

# DIGEST OF INSURANCE LAW

## WEST VIRGINIA

Courtesy of  
**Steptoe & Johnson PLLC**  
Clarksburg, West Virginia

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

**Magistrate Court.** One court exists for each county; two or more magistrates are elected by popular vote; magistrates must have a high school education and be at least 21 years of age. W. Va. Code §50-1-1, -4. Magistrate Courts have jurisdiction throughout their respective counties of all civil actions where amounts or damages involved do not exceed \$5,000.00, exclusive of interest and costs. Magistrates do not have jurisdiction of cases wherein title to real estate is sought to be recovered or is drawn in question and in certain other enumerated matters, including equity, matters of eminent domain, actions for false imprisonment, and malicious prosecution. W. Va. Code §50-2-1. Any person may appeal judgment of the magistrate court to the circuit court as matter of right by requesting such appeal not later than twenty days after judgment is rendered or a decision is rendered upon motion to set aside the judgment. A bond of not less than reasonable court costs of appeal nor more than sum of judgment and reasonable court costs may be required. W. Va. Code §50-5-12.

**Circuit Courts.** The State is divided into thirty-one judicial circuits of one or more counties, each having one or more judges elected by the people. W. Va. Code §51-2-1; W. Va. Const. Art. VIII §5. They have original and general jurisdiction of all matters involving title to real property, of all matters at law where amount in controversy, exclusive of interest, exceeds \$2,500.00, and in all cases in equity. §51-2-2. Their appellate authority is set out in the next section.

**Court of Claims.** Claims made against the State in its sovereign capacity must be presented to Court of Claims, which will approve awards and make such funding recommendations to Legislature as it deems just. W. Va. Code §14-2-2. The Court of Claims also makes awards to crime victims from Victim's Compensation Fund. §14-2A-5.

#### Appellate Courts

**Circuit Courts.** Circuit Courts exercise appellate jurisdiction over civil cases arising in Magistrate courts. Circuit Courts can regulate inferior tribunals by mandamus, certiorari, or prohibition, in proper cases. W. Va. Code §51-2-2. They may also review administrative agency decisions governed by Administrative Procedures Act, W. Va. Code §29A-5-4, *Lipscomb v. Tucker County Comm'n*, 197 W. Va. 84, 475 S.E.2d 84 (W. Va. 1996). Writ of prohibition is appropriate to prevent enforcement of an order requiring joinder of party who did not meet requirements of compulsory joinder rule. *Glover v. Narick*, 184 W. Va. 381, 400 S.E.2d 816 (1991). Writ of Mandamus is not appropriate to compel Board of Osteopathy to take disciplinary action against a doctor, but it is proper to compel it to consider and adopt formal findings of fact and conclusions of law. *Thompson v. W. Va. Bd. of Osteopathy*, 191 W. Va. 15, 442 S.E.2d 712 (1994).

**Supreme Court of Appeals.** Supreme Court of Appeals is the only other appellate court. This court is composed of five judges, elected by the people, serving twelve year terms. W. Va. Const. Art. VIII, §2. It has appellate jurisdiction in civil cases where amount in controversy, exclusive of interest and costs, is greater than \$300 and where there has been final judgment, decree or order in lower court. W. Va. Const. Art. VIII, §3; *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 474 S.E.2d 906 (W. Va. 1996). Appeals in civil cases do not lie as of right. Appellate process is begun by a petition for appeal, granting of which is within discretion of Court. W. Va. R. App. P. 3. Questions arising upon pleadings, summonses, returns of service of process, personal or subject matter jurisdiction, failure to join indispensable party, or a challenge of venue may be certified by Circuit Courts to Supreme Court of Appeals for consideration. W. Va. Code §58-5-2. Once question is certified to Supreme Court of Appeals, all proceedings are stayed in circuit court pending an answer. W. Va. Code §58-5-2; *Young v. JCR Petroleum, Inc.*, 188 W. Va. 280, 423 S.E.2d 889 (1992). Court may also certify questions of law to highest court of another state or of Canada or Canadian province, or to Mexico. W. Va.



Code §51-1A-2. Court also has original jurisdiction in habeas corpus, mandamus and prohibition. W. Va. Code §51-1-3. Supreme Court of Appeals is court of last resort in State. W. Va. Const. Art. VIII §3.

## LAW

### Abbreviations

- A.L.R. – American Law Reports.  
 S.E. – South Eastern Reporter.  
 S.E.2d – South Eastern Reporter, Second Series.  
 W. Va. – West Virginia Reports.  
 W. Va. R. App. P. – West Virginia Rules of Appellate Procedure.  
 W. Va. R. Civ. P. – West Virginia Rules of Civil Procedure.  
 W. Va. Code citations refer to Official Code of West Virginia, 1931, as amended, unless otherwise stated.

## ACCIDENT AND HEALTH INSURANCE

See also “ACCIDENTAL MEANS” and “DISABILITY.”

In General. The following articles of W. Va. Code, Chapter 33 should be consulted: Article 15, Accident and Sickness Insurance; Article 15A, West Virginia Long Term Care Insurance Act; Article 15B, Uniform Health Care Administration Act; Article 15C, Diabetes Insurance; Article 16, Group Accident and Sickness Insurance [repealed]; Article 16A, Group Health Insurance Conversion; Article 16B, Accident and Sickness Rates; Article 16D, Marketing and Rate Practices for Small Employer Accident and Sickness Insurance Policies; Article 16E, Contraceptive Coverage; and 16F Group Limited Health Benefit Plans.

Contract. See W. Va. Code §33-15-2 for scope and format of accident and health insurance policies; See W. Va. Code §33-15-4 for required policy provisions; See W. Va. Code §33-15-5 for optional policy provisions.

Cancellation. Accident and health insurance may not be subject to cancellation or nonrenewal because of diagnosis or treatment of Acquired Immune Deficiency Syndrome (AIDS). See W. Va. Code §§33-15-13, 33-16-9. An insurance policy will lapse for non-payment of premium, but insurer, despite knowledge of facts allowing him to claim forfeiture, is estopped if he continues to accept premium payments from insured. *Jarvis v. Pennsylvania Cas.*, 129 W. Va. 291, 40 S.E.2d 308 (1946). However, as the court in *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135, 144 (1998) clarified, insured must prove reasonable reliance on part of

insured on insurer’s stated grounds for denial to invoke estoppel.

Disease Induced by Accident. Where insurance policy limited meaning of “injury” to “sole cause of loss” and provided that benefits were payable only if injury “wholly and continuously” disabled insured, insured could not recover benefits for total disability if accident only activated a pre-existing diseased condition resulting in disability. *Adkins v. American Cas.*, 145 W. Va. 281, 114 S.E.2d 556 (1960); *Adkins v. American Cas.*, 146 W. Va. 1045, 124 S.E.2d 457 (1962).

Excepted Risks. Most policies in effect in state except aviation and military service. Cases construing contract exceptions: *Board of Education v. W. Harley Miller*, 160 W. Va. 473, 236 S.E.2d 439 (1977) (arbitration clause specifically enforceable in absence of fraud); *Diddle v. Continental Cas.*, 65 W. Va. 170, 63 S.E. 962 (1909); *Beard v. Indemn.*, 65 W. Va. 283, 64 S.E. 119 (1909) (alleged voluntary exposure); *Combs v. Colonial*, 73 W. Va. 473, 80 S.E. 779 (1914) (alleged obvious danger); *Parker v. North Am. Accident Ins. Co.*, 79 W. Va. 576, 92 S.E. 88 (1917) (alleged obvious danger); *Walker Dry Goods v. Massachusetts Bonding Ins. Co.*, 90 W. Va. 122, 110 S.E. 553 (1922) (exception of elevator operator under age fixed by law sustained).

If properly inserted in policy, provision specifically excepting certain risks will be held valid and enforceable in West Virginia courts. *Nowlan v. Guardian Life Ins. Co. of Am.*, 88 W. Va. 563, 107 S.E. 177 (1921).

However, certain exceptions in health insurance are prohibited: policies providing hospital and surgical expenses must offer mental health benefits (W. Va. Code §33-15-4a); all policies must offer primary health care nursing services (W. Va. Code §33-15-4b); policies with coverage of laboratory or x-ray services may not deny payment for mammograms or pap-smears when performed for cancer screening or diagnostic purposes (W. Va. Code §33-15-4c); all policies must provide coverage for rehabilitation services (W. Va. Code §33-15-4d); all policies must provide coverage for children of insured without regard to insured’s legal custody of children (W. Va. Code §33-15-16); policies of group health insurance must offer following coverage: mental illness; home health care (W. Va. Code §33-16-3a-b); primary health care nursing services; treatment of temporomandibular joint disorder and craniomandibular disorder; mammograms or pap-smears when performed for cancer screening or diagnostic purposes; and rehabilitation services (W. Va. Code §33-16-3e-h). Converted policy shall not exclude preexisting condition not excluded by group policy. W. Va. Code §33-16A-8.

See also "Exclusion of named driver" under "AUTOMOBILES."

Notice and Proof of Loss. Where insured is rendered physically or mentally unable to file proof of disability within stipulated time, he is excused therefrom if proof is filed within reasonable time after recovery of ability to prepare or direct its preparation. *Neill v. Fidelity Mut.*, 119 W. Va. 694, 195 S.E. 860 (1938), explained in, *Ragland v. Nationwide Mut.*, 146 W. Va. 403, 120 S.E.2d 482 (1961).

Object of filing proof of loss is to give insurer proper information as to facts which may render it liable. Requirement of proof of loss may be waived by insurer. Requirements are liberally construed and substantial compliance therewith by insured is all that is required. *Petrice v. Federal Kemper*, 163 W. Va. 737, 260 S.E.2d 276 (1979).

Double Indemnity. Accidental death resulting indirectly from intentional infliction of injury by another while deceased is engaged in trivial violation of law does not preclude right to double indemnity. *Patton v. Kansas City Life*, 115 W. Va. 40, 175 S.E. 334 (1934). But driving on wrong side of road in violation of law does preclude right to double indemnity. *Collins v. Woodmen*, 124 W. Va. 195, 19 S.E.2d 586 (1942). Double indemnity not allowed where policy specifically excludes injury intentionally inflicted. *Harper v. Jefferson*, 119 W. Va. 721, 196 S.E. 12, 116 A.L.R. 389 (1938); *Adkins v. Provident*, 119 W. Va. 701, 196 S.E. 16 (1938).

West Virginia Department of Health and Human Resources (DHHR) statutory subrogation right is a modification of usual and ordinary meaning of subrogation. Therefore, DHHR has a superior right to be fully reimbursed from any settlement, compromise, judgment, or award obtained by an injured party from a responsible third party. *Grayam v. Dep't of Health & Human Resources*, 201 W. Va. 444, 498 S.E.2d 12 (1997). However, under no circumstances shall any monies received by Commissioner or self-insured employer as subrogation to monies expended on behalf of worker exceed fifty percent of amount received from a third party after costs and attorney fees. *Cart v. Gen. Elec.*, 203 W. Va. 59, 506 S.E.2d 96, 99 (1998). West Virginia Department of Human Services must continue to pay medical expenses as long as injured party continues to qualify for state medical assistance program. *Kittle v. Icard*, 185 W. Va. 126, 405 S.E.2d 456 (1991), *rev'd on other grounds*, *Cart v. Gen. Elec.*, 203 W. Va. 59, 506 S.E.2d 96 (1998). Note: Court did not discuss extension of this principle to contractual rights of subrogation.

Rule concerning double indemnity for accidental death makes clear distinction between accidental means and accidental result, and these determinations must be made on basis of foreseeability of natural consequences viewed from demeanor of deceased. *Floyd v. Equitable Life Assurance Soc'y*, 164 W. Va. 661, 264 S.E.2d 648 (1980).

Even though municipality does not change insurance carriers, retirees insured under W. Va. Code §8-12-8 (1986) are to be insured at same cost for same coverage as regular employees of similar age groupings; where present insurance carrier changes its rates and such change results in retirees being charged different rates for same coverage as regular employees. *City of Wheeling Retirees Ass'n, Inc. v. City of Wheeling*, 185 W. Va. 380, 407 S.E.2d 384 (1991).

### ACCIDENTAL MEANS

Definition. An accident is usually defined as an event: 1) that takes place without one's foresight or expectation; and 2) that proceeds from an unknown cause, or is result of unusual effect of known cause, and therefore not expected. It is also generally held that the word "accident," in accident insurance policies, refers to events happening without any human agency, or, if happening through such agency, or an event which, under the circumstances, is unusual and not expected by person to whom it happens. *Sizemore v. Nat'l Cas. Ins. Co.*, 108 W. Va. 550, 151 S.E. 841 (1930). Distinction must be made between accidental means and accidental result, and their determination must be made on basis of foreseeability of natural consequences viewed from point of view of deceased (the insured) rather than from that of person causing death. Test is whether deceased individual apprehended his death. *Floyd v. Equitable Life Assur. Soc'y*, 164 W. Va. 661, 264 S.E.2d 648, 650 (1980). All surrounding acts or conduct of insured reasonably foreseeable by him as likely to result in his death must be taken as controlling factors in determining whether or not it was by accidental means. *Walker v. Metropolitan Life*, 272 F. Supp. 217, 220 (S.D. W. Va. 1967). But death that occurs as natural and probable cause of a course of action is not accidental nor product of accidental means. *Koger v. Mutual of Omaha Ins. Co.*, 152 W. Va. 274, 163 S.E.2d 672, 675 (1968) (death from Russian Roulette not accidental).

Cases holding death was accidental: *Beard v. Indemnity*, 65 W. Va. 283, 64 S.E. 119 (1909) (fall from bench over wall); *Tabor v. Commercial Cas.*, 104 W. Va. 162, 139 S.E. 656 (1927) (insured shot while approaching slayer in threatening manner); *Martin v. Mutual Life*, 106 W. Va. 533, 146 S.E. 53 (1928) (insured shot while approaching slayer in threatening manner);



*Miller v. Inter-Ocean Cas.*, 110 W. Va. 494, 158 S.E. 706 (1931) (carbon monoxide poisoning from running motor of stalled automobile); *Mitchell v. Metropolitan Life*, 124 W. Va. 20, 18 S.E.2d 803 (1942) (heat exhaustion caused by sudden temperature change).

Cases holding death resulted from non-accidental means: *Sizemore v. Nat'l Cas. Ins. Co.*, 108 W. Va. 550, 151 S.E. 841 (1930) (voluntarily stepping from moving automobile); *Adkins v. Provident Life & Accident Ins. Co.*, 119 W. Va. 701, 196 S.E. 16 (1938) (policy expressly excluded coverage for intentional act of other person; intentional assault); *Harper v. Jefferson Standard Life*, 119 W. Va. 721, 196 S.E. 12 (1938) (policy expressly excluded coverage for injury intentionally inflicted by insured or other person; gun shot by criminal); *Otey v. John Hancock Mut. Life Ins. Co.*, 120 W. Va. 434, 199 S.E. 596 (1938) (unknown and unascertainable hypersensitivity to novocaine properly injected); *Beckley Nat'l Exch. Bank v. Provident Life & Acc.*, 121 W. Va. 152, 2 S.E.2d 256 (1939) (insured shot while committing assault on wife); *Dorsey v. Prudential*, 124 W. Va. 100, 19 S.E.2d 152 (1942) (rupture of duodenal ulcer caused by lifting); *Walker v. Metro. Life*, 272 F. Supp. 217 (S.D. W. Va. 1967) (insured shot while voluntarily attempting a forceful entry despite warning from ex-wife); *Koger v. Mut. of Omaha Ins. Co.*, 152 W. Va. 274, 163 S.E.2d 672 (1968) (insured shot himself playing Russian Roulette).

### ADJUSTERS

Defined in W. Va. Code §33-12B-1. Effective July 1, 1989, W. Va. Code §33-12B-1 *et seq.* defines term "adjuster" and establishes qualification and licensing requirements for all individuals who, for compensation, fee or commission, investigate and settle claims on behalf, solely, of either insurer or insured. *Id.* A licensed attorney qualified to practice law in West Virginia is deemed not to be an adjuster under this statute. *Id.* An adjuster may be licensed as both a "company adjuster" (representing interests of insurer) and "public adjuster" (representing interests of insured), but in no event may adjuster act in both capacities with respect to same claim. W. Va. Code §33-12B-3.

**Qualification and Licensing Requirements.** Generally, adjuster's license is required. W. Va. Code §33-12B-4; (*but see* §33-12B-11a regarding emergency insurance adjusters). To qualify for a license, adjuster must be at least eighteen years of age, be a resident of West Virginia (*but see* §33-12B-9 regarding nonresident adjuster), and be trustworthy and competent. W. Va. Code §33-12B-5. At commissioner's discretion, applicant's competency may be tested. *Id.* Applicants engaged in practice of professional insurance adjusting prior to ef-

fective date of this Article (July 1, 1989) are exempt from testing requirements. *Id.* Exam fee of twenty-five dollars shall be required of each applicant. W. Va. Code §33-12B-8. Licenses "expire on the May thirty-first next following the date of issuance." W. Va. Code §33-12B-10.

### AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE"; "NEGLIGENCE."

**Age of Majority.** No person 18 years or older shall lack legal capacity to enter into contracts, sell or purchase property, create a lien, execute legal or written instruments, prosecute or defend legal actions, assert claims or deal in his own affairs. W. Va. Code §2-3-1, as amended, 1974.

**Drivers License.** Operator's license shall not be issued to anyone under 18 years, except that junior or probationary operator's license may be issued to person between 16 and 18 who complies with certain conditions. W. Va. Code §17B-2-3, and 17B-2-3a, as amended. One condition is continued school attendance unless withdrawal from school is involuntary. W. Va. Code §18-8-11, as amended.

**Sale of Alcoholic Liquors.** Alcoholic liquors shall not be sold to any person under 21 years of age. W. Va. Code §60-3-22, as amended, 1993. Legislature did not intend section to apply to anyone but sellers of alcoholic beverages. *Overbaugh v. McCutcheon*, 183 W. Va. 386, 396 S.E.2d 153, 156 (1990). Seller may also be liable for acts of other underage drinkers who were given alcoholic liquors by underage purchaser. *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61, 68 (1990).

### AGENTS AND BROKERS

**Definition.** An insurance agent is an individual appointed by an insurer to solicit, negotiate, effect or countersign insurance contracts in its behalf. W. Va. Code §33-1-12. Agent helps insurer service insurer's contract with insured and is not party to that contract. *Shrewsbury v. Nat'l Grange Mut. Ins. Co.*, 183 W. Va. 322, 395 S.E.2d 745 (1990). Broker is an individual who for compensation in any manner solicits, negotiates, or procures insurance or renewal or continuance thereof on behalf of insureds or prospective insureds. W. Va. Code §33-1-14. Licensing requirements for agents and brokers are set out in W. Va. Code §33-12-3. Qualifications are set out in W. Va. Code §§33-12-4 to 5.

Statute authorizing insurance commissioner to automatically suspend insurance license of those persons who fail to meet continuing insurance education requirements. W. Va. Code §33-12-8.



Any person soliciting insurance, shall in any controversy between insured or his beneficiary and insurer be regarded as agent of such insurer. W. Va. Code §33-12-22; *Smithson v. U.S. Fid. & Guar. Co. Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991); *Knapp v. Independence Life & Accident Ins. Co.*, 146 W. Va. 163, 118 S.E.2d 631 (1961). Licensed resident insurance agent who received fixed annual sum in return for countersigning policies is not entitled to commissions in addition to annual compensation. *Ostrosky v. Arkwright - Boston Mfrs. v. Mutual Ins. Co.*, 182 W. Va. 187, 386 S.E.2d 844 (1989). Agent or broker who, with a view to compensation for his services, undertakes to procure insurance for another and through his negligence fails to do so, will be held liable for any damages resulting from such failure. *Parsley v. GMAC*, 167 W. Va. 866, 280 S.E.2d 703 (1981).

**Existence of Relationship.** Where bank did not become insurer's agent by collecting premium (on group life policy covering bank's borrowers) from borrower; insurer was not liable on a policy mistakenly issued to bank covering ineligible debtor. *South Branch Valley Nat'l Bank v. Williams*, 151 W. Va. 775, 155 S.E.2d 845 (1967). Distinguished in subsequent decision holding bank to be agent of insurer where bank filled out necessary forms and bank received commission on credit insurance policy. *Warden v. Bank of Mingo*, 176 W. Va. 60, 341 S.E.2d 679 (1985).

**Fraud by Agents.** Fraud on part of agent may or may not vitiate policy, depending upon nature of fraud. If insured is free from any participation or knowledge in agent's fraudulent conduct, contract of insurance will not, generally speaking, and in absence of unusual circumstances, be forfeited. However, if insured participates in agent's fraud, or even has knowledge thereof, policy will usually be vitiated. Any collusion between insured and agent or broker, for purpose of defrauding insurer, will vitiate policy of insurance. Insurer is entitled to utmost good faith and loyalty on part of its agents. If agent intentionally conceals fact that he is personally interested in risk upon which he issues policy of insurance, so that he occupies a dual relationship in transaction, policy will be forfeited. *Henshaw v. Globe & Rutgers Fire Ins. Co.*, 109 W. Va. 235, 153 S.E. 512 (1930).

**Discharge of Agent.** Statutory provision in W. Va. Code §33-12A-3 states that, any insurance agent, who has been employed pursuant to a written contract for a period of more than five years, may not be terminated except for "good cause," was held to be unconstitutional to extent that it interferes with existing rights under employment contract. *Shell v. Metropolitan Life Ins. Co.*, 181 W. Va. 16, 380 S.E.2d 183 (1989). Employment of

an agent may be terminated in violation of W. Va. Code §33-12A-3 when federal law permits termination. *Cutwright v. Metropolitan Life Ins. Co.*, 201 W. Va. 50, 491 S.E.2d 308 (1997).

**Knowledge of Agents Imputed to Insurer.** If, at inception of contract of insurance, agent has knowledge of existence of any facts relating to risk which would immediately vitiate policy, such as defect in title to property covered by fire insurance policy, this knowledge will be imputed to insurer. *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S.E. 101 (1904). However, when such knowledge comes to agent after issuance of policy, it will not, in absence of unusual circumstances be imputed to insurer, *Morgan v. Am. Central Ins. Co.*, 80 W. Va. 1, 92 S.E. 84 (1917), explained in, *Aliff v. Atlas Assurance Co.*, 102 W. Va. 638, 135 S.E. 903 (1926). Nor ordinarily will knowledge by agent that insured may not intend to comply in future with a promissory warranty in policy, such as an Iron Safe Clause in standard fire insurance policy, be imputed to insurance company. *Cooper v. Providence Washington Ins. Co.*, 98 W. Va. 655, 127 S.E. 511 (1925).

**Liability of Agent.** Simple negligence committed by insurance agency is sufficient to impose liability on agency for loss caused thereby to insurer (agency accepting payment after attempted cancellation would be liable to insurer if policy cancellation attempt was effective so that, but for later acceptance of premium, policy would not have been in effect at time of claim). *Nat'l Grange Mut. Ins. Co. v. Wyoming County Ins. Co.*, 156 W. Va. 521, 195 S.E.2d 151 (1973).

Insurer is not chargeable with mistake of its agent who erroneously inserts facts regarding risks in application where facts are stated to him correctly but are too general with regard to property covered. *Jones v. Standard Fire Ins. Co.*, 116 W. Va. 597, 182 S.E. 800 (1935). But see *Arcuri v. Great Am. Ins. Co.*, 176 W. Va. 211, 342 S.E.2d 177 (1986), holding that insurers would be liable to insured for delay in payment on fire policy, if agent added additional person to policy, without consent of original insured.

When agent erroneously inserted incorrectly stated facts regarding risk, insurance company is chargeable with his error, and insured may recover. *Jarvis v. Modern Woodmen of Am.*, 185 W. Va. 305, 406 S.E.2d 736 (1991) (cited by U.S. Supreme Court in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711 (1993) as one of three highest punitive damages awards ever affirmed in West Virginia); *Moore v. United Benefit Life Ins. Co.*, 145 W. Va. 549, 115 S.E.2d 311 (1960).

Licensing and Regulation. W. Va. Code §33-12-1 *et seq.* codifies issues pertaining to licensing and regulation of insurance producers. Chapter requires that insurance producers and solicitors be licensed (§33-12-3), sets forth qualifications for each (§33-12-2), and establishes continuing legal education requirements (§33-12-8). Licensing of non-residents for property casualty are made pursuant to §33-12-12. Chapter gives West Virginia Insurance Commissioner power to revoke or suspend license of any agent, solicitor, broker or excess line broker. W. Va. Code §33-12-24.

## ARBITRATION

In general, *see* W. Va. Code §55-10-1 *et seq.*

As Condition Precedent to Action. By their contract, parties may lawfully make decision of arbitrators or any third person condition precedent to right of action upon contract. Syl. Pt. 1, *State ex rel. Center Designs, Inc. v. Henning*, 201 W. Va. 42, 491 S.E.2d 42 (1997). Contract creates a condition precedent to any right of action arising under contract if the contract provides procedure for arbitration of disputes and provides that: 1) all claims, disputes or other matters in question arising out of, or relating to contract shall be decided by arbitration, unless parties mutually agree otherwise; 2) arbitration agreement shall be specifically enforceable under prevailing arbitration law; 3) arbitration award shall be final; and 4) judgment may be entered upon award in accordance with applicable law in any court having jurisdiction. Syl. Pt. 2, *Id.*

Agreements for Arbitration. Presumption found that 1) arbitration provision in written contract was bargained for, and 2) arbitration was intended as exclusive means of resolving disputes arising under contract. However, when party alleges that arbitration provision in written contract was unconscionable or was thrust upon him because he was unwary and taken advantage of, or contract was one of adhesion, question of whether arbitration provision was bargained for and valid is matter of law for court to determine. *Board of Educ. of Berkeley County v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (1977); *Art's Flower Shop v. Chesapeake & Potomac Tel. Co.*, 186 W. Va. 613, 413 S.E.2d 670 (1991); *See also*, W. Va. Code §55-10-1.

Award. Awards are to be favorably and liberally construed and are not to be set aside unless they appear to be founded on clearly illegal grounds. *Board of Educ. of Berkeley County v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (1977). In absence of fraud or corruption on part of arbitrator, consideration of improper evidence in making award will not vitiate award. *United Fuel Gas Co. v. Columbian Fuel Corp.*, 165 F.2d 746 (4th Cir. W. Va. 1948); *See also*, W. Va. Code §55-10-4;

*Williams v. Sharples Coal Co.*, 663 F. Supp. 105 (S.D. W. Va. 1987). If an arbitration award has been rendered, it is not easily impeached. *Jackson Enters. v. Prociuous Pub. Serv. Dist.*, 178 W. Va. 574, 363 S.E.2d 460 (1987).

Duty to Arbitrate. There is no legal obligation to submit to arbitration; arbitration is matter of contract. *United Steel Workers of Am. v. Logan Park Care Ctr.*, 634 F. Supp. 182 (S.D. W. Va. 1986). However, duty to arbitrate under valid arbitration clause in a contract survives termination of contract. *Baker Mine Svc. v. Nutter*, 171 W. Va. 770, 301 S.E.2d 860 (1983). Where parties to a contract agree to arbitrate either all or particular limited disputes under contract and where parties bargained for arbitration provision, arbitration is mandatory and specifically enforceable. *Board of Educ. of Berkeley County v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (1977); *See also*, W. Va. Code §55-10-2.

Entry of Award. Upon return of award, it shall be entered as judgment or decree of court unless good cause be shown against it at first term after parties have been summoned to show cause against it. W. Va. Code §55-10-3.

Jurisdiction and Procedure. Arbitration statute supplements common law rules on arbitration: grounds for attack on arbitration award essentially parallel same grounds that existed at common law. *Clinton Water Ass'n v. Farmers Constr. Co.*, 163 W. Va. 85, 254 S.E.2d 692 (1979); *See also*, W. Va. Code §55-10-4.

Lemon Law. Automobile buyers are entitled to abandon manufacturer's "arbitration" remedy for alleged defective vehicles and pursue alternative legal remedies under Lemon Law where an agreement signed by buyers provided that if they were dissatisfied with decision of manufacturer's "customer arbitration board" or dealer's or manufacturer's performance, they could pursue other legal remedies, if they so choose. *Acord v. Chrysler Corp.*, 184 W. Va. 149, 399 S.E.2d 860 (1990); *See also*, W. Va. Code §46A-6A-1 *et seq.*

Object of Arbitration. Object and aim of arbitration is to arrive at a just determination of matters in dispute, and dispose of same in a speedy and inexpensive way. *Jackson Enters. v. Prociuous Pub. Serv. Dist.*, 178 W. Va. 574, 363 S.E.2d 460 (1987). Regardless of whether suit is pending, person desiring to settle dispute may submit dispute to arbitration and agree that submission may be entered of record in any court. W. Va. Code §55-10-1.

## ATTORNEYS

Appointment and Authority. To be eligible for admission to practice of law, applicant must be 18 years old, of good moral character, a graduate from approved

college or university, a graduate from an approved law school, pass West Virginia Bar and Multistate Professional Responsibility examination within 25 months of bar examination or admission on motion. Rules for Admission to Practice, Rule 2.0. Alcohol dependency is an appropriate factor to be considered by Board of Law Examiners in ascertaining whether applicant has proven good moral character sufficient to demonstrate fitness and capacity to practice law. *Frasher v. West Va. Bd. of Law Examiners*, 185 W. Va. 725, 408 S.E.2d 675 (1991). Supreme Court of Appeals reviews *de novo* questions of whether an applicant should or should not be admitted, and a previous criminal conviction is an appropriate factor to consider when determining applicant's good moral character. *In re Dortch*, 199 W. Va. 571, 486 S.E.2d 311 (1997). Retention as attorney does not by itself empower attorney to compromise claim of client, absent express authorization. *Humphreys v. Chrysler Motors Corp.*, 184 W. Va. 30, 399 S.E.2d 60 (1990); *Kelly v. Belcher*, 155 W. Va. 757, 187 S.E.2d 617 (1972). But in general, attorney's authority to consent to an entry of order is presumed, and contrary must be clearly established in order to invalidate order. *Fortuna v. Queen*, 178 W. Va. 586, 363 S.E.2d 472 (1987). Where attorney makes compromise unauthorized by client and consents to judgment thereon, judgment may be vacated upon seasonably made application by aggrieved client. *Humphreys v. Chrysler Motors Corp.*, 184 W. Va. 30, 399 S.E.2d 60 (1990); *Dwight v. Hazlett*, 107 W. Va. 192, 147 S.E. 877 (1929).

**Admission Pro Hac Vice.** Out-of-state attorney's pro hac vice admission for a limited purpose shall ordinarily be granted where there is full compliance with Rule 8.0 (b) of W. Va. Rules for Admission to the Practice of Law and where there is no evidence that attorney is trying to circumvent licensing procedures and conduct a generalized practice of law. *State ex rel. H.K. Porter Co. v. White*, 182 W. Va. 97, 386 S.E.2d 25 (1989). The "numerous or frequent" provision of Rule 8.0 (d) should not be interpreted to defeat a pro hac vice admission when applicant is engaged in a highly specialized practice of law and her involvement in West Virginia is limited to that area of expertise. *Id.* Local attorney must attend all court proceedings with an out-of-state attorney admitted pro hac vice unless released by order and, even if released, is still responsible. *Id.* Pro hac vice admission is a privilege, and trial court judge may refuse admission when there is evidence of misconduct or other procedural abuses. *Id.*

**Conflict of Interest.** Governed by W. Va. Rules of Professional Conduct, effective January 1, 1989. See Prohibited Transaction, Rule 1.8; Former Client, Rule 1.9. Attorney who serves in multiple roles of lawyer, personal representative and beneficiary of his mother's

estate fails to avoid irreconcilable conflict of interest. *Committee on Legal Ethics v. Veneri*, 186 W. Va. 210, 411 S.E.2d 865 (1991). It is unethical for a lawyer representing a client to appear as witness on client's behalf except under very limited circumstances. *Smithson v. U.S. Fid. & Guar. Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991). Attorney called to testify by an opposing party is disqualified from representing his client if testimony is material, evidence cannot be obtained elsewhere, and testimony is or may be prejudicial to testifying attorney's client. *Musick v. Musick*, 192 W. Va. 527, 453 S.E.2d 361 (1994). Attorney who formerly represented client in matter is precluded from representing another person in same or substantially related matter that is materially adverse to interests of former client unless former client consents. *State ex rel McClanahan v. Hamilton*, 189 W. Va. 290, 430 S.E.2d 569 (1993); Rule 1.9 (a), W. Va. Rules of Professional Conduct.

**Legal Malpractice.** See also "MALPRACTICE." See Misconduct, Rule 8.4, W. Va. Rules of Professional Conduct. Legal malpractice actions may sound in tort or contract. Where act complained of is breach of specific terms of contract, without reference to legal duties imposed by law on attorney-client relationship, action is contractual in nature; but where essential claim is breach of duty imposed by law on attorney-client relationship, action lies in tort. *Hall v. Nichols*, 184 W. Va. 466, 400 S.E.2d 901 (1990). Rules on agreements limiting lawyer's liability for malpractice is designed to cover two situations: first is where lawyer accepts representation upon client's prospectively releasing attorney from any potential claim for malpractice in handling case; second is where attorney, in representation of client, commits malpractice and then seeks to settle matter and obtain release from client who is unrepresented. *Committee on Legal Ethics v. Cometti*, 189 W. Va. 262, 430 S.E.2d 320 (1993). In suit against attorney for negligence, plaintiff must prove the following: 1) attorney's employment; 2) attorney's neglect of reasonable duty; and 3) attorney's negligence resulted in and was proximate cause of loss to client. *Keister v. Talbot*, 182 W. Va. 745, 391 S.E.2d 895 (1990). Discovery rule can apply in cases of legal malpractice. *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992). However, continuous representation doctrine tolls statute of limitations in attorney malpractice action until professional relationship terminates with respect to the matter underlying malpractice action. *Smith v. Stacey*, 198 W. Va. 498, 482 S.E.2d 115 (1996). State Supreme Court of Appeals is final arbiter of legal ethics problems and must make ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. *Committee On Legal Ethics v. Karl*, 192 W. Va. 23, 449 S.E.2d 277 (1994); *Committee on Legal Ethics v. Craig*, 187 W. Va. 14, 415



S.E.2d 255 (1992); *Committee on Legal Ethics v. Morton*, 186 W. Va. 43, 410 S.E.2d 279 (1991); *Committee on Legal Ethics v. Charonis*, 184 W. Va. 268, 400 S.E.2d 276 (1990); *Committee on Legal Ethics v. Blair*, 174 W. Va. 494, 327 S.E.2d 671 (1984). Recommendations made by State Bar Ethics Committee are to be given substantial consideration. *Committee on Legal Ethics v. Keenan*, 189 W. Va. 37, 427 S.E.2d 471 (1993). In court proceeding prosecuted by West Virginia State Bar Committee on Legal Ethics for purpose of suspending license of attorney for designated period of time, burden is on Committee to prove by full, preponderating and clear evidence charges contained in Committee's complaint. *Committee on Legal Ethics v. Matthews*, 186 W. Va. 122, 411 S.E.2d 265 (1991); *Committee on Legal Ethics v. Simmons*, 184 W. Va. 183, 399 S.E.2d 894 (1990); *Committee on Legal Ethics v. Lewis*, 156 W. Va. 809, 197 S.E.2d 312 (1973). Final criminal conviction satisfies Committee on Legal Ethics's burden of proving ethical violation arising from such convictions. *Committee on Legal Ethics v. Grubb*, 187 W. Va. 608, 420 S.E.2d 744 (1992). License to practice is valuable right, such that its withdrawal must be accompanied by appropriate due process procedures. *Committee on Legal Ethics v. Moore*, 186 W. Va. 127, 411 S.E.2d 452 (1991). Repayment of client's funds will not prevent disciplinary proceedings against attorney. *Committee on Legal Ethics v. Woodyard*, 174 W. Va. 40, 321 S.E.2d 690 (1984). False testimony on a material issue is grounds for disciplinary action even though no harm results. *Committee on Legal Ethics v. Craig*, 187 W. Va. 14, 415 S.E.2d 255 (1992). Withdrawal from case does not insulate attorney from liability for acts undertaken prior thereto. *Cardot v. Luff*, 164 W. Va. 307, 262 S.E.2d 889 (1980). Failure to settle estate until nearly ten years after probating will constitutes neglect of legal matter and warrants reprimand and submission of plan of supervision to committee. *Committee on Legal Ethics v. Matthews*, 186 W. Va. 122, 411 S.E.2d 265 (1991). Attempt to defraud government by filing false and fraudulent income tax returns for client is flagrant violation of Rules of Professional Conduct, and clearly indicates that attorney is unfit to practice law warranting annulment of his license. *Committee on Legal Ethics v. Hart*, 186 W. Va. 75, 410 S.E.2d 714 (1991). Court may order attorney to pay prevailing party reasonable attorney fees and costs as result of attorney's vexatious, wanton or oppressive assertion of a claim or defense that cannot be supported by good faith argument for the application, extension, modification or reversal of existing law. *Daily Gazette Co. v. Canady*, 175 W. Va. 249, 332 S.E.2d 262 (1985), distinguished by *Czaja v. Czaja*, 208 W. Va. 62, 537 S.E.2d 908 (2002) (fees must be reasonable and opposing counsel must be given opportunity to object if unreasonable). Preferred course of action for accident victim's attorney,

upon learning of summary judgment dismissal of declaratory judgment action against alleged tortfeasor's insurer, is to voluntarily disclose such information to insurer in spirit of encouraging truthfulness among counsel, rather than have belatedly accepted insurer's settlement offer. *Hamilton v. Harper*, 185 W. Va. 51, 404 S.E.2d 540 (1991). In all aspects of litigation, attorneys have general duty of candor to courts of the State, which is violated when 1) silence invokes a material misrepresentation, 2) court believes misrepresentation, 3) misrepresentation is meant to be acted upon, 4) court acts upon misrepresentation, and 5) damage is sustained. *Gum v. Dudley*, 202 W. Va. 477, 505 S.E.2d 391 (1997).

Fees. See Rule 1.5, W. Va. Rules of Professional Conduct, which limits fee to a reasonable one but does permit contingent fees except in criminal cases and domestic relations matters. Upon withdrawal for just cause, attorney can recover in quantum meruit for services rendered. *May v. Seibert*, 164 W. Va. 673, 264 S.E.2d 643 (1980). Where attorney fees are sought against third party, test of reasonableness of fees includes, in addition to fee arrangement between attorney and client, consideration of such factors as time and labor required, novelty and difficulty of questions, skill requisite to perform legal service properly, preclusion of other employment by attorney due to acceptance of case, customary fee, whether fee is fixed or contingent, time limitations imposed by client or circumstances, amount involved and results obtained, experience, reputation and ability of attorneys, undesirability of case, nature and length of professional relationship with client, and awards in similar cases. *Firstbank Shinnston v. W. Va. Ins.*, 185 W. Va. 754, 408 S.E.2d 777 (1991).

## AUTOMOBILES

See "NEGLIGENCE" and "NO-FAULT."

Age-Licensing: Graduated Driver's Licenses. W. Va. Code §17B-2-3a provides that anyone 15 years or older and in school may pass a written test to receive a level one instruction permit which is good until 30 days after applicant turns 18. Driver must have licensed driver 21 and over seated in front passenger seat; no more than two additional passengers, except family members; cannot drive between eleven p.m. and five a.m.; anyone under the age of 18 cannot use a wireless communication device while operating vehicle except to contact 911 system.

After holding level one permit for 180 days immediately prior, applicant 16 years and older can receive a level two intermediate driver's license upon passage of road skills course. May drive unsupervised between five a.m. and eleven p.m.; must be supervised after eleven p.m. unless traveling to or from school event, religious



event, job, or emergency. Conviction for a moving violation must take approved driver improvement program, second conviction revokes license until 18<sup>th</sup> birthday.

Level three - full class E license available to applicants 17 years and older and older who have possessed level two intermediate license for 12 months conviction-free immediately preceding date of application, or to applicants who reach age of 18. W. Va. Code §17B-2-3a.

Any driver holding a level one instruction permit or level two intermediate license who is under age of eighteen may not use a wireless communication device while operating a motor vehicle, except to call 9-1-1. W. Va. Code §17B-2-3a.

Driver between ages of 16 and 18 must be high school graduate, enrolled in school or general educational development (GED) course or institution of higher education or excused by circumstances beyond his control. W. Va. Code §18-8-11; *Means v. Sidiropolis*, 184 W. Va. 514, 401 S.E.2d 447 (1990).

Agency. Rebuttable presumption exists that operator of other's car is acting in owner's business. *Hollen v. Reynolds*, 123 W. Va. 360, 15 S.E.2d 163 (1941). Owner liable for negligent operation of automobile by person over whom owner had right of supervision at time of accident. *Stevens v. Frump*, 132 W. Va. 366, 52 S.E.2d 181 (1949).

Negligent Entrustment. Critical element of cause of action is that vehicle was improperly loaned to person known to be likely to cause unreasonable risk of harm. *Payne v. Kinder*, 147 W. Va. 352, 127 S.E.2d 726 (1962).

Comparative/Contributory Negligence. See this heading under NEGLIGENCE.

Compulsory Insurance Coverage. For Financial Responsibility Law, see W. Va. Code §17D-4-2. Under W. Va. Code §33-6-31 any motor vehicle insurance policy must include minimum coverage for accidents involving uninsured owners and operators. Exclusion of named driver, in automobile policy, is invalidated by Financial Responsibility law, as applied to claim by third party, up to minimum coverage required by statute; but exclusion is valid in excess of minimum limits. *Jones v. Motorists Mut. Ins. Co.*, 177 W. Va. 763, 356 S.E.2d 634 (1987). Claim for injuries incurred in traffic accident deemed to be covered by State's insurance because of specific language in Department of Highway's liability policy. *Eggleston v. W. Va. Dept. of Highways*, 189 W. Va. 230, 429 S.E.2d 636 (1993). Under West Virginia motor vehicle omnibus statute, foreign self-insuring commercial trucking company must afford the same coverage as

would liability insurance contract. *Jackson v. Donahue*, 193 W. Va. 587, 457 S.E.2d 524 (1995).

Alcohol/DWI. See W. Va. Code §17C-5-2. Liability of owner of automobile for negligence of another person who operates it while under the influence of intoxicating liquor does not arise from or depend on relationship of the parties. *Payne v. Kinder*, 147 W. Va. 352, 127 S.E.2d 726 (1962). Passenger may be liable for injuries to third party caused by driver's intoxication if driver's intoxicated operation of vehicle directly caused third party's injury and passenger substantially encouraged or assisted driver's intoxication. *Price v. Halstead*, 177 W. Va. 592, 355 S.E.2d 380 (W. Va. 1987). For passenger to be held liable, there is no requirement that he know that driver is intoxicated. *Wheeler v. Murphy*, 192 W. Va. 325, 452 S.E.2d 416 (1994). Sale of beer by vendor to minor gives rise to cause of action for injuries suffered by purchaser as result of his own or other's intoxication. *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990). Generally, no liability exists on part of social host who gratuitously furnishes alcohol to guest and injury to innocent third party occurs as result of guest's intoxication. *Overbaugh v. McCutcheon*, 183 W. Va. 386, 396 S.E.2d 153 (1990).

Damages. See also "DAMAGES." Where jury awards an amount approximating insured's estimates, insured has substantially prevailed. *Hadorn v. Shea*, 193 W. Va. 350, 456 S.E.2d 194 (1995). Whenever policy holder substantially prevails in action against insurer, insurer is liable for 1) insured's reasonable attorneys' fees, 2) damages caused by delay in settlement, and 3) damages for aggravation and inconvenience. Question of whether insured has substantially prevailed against insurer is determined by totality of policyholder's negotiations. *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). Diminution in value to structurally damaged automobile can be recovered over and above cost of repair if total recovery does not exceed value of automobile before accident. *Ellis v. King*, 184 W. Va. 227, 400 S.E.2d 235 (1990).

Family Purpose Doctrine. Family purpose doctrine imposes liability upon wife for negligent operation of her automobile by her husband, although automobile is maintained by him as head of family. *Wyant v. Phillips*, 116 W. Va. 207, 179 S.E. 303 (1935). And upon father who is owner of car, when car is driven by guest in presence of son. *Buffa v. Baumgartner*, 133 W. Va. 758, 58 S.E.2d 270 (1950). Family purpose doctrine will not prevail over clear and explicit contractual agreement in automobile liability insurance policy excluding insurance liability for claims arising out of accidents occurring while any automobile was being operated by insured's son. *McKenzie v. Fed. Mut.*, 393 F. Supp. 295

(S.D. W. Va. 1975). Owner of motor vehicle cannot be held liable under family purpose doctrine for personal injuries caused by his child's negligent operation of vehicle where child has not lived in his household for several years. *Bell v. West*, 168 W. Va. 391, 284 S.E.2d 885 (1981). Negligence of son driving father's motorcycle may not be imputed to father to bar his recovery for destruction of motorcycle. *Bartz v. Wheat*, 169 W. Va. 86, 285 S.E.2d 894 (1982). Mother, as passenger, may sue driver, as driver, for injuries in car crash caused by daughter's negligence; family purpose doctrine does not impute negligence of daughter onto mother for purposes of contributor/comparative negligence. *Erie Indem. v. Kerns*, 179 W. Va. 305, 367 S.E.2d 774 (1988); explained in *Cole v. Fairchild*, 198 W. Va. 736, 482 S.E.2d 913 (1996).

**Guests.** No insurance policy shall exclude coverage to owner or operator of motor vehicle on account of bodily injury or property damage to any guest who is passenger in motor vehicle. W. Va. Code §33-6-29. Parents are liable to unemancipated infant for personal injuries sustained in motor vehicle accident caused by negligence of parents. *Lee v. Comer*, 159 W. Va. 585, 224 S.E.2d 721 (1976). Driver owes guest duty to use reasonable care, but guest must also exercise reasonable care for his own safety. *Herold v. Clendennen*, 111 W. Va. 121, 161 S.E. 21 (1931). Other cases (caveat: these cases decided prior to adoption of comparative fault, and deal with old doctrine of contributory negligence). *Lewellyn v. Shott*, 109 W. Va. 379, 155 S.E. 115 (1930) (gratuitous guest accepts private automobile as he finds it; owner or operator not guarantor of safety of gratuitous guest but must exercise reasonable care); *Broyles v. Hagerman*, 116 W. Va. 267, 180 S.E. 99 (1935) (duty of reasonable care applies whether guest is invitee or licensee); *Marple v. Haddad*, 103 W. Va. 508, 138 S.E. 113 (1927) (One carried gratuitously in automobile and at his own request, takes machine as he finds it, subject to duty of operator to warn licensee of any known dangerous defect in vehicle). Guest is estopped to sue host driver after having been coplaintiff with in another action arising out of same accident. *Watkins v. Norfolk & Western Ry.*, 125 W. Va. 159, 23 S.E.2d 621 (1942). Guests who knew or should have known of intoxication of driver cannot recover. *Hurt v. Gwinn*, 142 W. Va. 259, 95 S.E.2d 248 (1956); *But see Korzun v. Shahan*, 151 W. Va. 243, 151 S.E.2d 287 (1966) (in order to prove contributory negligence as a matter of law, evidence must be of such magnitude as to leave no doubt). Owner of automobile is liable for injury sustained by guest as result of negligence of driver agent, although driver, due to relationship, is immune to action by guest. *Smith v. Smith*, 116 W. Va. 230, 179 S.E. 812 (1935); *Collar v. McMullin*, 107 W. Va. 645, 150 S.E. 2 (1929) (master

not liable for carrying guests by servant without authority and outside scope of duties unless actual or presumptive notice); *Stone v. Rudolph*, 127 W. Va. 335, 32 S.E.2d 742 (1944); *Deskins v. Warden*, 122 W. Va. 644, 12 S.E.2d 47 (1940) (failure of operator to anticipate that which could not be reasonably expected is not actionable negligence); *Castle v. Williamson*, 192 W. Va. 641, 453 S.E.2d 624 (1994) (guest must exhaust liability coverage of driver and third party before making claim for underinsured coverage, concurrent negligence of host driver and third party will effect guest's recovery).

**Duty of Guest.** Guest has duty to remonstrate when he knows or has reason to know driver is not taking precautions. *Price v. Halstead*, 177 W. Va. 592, 355 S.E.2d 380 (1987) (modifying earlier cases but not determining whether comparative fault abrogates assumption of risk). Other cases (Caveat: these cases decided prior to adoption of comparative negligence): Guest must exercise ordinary care for his own safety. *Herold v. Clendennen*, 111 W. Va. 121, 161 S.E. 21 (1931). But guest must have time to warn driver of impending danger. *Dangerfield v. Akers*, 127 W. Va. 409, 33 S.E.2d 140 (1945). Guest must alight from car if opportunity exists. *Young v. Wheby*, 126 W. Va. 741, 30 S.E.2d 6 (1944). Unheeded audible protest by one of several passengers, will relieve fellow passengers of duty to protest. *Boyce v. Black*, 123 W. Va. 234, 15 S.E.2d 588 (1941). But not applicable where guest seeks recovery from driver of another car. *Gilmer v. Janutolo*, 116 W. Va. 500, 182 S.E. 572 (1935).

**Imputed Negligence/Joint Enterprise.** Whether employee injured while being carried to work in employer's automobile is claimant whose coverage is excluded under policy as "employee while engaged in employment" depends upon whether carriage is term of contract of employment. *Farm Bureau v. Smoot*, 95 F. Supp. 600 (S.D. W. Va. 1950). Employee riding with employer-driver was not engaged in joint enterprise, where he had no voice in directing movements of truck. *Parsons v. N.Y. Cent. R.R. Co.*, 127 W. Va. 619, 34 S.E.2d 334 (1945). Existence of joint enterprise (joint action for common social, recreational purpose) does not impose liability on passenger for driver's negligence; but passenger could be held liable where he participates in and substantially encourages intoxication of driver. *Price v. Halstead*, 177 W. Va. 592, 355 S.E.2d 380 (1987).

**Omnibus Clause.** Any other person with express or implied permission of named insured will be covered under insured's liability policy. W. Va. Code §33-6-31 (a) and W. Va. Code §17D-4-12 (b) (2). Omnibus clause requires insurer to provide coverage when initial permission has been granted by insured owner, or authorized agent, to driver who then causes injury or property dam-



age. *Universal Underwriters v. Taylor*, 185 W. Va. 606, 408 S.E.2d 358 (1991). Initial permission can only be extended by a named insured or by one authorized to grant permission. *Metro. Prop. & Liab. Ins. Co. v. Acord*, 195 W. Va. 444, 465 S.E.2d 901 (1995).

**Ownership/Title.** Title certificate issued by Department of Motor Vehicles is not dispositive of question of ownership and may be rebutted by other evidence. *Commercial Credit Corp. v. Citizens Nat'l Bank*, 148 W. Va. 198, 133 S.E.2d 720 (1963); *Keyes v. Keyes*, 182 W. Va. 802, 392 S.E.2d 693 (1990). Clerical failure of seller to write name of buyer on certificate of title was not sufficient to invoke liability on seller for buyer's negligent operation where money was exchanged and possession has been delivered. *State ex rel. Castle v. Perry*, 201 W. Va. 90, 491 S.E.2d 760 (1997).

**Pedestrians.** Pedestrian crossing street between street crossings in violation of ordinance is guilty of prima facie negligence but is not necessarily precluded from recovery; to preclude recovery illegal crossing must naturally and proximately result in pedestrian's injury, a question clearly within province of jury. *Kretzer v. Moses Pontiac Sales*, 157 W. Va. 600, 201 S.E.2d 275 (1973). Medical coverage benefits are available to insured under medical payments of his automobile insurance policy when insured is struck as a pedestrian in same way coverage is available under uninsured motorist statute. *Hamric v. Doe*, 201 W. Va. 615, 499 S.E.2d 619 (1997). Insured's collision with car as pedestrian crossing street does not arise out of "use" of his automobile; therefore his policy provides no liability coverage. *Cleaver v. Big Arm Bar & Grill, Inc.*, 202 W. Va. 122, 502 S.E.2d 438 (1998).

**No-Fault.** Not applicable in West Virginia.

**Motorized Bicycles.** See W. Va. Code §§17C-1-4, 17C-1-5. Operating bicycle at night without lamp on front, visible from at least 500 feet and without red reflector on rear of bicycle, in violation of W. Va. Code §17C-11-7 held contributory negligence as a matter of law. *Lewis v. McIntire*, 150 W. Va. 117, 144 S.E.2d 319 (1965) (Caveat: decided before adoption of comparative fault).

**Seat Belts.** Seat belts for children. W. Va. Code 17C-15-46 requires that children under age of eight must be restrained by seat belt or federally approved child restraint device (latter must be used for children under eight who are not at least 4 feet 9 inches in height); failure to use device, however, may not be used as evidence of negligence by parents. Evidence of failure to wear seat belt is inadmissible in negligence action to assess comparative fault or to demonstrate failure to mitigate

damages. *Miller v. Jeffrey*, 213 W. Va. 41, 576 S.E.2d 520 (2002).

**Service of Process.** Service of Process Upon Non-resident Motorists. W. Va. Code §56-3-31 and W. Va. R. Civ. P. 4 (d) (1) provides for service of process on Secretary of State or insured's insurance company as attorney for non-resident motorists, and notice to non-resident motorists by registered or certified mail, in actions arising out of accidents in this state involving motor vehicles or operated by non-resident motorists. Objection by non-resident to statutory service of process is not waived by general appearance if issue raised in answer or in motion under Rule 12 (b). *Teachout v. Larry Sherman's Bakery, Inc.*, 158 W. Va. 1020, 216 S.E.2d 889 (1975). Venue of suit against foreign corporation sued under non-resident motorists statute is the county where accident took place in absence of other facts giving venue. *Crawford v. R.E. Carson and Packard Motor Car Co.*, 138 W. Va. 852, 78 S.E.2d 268 (1953); W. Va. Code §56-1-1. Default judgment against nonresident motorist for negligent operation of a motor vehicle in West Virginia is void for lack of jurisdiction where registered mail containing process forwarded to motorist by the secretary of state, after service upon him, was returned bearing postal notation "Insufficient Address." *Evans v. Holt*, 193 W. Va. 578, 457 S.E.2d 515 (1995).

**Speed Limit.** Where violation of speed limit is relied upon to prove negligence, it is not necessary to prove that driver was aware of speed limit. Evidence that 25-mile-per-hour speed limit sign was posted in opposite lane at point of accident creates presumption in wrongful death action that speed limit was 25 m.p.h. at point of accident absent evidence of irregularity in authorization of limit. *Pickett v. Taylor*, 178 W. Va. 805, 364 S.E.2d 818 (1987).

**Trailer/Weight Limits.** Oversize vehicles. Owner or operator of oversize vehicle, by statute is strictly liable to state for property damage, but is not strictly liable for personal injuries arising out of accidents involving vehicle. *McGlone v. Superior Trucking Co.*, 178 W. Va. 659, 363 S.E.2d 736 (1987).

**Uninsured/Underinsured Endorsements.** Uninsured motorists coverage is mandatory at statutorily set minimum in W. Va. Code §17D-4-2; *Snider v. State Farm Mut. Auto. Ins. Co.*, 360 F. Supp. 929 (S.D. W. Va. 1973). Insurer must offer insured option to purchase uninsured motorists coverage at limits up to 100/300/50, or up to limits of liability purchase in policy. Insurer bears burden of proof of compliance by making reasonable intelligible offer; in absence of such proof, insurer is liable for higher policy limits. W. Va. Code §33-6-31 (1988); *Bias v. Nationwide Mut. Ins. Co.*, 179 W. Va. 125, 365 S.E.2d 789 (1987). Neither West Virginia stat-

ute nor case law requires insured to obtain judgment against uninsured motorist as condition precedent to insurer's contractual duty to deal with insured fairly and in good faith in settlement negotiations. *Weese v. Nationwide Ins. Co.*, 879 F.2d 115 (4th Cir. 1989). Insurer can limit his liability as long as limitations do not conflict with spirit and intent of statute and premium charged is consistent with these limitations. *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989) (allowing exclusion of coverage for son under exclusionary language of underinsured motorist clause in father's policy). Insured covered by more than one uninsured/underinsured motorist policy may recover up to limits of stacked policies or amount of judgment whichever is less. However, anti-stacking language in case of liability is acceptable in absence of contrary statute. *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990). When an insured has underinsured motorist coverage for more than one vehicle under a single policy, insured may not stack coverages of multiple vehicles. *Arbogast v. Nationwide Mut. Ins. Co.*, 189 W. Va. 27, 427 S.E.2d 461 (1993). An insured is not entitled to stack liability coverage for every vehicle covered by a policy, when insured received a multi-car discount but policy contains language limiting liability. *Payne v. Weston*, 195 W. Va. 502, 466 S.E.2d 161 (1995); see also *Linkinogor v. Nationwide Mut. Ins. Co.*, 200 W. Va. 265, 489 S.E.2d 19 (1997). Named insured's knowing and intelligent rejection of optional uninsured and underinsured motorist coverage is binding on all persons insured under policy. *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995). Permissive user of insured's vehicle is entitled to recover uninsured/underinsured benefits only on occupied vehicle and may not stack insured's coverage on another vehicle. *Starr v. State Farm Fire & Cas. Co.*, 188 W. Va. 313, 423 S.E.2d 922 (1992); see also *Adkins v. Meador*, 201 W. Va. 148, 494 S.E.2d 915 (1997). Question of uninsured motorist coverage involving an aspect of policy coverage is treated as a contract question for purposes of conflict of law analysis. *Lee v. Saliga*, 179 W. Va. 762, 373 S.E.2d 345 (1988); *Adkins v. Sperry*, 190 W. Va. 120, 437 S.E.2d 284 (1993). Underinsured/uninsured motorist coverage under W. Va. Code §33-6-31 (b) contemplates recovery, up to coverage limits, from injured person's insurer, for damages not compensated by negligent tortfeasor who owned uninsured/underinsured vehicle. When a host driver's underinsured motorist policy language specifically provides coverage of a guest passenger as insured, and guest passenger is injured by concurrent negligence of host driver and third party, guest passenger may recover under host driver's underinsured policy if third party meets definition of underinsured motorist. *Dairyland Ins. Co. v. Bradley*, 192 W. Va. 199, 451 S.E.2d 765 (1994). Such coverage is activated when amount of tortfeasor's vehi-

cle liability insurance available to injured person is less than total amount of damages sustained by injured person, regardless of comparison between such policy limits available and underinsured motorist coverage limits. *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990). Underinsured motorist statute precludes offsets of amounts paid by tortfeasor's insurer against underinsured motorist policy limits of insurance carrier. W. Va. Code §33-6-31 (b); *Brown v. Crum*, 184 W. Va. 352, 400 S.E.2d 596 (1990); *Morrison v. Haynes*, 192 W. Va. 303, 452 S.E.2d 394 (1994). Absent specific coverage provisions to the contrary, underinsured motorist coverage is not available where insured vehicle strikes tire or other type of immobile object or debris on highway. *State Farm Mut. Auto. Ins. Co. v. Norman*, 191 W. Va. 498, 446 S.E.2d 720 (1994).

## AVIATION

See "ACCIDENT AND HEALTH INSURANCE, Excepted Risks."

A life insurance policy may contain provisions excluding or restricting coverage when death occurs as a result of aviation. W. Va. Code §33-13-25 (1998). Passenger in plane precluded from recovering where policy provided for exclusion while "engaging in aeronautics or submarine operations, either as passenger or otherwise." *Beveridge v. Jefferson Stand. Life Ins. Co.*, 120 W. Va. 256, 197 S.E. 721 (1938). However, recovery was allowed where policy merely provided for exclusion while "participating in aeronautics." *Chappell v. Commercial Cas. Ins. Co.*, 120 W. Va. 262, 197 S. E. 723 (1938).

Doctrines of absolute liability and *res ipsa loquitur* are applicable to unexplained airplane crashes. *Parcell v. United States*, 104 F. Supp. 110 (D. W. Va. 1951). Whether a pilot was negligent, and whether his negligence, if proven, was supervening or intervening cause, precluding imposition of liability on maintenance firm, was jury issue where there were inconsistencies in trial and deposition testimony, and accident reconstruction was result of expert and mechanic's testimony. *Costoplos v. Piedmont Aviation, Inc.*, 184 W. Va. 72, 399 S.E.2d 654 (1990).

Where decedents died on airline flight chartered to transport university's football team, they were not covered under insurance policy requiring death to have occurred in flying upon regular passenger route with definite schedule. *White v. Washington Nat'l Ins. Co.*, 162 W. Va. 829, 253 S.E.2d 144 (1979).

Certified hot air balloon pilot qualified to testify as expert in negligence action against manufacturer and designer of hot air balloons. *Cargill v. Balloon Works, Inc.*, 185 W. Va. 142, 405 S.E.2d 642 (1991).



**BROKERS**

See "AGENTS AND BROKERS."

**BURGLARY INSURANCE**

Liability. Insurer not liable for burglary of cash drawer inside safe while outer doors were closed but not locked where policy required all doors to be closed and locked by all combination and time locks thereon. *Stone v. Nat'l Sur. Corp.*, 147 W. Va. 83, 125 S.E.2d 618 (1962).

**CANCELLATION**

See also "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

Life and Casualty Insurance. Insurance policy provisions prevail in regard to cancellation issues; however, there may be cancellation by mutual agreement of parties. *Hi-Grade Oil & Gas Co. v. U.S. Fid. & Guar. Co.*, 93 W. Va. 448, 117 S.E. 157 (1923).

Tender of original premium by worthless check is not premium payment and insurance policy is not put into effect by tender of such worthless check. *Nationwide Mut. Ins. Co. v. Smith*, 153 W. Va. 817, 172 S.E.2d 708 (1970), superceded by statute W. Va. Code §33-6A-1.

Insurer is equitably estopped from asserting that insured failed to comply with notice requirements if policy was negligently canceled. *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989).

Insurer seeking to cancel life insurance for fraud of insured must tender back premiums received on policy; however, insurer need not reinstate earlier policies surrendered by insured in payment of premium on later policy when surrendering of old policy was not factor in procurement of new one. *Nat'l Life Ins. Co. v. Hanna*, 122 W. Va. 36, 7 S.E.2d 52 (1940).

Fire Insurance. West Virginia statutory law requires receipt of actual notice of cancellation. Mailing notice is insufficient to cancel policy. Even if statutory provisions were otherwise, policy provision on "notice" would be construed to mean "actual notice." *Smith v. Mun. Mut. Ins. Co.*, 169 W. Va. 296, 289 S.E.2d 669 (1982).

Malpractice Insurance. Cancellation of malpractice insurance (statutorily defined to include insurance on any professional or expert service) prohibited after June, 1986, except for specified causes in compliance with date and manner restrictions set forth in W. Va. Code §33-20C-2. Non-renewal with cause permitted if notice sent by certified mail, return receipt requested, ninety

days in advance of non-renewal. W. Va. Code §33-20C-4 (a).

Public board's attempt to cancel policy prior to expiration was ineffective because statute allows cancellation only at end of policy period. *W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985). Non-payment by public body can, however, terminate policy. *Id.*

Written notice from agency to insured insufficient to cancel policy as there was no indication that agency was general agent of insurance company, nor any indication that agency had been given special authority to cancel policies. *Staley v. Mun. Mut. Ins. Co.*, 168 W. Va. 84, 282 S.E.2d 56 (1981).

Prohibition on cancellation or non-renewal of automobile liability policies, except for specified reasons, set forth in W. Va. Code §33-6A-1 & 4. Prohibition applies to separately issued, additional, or new automobile policies written for one insured since such policies are not "separate policies" under statute. *Horace Mann Ins. Co. v. Shaw*, 175 W. Va. 671, 337 S.E.2d 908 (1985). Notice sent by automobile insurer, stating that, if insured failed to pay premium by certain date, policy would be cancelled on later date, was insufficient to constitute notice of cancellation in light of second notice sent after date due indicating that insured still had opportunity to pay premium. *Conn v. Motorist Mut. Ins. Co.*, 190 W. Va. 553, 439 S.E.2d 418 (1993).

**CHATTEL MORTGAGE**

See "FIRE INSURANCE."

**CONSTRUCTION OF POLICY**

Ambiguity of Terms. Plain and ordinary meaning is assigned to words of an insurance policy. *Marson Coal Co., Inc. v. Ins. Co. of State of Pa.*, 158 W. Va. 146, 210 S.E.2d 747 (1974); *Polan v. Travelers Ins. Co.*, 156 W. Va. 250, 192 S.E.2d 481 (1972); *Soliva v. Shand, Morahan & Co., Inc.* 176 W. Va. 430, 345 S.E.2d 33 (1986) (*criticized by Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987)). Reasoning of *Soliva* court was rejected based on belief that insured is not presumed to know contents of adhesion type insurance policy delivered to him.) Thus, where provisions of insurance policy are clear and unambiguous, they are not subject to judicial construction, but must be given full force and effect. *Arndt v. Burdette*, 189 W. Va. 722, 434 S.E.2d 394 (1993); *Ward v. Baker*, 188 W. Va. 569, 425 S.E.2d 245 (1992). This is especially true where there is no statutory provision that regulates coverage. For example, a medical payments provision of an automobile insurance policy is construed in accordance with



language of that provision. *Carney v. Erie Ins. Co., Inc.*, 189 W. Va. 702, 434 S.E.2d 374 (1993). When interpreting insurance policy made in one state and to be performed in another, law of the state of formation of contract shall govern, unless another state has more significant relationship to transaction and parties, or law of other state is contrary to public policy of this state. *Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co. of Am.*, 194 W. Va. 186, 460 S.E.2d 1 (1994). Whenever policy provision is reasonably susceptible of two different meanings or where reasonable minds may disagree as to its meaning, it is ambiguous. When contract is ambiguous and parties, by their subsequent conduct, place construction on it which is reasonable, that construction will be adopted by courts. *Bd. of Vocational Educ. v. Janicki*, 188 W. Va. 100, 422 S.E.2d 822 (1992).

Reasonable expectations of insured will be given effect, even if painstaking reading of policy would negate expectation; prior decision imposing duty to read policy was expressly disapproved. *Marcum Trucking Co. v. U.S. Fid. & Guar. Co.*, 190 W. Va. 267, 438 S.E.2d 59 (1993); *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987) (unclear whether ambiguity is required for expectations to override policy language), *overruled on other grounds by Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998).

In event of ambiguity, insurance policies are strictly construed against insurer and liberally construed in favor of insured. *Marcum Trucking Co. v. U.S. Fid. & Guar. Co.*, 190 W. Va. 267, 438 S.E.2d 59 (1993); *Carney v. Erie Ins. Co., Inc.*, 189 W. Va. 702, 434 S.E.2d 374 (1993); *Surbaugh v. Stonewall Cas. Co.*, 168 W. Va. 208, 283 S.E.2d 859 (1981); *Prete v. Merch. Prop. Ins. Co.*, 159 W. Va. 508, 223 S.E.2d 441 (1976).

Official bond of police officer covers defamatory utterances made under color of office. *City of Mullens v. Davidson*, 133 W. Va. 557, 57 S.E.2d 1 (1949). Official bond of a police officer is an insurance contract under W. Va. Code §33-1-10 and liability of the surety is limited by bond as long as there is no bad faith or breach of contract. *Robinson v. Fid. & Deposit Co.*, 181 W. Va. 463, 383 S.E.2d 95 (1989). Accident policy insuring against injury while standing in public highway does not include driver of motorcycle on halted motorcycle. *Davis v. Combined Ins. Co. of Am.*, 137 W. Va. 196, 70 S.E.2d 814 (1952).

Medical expense rider does not cover insured injured by slipped jack when changing tire. *Green v. Farm Bureau Mut. Auto. Ins. Co.*, 139 W. Va. 475, 80 S.E.2d 424 (1954).

Liability policy covering unowned automobile substituted for covered vehicle, also covers substitute vehicle owned by only one of joint owners of covered vehicle. *Farley v. Am. Auto. Ins. Co.*, 137 W. Va. 455, 72 S.E.2d 520 (1952).

The West Virginia Automobile Insurance Plan does not require insurer to insure activities involving specialized equipment attached to a covered vehicle where its activities are not those of an ordinary passenger vehicle. General liability insurance policies, not automobile insurance policies, insure activities unrelated to a vehicle's use for transportation purposes. *D&M Logging Co. v. Huffman*, 189 W. Va. 9, 427 S.E.2d 244 (1993).

When language in insurance policy clearly limits recovery of derivative claims to per person limit, per occurrence limit does not apply even though statutory provision allows for recovery by other family members. *Davis v. Foley*, 193 W. Va. 595, 457 S.E.2d 532 (1995).

Plaintiff may sue uninsured/underinsured insurance carrier if plaintiff has settled with the tortfeasor's liability carrier for full amount of policy and obtained from uninsured/underinsured carrier waiver of its right of subrogation against tortfeasor. *Plumley v. May*, 189 W. Va. 734, 434 S.E.2d 406 (1993); *Arndt v. Burdette*, 189 W. Va. 722, 434 S.E.2d 394 (1993).

West Virginia motor vehicle omnibus clause, being remedial in nature, requires insurer to provide coverage when permission has been granted by insured owner of vehicle or its authorized agent to driver who causes injury or property damage during permissive use, even if driver's use of vehicle may have exceeded or differed from owner's (or agent's) specifications. *Universal Underwriters Ins. Co. v. Taylor*, 185 W. Va. 606, 408 S.E.2d 358 (1991).

To be effective under omnibus clause, "named driver exclusion" must specifically designate by name individuals to be excluded. Where a valid "named driver exclusion" is present, and where a third party personal injury claim under family purpose doctrine arises against insured, and where named excluded driver was operating vehicle without insured's consent, insurer need only provide minimum mandatory liability coverage set forth in West Virginia Financial Responsibility Act. *Ward v. Baker*, 188 W. Va. 569, 425 S.E.2d 245 (1992).

An automobile dealer's liability policy has primary coverage for an accident involving a car loaned by dealer to customer in regular course of business. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 181 W. Va. 609, 383 S.E.2d 791 (1989).

Driver of automobile in which owner was riding as passenger at time of accident was in "actual possession"

of automobile at time of accident and, therefore, coverage for damage to automobile was afforded by driver's policy which was applicable to vehicles other than automobile named in policy when in driver's "actual possession." *Mooney v. Barton*, 155 W. Va. 329, 184 S.E.2d 322 (1971).

To invoke coverage under an insurance policy which extends coverage for use of a non-owned vehicle, there must first be established causal connection between use of vehicle and injury. Absent evidence that passenger in motor vehicle encouraged or assisted in intoxication of driver, causal connection did not exist. *Johnson v. State Farm Mut. Auto. Ins. Co.*, 190 W. Va. 526, 438 S.E.2d 869 (1993).

Homeowners policy providing liability coverage insuring against negligent acts of insured provides coverage against claim of negligent entrustment of automobile by insured to his son, notwithstanding exclusion for operation and use of vehicles. *Huggins v. Tri-County Bonding Co.*, 175 W. Va. 643, 337 S.E.2d 12 (1985).

Provision in hospital policy excluding injury covered by Workers' Compensation precluded recovery for any expenses where Workers' Compensation covered part of such expenses. *Keffer v. Prudential Ins. Co. of Am.*, 153 W. Va. 813, 172 S.E.2d 714 (1970).

Where permission was given to daughter to use automobile to "drive around" and daughter subsequently permitted friend to drive while she rode as a passenger in front seat, automobile was being used for purpose for which permission was given and friend was additional insured under omnibus clause of policy. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 154 W. Va. 448, 175 S.E.2d 478 (1970).

Employee of truck lessee operating truck at time of accident was held to be using truck with consent of truck liability insured within omnibus clause of policy, and lessee and lessee's employee were entitled to coverage thereunder as additional insureds. *Helvy v. Inland Mut. Ins. Co.*, 148 W. Va. 51, 132 S.E.2d 912 (1963). See also *State Farm Mut. Auto. Ins. Co. v. American Cas. Co.*, 150 W. Va. 435, 146 S.E.2d 842 (1966).

Occurrence. The term "occurrence" in limitation of liability clause from automobile insurance policy refers unmistakably to resulting event for which insured becomes liable; it does not refer to some antecedent causes of injury. *Helmick v. Jones*, 192 W. Va. 317, 452 S.E.2d 408 (1994).

Liquidated Damages. Liquidated Damages provisions in insurance contracts will be enforced but burden is on insurer to show that forfeiture of premiums provision is not grossly disproportionate to actual damages so

as to be unenforceable penalty. *W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985); *Wheeling Clinic v. Van Pelt*, 192 W. Va. 620, 453 S.E.2d 603 (1994).

Unconscionability. Because standard fire policy arises from legislative enactment, concept of unconscionability is not applicable to provisions of policy. *Meadows v. Employers' Fire Ins. Co.*, 171 W. Va. 337, 298 S.E.2d 874 (1982).

Automobile liability policy which included in definition of word "insured" any employee of named insured while acting within scope of his duties and any person using covered automobile with named insured's permission, covered employee of named insured while using automobile with insured's permission whether use was within or without scope of his employment. *Lewis v. Dils Motor Co.*, 148 W. Va. 515, 135 S.E.2d 597 (1964).

Pick up truck with stake body owned by insured's corporate employer was not "private passenger automobile" within meaning of accident policy. *Laraway v. Heart of Am. Life Ins. Co.*, 153 W. Va. 70, 167 S.E.2d 749 (1969). Intentional shooting which occurs from within cab of stationary pickup truck is not act arising out of ownership, maintenance, operation or use of vehicle. *Baber v. Fortner*, 186 W. Va. 413, 412 S.E.2d 814 (1991). But see *Farmers & Mechs. Mut. Ins. Co. v. Cook*, 210 W. Va. 394, 557 S.E.2d 801 (2001) ("Intentional acts" exclusion does not apply to a shooting in self-defense or defense of another and insurer is responsible for defending wrongful death action against insured).

Business Pursuits. Exclusion for activities arising out of business pursuits applies only to continuous or regular activity engaged in by insured for purpose of earning livelihood. *Camden Fire Ins. Ass'n v. Johnson*, 170 W. Va. 313, 294 S.E.2d 116 (1982); *Huggins v. Tri-County Bonding Co.*, 175 W. Va. 643, 337 S.E.2d 12 (1985); *W. Va. Ins. Co. v. Lambert*, 193 W. Va. 681, 458 S.E.2d 774 (1995).

Reformation. Written insurance policy may be reformed to conform with actual intent of parties where mistake was mutual if three prerequisites are met: 1) There was a bargain between parties. 2) There is a written instrument which is supposed to contain terms of that bargain. 3) There is a material variance between mutual intention of parties and written instruments. *Ohio Farmers Ins. Co. v. Video Bank, Inc.*, 200 W. Va. 39, 488 S.E.2d 39 (1997).

Excess and Pro Rata Coverage. Where pro rata and excess coverage clauses appear in automobile liability insurance policies of both driver and owner of an automobile, owner's insurer bears primary liability and must

pay entire loss up to policy limit. *Allstate Ins. Co. v. State Auto. Mut. Ins. Co.*, 178 W. Va. 704, 364 S.E.2d 30 (1987); *State ex rel. Allstate Ins. Co. v. Karl*, 190 W. Va., 176, 437 S.E.2d 749 (1993). Absent bad faith claim against insurer, prejudgment interest in excess of stated policy limits may not be assessed against insurer without policy provision providing therefore. *Buckhannon-Upshur County Airport Auth. v. R&R Coal Contracting, Inc.*, 186 W. Va. 583, 413 S.E.2d 404 (1991). Prejudgment interest is not a cost, but rather a form of compensatory damages intended to make injured plaintiff whole as far as loss of use of funds are concerned. *Id.*

An insurer wishing to avoid liability on a general or comprehensive insurance policy must make exclusionary clauses conspicuous, plain, clear, and obvious in their relationship to other policy terms, and insurer must bring such provisions to insured's attention. *Marcum Trucking Co. v. U.S. Fid. & Guar. Co.*, 190 W. Va. 267, 438 S.E.2d 59 (1993). Exclusionary language will be construed against insurer and reasonable expectations of insured will be honored even if painstaking study of policy would negate expectations (overruling prior case which imposed duty to read policy on insured). *Carney v. Erie Ins. Co., Inc.*, 189 W. Va. 702, 434 S.E.2d 374 (1993); *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987).

Where automobile dealership employee is returning vehicle to dealership and is involved in automobile accident, medical payments provision under employee's personal automobile liability policy will not cover loss where there is automobile business exclusion for anyone while working in a business that sells, repairs, services, or parks autos, unless business is yours. *Carney v. Erie Ins. Co., Inc.*, 189 W. Va. 702, 434 S.E.2d 374 (1993). "Consent to settle provision" of automobile insurance policy pertaining to underinsured motorists statutes, whereby insured voids his underinsurance coverage by settling claim with tortfeasor without insurer's written consent was valid and enforceable way for insurer to protect its right to subrogate claims. *Arndt v. Burdette*, 189 W. Va. 722, 434 S.E.2d 394 (1993).

Policy and application, if attached, should be construed together. *Layfield v. Jefferson Standard Life Ins. Co.*, 120 W. Va. 564, 199 S.E. 450 (1938). Specifications in bid request may be part of insurance contract; where parties look to specifications to guide performance of contract and parties act in conformity therewith, specifications will become part of contract. *W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985). Plan summary, or promotional or sales material, will prevail over express language of policy in the event of conflict; insurer is estopped to deny terms of summary or promotional mate-

rial. *Romano v. New Eng. Mut. Life Ins. Co.*, 178 W. Va. 523, 362 S.E.2d 334 (1987) (insured died one day after exercising negative option to obtain coverage under group plan; specific language of policy had not been provided prior to insured's death).

Issues involving insurance coverage should be resolved under conflict of laws principles applicable to contracts. *Adkins v. Sperry*, 190 W. Va. 120, 437 S.E.2d 284 (1993); *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W. Va. 329, 424 S.E.2d 256 (1992).

The law of the state of formation governs when interpreting a policy created in one state but performed in another. *Adkins v. Sperry*, 190 W. Va. 120, 437 S.E.2d 284 (1993); *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W. Va. 329, 424 S.E.2d 256 (1992); *Liberty Mut. Ins. Co. v. Triangle Indus. Inc.*, 182 W. Va. 580, 390 S.E.2d 562 (1990). Law of state of formation shall govern unless another state has more significant relationship to transaction and parties, or law of other state is contrary to public policy of this state. *Joy Tech., Inc. v. Liberty Mut. Ins. Co.*, 187 W. Va. 742, 421 S.E.2d 493 (1992).

When insurer creates reasonable expectation of insurance coverage and accepts premium, denial notice, in order to be effective, must include a refund of premium. *Keller v. First Nat'l Bank*, 184 W. Va. 681, 403 S.E.2d 424 (1991).

Insurers may incorporate terms, conditions, and exclusions in auto insurance consistent with premium, so father's underinsured motorist coverage policy will not cover son if language of policy and cost are consistent. *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989); *Dairyland Ins. Co. v. East*, 188 W. Va. 581, 425 S.E.2d 257 (1992).

Conditional Receipt of Application and Oral Binders. Binders or other contracts for temporary insurance may be made orally or in writing and shall be deemed to include all usual terms of policy as to which binder was given, together with such applicable endorsements as are designated in binder. W. Va. Code §33-6-18 (a). However, W. Va. Code §33-6-18 does not apply to conditional receipts issued by life, accident and sickness insurers, nor to policies of group insurance. W. Va. Code §33-6-18 (d).

A "binding receipt" and a temporary term acceptance, both attached to application for policy of life insurance, effect of which receipt and acceptance is expressly predicated upon issuance of insurance policy as applied for, are not binding or effective where insurer issues policy different from that described in application, unless policy issued in lieu thereof is accepted by applicant. *Kronjaeger v. The Travelers Ins. Co.*, 124 W. Va. 730, 22 S.E.2d 689 (1942). Coverage under binder is not

conditioned on payment unless it is required. *American Hardware Mut. Ins. Co. v. BIM, Inc.*, 885 F.2d 132 (4th Cir. 1989).

## CONTRIBUTION

See "LIABILITY INSURANCE."

Contribution between Joint Tortfeasors. W. Va. Code, §55-7-13, makes following provision regarding contribution by joint tortfeasors: "Where a judgment is rendered in an action ex delicto against several persons jointly, and satisfaction of such judgment is made by any one or more of such persons, the others shall be liable to contribution to the same extent as if the judgment were upon an action ex contractu."

Doctrine of contribution has its roots in equitable principles. Right to contribution arises when persons having common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his pro tanto share of obligation. One of essential differences between indemnity and contribution is that contribution does not permit full recovery of all damages paid by party seeking contribution. Recovery can only be obtained for excess that such party has paid over his own share. *Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 459 S.E.2d 151 (1995); *Mackey v. Irisari*, 191 W. Va. 355, 445 S.E.2d 742 (1994).

Each joint tortfeasor has inchoate right of contribution between joint tortfeasors in advance of judgment, unless that joint tortfeasor's act is malum in se. *Haynes v. City of Nitro*, 161 W. Va. 230, 240 S.E.2d 544 (1977); *Mackey v. Irisari*, 191 W. Va. 355, 445 S.E.2d 742 (1994); *Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 459 S.E.2d 151 (1995); Syl. Pt. 2, *Savage v. Booth*, 196 W. Va. 65, 468 S.E.2d 318 (1996).

As between joint tortfeasors, right of comparative contribution exists inter se based upon their relative degrees of primary fault or negligence, even where tortfeasor with greater fault seeks contribution from one with less fault. *Sitzes v. Anchor Motor Freight*, 169 W. Va. 698, 289 S.E.2d 679 (1982); *Mackey v. Irisari*, 191 W. Va. 355, 445 S.E.2d 742 (1994).

Defendants against whom judgment is rendered may have that verdict reduced by dollar amount of any good faith settlement previously made with plaintiff by other joint tortfeasors; defendant joint tortfeasor receives pro tanto credit on plaintiff's judgment. *Bradley v. Appalachian Power*, 163 W. Va. 332, 256 S.E.2d 879 (1979); Syl. Pt. 7, *Bd. of Educ. of McDowell County v. Zando, Martin & Milstead*, 182 W. Va. 597, 390 S.E.2d 796 (1990); Syl. Pt. 1, *Savage v. Booth*, 196 W. Va. 65, 468 S.E.2d 318 (1996). Those defendants against whom verdict is rendered are jointly and severally liable to plain-

tiff for payment of remainder of verdict. Where relative fault of nonsettling defendants has been determined, they may seek contribution among themselves after judgment if forced to pay more than their allocated share of verdict. Syl. Pt. 7, *Bd. of Educ. of McDowell County v. Zando, Martin & Milstead*, 182 W. Va. 597, 390 S.E.2d 796 (1990); Syl. Pt. 1, *Clark v. Kawasaki Motors, U.S.A.*, 200 W. Va. 763, 490 S.E.2d 852 (1997).

In reducing jury verdict in negligence action by amount of plaintiff's prior settlement with joint tortfeasor, in light of percentage of plaintiff's comparative negligence later found by jury at trial, Court adopts "settlement first," rather than "fault first" method. *Clark* Syl. Pt. 3. In making reduction, trial court first credits amount of prior settlement against jury verdict, and then reduces remainder by percentage of plaintiff's comparative negligence. *Id.*

Joint tortfeasor who is sued may implead other joint tortfeasors. (See W. Va. Code §55-2-21 for tolling of limitations.) However, joint tortfeasor who has made good faith settlement with plaintiff prior to institution of suit may not be joined by non-settling tortfeasors and is not liable for contribution regardless of any ultimate apportionment of fault. *Cook v. Gall*, 186 W. Va. 189, 411 S.E.2d 844 (1991); *Smith v. Monongahela Power*, 189 W. Va. 237, 429 S.E.2d 643 (1993); *McDowell County Bd. of Educ. v. Stephens*, 191 W. Va. 711, 447 S.E.2d 912 (1994); *Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 459 S.E.2d 151 (1995).

Codefendants are considered joint tortfeasors for purposes of contribution or settlement offsets only if plaintiff has suffered single indivisible loss proximately caused by joint actions of codefendants. *Biro v. Fairmont Gen. Hosp.*, 184 W. Va. 458, 400 S.E.2d 893 (1990).

Good faith settlement of contribution claim entered into between one joint tortfeasor and another, while resolving legal obligations between joint tortfeasors, does not bar plaintiff from subsequently asserting direct action against settling joint tortfeasor unless settling joint tortfeasor obtains a release from plaintiff at time of settlement. *McDowell County Bd. of Educ. v. Stephens*, 191 W. Va. 711, 447 S.E.2d 912 (1994).

"Mary Carter" Agreements. "Mary Carter" agreements are valid. Defendants may, by express agreement, release and settle inter se their claims for contribution and indemnity prior to recovery against one or more of them; moreover, such contract of settlement providing that defendant receiving payment will indemnify other defendants in event of monetary recovery against them by plaintiff is not, because of those features alone, against public policy. *State ex rel. Vapor Corp. v. Na-*



rick, 173 W. Va. 770, 320 S.E.2d 345 (1984). Where settling defendant remains in case through jury verdict, plaintiff's verdict is reduced by amount of "Mary Carter" agreement and settling defendant is subject to contribution. Disclosure to jury of general nature of a "Mary Carter" settlement agreement is not required in each case; such disclosure lies within sound discretion of trial court. *Mackey v. Irisari*, 191 W. Va. 355, 445 S.E.2d 742 (1994). But, disclosure of "Mary Carter" agreement to court and to opposing counsel is required. *Gum v. Dudley*, 202 W. Va. 477, 505 S.E.2d 391 (1997).

**Indemnity.** Indemnity is based on principles of equity and restitution, and one must be without fault to obtain implied indemnity. *Sydenstricker v. Unipunch Prods.*, 169 W. Va. 440, 288 S.E.2d 511 (1982). Indemnitor may be liable for cost of settlement without proof indemnitee would have lost at trial; costs and attorney's fees of indemnitee are recoverable. *Valloric v. Dravo Corp.*, 178 W. Va. 14, 357 S.E.2d 207 (1987). Indemnity agreements are permitted unless they indemnify against sole negligence of indemnitee. W. Va. Code §55-8-14; *Dalton v. Childress Serv.*, 189 W. Va. 428, 432 S.E.2d 98 (1993).

Third-party complaint against employer, grounded on contribution theory, must meet wanton, willful or reckless conduct standard applicable to employee's suit against employer. *Miller v. Gibson*, 177 W. Va. 535, 355 S.E.2d 28 (1987).

Two basic types of indemnity: "express indemnity," based on written agreement, and "implied indemnity," arising out of relationship between parties. *VanKirk v. Green Constr.*, 195 W. Va. 714, 466 S.E.2d 782 (1995). General principle of implied indemnity arises from equitable considerations. At heart of doctrine is premise that person seeking to assert implied indemnity, indemnitee, has been required to pay damages caused by third party, indemnitor. In typical case, indemnitee is made liable to injured party because of some positive duty created by statute or common law, but actual cause of injury was act of indemnitor. *Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 459 S.E.2d 151 (1995).

Seller who does not contribute to defect in product may have implied indemnity remedy against manufacturer of product, when seller is sued by user. *Id.*

In multiparty product liability lawsuit, good faith settlement between plaintiff(s) and manufacturing defendant who is responsible for defective product will not extinguish right of non-settling defendant to seek implied indemnification when liability of non-settling defendant is predicated not on its own independent fault or negligence, but on theory of strict liability. *Id.*

## DAMAGES

See also "LIABILITY INSURANCE" and "NEG-LIGENCE."

**Appellate Review. Excessive Verdicts.** Courts will correct mistaken verdicts where sums certain are involved, but where indeterminate damages are involved, it is virtually never permissible to disturb verdict of jury; jury verdict will not be disturbed unless monstrous and enormous, at first blush beyond all measure, unreasonable, outrageous, manifestly shows jury passion, partiality, prejudice, or corruption. *Addair v. Majestic Petroleum*, 160 W. Va. 105, 232 S.E.2d 821 (1977); *Adkins v. Foster*, 187 W. Va. 730, 421 S.E.2d 271 (1992). Upper limits as well as fair floors must be determined in injury awards. *Martin v. Charleston Area Med. Ctr.*, 181 W. Va. 308, 382 S.E.2d 502 (1989). Verdict of \$1.25 million for pain and suffering alone, caused by 13 year old boy's loss of leg, was not excessive. *Reager v. Anderson*, 179 W. Va. 691, 371 S.E.2d 619 (1988). Verdict of \$10 million for medical malpractice causing death of child was reduced to \$3 million as excessive; evidence of insurer's settlement efforts was considered in determining what was excessive. *Roberts v. Stevens Clinic*, 176 W. Va. 492, 345 S.E.2d 791 (1986). In retaliatory discharge action, award of \$125,000 in punitive damages was unwarranted in absence of evidence of egregious conduct by employer. *Mace v. Charleston Area Med. Ctr. Found.*, 188 W. Va. 57, 422 S.E.2d 624 (1992). Some punitive awards will require downward adjustment by court because of factors that would be prejudicial to defendant if admitted at trial. *TXO Prod. v. Alliance Res.*, 187 W. Va. 457, 419 S.E.2d 870 (1992).

**Verdict Inadequate.** Where verdict of jury does not cover actual pecuniary loss properly proved and it can be clearly ascertained that verdict is inadequate, verdict will be set aside. *Snyder v. Woods*, 178 W. Va. 741, 364 S.E.2d 269 (1987) (verdict failed to include any award for proved future medical costs or past or future pain and suffering). Where verdict does not include elements of damage that are specifically proved in uncontroverted amounts and a substantial amount as compensation for injuries and consequent pain and suffering, verdict is inadequate and will be set aside. *Godfrey v. Godfrey*, 193 W. Va. 407, 456 S.E.2d 488 (1995); *Maynard v. Napier*, 180 W. Va. 591, 378 S.E.2d 456 (1989). See also, *De Long v. Albert*, 157 W. Va. 874, 205 S.E.2d 683 (1974); *Allen v. Minnick*, 182 W. Va. 755, 391 S.E.2d 905 (1990); *Gebhardt v. Smith*, 187 W. Va. 515, 420 S.E.2d 275 (1992). Jury verdict will not be inadequate unless it is sum so low that under facts of case reasonable men cannot differ about its inadequacy. *Godfrey v. Godfrey*, 193 W. Va. 407, 456 S.E.2d 488 (1995); *Fullmer v. Swift Energy*, 185 W. Va. 45, 404 S.E.2d 534



(1991). But courts are reluctant to set aside jury's award of damages unless clearly shown that award was inadequate. *DeLong v. Kermit Lumber*, 175 W. Va. 243, 332 S.E.2d 256 (1985). In appeal from allegedly inadequate damage award, evidence concerning damages is to be viewed most strongly in favor of defendant. *Godfrey v. Godfrey*, 193 W. Va. 407, 456 S.E.2d 488 (1995); *Hewett v. Frye*, 184 W. Va. 477, 401 S.E.2d 222 (1990); *Gebhardt v. Smith*, 187 W. Va. 515, 420 S.E.2d 275 (1992).

Verdict of \$30,000 in personal injury action where young girl's foot was mangled by lawnmower was manifestly inadequate. *Godfrey v. Godfrey*, 193 W. Va. 407, 456 S.E.2d 488 (1995). Verdict of \$4,000 in pedestrian's widow's action arising from pedestrian's death in auto accident was manifestly inadequate and unsupported by evidence where pedestrian was 41 year old husband and father who was not employed outside home but contributed to family through variety of means. *Linville v. Moss*, 189 W. Va. 570, 433 S.E.2d 281 (1993).

Psychic Injuries, Mental Pain and Suffering. No rule for measuring amount of compensation for pain and suffering and court may not substitute its opinion for jury's unless verdict is so small it clearly indicates that jury was influenced by improper motives. *Richmond v. Campbell*, 148 W. Va. 595, 136 S.E.2d 877 (1964). Only truly outrageous, extreme and intolerable conduct, as opposed to "bad manners" and "hurt feelings," will support award for emotional distress; "this is a high standard indeed." *Keyes v. Keyes*, 182 W. Va. 802, 392 S.E.2d 693 (1990). Third person may recover emotional distress damages if direct victim of defendant's outrageous conduct is member of third person's immediate family, and third person witnessed outrageous conduct. *Courtney v. Courtney*, 186 W. Va. 597, 413 S.E.2d 418 (1991); *Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992). To meet sensory observation requirement for negligent infliction of emotional distress, sufficient that a third person closely related to victim is sensorially aware of critical injury or death as result of defendant's conduct. *Stump v. Ashland, Inc.*, 201 W. Va. 541, 499 S.E.2d 41 (1997). Damages for emotional distress and mental anxiety, for invasion of privacy, could be awarded based on victim's uncorroborated testimony. *Slack v. Kanawha County Hous. & Redevelopment Auth.*, 188 W. Va. 144, 423 S.E.2d 547 (1992). In order to recover for negligent infliction of emotional distress based on fear of contracting disease, plaintiff must prove that he or she was actually exposed to disease by negligent conduct of defendant, that emotional distress was reasonably foreseeable, and that emotional distress was actually suffered as result. *Marlin v. Bill Rich Constr.*, 198 W. Va. 635, 482 S.E.2d 620 (1996). If suit for damages is based solely upon plaintiff's fear of contracting

AIDS, but there is no evidence of actual exposure to virus, fear is unreasonable, and Court will not recognize legally compensable injury. *Funeral Services by Gregory v. Bluefield Cmty. Hosp.*, 186 W. Va. 424, 413 S.E.2d 79 (1991); *overruled on other grounds, Courtney v. Courtney*, 190 W. Va., 126, 437 S.E.2d 436 (1993). Damages for emotional distress may be recovered by plaintiff against hospital based upon plaintiff's fear of contracting Acquired Immune Deficiency Syndrome (AIDS) if: plaintiff is not employee of hospital but has duty to assist hospital personnel in dealing with patient infected with AIDS; plaintiff's fear is reasonable; patient physically injures plaintiff and such physical injury causes plaintiff to be exposed to AIDS; and hospital has failed to follow regulation which requires it to warn plaintiff of fact that patient has AIDS despite elapse of sufficient time to warn. *Johnson v. W. Va. Univ. Hosp.*, 186 W. Va. 648, 413 S.E.2d 889 (1991).

Punitive Damages. Jury will not be permitted to return verdict of punitive damages without finding compensatory damages. Punitive damages must bear reasonable relationship to potential of harm caused by defendant's actions. *Garnes v. Fleming Landfill*, 186 W. Va. 656, 413 S.E.2d 897 (1991). Jury must consider five factors in awarding punitive damages: 1) punitive damages should bear reasonable relationship to harm that is likely to occur from defendant's conduct as well as to harm that actually occurred; 2) jury may consider reprehensibility of defendant's conduct; 3) whether defendant profited from his wrongful conduct; 4) punitive damages should bear reasonable relationship to compensatory damages; and 5) defendant's financial position. *TXO Prod. v. Alliance Res.*, 187 W. Va. 457, 419 S.E.2d 870 (1992). When trial court reviews award of punitive damages, court should, at minimum, consider those five factors given to jury to consider, as well as following additional factors: 1) costs of litigation; 2) any criminal sanctions imposed on defendant for his conduct; 3) any other civil actions against same defendant based on same conduct; and 4) appropriateness of punitive damages to encourage fair and reasonable settlements when clear wrong has been committed. *Garnes v. Fleming Landfill*, 186 W. Va. 656, 413 S.E.2d 897 (1991). Insurer may be held liable for punitive damages for refusal to pay insured's property damage claim if such refusal is accompanied by malicious intention (actual malice) to injure or defraud. "Actual malice" may be demonstrated by evidence that insurer actually knew that insured's claim was proper, but willfully and intentionally denied claim. *Hayseeds v. State Farm*, 177 W. Va. 323, 352 S.E.2d 73 (1986); *See also, Berry v. Nationwide Mut.*, 181 W. Va. 168, 381 S.E.2d 367 (1989). Actual malice may also be demonstrated by evidence insurer actually knew claim was proper, but nonetheless acted willfully, maliciously



and intentionally in failing to settle claim on behalf of its insured. *Shamblin v. Nationwide Mut.*, 183 W. Va. 585, 396 S.E.2d 766 (1990). Punitive damages may be recovered in action under Fair Credit Reporting Act. *Jones v. Credit Bureau of Huntington*, 184 W. Va. 112, 399 S.E.2d 694 (1990). In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting rights of others appear, or where legislative enactment authorizes it, jury may assess exemplary, punitive, or vindictive damages. *Goodwin v. Thomas*, 184 W. Va. 611, 403 S.E.2d 13 (1991). In assessing punitive damages, trier of fact should take into consideration all circumstances surrounding particular occurrence including nature of wrongdoing, extent of harm inflicted, intent of party committing act, wealth of perpetrator, as well as any mitigating circumstances. *Id.*

Punitive damages should bear reasonable relationship to harm likely to occur from defendant's conduct as well as harm that has actually occurred. If defendant profited from his wrongful conduct, punitive damages should remove profit and should be in excess of profit so that award discourages future bad acts. Punitive damages should bear a reasonable relationship to compensatory damages, however, ratios of 500 to 1 are not per se unconstitutional. *TXO Prod. v. Alliance Res.*, 187 W. Va. 457, 419 S.E.2d 870 (1992).

Collateral Source Rule. Tortfeasor's liability insurance coverage set off against limits of injured person's damages rather than limits of injured person's underinsured motorist coverage. *State Auto. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990); *Brown v. Crum*, 184 W. Va. 352, 400 S.E.2d 596 (1990). Collateral source rule applies to uninsured and underinsured motorist benefits and thus precludes offsetting of these benefits as against damages claimed by injured party under W. Va. Code §33-6-31 (b). *Johnson v. General Motors*, 190 W. Va. 236, 438 S.E.2d 28 (1993).

Statutory Caps on Awards. W. Va. Code §55-7B-8, which provides \$1,000,000 limit on amount recoverable for non-economic loss if medical professional liability action is constitutional, and it does not violate state constitutional equal protection, special legislation, state constitutional substantive due process, "certain remedy," or right to jury trial provisions as provided for in West Virginia Constitution. *Robinson v. Charleston Area Med. Ctr.*, 186 W. Va. 720, 414 S.E.2d 877 (1991). W. Va. Code §55-7B-8, provides that maximum amount recoverable as damages for non-economic loss in medical professional liability action against health care provider is \$1,000,000 and applies as one overall limit to aggregated claims of all plaintiffs against health care provider, rather than applying to each plaintiff separately. *Id.*

Loss of Consortium. If parental consortium claim is made, nonfatally injured parent is entitled to claim recovery for loss or impairment of parent's pecuniary ability to support minor or handicapped child, while minor or handicapped child is entitled to claim recovery for loss or impairment of nonpecuniary elements of parental consortium. *Belcher v. Goins*, 184 W. Va. 395, 400 S.E.2d 830 (1990). Claims must ordinarily be joined. *Id.* Minor children claiming loss of consortium as result of automobile accident were not to be treated as separate "per person" and "per occurrence" liability limits of automobile policy. *Fed. Kemper v. Karlet*, 189 W. Va. 79, 428 S.E.2d 60 (1993).

Calculation of Damages. Diminution in value based on structural damages, as well as repair costs, may be awarded to vehicle owner if vehicle had significant value prior to accident and total award does not exceed market value of vehicle prior to accident. *Ellis v. King*, 184 W. Va. 227, 400 S.E.2d 235 (1990). Compensatory damages recoverable by injured party incurred through breach of contractual obligation are those as may fairly and reasonably be considered as arising naturally, that is, according to usual course of things from breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at time they made contract, as probable result of breach. *Descov. v. Trushel Constr.*, 186 W. Va. 430, 413 S.E.2d 85 (1991). Two categories of damages recoverable in breach of contract action; first being those directly flowing from contract breach. As to these damages, no requirement that parties must have actually anticipated them because they are natural consequence of breach. Second category is indirect or consequential damages that arise from special circumstances of contract. In order to recover these damages, plaintiff must show that at time of contracting, parties could reasonably have anticipated that these damages would be probable result of breach. *Id.* Whether contract damages are direct or consequential is question of law for trial court. Whether special circumstances exist to show that consequential damages were within reasonable contemplation of contracting parties, however, is ordinarily question of fact for jury. *Id.* Loss of profits cannot be based on estimates which amount to mere speculation and conjecture, but they must be proved with reasonable certainty. *Art's Flower Shop v. Chesapeake & Potomac Tel.*, 186 W. Va. 613, 413 S.E.2d 670 (1991); *Cell, Inc. v. Ranson Inv.*, 189 W. Va. 13, 427 S.E.2d 447 (1992). Compensatory damages recoverable by injured party incurred through breach of contractual obligation must be proved with reasonable certainty. *Id.*

Loss of enjoyment of life resulting from permanent injury is part of general measure of damages flowing from permanent injury, and these hedonic damages are not subject to economic calculation. *Wilt v. Buracker*,



191 W. Va. 39, 443 S.E.2d 196 (1993), *cert. denied*, 511 U.S. 1129 (1994).

**Future Damages.** Defined as sums awarded to injured party for, among other things: 1) residuals or future effects of injury which have reduced capability of individual to function as whole person; 2) future pain and suffering; 3) loss or impairment of earning capacity; and 4) future medical expenses. *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974); *Dowey v. Bonnell*, 181 W. Va. 101, 380 S.E.2d 453 (1989); *Adkins v. Foster*, 187 W. Va. 730, 421 S.E.2d 271 (1992). Permanency or future effect of injury must be proven with reasonable certainty in order to permit jury to award future damages. *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974); *Dowey v. Bonnell*, 181 W. Va. 101, 380 S.E.2d 453 (1989). Impairment of earning capacity is proper element of recovery if permanence of injury and reasonable degree of certainty of damages are proven. *Adkins v. Foster*, 187 W. Va. 730, 421 S.E.2d 271 (1992). Proof of future damages cannot be sustained by mere speculation or conjecture. *Dowey v. Bonnell*, 181 W. Va. 101, 380 S.E.2d 453 (1989). Proof of future medical expenses is insufficient as matter of law in absence of any evidence (from competent experts) as to necessity and cost of future medical treatment. *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974); *Dowey v. Bonnell*, 181 W. Va. 101, 380 S.E.2d 453 (1989).

In determining order of priorities of secondary insurers, automobile lessee's garage operations policy (despite nonownership clause) required to make payments. *Allstate Ins. v. Am. Hardware Mut.*, 865 F.2d 592 (4th Cir. 1989).

**Awards of Interest.** Interest awarded from time cause of action arose. *Bd. of Educ. of McDowell County v. Zando, Martin & Milstead*, 182 W. Va. 597, 390 S.E.2d 796 (1990). Prejudgment interest on special or liquidated damages is recoverable and must be calculated when damages are proven; it begins to run from time of injury. *Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536 (1989); *O'Neal v. Peake Operating*, 185 W. Va. 28, 404 S.E.2d 420 (1991). Where parties to settlement agreement have fixed time at which money is to be paid, right to receive interest will run from date set by parties for payment. *Auber v. Jellen*, 196 W. Va. 168, 469 S.E.2d 104 (1996). Under W. Va. Code §56-6-31, prejudgment interest on special or liquidated damages is recoverable as matter of law and must be calculated and added to those damages by trial court rather than by jury. *Beard v. Lim*, 185 W. Va. 749, 408 S.E.2d 772 (1991). Court will not, in every case, refrain from sorting out errors involving prejudgment interest, but when defendant fails to submit special jury interrogatory asking jury to set forth special liquidated damages, Court's attention

to such errors is entirely matter of grace; and if subject deliberately obfuscated by counsel or error invited, Court will summarily dismiss assignment. *Id.* It is duty of trial court to ascertain, where possible, amount of special damages proved at trial as well as actual accrual date of damages. Prudent defense counsel should continue to seek special interrogatory on issue of special damages where it would aid trial court in its determinations, but failure to submit special interrogatory will not necessarily justify award of prejudgment interest on entire verdict by trial court. In face of such failure to submit special interrogatory, however, trial court should give plaintiff benefit of any doubt in calculating prejudgment interest. *Id.*

**Attorney Fees and other Incidental Damages.** When property owner substantially prevails in damage suit, insurer is liable for insured's reasonable attorney fees, net economic damages for delay in settlement, and damages for aggravation and inconvenience. *Firstbank Shinnston v. W. Va. Ins.*, 185 W. Va. 754, 408 S.E.2d 777 (1991). Whether a policyholder has substantially prevailed is determined by looking at the totality of the policyholder's negotiations with the insurance carrier, not merely the status of negotiations before and after a lawsuit is filed. *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). Prevailing plaintiff not entitled to recover attorney's fees from defendant's liability insurer for failure to negotiate settlement in good faith. *Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536 (1989). But insured can recover attorney's fees from insurer incurred in reaching settlement where action is settled for amount equal to or approximating amount claimed by insured immediately prior to commencement of action, and attorney's services were necessary to obtain payment of insurance proceeds. *Jordan v. Nat. Grange Mut.*, 183 W. Va. 9, 393 S.E.2d 647 (1990).

**Prior Settlements.** In reducing jury verdict in negligence action by amount of plaintiff's prior settlement with joint tortfeasor, trial court should apply "settlement first" method. Under "settlement first" method, trial court first credits amount of prior settlements against jury verdict and then reduces remainder by percentage of plaintiff's comparative negligence. *Clark v. Kawasaki Motors*, 200 W. Va. 763, 490 S.E.2d 852 (1997).

## DEATH

See Law Digest Tables.

**Abatement and Survival.** When person brings action for injuries caused by wrongful act, neglect or default, and person injured dies as a result thereof, action shall not abate but may be revived in name of personal representative. W. Va. Code §55-7-8. Causes of actions which survive at common law, causes of actions for inju-

ries to property, real or personal, or injuries to person not resulting in death, or for deceit or fraud, brought by injured party, may be revived in favor of personal representative if injured party dies pending action. W. Va. Code §55-7-8a (a) - (b). If injured party dies before having begun such action, action may be begun by personal representative. W. Va. Code §55-7-8a (c); *Jones v. George*, 533 F. Supp. 1293 (S.D. W. Va. 1982). If any such action shall have begun against wrongdoer and wrongdoer dies during pendency thereof, action may be revived against personal representative of wrongdoer. W. Va. Code §55-7-8a (d).

**Action for Wrongful Death.** Action for damages may be brought by personal representative of deceased person whose death was caused by wrongful act, neglect, or default, and who would have been entitled to maintain action for damages had death not ensued, who did not compromise or accept satisfaction for injury prior to death. W. Va. Code §55-7-5; *Conrad v. Wertz*, 278 F. Supp. 428 (N.D. W. Va. 1968). Action for damages may be maintained for wrongful death of viable unborn child. *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971). Action may be maintained for wrongful death of nonviable unborn child. *Farley v. Sartin*, 195 W. Va. 671, 466 S.E.2d 522 (1995).

**Damages.** See also "DAMAGES." Monetary limit on recoveries no longer exists. Damages shall include, but may not be limited to following: (a) sorrow, mental anguish and solace which may include society, companionship, comfort, guidance, kindly offices and advice of decedent; (b) compensation for reasonably expected loss of (i) income of decedent, and (ii) services, protection, care and assistance provided by decedent; (c) expenses for care, treatment and hospitalization of decedent incident to injury resulting in death; and (d) reasonable funeral expenses. W. Va. Code §55-7-6(c)(1). Beneficiaries can recover damages for decedent's pain and suffering between time of injury and time of death where decedent institutes personal injury action prior to death and action is revived and amended as a wrongful death action subsequent to death. *Fox v. Martin*, 188 W. Va. 559, 425 S.E.2d 235 (1992). In appropriate cases, punitive damages may be recovered. *Bond v. City of Huntington*, 166 W. Va. 581, 276 S.E.2d 539 (1981), *superseded by statute on other grounds*. While award of damages for pecuniary loss, such as loss of future income, should be calculated to present value, nonpecuniary damages, such as those awarded for mental anguish should not. *Mooney v. E. Associated Coal*, 174 W. Va. 350, 326 S.E.2d 427 (1984). Prejudgment interest can be awarded for ascertainable pecuniary losses. *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). Wrongful death action is derivative claim. Therefore, when language in insurance policy limits recovery of derivative claims to per person

limit, per occurrence limit does not apply. However, if language in policy includes damages from wrongful death as separate bodily injury, then each person who recovers in action is entitled to per person limit. *Davis v. Foley*, 193 W. Va. 595, 457 S.E.2d 532 (1995).

Sums recovered for reasonable funeral, hospital, medical and other expenses are required to be set forth separately by jury in its verdict. W. Va. Code §55-7-6 (c)(2). Any amount recovered for such expenses shall be so expended by personal representative. *Id.* All other damages recoverable under W. Va. Code §55-7-6 (b) are "net damages" which are to be distributed in accordance with decedent's will or by intestate distribution. *Arnold v. Turek*, 185 W. Va. 400, 407 S.E.2d 706 (1991); *White v. Gosiene*, 187 W. Va. 576, 420 S.E.2d 567 (1992). (Generally, descent priority is as follows: (a) spouse; (b) descendants; (c) parents; and (d) siblings. More specifically and more completely, see W. Va. Code §42-1-3; 42-1-3a.

**Employment.** Under W. Va. Code §23-4-2, employer is subject to common law tort action for damages or for wrongful death only where such employer acts with "deliberate intention," *i.e.*, acts with consciously, subjectively and deliberately formed intention to produce specific result of injury or death to employee. Punitive or exemplary damages shall not be awarded.

**Limitations of Action.** Amended West Virginia wrongful death statute does not apply to actions brought for death of any person occurring prior to July 1, 1988. W. Va. Code §55-7-6 (d). Wrongful death actions shall be commenced within two years after death of deceased person (subject to §55-2-18). *Id.* Complaint must be timely filed within two-year statute of limitations. *Perdue v. Hess*, 199 W. Va. 299, 484 S.E.2d 182 (1997). Evidence of fraudulent concealment of one defendant will not be imputed to another defendant to toll two-year period solely on basis of privity of contract between defendants. *Pennington v. Bear*, 200 W. Va. 154, 488 S.E.2d 429 (1997). However, suit for unfair settlement practices is governed by one-year statute of limitations for any suit that could not be brought at common law by or against plaintiff's personal representative. *Wilt v. State Auto. Mut.*, 203 W. Va. 165, 506 S.E.2d 608 (1998).

**Parties in Interest.** Wrongful death action must be brought by personal representative of deceased person; beneficiary or heir cannot institute action. *Adams v. Grogg*, 153 W. Va. 55, 166 S.E.2d 755 (1969), *overruled on other grounds*. If personal representative settles wrongful death claim with tortfeasor's insurance carrier without seeking court approval for compromise of minor's claim, minor's primary cause of action is against personal representative; but if personal representative is

insolvent, insurance carrier is secondarily liable. *Jordan v. Allstate Ins.*, 184 W. Va. 678, 403 S.E.2d 421 (1991). Upon proper factual showing that personal representative was involved in decedent's death, circuit court may remove and direct appointment of new personal representative. *McClure v. McClure*, 184 W. Va. 649, 403 S.E.2d 197 (1991).

Slayer Statute. Persons convicted of feloniously killing or conspiring to kill another cannot take or acquire property or life insurance proceeds from person killed or conspired against. *Id.* Rule only applies where death of person killed creates property corpus in dispute. *Peoples Sec. Life v. Currence*, 187 W. Va. 561, 420 S.E.2d 552 (1992). W. Va. Code §42-4-2 designed to permit proof of judgment of conviction; if no conviction, evidence of unlawful and intentional killing must be shown in civil action by preponderance of evidence. *McClure v. McClure*, 184 W. Va. 649, 403 S.E.2d 197 (1991). Involuntary manslaughter did not constitute intentional killing for purposes of slayer statute. *Estate of Postlewait v. Ohio Valley Med. Ctr.* 214 W. Va. 668, 591 S.E.2d 226 (2003).

Unexplained Absence. Death is presumed from seven year absence. W. Va. Code §44-9-1.

## DISABILITY

See "ACCIDENT AND HEALTH INSURANCE."

Classifications. House confinement clause not violated where insured departs occasionally for air and exercise by order of physician. *Wade v. Mut. Benefit*, 115 W. Va. 694, 177 S.E. 611 (1934). Payment of specified amount for loss of foot bars claim for total disability under same policy. *Bates v. Inter-Ocean Cas.*, 126 W. Va. 620, 29 S.E.2d 469 (1944). Consultation and examination by surgeons in compensation claim not "regular medical treatment" under policy. *Mills v. Inter-Ocean Cas.*, 127 W. Va. 400, 33 S.E.2d 90 (1945).

Partial. Policy insuring for disability arising "solely" from accidental bodily injury did not cover disability arising when blow to head of insured re-activated pre-existing disease condition. *Adkins v. Am Cas.*, 146 W. Va. 1045, 124 S.E.2d 457 (1962).

Ability to do occasional light work does not bar benefits; on other hand, inability to perform accustomed vocation does not of itself confer right to benefits where some other useful work can be performed in practical manner. *Nat'l v. Thompson*, 117 W. Va. 61, 183 S.E. 863 (1936).

"Total disability" in accident and health policy exists if employee is incapable of performing any and every duty relating to his occupation; it does not require

total helplessness. *Lusk v. Aetna Life*, 156 W. Va. 549, 195 S.E.2d 163 (1973). Total disability provisions permit recovery if insured is unable to do substantially all material acts necessary to his business. *Wade v. Mut. Benefit*, 115 W. Va. 694, 177 S.E. 611 (1934).

Total and presumably permanent disability is not state of helplessness; it is inability of insured to engage in any useful occupation whether in his usual or another vocation. *Neill v. Fidelity Mut.*, 119 W. Va. 694, 195 S.E. 860 (1938); *Hayes v. Prudential Ins.*, 114 W. Va. 323, 171 S.E. 824 (1933). But instruction is prejudicially erroneous which informs jury that plaintiff may recover in event of incapability to engage in accustomed vocation or similar activities. Where policy applies only to disability of insured to engage in any occupation for remuneration or profit. *Frazee v. N.Y. Life*, 120 W. Va. 81, 196 S.E. 556 (1938). Evidence of total disability, confined or unconfined, is admissible under general averment of total disability. *Klein v. Great N. Life*, 109 W. Va. 59, 152 S.E. 859 (1930). Jury finding of partial disability from partial amputation of foot was not disturbed. *Cardwell v. Employers' Liab.*, 105 W. Va. 197, 141 S.E. 789 (1928).

Provision that total disability presumed to be permanent when existing continuously for three months carries benefits to insured only when doubt exists as to permanency of disability at end of three month period. *Triplett v. Equitable Life*, 117 W. Va. 537, 186 S.E. 124 (1936). Absolute helplessness not necessary, but whether insured permanently disabled is factual matter for jury. *Broidy v. Metro. Life*, 122 W. Va. 382, 9 S.E.2d 875 (1940).

Proof of Condition. As to waiver of proof, see "WAIVER AND ESTOPPEL." Receipt of proof held condition precedent to insurer's liability, and insurer was not required to pay benefits for period intervening between inception of disability and filing of proof thereof. *Jenkins v. New York Life Ins. Co.*, 122 W. Va. 73, 7 S.E.2d 343 (1940). *But see Neill v. Fidelity Mut. Life Ins. Co.*, 119 W. Va. 694, 195 S.E. 860 (1938) (corresponding clause in accident policy regarded as creating condition subsequent).

Proof of disability, in absence of provision in life insurance policy regarding time therefor, must be made and presented to insurance company within reasonable time after occurrence of disability. *Hanford v. Metro. Life Ins. Co.*, 131 W. Va. 227, 46 S.E.2d 777 (1948).

Verbal statement, to local manager of insurer's office, that insured was totally disabled did not constitute "due proof" required by policy provision. *Id.* *But see* "Notice" under "LIABILITY INSURANCE" and "WAIVER AND ESTOPPEL," for cases indicating

more liberal rule. Proof of loss is not required where insurer denies liability within period for filing proof of loss. *Wade v. Mut. Benefit Health & Acc. Ass'n*, 115 W. Va. 694, 177 S.E. 611 (1934).

Insured was not entitled to recover on accident policy requiring injury to be sole cause of loss on showing that accident merely activated pre-existing diseased condition. *Adkins v. Am. Cas. Co.*, 145 W. Va. 281, 114 S.E.2d 556 (1960).

### FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; "AUTOMOBILES, Compulsory Coverage."

See Chapter 17-D, Code of W. Va. 1961. Statute overrides conflicting statute authorizing named driver exclusion; exclusion is invalid below limits of required coverage. *Jones v. Motorist Mut. Ins. Co.*, 177 W. Va. 763, 356 S.E.2d 634 (1987). See also *Ward v. Baker*, 188 W. Va. 569, 425 S.E.2d 245 (1992). A named insured exclusion endorsement is invalid with respect to minimum coverage amounts required by West Virginia Motor Vehicle Safety Responsibility Law, W. Va. Code §17D-1-1 to §17D-6-7. Above the minimum amounts of coverage required by W. Va. Code §17D-4-12, however, endorsement remains valid. *Dairyland Ins. Co. v. East*, 188 W. Va. 581, 425 S.E.2d 257 (1992). "Owned but not insured" exclusion is valid and enforceable only above mandatory limits of uninsured motorist coverage required by statute. *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997). Primary purpose of mandatory uninsured motorist coverage is to protect innocent victims from hardships caused by negligent, financially irresponsible drivers. *Plymale v. Adkins*, 189 W. Va. 204, 429 S.E.2d 246 (1993). The term "use" in W. Va. Code §33-6-31 (c) is less restrictive than the term "occupying." "Use" of an insured vehicle implies employing vehicle for some purpose or object of user. *Adkins v. Meador*, 201 W. Va. 148, 494 S.E.2d 915 (1997). However, the "exact use of term 'use' is elusive and is not capable of a definition which will leave everyone 'comfortable.' Whether or not an injury arose from the 'use' of a motor vehicle within the contemplation of liability policy or statute depends upon the factual context of each case." *Id.* See also *Cleaver v. Big Arm Bar & Grill, Inc.*, 202 W. Va. 122, 502 S.E.2d 438 (1998).

Close and substantial physical nexus exists between unidentified hit-and-run driver and insured for uninsured motorist coverage when insured can establish by independent third party evidence to satisfaction of trial judge and jury, that, but for immediate evasive action of insured, direct physical contact would have occurred between unknown vehicle and victim. *Hamric v. Doe*, 201 W. Va. 615, 499 S.E.2d 619 (1997).

In direct conflict with definition of underinsured motorist set forth in W. Va. Code §33-6-31 (b), doctrine of reasonable expectations mandates that underinsured motorist coverage provider is liable, up to policy limits of coverage, for amount of insured's damages in excess of tortfeasor's liability coverage. *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990). When policy language excludes motor vehicle owned by insured from definition of "underinsured motor vehicle," injured guest passenger in insured's vehicle is not entitled to collect benefits under insured's underinsured's motorists coverage. *Alexander v. State Auto. Mut. Ins. Co.*, 187 W. Va. 72, 415 S.E.2d 618 (1992); See also *Metropolitan Prop. & Liab. Ins. Co. v. Acord*, 195 W. Va. 444, 465 S.E.2d 901 (1995). Where insured has failed to obtain his insurer's consent before settling with a tortfeasor, but in settling has procured full policy limits available under tortfeasor's insurance policy, victim's insurer must show that it was prejudiced by insured's failure to obtain its consent to settle in order to justify a refusal to pay underinsured motorist benefits. *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W. Va. 570, 490 S.E.2d 657 (1997).

### FIRE INSURANCE

See "WAIVER AND ESTOPPEL."

Under provisions of Chapter 33, Article 17, Section 2, of West Virginia Code, New York Standard Fire Policy of 1943 is standard fire policy of West Virginia.

Arson. Fact that fire is deliberately set does not necessarily imply that it was set by owner. *Hayseeds, Inc. v. State Farm Fire & Cas. Inc.*, 177 W. Va. 323, 352 S.E.2d 73 (1986). Although insurer asserting arson defense need not prove that insured committed arson beyond a reasonable doubt, insurer must present "clear and satisfactory" evidence proving act by a preponderance of evidence. *Id.*

Assignment. Lienholder, as loss payee, was entitled to insurance proceeds independent of attorney's lien, and guarantor did not have standing through subrogation to obtain entire amount of its payments free of attorney's lien. *Fuller v. Stonewall Cas. Co.*, 172 W. Va. 193, 304 S.E.2d 347 (1983). Subrogation will not be allowed except where subrogee has clear case of right and no injustice will be done to another. *Id.* Loss payee has separate contractual right with insurer, by reason of which lienholder who is named as loss payee, is entitled to insurance proceeds to the extent of his debt which is independent of claims of other lien or judgment creditors. *Id.*

Fire insurance policy may disallow assignments of policy before loss, but mere agreement to assign policy

before loss is not breach of policy condition. *Smith v. Buege*, 182 W. Va. 204, 387 S.E.2d 109 (1989).

Chattel Mortgage and Sole Ownership Clauses. New York short form of fire insurance policy contains neither chattel mortgage nor sole ownership clause.

Fire insurance policy void when half interest in property is in name of insured's wife when insured represents that he is sole owner. *Cook v. Farmers Mut.*, 139 W. Va. 700, 81 S.E.2d 71 (1954).

Cancellation. Standard New York Fire Policy contains following provisions for cancellation: "This policy shall be canceled at any time at request of insured, in which case company shall, upon demand and surrender of this policy, refund excess of paid premium above customary short rates for expired time. This policy may be canceled at any time by company by giving to insured five days written notice of cancellation with or without tender of excess of paid premium above pro rata premium for expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand." West Virginia adopted New York fire policy under W. Va. Code §33-17-2. In addition to method provided for in above statute, cancellation of fire insurance policy may be had by mutual agreement of parties. *Kelley v. Aetna*, 75 W. Va. 637, 84 S.E. 502 (1915); *Addia v. Globe & Rutgers*, 97 W. Va. 443, 125 S.E. 161 (1924). In either event burden is upon insurance company to establish cancellation. *Addia v. Globe & Rutgers, supra*; *Huff v. Columbia*, 94 W. Va. 663, 119 S.E. 854 (1923); *Firstbank Shinnston v. W. Va. Ins.*, 185 W. Va. 754, 408 S.E.2d 777 (1991).

Under statute providing that farmers' mutual fire insurer may cancel on at least five days written notice to holder there must be actual notice and mere mailing of notice, which if not received, is ineffective to cancel policy. *Smith v. Mun. Mut. Ins. Co.*, 169 W. Va. 296, 289 S.E.2d 669 (1982).

Authority of special agent to revive canceled policy already rejected by company cannot be presumed. *Hastalis v. Firemen's*, 117 W. Va. 211, 185 S.E. 419 (1936).

Misrepresentation. Misrepresentation which is positive and of material fact will void policy. If fire insurance policy is conditioned to be void in case of any misrepresentation whatever, any misrepresentation, whether material or not, will void it. *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S.E. 706 (1904); *Fire Ass'n of Philadelphia v. Ward*, 130 W. Va. 200, 42 S.E.2d 713 (1947).

Standard Provisions. Binding executory contract to sell real estate does not affect validity of insurance on real estate and, if loss occurs before performance of all

conditions of sale, recovery may be had by insured even though sale is afterwards completed. *Aetna v. Cameron*, 151 W. Va. 269, 151 S.E.2d 305 (1966).

Where testimony by insureds was only to effect that flat roof of insured building could have collapsed when building was subjected to windstorm which could have blown water so that it accumulated on one end of roof such that weight of water when it rushed to other end caused collapse, damage from such collapse was not "direct loss by windstorm," within meaning of windstorm rider of fire policy. *Lewis v. St. Paul*, 155 W. Va. 178, 182 S.E.2d 44 (1971).

Damages. Fixtures. Insured entitled to recover from insurer for fire loss to fixtures as well as building, notwithstanding existence of executory contract requiring insured to convey property on performance of certain conditions, where loss occurred before conditions were performed. *Aetna v. Cameron*, 151 W. Va. 269, 151 S.E.2d 305 (1966).

Mortgages. If fire insurance contract includes standard mortgage clause naming lender under deed of trust executed to secure debt owing on property, lender has independent and distinct contract with insurer and is deemed to be insured to extent of balance due it from property owner. *Firstbank Shinnston v. W. Va. Ins. Co.*, 185 W. Va. 754, 408 S.E.2d 777 (1991); *Jones v. Wes-banco Bank Parkersburg*, 194 W. Va. 381, 460 S.E.2d 627 (1995).

Proof of Loss. Standard New York Fire Policy of 1943 provides that insured shall file proof of loss within sixty days after fire, and that amount of loss or damage shall be paid by insurer to insured sixty days after such proof is received by insurance company. Failure of insured to file proof of loss within sixty days after fire does not forfeit policy but no right to sue accrues until such proof is filed. *Morris v. Dutchess Ins. Co.*, 67 W. Va. 368, 68 S.E. 22 (1910). Denial of liability by insurer on other grounds, however, waives requirement of proof of loss. *Id.* It is held that local agent or adjuster may waive requirement entirely, *Lusk v. American Cent. Ins. Co.*, 80 W. Va. 39, 91 S.E. 1078 (1917). Acceptance of unsworn statement of loss, together with conduct on part of insurer inducing reasonable belief in insured that formal proof is not necessary, waives requirement. *Fitzsimmons v. Alliance*, 115 W. Va. 303, 175 S.E. 62 (1934); *Maynard v. Nat'l Fire Ins. Co. of Hartford*, 147 W. Va. 539, 129 S.E.2d 443 (1963), *overruled on other grounds, Smithson v. U.S. Fid. & Guar. Co.*, 186 W. Va. 195, 204, 411 S.E.2d 850, 859 (1991). Insurer held to have waived formal proof of loss and therefore estopped to rely on failure to furnish formal proof of loss since insureds had been interrogated under oath by insurer and testimony reduced to writing. *Maynard v. Nat'l Fire Ins.*



*Co. of Hartford*, 147 W. Va. 539, 129 S.E.2d 443 (1963). Provision requiring insured to submit to examination under oath is not condition precedent to filing suit for policy proceeds, but refusal to comply may affect right to recovery. *Thompson v. W. Va. Essential Prop. Ins.*, 186 W. Va. 84, 411 S.E.2d 27 (1991). Grossly excessive values sworn to in proof of loss establish false swearing, avoiding policy. *Mazella v. Hanover*, 114 W. Va. 728, 174 S.E. 521 (1934). But false swearing is not shown by discrepancy between amount claimed and jury verdict where some witnesses supported figure claimed. *Dickerson v. Great Am.*, 125 W. Va. 135, 23 S.E.2d 117 (1942). Nor, as matter of law, by submission of three proofs of loss, each for different amount where explanation of discrepancies is partially plausible. *Toupin v. Federal*, 125 W. Va. 458, 25 S.E.2d 212 (1943).

Multiple Policies. Contribution. Delivery of check by merchant to creditor purporting to fully pay existing debt does not cancel merchant's insurable interest in goods where there is no agreement, express or implied, that debt is thereby extinguished. Thus, insurance coverage on goods continues in full force and effect and creditor's insurer is obligated to contribute to settlement made by merchant's insurer. *Aetna v. Federal*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

## FRAUD

See "AGENTS AND BROKERS"; "FIRE INSURANCE, Proof of Loss"; "REPRESENTATIONS AND WARRANTIES."

## GOVERNMENTAL LIABILITY

W. Va. Code §29-12-5 does not waive state's constitutional immunity from suit but renders such immunity inapplicable to extent of insurance coverage purchased by state or its agency. *Pittsburgh Elevator Co. v. Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983) (overruling, by implication, several earlier cases). W. Va. Code 29-12-5 (a) requires State Board of Risk and Ins. Mgt. to purchase contract for insurance. *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (W. Va. 1995). *Clark* also reaffirms *Pittsburgh Elevator*. What constitutes state agency is discussed in *Ohio Valley Contractors v. Board of Educ.*, 170 W. Va. 240, 293 S.E.2d 437 (1982). W. Va. Code §29-12A-16 (d) (1986) provides that purchase of liability insurance or establishment of self-insurance program by political subdivision does not constitute waiver of any immunity or defense of political subdivision or its employees, nor does it violate equal protection principles set forth in W. Va. Const. Art. III, §10. *Pritchard v. Arvon*, 186 W. Va. 445, 413 S.E.2d 100 (1991). Where State of West Virginia purchased policy covering only claims against Department of

Highways arising out of performance of construction and repair operations arising out of maintenance, State retained its sovereign immunity with respect to claims against Department of Highways based on facts and circumstances not specifically covered under insurance policy. *Shrader v. Holland*, 186 W. Va. 687, 414 S.E.2d 448 (1992).

Award of back pay and reasonable attorney fees is recoverable against State as employer in employment discrimination cases adjudicated before State Human Rights Commission or in court system, notwithstanding State's governmental immunity. *Kerns v. Bucklew*, 178 W. Va. 68, 357 S.E.2d 750 (1987).

Immunity of political subdivisions is not constitutional but judicial in origin and has been abolished as to municipalities, county boards of education, and county governments. *Long v. City of Weirton*, 158 W. Va. 741, 214 S.E.2d 832 (1975) (municipalities); *Ohio Valley Contractors v. Board of Educ.*, 170 W. Va. 240, 293 S.E.2d 437 (1982) (boards of education); *Gooden v. County Comm'n*, 171 W. Va. 130, 298 S.E.2d 103 (1982) (county governments). County clerk who failed to properly index prior conveyance of mineral rights was held liable but court awarded zero damages and found negligence was not proximate cause of purchaser's injury. *Keister v. Talbott*, 182 W. Va. 745, 391 S.E.2d 895 (1990). Qualified tort immunity provisions of West Virginia Governmental Tort Claims and Insurance Reform Act of 1986, W. Va. Code §29-12A-1 to §29-12A-18, do not violate "certain remedy" provision of W. Va. Const. Art. III, §17, nor do those provisions violate equal protection principles of W. Va. Const. Art. III, §10. *Pritchard v. Arvon*, 186 W. Va. 445, 413 S.E.2d 100 (1991). If special relationship exists between local governmental entity and individual that gives rise to duty to such individual and duty is breached causing injuries, then suit may be maintained against such entity. *Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E.2d 737 (1991); *Hose v. Berkeley County Planning Comm'n*, 194 W. Va. 515, 460 S.E.2d 761 (1995). To establish that special relationship exists between local governmental entity and individual, which is basis for special duty of care owed to such individual, the following elements must be shown: 1) assumption by local governmental entity, through promises or actions, of affirmative duty to act on behalf of party who was injured; 2) knowledge on part of local governmental entity's agents that inaction could lead to harm; 3) some form of direct contact between local governmental entity's agents and injured party; and 4) party's justifiable reliance on local governmental entity's affirmative undertaking. *Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E.2d 737. Where police are engaged in vehicular pursuit of known or suspected law violator, and pursued vehicle



collides with third party's vehicle, pursuing officer is not liable for injuries to third party arising out of collision unless officer's conduct in pursuit amounted to reckless conduct or gross negligence and was substantial factor in bringing about collision. *See* W. Va. Code §17C-2-5 (1971). *Peak v. Ratliff*, 185 W. Va. 548, 408 S.E.2d 300 (1991).

Claims arising after June of 1986 against political subdivisions (municipalities, boards of education, county commissions, etc.) are comprehensively regulated by "Governmental Tort Claim and Insurance Reform Act." W. Va. Code §29-12A-1 to -18. This statute 1) gives complete immunity to government employees, except as to malicious, intentional or reckless acts; 2) creates absolute immunity for political subdivisions in 17 listed circumstances; 3) forbids recovery of punitive damages; 4) limits recovery of noneconomic loss to \$500,000; 5) alters rules on joint and several liability; and 6) changes many pre-trial and judgment enforcement procedures. The Act affords political subdivisions immunity from tort liability in actions involving claims covered by workers' compensation even though party may not be employed by political subdivision at time of injury. *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 425 S.E.2d 551 (1992).

Public duty doctrine, principle independent of doctrine of governmental immunity, states that governmental entity is not liable because of its failure to enforce regulatory or penal statutes. *Holsten v. Massey*, 200 W. Va. 775, 490 S.E.2d 864 (1997). This doctrine operates to discharge a municipality of its liability where its employees failed to inspect premises to determine whether there are violations of fire or building codes. *Benson v. Kutsch*, 181 W. Va. 1, 380 S.E.2d 36 (1989). W. Va. Code § 29-12A-5 (a)(5) (1986), which provides, in relevant part, that political subdivision is immune from tort liability for 'the failure to provide, or the method of providing, police, law enforcement or fire protection,' is coextensive with common-law rule not recognizing cause of action from breach of general duty to provide, or method of providing, such protection owed to public as whole. Lacking clear expression to contrary, that statute incorporates common-law special rule and does not immunize breach of special duty to provide, or method of providing, such protection to particular individual. *Randall v. Fairmont City Police Dept*, 186 W. Va. 336, 412 S.E.2d 737 (1991); *Beckley v. Crabtree*, 189 W. Va. 94, 98, 428 S.E.2d 317, 321 (1993), *modified by Smith v. Burdette*, 211 W. Va. 477, 566 S.E.2d 614 (2002) (holding that "the phrase 'the method of providing police law enforcement or fire protection' refers to the decision making or the planning process in developing a governmental policy, including how that policy is to be performed"). Question of whether special duty arises to pro-

tect individual from local governmental entity's negligence in performance of non-discretionary function is ordinarily question of fact for trier of facts. *Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E.2d 737.

Promissory estoppel does not operate against State when functioning in governmental capacity. *Freeman v. Poling*, 175 W. Va. 814, 338 S.E.2d 415 (1985).

Sovereign immunity raises due process questions and may, in personal injury context, be constitutionally questionable. *G.M. McCrossin, Inc. v. Bd. of Regents*, 177 W. Va. 539, 355 S.E.2d 32 (1987) (dicta: court upheld sovereign immunity in contract action by sophisticated entity chargeable with knowledge of sovereign immunity).

Immunity. W. Va. Code §33-6-14a requires issuers of public liability insurance, written for religious or charitable organizations, to waive (or agree not to assert as a defense) charitable immunity, except where insured rejects such provision or endorsement in writing. This statute, however, does not constitute waiver by state institution of its immunity under Eleventh Amendment. *Westinghouse v. West Virginia Dep't of Hwys.*, 845 F.2d 468 (4th Cir. 1988).

Even though municipality does not change insurance carriers, retirees insured under W. Va. Code §8-12-8 (1986) are to be insured at same cost for same coverage as regular employees of similar age groupings where present insurance carrier changes its rates and such change results in retirees being charged different rates for same coverage as regular employees. *City of Wheeling Retirees Ass'n, Inc. v. City of Wheeling*, 185 W. Va. 380, 407 S.E.2d 384 (1991).

## GUEST CASES

See "AUTOMOBILES, Guests."

As to passenger exclusion, *See* W. Va. Code §33-6-29.

## HOSPITALS

Evidence-Records. W. Va. Code §57-5-4a through 57-5-4j, as amended, 1991, contain provisions relating to use of hospital records in suits in which hospital is not a party to the matter. These provisions 1) define records and custodian, 2) mandate answers to subpoena by custodians or other hospital officers, 3) approve use of copies rather than originals unless subpoena specifically requires production of originals (copies may be substituted for originals after introduction of originals), 4) approve submission of records by mail or other delivery to court or other tribunal, unless subpoena specifically requires physical presence of custodian, and 5) require that



records be sealed, identified, and properly directed. The act also provides that proof that hospital, medical and doctor bills were paid or incurred because of any illness, disease or injury shall be prima facie evidence that such bills were necessary and reasonable.

Medical peer review privilege statute evidences public policy encouraging health care professionals to monitor proficiency and conduct of their peers in order to safeguard and improve quality of patient care. W. Va. Code §30-3C-1 to 30-3C-3. Party asserting privilege has burden of demonstrating that privilege applies. *Young v. Saldanha*, 189 W. Va. 330, 431 S.E.2d 669 (1993).

Subject to certain defined exceptions, health care providers must furnish copies of health care records upon written request of patient. W. Va. Code §16-29-1, as amended, 1992. Reimbursement may not exceed \$.75 per page for copying costs and/or \$10 for search fees. W. Va. Code §16-29-2. Records regarding HIV-related testing may not be disclosed without subject's permission, except under certain defined conditions. See W. Va. Code §16-3C-3, as amended, 1998.

Warranties. W. Va. Code §16-23-1 declares distribution and use of blood, blood products, organs and the like to be services rather than sales. As such, no warranties of any kind or description are applicable thereto. Actions filed must therefore be grounded in negligence rather than breach of warranty when it is alleged that these items were contaminated.

Immunity. Charitable immunity doctrine is abolished as to hospitals. *Adkins v. St. Francis Hosp. of Charleston*, 149 W. Va. 705, 143 S.E.2d 154 (1965). W. Va. Code §33-6-14a requires issuers of public liability insurance, written for religious or charitable organizations, to waive (or agree not to assert as a defense) charitable immunity, except where insured rejects such provision or endorsement in writing. This statute, however, does not constitute waiver by state institution of its immunity under Eleventh Amendment. *Westinghouse v. West Virginia Dep't of Hwys.*, 845 F.2d 468 (4th Cir. W. Va. 1988).

## HUSBAND AND WIFE

See Law Digest Tables.

Actions. Wife, as plaintiff in tort action, cannot recover medical and domestic expenses paid by husband; they must be recovered in separate action brought by husband. *Larzo v. Swift*, 129 W. Va. 436, 40 S.E.2d 811 (1946). Suit by administrator of decedent against husband is allowed although wife is sole beneficiary of decedent's estate. *Morgan v. Leuck*, 137 W. Va. 546, 72 S.E.2d 825 (1952). See also "DAMAGES" and "Marital Property."

Community Property. West Virginia does not recognize division of marital assets by community property standards but by equitable distribution standards. W. Va. Code §§48-7-101 to 48-7-112. In the absence of a valid agreement before or during marriage, all property and earnings acquired by either spouse during marriage shall constitute marital property subject to equitable distribution unless: 1) property acquired in exchange for separate property; 2) property acquired by gift, bequest, devise, descent, or distribution; 3) property acquired after separation of parties; or 4) any increase in value of separate property. W. Va. Code §48-1-201 *et seq.* All material property shall be divided equally between the parties, but court may alter distribution after considering several factors. W. Va. Code §48-7-103. Transmutation is the legal process by which non-marital assets, properties acquired by gift, bequest, devise, or descent, may be converted to marital property. *Miller v. Miller*, 189 W. Va. 126, 428 S.E.2d 547 (1993). A transmutation also occurs when contributing spouse evidences his or her intent to make a gift of non-marital property to the marriage by significantly changing character of property as to make it marital. *Mayhew v. Mayhew*, 197 W. Va. 290, 475 S.E.2d 382 (1996), *overruled in part on other grounds*, *Mayhew v. Mayhew*, 205 W. Va. 490, 499, 519 S.E.2d 188, 197 (1999).

Debts. W. Va. Code §§48-29-103, 105 provides that married woman's property shall not be subject to control or disposal by her husband nor liable for his debts.

Fire Insurance. Co-ownership of property does not in itself entitle spouse to insurance proceeds. *Mazon v. Camden Fire*, 182 W. Va. 532, 389 S.E.2d 743 (1990).

Family Purpose. See "AUTOMOBILES."

Insurance. Spouse may procure insurance upon other spouse without other spouse's consent. W. Va. Code §33-6-5.

Interspousal Immunity. Doctrine abolished. *Coffindaffer v. Coffindaffer*, 161 W. Va. 557, 244 S.E.2d 338 (1978). Under provisions of W. Va. Code §§48-29, 101-104, defense of interspousal immunity is not available in suits between spouses in West Virginia. *Courtney v. Courtney*, 186 W. Va. 597, 413 S.E.2d 418 (1991).

Loss of Consortium. W. Va. Code §48-29-302 allows married women to sue and recover for loss of consortium to same extent as married men. Personal actions have a two-year statute of limitations. *McCourt v. Oneida Coal Co., Inc.*, 188 W. Va. 647, 425 S.E.2d 602 (1992).

Personal Liability. W. Va. Code §§48-29-101, 104, 105, 303 provide that a married woman may sue or be

sued without joining her husband unless his interest or liability makes him a party.

### INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age"; General cases on liability; "RELEASES, Infants."

### INLAND MARINE

Definitions. Navigable bayou flowing into river which empties into Mississippi was held a "tributary" of Mississippi within meaning of policy of marine insurance. *Miller v. Citizens*, 12 W. Va. 116, 29 Am. Rep. 452 (1877).

Personal Property Floaters. W. Va. Code §33-1-10 (d)(1) defines marine policies and notes that marine insurance includes "all personal property floater risks." It is incorrect to regard floater as casualty insurance, and one-year statute of limitations for suit permitted under marine policies at W. Va. Code §33-6-14 and contained in policy at issue applied rather than two-year limitation applicable to casualty insurance. *Chamberlaine & Flowers v. Smith*, 176 W. Va. 39, 341 S.E.2d 414 (1986).

### LIABILITY INSURANCE

See also, "CONSTRUCTION OF POLICY."

Bad Faith. Unfair Claim Settlement Practices, see W. Va. Code §33-11-4 (9); see also "Direct Action of Insured Against Insurer" and "DAMAGES."

Compromise of Claims. Settlement or release executed within 20 days of personal injury is voidable under certain statutory circumstances. W. Va. Code §55-7-11a; see also, *Raptis v. U.S. Fid. & Guar. Co.*, 109 W. Va. 602, 156 S.E. 53 (1930) (insured effecting settlement after judgment, mitigating loss, cannot recover amount of original liability; contract provided for reimbursement of loss actually sustained); *Black & White Cab Co. v. New York Indem.*, 108 W. Va. 93, 150 S.E. 521 (1929) (Claim for personal injuries settled before trial but after denial of liability by indemnity company; cab company sued indemnity company for amount paid out in effecting compromise; however, decision based upon failure of cab company to notify insurer of accident.) When surety settled claim without principal's knowledge, no recovery allowed from principal of amount paid. *Fidelity & Cas. Co. v. McNamara*, 127 W. Va. 731, 36 S.E.2d 402 (1945).

Contribution. See "CONTRIBUTION."

Cooperation of Insured in Defense of Action. Motor vehicle liability policy issued under Safety Responsibility Law cannot be voided by any statement or violation of policy by insured. W. Va. Code §17D-4-12(f)(1).

Insured refusing to cooperate is not entitled to recover attorney fees or other expenses in defending personal injury action. *Roberts v. Indemnity Ins. Co.*, 114 W. Va. 252, 171 S.E. 533 (1933). Insured's voluntary submission to jurisdiction and process is not breach of cooperation clause. *Marcum v. State Auto. Mut. Ins. Co.*, 134 W. Va. 144, 59 S.E.2d 433 (1950).

Coverage. Standard garage liability policy does not cover one to whom car was loaned by employee without permission. *Wylie v. Mountain Motors, Inc.*, 126 W. Va. 205, 27 S.E.2d 494 (1943). But, auto dealer's liability coverage is primary coverage for accident involving car loaned by dealer to customer in regular course of business. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 181 W. Va. 609, 383 S.E.2d 791 (1989). Underinsured motorist coverage is activated under W. Va. Code §33-6-31(b) when tortfeasor's liability insurance coverage is less than total damages of injured party. *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990). When insurer required by statute to offer optional coverage, such coverage is included by operation of law when insurer fails to prove effective offer and knowing and intelligent rejection by insured. *Bias v. Nationwide Mut. Ins. Co.*, 179 W. Va. 125, 365 S.E.2d 789 (1987). Policy issued under West Virginia Automobile Insurance Plan extends only to "ownership, maintenance or use" of vehicle as an automobile. *D&M Logging Co. v. Huffman*, 189 W. Va. 9, 427 S.E.2d 244 (1993) (negligent use of attached crane not contemplated by policy). When language in personal automobile insurance policy states that a resident relative is insured while "using" automobile of insured, mere occupancy as a passenger in insured vehicle by resident relative does not constitute "use." *Allstate Ins. Co. v. Smith*, 202 W. Va. 384, 504 S.E.2d 434 (1998).

Direct action against carrier on uninsured motorist policy is not allowed absent policy provision to that effect; plaintiff may not join insurer as party in suit against defendant insured; but once judgment has been obtained against uninsured motorist, direct action is allowed. *Criss v. U.S. Fid. & Guar. Co.*, 105 W. Va. 380, 142 S.E. 849 (1928) (claim must be liquidated before statutory insurer can be sued); *Conwell v. Hays*, 103 W. Va. 69, 136 S.E. 604 (1927) (policy provision for direct liability of insurer does not warrant joinder of taxi driver and his insurer in tort action); *Cramblitt v. Standard Accident*, 116 W. Va. 359, 180 S.E. 434 (1935). But, joinder is permissible in action of assumpsit. *O'Neal v. Pocahontas Transp. Co.*, 99 W. Va. 456, 129 S.E. 478 (1925) (statutory insurer cannot be joined with insured unless policy expressly or by necessary implication so provides); See also, "Rights of Injured against Insured."

Declaratory Judgments. Injured plaintiff may bring declaratory judgment action against defendant's insurance carrier to determine if there is policy coverage before obtaining judgment against defendant in personal injury action where defendant's insurer has denied coverage. *Christian v. Sizemore*, 181 W. Va. 628, 383 S.E.2d 810 (1989). Declaratory judgment claim with regard to defendant's insurance coverage may be brought in original personal injury suit rather than separate action. *Id.*

Duty to Defend. As general rule, insurer's duty to defend is tested by whether allegations of complaint are reasonably susceptible of interpretation that claim may be covered by policy. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). When complaint is filed against insured, insurer must look beyond bare allegations contained in pleadings and conduct reasonable inquiry into facts. *Farmers & Mechanics Mut. Fire v. Hutzler*, 191 W. Va. 559, 447 S.E.2d 22 (1994). But, there is no duty to defend where there would be no coverage. *Horace Mann Ins. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988) (intentional injury exclusion precluded coverage for sexual misconduct); *Dotts v. Taressa*, 182 W. Va. 586, 390 S.E.2d 568 (1990) (intentional injury exclusion in motor vehicle liability policy could not override required coverage of financial responsibility law); see also *Miller v. Lambert*, 195 W. Va. 63, 464 S.E.2d 582 (1995). Insurer must exercise reasonable diligence in obtaining insured's cooperation, including attendance at trial, before policy will be voided. *Charles v. State Farm Mut. Auto. Ins. Co.*, 192 W. Va. 293, 452 S.E.2d 384 (1994). As to liability for failure to defend, see "Rights of Insured against Insurer."

Excess Coverage and Pro Rata Coverage. See "Liability Between Insurers."

Excess Verdicts. See "Direct Action Against Insurer."

Exclusions. Intentional Injury Exclusion. Where insurance policy contains exclusion for injuries caused intentionally by insured, damages resulting from sexual misconduct of insured are excluded from coverage. In such case, intent of insured to cause some injury will be inferred as matter of law. *Horace Mann Ins. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988). Liability insurance coverage can be denied for (alleged) sexual misconduct by applying intentional injury exclusion. Intent to injure is inferred as matter of law because of nature of act. *Dotts v. Taressa*, 182 W. Va. 586, 390 S.E.2d 568 (1990). But acts in self-defense do not trigger intentional acts exclusion. *Farmers & Merchants Mut. Ins. Co.*, 210 W. Va. 394, 557 S.E.2d 801 (2001). For waiver of exclusions and reservation of rights requirement, see "WAIVER AND ESTOPPEL." Exclusion for liability

arising from use or ownership of automobile does not preclude coverage for negligent entrustment of auto. *Huggins v. Tri-County Bonding*, 175 W. Va. 643, 337 S.E.2d 12 (1985). Passenger exclusion clause prohibited by statute; coverage extended to vehicles loaned to insured by those in business of selling, repairing, or servicing vehicles. W. Va. Code §33-6-29. Exclusion of consensual user of automobile from coverage under liability policy prohibited by W. Va. Code §33-6-31. Policy must cover users acting by express or implied consent of owner or owner's spouse. Assault by cab driver on passenger held "accident" but not covered for injuries under policy insuring against liability arising out of ownership, maintenance or use of cab. *Huntington Cab v. American Fidelity*, 63 F. Supp. 939 (S.D. W. Va. 1945), *rev'd*, *Huntington Cab v. American Fidelity*, 155 F.2d 117 (4th Cir. 1946). Pollution exclusion clause will preclude liability of insurer only when damage was expected or intended by insured, even if pollution occurred gradually over time. *Joy Technologies, Inc. v. Liberty Mut.*, 187 W. Va. 742, 421 S.E.2d 493 (1992). An "owned but not insured" exclusion to UM coverage is valid and enforceable above mandatory limits of UM motorist coverage required by statute; and motorcyclist, who had recovered minimum mandatory UM coverage under his own policy, was not entitled to recover additional benefits under his parents' policy in light of the exclusion. *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997).

A contract exclusion provision that commercial general liability policy did not apply to bodily injury or property damage for which insured was obligated to pay damages by reason of assumption of liability in contract or agreement barred coverage for insureds' liability for cost overruns and delay under supervisory consultant of house; damages claimed by homeowners had origins solely in contract. *Silk v. Flat Top Constr.*, 192 W. Va. 522, 453 S.E.2d 356 (1994); *Nat'l Steel Erection Inc. v. J.A. Jones Constr. Co.*, 899 F. Supp. 268 (N.D. W. Va. 1995).

When examining whether coverage exists for a loss under first-party insurance policy when loss is caused by a combination of covered and specifically excluded risks, loss is covered by policy if covered risk was efficient proximate cause of loss. *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 509 S.E.2d 1 (1998).

Also, exclusionary policy language denying coverage to insured if liability was imposed as a result of violation of statute, ordinance or regulation pertaining to sale, gift, distribution or use of any alcoholic beverage, did not apply to owners of bar when lessee of bar sold alcohol to minor. *Farmers & Mechanics Mut. Fire v. Hutzler*, 191 W. Va. 559, 447 S.E.2d 22 (1994).

Fraud. Policy obtained fraudulently after occurrence of “insured event” was void ab initio. *Brown v. Community Moving & Storage*, 186 W. Va. 691, 414 S.E.2d 452 (1992).

Indemnity. See “CONTRIBUTION.”

Insolvency of Insured. Where policy restricted recovery from insurer to loss actually paid by insured, such payment is condition precedent to recovery notwithstanding fact that insured’s insolvency was cause of failure to pay. *Newton v. Westchester Fire*, 120 W. Va. 56, 195 S.E. 674 (1938).

Liability Between Insurers. When pro rata and excess clauses appear in automobile policies of both owner and driver of automobile, in event of accident, insurer of owner is primary and must bear whole loss within limits of policy. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 181 W. Va. 609, 383 S.E.2d 791 (1989).

Notice. In underinsured or uninsured case, delay in giving notice to insurer will not preclude coverage, unless delay was unreasonable. In determining reasonableness, prejudice to insurer is not presumed and is only one factor to be balanced against reason(s) for delay. *State Auto. Mutual Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990); *Dairyland Ins. v. Vosheh*, 189 W. Va. 121, 428 S.E.2d 542 (1993). Uninsured and underinsured coverage requires insured to give notice to insurer when insured reasonably determines tortfeasor is uninsured/underinsured. *State Auto. Mutual Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990); *Smith v. U.S. Fid. & Guar. Co.*, 109 W. Va. 280, 153 S.E. 584 (1930) (clause requiring immediate written notice of accident may be waived by insurer or its authorized representative); *Black & White Cab Co. v. New York Indem.*, 108 W. Va. 93, 150 S.E. 521 (1929) (prompt written notice of accident means reasonable notice; lapse of almost year not reasonable); *U.S. Fid. & Guar. Co. v. Pocahontas*, 119 W. Va. 344, 193 S.E. 804 (1937) (if bodily injury not apparent, notice not required, but if apparent, notice should be given); *Ohio Farmers v. Charleston Laundry Co.*, 183 F.2d 682 (4th Cir. 1950) (report of accident based on false statement of truck driver not breach of notice clause). Policy provision requiring notice of accident “as soon as possible” requires notice within reasonable time, and five month delay of notice of fatal accident relieves liability under policy. *Ragland v. Nationwide Mut. Ins. Co.*, 146 W. Va. 403, 120 S.E.2d 482 (1961). Where both insured father and son failed to realize that insurance policy would cover son driving car of third party, failure to notify insurer until months after accident must have prejudiced insurer to constitute “lack of notice” defense. *State Farm Mut. Auto. Ins. Co. v. Milam*, 438 F. Supp. 227 (S.D. W. Va. 1977).

Offset. Amount of tortfeasor’s motor vehicle liability insurance coverage actually available to injured person in question must be deducted from total amount of damages sustained by injured person, and insurer providing underinsured motorist coverage is liable for remainder of damages, not to exceed coverage limits. Syl. Pt. 4, *State Auto. Mutual Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990).

Punitive Damages. Insurance coverage of award of punitive damages is not against public policy, at least where punitive damages were awarded for wanton, gross and reckless conduct and not “intentional” conduct. *Hensley v. Erie Fire*, 168 W. Va. 172, 283 S.E.2d 227 (1981). As to award of punitive damages against insurer for bad faith or other action, see “Rights of Insured Against Insurer” and “Rights of Injured against Insured.”

Rights of Injured Party Against Insurer. Implied private cause of action by third-party claimant may exist for violation by insurance company of unfair settlement practice provisions of W. Va. Code §33-11-4, and such implied private cause of action may be joined with underlying action, but trials must be bifurcated. *State ex rel. State Farm Fire & Cas. Ins. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994). In a first-party bad faith action against insurer, bifurcation and stay of bad faith claim from underlying action are not mandatory. *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 506 S.E.2d 64 (1998). Also discovery and proceedings must be stayed until resolution of underlying action. *Pen. Coal Corp. v. William H. McGee & Co., Inc.*, 903 F. Supp. 980 (S.D. W. Va. 1995).

Rights of Insured Against Insurer. Insurer erroneously failing to defend insured against claim will be liable to insured for attorney fees incurred by insured in defending claim, as well as other costs and expenses. Further, insurer is liable for attorney fees incurred in prosecuting declaratory judgment action which establishes duty to defend. Amount of attorney fees is to be reasonable and is determined not solely by insured’s agreement with insurer, but by considering 12 listed factors. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986); *Brown v. Thompson*, 192 W. Va. 412, 452 S.E.2d 728 (1994). Failure of insurer to settle liability claim within policy limits constitutes prima facie case of breach of duty to insured. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990). To recover in a bad faith action against an insurer for failure to settle within policy limits under Shamblin there must be negligent refusal to accept a settlement offer by insurer and subsequent harm to the insured; the insured’s personal assets must be at risk. *Strahin v. Sullivan*, 220 W. Va. 329, 647 S.E.2d 765 (2007). Although standard is negligence - what reasonably pru-



dent insurer would do - on failure to settle, insurer must show by clear and convincing evidence that it was not negligent and that it accorded insured's interest same weight as its own. *Id.* Offer to settle within policy limits does not, by itself, bar action against insurer if there is dispute as to policy limits, but punitive damages are recoverable only on showing of high threshold of actual malice. *Id.*

Sexual Misconduct Exclusion. See "Exclusion" and "Intentional Injury."

Uninsured or Underinsured Motorists. See "Coverage"; See also, "AUTOMOBILES."

Violation of Law. Defense that automobile was operated by person under minimum age invalid unless insurer establishes relationship of principal and agent between insured and driver. *Raptis v. U.S. Fid. & Guar. Co.*, 109 W. Va. 602, 156 S.E. 53 (1930).

#### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

See W. Va. Code §55-2-12 (general statute for limitations of actions).

Permanent Incompetence of Injured Party. W. Va. Code §55-2-15 which limits time for filing action to maximum of twenty (20) years is constitutional and discovery rule is not applicable to extend limit. *Donley v. Bracken*, 192 W. Va. 383, 452 S.E.2d 699 (1994). In order for plaintiff who was under disability of infancy at time cause of action accrued, to maintain viable and timely action under W. Va. Code §55-2-15, plaintiff must file lawsuit; 1) within two years he/she has attained age of majority and 2) within twenty years of date of wrongful act and injury. *Albright v. White*, 202 W. Va. 292, 503 S.E.2d 860 (1998). Discovery rule can toll general statute of limitations contained in W. Va. Code §55-2-12 (b) in cases of fraudulent concealment if the plaintiff is an infant when cause of action accrues. *Miller v. Mongolia County Bd. of Educ.*, 210 W. Va. 147, 556 S.E.2d 427 (2001).

Contracts. Actions in contract, other than those for sale of goods, must be brought, "if it be upon any other contract in writing under seal, within ten years; if it be upon an award, or upon a contract in writing, signed by the party to be charged thereby, or by his agent, but not under seal, within ten years; and if it be upon any other contract, express or implied, within five years." W. Va. Code §55-2-6. Contracts as to sale of goods are governed by U.C.C. and are subject to four-year limitations period. W. Va. Code §46-2-725; see, e.g., *Greer Limestone Co. v. Nestor*, 175 W. Va. 289, 332 S.E.2d 589

(1985). However, when person suffers personal injuries as result of breach of express or implied warranty, two-year statute of limitations in W. Va. Code §55-2-12 controls rather than four-year statute of limitations under U.C.C. W. Va. Code §46-2-725. *Taylor v. Ford Motor Co.*, 185 W. Va. 518, 408 S.E.2d 270 (1991).

Accrual. See also "Discovery Rule" *infra*. In malicious prosecution action, one-year statute of limitations begins to run from date wrongfully-initiated action terminates favorably, but where action was dismissed with statutory right to reinstate within three terms, statute of limitations began to run three terms after entry of order of dismissal. *Preiser v. MacQueen*, 177 W. Va. 273, 352 S.E.2d 22 (1985). In action for abuse of process (willful misuse of lawfully issued process), one-year statute of limitations runs from date wrongful abuse occurs and not from date of termination of action in which abuse of process occurred. *Id.* In employment discharge cases involving sexual harassment or discrimination, two-year statute of limitations begins to run on date of last offensive contact or threat of offensive contact which precipitated termination of employment. *Harmon v. Higgins*, 188 W. Va. 709, 426 S.E.2d 344 (1992). When in the course of employment, a person receives a number of similar, but separate injuries, each injury gives rise to separate and distinct cause of action. Further, statute of limitations for each cause of action begins to run from date of injury giving rise thereto, without regard to any previous injury or injuries. *DeRocchis v. Matlack, Inc.*, 194 W. Va. 417, 460 S.E.2d 663 (1995). Concept of "continuing tort" for limitation purposes requires showing of repetitious, wrongful conduct. *Handley v. Town of Shinnston*, 169 W. Va. 617, 289 S.E.2d 201 (1982). Wrongful act with consequential continuing damages is not "continuing tort" for limitations purposes. *Id.* Where property damage was caused by leaking water line with damage increasing due to continuing leakage, each injury was new wrong and statute did not begin to run until pipe removed. *Id.* However, where original injury is permanent and present and future damages exist, statute begins to run on date of injury notwithstanding circumstantial damages which occur only later. *Christman v. American Cyanamid*, 578 F. Supp. 63 (N.D. W. Va. 1983). Failure of corporation to provide creditor with written notice of dissolution, immediately after filing statement of intent to dissolve, precluded application of two-year statute of limitations with respect to contract-based claim for damages; however, action for fraud and deceit against executors of sole shareholder's estate was barred by two-year statute of limitations. *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W. Va. 12, 365 S.E.2d 57 (1987). Underlying the principle question of when plaintiff knows or has reason to know of medical malpractice is for jury if assumption

that a legitimate issue exists regarding when plaintiff discovered malpractice; however, principle requiring presentation to jury need not be stretched to absurdity. *Findo v. Hamilton*, 189 W. Va. 151, 428 S.E.2d 779 (1993).

Amendment to change a party defendant will not be allowed unless new party defendant had notice within statute of limitations or within 120 days after commencement of action. *Brooks v. Isinghood*, 213 W. Va. 675, 584 S.E.2d 531 (2003). See also *King v. Heffernan*, 214 W. Va. 835, 591 S.E.2d 761 (2003).

**Discovery Rule.** In medical malpractice actions, West Virginia's discovery rule tolls running of statute of limitations while plaintiff is unaware of injury and in exercise of reasonable diligence could not have been aware of injury. *Morgan v. Grace Hosp.*, 149 W. Va. 783, 144 S.E.2d 156 (1965); *Hill v. Clarke*, 161 W. Va. 258, 241 S.E.2d 572 (1978); *Harrison v. Seltzer*, 165 W. Va. 366, 268 S.E.2d 312 (1980); W. Va. Code §55-7B-4; *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). As to latent consequences of traumatic injury, statute of limitations runs from date of injury, not date consequences were discovered. *Jones v. Trustees of Bethany College*, 177 W. Va. 168, 351 S.E.2d 183 (1986). In products liability tort action, statute of limitations runs only from date plaintiff knew or should have known of 1) existence of injury, 2) identity of maker of product, and 3) identity of product that caused injury. *Hickman v. Grover*, 178 W. Va. 249, 358 S.E.2d 810 (1987). Discovery rule applies to defamation actions. *Padon v. Sears, Roebuck & Co.*, 186 W. Va. 102, 411 S.E.2d 245 (1991). Two-year statute of limitations for tort action arising from latent defects and construction of house begins to run when injured party knew, or by exercise of reasonable diligence should have known, of defect. *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988). Point in time when injured party knew, or by exercise of reasonable diligence should have known of defect, is question of fact for jury. *Id.* As to injuries received after June, 1986, medical malpractice claims must be brought within maximum of ten years after injury unless there was collusion or fraudulent concealment. W. Va. Code §55-7B-4. Discovery rule applies to wrongful death actions. W. Va. Code §55-7-6. In wrongful death action, statute of limitations begins to run when decedent's representative knows or should have known: 1) that decedent died; 2) that death was result of wrongful act, neglect or default; 3) identity of person or entity who owed decedent duty to act with due care and who might have engaged in conduct that breached that duty; and 4) that wrongful act had causal relation to decedent's death. *Bradshaw v. Soulsby*, 210 W. Va. 682, 558 S.E.2d 681 (2001). Evidence of fraudulent concealment of one defendant will not be imputed to another defen-

dant, for purpose of tolling limitations period solely on basis of privity of contract between two defendants, but rather, court should make determination on case by case basis after considering such factors as nature of contract between defendants and whether defendant who did not commit fraudulent act nevertheless had knowledge of such act committed by other defendant. *Pennington v. Bear*, 200 W. Va. 154, 488 S.E.2d 429 (1997). Discovery rule generally applies to all torts unless statutorily prohibited. *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992). In order to benefit from discovery rule, plaintiff must make strong showing of fraudulent concealment, inability to comprehend injury or other extreme hardship. *Id.*

**Fraud.** Cause of action grounded in fraud is controlled by two-year statute of limitations. W. Va. Code §55-2-12; *Stemple v. Dobson*, 184 W. Va. 317, 400 S.E.2d 561 (1990). Statute of limitations does not begin to run until injured person knows, or by exercise of reasonable diligence should have known of nature of injury; point of knowledge is question of fact for jury. *Id.*

**Tolling.** Plaintiff in original action can assert direct claim against third party and new claim will relate back to date of original claim, unless third-party defendant can show substantial prejudice. *Rakes v. Fairmont Mobile Homes, Inc.*, 178 W. Va. 152, 358 S.E.2d 236 (1987). However, when amendment to cause of action creates entirely new claim, amended pleading will not relate back for purposes of statute of limitations. *Jones v. Jones*, 184 W. Va. 297, 400 S.E.2d 305 (1990) (citing W. Va. R. Civ. P. 15). Statute of limitations is not tolled by absence of motorist from state who is amenable to service of process; however, plaintiff in such case must have address for motorist in order for service of process to be amenable. *Gray v. Johnson*, 165 W. Va. 156, 267 S.E.2d 615 (1980). Where plaintiff has not filed claim against third party defendant, but after statute of limitations has run seeks to amend his complaint to add that party because new cause of action was discovered in development of original suit, it is within trial judge's discretion, under Rule 15 (c), W. Va. R. Civ. P. to determine if justice is served by permitting complaint to "relate back" to original complaint, thereby avoiding effect of statute of limitations. *Peneschi v. Nat'l Steel Corp.*, 170 W. Va. 511, 295 S.E.2d 1 (1982). Wrongful death case in which amendment was not sought until greater than two years after it was clear that new cause of action should have been discovered was correctly dismissed. See *Brown v. Community Moving*, 193 W. Va. 176, 455 S.E.2d 545 (1995). Statute was amended to allow service outside state, but amendment is not to be given retroactive effect; therefore, plaintiff could not have secured valid personal service upon defendant who



moved to another state. *Kisner v. Fiori*, 151 W. Va. 850, 157 S.E.2d 238 (1967). *But see*, W. Va. Code §56-3-31.

**Architects and Builders.** Ten-year statute of limitations is applicable to actions against architects and builders and bars any right of action after ten-year time period notwithstanding fact that injury was discovered after ten-year period. *Shirkey v. Mackey*, 184 W. Va. 157, 399 S.E.2d 868 (1990); W. Va. Code §55-2-6a (1996). However, ten-year statute of limitations not applicable to manufacturers of defective construction products. *Basham v. General Shale*, 180 W. Va. 526, 377 S.E.2d 830 (1988). Moreover, ten-year statute of limitations, actually “statute of repose” in that it forecloses cause of action after ten-year period regardless of when injury occurred, is constitutional under W. Va. Const. Art. III §§10, 17. *Gibson v. W. Va. Dept. of Hwys.*, 185 W. Va. 214, 406 S.E.2d 440 (1991). Ten-year statute of limitations begins to run when 1) the builder or architect relinquishes access and control over the construction or subsequent improvement; and 2) the construction or improvement is occupied or accepted by the owner of the real property, whichever occurs first. *Neal v. Marion*, 664 S.E.2d 721, 664 S.E.2d 721 (Jun. 18, 2008).

Twelve-month statute of limitations applicable to bringing suit against insurance company for failure to pay for loss under provisions of standard “New York Fire Insurance” policy begins to run when insurance company notifies insured, in writing, that it declines to pay loss. *Meadows v. Employers’ Fire Ins. Co.*, 171 W. Va. 337, 298 S.E.2d 874 (1982); *Thompson v. W. Va. Essential Prop. Ins.*, 186 W. Va. 84, 411 S.E.2d 27 (1991). Absent refusal to pay loss, twelve-month statute of limitations commences to run starting sixty days after date on which insured knew or should have known of loss. *Prete v. Royal Globe Ins. Co.*, 533 F. Supp. 332 (N.D. W. Va. 1982).

Where action brought within required statute of limitations period is dismissed, second action brought after twelve-month statute of limitations is barred. *Duncan v. Federal Union Ins. Co.*, 114 W. Va. 219, 171 S.E. 418 (1933). However, W. Va. Code §55-2-18 has been held to lengthen statute of limitations and save plaintiff’s cause of action for one year after dismissal. *Carroll Hardwood Lumber Co. v. Stephenson*, 131 W. Va. 784, 51 S.E.2d 313 (1948). Statute of limitations can be lengthened under W. Va. Code §55-2-18 even when one of original parties is not subsequently sued. *Keener v. Reynolds Transp. Co.*, 134 W. Va. 712, 61 S.E.2d 629 (1950).

W. Va. Code §33-6-14 further provides that no insurance policy, other than New York standard fire policy set forth in W. Va. Code §33-17-2, shall limit bringing

cause of action within period less than two years from time cause of action accrues.

Civil rights claims filed in West Virginia pursuant to 42 U.S.C. §1983 considered personal injury causes of action and governed by two-year statute of limitations. *Rodgers v. Corporation of Harpers Ferry*, 179 W. Va. 637, 371 S.E.2d 358 (1988).

**Governmental Units.** In suits against governmental bodies, laches may apply, even if cause of action is based on breach of contract and would not normally be barred by applicable statute of limitations. *Maynard v. Board of Educ. of County of Wayne*, 178 W. Va. 53, 357 S.E.2d 246 (1987).

**Specific Torts.** Personal injury causes of action governed by W. Va. Code §55-2-12. *Renner v. Asli*, 167 W. Va. 532, 280 S.E.2d 240 (1981). Personal causes of action that result in no personal or physical injury, such as libel, defamation, and privacy have a one year statute of limitations. *Courtney v. Courtney*, 190 W. Va. 126, 437 S.E.2d 436 (1993); *Slack v. Kanawha County Housing & Redevelopment Auth.*, 188 W. Va. 144, 423 S.E.2d 547 (1992); *Garrison v. Herbert J. Thomas Mem. Hosp. Ass’n*, 190 W. Va. 214, 438 S.E.2d 6 (1993). Invasion of privacy, for example, has a one-year statute of limitations because it is a personal action not surviving individual’s death. *Slack v. Kanawha County Housing & Redevelopment Auth.*, 188 W. Va. 144, 423 S.E.2d 547 (1992).

**Malpractice.** Two-year statute of limitations applicable to malpractice claim based on tort theory; not contractual breach theory. Governed by W. Va. Code §55-2-12. Period commences to run when plaintiff learned, or by exercise of reasonable diligence should have learned, of malpractice. *Hall v. Nichols*, 184 W. Va. 466, 400 S.E.2d 901 (1990). However, if malpractice claim based on contract theory, then W. Va. Code §55-2-6 is appropriate statute of limitations. *Id.* See “Contracts” *supra*.

**Foreign Judgments.** Ten-year statute of limitations set forth in W. Va. Code §55-2-13 controls filing of suit based on foreign judgment unless suit would be time-barred under law of jurisdiction where judgment was obtained (as set forth in W. Va. Code §55-2A-1, *et seq.*). *Gonzalez Perez v. Romney Orchards, Inc.*, 184 W. Va. 20, 399 S.E.2d 50 (1990).

**Conflict of laws.** W. Va. Code §55-2A-2 provides that period of limitation applicable to claim accruing outside of West Virginia is either that prescribed by W. Va. or by law where claim accrued, whichever first bars action. *Hayes v. Roberts & Schaefer Co.*, 192 W. Va. 368, 452 S.E.2d 459 (1994).



## MALPRACTICE

See also, "ATTORNEYS."

Medical professional liability. W. Va. Code, Chapter 55, Article 7B codifies issues relating to medical malpractice for injuries filed on or after July 1, 2003. The act sets forth elements of proof (§55-7B-3), limitations of actions (§55-7B-4), pretrial procedures (§55-7B-6), admissibility of expert testimony (§55-7B-7), limit on liability for non-economic loss (§55-7B-8), several liability (§55-7B-9). Deceased person fails to meet definition of "patient" under Medical Professional Liability Act and cannot serve as foundation for medical professional liability claim. *Ricottilli v. Summersville Mem'l Hosp.*, 188 W. Va. 674, 425 S.E.2d 629 (1992).

Claim for defamation, but not for medical malpractice, may be brought against physician who reports false information following evaluation of prospective employee made on behalf of employer. *Rand v. Miller*, 185 W. Va. 705, 408 S.E.2d 655 (1991).

Abandonment. Out-of-state abortionist had no duty to follow plaintiff into state for follow-up care, but did have duty to arrange source of treatment for follow-up, in light of apparently incomplete abortion. *S.R. v. City of Fairmont*, 167 W. Va. 880, 280 S.E.2d 712 (1981).

Aggravation of existing injury. Special instructions are not required, since most malpractice falls within category. *McAllister v. Weirton Hosp. Co.*, 173 W. Va. 75, 312 S.E.2d 738 (1983). Negligent physician is liable for injury aggravation caused by foreseeable subsequent negligent medical treatment undertaken to mitigate physician's own negligence. *Rine v. Irisari*, 187 W. Va. 550, 420 S.E.2d 541 (1992).

Medical malpractice defendant against whom verdict is rendered is entitled to have verdict reduced by amount of good faith settlements previously made by plaintiff with other joint tortfeasors. *Biro v. Fairmont General Hosp.*, 184 W. Va. 458, 400 S.E.2d 893 (1990). Further, in asbestos case, Supreme Court did not reverse trial court's offset of verdict by amounts of settlements entered into by plaintiff with non-parties. *Cline v. White*, 183 W. Va. 43, 393 S.E.2d 923 (1990).

Damages. In medical malpractice actions, statute limits recovery of noneconomic loss to \$250,000 per occurrence after July 1, 2003. Statute allows recovery in excess of \$250,000, not to exceed \$500,000 where damages suffered are for wrongful death, permanent and substantial physical deformity, loss of use of limb or loss of bodily organ system, or permanent physical or mental functional injury. On January 1, 2004, and every year thereafter, above limitations shall increase to account for inflation by an amount equal to consumer price index.

Limitations are not available to any defendant who does not have medical professional liability insurance of at least \$1,000,000. W. Va. Code §55-7B-8.

Discovery Rule. Causes of action for medical malpractice are subject to discovery rule, with ten year statute of repose. W. Va. Code §55-7B-4. Discovery rule also applies in cases of legal malpractice. *Clark v. Milam*, 192 W. Va. 398, 452 S.E.2d 714 (1994); *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992); *Barney v. Auvil*, 195 W. Va. 733, 466 S.E.2d 801 (1995). See also "LIMITATION OF TIME FOR COMMENCEMENT OF ACTION."

"Locality rule" abolished, national standard of care adopted. *Paintiff v. City of Parkersburg*, 176 W. Va. 469, 345 S.E.2d 564 (1986).

Expert Testimony. Rule 702 of West Virginia Rules of Evidence is the paramount authority for determining qualifications of expert to give an opinion and legislature may not do so by statute. *Dolen v. St. Mary's Hosp. of Huntington, Inc.*, 203 W. Va. 181, 506 S.E.2d 624 (1998) (per curiam). Expert witness testimony is typically required to show applicable standard of care, defendant's deviation from standard, and that deviation was proximate cause of injury. W. Va. Code §55-7B-7; *Hicks v. Chevy*, 178 W. Va. 118, 358 S.E.2d 202 (1987) (per curiam); *Hinkle v. Martin*, 163 W. Va. 482, 256 S.E.2d 768 (1979). Emergency medical services regulated by W. Va. Code §16-4C-1 are also subject to provisions of W. Va. Code §55-7B-7. *Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 507 S.E.2d 124 (1998).

However, where deviation or causation involves routine or non-complex matters within common knowledge of lay jurors, expert testimony is not required. *Totten v. Adongay*, 175 W. Va. 634, 337 S.E.2d 2 (1985); *Nearly v. Charleston Area Med. Ctr., Inc.*, 194 W. Va. 329, 460 S.E.2d 464 (1995) (per curiam). Similarly, res ipsa loquitur may be invoked in medical malpractice cases where foreign object was left in body following surgery to infer negligence on part of surgeon, but doctrine may not be invoked to infer negligence where there is absence of foreign object within body when object was supposed to have been placed in body during surgery. *Farley v. Meadows*, 185 W. Va. 48, 404 S.E.2d 537 (1991).

Informed Consent. Compliance is governed by patient need standard rather than standard based on disclosure practices of physicians in community or nation. *Cross v. Trapp*, 170 W. Va. 459, 294 S.E.2d 446 (1982); *Adams v. El-Bash*, 175 W. Va. 781, 338 S.E.2d 381 (1985). Limited Consent. Except in very extreme cases, surgeon has no legal right to operate upon patient without his consent or upon child without consent of parent



or guardian. *Catlett v. MacQueen*, 180 W. Va. 6, 375 S.E.2d 184 (1988) (per curiam). However, where child is mature minor, child's consent would be required. *Belcher v. Charleston Area Med. Ctr.*, 188 W. Va. 105, 422 S.E.2d 827 (1992). Whether child is mature minor is factual question. *Id.*

**Procedure.** Statute modifies procedures used in medical malpractice actions and specifies certain matters relating to complaint, to discovery, and use of expert testimony. W. Va. Code §55-7B-1 *et seq.*

**Several Liability.** In medical malpractice actions, several, but not joint, liability against each defendant applies to each defendant in accordance with percentage of fault attributed to defendant by trier of fact (applicable to causes of action filed on or after July 1, 2003). W. Va. Code §55-7B-9.

**Proximate Cause.** Value of chance rule adopted; plaintiff may recover if defendant's acts or omissions increase risk of harm and increased risk was substantial factor in causing ultimate injury. *Thornton v. CAMC*, 172 W. Va. 360, 305 S.E.2d 316 (1983); *Reager v. Anderson*, 179 W. Va. 691, 371 S.E.2d 619 (1988).

**Settlement.** Remittitur to \$3 million from \$10 million awarded in action for death of child caused by negligent biopsy; Supreme Court took evidence on insurer's settlement negotiations in determining that \$3 million was not excessive. *Roberts v. Stevens Clinic*, 176 W. Va. 492, 345 S.E.2d 791 (1986); *see Miller v. Lambert*, 196 W. Va. 24, 467 S.E.2d 165 (1995).

**Standard of Care.** National standard governs, locality rule abolished. *Paintiff v. City of Parkersburg*, 176 W. Va. 469, 345 S.E.2d 564 (1986). Physician must fail to exercise that degree of care, skill and learning required or expected of reasonable, prudent health care provider in profession or class to which health care provider belongs acting in same or similar circumstances. W. Va. Code §55-7B-3(a)(1). Specialists are held to standard of care prevailing within their specialty. *Hundley v. Martinez*, 151 W. Va. 977, 158 S.E.2d 159 (1967); *Mayhorn v. Logan Medical Foundation*, 193 W. Va. 42, 454 S.E.2d 87 (1994).

**Sexual intimacy with a patient, induced by a marriage or other counselor, is a form of malpractice, permitting recovery by patient.** *Weaver v. Union Carbide*, 180 W. Va. 556, 378 S.E.2d 105 (1989). But, uncounseled spouse does not have malpractice claim due to lack of any professional relationship between counselor and uncounseled spouse. *Id.*

**Patient's cause of action will only exist if intimacy follows formation of trust relationship between patient and counselor. Trust relationship is based on following:**

1) therapy must have continued for sufficient period of time; 2) actual therapy sessions must have occurred. *Sisson v. Seneca Mental Health*, 185 W. Va. 33, 404 S.E.2d 425 (1991).

**Vicarious liability may be imposed on hospital for physician's negligence, where patient goes to hospital solely for medical services and is forced to rely on hospital's choice of physician.** *Thomas v. Raleigh General Hosp.*, 178 W. Va. 138, 358 S.E.2d 222 (1987). However, captain-of-the-ship doctrine does not exist in West Virginia. Surgeon is not liable for everything that goes on in operating room. *Id.*

**Wrongful pregnancy action recognized where healthy child born after negligently-performed sterilization procedure. Costs of raising healthy child are not recoverable, but lost wages, pain and suffering and all medical expenses are.** *James G. v. Caserta*, 175 W. Va. 406, 332 S.E.2d 872 (1985).

**Wrongful birth action recognized where negligent failure to advise of condition likely to cause birth defects, or negligent failure to detect defects, leads to birth of defective child. Extraordinary costs of raising child to majority and, if child will then be unable to support himself, throughout life, are recoverable, as are damages available in wrongful pregnancy.** *James G. v. Caserta*, 175 W. Va. 406, 332 S.E.2d 872 (1985).

**Wrongful life, or action by child born with birth defects, is not recognized.** *James G. v. Caserta*, 175 W. Va. 406, 332 S.E.2d 872 (1985).

**Statutory prohibition of unlicensed radiologic technology practice read in conjunction with statutory prescription of delegation by physicians of professional responsibilities to unlicensed persons indicates that physicians may not employ unlicensed radiologic technicians.** *W. Va. Radiologic Tech. Bd. of Exam's v. Darby*, 189 W. Va. 52, 427 S.E.2d 486 (1993).

**Legal Malpractice.** See "ATTORNEYS."

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES"; "MALPRACTICE"; "LIABILITY INSURANCE" and "CONTRIBUTION."

**Age. Negligence and contributory negligence of infants discussed.** *Prunty v. Tyler Traction Co.*, 90 W. Va. 194, 110 S.E. 570 (1922); *French v. Sinkford*, 132 W. Va. 66, 54 S.E.2d 38 (1948); *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974) (Infant Standard). Contributory negligence of child is no defense when suit is based on violation of child labor laws. *Pitzer v. M. D. Tomkies & Sons*, 136 W. Va. 268, 67 S.E.2d 437 (1951). Two-



year old child conclusively presumed incapable of contributory negligence. *Miller v. Warren*, 182 W. Va. 560, 390 S.E.2d 207 (1990). There is a conclusive presumption that a child under age of 7 is incapable of negligence. *Pino v. Szuch*, 185 W. Va. 476, 408 S.E.2d 55 (1991). There is rebuttable presumption that a child between ages of 7 and 14 is incapable of negligence. *Id.* At age 14 and older, child is presumed to be capable of negligence. *Id.*

**Attorney Negligence.** Attorney undertaking to perform professional services required to exercise knowledge, skill, and ability ordinarily possessed and exercised by members of legal profession in similar circumstances; to recover in action against attorney, client must prove negligence and damages directly and proximately resulting therefrom. *Keister v. Talbott*, 182 W. Va. 745, 391 S.E.2d 895 (1990).

**Attractive Nuisance.** Theoretically does not apply in W. Va., but recovery is permitted on basis of "dangerous instrumentality," requiring safeguards to prevent injury to children. Rule is equally applicable to licensees and trespassers and applies where proprietor knows 1) children in habit of resorting to property for play and 2) children are actually present at time of danger. *Adams v. Virginian Gasoline & Oil Co.*, 109 W. Va. 631, 156 S.E. 63 (1930). Review of cases and discussion of doctrine in *White v. Kanawha City Co.*, 127 W. Va., 566, 34 S.E.2d 17 (1945) (holding unguarded pool not "dangerous instrumentality,") and in *Tiller v. Baisden*, 128 W. Va. 126, 35 S.E.2d 728 (1945) (holding trash bonfire not "dangerous instrumentality"); *Waddell v. New River Co.*, 141 W. Va. 880, 93 S.E.2d 473 (1956) (holding no negligence where trespassing child climbed utility pole guy wire and touched uninsulated electrical wire); *Huffman v. Appalachian Power Co.*, 187 W. Va. 1, 415 S.E.2d 145 (1991) (18 year old trespasser, no dangerous instrumentality rule).

**Charitable Institutions.** Charitable immunity rule abrogated at least as to hospitals. Non-stock, non-profit hospital, even though generally considered charitable institution, may be held liable for injuries to patient negligently caused by its servants, agents and employees. *Adkins v. St. Francis Hosp.*, 149 W. Va. 705, 143 S.E.2d 154 (1965). By statute, any remaining immunity is waived by purchase of insurance. W. Va. Code §33-6-14a.

**Comparative Assumption of Risk.** Plaintiff's assumption of risk does not bar recovery unless degree of fault equals or exceeds combined fault or negligence of other parties to accident. *King v. Kayak Mfg. Corp.*, 182 W. Va. 276, 387 S.E.2d 511 (1989). Predicate of assumption of risk is that plaintiff has full knowledge and appreciation of dangerous condition and voluntarily ex-

poses himself to it. *Desco Corp. v. Trushel Constr. Co.*, 186 W. Va. 430, 413 S.E.2d 85 (1991). Doctrine retroactive to all cases tried for first time or on retrial and those cases on appeal if point preserved at trial. *King v. Kayak Mfg. Corp.*, 182 W. Va. 276, 387 S.E.2d 511 (1989). Proposed assumption of risk instruction. *Id.* n. 17 Failure to instruct an assumption of risk is prejudicial error. *Bills v. Life Style Homes Inc.*, 189 W. Va. 193, 429 S.E.2d 80 (1993). Assumption of risk is available in strict liability actions brought for abnormally dangerous activities. *Peneschi v. Nat'l Steel Corp.*, 170 W. Va. 511, 295 S.E.2d 1 (1982). Implied assumption of risk is not available as defense to defendant guilty of wilful or wanton conduct. *Murphy v. North Am. River Runners, Inc.*, 186 W. Va. 310, 412 S.E.2d 504 (1991). Assumption of risk doctrine requires plaintiff to have full knowledge and appreciation of risk. *Desco Corp. v. Trushel Constr. Co.*, 186 W. Va. 430, 413 S.E.2d 85 (1991).

**Comparative Negligence.** Party is not barred from recovering damages in tort action so long as his negligence or fault does not exceed or equal combined negligence or fault of other parties involved in accident. *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979). *Accord, Adkins v. Whitten*, 171 W. Va. 106, 297 S.E.2d 881 (1982); *Everly v. Columbia Gas*, 171 W. Va. 534, 301 S.E.2d 165 (1982). Principles of comparative fault or negligence apply not only to actions in tort involving personal injury or property damages, but also to actions in tort involving pecuniary damage alone. *Brammer v. Taylor*, 175 W. Va. 728, 338 S.E.2d 207 (1985) (applying comparative negligence to actions based on bank's alleged unauthorized practice of law and negligence in assisting with will preparation). Rule is fully retroactive. *Sullivan v. Billey*, 163 W. Va. 445, 256 S.E.2d 591 (1979). Apportionment of negligence is question for jury. *Raines v. Lindsey*, 188 W. Va. 137, 423 S.E.2d 376 (1992).

**Contributory Negligence.** Doctrine abolished. See "Comparative Negligence."

**Damages.** Award of \$100,000 to 49 year-old mother of two who averaged \$90 per month for housework and selling cosmetics for injuries leaving her unable to do normal housework was not held to be excessive. *Williams v. Penn Line Serv., Inc.*, 147 W. Va. 195, 126 S.E.2d 384 (1962). Discussion of recovery by parent for consequential damages due to injury to child. *Packard v. Perry*, 221 W. Va. 526, 655 S.E.2d 548 (2007). Right to recover medical expenses as a result of minor's personal injuries belongs to both the minor, and the minor's parents, but under no circumstances will double recovery be allowed. *Packard v. Perry*, 221 W. Va. 526, 655 S.E.2d 548 (2007). There is no rule for measuring amount of compensation for pain and suffering and court may not

substitute its opinion for that of jury unless verdict is so small that it clearly indicates that jury was influenced by improper motives. *Richmond v. Campbell*, 148 W. Va. 595, 136 S.E.2d 877 (1964). See also *Crum v. Ward*, 146 W. Va. 421, 122 S.E.2d 18 (1961). Estate of deceased tortfeasor can be held liable for punitive damages. *Perry v. Melton*, 171 W. Va. 397, 299 S.E.2d 8 (1982). W. Va. Code §29-12A-7. The Government Tort Claims and Insurance Reform Act of 1986 (\$500,000); W. Va. Code §55-7B-8 The Medical Professional Liability Act of 2003 (\$250,000).

**Dangerous Instrumentalities.** Person who chooses to use abnormally dangerous instrumentality is strictly liable without a showing of negligence for any injury proximately caused by that instrumentality. *Evans v. Mutual Mining*, 199 W. Va. 526, 485 S.E.2d 695 (1997). Defendant without fault liable for damages resulting from blasting. *Fairfax Inn, Inc. v. Sunnyhill Mining Co.*, 97 F. Supp. 991 (N.D. W. Va. 1951). Plaintiff entitled to recover for blasting damages without establishing negligence on part of defendant. Plaintiff must prove damages were caused by blasting. *Whitney v. Ralph Myers Contracting Corp.*, 146 W. Va. 130, 118 S.E.2d 622 (1961). Electricity is inherently dangerous instrumentality which requires high level of care. *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700 (1991). Doctrines of absolute liability and res ipsa loquitur are applicable to unexplained airplane crash. *Parcell v. United States*, 104 F. Supp. 110 (S.D. W. Va. 1951). Motor vehicle carrying dynamite on public road as licensed carrier is not public nuisance or liable without fault, but res ipsa loquitur doctrine applicable when explosion occurs. *Pope v. Edward M. Rude Carrier Corp.*, 138 W. Va. 218, 75 S.E.2d 584 (1953). No inference of negligence arises from explosion of glass coffeemaker being used as such. *Saena v. Zenith Optical Co.*, 135 W. Va. 795, 65 S.E.2d 205 (1951). No inference of negligence against bottling company from collapse of cardboard carton of Coca-Cola on removal from retail dealer's shelf three days after delivery. *Cunningham v. Parkersburg Coca-Cola Bottling Co.*, 137 W. Va. 827, 74 S.E.2d 409 (1953).

**Definition and discussion of negligence.** *Patton v. City of Grafton*, 116 W. Va. 311, 180 S.E. 267 (1935); *Kelly v. Checker White Cab*, 131 W. Va. 816, 50 S.E.2d 888 (1948). Negligence formula. *Haynes v. City of Nitro*, 161 W. Va. 230, 240 S.E.2d 544 (1977) (Utility v. Risk).

**Dram Shop Act.** West Virginia Supreme Court of Appeals would recognize common law cause of action in negligence by injured third party against tavern owner who allegedly served customer already intoxicated, if presented with that issue. *Walker v. Griffith*, 626 F. Supp. 350 (W.D. Va. 1986). Sale of beer to person under

age 21 in violation of W. Va. Code §11-16-18 (a)(3) prima facie evidence of negligence if violation is held to be proximate cause of plaintiff's injury; such sale gives rise to cause of action against licensee in favor of purchaser or third party injured as proximate result of unlawful sale; rebuttal of prima facie evidence of negligence permitted by showing purchaser appeared to be of age and vendor used reasonable means of identification to ascertain age. *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990).

**Doctrine of complicity.** One who actively contributes to intoxication of another is barred from recovering damages under a Dram Shop Act; contributory negligence of minor-underage purchaser of beer in action against seller of beer may be considered; consideration of passenger's substantial assistance, encouragement, and contribution to driver's intoxication in suit against vendor permitted; discussion of factors in determination of foreseeability that underage purchaser will share alcoholic beverages with others under age. *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990). No liability on part of social host who gratuitously furnishes alcohol to guest when innocent third party injured by guest; employer gratuitously furnishing alcohol to employee not liable to third party where there is lack of affirmative conduct creating unreasonable risk of harm. *Overbaugh v. McCutcheon*, 183 W. Va. 386, 396 S.E.2d 153 (1990). Tort action exists against liquor licensee for personal injuries caused by licensee's sale of alcohol to someone who is "physically incapacitated" by drinking. *Bailey v. Black*, 183 W. Va. 74, 394 S.E.2d 58 (1990).

**Duty of Care.** Depends primarily on foreseeability of harm. *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983); *Brammer v. Taylor*, 175 W. Va. 728, 338 S.E.2d 207 (1985). Compliance with appropriate regulations is competent evidence of due care, but not due care per se or presumption of due care; party can be negligent even if it complies with appropriate regulations, where party knew or should have known of some risk that would be prevented by reasonable measures not required by regulations, and party did not take such measures. *Miller v. Warren*, 182 W. Va. 560, 390 S.E.2d 207 (1990). One who engages in affirmative conduct and thereafter realizes that conduct created unreasonable risk of harm to another is under duty to exercise reasonable care to prevent threatened harm. *Courtney v. Courtney*, 186 W. Va. 597, 413 S.E.2d 418 (1991).

**Entrustment of Vehicle.** Negligent entrustment of automobile, to one foreseeably dangerous, is actionable. *Payne v. Kinder*, 147 W. Va. 352, 127 S.E.2d 726 (1962); *Accord, Huggins v. Tri-County Bonding Co.*, 175 W. Va. 643, 337 S.E.2d 12 (1985).

Evidence. If scientific, technical, or their specialized knowledge will assist trier of fact to understand evidence or to determine fact in issue, witness qualified as expert by knowledge, skill, experience, training, or education may testify thereto in form of opinion or otherwise. W. Va. R. Evid. 702; Syl. Pt. 3, *Ventura v. Winegardner*, 178 W. Va. 82, 357 S.E.2d 764 (1987). Whether witness is qualified to state opinion is matter which rests within sound discretion of trial court, and ruling will not ordinarily be disturbed unless clearly appears discretion has been abused. Syl. Pt. 5, *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974). Rulings on admissibility of evidence largely within trial court's sound discretion and should not be disturbed unless there has been abuse of that discretion. *State v. Louk*, 171 W. Va. 639, 301 S.E.2d 596 (1983); Syl. Pt. 2, *State v. Pe-yatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983). Photographs of injuries admissible in negligence action to show extent of cosmetic damage, extent of injury and degree of disability. *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700 (1991). Doctor's negligence or want of professional skill generally can be proven only by expert witnesses. *Farley v. Meadows*, 185 W. Va. 48, 404 S.E.2d 537 (1991). Syl. Pt. 2, *Roberts v. Gale*, 149 W. Va. 166, 139 S.E.2d 272 (1964).

Immunity. Family Immunity. See "Parental Immunity" under "AUTOMOBILES." Interspousal immunity abolished. *Coffindaffer v. Coffindaffer*, 161 W. Va. 557, 244 S.E.2d 338 (1978). Municipal immunity abolished with regard to municipal corporations. *Long v. City of Weirton*, 158 W. Va. 741, 214 S.E.2d 832 (1975). Child v. Parent immunity abolished for intentional or willful conduct but remains for reasonable discipline. *Courtney v. Courtney*, 186 W. Va. 597, 413 S.E.2d 418 (1991).

Imputed Negligence. Negligence will not be imputed or presumed. *Miller v. Warren*, 182 W. Va. 560, 390 S.E.2d 207 (1990). Negligence of operator not imputed to passenger, in absence of joint enterprise. *Blackburn v. Smith*, 164 W. Va. 354, 264 S.E.2d 158 (1980); *Baltimore & O. R. Co. v. Green*, 136 F.2d 88 (4th Cir. 1943); *Tawney v. Kirkhart*, 130 W. Va. 550, 44 S.E.2d 634 (1947); *Frampton v. Consolidated Bus Lines*, 134 W. Va. 815, 62 S.E.2d 126 (1950). Even though passenger is employee of driver, joint enterprise does not exist where passenger has no voice in directing and governing movement of vehicle. *Parsons v. New York Central RR. Co.*, 127 W. Va. 619, 34 S.E.2d 334 (1945). Negligence of parent cannot be imputed to infant child; nor can such child be guilty of contributory negligence. *Miller v. Warren*, 182 W. Va. 560, 390 S.E.2d 207 (1990). Ordinarily, negligence of independent contractor is not imputed to one contracting for services; but holder of public franchise granting right to perform activity involving unreasonable risk of harm is liable for acts of independ-

ent contractors employed to perform acts franchised. *Griffith v. George Transfer & Rigging, Inc.*, 157 W. Va. 316, 201 S.E.2d 281 (1973) (confusing statement; motorcyclist sued because collision in which independent contractor was operating his own truck under ICC license of co-defendant transport company; decision in part may have turned on extent of control and advertising by transport company).

Insurance. In action against bus company for injuries sustained by passenger, statement by plaintiff's counsel relating to teaching insurance company lesson was prejudicial and ordinarily reversible error even though it was made inadvertently and was immediately corrected to refer to bus company. *Flanagan v. Mott*, 145 W. Va. 220, 114 S.E.2d 331 (1960). Appraising jury that defendant was insured was error regardless of court's instruction not to consider it. *Leftwich v. Wesco Corp.*, 146 W. Va. 196, 119 S.E.2d 401 (1961).

Joint and Several Liability. Where plaintiff is injured by concurrent negligence of several defendants, plaintiff may elect to sue one or more of them. *Kodym v. Frazier*, 186 W. Va. 221, 412 S.E.2d 219 (1991). Jury must apportion negligence among all parties to accident, not merely those to lawsuit; thus, it is generally error to order separate trials as to multiple defendants. *Bowman v. Barnes*, 168 W. Va. 111, 282 S.E.2d 613 (1981). See also, *Brammer v. Taylor*, 175 W. Va. 728, 338 S.E.2d 207 (1985) (affirming rule as to negligence causing only pecuniary loss). Implied indemnity in favor of innocent sellers not cut off by manufacturer's settlement. *Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 459 S.E.2d 151 (1995).

For causes of action that accrue after July 1, 2005, W. Va. Code §55-7-24 will apply. This statute changes rule of joint and several liability in West Virginia, which allows plaintiff to collect full amount of damages from one or more joint tortfeasors, irrespective of their percentage of fault. Under this new statute: 1) If defendant is found to be thirty percent (30%) or less at fault, then defendant's liability shall be several, and not joint, and he or she shall be liable only for damages attributable to him or her. Rules of joint and several liability shall apply to all defendants found to be 31% or more at fault. This means that if defendant is found to be 31% or more at fault, defendant's liability shall be several and joint and plaintiff will be entitled to collect full amount of damages from defendant, irrespective of defendant's percentage of fault. 2) This new rule does not apply to the following: (a) any party who acted with intention of inflicting injury or death; (b) any party who acted in concert with another person as part of a common plan or design resulting in harm; (c) any party who negligently or willfully caused unlawful emission, disposal or spill-



age of a toxic or hazardous substance; or (d) any party strictly liable for manufacture and sale of defective product.

If plaintiff is unable to collect from liable defendant, this statute allows plaintiff to move for reallocation of any uncollectible amount among other parties in litigation at the time verdict is rendered. The statute does not affect joint and several liability provisions under Tort Reform Act, W. Va. Code §29-12A-7, or joint and several liability provisions under Medical Professional Liability Act, W. Va. Code §55-7B-9.

Last Clear Chance. Doctrine abolished as result of adoption of comparative contributory negligence. *Ratlief v. Yokum*, 167 W. Va. 779, 280 S.E.2d 584 (1981).

Municipalities. Statute requiring written notice filed within thirty days after accrual of action against municipality in order to institute suit is unconstitutional. *O'Neil v. City of Parkersburg*, 160 W. Va. 694, 237 S.E.2d 504 (1977). Municipal immunity abolished with regard to municipal corporations. *Long v. City of Weirton*, 158 W. Va. 741, 214 S.E.2d 832 (1975). Public officer has qualified immunity for discretionary acts within scope of employment. *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995).

Premises Liability. No distinction between licensees and invitees; duty of reasonable care to all non-trespassers; possessor of property must refrain from willful or wanton injury to trespasser. *Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999). Five factors assess whether defendant used reasonable care: 1) foreseeability of injury; 2) severity of injury; 3) time, manner and circumstance; 4) expected use of premises; and 5) burden on landowner of guarding against injury. *Id.* Lessee of store in shopping center is not liable when patron sustains injuries as result of accident which occurs on non-leased common area. *Durm v. Heck's, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991). Owner or occupant owes all non-trespassers duty to exercise ordinary care to keep and maintain premises in reasonably safe condition, including protection against injury inflicted by others. *Puffer v. Hub Cigar Store, Inc.*, 140 W. Va. 327, Syl. Pt. 4, 84 S.E.2d 145, Syl. Pt. 4 (1954). Owner of premises is not deemed insurer of invitee, and only owes duty to exercise ordinary care to keep premises in reasonably safe condition. *Burdette v. Burdette*, 147 W. Va. 313, 127 S.E.2d 249 (1962). See also *Hovermale v. Berkeley Springs Moose Lodge No. 1483*, 165 W. Va. 689, 271 S.E.2d 335 (1980). Owner or occupant of premises owes to invitee workman or independent contractor duty of providing safe place to work and further duty to exercise ordinary care for safety of such persons. *Blake v. Wendy's Int'l, Inc.*, 186 W. Va. 593, 413 S.E.2d 414 (1991); *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 418

S.E.2d 738 (1992). Owner or occupant of building is not insurer and is not liable to invitees absent at least negligence; foreseeability necessary to establish proximate cause held lacking when one bowling alley customer shot others in attempt to shoot his wife. *Haddox v. Suburban Lanes, Inc.*, 176 W. Va. 744, 349 S.E.2d 910 (1986). A landlord does not have a duty to protect a tenant from unforeseeable criminal activity. *Miller v. Whitworth*, 193 W. Va. 262, 455 S.E.2d 821 (1995). A landlord does not have a duty to protect a tenant's social guest from criminal activity. *Jack v. Fritts*, 193 W. Va. 494, 457 S.E.2d 431 (1995). Owner of any place of employment, public assembly, or public building has statutory and non-delegable duty to maintain building in safe condition; employee of tenant allowed to recover from owner, notwithstanding tenant's contractual right to exclusive control of premises. As to violation of statutory duty, assumption of risk is available, if at all, only if defendant meets four-part test, including establishment that employee's conduct was willful, wanton or reckless; Court not yet called upon to determine whether assumption of risk exists in view of adoption of comparative fault. *Pack v. Van Meter*, 177 W. Va. 485, 354 S.E.2d 581 (1986). One who takes possession of land upon which there is existing structure or other artificial conditions unreasonably dangerous to persons or property outside land is subject to liability for physical harm only after possessor knows or should know of condition, knows or should know that condition exists without consent of those affected by it, and has failed, after reasonable opportunity, to make it safe or otherwise to protect such persons. *Miller v. Montgomery Investments, Inc.*, 182 W. Va. 242, 387 S.E.2d 296 (1989). Builder of home is liable to subsequent purchasers in negligence action, notwithstanding absence of privity, for damages arising from latent defects in construction of home not discoverable through reasonable inspection. *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988). Business operator or owner owes duty of care to invitees regularly using adjacent property in connection with business when she has actual or constructive knowledge of such use and is aware of hazard causing injury. *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992). An implied warranty of habitability exists. *Teller v. McCoy*, 162 W. Va. 367, 253 S.E.2d 114 (1978).

Proximate Cause. *Mills v. Indemnity Ins. Co. of N. Am.*, 114 W. Va. 263, 171 S.E. 532 (1933); *Yates v. Mancari*, 153 W. Va. 350, 168 S.E.2d 746 (1969). Defendant's negligence need not be sole proximate cause of harm in order for plaintiff to recover from him. *Everly v. Columbia Gas of W.V., Inc.*, 171 W. Va. 534, 301 S.E.2d 165 (1982). See also *Burdette v. Maust Coal & Coke Corp.*, 159 W. Va. 335, 222 S.E.2d 293 (1976). Negli-



gent defendant saved from liability if supervening or intervening negligence of another intervenes and becomes only proximate cause of injury. Supervening or intervening cause must be negligent act or omission which constitutes new, effective, and only cause of injury. *Wehner v. Weinstein*, 191 W. Va. 149, 444 S.E.2d 27 (1994); *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983); *Perry v. Melton*, 171 W. Va. 397, 299 S.E.2d 8 (1982); *Lester v. Rose*, 147 W. Va. 575, 130 S.E.2d 80 (1963). Where separate and distinct negligent acts of two or more persons continue unbroken to the instant of injury and contribute directly and immediately to injury, such acts constitute sole proximate cause of injury. *Hudnall v. Mate Creek Trucking, Inc.*, 200 W. Va. 454, 490 S.E.2d 56 (1997).

Question for Jury. *Somerville v. Dellosa*, 133 W. Va. 435, 56 S.E.2d 756 (1949). Even where facts are undisputed, negligence, proximate cause and due care may be questions for jury, if facts are such that reasonable men may draw different conclusions from them. *McAllister v. Weirton Hosp. Co.*, 173 W. Va. 75, 312 S.E.2d 738 (1983); *Board of Educ. of Ohio County v. VanBuren & Firestone Architects, Inc.*, 165 W. Va. 140, 267 S.E.2d 440 (1980). Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination. *Waugh v. Traxler*, 186 W. Va. 355, 412 S.E.2d 756 (1991). Fact finder's apportionment of negligence or causation may be set aside only if grossly disproportioned. *Raines v. Lindsay*, 188 W. Va. 137, 423 S.E.2d 376 (1992).

Under *res ipsa loquitur*, "it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff." *Foster v. City of Keyser*, 202 W. Va. 1, 501 S.E.2d 165 (1997).

Sudden Emergency. Defendant not entitled to defense of sudden emergency when he was driving truck with known defective brakes and therefore was unable to avoid striking stopped car. *Henthorn v. Long*, 146 W. Va. 636, 122 S.E.2d 186 (1961). Instruction on reduced standard of care due to sudden emergency is not proper where emergency was created by person seeking instruction; by implication, doctrine is available in comparative negligence cases, since court did not discuss impact of comparative negligence on doctrine. *Ratlief v. Yokum*, 167 W. Va. 779, 280 S.E.2d 584 (1981). Jury instruction regarding sudden emergency must state that existence of emergency is one factor of total comparative fault analysis. *Moran v. Atha Trucking, Inc.*, 208 W. Va. 379, 540

S.E.2d 903 (1997). Furthermore, sudden emergency may not operate as a total defense to a party's negligence when it is used under comparative negligence rule. *Id.* A jury may, however, assign zero percentage of fault to a party and 100% of fault to another party. *Id.* Notably, sudden emergency instructions are to be given rarely in situations of unanticipated emergencies in which parties had little or no time for reflection and deliberation. *Id.*

Violation of Statute. Violation of motor vehicle brake statute is *prima facie* negligence, requiring jury determination. *Spurlin v. Nardo*, 145 W. Va. 408, 114 S.E.2d 913 (1960). Driver was guilty of primary negligence as matter of law, in relation to accident in which she struck pedestrian in crosswalk, where driver's admitted and uncontroverted violation of city ordinance was natural and proximate cause of injury to pedestrian. *Thomas v. Ramey*, 156 W. Va. 191, 192 S.E.2d 873 (1972). Violation of statute is *prima facie* negligence, not negligence *per se*. *Lenox v. McCauley*, 188 W. Va. 203, 423 S.E.2d 606 (1992); *Sartin v. Evans*, 186 W. Va. 717, 414 S.E.2d 874 (1991); *Waugh v. Traxler*, 186 W. Va. 355, 412 S.E.2d 756 (1991); *Brammer v. Taylor*, 175 W. Va. 728, 338 S.E.2d 207 (1985), citing *Vangergrift v. Johnson*, 157 W. Va. 958, 206 S.E.2d 515 (1974). To be actionable, violation of a statute must be proximate cause of plaintiff's injury. *State ex rel. Castle v. Perry*, 201 W. Va. 90, 491 S.E.2d 760 (1997). Failure to comply with fire code or similar regulation constitutes *prima facie* negligence if any injury proximately flows from noncompliance and injury is the sort regulation was intended to prevent. *Miller v. Warren*, 182 W. Va. 560, 390 S.E.2d 207 (1990). Violation of smoke detector statute is *prima facie* evidence of negligence. *Reed v. Phillips*, 192 W. Va. 392, 452 S.E.2d 708 (1994). Violation of statute is *prima facie* evidence of negligence if proximate cause of injury. *Courtney v. Courtney*, 186 W. Va. 597, 413 S.E.2d 418 (1991). *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990). Nature of duty imposed by statute and resulting benefits usually determine those entitled to its protection. *Bailey v. Black*, 183 W. Va. 74, 394 S.E.2d 58 (1990).

## NO-FAULT INSURANCE

Not applicable in West Virginia.

## PENALTY AND ATTORNEY FEES

See also "ATTORNEYS"; "DAMAGES"; "LIABILITY INSURANCE" and Other Incidental Damages.

Situations in Which Insured Entitled to Attorney Fees from Insurer. Insurer who erroneously failed to defend insured against claim will be liable to insured for reasonable attorney's fees incurred by insured in defend-



ing claim, as well as other costs and expenses. Further, insurer is liable for attorneys' fees incurred in prosecuting declaratory judgment action which establishes duty to defend. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). Syl. Pt. 2, *Bruceton Bank v. U.S. Fid. & Guar. Co.*, 199 W. Va. 548, 486 S.E.2d 19 (1997); Syl. Pt. 1, *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997); *Erwin v. Henson*, 202 W. Va. 137, 502 S.E.2d 712 (1998).

Insured "substantially prevails" in a property damage action against his or her insurer when action is settled for amount equal to or approximating amount claimed by insured immediately prior to commencement of action, as well as when action is concluded by jury verdict for such amount. In either situation insured is entitled to recover reasonable attorney's fees from his or her insurer, as long as attorney's services were necessary to obtain payment of insurance proceeds. *Jordan v. Nat'l Grange Mut. Ins. Co.*, 183 W. Va. 9, 393 S.E.2d 647 (1990); *Miller v. Fluharty*, 201 W. Va. 685, Syl. Pt. 2, 500 S.E.2d 310, Syl. Pt. 2 (1997); *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

In *Jordan*, services of insureds' attorney were necessary to obtain payment of insurance proceeds. Insureds were entitled to compensation from insurer for payment of fees. Insurer had refused to offer any amount, much less reasonable amount, until after insureds' attorney was retained and action was filed. About 17 months had passed since loss had been incurred. Insurer ultimately agreed to pay exact amount originally and continuously claimed by insureds. *Jordan v. Nat'l Grange Mut. Ins. Co.*, 183 W. Va. 9, 393 S.E.2d 647 (1990).

Factors Considered in Determining Reasonable Attorney Fees. Amount of attorneys' fees is to be reasonable and is not determined solely by insured's agreement with insurer, but is to be determined by considering the following: time and labor required; novelty and difficulty of questions; skill required to perform legal service properly; preclusion of other employment by attorney due to acceptance of case; customary fee; whether fee is fixed or contingent; time limitations imposed by client or circumstances; amount involved and results obtained; experience, reputation and ability of attorney; undesirability of case; nature and length of professional relationship with client; and awards in similar cases. W. Va. R. of Prof. Conduct, 1.5(a); *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986); *Jordan v. Nat'l Grange Mut. Ins. Co.*, 183 W. Va. 9, 393 S.E.2d 647 (1990); *Rice v. Mike Ferrell Ford, Inc.*, 184 W. Va. 757, 403 S.E.2d 774 (1991); *State ex rel. Bd. of Educ., County of Kanawha v. McCuskey*, 184 W. Va. 615, 403 S.E.2d 17 (1991) (*per curiam*); *Erwin v. Henson*, 202 W. Va. 137, Syl. Pt. 1, 502 S.E.2d 712, Syl. Pt. 1 (1998);

*Landmark Baptist Church v. Bhd. Mut. Ins. Co.*, 199 W. Va. 312, Syl. Pt. 1, 484 S.E.2d 195, Syl. Pt. 1 (1997).

Breach of Duty to Insured. Failure of insurer to settle liability claim within policy limits constitutes prima facie case of breach of duty to insured. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990). Although standard is negligence - what a reasonably prudent insurer would do - on failure to settle, insurer must show by clear and convincing evidence that it was not negligent and that it accorded insured's interest same weight as its own. *Id.* Offer to settle within policy limits does not, by itself, bar action against insurer if there is a dispute as to policy limits. *Id.*

Penalty. Punitive damages may be awarded in favor of insured against its insurer for failure to settle claim within policy limits, but policy holder must establish a high threshold of actual malice in settlement process. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990). Similarly, punitive damages may be awarded to insured if insurer actually knew claim was proper and insured can prove that it was willfully, maliciously, and intentionally denied. *Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W. Va. 168, 381 S.E.2d 367 (1989).

Unfair Trade Practices Act. West Virginia has enacted Unfair Trade Practices Act regulating business of insurance. W. Va. Code §33-11-1 *et seq.*

Cause of action under West Virginia's Unfair Trade Practice Act is independent of any contract duty owed by insurer. Insured may sue insurer under Act. *Weese v. Nationwide Ins. Co.*, 879 F.2d 115 (4th Cir. 1989). However, third-party claimant may not bring private cause of action against insurer or any person for unfair claims settlement practices. W. Va. Code §33-11-4a. Third-party claimant's sole remedy for unfair claims settlement practice or bad faith settlement of claim is filing of administrative complaint with Insurance Commissioner in accordance with W. Va. Code §33-11-4a(b).

Unfair Methods of Competition and Unfair or Deceptive Acts or Practices. The following are defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance: 1) misrepresentation and false advertising of insurance policies; 2) false information and advertising generally; 3) defamation; 4) boycott, coercion and intimidation; 5) false statements and entries; 6) stock operations and advisory board contracts; 7) unfair discrimination; 8) rebates; 9) unfair claim settlement practices; 10) failure to maintain complaint handling procedures; 11) misrepresentation in insurance applications; and, 12) failure to maintain privacy of consumer financial and health information. W.

Va. Code §33-11-4 (2005). "Piggybacking," use of cash values or dividends of in-force policies to finance new policies, is not listed in W. Va. Code Section 33-11-4 as illegal or deceptive practice. *Shell v. Metro. Life Ins. Co.*, 183 W. Va. 407, 396 S.E.2d 174 (1990).

**Unfair Settlement Practices.** Insurer has overarching duty to deal with its insured fairly and in good faith. *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W. Va. 570, 490 S.E.2d 657 (1997) (*per curiam*). For first-party claims only (W. Va. Code §33-11-4a) an implied private right of action exists under W. Va. Code §33-11-4 (9) for settlement practices in violation of that section; violation must be of such frequency that it appears to be "general business practice." *Maher v. Continental Cas. Co.*, 76 F.3d 535 (4th Cir. 1996) (action exists whether injured party is insured). Action against insurer for bad-faith and unfair settlement practices may be joined in same complaint as underlying personal injury suit. *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994); *Maher v. Continental Cas. Co.*, 76 F.3d 535 (4th Cir. 1996). Insured's private cause of action against insurer may be initiated before underlying case is resolved. *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 506 S.E.2d 64 (1997). Insured's claim against uninsured motorist insurer for failing to settle in good faith is actionable under West Virginia's Unfair Trade Practices Act. *Bias v. Nationwide Mut. Ins. Co.*, 179 W. Va. 125, 365 S.E.2d 789 (1988). Under police officer's official bond, surety did not fail to settle claim made in good faith, prompt, fair and equitable manner, where as soon as liability was reasonably clear, company offered to pay what it considered to be its liability under bond. *Robinson v. Fid. & Deposit Co.*, 181 W. Va. 463, 383 S.E.2d 95 (1989). Insured who established bad faith settlement practices by insurer, could recover attorney fees incurred in successful appraisal proceeding despite failure of insured to prove any economic losses as result of insurer's failure to promptly settle loss. *Smithson v. U.S. Fid. & Guar. Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991).

**Defamation and Placing False Entries in Files.** Implied right of action exists for violation of W. Va. Code, Sections 33-11-4 (3) & 4 (5), which prohibits statements which are false, maliciously critical or derogatory to financial condition of person and which prohibit publishing or placing in any book or report statements harmful to financial condition or business of person. False allegation that insured was "heavily involved in the Mafia" placed in insured's file violates these sections and is actionable, even though allegation is not published by insurer to anyone. *Mutafis v. Erie Ins. Exch.*, 174 W. Va. 660, 328 S.E.2d 675 (1985), 561 F. Supp. 192 (N.D. W. Va. 1983), *aff'd*, 775 F.2d 593 (4th Cir. 1985). Private

plaintiff may recover punitive damages under W. Va. Code, Section 33-11-6. *Id.*

**Administrative Remedies.** W. Va. Code, Sections 33-11-6(g) and 33-11-4a(b) provide administrative remedy for violations of W. Va. Code, Section 33-11-4. Remedy provision further provides that existence of administrative remedy will not "absolve any person affected by such order or hearing from any other liability, penalty or forfeiture under law." W. Va. Code §33-11-6 (h). A hearing before Commissioner of insurance pursuant to W. Va. Code, Section 33-11-6 is not intended to be exclusive remedy for violation of unfair trade practices statutes. *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 280 S.E.2d 252 (1981).

### PRIVILEGED COMMUNICATIONS

**General rule.** Privilege of a witness, person, government, state, or political subdivision thereof shall be governed by principle of common law except as modified by Constitution of the United States or West Virginia, statute or court rule. W. Va. R. Evid. 501.

**Attorney/Client. Purpose.** Communications between attorney and client, made during professional consultation are privileged from disclosure; client has privilege to refuse to disclose, and to prevent others from disclosing, confidential communications between himself or his representative and his lawyer's representative. *State v. Douglass*, 20 W. Va. 770 (1882). Attorney/client privilege originated at common law, and has as its principle object promotion of full and frank disclosure between attorney and client so as to ensure sound legal advice or advocacy. *Marano v. Holland*, 179 W. Va. 156, 366 S.E.2d 117 (1988).

**Privileged communications.** In order to assert attorney-client privilege, three main elements must be present: 1) both parties must contemplate that attorney-client relationship does or will exist; 2) advice must be sought by client from attorney in his capacity as legal advisor; 3) communication between attorney and client must be intended to be confidential. *State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129, Syl. Pt. 2 (1979). Fact that attorney receives no compensation for his services is no bar to privilege. *Id.* Corporate "party," for purposes of Rule of Professional Conduct stating that lawyers shall not communicate about a subject of representation with "party" whom lawyer knows to be represented by another lawyer in a matter unless lawyer has consent of other lawyer or is authorized by law to do so, prohibits direct communication by adversary counsel with those officials, but only those, who have legal power to bind corporation in a matter or who are responsible for implementing advise of corporation's lawyer, or any member of organization whose own interests are directly at



stake in representation. *Dent v. Kaufman*, 185 W. Va. 171, 406 S.E.2d 68 (1991); *See also* W. Va. R. of Prof. Conduct, 4.2 (1989). Still, former employees of corporate party may be interviewed *ex parte* unless former employee is individually represented. *Charleston Area Med. Ctr. v. Zakaib*, 190 W. Va. 186, 437 S.E.2d 759 (1993). In medical malpractice action brought against hospital, plaintiff's counsel may interview hospital employees who were mere witnesses without presence of hospital's counsel. *Id.* However, attorney-client privilege may be waived if disclosure of privileged communications is made to third party. *Marano v. Holland*, 179 W. Va. 156, 366 S.E.2d 117 (1988). Likewise, client who testified in his own behalf concerning privileged communications with his attorney waived privilege. *Bennett v. Bennett*, 137 W. Va. 179, 70 S.E.2d 894 (1952).

**Work Product Doctrine.** To determine whether a document was prepared in anticipation of litigation and is, therefore, protected from disclosure under work product doctrine, primary motivating purpose behind creation of document must have been to assist in pending or probable future litigation. *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 199 W. Va. 316, 484 S.E.2d 199 (1997).

**Exceptions to Attorney-Client Privilege.** No privilege attaches as to communication that is relevant to issue of breach of duty by lawyer to his client (malpractice or inadequate representation) or by client to his lawyer (client's failure to pay his lawyer's fee for professional services). *Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703 (1881). If client seeks aid of attorney in preparation of fraud, his communications are not privileged. *Thomas v. Jones*, 105 W. Va. 46, 141 S.E. 434 (1928).

**Insurer/Insured.** In federal courts, communication received by liability insurance company from one of its insured concerning matters covered by insurance policy is not privileged communication. Law does not recognize any privilege of insurance companies. *Jackson v. Kroblin Refrigerated Xpress, Inc.*, 49 F.R.D. 134 (N.D. W. Va. 1970).

**Clergy/Penitent.** There is limited clergyman-penitent privilege in West Virginia. W. Va. Code, Section 48-1-301 prohibits clergyman from testifying as to any confidential communications or statements made by party to clergyman in clergyman's spiritual or religious capacity unless party making statement consents or waives privilege. This limited privilege applies only to parties in domestic lawsuits and when no person other than a member of the clergy, party and spouse of the party, was present when such communications or statements were made. W. Va. Code §48-1-301.

**Doctor/Patient.** Doctor-patient privilege is statutory privilege which was not recognized at common law. *See Whalen v. Roe*, 429 U.S. 589 (1977). It has not been adopted or codified in West Virginia. *Mohr v. Mohr*, 119 W. Va. 253, 193 S.E. 121 (1937). However, W. Va. Code §27-3-1 (1977) provides that communications and information obtained in course of treatment or evaluation of mental health patients shall be deemed "confidential information" and may be released only under certain enumerated circumstances. W. Va. Code §27-3-1; *Allen v. Smith*, 179 W. Va. 360, 368 S.E.2d 924 (1988). Plaintiff's attorney in a negligence action may not conduct *ex parte* interviews of plaintiff's physicians in absence of specific permission from plaintiff to do so. Plaintiff in a lawsuit has not waived his right to privacy in its entirety. *State ex rel. Kitzmiller v. Henning*, 190 W. Va. 142, 437 S.E.2d 452 (W. Va. 1993).

**Spousal.** Spousal communication privilege existed at common law and is codified at W. Va. Code, Section 57-3-4. W. Va. Code, Section 57-3-4 sets forth that neither husband nor wife, without consent of other, may be examined in any case as to confidential communication made by one to other while married. Privilege continues after relationship ceases to any communication made while marriage existed. W. Va. Code §57-3-4. Communication between husband and wife in known presence and hearing of a third person, capable of comprehending what is being said, is not so confidential as to be privileged communication, and either husband, wife, or third person may testify in regard thereto. *Fuller v. Fuller*, 100 W. Va. 309, 130 S.E. 270 (1925); *State v. Bohon*, 211 W. Va. 277, 565 S.E.2d 399 (2002). Test of whether acts of spouse come within privilege against disclosure of confidential marital communication is whether act or conduct was indicated or done in reliance on confidence of marital relation, *i.e.*, whether there was expectation of confidentiality. *State v. Robinson*, 180 W. Va. 400, 376 S.E.2d 606 (1988). Generally, communications made in private between husband and wife are presumed to be confidential until contrary is shown. *Id.*

## PRODUCTS LIABILITY

*See* "REPRESENTATIONS AND WARRANTIES"; "CONTRIBUTION"; "LIMITATION OF TIME FOR COMMENCEMENT OF ACTION."

Defendant is, without regard to privity, strictly liable in tort with respect to product which is defective in sense that it is not reasonably safe for its intended use where such defect causes injury. Standard of reasonable safeness is determined not by particular manufacturer, but by what reasonably prudent manufacturer's standard should have been at time product was made. *Church v. Wesson*, 182 W. Va. 37, 385 S.E.2d 393, Syl. Pt. 2



(1989). Question of what is intended use of product carries with it concept of all those uses reasonably prudent person might make of product. *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979). Jury may not speculate as to causation or existence of defect; verdict against dock owner could not stand merely because loading cranes fell over and subsequent examination showed that dock had sunk two inches while holding cranes. *Crane & Equip. Rental Co. v. Park Corp.*, 177 W. Va. 65, 350 S.E.2d 692 (1986).

Privity between seller and ultimate user not required where product is inherently and imminently dangerous. *Williams v. Chrysler Corp.*, 148 W. Va. 655, 137 S.E.2d 225 (1964). Privity abolished generally. See *Morningstar v. Black & Decker*, *supra*.

Recovery for damage to product must result from sudden calamitous event attributable to dangerous defect or design of product itself. If product is just flawed or defective, such that it does not meet purchaser's expectations, remedy is under Uniform Commercial Code. *Capitol Fuels, Inc. v. Clark Equip. Co.*, 181 W. Va. 258, 382 S.E.2d 311 (1989).

Strict liability in tort may be used, even by commercial enterprise, to recover solely for property damage to property other than product itself, as well as for damages to persons or property itself. *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W. Va. 79, 297 S.E.2d 854 (1982). Strict liability may not be used to recover for mere economic loss or diminution in value of property, occurring apart from "injury" (sudden calamitous event). *Basham v. General Shale*, 180 W. Va. 526, 377 S.E.2d 830 (1988).

Comparative negligence is also available as affirmative defense in action based on strict liability in tort, so long as allegedly negligent conduct is not failure to discover or guard against defect. *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W. Va. 79, 297 S.E.2d 854 (1982).

Product manufacturer may be held strictly liable even though proof of defect of product was circumstantial if evidence shows that malfunction would not have occurred in absence of defect and there was no abnormal use of product nor reasonable secondary cause for malfunction. *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 403 S.E.2d 189 (1991). Plaintiff must demonstrate that product failure would not ordinarily occur in absence of defect. *Beatty v. Ford Motor Co.*, 212 W. Va. 471, 574 S.E.2d 803 (2002).

Breach of express or implied warranties may be proved by circumstantial evidence if jury is not left to guess cause of alleged breach. *Id.*

Product may be defective by virtue of inadequate warnings; duty to warn exists only where danger is foreseeable. *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 307 S.E.2d 603 (1983). Basic inquiry is whether it was reasonably foreseeable to manufacturer that product would be unreasonably dangerous if distributed without warning. *Church v. Wesson*, 182 W. Va. 37, 385 S.E.2d 393 (1989). Manufacturer's advertising or promotional material concerning uses of product are part of reasonable use of product and may be admitted into evidence even though user is not aware of material. *King v. Kayak Mfg. Corp.*, 182 W. Va. 276, 387 S.E.2d 511 (1989).

It is permissible for physician to testify as to causal connection between accident and manner in which plaintiff was injured. *King v. Kayak Mfg. Corp.*, 182 W. Va. 276, 387 S.E.2d 511 (1989).

Doctrine of *res ipsa loquitur* may be applied even when product has left actual control of manufacturer if plaintiff can establish that intervening mishandling probably did not occur. *Ferrell v. Royal Crown Bottling Co.*, 144 W. Va. 465, 109 S.E.2d 489 (1959).

Defenses. Defense of assumption of risk is available in products liability action where it is shown that plaintiff used product with actual knowledge of defective condition. *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979). However, plaintiff is not barred from recovery unless degree of fault equals or exceeds combined fault of other parties to accident. *King v. Kayak Mfg. Corp.*, 182 W. Va. 276, 387 S.E.2d 511 (1989). Statute of limitations applicable to products liability action based upon breach of express or implied warranties resulting in personal injury is two-year tort statute of limitations. Time does not begin to run until injury occurs, and discovery rule applies for latent injury. *Taylor v. Ford Motor Co.*, 185 W. Va. 518, 408 S.E.2d 270 (1991). Crashworthiness doctrine adopted in West Virginia; plaintiff need only show a defect in vehicle's design was a factor in causing some aspect of plaintiff's harm; and in such cases where there is a split of authority on any issue which Supreme Court of Appeals of West Virginia has not determined, trial courts may presume that the court will adopt rule that is most liberal to plaintiff. *Blankenship v. General Motors Corp.*, 185 W. Va. 350, 406 S.E.2d 781 (1991). When plaintiff seeks to recover damages on theory of crashworthiness against manufacturer of motor vehicle, and manufacturer requests jury to apportion damages between first and second collisions, and jury does so, prior settlements between plaintiff and other defendants will not be set-off from jury verdict. *Johnson v. General Motors Corp.*, 190 W. Va. 236, 438 S.E.2d 28 (1993).

## RELEASE

See Law Digest Tables.

Contract Law. General. Law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation, and policy to uphold and enforce those contracts if fairly made and not in contravention of some law or public policy. *McDowell County Bd. of Educ. v. Stephens*, 191 W. Va. 711, 447 S.E.2d 912 (1994); *Acord v. Chrysler Corp.*, 184 W. Va. 149, 399 S.E.2d 860 (1990); *Sanders v. Roselawn Mem. Gardens, Inc.*, 152 W. Va. 91, 159 S.E.2d 784, Syl. Pt. 1 (1968). Release from all past and future liability does not bar recovery for disability subsequent to date of release where such release was not based on valuable consideration as to subsequent disability. *White v. Inter-Ocean Cas. Co.*, 117 W. Va. 236, 185 S.E. 203 (1936).

Mary Carter Settlement Agreements must contain four attributes: 1) agreeing defendants must remain in action in posture of defendants; 2) agreement must be kept secret; 3) agreeing defendants must guarantee to plaintiff certain monetary recovery regardless of outcome of lawsuit; and 4) agreeing defendants' liability must be decreased in direct proportion to increase in nonagreeing defendants' liability. *Mackey v. Irisari*, 191 W. Va. 355, 445 S.E.2d 742 (1994); *Riggle v. Allied Chem. Corp.*, 180 W. Va. 561, 378 S.E.2d 282 (1989). Disclosure to jury of general Mary Carter settlement agreement is not required in each case; disclosure lies in sound discretion of trial court. *Id.* Release or hold harmless agreement will not relieve common carrier of liability for negligence. *Adkins v. Slater*, 171 W. Va. 203, 298 S.E.2d 236 (1982).

Mistake. Release for personal injuries is effective even though claims agent incorrectly tells claimant in hospital that there is no liability, when claimant has ample time to consider offer. *Chesapeake & Ohio Ry. Co. v. Chaffin*, 184 F.2d 948 (4th Cir. 1950).

Fraud and Misrepresentation. Where fraud or duress is present in execution of release, release is void. *Carroll v. Fetty*, 121 W. Va. 215, 2 S.E.2d 521 (1939). To obtain relief from release on ground of duress, party seeking relief must prove duress by clear and convincing evidence. *Thomson v. McGinnis*, 195 W. Va. 465, 465 S.E.2d 922 (1995); *Melbourne Bros. Constr. Co. v. Pioneer*, 181 W. Va. 816, 384 S.E.2d 857 (1989). Evidence failed to clearly and distinctly prove fraud in obtaining release. *Campbell v. Campbell*, 146 W. Va. 1002, 124 S.E.2d 345 (1962). Fraud in procurement of general release not shown where plaintiff claimed he told insurance adjuster that he was releasing only property damage

claim and not personal injuries claim. *Peters v. Cook*, 152 W. Va. 634, 165 S.E.2d 818 (1969).

Infants. Capacity. W. Va. Code, Section 55-7-7 requires court approval for compromise of claim of minor sibling of wrongful death victim. *Miller v. Lambert*, 195 W. Va. 63, 464 S.E.2d 582 (1995); *Jordan v. Allstate Ins. Co.*, 184 W. Va. 678, 403 S.E.2d 421, Syl. Pt. 1 (1991). When administrator of wrongful death victim's estate settles claim, under W. Va. Code, Section 55-7-7 with tortfeasor's insurance carrier, but fails to seek court approval for compromise of minor's claim, minor's primary cause of action is against administrator and not insurance carrier; but if administrator is insolvent, carrier is secondarily liable. *Id.*

Joint Tortfeasors. W. Va. Code, Section 55-7-12 provides that release to one joint tortfeasor shall not inure to benefit of another tortfeasor. Compromise settlement with and release of one of two joint tortfeasors does not preclude action against other tortfeasor; however, partial satisfaction of injured party by one joint tortfeasor is satisfaction pro tanto as to all. *Tennant v. Craig*, 156 W. Va. 632, 195 S.E.2d 727, Syl. Pt. 1-2 (1973); *But see Doganieri v. United States*, 520 F. Supp. 1093 (N.D. W. Va. 1981) (broadly worded releases executed by plaintiffs clearly and explicitly discharged not only party making settlement, but extended to any and all persons whether or not named in releases). Where payment is made and release obtained by one joint tortfeasor, other joint tortfeasors shall be given credit for amount of such payment in satisfaction of the wrong. *Savage v. Booth*, 196 W. Va. 65, 468 S.E.2d 318 (1996); *Board of Educ. v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796 (1990). Party who has made good faith settlement with plaintiff prior to judicial determination of liability is relieved from any liability for contribution. *Id.* However, under certain circumstances, policy still liable to co-defendants under theory of implied indemnity. *Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 459 S.E.2d 151 (1995). By releasing car driver, plaintiffs did not also intend to release treating physician, as indicated by their immediate filing of malpractice claim against physician. *Pennington v. Bluefield Orthopedics, P.C.*, 187 W. Va. 344, 419 S.E.2d 8 (1992).

## REPRESENTATIONS AND WARRANTIES

Statutory Provisions. W. Va. Code, Section 56-4-21 requires insurance company relying on breach of condition of policy as defense to suit for recovery to file written statement specifying particular clause, condition or warranty breached. Procedural provision of W. Va. Code, Section 56-4-21 requiring assertion of certain defenses affirmatively by statement in writing under oath



in any action on policy was superseded by Rules of Civil Procedure 1, 8 (c), and 11. *Laxton v. Nat'l Grange Mut. Ins. Co.*, 150 W. Va. 598, 148 S.E.2d 725 (1966); see also *Smith v. Municipal Mut. Ins. Co.*, 169 W. Va. 296, 289 S.E.2d 669 (1982).

**Misrepresentations.** Under W. Va. Code, Section 33-6-7, which holds that all statements of insured are treated as representations and not warranties, misrepresentations will not prevent recovery unless there is fraud on part of insured. In order to be fraud, misrepresentations must be knowingly made with intent to deceive insurer and relate to a material fact affecting policy. *Powell v. Time Ins. Co.*, 181 W. Va. 289, 382 S.E.2d 342 (1989). If no written application is executed, verbal misrepresentations by insured will not ordinarily avoid policy, unless they are material to risk and are made by insured with intent to deceive and defraud insurer; but if such misrepresentations are made in answer to specific inquiries contained in written application, policy issued upon such application will ordinarily be avoided, even though there was no intent to deceive or defraud. *Stockton v. Cont'l Life Ins. Co.*, 105 W. Va. 240, 141 S.E. 878 (1928).

**Rescission.** Where insurer asks and demands answers to certain questions in application for life, health or accident insurance, and insured answers asserting correctness of answers, parties thereby agree to materiality of questions and answers, and insured's knowledge of falsity of those answers is ground for vitiating policy. See *Marshall v. Locomotive Eng'rs' Mut. Life & Accident Ins. Ass'n*, 79 W. Va. 121, 90 S.E. 847 (1916) (alleging blindness at time of issuance of policy); *Goodbar v. Western & S. Life Ins. Co.*, 89 W. Va. 221, 108 S.E. 896 (1921) (false statement as to existing physical injury); *Dye v. Pennsylvania Cas. Co.*, 128 W. Va. 112, 35 S.E.2d 865 (1945) (false statement as to insured being in good health, not having received medical treatment in five years preceding date of application). Mistake in expression of opinion in answer to question in application, made in good faith, will not avoid policy; but rule is otherwise where there is breach of warranty. *Layfield v. Jefferson Standard Life Ins. Co.*, 120 W. Va. 564, 199 S.E. 450, Syl. Pt. 1 (1938).

**Warranties. General.** Implied warranty of habitability and fitness for use as family home runs from builder to second and subsequent purchasers of home for reasonable length of time after construction, but warranties are limited to latent defects not discoverable through reasonable inspection. *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82, Syl. Pt. 6 (1988). Whether warranty is express or implied, courts use same analysis to determine whether plaintiff has made prima facie case of breach of warranty. *Anderson v. Chrysler Corp.*, 184 W.

Va. 641, 403 S.E.2d 189 (1991). Breach of warranty may be proved by circumstantial evidence as well as direct evidence, but jury must not be left to guess cause of alleged breach. *Id.*

Where person suffers personal injuries as result of defective product and seeks damages for those injuries based on breach of express or implied warranties, applicable statute of limitations is two-year tort statute rather than four-year statute for breach of contract contained in Uniform Commercial Code. *Taylor v. Ford Motor Co.*, 185 W. Va. 518, 408 S.E.2d 270 (1991). When warranty claims are placed upon two-year tort statute of limitations, they receive all benefits of that statute, and cause of action does not arise and statute does not begin to run until injury occurs; where injury is latent, period is postponed until it is discovered or reasonably should have been discovered. *Id.*

See provisions of Uniform Commercial Code regarding warranties in W. Va. Code, Sections 46-2-312 and 313. Attorney fees were recoverable under Magnuson-Moss Act where jury found breach of implied warranties under Uniform Commercial Code. See W. Va. Code. §46-2-314 and 315; *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 403 S.E.2d 189 (1991). Express warranty is created only when affirmation of fact, promise or description of goods is part of basis of bargain made by seller to buyer about goods being sold. W. Va. Code §46-2-313(a)-(b); *Reed v. Sears Roebuck & Co., Inc.*, 188 W. Va. 747, 426 S.E.2d 539, Syl. Pt. 7 (1992).

Requirement of privity of contract in actions for breach of warranty is abolished. *Dawson v. Canteen Corp.*, 158 W. Va. 516, 212 S.E.2d 82 (1975). *Accord, Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988).

## RES JUDICATA

**Administrative Agencies.** Res Judicata may be applied to quasi-judicial determinations of administrative agencies, if rendered pursuant to agency's adjudicatory authority with procedures similar to those used in court of law. *Rowan v. McNight*, 184 W. Va. 763, 403 S.E.2d 780 (1991); *Wilfong v. Chenoweth Ford, Inc.*, 192 W. Va. 207, 451 S.E.2d 773 (1994).

Judgment in action by husband for auto damage was res judicata to his subsequent action for medical expenses for treatment of wife and loss of consortium. *Warner v. Hedrick*, 147 W. Va. 262, 126 S.E.2d 371 (1962).

**Collateral estoppel.** For collateral estoppel to apply: 1) the issue previously decided is identical to the one presented in the action in question; 2) there is a final adjudication on the merits of the prior action; 3) the party



against whom the doctrine is invoked was a party or in privity with a party to a prior action; and 4) fair opportunity to litigate the issue in the prior litigation. *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Common requirement for application of res judicata and collateral estoppel is that there had to be mutuality of parties between first suit which had proceeded to judgment and second suit where defense of res judicata or collateral estoppel was being asserted, and concept of mutuality extends not only to named parties, but to those who were privy to them. *Conley v. Spiller*, 171 W. Va. 584, 301 S.E.2d 216 (1983); *Gribben v. Kirk*, 195 W. Va. 488, 466 S.E.2d 147 (1995). In applying doctrine of collateral estoppel strict requirement of mutuality of parties is no longer necessary to enforce a judgment against another. *Galanos v. Nat'l Steel Corp.*, 178 W. Va. 193, 358 S.E.2d 452 (1987). Collateral estoppel may be invoked where issue was actually and necessarily decided by court of competent jurisdiction and parties had full and fair opportunity to litigate issue. *McCulty v. Rockefeller*, 570 F. Supp. 1455 (S.D. W. Va. 1983). Whether stranger to first action can assert collateral estoppel in second depends on whether issues are the same, whether facts or law have changed substantially, and whether special circumstances indicate enforcement of judgment would be unfair. *Walden v. Hoke*, 189 W. Va. 222, 429 S.E.2d 504 (1993).

Res judicata bars relitigation of all matters which were or could have been decided in prior litigation; essential elements are identity in thing sued for, identity in cause of action, identity of persons and parties to action, identity of quality in persons for or against whom claim is made. Identity in cause of action will exist if same evidence would support both action or issues. *White v. State Workers Comp. Com'r*, 164 W. Va. 284, 262 S.E.2d 752 (1980); *State ex rel. Division of Human Servs. v. Benjamin P.B.*, 183 W. Va. 220, 395 S.E.2d 220 (1990). Preclusion can arise even if matter was not actually decided in prior litigation, providing parties might have litigated matter as an incident to issues joined in suit. *Moran v. Reed*, 175 W. Va. 698, 338 S.E.2d 175 (1985); *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 359 S.E.2d 124 (1987). Res Judicata did not bar child's paternity action merely because "previous paternity action brought by child's mother was dismissed with prejudice, where evidence showed neither privity between mother and child in original action or representation by counsel or guardian ad litem in original action." *State ex rel. Division of Human Servs. v. Benjamin P.B.*, 183 W. Va. 220, 395 S.E.2d 220 (1990); *State Dept. of Health & Human Res., Child Advocate ex rel. Cline v. Pentasuglia*, 193 W. Va. 621, 457 S.E.2d 644 (1995). Lease upheld in prior action as valid could not in subsequent suit be attacked as invalid because of viola-

tion of zoning ordinance, since that ground might have been raised in prior litigation. *Goodwin v. Thomas*, 179 W. Va. 593, 371 S.E.2d 90 (1988). Res judicata failed to apply to cases concerning size of prison recreational areas which resulted in consent decrees because parties, issues and relief sought were not identical in prior cases and current action and consent decrees were not court adjudications. *Wagner v. Burke*, 187 W. Va. 538, 420 S.E.2d 298 (1992). Litigant cannot relitigate in different jurisdiction issue previously ruled upon by another court merely by describing same facts in different way. *Walden v. Hoke*, 189 W. Va. 222, 429 S.E.2d 504 (1993).

Personal injury to minor child gives rise to two causes of action; one on behalf of child and one on behalf of parent. However, joinder of claims is not compulsory where minor's damages were different than parent's. *Glover v. Narick*, 184 W. Va. 381, 400 S.E.2d 816 (1990). Right to maintain an action to recover pre-majority medical expenses belongs to both the minor and the minor's parents, but under no circumstances will double recovery be allowed. Thus, a procedural bar that prevents the parents from maintaining an action will not affect their minor child's right to recover. *Packard v. Perry*, 221 W. Va. 526, 655 S.E.2d 548 (2007)

Doctrine of res judicata applies to Workers Compensation cases. *Pnakovich v. SWCC*, 163 W. Va. 583, 259 S.E.2d 127 (1979). However, doctrine won't be rigidly applied so as to defeat ends of justice. *Gentry v. Farruggia*, 132 W. Va. 809, 53 S.E.2d 741 (1949).

Passengers injured in bus accident sued insurer of bus but also their own insurers, or underinsured provisions of policies applicable to plaintiffs. Insurer of bus tendered policy limits, which were divided among plaintiffs after their damage claims were set by special commissioner, acting pursuant to agreement of parties. Plaintiff's underinsurance carriers were not bound by damages determinations of special commissioner, despite giving consent to plaintiffs to participate in settlement. *Bias v. Nationwide Ins. Co.*, 179 W. Va. 125, 365 S.E.2d 789 (1987).

Breaches of single contract provision may be distinct causes of action for res judicata purposes; lender's failure to maintain adequate loan reserves for disbursement to contractor was distinct cause of action from lender's alleged failure to collect down payment from borrower for subsequent payment to contractor. *Schenerlein & Sligar v. Hancock County Federal Savings & Loan*, 176 W. Va. 98, 341 S.E.2d 844 (1986).

## SERVICE OF PROCESS

Upon Non-Resident Motorists. See "AUTOMOBILES," and Law Digest Tables.

General corporate long arm statute, W. Va. Code §31D-5-504, provides for service of process in tort actions on Secretary of State when any corporation manufactures, sells, offers for sale or supplies defective product which causes injury to any person or property within State. See also W. Va. R. Civ. P. 4 and *Wetzel County Sav. & Loan Co. v. Stern Bros.*, 156 W. Va. 693, 195 S.E.2d 732 (1973).

General purpose long-arm statute, providing for service upon persons and entities with certain specified contacts within State, is found in W. Va. Code §56-3-33. Statute is a modification of Uniform Interstate and International Procedure Act and is intended to permit West Virginia Courts to exercise personal jurisdiction over non-residents to extent permitted by Constitution's due process clause. *Harman v. Pauley*, 522 F. Supp. 1130 (S.D. W. Va. 1981).

Specific statutes providing for service upon non-resident motorists, W. Va. Code §56-3-31 and W. Va. R. Civ. P. 4 (d)(1); Upon Domestic Corporations, W. Va. Code §56-3-13; Upon Domestic and Foreign Limited Partnerships, W. Va. Code §56-3-13a; Upon Non-resident party in Consumer Credit Transaction, W. Va. Code §46A-2-137; Upon Licensed Insurers, W. Va. Code 33-4-12; W. Va. Code 33-6-16 (on underwriters' and combination policies); Upon Unlicensed Insurers, W. Va. Code §33-4-13; Upon Insurance Holding Companies, W. Va. Code §33-27-3.

Service of process held to be adequate where copy of summons and complaint were delivered to defendant's wife at defendant's home. *White v. Berryman*, 187 W. Va. 323, 418 S.E.2d 917 (1992).

## SUBROGATION

Generally. "The doctrine of subrogation is that one who has the right to pay, and does pay, a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other." *Bassett v. Streight*, 78 W. Va. 262, 88 S.E. 848 (1916); *Ray v. Donohew*, 177 W. Va. 441, 352 S.E.2d 729 (1986); *Bush v. Richardson*, 199 W. Va. 374, 484 S.E.2d 490 (1997); *Grayam v. Department of Health & Human Resources*, 201 W. Va. 444, 498 S.E.2d 12 (1997). Generally, subrogation is limited by what is referred to as "made-whole rule," in which insured must be fully compensated for injuries or losses sustained before subrogation rights of insurance carrier arise. *Bush v. Richardson*, 199 W. Va. 374, 484 S.E.2d 490 (1997). When applying "made-whole" doctrine, "it is incumbent

on the circuit court to consider: 1) the ability of parties to prove liability; 2) the comparative fault of all parties involved in the accident; 3) the complexity of the legal and medical issues; 4) future medical expenses; 5) nature of injuries; and 6) the assets or lack of assets available above and beyond the insurance policy." Syl. Pt. 3, *Provident Life & Acc. Ins. Co. v. Bennett*, 199 W. Va. 236, 483 S.E.2d 819 (1997). In some factual circumstances, "made-whole" doctrine is not applicable. See Syl. Pt. 4, *Bush v. Richardson*, 199 W. Va. 374, 484 S.E.2d 490 (1997) (doctrine inapplicable under circumstances involving W. Va. Code §23-2A-1). West Virginia's rule expressly permits parties to contractually alter made-whole doctrine; this rule is not overcome merely by inclusion in insurance policy of a general statement that insurer is entitled to subrogation. *Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A.*, 210 W. Va. 223, 557 S.E.2d 277 (2001).

Principles of subrogation are favorably considered and liberally applied; it is not necessary for one entitled to subrogation to take written assignment of rights to which he/she is to be subrogated. *Holbert v. Safe*, 114 W. Va. 221, 171 S.E. 422 (1933).

Provision in insurance policy providing for subrogation of insurer to rights of insured to extent that medical payments are advanced to such insured by insurer is distinct from assignment of tort claim and is not invalid as against public policy. *Federal Kemper Ins. Co. v. Arnold*, 183 W. Va. 31, 393 S.E.2d 669 (1990). Valid subrogation clause in automobile insurance contract is enforceable within its terms against any covered person who receives benefits under policy, even if not named insured. *Id.* When automobile insurer is reimbursed under subrogation clause for benefits paid to insured which insured then recovers from third party, reimbursement should be reduced by insurer's pro rata share of cost to insured of recovering from third party. *Id.* Insurance carrier may not rely upon subrogation clause in its policy with injured insureds to receive reimbursement of medical payments made to insureds when it also insures tortfeasor; insurance carrier can prevent situation by placing clear and unambiguous language in its policy providing for reimbursement of medical payments it may advance to insured to extent such medical payments are compensated by settlement with or judgment against tortfeasor whom it also insures. *Richards v. Allstate Ins. Co.*, 193 W. Va. 244, 455 S.E.2d 803 (1995).

Parties. Joinder of insurer as real party in interest is not required, nor can defendant compel joinder, even if insurer has partially compensated plaintiff-insured and insured is prosecuting action against defendant for entire loss. *Capitol Fuels Inc. v. Clark Equipment Co.*, 176 W. Va. 277, 342 S.E.2d 245 (1986).



Fire Insurance. Standard New York Fire Policy of 1943 provides that insurer paying loss may require written subrogation agreement or assignment. *Phenix Fire Ins. Co. v. Virginia-Western Power Co.*, 81 W. Va. 298, 94 S.E. 372 (1917) (pleading that insurance company had policy in effect, received proof and paid loss, held sufficient). Insurance Company may take subrogation to rights of mortgagee against mortgagor in proper case. *Baker v. Monumental Savings & Loan Ass'n*, 58 W. Va. 408, 52 S.E. 403 (1905); *Gillespie v. Scottish Union*, 61 W. Va. 169, 56 S.E. 213 (1906) (mortgagors having parted with title). Company denied liability to insured but paid mortgagee. Insurer was entitled to subrogation to rights of mortgagee in amount paid. *Fire Ass'n of Phila. v. Ward*, 130 W. Va. 200, 42 S.E.2d 713 (1947); *Raleigh Hardware v. Williams*, 106 W. Va. 85, 144 S.E. 879 (1928) (no subrogation on grounds of pendency of mortgage foreclosure where attempted foreclosure was abortive, due to pendency of chancery suit). Whether purchaser of insured premises is entitled to be subrogated to rights of insured or insured's mortgagee under fire policy is not question which can be determined on law side of court. *Koppers Coal v. Dixie Fire Ins. Co.*, 121 W. Va. 258, 3 S.E.2d 52 (1939).

If insurer decides, after complete investigation, not to approve payment to its insured based upon allegedly tortious conduct of third party, insurer cannot validly claim that subsequent settlement by insured with other party violates subrogation clause of insurance contract by prejudicing insurer's subrogation rights. *Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W. Va. 168, 381 S.E.2d 367 (1989).

Insurer's payment to injured party and injured party's release of insurer did not relieve tortfeasor from liability in the event of insurer's subrogation suit against tortfeasor. However, insurer may nevertheless pursue tortfeasor and release insured's claims where insurer had been given such authority. *Billiter v. Melton Truck Lines, Inc.*, 187 W. Va. 526, 420 S.E.2d 286 (1992).

There is clear distinction between assignment of tort claim and subrogation as to medical payments under policy; subrogation by medical policy insurer to extent of payments on medical expenses also recovered under automobile policy is not against public policy. *Travelers Indemnity Co. v. Rader*, 152 W. Va. 699, 166 S.E.2d 157 (1969).

Reimbursement of state agencies through subrogation for medical payment is envisioned by W. Va. Code §9-5-11 (amended 1995) and will be allowed. Syl. Pt. 2, *Grayam v. Department of Health & Human Resources*, 201 W. Va. 444, 498 S.E.2d 12 (1997).

Notice. Written notification by insurance carrier as to its subrogation claim for medical payments made to its insured is legally sufficient even though it does not contain precise monetary amount of subrogation claim. *Nationwide Mut. Ins. Co. v. Dairyland Ins. Co.*, 191 W. Va. 243, 445 S.E.2d 184 (1994). Subrogation rights of insurance carrier are not barred as "long as the tortfeasor's insurance carrier was notified of the subrogation claim before it settled with the insured who received the medical payments." *Id.*; Syl. Pt. 2, *Provident Life & Acc. Ins. Co. v. Bennett*, 199 W. Va. 236, 483 S.E.2d 819 (1997).

## TORTS

See also "NEGLIGENCE"; "MALPRACTICE" and "PRODUCTS LIABILITY."

Consolidation. Action for wrongful death against truck driver and action for battery by decedent's son against truck driver did not involve common question of law or fact even though events underlying suits were proximate in time and space, and even though there was an overlap in expert witnesses. *Pickett v. Taylor*, 178 W. Va. 805, 364 S.E.2d 818 (1987).

Parental Consortium. Child may maintain secondary cause of action against tortfeasor who injures child's parent for child's loss of intangible benefits of companionship, comfort, guidance, affection, and aid of parent. This includes sorrow and mental anguish concerning impairment of parent-child relationship. *Belcher v. Goins*, 184 W. Va. 395, 400 S.E.2d 830 (1990).

Contributory Negligence. Doctrine of contributory negligence was abolished, and a modified form of comparative fault was approved in *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979). Party is not barred from recovering damages in a tort action so long as that party's negligence or fault does not equal or exceed combined negligence or fault of other parties involved in accident. *Id.*

Res ipsa loquitur can be invoked even when there is divided responsibility and control, if it can be shown that there are no other actions which would have contributed to accident other than action of defendant. Syl. Pt. 3, *Bronz v. St. Jude's Hosp. Clinic*, 184 W. Va. 594, 402 S.E.2d 263 (1991). Res ipsa loquitur cannot be involved unless defendant's negligence is only inference that can be reasonably drawn from circumstances, and proof of medical malpractice requires expert testimony. *Farley v. Meadows*, 185 W. Va. 48, 404 S.E.2d 537 (1991).

Contribution. See "CONTRIBUTION."

Question of defendant's right to comparative contribution is secondary issue not to be considered unless



jury has already determined plaintiff's degree of contributory negligence and found it to be less than that of other parties. Moreover, right of comparative contribution is not automatic but must be requested by a defendant. *King v. Kayak*, 182 W. Va. 276, 387 S.E.2d 511 (1989).

Under appropriate circumstances, vendor of alcoholic beverages who sells to minor may be liable in tort to anyone injured through his violation of statute, and he may not be relieved of liability by intervening acts of third persons. *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990).

Vendor of alcoholic beverages will not be liable in tort to injured customer unless vendor serves customer who is obviously physically incapacitated by his drinking. *Bailey v. Black*, 183 W. Va. 74, 394 S.E.2d 58 (1990).

**Intentional Torts.** Assault on passenger by transit driver arose out of "use or operation of vehicle" within meaning of policy; therefore, insurer was required to provide coverage to driver, but only up to amount of mandatory coverage required by Safety Responsibility Law. *Dotts v. Taressa*, 182 W. Va. 586, 390 S.E.2d 568 (1990); see W. Va. Code §17D-2A-1 *et seq.*

If jury finds breach of implied warranty under U.C.C., automobile owner can recover attorney fees pursuant to Magnuson-Moss Act. W. Va. Code §§46-2-314 & 315; 15 U.S.C. §2310 (d)(2); *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 403 S.E.2d 189 (1991).

In bad faith claim by insured against insurer for failure to settle third party claim within policy limits, insured must establish high threshold of actual malice. Actual malice means insurer actually knew that claim was proper, but nonetheless acted willfully, maliciously and intentionally in failing to settle claim. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990).

In assessing whether insurer is liable in tort to insured for amount of judgment in excess of policy limits, trial court should consider whether there was appropriate investigation and evaluation of claim based upon objective and cogent evidence, whether insurer had reasonable basis to contest insured's liability, and whether there was potential for excess verdict against insured. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990); *Marshall v. Saseen*, 192 W. Va. 94, 450 S.E.2d 791 (1994).

**Defamation.** Elements of private individual's defamation action are defamatory statements, nonprivileged communication to third party, falsity, reference to plaintiff, at least negligence on publisher's part, and resulting

injury. *Stalnaker v. Only One Dollar, Inc.*, 188 W. Va. 744, 426 S.E.2d 536 (1992).

Deliberate intention exception to workers' compensation immunity of employers is established by offering evidence sufficient to prove five specific requirements provided in statute creating legislative standard for loss of employer immunity. *Mayles v. Shoney's Inc.*, 185 W. Va. 88, 405 S.E.2d 15 (1990).

**Invasion of Privacy.** Tort recognized, and held to include four separate torts discussed by Prosser: 1) unreasonable intrusion or seclusion; 2) appropriation of name or likeness; 3) unreasonable publicity given to private life; 4) placing another in false light before public. *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1984).

**Outrage, or intentional infliction of emotional distress,** recognized in *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). Damages discussed and elements further discussed, in *Harless v. First Nat'l Bank*, 169 W. Va. 673, 289 S.E.2d 692 (1982). Conduct that is merely annoying, harmful of one's rights of expectations, uncivil, mean spirited or negligent does not constitute "outrageous conduct" sufficient to support claim for intentional infliction of emotional distress. *Courtney v. Courtney*, 186 W. Va. 597, 413 S.E.2d 418 (1991). Third person may recover emotional distress damages if direct victim of defendant's outrageous conduct is member of third person's immediate family and third person witnessed outrageous conduct. *Id.* Corporation cannot recover for this tort. *Chamberlaine & Flowers v. Smith Contracting, Inc.*, 176 W. Va. 39, 341 S.E.2d 414 (1986).

**Negligent infliction of emotional distress** recognized in *Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992). Party may recover damages if he or she was closely related to injured victim, if the party was located at scene of accident and was aware of injury to victim, victim was critically injured or killed and party suffered serious emotional distress. *Stump v. Ashland*, 201 W. Va. 541, 499 S.E.2d 41 (1997).

Absolute immunity exists in civil action for libel based on testimony before State Bar Legal Ethics Committee. *Farber v. Dale*, 182 W. Va. 784, 392 S.E.2d 224 (1990).

**Tortious interference with business relations or economic expectancy** recognized. *Torbett v. Wheeling Dollar Savings & Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983). One party to contract cannot maintain claim for tortious interference against another party to contract since neither is stranger to contract. *Shrewsbury v. Nat'l Grange Mut. Ins. Co.*, 183 W. Va. 322, 395 S.E.2d 745 (1990).

To establish prima facie proof of tortious interference, plaintiff must show: 1) existence of a contractual or business relationship or expectancy; 2) intentional act of interference by party outside that relationship or expectancy; 3) proof that interference caused the harm sustained; and 4) damages. As an affirmative defense, defendant may prove justification or privilege. *Bryan v. Massachusetts Mut. Life Ins. Co.*, 178 W. Va. 773, 364 S.E.2d 786 (1987).

Insurance agent, not party to insurance contracts he wrote, could not maintain tortious interference with contract claim against company for interfering with his efforts to renew policies after agent's termination from company. *Shrewsbury v. Nat'l Grange Mut. Ins.*, 183 W. Va. 322, 395 S.E.2d 745 (1990).

Tortious interference with testamentary bequest recognized. *Barone v. Barone*, 170 W. Va. 407, 294 S.E.2d 260 (1982).

Persons Liable. A person is liable for harm to third person from another's tort if she knows other person breached a duty and gives substantial encouragement to that person. *Barath v. Performance Trucking Co., Inc.*, 188 W. Va. 367, 424 S.E.2d 602 (1992).

#### WAIVER AND ESTOPPEL

General. Under W. Va. Code §56-4-22, plaintiff relying for recovery on defendant's waiver of breach of insurance contract must file writing specifying in general terms matter on which he intends to rely as waiver, estoppel or confession and avoidance. *Rubenstein v. Metropolitan*, 118 W. Va. 367, 190 S.E. 531 (1937). To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished known right, whereas estoppel applies when a party is induced to act or refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of material fact. *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998). Court may permit plaintiff to file required writing during trial of case. See *Guthrie v. Northwestern Mut. Life Ins. Co.*, 158 W. Va. 1, 208 S.E.2d 60 (1974). West Virginia courts, being loathe to enforce forfeiture, will promptly seize on any circumstances indicating waiver. *Republic Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 413 F. Supp. 649 (S.D. W. Va. 1976). Waiver may be express or implied and may occur by omission or failure to act. *Petrice v. Federal Kemper Ins. Co.*, 163 W. Va. 737, 260 S.E.2d 276 (1979). To establish that insurer has waived its right to assert a previously unarticulated reason for denying coverage, insured must show that insurer intentionally relinquished known right. *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998). Where offer of optimal coverage is required by

statute, insurer has burden of proving effective offer was made and any rejection of said offer by insured was knowing and informed. *Miller v. Hatton*, 184 W. Va. 765, 403 S.E.2d 782 (1991). Once insurer creates reasonable expectation of coverage, insurer must notify insured of denial of said coverage; in order for denial notice to be effective, it must be given no more than 30 days after insurer created reasonable expectation of coverage. *Keller v. First Nat'l Bank*, 184 W. Va. 681, 403 S.E.2d 424 (1991). Estoppel is defense that must be affirmatively set forth in responsive pleading, but knowledgeable, unconditional conduct of defense may constitute waiver and estoppel to assert non-coverage under policy. *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987). Insurance company seeking to avoid liability through operation of exclusion has burden of proving facts necessary to operation of that exclusion. *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998). Detrimental reliance is essential to assertion of estoppel. *Id.* Insurer may be estopped from asserting that binder was void by insurer's 1) failure to demand immediate payment as a condition precedent to binder coverage; 2) failure to promptly assert right to rescind contract for any fundamental breach; and 3) mere silence, which may sometimes constitute a binding waiver. *American Hardware v. BIM*, 885 F.2d 132 (4th Cir. 1989). Insurer who improperly canceled insured's policy may be estopped from claiming no duty to cover because of lack of formal notice where insurer told insured the policy had been canceled when insured gave informal notice. *Ara v. Erie*, 182 W. Va. 266, 387 S.E.2d 320 (1989). Insurer is equitably estopped from asserting insured failed to comply with notice requirements if policy was negligently canceled. *Id.*

Insurer is estopped to deny liability on ground of misstatement of facts in application when facts are correctly stated to agent preparing application. *Kincaid v. Equitable*, 116 W. Va. 672, 183 S.E. 40 (1935); *Lewis v. State Auto*, 115 W. Va. 405, 177 S.E. 449 (1934). Issuance of policy without investigation of title by insurer does not waive conditions against encumbrances or against less than fee simple title. See *Oliker v. Williamsburgh*, 72 W. Va. 436, 78 S.E. 746 (1913) (chattel mortgage); *Melton v. Aetna*, 110 W. Va. 73, 157 S.E. 33 (1931) (sole and unconditional ownership and fee simple ownership warranties breached). Conduct of defense, without notice of reservation of rights, creates estoppel to assert previously known ground of noncoverage as defense. *Insurance Co. of North Am. v. Nat'l Steel Serv. Ctr.*, 391 F. Supp. 512 (N.D. W. Va. 1975). Doctrine of waiver may not be applied to extend insurance coverage beyond that contracted for by the parties, although doctrine of estoppel may be so applied under appropriate



circumstances. *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998).

**Waiver by Agent.** Provisions in insurance policies for forfeiture upon breach of warranties or conditions therein contained may be waived by insurer or its agent, and circumstances may raise estoppel against assertion of such forfeiture; this notwithstanding provision in policy that no agent has power to waive its provisions. *Coles v. Jefferson Ins.*, 41 W. Va. 261, 23 S.E. 732 (1895) (condition against encumbrance waived where facts stated to agent writing policy); *Hamlet v. American Eagle*, 107 W. Va. 687, 150 S.E. 7 (1929) (policy taken by beneficiary of loss payable clause; insurer making no inquiry held to have waived sole ownership warranty); *Kirk v. Queen*, 126 W. Va. 213, 27 S.E.2d 596 (1943) (where insured has not sustained entire loss, his interest in property destroyed is not unconditional and sole ownership within meaning of fire policy for recovery by insured only if his interest is unconditional and sole ownership). Power of agent writing policy to waive conditions thereof is, however, limited to conditions avoiding policy at its inception; promissory warranties, particularly those regulating insured's actions after issuance of policy and prior to loss, cannot thus be waived. *Maupin v. Scottish*, 53 W. Va. 557, 45 S.E. 1003 (1903) (iron safe clause); *Medley v. German Alliance*, 55 W. Va. 342, 47 S.E. 101 (1904) (foreclosure proceeding); *Morgan v. American Central*, 80 W. Va. 1, 92 S.E. 84 (1917) (property transferred); *Toupin v. Federal*, 125 W. Va. 458, 25 S.E.2d 212 (1943) (clause against encumbrances held condition precedent, not promissory warranty). Agreement by adjuster that collision insured could sue, accept settlement with and release negligent party, and that collision insurer would pay difference between loss and settlement paid, held binding on insurance company despite absence of authority by adjuster and waiver of insured's right of subrogation. *Runner v. Calvert Fire*, 138 W. Va. 369, 76 S.E.2d 244 (1953). Insurer's agent's knowledge of vacancy when policy is issued constitutes waiver of vacancy clause when building is occupied subsequent to issuance of policy but vacant at time of loss. *McKinney v. Providence Washington Ins. Co.*, 144 W. Va. 559, 109 S.E.2d 480 (1959).

**Nonwaiver Agreements.** Nonwaiver agreements may themselves be waived. *West Augusta Corp. v. Giuffrida*, 717 F.2d 139 (4th Cir. 1983).

**Premiums.** Clause requiring premium payment within stipulated period not waived by agent's unauthorized extensions to insured. *Bernstein v. Ohio Nat'l*, 116 W. Va. 666, 182 S.E. 775 (1935); see *Thompson v. Prudential*, 118 W. Va. 573, 191 S.E. 205 (1937) (authority of agent to waive non-payment of premiums is governed by terms of policy under which recovery is sought; held

in this case agent had no power to waive); *Meadows v. Peoples Life*, 118 W. Va. 404, 191 S.E. 852 (1937) (company held bound by agent's waiver of advance payment of initial premium on industrial policy and liable for death of insured before expiration of grace period for payment of subsequent premiums). Acceptance of premiums without knowledge of falsity of answers in application is no waiver of defense of misrepresentation. *Dye v. Pennsylvania Cas.*, 128 W. Va. 112, 35 S.E.2d 865 (1945). But contra if premiums accepted with such knowledge. *Jarvis v. Pennsylvania Cas.*, 129 W. Va. 291, 40 S.E.2d 308 (1946). When insurer creates reasonable expectation of coverage and accepts premium, denial notice, in order to be effective, must include refund of premium. *Keller v. First Nat'l Bank*, 184 W. Va. 681, 403 S.E.2d 424 (1991).

**Proof of Loss.** Where insurer denies liability within period in which proof of loss should be filed, filing of same by insured is waived. *Wade v. Mutual Benefit*, 115 W. Va. 694, 177 S.E. 611 (1934).

## WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

## WORKERS' COMPENSATION

**Contribution.** Application of comity doctrine rendered foreign corporation, covered by foreign state's workers' compensation law but not by West Virginia's, immune from contribution claim by joint tortfeasor. *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 418 S.E.2d 738 (1992).

The Workers' Compensation Act was enacted by West Virginia legislature under police power of the state. *Blevins v. State Comp. Com'r*, 127 W. Va. 481, 33 S.E.2d 408 (1945). All workers injured in course of and resulting from employment have constitutional right to benefit of statutes establishing system of workers' compensation. *Meadows v. Lewis*, 172 W. Va. 457, 307 S.E.2d 625 (1983). Right to workers' compensation is wholly statutory and is not in any way based on common law. Statutes are controlling and rights, remedies and procedure provided by them are exclusive. *Bailes v. State Workmen's Comp. Com'r*, 152 W. Va. 210, 161 S.E.2d 261 (1968). The act itself relates common law and statutory rules of evidence and abolishes technical and formal rules of procedure other than those expressly retained. *Poccardi v. Ott*, 82 W. Va. 497, 96 S.E. 790 (1918). See W. Va. Code §23-1-15.

Workers' Compensation Act confers upon Commissioner full power and authority to hear and determine all questions within his jurisdiction, thus evidencing an

intent on part of legislature to require finding by Commissioner in each case presented to him. *Glenn v. State Comp. Com'r*, 118 W. Va. 203, 189 S.E. 705 (1937). Pursuant to W. Va. Code §23-5-1, any employer, employee, claimant, or dependant, who shall feel aggrieved at any final action of Commissioner or Administrative Law Judge shall have right to appeal to Worker's Compensation Appeal Board. On appeal from order of Commissioner, Appeal Board considers the case de novo and makes such findings or award as, in its opinion, should have been made by Commissioner. *Bowman v. State Workmen's Comp. Com'r*, 150 W. Va. 592, 148 S.E.2d 708 (1966). Appeal may be taken from any final decision of Appeal Board to West Virginia Supreme Court of Appeals. W. Va. Code §23-5-15. On or after first day of July, 1991, objections to Commissioner's decisions shall be filed with Office of Judges. Office of Judges shall keep full and complete records of all proceedings concerning a disputed claim. Upon consideration of entire record Administrative Law Judge shall render decision affirming, reversing or modifying Commissioner's action. W. Va. Code §23-5-9. Commissioner has continuing power and jurisdiction over cases and can modify orders provided that no further award be ordered in cases of nonfatal injuries more than two times within five years after commissioner makes last payment in original award or any subsequent increase in any permanent disability case. Time limitations do not apply within cases not yet closed by final order of commissioner. *Pugh v. State Workers' Comp. Com'r*, 188 W. Va. 414, 424 S.E.2d 759 (1992).

**Benefits.** Disability and death benefits are calculated and paid pursuant to W. Va. Code, Chapter 23, Article 4. Average weekly wage earnings, wherever earned, of injured person at date of injury, and average weekly wage in West Virginia as determined by Commissioner of Bureau of Employment Programs and the Insurance Commissioner, in effect at date of injury, shall be taken as basis upon which to compute injured worker's benefits. W. Va. Code §23-4-14.

**Delays.** Delays in handling worker's compensation claims contradict legislative policy of speedy claim resolution. *Boggs v. Richardson*, 187 W. Va. 318, 418 S.E.2d 764 (1992). Commissioner forced to pay benefits to claimant's estate in spite of statutory prohibition to such action because of long delay in processing claimant's award. *Id.*

Fixing of degree of disability is responsibility and duty of Commissioner alone. *McGeary v. State Comp. Dir.*, 148 W. Va. 436, 135 S.E.2d 345 (1964). In determining percentage of disability for workers' compensation claimant, consideration must be given to impairment of employee's earning capacity, possible impairment of

his efficiency at work, and impairment to normal pursuit of everyday living. *Posey v. State Workmen's Comp. Com'r*, 157 W. Va. 285, 201 S.E.2d 102 (1973). Claimant is "permanently and totally disabled" when he is unable to perform any remunerative work in a field of work for which he is suited by experience or training. This must be determined on a case by case basis. *Cardwell v. State Workmen's Comp. Com'r*, 171 W. Va. 700, 301 S.E.2d 790 (1983).

West Virginia Code authorizes state Workers' Compensation Commissioner to establish unlimited medical expense fund for treatment of injured employees of general subscribers to Workers' Compensation Fund. *Smith v. State Workmen's Comp. Com'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

Pursuant to W. Va. Code §23-4-7a (c)(1), when authorized treating physician recommends permanent partial disability award of fifteen percent or less and such recommendation is based upon examination performed prior to closing of claimant's temporary total disability benefits, then Commissioner has mandatory duty to enter award of permanent partial disability benefits based upon recommendation of authorized treating physician. *Dalton v. Spieler*, 184 W. Va. 471, 401 S.E.2d 216 (1990).

**Dependents' Benefits.** To obtain benefits under W. Va. Code §23-4-10 (b), dependant is required to satisfy the following conditions: 1) deceased employee must have suffered compensable personal injury or contracted occupational pneumoconiosis or another occupational disease; 2) injury or disease must have caused employee's death; and 3) if death was due to injury, disability must have been continuous from date such injury occurred until date of death. *Vandergriff v. Workers' Comp. Com'r*, 183 W. Va. 148, 394 S.E.2d 747 (1990).

West Virginia Code §23-4-10 (e) allows dependent of deceased employee to receive lump sum equal to 104 weeks of benefits if following three conditions have been met: 1) dependent was receiving permanent total disability workers' compensation benefits at his death; 2) death was from cause other than disability injury; and 3) decedent died leaving dependent as defined in W. Va. Code §23-4-10 (d). *Vandergriff v. Workers' Comp. Com'r*, 183 W. Va. 148, 394 S.E.2d 747 (1990).

In order for claim to be held compensable under Workers' Compensation Act, three elements must coexist: 1) personal injury; 2) received in course of employment; and 3) resulting from that employment. *Jordan v. State Workmen's Comp. Com'r*, 156 W. Va. 159, 191 S.E.2d 497 (1972).

**Preexisting Injury.** Preexisting infirmity of employee does not disqualify him from prosecuting suc-

cessful claim for compensation based upon new injury arising from his employment. But where there is evidence of preexisting like injury, his new claim will not be treated as compensable unless it is directly attributable to a definite, isolated and fortuitous occurrence. Preexisting condition does not dispense with necessity of showing that injury was actually caused by accident or injury received in course of and arising from employment. *Jordan v. State Workmen's Comp. Com'r*, 156 W. Va. 159, 191 S.E.2d 497 (1972). Fact that employee received workers' compensation benefits for both injury sustained during course of his employment and aggravation of this injury, which allegedly resulted from improper medical treatment of original injury by physician not associated with employer, does not bar tort action by employee against physician for damages for aggravation of original injury. Persons not expressly granted immunity from suit by Workers' Compensation Law are subject to common-law damage suits. *Jones v. Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973). Injury in course of travel to work place is not within workmen's compensation. *Harris v. State Workmen's Comp. Com'r*, 158 W. Va. 66, 208 S.E.2d 291 (1974).

**Dual Purpose.** Employee defendant is on business trip, so as to receive immunity under Workers' Compensation laws from suit by co-employee, only if employment created necessity for trip and if, upon cancellation for business reason, trip would not have gone forward. *Jenrett v. Smith*, 173 W. Va. 325, 315 S.E.2d 583 (1983) (dicta) (same test used in determining "course of employment" for purposes of benefits availability).

Where evidence discloses that precipitating cause of current disability was current injury, but permanent and total disability would not have resulted but for combined effect of current injury and previous injury, employer shall be chargeable only for compensation payable for second injury. *Estep v. State Workmen's Comp. Com'r*, 171 W. Va. 168, 298 S.E.2d 142 (1982); W. Va. Code §§23-3-1 and 23-4-6 (d).

Compensable injury which does not initially, or of itself, produce permanent total disability may become progressively worse over time or combine with prior impairments under second injury statute resulting in permanent total disability and, in those circumstances, "date of disability," from which permanent total disability will be calculated and paid, is date on which medical or other expert evidence indicated that permanent total disability existed. W. Va. Code §23-3-1; *Young v. State Workmen's Comp. Com'r*, 181 W. Va. 440, 383 S.E.2d 72 (1989).

Where permanent partial disability combines with factors, such as age, education and intelligence, to render claimant unemployable, he or she is entitled to perma-

nent total disability award; however, second injury life award may not be based solely on fact that claimant's advanced age precludes employment. *Hunter v. State Workers' Comp. Com'r*, 182 W. Va. 133, 386 S.E.2d 500 (1989).

For purposes of Workers' Compensation Act, occupational disease means disease incurred in course of and resulting from employment. No ordinary disease of life to which general public is exposed outside of employment shall be compensable except when it follows as incident of occupational disease as defined in this chapter. Except in case of occupational pneumoconiosis, disease shall be deemed to have been incurred in course of or to have resulted from employment only if it is apparent to rational mind, upon consideration of all circumstances 1) that there is direct causal connection between conditions under which work is performed and the occupational disease; 2) that it can be seen to have followed as natural incident of the work as result of exposure occasioned by nature of employment; 3) that it can be fairly traced to employment as proximate cause; 4) that it does not come from hazard to which workmen would have been equally exposed outside of employment; 5) that it is incidental to character of business and not independent of relation of employer and employee; and 6) that it must appear to have had its origin in a risk connected with employment and to have flowed from that source as natural consequence, though it need not have been foreseen or expected before its contraction. W. Va. Code §23-4-1f.

In claim for occupational pneumoconiosis, "hazard" under workers' compensation law exists in any work environment where it can be demonstrated that there are minute particles of dust in abnormal quantities, and once Commissioner has made non-medical finding that there is dust hazard, pneumoconiosis claimant must be referred to Occupational Pneumoconiosis Board to determine compensation. *Meadows v. State Workmen's Comp. Com'r*, 157 W. Va. 140, 198 S.E.2d 137 (1973).

**Limitations Period.** Two possible dates trigger running of statute of limitations for bringing workers' compensation claim for occupational disease benefits of which the last occurring will be used: 1) date of last exposure, or 2) date claimant was advised of occupational disease by physician or date claimant should reasonably have known of existence of occupational disease, which is earlier. W. Va. Code §23-4-15; *Holdren v. State Workers' Comp. Com'r*, 181 W. Va. 337, 382 S.E.2d 531 (1989).

**Mental Injury.** Mental claims (injuries solely caused by nonphysical means and which did not result in any physical injury or disease) are not compensable. W. Va. Code §23-4-1(f).

To ascertain whether workman is “employee” or independent contractor for purposes of Workers’ Compensation Act, each case must be decided on its own facts with no one feature of relationship controlling. *Hutchins v. Workmen’s Comp. Com’r*, 163 W. Va. 556, 258 S.E.2d 589 (1979). Company’s characterization is evidence of a worker’s status; it is not conclusive. *Barkley v. State Workmen’s Comp. Com’r*, 164 W. Va. 777, 266 S.E.2d 456 (1980).

Under W. Va. Code §23-4-2, employer is subject to common law tort action for damages for wrongful death where employer acts with deliberate intention. Statute sets forth two separate and distinct methods of proving deliberate intention: plaintiff demonstrates employer acted with consciously, subjectively and deliberately formed intention to produce specific result of injury or death to employee; or plaintiff offers evidence to prove five specific requirements provided in §23-4-2 (d)(2)(i)-(ii). *Mayles v. Shoney’s, Inc.*, 185 W. Va. 88, 405 S.E.2d 15 (1990); *Bell v. Vecellio & Grogan Inc.*, 191 W. Va. 577, 447 S.E.2d 269 (1994). Test must be satisfied by showing that employer actually possessed knowledge of

unsafe working condition and strong probability of injury or death presented by that condition. *Blevins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 408 S.E.2d 385 (1991).

Attorney’s Fee. Under Chapter 23, attorney’s fee for assisting workers’ compensation claimant in obtaining permanent total disability award, consisting of accrued and future benefits, is not to exceed 20 percent of accrued and future benefits as one award subject to 208-week limitation. *Committee on Legal Ethics v. Coleman*, 180 W. Va. 493, 377 S.E.2d 485 (1988). Claimant may not waive statutory limitation on attorney fees. *Committee on Legal Ethics v. Burdette*, 191 W. Va. 346, 445 S.E.2d 733 (1994). Claimant is entitled to reimbursement for attorney fees incurred in contesting commissioner’s illegal conduct. *Boggs v. Richardson*, 187 W. Va. 318, 418 S.E.2d 764 (1992).

Lien. In the event an employer defaults on any payment required by Workers’ Compensation Act, then payment, interest and penalty thereon shall be a lien enforceable against all property of employer, subject to certain exceptions. W. Va. Code §23-2-5(f)(2).