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Overview of State of New York Unified Court System

A. Trial Courts

The trial courts of superior jurisdiction, meaning they have jurisdiction over most cases, are the Supreme Courts, the Court of Claims, the Family Courts, the Surrogate's Courts and, outside New York City, the County Courts. In New York City, the Supreme Court exercises both civil and criminal jurisdiction. Outside New York City, the Supreme Court exercises civil jurisdiction, while the County Court generally handles criminal matters.

The trial courts of limited jurisdiction in New York City are the New York City Civil Court and the New York City Criminal Court. Outside New York City, the trial courts of limited jurisdiction are the City Courts, which have criminal jurisdiction over misdemeanors and lesser offenses, and civil jurisdiction over claims of up to $15,000. There are District Courts in Nassau County and parts of Suffolk County. District Courts have criminal jurisdiction over misdemeanors and lesser offenses, and civil jurisdiction over claims of up to $15,000.

Upstate New York Courts and Long Island Courts (Nassau and Suffolk County)- A County Court is in each county outside New York City. There are 55 counties located in upstate New York and two counties located in Long Island; Nassau and Suffolk County. The County Court is authorized to handle the prosecution of all crimes committed within the County. Unlike the Supreme Court, which is a single statewide court, each County Court is separate and distinct from the other County Courts. The County Court also has limited jurisdiction in civil cases involving claims up to $25,000.

City Courts outside New York City exist in 61 cities and have criminal jurisdiction over misdemeanors and lesser offenses, and civil jurisdiction over claims of up to $15,000. Some City Courts have separate parts to handle small claims or housing matters. City Court judges act as arraigning magistrates and conduct preliminary hearings in felony cases.

Town and Village Courts have criminal jurisdiction over violations and misdemeanors, and civil jurisdiction over claims up to $3,000. As magistrates, Town and Village Court justices hold arraignments and preliminary hearings for those charged with more serious crimes. Traffic infractions also are heard in these courts.

New York City Courts

The New York City Supreme Court - is the trial court of unlimited original jurisdiction, but it generally only hears cases that are outside the jurisdiction of other trial

courts of more limited jurisdiction. It exercises civil jurisdiction and jurisdiction over felony criminal cases. The Civil Practice Laws and Rules ("CPLR") is the main source of procedural rules in the Supreme Court. Part 202 of the Uniform Court Rules provides further procedural detail for practice in the Supreme and County courts).

The Family Court - hears matters involving children and families. Its jurisdiction includes: custody and visitation, support, family offense (domestic violence), persons in need of supervision, juvenile delinquency, child protective proceedings (abuse and neglect), foster care approval and review, termination of parental rights, adoption and guardianship.

The Surrogate's Court - hears cases involving the affairs of decedents, including the probate of wills and the administration of estates, and adoptions.

The Civil Court of the City of New York - has jurisdiction over civil cases involving claims up to $25,000 and other civil matters referred to it by the Supreme Court. It includes a small claims part for claims not exceeding $5,000 and a housing part for residential landlord-tenant matters and housing code violations.

The Criminal Court of the City of New York - has jurisdiction over misdemeanors and violations. Judges of the Criminal Court also act as arraigning magistrates and conduct preliminary hearings in felony cases.

B. Appellate Courts

The Appellate Courts hear and determine appeals from the decisions of the Trial Courts. The Appellate Courts include the Court of Appeals (the highest Court in the State), the Appellate Divisions of the Supreme Court, the Appellate Terms of the Supreme Court, and the County Courts acting as Appellate Courts in the Third and Fourth Judicial Departments. An appeal cannot be taken from anything other than an Order or a Judgment made by a Judge.

The Court of Appeals- The Court of Appeals, New York State's highest court, located in Albany, New York, is composed of a Chief Judge and six Associate Judges, each appointed to a 14-year term. The Court articulates statewide principles of law and generally focuses on broad issues of law as distinguished from individual factual disputes.

Appellate Divisions- There are four Appellate Divisions of the Supreme Court, one in each of the State's four Judicial Departments. Each justice is a Supreme Court justice whom the Governor has elevated. Appellate Division justices sit in panels of five. Four justices are required for a quorum.

The Appellate Division resolves appeals from judgments or orders of the superior courts of original jurisdiction in civil and criminal cases, and reviews civil appeals taken from the Appellate Terms and the County Courts acting as appellate courts.

Appeal from Lower Courts- Appellate Terms of the Supreme Court have been established in the First and Second Departments to hear appeals from civil and criminal cases originating in the Civil and Criminal Courts of the City of New York. The court consists of three to five (usually three) Supreme Court justices assigned to hear appeals from certain lower courts. In the Second Department, the Appellate Terms also have jurisdiction over appeals from civil and criminal cases originating in District, City, Town and Village Courts. The County Courts in the Third and Fourth Departments (although primarily trial courts), hear appeals from cases originating in the City, Town and Village Courts.

Bond Requirement- An appeal does not stay (stop) the execution of a judgment. To stay the enforcement of a money judgment either an "Undertaking" by bond or certified check or an Order from the Appellate Term of the Supreme Court is required. In most cases involving a private litigant and money damages, the appellant's attorney must serve an undertaking upon opposing counsel in order to obtain a stay. When served along with the notice of appeal, or with an affidavit of intention to move for permission to appeal if the appeal is not as of right, that undertaking automatically stays enforcement of the judgment or order. *See* CPLR 5519(a)(2) and Article 25. An undertaking usually consists of an appeal bond obtained from an insurance company, which will guarantee that the appellant will pay if he or she loses the appeal. The insurance company will require the appellant to put up collateral to secure the bond, usually liquid collateral, such as a bank book or money market account. Even then, the collateral must often be for 120% of the amount of the bond.

If appellants are not entitled to an automatic stay pending the decision from the appeal pursuant to CPLR 5519(a), they may apply for a court-ordered stay. CPLR 5519(c). "Neither a discretionary stay nor an automatic stay under CPLR 5519 stays all proceedings in the action; it stays only proceedings to enforce the order or judgment appealed from." *Baker v. Board of Educ. of West Irondequoit School Dist.*, 152 A.D.2d 1014, 544 N.Y.S.2d 258, 55 Ed. Law Rep. 221 (4th Dep't 1989) (citations omitted). In particular, the stay does not stay the trial of the action. *Baker v. Board of Educ. of West Irondequoit School Dist.*, 152 A.D.2d 1014, 544 N.Y.S.2d 258, 55 Ed. Law Rep. 221 (4th Dep't 1989).

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Procedural

A. Venue

The venue rules of Article 5 of the CPLR determine which of the counties is proper for the particular Supreme Court action. Venue rules are needed only for courts with territorial subdivisions. The county courts have none and therefore Article 5 does not apply, nor does it apply in the lower courts (City, Town and Village).

Criminal Procedure - The venue for criminal proceedings is governed by the Criminal Procedure Law section, which places proper venue for a criminal trial in the county in which the offense was committed or planned to be committed. If the offense produced a result, the county where the result occurred is the appropriate venue. For example, in a homicide, the county where the body was found may be the designated venue.

Civil Procedure – Pursuant to Article 5 of the CPLR, venue in a civil action is the county where one of the parties resides. If neither party resides in the state, the plaintiff determines the venue. When the action stems from a consumer credit transaction, the venue is determined by the residence of the defendant. If the defendant is a corporation, its residence is the location of its main office in New York.

CPLR § 503. Venue based on residence -

(a) Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.

(b) Executor, administrator, trustee, committee, conservator, general or testamentary guardian, or receiver - An executor, administrator, trustee, committee, conservator, general or testamentary guardian, or receiver shall be deemed a resident of the county of his appointment as well as the county in which he actually resides.

(c) Corporation - A domestic corporation, or a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located; except that such a corporation, if a railroad or other common carrier, shall also be deemed a resident of the county where the cause of action arose.

(d) Unincorporated association, partnership, or individually-owned business - A president or treasurer of an unincorporated association, suing or being sued on behalf of the association, shall be deemed a resident of any county in which the association has its principal office, as well as the county in which he actually resides. A partnership or an individually-owned business shall be deemed a resident of any county in which it has its principal office, as well as the county in which the partner or individual owner suing or being sued actually resides.

(e) Assignee - In an action for a sum of money only, brought by an assignee other than an assignee for the benefit of creditors or a holder in due course of a negotiable instrument, the assignee's residence shall be deemed the same as that of the original assignor at the time of the original assignment.

(f) Consumer credit transaction - In an action arising out of a consumer credit

transaction where a purchaser, borrower or debtor is a defendant, the place of trial shall be the residence of a defendant, if one resides within the state or the county where such transaction took place, if it is within the state, or, in other cases, as set forth in subdivision (a).

CPLR § 507. Real property actions - The place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated.

CPLR § 509. Venue in county designated - Notwithstanding any provision of this article, the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order upon motion, or by consent as provided in subdivision (b) of rule 511.

B. Statute of Limitations

A statute of limitations is a law which places a time limit on pursuing a legal remedy in relation to wrongful conduct. After the expiration of the statutory period, unless a legal exception applies, the injured person loses the right to file a lawsuit seeking money damages or other relief.

The statute of limitations begins to run upon the "accrual" of the cause of action. A claim typically accrues when the injury is suffered. There are, however, exceptions to this rule.

The Discovery Rule -

When it is not reasonably possible for an injured person to discover the cause of an injury, or even to know that an injury has occurred, until considerably after the act which causes the injury, the "discovery rule" permits a suit to be filed within a certain period of time after the injury is discovered, or reasonably should have been discovered.

Tolling of the Statute of Limitations -

The statute of limitations may be tolled for several reasons including: minority (the victim of the injury was a minor at the time the injury occurred), mental incompetence (the victim of the injury was not mentally competent at the time the injury occurred), and the defendant's bankruptcy (the "automatic stay" in bankruptcy ordinarily tolls the statute of limitations until such time as the bankruptcy is resolved or the stay is lifted). Under New York law, a minor ordinarily has 3 years from the date of his or her eighteenth birthday to commence litigation. However, for medical malpractice actions, the statute of limitations cannot be extended for more than 10 years from the date of the act or omission giving rise to the injury.

Contracts- Contract based actions must be filed within 6 years from the date of breach.

The contract, however, may specify an agreed upon shortened statute of limitations.

Defamation- These types of actions must be filed within 1 year from the date of the defamatory statement.

Fraud - Actions based on fraud must be filed within 6 years from the date of injury.

Injury to Personal Property - These types of actions must be filed within 3 years from the date of injury.

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

Intentional Torts- These types of actions must be filed within 1 year of the date of injury.

Judgments- These types of actions must be filed within 10 years of entry of that judgment by the county clerk.

Medical Malpractice - All actions against medical professionals must be filed within 2 years and 6 months from the date when the injury occurred, or within 2 years 6 months of the date the injury was, or should have been, discovered. If the injured party is a minor, the statute of limitations is 3 years from the date of the minor's 18th birthday (excluding wrongful death cases). If the injured person is continuously treating with the allegedly negligent doctor to remedy a known injury for allegedly negligent treatment, the statute of limitations is tolled until such treatment ceases. If a foreign object is left inside a patient, the statute of limitations is 2 years and six months following the occurrence, or 1 year after discovering the foreign object, whichever comes first.

Personal Injury Actions- Must be filed within 3 years from the date of the injury.

Product Liability - Product liability actions must be filed within 3 years from the date of the injury, or in instances where the injury is not immediately apparent, within 3 years from the date the injury was, or should reasonably have been, discovered.

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

C. Time for Filing an Answer

The time allotted to file an answer is either 20 or 30 days, depending on how the summons is served:

- 20 days - if the summons was delivered to defendant by personal (in hand) delivery
- 30 days - if the summons was delivered to defendant by any other method.

Parties may stipulate to extend the time to answer.

D. Dismissal Re-Filing of Suit

A plaintiff may file a voluntary discontinuance on notice at any time before a responsive pleading is received or before 20 days have passed (whichever is earlier). *See* CPLR § 3217(a)(1). This discontinuance is deemed to be without prejudice unless a suit was filed for the same cause of action once before and also discontinued by any means. A plaintiff cannot voluntarily discontinue and re-file an action more than once.

A plaintiff may also seek leave to discontinue an action, but the terms of the discontinuance (i.e. with or without prejudice) shall be determined by the court. *See* CPLR § 3217(b).

CPLR § 205(a) provides a savings clause for actions dismissed for certain reasons, even if the statute of limitations has run. For example, in New York, a "proposed" administrator lacks capacity to sue on behalf of its decedent. If the matter is dismissed for this reason, even if in the interim the statute of limitations has run (provided the original suit would have been timely if the administrator were properly named), the plaintiff's properly named and appointed administrator has six months to recommence the lawsuit.

Liability

A. Negligence

As in most other jurisdictions, negligence in New York is comprised of four elements: duty, breach of that duty, proximate cause, and resulting injury. A plaintiff must establish each element to recover in a negligence action.

New York is a "pure comparative negligence" state. In other words, there is no limit placed on the amount of fault that can be assigned to a plaintiff that would prevent him or her from recovering damages. For example, if a plaintiff is found to be 75% comparatively negligent for an accident, that plaintiff will still recover 25% of the damages from the defendant.

B. Negligence Defenses

Assumption of the Risk – In the absence of an express prior written wavier/release from future liability, this affirmative defense has been strictly limited to sporting or recreational activities in which participants consent to those commonly appreciated risks which are inherent in, and arise out of, the nature of the sport generally, and flow from such participation. *See, e.g. Trupia v. Lake George Central School Dist.*, 14 N.Y.3d 392 (2010).

This defense may also be available in non-sporting cases, where a defendant procures from plaintiff a written and signed statement that plaintiff assumes the risks of an

activity. This waiver/release must be explicit and some courts have held that it must contain the word "negligence" in order to be enforceable.

Last Clear Chance – This doctrine does not apply in New York State subsequent to the adoption of comparative negligence (abrogating the contributory negligence doctrine) in 1975. Comparative negligence is discussed in detail below.

Emergency Doctrine – This defense is a question of fact for a jury as to whether a person is faced with a "sudden and unexpected" circumstance. If a jury finds that the actions taken by the defendant were reasonable and prudent in the context of the sudden and unexpected circumstance, the defendant will not be found negligent.

Unavoidable Accident Doctrine – Similar to the emergency doctrine, an unavoidable accident is an occurrence which is not intended and could not have been foreseen or prevented by the exercise of reasonable caution.

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross Negligence - Gross negligence occurs when a defendant's conduct reaches the level of either intentional wrongdoing or reckless indifference to the rights of others. Gross negligence may entitle a plaintiff to punitive damages.

Recklessness – N/A. This is not a separate measure of breach of duty in tort cases in New York, and is only used in conjunction with gross negligence, as defined above.

Willful and Wanton Conduct - N/A. This is not a separate measure of breach of duty in tort cases in New York, and is only used in conjunction with gross negligence, as defined above.

D. Negligent Hiring and Retention

This cause of action requires an allegation that the employer knew or should have known of the employee's propensity for the conduct which caused the injury. This is infrequently sustained in New York. Employers generally have no duty to conduct background checks or criminal record searches for prospective employees.

E. Negligent Entrustment

The owner or possessor of a dangerous instrument is under a duty to entrust it only to a responsible person whose use does not create an unreasonable risk of harm to others. The basis of this liability hinges upon the level of knowledge the supplier of the instrument has or should have about the entrustee's propensity to use the instrument in a dangerous fashion.

F. Dram Shop

A bar or restaurant commits a Dram Shop violation when it serves alcohol to an underage patron or it serves alcohol to a patron who is already visibly intoxicated. The bar or restaurant will be liable where it commits such a violation and the patron, as a result of being intoxicated, injures a third-party. A bar or restaurant will be liable for underage service even where it had no reason to believe the patron was underage.

G. Joint and Several Liability

In most instances, a party that is found even 1 percent negligent relative to other tortfeasors will be jointly and severally liable for all of the plaintiff's pecuniary damages, including lost wages, medical expenses, etc. Pursuant to CPLR Article 16, however, only those defendants found 50 percent or more responsible will be jointly and severally liable for the plaintiff's non-economic damages, such as pain and suffering.

There are numerous exceptions to this rule pursuant to both Article 16 and other statutes. For example, car accident cases generally will involve complete joint and several liability for a tortfeasor. Other statutes, such as Labor Law 240(1), will also impose strict liability on a defendant in certain circumstances.

H. Wrongful Death and/or Survival Actions

There is no common law wrongful death cause of action in New York. Such actions are governed by the New York Estates Powers and Trusts Law. Under this law, damages are limited to 1) pecuniary loss; 2) post-impact conscious pain and suffering; and 3) pre-impact terror.

There are not separate causes of action for wrongful death and survival actions. One of the elements, as discussed below, of a wrongful death action is the survival of distributees who suffered a pecuniary loss.

Wrongful Death - To succeed on an action to recover damages for wrongful death, the plaintiff must prove the following elements: (1) the death of a human being born alive; (2) a wrongful act, neglect or default of the defendant by which the decedent's death was caused, provided the defendant would have been liable to the deceased had death not ensued; (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent; and (4) the appointment of a personal representative of the decedent.

I. Vicarious Liability

An employer is generally vicariously liable for its employee's negligent or intentional acts if those acts are committed within the scope of employment, and the conduct is generally foreseeable and a natural consequence of said employment.

An owner of a motor vehicle is vicariously liable for any negligent acts committed by an

operator of that motor vehicle as long as the operator had the consent of the owner to use the vehicle.

With regard to vicarious liability in trucking cases, New York has generally adopted the Federal Motor Carrier Safety Regulations. In other words, strict placard liability is no longer the standard. Instead, courts evaluate the intent of the parties. If a trucking company terminates a lease or that lease expires, but despite diligent efforts have been unable to retrieve their placards from the driver, the trucking company will generally not be found strictly liable even if their placards were displayed on the truck at the time of the loss. *See, e.g.*, *Davis v Rajbar*, 266 A.D.2d 828 (4th Dept. 1999).

With regard to construction site injuries, vicarious liability may be imposed under Labor Law Sections 240(1) (the "Scaffold Law") and 241(6) (which deals with Industrial Code Violations). Section 240(1) imposes strict liability on an owner of property (unless the property is a single or two family dwelling) or general contractor who fails to provide proper safety equipment in elevation-related injuries (such as those involving falls from ladders or scaffolding). Section 241(6) imposes liability on the owner or general contractor where there was a violation of a specific safety rule of the Industrial Code by a contractor. A violation of 241(6) is only some evidence of negligence and does not constitute negligence as a matter of law.

J. Exclusivity of Workers' Compensation

In New York, the Workers' Compensation law is designed to be the exclusive remedy of persons injured while functioning within the scope of their employment. Such an injured person generally may not maintain a lawsuit against either his employer or a co-worker. Exceptions to this exclusivity rule include when an employer or co-employee's conduct that caused the injury was intentional or when the employer fails to procure or maintain workers' compensation insurance.

A defendant may bring a third-party action against the plaintiff's employer only where the plaintiff suffered a "grave injury" or when "the employer 'expressly agreed' to indemnify the claimant." *Tonking v. Port Auth. of New York & New Jersey*, 3 N.Y.3d 486, 490, 821 N.E.2d 133, 136 (2004). Pursuant to section 11 of the Workers' Compensation law, a grave injury consists of: "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

This rule applies only to a plaintiff's employer or coworker. A plaintiff may maintain a lawsuit against any other negligent or responsible party even where the plaintiff may not sue his or her employer or coworker.

Damages

A. Statutory Caps on Damages

There are no statutory caps on damages in New York. Any party may challenge at the trial court level and on appeal, a damages award or lack thereof that "deviates materially from what would be reasonable compensation."

B. Compensatory Damages for Bodily Injury

The judge in a case will generally use the New York Pattern Jury Instructions to instruct a jury prior to its deliberations. These instructions, however, do not have specific guidelines as to what different injuries are worth and the jury is instructed to use its common sense and experience, along with considering the evidence presented at trial, to determine a verdict award. Attorneys for each party may suggest an amount for each item of damages to be considered by the jury. Generally, the Appellate Division will modify an award to the extent the Appellate Division finds a damages finding to be unreasonable.

C. Collateral Source

Plaintiff cannot recover for economic loss that has been compensated by a collateral source, such as health insurance, no-fault payments, or worker's compensation. However, workers' compensation and Medicare/Medicaid must assert a lien on any settlement or trial recovery to ensure that they are compensated for payments made on the plaintiff's behalf. Pursuant to CPLR Article 45, charitable donations to a plaintiff are not subtracted from, and play no role in, a jury's damages determination.

D. Pre-Judgment/Post-Judgment Interest

The statutory interest rate in New York is 9%.

Pre-judgment interest from a claim's accrual is typically awarded in breach of contract, wrongful death and certain interference with property cases.

Post-interest judgment begins to accrue on the date that judgment is entered, whether by verdict or motion. For example, if a summary judgment motion is granted to a plaintiff, and plaintiff opts to enter judgment against defendant, interest on any eventual damages award will begin to accrue from the date judgment was entered.

E. Damages for Emotional Distress

Intentional/Reckless Infliction of Emotional Distress - This tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. The first element—outrageous conduct—serves the dual function of filtering out petty and trivial complaints that do not

belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine. In practice, courts have tended to focus on the outrageousness element, the one most susceptible to determination as a matter of law.

Negligent Infliction of Emotional Distress – The elements for an action for negligent infliction of emotional distress are a breach of a duty owed to plaintiff which exposes him or her to an unreasonable risk of bodily injury or death. Physical injury is not a necessary element of a cause of action to recover for negligent infliction of emotional distress. However, such a cause of action must generally be premised upon conduct that unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for her own safety.

F. Wrongful Death and/or Survival Action Damages

Damages in a wrongful death action are limited to "just compensation" for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper factors to consider when determining damages.

A wrongful death cause of action is brought not on behalf of the decedent, but rather on behalf of the decedent's dependents and the damages recoverable are not in compensation for the injury sustained by the decedent, but rather for the injuries suffered by the dependents as a result of the decedent's death.

G. Punitive Damages

Punitive damages may be awarded when the fact-finder determines that the defendant's conduct was wanton and reckless or malicious. Punitive damages may be awarded for conduct that represents a high degree of immorality and shows such wanton dishonesty as to imply a criminal indifference to civil obligations. The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant for wanton and reckless or malicious acts and thereby to discourage the defendant and others from acting in a similar way in the future.

An act is malicious when it is done deliberately with knowledge of the plaintiff's rights, and with the intent to interfere with those rights. An act is wanton and reckless when it demonstrates conscious indifference and utter disregard of its effect upon the health, safety and rights of others.

Punitive damages awards must be proportionate to the conduct of the defendant as well as the harm to plaintiff, and must not be grossly excessive such that it would violate due process. When evaluating whether to invalidate a punitive damages award, courts consider the following factors: the degree of reprehensibility; the disparity between the

harm or potential harm suffered and the punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Punitive damages may not be covered by insurance in New York as a matter of public policy. *Hartford Acc. & Indem. Co. v. Vill. of Hempstead*, 48 N.Y.2d 218, 227, 397 N.E.2d 737 (1979).

H. Diminution in Value of Damaged Vehicle

The general rule in New York is that to calculate damages in an automobile property damage lawsuit, courts must use **either** the diminution of value **or** the cost of repair, whichever is less. There is an exception to this general rule in at least one of the four Appellate Divisions, however. This exception states that where the automobile is one where it is appreciating in value (in this case it was a rare collector's sports car), then the proper calculation of damages was the cost of repair **plus** the diminution of value. *See Franklin Corp. v Prahler*, 91 A.D.3d 49 (4th Dept 2011).

I. Loss of Use of Motor Vehicle

A successful plaintiff is entitled to the reasonable replacement cost, as measured most typically by the rental cost, of a motor vehicle while it is being repaired. This is true even when there is a reserve vehicle that is used in lieu of a rental. Damages in this instance are calculated by citing the prevailing market rate of a rental replacement.

Evidentiary Issues

A. Preventability Determination

Under the Federal Motor Carrier Safety Regulations, a carrier who was denied a hazardous materials permit due to its published accident rate may seek to prove that one or more of the accidents was not preventable, and thus should not count against the applying carrier. *See, e.g.*, http://www.fmcsa.dot.gov/safety-security/hazmat/CrashPreventability-WebsiteExcerpt.htm

There is no specific case law regarding the preventability of a motor vehicle accident. This would likely be admissible, however, in proving negligence. For example, but for defendant's excessive rate of speed, the accident could have been prevented by the timely application of brakes.

Under New York's "scaffold law," however, in order to prevail, a plaintiff must prove that the accident was one of the sorts of occurrences that the safety devices specifically enumerated under the statute could have prevented. *See, e.g.*, New York Labor Law § 240(a); *Santos v. 304 West 56th Street Realty LLC*, 862 N.Y.S.2d 435 (2008).

B. Traffic Citation from Accident

If the cited violation is of a state statute, then the ticket is admissible and if proximate cause is proven, this constitutes negligence per se. If the violation is of a local ordinance, including New York City traffic rules, the ticket is admissible and if proximate cause is proven, constitutes "some evidence" to be weighed by the jury when determining negligence. *See* N.Y. Pattern Jury Instructions, §§ 2:26, 2:29.

C. Failure to Wear a Seat Belt

In automobile accident cases, an affirmative defense of non-use or improper use of seatbelts may be asserted. This is a question for a jury to determine if the plaintiff failed to use available seatbelts and if so, the percentage to which this contributed to plaintiff's injury. The damages award must be reduced proportionate to this percentage.

This defense may not be used to argue that but for the failure to use or properly use a seatbelt, plaintiff would not have suffered a "serious injury" (discussed below). It is strictly a question for the jury in the determination of damages.

D. Failure of Motorcyclist to Wear a Helmet

This is admissible evidence to mitigate damages as it violates a New York statute. Expert testimony is required to opine on the causal link between the failure to wear a helmet and the suffering of the injuries alleged in the suit.

E. Evidence of Alcohol or Drug Intoxication

Evidence of blood alcohol content, if in a certified hospital record, is generally admissible under the business records exception to the hearsay rule.

Evidence of intoxication requires expert testimony to opine as to significance of the numerical readings and the effects of the associated level of intoxication.

F. Testimony of Investigating Police Officer

Police officers may testify about their personal knowledge. Police officers may qualify as experts if they meet the same qualifications as any other expert witness and the requirements for admissibility of expert testimony. Specifically, "a predicate for the admission of expert testimony is that its subject matter involve information or questions beyond the ordinary knowledge and experience of the trier of the facts. Moreover, the expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." *Matott v. Ward*, 48 N.Y.2d 455 (1979).

G. Expert Testimony

Admissibility of expert evidence is discussed above. The qualifications of an expert,

generally, are discussed above. More specifically, New York is a *Frye* state. To meet the Frye standard, scientific evidence presented to the court must be interpreted by the court as "generally accepted" by a meaningful segment of the associated scientific community. This applies to procedures, principles or techniques that may be presented in the proceedings of a court case.

H. Collateral Source

A plaintiff is entitled to prove his or her case to a jury with evidence of damages irrespective of any collateral source deduction that may later be made. The CPLR specifically states that a court may deduct the amount of a collateral source payment after the determination of a verdict by a jury.

I. Recorded Statements

With regard to the admissibility of recorded recollection, the court considers the following factors: (1) the witness must be unable or unwilling to testify to the events contained in the memorandum; (2) the witness must have observed the events described therein; (3) the memorandum must have been prepared when knowledge of the contents were fresh in the mind of the witness; (4) the witness must have intended the memorandum to be accurate at the time it was made.

With regard to depositions or prior testimony, any party's deposition may be admissible for any purpose at trial. For any non-party deposition, these are generally admissible if the witness is unavailable at trial and at the non-party deposition all parties were represented with the opportunity to examine the witness. A witness may also be cross-examined with their deposition transcript, particularly if their trial testimony differs from their deposition testimony.

J. Prior Convictions

A witness may be cross-examined with respect to immoral, vicious, or criminal acts which may affect witness' character and show witness to be unworthy of belief, provided inquiry is made in good faith and there is reasonable factual basis for it. *See* CPLR § 4513.

K. Driving History

A driver's DMV abstract that contains his or her driving history may be admissible only if it complies with the requirements of the CPLR regarding authentication of records made by public officers. *See* CPLR § 4540.

Prior accidents are generally not relevant and are excluded. Exceptions in automobile cases are when a prior accident involved injuries to the same body parts as have been allegedly injured in the instant case. In such a case, the prior accident is relevant to the

determination of damages.

L. Fatigue

New York has adopted the Federal Motor Carrier Safety Regulations with regard to hours of service requirements. Violation of these rules is admissible with proof of proximate cause of the accident. The effect is the same as the violation of a city ordinance, as discussed above, in that it may constitute "some evidence" of negligence but does not constitute negligence per se.

M. Spoliation

There is no independent cause of action for spoliation.

New York's spoliation remedies are governed by the same provision of the CPLR as the remedies for failure to disclose relevant discovery. If a Court finds that a party has destroyed evidence that "ought to have been disclosed," it may preclude a party from introducing such evidence at trial, strike a pleading of that party, or dismiss the complaint, if relevant. When determining the appropriate sanction, the party moving for sanctions must establish that they have been prejudiced by the spoliation and/or that dismissal is necessary as a matter of "elementary fairness." This standard is vaguely defined and trial courts are granted wide discretion that is rarely disturbed at the appellate level.

Settlement

A. Offer of Judgment

In New York this is known as an offer of compromise. Pursuant to CPLR § 3221, in any action except a matrimonial action, at least ten days before a trial of a matter, any party against whom a claim is asserted and against whom a separate judgment may be taken may serve upon a claimant an offer of settlement. Claimant has ten days to accept this offer in writing. If claimant does not accept the offer and fails to later secure a more favorable judgment, the claimant is responsible for paying the costs of the defendant who served the offer of judgment starting on the date that the offer was deemed rejected (10 days following its service).

Costs, however, do not mean actual costs incurred by a defendant. Rather, they refer to statutorily defined fees. An example is a witness fee. If a defendant pays an expert witness his or her customary fee, often in the several thousands, defendant will only be able to recover from plaintiff the statutorily defined witness fee of $15 per day plus $0.23 per mile for travel.

B. Liens

Workers' Compensation

Workers' Compensation carriers in New York have the ability to assert a lien for benefits paid out, beyond $50,000, on any future recovery by its insured plaintiff, whether by verdict or settlement. *See* N.Y. Workers' Comp. Law § 29; N.Y. Insurance Law § 5105. The prevailing plaintiff must either secure the approval of the workers' compensation lienholder prior to the settlement, or within thirty days of the proposed settlement, apply on notice to the Supreme Court, to confirm the settlement amount. *See id.*

Medicare/Medicaid

Pursuant to the Medicare Secondary Payment Act, there will be a lien for any past and future medical expenses paid by Medicare on any settlement. This process is administered by the Centers for Medicare and Medicaid Services. Claimants have a duty to report any claims or workers' compensation filing that may involve Medicare funded medical treatment. Medicare's payments for care are deemed conditional and generally must be repaid from settlement funds or funds obtained by a plaintiff after trial. This law applies in every state, including New York, and imposes substantial responsibilities on both plaintiffs and defendants.

C. Minor Settlement

Settlements with minors (and incompetents) are governed by Article 12 of the CPLR. No matter involving a minor may be settled with a minor's representative without the approval of the court after a process known as infant's compromise. If no formal lawsuit has been commenced, a special proceeding must be initiated in order to resolve the claim.

CPLR 1208 sets forth the proper procedure and papers required in presenting the infant's compromise petition and appearance at the Infant's Compromise Hearing.

D. Negotiating Directly with Attorneys

A plaintiff's counsel is permitted to engage in settlement negotiations directly with defendant's insurance carrier and this often happens in New York. The carrier, however, may refer all inquiries to the retained counsel.

E. Confidentiality Agreements

The current status of the law surrounding confidential settlements in New York is unclear. While many settlements contain confidentiality provisions, it is unclear if these are enforceable.

In particular, when a matter is settled and voluntarily discontinued, the parties must file the "terms" of this settlement with the Clerk. General practice is to file a stipulation of discontinuance without the settlement terms. The Clerk, in practice, accepts these to close the file as long as the $35 filing fee is paid. In order to avoid unintended adverse consequences for failing to follow the literal terms of the CPLR, it is recommended that

the stipulation of discontinuance be drawn to include language such as "this discontinuance is based on a settlement reached by the parties on the issues outstanding between them [maybe include the date], among which is the understanding that the details of the agreement and the consideration furnished for it on each side are to remain confidential." *See* TRACKING THE NEW LAW ON FILING SETTLEMENTS STILL MOST CONTROVERSIAL ISSUE: SEEKING WAYS OF FILING SETTLEMENTS WITHOUT REVEALING UNDERLYING DETAILS, SIEGEL'S PRACTICE REVIEW.

Regardless of how the settlement was filed with the court or its terms, however, these agreements may still be discoverable in future litigation or with continuing litigation involving non-settling defendants in a multi-defendant case where indemnification/contribution may be an issue. In determining whether confidential settlement terms are discoverable, a court looks to whether the confidential settlement has any bearing on the case currently before the court. In the absence of any "tangential relevance," disclosure of a confidential settlement will be denied. *See Mahoney v. Turner Construction Co.*, 872 N.Y.2d 433 (1st Dep't 2009)

F. Releases

Releases are generally full releases from liability that include a "hold harmless" clause for the named defendants and their insurance carrier for all liens or claims currently known or unknown, arising from the subject incident.

G. Voidable Releases

A release may be unilaterally voided only where the release was secured through duress or fraud. *See, e.g.*, *Board of Managers of NV 101 N 5th Street Condominium v. Morton*, 39 Misc.3d 1212(A) (N.Y. Sup. Ct. 2013).

In New York, it is unlawful to negotiate a settlement with a hospital patient within 15 days of the injury. *See, e.g.* Judicial Law § 480. Violation of this law, however, does not automatically void the release. Instead it places the burden on the releasee to establish that the release was secured without fraud or duress.

Transportation Law

A. State DOT Regulatory Requirements

New York has adopted the Federal Motor Carrier Safety Regulations with regard to interstate traffic. There are certain exceptions for motor carriers that operate strictly intrastate, however. These limited exceptions can be found at: https://www.dot.ny.gov/divisions/operating/osss/repository/17_NYCRR_Part_820.pdf

B. State Speed Limits

Irrespective of the posted speed limit, if applicable, the general catchall rule in New York

is "no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." *See* Veh. & Traf. L. § 1180.

On a New York State public highway without a posted speed limit, the default speed limit is 55 mph. State law authorizes a maximum speed limit of 65 mph on a series of specifically enumerated limited access highways. *See* Veh. & Traf. L. § 1180-a(3). The speed limit on all roadways within New York City, except on limited access-highways, is 30 mph.

C. Overview of State CDL Requirements

Drivers must undergo a medical examination pursuant to federal regulation and pass a criminal background check. Drivers must possess a valid driver's license in New York prior to taking a written examination for a CDL learner's permit. This permit functions similarly to a regular learner's permit in that the holder may operate a commercial vehicle only when accompanied by a fully licensed driver. A permit holder may never transport hazardous materials, even if the supervising driver has a valid hazmat endorsement. Drivers must then pass a road test to obtain a full CDL license.

Each endorsement requires the payment of a separate fee. Below is a list of endorsements and whether a written and/or skills test is required:

T—Double/Triple Trailers (knowledge test only)

P—Passenger (knowledge and skills tests)

N—Tank Vehicle (knowledge test only)

H—Hazardous Materials (knowledge test only)

S—School Buses (knowledge and skills tests)

Insurance Issues

A. State Minimum Limits of Financial Responsibility

The minimum limits for personal automobile insurance coverage in New York are $25,000/$50,000 for bodily injury, $50,000/$100,000 for death, and $10,000 for property damage.

B. Uninsured Motorist Coverage

New York requires a minimum of uninsured motorist coverage for all policies in the state at the same minimum limits described above.

C. No Fault Insurance

Every automobile insurance policy in New York must include an endorsement for first party no fault benefits.

Purpose

The idea behind "first party" or "personal injury protection" benefits is to restore individuals to health and productivity as swiftly as possible by ensuring the prompt payment of certain expenses, without regard to fault. *Nyack Hosp. v. General Motors Acceptance Corp.,* 8 N.Y.3d 294, 300, 832 N.Y.S.2d 880 (2007) (the fundamental goal of this regulatory scheme is "to promote prompt payment of legitimate claims").

Since insurers are obligated to pay PIP benefits early on, when there is only a limited opportunity to investigate a claim, the courts have held that the payment of PIP benefits does *not* amount to an admission that an injury or loss was caused by the accident at issue. Therefore, an insurer can argue the lack of a causal connection between the injuries and accident in subsequent litigation. *Dermatossian v. New York City Transit Auth.*, 67 N.Y.2d 219, 501 N.Y.S.2d 784 (1986).

First Party Benefits

First party benefits will reimburse "for basic economic loss sustained by an eligible injured person on account of personal injuries caused by an accident arising out of the use or operation of a motor vehicle . . . during the policy period . . ."

First party benefits (other than death benefits) are payments equal to basic economic loss reduced by:

A. 20% of the eligible injured person's loss of earnings from work (to the extent that an eligible injured person's basic economic loss includes loss of earnings and future earnings that may be "reasonably projected" may also be recovered);

B. amounts recovered or recoverable on account of personal injury to an eligible injured person under State or Federal laws providing social security disability or workers' compensation benefits;

C. the amount of any applicable deductible (such deductible shall apply to each accident and only to the total of first party benefits otherwise payable to the named insured and ay relative as a result of the accident).

Basic Economic Loss

- Shall not exceed $50,000 per person, per accident

- Consists of the following:

A. Medical Expense

- includes medical, hospital, surgical, nursing, dental, ambulance, x-ray, prescription, prosthetic, psychiatric, physical and occupational therapy and rehabilitation, nonmedical remedial care and treatment rendered in accordance with a religious method of healing recognized by New York law, and "any other" professional health services.

- Medical expenses are not subject to a time limitation if, within one year of the accident, it is determined that further medical expenses "may" be sustained as a result of the injury.

B. Work Loss

- Consists of a sum up to a maximum payment of $2,000 per month for a maximum period of three years after the accident (or until the $50,000 limit of combined medical expenses/wage loss is exhausted).

- Includes:
  1. loss of earnings from work which the eligible injured person would have performed had such person not been injured

  2. reasonable and necessary expenses sustained in obtaining services in lieu of those which such person would have performed for income.

- Calculated based upon the injured person's 52 week income prior to injury.

C. Death Benefit

- a $2,000 payment to the estate, in addition to the $50,000 basic economic loss limit.

D. Other "Reasonable and Necessary" Expenses

- A maximum payment of $25 per day for a period of up to one year after the accident.

"Eligible Injured" or "Covered" Person

- The named insured and any relative who sustains injury arising out of the use or operation of any motor vehicle or motorcycle (while not occupying a motorcycle).

- Any other person injured as a result of the "use or operation" of a vehicle in New York, while not occupying another vehicle.

- Any New York resident who sustains injury arising out of the use or operation of a vehicle outside New York while not occupying another motor vehicle.

Auto coverage follows the vehicle in New York

"Relative"

- A spouse, child or person related to the named insured by blood, marriage or adoption, who regularly resides in the insured's house.

Ineligible for PIP Benefits:

- The named insured (or any relative), while occupying or while a pedestrian struck by, an uninsured motor vehicle owned by the named insured (or the relative).
- The insured (or any relative) while occupying or while a pedestrian struck by, an insured vehicle other than the insured vehicle.
- Any person occupying a motorcycle.
- Any person who intentionally causes his/her own injuries.
- Any person who is injured while intoxicated or impaired by the use of a drug.
- Any person committing a felony or avoiding lawful apprehension/arrest.
- Any person operating a vehicle in a race or speed test.
- Any person operating/occupying a vehicle known to be stolen.
- Any person repairing, servicing or maintaining a vehicle within the scope of their employment, on the business premises.

Basic Economic Loss Exceeding $50,000

- The injured person may pursue additional PIP benefits, file a claim with their own health insurance company or apply for disability benefits.
- The injured person may also sue the tortfeasor (i.e., the person responsible for the accident) for economic losses exceeding $50,000 *and* for non-economic damages (i.e., pain and suffering), but only if the injured person sustained an injury that qualifies as "serious" under New York State Insurance Law.

  Section 5102(d) of the Insurance Law defines as serious injury as a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less

than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

D. Disclosure of Limits and Layers of Coverage

Defendants must disclose both their primary and excess insurance coverage, including copies of the policies if demanded, pursuant to CPLR § 3101(f).

E. Unfair Claims Practices

New York has adopted an unfair claims settlement statute that does not create a private cause of action. Instead it establishes timelines to respond to claims, communications, settlement tenders, etc. which, if violated, subject the insurer to fines by the state. The specific provisions are found in New York Insurance Law § 2601 – 2615.

F. Bad Faith Claims

First Party Claims - New York does not recognize a private tort cause of action for bad faith in the first-party insurance context. However, New York does permit actions for bad faith sounding in breach of contract arising out of the duty of good faith and fair dealing implicit in all insurance contracts, requiring the insurer to timely investigate, bargain for and settle all claims in good faith. *See Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 856 N.Y.S.2d 505 (2008).

Third-Party Claims – Pursuant to *Pavia v State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445 (1993), "in order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests--that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer. In other words, a bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted."

G. Coverage – Duty of Insured

An insured in New York has a duty to give notice to its insurer as soon as practicable.

An insurer that seeks to disclaim coverage based upon the insured's lack of cooperation must demonstrate 1) that it acted diligently in seeking to bring about the insured's cooperation; 2) that its efforts were reasonably calculated to obtain the insured's cooperation; and 3) that the attitude of the insurer was one of "willful and avowed obstruction." *Thrasher v. U. S. Liability Ins. Co.*, 19 N.Y.2d 159 (1967). An insurer must also demonstrate that the late notice resulted in prejudice to the insurer.

H. Fellow Employee Exclusions

These exclusions are enforceable, but all such policy language must be explicitly stated and any ambiguity will be resolved against the insurer. *See Breed v. Insurance Co. of North America*, 46 N.Y.2d 351 (1978). A fellow employee exclusion has been held to not apply to an individual who was the sole member of an insured company. *See Farm Family Cas. Ins. Co. v. Habitat Revival, LLC*, 91 A.D.3d 903 (2012). It has been found to be enforceable, however, when an employee had reported to work but there was ambiguity as to whether the worker was actually acting within the scope of his employment. *See Pesta v. City of Johnstown*, 906 N.Y.S.2d 775 (2007).