WEST VIRGINIA

STATE PROFILE

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BAD FAITH CLAIMS:

West Virginia courts have recognized a wide variety of situations in which an insurance carrier may be required to pay extra-contractual damages. These claims are generally categorized as "bad faith" claims.

First and third-party bad faith claims exist; however, third-party claims are limited to a statutorily established administrative remedy. The West Virginia Supreme Court of Appeals held that a private cause of action is derived from the Unfair Trade Practices Act (UTPA), under the West Virginia Code, as well as from common law.[1]

Third-Party Bad Faith:

The West Virginia Third-Party Bad Faith Act[2] (the Act) was enacted on April 9, 2005, effective July 8, 2005. The Act bans lawsuits by third-party claimants against insurers of alleged tortfeasors under the UTPA. Non-policyholders must now file administrative complaints with the insurance commissioner. The procedure is set forth in the West Virginia Code.[3] The Act does not preclude first-party claims under the UTPA.[4] The Act does not preclude a common law cause of action by a policyholder for breach of the implied covenant of good faith and fair dealing arising from the insurance contract.

[1] Taylor v. Nationwide Mut. Ins. Co., 214 W. Va. 324, 589 S.E.2d 55 (2003); W. Va. Code §§ 33-11-1 et seq.
[2] W. Va. Code § 33-11-4a.
[3] W. Va. CSR §§ 114-76-1 et seq.
[4] *See* Dorsey v. Progressive Classic Ins. Co., 232 W. Va. 595, 753 S.E.2d 93 (2013) (holding a passenger was a first-party insured under the terms of the insurance policy, and thus she could pursue an action against the insurer for violations of the UTPA).

Unfair Trade Practices Act:

The West Virginia Unfair Trade Practices Act prohibits insurance practices which "constitute unfair methods of competition or unfair or deceptive acts or practices."[5] Sections 4 and 5 define practices that would violate the Act, and Section 6 authorizes the insurance commissioner to enforce the Act's provisions.[6] If the commissioner determines, after notice and a hearing, that an insurance practice constitutes a violation of the statute, the commissioner may issue a cease and desist order, levy fines, or revoke and suspend the license of the company, broker or agent who violated the Act.[7] Private causes of action are not expressly provided.[8]

The West Virginia Code specifically lists the following as unfair claims settlement practices:

1. Misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue;

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

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

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

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

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

7. Compelling the insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered;

[5] W. Va. Code §§ 33-11-1 et seq.
[6] §§ 33-11-4 – 33-11-6.
[7] § 33-11-6.
[8] §§ 33-11-1 et seq.

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

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

10. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made;

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

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

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

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

15. Failing to notify the first-party claimant or provider of services covered under accident and sickness insurance and hospital and medical service corporation insurance policies whether the claimant has been accepted or denied and if denied, the reasons therefore, within fifteen calendar days from the filing of the proof of loss.[9]

DAMAGES:

Damages Recoverable in Personal Injury Action:

1. Past and future pain and suffering;

2. Past and future medical expenses;

3. Lost wages and impairment of future earning capacity;

4. Loss of enjoyment of life; and

[9] § 33-11-4(9).

5. Emotional distress. [10]

Damages in Wrongful Death Action:

A wrongful death action is a statutory creation which compensates survivors for the pecuniary losses sustained as a result of the decedent's death, including the value of the services the victim would have rendered to his family if he had lived. It is not the decedent's estate which is compensated, but rather the survivors.[11] Recovery may be shared by the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent. If there are no such survivors, then the damages shall be distributed in accordance with the decedent's will or, if there is no will, in accordance with the laws of intestacy.

The jury – or in a case tried without a jury, the court – may award such damages that it believes to be fair and just, and may also direct in what proportions the damages shall be distributed.[12] If the jury renders only a general verdict on damages and does not provide for the distribution thereof, the court shall distribute the damages in accordance with statutory requirements.[13]

The following represents the factors considered when determining damages in a wrongful death action:

1. Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices, and advice of the decedent;

2. Compensation for reasonably expected loss of income of the decedent, services, protection, care, and assistance provided by the decedent;

3. Expenses for the care, treatment, and hospitalization of the decedent incident to the injury resulting in death; and

[10] Adkins v. Foster, 187 W. Va. 730, 421 S.E.2d 271 (1992).
[11] W. Va. Code § 55-7-6; Davis v. Foley, 193 W. Va. 595, 457 S.E.2d 532 (1995).
[12] W. Va. Code § 55-7-6(b).
[13] § 55-7-6(b).

4. Reasonable funeral expenses.[14]

Although the wrongful death statute does not specifically authorize punitive damages, the Supreme Court of Appeals of West Virginia has determined that punitive damages may be recovered in wrongful death actions.[15]

Damages in Survival Action:

If a cause of action for personal injury or damage to real and/or personal property has been filed and is within the applicable statute of limitations, if the injured party dies pending the action, it may be revived in favor of the personal representative of such injured party and prosecuted to judgment and execution.[16] If the injured party dies before commencing such action, the action may be commenced by the personal representative of the injured party, so long as the statute of limitations has not run. Any such action shall be instituted within the same period of time that would have been applicable had the injured party not died.[17]

The decedent's personal estate may recover for the pain and suffering that the decedent suffered between the time of injury and the time of death, where the injury resulted in death and regardless of whether decedent instituted an action for personal injury prior to his death. However, there must be evidence of conscious pain and suffering prior to death. Where death was instantaneous, or there is no evidence that the decedent consciously perceived pain and suffering, no damages for pain and suffering are allowed.[18] The decedent's personal estate may also recover for the decedent's loss of earning power from the date of injury until his or her death.[19] Recovery

[14] § 55-7-6(c)(1).
[15] Bond v. City of Huntington, 166 W. Va. 581, 276 S.E.2d 539 (1981), *superseded by statute as stated in* Rice v. Ryder, 184 W. Va. 255, 400 S.E.2d 263 (1990).
[16] § 55-7-8a(b).
[17] § 55-7-8a(c).
[18] Syl. pt. 6, McDavid v. United States, 213 W. Va. 592, 584 S.E.2d 226 (2003); W. Va. Code § 55-7-6.
[19] W. Va. Code § 55-7-6.

is also allowed for the likely earnings the decedent would have acquired during his or her life expectancy.[20]

Damages in Insured's Suit against Insurer for Failure to Defend – Breach of Contract:

The insured will be "fully compensated for all expenses incurred as a result of the insurer's breach of contract," including reasonable attorneys' fees in retaining counsel.[21]

Whenever a policyholder substantially prevails in a property damage suit against its insurer, the insurer is liable for:

1. The insured's reasonable attorneys' fees in vindicating its claim (presumptively, one third of the face amount of the policy);
2. The insured's damages for net economic loss caused by the delay in settlement; and
3. Damages for aggravation and inconvenience.[22]

Punitive Damages:

Insurability:

Punitive damages imposed for gross, reckless, or wanton negligence are insurable. Absent an express exclusion for punitive damages, a policy with language to the effect that the insurer agrees to pay "*all* sums which the insured shall be legally obligated to pay" covers such punitive damages.[23] This holds true as well for uninsured and underinsured motorist insurance.[24]

Standards for Recovery:

By statute effective June 8, 2015, the West Virginia Legislature amended the state law regarding punitive damages.[25] First, Senate Bill 421 created a new standard of proof:

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[20] § 55-7-6.
[21] Aetna Cas. & Sur. Co. v. Pitrolo, 176 W. Va. 190, 194, 342 S.E.2d 156, 160 (1986).
[22] Miller v. Fluharty, 201 W. Va. 685, 694, 500 S.E.2d 310, 319 (1997); Syl. pt. 1, Hayseeds, Inc. v. State Farm Fire & Cas., 177 W. Va. 323, 352 S.E.2d 73 (1986).
[23] Hensley v. Erie Ins. Co., 168 W. Va. 172, 175, 283 S.E.2d 227, 229 (1981) (emphasis in original).
[24] Syl. pt. 5, State ex rel. State Auto Ins. Co. v. Risovich, 204 W. Va. 87, 93, 511 S.E.2d 498, 504 (1998).
[25] SB 421 (Mar. 10, 2015); W. Va. Code § 55-7-29.

> [the plaintiff must establish] by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.[26]

Malice has been defined to include anger, revenge, hatred, ill will, conduct "done with an evil mind and purpose and wrongful intention."[27] It has been suggested that "actual malice" "be defined as: (1) 'the state of mind under which the defendant's conduct is characterized by hatred, ill will or a spirit of revenge or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.' *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987)."[28]

Second, this new statute also allows for bifurcation. The first phase would determine liability. If the jury rules against the defendant, then the court will determine whether sufficient evidence exists to proceed with a consideration of punitive damages. If the court finds that sufficient evidence exists, then the same jury shall determine if a defendant is liable for punitive damages.[29] Third, the bill sets a cap on punitive damages at four times the amount of compensatory damages or $500,000, whichever is greater.[30]

The statute applies regardless of when the cause of action accrued or when the claim is made or suit is filed. [31]

Punitive damages may be awarded in cases of intentional torts or gross, reckless, or wanton negligence.[32] For punitive damages to be awarded, there must be a reasonable relationship

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[26] SB 421 (Mar. 10, 2015); W. Va. Code § 55-7-29(a).
[27] State v. Boggess, 512 S.E.2d 189, 195 (W.Va. 1998).
[28] Perrine v. E.I. Du Pont De Nemours & Co., 225 W.Va. 482, 694 S.E.2d 815 (W.Va., 2010) (Ketchum, J. concurring/dissenting opinion).
[29] SB 421 (Mar. 10, 2015); W. Va. Code § 55-7-29(b).
[30] SB 421 (Mar. 10, 2015); W. Va. Code § 55-7-29(c).
[31] Martinez v. Asplundh Tree Expert Co., 803 S.E.2d 582 (2017); Moore v. Ferguson, No. 2:15-CV-04531, 2015 WL 3999596, *3 n. 3 (S.D.W. Va. July 1, 2015).
[32] *See* Hensley v. Erie Ins. Co., 168 W. Va. 172, 283 S.E.2d 227 (1981).

between such damages and the harm that was likely to occur from defendant's conduct, as well as the harm that actually has occurred.[33]

The relevant factors include:

1. The reprehensibility of the defendant's conduct;

2. Profit from the wrongful conduct;

3. Deterrence; and

4. The reasonable relationship between punitive damages, compensatory damages, and financial position of the defendant.[34]

Additional factors which the trial court should consider when reviewing an award of punitive damages in conjunction with those listed above are:

1. The cost of litigation to the plaintiff;

2. Any criminal sanctions imposed on the defendant for his conduct;

3. Any other civil actions against the same defendant, based on the same conduct; and

4. The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. [35]

Any award of punitive damages must also comply with the United States Supreme Court's holding in *B.M.W. of North America v. Gore*, and therefore may not be grossly excessive.[36]

Furthermore, plaintiff's evidence of defendant's conduct, in arguing for punitive damages, must have a specific nexus to the actual harm suffered by the plaintiff.[37] In *Philip Morris USA v. Williams*, the Supreme Court reviewed a jury's $79.5 million punitive damages award, on a

[33] Alkire v. First Nat'l Bank, 197 W. Va. 122, 475 S.E.2d 122 (1996).
[34] *Id.*
[35] Syl. pt. 4, Garnes v. Fleming Landfill, 186 W. Va. 656, 413 S.E.2d 897 (1991), *overruled in part on other grounds by* Lunsford v. Shy, 243 W. Va. 175, 842 S.E.2d 728 (2020).
[36] 517 U.S. 559, 116 S.Ct. 1589 (1996). *See also* T.X.O. Prod. Corp. v. Alliance Res. Corp., 187 W. Va. 457, 419 S.E.2d 870 (1992).
[37] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513 (2003).

compensatory damages award of $821,000, where the trial court instructed the jury to consider the likelihood that the defendant's conduct would harm nonparties within the state and the defendant's awareness of that likelihood.[38] The Court held that the Due Process Clause of the Constitution forbids assessing punitive damages to punish defendants for injuries inflicted upon nonparties to the litigation as such damages are potentially unfair and arbitrary.[39]

DEFENSES:

General Defenses:

- Superseding cause,
- Comparative negligence,
- Assumption of risk, and
- Sudden emergency.[40]
- Additionally, West Virginia used to be the only state that did not follow the Learned Intermediary Defense for Products Liability claims. Now, this defense has been codified. However, this defense only applies to failure to warn cases.[41] The statute will apply to all causes of action accruing on or after May 17, 2016.

Assumption of Risk:

- Where Plaintiff has full knowledge and appreciation of the dangerous condition and voluntarily exposes himself to it.[42]
- West Virginia has adopted comparative assumption of risk which follows the modified comparative negligence standard.
- For all causes of action which arose or accrued before May 25, 2015, to be barred from recovery, a plaintiff's degree of fault must equal or exceed the combined fault or negligence of the other parties. By statute effective May 25, 2015, for causes of action

[38] 549 U.S. 346, 127 S.Ct. 1057 (2007).
[39] *Id.* at 355, 1065.
[40] *See generally*, White v. Lock, 175 W. Va. 227, 332 S.E.2d 240 (1985); Addair v. Bryant, 168 W. Va. 306, 284 S.E.2d 374 (1981); Bradley v. Appalachian Power. Co., 163 W. Va. 332, 256 S.E.2d 879 (1979).
[41] SB 15 (Feb. 17, 2016); W. Va. Code § 55-7-30.
[42] King v. Kayak Mfg. Corp., 182 W. Va. 276, 387 S.E.2d 511 (1989).

which arose or accrued on or after May 25, 2015, a plaintiff is barred from recovery if his fault is greater than the fault of all other persons combined.[43]

- Jury instructions should only require that the plaintiff's degree of fault be established.[44]

Contributory/Comparative Negligence:

As adopted by the West Virginia Supreme Court of Appeals, "a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident."[45] Therefore, a plaintiff must not be 50% or more at fault in order to recover.

By statute effective May 25, 2015, however, a plaintiff is barred from recovery if his fault is greater than the fault of all other persons combined.[46] The Supreme Court of Appeals in 2015 rejected the "wrongful conduct" rule, holding that "[a] plaintiff's immoral or wrongful conduct does not serve as a common law bar to his or her recovery for injuries or damages incurred as a result of the tortious conduct of another. Unless otherwise provided at law, a plaintiff's conduct must be assessed in accordance with our principles of comparative fault."[47]

In response, on February 24, 2016, the Legislature passed Senate Bill 7, which carves out an exception that bars a person from recovering under comparative fault if his actions were during the commission, attempt, or flight from a felony. The burden of proof is on the party seeking to assert the affirmative defense that such actions occurred during the commission, attempt, or flight from a felony.[48] This section applies to all causes of action arising or accruing on or after May 24, 2016.

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[43] W. Va. Code §§ 55-7-13c(c).
[44] *King*, 182 W. Va. at 276, 387 S.E.2d at 511.
[45] Bradley v. Appalachian Power Co., 163 W. Va. 332, 342, 256 S.E.2d 879, 885 (1979).
[46] W. Va. Code §§ 55-7-13c(c).
[47] Syl. pt. 5, Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty., 235 W. Va. 283, 292, 773 S.E.2d 627, 636 (2015).
[48] § 55-7-13d(c); SB 7 (May 24, 2016).

Seatbelts:

Under West Virginia law, evidence that a plaintiff was not wearing a safety belt at the time of the accident is not admissible to show negligence.[49] However, in 2021, S.B. 439 was enacted and now evidence of a plaintiff's failure to wear a safety belt at the time of the accident "may be admissible to show that his or her failure to wear a safety belt exacerbated or contributed to the [plaintiff's damages]."[50]

The West Virginia Code provides that no one may operate a "passenger vehicle" on a public road unless that person, any front seat passengers, and all back seat passengers under 18, are restrained by seatbelts.[51] A "passenger vehicle" is a motor vehicle designed for transporting ten passengers or less, including the driver. The term does not include motorcycles, trailers or or any motor vehicle which is not required on the date of the enactment of this section under a federal motor vehicle safety standard to be equipped with a belt system.[52]

DRIVING UNDER THE INFLUENCE STANDARD:

Operating a vehicle with a blood alcohol level of .08 or more is punishable by fine or imprisonment in West Virginia.[53] Drivers of commercial motor vehicles are prohibited from driving with "an alcohol concentration in . . . blood, breath or urine" of .04 or more.[54]

Dram Shop:

An establishment that serves alcohol can be held liable for an accident caused by a customer who was noticeably intoxicated while on the premises. Common statutory violations

[49] W. Va. Code § 17C-15-49a(b).
[50] W. Va. Code § 17C-15-49a(c) (effective July 6, 2021).
[51] W. Va. Code § 17C-15-49.
[52] § 17C-15-49.
[53] § 17C-5-2.
[54] § 17E-1-14.

include the sale of liquor to minors and to visibly intoxicated patrons.[55] "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages."[56]

EMPLOYER LIABILITY:

"Deliberate Intention" Claims:

Section 23-4-2 of the West Virginia Code established an exception to the exclusivity of the workers' compensation remedy where an injury is caused by the "deliberate intention" of the employer.[57] It provides an employee, widow, widower, child, or dependent with a deliberate intention cause of action against the employer for injury or death of the employee. A verified statement by a person with knowledge and expertise in the industry must be served by the plaintiff in support of the complaint. This verified statement must include the specific unsafe working condition(s) that were the cause of the injury that is the basis of the complaint, and the specific statutes, rules, regulations or written consensus industry safety standards violated by the employer that are directly related to the specific unsafe working conditions. This statement is not admissible at trial.[58]

In the case of an employee's death, a personal representative who is not one of the statutorily named beneficiaries of a deliberate intent action has standing and may assert a deliberate intention claim against a decedent's employer on behalf of any person or persons identified in the

[55] W. Va. Code §§11-16-18(a)(2)-(3) *amended by* HB 2548 (April 5, 2017); W. Va. Code § 60-7-12; *see e.g.* Bailey v. Black, 183 W. Va. 74, 75, 394 S.E.2d 58, 59 (1990) (concluding that there exists a civil cause of action against a licensee for personal injuries caused by the licensee's selling alcohol to anyone who is "physically incapacitated" by drinking).
[56] §55-7-9.
[57] W. Va. Code § 23-4-2(d)(2).
[58] W. Va. Code § 23-4-2(d)(2)(C)(i)

wrongful death statute, so long as the decedent could have maintained the action against the employer by satisfying the deliberate intention statutory criteria.[59]

The "deliberate intent" statute requires that an employer have actual knowledge of the existence of the specific unsafe working condition prior to the injury.[60] In order to succeed in an action for "deliberate intent," a plaintiff must prove all of the following elements:

> (i) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
>
> (ii) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition.
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> * * *
>
> (iii) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer.
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> * * *
>
> (iv) That notwithstanding the existence of the facts set forth in subparagraphs (i) through (iii), inclusive, of this paragraph, the person or persons alleged to have actual knowledge under subparagraph (ii) nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and
>
> (v) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three as a direct and proximate result of the specific unsafe working condition.[61]

Regarding the five factor test, House Bill 2011 – which was passed on March 14, 2015, and became effective as of June 12, 2015 – applies for all injuries occurring on or after July 1, 2015. House Bill 2011 tightens the requirements of Section 23-4-2 by (1) strengthening the "actual knowledge" requirement, clarifying that it may not be proven by constructive knowledge or by proof of what an employee's immediate supervisor or management personnel should have known of that specific unsafe working condition and the risk it posed had they exercised reasonable care;

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[59] Murphy v. E. Am. Energy Corp., 224 W. Va. 95, 680 S.E.2d 110 (2009).
[60] W. Va. Code § 23-4-2(d)(2)(B)(ii).
[61] HB 2011 (Mar. 14, 2015); W. Va. Code § 23-4-2(d)(2)(B)(i)-(v).

(2) requiring more stringent proof that a specific unsafe working condition violates commonly accepted or well-known safety standards or a state or federal safety statute, rule or regulation; and (3) specifying three new methods by which a plaintiff may establish that he has suffered a "serious, compensable injury." The new statute adds that in order to recover, an employee or his representative must have filed a workers' compensation claim for benefits "under this chapter," unless good cause was shown.[62]

"Deliberate intent" claims commonly have been filed in all cases involving serious work related injuries. Other "deliberate intent" issues include:

(a) Punitive damages are not recoverable against the employer in a "deliberate intent" action other than an action in which plaintiff claims and proves that the employer "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee."[63]

(b) Comparative negligence may not be a defense for the "deliberate intent" defendant. Often, however, defendants other than the "deliberate intent" defendant will assert such a defense.

(c) "Deliberate intent" defendants receive a set-off to the extent of workers' compensation benefits paid.[64]

Negligent Hiring, Training, and Retention:

The Restatement (Second) of Torts provides that an employer is subject to liability for the physical harm sustained by third persons and caused by the employer's failure to exercise reasonable care in employing competent and careful contractors to do work which involves the risk of physical harm unless it is skillfully and carefully done, or to perform any duty which the employer owes to third persons.[65]

[62] W. Va. Code § 23-4-2(c).
[63] W. Va. Code § 23-4-2(d)(2)(A).
[64] *See* Mooney v. E. Associated Coal Corp., 174 W. Va. 350, 326 S.E.2d 427 (1984).
[65] § 411 (1965).

An employer has a duty to conduct a comprehensive inquiry into the credentials of an individual, even if that individual is an independent contractor.[66] West Virginia courts have cited with approval the ruling of other states that an employer is negligent where it "engages an unqualified or careless contractor or, when on notice of deficient performance, fails to prevent the continuance of such negligence."[67]

Respondeat Superior:

West Virginia follows the universally recognized rule that an employer is liable to a third person for any injury to his person or property which results proximately from the tortious conduct of an employee acting *within the scope of his employment*.[68]

- The employee's negligent or tortious act may be imputed to the employer if the act of the employee was done in accordance with the expressed or implied authority of the employer.
- A servant is acting within the "course of his employment" when he is engaged in doing, for his master, either the act consciously and specifically directed by his master or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act, or a natural, direct and logical result of it.
- A mere deviation or departure from the usual and ordinary course and activities of this employment, even to accomplish some private purpose of the employee's own, does not of itself, as a matter of law, relieve the employer of liability.
- Whether such departure or deviation is sufficient to relieve the defendant of responsibility for the employee's act is a question of fact.
- "Scope of employment" is a relative term that requires the consideration of the surrounding circumstances (character of the employment, the nature of the wrongful deed, the time and place of its commission, and the purpose of the act).[69]
- An employer defense is the assertion that the employee was an "independent contractor."

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[66] Thomson v. McGinnis, 195 W. Va. 465, 465 S.E.2d 922 (1995); *see also* Chenoweth v. Settle Eng'rs, Inc., 151 W. Va. 830, 156 S.E.2d 297 (1967), *overruled in part on other grounds by* Sanders v. Georgia-Pacific Corp., 159 W. Va. 621, 628, 225 S.E.2d 218, 222 (1976)).
[67] *Thomson*, 195 W. Va. at 471, 465 S.E.2d at 928 (internal citations omitted).
[68] Griffith v. George Transfer & Rigging, 157 W. Va. 316, 201 S.E.2d 281 (1973). In Edwards v McElliotts Trucking, LLC, 268 F.Supp. 3d 867, (S.D. W. Va. 2017), the court distinguishes federal statutory employee liability based on 1992 amendments to applicable federal regulations.
[69] *Griffith*, 157 W. Va. At 326.

1. Requires a showing that the employer neither controlled nor had the right to control the work that the employee was performing. [70]

2. General rule for independent contractors is that a person who has contracted with a competent person to do work that is not in itself unlawful or intrinsically dangerous in character, and who exercises no supervision or control over the work contracted for, is not liable for the contractor's negligence or that of his servants. [71]

EVIDENCE AND DISCOVERY:

Evidence:

The West Virginia Rules of Evidence substantially reflect the Federal Rules of Evidence. The Supreme Court of Appeals of West Virginia has held that regarding motor vehicle accidents, ordinarily it is improper to permit evidence of an arrest for or conviction of an offense in a subsequent civil suit for damages arising out of the conduct of the arrested and/or convicted person.[72] A party's conviction of such an offense based on a guilty plea, however, may be admissible, as the guilty plea constitutes an admission against interest.[73]

Experts:

When considering expert evidence, West Virginia applies the *Daubert*[74] standard. This standard instructs a trial judge to make a preliminary assessment of whether an expert's scientific testimony is based on reasoning or methodology that is scientifically valid and can properly be applied to the facts at issue. Under this standard, the following factors may be considered:

1. Whether the theory or technique in question can be and has been tested;

2. Whether it has been subjected to peer review and publication;

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[70] *Id.*
[71] Stillwell v. City of Wheeling, 210 W. Va. 599, 558 S.E.2d 598 (2001) *quoting*, Syl. Pt. 1, Chenoweth v. Settle Eng'rs, Inc., 151 W.Va. 830, 156 S.E.2d 297 (1967), *overruled in part on other grounds by* Sanders v. Georgia-Pacific Corp., 159 W.Va. 621, 225 S.E.2d 218 (1976).
[72] Groves v. Compton, 167 W. Va. 873, 876, 280 S.E.2d 708, 710 (1981). Whether this holding can be applied to circumstances other than motor vehicle accidents will likely depend on the nature of the civil claims and the charges against the party.
[73] *Id.*at 876, 710 n. 1.
[74] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993).

3. Its known or potential error rate;

4. The existence and maintenance of standards controlling its operation; and

5. Whether it has attracted widespread acceptance within a relevant scientific community.[75]

The West Virginia Supreme Court of Appeals clarified that the court's role is "not to decide whether the preferred evidence is right, but whether the science is valid enough to be reliable."[76] Reliability is defined as "whether the testimony is to a reasonable degree based on the use of knowledge and procedures that have been arrived at using the methods of science—rather than being based on irrational and intuitive feelings, guesses, or speculation."[77]

Discovery:

West Virginia's Rules of Civil Procedure regarding discovery are also fairly standard, allowing for the discovery of statements by any witness, insurance information, and claims files.[78] A body of case law has developed governing discovery in suits involving claims against insurers for bad faith.[79]

FORUM SHOPPING:

Whenever possible, plaintiffs' counsel file suit in Marshall, Brooke, Ohio, or Hancock Counties, as they are particularly pro-plaintiff. Removal to federal court on the basis of diversity of citizenship should be evaluated in all such venues by the defendant.

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[75] Id.
[76] Harris v. CSX Transp., 232 W. Va. 617, 622, 753 S.E.2d 275, 280 (2013).
[77] *Id.* at 621-22, 279-80.
[78] State ex rel. Brison v. Kaufman, 213 W. Va. 624, 584 S.E.2d 480 (2003); *see also* State ex rel. W. Va. Fire & Cas. Co. v. Karl, 202 W. Va. 471, 505 S.E.2d 210 (1998).
[79] *See e.g.* State Farm Mut. Auto. Ins. Co. v. Stephens, 188 W. Va. 622, 425 S.E.2d 577 (1992) (holding that relevant information need not be produced if discovery request is unduly burdensome, oppressive, or needlessly cumulative); State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone, 218 W. Va. 593, 598, 625 S.E.2d 355, 360 (2005) (finding that in order to permit discovery of insurance reserves information, court must determine whether the information is relevant in that it is admissible or is reasonably calculated to lead to the discovery of admissible evidence); State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone, 220 W. Va. 525, 648 S.E.2d 31 (2007) (ruling that aggregate reserves information compiled for specific litigation is protected opinion work product).

GOOD FAITH SETTLEMENT:

Defendants in a civil action against whom a verdict for compensatory damages is rendered, are entitled to have that verdict reduced by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties.[80] A party in a civil action who has made a good faith settlement with the plaintiff prior to judicial determination of liability is relieved from any liability for contribution.[81] Settlements are presumptively made in good faith and the defendant seeking to establish that a settlement made by the plaintiff and a joint tortfeasor lacks good faith has the burden of doing so by clear and convincing evidence.[82] Since the primary consideration is whether the settlement arrangement substantially impairs the ability of the remaining defendants to receive a fair trial, the settlement may be rejected as lacking in good faith only upon a showing of corrupt intent by the settling plaintiff and joint tortfeasor, that the settlement involved collusion, dishonesty, fraud, or other tortious conduct.[83]

INDEMNITY:

"[I]ndemnity clauses serve our goals of encouraging compromise and settlement by reducing settlement discussions to bilateral discussions, by *encouraging adequate levels of insurance*, and by allowing the parties to a contract to allocate among themselves the burden of defending claims."[84] However, an indemnity agreement covering the sole negligence of the indemnitee will be void if:

1. The indemnitee is found by the trier of fact to have been completely, exclusively, or 100% negligent in causing the accident; and

[80] Burgess v. Porterfield, 196 W. Va. 178, 469 S.E.2d 114 (1996).
[81] Hager v. Marshall, 202 W. Va. 577, 505 S.E.2d 640 (1998), *citing* Bd. of Edu. of McDowell Cnty. v. Zando, Martin & Milstead, Inc. 182 W. Va. 597, 390 S.E.2d 796 (1990).
[82] *Hager*, 202 W. Va. at 583.
[83] Boyd v. Goffoli, 216 W. Va. 552, 608 S.E.2d 169 (2004), *citing* Smith v. Monongahela Power Co., 189 W. Va. 237, 429 S.E.2d 643 (1993).
[84] Dalton v. Childress Serv. Corp., 189 W. Va. 428, 431, 432 S.E.2d 98, 101 (1993) (emphasis in original).

2. The contract does not indicate that there was a proper agreement to purchase insurance for the benefit of all concerned.[85]

LIABILITY:

Joint and Several Liability:

With respect to causes of action arising on or after May 25, 2015, the new Modified Comparative Fault standard applies.[86] Under this new standard, defendants are responsible only for their share of damages. A plaintiff is barred from recovery if his fault is greater than the fault of all other persons combined.[87]

In making its determination, the trier of fact will consider fault of all persons, including nonparties, as long as the plaintiff entered into a settlement with the nonparty, or a defending party gives notice within 180 days after being served that the non-party was wholly or partially at fault.[88] If fault is assessed to non-parties, it does not subject them to liability and may not be introduced as evidence of liability in any other action.[89] Fault allocated to an immune or limited liability defendant may not be allocated to any other defendant. Joint and several liability will apply, however, to: (1) defendants who consciously conspire to commit a tortious act or omission, (2) a defendant who is driving under the influence, (3) a defendant whose criminal conduct is the proximate cause of plaintiff's injury, and (4) a defendant who illegally disposes of hazardous waste.[90]

Under this statute, if a plaintiff is unable to collect the full amount from any defendant one year after the judgment becomes final, he is permitted to seek reallocation of the uncollectible

[85] *Id.*
[86] HB 2002 (Feb. 24, 2015) (repealed § 55- 7- 24); W. Va. Code §§ 55-7-13a-d (new code);
[87] Note: The language of the bill leaves an unclear result if it is determined that a plaintiff is exactly 50% at fault. It remains to be determined how a court will handle this drafting issue.
[88] W. Va. Code § 55-7-13d(a)(2).
[89] § 55-7-13d(a)(5).
[90] § 55-7-13c(a)-(h).

amount among the other defendants according to their percentage of fault, up to each defendant's percentage of fault multiplied by the uncollectible amount. However, reallocation cannot increase the liability of any defendant whose percentage of fault is equal to or less than that of the plaintiff.[91] W. Va. Code Sections 55-7-13a-d do not apply to suits under the Governmental Tort Claims and Insurance Reform Act[92], the Uniform Commercial Code[93], or the Medical Professional Liability Act[94].

With respect to causes of action arising before May 25, 2015, former West Virginia Code Section 55-7-24 imposes joint liability on defendants found to be more than 30% at fault. Therefore, if a defendant is found to be 30% or less at fault, he is required to pay only the percentage of the damages for which he is actually found to be liable.[95]

Under the statute applicable to causes of action arising before May 25, 2015, if a plaintiff is unable to collect the full amount from any defendant six months after the verdict is rendered, he is permitted to seek reallocation of the uncollectible amount among the other defendants according to their percentage of fault, up to each defendant's percentage of fault multiplied by the uncollectible amount. However, reallocation cannot increase the liability of any defendant whose percentage of fault is (1) less than or equal to that of the plaintiff, or (2) less than ten percent.[96] This former version of Section 55-7-24 took effect on July 8, 2005, and applied only to causes of action that accrued on or after July 1, 2005. Finally, the rules of joint and several liability were applicable to: (1) Any party who acted with the intention of inflicting injury or damage; (2) Any party who acted in concert with another person as part of a common plan or design resulting in harm; (3) Any party

[91] § 55-7-13c(d).
[92] W. Va. Code § 29-12A-1, *et seq.*
[93] W. Va. Code § 46-1-101, *et seq.*
[94] W. Va. Code § 55-7B-1, *et seq.*
[95] § 55-7-24 (*repealed*).
[96] § 55-7-24 (*repealed*).

who negligently or willfully caused the unlawful emission, disposal or spillage of a toxic or hazardous substance; or (4) Any party strictly liable for the manufacture and sale of a defective product.[97]

Liability for Unauthorized Drivers:

Generally, policies disclaiming liability coverage for unauthorized drivers are unenforceable with respect to the mandatory minimum coverage limits.[98] However, by statute effective June 9, 2015, "[w]hen any person is specifically excluded from coverage under the provisions of a motor vehicle liability policy by any restrictive endorsement to the policy, the insurer is not required to provide any coverage, including both the duty to indemnify and the duty to defend, for damages arising out of the operation, maintenance or use of any motor vehicle by the excluded driver, notwithstanding the provisions of chapter seventeen-d of this code."[99]

Additionally, a "named driver exclusion" is valid under the omnibus statute,[100] and an insurer may deny coverage for damages caused by a driver who lacked the named insured's express or implied permission.[101] The applicability of Section 33-6-31(a) to automobile rental insurance is questionable in light of the Legislature's enactment of Section 33-12-32, which pertains to limited licenses for rental companies.[102]

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[97] § 55-7-24 (*repealed*).
[98] § 17D-4-2; *see* Jones v. Motorists Mutual Insurance Company, 177 W. Va. 763 (1987) (interpreting chapter seventeen-d of this code to require insurers to provide minimum financial responsibility limits of coverage to excluded drivers).
[99] § 33-6-31h.
[100] § 33-6-31(a); *see also* Howard v. Prop. & Cas. Ins. Co., 2011 WL 4596715 (S.D. W. Va. 2011), *citing* Dairyland Ins. Co. v. East, 188 W. Va. 581. 425 S.E.2d 257 (1992).
[101] Allstate v. Smith, 202 W. Va. 384, 504 S.E.2d 434 (1998).
[102] Wang-Yu Lin v. Shin Yi Lin, 224 W. Va. 620, 687 S.E.2d 403 (2009).

Liability for Unauthorized Passengers:

Where an employer expressly forbids an employee from permitting unauthorized passengers, and the employee nonetheless allows unauthorized passengers to occupy the vehicle, the employer owes no duty to the passenger other than the duty to protect him from the willful and wanton negligence of the employee.[103]

Premises Liability:

West Virginia has abolished the common law distinction between a landowner's duty to invitees and licensees, while retaining the distinction and exceptions for trespassers.[104] The *Mallet* decision kept in place the common law rule for the duty owed to a trespasser.[105] Senate Bill 3 – which was effective April 29, 2015, and applies prospectively only – provides that a possessor of real property owes no duty of care to a trespasser except the common law rights of action, such as causing willful or wanton injury to the trespasser.[106]

The *Huffman* decision set forth the following four factors to determine a landowner's duty, who has created or maintains a highly dangerous condition or instrumentality, to a trespasser:

1. The possessor must know or, from facts within his knowledge should know, that trespassers constantly intrude in the area where the dangerous condition is located;
2. The possessor must be aware that the condition is likely to cause serious bodily injury or death to such trespassers;
3. The condition must be such that the possessor has reason to believe trespassers will not discover it; and
4. In that event, the possessor must have failed to exercise reasonable care to adequately warn the trespassers of the condition. [107]

[103] Syl. pt. 1, Kelly v. Checker White Cab, 131 W. Va. 816, 50 S.E.2d 888 (1948).
[104] Mallet v. Pickens, 206 W. Va. 145,155, 522 S.E.2d 436, 446 (1999).
[105] *Id.*
[106] W. Va. Code § 55-7-27; SB 3 (Jan. 29, 2015).
[107] Huffman v. Appalachian Power Co., 187 W. Va. 1, 415 S.E.2d 145 (1991).

Additionally, there is a five point checklist of factors that the trier of fact must consider when determining whether the defendant has met its burden of reasonable care under the circumstances to all non-trespassing entrants:

1. The foreseeability that an injury might occur;
2. The severity of the injury;
3. The time, manner and circumstances under which the injured party entered the premises;
4. The normal or expected use made of the premises; and
5. The magnitude of the burden placed upon the defendant to guard against the injury.

In November of 2013, the Supreme Court of Appeals of West Virginia abolished the open and obvious doctrine in premises liability negligence actions.[108] The decision was widely criticized, and Justice Loughry's dissenting opinion even noted that "[i]t is decisions like this that have given this state the unfortunate reputation of being a 'judicial hellhole.'"[109]

Senate Bill 13 – which was passed February 18, 2015, and went into effect the same day – restores the open and obvious doctrine, superseding the *Hersh* decision. The new legislation provides:

> (a) A possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to protect others against dangers that are open, obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant, and shall not be held liable for civil damages for any injuries sustained as a result of such dangers.
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> * * *
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> (c) It is the intent and policy of the Legislature that **this section reinstates and codifies the open and obvious hazard doctrine** in actions seeking to assert liability against an owner, lessee or other lawful occupant of real property to its status prior to the decision of the West Virginia Supreme Court of Appeals in the matter of *Hersh*[.] [110]

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[108] Syl. pt. 6, Hersh v. E-T Enters., Ltd. P'ship, 232 W. Va. 305, 752 S.E.2d 336 (2013) *superseded by statute as stated in* Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cty., 235 W. Va. 283, 300, 773 S.E.2d 627, 644 (2015).
[109] *Id.* at 319, 350 (Loughry, J., *dissenting*).
[110] W. Va. Code § 55-7-28 (emphasis added); SB 13 (Feb. 18, 2015).

This bill does not appear to apply retroactively. The Southern District of West Virginia has addressed this issue in dicta and ruled that the statute does not apply retroactively.[111] For claims accruing on or after February 18, 2015, the open and obvious doctrine will apply, but it is most likely that claims accruing before that date likely will be governed by *Hersh.*

Although the Attractive Nuisance Doctrine is not recognized in West Virginia, the Supreme Court of Appeals has adopted a similar rule, the "dangerous instrumentality" doctrine.[112] Where a dangerous instrumentality or condition exists at a place frequented by children who suffer injury, the parties responsible for such dangerous condition may be held liable for such injury if they knew, or should have known, of the dangerous condition and that children frequented the dangerous premises either for pleasure or out of curiosity.[113]

LIENS:

Where a money judgment is obtained against a defendant or debtor, a judgment lien against personal property of the defendant/debtor may be perfected by delivering a writ of execution to the sheriff.[114]

West Virginia permits recovery of medical payments made by the injured party's automobile insurer, health insurer, or workers' compensation carrier. The attorney for the injured party is entitled to one third of the medical payments subrogation recovery.[115] Settlement of a

[111] *See* Farley v. United States, No. 2:13-CV-17090, 2015 WL 5786765, *6 (S.D.W. Va. Sept. 30, 2015), *appeal dismissed* (Jan. 8, 2016).
[112] Hatten v. Mason Realty Co., 148 W. Va. 380, 387, 135 S.E.2d 236, 241 (1964), *citing* Waddell v. New River Co., 141 W. Va. 880, 93 S.E.2d 473 (1956); Harper v. Cook, 139 W. Va. 917, 82 S.E.2d 427 (1954); Tiller v. Baisden, 128 W. Va. 126, 35 S.E.2d 728 (1945); White v. Kanawha City Co., 127 W. Va. 566, 34 S.E.2d 17 (1945).
[113] *Id.*
[114] W. Va. Code § 38-4-8.
[115] Fed. Kemper Ins. Co. v. Arnold, 183 W. Va. 31, 393 S.E.2d 669 (1990).

claim with the injured party does not release the medical lien if the subrogee has put the tortfeasor or the tortfeasor's insurer on notice of the subrogation lien prior to the settlement.[116]

West Virginia does not allow collateral source offsets if the benefits were paid under a contractual arrangement that the plaintiff made independently of the tortfeasor. This includes first-party medical benefits, health insurance benefits and underinsurance benefits.[117]

MEDIATION:

Most civil actions, before going to trial, must first go through court-ordered mediation. A court may, on its own motion, upon motion of any party, or by stipulation of the parties, refer a case to mediation. Upon entry of an order referring a case to mediation, the parties shall have fifteen (15) days within which to file a written objection, specifying the grounds. The court shall promptly consider any such objection, and may modify its original order for good cause shown. A case ordered for mediation shall remain on the court docket and the trial calendar.[118]

Sanctions against an Insurer:

Under West Virginia Trial Court Rule 25.10, it has been held that the trial court can impose sanctions on an insurer for failing to appear at a court-ordered mediation. The insurance carrier for an insured party is considered a party to court-ordered mediation and, thus, must be present through a representative who has full decision making power.[119] Pursuant to Rule 25.10, the following "persons" must appear at a court-ordered mediation:

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[116] Provident Life & Accident Ins. Co. v. Bennett, 199 W. Va. 236, 483 S.E.2d 819 (1997); *see also* Nationwide Mut. Ins. Co. v. Dairyland Ins. Co., 191 W. Va. 243, 246-47, 445 S.E.2d 184, 187-88 (1994) (holding that (1) written notification by the insurance carrier as to its subrogation claim for medical payments is legally sufficient even if it does not contain a precise monetary amount for the subrogation claim, and (2) subrogation rights of the insurer are not barred so long as the tortfeasor's insurer was notified of the subrogation claim before it settled with the insured).

[117] Johnson by Johnson v. Gen. Motors Corp., 190 W. Va. 236, 438 S.E.2d 28 (1993).

[118] W. Va. Trial Ct. Rule 25.03; W. Va. R. Civ. P. 16.

[119] Casaccio v. Curtiss, 228 W. Va. 156, 164, 718 S.E.2d 506, 514 (2011).

1. Each party or the party's representative having full decision-making discretion to examine and resolve issues;

2. Each party's counsel of record; and

3. A representative of the insurance carrier for any insured party, which representative has full decision-making discretion to examine and resolve issues and make decisions.[120]

MINORS:

There is a rebuttable presumption that children between the ages of seven and fourteen are incapable of negligence. The burden is upon the party attempting to overcome this presumption to prove by preponderance of evidence that a child has the capacity to be contributorily negligent.[121]

Under the "Minor Settlement Proceedings Reform Act" the parent, guardian, or next friend of a minor may negotiate a settlement of the minor's claim for damages before or after the filing of an action for damages.[122]

To secure a release of the party or parties allegedly responsible for the injury or loss, the parent, next friend, or guardian of the minor shall file a verified petition in the circuit court of the county in which the minor resides or in which venue would lie for an action for damages; however, if a suit is pending, the petition is to be filed and served by the parent, guardian, or next friend as a motion in the pending action.[123]

The court will appoint a *guardian ad litem* to represent the interests of the minor and will conduct a hearing on the petition or motion.[124] If the court grants the requested relief, the party authorized by the court to execute the release shall execute a release of the minor's claim against the persons or entities alleged to be responsible for the injuries or losses and who are identified in

[120] *Id.* at 162, 512, *quoting* W. Va. Trial Ct. R. 25.10.
[121] Pino v. Szuch, 185 W. Va. 476, 408 S.E.2d 55 (1991).
[122] W. Va. Code § 44-10-14(a).
[123] § 44-10-14(b).
[124] § 44-10-14(d)-(e).

the petition or motion to be released from liability, any other persons or entities making payment on behalf of those persons or entities and any subsidiaries or successor persons or entities.[125]

MOTOR VEHICLE LIABILITY INSURANCE:

Minimum Limits:

Bodily Injury to Others/Property Damage:

Compulsory limits are $25,000 per person and $50,000 per accident involving two or more persons.[126] The combined recovery under a liability policy for an injured party's claim and a derivative claim for loss of consortium by the spouse or children of the injured party cannot exceed the per person limit.[127] The minimum coverage for property damage that occurs from a single accident is $25,000.[128]

Uninsured Motorist (UM) and Underinsured Motorist (UIM) Coverage:

Minimum uninsured motorist coverage is: bodily injury, $25,000 per person, $50,000 per accident; property damage, $25,000.[129] Uninsured and underinsured motorist coverage must be offered for purchase in amounts of up to $100,000 per person, $300,000 per accident, and $50,000 in property damage.[130] Underinsured motorist coverage is not mandatory.

Med-Pay, Workers' Compensation, and/or No-Fault:

The West Virginia Code provides, in part, that an automobile liability policy shall provide an option for uninsured/underinsured motorist coverage up to the amount of bodily injury liability coverage "without setoff against the insured's policy or any other policy . . . . No sums payable as a

[125] § 44-10-14(f).
[126] W. Va. Code § 17D-4-2(b).
[127] Fed. Ins. Co. v. Karlet, 189 W. Va. 79, 428 S.E.2d 60 (1993).
[128] W. Va. Code § 17D-4-2(b).
[129] § 33-6-31(b); § 17D-4-12(b)(2).
[130] § 33-6-31(b).

result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy."[131]

With the exception of Workers' Compensation subrogation,[132] West Virginia follows the equitable "made-whole" doctrine.[133] A med-pay insurer may subrogate against any recovery from a tortfeasor if the med-pay policy so provides.[134]

If an injured employee asserts a UIM claim under his employer's policy,[135] the Workers' Compensation insurer or self-insured employer is entitled to subrogate against that recovery with regard to medical benefits paid as of the date of the recovery.[136] Under statutory amendments, effective January 2, 2006, the Commission, private insurer, or self-insured employer may subrogate with regard to all medical and indemnity benefits actually paid as of the date of the recovery.[137]

West Virginia is a fault-based automobile insurance state.

Workers' Compensation Subrogation:

Prior to January 1, 2006, workers' compensation coverage was provided exclusively through the state-run Workers' Compensation Commission. West Virginia eliminated the state fund and replaced it with a private insurance company, BrickStreet Mutual Insurance Company ("BrickStreet"). BrickStreet provided all coverage for workers' compensation claims until July 1,

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[131] W. Va. Code § 33-6-31(b); *see* Johnson by Johnson v. Gen. Motors Corp., 190 W. Va. 236, 243, 438 S.E.2d 28, 35 (1993).
[132] *See* Workers' Compensation Subrogation, below.
[133] Henry v. Benyo, 203 W. Va. 172, 181 n.10, 506 S.E.2d 615, 624 n.10 (1998), *quoting* Syl. pt. 11, *Allstate*, 190 W. Va. at 176, 437 S.E.2d at 749 (providing "[t]he [UM/UIM insurer's] right of subrogation under W. Va. Code [§] 33-6-31(f) (1988) is not available where the policyholder has not been fully compensated for the injuries received and still has the right to recover from other sources. Subrogation is permitted only to the extent necessary to avoid a double recovery by such policyholder.").
[134] Fed. Kemper Ins. Co. v. Arnold, 183 W. Va. 31, 393 S.E.2d 669 (1990).
[135] Which the employee may do, unless the tortfeasor driver was a co-employee. *Henry* 203 W. Va. at 172, 506 S.E.2d at 615.
[136] W. Va. Code § 23-2A-1(b).
[137] § 23-2A-1(d).

2008, when West Virginia opened the market for competition. West Virginia regulates benefit rates for injured workers through the West Virginia Insurance Commissioner.[138] These rates may change annually.

The "made whole" rule does not apply to workers' compensation subrogation.[139] For claims arising from an action that accrued on or after January 1, 2006, if an injured worker, his or her dependents, or his or her personal representative makes a claim against the third-party and recovers any sum for the claim, the private carrier or a self-insured employer shall be allowed statutory subrogation with regard to medical and indemnity benefits actually paid as of the date of the recovery.[140] For claims arising from an action that arose or accrued before January 1, 2006, the Workers' Compensation commission or a self-insured employer shall be allowed statutory subrogation with regard to medical benefits paid as of the date of the recovery.[141] The commission or self-insured employer shall permit the deduction from the amount received of a reasonable attorney's fee and a reasonable portion of costs for claims that arose or accrued, in whole or in part, prior to the effective date of the reenactment of this section in 2009, and all claims thereafter.[142] It is the duty of the injured worker, his or her dependents, his or her personal representative, or his or her attorney to notify the commission, private carrier, or employer when the claim is filed against the third-party.[143]

In the event that an injured worker, his or her dependents, or a personal representative makes a claim against a third party, a statutory subrogation lien upon the monies received exists in favor of the commission, private carrier, or self-insured employer.[144]

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[138] W. Va. C.S.R. § 85-1-1 *et. seq*.
[139] Cart v. Gen. Elec. Co., 203 W. Va. 59, 506 S.E.2d 96 (1998).
[140] W. Va. Code § 23-2A-1(b)(1).
[141] § 23-2A-1(b)(2).
[142] § 23-2A-1(c).
[143] § 23-2A-1(e).
[144] § 23-2A-1(d).

The right of subrogation described here does *not* attach to any claim arising from a right of action which arose or accrued, in whole or in part, before July 1, 2003. Under the former statute, the commissioner or a self-insured employer was allowed subrogation against a third-party recovery with regard to medical benefits paid as of the date of the recovery, but under no circumstances were the payments received by the commissioner or self-insured employer as subrogation to medical benefits expended on behalf of the injured or deceased worker permitted to exceed 50% of the amount received from the third-party, after payment of any attorneys' fees and costs.[145]

The injured worker, his or her dependents, personal representatives, or attorney must give reasonable notice to the commission, private carrier, or self-insured employer after a third-party claim is filed and before the disbursement of any third-party recovery.[146] The statutory subrogation does not apply to UM/UIM coverage or any other insurance coverage purchased by or on behalf of the injured worker. If the injured worker, his or her dependents, personal representatives, or attorney fail to protect the subrogation interest, they lose the right to retain attorneys' fees and costs out of subrogation amount, and the private carrier or self-insured employer have a cause of action against the injured worker, his or her dependents, personal representatives, or attorney for the full subrogation amount and reasonable fees and costs associated with that cause of action.[147]

Personal Injury Protection (PIP):

West Virginia auto insurance law *does not* require the purchase of PIP. In West Virginia, it is generally held that medical payments provisions in automobile liability insurance policies are

[145] § 23-2A-1(b)(2).
[146] § 23-2A-1(e).
[147] § 23-2A-1(e).

separate and apart from the liability provisions of the policies. The medical payment provisions in automobile liability policies are akin to personal injury accident policies.[148]

If an insurer does offer and pays PIP and the policy includes a subrogation clause, the insurer may subrogate against the insured's third-party recovery. A provision in an insurance policy providing for the subrogation of the insurer to the rights of the insured to the extent that medical payments are advanced to such insured by the insurer is valid and enforceable.[149] As discussed previously, West Virginia follows the "made whole" rule. The "made whole" rule means that "under general principles of equity, in the absence of statutory law or valid contractual obligations to the contrary, an insured must be fully compensated for injuries or losses sustained (made whole) before the subrogation rights of an insurance carrier arise."[150] Furthermore, the insurer's subrogation interest must be reduced to reflect attorneys' fees that the insured incurred to collect the subrogation amount.[151]

To preserve its subrogation claim, an insurer or the insured on the insurer's behalf must give notice of the subrogation claim to the liability carrier before the liability carrier settles with the insured. The notice does not have to state the precise amount of the subrogation claim. If appropriate notice is given, then any release obtained will not bar the subrogation claim.[152] West Virginia follows other jurisdictions which have held that "if the settlement were made with knowledge, actual or constructive, of [insurance carrier's] subrogation right, such settlement and release is a fraud on the insurer and will not affect the insurer's right of subrogation as against the tort-feasor [sic] or his insurance carrier."[153]

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[148] Carney v. Erie Ins. Co., Inc., 189 W. Va. 702, 434 S.E.2d 374 (1993).
[149] Travelers Indem. Co. v. Rader, 152 W. Va. 699, 166 S.E.2d 157 (1969).
[150] Porter v. McPherson, 198 W. Va. 158, 162, 479 S.E.2d 668, 672 (1996) (internal citations omitted).
[151] Fed. Kemper Ins. Co. v. Arnold, 183 W. Va. 31, 393 S.E.2d 669 (1990).
[152] Nationwide Mut. Ins. Co. v. Dairyland Ins. Co., 191 W. Va. 243, 445 S.E.2d 184 (1994).
[153] *Id.* at 246, 187, *quoting* Transamerica Ins. Co. v. Barnes, 29 Utah 2d 101, 106, 505 P.2d 783, 787 (1972).

Uninsured Motorist (UM) and Underinsured Motorist (UIM) Coverage Issues Specific to West Virginia:

Offsets:

UM and UIM coverage must be offered for purchase in amounts up to the dollar limits of liability coverage. There are offsets for payments from third-parties such as liability insurers. However, the UIM insurer may not set off payments made by a tortfeasor's liability insurer against the UIM coverage limit. UIM coverage is excess, not gap coverage.[154] Therefore, the setoff must be against the amount of damages established.[155]

Additional Issues:

1. Any exclusion of guests in an uninsured motorist policy is void.[156]

2. Where the insured is involved in a "hit-and-run" accident,[157] the West Virginia Code requires that the injured insured establish that the vehicle made "physical contact" with the insured or with a motor vehicle which the insured occupied (although decisions by the West Virginia Supreme Court of Appeals have eroded this requirement).[158]

3. Insurers must offer the optional limits of UM coverage and UIM coverage through standard policy provisions formulated by the Insurance Commissioner.[159]

4. UM and UIM claims are founded on contract; the ten-year statute of limitations applies to suits by an insured against a UM or UIM insurer.[160] If the UM operator is unknown, the injured claimant must sue the unknown owner/operator and serve his own UM insurer with a copy of the complaint. The two-year statute of limitations applicable to personal injury claims applies to such a "John Doe" suit.[161]

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[154] State ex rel. Allstate Ins. Co. v. Karl, 190 W. Va. 176, 437 S.E.2d 749 (1993).
[155] State Auto. Mut. Ins. Co. v. Youler, 183 W. Va. 556, 396 S.E.2d 737 (1990).
[156] W. Va. Code § 33-6-31(c).
[157] i.e., the owner and operator of a motor vehicle which causes bodily injury or property damage are unknown.
[158] W. Va. Code § 33-6-31(e)(3); *see* Dalton v Doe, 208 W. Va. 319, 540 S.E.2d 536 (2000); Dunn v. Doe, 206 W. Va. 684, 527 S.E.2d 795 (1999); Hamric v. Doe, 201 W. Va. 615, 499 S.E.2d 619 (1997).
[159] § 33-6-31(d).
[160] Plumley v. May, 189 W. Va. 734, 434 S.E.2d 406 (1993).
[161] § 33-6-31(e)(3).

Procedure for Substitution for Liability Insurer Settlement Offer:

When an automobile liability insurer indemnifying a tortfeasor offers to pay its full policy limits for bodily injury to a plaintiff, contingent upon the plaintiff's UIM coverage insurer waiving its subrogation rights against the tortfeasor, either the plaintiff or the liability insurer may provide written notice to the UIM insurer. The written notice must be sent by certified mail and it must contain:

1. The name and address of the UIM coverage claimant,
2. The name and address of the person in whose name the UIM policy is written,
3. The UIM policy number,
4. The name of the tortfeasor,
5. The name of the insurer and the policy number for the insurance policy indemnifying the tortfeasor under which an offer to settle for policy limits has been made,
6. A statement that the company indemnifying the tortfeasor has offered to settle with the claimant for policy limits, conditioned upon the waiver by the underinsured motorist coverage carrier of its subrogation rights against the tortfeasor, and
7. A statement that under the law the underinsured motorist coverage carrier has sixty days to preserve its subrogation rights against the tortfeasor by providing written notice of its intention to do so and by paying to the claimant an amount equal to the policy limits that have been offered to the claimant by the liability insurance company indemnifying the tortfeasor.[162]

In order to preserve its subrogation rights against the tortfeasor, the UIM coverage carrier must:

1. Within sixty days of receiving notice of the conditional settlement offer, send written notice to both the claimant and insurer indemnifying the tortfeasor that it does not waive its subrogation rights against the tortfeasor.

[162] § 33-6-31e(b)(1)-(7).

2. The notice to the claimant must be accompanied by payment in the amount of the policy limit offered by the insurer indemnifying the tortfeasor in the proposed settlement.[163]

3. If the UIM insurer fails to respond within 60 days, its subrogation rights against the tortfeasor are waived and the claimant may proceed to consummate the settlement.[164]

4. If the UIM insurer gives the required notice and provides payment, then the UIM carrier is and remains subrogated to the rights of the claimant to the extent of any and all sums paid by the UIM insurer to the claimant.[165]

Stacking:

An insurance contract may incorporate anti-stacking language if the insurer provides a multi-car discount on the premium for at least one of the coverages purchased under the policy.[166] By statute, an insurer issuing two or more policies to the same insured which provides the multi-vehicle discount may also include anti-stacking language in its policy.[167] The policy's particular anti-stacking language must be examined, but it is enforceable so long as the language does not contravene a West Virginia statute or public policy.[168]

Priority of Motor Vehicle Liability Insurance Policies:

Owner's liability coverage is primary between that of the owner and driver.[169]

Disclosure of Certain Insurance Information to Claimant's Counsel Required:

House Bill 4486 became law in 2012.[170] The statute permits a person who asserts that he suffered damages from a motor vehicle accident, to obtain certain information about personal-lines

[163] § 33-6-31e(c).
[164] § 33-6-31e(c).
[165] Miralles v. Snoderly, 216 W. Va. 91, 602 S.E.2d 534 (2004).
[166] Russell v. State Auto. Mut. Ins. Co., 188 W. Va. 81, 422 S.E.2d 803 (1992).
[167] W. Va. Code § 33-6-31(b).
[168] Syl. pt. 2, Mitchell v Fed. Kemper Ins. Co., 204 W. Va. 543, 514 S.E.2d 393 (1998).
[169] Allstate Ins. Co. v. State Auto. Mut. Ins. Co., 178 W. Va. 704, 364 S.E.2d 30 (1987).
[170] H.B. 4486 (Mar. 10, 2012).

motor vehicle liability insurance coverage available to an allegedly responsible party before the filing of a lawsuit. This law went into effect on June 8, 2012.

H.B. 4486 added § 33-6F-2 to the West Virginia Code. This statute requires an insurer to provide certain information upon written request from the claimant's attorney. The insurer has 30 days to respond to the inquiry by supplying information regarding each of the insurer's known policies that may provide coverage including:

1. The name of the insurer;
2. The name of each named insured of the subject policy; and
3. The limits of any motor vehicle liability policy in effect at the time of the events of the subject claim.

Alternatively, the insurer can provide the declarations page of any motor vehicle liability policy that may be applicable at the time of the events of the subject claim, appropriately redacted to comply with applicable privacy laws or regulations. This required disclosure by the insurer is not deemed an admission as to the applicability of the policy to the injury or damage, is not admissible at trial by reason of this disclosure, and does not waive any reservation of rights.

The claimant's request for the disclosure of the above information must satisfy a few requirements. The request must be written by the claimant's attorney and include the following information:

1. The date and location of the events that are the subject of the claim;
2. The name, and, if known, the last known address of the insured;
3. A copy of the accident or incident report, if any;
4. The insurer's claim number;
5. A good faith estimate and documentation of all of the claimant's medical expenses, if any, and any wage loss documentation as of the date of the request, if any; and
6. Documentation as of the date of the request of any and all property damage.

An insurer's failure to comply with the new disclosure requirements will subject the insurer to a penalty of $500, plus attorneys' fees and expenses incurred in obtaining disclosure of the information required by the new statute.[171]

NEGLIGENCE:

To establish a cause of action for negligence in West Virginia, a plaintiff must prove by a preponderance of the evidence that:

1. The defendant owed a duty of care to the plaintiff;
2. The defendant breached that duty of care; and
3. The defendant's breach was the proximate cause of the plaintiff's injuries.[172]

Negligence Per Se:

Evidence that a defendant violated a statute or regulation *does not* establish negligence per se in West Virginia. Rather, a violation of a statute or regulation creates a "*prima facie* presumption" of negligence which may be rebutted by evidence tending to show that the defendant's actions, in violating the statute or regulation, are reasonably expected of a person of ordinary prudence, acting under similar circumstances, and who desired to comply with the law.[173]

Negligent Infliction of Emotional Distress:

Damages for negligent infliction of emotional distress may be recovered where:

1. The plaintiff suffers physical injury as a result of the defendant's negligent conduct;
2. The plaintiff did not suffer physical injury but, as a result of the defendant's negligence, witnessed the critical injury or death of a person closely related to the plaintiff; or

[171] W. Va. Code §§ 33-6F-2(b)(1)-(6).
[172] Jack v. Fritts, 193 W. Va. 494, 457 S.E.2d 431 (1995).
[173] Gillingham v. Stephenson, 209 W. Va. 741, 746, 551 S.E.2d 663, 668 (2001) (emphasis added).

3. The plaintiff fears contracting disease, where, as a result of defendant's negligence plaintiff actually was exposed to disease, plaintiff's resulting serious emotional distress was reasonably foreseeable, and plaintiff actually suffered serious emotional distress.[174]

To recover for negligent infliction of emotional distress, the plaintiff must prove that the harm alleged reasonably could have been expected to befall the ordinarily sensitive person.[175] When the harm reasonably could affect *only* the hurt feelings of the supersensitive plaintiff, the "eggshell psyche," there is no entitlement to recovery.[176]

Standard of Care for Professionals:

Unless a person represents that he or she has greater or less skill or knowledge, a person who takes on the responsibility of providing services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.[177]

OFFERS OF JUDGMENT:

At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or to the effect specified in the offer, with costs then accrued.[178] If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.[179] While the term "costs" usually does not include attorney's fees, if an applicable statute defines costs to include attorney's fees, then attorney's fees

[174] Jones v. Sanger, 204 W. Va. 333, 512 S.E.2d 590 (1998); Syl. pt. 2, Ricottilli v. Summersville Mem'l Hosp., 188 W. Va. 674, 675, 425 S.E.2d 629, 630 (1992); *See also* Marlin v. Bill Rich Constr., Inc., 198 W. Va. 635, 482 S.E.2d 620 (1996).
[175] Heldreth v. Marrs, 188 W. Va. 481, 425 S.E.2d 157 (1992).
[176] *Id*. at 490, 166; Marlin, 198 W. Va. at 635, 482 S.E.2d at 620 (emphasis added).
[177] Capper v. Gates, 193 W. Va. 9, 15, 454 S.E.2d 54, 60 (1994).
[178] W. Va. R. Civ. P. 68(a).
[179] W. Va. R. Civ. P. 68(c).

may be recovered as costs under an offer of judgment.[180] "Unless a defendant's offer of judgment under Rule 68(a) explicitly provides that the amount of the offer is inclusive of costs and attorney fees, the circuit court should determine costs and fees in addition to the amount stated in the offer of judgment."[181]

STATUTES OF LIMITATIONS:

Bodily Injury / Property Damage: An action for negligent damage to person or property must be brought within **two years** after the right to bring the cause of action has accrued; however, suit must be filed within **one year** if the claim would not survive the death of the injured party.[182]

Wrongful Death / Survival Action: An action for wrongful death or a survival action must be filed within **two years** of the decedent's death.[183]

Product Liability: In product liability cases, the **two year** statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know (1) that he has been injured; (2) the identity of the maker of the product; and (3) that the product had a causal relation to his injury.[184]

Breach of Contract: Where the contract is in writing, a breach of contract action must be brought within **ten years** of the date on which the act breaching the contract becomes known. The statute of limitations for actions on unwritten contracts is **five years**.[185]

Bad Faith Claims: Claims involving unfair claims settlement practices that arise under the Unfair Trade Practices Act are governed by the **one-year** statute of limitations set forth in the West Virginia Code.[186] The one year statutory limitation period on an insureds' common law bad

[180] Shafer v. Kings Tire Serv., 215 W. Va. 169, 173, 597 S.E.2d 302, 306 (2004).
[181] Croft v. TBR, Inc., 664 S.E.2d 109 (W. Va. 2008).
[182] W. Va. Code § 55-2-12.
[183] § 55-2-12; § 55-7-6(d).
[184] § 55-2-12; Syl. pt. 1, Hickman v. Grover, 178 W. Va. 249, 358 S.E.2d 810 (1987).
[185] § 55-2-6.
[186] § 55-2-12(c); Wilt v. State Auto. Ins. Co., 203 W. Va. 165, 506 S.E.2d 608 (1998).

faith claim against a carrier brought pursuant to *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352 S.E.2d 73 (1986), begins to run *after* the policyholder prevails in his/her property damage suit.[187]

[187] State ex rel. Erie Ins. Prop. & Cas. Co. v. Beane, No. 15-0968, 2016 WL 3392560, at *4 (W. Va. June 13, 2016).