PATTERN JURY INSTRUCTIONS

for CIVIL PRACTICE

in the SUPERIOR COURT of the STATE of DELAWARE

2025 EDITION

[Cite as: DEL. P.J.I. CIV. § xx.xx (2025).]

Disclaimer: The following civil jury instructions were compiled as a reference guide for the benefit of practitioners in Superior Court. The instructions are merely advisory and the practitioner should not use these instructions without also reviewing the applicable statutes, court rules, and case law. While the Review Committee has made every effort to conform these instructions to the prevailing law, they are always subject to review by the Supreme Court. For further discussion of these instructions and their relation to applicable standards of appellate review, *see Russell v. K-Mart Corp.*, 761 A.2d 1, 4 (Del. 2000).

ACKNOWLEDGMENTS

At the direction of President Judge Jan R. Jurden (Ret.), the Superior Court assembled an *Ad Hoc* Committee in 2024 to review and revise the Pattern Jury Instructions for Civil Practice in the Superior Court. The Court thanks the Committee for their work on this project and a special thanks to Thomas P. Leff for his laboring oar.

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The Honorable Jan R. Jurden, President Judge (Ret.)
The Honorable Mary M. Johnston (Ret.)
The Honorable Kathleen M. Miller
The Honorable Susan C. Del Pesco (Ret.)

Thomas Leff, Editor

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1. *VOIR DIRE*

§ 1.1 – *Voir Dire*

VOIR DIRE

Good Morning:

We are about to select a jury in the case of _____ v. _____. The plaintiff,_____, has sued the defendant, _____, claiming that [_____].

- We estimate that the trial will take ___ days.
- Do you know anything about this case, through personal knowledge, discussion with anyone, the news media, or any other source?
- Do you know any of the parties in this case or their employees, friends, or relatives?
- The plaintiff is represented by _____, of the law firm _____.

  The defendant is represented by _____, of the law firm _____.
- Do you know the attorneys in this case or any other attorney or employee in their firms?

- Do you know any of the following persons who might be called to testify as witnesses:

_____	_____
_____	_____
_____	_____

[Add any additional *voir dire* questions here.]

- Do you have any bias or prejudice either for or against the plaintiff or defendant?

- Do you have any particular or personal opinions or attitudes about [***cause of action***] cases, or about lawsuits involving [***claim***]?

- Have any of your relatives or close friends been a party to a [***cause of action***] case?

- Do you have any physical impairment (hearing, sight, etc.) or mental condition that would make it difficult to participate effectively as a jury in this case?

- Is there any reason why you cannot give this case your undivided attention and render a fair and impartial verdict?

- Are you currently or have you recently been prosecuted for a felony offense?

If your answer to any of these questions is YES, or if you cannot serve for ___ days,

(_____ __, 20__ through _____ __, 20__), please raise your hand.

Source:

10 *Del. C.* § 4511; Super. Ct. Civ. R. 47(a); *see Robertson v. State*, Del. Supr., 630 A.2d 1084, 1092 (1993); *Celotex Corp. v. Wilson*, Del. Supr., 607 A.2d 1223, 1227-28 (1992); *Riley v. State*, Del. Supr., 496 A.2d 997, 1009 (1985); *Chavin v. Cope*, Del. Supr., 243 A.2d 694, 696-98 (1968).

1. *VOIR DIRE*

§ 1.2 – Additional *Voir Dire*

ADDITIONAL *VOIR DIRE*

The following *voir dire* may be necessary when some testimony will be given in a language other than English:

- Would the fact that some testimony will be given in a language other than English influence you in any way?

{**Comment***: In the case of a bilingual juror, The trial judge should conduct individual voir dire of the juror to determine whether the juror has a sufficient command of English. These questions should elicit more than a "yes" or "no" response.*}

The following *voir dire* may be necessary when some testimony will be given in a language other than English and there is a juror that is proficient in both English and the language of the party or witness:

- Do you believe that you will be able to disregard your own knowledge of [foreign language] and to base your judgment solely upon the interpreter's English translation?

- Will you refrain from discussing your own interpretation of the [foreign language] translation with other jurors?

- Should you have any concern about the English translation please advise the Court Security Officer *via* a written note.

Source:

10 *Del. C.* § 4509; *Diaz v. State*, Del. Supr., 743 A.2d 1166, 1172-76 (1999).

2. OATHS

§ 2.1 – Oath for Jurors

OATH FOR JURORS

Members of the Jury, please rise. Those of you who will swear on the Bible, take hold of the Bible with your right hand. Those of you who will affirm, raise your right hand.

{Clerk}:

Do each of you solemnly swear or solemnly affirm that you will decide the issues in this case fairly and honestly, and give a true verdict according to the evidence? Do you further swear or affirm that you have fully and truthfully answered all questions put to you about the matter now before the Court?

Please be seated.

Members of the Jury, you have all been sworn or affirmed.

{Clerk, turn to the Judge and say: "Your Honor."}

Source:

10 Del. C. § 4518 (petit jury); *10 Del. C. §§ 5321-5324* (administration of oaths). *See Lynam v. Latimer*, *Del. Err. & App., 2 Del. Cas. 644 (1821)* (judgment reversed because of defective swearing of the jury).

2. OATHS

§ 2.2 – Oath for Court Security Officers

OATH FOR COURT SECURITY OFFICER

{Clerk}:

Do you, _____, solemnly [***swear / affirm***] that you will conduct these jurors to some convenient room and keep them there, and that you will not allow anyone to speak to them, nor will you speak to them yourself, without the Court's permission, except to ask them whether they have agreed on a verdict?

{Turn to the Judge and say: "Your Honor."}

Source:

See 10 *Del. C.* § 5301 *et seq*.

2. OATHS

§ 2.3 – Oath for Witnesses

OATH FOR WITNESSES

{Clerk}:

[Place your right hand on the Bible/ Please raise your right hand] and state your name . . . .

Do you ***[solemnly swear / solemnly affirm]*** that as you testify, you will tell the truth, the whole truth, and nothing but the truth, ***[so help you God / so you affirm]?***

Would you please spell your full name for the Court?

Source:

D.R.E. 603 (witnesses); *see also* Super. Ct. Civ. R. 43(c) (affirmation may be accepted in lieu of Oath).

2. OATHS

§ 2.4 – Oath for Interpreters

OATH FOR INTERPRETERS

{Clerk}:

Do you solemnly [***swear / affirm***] that you will interpret accurately, completely, and impartially, using your best skill and judgment in accordance with the Code of Professional Responsibility for Court Interpreters?

Source:

D.R.E. 604 (interpreters); *see also* Super. Ct. Civ. R. 43(c) (affirmation may be accepted in lieu of Oath).

3. GENERAL INSTRUCTIONS

§ 3.1 – Cover Sheet

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

[**INSERT CASE CAPTION AND NUMBER**]

_____

[PROPOSED] JURY INSTRUCTIONS

Before the Honorable _____ and a Jury of Twelve [Six]

Date: [_____ __, ____]

_____, Esquire, of _____, _____ & _____, [__***City***__], Delaware, for the plaintiff[s];

_____, Esquire, of _____, _____ & _____, [__***City***__], Delaware, for Defendant[s].

3. GENERAL INSTRUCTIONS

§ 3.2 – Province of the Court and Jury

PROVINCE OF THE COURT AND JURY

Now that you have heard the evidence and [***are about to hear***] the arguments of counsel, it is my duty to instruct you about the law governing this case. Although you as jurors are the sole judges of the facts, you must follow the law stated in my instructions and apply the law to the facts as you find them from the evidence. You must not single out one instruction alone as stating the law, but must consider the instructions as a whole.

Nor are you to be concerned with the wisdom of any legal rule that I give you. Regardless of any opinion you may have about what the law ought to be, it would be a violation of your sworn duty to base a verdict on any view of the law other than what I give you in these instructions. It would also be a violation of your sworn duty, as judges of the facts, to base a verdict on anything other than the evidence in the case.

Justice through trial by jury always depends on the willingness of each juror to do two things: first, to seek the truth about the facts from the same evidence presented to all the jurors; and, second, to arrive at a verdict by applying the same rules of law as explained by the judge.

You should consider only the evidence in the case. Evidence includes the witnesses' sworn testimony and the items admitted into evidence. You are allowed to draw reasonable conclusions from the testimony and exhibits, if you think those conclusions are justified. In other words, use your common sense to reach conclusions based on the evidence.

You have been chosen and sworn as jurors in this case to decide issues of fact. You must perform these duties without bias for or against any of the parties. The law does not allow you to be influenced by sympathy, prejudice, or public opinion. All the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law, and reach a just verdict, regardless of the consequences.

{**Comment**: *It is recommended that this charge be given at the beginning of the trial proceedings as well as at the end.*}

Source:

DEL. CONST. art. IV, § 19 (1897); *Porter v. State*, Del. Supr., 243 A.2d 699 (1968) (judge may not comment on the facts of the case); *Gutheridge v. Pen-Mod, Inc.*, Del. Super., 239 A.2d 709 (1967) (jury sole judges of the facts); *Girardo v. Wilmington & Philadelphia Traction Co.*, Del. Super., 90 A. 476 (1914) (same). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 70.03, 71.01 (4th ed. 1987).

3. GENERAL INSTRUCTIONS

§ 3.2A – Social and Electronic Media [Introductory Instruction]

SOCIAL AND ELECTRONIC MEDIA

In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only to you and not known to your fellow jurors or the parties in this case. This would unfairly and adversely affect the judicial process. During the trial and in your deliberations, you must not communicate with, receive any information, or provide any information to anyone in any manner about this case. You may not use any electronic device or media, such as a telephone, cell phone, smartphone, iPhone, tablet, or computer; the Internet, any Internet service, or any text or instant messaging service; or any Internet chat room, blog, or website, such as Facebook, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until after a verdict has been returned.

In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate (in any form) with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during

deliberations. Furthermore, you are expected to inform the Court Security Officer if you become aware of any other juror not following this instruction.

You may not use any electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the Internet or available through social media might be wrong, incomplete, or inaccurate. Further, you are only permitted to discuss the case with your fellow jurors only during deliberations and not before, because they will have seen and heard the same evidence as you have.

You are not to communicate about this case with anyone by any means until all twelve of you are reassembled in the jury room for deliberations on a verdict. These limitations are essential to maintain the integrity of this trial.

Source:

Baird v. Owczarek, Del. Supr., 93 A.3d 1222, 1228-30 (2014).

3. GENERAL INSTRUCTIONS

§ 3.3 – Statements of Counsel

STATEMENTS OF COUNSEL

What the attorneys say is not evidence. Instead, whatever they say is intended to help you review the evidence presented. If you remember the evidence differently from the attorneys, you should rely on your own recollection.

The role of attorneys is to zealously and effectively advance the claims of the parties they represent within the bounds of the law. An attorney may argue all reasonable conclusions from evidence in the record. It is not proper, however, for an attorney to state an opinion as to the truth or falsity of any testimony or evidence. What an attorney personally thinks or believes about the testimony or evidence in a case is not relevant, and you are instructed to disregard any personal opinion or belief offered by an attorney concerning the testimony or evidence.

Source:

See McLeod v. Swier, 2016 WL 355123, at *3 (Del. Super.), *aff'd*, Del. Supr., 157 A.3d 757 (2017); *DeAngelis v. Harrison*, Del. Supr., 628 A.2d 77, 88 (1993); *Delaware Olds, Inc. v. Dixon*, Del. Supr., 367 A.2d 178, 179 (1976). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 70.03 (4th ed. 1987); 75A AM. JUR. 2d §§ 554, 566, 632.

3. GENERAL INSTRUCTIONS

§ 3.3A - Statements of Counsel [Introductory Instruction]

THE ROLE OF ATTORNEYS IN THESE PROCEEDINGS

The role of attorneys is to zealously and effectively advance the claims of the parties they represent within the bounds of the law. An attorney may argue all reasonable conclusions from evidence in the record. It is not proper, however, for an attorney to state an opinion as to the truth or falsity of any testimony or evidence. What an attorney personally thinks or believes about the testimony or evidence in a case is not relevant, and you are instructed to disregard any personal opinion or belief offered by an attorney concerning any testimony or evidence.

Notwithstanding what you have may have seen on television or at the movies, the attorneys in this trial will be expected to act professionally, argue persuasively, and conduct themselves with civility.

Source:

See McLeod v. Swier, 2016 WL 355123, at *3 (Del. Super.), aff'd, Del. Supr., 157 A.3d 757 (2017); *DeAngelis v. Harrison*, Del. Supr., 628 A.2d 77, 88 (1993); *Delaware Olds, Inc. v. Dixon*, Del. Supr., 367 A.2d 178, 179 (1976). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 70.03 (4th ed. 1987); 75A AM. JUR. 2d §§ 554, 566, 632.

3. GENERAL INSTRUCTIONS

§ 3.4 – Nature of the Case [Introductory and Final Instruction]

NATURE OF THE CASE

In this case, the plaintiff, [***plaintiff's name***], is suing for damages that resulted from [***describe elements of claim***]. [***Plaintiff's name***] alleges that [***describe circumstances underlying claim***].

{*If applicable*}: [***Plaintiff's name***] is also suing for [***describe other claims***].

[***Defendant's name***] has [***denied*** / ***admitted***] [***describe elements of claim***] [*or*] [***liability for the (accident/injury) has been admitted***]. A dispute remains as to the nature and extent of the injuries suffered by [***plaintiff's name***] and the amount of damages [***he/she***]may be entitled to receive].

{*If applicable*: [***Defendant's name***] alleges that [***state any affirmative defenses or counter / cross-claims***]. [***Defendant's name***] alleges that [***describe circumstances underlying claim***]}

Source:

Chesapeake & Potomac Tel. Co. of Maryland v. Chesapeake Utilities Corp., Del. Supr., 436 A.2d 314, 338 (1981); *Greenplate v. Lowth*, Del. Supr., 199 A. 659, 662-63 (1938). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 70.01 (4th ed. 1987).

3. GENERAL INSTRUCTIONS

§ 3.4A – Guardian *ad litem* [Introductory and Final Instruction]

GUARDIAN *AD LITEM*

In a civil case, such as this one, the party that brings the lawsuit is called the plaintiff. The persons against whom the lawsuit is brought are called defendants.

In this case, the plaintiffs are [***plaintiff's name(s) and name of guardian ad litem***]. Because [***plaintiff's name***] is [***a minor / incompetent***] and is not legally able to handle [***his/her***] own affairs, the Court appointed [***name of guardian ad litem***] to represent [***plaintiff's name***]'s interests in this lawsuit. Such a person is called a guardian *ad litem*. If you make an award for the plaintiffs, you should understand that such an award will be placed in a special trust account for [***plaintiff's name***]. By explaining this to you, the Court does not mean to suggest for whom you should render a verdict.

{*If applicable*}: Hereinafter, I will only refer to [***plaintiff's name***] in these instructions, as [***he/she***] is the real party in interest in this case.

The defendants in this case are [***defendant's name(s)***].

{**Comment**: *This instruction is intended to be used in conjunction with Jury Instr. No. 3.4, "Nature of the Case." The above instruction may need to modified in the situation where a plaintiff other than the minor or incompetent is charged with contributory negligence in which case the instruction should note that any such*

negligence is not imputed to the minor or incompetent for purposes of an award of damages.}

Source:

Super. Ct. Civ. R. 17; *See also Doe v. Hollingsworth*, 2007 WL 4575839, at *2 (Del. Super.); *Cohee v. Richey*, Del. Super., 150 A.2d 830, 831 (1959); *Guardian ad litem*, BLACK'S LAW DICTIONARY 706 (12th ed. 2024).

3. GENERAL INSTRUCTIONS

§ 3.5 – Cross-claims / Third-Party Claims [Introductory and Final Instruction]

CROSS-CLAIMS / THIRD PARTY CLAIMS

In this case, a [***cross-claim* / *third party claim***] has been filed. The [***cross*-*plaintiff* / *third party plaintiff***] is [***plaintiff's name***]. The [***cross*-*defendant* / *third party defendant***] is [***defendant's name***]. These parties stand in the same relationship to each other as a plaintiff would to a defendant.

A [***cross-claim* / *third party claim***] is simply another set of claims that the parties to the main case have brought against each other or against someone else. The reason you will hear and decide these claims is that they are related to the same facts and circumstances as the main case.

{**Comment**: *It is recommended that this charge be given at the beginning of the trial proceedings.*}

3. GENERAL INSTRUCTIONS

§ 3.6 – Plaintiff's Contentions / Defendant's Contentions [Introductory Instruction]

PLAINTIFF'S CONTENTIONS

(1) . . . . [*Fill in appropriate contentions*.]

DEFENDANT'S CONTENTIONS

(1) . . . . [*Fill in appropriate contentions*.]

3. GENERAL INSTRUCTIONS

§ 3.7A – Courtroom Interpretation –[Introductory Instruction]

COURTROOM INTERPRETATION

{**Comment**: *The three following instructions should be read as a single group. Each English instruction should be immediately followed by a recitation of a translated version in the language to be used.*}

This Court seeks a fair trial for all parties regardless of the language a person speaks and regardless of how well a person may, or may not, use the English language. Bias against or for persons who have little or no proficiency in English, or because they do not use English, is not allowed. The fact that any party requires an interpreter must not influence you in any way. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning of the non-English words.

{*If Spanish interpretation is to be used, recite the following translation*}:

Esta Corte busca un juicio para todos sin considerar que lengua hablan y sin considerar el bien o mal uso que hagan de la lengua inglesa. Prejuicio contra o hacia personas que tienen poco o nada de pericia en el idioma ingles, porque nunca lo usan,

no es permitido. Por lo tanto, de niguna manera permita usted ser influenciado por el hecho de que la parte requere un interprete.

{*If interpretation into any other language is required, recite a translation of the English passage above in that language*.}

Source:

Delaware Judiciary Language Access Plan, p. 27
https://courts.delaware.gov/forms/download.aspx?id=64928

3. GENERAL INSTRUCTIONS

§ 3.7B – Courtroom Interpretation –Witnesses

WITNESS INTERPRETATION

{**Comment**: *The following English instruction should be read before the witness' testimony and immediately followed by a recitation of a translated version in the other language to be used.*}

Treat the interpretation of the witness' testimony as if the witness had spoken English and no interpreter were present. Do not allow the fact that testimony is given in a language other than English to affect your view of the witness' credibility. Those members of the jury who may be proficient or have some understanding of the foreign language being used during these proceedings shall base all deliberations and decisions on the evidence presented in English through the interpretation.

{*If Spanish interpretation is to be used, recite the following translation*}:

Trate la interpretacion del testigo como si el testigo hubiera hablado en ingles y sin un interprete presente. No permita el hecho de que el testimonio es dado en una lengua, que no es el ingles, afecte su opinion acerca de la credibilidad del testigo.

{*If interpretation into any other language is required, recite a translation of the English passage above in that language*.}

Source:

Delaware Judiciary Language Access Plan , p. 27
https://courts.delaware.gov/forms/download.aspx?id=64928

3. GENERAL INSTRUCTIONS

§ 3.7C – Courtroom Interpretation –Interpreters

COURTROOM INTERPRETER

{**Comment**: *The following English instruction should be read to the witness and immediately followed by a recitation of a translated version in the other language to be used.*}

Court Interpreters:

I want you to understand the role of the court interpreter. The court interpreter is here only to interpret the questions that you are asked and to interpret your responses. [He/she] will say only what we or you say and will not add to your testimony, omit anything you say, or summarize what you say. [He/she] is not a lawyer and is prohibited from giving legal advice.

If you do not understand the court interpreter, please let me know. If you need the interpreter to repeat something you missed, you may do so.

Do you have any questions about the role or responsibilities of the court interpreter?

{*If Spanish interpretation is to be used, recite the following translation*}:

Yo quiero que usted comprenda la funcion del interprete de la corte. El interprete de corte esta aqui solamente para interpretar las preguntas dirigidas a usted

y para interpretar sus repuestas. Ellos diran solamente lo que nosotros o usted decimos y no agregaran nada a su testimonio, no omitiran nada que usted diga, ni resumiran lo que usted diga. Ellos no son abogados y les esta prohibido dar consejo legal.

Si usted no comprende al interprete de la corte, por favor hagamelo saber. Si usted necesita que el interprete repita algo que usted no capto, puede hacerlo.

Tiene usted alguna pregunta acerca de la funcion o de las responsabilidades del interprete de la corte?

{*If interpretation into any other language is required, recite a translation of the English passage above in that language*.}

Source:

Delaware Judiciary Language Access Plan, p. 27
https://courts.delaware.gov/forms/download.aspx?id=64928

3. GENERAL INSTRUCTIONS

§ 3.8 – English Translation

ENGLISH TRANSLATION

A language other than English was used during this trial. This Court seeks a fair trial for all regardless of the language spoken and regardless of how well a party or witness may or may not use the English language. Bias against or for persons who have little or no proficiency in English because they do not use English is not allowed. Therefore, do not allow the fact that a party or witness required an interpreter to influence you in any way.

The evidence you are to consider is only that provided through the official court interpreter. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning of the non-English words.

{**Comment**: *This instruction is appropriate when there is a juror proficient in English as well as the language of a party or witness that will be translated by an interpreter during the trial. The instruction should be given prior to opening arguments and at the end of the case.*}

Source:

Diaz v. State, Del. Supr., 743 A.2d 1166, 1175 (1999).

4. BURDEN OF PROOF

§ 4.1 – Preponderance of Evidence

BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE

In a civil case such as this one, the burden of proof is by a preponderance of the evidence. Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not. Preponderance of the evidence does not depend on the number of witnesses or exhibits.

If the evidence on any particular point is evenly balanced, the party having the burden of proof has not proved that point by a preponderance of the evidence, and you must find against the party on that point.

In deciding whether any fact has been proved by a preponderance of the evidence, you may, unless I tell you otherwise, consider the testimony of all witnesses regardless of who called them, and all exhibits received into evidence, regardless of who produced them.

{*If applicable*}:

In this particular case, [***plaintiff's name***] must prove all the elements of [***his/her/theirs***] claim of [***state the nature of the claim***] by a preponderance of the evidence. Those elements are as follows:

(1) . . . . [***state element***, ***etc.***]

{*If applicable*}: [***Party's name***] has alleged a [***counterclaim / cross-claim / third-party claim, etc***.] of [***_state claim(s)***]. [***Party's name***] has the burden of proof and must establish all elements of that claim by a preponderance of the evidence. Those elements are as follows:

(1) . . . . [**state element, *etc.***]

{*For an affirmative defense claiming* ***comparative negligence***}:

[***Defendant's name***] has pleaded comparative negligence and therefore has the burden of proving each of the following elements of this defense:

First, that [***plaintiff's name***] was negligent in at least one of the ways claimed by [***defendant's name***]; and

Second, that [***plaintiff's name***]'s negligence was a cause of [***his/her/its***] own injury and therefore was comparatively negligent.

Source:

Taylor v. State, 2000 WL 313501, at *2 (Del. Supr.); *Reynolds v. Reynolds*, Del. Supr., 237 A.2d 708, 711 (1967) (defining preponderance of the evidence); *McCartney v. Peoples Ry. Co.*, Del. Super., 78 A. 771, 772 (1911) (same). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.01 (4th ed. 1987).

10 *Del. C.* § 8132 (elements of comparative negligence); *Duphily v. Delaware Elec. Coop., Inc.*, Del. Supr., 662 A.2d 821, 828 (1995) (basic elements of negligence claim); *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1096-97 (1991) (same); *McGraw v. Corrin*, Del. Supr., 303 A.2d 641 (1973) (comparative negligence).

4. BURDEN OF PROOF

§ 4.2 – Evidence Equally Balanced

EVIDENCE EQUALLY BALANCED

Intentionally Omitted.

4. BURDEN OF PROOF

§ 4.3 – Clear and Convincing Evidence

BURDEN OF PROOF BY CLEAR AND CONVINCING EVIDENCE

[***Plaintiff's name***] must prove the claim by "clear and convincing" evidence. Clear and convincing evidence is a stricter standard of proof than proof by a preponderance of the evidence, which merely requires proof that something is more likely than not. To establish proof by "clear and convincing" evidence means to prove something that is highly probable, reasonably certain, and free from serious doubt.

Source:

See Hudak v. Procek, Del. Supr., 806 A.2d 140, 147 (2002); *Walsh v. Bailey*, Del. Supr., 197 A.2d 331 (1964); *Parke Bancorp Inc. v. 659 Chestnut LLC*, Del. Supr., 217 A.3d 701, 710 (2019); *Santosky v. Kramer*, 455 U.S. 745 (1982).

5. GENERAL NEGLIGENCE

§ 5.1 – Negligence Defined

NEGLIGENCE DEFINED

This case involves claims of negligence. Negligence is the lack of ordinary care; that is, the absence of the kind of care a reasonably prudent and careful person would exercise in similar circumstances. That standard is your guide. If a person's conduct in a given circumstance does not measure up to the conduct of an ordinarily prudent and careful person, then that person was negligent. On the other hand, if the person's conduct does measure up to the conduct of a reasonably prudent and careful person, the person was not negligent.

{**Comment**: *Add the following sentence if* ***not*** *using Jury Instr. No. 5.4, "Negligence is Never Presumed."*}:

The mere fact that an accident occurred is not enough to establish negligence.

Source:

Duphily v. Delaware Elec. Coop., Inc., Del. Supr., 662 A.2d 821, 828 (1995); *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1096-97 (1991); *Robelen Piano Co. v. Di Fonzo*, Del. Supr., 169 A.2d 240 (1961); *Rabar v. E.I. duPont de Nemours & Co.*, Del. Super., 415 A.2d 499, 506 (1980); *DeAngelis v. U.S.A.C. Transport*, Del. Super., 105 A.2d 458 (1954); *Kane v. Reed*, Del. Super., 101 A.2d 800 (1954).

5. GENERAL NEGLIGENCE

§ 5.2 – No Need to Prove All Charges of Negligence

NO NEED TO PROVE ALL CHARGES OF NEGLIGENCE

One party has alleged that the other was negligent in various ways, but a party does not have to be negligent in all these ways to be liable. You may find a party liable if that party was negligent in any one of the ways charged and if that negligence was a proximate cause of the accident.

5. GENERAL NEGLIGENCE

§ 5.3 – No Duty to Anticipate Negligence

NO DUTY TO ANTICIPATE NEGLIGENCE

Nobody is required to anticipate someone else's negligence. A [***driver / person***] is allowed to assume that another [***driver / person***] will not act negligently until [***he/she***] knows or should know that the other person is acting or is about to act negligently. Therefore, a [***driver / person***] is required to act reasonably and prudently under the circumstances of the particular situation.

Source:

Hudson v. Old Guard Ins. Co., 2010 WL 3178426, at *2 (Del. Supr.); *Levine v. Lam*, Del. Supr., 226 A.2d 925, 926-27 (1967); *Biddle v. Haldas Bros.*, Del. Super., 190 A. 588, 595 (1937).

5. GENERAL NEGLIGENCE

§ 5.4 – No Presumption of Negligence

NEGLIGENCE IS NEVER PRESUMED

Negligence is never presumed. It must be proved by a preponderance of the evidence before [***plaintiff's name***] is entitled to recover. No presumption that [***defendant's name***] was negligent arises from the mere fact that an accident occurred.

Source:

Lehner v. Dover Downs, Inc., 2018 WL 2363474, at *2 (Del. Super.); *Brown v. Walgreen Co.*, 2014 WL 7148924, at *2 (Del. Super.); *Hazel v. Delaware Supermarkets, Inc.*, Del. Supr., 953 A.2d 705, 712 (2008); *Collier v. Acme Markets, Inc.*, 1995 WL 715862 at *1 (Del.); *Wilson v. Derrickson*, Del. Supr., 175 A.2d 400 (1961); *Biddle v. Haldas Bros.*, Del. Super., 190 A. 588, 595 (1937).

5. GENERAL NEGLIGENCE

§ 5.5 – Multiple Defendants

MULTIPLE DEFENDANTS

There are several defendants in this case. Some may be liable while others are not. All the defendants are entitled to your fair consideration of their own defenses. If you find against one defendant, that should not affect your consideration of other defendants. Unless I tell you otherwise, all my instructions apply to every defendant.

Source:

Alexander v. Cahill, Del. Supr., 829 A.2d 117, 120 (2003); *Laws v. Webb*, Del. Supr., 658 A.2d 1000, 1007 (1995),*overruled on other grounds*, Del. Supr., *Lagola v. Thomas*, 867 A.2d 891 (2005).; *Diamond State Tel. Co. v. University of Delaware*, Del. Supr., 269 A.2d 52, 56 (1970).

5. GENERAL NEGLIGENCE

§ 5.6 – Apportionment of Liability Among Joint Tortfeasors

JOINT TORTFEASORS

If two or more [***defendants / parties***] are negligent, and their negligence combines to cause an injury, you must determine their relative degrees of fault. Using 100% as the total amount of the [***defendants' / parties'***] negligence, you must decide the percentage of each defendant's negligence [***as well as any comparative negligence of the plaintiff***], if any. I will give you a special verdict form for this purpose. Your answers in this form will enable me to calculate damages for each party.

{*If applicable*}:

The fact that the plaintiff has settled with one of the defendants should have no bearing on your verdict. The Court will take the settlement into account when entering judgment based on your verdict.

Source:

10 *Del. C.* §§ 6302, 6304, 8132; *Campbell v. Robinson*, 2007 WL 1765558, at *2 (Del. Super.); *Alexander v. Cahill*, Del. Supr., 829 A.2d 117, 120 (2003) (addressing settlement of one of the defendants); *Sears Roebuck & Co. v. Huang*, Del. Supr., 652 A.2d 568, 573 (1995); *Medical Ctr. of Delaware v. Mullins*, Del. Supr., 637 A.2d 6 (1994); *Blackshear v. Clark*, Del. Supr., 391 A.2d 747 (1978); *Farrall v. A.C. & S. Co.*, Del. Super., 586 A.2d 662 (1990).

5. GENERAL NEGLIGENCE

§ 5.7 – Violation of a Statute (Negligence *per se*)

NEGLIGENCE AS A MATTER OF LAW

A person is considered negligent if he or she violates a [***statute / regulation***] that has been enacted for others' safety. The violation of [***identify statute / regulation***] is negligence as a matter of law. If you find that [***defendant / plaintiff's name***] has violated the [***statute / regulation***] that I am about to read to you, then you must conclude that [***defendant / plaintiff's name***] was negligent.

{**Comment**: *See Jury Instr. No. 6.6, Motor Vehicle Statutes*}

Source:

Delaware Elec. Coop., Inc. v. Duphily, Del. Supr., 703 A.2d 1202, 1208-09 (1997); *Duphily v. Delaware Elec. Coop., Inc.*, Del. Supr., 662 A.2d 821, 828 (1995); *Wright v. Moffitt*, Del. Supr., 437 A.2d 554, 557 (1981); *Crawford v. Gilbane Bldg. Co.*, Del. Super., 563 A.2d 1066 (1986); *Nance v. Rees*, Del. Supr., 161 A.2d 795, 797 (1960). *See also* PROSSER & KEETON ON TORTS § 36 (5th ed. 1984).

5. GENERAL NEGLIGENCE

§ 5.8 – Intentional Conduct Defined

INTENTIONAL CONDUCT DEFINED

Intentional conduct means conduct that a person undertook with a knowing desire or with a conscious objective or purpose.

Source:

See 11 *Del. C.* § 231(a).

5. GENERAL NEGLIGENCE

§ 5.9 – Reckless Conduct Defined

RECKLESS CONDUCT DEFINED

Reckless conduct reflects a knowing disregard of a substantial and unjustifiable risk. It amounts to an "I don't care" attitude. Recklessness occurs when a person, with no intent to cause harm, performs an act so unreasonable and so dangerous that he or she knows, or should know, that harm will probably result.

Source:

See 11 *Del. C.* § 231(c). *See also Jardel Co., Inc. v. Hughes*, Del. Supr., 523 A.2d 518, 529-30 (1987).

5. GENERAL NEGLIGENCE

§ 5.10 – Willful and Wanton Conduct Defined

WILLFUL AND WANTON CONDUCT DEFINED

Willfulness indicates an intent, or a conscious decision, to disregard the rights of others. Willfulness is a conscious choice to ignore consequences when it is reasonably apparent that someone will probably be harmed.

Wanton conduct occurs when a person, though not intending to cause harm, does something so unreasonable and so dangerous that the person either knows or should know that harm will probably result. It reflects an "I don't care" attitude.

Source:

Jardel Co., Inc. v. Hughes, Del. Supr., 523 A.2d 518, 529-30 (1987); *Eustice v. Rupert*, Del. Supr., 460 A.2d 507, 509-11 (1983); *Yankanwich v. Wharton*, Del. Supr., 460 A.2d 1326, 1331 (1983); *Aastad v. Rigel*, Del. Supr., 272 A.2d 715, 717 (1970); *Wagner v. Shanks*, Del. Supr., 194 A.2d 701 (1963); *Creed v. Hartley*, Del. Supr., 199 A.2d 113 (1962); *Sadler v. New Castle County*, Del. Super., 524 A.2d 18, *aff'd*, Del. Supr., 565 A.2d 917 (1989).

5. GENERAL NEGLIGENCE

§ 5.11 – Plaintiff's Contributory Negligence Not a Defense to Intentional, Reckless, Willful or Wanton Conduct

PLAINTIFF'S NEGLIGENCE NOT A DEFENSE WHERE INTENTIONAL, RECKLESS, WILLFUL OR WANTON CONDUCT FOUND

If you find that [***defendant's name***] acted in a [***intentional, reckless, willful or wanton***] manner, and that this conduct was a proximate cause of the accident and injuries in this case, then even if you find that:

(1) [***plaintiff's name***] was negligent;

(2) this negligence was also a proximate cause of the accident; and

(3) [***plaintiff's name***]'s relative degree of fault was a greater percentage than [***defendant's name***]'s, [***plaintiff's name***]'s negligence does not affect whether [***plaintiff's name***] can recover damages.

I will furnish you with a special verdict form for you to indicate your finding on whether [***defendant's name***] acted in this manner.

{**Comment**: *This instruction will need to be given after Jury Instr. No. 5.12, "Comparative Negligence – Special Verdict Form."*}

Source:

Koutoufaris v. Dick, Del. Supr., 604 A.2d 390, 398-99 (1992); *Green v. Millsboro Fire Co.*, Del. Super., 385 A.2d 1135, *aff'd in part and rev'd in part on other grounds*, Del. Supr., 403 A.2d 286 (1987); *Gott v. Newark Mtrs. Inc.*, Del. Super., 267 A.2d 596 (1970).

5. GENERAL NEGLIGENCE

§ 5.12 – Comparative Negligence – Special Verdict Form

COMPARATIVE NEGLIGENCE - SPECIAL VERDICT FORM

[***Defendant's name***] alleges that [***plaintiff's name***]'s negligence proximately caused the accident. Negligence is negligence no matter who commits it. When the plaintiff is negligent, we call it contributory negligence. Under Delaware law, a plaintiff's contributory negligence does not mean that the plaintiff cannot recover damages from the defendant as long as the plaintiff's negligence was no greater than the defendant's negligence. Instead of preventing a recovery, Delaware law reduces the plaintiff's recovery in proportion to the plaintiff's negligence.

If you find plaintiff's contributory negligence was a proximate cause of the [***accident / injury***], you must determine the degree of that negligence, expressed as a percentage, attributable to [***plaintiff's name***]. Similarly, if you find that one, or more than one, defendant was negligent, you must determine their relative degrees of fault. Using 100% as the total combined negligence of the parties, you must determine what percentage of negligence is attributable to [***plaintiff's name*** / ***co-defendants***]. I will furnish you with a special-verdict form for this purpose. If you find that [***plaintiff's name***]'s negligence is no more than half the total negligence, that is, 50% or less, I will reduce the total amount of [***plaintiff's name***]'s damages

by the percentage of [***his/her***] comparative negligence. If you find that [***plaintiff's name***]'s negligence is more than half, that is, more than 50% of the total negligence, [***plaintiff's name***] may not recover any damages.

Source:

10 *Del. C.* § 8132; Super. Ct. Civ. R. 49; *Helm v. 206 Massachusetts Ave., LLC,* 2014 WL 7272771, at *4 (Del. Supr.); *Nutter v. Christiana Care Health Servs., Inc.*, 2014 WL 1760342, at *1 (Del. Super.); *Moffitt v. Carroll*, Del. Supr., 640 A.2d 169, 173 (1994); *Grand Ventures, Inc. v. Whaley*, Del. Super., 622 A.2d 655, 664 (1992), *aff'd*, Del. Supr., 632 A.2d 63 (1993) (holding court must try to reconcile any apparent inconsistencies in jury's verdict); *Greenplate v. Lowth*, Del. Super., 199 A. 659, 662-63 (1938) (each party entitled to general and specific instructions on applicable law and rights as the pleadings and evidence fairly justify).

6. MOTOR VEHICLES

§ 6.1 – Maintain Proper Lookout

DUTY TO MAINTAIN PROPER LOOKOUT

Drivers have a duty to keep a proper lookout for their own safety. The duty to look implies the duty to see what is in plain view unless some reasonable explanation is offered. A person is negligent not to see what is plainly visible where there is nothing to obscure one's vision, because a person is not only required to look, but also to use the sense of sight in a careful and intelligent manner to see things that a person in the ordinary exercise of care and caution would see under the circumstances.

If you find that any party failed to maintain a proper lookout, you must find that party negligent.

Source:

Trievel v. Sabo, Del. Supr., 714 A.2d 742, 745-46 (1998); 21 *Del. C.* § 4176(b); *Stenta v. Leblang*, Del. Supr., 185 A.2d 759 (1962) (pedestrians); *Floyd v. Lipka*, Del. Supr., 148 A.2d 541, 543-44 (1959) (drivers and pedestrians); *Odgers v. Clark*, Del. Super., 19 A.2d 724, 726 (1941) (drivers); *Willis v. Schlagenhauf*, Del. Super., 188 A. 700, 703 (1936) (drivers). *See also Hudson v. Old Guard Ins. Co.*, Del. Supr.,

3 A.3d 246, 250 (2010) (discussing duty of care in "dart out" cases); *cf. Pagano v. Stradley*, 2017 WL 2691189, at *2-3 (Del. Super.).

6. MOTOR VEHICLES

§ 6.2 – Maintain Proper Control

CONTROL

A driver must keep a vehicle under proper control. This means that the vehicle must be operated at such a speed and with such attention that the driver can stop with a reasonable degree of quickness or steer safely by objects or other vehicles on the highway, depending upon existing circumstances and the likelihood of danger to others.

Therefore, if you find that any party failed to exercise a proper degree of control over a motor vehicle, you must find that party negligent.

Source:

21 *Del. C.* § 4176; *Hazzard v. State*, Del. Supr., 456 A.2d 796, 797 (1983); *State v. Elliott*, Del. O. & T., 8 A.2d 873, 875-76 (1939).

6. MOTOR VEHICLES

§ 6.3 – Right to Assume That Others Will Use Ordinary Care

RIGHT TO ASSUME THAT OTHERS WILL USE ORDINARY CARE

Every driver has the right to assume that others will use ordinary care and obey the rules of the road. This right continues until the driver knows, or should know, that somebody else isn't using ordinary care or obeying the rules of the road.

{**Comment:** *See Jury Instr. No. 5.3 – "No Duty to Anticipate Negligence."}*

Source:

Newnam v. Swetland, Del. Supr., 338 A.2d 560, 561 n.1 (1975); *Wootten v. Kiger*, Del. Supr., 226 A.2d 238, 239 (1967); *Chudnofsky v. Edwards*, Del. Supr., 208 A.2d 516, 519 (1965).

6. MOTOR VEHICLES

§ 6.4 – Duty of Care at an Uncontrolled Intersection

DUTY OF CARE AT AN UNCONTROLLED INTERSECTION

This accident occurred at an uncontrolled intersection. [***Plaintiff's name***] contends that [***he/she***] had the right of way. But even if you determine that [***he/she***] had the right of way, the law requires motorists to keep a proper lookout for other vehicles. A right of way is not absolute; it is only relative. Regardless of having the right of way, a motorist must continuously exercise the due care required by the situation in order to prevent injury to [***himself/herself***] and others.

{**Comment**: *See Jury Instr. No. 6.1 – "Duty to Maintain Proper Lookout."*}

Source:

21 *Del. C.* §§ 4131–4133, 4152–4157; *Bullock v. State*, Del. Supr., 775 A.2d 1043, 1051 (2001); *Szewczyk v. Doubet*, Del. Supr., 354 A.2d 426, 429 (1976) (held that right-of-way statutes do not supersede the common law duty to maintain a proper lookout); *Newnam v. Swetland*, Del. Supr., 338 A.2d 560, 561 (1975); *Wootten v. Kiger*, Del. Supr., 226 A.2d 238, 240 (1967).

6. MOTOR VEHICLES

§ 6.5 – Waving Other Vehicles On

WAVING OTHER VEHICLES ON

[***Plaintiff / defendant's name***] alleges that [***defendant / plaintiff's name***] was negligent in waving [***person's name***] to go forward. Although there is no duty to wave a person forward, once a driver assumes a duty of looking for another, [***he/she***] can be liable if [***he/she***] fails to carry out that duty properly. Even though an act is done gratuitously, if the person performing the act anticipated that another will rely on the act, then a duty existed to perform the act properly.

A driver may rely on the assurance of another if it is reasonable to do so under the circumstances. If you find that [***person's name***] reasonably believed that [***he/she***] was given an assurance by [***plaintiff / defendant's name***] that [***he/she***] could go forward, then [***his/her***] reliance on that assurance is not considered negligence.

Source:

Evans v. Lattomus, 2011 WL 664046 (Del. Super.). *See also Boucher v. Grant*, 74 F. Supp. 2d 444, 448 (D. N.J. 1999).

6. MOTOR VEHICLES

§ 6.6 – Commonly Cited Motor Vehicle Statutory Provisions

COMMONLY CITED MOTOR VEHICLE STATUTES

[***Plaintiff / defendant's name***] charges [***defendant / plaintiff's name***] with violation of the following statutes. If you find that a party has violated a statutory provision, then the violation automatically amounts to negligence by that party.

{ *If applicable, insert after the relevant statute to be cited*}:

Before the violation of any traffic statute can be determined, it must first be established whether, under the circumstances at the time of the accident, an ordinary, prudent motorist would or should have been able to ascertain the duty to [***describe statutory duty***]. If an ordinary, prudent driver would not have been able to ascertain this duty, then a technical violation of a motor vehicle statute will be excused, and there is no negligence as a matter of law. If an ordinary, prudent driver could or should have been able to [***describe statutory duty***], then a violation of this motor vehicle statute by [***defendant / plaintiff's name***] automatically amounts to negligence.

{**Comment**: *The second paragraph is intended for use only in circumstances where the party charged with violating a traffic statute, has made a threshold showing that its statutory duty was not apparent under the circumstances.*}

{**Comment:** *Because so many personal injury claims allege the violation of a motor vehicle statute, the most commonly cited provisions of the code are listed below for your convenience in a form suitable for jury instruction.*}

Source:

Wilmington Country Club v. Cowee, Del. Supr., 747 A.2d 1087, 1094-95 (2000); *Green v. Millsboro Fire Co.*, Del. Supr., 403 A.2d 286, 289 (1979) (holding that before a violation constitutes negligence *per se*, it must be determined that the charged party was aware or should have reasonably been aware of the circumstances giving rise to applicable duty); RESTATEMENT (SECOND) OF TORTS § 288A(2)(b), cmt. f (same); *See also* 21 *Del. C.* §§ 4141-4151 (pedestrians); *Stenta v. Leblang*, Del. Supr., 185 A.2d 759, 761-62 (1962) (pedestrians); *Floyd v. Lipka*, Del. Supr., 148 A.2d 541, 543-44 (1959) (pedestrians). 21 *Del. C.* §§ 4152-4157 (turning vehicles); *Crouse v. United States*, 137 F. Supp. 47 (D. Del. 1955) (turning vehicles). *See also* 21 *Del. C.* §§ 4106, 4134, 4188 (emergency vehicles); *Millsboro Fire Co.*, 403 A.2d 286, 289 (1979) (emergency vehicles); *State Hwy. Dep't v. Buzzato*, Del. Supr., 264 A.2d 347, 352 (1970) (emergency vehicles); *Tolliver v. Moses*, Del. Supr., 700 A.2d 736 (TABLE), 1997 WL 537308 (statutory construction of the term "vehicle" in traffic statute also means "vehicles" and *vice versa*).

§ 6.6.1 – 21 *Del. C.* § 4114(a), (b) and (c) – ***Drive on the right side of the road***

Title 21 *Del. C.* § 4114(a), (b) and (c) provides as follows:

(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

(2) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;

(3) Upon a roadway divided into 3 marked lanes for traffic under the rules applicable thereon; or

(4) Upon a roadway designated and signposted for 1-way traffic.

(b) Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another

vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

(c) Upon any roadway having 4 or more lanes for moving traffic and providing for 2-way movement of traffic, no vehicle shall be driven to the left of the center line of the roadway, except when authorized by signs or markings designating certain lanes to the left side of the center of the roadway for use by traffic not otherwise permitted to use such lanes, or except as permitted under this section. This subsection shall not be construed as prohibiting the crossing of the center line in making a left turn into or from an alley, private roadway, driveway or highway.

* * * * *

§ 6.6.2 – 21 *Del. C.* § 4115 – ***Keep to the right side of the road***

Title 21 *Del. C.* § 4115 provides as follows:

Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than 1 line of traffic in each direction and each driver shall give to the other at least one half of the main-traveled portion of the roadway as nearly as possible.

* * * * *

§ 6.6.3 – 21 *Del. C.* § 4122 – ***Stay in your lane***

Title 21 *Del. C.* § 4122 provides as follows:

Whenever any roadway has been divided into 2 or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply:

(1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

(2) Upon a roadway which is divided into 3 lanes for 2-way traffic, a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway is clearly visible and such center lane is clear of oncoming traffic within a safe distance, or in preparation for a left turn or where such center lane is at the time allocated exclusively by traffic-control devices to traffic moving in the direction the vehicle is proceeding.

(3) Traffic-control devices may be erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway, and drivers of vehicles shall obey the directions of every such traffic-control device.

(4) Traffic-control devices may be installed prohibiting the changing of lanes on sections of roadway and drivers of vehicles shall obey the directions of every such device.

* * * * *

§ 6.6.4 – 21 *Del. C.* § 4123 – ***Following too closely***

Title 21 *Del. C.* § 4123 provides as follows:

(a) The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

(b) The driver of any truck or vehicle drawing another vehicle when traveling upon a roadway outside of a business or residence district, and which is following another vehicle, shall, whenever conditions permit, leave sufficient space, but not less than 300 feet, so that an overtaking vehicle may enter and occupy such space without danger, except that this shall not prevent a motor vehicle drawing another vehicle from overtaking and passing any vehicle or combination of vehicles.

(c) Vehicles being driven upon any roadway outside of a business or residence district in a caravan or motorcade, whether or not towing other vehicles, shall be so operated as to allow sufficient space between each such vehicle or

combination of vehicles so as to enable any other vehicle to enter and occupy such space without danger. This provision shall not apply to funeral processions.

* * * * *

§ 6.6.5 – 21 *Del. C.* § 4132 – ***Yield to oncoming traffic before making left turn***

Title 21 *Del. C.* § 4132 provides as follows:

The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard.

* * * * *

§ 6.6.6 – 21 *Del. C.* § 4154 – ***Moving a stopped car***

Title 21 *Del. C.* § 4154 provides as follows:

No person shall cause a vehicle to be moved which is stopped, standing or parked unless and until such movement can be made with reasonable safety.

* * * * *

§ 6.6.7 – 21 *Del. C.* § 4155 – ***Turning Vehicle***

Title 21 *Del. C.* § 4155 provides as follows:

(a) No person shall . . . turn a vehicle from a direct course or move right or left upon a roadway . . . until such movement can be made with safety without interfering with other traffic. No person shall so turn any vehicle without giving an appropriate signal . . .

(b) A signal of intention to turn or move right or left when required shall be given continuously during not less than the last 300 feet or more than one-half mile travelled by the vehicle before turning.

* * * * *

§ 6.6.8 – 21 *Del. C.* § 4164(a) – ***Stop and look before going through an intersection***

Title 21 *Del. C.* § 4164(a) provides as follows:

(a) Except when directed to proceed by police officers or traffic-control devices, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop at a marked stop sign, but if none, before entering the crosswalk on the near side of the intersection or if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection.

* * * * *

§ 6.6.9 – 21 *Del. C.* § 4164(b) – ***Yield the Right of Way***

Title 21 *Del. C.* § 4164(b) provides as follows:

(b) The operator of any vehicle who has come to a full stop as provided in subsection (a) of this section shall yield the right-of-way to any vehicle or pedestrian in the intersection or to any vehicle approaching on another roadway so closely as to constitute an immediate hazard and shall not enter into, upon or across such roadway or highway until such movement can be made in safety.

* * * * *

§ 6.6.10 – 21 *Del. C.* § 4168(a) – ***Speeding***

Title 21 *Del. C.* § 4168(a) provides as follows:

(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and without having regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any . . . vehicle . . . on . . . the highway, in compliance with legal requirements and the duty of all persons to use due care.

* * * * *

§ 6.6.11 – 21 *Del. C.* § 4168(b) – **E*xcessive speed in hazardous conditions***

Title 21 *Del. C.* § 4168(b) provides as follows:

(b) The driver of every vehicle shall, consistent with the requirements of subsection (a) of this section, drive at an appropriate speed when approaching and crossing an intersection or railway grade crossing, when approaching any going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway and when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

* * * * *

§ 6.6.12 – 21 *Del. C.* § 4171(a) – ***Driving too slowly***

Title 21 *Del. C.* § 4171(a) provides as follows:

(a) No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law.

* * * * *

§ 6.6.13 – 21 *Del. C.* § 4172(a), (b) and (c) – ***Drag racing***

Title 21 *Del. C.* § 4172(a) provides as follows:

(a) No person shall drive any vehicle in any race, speed competition or contest, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration and no person shall aid, abet, promote, assist or in any manner participate in any such race, competition, contest, test or exhibition.

Title 21 *Del. C.* § 4172(b) provides as follows:

(b) No person shall accelerate or try to accelerate his vehicle or any of its tires, regardless of whether the vehicle is stationary or in motion, at a rate which causes the drive wheels to spin or slip on the road surface, to produce smoke from tire slippage, or to leave visible tire acceleration marks on a highway, ground, or other surface. This subsection shall not apply during periods of inclement weather unless such conduct is done in willful or wanton disregard for the safety of persons or property.

Title 21 *Del. C.* § 4172(c) provides as follows:

(c) No owner or person in charge of a vehicle shall permit his vehicle or any vehicle under his control to be used by another person for any of the purposes

listed in subsection (a) or (b) of this section. If any vehicle is witnessed by a police officer to be in violation of this section and the identity of the operator is not otherwise apparent, the person in whose name such vehicle is registered as the owner shall be held prima facie responsible for such violation.

* * * * *

§ 6.6.14 – 21 *Del. C.* § 4175(a) – ***Reckless driving***

Title 21 *Del. C.* § 4175(a) provides as follows:

(a) No person shall drive any vehicle in willful or wanton disregard for the safety of persons or property.

* * * * *

§ 6.6.15 – 21 *Del. C.* § 4176(a) and (b) – ***Careless driving / Inattentive driving***

Title 21 *Del. C.* § 4176(a) provides as follows:

(a) Whoever operates a vehicle in a careless or imprudent manner, or without due regard for the road, weather and traffic conditions then existing, shall be guilty of careless driving.

Title 21 *Del. C.* § 4176(b) provides as follows:

(b) Whoever operates a vehicle and who fails to give full time and attention to the operation of the vehicle, or whoever fails to maintain a proper lookout while operating the motor vehicle, shall be guilty of inattentive driving.

* * * * *

§ 6.6.16 – 21 *Del. C.* § 4177(a) – ***Driving under the influence***

Title 21 *Del. C.* § 4177(a) provides as follows:

(a) No person shall drive a vehicle:

(1) When the person is under the influence of alcohol;

(2) When the person is under the influence of any drug;

(3) When the person is under the influence of any combination of alcohol and any drug;

(4) When the person's [blood] alcohol concentration is .08 [percent] or more; or

(5) When the person's [blood] alcohol concentration is, within 4 hours after the time of driving, .08 [percent] or more. Notwithstanding any other provision of the law to the contrary, a person is guilty under this subsection, without regard to the person's alcohol concentration at the time of driving, if the person's alcohol concentration is, within 4 hours after the time of driving

.08 or more and that alcohol concentration is the result of an amount of alcohol present in, or consumed by the person when that person was driving.

* * * * *

§ 6.6.17 – 21 *Del. C.* § 4176C – ***Electronic Communication Devices***

21 *Del. C.* § 4176C provides in part as follows:

(a) No person shall drive a motor vehicle on any highway while using an electronic communication device while such motor vehicle is in motion.

(b) For the purposes of this section, the following terms shall mean:

(1) "Cell telephone" shall mean a cellular, analog, wireless or digital telephone.

(2) "Electronic communication device" shall mean a cell telephone, personal digital assistant, electronic device with mobile data access, laptop computer, pager, broadband personal communication device, 2-way messaging device, electronic game, or portable computing device.

(3) "Engages or engaging in a call" shall mean when a person talks into or listens on an electronic communication device, but shall not mean when a person dials or punches a phone number on an electronic communication device.

(4) “Hands-free electronic communication device” shall mean an electronic communication device that has an internal feature or function, or that is equipped with an attachment or addition, whether or not permanently part of such electronic communication device, by which a user engages in a call without the use of either hand or both hands.

(5) “Hands-free equipment” shall mean the internal feature or function of a hands-free electronic communication device or the attachment or addition to a hands-free electronic communication device by which a user may engage in a call without the use of either hand or both hands.

(6) “Using” shall mean holding in a person’s hand or hands an electronic communication device while: viewing or transmitting images or data, playing games, composing, sending, reading, viewing, accessing, browsing, transmitting, saving or retrieving e-mail, text messages or other electronic data; or engaging in a call.

6. MOTOR VEHICLES

§ 6.7 - Effect of Guilty Plea

EFFECT OF PLEA OF GUILTY

The evidence shows that [***plaintiff / defendant's name***] pleaded guilty to a motor-vehicle charge. A guilty plea to a charge of violating a motor-vehicle statute is admissible in evidence as an admission against interest. Once admitted, it is up to you to draw any conclusions about the guilty plea. Remember to base your decision on all the facts and circumstances of the case, including [***plaintiff / defendant's name***]'s explanation for pleading guilty.

{**Comment**: See *Jury Instr. No. 23.19,"Plea of Nolo Contendere." Pleas of no contest are not admissible in evidence.*}

Source:

Boyd v. Hammond, Del. Supr., 187 A.2d 413, 416 (1963); *Torres v. Bishop*, 2021 WL 6053870, at *6 (Del. Super.) (payment of voluntary assessment). *See also* D.R.E. 801(d)(2), 803(8).

6. MOTOR VEHICLES

§ 6.8 - Guest Statute (Repealed)

GUEST STATUTE (REPEALED)

{**Comment**: *The application of the Guest Statute with respect to motor vehicles has been repealed.*}

7. HEALTHCARE - MEDICAL NEGLIGENCE

§ 7.1 – Medical Negligence Definition

DEFINITION OF MEDICAL NEGLIGENCE

A plaintiff must prove three elements to establish medical negligence: (1) a "breach" or violation of the standard of care; (2) that causes injury; and (3) resulting damages. The "standard of care" is that degree of skill and care ordinarily exercised by healthcare providers of the same or similar medical specialty, using reasonable care and diligence.

Every healthcare provider is held to the standard of care and knowledge commonly possessed by members in good standing of his or her profession and specialty. It is not the standard of care of the most highly skilled, nor is it necessarily that of average members of this profession, since those who have somewhat less than average skills may still possess the degree of skill and care to treat patients competently. [***Plaintiff's name***] cannot prove that [***defendant's name***] was negligent merely by showing that another healthcare provider would have acted differently.

Medical negligence is never presumed. Instead, medical negligence occurs when a healthcare provider does not meet the applicable standard of care. Simply

because a person is injured while under the care of a healthcare provider does not mean medical negligence occurred.

Delaware law requires "expert medical testimony" to prove medical negligence. [P***laintiff's name***] must present expert medical testimony showing that the alleged deviation from the applicable standard of care caused the injury. You may not guess about the standard of care that applies to [***defendant's name***], or whether the breach of that standard was a cause of harm to [***plaintiff's name***]. When determining the applicable standard, you must consider only expert testimony, then decide whether the standard was met, and – if it was not – determine if the breach of the standard of care caused [***plaintiff's name***] harm. If the expert witnesses have disagreed on the applicable standard of care, on whether it was met, or on the question of the cause of harm, you must decide what expert testimony to accept and what expert testimony to reject.

If you find that [***defendant's name***] failed to meet this standard and that this failure was a proximate cause of harm, then your verdict must be for [***plaintiff's name***]. [***I will explain what "proximate cause" means in a moment***.] On the other hand, if [***defendant's name***] met this standard, then your verdict must be against [***plaintiff's name***] and in favor of [***defendant's name***].

Source:

18 *Del. C.* §§ 6852, 6801(7), 6852, 6853, 6954; *Norman v. All About Women, P.A.*, Del. Supr., 193 A.3d 726, 730 (2018); *Bryson v. Delaware Occupational Health Res., LLC*, 2017 WL 2392501, at *2-3 (Del. Super.); *Derrickson v. Pruden*, 2011 WL 2083884, at *2 (Del. Super.); *Grace v. Morgan*, 2006 WL 2065172, at *1 (Del. Super.) (applicable standard of care applicable for a professional can *only* be established by way of expert testimony); *Balan v. Horner*, Del. Supr., 706 A.2d 518, 520-21 (1998) (noting physicians with different specialties may share concerns about the diagnosis and treatment of a common medical condition, and where there are concurrent fields of expertise, a common standard of care may be shared); *McKenzie v. Blasetto*, Del. Supr., 686 A.2d 160, 163 (1996) (application of a national standard of care may be used when that standard is found to be the same as the relevant Delaware standard); *Medical Ctr. of Delaware, Inc. v. Lougheed*, Del. Supr., 661 A.2d 1055, 1057-59 (1995); *Baldwin v. Benge*, Del. Supr., 606 A.2d 64, 68 (1992); *Riggins v. Mauriello*, Del. Supr., 603 A.2d 827, 829-31 (1992); *Register v. Wilmington Med. Ctr., Inc.*, Del. Supr., 377 A.2d 8, 10 (1977); *DiFilippo v. Preston*, Del. Supr., 173 A.2d 333, 336-37 (1961), *cf. Peters v. Gelb*, Del. Supr., 314 A.2d 901, 903-04 (1973) (expert witness who remained in good professional standing but had not actually practiced the particular procedure upon which his

opinion was sought could be found by the court as not qualified to testify as an expert).

Sostre v. Swift, Del. Supr., 603 A.2d 809, 812 (1992); *Burkhart v. Davies*, Del. Supr., 602 A.2d 56, 59-60 (1991), *cert. denied*, 504 U.S. 912 (1992); *Russell v. Kanaga*, Del. Supr., 571 A.2d 724, 732 (1990); *Loftus v. Hayden*, Del. Supr., 391 A.2d 749 (1978); *Ewing v. Beck*, Del. Supr., 520 A.2d 653 (1987); *Larrimore v. Homeopathic Hosp. Ass'n of Delaware*, Del. Supr., 181 A.2d 573, 576-77 (1962) (standard of care for nurses, as for physicians, is a matter of applying the appropriate standard required of the nursing profession in the given circumstances).

7. HEALTHCARE - MEDICAL NEGLIGENCE

§ 7.2 – Informed Consent

INFORMED CONSENT

[***Plaintiff's name***] alleges that [***defendant's name***] committed medical negligence by failing to obtain [***plaintiff's name***]'s informed consent to perform a [***describe treatment, surgery, procedure, etc.***]. "Informed consent" is a patient's consent to a procedure after the healthcare provider has explained both the nature of the proposed procedure or treatment and the risks and alternatives that a reasonable patient would want to know in deciding whether to undergo the procedure or treatment. The explanation must be reasonably understandable to a general lay audience.

You may consider whether the healthcare provider supplied information to the extent customarily given to patients by other healthcare providers in the same or similar field of medicine at the time of the [***treatment, procedure, surgery, etc.***]. The healthcare provider does not have to advise of hazards that are:

(1) inherent in a treatment, and

(2) generally known to people of ordinary intelligence and awareness in a position similar to that of [***plaintiff's name***].

To prevail on this claim, [***plaintiff's name***] must prove by a preponderance of the evidence:

(1) that before the procedure, [***defendant's name***] failed to tell [***him/her***] about certain risks of the procedure or alternatives to it; and

(2) that a reasonable patient would have considered this information to be important in deciding whether to have the procedure;

(3) that [***plaintiff's name***] has suffered injury as a proximate result of the procedure; and

(4) that a reasonably prudent patient would have declined to undergo the procedure if the risks had been known.

Source:

18 *Del. C.* §§ 6801(6), 6852(a); *See* 18 *Del. C.* § 6852(b) for defenses; *Shapira v. Christiana Care Health Services, Inc*., Del. Supr., 99 A.3d 217, 221-22 (2014); *Spencer v. Goodill*, Del. Supr., 17 A.3d 552 (2011); *Spencer v. Goodill*, 2009 WL 4652960, at *1-6 (Del. Super.); *Wagner v. Olmedo*, Del. Supr., 365 A.2d 643 (1976) (duties to disclose may vary according to accepted conventions of medical practice in community); *Moore v. Garcia*, 1995 WL 339176 (Del. Super.); *Oakes v. Gilday*, Del. Super., 351 A.2d 85, 87 (1976).

7. HEALTHCARE – MEDICAL NEGLIGENCE

§ 7.3 – Agency of Treating Healthcare Providers

AGENCY OF TREATING HEALTHCARE PROVIDERS

[***Plaintiff's name***] seeks to recover damages from [***healthcare facility***] on grounds that it/they is/are liable for the negligence of the [***healthcare provider***] whose conduct is the subject of this lawsuit.

{**Comment**: *If agency is **not** contested, insert the following*}:

Because the healthcare personnel who treated [***plaintiff's name***] at [***defendant healthcare facility***] [***are / are not***] employees or agents of the [***defendant's facility***], the facility [***is / is not***] responsible for their acts or omissions.

{**Comment**: *If agency **is** contested, see Jury Instr. No. 18.1, "Agent's Negligence Imputed to Principal" for additional language.*}

{**Comment**: *The "Apparent Agency" of a healthcare facility for the conduct of a healthcare provider, who is an independent contractor to a facility, may be considered with the following instruction; note: a special verdict form will be required*}:

A hospital is liable for the conduct of a health care provider who is not a hospital employee if the health care provider was the apparent agent of the hospital. To establish apparent agency, [***plaintiff's name***] must prove that the hospital,

through its own acts or failures to act, has caused the patient to reasonably believe the treatment is being provided by the hospital's agent.

Source:

Verrastro v. Bayhosptalists, LLC, Del. Supr., 208 A.3d 720, 724-26 (2019); *Lewis v. McCracken*, 2017 WL 2875388, at *4-5 (Del. Super.); *Reyes v. Kent Gen. Hosp., Inc.*, Del. Supr., 487 A.2d 1142, 1144 (1984); *Fulton v. Quinn*, 1993 WL 19674 at *4, *10 (Del. Super.) ("One who represents that another is his servant or agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused [by] a lack of care or skill of the one appearing to be a servant or other agent as if he were such."); *Vanaman v. Milford Mem'l. Hosp., Inc*., Del. Supr., 272 A.2d 718, 720-22 (1970); RESTATEMENT (SECOND) OF AGENCY §§ 267, 272 (1958); RESTATEMENT (THIRD) OF AGENCY § 3.03 (1958); *see also 84 Lumber Co. v. Derr*, 2010 WL 2977949, at *3 (Del. Super.).

7. HEALTHCARE – MEDICAL NEGLIGENCE

§ 7.4 – Duty of Patients to Describe Symptoms Truthfully (Superseded)

DUTY OF PATIENTS TO DESCRIBE SYMPTOMS TRUTHFULLY

{**Comment**: *This duty has been superseded the adoption of comparative negligence, under which a healthcare provider might be found liable for negligent treatment despite the patient's contributory negligence.*}

Source:

10 *Del. C.* § 8132 (comparative negligence); Super. Ct. Civ. R. 49 (special verdicts and interrogatories); *Rochester v. Katalan*, Del. Supr., 320 A.2d 704, 709 (1974).

7. HEALTHCARE – MEDICAL NEGLIGENCE

§ 7.5 – Medical Negligence Review Panel (Repealed)

OPINION OF MEDICAL NEGLIGENCE REVIEW PANEL

Source:

18 *Del. C.* § 6812 repealed effective Aug. 29, 2024; for pre-repeal, *see Russell v. Kanaga*, Del. Supr., 571 A.2d 724, 728-30 (1990); *see generally Robinson v. Mroz*, Del. Super., 433 A.2d 1051 (1981).

7. HEALTHCARE – MEDICAL NEGLIGENCE

§ 7.6 – Medical Examiner's Records

MEDICAL EXAMINER'S RECORDS

The Chief Medical Examiner's death certificate, autopsy report, and records have been introduced into evidence to explain how [***decedent's name***] died. When determining the cause of [***decedent's name***]'s death, you should consider these documents.

Source:

29 *Del. C.* § 4710(a), (d).

8. PROFESSIONAL NEGLIGENCE (NON-MEDICAL)

§ 8.1 – Duty of Professional

DUTY OF A PROFESSIONAL

[***Plaintiff's name***] has alleged that [***defendant's name***] was negligent in [***identify the alleged negligent conduct***]. One who undertakes to render services in the practice of a profession or trade is always required to exercise the skill and knowledge normally held by members in good standing of that profession or trade in communities similar to this one.

If you find that [***defendant's name***] held [***himself / herself / itself***] out as having a particular degree of skill in [***his/her***] trade or profession, then the degree of skill required of [***defendant's name***] is that which [***he/she/it***] held [***his/her/itself***] out as having.

Source:

Abegglan v. Berry Refrigeration Co., 2005 WL 6778336, at *2-3 (Del. Super.); *Tydings v. Loewnstein*, Del. Supr., 505 A.2d 443, 445 (1986); *Seiler v. Levitz Furniture Co. of E. Region, Inc.*, Del. Supr., 367 A.2d 999, 1007-08 (1976); *Sweetman v. Strescon Indus., Inc.*, Del. Super., 389 A.2d 1319, 1324 (1978). *See also* RESTATEMENT (SECOND) OF TORTS § 299A.

8. PROFESSIONAL NEGLIGENCE (NON-MEDICAL)

§ 8.2 – Duty of Specialist (*See* 7.1 or 8.1)

DUTY OF SPECIALIST

{**Comment**: *See Jury Instr. Nos. 7.1, "Healthcare Providers" and 8 .1,"Professions and Trades."*}

8. PROFESSIONAL NEGLIGENCE (NON-MEDICAL)

§ 8.3 – Attorney Negligence

ATTORNEY NEGLIGENCE

An attorney has the duty to possess and exercise the degree of learning and skill ordinarily held by an attorney practicing in this community under the same circumstances. A failure by [***defendant's name***] to conform to this duty is negligence and constitutes what is known as legal negligence. [***Plaintiff's name***] must prove by a preponderance of the evidence that:

(1) an attorney-client relationship existed between [***defendant's name***] and [***plaintiff's name***];

(2) [***defendant's name***] negligently [***describe duty***]; and

(3) such negligence proximately caused a loss to [***plaintiff's name***].

If you find that [***plaintiff's name***] has failed to prove any one of these elements, then you must find for [***defendant's name***].

{**Comment**: *Depending upon the facts of the case, an expert may be required to testify on the issue of negligence and proximate cause.*}

Source:

Phillips v. Wilks, Lukoff & Bracegirdle, LLC, 2014 WL 4930693, at *3 (Del. Supr.), *as corrected* (Oct. 7, 2014); *Brett v. Berkowitz*, Del. Supr., 706 A.2d 509, 517-18 (1998) (holding out-of-state expert must be "well acquainted and thoroughly conversant" with standard of care required of attorneys in the State of Delaware); *Thompson v. D'Angelo*, Del. Supr., 320 A.2d 729, 734 (1974); *Vredenburgh v. Jones*, Del. Ch., 349 A.2d 22, 38-40 (1975) (self-dealing by fiduciary); *Pusey v. Reed*, Del. Super., 258 A.2d 460, 461 (1969), *overruled on other grounds*, *Starun v. All Am. Eng'g Co.*, Del. Supr., 350 A.2d 765 (1975).

8. PROFESSIONAL NEGLIGENCE (NON-MEDICAL)

§ 8.4 – Professional Negligence

PROFESSIONAL NEGLIGENCE

A [***identify profession***] has the duty to possess and exercise ordinary care and diligence in the application of [***his/her***] professional knowledge. A failure by [***defendant's name***] to conform to this duty is negligence. [***Plaintiff's name***] must prove by a preponderance of the evidence that:

(1) a professional relationship existed between [***defendant's name***] and [***plaintiff's name***];

(2) [***defendant's name***] negligently [***describe professional service***]; and

(3) such negligence proximately caused a loss to [***plaintiff's name***].

If you find that [***plaintiff's name***] has failed to prove any one of these elements, then you must find for [***defendant's name***].

Source:

Coleman v. PricewaterhouseCoopers, LLC, Del. Supr., 854 A.2d 838, 842 (2004) (accountant negligence malpractice); *Moss Rehab v. White*, Del. Supr., 692 A.2d 902, 905-09 (1997) (educational negligence not cognizable); *Isaacson, Stolper & Co. v. Artisans' Sav. Bank*, Del. Supr., 330 A.2d 130, 132 (1974) (accountant negligence); *Rudginski v. Pullella*, Del. Super., 378 A.2d 646 (1977) (negligent installation of septic tank sewage disposal system); *Pack & Process, Inc. v. Celotex Corp.*, Del. Super., 503 A.2d 646 (negligent roof installation); *Hunter v. Quality Homes*, Del. Super., 68 A.2d 620 (negligent workmanship)

9. PRODUCTS LIABILITY

§ 9.1 – Negligent Manufacture of a Defective Product

NEGLIGENT MANUFACTURE OF A DEFECTIVE PRODUCT

A manufacturer of a product such as [***identify product***] owes a duty to the public and to any users of the product to exercise reasonable care, skill, and diligence in making the product.

A manufacturer is negligent if it fails to exercise reasonable care in making its product such that the product contains a manufacturing defect when placed into the stream of commerce. The mere fact that an accident occurs does not mean that the manufacturer was necessarily negligent. The test is whether [***defendant's name***] used the reasonable skill, care, and diligence of an ordinarily prudent manufacturer in making the product.

Source:

Nacci v. Volkswagen of Am., Inc., Del. Super., 325 A.2d 617, 620 (1974). *See also Cline v. Prowler Indus. of Maryland, Inc.*, Del. Supr., 418 A.2d 968 (1980) (declining to adopt theory of strict liability per § 402A of the Restatement for sales of goods, due to preeminence of UCC).

9. PRODUCTS LIABILITY

§ 9.2 – Manufacturer's Compliance with Specifications

MANUFACTURER'S COMPLIANCE WITH SPECIFICATIONS

The manufacturer of a product built in accordance with another entity's plans and specifications is not liable for damages caused by a defect in the plans unless they are so obviously dangerous that no reasonable [***person / manufacturer / fabricator***] would follow them.

Source:

Castaldo v. Pittsburgh-Des Moines Steel Co., Inc., Del. Supr., 376 A.2d 88, 90 (1977); *see also* RESTATEMENT (SECOND) OF TORTS § 399 (1965 and App.).

9. PRODUCTS LIABILITY

§ 9.3 – Manufacturer / Seller's Duty to Warn – Consumer Goods

MANUFACTURER / SELLER OF CONSUMER GOODS – DUTY TO WARN

A [***manufacturer / seller***] must warn about the risks of its product when it knows, or should know, that the product involves a risk of harm when used for the purpose supplied. The standard for determining the manufacturer's duty to warn is whatever a reasonably prudent manufacturer engaged in the same activity would have done. The duty extends not only to the immediate purchaser but also to anyone else who might ordinarily face a risk of harm from the product.

This duty to warn exists only when the [***manufacturer / seller***] has reason to believe that the product's users are not aware of the risk of harm. There is no duty to warn when the user has actual knowledge of the danger. A manufacturer is not required to warn of obvious risks that are generally known and recognized.

Source:

Brower v. Metal Indus., Inc., Del. Supr. 719 A.2d 941, 944-47 (1998); *In re Asbestos Litig.*, Del. Supr., 799 A.2d 1151, 1152-53 (2002); *In re Asbestos Litig. (Mergenthaler)*, Del. Super., 542 A.2d 1205, 1208-12 (1986) (adopting sophisticated purchaser defense); *Graham v. Pittsburgh Corning Corp.*, Del. Super., 593 A.2d 567, 568 (1990); *Wilhelm v. Globe Solvent Co.*, Del. Super., 373 A.2d 218 (1977), *aff'd in part, rev'd in part on other grounds*, Del. Supr., 411 A.2d 611 (1979). *See also* RESTATEMENT (SECOND) OF TORTS § 388 (1965); PROSSER & KEETON ON TORTS §§ 95A, 96, 99.

9. PRODUCTS LIABILITY

§ 9.4 – Sophisticated Purchaser

SOPHISTICATED PURCHASER

The duty to warn does not apply when the manufacturer supplies a product to a "sophisticated purchaser." A sophisticated purchaser is one who the manufacturer knows or reasonably believes is aware of the risk of danger. There is no duty to warn the purchaser or its agents about the risks of harm unless the manufacturer knows or has reason to believe that the required warning will fail to reach the agents, who are the eventual users of the product.

{**Comment**: *This defense almost always involves agents who are employees of the purchaser*.}

Source:

Ramsey v. Georgia S. Univ. Advanced Dev. Ctr., Del. Supr. 189 A.3d 1255, 1280-84 (2018); *see In re Asbestos Litig.*, Del. Supr., 799 A.2d 1151, 1153 n.2 (2002); *see also In re Asbestos Litig. (Mergenthaler)*, Del. Super., 542 A.2d 1205, 1208-1212 (1986) (adopting the "sophisticated purchaser" defense); *Wilhelm v. Globe Solvent Co.*, Del. Super., 373 A.2d 218 (1977), *aff'd in part, rev'd in part on other grounds*, Del. Supr., 411 A.2d 611 (1979). *See also* RESTATEMENT (SECOND) OF TORTS § 388 (1965 and App.); PROSSER & KEETON ON TORTS §§ 95A, 96, 99.

9. PRODUCTS LIABILITY

§ 9.5 – Negligent Design of a Product

NEGLIGENT DESIGN OF A PRODUCT

A manufacturer owes a duty to use reasonable care, skill, and diligence in designing its product to minimize all foreseeable risks. A manufacturer must reasonably anticipate the environment in which the product is normally used and must design the product to minimize foreseeable risks of harm that may result from using the product in such an environment.

To determine whether [***defendant's name***] acted reasonably in designing [***identify product***], you may consider:

(1) the purpose of the product;

(2) its usefulness and desirability;

(3) the likelihood of injury from its ordinary use;

(4) the nature and severity of likely injury;

(5) the obviousness of danger in the ordinary use of the product;

(6) the ability to eliminate the danger without making the product less useful, or creating other risks to the user;

(7) the availability of a feasible alternative design;

(8) the cost of any alternative design; and

(9) the likelihood of consumer acceptance of a product with an alternative design.

Although a manufacturer has a duty to exercise reasonable care, the manufacturer is not required to design a product that is foolproof or incapable of producing injury.

To prove that [***defendant's name***] was negligent, [***plaintiff's name***] must prove by a preponderance of the evidence that [***defendant's name***] failed to use reasonable care, skill, and diligence in designing its product.

{**Comment**: *Although a factor may be listed above, it does not necessarily mean that it should be used in every charge on negligent design. Each of the factors should be considered on a case by case basis in accordance with the evidence presented at trial.*}

Source:

Brower v. Metal Indus., Inc., Del. Supr., 719 A.2d 941, 944 (1998); *Massey-Ferguson, Inc. v. Wells*, Del. Supr., 383 A.2d 640, 642 (1978) (adopting RESTATEMENT (SECOND) OF TORTS §§ 395, 398 (1965 & App.)); *Nacci v. Volkswagen of Am., Inc.*, Del. Super., 325 A.2d 617, 620 (1974).

9. PRODUCTS LIABILITY

§ 9.6 – Seller's Duty to Inspect

SELLER'S DUTY TO INSPECT

Generally, a seller is under no duty to inspect the products it sells. To find a seller negligent, you must make two findings, that:

(1) the manufacturer was negligent in the [***design / manufacture***] of the product; and

(2) [***seller's name***] either had actual knowledge of a [***negligent design / manufacturing defect***] in the product or had reason to believe that the product was negligently [***designed / manufactured***].

{**Comment**: *See Jury Instr. No. 9.7, "Sealed Container Defense" for definition of "seller*."}

Source:

Behringer v. William Gretz Brewing Co., Del. Super., 169 A.2d 249, 253 (1961).

9. PRODUCTS LIABILITY

§ 9.7 – Sealed Container Defense

SEALED CONTAINER DEFENSE

A seller is not liable for defects in a product that is received by it in a sealed container and sold in an unaltered form. This defense does not apply, however, if the seller has knowledge of the defects, or if the seller reasonably could have discovered the defects while the product was in its possession. The burden of proving this defense is on [***seller's name***].

A seller is an individual or entity, other than the manufacturer, who is regularly engaged in the wholesale, retail, or distribution of a product. [***Sellers include a lessor or bailor regularly engaged in the business of the lease or bailment of the product.***]

{**Comment**: *Other subsections of 18 Del. C. § 7001 disallow the sealed container defense under certain circumstances and should be reviewed to determine their applicability to each individual case*.}

Source:

18 *Del. C.* § 7001; *In re Asbestos Litig.*, Del. Supr., 832 A.2d 705, 710 (2003); *Smith v. DaimlerChrysler Corp.*, 2002 WL 31814534, at *5 (Del. Super).

9. PRODUCTS LIABILITY

§ 9.8 – Strict Liability – Leased Property / Bailments

STRICT LIABILITY – LEASED PROPERTY

One who leases a product that is in defective condition and is unreasonably dangerous to the user of the product, or to the user's property, is strictly liable, without proof of negligence, if:

(1) the lessor is engaged in the business of leasing such products; and

(2) the product is expected to, and does, reach the user without substantial change in its condition when leased.

A substantial change occurs when the leased product is changed by someone other than the lessor in a way that the lessor could not have reasonably foreseen, given the product's intended use.

This liability applies even if the lessor exercised all possible care in preparing and leasing the product.

{**Comment**: *This instruction is based on language of* RESTATEMENT (SECOND) OF TORTS § 402A (1965) *and Martin v. Ryder Truck Rental, Inc., Del. Supr., 353 A.2d 581 (1976).*}

Source:

6 *Del. C.* §§ 2A-210 to 2A-216 (1994) (adopting product liability provisions of Article 2A of the UCC). *See also Martin v. Ryder Truck Rental, Inc.*, Del. Supr., 353 A.2d 581, 586 (1976) (adopting theory of strict liability, as articulated in § 402A of the RESTATEMENT (SECOND) OF TORTS, with regard to the lease or bailment of goods); *accord Golt by Golt v. Sports Complex, Inc.*, Del. Super., 644 A.2d 989, 991-92 (1994).

{**Comment**: *The language of Article 2A (lease of goods) mirrors that of Article 2 (sale of goods) and would imply that under previous Delaware common law, the theory of strict liability has not been adopted by Article 2A. See, e.g., Cline v. Prowler Indus. of Maryland, Inc., Del. Supr., 418 A.2d 968 (1980). The Delaware drafters of Article 2A indicated, however, that the holding of Martin v. Ryder Truck Rentals, that adopted the common law theory of strict liability for leased or bailed goods, would not be abrogated by the legislature's enactment of Article 2A. Del. Supr., 353 A.2d 581, 586 (1976). See 68 Del. Laws 1994, synopsis (drafter's comments).}*

9. PRODUCTS LIABILITY

§ 9.9 – Magnitude of the Risk of Harm

MAGNITUDE OF THE RISK OF HARM

The degree of care of a manufacturer depends on how great the risk is. The magnitude of the risk is determined not only by the chance that harm may result but also by the serious or trivial nature of the harm that is likely to result. So, a manufacturer's duty exists even when the probability of danger is very small, as long as the potential injury is great.

{**Comment**: *This instruction is intended for use only in the rare case where the risk of harm is very small, but the consequences are very great*.}

Source:

Graham v. Pittsburgh Corning Corp., Del. Super., 593 A.2d 567, 568 (1990) (citing AMERICAN LAW OF PRODUCTS LIABILITY 3d § 32:3 (1987)); *Delmarva Power & Light Co. v. Burrows*, Del. Super., 435 A.2d 716, 719 (1981).

9. PRODUCTS LIABILITY

§ 9.10 – Compliance With Regulations or Standards Does Not Preclude Finding of Negligence

COMPLIANCE WITH GOVERNMENT REGULATIONS OR INDUSTRY STANDARDS DOES NOT PRECLUDE A FINDING OF NEGLIGENCE

Evidence that [***defendant's name***] complied with government regulations or industry standards does not prove that [***defendant's name***] has met its standard of care, nor does it prevent you from finding in favor of [***plaintiff's name***]. Compliance with governmental or industry standards may be considered as evidence of due care. But governmental or industry standards do not necessarily set the standard in a negligence case because an entire industry may have lagged behind the prevailing standard of reasonable care.

Source:

See Duphily v. Delaware Elec. Co-op., Inc., Del. Supr., 662 A.2d 821, 836 (1995) (contributory negligence); *Slover v. Fabtek, Inc.*, Del. Super., 517 A.2d 293, 295 (1986); *Delmarva Power & Light Co. v. Burrows*, Del. Super., 435 A.2d 716, 720 (1981). *See also* AM. LAW PROD. LIAB. 3d § 4:30 (1987).

9. PRODUCTS LIABILITY

§ 9.11 – Improper Use by Plaintiff

MISUSE OF PRODUCT

[***Defendant's name***] claims that [***plaintiff's name***] misused [***describe product***]. If you find that [***describe alleged misuse of product***] was not a reasonably foreseeable use by the manufacturer, and if you find that this misuse was an intervening or superseding cause of [***plaintiff's name***]'s injuries, you must find for [***defendant's name***].

{**Comment**: *See Jury Instr. No. 10.3- "Superseding Cause"*}

Source:

6 *Del. C.* § 2-314(c) (warranty applies only to "*ordinary* purposes for which such goods are used") (emphasis added). *Brower v. Metal Indus, Inc.*, Del. Supr., 719 A.2d 941, 946 (1998). *See also S. States Coop., Inc. v. Townsend Grain & Feed Co. (In re Matter of L.B. Trucking, Inc.)*, Bankr. D. Del., 163 Bankr. 709, 719-21 (1994) (general discussion of application of UCC warranties).

9. PRODUCTS LIABILITY

§ 9.12 – Express Warranty - Generally

EXPRESS WARRANTY

[***Plaintiff's name***] has alleged that [***defendant's name***] made an express warranty that [***his/her/its***] product was [***identify promise, description, etc.***]. An express warranty is created in one of three ways:

(1) if [***defendant's name***] made a promise or factual representation about the product to [***buyer's name***] and that promise or representation became a basis of the parties' bargain;

(2) if [***defendant's name***] described the product in a certain manner to [***buyer's name***], and that description became a basis of the parties' bargain; or

(3) if [***defendant's name***] offered a sample or model of the product to [***buyer's name***], and that sample or model became a basis of the parties' bargain.

No formal words are necessary to create a warranty. Nor does [***defendant's name***] have to intend to make a warranty.

If you find that any one of these three circumstances existed in this case, then you must find that [***defendant's name***] warranted that the product would conform to the promise, description, or model.

{**Comment**: *This instruction may be used whether the goods are leased or sold.*}

Source:

6 *Del. C.* §§ 2-313, 2A-210; *Bell Sports, Inc. v. Yarusso*, Del. Supr., 759 A.2d 582, 592 (2000); *Pack & Process, Inc. v. Celotex Corp.*, Del. Super., 503 A.2d 646, 658-69 (1985); *S. States Coop., Inc. v. Townsend Grain & Feed Co. (In re Matter of L.B. Trucking, Inc.)*, Bankr. D. Del., 163 Bankr. 709, 720 (1994).

9. PRODUCTS LIABILITY

§ 9.13 – Express Warranty – After Sale

CREATION OF AN EXPRESS WARRANTY – AFTER SALE

An express warranty may be created after a sale if the warranty language used after the contract negotiation is a valid modification. This means that if a written agreement says that any modifications to it must also be in writing, then modifications are valid only if they are in writing. But if the original agreement was not in writing, or if the agreement did not require that modifications be in writing, then oral modifications may suffice. No additional consideration for a modification is necessary.

Source:

6 *Del. C.* §§ 2-313 cmt. 1, § 2-209; *Pack & Process, Inc. v. Celotex Corp.*, Del. Super., 503 A.2d 646, 659 (1985).

9. PRODUCTS LIABILITY

§ 9.14 – Statement of Opinion

STATEMENT OF OPINION

If you find that [***seller's name***] merely affirmed the value of the goods, or merely made a statement purporting to be [***his/her/its***] opinion or recommendation of the product, then you should not find that a warranty was created.

Source:

6 *Del. C.* § 2-313(2); *Pack & Process, Inc. v. Celotex Corp.*, Del. Super., 503 A.2d 646, 657-60 (1985).

9. PRODUCTS LIABILITY

§ 9.15 – Revocation of Acceptance

REVOCATION OF ACCEPTANCE OF GOODS

One of the buyer's remedies for breach of express warranty is known as "revocation of acceptance." To effectively revoke [***his/her/its***] acceptance of the goods, [***buyer's name***] must establish all of the following elements:

(1) when the product was delivered, it had a [***non-conformity / defect***] that could not reasonably have been discovered by [***buyer's name***];

(2) the [***non-conformity / defect***] substantially impaired the value of the product to [***buyer's name***], in light of [***his/her/its***] needs and circumstances and considering whether a reasonable person would consider the value of the product to be impaired under these circumstances;

(3) [***Buyer's name***] notified either [***defendant's name***] or one of [***his/her/its***] agents that [***he/she/it***] did not want to keep the product;

(4) the notification occurred within a reasonable time after [***buyer's name***] discovered or should have discovered the [***non-conformity / defect***]; and

(5) the revocation occurred before there was any substantial change in the product's condition that was not caused by the *[**non-conformity / defect***]. In this regard, a buyer may work with a seller in attempting to have the [***non-conformity /***

defect] repaired but may then timely revoke acceptance if the [***non-conformity / defect***] is not satisfactorily cured. If you find that [***buyer's name***] has established all of the above elements by a preponderance of the evidence, then you must find that [***buyer's name***] effectively revoked [***his/her/its***] acceptance of the product.

Source:

6 *Del. C.* §§ 2-314, ,2-608; *Mercedes-Benz of N. Am. Inc. v. Norman Gershman's Things to Wear, Inc.*, Del. Supr., 596 A.2d 1358, 1362-63 (1991); *Freedman v. Chrysler Corp.*, Del. Super., 564 A.2d 691, 697-98, 700 (1989); *Ed Fine Oldsmobile, Inc. v. Knisley*, Del. Super., 319 A.2d 33, 37 (1974). *See also* WHITE, SUMMERS & HILLMAN, UNIFORM COMMERCIAL CODE § 9:14 (6th ed. 2024 update).

9. PRODUCTS LIABILITY

§ 9.16 – Implied Warranty of Merchantability

IMPLIED WARRANTY OF MERCHANTABILITY

In every contract for the sale of goods, there is an implied promise that the goods are merchantable. In order to be merchantable, the goods must:

{**Comment**: *Instruct on each element as applicable.*}

(1) pass without objection in the trade under the contract description; and

(2) if they're fungible goods, (goods that are commercially interchangeable) be of fair average quality within their contract description; and

(3) be fit for the ordinary purposes for which the goods are used; and

(4) be, within the variations permitted by the contract, of even kind, quality, and quantity within each unit and among all units involved; and

(5) be adequately contained, packaged, and labeled as the contract requires; and

(6) conform to the factual promises or affirmations, if any, made on the container or label.

Further, [***plaintiff's name***] must show that:

(1) the merchant sold the goods;

(2) such goods were not "merchantable" at the time of sale;

(3) the [***plaintiff's name***] was damaged;

(4) the damage was caused by the breach of the warranty of merchantability; and

(5) the seller had notice of the damage.

If you find that any one of the above elements did not exist for the goods in this contract, then you must find that [***defendant's name***] breached its implied promise that the goods would be merchantable.

{**Comment**: *The implied warranty of merchantability applies only to the sale or lease of goods. This implied warranty does not apply to service contracts or to the sale or lease of real estate. An express warranty, on the other hand, may apply to any contract and is legally binding to the full extent of its terms*.}

Source:

6 *Del. C.* § 2-314; *Hyatt v. Toys "R" Us, Inc.*, 2007 WL 1970075, at *1 (Del. Supr.); *Reybold Grp., Inc. v. Chemprobe Techs., Inc*., Del. Supr., 721 A.2d 1267, 1269 (1998) (plaintiff must prove defect); *Johnson v. Hockessin Tractor, Inc.*, Del. Supr., 420 A.2d 154, 157 (1980) (holding breach of warranty is necessarily a breach of the sales contract). *See also* 6 *Del. C.* §§ 2A-210 to 2A-216 (implied warranties include goods offered in leases or bailments); *Neilson Bus. Equip. Ctr., Inc. v. Italo V. Monteleone, M.D., P.A.*, Del. Supr., 524 A.2d 1172, 1174-75 (1987).

S. States Coop., Inc. v. Townsend Grain & Feed Co. (In re Matter of L.B. Trucking, Inc.), 163 Bankr. 709, 721 (Bankr. D. Del. 1994); *Miley v. Harmony Mill Ltd. P'ship*, 803 F. Supp. 965 (D. Del. 1992) (implied warranties do not apply to real estate lease agreements); *Grigsby v. Crown Cork & Seal Co.*, 574 F. Supp. 128 (D. Del. 1983) (implied warranties do not apply to service contracts); *Cropper v. Rego Distrib. Ctr., Inc.*, 542 F. Supp. 1142, 1153-54 (D. Del. 1982) (discussing the definition of "merchant in goods of that kind").

9. PRODUCTS LIABILITY

§ 9.17 – Implied Warranty of Fitness for a Particular Purpose

IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

[***Plaintiff / buyer's name***] has alleged that [***defendant / seller's name***] has breached an implied promise that the product in question was fit for a particular purpose. If you find that when the contract was formed [***defendant / seller's name***] should have known about a particular purpose for which [***plaintiff / buyer's name***] was going to use the goods and that [***plaintiff / buyer's name***] was relying on [***his/her/its***] skill or judgment to select or furnish goods suitable for that purpose, then [***defendant / seller's name***] has impliedly warranted that the goods would be suitable for that purpose.

{**Comment**: *The implied warranty of fitness for a particular purpose applies only to the sale or lease of goods. This implied warranty does not apply to service contracts or to the sale or lease of real estate. An express warranty, on the other hand, may apply to any contract and is legally binding to the full extent of its terms*.}

Source:

6 *Del. C.* § 2-315; *Barba v. Carlson*, 2014 WL 1678246, at *5 (Del. Super.); *Neilson Bus. Equip. Ctr., Inc. v. Italo V. Monteleone, M.D., P.A.*, Del. Supr., 524 A.2d 1172, 1175-76 (1987); *see also* 6 *Del. C.* §§ 2A-210 to 2A-216 (implied warranties include goods offered in leases or bailments); *Gulko v. Gen. Motors Corp.*, Del. Super., 710

A.2d 213 (1997); *S. States Coop., Inc. v. Townsend Grain & Feed Co. (In re Matter of L.B. Trucking, Inc.)*, Bankr. D. Del., 163 Bankr. 709, 720-21 (1994); *Miley v. Harmony Mill Ltd. P'ship*, D. Del., 803 F. Supp. 965, 968 (1992) (implied warranties do not apply to real estate lease agreements); *Grigsby v. Crown Cork & Seal Co.*, D. Del., 574 F. Supp. 128, 130 (1983) (implied warranties do not apply to service contracts); *ICI Americas, Inc. v. Martin-Marietta Corp.*, D. Del., 368 F. Supp. 1148, 1151 (1974).

9. PRODUCTS LIABILITY

§ 9.18 – Scope of Warranty – Secondary Users of Product

SCOPE OF WARRANTY - SECONDARY USERS

A seller's warranty, whether express or implied, extends to any person who might reasonably be expected to use or be affected by the goods and who is injured by a breach of the warranty.

A secondary purchaser or user of a product is subject to the same warranties and the same disclaimers, modifications, or remedy-limitation clauses that were part of the underlying sales agreement between the original buyer and the seller.

If you find that [***describe the warranty, disclaimer, modification, or remedy limitation***] was a part of the original sale of the product, then you must apply the [***describe the warranty, disclaimer, modification, or remedy limitation***] to [***plaintiff's name***]'s claim under [***describe basis for claim***].

Source:

6 *Del. C.* §§ 2-316, 2-318, 2-719; *Franchetti v. Intercole Automation, Inc.*, D. Del., 523 F. Supp. 454, 457-58 (1981); *Lecates v. Hertrich Pontiac Buick Co.*, Del. Super., 515 A.2d 163, 166-67 (1986).

9. PRODUCTS LIABILITY

§ 9.19 – Exclusion or Modification of Warranties

EXCLUSION OR MODIFICATION OF EXPRESS WARRANTIES

If you find that [***seller's name***] has used words or conduct tending to create an express warranty and has also used words or conduct tending to exclude or limit the warranty, you must try to interpret them as being consistent with each other. But if you find that they cannot reasonably be reconciled, you must disregard the words or conduct tending to exclude or limit the warranty.

Source:

6 *Del. C.* § 2-316(1)-(2); *Bell Sports, Inc. v. Yarusso*, Del. Supr., 759 A.2d 582, 593 (2000); *Lecates v. Hertrich Pontiac Buick Co.*, Del. Super., 515 A.2d 163, 167-71 (1986).

9. PRODUCTS LIABILITY

§ 9.20 – Exclusion of Implied Warranties – "As Is"

EXCLUSION OF IMPLIED WARRANTIES – "AS IS"

A seller such as [***seller's name***] may generally prevent the creation of an implied warranty by making clear to the buyer that the goods are sold "as is" or "with all faults," or by other language that by common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.

If the buyer, before entering into the contract or accepting or purchasing the goods, has examined the goods fully, or has refused to examine the goods upon the seller's demand, there is no implied warranty for defects that an examination should have revealed.

An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade. {**Comment**: *Define these terms if necessary.*}

Implied warranties are not disclaimed where circumstances indicate otherwise. If the seller's words or conduct are ambiguous or conflict with an attempted exclusion of warranties, then the attempted exclusion is not effective.

You must decide whether the implied warranty claimed by [***plaintiff's name***] has been excluded in any manner by [***defendant's name***].

{**Comment**: *A seller may exclude or modify the implied warranty of merchantability, or any part of it, by using the word "merchantability" and, in the case of a writing, the language using the word merchantability must be conspicuous. All implied warranties of fitness for a particular purpose may be excluded by language which states "there are no warranties which extend beyond the description on the face hereof." The exclusion or modification of the implied warranty of merchantability or the exclusion of an implied warranty of fitness for a particular purpose is a matter of law for the court to decide*.}

Source:

6 *Del. C.* § 2-316(3)(a)-(c); *Lecates v. Hertrich Pontiac Buick Co.*, Del. Super., 515 A.2d 163, 167-69 (1986).

9. PRODUCTS LIABILITY

§ 9.21 – Exclusion of Implied Warranty of Merchantability (*See* § 9.20)

EXCLUSION OF IMPLIED WARRANTY OF MERCHANTABILITY

{**Comment**: *See Jury Instr. No. 9.20. A seller may exclude or modify the implied warranty of merchantability, or any part of it, by using the word "merchantability" and, in the case of a writing, the language using the word merchantability must be conspicuous. The exclusion or modification of the implied warranty of merchantability in this manner is a matter of law for the court to decide*.}

Source:

6 *Del. C.* § 2-316(2), cmt. 3.

9. PRODUCTS LIABILITY

§ 9.22 – Exclusion of Implied Warranty for Fitness for a Particular Purpose

EXCLUSION OF WARRANTY FOR FITNESS FOR A PARTICULAR PURPOSE

{**Comment**: *All implied warranties of fitness for a particular purpose may be excluded by language that states: "there are no warranties which extend beyond the description on the face hereof." The exclusion of an implied warranty of fitness for a particular purpose in this manner is a matter of law for the court to decide*.}

Source:

6 *Del. C.* § 2-316(2), cmt. 4.

9. PRODUCTS LIABILITY

§ 9.23 – Use After Defect is Known to Plaintiff

USE OF PRODUCT AFTER DEFECT IS KNOWN TO PLAINTIFF

If a buyer of a product, after accepting it, discovers a [***non-conformity / defect***] that substantially impairs its value, the buyer may seek relief by promptly revoking acceptance of the goods and demanding either a refund of the purchase price or the prompt cure of the defect by replacement or repair. But if the buyer continues to use the product without giving the seller reasonable opportunity to cure the [***non-conformity / defect***] or refund the purchase price, then the buyer may not revoke acceptance of the product.

A buyer is permitted, however, to work with a seller in attempting to have the [***non-conformity / defect***] repaired but may still revoke acceptance within a reasonable time if there is not a satisfactory cure of the [***non-conformity / defect***]. You must determine if acceptance has been revoked within a reasonable time under the circumstances.

If you find that [***buyer's name***] continued to use [***describe the product***] and did not give [***seller's name***] adequate opportunity to repair or replace the [***describe the product***], then you must return a verdict for [***seller's name***]. If you find that the [***non-conformity / defect***] in [***describe the product***] substantially impaired its value

to [***buyer's name***] and that [***buyer's name***] gave [***seller's name***] reasonable opportunity to repair or replace [***describe the product***] or return the purchase price before [***buyer's name***] continued to use it, then you must return a verdict for [***buyer's name***].

The value of a product is substantially impaired when a [***non-conformity / defect***] substantially interferes with the normal operation or enjoyment of a product or the normal purpose for which it was bought. Mere annoyance over minor [***non-conformities / defects***] that do not inhibit the normal, intended use of the product is not a substantial impairment. But the cumulative effect of minor defects, none of which by itself would substantially impair value, can be sufficient cause to justify revocation of acceptance.

Source:

6 *Del. C.* §§ 2-603, 2-608; *Mercedes-Benz of N. Am. Inc. v. Norman Gershman's Things to Wear, Inc.*, Del. Supr., 596 A.2d 1358, 1361-64 (1991); *Freedman v. Chrysler Corp.*, Del. Super., 564 A.2d 691, 700 (1989); *Olmstead v. Gen. Motors Corp.*, Del. Super., 500 A.2d 615 (1985); *Ed Fine Oldsmobile, Inc. v. Knisley*, Del. Super., 319 A.2d 33, 37-38 (1974); *Waltz v. Chevrolet Motor Div.*, Del. Super., 307 A.2d 815, 815-16 (1973); *Towe v. Justis Bros., Inc.*, Del. Super., 290 A.2d 657, 658-59 (1972). *See* ROSMARIN & SHELDON, SALES OF GOODS AND SERVICES § 27.32.2.

9. PRODUCTS LIABILITY

§ 9.24 – Notice of Breach of Warranty

REQUIREMENT OF NOTIFICATION OF BREACH – COMMERCIAL SALES

To recover for a breach of warranty, [***buyer's name***] must notify [***seller's name***] of the breach within a reasonable time after [***he/she/it***] discovers or should have discovered the breach. A buyer notifies a seller by taking reasonable steps to inform the seller under ordinary circumstances, regardless of whether the seller actually comes to know of the alleged breach. No particular words or forms are required. Notice need not be written. Conversations, conferences, and correspondence that call [***seller's name***]'s attention to the defect in the product can constitute notice of [***seller's name***]'s breach.

Source:

6 *Del. C.* §§ 1-201(25)-(27), 2-607, 2-608, cmt. 4; *Waltz v. Chevrolet Motor Div.*, Del. Super., 307 A.2d 815, 815-16 (1973); *Towe v. Justis Bros., Inc.*, Del. Super., 290 A.2d 657, 658-59 (1972). *See* 6 *Del. C.* § 2-607, cmt. 4 (No particular words are required to give notice. The notice must merely be sufficient to let the seller know that the transaction is still troublesome and must be watched); ROSMARIN & SHELDON, SALES OF GOODS & SERVICES § 30.5.

9. PRODUCTS LIABILITY

§ 9.25 – Automobile Warranties Act (Lemon Law)

AUTOMOBILE "LEMON LAW"

[***Plaintiff's name***] alleges that [***manufacturer's name***], as the manufacturer of [***his/her/its***] car, violated the Automobile Warranties Act, popularly known as the "Lemon Law."

This law provides:

> If a new automobile does not conform to the manufacturer's express warranty, and the consumer reports the nonconformity to the manufacturer or its . . . dealer during . . . the period of 1 year following the date of original delivery of an automobile to the consumer, . . . the manufacturer shall make, or arrange with its dealer . . . to make, within a reasonable period of time, all repairs necessary to conform the new automobile to the warranty, notwithstanding that the repairs or corrections are made after the . . . 1-year period.

A "nonconformity" is a defect or condition that substantially impairs the use, value, or safety of an automobile. The plaintiff may establish a nonconformity by showing within the first year after the date of original delivery that:

(1) substantially the same defect or condition has been subject to repair four or more times; or

(2) the automobile was out of service by reason of any repair for a total of more than 30 calendar days.

In this regard, if the consumer presents the car to the dealer, it is "subject to repair" even if the dealer cannot verify that anything is wrong and thus does not attempt to make repairs. If the nonconformity or defect does not substantially impair the use, value, or safety of the vehicle, the buyer cannot recover. On this last point, [***manufacturer's name***] has the burden of proof.

If you find there has been a violation of the Lemon Law, you should return a verdict in favor of [***plaintiff's name***] and against [***manufacturer's name***].

Source:

6 *Del. C.* § 5001 *et seq.*; *Mayew v. Chrysler, LLC*, 2008 WL 4447707, at *4 (Del. Super.); *Mercedes-Benz of N. Am. Inc. v. Norman Gershman's Things to Wear, Inc*., Del. Supr., 596 A.2d 1358 (1991) (holding only manufacturer liable for repairs and not the dealer); *Pender v. DaimlerChrysler Corp*., 2004 WL 2191030, at *3-5 (Del. Super.). *See also Brown v. Chrysler Grp., LLC*, 2010 WL 5551333, at *2 (Del. Super.) (discussing the substantial impairment affirmative defense).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.1 – Standard of Care – Minors

STANDARD OF CARE – MINORS

[***Minor's name***], who was [__] years old at the time of the accident, is by law a minor.

A minor is not held to the same standard of care as an adult. A minor must exercise the degree of care that is ordinarily exercised under similar circumstances by minors of similar age, maturity, intelligence and experience. You must determine whether, under the circumstances, [***minor's name***]'s conduct was what might have been reasonably expected of a minor of the same age, maturity, intelligence, and experience.

Source:

Hudson v. Old Guard Ins. Co., Del. Supr., 3 A.3d 246 (2010); *Moffitt v. Carroll*, Del. Supr., 640 A.2d 169, 173 (1994); *Beggs v. Wilson*, Del. Supr., 272 A.2d 713 (1970); *House v. Lauritzen*, Del. Supr., 237 A.2d 134, 136 (1967); *Pokoyski v. McDermott*, Del. Supr., 167 A.2d 742, 744 (1961); *Audet v. Convery*, Del. Super., 187 A.2d 412 (1963); *See also* RESTATEMENT (SECOND) OF TORTS §§ 283A.

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.2 – Standard of Care – Disabled Persons

STANDARD OF CARE – DISABLED PERSON

A person with a mental or physical disability must exercise the amount of care that a person of ordinary prudence with a similar disability would use under similar circumstances.

Source:

Coker v. McDonald's Corp., Del. Super., 537 A.2d 549, 550-51 (1987) (blind persons); *cf. Lutzkovitz v. Murray*, Del. Supr., 339 A.2d 64, 66-67 (1975) (ordinary standard of care applies to person with disability who knowingly undertakes activity potentially hazardous to others). *See also* RESTATEMENT (SECOND) OF TORTS §§ 283 (B) & (C).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.3 – *Res Ipsa Loquitur*

RES IPSA LOQUITUR

[***Plaintiff's name***] has alleged that [***defendant's name***] was negligent, and that this negligence caused [***describe accident / injury***]. On the issue of negligence, one of the questions for you to decide is whether the [__***describe accident / injury***__] occurred under the following conditions:

(1) the accident is the sort that does not ordinarily happen if those who have management and control use proper care;

(2) the evidence excludes [***plaintiff's name***]'s own conduct as a cause of the accident;

(3) the thing that caused the injury was under the control, although not necessarily the exclusive control, of [***defendant's name***] or [***his/her/its***] servants when the negligence occurred; and

(4) the facts are strong enough to suggest negligence and call for an explanation or rebuttal from [***defendant's name***].

If, and only if, you find that all these conditions exist, you may conclude that a cause of the occurrence was some negligent conduct by the defendant.

Source:

D.R.E. 304; *Cruz v. G-Town Partners, L.P.*, 2010 WL 5297161, at *8 (Del. Super.); *Austin ex rel. Austin v. Happy Harry's Inc.*, 2006 WL 3844076, at *4 (Del. Super.); *Lacy v. G.D. Searle & Co.*, Del. Super., 484 A.2d 527, 529-30 (1984); *Dillon v. General Motors Corp.*, Del. Super., 315 A.2d 732, 737 (1974), *aff'd*, Del. Supr., 367 A.2d 1020 (1976); *Freeman v. X-Ray Assocs. P.A.*, Del. Supr., 3 A.3d 224, 231 (2010).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.4 – Assumption of the Risk Primary

ASSUMPTION OF RISK (Primary)

[***Defendant's name***] has alleged that [***plaintiff's name***] voluntarily assumed a known risk when [***he/she/it***] [***describe alleged risk assumed***]. A person who chooses to take a risk, and who understands or should understand the danger associated with that risk, cannot recover for damages that result.

[***Defendant's name***] must prove by a preponderance of the evidence that [***plaintiff's name***] voluntarily assumed [***describe alleged risk of injury***] in this case. If you find that [***plaintiff's name***] assumed this risk of injury, then your verdict must be for [***defendant's name***].

{**Comment**: *This instruction contemplates what is referred to as "primary" assumption of the risk.*}

Source:

Helm v. 206 Massachusetts Ave., LLC, Del. Supr., 107 A.3d 1074, 1080 (2014); *Storm v. NSL Rockland Place, LLC*, Del. Super., 898 A.2d 874, 880-82 (2005); *North v. Owens-Corning Fiberglas Corp.*, Del. Supr., 704 A.2d 835, 839 (1997) (holding jury should focus on assumption of the risk only after finding liability on part of defendant); *Koutoufaris v. Dick*, Del. Supr., 604 A.2d 390, 397-98 (1992); *Fell v. Zimath*, Del. Super., 575 A.2d 267, 267-68 (1989); *Yankanwich v. Wharton*, Del. Supr., 460 A.2d 1326, 1330 (1983); *Patton v. Simone*, Del. Super., 626 A.2d 844, 852-53 (1992); *cf. Taylor v. Young Life*, 1995 WL 413400 (Del. Super.) (risk of injury assumed by participants in sporting or cheerleading activities unless caused by intentional or willful and wanton disregard for participants' safety); *James v. Laurel Sch. Dist.*, 1993 WL 81277 (Del. Super.) (same), *aff'd*, Del. Supr., 633 A.2d 370 (1993). PROSSER & KEETON ON TORTS § 68 (5th ed. 1984).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.5 – Assumption of the Risk Secondary (*See §§ 5.11 and 5.12)*

ASSUMPTION OF THE RISK (Secondary)

[Subsumed Within the Principles of Comparative Negligence, 10 *Del. C.* § 8132]

{**Comment**: *This instruction originally contemplated what is referred to as "secondary" assumption of the risk. It should be replaced with a comparative negligence charge*.}

Source:

Spencer v. Wal-Mart Stores E., LP, Del. Supr., 930 A.2d 881, (2007); *Koutoufaris v. Dick*, Del. Supr., 604 A.2d 390, 397-98 (1992); *Fell v. Zimath*, Del. Super., 575 A.2d 267 (1989). *See also* PROSSER & KEETON ON TORTS § 68 (5th ed. 1984).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.6 – Actions Taken in Emergency Situations (General, Motor Vehicles, Rescue)

ACTIONS TAKEN IN EMERGENCY – General

When a person is involved in an emergency situation not of [***his/her***] own making and not created by [***his/her***] own negligence, that person is entitled to act as a reasonably prudent person would under similar circumstances.

Therefore, if you find that [***person's name***] was confronted by an emergency situation when [***describe emergency***], you should review [***his/her***] conduct in light of what a reasonably prudent person would have done under those circumstances.

ACTIONS TAKEN IN EMERGENCY – Motor Vehicles

When a person is involved in an emergency situation not of [***his/her***] own making and not created by [***his/her***] own negligence, that person is entitled to act as a reasonably prudent person would under similar circumstances.

Therefore, if you find that [***defendant's name***] was operating [***his/her/its***] vehicle in a reasonably prudent manner when faced with a sudden emergency situation, then I instruct you that [***defendant's name***] was not required to act as a reasonable person who had sufficient time and opportunity to consider what the best

course of action would be, but instead that [***he/she/they***] [***was/were***] required only to react as a reasonable person would under the circumstances of this emergency.

RESCUE DOCTRINE IN AN EMERGENCY

Someone injured while reasonably undertaking a necessary rescue of another person may recover from the person whose negligence created the emergency situation.

Source:

Pagano v. Stradley, 2017 WL 2691189, at *2 (Del. Super.); *Daub v. Daniels*, 2013 WL 5460160, at *1 (Del. Super.), *aff'd*, Del. Supr., 124 A.3d 585; *Raczkowski v. Devlin*, 2011 WL 5042064, at *2 (Del. Super.); *Dadds v. Pennsylvania R.R. Co.*, Del. Supr., 251 A.2d 559, 560-61 (1969); *Panaro v. Cullen*, Del. Supr., 185 A.2d 889, 891 (1962); *Schwartzman v. Delaware Coach Co.*, Del. Super., 264 A.2d 519, 520 (1970) (rescue doctrine).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.7 – Good Samaritan Rule

GOOD SAMARITAN

Under Delaware law, if a person voluntarily renders first aid or rescue assistance to a another person who is unconscious, ill, injured, or in need of rescue assistance, or any person in obvious physical distress or discomfort — without expecting compensation from the person being helped — the helper is not liable for damages for injuries alleged to have been sustained by the person helped, or for the death of that person, alleged to have occurred by reason of the attempt to help, unless the helper caused injuries or death by acting willfully, wantonly, recklessly, or with gross negligence.

If you find that [***plaintiff's name***]'s injuries were caused by [***defendant's name***]'s conduct, but that [***defendant's name***] was voluntarily providing emergency treatment to [***plaintiff's name***] without expecting compensation, then you must find for [***defendant's name***]. But if you find that [***defendant's name***] acted with gross negligence, recklessness, wantonness, or willfulness, then you must find for [***plaintiff's name***].

{**Comment**: *See Jury Instr. Nos. 5.8, 5.9, 5.10 for definitions of intentional, reckless, and willful and wanton conduct.*}

Source:

16 *Del. C.* § 6801(a); *see also* 16 *Del. C.* § 6802 (exempting nurses from civil liability for rendering emergency care).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.8 – No Dram Shop Laws

NO DRAM SHOP LAWS

{**Comment**: *The Delaware Supreme Court has consistently refused to impose dram shop liability upon vendors of alcoholic beverages in cases where a patron or a third party is injured off premises. If a patron or third party is injured on the premises, liability may be imposed under the rules of "innkeeper" liability.*}

Source:

McCall v. Villa Pizza, Inc., Del. Supr., 636 A.2d 912, 913 (1994) (*en banc*); *Acker v. S.W. Cantinas, Inc.*, Del. Supr., 586 A.2d 1178 (1991); *Wright v. Moffitt*, Del. Supr., 437 A.2d 554 (1981); *Shea v. Matassa*, 2006 WL 258312 (Del. Super.).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.9 – Liability to Rescuers

LIABILITY TO RESCUERS

When a person negligently creates a situation in which it is reasonably foreseeable that rescuers will attempt to save a victim in peril, that person is liable for any injuries caused to the rescuers.

In this case, it is alleged that [***person A***] was injured while trying to save [***person B***]. If you find that [***defendant's name***]'s negligence caused the situation that led to this rescue attempt, and that this rescue attempt was a reasonably foreseeable consequence of [***defendant's name***]'s negligence, you must find for [***person A***].

Source:

Schwartzman v. Delaware Coach Co., Del. Super., 264 A.2d 519, 520 (1970); *cf. Carpenter v. O'Day*, Del. Super., 562 A.2d 595, 601-02 (adopting fireman's rule), *aff'd*, Del. Supr., 553 A.2d 638 (1988); *Burgess v. Rowland*, 1991 WL 113336 (Del. Super.). PROSSER & KEETON ON TORTS § 44 (5th ed. 1984); 4 ALR 3d § 558.

10. SPECIAL DOCTRINES OF TORT LAW

§10.10 – Last Clear Chance (Abrogated)

LAST CLEAR CHANCE (ABROGATED)

{**Comment**: *This doctrine has been abrogated by the statutory adoption of comparative negligence.*}

Source:

Laws v. Webb, Del. Supr., 658 A.2d 1000, 1004-08 (1995), *overruled on other grounds, Lagola v. Thomas*, 867 A.2d 891 (Del. 2005); *Lagola v. Thomas*, Del. Super., 867 A.2d 891 (2005).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.11 – Unavoidable Accident

UNAVOIDABLE ACCIDENT

The mere fact that an accident occurred does not mean that someone was negligent. There may be an unavoidable accident for which no party is responsible. Such an accident is one that could not have been avoided through the exercise of proper care. If none of the parties was negligent for proximately causing the accident, then the accident was unavoidable and [***defendant's name***] cannot be held liable.

Source:

Lutzkovitz v. Murray, Del. Supr., 339 A.2d 64, 67 (1975); *Rich v. Dean*, Del. Supr., 261 A.2d 522, 524-25 (1969); *Panaro v. Cullen*, Del. Supr., 185 A.2d 889, 891 (1962); *Dietz v. Mead*, Del. Supr., 160 A.2d 372 (1960); *White v. Clark*, 1998 WL 960735 (Del. Super.). *See also* RESTATEMENT (SECOND) OF TORTS § 283C (1965).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.12 – State Tort Immunity

STATE TORT IMMUNITY

Under Delaware law, no damages may be recovered against the State or any State officer or employee if the claim arose because of the performance of an official duty that was conducted in good faith for the benefit of the public. This rule is known as sovereign immunity. There is an exception to this rule, however, if the public officer or employee acted with gross or wanton negligence. Gross or wanton negligence refers to conduct of such a nature or degree that it constitutes a gross deviation from what a reasonable, ordinary person would do in the same situation. For [***plaintiff's name***]'s claim to fall within this exception to sovereign immunity, [***plaintiff's name***] must prove that [***defendant's name***] acted with gross or wanton negligence.

{**Comment**: *See Jury Instr. Nos. 5.8, 5.9 and 5.10 for definitions of intentional, reckless, and willful and wanton conduct .*}

Source:

10 *Del. C.* § 4001 (state tort immunity); 10 *Del. C.* §§ 4011-4013 (county and municipal tort immunity); *Greenfield as Next Friend for Ford v. Miles*, Del. Supr., 211 A.3d 1087 (2019); *Doe v. Cates*, Del. Supr., 499 A.2d 1175 (1985); *Vick v. Haller*, Del. Super., 512 A.2d 249, 250-52, *aff'd*, Del. Supr., 514 A.2d 782 (1986), *and aff'd in part and rev'd in part on procedural grounds*, 522 A.2d 865 (1987); *Eustice v. Rupert*, Del. Supr., 460 A.2d 507, 509 (1983) (discussing wanton conduct). *See also Smith v. New Castle Cnty. Vocational-Technical Sch. Dist.*, 574 F. Supp. 813 (D. Del. 1983).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.13 – County and Municipal Tort Immunity

COUNTY AND MUNICIPAL TORT IMMUNITY

Delaware law provides that no damages may be recovered against a governmental entity or any public officer or employee if the claim arose because of the performance of an official duty that was conducted in good faith for the benefit of the public. This is known as sovereign immunity. There is an exception to this rule, however, if the public officer or employee acted outside the scope of employment or with gross or wanton negligence. Gross or wanton negligence refers to conduct of such a nature or degree that it constitutes a gross deviation from what a reasonable, ordinary person would do in the same situation.

For [***plaintiff's name***]'s claim to fall within this exception to sovereign immunity, [***plaintiff's name***] must prove that [***defendant's name***] acted outside the scope of [***his/her***] employment or acted with gross or wanton negligence.

{**Comment**: *See Jury Instr. Nos. 5.9, "Reckless Conduct Defined," and 5.10, "Willful and Wanton Conduct Defined" for definitions of reckless and willful and wanton conduct and Jury Instr. No. 18.5, "Employee Tending to Personal Affairs," for definition of scope of employment. Refer to 10 Del. C. § 4011 for a list of specific exceptions to the general rule of sovereign immunity.*}

Source:

10 *Del. C.* §§ 4011-4013 (county and municipal tort immunity); 11 *Del. C.* § 231(a) (definition of criminal negligence); *Greenfield as Next Friend for Ford v. Miles*, 2019 WL 2295466, at *6-8 (Del. Supr.); *Moore v. Wilmington Hous. Auth.*, Del. Supr., 619 A.2d 1166, 1167-69 (1993); *Sussex County v. Morris*, Del. Supr., 610 A.2d 1354, 1357-58 (1992); *Jardel Co., Inc. v. Hughes*, Del. Supr., 523 A.2d 518, 530 (1987) (concluding gross negligence falls within meaning of criminal negligence); *Vick v. Haller*, Del. Super., 512 A.2d 249, 250-52, *aff'd*, Del. Supr., 514 A.2d 782 (1986), *aff'd in part and rev'd in part on procedural grounds*, 522 A.2d 865 (1987); *Fiat Motors of N. Am., Inc. v. Mayor and Council of City of Wilmington*, Del. Supr., 498 A.2d 1062 (1985). *See also Smith v. New Castle Cnty. Vocational Sch. Dist.*, 574 F. Supp. 813 (D. Del. 1983).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.14 – Duty of Railroad at Rail Crossings

DUTY OF THE RAILROAD AT RAIL CROSSINGS

Where railroad tracks cross a public highway, the railroad has a duty to erect warning systems that will notify persons attempting to cross the tracks of an approaching train. If a train is actually in the crossing, blocking the highway, it is ordinarily not necessary for the railroad to give any additional warning unless the crossing is extraordinarily dangerous.

If the crossing is extraordinarily dangerous, factors to consider in determining whether the warning system is adequate under the circumstances include:

(1) the general terrain;

(2) the grade of the highway and the crossing and its effect on the angle of headlights;

(3) the volume of motor traffic on the highway and the frequency of trains on the rail line;

(4) the angle at which the tracks intersect the highway;

(5) physical obstructions to the motorist's view of the crossing; and

(6) the presence or absence of lights on the train.

If you find that the warning system used by [***name of the railroad***] at this particular crossing was adequate to give timely warning to [***name of person***] when [***he/she***] attempted to cross, then your verdict must be for [***name of the railroad***].

{**Comment**: *"Extraordinarily" dangerous may require definition*.}

Source:

2 *Del. C.* §§ 1803-1818, 17 *Del. C.* § 701 *et seq*.; *Pennsylvania R.R. Co. v. Goldenbaum*, Del. Supr., 269 A.2d 229, 231-32 (1970).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.15 – Common Carriers - Duty to Public Generally

DUTY OF COMMON CARRIERS TO EXERCISE DUE CARE IN OPERATING THEIR VEHICLES

Common carriers must operate their vehicles with reasonable care. A common carrier is an individual or organization that transports passengers or goods and is required by law to transport them if the appropriate fare is paid. Common carriers may start and stop their vehicles only after passengers are fully inside the vehicle even if they are not seated. There may be minor jolts or jars in the starting or stopping. The operator of a common carrier must also exercise reasonable care in picking up and dropping off passengers at a safe place along the carrier's route.

If you find that [***name of common carrier***] did not exercise due care in operating its vehicle when [***describe incidents***] occurred, then you must find [***name of common carrier***] negligent.

Source:

2 *Del. C.* §§ 1801-1821; *Reeves v. Am. Airlines, Inc.*, Del. Supr., 408 A.2d 283 (1979) (aircraft); *Del. Coach Co. v. Reynolds*, Del. Supr., 71 A.2d 69 (1950) (buses, application of *res ipsa loquitur*); *Lightburn v. Delaware Power & Light Co.*, Del. Super., 167 A.2d 64 (1960) (buses); *Winter v. Pennsylvania R.R. Co.*, Del. Super., 57 A.2d 750 (1948) (trains); *Cannon v. Delaware Elec. Power Co.*, Del. Super., 24 A.2d 325 (1942); *Cooke v. Elk Coach Line*, Del. Super., 180 A. 782 (1935) (buses). *See also Carrier*, BLACK'S LAW DICTIONARY (12th ed. 2024).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.16 – Duty of Passenger to Common Carrier

DUTY OF PASSENGER TO FOLLOW REGULATIONS OF CARRIER AND THE INSTRUCTIONS OF THE PILOT / DRIVER

A passenger must take reasonable care to observe the regulations of a common carrier and must follow the reasonable instructions of the [***driver / pilot***]. If you find that [***name of passenger***] failed to take reasonable care to observe [***name of carrier***]'s reasonable regulations or follow the instructions of [***name of carrier's driver / pilot***], then you must return a verdict for the [***name of carrier***].

Source:

See Reeves v. Am. Airlines, Inc., Del. Supr., 408 A.2d 283, 284 (1979).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.17 – Liability for Ultrahazardous Activity

ULTRAHAZARDOUS ACTIVITIES

When a person engages in an activity that is inherently and extraordinarily dangerous, what the law calls an ultrahazardous activity, that person is liable for any injury proximately caused by the activity whether or not the person acted negligently. In this case, I have ruled that the [***describe the ultrahazardous activity***] undertaken by [***defendant's name***] is an ultrahazardous activity. Your duty is to determine whether it proximately caused the alleged injury to [***plaintiff's name***]. If you find that it did cause the injury, then you must determine the extent of the damages suffered.

Source:

Catholic Welfare Guild, Inc. v. Brodney Corp., Del. Super., 208 A.2d 301 (1964) (strict liability for damages from blasting in urban area); *but see Hammond v. Colt Indus. Operating Corp.*, Del. Super., 565 A.2d 558 (1989) (inherently dangerous product will not support claim based on strict liability for the sale of that product); *Fritz v. E.I. duPont de Nemours & Co.*, Del. Super., 75 A.2d 256 (1950) (declining to apply doctrine of strict liability to case involving the escape of chlorine gas from a manufacturing plant in a rural area).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.18 – Domestic Animal With Vicious Propensities

DOMESTIC ANIMAL WITH VICIOUS PROPENSITIES

In this case, [***plaintiff's name***] has alleged that [***he/she***] was injured when [***defendant's name***]'s [***type of domestic animal***] [***bit, scratched, etc***.] [***him/her***].

When a person keeps a domestic animal, and that person knows or should know that the animal has a dangerous trait that other animals of the same breed do not have and fails to keep the animal secure, that person is liable for any physical harm done by the animal if the harm results from the dangerous trait.

Source:

Richmond v. Knowles, Del. Super., 265 A.2d 53, 55 (1970); *F. Giovannozzi & Sons v. Luciani*, Del. Super., 18 A.2d 435 (1941); *Duffy v. Gebhart*, Del. Super., 157 A.2d 585, 586 (1960). *See also* PROSSER & KEETON ON TORTS § 76 (5th ed. 1984).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.19 – Dog Bite

DOG BITE

The owner of a dog that causes [***injury / death / loss***] to person or property is liable in damages, unless the [***injury / death / loss***] occurred when [***plaintiff's name***] was:

{*Include applicable defense:*}

(1) Committing or attempting to commit a trespass or other criminal offense on the owner's property; or

(2) Committing or attempting to commit a criminal offense against any person; or

(3) Teasing, tormenting or abusing the dog.

[***Plaintiff's name***] bears the burden to prove that none of the exceptions apply.

{**Comment**: *The dog bite statute supersedes the premises guest statute as to the potential liability of a property owner for dog bite injury*.}

Source:

16 *Del. C.* § 3053F; *McCormick v. Hoddinott*, Del. Super., 865 A.2d 523, 527 (2004); *Bemiller v. Rodriguez*, 2000 WL 1611085 (Del. Super.) (dog owners are strictly liable for injuries caused by their dog); *Russo v. Zeigler*, Del. Super., 67 A.3d

536, 540-41 (2013); *Riad v. Brandywine Valley SPCA, Inc.*, 2024 WL 2885283 (Del. Supr.) (dog bite statute does not contain an exception for animal welfare organizations).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.20 - Dog Running Free

DOG RUNNING FREE

Delaware law provides that:

> No dog, unless exempted under [as described herein], shall be permitted to run at large outside at any time, and must be secured by means of a leash that is capable of physically restraining the movement of the dog. A dog is not at large if it is within the real property limits of its owner, or on private property with permission, or within a vehicle being driven or parked.

The following dogs are exempt:

> a. Working dogs, which are dogs that are not merely pets but that learn and perform tasks to assist their human companions, and include dogs trained to hunt, herd, assist law enforcement or search and rescue personnel, or assist persons with disabilities, while actively engaged in performing such functions.
>
> b. Dogs within a designated "off-leash" dog park or area, or within an area permitted by a governmental entity, including a municipality, and attended by the dog's owner or custodian.

Violation of this law constitutes negligence as a matter of law.

Source:

16 *Del. C.* § 3048F; *Baker v. Wheeler*, 1985 WL 189289 (Del. Super.).

10. SPECIAL DOCTRINES OF TORT LAW

§ 10.21 – Duty to Maintain Proper Lookout – Pedestrians

DUTY TO MAINTAIN PROPER LOOKOUT – PEDESTRIANS

People have a duty to keep a proper lookout for their own safety. The duty to look implies the duty to see what is in plain view unless some reasonable explanation is offered. It is negligent not to see what is plainly visible where there is nothing to obscure one's vision, because a person is not only required to look, but also to use the sense of sight in a careful and intelligent manner to see things that a person in the ordinary exercise of care and caution would see under the circumstances.

If you find that [***party's name***] failed to maintain a proper lookout, you must find [***him/her***] negligent.

{**Comment**: *This instruction contemplates incidents arising in a non-commercial setting.* See *Jury Instr. No. 15.3, " Business Invitee's Duty to Maintain Proper Lookout."*}

Source:

Duran v. E. Athletic Clubs LLC, 2018 WL 3096612, at *2 (Del. Super.); *Walker v. Shoprite Supermarket Inc.*, 2004 WL 3023089, at *2 (Del. Supr.); *Upshur v. Bodie's Dairy Market*, 2003 WL 21999598, at *2 (Del. Super.); *Howard v. Food Fair Stores, New Castle, Inc.*, Del. Supr., 201 A.2d 638, 642 (1964); *cf. Franklin v. Salminen*, Del. Supr., 222 A.2d 261, 262 (1966) (holding proprietor not liable to invitee after giving proper warning to invitee of a plainly visible hazard which invitee then chose to disregard).

11. INTENTIONAL TORTS - Defamatory/Privacy Torts

§ 11.1 – Defamation – Definition

DEFAMATION

Defamation is a communication that tends to injure a person's "reputation" in the ordinary sense of that word; that is, some statement or action that diminishes the esteem, respect, goodwill, or confidence in which the person is held and tends to cause bad feelings or opinions about the person. Defamation necessarily involves the idea of disgrace. In this sense, a communication is defamatory if it tends to lower the person in the estimation of the community or if it deters third parties from associating or dealing with the person.

Defamation occurs only when the defamatory information is communicated to someone other than the person to whom it refers. In the law, this is known as "publication."

Source:

Cousins v. Goodier, Del. Supr., 283 A.3d 1140, 1148 (2022); *Page v. Oath Inc.*, Del. Supr., 270 A.3d 833, 842-43 (2022); *Ward v. Blair,* 2013 WL 3816568, at *7 (Del. Super.); *Pennington v. Scioli*, 2011 WL 3568266, at *4-5 (Del. Super.); *Sunstar Ventures, LLC v. Tigani*, 2009 WL 1231246, at *8 (Del. Super.); *Ramunno v.*

Cawley, Del. Supr., 705 A.2d 1029, 1035 (1998); *Kanaga v. Gannett Co., Inc.*, Del. Supr., 687 A.2d 173 (1996); *Gannett Co., Inc. v. Re*, Del. Supr., 496 A.2d 553 (1985); *Slawik v. News-Journal Co.*, Del. Supr., 428 A.2d 15 (1981); *Spence v. Funk*, Del. Supr., 396 A.2d 967, 969 (1978); *Reardon v. News-Journal Co.*, Del. Supr., 164 A.2d 263 (1960) (holding defamation is actionable if it imputes something which intends to disgrace, lower, or exclude one from, society, or bring one into contempt or ridicule); *Klein v. Sunbeam Corp.*, Del. Supr., 94 A.2d 385 (1952), *adhered to on reargument*, Del. Supr., 95 A.2d 460 (1953).

11. INTENTIONAL TORTS - Defamatory/Privacy Torts

§ 11.2 – Libel and Slander - Definition

LIBEL AND SLANDER

In general, libel is written defamation. Slander is oral defamation.

Source:

Cousins v. Goodier, Del. Supr., 283 A.3d 1140, 1148 (2022); *Optical Air Data Sys., LLC v. L-3 Commc'ns Corp.,* 2019 WL 328429, at *7 (Del. Super.); *Ward v. Blair*, 2013 WL 3816568, at *7 (Del. Super.); *Ramunno v. Cawley*, Del. Supr., 705 A.2d 1029 (1998); *Kanaga v. Gannett Co., Inc.*, Del. Supr., 687 A.2d 173 (1996); *Spence v. Funk*, Del. Supr., 396 A.2d 967, 969 (1978).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.3 – Slander *per se*

SLANDER AS A MATTER OF LAW

If a statement defames [***plaintiff's name***] in [***his/her/its***] trade, business, or profession, [***he/she/it***] need not show that the defamation caused actual monetary loss in order to recover damages.

{**Comment**: *Slander as a matter of law also includes defamatory statements that impugn a crime or a loathsome disease to the plaintiff or that impugn unchastity to a female plaintiff. If the alleged facts warrant, the instruction should be adapted accordingly*.}

Source:

Kanaga v. Gannett Co., Inc., Del. Supr., 687 A.2d 173, 182-83 (1996); *Optical Air Data Sys., LLC v. L-3 Commc'ns Corp.,* 2019 WL 328429, at *7 (Del. Super.); *Jagger v. Schiavello*, Del. Super., 93 A.3d 656, 661 (2014); *Ward v. Blair*, 2013 WL 3816568, at *7 (Del. Super.); *Sunstar Ventures, LLC v. Tigani*, 2009 WL 1231246, at *8 (Del. Super.); *Spence v. Funk*, Del. Supr., 396 A.2d 967, 970 (1978); *Pierce v. Burns*, Del. Supr., 185 A.2d 477, 479 (1962); *Klein v. Sunbeam Corp.*, Del. Supr., 94 A.2d 385, 390-91 (1952), *adhered to on reargument*, Del. Supr., 95 A.2d 460 (1953); *Re v. Gannett Co. Inc.*, Del. Super., 480 A.2d 662 (1984).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.4 - Libel – No Actual Loss Must Be Shown

LIBEL – NO ACTUAL LOSS MUST BE SHOWN

A claim for libel may be asserted without proof of actual monetary loss. This is so whether the libel is clear from the statement itself or is clear only after referring to outside facts not contained in the writing. In either case, a plaintiff is entitled to recover damages proximately caused by the defamation.

Source:

Gannett Co., Inc. v. Kanaga, Del. Supr., 750 A.2d 1174, 1183-84 (2000); *Kanaga v. Gannett Co.*, Del. Supr., 687 A.2d 173, 182-83 (1996); *Gannett Co., Inc. v. Re*, Del. Supr., 496 A.2d 553, 557 (1985); *Spence v. Funk*, Del. Supr., 396 A.2d 967, 971 (1978); *Klein v. Sunbeam Corp.*, Del. Supr., 94 A.2d 385, 390 (1952), *adhered to on reargument*, Del. Supr., 95 A.2d 460 (1953).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.5 – Defamation – Non-Public Figure – Non-Media Defendant

ELEMENTS OF DEFAMATION
NON-PUBLIC FIGURE – NON-MEDIA DEFENDANT

To prove defamation, [***plaintiff's name***] must prove:

(1) [***defendant's name***] made a defamatory statement;

(2) concerning [***plaintiff's name***];

(3) the statement was published;

(4) a third party would understand the character of the communication as defamatory;

(5) [***defendant's name***] acted negligently; and

(6) the defamation caused injury to [***plaintiff's name***].

{**Comment:** *Where the challenged statement is a matter of public concern, plaintiff must also prove the statement was false. Cousins v. Goodier, Del. Supr., 283 A.3d 1140, 1148, 1150 (2022).*}

Source:

Cousins v. Goodier, Del. Supr., 283 A.3d 1140, 1148, 1150 (2022) (discussing standard for private and public plaintiffs); *Page v. Oath Inc.*, Del. Supr., 270 A.3d 833, 842 (2022); *Gannett Co., Inc. v. Kanaga*, Del. Supr., 750 A.2d 1174, 1184 (2000) (clarifying that the presumption of damages when plaintiff is maligned in her trade, business, or profession ((for which no proof of special damages is required)), applies to harm to reputation and actual damages requires supporting proof); *Ramunno v. Cawley*, Del. Supr., 705 A.2d 1029, 1035 (1998); *Kanaga v. Gannett Co., Inc.*, Del. Supr., 687 A.2d 173 (1996); *Spence v. Funk*, Del. Supr., 396 A.2d 967, 971 (1978); *ShotSpotter Inc. v. VICE Media, LLC*, 2022 WL 2373418, at *6 (Del. Super.) (elements).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.6 – Defamation – Media Defendant

ELEMENTS OF DEFAMATION
NON-PUBLIC FIGURE VS. MEDIA DEFENDANT

To prove defamation, [***plaintiff's name***] must prove:

(1) [***defendant's name***] made a defamatory statement;

(2) concerning [***plaintiff's name***];

(3) the statement was published;

(4) a third party would understand the character of the communication as defamatory;

(5) the statement was false [***or not substantially true***]; and

(6) the defamation caused injury to [***plaintiff's name***]

Source:

Page v. Oath Inc., Del. Supr., 270 A.3d 833, 842-43 (2022) (substantial truth is when the "gist" or "sting" of the article produces the same impression as an absolute truth); *Ramada Inns, Inc. v. Dow Jones & Co., Inc.*, Del. Super., 543 A.2d 313, 318-19 (1987); *Kanaga v. Gannett Co., Inc.*, Del. Supr., 687 A.2d 173 (1996); *Gannett Co., Inc. v. Kanaga*, Del. Supr., 750 A.2d 1174 (2000); *Ramunno v. Cawley*, Del. Supr., 705 A.2d 1029 (1998); *Gannett Co., Inc. v. Re*, Del. Supr., 496 A.2d 553 (1985). *See also Rosenbloom v. Metromedia, Inc.*, U.S. Supr., 403 U.S. 29, 30 (1971); *New York Times Co. v. Sullivan*, U.S. Supr., 376 U.S. 254, 285 (1964).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.7 – Defamation – Public Figure Plaintiff

ELEMENTS OF DEFAMATION – PUBLIC-FIGURE PLAINTIFF

To prove defamation, [***plaintiff's name***] must prove:

(1) [***defendant's name***] made a defamatory statement;

(2) concerning [***plaintiff's name***];

(3) the statement was published;

(4) a third party would understand the character of the communication as defamatory;

(5) the statement was false [***or not substantially true***];

(6) [***defendant's name***] acted with actual malice; and

(7) that the defamation caused injury to [***plaintiff's name***].

{***If applicable***:} Where, as here, the defendant is an institution, this state of mind must be attributable to those responsible for the publication.

Source:

Cousins v. Goodier, Del. Supr., 283 A.3d 1140 (2022); *Page v. Oath Inc.*, Del. Supr., 270 A.3d 833, 842-44 (2022); *Gertz v. Welch, Inc.*, U.S. Supr., 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, U.S. Supr., 376 U.S. 254 (1964); *Owens v. Lead Stories, LLC,* 2021 WL 3076686, at *12 (Del. Super.), *aff'd*, Del. Supr., 273 A.3d 275 (2022); *Agar v. Judy*, Del. Ch., 151 A.3d 456, 486 (2017) (plaintiff's burden is to plead the statements were false; that is, "the statements are not substantially true"); *Martin v. Widener Univ. Sch. of Law*, 1992 WL 153540, at *10 (Del. Super.).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.7A – Defamation – Prior determination of defamatory statement

PRIOR DETERMINATION OF DEFAMATORY STATEMENT

The Court previously determined [***parties stipulated***] that [***identify the statements***] are defamatory. In order to recover, [***plaintiff's name***] must prove all of the elements of [***his/her/its***] claim as I have previously stated.

Source:

Doe v. Cahill, Del. Supr., 884 A.2d 451, 463-64 (2005).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.8 – Defamation – Intentional Publication

INTENTIONAL PUBLICATION

Intentionally Omitted.

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.9 – Defamation –Negligent Publication

NEGLIGENT PUBLICATION

A person negligently publishes a defamatory communication when a reasonable person under the circumstances would not have published the communication.

Source:

Kanaga v. Gannett Co., Inc., Del. Supr., 687 A.2d 173 (1996); *Gannett Co., Inc. v. Kanaga*, Del. Supr., 750 A.2d 1174, 1181 (2000); *Re v. Gannett Co., Inc.*, Del. Super., 480 A.2d 662, 666 (1984), *aff'd*, Del. Supr., 496 A.2d 553, 557 (1985) (rejecting a "gross irresponsibility" or "actual malice" test for private plaintiff).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.10 – Defamation – Reckless Publication

RECKLESS PUBLICATION

Intentionally Omitted.

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.11 – Defamation – Injury to Reputation

INJURY TO REPUTATION

In determining how much [***plaintiff's name***]'s reputation has been harmed, you must consider the reputation that [***plaintiff's name***] enjoyed before the defamatory publication compared to the reputation that [***he/she/it***] enjoyed after the publication, and whether that reputation has actually been diminished since the publication. You may also consider the manner in which the defamatory matter was distributed and the extent of its circulation in [***plaintiff's name***]'s community and whether those who [***read the article / heard the broadcast, etc.***] understood it to refer to [***plaintiff's name***].

Source:

Kanaga v. Gannett Co., Inc., Del. Supr., 687 A.2d 173, 183 (1996).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.12 – Defamation – Truth / Substantial Truth

TRUTH OR SUBSTANTIAL TRUTH

{*If* ***plaintiff*** *bears the burden to prove substantial truth*}:

For [***plaintiff's name***] to recover, [***he/she/it***] must also prove that the statement was not substantially true. Substantially true statements are not actionable. To determine if a statement is substantially true, you must determine if the alleged defamation was no more damaging to [***plaintiff's name***]'s reputation than an absolutely true statement would have been. In other words, if the "gist" or "sting" of the allegedly defamatory statement produces the same effect in the mind of the recipient as the precise truth would have produced, then the statement is "substantially true" and you cannot award damages to [***plaintiff's name***] for the statement.

{*If* ***defendant*** *bears the burden to prove substantial truth*}:

It is an absolute defense to a claim of defamation that the alleged defamatory statements were substantially true at the time the statements were made. Thus, even if you find that [***defendant's name***] made defamatory statements about [***plaintiff's name***] that proximately caused [***him/her/it***] injury, you cannot award damages if you find that the statements were substantially true.

The alleged defamatory statements do not have to be absolutely true for [***defendant's name***] to successfully assert this defense. Substantially true statements are not actionable. To determine if a statement is substantially true, you must determine if the alleged defamation was no more damaging to [***plaintiff's name***]'s reputation than an absolutely true statement would have been. In other words, if the "gist" or "sting" of the allegedly defamatory statement produces the same effect in the mind of the recipient as the precise truth would have produced, then the statement is "substantially true" and you cannot award damages to [***plaintiff's name***] for the statement.

To prevail on this defense, [***defendant's name***] bears the burden of proving by a preponderance of the evidence that the alleged defamatory statements were true or substantially true.

Source:

Page v. Oath Inc., Del. Supr., 270 A.3d 833, 843-44 (2022); *Optical Air Data Sys., LLC v. L-3 Commc'ns Corp.*, 2019 WL 328429, at *7 (Del. Super.)*; Stephen G. Perlman, Rearden LLC v. Vox Media, Inc.*, 2015 WL 5724838, at *14-15 (Del. Ch.)*; Sunstar Ventures, LLC v. Tigani*, 2009 WL 1231246, at *8 (Del. Super.); *Ramunno v. Cawley*, Del. Supr., 705 A.2d 1029, 1035-36 (1998); *Riley v. Moyed*, Del. Supr., 529 A.2d 248, 253 (1987); *Gannett Co., Inc. v. Re*, Del. Supr., 496 A.2d 553, 557

(1985); *Ramada Inns, Inc. v. Dow Jones & Co., Inc.*, Del. Super., 543 A.2d 313, 317-18 (1987).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.13 – Falsity – Media Defendant

FALSITY – MEDIA DEFENDANT

[***Plaintiff's name***] has the burden of proving that the defamatory statement was false. If you find that the published statement was true, you must find for [***defendant's name***]. The published statement does not have to be absolutely or mathematically true. Substantial truth is all that is required.

{**Comment**: *See Jury Instr. No. 11.12, "Truth or Substantial Truth"*.}

Source:

Stephen G. Perlman, Rearden LLC v. Vox Media, Inc., 2015 WL 5724838, at *14 (Del. Ch.); *Ramunno v. Cawley*, Del. Supr., 705 A.2d 1029, 1035-36 (1998); *Ramada Inns, Inc. v. Dow Jones & Co. Inc.*, Del. Super., 543 A.2d 313, 318-19 (1987). *See also Philadelphia Newspapers, Inc., v. Hepps*, U.S. Supr., 475 U.S. 767 (1986).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.14 – Defamation – Presumption of Good Reputation

PRESUMPTION OF GOOD REPUTATION

In the absence of contrary evidence, the law presumes that the plaintiff, at the time any defamatory statements were made, enjoyed a good name and reputation.

Source:

See Spence v. Funk, Del. Supr., 396 A.2d 967, 969 (1978) (recognizing that the law of defamation is a balance between policy of protecting one's reputation and encouraging freedom of expression).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.15 – Defamation – Retraction

RETRACTION

Retraction is the act of withdrawing the defamatory statement; it may be considered as a factor in reducing damages and negating malice. To be effective, a retraction must be:

(1) full, complete, and sincere;

(2) as conspicuous as the original defamation and with sufficient resources dedicated to provide some measure of confidence that the retraction will reach as many persons as the original defamatory statement; and

(3) issued within a reasonable time of when the original defamatory and false statement was published.

Source:

Ross v. News-Journal Co., Del. Super., 228 A.2d 531 (1967), (retraction may negate any inference of malice, reckless disregard of truth or falsity). *See also Brogan v. Passaic Daily News*, N.J. Supr., 123 A.2d 473 (1956), *overruled on other grounds*, *Maressa v. New Jersey Monthly*, N.J. Supr., 445 A.2d 376 (1982).

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.16 – Defamation – Actual Malice Defined

"ACTUAL MALICE" DEFINED

A published statement is made with "actual malice" if it is made with knowledge that it is false or with reckless disregard for whether it is false.

"Reckless disregard" means that the defendant entertained serious doubts as to the truth of its publication or had a high degree of awareness of its probable falsity.

Failure to investigation, alone, is insufficient to find actual malice. However, if you find that a defendant purposefully avoided of the truth, you may infer the defendant acted with actual malice if you find that inference is justified.

Actual malice must be established by clear and convincing evidence.

Source:

Smartmatic USA Corp. v. Newsmax Media, Inc., 2023 WL 1525024, at *15 (Del. Super.); *Smartmatic USA Corp. v. Newsmax Media, Inc.*, 2024 WL 4165101, at *15 (Del. Super.); *Page v. Oath Inc.*, Del. Supr., 270 A.3d 833, 842 (2022); *Abraham v. Post,* 2012 WL 5509619, at *4 (Del. Super.); *New York Times Co. v. Sullivan*, U.S. Supr., 376 U.S. 254 (1964); *Kanaga v. Gannett Co., Inc.*, Del. Supr., 687 A.2d 173, 183 (1996); *St. Anant v. Thompson*, U.S. Supr., 390 U.S. 727, 731-33 (1968); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989).

DEFAMATION – DEFENSE OF A CONDITIONAL PRIVILEGE

I have determined, as a matter of law, that [***defendant's name***] was privileged to publish false and defamatory communications. But a person with this privilege may not abuse it. You must determine whether [***defendant's name***] abused [***his/her/its***] privilege. If you find that [***he/she/it***] abused this privilege, you may return a verdict in favor of [***plaintiff's name***] and against [***defendant's name***].

The privilege that applies to [***defendant's name***] is [***state privilege***]. This privilege is abused, however, if [***defendant's name***] made or published the false and defamatory communication intentionally, that is, with knowledge of its falsity; or recklessly, that is, by disregarding whether it was true or false. The privilege is also abused when asserted outside [***defendant's name***]'s performance of [***his/her/its***] duties or functions that give rise to the privilege.

{**Comment**: *Examples of such conditional privileges include: Communications among persons with a common interest in a particular subject, such as work-related matters; intercommunications among immediate family members; good-faith communications intended to prevent a crime or to apprehend a criminal.*}

Source:

Meades v. Wilmington Hous. Auth., 2005 WL 1131112, at *2 (Del. Supr.); *Burr v. Atl. Aviation Corp.*, Del. Supr., 348 A.2d 179 (1975); *Klein v. Sunbeam Corp.*, Del. Supr., 94 A.2d 385 (1953), *adhered to on reargument*, Del. Supr., 95 A.2d 460 (1953); *Battista v. Chrysler Corp.*, Del. Super., 454 A.2d 286 (1982). *See also* RESTATEMENT OF TORTS § 593-598A.

11. INTENTIONAL TORTS – Defamatory / Privacy Torts

§ 11.18 – Invasion of Privacy

INVASION OF PRIVACY

{**Comment**: *There are four general claims for invasion of privacy. Choose the one appropriate to the circumstances of the case*}:

(1) Intrusion: One who intentionally intrudes, physically or otherwise, into another person's solitude, seclusion, or private affairs, is responsible to that person for any harm suffered as a result of this invasion of privacy if that type of intrusion would be highly offensive to a reasonable person. The question is whether a reasonable person in similar circumstances would find the conduct very objectionable or would be expected to take serious offense to it.

(2) Appropriation: One who appropriates the name or likeness of another person for use or benefit is responsible to that person for any harm suffered as a result of this invasion of privacy.

(3) Publication of Private Facts: One who negligently publicizes a matter concerning another person's private life is responsible to that person for any harm

caused by this invasion of privacy if similar publicity about a reasonable person would be highly offensive to that person and if the matter is not one of legitimate concern to the public.

The question is whether a reasonable person in similar circumstances would find the conduct very objectionable or would expect take serious offense to it. Publication or publicity means that the matter is communicated to the public at large or to so many persons that the matter must be regarded as substantially certain to become public knowledge.

(4) False Light: One who publicizes a matter concerning another person and places that person before the public in a false light is responsible to that person for any harm suffered as a result of this publicity if similar publicity about a reasonable person would be highly offensive to that reasonable person and if the person giving the publicity knew the matter was false or recklessly disregarded whether it was false.

The question is whether a reasonable person in similar circumstances would find the conduct very objectionable or would be expected to take serious offense to it. Publication or publicity means that the matter is communicated to the public at

large or to so many persons that the matter must be regarded as substantially certain to become public knowledge.

{**Comment**: *Liability for negative publicity cast in a false light may exist under this instruction if the defendant is found to have acted negligently, but this area of the law is one of evolving constitutional interpretation by the United States Supreme Court. It is possible that the* New York Times *"actual malice" standard may be the only basis for imposing liability. Compare Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534 (1967) with Gertz v. Robert Welch, Inc., 418 U.S. 323, 334, n.6 (1974).}*

Source:

Barker v. Huang, Del. Supr., 610 A.2d 1341, 1349-50 (1992); *Barbieri v. News-Journal Co.*, Del. Supr., 189 A.2d 773, 774-74 (1963) (outlining the basic elements for a claim of invasion of privacy); *Reardon v. News-Journal Co.*, Del. Supr., 164 A.2d 263, 266 (1960).

12. INTENTIONAL TORTS - Abuse of Process / Tortious Interference

§ 12.1 – Malicious Prosecution – Elements

MALICIOUS PROSECUTION

A person who causes a civil or criminal proceeding to be initiated or continued against another, resulting in [***his/her***] arrest, seizure of [***his/her***] property, or other special injury, is responsible for the injury if the proceeding was initiated or continued with malice and without probable cause and was terminated in favor of the plaintiff.

For the plaintiff to prevail, five elements must be shown:

(1) [***defendant's name***] instituted civil or criminal proceedings against [***plaintiff's name***];

(2) no probable cause existed to support the charge or claim;

(3) the proceedings were instituted and pursued with malice;

(4) the proceedings were terminated in [***plaintiff's name***]'s favor; and

(5) [***plaintiff's name***] suffered damages as a result.

{**Comment**: *See Jury Instr. No. 12.4, "Malice Defined."* Compare *Jury Instr. No. 11.16, "Actual Malice Defined."*}.

Source:

Quartarone v. Kohl's Dep't. Stores, Inc., Del. Super., 983 A.2d 949, 954 (2009); *Winshall v. Viacom Intern'l, Inc.,* 2019 WL 960213 (Del. Super.), *on reargument*, 2019 WL 5787989 (Del. Super.), *aff'd*, Del. Supr., 237 A.3d 67 (2020); *Scott v. Moffit,* 2019 WL 3976068 (Del. Super.); *Lefot v. Rahe*, 2016 WL 3453937 (Del. Super.); *Smith v. First State Animal Ctr. & SPCA*, 2018 WL 4829991, at **7-8 (Del. Super.), *aff'd sub nom.*, Del. Supr., 212 A.3d 803 (2019) (elements).

12. INTENTIONAL TORTS - Abuse of Process / Tortious Interference

§ 12.2 – Malicious Prosecution – Favorable Termination

FAVORABLE TERMINATION OF CHARGES AGAINST PLAINTIFF

[***I have ruled as a matter of law / It has been stipulated***] that [***describe charges***] brought against [***plaintiff's name***] by [***defendant's name***] were terminated in [***plaintiff's name***]'s favor. In your deliberations, you need consider only whether [***plaintiff's name***] has proved [***describe remaining elements in dispute***].

Source:

Quartarone v. Kohl's Dep't Stores, Inc., Del. Super., 983 A.2d 949, 954 (2009); *Winshall v. Viacom Intern'l, Inc.*, 2019 WL 960213 (Del. Super.), *on reargument*, 2019 WL 5787989 (Del. Super.), *aff'd*, Del. Supr., 237 A.3d 67 (2020); *Scott v. Moffit*, 2019 WL 3976068 (Del. Super.); *Lefot v. Rahe*, 2016 WL 3453937 (Del. Super.); *Smith v. First State Animal Ctr. & SPCA*, 2018 WL 4829991, at *7-8 (Del. Super.), *aff'd sub nom.*, Del. Supr., 212 A.3d 803 (2019) (elements).

12. INTENTIONAL TORTS - Abuse of Process / Tortious Interference

§ 12.3 – Malicious Prosecution - Probable Cause

PROBABLE CAUSE – MATTER OF LAW

[***I have ruled as a matter of law / It has been stipulated***] that probable cause did not exist when the charges were brought against [***plaintiff's name***] by [***defendant's name***]. In your deliberations you need consider only whether [***plaintiff's name***] has proved [***describe remaining elements in dispute***].

PROBABLE CAUSE – QUESTION OF FACT FOR THE JURY

{**Comment**: *When there is a dispute of fact, the jury determines the facts and then the Court determines whether those facts constitute probable cause. The jury will need to be instructed on which factual findings it is to resolve.*}

Source:

Quartarone v. Kohl's Dep't Stores, Inc., Del. Super., 983 A.2d 949, 954 (2009) (probable cause being a mixed question of fact and law, "facts and circumstances that are resolved by a jury determination when there are disputed facts, . . . [then] the Court may proceed and make its probable cause finding"); *Winshall v. Viacom Intern'l, Inc.,* 2019 WL 960213 (Del. Super.), *on reargument*, 2019 WL 5787989 (Del. Super.), *aff'd*, Del. Supr., 237 A.3d 67 (2020); *Scott v. Moffit*, 2019 WL

3976068 (Del. Super.); *Lefot v. Rahe*, 2016 WL 3453937 (Del. Super.); *Smith v. First State Animal Ctr. & SPCA*, 2018 WL 4829991, at **7-8 (Del. Super.), *aff'd sub nom*., Del. Supr., 212 A.3d 803 (2019) (elements).

See also 11 *Del. C.* § 1902 (defining detention for questioning which is not an arrest); 11 *Del. C.* § 1911 (defining who is a police officer); *Jarvis v. State*, Del. Supr., 600 A.2d 38, 41 (1991) (reasonable suspicion not sufficient to justify arrest, probable cause required); *Coleman v. State*, Del. Supr., 562 A.2d 1171, 1175 (1989) (probable cause measured in the totality of circumstances), *cert. denied*, U.S. Supr., 493 U.S. 1027 (1990). *See also* Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, THE LAW OF TORTS § 41, e*t. seq*. (2d ed.).

12. INTENTIONAL TORTS - Abuse of Process / Tortious Interference

§ 12.4 – Malice Defined

MALICE DEFINED

In this case [***plaintiff's name***] must show that [***defendant's name***] acted with malice. To be malicious, the acts of [***defendant's name***] must have been done with a wrongful or improper motive or with a wanton disregard of [***plaintiff's name***] rights. Malice does not necessarily mean that there was actual spite, ill will, or a grudge, although they may have existed.

{**Comment**: *See Jury Instr. No. 5.10, "Willful and Wanton Conduct Defined" for a definition of "Wanton"*; compare *Jury Instr. No. 11.16, "Actual Malice Defined."*}

Source:

Winshall v. Viacom Intern'l, Inc., 2019 WL 960213 (Del. Super.), *on reargument*, 2019 WL 5787989 (Del. Super.), *aff'd*, Del. Supr., 237 A.3d 67 (2020); *Scott v. Moffit,* 2019 WL 3976068 (Del. Super.); *Lefot v. Rahe*, 2016 WL 3453937 (Del. Super.) *citing Quartarone v. Kohl's Dep't Stores, Inc.*, Del. Super., 983 A.2d 949 (2009) (probable cause is a mixed question of fact and law); *Sekscinski v. Harris*, 2006 WL 509541, at *2 (Del. Super.).

12. INTENTIONAL TORTS – Abuse of Process / Tortious Interference

§ 12.5 – Malicious Prosecution – Prior False Testimony by Defendant

WHERE PROBABLE CAUSE IS BASED ON FRAUD OR FALSE TESTIMONY

Ordinarily, when someone is committed by a judicial officer to police custody or indicted by a grand jury, probable cause is established for the prosecution of a crime. The presumption that probable cause existed, however, is overcome if [***defendant's name***] withheld facts or other material evidence from [***the magistrate, grand jury, or* (*his/her/its*) *attorney***]. Evidence is material when it has a logical connection with the facts of the case.

If you find that [***defendant's name***] withheld facts or other material evidence from the [***the magistrate, grand jury, or* (*his/her/its*) *attorney***], you must then determine whether or not probable cause existed.

Source:

Rogers v. Morgan, 2017 WL 5606861, at *7 (Del. Super.), *aff'd*, Del. Supr., 208 A.3d 342 (2019) (plaintiff failed to demonstrate the existence of false testimony through actual, specific evidence); *Re v. Stern & Co.*, Del. Super., 11 A.2d 328, 329 (1940) (finding plaintiff failed to sufficiently plead a lack of probable cause due to

fraud or false testimony); *Fabricated Evidence*,, BLACK'S LAW DICTIONARY 236 (12th ed. 2024).

12. INTENTIONAL TORTS – Abuse of Process / Tortious Interference

§ 12.6 – Malicious Prosecution – Abuse of Process

ABUSE OF PROCESS

One who willfully uses the legal system, whether through a criminal or civil action in the courts or in a regulatory agency, against another primarily to accomplish a purpose for which the legal system is not designed is responsible to the person against whom the legal process was used for any harm caused by such use. I have determined as a matter of law that [***defendant's name***] caused legal process to issue against [***plaintiff's name***] in the nature of [***state process***]. The [***state process***] is designed to [***state purpose***].

The elements that [***plaintiff's name***] must prove are:

(1) an improper or wrongful purpose in using the legal process; and

(2) a willful act in the use of the system not proper in the regular conduct of legal proceedings.

Source:

Korotki v. Hiller & Arban, LLC, 2016 WL 3637382, at *2 (Del. Super.); *Nix v. Sawyer*, Del. Super., 466 A.2d 407, 412 (1983); *Unit, Inc. v. Kentucky Fried Chicken Corp.*, Del. Super., 304 A.2d 320, 331-32 (1973), *overruled on other grounds*, *Mann*

v. Oppenheimer & Co., Del. Supr., 517 A.2d 1056 (1986); *Cantatore v. Univ. of Delaware*, 2021 WL 2135120, at *2-3 (Del. Super.); *Dayton v. Collison*, 2020 WL 3412701, at *13-14 (Del. Super.), *aff'd*, Del. Supr., 250 A.3d 763 (2021); *Batchelor v. Alexis Properties, LLC*, 2018 WL 5919683, at *3-4 (Del. Super.); *Adams v. Aidoo*, 2012 WL 1408878, at *4 (Del. Super.), *aff'd*, Del. Supr., 58 A.3d 410 (2013), *as revised* (Jan. 3, 2013). *See also* RESTATEMENT (SECOND) OF TORTS § 136 cmt. d; Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, THE LAW OF TORTS § 594, *et. seq*. (2d ed.).

12. INTENTIONAL TORTS – Abuse of Process / Tortious Interference

§ 12.7 – Intentional Interference with a Contractual Relationship

INTENTIONAL INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP

{**Comment**: *Instruct as appropriate*}:

- One who intentionally and improperly induces or otherwise intentionally causes a third-party not to perform a contract with another party is responsible to that other party for the loss suffered as a result of the breach of contract.

- One who intentionally and improperly induces or otherwise intentionally prevents another from performing a contract with a third-party or makes the performance of the contract more costly is responsible to the other party for the loss suffered as a result of the prevention or interference with the contract.

- One who purposely and improperly induces or otherwise purposely causes a third-party not to enter into or continue a prospective contractual relation with another is responsible to that other party for the loss suffered as a result of the prevention or interference with the contractual relationship.

You must determine whether [***defendant's name***]'s conduct was improper. In doing so, you may consider the following factors:

(1) the nature of [***defendant's name***]'s conduct;

(2) [***defendant's name***]'s motive;

(3) [***plaintiff's name***]'s interests;

(4) the expectations of the parties involved;

(5) the relations between the parties involved;

(6) the interest that [***defendant's name***] sought to advance;

(7) whether [***defendant's name***]'s act was done for the purpose of causing the interference or whether it was merely incidental to another purpose;

(8) the proximity or remoteness of [***defendant's name***]'s conduct to the interference; and

(9) society's interest in protecting business competition as well as its interest in protecting an individual against interference with their pursuit of profit or lucrative return.

Source:

KT4 Partners LLC v. Palantir Techs. Inc., 2021 WL 2823567, at *13 (Del. Super.); *WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, Del. Supr., 49 A.3d 1168, 1174 (2012) (elements); *Clouser v. Doherty*, 2017 WL 3947404, at *10 (Del. Supr.); *Allen Family Foods, Inc. v. Capitol Carbonic Corp.*, 2011 WL 1205138, at **3-4 (Del. Super.); *Irwin & Leighton, Inc., v. W.M. Anderson Co.*, Del. Ch., 532 A.2d 983, 992-93 (1987); *Bowl-Mor Company Inc. v. Brunswick Corp.*, Del. Ch., 297 A.2d 61, 64 (1972); *DeBonaventura v. Nationwide Mut. Ins. Co.*, Del. Ch., 419 A.2d 942, 947 (1980), *aff'd*, Del. Supr., 428 A.2d 1151, 1153 (1981); *Connolly v. Labowitz*, Del. Super., 519 A.2d 138, 143 (1986); *Stoltz v. Delaware Real Estate Comm'n*, Del. Super., 473 A.2d 1258, 1263-64 (1984); *Murphy v. Godwin*, Del. Super., 303 A.2d 668, 672-73 (1973); *Metro. Convoy Corp. v. Chrysler Corp.*, Del. Super., 173 A.2d 617, 626 (1961); *Regal Home Distrib. V. Gordon*, Del. Super., 66 A.2d 754, 754-55 (1949); *see also* RESTATEMENT (SECOND) TORTS §§ 766, 767.

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.1 – Assault Defined

ASSAULT

If you find that [***defendant's name***] intentionally, and without [***plaintiff's name***]'s consent, caused [***plaintiff's name***] to be in fear of an immediate harmful or offensive contact, then [***defendant's name***] is liable for assault. It is not necessary for any actual contact to have been made between the parties.

Source:

See Brzoska v. Olson, Del. Supr., 668 A.2d 1355, 1361 (1995) (*en banc*); *Rodriguez v. Cahall*, 2023 WL 569358, at *4 (Del. Super.); *see also* *RESTATEMENT* (SECOND) OF TORTS § 21 *et seq.*

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.2 – Battery Defined

BATTERY

If you find that [***defendant's name***] intentionally, and without [***plaintiff's name***]'s consent, made contact with [***plaintiff's name***] in a harmful or offensive way, then [***defendant's name***] is liable for battery. It is not necessary that [***defendant's name***] intended harm or offense when the contact was made in order for [***defendant's name***] to be liable for battery.

{**Comment**: *If the plaintiff was not harmed by the contact but is claiming that he or she was offended by it, an "offensiveness" instruction will be necessary; see Jury Instr. No. 13.7, "Offensiveness."*}

Source:

Brzoska v. Olson, Del. Supr., 668 A.2d 1355, 1360-61 (1995) (*en banc*); RESTATEMENT (SECOND) OF TORTS § 13 *et seq.* (1965).

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.3 – Assault and Battery – Plaintiff's Consent

CONSENT

[***Defendant's name***] has alleged that [***plaintiff's name***] permitted [***defendant's name***] to make contact with [***plaintiff's name***]'s person. If you find that [***plaintiff's name***] showed a willingness to engage in the alleged conduct and that [***defendant's name***] acted in response to this willingness, then you must find for [***defendant's name***].

{**Comment**: *See also Jury Instr. No. 9.4, "Assumption of the Risk," especially as it pertains to participants in sporting events.*}

Source:

18 *Del. C.* § 6801(5) (medical informed consent); *Brzoska v. Olson*, Del. Supr., 668 A.2d 1355, 1360-61 (1995) (*en banc*) (medical informed consent and AIDS); *Newmark v. Williams*, Del. Supr., 588 A.2d 1108, 1115 (1991) (medical informed consent for minors). *See also* PROSSER & KEETON ON TORTS § 18 (5th ed. 1984).

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.4 – Assault and Battery – Use of Force in Lawful Arrest

USE OF FORCE IN LAWFUL ARREST

A citizen has a duty to cooperate with the directions of a peace officer attempting to make a lawful arrest. If resisted, the officer may use such force as is reasonably necessary to make the arrest. If you find that [***name of officer***] used excessive and unnecessary force to make the arrest of [***plaintiff's name***], then you must return a verdict for [***plaintiff's name***]. If you find that [***name of officer***] used reasonable and necessary force to make the arrest of [***plaintiff's name***], then you must return a verdict for [***name of officer***].

Source:

11 *Del. C.* § 467; *Newman v. State*, Del. Supr. 942 A.2d 588, 594-95 (2008); *State v. Krakus*, Del. Oyer & Term., 93 A. 554, 555 (1915); *Petit v. Colmery*, Del. Super., 55 A. 344, 345 (1903).

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.5 – Assault and Battery – Self-Defense

SELF-DEFENSE IN ASSAULT AND BATTERY CASES

In this case, [***defendant's name***] alleges that [***he/she***] acted in self-defense. Self-defense is an affirmative defense to [***plaintiff's name***]'s claim. So, the burden of proving self-defense is on [***defendant's name***]. [***Defendant's name***] contends that [***he/she***] acted in self-defense after [***he/she***] was attacked by [***plaintiff's name***]. When attacked, one may use the force that is sufficient to repel the attack, but the resistance must be no more than is reasonably necessary to protect oneself from bodily harm. If the resistance or retaliation is excessive or out of proportion to the danger, it is not justified.

A person using force to protect [***himself/herself***] from harm may estimate the necessity of using that force under the circumstances as [***he/she***] believes it to be at the time that the force is used. The person attacked is under no duty to retreat from [***his/her***] attacker, or to surrender possession of any property belonging to [***him/her***], or to perform any other act that [***he/she***] has no legal duty to do, or to refrain from any lawful action.

If you find that [***defendant's name***] was acting in self-defense when [***he/she***] struck [***plaintiff's name***], you must return a verdict in favor of [***defendant's name***].

Source:

11 *Del. C.* § 464(a)–(b); *Tice v. State*; Del. Supr., 624 A.2d 399, 401 (1993); *Moor v. Licciardello*, Del. Supr., 463 A.2d 268, 270-72 (1983) (subjective standard applied); *Tice v. State*, 382 A.2d 231, 233 nn.3, 4 (1974) (same); *Coleman v. State*, Del. Supr., 320 A.2d 740 (1974) (same); *State v. Stevenson*, Del. Oyer & Term., 188 A. 750, 751 (1936) (victim may use no more force than is necessary for the purpose of resisting assault); *State v. Roe*, Del. Gen. Sess., 103 A. 16, (1918) (mere words or threats do not justify assault).

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.6 – Assault and Battery – Self-defense With Deadly Force

SELF-DEFENSE WITH DEADLY FORCE

[***Defendant's name***] contends is that [***he/she***] acted in self-defense after being attacked by [***plaintiff's name***]. You may find that [***defendant's name***] used deadly force. "Deadly force" is force used with the purpose of causing death or serious physical injury or with the knowledge of a substantial risk of causing death or serious physical injury.

Deadly force by [***defendant's name***] is justified if the defendant believed it was necessary to protect [***himself/herself***] against death, kidnapping, unlawful sexual intercourse, or serious physical injury. "Serious physical injury" means physical injury that creates a substantial risk of death, or that causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

The use of deadly force is *not* justified if the defendant, with the purpose of causing death or serious physical injury, provoked the use of force in the same encounter. Nor is deadly force justified when the defendant knows that [***he/she***] can

avoid the use of deadly force with complete safety by retreating, by surrendering possession of a thing to a person claiming a right to it, or by complying with a demand that [***he/she***] not perform an act that [***he/she***] is not legally obligated to perform. But the defendant is under no obligation to retreat in or from [***his/her***] dwelling, or in or from [***his/her***] place of work.

If you find that [***defendant's name***] was not acting in self-defense, or that [***his/her***] use of deadly force was not justified, you must find in favor of [***plaintiff's name***]. But if you find that [***defendant's name***] was acting in self-defense and was justified in using deadly force, you must find in favor of [***defendant's name***].

Source:

11 *Del. C.* §§ 222(32), 464(c)-(e), 471(a) (2001); *Warrington v. State*, Del. Supr., 840 A.2d 590, 592-93 (2003); *Moor v. Licciardello*, Del. Supr., 463 A.2d 268, 270-72 (1983) (incorporating the self-defense principles of the criminal code to civil cases and abrogating the common law rule of self-defense).

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.7 – Assault and Battery – Offensiveness

OFFENSIVENESS

[***Plaintiff's name***] has alleged that [***defendant's name***]'s contact with [***him/her***] was offensive. For contact to be offensive, it must offend a reasonable sense of personal dignity; that is, it must be contact that would offend the ordinary person and not one who is unduly sensitive about [***his/her***] personal dignity.

Source:

Brzoska v. Olson, Del. Supr., 668 A.2d 1355, 1361 (1995) (*en banc*).

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.8 – False Imprisonment Defined

FALSE IMPRISONMENT

A person who intentionally causes the improper confinement of another person against [***his/her***] will is responsible to that person for all harm caused by the confinement. A confinement is improper when the person detained has not consented to it and the person causing the confinement was not privileged to do so.

Confinement means a restriction within the boundaries fixed by another from which the restricted person knows of no reasonable means of escape. A reasonable means of escape is an escape by which a person would run no risk of harm to self or property. A confinement may be accomplished by actual or apparent physical barriers, actual physical force, threats of physical force, or any other form of duress or coercion.

The requirement of imprisonment means that the restraint must be a total one and not merely preventing someone from going where he or she pleases.

{**Comment**: See also *Jury Instr. No. 13.11 – "Shoplifting."*}

Source:

See RESTATEMENT (SECOND) OF TORTS §§ 35-45A (general rule), 67-69 (privilege of self-defense), 147, 150-155 (parental and *in loco parentis* privileges) (1965); *Hunt v. State*, Del. Supr., 69 A.3d 360, 368 (2013). *See also* 11 *Del. C.* § 840 (precluding liability for merchant who has probable cause to believe person has engaged in shoplifting).

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.9 – False Arrest / False Imprisonment – Arrest by Officer Without Warrant

ARREST WITHOUT WARRANT

Delaware law provides that a peace officer may arrest a person without a warrant if the officer has witnessed, or has reasonable ground to believe that the person has committed, a crime in the officer's presence. If the officer has reasonable ground to believe that a felony has been committed, the officer may arrest a suspect whether or not the officer was present at the scene of the crime and whether or not a felony was actually committed. An officer may also make a warrantless arrest if a felony has been committed by the person even though the officer had no reasonable ground at the time of the arrest to believe the person committed the felony.

Reasonable ground for an arrest exists whenever all the facts and circumstances within the officer's knowledge are reasonably reliable and sufficient to allow a prudent person to conclude that the suspect has committed or is committing a crime. Mere suspicion of a criminal offense, without something more, does not justify an arrest.

Source:

11 *Del. C.* § 1904; *Darling v. State*, Del. Supr., 768 A.2d 463, 465-66 (2001); *Coleman v. State*, Del. Supr., 562 A.2d 1171, 1174-77 (1989) (probable cause measured in the totality of circumstances), *cert. denied*, U.S. Supr., 493 U.S. 1027 (1990); *Thompson v. State*, Del. Supr., 539 A.2d 1052, 1054-56 (1988). *See also Illinois v. Gates*, U.S. Supr., 462 U.S. 213, 230-32 (1983).

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.10 – False Arrest / Imprisonment – Arrest by Private Individual

ARREST BY PRIVATE PERSON

A private person may make an arrest without a warrant for an offense that was committed in his or her presence and that amounted to or threatened a breach of the peace. A breach of the peace is a public offense involving violence or causing or likely to cause an immediate disturbance of public order.

{**Comment**: *This Rule does not apply to Motor Vehicle Violations.*}

Source:

State v. Cochran, Del. Supr., 372 A.2d 193, 195 n.2 (1977); *State v. Hodgson*, Del. Super., 200 A.2d 567, 569 (1964) (common law citizen's arrest powers limited to breach or threatened breach of the peace); *cf.* 11 *Del. C.* § 1912 (authorizing federal law enforcement officers to make arrests in their official capacity); 11 *Del. C.* § 1932 (authorizing arrest by out-of-state police in "fresh pursuit").

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.11 – False Arrest / False Imprisonment - Detention by Property/Business Owner for Shoplifting

REASONABLE DETENTION BY PROPERTY OWNER – SHOPLIFTING

A property or business owner who has probable cause to believe that a person has wrongfully taken property from the premises or has failed to pay for goods or services may detain the person on the premises for the time necessary to make a reasonable investigation of the facts, to report the information to a peace officer, and to hold the person in a reasonable manner until the officer arrives.

Source:

11 *Del. C.* § 840 (Shoplifting Statute); RESTATEMENT (SECOND) OF TORTS § 120A (1965); *Roberts v. Murray*, 2009 WL 2620725, at *6 (Del. Super.), *aff'd*, Del. Supr., 991 A.2d 18 (2010).

13. INTENTIONAL TORTS – Torts Against the Body

§ 13.12 – False Arrest / False Imprisonment – Probable Cause for Arrest

PROBABLE CAUSE FOR ARREST

Probable cause is an assessment of all the facts and circumstances that are reasonably reliable and sufficient and that would lead a prudent person to conclude that a suspect has committed or is committing a crime. Probable cause is a practical, nontechnical standard based on the everyday life experience that reasonable, prudent persons act on. It is a common sense standard that includes the experience of those versed in the field of law enforcement.

Source:

Stafford v. State, Del. Supr. 59 A.3d 1223, 1228-29 (2012), *as corrected* (Mar. 7, 2013); *Lefebvre v. State*, Del. Supr., 19 A.3d 287, 292-93 (2011); *Darling v. State*, Del. Supr., 768 A.2d 463, 465-66 (2001); *Illinois v. Gates*, U.S. Supr., 462 U.S. 213, 230-32 (1983); *Jarvis v. State*, Del. Supr., 600 A.2d 38, 41 (1991) (reasonable suspicion not sufficient to justify arrest, probable cause required); *Coleman v. State*, Del. Supr., 562 A.2d 1171, 1175-76 (1989) (probable cause measured in the totality

of circumstances), *cert. denied*, 493 U.S. 1027 (1990); *State v. Moore*, Del. Super., 187 A.2d 807, 813 (1963) (unlawful delay may render police liable for false arrest).

14. EMOTIONAL DISTRESS

§ 14.1 - Intentional Infliction of Emotional Distress

OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS

If a person intentionally or recklessly causes severe emotional distress to another by extreme and outrageous conduct, that person is liable for the emotional distress and for any bodily harm that results from the distress.

Extreme and outrageous conduct goes beyond all possible bounds of decency and would be regarded as atrocious and utterly intolerable in a civilized community. Emotional distress includes all highly unpleasant mental reactions, including fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, and worry. Severe emotional distress is so extreme that no reasonable person could be expected to endure it.

Liability for severe emotional distress, however, does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The law cannot intervene in every case where someone's feelings are hurt. There must still be freedom to express unflattering opinions. The law will intervene only where the distress is so severe that no reasonable person could be expected to endure it. In this regard, the intensity and the duration of the distress are factors to be considered in determining its severity.

If you find that [***defendant's name***]'s conduct was outrageous and extreme and that this conduct caused [***plaintiff's name***] to suffer severe emotional distress, then you must find [***defendant's name***] liable for damages.

Source:

Spence v. Spence, 2012 WL 1495324, at *3-4 (Del. Super.)*; Goode v. Bayhealth Med. Ctr., Inc*., 2007 WL 2050761, at *2 (Del. Supr.); *Tackett v. State Farm Fire & Cas. Ins. Co.*, Del. Supr., 653 A.2d 254, 265 (1995), *overruled on other grounds*, *E.I. DuPont de Nemours & Co. v. Pressman*, Del. Supr., 679 A.2d 436 (1996); *Garrison v. Med. Ctr. of Delaware, Inc.*, Del. Supr., 581 A.2d 288, 293 (1989); *Mergenthaler v. Asbestos Corp. of Am.*, Del. Supr., 480 A.2d 647, 651 (1984); *Robb v. Pennsylvania R.R. Co.*, Del. Supr., 210 A.2d 709, 711 (1965) (no recovery for fright alone without evidence of physical consequences); *cf. Cummings v. Pinder*, Del. Supr., 574 A.2d 843, 845 (1990) (no showing of physical harm needed if intentional conduct causing emotional distress is outrageous); *Mattern v. Hudson*, Del. Super., 532 A.2d 85, 85-86 (1987) (same); *Ham v. Brandywine Chrysler-Plymouth, Inc.*, 1985 WL 189010 (Del. Super.) (same). *See also* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

14. EMOTIONAL DISTRESS

§ 14.2 – Effect of Parties' Relationship

EFFECT OF PARTIES' RELATIONSHIP

If a fiduciary, acting in a relationship of trust and confidence, causes a client to suffer severe emotional distress as a result of outrageous conduct, the fiduciary will be liable for damages.

If you find that [***defendant's name***], in [***his/her***] role as [***plaintiff's name***]'s [***describe the fiduciary responsibility***], acted in an outrageous manner that caused [***plaintiff's name***] to suffer severe emotional distress, then you may award [***plaintiff's name***] damages for injuries arising from the emotional distress.

Source:

Cummings v. Pinder, Del. Supr., 574 A.2d 843, 845 (1990) (recovery for emotional distress arising out of outrageous conduct in attorney-client relationship).

14. EMOTIONAL DISTRESS

§ 14.3 – Unintentional Infliction of Emotional Distress

UNINTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

If someone's negligence causes fright or severe emotional distress to a person within the immediate area of physical danger created by that negligence, and if the person suffers physical consequences as a result of that severe emotional distress, then the injured person may recover damages.

Source:

Armstrong v. A.I. Dupont Hosp. for Children, Del. Super., 60 A.3d 414, 423 (2012); *Fanean v. Rite Aid Corp. of Delaware, Inc*., Del. Super., 984 A.2d 812, 819-20 (2009); *Doe v. Green*, 2008 WL 282319, at *1 (Del. Super.); *Wisnewski v. Jackman*, 2005 WL 406338, at *2 (Del. Super.); *Robb v. Pennsylvania R.R. Co.*, Del. Supr., 210 A.2d 709 (1965) (cause of action may lie in negligent infliction of emotional distress to person within immediate area of physical harm) (impact rule rejected); *cf. McClain v. Faraone*, Del. Super., 369 A.2d 1090, 1094 (1977) (in an action based on contract without related affirmative tortious physical act or conduct, there is no recovery for negligent or unintentional infliction of emotional distress).

14. EMOTIONAL DISTRESS

§ 14.4 – Emotional Distress Caused by Injury to a Close Relative

EMOTIONAL DISTRESS FROM INJURY NEGLIGENTLY CAUSED TO A CLOSE RELATIVE

A person may recover damages for fright or severe emotional distress suffered as a result of witnessing an injury negligently caused to a close relative only if:

(1) the person was in the immediate area of physical danger created by the negligent party; and

(2) the person suffered physical injury as a result of the emotional distress.

If you find that [***plaintiff's name***] suffered severe emotional distress and then physical injury from witnessing [***describe negligent act to a close relative***] and that [***plaintiff's name***] was within an immediate area of physical danger created by [***defendant's name***]'s negligence, then [***defendant's name***] is liable for damages.

Source:

Fanean v. Rite Aid Corp. of Delaware, Inc., Del. Super., 984 A.2d 812, 818 (2009); *Doe v. Green*, 2008 WL 282319, at *1-2 (Del. Super.); *Garrison v. Med. Ctr. of Delaware*, Del. Supr., 581 A.2d 288, 293 (1989) (no recovery on claim of emotional distress without physical harm to claimant); *Mergenthaler v. Asbestos Corp. of Am.*,

Del. Supr., 480 A.2d 647, 651 (1984) (same); *Robb v. Pennsylvania R.R. Co.*, Del. Supr., 210 A.2d 709, 711 (1965) (no recovery for fright alone without evidence of physical consequences); *Mancino v. Webb*, Del. Super., 274 A.2d 711, 714 (1971) (recovery by parent for emotional distress only where parent witnesses injury to child and parent is within zone of danger to child).

15. PREMISES LIABILITY

§ 15.1 – Business Owner's Duty to Public/Business Invitees

BUSINESS OWNER / LANDOWNER'S DUTY TO PUBLIC / BUSINESS INVITEES

A [***business owner / landowner***] owes a duty to the public to see that the areas of the premises ordinarily used by customers are kept in a reasonably safe condition. With this duty, the [***business owner / landowner***] is responsible for injuries that are caused by defects or conditions that the [***business owner / landowner***] had actual notice or that could have been discovered by reasonably prudent inspection.

Under the law, a [***business owner / landowner***] is not an insurer of the safety of an invitee. Mere ownership does not make one liable for injuries sustained by persons who have entered on land, even though the owner has invited them to enter. The [***business owner / landowner***]'s liability to an invitee for unintentional injuries must be based on negligence; and the law does not presume that the owner was negligent merely because the invitee was injured while on the premises.

Source:

Craig v. A.A.R. Realty Corp., Del. Super., 576 A.2d 688, 696 (1989), *aff'd*, Del. Supr., 571 A.2d 786 (lessor retains no control over property management); *Jardel Co. v. Hughes*, Del. Supr., 523 A.2d 518, 525 (1987) (holding commercial property owner has duty to reasonably protect business invitees from criminal or tortious acts of third persons); *Howard v. Food Fair Stores, New Castle, Inc.*, Del. Supr., 201 A.2d 638, 640 (1964) (storekeepers); *Woods v. Prices Corner Shopping Ctr. Merchs. Ass'n*, Del. Super., 541 A.2d 574, 575 (1988); *Coker v. McDonald's Corp.*, Del. Super., 537 A.2d 549, 550 (1987); *DiSabatino Bros., Inc. v. Baio*, Del. Supr., 366 A.2d 508, 510 (1976); *Wilson v. Derrickson*, Del. Supr., 175 A.2d 400, 402 (1961). *See also Schorah v. Baltimore & Ohio R.R. Co.*, 596 F. Supp. 256, 259 (D. Del. 1984); *Johnson v. 1001 Mattlind Way, LLC*, 2012 WL 1409341, at *2 (Del. Super.) (as it relates to contractual shifting duties within a rental agreement); *New Haverford P'ship v. Stroot*, Del. Supr., 772 A.2d 792 (2001).

15. PREMISES LIABILITY

§ 15.2 – Business Owner's Duty to Inspect for Dangerous Conditions

DUTY TO INSPECT AND DISCOVER DANGEROUS CONDITIONS FOR BENEFIT OF INVITEE

[***Plaintiff's name***] alleges that [***defendant's name***] failed to reasonably inspect and discover a dangerous condition on the premises.

An owner or occupier who has exclusive control over premises must inspect the premises and discover dangerous conditions that would be apparent to a person conducting a prudent inspection. An invitee is entitled to expect that the owner or occupant will take reasonable care to know the actual condition of the premises and, having discovered the condition, will either make it reasonably safe by repair or warn of the dangerous condition and the risk involved.

If you find that [***defendant's name***] failed to reasonably inspect the premises, failed to discover a dangerous condition that should have been discovered, or failed to warn of that condition, then you may find [***defendant's name***] negligent.

Source:

Walker v. Shoprite Supermarket, Inc., 2004 WL 3023089, at *2 (Del. Supr.) (businesses have a duty to keep public walking areas in a reasonably safe condition for customers.); *Hazel v. Delaware Supermarkets, Inc.*, Del. Supr., 953 A.2d 705, 709 (2008); *DiOssi v. Maroney*, Del. Supr., 548 A.2d 1361, 1366 (1988) (adopting § 343 of the RESTATEMENT (SECOND) OF TORTS); *Coker v. McDonald's Corp.*, Del. Super., 537 A.2d 549, 550 (1987); *Hamm v. Ramunno*, Del. Supr., 281 A.2d 601, 603 (1971).

15. PREMISES LIABILITY

§ 15.2A – Duty to Provide Safe Ingress and Egress

DUTY OF PROPERTY OWNER TO PROVIDE SAFE INGRESS AND EGRESS FROM ITS PROPERTY

A landowner has a duty to provide a business invitee with safe ingress and egress to its property. Ingress means the entrance or way onto the premises. Egress means the exit or way off the premises. Ordinarily, a landowner does not have a duty to warn an invitee of a danger located off the premises. But if the actual location of the hazard is immediately adjacent to the place of ingress or egress from the premises, the landowner has a duty to warn of the danger or protect against the danger in order to provide its invitees with a safe way onto and off the premises. If the danger, however, is so apparent that a business invitee can reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning and the landowner has no further duty to warn or protect the invitee.

Source:

Ward v. Shoney's, Inc., Del. Supr., 817 A.2d 799, 801-02 (2003); *Wilmington Country Club v. Cowee*, Del. Supr., 747 A.2d 1087, 1092 (2000); *Alpern v. Bigger Fish, LLC*, 2011 WL 4011413, at *1 (Del. Super.); *Coleman v. Nat'l R.R.*, 1991 WL

113332, at *2 (Del. Super.) (landowner's duty to provide safe ingress and egress includes duty to warn of hazards on adjacent property to landowner); *Niblett v. Pennsylvania R.R. Co.*, Del. Super., 158 A.2d 580, 582 (1960) (obviousness of danger "so apparent" that notice of hazard was established as a matter of law); *cf. Maher v. Voss*, Del. Supr., 98 A.2d 499 (1953) (obviousness of the condition is ordinarily a question of fact for the jury).

15. PREMISES LIABILITY

§ 15.3 – Business Invitee's Duty to Maintain Proper Lookout

BUSINESS INVITEE'S DUTY TO MAINTAIN PROPER LOOKOUT

A business invitee must maintain a proper lookout for hazards on the premises by acting in a careful and intelligent manner to observe what a reasonable person would see. This duty implies a duty to see things that are in plain view. It is negligent not to see what is plainly visible if there is nothing to obscure one's vision.

{*If applicable, insert the following instruction for food stores*}:

A customer has a right to assume that the floor in a store is safe to walk on and free from obstacles or defects that might cause a fall. A customer walking along a store aisle and glancing at shelves may be excused from keeping a constant lookout of the floor to observe a dangerous condition, particularly in light of the right to assume that the floor is safe.

If you find that [***plaintiff's name***] failed to maintain a proper lookout, you must find that [***he/she***] was contributorily negligent.

Source:

Hazel v. Delaware Supermarkets, Inc., Del. Supr., 953 A.2d 705, 709 (2008)*; Winkler v. Delaware State Fair, Inc*., 1992 WL 53412, at *2 (Del. Supr.); *Howard v. Food Fair Stores, New Castle, Inc.*, Del. Supr., 201 A.2d 638, 642 (1964); *cf. Franklin v. Salminen*, Del. Supr., 222 A.2d 261, 262 (1966) (holding proprietor not liable to invitee after giving proper warning to invitee of a plainly visible hazard which invitee then chose to disregard).

15. PREMISES LIABILITY

§ 15.4 – Duty of Property Owner to Anticipate Crimes of Third Parties

DUTY OF PROPERTY OWNER TO ANTICIPATE CRIMES OF A THIRD PARTY

A property owner is not an insurer of public safety. But a property owner who invites the public onto the property for business purposes and who knows, or should know, of a history of criminal activity on the property must take reasonable care to protect the public from the crimes of others.

If you find that crimes previously occurred on the property, and that [***defendant's name***] knew, or should have known, about these crimes, and if you find that [***defendant's name***] failed to take reasonable care to protect [***plaintiff's name***] from similar crimes by another, then you must find [***defendant's name***] negligent.

Source:

Jardel Co., Inc. v. Hughes, Del. Supr., 523 A.2d 518, 525-26 (1987); *Craig v. A.A.R. Realty Corp.*, Del. Super., 576 A.2d 688, 692-95, *aff'd*, Del. Supr., 571 A.2d 786 (1989). *See also Furek v. Univ. of Delaware*, Del. Supr., 594 A.2d 506, 508, 521-22 (1991) (university has duty to protect or warn students, as its invitees, against

negligent or criminal acts of third persons); RESTATEMENT (SECOND) OF TORTS § 344 cmt. f.

15. PREMISES LIABILITY

§ 15.4A – Duty to Anticipate Acts of Third Parties

DUTY OF PROPERTY OWNER TO ANTICIPATE ACTS OF THIRD PARTIES

A property owner is liable to a business invitee for injuries caused by the accidental, negligent or intentional acts of third persons if the property owner failed to exercise reasonable care either to discover that such acts were occurring or to protect against them. A property owner is liable if it knew or had reason to know from past experience that there was a likelihood of conduct on the part of third persons that was likely to endanger the safety of a business invitee, even though the property owner had no reason to expect such conduct from a particular individual.

Source:

Furek v. Univ. of Delaware, Del. Supr., 594 A.2d 506, 508, 521-22 (1991) (duty to protect students, as invitees, against negligent or criminal acts of third persons); *see also Jardel Co., Inc. v. Hughes*, Del. Supr., 523 A.2d 518, 524 (1987); *Buford v. Ligon*, 2021 WL 5630048, at *6-8 (Del. Super.) (finding a duty owed under both § 323(a) and § 344 of the RESTATEMENT (SECOND) OF TORTS); *Craig v. A.A.R. Realty Corp.*, Del. Super., 576 A.2d 688, 692-95, *aff'd*, Del. Supr., 571 A.2d 786 (1989); RESTATEMENT (SECOND) OF TORTS § 344A cmt.f.

15. PREMISES LIABILITY

§ 15.4B – Business Owner's Duty to Protect Against Crime

DUTY OF BUSINESS OWNER TO PROTECT AGAINST CRIME

Under the law, a business owner is not an insurer of the safety of an invitee. Mere ownership does not make one liable for injuries sustained by persons who have entered on business premises, even though the owner has invited them to enter. The business owner's liability to an invitee must be based on negligence; and the law does not presume that the owner was negligent merely because the invitee was injured while on the premises.

A business owner who invites the public onto its premises and who knows, or should know, that there is a significant risk of criminal activity at the business site must take reasonable care to protect an invitee from criminal activity.

If you find that there was a significant risk of criminal activity at [***business site***] and that [***defendant's name***] knew, or should have known of that risk and, if you find that [***defendant's name***] failed to take reasonable care to protect [***plaintiff's name***] from criminal activity, then you must find [***defendant's name***] negligent.

Source:

Harvey v. Super Fresh Food Mkts., Inc., 2001 WL 898602, at *1 (Del. Supr.) (property owner's negligence must be the proximate cause of the injury).

15. PREMISES LIABILITY

§ 15.5 – Duty of Party in Control of Premises to Workers on the Site

EMPLOYEES ON PREMISES – CONTRACTOR'S DUTY TO EMPLOYEES OF ANOTHER CONTRACTOR OR SUBCONTRACTOR

[***Plaintiff's name***] was an employee of [_____] on the premises under a contract with [***owner, contractor, or subcontractor's name***].

A contractor who is in control of the workplace must provide a safe environment to work. This does not mean that the contractor guarantees or insures the safety of the workplace. The extent of the contractor's duty is to exercise ordinary care, under the circumstances, to see that the workplace is reasonably safe.

If you find that [***defendant's name***] failed to perform this duty, then [***he/she/it***] was negligent.

Source:

Handler Corp. v. Tlapechco, Del. Supr., 901 A.2d 737, 740-42 (2006) (discussing allocation of responsibility between general and subcontractor); *Seither v. Balbec Corp.*, 1995 WL 465187 (Del. Super.), *aff'd sub nom.*, Del. Supr. 676 A.2d 906 (1996) (discussing OSHA standards); *Rabar v. E.I. duPont de Nemours & Co.*, Del. Super., 415 A.2d 499, 506 (1980), *overruled on other grounds*, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *Harford Mut. Ins. Co. v. Weiner*, 2014 WL 4247724 (Del. Super.).

15. PREMISES LIABILITY

§ 15.6 – Violation of Regulation to Protect Workers – OSHA

OSHA

{**Comment**: *In Toll Bros., Inc. v. Considine, the Delaware Supreme Court held that relevant violations of the regulations of the Occupational Safety and Health Administration ("OSHA") are only evidence of negligence and not negligence per se. Del. Supr., 706 A.2d 493, 497-98 (1998). In Delaware Elec. Coop. v. Duphily, the Supreme Court stated that violations of the National Electrical Safety Code ("NESC"), or any other industry-wide standards, would constitute only evidence of negligence unless such standards were validly adopted by legislative directive as the law of the State. Del. Supr., 703 A.2d 1202, 1209 (1997)(dicta).}*

{**Comment**: See *Jury Instr. No. 9.10, "Compliance With Government Regulations or Industry Standards Does Not Preclude a Finding of Negligence*."}

15. PREMISES LIABILITY

§ 15.7 – Duty of Landowner to Employees of Independent Contractor

LANDOWNER'S DUTY TO EMPLOYEES OF AN INDEPENDENT CONTRACTOR

A landowner has no duty to protect an independent contractor's employees from hazards created by performance of the contracted work. Nor does a landowner have a duty to preserve the condition of the premises or to supervise the manner in which the work is performed unless the owner retains active control over how the work is carried out and the methods used.

Source:

O'Connor v. Diamond State Tel. Co., Del. Super., 503 A.2d 661, 663 (1985); *Seeney v. Dover Country Club Apartments*, Del. Super., 318 A.2d 619, 621 (1974); *see also Harford Mut. Ins. Co. v. Weiner*, 2014 WL 4247724, at *3-5 (Del. Super.).

15. PREMISES LIABILITY

§ 15.8 – Delaware Premises Guest Statute

GUEST STATUTE

Under the Landowner Guest Statute, a person who enters someone else's land as a guest without payment or as a trespasser cannot make a claim for any injuries or damages occurring on the premises unless the owner or occupier either intentionally caused the injuries or damages, or unless they were caused by the owner's or occupier's willful or wanton disregard of the rights of such persons.

You must consider only whether [***plaintiff's name***] has proved that [***defendant's name***] intentionally, willfully, or wantonly disregarded the rights of [***plaintiff's name***].

Source:

25 *Del. C.* § 1501; *Fox v. Fox*, Del. Supr., 729 A.2d 825, 828 (1999) (adopting RESTATEMENT (SECOND) OF TORTS § 343B and holding a minor licensee is not barred by the Guest Premises Statute from pursuing a claim based upon attractive nuisance); *see also Wilson v. Hunter*, 2022 WL 90209, at *3-4 (Del. Super.); *Stratford Apartments., Inc. v. Fleming*, Del. Supr., 305 A.2d 624, 625-26 (1973) (construing Delaware Guest Statute); *Jardel Co., Inc. v. Hughes*, Del. Supr., 523 A.2d 518, 529-30 (1987) (discussing intentional, willful, and wanton conduct).

15. PREMISES LIABILITY

§ 15.9 – Duty of Landowner to Licensee on Residential or Farm Premises

DUTY OF OWNER OR OCCUPIER OF PREMISES TO A LICENSEE OR TRESPASSER

A licensee is a person who enters or remains on the property of another with the consent of the owner or occupier.

A trespasser is a person who enters or remains on the property of another without the consent of the owner or occupier of the property.

{**Comment**: *A licensee is a "guest without payment" within the scope of the Delaware Guest Statute. See Jury Instr. No. 15.8, "Delaware Premises Guest Statute."*}

Source:

25 *Del. C.* § 1501; *Caine v. New Castle County*, Del. Supr., 379 A.2d 1112, 1114-15 (1977) (discussing "trespasser" and "licensee" classifications in the RESTATEMENT (SECOND) OF TORTS §§ 329 and 330 for purposes of Delaware Guest statute); *Fox v. Fox*, Del. Supr., 729 A.2d 825, 828 (1999) (adopting RESTATEMENT (SECOND) OF TORTS § 343B and holding a minor licensee is not barred by the Guest Premises Statute from pursuing a claim based upon attractive nuisance); *Acton v. Wilmington & N. R.R. Co.*, Del. Supr., 407 A.2d 204, 205-06 (1979) ("guest without

payment" includes all licensees); *Hoesch v. Nat'l R.R. Passenger Corp.*, Del. Supr., 677 A.2d 29 (1996) (enactment of 25 *Del. C.* § 1501, applicable to residential and farm property, did not alter common law duties owed by commercial and industrial property owners to trespassers and guests without payment); *Facciolo v. Facciolo Constr. Co.*, Del. Supr., 317 A.2d 27, 28 (1974); *Slovin v. Gauger*, Del. Supr., 200 A.2d 565, 567 (1964); *Maher v. Voss*, Del. Super., 84 A.2d 527, 528-29 (1951), *aff'd*, Del. Supr., 98 A.2d 499 (1953).

15. PREMISES LIABILITY

§ 15.10 – Duty of Landowner to Trespassing Children in Dangerous Conditions

LIABILITY TO CHILDREN FOR HIGHLY DANGEROUS ARTIFICIAL CONDITIONS

A possessor of land is liable to young children on the land for bodily harm caused by a structure or other artificial condition on the land, if:

(1) the place is one that the possessor knows or should know that young children are likely to trespass on;

(2) the possessor knows or should know that the structure or condition involves an unreasonable risk of death or serious bodily harm to young children;

(3) the children, because of their youth, do not discover the condition or realize the risk involved in meddling in it or in coming within the area made dangerous by it;

(4) the usefulness to the possessor of maintaining the condition is slight as compared to the risk to young children; and

(5) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

If you find that all of these elements exist, then you must find for [***plaintiff's name***].

Source:

Butler v. Newark Cnty. Country Club, Del. Supr., 909 A.2d 111, 113 (2006) (Delaware follows standards set forth in RESTATEMENT (SECOND) OF TORTS § 339 regarding landowner's liability for attractive nuisances); *Fox v. Fox*, Del. Supr., 729 A.2d 825, 828 (1999) (adopting RESTATEMENT (SECOND) OF TORTS § 343B and holding a minor licensee is not barred by the Guest Premises Statute from pursuing a claim based upon attractive nuisance); *Coe v. Schneider*, Del. Supr., 424 A.2d 1, 2 (1980); *Schorah v. Carey*, Del. Supr., 331 A.2d 383, 384 (1975); *Johnson v. Delmarva Power & Light Co.*, Del. Super., 312 A.2d 634, 636 (1973); *Moran v. Delaware Racing Ass'n*, Del. Super., 218 A.2d 452, 453-54 (1966); *Hoesch v. Nat'l R.R. Passenger Corp.*, Del. Supr., 677 A.2d 29 (1996) (common law duty owed to minors differs to the duties owed to an adult trespasser).

15. PREMISES LIABILITY

§ 15.11 – Duty to Keep Sidewalks Free of Hazards of Snow and Ice

DUTY OF OWNER OR OCCUPIER OF BUSINESS TO KEEP PREMISES SAFE FROM HAZARDS OF SNOW AND ICE

A [***business owner / occupier***] has a duty to keep the premises, including sidewalks and entry ramps, reasonably safe from the hazards associated with the natural accumulation of ice and snow. Although a [***business owner / occupier***] is not an insurer of the safety of its invitees, the owner must take reasonable steps to make the premises safe. The [***owner / occupier***] of the premises may relieve itself of liability, even though an invitee may be injured on the premises, by taking reasonable steps to make the area safe. The [***business owner / occupier***] is entitled to await the end of the snowfall and a reasonable time thereafter to take action to make the premises safe from the hazardous condition caused by the accumulation of ice and snow. It is not enough, however, merely to warn an invitee of the hazard.

If you find that [***name of business owner / occupier***] failed to take reasonable steps to keep the premises free from the hazard of snow and ice accumulations, then you must find [***name of business owner / occupier***] negligent.

Source:

Laine v. Speedway, LLC, Del. Supr., 177 A.3d 1227, 1229 (2018) (recognizing continuing storm doctrine); *Monroe Park Apartments. Corp. v. Bennett*, Del. Supr., 232 A.2d 105 (1967) (apartment building common areas); *Young v. Saroukos*, Del. Super., 185 A.2d 274, 282 (1962) (sidewalk leading to apartment building); *Woods v. Prices Corner Shopping Ctr. Merchs. Ass'n*, Del. Super., 541 A.2d 574 (1988) (duty of owner or occupier of business to keep premises safe from hazards of snow and ice); *Coker v. McDonald's Corp.*, Del. Super., 537 A.2d 549, 550 (1987) (ice on walkway leading to restaurant).

15. PREMISES LIABILITY

§ 15.12 – Liens Upon Chattels of Another

LIENS ON PROPERTY OF ANOTHER

A Delaware statute provides that certain workers and service providers who provide services for a fee or reward have a lien on items and may detain them to secure payment of the fee or reward. Those entitled to the lien are as follows:

> "[a]ny hotelkeeper, innkeeper, garage owner, auction service or other person who keeps a livery, boarding stable, garage, airport, marina, or other establishment and, for price or reward at such . . . [a place] . . . , furnishes food or care for any horse or has the custody or care of any carriage, cart, wagon, sleigh, motor vehicle, trailer, moped, boat, airplane, or other vehicle or any harness, robes or other equipment for the same or [who] makes repairs, auctions, performs labor upon, furnishes services, supplies materials, stores, safekeeps or tows any . . . [of these items] . . . for the same . . . ."

This statute creates a right to retain property through reasonable means. It does not create a right to use physical force.

Source:

25 *Del. C.* § 3901; *Allstate Ins. Co. v. Rossi Auto Body, Inc.*, Del. Super., 787 A.2d 742, 746 (2001) (discussing garagemen's lien statute).

16. FRAUD AND DECEIT

§ 16.1 – Fraud Defined

FRAUD

To establish that [***defendant's name***] is liable for fraud, [***plaintiff's name***] must prove the following elements by a preponderance of the evidence:

(1) [***defendant's name***] made a false representation of a material fact;

(2) [***defendant's name***] knew or believed that this representation was false, or it was made with reckless indifference to the truth, [***or defendant had a special duty to know whether the representation was false***];

(3) [***defendant's name***] intended to induce [***plaintiff's name***] to act or refrain from acting;

(4) [***plaintiff's name***] acted or refrained from acting, in justifiable reliance on the false representation; and

(5) [***plaintiff's name***] suffered damages as a result of this reliance.

A false representation may be made by words or by conduct. A fact is material if it would cause a reasonable person to decide to act in a particular way, or if the maker of the misrepresentation knew another person would regard it as important.

"Reckless indifference" means the truth was reasonably apparent but consciously ignored.

If you find that [***plaintiff's name***] has proved all of the above elements, then you must find [***defendant's name***] liable for fraud.

Source:

Patel v. Sunvest Realty Corp., 2018 WL 4961392, at *3 (Del. Super.); *Lorenzetti v. Hodges*, 62 A.3d 1224 (TABLE), 2013 WL 592923, at *3 (Del. Supr.); *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *6 (Del. Ch.); *Homan v. Turoczy*, 2005 WL 2000756, at *13 (Del. Ch.); *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *3 (Del. Ch.), *aff'd*, Del. Supr., 825 A.2d 239 (2003); *Gaffin v. Teledyne, Inc.*, Del. Supr., 611 A.2d 467, 472 (1992); *Stephenson v. Capano Dev., Inc.*, Del. Supr., 462 A.2d 1069, 1074 (1983); *Harmon v. Masoneilan Int'l, Inc.*, Del. Supr., 442 A.2d 487, 499 (1982); *Twin Coach Co. v. Chance Vought Aircraft, Inc.*, Del. Super., 163 A.2d 278, 284 (1960). *See also* RESTATEMENT (SECOND) OF TORTS §§ 525, 530, 531 (1965); *Craig v. A.A.R. Realty Corp.*, Del. Super., 576 A.2d 688, 697 (1989) (discussing "reckless indifference"), *aff'd*, Del. Supr., 571 A.2d 786; *see also Jardel Co., Inc. v. Hughes*, Del. Supr., 523 A.2d 518, 529-30 (1987) (in the context of punitive damages, discussing reckless indifference as "reasonably apparent but consciously ignored").

16. FRAUD AND DECEIT

§ 16.2 – Expression of Opinion

EXPRESSION OF OPINION

An expression of an opinion or a speculation about future events, when clearly made as such, is not considered fraud or misrepresentation even if the opinion or speculation turns out to be untrue. But if an opinion or speculation is false and made with the intent to deceive, then it is fraudulent in the same way that a misstatement of fact is fraudulent.

Source:

Wal-Mart Stores, Inc. v. AIG Life Ins. Co., Del. Supr., 901 A.2d 106, 115 (2006); *Consol. Fisheries Co. v. Consol. Solubles Co.*, Del. Supr., 112 A.2d 30, 37 (1955); *Traylor Eng'g & Mfg. Co. v. Nat'l Container Corp.*, Del. Super., 70 A.2d 9, 13-14 (1949).

16. FRAUD AND DECEIT

§ 16.3 – Intentional Concealment

INTENTIONAL CONCEALMENT OF FACTS

Fraud does not merely consist of overt misrepresentations. Fraud may also occur when someone deliberately conceals facts important to a transaction, causing [***plaintiff's name***] to rely on the deception to [***his/her/its***] detriment. This concealment can occur by a person's silence in the face of a duty to disclose the facts or by some action taken to prevent [***plaintiff's name***] from discovering the facts important to the transaction.

Source:

Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., Del. Ch., 854 A.2d 121, 143, 150 (2004); *Gaffin v. Teledyne, Inc.*, Del. Supr., 611 A.2d 467, 472 (1992); *Stephenson v. Capano Dev., Inc.*, Del. Supr., 462 A.2d 1069, 1074 (1983).

16. FRAUD AND DECEIT

§ 16.4 – Nondisclosure of Known Facts

NONDISCLOSURE OF FACTS ALREADY KNOWN TO PLAINTIFF

If [***plaintiff's name***] was aware of the true facts of the transaction, even if they were concealed by the other party, or if [***plaintiff's name***] did not rely on the concealment of these facts, then there is no fraud.

Source:

Merrill v. Crothall-Am., Inc., Del. Supr., 606 A.2d 96, 100 (1992) (knowledge by alleged victim of true facts, which are misrepresented by defendant, negates claim for fraud); *Nicolet, Inc. v. Nutt*, Del. Supr., 525 A.2d 146, 149 (1987) (no need to disclose material fact or opinion unless duty to speak exists).

16. FRAUD AND DECEIT

§ 16.5 – Negligent Misrepresentation – Consumer Fraud Act

NEGLIGENT MISREPRESENTATION – CONSUMER FRAUD ACT

Under the Delaware Consumer Fraud Act, if a person makes a false representation or conceals an important fact from another in connection with the advertising or sale of any merchandise, and intends that the other person will rely on it, the person making the false representation may be liable. This is so even if the person making the representation was unaware that it was false or that an important fact had been concealed. This is known as negligent misrepresentation.

If you find that [***defendant's name***] falsely represented that [***describe alleged misrepresentation or concealment***] and intended that [***plaintiff's name***] would rely on this representation, then [***defendant's name***] is liable for negligent misrepresentation.

{**Comment**: *The Consumer Fraud Act is limited to transactions involving the sale or advertising of merchandise, including real estate transactions.*}

Source:

6 *Del. C.* §§ 2511–2527; *Stephenson v. Capano Dev., Inc.*, Del. Supr., 462 A.2d 1069, 1074 (1983); *Teamsters Local 237 Welfare Fund v. AstraZeneca Pharms. LP*, Del. Supr., 136 A.3d 688, 693 (2016); *In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24, 28-29, *aff'd sub nom*., Del. Supr., *Brandywine Volkswagen, Ltd. v. State*, 312 A.2d 632, 634 (1973).

17. INSURANCE

§ 17.1 – Agent's Obligation to Act in Good Faith

INSURANCE AGENT'S DUTY OF CARE AND DUTY TO ACT IN GOOD FAITH

An insurance agent is generally required to exercise reasonable care, skill, and diligence in his or her business. Under Delaware law, a person licensed to sell insurance, or licensee, has a duty to transact business in accordance with the provisions of the Delaware Insurance Code and to conduct such business in good faith and using sound business principles.

In this case, [***plaintiff's name***] alleges that [***defendant's name***] breached [***his/her***] duty to [***specify duty***]. If you find that [***defendant's name***] breached this duty, which I will define shortly, and if you find [***defendant's name***]'s breach caused [***plaintiff's name***] to suffer injury or loss, then you must find [***defendant's name***] liable for damages.

Source:

See generally 18 *Del. C.* § 1702 *et seq.* (licensing and statutory definitions of insurance personnel); *Grand Ventures, Inc. v. Whaley*, Del. Super., 622 A.2d 655, 665 (1992), *aff'd*, Del. Supr., 632 A.2d 63 (1993); *Sinex v. Wallis*, Del. Super., 611

A.2d 31, 33-34 (1991); *Ins. Co. of N. Am. v. Waterhouse*, Del. Super., 424 A.2d 675, 677 (1980). *See also* 18 *Del. C.* § 2301 *et seq.* (statutory duties of agents and brokers).

17. INSURANCE

§ 17.2 – Duty to Pay First Party Claims

{**Comment**: *Refer to particular provision(s) in the Code for text of instruction.*}

Source:

See 18 *Del. C.* § 2304(16) (Unfair Claim Settlement Practices).

17. INSURANCE

§ 17.3 – Third Party Claims

{**Comment**: *Refer to particular provision(s) in the Code for text of instruction.*}

Source:

See 18 *Del. C.* § 2304(16) (Unfair Claim Settlement Practices).

17. INSURANCE

§ 17.4 – Duty to Settle within Policy Limits

{**Comment**: *Refer to particular provision(s) in the Code for text of instruction.*}

Source:

Connelly v. State Farm Mut. Auto. Ins. Co., Del. Supr., 135 A.3d 1271, 1275 (2016) (duty to settle within policy limits where recovery in excess of coverage is likely).

17. INSURANCE

§ 17.5 – Special Factors to Consider

{**Comment**: *Refer to particular provision(s) in the Code for text of instruction.*}

Source:

See generally 18 *Del. C.* §§ 903, 2720, 2726, 3504, and 6301 *et seq.*; *Kent Gen. Hosp., Inc. v. Blue Cross & Blue Shield of Delaware, Inc.*, Del. Supr., 442 A.2d 1368, 1370-72 (1982) (provisions in policy contract prohibiting assignment of benefits not void or unenforceable as a matter of public policy); *Myers v. Myers*, Del. Supr., 408 A.2d 279, 280 (1979) (irrevocable grant of rights to beneficiary valid); *Wilmington Tr.t Co. v. Barry*, Del. Super., 338 A.2d 575, 577 (1975), *aff'd*, Del. Supr., 359 A.2d 664 (1976) (insurance contracts that exempt proceeds from liability for debt of insured or beneficiary are valid); *Maneval v. Lutheran Bhd.*, Del. Super., 281 A.2d 502, 504 (1971) (proceeds of life insurance policy not available to beneficiary who killed insured).

17. INSURANCE

§ 17.6 – General Duty of Insurer to Its Insured to Handle Claims in Good Faith

GENERAL DUTY OF INSURER TO ITS INSURED TO HANDLE CLAIMS IN GOOD FAITH

An insurance company has a contractual obligation to investigate, process, and defend claims brought by or against its insured. An insurer violates its obligations to its insured if it acts in bad faith — meaning that the insurer has clearly [***acted or failed to act***] without any reasonable justification.

Source:

Guaranteed Rate, Inc. v. ACE Am. Ins. Co., 2022 WL 4088596, at *8 (Del. Super.), *aff'd*, Del. Supr., 305 A.3d 339 (2023) (considerations for judging reasonableness); *RSUI Indem. Co. v. Murdock*, Del. Supr., 248 A.3d 887, 910 (2021); *Bennett v. USAA Cas. Ins. Co.*, 2017 WL 961806, at *4 (Del. Supr.) (*dicta*); *Enrique v. State Farm Mut. Auto. Ins. Co*., Del. Supr., 142 A.3d 506, 511 (2016); *Pierce v. Int'l Ins. Co. of Illinois*, Del. Supr., 671 A.2d 1361, 1364-66 (1996) (under workers' compensation law, employer's carrier has duty to act in good faith to beneficiary-employee); *Tackett v. State Farm Fire & Cas. Ins. Co.*, Del. Supr., 653 A.2d 254, 262-64 (1995), *overruled on other grounds*, *E.I. DuPont de Nemours & Co. v. Pressman*, Del. Supr., 679 A.2d 436 (1996) (insurance carrier's duty to act in good faith in first party disputes).

17. INSURANCE

§ 17.7 – Insurance Company's Duty to Settle in Good Faith

INSURANCE COMPANY'S DUTY TO SETTLE IN GOOD FAITH

An insurance company has a duty to act in good faith to make a reasonable settlement of a claim within the insured's policy limits. An insurer fails to act in good faith when it refuses to offer to settle within the policy limits, and when this refusal is without reasonable justification.

The fact that an award exceeds the policy limits or is more than the insurance company's evaluation does not establish that the insurance company acted in bad faith. It is not bad faith if the insurance company has a credible defense, has acted reasonably, or has a reasonable belief that the plaintiff's claim is not worth more than the policy limits.

Source:

Moyer v. Am. Zurich Ins. Co., 2021 WL 1663578, at *4 (Del. Super.) (elements of cause of action); *Connelly v. State Farm Mut. Auto. Ins. Co.*, Del. Supr., 135 A.3d 1271, 1274-78 (2016); *Enrique v. State Farm Mut. Auto. Ins. Co*., Del. Supr., 142 A.3d 506, 511 (2016); *Tackett v. State Farm Fire & Cas. Ins. Co.*, Del. Supr., 653 A.2d 254, 262-64 (1995), *overruled on other grounds, E.I. DuPont de Nemours &*

Co. v. Pressman, Del. Supr., 679 A.2d 436 (1996) (insurance carrier's duty to act in good faith in first party disputes); *see also Stilwell v. Parsons*, Del. Supr., 145 A.2d 397, 402 (1958) (insurance carrier's duty of good faith and care in settlement negotiations).

17. INSURANCE

§ 17.8 – Insured's Duty to Read Policy

INSURED'S DUTY TO READ POLICY

The policyholder has a duty to read and understand the contents of an insurance policy.

Source:

See Graham v. State Farm Mut. Auto. Ins. Co., Del. Supr., 565 A.2d 908, 913 (1989) (general duty to read contract and a party's failure to read terms of insurance contract will not justify later disavowal of an unfavorable term); *Hallowell v. State Farm Mut. Auto. Ins. Co.*, Del. Supr., 443 A.2d 925, 928 (1982); *Vera v. Progressive N. Ins. Co.*, Del. Super., 286 A.3d 967, 985 (2022); *Sharpless-Hendler Ice Cream Co. v. Davis*, Del. Ch., 155 A. 247 (1931) (contract executed by illiterate person without being misled or demanding a reading, and where other party had no knowledge of illiteracy, held valid and binding).

17. INSURANCE

§ 17.9 – Insured's Duty to Cooperate

INSURED'S DUTY TO COOPERATE WITH INSURANCE COMPANY

The insurance policy in question provides:

[***insert language relating to insured's duty to cooperate***].

If you find that [***policyholder's name***] failed to cooperate with [***insurance carrier's name***] on an important or material matter and that [***insurance carrier's name***] was prejudiced in its ability to investigate, evaluate, or defend the claim, then [***policyholder's name***] has breached the contract and is precluded from recovering under the policy.

{**Comment**: *Failure to cooperate does not preclude the insured being entitled to coverage under the Delaware's Financial Responsibility Act. However, the insured's failure to cooperate to the detriment of the insurance company will preclude coverage for all amounts above the amount required by the financial responsibility laws of this State*.}

Source:

E.I. du Pont de Nemours & Co. v. Admiral Ins. Co., 1995 WL 654010, at *8 (Del. Super.) (carrier not required to show prejudice to prove lack of cooperation); *Harris v. Prudential Prop. & Cas. Ins. Co.*, Del. Supr., 632 A.2d 1380, 1383 (1993); *State Farm Mut. Auto. Ins. Co. v. Johnson*, Del. Supr., 320 A.2d 345, 346-47 (1974).

17. INSURANCE

§ 17.10 – Bad Faith by Insurance Company in First Party Claims

BAD FAITH BY INSURANCE COMPANY IN FIRST-PARTY CLAIMS

[***Plaintiff's name***] claims that [***defendant insurance company's name***] has breached its contract by failing to pay [***plaintiff's name***]'s claim for [***describe nature of claim***]. To recover, [***plaintiff's name***] must show that although [***he/she/it***] has complied with all policy requirements, [***defendant's name***] has not paid under the policy.

Not every refusal to pay a claim constitutes a breach of an insurance policy. You must determine whether, at the time [***defendant's name***] denied coverage, there were facts or circumstances known to [***defendant's name***] that created a legitimate dispute over its liability to pay under the policy. If you find that [***defendant's name***] refused to pay the claim without any reasonable justification, you may find that [***defendant's name***] acted in bad faith. Bad faith means that there were no facts or circumstances known to [***defendant's name***] that created a legitimate dispute over [***plaintiff's name***]'s claim.

If you find that [***defendant's name***]'s breach of the insurance policy was malicious and done with a reckless indifference to the insured, you may impose punitive damages.

Source:

Bennett v. USAA Cas. Ins. Co., 2017 WL 961806, at *4 (Del. Supr.); *Enrique v. State Farm Mut. Auto. Ins. Co.*, Del. Supr., 142 A.3d 506, 512 (2016); *Pierce v. Int'l Ins. Co. of Illinois*, Del. Supr., 671 A.2d 1361, 1367 (1996) (under workers' compensation law, employer's carrier has duty to act in good faith to beneficiary-employee); *Tackett v. State Farm Fire & Cas. Ins. Co.*, Del. Supr., 653 A.2d 254, 262-63 (1995), *overruled on other grounds*, *E.I. DuPont de Nemours & Co. v. Pressman*, Del. Supr., 679 A.2d 436 (1996); *Casson v. Nationwide Ins. Co.*, Del. Super., 455 A.2d 361, 368-69 (1982).

17. INSURANCE

§ 17.11 – Insurance Contracts - Generally

{**Comment**: *Please refer to appropriate section(s) in the Code for the citation necessary to an instruction if a jury question is raised.*}

Source:

See generally 18 *Del. C.* §§ 2301, 2701, 4501. Please refer to the Code for specific provisions and subject areas. *Graham v. State Farm Mut. Auto. Ins. Co.*, Del. Supr., 565 A.2d 908, 912 (1989) (insurance policy is generally contract of adhesion); *Hallowell v. State Farm Mut. Auto. Ins. Co.*, Del. Supr., 443 A.2d 925, 926-27 (1982) (insurance contract should be read in accordance with reasonable expectations of the purchaser so far as language of the policy permits, if contract is one of adhesion); *cf. Playtex FP, Inc. v. Columbia Cas. Co.*, Del. Super., 609 A.2d 1087, 1092 (1991) (doctrine of reasonable expectations does not apply to interpretation of negotiated insurance contract that was not a contract of adhesion); *Goodman v. Cont'l Cas. Co.*, Del. Super., 347 A.2d 662, 664 (1975) (ordinary rules of contract law apply to insurance policy unless otherwise provided by statute).

17. INSURANCE

§ 17.12 – Insurance Contracts – Policy Terms

{**Comment**: *Interpretation or construction of the terms and meaning of a policy is generally a question of law for the court to decide.*}

Source:

See 18 *Del. C.* § 23, 27; *Hallowell v. State Farm Mut. Auto. Ins. Co.*, Del. Supr., 443 A.2d 925, 926-27 (1982) (parties bound by plain meaning of clear and unambiguous language of insurance contract); *accord Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, Del. Supr., 616 A.2d 1192, 1195-96 (1992). *Calloway v. Nationwide Mut. Auto. Ins. Co.*, Del. Super., 248 A.2d 617, 69 (1968) (exclusions are binding upon insured as are policy limits and exclusionary terms must be strictly construed against insurer); *Lamberton v. Travelers Indem. Co.*, Del. Super., 325 A.2d 104, 106 (1974), *aff'd*, Del. Supr., 346 A.2d 167 (1975) (strict construction of terms proper only where ambiguity is found).

17. INSURANCE

§ 17.13 – Insurance Contracts – Ambiguities

{**Comment**: *Interpretation or construction of the terms and meaning of a policy is generally a question of law for the court to decide.*}

Source:

18 *Del. C.* § 23 & 27; *RSUI Indem. Co. v. Murdock*, Del. Supr., 248 A.3d 887, 905 (2021); *Hallowell v. State Farm Mut. Auto. Ins. Co.*, Del. Supr., 443 A.2d 925, 926-27 (1982) (court will not twist words of clear and unambiguous language in order to construe insurance contract, but ambiguous contract terms must be construed most strongly against insurer as drafter of the policy); *Cheseroni v. Nationwide Mut. Ins. Co.*, Del. Super., 402 A.2d 1215, 1217 (1979), *aff'd*, Del. Supr., 410 A.2d 1015 (1980) (ambiguity exists only where two or more reasonable interpretations are possible); *Lamberton v. Travelers Indem. Co.*, Del. Super., 325 A.2d 104, 106 (1974), *aff'd*, Del. Supr., 346 A.2d 167 (1975) (strict construction of terms proper only where ambiguity is found).

17. INSURANCE

§ 17.14 – Uninsured/Underinsured Claims

UNINSURED/UNDERINSURED CLAIMS

The defendant, [***insurer's name***], has issued a policy of insurance to [***plaintiff's name***]. The policy of insurance obligates [***insurer's name***] to compensate the [***plaintiff's name*****]** for damages which are proximately caused by the negligence of an [***uninsured / underinsured***] motorist. The parties have stipulated that [***tortfeasor's name***] was an [***uninsured / underinsured***] motorist at the time of the accident.

Therefore, if you find that the [***uninsured / underinsured***] motorist was negligent and that such negligence was the proximate cause of injury to [***plaintiff's name***], then you must award damages to [***plaintiff's name***].

Source:

18 *Del. C.* § 3902; *Johnson v. State Farm Mut. Auto. Ins. Co.*, Del. Supr., 189 A.3d 1287 (2018); *Moffitt-Ali v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 1424788, at *2 (Del. Super.), *af''d*, Del. Supr., 151 A.3d 448 (2016); *Hurst v. Nationwide Mut. Ins. Co.*, Del. Supr., 652 A.2d 10 (1995).

18. AGENCY

§ 18.1 – Agent's Negligence Imputed to Principal

AGENT'S NEGLIGENCE IMPUTED TO PRINCIPAL

If you find that [***plaintiff's name***]'s injuries were the result of the negligence of an [***agent / employee***] of [***defendant's name***] while acting within the scope of [***his/her***] [***employment / agency***], then that negligence is the legal responsibility of [***defendant's name***].

{**Comment**: *An agent is someone who acts for another, known as a principal, on the principal's behalf, and subject to the principal's control and consent.*}

Source:

Patel v. Sunvest Realty Corp., 2018 WL 4961392, at *4-5 (Del. Super.); *Randazzo v. Cochran*, 2018 WL 1037455, at *2 (Del. Super.); *West v. Flonard*, 2010 WL 892190, at *2 (Del. Super.); *Cumpston v. McShane*, 2009 WL 1485042, at *2-3 (Del. Super.), *as amended* (June 4, 2009); *Kulp v. Mann-Beebe*, 2008 WL 4120041, at *2-4 (Del. Super.); *Fisher v. Townsends, Inc.*, Del. Supr., 695 A.2d 53, 58 (1997) (discussing in great detail the various agency relationships); *Billops v. Magness Constr. Co.*, Del. Supr., 391 A.2d 196, 198-99 (1978); *E. Mem'l Consultants, Inc. v.*

Gracelawn Mem'l Park, Inc., Del. Supr., 364 A.2d 821 (1976) (principal is not employer of a sub-agent hired by principal's agent); *Fields v. Synthetic Ropes, Inc.*, Del. Supr., 215 A.2d 427, 432-33 (1965); *Richardson v. John T. Hardy & Sons, Inc.*, Del. Supr., 182 A.2d 901, 902-03 (1962). *See also* RESTATEMENT (THIRD) OF AGENCY § 7.07.

18. AGENCY

§ 18.2 – Agency Admitted

AGENCY ADMITTED

It has been admitted in this case that, at all times relevant to this litigation, [***employee's name***] was an employee acting within the scope of employment and was the agent of [***employer's name***].

Therefore, as a matter of law, [***employer's name***] is equally responsible with [***employee's name***] for any acts or omissions [***employee's name***] may have committed at the time of the incident.

Source:

Fields v. Synthetic Ropes, Inc., Del. Supr., 215 A.2d 427, 432-33 (1965).

18. AGENCY

§ 18.3 – Borrowed Servant Doctrine

BORROWED SERVANT

Delaware's Workers' Compensation Law provides that a person injured on the job must accept workers' compensation and may not file a liability claim against the employer.

In this case, [***plaintiff's name***] was an employee of [***name***]. [***Defendant's name***] claims that [***plaintiff's name***] acted as a loaned or borrowed employee of [***Defendant's name***] at the time of the injury. A loaned or borrowed employee who is temporarily acting under the control of a second employer is considered the second employer's employee.

Factors to consider in deciding whether an individual is acting as the employee of a second employer include:

(1) The terms of any agreement between the second employer and the alleged employee, and the extent of control that second employer could exert over the alleged employee. A requirement that the work of the alleged employee be performed according to standards and specifications imposed by a second employer is not sufficient to establish control. Instead, you must examine the provisions of any agreement about the manner or means by which the work was to be performed.

(2) Whether the alleged employee is engaged in an occupation or business distinct from the second employer.

(3) Whether at the jobsite, the work specified in the contract is usually done under the direction of the contracting party or by a specialist without supervision.

(4) The independent skill required by the alleged employee's area of work.

(5) Whether the second employer paid the wages of the alleged employee while working on the particular job.

(6) Whether the second employer hired and could fire the alleged employee while working on the particular job.

(7) Whether the second employer controlled the manner and performance of the alleged employee while on the job. Of all the factors, this is the most important.

(8) Whether the second employer supplied the tools and place of work to the alleged employee.

(9) Whether the alleged employee had an opportunity to profit under the agreement with the second employer.

(10) The length of the relationship between alleged employee and the second employer.

You must determine whether, at the time of the injury, [***plaintiff's name***] was acting in the business of and under the direction of the general employer, [***name***], or the second employer, [***name***].

Source:

19 *Del. C.* §§ 2304, 2311; *Zapatero v. George & Lynch, Inc.*, 2017 WL 6000492, at *2 (Del. Super.); *Discover Prop. and Cas. Ins. Co. v. Gavilon Grain, LLC*, 2015 WL 5157470, at *4-5 (Del. Super.); *Mitchell v. Allen Family Foods, Inc.*, 2013 WL 1752498, at *4-5 (Del. Super.); *Fisher v. Townsends, Inc.*, Del. Supr., 695 A.2d 53, 57-59 (1997) (discussing various agency relationships); *Porter v. Pathfinder Servs., Inc.*, Del. Supr., 683 A.2d 40, 42 (1996) (holding determination of an employer-employee relationship is a matter of law for the court to decide); *Kofron v. Amoco Chemicals Corp.*, Del. Supr., 441 A.2d 226, 231 (1982) (exclusivity of Worker's Compensation Law); *Dickinson v. E. R.R. Builders, Inc.*, Del. Supr., 403 A.2d 717, 721 (1979) (in context where contractor-subcontractor both exercise control over employee at job site, injured employee's rights to compensation fall upon subcontractor); *Faircloth v. Rash*, Del. Supr., 317 A.2d 871, 872-73 (1974); *Lester C. Newton Trucking Co. v. Neal*, Del. Supr., 204 A.2d 393, 395 (1964); *Richardson v. John T. Hardy & Sons, Inc.*, Del. Supr., 182 A.2d 901, 902-03 (1962); *Weiss v.*

Sec. Storage Co., Del. Super., 272 A.2d 111, 115 (1970), *aff'd*, Del. Supr., 280 A.2d 534 (1971). *See also* RESTATEMENT (THIRD) OF AGENCY § 7.03.

18. AGENCY

§ 18.4 – Injury by Co-Worker Covered by Workers' Compensation

EMPLOYEE INJURED BY CO-WORKER

Delaware's Workers' Compensation Law provides that a person injured on the job by a co-worker must accept workers' compensation and may not file a liability claim against the person's employer or the co-worker.

In this case [***plaintiff's name***] was an employee of [***name***]. [***Defendant's name***] claims that [***alleged co-worker's name***] was also an employee of [***name***].

A person who is temporarily acting under the control of another employer may be considered that employer's employee even though the person usually works for someone else. Factors to consider in deciding whether an individual is acting as the employee of a given employer at a particular time and place include:

(1) The terms of any agreement between the employer and the alleged employee, and the extent of control that the employer could exert over the alleged employee. A requirement that the work of the alleged employee be performed according to standards and specifications imposed by the employer is not sufficient to establish control. Instead, you must examine the provisions of any agreement about the manner or means by which the work is to be performed;

(2) Whether alleged employee is engaged in an occupation or business distinct from the employer;

(3) Whether at the jobsite, the work specified under the contract is usually done under direction of the contracting party or by a specialist without supervision;

(4) The independent skill required by the alleged employee's area of work;

(5) Whether the employer paid the wages of the alleged employee while working on the particular job;

(6) Whether the employer hired and could fire the alleged employee while working on the particular job;

(7) Whether the employer controlled the manner and performance of the alleged employee while on the job. Of all the factors, this is the most important;

(8) Whether the employer supplied the tools and place of work for the alleged employee;

(9) Whether the alleged employee had an opportunity to profit under the agreement with the employer; and

(10) The length of the relationship between alleged employee and the employer.

You must determine whether or not [***alleged co-worker's name***] was acting in the business of and under the direction of [***name***] at the time of the injury to [***plaintiff's name***].

Source:

19 *Del. C.* §§ 2304, 2311; *Fisher v. Townsends, Inc.*, Del. Supr., 695 A.2d 53, 57-59 (1997) (discussing various agency relationships); *Porter v. Pathfinder Servs., Inc.*, Del. Supr., 683 A.2d 40, 42 (1996) (holding determination of an employer-employee relationship is a matter of law for the court to decide); *Kofron v. Amoco Chems. Corp.*, Del. Supr., 441 A.2d 226, 231 (1982) (exclusivity of Worker's Compensation Law); *Dickinson v. E. R.R. Builders, Inc.*, Del. Supr., 403 A.2d 717, 721 (1979) (in context where contractor-subcontractor both exercise control over employee at job site, injured employee's rights to compensation fall upon subcontractor); *Faircloth v. Rash*, Del. Supr., 317 A.2d 871, 872-73 (1974); *Richardson v. John T. Hardy & Sons, Inc.*, Del. Supr., 182 A.2d 901, 902-03 (1962); *Ward v. GMC*, Del. Super., 431 A.2d 1277, 1280 (1981); *Weiss v. Sec. Storage Co.*, Del. Super., 272 A.2d 111, 115 (1970), *aff'd*, Del. Supr., 280 A.2d 534 (1971); *Lester C. Newton Trucking Co. v. Neal*, Del. Supr., 204 A.2d 393, 395 (1964). *See also* RESTATEMENT (SECOND) OF AGENCY § 227.

18. AGENCY

§ 18.5 – Agent Tending to Personal Affairs ("frolic and detour")

WHEN EMPLOYEE TENDS TO PERSONAL AFFAIRS AND AT THE SAME IS ACTING WITHIN SCOPE OF EMPLOYMENT

If an employee is acting within the scope of [***his/her***] employment, the employer is liable for any acts or omissions that occur during the course of employment. But if an employee acts for strictly personal reasons, then the employer is not liable.

In this case, you must decide whether [***employee's name***] acted within the scope of [***his/her***] employment when [***he/she***] [***describe disputed activity of employee***].

(1) Conduct by an employee is within the scope of employment if, but only if:

(a) the conduct is of a type that the employee is hired to perform;

(b) the conduct occurs substantially within the authorized time and space limits of the work; and

(c) the conduct is motivated, at least in part, by an intent to serve the employer.

(2) Conduct by an employee is not within the scope of employment if it is different in kind from what is authorized, far beyond the authorized time or space limits, or too little motivated by an intent to serve the employer.

Source:

Sherman v. State Dep't of Pub. Safety, Del. Supr., 190 A.3d 148, 157 (2018); *Cody v. Hardy*, 2017 WL 5075509, at *3 (Del. Super.); *Hecksher v. Fairwinds Baptist Church, Inc.*, Del. Supr., 115 A.3d 1187, 1200 (2015); *Litchford v. Johnson*, 2007 WL 4201130 (Del. Super.); *Keating v. Goldick*, 2004 WL 772077, at *3 (Del. Super.); *Fisher v. Townsends, Inc.*, Del. Supr., 695 A.2d 53, 57-59 (1997) (discussing in great detail the various agency relationships); *Wilson v. Joma, Inc.*, Del. Supr., 537 A.2d 187, 189 (1988) (employee acting with dual purpose to serve interests of employer and self may be within scope of employment); *Barnes v. Towlson*, Del. Super., 405 A.2d 137, 139-40 (1979) (employee simply driving to work not acting within the scope of employment); *Johnson v. E. I. Du Pont De Nemours & Co.*, Del. Super., 182 A.2d 904, 905 (1962) (trip home for lunch outside the scope of employee's employment).

18. AGENCY

§ 18.6 – Independent Contractor

INDEPENDENT CONTRACTOR – DEFINITION

Under Delaware law, an independent contractor is someone who exercises independent judgment and agrees to do a piece of work according to [***his/her/its***] own methods without being subject to the owner's control. You must consider several factors to determine whether a party is an independent contractor. The strongest test is whether the [***contractor, owner, employer, etc.***] exercised control over the work itself. Factors that indicate control include:

(1) The terms of any agreement between [***defendant's name***] and [***alleged independent contractor's name***] and the extent of control that [***defendant's name***] may exert over [***alleged independent contractor's name***]. A requirement that the work be performed according to standards and specifications imposed by the owner is not sufficient to establish control. Instead, you must examine the provisions about the manner or means by which the work is to be performed.

(2) Whether [***alleged independent contractor's name***] is engaged in an occupation or business distinct from defendant.

(3) Whether at [***location of the work done***] and its surroundings, the work to be done under the agreement is usually done under direction of the owner or contractor, or done by a specialist without supervision.

(4) The independent skill required by [***alleged independent contractor's name***]'s area of work.

(5) Who pays the wages to the individual employees of [***alleged independent contractor's name***].

(6) Who can hire and fire the individual employees.

(7) Who can control individual employees on the job in the manner and performance of their work. Of all the factors, this is the most important.

(8) Who supplies the tools and place of work to [***alleged independent contractor's name***]'s employees.

(9) Whether [***alleged independent contractor's name***] had an opportunity to profit under the agreement.

(10) The length of the relationship between [***alleged independent contractor's name***] and [***defendant's name***].

These are all factors that may determine the extent of control under the definition of an independent contractor. You must examine these factors and any others you believe to be relevant within the context that I have just described to you.

No one factor is determinative. It is the total relationship that governs. You must then decide whether [***alleged independent contractor's name***] was an independent contractor or an [***agent/employee***] of [***defendant's name***].

{**Comment**: *If vicarious liability of a third party (usually an owner or contractee) is an issue in the case and the jury makes a finding that the tortfeasor is an independent contractor; before the third party may be relieved of liability, the jury must make a second finding that the tortfeasor was not an agent of the third party. To make this finding, an instruction on whether the tortfeasor/independent contractor is an agent/non-agent of the owner/contractee will be required. On the verdict sheet, special interrogatories should direct the jury to make the appropriate findings.* See Fisher v. Townsends, Inc., *Del. Supr., 695 A.2d 53 (1997)*.}

Source:

Fisher v. Townsends, Inc., Del. Supr., 695 A.2d 53, 57-59 (1997) (discussing various agency relationships); *O'Connor v. Diamond State Tel. Co.*, Del. Super., 503 A.2d 661, 663 (1985); *Barnes v. Towlson*, Del. Super., 405 A.2d 137, 138-39 (1979); *Melson v. Allman,* Del. Supr., 244 A.2d 85, 87 (1968); *E. I. Du Pont De Nemours & Co. v. I. D. Griffith, Inc.*, Del. Supr., 130 A.2d 783, 784 (1957); *Schagrin v. Wilmington Med. Ctr., Inc.*, Del. Super., 304 A.2d 61 (1973). *See also* RESTATEMENT (THIRD) OF AGENCY § 7.07.

18. AGENCY

§ 18.6A – Independent Contractor Who Is an Agent of Owner/Contractee

INDEPENDENT CONTRACTOR WHO IS AN AGENT OF AN OWNER/CONTRACTEE

Generally, an independent contractor is not considered the agent of an/a [***owner or contractee***] who ordered the work performed. But if the [***owner / contractee's***] control or direction dominates the way that the work is performed, the independent contractor becomes an agent of the [***owner / contractee***], making the [***owner / contractee***] vicariously liable for the acts of the independent contractor.

You must determine whether [***owner / contractee's name***]'s control over the work dominated the manner in which it was performed by [***independent contractor's name***]. In this regard, some factors that you may consider include:

(1) the extent of control, which, by agreement, the [***owner / contractee***] may exercise over the details of the work;

(2) whether the independent contractor maintains a business distinct from the [***owner / contractee***];

(3) whether the details of the work are directly supervised by the [***owner / contractee***] or performed by an independent specialist without supervision;

(4) whether the [***owner / contractee***] may hire or dismiss employees of [***independent contractor***];

(5) whether, in the locale where the work was performed, it is customary for the [***owner / contractee***] or for the independent contractor to supply the tools, means, and place for doing the work;

(6) the length of time over which the work is done;

(7) whether the nature of the work is part of the regular business of the [***owner / contractee***];

(8) whether the [***owner / contractee***] and independent contractor believe they are acting as a principal and agent; that is, acting in a situation where the person in the role of an agent acts for another, known as a principal, on the principal's behalf and subject to the principal's control and consent; and

(9) whether the [***owner / contractee***] is or is not in business.

These are all factors that may determine whether the manner in which the work was performed was dominated by the [***owner / contractee***] or by the independent contractor. You must examine these factors and any others that you believe to be relevant within the context that I have just supplied to you. No one factor is determinative. It is the totality of the relationship that governs. You must then

decide whether [***independent contractor's name***] was an agent of [***owner / contractee's name***].

Source:

Handler Corp. v. Tlapechco, Del. Supr., 901 A.2d 737, 745 (2006); *Fisher v. Townsends, Inc.*, Del. Supr., 695 A.2d 53, 57-59 (1997) (discussing various agency relationships); *White v. Gulf Oil Corp.*, Del. Supr., 406 A.2d 48 (1979); *E. I. Du Pont De Nemours & Co. v. I. D. Griffith, Inc.*, Del. Supr., 130 A.2d 783, 784 (1957); *Seeney v. Dover Country Club Apartments, Inc.*, Del. Super., 318 A.2d 619, 621 (1974).

See also Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1436-37 (3d Cir. 1994); RESTATEMENT (THIRD) OF AGENCY § 7.07.

18. AGENCY

§ 18.7 – Employer's Liability for Non-Delegable Duty

NON-DELEGABLE DUTIES OF EMPLOYER OF INDEPENDENT CONTRACTOR OR AGENT

If the work that an [***independent contractor / agent***] is hired to do is inherently dangerous to [***the public / employees of the independent contractor or agent***], and if the employer knew or had reason to know about this unusual danger, regardless of safety measures taken, then the employer of the [***independent contractor / agent***] may be subject to liability for physical harm caused by [***independent contractor / agent***]'s failure to take reasonable precautions against this danger or to give an adequate warning of the danger. Even if the employer has provided for precautions within the contract or by some other means, the employer remains subject to liability for any physical harm caused by the failure of the [***independent contractor / agent***] to exercise reasonable care to avoid the harm.

{*If applicable*}: The employer will not be liable, however, for an injury caused by [***independent contractor / agent***] who has created a new risk not inherent in the work or contemplated by the employer.

For [***employer's name***] to be liable for [***plaintiff's name***] injuries, you must find that [***independent contractor / agent's name***] negligently caused [***plaintiff's name***]'s injury and that [***describe work done***] was inherently dangerous.

Source:

Fisher v. Townsends, Inc., Del. Supr., 695 A.2d 53, 58 (1997) (discussing various agency relationships). *See also* RESTATEMENT (SECOND) OF TORTS §§ 416, 427.

18. AGENCY

§ 18.8 – Corporations and their Agents

CORPORATIONS AND THEIR AGENTS

[***Plaintiff / Defendant's name***] is a corporation. A corporation is considered a person within the meaning of the law. As an artificial person, a corporation can only act through its servants, agents, or employees. If you find that any of a corporation's personnel were negligent in performing their duties at the time of the incident, then the corporation is also negligent.

The fact that a party is a corporation should not affect your decision in any way. All persons, whether corporate or human, appear equally in a court of law and are entitled to the same equal consideration.

Source:

Fisher v. Townsends, Inc., Del. Supr., 695 A.2d 53, 58 (1997) (discussing various agency relationships); *Guthridge v. Pen-Mod, Inc.*, Del. Super., 239 A.2d 709, 710-11 (1967).

18. AGENCY

§ 18.9 – Partnership Defined

DEFINITION OF PARTNERSHIP

{**Comment**: *Issues of partnership are generally determined as a matter of law.*}

Source:

6 *Del. C.* § 15-201; *Grunstein v. Silva*, 2014 WL 4473641, at *16-17 (Del. Ch.), *aff'd sub nom.*, Del. Supr., 113 A.3d 1080 (2015); *Paciaroni v. Crane*, Del. Ch., 408 A.2d 946, 952 (1979); *Chaiken v. Emp't Sec. Comm'n*, Del. Super., 274 A.2d 707, 709-10 (1971); *Garber v. Whittaker*, Del. Super., 174 A. 34, 36 (1934); *Jones v. Purnell*, Del. Super., 62 A. 149, 150-51 (1905).

18. AGENCY

§ 18.10 – Partnerships – Scope

SCOPE OF PARTNERSHIP BUSINESS DEFINED

Every partner is the agent of the partnership for the purpose of doing its intended business. A partner's act in furthering the partnership's business binds the entire partnership unless:

(1) the partner has no authority to act, and

(2) the person with whom the partner acts knows that the partner has no such authority.

In this case, you must determine whether [***partner's name***] acted within the scope of [***describe the nature of the partnership***] when [***he/she***] [***describe the actions of the partner***]. If you find that [***partner's name***] was acting outside the scope of [***his/her***] authority, then you must determine whether [***name of person with whom partner dealt***] knew that [***partner's name***] had no authority to act.

Source:

6 *Del. C.* § 15-301.

18. AGENCY

§ 18.11 – Joint Ventures

JOINT VENTURE DEFINED

A joint venture is an enterprise jointly undertaken by two or more persons to carry out a single business transaction, without the designation of a partnership or corporation, for their mutual benefit. The participants share liabilities that may arise from the joint venture. Generally, there must be a contractual relationship between the participants that may be expressly stated or implied from their actions. The participants in a joint venture may variously combine their property, money, effects, skill, and knowledge. The contributions of the various participants need not be equal.

You must determine whether the association of [***person's name***] and [***list other alleged joint venturers***] in [***describe the alleged enterprise***] constituted a joint venture.

Source:

Wenske v. Blue Bell Creameries, Inc., 2018 WL 3337531, at *16 (Del. Ch.); *see generally J. Leo Johnson, Inc. v. Carmer*, Del. Supr., 156 A.2d 499, 502 (1959) (discussing general elements of joint ventures); *Hannigan v. Italo Petroleum Corp. of Am.*, Del. Supr., 77 A.2d 209, 216 (1949) (general elements of joint venture

equated to those creating a syndicate); *Sheppard v. Carey*, Del. Ch., 254 A.2d 260, 262-63 (1969) (joint venture is a contractual creature); *Pan Am. Trade & Inv. Corp. v. Commercial Metals Co.*, Del. Ch., 94 A.2d 700, 702 (1953) (discussing general elements of joint ventures); *Hudson v. A.C. & S. Co. Inc.*, Del. Super., 535 A.2d 1361, 1363 (1987) (third-party claims against one joint venturer may be recovered from any of the joint venturers).

18. AGENCY

§ 18.12 – Motor Vehicle Owner's liability for Permissive Use by a Minor

MOTOR VEHICLES LIABILITY OF OWNER FOR PERMISSIVE USE BY A MINOR

Every motor-vehicle owner who causes or knowingly allows a minor under the age of 18 to drive the owner's vehicle, or who furnishes the vehicle to a minor, is jointly and severally liable with that minor for any damages caused by the minor's negligence while driving the vehicle.

If you find that [***vehicle owner's name***] gave control of [***his/her/its***] vehicle to [***minor's name***], then you must also find that [***vehicle owner's name***] is liable for any negligent conduct of [***minor's name***] while using [***vehicle owner's name***]'s vehicle.

Source:

21 *Del. C.* § 6105 (owner's liability for minor's negligent operation of a vehicle); *Kivlin v. Nationwide Mut. Ins. Co.*, Del. Supr., 765 A.2d 536, 538-39 (2000); *Galarza v. Olmstead*, 2020 WL 9259136, at *3 (Del. Super.); *Greyhound Lines, Inc. v. Caster*, Del. Supr., 216 A.2d 689, 691 (1966); *Finkbiner v. Mullins*, Del. Super., 532 A.2d 609, 615 (1987); *Eskridge v. Ruth*, Del. Super., 105 A.2d 785, 786 (1953).

18. AGENCY

§ 18.13 – Motor Vehicle Owners – Use Beyond Scope of Permission

DRIVER ACTING BEYOND SCOPE OF PERMISSION TO USE VEHICLE

Ordinarily, when someone drives another person's vehicle as the owner's agent and with the owner's permission, the owner is liable for the driver's acts. But if the driver uses the vehicle for a private purpose, then the owner is not liable because the driver has used the vehicle outside the scope of the owner's permission. Permission means the express or implied agreement of the owner for the driver to use the vehicle. Similarly, if the driver of another person's vehicle is not acting as the owner's agent but is using the vehicle with the owner's permission but for the driver's own purposes, the owner is not liable.

If you find that [***driver's name***] acted outside the scope of [***owner's name***]'s permission and used the vehicle for [***his/her***] own purposes, then you must find that [***owner's name***] is not liable for [***driver's name***]'s negligence.

{**Comment**: *See also Jury Instr. Nos. 18.5, "Employee Tending to Personal Affairs," and 18.12, "Motor Vehicle Owners – Liability of Owner for Permissive Use by Minor."*}

Source:

See Wilson v. Joma, Inc., Del. Supr., 537 A.2d 187 (1988); *Coates v. Murphy*, Del. Supr., 270 A.2d 527, 528 (1970); *Fields v. Synthetic Ropes, Inc.*, Del. Supr., 215 A.2d 427, 432-33 (1965) (discussing liability of owner to third party claimants); *Finkbiner v. Mullins*, Del. Super., 532 A.2d 609, 615 (1987); *Johnson v. E. I. Du Pont De Nemours & Co.*, Del. Super., 182 A.2d 904, 905 (1962) (setting forth dual purpose rule on whether servant is acting within scope of employment).

18. AGENCY

§ 18.14 – Motor Vehicles – No Imputation of Driver's Negligence to Rider

NO IMPUTATION OF DRIVER'S NEGLIGENCE TO PASSENGER

A driver's negligent conduct is not imputed to a passenger, unless the passenger exercises some control over the driver's operation of the vehicle.

If you find that [***passenger's name***] did not exercise some control over [***driver's name***]'s operation of the vehicle, then [***passenger's name***] is not liable for [***driver's name***] negligence.

Source:

Greyhound Lines, Inc. v. Caster, Del. Supr., 216 A.2d 689, 692 (1996); *Hickman v. Parag*, Del. Supr., 167 A.2d 225, 229 (1961); *Roach v. Parker*, Del. Super., 107 A.2d 798, 799-800 (1954); *Fusco v. Dauphin*, Del. Super., 88 A.2d 813, 815 (1952).

18. AGENCY

§ 18.15 – Liability of Parents for Minor's Operation of Vehicle

PARENTAL LIABILITY FOR MINOR'S NEGLIGENT USE OF VEHICLE

Under Delaware law, a parent or guardian who signs a minor's application for a driver's license is jointly and severally liable, along with the minor, for damages caused by the minor's negligent operation of a vehicle on a highway.

If you find that [***name of parent(s)***] signed [***name of minor***]'s application for [***his/her***] driver's license, then [***name of parent(s)***] [***is/are***] liable for any damages that you may award to [***plaintiff's name***].

Source:

21 *Del. C.* §§ 6104(a)(1) (outlining liability of parents for minors negligent operation of motor vehicle); *Alfieri v. Martelli*, Del. Supr., 647 A.2d 52, 54-55 (1994); *Williams v. Williams*, Del. Supr., 369 A.2d 669, 670-73 (1976); *McGeehan v. Schiavello*, Del. Supr., 265 A.2d 24, 25-26 (1970); *Markland v. Baltimore & O. R. Co.*, Del. Super., 351 A.2d 89, 92-93 (1976); *Rovin v. Connelly*, Del. Super., 291 A.2d 291, 292-93 (1972). *See also Tatlock v. Nathanson*, D. Del.,169 F. Supp. 151, 153 (1959) (finding parental liability for negligent operation of vehicle by minor under parents control).

18. AGENCY

§ 18.16 – Negligent Entrustment of a Vehicle

NEGLIGENT ENTRUSTMENT OF A VEHICLE

If a vehicle owner entrusts the vehicle to a driver who is so reckless or incompetent that using the vehicle becomes dangerous — and the owner knows or has reason to know at the time the vehicle is entrusted that the driver is reckless or incompetent — then the owner is liable for damages arising from the driver's negligence.

You must determine whether at the time that [***vehicle owner's name***] entrusted the vehicle to [***driver's name***], [***vehicle owner's name***] knew or should have known that [***driver's name***] was incompetent to drive the vehicle safely.

Source:

Willon v. Werb, 2018 WL 5078011, at *1 (Del. Super.); *Shonts v. McDowell*, 2003 WL 22853659, at *2 (Del. Super.); *Berger v. Millstone*, 2001 WL 1628308, at *2 (Del. Super.); *Smith v. Callahan*, Del. Supr., 144 A. 46, 50-51 (1928) (adopting negligent entrustment doctrine and rejecting "family use" doctrine); *Finkbiner v. Mullins*, Del. Super., 532 A.2d 609, 615-16 (1987) (negligent entrustment of an automobile); *Markland v. Baltimore & O. R. Co.*, Del. Super., 351 A.2d 89, 92-93

(1976) (minor's negligent use of vehicle owned by employer); *Horkey v. Cortz*, Del. Super., 173 A.2d 741, 743 (1961) (negligence liability of bailee of automobile not imputable to bailor).

19. CONTRACTS

§ 19.1 – Contract Formation

CONTRACT FORMATION

A contract is a legally binding agreement between two or more parties. Each party to the contract must perform according to the terms of the agreement. A party's failure to perform a contractual duty constitutes breach of contract. If a party breaches the contract and that breach causes injury or loss to another party, then the injured party may claim damages.

For a legally binding contract to exist, there must be:

(1) an offer of a contract by one party;

(2) an acceptance of that offer by the other party;

(3) consideration for the offer and acceptance; and

(4) sufficiently specific terms that define the obligations of each party.

In this case, [***plaintiff's name***] alleges that [***defendant's name***] breached a contract by [***describe alleged breach***]. You must determine from a preponderance of the evidence whether a legally binding contract was formed between [***plaintiff's name***] and [***defendant's name***].

Source:

Generally*: Trexler v. Billingsley*, 2017 WL 2665059, at *3 (Del. Supr.); *Leeds v. First Allied Connecticut Corp.*, Del. Ch., 521 A.2d 1095, 1101-02 (1986); *Norse Petroleum A/S v. LVO Int'l, Inc.*, Del. Super., 389 A.2d 771, 773 (1978).

Offer and Acceptance: *Indus. Am., Inc. v. Fulton Indus., Inc.*, Del. Supr., 285 A.2d 412, 415 (1971) (manifestation of intent must be overt, not subjective); *Friel v. Jones*, Del. Ch., 206 A.2d 232, 233-34 (1964), *aff'd*, Del. Supr., 212 A.2d 609 (1965) (acceptance must be identical with offer and be unconditional); *Salisbury v. Credit Serv., Inc.*, Del. Super., 199 A. 674, 681-82 (1937) (advertisements, *prospecti*, circulars are not generally offers).

Definiteness: *Marta v. Nepa*, Del. Supr., 385 A.2d 727, 729 (1978); *Hindes v. Wilmington Poetry Soc.*, Del. Ch., 138 A.2d 501, 503 (1958); *Guyer v. Haveg Corp.*, Del. Super., 205 A.2d 176, 182 (1964), *aff'd*, Del. Supr., 211 A.2d 910 (1965).

19. CONTRACTS

§ 19.2 – Meeting of the Minds

MEETING OF THE MINDS

A legally binding contract requires that the parties manifest or show mutual assent to the contract's terms. Mutual assent is not a subjective or personal understanding of the terms by either party. Rather, mutual assent must be shown by words or acts of the parties in a way that represents the mutually understood intent of the parties.

Source:

George & Lynch Co. v. State, Del. Supr., 197 A.2d 734, 736 (1964); *Limestone Realty Co. v. Town & Country Fine Furniture and Carpeting, Inc.*, Del. Ch., 256 A.2d 676, 679 (1969) (contract cannot arise from offer that offeree knows is unintended); *Barnard v. State*, Del. Super., 642 A.2d 808, 816 (1992), *aff'd*, Del. Supr., 637 A.2d 829 (1994).

19. CONTRACTS

§ 19.3 – Offer

OFFER

An offer is a display of willingness to enter into a contract on specified terms. To constitute an offer, this display must be made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract.

Source:

Gilbert v. El Paso Co., Del. Supr., 575 A.2d 1131, 1142 (1990); *Salisbury v. Credit Service, Inc.*, Del. Super., 199 A. 674, 681-82 (1938) (discussing elements of valid offer and acceptance). *See also Offer*, BLACK'S LAW DICTIONARY 453 (12th ed. 2024).

19. CONTRACTS

§ 19.4 – Duration of Offer

DURATION OF OFFER

An offer [***or counteroffer***] remains open for a reasonable time only, unless withdrawn earlier. What constitutes a reasonable period must be determined from the particular circumstances of the case and from any conditions declared in the terms of the offer.

Source:

See, e.g., *Wroten v. Mobil Oil Corp.*, Del. Supr., 315 A.2d 728, 730-31 (1973) (revocation of gratuitous option); *Chrysler Corp. v. Quimby*, Del. Supr., 144 A.2d 123, 129 (1958) (withdrawal of offer); *Murray v. Lititz Mut. Ins. Co.*, Del. Super., 61 A.2d 409, 410 (1948) (counteroffers); *see also* 6 *Del. C.* § 2-205 (under UCC firm offers may be held open for reasonable period up to 90 days; no consideration is required).

19. CONTRACTS

§ 19.5 – Acceptance

ACCEPTANCE

An acceptance of an offer is an agreement, either by express act, words, or conduct, to the precise terms of the offer so that a binding contract is formed. If the acceptance modifies the terms or adds new terms, it operates as a counteroffer and a binding contract is not yet formed.

Source:

Acierno v. Worthy Bros. Pipeline Corp., Del. Supr. 693 A.2d 1066, 1070 (1997); *Indus. Am., Inc. v. Fulton Indus., Inc.*, Del. Supr., 285 A.2d 412, 415-16 (1971) (manifestation of intent must be overt, not subjective); *Schenley Indus., Inc. v. Curtis*, Del. Supr., 152 A.2d 300, 302 (1959) (where offer indicates medium of reply, the acceptance must be made accordingly); *Limestone Realty Co. v. Town & Country Fine Furniture and Carpeting, Inc.*, Del. Ch., 256 A.2d 676, 679 (1969) (gratuitous offer will not ripen into contract if offeree knew or should have known offer was not serious on its face); *Friel v. Jones*, Del. Ch., 206 A.2d 232, 233-34 (1964), *aff'd*, Del. Supr., 212 A.2d 609 (1965) (acceptance must be identical with offer and be unconditional).

19. CONTRACTS

§ 19.6 – Counteroffer / Rejection

COUNTEROFFER

When a party receives an offer but replies with a new offer that varies the terms of the original offer, the original offer is rejected and the new offer is called a counteroffer. A counteroffer may be accepted or rejected like any other offer.

Source:

Murray v. Lititz Mut. Ins. Co., Del. Super., 61 A.2d 409, 410 (1948) (duration of counteroffers limited to reasonable time only); *Friel v. Jones*, Del. Ch., 206 A.2d 232, 233-34 (1964), *aff'd*, Del. Supr., 212 A.2d 609 (1965) (acceptance must be identical with offer and be unconditional).

19. CONTRACTS

§ 19.7 – Consideration

CONSIDERATION

Consideration is something of value received by someone which induces them to make a promise to the person giving the thing of value. To be enforceable, a contract must be supported by consideration. Consideration may include money, an act, a promise not to act, or a return promise, and it may be found anywhere in the transaction, whether or not it is [***clearly stated / spelled out in writing***] as "consideration."

Source:

Ryan v. Weiner, Del. Ch., 610 A.2d 1377, 1380-82 (1992); *Equitable Trust Co. v. Gallagher*, Del. Supr., 99 A.2d 490, 492-93 (1953); *Glenn v. Tidewater Associated Oil Co.*, Del. Ch., 101 A.2d 339, 344 (1953) (adequacy of consideration not generally a concern of the court); *Abbott v. Stephany Poultry Co.*, Del. Super., 62 A.2d 243, 246 (1948); *Affiliated Enters., Inc. v. Waller*, Del. Super., 5 A.2d 257, 259 (1939); *Am. Uni. v. Todd*, Del. Super., 1 A.2d 595, 597 (1938).

19. CONTRACTS

§ 19.8 – Contract Defenses – Mutual Mistake

MUTUAL MISTAKE

If the parties to a contract are both mistaken about an important fact, and if the mistake involves a basic assumption of the agreement and not merely an incidental matter, then the contract may be voided. An important fact is one that, in light of the surrounding circumstances, would affect the decision-making of the parties. The party complaining of the mistake must demonstrate a reasonable degree of diligence in discovering the necessary facts before the agreement was made. Finally, the mistake itself must be shown by clear and convincing evidence.

You may find that the contract at issue is not enforceable only if you find:

(1) that [***plaintiff's name***] has shown by clear and convincing evidence that there was a mistake of fact about [**describe the alleged mistake of fact**];

(2) that the mistake of fact was important to the agreement between [***plaintiff's name***] and [***defendant's name***]; and

(3) that [***plaintiff's name***] made a reasonable effort to discover the correct facts before entering the contract.

Source:

Hicks v. Sparks, 2014 WL 1233698, at *2 (Del. Supr.); *Craft Builders, Inc. v. Ellis D. Taylor, Inc.*, Del. Supr., 254 A.2d 233, 235 (1969) (mistake must be shown by clear and convincing evidence); *McGuirk v. Ross*, Del. Supr., 166 A.2d 429, 430 (1960); *Matter of Enstar Corp.*, Del. Ch., 593 A.2d 543, 551-52 (1991), *rev'd sub nom. on other grounds*, *Matter of ENSTAR Corp.*, Del. Supr., 604 A.2d 404 (1992) (general discussion of elements of mutual mistake); *Hendrick v. Lynn*, Del. Ch., 144 A.2d 147, 150 (1958); *Demetriades v. Kledaras*, Del. Ch., 121 A.2d 293, 295-96 (1956) (formal writing stands unless through mutual mistake, or the mistake of another party with a contracting party, the agreement fails to express the contract actually made).

19. CONTRACTS

§ 19.9 – Contract Defenses – Intoxicated Person

INTOXICATION - MENTAL INCAPACITY

If a party is intoxicated by alcohol or drugs when a contract is formed, that party may void the contract if [***his/her***] mental capacity was so impaired that [***he/she***] was unable to understand and act rationally in the particular transaction. Merely being under the influence of intoxicating alcohol or drugs is not enough reason to void a contract. Similarly, ignorance about the nature of the contract is not enough. To void the contract, the intoxicated party must be so mentally impaired as to be incapable of understanding the subject and nature of the contract's terms at the time the agreement was made.

You must determine in light of the evidence whether [***plaintiff's name***] was mentally incapable of comprehending the contract to [***briefly describe terms of contract***] with [***defendant's name***] when the contract was formed.

Source:

Poole v. Hudson, Del. Super., 83 A.2d 703, 704 (1951) (mental incapacity due to use of prescription medicine may justify avoidance of contract, but intoxication or use of illegal drug use does not in itself result in incapacity); *Poole v. Newark Trust*

Co., Del. Super., 8 A.2d 10, 15-16 (1939) (unsound mind); *Warwick v. Addicks*, Del. Super., 157 A. 205, 207 (1931) (before capacity to contract is destroyed by unsoundness of mind, reasoning powers must be so impaired as to be incapable of comprehending and acting rationally in the transaction).

19. CONTRACTS

§ 19.10 – Contract Defenses – Duress – Undue Influence

DURESS - UNDUE INFLUENCE

A person whose agreement to a contract was brought about by [***duress / undue influence***] that denied the person's free choice is not bound by that agreement. [***Duress / undue influence***] has four elements:

(1) a person subject to [***duress / undue influence***];

(2) an opportunity to exercise [***duress / undue influence***];

(3) a disposition of the alleged oppressor to exert this influence; and

(4) a result indicating the presence of [***duress / undue influence***].

Ordinary persuasion or argument does not amount to [***duress / undue influence***].

If you find that [***defendant's name***] exercised force or undue influence that denied [***plaintiff's name***] a free choice in making [***his/her***] decision, then you may find that the contract was made under [***duress / undue influence***] and is void.

Source:

See Ryan v. Weiner, Del. Ch., 610 A.2d 1377, 1380 (1992); *Robert O. v. Ecmel A.*, Del. Supr., 460 A.2d 1321, 1323 (1983), *overruled on other grounds, Sanders v. Sanders*, Del. Supr., 570 A.2d 1189 (1990) (general discussion of elements of claim

of undue influence); *Fowler v. Mumford*, Del. Super., 102 A.2d 535, 538 (1954) (acts constituting duress must be wrongful, unless excepted by statutory rule); *Fluharty v. Fluharty*, Del. Super., 193 A. 838, 840 (1937) (acts which are not actually violent or threaten violence, may still constitute coercion if they override the other party's judgment and will). *See also* 31 *Del. C.* § 3913 (exploitation of an infirm adult).

19. CONTRACTS

§ 19.11 – Contract Defenses – Undue Influence – Confidential Relationship

UNDUE INFLUENCE – CONFIDENTIAL RELATIONSHIP

If the parties to a transaction stand in a confidential relationship with each other, there is a presumption that the transaction is not valid if the person in the superior position obtains a benefit at the expense of the person in the inferior position when the person in the inferior position has not had the benefit of competent independent advice in the matter. The person in the superior position has a duty to advise the other to seek independent advice and, when this advice is indispensable, to confirm that the advice was obtained before proceeding with the transaction. Confidential relationships are those, for example, between an attorney and a client; a doctor and a patient; a stockbroker and a customer. Competent independent advice means the advice of an attorney or other professional who is able to provide unbiased and complete information about the transaction and who has no personal interest in it.

In this case, a confidential relationship of [***describe relationship***] existed between [***plaintiff's name***] and [***defendant's name***]. You must decide whether [***defendant's name***] benefitted at the expense of [***plaintiff's name***] from [***describe transaction***] arising out of this relationship, and whether [***plaintiff's name***] received

competent independent advice before entering into the agreement with [***defendant's name***].

Source:

Robert O. v. Ecmel A., Del. Supr., 460 A.2d 1321, 1323 (1983), *overruled on other grounds by Sanders v. Sanders*, 570 A.2d 1189 (Del. 1990); *Peyton v. William C. Peyton Corp.*, Del. Supr., 7 A.2d 737, 746-47 (1939) (reviewing the general duties in a confidential relationship); *Swain v. Moore*, Del. Ch., 71 A.2d 264, 267-68 (1950).

19. CONTRACTS

§ 19.12 – Contract Defenses – Minors

MINORS

Persons must be at least 18 years old before they can enter into contracts that are legally binding. But an exception to this rule exists for minors who must enter into contracts to obtain things indispensable to living, such as food, shelter, and clothing. In law, these things are known as "necessaries."

You must determine whether the contract between [***minor's name***] and [***other party's name***] was made for the purpose of securing necessaries.

Source:

Bloxam v. Lank, Del. Comm. Pl., 2 Del. Cas. 226 (1796) (infants generally not bound except for necessaries).

19. CONTRACTS

§ 19.13 – Defenses - Fraud

FRAUD OR MISREPRESENTATION BY A PARTY INVALIDATES CONTRACT

If there is a misrepresentation when a contract is being formed, the contract is void. If you find that [***defendant's name***] was involved in acts of intentional or negligent misrepresentation when the contract was formed, then you must find that there has been a breach of contract entitling [***plaintiff's name***] to an award of contractual damages.

If, on the other hand, you find that [***defendant's name***] was involved in acts of misrepresentation when the contract was formed, but that those misrepresentations were not done purposely or negligently, but rather unintentionally, then the contract is void only if you find that:

(1) there was, in fact, an unintentional misrepresentation;

(2) the misrepresentation was important to the contract's essential purpose;

(3) the misrepresentation induced [***plaintiff's name***] to enter into the contract; and

(4) [***plaintiff's name***] acted reasonably in entering into the contract given the misrepresentation made.

Source:

Stephenson v. Capano Dev., Inc., Del. Supr., 462 A.2d 1069, 1074 (1983); *Kern v. NCD Indus., Inc.*, Del. Ch., 316 A.2d 576, 582 (1973); *Stevens v. Johnston*, Del. Ch., 117 A.2d 540, 542 (1955); *Hegarty v. Am. Commonwealths Power Corp.*, Del. Ch., 163 A. 616, 618-19 (1932); *Travers v. Artic Roofing, Inc.*, Del. Super., 27 A.2d 78, 80 (1942), *aff'd sub nom.*, Del. Supr., 32 A.2d 559 (1943); *but see E. States Petroleum Co., Inc. v. Universal Oil Products. Co.*, Del. Ch., 49 A.2d 612, 616 (1946) (defrauded complainant cannot accept benefits of transaction and shirk its disadvantages).

19. CONTRACTS

§ 19.14 – Promissory Estoppel

PROMISSORY ESTOPPEL

If someone makes a promise to a person who reasonably relies on that promise but then takes an action to that person's detriment, the one making the promise is obligated to fulfill the promise. A promise is a declaration by which a person agrees to perform or refrain from doing a specified act. Mere expressions of opinion, expectation, or assumption are not promises.

You must determine from the evidence whether [***defendant's name***] made a promise to [***plaintiff's name***] to [***describe alleged promise***]. If you find that such a promise was made and that [***plaintiff's name***] relied on it to [***his/her/its***] detriment, then you may award [***plaintiff's name***] damages for the detriment suffered as a result of [***defendant's name***]'s failure to fulfill [***his/her/its***] promise.

Source:

Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd., Del. Supr., 822 A.2d 1024, 1032 (2003); *Lord v. Souder*, Del. Supr., 748 A.2d 393, 399 (2000); *Haveg Corp. v. Guyer*, Del. Supr., 226 A.2d 231, 236-37 (1967); *Hessler, Inc. v. Farrell*, Del. Supr., 226 A.2d 708, 711 (1967); *Metro. Convoy Corp. v. Chrysler Corp.*, Del. Supr., 208

A.2d 519, 521 (1965); *Danby v. Osteopathic Hosp. Ass'n of Delaware*, Del. Supr., 104 A.2d 903, 907 (1954) (promise to a charity); *Borish v. Graham*, Del. Super., 655 A.2d 831, 835-36 (1994). *See also Reeder v. Sanford Sch., Inc.*, Del. Super., 397 A.2d 139, 141 (1979) (indicating that claim in estoppel requires proof by clear and convincing evidence).

19. CONTRACTS

§ 19.15 – Construction of Ambiguous Terms

CONSTRUCTION OF AMBIGUOUS TERMS - BREACH OF CONTRACT

{**Comment**: *Construction of terms and the existence of any ambiguities in a contract are generally questions of law for the court to decide. On the other hand, questions of whether a contract exists or whether a party fulfilled the contract's requirements are issues of fact for a jury to decide. The following discussion reviews the basics of construction as applied to contracts.*}

There are certain rules to consider in interpreting contractual terms that appear ambiguous or unclear.

First, if the party that drafted the language of the contract can be determined, the language must be construed most strongly against that party.

Second, if the contract's language is susceptible of two constructions, one of which makes it a fair, customary, and reasonable contract that a prudent person would make, while the second interpretation makes the contract inequitable, unusual, or one that a prudent person would likely not make, the first interpretation must be preferred.

Third, to determine the parties' intent when there are ambiguous terms, the jury will look to the construction given to the terms by the parties as shown through their conduct during the period after the contract allegedly became effective and before

the institution of this lawsuit. The parties' conduct after a contract is made should be given great weight in determining a term's meaning.

Finally, explanatory circumstances existing when the contract was allegedly made may be considered in order to determine the parties' probable intent

Source:

Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co., Del. Supr., 616 A.2d 1192, 1195 (1992) (discussing rules of construction); *Graham v. State Farm Mut. Auto. Ins. Co.*, Del. Supr., 565 A.2d 908, 912 (1989) (same); *Artesian Water Co. v. State Dep't of Highways & Transp.*, Del. Supr., 330 A.2d 441, 443 (1974) (same); *State v. Dabson*, Del. Supr., 217 A.2d 497, 500 (1966); *B.S.F. Co. v. Philadelphia Nat. Bank Co.*, Del. Supr., 204 A.2d 746, 750 (1964); *Holland v. Nat'l Auto. Fibres*, Del. Ch., 194 A. 124, 127 (1937); *Goodman v. Cont'l Cas. Co.*, Del. Super., 347 A.2d 662, 665 (1975); *Hudson v. D&V Mason Contractors, Inc.*, Del. Super., 252 A.2d 166, 168-69 (1969); *Hajoca Corp. v. Sec. Trust Co.*, Del. Super., 25 A.2d 378, 381, 383 (1942); *Pope v. Landy*, Del. Super., 1 A.2d 589, 594 (1938).

Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co., 616 A.2d at 1195 (correct construction of any contract, including insurance policy, is a question of law); *Aetna Cas. and Sur. Co. v. Kenner*, Del. Supr., 570 A.2d 1172, 1174 (1990),

overruled on other grounds by Hurst v. Nationwide Mut. Ins. Co., 652 A.2d 10 (Del. 1995) (same); *Rohner v. Niemen*, Del. Supr., 380 A.2d 549, 552 (1977) (construction of a deed is a question of law).

19. CONTRACTS

§ 19.16 – Contract Modification

CONTRACT MODIFICATION

Generally, a written contract may be modified by a subsequent oral agreement. An oral agreement that modifies a written contract must be specific, direct, and clear about the parties' intention to change their original agreement. [***If the contract concerns services, the modification may also require additional consideration if a basic term of the contract is affected.***]

Source:

Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc., Del. Supr., 297 A.2d 28, 33 (1972); *Reeder v. Sanford Sch., Inc.*, Del. Super., 397 A.2d 139, 141 (1979); *De Cecchis v. Evers*, Del. Super., 174 A.2d 463, 464 (1961).

19. CONTRACTS

§ 19.17 – Performance

PERFORMANCE

Performance is the successful completion of a contractual duty and usually results in the performer's release from any past or future obligation on the contract. Successful completion of contractual duties simply requires that the terms be satisfied.

Source:

See, e.g., *DeMarie v. Neff*, 2005 WL 89403, at *4 (Del. Ch.); *See, e.g.*, *Ridley Inv. Co. v. Croll*, Del. Supr., 192 A.2d 925, 926-27 (1963); *Hudson v. D&V Mason Contractors, Inc.*, Del. Super., 252 A.2d 166, 169-70 (1969); *Emmett S. Hickman Co. v. Emelio Capaldi Dev., Inc.*, Del. Super., 251 A.2d 571, 572-73 (1969).

19. CONTRACTS

§ 19.18 – Substantial Performance

SUBSTANTIAL PERFORMANCE

A good-faith attempt to perform a contract, even if the attempted performance does not precisely meet the contractual requirement, is considered complete if the substantial purpose of the contract is accomplished. This means that the contract has been completed in every significant respect.

[For example, if a builder completes an office tower but fails to apply a second coat of paint to the basement walls, the builder will have substantially performed the contract. This situation is known in the law as substantial performance. In our example, the builder would be entitled to payment on the terms of the contract but would also be liable to the office tower's owner for the cost of painting the basement walls.]

If you find that [***performer's name***] substantially performed the duties of the contract with [***other party's name***] to [***describe duties briefly***], then [***performer's name***] is entitled to [***receive / recover***] [***describe amount owed, action due, etc.***] from [***other party's name***] and you may award damages accordingly. If you also find that [***other party's name***] suffered minimal damages due to the slight deviation

by [***performer's name***] in substantially performing the contract, you may award [***other party's name***] damages in the amount necessary to finish the contract.

Source:

Emmett S. Hickman Co. v. Emelio Capaldi Developer, Inc., Del. Super., 251 A.2d 571, 572-73 (1969).

19. CONTRACTS

§ 19.19 – Performance Prevented by a Party

PERFORMANCE PREVENTED BY A PARTY TO THE CONTRACT

A party to a contract may not prevent another party from performing its contractual duties and then claim that the other party has breached the contract or failed to complete its terms. [For example, a farmer who contracts with a builder to put up a barn on the farmer's land must make the land available to the builder so that the work may be done. Likewise, the farmer must not interfere with the progress of the work.]

In this case, you must determine whether [***party allegedly preventing performance***] prevented or otherwise interfered with [***other party's name***]'s duty to perform [***describe terms of the contract***].

Source:

Nemec v. Shrader, Del. Supr. 991 A.2d 1120, 1128 (2010); *Dunlap v. State Farm Fire & Cas. Co.*, Del. Supr. 878 A.2d 434, 442 (2005); *J.A. Jones Contr. Co. v. City of Dover*, Del. Super., 372 A.2d 540, 546-47 (1977); *T.B. Cartmell Paint & Glass Co. v. Cartmell*, Del. Super., 186 A. 897, 903 (1936). *See also Shearin v. E.F.*

Hutton Grp., Inc., Del. Ch., 652 A.2d 578, 590 (1994) (a party to a contract cannot be liable both for breach of a contract and for inducing that breach).

19. CONTRACTS

§ 19.20 – Breach of Contract Defined

RECOVERY FOR BREACH OF CONTRACT

Because [***plaintiff's name***] was a party to the contract at issue, [***plaintiff's name***] would be entitled to recover damages from [***defendant's name***] for any breach of the contract. To establish that [***defendant's name***] is liable to [***plaintiff's name***] for breach of contract, [***plaintiff's name***] must prove that one or more terms of [***plaintiff's name***]'s contract with [***defendant's name***] have not been performed and that [***plaintiff's name***] has sustained damages as a result of [***defendant's name***]'s failure to perform.

Source:

Ridley Inv. Co. v. Croll, Del. Supr., 192 A.2d 925, 926-27 (1963); *Hudson v. D&V Mason Contractors, Inc.*, Del. Super., 252 A.2d 166, 169-70 (1969); *Emmett S. Hickman Co. v. Emelio Capaldi Developer, Inc.*, Del. Super., 251 A.2d 571, 572-73 (1969).

19. CONTRACTS

§ 19.21 – Third Party Beneficiaries

THIRD PARTY BENEFICIARIES

[***Plaintiff's name***] contends that he is a third-party beneficiary of the contract between [***defendant's name***] and [***other party's name***].

A third-party beneficiary is a [***person, corporation, etc.***] who is entitled to enforce a contract even though that [***person, corporation, etc.***] did not sign or participate in the formation of that contract. The rights of a third-party claiming beneficiary status must be measured by the terms of the agreement between the signatories to the contract.

{**Comment***: depending on the factual dispute for trial, plaintiff may have to prove the elements of third-party beneficiary*.}

To prove that [***plaintiff's name***] is a third-party beneficiary of [***identify the contract***], [***he/she/it***] must prove the following by a preponderance of the evidence:

(1) the contracting parties must have intended that the third-party beneficiary benefit from the contract;

(2) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person; and

(3) the intent to benefit the third-party must be a material part of the parties' purpose in entering into the contract.

Here, [***plaintiff's name***] claims that [***state contentions***]. You must determine whether [***defendant's name***] was obligated to [***plaintiff's name***] [***or whether that obligation remained with (other party's name), an entity that is not a party to this action***.]

Source:

Reserves Mgmt., LLC v. Am. Acquisition Prop. I, LLC, 2014 WL 823407, at *6 (Del. Supr.); *Triple C Railcar Serv., Inc. v. City of Wilmington*, Del. Supr., 630 A.2d 629, 633 (1993); *Rumsey Elec. Co. v. Univ. of Delaware*, Del. Supr., 358 A.2d 712, 714 (1976); *Farmers Bank of State of Delaware v. Howard*, Del. Ch., 276 A.2d 744, 745-46 (1971); *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, Del. Super., 583 A.2d 1378, 1386-87 (1990); *Encore Preakness, Inc. v. Chestnut Health and Rehab. Group, Inc.*, 2017 WL 5068753, at *4 (Del. Super.), quoting *Madison Realty Partners 7, LLC v. Ag ISA, LLC*, 2001 WL 406268 (Del. Ch.) (elements of third-party beneficiary).

19. CONTRACTS

§ 19.22 – Assignments

ASSIGNMENTS

An assignment is any transfer of rights under a contract. Generally, an assignment of contractual rights is valid unless the contract involves personal services, is contrary to public policy, or is expressly prohibited in the contract.

Source:

Indus. Trust Co. v. Stidham, Del. Supr., 33 A.2d 159, 160-61 (1942) (judgments arising from contract not involving personal services are assignable); *FinanceAmerica Private Brands, Inc. v. Harvey E. Hall, Inc.*, Del. Super., 380 A.2d 1377, 1380 (1977); *Paul v. Chromalytics Corp.*, Del. Super., 343 A.2d 622, 625-26 (1975).

19. CONTRACTS

§ 19.23 – Waiver

WAIVER

Waiver is the voluntary relinquishment or abandonment of a legal right or advantage. A waiver may be expressly made or implied from conduct or other evidence. The party alleged to have waived a right must have known about the right and intended to give it up.

In this case, you must determine whether [***defendant's name***] waived [(***his/her/its***) ***contractual right***(***s***)] to [***describe particular rights***].

Source:

AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc., Del. Supr., 871 A.2d 428, 444 (2005); *Moore v. Travelers Indem. Ins. Co.*, Del. Super., 408 A.2d 298, 301 (1979); *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, Del. Supr., 297 A.2d 28, 33 (1972); *Klein v. Am. Luggage Works, Inc.*, Del. Supr., 158 A.2d 814 (1960); *Reeder v. Sanford Sch., Inc.*, Del. Super., 397 A.2d 139, 141 (1979) (claims in waiver and estoppel must be shown by clear and convincing evidence).

19. CONTRACTS

§ 19.24 – Estoppel

ESTOPPEL

When the conduct of a party to a contract intentionally or unintentionally leads another party to the contract, in reasonable reliance on that conduct, to change its position to its detriment, then the original party cannot enforce a contractual right contrary to the second party's changed position. This is known in the law as estoppel. Reasonable reliance means that the party that changed its position must have lacked the means of knowing the truth about the facts leading to the change.

In this case, [***plaintiff's name***] must prove:

(1) that there was a contractual relationship between [***plaintiff's name***] and [***defendant's name***];

(2) that [***plaintiff's name***] changed [***his/her/its***] position to [***his/her/its***] detriment because of [***defendant's name***]'s conduct; and

(3) that [***plaintiff's name***] reasonably relied on the conduct of [***defendant's name***].

You must determine whether [***plaintiff's name***] has proved all of the above elements by clear and convincing evidence.

Source:

Waggoner v. Laster, Del. Supr., 581 A.2d 1127, 1136 (1990); *Wilson v. Am. Ins. Co.*, Del. Supr., 209 A.2d 902, 903-04 (1965); *Reeder v. Sanford Sch., Inc.*, Del. Super., 397 A.2d 139, 141-42 (1979); *Nat'l Fire Ins. Co. of Hartford v. Eastern Shore Laboratories, Inc.*, Del. Super., 301 A.2d 526, 529 (1973).

19. CONTRACTS

§ 19.25 – Employment Contracts – Generally

EMPLOYMENT CONTRACTS

Generally, a contract for employment is "at-will". Employment "at-will" means that either party may terminate the contract at any time without providing a reason or cause.

In light of the evidence presented, you must determine whether [***plaintiff's name***]'s employment agreement with [***defendant's name***] expressly created a definite period of employment or otherwise expressly created a contract that could not be terminated "at-will".

Source:

E.I. duPont de Nemours & Co. v. Pressman, Del. Supr., 679 A.2d 436, 441, 444 (1996) (covenant of good faith and with fair dealing applies to at-will employment contract); *Merrill v. Crothall-Am., Inc.*, Del. Supr., 606 A.2d 96, 101-03 (1992) (implied covenant of good faith and fair dealing inheres to all employment contracts); *Heideck v. Kent Gen. Hosp., Inc.*, Del. Supr., 446 A.2d 1095, 1096-97 (1982) (discussing nature of at-will employment); *White v. Gulf Oil Co.*, Del. Supr., 406 A.2d 48, 52 (1979); *Lester C. Newton Trucking Co. v. Neal*, Del. Supr., 204

A.2d 393, 394-95 (1964) (reviewing elements that determine existence of master-servant relationship); *Barnard v. State*, Del. Super., 642 A.2d 808, 815 (1992), *aff'd*, Del. Supr., 637 A.2d 829 (1994) (existence of employer-employee relationship is a matter of law); *Haney v. Laub*, Del. Super., 312 A.2d 330, 332 (1973) (hiring for an indefinite period, which is ordinarily terminable at will, may be modified by a subsequent contractual restriction upon the right to discharge).

19. CONTRACTS

§ 19.26 – Employment Contracts - Discharge of At-Will Employee

COVENANT OF GOOD FAITH APPLIES TO DISCHARGE OF AT-WILL EMPLOYEE

Under Delaware law, an at-will employment contract may be terminated at any time by either party without cause and regardless of motive. But this right to terminate is subject to a duty to act in good faith and with fair dealing. This duty is violated when an employee is discharged as a result of ill will, with an intent to cause harm, and by means of deceit, fraud, or misrepresentation.

To prove that [***defendant's name***] did not act in good faith or with fair dealing, [***plaintiff's name***] must show by a preponderance of the evidence that:

(1) [***defendant's name***] harbored ill will toward [***plaintiff's name***];

(2) [***defendant's name***] intended to cause harm to [***plaintiff's name***] and committed [***describe acts of deceit, fraud or misrepresentation***]; and

(3) [***defendant's name***] acted to [***describe deceit, fraud or misrepresentation***] and caused [***plaintiff's name***] to be discharged from [***his/her***] employment.

If [***plaintiff's name***] has not proved the above matters, then you must find for [***defendant's name***].

Source:

Lord v. Souder, Del. Supr., 748 A.2d 393, 398-400 (2000); *Pressman v. E.I. duPont de Nemours & Co.*, Del. Supr., 679 A.2d 436, 441, 444 (1996); *Tuttle v. Mellon Bank of Delaware*, Del. Super., 659 A.2d 786, 789 (1995) (willful or wanton conduct of employee constitutes grounds for immediate dismissal without notice if sufficiently serious); *Merrill v. Crothall-American, Inc.*, Del. Supr., 606 A.2d 96, 102 (1992) (at-will employment contract terminable by either party); *Conner v. Phoenix Steel Corp.*, Del. Supr., 249 A.2d 866, 868-69 (1969) (defining "discharge" and "layoff"); *Shearin v. E.F. Hutton Grp., Inc.*, Del. Ch., 652 A.2d 578, 586-89 (1994) (finding wrongful discharge of at-will employee terminated for actions required under rules of professional conduct); *Haney v. Laub*, Del. Super., 312 A.2d 330, 332 (1973) (at-will employees may be terminated by either party, with or without cause); *Barisa v. Charitable Research Found.*, Del. Super., 287 A.2d 679, 681-82 (1972) (discussing grounds for dismissal for cause).

19. CONTRACTS

§ 19.27 – *Quantum Meruit*

QUANTUM MERUIT

Quantum meruit is a legal term that comes from a Latin phrase meaning "as much as he has deserved." A person who has supplied services to another is entitled to recover under a claim in *quantum meruit* for the value of those services even when there is no formal agreement between the two parties. On the other hand, someone who volunteers services or imposes those services on another is not entitled to compensation.

To recover in *quantum meruit*, [***plaintiff's name***] must show by a preponderance of the evidence each of the following elements:

(1) that [***his/her***] services were performed with a reasonable expectation that [***defendant's name***] would pay for them;

(2) that [***defendant's name***] had notice that [***plaintiff's name***] expected to be paid for [***his/her***] services; and

(3) that [***plaintiff's name***]'s services were of value to [***defendant's name***].

Source:

Petrosky v. Peterson, Del. Supr. 859 A.2d 77, 79-80 (2004); *Constr. Sys. Grp., Inc. v. Council of Sea Colony, Phase I*, 1995 WL 622421, at *1 (Del. Supr.); *Marta v. Nepa*, Del. Supr., 385 A.2d 727, 730 (1978); *Bellanca Corp. v. Bellanca*, Del. Supr., 169 A.2d 620, 623 (1961); *R.E. Haight & Assoc. v. W.B. Venables & Sons, Inc.*, 1996 WL 658969, at *4 (Del. Super.); *Cheeseman v. Grover*, Del. Super., 490 A.2d 175, 177 (1985).

19. CONTRACTS

§ 19.28 – Brokerage Contracts

BROKERAGE CONTRACTS

{**Comment**: *Many brokerage relationships — for example, in real estate or securities — are heavily regulated. See the appropriate provisions, if any, in the Code or in the relevant agency's regulations for the necessary language for a jury instruction. If a brokerage relationship is not regulated by statutory provision, then the common law of contract and agency apply.*}

Source:

See generally E. Commercial Realty Corp. v. Fusco, Del. Supr., 654 A.2d 833, 835-36 (1995); *Slaughter v. Stafford*, Del. Supr., 141 A.2d 141, 143-45 (1958); *Bernhardt v. Luke*, Del. Supr., 126 A.2d 556, 558 (1956); *Canadian Indus. Alcohol Co. v. Nelson*, Del. Supr., 188 A. 39, 51-52 (1936); *New York Stock Exch. v. Pickard & Co.*, Del. Ch., 274 A.2d 148, 150 (1971); *Dougherty v. Durham*, Del. Super., 249 A.2d 748, 748-49 (1969).

19. CONTRACTS

§ 19.29 – Broker's Duties

DUTY OF A BROKER

A broker has a duty to serve the client with good faith and loyalty in all matters falling within their relationship. The broker is bound to use reasonable diligence in carrying out the duties required or reasonably expected by the client. Reasonable diligence means the skill and judgment that brokers with similar responsibilities would be expected to apply under similar circumstances. Good faith and loyalty mean that the broker will act honestly and without self-interest to further the best interests of the client.

Source:

In re TD Banknorth S'holders Litig., Del. Ch., 938 A.2d 654, 658 (2007)*; Goodrich v. E.F. Hutton Grp., Inc.*, Del. Ch., 542 A.2d 1200, 1204 (1988) (stock brokers); *Warwick v. Addicks*, Del. Super., 157 A. 205, 206-07 (1931) (duty of good faith and loyalty of broker to principal); *In re Ellis' Estate*, Del. Orph., 6 A.2d 602, 612 (1939) (broker's relationship to customer is that of agent, bailee or trustee).

19. CONTRACTS

§ 19.30 – Procuring Cause

PROCURING CAUSE

Procuring cause refers to the efforts of an agent or broker who brings about the sale of real estate and is therefore entitled to a commission. If there are two or more brokers who have non-exclusive listings for a particular property, the broker whose efforts predominate in bringing about the sale is entitled to the commission.

You must determine by a preponderance of the evidence whether [***broker A's name***] or [***broker B's name***] [***and any other brokers***] made the predominant effort that brought about the sale of [***describe real estate***] to [***purchaser's name***].

Source:

Stoltz Realty Co. v. Hanby, 1988 WL 24441, at *3 (Del. Ch.); *Slaughter v. Stafford*, Del. Supr., 141 A.2d 141, 145-46 (1958); *Stolz Realty Co. v. Paul*, 1995 WL 654152 (Del. Super.); *see also*24 *Del. C.* §§ 2928, 2930.

20. CONDEMNATION

§ 20.1 – Statutory Authority

INTRODUCTION – STATUTORY AUTHORITY

[***Condemning authority's name***], under the power of eminent domain found in [***cite statutory authority***], is taking an undivided [***identify type***] interest in certain property owned by [***landowner's name***]. The property is [***identify location of property***], [_____] County, State of Delaware, and the property being taken has no liens, encumbrances, charges, or claims against it.

The taking of the property has been accomplished in accordance with the requirements of the law. The sole question before you is the issue of just compensation to be paid by [***condemning authority's name***] to [***landowner's name***].

Source:

See 10 *Del. C.* Ch. 61; 29 *Del. C.* § 8406; 17 *Del. C.* §§ 132, 137.

20. CONDEMNATION

§ 20.2 – Compensation Defined

DEFINITION OF COMPENSATION

The Delaware Constitution provides that no property may be taken or applied to public use without just compensation. You must determine the amount of compensation that is just and fair both to the owner of the property and to the public represented by the condemning authority. Your decision must be based wholly on the evidence presented before you in these proceedings, considered in light of your view of the property and in light of the legal principles stated in these instructions.

Source:

DEL. CONST. art. 1, § 8 (state power of eminent domain); 10 *Del. C.* § 6108(e) (requiring "just compensation" for property taken by State authority under the doctrine of eminent domain); *State v. Key Properties Grp., LLC*, 2016 WL 359104, at *3 (Del. Super.); *State ex rel. Sec'y of Dep't of Highways & Transp. v. Davis Concrete of Delaware, Inc.*, Del. Supr., 355 A.2d 883, 886 (1976); *State ex. rel. Smith v. 16.50, 10.04629, 3.34, 1.84, 5.97741, 3.94 & 7.49319 Acres of Land*, Del. Super., 200 A.2d 241, 244 (1964), *aff'd sub nom.*, Del. Supr., 208 A.2d 55, 59 (1965); *Wilmington Hous. Auth. v. Harris*, Del. Super., 93 A.2d 518, 521 (1952).

20. CONDEMNATION

§ 20.3 – Date of Valuation

DATE OF VALUATION

In this case, the taking of the property by [***condemning authority's name***] occurred on [***date***]. So you must consider market value on that date rather than the value at any time before or after that date. The just compensation to which the [***landowner's name***] is entitled is the fair market value of the property on [***date***], in consideration of all the uses and purposes then available to the property or adaptable to the property.

Source:

10 *Del. C.* § 6108(e); *State v. Catawba Assocs.*, 2005 WL 481390, at *2 (Del. Super.); *Wilmington Hous. Auth. v. Greater St. John Baptist Church*, Del. Supr., 291 A.2d 282, 284 (1972); *State ex rel. State Hwy. Dep't v. J.H. Wilkerson & Sons, Inc.*, Del. Supr., 280 A.2d 700, 701 (1971).

20. CONDEMNATION

§ 20.4 – Partial Taking

PARTIAL TAKING

In this case, only part of a piece of land is being taken by the condemning authority. The rest of the land is being left in the owner's hands. In a partial-taking case, the just compensation to which the owner is entitled includes not only compensation for the part of the property being taken, but also compensation for any resulting diminution in value to the rest of the property.

To help determine the just compensation to which the owner is entitled in a partial-taking case, Delaware uses the so-called "before and after" formula. Under this formula, the just compensation is the difference between the market value of the whole piece of land, immediately before (and unaffected by the taking) and the market value of the rest of the property immediately after (and as affected by) the taking.

Source:

State v. Catawba Assocs., 2005 WL 481390, at *2 (Del. Super.); *State ex rel. Rel. of Sec'y of Dep't. of Transp. v. ECR Properties, Inc.*, 2004 WL 693001, at *4 (Del. Super.); *State v. Harkins*, Del. Super., 732 A.2d 246 (1997) (reviewing methods of valuation and adopting the "subdivision method"); *State ex rel. Comm'r v. Rittenhouse*, Del. Super., 621 A.2d 357, 360-61 (1992), *aff'd*, Del. Supr., 634 A.2d 338 (1993); *City of Milford v. 0.2703 Acres of Land*, Del. Super., 256 A.2d 759, 759-60 (1969); *State ex rel. State Hwy. Dep't v. Morris*, Del. Super., 93 A.2d 523, 523 (1952).

Acierno v. State, Del. Supr., 643 A.2d 1328, 1332 (1994); *State ex rel. Rel. of Sec'y of Dep't of Transp. v. ECR Properties, Inc.*, 2004 WL 693001, at *4 (Del. Super.).

20. CONDEMNATION

§ 20.5 – Market Value Defined

DEFINITION OF MARKET VALUE

The term "market value" has a special meaning. It is the price that would be agreed on by a willing buyer and a willing seller under usual and ordinary circumstances, without any compulsion whatsoever on the buyer to buy or on the seller to sell. Market value is not what could be obtained for the property under peculiar circumstances, when a greater than fair price could be obtained. It is not a speculative value nor a value obtained due to the special needs of either the buyer or the seller. It is not a value peculiarly personal to the owner. Market value is simply what the property would bring at a fair sale when one party wants to sell and the other wants to buy.

Source:

State ex rel. Rel. of Sec'y of Dept. of Transp. v. ECR Properties, Inc., 2004 WL 693001, at *4 (Del. Super.); *State v. Harkins*, Del. Super., 732 A.2d 246 (1997) (reviewing methods of valuation and adopting the "subdivision method"); *State ex rel. Sec'y of Dep't of Highways & Transp. v. Davis Concrete of Delaware*, Del. Supr., 355 A.2d 883, 886-87 (1976); *State ex. rel. Smith v. 16.50, 10.04629, 3.34, 1.84, 5.97741, 3.94 & 7.49319 Acres of Land*, Del. Super., 200 A.2d 241, 244

(1964), *aff'd sub nom.*, Del. Supr., 208 A.2d 55, 59 (1965). *See also Metro. Mut. Fire Ins. Co. v. Carmen Holding Co.*, Del. Supr., 220 A.2d 778, 779-80 (1966) (assessed value of property is only one indicator of real or market value); *State v. Catawba Assocs.*, 2005 WL 481390, at *2 (Del. Super.); *State ex rel. Rel. of Sec'y of Dep't of Transp. v. ECR Properties, Inc.*, 2004 WL 693001, at *4 (Del. Super.).

20. CONDEMNATION

§ 20.6 – Consideration of Available Uses

CONSIDERATION OF THE AVAILABLE USES OF THE PROPERTY

In determining market value, you may consider the value of the property in view of all its available uses and purposes as of the date of taking. You may also consider the best and most valuable use for which the property is reasonably adaptable to the full extent that the prospect of demand for such use may affect present market value. In other words, if the reasonable probability of the land being put to its highest and best use enhances the present market value of the property, then that enhancement should be taken into account in determining just compensation. The landowner is entitled to have considered not only the general and naturally adapted uses of the property, but also any special value due to its adaptability for a particular or special use. So you may consider the adaptability and availability of the property for a certain purpose or use even though the property has never been put to that purpose or use. But you should not consider remote or purely speculative uses.

Source:

State v. Harkins, Del. Super., 732 A.2d 246 (1997) (reviewing methods of valuation and adopting the "subdivision method"); *State ex rel. Sec'y of Dep't of Highways & Transp. v. Davis Concrete of Delaware, Inc.*, Del. Supr., 355 A.2d 883, 887 (1976); *Wilmington Hous. Auth. v. Harris*, Del. Super., 93 A.2d 518, 521 (1952); *Bd. of Educ. of Claymont Special Sch. Dist. v. 13 Acres of Land in Brandywine Hundred*, Del. Super., 131 A.2d 180, 183 (1957); *State ex rel. Rel. of Sec'y of Dep't of Transp. v. ECR Properties, Inc.*, 2004 WL 693001, at *4 (Del. Super.).

20. CONDEMNATION

§ 20.7 – Probability of Zoning Change

PROBABILITY OF ZONING CHANGE

Market value must ordinarily be determined by considering the use for which the land is adapted and for which it is available. An exception to this general rule exists, however, when evidence shows that there is a reasonable probability of a change in zoning in the near future. The effect of such a probability on the minds of potential buyers may be taken into consideration in arriving at market value.

If you find by a preponderance of the evidence that [***landowner's name***]'s remaining lands were adaptable for [***specify use***], and if you further find by a preponderance of the evidence that there is a reasonable probability of rezoning these lands in the near future to permit [***specify use***], then you may consider the effect of this probability on the market value of [***landowner's name***]'s property.

Source:

New Castle Cnty. v. 16.89 Acres of Land, Del. Supr., 404 A.2d 135, 136 (1979); *Bd. of Educ. v. 13 Acres of Land*, Del. Super., 131 A.2d 180, 183 (1957).

EXCLUSION OF VALUE PECULIAR TO OWNER OR TO CONDEMNING AUTHORITY

In determining market value, you should not consider any value peculiarly personal to the owner, nor should you consider market value to be enhanced by the owner's unwillingness to dispose of the property at the time of the taking. Moreover, market value cannot be measured by the value of the land to [***condemning authority's name***] or by its need for this particular property.

Source:

State v. Lesko, 2015 WL 7776636, at *5-6 (Del. Super.); *State ex rel. Sec'y of Dep't of Highways & Transp. v. Davis Concrete of Delaware*, Del. Supr., 355 A.2d 883, 886 (1976); *State ex rel. Rel. of Sec'y of Dep't of Transp. v. ECR Properties, Inc.*, 2004 WL 693001, at *4 (Del. Super.).

20. CONDEMNATION

§ 20.9 – Riparian Rights

RIPARIAN RIGHTS

Riparian rights are those belonging to the owner of the bank of a river or stream.

[***Landowner's name***] has riparian rights to the land under the [***identify river or stream***], which abuts [***his/her/its***] property. These rights include the right to build a wharf, pier, or bulkhead and to fill the ground underneath it, subject only to the reasonable probability of getting the necessary permits. You should consider that the [***landowner's name***] is entitled to be compensated for these riparian rights even if the land under the [***identify river or stream***] is already owned by [***condemning authority's name***].

Riparian rights are property rights. They have value that cannot be taken by [***condemning authority's name***] without just compensation.

Source:

See Martin v. Turner, 2009 WL 4576228, at *2 (Del. Ch.); *State v. Wien*, 2004 WL 2830892, at *3 (Del. Super.); *Gorman v. Connell*, 2001 WL 332054, at *2 (Del. Ch.); *State of Delaware v. Pennsylvania R. Co.*, Del. Supr., 228 A.2d 587, 594 (1967), *aff'd*, Del. Supr., 267 A.2d 455 (1969), *supplemented*, 273 A.2d 268 (1971) (defining

a riparian owner); *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, Del. Supr., 607 A.2d 1163, 1168 (1992).

20. CONDEMNATION

§ 20.10 – Easements

EASEMENTS

An easement is a person's right of use over the property of another. Easements are valuable property rights that cannot be taken without compensation. Your determination of fair market value must therefore take into consideration the value of any easements.

Source:

See Wilmington Hous. Auth. v. Harris, Del. Super., 93 A.2d 518, 521 (1952) (fair market value includes value of property for *all* available uses at time of taking).

20. CONDEMNATION

§ 20.11 – Benefits Accruing to Property Owner

GENERAL AND SPECIAL BENEFITS

General benefits are benefits resulting from the fulfillment of the public project that necessitated the taking and are common to all lands near the taken property. They are the benefits that accrue to the owners of property within the usable range of the public work.

A special benefit is one that accrues directly and proximately to the particular land remaining after a partial taking by reason of the construction of the public work on the part of the land that was taken, as reflected in an increase in market value of the remaining land. Special benefits arise from the peculiar relation of the land to the public improvement. A benefit may be special even if it is not unique to the particular property at issue. A benefit does not cease to be special merely because it is enjoyed by other landowners in the immediate neighborhood of the taken land.

To be considered at all, a benefit must not be so remote or speculative that it cannot be fairly and accurately measured in dollars and cents. Benefits cannot be considered if they constitute only future possibilities and do not enhance the present value of the property allegedly benefitted, but benefits may be considered if they are reasonably certain to be realized.

[***Condemning authority's name***] contends that the improvements to [***identify property***] created [***description of benefit to landowner***].

In determining just compensation, you must consider any special benefits to [***landowner's name***] resulting from the [***alleged beneficial development***], and you must set off the value of any special benefit against whatever loss, detriment, or disadvantage that you find [***landowner's name***] has sustained or will sustain by reason of the taking for the [***alleged beneficial development***].

But if you find that the [***alleged beneficial development***] merely constitutes a general benefit, then you cannot set off the value of the general benefit against the loss, detriment, or disadvantage that you find [***landowner's name***] has sustained or will sustain by reason of the taking.

Source:

Alro Assocs., L.P. v. Hayward, 2003 WL 22594526, at *7 (Del. Ch.), *aff'd*, Del. Supr., 847 A.2d 1121 (2004); *Acierno v. State ex rel. Dep't of Transp.*, Del. Supr., 643 A.2d 1328 (1994); *State ex rel. State Hwy. Dep't v. J.H. Wilkerson & Sons, Inc.*, Del. Supr., 280 A.2d 700, 701-02 (1971); *City of Milford v. 0.2703 Acres of Land*, Del. Super., 256 A.2d 759, 759-60 (1969); *State ex rel. State Hwy. Dep't v. Morris*, Del. Super., 93 A.2d 523, 523 (1952).

20. CONDEMNATION

§ 20.12 – View of the Premises – Purpose

PURPOSE OF THE VIEW

You have viewed the premises. The purpose of this viewing was to let you better understand the evidence presented in this hearing and to let you more intelligently apply the evidence to the issue before you. The viewing is not evidence. You should consider the evidence in light of your viewing of the premises, but you must make your determination solely from the evidence.

{**Comment**: *There is a split of authority among jurisdictions as to the evidentiary value of the view. Delaware case law has adopted the minority position that the view is not substantive evidence, but incidental to the fact finder's consideration of the evidence presented in court*.}

Source:

Bd. of Educ. v. 13 Acres of Land, Del. Super., 131 A.2d 180, 184 (1957); *Wilmington Hous. Auth. v. Harris*, Del. Super., 93 A.2d 518, 522 (1952).

20. CONDEMNATION

§ 20.13 – Burden of Proof

BURDEN OF PROOF

The burden of establishing market value in a condemnation proceeding is on [***landowner's name***] and not on [***condemning authority's name***]. In this proceeding, therefore, [***landowner's name***] has the burden of proving by a preponderance of the evidence the just compensation to which [***he/she/it***] is entitled.

{*If condemning authority contends that its adjoining development has materially benefitted landowner*}:

[***Condemning authority's name***] has the burden of proving by a preponderance of the evidence that its project resulted in a measurable benefit to [***landowner's name***]'s remaining land. To meet this burden, [***condemning authority's name***] must prove that the increase in value of [***landowner's name***]'s remaining land resulted directly and specifically from the public improvement.

Source:

State ex. Rel. Com'r of Dep't of Correction v. Rittenhouse, Del. Super., 634 A.2d 338, 344 (1993); *Wilmington Hous. Auth. v. Harris*, Del. Super., 93 A.2d 518, 521 (1952); *Acierno v. State*, Del. Supr., 643 A.2d 1328, 1333 (1994).

21. PROXIMATE CAUSE

§ 21.1 – Proximate Cause

PROXIMATE CAUSE

A party's negligence, by itself, is not enough to impose legal responsibility on that party. A party's negligence must be shown by a preponderance of the evidence to be a proximate cause of the [***accident / injury***].

Proximate cause is a cause that directly produces the harm, and but for which the harm would not have occurred. A proximate cause brings about, or helps to bring about, the [***accident / injury***], and it must have been necessary to the result.

{*If applicable*}: There may be more than one proximate cause of an [**accident / injury**]

See Jury Instr. No. 21.2, "Concurrent Cause."

Source:

RBC Capital Markets, LLC v. Jervis, Del. Supr., 129 A.3d 816, 864 (2015); *compare CSX Transp., Inc. v. McBride,* 564 U.S. 685, 689-90 (2011); *see also Spicer v. Osunkoya,* Del. Supr., 32 A.3d 347, 350-51 (2011); *Jones v. Crawford*, Del. Supr., 1 A.3d 299, 302-03 (2010); *Wilmington Country Club v. Cowee*, Del. Supr., 747 A.2d 1087, 1097 (2000); *Duphily v. Delaware Elec. Coop., Inc.*, Del. Supr., 662

A.2d 821, 828 (1995); *Money v. Manville Corp. Asbestos Disease Comp. Trust Fund*, Del. Supr., 596 A.2d 1372, 1375-76 (1991); *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1097, 1099 (1991).

21. PROXIMATE CAUSE

§ 21.2 - Concurrent Causes

CONCURRENT CAUSES

There may be more than one cause of an [***accident / injury***]. The conduct of two or more [***persons, corporations, etc.***] may operate at the same time, either independently or together, to cause [***injury / damage***]. Each cause may be a proximate cause. A negligent party cannot avoid responsibility by claiming that somebody else — not a party in this lawsuit — was also negligent and proximately caused the [***accident / injury***].

Source:

See Jones v. Crawford, Del. Super., 1 A.3d 299, 302-03 (2010); *Laws v. Webb*, Del. Supr., 658 A.2d 1000, 1007-08 (1995); *Spicer v. Oxunkoya*, Del. Supr., 32 A.3d 347, 351 (2011) *citing McKeon v. Goldstein*, Del. Supr., 164 A.2d 260, 262 (1960) (distinguishing between concurrent and remote cause).

21. PROXIMATE CAUSE

§ 21.3 – Superseding Cause

SUPERSEDING CAUSE

In this case, [***defendant's name***] alleges that [***third party's name***]'s negligence was the only direct cause of [***plaintiff's name***]'s injuries. Just because [***defendant's name***] was negligent and that negligence set in motion a chain of events that caused [***plaintiff's name***]'s injuries, it does not mean that [***defendant's name***] is liable to [***plaintiff's name***].

One cause of injury may come after an earlier cause of injury. The second is called an intervening cause. The fact that an intervening cause occurs does not automatically break the chain of causation arising from the original cause. In order to break the original chain of causation, the intervening cause must also be a superseding cause. That is, the intervening act or event itself must not have been anticipated or reasonably foreseeable by the person causing the original injury. However, the precise intervening act or event need not be anticipated or foreseeable, but the risk of harm created by the first act must be. An intervening act of negligence will relieve the person who originally committed negligence from liability:

(1) if at the time of the original negligence, the person who committed it would not reasonably have foreseen that another's negligence might cause harm; or,

(2) if a reasonable person would consider the occurrence of the intervening act as highly extraordinary; or

(3) if the intervening act was extraordinarily negligent.

If [***third party's name***]'s negligence, coming after [***defendant's name***]'s negligence, was a distinct and unrelated cause of the injuries, and if that negligence could not have been reasonably anticipated or if that subsequent conduct was extraordinarily negligent, then you may find [***third party's name***]'s negligence to be the sole proximate cause of the injuries. If you so find, you must return a verdict in favor of [***defendant's name***].

Source:

GMG Ins. Agency v. Margolis Edelstein, 2024 WL 4440459 (Del.) (majority) (*see* concurring opinion *re* intentional or criminal intervening acts); *RBC Capital Markets, LLC v. Jervis,* Del. Supr., 129 A.3d 816, 864 (2015); *Spicer v. Osunkoya,* Del. Supr., 32 A.3d 347, 351 (2011); *Jones v. Crawford,* Del. Supr., 1 A.3d 299, 302-03 (2010); *Archer v. Warner,* 538 U.S. 314, 326-27 (2003); *Delaware Elec. Coop. v. Duphily,* Del. Supr., 703 A.2d 1202, 1209-10 (1997); *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 829-30 (1995); *Sears Roebuck & Co. v. Huang*, Del. Supr., 652 A.2d 568, 573-74 (1995); *Sirmans v. Penn*, Del. Supr., 588 A.2d

1103, 1106-07 (1991); *Nutt v. GAF Corp.*, Del. Supr., 526 A.2d 564, 566-67 (1987); *McKeon v. Goldstein*, Del. Supr., 164 A.2d 260, 262 (1960); *Burge v. Reiss*, 2010 WL 8250821 (Del. Super.).

21. PROXIMATE CAUSE

§ 21.4 – Plaintiff Unusually Susceptible

PLAINTIFF SUSCEPTIBLE TO INJURY

The law provides that the defendant in a personal-injury case must take the plaintiff as [***he/she***] finds [***him/her***]. One who causes personal injury to another is liable for all the resulting injuries to the plaintiff caused by this accident, regardless of the nature or severity of those injuries.

{**Comment**: *It may be necessary that the above instruction be used with Jury Instr. Nos. 22.2, "Damages – Preexisting or Independent Condition" and 22.3, "Damages – Aggravation of Preexisting Condition."* }

Source:

Hines v. Delaware Recyclable Products, 2003 WL 22293656, at *4 (Del. Super.) (pre-existing condition is not a bar to workers compensation); *Reese v. Home Budget Ctr.*, Del. Supr., 619 A.2d 907, 910 n.1 (1992); *Lipscomb v. Diamiani*, Del. Super., 226 A.2d 914, 918 (1967).

21. PROXIMATE CAUSE

§ 21.5 – Enhanced Injury

PROXIMATE CAUSE AND ENHANCED INJURIES

A party's negligence, by itself, is not enough to impose legal responsibility on that party. *Something more is needed*: the party's negligence must be shown by a preponderance of the evidence to be a proximate cause of the injury.

Proximate cause is a cause that directly produces the harm, and but for which the harm would not have occurred. A proximate cause brings about, or helps to bring about, the injury, and it must have been necessary to the result.

[***Plaintiff's name***] claims that [***he/she***] suffered enhanced injuries as a result of [***describe alleged defective design***]. Enhanced injuries are injuries suffered over and above those that would have resulted had the product been properly designed. In other words, an enhanced injury is the additional injury suffered, if any, as a result of the defective design. To prove that [***describe alleged defective design***] proximately caused [***him/her***] to suffer enhanced injuries, [***plaintiff's name***] must establish:

(1) the injuries that would have occurred if the product had been properly designed; and

(2) the additional injury inflicted because of the defective design.

Source:

Wolf v. Toyota Motor Corporation, 2013 WL 6596833, at *8 (Del. Super.); *Mazda Motor Corp. v. Lindahl*, Del. Supr., 706 A.2d 526, 532-33 (1998); *see also General Motors Corp. v. Wolhar*, Del. Supr., 686 A.2d 170, 172-73 (1996); *Meekins v. Ford Motor Co.*, Del. Super., 699 A.2d 339, 340-41 (1997); *Laguelle v. Bell Helicopter Textron, Inc.*, Del. Super., 88 A.3d 110, 127-128 (2014), *as corrected* (Mar. 19, 2014), *on reargument*, 2014 WL 2699880 (Del. Super.).

21. PROXIMATE CAUSE

§ 21.6 – Foreseeable Injury

FORESEEABLE INJURY – DEFINITION

A foreseeable injury is one that, under the circumstances, an ordinary person would recognize or anticipate the risk of injury. It is not necessary that the particular injury suffered was itself foreseeable, but only that the risk of injury existed.

Source:

Delaware Elec. Coop., v. Duphily, Del. Supr., 703 A.2d 1202, 1209-10 (1997); *Duphily v. Delaware Elec. Coop.*, Del. Supr., 662 A.2d 821, 830 (1995), *quoting Delaware Elec. Coop. v. Pitts*, 1993 WL 445474 (Del. Supr.).

22. DAMAGES

§ 22.1 – Measure of Damages – Personal Injury

DAMAGES – PERSONAL INJURY

If you do not find that [***plaintiff's name***] has met [***his/her***] burden to prove defendant liable for plaintiff's injury, then your verdict must be for [***defendant's name***]. If you find that [***plaintiff's name***] is entitled to recover for damages proximately caused by the [***accident / injury***], then you should consider the compensation to which [***he/she***] is entitled.

The purpose of a damages award in a civil lawsuit is just and reasonable compensation for the harm or injury done. Certain guiding principles must be followed to reach a proper damages award. Damages must be proved with reasonable probability, and not left to speculation. Damages are speculative when there is merely a possibility rather than a reasonable probability that an injury exists. While pain and suffering are proper elements on which to determine monetary damages, there is no exact standard for measuring such damages. They must be determined from a conclusion about how long the suffering lasted, the degree of suffering, and the nature of the injury causing the suffering.

If you find for [***plaintiff's name***], you should award [***him/her***] the sum of money that in your judgment will fairly and reasonably compensate [***him/her***] for

the following elements of damages that you find to exist by a preponderance of the evidence:

(1) compensation for pain and suffering that [***he/she***] has suffered to date;

(2) compensation for pain and suffering for which it is reasonably probable that [***plaintiff's name***] will suffer in the future;

(3) compensation for permanent impairment;

(4) compensation for reasonable and necessary medical expenses incurred to date;

(5) compensation for reasonable and necessary medical expenses that it is reasonably probable that [***plaintiff's name***] will incur in the future;

(6) compensation for loss of earnings suffered to date; and

(7) compensation for earnings that will probably be lost in the future.

In evaluating pain and suffering, you may consider its mental as well as its physical consequences. You may also consider such things as discomfort, anxiety, grief, or other mental or emotional distress that may accompany any deprivation of usual pleasurable activities and enjoyments.

In evaluating impairment or disability, you may consider all the activities that [***plaintiff's name***] used to engage in, including those activities for work and pleasure, and you may consider to what extent these activities have been impaired

because of the injury and to what extent they will continue to be impaired for the rest of [***his/her***] life expectancy.

{*If applicable*}: It has been agreed that a person of [***plaintiff's name***]'s age and sex would have a life expectancy of [___] years.

The law does not prescribe any definite standard by which to compensate an injured person for pain and suffering or impairment, nor does it require that any witness or counsel should have expressed an opinion about the amount of damages that would compensate for such injury. Your award should be just and reasonable in light of the evidence and reasonably sufficient to compensate [***plaintiff's name***] fully and adequately.

{**Comment**: *This instruction almost always needs to be tailored to the particular facts of each claim for damages.*}

Source:

Gannett Co., Inc. v. Kanaga, Del. Supr. 750 A.2d 1174 (2000); *Medical Ctr. of Delaware, Inc. v. Lougheed*, Del. Supr., 661 A.2d 1055, 1060-61 (1995) (discussing issue of excessive awards for damages); *Jardel Co., Inc. v. Hughes*, Del. Supr., 523 A.2d 518, 527-32 (1987) (discussing compensatory and punitive damages); *McNally v. Eckman*, Del. Supr., 466 A.2d 363, 371 (1983), *overruled on other grounds by Wright v. State*, 953 A.2d 144 (Del. 2008) (allowances for likely promotions and pay

increases proper in award of damages); *Thorpe v. Bailey*, Del. Supr., 386 A.2d 668, 668-70 (1978) (reduction of award to present value); *Steppi v. Stromwasser*, Del. Supr., 297 A.2d 26, 27-28 (1972) (future earnings must be reduced to present value); *Henne v. Balick*, Del. Supr., 146 A.2d 394 (1958) (requiring evidence of reasonable probability for loss of future earnings); *Biggs v. Strauss*, 1988 WL 55343 (Del. Super.), *aff'd*, Del. Supr., 525 A.2d 992 (1987); *Coleman v. Garrison*, Del. Super., 281 A.2d 616, 619 (1971); *Biddle v. Griffin*, Del. Super., 277 A.2d 691, 692 (1970); *J.J. White, Inc. v. Metro. Merchandise Mart*, Del. Super., 107 A.2d 892, 894 (1954) (measure of damages in the absence of any willful, wanton, or intentional wrong-doing is the loss or injury resulting from the wrongful act of the defendant); *Kane v. Reed*, Del. Super., 101 A.2d 800, 802-04 (1954); *Prettyman v. Topkis*, Del. Super., 3 A.2d 708, 710-12 (1939); *Gen. Motors Corp. v. Smith*, 1985 WL 188973, at *3 (Del. Super.); *Balick v. Philadelphia Dairy Products Co.*, Del. Super., 162 A. 776, 779 (1932).

22. DAMAGES

§ 22.2 – Damages – Pre-Existing or Independent Condition

PREEXISTING OR INDEPENDENT CONDITION

A party is not entitled to recover any damages for pain and suffering, loss of income, or other alleged injuries, not caused by [***defendant's name***]. Therefore, if you find that the injuries claimed by [***plaintiff's name***] here existed before the accident or apart from the accident, then I instruct you that for the portion of the injuries that you find were not caused by the accident, there can be no recovery by [***plaintiff's name***].

{**Comment**: *See also Jury Instr. No. 10.4, "Susceptible Plaintiff," for situations in which the extent of the injuries suffered is unexpectedly high due to the unusual physical or mental condition of the plaintiff before the injury occurred.*}

Source:

Braunstein v. Peoples Ry. Co., Del. Super., 78 A. 609, 611 (1910). *See also, Jury Instr. No. 21.1 "Proximate Cause."*

22. DAMAGES

§ 22.3 – Damages – Aggravation of Pre-Existing Condition

AGGRAVATION OF PREEXISTING CONDITION

An issue in this case is whether [***plaintiff's name***] had a preexisting condition that caused pain and suffering before the accident and that would have continued to exist after the accident, even if the accident had not occurred. If you find that [***plaintiff's name***] had a preexisting condition, then [***plaintiff's name***] is entitled to recover only for the aggravation or worsening of [***his/her***] preexisting condition.

{**Comment**: *See also Jury Instr. No. 10.4, "Susceptible Plaintiff," for situations in which the extent of the injuries suffered is unexpectedly high due to the unusual physical or mental condition of the plaintiff before the injury occurred*.}

Source:

Maier v. Santucci, Del. Supr., 697 A.2d 747, 749 (1997); *Coleman v. Garrison*, Del. Super., 281 A.2d 616, 619 (1971), *conformed to*, Del. Super., 327 A.2d 757, 761 (1974), *aff'd*, Del. Supr., 349 A.2d 8 (1975) (generally tortfeasor must place injured party in same financial position had there been no tort); *J.J. White, Inc. v. Metro. Merchandise Mart*, Del. Super., 107 A.2d 892 (1954) (measure of damages in the absence of any willful, wanton, or intentional wrong doing is the loss or injury resulting from the wrongful act of the defendant).

22. DAMAGES

§ 22.4 – Mitigation of Damages – Personal Injury

MITIGATION OF DAMAGES PERSONAL INJURY

An injured party must exercise reasonable care to reduce the damages resulting from the injury. If you find that [***plaintiff's name***] failed to undergo reasonable medical treatment to reduce [***his/her***] damages, [or that [***he/she***] failed to follow reasonable medical advice], then any damages resulting from that failure are not the responsibility of [***defendant's name***] and should not be included in your award.

Source:

Lynch v. Vickers Energy Corp., Del. Supr., 429 A.2d 497, 504 (1981), *overruled by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (proper measure of injured party's mitigation of damages depends upon circumstances of the case); *Gulf Oil Co. v. Slattery*, Del. Supr., 172 A.2d 266, 270 (1961) (duty of person injured in tort to take all reasonable steps to minimize damages); *Am. Gen. Corp. v. Cont'l. Airlines Corp.*, Del. Ch., 622 A.2d 1, 11, *aff'd*, Del. Supr., 620 A.2d 856 (1992) (general duty to mitigate damages does not require injured party to take unreasonable or speculative steps to meet that duty).

Coleman v. Garrison, Del. Super., 281 A.2d 616, 619 (1971) (duty of injured party to mitigate financial consequences of defendant's negligence), *appeal dismissed*, *Wilmington Medical Ctr., Inc. v. Coleman*, Del. Supr., 298 A.2d 320 (1972), *conformed to*, Del. Super., 327 A.2d 757, 761 (1974) (speculative damages not allowed), *aff'd*, Del. Supr., 349 A.2d 8 (1975); *Meding v. Robinson*, Del Super., 157 A.2d 254, 257 (1959) (refusal of injured party to continue medical treatment after certain point in time precluded recovery of damages for pain and suffering after treatment terminated), *aff'd*, Del. Supr., 163 A.2d 272 (1960).

22. DAMAGES

§ 22.5 – Measure of Damages – Property

MEASURE OF DAMAGES – PROPERTY

If you find that [***plaintiff's name***] is entitled to recover for property damages that were proximately caused by the actions of [***defendant's name***], you should consider the compensation to which [***plaintiff's name***] is entitled. The proper measure of compensation is the difference between the value of the property before the damage occurred and its value afterward.

Source:

Super. Ct. Civ. R. 9(g) (claim for damages may be generally stated except special damages which shall be specifically stated); *Alber v. Wise*, Del. Supr., 166 A.2d 141, 145 (1960) (using before and after rule to determine damages); *Twin Coach Co. v. Chance Vought Aircraft, Inc.*, Del. Super., 163 A.2d 278, 286 (1960); *Wills v. Shockly*, Del. Super., 157 A.2d 252, 254 (1960); *cf. Stitt v. Lyon*, Del. Super., 103 A.2d 332, 333-34 (1954) (specificity required under Rule 9(g) not as demanding as required in common law pleading); *Nardo v. Jim Baxter's Delaware Tire Ctr., Inc.*, 1991 WL 269890 (Del. Super.) (value of car after accident or negligent repairs).

See also Pan Am. World Airways, Inc. v. United Aircraft Corp., Del. Super., 192 A.2d 913, 918-19 (1963), *aff'd*, Del. Supr., 199 A.2d 758 (1964); *Catalfano v. Higgins*, Del. Super., 191 A.2d 330, 333 (1963); *Adams v. Hazel*, Del. Super, 102 A.2d 919, 920 (1954).

22. DAMAGES

§ 22.6 – Measure of Damages – Injury to Minor

{**Comment**: *Awarding damages to an injured child often poses a difficult problem to the jury, especially with regard to such items as loss of future earnings and long-term pain and suffering. In such circumstances, it may be necessary to emphasize that the jury use its common sense and do the best it can with criteria enumerated in Jury Instr. No. 21.1, "Proximate Cause." A special instruction, however, should not be necessary*.}

Source:

Excessive Damages: *Cloroben Chemical Corp. v. Comegys*, Del. Supr., 464 A.2d 887, 893 (1983) (discussing issue of excessive damage award to minor injured when chemicals burned over 20% of her body); *Wilmington Hous. Auth. v. Williamson*, Del. Supr., 228 A.2d 782, 789 (1967) (award of $200,000 for loss of arm and leg and permanent disability by four-year old not excessive); *Arnett v. Hanby*, Del. Super., 262 A.2d 659, 660 (1970) (damage award for injuries suffered by young boy sustained as proper).

Inadequate Damages: *See Mills v. Telenczak*, Del. Supr., 345 A.2d 424, 426 (1975).

22. DAMAGES

§ 22.7 – Loss of Consortium

LOSS OF CONSORTIUM

When a married person is injured and that injury causes the person's spouse to suffer the loss of the company, cooperation, affection, and aid that were previously a feature of their married life, the spouse is entitled to recover damages in [***his/her***] own right for this loss. This claim is known as "loss of consortium."

To recover for loss of consortium, [***spouse's name***] need not prove a total loss. It is enough that partial loss or impairment of services, companionship, and comfort is shown. Any lessening of these aspects of a normal marital relationship due to the injury of a healthy [***wife / husband***] is considered an element of damages under the law.

There is no yardstick or formula for assessing damages for loss of consortium, just as there is none for pain and suffering. The amount of damages to be awarded is what you decide is fair and reasonable, under all the circumstances, as disclosed by the evidence.

Source:

18 *Del. C.* § 6853 (personal injury requires expert testimony except in limited number of circumstances); *Sostre v. Swift*, Del. Supr., 603 A.2d 809, 813 (1992); *Jones v. Elliott*, Del. Supr., 551 A.2d 62, 63-65 (1988); *Folk v. York-Shipley, Inc.*, Del. Supr., 239 A.2d 236, 238-39 (1968) (applying Pennsylvania law); *Stenta v. Leblang*, Del. Supr., 185 A.2d 759, 762 (1962); *Gill v. Celotex Corp.*, Del. Super., 565 A.2d 21, 23-24 (1989); *Mergenthaler v. Asbestos Corp. of Am., Inc.*, Del. Super., 534 A.2d 272, 280-81 (1987); *Lacy v. G.D. Searle & Co.*, Del. Super., 484 A.2d 527, 532-33 (1984) (spouse who asserts loss of consortium need not have any physical proximity to the site of the injury because the enveloping status which arises from that marriage status qualifies the spouse to assert the action); *Biddle v. Griffin*, Del. Super., 277 A.2d 691 (1970).

22. DAMAGES

§ 22.8 – Measure of Damages - Wrongful Death

WRONGFUL DEATH

The law recognizes that when a person dies as the result of another's wrongful conduct, there is injury not only to the deceased but also to immediate family members. While it is impossible to compensate the deceased for the loss of [***his/her***] life, it is possible to compensate certain family members for the losses that they have suffered from the death of a loved one. For this reason, Delaware law provides that when a person dies as a result of another's wrongful act, certain family members may recover fair compensation for their losses resulting from the death. In determining a fair compensation, you may consider the following:

(1) the loss of the expectation of monetary benefits that would have resulted from the continued life of [***decedent's name***]; that is, the expectation of inheritance that [***name of family beneficiaries***] have lost;

(2) the loss of the portion of [***decedent's name***]'s earnings and income that probably would have been used for the support of [***names of family beneficiaries***];

(3) the loss of [***decedent's name***]'s parental, marital, and household services, including the reasonable cost of providing for the care of minor children;

(4) the reasonable cost of funeral expenses, not to exceed $7000; and

(5) the mental anguish suffered by [***names of eligible family beneficiaries***] as a result of [***decedent's name***]'s death.

The term "mental anguish" encompasses the grieving process associated with the loss of a loved one. You may consider that the grieving process, accompanied by its physical and emotional upheaval, will be experienced differently by different people, both in its intensity and in its duration. The ability to cope with the loss may be different for each person.

There is no fixed standard or measurement. You must determine a fair award through the exercise of your judgment and experience after considering all the facts and circumstances presented to you during the trial.

While [***plaintiff's name***] carries the burden of proving [***his/her/their***] damages by a preponderance of the evidence, [***he/she/they***] [***is/are***] not required to claim and prove with mathematical precision exact sums of money representing their damages for mental anguish. It is required only that [***plaintiff's name***] furnish enough evidence so that you, the jury, can make a reasonable determination of those damages.

Source:

10 *Del. C.* § 3724 (wrongful death statute). *Bennett v. Andree*, Del. Supr., 252 A.2d 100, 101-03 (1969); *Gill v. Celotex Corp.*, Del. Super., 565 A.2d 21, 23-24 (1989) (mental anguish); *Sach v. Kent Gen. Hosp.*, Del. Super., 518 A.2d 695, 696-97 (1986) (claim by surviving parents); *Okie v. Owens*, 1985 WL 189292 (Del. Super.), *as amended* (Nov. 15, 2006); *Beebe Med. Ctr., Inc. v. Bailey*, Del. Supr., 913 A.2d 543 (2006), *as amended* (Nov. 15, 2006).

See also Frantz v. United States, 791 F. Supp. 445, 448 (D. Del. 1992) (proper beneficiaries of claim for wrongful death); *Johnson v. Physicians Anesthesia Serv. P.A.*, 621 F. Supp. 908, 915-16 (D. Del. 1985) (action and potential damages arise only after time of death).

22. DAMAGES

§ 22.9 – Increased Risk of Harm – Spread of Cancer

INCREASED RISK OF HARM

Increased risk of harm, in this case risk of [***e.g., metastasis and death***], is an element of damages that you may consider. [***Metastasis is the medical term given to the spreading of cancer from the primary site to other parts of the body.]*** You may award damages for an increased risk of [***e.g., metastasis and death***] if the evidence establishes with a reasonable degree of medical probability that [***defendant's name***]'s conduct caused an appreciable increase in the risk of [***e.g., metastasis of (plaintiff's name)'s cancer and (his/her) ultimate death***].

If you award damages for an increased risk of [***e.g., metastasis and death***], you should take into account that there would have been some risk of [***metastasis and death***] even if [***plaintiff's name***'s] cancer had been promptly discovered and treated. You may award damages only to the extent of any increase in the risk of [***e.g., metastasis and death***] resulting from medical negligence of [***defendant's name***].

Source:

United States v. Anderson, Del. Supr., 669 A.2d 73, 74, 78 (1995) (holding "increased risk of harm" may be raised as one element in claim for damages arising

from medical negligence); *cf. United States v. Cumberbatch*, Del. Super., 647 A.2d 1098, 1103 (1994) (holding "loss of chance" claim is not viable under Delaware's wrongful death statute).

22. DAMAGES

§ 22.10 – Measure of Damages – Intentional Infliction of Emotional Distress

DAMAGES - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

If you find that [***plaintiff's name***] has proven the liability of [***defendant's name***] for the intentional infliction of severe emotional distress, then you may consider the amount of damages that [***plaintiff's name***] may recover.

The purpose of an award of damages in a civil lawsuit is just and reasonable compensation for the harm done. Certain guiding principles of law must be followed to reach a proper damages award. In order to be recoverable, damages must be proved with reasonable probability and not left to speculation. Damages are termed speculative when there is merely a possibility, rather than a reasonable probability, that an injury exists. While pain and suffering are proper elements on which to determine monetary damages, there is no exact standard for measuring such damages. They must be determined from a conclusion about the length of suffering, the degree of suffering, and the nature of the injury causing the suffering. If you find for [***plaintiff's name***], you should award [***him/her***] a sum of money that in your judgment will fairly and reasonably compensate [***him/her***] for the following elements of damages, which you find to exist by a preponderance of the evidence:

{*Where there is no evidence of physical injury*}:

Any monetary expenses, mental pain and suffering, fright, nervousness, indignity, humiliation, embarrassment, and insult that plaintiff was subjected to or will be subjected to in the future that are a direct result of [***defendant's name***]'s conduct.

The law does not prescribe any definite standard by which to compensate an injured person for mental pain and suffering and other aspects of severe emotional distress, nor does it require that any witness or counsel express an opinion as to the amount of damages that would compensate for that injury. Your award should be just and reasonable in light of the evidence and reasonably sufficient to compensate [***plaintiff's name***] fully and adequately.

{*Where there has been physical injury*}:

(1) compensation for pain and suffering that [***he/she***] has suffered to date;

(2) compensation for pain and suffering that it is reasonably probable that [***plaintiff's name***] will suffer in the future;

(3) compensation for permanent impairment;

(4) compensation for reasonable and necessary medical expenses incurred to date;

(5) compensation for reasonable and necessary medical expenses that it is reasonably probable that [***plaintiff's name***] will incur in the future;

(6) compensation for loss of earnings suffered to date; and

(7) compensation for earnings that will probably be lost in the future.

The law does not prescribe any definite standard to compensate an injured person for pain and suffering, mental anguish, impairment or disfigurement, nor does it require that any witness or counsel express an opinion about the amount of damages that would compensate for such injury. Your award should be just and reasonable in light of the evidence and reasonably sufficient to compensate [***plaintiff's name***] fully and adequately.

{**Comment**: *This instruction will need to be tailored to the particular facts of the claim. This instruction may be readily adapted to any intentional tort.*}

Source:

Cummings v. Pinder, Del. Supr., 574 A.2d 843, 845 (1990) (recovery for emotional distress arising out of outrageous conduct in attorney-client relationship); *Garrison v. Medical Ctr. of Delaware*, Del. Supr., 581 A.2d 288, 289 (1989) (no recovery on claim of emotional distress without physical harm to claimant); *Mancino v. Webb*, Del. Super., 274 A.2d 711, 714 (1974) (parents may not recover for damages for mental anguish suffered as a result of unwitnessed assault and battery upon their child). *See also* RESTATEMENT (SECOND) OF TORTS § 47(b) (emotional distress — damages).

22. DAMAGES

§ 22.11 – Measure of Damages – Malicious Prosecution

DAMAGES –-- MALICIOUS PROSECUTION

If you find that [***plaintiff's name***] has proven that [***defendant's name***] is liable for malicious prosecution, then you should consider the amount of damages [***plaintiff's name***] is entitled to recover. In making an award, you may consider the following factors:

(1) the harm to [***plaintiff's name***]'s reputation resulting from the accusation brought against [***him/her***]; and

(2) the emotional distress resulting from the proceedings.

{*If the plaintiff has pleaded special damages, the following factors may also be considered*}:

(3) the harm caused by any arrest or imprisonment suffered by [***plaintiff's name***] during the prosecution;

(4) the expense that [***he/she***] has reasonably incurred in defending [***himself/herself***] against the accusation; and

(5) any specific monetary loss caused by the proceedings.

You may presume that [***plaintiff's name***] suffered injury to [***his/her***] reputation as well as emotional distress, mental anguish, and humiliation that would normally

result from [***defendant's name***]'s conduct. This means you need not have proof that [***plaintiff's name***] suffered any particular injury to [***his/her***] reputation or that [***plaintiff's name***] in fact suffered emotional distress, mental anguish, and humiliation in order to award [***him/her***] damages.

In determining the amount of an award, you also may consider the character of [***plaintiff's name***] and [***his/her***] general standing and reputation in the community; the publicity surrounding [***defendant's name***]'s act; and the probable effect that [***defendant's name***]'s conduct had on [***plaintiff's name***]'s trade, business, or profession and the harm sustained as a result.

{*If applicable*}: If [***defendant's name***] made a public retraction of [***state claim***] or an apology to those who learned of the [***state claim***], that fact, together with the timeliness and adequacy of the retraction or apology, is important in determining the probable harm to [***plaintiff's name***]'s reputation.

Source:

Marshall v. Cleaver, Del. Super., 56 A. 380, 381 (1903) (false arrest); *Petit v. Colmary*, Del. Super., 55 A. 344, 345-46 (1903) (recognizing recovery for loss of time, physical and mental suffering, expenses incurred, indignity, shame, humiliation and disgrace for false imprisonment or arrest). *See also* RESTATEMENT

(SECOND) OF TORTS §§ 670, 681-682 (1977) (specific proof of injury to a plaintiff's reputation and of a plaintiff's emotional distress, mental anguish, and humiliation is not required; such injury is presumed).

22. DAMAGES

§ 22.12 – Measure of Damages - Abuse of Civil Process

DAMAGES - ABUSE OF CIVIL PROCESS

If you find that [***plaintiff's name***] has proven [***defendant's name***] is liable for abuse of civil process, then you should consider the amount of damages [***plaintiff's name***] is entitled to recover.

In making an award, you may consider the following factors:

(1) the harm resulting from any disposition or interference with the advantageous use of [***plaintiff's name***]'s property suffered during the course of the proceedings;

(2) the harm to [***his/her***] reputation by any defamatory matter alleged as the basis of the proceedings;

(3) the expense reasonably incurred in defending [***himself/herself***] against the proceedings;

(4) any specific monetary loss that resulted from the proceedings; and

(5) any emotional distress caused by the proceedings.

You may presume that [***plaintiff's name***] suffered injury to [***his/her***] reputation as well as emotional distress, mental anguish, and humiliation that would normally result from [***defendant's name***]'s conduct. This means that there need not be proof

that [***plaintiff's name***] suffered any particular injury to [***his/her***] reputation or that [***plaintiff's name***] in fact suffered emotional distress, mental anguish, or humiliation in order to award [***him/her***] damages.

In determining the amount of an award, you also may consider the character of [***plaintiff's name***] and [***his/her***] general standing and reputation in the community; the publicity surrounding [***defendant's name***]'s act; and the probable effect that [***defendant's name***]'s conduct had on [***plaintiff's name***]'s trade, business, or profession, and the harm sustained as a result.

{*If applicable*}: If [***defendant's name***] made a public retraction of [**state claim**] or an apology to those who learned of the [**state claim**], that fact, together with the timeliness and adequacy of the retraction or apology, is important in determining the probable harm to [***plaintiff's name***]'s reputation.

Source:

Marshall v. Cleaver, Del. Super., 56 A. 380, 381 (1903) (false arrest); *Petit v. Colmary*, Del. Super., 55 A. 344, 345-46 (1903) (recognizing recovery for loss of time, physical and mental suffering, expenses incurred, indignity, shame, humiliation and disgrace for false imprisonment or arrest). *See also* RESTATEMENT (SECOND) OF TORTS §§ 670, 681-682 (specific proof of injury to a plaintiff's

reputation and of a plaintiff's emotional distress, mental anguish, and humiliation is not required; such injury is presumed).

22. DAMAGES

§ 22.13 – Measure of Damages – Defamation

DEFAMATION – DAMAGES – COMPENSATORY OR NOMINAL

If you find that [***plaintiff's name***] has not sustained [***his/her/its***] burden of proof, the verdict must be for [***defendant's name***]. If you do find that [***plaintiff's name***] is entitled to recover for damages that were proximately caused by the defamatory statements of [***defendant's name***], you should consider the compensation to which [***he/she/it***] is entitled.

In determining the amount of compensatory damages for defamation, you must consider all the facts and circumstances of the case as revealed by the evidence. Factors to consider include:

(1) the nature and character of the statements in [***describe medium of defamation***];

(2) the language used;

(3) the occasion when the statements were published;

(4) the extent of their circulation;

(5) the probable effect on those to whose attention they came; and

(6) the probable and natural effect of the defamatory statements on [***plaintiff's name***]'s business, personal feelings, and standing in the community.

You should award [***plaintiff's name***] damages that will fairly and adequately compensate [***him/her/it***] for:

(1) any damage to [***his/her/its***] reputation and standing in the community;

(2) any emotional distress, embarrassment, humiliation and mental suffering endured by [***him/her/it***], and any physical or bodily harm caused by that suffering; and

(3) any special injury, such as a monetary loss, suffered by the plaintiff.

Your award must be based on the evidence and not on speculation. The law does not furnish any fixed standards by which to measure damage to reputation or mental suffering, and counsel are not permitted to argue that a specific sum would be reasonable. You must be governed by your own experience and judgment, by the evidence in the case, and by the purpose of a damages award, which is fair and reasonable compensation for harm wrongfully caused by another.

A person who has been defamed but who has not suffered any injury may recover nominal damages, usually in the amount of $1.00.

Source:

Kanaga v. Gannett Co., Inc., Del. Supr., 687 A.2d 173 (1996); *Gannett Co., Inc. v. Kanaga*, Del. Supr., 750 A.2d 1174 (2000); *Sheeran v. Colpo*, Del. Supr., 460 A.2d 522 (1983); *Spence v. Funk*, Del. Supr., 396 A.2d 967, 970-71 (1978); *Ramada Inns, Inc. v. Dow Jones & Co., Inc.*, Del. Super., 543 A.2d 313, 329-31 (1987) (determining whether conduct was a "substantial factor"); *Re v. Gannett Co., Inc.*, Del. Super., 480 A.2d 662 (1984) *aff'd*, Del. Supr., 496 A.2d 553 (1985); *Stidham v. Wachtel*, Del. Super., 21 A.2d 282, 282-83 (1941). *See also* RESTATEMENT (SECOND) OF TORTS §§ 621-623.

22. DAMAGES

§ 22.14 – Measure of Damages – Defamation – Duty to Mitigate

DEFAMATION – DAMAGES – DUTY TO MITIGATE

A person who has been defamed must use reasonable efforts, to minimize the effect of the defamation. Failure of [***plaintiff's name***] to make a reasonable effort to minimize [***his/her/its***] damages does not prevent all recovery, but it does prevent recovery of the damages that might otherwise have been avoided.

Source:

Gulf Oil Corp. v. Slattery, Del. Supr., 172 A.2d 266, 270 (1961) (failed to seek psychiatric treatment). *See* MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES, §33 at 127 (1935); Murasky, *Avoidable Consequences in Defamation: The Common-Law Duty to Request a Retraction*, 40 RUTGERS LAW REV. 167 (1987).

22. DAMAGES

§ 22.15 – Defamation – Punitive Damages – Media Defendant

DEFAMATION – PUNITIVE DAMAGES – MEDIA DEFENDANT

If you decide to award compensatory damages to [***plaintiff's name***], you must determine whether [***defendant's name***] is also liable to [***plaintiff's name***] for punitive damages. For [***plaintiff's name***] to recover punitive damages, you must find that [***defendant's name***] acted with "actual malice," which has been defined for you.

If you find that [***plaintiff's name***] has established the essential elements of [***his/her/its***] claim, and if you also find, on the basis of clear and convincing evidence, that [***defendant's name***] acted with actual malice in publishing the defamatory statement in question, then you may award [***plaintiff's name***] punitive damages in addition to compensatory damages. Punitive damages are different from compensatory damages. Compensatory damages are awarded to compensate the plaintiff for the injury suffered. Punitive damages are designed to punish the offender and serve as an example to others. You must decide whether to award punitive damages and, if so, how much to award.

In making this decision, you must consider the [***defendant's name***]'s conduct was reprehensible or outrageous. You must also consider the amount of punitive

damages that will deter [***defendant's name***] and others like [***him/her/it***] from similar conduct in the future. You may consider [***defendant's name***]'s financial condition for this purpose only. Any award of punitive damages must bear a reasonable relationship to [***plaintiff's name***]'s compensatory damages.

If you find that [***plaintiff's name***] is entitled to punitive damages, you must state the amount of punitive damages separately on the special-verdict form.

{**Comment**: *If the defendant is not an entity of the media, the burden of proof on the plaintiff is by a preponderance of the evidence.* See *Instruction 11.16 for definition of "Actual Malice."*}

Source:

Kanaga v. Gannett Co., Inc., Del. Supr., 687 A.2d 173, 183 (1996); *Gannett Co., Inc. v. Kanaga*, Del. Supr., 750 A.2d 1174 (2000); *Gannett Co. v. Re*, Del. Supr., 496 A.2d 553, 558 (1985); *Sheeren v. Colpo*, Del. Supr., 460 A.2d 522, 524-25 (1983); *Stidham v. Wachtel*, Del. Super., 21 A.2d 282, 283 (1941).

22. DAMAGES

§ 22.16 – Measure of Damages – Invasion of Privacy

DAMAGES – INVASION OF PRIVACY

If you find that [***plaintiff's name***] has not sustained [***his/her***] burden of proof, the verdict must be for [***defendant's name***]. If you do find that [***plaintiff's name***] is entitled to recover for damages that were proximately caused by the invasion of [***his/her***] privacy by [***defendant's name***], you should consider the compensation to which [***plaintiff's name***] is entitled.

[***Plaintiff's name***] is entitled to be fairly and adequately compensated for the injuries that you believe [***he/she***] suffered as a result of [***defendant's name***]'s invasion of [***his/her***] privacy. [***Plaintiff's name***] may recover damages for the following injuries:

(1) the harm to [***his/her***] interest in privacy;

(2) the mental distress suffered as a result of the invasion of privacy;

(3) any other injuries suffered as a result of the invasion of privacy; and

(4) punitive damages if there was a malicious or intentional desire to injure or hurt [***plaintiff's name***].

Your award must be based on the evidence and not on mere speculation. The law does not furnish any fixed standards by which to measure damages for invasion

of privacy or for mental suffering, and counsel are not permitted to argue that a specific sum would be reasonable. You must be governed by your own experience and judgment, by the evidence in the case, and by the purpose of a damages award, which is fair and reasonable compensation for harm wrongfully caused by another.

If you find that [***defendant's name***] conduct constituted an invasion of privacy but that the plaintiff did not suffer an injury to justify compensation, then [***plaintiff's name***] may recover nominal damages, usually in the amount of $1.00.

Source:

Reardon v. News-Journal Co., Del. Supr., 164 A.2d 263, 266 (1960); *Guthridge v. Pen-Mod, Inc.*, Del. Super., 239 A.2d 709, 714-15 (1967). *See also* RESTATEMENT (SECOND) OF TORTS § 652H.

22. DAMAGES

§ 22.17 – Damages – Fraud

DAMAGES - FRAUD: BENEFIT OF THE BARGAIN RULE

{**Comment**: *Delaware recognizes two measures for damages in cases of fraud or deceit and for violations of the Consumer Fraud Act. Depending on how the damages are pleaded in the complaint, or later amended, a plaintiff may recover under either theory.*}

If you find that [***defendant's name***] committed fraud, then [***plaintiff's name***] is entitled to damages that will put [***him/her/it***] in the same financial position that would have existed had [***defendant's name***]'s fraudulent representation been true. Your award should reflect the difference in value between the actual value of [***describe the transaction***] and the value represented by [***defendant's name***].

{*If applicable*}: This goal can also be achieved by awarding (***plaintiff's name***) the cost of putting the (***item of the fraud***) in the condition in which it was represented to be — that is, the cost of repairs.

DAMAGES - FRAUD: OUT-OF-POCKET MEASURE OF LOSS

If you find that [***defendant's name***] committed fraud, then [***plaintiff's name***] is entitled to damages that will give [***him/her/it***] the difference in value between

what [***he/she/it***] paid and the actual value of [***describe the item fraudulently represented***]. This award of damages is intended to put [***plaintiff's name***] back in the same financial position [***he/she/it***] occupied before the transaction took place.

Source:

LCT Capital, LLC v. NGL Energy Partners LP, Del. Supr., 249 A.3d 77, 90-91 (2021), *corrected* (Mar. 4, 2021) (explaining two approaches to damages – out-of-pocket and benefit-of-the-bargain damages); *Stephenson v. Capano Dev., Inc.*, Del. Supr., 462 A.2d 1069, 1076 (1983) (applying benefit-of-the-bargain rule); *Harman v. Masoneilan Int'l, Inc.*, Del. Supr., 442 A.2d 487, 499 (1982) (damages limited to direct and proximate losses, which represent loss-of-the-bargain or actual out-of-pocket losses); *Young v. Joyce*, Del. Supr., 351 A.2d 857, 859 (1975) (cost of repairs); *Nye Odorless Incinerator Corp. v. Felton*, Del. Super., 162 A. 504, 510-11 (1931) (damages are the difference between the real value of the item and the represented value thereof).

22. DAMAGES

§ 22.18 – Damages – Intentional Interference with Contractual Relations

DAMAGES – INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

The [***plaintiff's name***] is entitled to be fairly and adequately compensated for:

(1) the monetary loss of the contractual benefits suffered by [***plaintiff's name***];

(2) all other losses suffered by [***plaintiff's name***] as a direct result of [***defendant's name***]'s act; and,

(3) the emotional distress and harm to [***plaintiff's name***]'s reputation suffered by [***him/her/it***] as a result of the [***defendant's name***]'s act.

Source:

Empire Fin. Servs., Inc. v. Bank of New York (Delaware), Del. Supr., 900 A.2d 92, 98-99 (2006); *DeBonaventura v. Nationwide Mut. Ins. Co.*, Del. Ch., 419 A.2d 942 (1980), *aff'd*, Del. Supr., 428 A.2d 1151 (1981); *Bowl-Mor Co., Inc. v. Brunswick Corp.*, Del. Ch., 297 A.2d 61, *appeal dismissed*, 297 A.2d 67 (1972); *Murphy v. Godwin*, Del. Super., 303 A.2d 668 (1973). *See also* RESTATEMENT (SECOND) OF TORTS § 774A.

22. DAMAGES

§ 22.19 – Settling Co-defendant

SETTLING CO-DEFENDANT

When this case began, [***plaintiff's name***] alleged in the complaint that the joint negligence of [***non-settling-defendant's name***] and [***settling-defendant's name***] was the proximate cause of [***plaintiff's name***]'s injuries. [***Before / during***] this trial, [***settling-defendant's name***] reached a settlement with [***plaintiff's name***] on all of [***plaintiff's name***]'s claims against [***him/her***]. Your deliberations, however, must determine whether [***non-settling-defendant's name***], [***settling-defendant's name***], or both of them were negligent and whether that negligence was the proximate cause of the injuries to [***plaintiff's name***].

[***Non-settling-defendant's name***] has asserted a cross-claim against [***settling-defendant's name***], asserting that [***his/her***] negligence was the proximate cause of the injuries to [***plaintiff's name***]. You must determine whether either or both of [***defendants' names***] were negligent, and whether that negligence proximately caused [***plaintiff's name***]'s injuries. If you find that either one or both of the defendants were liable of negligence and that the negligence was a proximate cause of the injuries to [***plaintiff's name***], you must then determine the amount of damages

you should award to [***plaintiff's name***] to compensate [***him/her***] fairly and reasonably for [***his/her***] injuries.

{*If there was a monetary settlement, add the following*}:

In computing these damages, do not be concerned with the fact that a settlement was made with [***plaintiff's name***] or speculate why a settlement was reached. You also must not speculate about what [***plaintiff's name***] may have or should have received in that settlement. If you find from the evidence that both [***defendants' names***] were guilty of negligence proximately causing [***plaintiff's name***]'s injuries, then you should award damages to compensate [***plaintiff's name***] for [***his/her***] fair and reasonable damages in full. In addition, you should apportion your verdict to attribute a percentage of negligence to each defendant in a percentage range from zero to 100. You will be provided with a verdict form to guide you in this process.

Source:

10 *Del. C.* § 6301 *et seq*.; *Med. Ctr. of Delaware, Inc. v. Mullins*, Del. Supr., 637 A.2d 6, 7-9 (1994); *Ikeda v. Molock*, Del. Supr., 603 A.2d 785, 786-88 (1991); *Blackshear v. Clark*, Del. Supr., 391 A.2d 747, 748 (1978); *Farrall v. A.C. & S. Co. Inc.*, Del. Super., 586 A.2d 662, 663-66 (1990); *Atwell v. RHIS, Inc.*, Del. Supr., 974 A.2d 148 (2009).

22. DAMAGES

§ 22.20 – Stipulation Concerning Medical Bills

STIPULATION REGARDING MEDICAL BILLS TO DATE

The parties have agreed that the medical bills incurred to date by [***plaintiff's name***] following the accident at [**identify location, etc.**] amounted to [***$_____.__***]. Counsel for [***defendant's name***] has not agreed, however, that those medical bills [***proximately resulted from the alleged negligence of (defendant's name)***] [***and/or***] [***were for reasonably necessary medical treatment***]. You may award [***plaintiff's name***] the amount of the medical bills if you find that those bills reflecting the medical treatment of [***plaintiff's name***] [***proximately resulted from the negligence of*** (***defendant's name)***] [***and/or***] [***were reasonable and necessary***].

Source:

Mitchell v. Haldar, Del. Supr., 883 A.2d 32, 37-38 (2005).

22. DAMAGES

§ 22.21 – Worker's Compensation Benefits

WORKER'S COMPENSATION

You have heard testimony about worker's compensation benefits that [***plaintiff's name***] received. You should not consider the fact that some of the medical expenses and lost wages that [***he/she***] claims in this lawsuit have been paid through worker's compensation because [***plaintiff's name***] has a legal obligation to repay this compensation from any money that you might award in this case. On the other hand, if [***he/she***] does not recover in this case, there is no obligation for [***plaintiff's name***] to reimburse.

{**Comment**: *The collateral source rule does not apply to worker's compensation payments relevant to a claim for damages arising from medical negligence. See 18 Del. C. § 6862.*}

Source:

19 *Del. C.* § 2363(e); *Spencer v. Wal-Mart Stores East, LP*, Del. Supr., 930 A.2d 881, 886-87 (2007); *Duphily v. Delaware Elec. Co-op., Inc.*, Del. Supr., 662 A.2d 821, 834-35 (1995); *State v. Calhoun*, Del. Supr., 634 A.2d 335, 337-38 (1993); *but see Baio v. Com. Union Ins. Co.*, Del. Supr., 410 A.2d 502, 507-08 (1979) (principles of equity apply and carrier's right of subrogation may be waived in case where employer, or employee's carrier, has a conflict of interest with injured worker pursuing a right of subrogation).

22. DAMAGES

§ 22.21A – Medicare / Medicaid Benefits

MEDICARE / MEDICAID BENEFITS

You have heard testimony about medical compensation that has been paid to [***plaintiff's name***]. Delaware law requires that you must consider such evidence in deciding any damages that you may award. Although [***some / all***] of the expenses that [***he/she***] claims in this lawsuit have been paid through [***Medicare / Medicaid / Social Security disability payments***], [***plaintiff's name***] has a legal obligation to repay [***state the portion to be repaid***] of this compensation from any money that you might award in this case. On the other hand, if [***he/she***] does not recover in this case, there is no obligation for [***plaintiff's name***] to reimburse.

{**Comment**: *Because an evidentiary foundation must first be established as to the extent of the Medicare/Medicaid payments actually made and for the portion of that amount that is statutorily subject to a lien, a motion* in limine *may be necessary to resolve whether use of this instruction is appropriate given the facts of the case*.}

Source:

18 *Del. C.* § 6862; 42 U.S.C. § 1395y(b)(2); 42 C.F.R. §§ 411.24(b)-(i), 411.25, 411.26 (1998); *Smith v. Mahoney*, Del. Supr. 150 A.3d 1200, 1205-09 (2016); *Nanticoke Mem'l. Hosp., Inc. v. Uhde*, Del. Supr., 498 A.2d 1071 (1985) (purpose of 18 *Del. C.* § 6862 is to prevent collection of a loss from a collateral public source and then a collection for the same loss from the party or hospital being sued); *Myer v. Dyer*, Del. Super., 643 A.2d 1382, 1388 (1993) (reviewing collateral source rule as applied to medical negligence claims).

22. DAMAGES

§ 22.22 – No-Fault (PIP) Insurance Benefits

NO-FAULT INSURANCE

Under Delaware's no-fault law, [***plaintiff's name***] has been compensated by [***his/her***] own insurance company for [***lost wages / medical expenses***] incurred [***within two years of the date of the accident / to the extent of the benefits available***]. The amounts of the bills paid are not in evidence because they have been paid. The law does not permit [***plaintiff's name***] to recover losses or expenses that have been paid, or were eligible for payment, as part of no-fault benefits.

The claims in evidence in this case are for [***lost wages / medical expenses***] beyond those already paid by or available through no-fault insurance.

Source:

21 *Del. C.* § 2118(g)-(h); *Turner v. Lipschultz*, Del. Supr., 619 A.2d 912, 916 (1992); *Read v. Hoffecker*, Del. Supr., 616 A.2d 835, 836-38 (1992); *but see Wallace v. Archambo*, Del. Supr., 619 A.2d 911, 912 (1992); *Brown v. Comegys*, Del. Super., 500 A.2d 611, 614 (1985); *Webster v. State Farm Mut. Auto. Ins. Co.*, Del. Super., 348 A.2d 329, 332 (1975); *DeVincentis v. Maryland Cas. Co.*, Del. Super., 325 A.2d 610, 612-13 (1974). *See also Burke v. Elliott*, 606 F.2d 375, 378-79 (3d Cir. 1979).

22. DAMAGES

§ 22.23 – Attorney's Fees and Taxes

ATTORNEY'S FEES – STATE AND FEDERAL INCOME TAX

Any award that you might make to [***plaintiff's name***] in this case is not subject to federal and state income taxes. Thus, you should not consider taxes in fixing the amount of any award. You are also instructed that if an award is made to [***plaintiff's name***], it would be subject to a substantial attorney's fee.

{**Comment**: *Awards of punitive and purely emotional damages are subject to federal income taxation.* See *26* U.S.C. *§ 104(a)(2), (c)(1)-(2) (this provision does not apply to wrongful death actions and, as provided under state law, to civil actions where only punitive damages may be awarded).*}

Source:

McNally v. Eckman, Del. Supr., 466 A.2d 363, 371 (1983); *Sammons v. Ridgeway*, Del. Supr., 293 A.2d 547, 551 (1972); *Gushen v. Penn Cent. Transp. Co.*, Del. Supr., 280 A.2d 708, 710 (1971) (no account should be taken of taxes on future earnings in an award for damages); *Abele v. Massi*, Del. Supr., 273 A.2d 260 (1970).

22. DAMAGES

§ 22.24 – Measure of Damages – Breach of Contract

DAMAGES – BREACH OF CONTRACT – GENERAL

If you find that one party committed a breach of contract, the other party is entitled to compensation in an amount that will place it in the same position it would have been if the contract had been properly performed. The measure of damages is the loss actually sustained as a result of the breach of the contract.

DAMAGES – BREACH OF CONTRACT – GENERAL/NOMINAL

A party who is harmed by a breach of contract is entitled to damages in an amount calculated to compensate [***him/her/it***] for the harm caused by the breach. The compensation should place the injured party in the same position [***he/her/it***] would have been in if the contract had been properly performed.

If you find that [***plaintiff's name***] is entitled to a verdict in accordance with these instructions, but do not find that [***plaintiff's name***] has sustained actual damages, then you may return a verdict for [***plaintiff's name***] in some nominal sum, such as one dollar. Nominal damages are not given as an equivalent for the wrong but rather merely in recognition of a technical injury and by way of declaring the rights of [***plaintiff's name***].

{**Comment:** *Punitive damages are not recoverable in breach of contract actions, unless the conduct also amounts to an independent tort, except in the insurance "bad faith" context*. Pierce v. Int'l Ins. Co. of Ill., *Del. Supr., 671 A.2d 1361, 1367 (1996).*}

Source:

Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc., Del. Supr., 394 A.2d 1160, 1163-64 (1978) (loss of profits); *Am. Gen. Corp. v. Cont'l Airlines Corp.*, Del. Ch., 622 A.2d 1, 11, *aff'd*, Del. Supr., 620 A.2d 856 (1992); *Farny v. Bestfield Builders, Inc.*, Del. Super., 391 A.2d 212, 214 (1978); *Guthridge v. Pen-Mod, Inc.*, Del. Super., 239 A.2d 709, 714 (1967) (nominal damages); *J.J. White, Inc. v. Metro. Merchandise Mart*, Del. Super., 107 A.2d 892, 894 (1954).

22. DAMAGES

§ 22.25 – Employment Contracts - Wrongful Discharge -– Damages

DAMAGES FOR WRONGFUL DISCHARGE

If you find that [***plaintiff's name***] was wrongfully discharged from [***his/her***] employment, then [***he/she***] is entitled to an award of compensatory damages in the amount of the wages that would have been payable during the remainder of the term of employment, less any amount actually earned or that might have been earned by [***plaintiff's name***] by due and reasonable diligence during the period after the discharge.

{**Comment**: *For retroactively reinstated employees, add the following language*}:

Because [***plaintiff's name***] was reinstated, the measure of your award for damages is the wages that would have been payable to the date of the reinstatement, or what is commonly known as "backpay," less any amount actually earned or that might have been earned by [***plaintiff's name***] by due and reasonable diligence during the period after the discharge.

Source:

Ogden-Howard Co. v. Brand, Del. Supr., 108 A. 277, 278 (1919) (measure of damages is salary lost for period entitled to recover less amounts actually earned or might have earned by due and reasonable diligence during such period after discharge); *State v. Berenguer*, Del. Super., 321 A.2d 507, 510-11 (1974) (state employee). *See also* 29 *Del. C.* § 5949 (discharge and appeal procedures of state employees).

22. DAMAGES

§ 22.26 – Duty to Mitigate Damages – Contract

DUTY TO MITIGATE DAMAGES – CONTRACT

Generally, the measure of damages for one who is harmed by a breach of contract is tempered by a rule requiring that the injured party make a reasonable effort, whether successful or not, to minimize the losses suffered. To mitigate a loss means to take steps to reduce the loss. If an injured party fails to make a reasonable effort to mitigate its losses, its damage award must be reduced by the amount a reasonable effort would have produced under the same circumstances. This reduction, however, must be measured with reasonable probability.

Source:

Duncan v. Theratx, Inc., Del. Supr. 775 A.2d 1019, 1021-23 (2001); *Lynch v. Vickers Energy Corp.*, Del. Supr., 429 A.2d 497, 504 (1981) (plaintiff with out-of-pocket expenses has duty to mitigate them); *McClain v. Faraone*, Del. Super., 369 A.2d 1090, 1093 (1977) (duty to mitigate losses in liquidation of property at foreclosure sale of injured party); *Nash v. Hoopes*, Del. Super., 332 A.2d 411, 414 (1975) (duty in contractual breach to mitigate losses when reasonably possible); *Katz v. Exclusive Auto Leasing, Inc.*, Del. Super., 282 A.2d 866, 868 (1971) (common law of contracts

requires injured party to minimize losses). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 350.

22. DAMAGES

§ 22.27 – Punitive Damages

PUNITIVE DAMAGES

If you decide to award compensatory damages to [***plaintiff's name***], you must determine whether [***defendant's name***] is also liable to [***plaintiff's name***] for punitive damages.

Punitive damages are different from compensatory damages. Compensatory damages are awarded to compensate the plaintiff for the injury suffered. Punitive damages, on the other hand, are awarded in addition to compensatory damages for the purpose of punishing the wrongdoer and to discourage such person and others from similar wrongful conduct in the future.

You may award punitive damages to punish [***defendant's name***] for [***his/her/its***] outrageous conduct and to deter [***him/her/it***], and others like [***him/her/it***], from engaging in similar conduct in the future if you find by a preponderance of the evidence that [***defendant's name***] acted [***intentionally / recklessly***]. Punitive damages cannot be awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence.

Intentional conduct means it is the person's conscious object. Reckless conduct is a conscious indifference that amounts to a "I don't care" attitude. Reckless

conduct occurs when a person, with no intent to cause harm, performs an act so unreasonable and dangerous that [***he/she/it***] knows or should know that there is a readily perceived likelihood that harm may result. Each requires that the defendant foresee that [***his/her***] conduct threatens a particular harm to another.

The law provides no fixed standards for the amount of punitive damages. In determining any award of punitive damages, you are to consider the nature of [***defendant's name***]'s conduct and to extent to which it was reprehensible or outrageous. You may assess the amount of punitive damages that will deter [***defendant's name***] and others like [***him/her***] from similar conduct in the future. You may consider [***defendant's name***]'s financial condition for this purpose only. Any award of punitive damages must bear a reasonable relationship to [***plaintiff's name***]'s compensatory damages. If you find that [***plaintiff's name***] is entitled to an award of punitive damages, state the amount of punitive damages separately on the verdict form.

{ *If* ***both*** *compensatory and punitive damages go to the jury as the same time, the jury should be instructed as follows.*}

[***Defendant's name***]'s financial condition must not be considered in assessing compensatory damages.

Source:

Gannett Co., Inc. v. Kanaga, Del. Supr., 750 A.2d 1174, 1190 (2000); *Devaney v. Nationwide Mut. Auto. Ins. Co.*, Del. Supr., 679 A.2d 71, 76-77 (1996); *Tackett v. State Farm Fire and Cas. Ins. Co.*, Del. Supr., 653 A.2d 254, 265-66 (1995), *overruled on other grounds, E.I. DuPont de Nemours & Co. v. Pressman*, Del. Supr., 679 A.2d 436 (1996) (punitive damages available in bad faith action if breach is particularly egregious); *Jardel Co., Inc. v. Hughes*, Del. Supr., 523 A.2d 518, 527-31 (1987); *see also Estate of Farrell v. Gordon*, Del. Supr., 770 A.2d 517, 521 (2001) (punitive damages are available against the estate of the deceased tortfeasor); 10 *Del. C.* § 3701.

22. DAMAGES

§ 22.27A – Punitive Damages – Employer or Principal of Tortfeasor

PUNITIVE DAMAGES – EMPLOYER OR PRINCIPAL OF TORTFEASOR

You may award punitive damages against [***employer / principal's name***] because of the act of its [***employee / agent***], [***tortfeasor's name***], if one of the following conditions is met:

(1) [***Employer or principal's name / managerial agent***] authorized the doing and manner of [***tortfeasor's name***]'s action; or

(2) [***Tortfeasor's name***] was unfit and [***employer or principal's name / managerial agent***] was reckless in [***employing / retaining***] [***him/her***]; or

(3) [***Tortfeasor's name***] was employed in a managerial capacity and was acting within [***his/her***] scope of employment; or

(4) [***Employer or principal's name/managerial agent***] ratified or approved [***tortfeasor's name***]'s action.

{**Comment**: *The Court will determine whether a party is a principal/employer as a matter of law. This instruction should be used only if an instruction for punitive damages is to be given against the individual tortfeasor and should be given immediately following Jury Instr. No. 21.27, "Punitive Damages." The special verdict form should reflect that punitive damages may only be awarded against a principal/employer if punitive damages have first been awarded against the tortfeasor.*}

Source:

Ramada Inns, Inc. v. Dow Jones & Co., 1988 WL 15825, at *1 (Del. Super.), citing *DiStefano v. Hercules, Inc.*, 1985 WL 189309 (Del. Super.); RESTATEMENT (SECOND) OF TORTS § 909; *Porter v. Pathfinder Servs., Inc.*, Del. Supr., 683 A.2d 40, 42 (1996) (employer-employee relationship determined as a matter of law).

22. DAMAGES

§ 22.28 – Effect of Damages Instructions

EFFECT OF INSTRUCTIONS AS TO DAMAGES

The fact that I have instructed you about the proper measure of damages should not be considered as a suggestion as to which party is entitled to your verdict in this case. Instructions about the measure of damages are given for your guidance, only if you find that a damages award is warranted by the facts of the case.

Source:

Philadelphia, B. & W. R.R. Co. v. Gatta, Del. Supr., 85 A. 721, 729 (1913) (jury is sole judge of facts).

22. DAMAGES

§ 22.29 - Effect of Instructions as to Punitive Damages

EFFECT OF INSTRUCTIONS AS TO PUNITIVE DAMAGES

The fact that I have instructed you about the proper measure of punitive damages should not be considered as an indication that [***plaintiff's name***] is entitled to recover punitive damages from [***defendant's name***]. The instructions on punitive damages are given only for your guidance, in the event you find in favor of [***plaintiff's name***] on [***his/her***] claims for punitive damages.

Source:

Philadelphia, B. & W. R.R. Co. v. Gatta, Del. Supr., 85 A. 721, 729 (1913) (jury is sole judge of facts).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.1 – Evidence: Direct and Indirect or Circumstantial Evidence

EVIDENCE: DIRECT AND INDIRECT OR CIRCUMSTANTIAL

Generally speaking, there are two types of evidence from which a jury may properly find the facts. One is direct evidence — such as the testimony of an eyewitness. The other is indirect or circumstantial evidence —that is, circumstances pointing to certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts from all the evidence in the case: both direct and circumstantial.

Source:

See 3 FED. JURY PRAC. & INSTR. § 104:05 (6th ed.); FEDERAL TRIAL HANDBOOK: CIVIL § 30:1 (2024-2025 ed.); *Evidence*, BLACK'S LAW DICTIONARY (12th ed. 2024); 29A AM. JUR. 2d Evidence § 1345.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.2 – Prior Sworn Statements

PRIOR SWORN STATEMENTS

If you find that a witness made an earlier sworn statement that conflicts with witness's trial testimony, you may consider that contradiction in deciding how much of the trial testimony, if any, to believe. You may consider whether the witness purposely made a false statement or whether it was an inadvertent mistake; whether the inconsistency concerns an important fact or a small detail; whether the witness had an explanation for the inconsistency; and whether that explanation made sense to you.

Your duty is to decide, based on all the evidence and your own good judgment, whether the earlier statement was inconsistent; and if so, how much weight to give to the inconsistent statement in deciding whether to believe the earlier statement or the witness's trial testimony.

Source:

See generally D.R.E. 801(d)(1), 803(8); *Lampkins v. State*, Del. Supr., 465 A.2d 785, 790 (1983) (prior statements generally); *Bruce E.M. v. Dorothea A.M.*, Del. Supr., 455 A.2d 866, 869 (1983) (prior sworn statements).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.3 – Prior Inconsistent Statement

PRIOR INCONSISTENT STATEMENT BY WITNESS

A witness may be discredited by evidence contradicting what that witness said, or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness's present testimony.

It is up to you to determine whether a witness has been discredited, and if so, to give the testimony of that witness whatever weight that you think it deserves.

Source:

D.R.E. 613; *see also* 3 FED. JURY PRAC. & INSTR. § 105:04 (6th ed.); FEDERAL TRIAL HANDBOOK: CIVIL § 49:1 (2024-2025 ed.); 81 AM. JUR. 2d Witnesses § 830.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.4 – Court's Rulings on Evidence

OBJECTIONS - RULINGS ON EVIDENCE

Lawyers have a duty to object to evidence that they believe has not been properly offered. You should not be prejudiced in any way against lawyers who make these objections or against the parties they represent. If I have sustained an objection, you must not consider that evidence, nor may you speculate about whether other evidence might exist or what it might be. If I have overruled an objection, you are free to consider the evidence that has been offered.

Source:

D.R.E. 103(c), 104(c), 104(e), 105; *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, Del. Supr., 607 A.2d 1163, 1170 (1992); *Concord Towers, Inc. v. Long*, Del. Supr., 348 A.2d 325, 327 (1975) (court must avoid giving the impression of favoring one side or other in ruling on counsel's objections); *see also* 3 FED. JURY PRAC. & INSTR. §§ 101:49, 102:71 (6th ed.); FEDERAL TRIAL HANDBOOK: CIVIL § 28:1 (2024-2025 ed.); 75 AM. JUR. 2d Trial § 303.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.5 – Use of Depositions

DEPOSITION - USE AS EVIDENCE

Some testimony is given in the form of sworn recorded answers to questions asked of a witness before the trial. This is known as deposition testimony. This kind of testimony is used when a witness, for some reason, cannot be present to testify in person. You should consider and weigh deposition testimony in the same way as you would the testimony of a witness who has testified in court.

Source:

Super. Ct. Civ. R. 32(a); D.R.E. 804(a)(5); *Green v. Alfred A.I. duPont Inst. of Nemours Found.*, Del. Supr., 759 A.2d 1060, 1064-66 (2000); *Firestone Tire & Rubber Co. v. Adams*, Del. Supr., 541 A.2d 567, 572 (1988); *see also* 3 FED. JURY PRAC. & INSTR. § 102:23 (6th ed.); FEDERAL TRIAL HANDBOOK: CIVIL § 36:3 (2024-2025 ed.); 23 AM. JUR. 2d Depositions and Discovery § 105.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.6 – Interrogatories

INTERROGATORIES - USE AS EVIDENCE

Some of the evidence in this case has been presented in the form of interrogatory answers. An interrogatory is a written question asked by one party of the other, who must answer the question in writing and under oath, all before trial. You must consider interrogatories and the answers given to them just as if the questions had been asked and answered here in court.

Source:

Super. Ct. Civ. R. 33(c); *see also* 3 FED. JURY PRAC. & INSTR. § 102:24 (6th ed.); FEDERAL TRIAL HANDBOOK: CIVIL § 36:9 (2024-2025 ed.); 23 AM. JUR. 2d Depositions and Discovery § 133.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.7 – Request for Admissions

REQUESTS FOR ADMISSIONS - USE AS EVIDENCE

Some of the evidence has been presented in the form of written admissions. You must regard as conclusively proven all facts that were expressly admitted by the [***plaintiff / defendant's name***], [***or all facts which the (plaintiff / defendant's name) failed to deny***].

Source:

Super. Ct. Civ. R. 36(b); *Bryant ex rel. Perry v. Bayhealth Med. Ctr., Inc.*, Del. Supr., 937 A.2d 118, 126 (2007); *see also* 3 FED. JURY PRAC. & INSTR. § 102:24.50 (6th ed.); FEDERAL TRIAL HANDBOOK: CIVIL § 33:5 (2024-2025 ed.).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.8 – Stipulated Evidence

STIPULATED EVIDENCE

The parties have agreed that if [***witness's name***] were called as a witness, [***he/she***] would testify that [***state the stipulated testimony***]. You must consider this stipulated testimony as if it had been given here in court.

Source:

Harris v. State, 2018 WL 6309088, at *2 (Del. Super.) (discussing stipulated evidence generally); *see also* 3 FED. JURY PRAC. & INSTR. § 102:10; FEDERAL TRIAL HANDBOOK: CIVIL § 34:6 (2024-2025 ed.); 73 AM. JUR. 2d Stipulations § 16.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.9 – Credibility of Witnesses – Conflicting Testimony

CREDIBILITY OF WITNESSES –-
WEIGHING CONFLICTING TESTIMONY

You are the sole judges of each witness's credibility. That includes the parties. You should consider each witness's means of knowledge; strength of memory; opportunity to observe; how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witnesses' biases, prejudices, or interests; the witnesses' manner or demeanor on the witness stand; and all circumstances that, according to the evidence, could affect the credibility of the testimony.

If you find the testimony to be contradictory, you must try to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if you cannot do this, then it is your duty and privilege to believe the testimony that, in your judgment, is most believable and disregard any testimony that, in your judgment, is not believable.

Source:

See 3 FED. JURY PRAC. & INSTR. §§ 101:43, 105:01 (6th ed.); FEDERAL TRIAL HANDBOOK: CIVIL § 12:4 (2024-2025 ed.); 75A AM. JUR. 2d Trial § 603.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.10 – Expert Testimony

EXPERT TESTIMONY

Expert testimony is testimony from a person who has a special skill or knowledge in some science, profession, or business. This skill or knowledge is not common to the average person but has been acquired by the expert through special study or experience.

In weighing expert testimony, you may consider the expert's qualifications, the reasons for the expert's opinions, and the reliability of the information supporting the expert's opinions, as well as the factors I have previously mentioned for weighing the testimony of any other witness. Expert testimony should receive whatever weight and credit you think appropriate, given all the other evidence in the case.

{**Comment**: *This instruction should be given following the general instruction on witness credibility, Jury Instr. No. 23.9, "Credibility Of Witnesses –-Conflicting Testimony."*}

Source:

D.R.E. 701-703; *Sturgis v. Bayside Health Ass'n Chartered*, Del Supr., 942 A.2d 579, 583-84 (2007); *State v. Herbert*, 2022 WL 3211004, at *3-4 (Del. Super.), *aff'd*, Del. Supr., 308 A.3d 1121 (2023); *see also* 3 FED. JURY PRAC. & INSTR. § 104:40 (6th ed.); FEDERAL TRIAL HANDBOOK: CIVIL § 54:16 (2024-2025 ed.); 31A AM. JUR. 2d Expert and Opinion Evidence §§ 20-21.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.11 – Non-Medical Expert Opinion Must Be to a Reasonable Probability

EXPERT OPINION MUST BE TO A REASONABLE PROBABILITY

You have heard experts being asked to give opinions based on a reasonable [***scientific, engineering, economic, etc.***] probability. In Delaware, an expert may not speculate about mere possibilities. Instead, the expert may offer an opinion only if it is based on a reasonable probability. Therefore, in order for you to find a fact based on an expert's testimony, that testimony must be based on reasonable probabilities, not just possibilities.

Source:

D.R.E. 703, 705 (expert testimony); *Van Arsdall v. State*, Del. Supr., 486 A.2d 1, 9 (1984) (medical expert testimony), *vacated and remanded on other grounds*, 475 U.S. 673 (1986); *Delmarva Power & Light Co. v. Burrows*, Del. Supr., 435 A.2d 716, 720-21 (1981) (testimony of economist); *0.040 Acres of Land v. State ex rel. State Highway Dep't*, Del. Supr., 198 A.2d 7, 11 (1964) (real estate appraisers); *Gen. Motors Corp. v. Freeman*, Del. Supr., 164 A.2d 686, 688-89 (1960) (medical expert testimony); *see also* FEDERAL TRIAL HANDBOOK: CIVIL § 52:1 (2024-2025 ed.); 31A AM. JUR. 2d Expert and Opinion Evidence § 49.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.12 – Expert Medical Opinion Must Be to a Reasonable Probability

EXPERT MEDICAL OPINION MUST BE TO A REASONABLE PROBABILITY

You have heard medical experts being asked to give opinions based on a reasonable medical probability. In Delaware, a medical expert may not speculate about mere possibilities. Instead, the expert may offer an opinion only if it is based on a reasonable medical probability. Therefore, in order for you to find a fact based on an expert's testimony, that testimony must be based on reasonable medical probabilities, not just possibilities.

Source:

D.R.E. 703, 705 (expert testimony); *Van Arsdall v. State*, Del. Supr., 486 A.2d 1, 9 (1984) (medical expert testimony) *vacated and remanded on other grounds,* 475 U.S. 673 (1986); *Gen. Motors Corp. v. Freeman*, Del. Supr., 164 A.2d 686, 688-89 (1960) (medical expert testimony).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.13 – Statements Made by Patient to Doctor – Subjective / Objective Symptoms

STATEMENTS BY PATIENT TO DOCTOR
- SUBJECTIVE AND OBJECTIVE SYMPTOMS -

A doctor's opinion about a patient's condition may be based entirely on objective symptoms such as those revealed through observation, examination, tests or treatment. Or, the opinion may be based entirely on subjective symptoms, revealed only through statements made by the patient. Or, the opinion may be based on a combination of objective symptoms and subjective symptoms.

If a doctor has given an expert opinion based on subjective symptoms described by a patient, you may, of course, consider the reliability of the patient's statements in weighing the doctor's opinion.

{**Comment**: *There is a split of opinion on whether the second paragraph, above, constitutes a comment on the evidence by the judge.*}

Source:

D.R.E. 703; *Storey v. Castner*, Del. Supr., 314 A.2d 187 (1973); *Loftus v. Hayden*, Del. Super., 379 A.2d 1136 (1977), *aff'd*, Del. Supr., 391 A.2d 749 (1978); *Rodriguez v. Wal-Mart Stores, Inc.*, 2012 WL 1408859, at * 3 (Del. Super.); *see also*

FEDERAL TRIAL HANDBOOK: CIVIL § 40:1 (2024-2025 ed.); 31A AM. JUR. 2d Expert and Opinion Evidence §§ 166-68.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.14 – No Unfavorable Inferences From Exercise of Privilege

NO UNFAVORABLE INFERENCES FROM EXERCISE OF PRIVILEGE

Our law protects persons in certain confidential relationships from having to testify about matters shared with them in confidence. If any witness has exercised a privilege not to testify about something, or if I have ruled that a witness may not be compelled to give certain testimony, you must not assume anything as a result. That is, you must not draw any conclusion about the credibility of that witness or about any matter relating to this trial.

Source:

D.R.E. 512; *see Texaco, Inc. v. Phoenix Steel Corp.*, Del. Ch., 264 A.2d 523, 524 (1970); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.*, Del. Super., 623 A.2d 1118, 1121 (1992) (general statement of the parameters of privilege); *see also* 3 FED. JURY PRAC. & INSTR. § 105:10 (6th ed.) (constitutional privileges of defendant).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.15 – Confidential Sources

CONFIDENTIAL SOURCES

During the trial, you occasionally heard witnesses refer to confidential sources. The law recognizes that people often will not disclose information to a news reporter unless the reporter promises confidentiality. The law gives journalists the right to keep their sources confidential. Reporters and their editors are allowed to refuse to disclose the names of sources. Similarly, certain information about which a reporter or editor testified has been deleted from documents that you have seen, if it might tend to disclose the identity of a confidential source. You must not draw any adverse conclusion solely from the fact that a reporter or editor chose not to disclose a confidential source's identity.

At the same time, parties often disagree about the existence and content of confidential conversations. You should resolve any such disputes based on all the evidence before you.

Source:

10 *Del. C.* § 4322; D.R.E. 513; *Riley v. Moyed*, 1985 WL 549253, at *1 (Del. Super.) (finding 10 *Del. C.* § 4322 constitutional), *aff'd*, Del. Supr., 529 A.2d 248 (1987); *State v. Rogers*, Del. Super., 820 A.2d 1171, 1175-79 (2003) (analyzing scope and

application of 10 *Del. C.* §§ 4320-4326); *see also* FEDERAL TRIAL HANDBOOK: CIVIL § 55:25 (2024-2025 ed.); 81 AM. JUR. 2d Witnesses § 494.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.16 – Attorney-Client Privilege

ATTORNEY-CLIENT PRIVILEGE

During the trial, you have heard witnesses decline to answer because of the attorney-client privilege. You should know that it is perfectly proper for any witness to invoke the attorney-client privilege while testifying, and you should not draw any conclusion adverse to either party simply because a witness has invoked the privilege. Nor should you speculate on what the witness might have testified if the privilege had not been raised. Confine your deliberations to the testimony that you have heard and to the documents in evidence.

Source:

D.R.E. 502, 512; FEDERAL TRIAL HANDBOOK: CIVIL § 55:8 (2024-2025 ed.); 81 AM. JUR. 2d Witnesses § 318.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.17 – Spoliation

SPOLIATION – ADVERSE INFERENCE

The court has determined that [***person's name***] did not properly preserve [***identify items destroyed or suppressed***]. In your deliberations, you may conclude that the missing evidence would have been unfavorable to [***person's name***]'s case.

Source:

Sears, Roebuck and Co. v. Midcap, Del. Supr., 893 A.2d 542 (2006) (before an adverse inference instruction may be given, the trial judge must make a preliminary finding that the litigant intentionally or recklessly destroyed the evidence); *Tighe v. Castillo*, 2021 WL 144241 (Del. Super.); *Equitable Trust Co. v. Gallagher*, Del. Supr., 77 A.2d 548, 549 (1950); 3 FED. JURY PRAC. & INSTR. § 104:27 (6th ed.); FEDERAL TRIAL HANDBOOK: CIVIL § 32:10 (2024-2025 ed.); 75A AM. JUR. 2d Trial § 1048.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.18 – Seatbelt Evidence - Curative Instruction

SEATBELT EVIDENCE

Ordinarily, you may not consider the use or non-use of a seatbelt as evidence of [***plaintiff's name***]'s negligence. But there are two exceptions:

First, you can consider this evidence in deciding whether there is a defect in the overall design of the passenger-restraint system; and

Second, you can consider this evidence in deciding whether the use or non-use of the seatbelt was a supervening cause of [***plaintiff's name***]'s enhanced injuries.

{**Comment**: *This instruction is relevant only to products liability claims against an automobile manufacturer.*}

Source:

21 *Del. C.* § 4802(i); *Gen. Motors Corp. v. Wolhar*, Del. Supr., 686 A.2d 170, 176 (1996); *see also* D.R.E. 105 (instructions limiting the use of conditionally admitted evidence); *Sears, Roebuck & Co. v. Huang*, Del. Supr., 652 A.2d 568, 574 (1995) (admission of evidence for a limited purpose); *Stout v. CFT Ambulance Serv. Inc.*, 2013 WL 6920356, at *2 (Del. Super.) (prohibition against the admissibility of failure to use seatbelts); 63A AM. JUR. 2d Products Liability § 1198.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.19 – Plea of Nolo Contendere – Curative Instruction

PLEA OF NOLO CONTENDERE

In this case, a plea of nolo contendere that [***plaintiff / defendant's name***] made to [_____] charges in the [_____] Court has been mentioned. Nolo contendere means literally, "I will not contest it," and it allows the criminal court in which the plea was entered to proceed to sentencing. The plea does not, however, formally admit the facts alleged in the charge. You are not permitted to consider the plea of nolo contendere in deciding this case.

{**Comment**: *This instruction is limited to use as a curative charge in circumstances where mention of a* nolo contendere *plea was made during trial in spite of the fact that such a plea is inadmissible.*}

Source:

D.R.E. 410; *V.F.W. Hold. Co., Inc. v. Delaware Alcoholic Beverage Control Comm'n*, Del. Super., 252 A.2d 122, 123 n.1 (1969); *Betts v. State*, Del Supr., 983 A.2d 75, 76 (2009); FEDERAL TRIAL HANDBOOK: CIVIL § 33:9 (2024-2025 ed.); 29 AM. JUR. 2d Evidence § 517.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

§ 23.20 - Polygraph Test Result Not Admissible - Curative Instruction

TESTIMONY REGARDING POLYGRAPHS

During the trial you have heard testimony about polygraph examinations, or lie-detector tests, taken by [***person's name***]. In Delaware, the results of lie-detector tests are not admissible to prove whether someone is telling the truth because the scientific reliability of these tests has not been established. Accordingly, the testimony about the results of any lie-detector tests is not admitted to prove whether [***person's name***] is telling the truth and may not be considered by you as an indicator of [***his/her***] credibility.

{**Comment**: *Polygraph evidence is generally inadmissible. If polygraph evidence has been admitted for another purpose, the limited use of such evidence must be explained by the court.*}

Source:

See Melvin v. State, Del. Supr., 606 A.2d 69, 71 (1992); *Whalen v. State*, Del. Supr., 434 A.2d 1346, 1353 (1980), *cert. denied*, 455 U.S. 910(1982); *Foraker v. State*, Del. Supr., 394 A.2d 208, 213 (1978); *see also* D.R.E. 702; 29A AM. JUR. 2d Evidence § 999.

24. CONCLUDING INSTRUCTIONS

§ 24.1 - Sympathy

SYMPATHY

Your verdict must be based solely on the evidence in the case. Your decision-making must not be governed by prejudice, sympathy, passion, or any other motive except the fair and impartial consideration of the evidence. You must not, under any circumstances, allow any sympathy that you might have for any of the parties to influence you in any way in arriving at your verdict.

I am not telling you not to sympathize with the parties. It is only natural and human to sympathize with persons involved in litigation. But you must not allow that sympathy to enter into your consideration of the case or to influence your verdict.

Source:

Briscoe v. State, 2006 WL 2190581, at *4 (Del. Supr.); *see DeAngelis v. Harrison*, Del. Supr., 628 A.2d 77, 80 (1993); *Delaware Olds, Inc. v. Dixon*, Del. Supr., 367 A.2d 178, 179-80 (1976). *See also McLeod v. Swier*, 2016 WL 355123, at *11 (Del. Super.), *aff'd*, Del. Supr., 157 A.3d 757 (2017); *Broughton v. Wong*, 2018 WL 1867185, at *9 (Del. Super.), *aff'd*, Del. Supr., 204 A.3d 105 (2019).

24. CONCLUDING INSTRUCTIONS

§ 24.2 - Juror Notes

JUROR NOTE-TAKING AND EXHIBIT BINDERS

{*At beginning of trial*}:

I am allowing you to take notes during trial. If you wish to take notes, be sure that your note-taking does not interfere with your ability to follow and consider all the evidence. As you see, we have a court reporter here who will be transcribing the testimony during the course of the trial. But you should not assume that the transcripts will be available for your reviewing during deliberations. In fact, you should assume the opposite – that there will be no transcripts available during deliberations. In turn, you must pay close attention to the testimony as it is given.

Each of you may take notes. No one is required to take notes. If you wish to take notes, be sure that your note-taking does not interfere with your ability to follow and consider all the evidence. Overuse of note-taking may be distracting. Be brief—don't try to summarize all the testimony. You must determine the credibility of witnesses; so you must observe the demeanor and appearance of each person on the witness stand. Note-taking must not distract you from that task. You may not discuss your notes with anyone until deliberations begin. At the end of each day,

the Court Security Officer will collect your notes and return them to you the next day.

{*At the close of evidence*}:

I have allowed you to take notes during trial. The purpose of taking notes is to assist you during your deliberations. During your deliberations you should not allow the notes taken by one juror or several jurors to control your consideration of the evidence. Instead, give due regard to the individual recollection of each juror whether or not supported by written notes. Your ultimate judgment should be the product of the collective memory of all twelve jurors.

{*If applicable*}:

I have also permitted you to have notebook binders containing exhibits. The fact that evidence is contained in the binder does not mean that you should give it more weight than other evidence in the case. These documents have no more or less weight than the other evidence presented.

Source:

Bradley v. A.C. & S. Co., 1989 WL 70834, at *1-2 (Del. Super.); *In re Asbestos Litigation*, 1988 WL 77737, at *2 (Del. Super.).*See also United States v. Maclean*, 578 F.2d 64, 65-67 (3d Cir. 1978) ("We do conclude, however, that the benefits are substantial enough to allow trial judges to decide, in each case, whether note-taking

should be permitted. Since the value of note-taking will vary according to the complexity and quantitative nature of each trial as well as according to the abilities and desires of the jurors, the decision on whether to permit note- taking is best left to the trial judge to make based on the circumstances of each case.").

24. CONCLUDING INSTRUCTIONS

§ 24.3 – Instructions to Be Considered As a Whole

INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

I have read a number of instructions to you. The fact that some particular point may be covered in the instructions more than some other point should not be regarded as meaning that I intended to emphasize that point. You should consider these instructions as a whole, and you should not give emphasis to any one or more instructions and disregard the others. You must follow all the instructions that I have given you.

Source:

DEL. CONST. art. IV, § 19; *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1096 (1991) (instructions to be considered as a whole); *Sirmans v. Penn*, Del. Supr., 588 A.2d 1103, 1104 (1991) (instructions are not in error if they correctly state the law, are reasonably informative and not misleading judged by common practices and standards of verbal communication); *Dawson v. State*, Del. Supr., 581 A.2d 1078, 1105 (1990), *vacated*, 503 U.S. 159 (1992) (jury instructions do not need to be perfect); *Probst v. State*, Del. Supr., 547 A.2d 114, 119 (1988) (entire charge must be considered as a whole); *Russell v. K-Mart Corp.*, Del. Supr., 761 A.2d 1 (2000).

24. CONCLUDING INSTRUCTIONS

§ 24.4 – Court Impartiality

COURT IMPARTIALITY

Nothing I have said since the trial began should be taken as an opinion about the outcome of the case. You should understand that no favoritism or partisan meaning was intended in any ruling I made during the trial or by these instructions. Further, you must not view these instructions as an opinion about the facts. You are the judges of the facts, not me.

Source:

DEL. CONST. art. IV, § 19; *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1096 (1991) (instructions to be considered as a whole); *Probst v. State*, Del. Supr., 547 A.2d 114, 119 (1988) (same); *Haas v. United Techs. Corp.*, Del. Supr., 450 A.2d 1173, 1179 (1982), *appeal dismissed*, U.S. Supr., 459 U.S. 1192 (1983); *State Hwy. Dep't v. Bazzuto*, Del. Supr., 264 A.2d 347, 351 (1970) ("the Delaware Constitution prohibits a trial judge from commenting on the evidence"); *Cloud v. State*, Del. Supr., 154 A.2d 680 (1959); *Young v. Frase*, Del. Supr., 702 A.2d 1234, 1237 (1997) (jury is sole judge of facts).

24. CONCLUDING INSTRUCTIONS

§ 24.5 – Jury Deliberations

JURY'S DELIBERATIONS

How you conduct your deliberations is up to you. But I would like to suggest that you discuss the issues fully, with each of you having a fair opportunity to express your views, before committing to a particular position. You have a duty to consult with one another with an open mind and to deliberate with a view toward reaching a verdict. Each of you should decide the case for yourself, but only after impartially considering the evidence with your fellow jurors. You should not surrender your own opinion or defer to the opinions of your fellow jurors for the mere purpose of returning a verdict, but you should not hesitate to reexamine your own view and change your opinion if you are persuaded by another view.

Your verdict, whatever it is, must be unanimous.

[EXCUSE JURY ALTERNATES – SWEAR COURT SECURITY OFFICER]

Source:

See Adkins v. State, 2016 WL 5940363, at *2 (Del. Supr.); *Papantinas v. State*, 2003 WL 1857548, at *1-2 (Del. Supr.); *Hyman Reiver & Co. v. Rose*, Del. Supr., 147 A.2d 500, 505-07 (1958) (the private deliberations of the jury should not be a concern of the court).

24. CONCLUDING INSTRUCTIONS

§ 24.6 – When Jury Fails to Agree - *Allen* Charge

WHEN JURY FAILS TO AGREE – *ALLEN* CHARGE

Members of the jury, I am told that you have been unable to reach a verdict. I have a few thoughts that you may wish to consider in your deliberations, along with the evidence and the instructions previously given to you.

Every case is important to the parties involved. The trial has been time-consuming and expensive to both [***plaintiff's name***] and [***defendant's name***]. But if you should fail to agree upon a verdict, the case is left open and undecided. Like all cases, it must be disposed of in some way. There is little to believe that another trial would not be equally time-consuming and expensive to all persons involved, and there is little reason to think that the case can be tried again better or more exhaustively than it has been in this trial. Any future jury must be selected in the same manner and from the same source as you have been chosen. So, it's unlikely that the case could ever be submitted to twelve people more intelligent, more impartial, or more competent to decide it.

I don't want any of you to surrender your conscientious convictions. But it is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without sacrificing individual judgment. Each of you must decide the case for yourself, but you should do so only after considering the evidence with your fellow jurors, and during your deliberations you should not hesitate to change your opinion if you become convinced that another position is correct.

You may conduct your deliberations as you choose, but I suggest that you now retire and carefully reconsider all the evidence before you and try your very best to reach a unanimous verdict.

Source:

Collins v. State, Del. Supr., 56 A.3d 1012 (2012); *Adkins v. State,* 2016 WL 5940363, at *2 (Del. Supr.); *Papantinas v. State,* 2003 WL 1857548, at *1-2 (Del. Supr.) (*Allen* charge was no coercive and court did not abuse its discretion in giving the charge); *Rush v. State*, Del. Supr., 491 A.2d 439, 452-53 (1985); *Brown v. State*, Del. Supr., 369 A.2d 682, 684 (1976) ("*Allen*" type charge generally proper in order to encourage jury to reach a verdict where unanimity is required).

25. HOW TO USE THESE INSTRUCTIONS

Pattern instructions provide a uniform foundation for the creation of customized instructions appropriate to the case. These Pattern Instructions have been designed to help counsel and the Court particularize the circumstances of the case -- the parties, the issues, the facts in dispute -- into a form that will give the jury an effective means to apply the relevant law to the evidence presented. They are not simply boilerplate, nor are they a substitute for careful research and drafting.

The following example illustrates how pattern instructions might be selected and adapted to a hypothetical case. The facts are: On a snowy evening, a truck and a car collided at an uncontrolled intersection. There were serious injuries to the driver of the car, Ms. Jones, and the car was totaled. The driver of the truck, Mr. Smith, was not hurt, but the truck sustained major damage including the destruction of its expensive equipment. Mr. Smith, an employee of ACME Trucking Co., was making a delivery at the time of the accident.

Ms. Jones brought an action against ACME and Mr. Smith for negligent operation of the truck and for damages. Ms. Jones' husband, Harold, brought a claim for loss of consortium. ACME and Mr. Smith asserted an affirmative defense of

contributory negligence against Ms. Jones and counterclaimed for damages to the truck.

Jury instructions may be compiled in a variety of ways depending upon the individual preferences of the judge and the attorneys. But the Court typically begins its instructions by defining the respective roles of the Court and the jury in the process of reaching a verdict. This instruction is usually followed by a brief summary of the contentions and claims of the parties. The instructions will then address particular points of law relevant to the dispute. A verdict form will also be required. The instructions will conclude with final comments on the manner of the jury's deliberations.

In the hypothetical case above, the following pattern instructions might be used:

3.2 Province of the Court and Jury

3.3 Statements of Counsel

3.4 Nature of the Case

4.1 Burden of Proof by a Preponderance of the Evidence

5.1 Negligence Defined

21.1	Proximate Cause
5.3	No Duty to Anticipate Negligence
5.4	Negligence Is Never Presumed
5.12	Comparative Negligence - Special Verdict Form
3.6	Contentions of the Parties
6.1	Lookout
6.2	Control
6.4	Duty of Care at an Uncontrolled Intersection
5.6	Motor Vehicle Statutes (pertinent to case)
5.7	Negligence *per se*
10.11	Unavoidable Accident
18.1	Agent's Negligence Imputed to Principal
18.2	Agency Admitted
22.1	Damages - Personal Injury
22.7	Damages - Loss of Consortium

Instructions needed for a particular case will vary depending on a number of factors, including whether the parties stipulated certain facts or issues, or additional issues arose pretrial or during the trial itself. There may also be unusual or unique issues for which no pattern instruction exists, in which circumstance appropriate instructions will need to be drafted.

Below are two illustrations of pattern instructions that have been adapted to the circumstances of the hypothetical case.

3.4 - Nature of the Case:

Adapted Instruction: In this case, the plaintiff, Ms. Jones, is suing for damages for personal injuries and loss of property which resulted from the collision of her car and a truck, owned by, defendant, ACME Trucking Co., and driven by, defendant, Mr. Smith. The collision occurred on January 10, 1996, at the intersection of Oak and 23rd Streets in Harrington, Delaware. Ms. Jones alleges that the collision was caused by Mr. Smith's negligent failure to maintain proper lookout at an intersection and failure to keep his vehicle under control in snowy conditions. Ms. Jones husband, Harold Jones, is suing for loss of consortium.

Mr. Smith and ACME Trucking Co. have denied negligence and allege that the collision was caused by Ms. Jones' excessive rate of speed. ACME is suing Ms. Jones for damages to its truck.

5.7 - Negligence *Per Se* (violation of motor vehicle statutes):

Adapted Instruction: A person is considered negligent if that person violates a motor vehicle statute that has been enacted for the safety of the public while using the roadways. The violation of a motor vehicle statute is negligence as a matter of law. If you find that Mr. Smith violated any of the following statutes in the operation of his truck at the time of the collision with Ms. Jones, then you must find Mr. Smith negligent.

Title 21 *Del. C.* section 4176(a) states that "Whoever operates a vehicle in a careless or imprudent manner, or without due regard for the road, weather and traffic conditions then existing, shall be guilty of careless driving."

Title 21 *Del. C.* section 4176(b) states that "Whoever operates a vehicle and who fails to give full time and attention to the operation of the vehicle, or whoever

fails to maintain a proper lookout while operating the motor vehicle, shall be guilty of inattentive driving."

If you find that Ms. Jones violated any of the following statutes in the operation of her car at the time of the collision with Mr. Smith, then you must find Ms. Jones negligent.

Title 21 *Del. C.* section 4168(a) states that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and without having regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any . . . vehicle . . . on . . . the highway, in compliance with legal requirements and the duty of all persons to use due care."

* * *

In the above illustrations, the adapted instruction preserves the integrity of the legal rule as it relates the law to the appropriate context of the case. By adapting the pattern instruction to the specific context of the case and by using plain English to explain the rule, the edited instruction is designed to help the average lay juror apply the law in a fair and accurate manner. Any of the pattern instructions may be adapted in a like fashion. Obviously, some instructions, for example, Nature of the Case, are

by their nature more context specific than others, such as Proximate Cause or Jury Deliberations, which have no specific application to the context of the case at all. In this manner, counsel and the Court may work together to develop a set of instructions to suit the particulars of each case.

Section 27 contains checklists intended to assist counsel in identifying and organizing appropriate jury instructions for general categories of cases.

26. Jury Instructions — Delaware Law[1]

Jury instructions are restatements of the law for the average person. In formulating a jury charge, the court and counsel would do well as a practical matter to place themselves in the shoes of the ordinary juror who, with little more than common sense and experience, must fairly apply often bewildering principles of law to an array of evidence.[2] Jury instructions should be accurate, clear, and brief and direct the jury to decide only those points in dispute that are necessary to determine a just verdict. In this regard, Delaware courts have developed principles that address many of the issues faced by the bench and bar when drafting and assembling jury instructions.

Although the court has broad authority under Rule 51 to charge the jury,[3] it has a duty to submit all issues affirmatively and to apply the law to the evidence in

[1] By Thomas P. Leff, Esquire

[2] For a thorough discussion of the nature and function of jury instructions, *see* A. ELWORK, B. SALES & J. AFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Wilcox, *The Craft of Drafting Plain-Language Jury Instructions*, 59 TEMPLE L.Q. 1159 (1986); Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALF. L. REV. 731 (1981); Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUMBIA L. REV. 1306 (1979).

[3] DEL. CONST. art. IV, sec. 19; Super. Ct. Civ. R. 51.

a manner that enables the jury to perform its duty intelligently.[4] The jury charge should be given, as far as possible, in language that will enable the average lay mind, unacquainted with the technicalities of the law, to understand thoroughly the subject matter upon which the charge is based.[5] A statement of the abstract rule of law is in itself an inadequate charge to the jury.[6] The court has a duty to tailor its instructions to the jury so as to make them clearly applicable to the specific facts of the case as shown by the evidence.[7] Finally, the entire jury instruction must be considered as a whole, with no statement to be viewed out of context in judging the propriety of the instruction.[8]

[4] *Alber v. Wise*, Del. Supr., 166 A.2d 141, 143 (1960); *Island Express v. Fredrick*, Del. Supr., 171 A. 181, 187 (1934).
[5] *Alber v. Wise*, Del. Supr., 166 A.2d 141, 143 (1960); *Buckley v. R.H. Johnson & Co.*, Del. Super., 25 A.2d 392 (1942).
[6] *Beck v. Haley*, Del. Supr., 239 A.2d 699, 702 (1968).
[7] *Lutzkovitz v. Murray*, Del. Supr., 339 A.2d 64, 67 (1975)(complex cases require the court to craft its instructions with special care); *Beck v. Haley*, Del. Supr., 239 A.2d 699, 702 (1968).
[8] *Haas v. United Technologies, Inc.*, Del. Supr., 450 A.2d 1173, 1179 (1982), *appeal dismissed*, 459 U.S. 1192, 103 S. Ct. 1170, 75 L.Ed.2d 423 (1983); *Buckley v. R.H. Johnson & Co.*, Del. Super., 25 A.2d 392 (1942).

Upon appropriate requests by prayer to the court, each party is entitled to such general and specific instructions as are fairly justified by the applicable law.[9] All prayer conferences must be conducted on the record.[10] The court shall not disregard proper and applicable prayers for instructions.[11] Nor is the trial court relieved of its duty to apply the law properly to the facts because of any deficiency in instructions requested by a party.[12] Refusal of prayers for instructions that were sufficiently and properly covered by the court's own charge, however, is not error.[13] Similarly, a trial court's refusal to use a litigant's proposed jury charge or to take the time to fix a proposed instruction which incompletely describes the legal duties of a party to the action is not error.[14] A trial court's refusal to use the particular wording of a proposed instruction, but which was in substance given in language requested by the litigant, is also not error.[15] In the same vein, a party has no right to contest the particular

[9] *Koutoufaris v. Dick*, Del. Supr., 604 A.2d 390, 399 (1992); *Greenplate v. Lowth*, Del. Super., 199 A. 659, 662-63 (1938).
[10] *Cloroben Chemical Corp. v. Comegys*, Del. Supr., 464 A.2d 887, 893 (1983).
[11] *Alber v. Wise*, Del. Supr., 166 A.2d 141, 143 (1961); *Island Express v. Fredrick*, Del. Supr., 171 A. 181 (1934).
[12] *Beck v. Haley*, Del. Supr., 239 A.2d 699, 702 (1968); *Robelen Piano Co. v. DiFonzo*, Del. Supr., 169 A.2d 240 (1961).
[13] *Universal Products Co. v. Emerson*, Del. Supr., 179 A. 387, 397 (1935).
[14] *Greyhound Lines, Inc. v. Caster*, Del. Supr., 216 A.2d 689, 693 (1966).
[15] *Lord v. Poore*, Del. Supr., 108 A.2d 366, 371 (1954); *Grand Ventures, Inc. v. Whaley*, Del. Super., 622 A.2d 655, 664 (1992).

language of an instruction, so long as the instruction correctly states the law.[16] The court need not repeat elements of a legal standard in later paragraphs dealing with related issues in dispute,[17] and a party has no right to a fixed sequence of instructions in the charge to the jury.[18] The decision of whether a litigant has produced sufficient evidence to warrant a requested instruction is a matter within the sound discretion of the court.[19]

A general statement of the issues which outlines the contentions of each party is appropriate if generally supported by the pleadings and evidence and if presented in an impartial and summary fashion for the purpose of assisting the jurors in the performance of their duties.[20] But, instructions that assume the existence of material facts in dispute are in error and invade the province of the jury.[21] A court's recitation

[16] *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1096 (1991); *Chavin v. Cope*, Del. Supr., 243 A.2d 694 (1968); *Grand Ventures, Inc. v. Whaley*, Del. Super., 622 A.2d 655, 664 (1992). *See also* Super. Ct. Civ. R. 51.
[17] *House v. Lauritzen*, Del. Supr., 237 A.2d 134, 136 (1967).
[18] *Franklin v. Salimen*, Del. Supr. 222 A.2d 261, 263 (1966).
[19] *McNally v. Eckman*, Del. Supr., 466 A.2d 363, 370 (1983).
[20] *Chesapeake & Potomac Tel. Co. v. Chesapeake Utility Corp.*, Del. Supr., 436 A.2d 314, 338 (1981); *Greenplate v. Lowth*, Del. Supr., 199 A. 659, 662-63 (1938).
[21] *Buckley v. R.H. Johnson & Co.*, Del. Super., 25 A.2d 392, 399 (1942); *cf. Canadian Industrial Alcohol Co. v. Nelson*, Del. Supr., 188 A. 39, 55 (1936)(holding that statement in jury charge that referred to undisputed facts is not objectionable as comment on evidence). *See* DEL. CONST. Art. IV, § 19.

of statutes on the evidentiary value of a particular item, however, does not amount to improper comment on evidence.[22]

Some inaptness or inaccuracies are inevitable in jury charges, but are harmless so long as the charges are informative, accurate as to the law, and not misleading by common standards of verbal communication.[23] No party may object to an instruction on appeal without having first objected to the instruction before the jury returns with its verdict.[24] Where an issue is not raised in the pleading and a proper request for a charge is not requested, a party cannot subsequently complain of the alleged omission.[25] But, a new trial may be ordered if the jury's answers to interrogatories are inconsistent and cannot be reconciled upon further consideration by the jury or by the court.[26]

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[22] *Nanticoke Memorial Hosp., Inc. v. Uhde*, Del. Supr., 498 A.2d 1071, 1074 (1985).
[23] *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1098 (1991); *Haas v. United Technologies, Inc.*, Del. Supr., 450 A.2d 1173, 1179 (1982), *appeal dismissed*, 459 U.S. 1192, 103 S. Ct. 1170, 75 L.Ed.2d 423 (1983); *Storey v. Castner*, Del. Supr., 314 A.2d 187, 194 (1973).
[24] *Riggins v. Mauriello*, Del. Supr., 603 A.2d 827, 830 (1992); *Boyd v. Hammond*, Del. Supr., 187 A.2d 413 (1963); *Chrysler Corp. v. Quimby*, Del. Supr., 144 A.2d 123, 129-30 (1958); *Grand Ventures, Inc. v. Whaley*, Del. Super., 622 A.2d 655, 664 (1992). *See* Super. Ct. Civ. R. 51.
[25] *Szewczyk v. Doubet*, Del. Supr., 354 A.2d 426, 429 (1976); *Alber v. Wise*, Del. Supr., 166 A.2d 141, 144 (1960).
[26] *Grand Ventures, Inc. v. Whaley*, Del. Super., 622 A.2d 655, 664 (1992); Super. Ct. Civ. R. 49(b). *See also Atlantic & Gulf Stevedores v. Ellerman Lines, Ltd.*, U.S. Supr., 369 U.S. 355, 82 S. Ct. 780, 7 L.Ed.2d 798 (1962).

27. SAMPLE CHECKLISTS

§ 27.1 – Injured Person

(If multiple plaintiffs, fill out new damages portion of list for each)

Plaintiff's Name _____

Defendant's Name _____

Nature of Action:

____ Medical Malpractice

____ Personal Injury / Automobile Accident

____ Personal Injury / Premises Liability

Standard Instructions:

____ Province of Court & Jury (3.2)

____ Statements of Counsel (3.3)

____ Corporations and their Agents (18.8)

____ Burden of Proof (4.1)

____ Negligence (5.1)

___ Lookout (6.1) ___ Control (6.2) ___ Other _____ (specify)

___ Statutory (6.6) _____ (specify)

___ Regulatory _____ (specify)

___ Other _____ (specify)

____ No Need to Prove All Charges of Negligence (5.2)

____ Negligence Is Never Presumed (5.4)

____ Negligence *per se* (5.7)

____ Comparative Negligence (5.12)

____ Proximate Cause (21.1)

___ Accident only

___ Accident & Injury

___ Injury only

Damages: (Plaintiff: _____) (22.1)

____ Pain & Suffering ___ past ___ future

____ Permanent Injury

____ Medical Expenses ___ past ___ future

____ Loss of Wages ___ past ___ future

____ Life Expectancy ___ years

____ Consortium (22.7) ___ wife ___ husband

____ Plaintiff Unusually Susceptible (21.4)

____ Pre-Existing or Independent Condition (22.2)

____ Mitigation of Damages - Personal Injury (22.4)

____ Effect of Instructions as to Damages (22.28)

____ Punitive Damages (22.29)

Evidence:

____ Direct & Indirect (23.1)

____ Credibility of Witnesses / Conflicting Testimony (23.9)

____ Expert Testimony (23.10) ___ Medical ___ Other: _____ (specify)

____ Expert Opinion to a Reasonable Probability (23.11)

____ Subjective / Objective Symptoms (23.13)

____ Objections by Counsel / Rulings on Evidence (23.4)

____ Deposition - Use as Evidence (23.5)

____ Other _____ (specify)

Closing Remarks:

____ Sympathy (24.1)

____ Juror Notes (24.2)

____ Instructions to Be Considered as a Whole (24.3)

____ Court Impartiality (24.4)

____ Jury Deliberations (24.5)

Verdict Form:

Liability ____ Negligence

____ Proximate Cause

____ Comparative Negligence

Damages ____ Plaintiff

____ Consortium

____ Punitive

27. SAMPLE CHECKLISTS

§ 27.2 – Products Liability - Personal Injury

(If multiple plaintiffs, fill out new damages portion of list for each)

Plaintiff's Name _____

Defendant's Name _____

Nature of Action:

____ Personal Injury / Other Product _____ (specify)

Standard Instructions:

____ Province of Court & Jury (3.2)

____ Statements of Counsel (3.3)

____ Corporations and their Agents (18.8)

____ Burden of Proof (4.1)

____ Negligence

___ Negligent Manufacture (9.1)

___ Duty to Warn (9.3)

___ Negligent Design (9.5)

___ Other _____ (specify)

___Statutory _____ (specify)

___ Regulatory _____ (specify)

____ No Need to Prove All Charges of Negligence (5.2)

____ Negligence Is Never Presumed (5.4)

____ Negligence *per se* (5.7)

____ Comparative Negligence (5.12)

____ Proximate Cause (21.1)

___ Accident only

___ Accident & Injury

___ Injury only

Damages: (Plaintiff: _____) (22.1)

____ Pain & Suffering ___ past ___ future

____ Permanent Injury

____ Medical Expenses ___ past ___ future

____ Loss of Wages ___ past ___ future

____ Life Expectancy ___ years

____ Consortium (22.7) ___ wife ___ husband

____ Plaintiff Unusually Susceptible (21.4)

____ Pre-Existing or Independent Condition (22.2)

____ Mitigation of Damages - Personal Injury (22.4)

____ Effect of Instructions as to Damages (22.8)

____ Punitive Damages (22.29)

Evidence:

____ Direct & Indirect (23.1)

____ Credibility of Witnesses / Conflicting Testimony (23.9)

____ Expert Testimony (23.11, 23.12) ___ Medical ___ Other: _____ (specify)

____ Expert Opinion to a Reasonable Probability (23.10)

____ Subjective / Objective Symptoms (23.13)

____ Rulings on Evidence (23.4)

____ Deposition - Use as Evidence (23.5)

____ Other _____ (specify)

Closing Remarks:

____ Sympathy (24.1)

____ Juror Notes (24.2)

____ Instructions to Be Considered as a Whole (24.3)

____ Court Impartiality (24.4)

____ Jury Deliberations (24.5)

Verdict Form:

Liability ____ Negligence

____ Proximate Cause

____ Comparative Negligence

Damages ____ Plaintiff

____ Consortium

____ Punitive

27. SAMPLE CHECKLISTS

§ 27.3 – Products Liability - Property Damage

(If multiple plaintiffs, fill out new damages portion of list for each)

Plaintiff's Name _____

Defendant's Name _____

Nature of Action:

____ Property / Other Product _____ (specify)

Standard Instructions:

____ Province of Court & Jury (3.2)

____ Statements of Counsel (3.3)

____ Corporations and their Agents (18.8)

____ Burden of Proof (4.1)

____ Negligence

___ Standard of Manufacturers (9.1)

___ Duty to Warn (9.3)

___ Negligent Design (9.5)

___ Other _____ (specify)

____ No Need to Prove All Charges of Negligence (5.2)

____ Negligence Is Never Presumed (5.4)

____ Negligence *per se* (5.7)

____ Comparative Negligence (5.12)

____ Proximate Cause (21.1)

Damages: (Plaintiff: _____)

____ Damages to Product Itself

___ Warranty of _____ (specify type)

____ Misuse of a Product by Plaintiff (9.11)

____ Use After Defect is Known to Purchaser (9.23)

____ Pure Economic Losses

____ Effect of Instructions as to Damages (22.28)

Evidence:

____ Direct & Indirect (23.1)

____ Credibility of Witnesses / Conflicting Testimony (23.9)

____ Expert Testimony (23.10) ___ Engineering ___ Other: ____ (specify)

____ Expert Opinion to a Reasonable Probability (23.11)

____ Rulings on Evidence (23.4)

____ Deposition - Use as Evidence (23.5)

____ Other _____ (specify)

Closing Remarks:

____ Sympathy (24.1)

____ Juror Notes (24.2)

____ Instructions to Be Considered as a Whole (24.3)

____ Court Impartiality (24.4)

____ Jury Deliberations (24.5)

Verdict Form:

Liability ____ Negligence

____ Proximate Cause

____ Comparative Negligence

Damages ____ Plaintiff

27. SAMPLE CHECKLISTS

§ 27.4 – Contract

(If multiple plaintiffs, fill out new damages portion of list for each)

Plaintiff's Name _____

Defendant's Name _____

Nature of Action:

____ Existence of Contract

____ Breach of Contract

____ Employment Contract

____ Insurance Contract

Standard Instructions:

____ Province of Court & Jury (3.2)

____ Statements of Counsel (3.3)

____ Corporations and their Agents (18.8)

____ Burden of Proof (4.1)

____ Contract Formation

___ Formation (19.1)

___ Meeting of the Minds (19.2)

___ Offer (19.3)

___ Acceptance (19.5)

___ Consideration (19.7)

___ Performance (19.17)

___ Other _____ (specify)

____ Breach of Contract (19.20)

____ Estoppel (19.24)

____ Construction of Ambiguous Terms (19.15)

____ Modification (19.16)

____ Substantial Performance (19.18)

____ Other _____ (specify)

Damages: (Plaintiff: _____)

____ Damages For Breach (22.24)

___ Employment (22.25)

___ Insurance

___ Other _____ (specify)

____ Mitigation of Damages - Breach of Contract (22.26)

____ Effect of Instructions as to Damages (22.28)

____ Other _____ (specify)

Evidence:

____ Direct & Indirect (23.1)

____ Credibility of Witnesses / Conflicting Testimony (23.9)

____ Expert Testimony (23.10) ___ Other: ____ (specify)

____ Expert Opinion to a Reasonable Probability (23.11)

____ Rulings on Evidence (23.4)

____ Deposition - Use as Evidence (23.5)

____ Other _____ (specify)

Closing Remarks:

____ Sympathy (24.1)

____ Juror Notes (24.2)

____ Instructions to Be Considered as a Whole (24.3)

____ Court Impartiality (24.4)

____ Jury Deliberations (24.5)

Verdict Form:

Liability ____ Existence of Contract

____ Breach

____ Damages

28. SAMPLE VERDICT FORMS

§ 28.1 – Personal Injury with Comparative Negligence

BARBARA and WALTER HURT

v.

ACME HILL REALTY CO.

v.

SPEEDY CLEARALL CO.

NATURE OF THE CASE

In this case, plaintiff Barbara Hurt is suing to recover damages that she claims arose from injuries suffered when she fell on the sidewalk outside her place of employment on January 3, XXXX. As the husband of Mrs. Hurt, plaintiff Walter Hurt is suing to recover damages for loss of consortium.

The defendant, Acme Hill Realty Company denies negligence and that Mrs. Hurt suffered injuries to the extent she claims. Acme Hill asserts a cross-claim against Speedy Clearall Company alleging that Speedy was negligent. Acme Hill also asserts that Mrs. Hurt was contributorily negligent in causing her own injuries.

[case caption]

VERDICT FORM

(1) Do you find that Defendant Acme Hill Realty Company was negligent?

____ YES ____ NO

If your answer to Question 1 was "YES," proceed to Question 2.

If your answer to Question 1 was "NO," proceed to Question 3.

(2) Do you find that Defendant Acme Hill's negligence was a proximate cause of injury to Barbara Hurt?

____ YES ____ NO

(3) Do you find that Cross-Defendant Speedy Clearall Company was negligent?

____ YES ____ NO

If your answer to Question 3 was "YES," proceed to Question 4.

If your answer to Question 3 was "NO," proceed to Question 5.

(4) Do you find that Cross-Defendant Speedy's negligence was a proximate cause of injury to Barbara Hurt?

____ YES ____ NO

If your answer is "NO" to both Question 2 and Question 4, call the Court Security Officer.

If your answer is "YES" to either Question 2 or Question 4 or both, proceed to Question 5.

(5) Do you find that Plaintiff Barbara Hurt was contributorily negligent?

____ YES ____ NO

If your answer to Question 5 was "YES," proceed to Question 6.

If your answer to Question 5 was "NO," proceed to Question 7.

(6) Do you find that Mrs. Hurt's negligence was a proximate cause of her own injury?

____ YES ____ NO

(7) Apportion the amount of negligence among the parties that you have found to have been negligent. If you find that a party was not negligent or did not proximately cause the injury, that party must be assigned 0%. The assigned percentages must total 100%.

Acme Hill Realty Co.	____ %
Speedy Clearall Co.	____ %
Barbara Hurt	____ %
	100 %

If Mrs. Hurt's portion of negligence is greater than 50%, call the Court Security Officer. If you find that Mrs. Hurt's negligence is 50% or less, proceed to question 8.

(8) State the full amount of your award of damages to Barbara Hurt and to Walter Hurt. Do not reduce your award by the amount of her negligence, if you have found her to be negligent. The Court will calculate the reduction if it applies.

Barbara Hurt	$ _____
Walden Hurt	$ _____

Dated: October ___, XXXX _____ (Foreperson)

28. SAMPLE VERDICT FORMS

§ 28.2 – Breach of Contract

UNITED MEDICAL SERVICES

v.

CATHRYN DEFENDANT

NATURE OF THE CASE

This case is a civil action for breach of contract. United Medical Services is suing Dr. Cathryn Defendant for an alleged breach of her employment contract with United and seeks money damages for losses that resulted from the alleged breach of contract.

Dr. Cathryn Defendant denies breach of her employment contract with United. Dr. Defendant brings a counterclaim alleging that United breached certain contractual agreements with her and seeks money damages for losses that resulted from United's alleged breach of contract.

United denies the allegations of Dr. Defendant's counterclaim.

[case caption]

VERDICT SHEET

(1) Do you find an Employment Agreement, as asserted by United Medical Services, existed between United and Dr. Cathryn Defendant?

_____ YES _____ NO

If your answer to Question 1 is "YES," proceed to Question 2.

If your answer to Question 1 is "NO," proceed to Question 5.

(2) Do you find that Dr. Defendant breached her Employment Agreement with United?

_____ YES _____ NO

If your answer to Question 2 is "YES," proceed to Question 3.

If your answer to Question 2 is "NO," proceed to Question 5.

(3) Do you find that United has suffered damages as a direct result of Dr. Defendant's breach of her Employment Agreement with United?

_____ YES _____ NO

If your answer to Question 3 is "YES," proceed to Question 4.

If your answer to Question 3 is "NO," proceed to Question 5.

(4) In a lump sum, state the amount of your award of damages to United.

$ _____

(5) Under either a contract or a *quantum meruit* basis for recovery, do you find that Dr. Defendant is entitled to be compensated for her service as managing shareholder?

_____ YES _____ NO

If your answer to Question is "NO," stop here and call the Court Security Officer. If your answer to Question 5 is "YES," state, in a lump sum, your award for Dr. Defendant.

$ _____

Dated: October __, XXXX. _____ (Foreperson)

28. SAMPLE VERDICT SHEETS

§ 28.3 – Personal Injury – Punitive Damages

JAMES and JOAN PLAINTIFF

v.

ARNOLD DEFENDANT

NATURE OF THE CASE

In this action the plaintiff, James P. Plaintiff, is suing for damages resulting from an accident caused by the negligent operation of a motor vehicle by Arnold D. Defendant on March 11, XXXX. Mr. Plaintiff also claims that Mr. Defendant's actions causing the accident were wanton. Joan P. Plaintiff, Mr. Plaintiff's wife, is suing for loss of consortium.

The defendant, Arnold Defendant, admits negligence and that his negligence was a proximate cause of the accident, but claims in an affirmative defense that Mr. Plaintiff's injuries were the result of his own negligence. Mr. Defendant denies that he acted wantonly to cause the accident.

[case caption]

VERDICT SHEET

(1) Do you find that Defendant Arnold Defendant's conduct was wanton?

YES _____ NO _____

If your answer to Question 1 is "Yes," proceed to Question 4.

If your answer to Question 1 is "No," proceed to Question 2.

(2) Do you find that plaintiff, James Plaintiff, was negligent in a manner proximately causing the accident and harm to himself?

YES _____ NO _____

If your answer to Question 2 is "Yes," proceed to Question 3.

If your answer to Question 2 is "No," proceed to Question 4.

(3) What is the apportionment of negligence:

James Plaintiff _____ %

Arnold Defendant _____ %

100 %

If you have answered Question 3, answer Question 4 only if you have assigned 50% or more to Arnold defendant.

(4) State in a lump sum the amount of your award of damages to the plaintiffs. (Do not reduce your awards by the percentage of contributory negligence, if any, you attributed to plaintiff, James Plaintiff. The Court will do so.)

James Plaintiff $ _____

Joan Plaintiff $ _____

Dated: October __, XXXX. _____ (Foreperson)