STATE OF DELAWARE RETAIL AND HOSPITALITY COMPENDIUM OF LAW

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I. *The Delaware State Court System:*

a. Trial Courts

1. Justice of the Peace Court ("JP Court")

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

2. The Court of Common Pleas ("CCP")

CCP is a statewide court of limited jurisdiction. CCP has jurisdiction in civil matters if the amount in controversy is less than $50,000.00. Filing a civil complaint in CCP constitutes a waiver of a jury trial. A defendant that files an answer with a demand for a jury trial will automatically transfer the case to the Superior Court. Criminal jurisdiction is limited to misdemeanors and violations. The court has concurrent jurisdiction with the JP Court in this area. The court also hears preliminary hearings in criminal matters including felonies. The court has appellate jurisdiction over the JP Court and revocations of drivers' licenses from the Department of Motor Vehicles. Appeals from CCP are on the record to the Superior Court.

3. Superior Court

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

4. Family Court

The Family Court has limited, statutory jurisdiction. The Family Court hears domestic cases, including divorce proceedings, Protection From Abuse petitions, and criminal cases involving juveniles. In addition, the court may hear criminal matters, other than felonies, involving one family member against another, child abuse and neglect prosecutions, as well as custody issues. Appeals from the Family Court go directly to the Supreme Court of the State of Delaware, except in criminal matters, where the accused has a right to a jury trial, in which case there is a trial *de novo* in the Superior Court

5. Court of Chancery

The Court of Chancery is Delaware's court of equity. The Court of Chancery does not have jurisdiction over any case where an adequate remedy may be had at common law or by statute. 10 *Del. C.* § 341. The Court of Chancery is traditionally the court of corporate litigation, including shareholder disputes, contract matters not involving a claim for monetary damages (i.e., a demand for specific performance), and Trust and Estate matters. The Court of Chancery may award monetary damages in conjunction with equitable remedies under the "clean up" doctrine. Appeals from Court of Chancery are to the Supreme Court of the State of Delaware.

b. Appellate Court

1. The Supreme Court of the State of Delaware

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

II. *General Negligence Principles*

a. Definition and Elements

Negligence is defined as the act or failure to act that the actor, as a

reasonable person, should recognize involves an unreasonable risk of harm to others and the actor has a duty to refrain from taking the action or has a duty to act if the omission may result in harm. RESTATEMENT 2ND TORTS § 284 (1965). Recovery in an action for negligence requires: one, proof of a duty; two, a breach of that duty; three, proximate causation; and four, damages. *Hudson v. Old Guard Ins. Co.*, 3 A.3d 246, 250 (Del. 2010); *Lenkewicz v. Wilmington City Ry. Co*., 74 A. 11, 12-13 (Del. Super. 1908). Children are generally held to the standard of care that a child of similar age and maturity would be expected to understand. *Beggs v. Wilson*, 272 A.2d 713 (Del. 1970). However, children under the age of seven are afforded a rebuttable presumption that they are "incapable of negligence." *McCormick v. Hoddinott*, 865 A.2d 523, 530 (Del. Super. 2004); *Audet v. Convery*, 187 A.2d 412, 413 (Del. Super. 1963).

b. **Negligence Per Se**

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

c. **Respondeat Superior**

This doctrine allows for an employer to be held liable for the actions of their employees. The employee must be acting within the scope of their employment when the tortious conduct takes place. *Fisher v. Townsend's, Inc.*, 695 A.2d. 53, 58 (Del. Super. 1997). Essentially, the employer is vicariously liable for the actions of their employee or agent. *Id* at 58-59. The employer is not liable for the actions of an independent contractor. *Re Newborn v. Christiana Psychiatric Servs., P.A.*, 2017 WL 375637, at *3 (Del. Super. Jan. 25, 2017). Generally, the determination of whether an individual is an employee or an independent contractor is left to the trier of fact. *Id.*

"Under the Restatement of Agency (2d) § 228, conduct is within the scope of employment if, (1) it is of the kind he is employed to perform; (2) it occurs within the authorized time and space limits; (3) it is activated, in part at least, by a purpose to serve the master; and (4) if force is used, the use of force is not unexpectable." *Doe v. State*, 76 A.3d 774, 776 (Del. 2013). "The mere fact that the primary motive is to benefit himself or a third person does not

cause the act to be outside the scope of employment." *Re Newborn*, 2017 WL 375637, at *4.

If the Court finds that the employee did not act within the scope of employment, then the Court consults the exceptions in § 219 of the Restatement (Second) of Agency. *Cook v. J and V Trucking Company, Inc.*, 2021 WL 1292796, *2 (Del. Super. 2021). When § 219's exceptions apply, an employer can be held responsible under respondeat superior even if § 228 is not satisfied. *Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 154 (Del. 2018). Negligent hiring and supervision claims cannot be used to meet the exceptions under § 219(2)(b). *J and V Trucking Company, Inc.*, 2021 WL 1292796 at *4.

d. **Res Ipsa Loquitur**

Res ipsa loquitur means "the thing speaks for itself." *Moore v. Anesthesia Servs., P.A.*, 966 A.2d 830, 842 (Del. Super. 2008). Pursuant to Delaware Rule of Evidence 304, the doctrine of *res ipsa loquitur* allows, but does not require, the trier of fact to draw the inference that negligence occurred in an accident in certain circumstances. This applicability of this doctrine is determined at the *close* of the plaintiff's case. D.R.E. 304(c)(1).

The elements of *res ipsa loquitur* are: "(1) The accident must be such as, in the ordinary course of events, does not happen if those who have management and control use proper care; and (2) The facts are such as to warrant an inference of negligence of such force as to call for an explanation or rebuttal from the defendant; and (3) The thing or instrumentality which caused the injury must have been under the management or control (not necessarily exclusive) of the defendant or his servants at the time the negligence likely occurred; and (4) Where the injured person participated in the events leading up to the accident, the evidence must exclude his own conduct as a responsible cause." *Seck v. Verizon*, 2017 WL 4317257, at *2 (Del. Super. Sept. 27, 2017).

III. ***Delaware Specific Negligence Principles***

a. **Premises Liability**

Premises liability in Delaware is controlled in part by the Guest Premises Statute, which states that there shall be no cause of action against a landowner by licensees (guests without payment) or trespassers for injuries occurring on the property due to the landowner's negligence. 25 *Del. C.* § 1501; *Simpson v. Colonial Parking, Inc.*, 36 A.3d 333, 335 (Del. 2012). A plaintiff may recover upon proof of willful or wanton conduct on the part of the landowner. 25 *Del. C.* § 1501; *Simpson*, 36 A.3d at 335.Child trespassers may still recover under the attractive nuisance doctrine. *Kalb v. Council*, 2013 WL 1934665, at *5 (Del. Super. May 8, 2013).

Where a public thoroughfare is obstructed due to a sudden and recent cause, a traveler has a limited right to enter adjacent lands to the extent it is *inevitably necessary* to avoid the obstruction or accident. The obstructed traveler must pass "as near to the original way as possible" and will not be guilty of trespass. *Berns v. Doan*, 961 A.2d 506, 509 (Del. 2008) (the common law right to go *extra viam* converts the traveler from a trespasser to licensee, not a public invitee, and thus only acts as a shield to liability, not a sword).

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

b. Continuous Storm Doctrine

Landowners need not begin clearing their walkways and parking lots of snow until a reasonable period of time after the storm ends, absent unusual circumstances. *Laine v. Speedway, LLC*, 2018 WL 315584, at *5 (Del. Jan. 8, 2018); *Sztybel v. Walgreen Co.*, 2011 WL 2623930, at *1 (Del. Super. June 29, 2011) (citing *Young v. Saroukos*, 185 A.2d 274, 282 (Del. Super. 1962), ***aff'd***, 189 A.2d 437 (Del. 1963). The "landowner has no legal duty to begin ice removal until precipitation has stopped, regardless of the severity of the storm." *Cash v. East Coast Prop. Mgmt., Inc.*, 2010 WL 2336867, at *2 (Del. Super. June 8, 2010), ***aff'd***, 2010 WL 4272925 (Del. Oct. 29, 2010). Nor does the landowner have a duty to warn of the dangerous condition during the storm. *Laine*, 2018 WL 315584, at *6. "Snow is not required to implicate the Continuing Storm doctrine, but rather a 'light drizzle' is sufficient to establish an ongoing storm." *Demby v. Delaware Racing Ass'n*, 2016 WL 399136, at *2 (Del. Super. Jan. 28, 2016) (citing *Cash*, 2010 WL 2336867, at *2). A store's policy that ice and snow shall be removed during a storm, "without more, does not constitute the voluntary assumption of a legal duty." *Cash*, 2010 WL 4272925 at *4. Thus, even if the landowner attempts to remove the snow during the storm, "[t]he absence of a legal duty to remove the icy conditions renders moot the question of whether they exercised reasonable care." *Id.*

IV. ***Common Causes of Action***

a. **The Standard of Care for Slip and Fall Causes of Action**

The "storekeeper owes a duty to the public to see that those portions of its premises ordinarily used by its customers are kept in a reasonably safe condition for their use." *Howard v. Food Fair Stores*, 201 A.2d 638, 640 (Del. 1964). This "duty includes taking reasonable steps to remove dangerous conditions." *Walker v. Shoprite Supermarket, Inc.*, 2004 WL 3023089, at *2 (Del. Oct. 20, 2004). Generally, expert testimony is not required to establish the standard of care for a storekeeper or property manager because they are not considered "professionals" who are held to a higher standard of care. *See, e.g.*, *Small v. Super Fresh Food Markets, Inc.*, 2010 WL 530071, at *3 (Del. Super. Feb. 12, 2010) (storekeeper); *Vandiest v. Santiago*, 2004 WL 3030014, at *7 (Del. Super. Dec. 9, 2004) (property manager). The storekeeper's liability is limited to injuries caused by "defects or conditions of which the storekeeper had actual notice or which could have been discovered by such reasonable inspection." *Howard*, 201 A.2d at 640. Customers entering a store have "the right to assume that the floor is suitable and safe to walk upon, and is free from obstacles and defects which might cause a fall." *Id.* at 642.

Customers must, however, "exercise reasonable care while walking in the store." *Walker*, 2004 WL 3023089 at *2. "It is negligent for a patron not to see what is plainly visible when there is nothing to obscure his or her view." *Id.* "Although customers . . . do not need to keep a constant lookout, they must keep a reasonable lookout, and exercise reasonable care." *Id.* A customer "is under the affirmative obligation to watch where he or she is walking, to exercise the sense of sight in a careful and intelligent manner to observe what a reasonable person would see." *Winkler v. The Delaware State Fair, Inc.*, 1992 WL 53412, at *2 (Del. Feb. 20, 1992); *see Talmo v. Union Park Auto.,* 38 A.3d 1255 (Del. 2012).

i. **Examples of Negligent Customers**

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

In *Winkler*, the plaintiff tripped over a rope on the fair grounds. *Winkler*, 1992 WL 53412 at *1. The plaintiff testified that she was not

paying attention to where she was walking when she fell. *Id.* The trial court concluded that the plaintiff's actions constituted negligence. *Id.* The Supreme Court of the State of Delaware affirmed the trial court and wrote that it "was correct in stating that it is negligent not to see what is plainly visible where there is nothing to obscure one's vision." *Id.* at 2.

In *Talmo,* the plaintiff walked into a window when a salesman directed him outside. *Talmo*, 38 A.3d 1255. The Court held as a matter of law that owners and occupiers of land do not have to warn persons on their premises about the existence of windows. *Id*.

In Polaski v. Dover Downs, Inc., the plaintiff fell off a curb while walking toward the designated smoking area. the trial court, granting summary judgment, held that a "change in elevation on this well-lit, defect-free sidewalk leading down to a handicapped ramp is not a dangerous condition." The Delaware Supreme Court affirmed, stating the plaintiff "injured herself by falling off a normal curb. Doing so does not cause an injury capable of redress through a negligence action. . .Therefore, [the lower court] properly ruled that a normal curb does not constitute a dangerous condition, even if it borders atypical portions of curb." 49 A.3d 1193 (Del. Supr. 2012)

b. **Slip and Fall – Outdoors**

i. **Snow and Ice**

The courts will look to the Continuous Storm Doctrine to determine if the business owner may be held liable.

ii. **Snow Removal Contractor**

To determine whether or not a contractor, hired by a business or landowner to remove snow and/or ice from their land, may be held liable for injuries sustained by a person who fell in same, the courts will refer to the terms of the contract between the contractor and the business. *Brown v. Baird*, 2008 WL 324661 (Del. Feb. 7, 2008). In *Brown*, the contractor would plow the parking lot upon request. *Id* at 2. Because the business had not requested such services, the contractor did not owe a duty to the injured. *Id*. Courts will also look to specific instructions given to the contractor. *Spence v. Layaou Landscaping, Inc.*, 2013 WL 6114873 (Del. Super. Oct. 31, 2013). In *Spence*, the plaintiff fell in an area that the contractor was told not to plow. *Id* at 8. The court held that the contractor owed no duty to the plaintiff to maintain this area and so, a negligence action could not be maintained against the contractor. *Id.* The continuing storm

doctrine extends to contractors hired by the landowner. *Day v. Wilcox Landscaping, Inc.*, 2017 WL 816456, at *4 (Del. Super. Feb. 28, 2017).

c. **Slip and Fall – Indoors**

A customer who sues a store for failing to keep the premises reasonable safe must demonstrate that there was an unsafe condition in the store, that same caused their injuries, and that the store had actual notice of the unsafe condition or could have discovered same through a reasonable inspection. *Hazel v. Delaware Supermarkets, Inc.*, 953 A.2d 705, 709 (Del. 2008).

d. **Negligent Hiring and Supervision**

Under Delaware law, an employer is liable for negligent hiring and supervision in the "giving of improper or ambiguous orders or in failing to make proper regulations, or in the employment of improper persons involving risk of harm to others, or in the supervision of the employee's activity." *Doe v. Bicking*, 2020 WL 374677, *5 (Del. Super. 2020) (quoting *Simms v. Christiana School Dist.*, 2004 WL 344015, *8 (Del. Super. 2004)). The negligence is based upon a failure to exercise the care that a reasonably prudent person would exercise under the circumstances. *J and V Trucking Company, Inc.*, 2021 WL 1292796 at *5 (quoting *Simms v. Christiana School Dist.*, 2004 WL 344015, *8. An employer may be held liable for negligent hiring if they employ someone and should have known that they posed a risk of harm to others, or in the case of supervision, the employer failed to properly provide procedures, orders, or otherwise supervise the actions of the employee who commits a tortuous act. *Knerr v. Gilpin, Van Trump & Montgomery, Inc.*, 1988 WL 40009, at *3 (Del. Super. Apr. 8, 1988); Restatement (Second) of Agency § 213 (1958). Direct negligence claims (negligent hiring, supervision, and retention) require that the employer be on notice. "The deciding factor is whether the employer had or should have had knowledge of the necessity to exercise control over its employee." *Fanean v. Rite Aid Corp. of Delaware*, 984 A.2d 812, 826 (Del. Super. 2009).

V. ***Violent Crime***

a. **Liability**

Delaware adopted the Restatement (Second) of Torts standard with regard to a business owner's liability for thirty party criminal activity, which occurs on the business' premises. *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 525 (Del. 1987). Section 344(f) of the Restatement Second states that the possessor of land is generally under no duty to police their land until he or she "knows or has reason to know that the acts of the third person are

occurring, or are about to occur." Restatement (Second) of Torts § 344(f) (1965). Knowledge may be inferred from past experiences. *Id.*

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

The Supreme Court of the State of Delaware held that "while a property owner is no more an insurer or guarantor of public safety than are police agencies, there is a residual obligation of reasonable care to protect business invitees from the acts of third persons." *Id.* at 525. The Court explained that malls have distinguishing characteristics because they are situated on large tracts of private property and "do not enjoy the benefit of routine police protection." *Id.* The Court held that because the defendant had "undertaken [the] security responsibility," the mall was charged "with anticipating the conduct of all persons who might frequent the mall and, in the language of the Restatement, 'give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect against it.'" *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 344 (1965). The "foreseeable standard" is not limited to anticipating only the crimes that had previously been reported. *Jardel Co., Inc.*, 523 A.2d at 524-25. The Court explained that although the most foreseeable crime for malls is shoplifting, the "repetition of criminal activity, regardless of its mix, may be sufficient to place the property owners on notice of the likelihood that personal injury, not merely property loss, will result." *Id* at 525. The Court adopted "the Restatement standard, which approves the concept that incidents of criminal activity provide a duty to foresee specific conduct." *Id.*

This duty to warn and protect is limited to the "geographic zones" within the landowner's control. *Rhudy v. Bottlecaps, Inc*, 830 A.2d 402, 405 (Del. Aug. 25, 2003). In *Rhudy*, the plaintiffs parked in a public lot adjacent to the defendant's establishment. *Id* at 403. After they excited their vehicle, they were robbed at gunpoint and shot at, which left one plaintiff dead. *Id*. The defendant did not own the parking lot or have an agreement for the exclusive use thereof. *Id* at 403-04. However, they did reference in their advertisements the availability of nearby parking and would pick up litter there after large events. *Id* at 404. "The trial court reasoned that because [the defendant] did not possess or control the [public lot], it did not owe a duty to warn or protect [the plaintiffs] from crime on the lot." *Id.* The Supreme Court of the State of Delaware affirmed. *Id* at 405. The Court reasoned that because the lot was not owned by the defendant, it could not be expected to protect its patrons from crimes that occurred there "to any

greater extent than it could protect patrons who parked on any nearby public streets." *Id* at 406. The Court was not swayed that the defendant should be held liable "because it benefitted from the public parking made available to its patrons." *Id* at 407.

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

In *Greenfield v. Budget,* the court declined to grant Budget's motion to dismiss where the plaintiff alleged that he and his sisters were abused and other illegal conduct was occurring on Budget's property, a motel. Plaintiff alleged that Budget was grossly negligent and reckless in that it was aware, or at least should have been aware, of the abuse and failed to act. The court found that "the staff, employees, owners, and or agents of Budget had a duty, which they failed, to provide a safe premises, to protect its patrons from criminal acts by third parties, and to notify the proper authorities upon discovering the ongoing criminal nature of Plaintiff's living environment." *Greenfield for Ford v. Budget of Delaware, Inc*., 2017 WL 5149274, at *1 (Del. Super. Oct. 31, 2017).

b. **Wrongful Death**

The Delaware Wrongful Death Statute provides for recovery of mental anguish suffered by survivors of a decedent, to include the surviving spouse, children, father and mother, and/or persons standing in *loco parentis* at the time of the death. 10 *Del. C.* § 3724.

Delaware's Survival Statute allows for all causes of action, except defamation and malicious prosecution, to survive the decedent and pass on to the estate to continue to prosecute the cause of action. 10 *Del. C.* § 3701.

The deceased may waive the estate's right to bring a claim for wrongful death through a clause in an employment agreement. *Deuley v. DynCorp Int'l*, Inc., 8 A.3d 1156, 1165 (Del. 2010) (wrongful death claims are wholly derivative and "subject to the same infirmities as would have existed in a suit by the deceased if still alive").

c. Emotional Distress Claims

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

To present a cause of action for Intentional Infliction of Emotion Distress, the plaintiff must show intentional or reckless conduct by the defendant that was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community..." *Akinniyi Shiyanbola, v. Amazon, LLC*, 2018 WL 1216098, at *2 (Del. Super. Mar. 8, 2018); *Mattern v. Hudson,* 532 A.2d 85, 86 (Del. Super. 1987). Liability does not arise from insults, indignities, petty oppressions, as one must be free to express opinions. Only if the "distress is so severe that no reasonable man could be expected to endure it" does liability arise. *Mattern* 532 A.2d at 86.

VI. *Actions Brought Against a Store by a Person Accused of Theft/Shoplifting*

a. **Standard**

Pursuant to 11 *Del. C.* § 840(c), adult store employees whom have probable cause to believe a person has committed shoplifting or concealed unpurchased merchandise "may, for the purpose of summoning a law-enforcement officer, take the person into custody and detain the person in a reasonable manner on the premises for a reasonable time." Such an employee who detains or provides information leading to the arrest of a shoplifter, "shall not be held civilly or criminally liable for such detention or arrested," provided that they had probable cause to believe the person shoplifted. 11 *Del. C.* § 840(d); *Roberts v. Murray*, 2009 WL 2620725, at *6 (Del. Super. July 24, 2009), aff'd, 991 A.2d 18 (Del. 2010) (noting in dicta that an "eyewitness account of a crime is sufficient to establish probable cause").

b. **Malicious Prosecution**

Malicious prosecution claims are viewed with disfavor in Delaware and are scrutinized accordingly. *Batchelor v. Alexis Properties, LLC*, 2018 WL 1053016, at *3 (Del. Super. Feb. 23, 2018). A claim of malicious prosecution requires the plaintiff to prove six elements: first, the plaintiff was prosecuted at a prior judicial proceeding; second, the defendant initiated and/or prosecuted the plaintiff at the previous proceeding; third, the former proceeding terminated in favor of the plaintiff; fourth, the defendant acted with malice; fifth, there was a lack of probable cause for the commencement of the prior judicial proceeding; and sixth, the plaintiff suffered an injury. *Quartarone v. Kohl's Dep't Stores, Inc.*, 983 A.2d 949, 955 (Del. Super. Feb. 2, 2009).

c. **Defamation**

A claim of defamation requires the plaintiff to demonstrate: first, a false, defamatory statement was made concerning the plaintiff; second, same was published to a third party; third, the third party understood the statement to be defamatory in nature; fourth, fault on the part of the defendant; and fifth, the plaintiff suffered injury. *Alston v. Christiana Hosp.*, 148 A.3d 1171 (Del. 2016); *Robert v. Murray*, 2009 WL 2620725, at *5 (Del. Super. July 24, 2009). "Truth is an absolute defense." *Id.* Additionally, "[s]tatements to a law enforcement officer are privileged." *Better v. Mitchell*, 2004 WL 3312524, at *2 (Del. Com. Pl. Oct. 5, 2004).

Slander is a category of defamation and requires proof of special damages, except in limited circumstances. *Naples v. New Castle Cty.*, 2015 WL

1478206, at *12 (Del. Super. Mar. 30, 2015), aff'd, 127 A.3d 399 (Del. 2015) (slander per se does not require special damages and occurs in statements that: malign a person's trade, profession, or business; impute a crime; impute a loathsome disease; or impute a woman is unchaste.) Libel does not require proof of special damages. *Id.*

VII. ***Defenses***

a. **Statute of Limitations**

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

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

There is a three year statute of limitations for breach of warranty, breach of contract and negligence claims. 10 *Del. C.* 8106. The cause of action for a negligence claim accrues at the time of injury. *Silverstein v. Fischer*, 2016 WL 3020858, at *4 (Del. Super. May 18, 2016). The time of injury is when "the plaintiff has reason to know that a wrong has been committed." *S&R Associates, L.P. v. Shell Oil Co.*, 725 A.2d 431, 439 (Del. Super. 1998). This is known as the "Time of Discovery Rule," which may extend the limitations period beyond that established by statute. *Cavalier Group v. Strescon Industries, Inc.*, 782 F. Supp. 946 (Del. 1992); *but see Bromwich v. Hanby,* 2010 WL 8250796, at *3 (Del. Super. Ct. July 1, 2010) (quoting *Marcucilli v. Boardwalk Builders,* Inc., 2002 WL 1038818 (Del. Super. May 16, 2002) ("The time of discovery rule does not apply to the claim for breach of implied warranty of good quality and workmanship…").

b. **Comparative Negligence**

Delaware is a comparative negligence state. 10 *Del. C.* § 8132. The plaintiff's negligence will bar recovery if his or her negligence is greater than the negligence of the defendant(s). *Helm v. 206 Massachusetts Ave., LLC*, 107 A.3d 1074, 1079 (Del. 2014). However, damages shall be diminished in proportion to the amount of negligence attributed to the plaintiff. Essentially, if the plaintiff is greater than 50% at fault there is no recovery. If there is 50% fault on the part of the plaintiff, the plaintiff can recover, but damages will be reduced by half. *Id.*

i. **Examples**

In *Winkler*, the jury found the plaintiff to be 92% at fault and the defendant/store 8% at fault. *Winkler v. The Delaware State Fair, Inc.*, 1992 WL 53412, at *2 (Del. Feb. 20, 1992). Therefore, the plaintiff "was not entitled to recover damages." *Id.*

In *Walker*, the jury apportioned negligence 70% on the part of the plaintiff and 30% on the part of the defendant/store. *Walker v. Shoprite Supermarket, Inc.*, 2004 WL 3023089, at *1 (Del. Oct. 20, 2004). In reviewing the record, the Court found there was sufficient evidence for the jury to conclude that the defendant had acted reasonably in discovering the spill and "that it had taken reasonable steps to clean up that spill." *Id* at 2.

c. **Assumption of the Risk**

Assumption of the risk is divided into two categories. *Farrell v. Univ. of Delaware*, 2009 WL 3309288, at *2 (Del. Super. Oct. 8, 2009). Primary assumption of the risk is when the plaintiff relieves the defendant of legal duty by expressly agreeing to take his or her chance of injury from a known risk arising from the defendant's conduct or property. *Id*. This can be established through circumstantial "words or conduct" and "need not take the form of specific spoken or written words." *Id.* (internal quotation marks omitted). Secondary implied assumption of the risk has been absorbed "into the concept of comparative negligence." *Id.* The question is whether the plaintiff's conduct in encountering a known risk is in itself unreasonable. This is left to the finder of fact to determine if the plaintiff's conduct was reasonable, and whether it rose to the level of negligence greater than that of the defendant. *Koutoufaris v. Dick,* 604 A.2d 390 (Del. 1992); *see also Helm v. 206 Massachusetts Ave., LLC*, 107 A.3d 1074, 1081 (Del. 2014) (discussing the evolution of primary assumption of risk and secondary implied assumption of risk).

VIII. **Indemnification**

Claims for indemnification sound in contract and are thus subject to the three year statute of limitations found in 10 *Del. C.* § 8016. *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 558 (Del. 2002). Indemnification means "that when a claim is made against an indemnitee for which he [or she] is entitled to indemnification, the indemnitor is liable for any reasonable expenses incurred by the indemnitee in defending against such claim, regardless of whether the indemnitee is ultimately held liable." *Pike Creek Chiropractic Center v. Robinson*, 637 A.2d 418, 420 (Del. 1994).

IX. Damages

a. Compensatory

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

b. Punitive

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

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

Punitive damages may be recovered from the estate of a deceased tortfeasor, except in limited circumstances. *Estate of Farrell ex rel. Bennett v. Gordon*, 770 A.2d 517, 520 (Del. 2001); 10 *Del. C.* § 3701 ("All causes of action, except actions for defamation, malicious prosecution, or upon penal statutes, shall survive to and against the executors or administrators of the person to, or against whom, the cause of action accrued….").

A party may procure insurance to protect itself against punitive damages. *Whalen v. On-Deck, Inc.*, 514 A.2d 1072, 1074 (Del. 1986); *Arch Insurance*

Company, Liberty Mutual Insurance Company, Continental Casualty Insurance Company, Navigators Insurance Company, Rsui Indemnity Company, & Berkley Insurance Company, v. David H. Murdock, C. Michael Carter, Dole Food Company, Inc., & Dfc Holdings, LLC, 2018 WL 1129110, at *11 (Del. Super. Mar. 1, 2018).

c. **Interest**

Delaware follows the general rule that the prevailing party is entitled to pre-judgment and post-judgment interest on a monetary judgment, with several limitations. Pre-judgment interest is an "extraordinary award that applies when a party unjustifiably refuses to live up to its obligation after payment is due." *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1262 (Del. 2010). Pre-judgment interest is generally only available where the damages were easily determined prior to litigation, or liquidated, such as a breach of contract action or property damage. In a tort action for compensatory damages where the plaintiff made an offer, extended for a minimum of thirty days, that is less than the judgment, then pre-judgment interest is available and is calculated from the date of the injury. 6 *Del. C.* § 2301(d). Interest is not self-executing and must be requested as an item of damages. *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 961 A.2d 521, 525 (Del. 2008). Post-judgment interest attaches upon entry of judgment. The rate of interest is 5% plus the Federal Reserve Discount Rate at the time the interest is due. 6 *Del. C.* § 2301(a).

d. **Attorneys' Fees**

Delaware follows the American Rule, which requires that "a litigant must, himself, defray the cost of being represented by counsel" unless otherwise provided for by contract or by statute. *Dover Historical Soc., Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006).

There are several exceptions to the American Rule. One exception is when the court determines that the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Brice v. Dep't of Corr.,* 704 A.2d 1176, 1179 (Del. 1998). Another is the "common benefit exception," which allows a litigant to receive an award of attorney's fees if: (a) the action was meritorious at the time it was filed, (b) an ascertainable group received a substantial benefit, and (c) a causal connection existed between the litigation and the benefit. *Dover Historical Soc., Inc.* 902 A.2d 1084, 1089 (generally arising in the context of corporate litigation).

e. **Costs**

Under Delaware law, the prevailing party is entitled to an award of ordinary court costs as a matter of course. Super. Ct. Civ. R. 54(d); *Smith v. Greif*,

2015 WL 1598084, at *2 (Del. Super. Apr. 10, 2015). The party must present a motion for costs following entry of judgment. This may include costs of deposition transcripts provided the transcript was entered into the record as evidence. Expert witness fees are subject to review by the court for reasonableness. Although costs are generally awarded to the prevailing party, it is not required. Awarding costs is a matter of judicial discretion. *Id.*

The Court of Chancery applies the "predominance in the litigation" standard to determine the prevailing party. A litigant should prevail on the case's chief issue to achieve predominance. This is an "all or nothing approach." *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2018 WL 300454, at *2 (Del. Ch. Jan. 5, 2018) (citations and quotations omitted); *Brandin v. Gottlieb*, 2000 WL 1005954, at *26 (Del. Ch. July 13, 2000).

i. **Offer of Judgment**

If a defendant makes a settlement offer more than ten days from the date of trial, the offer is refused by the plaintiff, and the subsequent judgment is less than or equal to the offer, the plaintiff must pay the defendant's costs incurred subsequent to the offer. Additionally, the plaintiff is precluded from filing for his or her costs. Super. Ct. Civ. R. 68; *Wilhelm v. Ryan*, 903 A.2d 745, 757 (Del. 2006).

f. **Contribution Among Joint Tortfeasors**

i. Delaware Law provides statutory contribution for defendants with a common liability to the plaintiff. 10 *Del. C.* § 6301 et seq.

ii. The statute provides for apportionment among joint tortfeasors in accordance with their relative percentages of fault.

iii. Defendants may be jointly or severally liable to the plaintiff. When it is determined that one defendant is the sole proximate cause of the injury, this acts as a supervening cause, shielding other defendants from liability. *Sears Roebuck & Co. v. Huang*, 652 A.2d 568 (Del. 1995).

iv. Tortfeasors are required to prove the joint tortfeasor status of all defendants whose credits they desire, either through the settling documents or a judicial determination, before they are entitled to any of the settling defendants' credits.

v. A joint tortfeasor is not entitled to a money judgment for contribution until he or she has discharged the common liability or has paid more than his or her pro rata share. 10 Del. C. § 6302.

DRAM SHOP

The Delaware Supreme Court, in an unbroken line of cases over the past thirty-five years, has determined that the establishment of a Dram Shop cause of action presents a social policy issue for the legislature to establish, not the court. *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009); *Shea v. Matassa*, 2006 WL 1134782 (Del. Super. 2006), ***aff'd***, 918 A.2d 1090, 1092 (Del. 2007); *Acker v. S.W. Cantinas, Inc*., 586 A.2d 1178, 1180 (Del. 1991); *Oakes v. Megaw*, 565 A.2d 914, 916 (Del. 1989); *Samson v. Smith*, 560 A.2d 1024, 1027 (Del. 1989); *Wright v. Moffitt*, 437 A.2d 554, 556 (Del. 1981).

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.