of, employment. An exception exists in the case of a claim of negligent hiring. An employer may be held responsible for the criminal or wrongful acts of [*his*] [*her*] [*its*] employee, even if those acts occur outside the scope of employment, if the employer was negligent in the manner in which [*he*] [*she*] [*it*] hired, supervised or retained an inappropriate or unfit employee." N.J. Model Civil Jury Charge 5.76

An action for negligent hiring or retention of an employee, requires Plaintiff to demonstrate: (1) that the employer "knew or had reason to know of the particular unfitness, incompetence, or dangerous attributes of the employee and the employer could reasonably have foreseen that those qualities created a risk of harm to other persons" and (2)that the employee's "unfitness or dangerous characteristics proximately caused the plaintiff's injury." DiCosala v. Kay, 91 N.J. 159(1982).

E. Negligent Entrustment

New Jersey recognizes a cause of action for negligent entrustment. Cosgrove v.

Lawrence, 214 N.J. Super. 670, 679 (Law Div. 1986).

In an action based on the theory of negligent entrustment, the plaintiff generally must prove that:

(1) the entrustee was incompetent, unfit, inexperienced, or reckless;

(2) the entrustor knew (in some jurisdictions "actually" knew), should have known, or had reason to know[4] of the entrustee's condition or proclivities;

(3)there was an entrustment of the dangerous instrumentality;

(4)the entrustment created an appreciable risk of harm to others; and

(5)the harm to the injury victim was "proximately" or "legally" caused by the negligence of the entrustor and the entrustee.

NJ United Reciprocal Exchange v. Hernandez, No. A-4060-04T5, slip op. at 9-10 (App. Div. March 20, 2006) (citing 57A Am Jur 2d Negligence § 318

"Under New Jersey common law, the owner of a motor vehicle is not liable for the negligence of the operator of the vehicle, unless the operator is acting as the owner's agent or employee." Haggerty v. Cedeno, 279 N.J. Super. 607, 609 (App.Div. 1995).

Even where there is reason to believe that a driver may not be legally qualified to drive, accommodation signers and co-lessees of a vehicle have no duty to determine the competence of a lessee to operate the vehicle. There "must be actual knowledge or reasonable cause to believe that the operator is unqualified or incompetent." Baran v. Clouse Trucking, Inc., 225 N.J. Super. 230, (App. Div. 1988).

F. Dram Shop

In New Jersey, in order to prevail on a Dram Shop claim, the Plaintiff must prove the following three elements:

(1) A licensed alcoholic beverage server "served a visibly intoxicated person, or served a minor, under circumstances where the server knew, or reasonably should have known,that the person served was a minor."

(2) "The injury or damage was proximately caused by the negligent service of alcoholic beverages; and"

(3) "that the injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages."

N.J.S.A. 2A:22A-5. Statutory Dram Shop claims are the exclusive remedy for actions involving negligent service of alcohol. Pursuant to N.J.S.A. 2A:22A-6(b) there is several

liability, only for licensees/servers, no joint liability, so the 60% rule for Joint and Several Liability (see below) does not apply.

G. Joint and Several Liability

Pursuant to N.J.S.A. 2A: 15-5.3, a defendant who is determined to be less than 60% at fault is responsible only for the proportion of negligence attributed to him or her. A defendant who is found to be 60% or more at fault may be responsible for the total damages.

New Jersey courts have ruled that it is acceptable for counsel to suggest specific percentages of liability at trial in opening and closing arguments when asking juries to apportion liability among multiple tort defendants. Brodsky v. Grinnell Haulers, Inc., et al, 181 N.J. 102 (2004).

Where plaintiff is unable to determine which tortfeasor is actually liable for Plaintiff's injury, each joint tortfeasor becomes responsible for total damages. Lyons v. Premo Pharmaceutical Labs, Inc., 170 N.J. Super. 183 (1979) (citing Summers v. Tice, 33 Cal2d 80 (1948)).

Pursuant to N.J.S.A. 2A:53A-3, a joint tortfeasor who pays more than his or her pro rata share is entitled to contribution from the other tortfeasors..

H. Wrongful Death and/or Survival Actions

A wrongful death action may be brought on behalf of the decedent "for injuries which were caused by a wrongful act, neglect, or default and for which, if death had not occurred, the [decedent] would have been entitled to recover damages." N.J.S.A. 2A:31-1.

In determining damages for a wrongful death claim, "the jury should be instructed that it is permissible for them to consider the impact of inflation upon the survivor's future losses..[the jury] should also have an opportunity to offer expert economic testimony on the question to provide them with informed guidelines in their deliberations." Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 488 (1975).

Damages under a wrongful death claim are limited to pecuniary losses. "Significantly, no pecuniary value may be attributed to emotional pleasures or satisfaction now lost." Hudkins v. Serrano, 186 N.J. Super. 465, 478 (App. Div. 1982).

A damage award under a wrongful death claim is not subject to income tax. Tenore v. Nu Car Carriers, Inc., 67 N.J. 466 1975).

Punitive damages are prohibited under wrongful death claims. Kern v. Kogan, 93 N.J. Super. 459, 475 (Law Div. 1967)

The New Jersey's Survivor's Act permits executors and administrators to recover damages for any trespass to person or property on behalf of the decedent as if he or she were still alive. "[W]here death resulted from injuries for which the deceased would have had a cause of action if he had lived, the executor or administrator may recover all reasonable funeral and burial expenses in addition to damages accrued during the lifetime of the deceased." N.J.S.A. 2A:15-3

Punitive damages are permitted under the Survivor's Act. Smith v. Whitaker, 313 N.J. Super. 165, 189 (App. Div. 1998)

The statute of limitations for these actions is two years after the death of the decedent. However, "if the death resulted from murder, aggravated manslaughter or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent, the action may be brought at any time." N.J.S.A. 2A:15-3

Under these acts, "persons entitled to take any intestate personal property of the decedent" and "any person dependent on the decedent at his death" are entitled to recover damages. N.J.S.A. 2A:31-4.

The key difference between these actions is that under a wrongful death claim, the decedent's personal representative makes a cause of action that runs from the time of the decedent's death whereas in a survival claim, the decedent's estate makes a cause of action running from time of the injury until the decedent's death. Smith v. Whitaker, 313 N.J. Super. 165, 182 (App. Div. 1998) (citing Kern v. Kogan, 93 N.J. Super. 459, 472 (Law Div. 1967).

I. Vicarious Liability

Respondeat Superior

"[A]n employer can be found liable for the negligence of an employee causing injuries to third parties under the doctrine of Respondeat Superior, if, at the time of the occurrence, the employee was acting within the scope of his or her employment." Carter v. Reynolds, 175 N.J. 402, 408-09 (N.J. Sup. Ct. 2003).

Therefore, to succeed in bringing a claim under Respondeat Superior , "a plaintiff must prove (1) that a master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment." Id. "If no master-servant relationship exists, no further inquiry need take place…" Id.

In defining "scope of employment," New Jersey follows the Restatement (Second) of Agency, § 228 (1957):

1) "The conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;
(c) it is actuated, at least in part, by a purpose to serve the master; and
(d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

2) The conduct of a servant is not within the scope of employment if it is "not of the kind that the servant is employed to perform, far beyond the authorized time and space limits or too little actuated by a purpose to serve the master." DiCosala v. Kay, 91 N.J. 159, 169 (1982) (quoting Restatement (Second) of Agency, § 228 (1957).

New Jersey has also adopted the "dual purpose" rule which states that "where a trip serves the employee/driver's private affairs and is also in furtherance of the master's business, the master is subject to liability for the employee's actions." Gilborges v. Wallace, 78 N.J. 342,(1978).

The determination of whether a deviation from the required route is considered a "detour" (which allows for recovery against an employer) or a "frolic" (which relieves the employer of liability) is a fact-based determination to be made by a jury. Deleson Steel Co., Inc. v. Hartford Ins. Group, 148 N.J. Super. 336 (Law Div. 1977).

In differentiating between negligent hiring and Respondeat Superior, the Di Cosola Court explained that an employer can be found liable for an injury that was intentionally caused by an employee and beyond the scope of employment under negligent hiring but not under Respondeat Superior. (citing Fleming v. Bronfin, 80 A.2d 915, 917 (D.C.Mun.App.1951))

Strict Placard Liability

New Jersey does not recognize the doctrine of strict placard liability, inasmuch as a dispute between two carriers over which insurance policy is primary will be decided by which carrier was actually in control of the driver and tractor under New Jersey State Law. See Nat'l Interstate Ins. Co. v. Champion Truck Lines, 2013 U.S. Dist. LEXIS 39795 at *14-*18. This is in accordance with the 1986 amendment to ICC regulations expressing displeasure that "certain courts have relied on [ICC] regulations in holding carriers liable for the acts of equipment owners who continue to display the carrier's identification on equipment after termination of the lease contract" and suggesting that courts should rather "decide suits of this nature by applying the ordinary principles of State tort, contract, and agency law." Lease & Interchange of Vehicles (Identification Devices) 3 I.C.C. 2d 92, 93 (Oct. 10, 1986). Thus, in issues between carriers and involving insurance policies, the insurance contracts – and New Jersey contract law – control; the placard on the vehicle is not dispositive. See Nat'l Interstate Ins. Co., 2013 U.S. Dist. LEXIS 39795 at *17.

In National Interstate Insurance Co., the United States District Court for the District of New Jersey noted that the issue before it was one of "which insurance policy is primary when both are valid and collectible," and not "protecting the public from under- or un-insured truckers…." Id. This suggests that New Jersey law will give more weight to the identifying placard when the issue involves a member of the public who was injured by an under- or un-insured trucker. New Jersey Courts have held that "as long as the [placard] remain[s] on the tractor, there is a 'strong presumption' that the tractor was engaged in authorized transportation and that [the company identified by the placard is] 'still in exclusive possession, control and use of it and [is] completely responsible for its operation." Planet Ins. Co. v. Anglo American Ins. Co., Ltd., 711 A.2d 899, 904 (N.J. Super. App. Div. 1998). It is likely that the above presumption will be much more difficult to overcome in a dispute involving a member of the public and an under- or un-insured trucker rather than two carriers trying to determine which insurance policy is primary.

Independent Contractor

To be considered an independent contractor, the following three elements must be established:

(A) "Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business."

Philadelphia Newspapers Inc. v. Board of Review, 397 N.J. Super. 309,325 (App. Div. 2007) (citing N.J.S.A. 43:21-19(i)(6)(A)(B)(C))

"The principal is [generally] not vicariously liable for the torts of the independent contractor if the principal did not direct or participate in them." Baldasarre v. Butler, 625 A.2d 458, 465 (N.J. 1993). However, in certain cases involving public safety, the principal remains liable if the principal's duty is considered nondelegable. Baboghlian v. Swift Elec. Supply Co., 197 N.J. 509, 515 (2009). For instance, a gas company's duty to install pipes was held to be nondelegable even though the gas company was contracted by a supply company because "[t]he highly dangerous character of gas and its tendency to escape required the exercise of a proportionate amount of care." Araujo v. N.J. Natural Gas Co., 62 N.J. Super. 88, 102 (App. Div. 1960) (citing Anderson v. Atlantic City Gas Co., 7 N.J. Misc. 297, 300 (Sup. Ct. 1929).

J. Exclusivity of Workers' Compensation

Workers' Compensation is Generally an Exclusive Remedy

Under New Jersey law, an employee is barred from suing his/her employer directly for job related injuries. Thus, employees can only recover against their employers for job related injuries through the workers' compensation system. N.J.S.A. 34:15-1.

In situations where an employee is injured on the job by someone other than his employer, the employee can sue the responsible party for damages and can also file a Workers' Compensation claim. Schweizer v. Elox Div. of Colt Indus., 70 N.J. 280, 287-88, 359 A.2d 857 (1976).However, in such circumstances the Workers' Compensation carrier will have a statutory lien against any money that the injured party recovers from the responsible party, equal to 2/3 of the Workers'Compensation benefits that have been paid on the injured party's behalf.

Exception to the Worker's Compensation Bar for Intentional Wrongdoings: Employers may be sued directly for job related injuries where they have committed an intentional wrong. Tomeo v. Thomas Whitesell Constriction, 176 N.J. 366, 370 (2003).

"In order for an employer's act to be considered "intentional," the following must be satisfied:

> (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and
>
> (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize." Id. (quoting Laidlow v. Hariton Machinery Co., Inc., 170 N.J. 602, 617 (2002).

Suits Against Co-Employees

In addition to being barred from using their employer, the New Jersey Workers' Compensation Act bars injured employees from suing co-employees as well. N.J.S.A. 34:15-8.

Damages

A. Statutory Caps on Damages

There is a cap on punitive damages — five times the amount of compensatory damages or $350,000, whichever is greater. However, the jury is not informed that there is a cap on punitive damages. N.J.S.A. 2A:15-5.14

Punitive damages awarded in Law Against Discrimination (LAD) Claims and New Jersey Conscientious Employee Protection Act (CEPA) Claims among others are exempt from the punitive damage cap under N.J.S.A. 2A:15-5.14.

B. Compensatory Damages for Bodily Injury

"[P]laintiff is generally entitled to recover compensatory damages if he[or she] has proven some loss or injury and if the jury has been provided some evidence from which to estimate the amount of damages, even if [plaintiff] is unable to prove the exact measure of damages." Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 41 (1984).

Damages are generally awarded to compensate plaintiff for past and future medical expenses and lost wages directly attributable to defendant's negligence, as well as pain and suffering.

Lost Wages

Any award for lost earnings must be based on net [take-home] pay, not on gross income. This is because the amount awarded is not subject to Federal and New Jersey income taxes. Ruff v. Weintraub, 105 N.J. 233, 238 (1987).

Verbal Threshold

If the lawsuit is brought pursuant to N.J.S.A. 39:6A-8a, the "verbal threshold" statute, the jury must be instructed as follows: "regardless of whether you found that [plaintiff] proved that he/she sustained a permanent injury by a preponderance of the evidence, the jury may award [plaintiff] a sum of money for past lost earnings. If you find that [plaintiff] has proved a claim for future lost earnings by a preponderance of the evidence, your award must be limited only to that reasonable period of recuperation and recovery that proximately results from the non-permanent injury sustained." NJ Model Civil Jury Charges § 8.11C.

Pain and Suffering

A plaintiff who is awarded a verdict is entitled to fair and reasonable compensation for any permanent or temporary injury resulting in disability to or impairment of his/her faculties, health, or ability to participate in activities, as a proximate result of the defendant's negligence (or other wrongdoing). New Jersey law also recognizes as proper items for recovery, the pain, physical and mental suffering, discomfort, and distress that a person may endure as a natural consequence of the injury. The measure of damages is what a reasonable person would consider to be adequate and just under all the circumstances to compensate [plaintiff]. The law does not provide any table, schedule or formula by which a person's pain and suffering disability, impairment, loss of enjoyment of life may be measured in terms of money. The amount is left solely

to the discretion of the jury. NJ Model Civil Jury Charges § 8.11E.

Damages may be awarded for future disability and impairment. Coll v. Sherry, 29 N.J. 166 (1959). "It is well settled that damages may be recovered for the prospective consequences of a tortious injury. See, e.g., Kimble v. Degenring, 116 N.J.L. 602, 604 (Sup. Ct. 1936); Annotation 81 A.L.R. 423 (1932); 15 Am. Jur., Damages, § 24; 25 C.J.S. Damages § 29. And this rule applies to future medical care and treatment as well as to anticipated pain and suffering."

Damages may be awarded for mental or nervous impairment, but only under very specific circumstances. The evolution in the requirements for an emotional distress claim culminated when the NJ Supreme Court in Portee v. Jaffee, 84 N.J. 88 (N.J. 1980), identified four elements that a plaintiff must prove to recover for emotional distress as a bystander: "(1) the death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress." McDougall v. Lamm, 211 N.J. 203, 214-215 (N.J. 2012). In the three decades since Portee was decided, the four-element test has remained in place as the framework for a bystander's emotional distress claim in New Jersey. McDougall at 215 (N.J. 2012). "Recovery for negligent infliction of emotional harm requires that it must be reasonably foreseeable that the tortious conduct will cause genuine and substantial emotional distress or mental harm to average persons." Id.

Future Medical Expenses

In deciding how much to award for future medical expenses the jury must consider: (1) the nature, extent and duration of plaintiff's injury; (2) the plaintiff's age today; (3) his/her general state of health before the accident; and (4) and how long one reasonably expects the medical expenses to continue. NJ Model Civil Jury Charges § 8.11I.

It is the burden of the plaintiff to prove, by a preponderance of the evidence, the probable need for future medical care and the reasonableness of the charge for future medical care. Id.

Any award for future medical expenses should be increased to account for losses due to inflation. Id.

Loss of Consortium

A spouse may recover damages for loss of consortium which includes fair and reasonable compensation for the loss of the spouse attending to household duties, loss of companionship, loss of comfort, and loss of marital relations. Tichenor v. Santillo, 218 N.J. Super. 165, 527 (App. Div. 1987); R. 4:28-3(b).

C. Collateral Source

This rule prevents plaintiff from obtaining a double recovery in excess of the party's actual loss by deducting certain "benefits" received from any other source other than a joint tortfeasor. N.J.S.A. 2A:15-97. Loss of earnings, medical and hospital expenses and pension benefits are deducted from Plaintiff's award. NJ Model Civil Charges 8.11C and 8.11A, Fillebrown v. Steelcase, Inc., 63 Fed. Appx. 54, 61 (3rd Cir. 2003). Additionally, social security disability payments that are neither contingent nor speculative nor subject to change or modification are also deducted. Woodger v. Christ Hosp., 364 N.J. Super. 144, 153-54 (App. Div. 2003) (citing Parker v. Esposito, 291 N.J. Super. 560, 565-566 (App. Div.), certif. denied, 146 N.J. 566 (1996)).

The following are not deducted from Plaintiff's award:

1) Worker's compensation benefits (N.J.S.A. 2A:15-97)

2) Proceeds from a life insurance policy (N.J.S.A. 2A:15-97)

3) Social security disability payments, but that are contingent, speculative or subject to change or modification. Woodger v. Christ Hosp., 364 N.J. Super. 144, 153-54 (App. Div. 2003) (citing Parker v. Esposito, 291 N.J. Super. 560, 565-566 (App. Div.), certif. denied, 146 N.J. 566 (1996)).

4) Medicaid (Lusby by & ex rel. Nichols v. Hitchner, 273 N.J. Super. 578, 591-592 (App. Div. 1994). Mason v. Sebelius, Civ. No. 11-2370, slip op. at 34 (D.N.J. 2012).

5) Settlement proceeds, regardless of whether the joint tortfeasor is ultimately found liable for plaintiff's injury. Kiss v. Jacob, 138 N.J. 278, 282-83 (1994). This is done to prevent inequity where the amount of a settlement and the allocation of fault could cause a 100% liable defendant to pay nothing. Id. at 284.

The plaintiff is required to disclose to the court any "benefits [received] for the injuries allegedly incurred from any other source other than a joint tortfeasor[,]" "Any party to the action shall be permitted to introduce evidence regarding any of the matters described in the [collateral source statute]. N.J.S.A. 2A:15-97.

In a jury trial, the medical expenses and/or loss of earnings paid from collateral sources goes into evidence, the jury makes its award, and the judge carves out the medicals and loss of earnings paid by the collateral source. Statute: N.J.S.A. 2A:15-97.

At trial, a defendant is entitled to a set-off for the equitable share of liability assessed to a settled defendant by the jury. The trial defendant has the burden of proving the settled defendant's liability to plaintiff. Young v. Latta, 123 N.J. 584 (1991).

The rule is also intended, to some extent, "to shift the burden from liability insurance carriers to health and disability carriers." Fayer v. Keene Corp., 311 N.J. Super. 200 (App..Div. 1998) (citing Lusby by & ex rel. Nichols v. Hitchner, 273 N.J. Super. 578, 591-592 (App. Div. 1994))Thus, a plaintiff injured as a result of a third party's negligence who receives medical treatment paid by his health insurer cannot recover his medical expenses from the defendant. The exception to this rule is contained in the no fault provisions of the motor vehicle and traffic regulations which provide that the benefits allowed for personal injury protection shall be payable as loss accrues without regard to collateral sources, except that benefits collectible under workers' compensation insurance, employees' temporary disability benefit statutes, Medicare provided under federal law, and benefits, in fact collected, that are provided under federal law to active and retired military personnel shall be deducted from the benefits collectible. N.J.S.A. 39:6A-6.

In regards to the effect that the collateral source rule has on the insurance community, the New Jersey Supreme Court noted that "where subrogation or contract reimbursement rights are granted to health insurers, that industry is the beneficiary of the legislative modification. Where subrogation and reimbursement are prohibited, the liability carriers benefit." Perreira v. Rediger, 169 N.J. 399, 409 (2001). "The general rule is,…that the insurer is not subrogated to the insured's rights or to the beneficiary's rights under contracts of personal insurance, at least in the absence of a policy provision so providing. Nor would a settlement by the insured with the wrongdoer bar his cause of action against the insurer. However, if a subrogation provision were expressly contained in such contracts, it probably would be enforced quite uniformly. Such a provision cannot be read into a policy by calling it an indemnity contract, however." Id. at 413.

D. Pre-Judgment/Post-Judgment Interest

Post-Judgment Interest

Pursuant to R. 4:42-11(a)(ii), prior to January 2, 1986, the annual post-judgment interest rate is equal to "6% for the period prior to April 1, 1975; 8% for the period between April 1, 1975 and September 13, 1981; and 12% for the period between September 14, 1981 and January 1, 1986." Subsequent to January 2, 1986, the interest rate is equal to the average rate of return for the State of New Jersey Cash Management Fund for the preceding fiscal year, rounded off to the nearest one-half percent.

Pre-Judgment Interest

Prejudgment interest is allowed in most tort actions, except with respect to public

entities or employees. Pursuant to R. 4:42-11(b), interest rates in tort actions after January 1, 1988 are the same as the post-judgment interest rates. Prior to January 1, 1988, the rate is 12% per annum. Pre-judgment interest is prohibited on awards for future economic losses.

Special Civil Part

Effective September 1, 1996, if the judgment exceeds the monetary limit of the Special Civil Part (currently $15,000), 2% should be added to the above interest rate, pursuant to R.4:42-11(a)(iii).

E. Damages for Emotional Distress

New Jersey recognizes a separate cause of action for negligent infliction of emotional harm to a bystander provided that four elements are established: (1) the death or serious physical injury of another was caused by defendant's negligence; (2) a marital or intimate family relationship existed between plaintiff (bystander) and the injured person; (3) there was an observation of death or serious physical injury by the bystander who witnessed the death or physical injury at the scene of the accident; and (4) the observation resulted in severe emotional distress. Dunphy v. Gregor, 136 N.J. 99, 103 (1994) (citing Portee v. Jaffee, 84 N.J. 88, 101(1980)).

Moreover, the "intimate family relationship" standard has been liberalized to include relationships outside those of blood or marriage, such as an engaged couple living together who are considering marriage. Id.

F. Wrongful Death and/or Survival Action Damages

New Jersey permits a wrongful death action to be brought in the name of the administrator of the estate of the decedent for injuries which were caused by a wrongful act, neglect, or default and for which, if death had not occurred, the person would have been entitled to recover damages. N.J.S.A. 2A:31-1.

The New Jersey's Survivor's Act was intended to supplement the Wrongful Death Act and therefore, affords complete and adequate redress to the estates of those who were injured in person or property by injuries causing the death. N.J.S.A 2A:15-3. To that end, the Act allows the decedent's estate to recover any loss to the decedent that accrued between injury and death.

The Survivor's Act, in contrast to the Wrongful Death Act, does not contain an express limitation on the types of damages recoverable under the Act. N.J.S.A 2A:15-3

Under New Jersey law, punitive damages are permitted under the Survivor's Act. N.J.S.A 2A:15-3

Survives Death of Wrongdoer: Yes. N.J.S.A. 2A:15-4.

Who May Recover: All persons dependent upon the decedent and anyone entitled to intestate personal property. N.J.S.A. 2A:31-4.

Damages: Pecuniary. N.J.S.A. 2A:31-5.

Reduction to Present Value: Future economic damages, (Not non-economic damages) must be reduced.

Reduction for Taxes: Decedent's future earnings must be calculated on a "net" basis. 0

G. Punitive Damages

Under the Punitive Damages Act of 1995, punitive damages may be awarded in New Jersey for personal injury actions based on negligence. To warrant an award of punitive damages, defendant's conduct must amount to intentional wrongdoing in the sense of an "evil-minded act", or an act accompanied by a wanton and willful disregard of the rights of another.46 The key to the recovery of punitive damages is the intentional aspect of the wrongful act. N.J. Model Jury Charge 8.63

"In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:

(1) "The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;

(2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;

(3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and

(4) The duration of the conduct or any concealment of it by the defendant.

c. If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. In making that determination, the trier of fact shall consider all relevant evidence, including, but not limited to, the following:

(1) All relevant evidence relating to the factors set forth in subsection b. of this section;

(2) The profitability of the misconduct to the defendant;

(3) When the misconduct was terminated; and

(4) The financial condition of the defendant."

N.J.S.A. § 2A:15-5.12

There is a punitive damages cap of $350,000 or five times the liability of the defendant for compensatory damages, whichever is greater. N.J.S.A. 2A:15-5.14

The standard of proof for punitive damages is clear and convincing evidence. N.J. Model Jury Charge 8.63

H. Diminution in Value of Damaged Vehicle

In New Jersey, the owner of the vehicle may bring a claim against the defendant and demand "diminution in value" damages. If the defendant does not have insurance or the amount of insurance is insufficient to compensate for this diminution in value, the plaintiff may make a claim under his or her own insurance policy's underinsured or uninsured motorist coverage for compensation. Whether or not the plaintiff is entitled to compensation for diminution in value of the damaged vehicle is dictated by the policy coverage.

I. Loss of Use of Motor Vehicle

Under New Jersey Law, recovery is permitted for all damages naturally and proximately caused by wrongful conduct, including loss of use of motor vehicle. Loss of use has been defined as those damages occasioned to the plaintiff by reason of the detention, including personal loss, inconvenience and capital outlay.

Evidentiary Issues

A. Preventability Determination

N/A

B. Traffic Citation from Accident

"[G]uilty pleas to traffic offenses are admissible in a civil suit to establish liability arising from the same occurrence unless a nonevidential-order is made pursuant to New Jersey Court Rule 7:6-2(a)(1). Eaton v. Eaton, 119 N.J. 628, 644 (1990). See also State v. LaResca, 267 N.J. Super. 411, 418 (App. Div. 1993).

A civil reservation is a specific request made on behalf of the defendant against the use of a guilty plea in a civil suit.

Pursuant to R. 7:6-2(a)(1), a Court may, upon the request of a defendant at the time a plea is entered, order that the guilty plea shall not be used as evidence in any civil proceeding.

If a civil reservation is requested and obtained by the defendant, issuance of the ticket and guilty plea are only discoverable, but neither will be admissible at trial.

C. Failure to Wear a Seat Belt

Although not the basis of a defense, New Jersey has a mandatory seat belt law. N.J.S.A. 39:3-76.2e – h, j-k.

The failure to wear a seat belt is not negligence per se. However, "it is a circumstance which the jury should consider in assessing liability." Waterson v. General Motors Corp., 111 N.J. 238(NJ), 544 A.2d 357.

"The only way the seat belt defense can go to the jury is if the defendant comes forward with specific evidence demonstrating the causal link; *i.e.*, the relationship between failure to fasten the belt and the plaintiff's injuries." Dziedzic v. St. John's Cleaners & Shirt Launderers, Inc., 53 N.J. 157, 162 (1969).

"While… seat belt nonuse is not a bar to a strict liability recovery…juries may reduce an injured party's recovery on the basis of such evidence under certain circumstances." Waterson v. GM Corp., 111 N.J. 238, 270 (1988).

D. Failure of Motorcyclist to Wear a Helmet

No New Jersey state court has addressed the helmet defense. Nunez v. Schneider National Carriers, 217 F.Supp.2d 562, 565 (D.N.J., 2002).

"Evidence of failure to wear a helmet generally has no relevance on the issue of liability, since such failure rarely contributes to the cause of an accident. Failure to use a helmet may, however, be a contributing cause to the injuries sustained and so may be relevant to the issue of damages." Id. at 565.

"Where a defendant introduces satisfactory evidence that a plaintiff's failure to wear a safety helmet increased the extent or severity of plaintiff's injuries, the defendant will be permitted to present the helmet defense to the jury." Id. at 570.

The jury must then engage in a two-step inquiry, it must first decide:

> (1) "whether a reasonable person exercising ordinary care would have worn a helmet to avoid or mitigate injury in the event of an accident."
> (2) "If the answer is yes, the jury must next decide whether the evidence establishes that failure to wear a helmet contributed to the severity of the injuries."
> Id. at 570.

If so, then the jury may "reduce damages to the extent that a helmet would have decreased the injuries suffered." Id. at 570.

E. Evidence of Alcohol or Drug Intoxication

Proving Intoxication

A driver is considered to be under the influence if the driver's blood alcohol concentration ('BAC') is 0.08% or higher. There are increased fines/penalties if the driver's BAC is 0.10% or higher. N.J.S.A. § 39:4-50, et seq.

A driver who is under the legal age to purchase and consume alcohol is presumed "intoxicated" with a BAC of over .01%. N.J.S.A. § 39:4-50.14.

Intoxication can be proven, in part, by the police officer's observations of the driver. State v. Morris, 262 N.J. Super. 413, 621 A.2d 74 (App. Div. 1993).

Admissibility

To be admissible, the information sought to be admitted must be causally related to the happening of the accident, "since a permissible inference of causality is indispensable to its relevancy ." Mattero v. Silverman, 71 N.J.Super. 1, 9, 176 A.2d 270 (App.Div.1961)

According to New Jersey case law, evidence of a driver's intoxication will only be admissible if the intoxication was a proximate cause of the accident.

For example, evidence of a driver's consumption of alcoholic beverages several hours prior to an automobile accident was inadmissible without additional proof establishing that the alcohol affected the defendant's driving ability. Gustavson v. Gaynor, 206 N.J.Super. 540, 542, 503 A.2d 340 (App.Div.1985), certif. denied, 103 N.J. 476, 511 A.2d 655 (1986).

"Evidence of prior drinking is usually only admissible where there is some supplementary proof that the alcohol consumption affected driving ability, such as driving at excessive speeds or drunken behavior at the accident scene. Id. at 544-45.

"The mere fact that a driver had consumed some alcoholic beverages is by itself insufficient to warrant an inference that the driver was intoxicated and that the intoxication was of such a degree as to render him unfit to drive at the time of the accident. The admission of such testimony without supporting evidence is unduly prejudicial in view of its capacity to inflame the jury." Id. at 545.

Thus, it follows logically that evidence of narcotics possession will only be admissible if there is proof that the driver was under the influence and that the impairment created by the narcotics use was a proximate cause of the accident.

Expert Testimony

Generally, expert testimony will not be required to establish that an individual was intoxicated at the time of an accident.

In regards to dram shop cases, all evidence should be considered in establishing that the plaintiff was "visibly intoxicated" at the time when the bartender continued to serve him with alcoholic beverages. (See, e.g. Mazzacano v. Estate of Kinnerman, 197 N.J. 307 (2009).)

Conviction for Intoxication Bars Recovery (other than for PIP benefits)

Any person who is convicted of, or pleads guilty to, operating a motor vehicle while intoxicated, in connection with an accident, shall have no cause of action for recovering economic or non-economic loss sustained as a result of the accident. N.J.S.A. 39:6A4.5. However, this statute does not prevent an intoxicated driver from recovering PIP benefits from his or her insurer directly. Walcott v. Allstate N.J. Ins. Co., 376 NJ Super. 384 (App. Div. 2005). Also, this statute does not bar an intoxicated driver from pursuing a dram shop claim on the basis that the driver's intoxication in connection with the accident was caused by the shop keeper. Voss v. Tranquillo, 413 NJ Super. 82 (App. Div. 2009).

F. Testimony of Investigating Police Officer

Police Officer Testimony as Lay Opinion

The testimony of a police officer who is not introduced as an expert in discovery or qualified as an expert at trial and who does not testify as to factual observations will not be deemed a lay opinion or expert opinion. "lay opinion" Patel v. Decortes, No. A-4112-05T2 (App. Div. July 27, 2006). See also N.J.R.E. 701.

N.J.R.E. 701 states, "[i]f a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it

(a) is rationally based on the perception of the witness; and
(b) will assist in understanding the witness' testimony or in determining a fact in issue."

Police Officer Testimony as Expert Opinion (Also See "Expert Testimony" Section Below)

It is well established that an expert's opinion must, in all instances, be based on a proper factual foundation. Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super 309, 232 (App. Div. 1996).

"In other words, expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate

conclusion as distinguished from a mere guess or conjecture." Id. (citations omitted).

That is because an opinion that lacks such foundation and consists of bare conclusions unsupported by factual evidence is inadmissible as a net opinion. Buckelew v. Grossbard, 87 N.J.512 (1981); Creanga v. Jardal, 185 N.J.345, 360 (2005).

This rule prohibits speculative testimony by requiring an expert to give the "why and wherefore" of his or her opinion, and not a mere conclusion. Id. Stated differently, if there is no factual basis for an expert's opinion then it is lacking in foundation and "worthless." State v. One Marlin Rifle, 319 N.J. Super. 359, 370 (App. Div. 1999).

Thus, a police officer can be qualified as an expert as long as his testimony is not outside of his personal knowledge and is based on facts that enable him to "express a reasonably accurate conclusion." Dawson at 232.

G. Expert Testimony

New Jersey adheres to the expert testimony admission standard laid out in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Pursuant to New Jersey Evidence Rule §702, in order for expert testimony to be admissible:

(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror:

i.e. Expert testimony must be relevant to the facts of the case and be beyond the understanding of persons of "ordinary experience, intelligence, education and knowledge." State v. Odom, 116 N.J. 65, 71 (1989);

(2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable:

i.e. "[a]n expert must be suitably qualified and possessed of sufficient specialized knowledge to be able to express [an expert opinion] and to explain the basis of that opinion." Bahrle v. Exxon Corp., 279 N.J. Super. 5, 30 (App. Div. 1995), aff'd, 145 N.J. 144 (1996) (citations omitted) [alteration in original]. An expert, however, is not necessarily required to practice in the area of her proffered testimony. Id. at 32; and

(3) the witness must have sufficient expertise to offer the intended testimony. Landrigan v. Celotex Corp., 127 N.J. 404, 411 (1992) (quoting State v. Kelly, 97 N.J. 178 (1984)):

In order to be reliable "[t]he technique or mode of analysis used by … [an] expert must

have a sufficient scientific basis to produce uniform and reasonably reliable results so as to contribute materially to the ascertainment of the truth." Kelly, supra, 97 N.J. at 210 (citation omitted). An expert must be able to "explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom." Buckelew v. Grossbard, 87 N.J. 512, 524 (1981) (citations omitted). Without proof of a causal connection and a sufficient scientific basis, the expert's testimony is inadmissible as a "net opinion." Buckelew, 87 N.J. at 524; "The net opinion rule requires an expert witness to give the why and wherefore of his expert opinion, not just a mere conclusion." Vitrano v. Schiffman, 305 N.J. Super. 572, 577 (App. Div. 1997).

In sum, (a) the testimony must go beyond common knowledge; (b) the expert must be qualified to testify; and (c) the testimony must be reliable.

H. Collateral Source

See Collateral Source section under Damages, supra.

I. Recorded Statements

Pursuant to N..J..R..E. 803(a)(1)(A), a recorded statement is admissible at trial only if:

(1) the recorded statement was made previously by someone testifying at the trial,

(2) the statement does not violate any other rules of evidence

(3) the statement is relevant to the proceeding;

(4) the statement is inconsistent with the witness' trial testimony

(5) the statement is reliable/authenticated as belonging to the witness that is currently testifying.

J. Prior Convictions

Pursuant to N.J.R.E. 609, "for the purpose of affecting the credibility of any witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote for other causes. Such conviction may be proved by examination, production of the

record thereof, or by other competent evidence."

K. Driving History

A driver's prior accident history may be admissible as substantive evidence of a dangerous condition only where the plaintiff can establish:

"(1) the same or substantial similarity of circumstances between the prior accident and the one involved in the case on trial: and

(2) the absence of other causes of the accident." Wymbs v. Township of Wayne, 163 N.J. 523,536 (2000).

"The requirement of substantial similarity is more stringent when the prior-accident evidence is offered to prove the existence of a dangerous condition than when offered to prove notice because "'all that is required [for notice] is that the previous . . . [accident] should be such as to attract the defendant's attention to the dangerous situation which resulted in the litigated accident.'" Wymbs at 536 (citing Kaeo v. Davis, 719 P.2d 387, 393 (Sup. Ct. Hawaii 1986).

L. Fatigue

Currently, there is no case law in New Jersey discussing admission of HOS violations as evidence of proximate cause of an accident. Nevertheless, it is common place to see Plaintiffs arguing fatigue and HOS violations as evidence of proximate cause of an accident. HOS violations are being used in various ways by Plaintiffs to demonstrate corporate incompetence or lack of oversight and negligent retention.

M. Spoliation

Spoliation refers to "the destruction or concealment of evidence by one party to impede the ability of another party to litigate a case." Jerista v. Murray, 185 N.J. 175, 201 (2005)

Depending on the circumstances, spoliation of evidence can result in a separate tort action for fraudulent concealment or discovery sanctions. Id.

Negligent Spoliation of Evidence

The tort of "negligent spoliation of evidence" is not recognized in New Jersey. Proske v. St. Barnabas Medical Center, 313 N.J. Super. 311 (App. Div. 1998).

However, the court has discretion to impose discovery sanctions for negligent spoliation of evidence. Hirsch v. General Motors Corp., 266 N.J. Super. 222 (Law Div. 1993).

Additionally, there is case law establishing that negligent spoliation of evidence can lead to a mistrial. Pellicer v. St. Barnabas Hospital, 200 N.J. 22, 36 (2009)

Intentional Spoliation of Evidence as a Separate Tort Action

Although a specific tort entitled "intentional spoliation of evidence" has not yet been recognized in NJ, the traditional tort of Fraudulent Concealment has been used to assert a claim for intentional and willful spoliation of evidence.

The elements of Fraudulent Concealment are as follows:

(1) "pending or probable litigation involving the plaintiff;

(2) knowledge on the part of the defendant that litigation exists or is probable;

(3) willful or negligent destruction of evidence by the defendant designed to disrupt the plaintiff's case;

(4) actual disruption of the plaintiff's case; and

(5) damages proximately caused by the defendant's acts."

Zappasodi v. State, 335 N.J. Super 83, 92-93 (App. Div. 2000).

Settlement

A. Offer of Judgment

Twenty (20) days before the trial date, any party may serve on any adverse party and file with the court an offer to take monetary judgment. R. 4.58-1.

If any time before ten (10) days before trial the offer is accepted, the offerree must serve the offeror and file a notice of acceptance with the court.

Consequences of Non-Acceptance of Claimant's Offer – "If the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of the completion of discovery, whichever is later; and (3) a reasonable attorney's fee for such subsequent servicers as are compelled by the non-acceptance."

Consequences of Non-Acceptance of Offer of Party (Not a Claimant) – "If the offer of a party other than the claimant obtains a monetary judgment that is favorable the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2, which shall constitute a prior charge on the judgment."

"A favorable determination qualifying for allowances under this rule is a money judgment in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less."

"No allowances are granted if:
(1) the claimant's claim is dismissed;
(2) a no-cause verdict is returned;
(3) only nominal damages are awarded;
(4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court; or
(5) an allowance would impose undue hardship."

B. Liens

Medical Liens

Every hospital, nursing home, and licensed physician or dentist practicing in New Jersey shall have a lien for services rendered to any person who sustained injuries as a result of negligence of others. N.J.S.A. § 2A:44-36.

This lien shall attach to rights of action suits, claim or judgments, N.J.S.A. § 2A:44-37.

Notice Requirement:

The lienholder must file a Notice of Medical Lien, with the County Clerk, in the county where the injuries were suffered. N.J.S.A. 2A:44-41.

The notice must be filed within 90 days after the date of first treatment, care or maintenance, and before the injured patient or his/her legal representative receives any money for damages for the injuries. Id.

For the lien to be valid, the lienholder must also send a copy of the notice by registered mail or personal delivery, within 10 days of filing it with the County Clerk, to the injured person, and each person alleged to be liable for his/her damages, if the names and addresses of such liable parties can be ascertained by reasonable diligence. N.J.S.A. § 2A:44-42

No such lien exists where accident causing injury is within scope of workers' compensation law. N.J.S.A. § 2A:44-40.

Professional Liens

"The amount of the liens of the physician or dentist for services rendered to a person as a result of an accident shall be based on the reasonable value thereof, but not to

exceed twenty-five per centum (25%) of the amount of any award, report, decision, judgment or settlement to the injured person." N.J.S.A. § 2A:44-39.

Workers' Compensation and Life Insurance Policy Liens

N.J.S.A. 2A:15-97 specifically excludes from the collateral source rule workers' compensation liens and liens created by life insurance policies in wrongful death cases.

Therefore, a lien asserted by a workers' compensation insurance carrier or a lifinsurance company would generally be valid.

In the case of workers' compensation liens, it is important to get an itemized listing of all medical expenses and to make sure medical experts have reviewed the charges to determine whether they were reasonable, necessary and related to the subject accident.

The ERISA Self-Funded Health Plan Lien

ERISA (Employee Retirement Income Security Act of 1974) is a federal law that sets minimum standards for most employer-sponsored health plans. ERISA's deeemerr clause preempts New Jersey's collateral source rule when the plan in question is self funded by the employer. White Consol. Industry, Inc. v. Liu, 372 NJ Super. 480, 482 (App. Div. 2004).

ERISA does not, however, preempt state laws that regulate insurance companies. Therefore, when a health insurance company asserts a lien in a New Jersey personal injury case, the lien is invalid because of New Jersey's collateral source rule. The reason this does not apply to plans that are self-funded by employers is because such plans are not deemed to be insurance, due to the fact that the employer pays for all of the treatment, rather than it being paid for by an insurance company. FMC Corp v. Holliday, 498 U.S. 52 (1990); see also 29 U.S.C. §114(b)(2)(B).

Medicare Lien

A lien asserted by Medicare is generally valid. However, an itemized statement from Medicare must be examined to determine that all charges are related to the subject injury.

Whether or not there is notice of such a lien inquiry into Medicare should be made regarding such a lien, if the injured party is sixty-five years of age or older, or is on Social Security Disability for twenty-four months or longer.

Medicare lien information can be obtained by writing to:

Medicare

Subrogation Department
730 Chestnut Street
Chattanooga, Tennessee, 37402.

C. Minor Settlement

Guardian Ad Litem - R. 4:26-2(b)(1) states "in negligence actions, unless the court otherwise directs, a parent of a minor or mentally incapacitated person shall be deemed to be appointed guardian ad litem of the child *without court order upon the filing of a pleading or certificate signed by an attorney* stating the parental relationship, the child's status and, if a minor, the age, the parents consent to act as guardian ad litem and the absence of a conflict of interest between parent and child.

If there is a conflict preventing the minor's parent from being the GAL for the child, "The court may appoint a guardian ad litem for a minor or an alleged mentally incapacitated person, upon the verified petition of a friend on his or her behalf." R. 4:26-2(b)(2).

Procedure and Court Approval

R. 4:44-1 states: "actions brought in the Superior Court on behalf of a minor or mentally incapacitated person, instituted without process, for the purpose of obtaining the court's approval of a settlement shall be brought in any county in which the venue might be laid under R. 4:3-2, and in such actions in the Superior Court, the papers shall, unless the court otherwise orders, be filed with the deputy clerk of the Superior Court in the county of venue before the hearing on the application for approval."

R. 4:44-2 states: "Medical testimony as to the injuries of a minor or mentally incapacitated person given in proceedings to obtain the approval of a settlement shall be that of the attending or consulting physician and may be submitted by affidavit unless the court, for good cause shown, permits the testimony of other medical experts or in its discretion requires the physician's personal appearance."

R. 4:44-3 states: "All proceedings to enter a judgment to consummate a settlement in matters involving minors and mentally incapacitated persons shall be heard by the court without a jury.

The court shall determine whether the settlement is fair and reasonable as to its amount and terms:

"In the case of a structured settlement providing for deferral of all or part of the proceeds thereof, the court shall also satisfy itself, based on the financial security of the obligor or surety and such other relevant facts as may be adduced, of the reasonable certainty that all future payments will be made as proposed by the settlement. If the court approves the settlement it shall enter an order reciting the action taken and directing the appropriate judgment in accordance with R. 4:48A, whose provisions shall also apply to deferred payments under structured settlements." R. 4:44-3

"The court, on the request of the claimant or the claimant's attorney or on its own motion, may approve the expenses incident to the litigation, including attorney's fees. If the fees of the attorney representing the guardian ad litem are to be paid by the defendant, the defendant shall upon the court's request make available to it defendant's complete file in the action." Id.

D. Negotiating Directly with Attorneys

Assuming "that suit has been instituted, coverage under the policy is not disputed and the policy limit is ample to cover any potential recovery[,]…that the carrier has accepted the obligation to defend and has retained counsel designated by it to appear as attorney of record for the defendant, its named insured[,]… "Canons of Professional Ethics, Canon 9 requires that counsel for the plaintiff refrain from communicating with the carrier unless he secures express permission from its attorney of record authorizing such communication."

"It is unethical to participate in such communication with the carrier whether the communication is initiated by a non-attorney representative of the carrier or by counsel for the plaintiff. Furthermore, if the express authorization from defendant's counsel of record is limited, the communication must be confined within such limits." Ethics Committee Opinion #132

E. Confidentiality Agreements

New Jersey courts encourage settlement for reasons of public policy. As such, Courts have held that confidentiality agreements encourage settlement and are therefore not discoverable.

"Where the terms of a settlement are embodied in a private agreement and not spread on the record of court proceedings, a [party] has no right to obtain disclosure from parties who wish to protect confidentiality." UMC/Stamford, Inc. v. Allianz Underwriters Ins. Co. 276 N.J. Super. 52,71 (Law. Div. 1994)(quoting Zukerman v. Piper Pools, Inc., 256 N.J. Super. 622, 628 (App. Div. 1992).

"Settlement negotiations are generally deemed confidential and the admissibility of evidence relating to settlement negotiations is restricted. N.J.R.E. 408 specifically provides that 'evidence of statements or conduct by parties or their attorneys in settlement negotiations' is inadmissible at trial. The grounds most commonly advanced for excluding evidence of settlements are the lack of relevance and the social desirability of encouraging the settling of disputes. Id. at 69.

F. Releases

"A release is merely a type of contract, and general rules that apply to contract interpretation apply to releases." Domanske v. Rapid-American, 330 N.J. Super. 241,

(App. Div. 2000). See also Guerin v. Cassidy, 38 N.J. Super. 454, 461, (Ch. Div. 1955) (noting that a release must have valuable consideration.)

The release should be notarized.

Fraud in procurement of release nullifies release. Palmer v. Tomlin, 104 N.J.L. 215, 141 A. 2 (Sup. Ct. 1928).

Under New Jersey law, "where a party affixes his signature to a written instrument, such as a release, there is a conclusive presumption arises that he read, understood and assented to its terms, and he will not be heard to complain that he did not comprehend the effect of his act in the signing." Cooper v. Borough of Wenonah, 977 F. Supp. 305 (D.N.J. 1997).

Joint Tortfeasor - A release of one joint tortfeasor does not release the others tortfeasors unless it was the intention of the parties "or the consideration constituted full compensation or was accepted as such." Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958); see also Cartel Capitol v. Fireco of New Jersey, 81 N.J. 548, 410 A.2d 674 (1980). However, satisfaction of judgment against one joint tortfeasor concludes rights against all others. Theobald v. Kenney's Suburban House, 48 N.J. 203, 225 A.2d 10 (1966).

G. Voidable Releases

Release Entered Into With a Minor

Generally, an infant's contract is voidable at his discretion. Notaro v. Notaro, 38 N.J. Super. 311, 118 A.2d 880 (Ch. Div. 1955). However, "an infant must restore the other party to the *status quo* to the extent of the benefits the infant has received, if the other party is free from fraud or bad faith." Boyce v. Doyle, 113 N.J. Super. 240, (Law Div. 1971) (plaintiff minor who executed release in favor of defendant in consideration of payment of money, who, while proceeds could not be directly traced, received immediate benefit upon signing release, and who later elected to rescind release and obtained judgment against co-defendant, was required to return consideration he received from defendant who prevailed on merits as to plaintiff.)

Transportation Law

A. State DOT Regulatory Requirements

New Jersey adheres to the regulatory requirements as promulgated by the Federal Motor Carrier Safety Administration.

For more information, see: http://www.fmcsa.dot.gov/

B. State Speed Limits

Rural Interstate – Cars and Trucks 65 MPH
Urban Interstate – Cars and Trucks 55 MPH
Other Limited Access Roads – Cars and Trucks 65 MPH

C. Overview of State CDL Requirements

There are three different CDL classes in New Jersey. Each CDL class has its own regulations:

Class A includes
- Tractor trailers
- Any truck and trailer combination with a gross combined weight rating (GCWR) of 26,001 or more pounds – provided that the gross vehicle weight rating (GVWR) of the vehicle being towed is more than 10,000 pounds
- Any vehicle in B, C or D categories, if qualified for the proper extra endorsements

Class B includes
- Any vehicle with a GVWR of 26,001 or more pounds
- A vehicle with a GVWR of 26,001 or more pounds towing a trailer with a GVWR of less than 10,000 pounds
- A bus with a GVWR of 26,001 or more pounds designed to transport 16 or more passengers (including driver)
- Vehicles in Class C and D categories – if qualified for the proper extra endorsements

Class C includes
- Any vehicle with a GVWR of less than 26,001 pounds used to transport hazardous material (with mandatory placard)
- Any bus designed to carry 16 or more passengers (including the driver) and with a GVWR of less than 26,001 pounds
- School vehicles designed for 15 passengers or less (including the driver)
- Any bus or vehicle used for hire and designed to transport eight to 15 passengers (including the driver)

Insurance Issues

A. State Minimum Limits of Financial Responsibility

$15,000 bodily injury liability for one person per accident
$30,000 bodily injury liability for all injuries per accident.
$5,000 property damage liability per accident

B. Uninsured Motorist Coverage

Every owner or registrant of an automobile registered or principally garaged in New Jersey must maintain uninsured/underinsured motorist coverage in the amounts of $15,000 per person for bodily injury, $30,000 per accident for bodily injury, and $5,000 per accident for property damage with a $500 deductible for each insured. N.J.S.A. 17:28-1.1; N.J.S.A. 39:6A-14.

This statute differentiates between uninsured motorists ("UM") and underinsured motorists ("UIM"). N.J.S.A. 17:28-1.1(e). However, the term "automobile" as defined by the statute is limited to private passenger automobiles and does not include commercial vehicles or buses. N.J.S.A. 39:6A-2.

UM/Valid Claim: A claimant must show that (1) he is an insured under the policy, (2) he suffered bodily injury or property damage in an accident arising out of the ownership, maintenance or use of a motor vehicle, (3) he is legally entitled to recover damages from the uninsured or hit and run tortfeasor, (4) the accident occurred in the territory designated in the policy, and (5) timely notice of the accident was given.

UM/Arbitration: The standard UM endorsement in this state provides for arbitration before a panel of three arbitrators, with their decision binding as to the insured's legal entitlement to recover and to the amount of damages. Any damage award in excess of $15,000 can be voided by a demand for trial, with the policy holder filing suit against the insurer, with the only issue for determination being the amount of damages due claimant.

UIM/Offer: This is **optional** coverage but it must be offered to the insured to purchase limits up to $250,000/person, $500,000/accident for bodily injury and $100,000/accident for property damage or a $500,000 combined single limit policy.

UIM/Recovery: The applicable UIM limits must be greater than the limits of liability of all policies available to the insured. Any recovery under UIM is set-off by any amount received by the insured from any tortfeasor.

An injured person is not merely limited to his own UIM coverage as a source of UIM benefits. However, N.J.S.A. 17:28-1.1c prohibits the insured from "stacking" UIM policies of those available, regardless if one of the policies provides excess coverage rather than primary coverage. Magnifico v. Rutgers Cas. Ins. Co., 153 N.J. 406 (N.J. 1998).

The UIM policy of a host vehicle is almost universally available to an injured passenger as well as the UIM policy of his own personal automobile policy. Magnifico v. Rutgers Cas. Ins. Co., 153 N.J. 406 (N.J. 1998).

The key factor in determining whether UIM benefits are available is the policy language. Breen v. New Jersey Manufacturers Ins. Co., 153 N.J. 424 (1998).

In a case "involving a full-time employee of an enterprise, the probable fair expectations

and common intent of an insurance company and policyholder, absent specification to the contrary, are that the policy provide UIM coverage for employees of the business entity". French v. New Jersey School Boards, 149 N.J. 478, 495 (1997).

Settlement: An injured party is allowed to settle with an underinsured motorist, even where settlement is less than the underinsured driver's limits of liability. "The insured has the right to accept what he or she considers the best settlement available and to proceed to arbitrate the underinsurance claim for a determination of whether the damages do indeed exceed the tortfeasor's liability limits." Longworth v. Van Houten, 223 N.J. Super. 174, 191 (App. Div. 1988) (quoting Schmidt v. Clothier, 338 N.W.2d 256, 260-261 (Sup. Ct. of MN 1983)).

However, in arbitration against an underinsured motorist carrier, the full limits of underinsured motorist's liability will be deducted from the arbitration award. Longworth at 191.

Subrogation and consent to settle clauses in UIM endorsements contravene public policy because they hamper an insured's ability to dispose of his claim against underinsured tortfeasors. However, an insured must notify his UIM carrier before accepting a settlement offer from an underinsured tortfeasor, in order to protect the insurer's subrogation rights. Longworth at 194.

Fellow Employee:

New Jersey law generally defers to the language in the employer/insured's policy to determine coverage for a fellow employee injured, in the course of business, by another employee.

Cutone v. Massachusetts Bonding & Ins. Co. 53 N.J.Super. 165, 146 A.2d 782 (1959).

C. No Fault Insurance

Personal Injury Protection: Every automobile registered in New Jersey must have automobile insurance containing Personal Injury Protection (PIP) benefits.

Automobile: Is defined as a private passenger, van, pick-up and camper type vehicles used for recreational purposes, excluding vehicles used as public or livery conveyance for passengers. The definition of "automobile" does not include motorcycles or commercial vehicles. N.J.S.A. 39:6A-2.

Who is Covered: The Named Insured, any resident relative in named insured's household who is not insured under a policy of their own, and other persons injured while entering into or alighting from or using the automobile of the named insured with permission of the named insured, sustaining bodily injury caused by named insured's automobile or struck by an object propelled by or from such automobile, when that

individual does not have insurance of his own. This includes injured pedestrians without insurance of their own.

Exclusions:

(1) Persons whose conduct contributed to the injuries while committing a crime,
(2) an individual convicted of DWI,
(3) those seeking to avoid arrest, or while acting with specific intent to injure himself or others.
(4) those whose auto is owned and principally garaged in NJ who fails to maintain the required insurance and persons operating or occupying an automobile without permission.

Payment of Medical Expenses: Payment is made pursuant to a medical fee schedule (N.J.A.C. 11:3-29 et al).

Subrogation: Only the PIP carrier is permitted to recover benefits from a commercial vehicle's liability insurance company, or any tortfeasor who is not required to maintain PIP benefits, such as the owner or operator of private premises or a dram shop, or from an individual who was required to maintain PIP coverage, but did not. N.J.S.A. 39:6A-9.1.

PIP Statute of Limitations: Two years after the expense is known to be related to the accident or four years after the accident, whichever is earlier (N.J.S.A. 39:6A-13.1). If payment of benefits were terminated, an action must be commenced within two years after the last payment made by the PIP carrier.

Set-Offs: Benefits collectible under workers' compensation insurance, employees' temporary disability benefits statutes, Medicare and federal benefits provided to active and retired military personnel are deducted from collectible PIP benefits.

Work Related Accidents: If a motor vehicle accident is work-related and the workers' compensation carrier refuses benefits, automobile insurer must provide PIP benefits to cover same.

D. Disclosure of Limits and Layers of Coverage

New Jersey Administrative Code Title 11 §2-17.5, states:

(a) "No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

(b) No agent, broker, or insurer shall conceal from first party claimants benefits,

coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim."

E. Unfair Claims Practices

N.J.S.A. §17B:

30-13.1, states:

No person shall engage in unfair claim settlement practices in this State. Unfair claim settlement practices which shall be unfair practices as defined in N.J.S.A §17B:30-2, shall include the following practices:

"Committing or performing with such frequency as to indicate a general business practice any of the following:

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;

e. Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

g. Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

i. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

j. Making claims payments to insureds or beneficiaries not accompanied by

statement setting forth the coverage under which the payments are being made;

k. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

l. Delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

m. Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement."

F. Bad Faith Claims

Common Law: An Insurer may be held liable for the entire amount of a judgment (including the amount in excess of its policy limits) where it had the opportunity to settle the matter within the applicable limits, but, in light of all the circumstances, unreasonably refused to settle. Rova Farms Resorts, Inc. v. Investors Ins. Co. of Am., 65 NJ 474 (1974).

Fiduciary Duty: Insurer owes insured a fiduciary duty to protect him from personal financial exposure and may maintain a direct suit against the insurer for a breach of that duty.

G. Coverage – Duty of Insured

"Cooperation clauses impose a duty on the insured to assist the insurers in the conduct and defense of actions. Insureds are generally required to provide all such information and assistance as the insurer may require."
In re: Environmental Ins. Declaratory Jmt. Actions, 259 N.J. Super. 308, (App. Div. 1992).

However, if the insured voluntarily assumes liability for an accident, the insurer is relieved from liability under the policy. Kindervater v. Motorists Casualty, 120 N.J.L. 373, (E. & A. 1938).

The insured's "duty to cooperate" with the carrier in conduct of suits and in "securing and giving of evidence," and to refrain from "voluntarily…assuming any obligation"

[independent action such as retaining an attorney]is a condition precedent to recovery under the policy, and an insured's breach can cause forfeiture of coverage. Griggs v. Bertram, 88 N.J. 347(1982).

The insurer may disclaim coverage under the cooperation clause only by showing that:

(1) "the insured breached the cooperation clause; and
(2) that the insurer suffered likelihood of appreciable prejudice as a result of this breach. Chemical Leaman Tank v. Aetna, 817 F. Supp. 1136 (D.N.J. 1993)